IMPLEMENTING *RAPANOS*—WILL JUSTICE KENNEDY'S SIGNIFICANT NEXUS TEST PROVIDE A WORKABLE STANDARD FOR LOWER COURTS, REGULATORS, AND DEVELOPERS?

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INTRODUCTION

In 2001, the Supreme Court in *Solid Waste Agency of Northern Cook County ("SWANCC") v. United States Army Corps of Engineers*[1] held that the United States Army Corps of Engineers (Corps) lacked authority under the 1972 Clean Water Act ("CWA" or "the Act")[2] to regulate wetlands and waters that serve as habitat for migratory birds when those waters are isolated from navigable waters.[3] The Court concluded that Congress intended that the CWA's jurisdiction be limited to navigable waters and non-navigable waters that have a "significant nexus" to navigable waters, including wetlands adjacent to navigable waters.[4] *SWANCC* did not address the Corps' regulation of wetlands near non-navigable tributaries that flow into navigable rivers or wetlands that are not immediately adjacent to navigable waters but have some hydrological or ecological connection to navigable waters.[5]

After *SWANCC*, the federal circuit courts of appeals were divided over when the Corps may regulate what one may call for simplicity "tributary wetlands."[6] Six of the circuit courts of appeal limited *SWANCC* to its facts and allowed the Corps to regulate tributary wetlands, or similar wetlands, if there is any hydrological connection between them and navigable waters and sometimes when there is only an ecological connection.[7] The Fifth Circuit, however, interpreted *SWANCC* as limiting the Corps' jurisdiction to regulate wetlands adjacent to navigable waters.[8] In a 2003 article, this author proposed the

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1. 531 U.S. 159 (2001).

2. *See generally* Federal Water Pollution Control (Clean Water) Act, 33 U.S.C. 1251-1387 (2000).

3. *SWANCC*, 531 U.S. at 167-68.

4. *Id.* (explaining the Court's prior decision in United States v. Riverside Bayview Homes, 474 U.S. 121, 131-32 (1985), which requires that a "significant nexus" exist between adjacent wetlands and navigable waters in order for the Corps to have the authority to regulate); 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, 848 (2003) (discussing significant nexus test).

5. In *Riverside Bayview Homes*, 474 U.S. at 129, the Supreme Court held that the CWA gives the Corps authority to regulate wetlands adjacent to navigable waters.

6. *See* Mank, *supra* note 4, at 860-79.

7. *See infra* note 417 and accompanying text.

8. Rice v. Harken Exploration Co., 250 F.3d 264, 268-69 (5th Cir. 2001) ("[U]nder

intermediate position "that courts should interpret the Act to include non-navigable waters, wetlands, or tributaries that possess a significant hydrological connection or nexus with navigable waters."[9] The First, Fourth, Fifth, Sixth, and Tenth Circuits have recognized the significant nexus test as the key test for determining the Act's jurisdiction, although the Ninth Circuit has concluded that case-by-case application of that test is not required.[10]

In 2006, the Supreme Court in *Rapanos v. United States*,[11] a decision consolidating two appeals from the Sixth Circuit: *United States v. Rapanos*[12] and *Carabell v. United States Army Corps of Engineers*[13] finally addressed the question of jurisdiction over tributary wetlands or non-adjacent wetlands, but the Court was unable to provide clear answers.[14] In *Carabell*, the Sixth Circuit Court of Appeals held that a wetland separated by a manmade berm from a ditch that connects through tributaries to navigable waters still qualifies for CWA protection, even though there was only an occasional hydrological connection between the wetland and the ditch.[15] In *Rapanos*, the Sixth Circuit ruled that non-navigable wetlands that are adjacent to non-navigable tributaries are subject to CWA jurisdiction, although the only connection between wetlands at issue and actually navigable waters is by way of twenty miles of non-navigable tributaries.[16]

In *Rapanos*, the Supreme Court fractured into four-to-one-to-four blocs, although a majority of five agreed to vacate and remand the two Sixth Circuit decisions.[17] Justice Scalia, joined by Chief Justice Roberts and Justices Thomas and Alito, issued the judgment of the Court and wrote a plurality opinion that would have sharply restricted CWA jurisdiction to only those waters that are "relatively permanent, standing or continuously flowing" or to wetlands that have a physical surface water connection to these waters.[18] Justice Scalia relied on dictionary definitions to discern the meaning of the statutory text.[19] The plurality opinion is the nominal opinion of the Court because it ordered vacating and

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[*SWANCC*], it appears that a body of water is subject to regulation under the [Act] if the body of water is actually navigable or is adjacent to an open body of navigable water."); *see In re* Needham, 354 F.3d 346, 347 (5th Cir. 2003); *infra* notes 346, 400-03, 413-14 and accompanying text.

9. Mank, *supra* note 4, at 821-22, 883-91; *see also* FD & P Enters. v. U.S. Army Corps of Eng'rs, 239 F. Supp. 2d 509, 513-17 (D.N.J. 2003) (stating that *SWANCC* "has substantially altered the meaning of "'navigable waters' in the [FWPCA and, therefore,] a 'significant nexus' must constitute more than a mere 'hydrological connection'").

10. *See infra* notes 346-50 and accompanying text.

11. 126 S. Ct. 2208 (2006).

12. 376 F.3d 629 (6th Cir. 2004), *vacated and remanded*, 126 S. Ct. 2208 (2006).

13. 391 F.3d 704 (6th Cir. 2004), *vacated and remanded*, 126 S. Ct. 2208 (2006).

14. *Rapanos*, 126 S. Ct. at 2220-27.

15. *Carabell*, 391 F.3d at 708-09.

16. *Rapanos*, 376 F.3d at 643-44.

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

18. *Id.* at 2220-25.

19. *Id.* at 2220-21.

remanding the two decisions, and as a practical matter, the plurality opinion will not serve in most cases as precedent for lower courts.[20] Because Justice Kennedy's concurrence disagrees with the plurality opinion in many ways, most lower courts may treat Justice Scalia's opinion more like a dissenting opinion than a majority opinion.[21]

On the other side, Justice Stevens in his dissenting opinion, joined by Justices Souter, Ginsburg and Breyer would have upheld the Corps' broad jurisdiction over "tributary wetlands."[22] Justice Stevens emphasized the statute's ecological purposes and the importance of deferring to the interpretation of expert executive agencies.[23] Justice Kennedy was less deferential to the Corps' interpretation, but his focus on the Act's ecological purposes is closer to the dissenting opinion than it is to Justice Scalia's restrictive reading of the Act.[24]

According to most, but not all, commentators, the key opinion was Justice Kennedy's lone opinion concurring in the judgment, which joined Justice Scalia's opinion only in vacating and remanding the two decisions.[25] Justice Kennedy being at the center of the Court is not surprising. In a number of cases involving federalism and national power, he has staked a position in the middle between conservatives, who are often led by Justice Scalia, and liberals, who are often led by Justice Stevens.[26] Kennedy concluded that the CWA's jurisdiction reached waters and wetlands with a "significant nexus" to actually navigable waters.[27] He balanced the CWA's broad ecological purposes against its

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20. *Id.* at 2265 (Stevens, J., dissenting); *see also* Michael C. Dorf, Commentary, *In the Wetlands Case, the Supreme Court Divides Over the Clean Water Act—and Seemingly Over How to Read Statutes as Well* (June 21, 2006), http://writ.lp.findlaw.com/dorf/20060621.html.

21. Linda Greenhouse, *Justices Divided on Protections Over Wetlands*, N.Y. TIMES, June 20, 2006 ("Justice Scalia's opinion reads like a dissent.").

22. *Rapanos*, 126 S. Ct. at 2252-65 (Stevens, J., dissenting).

23. *Id.* at 2262-63.

24. *See* Dorf, *supra* note 20; Posting of Amy Howe to SCOTUSblog, http://www.scotusblog.com/movabletype/archives/2006/06/more_on_rapanos.html (June 19, 2006, 13:54 EST) (quoting William Buzbee).

25. *Recent Supreme Court Decisions Regarding the Clean Water Act:* Rapanos v. United States *and* Carabell v. U.S. Corps of Engineers*: Hearing Before the Sen. Comm. on Environ. and Pub. Works*, 109th Cong. 26 (2006) (statement of William W. Buzbee, Professor of Law, Emory Law School), *available at* http://epw.senate.gov/109th/Buzbee_Testimony.pdf [hereinafter Buzbee Statement]; Amena H. Saiyid, *Lawyers Say Supreme Court Did Not Resolve Question of Authority of Corps of Engineers,* 37 ENVT. REP. (BNA) 1329 (June 23, 2006) (reporting that Professors Jonathan Adler and Patrick Parentau believe Justice Kennedy's opinion will carry the most weight with lower courts, but that attorney R. Lee Stephens argued "[i]n a plurality opinion, a clever litigator can turn it any way."); Posting of Doug Kendall to The Blog of the American Constitutional Law Society, http://www.acsblog.org/guest-bloggers-2907-guest-blogger-doug-kendall-on-rapanos-and-federalism.html (June 20, 2006, 14:45 EST).

26. Louis D. Bilionis, *Grand Centrism and the Centrist Judicial Personam*, 83 N.C. L. REV. 1353, 1354, 1376 (2005).

27. *Rapanos*, 126 S. Ct. at 2241; *see infra* notes 156-57, 232-34 and accompanying text.

limitation of using the term "navigable waters."[28] He explained that waters or wetlands have this nexus if they significantly affect the ecological or hydrological integrity of navigable waters.[29] Thus, waters or wetlands that are not adjacent to navigable waters are protected if they have a significant impact on actually navigable waters.[30] Waters or wetlands with a less significant connection with actually navigable waters would not be protected.[31] Under Kennedy's approach, lower courts will have to engage in a case-by-case analysis to determine whether a significant nexus links wetlands to navigable waters.[32] Because he asserted that the Corps and lower courts may consider broad ecological connections among wetlands and navigable waters in determining whether there is a significant nexus between them, Justice Kennedy's opinion suggests that the Corps will be able to regulate many of the "tributary wetlands" that it had asserted jurisdiction over before the *Rapanos* decision.[33]

Justice Kennedy's significant nexus test has both the advantages and disadvantages of comprehensiveness. His approach looks at both the physical hydrological connection between wetlands and navigable waters as well as broader ecological connections.[34] A test limited to the physical hydrological connections would have been easier to apply.[35] By requiring consideration of ecological connections, he places a much heavier burden on the Corps and lower courts to examine complex biological relationships between wetlands and navigable waters. His test in most cases will produce the same result as Justice Stevens in his dissenting opinion.[36] It would have been easier if Justice Kennedy had simply joined the dissenting opinion.[37] Nevertheless, Justice Kennedy likely felt constrained by his vote with the *SWANCC* majority opinion not to join the *Rapanos* dissenting opinion.[38] Justice Kennedy had to remain true to *SWANCC's* underlying principle that the Act is limited to waters that have some meaningful connection to navigable waters.[39]

There is disagreement about which opinions in *Rapanos* are binding on lower courts. Chief Justice Roberts in his solo concurring opinion mentioned the rule in *Marks v. United States*,[40] which held that when the Supreme Court issues a fragmented decision, those members who concur "on the narrowest grounds"

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28. *Rapanos*, 126 S. Ct. at 2248-49; *see infra* notes 269, 275 and accompanying text.
29. *See infra* notes 254, 268-69 and accompanying text.
30. *See infra* note 255 and accompanying text.
31. *Rapanos*, 126 S. Ct. at 2249; *see infra* note 277 and accompanying text.
32. *See infra* notes 255-57 and accompanying text.
33. *See infra* notes 157, 217-20, 329-31, 360, 488 and accompanying text.
34. *See infra* note 318 and accompanying text.
35. *See infra* notes 354-59 and accompanying text.
36. *See infra* notes 363, 464 and accompanying text.
37. *See infra* note 363 and accompanying text.
38. *See infra* notes 232-33, 241 and accompanying text.
39. *See infra* notes 234, 243-45, 266 and accompanying text.
40. 430 U.S. 188, 193-94 (1977).

have the controlling opinion.[41] He did not address which opinion would control the lower courts.[42] Justice Stevens's dissent stated that because the four dissenting votes agreed that the government's broad regulation of tributary wetlands was valid the government should have jurisdiction over tributary wetlands if the wetlands at issue meet either the plurality's test or Justice Kennedy's significant nexus standard because there would be a working majority of at least five votes, including dissenting votes.[43] Professor Adler has interpreted the *Marks* decision to require lower courts to follow those portions of the *Rapanos* decision where the plurality opinion and Justice Kennedy agree and to forbid lower courts from considering the dissenting opinion.[44] Professor Buzbee, by contrast, argues that *Marks* allows lower courts to consider the numerous points upon which the dissenting opinion and Justice Kennedy's opinion form a five vote majority.[45] In its Motion for Remand in the *Rapanos* case, the Department of Justice ("DOJ") cited *Marks* in agreeing with Justice Stevens's dual approach that the government should have jurisdiction over wetlands if the wetlands at issue meet either the plurality's test or Justice Kennedy's "significant nexus" standard.[46]

The first lower court decision decided after *Rapanos* did not follow Justice Kennedy's significant nexus test. In *United States v. Chevron Pipe Line Co.*,[47] the U.S. District Court for the Northern District of Texas on June 28, 2006 criticized the significant nexus test in Justice Kennedy's *Rapanos* concurrence as too vague and subjective to provide guidance. Instead the court followed the Fifth Circuit's prior precedent that had narrowly construed the Act in an approach closer to the plurality opinion.[48] In August 2006, however, the Ninth Circuit in *Northern California River Watch v. City of Healdsburg*[49] followed Justice Kennedy's test.[50] In September 2006, the Seventh Circuit in *United States v. Gerke Excavating, Inc.*[51] stated that Justice Kennedy's test should be followed except in the rare case when the plurality's approach would give greater federal jurisdiction under the CWA.[52] Four other circuits are also likely to follow the significant nexus test based on their prior pre-*Rapanos* precedent.[53]

On remand, the Sixth Circuit and its district courts are likely to apply Justice

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41. *See infra* note 298 and accompanying text.

42. *See infra* note 298 and accompanying text.

43. *See infra* notes 226-27 and accompanying text.

44. *See infra* note 457 and accompanying text.

45. *See infra* notes 461-64 and accompanying text.

46. *See infra* notes 441-42 and accompanying text.

47. 437 F. Supp. 2d 605, 613 (N.D. Tex. 2006).

48. *Id.* at 613.

49. 457 F.3d 1023 (9th Cir. 2006).

50. *Id.* at 1029-30.

51. 464 F.3d 723 (7th Cir. 2006) (per curiam). The Seventh Circuit remanded the case to the district court to apply Justice Kennedy's significant nexus test to the facts of the case. *Id.* at 725.

52. *Id.*

53. *See infra* note 417 and accompanying text.

Kennedy's significant nexus test in determining whether the government has proven a sufficient connection between the wetlands on Rapanos and Carabell's properties and navigable waters.[54] Justice Kennedy suggested that there may be sufficient evidence of such a nexus for the government to win both cases. He also implied that the final result after the remand would likely be closer to Stevens's dissenting opinion than the plurality opinion.[55]

The Corps and EPA (the "Agencies") have promised to issue new joint guidance in the near future to address the scope of the Act in the wake of *Rapanos*, but it is unclear whether the Agencies will issue detailed regulations in this area. After the *SWANCC* decision, in 2001, the Agencies had announced their intention of issuing new wetlands rules. In 2003, however, the Agencies abandoned their attempt to develop new wetlands regulations.[56] There are serious disagreements between developers and conservationists about the scope of the Act and those disagreements remain a serious obstacle to the agencies developing new regulations.[57] Yet Justice Kennedy's significant nexus test could provide a workable framework for new regulations, and thus, there is a better opportunity after *Rapanos* for the agencies to develop new regulations.[58]

Section II will provide a brief history of federal regulation of "navigable waters," the passage of the Act, the Corps' regulations, the *SWANCC* decision, and the agencies' failure to issue new regulations. Section III will analyze the main *Rapanos* opinions of Justice Scalia, Justice Stevens and Justice Kennedy, as well as the briefer opinions of Chief Justice Roberts and Justice Breyer. Section IV will examine the Texas District Court decision, the likely response in other Circuits, and how quickly the Corps is likely to issue new wetlands regulations.

I. FEDERAL REGULATION OF NAVIGABLE WATERS AND WETLANDS

A. Regulation of Navigable Waters

The Constitution does not expressly authorize federal regulation of navigation, but Congress' authority over navigation has long been recognized through its authority under the Commerce Clause of the Constitution to "regulate Commerce with foreign Nations, and among the several States."[59] In 1824, Chief Justice Marshall in *Gibbons v. Ogden*[60] held that Congress had authority under the Commerce Clause to license steamboat operations in New York waters because Congress had the implied power to regulate navigation to facilitate its

54. *See infra* notes 284-92, 417 and accompanying text.
55. *See infra* notes 312, 387-88, 464 and accompanying text.
56. *See infra* note 148 and accompanying text.
57. *See infra* note 150 and accompanying text.
58. *See infra* notes 276, 436, 489 and accompanying text.
59. U.S. CONST. art. I, § 8, cl. 3; Mank, *supra* note 4, at 824.
60. 22 U.S. (9 Wheat.) 1, 189-90 (1824).

authority over interstate commerce.[61] During the nineteenth century, the Court limited federal authority over navigable waters to waters that were navigable in fact.[62] In 1871, the Court in *The Daniel Ball*[63] defined navigable waters of the United States as those interstate waters that are "navigable in fact" or readily susceptible of being rendered so.[64]

Beginning in 1937, courts broadened their interpretation of Congress's authority over interstate commerce, which in turn led courts to expand the federal navigation power as well.[65] In its 1940 decision *United States v. Appalachian Electric Power Co.*,[66] the Supreme Court broadened the definition of navigable waters to include those susceptible to navigation with "reasonable improvement."[67] More importantly, the Court recognized that Congress has authority under the Commerce Clause to regulate non-navigable waters that have significant effects on interstate Commerce.

> [I]t cannot properly be said that the constitutional power of the United States over its waters is limited to control for navigation. . . . In truth the authority of the United States is the regulation of commerce on its waters. Navigability . . . is but a part of this whole. Flood protection, watershed development, recovery of the cost of improvements through utilization of power are likewise parts of commerce control. . . . [The] authority is as broad as the needs of commerce. . . . The point is that navigable waters are subject to national planning and control in the broad regulation of commerce granted the Federal Government.[68]

After the *Appalachian Power* decision, courts gradually expanded the range of circumstances in which the federal government has authority over non-navigable tributaries of navigable waters.[69] In the 1965 decision *Federal Power Commission v. Union Electric Co.*,[70] the Supreme Court held that the Federal Power Commission's authority over power-generation facilities extended to non-navigable waters as well, determining that the Commerce Clause applies to non-navigable waters.[71]

In the 1979 decision *Kaiser Aetna v. United States*,[72] Justice Rehnquist stated that Congress can regulate non-navigable waters under the Commerce Clause.[73]

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61. *Id.*; Mank, *supra* note 4, at 824.
62. Mank, *supra* note 4, at 826.
63. 77 U.S. (10 Wall.) 557 (1870).
64. *Id.* at 563; United States v. Rapanos, 126 S. Ct. 2208, 2216 (2006).
65. Mank, *supra* note 4, at 828-30.
66. 311 U.S. 377 (1940).
67. *Id.* at 408-09.
68. *Id.* at 426-27.
69. Mank, *supra* note 4, at 829-30.
70. 381 U.S. 90 (1965).
71. *Id.* at 97-110; Mank, *supra* note 4, at 830.
72. 444 U.S. 164 (1979).
73. *Id.* at 174; Mank, *supra* note 4, at 832-33.

He observed that the "navigability of a waterway adds little if anything to the breadth of Congress' regulatory power over interstate commerce."[74] Instead, Justice Rehnquist focused on the effect waters or other economic activities have on interstate commerce.[75] In particular, he found that economic activities that affect interstate commerce "are susceptible of congressional regulation under the Commerce Clause irrespective of whether navigation, or, indeed, water, is involved."[76] A key issue is whether Congress in the CWA intended to reach the furthest limits of its authority under the Commerce Clause.

B. The 1972 Clean Water Act

In the 1972 CWA, Congress adopted a comprehensive approach to regulating pollution and improving the quality of the nation's waters.[77] The statute's goal is the "[r]estoration and maintenance of chemical, physical and biological integrity of Nation's waters" for current and future generations.[78] Section 404 of the Act protects wetlands by requiring 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."[79] The Corps plays the primary role in issuing Section 404 permits, but the EPA has authority to veto a Corps' permit or an approved State or Tribe permit, although the EPA's exercise of its veto authority is rare.[80]

The Act delineates its jurisdiction to include navigable waters, which the Act then defines as "the waters of the United States, including the territorial seas."[81] The joint House-Senate Conference Report for the Act explained that "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."[82] In its

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74. *Kaiser Aetna*, 444 U.S. 173.

75. Mank, *supra* note 4, at 832-33.

76. *Kaiser Aetna*, 444 U.S. at 174.

77. Mank, *supra* note 4, at 831.

78. 33 U.S.C. § 1251(a) (2000).

79. *Id.* § 1344(a).

80. *Id.* § 1344(c) ("The [EPA] Administrator is authorized to prohibit the specification . . . of any defined area as a disposal site . . . whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas."); *see also* James City County v. EPA, 12 F.3d 1330 (4th Cir. 1993) (upholding EPA's veto under § 404(c) of Corps § 404(b) permit); Mank, *supra* note 4, at 814 n.6; Lance D. Wood, *Section 404: Federal Wetland Regulation Is Essential*, 7 NAT. RESOURCES & ENV'T 7 (1992) (observing that the EPA rarely uses its veto power over Corps wetlands permits).

81. 33 U.S.C. § 1362(7) (2000).

82. S. REP. NO. 92-1236, at 144 (1972), *as reprinted in A Legislative History of the Water Pollution Control Act Amendments of 1972*, 93d Cong., 1st Sess. 327 (1973).

1974 decision *United States v. Ashland Oil & Transportation Co.*,[83] the Sixth Circuit interpreted the Conference Report's language to mean that Congress intended that the Act reach all waters that substantially affect interstate commerce.[84] Nevertheless, some courts and commentators have continued to argue that Congress in the 1972 Act intended the term "waters of the United States" to include only actually or potentially navigable waters.[85]

A number of provisions in the 1972 CWA suggest Congress intended to regulate some non-navigable waters.[86] Although some sections of the CWA refer specifically to navigable waters,[87] the statute defines the term to include the waters of the United States without any further reference to navigability.[88] The House Bill for the 1972 Act had defined navigable waters as the "navigable waters of the United States, including the territorial seas,"[89] but the final Conference Bill eliminated the word navigable.[90] The EPA and the Corps have each argued that this deletion is strong evidence that Congress intended to expand the Act's definition beyond navigable waters.[91] Additionally, other sections of the Act go beyond interstate navigable waters to include "intrastate waters"[92] and "any waters."[93]

Some commentators, however, argue that the Conference Report for the Act demonstrates that Congress intended to require only the broadest constitutional authority over traditional navigable waters.[94] In *SWANCC*, the government acknowledged that it was "somewhat ambiguous" whether the conferees' language sought to reach the broadest possible limits of navigability or of the

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83. 504 F.2d 1317 (6th Cir. 1974).

84. *Id.* at 1325; *see also* Philip Weinberg, *It's Time For Congress to Rearm the Army Corps of Engineers: A Response to the Solid Waste Agency Decision*, 20 VA. ENVTL. L.J. 531, 535 (2001) (maintaining Congress intended in 1972 Act to employ its full authority under the Commerce Clause to regulate both navigable and non-navigable waters).

85. Virginia S. Albrecht & Stephen M. Nickelsburg, *Could* SWANCC *Be Right? A New Look at the Legislative History of the Clean Water Act*, 32 ENVTL. L. REP. 11042, 11046-49 (2002) (contending that Congress in the 1972 Act sought only to regulate potentially navigable waters).

86. Mank, *supra* note 4, at 831-32.

87. 33 U.S.C. § 1344 (2000).

88. *See, e.g.*, 33 U.S.C. § 1312(a) (establishing water quality-related effluent limitations for "navigable waters"); *see also id.* § 1362(7); Mank, *supra* note 4, at 831-32; Weinberg, *supra* note 84, at 535.

89. H.R. 11896, 92nd Cong. 502(8) (1972).

90. Albrecht & Nickelsburg, *supra* note 85, at 11047; Mank, *supra* note 4, at 832.

91. Albrecht & Nickelsburg, *supra* note 85, at 11047; Mank, *supra* note 4, at 832.

92. 33 U.S.C. § 1313(a)(2) (2000) (stating EPA must approve state water quality standards for intrastate waters); Mank, *supra* note 4, at 832; Weinberg, *supra* note 84, at 535.

93. 33 U.S.C. § 1317(a)(2) (2000) (stating that EPA effluent limitations for toxic pollutants "shall take into account the . . . presence of the affected organisms in any waters"); Mank, *supra* note 4, at 832; Weinberg, *supra* note 84, at 535.

94. Albrecht & Nickelsburg, *supra* note 85, at 11047; Mank, *supra* note 4, at 833.

Commerce Clause.[95] In light of Congress's concern during the early 1970s that the Corps failed to interpret its authority under the 1899 River and Harbor Act[96] to the fullest possible limits of navigable waters, some commentators contend that Congress more likely intended the 1972 Act only to reach all actually or potentially navigable waters rather than whatever non-navigable waters Congress might be able to regulate under the Commerce Clause.[97]

C. The Corps Wetlands Regulations

1. The EPA and the Corps Initially Disagreed About the Act's Jurisdiction.—From 1972 until 1975, the EPA and the Corps disagreed about the scope of the Act's jurisdiction.[98] In 1973, the EPA's general counsel issued an opinion stating that the "the deletion of the word 'navigable' [in the 1972 Act] eliminates the requirement of navigability. The only remaining requirement, then, is that pollution of waters covered by the bill must be capable of affecting interstate commerce."[99] In May 1973, the EPA promulgated regulations defining navigable waters requiring a CWA permit to include several types of non-navigable waters.[100]

The Corps, by contrast, defined the CWA's jurisdiction as only "the broadest possible definition of actually and potentially navigable waters."[101] In a 1974 rule addressing its jurisdiction under Section 404 of the Act, the Corps construed the 1972 FWPCA Conference Report's statement that the Act should be interpreted according to "the broadest possible constitutional interpretation, unencumbered by agency determinations which have been made or may be made for administrative purposes" to refer to prior judicial precedents addressing the constitutional limits of actually or potentially navigable waters.[102] The Corps'

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95. Solid Waste Agency of N. Cook County (SWANCC) v. U.S. Army Corps of Eng'rs, 531 U.S. 157, 168 n.3 (2001) (citing Brief for Federal Respondents at 24); Mank, *supra* note 4, at 833.

96. River and Harbor Act of 1899, ch. 425, 30 Stat. 1151 (codified as amended at 33 U.S.C. § 401 (2000)); Mank, *supra* note 4, at 827-28.

97. Albrecht & Nickelsburg, *supra* note 85, at 11047; Mank, *supra* note 4, at 833.

98. Albrecht & Nickelsburg, *supra* note 85, at 11049-50; Mank, *supra* note 4, at 833-34.

99. Albrecht & Nickelsburg, *supra* note 85, at 1049 (quoting EPA General Counsel Opinion (Feb. 6, 1973)).

100. National Pollutant Discharge Elimination System, 38 Fed. Reg. 13,528, 13,528-29 (May 22, 1973); Mank, *supra* note 4, at 833-34. The regulation defined CWA jurisdiction to include:

> (1) All navigable waters of the United States; (2) Tributaries of navigable waters of the United States; (3) Interstate waters; (4) Intrastate lakes, rivers, and streams which are utilized by interstate travelers for recreational or other purposes; (5) Intrastate lakes, rivers, and streams from which fish or shellfish are taken and sold in interstate commerce; (6) Intrastate lakes, rivers, and streams which are utilized for industrial purposes by industries in interstate commerce.

National Pollutant Discharge Elimination System, 38 Fed. Reg. at 13,529.

101. Mank, *supra* note 4, at 834 (citing Albrecht & Nickelsburg, *supra* note 85, at 11050).

102. *Id.* (citing 33 C.F.R. § 209.120(d)(1) (1974)).

1974 regulations defined "navigable waters" as "those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce."[103]

2. The Corps' 1975 Interim and 1977 Final Regulations Expand the CWA's Jurisdiction.—"In the 1975 decision *Natural Resources Defense Council[, Inc.] v. Callaway*, the United States District Court for the District of Columbia held that the Corps' definition of 'navigable waters' was unduly limited and violated the FWPCA."[104] "The court concluded that Congress 'asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution.'"[105] Accordingly, "the term [navigable waters] is not limited to the traditional tests of navigability."[106]

In response to the *Callaway* decision's order requiring it to issue new regulations,[107] the Corps issued interim regulations in 1975 that defined "navigable waters" to include intrastate lakes, rivers and streams that are used by interstate travelers or in interstate commerce; non-navigable tributaries; and "intermittent rivers, streams, tributaries, and perched wetlands that are not contiguous or adjacent to navigable waters."[108] In 1977, the Corps issued a final rule that included all of the categories of waters in the interim rule and also included isolated wetlands and waters whose degradation or destruction could affect interstate commerce.[109] In the 1977 amendments to the Act, Congress considered bills that would have clarified the definition of navigable waters in the statute or the scope of the Act's jurisdiction, but it failed to pass any of these amendments.[110]

D. Riverside Bayview*: Providing Support for Broader Agency Jurisdiction*

"In the 1985 decision *United States v. Riverside Bayview Homes, Inc*., the Supreme Court held that the Corps had jurisdiction over non-navigable wetlands that are adjacent to navigable waters because they are 'waters of the United States' as defined by the Act."[111] The Court concluded that the agencies' regulation of "any adjacent wetlands that form the border of or are in reasonable

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103. *Id.*

104. Mank, *supra* note 4, at 834 (citing Natural Res. Def. Council, Inc. v. Callaway, 392 F. Supp. 685, 686 (D.D.C. 1975)).

105. *Id.* (quoting *Callaway*, 392 F. Supp. at 686).

106. *Id.*

107. *See Callaway*, 392 F. Supp. at 686.

108. Permits for Activities in Navigable Waters or Ocean Waters, 40 Fed. Reg. 31,320, 31,324-25 (July 25, 1975); *see also* Mank, *supra* note 4, at 835.

109. *See* Regulatory Programs of the Corps of Engineers, 42 Fed. Reg. 37,122, 37,144 (July 19, 1977); *see also* Mank, *supra* note 4, at 835.

110. *See* Mank, *supra* note 4, at 836.

111. *Id.* at 837-40 (citing United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 131 (1985)).

proximity to other waters of the United States" was valid under the Act.[112] The wetlands at issue were adjacent to and partly abutted a navigable creek.[113] "The *Riverside Bayview* Court concluded that the term 'navigable' is of 'limited import' and that Congress sought '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.'"[114] Based on the Act's goals and legislative history, the Court concluded that Congress sought to regulate some non-navigable waters, especially waters such as adjacent wetlands that often have substantial hydrological or ecological impacts on navigable waters.[115]

"The *Riverside Bayview* Court emphasized the importance of hydrological and biological interactions between adjacent wetlands and navigable waters in determining that adjacent wetlands are within the scope of the Act."[116] The Court conceded that some adjacent wetlands might not have significant hydrological and ecological relationships with navigable waters, but determined that the Corps' regulation was valid because substantial interactions exist for most adjacent wetlands.[117] "The Court emphasized that the agencies' 'technical expertise' and 'ecological judgment' in determining the relationship 'between waters and their adjacent wetlands provide[] an adequate basis for a legal judgment that adjacent wetlands' are covered by the Act."[118] Additionally, the Court concluded that the Corps had jurisdiction over adjacent wetlands because there was evidence that Congress, in enacting the 1977 Amendments to the Act, had acquiesced to the Corps' regulations applying the Act to adjacent wetlands because even an unsuccessful bill that proposed to limit the Corps' jurisdiction to traditional navigable waters had not sought to exclude the Corps' regulation of wetlands adjacent to navigable waters.[119]

E. SWANCC

In the 2001 *SWANCC* decision, the Court invalidated the Corps' 1986 Migratory Bird "Rule,"[120] which sought to regulate all wetlands and waters that

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112. *Riverside Bayview*, 474 U.S. at 134 (quoting Regulatory Programs of the Corps of Engineers, 42 Fed. Reg. 37,128 (1977)).

113. *Id.* at 135.

114. Mank, *supra* note 4, at 838 (quoting *Riverside Bayview*, 474 U.S. at 133).

115. *See Riverside Bayview*, 474 U.S. at 129-35; *see also* Mank, *supra* note 4, at 837-38.

116. Mank, *supra* note 4, at 840 (citing *Riverside Bayview*, 474 U.S. at 132-35).

117. *Riverside Bayview*, 474 U.S. at 135 n.9; *see also* Mank, *supra* note 4, at 840.

118. Mank, *supra* note 4, at 838 (citing *Riverside Bayview*, 474 U.S. at 134).

119. *See Riverside Bayview*, 474 U.S. at 136-39; *see also* Mank, *supra* note 4, at 839.

120. The so-called Migratory Bird "Rule" was contained in the preamble of 1986 Corps regulations interpreting the scope of the Corps existing wetland regulations. *See* Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986) (interpreting 33 C.F.R. § 328.3 (2005)); Albrecht & Nickelsburg, *supra* note 85, at 11042 n.2, 11052; Mank, *supra* note 4, at 842-43. In 1988, the EPA included the same Migratory Bird "Rule" in the preamble of one its regulations. *See* Clean Water Act Section 404 Program Definitions and

serve as habitat for migratory birds because the Corps exceeded the Act's jurisdiction in attempting to regulate waters "isolated" from navigable waters.[121] The Court concluded that Congress intended that the Act's jurisdiction be limited to navigable waters and non-navigable waters that have a "significant nexus" to navigable waters, including wetlands adjacent to navigable waters.[122] Although the *Riverside Bayview* decision had stated that navigability was of limited import in determining the Act's scope, the *SWANCC* Court stated that the relationship of waters to navigability was still an important factor in determining whether particular waters were within the Act's jurisdiction,

> it is one thing to give a word limited effect and quite another to give it no effect whatever. The term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the [Act]: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.[123]

Based on its reading of the statute's text, the Court concluded that the term "navigable waters" did not encompass "isolated" wetlands or waters because navigability is a central factor in determining the Act's jurisdiction.[124] As support for its "navigability" interpretation, the Court observed that the Corps' original 1974 interpretation of the Act has defined the Act's jurisdiction as waters that are potentially navigable.[125] The Court rejected the government's argument that even if the 1972 Congress had intended to cover only navigable waters that Congress in enacting the 1977 Amendments had acquiesced in the Corps' broader regulatory definition in the 1977 regulations or the subsequent 1986 Migratory Bird "Rule."[126]

Although it did not actually decide whether Congress has authority under the Commerce Clause to regulate isolated waters, the Court stated that one reason that it refused to defer to the government's interpretation of the Act in the Migratory Bird "Rule" was due to its serious doubts about whether the regulation was within the scope of the congressional commerce power.[127] "The *SWANCC* Court rejected the government's argument that the Corps' interpretation was entitled to deference under the *Chevron* doctrine, which states that courts should usually defer to an agency's reasonable interpretation of an ambiguous statute for which Congress has delegated authority to the agency."[128] The Court concluded

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Permit Exemptions; Section 404 State Program Regulations, 53 Fed. Reg. 20,764, 20,764-65 (June 6, 1988).

121. Solid Waste Agency of N. Cook County (SWANCC) v. Army Corps of Eng'rs, 531 U.S. 157, 171-72 (2001).

122. *See id.* at 167-68; *see also* Mank, *supra* note 4, at 847-48.

123. *SWANCC*, 531 U.S. at 172.

124. *Id.* at 167-68; Mank, *supra* note 4, at 846-54.

125. *SWANCC*, 531 U.S. at 168; *see also* Mank, *supra* note 4, at 852-53.

126. *SWANCC*, 531 U.S. at 168-71; *see* Mank, *supra* note 4, at 848-49.

127. *See SWANCC*, 531 U.S. at 173-74; Mank, *supra* note 4, at 849-52.

128. *See SWANCC*, 531 U.S. at 172-74; Mank, *supra* note 4, at 841; *see also* Chevron U.S.A.,

that "we find 404(a) to be clear" and, "even were we to agree with respondents [that the statute is ambiguous], we would not extend *Chevron* deference here."[129]

"The Court applies an exception to the [*Chevron*] doctrine when an agency's interpretation raises serious constitutional questions; the Court places the burden of proof on the agency to demonstrate that Congress intended a statute to reach the broadest limits of congressional authority under the Constitution."[130] The Court stated, "Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result."[131] Additionally, the Court observed, "This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power," in this case local regulation of land use.[132] The Court did not find any "clear indication" that Congress intended the Act to regulate isolated waters, stating "[t]hese are significant constitutional questions raised by respondents' application of their regulations, and yet we find nothing approaching a clear statement from Congress that it intended § 404(a) to reach an abandoned sand and gravel pit such as we have here."[133] Accordingly, the *SWANCC* majority rejected the government's broad interpretation of the Act to include isolated waters. "We thus read the statute as written to avoid the significant constitutional and federalism questions raised by respondents' interpretation, and therefore reject the request for administrative deference."[134]

The voting of the Court's justices in *SWANCC* had important implications for the vote in *Rapanos.* Chief Justice Rehnquist wrote the *SWANCC* majority opinion, joined by Justices O'Connor, Scalia, Kennedy and Thomas.[135] Chief Justice Rehnquist died and Justice O'Connor retired before the *Rapanos* decision. They were replaced by Chief Justice Roberts and Justice Alito. As Part III will discuss, Justice Kennedy and Justice Scalia, joined by Justice Thomas, disagreed about the implications of *SWANCC* when they addressed the different facts in *Rapanos*. Justices Stevens, Souter, Ginsburg, and Breyer dissented.[136] These same four Justices also dissented in *Rapanos*.

Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984) (holding that courts should defer to an agency's interpretation of a statute for which Congress has delegated authority if the statute is ambiguous and the agency's interpretation is permissible, or, in other words, reasonable).

129. *SWANCC*, 531 U.S. at 174; *see* Mank, *supra* note 4, at 851.

130. *SWANCC*, 531 U.S. at 172-74; *see also* Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 574-75 (1988); Mank, *supra* note 4, at 851-52 n.256.

131. *SWANCC*, 531 U.S. at 172; *see* Mank, *supra* note 4, at 850-52.

132. *SWANCC*, 531 U.S. at 173; *see* Mank, *supra* note 4, at 850-52.

133. *SWANCC*, 531 U.S. at 174; *see* Mank, *supra* note 4, at 850-52.

134. *SWANCC*, 531 U.S. at 174.

135. *Id.* at 161.

136. *Id.* at 174 (Stevens, J., dissenting).

F. The EPA's and the Corps' 2001 Joint Memorandum on SWANCC *and 2003 Advance Notice of Proposed Rule Making*

On January 19, 2001, the last full day of the Clinton administration, the Agencies issued a joint memorandum written by Gary S. Guzy, General Counsel of the EPA, and Robert M. Andersen, Chief Counsel of the Corps, adopting the narrow interpretation that *SWANCC* limited the agencies' regulatory authority only over waters in which their jurisdiction was based solely on the presence of migratory birds.[137] The 2001 joint memorandum took a broad interpretation of which waters are within the Act's jurisdiction after the *SWANCC* decision.[138] The memorandum stated that *SWANCC* had not overruled the holding or rationale of *Riverside Bayview*, which the memorandum claimed had "upheld the regulation of traditionally navigable waters, interstate waters, their tributaries and wetlands adjacent to each."[139] Additionally, the memorandum contended that even "waters that are isolated, intrastate, and nonnavigable," may still be within the Act's jurisdiction "if their use, degradation, or destruction could affect other 'waters of the United States,' thus establishing a significant nexus between the water in question and other 'waters of the United States.'"[140] The joint memorandum's use of the term significant nexus test was clearly based on its use in *SWANCC*.[141]

On January 15, 2003, during President George W. Bush's Administration, the EPA and the Corps published in the Federal Register an Advance Notice of Proposed Rule Making (ANPRM) to solicit public comment for forty-five days to clarify the extent of the Act's jurisdiction in light of *SWANCC*.[142] The Agencies also issued a new joint memorandum, or guidance attached as Appendix A to the ANPRM, which superseded the 2001 joint memorandum, on how field staff should address jurisdictional issues until the agencies issue a final rule on the subject.[143] The most significant change in the revised 2003 joint memorandum from its 2001 predecessor is that field staff must receive "formal project-specific [] approval" from agency headquarters before claiming jurisdiction over any isolated, non-navigable, intrastate waters.[144] "Because *SWANCC* did not directly address tributaries, the Corps notified its field staff

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137. Memorandum from Gary S. Guzy, General Counsel, U.S. Environmental Protection Agency, and Robert M. Andersen, Chief Counsel, U.S. Army Corps of Engineers 2-3 (Jan. 19, 2001) [hereinafter 2001 Joint Memorandum], *available at* http://www.aswm.org/fwp/swancc/legal.pdf; *see* Mank, *supra* note 4, at 858-60.

138. Mank, *supra* note 4, at 859.

139. 2001 Joint Memorandum, *supra* note 137, at 2; *see* Mank, *supra* note 4, at 859.

140. 2001 Joint Memorandum, *supra* note 137, at 3; Mank, *supra* note 4, at 859.

141. Mank, *supra* note 4, at 859.

142. Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States," 68 Fed. Reg. 1991, 1991-92 (Jan. 15, 2003) [hereinafter ANPRM]; Mank, *supra* note 4, at 879-80.

143. ANPRM, *supra* note 142, at 1995-98; *see* Mank, *supra* note 4, at 880-83.

144. ANPRM, *supra* note 142, at 1997-98; *see* Mank, *supra* note 4, at 881-83.

that they 'should continue to assert jurisdiction over traditional navigable waters . . . and, generally speaking, their tributary systems (and adjacent wetlands).'"[145] Additionally, "because *SWANCC* did not overrule *Riverside Bayview*, the Corps continued to assert jurisdiction over waters "'neighboring'" traditional navigable waters and their tributaries."[146]

After receiving over 30,000 comments, the agencies subsequently extended the comment period to April 16, 2003.[147] In December 2003, the Agencies announced that they would not issue new regulations significantly restricting their jurisdiction over wetlands, but instead would keep the January 2003 joint guidance in effect until issuing revised guidance defining the Act's jurisdiction.[148] According to Justice Stevens, "almost all of the 43 States to submit comments opposed any significant narrowing of the Corps' jurisdiction—as did roughly 99% of the 133,000 other comment submitters."[149] Some commentators have speculated that the Agencies may have decided not to issue regulations because there were strongly conflicting views between developers and conservationists, including hunters and fishers, about the scope of the Act's jurisdiction.[150]

II. *RAPANOS*

The fundamental underlying difference among the three main opinions in *Rapanos* was between the textualist method of statutory interpretation used by Justice Scalia and the purposivist approaches of Justices Kennedy and Stevens.[151] Justice Scalia's plurality opinion focused on the meaning of the statute's text in light of the common meaning of words in a dictionary.[152] He peremptorily assumed that he could find the Act's meaning by simply using a dictionary and dismissed the possibility that the text was ambiguous enough to justify the Corps' interpretation.[153]

Justices Kennedy and Stevens focused on the Act's underlying purposes,

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145. *Rapanos*, 126 S. Ct. at 2217 (2006) (quoting ANPRM, *supra* note 142, at 1998).

146. *Rapanos*, 126 S. Ct. at 2217 (quoting ANPRM, *supra* note 142, at 1997 (citation omitted)).

147. Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States," 68 Fed. Reg. 9613, 9613 (Feb. 28, 2003); Ray A. Smith, New Guidelines Stir Debate on Wetlands, WALL ST. J., Feb. 26, 2003, at B8 (reporting agencies received over 30,000 comments regarding ANPRM).

148. Press Release, EPA, EPA and Army Corps Issue Wetlands Decision (Dec. 16, 2003), *at* http://yosemite.epa.gov/opa/admpress.nsf/b1ab9f485b098972852562e7004dc686/540f28acf38d7f9b85256dfe00714ab0?OpenDocument; Mank, *supra* note 4, at 883.

149. United States v. Rapanos, 126 S. Ct. 2208, 2256 n.4 (2006) (Stevens, J., dissenting).

150. Matt Shipman, *Old Dispute Hampers New Administration Bid to Settle Water Act Scope*, INSIDE THE EPA, June 23, 2006, *available at* 2006 WL 10765163.

151. Dorf, *supra* note 20.

152. *See infra* notes 164-67, 364 and accompanying text.

153. *See infra* notes 164-70 and accompanying text.

agreed that the plurality's interpretation was flawed, but the two Justices disagreed as to what extent the statute was ambiguous and the amount of deference due to the Corps.[154] In light of the Act's broad purposes and Congress' intent to give the Corps wide discretion to achieve those purposes, Justice Stevens's dissenting opinion argued that the Corps' wetlands regulations were justified in claiming jurisdiction over all tributary wetlands.[155] By contrast, Justice Kennedy argued that the Act's use of the term "navigable waters" limited its jurisdictional scope to waters having a "significant nexus" to navigable waters and that the Corps regulations were deficient because they did not demonstrate the existence of such a nexus for all the wetlands that it regulated.[156] His broad interpretation of the term "significant nexus" in light of the Act's broad ecological purposes, however, raises a significant possibility that the Corps could justify most of its existing regulation of tributary wetlands.[157] Justice Kennedy's overall approach was closer to Justice Stevens's dissenting opinion because they both focused on the statute's purposes more than its ambiguous text, although there are clearly some important differences between the two opinions.

A. Justice Scalia's Plurality Opinion

Justice Scalia announced the judgment of the Court, but lower courts will more likely follow Justice Kennedy's opinion rather than the plurality opinion.[158] At the beginning of the opinion, the plurality criticized "the immense expansion of federal regulation of land use that has occurred under the Clean Water Act—without any change in the governing statute," described the Corps as an "enlightened despot," deplored the delays and expense of the permit process, and observed that "Mr. Rapanos faced 63 months in prison and hundreds of thousands of dollars in criminal and civil fines."[159] Justice Scalia complained that the Corps' expansive definition gave it jurisdiction over almost any significant land area that contained an intermittent conduit, stating, "[b]ecause they include the land containing storm sewers and desert washes, the statutory 'waters of the United States' engulf entire cities and immense arid wastelands."[160] A cynical observer would argue that the plurality's distaste for the results of the Corps' policies could have easily influenced their narrow interpretation of the Act's language.

Although rejecting the *Rapanos* petitioners' argument that the terms "navigable waters" and "waters of the United States" in the Act are "limited to the traditional definition of [navigability in] *The Daniel Ball*," Justice Scalia

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154. *See infra* notes 264-69, 387-88 and accompanying text.

155. United States v. Rapanos, 126 S. Ct. 2208, 2252 (2006) (Stevens, J., dissenting); *see also infra* notes 214-24 and accompanying text.

156. *Rapanos*, 126 S. Ct. at 2236; *see also infra* notes 263-76 and accompanying text.

157. *See infra* notes 217-20, 329-31, 360, 488 and accompanying text.

158. *Rapanos*, 126 S. Ct. at 2265 & n.14 (2006) (Stevens, J., dissenting).

159. *Id.* at 2214-15 (Scalia, J., plurality opinion).

160. *Id.* at 2215.

observed that the *SWANCC* Court made clear that the "qualifier 'navigable' is not devoid of significance."[161] He maintained that the Court did not need to "decide the precise extent to which the qualifiers 'navigable' and 'of the United States' restrict the coverage of the Act" because "[w]hatever the scope of these qualifiers, the CWA authorizes federal jurisdiction only over 'waters.'"[162] Justice Scalia reasoned that the "Corps' expansive approach might be arguable if the CSA [sic] defined 'navigable waters' as 'water of the United States.'"[163]

Justice Scalia focused on the meaning of the statute's text in light of the common meaning of words in dictionaries. He argued that the Act's "use of the definite article ('the') and the plural number ('waters') show plainly that § 1362(7) does not refer to water in general."[164] Instead, relying on and quoting the 1954 second edition of Webster's New International Dictionary ("Webster's Second"), he maintained that "'the waters' refers more narrowly to water '[a]s found in streams and bodies forming geographical features such as oceans, rivers, [and] lakes,' or 'the flowing or moving masses, as of waves or floods, making up such streams or bodies.'"[165]

Additionally, Justice Scalia observed that the Webster's Second definition "refers to water as found in 'streams,' 'oceans,' 'rivers,' 'lakes,' and 'bodies' of water 'forming geographical features.'"[166] He reasoned that "[a]ll of these terms connote continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows."[167] Justice Scalia conceded that the term might include rivers that "dry up in extraordinary circumstances, such as drought" or seasonal rivers.[168] He rejected Justice Kennedy's observation that Webster's Second includes an alternative definition of waters because it was "wholly unreasonable to interpret the statute as regulating only 'floods' and 'inundations' rather than traditional waterways."[169] Implicitly, Justice Scalia rejected the possibility that waters could include both permanent waterways and intermittent streams caused by rainfall or flooding.

Justice Scalia recognized that his interpretation of the Act's jurisdiction to include only relatively permanent, standing or continuously flowing bodies of water would exclude many channels that the Corps has regulated for over thirty years. Under his interpretation of the statute, the Corps had over-regulated far too many areas that are essentially dry land. Justice Scalia asserted, "[i]n applying the definition to 'ephemeral streams,' 'wet meadows,' storm sewers and

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161. *Id.* at 2220.

162. *Id.* (quoting 33 U.S.C. § 1362(7) (2000)).

163. *Id.*

164. *Id.*

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

166. *Id.* at 2221 (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY, *supra* note 165, at 2882).

167. *Id.*

168. *Id.* at 2221 n.5.

169. *Id.* at 2221 n.4.

culverts, 'directional sheet flow during storm events,' drain tiles, man-made drainage ditches, and dry arroyos in the middle of the desert, the Corps has stretched the term 'waters of the United States' beyond parody."[170]

Additionally, Justice Scalia reasoned that "the Act's use of the traditional phrase 'navigable waters' . . . further confirms that it confers jurisdiction only over relatively *permanent* bodies of water."[171] He observed that traditionally the term "navigable waters" was understood to include "only discrete *bodies* of water," and that *SWANCC* recognized that the term "carries *some* of its original substance."[172] Justice Scalia also noted that the *Riverside Bayview* Court had described "the waters of the United States" as "referr[ing] primarily to 'rivers, streams, and other *hydrographic features*,'" all of which in his view referred to permanent bodies of water.[173]

Furthermore, Justice Scalia argued "the CWA itself categorizes the channels and conduits that typically carry intermittent flows of water separately from 'navigable waters,' by including them in the definition of 'point source.'"[174] He observed that the definition of point source includes, but is not limited to, "any pipe, ditch, channel, tunnel, conduit . . . from which pollutants are or may be discharged."[175] He claimed that it made more sense to treat "'point sources'" and "'navigable waters'" as separate and distinct categories because the "definition of 'discharge' would make little sense if the two categories were significantly overlapping."[176] Justice Scalia reasoned that the "separate classification of 'ditch[es], channel[s], and conduit[s]'—which are terms ordinarily used to describe the watercourses through which *intermittent* waters typically flow—shows that these are, by and large, *not* 'waters of the United States.'"[177]

Next, Justice Scalia argued that only his narrow interpretation of the term "'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 and use . . . of land and water resources.'" [178] Thus, he reasoned that "[e]ven if the phrase 'the waters of the United States' were ambiguous as applied to intermittent flows, our own canons of construction would establish that the Corps' interpretation of the statute is impermissible."[179] Justice Scalia observed that *SWANCC* had rejected the Corps broad interpretation of its jurisdiction, in part, because the term "the waters of the United States" did not

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170. *Id.* at 2222.

171. *Id.*

172. *Id.*

173. *Id.* (quoting United States v. Riverside Bayview Homes, 474 U.S. 121, 131 (1985)) (emphasis added by Justice Scalia).

174. *Id.* (quoting 33 U.S.C. § 1362(14) (2000)).

175. *Id.* (quoting 33 U.S.C. § 1362(14) (2000)).

176. *Id.* at 2223.

177. *Id.* (emphasis in original).

178. *Id.* (quoting 33 U.S.C. § 1251(b) (2000)).

179. *Id.* at 2224; *see* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) (deferring to agency interpretation of a statute only if the interpretation is permissible).

support the Corps' "unprecedented intrusion into traditional state authority" or authorize federal action that "stretches the outer limits of Congress's commerce power" without far more explicit statutory authorization from Congress.[180] He concluded that "on its only plausible interpretation, the phrase 'the waters of the United States' includes only those relatively permanent, standing or continuously flowing bodies of water. . . . The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall."[181] One must question Justice Scalia's assurance that his is the only plausible interpretation when five other justices disagreed and most lower court decisions had interpreted the Act more broadly.[182]

Justice Scalia concluded that it is "*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 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act."[183] This continuous surface connection requirement invalidates the approach used by many lower courts and the Corps on numerous occasions to allow regulation of wetlands that have a hydrological or ecological connection to navigable waters. Justice Scalia observed that the Sixth Circuit in *Rapanos* had "stated that, even if the ditches were not 'waters of the United States,' the wetlands were 'adjacent' to *remote* traditional navigable waters in virtue of the wetlands' 'hydrological connection' to them."[184] He noted that many Corps' district offices had adopted the hydrological connection approach.[185] Justice Scalia argued that a wetland may not be considered "adjacent to" remote "waters of the United States" based on a mere hydrologic connection.[186] He characterized the *Riverside Bayview* Court's deference to the Corps inclusion of adjacent wetlands as "waters of the United States" as justified by the inherent ambiguity in defining the boundaries where the "water" ends and its abutting or "adjacent" wetlands begin.[187] Justice Scalia maintained that the *Riverside Bayview* Court allowed the Corps to rely on ecological considerations only to resolve that ambiguity in favor of treating all abutting wetlands as waters.[188] He contended that his interpretation of *Riverside Bayview* was supported by the fact that the *SWANCC* Court did not allow the Corps to consider ecological factors in determining their jurisdiction over isolated waters because there was no boundary-drawing problem justifying the

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

181. *Id.* at 2225.

182. *See infra* notes 206-08, 247-50, 417 and accompanying text.

183. *Rapanos*, 126 S. Ct. at 2226 (emphasis in original).

184. *Id.* at 2225 (quoting United States v. Rapanos, 376 F.3d 629, 639-40 (6th Cir. 2004), *vacated and remanded*; 126 S. Ct. 2208 (2006)) (emphasis added by Justice Scalia).

185. *Id.*

186. *Id.* at 2225-27.

187. *Id.* at 2225-26.

188. *Id.*

invocation of those factors.[189]

Although not an issue before the Court, Justice Scalia rejected the argument of the government and many amici that restricting the definition of navigable waters would "frustrate enforcement against traditional water polluters" by allowing them to pollute intermittent streams that would no longer be within the Act's jurisdiction under the plurality opinion.[190] Although under his interpretation of the Act intermittent streams or channels would no longer be navigable waters, he maintained that such channels would still be point sources under Section 402 of the Act, and therefore, polluters who dumped into non-navigable channels would still be liable if any pollution flowed downstream into navigable waters. [191] Justice Scalia acknowledged that the issue of point source pollution was not before the Court, but he felt compelled to address the issue because he needed to respond to the assertion that his narrow definition of "waters of the United States" must be wrong if it effectively gutted enforcement against water polluters. He suggested in dicta that the hydrological connection approach used by the Sixth Circuit might well be appropriate in determining the responsibility of point sources for downstream pollution into waters of the United States, but maintained that the hydrological connection approach was not appropriate to the different problem of placing immobile fill into wetlands under separate § 404 wetlands program.[192]

Because the Sixth Circuit applied an incorrect standard to determine whether the wetlands at issue are covered "waters," and because of the "paucity of the record," the plurality, joined by Justice Kennedy's fifth vote, vacated the judgments of the Sixth Circuit and remanded the cases for further proceedings.[193] According to the plurality opinion, the lower courts on remand could find in favor of the Corps having jurisdiction over the *Rapanos* and *Carabell* sites only by finding that the adjacent channel contains a relatively permanent "water of the United States," and that each wetland "has a continuous surface connection with that water, making it difficult to determine where the water ends and the 'wetland' begins."[194] The Corps would likely lose both cases under this two-part test.

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189. *Id.* at 2226.

190. *Id.* at 2227.

191. *Id.* (discussing CWA § 301, 33 U.S.C. § 1311(a) (2000) (prohibiting discharge of any pollutant except in compliance with other provisions of Act); CWA § 402, 33 U.S.C. § 1342 (2000) (requiring permit before anyone may discharge pollutant from point source into navigable waters); CWA § 502, 33 U.S.C. § 1362(12)(A) (2000) (defining the "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source")).

192. *Id.* at 2228 (contrasting CWA § 404, 33 U.S.C. § 1344 (2000) (requiring permit before anyone may place fill into wetlands) with CWA § 402, 33 U.S.C. § 1342 (2000) (requiring permit before anyone may discharge pollutant from point source into navigable waters).

193. *Id.* at 2235.

194. *Id.* at 2227, 2235.

B. Justice Stevens's Dissenting Opinion

Next, it will be helpful to consider Justice Stevens's dissenting opinion to better understand whether Justice Kennedy's opinion concurring in the judgment is closer to the plurality opinion or the dissenting opinion. Justice Stevens argued that Justice Kennedy, and especially the plurality opinion, failed to give sufficient deference to the Corps' interpretation of a complex regulatory statute that Congress had delegated to the Corps to administer and ignored that Congress had implicitly acquiesced in that interpretation.[195] Justice Stevens contended that the Court should defer to the Corps' "reasonable interpretation" that protecting wetlands adjacent to tributaries of navigable waters enhance the ecology and hydrology of "waters of the United States."[196]

1. Justice Stevens Strongly Disagrees with the Plurality Opinion.—Justice Stevens argued that *Riverside Bayview* controlled the decision in *Rapanos* even though the wetlands in the former case were adjacent to actual navigable waters and the ones in the present cases were not.[197] He stated, "Our unanimous opinion in *Riverside Bayview* squarely controls these cases."[198] Justice Stevens explained,

> [a]lthough the particular wetland at issue in *Riverside Bayview* abutted a navigable creek, we framed the question presented as whether the Clean Water Act "authorizes the Corps to require landowners to obtain permits from the Corps before discharging fill material into wetlands adjacent to navigable bodies of water *and their tributaries*."[199]

Not surprisingly, Justice Scalia explicitly disagreed and concluded that *Riverside Bayview* could not control the different facts at issue in the two Sixth Circuit cases before the Court.[200] Justice Stevens, conversely, rejected "the plurality's revisionist reading" of *Riverside Bayview* "that 'adjacent' means having a 'continuous surface connection' between the wetland and its neighboring creek" when that Court had actually defined adjacent as "wetlands that form the border of or are in reasonable proximity to other waters."[201]

Justice Stevens argued that the plurality's heavy reliance on *SWANCC* was misplaced because that case was about isolated waters and "had nothing to say about wetlands, let alone about wetlands adjacent to traditionally navigable waters or their tributaries."[202] Instead, he argued that *Riverside Bayview* should control because wetlands adjacent to tributaries play the same ecological role as

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195. *Id.* at 2252-53 (Stevens, J., dissenting).

196. *Id.* at 2253.

197. *Id.* at 2255.

198. *Id.*

199. *Id.* (quoting United States v. Riverside Bayview Homes, 474 U.S. 121, 123 (1985)) (emphasis added by Justice Stevens).

200. *Id.* at 2229-30 (Scalia, J., plurality opinion)

201. *Id.* at 2255 (Stevens, J., dissenting) (quoting *Riverside Bayview*, 474 U.S. at 134).

202. *Id.* at 2256.

the adjacent wetlands at issue in that case, and the term "waters of the United States" is an ambiguous phrase that the Corps may reasonably construe to include all non-isolated wetlands, including those adjacent to tributaries.[203] Furthermore, the dissenters argued that *Riverside Bayview* allowed the Corps to regulate all adjacent wetlands because most serve important ecological values and have a significant nexus to navigable waters without imposing a requirement that the courts and the Corps conduct a case-by-case examination of these connections in every single case, which the plurality and Justice Kennedy would require.[204] Justice Stevens contended that the plurality had exaggerated the costs of wetlands regulation, ignored the benefits of such regulation, and, most importantly, that it was inappropriate for the judiciary to engage in policy balancing that is the role of Congress and the Corps.[205]

Justice Stevens sharply disagreed with the plurality's requirement that jurisdictional waters must be "relatively permanent" because even the dictionary definition in Webster's Second that they relied upon which defines "streams" as "waters" does not address whether streams must be continuous or may be intermittent, such as a 290-day stream.[206] He argued that "common sense and common usage demonstrate that intermittent streams, like perennial streams, are still streams."[207] Additionally, the dissent contended that the plurality's attempted distinction between permanent waters and intermittent point sources is flawed since "all hold water permanently as well as intermittently."[208]

Furthermore, Justice Stevens responded that the Act's general policy that states retain primary responsibility for preventing water pollution does not justify the plurality's claim that protecting states' rights requires a narrow construction of the term "waters of the United States" to exclude intermittent waters.[209] Under the Commerce Clause, he argued that Congress may regulate any intermittent waters to prevent pollution or protect against floods in navigable waters.[210] Also, Justice Stevens asserted that the plurality's "separate requirement that 'the wetland has a continuous surface connection' with its abutting waterway" ignores the impact that neighboring waters without such an explicit connection may have on navigable waters.[211]

Moreover, he maintained that the plurality's distinction between limited federal regulation of allegedly immobile fill in wetlands and greater federal regulation of mobile pollutants from point sources was flawed because silt from wetland fill could be carried downstream and thus bring pollution downstream.[212]

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203. *Id.* at 2257.
204. *Id.* at 2258.
205. *Id.* at 2258-59.
206. *Id.* at 2259-60.
207. *Id.* at 2260.
208. *Id.* at 2260-61.
209. *Id.* at 2261 (citing 33 U.S.C. § 1251(b) (2000)).
210. *Id.* at 2261-62.
211. *Id.* at 2262-63.
212. *Id.* at 2263.

Furthermore, Justice Stevens also contended that there was justification for federal regulation of immobile fill because excessive sediment can harm invertebrates and fish spawning.[213]

2. Justice Stevens Disagrees with Justice Kennedy's "Significant Nexus" Test.—Although he "generally agree[d] with Parts I and II-A" of Justice Kennedy's opinion, which summarized the Act's history and disagreed with the plurality opinion in most respects, Justice Stevens disagreed with Justice Kennedy's "view that we should replace regulatory standards that have been in place for over 30 years with a judicially crafted rule distilled from the term 'significant nexus' as used in *SWANCC*."[214] Even if the "significant nexus" test should be the standard, Justice Stevens argued that test "is categorically satisfied as to wetlands adjacent to navigable waters or their tributaries."[215] He contended that the "significant nexus" test was satisfied in *Rapanos* and *Carabell* because the tributary wetlands in those two cases were essentially similar to the adjacent wetlands at issue in *Riverside Bayview*.[216]

Justice Stevens argued that "wetlands adjacent to tributaries of navigable waters generally have a 'significant nexus' with the traditionally navigable waters downstream."[217] Unlike the isolated waters at issue in *SWANCC*, he maintained that:

> these wetlands can obviously have a cumulative effect on downstream water flow by releasing waters at times of low flow or by keeping waters back at times of high flow. This logical connection alone gives the wetlands the "limited" connection to traditionally navigable waters that is all the statute requires. . . .[218]

Additionally, Justice Stevens asserted, tributary wetlands "can preserve downstream water quality by trapping sediment that filtering toxic pollutants, protecting fish-spawning grounds, and so forth."[219] Although conceding that a few wetlands adjacent to tributaries may not have a significant nexus, he contended that the vast majority will meet that test and as a result the "test will probably not do much to diminish the number of wetlands covered by the Act in the long run."[220] Justice Stevens complained that Justice Kennedy's "approach will have the effect of creating additional work for all concerned parties," including developers and the Corps.[221] Justice Stevens argued that *Riverside Bayview*'s "deferential approach avoided" the largely unnecessary work imposed

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213. *Id.* at 2263-64.
214. *Id.* at 2264.
215. *Id.*
216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.*
220. *Id.*
221. *Id.* at 2264-65.

by the "significant nexus" test.[222] Disagreeing with Justice Kennedy, Justice Stevens saw "no reason to change *Riverside Bayview*'s approach—and every reason to continue to defer to the Executive's sensible, bright-line rule."[223]

3. Justice Stevens's Conclusion.—Justice Stevens concluded:

> By curtailing the Corps' jurisdiction of more than 30 years, the plurality needlessly jeopardizes the quality of our waters. In doing so, the plurality disregards the deference it owes the Executive, the congressional acquiescence in the Executive's position that we recognized in *Riverside Bayview*, and its own obligation to interpret laws rather than to make them. While Justice KENNEDY's approach has far fewer faults, nonetheless it also fails to give proper deference to the agencies entrusted by Congress to implement the Clean Water Act.[224]

The dissenters would have affirmed the judgments in both cases, thus disagreeing with the decision of five members of the Court to vacate and remand.[225] Justice Stevens observed that the case was unusual because the plurality and Justice Kennedy proposed different tests to be applied on remand and therefore Justice Stevens suggested how the lower courts should reconcile those differences.[226] "Given that all four Justices who have joined this 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," Justice Stevens declared that "on remand each of the judgments should be reinstated if *either* of those tests is met."[227] The DOJ has explicitly endorsed his approach in its motion for remand in the *Rapanos* case now before the Sixth Circuit.[228] Justice Stevens further explained that Justice Kennedy's test would apply in most circumstances, but that it was possible in a few cases that the plurality opinion would be broader and thus operative.[229] "I assume that Justice KENNEDY's approach will be controlling in most cases because it treats more of the Nation's waters as within the Corps' jurisdiction, but in the unlikely event that the plurality's test is met but Justice KENNEDY's is not, courts should also uphold the Corps' jurisdiction."[230] As is discussed below, Justice Stevens's assertion about there being a working majority whenever either the plurality or Justice Kennedy's test is satisfied is also arguably supported by the Court's subsequent *League of United Latin American Citizens* decision, which was decided the week after *Rapanos* and involved different working majorities on different issues.[231]

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222. *Id.* at 2265.
223. *Id.*
224. *Id.*
225. *Id.*
226. *Id.*
227. *Id.*
228. *See infra* notes 441-42 and accompanying text.
229. *Rapanos*, 126 S. Ct. at 2265 n.14.
230. *Id.*
231. *See infra* notes 468-71 and accompanying text.

C. Justice Kennedy's Crucial Opinion

1. The Significant Nexus Test is the Key to the Act's Jurisdiction.—At the beginning of his opinion, Justice Kennedy stated that *SWANCC* had held that the term "navigable waters" under the Act is defined by whether a water or wetland "possess[es] a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made."[232] Explaining his decision to write a solo opinion, he observed that neither the plurality opinion nor the dissenting opinion "chooses to apply this test[.]"[233] Justice Kennedy explained that the Sixth Circuit in the two cases below had applied the "significant nexus" test, but "it did not consider all the factors necessary to determine whether the lands in question had, or did not have, the requisite nexus. In my view the cases ought to be remanded to the Court of Appeals for proper consideration of the nexus requirement."[234] His introductory paragraph announces that the "significant nexus" test is the crucial standard for lower courts to consider in determining whether wetlands that are not adjacent to navigable waters have the "requisite nexus" to navigable or potentially navigable waters.[235]

Justice Kennedy took a much more positive view of the Corps regulations defining the Act's jurisdiction than the plurality. He wrote, "Contrary to the plurality's description wetlands are not simply moist patches of earth."[236] Justice Kennedy explained that the Corps regulations and its lengthy Wetlands Delineation Manual carefully define wetlands by requiring the presence of the following factors:

> (1) prevalence of plant species typically adapted to saturated soil conditions; . . . (2) hydric soil, meaning soil that is saturated, flooded, or ponded for sufficient time during the growing season to become anaerobic, or lacking in oxygen, in the upper part; and (3) wetland hydrology, a term generally requiring continuous inundation or saturation to the surface during at least five percent of the growing season in most years.[237]

Under the Corps regulations, wetlands that meet these criteria and are adjacent to tributaries of navigable waters are within the Act's jurisdiction, "even if they are 'separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like.'"[238]

In reviewing the facts of the two cases, especially *Rapanos*, Justice Kennedy

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232. *Rapanos*, 126 S. Ct. at 2236 (Kennedy, J., concurring) (quoting Solid Waste Agency of N. Cook County (SWANCC) v. Army Corps of Eng'rs, 531 U.S. 159, 167, 172 (2001)).

233. *Id*. at 2236; *see also id.* at 2241.

234. *Id*. at 2236.

235. *Id.*

236. *Id*. at 2237 (citation omitted).

237. *Id*. at 2237-38.

238. *Id*. at 2238 (quoting 33 C.F.R. § 328.3(c) (2005)).

emphasized the facts favorable to the government. The District Court in *Rapanos* had found surface water connections between wetlands on all three parcels of Rapanos' land and navigable waters or tributaries that flow into such waters.[239] In *Carabell*, a berm currently prevented surface-water flow from the wetlands at issue into a ditch that eventually flowed in navigable waters, but there was some evidence that water might flow in the future if the Carabells were allowed to fill the disputed wetlands.[240]

In discussing the seminal *Riverside Bayview* and *SWANCC* decisions, Justice Kennedy reasoned that the key issue underlying both decisions was whether a significant nexus existed between the wetlands at issue and navigable or potentially navigable waters.[241] He observed that the *Riverside Bayview* Court had held that "'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,'" although the Court only addressed wetlands adjacent to navigable waters.[242] In *SWANCC*, the Court interpreted *Riverside Bayview* as resting on an implied significant nexus test and held that isolated waters lacked such a nexus.[243] For Justice Kennedy, "[a]bsent a significant nexus, jurisdiction under the Act is lacking."[244] Accordingly, "[b]ecause neither the plurality nor the dissent addresses the nexus requirement, this separate opinion, in my respectful view, is necessary."[245]

2. Rejecting the Plurality Opinion.—Justice Kennedy disagreed with the plurality opinion's two-part test and most of its reasoning.[246] He rejected the plurality's first requirement of either "permanently standing water or continuous flow" because intermittent waters, especially in the western United States, frequently have far more significant impacts than most continuously flowing small streams.[247] Although Congress in theory could have excluded intermittent waters despite their importance, Justice Kennedy observed that the definition of waters in Webster's Second includes "flood or inundation," which he reasoned would indicate that Congress meant to include intermittent waters as waters of the United States.[248] Additionally, the plurality's contention that *Riverside Bayview*'s use of the term "hydrographic feature[]" limits the definition of waters

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239. *Id*.

240. *Id*. at 2239-40.

241. *Id*. at 2240-41.

242. *Id*. at 2240 (quoting United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 134 (1985)).

243. *Id*. at 2241 (citing Solid Waste Agency of N. Cook County (SWANCC) v. Army Corps of Eng'rs, 531 U.S. 159, 167, 172 (2001)).

244. *Id*. at 2241.

245. *Id*.

246. *Id*. at 2241-47.

247. *Id*. at 2242.

248. *Id*. at 2242-43 (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY, *supra* note 165, at 2882).

to permanent waters is flawed because the phrase could easily apply to "intermittent streams carrying substantial flow to navigable waters."[249] Furthermore, the plurality's argument that the Act makes a clear distinction between permanent waters of the United States and intermittent point sources is wrong Justice Kennedy asserted because either waters or point sources can be permanent or intermittent.[250]

Moreover, Justice Kennedy responded that the "plurality's second limitation—exclusion of wetlands lacking a continuous surface connection to other jurisdictional waters—is also unpersuasive."[251] He rejected the plurality's interpretation of *Riverside Bayview* as including only wetlands that "are '*indistinguishable*' from waters to which they bear a surface connection."[252] Although the plurality may be correct that *Riverside Bayview* included adjacent wetlands as waters of the U.S. in part because of the difficulty in drawing the line between open waters and wetlands, Justice Kennedy responded that the *Riverside Bayview* decision had rejected the requirement that water must flow between wetlands and navigable waters.[253] Instead it had allowed their regulation because it was reasonable "'for the Corps to conclude that in the majority of cases, adjacent wetlands have significant effects on water quality and the aquatic ecosystem.'"[254] Furthermore, *Riverside Bayview* presumed that wetlands created by flooding as opposed to continuous surface flow may be regulated as adjacent wetlands.[255] Also, adjacent wetlands may protect water quality by filtering substances that would otherwise harm navigable waters even if there is not a direct surface connection.[256]

Justice Kennedy concluded, "[i]n sum the plurality's opinion is inconsistent with the Act's text, structure, and purpose."[257] He criticized "the plurality's overall tone and approach" for being "unduly dismissive" of the public interest in protecting wetlands and aquatic quality.[258] Justice Kennedy argued that "[t]he limits the plurality would impose, moreover, give insufficient deference to Congress' purposes in enacting the Clean Water Act and to the authority of the Executive to implement that statutory mandate."[259]

Finally, Justice Kennedy disagreed with Chief Justice Roberts's concurring opinion, which argued that the Corps should have issued revised regulations in the wake of *SWANCC*.[260] Justice Kennedy observed that "because the plurality

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249. *Id*. at 2243.
250. *Id*.
251. *Id*. at 2244.
252. *Id*. at 2234, 2244 (emphasis supplied by Justice Kennedy).
253. *Id.* (Kennedy, J., concurring).
254. *Id*. (quoting United States v. Riverside Bayview Homes, 474 U.S. 121, 135 n.9 (1985)).
255. *Id*.
256. *Id*. at 2245-46.
257. *Id*. at 2246.
258. *Id*. at 2246-47.
259. *Id*. at 2247.
260. *Id*.; *see also id*. at 2235-36 (Roberts, C.J., concurring).

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."[261] He responded, "[n]ew rulemaking could have averted the disagreement here only if the Corps had anticipated the unprecedented reading of the Act that the plurality advances."[262]

3. Disagreeing with the Dissenting Opinion.—Justice Kennedy had some significant disagreements with the dissenting opinion, but he agreed with it more than he did with the plurality opinion. He stated, "[w]hile the plurality reads nonexistent requirements into the Act, the dissent reads a central requirement out—namely, the requirement that the word 'navigable' in 'navigable waters' be given some importance."[263] Justice Kennedy rejected the dissenting opinion's interpretation that the term "navigable waters" was so ambiguous that the Corps was entitled to regulate any non-isolated waters.[264] He claimed, "the dissent would permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters. The deference owed to the Corps' interpretation of the statute does not extend so far."[265] Although the Act is not limited to only navigable in fact waters, Justice Kennedy observed that *SWANCC* had stated that "the word 'navigable' in the Act must be given some effect."[266]

Rejecting the dissenting opinion's complete deference to the Corps regulations, Justice Kennedy stated, "the Corps' jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense."[267] He accepted the Corps' general rationale in its 1977 regulations for regulating wetlands "that wetlands can perform critical functions related to the integrity of other waters—functions such as pollutant trapping, flood control, and runoff storage."[268] Justice Kennedy demanded, however, that the Corps demonstrate a specific ecological nexus between the wetlands it seeks to regulate and navigable waters. He explained,

> 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." When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they

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261. *Id*. at 2247; *see also id.* at 2225-27 (Scalia, J., plurality opinion).

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

263. *Id*.

264. *Id*. at 2248.

265. *Id*. at 2247.

266. *Id*. (citing Solid Waste Agency of N. Cook County (SWANCC) v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 172 (2001)).

267. *Id*. at 2248.

268. *Id*. (citing 33 C.F.R. § 320.4(b)(2) (2005)).

> fall outside the zone fairly encompassed by the statutory term navigable waters.[269]

4. Calling on the Corps to Issue Regulations Defining What is a Significant Nexus.—Justice Kennedy strongly encouraged the Corps to issue new regulations defining when tributary wetlands have a significant nexus with navigable waters.[270] He first observed that the Corps' current test for wetlands adjacent to traditional navigable waters is reasonable because for such wetlands a "reasonable inference of ecological interconnection" can be drawn as recognized in *Riverside Bayview*.[271] For the tributary wetlands at issue in the current two cases, however, Justice Kennedy contended that one could not presume such a close connection to navigable waters.[272] First, the Corps' definition of tributary includes any water that "feeds into a traditional navigable water (or a tributary thereof) and possesses an ordinary high-water mark, defined as a 'line on the shore established by the fluctuations of water and indicated by [certain] physical characteristics,' [33 C.F.R.] § 328.3(e)."[273] Although this definition had some merit if the Corps applied it consistently, he contended that the Corps' broad definition of tributary "seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water-volumes towards it" and that this definition "precludes its adoption as the determinative measure of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood."[274] Because wetlands adjacent to tributaries do not always have a significant nexus with navigable waters, Justice Kennedy argued that the Corps needed to define which categories of tributary wetlands have significant ecological nexus with navigable waters by either issuing new regulations or deciding the issue through case-by-case adjudications.[275]

To encourage the Corps to issue new regulations addressing his significant nexus test, Justice Kennedy suggested relevant factors the Corps could evaluate to

> identify categories of tributaries that, due to their volume of flow (either annually or on average), their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters.[276]

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269. *Id*.

270. *Id*. at 2248-49.

271. *Id*. at 2248.

272. *Id*. at 2249.

273. *Id*. at 2237, 2248-49; *see generally* Virginia Albrecht & Deidre Duncan, *Justice Kennedy's Concurring Opinion in* Rapanos *Suggests Need for Rulemaking*, 37 ENV'T REP. (BNA) 1647 (2006).

274. *Rapanos*, 126 S. Ct. at 2249 (Kennedy, J., concurring).

275. *Id.*

276. *Id*. at 2248.

Until the Corps issued such regulations, he observed that the Corps, developers, and lower courts would have to address whether there is a significant nexus between tributary wetlands and navigable waters on a case-by-case basis.[277] Justice Kennedy also suggested, "[w]here 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," but he acknowledged that this idea was dicta because "[t]hat issue, however, is neither raised by these facts nor addressed by any agency regulation that accommodates the nexus requirement outlined here."[278]

Justice Kennedy obliquely rejected a quasi-constitutional argument raised by the plurality against a broad interpretation of the Corps' authority. The plurality opinion, without directly endorsing the constitutional challenge by the petitioners, stated that the Corps' interpretation of its authority over wetlands "stretches the outer limits of Congress's commerce power."[279] Justice Kennedy, however, stated that wetlands as defined by his significant nexus test "raise no serious constitutional or federalism difficulty."[280] He explained that application of the significant nexus test would "prevent[] problematic applications of the statute."[281] Furthermore, Justice Kennedy argued that if his test allowed a few examples of federal regulation that arguably intruded on legitimate state sovereignty, these isolated instances were of no importance as part of a comprehensive statutory scheme that legitimately regulates commerce.[282] He cited the Court's 2005 decision in *Gonzales v. Raich*[283] in which the Court held that Congress may prohibit states from legalizing medical marijuana even if most of the medical marijuana does not enter interstate commerce because the challenged statute serves the comprehensive purpose of regulating interstate commerce in marijuana and the fact that the statute may intrude on some purely intrastate commerce does not undermine its overall validity. Thus, Justice Kennedy argued that his test was constitutional pursuant to the Court's comprehensive doctrine even if his test might intrude on state sovereignty.

5. Suggesting the Government Would Likely Win on Remand.—Justice Kennedy stated that it was necessary to remand the two cases because the lower courts had not fully applied the significant nexus test he had discussed in his opinion in determining whether the government had proven a sufficient connection between the wetlands on Rapanos's and Carabell's properties and navigable waters.[284] He suggested that there may be sufficient evidence of such a nexus for the government to win both cases and that the end result on remand

277. *Id*. at 2249.

278. *Id.*

279. *Id*. at 2224 (Scalia, J., plurality opinion).

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

281. *Id*. at 2250.

282. *Id.*

283. 545 U.S. 1 (2005).

284. *Rapanos*, 126 S. Ct. at 2250 (Kennedy, J., concurring).

would likely be closer to the dissenting opinion.[285] Justice Kennedy stated that the "record contains evidence suggesting the possible existence of a significant nexus according to the principles outlined above. Thus the end result in these cases and many others to be considered by the Corps may be the same as that suggested by the dissent, namely, that the Corps's assertion of jurisdiction is valid."[286]

Justice Kennedy examined the specific factual conclusions and legal standards used in the two cases below. In *Rapanos*, he observed that the "District Court found that each of the wetlands bore surface water connections to tributaries of navigable-in-fact waters," but he faulted the Sixth Circuit for applying a "mere hydrological connection" test that did not assess how significant the nexus was between the wetlands and navigable waters.[287] In *Carabell*, Justice Kennedy suggested that the record contained evidence by the Corps that filling the wetlands could cause ecological harm, but he claimed that this evidence was too speculative to meet the substantial evidence required to justify the Corps claims.[288] Justice Kennedy further commented, "[a]s in *Rapanos,* though, the [*Carabell*] record gives little indication of the quantity and regularity of flow in the adjacent tributaries—a consideration that may be important in assessing the nexus. Also, as in *Rapanos,* the legal standard applied [in *Carabell*] to the facts was imprecise."[289] He also observed that the Sixth Circuit in *Carabell* had stated that a hydrological connection between the wetlands at issue and navigable waters was not necessary and expressed his view that "that much of its holding is correct. Given the role wetlands play in pollutant filtering, flood control, and runoff storage, it may well be the absence of hydrologic connection (in the sense of interchange of waters) that shows the wetlands' significance for the aquatic system."[290] Justice Kennedy reasoned, however, that the Court must remand the *Carabell* decision because the Corps had relied too much on the mere adjacency of the wetlands to a tributary without the necessary analysis of how significantly connected the wetlands are to navigable waters.[291] He concluded, "[i]n these consolidated cases I would vacate the judgments of the Court of Appeals and remand for consideration whether the specific wetlands at issue possess a significant nexus with navigable waters."[292]

D. Chief Justice Roberts's Concurring Opinion

While joining the plurality opinion, Chief Justice Roberts also wrote a separate, solo concurring opinion. He first criticized the Corps and EPA for

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285. *Id.*
286. *Id.*
287. *Id*. at 2250-51.
288. *Id*. at 2251.
289. *Id.*
290. *Id.*
291. *Id*. at 2251-52.
292. *Id*. at 2252.

failing to issue new wetlands regulations in the wake of *SWANCC*, contrary to their promise to do so in the 2003 ANPRM.[293] Citing the *Chevron* doctrine of judicial deference to agency interpretations of ambiguous statutes, Roberts suggested that the Court would have given the Agencies "generous leeway" if they had narrowed their regulations in light of *SWANCC*.[294] He complained, "[r]ather than refining its view of its authority in light of our decision in *SWANCC*, and providing guidance meriting deference under our generous standards, the Corps chose to adhere to its essentially boundless view of the scope of its power. The upshot today is another defeat for the agency."[295] As Justice Kennedy observed, it is questionable whether the three other members of the plurality would have been as generous as Chief Justice Roberts suggests if the Corps had adopted new regulations that included intermittent waters or waters without a surface connection.[296]

If the Corps had adopted regulations that were narrower than its 1977 regulations but broader than the plurality's approach, it is an interesting, but unknowable question whether any members of the plurality opinion would have deferred to these hypothetical regulations. "Malcolm Stewart, the assistant U.S. solicitor general who wrote the government briefs for the two wetland cases defended the Corps" by arguing, "[i]t is more advantageous to do rulemaking now after the Supreme Court has issued more nuanced guidance on the subject."[297] Until Justice Kennedy's *Rapanos* opinion, the Agencies may have been unsure of the Court's approach to the Act's jurisdiction, so Chief Justice Roberts's criticism of their inaction is somewhat unfair.

Chief Justice Roberts was clearly unhappy that the Court failed to provide clear guidance to the lower courts on the scope of the Act, but he also implied that lower courts could find sufficient guidance in many cases by examining both the plurality opinion and Justice Kennedy's opinion. Roberts stated,

> 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 regulated entities will now have to feel their way on a case-by-case basis. This situation is certainly not unprecedented. *See Grutter v. Bollinger*, 539 U.S. 306, 325 . . . (2003) (discussing *Marks v. United States*, 430 U.S. 188 . . . (1977)). What is unusual in this instance, perhaps, is how readily the situation could have been

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

294. *Id*. (citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-45 (1984)). Justice Breyer's dissenting opinion also argued that courts should give *Chevron* deference to any regulations that the Corps wrote to implement the "significant nexus" test. *Id.* at 2266 (Breyer, J., dissenting).

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

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

297. Amena H. Saiyid, *Corps of Engineers Urged to Write Rules to Clarify U.S. Jurisdiction Over Wetlands,* 37 ENV'T REP. (BNA) 1328 (2006).

avoided.[298]

Part IV.C will discuss the Department of Justice's dual approach to whether lower courts should follow the plurality or Justice Kennedy's concurring opinion, as well as scholarly disagreement about how lower courts should apply the *Marks* decision to the *Rapanos* opinions.[299]

E. Justice Breyer's Dissenting Opinion

Although he joined Justice Stevens's dissenting opinion, Justice Breyer also wrote a separate and solo dissent in which he urged the Corps to "speedily" write new regulations.[300] He argued that Congress wanted the Corps "to make the complex technical judgments that lie at the heart of the present cases (subject to deferential judicial review)" rather than have courts "make ad hoc determinations that run the risk of transforming scientific questions into matters of law."[301] Breyer also argued that courts should give *Chevron* deference to any regulations that the Corps wrote to implement the "significant nexus" test.[302]

F. Analysis of Rapanos

1. Not a Revolutionary Decision.—The *Rapanos* Court was one vote short of a major change in the Act's jurisdiction.[303] The plurality opinion would have drastically restricted the scope of the Act by limiting "waters of the United States" to permanent, standing or continuously flowing waters. By excluding most intermittent or ephemeral waters, the plurality would eliminate federal regulation of many rivers and streams, especially in the often dry western states.[304] Furthermore, this approach would have threatened federal regulation of many headwaters and canals even in generally wet Eastern and Midwestern states.[305] The plurality approach would have rejected the Corps' interpretation of the statute since 1975, which both Republican and Democratic administrations have accepted.[306] The plurality interpretation shows the dangers of a textualist approach that relies on a judge deciding which is the "best" dictionary definition from among many possibilities and arrogantly ignores the environmental expertise of the Corps and EPA over the last thirty years.[307] In light of the

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298. *Rapanos*, 126 S. Ct. at 2236 (Roberts, C.J., concurring).

299. *See infra* Part IV.C.

300. *Rapanos*, 126 S. Ct. at 2266 (Breyer, J., dissenting).

301. *Id.*

302. *Id.* (citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984)).

303. Howe Posting, *supra* note 24.

304. *Id.*

305. *Id.*

306. *Id*

307. Bradford C. Mank, *Is a Textualist Approach to Statutory Interpretation Pro-Environmentalist?: Why Pragmatic Agency Decisionmaking Is Better Than Judicial Literalism*, 53 WASH. & LEE L. REV. 1231, 1278-90 (1996) (arguing textualist statutory interpretation undervalues

multiple definitions of "waters," Justice Scalia should have been more willing to consider the possibility that the statute was ambiguous and that deference to the agencies that Congress delegated responsibility for enforcing the Act was appropriate.

The plurality also questioned the scope of congressional authority under the Commerce Clause, although it did not ultimately address that issue because it was not before the Court.[308] Justice Scalia did appropriately observe that a major purpose of the Act is to preserve a primary role for states in implementing its policies,[309] but he ignored the opposition of the 43 states to any significant narrowing of the current regulatory scheme.[310] He appears to take a formalist approach to what he thinks is the appropriate federalist division of responsibilities without looking at the empirical evidence of what most state governments actually want.

Justice Kennedy rejected the two central tests of the plurality opinion, first, the permanent, standing, or continuously flowing waters requirement; and, second, the surface water connection requirement.[311] Although he disagreed with all the other members of the Court for failing to adopt his significant nexus test, Justice Kennedy agreed far more with the dissenting opinion than with the plurality opinion.[312] For example, he explicitly agreed with the dissenting opinion that "waters" as defined in the Act includes intermittently flowing waters and explicitly disagreed with the plurality opinion's exclusion of impermanent waters.[313] Justice Kennedy also rejected the "plurality's second limitation—exclusion of wetlands lacking a continuous surface connection to other jurisdictional waters."[314] He concludes, "In sum the plurality's opinion is inconsistent with the Act's text, structure, and purpose."[315] Justice Kennedy's rejection of the plurality opinion is far more complete than his criticism of the dissenting opinion. He explicitly acknowledges that in most cases, including the two cases below, his significant nexus test is likely to lead to the same result as would occur under the dissenting opinion's complete deference to the Corps'

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agency expertise in addressing complex environmental issues) [hereinafter Mank, *Textualist Approach*].

308. *See supra* note 279 and accompanying text.

309. United States v. Rapanos, 126 S. Ct. 2208, 2223-24 (2006) (Scalia, J., plurality opinion) (quoting 33 U.S.C. § 1251(b) (2000)).

310. *Id.* at 2256 n.4 (Stevens, J., dissenting).

311. *See supra* notes 247-56 and accompanying text.

312. Posting of Amy Howe to SCOTUSblog, http://www.scotusblog.com/movabletype/archives/2006/06/more_on_rapanos.html (June 19, 2006, 13:54 EST) (quoting William Buzbee); Posting of Amy Howe to SCOTUSBlog, http://www. scotusblog.com (June 19, 2006 13:30 EST) (quoting Richard Lazarus); *infra* notes 462-64 and accompanying text.

313. *Rapanos*, 126 S. Ct. at 2243 (Kennedy, J., concurring) ("[T]he dissent is correct to observe that an intermittent flow can constitute a stream" and "the plurality concludes . . . that navigable waters may not be intermittent. The conclusion is unsound.").

314. *Id.* at 2244-46.

315. *Id.* at 2246.

existing regulations.[316]

2. Is the Significant Nexus Test Appropriate?—Justice Kennedy was the only member of the Court to adopt the "significant nexus" test. It is important to understand why neither the plurality nor the dissenting opinion accepted that test. Both the plurality and dissenting opinions argued that *SWANCC*'s use of the term "significant nexus" was less significant than Justice Kennedy in understanding the scope of the Act, although for different reasons. Although his test is relatively vague, Justice Kennedy's significant nexus standard seeks to give meaning to an interpretation of the Act that is broader than traditional navigable waters, but still limits the Act's jurisdiction by requiring a significant connection between jurisdictional wetlands and navigable waters.

a. The plurality criticizes the "significant nexus" test.—The plurality sharply criticized the "significant nexus" test. The plurality argued that Justice Kennedy's "significant nexus" test was flawed because he expanded its meaning far beyond its use in *SWANCC* or what it could have meant in *Riverside Bayview*.[317] Justice Kennedy's "significant nexus" test requires the Corps to "establish . . . on a case-by-case basis" whether wetlands adjacent to non-navigable tributaries "significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"[318] By contrast, the plurality argued, *Riverside Bayview* had "explicitly rejected such case-by-case determinations of ecological significance for the *jurisdictional* question whether a wetland is covered, holding instead that *all* physically connected wetlands are covered."[319] Furthermore, *SWANCC*'s only example of a significant nexus was the abutting wetlands in *Riverside Bayview*.[320] Thus, the plurality reasoned that Justice Kennedy's approach,

> misreads *SWANCC's* "significant nexus" statement as mischaracterizing *Riverside Bayview* to adopt a case-by-case test of ecological significance; and then transfers that standard to a context that *Riverside Bayview* expressly declined to address (namely, wetlands nearby non-navigable tributaries); while all the time *conceding* that this standard does not apply in the context that *Riverside Bayview did* address (wetlands abutting navigable waterways).[321]

A weakness of the plurality's argument is that, while the *SWANCC* decision used *Riverside Bayview* as the only example of a "significant nexus,"[322] the Court's use of the term also suggested that a "significant nexus" between wetlands and

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316. *Id.* at 2250.

317. *Id.* at 2233 (Scalia, J., plurality opinion).

318. *Id.*; *see also id.* at 2248-49 (Kennedy, J., concurring).

319. *Id.* at 2233 (Scalia, J., plurality opinion) (emphasis in original).

320. *Id.*

321. *Id.*

322. Solid Waste Agency of N. Cook County (SWANCC) v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 167-68 (2001) ("It was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes*.").

navigable waters is a fundamental test for whether wetlands are within the Act's jurisdiction, which is Justice Kennedy's interpretation of *SWANCC*.[323]

More importantly, the plurality argued that Justice Kennedy's opinion was fundamentally flawed because his test failed to address the meaning of the Act's text and structure.[324] The plurality argued that Justice Kennedy's "significant nexus" test placed far too much weight on a phrase that appears in only one sentence of one prior Court opinion and is found nowhere in the Act's text.[325] The plurality's argument that Justice Kennedy's opinion places far too much weight on the phrase "significant nexus" is shared by the dissenting opinion.[326] More controversial, is the plurality's argument that a "significant nexus" between waters and wetlands only exists if there is a "physical connection" between them so that they are "as a practical matter *indistinguishable* from waters of the United States."[327] The plurality dismissed Justice Kennedy's test that the Act includes wetlands that significantly affect navigable waters as the linguistic absurdity "that whatever (alone or in combination) *affects* waters of the United States *is* waters of the United States?"[328]

The plurality charged that Justice Kennedy had re-written the statute by ignoring the statute's text and then tried to justify the "significant nexus" standard as serving the Act's ecological purposes, although at the same time ignoring the federalist policies in the statute.[329] The plurality argued that Justice Kennedy had essentially but wrongly set forth an interpretation which means that anything that "affects waters is waters."[330] Although Justice Kennedy claimed that his approach limited the authority of the Corps compared to the dissenting opinion's approach, the plurality feared that the "opaque" significant nexus test would in practice allow the Corps to regulate virtually everything it had under its current regulations.[331]

b. The dissenting opinion disagrees with the "significant nexus" test.—The dissenting opinion disagreed with making the "significant nexus" test the crucial jurisdictional test for the Act but for different reasons than the plurality. Justice Stevens argued,

> I do not share [Justice Kennedy's] view that we should replace regulatory standards that have been in place for over 30 years with a judicially crafted rule distilled from the term "significant nexus" as used in *SWANCC*. To the extent that our passing use of this term has become a statutory requirement, it is categorically satisfied as to wetlands

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323. *Rapanos*, 126 S. Ct. at 2236 (Kennedy, J., concurring)
324. *Id.* at 2234-35 (Scalia, J., plurality opinion).
325. *Id.* at 2234.
326. *See supra* notes 214-23 and accompanying text.
327. *Rapanos*, 126 S. Ct. at 2234 (Scalia, J., plurality opinion) (emphasis in original).
328. *Id.* (emphasis in original).
329. *Id.* at 2234-35.
330. *Id.* at 2235.
331. *Id.* at 2234 n.15.

> adjacent to navigable waters or their tributaries.[332]

The dissenting opinion argued that the *Riverside Bayview* had addressed wetlands both adjacent to navigable waters and their tributaries and, thus, that only isolated waters like those in *SWANCC* were excluded.[333] Additionally, Justice Stevens maintained "it [is] clear that wetlands adjacent to tributaries of navigable waters generally have a 'significant nexus' with the traditionally navigable waters downstream[,]"[334] because of their ecological impacts.[335] Although the dissenting opinion disagreed with requiring the Corps to meet the "significant nexus" test, Justice Stevens optimistically predicted that the test would have little actual impact on restricting the Corps' authority, but would simply create a great deal of unnecessary work for the Corps without changing the ultimate result in most cases.[336]

c. Justice Kennedy's "significant nexus" test is consistent with precedent, but poses practical problems.—The extra work from the Corps that Justice Kennedy's approach would require makes sense only if one interprets the Act as broader than the plurality's physical connection approach, but narrower than the Corps' regulations or the dissenting opinion. Under an "intermediate" interpretation of the statute, the Corps cannot simply regulate any wet area in the United States, but only those that have a significant nexus with navigable waters, as *SWANCC* had suggested in a single sentence.[337] Because so many intermittent streams have important hydrological and ecological impacts, one must be skeptical that Justice Scalia's permanent flowing waters interpretation is the only reasonable interpretation of the Act, especially when inundation or flood is an alternative meaning of the word "waters."[338] Additionally, his second requirement that wetlands have a physical surface connection with navigable waters so that they are "indistinguishable" from those waters again contradicts the scientific reality that many long recognized wetlands are mostly land-like, are frequently filters for navigable waters, and are easily distinguishable from flowing waters.[339]

Justice Kennedy is correct that the dissent ignores "the requirement that the word 'navigable' in 'navigable waters' be given some importance."[340] Although the *Riverside Bayview* decision had stated that navigability was of limited import in determining the Act's scope, the *SWANCC* Court stated that

> it is one thing to give a word limited effect and quite another to give it no effect whatever. The term "navigable" has at least the import of

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332. *Id.* at 2264 (Stevens, J., dissenting).
333. *Id.*
334. *Id.*
335. *Id.*
336. *Id.* at 2264-65.
337. *See supra* notes 232-35, 241-45, 267, 269-77 and accompanying text.
338. *Rapanos*, 126 S. Ct. at 2242-43 (Kennedy, J., concurring).
339. *Id.* at 2244-47.
340. *Id.* at 2247.

> showing us what Congress had in mind as its authority for enacting the [Act]: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.[341]

The dissent tried to limit *SWANCC* to its facts of excluding isolated waters from the Act's jurisdiction,[342] but Justice Kennedy rightly reads the case as also requiring that waters within the Act's jurisdiction have some relationship to navigable waters.[343] Thus, the dissenters' deferential approach to the Corps' regulations in *Rapanos* is inconsistent with *SWANCC*'s emphasis that navigability still matters. It is not surprising that the four *Rapanos* dissenters had all also dissented in *SWANCC*.[344]

In a prior article, the author predicted that the Court would use the "significant nexus" phrase in *SWANCC* as its key jurisdictional test for the Act because it was the only possible standard in that case to give some meaning to the case's statement that navigability still had some "import" in defining the scope of the Act.[345] The First, Fourth, Fifth, Sixth and Tenth Circuits have all used the "significant nexus" test as a key test for determining the Act's jurisdiction, although the Fifth Circuit defined the test much more narrowly than the other circuits to so far include only wetlands adjacent to navigable waters.[346] For example, the Fourth Circuit in *United States v. Deaton* found that there was a sufficient nexus between tributary wetlands and navigable to allow the government to exercise "jurisdiction over the whole tributary system of any navigable waterway," including roadside ditches.[347] The Sixth and Tenth Circuits have explicitly endorsed *Deaton*'s approach to the significant nexus test as applied to tributaries and decisions in the First and Seventh Circuits have praised *Deaton*.[348] The Ninth Circuit in *Baccarat Fremont Developers, LLC v.*

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341. Solid Waste Agency of N. Cook County (SWANCC) v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 172 (2003).

342. *Rapanos*, 126 S. Ct. at 2256-57 (Stevens, J., dissenting).

343. *Id.* at 2242-43 (Kennedy, J., concurring).

344. *See supra* note 136 and accompanying text.

345. Mank, *supra* note 4.

346. United States v. Hubenka, 438 F.3d 1026, 1033-34 (10th Cir. 2006); United States v. Johnson, 437 F.3d 157, 170, 175, 180-81 (1st Cir. 2006), *vacated and remanded*, No. 05-1444, 2006 WL 3072145 (1st Cir. Oct. 31, 2006); United States v. Rapanos, 376 F.3d 629, 639-41 (6th Cir. 2004), *vacated and remanded*; 126 S. Ct. 2208 (2006); *In re* Needham, 354 F.3d 340, 347 (5th Cir. 2003); United States v. Deaton, 332 F.3d 698, 712 (4th Cir. 2003); *infra* notes 347-50, 417 and accompanying text.

347. *Deaton*, 332 F.3d at 712.

348. *Hubenka*, 438 F.3d at 1034; United States v. Rapanos, 339 F.3d 447, 452 (6th Cir. 2003); *see also Johnson*, 437 F.3d at 169-81 (stating that *Deaton* "provides helpful methodological and substantive guidance"); United States v. Gerke Excavating, Inc., 412 F.3d 804, 807 (7th Cir. 2005) ("Whether the wetlands are 100 miles from a navigable waterway 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."), *vacated and remanded*, 126 S. Ct. 2964 (2006),

United States Army Corps of Engineers,[349] however, stated that "case-by-case" application of the "significant nexus" test was not required to find jurisdiction under the CWA, although the Court went on to apply the test anyway and found that it had been met.[350] The fact that several different courts of appeals had emphasized the importance of the "significant nexus" test before Justice Kennedy's *Rapanos* opinion is strong evidence that it is a useful approach to understanding the Court's precedent in *Riverside Bayview* and *SWANCC*.

Adopting the "significant nexus" test has the advantage of making *Rapanos* consistent with *SWANCC*. Conversely, there is a strong argument that Justice Kennedy's approach to the "significant nexus" test will mean a great deal of work for the Corps, but in the end, the use of the test will result in little actual change in how they define wetlands because of Justice Kennedy's expansive interpretation of the test. Justice Kennedy broadly defined the "significant nexus" test in light of the ecological goals of the Act, to "'restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'"[351] Thus, he stated that wetlands are within the Act's jurisdiction if they "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.'"[352] The dissenting opinion emphasized similar ecological factors.[353]

In a prior article, this author argued that the Court should define significant nexus in terms of whether there is a significant hydrological connection between wetlands and navigable waters.[354] A minor hydrological connection would be insufficient. Justice Kennedy agreed that drains, ditches, and streams carrying only a minor volume of water to navigable waters should be excluded from the Act.[355] My approach would have allowed the consideration of ecological factors only as a tie breaker in close cases where the hydrological flow was moderate in volume.[356] Unlike the plurality opinion, my approach would have allowed courts to consider groundwater hydrological connections between wetlands and navigable waters, although I acknowledged that whether groundwater is included within the Act is a close and difficult issue.[357]

The approach in my prior article had both advantages and disadvantages

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modified 464 F.3d 723 (7th Cir. 2006) (per curiam); United States v. Deaton, 332 F.3d 898, 704-12 (4th Cir. 2003).

349. 425 F.3d 1150 (9th Cir. 2005).

350. *Id.* at 1157-58 ("We note that even if the CWA did require demonstration of a significant nexus on a case-by-case basis (which it does not), there is no question that one exists here.").

351. United States v. Rapanos, 126 S. Ct. 2208, 2248 (2006) (Kennedy, J., concurring) (quoting 33 U.S.C. § 1251(a) (2000)).

352. *Id.*

353. *Id.* at 2257 (Stevens, J., dissenting).

354. Mank, *supra* note 4, at 821-22, 883-91.

355. *Rapanos*, 126 S. Ct. at 2249 (Kennedy, J., concurring).

356. Mank, *supra* note 4, at 821-22, 883-91.

357. *Id.* at 888-89.

compared to Justice Kennedy's broad ecological interpretation of *SWANCC*'s significant nexus test. There is an advantage in focusing on only whether there is a significant hydrological connection because a single factor is easier for the Corps and courts to measure than the myriad of issues that are involved in ecological connections. The disadvantage is that ecological factors are a major goal in the Act's general purposes, although not necessarily within its definition of "navigable waters" or "waters of the United States."[358] My approach included the consideration of ecological factors in "close cases." The difference between my test and Justice Kennedy's would be primarily in cases where there is no, or only a minor hydrological connection between a particular wetlands and navigable waters, but where there are still significant ecological impacts between them.[359] An unspoken factor in formulating my approach was my belief that the *SWANCC* decision suggested that a majority of the Court wanted a significantly narrower jurisdiction for the Act than the approach in the Corps 1977 regulations. It was not until *Rapanos* that it became clear that there were significant differences between Justice Kennedy and Justices Scalia and Thomas, who had all joined the *SWANCC* majority.

As the dissent argued, Justice Kennedy's inclusion of ecological factors in his "significant nexus" test will likely mean that the Corps will regulate almost as many wetlands as it does under its current regulations, but that his new test will likely require the Agencies to spend significant time and resources to issue new guidance or regulations justifying the regulation of these same wetlands.[360] In fact, his approach could allow the government to regulate for the first time wetlands that are not adjacent to tributaries that have a significant ecological impact on navigable waters.[361] Additionally, before it issues new regulations or guidance, the Corps and the lower courts will spend significant effort applying the new test on a case-by-case basis in reviewing remanded, appealed and new cases. As Chief Justice Roberts suggests, there may be considerable uncertainty in the lower courts until the Agencies issue new regulations or guidance.[362]

In light of all this extra work and uncertainty, it would have been easier if Justice Kennedy had simply joined the dissenting opinion, but in light of his vote with the *SWANCC* majority opinion, he likely found himself unable to join with the four justices who had dissented in *SWANCC.* In the areas of national power and federalism, Justice Kennedy has taken a centrist position that seeks a middle ground between Justice Scalia's states' rights philosophy and Justice Stevens's support for broad national power.[363] Thus, Justice Kennedy took a middle position using the "significant nexus" test as the foundation of his position.

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358. 33 U.S.C. § 1362(7) (2000).

359. *Id.* at 821-22, 883-91.

360. *Rapanos*, 126 S. Ct. at 2264-65 (Stevens, J., dissenting).

361. *Hoped-For Guidance About Wetlands Fails to Materialize in Closely Watched Case*, SUPREME COURT TODAY, 75 U.S.L.W. 3053 (2006) (reporting Virginia Albrecht stated Kennedy's nexus test allows non-adjacent wetlands to be jurisdictional under Act).

362. *Rapanos*, 126 S. Ct. at 2236 (Roberts, C.J., concurring).

363. Bilionis, *supra* note 26, at 1354, 1376-82.

3. The Contrast Between Textualist and Purposivist Statutory Interpretation.—The most important underlying difference among the three main opinions in *Rapanos* was between the textualist method of statutory interpretation used by Justice Scalia and the purposivist approaches of Justices Kennedy and Stevens.[364] There are three main approaches to statutory interpretation, although individual judges vary to lesser degrees in how they interpret a statute: (1) intentionalism, (2) purposivism, and (3) textualism.[365] First, judges who primarily follow an "intentionalist" approach to interpretation usually examine both a statute's text and its legislative history, along with other contextual evidence in some cases, to determine the original intent of the enacting legislature.[366] Second, judges who adopt a purposivist approach to interpretation are more willing to look beyond the legislature's original intent to assess the statute's goals or purposes because it may be impossible to determine the original legislature's intent or a court must apply a statute to circumstances that the enacting legislature did not anticipate.[367] As discussed below, advocates of textualism have criticized both intentionalism and purposivism as flawed in several respects, especially by giving judges too much discretion to use inferred statutory intent or purposes as license to adopt an interpretation suiting the judge's policy preferences.[368]

Third, judges have always given significant emphasis to a statute's text in discerning its meaning, but since the 1980s, Justice Scalia, along with Justice Thomas and a number of judges on the lower federal courts, have promoted a comprehensive modern textualist approach to interpretation, sometimes referred to as "new textualism,"[369] which argues that courts should interpret a statute by determining how a hypothetical "ordinary reader" of a statute would have understood its words at the time of its enactment to find the statute's meaning.[370] Modern textualists contend that courts should be faithful agents of what the legislature commands in a statute and not examine the often conflicting reasons or intents that led individual legislators to vote for the statute.[371] They usually

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364. Dorf, *supra* note 20.

365. William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 354 (1990); Bradford C. Mank, *Textualism's Selective Canons of Statutory Construction: Reinvigorating Individual Liberties, Legislative Authority and Deference to Executive Agencies*, 86 KY. L.J. 527, 528-42 (1998) [hereinafter Mank, *Textualism*].

366. Eskridge & Frickey, *supra* note 365, at 326-27; Mank, *Textualism*, *supra* note 365, at 529.

367. WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 25-34 (1994); Mank, *Textualism*, *supra* note 365, at 529.

368. Bradford C. Mank, *Legal Context: Reading Statutes in Light of Prevailing Legal Precedent*, 34 ARIZ. ST. L.J. 815, 819 (2002) [hereinafter Mank, *Context*]; Mank, *Textualism*, *supra* note 365, at 535-38.

369. William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990)

370. ANTONIN SCALIA, A MATTTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 16-23 (1997); Mank, *Textualism*, *supra* note 365, at 533-34.

371. Mank, *Context*, *supra* note 368, at 819; Mank, *Textualism*, *supra* note 365, at 533-37.

oppose the use of legislative history to determine statutory meaning because such material is not presented for the approval of the President as is required by the Constitution and since it is frequently written by a small number of legislators or their staff and may not be reflective of the entire legislature.[372] Additionally, modern textualist judges often argue that judges have sometimes misused legislative history by selectively using snippets to justify personal policy preferences.[373] Textualist judges will consider explicit legislative purposes in a statute, as Justice Scalia did in discussing the Act's policy of placing primary responsibility for planning the development and use of land and water resources in the hands of the states,[374] but they are usually suspicious of judges who emphasize legislative purpose because purposivism gives judges broad discretion to consider legislative history, broader contextual material, or inferred legislative intent to find a statute's purpose.[375] Although there are differences among them in the extent to which they consider non-textual material, textualist judges normally place greater weight on the meaning of a statute's text than any other factor.

Before considering criticisms of textualism, it is important to recognize that all judges are "presumptive textualists" who "follow relatively clear statutory language absent some strong reason to deviate from it."[376] Critics of textualism often argue that statutory language is ambiguous or confused more often than Justice Scalia or other textualists are willing to concede and therefore that it is helpful to consider additional information such as legislative history to understand its meaning, intent, or purpose.[377] Textualists often ignore or undervalue the statutory interpretations of administrative agencies in understanding the meaning of a statute that Congress delegated for an agency to enforce.[378] Professor Eskridge has accused Justice Scalia of practicing a "dogmatic textualism" that stubbornly rejects non-textualist evidence about a statute's meaning.[379]

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372. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 452-53 (1987) (Scalia, J., concurring); SCALIA, *supra* note 370, at 29-37; Mank, *Textualism*, *supra* note 365, at 535-37.

373. *See Cardoza-Fonseca*, 480 U.S. at 452-53 (Scalia, J., concurring) (arguing that if statutory text has "plain meaning" it is unnecessary to examine statute's legislative history); SCALIA, *supra* note 370, at 29-37 (criticizing legislative history as unreliable and arguing that it is inappropriate to use such history to seek for statute's intent; instead, judges should focus on statute's meaning); Mank, *Textualism*, *supra* note 365, at 535-37.

374. United States v. Rapanos, 126 S. Ct. 2208, 2223-25 (2006) (Scalia, J., plurality opinion) (citing 33 U.S.C. § 1251(b) (2000)).

375. Mank, *Context*, *supra* note 368, at 819; Mank, *Textualism*, *supra* note 365, at 537-38.

376. Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 408 n.119 (1993).

377. *See* Mank, *Textualism*, *supra* note 365, at 540-41 (arguing text alone is not best guide to statutory meaning); Mank, *Textualist Approach*, *supra* note 307, at 1267-78 (considering legislative history leads to better understanding of statutory meaning).

378. *See* Mank, *Textualist Approach*, *supra* note 307, at 1278-90.

379. ESKRIDGE, *supra* note 367, at 120.

Faithful to his approach to statutory interpretation, Justice Scalia's plurality opinion focused on the meaning of the statute's text in light of the common meaning of the words in a dictionary.[380] He arrogantly assumed that he could find the Act's meaning in this way and dismissed the possibility that the text was ambiguous enough to justify the Corps' interpretation.[381]

Commentators have identified Justices Stevens and Breyer as the current justices most identified with a purposivist approach to statutory interpretation.[382] Accordingly, it is not surprising that Justice Stevens's dissenting opinion focused on the Act's underlying purposes and that Justice Breyer joined that opinion.[383] Based on the Act's broad purposes and Congress' intent to give the Corps wide discretion to achieve those purposes, Justices Stevens's dissenting opinion argued that the Corps' wetlands regulations were justified in claiming jurisdiction over all tributary wetlands.[384]

In 1994, Professor Eskridge characterized Justice Kennedy's approach to statutory interpretation as "lenient textualism."[385] Compared to Justice Scalia, Justice Kennedy is more willing to consider legislative history and other factors besides a statute's text.[386] In *Rapanos*, Justice Kennedy recognized that the Court could not find the precise intent of the Congress that enacted the 1972 Act in using the terms "navigable waters" and "waters of the United States" to describe the Act's jurisdiction because those words do not provide the type of clear definition that was possible when the United States regulated only actually navigable waters. Although the scope of the Act's jurisdiction is not precise, he argued, however, that the Act's use of the term "navigable waters" limited its jurisdictional scope to waters having a "significant nexus" to navigable waters and that the Corps' regulations were deficient because they did not demonstrate the existence of such a nexus for all the wetlands that it regulated.[387] Because it was not possible to ascertain the precise intent of Congress as to which waters are covered by the Act, he interpreted the term "significant nexus" in light of the Act's broad ecological purposes.[388] Justice Kennedy's approach was closer on the whole to Justice Stevens's dissenting opinion because both focused on the statute's purposes more than its ambiguous text, although they did not agree on

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380. *See generally supra* notes 364-79 and accompanying text.

381. *See supra* notes 364-79 and accompanying text.

382. *See, e.g.*, Clinton v. City of New York, 524 U.S. 417, 428-29 (1998) (interpreting statute in light of its purpose); Lewis v. United States, 523 U.S. 155, 160 (1998) (same); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 3 n.4 (2001) (stating Justices Stevens and Breyer often take a purposivist approach).

383. *See supra* notes 195-31 and accompanying text.

384. *See supra* notes 195-31 and accompanying text.

385. ESKRIDGE, *supra* note 367, at 120.

386. Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 610 n.4, 610-12 (1991) (considering legislative history); Mank, *Context*, *supra* note 368, at 826.

387. United States v. Rapanos, 1265 S. Ct. 2208, 2236 (2006) (Kennedy, J., concurring); *see also supra* notes 263-77 and accompanying text.

388. *See supra* notes 269, 277 and accompanying text.

the amount of deference owed to the Corps' interpretation.

IV. THE FUTURE

A. How Will the Lower Courts Apply Rapanos?

1. United States v. Chevron Pipe Line Company.—In late June 2006, shortly after the *Rapanos* decision, in *United States v. Chevron Pipe Line Co.*,[389] the U.S. District Court for the Northern District of Texas criticized the "significant nexus" test in *Rapanos* as failing to provide guidance because the test was "vague" and "subjective."[390] Instead, the district court followed the Fifth Circuit's prior precedent giving a narrow interpretation of the scope of the Act in an opinion that was closer to the plurality opinion than Justice Kennedy's opinion. The court held the defendant Chevron Pipe Line Company is not subject to CWA or Oil Pollution Act (OPA)[391] civil penalties that the U.S. Government sought to impose for an oil spill into the dry channel of an intermittent stream because the waters in question did not have a significant nexus with navigable waters subject to jurisdiction under the statutes.[392] The streams were dry at the time that a leaking Chevron pipeline spilled 3000 barrels of crude oil into an unnamed intermittent channel/tributary that is usually dry unless there is a significant rainfall event.[393] The unnamed channel/tributary joins the intermittent Ennis Creek, which is dry unless there is rainfall, approximately 500 feet from the location of the spill; Ennis Creek then flows 17.5 river miles into the intermittent Rough Creek, which creek flows 23.8 river miles to its confluence with the Double Mountain Fork of the Brazos River.[394]

U.S. District Judge Cummings stated that the Supreme Court's decision in *Rapanos* had "failed to reach a consensus of a majority as to the jurisdictional boundary of the CWA."[395] He observed, "Justice Kennedy wrote his own concurring opinion and advanced an ambiguous test-whether a 'significant nexus' exists to waters that are/were/might be navigable."[396] The district court criticized the test as unworkable. "This test leaves no guidance on how to implement its vague, subjective centerpiece. That is, exactly what is 'significant' and how is a 'nexus' determined?"[397] By contrast, Judge Cummings discussed the plurality opinion's view that "the waters of the United States" as including

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389. 437 F. Supp. 2d 605 (N.D. Tex. 2006).

390. *Id.* at 613.

391. The OPA's jurisdiction is defined by the same "navigable waters" standard as the Clean Water Act. *See* 33 U.S.C. § 2701(21) (2000) (defining "navigable waters" as "the waters of the United States, including the territorial sea").

392. *Chevron Pipe*, 437 F. Supp. 2d at 608-15.

393. *Id.* at 607.

394. *Id.* at 608.

395. *Id.* at 613.

396. *Id.*

397. *Id.*

only relatively permanent, standing or continuously flowing bodies of water without any criticism, unlike his critical evaluation of Justice Kennedy's "significant nexus" test. The district court stated, "the plurality looked to the statutory wording of the CWA and gave it its plain and literal meaning-a constructionist viewpoint." [398]

Judge Cummings concluded, "[b]ecause Justice Kennedy failed to elaborate on the 'significant nexus' required, this Court will look to the prior reasoning in this circuit."[399] In *In re Needham*,[400] the Fifth Circuit stated that "[t]he 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."[401] In deciding whether an oil spill affected "navigable waters," the *Needham* court concluded, "the proper inquiry is whether . . . the site of the farthest traverse of the spill, is *navigable-in-fact* or adjacent to an open body of navigable water."[402] Although the district court did not mention this statement, the *Needham* court had also stated, "the term 'adjacent' cannot include every possible source of water that eventually flows into a navigable-in-fact waterway. Rather, adjacency necessarily implicates a 'significant nexus' between the water in question and the navigable-in-fact waterway."[403] The district court in *Chevron Pipe* determined, "as a matter of law in this circuit, the connection of generally dry channels and creek beds will not suffice to create a 'significant nexus' to a navigable water simply because one feeds into the next during the rare times of actual flow."[404] The district court's and presumably the Fifth Circuit's approach is closer to the *Rapanos* plurality opinion than Justice Kennedy's opinion.

Following *Needham* and the *Rapanos* plurality opinion, the district court found that the intermittent streams at issue in its case were not within the jurisdiction of the CWA or OPA.[405] Addressing Chevron's motion for summary judgment, the court stated "this Court must look to see if there is a genuine issue of material fact as to whether the farthest traverse of the spill is a navigable-in-fact water or adjacent to an open body of navigable water."[406] The government argued that during an average month there would be enough rain to cause the oil deposited in the intermittent stream to flow into the Brazos River.[407] The court rejected this "speculation" as failing to show "whether any oil from the spill actually reached 'the navigable waters of the United States'—as that term is

398. *Id.*
399. *Id.*
400. 354 F.3d 340 (5th Cir. 2003).
401. *Id.* at 345.
402. *Id.* at 346 (emphasis added).
403. *Id.* at 347.
404. *Chevron Pipe*, 437 F. Supp. 2d at 613.
405. *Id.* at 613-15.
406. *Id.* at 613.
407. *Id.* at 614-15.

defined in *Needham* or in the Supreme Court's plurality opinion in *Rapanos*."[408] The district court treated the *Needham* opinion and *Rapanos* plurality opinion as the operative law rather than Justice Kennedy's opinion. The court did refer to the "significant nexus" test in finding that the stream was not within the jurisdiction of the OPA or CWA, but it defined that nexus in light of the Fifth Circuit's approach to the jurisdiction of the two statutes. "Thus, absent actual evidence that the site of the farthest traverse of the spill is *navigable-in-fact* or adjacent to an open body of navigable water, the Court finds that a 'significant nexus' is not present under the law of this circuit."[409]

Because Chevron argued that there had been no rain at the time of the spill and the government produced no evidence of any rainfall, the district court granted Chevron's motion for summary judgment.[410] In its conclusion, the court emphasized the *Rapanos* plurality opinion, stating, "based upon the arguments contained in Chevron's Brief . . . as well as the Fifth Circuit's reasoning contained in *In re Needham* and the Supreme Court's plurality opinion in *Rapanos v. United States*, this Court finds that the subject discharge of oil did not reach navigable waters of the United States."[411] In a footnote, the court "conclude[d] that the United States has failed to establish a 'significant nexus' with competent summary judgment evidence."[412]

The district court relied more on the plurality opinion than Justice Kennedy's significant nexus test. Indeed, the court dismissed the significant nexus test as unworkable. The court implied that the Fifth Circuit's *Needham* opinion was closer to the plurality opinion

The *Chevron Pipe* decision may have little influence in other circuits that do not have the Fifth Circuit's unique history of narrowly construing the Act. For example, the Tenth Circuit in *Hubenka* explicitly disagreed with the Fifth Circuit's approach, stating, "The Supreme Court's opinion in *SWANCC* does not compel such a narrow interpretation of the phrase 'significant nexus.'"[413] The First Circuit has also explicitly rejected the Fifth Circuit's approach.[414] As is discussed in the next section, the law in other circuits is also inconsistent with the Fifth Circuit's narrow interpretation of the Act.

2. The First, Fourth, Sixth, Seventh, Ninth, and Tenth Circuits Will Likely Follow Justice Kennedy's Approach.—Citing *Marks*, the Ninth Circuit in *Healdsburg* stated that "Justice Kennedy, constituting the fifth vote for reversal, concurred only in the judgment and, therefore, provides the controlling rule of law."[415] Similarly, the Seventh Circuit in *Gerke* also cited *Marks* in concluding

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408. *Id.* at 614.

409. *Id.* at 615 (emphasis in original).

410. *Id.* at 614-15.

411. *Id.* at 615.

412. *Id.* at 615 n.15.

413. United States v. Hubenka, 438 F.3d 1026, 1033-34 (10th Cir. 2006).

414. United States v. Johnson, 437 F.3d 157, 170 n.16 (1st Cir. 2006), *vacated and remanded*, No. 05-1444, 2006 WL 3072145 (1st Cir. Oct. 31, 2006).

415. N. Cal. River Watch v. City of Healdsburg, 457 F.3d 1023, 1029 (9th Cir. 2006). The

that Justice Kennedy's test should be followed except in the rare case when the plurality's approach would give greater federal jurisdiction under the CWA.[416] Based on past precedent, the First, Fourth, Sixth, and Tenth Circuits will also more likely follow Justice Kennedy's "significant nexus" test rather than the plurality opinion because these circuits had limited *SWANCC* to its facts and allowed the Corps to regulate tributary wetlands or similar wetlands if there is any hydrological connection between them and navigable waters.[417] For example, in *Deaton*, the Fourth Circuit found a sufficient hydrological connection between wetlands adjacent to a manmade ditch that flowed over several miles into tributaries that eventually reached a navigable river.[418]

The *Deaton* court's approach of approving the Corps broad regulation of wetlands next to nonnavigable tributaries has been adopted in the Sixth and Tenth Circuits and has also strongly influenced decisions in the First and Seventh Circuits.[419] Citing *Deaton*, the Sixth Circuit in *Rapanos* found jurisdictional wetlands even though water from them had to travel twenty miles to reach navigable waters and in *Carabell* the Circuit found jurisdiction over wetlands

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Healdsburg court also stated that *Rapanos* had narrowed *Riverside Bayview* by requiring the Government to prove that even wetlands adjacent to a navigable river have a "significant nexus" with that river. *Id.* at 1030. That conclusion is a misreading of *Rapanos*, which did not change *Riverside Bayview*'s holding that wetlands adjacent to a navigable river are always within the Act's jurisdiction. E-mail from Jonathan H. Adler to envlawprofessors (Aug. 11, 2006) (on file with author); E-mail from Steve Johnson, to envlawprofessors (Aug. 11, 2006) (on file with author).

416. United States v. Gerke, 464 F.3d 723, 725 (7th Cir. 2006) (per curiam).

417. Before *Rapanos*, six of the circuit courts of appeal limited *SWANCC* to its facts and read the Act's jurisdiction broadly to include wetlands near non-navigable waters that eventually flow into navigable waters. *See, e.g.*, *Hubenka*, 438 F.3d at 1033-34; *Johnson*, 437 F.3d at 170, 175, 180-81 (allowing Corps to regulate wetlands on cranberry farm); United States v. Gerke, 412 F.3d 804 (7th Cir. 2005), *vacated and remanded*, 126 S. Ct. 2964 (2006), *modified* 464 F.3d 723 (7th Cir. 2006) (per curiam); United States v. Rapanos, 376 F.3d 629, 634 (6th Cir. 2004), *vacated and remanded* 126 S. Ct. 2208 (2006); United States v. Deaton, 332 F.3d 698, 702 (4th Cir. 2003) (holding Corps has jurisdiction over wetlands adjacent to non-navigable drainage ditch, which is eventual tributary to navigable waters); Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526, 528-34 (9th Cir. 2001); Robin Kundis Craig, *Beyond* SWANCC: *The New Federalism and Clean Water Act Jurisdiction*, 33 ENVTL. L. 113, 132-34 (2003) ("The emerging majority rule among the federal courts and EPA ALJs is that any surface water connection to waters that are navigable in the traditional sense—however intermittent, convoluted, or human-made the connection might be—is sufficient to confer CWA jurisdiction over a water body."); Mank, *supra* note 4, at 866-79 (discussing cases reading *SWANCC* narrowly and Clean Water Act broadly).

418. *See Deaton*, 332 F.3d at 702.

419. *See Hubenka*, 438 F.3d at 1034; United States v. Rapanos, 339 F.3d 447, 452 (6th Cir. 2003); *see also Johnson*, 437 F.3d at 169-81; *Gerke*, 412 F.3d at 807 ("Whether the wetlands are 100 miles from a navigable waterway 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."); *Rapanos*, 339 F.3d at 450-53; *Deaton*, 332 F.3d at 704-12.

that are usually separated from hydrological waters by a berm.[420] In *Hubenka*, the Tenth Circuit concluded that the Corps had jurisdiction over the defendants' filling and building dikes in the nonnavigable tributary of a navigable river.[421] In *Gerke*, the Seventh Circuit held that the Corps had jurisdiction over wetlands next to a nonnavigable man-made ditch that "runs into a nonnavigable creek that runs into the nonnavigable Lemonweir River, which in turn runs into the Wisconsin River, which is navigable."[422] Stating that *Deaton* "provides helpful methodological and substantive guidance,"[423] the First Circuit in *Johnson* held the Corps had jurisdiction over wetlands that are located near cranberry bogs on a farm because the wetlands are hydrologically connected to the navigable Weweantic River through nonnavigable tributaries, but the First Circuit vacated this decision in the wake of *Rapanos* and remanded the case to the district court.[424]

Justice Scalia, in his plurality opinion, sharply disagreed with cases adopting the mere hydrological connection approach because many of the "tributaries" are intermittent, stating:

> Even after *SWANCC*, the lower courts have continued to uphold the Corps' sweeping assertions of jurisdiction over ephemeral channels and drains as "tributaries." For example, courts have held that jurisdictional "tributaries" include the "intermittent flow of surface water through approximately 2.4 miles of natural streams and manmade ditches (paralleling and crossing under I-64)," *Treacy v. Newdunn Assoc.*, 344 F.3d 407, 410 (C.A.4 2003); a "roadside ditch" whose water took "a winding, thirty-two-mile path to the Chesapeake Bay," *United States v. Deaton*, 332 F.3d 698, 702 (C.A.4 2003); irrigation ditches and drains that intermittently connect to covered waters, *Community Assn. for Restoration of Environment v. Henry Bosma Dairy*, 305 F.3d 943, 954-955 (C.A.9 2002); *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 534 (C.A.9 2001); and (most implausibly of all) the "washes and arroyos" of an "arid development site," located in the middle of the desert, through which "water courses . . . during periods of heavy rain," *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1118 (C.A.9 2005).[425]

The Seventh and Ninth Circuits have already endorsed Justice Kennedy's "significant nexus" test as the standard for determining federal jurisdiction under the CWA, except in the rare case where the plurality's approach would provide greater jurisdiction.[426] In light of their prior precedent broadly interpreting the

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420. *See supra* notes 239-40, 287-90 and accompanying text.

421. *Hubenka*, 438 F.3d at 1034-36.

422. *Gerke*, 412 F.3d at 805-08.

423. *Johnson*, 437 F.3d at 170.

424. *Id.* at 160-64, 169-81.

425. Rapanos v. United States, 126 S. Ct. 2208, 2217-18 (2006).

426. *See supra* notes 415-16 and accompanying text.

Act's jurisdiction over tributaries, the First, Fourth, Sixth and Tenth Circuits are more likely to follow Justice Kennedy's "significant nexus" test rather than the plurality opinion's approach.[427]

B. Will the Corps Issue New Regulations?

On July 5, 2006, the Corps regulatory branch chief Mark Sudol sent via e-mail an "interim guidance" to Corps district officials stating that the Corps and EPA planned to issue joint guidance "in the near future" that would clarify the Agencies' CWA jurisdiction to make it consistent with *Rapanos*.[428] The Sudol guidance stated that the Agencies may

> make some changes in how we describe and document the justifications that underlie some of our CWA jurisdictional determinations (JDs). In other words, the tests that we cite and the facts that we document in some of our JD administrative records will probably change somewhat, to insure that our JDs reflect the Supreme Court's most recent legal tests for asserting CWA jurisdiction.[429]

This language suggests that the Agencies may make only moderate changes to justify how they currently make CWA jurisdictional determinations rather than the sweeping changes limiting their jurisdiction that Justice Scalia would prefer.[430] The Sudol guidance asked Corps personnel not to take any public position "in court pleadings or in any sort of dealings with outside parties" on the scope of CWA jurisdiction until the agencies issued their joint guidance.[431] Ann Klee, then general counsel for the EPA, similarly urged EPA attorneys not to use *Rapanos* in their pleadings until the Agencies issue new guidance "in the near future."[432] The Sudol guidance also asked staff to restrict their enforcement actions and permit authorizations to traditional navigable waters unless they receive authorization from headquarters.[433]

On August 1, 2006, before a Senate subcommittee hearing on *Rapanos*,

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427. *See supra* notes 417-24 and accompanying text.

428. Memorandum from Mark Sudol to Various Army Corps Staff, Interim Guidance on the *Rapanos* and *Carabell* Supreme Court Decision (July 5, 2006) (on file with author) [hereinafter Sudol Memorandum]; Amena H. Saiyid, *Corps of Engineers, EPA Preparing Guidance In Wake of U.S. Supreme Court Decision*, 37 ENV'T REP. (BNA) 1520 (2006) (discussing Sudol "interim guidance").

429. Sudol Memorandum, *supra* note 428, at 1.

430. Matt Shipman, *Memo Hints At Limited EPA, Corps Clean Water Changes After* Rapanos *Ruling*, INSIDE EPA, June 10, 2006, *available at* http://www.aswm.org/wbn/epa_rapanos_memo.pdf.

431. Sudol Memorandum, *supra* note 428, at 1-2.

432. Andrew S. Neal, *Federal Lawyers Discuss Development of Law After Supreme Court Decision in* Rapanos, 37 ENV'T REP. (BNA) 1521 (2006) (quoting Ann Klee, general counsel for the EPA).

433. Sudol Memorandum, *supra* note 428, at 2-3.

Benjamin Grumbles, EPA Assistant Administrator for Water, and Army Assistant Secretary for Civil Works John Paul Woodley, Jr. presented a joint written statement that the Agencies were "working quickly" to issue joint interim guidance in the near future to address the CWA jurisdictional issues raised by the decision and might issue additional guidance if it were needed to refine the guidance.[434] Grumbles stated that "[w]e have no schedule, but we expect to issue [the guidance] as soon as possible."[435] Woodley stated that the guidance would address how to apply the "significant nexus" standard.[436] In response to Sen. Lisa Murkowski's (R-AK) request that the Agencies issue new regulations, rather than unenforceable guidance, Grumbles and John C. Cruden, Deputy Assistant Attorney General for the Environment and Natural Resources Division, replied that the agencies were considering regulations, but that issuing guidance would take less time and, therefore, would provide regulatory clarity sooner than issuing regulations.[437]

On September 26, 2006, the Corps published in the Federal Register a proposal to reissue and modify its nationwide wetland permits ("NWPs") beginning in 2007 and solicited public comment on the proposal.[438] The proposal briefly observed that the Supreme Court's *Rapanos* decision raised questions about its jurisdiction over wetlands that would be addressed on a case-by-case basis by the DOJ and by any future guidance issued by the DOJ and other agencies.[439] Implicitly rejecting the "permanent stream" approach of the plurality opinion, the Corps stated that "[w]e are proposing to provide greater protection for ephemeral streams" by applying the 300 linear foot limit for loss of stream bed to ephemeral streams; the 2002 NWPs applied the 300 linear foot limit only to perennial and intermittent stream beds.[440] The Corps proposed expansion of its jurisdiction in the proposed 2007 NWPs program suggests that the forthcoming guidance on wetlands jurisdiction may also take an expansive view of that jurisdiction.

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434. *Hearing Concerning Recent Supreme Court Decisions Dealing with the Clean Water Act Before the S. Subcomm. on Fisheries, Wildlife and Water of the S. Comm. on Environment and Public Works*, 109th Cong. 13-14 (2006) (statement of Benjamin Grumbles, EPA Assistant Administrator for Water, and John Paul Woodley, Jr., Army Assistant Secretary for Civil Works).

435. Amena H. Saiyid, *EPA, Corps of Engineers to Issue Guidance on* Rapanos *Decision 'As Soon as Possible,'* 37 ENV'T REP. (BNA) 1626 (Aug. 4, 2006).

436. *DOJ Plan for Dual Wetlands Jurisdiction Test Wins Cautious Backing*, INSIDE THE EPA (Aug. 4, 2006), *available at* 2006 WLNR 13395727, at *4 [hereinafter *DOJ Plan for Dual Wetlands Jurisdiction*].

437. *Id.*

438. Proposal to Reissue and Modify Nationwide Permits, 71 Fed. Reg. 56,258 (Sept. 26, 2006).

439. *Id.* at 56,261.

440. *Id.*

C. The Department of Justice Adopts Justices Stevens's Approach of Following Either the Plurality or Justice Kennedy's Concurrence

In its Motion for Remand in the *Rapanos* case, the DOJ agreed with Justice Stevens's dual approach that the government should have jurisdiction over wetlands if the wetlands at issue meet either the plurality's test or Justice Kennedy's "significant nexus" standard because the four dissenting justices would have affirmed the government's jurisdiction and, hence, only one additional vote is needed for the government to prevail.[441] The Motion stated:

> When no majority opinion exists in a decision of the Supreme Court, controlling legal principles may derive from those principles espoused by five Justices. See Marks v. United States, 430 U.S. 188, 193-94 (1977); cf. LULAC v. Perry, 126 S. Ct. 2594, 2607 (2006). Thus, regulatory jurisdiction under the Clean Water Act (CWA) exists over a wetland if either the plurality's or Justice Kennedy's test is satisfied. 126 S. Ct. at 2265 (Stevens, J., dissenting).[442]

In a lengthy and thoughtful opinion addressing the meaning of *Marks*, the First Circuit in *Johnson* adopted Justice Stevens's dual approach; a Florida federal district court has also endorsed his dual approach.[443]

There is likely to be criticism of the DOJ's dual standard approach. Some environmentalists are unhappy with the dual standard because they believe that it will sow confusion in the lower courts.[444] Professor Adler interprets *Marks* as only authorizing lower courts to consider a plurality opinion and concurring opinions, but not dissenting opinions.[445]

In *Marks*, the Court stated, "When 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.'"[446] There is disagreement about how to apply the *Marks* rule when the plurality and concurring opinions differ substantially.[447] In fact, the Court has acknowledged that it and lower courts in some cases have struggled to apply *Marks*.[448]

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441. Motion for Remand to the District Court for Further Proceedings Regarding Regulatory Jurisdiction, In the United States Court of Appeals for the Sixth Circuit, United States v. Rapanos, No. 03-1489 (July 31, 2006), at 3 (on file with author).

442. *Id.*

443. *See* United States v. Johnson, No. 05-1444, 2006 WL 3072145, at *6-20 (1st Cir. Oct. 31, 2006); *see also* United States v. Evans, No. 3:05CR159J32HTS, 2006 WL 2221629, at *19 (M.D. Fla. Aug. 2, 2006).

444. *DOJ Plan for Dual Wetlands Jurisdiction*, *supra* note 436.

445. *See infra* notes 457-60 and accompanying text.

446. Marks v. United States, 430 U.S. 188, 193-94 (1977); *see also* Posting of Amy Howe to SCOTUSBlog, http://www. scotusblog.com (June 19, 2006 13:30 EST) (quoting Richard Lazarus).

447. *See infra* notes 448-67 and accompanying text.

448. *See* Grutter v. Bollinger, 539 U.S. 306, 325 (2003); *see also* Nichols v. United States, 511

Some argue that the *Marks* case should not apply to a case like *Rapanos* because there is little overlap and hence no "common denominator" between the concurring and plurality opinions.[449] The *Chevron Pipe* decision did not cite Marks, but it stated that "the Supreme Court [in *Rapanos*] failed to reach a consensus of a majority as to the jurisdictional boundary of the CWA."[450] The Ninth Circuit in *Healdsburg*, however, assumed that the *Marks* rule applied to Justice Kennedy's opinion because it "constitute[ed] the fifth vote for reversal, concurred only in the judgment and, therefore, provides the controlling rule of law."[451] Similarly, the Seventh Circuit in *Gerke* also cited *Marks* and considered the votes of the four dissenting justices in concluding that Justice Kennedy's test should be followed except in the rare case when the plurality's approach would give greater federal jurisdiction under the CWA.[452] Additionally, a Florida federal district court found that there was no common denominator between the plurality opinion and Justice Kennedy's opinion in *Rapanos* and hence no "rule" under *Marks*, but it still endorsed Justice Stevens's dual approach.[453]

Additionally, some lower courts consider not just the overlap between the concurring and the plurality opinions, but also examine other concurring or dissenting opinions.[454] These lower courts seek to find an "implicit agreement" or a "common denominator" between opinions.[455] Under that approach, lower courts could consider the substantial overlap between Justice Kennedy's concurring opinion and the Stevens dissent. The Seventh Circuit in *Gerke* explicitly considered the votes of the four dissenting justices in concluding that Justice Kennedy's test should be followed except in the rare case when the plurality's approach would give greater federal jurisdiction under the CWA.[456]

In a statement presented at the August 1, 2006 Senate subcommittee hearing

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U.S. 738, 745-46 (1994).

449. Posting of Hans Bader to SCOTUSBlog, http://www.scotusblog.com (June 19, 2006 14:00 EST) (arguing *Marks* is inapplicable because Kennedy and the plurality opinion do not "share a common denominator in their approach to deciding the case").

450. United States v. Chevron Pipe Line Co., 437 F. Supp. 2d 605, 613 (N.D. Tex. 2006).

451. N. Cal. River Watch v. City of Healdsburg, 457 F.3d 1023, 1029 (9th Cir. 2006).

452. *See* United States v. Gerke Excavating, Inc., 464 F.3d 723, 724-25 (7th Cir. 2006).

453. *See* United States v. Evans, No. 3:05CR159J32HTS, 2006 WL 2221629 (M.D. Fla. Aug. 2, 2006).

454. *See, e.g.*, DeStefano v. Emergency Housing, 247 F.3d 397, 418-19 (2d Cir. 2001); Breyer v. Meissner, 214 F.3d 416, 424-25 (3d Cir. 2000); ACLU v. Schundler, 168 F.3d 92, 103-04 (3d Cir. 1999); Papike v. Tambrands, Inc., 107 F.3d 737, 740-41 (9th Cir. 1997); Tyler v. Bethlehem Steel Corp., 958 F.2d 1176, 1182-83 (2d Cir. 1992); *see* E-mail from Richard Lazarus to ENVLAWPROFESSORS (listserv of environmental law professors, moderated by Professor John Bonine University of Oregon, Bowerman Environmental Law Center) (June 20, 2006) (on file with author) [hereinafter Lazarus E-Mail].

455. Mark Alan Thurmon, Note, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 DUKE L.J. 419, 428-29 (1992); *see* Lazarus E-mail, *supra* note 454.

456. 464 F.3d 723, 725 (7th Cir. 2006) (per curiam).

on *Rapanos*, Professor Adler interpreted the *Marks* decision to require lower courts to follow those portions of the *Rapanos* decision where the plurality opinion and Justice Kennedy agree and to forbid lower courts from considering the dissenting opinion.[457] He argued that the plurality opinion and Justice Kennedy's opinion agreed that the Act's jurisdiction is limited by the term "navigable waters" and that the Corps' current regulations are too broad and that those points of agreement are the only binding portions of *Rapanos* under the *Marks'* framework.[458] Because nothing in a dissenting opinion is part of the judgment of the court or is legally binding, Adler argues that nothing in a dissent can be part of the Court's holding under the *Marks* rule that the holding of a fragmented Court can be found within the opinions of "those Members who concurred in the judgments on the narrowest grounds."[459] Accordingly, he concludes that lower courts may not treat those areas where Justice Stevens's dissent agrees with Justice Kennedy's opinion as a "'holding'" of the Court.[460]

Professor Buzbee, by contrast, argues that *Marks* allows lower courts to consider the numerous points upon which the dissenting opinion and Justice Kennedy's opinion form a five vote majority.[461] Professor Buzbee contends that Justice Kennedy's opinion agrees far more with the dissenting opinion than with the plurality opinion.[462] This Article comes to the same conclusion.[463] Because Justice Kennedy's opinion coincides more with the dissenting opinion, Professor Buzbee reasons that it is appropriate to treat these two opinions as the majority of the Court under the *Marks* standard. He states:

> In the United States judicial system, five aligned votes by Supreme Court justices make a binding precedent. As indicated by the brief concurring opinion of Chief Justice Roberts, if the Court is splintered, the narrowest opinion, here Justice Kennedy's, would be the key. As the Chief Justice states through his citation to *Marks v. Whitney*, the question is whether a "single rationale explaining the result enjoys the assent of five Justices." Here, Justice Kennedy's concurring *Rapanos* opinion shares substantial overlap with the dissenters' approaches. The dissenters would have deferred even more than Justice Kennedy to regulators' judgments, but in all parts of their opinion, the dissenters would protect waters at least to the extent set forth by Justice Kennedy. They

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457. *Hearing Concerning Recent Supreme Court Decisions Dealing with the Clean Water Act Before the S. Subcomm. on Fisheries, Wildlife and Water of the S. Comm. on Environment and Public Works*, 109th Cong. 4-5 (2006) (written statement of Jonathan H. Alder, Deputy Assistant Attorney General Environment and Natural Resources Division), *available at* http://epw.senate.gov/109th/Adler_Testimony.pdf.

458. *Id.* at 5.

459. *Id.*

460. *Id.*

461. Buzbee Statement, *supra* note 25, at 4-5.

462. *Id.*

463. *See supra* notes 24-25 and accompanying text.

> repeatedly and explicitly agree with the rationales for federal protection set forth in the Justice Kennedy concurrence. Whether taken by itself as the "narrowest opinion," or as an opinion with underlying rationales agreed upon by five justices, Justice Kennedy's opinion is the key.[464]

In a lengthy and thoughtful opinion addressing the meaning of *Marks*, the First Circuit in *Johnson* acknowledged that the *Marks* "narrowest grounds" test "does not translate easily" to the *Rapanos* case because the "cases in which Justice Kennedy would limit federal jurisdiction are not a subset of the cases in which the plurality would limit jurisdiction."[465] The *Johnson* decision argued that "the Supreme Court itself has moved away from the *Marks* formula" because subsequent Supreme Court decisions had acknowledged that the *Marks* test was difficult to apply and that several members of the Court had considered dissenting opinions in determining what is the opinion of a fragmented Court.[466] Accordingly, the First Circuit concluded that Justice Stevens's approach was the best way to determine the opinion of the *Rapanos* court even if it was inconsistent with the *Marks* test because Stevens's view

> is consistent with the direction that the Court as a whole has taken since *Marks.* Moreover, the fact that Justice Stevens does not even refer to *Marks* indicates that he found its framework inapplicable to the interpretation by the lower courts of the divergent tests laid out by the opinions in *Rapanos*.[467]

The *Johnson* decision's view that the *Marks* test does not apply to the *Rapanos* opinions is sound and provides the best rationale for adopting Justice Stevens's dual approach.

The DOJ Motion also cited, "*cf.*" a Supreme Court case decided the week after *Rapanos* as supporting the view that lower courts may examine all opinions of the Court to determine which view commands a working majority of five. In *League of United Latin American Citizens v. Perry* (*LULAC*),[468] which involved a challenge to the Texas state legislature's 2003 changes to the state's congressional district boundaries, Justice Kennedy authored the majority opinion, which was joined by Justices Stevens, Souter, Ginsburg and Breyer with respect to Parts II-A and III; an opinion with respect to Parts I and IV, which Chief Justice Roberts and Justice Alito joined; and an opinion with respect to Parts II-B and II-C and Part II-D, which Justice Souter and Justice Ginsburg joined.[469] In remarks at a conference, Ann Klee, then the EPA General Counsel, suggested that the *LULAC* decision implies a more flexible approach than *Marks*'s "narrowest grounds" approach and instead finds a majority whenever five

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464. Buzbee Statement, *supra* note 25, at 5.

465. United States v. Johnson, No. 05-1444, 2006 WL 3072145, at *7 (1st Cir. Oct. 31, 2006).

466. *Id.* at *9.

467. *Id.*

468. 126 S. Ct. 2594, 2604 (2006).

469. *Id.*

justices agree on a particular issue even if another set of five justices constitute a majority on other issues.[470] The DOJ Motion, however, cites *Marks* as the primary support for its dual opinion standard and cites *LULAC* only tangentially.[471] Because *LULAC* did not directly address the issue of which Court opinions are binding, *Marks* remains the Court's most important decision on which opinions of a fragmented court are binding on lower courts.

D. Will Congress Pass Legislation?

Congress could pass legislation to resolve the Act's jurisdiction, which it commonly did during the 1970s and 1980s, but since the 1990s it has become more difficult to enact environmental legislation in an increasingly partisan Congress where there is a growing divide between liberal Democrats and conservative Republicans.[472] Even during the less partisan 1970s and 1980s, Congress was unable to agree on legislation to clarify the Act's jurisdiction. In 1977, Congress considered several bills to clarify the Act's jurisdiction, but in the end did not pass any jurisdictional amendments.[473] In 1987, Congress made several significant Amendments to the Act, but did not resolve jurisdictional issues.[474]

In 2005, Democrat Senator Russell Feingold, along with 15 co-sponsoring Democratic Senators, proposed legislation, entitled "The Clean Water Authority Restoration Act of 2005," that would have expanded the Act's jurisdiction to reach to "all waters" that are "subject to the legislative power of Congress under the Constitution" and would strike the term "navigable waters of the United States" in the current statute and replace it with the term "waters of the United States."[475] A similar bill was proposed in the House by Representatives Oberstar (D-MN), Leach (R-IA), Dingell (D-MI) and Boehlert (R-NY) and 155 other House members.[476] Many Democrats and environmentalists support the Feingold

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470. *Texas Redistricting Case Could Complicate High Court Wetlands Ruling*, INSIDE THE EPA, July 28, 2006 (reporting remarks of EPA General Counsel Ann Klee at July 18 forum on *Rapanos* hosted by the Washington Legal Foundation), *available at* 2006 WLNR 12952674. Ms. Klee subsequently resigned as EPA General Counsel.

471. *See supra* note 441 and accompanying text.

472. *See* Richard J. Lazarus, *Congressional Descent: The Demise of Deliberative Democracy in Environmental Law*, 94 GEO. L.J. 619, 668-74 (2006) (presenting data compiled by the League of Conservation Voters from 1971 until 2004 showing Republicans and Democrats increasingly disagree on environmental issues).

473. Mank, *supra* note 4, at 836.

474. *See* Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7-90 (1987); Lazarus, *supra* note 472, at 628-29.

475. Clean Water Authority Restoration Act of 2005, S. 912, 109th Cong. §§ 4(23), 5(1)-(3) (1st Sess. 2005) (introduced Apr. 27, 2005 and referred to the Committee on Environment and Public Works) (amending the Federal Water Pollution Control Act to clarify the jurisdiction of the United States over waters of the United States).

476. Clean Water Authority Restoration Act of 2005, H.R. 1356, 109th Cong. (1st Sess. 2005)

legislation.[477] Most Republican legislators prefer to wait before considering any legislative changes until after the Bush Administration has time to issue clarifying regulations.[478] By the time the Agencies issue clarifying regulations, many legislators up for reelection will probably have turned their attention to the November 2006 elections and, therefore, any legislative changes to the Act will more likely come in 2007, if at all.

CONCLUSION

The *Rapanos* decision will likely require the Corps to issue new regulations or guidance that more carefully justify its regulation of tributary wetlands, but it is not a revolutionary decision and will not undermine the Corps' current practice of broadly enforcing the Act. The plurality opinion would have drastically limited the scope of the Act by limiting the definition of "waters of the United States" to permanently flowing waters and wetlands that have a physical surface water connection with those waters.[479] A fundamental flaw with the plurality opinion is its excessive reliance on dictionary definitions and textualist methodology to the exclusion of the Act's ecological goals. [480] Thus, the plurality would exclude many significant intermittent streams from the Act's jurisdiction even though they play a significant role in affecting hydrology and ecology in many areas, especially the western areas of the United States. The plurality harshly criticizes the expense of Corps regulations without giving any weight to the value of the wetland resources they protect. [481] It is fortunate for the nation's wetlands that the plurality could not command a majority.

The dissenting opinion appropriately emphasized the Act's ecological purposes in interpreting the statute. Because Congress gave the Agencies broad discretion to fulfill the Act's purposes, the dissenting opinion gave great deference to the Corps' existing regulations, which Republican and Democratic Administrations had supported for thirty years. [482] The dissent failed, however, to acknowledge *SWANCC*'s underlying philosophy that a connection to navigable waters still has some importance in defining the Act's jurisdiction. [483] Probably because all of the *Rapanos* dissenters had dissented in *SWANCC*, they were reluctant to give the latter decision the precedential weight it deserved. [484]

Justice Kennedy appropriately took a middle position that was closer to the

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(introduced Mar. 17, 2005) (amending the Federal Water Pollution Control Act to clarify the Jurisdiction of the United States over Waters of the United States).

477. *Chafee Signals He May Side with Environmentalists on Water Act Scope*, INSIDE THE EPA, July 21, 2006, *available at* 2006 WLNR 12482643.

478. *Id.*

479. *See supra* notes 185-89 and accompanying text.

480. *See supra* notes 185-89 and accompanying text.

481. *See supra* notes 190-94 and accompanying text.

482. *See supra* notes 195, 224 and accompanying text.

483. *See supra* notes 340-42 and accompanying text.

484. *See supra* notes 340-42 and accompanying text.

purposivist dissenting opinion than the textualist plurality opinion. In the areas of national power and federalism, Justice Kennedy has taken a centrist position that seeks a middle ground between Justice Scalia's states right's philosophy and Justice Stevens's support for broad national power.[485] Based upon *SWANCC*'s underlying philosophy that a connection to navigable waters still has some importance in defining the Act's jurisdiction, he used the term "significant nexus" found in one sentence of the case explaining the Court's earlier *Riverside Bayview* decision and made it the cornerstone of a new test for which waters and wetlands are sufficiently connected with navigable waters to come within the Act's jurisdiction.[486] His choice of the "significant nexus" language as the basis for his new jurisdictional test is reasonable because commentators and several lower courts had recognized that it provided the best test for applying the Court's precedent in *Riverside Bayview* and *SWANCC* to cases involving tributary wetlands.[487]

In the end, Justice Kennedy's significant nexus test will likely only modestly limit the scope of the Act because he emphasizes ecological considerations in applying his standard.[488] As the dissent predicts and the plurality acknowledges is a substantial possibility, the Corps will likely be able to issue regulations or guidance based on the significant nexus test that allow it to regulate most of the wetlands that fall within its current regulations because most tributary wetlands have significant ecological or hydrological impacts on navigable waters.[489] Justice Kennedy could have defined the significant nexus test more narrowly to address only hydrological connections, but he adopted a broader definition in light of the Act's broad ecological goals.[490]

In the short term, before the Agencies issue new guidance or regulations, there is likely to be some confusion and disagreement in the lower courts on how to apply the significant nexus test.[491] As the Texas District Court decision in *Chevron Pipe* demonstrates, the impact of the decision will vary somewhat from circuit to circuit based in large part upon how the various circuit courts of appeal had reacted to *SWANCC*.[492] The Seventh and Ninth Circuits have already endorsed Justice Kennedy's "significant nexus" test as the standard for determining federal jurisdiction under the CWA, except in the rare case where the plurality's approach would provide greater jurisdiction.[493] In light of their prior precedent broadly interpreting the Act's jurisdiction over tributaries, the First, Fourth, Sixth, and Tenth Circuits are more likely to follow Justice

485. Bilionis, *supra* note 26, at 1354, 1376-82.
486. *See supra* notes 324-28, 332 and accompanying text.
487. *See supra* notes 345-50 and accompanying text.
488. *See supra* notes 351-60 and accompanying text.
489. *See supra* notes 217-20, 329-31 and accompanying text.
490. *See supra* notes 263-77 and accompanying text.
491. *See supra* notes 413-14 and accompanying text.
492. *See supra* notes 389-414 and accompanying text.
493. *See supra* notes 415-16 and accompanying text.

Kennedy's "significant nexus" test rather than the plurality opinion's approach.[494] Based on past precedent, more circuits are likely to follow Justice Kennedy's test than the plurality's standard.

The Corps has recognized that it needs to issue at least interim guidance in the near future to assure more consistent resolution of jurisdictional issues.[495] The Corps should consider issuing detailed regulations to clarify any issues not resolved by its new guidance. It is less likely that Congress will be able to achieve sufficient consensus to pass legislation defining the Act's jurisdiction.[496]

494. *See supra* notes 417-24 and accompanying text.

495. *See supra* notes 428-37, 439 and accompanying text.

496. *See supra* notes 472-78 and accompanying text.