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A Muddy Decision – The High Court Fails To Define The Corps’ Wetland Jurisdiction In *Rapanos v. United States*

Jill Lambird*

I. INTRODUCTION

So, who cares about stinky swamps anyway? Apparently more people than one might think. Wetlands, otherwise known as sloughs, bogs, or marshes are extremely valuable resources. They provide fertile breeding grounds for fish and birds, and they naturally control erosion and flooding. Wetlands also play a critical role in water purification, effectively removing sediments, organic wastes, and other pollutants while producing oxygen and nutrients. Wetlands also make great homes for people. They are invariably flat and easy to build on once groundwater is removed. Also, wetlands tend to be near rivers, lakes, and coastlines – areas under high pressure from human development.

It’s no wonder that wetlands have sparked argument throughout the courts for decades. Wetlands are not only a hot topic in the courts; they also permeate political ideologies, scientific thought, and social movements. Developers want to build on them, environmentalists want to save them, and thousands of critters (present company included) want to call them home. In fact, this issue creates polarity almost everywhere it surfaces.

Modern debates regarding the definition and regulation of wetlands have existed since Congress passed the Clean Water Act (CWA) in 1972.¹ The most current debate, found in *Rapanos v. United States* poses the following question: Does the federal

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1. 33 U.S.C. §§1251-1387 (2000).

government have jurisdiction over wetlands that may be part of a drainage area or tributary system but do not physically abut the “navigable waters” to which the CWA refers?²

This note explores the *Rapanos* decision. Part II illustrates the legislative, legal, and administrative history of issues set forth in the case.³ Part III details the facts and procedural history of the case.⁴ Part IV analyzes the plurality opinion by Justice Scalia, concurrences by Chief Justice Roberts and Justice Kennedy, and dissenting opinions by Justice Stevens and Justice Breyer.⁵ Part V considers *Rapanos*’ legislative, judicial, and social impact.⁶ Lastly, Part VI concludes the discussion of *Rapanos* and its effect on federal wetland jurisdiction.⁷

II. HISTORICAL BACKGROUND

A. *The Commerce Clause*⁸

Most federal environmental legislation is rooted in Congress’ authority to regulate interstate commerce.⁹ The Supreme Court first construed Congress’ commerce power in *Gibbons v. Ogden*, where

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

3. See *infra* Part II and accompanying notes.

4. See *infra* Part III and accompanying notes.

5. See *infra* Part IV and accompanying notes.

6. See *infra* Part V and accompanying notes.

7. See *infra* Part VI and accompanying notes.

8. The Commerce Clause empowers the United States Congress “to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” U.S. CONST. art. I, § 8, cl. 3.

9. Robert L. Glicksman, *From Cooperative to Inoperative Federalism: The Perverse Mutation of Environmental Law and Policy*, 41 WAKE FOREST L. REV. 719, 755-761. The Commerce Clause grants Congress three regulatory categories:

First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress’ commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, i.e. those activities that substantially affect interstate commerce.

United States v. Lopez, 514 U.S. 549, 558-59 (1995).

the Court supported federal law over state law in determining shippers' rights to navigate the nation's waters.¹⁰ After the Court's decision in *Gibbons*, there was a lull in Commerce Clause decisions, resulting in a "state of confusion."¹¹ However, in the late 1800s, laissez-faire economics gradually provoked another shift in jurisprudence that caused the Court to impose stifling limits on federal commerce power.¹² Along with the Great Depression, the scope of Congress' commerce power stretched once again with the passage of New Deal legislation.¹³ Consequently, Congress' commerce authority grew into a commanding legislative force with

10. Joshua L. Lee, Note, *Federal Wetland Jurisdiction and the Power to Regulate Commerce: Searching for the Nexus in Gerke Excavating*, 2006 BYU L. REV. 263, 265-72 (2006). In *Gibbons*, a state act gave certain individuals an exclusive right to use steam navigation in all New York waters for 30 years beginning in 1808. *Gibbons v. Ogden*, 22 U.S. 1, 8 (1824). The Supreme Court held that the Act of Congress gave full authority to defendants' vessels to navigate the waters of the United States. *Lee, supra* note 10, at 266. The New York state law, prohibiting the vessels from navigating state waters, was repugnant to the Constitution and void. *Id.* Chief Justice Marshall established that the Commerce power "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." *Id.* Significantly, *Gibbons* granted Congress regulatory control over channels of commerce. *Id.* at 267.

11. *Id.* at 267. The law and doctrine of the earlier cases with respect to the fostering and protection of navigation are well summed up in a frequently cited passage from the Court's opinion in *Gilman v. Philadelphia*.

Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and subject to all requisite legislation by Congress. This necessarily includes the power to keep them open and free from any obstruction to their navigation, interposed by the States or otherwise; to remove such obstructions when they exist; and to provide, by such sanctions as they may deem proper, against the occurrence of the evil and for the punishment of offenders. For these purposes, Congress possesses all the powers which existed in the States before the adoption of the national Constitution, and which have always existed in the Parliament in England.

Gilman v. Philadelphia, 70 U.S. 713, 724-25 (1866).

12. *Id.* at 268.

13. *Id.* at 269.

firm approval from the Court.¹⁴ As a result, Congress was able to use its commerce power to impress environmental regulations on the nation's waterways.¹⁵

While environmental regulation expanded through Congress' control of commerce in the 1970s and 1980s, state autonomy depreciated.¹⁶ State and local governments began to lobby for more control over environmental regulation.¹⁷ Not until 1995 did the Supreme Court in *United States v. Lopez* finally strike down a federal statute under the Commerce Clause for the first time in over fifty years.¹⁸ Fortunately for state and local governments, *Lopez* drastically limited the reach of federal power to regulate environmental law under the Commerce Clause.¹⁹

The Supreme Court continued its strict scrutiny review of Commerce Clause legislation when it decided *United States v. Morrison* in 2000.²⁰ There, the Court invalidated a clause in the Violence Against Women Act that gave victims of sexual abuse a private cause of action, as it was outside Congress' remedial power under the Fourteenth Amendment of the United States Constitution.²¹ The Court affirmed the lower court decision, holding that gender-motivated crimes were not considered economic activity, and therefore, the Commerce Clause did not give Congress the authority

14. *Id.* at 272.

15. *Id.* at 273-80.

16. Jaimie Y. Tanabe, *The Commerce Clause Pendulum: Will Federal Environmental Law survive in the Post-SWANCC Epoch of "New Federalism?"*, 31 ENV. LAW 1051, 1060-62 (2001).

17. *Id.* at 1060.

18. *Id.* In a five-to-four majority, the Court in *Lopez* struck down the Gun-Free School Zones Act of 1990, which prohibited the possession of firearms near schools. *Id.* The Court held that the Act violated Congress' Commerce Clause power because it was a criminal statute that essentially had nothing to do with commerce. *Id.* at 1061. Also, the Act was not an essential part of a larger regulation of economic activity. *Id.* The Court realized that its interpretation of the commerce power was slipping further from its original meaning as determined by the framers of the Constitution. *Id.* The Court had essentially given Congress general police power authority through Commerce Clause justification, to the detriment of the State's traditional powers. *Id.*

19. *Id.*

20. *United States v. Morrison*, 529 U.S. 598, 607 (2000).

21. *Id.* at 607-08.

to enact a statute regulating such crimes.²²

Both *Lopez* and *Morrison* laid the foundation for the Court's limit on the CWA's scope, under which jurisdiction is frequently asserted on the basis of substantial effects on interstate commerce.²³ The Court displayed its willingness to curtail federal Commerce Clause jurisdiction in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (*SWANCC*), even though the holding itself did not rest on constitutional grounds.²⁴

The Court eventually addressed the effect of *Lopez* on the CWA's scope in *SWANCC*, which is discussed further in Subsection C of this Part.²⁵ *SWANCC* questioned Congress' constitutional authority to regulate isolated wetlands based on their status as migratory bird habitats.²⁶ Relying on *Lopez*, a county agency argued that Congress could not require it to obtain a federal permit under section 404(a) of the CWA to fill wetlands in an abandoned sand-and-gravel pit.²⁷ The Court, in a five-four opinion, dodged the constitutional issue by construing section 404(a) quite narrowly.²⁸ The Court deduced that Congress lacked clear intent to apply section 404(a) to isolated wetlands simply due to their status as migratory bird habitats. In fact, the Court believed that such characterization would encroach on "states' traditional and primary power over land and water use."²⁹ To avoid "significant constitutional and federalism questions," the Court held that section 404(a)'s jurisdictional predicate – "waters of the United States" – did not include isolated wetlands where migratory birds are present.³⁰ Thus, *SWANCC* narrows the jurisdictional reach of the CWA, while leaving the ultimate effect of *Lopez* on federal constitutional authority to protect the environment unresolved.³¹

22. *Id.* at 613.

23. Kimberly Breedon, Note, *The Reach of Raich: Implications for Legislative Amendments and Judicial Interpretations of the Clean Water Act*, 74 U. CIN. L. REV. 1441, 1456 (2006).

24. *Id.*

25. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (*SWANCC*), 531 U.S. 159 (2001).

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 174.

30. *Id.* at 174.

31. *Id.*

B. Early Wetland Legislation

Primary destruction of wetlands came from draining, filling, and converting wetlands to dry land.³² Early American colonists quickly began draining wetlands with small ditches, which continued during Westward Expansion.³³ In 1850, Congress passed the Swamp Land Act, which allowed the state to “reclaim the swamp and overflowed lands therein.”³⁴ Later, in 1899, the Rivers and Harbors Act gave the Army Corps of Engineers authority to regulate construction activities involving dredging, filling or obstructing navigable waters.³⁵ This Act is still in effect today.³⁶ Under section 541, a developer needs to apply to the Corps prior to building any structure in any water of the United States.³⁷ Specifically, section 403 prohibits the “creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States. . . .”³⁸ This regulation did not extend to most wetlands because most wetland areas are outside the mean high water mark of navigable waters, the area over which the Corps has authority.³⁹ In large part, the Corps does not regulate wetlands at all under this Act.⁴⁰

The deferral government’s anti-wetland policy reached a high in the early 20th century when it, “in essence, provided free engineering services to farmers to drain wetlands” and “shared the cost of drainage projects.”⁴¹ But eventually, the growing body of information on wetlands prompted a change in policy.⁴² The shift

32. *Lee, supra* note 10, at 282.

33. *Id.*

34. *Id.* The first legislation on wetlands, the Swamp Lands Acts of 1849, 1850, and 1860, conveyed to 16 states all swamp and flood lands so the states could convert these lands to agricultural use. *See* Hearing on Federal Wetlands Regulations: Hearing Before the Comm. on Small Business, 102d Cong. 54 (1991) (statement of Elizabeth Raisbeck, Senior Vice President, National Audubon Society).

35. 33 U.S.C. § 541 (2006).

36. *Id.*

37. *Id.*

38. *Id.* § 403.

39. *Id.*

40. *Id.*

41. *Lee, supra* note 10, at 282.

42. Murray G. Sagsveen and Matthew A. Sagsveen, *Waterfowl Protection*

began in 1934 when Congress passed the Migratory Bird Hunting Stamp Act which imposed a cost on hunting waterfowl and allocated some of the proceeds for acquiring wetlands to be set aside as "Waterfowl Protection Areas."⁴³

Before the colonists' reclamation began, wetlands comprised about 225 million acres of the United States territory.⁴⁴ Since then, extensive losses have occurred, and over half of our original wetlands have been drained and converted to other uses.⁴⁵ The years from the mid-1950s to the mid-1970s were a time of major wetland loss, but since then the rate of loss has decreased. Between 1986 and 1997, an estimated 58,500 acres of wetlands were lost each year in the continental United States.⁴⁶

The enormous loss of wetlands eventually prompted further reaction from the federal government to regulate in this area. In 1969, the National Environmental Policy Act (NEPA) was enacted, which requires all federal agencies to consider potential adverse environmental impacts in evaluating major federal actions, which include permit approvals.⁴⁷

The primary basis for the federal regulation of wetland habitats derives from the Federal Water Pollution Control Act, commonly known as the Clean Water Act.⁴⁸

C. Clean Water Act

In 1972, Congress passed the Clean Water Act. Its stated

Areas: An Updated State Program, 76 N. DAK. L. REV. 861, 861-62 (2000).

43. *Id.* See also Virginia C. Veltman, Comment, *Banking on the Future of Wetlands Using Federal Law*, 89 NW. U. L. REV. 654, 656 (1995). Early laws tended to focus on waterfowl nesting and breeding, including the Wetlands Loan Act of 1961, amendments to the Migratory Bird Stamp Act of 1934, and the Water Bank Act of 1970. *Id.*

44. *Lee*, *supra* note 10, at 283.

45. US Environmental Protection Agency, Wetlands: Status and Trends <http://www.epa.gov/owow/wetlands/vital/status.html> (last visited Dec. 28, 2006).

46. *Id.*

47. Maher M. Shomali, *Maryland Native Plant Society v. U.S. Army Corps of Engineers: The Corps of Engineers Must Clearly Justify a Decision to Authorize Activity Having Adverse Environmental Effects*, 12 U. BALT. J. ENVTL. L. 213, 215 (2005).

48. *Id.* at 215-16.

objective is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”⁴⁹ More specifically, the CWA prohibits unpermitted discharges of pollutants to “navigable waters.”⁵⁰ The term “navigable waters” is defined in section 1362(7) to mean “the waters of the United States, including territorial seas.”⁵¹ Questions concerning how broadly to interpret “waters of the United States” and the extent to Congress’s constitutional authority to regulate certain waters have generated considerable litigation, as discussed in more detail below.⁵²

The question of what constitutes the “waters of the United States” for purposes of defining the jurisdiction limits of federal authority under the CWA is enormously important. Approximately 98 to 99 percent of the nation’s water bodies are not waters that would be considered traditionally navigable.⁵³ The quality of navigable waters is significantly affected by the quality of both their non-navigable tributaries and of wetlands adjacent to both navigable waters and their non-navigable tributaries. The CWA’s section 404 permitting rules use “navigable waters” as their touchstone for federal jurisdiction.

Section 404 of the CWA is the most relevant section with regards to wetlands.⁵⁴ Section 404 generally prohibits the discharge of

49. *Rapanos*, 126 S. Ct. at 2215 (quoting 33 U.S.C. § 1251(a)).

50. 33 C.F.R. § 502.

51. 33 U.S.C. § 1362(7) (2006).

52. *See infra* Part III and IV and accompanying notes.

53. Percival, et al., *Environmental Regulation: Law, Science, and Policy* (5th ed. 2006).

54. 33 C.F.R. § 404 (g)(1)(2006).

The Governor of any State desiring to administer its own individual and general permit program for the discharge of dredged or fill material into the navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto), within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall

dredged or fill material into waters of the United States without a permit from the Corps.⁵⁵ The Corps and Environmental Protection Agency (EPA) regulations under the section 404 program define “waters of the United States” for which a permit must be obtained to include, among other things: (1) interstate waters; (2) waters which are or could be used in interstate commerce; (3) waters such as wetlands, the use or degradation of which could affect interstate commerce; (4) tributaries of the waters identified above; and (5) wetlands adjacent to these waters.⁵⁶ As such, this program is the nation’s primary wetland protection program.⁵⁷ In addition to the federal regulation of wetlands, some state and local governments have developed wetland protection measures.⁵⁸

Traditionally, the use of the definite article (“the”) and the plural number (“waters”) in “waters of the United States” were thought to

submit a statement from the attorney general (or the attorney for those State agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program.

Id.

55. *Id.* at 4. By issuing wetland fill permits, the United States Army Corps of Engineers demands that all relevant factors and cumulative effects be considered, among those being 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. *Rapanos*, 126 S. Ct. at 2215. Section 404(e) of the CWA authorizes the Corps to develop general permits on a geographic basis for categories of activities having minimal environmental impact. 33 C.F.R. § 404(e). Section 404(f) identifies activities exempt from the permitting requirement, including certain ongoing farming activities. 33 C.F.R. § 404(f). Section 404(g) authorizes states (and tribes) to establish their own programs. 33 C.F.R. § 404(e)-(g)(2006).

56. *Id.* at 4-5.

57. *Id.* The Corps administers section 404 permitting responsibilities, while the EPA in conjunction with the Corps establishes the substantive environmental protection standards that permit applicants must meet. EPA also has final administrative responsibility for interpreting the term “waters of the United States,” a term that governs the scope of many other programs that EPA administers under the CWA. *Id.* at 5.

58. *Id.*

illustrate that “waters” refers more narrowly to water as found in streams and standing bodies such as oceans, rivers, and lakes, or the flowing or moving masses, as of waves or floods, making up such streams or bodies.⁵⁹ Under this definition, “the waters of the United States” include only relatively permanent, standing or flowing bodies of water.⁶⁰ The definition refers to water as found in streams, oceans, rivers, lakes, and bodies of water forming geographical features.⁶¹ All of these terms imply continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows.⁶² Even the least substantial of the definition’s terms, namely “streams,” connotes a continuous flow of water in a permanent channel, especially when used in company with other terms such as rivers, lakes, and oceans.⁶³ None of these terms seems to encompass transitory puddles or ephemeral flows of water.⁶⁴

After a district court enjoined these regulations as too narrow, the Corps adopted a much broader definition.⁶⁵ The Corps’ current regulations interpret “the waters of the United States” to include, in addition to traditional interstate navigable waters, all interstate waters including interstate wetlands; 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; tributaries of such waters; and

59. *Id.* See also, *The Daniel Ball*, 77 U.S. 557 (1870) (holding that “navigable waters of the United States” include interstate waters that are “navigable in fact” or readily susceptible of being rendered so.).

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Natural Res. Def. Council, Inc. v. Calloway*, 392 F. Supp. 685 (D.D.C. 1975). In *Calloway*, environmental groups challenged the interpretation of federal jurisdiction as too narrow because it extended only to waters that were actually, potentially, or historically navigable. *Id.* The court held that Congress had not intended the term “navigable waters” to be limited to the traditional tests of navigability. *Id.* On the contrary, Congress had intended to extend federal regulatory authority to the limits of its commerce clause powers. *Id.* On the basis of *Calloway*, the Corps expanded its regulations to specifically include wetlands. *Id.*

wetlands adjacent to such waters and tributaries (other than waters that are themselves wetlands).⁶⁶ The regulation defines “adjacent” wetlands as those bordering, contiguous to, or neighboring waters of the United States.⁶⁷ It specifically provides that wetlands 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.⁶⁸

D. Case History

The progression of the CWA terms “navigable waters” and “waters of the United States” have a long and convoluted history. Nearly 100 years before the CWA’s existence, *The Daniel Ball* defined “navigable waters” as those that are “navigable in fact” meaning that such waters “susceptible of being used. . . in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.”⁶⁹ This traditional definition is much narrower than the modern definition espoused by the CWA. Since the traditional definition of the CWA terms “navigable waters” and “waters of the United States,” require that the “waters” be navigable in fact, or susceptible of being rendered so, it cannot be applied wholesale to the CWA.⁷⁰ The CWA’s “navigable waters” are simply defined as “the waters of the United States.”⁷¹ Moreover, the CWA provides, in certain circumstances, for an even wider definition including waters that are presently used, or are susceptible to use, in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce,

66. 33 C.F.R. § 328.3 (2004).

67. 33 C.F.R. § 328.3(c) (2004).

68. 33 C.F.R. § 328.3 (2004).

69. *The Daniel Ball*, 77 U.S. at 563. In *The Daniel Ball*, the Grand River was regarded as a navigable water of the United States because it was capable of bearing a 123 ton steamer, laden with passengers and merchandise, as far as Grand Rapids, Michigan, which is about forty miles from the mouth of Lake Michigan. *Id.* at 564.

70. *Id.* at 563-566.

71. 33 U.S.C. § 1362(7).

including adjacent wetlands.⁷² This provision shows that the CWA's term "navigable waters" includes something more than traditional navigable waters. The United States Supreme Court has twice stated that the meaning of "navigable waters" in the CWA is broader than the traditional understanding of that term.⁷³ The Court has also emphasized, however, that the qualifier "navigable" is not devoid of significance.⁷⁴ Through an examination of progressive case law, the expansion and contraction of the traditional definition of "navigable waters" and "waters of the United States" is revealed.

The test laid down in *The Daniel Ball* was generally adhered to by the Supreme Court until the decision in *United States v. Appalachian Electric Power Company*, in which the Court gave the term "navigable waters" a broader construction than that in *The Daniel Ball* and in subsequent decisions.⁷⁵ In *Appalachian Electric Power Co.*, the Court considered the Federal Power Act, which defines navigable waters as follows:

[N]avigable waters are those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids, together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority.⁷⁶

72. 33 U.S.C. § 1344(g)(1).

73. *Rapanos*, 126 S. Ct. at 2220.

74. *Id.*

75. *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377 (1940).

76. 16 U.S.C. § 791(a).

This definition is considerably broader than that used in *The Daniel Ball* because it includes any water than can potentially be used in interstate or foreign commerce, including shallows or rapids which are not navigable in fact. Thus, the new definition of “navigable waters” includes such waters that are not traditionally navigable in fact.

In *United States v. Riverside Bayview Homes*, the Supreme Court recognized the CWA’s overarching scope.⁷⁷ Before this case came to the Supreme Court, the Corps defined and redefined the term “navigable waters” in the CWA to include “areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.”⁷⁸

In *Riverside Bayview*, respondent Riverside Bayview Homes, Inc. filled part of its property in preparation for construction of a housing development.⁷⁹ The Corps argued, under the current CWA definition of navigable waters, that the “adjacent wetlands” at issue were under the Corps’ jurisdiction. Thus, respondent illegally filled the wetland without a permit as required by the Corps.⁸⁰ The Court determined that no taking under the Fifth Amendment had occurred since there was no evidence that the denial of a permit would deny respondent economically viable use of its land.⁸¹ Holding that the Corps’ construction of the Act was reasonable, the Court extended the Corps permit-granting authority under section 1344 to wetlands adjacent to “navigable waters,” given Congress’ broad definition of navigable waters as “waters of the United States.”⁸² Thus, the Supreme Court reversed the judgment of the Court of Appeals, because petitioner United States was entitled to an injunction to prohibit respondent

77. Thomas L. Casey, III, *Reevaluating “Isolated Waters”: Is Hydrologically Connected Ground Water “Navigable Water” Under the Clean Water Act?*, 54 ALA. L. REV. 159, 161 (2002).

78. *United States v. Riverside Bayview*, 474 U.S. 121, 124 (1985) (quoting The Clean Water Act, 33 C.F.R. § 323.2(c) (1978)).

79. *Id.*

80. *Id.*

81. *Id.* at 126.

82. *Id.* at 138-39.

developer from filling “wetlands” adjacent to “waters of the United States,” since the issuance of regulations requiring a permit for such use was not a “taking” of property, and the Corps had authority to require a permit under a reasonable construction of the CWA.⁸³ After the Court adopted this decision, the Corps adopted increasingly broad interpretations of its own regulations under the CWA.⁸⁴ *Riverside Bayview* explicitly rejected case-by-case determinations of ecological significance for the jurisdictional question whether a wetland is covered under the CWA, holding instead that all physically connected wetlands are covered.⁸⁵ The decision reflects concern that a more restrictive interpretation of regulatory authority could undermine the congressional goal of providing comprehensive protection to water quality. The Corps and lower courts continued to define tributaries and adjacent wetlands broadly.

In 2001, the Supreme Court revisited the meaning of “navigable waters” in *Solid Waste Agency of Northern Cook County v. SWANCC*.⁸⁶ There, Petitioner was a conglomerate of municipalities which sought to develop a deserted gravel pit as a solid waste disposal site.⁸⁷ Respondent United States Army Corps of Engineers denied Petitioner’s application for a disposal permit on the ground that, even though the gravel pit ponds constituted non-navigable isolated, intrastate waters, they were subject to protection as habitats for migratory birds.⁸⁸ The Court held that Respondent’s regulatory interpretation of the CWA to include the gravel pit, based solely on its nature as a bird habitat, impermissibly extended respondent’s jurisdiction to ponds that were not adjacent to open water.⁸⁹

Even though Respondent’s interpretation was never overruled by

83. *Id.*

84. *Casey*, *supra* note 76 at 161.

85. *Id.*

86. *Solid Waste Agency of Northern Cook Cty v. Army Corps of Eng’rs (SWANCC)*, 531 U.S. 159 (2001).

87. *SWANCC*, 531 U.S. at 676.

88. *Id.* at 164. The Corps asserted jurisdiction over the site under subpart (b) of the “Migratory Bird Rule.” *Id.* In fact, the Corps found about 121 bird species had previously been observed at the site. *Id.* Though SWANCC made various proposals to mitigate any potential damage to the bird habitat and secured water quality certification from the Illinois Environmental Protection Agency, the Corps refused to issue a section 404(a) permit. *Id.* at 165.

89. *Id.*

legislation, it did not indicate congressional acquiescence to such jurisdiction either.⁹⁰ Further, the significant constitutional issues presented by Respondent's attempt to usurp the states' traditional and primary power over land and water use, precluded administrative deference and warranted reading the statute as written rather than as interpreted by respondent.⁹¹ Judgment was reversed; even though Petitioner's proposed waste disposal site was a habitat for migratory birds, federal agency jurisdiction did not extend to such non-navigable, isolated, intrastate waters under the clean water statute which expressly limited such jurisdiction to navigable waters.⁹²

Since the Court's decision in *SWANCC*, district and appellate courts have struggled to define the Corps' power in various situations dealing with wetlands and ephemeral waters. Lower courts interpreted *SWANCC* as restricting federal authority only where it turned solely on the potential presence of migratory birds.⁹³

In *Sierra Club v. El Paso Gold Mines*, the Tenth Circuit was pressed with the issue of whether a sewer system could be included in the definition of "waters of the United States" in the CWA, thus necessitating a permit granted by the Corps.⁹⁴ Defendant argued that the discharge in question was not covered by the CWA because it was discharged into a sewer system rather than directly into "the waters of the United States."⁹⁵ However, the Tennessee district court found that argument unavailing because it determined that the fact that a discharge followed through a conveyance before reaching covered water did not remove the discharge from CWA's jurisdiction.⁹⁶ The pollutant was discharged into a shaft that emptied into a tunnel which, in turn, traveled 2.5 miles before discharging

90. *Id.* at 173-74.

91. *Id.* at 167.

92. *Id.* at 192-94.

93. See *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003); *United States v. Gerke*, 412 F.3d 804 (7th Cir. 2005); *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526 (9th Cir. 2001); *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 340 (5th Cir. 2001). However, the Fifth Circuit in *Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001) and *In re Needham*, 354 F.3d 340 (5th Cir. 2003) concluded that federal jurisdiction extended only to waters that are actually navigable or adjacent to an open body of navigable water. *Id.* at 344.

94. *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133 (10th Cir. 2005).

95. *Id.* at 1148-49.

96. *Id.* at 1149-50.

into navigable water.⁹⁷ In reviewing the issue of subject matter jurisdiction, the Tenth Circuit concluded that CWA jurisdiction was established, in part, because the discharge was from a point source, the shaft, which merely flowed through “other conveyances” before reaching navigable water.⁹⁸ Thus, the court effectively determined that point sources that eventually reach navigable water are included in the Corp’s jurisdiction.⁹⁹

In *Northern California River Watch v. City of Healdsburg*, the Ninth Circuit had the task of determining whether a pond was subject to the CWA because it contained wetlands that were adjacent to a navigable river of the United States.¹⁰⁰ The City discharged sewage into a pond, which was a quarry pit that had filled with water from a surrounding aquifer, and which was also located next to a river.¹⁰¹ The appellate court affirmed, holding that the pond and its wetlands possessed a significant nexus to navigable waters because the pond waters seeped directly into the navigable river.¹⁰² The river and surrounding area rested on top of a vast gravel bed extending as far as sixty feet into the earth.¹⁰³ The bed was a porous medium, saturated with water.¹⁰⁴ Beneath the surface, water soaked in and out of the pond via the aquifer, twenty-four hours a day, seven days a week, 365 days a year.¹⁰⁵ Moreover, there was an actual surface connection between the pond and the river where the river overflowed the levee between them.¹⁰⁶ Thus, there were hydrological connections between the two.¹⁰⁷ What’s more, there were ecological connections, and the pond significantly affected the chemical integrity of the river by increasing its chloride levels.¹⁰⁸

97. *Id.*

98. *Id.* at 1141.

99. *Id.* at 1149-50.

100. *N. Cal. River Watch v. City of Healdsburg*, 457 F.3d 1023, 1025 (9th Cir. 2005).

101. *Id.*

102. *Id.*

103. *Id.* at 1027.

104. *Id.*

105. *Id.* at 1028.

106. *Id.* at 1030.

107. *Id.*

108. *Id.* at 1031. At high enough levels, chlorides can create toxic conditions for aquatic biota.

Finally, neither the waste treatment nor the excavation operation exceptions applied.¹⁰⁹ Through the use of the “significant nexus” test, the court looked deeper into a water body’s ecological relation to other waters in order to determine its scope under the CWA.¹¹⁰

While appellate courts continued expanding the definition of “navigable waters”, the Northern District of Texas still held on to a narrower scope of the CWA.¹¹¹ In *United States v. Chevron Pipe Company*, the connection of generally dry channels and creek beds would not suffice to create a “significant nexus” to navigable water simply because one fed into the next during the rare times of actual flow.¹¹² The unnamed tributary at issue, into which the oil spilled, was strikingly similar to a dry arroyo.¹¹³ The United States admitted that only during times of flow was there an unbroken surface water tributary connection to a river.¹¹⁴ The proper inquiry was whether the site of the farthest traverse of the spill was navigable-in-fact or adjacent to an open body of navigable water.¹¹⁵ A declaration submitted by the government did not state that sufficient flow actually occurred during the relevant time frame.¹¹⁶ There was no evidence that oil was actually transported by stream flow during a time of flow to a navigable-in-fact water or open body of water.¹¹⁷ Some evidence was required that oil actually reached a navigable waterway — evidence more than speculation that such an event could occur.¹¹⁸ Absent actual evidence that the site of the farthest traverse of the spill was navigable-in-fact or adjacent to an open body of navigable water, a “significant nexus” was not present.¹¹⁹

Next, another Ninth Circuit decision continued to enforce a low bar against the Corps. In *Baccarat Fremont Developers, LLC v. US*

109. *Id.* at 1031-32.

110. *Id.* at 1033.

111. *United States v. Chevron Pipe Co.*, 437 F. Supp. 2d 605, 615 (N.D. Tex. 2006).

112. *Id.* at 613.

113. *Id.*

114. *Id.* at 614.

115. *Id.*

116. *Id.*

117. *Id.* at 615.

118. *Id.*

119. *Id.*

Army Corps of Engineers, the Corps determined that the wetlands at issue were adjacent to tidal waters and thus were subject to its jurisdiction under the CWA.¹²⁰ The Corps offered the developer a permit to fill 2.36 acres of wetlands subject to certain conditions.¹²¹ The developer signed the permit and then brought the instant action.¹²² The appellate court found that the Corps had jurisdiction over the adjacent wetlands as defined in 33 C.F.R. § 328.3(c), and did not depend on the existence of a significant hydrological or ecological connection between the particular wetlands at issue and waters of the United States.¹²³ The Corps' findings were not arbitrary or capricious such that the court would be required to set them aside pursuant to 5 U.S.C. § 706, and were more than sufficient to establish a significant nexus between the wetlands on the site and the flood control channels.¹²⁴ The CWA did not require a significant hydrological or ecological connection as necessary for the Corps to have jurisdiction over adjacent wetlands.¹²⁵

Thus, since the Supreme Court's ruling in *SWANCC*, appellate and district courts have construed the meaning in a variety of creative ways. In hopes of remedying the confusion in lower courts, the Supreme Court granted certiorari in order to review the consolidated cases of *Rapanos v. United States* and *Carabell v. United States Army Corps of Engineers*.¹²⁶ The facts of both cases are set forth below.

III. FACTS

A. Procedural History

Rapanos v. United States consists of two companion cases that

120. *Baccarat Fremont Developers, LLC v. U.S. Army Corps of Eng'rs*, 425 F.3d 1150 (9th Cir. 2005).

121. *Id.* at 1152.

122. *Id.* at 1153.

123. *Id.* at 1155.

124. *Id.* at 1157.

125. *Id.* at 1158.

126. *See United States v. Rapanos*, 376 F.3d 629, 635 (6th Cir. 2004). "Unfortunately, the two leading Supreme Court cases on the reach of the CWA have done little to clear the muddled waters of CWA jurisdiction." *Id.*

arose from the development of four Michigan wetlands. Originally, both cases, *Rapanos v. United States* and *Carabell v. United States Army Corps of Engineers*, were separately brought before Eastern District of Michigan trial courts before reaching the Sixth Circuit on appeal. The Supreme Court consolidated the cases when it granted certiorari.¹²⁷

At the time of the original *Rapanos* case, the Corps had essentially boundless discretion in deciding whether to grant or deny a section 404 permit, relying on such factors as economics, recreation, and the general needs and welfare of the people.¹²⁸ The dicta noted that the average applicant for an individual permit spends 788 days and \$271,596 in completing the process.¹²⁹

John Rapanos owned three of the four properties, all of which lay near ditches or human-made drains and eventually flowed into either a river or Lake Huron.¹³⁰ In 1989, Rapanos began filling and clearing his land even after a private consultant and the state told him that a permit was probably required.¹³¹ Federal officials brought criminal charges and instituted a civil action.¹³² Rapanos faced sixty-three months in prison and hundreds of thousands of dollars in criminal and civil fines.¹³³ The Rapanoses and their affiliated businesses deposited fill material without a permit into wetlands on three sites near Midland, Michigan.¹³⁴ The district court found that the wetlands were “within federal jurisdiction” because they were “adjacent to other waters of the United States.”¹³⁵ On appeal, the appellate court affirmed, holding that there was federal jurisdiction over the wetlands at all three sites because “there were hydrological connections between all three sites and corresponding adjacent tributaries of navigable waters.”¹³⁶

The proceedings against the Rapanoses comprise a small part of

127. *Rapanos*, 126 S. Ct. at 2219.

128. *Id.* at 2215.

129. *Id.* at 2214.

130. *Id.* at 2219.

131. *Rapanos*, 376 F.3d at 632.

132. *Id.* at 633-34.

133. *Rapanos*, 126 S. Ct. at 2215.

134. *Id.* at 2219.

135. *Id.*

136. *Id.* (quoting *Rapanos*, 376 F.3d at 643).

the immense expansion of federal regulation of land use that has occurred under the CWA during the past five Presidential administrations.¹³⁷ Before the Court's decision here, almost any land area that is ever touched by water can potentially be regulated as a "water of the United States."¹³⁸

The fourth property, from the companion case, was a wetland on which Keith and June Carabell wanted to build condominiums.¹³⁹ There, the Carabells were denied a permit to deposit fill material in a wetland located on a triangular parcel of land about one mile from Lake St. Clair, a 430-square-mile lake on the Michigan-Ontario border.¹⁴⁰ Unlike *Rapanos*, a human-made barrier ran between the ditch and the Carabell's land.¹⁴¹ The state department of the environment and the Corps denied the Carabells' permit application and after their administrative appeal was rejected, they filed suit challenging the exercise of federal regulatory jurisdiction over their site.¹⁴² The district court ruled that there was federal jurisdiction because the wetland "is adjacent to neighboring tributaries of navigable waters and has a significant nexus to 'waters of the United States.'"¹⁴³ The appellate court affirmed the decision.¹⁴⁴

B. Case Facts

In *Rapanos*, John Rapanos owned a land parcel near Midland, Michigan, known as the Salzburg site.¹⁴⁵ A company he controlled owned another nearby parcel known as the Hines Road site.¹⁴⁶ His wife and a company she controlled owned a third site known as the Pine River site.¹⁴⁷ In December 1988, Rapanos, hoping to construct a

137. *Id.* at 2215.

138. *Id.*

139. *Carabell v. U.S. Army Corps of Eng'rs*, 257 F. Supp. 2d 917, 923-24 (E.D. Mich. 2003).

140. *Id.* at 923.

141. *Id.*

142. *Carabell v. U.S. Army Corps of Eng'rs*, 391 F.3d 704, 706 (6th Cir. 2004).

143. *Rapanos*, 126 S. Ct. at 2219.

144. *Id.*

145. *Id.* at 2238.

146. *Id.*

147. *Id.*

shopping center, asked the Michigan Department of Natural Resources to inspect the Salzburg site.¹⁴⁸ A state official told Rapanos that while the site was probably under the state's definition of wetlands, Rapanos could continue with the project if the wetlands were delineated or if a permit were obtained.¹⁴⁹ Rapanos chose the delineation option and hired a wetlands consultant to survey the property.¹⁵⁰ The consultant said that his lands were wetlands and Rapanos allegedly threatened to destroy the consultant's career unless he got rid of the report.¹⁵¹ Then Rapanos ordered \$350,000 worth of earthmoving and land-clearing work that filled in twenty-two of the sixty-four wetland acres on the Salzburg site.¹⁵² He did this without a permit and despite receiving cease and desist orders from state officials and the EPA.¹⁵³ Additionally, construction work at the Hines Road and Pines River sites was in violation of the state, and federal compliance orders altered another seventeen and fifteen wetlands acres.¹⁵⁴

In the case at hand, the United States alleges civil violations of the CWA against all Rapanos petitioners claiming that petitioners discharged fill into jurisdictional wetlands, failed to respond to requests for information, and ignored administrative compliance orders.¹⁵⁵ The trial and appellate court decisions were in favor of the government.¹⁵⁶ Here, the Supreme Court grants certiorari to consider the Corps' jurisdiction over wetlands on the Salzburg, Hines Road, and Pine River Sites.¹⁵⁷

In *Carabell*, petitioners Keith and June Carabell applied for a permit from the Michigan Department of Environmental Quality (MDEQ) (which follows Section 1344(g)) in order to fill in wetlands on a right triangle-shaped parcel they owned, to construct 130

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 2238-39.

153. *Id.* at 2239.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

condominium units.¹⁵⁸ The MDEQ denied the permit.¹⁵⁹ A state Administrative Law Judge directed the agency to approve an alternative plan proposed by the Carabells, that involved the construction of 112 units.¹⁶⁰ This plan would fill 12.2 acres and create retention ponds on 3.74 acres.¹⁶¹ Since the EPA objected to the permit, jurisdiction over the case transferred to the Corps (Section 1344(j)).¹⁶² The Corps concluded that the Carabell property “provide[d] water storage functions that, if destroyed, could result in an increased risk of erosion and degradation of water quality in the Sutherland-Oemig Drain, Auvase Creek, and Lake St. Clair.”¹⁶³

In the case at hand, the Carabells challenged the permit denial and the Corps’ jurisdiction.¹⁶⁴ The district court granted subject matter jurisdiction for Corps.¹⁶⁵ The appellate court affirmed.¹⁶⁶ After consolidating the Rapanos’ case with the Carabells’, the Supreme Court granted certiorari.¹⁶⁷

IV. ANALYSIS OF OPINION

In *Rapanos v. United States*, the Court divided 4-1-4 in its efforts to define the scope United States Army Corps of Engineers’ jurisdiction over “waters of the United States.” Though the Court struggled to create a clean test for analysis, it remained divided on the issue of federal power over “navigable waters.” Fortunately, some direction can be adapted from Justice Kennedy’s middle ground approach which provides the Corps an appropriate amount of discretion to use their scientific proficiency. Regrettably, Justice Scalia’s plurality opinion and Justice Steven’s dissenting opinion embrace totally opposite ends of the jurisdictional spectrum. Both plurality and dissent reinforce the dichotomy between state and

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at 2240.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Rapanos*, 126 S. Ct. at 2240.

federal authority with regards to wetland development and preservation.

A. Plurality: Surface Connection Requirement

The Supreme Court vacated the Sixth Circuit's judgments in both cases and remanded for lower level review. In the Court's plurality opinion, Justice Scalia narrows the range of CWA interpretations to preserve state autonomy while observing the intent of Congress in its construction of federal environmental law.

In the introduction to his opinion, Justice Scalia submits general background information on the case and the history of the Clean Water Act.¹⁶⁸ Critiquing the immense scope of agency power held by the Corps, Justice Scalia denounces the burdens of time and cost that the section 404 program imposes on landowners.¹⁶⁹

In Part I of the plurality opinion, Justice Scalia offers a brief history of the CWA.¹⁷⁰ In order to meet its objective "to restore and maintain the chemical, physical, and biological integrity of the nation's waters," the CWA makes the "discharge of any pollutant unlawful."¹⁷¹ However, section 404 permits may be issued at the Corps' discretion "for the discharge of . . . fill material into the navigable waters."¹⁷²

Traditionally, such navigable waters of the United States were defined as those relatively permanent, standing or continuously

168. *Id.* at 2214.

169. *Id.* at 2215. Justice Scalia provides outstanding figures:

In the last three decades, the Corps and the [EPA] have interpreted their jurisdiction over "the waters of the United States" to cover 270-to-300 million acres of swampy lands in the United States The Corps has also asserted jurisdiction over virtually any parcel of land containing a channel or conduit – whether manmade or natural, broad or narrow, permanent or ephemeral – through which rainwater or drainage may occasionally or intermittently flow [T]he entire land area of the United States lies in some drainage basin, and an endless network of visible channels furrows the entire surface

Id. Essentially all land in the United States subject to the jurisdiction of the Corps. *Id.*

170. *Id.* at 2215-19.

171. *Id.* at 2215.

172. *Id.* at 2215-16.

flowing bodies of water “forming geographic features” that are described in ordinary terms as “streams,” “oceans, rivers [and] lakes,” and do not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.¹⁷³ Over time, however, the Corps successfully extended the definition of “navigable waters” and “waters of the United States” to include not only traditional interstate waters, but “all interstate waters including interstate wetlands.”¹⁷⁴ Throughout the opinion, Justice Scalia argues for an end to the Corps’ expansive interpretation of “navigable waters” because it is not “based on a permissible construction of the statute.”¹⁷⁵

Thus, Justice Scalia seeks to decipher the meaning of “waters” as keyed to the CWA’s purpose and previous case law.¹⁷⁶ While the meaning of “navigable waters” in the CWA is broader than the traditional definition found in *The Daniel Ball*, the CWA authorizes federal jurisdiction only over “waters.”¹⁷⁷ The CWA’s use of the traditional phrase “navigable waters” further confirms that the CWA confers jurisdiction only over relatively permanent bodies of water.¹⁷⁸

Traditionally, such “waters” included only discrete bodies of water, and the term still carries some of its original substance.¹⁷⁹ This Court’s subsequent interpretation of “the waters of the United States” in the CWA likewise confirms this limitation.¹⁸⁰ And the CWA itself categorizes the channels and conduits that typically carry intermittent flows of water separately from “navigable waters,” including them in the definition of “point sources.”¹⁸¹ Moreover, only the foregoing definition of “waters” is consistent with CWA’s stated policy “to recognize, preserve, and protect the primary responsibilities and rights of the States . . . to plan the development

173. Webster’s New International Dictionary, 2882 (2nd ed. 1934).

174. *Rapanos*, 126 S. Ct. at 2216.

175. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.* 467 U.S. 837, 843 (1984).

176. *Rapanos*, 126 S. Ct. at 2216-19.

177. *Id.* at 2216.

178. *Id.*

179. *SWANCC*, 531 U.S. at 172. See also *Riverside Bayview*, 474 U.S. at 131.

180. *Rapanos*, 126 S. Ct. at 2216.

181. 33 U.S.C. § 1362(14).

and use . . . of land and water resources”¹⁸² In addition, “the waters of the United States” hardly qualifies as the clear and manifest statement from Congress needed to authorize intrusion into such an area of traditional state authority as land-use regulation, and to authorize federal action that stretches the limits of Congress’s commerce power.¹⁸³

The Court first addressed the meaning of “the waters of the United States” in *United States v. Riverside Bayview Homes, Inc.*¹⁸⁴ There, the Court held that a wetland may not be considered adjacent to remote “waters of the United States” based on a mere hydrologic connection.¹⁸⁵ *Riverside Bayview* rested on an inherent ambiguity in defining where the “water” ends and its abutting (“adjacent”) wetlands begin, permitting the Corps to rely on ecological considerations only to resolve that ambiguity in favor of treating all abutting wetlands as waters.¹⁸⁶ Isolated ponds are not “waters of the United States” in their own right and present no boundary-drawing problem justifying the invocation of such ecological factors.¹⁸⁷ Thus, 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 the two, are “adjacent” to such waters and covered by the Act.¹⁸⁸ This interpretation was further asserted in the *SWANCC* decision where the Court held that *Riverside Bayview* did not establish Corps’ jurisdiction over ponds that were not adjacent to open water.¹⁸⁹

Even after the Court’s restrictive decisions in *Riverside Bayview* and *SWANCC*, the lower courts continued to expand the meaning of “waters” to encompass seemingly insignificant water supplies, such as a “roadside ditch” and the “‘washes and arroyos’ of an ‘arid development site.’”¹⁹⁰ Consequently, the Court granted certiorari here to create some sort of test, rather than continuing to rely on

182. 33 U.S.C § 1251(b).

183. See *SWANCC*, 531 U.S. at 181-83.

184. *Rapanos*, 126 S. Ct. at 2216.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.* at 2217.

190. *Id.* at 2218.

seemingly arbitrary ad hoc determinations.¹⁹¹

In Part II and III, Justice Scalia addresses the consolidated cases at issue here.¹⁹² Justice Scalia rejects the Corps' broad interpretation of "waters of the United States," calling it a "Land Is Waters" approach to federal jurisdiction.¹⁹³ Instead, he argues, a body of water must meet two criteria to fall under the CWA.

First, waters must be "relatively permanent, standing or flowing bodies of water," such as a stream, ocean, river, or lake.¹⁹⁴ Ephemeral flows do not fall within a "commonsense understanding" of the word "waters."¹⁹⁵ Establishing coverage of the Rapanos and Carabell sites requires finding that the adjacent channel contains a relatively permanent "water of the United States," and that each wetland has a continuous surface connection to that water, making it difficult to determine where the water ends and the wetland begins.¹⁹⁶ Justice Scalia argues that this cannot be found because the traditional and ordinary meaning of the phrase "waters of the United States" does not include ephemeral streams that "periodically provide drainage for rainfall."¹⁹⁷ Justice Scalia reaches this conclusion through three steps.¹⁹⁸ First, "the waters of the United States" are not the same as "navigable waters" according to the CWA.¹⁹⁹ The use of the definite article "the" and the plural "waters" shows plainly that Section 1362(7) does not refer to water in general, but more narrowly to water "[a]s found in streams," "oceans, rivers, [and] lakes."²⁰⁰ Those terms all connote relatively permanent bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows.²⁰¹ Second, the use of the term "navigable waters" further confirms that the Corps holds jurisdiction over only

191. *Id.* at 2217.

192. *Id.* at 2219.

193. *Id.* at 2222.

194. *Id.* at 2221.

195. *Id.* at 2222.

196. *Id.* at 2219.

197. *Id.* at 2225.

198. *Id.* at 2220-24.

199. *Id.* at 2220.

200. *Id.*

201. *Id.* at 2221.

relatively permanent bodies of water.²⁰² Third, while the Court in *Riverside Bayview* upheld the inclusion of wetlands abutting hydrologic features, nowhere in the opinion did the Court intend to include wetlands in their own right.²⁰³

In Part IV of the plurality opinion, Justice Scalia addresses his second criterion to determine whether a wetland may be considered “adjacent to” remote “waters of the United States,” because of a mere hydrologic connection to them.²⁰⁴ Since *Riverside Bayview* and *SWANCC* viewed the connection between waters and wetlands that they blend into with utmost significance, it would lack sound reasoning to conclude that the disconnected wetlands in *Rapanos* could be considered “waters of United States.”²⁰⁵ According to past precedent and legislative history, Justice Scalia concludes 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, are ‘adjacent to’ such waters and covered by the Act.”²⁰⁶

Remanding both cases for application of his opinion, Justice Scalia rejected the Sixth Circuit’s view that a mere “hydrologic connection” to waters of the United States is sufficient to bring a wetland within the CWA’s domain.²⁰⁷

B. Concurring Opinions

1. Chief Justice Roberts’ Concurrence

In his concurring opinion, the Chief Justice further seeks to repair the chasm between Congress’ original intent and the Court’s boundless grant of authority bestowed on the Corps.²⁰⁸ The tide ebbed with the decision in *SWANCC*, where the Court rejected the Corps overarching authority to regulate wetlands.²⁰⁹ Soon after this

202. *Id.* at 2222.

203. *Id.*

204. *Id.* at 2225.

205. *Id.* at 2226.

206. *Id.*

207. *Id.* at 2225.

208. *Id.* at 2235 (Roberts, C.J., concurring).

209. *Id.* (Roberts, C.J., concurring).

threat to agency power, the Corps sought, in connection with the EPA, to clarify the scope of “waters” under Corps jurisdiction.²¹⁰ While this was a difficult task, within the meaning of science, law, and politics, the Chief Justice noted that the Corps and the EPA “enjoyed plenty of room to operate in developing *some* notion of an outer bound to the reach of their authority.”²¹¹

Much to the Chief Justice’s chagrin, the Corps essentially ignored the decision in *SWANCC* and “chose to adhere to its essentially boundless view of the scope of its power.”²¹² A sense of disappointment reverberates through the concurrence as the Chief Justice accepts that without a majority opinion, the courts will have to “feel their way on a case-by-case basis.”²¹³ While many decisions are decided in such ad hoc fashion, the Chief Justice sees no reason for the application of this method here where the Court already determined a proper definition of “waters of the United States” in *SWANCC*.²¹⁴

2. Justice Kennedy’s Concurrence: “Significant Nexus” Requirement

Justice Kennedy wrote a second concurring opinion, which illustrates a middle ground between Justice Scalia’s four-justice plurality and Justice Stevens’s four-justice dissent.²¹⁵ Justice Kennedy, like Justice Scalia, rejected the Corps interpretation of navigable waters as overbroad. However, while pondering the importance of the term “navigable” he proposed a proper measure of significance achieved in the “significant nexus” test.²¹⁶ He stated that the test should be informed by the CWA’s goal of “restor[ing] and maintain[ing] the chemical, physical, and biological integrity of

210. *Id.* (Roberts, C.J., concurring).

211. *Id.* at 2236 (Roberts, C.J., concurring).

212. *Id.* (Roberts, C.J., concurring).

213. *Id.* (Roberts, C.J., concurring).

214. *Id.* In his footnote, the Chief Justice suggests that Justice Stevens viewed the proposed rulemaking too narrowly. The Court’s decision in *SWANCC* was meant to provide guidelines to aid the Corps in determining their jurisdictional scope. It was not meant to say that the agencies should essentially ignore the decision and “decide for themselves whether...it was wise for them to take no action in response to *SWANCC*.” *Id.* (Roberts, C.J., concurring).

215. *Id.* (Kennedy, J., concurring).

216. *Id.* at 2241 (Kennedy, J., concurring).

the Nation's waters."²¹⁷ Thus, he said that a "significant nexus" would exist if the wetlands "significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"²¹⁸ Furthermore, the link cannot be "speculative or insubstantial."²¹⁹ If a wetland is adjacent to a navigable in fact waterway, jurisdiction can rest on a "reasonable inference of ecologic inter-connection."²²⁰ When, on the other hand, a wetland is adjacent to a non-navigable waterway, the Corps must establish a "significant nexus on a case-by-case basis."²²¹ While Justice Kennedy agrees that the case should be remanded, he concludes that there was a possible significant nexus in both cases.²²²

Unfortunately for lower courts, his conclusion was bleak: a bright line test is nearly impossible due to the intricate legal and ecological concepts at issue here.²²³

Justice Kennedy begins with a brief background of the CWA and both the *Rapanos* and *Carabell* cases.²²⁴ While the case descriptions do not bode well for petitioners, Justice Kennedy turns his analysis to the letter of the law, not the seemingly unsavory actions of petitioners.²²⁵ The purpose of the consolidated cases is to determine the Corps' proper scope of authority, not to punish for permit violations.²²⁶

In Part II of his concurrence, Justice Kennedy analyzes two previous cases where the Supreme Court construed "navigable waters": *Riverside Bayview* and *SWANCC*.²²⁷ In *Riverside Bayview*, the Court upheld the Corps' jurisdiction over wetlands adjacent to navigable-in-fact watercourses.²²⁸ Similar to the property in *Carabell*, the wetlands in *Riverside Bayview* were located about one

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

218. *Id.* (Kennedy, J., concurring).

219. *Id.* (Kennedy, J., concurring).

220. *Id.* (Kennedy, J., concurring).

221. *Id.* at 2249 (Kennedy, J., concurring).

222. *Id.* (Kennedy, J., concurring).

223. *Id.* at 2236-52 (Kennedy, J., concurring).

224. *Id.* at 2236-40 (Kennedy, J., concurring).

225. *Id.* at 2240-51 (Kennedy, J., concurring).

226. *Id.* at 2236 (Kennedy, J., concurring).

227. *Id.* at 2240 (Kennedy, J., concurring).

228. *Id.* (Kennedy, J., concurring).

mile away from Lake St. Clair in Michigan.²²⁹ However, *Riverside Bayview* is distinguishable from both cases at issue because the land formed part of a wetland that directly abutted a navigable-in-fact creek, thus creating a “significant nexus” between the wetlands and navigable waters.²³⁰ While the Court in *Riverside Bayview* determined that the Corps would hold jurisdiction over navigable-in-fact waters, it did not discuss the Corps’ “authority to regulate wetlands other than those adjacent to open waters.”²³¹

In *SWANCC*, the Court assessed the “validity of the Corps’ jurisdiction over ponds and mudflats that were isolated in the sense of being unconnected to other waters covered by the [CWA].”²³² The Court determined that these ponds were not significantly connected with navigable-in-fact waters.²³³ In other words there was no significant nexus between the isolated ponds and any navigable water.²³⁴ “Because such a nexus was lacking . . . the Court held that the plain text of the statute did not permit the Corps’ action.”²³⁵

Justice Kennedy searches for middle ground between the plurality and the dissent by elaborating on the “significant nexus” test relied on in *Bayview Homes* (which is not discussed in either the plurality or dissent).²³⁶ First, Justice Kennedy critiques two of the plurality’s limitations on the CWA: (1) requirement of permanent standing water or continuous flow and (2) “exclusion of wetlands lacking a continuous surface connection to other jurisdictional waters.”²³⁷ Based on these critiques, he concludes that most, if not all wetlands meet the significant nexus test because wetlands perform critical ecosystem services related to the quality of other waters, such as flood control, pollutant trapping, viable habitat, and runoff storage.²³⁸ Thus, since wetlands contribute to the hydrological, physical, chemical, and biological integrity of traditionally navigable waters,

229. *Id.* (Kennedy, J., concurring).

230. *Id.* (Kennedy, J., concurring).

231. *Id.* (Kennedy, J., concurring).

232. *Id.* (Kennedy, J., concurring).

233. *Id.* at 2241 (Kennedy, J., concurring).

234. *Id.* (Kennedy, J., concurring).

235. *Id.* (Kennedy, J., concurring).

236. *Id.* (Kennedy, J., concurring).

237. *Id.* at 2242-44 (Kennedy, J., concurring).

238. *Id.* at 2247 (Kennedy, J., concurring).

the Corps should hold jurisdiction over them under the CWA.²³⁹

While the plurality limits the scope of the Corps' power, the dissent focuses too much on the "navigable" requirement.²⁴⁰ At this point in the concurrence, Justice Kennedy must again argue that the Court cannot completely abandon the term "navigable" in its analysis.²⁴¹ Justice Kennedy believes that the wetlands at issue do amount to "navigable waters" under the significant nexus test, but he refuses to extend this classification to "remote and insubstantial" waters, such as "wetlands that lie alongside a ditch or drain that eventually may flow into traditional navigable waters."²⁴² However, Justice Kennedy does want to give the term "navigable" some meaning in the Court's analysis.²⁴³

In conclusion, Justice Kennedy states that a remand would be appropriate since neither the agency nor the reviewing courts properly considered the issue.²⁴⁴ Because Justice Kennedy concurred in the judgment on the narrowest rounds, his middle ground test represents a pragmatic alternative to today's polarized environmental law and policy.

C. Dissenting Opinions

1. Justice Steven's Dissent

The dissent begins with the view that *Riverside Bayview* is controlling authority and criticizes the plurality for relying too heavily on *SWANCC*.²⁴⁵

In stark contrast to *Riverside Bayview*, however, *SWANCC* made no mention of wetlands, let alone of wetlands adjacent to traditionally navigable waters or their tributaries.²⁴⁶ Instead, *SWANCC* dealt with the Corps' jurisdiction over isolated waters,

239. *Id.* (Kennedy, J., concurring).

240. *Id.* (Kennedy, J., concurring).

241. *Id.* at 2248 (Kennedy, J., concurring).

242. *Id.* at 2247 (Kennedy, J., concurring).

243. *Id.* at 2248 (Kennedy, J., concurring).

244. *Id.* at 2250 (Kennedy, J., concurring).

245. *Id.* at 2252 (Stevens, J., dissenting). Justice Stevens was joined in his dissent by Justice Souter, Justice Ginsburg, and Justice Breyer.

246. *Id.* (Stevens, J., dissenting).

meaning “waters that are *not* part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce.”²⁴⁷

Justice Stevens first discusses Congress’ deliberate acquiescence to the Corps’ regulations in 1977.²⁴⁸ Both the House and Senate conducted extensive debates about the Corps’ regulatory jurisdiction over wetlands, rejected efforts to limit this jurisdiction, and appropriated funds for a “National Wetlands Inventory” to help the States “in the development and operation of programs under this Act.”²⁴⁹

Justice Stevens next delves into a cost/benefit analysis by weighing the cost of obtaining section 404 permits and the importance in protecting wetland eco-hydrologic systems.²⁵⁰ Obtaining a wetland dredging permit is quite expensive; however, wetlands provide various ecosystem services which offset potential future water quality and purification expenses. “The importance of wetlands for water quality is hard to overstate.”²⁵¹ Wetlands reduce flooding, protect shorelines, recharge ground water, trap suspended sediment, filter out toxic pollutants, and protect fish and wildlife.²⁵²

In Part III Justice Stevens critiques the plurality opinion. First he discusses, arbitrary lines drawn by the plurality.²⁵³

Under the plurality’s view . . . the Corps can regulate polluters who dump dredge into a stream that flows year round but may not be able to regulate polluters who dump into a neighboring stream that flows for only 290 days of the year – even if the dredge in this second stream would have the same effect on downstream waters as the dredge in the year-round one.²⁵⁴

247. *Id.* at 2256 (Stevens, J., dissenting).

248. *Id.* (Stevens, J., dissenting).

249. *Id.* (Stevens, J., dissenting).

250. *Id.*

251. *Id.* at 2259.

252. *Id.*

253. *Id.*

254. *Id.* at 2260.

Justice Stevens is also concerned with the plurality's disregard for the CWA's significance.²⁵⁵ Furthermore, Justice Stevens is troubled by the plurality's characterization of the term "adjacent." Lastly, the dissent criticizes the plurality's rejection of thirty years of precedent.

In conclusion, the dissent agrees that the court should have affirmed the judgments in both cases.²⁵⁶ "It has been the Court's practice in a case coming . . . from a lower federal court to enter a judgment commanding that court to conduct any further proceedings pursuant to a specific mandate."²⁵⁷ That prior practice has, on occasion, made it necessary for Justices to join a judgment that did not conform to their own views.²⁵⁸ In these cases, however, while both the plurality and Justice Kennedy agree that there must be a remand for further proceedings. Their respective opinions would apply different tests of remand.²⁵⁹ Given that all four Justices who have joined this opinion would uphold the Corps' jurisdiction in both of these cases – and 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.²⁶⁰

2. Justice Breyer's Dissent

In his dissent, Justice Breyer looks to the root of the issue by addressing the CWA's purpose.²⁶¹ In order to protect the chemical, physical, and biological integrity of the nation's waters, the term "waters" must be defined broadly.²⁶² In fact, Justice Breyer believes that the Corps should structure the appropriate scope of the term.²⁶³ He figures that the Court should take a "hands off" approach and allow the experts, in this case the Army Corps of Engineers, to update their regulations and the Court should give deference to

255. *Id.*

256. *Id.* at 2265.

257. *Id.*

258. *Rapanos*, 126 S. Ct. at 2240-64.

259. *Id.*

260. *Id.* at 2265.

261. *Id.* at 2266.

262. *Id.*

263. *Id.*

them.²⁶⁴ Otherwise, courts' "ad hoc determinations . . . run the risk of transforming scientific questions into matters of law," which is not what Congress intended.²⁶⁵

V. IMPACT

The ramifications of the Supreme Court's decision in *Rapanos v. United States* may lack the precedential value desired by lower courts, but will impact legislative action and lower court decisions by providing two models for analysis: the plurality two-part approach analyzing adjacency and continuous surface connection, and the Kennedy "significant nexus" test.

A. Legislative Impact

Chief Justice Roberts offers the most telling observation in his concurring opinion: "It 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. Lower courts and the regulated entities will now have to feel their way on a case-by-case basis."²⁶⁶

Despite the uncertainty, some speculation on the future is justified. The Corps' definition of "waters of the United States" in 33 C.F.R. § 328 has remained largely intact.²⁶⁷ The only difference

264. *Id.*

265. *Id.*

266. *Rapanos*, 126 S. Ct. at 2236.

267. 33 C.F.R. Part 328.1-5(2006). Section 328 of the Code of Federal Regulations comprises a definition of waters of the United States. This definition is used in CFR parts 320-330. For purposes of this section, 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 for recreation; or (ii) from which fish or shellfish are or could be taken and sold; or (iii) which are used

is that wetlands will either need to be adjacent to navigable waters or there must be a “significant nexus” between such wetlands and navigable waters. This determination may be based on the effects of the individual wetland in question and whether the wetlands either alone or in combination with similar lands in the region have a significant nexus to traditional navigable waters. The level at which the Corps sets the bar for a significant nexus determination will greatly influence the extent to which it maintains or relinquishes its current jurisdiction.

Neither Justice Scalia’s plurality nor Justice Kennedy’s concurrence specifically address the issue of whether drainage ditches are to be considered tributaries to navigable waters. The Corps might continue to claim jurisdiction over remote and insignificant drainage ditches, ephemeral channels and other features as potential jurisdictional tributaries. However, an objective reading of Justice Kennedy’s concurrence provides that the “significant nexus” test should apply to both the adjacency and the tributary issues.

The Corps and EPA will most likely focus on providing guidance and direction in applying the new standard. The Corps has already made some headway in this area, as noted in section C. *Administrative Impacts*, below. In the meantime, uncertainty will prevail and new fill permit-seekers should anticipate considerable delay and expense. In particular, such permit-seekers will need to hire sophisticated consultants to determine the existence of potential wetlands on their properties. In addition, consultants must be given a standard unit of measurement to calculate the physical scope of a wetland delineation. It will also be important for the EPA or the Corps to define the parameters of a region for the purposes of determining a significant nexus. A clear understanding of uniform parameters is crucial because the broader the area in which the significant nexus determination is evaluated, the more likely it is that a significant nexus will be found. On the other hand, if the region

or could be used by industry; (4) All impoundments of waters otherwise defined as waters of the United States under the definition; (5) Other tributaries of waters; including territorial seas; (6) Wetlands adjacent to waters; (7) Waste treatment systems.

Id. However, waters of the United States do not include converted cropland.

comprises a narrower area, a determination that there is no significant nexus is more likely.²⁶⁸

B. Judicial Impact

The most apparent judicial impact is that lower courts will continue to struggle over wetland fill permit disputes. Since there is no majority opinion, lower courts can essentially choose to adopt one view over another. If the courts follow the plurality, it would substantially restrain federal jurisdiction under the CWA. If, on the other hand, lower courts adopt Justice Kennedy's "significant nexus" test, the limitation on federal authority will diverge on a case-by-case basis depending on whether the court gives the test a narrow or broad conception.²⁶⁹ Overall, it is more likely that Corps' jurisdiction will diminish in areas where ephemeral channels and arid landscapes prevail.

Justice Scalia's plurality opinion requires lower courts to distinguish wetlands significantly connected to "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'" from wetlands that have no adjacency to navigable in fact waters.²⁷⁰ Any waters comparable to those at issue in the *Rapanos* case are not likely to meet this jurisdictional test. The evidence in *Rapanos* does not differentiate the wetlands from streams, rivers, or lakes primarily because they are the result of man-made drainage ditches.²⁷¹

The Kennedy concurrence, on the other hand, asks the courts to determine if regulated wetlands "either alone or in combination with similarly situated lands, in the region, significantly affect the

268. *Id.* at 2249. Justice Kennedy recognized this need for a standard unit for measurement and a clear definition of a region for the purposes of wetland delineation: "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. That issue, however, is neither raised by these facts nor addressed . . . here." *Id.*

269. *See* N. Cal. River Watch v. City of Healdsburg, 457 F.3d 1023, 1023 (9th Cir. 2006) (concluding that Justice Kennedy's significant nexus test is controlling).

270. *Rapanos*, 126 S. Ct. at 2225.

271. *Id.* at 2238.

chemical, physical, and biological integrity” of navigable in fact waters.²⁷² This statement embodies his “significant nexus” test. Under this test, properties similar to those in *Rapanos* will only meet this test if lower courts construe and apply it broadly. Even so, a site-specific analysis is probably necessary to accurately decipher the water’s affect on downstream navigable-in-fact waters. In *Rapanos*, there was no such site-specific analysis.²⁷³

C. Administrative Impact

The *Rapanos* decision sent a clear message to the United States Army Corps of Engineers: they will be on the front line of interpreting this murky decision. The United States Army Corps of Engineers will continue to assess jurisdiction regarding wetlands not adjacent to navigable-in-fact waters on a case-by-case basis.²⁷⁴

The Corps is proposing to allocate greater protection for ephemeral waterways.²⁷⁵ In adapting nationwide permits (NWP) to the *Rapanos* decision, the Corps looks to apply the regular 300 linear-foot limit for loss of stream bed to more intermittent and ephemeral streams, like those in *Rapanos*.²⁷⁶ But, if a district engineer finds that a loss of more than 300 linear feet of ephemeral stream bed will minimally affect the aquatic environment, a waiver, in writing, can be granted.²⁷⁷ Before *Rapanos*, no waiver process was necessary because impacts to ephemeral streams were not included in the 300 linear foot limit for determining compliance with NWPs.²⁷⁸ This new regulation will help to simplify the Corps administration of the NWP program.²⁷⁹ However, a greater reliance of fact-finding will be necessary because many topographic maps do not show intermittent and ephemeral stream locations, resulting in

272. *Id.* at 2248.

273. *Id.* at 2250-51.

274. Proposal to Reissue and Modify Nationwide Permits, 71 Fed. Reg. 186 (proposed Sept. 26, 2006).

275. *Id.* The 300 linear foot limit is found in the terms of NWPs 29, 39, 40, and 42. *Id.*

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.*

greater reliance on site visits or more detailed permit applications.²⁸⁰

The Corps is also proposing to modify the definition of “loss of waters of the United States” to include ephemeral stream bed filling and excavation when determining whether proposed activities exceed the NWPs’ threshold limits.²⁸¹

Overall, where the Corps jurisdiction lacks or is uncertain, existing state and local regulations will fill in to provide direction. New guidance from the Courts, the EPA, and the Corps is greatly anticipated and expected to pan out in the near future.

D. Social Impact

The *Rapanos* case illustrates two sides of the environmental debate between developers and preservationists. Under *Rapanos*, developers’ rights significantly expanded, resulting in the increased ability to fill wetland areas without the overly broad discretion previously held by the Army Corps of Engineers. The National Association of Home Builders (NAHB) said that it was “encouraged” by the decision.²⁸² Barton Schmidt, the NAHB director of environmental communications stated that “this is a step forward for affordable housing and the battle against excessive regulation.”²⁸³

However, others had an overcast view on the outcome. Environmentalists did not get the affirmation that would have given the Corps continued broad authority to regulate wetlands, even though they are not directly adjacent to navigable waterways. The

280. *Id.*

For those NWPs that have both an acreage limit and a linear foot limit for stream bed impacts, the acreage of stream impacts (i.e., the length of the stream bed filled or excavated times the average width of the stream, from OHWM to OHWM) applies towards that acreage limit. For example, if a proposed NWP 39 activity involves filling 1/10 acre of non-tidal wetlands and 100 linear feet of a stream bed with an average width of 10 feet, the acreage loss of waters of the United States for that activity is 0.123 acre.

Id.

281. *Id.*

282. Lawlor, James D., Wetlands: Law & Regulation Report, Court Decision – More Corps Precision, Vol. 3 No. 6, 51 (June 2006).

283. *Id.* at 52.

American Audubon Society said that the decision “created chaos for protections of over fifty percent of the nation’s waters,” adding that the decision “signaled an environmentally unfriendly director for the court.”²⁸⁴

However, neither group is really satisfied because the decision doesn’t provide clear guidance for future decisions. Without a majority opinion, the case falls back down to the lower courts for continued debate in determining the proper scope of the Corps jurisdiction in regulating the wetland fill. John Kusler, associate director of the Association of State Wetlands Managers predicted how landowners will react as a result of the opinion:

If I were sitting on a chunk of land and I had a permit turned down and it was one of the drier inland wetlands, I would take some language from Scalia’s opinion, maybe a little bit of Kennedy, and I would challenged. I think we’re going to see a whole bunch of challenges. People will go out on a limb even if there just a small chance of winning.²⁸⁵

Unless Congress adopts new legislation, the Corps will be responsible for interpreting this decision. However, as Kusler noted, there will be more court cases on this issue. When and if these lower court cases again reach the Supreme Court, the Roberts Court will be sharply divided on environmental issues.

Additionally, the *Rapanos* case will have an impact on legal treatment of hydrobiological systems. The Court’s opinion, though a logical interpretation of the English language, creates a disconnect between the law and science. While the words “waters of the United States” might linguistically apply to those particularly robust, permanent flowing or standing bodies, the science of hydrology explains the phrase in a more holistic nature. In looking back on the purpose of the CWA, it is clear that the purpose of the act is to protect continued human health through the preservation of the earth’s water resources. While we might traditionally think of a shimmering lake or raging river in our efforts to protect our water,

284. *Id.*

285. *Id.*

groundwater, swamps, and marshes deserve just as much, if not more security.

Riparian zones possess an unusual diversity of species and provide various ecosystem services, such as water purification and erosion mitigation.²⁸⁶ The ecological diversity is related to variable flood systems, geographically unique channel processes, altitudinal climate shifts, and upland influences on the fluvial corridor.²⁸⁷ The resulting dynamic environment supports a variety of aquatic life cycles, biogeochemical cycles and rates, and organisms adapted to unstable ecosystems over broad temporal and spatial scales.²⁸⁸ If courts fail to recognize the dynamic ecosystem services provided by wetlands, we can hardly expect legislatures to do so.

VI. CONCLUSION

The Supreme Court's decision in *Rapanos v. United States* significantly alters the scope of federal authority under the Clean Water Act. However, it is yet to be seen how lower courts and federal regulators will adhere to the Supreme Court's limits on the scope of federal power.

286. Robert J. Naiman & Henri Decamps, The Ecology of Interfaces: Riparian Zones, ANN. REV. ECOL. SYST. 1997, 28:621-58.

287. *Id.* at 622-23.

288. *Id.*