

# RAPANOS V. UNITED STATES AND CARABELL V. UNITED STATES ARMY CORPS OF ENGINEERS

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The Supreme Court's 2001 decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* (SWANCC)<sup>1</sup> cast a pall over the Army Corps of Engineers' ("the Corps") wetlands regulation program.<sup>2</sup> In ruling that the Corps had no authority to prohibit the destruction of certain isolated wetlands, the Court threatened to dramatically curtail the scope of the Clean Water Act (CWA), and infused virtually exercise of the Corps's jurisdiction with doubt.<sup>3</sup> Last Term, in the consolidated cases *Rapanos v. United States* and *Carabell v. United States Army Corps of Engineers* (*Rapanos*),<sup>4</sup> the Supreme Court granted a partial reprieve to the CWA. While the Court's divided opinion left substantial uncertainty about the scope of federal jurisdiction, the Court rejected strict limits on the Corps's authority under the CWA.

## BACKGROUND

The Clean Water Act prohibits the discharge without a permit of pollutants and fill material into "navigable waters," unhelpfully defined as "the waters of the United States."<sup>5</sup> Two apparent contradictions in the CWA's language have contributed to lingering uncertainty surrounding the statute's scope. First is the linguistic difficulty associated with using the term "navigable waters" in a statute that clearly encompasses some non-navigable waters<sup>6</sup> and some wetlands.<sup>7</sup> Second is Congress's problematic

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<sup>1</sup> 531 U.S. 159 (2001).

<sup>2</sup> See Lance D. Wood, *Don't Be Misled: CWA Jurisdiction Extends to All Non-Navigable Tributaries of the Traditional Navigable Waters and to Their Adjacent Wetlands*, 34 *Env'tl. L. Rep.* (Env'tl. L. Inst.) 10,187, 10,189 (2004).

<sup>3</sup> See *id.*; Robert R.M. Verchick, *Toward Normative Rules for Agency Interpretation: Defining Jurisdiction Under the Clean Water Act*, 55 *ALA. L. REV.* 845, 846 (2004).

<sup>4</sup> *Rapanos v. United States*, 126 S. Ct. 2208 (2006).

<sup>5</sup> 33 U.S.C. § 1362(7) (2006). This language defines not only the scope of the Corps's section 404 program, but also the Environmental Protection Agency's section 402 pollutant discharge program, the section 302 water quality standards program, the section 303 wastewater allocation program, the section 401 certification program, and the Oil Pollution Act's regulatory program. See Verchick, *supra* note 3, at 846.

<sup>6</sup> See *Rapanos*, 126 S. Ct. at 2220, 25 (plurality opinion) (noting that provisions of the CWA presuppose that "navigable waters" includes "other than those which are presently used, or are susceptible to use . . . as a means to transport interstate or foreign commerce . . . including wetlands"); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132-33 (1985); see also 33 U.S.C. § 1344(g)(1) (2006). Traditionally, "navigable waters" included only navigable-in-fact waters and waters that could readily be made so. See, e.g., *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1871). In *Riverside*, the Court concluded that Congress intended to repudiate the limits this definition imposed. See 474 U.S. at 133.

<sup>7</sup> *Rapanos*, 126 S. Ct. at 2230 n.12 (plurality opinion); *Riverside*, 474 U.S. at 138-39;

description of its purposes, at once suggesting a need to preserve the integrity of the nation's waters *and* to preserve the primary rights and responsibilities of the states.<sup>8</sup> For almost thirty years, courts resolved these ambiguities in favor of a broad understanding of federal authority.<sup>9</sup>

In its first encounter with the reach of the CWA, *United States v. Riverside Bayview Homes, Inc.*,<sup>10</sup> the Supreme Court seemingly endorsed this expansive view, concluding that the Corps could reasonably read "navigable waters" to include non-navigable wetlands adjacent to, and connected with, navigable-in-fact waterways.<sup>11</sup> In 2001, however, the Court issued an opinion reining in the Corps's historically expansive jurisdiction.<sup>12</sup> Relying primarily on the statutory text,<sup>13</sup> the Court held that the Act did not reach wetlands "isolated" from navigable-in-fact waterways.<sup>14</sup> The Court invalidated the Migratory Bird Rule, which gave the Corps jurisdiction over wetlands used by migratory birds, regardless of whether or not the wetland was connected to navigable waters.<sup>15</sup> The Court concluded that though the statute contained some ambiguity, the term "navigable waters" was clear in requiring some connection between a regulated water or wetland and navigable-in-fact waterways.<sup>16</sup>

The SWANCC decision did little to guide lower courts or the Corps in future cases.<sup>17</sup> Because the SWANCC Court did not overrule *River-*

*see also* 33 U.S.C. § 1344(g)(1) (listing wetlands as a covered water).

<sup>8</sup> *See* 33 U.S.C. § 1251(a), (b) (2006).

<sup>9</sup> *See generally* Michael P. Healy, *Law, Policy, and the Clean Water Act: The Courts, the Bush Administration, and the Statute's Uncertain Reach*, 55 ALA. L. REV. 695, 700 (2004); *see also* *Riverside*, 474 U.S. at 135; *Natural Res. Def. Council, Inc. v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975) (holding that the Corps's authority extends to the limit of Congress's power under the Commerce Clause); *United States v. Holland*, 373 F. Supp. 665, 671-72 (M.D. Fla. 1974) (same).

<sup>10</sup> 474 U.S. 121 (1985).

<sup>11</sup> *Id.* at 135. The Court reached this conclusion after applying the deference afforded to administrative agencies under *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-45 (1984). Under *Chevron*, a court reviewing an agency's interpretation of a statute conducts a two-step inquiry. At step one, the court determines if the statute is ambiguous. At step two, the court determines whether the agency's interpretation is reasonable. If the court answers both questions in the affirmative, it should defer to the agency's interpretation. *Id.*

<sup>12</sup> *See* *Solid Waste Agency v. U.S. Army Corps of Eng'rs (SWANCC)*, 531 U.S. 159, 166-67 (2001); Verchick, *supra* note 3, at 846 (arguing that SWANCC reduced the scope of federal jurisdiction under the CWA).

<sup>13</sup> This contrasts with what some have called the "purposive" reading employed by the dissent in *Rapanos* and *Riverside*. *See* Michael C. Dorf, *In the Wetlands Case, the Supreme Court Divides on the Clean Water Act—and Seemingly over How To Read Statutes as Well*, FindLaw's Legal Commentary (June 21, 2006), <http://writ.news.findlaw.com/dorf/20060621.html>.

<sup>14</sup> SWANCC, 531 U.S. at 166-67.

<sup>15</sup> *Id.* at 164; *see also* Final Rule for Regulatory Programs of the Corps of Eng'rs, 51 Fed. Reg. 41,217 (Nov. 13, 1986) (interpreting 33 C.F.R. § 328.3(a)(3)).

<sup>16</sup> SWANCC, 531 U.S. at 171-72.

<sup>17</sup> *See* *United States v. Rapanos*, 376 F.3d 629, 635 (6th Cir. 2004) ("Unfortunately, the two leading Supreme Court cases on the reach of the CWA have done little to clear the muddied waters of CWA jurisdiction.").

side,<sup>18</sup> it remained clear that navigable-in-fact waters and their adjacent wetlands qualified as “navigable waters.”<sup>19</sup> But the status of non-navigable tributaries and their adjacent wetlands remained in doubt,<sup>20</sup> and courts were divided on the status of these non-navigable waters.<sup>21</sup>

In *Rapanos* and then in *Carabell*, the Sixth Circuit adopted a broad understanding of federal authority, narrowly interpreting the *SWANCC* decision.<sup>22</sup> Both *Rapanos* and *Carabell* faced civil charges for filling wetlands on their properties without a section 404 permit.<sup>23</sup> Each wetland was adjacent to a channel—variously described as a ditch, drain, or intermittent stream—that ultimately emptied into a navigable-in-fact waterway.<sup>24</sup> The *Carabell* property is distinct only in that an allegedly impermeable man-made berm separated the wetland from its adjacent channel.<sup>25</sup>

In *Rapanos*, articulating what many have called the hydrological connection test, the Sixth Circuit held that because water flowed from the *Rapanos*’ wetlands, through a series of tributaries, to a navigable-in-fact water, jurisdiction was proper.<sup>26</sup> In *Carabell*, the Sixth Circuit went farther, concluding that no hydrological connection was necessary.<sup>27</sup> The Corps could regulate all wetlands geographically adjacent to tributaries on the “reasonable conclusion” that most such wetlands would be hydrologically connected to navigable-in-fact waterways.<sup>28</sup>

<sup>18</sup> See *SWANCC*, 531 U.S. at 166, 171–72.

<sup>19</sup> See, e.g., *United States v. Rapanos*, 339 F.3d 447, 452–53 (6th Cir. 2003) (holding that *SWANCC* does not overrule *Riverside*).

<sup>20</sup> Verchick, *supra* note 3, at 846; Wood, *supra* note 2, at 10,187; *Agency Implementation of the SWANCC Decision: Hearing Before the Subcomm. on Energy Policy, Natural Res. and Regulatory Affairs of the H. Comm. on Gov’t Reform*, 107th Cong. 139–43 (2002) [hereinafter *Hearings*] (amended statement of Patrick Parenteau, Prof., Vt. Law Sch.); see also Gregory T. Broderick, *From Migratory Birds to Migratory Molecules: The Continuing Battle over the Scope of Federal Jurisdiction Under the Clean Water Act*, 30 COLUM. J. ENVTL. L. 473, 474–78 (2005).

<sup>21</sup> Roughly, courts adopted three positions. The Fifth Circuit interpreted *SWANCC* as limiting “navigable waters” to navigable-in-fact waterways and their immediately adjacent wetlands and tributaries. See *In re Needham*, 354 F.3d 340, 344–45 (5th Cir. 2001) (interpreting the reach of the Oil Pollution Act, which is co-extensive with the CWA); *Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001) (same). Most circuits adopted a hydrological connection test, allowing the Corps to regulate any part of the tributary system of navigable-in-fact waters. E.g., *United States v. Gerke Excavating, Inc.*, 412 F.3d 804 (7th Cir. 2005); *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003). The Ninth and Sixth Circuits adopted an even more permissive interpretation, concluding that the Corps could regulate wetlands geographically adjacent to tributaries of navigable-in-fact waters, even if the individual waterway was not hydrologically connected to the tributary system. E.g., *Baccarat Fremont Developers v. U.S. Army Corps of Eng’rs*, 425 F.3d 1150 (9th Cir. 2005); *U.S. Army Corps of Eng’rs v. Carabell*, 391 F.3d 704, 708–10 (6th Cir. 2004).

<sup>22</sup> See *Carabell*, 391 F.3d at 708–10; *United States v. Rapanos*, 376 F.3d 629, 639–40 (6th Cir. 2004).

<sup>23</sup> *Carabell*, 391 F.3d at 707; *Rapanos*, 376 F.3d at 632.

<sup>24</sup> *Carabell*, 391 F.3d at 706; *Rapanos*, 376 F.3d at 633–34.

<sup>25</sup> See *Carabell*, 391 F.3d at 708–09.

<sup>26</sup> *Rapanos*, 376 F.3d at 639.

<sup>27</sup> *Carabell*, 391 F.3d at 705.

<sup>28</sup> *Id.* at 709.

In a deeply divided opinion, the Supreme Court reversed and remanded both *Rapanos* and *Carabell*.<sup>29</sup> No opinion garnered a majority of the Justices, leaving a fragmented opinion and leading several justices to openly comment on the proper resolution of the divided vote.<sup>30</sup>

Writing for the plurality, Justice Scalia found that the Corps had vastly exceeded its statutory authority, concluding that the statute clearly precluded the Corps' interpretation.<sup>31</sup> Opening his analysis by outlining a dim view of the Corps' wetlands program, highlighting its burdensome costs,<sup>32</sup> unpredictable regulatory regime,<sup>33</sup> and limitless scope,<sup>34</sup> Justice Scalia interpreted the text of the CWA to impose two limits on the Corps' authority. First, Justice Scalia rejected the Corps' definition of tributaries as overbroad.<sup>35</sup> Reasoning that by using "the waters" rather than "water," Congress meant to confer jurisdiction only over those "relatively permanent bodies of water" commonly called oceans, lakes, rivers, and streams; Congress did not intend to include intermittent waterways such as ditches, dry arroyos, and ephemeral streams.<sup>36</sup> Second, Justice Scalia limited the Corps' wetlands jurisdiction to those wetlands bearing a continuous surface water connection to otherwise covered waterways.<sup>37</sup> Noting the linguistic difficulty of including wetlands within the term "waters," Justice Scalia interpreted *Riverside* as permitting the Corps to exercise jurisdiction only over those wetlands indistinguishable from adjacent covered waters.<sup>38</sup> Taken together, Justice Scalia's two restrictions permit the Corps to regulate navigable-in-fact waterways, their continuous and seasonal tributaries, and wetlands possessing a continuous surface connection to, and indistinguishable from, an adjacent covered waterway.<sup>39</sup>

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<sup>29</sup> *Rapanos v. United States*, 126 S. Ct. 2208, 2209 (2006) (plurality opinion).

<sup>30</sup> *Id.* at 2265 (Stevens, J., dissenting).

<sup>31</sup> *Id.* at 2220 (plurality opinion). Though he acknowledged some ambiguity in the statutory language, Justice Scalia decided the case at *Chevron* step one: as applied to "storm drains and dry ditches" the statute was perfectly clear. *Id.* at 2232.

<sup>32</sup> *Id.* at 2214–15 (plurality opinion).

<sup>33</sup> *Id.* at 2214, 2218 (stating that the Corps employs deliberately vague jurisdictional standards and exercises the discretion of an "enlightened despot").

<sup>34</sup> *Id.* at 2215 ("On [the Corps's] view . . . the statutory waters of the United States engulf entire cities and immense arid wastelands . . . the entire land area of the United States lies in some drainage basin.").

<sup>35</sup> *Rapanos*, 126 S. Ct. at 2220 (plurality opinion).

<sup>36</sup> *Id.* at 2220–21. Justice Scalia found further support for his position in Congress's use of the term "navigable" (connoting discrete bodies of water) and the statute's distinction between point sources and navigable waters (connoting a distinction between impermanent and permanent flows). *Id.* at 2222–23. Scalia's interpretation would not exclude "perennial" flows such as seasonal streams and rivers that dry up under drought conditions. *Id.* at 2221 n.5.

<sup>37</sup> *Id.* at 2225–27.

<sup>38</sup> *Id.* at 2226. Justice Scalia concluded that *Riverside* rested on the "boundary-drawing problem" that arises when waterways seamlessly blend into adjacent bogs and wetlands. *Id.*

<sup>39</sup> However, Justice Scalia would also exclude from his definition some man-made enclosed conveyances such as pipes. *Id.* at 2223 n.7. Additionally, Justice Scalia was careful to note that his limitations would not, in practice, implicate programs regulating effluent

Justice Scalia also reiterated the Court's concerns about the federal-state balance.<sup>40</sup> The Corps' virtually limitless view of its own authority, Justice Scalia reasoned, would subject virtually all state and local land use decisions to a federal veto.<sup>41</sup> Such an interpretation would be inconsistent with the statutory command to "preserve and protect the primary responsibilities and rights of the states."<sup>42</sup> Justice Scalia concluded, moreover, that even if the statutory language did not foreclose the Corps' jurisdiction, the doctrine of constitutional avoidance would.<sup>43</sup> Courts require a "clear and manifest" statement from Congress to authorize an unprecedented intrusion into traditional state authority," something not found in the phrase "the waters of the United States."<sup>44</sup>

Justice Kennedy concurred in the judgment, though he articulated radically different reasoning.<sup>45</sup> He rejected the plurality's limitations on the Corps' authority as contrary to text, precedent, and congressional intent.<sup>46</sup> However, he did not endorse a limitless view of the Corps' authority under the CWA.<sup>47</sup> Instead he interpreted *Riverside* and *SWANCC* as imposing a single requirement on all exercises of the Corps' jurisdiction: the Corps may regulate only those wetlands that have a "significant nexus" to navigable-in-fact waterways.<sup>48</sup> A wetland possesses the requisite significant nexus if it "alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"<sup>49</sup> When, in contrast, wetlands' effects on water quality are "speculative or insubstantial," they cannot reasonably be classified as navigable waters.<sup>50</sup> Kennedy suggested no need for the Corps to make a case-by-case determination in every instance. Instead the Corps may identify whole classes of wetlands that, in the "majority of cases," will "perform important functions for an aquatic system incorporating navigable waters."<sup>51</sup>

Thus, Justice Kennedy found that the Corps' treatment of wetlands abutting navigable-in-fact waterways rested on the reasonable presumption that adjacent wetlands will, in most cases, perform important func-

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discharges: the Corps could regulate such discharges where the pollution did or was likely to naturally flow into covered waters. *Id.* at 2227.

<sup>40</sup> *Id.* at 2223–24.

<sup>41</sup> *Rapanos*, 126 S. Ct. at 2224 (plurality opinion).

<sup>42</sup> *Id.* (citing 33 U.S.C. § 1251(b) (2006)).

<sup>43</sup> *Id.* at 2224; *see also* Gregory v. Ashcroft, 501 U.S. 452 (1991); Edward J. DeBartolo Co. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988).

<sup>44</sup> *Rapanos*, 126 S. Ct. at 2224 (plurality opinion) (quoting *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994)).

<sup>45</sup> *Id.* at 2236 (Kennedy, J., concurring).

<sup>46</sup> *Id.* at 2241–47.

<sup>47</sup> *Id.* at 2247–50.

<sup>48</sup> *Id.* at 2248.

<sup>49</sup> *Id.* at 2248.

<sup>50</sup> *Rapanos*, 126 S. Ct. (Kennedy, J. concurring).

<sup>51</sup> *Id.*

tions for the navigable waterway.<sup>52</sup> That same presumption was unreasonable as applied to wetlands adjacent to non-navigable tributaries of navigable-in-fact waterways, because of the expansive way in which the Corps defined “tributary.”<sup>53</sup> By defining all waterways with an ordinary high water mark as “tributaries,”<sup>54</sup> the Corps obtained jurisdiction over wetlands abutting “drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water-volumes . . . .”<sup>55</sup> There is little to suggest that the majority of wetlands abutting these minor tributaries will have substantial effects on navigable waters.<sup>56</sup> Justice Kennedy also dismissed the plurality’s constitutional avoidance concerns, reasoning that his test—requiring substantial effects on commerce—was constitutionally unproblematic.<sup>57</sup>

Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, dissented, concluding that neither the plurality nor Justice Kennedy gave sufficient deference to the Corps’ interpretation of the CWA.<sup>58</sup> Given Congress’s overriding purpose to “preserve the quality of our nation’s waters” and extensive scientific evidence regarding the function of wetlands in preserving water quality, regulating flood flows, and maintaining habitat, the Corps’ interpretation of the CWA was “a quintessential example of the Executive’s reasonable interpretation of a statutory provision.”<sup>59</sup> Characterizing the plurality’s reading of the text as “novel,” “creative,” and “arbitrary,”<sup>60</sup> and condemning its “exaggerated concern about costs,” the dissent argued that the plurality had substituted its own policy judgment for that of Congress.<sup>61</sup> According to the dissent, only a statute reaching wetlands throughout the tributary system could effectively achieve Congress’s goal of comprehensively regulating water quality.<sup>62</sup>

The dissent also rejected the plurality’s concerns about federal encroachment on state and local authority.<sup>63</sup> The statutory command to preserve the primary role of the states is accomplished not by limits on federal power, but by allowing the states to adopt their own section 404 programs, impose tougher pollution control standards, and regulate non-point-

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 2248–49.

<sup>54</sup> An ordinary high water mark is a “line on the shore established by fluctuations of waters and indicated by physical characteristics.” 33 C.F.R. § 328.3(e) (2006).

<sup>55</sup> *Rapanos*, 126 S. Ct. at 2249 (Kennedy, J., concurring).

<sup>56</sup> *Id.* Here, Kennedy’s test is more restrictive of federal jurisdiction than is the plurality’s. Kennedy criticized the plurality on the grounds that under its test, “the merest trickle, if continuous” would qualify as a water regardless of its effects on navigable waters. *Id.* at 2242.

<sup>57</sup> *Id.* at 2249–50.

<sup>58</sup> *Id.* at 2252 (Stevens, J., dissenting).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 2259.

<sup>61</sup> *Id.*

<sup>62</sup> *Rapanos*, 126 S. Ct. at 2258–59.

<sup>63</sup> *Id.* at 2260–62.

source pollution.<sup>64</sup> The dissent found constitutional avoidance canons totally inapplicable, as Congress had clearly indicated that the Corps should have the power to regulate pollution at the source. Consequently, federal regulation of the tributary systems of navigable-in-fact waterways raises *no* Constitutional concerns.<sup>65</sup>

#### ANALYSIS

*Rapanos* did not have the far-reaching consequences many expected.<sup>66</sup> The Court did not, for example, render a decision on Commerce Clause grounds, instead confining itself to statutory interpretation. Yet the Court was one vote shy of a sea-change in federal jurisdiction over wetlands. Had the plurality's view prevailed, the Corps' ability to regulate wetlands would have been dramatically curtailed, putting vast tracts of wetlands connected to navigable waters by "intermittent" and "ephemeral" streams beyond the reach of the Corps' authority.<sup>67</sup> While the Court's divided decision will certainly add to confusion over the scope of the Corps' jurisdiction, it should be no serious obstacle to effective wetlands protection.

Justice Kennedy's test, which for practical purposes will probably control most jurisdictional determinations,<sup>68</sup> appears highly permissive of federal jurisdiction. The "significant nexus" test leaves undisturbed SWANCC's conclusion that some wetlands isolated from navigable waters remain beyond federal control. However, the test reads SWANCC narrowly, and should permit the Corps to exercise far greater authority than many suspected SWANCC would allow.

It is, however, not immediately clear that Kennedy's test is the controlling one. The lack of a majority opinion has created doubt and confusion about which opinion(s) to apply. As one commentator put it, "environmental law now has its own *Bakke*."<sup>69</sup> Normally, under *Marks v. United*

<sup>64</sup> *Id.* at 2261.

<sup>65</sup> *Id.* at 2261–62 (citing *Oklahoma ex rel. Phillips v. Guy F. Atkinson, Co.*, 313 U.S. 508, 525 (1941)).

<sup>66</sup> See *Interpreting the Effect of the U.S. Supreme Court's Recent Decision in the Joint Cases of Rapanos v. United States and Carabell v. U.S. Army Corps of Eng'rs: Hearing Before the Subcomm. on Fisheries & Wildlife of the S. Comm. on Env't & Pub. Works*, 108th Cong. (2006) (statement of William W. Buzbee, Prof. Emory Univ. Sch. of Law), [http://epw.senate.gov/109th/Buzbee\\_Testimony.pdf](http://epw.senate.gov/109th/Buzbee_Testimony.pdf) (on file with the Harvard Environmental Law Review).

<sup>67</sup> Some suggested that SWANCC put as much as ninety-nine percent of America's wetlands beyond the Corps's reach. See Wood, *supra* note 2, at 10,187. Other estimates ranged between twenty and seventy-nine percent. *Hearings, supra* note 20, at 139–45.

<sup>68</sup> See *Rapanos*, 126 S. Ct. at 2265 (Stevens, J. dissenting) (arguing that Justice Kennedy's test will control most determinations); *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 725 (7th Cir. 2006) (arguing that in practice, the "significant nexus" test will control).

<sup>69</sup> Posting of Richard Lazarus to SCOTUSblog, Discussion Board: *Rapanos* and *Carabell*, [http://www.scotusblog.com/movabletype/archives/2006/06/discussion\\_boar\\_1.html](http://www.scotusblog.com/movabletype/archives/2006/06/discussion_boar_1.html) (June 19, 2006, 13:30 EST).

*States*, where there is no majority decision, the controlling decision is the opinion of the judge concurring in the decision on the narrowest grounds.<sup>70</sup> However, deciding which decision stands on the “narrowest grounds” is far from simple.<sup>71</sup> Kennedy’s decision is the obvious candidate, but it qualifies only if “narrowest” is synonymous with least restrictive of federal authority.<sup>72</sup> Choosing Kennedy’s opinion as the controlling one is also problematic because his opinion is not a “logical subset” of the plurality decision.<sup>73</sup> As the dissent noted, there are situations in which Kennedy would bar federal jurisdiction while both the plurality and the dissent would permit it.<sup>74</sup> For example, where a wetland is connected to navigable waters by a small but relatively permanent stream, both the dissent and plurality tests would permit the Corps to regulate, but the flow might be so insignificant that the wetland could not satisfy the “significant nexus” test.<sup>75</sup> Justice Stevens suggested that lower courts resolve the dilemma by finding jurisdiction where *either* the plurality *or* Justice Kennedy would permit the Corps to exercise jurisdiction; in either case, there would be at least five votes to uphold federal jurisdiction, four dissenters and either Justice Kennedy or the four Justices in the plurality.<sup>76</sup>

Lower courts are already divided over the proper approach to follow.<sup>77</sup> The Fifth Circuit has continued its past practice of reading the CWA to support limited federal jurisdiction, concluding that the ambiguities in Kennedy’s opinion require courts to interpret the “significant nexus” test in light of the plurality opinion and prior in-circuit precedent.<sup>78</sup> Most courts, however, have either relied upon Kennedy’s opinion as controlling,<sup>79</sup> or adopted Justice Stevens’ suggested approach.<sup>80</sup> Under either of these approaches, Justice Kennedy’s opinion is likely to control in the vast majority of situations. Though it is theoretically possible that there will be cases in which a water is sufficiently continuously flowing to satisfy Justice Scalia but insufficiently significant to satisfy Justice Kennedy, such cases are likely to be exceedingly rare.<sup>81</sup>

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<sup>70</sup> 430 U.S. 188, 193 (1977).

<sup>71</sup> See, e.g., *United States v. Johnson*, No. 05-1444, slip op. at 13 (1st Cir. Oct. 31, 2006) (detailing the difficulties of applying the *Marks* formula to *Rapanos*).

<sup>72</sup> *Id.* at 15.

<sup>73</sup> See *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc).

<sup>74</sup> *Rapanos v. United States*, 126 S. Ct. 2208, 2265 (2006) (Stevens, J., dissenting); see also *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 725 (7th Cir. 2006).

<sup>75</sup> See *Gerke*, 464 F.3d at 725; *Johnson*, No. 05-1444, slip op. at 17; see also *supra* notes 53–57 and accompanying text.

<sup>76</sup> *Rapanos*, 126 S. Ct. at 2265 (Stevens, J., dissenting).

<sup>77</sup> Compare *N. Cal. River Watch v. City of Healdsburg*, 457 F.3d 1023 (9th Cir. 2006) with *Johnson*, No. 05-1444 and with *United States v. Chevron Pipe Line Co.*, 437 F. Supp. 2d 605 (N.D. Tex. 2006).

<sup>78</sup> *Chevron Pipe Line*, 437 F. Supp. 2d at 613.

<sup>79</sup> *N. Cal. River Watch*, 457 F.3d at 1029.

<sup>80</sup> *Johnson*, No. 05-1444; *Gerke*, 464 F.3d at 724–25.

<sup>81</sup> *Gerke*, 464 F.3d at 725 (arguing that such cases will be rare).

Whether courts follow Kennedy's test or Stevens' approach, *Rapanos* will probably not interfere with effective wetlands preservation.<sup>82</sup> Kennedy's test permits the Corps broad leeway in defining federal jurisdiction.

For the time being, the Corps will have to show a "significant nexus" on a case-by-case basis. However, once the Corps issues interpretive guidance, Justice Kennedy's test permits the Corps to regulate categorically.<sup>83</sup> To establish jurisdiction, the Corps may show that a wetland significantly affects the integrity of navigable waters, that *combined* with other similarly situated wetlands in the area it has such effects, or that such wetlands *generally* have such effects.<sup>84</sup> Thus, in future cases like *Carabell*, unique property features, such as berms, will be no bar to federal jurisdiction.<sup>85</sup>

Second, though Justice Kennedy did little to elaborate on what constitutes a "nexus," or makes a nexus "significant,"<sup>86</sup> what clues we do have suggests that the test will permit the Corps great freedom of action. Kennedy's opinion suggests that a broad category of wetland functions can form a "nexus" with navigable waters: filtering and runoff-control, nutrient trapping, wildlife habitat, silt control and dam maintenance, and pollutant filtering and trapping.<sup>87</sup> This test rejects the hydrological limitation suggested by the *Carabell*<sup>88</sup> as well as the Fifth Circuit's "insuperably bound up with" test.<sup>89</sup> The "significant nexus" test is likely to sweep up the vast majority of wetlands in the United States. Most wetlands in the United States are connected to navigable-in-fact waters by virtue of ground and surface water, flooding at high flow, run-off storage, and sediment filtration.<sup>90</sup> Still more provide habitat for local animals, fish, plant, and bird life.<sup>91</sup>

Even Justice Kennedy's rejection of the Corps' test for defining tributaries—the "ordinary high water mark" standard—should do little to con-

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<sup>82</sup> The *Chevron Pipe Line* approach is unlikely to be widely adopted, given Kennedy's explicit condemnation of the plurality's interpretation. Moreover, even if other circuits adopt this interpretive approach, they will do so against a backdrop of circuit precedent that is permissive, rather than restrictive, of federal jurisdiction. *See, e.g., United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003).

<sup>83</sup> *United States v. Rapanos*, 126 S. Ct. 2208, 2248–49 (2006) (Kennedy, J., concurring).

<sup>84</sup> *Id.*

<sup>85</sup> *See U.S. Army Corps of Eng'rs v. Carabell*, 391 F.3d 704, 705 (6th Cir. 2004).

<sup>86</sup> *See United States v. Chevron Pipe Line Co.*, 437 F. Supp. 2d 605, 613 (N.D. Tex. 2006) ("This test leaves no guidance on how to implement its vague, subjective center-piece.").

<sup>87</sup> *Rapanos*, 126 S. Ct. at 2252 (Kennedy, J. concurring).

<sup>88</sup> Brief for Petitioners at 13, *Carabell v. U.S. Army Corps of Eng'rs*, No. 04-1384 (U.S. June 19, 2006).

<sup>89</sup> *In re Needham*, 354 F.3d 340, 344–45 (5th Cir. 2003).

<sup>90</sup> JUDY L. MEYERS ET AL., WHERE RIVERS ARE BORN: THE SCIENTIFIC IMPERATIVE FOR DEFENDING SMALL STREAMS AND WETLANDS 9 (2003), available at <http://www.americanrivers.org/site/DocServer/WhereRiversAreBorn1.pdf?docID=182#search=%22Where%20Rivers%20Are%20Born%22>.

<sup>91</sup> *Id.*

strain the Corps' jurisdiction.<sup>92</sup> Though Justice Kennedy discusses level of flow as a factor in evaluating the importance of a tributary channel, he does not require any particular quantity of flow. Instead, tributaries are subject to the same effects test applied to wetlands.<sup>93</sup> The ultimate question for all exercises of federal jurisdiction over waters not navigable-in-fact is the same—whether or not the water or wetland significantly affects the physical, chemical, or biological integrity of navigable-in-fact waters. The test, therefore, is likely to be similarly permissive of federal jurisdiction.

The requirement that the nexus be “significant” also appears to be highly permissive. Though Kennedy did not elaborate on the scientific meaning of “significant,”<sup>94</sup> what he did say suggests that the Corps will have broad latitude. Justice Kennedy rejected only the basis of the Corps' regulations, not necessarily the particular outcomes in *Rapanos* and *Carrabelle*. In what Justice Scalia called “a wink to the agency,”<sup>95</sup> Justice Kennedy went so far as to suggest that the record in the two cases already contained the evidence that the Corps would need to assert jurisdiction.<sup>96</sup> This is surprising given the flimsy quality of the evidence that the Corps marshaled in the jurisdictional hearings in the lower courts.<sup>97</sup> The task of the Corps, therefore, will be to provide an alternate basis on which to assert jurisdiction, *not* to modify the actual scope of federal authority. This appears to be precisely what the Corps is doing: an early guidance letter indicates that the Corps will only alter the way it will “describe and document the justifications that underlie [its] CWA jurisdictional determinations,” not the determinations themselves.<sup>98</sup>

Finally, Justice Kennedy decided the case at *Chevron* step two, suggesting that if the Corps issues new regulations, its determinations will receive judicial deference under *Chevron*.<sup>99</sup> The Corps' scientific expertise will thus determine the meaning of “significant” and “nexus.” To be sure, the Corps could define these terms in a manner unnecessarily restrictive of federal authority, but there is little indication that they will do

<sup>92</sup> See Virginia S. Albrecht & Deirdre G. Duncan, *Defining Wetlands*, Daily Env't Rep. (BNA), Aug. 3, 2006, at 3.

<sup>93</sup> *Rapanos*, 126 S. Ct. at 2248–49 (Kennedy, J., concurring). Justice Kennedy's statement that the Corps's standard was overbroad because it might reach “remote” tributaries does not necessarily connote geographic remoteness. See *id.* at 2249. Kennedy suggests only that non-navigable tributaries must have a significant nexus to navigable waters, a test that Kennedy does not vary from wetlands to tributaries.

<sup>94</sup> See *id.* at 2235 n.15 (plurality opinion).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 2250–52 (Kennedy, J., concurring).

<sup>97</sup> See *id.*

<sup>98</sup> Letter from Mark F. Sudol, Chief, Regulatory Branch, U.S. Army Corps of Eng'rs, to Staff, U.S. Army Corps of Eng'rs (July 5, 2006) (on file with the Harvard Environmental Law Review).

<sup>99</sup> *Rapanos*, 126 S. Ct. at 2237, 2247 (Kennedy, J., concurring).

so.<sup>100</sup> Until the Corps issues new guidance, however, much uncertainty will remain; even after the agency issues such guidance, legal challenges seem certain.

A final feature of Justice Kennedy's opinion suggests that its effects on wetlands preservation may be mild. Much of the case for federal regulation of wetlands is grounded in the serious externality problems involved. Interstate competition for commercial activity, combined with the ability of states to pass the costs of environmental degradation on to other jurisdictions, risks a race-to-the-bottom in environmental regulation generally.<sup>101</sup> This problem is likely to be especially pressing in the context of wetlands regulation, which pits powerful pressures for local development against the interests of remote, diffuse, out-of-state residents.<sup>102</sup> Wetland losses in Minnesota and the Dakotas, for example, increase flooding along the Mississippi and contribute to pollution in the Gulf of Mexico.

Justice Kennedy's approach appears to graft these functional considerations onto the statute. In the process, he helps to accommodate the statute's apparently conflicting commands to both preserve the integrity of the nation's waterways and preserve the primary rights and responsibilities of the states.<sup>103</sup> By allowing the federal government to regulate in all those cases where wetlands affect interstate waters, Justice Kennedy allocates regulatory responsibility to the federal government where state regulation alone is likely to undervalue wetlands preservation. Similarly, by allocating to the states responsibility in those cases where wetlands functions are localized and states will more fully internalize the costs and benefits of their regulatory decisions.<sup>104</sup>

This is not to suggest that state regulation will be a perfect substitute for federal authority, or that navigability is a perfect proxy for describing the federal and interstate interests involved.<sup>105</sup> Rather, it is merely that one

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<sup>100</sup> See Proposal To Reissue and Modify Nationwide Permits Part III, 71 Fed. Reg. 56,258, 56,261 (Sept. 26, 2006) (proposing to increase protection for ephemeral streams in response to *Rapanos*).

<sup>101</sup> See Jacques LeBoeuf, *The Economics of Federalism and the Proper Scope of the Federal Commerce Power*, 31 SAN DIEGO L. REV. 565 (1994) (discussing the problems associated with state regulation in the face of trans-boundary externalities). *But see* Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992) (suggesting that interstate competition may exert upward pressures on environmental regulation).

<sup>102</sup> See Oliver A. Houck & Michael Rolland, *Federalism in Wetlands Regulation: A Consideration of Delegation of Clean Water Act Section 404 and Related Programs to the States*, 54 MD. L. REV. 1242, 1244-53 (1995) (detailing the case for a robust federal role in wetlands protection). *But see* Jonathan H. Adler, *Swamp Rules: The End of Federal Regulation?*, REGULATION, Summer 2001 (arguing that states would adequately fill in for the reduced federal role).

<sup>103</sup> 33 U.S.C. §§ 1251(a), (b) (2006).

<sup>104</sup> See Jonathan H. Adler, *The Jurisdictional Mismatch in Environmental Federalism*, 14 N.Y.U. ENVTL. L.J. 130 (2005).

<sup>105</sup> See Tobias Halvarson, *Solid Waste Agency Of Northern Cook County v. United States Army Corps Of Engineers: The Failure Of "Navigability" as a Proxy in Demarcating Federal Jurisdiction for Environmental Protection*, 29 ECOLOGY L.Q. 181 (2002) (sug-

should not automatically expect states to fail as regulators where they will internalize most, if not all, of the costs of wetlands protection. Doubtless, many states will not adopt the same policies that the Corps would choose. However, where states do internalize the large majority of the costs of wetlands losses, such policy variation reflects healthy experimentation, not destructive competition for economic development. Justice Kennedy's test, to the extent that it does wall off certain wetlands from federal control, may help encourage state innovation and experimentation with wetlands protection without risking serious consequences to navigable waterways.<sup>106</sup> Indeed, in *Rapanos* thirty-seven states filed briefs as amici supporting the government, suggesting that states can and will be effective partners in regulation.

Thus, the consequences of *Rapanos* for wetlands protection are likely to be relatively benign. While the Court's divided opinion left substantial ambiguity about the scope of federal jurisdiction, the Court repudiated the severe limits on federal jurisdiction that many thought *SWANCC* implied. Moving forward, the Corps is likely to enjoy a relatively free hand in establishing new limits on its own jurisdiction.

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gesting that the connection to navigability does not capture the federal interests Congress meant to assert); *Rapanos*, 126 S. Ct. at 2266 (Breyer, J., dissenting) (arguing that Congress used "navigable" as a stand-in for all possible federal interests). It is true that "isolated" wetlands have interstate effects beyond their effects on navigation. See R. W. TINER ET AL., U.S. DEP'T OF THE INTERIOR, GEOGRAPHICALLY ISOLATED WETLANDS: A PRELIMINARY ASSESSMENT OF THEIR CHARACTERISTICS AND STATUS IN SELECTED AREAS OF THE UNITED STATES 9-12 (2002), available at [http://www.fws.gov/nwi/Pubs\\_Reports/isolated/isolated\\_no\\_images2.pdf](http://www.fws.gov/nwi/Pubs_Reports/isolated/isolated_no_images2.pdf). However, *SWANCC* forecloses these interests as a basis for federal regulation. *Solid Waste Agency v. U.S. Army Corps of Eng'rs (SWANCC)*, 531 U.S. 159, 166-67 (2001). *Rapanos* does not alter this conclusion one way or another.

<sup>106</sup> See Adler, *supra* note 104, at 169-78 (arguing that federal regulation displaces and discourages state environmental protection programs, and that states may effectively supplant the federal government).