RAPANOS AND *WARREN* - A TALE OF TWO CASES: THE SUPREME COURT BATS .500

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TABLE OF CONTENTS

INTRODUCTION

On February 21, 2006, the United States Supreme Court heard arguments in two cases interpreting the Clean Water Act (CWA).[1] One of these cases, *Rapanos v. United States*,[2] involved the definition of the phrase "navigable waters,"[3] particularly with respect to the dredge and fill permit process under § 404 of the CWA.[4] The other case, *S.D. Warren Co. v. Maine Board of Environmental Protection*,[5] involved the definition of the term "discharge" under § 401 of the CWA.[6]

The CWA was enacted in 1972 over the veto of President Nixon.[7] The Act was intended to provide a far-reaching and comprehensive regulation of water pollution with "[t]he objective of . . . restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters."[8] The statute established a "national goal that the discharge of pollutants into the navigable waters be eliminated by 1985."[9]

The CWA is an extremely complex statute establishing a variety of programs to be administered by federal agencies, most notably the Environmental Protection Agency (EPA) and the United States Army Corps of Engineers (the Corps).[10] The CWA also contemplates that a number of other pollution control programs will be administered by the states pursuant to delegation agreements.[11] Nevertheless, two of the crucial terms in the statute, "discharge" and "navigable waters" are not precisely defined.[12] The definition of "navigable waters" has only

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[1] Rapanos v. United States, 126 S.Ct. 2208, 2215 (2006); S.D. Warren Co. v. Me. Envtl. Prot. Bd., 126 S. Ct. 1843, 1846 (2006); 33 U.S.C. § 1251 et.seq. (2000).

[2] *Rapanos*, 126 S.Ct. at 2214.

[3] *Id.* at 2220; 33 U.S.C. § 1362(7) (2000).

[4] *Rapanos*, 126 S.Ct. at 2215; 33 U.S.C. § 1344(a) (2000).

[5] *S.D. Warren Co.*, 126 S.Ct. at 1843.

[6] *Id.* at 1847; 33 U.S.C. § 1341(a) (2000).

[7] 33 U.S.C. § 1251 et.seq. (2000); Gregory T. Broderick, *From Migratory Birds to Migratory Molecules; The Continuing Battle Over the Scope of Federal Jurisdiction Under the Clean Water Act*, 30 COLUM J. ENVTL L. 473, 480 (2005).

[8] 33 U.S.C. § 1251(a).

[9] *Id.*

[10] *Id.* § 1251 et.seq.; Jeanne M. Christie, *State Wetland Programs,* SK081 ALI-ABA 329, 352 (June 9-10, 2005).

[11] 33 U.S.C. § 1251(b).

[12] *Id.* § 1362(7), (16).

been reviewed by the Supreme Court on two previous occasions.[13] The definition of "discharge" in the context of § 401 of the CWA has only been reviewed by the Court on one previous occasion.[14]

The term "discharge"is defined in § 502(16)[15] to include the term "discharge of a pollutant," which is defined separately in § 502(12) of the CWA.[16] Nevertheless, the only time that "discharge" appears in the CWA separate from "discharge of a pollutant" is in § 401.[17]

The Supreme Court heard both arguments for these two important cases on the same day, which was the first day that new Supreme Court Justice Alito was sitting on the Court.[18] Also, this was only a year after the appointment of a new Chief Justice.[19] As a result, it was reasonable to hope that the Court would provide a clear definition and resolution of the meaning of critical definitions under the CWA.[20]

However, through *Rapanos*, and its companion case, *Carabell v. United States Army Corps of Engineers*,[21] a badly splintered Court produced five separate opinions, three separate standards of review with respect to the scope of the Corps' authority under § 404 of the CWA,[22] and ultimately failed to address the critical

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[13] *See* Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 162 (2001) (finding that the Clean Water Act did not have jurisdiction over an abandoned pit in Illinois which provides habitat for migratory birds); United States v. Riverside Bayview Homes, 474 U.S. 121, 123, 139 (1985) (finding that the Clean Water Act has the power to regulate discharges into wetlands that are adjacent to navigable bodies of water).

[14] *See* PUD No. 1 of Jefferson County & City of Tacoma v. Wash. Dep't of Ecology, 511 U.S. 700, 723 (1994) (finding that a state may impose additional requirements on certifications issued pursuant to § 401 of the Clean Water Act if necessary).

[15] 33 U.S.C. § 1362(16).

[16] *Id.* § 1362(12).

[17] *Id.* § 1341(a).

[18] *See* Correy E. Stephenson, *U.S. Justices Nearly Drowned in Clean Water Act Cases*, LAWYERS WEEKLY U.S.A., Feb. 27, 2006, at 1 (discussing the pair of consolidated cases from the Sixth Circuit in Michigan, *Rapanos* and *Carabell*).

[19] *See id.* (stating that this consolidated pair of cases was the first environmental case before Chief Justice John Roberts).

[20] *See* Michael T. Burr, *Splintered Supreme Court Complicates Wetlands Regulation*, INSIDE COUNSEL, Sept. 2006, at 91 (stating that many landowners looked forward to the Supreme Court finally bringing some sort of clarity over the scope of the Corps' authority under the Clean Water Act).

[21] Carabell v. U.S. Army Corps of Eng'rs, 391 F. 3d 704 (6th Cir. 2004).

[22] *See* Rapanos v. United States, 126 S.Ct. 2208, 2225 (2006) (stating Justice Scalia's opinion that the legal standard used to determine bodies of water classified as "the waters of the United States" should use the ordinary definition of the phrase). Chief Justice Roberts writes in his concurring opinion, that

question of how to define the term "navigable waters."[23] The decision in *Rapanos* will create substantial confusion for the Corps in administering its wetlands program, and also in issuing permits for dredging and filling wetlands under § 404 of the CWA.[24] Of equal importance, *Rapanos* will create substantial confusion for the EPA and state agencies in the regulation of the "discharge of pollutants" into streams, waters, and lakes under § 402 of the CWA.[25]

This article will examine the Court's plurality opinion, written by Justice Scalia, in *Rapanos*.[26] This opinion represents a goal-determined result, which, despite its claim to be based on a strict construction of the statute, actually represents a judicial rewriting, not only of the plain language of the CWA, but also of the Court's previous decisions in *United States v. Riverside Bayview Homes*[27] and *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* (SWANCC).[28] If the law was less than crystal clear before the decision in *Rapanos*, it is now hopelessly muddied. It will be difficult, if not impossible, to determine what is or is not a wetland subject to the jurisdiction of the CWA under the unworkable standards set forth by the Court's opinion. The standards defy the reality of basic hydrology, deny obvious environmental facts, and constitute an unworkable legal criterion. Furthermore, the Court's plurality opinion does not even represent the law because five other Justices explicitly rejected the legal tests set forth in the plurality opinion.

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because there is no majority opinion in the case, lower courts and agencies will now have to determine the bodies of water classified as "navigable waters" on a case by case basis. *Id*. at 2236. On the other hand, Justice Kennedy's concurring opinion announced a "significant nexus" test that should be employed on a case-by-case basis when the Corps seeks to regulate wetlands based on adjacency to nonnavigable tributaries. *Id.* at 2249.

[23] *See* Burr, *supra* note 20, at 91 (stating that instead of clarifying the issue of the regulation of "the waters of the United States," the Supreme Court's split decision instead fueled more litigation and uncertainty).

[24] *See id.* at 91 (stating that *Rapanos* is as "[c]lear [a]s [m]ud," leaving landowners, lower courts, and agencies confused).

[25] *Rapanos*, 126 S.Ct. at 2215-16; 33 U.S.C. § 1342 (2000).

[26] *Rapanos,* 126 S.Ct. at 2213. Justice Scalia was joined by Chief Justice Roberts, and Justices Alito and Thomas. Judge Kennedy's concurring opinion in the judgment provided the fifth Justice for the majority. *Id.*

[27] *Id.* at 2226-17; United States v. Riverside Bayview Homes, 474 U.S. 121, 139 (1985); 33 U.S.C. § 1251 et. seq. (2000).

[28] *Rapanos*, 126 S.Ct. at 2226-27; Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs, 531 U.S. 159, 174 (2001).

In contrast, the Supreme Court's decision in *Warren* unanimously and conclusively resolved the issue pertaining to the definition of the word "discharge" with respect to Water Quality Certificates under § 401 of the CWA.[29] Similar to *Rapanos*, the Court in *Warren* was charged with the responsibility of interpreting a broad statutory term.[30] In defining the term, the Court needed to resort, not only to agency regulations, but also to traditional methods of statutory construction, including dictionary definitions and legislative history.[31] The *Warren* decision, unlike *Rapanos*, will result in increased power for government to enforce environmental regulations.

It should be noted that *Warren* involved the ability of a state to regulate hydroelectric facilities.[32] In contrast, *Rapanos* involved the federal government's authority to regulate wetlands.[33] If one is looking for intellectual consistency, perhaps the divergent results can be explained by a philosophical predilection of the plurality opinion in *Rapanos*, which favors increased state environmental regulation, while expressing skepticism about the authority of the federal government to impose environmental regulations.

On the other hand, the decision in *Rapanos* could be viewed more cynically as part of an agenda to facilitate development by making it difficult for governmental agencies, either state or federal, to protect wetlands. Certainly, it is no secret that a number of so-called property rights advocacy groups and conservative organizations around the country have expressed extreme hostility to the concept of wetlands regulation, and have been advocating for changes to prohibit governmental action to protect wetlands.[34] Whether the *Rapanos* decision should be viewed as an attempt to facilitate a political goal, or whether, in the alternative, the Court's decision should be viewed as a logical evolution of the jurisprudence of previous decisions, is a political value judgment beyond the scope of this article. Regardless of the motivation behind the plurality opinion, the legal reasoning

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[29] S.D. Warren Co. v. Me. Envtl. Prot. Bd., 126 S. Ct. 1843, 1853 (2006); 33 U.S.C. § 1341 (2000).

[30] *Rapanos*, 126 S.Ct. at 2220; *S.D. Warren*, Co, 126 S. Ct. at 1847.

[31] *S.D. Warren Co*., 126 S. Ct. at 1847, 1851.

[32] *Id.* at 1846-47.

[33] *Rapanos*, 126 S. Ct. at 2216.

[34] *E.g.* Pacific Legal Foundation, Cato Institute, National Federation of Independent Businesses, and the Federalist Society, to name a few.

is badly flawed.

I. *RAPANOS* AND § 404 OF THE CWA

The dredge and fill permit program under § 404 of the CWA material that is excavated or dredged is defined as "dredged material,"[35] and material used to replace aquatic areas with dry land or to raise the bottom of a water body is defined as "fill material."[36] Dredged and fill materials are pollutants under the CWA,[37] and the discharge of pollutants into the "navigable waters" of the United States is prohibited without a permit.[38] If "wetlands" are defined as navigable waters,[39] they cannot be filled by the placement of substances, such as dredged and fill material, without a permit.[40] The Corps administers a permit program pursuant to § 404 of the CWA, which governs the circumstances under which "wetlands" can be filled, and converted into dry land suitable for construction.[41]

The Corps has adopted extensive regulations to implement the permit program under § 404. These regulations, which were first promulgated in 1977, have been used to determine when a permit is actually necessary to dispose of dredge and fill material.[42] In particular, the Corps has promulgated a detailed description of which wetlands are "navigable waters" under the CWA and therefore subject to regulation.[43] Depositing such material on dry land is outside of the purview of the CWA, and does not require a § 404 permit.[44] Therefore, whether a permit is required to dispose of dredged and fill material at a specific site depends upon whether or not the site is determined, pursuant to the Corps regulations, to be part of the "navigable waters."[45]

The CWA defines "navigable waters" to mean "the waters of United States, including the territorial seas."[46] The term "the

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[35] 33 C.F.R. § 323.2(c) (2006).
[36] *Id.* § 323.2(e).
[37] 33 U.S.C. § 1362(6) (2000).
[38] *Id.* § 1311.
[39] 33 C.F.R. § 328.3(a)(2).
[40] *Id.* § 323.1.
[41] *Id.*
[42] *Id.*; Rapanos v. United States, 126 S. Ct. 2208, 2229 (2006).
[43] 33 C.F.R. § 328.3(b).
[44] *See id.* § 323.1 (requiring a permit for only "the discharge of dredged or fill materials into waters of the United States").
[45] *Id.* § 328.3.
[46] 33 U.S.C. § 1362(7) (2000).

waters of the United States" is not defined. Nevertheless, the Corps, as well as EPA, by regulation, has defined "the waters of the United States," and therefore "navigable waters," to include virtually all water bodies, including rivers, streams, lakes, and "wetlands."[47] Wetlands are defined 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," and "generally include swamps, marshes, bogs, and similar areas."[48]

Wetlands are ecologically important because they function as a pollution filtration system and a groundwater supply. Wetlands also protect against erosion, and provide critical habitats for animals, particularly aquatic animals and waterfowl.[49] Although wetlands were regarded as wastelands, suitable for filling and "reclamation" in the nineteenth century, today the importance of wetland preservation is generally recognized. Nevertheless, the owner of a wetland, particularly a wetland located in a prime development area, may have a strong economic interest to fill it.

Although the word "wetland" does not appear in the Clean Water Act itself, both the Corps and EPA have, by regulation, defined such areas, as well as "intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds" as the "navigable waters" of the United States.[50]

II. *UNITED STATES V. RIVERSIDE BAYVIEW HOMES*

In *United States v. Riverside Bayview Homes*, [51] the Supreme Court sustained the action of the Corps enjoining the placement of fill on low-lying marshy land near the shores of Lake St. Clair in Michigan, in preparation for the construction of a housing development.[52] The Court held that the area was a wetland within the meaning of the regulation, and that it was a navigable water because it was adjacent to a navigable waterway known as Black Creek.[53] After determining that the land in question met

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47 33 C.F.R. § 328.3(a)(2)(3).
48 *Id.* § 328.3(b).
49 Rapanos v. United States, 126 S. Ct. 2208, 2240 (2006).
50 33 C.F.R. § 328.3(a)(3).
51 United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985).
52 *Id.* at 124, 139.
53 *Id.* at 131.

the Corps' regulatory definition of a "water of the United States,"[54] the Court addressed the issue of whether the regulatory definition was an appropriate interpretation of the statutory term "navigable waters."[55]

The Court characterized its review as "limited to the question 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.'"[56] Significantly, the Court noted that it was "not called upon to address the question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water . . . and we do not express any opinion on that question."[57]

The Court found that the legislative history and stated policy of the CWA "together . . . support the reasonableness of the Corps' approach of defining adjacent wetlands as "waters" within the meaning of § 404(a)."[58] The Court noted that Congress intended for the term navigable to have "limited import" because "the evident breadth of congressional concern for protection of water quality and aquatic ecosystems suggests that it is reasonable for the Corps to interpret the term "waters" to encompass wetlands adjacent to waters as more conventionally defined."[59] The Court sustained the Corps' decision to encompass adjacent wetlands because of the vital role they play in the aquatic environment, stating, "we cannot say that the Corps' judgment on these matters is unreasonable, and we therefore conclude that a definition of 'waters of the United States' encompassing all wetlands adjacent to other bodies of water over which the Corps has jurisdiction is a permissible interpretation of the Act."[60]

Therefore, a permit was required before the filling of the land at issue in the case. Congress had considered the CWA in 1977 but had declined to legislatively overturn the definition of wetlands that was part of the regulations that had previously

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[54] *Id.*
[55] *Id.*
[56] *Id.* at 131 (emphasis added).
[57] *Riverside*, 474 U.S. at 131 n.8.
[58] *Id.* at 132.
[59] *Id.* at 133.
[60] *Id.* at 135.

been adopted by the Corps.[61] The Court ascribed a legislative intent to ratify the Corps' regulation, stating that, despite the Court's reluctance to interpret the meaning of Congress' failure to act, "a refusal by Congress to overrule an agency's construction of legislation is at least some evidence of the reasonableness of that construction, particularly where the administrative construction has been brought to Congress' attention through legislation specifically designed to supplant it."[62]

III. *SOLID WASTE AGENCY OF NORTHERN COOK COUNTY V. UNITED STATES ARMY CORPS OF ENGINEERS*

It was 16 years after the unanimous decision in *Riverside Bayview* before the Supreme Court again addressed the question of the Corps' wetlands regulations. In 2001, the Court in *SWANCC*[63] held, by a five to four vote,[64] that the Corps could not assert jurisdiction over an isolated wetland pursuant to its "Migratory Bird Rule."[65]

A. Justice Rehnquist's Opinion for the Court

In *SWANCC*, a consortium of suburban Chicago municipalities had applied for a permit to fill ponds that existed on a proposed waste disposal site.[66] The Court noted that *Riverside Bayview* had not addressed the question of whether or not the Corps had the authority to regulate discharges of fill material onto wetlands that, as in *SWANCC*, were not adjacent to bodies of open water.[67] The Court refused to make such a ruling.[68] Instead, the *SWANCC* Court, for the first time, claimed there was a requirement of a "significant nexus between the wetlands" and

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[61] *Id.* at 138.

[62] *Id.* at 137.

[63] Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs, 531 U.S. 159, 162 (2001).

[64] *Id*. at 161. Chief Justice Rehnquist wrote the opinion for the Court, joined by Justices O'Connor, Scalia, Thomas and Kennedy. Justice Stevens wrote the dissent, joined by Justices Souter, Ginsburg and Breyer.

[65] 33 C.F.R. 328.3(a)(3) (2006). In this rule, adopted in 1986, the Corps attempted to assert jurisdiction over intrastate waters on the grounds that they, *inter alia*, provided habitat for migratory birds. 51 Fed. Reg. 41,217 (1986).

[66] *Solid Waste,* 531 U.S. at 162-63.

[67] *Id.* at 167-68.

[68] *Id.*

'navigable waters' had "informed our reading of the CWA in *Riverside Bayview Homes*"[69] and found that such a nexus was lacking.

The Court's determination of the applicability of the regulations to non-adjacent wetlands was an issue that had been specifically reserved by *Riverside Bayview*. Therefore, the holding in *SWANCC* that the regulations, including the Migratory Bird Rule, were beyond the scope of the statute, was consistent with *Riverside Bayview*. However, the *SWANCC* Court reversed the position of *Riverside Bayview* with respect to the question of Congressional acquiescence in 1977. In *SWANCC*, the Court noted that the Corps had originally, in 1974, adopted a significantly more restrictive concept of "navigable waters" than it later promulgated.[70] *SWANCC* concluded that the Corps had "failed to make the necessary showing that the failure of the 1977 House bill demonstrates Congress' acquiescence to the [amended expansive] Corps' regulations . . ."[71] Compare what the Court said in *Riverside Bayview*: "Congress acquiesced in the administrative construction."[72]

SWANCC acknowledged that *Riverside Bayview* had construed the term "navigable waters" to include waters that traditionally would not have been considered navigable.[73] However, *SWANCC* stated that *Riverside Bayview* had not defined what "other waters" might be included in the term "navigable," and claimed that "it is also plausible . . . that Congress simply wanted to include all waters adjacent to 'navigable waters,' and went on to state that § 404(g) of the CWA[74] did not "conclusively determine" the definition of "navigable waters."[75] Although *SWANCC* recognized that *Riverside Bayview* held that the term "navigable" had only "a limited effect," *SWANCC* held that it would have been quite another thing "to give it no effect whatever."[76] The Court stated that "the term navigable has at least the import of showing us what Congress had in mind as its authority for

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[69] *Id.* at 167.
[70] *Id.* at 168.
[71] *Id.* at 170.
[72] United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 136-37 (1985).
[73] *Solid Waste,* 531 U.S. at 171.
[74] 33 U.S.C. 1344(g) (2000).
[75] *Solid Waste*, 531 U.S. at 171.
[76] *Id.* at 172.

enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made."[77]

SWANCC stopped short of defining the term "navigable." On one hand, the Court acknowledged that it previously held that the term had limited importance, but suggested that Congress might have been considering, in adopting the CWA, to use the concept of "navigable in fact."[78] The Court did not attempt to resolve the apparent contradiction between a possible definition of "navigable waters" as "navigable in fact" and the clear intention of Congress to impose some jurisdiction over some wetlands which are obviously not "navigable in fact."[79]

Under the Migratory Bird Rule, the Corps attempted to assert jurisdiction over wetlands that were not hydrologically connected to water bodies or to other wetlands if the wetlands were utilized by migratory birds.[80] *SWANCC* characterized this rule as "an administrative interpretation of the statute [that] invokes the outer limits of Congress power" under the Commerce Clause.[81] Because there was no clear indication that Congress intended such a broad interpretation, *SWANCC* overturned this rule in order to avoid the Constitutional issue of whether the Corps' rule exceeded Congress' power to regulate interstate commerce.

B. Justice Stevens' Dissent

Justice Stevens wrote the dissent, joined by Justices Souter, Ginsburg and Breyer.[82] Justice Stevens stated that it was "fair to characterize the Clean Water Act as 'watershed' legislation" that fundamentally expanded federal regulation of the nation's waters. He stated that the definition of "navigable waters" did not require either "actual [or] potential navigability."[83]

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[77] *Id.*

[78] *Id*. at 167.

[79] The term "navigable in fact" or the numerous references in the Supreme Court opinions discussed in this article to "traditionally navigable," generally means that it is possible to float a boat on the waterway. The term has a long history at English common law, which was incorporated into the United States. *See* Morgan v. King, 35 N.Y. 454, 459 (N.Y. 1866), quoted at length in Adirondack League Club v. Sierra Club, 92 N.Y. 2d 591, 601 (N.Y. 1998).

[80] United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 134 (1985).

[81] *Solid Waste*, 531 U.S. at 172.

[82] These are the same four Justices who ultimately dissented from the judgment in *Rapanos*. Rapanos v. United States, 126 S.Ct. 2208, 2215-6 (2006).

[83] *Solid Waste*, 531 U.S. at 175 (Stevens, J., dissenting).

Justice Stevens accused the majority of ignoring the history of federal water regulation. He noted that the "major purpose" of the 1972 CWA was "to establish a comprehensive long-range policy for the elimination of water pollution."[84] Furthermore, "although Congress opted to carryover the traditional jurisdictional term navigable waters from the [Rivers and Harbors Act] and prior versions of the [Federal Water Pollution Control Act], it broadened the *definition* of that term to encompass all waters of the United States."[85] Since the 1972 statute did not address the issue of navigation at all, it was clear to Justice Stevens that Congress intended to extend its pollution regulations to the broadest extent possible.[86] Therefore, Justice Stevens disagreed with the majority's interpretation that the CWA did nothing more than assert the Congressional power to regulate navigation under the Commerce Clause.

Justice Stevens recognized that the "appropriate focus" of the Court's attention was the definition of the phrase "navigable waters." However, he asserted that the term "navigable" was read out of the statute by Congress in its definition, and that the use of the term "navigable waters" in the final language of the CWA merely continued a century of prior usage. The term "navigable waters" was simply "shorthand for 'waters over which federal authority may properly be asserted.'"[87]

Justice Stevens went on to characterize the Court's reference to the superseded 1974 Corps' regulations as "strange."[88] Since the Corps' later regulations were upheld by the Court in *Riverside Bayview*, he also reminded the majority that "our broad determination in *Riverside Bayview* that the 1977 Congress acquiesced in the very regulations at issue in this case should foreclose" the Court's finding in *SWANCC*, that there was no congressional acquiescence to the regulations.[89] Furthermore, in addition to the legislative history, Justice Stevens noted that §

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[84] *Id*. at 179 (quoting S. Rep. No. 92-414, 95 (1971), *reprinted in* 2 Legislative History of the Water Pollution Control Act Amendments, 1972 (Committee Print compiled for the Senate Committee on Public Works by the Library of Congress), Ser. No. 93-1, 1511 (1971) (hereinafter Leg. Hist.) (emphasis added)).

[85] *Solid Waste*, 531 U.S. at 180 (Stevens, J., dissenting) (emphasis in original).

[86] *Id* at 180-81.

[87] *Id.* at 182.

[88] *Id.* at 184.

[89] *Id.* at 186.

404(g)(1) of the CWA[90] had a specific reference to waters that were not used in commerce (i.e., were not "navigable in fact") and that this section indicated that Congress intended to regulate bodies of water beyond those that were "navigable in fact."[91]

Finally, Justice Stevens would have held that Congress and the Corps had the power to impose regulations pertaining to migratory birds, because bird watching and hunting, and associated commercial activities may have substantial impacts on interstate commerce.[92] Therefore, Justice Stevens viewed the Corps' regulation of the placement of fill in waters used as bird habitats as within the Corps' and within Congress' Constitutional powers. The Corps' regulations were entitled to deference under *Chevron USA v. Natural Resources Defense Council*.[93] Justice Stevens' opinion, if it had prevailed, would have clearly established that the phrase "navigable waters" included wetlands, in spite of the fact that wetlands are not navigable in fact.[94]

The majority opinion in *SWANCC* simply resolved the question left open by *Riverside Bayview*: whether wetlands that are not adjacent to bodies of open water are navigable waters under the CWA.[95] The majority held that these wetlands are not protected by the statute and the Migratory Bird Rule is beyond the scope of the statute.[96] Therefore, *SWANCC* should not have had a major impact on the development of the law because the overall principles set forth in *Riverside Bayview* should continue to control.

Under *Riverside Bayview*, the Corps' regulations that asserted jurisdiction over adjacent waterways, according to the Corps' definition of the word "adjacent," were specifically affirmed and it was deemed that Congress had acquiesced to these regulations in

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[90] 33 U.S.C. § 1344(g)(1) (2000).

[91] *Solid Waste*, 531 U.S. at 188-189 (Stevens, J., dissenting).

[92] *Id.* at 191-95.

[93] *Id.* at 191-92. *Chevron* is typically cited for the proposition that courts should defer to administrative agencies', possessing specialized expertise, interpretations and applications of statutes, especially complex environmental statutes. Chevron U.S.A. Inc. v. Natural Res. Def. Council Inc., 467 U.S. 837, 842-45 (1984).

[94] *Solid Waste*, 531 U.S. at 182.

[95] *See id.* at 162 (stating that since § 404(a) does not apply to sand and gravel pits serving as habitats for these birds, the Court does not reach the question of whether Congress is able to regulate these pits under the Commerce Clause).

[96] *Id.* at 166-67.

1977.[97] Indeed, as explained below, Justice Stevens' dissent in *Rapanos*, maintained that *Riverside Bayview* set forth the controlling principles for determining the scope of the federal government's authority to regulate wetlands.

C. Interpretation of SWANCC

As explained below, the plurality in *Rapanos* found that *SWANCC* did more than simply resolve the question left unanswered by *Riverside Bayview*. The plurality opinion read *SWANCC* as holding that in spite of the statute's legislative and regulatory history, which Justice Stevens described at length, the word "navigable", while meaning something more than "navigable in fact" had a limited meaning. [98]

The plurality opinion read *SWANCC* for the proposition that there may be a Constitutional limitation on Congress' power in enacting the CWA. The Court implicitly questioned whether Congress had the authority to enact the comprehensive plan to prevent water pollution throughout the nation which was contemplated by the CWA's legislative goals. Furthermore, if some "non-navigable" wetlands cannot be constitutionally regulated, then the regulation of "non-navigable" surface waters can also be challenged.[99] As a result, *SWANCC* was a stepping-stone to the Supreme Court's decision in *Rapanos,* that held that Congress', and by extension, the Corps' and EPA's authorities to regulate water pollution can be limited by both Constitutional grounds, and by a very narrow interpretation of the CWA's definitions.

IV. *RAPANOS V. UNITED STATES*

A. Facts

Mr. Rapanos owned a 230 acre site in Michigan, and together with his wife, also owned a 200 acre site and a 275 acre site.[100] After Mr. Rapanos' consultant informed him that his 230 acre

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[97] United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 137, 139 (1985).

[98] Rapanos v. United States, 126 S. Ct. 2208, 2220 (2006).

[99] *Solid Waste*, 531 U.S. at 173.

[100] *Rapanos*, 126 S. Ct. at 2238.

site contained wetlands, Mr. Rapanos allegedly threatened to "destroy" the consultant and hired construction companies to clear the land and fill the wetlands.[101] Also, all of Mr. Rapanos' sites had surface connections to tributaries that were navigable and ultimately drained into Lake Huron.[102]

In its companion case, *Carabell v. United States Army Corps of Engineers*, the District Court and the Court of Appeals for the Sixth Circuit held that the Corps had jurisdiction to deny a permit to a landowner that would have allowed the landowner to fill approximately 16 of the 20 acres on their tract of land.[103] The Carabells, who were the petitioners and the landowners, had requested a permit to fill a wetland on their property in order to construct a 112 unit condominium development.[104] The parcel was described as a "forested wetland that provides valuable seasonal habitat for aquatic organisms and year round habitat for terrestrial organisms . . . [t]he extent of impacts in the project area when considered both individually and cumulatively would be unacceptable and contrary to the public interest."[105]

B. Justice Scalia's Plurality Opinion

Justice Scalia's primary holding in *Rapanos* replaced the Corps' thirty year old regulations with two new requirements to determine whether a wetland is covered by the CWA.[106] A wetland will be regulated by the CWA: 1) if it has a channel adjacent to the wetland that is a continuous and permanent body of water and 2) the wetland must have a "continuous surface connection" with that channel.[107]

Justice Scalia claimed that these requirements were justified and required by the CWA's language.[108] However, as discussed

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[101] *Id.* at 2253. Ultimately, the District Court found that 22 acres of wetlands had been filled. Similarly, at the 275 acre site, Mr. and Mrs. Rapanos spent $158,000 to fill 17 of the existing 64 acres of wetlands and spent $463,000 to fill 15 of the 49 acres of wetlands at the 200 acre site. *Id.*

[102] *Id.*

[103] *Id.* at 2254; Carabell v. U.S. Army Corps of Eng'rs, 391 F.3d 704, 706 (6d Cir. 2004).

[104] *Rapanos*, 126 S. Ct. at 2254.

[105] *Id.* at 2226, 2254. This quote in Justice Stevens' dissenting opinion is from a letter to the petitioners, presumably by the Corps, which was contained in paragraphs 127a - 128a of the appendix to *Carabell.*

[106] *Id.* at 2227.

[107] *Id.*

[108] *Id.* at 2234.

below, both the dissent and Justice Kennedy's concurrence argued that the requirements would actually constitute a judicial repeal of the CWA.[109]

Justice Scalia commenced his opinion by characterizing Mr. Rapanos' actions as the backfilling of wetlands on his parcel of property, eleven to twenty miles away from the nearest navigable body of water.[110] He then described the high costs of these regulations and the expenses and potential criminal liability Mr. Rapanos faced because of his actions.[111] According to Justice Scalia, the Corps' was asserting jurisdiction "over virtually any parcel of land containing a channel or conduit - whether man-made or natural, broad or narrow, permanent or ephemeral - through which rainwater or drainage may occasionally or intermittently flow. . . any plot of land containing such a channel may potentially be regulated as a 'water of the United States.'"[112]

Justice Scalia then proceeded to discuss the history of the Corps' regulations of wetlands. He characterized the 1975 amendment to the regulations as "deliberately [seeking] to extend the definition of the 'waters of the United States' to the outer limits of Congress's commerce power,"[113] and accused the Corps of adopting "increasingly broad interpretations of its own regulations" after *Riverside Bayview*.[114] Justice Scalia noted that lower courts have relied on the Corps' definition of "tributaries" to hold that storm sewers and dry arroyos, that transmitted groundwater over "centuries," were considered to be "the waters of the United States,"[115] citing *United States v. Eidson*[116] and *Quivira Mining Company v. Environmental Protection Agency,*[117]

Justice Scalia disapproved of the Corps' failure to limit its authority, noting that "[f]ollowing our decision in *SWANCC*, the Corps did not significantly revise its theory of federal jurisdiction."[118] Instead, the Corps continued to assert

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[109] *Id.* at 2254 (characterizing the plurality opinion as a "judicial amendment of the Clean Water Act.")

[110] *Rapanos*, 126 S. Ct. at 2214.

[111] *Id* at 2215.

[112] *Id.*

[113] *Id.* at 2216.

[114] *Id*.

[115] *Id.* at 2217.

[116] *Rapanos*, 126 S. Ct. at 2217 (citing United States v. Eidson, 108 F.3d 1336, 1340-41 (11d Cir. 1997).

[117] *Id.* (citing Quivira Mining Co. v. EPA, 765 F.2d 126, 129 (10th Cir. 1985)).

[118] *Id*.

jurisdiction over tributaries and wetlands that neighbored navigable waters and their tributaries.[119] Additionally, Justice Scalia criticized the lower courts for continuing to "uphold the Corps' sweeping assertions of jurisdiction over ephemeral channels and drains as tributaries."[120]

The plurality opinion acknowledged the previous decisions in *Riverside Bayview* and *SWANCC* that held navigable waters means something more than navigable in fact.[121] However, while the plurality opinion explicitly rejected the "expansive meaning" that the Corps gave to the term "navigable," it nevertheless concluded that it was not necessary to determine "the precise extent to which the qualifier 'navigable' . . . restrict[s] the coverage of the Act."[122]

Furthermore, the plurality opinion noted that the statute defines "navigable waters" as "the *waters* of the United States," rather than the "*water* of the United States."[123] According to Justice Scalia, the use of the definite article ("the") and the plural form for the word water "plainly" indicated that the definition does not refer to any body of water, but instead refers to "relatively permanent, standing or flowing bodies of water."[124] The difference between "waters" and "the water" is the basis for the claim that the statutory language includes only permanent, standing, or flowing bodies of water.[125] The logical leap from the difference between the singular and the plural to the conclusion that the bodies of water must be relatively permanent is explained only by Justice Scalia's assertion that the definition "connotes a continuous flow of water," and that the exclusion of intermittent streams is a "commonsense understanding" of the term.[126] In the absence of a logical explanation, Justice Scalia resorts to categorizing the Corps' definition of the term "waters of the United States" as "beyond parody."[127] Although Justice Scalia ridicules the opposition, he provides no reason, in either

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119 *Id*. at 2216.
120 *Id.* at 2217.
121 *Id.* at 2220.
122 *Rapanos*, 126 S. Ct. at 2220-21.
123 *Id*. (emphasis added).
124 *Id.* at 2222.
125 *Id.*
126 *Id.* at 2221, 2222.
127 *Id.* at 2222. Justice Scalia supported his belittling of the opposition with a quotation of a conversation between Captain Renault and Rick in Casablanca, where Rick states that he had moved to Casablanca for the waters, despite the fact that Casablanca is located in the desert. *Rapanos,* 126 S. Ct. at 2218.

the text of the statute, case law, or anywhere else, why a body of water must be relatively permanent to qualify as "navigable water."[128]

Justice Scalia attempts to support his theory with respect to the applicability of the CWA to intermittent streams by claiming that such streams are included in the definition of "point source" and that "the definitions thus conceive of 'point sources' and 'navigable waters' as separate and distinct categories."[129] Since, according to Justice Scalia, pollutants are discharged "*to* navigable waters *from* any point source," a point source cannot be a navigable water, nor can a navigable water be a point source.[130]

No reason is offered as to why the two terms cannot overlap, nor is Justice Scalia's argument convincing. The term "point source" refers to a place from which pollutants are or may be discharged.[131] An intermittent stream may be a "point source" if it is a source of pollutants and it can also be a "navigable water," if, on occasion, it serves as a conduit to transport water.[132] However, if pollutants are never discharged from an intermittent stream, it would never be a point source. Thus, an intermittent stream may be, but is not necessarily, either or both a "point source" or a 'navigable water."

Justice Scalia also claims that only his definition of the term "waters" is consistent with the CWA's stated policy that Congress "recognize preserve and protect the primary responsibilities and rights of the States . . . ."[133] This sentence simply ignores the fact that the primary purpose of the CWA is to provide a broad and comprehensive scheme for water pollution,[134] a purpose that is not consistent with Justice Scalia's restricted definition. Nevertheless, Justice Scalia finds in the Corps' regulations an interference with the ability of states to regulate land and water uses.[135] He makes the finding despite broad state support of the

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[128] *See generally Rapanos*, 126 S. Ct. at 2222. (showing Justice Scalia's opinion is devoid of specific statutory or past precedent support for his position that navigable waters must be permanent water sources).

[129] *Id.* at 2223.

[130] *Id.* (citing 33 U.S.C. § 1362(14) (2005)).

[131] *Id.* at 2222.

[132] *Id*. at 2221 n.5.

[133] *Id*. at 2212.

[134] *See* United States v. Eidson, 108 F.3d 1336, 1341 (11th Cir. 1997) (detailing Congress' intended broad and far reaching jurisdiction for the Clean Water Act).

[135] *Rapanos*, 126 S. Ct. at 2224 n.8. Justice Scalia stated that the Court would "ordinarily expect a 'clear and manifest' statement from Congress to

Corps' rules.[136] Therefore, Justice Scalia found that the alleged assertion of the Corps' authority to regulate "intrastate land . . . stretches the outer limits of Congress' commerce power."[137]

It is important to remember that the issue in *Rapanos* pertained to wetlands, not tributaries. *Rapanos* questioned whether wetlands can be classified as "navigable waters" even when they are adjacent only to non-navigable tributaries.[138]

In the companion case of *Carabell*, the plurality considered "whether a wetland may be considered 'adjacent to' remote waters of the United States, because of a mere hydrological connection to them."[139] Justice Scalia acknowledged an "inherent ambiguity" in drawing the boundary between waters to determine whether or not the adjacency actually existed.[140] Justice Scalia stated that "*SWANCC* rejected the notion that the ecological considerations upon which the Corps relied in *Riverside Bayview* . . . provided an *independent* basis for including entities like 'wetlands' (or 'ephemeral streams') within the phrase the waters of the United States."[141] Justice Scalia concluded that "wetlands with only an intermittent, physically remote hydrologic connection do not implicate the boundary-drawing problem of *Riverside Bayview*" because the Corps had no grounds to use ecological factors as a basis to assert regulatory jurisdiction over "isolated ponds."[142]

The United States, as well as various environmental organizations that filed amicus briefs, expressed a concern that a restrictive definition of navigable waters would adversely impact the National Pollutant Discharge Elimination System permit program established under § 402 of the Act.[143] Since navigable waters are defined throughout the CWA, a restrictive definition of Congressional authority to regulate wetlands under § 404 also implicates Congress' authority to eliminate the discharge of pollutants from point sources into navigable waters under §

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authorize an unprecedented intrusion into traditional state authority." *Id*. at 2224.

136 *Id.* at 2256 n.4 (Stevens, J., dissenting) (". . . almost all of the 43 States to submit comments opposed any significant narrowing of the Corps' jurisdiction.").

137 *Id.* at 2224.

138 *Id.* at 2218.

139 *Id.* at *2225*.

140 *Id.* at 2226.

141 *Rapanos*, 126 S. Ct. at 2226.

142 *Id.*

143 *Id.* at 2227.

402.[144] Justice Scalia responded to this argument by stating that the CWA prohibited the addition of pollutants *to* navigable waters, not just *directly to* navigable waters.[145] Since discharges into intermittent channels might eventually reach navigable waters, they are subject to regulation under the CWA. In contrast, Justice Scalia determined that "'dredge or fill material,' which is typically deposited for the sole purpose of staying put, does not normally wash downstream, and thus it does not normally constitute an 'addition. . . to navigable waters' when deposited in upstream isolated wetlands."[146] Justice Scalia did not specify a basis for his belief that dredge or fill material does not actually migrate downstream even though the regulation of the placement of dredge and fill material has always been based on the assumption that such migration, does, in fact, occur, as specifically noted by Justice Stevens' dissent – See note 199 *supra.*

According to Justice Scalia, the CWA established two separate programs under §§ 402 and 404. However, he acknowledged that, under both programs, an enforcement agency must demonstrate some hydraulic connection between the polluted water body or wetlands and the "waters of the United States."[147] Nevertheless, the plurality opinion does not address the situation that is sure to arise in the near future: a polluter will argue that a discharge regulated under § 402 is not prohibited because the receiving water body or wetland is not subject to regulation under the CWA.

Justice Scalia also tacitly acknowledged that narrowing the definition of waters of the United States would hamper federal efforts to preserve the nation's wetlands, but he strongly implied that the state and local efforts would be adequate; further, he claimed that Congress did not enact a "Comprehensive National Wetlands Protection Act."[148] Thus, despite the clear legislative history and thirty years of interpretation holding that the 1972 Clean Water Act was intended to be a broad comprehensive regulation of all forms of water pollution, we now have an opinion that states that Congress did not intend to enact such a program, but instead intended to leave a significant portion of wetlands

144 *Id.*
145 *Id.* (emphasis in original).
146 *Id.* at 2228.
147 *Rapanos*, 126 S. Ct. at 2228.
148 *Id.*

enforcement to state and local efforts.[149]

Justice Scalia characterized the dissent as "long on praise of environmental protection and notably short on analysis of the statutory text and structure."[150] He claimed that *Riverside Bayview* only addressed wetlands that abutted navigable in fact waters but did not address either non-navigable tributaries or non-adjacent wetlands. Furthermore, "the scope of ambiguity of 'the waters of the United States' is determined by a wetlands' *physical connection* to covered waters, *not* its ecological relationship thereto."[151]

Obviously, Congress has the authority to regulate waters under the Commerce Clause if it can show an ecological relationship as well as a physical connection. For an opinion that apparently prides itself on strict statutory construction, it is interesting that Justice Scalia does not cite any statutory language which supports the interpretation of Congressional intent to regulate waters only on the basis of a physical connection to covered waters, rather than by an ecological relationship. Justice Scalia's interpretation is apparently based on his interpretation of the Court's prior use of the word "adjacent" in *Riverside Bayview*.[152] He interprets the term as meaning "physically abutting."[153] However, this interpretation of "adjacent" is contrary to the interpretation advanced by the Corps, which uses the term in its own regulations.[154] Justice Scalia depicts the dissent's "total deference to the Corps' ecological judgments" as permitting "the Corps to regulate the entire country as 'waters of the United States.'"[155] However, he goes to the other extreme in his reasoning, offering no reason for his refusal to defer to the Corps' definition of "adjacency."

Justice Scalia acknowledged that the Court recognized Congress' alleged acquiescence to the Corps regulations during the 1977 debate in *Riverside Bayview*.[156] However, he cited the skepticism of this acquiescence that the Court had expressed in *SWANCC*.[157] Notably, the plurality found that "[no] plausible

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149 *Id.*
150 *Id.* at 2229.
151 *Id.*
152 *Id*.
153 *Rapanos*, 126 S. Ct. at 2230.
154 33 CFR § 328.3(c) (2006).
155 *Rapanos*, 126 S. Ct. at 2230.
156 *Id.* at 2230-2231.
157 *Id.*; *see* Author's Discussion, *infra* pages 74-75 (where the author discusses

interpretation of [Congress's failure to act] can construe it as an implied endorsement of every jot and title of the Corps' 1977 regulations."[158] Furthermore, the dissent's argument that deference should be afforded to the thirty year old regulations of the Corps constituted a "curious appeal to entrenched Executive error."[159] In an Orwellian twist, the plurality, which cited the costs of the regulations and minimized the importance of wetlands, made a public policy determination to invalidate conservation measures while claiming that it "could not agree more with the dissent's statement that 'whether the benefits of particular conservation measures outweigh their costs is a classic question of public policy that should not be answered by appointed judges.'"[160]

The plurality also criticized the concurring opinion of Justice Kennedy, which proposed a case-by-case basis to determine whether or not any "significant nexus" exists. Justice Scalia argued that "case-by-case determination of the ecological effect *was not the test*."[161] Justice Scalia pointed out that the phrase "significant nexus . . . appears nowhere in the Act but is taken from *SWANCC's* cryptic characterization of the holding of *Riverside Bayview*."[162] However, Justice Scalia interpreted significant nexus to mean a physical connection, rather than an ecological one.[163]

The plurality opinion accused Justice Kennedy of "substituting the purpose of the statute for its text," with the intention of writing "a different statute that achieves the same purpose."[164] Justice Scalia stated that the dissent could blame their reading of the statute upon the Corps of Engineers, but charged that Justice Kennedy invented "his new statute all on his own."[165] It purported to be not a grudging acceptance of an agency's close-to-the-edge expansion of its own powers, but rather "*the* most reasonable interpretation of the law."[166] Again, it would appear to be the plurality, with its adoption of a new test to determine

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Scalia's skepticism of the court's acquiescence in *SWANCC*).

158 *Rapanos,* 126 S. Ct. at 2231-32.

159 *Id.* at 2232.

160 *Id.* at 2233.

161 *Id.* (emphasis in original).

162 *Id.* at 2234.

163 *Id.*

164 *Rapanos,* 126 S. Ct. at 2234.

165 *Id.* at 2235.

166 *Id*. at 2235 (emphasis in original).

whether a water body can be regulated under the CWA, that wrote its own statute.

C. Justice Stevens' Dissent

For Justice Stevens, "the proper analysis [of the Corps' regulations] is straightforward."[167] He wrote, for the dissent, that the Corps' regulations provided necessary and appropriate protection for wetlands, and that those regulations were a reasonable interpretation of the statute entitled to *Chevron* deference.[168] He characterized the question of whether these regulations, which had been "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 . . . ."[169] He would have held that the issues in the case were controlled by *Riverside Bayview*, which had upheld the same regulations that were at issue in *Rapanos*.[170]

Justice Stevens, contrary to both the plurality and Justice Kennedy, distinguished *Riverside Bayview* because that opinion addressed and resolved the question of whether the Corps' regulations could require permits for navigable bodies of water "and their tributaries," but only reserved the issue of the Corps' jurisdiction over isolated wetlands that were not adjacent to navigable waters.[171] Furthermore, Justice Stevens pointed out that nothing in *Riverside Bayview* defined "adjacent" as "having a continuous surface connection between the wetland and its neighboring creek."[172]

Justice Stevens read *SWANCC* as simply resolving the narrow question left open by *Riverside Bayview*, whether the Corps' jurisdiction extended to "isolated waters" or "waters that are *not* part of a tributary system to interstate waters or to navigable waters of the United States. . . ."[173] *Rapanos*, like *Riverside*

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167 *Id.* at 2252 (Stevens, J., dissenting).

168 *Id.* (citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc. 467 U.S. 837, 842-45 (1984) (recognizing that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer . . . .").

169 *Id.*

170 *Rapanos,* 126 S. Ct. at 2255.

171 *Id.*

172 *Id*. at 2255.

173 *Id.* at 2256 (remarking that "*SWANCC* had nothing to say about wetlands.").

Bayview, but unlike *SWANCC*, pertained to a wetland that was adjacent to a navigable body of water.[174] Since such wetlands are very important for maintaining the quality of the adjacent water, their preservation was "integral to the chemical, physical and biological integrity of the nation's waters"[175] and the determination to protect such wetlands was not the "*independent*' ecological considerations" alleged by the plurality.[176] The dissent also took issue with Justice Scalia's "assumption that the costs of preserving wetlands are unduly high."[177] In response, Justice Stevens stated that the costs were a "small fraction" of the development costs, and accused the plurality of completely ignoring the benefits of the regulations.[178] In response to Justice Scalia's criticism, Justice Stevens wrote, "[r]ather than defending its own antagonism to environmentalism, the plurality counters by claiming that my dissent is policy laden. The policy considerations that have influenced my thinking are Congress' rather than my own."[179]

The dissent bitterly criticized the requirements that wetlands, to be considered waters of the United States, must be adjacent to a channel containing a continuous and permanent body of water and must have a continuous surface connection with that water. Justice Stevens alleged that the imposition of such a requirement was improper "highlighted by the fact that *no* party or *amicus* has suggested either" requirement.[180] The dissent argued that "intermittent streams . . . are still streams", and noted that under the plurality view, the Corps might not be able to regulate a polluter who dumps into a stream that flows for only 290 days of the year, even though that dumping might have the same effect on downstream waters as dumping in a stream that flows 365 days of the year.[181]

The dissent noted that the plurality relied upon two "tangential" provisions of the CWA and two "inapplicable" canons of statutory construction in support of its proposed new

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[174] *Id.* at 2256-57.

[175] *Id.* at 2257 (internal quotations omitted) (citing 33 U.S.C. § 1251(a) (2001)).

[176] *Rapanos*, 126 S. Ct. at 2257 (emphasis in original) (internal quotations omitted).

[177] *Id.* at 2258.

[178] *Id*.

[179] *Id.* at 2259 n.8 (internal quotations omitted).

[180] *Id.* at 2259.

[181] *Id.* at 2260.

standards.[182] The first provision, the definition of "point source" in § 502(14) of the CWA,[183] had "no conceivable bearing"[184] on the distinction between permanent tributaries and intermittent ones, and the plurality's "reasoning to the contrary is mystifying."[185]

The second statutory provision, § 101(b) of the Act,[186] recognizing the primary responsibility of the states to prevent pollution, was also inapplicable because granting broad authority to the Corps still left the states with "ample rights and responsibilities" and the power to impose more stringent conditions.[187]

The two canons of statutory construction, intrusions on state power and constitutional avoidance because of the danger of approaching the limits of Commerce Clause authority, did not overcome *Chevron* deference.[188] Justice Stevens noted that *Riverside Bayview* mentioned that Congress mandated controlling pollution at the source, and that the Corps could adopt a broad definition to accomplish that aim.[189] Furthermore, Justice Stevens cited a 1941 Supreme Court case to support the proposition that Congress had the Constitutional power, under the Commerce Clause, to "treat the watersheds as a key to flood control."[190]

Justice Stevens' major complaint against the plurality was their alleged "disregard [of] the fundamental significance of the Clean Water Act" as "'not merely another law' but rather . . . 'a total restructuring' and 'complete rewriting' of the existing water pollution legislation."[191] The intention to establish such a far-

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[182] *Rapanos*, 126 S. Ct. at 2260.

[183] 33 U.S.C. § 1362(14) (2001).

[184] *Rapanos*, 126 S. Ct. at 2260.

[185] *Id.* at 2261 n.12.

[186] 33 U.S.C. § 1251(b).

[187] *Rapanos*, 126 S. Ct. at 2261(citing S.D. Warren Co. v. Maine Bd. of Envtl. Prot., 126 S. Ct. 1843, 1848-49 (2006)).

[188] *See id.* (arguing that the decision of the plurality in this case failed to correspond with deference owed to the Army Corps of Engineers in exercising the broad power assigned to them by Congress); *see also* Chevron U.S.A. Inc. v. Natural Res. Def. Council Inc., 467 U.S. 837, 842-45 (1984) (holding that agencies that are delegated rulemaking authority from Congress are afforded a wide berth in deference to their decisions, but nonetheless are restricted to permissible construction of the statute that is the basis of their authority).

[189] *Rapanos,* 126 S. Ct. at 2261.

[190] *Id.* at 2261-62 (citing Oklahoma *ex rel.* Phillips v. Guy F. Atkinson Co., 313 U.S. 508, 525 (1941)).

[191] *Id.* at 2262 (citing Justice Rehnquist's opinion in City of Milwaukee v. Illinois, 451 U.S. 304, 317 (1981)).

reaching program warranted deference to the Corps interpretation of the ambiguous phrase "waters of the United States."[192]

Justice Stevens characterized the continuous surface connection requirement as "trivializing the significance of changing conditions in wetlands environments."[193] Justice Stevens noted that the dictionary definition of "adjacent" did not require actual contact between the wetland and the adjacent water body, and that the Corps' definition, which includes the word "neighboring," was reasonable, especially in terms of the purposes of the Act.[194]

Justice Stevens declined to express any opinion with respect to the plurality's belief that its interpretation of § 404 will not have an adverse impact on the authority of the EPA to regulate the discharge of pollutants into the waters of the United States under § 402.[195] However, he pointed out that the "EPA's authority over pollutants" under § 402 arose in the same statutory language as the Corps' jurisdiction over wetlands under § 404.[196] Since some dredge and fill material placed in wetlands will migrate downstream, there is no reason why the Corps should not have the same authority under § 404 that the EPA has under § 402.[197]

The dissent took issue with Justice Kennedy's concurrence because it replaced the Corps' long-established regulations with a "judicially crafted rule distilled from the term 'significant nexus' as used in *SWANCC*."[198] In any event, the dissent viewed the significant nexus requirement as "categorically satisfied as to wetlands adjacent to navigable waters or their tributaries."[199]

Although the significant nexus test would be satisfied in most cases, Justice Stevens believed that Justice Kennedy's approach would create additional work for developers, the Corps, and all other interested parties, because it would become necessary to perform additional review in order to make a determination as to

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[192] *Id.* at 2263.
[193] *Id.* at 2262.
[194] *Id.* at 2263.
[195] *Rapanos,* 126 S. Ct. at 2263. According to the plurality, its interpretation of § 1342 of the CWA does not "reduce the scope . . . of the Act." *Id.* at 2227-28 (plurality opinion).
[196] *Id.* at 2263.
[197] *Id.* at 2263-64.
[198] *Id.* at 2264.
[199] *Id.*

whether a § 404 permit will be needed in a specific case.

D. Justice Kennedy's Concurring Opinion

Justice Kennedy's opinion, although sharply critical of the plurality opinion, ultimately concurred in the judgment to vacate the judgment of the 6th Circuit and to remand the case for further processing.[200] Although Justice Kennedy rejected the standards promulgated by the plurality, he ultimately held that the question of whether or not the wetlands are navigable waters under the CWA must be determined under the "significant nexus" test first referenced in *SWANCC*.[201] One commentator characterized Justice Kennedy's concurrence as "a pragmatic approach to environmental law and policy the soundest of the three methods showcased in *Rapanos* and is the one future courts, regulators, and environmental advocates should embrace."[202]

The dissent stated that it "generally" agrees with Parts I and II A of Justice Kennedy's opinion.[203] In Part I of his concurrence, Justice Kennedy took issue with the plurality's description of wetlands as "simply moist patches of earth."[204] In Part II, particularly Part II A, Justice Kennedy traced the history of *SWANCC* and *Riverside Bayview*, and then stated that the limitations on waters set forth in the plurality opinion were "without support in the language and purposes of the Act or in our cases interpreting it."[205]

Justice Kennedy, who hails from California,[206] discussed the Los Angeles River, which is normally dry, but occasionally becomes a torrent during heavy rain events.[207] Requiring permanent or continuous flow, according to Justice Kennedy "makes little practical sense in a statute concerned with downstream water quality."[208] Furthermore, Justice Kennedy agreed with the dissent that the plurality's second requirement,

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[200] *Id*. at 2236 (Kennedy, J., concurring).
[201] *Rapanos,* 126 S. Ct. at 2252.
[202] *Leading Cases*, 120 HARV. L. REV. 351, 352 (Nov. 2006).
[203] *Rapanos*, 126 S. Ct. at 2264 (Stevens, J., dissenting).
[204] *Id*. at 2237 (Kennedy, J., concurring).
[205] *Id*. at 2242.
[206] The Justices of the Supreme Court, http://www.supremecourtus.gov/about/biographiescurrent.pdf (last visited Apr. 2, 2007).
[207] *Rapanos*, 126 S. Ct. at 2242.
[208] *Id.*

that wetlands must have a continuous surface connection to other jurisdictional waters, should have been rejected.[209]

Additionally, Justice Kennedy agreed with the dissent that *Riverside Bayview* stood for the proposition that a broad interpretation of wetlands would be permissible, and even if *Riverside Bayview* was read narrowly, it would not support the plurality's proposed requirement of a continuous surface connection. Furthermore, he did not believe that *SWANCC* supported the plurality's surface-connection requirement.[210] Instead, the Corps' adjacency standard was "reasonable in some of its applications" because "the Corps' view draws support from the structure of the [CWA], while the plurality's surface-water-connection requirement does not."[211]

Justice Kennedy also agreed with the dissent that the plurality's opinion was not consistent with the "text structure [or] purpose" of the CWA.[212] He noted the logical inconsistency between: 1) foreclosing jurisdiction over wetlands that abut navigable in fact waters when a surface water connection is lacking, while saying 2) the CWA covers remote wetlands that possess a small surface water connection with a continuously flowing stream. [213] He characterized the plurality's "overall tone and approach" as "dismissive" of the interests of the United States, and noted that thirty-three States plus the District of Columbia have filed an *amicus* brief asserting the importance of the CWA, especially with respect to regulating out-of-state pollution that the States could not regulate themselves.[214]

However, while Justice Kennedy was sharply critical of the plurality, he believed that the word "navigable" and "navigable waters" had some importance, and that the dissent did not recognize its significance.[215] He believed that there must be a significant nexus between a wetland and a body of water that was navigable in fact and that such nexus must be evaluated in terms of the statute's goals and purposes.[216] This nexus would exist "if the wetlands, either alone or in combination with

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[209] *Id*. at 2244; *cf id*. at 2264 (Stevens, J., dissenting) (rejecting the significant nexus test).
[210] *Rapanos*, 126 S. Ct. at 2244 (Kennedy, J., concurring).
[211] *Id*. at 2245.
[212] *Id*. at 2246.
[213] *Id*. at 2248.
[214] *Id*. at 2246.
[215] *Id*. at 2247.
[216] *Rapanos*, 126 S. Ct. at 2248.

similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"[217]

Although the Corps' standard for jurisdiction with respect to wetlands adjacent to navigable in fact waters based upon "a reasonable inference of ecological interconnection" had been upheld by *Riverside Bayview*, the Corps' existing standard of adjacency to any tributary, "however remote and insubstantial" was overbroad.[218] The Corps' standard enabled it to regulate drains, ditches and streams remote "from any navigable in fact water."[219] Therefore, absent more specific regulations, the Corps must establish a significant nexus on a case-by-case basis with respect to wetlands that are adjacent to non-navigable tributaries.[220]

Justice Kennedy recognized that the evidence in both *Rapanos* and *Carabell* indicated that a significant nexus might well have existed in these cases, warranting the proper assertion of jurisdiction by the Corps. Nevertheless, because the lower courts used an incorrect legal standard, the case had to be remnded.[221]

In *Rapanos*, the District Court relied upon an expert that it found eminently qualified.[222] The District Court found that each of the wetlands had connections to tributaries of navigable waters.[223] However, Justice Kennedy stated that the mere hydrologic connection might not suffice because the connection might be too insubstantial to establish the required nexus.[224]

In *Carabell*, significant evidence in the record showed that the proposed filling of the wetland would have adverse impacts upon downstream navigable water bodies.[225] However, there was "little indication of the quantity and regularity of flow in the adjacent tributaries - a consideration that may be important in assessing the nexus."[226] Justice Kennedy agreed with the Court of Appeals n *Carabell*, which held that no hydrologic connection was required to establish a nexus, noting the importance of

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[217] *Id*. at 2248.
[218] *Id.* at 2248-49.
[219] *Id*..at 2249.
[220] *Id*. at 2248.
[221] *Id*. at 2251-52.
[222] *Rapanos*, 126 S.Ct. at 2250.
[223] *Id.*
[224] *Id.* at 2251-52.
[225] *Id.* at 2251.
[226] *Id.*

wetlands in pollutant filtering, flood control, and runoff storage.[227] Nevertheless, since the Corps itself had based its jurisdiction solely on the wetlands adjacency to a ditch that was separated by a berm, further inquiry was necessary to determine whether the "significant nexus" standard had been met.[228]

E. Wetland Regulation Post-Rapanos

Given the badly splintered Court, it is worth taking a step back and asking the question: what, if anything, has been decided by *Rapanos*?

First, the Court did not provide any guidance as to the meaning of the term "navigable waters." While the dissent argued that the term "navigable" is of only historical usage, and that "navigable" only refers to the past history of regulation,[229] that view was rejected by the plurality and by Justice Kennedy.[230] On the other hand, even the plurality opinion recognizes that some regulation of waters which are not navigable in fact is permitted under the CWA.[231] Thus, *Rapanos* has not done anything to clarify what waters are navigable within the scope of the CWA definition. While *SWANCC* retreated from the apparent intention to apply a broad definition of the term navigable waters, it did not explain what waters might be classified as navigable, and consequently "waters of the United States." *Rapanos* simply confirms the uncertainty of the SWANCC majority.

Second, the plurality proposed a two-part test that the other five Justices rejected; the test requires that (1) a wetland must be adjacent to a permanent body of water connected to navigable in fact water bodies, and (2) there must be a continuous surface connection with that body.[232] Neither the dissent nor Justice Kennedy found any basis for either requirement, and criticized them sharply.[233] Therefore, the criteria advocated in the Opinion adopted for the Court is not the law.

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[227] *Id.* (noting the importance of wetlands in pollutant filtering, flood control and runoff storage).

[228] *Rapanos*, 126 S. Ct. at 2251-52.

[229] *See id.* at 2256 (Stevens, J., dissenting) (discussing that Congress could have amended the definition if it sought fit).

[230] *Id.* at 2220, 2241.

[231] *Id.* at 2220.

[232] *Id.* at 2226.

[233] *Id.* at 2244, 2262.

Third, the regulations of the Corps have apparently been invalidated by *Rapanos*. Five justices of the Court have found that these regulations, despite their long usage, are overbroad and in excess of the CWA's statutory authority.[234] These regulations were not amended after *SWANCC*, even though amendments were considered, but not adopted. Chief Justice Roberts, in a separate concurrence, claimed that the Corps, as well as the EPA, "would have enjoyed plenty of room to operate in developing *some* notion of an outer bound to the reach of their authority."[235] The use of the conditional tense is interesting. Does Chief Justice Roberts mean to say that the Corps has now forfeited its ability to adopt regulations by failing to act? If not, what regulations can the Corps adopt in the future? The Chief Justice recognizes that it will now be necessary for all parties, including lower courts, to "feel their way on a case-by-case basis."[236]

Fourth, the case-by-case test proposed by Justice Kennedy,[237] although rejected by the remaining eight justices, might be applied by the Corps as a default. If the regulations of the Corps are invalidated as overbroad, and the standards to judge future regulations are unclear, the Corps, at least on a short-term basis, will have to determine whether to grant permits on a case-by-case basis. It is unclear how the Corps will make a determination whether or not to grant a wetlands permit in a specific case.

The "unusual feature" of these cases was mentioned in the dissent, which noted that Justice Kennedy would apply a different test on remand than the plurality opinion.[238] The dissent indicated that the Corps jurisdiction in both *Rapanos* and *Carabell* should be upheld if it is determined that there is either a significant nexus under Justice Kennedy's standard, or if the requirements of continuous flow and surface water connection are met under the plurality opinion.[239]

Beyond the cases being remanded, the Corps will have jurisdiction in future cases if it can be determined that the wetland meets the broad standard for assertion of jurisdiction of

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234 *Rapanos*, 126 S. Ct. at 2220, 2249.
235 *Id*. at 2236 (emphasis in original).
236 *Id.*
237 *Id.* at 2249.
238 *Id.* at 2265 (Stevens, J., dissenting).
239 *Id.* at 2265.

the dissent,[240] and either the significant nexus standard[241] or the restrictive standard of the plurality.[242] As a practical matter, it would seem that any situation meeting the restrictive standard of the plurality would also meet the significant nexus test of Justice Kennedy. Therefore, the significant nexus test will be used to determine jurisdiction, despite the fact that it was not accepted by the other eight Justices.

The nexus requirement, which effectively requires a case-by-case analysis, was specifically criticized in Justice Breyer's short dissent. Justice Breyer noted that it was Congress' intention to have the Corps make the "complex technical judgments that lie at the heart of the present cases."[243] The Corps will have to write the new regulations, and those regulations, as Justice Breyer indicates, will be entitled to substantial deference.[244]

Finally, *Rapanos* has created some uncertainty with respect to the enforcement of the NPDES program under § 402 of the Clean Water Act. We can expect that a discharger, facing a permit requirement and/or enforcement action for discharges into an allegedly non-navigable water, will raise the question of whether the CWA authorizes the regulation of the discharge. Although only four Justices believed that such a stream may not be a navigable water,[245] the question is now on the table. Furthermore, it is by no means clear that a lower court will accept the plurality opinion's distinction that discharge can be regulated if it will eventually flow to a navigable water, even if it is not directly connected to a navigable water. If a lower court ultimately accepts this distinction, the regulatory agency, the state agency, or the EPA, will now have the substantial factual burden of establishing that a hydrologic connection actually exists. Under the pre-*Rapanos* law, proof of such a connection would not have been necessary.

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240 *Rapanos,* 126 S. Ct. at 2252.
241 *Id.* at 2248.
242 *Id.* at 2226.
243 *Id.* at 2266 (Breyer, J., dissenting).
244 *Id*. (Breyer, J., dissenting).
245 *Id.*

V. *WARREN* AND § 401 OF THE CWA

A. Definition of "Discharge" Before Warren

The term "discharge," like "navigable waters," is defined very generally by the CWA. Section 1362(16) of the CWA defines "discharge" as "when used without qualification includes a discharge of a pollutant, and a discharge of pollutants."[246] "Discharge of a pollutant" is defined separately by § 1362(12) to require the addition of a pollutant to navigable waters.[247] The definition of "discharge" was never squarely addressed by the Supreme Court prior to its decision in *Warren*.

Section 401 of the CWA requires an applicant for a federal license or permit to obtain a Water Quality Certificate from the state where the activity will occur if the activity will "result in any discharge into the navigable waters."[248] In § 401, the phrase "of a pollutant" does not modify the word "discharge." Therefore, a Water Quality Certificate must be obtained even if no pollutants are discharged[249] and any "discharge" will subject the activity to the statutory requirement of a state certificate. "Section 401 (a)(1) . . . implements the policy of empowering states to protect their water quality programs by authorizing them to veto federal licenses or permits that threaten to undermine the quality of their waters."[250]

However, the term "discharge" appears, not only in § 401, but also in § 402 of the CWA.[251] Courts have construed "discharge," under § 402 of the CWA, to mean any discharge of a pollutant.[252] In *Miccosukee*, the Court held that a pumping facility which transferred water from a canal into a reservoir did not need a discharge permit under § 402.[253] Even though the pumping

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246 33 U.S.C. § 1362(16) (2000).

247 *Id.* § 1362(12).

248 *Id.* § 1341(a)(1) (2000). The EPA Water Quality Standards Handbook identifies five federal permits or licenses that require Water Quality Certificates under § 401, including licenses for hydroelectric facilities. ENVTL. PROT. AGENCY, WATER QUALITY STANDARDS HANDBOOK: SECOND EDITION 7-10 (1994).

249 North Carolina v. Fed. Energy Regulation Comm'n, 112 F.3d 1175, 1181 (D.C. Cir. 1997).

250 *Id.* at 1194 (Wald, J., dissenting).

251 33 U.S.C. § 1342 (2000).

252 So. Fla. Water Mgmt. Dist. v. Miccosukee Tribe, 541 U.S. 95, 102 (2004).

253 *Id.* at 106.

facility was a "point source" under § 502(14) which transferred polluted water,[254] the Court found that it would not need a permit if the canal and the reservoir were not distinct "meaningfully water bodies."[255] Consequently, if the canal and the reservoir were "two parts of the same water body," then transferring water from one part to the other part would not involve the addition of pollutants.[256]

B. Water Quality Certificates for Hydroelectric Facilities

Under the Federal Power Act, the Federal Energy Regulatory Commission (FERC) has exclusive jurisdiction over the regulation of hydroelectric facilities, and issues licenses for their operation.[257] The typical hydroelectric facility removes water upstream from a dam, uses the water to power a turbine, and then releases the water.[258] If a "discharge" under § 401 of the CWA refers to the addition of a pollutant, as *Miccosukee* held with respect to § 402, then an applicant for a federal license for a hydroelectric facility would not need a Water Quality Certificate because the transfer of water through the facility would not be considered a discharge.[259]

The Supreme Court addressed § 401 of the Clean Water Act on only one previous occasion.[260] In *Jefferson County PUD v. Washington Department of Ecology*, the Court examined the state's authority to impose conditions in a certificate pursuant to § 401.[261] The Court held that a state can impose conditions, not only under § 401(a), but also under § 401(d), which authorizes the imposition of conditions to enforce "any other appropriate requirement of State law."[262] *Jefferson County PUD* recognized

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254 33 U.S.C. § 1362(14).

255 *Miccosukee*, 541 U.S. at 112.

256 *Id* at 109-10. The District and the Tribe disagreed over whether the canal and the reservoir were two parts of the same water body or not. *Id.* This issue of fact was remanded to the District Court. *Id.* at 112.

257 16 U.S.C. § 817(1) (2000).

258 U.S. Geological Survey, http://ga.water.usgs.gov/edu/hyhowworks.html (last visited Mar. 31, 2007).

259 S.D. Warren Co. v. Me. Bd. of Envt'l. Prot., 126 S. Ct. 1843, 1846 (2006) (holding that "state approval is needed" since the operation of a dam may result in a discharge).

260 *See* Jefferson County PUD v. Wash. Dep't of Ecology, 511 U.S. 700, 710 (1994) (phrasing the issue as whether a "minimum stream flow requirement" is permissible under § 401 of the CWA).

261 *Id.* at 711.

262 *Id.* (authorizing imposing conditions to enforce "any other appropriate

the long-standing policy of reserving power to regulate water pollution and discharges to national waters.[263] However, the Court, as well as both parties to the litigation, apparently assumed that the hydroelectric facility's activities may result in a discharge to the navigable waters.[264]

Since *Jefferson PUD,* courts have significantly broadened the authority of states to impose conditions on hydroelectric facilities under § 401. One commentator has noted that "in the last decade and a half, several court decisions have undermined FERC's position as the nation's unchallenged hydropower regulatory czar" by holding that federal and state agencies have a role in the re-licensing of hydroelectric projects, and that FERC must incorporate their license conditions into the license "even if it disagrees with the terms."[265]

In *American Rivers v. Federal Energy Regulatory Commission*, the Second Circuit found that FERC did not have the authority to refuse to incorporate state certificate conditions related to water quality into a federal license.[266] The court characterized the language of § 401(d) as "unequivocal" and held FERC could not reject extraneous conditions.[267] The court held that, if FERC was concerned that the state action intruded upon its authority under the Federal Power Act, its sole remedy was to deny the license because there was no congressional mandate for FERC to reject a condition imposed by a state.[268]

Furthermore, *American Rivers* held that *it is a state, not FERC*, that is responsible to determine which conditions are appropriate and should be included in the license under § 401(d) of the Clean Water Act.[269] If a state imposes conditions in excess of state authority, the aggrieved party could challenge the

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requirement of State law").

[263] *Id.* at 712.

[264] *See id.* at 708-9. (assuming the dam was constructed as planned, all parties could anticipate water would be drawn into the facilities before being discharged).

[265] Michael Blumm & Viki Nadol, *The Decline of the Hydropower Czar and the Rise of Agency Pluralism in Hydroelectric Licensing*, 26 COLUM. J. ENVTL. L. 81, 84 (2001).

[266] Am. Rivers v. Fed. Energy Regulatory Comm'n, 129 F.3d 99, 102 (2d Cir. 1997).

[267] *Id.* at 107.

[268] *Id.* at 111.

[269] *See id.* at 102 (highlighting that states shall set regulations, and those regulations become conditions on federal licenses and permits).

conditions in a "court of appropriate jurisdiction,"[270] presumably a state court. Also, the Court held that a state has the authority to impose conditions under §§ 401(a)(3) and (5) that affect licenses that have already been issued.[271]

FERC has been inconsistent in determining whether or not to accept allegedly objectionable conditions in § 401 certificates.[272] However, although *Jefferson Co. PUD* and *American Rivers* "clearly interpret the CWA to authorize states to use § 401's certification process to condition for licenses,"[273] the scope of permit conditions a state can impose, as well as the applicability of state procedural requirements to § 401 certificates, has not been addressed by any federal court since *American Rivers*.

In 2005, in *S.D. Warren Co. v. Board of Environmental Protection*,[274] the Supreme Judicial Court of Maine upheld the State Board of Environmental Protection's authority to impose conditions pertaining to a dissolved oxygen criterion," minimum stream flow requirements and to provide for a "reopener," to ensure compliance in the event of the permit holder's non-compliance after receipt of its license.[275]

In *Warren*, the Maine Supreme Judicial Court noted that *American Rivers* had considered the issue of "reopeners," and had specifically rejected FERC's claim that permitting "reopeners" would interfere with FERC's responsibilities under the Federal Power Act. After Warren exhausted its administrative appeals, it filed suit, arguing that the State of Maine did not have the authority to issue a § 401 certificate, on the grounds that operating a hydroelectric facility did not constitute a "discharge" within the meaning of § 401.[276] After losing in state court, Warren appealed to the United States Supreme Court, claiming, as it had done throughout the state administrative process, that a Water Quality Certificate was not required for a hydroelectric

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[270] *Id.* at 112.

[271] *Am. Rivers*, at 108 (citing Keating v. Fed. Energy Regulatory Comm'n, 927 F.2d 616, 621-22 (D.C. Cir. 1991)).

[272] *See* Blumm & Nadol, *supra* note 266, at 107 (describing the inconsistency as including all state certification conditions in some cases, and excluding certain conditions in others).

[273] *Id.* at 107-08.

[274] S.D. Warren Co. v. Bd. of Envtl. Prot., 868 A.2d 210, 217 (Me. 2005).

[275] *Id. Warren* cited *Jefferson PUD* as interpreting "§ 401(d), 33 U.S.C. § 1341(d) broadly to mean that a state may attach *any* conditions that are necessary to ensure compliance with § 303 [of the CWA] limitations and are appropriate under state law." *Id.* at 218 (emphasis in original).

[276] S.D. Warren Co. v. Me. Bd. of Envtl. Prot., 126 S. Ct. 1843, 1847 (2006).

facility.[277]

C. The Court's Holding in Warren

In *Warren*, like *Rapanos*, the Court considered a challenge to a long accepted interpretation of the CWA.[278] Hydroelectric facilities had routinely applied for Water Quality Certificates under § 401 as part of their federal licensing process,[279] and as the Supreme Court noted in *Warren*, the issue of whether the operations of a hydroelectric facility constitute a discharge was not even considered in *PUD No. 1 of Jefferson County*, the only previous Supreme Court case to address § 401 of the CWA.[280] *Warren*, like *Rapanos*, also involved a question of a statutory definition. Therefore, if, as we have seen, the conservative members of the Supreme Court took the opportunity in *Rapanos* to attempt to make a significant change in the existing law, a similar effort might have been expected in *Warren*. That, however, did not happen. Instead, Justice Souter wrote the opinion for a unanimous Court (although Justice Scalia declined to join in one part of the opinion).[281]

In the absence of any formal regulatory definition of discharge, it appears that both FERC and EPA "had each regularly read 'discharge' as having its plain meaning," and found that it applies to hydroelectric facilities.[282]

The petitioner in *Warren* raised three arguments in support of its claim that a hydroelectric facility does not "discharge" water:[283] (1) a statutory canon of construction *noscitur a sociis*, or "a word is known by the company it keeps,"[284] (2) *Miccosukee* requires that the definition of "discharge" is the same as the definition of "discharge of a pollutant,"[285] and (3) the legislative history supports its proposed definition of discharge.[286] All of

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[277] *Id.*
[278] *Id.* at 1846; Rapanos v. United States, 126 S. Ct. 2208, 2216 (2006).
[279] *S.D. Warren Co.*, 126 S. Ct. at 1846.
[280] *Id.* at 1848. *See generally* PUD No. 1 of Jefferson County v. Wash. Dep't of Ecology, 511 U.S. 700, 723 (1994) (finding that additional requirements imposed by the state's environmental protection agency was permissible under § 401 of the CWA).
[281] *S.D. Warren Co.*, 126 S. Ct. at 1846.
[282] *Id.* at 1848.
[283] *Id.* at 1849.
[284] *Id.* 1849-50.
[285] *Id.* at 1850.
[286] *Id.* at 1851-52.

these arguments involve the question of whether "discharge" can be defined separately from "discharge of a pollutant."[287]

The Court rejected the first argument based on *noscitur a sociis,* noting that "it should also go without saying that uncritical use of interpretive rules is especially risky in making sense of a complicated statute like the Clean Water Act, where technical definitions are worked out with great effort in the legislative process."[288] This caution should be contrasted with Justice Scalia's liberal use of interpretive rules to reach his conclusion in *Rapanos*.

The Court also rejected the second argument, holding that, while *Miccosukee* addressed the question of addition of a pollutant under § 402 (which required discharges of pollutants), § 401 served an entirely different purpose.[289] While § 402 requires that something be added to constitute a discharge, § 401 does not.[290]

Finally, Warren's third argument was based upon a claim that the word "includes" was simply left in statutory definition of "discharge" by accident.[291] Therefore, the term "discharge" should be read to mean "discharge of a pollutant." The Court's opinion summarily rejected this argument, characterizing it as implausible speculation that Congress might have made such a mistake inadvertently.[292] In any event, the Court noted that "when Congress fine-tunes its statutory definitions, it tends to do so with a purpose in mind."[293] Interestingly enough, the section of the Court's decision on legislative history was the one section that Justice Scalia did not join.[294]

After rejecting the arguments based on statutory construction, the opinion proceeded to Part IV, where the Court expressed its opinion about the policy considerations of the CWA. The Court characterized Warren's arguments as missing "the forest for the trees."[295] The Court cited the language from the Congressional declaration of goals and policy in the CWA[296] and noted that

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[287] *S.D. Warren Co.*, 126 S. Ct. at 1840.
[288] *Id.* at 1849-50.
[289] *Id.* at 1850.
[290] *Id*.
[291] *Id.* at 1851.
[292] *Id.* at 1852.
[293] *S.D. Warren Co.*, 126 S. Ct. at 1852.
[294] *Id.* at 1846.
[295] *Id.* at 1852.
[296] *Id* at 1852-53; 33 U.S.C. § 1251(a) (2004).

several *amici*, as well as *Warren* itself, admitted that the operation of the dams could affect water quality.[297] In particular, the dewatering of the river bed below the dam makes it unavailable for habitat for fish and other aquatic organisms, as specifically found by the Maine Bureau of Environmental Protection,[298] quoting from the findings themselves.[299]

The Court, citing a speech by then Senator Muskie in 1970, declared "[s]tate certifications under § 401 are essential in a scheme to preserve state authority to address the broad range of pollution."[300] In other words, Congress intended to enact sweeping powers to address pollution, and states can use these powers under the CWA.

CONCLUSION: THE CLEAN WATER ACT AFTER *RAPANOS* AND *WARREN*

In *Rapanos*, five Justices (the four dissenters and Justice Kennedy) apparently recognized the intention of Congress to enact an all-encompassing statute to provide a comprehensive approach to the problems of water pollution.[301] Similarly, the *Warren* Court recognized the CWA's larger goal of ending water pollution.

However, the opinion of the plurality in *Rapanos* represents a serious threat, not just to the administration of the wetlands permit program by the Army Corps of Engineers, but to the ability of Congress to enact a comprehensive statute to address a problem of national concern, in this case water pollution. Accepting, *arguendo*, the premise of Chief Justice Roberts' concurring opinion, that the Army Corps of Engineers regulations are overbroad, and are beyond the authorization of the statute,[302] there is still no need for the plurality to speculate that Congress did not have the constitutional authority to regulate isolated bodies of water.

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[297] *S.D. Warren Co.*, 126 S. Ct. at 1853.

[298] *Id.*

[299] *Id.*

[300] *Id.*

[301] *See* Rapanos v. United States, 126 S. Ct. 2208, 2236-37, 2252 (2006) (describing the intention of Congress to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters.").

[302] *See id.* at 2220 (characterizing the Army Corps of Engineers interpretation of the phrase "the waters of the United States" as "expansive" and outside the construction of the statute).

The most dangerous aspect of the plurality opinion is the apparent intention to judicially create a rule defining which wetlands are subject to regulation under the CWA. The question of what water bodies or wetlands affect "navigable water" is an ecological and scientific question, which should be the subject of administrative rulemaking by agencies with technical expertise, not resolved by courts.[303] This is especially true since, as noted by the dissent, none of the parties to the litigation had asked for the sweeping declaration of the Court to offer its own definitions of what constitutes a wetland subject to regulation.[304]

It is fair to state that the plurality, the dissent, and the concurring opinion of Justice Kennedy all contain a significant amount of discussion of "policy." While the dissent and Justice Kennedy talk about environmental benefits and the intention of Congress,[305] Justice Scalia, for the plurality, talks about regulatory costs, and what he considers to be the overreaching of the Corps of Engineers.[306] Justice Scalia also talks about Congressional policy to provide the states with the primary responsibility for water pollution control.[307] However, his reference to state responsibility occurs in the context of his argument that Congressional power to regulate intrastate waters may be limited by the Commerce Clause.

In *Warren*, all of the Justices, even Justice Scalia, could agree that the Clean Water Act was enacted to provide a broad-based approach to addressing water pollution in the nation.[308] Perhaps the four Justices who signed the plurality opinion in *Rapanos*

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[303] *See Clean Water Act – Federal Jurisdiction Over Navigable Waters*, 120 HARV. L. REV. 351, 359 (2006) (arguing that the plurality's "'continuous surface connection' requirement," is faulty because it places a purely scientific determination in the hands of judges rather than the agencies equipped with the environmental expertise).

[304] *See Rapanos*, 126 S. Ct. at 2259 (stating that none of the parties or *amici* briefs even mentioned the new rule now being imposed by the plurality).

[305] *See id.* at 2237-38, 2240, 2252 (discussing the intent of Congress to restore and maintain our Nation's waters and how wetlands provide various benefits such as flood prevention).

[306] *See id.* at 2214-15 (discussing the enormous costs spent by parties to obtain wetland permits and the overreaching power of the Army Corps to potentially regulate any land parcel by their expansive interpretation of "waters of the United States").

[307] *See id.* at 2223-24 (discussing Congress' intent to protect the rights of the several states to establish and maintain their own administrative programs dealing with the preservation of water resources).

[308] *See* S.D. Warren Co. v. Me. Bd. of Envtl. Prot., 126 S. Ct. 1843, 1852-53 (2006) (describing Congress' intention in passing the CWA).

could agree to this in *Warren* because, in *Warren*, the Court was dealing with the power to impose conditions in a Water Quality Certificate, and that power is specifically reserved to the states under § 401 of the CWA.[309] A Congressional reservation of power to the states, as opposed to an assertion of federal authority, does not raise any issue under the Commerce Clause.

Nevertheless, if a comprehensive scheme to address pollution is needed, those same policy considerations require that Congress, as the legislative body, have the authority to adopt such a law. Prior to *Rapanos*, we could be confident that the Commerce Clause gave Congress the authority to regulate all forms of water pollution in the United States, and that the enforcement of that authority, by regulation, could be delegated to the Corps and/or to EPA.[310] Unfortunately, the opinion of the plurality in *Rapanos* casts doubt upon whether the Supreme Court will use an unduly restrictive view of federal power as a means of frustrating the noble policy goals and aspirations of federal anti-pollution statutes.

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[309] 33 U.S.C. § 1341(a)(1) (2000) ("Any applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable water[s] shall provide the licensing or permitting agency a certification from the State in which the discharge originates.").

[310] *See* Jonathan H. Adler, *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation*, 29 ENVTL. L. 1, 24-25 (1999) (describing how increased national concern for water pollution in the early 1970's lead to the expansive federal regulation of wetlands by the Army Corps and how this spurred great opposition under the Commerce Clause).