Federal Regulation of Wetlands after *Rapanos v. United States*: A Call for Lower Courts to Employ the Proper Standard

Second Year Seminar

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I. INTRODUCTION

"[T]here is a poor fit between our conventional notions of ownership . . . and our concerns about protecting natural systems."
- Professor Joseph L. Sax

The United States is often referred to as the "land of the free." Its citizens enjoy a variety of rights and freedoms, some of which are considered fundamental and are constitutionally guaranteed. One such fundamental right can be found in the text of the Fifth Amendment: "No person shall be . . . deprived of life, liberty, or property, without due process of law[.]" Although the right to use and enjoy one's property is not absolute, "the prohibition against deprivation of property without due process of law reflects the high value, embedded in our constitutional

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3 See, e.g., Francis Scott Key, The Star-Spangled Banner, http://www.franciscottkey.org (last visited Mar. 1, 2007) ("O'er the land of the free and the home of the brave?").

4 U.S. CONST. amend. V (emphasis added). This language is commonly referred to as the Due Process Clause. See also U.S. CONST. amend. XIV, § 1 ("No state shall . . . deprive any person of life, liberty, or property, without due process of law[.]").

and political history, that we place on a person’s right to enjoy what is his, free of governmental interference.”⁶

Notwithstanding these constitutional guarantees and this high value that the United States claims to place on an individual’s property rights, the federal government effectively limits the right to use and enjoy property by imposing upon its owner a variety of legal restrictions and regulations. The Clean Water Act⁷ ("CWA"), particularly significant for the purposes of this article, is a prime example of federal legislation that constrains property owners’ rights by prohibiting certain land-use activities. At its core, the CWA is environmental legislation that aims to prohibit water pollution and maintain water quality.⁸ While keeping water clean is no doubt a noble cause, Sax correctly observes that protecting the environment and protecting the fundamental property rights of individuals are often conflicting interests.⁹

Perhaps nowhere is this idea more evident than in the federal judiciary’s collective struggle to balance these competing interests and conclusively determine the proper scope of federal jurisdiction under the CWA. On one hand, granting the federal government broad discretion in regulating private property and enforcing the CWA surely helps protect the environment; on the other hand, limiting the government’s jurisdictional reach undoubtedly protects owners of

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⁸ See infra Part II.A.

⁹ See supra text accompanying note 1.
private property. *Rapanos v. United States*\(^{10}\) represents the Supreme Court's most recent attempt to determine the proper scope of federal CWA jurisdiction. More specifically, the *Rapanos* Court examined the meaning of the phrase "navigable waters"\(^{11}\) and, consequently, considered the extent to which wetlands are subject to federal regulation under the CWA. Although seemingly a task easily accomplished, the Court has repeatedly struggled with determining the precise legal interpretation of this phrase due to its profound jurisdictional implications.\(^{12}\)

In *Rapanos*, the Court held that the U.S. Army Corps of Engineers ("the Corps") had interpreted "navigable waters" too broadly in defining its own jurisdictional reach.\(^ {13}\) The Court remanded the case but, unfortunately, failed to reach a majority decision.\(^ {14}\) As a result, the *Rapanos* decision offers two competing tests for determining the proper scope and reach of federal jurisdiction under the CWA. Specifically, the two proposed standards address the issue of deciphering which wetlands are subject to CWA jurisdiction. Justice Scalia authored the plurality opinion which held that CWA jurisdiction exists over only those wetlands that have "a continuous surface connection"\(^ {15}\) with "a relatively

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\(^{10}\) 547 U.S. ___, 126 S. Ct. 2208 (2006).

\(^{11}\) 33 U.S.C.S. § 1362(7).

\(^{12}\) *See infra* Part II.C.

\(^{13}\) *See infra* Part III.B.

\(^{14}\) The Court's decision was split 4-4-1, with Justices Scalia, Thomas, Alito, and C.J. Roberts forming the plurality, Justices Stevens, Souter, Ginsburg, and Breyer forming the dissent, and Justice Kennedy concurring in the judgment but not the reasoning of the plurality.

\(^{15}\) *Rapanos*, 547 U.S. at ___, 126 S. Ct. at 2226.
permanent body of water connected to traditional interstate navigable waters\textsuperscript{16} such that "there is no clear demarcation between\textsuperscript{17} the wetland and the body of water. Justice Kennedy wrote a concurring opinion which held that CWA jurisdiction exists over any wetland that possesses a "significant nexus,"\textsuperscript{18} meaning that the wetland "significantly affect[s] the chemical, physical, and biological integrity"\textsuperscript{19} of a navigable-in-fact water.

In the absence of a controlling opinion, it remains unclear which of these two standards the lower courts will ultimately choose to employ in cases dealing with federal regulation of wetlands under the CWA. Perhaps more importantly, which test should the lower courts employ? This article suggests, for a number of reasons, that the test proposed in Justice Scalia's plurality opinion should be the new judicial standard in these types of cases. Part II of this article briefly surveys the history and purpose of the CWA as well as the evolving meaning of "navigable waters." Part III examines the \textit{Rapanos} decision more thoroughly and how lower courts have thus far interpreted the case. Part IV argues that Justice Scalia's plurality opinion should be applied as the controlling standard. More specifically, it suggests that the plurality opinion, among other things, (1) helps prevent unnecessary and difficult constitutional issues from arising, (2) promotes conventional notions of federalism by helping thwart federal intrusion into the

\textsuperscript{16} \textit{Id.} at \underline{___}, 126 S. Ct. at 2227.

\textsuperscript{17} \textit{Id.} at \underline{___}, 126 S. Ct. at 2226.

\textsuperscript{18} \textit{Id.} at \underline{___}, 126 S. Ct. at 2248 (Kennedy, J., concurring).

\textsuperscript{19} \textit{Id.}
traditional powers of the States, (3) aligns more closely with existing judicial precedent, (4) places meaningful and much-needed limits on the Corps’s jurisdictional authority, and (5) gives stability and clarity to an area of the law that has long been in flux, making proper enforcement of the CWA much more efficient and predictable for all parties involved. Finally, Part V, while acknowledging the importance of wetlands conservation efforts, concludes by reaffirming why the plurality’s test is the preferable standard that should be employed by the lower courts.

II. BACKGROUND: THE CWA, THE CORPS, AND “NAVIGABLE WATERS”

“I believe there are more instances of the abridgment of the freedom of the people by gradual and silent encroachments of those in power, than by violent and sudden usurpations....”

- James Madison

Even though citizens of the United States are purportedly “insure[d] domestic tranquility,” perhaps not all domestic intrusions on freedom are evident to the average American. Madison warned that an individual’s rights might be jeopardized by slow-moving, long-term governmental interference without the individual ever knowing. Since the enactment of the CWA, the Corps’s assertion of federal jurisdiction under the Act grew gradually in scope until early in the twenty-first century. Prior to the Rapanos decision, the Corps’s interpretation of the CWA would have allowed it to exercise jurisdiction

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21 U.S. CONST. pmbl.

22 See infra Part II.C.
over many unsuspecting landowners. The remainder of Part II briefly reviews the respective backgrounds of the CWA and the Corps and then traces the evolution of "navigable waters" as interpreted by both the Corps and the U.S. Supreme Court.

A. The Clean Water Act

The CWA was enacted in 1972 in order to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."\(^{23}\) One major way in which the CWA seeks to accomplish this goal is by prohibiting "the discharge of any pollutant by any person.\(^{24}\) The CWA further defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source."\(^{25}\) In addition, "pollutant" includes "dredged soil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water."\(^{26}\)

Of particular significance here is the CWA's use of the term "navigable waters," as it lies at the root of the issue in *Rapanos* as well as the issues discussed in this article. It is imperative that this term be defined and interpreted

\(^{23}\) 33 U.S.C.S. § 1251(a) (LexisNexis 2007).

\(^{24}\) *Id.* § 1311(a). Of course, this prohibition is subject to the exceptions listed in this section.

\(^{25}\) *Id.* § 1362(12).

\(^{26}\) *Id.* § 1362(6).
in a manner that clearly establishes the jurisdictional reach of the CWA,
especially considering that violators of the CWA can be subject to both civil and
criminal penalties.\textsuperscript{27} "Navigable waters" under the CWA is defined simply as
"waters of the United States, including the territorial seas."\textsuperscript{28} However, the legal
interpretation of this term is far more complicated and extensive than this simple
definition might imply.

\section*{B. The United States Army Corps of Engineers}

The Corps is one of the federal agencies that is charged with enforcing the
CWA; specifically, the Corps is authorized under the CWA to issue permits "for
the discharge of dredged or fill material into the navigable waters[...]."\textsuperscript{29} Through
this permitting process, the Corps essentially acts as the federal government's
agent in determining where and how dredged or fill material may be legally
deposited into "navigable waters." Without a federal permit from the Corps,
discharging dredged material, sand, and other "pollutants" into "navigable
waters" is illegal.\textsuperscript{30}

In exercising its authority, the Corps issues federal regulations that purport
to further define and explain certain terms under the CWA. The regulations also
attempt to define the appropriate jurisdictional reach under the CWA. For

\textsuperscript{27} \textit{Id.} § 1319. \textit{See also} \textit{Rapanos v. United States}, 547 U.S. \textit{___}, \textit{___}, 126 S. Ct.
2208, 2214 (2006) (explaining that the CWA imposes both criminal liability and severe
civil fines on many customary developmental activities).

\textsuperscript{28} 33 U.S.C. § 1362(7).

\textsuperscript{29} \textit{Id.} § 1344(a). These permits are commonly referred to as Section 404 permits.

\textsuperscript{30} \textit{Id.} § 1311(a).
example, the Corps defines "waters of the United States"\textsuperscript{31} to include all waters used in interstate commerce, all interstate waters and wetlands, all impoundments of such waters, and all tributaries of such waters.\textsuperscript{32} Moreover, "[a]ll 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" are also including in the Corps's definition of "waters of the United States."\textsuperscript{33} Clearly this definition of "navigable waters" is far more expansive and detailed than the corresponding definition of "navigable waters" in the CWA,\textsuperscript{34} which prompts the question: how did the Corps's definition become so broad?

C. The Evolving Meaning of "Navigable Waters"

Prior to the CWA's enactment, the Supreme Court had long interpreted the term "navigable waters" as meaning "navigable in fact" or readily susceptible of being rendered so.\textsuperscript{35} Upon the CWA's enactment in 1972, the Corps initially interpreted "navigable waters" in this limited, traditional sense.\textsuperscript{36} However, in

\textsuperscript{31} For the purposes of this article, the terms "navigable waters" and "waters of the United States" may be used interchangeably.

\textsuperscript{32} 33 C.F.R. § 328.3(a)(1), (2), (4), (5) (2007).

\textsuperscript{33} Id. § 328.3(a)(3).

\textsuperscript{34} See supra text accompanying note 29.

\textsuperscript{35} The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1871). See also Rapanos v. United States, 547 U.S. ___, ___, 126 S. Ct. 2208, 2216 (2006) (explaining that "navigable waters" had been interpreted for over a century as meaning those waters that are "navigable in fact.").

\textsuperscript{36} See 39 Fed. Reg. 12119 (codified at 33 C.F.R. § 209.120(d)(1) (1974)).
1975, the Corps adopted a much broader interpretation of "navigable waters," largely in response to a federal district court case which held that CWA jurisdiction existed "over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution." 37 Thus, the Corps abandoned its original interpretation of "navigable waters," declaring instead that the term "is not limited to the traditional tests of navigability." 38

Under the Corps's new understanding of the term, "waters of the United States" includes, in addition to traditional interstate navigable-in-fact waters, "all interstate waters including interstate wetlands," 39 as well as several other categories of "waters" that are not navigable-in-fact. 40 In addition, the new regulations claimed jurisdiction over "wetlands adjacent to [such] waters (other than waters that are themselves wetlands)." 41 "Wetlands" in turn are "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." 42 "Adjacent wetlands" are those that border, neighbor, or are contiguous with


38 Id.


40 See supra notes 33 & 34 and accompanying text. This broader definition of the term remains embodied in the Code of Federal Regulations to this day.

41 33 C.F.R. § 328.3(a)(7) (emphasis added).

42 Id. § 328.3(b).
“navigable waters,” even if physically separated by a natural or man-made barrier.\textsuperscript{43}

Even though the Corps’s new interpretation went far beyond the original understanding of “navigable waters,” the new regulations remained unquestioned for nearly a decade since the issue never came before the Supreme Court. Moreover, it is unclear whether the Supreme Court would have found the regulations to be overreaching, given that “agencies delegated rulemaking authority under a statute such as the Clean Water Act are afforded generous leeway by the courts in interpreting the statute they are entrusted to administer.”\textsuperscript{44}

Finally, in 1985, the Court addressed the issue of determining the proper construction of “navigable waters” under the CWA, scrutinizing for the first time the Corps’s jurisdictional reach under the Act.

1. \textit{United States v. Riverside Bayview Homes, Inc.}\textsuperscript{45}

\textit{United States v. Riverside Bayview Homes, Inc.},\textsuperscript{45} represents the Supreme Court’s first attempt at clarifying the definition of “navigable waters” in the CWA. In \textit{Riverside Bayview}, the Corps sought to enjoin a property owner from placing fill materials on the property without first obtaining a federal permit.\textsuperscript{46}

The District Court held for the Corps, finding the property to be a wetland subject to CWA jurisdiction. On appeal, the Sixth Circuit Court of Appeals reversed,

\textsuperscript{43} \textit{Id.} \S 328.3(c).

\textsuperscript{44} \textit{Rapanos v. United States}, 547 U.S. \underline{____}, \underline{____}, 126 S. Ct. 2208, 2235-2236 (2006) (citing \textit{Chevron U.S.A., Inc. v. NRDC, Inc.}, 467 U.S. 837, 842-845 (1984)).

\textsuperscript{45} 474 U.S. 121 (1985).

\textsuperscript{46} \textit{Id.} at 124.
holding that “adjacent wetlands” did not include “wetlands that were not subject to flooding by adjacent navigable waters at a frequency sufficient to support the growth of aquatic vegetation.”47 The Supreme Court granted certiorari to consider the proper meaning of “waters of the United States” and the scope of the Corps’s jurisdiction. In reversing the judgment of the Sixth Circuit, the Supreme Court rejected its reasoning and instead held that wetlands that actually abut a traditional navigable water are subject to CWA jurisdiction.48

In reaching its holding, the Court noted that “the transition from water to solid ground is not necessarily or even typically an abrupt one”49 and “the Corps must necessarily choose some point at which water ends and land begins”50 in order to define the limits of its jurisdictional reach. Thus, the Court granted a fair amount of deference to the Corps in this regard and concluded that jurisdiction was appropriate in this case where the property in question actually abutted a navigable in fact water. However, following the decision in Riverside Bayview, “the Corps adopted increasingly broad interpretations of its own regulations.”51 Apparently, the Corps noted the judicial deference embodied in the Riverside Bayview opinion and consequently proceeded to exercise what it perceived to be its newfound sense of authority. Although the Court had allowed the Corps a

47 Id. at 125.

48 Id. at 135.

49 Id. at 132.

50 Id.

certain amount of leeway in making its jurisdictional determinations with regards to wetlands, there is no indication that the Court in \textit{Riverside Bayview} intended to broaden the scope of the Corps's power any further.

Nonetheless, the Corps began interpreting its regulations as including, for example, "ephemeral streams" and "drainage ditches" as "waters of the United States" as long as they had an observable "ordinary high water mark."\textsuperscript{52} This interpretation is clearly more aggressive from a jurisdictional viewpoint, since any wetland that had a drainage ditch or ephemeral stream passing through it (or next to it for that matter) might potentially be subject to CWA jurisdiction. Another example of the Corps's attempts to broaden the scope of its jurisdiction post-\textit{Riverside Bayview} came in the form of a proposed regulation under which federal CWA jurisdiction would extend to any waters "which are or would be used as habitat by birds protected by the Migratory Birds Treaties[.]")\textsuperscript{53} This so-called "Migratory Bird Rule" would form the basis of the Supreme Court's next attempt at clarifying the meaning of "navigable waters."

2. \textit{Solid Waste Agency of Northern Cook County v. United States}

\textit{Army Corps of Engineers}

In \textit{Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers}\textsuperscript{54} ("SWANCC"), several municipalities of suburban Chicago


\textsuperscript{53} \textit{Id}.

\textsuperscript{54} 531 U.S. 159 (2001).
sought to develop a disposal site for "baled nonhazardous solid waste."\textsuperscript{55} The municipalities located an abandoned sand and gravel pit in Illinois and decided to purchase the site for that purpose.\textsuperscript{56} Over roughly three decades of nonuse, the property had evolved into a forested area with a number of permanent and seasonal ponds.\textsuperscript{57} The fact that the lands in question contained "no 'wetlands'"\textsuperscript{58} and only "nonnavigable, isolated, intrastate waters"\textsuperscript{59} is particularly significant in this case. State and local administrative agencies granted the municipalities permission to develop the disposal site,\textsuperscript{60} but the Corps asserted federal jurisdiction over the land based on its aforementioned "Migratory Bird Rule."\textsuperscript{61} The Corps ""determined that the seasonally ponded, abandoned gravel mining depressions located on the project site, while not wetlands, did qualify as 'waters of the United States' . . . [because] . . . the waters areas [were] used as habitat by migratory bird[s]."\textsuperscript{62}

The municipalities filed a lawsuit challenging the Corps's assertion of jurisdiction over the proposed landfill site.\textsuperscript{63} The district court held that the

\textsuperscript{55} \textit{Id.} at 162-163.

\textsuperscript{56} \textit{Id.} at 163.

\textsuperscript{57} \textit{Id.}

\textsuperscript{58} \textit{Id.} at 164.

\textsuperscript{59} \textit{Id.} at 166.

\textsuperscript{60} \textit{Id.} at 165.

\textsuperscript{61} \textit{Id.} at 164.

\textsuperscript{62} \textit{Id.} at 164-165.

\textsuperscript{63} \textit{Id.} at 165.
assertion of federal jurisdiction was proper, and the Seventh Circuit Court of Appeals affirmed, ruling that the Corps’s “Migratory Bird Rule” was a reasonable interpretation of the CWA.\textsuperscript{64} The Supreme Court granted certiorari and ultimately concluded that the Corps had exceeding its regulatory authority under the CWA.\textsuperscript{65} Accordingly, the Court reversed the Circuit Court’s judgment, holding that the “Migratory Bird Rule” was not supported by the CWA.\textsuperscript{66} In reaching its holding, the Court referred to its decision in \textit{Riverside Bayview} and noted that “[i]t was the significant nexus between the wetlands and ‘navigable waters’ that informed [its] reading of the CWA” in that case.\textsuperscript{67} In other words, wetlands that were \textit{adjacent to} “navigable waters,” meaning that they were “inseparably bound up with the ‘waters’ of the United States,”\textsuperscript{68} possessed a significant nexus to such waters. This reasoning in \textit{Riverside Bayview} led the Court to hold in \textit{SWANCC} that the Corps could not assert jurisdiction over isolated intrastate waters that were “\textit{not adjacent to open water}.”\textsuperscript{69}

\textit{SWANCC} represents the first time that the Supreme Court placed limits on the Corps’ power to assert federal jurisdiction under the CWA. While the Court in \textit{Riverside Bayview} deferred to the Corps’ interpretation of the CWA regarding

\textsuperscript{64} \textit{Id.} at 166.

\textsuperscript{65} \textit{Id.} at 174.

\textsuperscript{66} \textit{Id.} at 167.

\textsuperscript{67} \textit{Id.}


\textsuperscript{69} \textit{SWANCC}, 531 U.S. at 168.
truly adjacent wetlands, the SWANCC Court declined to “extend Chevron
deferece” to the “Migratory Bird Rule.”70 This refusal to grant the Corps
administrative deference marked a significant change in judicial reasoning. For
nearly thirty years, the Corps’s scope of authority had continually expanded as a
result of regulations that took an increasingly aggressive stance regarding the
jurisdictional reach of the CWA. While the courts, including the Supreme Court,
had allowed the Corps virtually absolute interpretive discretion for decades, the
SWANCC Court finally recognized that there clearly must be a limit to the
Corps’s authority in this regard.

Following the SWANCC decision, federal courts were divided “in their
understanding of how much ‘reigning in’ of Corps’s authority was intended by the
SWANCC majority.”71 Some Circuits interpreted the SWANCC decision quite
narrowly, holding it to mean only that the Corps could not assert CWA
jurisdiction over isolated, intrastate, nonnavigable waters based on the
aforementioned “Migratory Bird Rule.” For example, in United States v.
Deaton,72 the Fourth Circuit Court of Appeals, in holding that CWA jurisdiction
applied to a roadside ditch and, thus, an adjacent wetland, afforded considerable
deferece to the Corps’s delegated authority. The Deaton Court stated that the

70 Id. at 172.

71 Carey Schmidt, Comment, Private Wetlands and Public Values: “Navigable
Waters” and the Significant Nexus Test under the Clean Water Act, 26 PUB. LAND &

72 332 F.3d 698 (4th Cir. 2003).
Corps had an "implied delegation of authority" that allowed it "to determine which waters are to be covered within the range suggested by SWANCC." The Seventh Circuit Court of Appeals in United States v. Rueth Dev. Co. likewise interpreted the SWANCC decision narrowly. In that case, the petitioner claimed that SWANCC represented "a material change in law," but the court reasoned to the contrary and ultimately affirmed the Corps's determination that the wetlands in that case were jurisdictional. By holding that the Corps could assert adjacency jurisdiction based on an attenuated hydrologic connection, the Rueth Court stated that "it is clear that SWANCC did not affect the law regarding the government's alternative asserted basis for jurisdiction adjacency."

At the same time, at least one federal Circuit interpreted SWANCC broadly. In In re Needham, the Fifth Circuit reasoned that SWANCC precluded "waters," including wetlands, that were not "truly adjacent to navigable waters" from being included as "waters of the United States" under the CWA. Although the actual holding of this case is fairly narrow, the court, in dicta, used strong and conclusive language indicating its broad interpretation of SWANCC. The Needham Court stated that "in [the Fifth Circuit] the United States may not

73 Id. at 709.
74 Id. at 710.
75 335 F.3d 598 (7th Cir. 2003).
76 Id. at 600.
77 Id. at 604.
78 354 F.3d 340 (5th Cir. 2003).
79 Id. at 345.
simply impose regulations over puddles, sewers, roadside ditches and the like; under SWANCC 'a body of water is subject to regulation . . . if the body of water is actually navigable or adjacent to an open body of navigable water.'

Clearly, the scope of the Corps's authority remained an unsettled area of law in the aftermath of the SWANCC decision. Indeed, scholars at the time wrote often regarding the uncertain future of federal wetlands regulation. Since the Circuits were split regarding how to properly interpret SWANCC, the possibility that similarly situated land owners might be treated differently simply because of the geographic location of their property became a real concern. Why should one person's wetland property be subject to CWA jurisdiction in one State while another person's wetland property, similarly situated with regards to "navigable waters" but in a different State, not be subject to CWA jurisdiction? Perhaps it was this arbitrary distinction caused by the split between the Circuits that prompted the Supreme Court to revisit the meaning and scope of "navigable waters" just five years later.

III. Rapanos v. United States

"Under the Federal regulations, you can't dig a ditch in this country without Federal approval."

- M. Reed Hopper

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80 Id. at 345-46 (quoting Rice v. Harken Exploration Co., 250 F.3d 264, 269 (5th Cir. 2001)).

A. The Facts and Procedural History

The *Rapanos* case consisted of two separate Sixth Circuit cases that were consolidated on appeal. In the first case, the petitioner sought to develop certain wetlands that he owned in Michigan. As part of this process, he deposited fill material onto three different sites on his land without a federal permit. The federal government sued the landowner, alleging violations of the CWA. The district court held for the Corps, finding that the petitioner’s wetlands came under federal regulatory jurisdiction because they were adjacent to “waters of the United States.” The Sixth Circuit Court of Appeals affirmed, holding that “there was federal jurisdiction over the wetlands at all three sites because ‘there were hydrological connections between all three sites and corresponding adjacent tributaries of navigable waters.’” These “hydrological connections” were found apparently because the petitioner’s wetlands were connected to a man-made drain, which drained into a creek, which eventually flowed into a navigable in fact river. The court so concluded notwithstanding the fact that the petitioner’s

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84 *Id.* at ___, 126 S. Ct. at 2219.

85 *Id.*

86 *Id.*

87 *Id.*

88 *Id.*
wetlands were situated at least ten miles from the nearest body of navigable in
dfact water.\textsuperscript{89} As a result, the petitioner suffered both civil and criminal penalties.

In the second case, the Corps had denied petitioners’ request for a federal
permit to deposit fill material on their wetland which was situated roughly a mile
from a navigable lake.\textsuperscript{90} The Corps based its denial on the fact that the
petitioners’ wetland abutted a man-made drainage ditch that emptied into another
ditch or drain that connected to a creek that, in turn, emptied into the lake.\textsuperscript{91} The
petitioners eventually brought a lawsuit challenging the Corps’s exercise of
federal regulatory jurisdiction over their wetlands.\textsuperscript{92} The district court found that
federal jurisdiction was appropriate because the wetland in question was adjacent
to the ditch, which was deemed a neighboring tributary of a navigable waters.
Also, the district court concluded that the petitioners’ wetland possessed a
significant nexus to “waters of the United States.” As in the first case, the Sixth
Circuit affirmed the district court’s judgment.

In both cases, judgment for the Corps was based on finding a
“hydrological connection” between the petitioners’ wetlands and some navigable
in fact water. In other words, even though none of the wetlands in question were
actually adjacent to navigable in fact waters, the “hydrological connections”
between those wetlands and navigable in fact waters constituted a significant

\textsuperscript{89} Id. at ____ , 126 S. Ct. at 2214.

\textsuperscript{90} Id. at ____ , 126 S. Ct. at 2219.

\textsuperscript{91} Id.

\textsuperscript{92} Id.
nexus between the wetlands and "waters of the United States." Apparently, the
Sixth Circuit reasoned that even the slightest "hydrological connection" could act
as a proxy for adjacency under the CWA.

B. The Supreme Court Decision

A majority of the Court agreed that the Sixth Circuit had applied the
wrong test in reaching its judgment, and thus, the cases were ultimately remanded
for further consideration in the lower courts.\textsuperscript{93} However, the Court failed to reach
a majority regarding the appropriate standard for lower courts to utilize on
remand. Essentially, two distinct tests arose from the \textit{Rapanos} opinions.\textsuperscript{94}

1. Scalia's plurality opinion

The plurality opinion\textsuperscript{95} began by clarifying the respective definitions of
"adjacent to" and "navigable waters." The opinion concluded that the "only
plausible interpretation" of "navigable waters" includes "only those relatively
permanent, standing or continuously flowing bodies of water 'forming geographic
features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers,
[and] lakes.'"\textsuperscript{96} Next, the plurality determined that "only those wetlands with a
continuous surface connection to bodies that are [navigable waters] in their own

\textsuperscript{93} \textit{Id.} at __, 126 S. Ct. at 2235-36.

\textsuperscript{94} For the purposes of this article, the dissenting opinion in \textit{Rapanos} is not
considered a viable option for lower courts to look to in determining the scope of
"navigable waters." A discussion of how persuasive a dissenting opinion should be in
cases where the Court fails to reach a true majority is beyond the scope of this paper.

\textsuperscript{95} The plurality consisted of Justices Scalia, Thomas, Alito, and Chief Justice
Roberts.

\textsuperscript{96} \textit{Rapanos}, 547 U.S. at __, 126 S. Ct. at 2225 (emphasis added) (citation
omitted).
right, so that there is no clear demarcation between ‘waters’ and wetlands, are
‘adjacent to’ such waters and covered by the [CWA].”

Taking these terms in conjunction with one another, the plurality ultimately crafted a two-prong test for determining whether a particular wetland is covered by the CWA by virtue of its adjacency. Two findings are required:

First, that the adjacent channel contains a “water of the United States,” (i.e., a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the “water” ends and the “wetland” begins.

The plurality also explicitly stated that “[w]etlands with only an intermittent, physically remote hydrologic connection to ‘waters of the United States’ do not implicate the boundary-drawing problem of Riverside Bayview, and thus lack the necessary connection to covered waters that we described as a ‘significant nexus’ in SWANCC.” In formulating this standard, the plurality noted that the Corps had gone much too far in asserting its regulatory authority.

2. Kennedy’s concurring opinion

Unlike the plurality, Justice Kennedy, in his concurring opinion, concluded that “the Corps’ jurisdiction over wetlands depends upon the existence of a _significant nexus_ between the wetlands in question and navigable waters in

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97 _Id._ at __, 126 S. Ct. at 2226 (emphasis added).

98 _Id._ at __, 126 S. Ct. at 2227.

99 _Id._ at __, 126 S. Ct. at 2226.

100 _See id._ at __, 126 S. Ct. at 2222 (“[T]he Corps has stretched the term ‘waters of the United States’ beyond parody.”).
the traditional sense." Kennedy elaborated, stating that "wetlands possess the requisite nexus, and thus come within the statutory phrase ‘navigable waters,’ if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’" Thus, while the plurality’s test focuses more on the proximity and geographic characteristics of the wetlands, Kennedy’s test focuses solely on the presence of a “significant nexus,” regardless of the wetland’s location. Although Kennedy did seem to place a limit on the Corps’s jurisdictional reach by conclusively stating that “[w]hen . . . wetlands’ effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term ‘navigable waters,’” his new “significant nexus” standard nonetheless leaves considerable room for the Corps’s discretion in determining whether a “significant nexus” exists in any given case. Kennedy practically acknowledged as much when he hinted in his opinion that the Corps could likely find a “significant nexus” between the instant petitioners’ wetlands and navigable in fact waters.

C. In the wake of Rapanos

101 Id. at ___, 126 S. Ct. at 2248 (Kennedy, J., concurring).

102 Id.

103 Id.

104 Id. at ___, 126 S. Ct. at 2250 (“In both the consolidated cases before the Court the record contains evidence suggesting the possible existence of a significant nexus . . . . Thus the end result in these cases and many others to be considered by the Corps may be the same as that suggested by the dissent, namely, that the Corps’ assertion of jurisdiction is valid.”).
Since the *Rapanos* decision, several lower courts have already addressed issues involving wetlands jurisdiction and have been forced to apply the Supreme Court's holding. Although it remains unclear which test (the plurality's or Kennedy's) the lower courts will ultimately choose to adopt, it is clear that, presently, there is no consensus. In fact, this area of the law is quickly becoming just as muddled, if not more, as it was during the years following the *SWANCC* decision.

The Seventh and Ninth Circuits have already interpreted Justice Kennedy's concurring opinion in *Rapanos* as presenting the appropriate standard. In *Northern California River Watch v. Healdsburg*, the Ninth Circuit Court of Appeals chose to follow Kennedy's opinion in upholding CWA jurisdiction over a rock quarry pit in California. Referring to the *Rapanos* decision, the Healdsburg Court stated that “the controlling opinion is that of Justice Kennedy who said that to qualify as a navigable water under the CWA the body of water itself need not be continuously flowing, but that there must be a 'significant nexus' to a waterway that is in fact navigable.” Likewise, the Seventh Circuit adopted Kennedy's proposed standard as controlling in *United States v. Gerke Excavating, Inc.* In that case, the petitioner had been fined for depositing fill material onto privately owned wetlands in Wisconsin. In remanding the case to the lower court for specific fact-finding in light of the *Rapanos* decision, the

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105 457 F.3d 1023 (9th Cir. 2006).

106 *Id.* at 1025.

107 464 F.3d 723 (7th Cir. 2006).
Gerke Court said that “Justice Kennedy’s proposed standard . . . must govern the further stages of this litigation.”\textsuperscript{108}

Taking a different approach, the First Circuit decided against choosing one of the two proposed standards and, instead, concluded that both tests should be utilized in determining federal jurisdiction of wetlands under the CWA. In United States \textit{v.} Johnson,\textsuperscript{109} the court remanded the case for additional factfinding and further proceedings in light of \textit{Rapanos} where a group of Massachusetts farmers had been held liable for discharging pollutants into federally-regulated waters without a permit. The Johnson Court, rather than classifying the plurality’s or Kennedy’s opinion as controlling in \textit{Rapanos}, followed Justice Stevens’s advice in his dissenting opinion. Stevens’s suggestion reads as follows:

\begin{quote}
[W]hile both the plurality and Justice Kennedy agree that there must be a remand for further proceedings, their respective opinions define different tests to be applied on remand. Given that all four Justices who have joined this [dissenting] opinion would uphold the Corps’ jurisdiction in both of these cases -- and in all other cases in which either the plurality’s or Justice Kennedy’s test is satisfied -- on remand each of the judgments should be reinstated if either of those tests is met.\textsuperscript{110}
\end{quote}

On remand, the Johnson Court instructed the district court to “do exactly as Justice Stevens has suggested.”\textsuperscript{111} The court continued by explicitly stating that “[t]he federal government can establish jurisdiction over the

\textsuperscript{108} Id. at 725.

\textsuperscript{109} 467 F.3d 56 (1st Cir. 2006).


\textsuperscript{111} \textit{Johnson}, 467 F.3d at 66.
target sites if it can meet either the plurality’s or Justice Kennedy’s standard as laid out in Rapanos.\textsuperscript{112}

Taking perhaps the most unconventional and arguably controversial approach to interpreting the \textit{Rapanos} decision, a federal district court in Texas decided, essentially, to ignore the opinion altogether. In \textit{United States v. Chevron Pipe Line Co.},\textsuperscript{113} the court held that Chevron Pipe Line was not liable for the discharge of a pollutant into a nearby creek and stream bed because there was no “significant nexus” to navigable-in-fact waters. While utilizing Justice Kennedy’s “significant nexus” language and acknowledging that the \textit{Rapanos} decision should control the case’s outcome, the \textit{Chevron Pipe Line} Court relied not on the proposed standards in \textit{Rapanos}, but instead, considered primarily Fifth Circuit caselaw pre-dating the \textit{Rapanos} decision. The court seemed to dismiss the plurality’s test without discussion and referred to Kennedy’s test as being “vague” and “subjective.”\textsuperscript{114} Then, the court reasoned that “[b]ecause Justice Kennedy failed to elaborate on the ‘significant nexus’ requirement, [it] will look to the prior reasoning in [the Fifth Circuit]” for guidance.\textsuperscript{115} Thus, the \textit{Chevron Pipe Line} Court applied the previously existing Fifth Circuit interpretation of “navigable waters.”

\textsuperscript{112} \textit{Id.} (emphasis added). \textit{See also} United States v. Evans, No. 3:05-cr-159(S3)-J-32MMH, 2006 U.S. Dist. LEXIS 94369 (M.D. Fla. July 14, 2006) (following Justice Stevens’s suggestion in his \textit{Rapanos} dissenting opinion to use both proposed standard in evaluating jurisdictional questions regarding wetlands under the CWA.).

\textsuperscript{113} 437 F. Supp. 2d 605 (N.D. Tex. 2006).

\textsuperscript{114} \textit{Id.} at 613.

\textsuperscript{115} \textit{Id.}
It is clear from the already emerging splits between the Circuits that, despite the Court’s decision in *Rapanos*, the state of this area of law remains in flux, just as it was post-*SWANCC*. Noticeably absent from the preceding discussion of post-*Rapanos* cases is any mention of a court that has adopted Scalia’s plurality opinion as controlling. It is unclear whether this is indicative of how courts will continue to interpret the *Rapanos* decision in the future. In any event, the next section of this article demonstrates why the plurality’s test should be adopted and employed by the lower courts, as its test is markedly superior to the standard proposed by Justice Kennedy.

**IV. ARGUING FOR THE PLURALITY TEST AS THE APPROPRIATE STANDARD**

“What if we say that if it is wet, it’s a wetland?”

- Dan Quayle\(^{116}\)

Unfortunately, the task of determining which wetlands are subject to federal jurisdiction under the CWA is not as simple as Mr. Quayle’s proposed definition of “wetland.” Instead, it is a difficult task that involves balancing competing policies and considering a multitude of factors. The Court’s splintered decision in *Rapanos* is clearly illustrative of this immense difficulty. Nonetheless, it is an undertaking that is necessary for the benefit of property owners, environmentalists, judges, legislators, and governmental agencies alike. The remainder of this section argues that Justice Scalia’s plurality opinion in *Rapanos*, and not Justice Kennedy’s concurring opinion, provides the preferable standard that should be applied in cases dealing with the federal regulation of wetlands.

\(^{116}\) **RONALD KEITH GADDIE & JAMES L. REGENS, REGULATING WETLANDS PROTECTION: ENVIRONMENTAL FEDERALISM AND THE STATES** 17 (2000).

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wetlands under the CWA. First, the plurality’s test helps prevent difficult constitutional questions from arising as a result of the Corps’ jurisdictional assertions. Second, the plurality’s test inhibits federal intrusion into areas that are traditionally governed by the States. Third, the plurality’s test is more consistent with traditional notions of judicial precedent. Fourth, the plurality’s test places meaningful limits on the scope of the Corps’s jurisdiction, thereby bringing stability and predictability to an area of law that has long been in flux. Finally, the plurality’s test promotes administrative and judicial efficiency by its objective and discernable instructions.

A. Preventing Unnecessary Constitutional Inquiries

Whenever the government places restrictions on how a property owner may use or enjoy his property, constitutional implications necessarily follow. The Takings Clause of the Fifth Amendment requires that “private property [not] be taken for public use without just compensation.” Even if property is not literally taken by the government, regulations that substantially interfere with a property owner’s rights to use and enjoy the property can also constitute a “taking” under the Fifth Amendment. In 1922, the Supreme Court stated that “while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” Moreover, there are instances where regulations constitute a taking per se, but most often, courts will employ a

117 U.S. CONST. amend. V.


balancing test to determine whether or not a taking has occurred.\textsuperscript{120} Under this balancing test, courts will consider "the extent to which the regulation has interfered with distinct investment-backed expectations,"\textsuperscript{121} "the character of the governmental action,"\textsuperscript{122} the degree to which the regulation prevents "substantial individualized harm,"\textsuperscript{123} and the degree to which the regulation allows the government to use the regulated property for "uniquely public functions."\textsuperscript{124}

The CWA requires landowners to obtain a federal permit before depositing dredge or fill material on wetlands that are adjacent to navigable waters. Although merely requiring the property owner to obtain such a permit is not generally considered a taking,\textsuperscript{125} "when a permit is denied and the effect of the denial is to prevent 'economically viable' use of the land in question . . . a taking has occurred."\textsuperscript{126} This type of "taking" is perhaps more commonly referred to as \textit{inverse condemnation}.\textsuperscript{127} Moreover, when dealing specifically with


\textsuperscript{121} \textit{Id.} at 124.

\textsuperscript{122} \textit{Id.}

\textsuperscript{123} \textit{Id.} at 125.

\textsuperscript{124} \textit{Id.} at 128.

\textsuperscript{125} See, e.g., United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 127 (1985) ("A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself 'take' the property in any sense[].")

\textsuperscript{126} \textit{Id.}

\textsuperscript{127} In the context of the Section 404 permitting process, if the Corps were to deny such a permit, the landowner might be able to show that the denial of the permit

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the filling of wetlands under the CWA, "legal precedent exists for viewing the activities of the government under section 404 as regulatory takings."\textsuperscript{128} For example, in \textit{Palm Beach Associates v. United States},\textsuperscript{129} the United States Court of Appeals for the Federal Circuit held that a regulatory taking occurred when the Corps refused to grant a section 404 permit authorizing the fill of roughly fifty acres of wetlands. Thus, it is clear that regulatory takings is a major issue in the context of wetlands regulation, especially considering that "section 404 is probably more intrusive than any other form of federal regulation regarding the use and development of private property."\textsuperscript{130}

When the Supreme Court issues an opinion, it should always be aware of any constitutional implications of its holding. In fact, the Supreme Court acknowledged the importance of this in \textit{SWANCC} when it chose to interpret the CWA in a manner that "avoids the significant constitutional and federalism questions raised"\textsuperscript{131} by the Corps's broad interpretation of the Act. Justice Kennedy's concurring opinion's test in \textit{Rapanos} was not written in such a manner as to help prevent such constitutional issues from arising. Rather, his vague "significant nexus" standard leaves far too much room for interpretation, and the

\textsuperscript{128} GADDIE \& REGENS, \textit{supra} note 116, at 43.

\textsuperscript{129} 231 F.3d 1354 (Fed. Cir. 2000).

\textsuperscript{130} GADDIE \& REGENS, \textit{supra} note 116, at 37-38.

Corps, under this test, might still be able to assert federal jurisdiction over any wetland that possesses a hydrologic connection with a navigable in fact water that it deems "significant." Kennedy provides no insight as to the meaning of "significant" in this test, apparently granting the Corps substantial deference in interpreting its meaning. As history has illustrated, the Corps has in the past interpreted certain terms in the CWA in an exceedingly broad fashion, and there is no indication that the Corps would not do the same here. Under Kennedy's test, the Corps would be able to justify its assertions of jurisdiction by using its own interpretation of "significant nexus," and, consequently, it is likely that the number of wetlands subject to CWA jurisdiction would remain substantially high. Presumably, more assertions of regulatory jurisdiction means, in turn, more denials of permits. More permit denials means, in turn, more regulatory takings claims by landowners. This is by no means a desirable result.

The plurality, on the other hand, proposes an objective, clearly defined standard. Under its test, only those wetlands which have a continuous surface connection with a navigable in fact water are subject to the Corps's jurisdictional assertions. This test limits the Corps's federal regulatory authority by depriving the Corps of a substantial amount of interpretive discretion. In so doing, the plurality's test presumably restricts the number of wetlands requiring a federal permit before depositing fill material on the land, thus reducing the potential number of permit denials (which might constitute a regulatory taking). Kennedy's test allows the Corps a great deal of discretion in determining which wetlands need such a permit, thus increasing the chances that even wetlands that
are neither wet for a significant period of time nor truly adjacent to navigable waters might be denied the necessary permit. In sum, the Supreme Court has stated that, when possible, it is wise to consider and analyze cases in a manner that does not implicate difficult questions that raise constitutional concerns. In this regard, the plurality's proposed standard is clearly preferable to Kennedy's since the plurality's test helps reduce the number of potential regulatory takings claims.

B. Maintaining a Proper Balance Between Federal and State Powers: The Federalism Issue

"Regulation of land use, as through the issuance of [ ] development permits . . . is a quintessential state and local power."\textsuperscript{132} Moreover, in \textit{SWANCC}, the Court stated that the Corps' broad interpretation of the CWA would "result in a significant impingement of the States' traditional and primary power over land and water use."\textsuperscript{133} In \textit{Rapanos}, the Corps argued that its jurisdictional reach was so broad that it could "function as a de facto regulator of immense stretches of intrastate land."\textsuperscript{134} The Court noted its desire to not allow such "an unprecedented intrusion into traditional state authority"\textsuperscript{135} in the absence of clear congressional intent. The Supreme Court has consistently expressed its aspiration to protect the balance between federal and state governments and to not allow


\textsuperscript{133} \textit{SWANCC}, 531 U.S. at 174.

\textsuperscript{134} \textit{Rapanos}, 547 U.S. at \_, 126 S. Ct. at 2224.

\textsuperscript{135} \textit{Id.}
federal agencies to intrude on territory that is more appropriately handled by the states.

Even a cursory review of the Supreme Court’s federalism cases from the last quarter of a century illustrates that a majority of the court consistently rendered decisions that promoted federalism by empowering the states and maintaining a proper balance between the federal and state levels of government.\textsuperscript{136} Former Supreme Court Justice Sandra Day O’Connor, in the 1991 case of *Gregory v. Ashcroft*,\textsuperscript{137} succinctly stated the reasons for promoting federalism:

\begin{quote}
[O]ur Constitution establishes a system of dual sovereignty between the States and the federal government. This Court also recognized this fundamental principle. \ldots The Constitution created a Federal government of \textit{limited powers}. \ldots This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases the opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.\textsuperscript{138}
\end{quote}

In general, the so-called “liberal wing of the Court has previously eschewed federalism and states’ rights in favor of an increasing federal presence – some would say intrusion – into the lives of the citizens of the several states.”\textsuperscript{139}

\begin{footnotes}
\footnotetext[137]{501 U.S. 452.}
\footnotetext[138]{Id. at 457-58 (emphasis added).}
\footnotetext[139]{Callies, supra note 136, at 342.}
\end{footnotes}
However, the Court’s relatively recent decision in *Kelo v. City of New London*[^40] arguably “represents a philosophical U-turn [by the liberal wing] in favor of state action and against the establishment of federal criteria.”[^41] In *Kelo*, the Court upheld the exercise of eminent domain as constitutional where the purpose of the condemnation was economic revitalization. In so holding, the Court essentially reduced the “public use” requirement in the law of eminent domain to “little more than a speed bump”[^42] by reasoning that as long the condemnation of privately owned land occurs for the purpose of economic revitalization (which presumably will result in public benefits), the process is constitutional. However, Justice Stevens, author of the *Kelo* majority opinion (and notably one who generally has opposed federalism), clearly articulated that “nothing in [the] opinion precludes any State from placing further restrictions on its exercise of the takings power.”[^43]

In preserving the states’ rights in this manner, Justice Stevens and the liberal wing of the Court appear to be moving towards supporting the very same traditional notions of federalism that the remainder of the Court has long endorsed.

Turning attention back to the competing standards of *Rapanos*, it is evident that the plurality’s test sufficiently limits the ability of the Corps to encroach upon the states’ authority to regulate land-use by requiring that wetlands be actually adjacent to navigable in fact waters. Kennedy’s test, meanwhile,

[^40]: 545 U.S. 469 (2005).

[^41]: Callies, *supra* not 136, at 327.

[^42]: *Id*.

[^43]: *Kelo*, 545 U.S. at 489.
might allow the Corps to assert federal jurisdiction over completely isolated, intrastate wetlands that are not even adjacent to a navigable in fact water, so long as the Corps finds that the wetland possesses a "significant" enough of a "nexus" to a navigable water. Clearly such an assertion of jurisdiction would be an encroachment of the states' powers to regulate land-use, especially when the land in question is completely intrastate. In fact, Justice Kennedy himself admitted that his "significant nexus requirement may not align perfectly with the traditional extent of federal authority." In light of the Supreme Court's obvious history of promoting federalism, coupled with the liberal wing's "philosophical U-turn" in Kelo, surely the controlling standard for determining federal wetlands jurisdiction should be one that empowers the states and keeps federal intrusion to a minimum. Again, the plurality's test significantly reduces the scope of the Corps's power under the CWA, resulting in minimal federal interference of the states' traditionally reserved powers.

Moreover, the language of the CWA itself explicitly recognizes the importance of promoting and preserving the notion of federalism. As previously noted, an objective of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." However, that is not the sole objective of the Act. The Act further states that "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States prevent, reduce, and eliminate pollution, [and] to plan the development and use...."

Thus, the CWA, by its own terms, acknowledges that preventing water pollution is not its only concern. The CWA makes it clear that not only do states have the right to conduct their own land-use and development plans, but they are charged with the "primary responsibility" of doing so. Kennedy's test in Rapanos essentially takes this primary responsibility from the states and charges the federal government with it, whereas the plurality's standard protects and preserves the states' rights.

C. Conforming to Judicial Precedent

The plurality's test should be employed by the lower courts because it is more consistent with the Court's previous decisions in this area, specifically Riverside Bayview and SWANCC. Justice Kennedy, in his concurring opinion, accused the plurality of ignoring judicial precedent and applying the wrong standard in its analysis. However, he, not the plurality, is the one who appears to have misinterpreted those cases. Justice Kennedy claims that his "significant nexus" test is the appropriate standard because it is directly set forth in SWANCC. Justice Kennedy is incorrect.

The phrase "significant nexus" is only mentioned once in the entire SWANCC opinion. The majority in SWANCC stated that "[i]t was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in Riverside Bayview Homes." Justice Kennedy apparently took this to mean that the new rule required under SWANCC was that, in order for wetlands


146 SWANCC, 531 U.S. at 167.
to be subject to federal jurisdiction under the CWA, all that need be shown is that there exists a significant nexus between the wetlands and a navigable water. However, Justice Kennedy reads this single line in SWANCC out of context.

In the opinion's immediately preceding paragraph, the majority discussed its findings in Riverside Bayview. The Court noted that its holding in Riverside Bayview was "based in large measure upon Congress' unequivocal acquiescence to, and approval of, the Corps' regulations interpreting the CWA to cover wetlands adjacent to navigable waters."\(^{147}\) Then, the Court noted that it was Congress' intent to regulate wetlands that were "inseparably bound up with the 'waters' of the United States."\(^ {148}\) Thus, the majority in SWANCC was not advancing a new test with the language "significant nexus," but merely noting that when wetlands are "inseparably bound up" with "navigable waters," they have a significant nexus to those waters. Therefore, Kennedy, in Rapanos, was not asserting an established test that was merely ignored by the remainder of the Court (as he so claimed), but rather, he was advancing a completely new standard for the lower courts to consider.

Arguably, the standard that Justice Kennedy proposes can be classified as "judicial legislation." The plurality opinion points out that Kennedy seems to utilize "the familiar tactic of substituting the purpose of the statute for its text, freeing the Court to write a different statute that achieves the same purpose."\(^ {149}\)

\(^{147}\) Id.


In essence, his test is that "anything that might 'significantly affect' the purity of [navigable] waters bears a 'significant nexus' to those waters and thus ... is those waters."\textsuperscript{150} The only way that Justice Kennedy could create this test is by ignoring the dual purposes of the CWA and the actual text of the statute as well as misreading the Court's previous holdings in \textit{Riverside Bayview} and \textit{SWANCC}. The plurality's test, that wetlands need to have a continuous surface connection with a traditional navigable water in order for the Corps to assert federal jurisdiction over them, conforms much more closely to the true meaning of the holdings in \textit{Riverside Bayview} and \textit{SWANCC}, as well as the statutory text of the CWA itself.

\textbf{D. Placing Meaningful Limits on the Scope of the Corps's Jurisdiction}

Although the plurality and Justice Kennedy could not agree on a single standard for determining the scope of federal wetlands jurisdiction, both opinions agreed that the Corps's broad assertion of CWA jurisdiction had gone too far. Moreover, both the plurality opinion and Kennedy's concurring opinion acknowledged that the dissenters' complete deference to the Corps's interpretation of the CWA was inappropriate as well. Thus, it is evident that a majority of the Court believed that limitations needed to be placed on the Corps's scope of authority.

Justice Kennedy's "significant nexus" standard places mere illusory limitations on the Corps's jurisdictional reach. Indeed, Justice Stevens, in his dissenting opinion, acknowledged that "Justice Kennedy's 'significant nexus' test

\textsuperscript{150} \textit{Id.}
will probably not do much to diminish the number of wetlands covered by the Act in the long run.\textsuperscript{151} This is due in large part to Kennedy's failure to provide specific guidance for determining what constitutes a "significant nexus" under his test. True, he states that a wetland has the requisite nexus if it affects the varied integrities of the navigable waters, but all this does is reiterate the purpose of the CWA, which the Corps presumably already knows and understands. With no guidance regarding how to interpret "significant nexus," the Corps would be left again to crafting its own interpretation of the phrase. With such deference extended to the Corps, it is no wonder that the dissenting Justices take less exception with Kennedy's proposed standard.

Instead of placing mere illusory limitations on the Corps's scope of authority, the plurality's test limits federal jurisdiction on a meaningful level. With an objective and clearly decipherable standard, the plurality's standard leaves little discretion to the Corps to determine on a case-by-case basis which wetlands fall under its jurisdiction. By reducing the Corps's discretion, the plurality's test ensures that the Corps will know and understand its jurisdictional limits under the CWA.

Moreover, by placing meaningful limits on the Corps's regulatory authority with an objective and unambiguous standard, the plurality opinion promotes stability and predictability in this area of the law. The area of the law dealing with wetlands regulations has been unstable and unpredictable for many years. Particularly evident during the post-\textit{SWANCC} years, the potential for

\textsuperscript{151} \textit{Id.} at 2264 (Stevens, J., dissenting).
unpredictable outcomes, both in court and in the field, was a constant concern. Kennedy’s test may continue to generate unpredictable and unexpected assertions of jurisdiction from the Corps because of the amount of discretion left to the Corps. A property owner who owns isolated, intrastate wetlands might be completely unaware that his property is subject to federal jurisdiction under the CWA. Moreover, state agencies responsible for issuing development permits and the like might be completely unaware as well. Should the state agency issue a developer the necessary permits and, subsequently, the Corps asserts federal jurisdiction over the area, then the efforts of both the developer and the state agency become moot. The plurality’s test, on the other hand, provides the states with a predictable and discernable standard by which to determine if the Corps is likely to assert its federal jurisdiction under the CWA.

E. Promoting Administrative and Judicial Efficiency

Finally, the plurality’s test promotes judicial and administrative efficiency, while Kennedy’s test probably would hinder such efficiency. Since the plurality’s test rests largely on objective standards for determining which wetlands are subject to federal jurisdiction, governmental agencies would be able to reasonably predict which areas of wetland might potentially need a permit. In particular, the plurality’s test would allow the Corps to utilize its resources to the maximum extent possible and focus its regulatory efforts and oversight on areas that it knows might be susceptible to federal jurisdiction. Instead, the splintered decision of the Rapanos Court has made it necessary for “[l]ower courts and
regulated entities ... to feel their way on a case-by-case basis."152 Chief Justice Roberts lamented that this is truly "unfortunate."153 Justice Kennedy's test, with its lack of clarity and subjective implications, would necessitate the continued use of a case-by-case analysis. Clearly then, the judiciary will benefit from the plurality's test as well, considering it would essentially solve the case-by-case problem. With a clear and objective standard, it is likely that fewer lawsuits related to CWA wetland jurisdiction will be filed, and those that are filed will be able to be taken care of quickly and efficiently. Also, the plurality's test will stabilize this area of law, at least temporarily.

Kennedy's test, on the other hand, fails to promote efficiency all around. Because of his vague standard, more lawsuits are likely to be filed challenging the Corps' assertions of jurisdiction, the Corps' itself will not be able to utilize its limited resources in an effective manner and focus its efforts as needed, and this area of the law will continue to remain in flux.

V. CONCLUSION

"The burden of federal regulation on those who would deposit fill material in locations denominated 'waters of the United States' is not trivial."154

As the quote above indicates, the issue of federal regulation of wetlands is not trivial, but rather, it is an important issue that needs resolving. It is an area of the law that is particularly difficult to deal with, especially considering the

152 Id. at 2236 (Roberts, C.J., concurring).
153 Id.
154 Id. at 2214.
competing interests involved. Wetlands undoubtedly constitute an important, if not vital, part of the nation’s natural ecosystem, and thus, conservation efforts of wetlands should not be taken lightly. Indeed, “[w]etlands serve significant roles for human habitation, primarily through flood control, groundwater recharge, and water filtration, and providing habitat to a variety of economically valuable plant and animal species.”

At the same time, the issue in *Rapanos* involves the CWA, not an Act that is designed to protect the wetlands. In fact, “[c]ontrary to the perceptions of many casual observers of environmental regulation, no federal legislation is specifically designed to govern the preservation and use of wetlands.” As Justice Scalia noted in his *Rapanos* opinion, “a Comprehensive National Wetlands Protection Act is not before us.” Congress might very well decide to enact legislation designed specifically to protect the destruction of wetlands, but that is yet to be seen. Under the current status of the law, the need to regulate and preserve wetlands needs to be balanced against the competing interests of fundamental property rights and the goals of federalism.

The plurality’s test in *Rapanos* is truly the more preferable standard for determining the scope of federal wetlands jurisdiction under the current status of the law. The plurality’s standard prevents constitutional questions from arising, advocates for notions of federalism, conforms to judicial precedent, places

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155 GADDIE & REGENS, supra note 116, at 32.

156 *Id.* at 36.

157 *Rapanos*, 547 U.S. at __, 126 S. Ct. at 2228.
meaningful limits on the Corps's regulatory powers, and promotes efficiency for all parties involved. It is clear that it should be the test employed by the lower courts in future cases involving wetlands regulations under the CWA.