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# Nexus of Confusion: Why the Agencies Responsible for Clean Water Act Enforcement Should Promulgate a New Set of Rules Governing the Act's Jurisdiction, A

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# A Nexus of Confusion: Why the Agencies Responsible for Clean Water Act Enforcement Should Promulgate a New Set of Rules Governing the Act's Jurisdiction

Gregory H. Morrison\*

## TABLE OF CONTENTS

|  |     |
|--|-----|
| I. INTRODUCTION .....  | 398 |
| II. THE CLEAN WATER ACT AND SECTION 404 .....                                  | 399 |
| III. THE SUPREME COURT'S INTERPRETATION OF SECTION 404 .....                   | 400 |
| A. <i>Riverside Bayview and the Early Deferential Approach</i> .....           | 400 |
| B. <i>SWANCC and the Retreat from Deference</i> .....                          | 401 |
| C. <i>The Fractured Rapanos Decision</i> .....                                 | 402 |
| 1. <i>The Plurality Opinion</i> .....  | 402 |
| 2. <i>Justice Kennedy's Concurrence—The "Significant Nexus"</i> .....          | 403 |
| 3. <i>The Dissent—An Inclusive Approach</i> .....                              | 405 |
| 4. <i>Offers of Deference?</i> .....   | 406 |
| IV. SUBSEQUENT LOWER COURT APPLICATION AND THE CORPS AND<br>EPA RESPONSE ..... | 407 |
| A. <i>Lower Courts Try to Apply Rapanos</i> .....                              | 407 |
| B. <i>The Corps and EPA Attempt to Provide a Solution</i> .....                | 409 |
| V. WHAT ABOUT A CONGRESSIONAL AMENDMENT TO THE<br>CLEAN WATER ACT? .....       | 411 |
| VI. NEW FEDERAL REGULATIONS: A MORE LIKELY SOLUTION .....                      | 413 |
| A. <i>Begin by Codifying the Plurality Opinion</i> .....                       | 414 |
| B. <i>Supplement with the Significant Nexus Test</i> .....                     | 415 |
| C. <i>Standardize and Maintain Administrative Data</i> .....                   | 417 |
| D. <i>Aggregate Impacts and Similarly Situated Wetlands</i> .....              | 418 |
| VII. CONCLUSION .....  | 418 |

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## I. INTRODUCTION

At the time of European settlement, the territory now occupied by the forty-eight contiguous United States contained approximately 221 million acres of wetlands.<sup>1</sup> Because these resources were considered throughout our nation's development as "swampy lands that bred diseases, restricted overland travel, impeded the production of food and fiber, and generally were not useful for frontier survival," they were aggressively filled and drained to make way for more productive uses, resulting in a net loss of over half of that area.<sup>2</sup> Recently, as science has given us a greater understanding of the important function of these wetlands in the context of the overall health of our nation's waters, pressure has mounted to preserve them.<sup>3</sup> With this in mind, Congress passed the Clean Water Act (CWA), one of the highlights of which is section 404, a permitting system for those who wish to fill or drain wetlands for productive use.<sup>4</sup>

For over thirty years, the United States Army Corps of Engineers (Corps), the agency charged with section 404 oversight, has interpreted the jurisdictional parameters of the CWA to give it regulatory power "to the maximum extent permissible under the Commerce Clause of the Constitution."<sup>5</sup> Recently, however, the Supreme Court has reduced the extent to which the Environmental Protection Agency (EPA) and the Corps may regulate wetlands.<sup>6</sup> Beginning with *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers* (SWANCC)<sup>7</sup> in 2001, the scope of regulatory power began to recede from its high-water mark.<sup>8</sup> Ultimately, in 2006, *Rapanos v. United States* saw the Supreme Court invalidate the Corps' section 404 regulations as they pertained to wetlands adjacent to non-navigable waterways.<sup>9</sup>

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1. Thomas E. Dahl & Gregory J. Allord, History of Wetlands in the Coterminous United States, *United States Geological Survey Water Supply Paper 2425*, available at <http://water.usgs.gov/nwsum/WSP2425/history.html> (last visited Sept. 12, 2010) (on file with the *McGeorge Law Review*).

2. *Id.* (stating that "[a]bout 103 million acres remained as of the mid-1980's").

3. See Mark Squillace, *From "Navigable Waters" to "Constitutional Waters": The Future of Federal Wetlands Regulation*, 40 U. MICH. J.L. REFORM 799, 802-09 (2007) (listing as some of the recognized functions of wetlands: flood prevention; carbon sinks; wastewater treatment; housing biologically diverse plant and animal species; and recreation).

4. Clean Water Act of 1972, 33 U.S.C. § 1344 (2001).

5. See *Natural Res. Def. Council, Inc. v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975) (ordering the U.S. Army Corps of Engineers to promulgate new jurisdictional guidelines which reflect the congressional intent to regulate to "the maximum extent possible under the Commerce Clause of the Constitution").

6. See generally Clean Water Act §§ 1251-1387 (granting enforcement jurisdiction over CWA's various programs to either the U.S. Army Corps of Engineers or the Environmental Protection Agency); Squillace, *supra* note 3, at 799 ("In three decisions over the course of twenty years, the Supreme Court has expressed increasing skepticism that the phrase 'navigable waters' supports the Corps' broad claim of jurisdictional authority.").

7. 531 U.S. 159 (2001).

8. See Samuel Bickett, *The Illusion of Substance: Why Rapanos v. United States and its Resulting Regulatory Guidance do not Significantly Limit Federal Regulation of Wetlands*, 86 N.C. L. REV. 1032, 1034 (saying that SWANCC "narrowed the outer limits of the CWA's coverage").

9. See generally *Rapanos v. United States*, 547 U.S. 715 (2006) (holding Army Corps of Engineers

Unfortunately, the *only* thing that the fractured 4-1-4 decision made clear was the invalidity of the Corps' thirty-year-old jurisdictional regulations.<sup>10</sup> The decision left wide open to interpretation the question of exactly which wetlands would continue to receive protection under the CWA and, as will be discussed later in this Comment, that question remains unanswered.<sup>11</sup> Something must be done to eliminate confusion on the part of both regulatory agencies and individual landowners who wish to utilize their land by filling or dredging it. Exactly what that solution should be is a matter of great debate.

This Comment asserts that, in order to maintain the maximum amount of protection under the CWA, the inclusive approach of the *Rapanos* dissent holds the answer. By promulgating regulations that include waters falling under either the *Rapanos* plurality's test or Justice Kennedy's concurring "significant nexus" test, and relying on the deference which Justices Roberts and Breyer seem to offer in their separate opinions, the EPA and Corps can restore the predictability that both they and the parties potentially responsible for section 404 permits require.

Part II of this Comment gives a brief overview of the CWA and, more specifically, the often litigated section 404 at issue in *Rapanos*.<sup>12</sup> Part II includes the disputed language and stated intent of the CWA, as well as the now invalid regulations under which the Corps has operated since 1975.<sup>13</sup> Part III will briefly examine the history of Supreme Court interpretation of section 404's reach, culminating with the divisive *Rapanos* decision. Part IV will examine the subsequent case law and discrepancies therein, which highlight the need for a uniform standard of application. Part V discusses the interim guidelines published jointly by the EPA and Corps, which provide the current guidance in applying the CWA in the field. Part V examines some of the problems created by the confusion and some ideas for remedies. Finally, Part VI concludes that the action necessary to ensure comprehensive wetland protection is the codification by the EPA and Corps of the "either/or" approach from Justice Stevens' *Rapanos* dissent.

## II. THE CLEAN WATER ACT AND SECTION 404

In 1972, Congress passed the Federal Water Pollution Control Act Amendments, collectively known as the Clean Water Act.<sup>14</sup> Congress stated goals "to restore and maintain the chemical, physical, and biological integrity of the

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jurisdiction to be too broad and formulating a two-part test for future jurisdiction).

10. See *id.* (noting that the plurality and Justice Kennedy, as the fifth vote, remanded the cases to the Sixth Circuit to determine jurisdiction based on new criteria).

11. See *infra* Part III.C (discussing the five separate opinions written in *Rapanos*, three of which lead to different jurisdictional analysis).

12. Clean Water Act of 1972, 33 U.S.C. § 1344 (2001).

13. 33 C.F.R. § 328.3 (2009).

14. Clean Water Act, §§ 1251-1387.

Nation's waters" and to "eliminat[e water pollution] by 1985[.]" and the CWA created two basic permitting programs.<sup>15</sup> One, created by section 402, is the National Pollutant Discharge Elimination System.<sup>16</sup> The EPA oversees this program, which regulates waste discharges from point sources into waters.<sup>17</sup> The other permitting program created by section 404, regulates discharges of dredged or fill material.<sup>18</sup> This program, overseen by the Corps, will be the focal point of this Comment.

The CWA defines its scope by requiring a section 404 permit to discharge dredge or fill material into any "navigable waters," later defined in the Act as "waters of the United States."<sup>19</sup> It is the choice of the phrase "navigable waters" in the Act, and the Corps' interpretation of that phrase, which has led to the jurisdictional controversy that continues today. While the Corps initially read "navigable waters" narrowly,<sup>20</sup> a 1975 D.C. Circuit Court decision concluded that Congress had "asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution[.]" and the court required the Corps to broaden the scope of regulation.<sup>21</sup> Since those judicially mandated revisions were made, the Corps has broadly defined "navigable waters" as "intrastate lakes, rivers, and streams" that are used by interstate travelers or in interstate commerce, non-navigable tributaries of the same, and "wetlands adjacent to" the aforementioned waters.<sup>22</sup> This extensive interpretation of section 404 jurisdiction has generated the most controversy.

### III. THE SUPREME COURT'S INTERPRETATION OF SECTION 404

#### A. Riverside Bayview and the Early Deferential Approach

Initially, the Supreme Court answered challenges to the Corps' jurisdiction with the traditional deferential approach articulated in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*<sup>23</sup> Under the doctrine now referred to as "*Chevron* deference," when a statute is ambiguous, a court will generally defer to the expertise of an administrative agency to which enforcement of a statute has

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15. *Id.* § 1251(a).

16. *Id.* § 1342.

17. *Id.*

18. *Id.* § 1344.

19. *Id.* §§ 1344(a), 1362.

20. See Bradford C. Mank, *Implementing Rapanos—Will Justice Kennedy's Significant Nexus Test Provide a Workable Standard for Lower Courts, Regulators, and Developers?*, 40 IND. L. REV. 291, 300-01 (2007) (stating that the Corps initially defined the CWA's jurisdiction as "'the broadest possible definition of actually and potentially navigable waters'").

21. *Natural Res. Def. Council, Inc. v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975).

22. 33 C.F.R. § 328.3 (2009).

23. 467 U.S. 837, 844 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations.").

been delegated, unless the agency's interpretation of that statute can be shown to be "arbitrary, capricious, or manifestly contrary to the statute."<sup>24</sup> The Court gave this deference in the first case of the trinity of CWA cases.<sup>25</sup>

In *United States v. Riverside Bayview Homes, Inc.*, a unanimous Supreme Court held the Corps' jurisdiction stretched to wetlands adjacent to larger, navigable bodies of water.<sup>26</sup> Granting deference to the agency's interpretation, the opinion states: "[T]he 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."<sup>27</sup> Importantly, the Court in *Riverside Bayview* considered the functionality of the adjacent wetlands in its decision to hold the agency's interpretation as rational.<sup>28</sup> Using language directly from the congressional statement of intent in the CWA, the Court found that water quality and ecosystem function were intimately connected, and that "'integrity' . . . refers to a condition in which the natural structure and function of ecosystems [are] maintained."<sup>29</sup> This acknowledgement of wetlands' functionality would, however, soon give way to a more literalist interpretation.

## B. SWANCC and the Retreat from Deference

SWANCC put an end to the expansion of the Corps' jurisdiction under the CWA and introduced language that would ultimately place limits on it.<sup>30</sup> In 1986, the Corps promulgated a "migratory bird rule," which sought to regulate all wetlands and waters that served as a habitat for migratory birds, even when remote from navigable waters.<sup>31</sup> In a 5-4 decision, over the dissent's calls for continued agency deference, the majority held that the existence of a "significant nexus" between the navigable waterway and an adjacent wetland was required in order for the Corps to exercise permitting authority.<sup>32</sup> Deemphasizing the importance of functionality relied on in *Riverside Bayview*, the Court held that it was this "significant nexus" that guided the decision, and which was missing in

24. *Id.*; see Mank, *supra* note 20, at 304.

25. 474 U.S. 121 (1985). *Riverside Bayview*, SWANCC, and *Rapanos* are often referred to as the "trinity" of CWA cases in the Supreme Court.

26. 474 U.S. 121, 131.

27. *Id.* at 133.

28. *Id.* at 134-35.

29. *Id.* at 132; see also Clean Water Act of 1972, 33 U.S.C. § 1251 (2001) (stating that the goal of the CWA was "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters").

30. See generally *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) ("Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result . . . this is a far cry, indeed, from the 'navigable waters' . . . to which the statute by its terms extends.").

31. See Mank, *supra* note 20, at 302-03 n.120 (explaining the "Migratory Bird Rule" contained in the preamble of 1986 Corps regulations).

32. SWANCC, 531 U.S. at 167-68.

the facts of *SWANCC*.<sup>33</sup> The movement that began in *SWANCC*—away from functionality and deference and toward literalism and limitation—culminated in the *Rapanos* decision.<sup>34</sup>

### C. The Fractured *Rapanos* Decision

In *Rapanos*, the Court dealt with facts distinct from the prior two cases of the trinity. Granting certiorari to a pair of Sixth Circuit cases, the Court considered whether wetlands that “lie near ditches or man-made drains that eventually empty into traditional navigable waters, constitute ‘waters of the United States’” within the meaning of the CWA.<sup>35</sup> The ensuing “train wreck of a decision” failed to produce a definitive answer to the question and has led to confusion and mixed application in circuit and district courts ever since.<sup>36</sup> With five separate opinions, three separate tests were forwarded to provide guidance on remand as to whether the Corps had permitting jurisdiction over the filled wetlands in question.<sup>37</sup> This Section will examine both the plurality and concurring opinions, but will focus on Justice Stevens’ dissent, which is a useful mechanism in determining jurisdiction post-*Rapanos*.

#### 1. The Plurality Opinion

In his plurality opinion, Justice Scalia rejects the purposivist approaches of both Justice Kennedy’s concurrence and Justice Stevens’ dissent.<sup>38</sup> Justice Scalia focused on the plain meaning of the words of the statute, using his trusted 1954 edition of *Webster’s New International Dictionary* as an interpretive tool.<sup>39</sup> Centering in on the inclusion of the phrase “the waters” rather than simply “waters” in the language of the CWA, Scalia concluded that “the waters” refers to water “found in streams and bodies forming geographical features such as oceans, rivers, and lakes . . . .”<sup>40</sup> He also reasoned, based on dictionary definitions, that these bodies were necessarily “only relatively permanent,

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33. *Id.* at 167.

34. See Mank, *supra* note 20, at 302-03 (stating that the Court in *Riverside Bayview* had taken a deferential approach which “emphasized the importance of hydrological and biological interactions . . . [.]” while in *SWANCC*, it determined that the relationship to navigability was still important, as the word was included in the CWA).

35. *Id.* at 729.

36. See Mark A. Ryan, *New Supreme Court Clean Water Decision: Here We Go*, 24 NAT. RES. & ENV’T 48, 48 (2009) (referring to the *Rapanos* decision as a “train wreck”).

37. See *Rapanos v. United States*, 547 U.S. 715 (2006) (noting opinions from Justices Scalia, Kennedy, and Stevens).

38. See Mank, *supra* note 20, at 306 (referring to the methodology of Justice Scalia as textualist and the methodology of Justices Stevens and Kennedy as purposivist).

39. *Rapanos*, 547 U.S. at 732.

40. *Id.* at 732.

standing or flowing bodies of water[.]" seemingly eliminating from jurisdiction temporal or intermittent features.<sup>41</sup>

Based on this analysis, the plurality developed a two-part test to be used in determining jurisdictional wetlands.<sup>42</sup> This test requires that: (1) the adjacent channel contain a water of the U.S. (a relatively permanent body of water connected to traditional interstate navigable waters); and (2) there be a *continuous* surface connection to the adjacent water, making it difficult to determine where the "water" ends and the "wetland" begins.<sup>43</sup> The plurality advocated this limitation as a way to countermand the regulatory agencies' broad interpretation of the statute, which the plurality felt had "stretched the term 'waters of the United States' beyond parody."<sup>44</sup> The new interpretation is a return to the intent of the CWA and within recognizable parameters of the Constitution. It is not, however, the standard by which future CWA jurisdiction is determined.

## 2. Justice Kennedy's Concurrence—The "Significant Nexus"

Justice Kennedy, in his concurring opinion, took issue with both the plurality and dissenting opinions.<sup>45</sup> In what has emerged as the seminal opinion from *Rapanos*, he re-introduced the concept of the significant nexus between wetlands and used it to reconcile the holdings from the prior two cases of the trinity.<sup>46</sup> Kennedy agreed with the plurality's assertion that Congress had intended the Corps to regulate waters that fall outside of the traditional definition of "navigable," but harshly criticized the limitations placed upon them by the plurality.<sup>47</sup> Calling the opinion "without support in the language and purposes of the Act or in our cases interpreting it[.]" Kennedy asserted that the plurality interpretation "makes little practical sense in a statute concerned with downstream water quality."<sup>48</sup> Commentators attribute this appreciation of the interconnectedness of the hydrological cycle, even regarding ephemeral bodies, to Kennedy's western roots, speculating that this background accounted for his inclusive reading of the Act.<sup>49</sup>

Justice Kennedy categorically rejected two of the key findings of the plurality. First, he rejected the idea that the term "navigable waters" encompasses

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41. *Id.*

42. *Id.* at 742

43. *Id.*

44. *Id.* at 734.

45. *Id.* at 759 (Kennedy, J., concurring).

46. *Id.*; Mank, *supra* note 20, at 317.

47. *Rapanos*, 547 U.S. at 769 (Kennedy, J., concurring). Justice Kennedy says the plurality opinion is "unduly dismissive of government interests" and "makes little practical sense in a statute concerned with downstream water quality." *Id.* at 769, 777.

48. *Id.* at 768-69.

49. See Squillace, *supra* note 3, at 836 ("Kennedy, a westerner, was especially critical of the plurality's failure to appreciate the ephemeral nature of many major river systems in the west.").

only relatively permanent bodies of water; and second, that the CWA was intended to protect only waters bearing a continuous surface connection to such waters.<sup>50</sup> Kennedy gave the Los Angeles River, which he described as “more like a dry roadway than a river[,]” as an example of how counterintuitive the plurality decision is.<sup>51</sup> Although dry for most of the year, the river “periodically releases water volumes . . . powerful and destructive . . .” when it rains, illustrating the need for the CWA jurisdiction over it.<sup>52</sup> The plurality’s two-part test would exclude this river from Corps’ jurisdiction, a result which Kennedy found improper and contrary to the purpose of the CWA.<sup>53</sup>

While Justice Kennedy was much more in agreement with the dissent, he felt that their interpretation of the CWA ignored a key term of the Act—“navigable.”<sup>54</sup> Writing that “the word ‘navigable’ in the Act must be given some effect[,]” Kennedy rejected the dissent’s broad deference to the Corps’ interpretation.<sup>55</sup> Under the long-recognized Corps guidelines, navigability held relatively little value when determining CWA applicability.<sup>56</sup> Kennedy’s opinion would require “that the Corps demonstrate a specific ecological nexus between the wetlands it seeks to regulate and the navigable waters” warranting that regulation.<sup>57</sup>

Justice Kennedy cited the Corps’ rationale for the CWA regulation of non-adjacent wetlands before outlining the precise test for “significant nexus.”<sup>58</sup> It was with these functions in mind that he posited:

[W]etlands possess the requisite nexus, and thus come within the statutory phrase “navigable waters,” if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as “navigable.” When, in contrast, wetlands’ effects on water quality are speculative or insubstantial, they

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50. *Rapanos*, 547 U.S. at 768 (Kennedy, J. concurring). Justice Kennedy calls the “two limitations on the Act . . . without support in the language and purposes of the Act or in our cases interpreting it.” *Id.*

51. *Id.* at 769.

52. *Id.*

53. *See id.* (“[T]he plurality seems to presume that such irregular flows are too insignificant to be of concern in a statute focused on ‘waters’ . . .”).

54. *Id.* at 778.

55. *Id.* at 779; *see also* *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172 (“[I]t is one thing to give a word limited effect and quite another to give it no effect whatever.”).

56. *See* 33 C.F.R. § 328.3 (2009) (noting that the word “navigable” is never used in the list of waters subject to CWA regulation).

57. *Mank*, *supra* note 20, at 319.

58. *Rapanos*, 547 U.S. at 779 (Kennedy, J., concurring) (citing 33 C.F.R. § 320.4(b)(2)) (“[W]etlands can perform critical functions related to the integrity of other waters—functions such as pollutant trapping, flood control, and runoff storage.”).

fall outside the zone fairly encompassed by the statutory term “navigable waters.”<sup>59</sup>

While Justice Kennedy’s test leaves some terms open to interpretation (“significantly affect”, “speculative”, and “insubstantial”, etc.), it has emerged as the test that most circuit and district courts use as their standard for interpretation.<sup>60</sup>

Additionally, Justice Kennedy suggested that the responsible agencies could streamline the jurisdictional determination process and sidestep costly litigation by regulating comparable wetlands on a regionally consistent basis.<sup>61</sup> Recognizing that, in individual regions, similarly situated waters will have similar downstream effects, Kennedy suggested that it would be appropriate “to presume covered status for other comparable wetlands in the region.”<sup>62</sup> Therefore, the case-by-case analysis that many feared would be the result of the opinion could be drastically reduced.

### 3. *The Dissent—An Inclusive Approach*

In his dissenting opinion, Justice Stevens asserted that the *Riverside Bayview* holding “squarely control[led]” the outcome of the cases in *Rapanos*.<sup>63</sup> Stevens’ dissent paid much more heed to the stated purpose of the CWA, reiterating the Act’s intent to ““restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.””<sup>64</sup> With that purpose in mind, Stevens pointed out that “wetlands adjacent to tributaries of traditionally navigable waters preserve the quality of our Nation’s waters.”<sup>65</sup> Therefore, the Corps’ decision to treat such wetlands as within the meaning of the CWA was “a quintessential example of the Executive’s reasonable interpretation of a statutory provision[.]” which warranted *Chevron* deference—the approach the Court took in *Riverside Bayview*.<sup>66</sup> Ultimately, Stevens argued, if deference was not to be given the agencies’ regulations, then either wetlands possessing a significant nexus to navigable waters *or* wetlands meeting the plurality’s two-part test should be eligible to be regulated by the Corps.<sup>67</sup>

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59. *Id.* at 780.

60. See generally Margaret N. Strand, *Wetlands Law in 2009-Still in Flux*, SPO36 ALI-ABA 309, 325-334 (2009) (giving a case-by-case listing of post-*Rapanos* jurisdictional determinations made by lower courts).

61. *Rapanos*, 547 U.S. at 782.

62. *Id.*

63. *Id.* at 792 (Stevens, J., dissenting).

64. *Id.* at 787 (citing Clean Water Act of 1972, 33 U.S.C. § 1344 (2001)).

65. *Id.* at 788.

66. *Id.*

67. *Id.* at 810.

#### 4. Offers of Deference?

Chief Justice Roberts and Justice Breyer also authored opinions in *Rapanos*; Roberts' a concurrence and Breyer's a dissent.<sup>68</sup> While these opinions get very little exposure in the analysis of the case, for the purposes of this Comment, they are significant, as they both point to the availability of significant deference to future regulations promulgated by the enforcement agencies.<sup>69</sup>

Chief Justice Roberts pointed out that five years prior, in *SWANCC*, the Court had rejected the expansive jurisdiction over wetlands that the Corps had exercised for the prior twenty-five years, recommending that the rules be rewritten.<sup>70</sup> The agency, in conjunction with the EPA, had initiated rulemaking procedures with the goal of developing "proposed regulations that will further the public interest by clarifying what waters are subject to CWA jurisdiction and affording full protection to these waters through an appropriate focus of Federal and State resources consistent with the CWA."<sup>71</sup> Roberts seems to intimate that had that rulemaking gone beyond the preliminary stages, the agency would have received greater deference in the plurality's decision.<sup>72</sup> Pointing out that "[t]he proposed rulemaking went nowhere[,] rather than "providing guidance meriting deference under our generous standards . . . [,]" the Chief Justice says that the failure to promulgate new regulations' direct "upshot . . . is another defeat for the agency."<sup>73</sup>

Justice Breyer echoed the same offer of deference, but did so in agreement with the dissent.<sup>74</sup> Breyer asserted that, based upon Congress' stated purpose in enacting the CWA, there was not meant to be any requirement of a "significant nexus" as a prerequisite to jurisdiction.<sup>75</sup> Despite the new requirement, Breyer pointed out the plurality's decision "left the administrative powers of the Army Corps of Engineers untouched."<sup>76</sup> Breyer urged the Corps to write new regulations defining this significant nexus as broadly as possible, reminding his colleagues on the Court that they "must give those regulations appropriate deference."<sup>77</sup> His dissent and Chief Justice Roberts' concurrence indicate that supporters of both Scalia's plurality opinion and Stevens' dissent encourage the agencies to promulgate new regulations and offer significant deference in subsequent application.

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68. *Id.* at 757 (Roberts, CJ., concurring); *id.* at 811 (Breyer, J., dissenting).

69. *Id.* at 757 (Roberts, CJ., concurring); *id.* at 811 (Breyer, J., dissenting).

70. *Id.* at 757 (Roberts, CJ., concurring).

71. *Id.* at 758 (quoting 68 Fed. Reg. 1991 (2003)).

72. *See id.* ("[T]he Corps and EPA would have enjoyed plenty of room to operate in developing *some* notion of an outer bound to the reach of their authority[,] had the effort to promulgate new rules continued.).

73. *Id.*

74. *Id.* at 811 (Breyer, J., dissenting).

75. *Id.*

76. *Id.*

77. *Id.*

#### IV. SUBSEQUENT LOWER COURT APPLICATION AND THE CORPS AND EPA RESPONSE

##### A. Lower Courts Try to Apply *Rapanos*

In the wake of *Rapanos*, district and circuit courts continue to struggle with the question of which test to apply when considering Corps' jurisdiction over a disputed wetland. In all, seven courts of appeal have faced the decision of which test emerged from *Rapanos* as controlling.<sup>78</sup> Those courts applying Kennedy's significant nexus test are in the clear majority, but others have taken different approaches.<sup>79</sup> The first circuit court to approach the question was the Seventh Circuit.<sup>80</sup> In looking for guidance as to which opinion was controlling, the court relied on the doctrine from *Marks v. United States*.<sup>81</sup> The *Marks* doctrine holds that, in the case of a fractured Supreme Court decision where a majority of Justices agree on the outcome but not the grounds for it, "lower court judges are to follow the narrowest ground to which a majority of the Justices would have assented if forced to choose."<sup>82</sup> Stating "[t]he plurality Justices thought that Justice Kennedy's [opinion] . . . was narrower than their own . . . [,]" the Seventh Circuit Court based its opinion on that principle.<sup>83</sup> Because "any conclusion that Justice Kennedy reaches in favor of [jurisdiction] in a future case will command the support of five Justices (himself plus the four dissenters), and in *most* cases in which he concludes that there is no federal authority he will command five votes (himself plus the *Rapanos* plurality) . . . ." his concurrence sets the least common denominator.<sup>84</sup> Therefore, the Seventh Circuit determined, that Kennedy's proposed standard would apply on remand.<sup>85</sup>

The Ninth Circuit followed suit.<sup>86</sup> Once again invoking *Marks*, the court agreed with the Seventh Circuit's reasoning and applied Justice Kennedy's significant nexus test.<sup>87</sup> The court added that Justice Kennedy's test reaffirmed the holding of *Riverside Bayview*—that wetlands adjacent to navigable waterways were covered by the Act—as "by virtue of the 'reasonable inference

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78. Damien M. Schiff, *Post-Rapanos Fallout*, TRENDS (ABA Section of Environment, Energy, and Resources Newsletter), Nov./Dec. 2009, at 12.

79. See generally Strand, *supra* note 60 (listing all circuit and district court decisions regarding CWA jurisdiction since *Rapanos*).

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

81. 430 U.S. 188 (1977).

82. *Id.* at 193; *Gerke Excavating*, 464 F.3d at 724.

83. *Id.*

84. *Id.* at 725.

85. *Id.*

86. See generally *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007) (finding a significant nexus between a rock quarry into which sewage had been discharged and wetlands adjacent to a navigable river); see also *S.F. Baykeeper v. Cargill Salt Div.*, 481 F.3d 700 (9th Cir. 2007) (applying Justice Kennedy's standard and finding no significant nexus despite actual adjacency to the navigable water).

87. *N. Cal. River Watch*, 496 F.3d at 995.

of ecologic interconnection,' assertion of jurisdiction 'is sustainable under the Act by showing adjacency alone.'"<sup>88</sup> The Eleventh Circuit placed even more emphasis on *Marks* when remanding a criminal case for interpretation under the significant nexus test.<sup>89</sup> Noting "*Marks* does not direct lower courts interpreting fractured Supreme Court decisions to consider the positions of those who dissented[.]" the Eleventh Circuit held that the only standard which could be considered was Justice Kennedy's "significant nexus."<sup>90</sup>

Other circuits disagree with the interpretation of *Rapanos* through *Marks*.<sup>91</sup> Declining to defer to the Seventh Circuit, the First Circuit noted that the Supreme Court had been moving away from the *Marks* doctrine toward one articulated in a newer precedential case.<sup>92</sup> The court found the appropriate test to be one of "analyzing the points of agreement between plurality, concurring, and dissenting opinions to extract the principles that a majority has embraced."<sup>93</sup> The First Circuit noted that "[t]he cases in which Justice Kennedy would limit federal jurisdiction are not a subset of the cases in which the plurality would limit jurisdiction[.]" and that certain sets of facts would lead to "a bizarre outcome—the court would find no federal jurisdiction even though eight Justices (the four members of the plurality and the four dissenters) would all agree that federal authority should extend . . . ."<sup>94</sup> Characterizing Justice Stevens' "either/or" test as "simple and pragmatic," the First Circuit remanded the case with the instruction to "do exactly as Justice Stevens has suggested"<sup>95</sup>—that is, to find CWA jurisdiction over sites in question if they meet either the plurality test *or* the significant nexus test.<sup>96</sup> The Eighth Circuit,<sup>97</sup> the District of Connecticut,<sup>98</sup> and the Western District of Kentucky have all subsequently applied the First Circuit's approach.<sup>99</sup>

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88. *Id.* at 1000.

89. *United States v. Robison*, 505 F.3d 1208, 1221 (11th Cir. 2007).

90. *See id.* (addressing the position that other circuit courts had adopted which would allow CWA jurisdiction under either the plurality opinion in *Rapanos* or the Kennedy "significant nexus" test).

91. *See United States v. Johnson*, 467 F.3d 56, 62 (1st Cir. 2006) (noting that the *Marks* doctrine "has proven troublesome in application" and "require[s] scrutiny").

92. *Id.* at 65 (citing *Nichols v. U.S.*, 511 U.S. 738).

93. *Id.* (citing *Waters v. Churchill*, 511 U.S. 661, 685 (1994)).

94. *Id.* at 64.

95. *Id.* at 64, 66.

96. *Id.* at 66.

97. *See United States v. Bailey*, 571 F.3d 791 (8th Cir. 2009) ("We find Judge Lipez's reasoning in *Johnson* to be persuasive, and thus we join the First Circuit in holding that the Corps has jurisdiction over wetlands that satisfy either the plurality or Justice Kennedy's test.").

98. *See Simsbury-Avon Pres. Soc'y, LLC v. Metacon Gun Club, Inc.*, 472 F. Supp. 2d 219, 226 (D. Conn. 2007) (calling the First Circuit's *Johnson* analysis "common-sense").

99. *See United States v. Cundiff*, 480 F. Supp. 2d 940, 944-47 (D. Ky. 2007) (finding the wetlands at issue were covered by CWA under either test because they affected chemical, physical, and biological integrity of a navigable river as well as having a continuous surface connection).

At least one district court judge has refused to even attempt to answer the jurisdictional question.<sup>100</sup> Saying that “I am so perplexed by the way the law applicable to this case has developed that it would be inappropriate for me to try it again[.]” the judge wrote an opinion reassigning the case at bar to another judge.<sup>101</sup>

The one commonality all subsequent cases visited by lower courts have is that the Supreme Court has steadfastly refused to grant certiorari to any of them.<sup>102</sup> Cases applying both the First Circuit (significant nexus or the plurality test) approach and Seventh Circuit (significant nexus) have been denied certiorari in the last two sessions, indicating that if there is going to be clarification of the issue, it will need to come from a source different than the Court.<sup>103</sup> In fact, the Supreme Court has denied petitions for writ of certiorari from five of the seven circuit court decisions addressing the jurisdictional question that *Rapanos* left unanswered.<sup>104</sup> It would appear that the Court has placed the onus of clarifying jurisdiction on either Congress or the agencies, intending to revisit the issue only after new regulations are written.

#### B. The Corps and EPA Attempt to Provide a Solution

The agencies involved in the fray have also weighed in on the post-*Rapanos* jurisdictional quandary, issuing a joint memorandum in 2007, including amendments in 2008, of guidelines (Guidelines) for developers and enforcement officers alike.<sup>105</sup> The Corps/EPA memorandum, issued in response to *Rapanos* and “in recognition of the fact that EPA regions and Corps districts need guidance to ensure that jurisdictional determinations . . . are consistent with the decision . . . [.]” provides some basic structures for determining when jurisdiction should be found.<sup>106</sup> The Guidelines provide a listing of the water features over which the agencies will *always* assert jurisdiction, those that are *never* included within the meaning of the CWA, and those that require “fact-specific analysis.”<sup>107</sup> The Guidelines plainly state that the test to be used in the analysis is whether “they have a significant nexus with traditional navigable water.”<sup>108</sup> The

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100. Juliet Eilperin, *EPA Enforcement is Faulted*, WASH. POST, July 8, 2008, available at [http://www.washingtonpost.com/wp-dyn/content/article/2008/07/07/AR2008070702418\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2008/07/07/AR2008070702418_pf.html) (on file with the *McGeorge Law Review*).

101. *Id.*

102. Schiff, *supra* note 78, at 13.

103. *See id.* (“It . . . seems unlikely that the Court will address the question in the near future.”).

104. *Id.*

105. *See* U.S. Army Corps of Engineers Jurisdictional Determination Memorandum 1 (Dec. 2, 2008), available at [http://www.usace.army.mil/CECW/Documents/cecwo/reg/cwa\\_guide/cwa\\_juris\\_2dec08.pdf](http://www.usace.army.mil/CECW/Documents/cecwo/reg/cwa_guide/cwa_juris_2dec08.pdf) [hereinafter *Determination Memorandum*] (on file with the *McGeorge Law Review*) (issuing guidance in light of the *Rapanos* decision to field officers regarding when CWA jurisdiction is available).

106. *Id.* at 3.

107. *See generally id.* (listing three basic categories of CWA jurisdiction).

108. *Id.* at 8.

Guidelines proceed to give instructions on how to apply the significant nexus standard, including a fairly exhaustive list of the factors to be considered.<sup>109</sup>

The agencies' application of the significant nexus test focuses on "the ecological relationship between tributaries and their adjacent wetlands, and their closely linked role in protecting the chemical, physical, and biological integrity of downstream traditional navigable waters."<sup>110</sup> The Guidelines instruct agencies to evaluate the nexus relationship based on determinations of certain hydrologic factors (such as volume, duration, and frequency of flow of water between both the wetland in question and the tributary as well as between the tributary and the navigable water it feeds) and ecological factors (such as potential of tributaries to carry pollutants to navigable waters and the potential of a wetland to trap floodwaters).<sup>111</sup> These determinations are then documented and added to a database of the wetlands that fall under CWA jurisdiction and those that do not.<sup>112</sup> While these guidelines have proven somewhat workable by the agencies administering them for the past two years, they are not a definitive answer to completely clarify difficult questions of jurisdiction.

Critics of the agency guidance charge that it "not only fails to correctly interpret the Court's opinions, but is itself rife with striations of political leanings that improperly interpret important aspects of the opinions and further limit the Act's ability to protect waters."<sup>113</sup> Calling it "both under-inclusive and over-inclusive, and unnecessarily so on both counts[.]" critics point out that by applying the significant test to direct tributaries of navigable waters, the agencies are eliminating categorical protection for those bodies that the Court did not question in its decision.<sup>114</sup> They also point out that because *Rapanos* was not concerned with section 402 point source programs, the joint guidance creates different jurisdictional analyses for different CWA programs.<sup>115</sup> This development is both "legally indefensible" and "potentially a practical nightmare" which has holders of section 402 permits claiming exemption from the permitting process.<sup>116</sup>

Further, critics point out that the Guidelines fail to address Justice Kennedy's recognition that similarly-situated wetlands can be presumptively lumped together once one has been shown to contain the requisite significant nexus.<sup>117</sup> The Guidelines fail to recognize the importance of aggregating the impacts of

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109. *Id.* at 10-12.

110. *Id.* at 10.

111. *Id.* at 10-12.

112. *Id.* at 11.

113. James Murphy & Stephen M. Johnson, *Significant Flaws: Why the Rapanos Guidance Misinterprets the Law, Fails to Protect Waters, and Provides Little Certainty*, 15 SOUTHEASTERN ENVTL. L.J. 431, 433 (2007).

114. *Id.* at 446.

115. *Id.* at 447.

116. *Id.* at 447-48.

117. *Id.* at 450.

multiple tributaries, an important aspect of the significant nexus test, which examines the effect of the tributary system as a whole, rather than as individual parts.<sup>118</sup> In light of such criticisms, the Guidelines are obviously not the answer to all jurisdictional questions presented by the *Rapanos* decision.

## V. WHAT ABOUT A CONGRESSIONAL AMENDMENT TO THE CLEAN WATER ACT?

The joint EPA/Corps Guidelines present a good, albeit incomplete, introductory process for CWA jurisdictional analysis. An initial problem is that, due to questions surrounding judicial enforcement, the Guidelines have not eliminated much of the uncertainty regarding CWA jurisdiction. The Guidelines do not carry the authoritative weight of law, as they have not been codified in the Code of Federal Regulations. This confusion leads to difficulties and delays in both the permitting and enforcement process.<sup>119</sup> Further, some already permitted-facilities have begun to assert that in light of *Rapanos* and the inconsistencies in the Guidelines, they no longer need to maintain their permits.<sup>120</sup> Lack of certainty has created an obvious vacuum when it comes to solid guidance for CWA jurisdiction, but the solution is not as readily apparent.

While the agencies and Congress debate the proper solution to the problem, the nation's waters are left unprotected. In March 2008, the EPA's Office of Enforcement and Compliance Assurance released a memo detailing just how drastic an effect *Rapanos* is having on CWA enforcement.<sup>121</sup> According to the memo, the Court's decision and the subsequent guidelines led EPA regional offices to cite "judicial uncertainty" as the reason to not pursue potential violations in over 300 cases.<sup>122</sup> Additionally, the "guidance instructs federal officials to focus on the 'relevant reach' of a tributary, which translates into a single segment of a stream."<sup>123</sup> This isolation of a small tributary "ignores longstanding scientific ecosystem and watershed protection principles critical to meeting the goals . . . ." of CWA.<sup>124</sup> In all, the memo estimated that the *Rapanos* decision and confusion surrounding the subsequent guidelines had "negatively affected approximately 500 enforcement cases . . . ." in only a nine month

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118. See *id.* at 450-51 (examining the results of an American Rivers report which showed that individual wetlands considered in isolation only account for "a scintilla" of the various benefits of the headwater system as a whole).

119. See CLEAN WATER ACTION, *Overview: Clean Water Restoration Act of 2009*, <http://www.cleanwateraction.org/print/714> (on file with the *McGeorge Law Review*) (asserting that enforcement was not pursued for over 300 CWA violations due to uncertainty about jurisdiction, and that the time to receive a permit has increased by up to three months).

120. *Id.* ("[S]everal are arguing that because of the Supreme Court decisions they no longer require permits which impose limits on their pollution levels.").

121. Eilperin, *supra* note 100.

122. *Id.*

123. *Id.*

124. *Id.*

span.<sup>125</sup> To meet the purpose of the CWA, either Congress or the administrative agencies charged with its enforcement must take some sort of action.

Many commentators have championed the need for a congressional amendment to the CWA in order to eliminate the confusion.<sup>126</sup> Most of these proposed amendments involve a change in the wording of the CWA to reflect the broad congressional intent behind it by pushing regulation to the outer limits of the broad powers vested in Congress under the Commerce Clause of the Constitution.<sup>127</sup>

One scholar suggests changing the wording of the CWA to substitute the phrase “constitutional waters” for the ill-advised “navigable waters” included in the original.<sup>128</sup> The scholar posits that the original intent of Congress when enacting the CWA was to extend jurisdiction of the Act as far as the Commerce Clause would allow, establishing a comprehensive federal program for wetlands regulation.<sup>129</sup> The unfortunate usage of the phrase “navigable waters” was simply due to directly lifting language from the Rivers and Harbors Appropriation Act, which “focused on activities that might obstruct navigation.”<sup>130</sup> In his *SWANCC* dissent, Justice Stevens addressed this historical inconsistency by pointing out the vastly different stated purposes of the two Acts, even though the language of the earlier was incorporated into the later.<sup>131</sup> By changing the language very slightly, Congress could dispel the idea that navigability has anything to do with the purpose of the CWA.<sup>132</sup>

Certain members of Congress agree with those who call for an amendment to the CWA. In 2009, Senator Russ Feingold introduced the Clean Water Restoration Act.<sup>133</sup> The proposed act states that *SWANCC* and *Rapanos* have “resulted in confusion, permitting delays, increased costs, litigation, and reduced protections for waters of the United States . . . [,]” and that Congress is the only entity that can reaffirm the scope of protected waters.<sup>134</sup> The proposed act also says that “protection of intrastate waters is necessary to restore and maintain the

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125. *Id.*

126. *See, e.g.,* Squillace, *supra* note 3, at 801 (proposing the solution of a Congressional amendment changing the wording of the CWA to substitute the phrase “constitutional waters” for “navigable waters.”); Jenny L. Routheaux, Note, *Western Wetlands in Jeopardy After Rapanos v. United States: Congressional Action Needed to Define “Navigable Waters” Under the Clean Water Act*, 8 NEV. L.J. 1045, 1075 (2008) (positing that the proper solution to the CWA confusion is a congressional amendment clarifying exactly which waters are subject to CWA jurisdiction; including those that “impact” traditionally navigable waters).

127. U.S. CONST. art. I, § 8, cl. 3.

128. *See* Mark Squillace, *supra* note 3 at 801 (noting that substitution of the phrase “constitutional waters” will have the effect of extending jurisdiction to the maximum allowable constitutional limit).

129. *Id.* at 814.

130. *Id.* at 811.

131. *S.W. Waste Agency of N. Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 179-80 (Stevens, J., dissenting).

132. Squillace, *supra* note 3, at 859.

133. Clean Water Restoration Act, S. 787, 111th Cong. (2009).

134. *Id.* at 6.

chemical, physical, and biological integrity of all waters of the United States[.]”<sup>135</sup> The bill would accomplish all of this by amending the language of the CWA to replace the term “navigable waters” with the term “waters of the United States.”<sup>136</sup> This simple change will reaffirm the intent of Congress to exercise jurisdiction over any waters which have the potential to have a substantial effect on the interstate commerce.<sup>137</sup>

Supporters hail the bill as a return to the intended scope of the CWA, and characterize the Court’s prior decisions as utilization of unintended legislative loopholes.<sup>138</sup> Opponents fear that the Congressional amendment to the CWA is an unauthorized land grab that violates the federalist foundation of the country.<sup>139</sup> Regardless of which characterization is correct, it is unlikely that the bill or anything resembling it will pass in the immediate future.

A virtually identical bill was introduced in the Senate in the previous congressional session, along with a companion in the House of Representatives.<sup>140</sup> Neither of these bills left the committee stages, failing to garner significant support from Republicans.<sup>141</sup> In fact, since the 1990s it has become increasingly difficult to pass environmental legislation due to the partisan nature of the Congress.<sup>142</sup> Considered along with the fact that legislation to clarify the Act’s jurisdictional limits failed to get through Congress in 1977, when the partisan rift was not nearly as pronounced, hopes for a congressional solution seem to be fading.<sup>143</sup> Therefore, an alternative solution will be needed.

## VI. NEW FEDERAL REGULATIONS: A MORE LIKELY SOLUTION

Since neither the Supreme Court nor Congress seem inclined to give a definitive answer of where CWA jurisdiction begins or ends, if the agencies charged with enforcement of the Act would like to have a clear line delineated, they will ultimately have to do it themselves. To draw that line properly will require incorporation of each of the five opinions in *Rapanos*. The EPA and

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135. *Id.* at 8.

136. *Id.* at 13.

137. *Id.*

138. See *Clean Water Restoration Act Provides Hope*, Apr. 3, 2009, HUFFINGTON POST, [http://www.huffingtonpost.com/trip-van-noppen/clean-water-restoration-a\\_b\\_182927.html](http://www.huffingtonpost.com/trip-van-noppen/clean-water-restoration-a_b_182927.html) (on file with the *McGeorge Law Review*).

139. See *Not So Private Property?: Clean Water Restoration Act Raises Fears of Land Grab*, FOX NEWS, <http://www.foxnews.com/politics/2009/12/14/private-property-clean-water-restoration> (Dec. 14, 2009) (on file with the *McGeorge Law Review*).

140. See *Clean Water Restoration Act*, S. 1870, 110th Cong. (2007) (proposing to replace the phrase “navigable waters” with “waters of the United States” in the Clean Water Act); see also *Clean Water Restoration Act*, H.R. 2424, 110th Cong. (2007) (identical to the aforementioned Senate Bill).

141. OpenCongress.org, *S-1870 The Clean Water Restoration Act of 2007*, [http://www.Opencongress.org/bill/110-s1870/actions\\_votes](http://www.Opencongress.org/bill/110-s1870/actions_votes) (last visited Feb. 11, 2010).

142. Mank, *supra* note 20, at 346.

143. *Id.*

Corps must codify the new set of jurisdictional rules they began to create after SWANCC, and incorporate definitions from the plurality and Justice Kennedy's concurrence, the fusion of the two opinions by the Stevens dissent, and the assurances of the *Chevron* deference from both Chief Justice Roberts' concurrence and the Breyer dissent.<sup>144</sup>

It appears that to be within the mandate the Court issued in *Rapanos*, the new regulations will need merely to be a little narrower than the previous set.<sup>145</sup> This new set of regulations could be more inclusive than the plurality's criteria and still allow the EPA and Corps to expect approval by a majority of the Court.<sup>146</sup> While it is an "interesting, but unknowable question" whether members of the plurality opinion would defer to this new set of regulations, the time and cost of promulgating the new regulations would undoubtedly cut in favor of at least the Chief Justice standing behind his offer of "generous" deference.<sup>147</sup> The agencies should begin with the plurality opinion, supplement it with Justice Kennedy's significant nexus, standardize and maintain record databases, demonstrate conclusively the aggregate impact of upstream wetlands, and allow similarly situated regional wetlands to receive consistent coverage.

#### A. Begin by Codifying the Plurality Opinion

First, the most basic step is to codify the two-part test of the plurality; making waters that (1) are adjacent to navigable-in-fact waters, and (2) have a continuous surface connection to those waters automatically fall under CWA jurisdiction.<sup>148</sup> This would begin to set forth, in detail, exactly what waters fall under CWA, as well as eliminate future legal confusion. It would also, in conjunction with a codification of an expansive definition of "significant nexus," provide for the maximum allowable coverage of the CWA, by filling in a slight gap in coverage left by the significant nexus test.

From a legal perspective, these waters are acknowledged by eight members of the Court (with the exception of Justice Kennedy) to fall under CWA jurisdiction.<sup>149</sup> It would take a bizarre turn of events (or a retroactive rewrite of the 1958 *Webster's New American Dictionary*) for any of the plurality justices to abandon their criteria after so explicitly outlining them, and the three remaining dissenters who joined the Stevens opinion would certainly maintain their stance

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144. See *supra* Part III.C (discussing the different opinions).

145. Mank, *supra* note 20, at 323 (hypothesizing that new regulations—slightly narrower than the 1977 version, yet broader than the *Rapanos* plurality's interpretation—may receive deference).

146. *Id.*

147. See *id.* (characterizing the question of Supreme Court deference to a set of regulations narrowed by SWANCC "interesting but unknowable"); see also *Rapanos v. United States*, 547 U.S. 715, 758 (2006) (Roberts, C.J., concurring).

148. *Rapanos v. United States*, 547 U.S. 715, 742 (2006)

149. See *id.* (the plurality's test); see also *id.* at 787 (Stevens, J. dissenting) (advising on remand that the plurality test should be considered as one test of CWA jurisdiction).

of inclusiveness.<sup>150</sup> Therefore, little legal controversy should be expected as a result of this starting point.

The plurality test is also necessary to the goal of providing the most CWA coverage allowable. While the significant nexus requirement can and should be written to only modestly narrow the scope of CWA enforcement, there will be some gaps left. As pointed out by Judge Lipez of the First Circuit, there are certain waters which have no significant nexus with a navigable waterway that do, however, meet the plurality criteria.<sup>151</sup> Therefore, to be complete and inclusive, any new regulations will require that waters with a continuous surface connection to the navigable-in-fact waters they abut are protected per se.<sup>152</sup>

### B. Supplement with the Significant Nexus Test

The next step is to promulgate a set of criteria based upon the significant nexus requirement. This would provide virtually the same broad protection as the regulations invalidated by *Rapanos*, but phrase the jurisdictional parameters in a more acceptable way. As most tributary wetlands have significant ecological or hydrological impacts on downstream navigable waters, virtually all wetlands previously covered by the Corps' regulations will also satisfy the significant nexus test.<sup>153</sup> From a legal perspective, the agencies should be able to count on at least five votes from the Court to validate the regulations when they are inevitably challenged (assuming that Justices Sotomayor and Kagan are consistent with their predecessors).<sup>154</sup>

Writing the significant nexus test into the federal regulations could begin with codifying much of the existing joint Corps/EPA Guidelines. The agencies should write into the Code of Federal Regulations every step that the Guidelines give for determining when there is a significant nexus, include every minute detail that could demonstrate a chemical or hydrological connection to downstream navigable water, and the exact amount that is needed to show any sort of detrimental environmental effect. The result will be a very clear definition of a significant nexus and how one is determined. It seems that, if the promised deference is granted, this level of specificity would withstand the legal challenges that will no doubt follow closely on the heels of publication.

150. Justice Stevens, who authored the dissent and Justice Souter, who joined it, have since retired. Their respective replacements, Justices Sotomayor and Kagan, have, at the time of writing, yet to weigh in on the issue.

151. See *United States v. Johnson*, 467 F.3d 56, 64 (1st Cir. 2006) (pointing out that in the case of a small stream or brook with a surface connection, the plurality's criteria are met, while Justice Kennedy's are not, leading to a "bizarre outcome" of no jurisdiction under the significant nexus test, even though eight justices would support it).

152. *Id.*

153. Mank, *supra* note 20, at 348.

154. The four dissenting Justices plus Justice Kennedy would support CWA jurisdiction when a significant nexus exists.

The first order of business under the Guidelines is to determine if a tributary has adjacent wetlands.<sup>155</sup> In the case of section 404 permits, those wetlands are the subject of permitting disputes, so they can safely be assumed to exist. Perhaps the converse of the listed first step is to determine if the wetlands under consideration abut a tributary of navigable water. This will acknowledge the requirement of both the plurality and Justice Kennedy that the word “navigable” in the Act be given some meaning,<sup>156</sup> as well as provide a simple prerequisite to determining if a significant nexus exists.

The Guidelines continue, as should the new codified rules, by making the next step in jurisdictional determinations evaluation of the significant nexus. By examining the “closely linked role in protecting the chemical, physical, and biological integrity of downstream traditional navigable waters[,]” the enforcement agencies determine if permits are necessary.<sup>157</sup> By focusing on this connection and the downstream effects of proposed projects, the agencies will stay true to the stated goal of the Act.<sup>158</sup>

Agencies are to use available hydrologic information, including but not limited to “gauge data, flood predictions, historic records of water flow, statistical data, [and] personal observations/records . . . [.]” to examine this connection.<sup>159</sup> They may also consider the physical characteristics of the wetlands and the tributaries, including existence of a reliable ordinary high water mark, “shelving, wracking, water staining, sediment sorting, and scour[,]” to supplement this information.<sup>160</sup> Additionally, significant nexus analyses will look at contextual factors of the wetlands and tributaries, “including size of watershed, average annual rainfall, average annual winter snow pack, slope, and channel dimensions.”<sup>161</sup>

Significant nexus determinations must also continue to consider the functionality of the wetlands, regardless of narrow dictionary definitions.<sup>162</sup> More than any analysis of parts-per-million of substances or gallons transferred between the water bodies, the functionality will provide for extensive protection of wetlands. Factors such as capacity to filter pollutants or to capture and regulate the amount of flood waters that enter tributaries will significantly expand the CWA coverage, while remaining within the constraints of Justice Kennedy’s

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155. *Determination Memorandum*, *supra* note 105, at 10.

156. *See* *Rapanos v. United States*, 547 U.S. 715, 742 (2006) (the plurality’s test); *see also id.* at 778 (Kennedy, J., concurring) (stating that the word “navigable” in the CWA had to be given some meaning).

157. *Determination Memorandum*, *supra* note 105, at 10.

158. Clean Water Act of 1972, 33 U.S.C. § 1251 (2001) (Its stated goals are “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters” and to “eliminat[e] . . . water pollution by 1985.”).

159. *Determination Memorandum*, *supra* note 105, at 10

160. *Id.* at 10-11.

161. *Id.* at 11.

162. *Id.*

test.<sup>163</sup> Therefore, agencies could look to not just to the waters which are released from a wetland to a tributary, but the waters that are *not* released.

Biology is also a strong factor to determining that a significant nexus exists, and the guidance recognizes that. Even though SWANCC invalidated CWA protection based solely on the temporary presence of migratory birds, other biological factors can show a direct link between the wetlands in question and downstream navigable waters.<sup>164</sup> For instance, the wetlands might “transfer nutrients and organic carbon [matter] vital to support downstream foodwebs.”<sup>165</sup> They may also provide spawning grounds “for recreationally or commercially important species in downstream waters . . . .”<sup>166</sup> By codifying these factors among those to be considered in determining a significant nexus, the jurisdictional reach of the CWA might even be expanded to situations where a hydrological connection simply doesn’t exist. For this reason, many in the plurality would dispute this factor’s availability as part of a significant nexus determination, but Justice Kennedy explicitly included biological integrity as one of the factors to be considered.<sup>167</sup>

When all of this data is gathered, the agencies will examine it to determine whether the possible effects are speculative and insubstantial, or if real connections can be made.<sup>168</sup> Far from attempting to prove a negative, it would seem that if the agencies can show that just one of their codified factors exists in more than an anomalous manner, the significant nexus test is satisfied. This will ultimately have the effect of allowing agency jurisdiction over nearly every wetland.<sup>169</sup>

### C. Standardize and Maintain Administrative Data

In the interest of avoiding unnecessary jurisdictional disputes and costly litigation, the Corps’ newly promulgated rules should maintain the administrative record documentation requirement from the interim guidelines.<sup>170</sup> Current guidelines instruct regional offices, in the course of making jurisdictional determinations, to maintain records of all information and bases for making those

163. *Id.*

164. *See generally* Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001) (holding that the intermittent presence of migratory waterfowl could not be the basis for CWA jurisdiction).

165. *See Determination Memorandum, supra* note 105, at 11 (“[M]acroinvertebrates present in headwater streams convert carbon in leaf litter making it available to species downstream.”).

166. *Id.*

167. *Rapanos v. United States*, 547 U.S. 715, 779 (2006) (Kennedy, J., concurring).

168. *See id.* at 780 (saying that when effects on water quality are speculative or insubstantial, they “fall outside the zone fairly encompassed by the statutory term ‘navigable waters.’”).

169. *See Mank, supra* note 20, at 348 (“[M]ost tributary wetlands have significant ecological or hydrological impacts on navigable waters.”).

170. *Determination Memorandum, supra* note 105, at 11 (explaining the interim guidelines).

determinations.<sup>171</sup> If records of agency decisions regarding jurisdictional decisions are diligently maintained, and include the required information, most suits challenging jurisdiction could be summarily decided. Either the requirements were met or they were not, and there should be voluminous data on record to support either decision. District and circuit courts could summarily determine whether the data is reliable and render a decision.

*D. Aggregate Impacts and Similarly Situated Wetlands*

In light of the reasonable criticisms, the guidance should be supplemented with a few additional provisions to completely address the significant nexus test and ensure comprehensive coverage of all of the nation's waters. To begin, the aggregate impact of upstream wetlands must be addressed and codified. This would protect the headwater streams and associated wetlands that might fail to meet the significant nexus test when considered in isolation.<sup>172</sup> This aggregate approach would have the support of at least five members of the Court, as along with the dissent, Justice Kennedy realized its importance.<sup>173</sup>

The new rules should also contain a provision allowing wetlands similarly situated and within the same protection region as those which have already been recognized as jurisdictional to be presumptively under CWA jurisdiction. Supported by Justice Kennedy's concurrence,<sup>174</sup> this presumption would be helpful to both agencies making jurisdictional decisions and courts faced with challenges to those decisions. It would also be the final step in maintaining the broad jurisdiction of the CWA over American waters while remaining within the framework laid out in *Rapanos*.

## VII. CONCLUSION

While the best way to ensure broad CWA protections over our nation's waters is certainly to have Congress affirm its broad intent, today's political climate is simply not conducive to that response. In order to maintain the previous levels of protection, the agencies responsible for enforcing the Act, the EPA and the Corps, need to promulgate and publish a set of rules consistent with recent Supreme Court rulings. In writing the regulations to recognize that virtually all wetlands in the country have some sort of ecological or hydrological "significant nexus" with the navigable waterways downstream, the agencies should be able to rely on generous deference offered to them by both the concurring and dissenting opinions in the definitive, yet convoluted *Rapanos* decision.

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171. *Id.*

172. Murphy & Johnson, *supra* note 113, at 452.

173. *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring).

174. *Id.*