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Jurisdictional Donnybrook

DECIPHERING WETLANDS JURISDICTION AFTER *RAPANOS*

I. INTRODUCTION

Over the past decade, a multitude of appellate courts have debated the precise boundaries of the Army Corps of Engineers' ("Corps") jurisdiction to enforce the Clean Water Act ("CWA").¹ This debate recently culminated with the Supreme Court addressing the issue of the Corps' wetlands jurisdiction for the third time in the CWA's thirty-year history.² In *Rapanos v. United States*, a split decision and the subject of this Note, the Supreme Court presented three tests for determining wetlands jurisdiction under the CWA, but no test commanded a majority of justices' approval.³ This Note will argue that the *Rapanos* court should have applied the agency deference approach—upholding an agency's construction of a statute so long as the construction was reasonable⁴—to determine the appropriateness of the Corps' jurisdiction over the property at issue. This Note will further argue that all courts addressing the appropriateness of the Corps' wetlands jurisdiction should implement this approach.

¹ See *United States v. Phillips*, 367 F.3d 846, 849 (9th Cir. 2004); *In re Needham*, 354 F.3d 340, 343 (5th Cir. 2003); *Tracey v. Newdunn Assocs., LLP.*, 344 F.3d 407, 408 (4th Cir. 2003); *United States v. Rueth Dev. Co.*, 335 F.3d 598, 600 (7th Cir. 2003); *United States v. Deaton*, 332 F.3d 698, 699 (4th Cir. 2003); *United States v. Krilich*, 303 F.3d 784, 785 (7th Cir. 2002); *United States v. Interstate Gen. Co.*, No. 01-4513, 2002 WL 1421411, at *1-2 (4th Cir. July 2, 2002); *Rice v. Harken Exploration Co.*, 250 F.3d 264, 264 (5th Cir. 2001); *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 527 (9th Cir. 2001).

² See *Rapanos v. United States*, 126 S. Ct. 2208, 2208 (2006); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs (SWANCC)*, 531 U.S. 159, 159 (2001).

³ See *Rapanos*, 126 S. Ct. at 2236 (Roberts, C.J., concurring); see also *id.* at 2265 (Stevens, J., dissenting) (arguing that the courts on remand should reinstate the judgments if either the "significant nexus" or plurality test is met).

⁴ *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) ("[T]he question for the court is whether the agency's [interpretation] is based on a permissible construction of the statute.").

The source of the Corps' jurisdiction over wetlands is the CWA. The CWA provides that the Corps may issue permits for the discharge of pollutants or fill material into "navigable waters,"⁵ and further defines "navigable waters" as "waters of the United States."⁶ While Congress left "waters of the United States" undefined within the CWA, it evinced an intent that jurisdiction under the CWA be "the broadest constitutional interpretation."⁷ In response, courts construed the definition of "navigable waters" broadly to include waters that are not actually navigable in the traditional sense.⁸ Under this logic, the Corps issued a regulation defining "waters of the United States" to include waters used in foreign or interstate commerce; all interstate waters and wetlands; intrastate lakes, rivers, and streams; tributaries;⁹ and wetlands adjacent to any of these waters ("adjacent wetlands").¹⁰ Unlike other features

⁵ The statute reads:

(a) Discharge into navigable waters at specified disposal sites.

The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

33 U.S.C. § 1344(a) (2000).

⁶ "The term 'navigable waters' means the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7) (2000).

⁷ S. REP. NO. 92-1236, at 144 (1972) (Conf. Rep.), *as reprinted in* 1972 U.S.C.C.A.N. 3776, at 3822.

⁸ *See Int'l Paper Co. v. Oulette*, 479 U.S. 481, 486 n.6 (1987).

⁹ The term "tributary" is left undefined by the Code of Federal Regulations and the CWA, but is generally understood to mean "[a] stream flowing directly or indirectly into [a body of water]." BLACK'S LAW DICTIONARY 1545 (8th ed. 2004).

¹⁰ 33 C.F.R. § 328.3 (2006). For the purpose of this regulation,

(a) The term *waters of the United States* means

- (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- (2) All interstate waters including interstate wetlands;
- (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes . . . ;
- (4) All impoundments of water otherwise defined as waters of the United States under the definition;
- (5) Tributaries of waters identified in paragraphs (a)(1) through (4) of this section;
- (6) The territorial seas;
- (7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section.

mentioned in this regulation, wetlands are constantly changing eco-systems, which may be wet for only part of the year.¹¹ Therefore, some wetlands are difficult to designate as within the Corps' jurisdiction because these wetlands may not be adjacent to another "water of the United States" for an entire year.¹²

In *Rapanos*, the Supreme Court reversed the Sixth Circuit's decisions in two consolidated cases that had upheld the Corps' jurisdiction to deny permits to two parties wishing to build on privately owned wetlands.¹³ The plurality decision to remand the case produced three conflicting positions for assessing the Corps' right to regulate private wetlands and, thus, the propriety of the Corps' definition of "waters of the United States."¹⁴ First, in the plurality opinion, Justice Scalia limited his interpretation of "waters of the United States" to waters that are relatively permanent, standing, or flowing bodies, and restricted adjacent wetlands covered by the CWA to those wetlands with a continuous surface connection to "waters of the United States."¹⁵ Second, Justice Kennedy's concurring opinion proposed that a significant nexus must be satisfied

33 C.F.R. § 328.3 (2006).

¹¹ U.S. Environmental Protection Agency, What Are Wetlands?, <http://www.epa.gov/owow/wetlands/vital/what.html> [hereinafter What Are Wetlands?]. Wetlands are a vanishing element of the global ecological community yet the definition of wetlands is so technical that reasonable minds differ on what it is they wish to protect. One legal definition of wetlands requires soil covered by water for all or part of the year. Wetlands, however, cannot be determined through a legal test, as these features are eco-systems, which are more extensive than their component parts. Like coral reefs and rainforests, wetlands support a variety of plant and animal life forms. Both aquatic and terrestrial creatures live on wetlands depending upon whether the region consists of coastal or inland wetlands. *Id.* Skeptics who refer to wetlands as isolated, disease-ridden swamps overlook their value in contributing water purification, water storage, flood prevention, erosion control, timber production, recreation, and several other natural products to the surrounding environment and human society. U.S. Environmental Protection Agency, Wetlands and People, <http://www.epa.gov/owow/wetlands/vital/people.html>.

Wetlands vary tremendously between coastal and inland regions. Coastal regions often consist of a mix between salt and fresh water and are located on the Atlantic, Pacific, and Gulf coasts. What Are Wetlands?, *supra*. Many parts of these regions are unvegetated because the salt water extinguishes the lives of the plants. On the other hand, inland wetlands are almost entirely freshwater and are located near moving bodies of water on floodplains. These wetlands frequently involve groundwater or precipitation reaching the surface on a seasonal basis. In some cases, the ground may be wet for only a few months per year. *Id.*

¹² What Are Wetlands?, *supra* note 11.

¹³ *Rapanos*, 126 S. Ct. at 2235.

¹⁴ *See id.* at 2215, 2236 (Kennedy, J., concurring), 2252 (Stevens, J., dissenting).

¹⁵ *Id.* at 2221, 2226.

between the wetlands at issue and navigable-in-fact waters to confer jurisdiction under the CWA, and provided several factors for determining which wetlands had this nexus.¹⁶ Finally, Justice Stevens—joined by three dissenting justices—advocated deference to the Corps’ jurisdiction, so long as its interpretation of the CWA was reasonable.¹⁷ In response to *Rapanos*, several courts have applied Kennedy’s significant nexus test with reservation.¹⁸ A few courts have declared this test too ambiguous, and have chosen instead to use their own precedent on a case-by-case basis.¹⁹ As a result, the precise boundaries of the Corps’ jurisdiction under the CWA remain unclear.²⁰

This Note will argue that Justice Stevens’ agency deference approach provides the correct standard for examining the Corps’ jurisdiction under the CWA and that the plurality and significant nexus tests advocated in *Rapanos* by Justices Scalia and Kennedy, respectively, inappropriately impose unnecessary judicial constraints on the Corps. While the plurality test provides a plausible definition of the phrase “waters of the United States,” this definition fails to recognize the Corps’ administrative role in construing the statute, the CWA’s thirty-year history of legislative and judicial precedent, and the harmful effects that this definition would impose on the environment through its practice. The significant nexus test, in contrast, recognizes the importance of the CWA’s thirty-year history and purpose of environmental protection, but the concept of a “significant nexus” in practice would lead to disparate outcomes and uncertainty for private property

¹⁶ *Id.* at 2248 (Kennedy, J., concurring). “Navigable in fact” refers to waters considered navigable in the traditional sense of capability for interstate commerce. The *Daniel Ball*, 77 U.S. 557, 563 (1870). The factors suggested by Kennedy consisted of “the statute’s goals and purposes. . . . [o] ‘restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.’” *Rapanos*, 126 S. Ct. at 2248 (Kennedy, J., concurring) (quoting 33 U.S.C. § 1251(a) (2000)).

¹⁷ *Rapanos*, 126 S. Ct. at 2252 (Kennedy, J., concurring).

¹⁸ *United States v. Johnson*, 467 F.3d 56, 59 (1st Cir. 2006); *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 999-1000 (9th Cir. 2007), *superseding* 457 F.3d 1023 (9th Cir. 2006); *United States v. Cundiff*, 480 F. Supp. 2d 940, 943 (W.D. Ky. 2007); *United States v. Fabian*, No. 2:02-CV-495, 2007 WL 1035078, at *14-15 (N.D. Ind. Mar. 29, 2007); *Env’tl. Prot. Info. Ctr. v. Pac. Lumber Co.*, 469 F. Supp. 2d 803, 824 (N.D. Cal. 2007); *United States v. Evans*, No. 3:05 CR 159 J 32HTS, 2006 WL 2221629, at *20-21 (M.D. Fla. Aug. 2, 2006).

¹⁹ *E.g.*, *United States v. Chevron Pipe Line Co.*, 437 F. Supp. 2d 605, 613 (N.D. Tex. 2006); *see also United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 724-25 (7th Cir. 2006) (discussing the limitations of applying *Rapanos*).

²⁰ *See Rapanos*, 126 S. Ct. at 2236 (Roberts, C.J., concurring).

owners and the government. Unlike these two previous tests, the agency deference approach allows the Corps to further the purposes and history of the CWA within its discretion and provides for courts to intervene to enjoin an unreasonable construction. In suggesting that the *Rapanos* Court reached an improper result, this Note argues that agency deference should be applied to the Corps' jurisdiction over the property at issue in that case, and, by extension, to all cases concerning the Corps' ability to regulate wetlands regardless of the presence or absence of any surface connection to "waters of the United States."

Part II will describe the history behind the CWA and its deference to the Corps on rule-making. Part III will then demonstrate that the reasoning embodied in the plurality test is not only flawed and strained, but also inconsistent with prior Supreme Court precedent, CWA legislative history, and the purposes of environmental protection behind the CWA. Next, Part IV will contend that the significant nexus test misinterprets relevant precedent and thwarts the interests of both private property owners and the government. Finally, Part V will argue that the agency deference position correctly provides reasonable boundaries to the Corps' jurisdiction because the CWA's structure, purpose, and thirty-year history of jurisprudence—along with the strong policies of administrative efficiency, economic concerns, and environmental protection—trump the whims of individual property owners.

II. THE HISTORY BEHIND THE WETLANDS JURISDICTION ISSUE

A. *The Clean Water Act*

In 1972, Congress passed the CWA after a disastrous pair of decades.²¹ Over the previous twenty years, Congress had left water pollution regulation mostly to the states, and the states had failed to adequately enforce any uniform policy against interstate water pollution.²² This local experiment

²¹ S. REP. NO. 92-414, at 1-2 (1971), as reprinted in 1972 U.S.C.C.A.N. 3668, 3672.

²² *Id.* The states actually had full power over enforcement until 1956, when Congress authorized federal grants to be issued for pollution control and to help build treatment plants. *Id.* This federal assistance through grants could not adequately satisfy the needs of states, so Congress attempted to provide more federal support by

resulted in several environmental disasters of the late 1960s and early 1970s, which garnered national and congressional attention.²³ In response, Congress enacted the CWA.²⁴ Through the CWA, Congress sought to ameliorate concerns of future disasters by attempting “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”²⁵ As the Supreme Court recognized, Congress saw the need for the federal government to regulate water pollution because it believed controlling the discharge of toxins into water at the source would prevent them from traveling great distances through the natural water system.²⁶

creating a new federal agency in 1966 and adopting amendments in 1970 to add new areas of federal liability. *Id.* at 1, 1972 U.S.C.C.A.N. at 3669-70.

²³ The most famous of these events was the Cuyahoga River catching fire due to excessive pollution in 1969, discussed *infra* note 25. EPA, A BENEFITS ASSESSMENT OF THE WATER POLLUTION CONTROL PROGRAMS SINCE 1972, 1-2 (2000), available at [http://yosemite.epa.gov/ee/epa/ermfile.nsf/Attachment+Names/EE-0429-01.pdf/\\$File/EE-0429-01.pdf?OpenElement](http://yosemite.epa.gov/ee/epa/ermfile.nsf/Attachment+Names/EE-0429-01.pdf/$File/EE-0429-01.pdf?OpenElement) [hereinafter BENEFITS ASSESSMENT]. In addition, a 1971 senate report noted that there was only one litigated case in the previous twenty years under the abatement procedure of the Federal Water Pollution Control Act. *See* S. REP. NO. 92-414, at 5 (1971); as reprinted in 1972 U.S.C.C.A.N. 3668, 3672. In that case, more than four years elapsed between the initial conference and the consent decree, while more than five million tons of raw sewage was being dumped into a midwestern city’s river each day. *Id.*

In 1970, the Senate Subcommittee on Air and Water Pollution spent fourteen days conducting public hearings on water pollution abatement and control. S. REP. NO. 92-414, at 3-4 (1971), as reprinted in 1972 U.S.C.C.A.N. 3668, 3670. These hearings culminated in eighteen Senate bills on water pollution, four of which recommended amendments to the current law on construction grants, standard setting, and enforcement. The Subcommittee, however, was too busy in 1970 developing the Clean Air Act, so the actual drafting of the CWA was postponed until the 95th Congress could take up the issue. BENEFITS ASSESSMENT, *supra*, at 1-1, 1-2.

²⁴ *See* What Are Wetlands?, *supra* note 11.

²⁵ 33 U.S.C. § 1251(a). In addition, the CWA’s passage in 1972 evidenced a broad purpose to reduce and eliminate pollution, create a new federal regime to supplant the state administration system, and respond to several environmental events garnering public attention. *Rapanos*, 126 S. Ct. at 2265 (Stevens J., dissenting) (citing BENEFITS ASSESSMENT, *supra* note 23). The EPA’s assessment discusses the act’s provision regarding elimination of pollution discharges by 1985, and it cites the improvements along the Cuyahoga River as benefits reversing the trend of industrialization that led to the river catching fire in 1969. *Id.* at 1-1, 1-2.

²⁶ *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985) (citing S. REP. NO. 92-414, at 1-2 (1971), as reprinted in 1972 U.S.C.C.A.N. 3668, 3742) (“Water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.”). The hydrologic cycle, also known as the water cycle, generally “describes the continuous movement of water on, above, and below the surface of the Earth.” U.S. Geological Survey, *The Water Cycle*, <http://ga.water.usgs.gov/edu/watercycle.html> (last visited Oct. 3, 2007). As this term describes a literal cycle, it refers to water in all three of its states: liquid, vapor, and ice. *Id.*

B. *The Army Corps of Engineers and the Clean Water Act*

The Corps' enforcement of the CWA profoundly reversed a progressive loss of wetlands. At the time Congress enacted the CWA, annual wetlands loss was about 500,000 acres per year.²⁷ Since that time, the annual wetlands loss has become a slight annual gain in recent years.²⁸ The Corps accomplished this reversal through Section 404 of the CWA.²⁹ The Section 404 program requires property owners to obtain a permit from the Corps if they plan to carry out activities involving disposal of dredged or fill materials into "waters of the United States."³⁰ While the EPA and other agencies³¹ play different roles in the Section 404 program, the Corps is the sole administrative agency with jurisdiction to issue permits.³² The Corps broadly

²⁷ JEFFREY A. ZINN & CLAUDIA COPELAND, CRS REP. NO. RL33483, WETLANDS: AN OVERVIEW OF ISSUES, at 5 (June 20, 2006) (on file with author), *updated version available at* <http://www.cnie.org/nle/crs/abstract.cfm?NLEid=1647> (July 26, 2007) [hereinafter ZINN & COPELAND I]. When European explorers landed in North America in the seventeenth century, over 220 million acres of wetlands existed in the lower forty-eight states. *Id.*; see also EPA, Wetlands: Status and Trends, <http://www.epa.gov/owow/wetlands/vital/status.html>. Three centuries later, less than fifty percent of these lands remained. *Id.*

²⁸ The U.S. Fish and Wildlife Service ("FWS") estimates this annual gain to be about 32,000 acres per year between 1998 and 2004. ZINN & COPELAND I, *supra* note 27. Several environmentalists, however, dispute the gains in acreage as flawed data representing the expansion and development of small private ponds, instead of natural wetlands. *Id.* The FWS estimates 105.5 million acres remain in the forty-eight contiguous states. Alaska currently encompasses an additional estimated 170-200 million acres of wetlands. EPA, *Wetlands: Status and Trends*, *supra* note 27. Louisiana suffers 80% of the total loss of coastal wetlands in the United States and has recently become a focus of potentially \$14 billion in wetlands restoration legislation proposed since the devastation of Hurricane Katrina. JEFFREY A. ZINN & CLAUDIA COPELAND, CRS ISSUE BRIEF NO. IB97014, WETLAND ISSUES (Aug. 7, 2001), *available at* <http://www.ncseonline.org/NLE/CRSreports/Wetlands/wet-5.cfm> [hereinafter ZINN & COPELAND II]. The Gulf of Mexico Energy Security Act, introduced by United States Senator Mary Landrieu of Louisiana, would provide revenues from new oil and gas production in the Gulf of Mexico in part to benefit coastal restoration along the shorelines of Louisiana, Mississippi, Alabama, and Texas. *N.Y. Times Reverses Stand on LA's Sen. Mary Landrieu Oil Royalty Bill*, NEW ORLEANS CITYBUSINESS, Oct. 30, 2006.

²⁹ ZINN & COPELAND I, *supra* note 27, at 6.

³⁰ *Id.* "Waters of the United States" refers to the terms of 33 U.S.C. § 1362(7), which defines "navigable waters" as "waters of the United States." 33 U.S.C. § 1362(7). The Corps' authority to regulate dredging and filling derives from and relates back to its jurisdiction to enforce the River and Harbors Act of 1899. ZINN & COPELAND I, *supra* note 27, at 6. If a state's governor wishes the state to implement its own permit program in lieu of the Corps', the governor must submit to the Administrator of the EPA a description of the proposed state program. 33 U.S.C. § 1344(g)(1).

³¹ Most notably, the FWS, the Natural Resources Conservation Service, and the National Marine Fisheries Service ("NMFS") also administer portions of Section 404. ZINN & COPELAND I, *supra* note 27, at 6.

³² *Id.*

defines this jurisdiction to include waters used in foreign or interstate commerce; all interstate waters and wetlands; intrastate lakes, rivers, and streams; tributaries;³³ and wetlands adjacent to any of these waters.³⁴ Congress' subsequent refusal to amend the CWA suggests its intent for the Corps' jurisdiction to remain broad.³⁵

C. *The Congressional Acquiescence of 1977*

In 1977, Congress considered amending the CWA because critics of the Section 404 program had claimed that the Corps overreached its authority to regulate wetlands not "navigable-in-fact."³⁶ In the House, the Committee on Public Works and Transportation reported a bill that limited the Corps' jurisdiction to navigable-in-fact waters.³⁷ By contrast, the Senate bill out of committee³⁸ included only minor specific exemptions from the Corps' authority with no direct limit on jurisdiction.³⁹ Ultimately, after much debate, the Joint Conference Committee acquiesced and allowed the broader

³³ The term "tributaries" is left undefined by the regulations and the CWA, but "tributaries" is generally understood to mean "a stream flowing into [a body of water]." BLACK'S LAW DICTIONARY 1545 (8th ed. 2004).

³⁴ 33 C.F.R. § 328.3. For the relevant text, see *supra* note 10.

³⁵ See discussion *infra* Part II.C.

³⁶ *United States v. Riverside Bayview Homes*, 474 U.S. 121, 135-36 (1985) (citing H.R. REP. NO. 95-139, at 1-2 (1977)). Many of these critics were actually from farm, forestry, and land development groups that pressured Congress to amend the CWA so that they would not have to apply to the Corps for permits to develop certain types of lands. See, e.g., *United States v. Pozsgai*, 999 F.2d 729, 729-30 (3d Cir. 1993); *Avoyelles Sportsmen's League, Inc. v. Alexander*, 511 F. Supp. 278, 288 (W.D. La. 1981).

"Navigable-in-fact" refers to waters considered navigable in the traditional sense of capability for interstate commerce. Once, the standard for wetlands jurisdiction depended on whether a body of water was "navigable-in-fact." The *Daniel Ball*, 77 U.S. 557, 563 (1870) ("Those rivers must be regarded as navigable rivers in law which are navigable in fact.") The *Daniel Ball* court further held that "navigable in fact" waters were those capable of being used as "highways for commerce, over which trade and travel are or may be conducted." *Id.* When the focus of environmental regulation changed from promoting navigability to reducing pollutants, however, the navigability requirement was dropped with the creation of the CWA. ZINN & COPELAND I, *supra* note 27, at 6.

³⁷ H.R. 3199, 95th Cong., at 80-81, 102-04 (1977) (cited in *Riverside Bayview*, 474 U.S. at 136).

³⁸ The Senate committee reporting this legislation was the Senate Committee on Environment and Public Works. *Riverside Bayview*, 474 U.S. at 136.

³⁹ See generally S. 1952, 95th Cong., at 63-76 (1977) (cited in *Riverside Bayview*, 474 U.S. at 136). In the Senate, the narrow House definition was defeated in favor of the older definition. *Riverside Bayview*, 474 U.S. at 136-37.

construction of “navigable waters” to endure.⁴⁰ Since this acquiescence, Congress has not reconsidered limiting the Corps’ jurisdiction.⁴¹

D. *The History of Agency Deference*

If a party challenges the Corps’ jurisdiction, courts traditionally use agency deference as the standard of review. This standard derives from *Chevron v. Natural Resources Defense Council*.⁴² Under the agency deference approach, also known as *Chevron* deference, a court must first ask if Congress has expressed its intent on the issue.⁴³ If Congress’ intent is not clear, the court should not try to create its own interpretation of the statute.⁴⁴ Instead, the court must determine whether the agency’s construction of the statute was reasonable.⁴⁵ Since *Chevron*, courts have utilized agency deference to resolve countless issues relating to administrative agencies’ jurisdiction.⁴⁶ Thus, courts have typically used agency

⁴⁰ *Riverside Bayview*, 474 U.S. at 136-37. Senator Baker even remarked that the CWA “retain[ed] the comprehensive jurisdiction over the Nation’s waters exercised in the 1972 Federal Water Pollution Control Act.” *Id.* (citing 123 CONG. REC. 39209 (1977)); see also 123 CONG. REC. 38950-39210. The CWA is also known as the Federal Water Pollution Control Act. Brian Knutsen, *Asserting Clean Water Act Jurisdiction Over Isolated Waters: What Happens After the SWANCC Decision*, 10 ALB. L. ENVTL. OUTLOOK 155, 157 (2005).

⁴¹ See 33 U.S.C. §§ 1344(a), 1362(7) (2000); see also 33 C.F.R. 328.3 (2006).

⁴² *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984). In *Chevron*, the large oil company sought review of a D.C. Circuit decision that upheld a Natural Resources Defense Council (“NRDC”) challenge to the EPA regulations of the Clean Air Act. *Id.* at 844. In a 6-0 decision, the Supreme Court held the EPA regulations should be upheld as a permissible construction of the Clean Air Act. *Id.* at 866.

⁴³ “First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Id.* at 842-43.

⁴⁴ “If . . . the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation.” *Id.* at 843.

⁴⁵ “Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.” *Id.*

⁴⁶ See *Chem. Mfrs. Ass’n. v. NRDC*, 470 U.S. 116, 125 (1985); *Train v. NRDC*, 421 U.S. 60, 75, 87 (1975); *Piney Run Pres. Ass’n v. County Comm’rs of Carroll County, Md.*, 268 F.3d 255, 267 (4th Cir. 2001); *United States v. Pozsgai*, 999 F.2d 719, 729 (3d Cir. 1993).

deference as the standard to resolve issues regarding the Corps' and the EPA's jurisdiction.⁴⁷

E. *Pre-Rapanos Jurisprudence*

Between the congressional acquiescence in 1977 and the *Rapanos* decision, the Supreme Court addressed the issue of the Corps' jurisdiction twice: in *United States v. Riverside Bayview Homes* ("*Riverside Bayview*")⁴⁸ and in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* ("*SWANCC*").⁴⁹ In *Riverside Bayview*, the Corps sought to enjoin the filling of property on what the Corps' own regulation defined as an "adjacent wetland."⁵⁰ The Sixth Circuit narrowly construed the Corps' jurisdiction over adjacent wetlands to exclude "wetlands that were not subject to flooding by adjacent navigable waters at a frequency sufficient to support the growth of aquatic vegetation."⁵¹ Reversing the Sixth Circuit, the Supreme Court used agency deference to hold that the legislative history and environmental policy behind the CWA commanded a broad interpretation of the Corps' powers.⁵² The *Riverside Bayview* Court did not attempt to

⁴⁷ "Accordingly, our review is limited to the question whether it is reasonable, in light of the language, policies, and legislative history of the Act for the Corps to exercise jurisdiction over [adjacent wetlands]." *United States v. Riverside Bayview Homes*, 474 U.S. 121, 131 (1985).

This view of the agency charged with administering the statute is entitled to considerable deference; and to sustain it, we need not find that it is the only permissible construction that EPA might have adopted but only that EPA's understanding of this very 'complex statute' is a sufficiently rational one to preclude a court from substituting its judgment for that of EPA.

Chem. Mfrs. Ass'n, 470 U.S. at 125.

⁴⁸ *Riverside Bayview*, 474 U.S. at 126.

⁴⁹ *SWANCC*, 531 U.S. 159, 176-77 (2001).

⁵⁰ *Riverside Bayview*, 474 U.S. at 124. The Corps' regulation provided "[t]he term 'wetlands' means 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." 33 C.F.R. § 323.2(c) (1978). The Corps had sued a developer in District Court to enjoin its construction of a housing development on wetlands, which were inundated with ground water. *Riverside Bayview*, 474 U.S. at 124, 130-31. The District Court had granted the relief sought by the Corps, but the Sixth Circuit reversed, and the Corps petitioned the United States Supreme Court. *Id.* at 125.

⁵¹ *Riverside Bayview*, 474 U.S. at 125. The Sixth Circuit's holding that a narrow construction must apply to the Corps' authority under the CWA to avoid a regulatory taking was quickly dismissed by the Supreme Court. *Id.* at 126-27.

⁵² *Id.* at 132-33.

Faced with such a problem of defining the bounds of its regulatory authority, an agency may appropriately look to the legislative history and underlying

construe the CWA or determine whether the Corps' regulation was the most beneficial means of enforcing the CWA's purposes.⁵³ Instead, the Court recognized that the Corps' definition of adjacent wetlands was reasonable, and held that therefore it was improper to subject the issue to further judicial scrutiny.⁵⁴

In *SWANCC*, the Court denied the Corps' wetlands jurisdiction for the first time in the CWA's history.⁵⁵ The Corps had enacted the Migratory Bird Rule,⁵⁶ a regulation that extended the Corps' jurisdiction over "navigable waters" to include all habitats of migratory birds in intrastate waters.⁵⁷ When a state commission informed the Corps that a proposed disposal site for solid waste was also the nesting site for 121 bird species, the Corps forbade any development on the site claiming that a group of abandoned gravel mining depressions constituted "waters of the United States."⁵⁸ In affirming the Corps' jurisdiction, the Seventh Circuit noted the Corps' authority under the CWA to regulate any waters within the scope of the Commerce Clause and concluded that the site at

policies of its statutory grants of authority. Neither of these sources provides unambiguous guidance for the Corps in this case, but together they do support the reasonableness of the Corps' approach

Id. at 132.

The Court went on to note that Congress recognized broad federal authority in enacting the CWA and defining "waters of the United States." *Id.* at 133. Further, the Court mentioned the congressional concern for water quality, and noted the weight of the Corps' ecological judgment, as an expert agency in the field. *Id.* at 133-34. Finally, the Court discussed the 1977 congressional acquiescence and amendment of the CWA to show that "Congress expressly stated that the term 'waters' included adjacent wetlands." *Id.* at 136-39.

⁵³ *See id.* at 138-39.

⁵⁴ *Id.*, 474 U.S. at 139 ("We are thus persuaded that the language, policies, and history of the [CWA] compel a finding that the Corps has acted reasonably in interpreting the Act . . .").

⁵⁵ *SWANCC*, 531 U.S. at 170-71.

⁵⁶ Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986).

⁵⁷ *SWANCC*, 531 U.S. at 164-65.

⁵⁸ *Id.* at 164. The Court noted:

[T]he Corps formally '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" . . . based upon the following criteria: (1) the proposed site had been abandoned as a gravel mining operation; (2) the water areas and spoil piles had developed a natural character; and (3) the water areas are used as habitat by migratory bird [sic] which cross state lines.'

Id. at 164-65.

issue fell within these bounds.⁵⁹ The Supreme Court reversed.⁶⁰ Writing for the majority, Justice Rehnquist held that the gravel mining depressions at issue were not “navigable waters” or adjacent wetlands, but failed to settle on one definition for the critical link needed to classify wetlands as “waters of the United States.”⁶¹ In response to the Corps’ argument for agency deference, the *SWANCC* Court held that this approach was inapplicable when an administrative interpretation reached the limits of Congress’ power.⁶² Rehnquist also reasoned that the 1977 congressional acquiescence⁶³ did not apply to “nonnavigable, isolated, intrastate waters” because this acquiescence resulted from a concern for wetlands preservation, not a concern for migratory birds, and occurred nearly ten years before the Corps issued the Migratory Bird Rule.⁶⁴ Thus, the *SWANCC* Court held that the land at issue was not subject to the Corps’ jurisdiction because of its isolated, intrastate, and non-navigable nature.⁶⁵

⁵⁹ *SWANCC*, 531 U.S. at 166. The Commerce Clause of the United States Constitution states, “The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States . . .” U.S. CONST. art. I, § 8, cl. 1, 3. The Supreme Court has held this clause gives Congress the expansive power to pass legislation regulating any commerce that is “interstate” in nature. *See Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). Between 1937 and 1995, the Supreme Court failed to declare any federal law unconstitutional as exceeding Congress’ scope under the Commerce Clause. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* § 3.3, at 239 (2d ed. 2002). The Rehnquist Court, however, twice employed the Commerce Clause to strike down two federal laws as unconstitutional. *See United States v. Morrison*, 529 U.S. 598 (2000) (Violence Against Women Act); *United States v. Lopez*, 514 U.S. 549 (1995) (Gun Free School Zones Act). Under *Lopez* and *Morrison*, Congress may regulate (1) the channels of interstate commerce, (2) the instrumentalities of interstate commerce and persons or things in interstate commerce, and (3) activities that have a substantial effect on interstate commerce. *Morrison*, 529 U.S. at 609; *Lopez*, 514 U.S. at 558-59.

⁶⁰ *SWANCC*, 531 U.S. at 174.

⁶¹ *Id.* Rehnquist described the requisite link in different parts of the opinion as “wetlands ‘inseparably bound up with the “waters” of the United States,’” “wetlands that actually abutted on a navigable waterway,” and wetlands possessing a “significant nexus” with navigable-in-fact waters. *Id.* at 165-67.

⁶² “Where an administrative interpretation of a statute invokes the outer limits of Congress’ power, we expect a clear indication that Congress intended that result.” *Id.* at 172.

⁶³ This term refers to Congress’ failure to amend the Corps’ jurisdiction with a proposed amendment in 1977. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 136-39 (1985); *see also supra* Part II.C.

⁶⁴ *SWANCC*, 531 U.S. at 170-71.

⁶⁵ *Id.* at 171-72. After *SWANCC* and before *Rapanos*, most appellate courts limited *SWANCC*’s holding to waters that were isolated, intrastate, and non-navigable. Robert R.M. Verchick, *Toward Normative Rules for Agency Interpretation: Defining Jurisdiction Under the Clean Water Act*, 55 ALA. L. REV. 845, 866 (2004) (“Several federal courts have now examined the impact of *SWANCC* on Clean Water Act

F. *The Rapanos Decision*

The *Rapanos* Court issued the Supreme Court's third decision on the scope of the Corps' wetlands jurisdiction in the CWA's thirty-year history.⁶⁶ The opinion consolidated the appeals of two Sixth Circuit decisions, *Rapanos v. United States*⁶⁷ and *Carabell v. United States*,⁶⁸ which involved disputes between two property owners and the Corps over the denial of permits to develop four plots of land.⁶⁹ Each of the four plots at issue contained wetlands and some connection to a river or tributary of another body of water.⁷⁰

Rapanos, a real estate developer, initiated construction on wetlands at the various sites without applying to the Corps for permits.⁷¹ Despite receiving several administrative compliance orders from the EPA directing him to cease work immediately, Rapanos continued to build on the sites and performed extensive clearing and filling activities at these locations.⁷² The United States brought criminal and civil actions against Rapanos for illegally discharging fill material into protected wetlands under the CWA, failing to respond to requests for information, and ignoring the administrative compliance orders.⁷³ After a bench trial, the United States District Court for the Eastern District of Michigan found that Rapanos filled twenty-two acres of wetlands in violation of 33

jurisdiction. Most of these cases limit SWANCC's effect to waters that are isolated, intrastate, and non-navigable, although a few do not.⁷⁴)

⁶⁶ *Rapanos*, 126 S. Ct. 2208.

⁶⁷ 376 F.3d 629 (6th Cir. 2004), *vacated*, 126 S. Ct. 2208.

⁶⁸ 391 F.3d 704 (6th Cir. 2004), *vacated*, *Rapanos*, 126 S. Ct. 2208.

⁶⁹ *Rapanos*, 126 S. Ct. at 2238-39 (Roberts, CJ., concurring). In *Rapanos*, four pieces of land were at issue: (1) a plot of 230 acres, known as the Salzburg site, including 28 acres of wetlands; (2) a plot of 275 acres, known as the Hines Road site, including 64 acres of wetlands; (3) a plot of 200 acres, known as the Pine River site, with 49 acres of wetlands; and (4) a parcel of 19.6 acres, the *Carabell* site, including 15.9 acres of wetlands. *Id.*

⁷⁰ *Id.* at 2239. The District Court found that the Salzburg site had a surface water connection to "tributaries of the Kawkawlin River which, in turn, flows into the Saginaw River and ultimately into Lake Huron." *Id.* The Hines Road site connected to a drain that carried water into the Tittabawassee River, while the Pine River site's wetlands connected through surface water to the Pine River and also flowed into Lake Huron. *Id.* In *Carabell*, the property was separated by a man-made berm from a ditch that connected to a drain which empties into a creek that empties into Lake St. Clair. *Carabell v. United States*, 257 F. Supp. 2d 917, 923 (E.D. Mich. 2003).

⁷¹ *Rapanos*, 126 S. Ct. at 2253. (Stevens, J., dissenting).

⁷² *Id.*

⁷³ *Id.* at 2239 (Kennedy, J., concurring).

U.S.C. §1311.⁷⁴ Rapanos subsequently appealed to the Sixth Circuit, which affirmed the findings of the District Court on the grounds that Rapanos filled lands that contained “adjacent waterways” to “navigable waters.”⁷⁵

Unlike Rapanos, the Carabells apparently did not attempt to develop their lands.⁷⁶ The Carabells twice applied for a permit to build condominium units on their land between 1993 and 1994.⁷⁷ Upon the Corps’ second denial, the Carabells brought an administrative appeal to the United States District Court for the Eastern District of Michigan.⁷⁸ The District Court found that the Corps was within its jurisdiction to deny the permit and was not arbitrary and capricious in doing so, and the Sixth Circuit affirmed.⁷⁹

The Supreme Court reversed the Sixth Circuit on both cases and remanded to the District Court.⁸⁰ However, the Court was divided on the proper test to be applied. Four justices (Scalia, Thomas, Alito, and Roberts) agreed that “waters of the United States” should be limited in application to “only relatively permanent, standing, or flowing bodies of water” and that only wetlands with a *continuous* surface connection to “waters of the United States” may be classified as adjacent wetlands.⁸¹ Four justices (Stevens, Souter, Breyer, and Ginsburg) agreed that the Court should have deferred to the Corps’ jurisdiction as an executive agency with a broad congressional delegation of authority.⁸² In a concurring opinion, Justice Kennedy argued that the case should be remanded on the grounds that neither the plurality nor the dissent applied a

⁷⁴ *Rapanos*, 126 S. Ct. at 2252 (Stevens, J., dissenting). This conclusion was based largely on the “highly credible” testimony of Dr. Daniel Willard, an expert in wetlands whom the District Court found to be “eminently qualified.” *Rapanos*, 376 F.3d at 644 (“The district court found Dr. Willard to be ‘eminently qualified’ as an expert in wetlands and concluded that his testimony was ‘highly credible.’”).

⁷⁵ *Rapanos*, 376 F.3d at 639. The Court of Appeals pointed out that “adjacent waterways” include any branch of a tributary system that eventually flows into a navigable body of water. *Id.*

⁷⁶ See *Carabell v. U.S. Army Corps of Eng’rs*, 257 F. Supp. 2d 917, 920-23 (E.D. Mich. 2003), *aff’d*, 391 F.3d 704 (6th Cir. 2004), *rev’d*, *Rapanos*, 126 S. Ct. at 2208.

⁷⁷ *Id.* at 919.

⁷⁸ *Id.* at 921.

⁷⁹ *Id.* at 933-34; *Carabell v. U.S. Army Corps of Eng’rs*, 391 F.3d 704, 710 (6th Cir. 2004).

⁸⁰ *Rapanos*, 126 S. Ct. at 2208.

⁸¹ *Id.* at 2221, 2226.

⁸² *Id.* at 2265 (Stevens, J., dissenting).

significant nexus test.⁸³ According to Kennedy, wetlands have a “significant nexus” when they, alone or in combination with nearby lands, “significantly affect the chemical, physical, and biological integrity” of navigable-in-fact waters.⁸⁴ Courts must then assess the significant nexus in terms of the CWA’s goals and purposes to determine whether the wetlands are “waters of the United States.”⁸⁵

G. Cases Since Rapanos

Since *Rapanos*, courts have disagreed over the proper test to apply.⁸⁶ Some courts have chosen to apply the significant nexus test as the narrowest grounds to follow *Rapanos*.⁸⁷ Other courts have held that the Corps has wetlands jurisdiction if the wetlands at issue satisfy either the plurality or significant nexus tests.⁸⁸ Finally, a few courts have disregarded the

⁸³ *Id.* at 2250 (Kennedy, J., concurring).

⁸⁴ *Id.* at 2248.

⁸⁵ *Id.*

⁸⁶ See *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 725 (7th Cir. 2006); *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 999-1000 (9th Cir. 2007), *superseding* 457 F.3d 1023 (9th Cir. 2006); *United States v. Johnson*, 467 F.3d 56, 63-64 (1st Cir. 2006). *United States v. Chevron Pipe Line Co.*, 437 F. Supp. 2d 605, 613 (N.D. Tex. 2006).

⁸⁷ See *S.F. Baykeeper v. Cargill Salt Div.*, 481 F.3d 700, 707-08 (9th Cir. 2007); *N. Cal. River Watch*, 496 F.3d at 999-1000; *Gerke Excavating*, 464 F.3d at 725; *United States v. Fabian*, No. 2:02-CV-495, 2007 WL 1035078, at *15 (N.D. Ind. Mar. 29, 2007); *Envtl. Prot. Info. Ctr. v. Pac. Lumber Co.*, 469 F. Supp. 2d 803, 824 (N.D. Cal. 2007). These courts follow the precedent of *Marks v. United States*, which states, “[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.” *Marks v. United States*, 430 U.S. 188, 193 (1977).

⁸⁸ See *Johnson*, 467 F.3d at 63-64; *United States v. Cundiff*, 480 F. Supp. 2d 940, 944 (W.D. Ky. 2007); *Simsbury-Avon Pres. Soc’y v. Metacon Gun Club, Inc.*, 472 F. Supp. 2d 219, 226-27 (D. Conn. 2007); *United States v. Evans*, No. 3:05 CR 159 J 32HTS, 2006 WL 2221629, at *18 (M.D. Fla. Aug. 2, 2006). These courts follow a suggestion from Justice Stevens’ dissent in *Rapanos*:

It has been our practice in a case coming to us from a lower federal court to enter a judgment commanding that court to conduct any further proceedings pursuant to a specific mandate. That prior practice has, on occasion, made it necessary for Justices to join a judgment that did not conform to their own views. In these cases, however, while both the plurality and Justice Kennedy agree that there must be a remand for further proceedings, their respective opinions define different test to be applied on remand. Given that all four Justices who have joined this 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.

plurality and significant nexus tests, choosing instead to apply their own precedent.⁸⁹ Thus, the extent of the Corps' wetlands jurisdiction remains unclear.⁹⁰

III. THE ILLOGIC OF THE PLURALITY TEST

The plurality test presents a flawed approach to limiting the Corps' jurisdiction for several reasons. First, the plurality test threatens to defeat the purposes of the CWA by excluding wetlands necessary to preserve water quality and produce natural products.⁹¹ Second, this test presents an implausible and self-contradicting construction of "waters of the United States."⁹² Third, the plurality test misconstrues congressional intent and legislative history.⁹³ Finally, the test misreads prior Supreme Court precedent, and it fails to accord agency deference.⁹⁴ Most courts after *Rapanos* have disregarded the plurality test.⁹⁵ This Section will discuss the illogic of this test and suggest that future courts also decline to accept the *Rapanos* plurality's constructions of "waters of the United States" and adjacent wetlands.

A. *Environmental Effects of the Plurality Test*

The environmental implications of adopting the plurality test could be devastating. While natural wetlands continue to disappear and the realm of private property

Rapanos, 126 S. Ct. at 2265 (footnotes omitted). *But see* *King v. Palmer*, 950 F.2d 771, 783 (D.C. Cir. 1991) ("[W]e do not think we are free to combine a dissent with a concurrence to form a *Marks* majority."). The *King* Court held that an opinion can only be regarded as "narrower" when it is a subset of broader opinions. *Id.* at 781. The First Circuit in *Johnson*, however, distinguished *King* because it noted that none of the tests from *Rapanos* were a subset of another test. *Johnson*, 467 F.3d at 64 ("[The *King* Court's] understanding of 'narrowest grounds' . . . does not translate easily to the present situation. The cases in which Justice Kennedy would limit federal jurisdiction are not a subset of the cases in which the plurality would limit jurisdiction.>").

⁸⁹ See *Gerke Excavating*, 464 F.3d 723 at 725; *Chevron Pipe Line*, 437 F. Supp. 2d at 613.

⁹⁰ Charles Lane, *Justices Rein in Clean Water Act; Still-Divided Court Leaves Reach of the Law Unclear*, WASH. POST, June 20, 2006, at A1.

⁹¹ See *infra* Part III.A.

⁹² See *infra* Part III.B.

⁹³ See *infra* Part III.C.

⁹⁴ See *infra* Part III.D.

⁹⁵ See *infra* Part III.E.

expands,⁹⁶ the Corps may be unable to regulate several types of waters under this test. The plurality test forbids waters that are not “relatively permanent, standing, or flowing bodies” and wetlands lacking a “continuous surface connection” to “waters of the United States” from ever being considered “waters of the United States.”⁹⁷ Waters falling outside the Corps’ jurisdiction would thus include intermittent streams, seasonal rivers, and periodically-dry river beds.⁹⁸ Wetlands falling outside the Corps’ jurisdiction would include wetlands near, but not directly touching, a relatively permanent, standing, or flowing body of water.⁹⁹ These natural features would then become unregulated candidates for development or the deposit of dredge due to one of two arbitrary facts: (1) water was not present for a sufficiently large number of days, or (2) the wetland was close, but not directly touching, “water of the United States.” Two polluters that cause the same amount of damage to the environment might face disparate degrees of liability based solely on a percentage of days or the proximity of a connection.¹⁰⁰ Developers, polluters, and property owners would be encouraged to alter the nature of their property in order to exempt their lands from the Corps’ jurisdiction.¹⁰¹ Plant and animal life forms that rely on intermittent bodies of water and non-continuous wetlands for subsistence would be forced to find other habitats or die off in the face of development.¹⁰² In essence, eco-systems would die.¹⁰³ While

⁹⁶ ZINN & COPELAND II, *supra* note 28. A FWS study estimated an annual loss of wetlands in the continental United States of 58,000 acres per year between 1986 and 1997. *Id.*

⁹⁷ *Rapanos*, 126 S. Ct. at 2221, 2224.

⁹⁸ *See id.* at 2259-60 (Stevens, J., dissenting).

⁹⁹ *Id.* at 2262.

¹⁰⁰ In his dissent, Justice Stevens discusses a hypothetical stream that flows for 290 days of the year and another stream that flows for the entire year to illustrate that polluters in both streams could cause the same effect on downstream waters, while realizing disparate levels of liability under the plurality test. *Id.* (“Under the plurality’s view, then, the Corps can regulate polluters who dump dredge into a stream that flows year round but may not be able to regulate polluters who dump into a neighboring stream that flows for only 290 days of the year—even if the dredge in this second stream would have the same effect on downstream waters as the dredge in the year-round one.”).

¹⁰¹ For example, a developer could block the inundation of water onto his property in order to prevent it from including a relatively permanent, standing, or flowing body of water. This step would remove the Corps’ jurisdiction over the property, and thus allow the property owner to proceed with development.

¹⁰² What Are Wetlands?, *supra* note 11. Both aquatic and terrestrial creatures live on wetlands, and some species’ habitat depends upon whether the area consists of coastal or inland wetlands. *Id.* “Destruction of wetlands eliminates or severely minimizes their function and value. Drainage of wetlands prevents surface water

developers may argue the necessity of sacrifices to prevent the Corps from overreaching its authority, statistics indicate the Corps' permit process is far from highly selective.¹⁰⁴ In reality, the Corps denies less than 1% of fill permits.¹⁰⁵ Finally, as Justice Stevens points out, the large investments necessary for such development show that the property owners affected by the Section 404 program¹⁰⁶ are quite capable of lobbying their representatives for a change in congressional policy.¹⁰⁷ The effects of the plurality test would work cruel and unnecessary destruction on the environment in the name of needlessly promoting economic development.¹⁰⁸ Therefore, the environmental consequences of the plurality test suggest that a harsh standard for establishing the Corps' jurisdiction would be inappropriate.

B. The Plurality Test as a Matter of Statutory Construction

The plurality test, as a matter of statutory construction, suffers from inconsistency and implausibility. The first holding of the plurality's opinion—that “only relatively permanent, standing or flowing bodies of water” make up “waters of the United States”¹⁰⁹—results from a thorough tour of the *Webster's New International Dictionary* (“*Webster's Second*”), which Scalia separately cites to define such ambiguous terms as “the,” “waters,” and “waters of the United States.”¹¹⁰ Somehow, Scalia

storage and reduces their water quality enhancement function. Wetland filling does likewise as well as destroying vital habitats for native fish and wildlife species.” *NWI Values of Wetlands for Flood and Storm Surge Attenuation*, U.S. Fish & Wildlife Service, <http://www.fws.gov/nwi/stormvalues.htm>.

¹⁰³ What Are Wetlands?, *supra* note 11; *see also* U.S. Fish & Wildlife Service, National Wetlands Inventory: Developing and Providing Wetlands Information, http://www.fws.gov/fisheries/CD/Programs/National_Wetlands_Inventory.pdf (last visited Nov. 13, 2007) (noting the ecological and economic importance of preserving wetlands as eco-systems). For further information on eco-systems, *see discussion supra* note 11.

¹⁰⁴ U.S. GEN. ACCOUNTING OFFICE, WATERS AND WETLANDS: CORPS OF ENGINEERS NEEDS TO EVALUATE ITS DISTRICT OFFICE PRACTICES IN DETERMINING JURISDICTION 8 (GAO-04-297, 2004), <http://www.gao.gov/new.items/d04297.pdf>.

¹⁰⁵ In 2002, for example, the Corps denied 128 Section 404 permits out of 85,445 applications. *Id.*

¹⁰⁶ The Section 404 program is the process employed by the Corps to issue permits under Section 404 of the Clean Water Act. ZINN & COPELAND I, *supra* note 27, at 2.

¹⁰⁷ *Rapanos*, 126 S. Ct. at 2259 (Stevens, J., dissenting).

¹⁰⁸ *See id.*

¹⁰⁹ *Id.* at 2221 (plurality opinion).

¹¹⁰ *Id.* at 2220.

concludes that the use of the definite article “the” and the plural version of “waters” links the terms of 33 U.S.C. § 1311 with the definitions in *Webster’s Second*, which refer to water “[a]s found in streams and bodies forming geographical features such as oceans, rivers, and lakes” or “the flowing or moving masses, as of waves or flood, making up such streams or bodies.”¹¹¹ Next, Justice Scalia takes the awkward step of equating the preceding definitions with his own requirement of “relatively permanent, standing, or flowing” water without

¹¹¹ *Id.* Justice Scalia continued:

The Corps’ expansive approach might be arguable if the CSA [sic] defined ‘navigable waters’ as ‘water of the United States.’ But ‘the waters of the United States’ is something else. The use of the definite article (‘the’) and the plural number (‘waters’) show plainly that § 1362(7) does not refer to water in general. In this form, ‘the waters’ refers more narrowly to water ‘[a]s found in streams and bodies forming geographical features such as oceans, rivers, [and] lakes,’ or ‘the flowing or moving masses, as of waves or floods, making up such streams or bodies.’

Id. (citing WEBSTER’S NEW INTERNATIONAL DICTIONARY 2882 (2d ed. 1955) [hereinafter *Webster’s Second*]). Scalia’s distinction between “waters” and “water” would therefore remove the Corps’ jurisdiction from several types of natural features based on the presence of a single letter, when Congress’ express purposes and legislative history counsel for the opposite conclusion.

Further, Scalia supplies no reason for citing the *Webster’s Second* beyond his conclusion that it provides “the only natural definition of the term ‘waters.’” *Id.* at 2220. Judging by his abandonment of *Webster’s Second* when he defines “adjacent wetlands,” Scalia must have chosen this source because it was most advantageous to support a conclusion he had already reached. Thus, the definitions of ‘waters’ cited by Scalia within *Webster’s Second* do not connote the significance of a controlling rule of law.

Finally, *Webster’s Second*’s definitions of “waters” provide inadequate support for Scalia’s conclusion. Even if “waters” refers to “[a]s found in streams and bodies forming geographical features such as oceans, rivers, [and] lakes” or “the flowing or moving masses, as of waves or floods, making up such streams or bodies,” these definitions do not mandate that waters be permanent, standing, or flowing bodies. *Id.* at 2220 (citing *Webster’s Second*). At most, these definitions connote that some waters have these qualities, but others may lack these qualities. Therefore, the plurality test’s first conclusion lacks support in the cited definitions.

One can only guess why Scalia attempts this strained construction of “waters,” and why the other three members of the plurality subscribe to it, when these Justices could have adopted the more obvious position: Congress intended to give the Corps broad discretion to define the Corps’ jurisdiction. A potential explanation can be given by a quote from Chief Justice Roberts’s brief concurring opinion: “[After SWANCC], the Corps chose to adhere to its essentially boundless view of the scope of its power.” *Id.* at 2236 (Roberts, C.J., concurring). Roberts use of the words “essentially boundless” indicates an ideological belief, possibly held by other members of the plurality, that the Corps’ jurisdiction is too large, and must be reduced at all costs. If this belief is the real motivation behind the plurality’s “revisionist reading” of the CWA, the Court’s agency jurisprudence has taken a shameful turn beyond impartiality into ideology, and the Court is lucky this view does not command majority approval. *Id.* at 2255 (Stevens, J., dissenting).

defining any of these terms.¹¹² Although Scalia points out that “[n]one of these terms encompasses transitory puddles or ephemeral flows of water,” the conclusion that all “waters of the United States” therefore must be relatively permanent lacks a logical basis.¹¹³ As Justice Stevens points out in his dissent, *Webster’s Second* says nothing about whether waters can be intermittent or ephemeral and yet be classified as “waters.”¹¹⁴ Therefore, the plurality test’s first element lacks foundation.

In the second part of the plurality test—that “adjacent wetlands” must have a “continuous surface connection” to “waters of the United States”—Justice Scalia abandons the counsel of his “preferred” source, *Webster’s Second*, to read in an “amendment” to the CWA.¹¹⁵ Delving immediately into the case history of *Riverside Bayview* and *SWANCC* for foundation, Scalia fails to conduct any investigation on a linguistic meaning of “adjacent,” “wetlands,” or “adjacent wetlands.”¹¹⁶ One potential reason for this omission might be the definition of “adjacent” in *Webster’s Second*, which defines “adjacent” as “nearby” or “close,” and explicitly states “[o]bjects are adjacent when they lie close to each other, but not necessarily in actual contact.”¹¹⁷ This definition squarely conflicts with any requirement of a connection. Under the Corps’ definition, “adjacent” means “bordering, contiguous, or neighboring,” and “adjacent wetlands” include non-contiguous wetlands.¹¹⁸ This

¹¹² *Rapanos*, 126 S. Ct. at 2220-21 (plurality opinion).

¹¹³ *Id.* at 2221.

¹¹⁴ *Id.* at 2260 (Stevens, J., dissenting).

¹¹⁵ *Id.* at 2226 (plurality opinion), *construed in id.* at 2262 (Stevens, J., dissenting). By “amendment,” Stevens is referring to Scalia’s logic formulating the plurality test. In creating this test, Scalia devised a definition for two terms in the CWA. Thus, Scalia amended the CWA by promulgating these two definitions. *See id.* Stevens also notes that the two canonical principles that the plurality test relies upon—concern over intrusion on state power and constitutional avoidance—are inapplicable to the issue of adjacent wetlands. *Id.* at 2261. On the state power intrusion issue, “Congress found it ‘essential that discharge of pollutants be controlled at the source,’ and the Corps can define ‘waters’ broadly to accomplish this aim;” and on the constitutional avoidance issue, “[t]he wetlands in these cases are not ‘isolated’ but instead are adjacent to tributaries of traditionally navigable waters and play important roles in the watershed . . .” *Id.* at 2261-62.

¹¹⁶ *Id.* at 2225-27 (plurality opinion).

¹¹⁷ *Webster’s Second* defines adjacent as “[l]ying near, close, or contiguous; neighboring; bordering on.” *See id.* at 2263 (Stevens, J., dissenting) (quoting *Webster’s Second* 32).

¹¹⁸ 33 C.F.R. § 328.3(c) (2006) (“Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are ‘adjacent wetlands.’”).

definition is both consistent with the delegation of authority in the CWA and other legal and nonlegal definitions of “adjacent.”¹¹⁹ Therefore, the plurality test’s requirement of a “continuous surface connection” implausibly fails to consider accepted definitions of “adjacent” and conflicts with the methods of construction used to construe “waters of the United States.”

C. *The Plurality Test Versus Congressional Intent and Legislative History*

The plurality test fails most, perhaps, in its attempt to reflect consistency with congressional intent. Congress made no mention of permanence, connections, or *Webster’s Second* when it promulgated § 1311 in 1972.¹²⁰ At the time, Congress’ intent was to eliminate pollution and resolve the problems caused by the states’ failure to regulate their own programs.¹²¹ The CWA, as a result, gave broad power to the federal government, allowing the Corps to define “waters of the United States.”¹²² In contrast, the plurality test’s interpretations of “waters of the United States” and “adjacent wetlands” would limit federal power and frustrate this intent.¹²³ Moreover, the plurality test conflicts with Congress’ 1977 acquiescence.¹²⁴ While Scalia “ha[s] no idea whether the Members’ failure to act in 1977 was attributable to their belief that the Corps’

¹¹⁹ See, e.g., *Rapanos*, 126 S. Ct. at 2262 (Stevens, J., dissenting) (quoting *Webster’s Second* 32); BLACK’S LAW DICTIONARY 44 (8th ed. 2004) (defining “adjacent” as “[l]ying near or close to, but not necessarily touching”).

¹²⁰ See Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251-1376 (2000)).

¹²¹ S. REP. NO. 92-414, at 1-2 (1971), as reprinted in 1972 U.S.C.C.A.N. 3668, 3675-76.

¹²² See Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 404, 86 Stat. 816, 884 (codified at 33 U.S.C. § 1344 (2000)).

¹²³ By specifying that “waters of the United States” must be “relatively permanent, standing, or flowing” bodies and holding that adjacent wetlands must include a “continuous surface connection,” the plurality test specifically removes certain wetlands from the jurisdiction of the federal government. *Rapanos*, 126 S. Ct. at 2221, 2226. Ironically, this removal occurs against the explicit wishes of most state governments, as 33 states petitioned the *Rapanos* Court in support of the Sixth Circuit’s decision. *Id.* at 2224 n.8.

¹²⁴ In 1977, Congress decided not to amend the CWA to reduce the Corps’ jurisdiction. H.R. REP. NO. 95-139, at 54 (1977). By removing specific wetlands and waters from the Corps’ jurisdiction, the plurality test also works in contravention of the congressional intent, which this acquiescence conveys. *Rapanos*, 126 S. Ct. at 2264 (Stevens, J., dissenting). See *supra* Part II.C.

regulations were correct,”¹²⁵ the congressional record indicates that the Corps’ jurisdiction was specifically debated and resolved in favor of an expansive definition.¹²⁶ Therefore, the plurality test conflicts with both the legislative intent at the drafting and through the subsequent history of the CWA.

D. The Plurality Test’s Treatment of Prior Supreme Court Precedent

Similarly, the plurality test fails to properly interpret the prior case law on the Corps’ jurisdiction. Under *Chevron*, when congressional intent is ambiguous, courts must defer to an agency’s construction of a statute so long as the construction is reasonable.¹²⁷ In *Riverside Bayview*, the Court applied agency deference to uphold the Corps’ jurisdiction over adjacent wetlands.¹²⁸ The *SWANCC* Court, in contrast, denied the Corps agency deference because the intrastate, isolated nature of the land at issue “invoke[d] the outer limits of Congress’ power” under the Commerce Clause.¹²⁹ The wetlands at issue in *Rapanos*, however, significantly differed from the gravel pit in *SWANCC* because the *Rapanos* wetlands held connections to various bodies of water, which directly affected interstate commerce.¹³⁰ Therefore, upholding the Corps’ jurisdiction in

¹²⁵ *Rapanos*, 126 S. Ct. at 2230.

¹²⁶ 123 CONG. REC. 39,209 (1977) (“[T]he conference bill retains the comprehensive jurisdiction over the Nation’s waters . . .”). Specifically, the record shows that the 1977 House passed a bill limiting the Corps’ wetlands jurisdiction to navigable-in-fact waters and their adjacent wetlands. See H.R. 3199, 95th Cong., at 80-81, 102-04 (1977). Next, the Senate passed a bill that contained no redefinition. S. 1952, 95th Cong., at 63-76 (1977). Finally, the record shows the Conference Committee of both houses adopted the Senate’s approach. 123 CONG. REC. 39,209 (1977) (“The solution presented in the Senate Bill was adopted with only minor changes.”).

¹²⁷ *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984).

¹²⁸ *United States v. Riverside Bayview Homes*, 474 U.S. 121, 138 (1985).

¹²⁹ *SWANCC*, 531 U.S. 159, 172 (2001). The Commerce Clause, in Article I, Section 8 of the Constitution, expressly gives Congress “power . . . [t]o regulate commerce with foreign nations, and among the several States.” U.S. CONST. art. I, § 8, cl. 3. The *SWANCC* Court held, “[w]here an administrative interpretation of a statute invokes the outer limits of Congress’ power, we expect a clear indication that Congress intended that result.” *SWANCC*, 531 U.S. at 172. This court went on to explain that its requirement was derived from “[its] prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority.” *Id.* at 172-73.

¹³⁰ See *Rapanos*, 126 S. Ct. at 2239. The District Court found that the Salzburg site had a surface water connection to “tributaries of the Kawkawlin River which, in turn, flows into the Saginaw River and ultimately into Lake Huron.” The Hines Road site connected to a drain that carried water into the Tittabawassee River,

Rapanos would not have raised the “significant constitutional questions”¹³¹ cited in *SWANCC*, and the *Rapanos* plurality should not have abrogated agency deference.

1. The Plurality’s Misapplication of *SWANCC*

Instead of recognizing the lack of “constitutional questions” in *Rapanos*, Scalia relied heavily on *SWANCC* to redefine “adjacent wetlands” under an inappropriate standard. In Scalia’s opinion, though disputed by several other courts, *SWANCC* held that adjacent wetlands directly abut “waters of the United States.”¹³² *SWANCC*, however, denied the Corps jurisdiction under a “heightened concern” evoked by “constitutional questions” relating to the isolated, intrastate lands at issue in that case.¹³³ In contrast, the plurality in *Rapanos* did not consider any “constitutional questions” because the *Rapanos* wetlands were not isolated.¹³⁴ The *Rapanos* plurality did, however, apply the same heightened concern of *SWANCC* to impose that Court’s construction of adjacent wetlands upon the Corps.¹³⁵ As the *SWANCC* standard

while the Pine River site’s wetlands connected through surface water to the Pine River and also flowed into Lake Huron. *Id.* at 2239. In *Carabell*, the property was separated by a man-made berm from a ditch that connected to a drain, which empties into a creek that empties into Lake St. Clair. *Carabell v. United States*, 257 F. Supp. 2d 917, 923 (E.D. Mich. 2003).

¹³¹ *SWANCC*, 531 U.S. at 174.

¹³² *Rapanos*, 126 S. Ct. at 2218. Most appellate courts have limited the holding of *SWANCC* to the intrastate, isolated land at issue in that case. Verchick, *supra* note 65. Further, while mentioning “wetlands that actually abutted on a navigable waterway” as one of three definitions for adjacent wetlands, the *SWANCC* court never required direct abutment as a condition precedent for adjacency. *SWANCC*, 531 U.S. at 167.

¹³³ *SWANCC* concerned pools created in abandoned sand and gravel pits where migratory birds nest. *SWANCC*, 531 U.S. at 174. These pits, unlike the waters at issue in *Rapanos*, were wholly intrastate. *See id.* Thus, the land at issue in *SWANCC* evoked the outer limits of Congress’ power under the Commerce Clause, causing the court to evaluate the Corps’ jurisdiction under a “heightened concern.” *Id.*; *see also* John D. Ostergren, *SWANCC in Duck Country: Will Court-Ordered Devolution Fill the Prairie Potholes?*, 22 STAN. ENVTL. L.J. 381, 396-99 (2003) (discussing the effect of *SWANCC* on federal jurisdiction over intrastate, non-navigable isolated wetlands). For a discussion on the scope of the Commerce Clause, *see* discussion *supra* note 59.

¹³⁴ *See Rapanos*, 126 S. Ct. at 2225.

¹³⁵ Specifically, the court held that the Corps’ definition of “waters of the United States” was impermissible, under *Chevron*, and applied the direct abutment requirement of *SWANCC*, instead of deferring to the Corps. *Id.* The court’s conclusion that the definition was impermissible, however, is largely founded upon the court’s reading of *Webster’s Second* for the requirement of “relatively permanent, standing, or flowing bodies of water” and *SWANCC* for the requirement of a “direct surface connection.” *Id.* at 2221, 2224-25. Thus, the court renders an agency’s construction of a

was intended to address constitutionally invasive exercises of federal power and not *all* of the exercises of the Corps' wetlands jurisdiction, the plurality's use of SWANCC was improper.

2. The Plurality's Erroneous Distinction of *Riverside Bayview*

In addition, the plurality erroneously distinguished *Riverside Bayview*. *Riverside Bayview* supported deferring to the Corps as long as its jurisdiction was reasonable and provided the controlling precedent on the central issue in *Rapanos*—adjacent wetlands.¹³⁶ Arguing to the contrary, Justice Scalia held that *Riverside Bayview* was irrelevant because “the definition of tributaries was not at issue in that case.”¹³⁷ Scalia's logic, however, is misplaced. While tributaries were not at issue in *Riverside Bayview*, this fact is *de minimus* because this precedent was intended to apply to all wetlands, including those with a tributary connection to “waters of the United States.”¹³⁸ In *Rapanos*, tributaries connected the wetlands at issue to “waters of the United States.”¹³⁹ Therefore, *Riverside Bayview* provided the controlling precedent, and the plurality improperly distinguished this case.¹⁴⁰

E. *Post-Rapanos Courts Have Disregarded the Plurality Test*

Several lower courts have entirely snubbed the strict nature of the plurality test.¹⁴¹ These cases have either followed

statute “impermissible” based on the weight of a dictionary and an irrelevant precedent. *Id.* at 2224.

¹³⁶ United States v. Riverside Bayview Homes, 474 U.S. 121, 123 (1985).

¹³⁷ *Rapanos*, 126 S. Ct. at 2229.

¹³⁸ *Id.* at 2255 (Stevens, J., dissenting).

¹³⁹ *Id.* at 2256-57.

¹⁴⁰ Essentially, the test renders the determinations of *Riverside Bayview* and SWANCC insignificant by creating an entirely new standard that conflicts with the underlying premises of these cases.

¹⁴¹ N. Cal. River Watch v. City of Healdsburg, 496 F.3d 993, 999-1000 (9th Cir. 2007) (holding that the “significant nexus” test “provides the controlling rule of law”); United States v. Cundiff, 480 F. Supp. 2d 940, 944 (W.D. Ky. 2007); United States v. Fabian, No. 2:02-CV-495, 2007 WL 1035078, at *15 (N.D. Ind. Mar. 29, 2007); Env'tl. Prot. Info. Ctr. v. Pac. Lumber Co., 469 F. Supp. 2d 803, 824 (N.D. Cal. 2007) (holding that satisfaction of the plurality test is “not necessary” for jurisdiction under the CWA); United States v. Evans, No. 3:05 CR 159 J 32HTS, 2006 WL 2221629, at *19 (M.D. Fla. Aug. 2, 2006) (allowing the jurisdictional requirement to be met if either the plurality or “significant nexus” test was satisfied). An EPA administrative decision also

Justice Kennedy's significant nexus test¹⁴² as the controlling rule of law or awarded jurisdiction to the Corps if the property at issue met either the plurality or significant nexus tests' criteria.¹⁴³ As these decisions concerned the Corps' wetlands jurisdiction, the unwillingness of these courts to apply the plurality test indicates the impracticality of categorically applying this standard.

In conclusion, the plurality test consists of two arbitrary definitions,¹⁴⁴ both of which lack consistency and foundation. These constructions fail to comport with congressional intent, subsequent legislative intent, both of the prior Supreme Court cases involving the subject matter at issue, and the environmental concerns expressed in thirty-three amici briefs, none of which advocated the plurality's test.¹⁴⁵ In addition, the test sharply contradicts the proper deference owed to the Corps under *Chevron* and *Riverside Bayview*.¹⁴⁶ Moreover, the test would yield unnecessary and harsh environmental consequences, such as the arbitrary destruction of eco-systems and the death of plant and animal life.¹⁴⁷ For these reasons and others, lower courts since *Rapanos* facing similar issues have

recognized that the plurality test was "at odds with the [CWA's] concern with downstream water quality." *In re J. Phillips Adams*, No. CWA-10-2004-0156, 2006 EPA ALJ LEXIS 33, *71 (EPA Oct. 18, 2006). This tribunal employed Justice Kennedy's significant nexus test to uphold CWA jurisdiction over the property at issue. *Id.*

¹⁴² See discussion *infra* Part IV.

¹⁴³ *N. Cal. River Watch*, 496 F.3d at 999-1000; *Cundiff*, 480 F. Supp. 2d at 944; *Fabian*, 2007 WL 1035078, at *15; *Envtl. Prot. Info. Ctr.*, 469 F. Supp. 2d at 824; *Evans*, 2006 WL 2221629, at *19.

¹⁴⁴ The first part of the plurality test states "waters of the United States' include only relatively permanent, standing or flowing bodies of water." *Rapanos*, 126 S. Ct. at 2221. The second part of the plurality test states "the phrase 'the waters of the United States' 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.'" *Id.* at 2225 (citing *Webster's Second*, at 2882).

¹⁴⁵ *Id.* at 2224 n.8; *id.* at 2259 n.9 (Stevens, J., dissenting ("[T]he Corps' approach has the overwhelming endorsement of numerous *amici curiae*, including 33 States . . ."). An *amicus curiae* is an entity "who is not a party to a lawsuit but who petitions the court or is requested by the court to file a brief in the action because that person has a strong interest in the subject matter." BLACK'S LAW DICTIONARY 93 (8th ed. 2004).

¹⁴⁶ *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 138-39 (1985). The *Riverside Bayview* Court held the Corps' construction of the CWA interpreting "waters of the United States" to include adjacent wetlands was reasonable, and therefore permissible under *Chevron*. *Id.*

¹⁴⁷ As discussed above, the arbitrary nature of the plurality test's two requirements would categorically exclude certain wetlands, and force plants and animals depending on these lands to either die off or relocate. See discussion *supra* Part III.A. Further, this result is unnecessarily harsh because the Corps only denies 1% of permits. *Id.*

sidestepped or avoided the plurality test.¹⁴⁸ This Note argues that courts should continue to disregard the plurality test as an implausible, inconsistent standard, which fails to accord appropriate deference to legislative intent, prior case law, the views of state governments, or the Corps' judgment.

IV. AN EXAMINATION OF THE SIGNIFICANT NEXUS TEST

The significant nexus test, already the most frequently applied standard of the Corps' jurisdiction in the post-*Rapanos* era,¹⁴⁹ is likely to be the most influential test deriving from *Rapanos*. This test requires that property exhibit a "significant nexus" between the wetlands at issue and navigable-in-fact waters for the Corps to have jurisdiction.¹⁵⁰ This nexus is "assessed in terms of the statute's goals and purposes," as outlined in 33 U.S.C. § 1251.¹⁵¹ For the nexus to exist, either the wetlands or a combination of the wetlands and surrounding lands must "significantly affect the chemical, physical, and biological integrity" of navigable-in-fact waters.¹⁵² Justice Kennedy further notes that wetlands whose effects on water quality are "speculative" or "insubstantial" fall outside the Corps' regulatory jurisdiction.¹⁵³ On its face, the significant nexus test may seem reasonable through its balancing of interests and respect for both congressional intent and prior case law. This test, however, is far from the most logical or

¹⁴⁸ *E.g.*, *N. Cal. River Watch*, 496 F.3d at 999-1000; *United States v. Johnson*, 467 F.3d 56, 66 (1st Cir. 2006) (suggesting that on remand the district court could base jurisdiction on either the plurality's or Justice Kennedy's standard); *Fabian*, 2007 WL 1035078, at *15; *Env'tl. Prot. Info. Ctr.*, 469 F. Supp. 2d at 824; *Evans*, 2006 WL 2221629, at *19; *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 725 (7th Cir. 2006); *United States v. Chevron Pipe Line Co.*, 437 F. Supp. 2d 605, 613 (N.D. Tex. 2006).

¹⁴⁹ Since *Rapanos*, two courts have disregarded the *Rapanos* decision. *See Gerke Excavating*, 464 F.3d at 725; *Chevron Pipe Line*, 437 F. Supp. 2d at 613. Other courts addressing this issue have either applied the "significant nexus" test, as the narrowest grounds of the *Rapanos* holding, or allowed the Corps jurisdiction if the wetlands at issue met either the plurality or "significant nexus" test. *See Fabian*, 2007 WL 1035078, at *15; *Env'tl. Prot. Info. Ctr.*, 469 F. Supp. 2d at 824; *Evans*, 2006 WL 2221629, at *19; *N. Cal. River Watch*, 496 F.3d at 999-1000; *Johnson*, 467 F.3d at 63-64.

¹⁵⁰ *Rapanos*, 126 S. Ct. at 2248 (Kennedy, J., concurring) ("Consistent with *SWANCC* and *Riverside Bayview* and with the need to give the term 'navigable' some meaning, the Corps' jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense.").

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

proper one due to its incredible ambiguity and the complications it creates for both government enforcement and private property owners in the permit process.

A. *The History of the Significant Nexus Test*

The significant nexus test originated in Justice Rehnquist's opinion in *SWANCC*.¹⁵⁴ The *Riverside Bayview* Court failed to mention the term "significant nexus" and concluded that the Corps' jurisdiction over adjacent wetlands was reasonable under agency deference.¹⁵⁵ In *SWANCC*, however, Justice Rehnquist noted that "[i]t was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview*."¹⁵⁶ This "significant nexus" was one of three potential definitions of the requisite link suggested by the *SWANCC* Court, which never decided upon one definition.¹⁵⁷ Therefore, as read by *SWANCC*, the significant nexus of the property at issue in *Riverside Bayview* was a factor permitting that Court to hold that agency deference was appropriate.¹⁵⁸ In contrast, the Court in *SWANCC* held that the property at issue lacked this nexus, but the Court's holding did not turn on this determination.¹⁵⁹ Instead, the Court concluded that an expanded definition of "navigable waters" to include isolated ponds would rob the term "navigable" of any effect.¹⁶⁰ Rehnquist also concluded that the constitutional questions generated by the property's isolated, intrastate nature required a clear intent from

¹⁵⁴ *SWANCC*, 531 U.S. 159, 167 (2001).

¹⁵⁵ *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 139 (1985). The *Riverside Bayview* Court recognized that agency deference, under *Chevron*, was the appropriate standard for evaluating the Corps' wetlands jurisdiction. *Id.*

¹⁵⁶ *SWANCC*, 531 U.S. at 167.

¹⁵⁷ Rehnquist described the requisite link in different parts of the opinion as "wetlands 'inseparably bound up with the "waters" of the United States,'" "wetlands that actually abutted on a navigable waterway," and wetlands possessing a "significant nexus" with navigable-in-fact waters. *Id.* at 165-67; see also Verchick, *supra* note 65, at 865 ("In distinguishing *Riverside [Bayview]* from] its current case, the *SWANCC* majority described 'adjacent' waters in various ways But however one defined the critical link to navigable waters, the Court was sure it was absent from those Illinois gravel pits.").

¹⁵⁸ *SWANCC*, 531 U.S. at 167.

¹⁵⁹ *Id.* The Court's determination, in fact, turned on the effect of the Migratory Bird Rule on "navigable waters" and the constitutional questions raised by the isolated, intrastate nature of the property at issue. *Id.* at 171-72.

¹⁶⁰ *Id.* at 172 ("We cannot agree that Congress' separate definitional use of the phrase 'waters of the United States' constitutes a basis for reading the term 'navigable waters' out of the statute.").

Congress to uphold the Corps' jurisdiction.¹⁶¹ Thus, the SWANCC holding rested on an unwillingness to misconstrue "navigable" and a belief that the property at issue in that case was invoking the outer limits of Congress' power.

Justice Kennedy created the significant nexus test out of a factor from SWANCC's reading of *Riverside Bayview*.¹⁶² These cases, however, relied on other factors to reach their conclusions. While *Riverside Bayview* rested on agency deference, SWANCC denied the Corps' jurisdiction based on congressional intent and constitutional implications.¹⁶³ In the following subsections, this Note will suggest the impropriety of the significant nexus test, due to its failures as a matter of congressional intent, ambiguity, and economic efficiency.

B. The Significant Nexus Test Versus Congressional Intent and Legislative History

The significant nexus test addresses the congressional intent examined in SWANCC and *Riverside Bayview* by requiring courts to assess the nexus in terms of the statute's goals and purposes.¹⁶⁴ Three questions, however, arise over whether this assessment is actually a furtherance of Congress' intent. First, the test's consideration of the CWA's initial "goals and purposes" leaves no room for consideration of subsequent legislative history.¹⁶⁵ Second, the test defeats Congress' intent to provide broad federal regulatory authority because the test requires a "significant nexus" as a condition precedent to any

¹⁶¹ SWANCC, 531 U.S. at 172 ("Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result.").

¹⁶² Justice Kennedy introduces the concept of a "significant nexus," without any context beyond stating its "[c]onsisten[cy] with SWANCC and *Riverside Bayview* and with the need to give the term 'navigable' some meaning." *Rapanos*, 126 S. Ct. at 2248 (Kennedy, J., concurring). The SWANCC Court's reading of the *Riverside Bayview* opinion, however, was flawed, because *Riverside Bayview* upheld the Corps' jurisdiction based on agency deference, and never mentioned the term "significant nexus." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 138-39 (1985). Therefore, the "significant nexus" in *Riverside Bayview* was, at most, only a factor in that Court's holding.

¹⁶³ SWANCC, 531 U.S. at 171-72; see also *Rapanos*, 126 S. Ct. at 2248 (Kennedy, J., concurring).

¹⁶⁴ *Rapanos*, 126 S. Ct. at 2248 (Kennedy, J., concurring) ("The required nexus must be assessed in terms of the statute's goals and purposes.").

¹⁶⁵ *Id.* Kennedy's announcement of the significant nexus test mentions that courts should consider the CWA's goals and purposes, but does not mention whether the 1977 congressional acquiescence should be considered. *Id.*

consideration of congressional intent.¹⁶⁶ Finally, the test misleads courts into disregarding the part of the test calling for an assessment of congressional intent.¹⁶⁷

Although the significant nexus test recognizes congressional intent, this test abandons consideration of the CWA's legislative history. In CWA jurisprudence, the CWA's legislative history is just as important as the initial goals and purposes of Congress.¹⁶⁸ While Congress thoroughly considered the CWA before its enactment in 1972, the congressional acquiescence to the Corps' jurisdiction in 1977 provided perhaps a more focused analysis on wetlands preservation.¹⁶⁹ Both houses debated proposals for a more limited Section 404 jurisdiction,¹⁷⁰ and the House passed a bill limiting the Corps' jurisdiction, but the old definition was ultimately retained.¹⁷¹ Without considering these deliberations, courts may ignore specific evidence of express congressional intent acknowledging the validity of the Corps' interpretation of its jurisdiction.¹⁷² Therefore, the absence of consideration for legislative history in the significant nexus test detracts from a court's ability to

¹⁶⁶ *Id.* ("The required nexus must be assessed in terms of the statute's goals and purposes.").

¹⁶⁷ Though courts have implicitly followed congressional intent since *Rapanos*, the omission of any discussion of congressional intent within these decisions could prove troublesome. This omission would be troublesome because it might cause future courts to disregard the assessment of congressional intent, even though the significant nexus test explicitly calls for an assessment of this intent. *See* *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 999-1000 (9th Cir. 2007); *United States v. Johnson*, 467 F.3d 56, 59 (1st Cir. 2006); *United States v. Fabian*, No. 2:02-CV-495, 2007 WL 1035078, at *15 (N.D. Ind. Mar. 29, 2007); *Env'tl. Prot. Info. Ctr. v. Pac. Lumber Co.*, 469 F. Supp. 2d 803, 824 (N.D. Cal. 2007); *United States v. Evans*, No. 3:05 CR 159 J 32HTS, 2006 WL 2221629, at *21-22 (M.D. Fla. Aug. 2, 2006).

¹⁶⁸ Congress' intent through its 1977 acquiescence to the broader definition of the Corps' jurisdiction should be just as important to a court's analysis as Congress' original intent behind the act. *See Riverside Bayview*, 474 U.S. at 137-38 (discussing the importance of the congressional acquiescence to the Corps).

¹⁶⁹ *See id.* at 136-37 (discussing the congressional acquiescence after arguments were made for and against a narrower interpretation of jurisdiction).

¹⁷⁰ Section 404 jurisdiction refers to the Corps' jurisdiction to issue or deny permits to deposit dredge or fill material on "waters of the United States." *ZINN & COPELAND I*, *supra* note 27, at 6.

¹⁷¹ *Riverside Bayview*, 474 U.S. at 137. The House bill would have narrowed the Corps' jurisdiction to govern only wetlands that were navigable-in-fact. *See* H.R. 3199, 95th Cong., at 80-81, 102-04 (1977). The Joint Conference Committee, however, retained the broad definition of jurisdiction, allowing the Corps to continue interpreting the CWA's language—"waters of the United States." *See* S. 1952, 95th Cong., at 63-76 (1977).

¹⁷² The 1977 congressional acquiescence to the Corps' jurisdiction presents the only moment in CWA history when Congress has acknowledged with approval the Corps' past interpretations of its jurisdiction. *United States v. Pozsgai*, 999 F.2d 719, 729 (3d Cir. 1993); *Riverside Bayview*, 474 U.S. at 137-38.

analyze all the factors that may have contributed to Congress' intent behind the CWA.

The significant nexus test raises a second congressional intent issue concerning the worth of this intent when a significant nexus is a condition precedent.¹⁷³ By requiring a significant nexus before any analysis of legislative intent, this test immediately imposes a burden on the Corps to prove that the lands at issue "significantly affect the chemical, physical, and biological integrity" of navigable-in-fact waters.¹⁷⁴ In contrast, the congressional "goals and purposes" that must be considered in light of the "significant nexus" support broad federal authority and seem to contradict any judicial requirement beyond the Corps' obligation to reasonably construe the CWA.¹⁷⁵ Therefore, Justice Kennedy's test will consider congressional intent once the Corps has cleared a much higher hurdle than Congress intended.¹⁷⁶ This procedure is far from a thorough and deferential evaluation of congressional intent.

The third issue the significant nexus test presents is whether courts will erode the relevancy of congressional intent given its limited role in many of the lower court cases since *Rapanos*.¹⁷⁷ To an extent, congressional intent has been mentioned and then quickly disregarded in the cases since *Rapanos*.¹⁷⁸ As pointed out below, the lack of consideration for

¹⁷³ "The required nexus must be assessed in terms of the statute's goals and purposes." *Rapanos*, 126 S. Ct. at 2248 (Kennedy, J., concurring). This statement indicates that courts must first find the "significant nexus," and then assess the nexus according to Congress' intent behind the CWA.

¹⁷⁴ *Id.* at 2248.

¹⁷⁵ Congress evinced its intent that CWA jurisdiction be "the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." S. REP. NO. 92-1236, at 144 (1972) (Conf. Rep.), as reprinted in 1972 U.S.C.C.A.N. 3776, 3822. This broad interpretation of federal jurisdiction resulted from the failures of states to implement their own programs. S. REP. NO. 92-414, at 1-2 (1971), as reprinted in 1972 U.S.C.C.A.N. 3668, 3675 ("[M]any states do not have approved standards. Officials are still working to establish relationships between pollutants and water uses. Time schedules for abatement are slipping away because of failure to enforce, lack of effluent controls, and disputes over Federal-State standards.")

¹⁷⁶ *Id.*

¹⁷⁷ See *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 999-1000 (9th Cir. 2007); *United States v. Johnson*, 467 F.3d 56, 59 (1st Cir. 2006); *United States v. Fabian*, No. 2:02-CV-495, 2007 WL 1035078, at *15 (N.D. Ind. Mar. 29, 2007); *Env'tl. Prot. Info. Ctr. v. Pac. Lumber Co.*, 469 F. Supp. 2d 803, 824 (N.D. Cal. 2007); *United States v. Evans*, No. 3:05 CR 159 J 32HTS, 2006 WL 2221629, at *21-22 (M.D. Fla. Aug. 2, 2006).

¹⁷⁸ See *N. Cal. River Watch*, 496 F.3d at 999-1000 (briefly mentioning Justice Kennedy's requirement to assess congressional goals and purpose, but failing to

congressional intent in these cases may be irrelevant because lower courts using the ambiguous significant nexus test have consistently supported Congress' intent without explicit discussion.¹⁷⁹ The omission of such discussion, however, could prove troublesome for congressional intent if future courts disregard the test's assessment of goals and purposes completely and focus solely on the existence of a nexus.¹⁸⁰ If such cases arose, courts would be deciding the Corps' jurisdiction solely based on a scientific judgment, which the Corps is better equipped to make than a court.¹⁸¹ Therefore, the significant nexus test has led lower courts to briefly discuss congressional intent, but the brief nature of this discussion may cause future courts to abandon any consideration of this intent.

C. *The Ambiguity of the Significant Nexus Test*

A profound question surrounds the significant nexus test: What really is a "significant nexus?" Lower courts are now

mention the CWA's goals and purposes again); *Johnson*, 467 F.3d at 59 (discussing Justice Kennedy's significant nexus test and omitting any mention of assessing the goals and purposes of the Clean Water Act); *Fabian*, 2007 WL 1035078, at *15 (same); *Envtl. Prot. Info. Ctr.*, 469 F. Supp. 2d at 824 (discussing Justice Kennedy's test without referring to his assessment of congressional intent); *Evans*, 2006 WL 2221629, at *21-22.

¹⁷⁹ *N. Cal. River Watch*, 496 F.3d at 999-1000 (upholding the Corps' jurisdiction despite limited discussion of congressional intent); *Fabian*, 2007 WL 1035078, at *15 (holding the wetlands at issue subject to the CWA despite brief discussion of congressional intent); *Envtl. Prot. Info. Ctr.*, 469 F. Supp. 2d at 824 (upholding CWA jurisdiction under Kennedy's standard despite no mention of congressional intent); *Evans*, 2006 WL 2221629 at *23 (same).

¹⁸⁰ Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 69-70 (1994).

Judges are overburdened generalists, not philosophers or social scientists. Methods of interpretation that would be good for experts are not suitable for generalists. Generalists should be modest and simple. While recognizing that specialists might produce a more nuanced approach, generalists must see the process and error costs are much higher when they try to do the same thing.

Id. If future courts disregard congressional intent, these courts would ignore an intended element of the significant nexus test, and reach their holdings based solely on a scientific judgment. This would be troublesome because experts are better at making scientific decisions than courts. *Id.*

¹⁸¹ The Corps is better equipped to make decisions concerning the existence of a nexus because the Corps' day-to-day activities involve making scientific judgments, and because the Corps issues a manual defining which wetlands fall under its jurisdiction. See discussion *infra* Part IV.D; see also Easterbrook, *supra* note 180, at 69-70.

asking this question, yet few reach a consistent definition.¹⁸² Justice Kennedy explains that, in terms of wetlands, they must “significantly affect the chemical, physical, and biological integrity” of navigable-in-fact waters.¹⁸³ Kennedy further allows establishment of a nexus for adjacent wetlands when the Corps can establish adjacency to navigable-in-fact waters.¹⁸⁴ In the case of adjacency to *non*-navigable waters, however, “[a]bsent more specific regulations . . . the Corps must establish a significant nexus on a case-by-case basis.”¹⁸⁵ While the Ninth Circuit found no trouble in holding that a man-made levee does not bar a significant nexus between a wetland and a river,¹⁸⁶ a Texas District Court entirely dismissed the significant nexus test.¹⁸⁷ The district court complained that Justice Kennedy failed to provide sufficient details to resolve the ambiguity of a “significant nexus.”¹⁸⁸ Thus, there is great potential for disparate outcomes in the practical application of the significant nexus test. In addition, the ambiguity of the significant nexus test allows Justice Kennedy, its creator, to command a majority of the Supreme Court on any conclusion he reaches regarding the existence of a significant nexus.¹⁸⁹

¹⁸² See *N. Cal. River Watch*, 496 F.3d at 1000 (concluding that a pond held a significant nexus despite minimal discussion of the significant nexus test); *Johnson*, 467 F.3d at 59 (discussing the ambiguous nature of the significant nexus test); *United States v. Chevron Pipe Line Co.*, 437 F. Supp. 2d 605, 613 (N.D. Tex. 2006) (“Because Justice Kennedy failed to elaborate on the ‘significant nexus’ required, this Court will look to the prior reasoning in this circuit.”).

¹⁸³ *Rapanos*, 126 S. Ct. at 2248 (Kennedy, J., concurring). Beyond the subject of wetlands, the application of the significant nexus requirement to determine Corps jurisdiction is likewise unclear, because Kennedy fails to explain whether or not his test is an exception applicable only to wetlands. See *id.* at 2236-52.

¹⁸⁴ *Id.* at 2249.

¹⁸⁵ *Id.*

¹⁸⁶ *N. Cal. River Watch*, 496 F.3d at 1000. The facts in *River Watch* indicated several hydrologic connections between the waters at issue and “waters of the United States” despite the existence of the levee, so the Ninth Circuit had no trouble declaring the existence of a “significant nexus.” *Id.* Even this court, however, did not define “significant nexus.” See *id.*

¹⁸⁷ *Chevron Pipe Line Co.*, 437 F. Supp. 2d at 613.

¹⁸⁸ *Id.* The court also stated its disapproval for the “significant nexus” test. *Id.* (“Justice Kennedy . . . advanced an ambiguous test—whether a ‘significant nexus’ exists to waters that are/were/might be navigable. This test leaves no guidance on how to implement its vague, subjective centerpiece. That is, exactly what is ‘significant’ and how is ‘nexus’ determined?”) (citations omitted). The court further stated, that “[b]ecause Justice Kennedy failed to elaborate on the ‘significant nexus’ required, this Court will look to the prior reasoning in this circuit.” *Id.*

¹⁸⁹ This conclusion assumes that Justices Scalia, Thomas, Roberts, and Alito will continue to adhere to the plurality test and that Justices Stevens, Ginsburg, Breyer, and Souter will continue to adhere to the agency deference approach. On this issue, the Seventh Circuit commented, in most cases “any conclusion that Justice

Thus, on the Supreme Court at least, the ambiguity of the significant nexus test gives Justice Kennedy unitary power over most cases involving federal authority over wetlands.¹⁹⁰ Therefore, the ambiguity of the significant nexus test presents a challenge to its practical application.

D. The Necessity and Cost Implications of the Significant Nexus Test

The significant nexus test suffers further by creating the same standard as agency deference but with additional procedural hurdles.¹⁹¹ To its credit, the test reaches the same result as the plurality in *Rapanos*, while suggesting a more eco-friendly standard for evaluating the Corps' jurisdiction.¹⁹² As the plurality disapprovingly notes, however, "Justice Kennedy tips a wink at the agency, inviting it to try its same expansive reading again."¹⁹³ This "wink" means that, although the significant nexus test may be different in form from an agency deference approach, the practical results of employing the two tests will almost always be the same.¹⁹⁴ In fact, nearly all of the lower courts applying the significant nexus test have

Kennedy reaches [with respect to] federal authority over wetlands will command the support of five Justices." *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 725 (7th Cir. 2006).

¹⁹⁰ The exception, as pointed out in *Gerke*, would occur in the case of a "slight surface hydrological connection," allowing the *Rapanos* plurality and dissenters to vote to uphold federal jurisdiction, but the connection is too small for Justice Kennedy to consider that a "significant nexus" exists. *Id.*

¹⁹¹ The test is essentially the same standard as agency deference because most wetlands where the Corps' jurisdiction would be reasonable also have a "significant nexus" to traditionally navigable waters. *Rapanos*, 126 S. Ct. at 2264 (Stevens, J., dissenting). Though "significant nexus" is an ambiguous term, most lower courts since *Rapanos* have upheld the Corps' jurisdiction using this test. *See N. Cal. River Watch*, 496 F.3d at 1000; *United States v. Johnson*, 467 F.3d 56, 59 (1st Cir. 2006); *United States v. Fabian*, No. 2:02-CV-495, 2007 WL 1035078, at *15 (N.D. Ind. Mar. 29, 2007); *United States v. Evans*, No. 3:05 CR 159 J 32HTS, 2006 WL 2221629, at *21-22 (M.D. Fla. Aug. 2, 2006). Justice Stevens further recognizes, "Justice Kennedy's 'significant nexus' test will probably not do much to diminish the number of wetlands covered by the [CWA] in the long run." *Rapanos*, 126 S. Ct. at 2264 (Stevens, J., dissenting).

¹⁹² *Rapanos*, 126 S. Ct. at 2264 (Stevens, J., dissenting). While a more eco-friendly standard than the plurality test is hardly an accomplishment, the significant nexus test does assess the goals and purposes of the CWA. *See id.* at 2248 (Kennedy, J., concurring). These goals and purposes include seeking "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a).

¹⁹³ *Rapanos*, 126 S. Ct. at 2235 n.15 (plurality opinion).

¹⁹⁴ *Id.*

eventually “deferred” to the Corps’ interpretation of the CWA.¹⁹⁵ Two practicalities, however, are different beyond the similar results in court holdings. First, the significant nexus test imposes additional costs for property owners who must assess their properties both in terms of the Corps’ regulations and under a new judicial standard.¹⁹⁶ Second, the significant nexus test creates uncertainty for a property owner who either does not understand the meaning of “significant nexus” or does not know of the additional judicial definition.¹⁹⁷

The costs of hiring wetlands experts, known as hydrologists, to assess property will increase under the significant nexus test.¹⁹⁸ Usually, a developer will consult such a hydrologist before filling a plot including potential wetlands in order to determine whether the wetlands meet the Corps’ existing regulations for jurisdiction.¹⁹⁹ In *Rapanos*, the property owner asked a Michigan Department of Natural Resources inspector to look over the site and discuss the feasibility of

¹⁹⁵ See *N. Cal. River Watch*, 496 F.3d at 1000; *Johnson*, 467 F.3d at 59; *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 725 (7th Cir. 2006); *Fabian*, 2007 WL 1035078, at *15; *Evans*, 2006 WL 2221629, at *21-22.

¹⁹⁶ Property owners must pay for experts to assess their lands to determine compliance with the Corps’ regulations, and then must pay for further assessments in the event they choose to challenge the Corps’ jurisdiction to deny their permits.

¹⁹⁷ A property owner wishing to challenge the Corps’ jurisdiction to deny a permit cannot be expected to understand the judicially-constructed meaning for “significant nexus.” *Rapanos*, 126 S. Ct. at 2264-65 (Stevens, J., dissenting).

¹⁹⁸ If the significant nexus test becomes the standard for wetlands jurisdiction, property owners will be forced to further employ wetlands experts to evaluate the property for compliance with this additional test.

¹⁹⁹ See 33 C.F.R. § 328.3 (2006). A wetlands manual provided by the Corps further advises property owners of the following qualities that confer jurisdiction on the Corps:

- (1) prevalence of plant species typically adapted to saturated soil conditions, determined in accordance with the United States Fish and Wildlife Service’s National List of Plant Species that Occur in Wetlands;
- (2) hydric soil, meaning soil that is saturated, flooded, or ponded for sufficient time during the growing season to become anaerobic, or lacking in oxygen in the upper part; and
- (3) wetland hydrology, a term generally requiring continuous inundation or saturation to the surface during at least five percent of the growing season in most years.

Wetlands Research Program Technical Report, Y-87-1, 9-10 (Jan. 1987), available at <http://citeseer.ist.psu.edu/617377.html> [hereinafter Technical Report]. These regulations provide precise, scientifically-determined definitions for the Corps’ exercise of jurisdiction. Therefore, these regulations provide adequate limits on the Corps’ jurisdiction, supply definitions capable of a lay person’s understanding, and should not be supplanted by a judicial construction like the significant nexus test. *Rapanos*, 126 S. Ct. at 2264 (Stevens, J., dissenting).

building a shopping center.²⁰⁰ The government also used an expert to testify at trial on the ecological functions of the wetlands at issue.²⁰¹ Hydrologists are a necessary and indispensable part of any CWA case, but their work is not cheap.²⁰² Instead of assisting the developers with this burden, however, the significant nexus test increases the burden by imposing additional work on the hydrologists.²⁰³ If, indeed, the significant nexus test is more than “a wink to the agency,” the hydrologist must first assess whether the property contains the applicable plant species, the soil, and inundation or saturation of water.²⁰⁴ The hydrologist must then assess whether the property significantly affects the chemical, physical, or biological integrity of navigable-in-fact waters.²⁰⁵ If this test is meant to reduce the burdens of overreaching jurisdiction by the federal government, it does so by burdening the individual property owner with higher costs of both wetlands experts and attorneys fees to make the necessary determinations.²⁰⁶ If, instead, the standard is meant to provide executive agencies with a workable definition of what they can regulate, the test again fails by imposing greater costs on the agencies to make these same determinations.²⁰⁷ As Justice Stevens points out, these costs are exactly what *Riverside Bayview* attempted to avoid.²⁰⁸ Therefore, the dual standard of the significant nexus

²⁰⁰ *Id.* at 2253.

²⁰¹ *Id.*

²⁰² The cost of hiring a hydrologist is comparable to the cost of hiring any other expert. For example, the Anoka Conservation District, a Minnesota non-regulatory state government subdivision, provides “water monitoring services” to private landowners at costs ranging from \$800 to \$2700. Anoka Conservation District’s Services Guide for 2007: Routine Water Monitoring Services, http://www.anokaswcd.org/info/2007_fee_schedule.pdf.

²⁰³ Experts must additionally assess land to determine compliance with the significant nexus test, whereas they would otherwise assess wetlands based only on the standards in the Corps’ manual. *See* Technical Report, *supra* note 199.

²⁰⁴ *Id.*

²⁰⁵ *Rapanos*, 126 S. Ct. at 2248 (Kennedy, J., concurring).

²⁰⁶ *Rapanos*, 126 S. Ct. at 2264-65 (Stevens, J., dissenting) (“Justice Kennedy’s approach will have the effect of creating additional work for all concerned parties.”); *see also* Easterbrook, *supra* note 180.

²⁰⁷ Agencies, such as the Corps, will have the same additional costs as property owners of hiring attorneys and wetlands experts to assess the additional implications of the significant nexus test’s requirements. For the Corps, this burden will be especially significant given its currently extensive involvement in several high-profile projects. *See* discussion *infra* note 213.

²⁰⁸ *Rapanos*, 126 S. Ct. at 2265 (Stevens, J., dissenting) (“And the Corps will have to make case-by-case . . . jurisdictional determinations, which will inevitably increase the time and resources spent processing permit applications. These problems are precisely the ones that *Riverside Bayview*’s deferential approach avoided.”).

test creates unnecessarily high costs for private property owners and the federal government that could be lowered by adhering to agency deference.²⁰⁹

The significant nexus test also adds greater uncertainty to the permit process for both property owners and the Corps. The Corps' definitions manual is extensive but not legal.²¹⁰ This allows a curious property owner to decipher its language as he chooses. In contrast, the significant nexus test proposes a legal standard for evaluating federal jurisdiction over wetlands, which would prevent or at least make it difficult for a layperson to discover on his own whether his property includes wetlands.²¹¹ In addition, this test adds to both sides the uncertainty of increased litigation.²¹² If the significant nexus test is, in substance, the same as agency deference, why provide property owners an added incentive to take these matters to court under an illusory hope the Corps will be unable to prove a "significant nexus?" From the Corps' perspective, the significant nexus test burdens a government agency, which is already overburdened in other areas, with increased litigation.²¹³ Thus, the additional costs and

²⁰⁹ The significant nexus test creates both additional litigation and expert fees that would not be incurred with the agency deference approach. *See* discussion *infra* Part V.B. In addition, there are further process and error costs associated with increased judicial determinations. *See* Easterbrook, *supra* note 180.

²¹⁰ The Corps issues this manual to provide guidance to property owners on the terms of 33 C.F.R. § 328.3. *See* Technical Report *supra* note 199.

²¹¹ *Rapanos*, 126 S. Ct. at 2265 (Stevens, J., dissenting) ("Developers wishing to fill wetlands adjacent to ephemeral or intermittent tributaries of traditionally navigable waters will have no certain way of knowing whether they need to get § 404 permits or not.").

²¹² With agency deference, the outcome would be more certain because the Corps' jurisdiction would be upheld, so long as its construction of the CWA was reasonable. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985).

²¹³ The Corps has recently taken significant stakes in the rebuilding efforts within Iraq and Afghanistan, and the clean-up after Hurricane Katrina. While the cost of litigation is unlikely to make a difference in these areas, the costs incurred by litigation could always be used to assist with other projects in the absence of the litigation. *See generally* Press Release, Gerry J. Gilmore, American Forces Press Service, U.S. General: Afghan Road, Electricity Projects Move Ahead, Oct. 18, 2006, <http://www.defenselink.mil/News/NewsArticle.aspx?ID=1676> (discussing the Corps' \$170 million investment in construction of infrastructure within Afghanistan); Press Release, Norris Jones, U.S. Army Corps of Eng'rs., Baghdad Counts on Local Improvements, Dec. 4, 2006, <http://www.grd.usace.army.mil/news/releases/NR06-12-04.html> (discussing 150 projects worth \$500 million in Iraq for which the Corps provides oversight); Press Release, White House Office of the Press Secretary, Press Briefing on Gulf Coast Rebuilding, Aug. 22, 2006, <http://www.whitehouse.gov/news/releases/2006/08/20060822-5.html> (officials from the Office of Gulf Coast Rebuilding, FEMA, and the Corps discussing the rebuilding costs for parts of Louisiana and Mississippi after Hurricane Katrina).

uncertainty associated with the significant nexus test suggest courts should rethink using this test.

E. Post-Rapanos Judicial Treatment of the Significant Nexus Test

The significant nexus standard will control future cases unless a new standard is enunciated. As Justice Kennedy will submit the fifth and deciding vote on most Supreme Court cases involving wetlands jurisdiction, the only wetlands over which this justice will not provide the controlling rule of law will be: (1) all continuous, yet slight, surface connections to navigable waters²¹⁴ and (2) Justice Kennedy's own property.²¹⁵ As Justice Stevens notes, and as subsequent lower courts' opinions have shown, the practical results to the environment and the litigants of the significant nexus test are negligible in comparison with an agency deference approach.²¹⁶ The costs and uncertainty that follow as a necessary result of the test's ambiguity, however, create powerful arguments against the test's merit.²¹⁷ Therefore, the significant nexus test may be the present standard for federal wetlands authority, but the additional costs and uncertainty this test creates suggest agency deference could more efficiently accomplish the same results.

V. THE AGENCY DEFERENCE APPROACH

Agency deference is the most appropriate standard for CWA jurisdiction. In *Chevron*, the Supreme Court recognized that cases concerning administrative agencies establish principles of law in areas where judges are not typically experts.²¹⁸ Thus, courts must defer to the agency's construction of a statute when that construction is reasonable.²¹⁹ This

²¹⁴ *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 725 (7th Cir. 2006).

²¹⁵ One would hope Justice Kennedy would choose to recuse himself if such a matter arose.

²¹⁶ *Rapanos*, 126 S. Ct. at 2264 (Stevens, J., dissenting) ("Justice Kennedy's 'significant nexus' test will probably not do much to diminish the number of wetlands covered by the Act in the long run.").

²¹⁷ See discussion *supra* Part IV.D.

²¹⁸ See *Rapanos v. United States*, 376 F.3d 629, 640 (6th Cir. 2004).

²¹⁹ *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984).
The Court instructed:

First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of

interpretation of agency jurisprudence was not present when the CWA was passed in 1972.²²⁰ The *Riverside Bayview* and *SWANCC* decisions, however, each recognize the importance of this mechanism.²²¹ Moreover, deference makes economic sense, saving time and money that would be unnecessarily wasted on a judicial inquiry into a matter best reserved to experts in the particular field.²²² Although skeptics argue that deference gives too much authority to agencies and opens the door to the possibility of overreaching, several checks, including judicial intervention when an agency's interpretation is unreasonable, prevent these fears from reaching fruition.²²³ Therefore, agency deference should be applied to the exclusion of the plurality and significant nexus tests in cases concerning federal authority over wetlands.

A. *The History of the Agency Deference Approach*

Since the inception of administrative agencies in the late nineteenth century, courts have deferred to agencies'

the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842-43 (footnotes omitted).

²²⁰ *Chevron* was decided in 1984. *Id.*

²²¹ The *Riverside Bayview* Court reached its holding based on agency deference. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985). The *SWANCC* Court recognized that agency deference would normally be the standard of review for the Corps' jurisdiction, if not for the "heightened concern" resulting from the "constitutional questions" in that case. *SWANCC*, 531 U.S. 159, 172-73 (2001).

²²² *Rapanos*, 126 S. Ct. at 2264-65 (Stevens, J., dissenting).

In view of the breadth of federal regulatory authority contemplated by the [CWA] itself and the inherent difficulties of defining precise bounds to regulable waters, the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the [CWA].

United States v. Pozsgai, 999 F.2d 719, 729 (3d Cir. 1993); see also Easterbrook, *supra* note 180. The judicial inquiry would be unnecessarily wasted because the same result—upholding the Corps' jurisdiction—could be reached simply by deferring to the Corps' jurisdiction. Under the agency deference approach, property owners could also avoid uncertainty over whether the CWA gave the Corps' jurisdiction over their land. *Rapanos*, 126 S. Ct. at 2264-65 (Stevens, J., dissenting). For a more detailed discussion, see *infra* Part V.B.

²²³ *Pozsgai*, 999 F.2d at 729.

constructions of their statutory authority.²²⁴ In *Chevron*, the Supreme Court noted the weight of these holdings, especially when the regulatory interpretation at issue was considered ambiguous.²²⁵ The *Chevron* Court then applied this precedent to formulate a test: when a statute is “silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”²²⁶ Courts that follow this position recognize that judges are ill-equipped to issue policy-related statutory definitions and to trust the elaborate system of checks and balances that govern executive agencies.²²⁷ This is the case because the federal government’s executive branch is directly accountable to the public, while the agency is not.²²⁸ Since *Chevron*, courts have widely followed the Supreme Court’s approach to agency interpretations of federal statutes

²²⁴ *Webster v. Luther*, 163 U.S. 331 (1896). The *Webster* Court, for example, stated,

The practical construction given to an act of Congress, fairly susceptible of different constructions, by one of the Executive Departments of the government, is always entitled to the highest respect, and in doubtful cases should be followed by the courts, especially when important interests have grown up under the practice adopted.

Id. at 342. The Supreme Court also noted the deference owed to administrative agencies in several other decisions before *Chevron*. See *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 31-32 (1981) (“The interpretation put on the statute by the agency charged with administering it is entitled to deference.”); *NLRB v. Brown*, 380 U.S. 278, 292 (1965) (“Of course due deference is to be rendered to agency determinations of fact, so long as there is substantial evidence to be found in the record as a whole.”); *Burnet v. Chicago Portrait Co.*, 285 U.S. 1, 16 (1932) (“The familiar principle is invoked that great weight is attached to the construction consistently given to a statute by the executive department charged with its administration.”).

²²⁵ *Chevron U.S.A.*, 467 U.S. at 843. On this issue, the *Chevron* Court remarked, “[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.” *Id.* at 843 n.9.

²²⁶ *Id.* at 843.

²²⁷ Verchick, *supra* note 65, at 861 (suggesting that agencies interpreting law for a national program should favor their own views “over that of a single district or appellate court”).

²²⁸ “Presidential control also leads to better political accountability.” Verchick, *supra* note 65, at 857. Additionally,

Any president is likely to seek assurance that an unwieldy federal bureaucracy conforms its actions to his or her basic principles. Any president is likely to be concerned about excessive public and private costs. And any president is likely to want to be able to coordinate agency activity so as to ensure consistency and coherence

Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 16 (1995), quoted in Verchick, *supra* note 65, at 855.

and have referred to agency deference as *Chevron* deference.²²⁹ Thus, an agency's constructions of the CWA still need only be "rational" to be permissible.²³⁰

Since the adoption of the CWA, several Supreme Court justices have employed agency deference to reach their holdings. *Chemical Manufacturers Association v. Natural Resources Defense Council* provides one of the first post-*Chevron* examples of agency deference used in connection with the CWA.²³¹ Upholding the EPA's jurisdiction, the Supreme Court held that an agency's construction of the CWA need not be the most permissible, but rather sufficiently rational to prevent a court from substituting its judgment for that of the agency.²³²

Next, *Riverside Bayview* became the first Supreme Court case to use agency deference to address the Corps' authority over wetlands.²³³ Courts have described the CWA as "very complex."²³⁴ These same courts, however, recognized that agencies held broad jurisdiction under the CWA.²³⁵ Again upholding an agency's jurisdiction, the *Riverside Bayview* Court held that the Corps' definition of navigable waters was reasonable as applied to adjacent wetlands.²³⁶ In the process,

²²⁹ *Piney Run Pres. Ass'n v. County Comm'rs of Carroll County, Md.*, 268 F.3d 255, 267 (4th Cir. 2001) (applying agency deference to the EPA's interpretation of the CWA); *Pozsgai*, 999 F.2d at 729-30 (deferring to the Corps' construction of "water" within the CWA); *Chem. Mfrs. Ass'n v. NRDC*, 470 U.S. 116, 125 (1985) (holding that the EPA's understanding of the CWA is entitled to "considerable deference"); *Train v. NRDC*, 421 U.S. 60, 75, 87 (1975) (deferring to the EPA's interpretation of the Clean Air Act).

²³⁰ *Piney Run Pres. Ass'n*, 268 F.3d at 267; *Pozsgai*, 999 F.2d at 729; *Chem. Mfrs. Ass'n*, 470 U.S. at 125.

²³¹ *Chem. Mfrs. Ass'n*, 470 U.S. at 125. In this case, an EPA practice of issuing fundamentally different factor variances, a practice on which congressional intent had been silent, was challenged as exceeding the limits of its jurisdiction under the Clean Water Act. *Id.* at 124.

²³² *Id.* at 125.

This view of the agency charged with administering the statute is entitled to considerable deference . . . to sustain it, we need not find that it is the only permissible construction that EPA might have adopted but only that EPA's understanding of this very "complex statute" is a sufficiently rational one to preclude a court from substituting its judgment for that of EPA.

Id.

²³³ *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985).

²³⁴ *Piney Run Pres. Ass'n*, 268 F.3d at 267; *Pozsgai*, 999 F.2d at 729; *Chem. Mfrs. Ass'n*, 470 U.S. at 125.

²³⁵ *Piney Run Pres. Ass'n*, 268 F.3d at 267; *Pozsgai*, 999 F.2d at 729; *Chem. Mfrs. Ass'n*, 470 U.S. at 125.

²³⁶ *Riverside Bayview*, 474 U.S. at 139.

the Court recognized that its review was “limited” by *Chevron*, especially when express congressional intent counseled deference to the Corps.²³⁷ The *Riverside Bayview* Court’s use of agency deference also indicates that such deference is necessary to preserve the Corps’ authority to interpret the CWA, as this approach is the only position advocated in *Rapanos* that allows courts to assess legislative history.²³⁸ Subsequently, several lower courts deferred to the Corps’ wetlands jurisdiction under the CWA.²³⁹ Therefore, the history of agency deference indicates that this approach was the standard for assessing wetlands jurisdiction before *Rapanos*.

B. *The Cost Implications of the Agency Deference Approach*

The Corps’ wetlands manual provides the most efficient method for determining CWA coverage in most cases.²⁴⁰ This manual includes a test—focusing on the present plant species, the qualities of the soil, and the specific water connections involved with the lands at issue—that provides a reasonable method for determining which lands are covered without additional litigation costs.²⁴¹ Moreover, this test is understandable to a layperson and therefore promotes both efficiency and resource allocation.²⁴² One may argue that a

²³⁷ *Id.* at 131 (“An agency’s construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress. Accordingly, our review is limited to the question whether it is reasonable, in light of the language, policies, and legislative history of the [CWA] for the Corps to exercise jurisdiction . . .”).

²³⁸ *Id.* at 131-32. This Court recognized that an agency may look to underlying policies of its statutory grant and legislative history in arriving at a reasonable construction of its jurisdiction. Therefore, legislative history can be used to assess an agency’s jurisdiction under the agency deference approach, but not under either the plurality or significant nexus tests. Because the congressional acquiescence to the broader definition of the Corps’ jurisdiction provides unique evidence of express congressional intent, the agency deference approach becomes a necessity to preserving the Corps’ intended jurisdiction. *Id.* at 132.

²³⁹ *United States v. Deaton*, 332 F.3d 698, 708 (4th Cir. 2003) (using agency deference to uphold the Corps CWA jurisdiction); *Baccarat Fremont Developers, LLC v. U.S. Army Corps of Eng’rs*, 425 F.3d 1150, 1155 (9th Cir. 2001) (employing the *Riverside Bayview* Court’s test of an “adequate basis” for the Corps’ legislative construction).

²⁴⁰ See Technical Report, *supra* note 199.

²⁴¹ *Id.*

²⁴² By using terms such as “prevalence of plant species,” “saturated soil,” and “wetland hydrology,” as opposed to “significant nexus,” the Corps’ wetlands manual provides a definition of its jurisdiction to property owners in terms that can be understood by a layperson. In contrast, the term “significant nexus” is a judicially-crafted term, which no court has precisely defined. *Rapanos*, 126 S. Ct. at 2264 (Stevens, J., dissenting). Since the property owner is better informed under agency

property owner who wishes to determine the CWA's applicability to his land faces the fees from consulting wetlands experts and attorneys, regardless of which test a court may apply.²⁴³ The Corps' manual, however, provides property owners with a definite idea of wetlands for which the Corps can regulate development, thereby reducing the risk that a property owner will make an uninformed decision to expend time and money.²⁴⁴ If courts adopt an additional judicial test, the Corps' manual will lose this function, and property owners will have to pay for additional wetlands assessments and attorneys costs out of the resulting uncertainty from the additional test.²⁴⁵ Therefore, the agency deference approach is the most preferable standard from an economic perspective because it minimizes property owners' costs and provides them with certainty over which wetlands are regulated.

C. *The Existence of Adequate Checks and Balances*

In addition to the Corps' existing test within the wetlands manual, there are other checks on the Corps' authority. First, one might question whether the Corps jurisdiction is even a controversial issue, as the Corps approves more than 99% of approximately 85,000 permits submitted.²⁴⁶

deference, logical extension suggests the property owner will allocate his resources in a more efficient manner under this approach than under an additional judicial test, where additional factors create uncertainty about the wetlands manual's definition of the Corps' jurisdiction.

²⁴³ The argument would be that a property owner must still consult wetlands experts and attorneys regardless of which test the court applies for the Corps' jurisdiction.

²⁴⁴ Technical Report, *supra* note 199. By focusing on the present plant species, the qualities of the soil, and the specific water connections involved with the lands at issue, the wetlands manual uses terms that property owners can understand, thereby giving them a definite idea of which wetlands are regulated. *See Rapanos*, 126 S. Ct. at 2264 (Stevens, J., dissenting).

²⁴⁵ *See Rapanos*, 126 S. Ct. at 2264-65 (Stevens, J., dissenting). In order to learn whether his property had a "significant nexus" to navigable-in-fact waters, a property owner would have to retain an attorney, incurring significant costs. *See Wal-Mart Watch—Battle-Mart: Hiring an Expert*, http://walmartwatch.com/battlemart/go/cat/expert_testimony_whistleblower (last visited Nov. 11, 2007) ("Land use attorneys can cost more than \$275 per hour."). In addition, a property owner would also need to retain a wetlands expert, also known as a hydrologist, to evaluate the property and to determine the existence of a significant nexus. *Id.*; *see also* discussion *supra* note 203.

²⁴⁶ *See ZINN & COPELAND I*, *supra* note 27, at 7. The Corps authorizes about 90% of these permits under a general permit where the Corps estimates the proposed activity to have a minor impact. About 9% of these permits undergo a more detailed evaluation, but the Corps usually denies only about 0.3% of total permits. Property

Moreover, the EPA holds a veto power over every proposed Corps permit, enabling the Agency to block any decision that may result in jurisdictional overreach.²⁴⁷ Some commentators claim the Fish and Wildlife Service (“FWS”) and other agencies also hold unofficial veto powers over the Corps’ decisions and exercise them through threats of delay.²⁴⁸ Structurally, executive agencies are accountable to the executive branch, which is accountable to the political system.²⁴⁹ Finally, executive agencies also hold a duty of loyalty to Congress, which creates laws and delegates authority to agencies.²⁵⁰ If judicial tests and statutory constructions interfere with this delicate system of checks and balances, courts may frustrate the original goals of the CWA and its broad federal authority to ensure comprehensive environmental legislation.²⁵¹ Further, existing restrictions placed on executive agencies by the political system, the executive, and fellow environmental agencies already provide oversight for the Corps’ jurisdiction.²⁵² Therefore, adequate checks and balances suggest that courts should adopt the agency deference approach with respect to federal authority over wetlands.

owners typically withdraw approximately 5% of applications prior to permit decisions. *Id.*

²⁴⁷ See *id.* at 7. The EPA, the only federal agency with a veto power over the Corps’ permitting decisions, has used its veto power 11 times over the CWA’s thirty-year history. *Id.*

²⁴⁸ See *id.* The Reagan, George H.W. Bush, and Clinton Administrations attempted to reduce these unofficial veto powers in order to expedite the Section 404 program, but some critics claim these attempts did not completely fix the problems. *Id.*

²⁴⁹ Verchick, *supra* note 65, at 857; see also Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2347 (2001) (discussing the intricacies of agency’s relationships with Congress, the President, and the judicial branch). In addition, Congress in 1996 passed the Congressional Review Act (CRA), requiring agencies promulgating most new rules to submit a report and a copy of the rule to each House of Congress. Both houses then have the authority to disapprove a rule, even if the rule has already gone into effect. For a detailed discussion of the CRA and its legislative history, see generally Morton Rosenberg, *Whatever Happened to Congressional Review of Administrative Rulemaking?: A Brief Overview, Assessment, and Proposal for Reform*, 51 ADMIN. L. REV. 1051 (1999).

²⁵⁰ See *supra* note 249.

²⁵¹ 33 U.S.C. § 1251 (2000). The statute states that the purposes of the CWA are “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” *Id.* These goals would be frustrated by additional judicial tests, which impede on the Corps’ authority to restore and maintain these waters. *Rapanos*, 126 S. Ct. at 2264 (Stevens, J., dissenting).

²⁵² See Verchick, *supra* note 65, at 857; ZINN & COPELAND I, *supra* note 27, at 7.

D. Environmental Effects of the Agency Deference Approach

Agency deference is also a superior standard from an environmental policy perspective. This approach's greatest benefit to the environment is that it places most decisions regarding environmental policy in the hands of the agency best qualified to make the decisions.²⁵³ Thus, when a court assesses an environmental agency's interpretation of its governing statute, the agency deference approach commands courts to defer to the decision of the Corps, the EPA or the FWS, so long as the decision is reasonable.²⁵⁴ In general, executive agencies receive this deference because they benefit from scientific expertise with respect to practical functions, like reducing discharges of pollutants and preventing groundwater contamination.²⁵⁵ The Corps has technical experience and access to resources that no other agency or body of government possesses, allowing it to make informed decisions about environmental issues.²⁵⁶ In contrast, the Supreme Court rarely hears cases involving environmental law or the Corps' jurisdiction.²⁵⁷ Thus, the Corps, not courts, should be the primary decision-makers on issues of environmental policy, such as those issues involved with the Section 404 program.²⁵⁸ When the Corps' jurisdiction is left as broad as possible under the agency deference approach, fewer wetlands are

²⁵³ By deferring to the agency's construction of a statute when its construction is reasonable, courts allow agencies to make decisions based on their scientific expertise. *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 864-66 (1984); *see also* Easterbrook, *supra* note 180, at 69-70 (discussing the inappropriateness of judges deciding matters of scientific judgment).

²⁵⁴ *See Chem. Mfrs. Ass'n. v. NRDC*, 470 U.S. 116, 125 (1985); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985); *Chevron*, 467 U.S. at 842-43; *Train v. NRDC*, 421 U.S. 60, 75, 87 (1975); *Piney Run Pres. Ass'n v. County Comm'rs of Carroll County, MD*, 268 F.3d 255, 267 (4th Cir. 2001).

²⁵⁵ Verchick, *supra* note 65, at 862-63.

The scientific expertise within the EPA and the Army Corps justifies, in part, Congress' [sic] decision to delegate administrative powers to those agencies. The courts have also acknowledged the specialized expertise of many agencies and have cited such expertise as a basis for deferring to administrative judgments when cases are close.

Id.

²⁵⁶ *Id.*

²⁵⁷ *Rapanos* was the only case on the Court's 2006 docket involving environmental law or the Corps' wetlands jurisdiction. *See Rapanos*, 126 S. Ct. at 2208. Further, the Corps' wetlands jurisdiction has only arisen before the Supreme Court three times in the CWA's thirty-year history. *See id.* *See generally* *SWANCC*, 531 U.S. 159 (2001); *Riverside Bayview*, 474 U.S. 121.

²⁵⁸ *United States v. Pozsgai*, 999 F.2d 719, 729 (3d Cir. 1993).

categorically excluded from the Corps' jurisdiction, and the Corps considers more permits on a case-by-case basis.²⁵⁹ Considering that most scientifically qualified agencies on environmental issues make most of the jurisdictional decisions under the agency deference approach, this approach is the superior standard for courts to review the Corps' wetlands jurisdiction from an environmental policy perspective.

VI. CONCLUSION

The logic behind a proper approach to judicial assessment of the Corps' wetlands jurisdiction is not as complicated as the sharp divisions within the *Rapanos* Court seem to indicate. The plurality test presents an implausible, inconsistent, and revisionist reading of the CWA's history. This test categorically excludes classes of wetlands and likely will not gain widespread approval from lower courts.²⁶⁰ The significant nexus test is an intermediate standard that most courts now apply, but the ambiguous mechanics of this test create uncertainty and fail to ultimately constrain the Corps' jurisdiction.²⁶¹ In contrast, the agency deference approach is a standard that has worked for thirty years, reduces uncertainty, leaves adequate checks and balances in place, and allows more environmental decisions to be made by the most scientifically qualified body.²⁶² The Corps in *Rapanos* reasonably construed the CWA; therefore, the Court should have deferred to its construction and upheld jurisdiction. Likewise, future courts should return to evaluating the Corps' wetlands jurisdiction under the agency deference approach without employing additional judicial tests.

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²⁵⁹ This assertion is supported by the logical extension that the agency deference approach would not categorically exclude wetlands failing to possess a "significant nexus," a "continuous surface connection" to "waters of the United States," or "relatively permanent, standing, or flowing bodies of water." *Rapanos*, 126 S. Ct. at 2221, 2224, 2248.

²⁶⁰ See discussion *supra* Part III.

²⁶¹ See discussion *supra* Part IV.

²⁶² See discussion *supra* Part V.

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