



LEGAL STUDIES RESEARCH PAPER SERIES

**Working Paper Number 06-42
December 13, 2006**

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The Future of Federal Wetlands Regulation**

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University of Michigan Journal of Law Reform, Vol. 40, No. 4, 2006-2007

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**FROM “NAVIGABLE WATERS” TO “CONSTITUTIONAL WATERS”:
THE FUTURE OF FEDERAL WETLANDS REGULATION†**

Mark Squillace*

Wetlands regulation in the United States has a tumultuous history. The early European settlers viewed wetlands as obstacles to development, and they drained and filled wetlands and swamps at an astounding rate, often with government support, straight through the middle of the twentieth century. As evidence of the ecological significance of wetlands emerged over the last several decades, programs to protect and restore wetlands became prominent. Most notable among these is the permitting program under § 404 of the Clean Water Act. That provision prohibits dredging or filling of “navigable waters,” defined by law to mean “waters of the United States.” Since 1975, the United States Army Corps of Engineers (the Corps), which is primarily responsible for the § 404 permitting program, has construed “navigable waters” expansively to encompass most wetlands that could affect interstate commerce. In three decisions over the course of twenty years, the Supreme Court has expressed increasing skepticism that the phrase “navigable waters” supports the Corps’ broad claim of regulatory authority. In its most recent decision, United States v. Rapanos, 126 S.Ct. 2208 (2006), a majority of the Court found that the phrase “navigable waters” encompassed only those waters that met the traditional test for navigability.

This Article considers the state of federal wetlands regulation after Rapanos. It begins by describing the significant role that wetlands play in the ecological health of the planet, and the impracticality of setting standards to protect those wetlands at the state or local level. It then examines the history of wetlands regulation, focusing in particular on the Clean Water Act, and the problems encountered with regulating wetlands by federal agencies and in the courts. The Article concludes with recommendations for improving the § 404 program. While the Corps can and perhaps should adopt rules to clarify the law, the time is long overdue for Congress to amend the Clean Water Act to clarify the scope of federal authority over wetlands. In doing so, Congress should affirm its original intent to establish a comprehensive federal program for wetlands regulation under the Clean Water Act. This can best be accomplished by abandoning the ill-fated use of the phrase “navigable waters” and substituting a new phrase such as “constitutional waters,” which will clearly convey Congress’ intent to encompass all waters that are subject to federal jurisdiction under the constitution.

Wetlands are among our most important ecological resources. They provide habitat for fish and wildlife, they protect and improve our water quality, and—as we learned in the aftermath of Hurricane Katrina—they store floodwaters and protect inland property from the catastrophic consequences of tropical storms.¹ But private landowners rarely profit from protecting these vital attributes of wetlands. Therefore, many owners are draining or filling wetlands to realize the economic development potential of these lands. Moreover, because wetlands are frequently associated with open water their development

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1. Env'tl. Prot. Agency (EPA), Office of Water, EPA843-F-06-001, Wetlands: Protecting Life and Property from Flooding (May 2006), available at <http://www.epa.gov/owow/wetlands/pdf/Flooding.pdf>

value is often higher than for dry lands,² which only heightens the prospect for conflict between land conservation and development.

Draining wetlands to promote agricultural and other uses has a long tradition in this country and was historically viewed as a way to “reclaim” lands for productive purposes.³ More recently, private owners have claimed the right to fill in wetlands to accommodate a wide range of construction projects, from single family homes to shopping malls.⁴ Because the economic benefits of filling wetlands to the private landowner can be substantial, efforts by the government to limit or control such development is controversial and can give rise to claims that a landowner’s property rights have been taken in violation of the Fifth Amendment to the U.S. Constitution.⁵

The United States Army Corps of Engineers (the Corps) exercises regulatory authority over wetlands development through Section 404 of the Clean Water Act, which generally prohibits “the discharge of dredged or fill material into the navigable waters [of the United States]” without a permit from the Corps.⁶ Since as early as 1975, the Corps has construed its authority to regulate wetlands development broadly, and as a result, most private landowners who wish to develop on wetlands have been required to obtain a “dredge and fill” permit.⁷

The Supreme Court has had the opportunity to consider the scope of the Corps’ authority under Section 404 on three occasions. In United States v. Riverside Bayview Homes, Inc., the Court held that a permit was required to develop wetlands adjacent to navigable waters.⁸ In Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers, the Court held that the scope of the law did not reach to waters that were “isolated” from navigable waters, even where those waters were frequented by migratory birds.⁹ Most recently, in Rapanos v. United States, the Court exposed serious divisions about whether the law encompasses wetlands with a less obvious connection to navigable waters than those at issue in Riverside.¹⁰

This Article considers the future of wetlands regulation after Rapanos. It begins with a brief review of wetlands ecology and the extent of wetlands and wetland trends in the United States. It then describes the evolution of wetlands regulation in the United States through the Rapanos decision and pays

2. See, e.g., “Life’s a Beach,” *Business Day*, (Dec. 1st, 2006), <http://www.businessday.co.za/articles/homefront.aspx?ID=BD4A331822> (discussing the common-knowledge fact that beachfront property is more valuable than non-beachfront property).

3. See, e.g., Ralph E. Heimlich et al., *Wetlands and Agriculture: Private Interests and Public Benefits*, *Agric. Econ. Rep. No. 765*, at 18–23 (1998) (on file with author), [available at http://www.ers.usda.gov/publications/aer765/aer765e.pdf](http://www.ers.usda.gov/publications/aer765/aer765e.pdf). See *infra* text accompanying notes 79-81.

4. Nina Totenberg, Divided Supreme Court Rules on Wetlands Law, *NPR*, Nov. 28th, 2006, <http://www.npr.org/templates/story/story.php?storyId=5496382>.

5. The Fifth Amendment precludes the taking of private property for a public use without just compensation. U.S. Const. amend. V. Takings claims have been raised in many wetlands cases. See, e.g., Palazzolo v. Rhode Island, 533 U.S. 606 (2001) (regulation which precluded use of fill on wetlands and thus development of beach club on wetlands portion of 18-acre tract, but which permitted landowner to build substantial residence on uplands portion of tract, leaving parcel with \$200,000 in development value, did not deprive landowner of all economic use of entire parcel so as to support takings claim under Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992)); Claridge v. New Hampshire Wetlands Board, 485 A.2d 287 (N.H. 1984) (owner may, without compensation, be barred from filling wetlands because land-filling would deprive adjacent coastal habitats and marine fisheries of ecological support); Bartlett v. Zoning Comm’n of the Town of Old Lyme, 282 A.2d 907 (Conn. 1971) (owner barred from filling tidal marshland must be compensated, despite municipality’s “laudable” goal of “preserv[ing] marshlands from encroachment or destruction”).

6. 33 U.S.C. §1344 (2006).

7. See *infra*, notes 121-128 and accompanying text.

8. 474 U.S. 121 (1985).

9. 531 U.S. 159 (2001).

10. 126 S. Ct. 2208, ___ U.S. ___ (2006).

special attention to the issues raised in Rapanos and their previous treatment in the diverse opinions from the Court. The article concludes with a discussion of federal wetlands policy. Because the Environmental Protection Agency (EPA) and the Corps have not taken regulatory action to address the ambiguities created by the SWANCC and Rapanos decisions, and because any such effort would likely fall short of the fundamental reform that is needed, the time has come for Congress to act. Given the important role that wetlands play in the ecological health of the planet and the impracticality of setting standards at the state level, Congress should affirm its intent to establish a comprehensive federal program for wetlands regulation by abandoning the phrase “navigable waters” in favor of a new phrase, such as “constitutional waters,” which would unambiguously encompass all waters subject to federal jurisdiction under the Constitution.

I. Understanding Wetlands and Wetlands Ecology

For purposes of the § 404 program, the EPA and the Corps have defined wetlands as “those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.”¹¹ Using this definition, the EPA has described four different categories of wetlands: marshes, swamps, bogs, and fens.¹² This Part describes wetlands and their economic, environmental, and social value, in order to demonstrate the importance of wetlands regulation.

Marshes may be tidal or non-tidal.¹³ Tidal marshes are found along protected coastlines.¹⁴ They can be freshwater, brackish, or saline, but they are all influenced by ocean tides.¹⁵ Tidal wetlands provide a buffer against storms, help minimize shoreline erosion, and provide food and shelter for aquatic species and migratory waterfowl.¹⁶ They also absorb excess nutrients which deplete oxygen levels when they reach oceans and estuaries, thereby making these areas unsuitable for aquatic life.¹⁷ Non-tidal marshes are

11. 33 C.F.R. § 328.3(b) (Corps); 40 C.F.R. § 230.3(t) (EPA). A 2004 Government Accountability Office (GAO) Report describes the respective roles of the Corps and EPA as follows:

The Corps administers the permitting responsibilities of the section 404 program, while EPA in conjunction with the Corps establishes the substantive environmental protection standards that permit applicants must meet. EPA also has final administrative responsibility for interpreting the term “waters of the United States,” a term that governs the scope of many other programs that EPA administers under the Clean Water Act. Day-to-day authority for administering the permitting program rests with the 38 Corps district offices, whereas Corps division and headquarters offices exercise policy oversight. Under section 404(q), EPA and other federal agencies, such as the Department of the Interior’s Fish and Wildlife Service, can request that a permit application receive a higher level of review within the Department of the Army. Under a memorandum of agreement between EPA and the Corps, EPA may also initiate a “special case,” in which EPA determines the scope of jurisdiction for a particular site or issue for section 404 purposes. EPA also has “veto” authority over section 404 permitting decisions under section 404(c). However, EPA has rarely used its 404(c) authority to intervene in or overrule Corps permit decisions. EPA also exercises independent enforcement authority.

U.S. Gov’t Accountability Office, GAO-04-297, Report to the Chairman, Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs, Committee on Government Reform, House of Representatives: Water and Wetlands—Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction 5 (2004), available at, <http://www.gao.gov/new.items/d04297.pdf>. See also 43 Op. Att’y Gen. 197 (Sep 5, 1979).

12. Env’tl. Prot. Agency, Wetland Types, <http://www.epa.gov/owow/wetlands/types/> (last visited October 21, 2006).

13. <http://www.epa.gov/owow/wetlands/types/marsh.html#tidal> (last visited October 21, 2006).

14. Id.

15. Id.

16. Id.

17. Id.

the most common type of wetlands in North America.¹⁸ They are usually freshwater marshes and often occur near streams, lakes, ponds, and rivers.¹⁹ Non-tidal marshes generally contain highly organic, mineral rich soils.²⁰ Typical vegetation includes lily pads, cattails, reeds, and bulrushes that afford excellent habitat for a wide range of waterfowl and small mammals, such as red-winged blackbirds, great blue herons, otters, and muskrats.²¹ Non-tidal marshes include prairie potholes, playa lakes, vernal pools, and wet meadows.²²

Swamps are forested or shrub-based and are dominated by woody plants and characterized by saturated soils.²³ Like marshes, swamps offer flood protection and remove excess nutrients that are often generated by agricultural activities.²⁴ Alluvial deposits from flooding in swamps provide a rich habitat for a wide range of species.²⁵

Bogs are characterized by spongy peat deposits, acidic waters, and a floor covered by a thick carpet of sphagnum moss.²⁶ Bogs include northern bogs, which are found in the northeast and Great Lakes regions, and pocosins, which occur along the southeastern coastal plain.²⁷ Bogs absorb a great deal of water and thereby protect uplands from flooding.²⁸ In addition, peat bogs act as carbon sinks.²⁹

Finally, fens, like bogs, are peat-forming wetlands.³⁰ Unlike bogs, however, fens receive nutrients from sources other than precipitation such as surface drainage or groundwater.³¹ As a result, fens are less acidic and richer in nutrients than bogs and are able to support a more diverse plant and animal community.³²

18. Id.

19. Id.

20. Id.

21. Id.

22. Id. Five to seven million migratory waterfowl, including more than half of American ducks and the endangered whooping crane use prairie potholes as way stations for food, rest, and breeding. Env'tl. Prot. Agency, Office of Water, EPA 843-F-06-004, Economic Benefits of Wetlands (May 2006), available at, <http://www.epa.gov/owow/wetlands/pdf/EconomicBenefits.pdf>. Potholes also play an important role in recharging aquifers. S.D. WATER RESEARCH INST., ANNUAL REPORT at 8 (1999), available at, <http://wri.sdstate.edu/Annual%20Reports/Annual%20Report%201999.pdf>.

23. According to the EPA:

A swamp is any wetland dominated by woody plants. There are many different kinds of swamps, ranging from the forested red maple, (*Acer rubrum*), swamps of the Northeast, to the extensive bottomland hardwood forests found along the sluggish rivers of the Southeast. Swamps are characterized by saturated soils during the growing season, and standing water during certain times of the year.

<http://www.epa.gov/owow/wetlands/types/swamp.html#forested> (last visited October 21, 2006).

24. Id.

25. Id.

26. <http://www.epa.gov/owow/wetlands/types/bog.html> (last visited October 21, 2006).

27. Id.

28. Id.

29. See <http://www.mcgill.ca/reporter/32/15/roulet/> (noting that twenty-five percent of the carbon in land plants and soils is stored in peat deposits; peat bogs, the world over, act as storage for approximately ten percent of all "fixed" carbon, meaning the carbon taken up by mosses and flora; and that one of every ten molecules of carbon photosynthesized remains in the bog) (last visited October 21, 2006).

30. <http://www.epa.gov/owow/wetlands/types/fen.html> (last visited October 21, 2006). Acre for acre, swamps often equal rainforests in biological variety. Bruce Selcraig, What is a Wetland?, Sierra, May-June 1996, at 46. See also Env'tl. Prot. Agency (EPA), Office of Water, EPA 843-F-04-011a, Wetlands Overview (December 2004), available at <http://www.epa.gov/owow/wetlands/pdf/overview.pdf>.

31. Id.

32. Id.

Wetlands may not be wet all year round,³³ but as the agency definition suggests, they must under normal conditions support or be capable of supporting wetlands vegetation.³⁴ As described more fully below, wetlands delineation for purposes of § 404 requires a scientific assessment of a given property to determine the presence of distinctive soils, plants, and hydrology that characterize wetlands.³⁵

A wetland's characteristics change when hydrologic conditions cause the water table to saturate or inundate the soil for a certain amount of time each year.³⁶ Even minute fluctuations in hydrology can significantly alter the soil chemistry and plant and animal communities.³⁷ Typical examples of changes that alter the habitat include: (1) deposition of fill material for development; (2) drainage of land for development, farming, and mosquito control, (3) dredging and stream channelization for navigation; (4) development and flood control; (5) diking and damming to form ponds and lakes; (6) diversion of flow to or from wetlands; and (7) the addition of impervious surfaces in the watershed in a manner that increases runoff into wetlands.³⁸

Wetlands are prized for many reasons, including their aesthetic value.³⁹ But wetlands also provide important ecosystem services to plant, animal, and human communities. Wetlands serve as natural wastewater treatment facilities, filtering out pollutants and improving water quality.⁴⁰ They absorb the impact of floods and stabilize runoff by retaining water and releasing it gradually.⁴¹ Wetlands similarly temper catastrophic climatic events.⁴²

Wetlands are "nurseries of life"⁴³ that serve as home to millions of plants and animals that rely on them for food, habitat, and breeding grounds.⁴⁴ Although they cover less than five percent of the land

33. EPA, supra note 22.

34. See supra text accompanying note 11.

35. See discussion of the wetlands delineation process, infra Part III.B.

36. Env'tl. Prot. Agency, Office of Water, EPA 843-F-01-002d, Threats to Wetlands (September 2001), available at <http://www.epa.gov/owow/wetlands/facts/threats.pdf>.

37. Id.

38. Id.

39. See Env'tl. Prot. Agency, Office of Water, <http://www.epa.gov/owow/wetlands/recreation.html> (last visited October 25, 2006) "Just watching the wildlife, many of which depend on wetlands, has become a popular pastime. More than 66 million people 16 years old and older—31% of all Americans—fed, photographed and observed wildlife in 2001 and spent \$40 billion on their activities." See EPA, supra note 22. Wetlands provide a place of natural beauty and solitude that can be enjoyed by persons of all ages who may seldom be exposed to nature. Id.

40. According to the EPA:

Because natural wetlands are so effective at removing pollutants from water that flows through them, engineers and scientists construct systems that replicate some of the functions of natural wetlands. These constructed treatment wetlands use natural processes involving wetland vegetation, soils and their associated microbial life to improve water quality. They are often less expensive to build than traditional wastewater and stormwater treatment options, have low operating and maintenance expenses and can handle fluctuating water levels. . . . There are hundreds of wastewater treatment wetlands operating in the United States today.

EPA, supra note 22

41. Id.

42. T.E. DAHL, U.S. DEPT. OF THE INTERIOR, FISH AND WILDLIFE SERV., Wetlands Losses in the United States 1780s to 1980s 2 (1990).

43. See EPA, supra note 30

44. See Selcraig, supra note 30. Wetlands sustain and promote biodiversity by providing habitat to more than 5,000 species of plants, 190 kinds of amphibians, and one-third of all the bird species in the United States. See id. at 45. Two-thirds of the 10–12 million waterfowl of the continental US reproduce in the prairie pothole wetlands of the Midwest, and in the winter, millions of ducks can be found in the wetlands of the south-central United States. EPA, supra note 30. As many as one-half of all North American bird species nest or feed in wetlands. EPA, supra note 22.

surface, wetlands host thirty-one percent of all plant species in the lower forty-eight states.⁴⁵ They are among the most fertile and biologically productive ecosystems in the world, rivaling tropical rainforests and coral reefs in the number and diversity of species they support.⁴⁶ More than one-third of threatened or endangered species live only in wetlands⁴⁷ and many species are dependent on wetlands to reproduce.⁴⁸

Wetlands also play an important role in our economic well-being. By improving drinking water quality, minimizing the damage done by floods, providing outstanding recreational opportunities,⁴⁹ attracting businesses to areas rich in biodiversity and natural beauty, and providing raw materials and employment opportunities for numerous commercial concerns, wetlands help promote a robust economy.⁵⁰ As a reliable source of food, shelter and nursery grounds for both marine and freshwater species, wetlands are a cornerstone of the nation's multibillion dollar fishing industry.⁵¹ They provide an essential link in the life cycle of seventy-five percent of the fish and shellfish commercially harvested in the United States, and up to ninety percent of the recreational fish catch.⁵² Two-thirds of all fish consumed

45. EPA, supra note 22.

46. Id.

47. An additional twenty percent of the country's threatened or endangered species use or inhabit wetlands at some time in their life. Id.

48. Id.

49. According to the EPA:

Wetlands are often inviting places for popular recreational activities including hiking, fishing, bird watching, photography and hunting. More than 82 million Americans took part in these activities in 2001, spending more than \$108 billion on these pursuits. For example, over 34 million people went fishing in 2001, spending an average of \$1,046 and 16 days each on the water. Anglers spent \$14.7 billion in 2001 for fishing trips, \$17 billion on equipment and \$4 billion for licenses, stamps, tags, land leasing and ownership, membership dues, contributions and magazines. The overall economic impact of recreational fishing is estimated at \$116 billion [according to the American Sportfishing Association], and wetlands play a crucial role in the life cycle of up to 90 percent of the fish caught recreationally. In 2001, approximately 3 million people hunted migratory birds, and 6.5 million small mammals that are often found in wetlands." They spent more than \$2.2 billion, including \$111 million paid by migratory bird and large game hunters to lease hunting areas and blinds, often located on private property with wetlands [according to the U.S. Fish and Wildlife Service]. Each year nearly \$200 million in hunters' federal excise taxes are distributed to state agencies to support wildlife management programs, the purchase of lands open to hunters and hunter education and safety classes. Proceeds from the federal Duck Stamp, a required purchase of migratory water fowl hunters, have purchased more than five million acres of habitat for the refuge system [according to Ducks Unlimited].

Id.

50. Id.

51. Landings of crab, shrimp and salmon were valued at \$1,167 billion in 2004. Id. In 2004 the dockside value of fin fish and shellfish landed in the United States was \$3.7 billion and was the basis for the \$7.2 billion fishery processing business. Id. According to the U.S. Fish and Wildlife Service, U.S. consumers spent an estimated \$54.4 billion for fishery products in 2000. Id.

52. It is not just the fishing industry that derives benefits or produces products dependent on wetlands. As the EPA notes:

Part of this economic value lies in the variety of commercial products they provide, such as food and energy sources. Rice can be grown in a wetland during part of the year, and the same area can serve as a wildlife habitat for the rest of the year. Some wetland plant species, such as wild rice and various reeds, can be harvested for or used to produce specialty foods, medicines, cosmetics and decorative items. In many coastal and river delta wetlands, haying of wetland vegetation is important to livestock producers. In Europe, reed-growing for building materials is undergoing a revival in some countries as people realize the full potential of reeds as a roofing material. Aesthetically pleasing, thatched roofs are superior insulators to conventional tile roofs, and they have a life span of 25-40 years. Fur-bearing animals, such as mink, muskrat and beaver, use wetlands during some part of their life cycle. Income can be derived from trapping these furbearers, either by direct sale of their pelts or

worldwide depend on coastal wetlands at some stage in their life cycle.⁵³ Water flushing through wetlands also provides needed transportation for migratory fish species.⁵⁴ Wetlands also play a major role in the production of cash crops such as marsh hay, wild rice, blueberries, cranberries, peat moss, and timber.⁵⁵

Another important and often overlooked aspect of wetlands is the role they play in the hydrologic cycle.⁵⁶ The dense vegetation and sediment typically found in wetlands not only purifies water that runs through the wetlands,⁵⁷ it also stabilizes the land and protects adjacent communities during floods and storms.⁵⁸ By absorbing and storing a significant amount of floodwater, wetlands act as natural buffers, reducing the frequency and intensity of floods.⁵⁹ After peak flood flows have passed, wetlands slowly release the stored waters, thereby minimizing the impacts on downstream property.⁶⁰ This slow release also allows coastal wetlands to preserve shorelines by minimizing erosion.⁶¹ In the Gulf coast area, for example, barrier islands, shoals, marshes, forested wetlands and other features of the coastal landscape provide a significant and potentially sustainable buffer from wind wave action and storm surge generated by tropical storms and hurricanes.⁶² Indeed, the damage sustained during Hurricane Katrina in 2005 would have been far less severe had it not been for the significant loss of wetlands along the coast and Mississippi delta.⁶³ Preserving wetlands, in conjunction with other flood control measures offers a degree of protection against flooding that is often more effective and less costly than a system of traditional dikes and levees.⁶⁴

A wetland's natural filtration process also removes excess nutrients before water leaves a wetland, making it healthier for drinking, swimming, and supporting plants and animals.⁶⁵ The most important factor for the health and function of wetlands is water movement.⁶⁶ When water enters a wetland, it slows down and moves around wetland plants.⁶⁷ Much of the suspended sediment drops out and settles to the

by leasing wetlands for the fur harvest. The nation's harvest of muskrat pelts alone was worth \$124 million in 2004. Wetlands also provide employment opportunities, including such positions as surveyor or park ranger. The production of raw materials from wetlands provides jobs to those employed in the commercial fishing, specialty food and cosmetic industries. These are billion dollar industries that depend in part on wetlands to flourish.

Id.

53. Id.

54. Selcraig, *supra* note 30, at 46.

55. EPA, *supra* note 22.

56. EPA, *supra* note 30.

57. <http://www.cwn.org/cwn/issues/wetlands/index.cfm> (last visited October 25, 2006). The average wetland can store about three-acre feet of water, or one million gallons. EPA, *supra* note 22.

58. According to the EPA, maintaining only 15% of the land area of a watershed in wetlands can reduce flooding peaks by as much as 60%. EPA, *supra* note 22. See also Douglas R. Williams et al., Federal Wetlands Regulation: An Overview, in *Wetlands Law and Policy: Understanding Section 404 2* (Connolly et al., eds., A.B.A. 2005); Env'tl. Prot. Agency (EPA), Office of Water, EPA843-F-06-001, *Wetlands: Protecting Life and Property from Flooding* (May 2006), available at <http://www.epa.gov/owow/wetlands/pdf/Flooding.pdf>; EPA, *supra* note 30. Flood damages in the U.S. average \$2 billion each year and have become more costly since over half of the wetlands in the United States have been drained or filled. EPA, *supra* note 22.

59. EPA, *supra* note 22.

60. Id.

61. Id.

62. Id.

63. Id.

64. Donald L. Hey et al., *The Wetlands Initiative, Flood Damage Reduction in the Upper Mississippi River Basin: An Ecological Alternative 1-5* (2004).

65. See EPA, *supra* note 22. The Congaree Bottomland Hardwood Swamp in South Carolina removes a quantity of pollutants from the watershed equivalent to that which would be removed by a \$5 million treatment plant. Id.

66. See id.

67. EPA, *supra* note 22.

wetland floor.⁶⁸ Plant roots as well as microorganisms on plant stems and in the soil absorb excess nutrients in the water originating from fertilizers, manure, leaking septic tanks, and municipal sewage.⁶⁹

Finally, wetlands, like forests, provide a substantial carbon sink that can help mitigate the impact of climate change.⁷⁰ Wetlands are much better than forests for storing carbon, however, because unlike forests they can last for hundreds and even thousands of years.⁷¹

According to a 1997 assessment of all wetlands worldwide, the economic value of the range of services wetlands provide is approximately \$14.9 trillion.⁷² That said, the difficulty of quantifying aesthetic value means that the true worth of wetlands is impossible to measure accurately. Still, as the EPA notes, “[b]y nearly any measure used, it pays to save wetlands.”⁷³

II. Wetlands in the United States

Wetlands can be found in every county and climatic zone in the United States.⁷⁴ Nearly seventy-five percent of the nation’s wetlands in the lower forty-eight states are privately owned.⁷⁵ Historians estimate that wetlands in Colonial times comprised about 221 million acres of the lower forty-eight states.⁷⁶ Another 170 million acres were found in Alaska, comprising approximately forty-five percent of the state’s total surface area,⁷⁷ and Hawaii originally contained an estimated 59,000 acres of wetlands.⁷⁸ A spectacular variety of wetland types exist throughout the United States, ranging from permafrost underlain wetlands in Alaska to tropical rain forests in Hawaii to riparian wetlands in the arid Southwest. This Part briefly describes the history of American wetlands policy in order to provide context to the current debate over wetlands regulation.

Even though the United States is in large part composed of wetlands, Americans have not always understood or appreciated their important ecological role. From the time of the earliest European settlements in the United States, settlers viewed wetlands primarily as an obstacle to productive land use.⁷⁹ In 1763, George Washington established a company to drain the Great Dismal Swamp of Virginia and North Carolina.⁸⁰ Over the 200 year period between the 1780s and 1980s, the lower forty-eight states

68. Id.

69. Id.

70. As the EPA explains, carbon sinks are “[c]arbon reservoirs and conditions that take-in and store more carbon (i.e., carbon sequestration) than they release. Carbon sinks can serve to partially offset greenhouse gas emissions. Forests and oceans are large carbon sinks.”
http://yosemite.epa.gov/OAR/globalwarming.nsf/content/Glossary.html#Carbon_sinks.

71. See, e.g., <http://www.iisd.org/wetlands/info.htm> (last visited October 28, 2006). But see, e.g., <http://www.eia.doe.gov/oiarf/1605/gg97rpt/chap7.html> (last visited October 28, 2006) (suggesting that wetlands are a significant source of greenhouse gas emissions). The exact degree to which wetlands will mitigate the impact of climate change remains to be seen. See, e.g., <http://www.mcgill.ca/reporter/32/15/roulet/> (noting that “how the bog stores carbon, in what quantity and how that storage capacity will change with changes in the climate is completely unknown”); <http://aswm.org/science/carbon/quebec/sym43.html> (noting many uncertainties in magnitude and the direction of potential changes in carbon dynamics of northern peatlands based on climate change).

72. EPA, supra note 22.

73. Id.

74. EPA, supra note 30.

75. Id.

76. Dahl, supra note 42, at 1. Among the lower 48 states, Florida, Louisiana, Minnesota, and Texas are the 4 states with the greatest wetland acreage. Id. at 5. Other states with considerable wetlands include Alabama, Georgia, Maine, Michigan, Mississippi, North Carolina, South Carolina, and Wisconsin. Id.

77. Id.

78. Id.

79. Id.

80. Selcraig, supra note 30, at 46.

lost an estimated fifty-three percent of their original acreage of wetlands—a startling average of sixty acres of wetlands lost every hour over 200 years.⁸¹ While the rate of wetlands loss has declined dramatically since the 1980s, our nation’s wetlands remain imperiled.⁸² Nonetheless, the growing recognition of the importance of wetlands to our quality of life and the ecological health of the planet has increasingly led to bi-partisan support for policies that promote wetlands preservation and restoration. For example, in 1989, the first President Bush established a national goal of “no net loss of wetlands.”⁸³ This policy was reaffirmed by President George W. Bush in 2002 and again on Earth Day, 2004, when he challenged the nation to increase the quantity as well as quality of these important resources.⁸⁴ Still, critics of the government’s efforts have raised doubts about of these policies, and much remains to be accomplished.⁸⁵

III. History of Section 404 of the Clean Water Act

Federal authority to regulate commercial activities on our Nation’s waterways has deep roots.⁸⁶ This Part describes the history of federal regulation of waterways, as it pertains to wetlands development.

In its seminal decision in Gibbons v. Ogden, the Supreme Court described the federal power to regulate commerce, including navigation, as “one of the primary objects for which the people adopted their government.”⁸⁷ Further, an early federal statute, the Rivers and Harbors Act (“RHA”) of 1899,

81. Id. at 1. California has lost the largest percentage of original wetlands within the state: 91%. Id. Florida has lost the most acreage, 9.3 million acres. Id. Alaska stands alone as the only state where wetland resources have not been substantially reduced, having lost an estimated one-tenth of one percent of its wetlands. Id. at 5. The states of Hawaii, New Hampshire, and Rhode Island have lost the fewest wetland acres overall, 7,000, 20,000 and 38,000 acres respectively. Id. Alaska has lost a fraction of one percent while Hawaii has lost an estimated 12 percent of its original wetland areas. See also Williams et al., supra note 58 at 2.

82. A year 2000 Fish and Wildlife Service report documenting changes in wetlands status and trends that occurred between 1986 and 1997 indicated the annual loss rate was 58,500 acres, an eighty percent reduction in the average annual rate of wetland loss. T.E. Dahl, U.S. Department of the Interior, Fish and Wildlife Service, Status and Trends of Wetlands in the Conterminous United States 1998 to 2004, at 15 (2005). Data collected for this report shows that for the first time net wetland gains, acquired through wetland restoration and creation activities, outpaced net wetland losses, with a net gain of 191,750 wetland acres nationwide, or an average annual net gain of 32,000 acres. Id.

83. See Compensating for Wetland Losses Under the Clean Water Act 2 (National Academies Press, 2001).

84. Dahl, supra note 82, at 19.

85. See e.g., Ponds Proliferate, but Wetland Losses Continue, Association of State Wetlands Managers press release, March 30, 2006, available at, <http://www.aswm.org/fwp/pressrelease2006.htm> (last visited November 28, 2006). (noting that “[t]he ‘no net loss of wetlands’ is largely due to the proliferation of ponds, lakes and other ‘deepwater habitats....’ These ponds include ornamental lakes for residential developments, stormwater detention ponds, wastewater treatment lagoons, aquaculture ponds and golf course water hazards.”) Last viewed November 26, 2006. See also, Julie M. Sibbing, Nowhere Near No-Net-Loss, available at <http://www.nwf.org/wildlife/pdfs/NowhereNearNoNetLoss.pdf>. (last visited November 26, 2006)

86. Sam Kalen, Commerce to Conservation: The Call for a National Water Policy and the Evolution of Federal Jurisdiction Over Wetlands, 69 N.D.L.Rev. 873, 877 (1993). See also Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC), 531 U.S. 159, 176 (2001) (Stevens, J., dissenting).

87. 22 U.S. (9 Wheat.) 1, 190 (1824). As the court stated:
Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations, which shall exclude all laws concerning navigation . . . All America understands, and has uniformly understood, the word ‘commerce,’ to comprehend navigation . . . The power over commerce, including navigation, was one of the

focused on activities that might obstruct navigation.⁸⁸ Section 10 of the RHA prohibited excavating or filling in navigable waters without authorization from the U.S. Army Corps of Engineers.⁸⁹ Section 13 of the RHA, commonly known as the Refuse Act, was the precursor to our modern pollution control laws and prohibits the discharge of refuse into any “navigable water” or its tributaries, as well as the deposit of refuse on the bank of a navigable water “whereby navigation shall or may be impeded or obstructed” without first obtaining a permit from the Corps.⁹⁰

As the nation matured, the focus of federal regulatory power over water gradually shifted from navigation to pollution control.⁹¹ In addition to Section 13 of the RHA, Congress passed the Federal Water Pollution Control Act (“FWPCA”) in 1948, which took modest steps toward establishing a regulatory program.⁹² It authorized the Surgeon General of the Public Health Service to work with federal, state, and local authorities to develop programs to reduce or eliminate pollution of “interstate waters and their tributaries,” and it declared “pollution . . . which endangers the health or welfare of person in a State other than that in which the discharge originates, . . . to be a public nuisance.”⁹³

The RHA also took on more of a pollution control focus. In 1960, the Supreme Court upheld the government’s claim that industrial deposits in a navigable waterway that reduced the depth of the channel was a prohibited “obstruction” to the navigable capacity of the river within the meaning of § 10 of the RHA.⁹⁴ This generous judicial interpretation of the RHA favored broad federal powers.

Finally, the enactment of the National Environmental Policy Act (NEPA) in 1970 made environmental protection part of the mandate of every federal agency.⁹⁵ In Zabel v. Tabb the Court of

primary objects for which the people of America adopted their government, and must have been contemplated in forming it.

Id. at 189–90.

88. 33 U.S.C. § 403 (2000). See Sax et al., Legal Control of Water Resources 639 (4th ed., West Group 2006).

89. 33 U.S.C. § 403 (2000). See also Williams et al., supra note 58, at 4.

90. See 33 U.S.C.A. § 407, Mar. 3, 1899, c. 425, § 13, 30 Stat. 1152 (emphasis added). See also U.S. Army Corps of Eng’rs, Regulatory Program Overview, <http://www.usace.army.mil/cw/cecwo/reg/oceover.htm> (last visited October 27, 2006).

91. SWANCC, 531 U.S. 159, 178 (2001) (Stevens, J., dissenting) (citing Kalen, supra note 86, at 877–879, and n. 30) (“During the middle of the 20th century, the goals of federal water regulation began to shift away from an exclusive focus on protecting navigability and toward a concern for preventing environmental degradation.”).

92. 62 Stat. 1155; Pub. L. 845, Ch. 758 (1948).

93. Id. Justice Stevens also noted in a footnote in his SWANCC dissent:

The FWPCA of 1948 applied only to ‘interstate waters.’ Subsequently, it was harmonized with the [RHA] such that—like the earlier statute—the FWPCA defined its jurisdiction with reference to ‘navigable waters.’ None of these early versions of the FWPCA could fairly be described as establishing a comprehensive approach to the [pollution] problem, but they did contain within themselves several of the elements that would later be employed in the CWA.

SWANCC, 531 U.S. at 178, n. 5 (Stevens, J., dissenting) (internal citations omitted).

See generally Kenneth M. Murchison, Learning from More than Five-and-a-Half Decades of Federal Water Pollution Control Legislation: 20 lessons for the future, 32 B.C. Env’tl Aff. L. Rev. 527 (2005) (describing history of federal water pollution legislation).

94. United States v. Republic Steel Corp., 362 U.S. 482, 489 (1960). In his dissent in SWANCC, Justice Stevens cited Republic Steel Corp. as an example of the “awakening of interest in the use of federal power under the Commerce Clause to protect the aquatic environment [by] reinterpret[ing] § 13 of the RHA in order to apply its permit requirement to industrial discharges into navigable waters, even when such discharges did nothing to impede navigability.” 531 U.S. 159, 178 (2001) (Stevens, J., dissenting).

95. See, e.g., Calvert Cliffs’ Coordinating Committee, Inc. v. U. S. Atomic Energy Commission, 449 F.2d 1109 (D.C. Cir., 1971). See also Williams et al., supra note 58, at 5

Appeals for the Fifth Circuit cited NEPA in expressing “no doubt that the [Corps] can refuse on conservation grounds to grant a permit under the [RHA].”⁹⁶

The modern era of federal water pollution control began with the adoption of comprehensive amendments to the FWPCA in 1972 which had the ambitious and ultimately unsuccessful goal of eliminating the discharge of all pollutants into the navigable waters by 1985.⁹⁷ Congress amended and renamed the FWPCA the Clean Water Act (CWA) in 1977⁹⁸ and significantly amended it again in 1987.⁹⁹ Notwithstanding these changes, today the basic structure of the 1972 law remains intact. The Act’s primary purpose is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”¹⁰⁰ The law also directs federal agencies to give ‘due regard’ . . . [to] ‘improvements which are necessary to conserve such waters for the protection and propagation of fish and aquatic life and wildlife [and] recreational purposes.’”¹⁰¹

The CWA establishes two distinct permit programs; one operated by the EPA, and one operated by the Corps. First, section 402 establishes the National Pollutant Discharge Elimination System (NPDES), which prohibits the point source discharge of pollutants (other than dredged or fill material) into “navigable waters” without a permit issued or approved by the EPA.¹⁰² Second, section 404 prohibits the discharge of dredged or fill material into “navigable waters” without a permit from the Corps.¹⁰³ However, unlike § 13 of the RHA, which focused on the maintenance of navigability, § 404’s principal purpose is pollution control.¹⁰⁴ Thus, although Congress opted to carry over the traditional jurisdictional term “navigable waters” from the RHA and early iterations of the FWPCA, it defined that term for all purposes under the 1972 Act to encompass all “waters of the United States.”¹⁰⁵ As described more fully

96. 430 F.2d 199, 214 (5th Cir. 1970).

97. See 86 Stat. 817, amended by 33 U.S.C. § 1251 et seq.(2000)

98. Clean Water Act of 1977, Pub. L. No. 95–217, 91 Stat. 1566 (current version at 33 U.S.C. § 1251 et seq. (2000)).

99. Amendments to Clean Water Act of 1977, Pub .L. No. 100-4, 101 Stat. 7 (current version at 33 U.S.C. § 1251 et seq. (2000)).

100. 33 U.S.C. § 1251 (2000).

101. Id. § 1252(a) (2000).

102. Id. § 1342 (2000).

103. Id. § 1344 (2000). Selection of such sites must be in accordance with guidelines developed by the Environmental Protection Agency (“EPA”) in conjunction with the Secretary of the Army; these guidelines are known as the “404(b)(1) Guidelines”. 40 C.F.R. § 230.1.

104. SWANCC, 531 U.S. at 179 (2001) (Stevens, J., dissenting). Earlier in his dissent, Justice Stevens stated that because § 13 of the RHA “assigned to the Corps the mission of regulating discharges into certain waters in order to protect their use as highways for the transportation of interstate and foreign commerce, the scope of the Corps’ jurisdiction under the RHA accordingly extended only to waters that were ‘navigable.’” Id. at 175. In contrast, Stevens noted, “[t]he activities regulated by the CWA have nothing to do with Congress’ commerce power over navigation. Indeed, the goals of the 1972 statute have nothing to do with navigability at all.” Id. at 181.

105. “Navigable waters” is defined in the statute as “the waters of the United States, including the territorial seas.” 33 U.S.C. § 1362(7) (2000). The statutory and regulatory definitions of “waters of the United States” apply not only to § 404 but throughout the Act. See, e.g., id. § 1311 (general prohibition against discharging pollutants into waters without a permit); id. § 1342 (the CWA’s other major permitting program, the National Pollution Discharge Elimination System); id. § 1313 (water quality standards and total maximum daily loads); id. § 1321 (oil spill liability prevention and liability provisions). See also Brief of the U.S. Gov’t at 20, United States v. Rapanos, 126 S.Ct. 2208 (2006) (No. 04-1034) (asserting that the term ‘waters of the United States’ “defines the scope of regulatory jurisdiction to be exercised under other provisions of the CWA”); Mark A. Chertok et al., Federal Jurisdiction Over Wetlands: “Waters of the United States” in Wetlands Law and Policy: Understanding Section 404 2 (Connolly et al., eds., A.B.A. 2005).

below,¹⁰⁶ the legislative history suggests that this definition was intended to be construed broadly—arguably to the full extent of the government’s constitutional power.¹⁰⁷

In part because the RHA defined “navigable waters” narrowly, the CWA’s use of the same term to describe an ostensibly broader category of waters has created much contention and confusion. Whether Section 404 authorizes the Corps to regulate isolated water bodies and wetlands that lack a direct connection to navigable waters has been a particular source of controversy.

A. The Corps and EPA Rulemaking Actions

The Corps promulgated its first rule interpreting its jurisdiction over the “navigable waters of the United States” in 1972, immediately after the FWPCA amendments were enacted.¹⁰⁸ The 1972 rule defined “navigable waters of the United States” as “those waters which are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce.”¹⁰⁹ Although the Corps later described this definition as “assert[ing] regulatory authority over many heretofore unregulated waterways,”¹¹⁰ it still limited § 404 to “only waters encumbered by the federal navigation servitude (i.e., the navigable waters of the United States).”¹¹¹ When it established its § 404 permitting program in 1974, the Corps again interpreted its jurisdiction over the “waters of the United States” to mean authorization of regulation of the full scope of the traditional navigable waters.¹¹² In the preamble to the 1974 rule, the Corps stated:

Section 404 of the FWPCA uses the term “navigable waters” which is later defined in the Act as “the waters of the United States.” The Conference Report, in discussing this term, advises that this term is to be given the “broadest possible Constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes.” We feel that the guidance in interpreting the meaning of this term which has been offered by this Conference Report—to give it the broadest possible Constitutional interpretation—is the same as the basic premise from which the aforementioned judicial precedents [interpreting the “navigable waters of the United States”] have evolved. The extent of Federal regulatory jurisdiction must be limited to that which is Constitutionally permissible, and in this regard, we feel that we must adopt an administrative definition of this term which is soundly based on this premise and the judicial

106. Infra section IV, B.

107. S. Rep. No. 92-1236 (1972) (Conf. Rep.). See also Regulatory Program of the Corps of Engineers, 42 Fed. Reg. 37127 (July 19, 1977) (quoting H.R. Rep. No. 92-1465 at 144, A Legislative History of the FWPCA at 327).

108. Definition of Navigable Waters of the United States, 37 Fed. Reg. 18,290 (Sept. 9, 1972).

109. Id. As an interpretative rule of general applicability formulated and adopted by the Corps of Engineers, this amendment was promulgated without publication of a notice of proposed rule making. Id. It superseded the definition located in 33 C.F.R. § 209.260. Id.

110. Permits for Activities in Navigable Waters or Ocean Waters, 39 Fed. Reg. 12,115 (Apr. 3, 1974).

111. Navigable Waters Procedures and Guidelines for Disposal of Dredged or Fill Material, 40 Fed. Reg. 19,766 (May 6, 1975) (emphasis added).

112. See Permits for Activities in Navigable Waters or Ocean Waters, 39 Fed. Reg. 12,115. As one commentator explained:

The Corps . . . rejected EPA’s broad interpretation. Instead, the Corps viewed the CWA as requiring it to assert jurisdiction over all the traditional navigable waters, including those traditional navigable waters that it had previously declined to regulate . . . [T]his interpretation makes sense in light of the historical context. Congress had repeatedly urged the Corps to discard earlier, limited interpretations of its jurisdiction and to expand its interpretation of its authority to include the full extent of the ‘traditional navigable waters.’

Virginia S. Albrecht and Stephen M. Nickelsburg, Could SWANCC Be Right? A New Look at the Legislative History of the Clean Water Act, 32 ELR 11042, 11050 (September 2002).

precedents which have reinforced it. Accordingly, we feel that in the administration of this regulatory program both terms should be treated synonymously.¹¹³

The Corps further explained which criteria would qualify a water body as “navigable,” including “past, present, or potential presence of interstate or foreign commerce” and “physical capabilities for use by commerce.”¹¹⁴ The Corps emphasized that “[i]t is the water body’s capability of use by the public for purposes of transportation or commerce which is the determinative factor.”¹¹⁵ As to wetlands, the 1974 rule states that:

Unless the public interest requires otherwise, no permit shall be granted for work in wetlands identified as important . . . unless the District Engineer concludes, on the basis of the analysis required in [33 C.F.R. § 209.120(f)], that the benefits of the proposed alteration outweigh the damage to the wetlands resource and the proposed alteration is necessary to realize those benefits.¹¹⁶

In Natural Resources Defense Council v. Callaway, the Natural Resources Defense Council challenged the Corps’ regulatory definition of “waters of the United States.”¹¹⁷ The U.S. District Court for the District of Columbia issued an order finding that Congress had “asserted federal jurisdiction over the nation’s waters to the maximum extent permissible under the Commerce Clause of the Constitution.”¹¹⁸ “Accordingly,” the court declared, “as used in the Water Act, the term [“navigable waters”] is not limited to the traditional tests of navigability.”¹¹⁹ The court ordered the Corps to develop regulations “clearly recognizing the regulatory mandate of the Water Act.”¹²⁰

In response to Callaway, the Corps proposed new regulations in May 1975 intended to clarify the bounds of its jurisdiction.¹²¹ After receiving public comments, the Corps promulgated interim final regulations in July of 1975.¹²² These regulations extended federal jurisdiction to most linear water bodies

113. Permits for Activities in Navigable Waters or Ocean Waters, 39 Fed. Reg. 12,113. The Corps defined “navigable waters” to include “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.” 33 C.F.R. § 209.120(d)(1).

114. 33 C.F.R. § 209.260(d).

115. 33 C.F.R. § 209.260(e)(1).

116. 33 C.F.R. § 209.120(g)(3)(iv). In 33 C.F.R. § 209.120(g)(3)(ii), the rule defines wetlands considered to perform functions important to the public interest as:

- (a) wetlands which serve important natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing and resting sites for aquatic or land species;
- (b) wetlands set aside for study of the aquatic environment or as sanctuaries or refuges;
- (c) wetlands contiguous to areas listed in paragraph (g)(3)(ii)(a) and (b) of this section, the destruction or alteration of which would affect detrimentally the natural drainage characteristics, sedimentation patterns, salinity distribution, flushing characteristics, current patterns, or other environmental characteristics of the above areas;
- (d) wetlands which are significant in shielding other areas from wave action, erosion, or storm damage. Such wetlands often include barrier beaches, islands, reefs and bars;
- (e) wetlands which serve as valuable storage areas for storm and flood waters; and
- (f) wetlands which are prime natural recharge areas. Prime recharge areas are locations where surface and ground water are directly interconnected.

39 Fed. Reg. at 12,121.

117. Natural Res. Def. Council v. Callaway, 392 F. Supp. 685 (D.D.C. 1975).

118. Id. at 686.

119. Id.

120. Id.

121. Navigable Waters Procedures and Guidelines for Disposal of Dredged or Fill Material, 40 Fed. Reg. 19,766 (May 6, 1975).

122. Permits for Activities in Navigable Waters or Ocean Waters, 40 Fed. Reg. 31,320 (July 25, 1975). The final rule was intended to be published after a 90-day period for public comment on the interim final rule;

below the headwaters.¹²³ They also provided for a phase-in period, whereby the Corps would gradually assert jurisdiction over waters upstream of the traditional navigable waters.¹²⁴

however, the final rule was not published for another two years. See Regulatory Program of the Corps of Engineers, 42 Fed. Reg. 37,122 (July 19, 1977).

123. "Headwaters" is defined as:

the point on the stream above which the flow is normally less than 5 cubic feet per second; provided, however, the volume of flow, point and nonpoint source discharge characteristics of the watershed, and other factors that may impact on the water quality of waters of the United States will be considered in determining this upstream limit.

40 Fed. Reg. at 31,325 (as codified in 33 C.F.R. § 209.120(d)(2)(ii)(d)).

"Navigable waters" is defined as including coastal waters and wetlands; navigable rivers, lakes, and streams; artificial channels and canals connected to navigable waters; wetlands adjacent to navigable waters; and

(c) Rivers, lakes, streams, and artificial water bodies that are navigable waters of the United States up to their headwaters and landward to their ordinary high water mark;

...

(e) All tributaries of navigable waters of the United States up to their headwaters and landward to their ordinary high water mark;

(f) Interstate waters landward to their ordinary high water mark and up to their headwaters;

(g) Intrastate lakes, rivers and streams landward to their ordinary high water mark and up to their headwaters that are utilized:

(1) By interstate travelers for water-related recreational purposes;

(2) For the removal of fish that are sold in interstate commerce;

(3) For industrial purposes by industries in interstate commerce;

(4) In the production of agricultural commodities sold or transported in interstate commerce;

...

(i) Those other waters which the District Engineer determines necessitate regulation for the protection of water quality . . . for example, in the case of intermittent rivers, streams, tributaries, and perched wetlands that are not contiguous or adjacent to navigable waters identified in paragraphs (a)-(h), a decision on jurisdiction shall be made by the District Engineer.

Id. at 31,324-25 (as codified in 33 C.F.R. § 209.120(d)(2)).

124. The Corps announced that

Department of the Army permits will be required for the discharge of dredged material or of fill material into navigable waters in accordance with the following phased schedule:

(a) Phase I: After the effective date of this regulation, discharges of dredged material or of fill material into coastal waters and coastal wetlands contiguous or adjacent thereto or into inland navigable waters of the United States and freshwater wetlands contiguous or adjacent thereto are subject to the procedures of this regulation.

(b) Phase II: After July 1, 1976, discharges of dredged material or of fill material into primary tributaries, freshwater wetlands contiguous or adjacent to primary tributaries, and lakes are subject to the procedures of this regulation.

(c) Phase III: After July 1, 1977, discharges of dredged material or fill material into any navigable water are subject to the procedures of this regulation.

40 Fed. Reg. at 31,326 (as codified in 33 C.F.R. § 209.120(e)(2)).

The Corps issued final rules largely confirming its 1975 interim final rules in July of 1977.¹²⁵ The Corps defined “waters of the United States” to include “isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce.”¹²⁶ The 1977 final regulations exempted areas above the headwaters from the § 404 permit requirement. The Corps thus established by rule that discharges into “non-tidal rivers, streams and their impoundments, including adjacent wetlands that are located above the headwaters,” were permitted.¹²⁷ In practical effect, the 1975 and 1977 regulations were similar. The Corps would require permits for dredge or fill activities in the traditional navigable waters, in non-navigable tributaries, and adjacent wetlands, but not above the headwaters. This scheme satisfied the order handed down in Callaway; in 1985, the Supreme Court upheld the Corps’ determination that wetlands adjacent to navigable waters were subject to § 404 jurisdiction.¹²⁸

Just under a year later, in an attempt to “clarify the scope” of the § 404 permit program, the Corps published the so-called “migratory bird rule.”¹²⁹ The Corps stated in the regulatory preamble that it was responding to many concerns expressed by both the public and the Presidential Task Force on Regulatory Relief, and not making any changes to existing definitions.¹³⁰ The Corps emphasized that it was neither trying to “reduce” or “expand” the scope of jurisdiction, but merely to “clarify . . . by defining the terms in accordance with the

125. Regulatory Program of the Corps of Engineers, 42 Fed. Reg. 37,122 (July 19, 1977). “Waters of the United States” was defined as:

- (1) The territorial seas
- (2) Coastal and inland waters, lakes, rivers, and streams that are navigable waters of the United States, including adjacent wetlands;
- (3) Tributaries to navigable waters of the United States, including adjacent wetlands (manmade nontidal drainage and irrigation ditches excavated on dry land are not considered waters of the United States under this definition);
- (4) Interstate waters and their tributaries including adjacent wetlands; and
- (5) All other waters of the United States not identified in paragraphs (1)–(4) above, such as isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce.

Id. at 37,144.

126. Id.

127. Id. at 37,146.

128. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 133 (1985). The Court concluded in part that the definition of “navigable waters” as “waters of the United States” signaled Congress’s intent to provide a more expansive jurisdiction under Section 404 than is provided by the Corps’s jurisdiction over activities in “navigable waters” under the RHA. Id. The Riverside Court agreed with the Corps’ view that waters and adjacent wetlands “together form the entire aquatic system.” Id. The Corps’ regulatory definition of “wetlands” is set forth at 33 C.F.R. § 323.2(c). “Once a site is properly characterized as a wetland, the Corps’ regulations regard it as within the ‘waters of the United States’ in three circumstances: (1) the wetland is an interstate wetland, (2) the wetland is adjacent to other waters of the United States, or (3) the use, degradation, or destruction of the wetland could affect interstate commerce.” Chertok et al., supra note 101, at 65. See 33 C.F.R. 323.2(d) for the Corps’ definition of “adjacent,” a term that “has been construed generously by the courts.” Chertok et al., supra note 101, at 66. “Some courts have held that wetlands may be regulated as ‘adjacent’ when groundwater aquifers provide hydrologic connections between the wetlands and other surface waters.” Id. “Other courts have also found that adjacency may be demonstrated by an ecological relationship rather than a direct physical connection.” Id. “Absent contiguity or an ecological relationship to other waters of the United States, a wetland is generally considered to be ‘isolated’ rather than adjacent.” Id. at 67.

129. Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41,217 (November 13, 1986).

130. Id. at 41,210, 41,216.

way the program is presently being conducted.”¹³¹ The preamble also described what the Corps and the EPA deemed to be “waters of the United States”¹³² and what they did not.¹³³ The Corps also stated that it planned to “propose a complete revision of the ‘Definition of Navigable Waters of the United States’, in the near future, to simplify and clarify the procedures involved, while retaining the essential aspects of the relevant policy,”¹³⁴ but it never followed through on that commitment.¹³⁵

In 2001, the Supreme Court held in SWANCC that the Corps could not assert jurisdiction over isolated, intrastate, non-navigable waters solely on the basis of the migratory bird rule.¹³⁶ In response to this decision, the Corps and the EPA published an Advance Notice of Proposed Rulemaking on the regulatory definition of the scope of the waters subject to jurisdiction under the CWA in 2003.¹³⁷ Part of

131. Id. at 41,217.

132. The term “waters of the United States” extends to intrastate waters:

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

51 Fed. Reg. 41,217.

133. The Corps described those waters generally not considered “waters of the United States,” reserving the right for either the Corps or the EPA, however, on a case-by-case basis, to determine otherwise. Those waters generally outside the scope of § 404 include:

- (a) Non-tidal drainage and irrigation ditches excavated on dry land.
- (b) Artificially irrigated areas which would revert to upland if the irrigation ceased.
- (c) Artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.
- (d) Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating and/or diking dry land to retain water for primarily aesthetic reasons.
- (e) Water-filled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States (see 33 CFR 328.3(a)).

Id.

134. Id. (citation omitted).

135. The next clarification of the term “navigable waters” came from the Supreme Court, not from the promised Corps rulemaking. SWANCC, 531 U.S. at 171–172.

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

137. Clean Water Act Regulatory Definition of “Waters of the United States.” 68 Fed. Reg. 1991 (Jan. 15, 2003). As described in a 2004 GAO Report:

The ANPRM generated significant interest, as evidenced by the approximately 133,000 comments submitted by state agencies, national development organizations, environmental groups, and other parties. According to EPA, 99 percent of the comments on the need for a new rule submitted to EPA and the Corps in response to the ANPRM were opposed to a new rule. Some groups, such as industry representatives, generally indicated that they favor a rulemaking because they believe the SWANCC decision created, among other things, a great deal of uncertainty, resulting in unequal treatment and significant financial burden to the regulated community In contrast, other groups, such as environmentalists, indicated a general opposition to any rulemaking effort, expressing concerns that a new rule would result in reduced federal jurisdiction under section 404 and other programs under the Clean Water Act An EPA official stated that 41 of the 43 states that submitted comments were concerned about any major reduction in Clean Water Act jurisdiction. This official also said that most states are concerned that political, legal, and budgetary constraints complicate efforts to regulate certain types of waters and wetlands at the state level.

GAO-04-297, supra note 11, at 14.

the reason for the proposed rulemaking was concern over whether CWA jurisdiction over isolated, intrastate, non-navigable waters could continue to be predicated on the other factors listed in the migratory bird rule.¹³⁸ In addition, the agencies were concerned that SWANCC might change the scope of regulatory jurisdiction under other provisions of the CWA, including programs under §§ 303, 311, 401, and 402, since jurisdiction under these sections was also defined as over “the waters of the United States.”¹³⁹ Once again, however, the agencies never issued a final rule.¹⁴⁰ Instead, the Corps continued to interpret their jurisdiction under § 404 as reflected in 33 C.F.R. § 328.3(a).¹⁴¹

B. Application of the Standards in the Field

To understand wetlands regulation under § 404 of the CWA, it is important to understand not only the meaning of the rules, but also the application of those rules in the field. The Corps’ Wetlands Delineation Manual is the chief guidance document for determining the existence of wetlands at a project site.¹⁴² This guidance, which is mandatory, was first published in 1987 and has since been augmented by regional supplements.¹⁴³ In 1989, the Corps, the EPA, the Fish & Wildlife Service, and the Soil

138. See 51 Fed. Reg. 41,217.

139. See *supra* note 105.

140. This failure to issue a final rule and thus clarify matters was recently lamented by Justice Roberts in his concurrence in Rapanos. *Rapanos v. United States*, 126 S. Ct. 2208, ___ U.S. ___ (2006).

141. 33 C.F.R. § 328.3(a) provides:

For the purpose of this regulation these terms are defined as follows:

(a) The term “waters of the United States” means

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a)(1)–(4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)–(6) of this section.

(8) Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area’s status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States.

142. Environmental Laboratory, U.S. Army Corps of Eng’rs, Wetlands Research Program Technical Report Y-87-1, Wetlands Delineation Manual (1987).

143. See, e.g., U.S. Army Corps of Engineers, Draft for Peer Review and Field Testing, Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Arid West Region (Aug. 3, 2005), available at <http://www.usace.army.mil/inet/functions/cw/cecwo/reg/Arid%20West%20draft.pdf>.

Conservation Service prepared an Interagency Wetlands Delineation Manual in response to criticism that federal agencies were using different procedures to identify jurisdictional wetlands.¹⁴⁴ But critics of the 1989 Manual claimed that it expanded regulatory jurisdiction without giving the public a chance to comment.¹⁴⁵ The criticism led to a 1991 proposal for a further revision of the Manual, but these revisions also met strong opposition.¹⁴⁶ Ultimately, the Corps and the EPA decided to revert to the 1987 Manual, and they continue to rely on it today.¹⁴⁷

The 1987 Manual requires that wetlands determinations be made based upon positive evidence of hydrophytic vegetation, hydric soils, and wetland hydrology.¹⁴⁸ Generally, all three of these indicators must be present for the area to be delineated as a wetland, though limited exceptions apply in specific situations, such as prairie potholes during drought years.¹⁴⁹ The purpose of the Manual is not to classify a given wetland by type, but merely to determine whether it is a wetland for purposes of § 404.¹⁵⁰

Once wetlands or other waters are found to exist at the project site, Corps field inspectors and project managers make an initial jurisdictional determination (JD) as to whether they constitute “waters of the United States” and thus require a § 404 permit.¹⁵¹ The Corps considers over 80,000 applications for § 404 permits each year and approves nearly all of them.¹⁵² Using the general permit standards of § 404(e), the Corps approves nearly ninety percent of the applications received.¹⁵³ The Corps approves the remaining ten percent by individual permits, a process which typically takes two to three months.¹⁵⁴ The Corps district offices process about 5,500 alleged violations each year, usually for failing to obtain a required permit.¹⁵⁵ About ten percent of these are violations of § 10 of the RHA; seventy-five percent are violations of § 404, and the remaining fifteen percent are violations of both § 10 and § 404.¹⁵⁶

144. White House Office on Environmental Policy, Protecting America’s Wetlands: A Fair, Flexible, and Effective Approach (Aug. 24, 1993) available at <http://www.usace.army.mil/inet/functions/cw/cecwo/reg/aug93wet.htm> (last visited October 27, 2006).

145. Id.

146. Id.

147. Id.

148. Environmental Laboratory, supra note 142, at v.

149. Id. at 84. As the Corps explains, “[t]here are certain wetland types and/or conditions that may make application of indicators of one or more parameters difficult, at least at certain times of the year. These are not considered to be atypical situations. Instead, they are wetland types in which wetland indicators of one or more parameters may be periodically lacking due to *normal* seasonal or annual variations in environmental conditions that result from causes other than human activities or catastrophic natural events.” Id. (emphasis in original). The Corps gives several “representative examples” of these types of wetlands which may not meet the three criteria (hydrophytic vegetation, hydric soils, and wetland hydrology), including seasonal wetlands, prairie potholes, and vegetated flats. Id.

150. Id. at 3. Although the Manual was “prepared primarily for use by Corps of Engineers field inspectors,” it is also used by consultants hired by developers who may need to apply for a § 404 permit. Id. at 5. See also United States Gov’t Accountability Office, GAO-05-870, “Waters and Wetlands: Corps of Engineers Needs to Better Support Its Decisions for Not Asserting Jurisdiction” 4 (2005) (describing process for applying for § 404 permit); GAO-04-0297, supra note 11, at 7.

151. Id.

152. See Williams et al., supra note 58, at 13. According to the GAO, of 85,445 § 404 applications received in fiscal year 2002, the Corps denied 128 applications; another 4,143 were withdrawn. GAO-04-297, supra note 11, at 8.

153. Williams et al., supra note 58, at 13.

154. U.S. Army Corps of Eng’rs, supra note 90. In emergencies, decisions can be made in a matter of hours. Id. The decisions on individual permit applications that require an individualized environmental impact statement (“EIS”) average about three years to process, but these permits make up less than one percent of the total number of permit applications. Id.

155. Id.

156. Id.

Although the CWA's § 404 program remains the centerpiece of the federal government's wetlands regulatory programs,¹⁵⁷ the federal government also uses water quality standards,¹⁵⁸ watershed planning,¹⁵⁹ financial assistance,¹⁶⁰ mitigation,¹⁶¹ monitoring and assessment,¹⁶² and restoration efforts¹⁶³ to protect wetlands. In addition, the wetlands conservation provision of the Food Security Act,¹⁶⁴ generally known as "Swampbuster," has dramatically reduced the amount of wetlands acreage converted for farming.¹⁶⁵ Swampbuster works essentially by withholding federal farm program benefits from any person who plants an agricultural commodity on a converted wetland that was converted by drainage, dredging, leveling, or any other means after December 23, 1985.¹⁶⁶ Swampbuster is supplemented by two other provisions of the Food Security Act: the Conservation Reserve Program, which authorizes annual federal payments to agricultural producers who remove highly erosion-prone cropland from production,¹⁶⁷ and the Wetlands Reserve Program, which authorizes the federal government to purchase conservation easements on wetlands or enter into cost-share agreements to restore wetlands.¹⁶⁸

IV. The Supreme Court and the Scope of § 404

Section 404 of the CWA prohibits the discharge of dredged or fill material into navigable waters without a permit.¹⁶⁹ The Supreme Court has addressed the scope of § 404 on three occasions. This Part argues that the Supreme Court has misconstrued Congress' intent, and that only legislative reform can remedy the problem that the Court has created.

157. Preface to Wetlands Law and Policy: Understanding § 404 (Connolly et al., ABA 2005). "At least thirty-six federal agencies have been involved in wetland-related activities since 1990." Williams et al., supra note 58, at 1. The federal government has embraced a national goal of no overall net loss of the nation's wetland resources since 1988. On April 22, 2004—Earth Day—President Bush set the goal of moving beyond "no net loss" of wetlands to attain an overall increase in the amount and quality of wetlands in America, announcing an objective to restore, protect, and improve at least three million acres of wetlands over the next five years. Council on Environmental Quality, Conserving America's Wetlands 2006: Two Years of Progress Implementing the President's Goal (2006). According to this report, 1,797,000 acres of wetlands had been restored, created, protected, or improved by April 2006, including 588,000 acres of wetlands that did not exist in 2004, 563,000 acres that existing wetlands that were improved, and 646,000 acres of existing, high-quality wetlands that were protected. Id.

158. See <http://www.epa.gov/owow/wetlands/waterquality/> (last visited October 25, 2006).

159. See <http://www.epa.gov/owow/wetlands/facts/fact26.html> (last visited October 25, 2006).

160. See <http://www.epa.gov/owow/wetlands/initiative/#financial> (last visited October 25, 2006).

161. See <http://www.epa.gov/wetlandsmitigation/> (last visited October 27, 2006). Wetlands mitigation banking—allowing property owners to restore or create a wetland to offset an action that will destroy one—has gained popularity among agencies, utility companies, loggers, and land developers, although biodiversity suffers with the increase of "created" wetlands because it's virtually impossible to inventory every living thing in order to know what you've lost. Selcraig, supra note 30, at 44.

162. See <http://www.epa.gov/owow/wetlands/monitor/> (last visited October 25, 2006).

163. See <http://www.epa.gov/owow/wetlands/restore/> (last visited October 25, 2006).

164. 16 U.S.C. §§ 3821–3824

165. See Jeffrey Zinn and Claudia Copeland, Agricultural Wetlands: Current Programs and Legislative Proposal, CRS Report 96–35ENR (1996). Describing the combined impact of the § 404 program and Swampbuster, the report notes:

The Natural Resource Conservation Service (NRCS), citing data it gathers in the Natural Resources Inventory every 5 years, calculates that the gross rate of [wetlands] loss averaged about 135,000 acres on non-Federal lands annually between 1982 and 1992, with a net loss is [sic] 70,000 to 90,000 acres after all restoration and mitigation activities are also considered. By 1992, the gross rate of conversions to agricultural use had declined to 31,000 acres, while the net loss was about 20,000 acres.

166. 16 U.S.C. § 3821(a)-(b) (2000).

167. 16 U.S.C. § 3831 (2000).

168. 16 U.S.C. § 3837 (2000).

169. 33 U.S.C. § 1344(a) (2000). Section 404 is described fully in Part III.

A. United States v. Riverside Bayview Homes, Inc.

The Riverside case arose as a result of a plan by a developer, Riverside Bayview Homes, to build a housing development on its 80-acre tract of land about one mile from Lake St. Clair in southeastern Michigan.¹⁷⁰ To accommodate the development, Riverside began to fill the land.¹⁷¹ The Corps sued Riverside to enjoin the filling, claiming that the land contained wetlands adjacent to navigable waters and that the developer was thus required to obtain a § 404 permit before proceeding with its construction.¹⁷² The federal district court for the Eastern District of Michigan ruled for the Corps, but the Sixth Circuit reversed.¹⁷³ The appeals court construed the Corps' rules narrowly to encompass only those wetlands subject to flooding at a frequency that would support the growth of aquatic vegetation.¹⁷⁴ The court chose this narrow reading because of its concern that a broad construction of the Corp's authority over wetlands might result in a taking of private property for a public use without just compensation in contravention of the Fifth Amendment.¹⁷⁵

In a unanimous opinion, the Supreme Court described the issues before it as "whether [Riverside's] property is an 'adjacent wetland' within the meaning of the applicable regulation, and if so, whether the Corps' jurisdiction over 'navigable waters' gives it statutory authority to regulate discharges of fill material into such a wetland."¹⁷⁶ It was not impressed with the lower court's concern about a possible "taking":

[W]e have made it quite clear that the assertion of regulatory jurisdiction by a government agency does not constitute a regulatory taking. The reasons are obvious. A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself 'take' the property in any sense: after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired. Moreover, even if the permit is denied, there may be other viable uses available to the owner. Only when a permit is denied and the effect of the denial is to prevent 'economically viable' use of the land in question can it be said that a taking has occurred.¹⁷⁷

After addressing the appeals court's constitutional concerns, the Court found the remaining questions relatively easy. Regarding the scope of the Corps' rule, the Court found that it encompassed wetlands that were saturated by surface or groundwater, even if they were never subject to flooding. As for the question of whether the Corps' rules were supported by the language of the statute, the Court first determined that review of the Corps' interpretation should proceed under the deferential standard set forth in its Chevron decision.¹⁷⁸ In accordance with this standard, and after a lengthy review of the merits of the Corps' conclusion "that wetlands adjacent to lakes, rivers, streams, and other bodies of water may function as integral parts of the aquatic environment even when the moisture creating the wetlands does not find its source in the adjacent bodies of water,"¹⁷⁹ the Court found the Corps' rules to be a reasonable interpretation of the statute:

170. 474 U.S. 121 (1985).

171. Id.

172. Id.

173. The lower court had found that the wetland located on Riverside's property was adjacent to Black Creek, a navigable waterway, which flows into Lake St. Clair. Id. at 121.

174. United States v. Riverside Bayview Homes, Inc., 729 F.2d 391, 397-98 (6th Cir., 1984).

175. Id.

176. Riverside, 474 U.S. at 126.

177. Id. at 126-27 (internal citations omitted).

178. Id. at 131. See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-845 (1984).

179. Riverside, 474 U.S. at 135.

We cannot say that the Corps' conclusion that adjacent wetlands are inseparably bound up with the 'waters' of the United States—based as it is on the Corps' and EPA's expertise—is unreasonable. In view of the breadth of federal regulatory authority contemplated by the Act itself and the inherent difficulties of defining the precise bounds to regulable waters, the Corps' ecological judgment about the relationship between waters and their adjacent wetlands may be defined as waters under the Act.¹⁸⁰

The Court also found a strong case for congressional acquiescence in the Corps' broad assertion of regulatory power. During the debate over amendments to the Clean Water Act in 1977, critics of the Corps sought to limit its jurisdiction to waters that were navigable in fact and those wetlands that were inundated by contiguous navigable waters. After substantial debate on the very question of the scope of the Corps' jurisdiction, Congress chose to retain the Corps' broad jurisdictional claim.¹⁸¹ Even while acknowledging some wariness in reading too much into Congress' failure to act, the Court found that “a refusal by Congress to overrule an agency's construction of legislation is at least some evidence of the reasonableness of that construction, particularly where the administrative construction has been brought to Congress' attention through legislation specifically designed to supplant it.”¹⁸²

180. *Id.* at 134.

181. The original House bill included the following provision: “The discharge of dredged or fill material into non-navigable waters and wetlands adjacent to them is regulated if the Secretary of the Army and the Governor of the State in which they are located agree that their regulation is needed because of their ecological and environmental importance.” H.R. CONF. REP. 95-830, at 97-98 (1977), reprinted in A Legislative History of the Clean Water Act of 1977, Vol. 3, at 281–282 (1978) (emphasis added). Although this language did not survive the Senate's modifications to H.R. 3199 and ultimately did not end up in the conference report, it does demonstrate that even those House members who wanted to limit jurisdiction under the dredge and fill permit program would still have extended it to non-navigable waters and wetlands adjacent to them so long as the affected state's Governor agreed the areas should be regulated.

Excerpts from the final debate in the House and Senate before passage of the 1977 Amendment include the following telling remarks:

Initially, the concern of people interested in protecting the wetlands was that the definition for “navigable waters” might be tightened. The definition remains fundamentally unchanged. . . . 123 Cong. Rec. 30, 38994 (1977) (statement of Rep. Ambro) (emphasis added).

One of the most controversial [issues] relates to the regulation of disposal of dredge and fill material, resulting from a judicial decision as to the authority and responsibility of the Army Corps of Engineers under section 404 of the 1972 Act. That decision resulted in widespread concern that many activities usually considered routine would be prohibited or made extremely difficult because of the complex regulatory procedure set up by the Corps unless there was a new statement of congressional intent. I believe H.R. 3199, in its present form, provides that clarification and necessary direction. It recognizes that there must be no basic gaps in the program for protection of wetlands and waterways from contamination and thus provides a broad program of control and required discharge permits.

Id. at 39196 (1977) (statement of Sen. Randolph, Chairman of the Senate Committee on Environment and Public Works).

The conference bill retains the comprehensive jurisdiction over the Nation's waters exercised in the 1972 Federal Water Pollution Control Act to control pollution to the fullest constitutional extent.

Id. at 39209 (statement of Sen. Baker).

182. *Riverside*, 474 U.S. at 137.

***B. Solid Waste Agency of Northern Cook County v. U.S. Army Corps
of Engineers (SWANCC)***

The SWANCC case¹⁸³ posed a more difficult question than Riverside. In SWANCC, the issue was whether the Solid Waste Agency needed a § 404 permit to construct a landfill among isolated intrastate ponds.¹⁸⁴ The Corps had initially concluded that it lacked jurisdiction over the site because it contained no wetlands, but it reversed that decision on the basis of the so-called migratory bird rule.¹⁸⁵ According to the 1986 Corps interpretation of its rules, § 404 covered lands which are or would be used by migratory birds that cross state lines or are protected by migratory bird treaties.¹⁸⁶ Speaking for a five-person majority, Justice Rehnquist found that “the ‘Migratory Bird Rule’ is not fairly supported by the CWA.”¹⁸⁷ The Court distinguished Riverside, noting that:

[i]t was the significant nexus between the wetlands and ‘navigable waters’ that informed our reading of the CWA in Riverside Bayview Homes . . . In order to rule for respondents here, we would have to hold that the jurisdiction of the Corps extends to ponds that are not adjacent to open water. But we conclude that the text of the statute will not allow this.¹⁸⁸

In a footnote, the majority referenced the legislative history of the original Clean Water Act wherein Congress indicated that it “intend[ed] that the term ‘navigable waters’ be given the broadest possible constitutional interpretation.”¹⁸⁹ Somewhat oddly, however, and without further explanation, the majority states that this language does not “signif[y] that Congress intended to exert anything more than its commerce power over navigation.”¹⁹⁰ Yet, as the Court had previously acknowledged in Riverside and as the SWANCC majority itself admits, “[c]ongress intended the phrase ‘navigable waters’ to include ‘at least some waters that would not be deemed navigable under the classical understanding of that term.’”¹⁹¹ Thus, Congress apparently did intend to exert something more than its traditional commerce power over navigation. Indeed, if one accepts the legislative history, Congress apparently intended that the phrase “navigable waters” be construed as broadly as the commerce clause itself would allow.¹⁹²

The majority also rejected the argument that had been successfully made in the Riverside case that the post-enactment legislative history of the CWA showed congressional acquiescence in the broad administrative interpretation of the law. Although acknowledging that it had occasionally recognized congressional acquiescence in administrative interpretations, it found the evidence of such acquiescence wanting in this case, notwithstanding its plain finding to the contrary in Riverside.¹⁹³

183. 531 U.S. 159 (2001).

184. Id. at 162.

185. Id. at 164.

186. Id.

187. Id. at 167. The majority included Justices O’Connor, Kennedy, Scalia, and Thomas, as well as Chief Justice Rehnquist. Id. at 161.

188. Id. at 168.

189. Id. at 168 n.3 (quoting S. Conf. Rep. No. 92-1236, at 144 (1972)).

190. Id.

191. Id. at 171 (citing United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 133 (1985)).

192. “The legislative history of the term ‘navigable waters’ specified that it ‘be given the broadest constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes.’ Regulatory Program of the Corps of Engineers, 42 Fed. Reg. 37127 (July 19, 1977) (quoting H.R. Report No. 92-1465 at 144). See infra, note 272 (statement made by Rep. John Dingell during the 1972 floor debate in the House).

193. SWANCC, 531 U.S. at 169–170 (stating that “[w]e conclude that respondents have failed to make the necessary showing that the failure of the 1977 House bill demonstrates Congress’ acquiescence to the Corps’ regulations of the “Migratory Bird Rule”). When the Corps promulgated its final rule “revising and reorganizing all regulations governing the permit programs of the Corps of Engineers” on July 19, 1977, it explicitly included

Finally, the majority rejected the government's claim that its interpretation of the law was entitled to deference under the Chevron doctrine.¹⁹⁴ The majority suggested that deference was not warranted because the statute was clear, but that even if it were not clear, deference would not be accorded the agency's interpretation of the statute because it sought to invoke "the outer limits of Congress' power."¹⁹⁵

Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, dissented.¹⁹⁶ Stevens began by tracing the history of the CWA. He noted in particular that while § 404 has its roots in the RHA, its purposes were fundamentally different. Whereas the focus of the RHA was on obstructions to navigation, the CWA was intended to control water pollution. According to the dissent, this shift in purpose made it necessary to expand the scope of the law beyond navigability.¹⁹⁷ Congress' intent to support such a shift was evidenced by the decision to delete the word "navigable" from the definition of "navigable waters," as well as by the Conference Report language that had been summarily rejected by the majority. Indeed, the dissent suggested that despite the use of the phrase "navigable waters," "[t]he activities regulated by the CWA have nothing to do with Congress' 'commerce power over navigation.'"¹⁹⁸

Stevens found a strong case for congressional acquiescence as well as deference under Chevron. As Stevens noted, the Court had already decided in Riverside that Congress had acquiesced in the Corps' broad jurisdictional claims during the debates on the 1977 CWA amendments.¹⁹⁹ While the SWANCC case involved isolated waters—a resource whose connection to "navigable waters" was more tenuous than the wetlands that were adjacent to navigable waters in Riverside—these isolated waters were fully within the scope of those waters that were the subject of congressional debate over § 404's jurisdictional reach during the deliberations over amendments to the Clean Water Act in 1977.²⁰⁰ Moreover, although the majority had focused its attention on the migratory bird rule announced in 1986, Stevens noted that the isolated waters over which the Corps' 1977 rules claimed jurisdiction might affect interstate

isolated wetlands as within its jurisdiction. Regulatory Program of the Corps of Engineers, 42 Fed. Reg. 37144 (July 19, 1977). For the purpose of the regulation, the Corps defined "waters of the United States" as, among other things, "[a]ll other waters of the United States . . . such as isolated wetlands and lakes, intermittent streams . . . and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce." Id. In a footnote to this section of the definition of waters of the United States, the Corps described this inclusion of isolated wetlands, etc., as "incorporat[ing] all other waters of the United States that could be regulated under the Federal government's Constitutional powers to regulate and protect interstate commerce, including those for which the connection to interstate commerce may not be readily obvious..." Id.

Five months later, during the final debate in the House on H.R. 3199, the bill's sponsor, Rep. Roberts, mentioned this very same July 19, 1977 regulation as part of the source of the Committee on Public Works and Transportation's concern that the § 404 program would prove difficult to administer. A Legislative History of the Clean Water Act of 1977 at 348. Thus, the Committee had recommended a narrowing of § 404 jurisdiction to "traditionally navigable waters." Id. However, the final version of the bill that resulted from the Conference Report, described by Rep. Roberts as a "successful compromise," left the Corps' interpretation of its jurisdiction untouched. This bill became the 1977 Amendment to the FWPCA.

194. Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC), 531 U.S. at 172 (citing Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)).

195. SWANCC, 531 U.S. at 172. The Court of Appeals had found that the Migratory Bird Rule was plainly within the scope of the commerce clause because millions of people spend more than a billion dollars on recreational pursuits relating to migratory birds. Id. at 173. The government had further argued that the protection of migratory birds is an important national interest. Id. The majority was at best skeptical of these claims, noting that "these arguments raise significant constitutional questions." Id.

196. Id. at 174.

197. Id. at 179–80.

198. Id. at 181.

199. SWANCC, 531 U.S. at 185-191 (Stevens, J., dissenting).

200. See supra notes 189-192 and accompanying text.

commerce in any number of ways.²⁰¹ Thus, the migratory bird rule was merely intended as another example of how isolated waters might affect interstate commerce. It was not meant to supplant the general rule that isolated waters should be covered whenever they could affect interstate commerce, regardless of the way in which such commerce might be affected.²⁰²

Stevens also noted that the connection between migratory birds and the isolated waters at issue in the SWANCC case was clear, as was their impact on commerce. The waters were home to several bird species protected by international treaties,²⁰³ and filling these waters would adversely impact these species.²⁰⁴ The presence of these migratory birds, in turn, affected interstate commerce by generating commercial activities such as bird watching and hunting of enormous economic value.²⁰⁵

C. Rapanos v. United States and Carabell v. U.S. Army Corps of Engineers

The facts in the Rapanos and Carabell cases²⁰⁶ are more similar to those in Riverside than they are to SWANCC. Unlike SWANCC, which involved isolated waters, the Rapanos and Carabell cases involved wetlands that were adjacent to tributaries of navigable waters.²⁰⁷ Unlike Riverside, however, the wetlands in Rapanos and Carabell were not adjacent to the navigable waters themselves.²⁰⁸ This distinction was critical to Justice Scalia's plurality opinion.

John Rapanos owned three tracts of land near Midland, Michigan.²⁰⁹ On the 230 acre Salzburg site, Rapanos proposed to build a shopping center.²¹⁰ The Michigan Department of Natural Resources, which administers the § 404 program for the state under the Corps' supervision, inspected the site and advised Rapanos that the land likely included wetlands that would require a § 404 permit.²¹¹ Rapanos

201. The rules were intended to encompass "isolated lakes and wetlands, intermittent streams, prairie potholes, and other waters not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce." Regulatory Programs of the Corps of Engineers, 42 Fed. Reg. 37,127 (July 19, 1977). The Corps went on to describe four possible ways in which isolated waters could affect interstate commerce, such as waters used for the removal of fish sold in interstate commerce, or the use of waters for agricultural purposes to produce products sold in interstate commerce. Id. at 37,128. The Corps made clear, however, that this was not intended as an inclusive list, and thus the 1986 "migratory bird rule" was merely intended as another possible example of how isolated waters might affect interstate commerce. See Final Rule for Regulatory Programs of the Corps of Engineers 51 Fed. Reg. 41,216 to 41,217 (November 13, 1986).

202. SWANCC, 531 U.S. at 185, n.12 (Stevens, J., dissenting).

203. The site was home to the second largest breeding colony of Great Blue herons in northeastern Illinois. SWANCC, 531 U.S. at 194. Among the other species that used the site were the Great Egret, the Green-Backed Heron, the Black-Crowned Night Heron, the Canada Goose, the Wood Duck, the Mallard, the Greater Yellowlegs, and the Belted Kingfisher. Id. at 194, n.16.

204. SWANCC, 531 U.S. at 194 (Stevens, J., dissenting).

205. As suggested in more detail below, Congress' power to regulate activities affecting migratory birds is protected under the treaty power even if it is not supported by the commerce clause. See infra notes 299-300 and accompanying text.

206. The Supreme Court granted certiorari in both Rapanos v. United States, No. 04-1034, and Carabell v. Army Corps of Engineers, No. 04-1384, and consolidated the cases for review. Rapanos v. United States, 126 S.Ct. 2208 (2006).

207. Rapanos, 126 S.Ct. at 2219 ("In these consolidated cases [Rapanos and Carabell], we consider whether four Michigan wetlands, which lie near ditches or man-made drains that eventually empty into traditional navigable waters, constitute 'waters of the United States' within the meaning of the Act.").

208. Rapanos, 126 S.Ct. at 2214.

209. Rapanos, 126 S.Ct. at 2238 (Kennedy, J., concurring).

210. Id.

211. Id.

hired a consultant who confirmed the presence of many acres of wetlands,²¹² but Rapanos nonetheless chose to proceed with land-clearing and filling activities without seeking a permit.²¹³ He did the same on his two other sites—a 275-acre Hines Road site and a 200-acre Pine River site—destroying an estimated seventeen acres of wetlands on the former and fifteen acres of wetlands on the latter.²¹⁴ All of the sites were adjacent to non-navigable tributaries of traditionally navigable waters.²¹⁵

June and Keith Carabell owned twenty acres of land of which sixteen were wetlands.²¹⁶ Like the lands in Riverside the site was approximately one mile from Lake St. Clair.²¹⁷ Unlike Riverside, however, the Carabell site was not adjacent to navigable waters, but rather to a ditch that was tributary to navigable waters.²¹⁸ The ditch was hydrologically separated from the site by a man-made berm.²¹⁹ Carabell applied for a permit to fill the wetlands to accommodate the construction of a 112 unit condominium complex. The permit was denied for ecological reasons.²²⁰

The five opinions in the Rapanos and Carabell cases expose sharp divisions among members of the Court about the scope of the CWA and leave some doubt as to the current state of the law. Writing for a four person plurality, and relying primarily on the definition of “waters” from the 1954 edition of Webster’s New International Dictionary, Justice Scalia found that “[‘waters of the United States’] includes only those relatively permanent, standing or continuously flowing bodies of water ‘forming geographic features’ that are described in ordinary parlance as ‘streams[,] . . . oceans, rivers, [and] lakes.’”²²¹ He conceded that there was an “inherent ambiguity” in attempting to draw a line between water and land, and so he deferred to the Corps’ decision to include wetlands that actually abut “traditional navigable waters.”²²² Beyond this, however, he refused to recognize the Corps’ authority. He wholly rejected the dissent’s claim that Congress acquiesced to the Corps’ rules, and that those rules merit deference under the Chevron doctrine.²²³ Regarding the issue of deference, he found that whatever ambiguity might exist with respect to the meaning of the phrase “waters of the United States,” it does not extend to “whether storm drains and dry ditches are ‘waters.’”²²⁴

One of the government’s chief concerns with adopting a narrow construction of the phrase “navigable waters” was its implication for regulating industrial discharges under § 402 of the CWA,

212. Id. at 2253 (Stevens, J., dissenting). Rapanos “threatened to ‘destroy’ Dr. Goff [the consultant] if he did not destroy the wetlands report, and refused to pay Dr. Goff unless and until he complied.” Id. (citing App. For Pet. To Cert., No. 04-1034, p. B15).

213. Id.

214. Id.

215. Id.

216. Id. at 2254.

217. Id.

218. Id.

219. Id.

220. 126 S.Ct. 2208, 2239 (2006) (Kennedy, J., concurring).

221. Id. at 2225. Scalia makes clear that “relatively permanent” could encompass “seasonal rivers which contain continuous flow during some months of the year, but no flow during dry months.” Id. at n.5. But he leaves for another day the extent to which such intermittent streams might be covered by the law. Plainly though, streams that come and go at intervals and that are “broken and fitful” are not covered under this analysis.

222. Id. at 2225.

223. Id. at 2220-25.

224. Id. at 2232. It is hard to know whether Scalia viewed Rapanos as a “step one” or “step two” case under the Chevron test. At first blush, he seems to say that the statute is clear, and that the case can thus be resolved under step one. Id. at 2225 (“In sum, 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”) (emphasis added). Two sentences later, however, he states that the Corps’ interpretation “is thus not ‘based on a permissible construction of the statute’”—a phrase that is only relevant under step two, where the Court finds the language of a statute ambiguous. Id. Perhaps Scalia was merely suggesting that the statute was clear (step one), but that even if it were ambiguous (step two), the agency’s interpretation was unreasonable.

because the definition of “navigable waters” applied to the entire Act.²²⁵ Scalia dismissed this concern.²²⁶ Even though the same definition might apply, he noted, the law prohibits “the addition of any pollutant to navigable waters,”²²⁷ and since industrial discharges into tributaries can ultimately result in the addition of a pollutant into traditional navigable waters, the scope of § 402 was not unduly impacted by his decision.²²⁸ By contrast, Scalia argued that the dredged or fill material that is the subject of the § 404 program does not add a pollutant to navigable water because it “does not normally wash downstream.”²²⁹

Justice Roberts, who joined the plurality opinion,²³⁰ wrote a brief concurring opinion that seems somewhat at odds with the plurality. Roberts’ opinion laments the fact that the Corps and the EPA failed to follow through with a proposed rule that would have clarified the scope of waters that are covered by the CWA in light of the SWANCC decision.²³¹ Had they done so, Roberts suggests that he would have accorded them “generous leeway . . . [g]iven the broad, somewhat ambiguous, but nonetheless clearly limiting terms Congress employed in the Clean Water Act”²³² But SWANCC dealt with “isolated waters” and clarifying the scope of the Corps’ authority over isolated waters would not have had much relevance to Justice Scalia’s conclusion that “waters of the United States” do not include intermittent streams, even if they bear a hydrological connection to navigable waters.²³³ Indeed, Carabell’s lawyers had specifically tailored their argument to claim that the subject wetlands were isolated just as in SWANCC.²³⁴ They even conceded that the Corps had jurisdiction over isolated wetlands if they could demonstrate a hydrological connection—a concession that would have proved unnecessary had the Rapanos plurality view prevailed.²³⁵ Moreover, the plurality suggested that its reading of the law was the only permissible reading of the statute.²³⁶ Given this finding, it is hard to see how the plurality would grant “generous leeway”²³⁷ to the Corps in promulgating new rules.

The key opinion in the case was Justice Kennedy’s.²³⁸ Kennedy concurred in the plurality’s decision to remand the case for further fact-finding.²³⁹ However, Kennedy disagreed with the plurality’s finding that the scope of the Corps’ jurisdiction is not limited to the traditional definition of navigable waters.²⁴⁰ Furthermore, he rejected outright two key findings by the plurality: (1) that “navigable waters”

225. Rapanos, 126 S.Ct. at 2227.

226. Id.

227. See 33 U.S.C. § 1362(12)(A) (2000) (emphasis added).

228. Rapanos, 126 S.Ct. at 2227.

229. Id. at 2228. Both Justice Kennedy in his concurring opinion and Justice Stevens in his dissenting opinion note the likelihood that the discharged material will release sediments and other pollutants that will indeed wash downstream. Id. at 2245 (Kennedy, J., concurring); Id. at 2263 (Stevens, J., dissenting).

230. Id. at 2214.

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

232. Id.

233. The Corps was certainly free to address the scope of its authority more broadly, and as Chief Justice Roberts notes, the agency had invited broad comments on the scope of its jurisdiction, but the plurality’s analysis of the Rapanos and Carabell cases would not have been helped by clarifying the meaning of SWANCC.

234. Brief for the Petitioner at 39-40, Carabell v. U.S. Army Corps of Eng’rs, 126 S.Ct. 2208 (2006) (No. 04-1384).

235. Id. at 28-29.

236. Rapanos, 126 S.Ct. at 2225.

237. See supra, text accompanying note 224.

238. See infra, note 263 and accompanying text.

239. Rapanos, 126 S.Ct. at 2236 (Kennedy, J., concurring).

240. Kennedy acknowledges that “Congress’ choice of words creates difficulties . . . the word ‘navigable’ in the Act must be given some effect.” Id. at 2247. He goes on to state:

Consistent with SWANCC and Riverside Bayview and with the need to give the term ‘navigable’ some meaning, 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.

encompasses only “relatively permanent, standing or flowing bodies of water”,²⁴¹ and (2) that wetlands are covered by the Act only if they bear a “continuous surface connection to bodies that are ‘waters of the United States’ in their own right.”²⁴² Kennedy, a westerner, is especially critical of the plurality’s failure to appreciate the ephemeral nature of many major river systems in the west. As he noted, under the plurality’s approach, “the merest trickle, if continuous, would count as a ‘water’ subject to federal regulation, while torrents thundering at irregular intervals through otherwise dry channels would not.”²⁴³ Kennedy’s alternative approach relies heavily on a single reference from SWANCC requiring a showing of a “significant nexus” between the wetlands and navigable waters.²⁴⁴ But Kennedy’s reading of this standard is much more generous than the plurality’s:

Consistent with SWANCC and Riverside Bayview and with the need to give the term “navigable” some meaning, 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. The required nexus must be assessed in terms of the statute’s goals and purposes. Congress enacted the law to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,” . . . and it pursued that objective by restricting dumping and filling in “navigable waters,” . . . With respect to wetlands, the rationale for Clean Water Act regulation is, as the Corps has recognized, that wetlands can perform critical functions related to the integrity of other waters—functions such as pollutant trapping, flood control, and runoff storage . . . Accordingly, wetlands possess the requisite nexus, and thus come within the statutory phrase “navigable waters,” if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as “navigable.” When, in contrast, wetlands’ effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term “navigable waters.”²⁴⁵

Kennedy also clarified that the Corps may regulate wetlands adjacent to waters considered navigable under the traditional test without any further showing.²⁴⁶ He further acknowledged that the Corps may lawfully identify by regulation “categories of tributaries” that are sufficiently significant that wetlands adjacent to them can be protected on the basis of adjacency alone.²⁴⁷ For wetlands adjacent to non-significant, non-navigable tributaries, however, Kennedy would require the Corps to “establish a significant nexus on a case-by-case basis.”²⁴⁸

Because the Court of Appeals for the Sixth Circuit had failed to specifically find a significant nexus between the wetlands and navigable waters in either the Rapanos or Carabell cases, Kennedy found that a remand was necessary.²⁴⁹ Regarding Rapanos, Kennedy rejected the Sixth Circuit’s finding that a significant nexus can be found merely by showing a hydrologic connection.²⁵⁰ Rather, “some measure of the significance of the connection for downstream water quality” would have to be shown.²⁵¹ On the other hand, with respect to Carabell, Kennedy agreed with the Sixth Circuit’s finding that a hydrologic

Id. at 2248.

241. Id. at 2242.

242. Id.

243. Id. at 2242.

244. Id. at 2246, 2248-50.

245. Id. at 2248 (emphasis added).

246. Id.

247. Id.

248. Id. at 2249.

249. Id. at 2250.

250. Id. at 2250-51.

251. Id. at 2250.

connection was not necessary to show a significant nexus: “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.”²⁵² Nonetheless, because the Corps in this case had based its jurisdiction solely on the adjacency of the land to a ditch, “[a] more specific inquiry, based on the significant nexus standard, was necessary.”²⁵³

Justice Stevens wrote the principal dissent. In Stevens’ view, Riverside “squarely controls” the outcome of the Rapanos and Carabell cases.²⁵⁴ While Riverside involved a wetland adjacent to a navigable waterway, Stevens noted that the issue in that case had been framed as whether § 404 permits were required for the discharge of fill material “into wetlands adjacent to navigable bodies of waters and their tributaries.”²⁵⁵ Stevens also emphasized the Court’s finding in Riverside that under Chevron judicial review was limited to the question of “whether it is reasonable, in light of the language, policies, and legislative history of the Act for the Corps to exercise jurisdiction over wetlands adjacent to but not regularly flooded by rivers, streams, and other hydrographic features more conventionally identifiable as ‘waters.’”²⁵⁶

In Riverside, the Court had found that the Corps’ rules encompassing wetlands adjacent to navigable waters and their tributaries were reasonable even if they might include some wetlands not significantly intertwined with the ecosystem of adjacent waterways, “for where it appears that a wetland covered by the Corps’ definition is in fact lacking in importance to the aquatic environment . . . the Corps may always allow development of the wetland for other uses simply by issuing a permit.”²⁵⁷ In contrast to Riverside, Stevens found the plurality’s reliance on SWANCC to be misplaced because SWANCC involved the Corps’ jurisdiction over isolated waters and “had nothing to say about wetlands, let alone wetlands adjacent to traditionally navigable waters or their tributaries.”²⁵⁸

While Stevens was highly critical of the plurality opinion, he was more generous toward Kennedy’s concurrence, taking issue primarily with Kennedy’s finding that a significant nexus between wetlands and navigable waters must be shown before those wetlands are subject to the Corps’ jurisdiction.²⁵⁹ As Stevens pointed out, the “significant nexus” reference was an effort by the SWANCC Court to characterize the Riverside decision, and that decision purportedly encompassed wetlands adjacent to both navigable waters and their tributaries.²⁶⁰ Moreover, Stevens noted that because wetlands

252 Id. at 2251.

253 Id. at 2252.

254 Id. at 2255. (Stevens, J., dissenting).

255 Id. (emphasis in original).

256 Id. at 2255 (citing Riverside Bayview, 474 U.S. at 131).

257 Id. at 2256 (citing 474 U.S. at 135).

258 Id.

259 Referring to the plurality opinion as well as Justice Kennedy’s concurring opinion, Justice Stevens had the following to say at the beginning of his dissent:

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

Id. at 2252.

260 Id. at 2264. In a separate dissenting opinion, Justice Breyer also takes issue with the nexus requirement. In his view, the Corps’ authority under the Clean Water Act “extends to the limits of Congress’ power to regulate interstate commerce.” Id. at 2266. Under this standard he would have no problem finding these cases within the Corps’ jurisdiction. Id.

adjacent to non-navigable tributaries generally do significantly affect traditional navigable waters by preserving water flows and protecting water quality, the Corps' longstanding rules could not fairly be criticized as overbroad as applied to such tributaries.²⁶¹ Stevens conceded, however, that the "significant nexus" test "will probably not do much to diminish the number of wetlands covered by the Act in the long run."²⁶²

D. Understanding Rapanos

Justice Kennedy's opinion is crucial to the way in which Rapanos will serve as precedent in the future. If the Corps can demonstrate a significant nexus between wetlands adjacent to non-navigable tributaries and navigable waters then jurisdiction over those wetlands would have the support of five members of the Court—the four dissenters and Justice Kennedy.²⁶³ But understanding Rapanos requires further analysis of several key issues.

First, as the divergent opinions suggest, the language of the CWA and its legislative history are at least somewhat at odds with one another. While Congress chose to use the phrase "navigable waters," there are good arguments to support the dissent's view that it never meant "navigable" in any conventional—or "traditional"—sense of that word. Perhaps the most compelling evidence in support of this argument stems simply from the fact that—as Justice Stevens noted in his dissent in SWANCC²⁶⁴—the goals of the 1972 CWA have nothing to do with navigation. The Act's purpose is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."²⁶⁵ That purpose cannot practically be achieved without recognizing the integrated nature of the hydrologic cycle and the need to protect the water resource at every stage of its existence.²⁶⁶ Even water vapor can be compromised when it interacts with pollutants to form acid rain and can lead to significant contamination of surface water supplies.²⁶⁷ Plainly, a narrow definition of the phrase "navigable waters" as used in the CWA is not adequate to achieve the statute's broad purposes.

261. Id. at 2264.

262. Id.

263. Stevens argues that the Corps jurisdiction should be upheld if on remand either the plurality's test or Justice Kennedy's test is met, although he acknowledges that it is Kennedy's opinion that will likely be controlling. More generally, the Supreme Court has indicated that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . .'" Marks v. United States, 430 U.S. 188, 193 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 169 (1979)). Indeed, the U.S. Court of Appeals for the Seventh Circuit has already followed this principle in interpreting Rapanos. U.S. v. Gerke Excavating, 464 F.3d 723, 724 (7th Cir. 2006) ("When a majority of the Supreme Court agrees only on the outcome of a case and not on the ground for that outcome, lower-court judges are to follow the narrowest ground to which a majority of the Justices would have assented if forced to choose. In Rapanos, that is Justice Kennedy's ground.") (internal citation omitted). But see Grutter v. Bollinger, 539 U.S. 306, 325 (2003); U.S. v. Johnson, No. 05-1444 (1st Cir. Oct. 31, 2006) (following Justice Stevens' suggestion in his Rapanos dissent that future courts may find federal jurisdiction over wetlands using either the plurality or Justice Kennedy's standard from Rapanos, instead of finding Justice Kennedy's standard to be controlling).

264. 531 U.S. at 181.

265. 33 U.S.C. § 1251(a).

266. See <http://www.nationalatlas.gov/water.html> (explaining that "[a]lthough water that is temporarily diverted from the hydrologic cycle is eventually returned back to the cycle, the quality of that 'used' water usually is changed") (last visited October 28, 2006).

267. See http://www.windows.ucar.edu/tour/link=/milagro/effects/water_watersheds.html (describing how nitrogen oxides and sulfur dioxide dissolve in water vapor to form acid rain) (last visited October 28, 2006). While such discharges are generally regulated under the Clean Air Act, 42 U.S.C. §§ 7401 et seq., there is no compelling reason for denying EPA the authority to control such pollution under the CWA as well if necessary to achieve the Act's fundamental purposes.

Moreover, Congress was fully aware of the relevance of the hydrologic cycle to pollution control and of the critical need to include tributaries within the scope of the law.²⁶⁸ This broad intent was further suggested—though somewhat ambiguously—by final changes made to the definition of “navigable waters.” The original Senate bill expressly included “tributaries” within the definition²⁶⁹ while the House bill defined “navigable waters” as “navigable waters of the United States.”²⁷⁰ The final language removed both the reference to tributaries and navigable from the definition.²⁷¹ But in explaining these changes the conferees plainly indicated their intention “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.”²⁷²

On the other hand, there remains the nagging problem that Congress chose to use the phrase “navigable waters” to define the scope of the Act. Even Justice Stevens, in his dissent in Rapanos, saw the

268. The 1977 Senate report described the scope of the Act as follows:

Initial consideration of the section 404 controversy stimulated discussion on the extent of the waters in which discharges of dredged or fill material will be regulated.

The 1972 Federal Water Pollution Control Act exercised comprehensive jurisdiction over the Nation’s waters to control pollution to the fullest constitutional extent. In its report on that legislation, the Senate Public Works Committee stated ‘waters move in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.’

Restriction of jurisdiction to those relatively few waterways that are used or are susceptible to use for navigation would render this purpose impossible to achieve. Discharges of dredged or fill material into lakes and tributaries of these waters can physically disrupt the chemical and biological integrity of the Nation’s waters and adversely affect their quality. The presence of toxic pollutants in these materials compounds this pollution problem and further dictates that the adverse effects of such materials must be addressed where the material is first discharged into the Nation’s waters. To limit the jurisdiction of the Federal Water Pollution Control Act with reference to discharges of the pollutants of dredged or fill material would cripple efforts to achieve the act’s objectives.

S. Rep. No. 95-370, at 75 (1977), as reprinted in 1977 U.S.C.C.A.N. 4326, 4400.

269. See S. Rep. No. 92-414, at 77 (1972), reprinted in Legislative History of the Water Pollution Control Act Amendments of 1972, at 1495 (1973).

270. H.R. 11896, 92d Cong., 2d Sess., § 502(8) (1971), reprinted in 1 Leg. Hist. 1069 (emphasis added).

271 33 U.S.C. §1362(7) (2006) (“The term ‘navigable waters’ means the waters of the United States.”).

272. S. Rep. No. 92-1236, at 144 (1972), as reprinted in 1 Legislative History 327. On the House floor, Congressman John Dingell further explained the conferees intent regarding the scope of the law:

The conference bill defines the term “navigable waters” broadly for water quality purposes. It means all “the waters of the United States” in a geographical sense. It does not mean “navigable waters of the United States” in the technical sense as we sometimes see in some laws The authority of Congress over navigable waters is based on the Constitution’s grant to Congress of “Power . . . to regulate commerce with Foreign Nations and among the several States” Although most interstate commerce 150 years ago was accomplished on waterways, there is no requirement in the Constitution that the waterway must cross a State boundary in order to be within the interstate commerce power of the Federal Government. Rather, it is enough that the waterway serves as a link in the chain of commerce among the States as it flows in the various channels of transportation—highways, railroads, air traffic, radio and postal communication, waterways, et cetera. The “gist of the Federal test” is the waterway’s use “as a highway,” not whether it is “part of navigable interstate or international commercial highway.” Thus, this new definition clearly encompasses all water bodies, including main streams and their tributaries, for water quality purposes. No longer are the old, narrow definitions of navigability, as determined by the Corps of Engineers, going to govern matters covered by this bill.

1 Legislative History, at 250–51 (emphasis added).

need to defend his opinion against Justice Kennedy’s claim that Stevens’ reading of the law failed to give meaning to the word “navigable.”²⁷³

Second, even accepting that the phrase “navigable waters” should be given its “traditional” meaning, as five Justices do, the plurality and concurring opinions are devoid of any analysis explaining how that term has “traditionally” been viewed by the Court.²⁷⁴ Yet the phrase has a rich history that suggests a far more ambiguous meaning—one highly dependent on context—than any of the five justices in the plurality seem to appreciate. While the plurality and concurring opinions faithfully cite The Daniel Ball,²⁷⁵ and United States v. Appalachian Electric Power²⁷⁶—two important cases addressing the meaning of the term “navigability”—they fail to note that even these two seminal cases fundamentally disagree on the meaning of the term. The most commonly cited definition of navigability comes from The Daniel Ball,²⁷⁷ which involved a federal law requiring a license for passenger steam ships operating upon “the navigable waters of the United States.”²⁷⁸ In considering the scope of the law, the Court announced that

Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.²⁷⁹

Nearly 70 years later, in the Appalachian Electric Power case, the Court took a different view—

The legal concept of navigability embraces both public and private interests. It is not to be determined by a formula which fits every type of stream under all circumstances and at all times. Our past decisions have taken due account of the changes and complexities in the circumstances of a river. We do not purport now to lay down any single definitive test. We draw from the prior decisions in this field and apply them, with due regard to the dynamic nature of the problem To appraise the evidence of navigability on the natural condition only of the waterway is erroneous. Its availability for navigation must also be considered A waterway, otherwise suitable for navigation, is not barred from that classification merely because artificial aids must make the highway suitable for use before commercial navigation may be undertaken Nor is it necessary that the improvements should be actually completed or even authorized. The power of Congress over commerce is not to be hampered because of the necessity for reasonable improvements to make an interstate waterway available for traffic.²⁸⁰

The Appalachian Electric Power case thus effectively eliminated the requirement that waters be navigable “in their ordinary condition” and expressly recognizes “the dynamic nature of the problem.”²⁸¹

273. “This logical connection [between wetlands adjacent to tributaries and traditional navigable waters] alone gives the wetlands the ‘limited’ connection to traditional navigable waters . . . and disproves Justice Kennedy’s claim that my approach gives no meaning to the word ‘navigable.’” Rapanos, 126 S.Ct. at 2264 (Stevens, J., dissenting).

274. See generally, Id. at 2214-2252.

275. 77 U.S. 557 (1870).

276. 311 U.S. 377 (1940).

277. The Daniel Ball, 77 U.S. at 563.

278. Id. at 559 (citing 10 Stat. 61 (1852)).

279. Id. at 563.

280. Appalachian Elec. Power, 311 U.S. at 404-408.

281. Id. at 404.

Moreover, as far back as 1903 the Court made clear that even artificial channels such as canals can be navigable waters for purposes of determining the scope of federal power.²⁸²

More recently, the Supreme Court expressly recognized that the phrase “navigable waters” means different things in different contexts. In Kaiser Aetna v. United States, the Supreme Court found that a pond that had been dredged and connected to the Pacific Ocean was navigable for purposes of the federal government’s regulatory authority.²⁸³ In so finding, it rejected the government’s claim that navigability has a “fixed meaning”:

The position advanced by the Government . . . presumes that the concept of ‘navigable waters of the United States’ has a fixed meaning that remains unchanged in whatever context it is being applied. . . . [W]e . . . agree with [the District Court’s] conclusion that all of this Court’s cases dealing with the authority of Congress to regulate navigation . . . cannot simply be lumped into one basket. As the District Court aptly stated, ‘any reliance upon judicial precedent must be predicated upon careful appraisal of the purpose for which the concept of “navigability” was invoked in a particular case.’²⁸⁴

The Court went on to recognize that the concept of navigability has been construed differently in at least four different contexts: (1) delimiting the boundaries of the navigational servitude; (2) determining the scope of regulatory authority under the commerce clause; (3) determining the scope of authority under the RHA; and (4) establishing the limits of federal jurisdiction over admiralty cases.²⁸⁵ Furthermore, although the Court does not say so in Kaiser Aetna, it has used a somewhat different test for navigability to determine ownership of the title to the bed of navigable streams.²⁸⁶

Third, beyond the meaning of “navigable waters,” the meaning of the word “navigable” is itself far from clear. For example, the Supreme Court has held that a river or stream may be navigable even where it fails to meet Justice Scalia’s test of “relatively permanent, standing or continuously flowing bodies of water.” In Economy Light & Power Co. v. United States,²⁸⁷ the Court held that: “[n]avigability . . . is not destroyed because the water course is interrupted by occasional natural obstructions or portages; nor need the navigation be open at all seasons of the year, or at all stages of the water.”²⁸⁸

Moreover, courts have accepted claims of navigability based on evidence that a body of water is capable of being traversed by a canoe, even if it has never actually been traversed by a canoe.²⁸⁹ Even a ditch or canal with a seasonal water supply that is capable of supporting a canoe might therefore be deemed “navigable.” Thus, while navigability is an inherently ambiguous term, it is not especially

282. Perry v. Haines, 191 U.S. 17, 29 (1903).

283. 444 U.S. 164, 172 (1979).

284. Id. at 170–71 (emphasis in original).

285. Id. at 171–72.

286. See United States v. Sasser, 967 F.2d 993, 996 (4th Cir.1992) (construing Kaiser Aetna as approving at least four different tests for determining navigability: (1) ebb and flow, (2) connection with a continuous interstate waterway, (3) navigable capacity, and (4) navigable in fact).

287. 256 U.S. 113 (1921).

288. Id. at 122 (emphasis added).

289. FPL Energy Maine Hydro, LL v. Fed. Energy Reg. Comm’n, 287 F.3d 1151 (D.C. Cir. 2002). In this case, the court sustained FERC’s conclusion that the Messalonskee Stream, a tributary of the Kennebec River in Maine, was navigable based upon three “test” trips in a canoe made for purposes of the litigation as well as FERC’s determination that the physical characteristics of the stream rendered it suitable for commercial navigation. Id. at 1155. All parties to the case had acknowledged that there was no evidence that the stream had ever been used for commercial or even recreational purposes. Id. In the course of deciding the case, the court referenced FERC’s prior determinations that streams that are only suitable for kayaking by expert paddlers (as opposed to canoeing) are not navigable. Id. at 1158. This distinction has been criticized. See, e.g., Richard J. Pierce, Jr., What is a Navigable River? Canoes Count but Kayaks Do Not, 53 Syracuse L. Rev. 1067 (2003).

limiting. Given the ambiguity surrounding the phrase “navigable waters” and the word “navigability”, it seems most appropriate for courts to accord broad deference to an agency in its efforts to construe the these words in the context in which they were written and in a manner that satisfies congressional intent.²⁹⁰

Fourth, the argument that Congress intended the phrase “navigable waters” to include non-navigable tributaries is bolstered by the language from one of the progenitors of the CWA, § 13 of the RHA. As described previously,²⁹¹ that provision, sometimes called the Refuse Act, makes it unlawful to:

throw, discharge, or deposit . . . any refuse matter of any kind or description whatever . . . into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; and it shall not be lawful to deposit . . . material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or floods, or otherwise . . .²⁹²

It seems highly unlikely that in adopting a more robust pollution control program with the passage of the 1972 FWPCA Congress would have intended the law to apply to only a small fraction of the waters covered under § 13 of the RHA.²⁹³

Fifth, whether one agrees or disagrees with Justice Scalia’s conclusion, his analytical approach to this case is divorced from the reality of two centuries of American water law. Scalia blithely brushes away years of judicial and administrative precedent fleshing out in great detail the meaning of the phrase “navigable waters” in favor of a common dictionary definition of the word “waters,” which he then argues offers “the only plausible interpretation” of the word and thus the scope of a major environmental law.²⁹⁴ The dictionary definition used by the plurality, which encompasses “only those relatively permanent, standing or continuously flowing bodies of water forming geographic features . . .” bears no clear relation to traditional notions of navigability nor, as Justice Kennedy observed, does it square with the practical realities of watercourses in the Western United States.²⁹⁵ Thus, far from clarifying the law, Scalia’s approach only serves to obscure it. What is perhaps most unsettling about the plurality’s decision

290. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–845 (1984). Under the familiar *Chevron* test for reviewing an agency’s construction of a statute, the court must first ask whether the statute is clear. *Id.* If it is, the court enforces the statute. *Id.* If, however, the statute is ambiguous, the court will defer to any reasonable interpretation of the statute by an agency, at least when the agency has announced its interpretation in a notice and comment rulemaking or formal adjudication. *Id.* See *United States v. Mead Corp.*, 533 U.S. 218 (2001) (suggesting that interpretive rules not promulgated through notice and comment rulemaking not entitled to *Chevron* deference).

291. See *supra* note 90 and accompanying text.

292. 33 U.S.C. § 407 (2000) (emphasis added).

293. See Lance Wood, Don’t Be Misled: CWA Jurisdiction Extends to All Non-Navigable Tributaries of the Traditional Navigable Waters and to Their Adjacent Wetlands, 34 *Env’tl Law Rep.* 10187, 10201 (2004).

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

295. The absence of Justice O’Connor from the decision in this case is palpable. O’Connor’s knowledge and practical experience as a Western rancher would surely have helped better ground the outcome in the realities of water law. While it is hard to know how O’Connor would have come down on the merits of these cases, it is hard to imagine that she would have been persuaded to support a dictionary definition of water that was so far removed from the reality of her native Arizona. While Justice Kennedy—the only Westerner now on the Court—notes many of these same problems with the plurality opinion in his concurrence, O’Connor’s credibility on these issues might well have swayed at least one other member of the Court away from the approach announced by the plurality.

is that it commands the support of four members of the Court and was reached without even the benefit of briefing.²⁹⁶

Finally, it must be observed that however convoluted wetlands law has become as a result of the Rapanos decision, the Court has not raised serious questions about the federal government's constitutional authority to adopt a comprehensive wetlands regulation program. To be sure, some expressions of doubt were voiced by Justice Rehnquist in the SWANCC decision²⁹⁷ and by Justice Scalia in Rapanos.²⁹⁸ But a clear majority of the Court appears willing to accept that the Congress has the constitutional power to regulate activities that impact most wetlands. Indeed, even if the Commerce Clause does not fully authorize Congress' power to regulate wetlands, Congress plainly has additional authority under the treaty clause and perhaps the property clause that could overcome those limitations at least in some cases. The Necessary and Proper Clause gives the Congress the power to adopt laws necessary and proper for the execution of treaties.²⁹⁹ The United States has adopted various migratory bird treaties which afford ample authority for the migratory bird rule, even if it would not pass muster under the commerce clause.³⁰⁰

On the other hand, the fact that the application of § 404 in a particular case might lead to a valid takings claim³⁰¹ does not render the general requirement for permits to fill wetlands or other waters unconstitutional.³⁰² In a similar context, the Supreme Court held that general requirements to comply with mining and mine reclamation standards under the Surface Mining Control and Reclamation Act do not render the law unconstitutional on its face.³⁰³

E. The Fallout from Rapanos

A mere nine days after the Supreme Court reached its decision in Rapanos, a federal district court in Texas handed down a decision that aptly illustrates the uncertainty and confusion that Rapanos has caused, and the possible impact that the decision may have on the government's ability to enforce water

296. See 126 S.Ct. at 2259 (Stevens, J. dissenting). The plurality opinion may seem plausible to those unfamiliar with watercourses and the law that has evolved over the past two centuries, but it calls to mind an earlier mistake by the Court of Appeals for the Ninth Circuit in Charlestone Stone Products v. Andrus, 553 F.2d 1209 (1977). There the Ninth Circuit decided—without the benefit of briefing—that water is a mineral for purposes of the General Mining Law of 1872. *Id.* As with the plurality opinion in this case, that conclusion seemed plausible to those unfamiliar with the mining law. At a simplistic definitional level, water surely is a mineral. But as a unanimous Supreme Court found in overturning the appeals court decision, Congress never intended that water should be treated as a locatable mineral for purposes of the mining law. Andrus v. Charlestone Stone Products Co., Inc., 436 U.S. 604 (1978).

297. 531 U.S. at 173 (noting that significant constitutional questions raised by Corps' assertion that CWA jurisdiction extends to intrastate, non-navigable, isolated wetlands).

298. 126 S.Ct. at 2224 (noting that the Corps' interpretation stretches the outer limits of Congress's commerce power and raises difficult questions about the ultimate scope of that power); *but see id.* at 2249 (Kennedy, J., concurring) (asserting that regulation of wetlands adjacent to non-navigable tributaries that possess a significant nexus with navigable waters will raise no serious constitutional or federalism difficulty).

299. Const. art. 1, § 8, cl. 18. The Supreme Court has held that legislation implementing a valid treaty is likewise valid under the necessary and proper clause. Missouri v. Holland, 252 U.S. 416 (1920) (concerning the Migratory Bird Treaty between the United States and Great Britain).

300. For example, the Migratory Bird Treaty Act, 16 U.S.C. §§ 703–711 (2000), is the domestic law that implements the United States' commitment to four international conventions (with Canada, Japan, Mexico, and Russia) for the protection of shared migratory bird resources.

<http://www.fws.gov/migratorybirds/intrnltr/treatlaw.html#mbta> (last visited October 29, 2006).

301. See, e.g., Palm Beach Isles Associates v. U.S., 208 F.3d 1374 (Fed. Cir. 2000) (denial of § 404 permit could amount to categorical taking if permit denial had effect of denying owner all economically viable use of property).

302. Since the enactment of the Clean Water Act more than thirty years ago, the Supreme Court has repeatedly affirmed the authority of the federal government to regulate wetlands, most recently in Rapanos itself. 126 S.Ct. 2208.

303. Hodel v. Virginia Surface Mining and Reclamation Ass'n., 452 U.S. 264, 268 (1981).

pollution standards. In United States v. Chevron Pipe Line Co., the United States brought an action against Chevron after a corroded pipeline leaked 3,000 barrels of oil into an ephemeral creek.³⁰⁴ The action was brought under the Oil Pollution Act (OPA), which imposes strict liability for natural resource damages and removal costs for the discharge of oil “into or upon the navigable waters or adjoining shorelines.”³⁰⁵ As with the CWA, “navigable waters” are defined in the OPA as “waters of the United States.”³⁰⁶

The unnamed creek that received the discharge flows into Ennis Creek, which flows into Rough Creek, and then to the Double Mountain Fork of the Brazos River.³⁰⁷ Only the Double Mountain Fork flowed continuously, although no clear finding was made as to whether it was “navigable.”³⁰⁸ The three creeks feeding into the Double Mountain Fork flowed only in response to rainfall events.³⁰⁹ The unnamed creek enters Ennis Creek 17.5 miles upstream from Rough Creek, which enters the Double Mountain Fork 23.8 miles later.³¹⁰

The spill occurred 500 feet upstream of the confluence with Ennis Creek and extended to that confluence.³¹¹ The evidence showed that there was no flowing water in the creek from the time of the spill in August, 2000 until October 12, 2000, when the first rainfall event occurred.³¹² Chevron claimed that by the time of the rainfall, it had completed remedial measures.³¹³ The United States produced evidence indicating that extensive areas of oil contaminated soil remained until some time after October 12.³¹⁴

Chevron filed a motion for summary judgment arguing, among other things, that the spill did not involve navigable waters.³¹⁵ The district court agreed.³¹⁶ Much of the district court’s analysis is questionable. The court relies essentially on dictum from a Fifth Circuit decision suggesting that “navigable waters” had to meet the “navigable in fact” test or be adjacent to such waters,³¹⁷ as well as on the Supreme Court’s Rapanos decision.³¹⁸ On the basis of these authorities, the district court concluded that Chevron’s motion should be granted unless “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.”³¹⁹

This characterization of the issue, following Justice Scalia’s plurality opinion in Rapanos, effectively ignores the significant nexus test from the SWANCC decision and Justice Kennedy’s concurring opinion in Rapanos. But the district court’s characterization seems wrong even under Scalia’s analysis. While Scalia clearly would define “navigable waters” narrowly so as not to include the ephemeral creek into which the oil in Chevron Pipe Line spilled, he nonetheless recognized that

304. 437 F.Supp.2d 605 (N.D. Tex. 2006).

305. 33 U.S.C. § 2702(a).

306. Id. § 2701(21).

307. Chevron Pipe Line, 437 F.Supp.2d at 608.

308. Id.

309. Id.

310. Id.

311. Id.

312. Id.

313. Id.

314. Id.

315. Id.

316. Id. at 615.

317. Id. at 611–12 (citing in re Needham, 354 F.3d 340 (5th Cir. 2003)).

318. Id. at 615 (“Therefore, based upon the arguments contained in Chevron’s Brief in Support of its Motion for Summary Judgment, 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 and adjoining shorelines. Accordingly, Chevron’s Motion for Summary Judgment is granted.”).

319. Id. at 614.

discharges into non-navigable, intermittent waters that flow into navigable waters might be encompassed by the law. In particular, he notes approvingly that “from the time of the CWA’s enactment, lower courts have held that the discharge into intermittent channels of any pollutant that naturally washes downstream likely violates [the CWA], even if the pollutants discharged from a point source do not emit ‘directly into’ covered waters, but pass ‘through conveyances’ in between.”³²⁰ Thus, Scalia still might find that the spill in Chevron Pipe Line, while discharged into a non-navigable waterway, would still violate the CWA.

Whether or not the court in Chevron Pipe Line got the law right, it helps to show how Rapanos has further complicated an issue that had already created substantial confusion for the regulated and regulators alike. A growing number of courts have had to grapple with this problem,³²¹ and the ad hoc nature of the significant nexus test assures that substantial additional resources will be spent at the administrative and judicial levels just to sort through the basic question of federal jurisdiction.³²² The time and money spent on resolving these jurisdictional issues would be far better spent on the ground to protect the wetlands themselves.

V. The Need for Policy Reform

The Rapanos, SWANCC, and Riverside decisions have plainly created a jurisdictional muddle. For different reasons, Justices Roberts and Kennedy suggested that this confusion might present an opportunity for the Corps to promulgate new rules that clarify the scope of the Corps’ authority.³²³ There are good reasons for the Corps to proceed with such a rulemaking. In the end, however, real clarity will only come if Congress intercedes and amends the law to flesh out its intent. This Part fully explores the rulemaking and legislative options.

A. Rulemaking: Explaining the “Significant Nexus” Test

Rapanos raises questions about the approach to jurisdiction taken under the current rules. While those rules rely substantially on the Corps’ primary authority over non-navigable tributaries, a majority of the Court seems reluctant to accept that authority. For that reason, the Corps should consider rules that accomplish three principal things.³²⁴ First, the Corps should flesh out and explain how it will determine jurisdiction based upon evidence of a significant nexus between wetlands and navigable waters test. Justice Kennedy has offered support for a generous test, but the Corps should explain how it will administer the test in individual cases. In particular, the Corps might accept Justice Kennedy’s suggestion that it identify “through regulations or adjudication . . . 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 [to fall under the Corps

320. Rapanos, 126 S.Ct. at 2227 (emphasis in original).

321. Northern California River Watch v. City of Healdsburg, 457 F.3d 1023 (9th Cir. 2006) (upholding jurisdiction over discharge into a rock pond that was connected by groundwater to the Russian River under a significant nexus analysis); United States v. Evans, 2006 WL 2221629, slip op. (M.D.Fla., 2006) (upholding jurisdiction using the significant nexus test over discharge of a pollutant into a stream that was either itself a covered water or that flowed into a covered water).

322. Moreover, at least one court does not agree that Justice Kennedy’s “significant nexus” standard from his Rapanos concurrence is the controlling opinion: the First Circuit recently remanded a case on the issue of regulatory jurisdiction with the specific instructions that “the district court should do exactly as Justice Stevens has suggested [in his Rapanos dissent]. The federal government can establish jurisdiction over the target sites if it can meet either the plurality’s or Justice Kennedy’s standard as laid out in Rapanos.” U.S. v. Johnson, No. 05-1444 (1st Cir. Oct. 31, 2006) at 23, available at <http://www.ca1.uscourts.gov> (last visited Nov. 28, 2006).

323. See Rapanos, 126 S.Ct. at 2235–36 (2006) (Roberts, C.J., concurring); *id.* at 2248–49 (Kennedy, J., concurring).

324. References to the Corps and rulemaking options should be understood to include the EPA, which generally issues joint regulations with the Corps on matters relating to wetlands. See *supra* note 11.

§ 404 authority.]”³²⁵ As Kennedy intimates, the Corps’ rules might essentially create a rebuttable presumption in favor of jurisdiction in such cases. The presumption could be rebutted only by providing expert evidence that the wetlands “either alone or in combination with similarly situated lands in the region, [do not] significantly affect the chemical, physical, or biological integrity of other covered waters more readily understood as navigable.”³²⁶ If done well, these rules could go a long way to avoiding the cumbersome, case-by-case analysis that will otherwise be required for wetlands adjacent to non-navigable tributaries.

Second, the facts in Rapanos suggest a need for the Corps to adopt rules to ensure that any expert used to evaluate wetlands has no pecuniary or personal interest in the outcome of the assessment, and otherwise avoids any conflict of interest.³²⁷ The developer, Rapanos, refused to pay his expert and threatened to “destroy” him if he did not expunge the unfavorable report he had prepared.³²⁸ Although the expert employed by Rapanos stood up to him, it is easy to imagine that only those consultants who prepare reports that minimize the identification of jurisdictional wetlands will find favor with developers. Rules regarding preparation of environmental impact statements under NEPA might help inform the content and scope of rules ensuring fair and independent determinations of jurisdictional wetlands.³²⁹

Third, the Corps should address Justice Roberts’ concern about the need to clarify the result in SWANCC. While SWANCC suggests that the Corps lacks authority to regulate isolated waters, the Corps should consider rules that will help it assess whether waters are truly isolated or whether a significant nexus between such waters and navigable waters can be shown. While the Corps informally makes these

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

326. Id.

327. The Corps might, for example, require that the wetlands delineation report be requested and paid for by the developer but prepared for the Corps. A good model for such rules is the process for preparing mineral surveys for patents issued under the General Mining Law of 1872. 30 U.S.C. § 29 (2000). The mineral survey is used to delineate and mark boundaries, describe improvements on the land, and resolve any conflicts with others claiming an interest in the land. See generally, 43 C.F.R. § 3861 (2005). The surveyor must be chosen from a list of surveyors approved by the Bureau of Land Management. Id. at § 3861.5–1. The claimant arranges for and pays for the survey, but the surveyor and any assistants must be disinterested parties. Id. at § 3861.5–2. The surveyor’s report and field notes are provided to the BLM with a copy to the claimant. Id. at § 3861.6–1. Most importantly, when the surveyor is preparing the survey she is acting as an employee of the federal government and not as an employee of the claimant. Waskey v. Hammer, 223 U.S. 85 (1912).

In contrast to the rules for preparing mineral surveys, the GAO found in 2005 that the use of a consultant to prepare a JD request or a permit application can affect the Corps’ decision on what data to review, noting the following:

Each district maintains a list of consultants whom residential homeowners and developers can use, although the Corps does not advocate or recommend specific consultants or require that only those consultants on its lists be used. As a result, the list can contain a number of consultants with varying levels of technical expertise. According to several project managers, if they have extensive experience with a particular consultant and trust that consultant’s work, they are more likely to limit their review to the data submitted with the request, including any data on the types of soils, plants, and hydrology the consultant may have collected for use in delineating wetlands, along with questioning the consultant rather than independently verifying the information with their own data sources.

GAO-05-870, supra note 150, at 25.

328. See supra note 212.

329. The regulations require, among other things, that any contractor involved in preparing an EIS execute a disclosure statement “specifying that they have no financial or other interest in the outcome of the project.” 40 C.F.R. § 1506.5(c) (2006).

judgments already under the standard form used to make jurisdictional determinations,³³⁰ the criteria that it uses should be better fleshed out.

Finally, both the Corps and the EPA should clarify when and how waters are subject to federal authority under the CWA as a result of their potential to cause the “addition of any pollutant to navigable waters.”³³¹ While Justice Scalia makes this point in response to the government’s concern about its authority to regulate industrial discharges under § 402 of the Clean Water Act,³³² it may apply as well to the addition of pollutants that occur as the result of the discharge of dredged and fill material under a § 404 permit, or, as the recent district court decision in Chevron Pipe Line suggests, a discharge of oil under the OPA.³³³

While clarifying rules may seem like a good idea at first blush, the reality of the federal rulemaking process should give the Corps and EPA pause.³³⁴ Even under the most optimistic scenario, it will likely take several years and millions of dollars for the agencies to promulgate final rules. Once promulgated, litigation over those rules seems inevitable and will result in several more years of uncertainty. Thus, even if new regulations could effectively clarify the scope of the Corps’ authority under the Clean Water Act, they cannot resolve the ongoing debate over congressional intent in using the phrase “navigable waters” to describe the government’s jurisdiction under the CWA. Only Congress can address this issue, and it should do so without delay so that the Corps and EPA are not forced into needless regulatory proceedings.

B. Bases for Extending Jurisdiction

While SWANCC and Rapanos suggest that one or more members of the current Supreme Court have concerns about the government’s constitutional authority under the Commerce Clause over certain waters that may be remote from navigable waters,³³⁵ the Court has never ruled on the full scope of the government’s constitutional powers over water resources.³³⁶ Thus, Congress plainly has an opportunity to clarify the current confusion over federal authority. Moreover, the level of confusion and dissonance over this issue appears to worsen with every new decision from the Court. The time has come for Congress to act. If Congress chooses to act, it seems most likely that it will expand federal authority over water resource activities that impact water quality beyond traditional navigable waters.³³⁷

330. Jurisdictional Determination form, U.S. Army Corps of Eng’rs (August 13, 2004). Examples of the forms can be found at http://www.spa.usace.army.mil/reg/Jurisdictional_Determinations/QTR01-FY06/200300296.pdf and http://www.spa.usace.army.mil/reg/SWANCC/swancc_non.asp. See Regulatory Guidance Letter, No. 05-02, Expiration of Geographic Jurisdictional Determinations of Waters of the United States, U.S. Army Corps of Eng’rs (June 14, 2005) available at <http://www.usace.army.mil/cw/cecwo/reg/rpls/RGL05-02.pdf>. See also supra text accompanying note 150.

331. 33 U.S.C. § 1362(12) (2000).

332. 33 U.S.C. § 1342 (2000). See Rapanos, 126 S.Ct. at 2227.

333. See supra text accompanying notes 304-322.

334. See, e.g., Thomas O. McGarity, The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld, 75 Texas L. Rev. 525 (1997).

335. See, e.g., Rapanos, 126 S.Ct. at 2224 (“even if the term ‘the waters of the United States’ were ambiguous as applied to channels that sometimes host ephemeral flows of water (which it is not), we would expect a clearer statement from Congress to authorize an agency theory of jurisdiction that presses the envelope of constitutional validity”).

336. The Court has made clear that water is an article of commerce and that state regulation of water is subject to review under the dormant commerce clause. Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941 (1982). But it has not ruled on the full scope of federal authority over water.

337. The current Congress will likely be wary of taking any action that directly implicates state authority over water quantity. The “Wallop Amendment,” adopted as part of the 1977 amendments to the Clean Water Act expressly provides:

It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this

For several reasons, Congress should extend that authority to the fullest extent possible. Most importantly, water resources are far more integrated than the courts sometimes recognize.³³⁸ It is not surprising that questions of constitutional power have arisen under the CWA but not under the Clean Air Act because it is obvious that outdoor, ambient air cannot be easily confined inside jurisdictional boundaries.³³⁹ Water is more easily confined than air, even when water occurs under natural conditions, and it is probably easier to control. But the hydrologic cycle suggests that air and water resources are more similar than they are different because even supposedly “isolated waters” play an integral role in the hydrologic cycle.³⁴⁰ Furthermore, establishing state or local standards for wetlands regulation, effluent discharges, and nonpoint source pollution are impractical and potentially burdensome on entities operating in multiple jurisdictions, and that is why so many states support a comprehensive federal regulatory program.³⁴¹ Finally, even “isolated waters” may play a critical role in protecting the habitat of birds and other wildlife. The EPA estimates, for example, that the prairie potholes of the Upper Midwest are home to more than 50% of the migratory waterfowl of North America.³⁴²

Just how far the government can go with a federal program will likely remain uncertain for some time, but it can go much farther than the SWANCC and Rapanos decisions allow. Most obviously, the federal government can extend jurisdiction beyond navigable waters to the fullest extent allowed under the commerce clause. Recent Supreme Court jurisprudence suggests that the Commerce Clause gives the federal government the power to regulate only the channels of commerce, the instrumentalities of commerce, and action that substantially affects interstate commerce.³⁴³ While these limitations have

chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

33 U.S.C. § 1251(g) (2000).

338. See <http://ga.water.usgs.gov/edu/watercycle.html>.

339. On the other hand, indoor air quality is often the subject of state and local regulation. Cite to articles. See, e.g., Arnold W. Reitze, Jr. and Sheryl-Lynn Carof, The Legal Control of Indoor Air Pollution, 25 B.C. Envtl. Aff. L. Rev. 247, 254 (1998) (noting that “the Occupational Safety and Health Administration (OSHA), EPA, and many state agencies regulate indoor air quality under various programs”).

340. See <http://ga.water.usgs.gov/edu/watercycle.html>; Ralph W. Tiner, U.S. Fish and Wildlife Service, Geographically Isolated Wetlands of the United States, WETLANDS, Vol. 23, No. 3, at page 496 (2003), available at:

<http://www.bioone.org/archive/0277-5212/23/3/pdf/i0277-5212-23-3-494.pdf>;
<http://www.epa.gov/owow/wetlands/types/pothole.html>

341. Thirty-three individual states as well as the District of Columbia joined together to file an amicus brief in Rapanos in support of the United States and the Corps of Engineers, in which they argued that:

Petitioners’ narrow view of the Act, which excluded these waters from federal regulation, would unavoidably impose additional, unnecessary burdens on downstream States and their citizens. Each such State, when dealing with waters within state boundaries that fail water quality standards mandated by the Clean Water Act, would be forced to impose disproportionate limits on in-state sources to offset pollution from out-of-state sources that the State cannot regulate. This could produce unfair differences not only between dischargers in different States but also between dischargers in different areas of a single State, since those areas downstream of other States might have to be regulated more strictly than other areas—all contrary to the primacy of evenhanded discharge standards under the Act.

Brief for New York et al. as Amici Curiae Supporting Respondents at 15, Rapanos v. United States, 126 S.Ct. 2208 (2006) (No. 04-1034).

342. <http://www.epa.gov/owow/wetlands/types/pothole.html>.

343. United States v. Morrison, 529 U.S. 598, 608–609 (2000).

sometimes stymied federal efforts to regulate certain activities with a tangential relation to commerce,³⁴⁴ the courts have had no trouble upholding environmental regulation on commerce clause grounds.³⁴⁵ Federal authority should be especially easy to show for a commodity like water, which exists in a global cycle. Indeed, the Supreme Court has expressly recognized that water is an article of commerce such that States may not adopt rules that unduly restrict its delivery across state lines.³⁴⁶

Moreover, even the regulation of isolated wetlands would seem to fit easily under the Supreme Court's decision in Wickard v. Filburn.³⁴⁷ In Wickard, the Court held that Congress could regulate the production of wheat produced on Filburn's farm even if it never entered the stream of commerce and even if Filburn consumed all of the wheat that he produced on the farm.³⁴⁸ The Court held that Congress can regulate such wholly intrastate, non-commercial, and relatively trivial wheat production so long as that production, when viewed in combination with other wheat production, might have a substantial effect on interstate commerce.³⁴⁹ Given the cumulative significance of wetlands for wildlife habitat, flood prevention, erosion control, and water quality, it is hard to imagine that even isolated wetlands would fail to satisfy the Wickard standard.

Beyond the Commerce Clause, Congress can also invoke federal authority under the treaty power. Invoking the treaty power would assure the government's ability to regulate activities that might affect migratory birds, or international waters for which treaties have been approved, including, for example, various migratory bird treaties,³⁵⁰ the 1909 Boundary Waters Treaty with Canada,³⁵¹ and the 1944 United States-Mexico Treaty, which provides for the allocation of water in the Colorado, Tijuana, and Rio Grande Rivers.³⁵² In Missouri v. Holland, which addressed the constitutionality of the Migratory Bird Treaty Act of 1918,³⁵³ the Court made clear that Congress can adopt all legislation necessary to carry out its treaty obligations.³⁵⁴

It seems unlikely that any but the most insignificant waters or wetlands would escape regulation if Congress chose to exercise the full scope of its authority under the Commerce Clause and treaty power. But if any waters were left unregulated, the government could probably regulate such waters on public lands under the property clause, which authorizes the Congress to "make all needful rules and regulations

344. See, e.g., id. (holding that commerce clause did not provide Congress with authority to enact civil remedy provision of Violence Against Women Act inasmuch as provision was not regulation of activity that substantially affected interstate commerce); U.S. v. Lopez, 514 U.S. 549 (1995) (holding Gun-Free School Zones Act exceeded Congress' commerce clause authority since possession of gun in local school zone was not economic activity that substantially affected interstate commerce).

345. See, e.g., Hodel v. Virginia Surface Min. and Reclamation Ass'n, Inc., 452 U.S. 264 (1981). See also John C. Eastman, A Fistful of Denial: The Supreme Court Takes a Pass on Commerce Clause Challenges to Environmental Laws, Cato Sup. Ct. Rev. (September 2004), available at <http://ssrn.com/abstract=907869>.

346. Sporhase, 458 U.S. 941 (holding that (1) groundwater is an article of commerce and, therefore, subject to congressional regulations and (2) Nebraska statutory restriction on withdrawal of groundwater from any well within Nebraska intended for use in adjoining state violated commerce clause by imposing impermissible burden on interstate commerce). Note that Sporhase involved groundwater, not a water body that was clearly crossing state lines.

347. 317 U.S. 111 (1942).

348. Id. at 127-28.

349. Id.

350. See supra text accompanying note 300.

351. Treaty Between the United States and Great Britain Respecting Boundary Waters Between the United States and Canada, U.S.—Gr. Brit., January 11, 1909, 36 Stat. 2448.

352. Treaty Between the United States of America and Mexico Respecting Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, U.S.—Mex., February 3, 1944, 59 Stat. 1219.

353. 16 U.S.C. §§ 703-711 (2000).

354. See supra note 299 and accompanying text.

respecting the Territory or other Property belonging to the United States.”³⁵⁵ This language would seem to assure the government’s plenary power to protect activities impacting water resources on public lands.

C. The Legislative Solution: Expanding Federal Power to “Constitutional Waters”

Ever since the SWANCC decision, some members of Congress have recognized a need for legislative action. Several bills first introduced in 2003 propose important first steps toward clarifying the scope of the federal government’s jurisdiction over water resources. The most recent iteration of this proposed legislation, The Clean Water Authority Restoration Act of 2005, was introduced with fifteen co-sponsors in the Senate and 163 co-sponsors in the House.³⁵⁶ It would redefine “waters of the United States” to mean:

. . . all waters subject to the ebb and flow of the tide, the territorial seas, and all interstate and intrastate waters and their tributaries, including lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, natural ponds, and all impoundments of the foregoing, to the fullest extent that these waters, or activities affecting these waters, are subject to the legislative power of Congress under the Constitution.³⁵⁷

From a semantic perspective, the chief concern with this proposed legislation is that it fails to fix the fundamental flaw in the current law. The current statute defines “navigable waters” to mean “waters of the United States.”³⁵⁸ The proposed legislation would define “waters of the United States” to mean, essentially, all waters subject to regulation under the constitution. But adding a definition to a phrase which is itself the definition of that loaded phrase used in the statute—“navigable waters”—is unnecessarily complicated, and this approach fails to acknowledge the repeated admonition from a majority of the Court that Congress must give meaning to the word “navigable.”

Instead, Congress should simply abandon the phrase “navigable waters” and substitute a new phrase that truly describes what Congress intends—“constitutional waters.” “Constitutional waters” would stand in marked contrast to “navigable waters,” and, as described above, would likely extend the government’s permitting authority to virtually all activities that could impact water resources. And while this new phrase might help avoid a debate over dictionary meanings, such a broad delegation of power to federal agencies will still raise some significant objections. Most obvious, perhaps, is a concern about the proper division of power between the federal government and the states. But so long as the government maintains its focus on water quality, states are likely to accept a strong federal role. Unlike water quantity allocation, which has a long tradition of state regulation and control,³⁵⁹ water quality regulation has long been within the purview of the federal government,³⁶⁰ and states and regulated entities alike benefit from the federal government’s capacity to establish uniform national standards.

Evidence of state support for a strong federal role is illustrated by the fact that thirty-three states and the District of Columbia filed an amicus brief in support of broad federal power over wetlands.³⁶¹ By

355. U.S. Const., art. IV, § 3, cl. 2.

356. For legislative tracking and a list of co-sponsors of this legislation, see the Library of Congress’s legislative information database, Thomas, at <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:SN00912:@@L&summ2=m&> (Senate) and <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR01356:@@P> (House)

357. The Clean Water Authority Restoration Act of 2005, § 4(3), amending § 502(23), S. 912, 109th Cong., 1st Sess.; H.R. 1356, 109th Cong., 1st Sess. (2005). As of October 29, 2006, the bill remains in committee. <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:s.00912>: (last visited October 29, 2006).

358. 33 U.S.C. § 1362(7) (2000).

359. See *supra* note 337.

360. As evidenced by the Clean Water Act, 33 U.S.C.A. §§ 1251 *et seq.*

361. See *supra* note 341. Rapanos, 126 S.Ct. at 2246 (Kennedy, J., concurring) (remarking that “it is noteworthy that 33 states plus the District of Columbia have filed an amici brief in this litigation asserting that the

contrast, only two states supported the position of Rapanos and Carabell.³⁶² Moreover, most states are not idle observers in the regulation of water quality. Under the cooperative federalism model of the CWA, states are allowed to adopt their own programs to assume responsibility for regulating pollution discharges under both the § 402 and § 404 programs.³⁶³

Expanding the scope of the CWA to constitutional waters will also not fully resolve the problem that arises with the current definition of deciding which waters are subject to federal jurisdiction. As a practical matter, however, it should make the problem much easier. Under the current definition, as interpreted by the Supreme Court, the government must first decide what waters are “navigable.” Wetlands located adjacent to such waters are jurisdictional, but someone must decide what it means to be adjacent. If the wetlands are not “adjacent” to “navigable waters” then the test becomes even murkier. The government must decide whether the wetlands have a significant effect on the chemical, physical or biological integrity of navigable waters, which may be located many miles away. While the courts may defer to agency judgments about these matters, the process for making these determinations will be complicated, site specific, and expensive.

By contrast, making jurisdictional determinations for “constitutional waters” should be relatively easy. First, virtually any land or water resource that has much association with the hydrologic cycle is likely encompassed by the new definition. More importantly, though, as a practical matter, the Corps is almost certain to extend its general permit program to ensure that waters of marginal ecological importance are addressed routinely. Any waters with anything more than marginal importance will plainly meet the new jurisdictional standards. Thus, the line-drawing exercise for “constitutional waters” is likely to be relatively painless, especially as compared with the procedures that will have to be followed to implement Rapanos.

Another potential problem with a broad definition suggested by Justice Scalia in his plurality opinion in Rapanos concerns the impact of broad federal jurisdiction on private property rights. But this concern is not peculiar to federal regulation. It applies with equal force to state or local regulation. Moreover, such rights will have the same level of protection they have always had from government regulation and control. If they go “too far”³⁶⁴—if they interfere with “distinct investment-backed expectations”³⁶⁵ courts may still conclude that the government must compensate the private owner.³⁶⁶ That said, concerns that regulation of water quality might occasionally result in takings claims should not be used as an excuse to avoid the imposition of reasonable regulatory standards. Moreover, takings claims will likely be rare, and cannot even be known until a decision on a permit application is first made.³⁶⁷

CONCLUSION

The Supreme Court has struggled to define the proper scope of regulatory power over wetlands under the CWA. While one can fairly argue that the Court’s task would have been easier if it had simply followed the congressional intent evident in legislative history, Congress deserves a fair share of the blame for using the phrase “navigable waters” to describe the scope of the Clean Water Act—a law that has nothing to do with navigation. By defining the phrase ambiguously, Congress only compounded the problem. The solution to these problems is not—as some of the Justices have suggested—to have the

Clean Water Act is important to their own water policies . . . these amici note, among other things, that the Act protects downstream states from out of state pollution that they cannot themselves regulate”).

362. Brief for Alaska et al., as amici curiae for Petitioners, Rapanos, 126 S.Ct. 2208 (2006) (Nos. 04-1034, 04-1384).

363. See 33 U.S.C. §§ 1342, 1444 (2000).

364. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

365. Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978).

366. See supra note 301.

367. Hodel, 452 U.S. 264 (1981).

agency clarify the law. After three Supreme Court decisions and much agency guidance, the problems are too convoluted to be addressed with another rule. Nor will the problems be solved by embedding another definition in the current definition of “navigable waters” as some in Congress have proposed. Rather, the solution requires a simple acknowledgement that the historical reference to “navigable waters” was a mistake, and that what Congress really meant was to allow water quality regulation over all waters subject to federal constitutional authority, i.e., “constitutional waters.” By adopting this simple solution, the federal government can get on with fulfilling its mandate to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters . . .”³⁶⁸

368. 33 U.S.C. § 1251(a) (2000).