

**COMMENT: *RAPANOS V. UNITED STATES*—A  
HISTORICAL PERSPECTIVE ON THE RECENT  
DECLINE IN “JUDICIAL PIONEERING” IN  
WETLANDS REGULATION**

Ryan Fortin<sup>†</sup>

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<sup>†</sup> J.D. Candidate May 2008, William Mitchell College of Law; B.S.E., Chemical Engineering, *magna cum laude*, Arizona State University, May 2004.

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## I. INTRODUCTION

In June of 2006, the United States Supreme Court handed down its second decision in five years concerning the regulatory jurisdiction of the United States Army Corps of Engineers (Corps) under section 404 of the Clean Water Act (CWA).<sup>1</sup> Section 404 gives the Corps discretionary power, through a permitting process, to allow or disallow the discharge of dredged or fill material into “waters of the United States” by private individuals and companies.<sup>2</sup> *Rapanos v. United States*<sup>3</sup> involves the filling of wetlands for commercial purposes, as do the only other two Supreme Court decisions involving section 404.<sup>4</sup>

The issue in *Rapanos* has been one of the most litigated in the short thirty-five year history of the CWA—to what extent may the Corps assert its regulatory jurisdiction? In other words, how far did Congress intend the term “waters of the United States” to reach? The constitutional limit to the power that Congress may delegate to the Corps extends no further than the limitations of the Interstate Commerce Clause,<sup>5</sup> which forms the basis for the Executive’s regulatory power over pollution in general. Before *Rapanos* and its predecessor five years earlier, *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (SWANCC)*,<sup>6</sup> it seems that most federal judges—district court and circuit court alike—would have interpreted the language of the CWA broadly to extend all the way to the limits of the Commerce Clause. A small but vocal minority of judges, however, disputed this interpretation and would have strictly construed the CWA’s language to limit the Corps’s jurisdiction to only those waters that are truly interstate. What is undisputed is the fact that after *Rapanos* and *SWANCC*, a majority of Supreme Court Justices will not allow an overly broad

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1. 33 U.S.C. § 1344 (2000).

2. The term “waters of the United States” and the term “navigable waters” are used interchangeably in this Article because the CWA gives them the same meaning. See *infra* note 75 and accompanying text.

3. 126 S. Ct. 2208 (2006).

4. The other two Supreme Court cases discussing section 404 of the CWA are *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), and *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001). The later case is generally referred to as the “SWANCC” case and both are discussed in depth below.

5. U.S. CONST. art. I, § 8, cl. 3.

6. 531 U.S. 159 (2001).

interpretation of the CWA. The result being, from an ecological standpoint, the loss of even more wetlands to agriculture and development because those wetlands that are not under federal control fall to the states for regulation, and the states have historically done a poor job at preserving wetlands.

This Article will show, through a historical analysis of federal waters/wetlands jurisprudence, that *Rapanos* and *SWANCC* were wrongly decided, representing a sudden shift away from prior waters/wetlands precedent that sought to give maximum control to the Executive to prevent pollution and preserve our nation's aquatic ecological resources. This Article will first present some background information relating to wetlands, with an added focus on Minnesota wetlands.<sup>7</sup> Second, it will discuss the early expansion of the term "waters of the United States" as the basis for federal control over water pollution.<sup>8</sup> Third, this Article will show how the Rivers and Harbors Act of 1899 (RHA), through a series of increasingly liberal court of appeals and Supreme Court decisions, came to be used for the regulation of industrial water pollution, even though it was initially passed only to prevent navigational blockages in open waters.<sup>9</sup> Fourth, this Article will outline the CWA provisions that are pertinent to wetlands, discussing them in the context of overdue congressional action on the need for comprehensive water pollution legislation, action which the judiciary had been pressing for all along.<sup>10</sup> Fifth, this Article will analyze the continuing trend in the judiciary to liberally construe waters/wetlands legislation, but now with the CWA rather than the RHA as the basis for these decisions.<sup>11</sup> Finally, this Article will discuss and critique the two recent "less pioneering" Supreme Court decisions in light of all this progressive history and precedent, with particular attention paid to the *Rapanos* decision.<sup>12</sup>

## II. WETLANDS

### A. *Nationally*

Since early in our nation's history, the American pioneer spirit

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7. *See infra* Part II.

8. *See infra* Part III.A.

9. *See infra* Part III.B–C.

10. *See infra* Part IV.A.

11. *See infra* Part IV.B–C.

12. *See infra* Parts V, VI.

has driven our people to tame the wilderness and reclaim and exploit our natural resources to their fullest extent. Such activities include logging and deforestation, river diversion and damming, mining and excavation, and wetlands reclamation in order to provide fertile lands for farming and solid ground for construction and development. With respect to wetlands, nearly fifty percent of their former acreage has been lost to human activity.<sup>13</sup>

### 1. *Old Views*

Until the last few decades, many believed that wetlands served no useful purpose, and that the public interest was best served by draining and filling these lands. In fact, the common mindset in the nineteenth century was that wetlands were “bogs of treachery, mires of despair, homes of pests, and refuges for outlaw and rebel.”<sup>14</sup> Congress also seems, at one point, to have shared this belief, indicated by the passage of the Swamp Lands Acts in the mid-nineteenth century, which granted nearly sixty-five million acres of federal lands to the states for the purposes of reclamation in order to prevent the spread of insect-borne disease and to promote the expansion of agriculture.<sup>15</sup>

### 2. *Modern Views*

But as science and society progressed, the “noxious and useless” reputation of wetlands began to be called into question—initially by backwoods hunters and gatherers who recognized that sharply declining populations of duck and geese depended on this type of habitat for their survival.<sup>16</sup> In the fifty years between 1934 and 1984, over 3.5 million acres of wetlands were preserved through the Duck Stamp Act—a federal initiative designed to create a source of revenue from waterfowl hunters and other outdoor enthusiasts.<sup>17</sup> During those same years, Americans began to recognize the value of environmental causes in general, including wetlands, as indicated by the reservation and withdrawal of millions of federal acres for national parks and monuments.<sup>18</sup> As

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13. David C. Forsberg, *The Minnesota Wetland Conservation Act of 1991: Balancing Public and Private Interests*, 18 WM. MITCHELL L. REV. 1021, 1022 (1992).

14. *Id.* at 1025.

15. *Id.*

16. *Id.* at 1026.

17. *Id.*

18. See AmericanFrontiers.net, Public Lands Timeline, <http://www.americanfrontiers.net>

knowledge of wetlands increased, their impressive water purification and flood-control qualities came to be recognized. In fact, wetlands are often described as the “kidneys of the landscape” for their ability to clean polluted waters that pass through them.<sup>19</sup>

[Wetlands] contribute directly to the water quality of lakes and streams by acting as buffers, filtering the water which ultimately passes into them . . . . Wetlands also retain rainwater and snowmelt, permitting them to percolate into underground aquifers. In the absence of [wetlands], the water would rapidly find its way into streams and rivers and ultimately to the sea, where its availability to human communities is lost. Because of their ability to retain water, wetlands are indispensable to effective flood control. Flood damage is extremely costly, and wetland retention and restoration are cost-effective methods of reducing the damage.<sup>20</sup>

In recognition of their many values, wetlands gained protection under a host of state and federal laws.

### 3. *The 1948 Federal Water Pollution Control Act*

The first of these laws was the 1948 Federal Water Pollution Control Act (FWPCA).<sup>21</sup> But this law and its subsequent amendments in the 1950s and 1960s were largely ineffective because they only set forth a general plan for pollution control, entrusting the states to implement and police the plan at their discretion.<sup>22</sup> And the states, more interested in their own economies and less interested in pollution at a national level, largely disregarded the FWPCA because its advisory nature lacked incentive for them to act.<sup>23</sup>

As a result, many lakes, rivers, and wetlands were polluted well

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frontiers.net/timeline (last visited Feb. 7, 2007) (providing a timeline from 1492–1976).

19. Forsberg, *supra* note 13, at 1027.

20. *Id.* at 1027–28. Wetlands also support a large variety of endangered species; some thirty-five percent of them depend on wetlands for their survival. *Id.* at 1028 (citing 16 U.S.C. § 4401 (1988 & Supp. II 1990)).

21. Pub. L. No. 80-845, 62 Stat. 1155 (1948).

22. JOEL M. GROSS & LYNN DODGE, CLEAN WATER ACT 5–6 (2005). The 1948 Federal Water Pollution Control Act, due to federalism concerns, allowed the states to take the primary role in regulation and enforcement. *See* ROBIN KUNDIS CRAIG, THE CLEAN WATER ACT AND THE CONSTITUTION: LEGAL STRUCTURE AND THE PUBLIC'S RIGHT TO A CLEAN AND HEALTHY ENVIRONMENT 12 (2004). *See also* Federal Water Pollution Control Act § 1, Pub. L. No. 80-845, 62 Stat. 1155 (1948).

23. GROSS & DODGE, *supra* note 22, at 5–6.

beyond levels safe for human consumption or recreation—a fact exemplified by two infamous events in 1969: sparks from a passing train set the Cuyahoga River in Cleveland, Ohio, on fire for over thirty minutes,<sup>24</sup> and a Union Oil Company drilling platform located six miles off the coast of Santa Barbara, California suffered a blowout resulting in the release of 200,000 gallons of crude oil into the Pacific Ocean.<sup>25</sup> These circumstances and events, combined with a new “environmental consciousness”—symbolized by the first Earth Day in 1970—finally prompted Congress to act in a comprehensive manner and on a national level to protect our aqueous resources.<sup>26</sup>

#### 4. *The Clean Water Act*

The 1972 amendment to the FWPCA, commonly known as the Clean Water Act,<sup>27</sup> is now the primary federal statute that regulates pollution and other discharges into the waters of the United States.<sup>28</sup> The goal of the CWA is to “protect the quality of lakes, streams, and other waters for recreational use, for maintenance of aquatic life,”<sup>29</sup> and to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”<sup>30</sup> But as a federal statute, the CWA cannot reach all waters and wetlands; the states still have a large, although somewhat circumscribed, role to play in the preservation and regulation of wetlands. In fact, the CWA specifically states that “[i]t is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development . . . of land and water resources.”<sup>31</sup>

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24. *Id.* at 6–7; OhioHistoryCentral.org, Cuyahoga River Fire, <http://www.ohiohistorycentral.org/entry.php?rec=1642> (last visited Feb. 7, 2007).

25. GROSS & DODGE, *supra* note 22, at 6; Santa Barbara Wildlife Care Network Online, Santa Barbara’s 1969 Oil Spill, <http://www.sbwcen.org/spill.shtml> (last visited Feb. 7, 2007).

26. GROSS & DODGE, *supra* note 22, at 6.

27. Clean Water Act, Pub. L. No. 92-500, 86 Stat. 816 (1972). The Clean Water Act was amended in 1977 and in 1987; the current version is codified at 33 U.S.C. §§ 1251–1387 (2000).

28. GROSS & DODGE, *supra* note 22, at 1.

29. *Id.*

30. Clean Water Act § 101(a); 33 U.S.C. § 1251(a) (2000).

31. *Id.* § 101(b); 33 U.S.C. § 1251(b). The importance of this section is hotly debated. Those who would seek to limit the Corps’s jurisdiction—the plurality opinion in *Rapanos*, for example—often point to this section for support. See *Rapanos v. United States*, 126 S. Ct. 2208, 2223–24 (2006). Others assert that this section is merely Congress’s recognition that the Commerce Clause cannot cover

*B. In Minnesota*

Minnesota has the fourth-largest wetland area in the United States, surpassed only by Alaska, Florida, and Louisiana, and it has consistently been in the forefront of wetlands regulation and preservation.<sup>32</sup> There are 9.285 million acres of recognized wetlands in the state of Minnesota.<sup>33</sup> But over fifty-two percent of the state's original wetlands have been lost due to development, making way for houses, roads, and farmland.<sup>34</sup> The remaining wetlands include "prairie potholes," which are primarily freshwater marshes formed by glaciers during the Pleistocene epoch.<sup>35</sup> Prairie potholes are some of the most important wetlands in the world because three-quarters of all North American waterfowl originate from these regions.<sup>36</sup>

In 1991, the Minnesota Legislature acted to pass a new comprehensive wetlands bill, entitled the Minnesota Wetland Conservation Act (WCA).<sup>37</sup> The WCA:

prohibits the draining and filling of protected wetlands unless replaced by restored or created wetlands of equal public value under an approved replacement plan. It designates as "scientific and natural areas" about 150,000 acres of specifically described peatlands in northern Minnesota. The [WCA] restricts a variety of activities in peatlands including construction of new drainage systems, exploration for and removal of peat, oil, gas, and other minerals and commercial logging.<sup>38</sup>

With the passage of the WCA, Minnesota adopted a "no net loss" policy in regard to its wetlands.<sup>39</sup> Judicial decisions over the past

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all waters, and that certain waters still need to be regulated solely by the states. *See id.* at 2246 (Kennedy, J., concurring in the judgment).

32. Forsberg, *supra* note 13, at 1023.

33. Minnesota Department of Natural Resources Online, Wetlands, <http://www.dnr.state.mn.us/wetlands/index.html> (last visited Feb. 13, 2007).

34. Minnesota Department of Natural Resources Online, Wetlands: Benefits of Wetlands, <http://www.dnr.state.mn.us/wetlands/benefits.html> (last visited Feb. 13, 2007).

35. Forsberg, *supra* note 13, at 1023. In the United States, prairie potholes are found in North Dakota, South Dakota, Iowa, and Minnesota; in Canada, prairie potholes are found in Manitoba, Saskatchewan, and Alberta. *Id.*

36. *Id.*

37. 1991 Minn. Laws 2794, ch. 354 (codified as amended in scattered sections of MINN. STAT. chs. 84 and 103A (2006)).

38. Forsberg, *supra* note 13, at 1022–23. Peatlands are another common type of wetlands.

39. MINNESOTA DEPARTMENT OF NATURAL RESOURCES: WETLANDS REGULATION

thirty years accord with this policy.<sup>40</sup>

But a frequently cited flaw in the WCA is the fact that its jurisdiction does not apply to artificial wetlands, only naturally occurring ones.<sup>41</sup> This flaw exists due to pre-WCA case law that interprets wetlands as including only “natural” waters.<sup>42</sup> It is in this natural/artificial wetlands jurisdictional distinction that Minnesota state law differs from federal law (i.e. the CWA),<sup>43</sup> and it is one of the main reasons why an understanding of federal law is critically important to practitioners in Minnesota who are working in the various areas of land regulation. Furthermore, even where Minnesota state regulations are applicable, the CWA also requires a parallel permitting process for any development or filling of wetlands that are also federal waters of the United States.<sup>44</sup>

Therefore, in order to develop a full picture of federal wetlands regulation, this Article begins with a discussion of jurisdictional issues as they relate to waters and water pollution generally, starting with the departure from English precedent in the latter half of the nineteenth century. Although antiquated and largely superseded by statute and subsequent case law, these early

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IN MINNESOTA 11 (2003), <http://www.bwsr.state.mn.us/wetlands/publications/MNRegulations.pdf> (last visited Feb. 13, 2007); Christopher J. Schulte, *Minnesota Wetland Conservation Act of 1991: “Did Minnesota Miss the Boat to Protect Artificially Created Wetlands?”*, 15 HAMLIN L. REV. 439, 439 (1992).

40. See, e.g., *In re Christenson*, 417 N.W.2d 607 (Minn. 1987) (restricting permit applicant from enlarging and rebuilding pre-existing wetland drainage system); *County of Freeborn by Teveson v. Byrson*, 309 Minn. 178, 243 N.W.2d 316 (1976) (enjoining construction of highway where alternate route around wetland was available); *In re Cent. Baptist Theological Seminary*, 370 N.W.2d 642 (Minn. Ct. App. 1985) (building of radio tower in wetland in detriment to wildlife habitat not permitted); *State v. Drum*, No. CX-92-922, 1998 WL 170118 (Minn. Ct. App. Apr. 14, 1998) (upholding conviction for violation of WCA cease-and-desist order).

41. See Schulte, *supra* note 39, at 439 (recommending amendments to the statute). See also Forsberg, *supra* note 13, at 1052–57 (containing a further critique of the WCA).

42. See *Dep’t. of Natural Res. v. Mahnomen County Hearings Unit*, 407 N.W.2d 434 (Minn. Ct. App. 1987) (distinguishing between artificially and naturally created wetlands); *Dep’t. of Natural Res. v. Todd County Hearings Unit*, 356 N.W.2d 703 (Minn. Ct. App. 1984) (rejecting the designation of three sites in central Minnesota as wetlands because they were artificially created and enlarged). See also Schulte, *supra* note 39, at 459–60 (“[These] holdings are unequivocal that wetlands artificially created receive no protection under the public waters statutes. The state, therefore, can claim no jurisdiction . . .”).

43. The CWA does not make this distinction. See discussion *infra* Part IV.A. Therefore, even if a Minnesota wetland is not subject to state regulation, it may still be subject to federal regulation.

44. See discussion *infra* Part IV.A.

decisions shed light on how liberal judicial decision making formed the basis for the expansion of legislation and regulation pertaining to wetlands; in other words, they are the beginning in a long line of cases that suggest *Rapanos* and *SWANCC* were wrongly decided.

### III. THE EXPANSION OF FEDERAL JURISDICTION OVER WATERS AND WETLANDS

While the CWA represents the federal government's most marked policy shift in water pollution and wetlands regulation,<sup>45</sup> it is certainly not our nation's first effort to control what is put into our waters. Since 1871, Congress and the federal courts have been steadily expanding the body of law concerning what type of waters and wetlands are subject to regulation.<sup>46</sup> Before this expansion occurred, American courts had followed English common law, which held that a country's waters were only those that were subject to the ebb and flow of the tide.<sup>47</sup> In the United States, this rule largely limited federal jurisdiction to coastal waters and the Great Lakes. At that time in history, though, water pollution was only starting to become a problem. Accordingly, early decisions dealing with jurisdictional issues are largely based on commerce in the traditional sense of the word, as seen in the following case.

#### A. *The Term "Waters of the United States" Gains New Meaning*

In *The Daniel Ball*, the Supreme Court made a definite shift away from English common law and towards a more expanded interpretation of what constitutes "navigable waters of the United States."<sup>48</sup> The *Daniel Ball* was a cargo steamer that carried goods

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45. "The 1972 Amendments to the Federal Water Pollution Control Act represented a change in the regulatory philosophy from [inconsistent and often non-existent] water-quality standards established by states to a [national] 'clean waters' approach." GROSS & DODGE, *supra* note 22, at 6–7. For example, a specific federal-level objective of the CWA was the elimination of all pollutant discharges by 1985. *Id.* at 7. This obviously did not happen, but it represents the spirit of the legislation, which the Supreme Court in recent years seems to have forgotten. See discussion *infra* Part V.

46. This expansion closely parallels the Supreme Court's increasing willingness to grant Congress regulatory power under the Commerce Clause. See generally E. PARMALEE PRENTICE & JOHN G. EGAN, *THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION* (Fred B. Rothman & Co. 1981).

47. See, e.g., *Mayor of Lynn v. Turner*, (1774) 98 Eng. Rep. 980, 981 (K.B.) ("For wherever a [water] flows and reflows it is in the nature of a highway, and is common to all.").

48. 77 U.S. 557, 563 (10 Wall. 1870).

up and down the Grand River, which was navigable wholly within the state of Michigan for approximately forty miles.<sup>49</sup> A federal statute passed in 1838 required a permit for any ships carrying cargo or passengers in any navigable waters of the United States.<sup>50</sup> The Court, holding that a permit was required for transit along the Grand River, extended the regulatory power of the government to include waters that “form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries.”<sup>51</sup> In other words, the Court held that when purely intrastate transit of goods has the potential to affect interstate commerce through continuous transit connections, federal regulation is proper under the Commerce Clause.<sup>52</sup>

*B. The Rivers and Harbors Act*

With this new jurisdictional power, courtesy of the Supreme Court, Congress was able to pass a law that limited discharges into these new federally controlled waters. In 1899, Congress passed the Rivers and Harbors Act (RHA), which was primarily designed to aide navigation by preventing obstructions from being discharged into waterways.<sup>53</sup> And for the first few decades following its passage, that is exactly for what the RHA was used.<sup>54</sup> But with the industrial revolution and the increase in factories situated along rivers and lakes, water pollution was quickly becoming more prevalent. It was during this time when the judiciary made its first pioneering step

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49. *Id.* at 564.

50. *Id.*; *see also* 5 Stat. 304 (1838).

51. *The Daniel Ball*, 77 U.S. (10 Wall.) at 563.

52. This holding was important when the Corps (many decades later) first sought to regulate intrastate tributaries of navigable interstate rivers by reason of their “continuous connections.” *See* discussion *infra* Part IV.C.1.b (regulation of wetlands adjacent to tributaries).

53. Rivers & Harbors Act, ch. 425, § 13, 30 Stat. 1152 (1899) (codified at 33 U.S.C. § 407 (2000)):

It shall not be lawful to throw, discharge, or deposit . . . any refuse matter of any kind or description whatever . . . [but] the Secretary of the Army . . . may permit the deposit of any material above mentioned in navigable waters, within limits to be defined and under conditions to be prescribed by him . . . .

*Id.* Section 13 of the Rivers and Harbors Act is commonly known as the Refuse Act.

54. *See, e.g.,* Corrigan Transit Co. v. Sanitary Dist. of Chicago, 137 F. 851 (7th Cir. 1905) (shipping line affected by the alteration of the current in a canal, due to structural changes made by the Sanitary District).

forward. Although nowhere in the language of the RHA did Congress provide authority to control water pollution, a series of judicial decisions from the 1930s to the 1960s interpreted the RHA as impliedly supplying this power. In essence, congressional intent took a back seat to an increasing concern for the quality of our nation's water resources, with the federal judiciary at the wheel.<sup>55</sup>

*C. Stretching the Rivers and Harbors Act to Its Breaking Point*

Consequently, until the passage of the CWA, the United States prosecuted an increasing number of RHA violations that had nothing to do with navigation per se.<sup>56</sup> The judicially powered expansion of the RHA's use reached its peak when the U.S. Supreme Court affirmed, in two famous cases, what had become a sizeable body of law in the lower courts.<sup>57</sup> The Court interpreted the RHA not just as a navigational aide, but also as a tool to combat industrial pollution.

*I. United States v. Republic Steel Corp.*

The first case, *United States v. Republic Steel Corp.*, involved iron mills on the Calumet River near Gary, Indiana.<sup>58</sup> It was undisputed in the case that the only discharge from the mills was in the liquid state, but the Court took an expansive reading of section 10 of the RHA, dismissing the argument that the word "obstruction" means some kind of structure.<sup>59</sup> "We read the [RHA] charitably in light

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55. The early cases under the Refuse Act are regarded as the first attempts to use federal statutes to control water pollution. See CRAIG, *supra* note 22, at 10; GROSS & DODGE, *supra* note 22, at 5.

56. CRAIG, *supra* note 22, at 10. Even as early as 1936, in the case *La Merced*, which involved an oil spill on Lake Washington near Seattle, the Ninth Circuit Court of Appeals liberally interpreted the RHA and saw "no reason for limiting 'refuse matter of any kind or description whatever' to such refuse matter only as would impede or obstruct navigation. The plain intention of Congress was to prohibit the discharge into navigable water of any material . . ." *La Merced*, 84 F.2d 444, 446 (9th Cir. 1936).

57. See *infra* Part III.C.1-2.

58. 362 U.S. 482, 483 (1960). The mills acquired water intake from the river, used it in the manufacturing process, filtered it, and then discharged it back into the river. *Id.* But minute suspended industrial solids, mostly iron, remained in the effluent. *Id.* The only "obstruction" created by this process was the gradual shallowing of the river, at a rate of approximately one foot per decade. See *id.* 483-84.

59. *Id.* at 486. Section 10 of the RHA is very similar to section 13: "the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby

of the purpose to be served. The philosophy of the statement of Mr. Justice Holmes . . . that ‘[a] river is more than an amenity, it is a treasure,’ forbids a narrow, cramped reading either of [Section] 13 or of [Section] 10.”<sup>60</sup> Furthermore, the Court held that deference should be given to the judgment of the administrative agency in charge of maintaining navigable river ways—the Army Corps of Engineers—to determine what acts constitute a violation of the RHA.<sup>61</sup>

## 2. United States v. Standard Oil Co.

Six years after deciding *Republic Steel*, the Supreme Court reaffirmed its commitment to using a liberal construction of the RHA to abate pollution.<sup>62</sup> *United States v. Standard Oil Co.* involved the accidental discharge of aviation fuel into the St. Johns River in central Florida.<sup>63</sup> The United States brought a suit against Standard Oil under section 13 of the RHA, claiming that the 100-octane fuel was “refuse matter.”<sup>64</sup> Clearly, an environmental, rather than navigational motive was behind the prosecution. Justice Douglas even went so far in his opinion as to admit that the case was not of the type of violation that Congress had originally intended to prevent, yet, following the “spirit” of the precedent in previous decades, he ruled in favor of the government nevertheless, stating:

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prohibited . . .” 33 U.S.C. § 403 (2000). When read in relation to section 13, the original intent of Congress that this statute be primarily a navigation aide is revealed.

60. *Republic Steel*, 362 U.S. at 491 (quoting Holmes, J., in *New Jersey v. New York*, 283 U.S. 336, 342 (1931)). *New Jersey v. New York* involved an attempt by New York to divert a significant portion of the Delaware River. 283 U.S. 336, 341 (1931).

61. The case record reveals the Corps’s extensive involvement in policing the Calumet since 1909. See *Republic Steel*, 362 U.S. at 491 n.5. The Court, recognizing that the Corps, as the administrative agency in charge of enforcing the RHA, having much more experience dealing with and interpreting the statute, stated that “[a]ny doubts are resolved by a consistent administrative construction which refused to give immunity to industrial wastes resulting in the deposit of solids. . . . This long-standing administrative construction, while not conclusive of course, is entitled to ‘great weight . . . .’” *Id.* at 490, 491 n.5. This prescient statement foreshadowed the Court’s opinion in another famous administrative law case. See discussion *infra* note 112. It is also a concept that has become largely lost in the recent *SWANCC* and *Rapanos* cases. See discussion *infra* Part V.

62. CRAIG, *supra* note 22, at 11.

63. 384 U.S. 224, 225 (1966). A dock-side shut-off valve had been negligently left open, causing the spill. *Id.*

64. *Id.*

This case comes to us at a time in the Nation's history when there is greater concern than ever over pollution—one of the main threats to our free-flowing rivers and to our lakes as well. The crisis that we face in this respect would not, of course, warrant us in manufacturing offenses where Congress has not acted nor in stretching statutory language in a criminal field to meet strange conditions. But whatever may be said of the rule of strict construction, it cannot provide a substitute for common sense, precedent, and legislative history. We cannot construe § 13 of the Rivers and Harbors Act in a vacuum.<sup>65</sup>

### 3. *Moving Forward*

In light of these decisions, legal scholars and commentators found it curious that a nineteenth century statute was still being used to remedy water pollution issues,<sup>66</sup> even after all of the amendments to the FWPCA.<sup>67</sup> In fact, after the broad, reaching decisions in *Standard Oil* and *Republic Steel*, there was still much uncertainty as to the future enforcement of water pollution; in other words, could the judiciary stretch the RHA even further?<sup>68</sup> But any uncertainty was put to rest in 1972 with the passage of the CWA.

## IV. REGULATION OF WETLANDS UNDER THE CLEAN WATER ACT

Better late than never, it took Congress another six years after the decision in *Standard Oil* was announced before it passed the

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65. *Id.* at 225–26. “[B]y the mid-1960s, the United States had firmly established its authority under the RHA ability to prevent pollution in the navigable waters.” CRAIG, *supra* note 22, at 11.

66. See, e.g., William H. Rodgers, Jr., *Industrial Water Pollution and the Refuse Act: A Second Chance for Water Quality*, 119 U. PA. L. REV. 761, 762 (1971) (noting “[t]hat the solons of the nineteenth century appear to have surpassed their modern successors in fashioning useful tools for combating water pollution is a curious commentary on the accidents of legal history and on the vitality of the current drive to secure water quality”).

67. Before Congress passed the CWA, the FWPCA had been amended in 1952, 1956, 1961, 1965, 1966, and 1970. See CRAIG, *supra* note 22, at 13–22 (discussing in detail the various amendments).

68. Professor Rodgers discusses two hypothetical situations, the first involving aggressive prosecution of virtually all major contributors of industrial waste to navigable waters, and the second involving “[u]nprepared, uninspired, and disinterested [officials who perceive] the certification [or permit] as but another piece of paper to sign.” See Rodgers, *supra* note 66, at 821.

CWA.<sup>69</sup> With all of the strained applications of the RHA, it was a badly needed addition to federal law. Serving a complex problem, the CWA is a complex piece of legislation, containing hundreds of provisions, regulations, and definitions—a full treatment of its text is beyond the scope of this Article.<sup>70</sup>

A. *Statutory Language*

1. *The Corps's Power*

The CWA gives regulatory power to the Corps through a discretionary permitting process set forth in section 404. When the Corps has jurisdiction over a particular area, “the discharge of any pollutant by any person [is] unlawful” without a section 404 permit.<sup>71</sup> But the Corps “may issue [section 404] permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites.”<sup>72</sup> This permitting process can be very long, involved, and expensive. As Justice Scalia commented:

In deciding whether to grant or deny a [section 404] permit, the [Corps] exercises the discretion of an enlightened despot, relying on such factors as “economics,” “aesthetics,” “recreation,” and “in general, the needs and welfare of the people.” The average applicant for an individual permit spends 788 days and \$271,596 in completing the process, and the average

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69. Under the FWPCA, only one case was prosecuted in the twenty-four years between 1948 and 1972. GROSS & DODGE, *supra* note 22, at 6. The FWPCA was initially designed to be implemented by the states, with only limited federal support in financing and research. *See id.* at 5–6. Although the FWPCA was amended several times before 1972, no adequate federal enforcement was ever included, and it remained basically toothless. *See id.* at 6. Thus, the CWA is generally considered to be the first legislative effort to specifically combat water pollution, lightening the burden on the court system from strained applications of the RHA. *See id.* at 5–6.

70. This Article has heretofore discussed water pollution generally in an effort to show the overall relationship between the judiciary and the legislature. But after Congress passed the CWA, wetlands, rivers, lakes, and other areas all furcated into their own respective branches of law. Because the Corps has jurisdiction over the filling of wetlands with dredged or fill material, and because only wetlands are involved in the *Rapanos* decision and the sequence of decisions that led up to it, this Article will, from this point forward, focus its discussion on the Corps's permitting process that is required to dredge or fill wetlands.

71. Clean Water Act, tit. III, § 301(a), Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified at 33 U.S.C. § 1311(a) (2000)).

72. *Id.* § 404(a) (codified at 33 U.S.C. § 1344(a) (2000)).

applicant for a nationwide permit spends 313 days and \$28,915—not counting costs of mitigation or design changes. “[O]ver \$1.7 billion is spent each year by the private and public sectors obtaining wetlands permits.” These costs cannot be avoided . . . .<sup>73</sup>

Often times, in processing a permit application, the Corps requires that the applicant engage in wetland restoration projects so that the potential impact on wetlands is minimized.<sup>74</sup>

## 2. “Navigable Waters”

Just as with the RHA, the primary issue in Supreme Court cases addressing wetlands regulation under the CWA was the meaning of “navigable waters,” a term which Congress has defined as “the waters of the United States, including the territorial seas.”<sup>75</sup> After passage of the CWA, the Corps initially adopted the traditional definition for the term navigable waters.<sup>76</sup> But it soon became evident that this definition was clearly insufficient in light of the stated purpose of the CWA.<sup>77</sup>

Recognizing this problem, the Natural Resources Defense Council brought suit against the Corps in *Natural Resources Defense Council, Inc. v. Callaway*, arguing that the legislative history, historical circumstances, and judicial precedent under which the CWA was enacted mandated a broad interpretation of navigable waters, hence broad regulatory power over, among other things,

73. *Rapanos v. United States*, 126 S. Ct. 2208, 2214–15 (2006) (quoting 33 C.F.R. § 320.4(a) (2004) and David Sunding & David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 NAT. RESOURCES J. 59, 74–76, 81 (2002)) (citations omitted).

74. See EPA Wetland Regulatory Authority, Regulatory Requirements, [http://www.epa.gov/owow/wetlands/pdf/reg\\_authority\\_pr.pdf](http://www.epa.gov/owow/wetlands/pdf/reg_authority_pr.pdf) (last visited Feb. 19, 2007) (describing the general principles that the Corps follows when issuing section 404 permits); see also EPA: River Corridor and Wetland Restoration, Principles for the Ecological Restoration of Aquatic Resources, <http://www.epa.gov/owow/wetlands/restore/principles.html> (last visited Feb. 19, 2007).

75. Clean Water Act § 502(7) (codified at 33 U.S.C. § 1362(7) (2000)).

76. This definition is traditional in the *Daniel Ball* sense of the word—waters that are navigable in fact or readily susceptible to being rendered so. See 39 Fed. Reg. 12115, 12119 (Apr. 3, 1974). The text of the Corps’s initial definition stated: “Navigable waters of the United States are those waters which are presently or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce.” 37 Fed. Reg. 18290 (Sept. 9, 1972).

77. The goal of the CWA is to “protect the quality of lakes, streams, and other waters for recreational use, for maintenance of aquatic life.” GROSS & DODGE, *supra* note 22, at 1.

wetlands.<sup>78</sup> On motion for summary judgment, the district court held that “Congress, by defining the term ‘navigable waters’ . . . to mean ‘the waters of the United States,’ . . . asserted federal jurisdiction over the nation’s waters to the maximum extent permissible under the Commerce Clause of the Constitution.”<sup>79</sup> Furthermore, it held that the Corps was without power to amend or change the statutory definition through its own regulations, in derogation of its responsibilities under the CWA.<sup>80</sup> The court ordered the Corps to rescind its current regulations, and write and publish new regulations within thirty days that “clearly recogniz[e] the full regulatory mandate of the [CWA].”<sup>81</sup>

The result of the *Callaway* decision was a revised set of regulations in 1975 and 1977 that dramatically increased the jurisdiction of the Corps in regard to “navigable waters.” These revised regulations extended the definition of “the waters of the United States” to the outer limits of Congress’s commerce power as it was then understood.<sup>82</sup>

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78. See *Natural Res. Def. Council, Inc. v. Callaway*, 392 F. Supp. 685, 686 (D. D.C. 1975) (the defendants were Chief of the Army Corps of Engineers, Lt. Gen. William C. Gribble, and Secretary of the Army, Howard H. Callaway).

79. *Id.*

80. *Id.*

81. *Id.* The Corps chose to accept this ruling and it did not appeal the order.

82. Immediately after the *Callaway* ruling, the Corps took the direction of the judge seriously and amended their regulations drastically—“navigable waters” would now include:

[a]ll artificially created channels and canals used for recreational or other navigational purposes that are connected to other navigable waters, . . . [a]ll tributaries of navigable waters of the United States up to their headwaters and landward to their ordinary high water mark, . . . [and] [f]reshwater wetlands including marshes, shallows, swamps and, similar areas that are contiguous or adjacent to other navigable waters and that support freshwater vegetation.

40 Fed. Reg. 31320 (July 25, 1975). Two years later, the definition of navigable waters was further extended to include: “[a]ll other waters of the United States . . . such as isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce.” 42 Fed. Reg. 37144 (July 19, 1977). With respect to these new regulations, Justice Scalia later commented, in a criticizing tone, that

immense expansion of federal regulation of land use . . . has occurred under the [CWA]. . . . In the last three decades, the Corps and the [EPA] have interpreted their jurisdiction over “the waters of the United States” to cover 270-to-300 million acres of swampy lands in the United States—including half of Alaska and an area the size of California in the lower 48 States.

### 3. *Congressional Acquiescence to the New Definition of Navigable Waters*

In 1977, critics of the CWA who felt that the Corps had too much jurisdiction, especially after the 1977 regulations were adopted, attempted to insert limitations in the CWA amendments of that year.<sup>83</sup> Debate on the proposal centered largely around wetlands preservation: those who supported the plan argued that the Corps's new regulations far exceeded what Congress had intended in 1972, while opponents of the plan argued that a narrower definition of navigable waters would exclude vast stretches of crucial wetlands to the detriment of the environment.<sup>84</sup> The House of Representatives passed the amendment, while the Senate rejected it; the Conference Committee eventually adopted the Senate approach, and efforts to narrow the definition of navigable waters were abandoned.<sup>85</sup>

Perhaps this outcome was luck, or perhaps a majority of Congress decided to take a cue from what the judiciary had been doing over the past fifty years and used their power with the purpose of bettering the environment in mind. The Conference Report represented the sentiment of those environmentally conscious members of Congress who pushed to defeat the amendment:

There is no question that the systematic destruction of the Nation's wetlands is causing serious, permanent ecological damage. The wetlands and bays, estuaries and deltas are the Nation's most biologically active areas. They represent a principal source of food supply . . . . The unregulated destruction of these areas is a matter which needs to be corrected and which implementation of section 404 has attempted to achieve.<sup>86</sup>

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Rapanos v. United States, 126 S. Ct. 2212, 2215 (2006).

83. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 136 (1985) (discussing the congressional record).

84. *Id.* It is important to note that wetlands were not specifically enumerated in the text of the CWA. But the Corps interpreted its new mandate to include wetlands as well, much like they had interpreted the RHA broadly before 1972. GROSS & DODGE, *supra* note 22, at 77. Cases discussing the applicability of the CWA to wetlands include *Parkview Corp. v. Dep't. of Army Corps of Eng'rs*, 469 F. Supp. 217 (E.D. Wis. 1979), and *Track 12, Inc. v. U.S. Army Corps of Eng'rs*, 618 F. Supp. 448 (D. Minn. 1985).

85. *Riverside Bayview*, 474 U.S. at 136-37.

86. S. Rep. No. 95-370, at 10 (1977) (Conf. Rep.), as reprinted in 1977 U.S.C.C.A.N. 4326, 4336.

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

It appeared that in the first few years after the CWA was in force, the liberal philosophy and pioneering tradition of construing environmental regulations to the broadest extent possible was continued by the Congress, the Corps, and by the lower federal courts. The Supreme Court finally spoke in 1985, issuing its first wetlands opinion on the validity of the Corps's policy<sup>87</sup> that wetlands connected to "waters of the United States" also came under the purview of section 404 of the CWA.<sup>88</sup>

1. *Factual Background*

The defendant in *United States v. Riverside Bayview Homes, Inc.* was a housing developer that owned approximately eighty acres of undeveloped marshland north of Detroit in Harrison Township, Macomb County, Michigan.<sup>89</sup> The land in question was located one mile west of Lake Saint Clair and parallel to the Clinton River, both traditional navigable waters.<sup>90</sup> Around seventy-five percent of the land was used as farmland before it was purchased by the defendant.<sup>91</sup> Due to emergency measures taken by the Township during a period of heavy flooding in 1973, the drainage on portions of the land was destroyed.<sup>92</sup> Several years later, Riverside Bayview contracted to have the land filled.<sup>93</sup> It submitted a partially completed permit to the Corps in November of 1976.<sup>94</sup> In December, Riverside Bayview began to place fill material on the

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87. See 33 C.F.R. § 328.3(a) (2004):

The term "waters of the United States" means (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide; (2) All interstate waters including interstate wetlands; (3) All other waters such as intrastate lakes, rivers, streams . . . the use, degradation or destruction of which could affect interstate or foreign commerce . . . .

*Id.*

88. *Riverside Bayview*, 474 U.S. at 121, 139.

89. *Id.* at 124 (summarizing the facts); *United States v. Riverside Bayview Homes, Inc.*, 729 F.2d 391, 392 (6th Cir. 1984) (providing a more detailed description of the facts).

90. *Riverside Bayview*, 474 U.S. at 124; *Riverside Bayview*, 729 F.2d at 392.

91. *Riverside Bayview*, 729 F.2d at 392.

92. *Id.* at 393. The court does not place any significance on the fact that the wetland conditions on the Riverside Bayview land were exacerbated by municipal actions in response to flooding problems.

93. *Id.*

94. *Id.*

property in preparation for construction of a housing development, and the Corps ordered it to cease and desist its activities.<sup>95</sup> When Riverside Bayview continued nonetheless, litigation ensued.<sup>96</sup>

## 2. *Opinion per Justice White*

The Court's opinion was an unqualified affirmation of the tradition and precedent of liberally interpreting waters/wetlands legislation. First, the Court addressed the intent of Congress in passing the CWA by recognizing that:

[o]n a purely linguistic level, it may appear unreasonable to classify "lands," wet or otherwise, as "waters." Such a simplistic response, however, does justice neither to the problem faced by the Corps in defining the scope of its authority under § 404(a) nor to the realities of the problem of water pollution that the Clean Water Act was intended to combat.<sup>97</sup>

Next, after analyzing the congressional record, the Court held that Congress had intended to "exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term."<sup>98</sup> The Court also noted that, from the record, it appeared that "the scope of the Corps's asserted jurisdiction over wetlands was specifically brought to Congress's attention, and Congress rejected measures designed to curb the Corps's jurisdiction in large part because of its concern that protection of wetlands would be unduly hampered by a narrow definition of 'navigable waters.'"<sup>99</sup>

Given this breadth granted by Congress, it was therefore "reasonable for the Corps to interpret the term 'waters' to encompass wetlands adjacent to waters as more conventionally

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95. *Id.*

96. *Riverside Bayview*, 474 U.S. at 124–25; *Riverside Bayview*, 729 F.2d at 393. The district court enjoined Riverside from further filling without the Corps's permission. *Riverside Bayview*, 474 U.S. at 124; *Riverside Bayview*, 729 F.2d at 393.

97. *Riverside Bayview*, 474 U.S. at 132. The Court also asserted that "[p]rotection of aquatic ecosystems . . . demand[s] broad federal authority to control pollution, for water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source." *Id.* at 132–33 (quoting S. Rep. No. 92-414, at 77 (1972) (Conf. Rep.), as reprinted in 1972 U.S.C.C.A.N. 3668, 3742).

98. *Id.* at 133.

99. *Id.* at 137. See also discussion *supra* Part IV.A.3.

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defined.”<sup>100</sup> On this point, the Court chose to quote from the EPA’s regulations on wetlands—the language speaks volumes as to the Court’s intent when framing this opinion:

The regulation of activities that cause water pollution cannot rely on . . . artificial lines . . . but must focus on all waters that together form the entire aquatic system. Water moves in hydrologic cycles, and the pollution of this part of the aquatic system . . . will affect the water quality of the other waters within that aquatic system.

For this reason, the landward limit of Federal jurisdiction under section 404 must include any adjacent wetlands that form the border of or are in reasonable proximity to other waters of the United States, as these wetlands are part of this aquatic system.<sup>101</sup>

Concluding the opinion, the Court held that the Corps had acted reasonably in requiring Riverside Bayview to seek a permit before filling its land.<sup>102</sup>

C. *The Judiciary Further Stretches the CWA post-Riverside Bayview*

With the broad language in *Riverside Bayview* concerning the extent of the Corps’s authority under section 404,<sup>103</sup> it is no surprise that numerous cases were entertained before various federal circuit courts of appeals in the years that followed. Of these cases, two stand out as particularly pioneering in the field of wetland regulation. These two cases tested whether the judiciary would continue its trend of broadly interpreting Congress’s intent when it delegated authority to the Corps under the CWA.<sup>104</sup>

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100. *Riverside Bayview*, 474 U.S. at 133.

101. *Id.* at 133–34 (quoting 42 Fed. Reg. 37,122, 37,128 (July 19, 1977)).

102. *Id.* at 139. The Court took every opportunity to show that it was implementing Congress’s plan, not its own. “[W]etlands are a concern of the Clean Water Act and [when] . . . defining the waters covered by the Act to include wetlands, the Corps is ‘implementing congressional policy rather than embarking on a frolic of its own.’” *Id.* (quoting *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 375 (1969)).

103. Noting that it was not called upon to address the extent of the Corps’s authority to regulate wetlands, the Court seemingly invited litigants to test this authority. *See* 474 U.S. at 131 n.8. And so they did.

104. *See* *United States v. Pozsgai*, 999 F.2d 719 (3d Cir. 1993); *Hoffman Homes, Inc. v. EPA*, 999 F.2d 256 (7th Cir. 1993).

## 1. United States v. Pozsgai

### a. *Factual Background*

In *United States v. Pozsgai*,<sup>105</sup> defendant Pozsgai began to fill concrete rubble, earth, and building scraps on his fourteen-acre lot in Pennsylvania in order to build on the property a garage that was needed to expand his truck repair business.<sup>106</sup> Pozsgai had been warned by three separate engineers that the land would probably fall under the Corps's definition of wetlands and had been advised to seek a permit.<sup>107</sup> Pozsgai ignored not only the warnings of his engineers, but also several cease-and-desist letters that the Corps sent to him. Pozsgai continued to fill his land.<sup>108</sup>

The Corps filed suit against Pozsgai, and the district court granted a permanent injunction.<sup>109</sup> There had been several surveys done on the wetlands in question—the Corps's biologist and field investigator described the land “as ‘a forested wetland dominated by arrowwood’ and noted ‘areas of standing water were scattered throughout the site,’ and ‘a stream flows along the east border of the property and wetland and is a tributary to the Pennsylvania Canal,’” which the district court found to be a navigable water of the United States.<sup>110</sup>

### b. *Extending Regulation to Tributaries and Their Adjacent Wetlands*

*Pozsgai* presented the court of appeals with a chance to weigh in on how far it felt that the Commerce Clause allowed the Corps to exercise wetland jurisdiction. First, the Third Circuit recognized the holding in *Riverside Bayview* by reaffirming that

[i]n determining the limits of its power to regulate discharges under the [CWA], the Corps must necessarily

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105. *Pozsgai*, 999 F.2d at 719.

106. *Id.* at 721–22.

107. *Id.* at 722. In this case, the wetland in question was not adjacent to a navigable water of the United States like in *Riverside Bayview*—it was one step removed and adjacent to a tributary of a water of the United States. *See id.* at 722 n.1 (citing 33 C.F.R. § 328.3(a)(3), (7) (1992) for the proposition that “[t]he regulations . . . cover wetlands adjacent to tributaries of waters used in interstate commerce”).

108. *Id.* at 722–23.

109. *Id.* at 724. Pozsgai was also found guilty on related criminal charges. *Id.* at 723.

110. *Id.* at 721–22, 730.

choose some point at which water ends and land begins. Our common experience tells us that this is often no easy task: the transition from water to solid ground is not necessarily or typically an abrupt one . . . . Where on this continuum to find the limit of “waters” is far from obvious.<sup>111</sup>

Second, the court of appeals recognized that courts should grant deference to agency interpretations, especially when the regulatory scheme is technical and complex, like the CWA, which addresses a scientifically complicated subject and has an intricate regulatory structure.<sup>112</sup> Third, the court turned to Pozsgai’s claim that “the Corps’s adjacent wetlands regulations as applied to them violates the Commerce Clause.”<sup>113</sup> But it dismissed Pozsgai’s argument by differentiating statutes that do require an individualized effect on interstate commerce from statutes that do not, such as the CWA.<sup>114</sup> The court found that the CWA statutorily delegates authority to the Corps, which has determined that wetlands that are adjacent to tributaries of waters used in interstate commerce should be regulated at the federal level.<sup>115</sup> Rather than individualizing the effects that Pozsgai’s actions had on the environment, the court treated his infraction as one in a class of activities, and the class as a whole generally requires permitting.<sup>116</sup> Finally, the court held that because the Corps’s “regulations reveal [that it] gave serious consideration to this issue, . . . [w]e cannot say

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111. *Id.* at 728 (discussing *United States v. Riverside Bayview Homes*, 474 U.S. 121, 132 (1985)).

112. *Id.* at 729. Agency deference is known as *Chevron* deference, after *Chevron U.S.A., Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Chevron* involved an application of the Clean Air Act, and it was the first major case in administrative law to specifically grant executive agencies a large amount of autonomy to interpret congressional laws. It also introduced the concept of judicial restraint into this field of law: “Judges are not experts in the field, and are not part of either political branch of the Government.” *Chevron*, 467 U.S. at 865.

113. *Pozsgai*, 999 F.2d at 733. “We will uphold application of the law if there is a ‘rational basis’ for the congressional determination that the regulated activity ‘affects interstate commerce,’ and if the means chosen to regulate the activity are reasonable.” *Id.* (following the reasoning in *Chevron*).

114. *Id.* at 733–34.

115. *Id.* at 733.

116. *Id.* at 734. The court here made a reference to what is known as the “cumulative effect” doctrine in Commerce Clause jurisprudence: “[W]here the class of activities is regulated and that class is within the reach of the federal [commerce] power, the courts have no power ‘to excise, as trivial, individual instances’ of the class.” *Id.* (quoting *Perez v. United States*, 402 U.S. 146, 154 (1968)).

the Corps did not have a rational basis for this determination.”<sup>117</sup> Therefore, the Third Circuit upheld the Corps’s regulation that extended its jurisdiction to wetlands adjacent to tributaries of waters of the United States against a Commerce Clause attack, and in doing so continued the tradition of liberally interpreting water and wetlands regulations.

## 2. Hoffman Homes, Inc. v. United States Environmental Protection Agency

### a. *Factual Background*

The second pioneering case after *Riverside Bayview* was *Hoffman Homes, Inc. v. EPA*, a case addressing the extent to which the Corps could “stretch” in interpreting its own regulations.<sup>118</sup> Hoffman Homes had begun to fill some of its land in the Village of Hoffman Estates, Illinois, without a section 404 permit.<sup>119</sup> The land, a bowl-shaped depression at the northeast border of the tract that covered approximately one acre and contained at least four different kinds of wetland vegetation, was not connected to any tributary or any other water of the United States.<sup>120</sup> The Corps sought enforcement of the CWA against Hoffman because of its interpretation of a regulation that defined waters of the United States; the regulation provided for jurisdiction over “[a]ll other waters such as intrastate lakes, rivers, [or] streams . . . the use, degradation or destruction of which could affect interstate or foreign commerce.”<sup>121</sup> The Corps

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117. *Id.* at 734 n.11 (discussing how previous statutes and regulations culminated in the (then) current form of the Corps’s regulations concerning wetlands). Although courts in the 1980s and 1990s continued the trend of increasing the Corps’s power to regulate wetlands, unlike *Republic Steel* and *Standard Oil*, these courts relied more on legislative history—which can be ambiguous—than on environmental policy arguments. “The legislative history also demonstrates the significance and breadth of the term ‘navigable waters.’ The Conference Report states: ‘[t]he conferees fully intend that the term ‘navigable waters’ be given the broadest possible constitutional interpretation . . . .’” *Id.* at 726–27 (quoting S. Rep. No. 92-1236, at 144 (1972) (Conf. Rep.), as reprinted in 1972 U.S.C.C.A.N. 3668). Unfortunately, this shift in argument style may have eventually led to undesirable results. See discussion *infra* Part V.

118. 999 F.2d 256 (7th Cir. 1993).

119. *Id.* at 257–58.

120. *Id.* at 258. The land lay over 750 feet away from Poplar Creek, a tributary of a water of the United States. *Id.*

121. *Id.* at 260 (quoting 33 C.F.R. § 328.3(a)(3) (1992)). See also discussion *infra* note 148 (setting out the text of the Migratory Bird Rule as addressed by the Supreme Court in *SWANCC*).

interpreted this regulation “as allowing migratory birds to be [the] connection between a wetland and interstate commerce.”<sup>122</sup>

*b. Extending Regulation to Migratory Bird Habitats*

The Seventh Circuit first noted that the regulation does not require an actual effect on interstate commerce, only a potential effect.<sup>123</sup> It then went on to state the rule that “[a]n agency’s construction of its own regulation binds a court in all but extraordinary cases” and that it must uphold the Corps’s interpretation “unless it is plainly erroneous or inconsistent with the regulation.”<sup>124</sup> With this in mind, the court held that it was reasonable to interpret the regulation as including wetlands where the only interstate commerce connection was migratory bird activity.<sup>125</sup> Therefore, as far as the Seventh Circuit was concerned, the EPA and the Corps were free to interpret their own regulations very broadly.

*3. Questioning the Rapid Expansion of Power*

*a. Arguments Against Pozsgai and Hoffman*

Although the decisions in *Pozsgai* and *Hoffman* represented the majority sentiment in the federal circuits post-*Riverside Bayview*,<sup>126</sup>

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122. *Hoffman Homes*, 999 F.2d at 261. In effect, the Corps sought to regulate any water, no matter how far disconnected to any navigable water of the United States, if birds, in the course of their yearly migration, used the water to alight.

123. *Id.* at 260. In support of the interstate commerce connection, the court pointed to the fact that “[t]hroughout North America, millions of people annually spend more than a billion dollars on hunting, trapping, and observing migratory birds. Yet, the cumulative loss of wetlands has reduced populations of many bird species and consequently the ability of people to hunt, trap, and observe those birds.” *Id.* at 261.

124. *Id.* at 260.

125. *Id.* at 261. Despite this holding, the court ruled against the EPA because it felt that the Corps had not proved that migratory birds did in fact visit the land in question. “After April showers not every temporary wet spot necessarily becomes subject to governmental control.” *Id.* at 262. This statement was particularly telling. Although the court here was willing to uphold the “Migratory Bird Rule” against an administrative challenge, the end result foreshadowed the Supreme Court’s sentiments several years later when the rule was considered before that Court. See discussion *infra* Part V.A.

126. A notable exception to the expansion of Corps’s power under section 404 was the Fourth Circuit’s decision in *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997). Following the recent Supreme Court holding in *United States v. Lopez*, 514 U.S. 549 (1995) (school-zone gun-control law not allowable under the Commerce Clause), Judge Niemeyer based the majority’s holding (2-1) on the Commerce

legal commentators presented a mixed view of the Corps's jurisdiction. They were concerned that Congress did not have the ability to regulate certain wetlands under the Commerce Clause, and they were also concerned that the Corps did not have the ability to interpret its mandate under the CWA as broadly as it had been. After a thorough discussion of the term "navigable waters" as used by Congress over the past century, two respected commentators, James K. Jackson and William A. Nitze,<sup>127</sup> concluded that:

[L]egislative and judicial history concerning the term 'navigable waters' indicate that the term 'navigable waters,' as used in [the CWA], was to include all waters covered by the expanded judicial interpretation of that term,<sup>128</sup> but no others. There is no indication in the language or history of the 1972 amendments that Congress was asserting jurisdiction over ground water or any other waters which were not in some way connected with waterborne commerce.<sup>129</sup>

The authors' proposition on this point is certainly plausible, considering the monumental change in regulation that Congress had enacted under the CWA. It is important to recognize that although Congress legislates as a whole, it is not comprised of a sole voice. Although many judicial opinions speak of congressional intent, often quoting various members of Congress in the majority whose record statements reflect the court's position, it is probable that there would also be a significant number of members of Congress who did not agree with that proposition. As the authors

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Clause, stating that the Corps did not possess the power to regulate otherwise isolated wetlands that were used as habitats for migratory birds. *Wilson*, 133 F.3d at 257.

127. James K. Jackson & William A. Nitze, *Wetlands Protection Under Section 404 of the Clean Water Act—The Riverside Bayview Decision, Its Past and Future*, 7 PUB. LAND L. REV. 21, 26–34 (1986).

128. This language refers to a statement by representative Dingell while the CWA was in the congressional conference committee:

[I]t is enough that the waterway serves as a link in the chain of commerce among the states as it flows in the various channels of transportation. . . . Thus, this new definition clearly encompasses all water bodies, including mainstreams and their tributaries, for water quality purposes. No longer are the old, narrow definitions of navigability . . . going to govern matters covered by this bill.

*Id.* at 33.

129. *Id.* Attempting to divine the elusive concept, they comment: "Clearly, a wholesale expansion of federal control over other waters was not then intended by Congress." *Id.* at 34.

point out, the definition of “navigable waters” after 1972 surely was meant to include more than the holding in decades-old opinions such as *The Daniel Ball*,<sup>130</sup> but they do call into question the holdings in *Pozsgai* and *Hoffman*.<sup>131</sup>

The authors also address the statement in *Riverside Bayview* concerning the acquiescence of Congress to the 1977 Corps’s interpretation of its mandate under section 404. They argue that the legislative history of the 1977 amendment, although not concerning section 404, indicates that Congress tacitly accepted the Corps’s expanded interpretation of its mandate in 1975 following the *Callaway* decision, but not necessarily the further expansion in 1977, upon which the Court in *Riverside Bayview* rested its decision.<sup>132</sup> As discussed earlier, both the 1975 and the 1977 versions of the Corps’s regulations include wetlands regulation, the difference being how wetlands are defined. Recognizing this, Jackson and Nitze do not argue that the *Riverside Bayview* Court was wrong per se—they simply argue that it was wrong for the Court to “cryptically [conclude] that [the 1977 regulation] could serve as a regulatory springboard for further expansions in regulatory authority over adjacent wetlands [such as in *Pozsgai* and *Hoffman*].”<sup>133</sup>

*b. Arguments in Support of Pozsgai and Hoffman*

The Jackson and Nitze article is a wonderful illustration of the position of those in the judiciary who would seek to limit the Corps’s jurisdiction at something less than the full power of the Commerce Clause; it is also an illustrative contrast to the position asserted in this Article. The principal difference is the focus on

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130. See *supra* Part III.A.

131. See Jackson & Nitze, *supra* note 127, at 36–38. Arguing that the 1977 regulations are not supported by Congress also impliedly argues that *Pozsgai* and *Hoffman* were wrongly decided.

132. See *id.* at 34–38 (discussing various congressional proposals in 1977 that would have contracted or expanded the Corps’s jurisdiction, resulting in a compromise scheme that the authors contend accepted the 1975 post-*Callaway* interpretation, although not specifically so stating). They remarked that

[t]he [*Riverside Bayview* Court] reviewed much of this legislative history . . . when it recognized that “Congress in 1977 acquiesced in the Corps’s definition of waters as including adjacent wetlands. . . .” In doing so, the Supreme Court appears to have misapplied the 1977 legislative history. A better reading of this history is that Congress intended to ratify the Corps’s 1975 regulations and not the 1977 regulations.

*Id.* at 37–38.

133. *Id.* at 38.

congressional intent; both *Riverside Bayview* and Jackson and Nitze are interpreting the same legislative history, and both come to plausible, though opposite conclusions. As discussed, legislative history can often be molded to fit a wide variety of contrary conclusions. But as this Article has endeavored to show, in the area of environmental regulation, judicial decisions have always followed a broad statutory interpretation; in fact, congressional intent has often been abandoned in favor of environmental protection.<sup>134</sup> Therefore, a focus on congressional intent can lead to an arguably erroneous conclusion. The analyses of all of the waters/wetlands cases up to this point have involved public policy arguments; therefore, proper case analysis involves an application of this liberal precedent to the facts at hand. With this in mind, the most logical conclusion is that *Pozsgai* and *Hoffman* were correctly decided because of the damage that could result if the federal government did not have the ability to regulate such wetlands, and because they represent a continuation in the long-standing trend or precedent of liberal environmental jurisprudence.

Most courts post-*Riverside Bayview* agreed with this position. There were also calls for even further expansion of federal jurisdiction over wetlands.<sup>135</sup> An article by Dennis J. Priolo argued that after the 1977 amendments, the Corps possessed the power to regulate isolated wetlands that exhibit site-specific impacts (i.e., no hydrologic connection) on interstate commerce.<sup>136</sup> The *Hoffman* line of cases,<sup>137</sup> at least with respect to migratory birds, did seem to lend credence to this argument. Furthermore, Priolo argued that the “cumulative effect” doctrine<sup>138</sup> as applied in *Pozsgai* gave the Corps power to regulate all isolated wetlands, regardless of whether

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134. That is not to say that congressional intent arguments should be completely abandoned; rather, they should be made in light of the purpose and history of waters/wetlands legislation and jurisprudence.

135. See generally Dennis J. Priolo, *Section 404 of the Clean Water Act: The Case for Expansion of Federal Jurisdiction over Isolated Wetlands*, 30 LAND & WATER L. REV. 91 (1995).

136. See *id.* at 96–100. The author uses *Leslie Salt Co. v. United States*, 896 F.2d 354 (9th Cir. 1990), in addition to *Hoffman*, to support this proposition. *Leslie Salt* was also a case involving migratory birds. “The Commerce Clause power, and thus the Clean Water Act, is broad enough to extent the Corps’s jurisdiction to local water which may provide habitat to migratory birds and endangered species.” *Leslie Salt*, 896 F.2d at 360.

137. E.g., *Leslie Salt*, 896 F.2d at 354; *United States v. Suarez*, 846 F. Supp. 892 (D. Guam 1994); *Golden Gate Audubon Soc’y, Inc. v. U.S. Army Corps of Eng’rs*, 796 F. Supp. 1306 (N.D. Cal. 1992).

138. See *supra* note 116.

their impact was only site-specific.<sup>139</sup> Priolo's argument,<sup>140</sup> in line with the thesis of this Article, is supported by judicial precedent that has always interpreted water pollution legislation more broadly than a straightforward reading of the statute might allow. The RHA was extended by judicial interpretation to forbid many activities that had nothing to do with refuse nor anything to do with traditional maritime navigation, and these decisions serve as a foundation for an argument to extend the reaches of the Corps's jurisdiction under the CWA to isolated wetlands.

#### V. THE SUDDEN HALT IN JUDICIAL PIONEERING

Tracing the decisions back through history, cases such as *Standard Oil* and *Republic Steel* demonstrate a judicial effort to expand the power of the RHA through a robust interpretation of the act. Following these decisions, in an effort to catch up with the times, Congress passed the CWA. History then seemed to repeat itself, whereas this time the judiciary used the CWA as a basis for its decisions, rather than the thoroughly outdated RHA, to increase federal protection over water pollution, herein related to wetlands. It would seem that *Riverside Bayview*, *Pozsgai*, and *Hoffman* were all steps along the way in an ever increasing role of the federal government in protecting our waters and wetlands. So if the maxim that history repeats itself were to be followed again, one might assume that the next major development in the area of wetland regulation would either have been 1) a Supreme Court decision upholding either "site specific" or (more aggressively) "cumulative effect"<sup>141</sup> regulation of isolated or semi-isolated

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139. See Priolo, *supra* note 135, at 100–08. In addition to *Pozsgai*, the author argues that *Wickard v. Filburn*, 317 U.S. 111 (1942) (wheat quotas, although applied to specific farmers, in the aggregate have substantial interstate affect on the demand for wheat) and *Perez v. United States*, 402 U.S. 146 (1971) (loansharking as a class of activities, although in this case purely intrastate, is within the federal Commerce Clause power) support his proposition that any wetland can legally be regulated by the Corps. *Id.* at 100–03. But there is no discussion of the cases under the RHA that would more strongly support this position. See *supra* Part III.

140. In its end, not its means. As discussed previously, this shift in argument from policy to congressional intent or constitutional arguments may have led to the judiciary's change in course in recent years. Using environmental policy arguments based on history and precedent provides a stronger argument in support of broadly interpreting statutes and regulations, with sufficient deference to the Corps's determinations as experts in the field.

141. In addition to migratory birds, various theories might have been used as a legal basis for upholding a "cumulative effect" ruling on isolated wetlands: for

wetlands under the Commerce Clause, or 2) comprehensive congressional legislation amending the CWA to catch-up with the current state of judicial precedent and interpretation. Although Congress at times did pass, or attempted to pass, various legislation aimed at amending the CWA, none of it was very significant, at least with respect to the way that the CWA made obsolete the RHA.<sup>142</sup> Thus, it seemed that Congress was not yet prepared to act, and the role of expanding wetland jurisdiction would again fall to the Supreme Court, at least in the short term. In 2001, the Court was presented with an excellent opportunity to do just that; instead, Chief Justice Rehnquist, writing for a 5-4 majority, broke ranks with over 100 years of legal precedent in a decision that left many wetlands practitioners scratching their heads.

A. Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers

1. *Factual Background*

The case of *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*<sup>143</sup> (SWANCC) arose out of northern Illinois in the late 1990s. SWANCC was a municipal corporation that owned 533 acres of a former gravel-mining pit, which it intended to convert into a repository for non-hazardous waste that could not be otherwise disposed of or recycled.<sup>144</sup> To convert the land into its intended purpose, SWANCC had to fill in a large section of it.<sup>145</sup> Because approximately 17.6 acres of the parcel contained large surface depressions that held rainwater and other precipitation, SWANCC initially asked the Corps to determine whether its property contained any apparent wetlands.<sup>146</sup> Although

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example, effects on the water table (the underground water level that mixes and migrates after rainfall) that may affect regional water quality. Using arguments based on concrete, hydrological physics, rather than the particular fancy of a species of birds, adds credibility to the Commerce Clause argument in support of broad Corps jurisdiction, continuing the liberal trend, and it makes more difficult for critics to attack the argument as tangential.

142. See GROSS & DODGE, *supra* note 22, at 11–14 (discussing various reform legislation in the 1980s and 1990s).

143. 531 U.S. 159 (2001).

144. *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs* (SWANCC), 998 F. Supp. 946, 948 (N.D. Ill. 1998).

145. *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs* (SWANCC), 191 F.3d 845, 847 (7th Cir. 1999).

146. SWANCC, 998 F. Supp. at 948.

the Corps initially determined it did not have jurisdiction, an inquiry from the Illinois Nature Preserves Commission<sup>147</sup> led the Corps to reevaluate the site and require SWANCC to apply for a section 404 permit.<sup>148</sup> Specifically, it was inquired whether the SWANCC property might be subject to federal jurisdiction because four different species of migratory birds had been observed there in the past. The Corps eventually denied SWANCC's two permit applications,<sup>149</sup> and litigation ensued.<sup>150</sup>

## 2. *Opinion per Chief Justice Rehnquist*

Because the two lower court opinions<sup>151</sup> used almost identical

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147. For further information on this agency, see Illinois Nature Preserves Commission Homepage, <http://dnr.state.il.us/INPC/index.htm> (last visited Jan. 31, 2007).

148. *SWANCC*, 998 F. Supp. at 948–49. The migratory bird presence is in reference to 33 C.F.R. section 328.3(a)(3)(i) (1987):

All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters [that] are or could be used by interstate or foreign travelers for recreational or other purposes . . . .

The Corps interpreted this section as “including the following waters: [those w]hich are or would be used as habitat by birds protected by Migratory Bird Treaties . . . or would be used as habitat by other migratory birds which cross state lines . . . .” 51 Fed. Reg. 41217 (Nov. 13, 1986).

149. The Supreme Court's opinion in *SWANCC* elaborates on this denial:

Despite SWANCC's securing the required water quality certification from the Illinois Environmental Protection Agency, the Corps refused to issue a [section] 404(a) permit. The Corps found that SWANCC had not established that its proposal was the least environmentally damaging, most predictable alternative for disposal of nonhazardous solid waste; that SWANCC's failure to set aside sufficient funds to remediate leaks posed an unacceptable risk to the public's drinking water supply; and that the impact of the project upon area-sensitive species was unmitigatable since a landfill surface cannot be redeveloped into a forested habitat.

*Solid Waste Agency of N. Cook County v. U. S. Army Corps of Eng'rs*, 531 U.S. 159, 165 (2001).

150. *SWANCC*, 998 F. Supp. at 949. The Corps, after conducting an on-site survey, found several species of avian and waterfowl and various species of flora and avifauna. *Id.* at 953. The district court opinion contained the most objective and factual description of the land in question; but on appeal, the Seventh Circuit described the land as “an attractive woodland vegetated by approximately 170 different species of plants,” *SWANCC*, 191 F.3d at 848, while the Supreme Court's majority opinion described the land as “an abandoned sand and gravel pit,” *SWANCC*, 531 U.S. at 162. From these descriptions alone, one need not strain oneself much to figure out for which party each appellate court ruled.

151. See *SWANCC*, 191 F.3d at 845; *SWANCC*, 998 F. Supp. at 946.

reasoning to reach the same conclusion—that the Corps had jurisdiction over SWANCC land pursuant to the Migratory Bird Rule—and because only a 2-1 majority of a Fourth Circuit panel felt otherwise,<sup>152</sup> it seemed reasonable to assume, when the Supreme Court granted certiorari in 2000, that the vast majority of circuit precedent would be upheld. Such was not the case.

Chief Justice Rehnquist began the Court's opinion by recognizing that in *Riverside Bayview*, the Court had noted that the term “navigable waters” was of limited import and that Congress had intended, in passing the CWA, to regulate some waters that would not be held navigable in *The Daniel Ball* sense of the term.<sup>153</sup> But the Court observed that

[i]t was the significant nexus between the wetlands and “navigable waters” that informed our reading of the CWA in [*Riverside Bayview*] . . . . In order to rule for the respondents here, we would have to hold that the jurisdiction of the Corps extends to ponds that are *not* adjacent to open water.<sup>154</sup>

Second, the Court addressed the congressional “acquiescence” to the 1977 regulations by remarking that recognizing such acquiescence should be done with extreme care, and that “failed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute.”<sup>155</sup> The Court made clear that congressional intent is not something to be merely assumed, stating that “[t]he relationship between the actions and inactions of the 95th Congress and the intent of the 92d Congress

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152. See *supra* note 126.

153. *SWANCC*, 531 U.S. at 167. This statement was based on the “unequivocal” congressional acquiescence to the Corps's regulations “interpreting the CWA to cover wetlands *adjacent to navigable waters*.” *Id.* (emphasis supplied). Notice that the Court is careful to point out what it had held that Congress acquiesced to—only wetlands adjacent to navigable waters. This is a far cry from what the various circuits had been saying in the previous decade, that the congressional intent was to extend the jurisdiction of the Corps to the *full extent of the Commerce Clause power*. Cf. argument made by Jackson & Nitze, *supra* Part IV.C.3.a.

154. 531 U.S. at 167–68. The Court's language here makes it seem like this statement is shocking or unusual. Whereas in reality, courts had been upholding such regulation for almost ten years.

155. *Id.* at 169–70. In a curious and confusing passage of dicta, Chief Justice Rehnquist commented that the Corps had put forward no persuasive evidence that the *original 1972 interpretation* was out of line the congressional intent, despite the *Callaway* decision and the Court's own holding in *Riverside Bayview*. As to the import of 1972 Conference Report statement that the conferees “intend that the term ‘navigable waters’ be given the broadest possible constitutional interpretation,” the Chief Justice tersely rebutted its significance. *Id.* at 168, n.3.

in passing [section] 404(a) is . . . considerably attenuated.”<sup>156</sup> The Court thus concluded that the Corps had failed to make the necessary showing that Congress had acquiesced to the Migratory Bird Rule, a rule that had been promulgated almost a decade earlier with no adverse congressional reaction of which to speak.<sup>157</sup>

Lastly, the Court held that this was not a case where *Chevron* deference would be appropriate, as it was in *Riverside Bayview*.<sup>158</sup> Chief Justice Rehnquist noted that a clear indication from Congress would be required in order to uphold an administrative interpretation of a statute that invokes the outer limits of constitutional power.<sup>159</sup> The Court concluded its opinion by ruling that the Migratory Bird Rule exceeds congressional authority granted to the Corps, reversing the Seventh Circuit, and effectively overruling the *Hoffman* line of cases.<sup>160</sup>

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156. *Id.* at 170. “[S]ubsequent history is less illuminating than the contemporaneous evidence . . . . [R]espondents face a difficult task in overcoming the plain text and import of [Section] 404(a).” *Id.* The Court here is correctly giving little weight to legislative history, but incorrectly focuses on lexicography. It should have looked to the history and precedent under the RHA, and should have relied more heavily on the post-CWA trend started by *Riverside Bayview*.

157. *Id.*

158. *Id.* at 172.

159. *Id.* This concept is rooted in the long standing Supreme Court canon of statutory construction that the Court should not “needlessly reach constitutional issues . . . where [an] administrative interpretation alters the federal-state framework by permitting federal encroachment upon traditional state power.” *Id.* at 172–73.

160. *Id.* at 174. This holding was by no means unanimous. Justice Stevens, writing for a four-Justice minority, fervently denounced the Court’s majority opinion as contrary to the current state of the law. *See id.* at 174–97 (Stevens, J., dissenting). The minority essentially echoed the sentiments of the district court and the Seventh Circuit, discussed above, adding a comprehensive discussion of CWA legislative history to support the proposition that the “‘major purpose’ of the CWA was ‘to establish a *comprehensive* long-range policy for the elimination of water pollution’” and that the goals of the CWA “have nothing to do with *navigation* at all.” *Id.* at 179, 181 (Stevens, J., dissenting).

Although the majority did not reach the Commerce Clause question, the dissent would have upheld the rule under the broader cumulative effect doctrine, thereby extending the holding in *Pozsgai*. *See id.* at 192–97 (Stevens, J., dissenting). *See also* discussion of *Pozsgai*, *supra* Part IV.C.1. Justice Stevens’s opinion did an excellent job looking past semantics and ambiguous congressional intent, focusing on the purposes and policies that have driven forward all waters/wetlands legislation and judicial decisions in the past. He echoed these same opinions, though in a slightly different context, in his dissenting opinion in *Rapanos*. *See infra* Part V.C.3.c.

### 3. *Analysis*

Even though the majority opinion in *SWANCC* makes it very clear that the Migratory Bird Rule is not a permissible interpretation of the CWA, it does very little else to shed light on what *are* the limits of the Corps's jurisdiction. In the past, many Supreme Court decisions have set forth a test or guidelines of some sort that would allow courts in the future to make appropriate rulings in that particular area of law. *SWANCC* does not even attempt to do this. The lack of guidance in *SWANCC* may be due to the fact that wetlands law originates primarily from the CWA and a common-law test might therefore be inappropriate. Support for this argument is found in various parts of the opinion, which almost seemed to beg Congress for an answer or clarification on what its true intent was in 1972, and more importantly in 1977. But this approach is markedly different from past rulings. As this Article has attempted to show, the Supreme Court, and the federal court system in general, have largely taken the initiative by pushing Congress to act on more comprehensive environmental legislation through their broad interpretations of both RHA and CWA.

For whatever reason, the *SWANCC* Court was uncomfortable with this precedent of over 100 years, and decided to take the opposite approach—giving the CWA a “miserly construction”<sup>161</sup> in a possible attempt to urge Congress to act. Such a narrow construction might force Congress to state that it did in fact intend for the CWA to reach the full extent of the Commerce Clause, or whatever variation short thereof that it desired, by enacting new legislation.

So, after 100 years of activism, did the Court truly wish to make further rulings in a minimalistic fashion, or was the Court simply expressing a “one-time” dissatisfaction with a rule that it found particularly offensive? Or, perhaps, the Migratory Bird Rule pushed federal wetlands regulation too far, too fast? After all, the RHA had been around for almost seventy years when the rulings in *Standard Oil* and *Republic Steel* were handed down, whereas the Migratory Bird Rule appeared after barely fifteen years of the CWA's existence. Yet another potential motivator might have been that the problem of environmental pollution is no longer as dire as it was in the 1960s (many would argue with this point, but it must be conceded that, for example, the Cuyahoga River no longer

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161. *SWANCC*, 531 U.S. at 192 (Stevens, J., dissenting).

possesses the same flammable qualities that it did in 1969).<sup>162</sup>

*B. The Aftermath of SWANCC*

Soon after the *SWANCC* decision was published, these same questions began to plague the federal courts. The issue in *Pozsgai*—whether wetlands adjacent to tributaries of navigable water were within the Corps’s jurisdiction—suddenly became litigable once again. As these new tributary cases began to pop up across the country, the circuits were given an opportunity to add their own gloss to *SWANCC*; that is, whether they felt that decision truly represented a shift away from judicial activism in wetlands regulation.

*Headwaters, Inc. v. Talent Irrigation District* is a typical post-*SWANCC* tributary case that represents the majority sentiment among the circuits.<sup>163</sup> The case involved a question of jurisdiction over lands parallel and adjacent to irrigation canals, which eventually connected to traditionally navigable waters.<sup>164</sup> The court read the opinion in *SWANCC* as limited to “intrastate waters with no connection to any navigable waters, but which were or would be used as habitat by migratory birds,” contrasting the irrigation canals by describing them as “not ‘isolated waters’ such as those that the [Supreme Court] concluded were outside the jurisdiction of the Clean Water Act.”<sup>165</sup> The Fifth Circuit, in contrast, appears to be the only circuit that took the opposite approach. *In re Needham* was an oil spill case where the tributary in question was a drainage ditch in southern Louisiana that eventually emptied into the Gulf of Mexico.<sup>166</sup> In concluding that these waters were not subject to federal regulation as navigable waters, the court expressed a sentiment similar to Chief Justice Rehnquist’s opinion in *SWANCC*: “[T]he regulatory definition, if applied in this fashion, would push the [jurisdictional bounds] to the outer limits of the Commerce Clause and raise serious constitutional questions.”<sup>167</sup> Thus, the circuit courts of appeal were unable to reach a post-*SWANCC* consensus on the question of whether tributaries of navigable

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162. See *supra* note 24 and accompanying text.

163. 243 F.3d 526 (9th Cir. 2001).

164. *Id.* at 533.

165. *Id.*

166. 354 F.3d 340, 343 (5th Cir. 2003).

167. *Id.* at 345 n.8. As in *SWANCC*, the Fifth Circuit here declined to extend *Chevron* deference to the regulation. *Id.*

waters were also themselves navigable waters, hence subjecting any adjacent wetlands to CWA regulation.<sup>168</sup>

Despite all of the possible implications of *SWANCC* and its effects on the Corps's jurisdiction, the Corps itself did not seem to think much of the decision. In fact, the Corps read *SWANCC* very narrowly, and reaffirmed its commitment to its "no net loss of wetlands" policy.<sup>169</sup> The Corps also announced new regulations for its field staff to follow when assessing CWA issues, the only changes being that they could no longer use the Migratory Bird Rule, and that they should seek permission from headquarters before pursuing action against other non-navigable intrastate waters.<sup>170</sup> Based on these facts it does not seem that the Corps felt that section 328.3(a) was affected at all; the Corps merely treated its Migratory Bird Rule interpretation of that section as void and did

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168. Judge Snyder in *United States v. Adam Bros. Farming, Inc.*, 369 F. Supp. 2d 1180, 1183-84 (C.D. Cal. 2004), notes a significant circuit split in decisions applying *SWANCC*. Although no true consensus was reached, most cases seemed to correctly interpret past waters/wetlands precedent and decided to construe *SWANCC* narrowly. *E.g.*, *United States v. Johnson*, 437 F.3d 157 (1st Cir. 2006) (construing *SWANCC* narrowly; cranberry bogs adjacent to tributaries were subject to the Corps's jurisdiction); *Baccarat Fremont Developers, LLC v. U.S. Army Corps of Eng'rs*, 425 F.3d 1150 (9th Cir. 2005) (construing *SWANCC* narrowly; Corps's jurisdiction did not depend on existence of actual hydrological or ecological connection); *United States v. Rueth Dev. Co.*, 335 F.3d 598 (7th Cir. 2003) (construing *SWANCC* narrowly; consent decree concerning wetlands adjacent to tributaries not affected). It is important to note that, had *SWANCC* set forth some sort of jurisdictional test, much of this litigation would likely not have been necessary.

169. *See* Press Release, Environmental Protection Agency, Administration to Reaffirm Commitment to No Net Loss of Wetlands and Address Approach for Protecting Isolated Waters in Light of Supreme Court Ruling on Jurisdictional Issues (Jan. 10, 2003), available at <http://www.epa.gov/newsroom/newsreleases.htm> (follow "By Date: 2003" hyperlink; then follow "Earlier Releases" hyperlink repeatedly until reaching "01/10/2003"; then follow hyperlink to the release) (announcing actions that "reaffirm federal authority over the vast majority of America's wetlands").

170. The Corps gave the following instructions to its field staff:

Field staff should continue to assert jurisdiction over traditional navigable waters (and adjacent wetlands) and, generally speaking, their tributary systems (and adjacent wetlands). In light of *SWANCC*, field staff should not assert CWA jurisdiction over isolated waters that are both intrastate and non-navigable, where the sole basis available for asserting CWA jurisdiction rests on any of the factors listed in the "Migratory Bird Rule." In light of *SWANCC*, field staff should seek formal project-specific HQ approval prior to asserting jurisdiction over isolated non-navigable intrastate waters based on other types of interstate commerce links listed in current regulatory definitions of "waters of the U.S."

*Id.*

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not make any formal amendment to its regulations.<sup>171</sup>

The Corps's reaction to the *SWANCC* decision is understandable in light of the fact that it had always, up until 2001, largely enjoyed the support and backing of the judiciary to make its own decisions and interpretations. The Corps likely felt that *SWANCC* was something of an anomaly, and that further judgments would vindicate its right to assert broad jurisdiction over wetlands. After all, the Corps had been directly in charge of water/wetlands since the RHA was first passed, and it therefore had a better perspective than any other branch of government to see that the judiciary had always been pioneering and held more regard for environmental concerns than for congressional intent. It is likely that the Corps was unsure how to proceed after the *SWANCC* opinion and felt that it was best to "wait and see" what the courts would do next. In fact, most of the reported decisions after *SWANCC* appear to be (arguably) correctly decided. Most decisions followed the spirit of the previous hundred years of precedent and either distinguished *SWANCC* or limited it to its facts. Decisions like *Needham* appear to be limited to the Fifth Circuit. Although these circuit decisions post-*SWANCC* did provide some degree of guidance, the Corps did not have to wait long for the Supreme Court to again weigh in on the issue.

### C. Rapanos v. United States

#### 1. Factual Background

*Rapanos v. United States*<sup>172</sup> came before the Supreme Court as a consolidation of two separate Sixth Circuit cases with nearly identical facts: *Rapanos v. United States*<sup>173</sup> and *Carabell v. United States Army Corps of Engineers*.<sup>174</sup>

#### a. Rapanos

In the first case, Rapanos was a land developer in Bay,

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171. The Corps only paid lip service to the Supreme Court's decision, stating that "[w]e are committed to protecting America's wetlands and watersheds to the full extent under the Clean Water Act and the recent Supreme Court ruling. We are also committed to full public involvement in this process, and we will seek additional information and scientific data for possible rulemaking." *Id.* But this rulemaking never occurred.

172. 126 S. Ct. 2208 (2006).

173. 376 F.3d 629 (6th Cir. 2004).

174. 391 F.3d 704 (6th Cir. 2004).

Midland, and Saginaw Counties in Michigan.<sup>175</sup> In the late 1980s and early 1990s, he began to fill in parts of his lands in preparation for construction, despite the advice of the state and an independent consultant, who had noted the presence of a significant number of acres of wetlands on the properties.<sup>176</sup> After the Corps discovered that Rapanos had been filling wetlands in violation of the CWA, and after Rapanos ignored various orders from the Corps to cease and desist, over a decade of criminal and civil litigation ensued.<sup>177</sup>

*b. Carabell*

In the second case, the Carabells were land developers who owned approximately twenty acres in Chesterfield Township, Macomb County, Michigan, near Lake Saint Clair,<sup>178</sup> which they sought to fill and develop into a condominium complex.<sup>179</sup> In 2000, the Carabells applied to the Corps for, and were denied, a section 404 permit to add over 50,000 cubic yards of fill material to their land.<sup>180</sup> The Corps reasoned that “the operation and use of the proposed activity would have major, long term, negative impacts on water quality, on terrestrial wildlife, on the wetlands, on conservation, and on the overall ecology of the area.”<sup>181</sup> The Carabells eventually brought suit arguing that “the Corps lacked regulatory jurisdiction over the property because [it was] isolated from all outside waters.”<sup>182</sup> Geographically speaking, the *Rapanos* and *Carabell* wetlands were all adjacent to tributaries of traditional navigable waters; hence, they were not directly adjacent to traditionally navigable waters, as in *Riverside Bayview*, but they also were not so isolated as to have no direct hydrological connection at all to navigable waters as in *SWANCC*.<sup>183</sup> As discussed above, it was

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175. *Rapanos*, 376 F.3d at 632–33.

176. *Id.*

177. *Id.* at 633–34.

178. *Carabell*, 391 F.3d at 705. Recall that the wetlands in question in *Riverside Bayview* were located a similar distance from Lake St. Clair. The difference in disposition is due to the fact that *Riverside Bayview*, unlike *Carabell*, involved a portion of wetlands that directly abutted a navigable-in-fact creek. *Rapanos*, 126 S. Ct. at 2240 (Kennedy, J., concurring in the judgment).

179. *Carabell*, 391 F.3d at 705.

180. *Id.* at 706.

181. *Id.*

182. *Id.* at 707.

183. In *Rapanos*, the Sixth Circuit Court of Appeals described the land as follows:

these types of wetlands that had caused the post-SWANCC rift between the Fifth Circuit and the rest of the courts of appeals.

2. *On Appeal at the Sixth Circuit*

On appeal, the Sixth Circuit upheld the right of the Corps to exercise jurisdiction in each case, distinguishing *SWANCC* on its facts. The *Carabell* court concluded on the authority of section 328.3(a) that, as a factual matter, the wetlands in question were adjacent to waters of the United States.<sup>184</sup> The *Rapanos* court reached a similar conclusion and recognized that in light of *Riverside Bayview* and *SWANCC*, what constitutes an adjacent wetland is still debatable.<sup>185</sup> Although both courts recognized that the holding in *SWANCC* had removed from federal jurisdiction some isolated wetlands, they chose to follow the majority of courts in reading *SWANCC* narrowly—as excising only the Migratory Bird Rule.<sup>186</sup> Furthermore, both courts found that *SWANCC* did not alter *Riverside Bayview*, and that the *Riverside Bayview* nexus extended not only to wetlands directly adjacent to navigable waters, but also to wetlands adjacent to tributaries of navigable waters.<sup>187</sup> The *Rapanos* court also commented that Congress clearly envisioned that CWA jurisdiction would extend to wetlands with a

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[T]he Salzburg wetlands have a surface water connection to tributaries of the Kawkawlin River, which in turn, flows into the Saginaw River and ultimately into Lake Huron. . . . [T]he Hines Road site [has] a surface water connection to the Rose Drain which, in turn, has a surface water connection to the Tittabawassee River. . . . [T]he Pine River site [has] a surface water connection to the Pine River, which flows into Lake Huron. 376 F.3d at 642–43. In *Carabell*, the Sixth Circuit described the land by noting: [There is a] berm edging the Carabells' property [that] serves to block immediate drainage of surface water out of the parcel into [a] ditch. . . . At the northeastern corner of the property, the ditch connects to the Sutherland-Oemig Drain, which empties into the Auvase Creek, which empties into Lake St. Clair, which is part of the Great Lakes drainage system. 391 F.3d at 705.

184. *Carabell*, 391 F.3d at 708–09.

185. *Rapanos*, 376 F.3d at 635, 642.

186. See *Carabell*, 391 F.3d at 709 (declining to follow the *Needham* minority, which gave *SWANCC* a broader reading); *Rapanos*, 376 F.3d at 638–39 (citing various circuit precedent post-*SWANCC* giving that decision a narrow reading).

187. See *Carabell*, 391 F.3d at 709–10 (noting congressional acquiescence to regulation of adjacent wetlands); *Rapanos*, 376 F.3d at 639–40, 642 (affirming the need for a hydrological connection, while refuting the “direct abutment” requirement).

hydrological connection to navigable waters.<sup>188</sup>

3. *At the Supreme Court*

Although a majority of five Justices voted to vacate the opinions of the Sixth Circuit and remand the matters back to the district court for further findings, the United States Supreme Court was unable to agree on a definite standard or test for how to reevaluate the two cases, or future cases that involve wetlands adjacent to tributaries of traditionally navigable waters. Four Justices would have limited the CWA to relatively permanent bodies of water or wetlands whose surface area is wholly contiguous with traditional waters of the United States,<sup>189</sup> one Justice would have used the “significant nexus” test—introduced by the *SWANCC* court to describe the holding in *Riverside Bayview*—to analyze wetlands on a case-by-case basis,<sup>190</sup> and the other four Justices would have upheld the right of the Corps to determine and follow their own reasonable regulations, so long as they did not reach truly isolated waters as in *SWANCC*.<sup>191</sup>

a. *Justice Scalia’s Opinion*

i. *Rejecting the Corps’s Regulations*

The plurality opinion began by criticizing the Corps for not changing their regulations after *SWANCC*, and further chastising the federal judiciary for the wholesale acceptance of the Corps’s broad interpretations of their jurisdiction.<sup>192</sup> Second, it entered

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188. *Rapanos*, 376 F.3d at 640. This court also cited *Chevron* deference as an alternate ground for upholding the Corps’s jurisdiction. *Id.* at 640–41.

189. *See Rapanos v. United States*, 126 S. Ct. 2208, 2214–35 (2006) (Scalia, J., plurality opinion, with whom Chief Justice Roberts and Justices Thomas and Alito joined).

190. *See id.* at 2236–52 (Kennedy, J., concurring). *See also supra* note 154 and accompanying quotation from *SWANCC*.

191. *See id.* at 2252–65 (Stevens, J., dissenting, with whom Justices Breyer, Ginsburg, and Souter joined).

192. *See id.* at 2217–19 (plurality opinion). Although *SWANCC* provided almost no guidance, and it did not set forth any sort of rule to be followed, Justice Scalia nonetheless remarked:

Following our decision in *SWANCC*, the Corps did not significantly revise its theory of federal jurisdiction under [section 404 of the CWA]. The Corps provided notice of a proposed rulemaking in light of *SWANCC*, but ultimately did not amend its published regulations. . . . Even after *SWANCC*, the lower courts have continued to uphold the Corps’s sweeping assertions of jurisdiction over ephemeral channels and drains

into an extended discussion of what constitutes waters of the United States, first recognizing the holding in *Riverside Bayview* that the meaning of navigable waters is broader than the traditional understanding, although not devoid of significance.<sup>193</sup> Justice Scalia argued that the Corps's expansive interpretation of navigable waters cannot be upheld because: (1) the dictionary definition of waters does not support the conclusion,<sup>194</sup> (2) the plain language of the statute does not support the conclusion,<sup>195</sup> (3) the term navigable waters carries some of its original significance,<sup>196</sup> (4) the CWA uses an alternate term, "point source," to include the geographical features that the Corps would erroneously include within navigable waters,<sup>197</sup> (5) the limited definition of waters of the

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as tributaries. . . . These judicial constructions of "tributaries" are not outliers. Rather, they reflect the breadth of the Corps's determinations in the field.

*Id.* at 2217–18 (citation omitted). Justice Scalia particularly focused on the fact that "adjacency" had taken on an over-extended meaning. *See id.* at 2218–19 (citing and criticizing much of the post-SWANCC precedent).

193. *Id.* at 2220.

194. Although Justice Scalia was able to use the dictionary for an argument in his favor (reproduced in part in this note), Justice Kennedy used the same dictionary to support his opinion. *See id.* at 2242–43 (Kennedy, J., concurring).

The Corps's expansive approach might be arguable if the CWA defined "navigable waters" as "water of the United States." But "the waters of the United States" is something else. The use of the definite article ("the") and the plural number ("waters") show plainly that [the CWA definition] does not refer to water in general. In this form, "the waters" refers more narrowly to water "[a]s found in streams and bodies forming geographical features such as oceans, rivers, [and] lakes," or "the flowing or moving masses, as of waves or floods, making up such streams or bodies."

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

195. "[T]he Corps has stretched the term 'waters of the United States' beyond parody. The plain language of the statute simply does not authorize this 'Land is Waters' approach to federal jurisdiction." *Id.* at 2222. This statement seems contrary to the Court's opinion in *Standard Oil* and *Republic Steel*. *See supra* Part III.C.

196. *See Rapanos*, 126 S. Ct. at 2222 (comparing the meaning as used in the *Daniel Ball*, *Riverside Bayview*, and *SWANCC*).

197. This is the first time any court had suggested that wetlands regulation was a wholly separate subject from waters regulation in general; most courts have read these sections *in pari materia* without hesitation, as there is nothing (besides this opinion) to suggest that they were meant to be separate regulatory spheres. In fact, many of the same statutory definitions apply to both sections. Nonetheless, the plurality argued that:

Most significant of all, the CWA itself categorizes the channels and conduits that typically carry intermittent flows of water separately from "navigable waters," by including them in the definition of "point

United States is consistent with federalism and states' rights,<sup>198</sup> and (6) the Supreme Court canons of construction require a "clear and manifest" statement from Congress to authorize an unprecedented intrusion into traditional state authority" or "an agency theory of jurisdiction that presses the envelope of constitutional validity."<sup>199</sup> Rather, Justice Scalia argued that the proper interpretation of "waters of the United States" is "only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as streams[,] . . . oceans, rivers, and lakes."<sup>200</sup>

*ii. Issues of Adjacency*

The plurality then discussed its discontent with the growing body of federal precedent that wetlands may be considered adjacent to navigable waters because of a remote hydrologic connection.<sup>201</sup> They argued that *Riverside Bayview* only recognized wetlands as waters to a limited extent, allowing agency deference in

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source." . . . The definitions thus conceive of "point sources" and "navigable waters" as separate and distinct categories. . . . The separate classification of "ditch[es], channel[s], and conduit[s]"—which are terms ordinarily used to describe the watercourses through which *intermittent* waters typically flow—shows that these are, by and large, *not* "waters of the United States."

*Id.* at 2222–23.

198. Ignoring the pre-CWA history that the states were simply unable or unwilling to regulate water pollution under the 1948 FWPCA, the plurality commented that:

[T]he foregoing definition of "waters" is consistent with the CWA's stated "policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources . . . ." [Clean Water Act § 101(b), 33 U.S.C. § 1251(b) (2000)]. But the expansive theory advanced by the Corps, rather than "preserv[ing] the primary rights and responsibilities of the States," would have brought virtually all "plan[ning of] the development and use . . . of land and water resources" by the States under federal control. It is therefore an unlikely reading of the phrase "the waters of the United States."

*Id.* at 2223–24.

199. *See id.* at 2224 ("Regulation of land use, as through the issuance of the development permits sought by petitioners in both of these cases, is a quintessential state and local power, . . . [and] the Corps's interpretation stretches the outer limits of Congress's commerce power . . .").

200. *Id.* at 2225.

201. *See id.* at 2225–27 (noting, however, the "inherent ambiguity in drawing the boundaries of any 'waters'").

that case because of the difficulty in delineating boundaries.<sup>202</sup> They also rejected the formulation that wetlands “in reasonable proximity” to navigable waters or wetlands that have an “ecological connection” to navigable waters is sufficient to bring them within the jurisdiction of the CWA.<sup>203</sup> The plurality concluded that “*only* those wetlands with a continuous surface connection to bodies that are ‘waters of the United States’ in their own right . . . [are] covered by the [CWA],” while those “with only an intermittent, physically remote hydrologic connection to ‘waters of the United States’ . . . lack the necessary connection.”<sup>204</sup>

iii. *Refuting Environmental Concerns*

The plurality then addressed some of the concerns raised at oral argument that a curtailment of the Corps’s jurisdiction over wetlands would have ramifications across the board on all types of environmental pollution.<sup>205</sup> They reasoned that the dredged/fill material typically used to fill wetlands is different from pollutants in that dredged/fill material is stationary, while other pollutants are mobile.<sup>206</sup> They also asserted that the preservation of wetlands is

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202. *See id.* at 2225–26 (“[T]he [Corps] could reasonably conclude that a wetland that ‘adjoin[ed]’ waters of the United States is itself a part of those waters.”).

203. *Id.* at 2226 n.10. Even though *SWANCC* can, at best, only be read as rejecting a *single* ecological consideration, the Migratory Bird Rule, the plurality made the sweeping assertion that “the most natural reading of [*Riverside Bayview*] is that a wetlands’ mere ‘reasonable proximity’ to waters of the United States is not enough to confer Corps jurisdiction.” *Id.* “[Furthermore], *SWANCC* rejected the notion that the ecological considerations . . . [provide] an *independent* basis for including entries like ‘wetlands’ (or ‘ephemeral streams’) within the phrase ‘the waters of the United States.’ *SWANCC* found such ecological considerations irrelevant . . .” *Id.* at 2226.

204. *Id.* at 2226.

205. *Id.* at 2227–28.

206. *Chevron* held that the judiciary is not in as good of a position as Congress or the Executive to make scientific decisions that require background knowledge or expertise—hence, deference is appropriate. But the plurality here took it upon themselves to base their opinion on their own interpretation of the ecological and hydrological science involved:

“[D]redged or fill material,” which is typically deposited for the sole purpose of staying put, does not normally wash downstream, and thus does not normally constitute an “addition . . . to navigable waters” when deposited in upstream isolated wetlands. . . . [while] the deposit of *mobile* pollutants into upstream ephemeral channels is naturally described [as such] . . .

*Id.* at 2228, 2228 n.11.

not one of the goals of the CWA.<sup>207</sup>

*iv. The Judgment of the Court*

The plurality opinion concluded by vacating the decisions of the Sixth Circuit and remanding for a determination whether “[f]irst, . . . the adjacent channel contains a ‘wate[r] of the United States,’” as Justice Scalia has described it; and second, whether “the wetland has a continuous surface connection with that water, making it difficult to determine where the ‘water’ ends and the ‘wetland’ begins.”<sup>208</sup>

*b. Justice Kennedy’s Opinion*

*i. The “Significant Nexus” Test*

Justice Kennedy began his opinion<sup>209</sup> by identifying the “significant nexus” test as the basis of his argument, relying on *Riverside Bayview* and *SWANCC* as definitive support for the test.<sup>210</sup>

Taken together [*Riverside Bayview* and *SWANCC*] establish that in some instances, as exemplified by *Riverside Bayview*, the connection between a nonnavigable water or wetland and a navigable water may be so close, or potentially so close, that the Corps may deem the water or wetland a “navigable water” under the [CWA]. In other instances, as exemplified by *SWANCC*, there may be little or no

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207. See *id.* at 2228 (“[A] Comprehensive National Wetlands Protection Act is not before us, and the ‘wis[dom]’ of such a statute . . . is beyond our ken. What is clear, however, is that Congress did not enact one when it granted the Corps jurisdiction over only ‘the waters of the United States.’”). What is more “clear,” however, is that most other courts, at least in part, have disagreed with this assertion.

208. *Id.* at 2227, 2235. The only controlling aspect of the main opinion was that the cases should be vacated and remanded. Justice Scalia’s determinative considerations on remand are no more binding than anything else in his opinion. It also deserves mention that Chief Justice Roberts, in a brief opinion concurring with the plurality, chastised the Corps in stronger terms for not having rewritten their regulations post-*SWANCC*, stating that although “[i]t is unfortunate that no opinion commands a majority of the Court on precisely how to read Congress’s limits on the reach of the Clean Water Act, . . . [t]he upshot today is another defeat for the agency.” *Id.* at 2235–36 (Roberts, C.J., concurring).

209. Although the opinion concurs in the result, the majority of the text is spent rejecting the arguments that Justice Scalia made.

210. *Rapanos*, 126 S. Ct. at 2236, 2240–41 (Kennedy, J., concurring in the judgment) (“[T]o constitute ‘navigable waters’ under the [CWA], a water or wetland must possess a ‘significant nexus’ to waters that are or were navigable in fact or that could reasonably be so made.”).

connection. Absent a significant nexus, jurisdiction under the [CWA] is lacking.<sup>211</sup>

To this end, he took issue with the plurality's description of wetlands in that it seemed to use a dismissive tone with respect to the importance of wetlands because, if wetlands did not have an ecological role to play with respect to traditionally navigable waters, there could never be a significant nexus between the two.<sup>212</sup>

*ii. Justice Kennedy's Recommendations*

Justice Kennedy then presented the Corps with two alternatives: it could either (1) rewrite its regulations to specifically exclude such things as "drains, ditches, and streams remote from any navigable-in-fact water" or, (2) "[a]bsent more specific regulations . . . the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to non-navigable tributaries."<sup>213</sup> He reasoned that his solution to the problem will prevent constitutional Commerce Clause or federalism difficulties, and that it will avoid problematic applications of the statute.<sup>214</sup> Justice Kennedy concluded his opinion by pointing out some facts from both the *Rapanos* and *Carabell* cases that might be used to support a significant nexus finding upon remand, in addition to pieces of evidence that are lacking and might be further developed.<sup>215</sup>

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211. *Id.* at 2241.

212. *See id.* at 2237–38 ("Contrary to the plurality's description . . . wetlands are not simply moist patches of earth.").

213. *Id.* at 2249.

214. *Id.* at 2249–50.

215. The facts Justice Kennedy highlighted in *Rapanos* were:

An expert . . . testified that the wetlands were providing "habitat, sediment trapping, nutrient recycling, and flood peak diminution" . . . [T]he District Court made extensive findings regarding water tables and drainage on the parcels at issue. . . . [E]stablishment of a significant nexus . . . [might be] supplemented by further evidence about the significance of the tributaries to which the wetlands are connected.

*Id.* at 2250. The facts he identified from the *Carabell* case were:

The Corps noted . . . "that the project would have a major, long-term detrimental effect on wetlands, flood retention, recreation and conservation and overall ecology" . . . . The conditional language in [the Corps's assessment]—"potential ability," "possible flooding"—could suggest an undue degree of speculation, and a reviewing court must identify substantial evidence . . . . [T]he record does show that factors relevant to the jurisdictional inquiry have already been noted and considered. . . . [T]he Corps based its jurisdiction solely on the wetlands' adjacency to the ditch opposite the berm on the property's edge, [which

c. *Justice Stevens' Opinion*

The dissenting opinion, authored by Justice Stevens, would have sustained the authority of the Corps to continue asserting jurisdiction over all wetlands adjacent to tributaries in conformance with its regulations. It criticized Justice Kennedy's concurrence as failing to defer sufficiently to the Corps, though recognizing that he was far more faithful to precedent and principles of statutory interpretation; it dismissed Justice Scalia's "creative" criticisms as disregarding the "nature of the congressional delegation to the agency and the technical and complex character of the issues at stake."<sup>216</sup>

i. *Relying on Riverside Bayview, Dismissing SWANCC*

In the view of the dissenting Justices, the Corps's determination that "wetlands adjacent to tributaries of traditionally navigable waters preserve the quality of our Nation's waters . . . [was] a quintessential example of the Executive's reasonable interpretation of a statutory provision."<sup>217</sup> They would have relied wholly on *Riverside Bayview* because they felt that the question presented, and answered in the affirmative there, included such wetlands adjacent to tributaries as were at issue in the present case.<sup>218</sup> Furthermore, the dissent did not read *Riverside Bayview* to include a surface connection requirement because that opinion's mention of such a connection was made in the context of a statement of approval, rather than a steadfast requirement.<sup>219</sup> The dissent reasoned that, as a class, the majority of wetlands have a

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is not a strong enough connection].

*Id.* at 2251–52.

216. *Id.* at 2252 (Stevens, J., dissenting). The dissenting opinion most closely follows the ideas developed in this Article.

217. *Id.*

218. *Id.* at 2255 ("Although the particular wetland at issue in *Riverside Bayview* abutted a navigable creek, we framed the question presented as whether the Clean Water Act 'authorizes the Corps to require landowners to obtain permits from the Corps before discharging fill material into wetlands adjacent to navigable bodies of waters *and their tributaries*."). This statement observes the broad holding in *Riverside Bayview*, and it further supports the conclusion that the Court was wrong to restrict the Corps's authority in *SWANCC* and in the present case.

219. *Id.* at 2255–56 ("Contrary to the plurality's revisionist reading today, . . . *Riverside Bayview* nowhere implied that our approval of 'adjacent' wetlands was contingent upon an understanding that 'adjacent' means having a 'continuous surface connection' between the wetland and its neighboring [navigable waters] . . .").

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great impact on the environment, and therefore deserve to be protected, while the minority of less significant wetlands may simply be developed through the section 404 permitting process.<sup>220</sup> They also placed significance on the 1977 congressional session that discussed, but failed to pass an amendment specifically limiting the Corps's jurisdiction.<sup>221</sup> The dissent dismissed the plurality's reliance on the holding in *SWANCC* as not on point because it dealt with a question specifically reserved in *Riverside Bayview*, namely, the Corps's jurisdiction over isolated waters.<sup>222</sup>

*ii. Refuting Economic Concerns*

The dissent then shifted its focus to general economic concerns that the wetlands permitting process is too time consuming and expensive, noting that “[t]he Corps approves virtually all section 404 permit[s], though often requiring applicants to avoid or mitigate impacts to wetlands and other waters.”<sup>223</sup> It attempted to put the seemingly high cost in context by showing that wetland expenditures constitute “only a small fraction of 1% of the \$760 billion spent each year on private and public construction and development activity.”<sup>224</sup> The dissent also refuted the plurality's charge that its opinion was “policy-laden” by showing that the policies expressed were Congress's, rather than Justice Stevens's.<sup>225</sup>

*iii. Judicial Deference*

Justice Stevens then expressed his view that any intervention that would restrict the Corps's jurisdiction is not within the purview of the judiciary and should be addressed by Congress:

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. The fact that large investments are required to finance large developments merely means that those who are most adversely affected by the Corps's permitting decisions are

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220. *Id.* at 2256.

221. *Id.*

222. *Id.*

223. *Id.* at 2258 n.6 (internal quotation marks omitted).

224. *Id.* at 2258–59 (questioning the impartiality of the plurality's exaggerated concern about cost that fails to recognize the benefits that the CWA has provided).

225. *Id.* at 2259 n.8. Justice Stevens's opinion hits the mark by identifying policy as the paramount consideration.

persons who have the ability to communicate effectively with their representatives. Unless and until they succeed in convincing Congress (or the Corps) that clean water is less important today than it was in the 1970's [sic], we continue to owe deference to regulations satisfying the "evident breadth of congressional concern for protection of water quality and aquatic ecosystems . . . ."<sup>226</sup>

#### 4. *Deciphering the Holding*

To many, the *Rapanos* decision was even more confusing than the *SWANCC* decision.<sup>227</sup> Observers questioned whether landowners might have an easier time getting a permit from the Corps, or whether only the existing nomenclature would change.<sup>228</sup> In 1977, the Supreme Court issued an opinion on how to handle a plurality decision.<sup>229</sup> The rule states that when a majority of the Supreme Court agrees only on the outcome of a case and not on the ground for that outcome, lower-court judges are to follow the narrowest ground to which a majority of the justices would have assented if forced to choose.<sup>230</sup> Therefore, in considering what it would take to achieve a majority of five Justices, courts have to determine where the "middle ground" is. Clearly, this is Justice Kennedy's opinion, because it rejects the plurality's narrow interpretation while using the "significant nexus" test to somewhat restrict the dissent's broad interpretation. Therefore, any decision that uses Justice Kennedy's test to uphold jurisdiction would not gain the support of the four plurality Justices, but would likely gain the support of the four dissenting Justices because it is the "next best option" if they were forced to choose; hence, there would be a five-Justice majority. If jurisdiction were rejected, the inverse would be true.<sup>231</sup>

Since June 2006, there have been a handful of decisions that discuss *Rapanos*; all but one of them have reached the conclusion that Justice Kennedy's "significant nexus" test will be controlling

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226. *Id.* at 2259.

227. See Margaret Graham Tebo, *Lawyers, Developers Puzzle over Wetlands Case*, 5 No. 25 A.B.A. J. E-REP. 3 (June 23, 2006) ("There's a developing consensus that things are probably more confusing now than before the opinion was issued. . . .").

228. *Id.*

229. *Marks v. United States*, 430 U.S. 188 (1977).

230. *Id.* at 193.

231. See *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 724–25 (7th Cir. 2006), for a detailed description of the deductive reasoning required under *Marks* to reach the conclusion that Justice Kennedy's opinion is controlling.

from now on.<sup>232</sup> Whether the trend continues is anyone's guess, and until there is a larger body of post-*Rapanos* precedent, lawyers and developers will have to feel their way through these jurisprudential uncertainties on a case-by-case basis. It is important to keep in mind, though, that in the context of the 100 years or more of precedent in waters/wetlands law, *Rapanos* is "just a turn in a long and winding road."<sup>233</sup>

## VI. CONCLUSION AND RECOMMENDATIONS

Tracing the steps back through history, the progressive and "pioneering" trend in waters/wetlands jurisprudence should now be clear. First, the Supreme Court expanded the definition of navigable waters to include waters that are purely intrastate when they have linked effects on interstate commerce. Second, over the course of seventy years, the federal courts gradually expanded and stretched, with little regard to congressional intent, the interpretation of the RHA from a purely navigational statute to a comprehensive water pollution prevention tool, culminating in two

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232. See *United States v. Johnson*, 467 F.3d 56, 59–60 (1st Cir. 2006) (discharging fill material into a cranberry bog without a permit—the court held that the jurisdictional test was either Justice Kennedy's test or the plurality's guidelines); *Gerke Excavating*, 464 F.3d at 724–25 (concluding that Justice Kennedy's opinion controls because in most cases it will command a "forced" majority of the court, regardless of whether he finds for or against jurisdiction, and remanding for further findings by the district court); *N. Cal. River Watch v. City of Healdsburg*, 457 F.3d 1023 (9th Cir. 2006) (controlling opinion is that of Justice Kennedy, seepage between a pond and a river, separated by a man-made levy, is enough to find a nexus); *Env'tl. Prot. Info. Ctr. v. Pac. Lumber Co.*, No. C 01-2821 MHP, 2007 WL 43654, at \*12–15 (N.D. Cal. Jan 8, 2007) (following the significant nexus test, rejecting Justice Scalia's plurality opinion); *United States v. Evans*, No. 3:05 CR 159 J 32HTS, 2006 WL 2221629, at \*19 (M.D. Fla. Aug. 2, 2006) (recognizing that either the plurality's or Justice Kennedy's test may be used and upholding CWA jurisdiction related to a search warrant for water pollution). *But see* *United States v. Chevron Pipe Line Co.*, 437 F. Supp. 2d 605, 613 (N.D. Tex. 2006) (reasoning that because Justice Kennedy's "significant nexus" test was too uncertain to follow, the court relied on Fifth Circuit precedent (*Needham*, *supra* Part V.B) and construed the holding in *Rapanos* narrowly, rejecting Corps jurisdiction).

Since the First, Seventh, Ninth, and Eleventh Circuits seem to have no difficulty interpreting Justice Kennedy's opinion, the decision of this district court seems unusual, and it may be reversed or vacated—unless, of course, the Fifth Circuit decides to continue its unusual tradition of construing federal wetlands jurisdiction narrowly, which would be unfortunate because Texas, Louisiana, and Mississippi have many of the most fragile and endangered inland and coastal wetlands in the country.

233. Tebo, *supra* note 227.

Supreme Court decisions in the 1960s that almost completely abandoned the language of the statute. Third, Congress belatedly reacted in 1972 to pass the first effective, enforceable, national water pollution legislation, which came to be known as the CWA, in response to the judiciary's repeated prodding for such legislation. The Corps then promulgated its own regulations under the new law, which became increasingly broad throughout the 1970s and 1980s, and Congress never acted to invalidate these laws. Fourth, the Supreme Court affirmed what had become a pattern of liberal and broad interpretations up to that point (1985) under the CWA and further invited the judiciary to test the bounds of the CWA both in the language of the statute itself and under the Interstate Commerce Clause. And fifth, the federal courts continued their trend of expanding the Corps's jurisdiction over the following fifteen years, upholding such novel concepts as tributary wetland regulation and migratory-bird-based wetland regulation.

With all of this history and precedent, the proper ruling should have been clear to the Court in 2001 when deciding *SWANCC* and in 2006 when deciding *Rapanos*. Instead, the Court in both of these cases made assertions that were arguably contrary to the state of the law. In *SWANCC*, these include first, the introduction of the nebulous "significant nexus," which is a poor proxy for the environmental policy arguments that should inform judges' decisions. Second, the Court asserted that the Corps had not made a sufficient showing that Congress had accepted its regulations even though Congress had never acted to contravene the Corps's determinations in the over ten years that the regulations had been enforced. And third, the Court refused to give *Chevron* deference to the Corps's determinations, implying that the regulations were not a reasonable interpretation of the CWA even though they were consistent with the ever increasing regulatory power that the Corps had enjoyed and had come to depend on.

In *Rapanos*, the plurality's position was arguably even more contrary to the state of the law, but fortunately because of the 4-1-4 split, it was probably not a controlling opinion. First, any negative inference that the Court drew due to the fact that the Corps had not changed their regulation is seemingly unjustified because the Court had not provided a clear test in *SWANCC*. Second, the plurality's introduction of the continuous flow and continuous surface connection requirements are unwarranted because

nowhere in the legislation or the case law do these terms appear; they are completely novel concepts created by the plurality, as Justice Kennedy indicated in his opinion. Third, subjecting every statutory word to close dictionary and lexicographic “scrutiny” does no justice to the very real problems addressed by the CWA and that the plurality passed over (or criticized others for considering in their opinions). Fourth, the plurality’s excision and separation of “point source” and “navigable waters” goes against canons of construction that require that definitional terms be read in connection and as complimentary to one another whenever possible; these terms are simply definitional analogs relating to the areas where toxins and dredged/fill material, respectively, are deposited, and any suggestion that one is more important or more worthy of regulation than the other is at odds with the generally accepted ecological perspective. And fifth, the plurality’s overreliance on *SWANCC* and misinterpretation of *Riverside Bayview* focuses too heavily on a questionable decision five years ago and largely ignores the other 100 years of progressive precedent and legislative and administrative action.

So if in fact *SWANCC* and *Rapanos* were wrongly decided as this article suggests, what is the proper solution to restore the Corps’s and the judiciary’s power as it stood before 2001? First of all, it is clear that, at least with the current composition, the Supreme Court is unable to provide concrete guidance on how to regulate wetlands. *SWANCC* was sparsely reasoned and did not provide any kind of future guidance. *Rapanos* did not even command a majority of the Court, resulting in three long, contradictory opinions. Therefore, the Court should refrain from accepting any section 404 cases for at least a decade, until the courts of appeals have had time to flesh out the current state of the law. As most courts seem to be following Justice Kennedy’s opinion in *Rapanos* and construing *SWANCC* narrowly, if the Supreme Court recuses itself from this debate for a while, the future of wetlands will be bright because most wetlands that were previously regulated likely also fall within the “significant nexus.”<sup>234</sup> The trend of liberal jurisdictional expansion, however, will be difficult to continue for the same reasons.

Second, Congress should act to clarify what it intended the Corps’s jurisdiction to be under the CWA. The CWA has been on

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234. All that would be needed is for the Fifth Circuit to get on board with the rest of the circuit courts of appeals.

the books for over thirty-five years, and a comprehensive amendment or clarification is becoming quickly overdue. Senator Russell Feingold of Wisconsin introduced a bill in the 2005 legislative session entitled the Clean Water Authority Restoration Act.<sup>235</sup> This act would do exactly what is needed in the area of wetlands regulation consistent with the original purposes of the CWA, but with the added benefit of eliminating any possibility of argument against full exercise of the Corps's authority under the Constitution. The effect of this bill, if passed, would be to completely supersede *SWANCC* and *Rapanos*, and it would restore the law to where it was in the late 1990s, but without the critics and dissenting opinions. It also has the added benefit of continual expansion of regulation over time, parallel to the probable expansion of congressional authority under the Commerce Clause.<sup>236</sup>

Third, until Senator Feingold's legislation is (hopefully) passed,<sup>237</sup> the Corps should slightly modify section 328.3(a) regulations to exclude only those most objectionable aqueous conduits over which the Corps had previously asserted jurisdiction in order to avoid tempting the court system to rule against them, as in *Rapanos*. If the Corps, for the time being, shows that it is willing to at least appear to be complying with the mandates set forth by the judiciary, judges will have less incentive and less reason to criticize the Corps's conduct. After all, if *Rapanos* stands for anything at all, it is that the Court was unhappy with the fact that the Corps was still operating under the same regulations five years

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235. S. 912, 109th Cong. § 2 (2005). The purposes of this act are as follows:

(1) To reaffirm the original intent of Congress in enacting the Federal Water Pollution Control Act Amendments of 1972 to restore and maintain the chemical, physical, and biological integrity of the waters of the United States.

(2) To clearly define the waters of the United States that are subject to the Federal Water Pollution Control Act.

(3) To provide protection to the waters of the United States to the fullest extent of the legislative authority of Congress under the Constitution.

*Id.* (citations omitted). The act then goes on to specify provisions to meet each of these goals. *Id.* § 3.

236. See PRENTICE & EGAN, *supra* note 46. *But cf.* *United States v. Lopez*, 514 U.S. 549 (1995) (recognizing that the Interstate Commerce Clause is not omnipotent, and that there still remain many areas of the law where federal regulation is not proper).

237. In January 2007, the Democratic Party took control of the Congress, making it more likely that a proposal such as this will be passed, or at least considered.

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after *SWANCC*.

In conclusion, wetlands regulation will continue to be an important issue that affects everyone—from permitting requirements to drinking water quality. Wherever the state of the law goes from here, it should keep in mind the purposes for which the original laws were enacted and the overarching theme of the need for strong environmental protection at the federal level, and it should strive for realization of the no-net-loss policy. With any luck, wetlands will be around for a long time to come to prevent the spread of pollution, to mitigate flooding, and to provide habitats for our nation's many diverse and endangered species.