MURKY WETLANDS PROTECTION FOLLOWING *RAPANOS V. UNITED STATES*, 547 U.S. 715 (2006)

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I. INTRODUCTION**

Since Europeans arrived in what is now the contiguous United States, over half of the original 220 million acres of wetlands then present have been lost to agriculture and development.[1] Although some of this loss was inevitable given the dietary and housing needs of the growing population, hindsight and scientific study have shown that wetlands play a vital role in flood control and pollutant filtration, as well as provide habitat for complex ecosystems.[2] The protection of the remainder of our Nation's wetlands is an issue of contention for many parties, including government agencies, land developers, and citizen groups concerned about environmental deterioration and destruction.

In *Rapanos v. United States*,[3] the United States Supreme Court confronted the tension between these disparate interests over federal wetlands policies and procedures. The *Rapanos* case consists of two consolidated controversies involving husband-and-wife teams of land developers from Michigan, John and Judith Rapanos and Keith and June Carabell.[4] At the heart of each dispute lies the question of what wetlands receive protection under the Clean Water Act (CWA) as "waters of the United States."[5] To reach an answer, the Court considered the permanency of water in the areas

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** Developments following the U.S. Supreme Court's decision in *Rapanos v. United States*, 547 U.S. 715 (2006), including the issuance of a guidance memorandum by the U.S. Environmental Protection Agency and any subsequent rulemaking proceedings, are beyond the scope of this Casenote.

1. Gregory J. Allord, U.S. Geological Survey, & Thomas E. Dahl, U.S. Fish & Wildlife Service, *Technical Aspects of Wetlands: History of Wetlands in the Conterminous United States*, http://water.usgs.gov/nwsum/WSP2425/history.html (last visited Apr. 14, 2008).
2. U.S. Environmental Protection Agency, Wetlands: Wetlands and People, http://www.epa.gov/owow/wetlands/vital/people.html (last visited Apr. 14, 2008).
3. Rapanos v. United States, 547 U.S. 715 (2006).
4. *Id.*
5. *Id.* at 730.

in question, as well as the presence or lack of a surface connection with traditionally navigable waters.[6]

Ultimately, the Court vacated the judgments against the parties challenging the CWA and remanded the cases for reconsideration.[7] However, the Court did not produce a majority opinion to guide lower courts in determining whether a wetland falls under the protection of the CWA. Instead, the Supreme Court issued a plurality opinion written by Justice Scalia and joined by Chief Justice Roberts and Justices Thomas and Alito,[8] an opinion concurring in the judgment following very different reasoning by Justice Kennedy,[9] and a dissent by Justice Stevens joined by Justices Breyer, Souter, and Ginsburg.[10]

This Casenote focuses on the flaws in the reasoning of the plurality opinion, as well as the effects the lack of a majority opinion in *Rapanos* will have on regulating agencies and lower courts' decisions.

Part II provides background to aid in understanding the consolidated cases involved. It begins by examining the CWA's applicability to wetlands in subsection A. Subsection B more closely examines the process by which the Corps and approved state agencies may issue permits to individuals and organizations to fill wetland areas. Subsection C briefly reviews the two-step analysis generally employed by the Supreme Court when reviewing agency regulations. Subsection D explains Supreme Court precedent in the realm of the CWA's protection of wetlands and other non-navigable bodies of water.

Part III of this Casenote examines the *Rapanos* case in greater detail. Subsection A presents an overview of the facts and procedure of the *Rapanos* controversy, while subsection B reviews the same in the *Carabell* dispute. Subsection C explains the Court's plurality holding.

Part IV, the Analysis of this Casenote, dissects the Court's plurality opinion. Subsection A discusses the plurality's failure to recognize the ambiguity present in the language of the CWA, while subsection B addresses the impracticality of the plurality's permanency and surface connection standards for extending CWA protection. Finally, subsection C suggests potential repercussions that may result from the plurality's holdings and the Court's lack of a majority opinion.

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6. *Id.* at 742.
7. *Id.* at 757.
8. *Id.* at 718.
9. *Id.* at 759.
10. *Id.* at 787.

II. BACKGROUND

To assist in the understanding of *Rapanos*, the Background section of this Casenote provides information on the origin of the CWA. It also discusses the pertinent provisions and regulations promulgated under the authority of the CWA at issue in this case. The permitting process for filling wetlands is also explained. Finally, the Background section examines prior Supreme Court decisions related to the CWA and wetlands.

A. The Clean Water Act and Wetlands Regulation

In 1972, Congress passed amendments to the Federal Water Pollution Control Act in legislation known as the Clean Water Act.[11] The enactment of the CWA continued the progression of federal water policy away from the regulation of navigation and toward the prevention of pollution[12] through the protection of "the chemical, physical, and biological integrity of the Nation's waters."[13] In passing the CWA, Congress aimed to eliminate the "discharge of pollutants into the navigable waters" by 1985.[14] Congress provided an extensive list of what constitutes a pollutant for purposes of the Act.[15] Not only does "pollutant" mean wastes of various sorts, it also means heat, rock, and sand.[16] Congress also provided a definition of "navigable waters," albeit an ambiguous one with a broad scope:[17] "the waters of the United States."[18]

Prior to the enactment of the Clean Water Act, the United States Army Corps of Engineers oversaw the regulation of discharges into navigable waterways under the authority of the Rivers and Harbors Appropriation Act of 1899.[19] Through its delegated authority under the CWA, the Corps' jurisdiction now applies to discharges of "dredged or fill material"[20] into all "waters of the United States." In the absence of a more concise explanation of the extent of the CWA's coverage, the Corps promulgated a definition of

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11. Federal Water Pollution Control Act § 101, 33 U.S.C. § 1251 (2000).
12. Jonathan H. Adler, *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation*, 29 ENVTL. L. 1, 24 (1999).
13. 33 U.S.C. § 1251(a).
14. *Id*. § 1251(a)(1).
15. Federal Water Pollution Control Act § 502, 33 U.S.C. § 1362(6) (2000).
16. *Id.*
17. Adler, *supra* note 12, at 25.
18. 33 U.S.C. § 1362(7).
19. Rivers and Harbors Appropriation Act, 33 U.S.C. § 407 (2000).
20. Federal Water Pollution Control Act § 404, 33 U.S.C. § 1344(g)(1) (2000).

"waters of the United States" covering interstate waters and wetlands.[21] The Corps' regulation also encompasses intrastate waters whose "use, degradation or destruction...could affect interstate or foreign commerce."[22] Tributaries of those protected waters[23] and wetlands adjacent to protected waters[24] are also included in the Corps' jurisdiction.

The Corps defines wetlands as "areas that are inundated or saturated by surface or ground water" enabling them to support "vegetation typically adapted for life in saturated soil conditions"[25] such as swamps, marshes, and bogs.[26] As the Corps defines "waters of the United States" to include adjacent wetlands, it further explains "adjacent" as meaning "bordering, contiguous, or neighboring."[27] The Corps explicitly notes that man-made barriers do not destroy the wetlands' adjacency from neighboring waters.[28]

B. The Permitting Process

As § 1311(a) of the CWA makes clear, "the discharge of any pollutant" by anyone into protected waters violates the CWA unless done in compliance with its enumerated sections.[29] The Corps is authorized by § 404 of the CWA to grant permits for discharges of "dredged or fill material" into protected waters at specific locations.[30] Through a regulatory scheme devised by the Environmental Protection Agency (EPA) and the Corps, applicants receive § 404 permits if they meet specified substantive and procedural requirements.[31] States may administer their own permit programs for discharges as long as their proposed programs comply with federal standards.[32]

The EPA sets forth the basic guidelines by which the Corps or approved state agencies should evaluate applications for § 404 permits.[33] These guidelines form merely the minimum requirements that must be met to issue

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21. Definition of Waters of the United States, 33 C.F.R. § 328.3(a)(2) (2007).
22. *Id*. § 328.3(a)(3).
23. *Id*. § 328.3(a)(5).
24. *Id*. § 328.3(a)(7).
25. *Id*. § 328.3(b).
26. *Id.*
27. *Id*. § 328.3(c).
28. *Id.*
29. Federal Water Pollution Control Act § 301, 33 U.S.C. § 1311(a) (2000).
30. Federal Water Pollution Control Act § 404, 33 U.S.C. § 1344(a) (2000).
31. Section 404(b)(1) Guidelines for Specification or Disposal Sites for Dredged or Fill Material, 40 C.F.R. § 230.10 (2007).
32. 33 U.S.C. § 1344(g).
33. 40 C.F.R. § 230.10.

a permit to fill wetlands.[34] The Corps or the state agency may impose additional requirements on applicants beyond those of the EPA.[35] The public must be provided with notice of permit applications, along with opportunities to comment on the proposed permits.[36] The EPA prohibits the granting of a permit if a "practicable alternative" exists for the proposed project that would less severely injure the affected "aquatic ecosystem."[37] The EPA describes a practicable alternative as "available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes."[38]

The Corps' regulations further clarify federal policy regarding wetlands.[39] The Corps grants permits to discharge dredged or fill material into federal wetlands unless it is against the public interest to issue the permit.[40] Factors relevant to public interest considerations include the intended use of the site following the discharge, aesthetics, floodplain values, water quality, and general environmental concerns.[41] Acknowledging that wetlands are a "productive and valuable public resource," the Corps discourages their "unnecessary alteration and destruction."[42] Wetlands, the Corps notes, are important to the public interest because they foster the natural food chain and provide habitat for a variety of species,[43] control flooding,[44] and help purify water,[45] among other functions.

If the Corps or state agency determines that a developer's project will adversely affect wetlands, the developer must provide mitigation plans to minimize negative impacts as much as possible in order to receive a § 404 permit.[46] Mitigation measures might include restoring former wetlands, enhancing degraded wetlands, creating new wetlands, or preserving existing

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34. *Id.*
35. *Id.*
36. 33 U.S.C. 1344(a).
37. 40 C.F.R. § 230.10(a).
38. *Id*. § 230.10(a)(2).
39. General Regulatory Policies, 33 C.F.R. § 320.4 (2007).
40. *Id*. § 320.4(a)(1).
41. *Id.*
42. *Id*. § 320.4(b)(1).
43. *Id*. § 320.4(b)(2)(i).
44. *Id*. § 320.4(b)(2)(v).
45. *Id*. § 320.4(b)(2)(vii).
46. U.S. GENERAL ACCOUNTING OFFICE, WETLANDS PROTECTION: ASSESSMENTS NEEDED TO DETERMINE THE EFFECTIVENESS OF IN-LIEU-FEE MITIGATION 1 (May 2001), http://www.epa.gov/owow/wetlands/pdf/GAO.pdf.

wetlands.[47] Developers may undertake this mitigation on their own or pay other parties to complete mitigation measures at other sites.[48]

Upon determining that no practicable alternative plan for the project is available, and that mitigation measures are adequate, the Corps or state agency may grant a permit to fill in wetlands.[49] The Corps may overturn state agencies' decisions to issue permits if it concludes that the project in question will interfere with "navigable waters."[50] In addition, the EPA reserves the right to veto any decision regarding the granting of a permit.[51]

C. Review of Agency Regulations

The Supreme Court established a two-step analytical approach for considering the validity of agency regulations known as *Chevron* deference.[52] First, a court should determine whether Congress addressed the subject of the regulation in the statute delegating authority to the agency in question.[53] If the statute clearly speaks to the issue, the regulation must abide by the language enacted by Congress.[54] If, however, the statute is "silent or ambiguous" on the matter, a court must decide whether the regulation is "based on a permissible construction of the statute."[55] If the agency's interpretation of the statute is reasonable, a court should defer to the agency's determinations and not "substitute its own construction."[56]

D. Supreme Court Wetlands Precedent

Congress enacted the CWA pursuant to its constitutionally enumerated commerce power.[57] Controversy has arisen over whether Congress intended for the CWA to apply as expansively as interpreted by the Corps. If Congress did so intend, critics assert, it may be extending its reach beyond the federal jurisdiction of interstate and foreign commerce and into the traditionally state-

47. *Id.* at 3.
48. *Id.* at 1.
49. Federal Water Pollution Control Act § 404, 33 U.S.C. § 1344(a) (2000).
50. *Id.* § 1344(h)(1)(F).
51. *Id.* § 1344(c).
52. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).
53. *Id.* at 842.
54. *Id.* at 842–43.
55. *Id.* at 843.
56. *Id.* at 844.
57. U.S. CONST. art. I, § 8, cl. 3.

regulated areas of intrastate land and water use.[58] If Congress did not intend such vast coverage, critics argue, the Corps' and EPA's regulation of wetlands and waters "greatly attenuated" from the "waters of the United States" cannot stand.[59] The Supreme Court of the United States considered such challenges to the CWA's application to wetlands and non-navigable waters in two noteworthy cases: *United States v. Riverside Bayview Homes, Inc.* (*Riverside*)[60] and *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (*SWANCC*).[61]

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

In *Riverside*, the Corps brought suit against Riverside Bayview Homes, Inc., a land development company that placed fill materials in wetlands on its property along Lake St. Clair in the state of Michigan without a permit.[62] In its 1985 decision written by Justice White, the unanimous Supreme Court deferred to the Corps' inclusion of wetlands adjacent to lakes, rivers, and streams in its definition of "waters of the United States" as a permissible interpretation of the CWA.[63] Noting the Corps' and the EPA's scientific expertise, the Court determined that "adjacent wetlands are inseparably bound up with the 'waters' of the United States"[64] and recognized the Corps' authority over the wetlands found on the property of the land development company.[65] While deferring to the Corps' inclusion of wetlands adjacent to "waters of the United States," the *Riverside* Court pointed out that it did not express any opinion on the question of wetlands that are not adjacent to bodies of open water.[66]

Aware that Congress enacted the CWA to extend "broad federal authority to control pollution," the Court noted that the CWA prohibits the discharge of pollutants into "navigable waters."[67] However, because Congress defined "navigable waters" to generally include "waters of the United States,"

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58. Reply Brief of Petitioner at 2, Carabell v. U.S. Army Corps of Eng'rs (consolidated with Rapanos v. United States (No. 04–1034)), Rapanos v. United States, 547 U.S. 715 (2006) (No. 04–1384) 2006 WL 353468.
59. *Id.*
60. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985).
61. Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001).
62. *Riverside*, 474 U.S. at 121.
63. *Id.* at 135.
64. *Id.* at 134.
65. *Id.* at 139.
66. *Id.* at 131.
67. *Id.*

the *Riverside* Court found the word "navigable" to be of "limited import" in proper interpretations of the CWA's coverage.[68]

The *Riverside* Court also placed significant weight on Congress' acquiescence to the Corps' definition.[69] In 1977, legislation aimed at curbing the extent of the Corps' jurisdiction under § 404 of the CWA was proposed to Congress.[70] Congress, according to the Court, rejected these proposals because it did not want wetlands protection to be "hampered by a narrowed definition of 'navigable waters.'"[71] The Court noted that it hesitates to give "significance to Congress' failure to act."[72] Since the Corps' interpretation of the Act was presented for Congress' review, however, the Court understood Congress' inaction to be "at least some evidence of the reasonableness of [the Corps'] construction."[73]

The *Riverside* Court also noted that amendments to the Clean Water Act enacted by Congress in 1977 contained language referring to adjacent wetlands and their coverage under the Act.[74] Within the 1977 legislation, Congress additionally appropriated $6 million for a wetlands inventory project designed to help states carry out the objectives of the CWA.[75] The Court thus determined that the Corps correctly understood the Act to concern wetlands protection. Through its regulations the Corps was "implementing congressional policy," not undertaking its own.[76] In sum, the Court was persuaded that the Corps reasonably interpreted the CWA to require discharge permits for wetlands adjacent to other waters covered by the Act.[77]

2. Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers

In 2001, the Supreme Court decided the *SWANCC* case by a five-to-four margin.[78] The *SWANCC* dispute arose from the Solid Waste Agency of Northern Cook County's attempt to use an abandoned gravel pit as a solid waste disposal site.[79] The Corps denied the Waste Agency's permit to fill the

68. *Id.*
69. *Id.* at 138.
70. *Id.* at 137.
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.* at 138.
75. *Id.* at 139.
76. *Id.*
77. *Id.*
78. *Id.* at 161.
79. *Id.* at 163.

site's remaining trenches[80] because the trenches had developed into permanent and seasonal ponds used by many species of migratory birds,[81] and the Waste Agency's § 404 permit application failed to adequately provide for mitigation measures.[82] The Waste Agency subsequently filed suit, challenging the Corps' jurisdiction over the site.[83] In a majority opinion written by Chief Justice Rehnquist, the *SWANCC* Court refused to recognize the Corps' authority over the abandoned gravel pit, determining the isolated ponds did not fall within the "navigable waters" covered by the Clean Water Act.[84]

In 1986, the Corps promulgated regulations expressing its § 404 jurisdiction over areas used by migratory birds under the so-called "Migratory Bird Rule."[85] The *SWANCC* Court found this rule to be inconsistent with the Corps' original CWA regulations.[86] Although the *Riverside* Court deferred to the Corps' definition of "waters of the United States" to include adjacent wetlands, the *SWANCC* Court declined to extend such deference to the Migratory Bird Rule.[87] Nor did it join the *Riverside* Court in its determination of congressional acquiescence to the Corps' regulatory interpretation of "waters of the United States."[88] Instead, the Court in *SWANCC* referred to the Corps' original 1974 interpretation of the CWA in determining what constituted CWA-protected "waters."[89] Those regulations extended CWA coverage only to truly "navigable waters" that are "presently, have been in the past, or may be in the future" used for "purposes of interstate or foreign commerce."[90]

Because the *Riverside* Court reserved the question of whether the CWA covers wetlands not adjacent to open waters, the *SWANCC* Court determined it appropriate to answer that question in the controversy before it, again using the Corps' 1974 regulations.[91] The *Riverside* Court found the word "navigable," as used by Congress in the CWA, to be of "limited import."[92] The *SWANCC* Court, on the other hand, determined that its inclusion in the

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80. *Id.* at 165.
81. *Id.* at 163.
82. *Id.* at 165.
83. *Id.*
84. *Id.* at 171.
85. *Id.* at 164.
86. *Id.* at 168.
87. *Id.* at 172.
88. *Id.* at 167–68.
89. *Id.*
90. *Id.*
91. *Id.* at 167–68.
92. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 131 (1985).

Act's text indicates "what Congress had in mind" when it passed the CWA.[93] As such, the Court found that the ponds in dispute in *SWANCC* were isolated from "navigable waters" and the reach of the Corps only extended to them by way of the Migratory Bird Rule.[94] The former gravel pit, according to the *SWANCC* Court, lacked a "significant nexus" with "navigable waters," unlike the wetlands in question in *Riverside.*[95]

The Court gave little attention to arguments that migratory bird protection falls within Congress' regulatory commerce power, and is thus proper under the CWA.[96] By the terms of the CWA, the Court noted, Congress extended protection only to "navigable waters" and "waters of the United States."[97] Not only would the recognition of the Migratory Bird Rule be inappropriate under the language of the CWA, the Court concluded, in this particular case it would raise constitutional concerns about the "significant impingement of the States' traditional and primary power over land and water use."[98]

The Supreme Court generally reads the text of statutes to avoid interpretations that raise problems of constitutionality.[99] Deference to the Migratory Bird Rule in light of this doctrine would be inappropriate, according to the Court.[100] The *SWANCC* Court's opinion concluded with a reminder that a stated goal of the CWA was to continue to allow States to exercise authority over land and water development within their territory.[101]

3. The SWANCC *Dissent*

The *SWANCC* dissent, written by Justice Stevens, expressed dismay at the majority's failure to use the doctrine of *stare decisis* in deciding the outcome of the dispute between the Waste Agency and the Corps.[102] The dissent reminded the majority that in *Riverside* it recognized Congress' acquiescence to the definitions of "waters of the United States" adopted by the

93. *SWANCC*, 531 U.S. at 172.
94. *Id.* at 171.
95. *Id.* at 167.
96. *Id.* at 173.
97. *Id.*
98. *Id.* at 174.
99. *Id.* at 173.
100. *Id.* at 174.
101. *Id.*
102. *Id.* at 187 (Stevens, J., dissenting).

Corps,[103] and asserted that the *SWANCC* decision ignores that precedent, instead resting its holding on "untenable premises."[104]

First, the dissent took issue with the majority's insinuation that Congress did not intend the CWA to extend its commerce power over anything more than navigation.[105] The goal of the CWA, the dissent pointed out, was the prevention of pollution into the nation's waters, not the protection of those waters' navigability.[106] The definition of "waters of the United States" does not, according to the dissent, "require actual [or] potential navigability."[107] Neither did the majority appropriately answer the question it reserved in *Riverside*, the dissent asserted.[108] The question reserved by the *Riverside* Court did not concern isolated ponds, such as in the *SWANCC* dispute, but isolated wetlands.[109] Besides, the dissent argued, even apparently isolated wetlands are hydrologically and ecologically connected to navigable waters.[110] In addition, the dissent criticized the majority for placing too much emphasis on the Corps' original 1974 interpretation of the CWA and none at all on the subsequent regulations to which Congress acquiesced in 1977.[111]

The Court's past interpretations of the Act have all recognized the broad goal of the CWA to eliminate pollution, the dissent noted.[112] The dissent scolded the majority for ruling inconsistently with both its previous CWA decisions[113] and its Commerce Clause jurisprudence.[114] The Court recognizes Congress' authority to regulate through its commerce power "activities that substantially affect interstate commerce," said the dissent.[115] Although an individual instance of an activity might not affect interstate commerce, the dissent declared, when "taken in the aggregate, the class of activities...has such an effect."[116] Analyzing the Migratory Bird Rule under this "substantial effects" test, the dissent found no reason to determine that the Corps had overstepped its delegated authority in applying CWA protection to the ponds in question.[117] The regulated activity, the discharge of fill material into water,

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103. *Id.* at 176.
104. *Id.* at 177.
105. *Id.*
106. *Id.* at 179.
107. *Id.* at 175.
108. *Id.* at 187 (Stevens, J., dissenting).
109. *Id.*
110. *Id.* at 176.
111. *Id.* at 184.
112. *Id.* at 175.
113. *Id.* at 193 (Stevens, J., dissenting).
114. *Id.* at 192–93.
115. *Id*.
116. *Id.* at 193.
117. *Id.* at 192–93.

when aggregated, has a substantial effect on interstate commerce, said the dissent.[118] Unlike activities determined by earlier Courts to be unrelated to commerce and beyond the reach of regulation by Congress, "the discharge of fill material into the Nation's waters is almost always undertaken for economic reasons."[119]

The protection of migratory birds by the federal government does not unnecessarily interfere with a traditionally state-regulated area, according to the dissent. The Supreme Court previously held that the threat to birds is "a textbook example of a national problem."[120] The Commerce Clause empowers Congress to regulate the causes of "environmental hazards that may have effects in more than one State" and "individual actions that, in the aggregate, would have the same effect,"[121] said the dissent, noting earlier Court rulings.

The dissent thus disagreed with nearly every determination of the majority's opinion, and given the slim margin between the majority and the dissent (only one vote), the dissent's arguments are not easily dismissed.

III. *RAPANOS V. UNITED STATES*

A. The *Rapanos* Dispute

In 1994, the federal government initiated both civil and criminal proceedings against John Rapanos.[122] The federal government alleged that Rapanos violated § 301 of the CWA by discharging fill material without a § 404 permit into wetlands on several sites that constituted "waters of the United States."[123]

Six years earlier, Rapanos decided to build a shopping center on a parcel of land he owned in Michigan, known as the "Salzburg site."[124] Rapanos asked the Michigan Department of Natural Resources[125] ("DNR") to visit the

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118. *Id.* at 193.
119. *Id.*
120. *Id.* at 195.
121. *Id.* at 196.
122. Brief for the United States at 12, Rapanos v. United States, 547 U.S. 715 (2006) (No. 04–1034) 2006 WL 123765.
123. *Id.*
124. *Id.* at 10.
125. U.S. Environmental Protection Agency, Federal Register Environmental Documents: Preliminary Findings of Informal Review of State of Michigan's Approved Clean Water Act Section 404 Permit Program, http://www.epa.gov/fedrgstr/EPA-WATER/2003/January/Day-07/w285.htm (last visited Apr. 14, 2008). From 1984 to 1997, the Michigan Department of Natural Resources administered the state's § 404 permit program. *Id.*

land to discuss his plans.[126] The DNR told Rapanos that he could potentially complete his project if he either refrained from filling in the wetlands on the property or obtained a § 404 permit to do so.[127] Rapanos hired his own consultant, who agreed with the DNR that the Salzburg site consisted of several acres of wetlands.[128] In response, Rapanos "threatened to 'destroy'" the consultant if he shared his report with the permitting authorities.[129] Rapanos then filled in the wetlands with sand without seeking a permit to do so, resulting in a loss of twenty-two of the twenty-eight acres of wetlands.[130] The DNR and the EPA issued cease and desist and compliance orders which Rapanos ignored.[131]

Water from the Salzburg wetlands flows downstream through the Hoppler Drain and into Hoppler Creek, which connects with the navigable Kawkawlin River and eventually flows into Lake Huron.[132] The Salzburg site is at least eleven miles from the nearest "navigable-in-fact" waters (the Kawkawlin River).[133]

Rapanos, through his company Prodo, Inc., also owned land called the "Hines Road site."[134] Between 1991 and 1997, Rapanos filled in wetlands at this site without a § 404 permit, and continued to do so despite orders from the DNR and the EPA to stop.[135] Rapanos' actions at the Hines Road site destroyed seventeen of the original sixty-four acres of wetlands found there.[136] The Hines Road wetlands' surface water flows into the Rose Drain, which flows into the traditionally navigable Tittabawassee River.[137]

The other site involved in the *Rapanos* dispute, known as the "Pine River site," was owned by Rapanos' wife, Judith Nelkie Rapanos, through her company Pine River Bluff Estates, Inc.[138] Rapanos directed construction work there between 1992 and 1997, again without a § 404 permit. Again, the DNR and the EPA issued orders to Rapanos to halt the depositing of sand into the site's forty-nine acres of wetlands, but Rapanos ignored the orders, and fifteen

126. Brief for the United States, *supra* note 122, at 10.
127. *Id.*
128. Rapanos v. United States, 547 U.S. 715, 788–89 (2006).
129. *Id.* at 789.
130. Brief for the United States, *supra* note 122, at 10–11.
131. *Id.* at 10.
132. *Id.* at 11.
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.* at 12.
137. *Id.*
138. *Id.* at 10 n.5.

of those acres were ultimately lost.[139] Those wetlands have a surface connection to the nearby Pine River, which flows into Lake Huron.[140]

After an initial mistrial, Rapanos was found criminally guilty of the CWA violations, but fought the conviction in the United States Court of Appeals for the Sixth Circuit through the year 2000.[141] Although the Court of Appeals for the Sixth Circuit upheld Rapanos' conviction,[142] less than a year later the Supreme Court vacated the judgment against Rapanos and remanded the case for consideration in light of its January 2001 *SWANCC* decision.[143]

Upon remand, the District Court for the Eastern District of Michigan dismissed the criminal charges against Rapanos, finding that the wetlands at the three sites were not adjacent to navigable waters protected by the CWA and thus not under federal regulation as limited by *SWANCC*.[144] The Court of Appeals declined to interpret *SWANCC* so narrowly, and subsequently reinstated the criminal conviction.[145] It found that a significant nexus and hydrological connection existed between the wetlands and navigable-in-fact waters.[146]

The federal government joined Mrs. Rapanos, Prodo, Inc., and Pine River Bluff Estates, Inc., as defendants in the civil suit against Rapanos.[147] Following a bench trial in 2000, the District Court ruled in favor of the federal government's assertion of jurisdiction over the Salzburg, Hines Road, and Pine River sites, and found the defendants liable for unlawfully filling protected wetlands.[148] The Court of Appeals upheld the District Court's judgment in the civil case,[149] relying on the existence of a significant nexus between the wetlands and the traditionally navigable waters noted by *SWANCC*.[150]

B. The *Carabell* Dispute

In the second controversy at issue, Keith and June Carabell filed suit against the Corps and the EPA in the District Court of the Eastern District of

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139. *Id.* at 12.
140. *Id.*
141. United States v. Rapanos, 235 F.3d 256 (6th Cir. 2000).
142. *Id.* at 261.
143. Rapanos v. United States, 533 U.S. 913 (2001).
144. United States v. Rapanos, 190 F. Supp. 2d 1011, 1016 (E.D. Mich. 2002).
145. United States v. Rapanos, 339 F.3d 447, 454 (6th Cir. 2003).
146. *Id.* at 453.
147. Brief for the United States, *supra* note 122, at 10 n.5.
148. United States v. Rapanos, 376 F.3d 629, 634 (6th Cir. 2004).
149. *Id.* at 648.
150. *Id.* at 640.

Michigan following the denial of their § 404 permit application and exhaustion of their administrative appeals.[151] The Carabells owned just under twenty acres of land in Michigan on which they planned to build a condominium complex.[152] The Michigan Department of Environmental Quality[153] ("DEQ") denied the Carabells' application to fill in nearly sixteen acres of wetlands on the property after the EPA objected to the proposal.[154] Subsequently, a state administrative law judge recommended that the DEQ grant the Carabells a § 404 permit for an alternative plan, which would fill seven fewer acres of wetlands and create retention ponds.[155] The Carabells' property, determined the administrative law judge, stood isolated from navigable waters.[156] The land in question borders a ditch that leads to the Sutherland-Oemig Drain.[157] A clay ridge, formed during the ditch's excavation, runs along the drain and under normal conditions keeps water from the property's wetlands from flowing into the ditch.[158] The Sutherland-Oemig Drain empties into Auvase Creek, which flows into the traditionally navigable Lake St. Clair, part of the Great Lakes system.[159]

The EPA again objected to the grant of the § 404 permit to the Carabells and directed the Corps to determine whether a permit was appropriate.[160] The Corps, declining to grant a § 404 permit, determined that water from the Carabells' property flowed into the watershed of Lake St. Clair, part of the "waters of the United States."[161] The Carabells appealed the decision of the Corps at the administrative level and again were denied a permit[162] because, according to the state appeals division, the Corps' determination was reasonable.[163] Finally, the Carabells brought their complaint to federal court, seeking judicial review of the agencies' actions.[164]

The District Court found that the Corps "provided a rational basis for [its] decisions" regarding CWA coverage of the wetlands on the Carabell's

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151. *See generally* Carabell v. U.S. Army Corps of Eng'rs, 257 F. Supp. 2d 917 (E.D. Mich 2003).
152. *Carabell*, 257 F. Supp. 2d 917.
153. Preliminary Findings, *supra* note 125. Since 1997, the Michigan Department of Environmental Quality has administered the state's § 404 permit program. *Id.*
154. *Carabell*, 257 F. Supp. 2d at 919.
155. *Id.*
156. *Id.*
157. *Id.* at 918.
158. *Id.* at 919.
159. Carabell v. U.S. Army Corps of Eng'rs, 391 F.3d 704, 706 (6th Cir. 2004).
160. Carabell v. U.S. Army Corps of Eng'rs, 257 F. Supp. 2d. 917, 920 (E.D. Mich. 2003).
161. *Id.*
162. *Id.* at 922.
163. *Id.* at 926.
164. *Id.*

property and declined to substitute its own judgment for that of the Corps.[165] The District Court reasoned that the *SWANCC* decision did not apply to "non-navigable tributaries of navigable waters," and, thus, did not negate the Corps' regulation of wetlands adjacent to such waters.[166] Again relying on the "significant nexus" consideration, the District Court deferred to the Corps' regulations.[167] The U.S. Court of Appeals for the Sixth Circuit agreed, noting its earlier *Rapanos* decisions.[168]

C. The Supreme Court's Plurality Decision

The Supreme Court granted certiorari in both the *Rapanos* and *Carabell* controversies, consolidating the cases to further clarify what constitutes the "waters of the United States" and how the Clean Water Act applies to wetlands.[169] Justice Scalia, writing for the plurality, concludes that "navigable waters" under the CWA only include waters with a "relatively permanent flow."[170] In addition, for wetlands to be found "adjacent" and protected by the Act, the plurality holds they must have a "continuous surface connection" to a permanent body of water.[171] Justice Scalia also asserts that discharges of "dredged or fill material" do not flow downstream.[172]

The plurality thus disagrees with the Corps' broad interpretation of "waters of the United States" and vacates the judgments of the Sixth Circuit.[173] In reaching its decision, the plurality attacks the Corps for acting as an overreaching "despot"[174] and essentially calls for the invalidation of two Corps-promulgated regulations:[175] one including "intermittent streams" in the waters protected by the CWA,[176] and one defining "adjacent" wetlands without requiring any surface water connection, as well as explicitly stating that man-made barriers do not disrupt wetlands' adjacency from other protected waters.[177]

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165. *Id.* at 934.
166. *Id.* at 930–31.
167. *Id.* at 930.
168. Carabell v. U.S. Army Corps of Eng'rs, 391 F.3d. 704, 710 (6th Cir. 2004).
169. Rapanos v. United States, 547 U.S. 715 (2006).
170. *Id.* at 757.
171. *Id.*
172. *Id.* at 744.
173. *Id.* at 757.
174. *Id.* at 721.
175. *Id.* at 739 and 742.
176. Definition of Waters of the United States, 33 C.F.R. § 328.3(a)(3) (2007).
177. *Id.* § 328.3(c).

In its interpretation of the extent of the CWA's reach, the plurality attempts to dissect Congress' definition of "navigable waters" as "the waters of the United States."[178] Justice Scalia makes much of Congress' inclusion of "the" before "waters," and the fact that "waters" is plural, not singular.[179] The combination of these two things, says the plurality, indicates that the CWA does not apply to all water within the United States.[180] The plurality then relies heavily on Webster's New International Dictionary[181] to define "waters."[182] "Waters," according to the plurality's reading of Webster's Dictionary, are "geographical features" such as streams and lakes.[183] Such features, Justice Scalia writes, are "continuously present," and do not include intermittent streams or "transitory puddles."[184]

To support its interpretation, the plurality asserts that a broader reading of Congress' language would violate the CWA's policy to respect states' rights and responsibilities over land and water development and use,[185] as well as raise constitutional concerns about the limits of Congress' commerce power.[186] However, Justice Scalia notes that the plurality does not mean to exclude from CWA protection waters that evaporate during times of drought or rivers that flow only seasonally.[187] "Common sense," Justice Scalia is confident, distinguishes only occasional flows from seasonal rivers.[188]

Considering the characteristics of CWA-covered wetlands, the plurality notes that in *Riverside*, the Court acknowledged the "inherent ambiguity" in establishing wetlands' definite boundaries.[189] In practice, the Corps extends its jurisdiction to wetlands that are in "reasonable proximity" to other protected waters.[190] However, mere proximity and ecological considerations fail to establish a "significant nexus" between wetlands and waters as required by *SWANCC*, according to the plurality.[191] Instead, the plurality says a lack of a "clear demarcation" between wetlands and another body of water (in

178. *Rapanos*, 547 U.S. at 732–33.
179. *Id*. at 732.
180. *Id*.
181. WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d. Ed. 1954).
182. *Rapanos*, 547 U.S. at 732.
183. *Id.* at 732–33.
184. *Id.* at 733.
185. *Id.* at 737.
186. *Id.* at 738.
187. *Id.* at 733 n.5.
188. *Id.*
189. *Id.* at 740.
190. *Id.* at 741 n.10.
191. *Id.* at 742.

other words, the presence of a "continuous surface connection") is necessary for CWA protection to apply to the adjacent wetlands.[192]

IV. ANALYSIS

The plurality decision announced by the Supreme Court in *Rapanos v. United States* wrongly determines the Corps' regulations regarding intermittent waters and adjacent wetlands to be invalid under the *Chevron* test. Congress defined "navigable waters" broadly as "waters of the United States."[193] The Corps, recognizing the ambiguity present in Congress' definition, reasonably constructed regulations to carry out its delegated functions under the Clean Water Act.[194] The plurality erroneously fails to defer to the Corps' expertise and instead replaces the Corps' regulations with impractical permanency and surface connection requirements.[195] In doing so, the plurality further threatens the protection of the Nation's remaining wetlands.

A. The Plurality's Failure to Recognize the Ambiguity in Congress' Language

Rather than defer to the Corps' scientific determinations, Justice Scalia uses Webster's New International Dictionary to conclude that the CWA excludes less than relatively permanent waters from its protection.[196] Focusing intently on the article "the" and the plural nature of "waters," the plurality interprets the phrase "the waters of the United States" as *not* ambiguous as applied to intermittent flows.[197] Justice Scalia reads "the waters" to indicate specific waters, as opposed to "waters" alone.[198] Additionally, according to the plurality, Webster's New International Dictionary's denotation of the plural "waters" as specific "geographical features" and "flowing or moving masses" eliminates waters not "continuously present" from CWA coverage.[199] Thus, the plurality declares,

192. *Id*.
193. Federal Water Pollution Control Act § 502, 33 U.S.C. § 1362(6) (2000).
194. Definition of Waters of the United States, 33 C.F.R. § 328.3 (2007).
195. *Rapanos*, 547 U.S. at 742–43.
196. *Id.* at 732–33.
197. *Id.*
198. *Id.* at 732–33.
199. *Id.* at 732–33.

the Corps' "expansive approach" to its CWA jurisdiction and its inclusion of intermittent flows of water is unjustified.[200]

The lack of ambiguity found by the plurality in *Rapanos* stands in stark contrast to the *Riverside* Court's deference to the Corps' interpretations as reasonable constructions of the broad language of the CWA.[201] There, the Court acknowledged the "inherent difficulties" of defining "waters of the United States" and deferred to the Corps' ecological expertise, upholding Corps regulations extending coverage to wetlands adjacent to protected waters.[202] The Corps' regulations to which the *Riverside* Court deferred and those at issue here[203] do not focus on "the" at all, as do Justice Scalia and the plurality in *Rapanos*.[204] In fact, in the part of the Code of Federal Regulations devoted to areas covered by the CWA, the Corps simply uses the title "Definition of Waters of the United States."[205] Noticeably absent is "the." The part thereafter only refers to "waters," not "the waters."[206]

The plurality's overly literal interpretation of Congress' language does not align with the straightforward goal of the CWA: to prevent further degradation of the waters of the United States.[207] The CWA prohibits discharges of pollutants into the Nation's waters, including "dredged or fill material."[208] For the § 404 permit program overseen by the Corps to have any effective meaning, any waters that reach traditionally navigable waters must be protected under the CWA. The *SWANCC* decision eliminated protection for "isolated ponds" that do not affect navigable waters,[209] but the plurality in *Rapanos* cuts off protection for wetlands and streams that do indeed affect such waters, even if only sporadically.

B. The Impracticality of the Plurality's Permanency and Surface Connection Requirements

By ignoring the ambiguity of "waters of the United States," the plurality determines that the regulations promulgated by the Corps' under the authority of the CWA are impermissible constructions of the language of the statute,

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200. *Id.* at 732.
201. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 134 (1985).
202. *Id.*
203. Definition of Waters of the United States, 33 C.F.R. §§ 328.1 to 328.5 (2007).
204. *Rapanos*, 547 U.S. at 732.
205. 33 C.F.R. § 328.
206. *Id.*
207. Federal Water Pollution Control Act § 101, 33 U.S.C. § 1251(a) (2000).
208. Federal Water Pollution Control Act § 502, 33 U.S.C. § 1362(6) (2000).
209. Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 171 (2001).

failing the *Chevron* test.[210] Rather than defer to the Corps' regulations, in place since 1975,[211] the plurality instead dictates how the Corps should apply the CWA to wetlands through rigid but unclear standards: relative permanency and surface water connections.[212]

The plurality fails to recognize the inherent qualities of water that make a permanency requirement for CWA protection impractical. Water by nature is not static.[213] It evaporates, condenses, and falls as precipitation.[214] Upon the surface of the earth, water flows downstream from higher altitudes to lower altitudes.[215] As such, the level and flow of inland bodies of water depend on weather events both in their direct vicinity and upstream in their respective watersheds.[216] Dry and wet seasons, as well as more dramatic events such as droughts and large snow melts, thus directly affect the amount of water present in lakes, rivers, and wetlands at any given time.[217]

The plurality, unfortunately, offers no help in specifying a time frame by which to determine a stream or wetland's relative permanency. Justice Scalia indicates he does not mean to exclude "seasonal" rivers from CWA protection, but fails to explain the significance between a seasonal river and an intermittent one.[218] Instead, "common sense" should guide such determinations, writes Justice Scalia.[219] However, the subjective measure of common sense would *not* suggest that CWA protection should turn on the most unpredictable of bases–weather–but that is what the plurality's relative permanency requirement essentially does.

In light of recent increased focus on weather pattern aberrations caused by global warming,[220] it seems unnecessarily arbitrary and short-sighted to make water pollution protection contingent on whether rain falls in downpours, steadily over a year, or not at all. Water molecules, after all, flow downstream and intermingle with connecting waters[221] regardless of whether the stream that carries them is present only temporarily.[222] The plurality's

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210. Rapanos v. United States, 547 U.S. 715, 739 (2006).
211. *SWANCC*, 531 U.S. at 184 (Stevens, J., dissenting).
212. *Rapanos*, 547 U.S. at 742.
213. U.S. Geological Survey, The Water Cycle: Summary, http://ga.water.usgs.gov/edu/watercyclesummary.html (last visited Apr. 14, 2008).
214. *Id.*
215. *Id.*
216. *Id.*
217. *Id.*
218. Rapanos v. United States, 547 U.S. 715, 733 n.5 (2006).
219. *Id.*
220. Scott Barrett, *The Problem of Averting Global Catastrophe*, 6 CHI. J. INT'L L. 527, 546–47 (2006).
221. United States v. Rueth Dev. Co., 189 F. Supp. 2d 874, 877–78 (N.D. Ind. 2002).
222. *Rapanos*, 547 U.S. at 801 (Stevens, J., dissenting).

restrictive interpretation requiring relative permanency begs the question posed by Justice Kennedy in his opinion concurring in the judgment: in times of flood, would large discharges into torrents of water, which may only briefly exist, have less effect on downstream waters than small discharges into a continuous trickle?[223] By failing to consider scientific realities, the plurality places semantic obstacles before the Corps, preventing the achievement of Congress' stated goals for the CWA.

The plurality similarly fails to recognize the physical characteristics of wetlands. In order to exercise jurisdiction over a wetland, Justice Scalia writes that the Corps must identify a continuous surface water connection with another CWA-protected body of water.[224] Although vegetation obscures much of the water contained in marshes and swamps, and many wetlands only contain water below thin layers of soil,[225] the plurality invalidates any determination of wetlands' adjacency to CWA-protected waters based on "reasonable proximity."[226] Only wetlands whose waters "actually abut" traditionally navigable waters acceptably invoke CWA protection, according to the plurality.[227]

The Corps, of course, does not limit its jurisdiction over adjacent wetlands in this way, but simply requires a wetland to border, neighbor, or be contiguous with traditionally navigable waters or their tributaries to warrant CWA coverage.[228] Furthermore, man-made barriers do not disturb adjacency in the eyes of the Corps.[229] Considering the myriad pathways water flowing downstream from a wetland might take, the Corps' adjacency standards more fully incorporate the constantly shifting channels[230] and fluctuating water levels of every water body.[231]

Although the plurality bases its permanency standard almost entirely on Webster's New International Dictionary, the same reference works against the plurality's surface connection requirement for adjacency, as the *Rapanos* dissent shrewdly points out.[232] The definition provided by the dictionary for "adjacent" nearly mirrors that of the Corps: "contiguous; neighboring;

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223. *Id.* at 769 (Kennedy, J., concurring).
224. *Id.* at 742.
225. U.S. Environmental Protection Agency, What Are Wetlands?, http://www.epa.gov/owow/wetlands/vital/what.html (last visited Apr. 14, 2008).
226. *Rapanos*, 547 U.S. at 741 n.10.
227. *Id.* at 740.
228. Definition of Waters of the United States, 33 C.F.R. § 328.3(c) (2007).
229. *Id.*
230. Stephen D. Osborne, Jennifer Randle & Michael Gambrell, *Laws Governing Recreational Access to Waters of the Columbia Basin: A Survey and Analysis*, 33 ENVTL. L. 399, 442 (Spring 2003).
231. The Water Cycle, *supra* note 213.
232. Rapanos v. United States, 547 U.S. 715, 805 (2006) (Stevens, J., dissenting).

bordering on."[233] In addition, two things may be adjacent to each other when they "lie close to each other, but *not necessarily in actual contact*," according to the dictionary.[234] Under this definition, the Corps' jurisdiction over a wetland separated from another protected body of water would not necessarily be eliminated by a man-made barrier.

Not only does the plurality's surface connection standard misinterpret the meaning of "adjacent," the requirement lacks practicability in real-world situations. Relying on surface water connections to establish CWA protection disregards the groundwater connections so prevalent in wetlands ecology,[235] as well as waters separated by human obstructions but connected by underground culverts. Justice Scalia apparently considers a visible connection between the waters of two areas more important than ecological evidence that waters from one area indeed reach waters covered by the CWA. He further states that the discharged material regulated by the Corps through the § 404 permit process does not "wash downstream."[236] In reality, flowing waters often carry heavy loads of particles and sediments, and can shift gravel and even boulders.[237] As the dissent notes, the plurality makes several such "head-scratching" assertions that do little to support its conclusions and much to cause confusion.[238]

Courts generally defer to agency expertise in scientific matters.[239] Congress specifically assigned to the Corps the task of implementing and enforcing the § 404 permit program.[240] Congruent with the objective of the CWA to eliminate pollution of the Nation's waters, the Corps considered ecological considerations when defining the extent of its CWA jurisdiction.[241] Rather than accept the Corps' scientific expertise, the plurality in *Rapanos* instead relies inconsistently on dictionary definitions to construct flawed permanency and surface connection requirements that ignore the intent of Congress.

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233. *Id.*
234. *Id.*
235. The Water Cycle, *supra* note 213.
236. *Rapanos*, 547 U.S. at 744.
237. McDougall Littell, Exploring Earth, http://www.classzone.com/books/earth_science/terc/content/visualizations/es1303/es1303page01.cfm?chapter_no=visualization (last visited Apr. 14, 2008).
238. *Rapanos*, 547 U.S. at 803 n.12 (Stevens, J., dissenting).
239. United States v. Alpine Land & Reservoir Co., 887 F.2d 207, 213 (9th Cir. 1989).
240. Federal Water Pollution Control Act § 404, 33 U.S.C. § 1344(a) (2000).
241. Definition of Waters of the United States, 33 C.F.R. § 328.3 (2007).

C. Repercussions of the Plurality Opinion

Because the Supreme Court issued a mere plurality in *Rapanos*, not a majority, the Corps and lower courts have no specific mandate to follow. Still, the Corps will likely now move forward in promulgating standards amenable to the limitations the plurality would impose on its jurisdiction, a process the Corps and the EPA began after the *SWANCC* decision.[242] Any changes to the Corps' regulations, however, will represent a compromise to the detriment of pollution control efforts. The CWA recently reached its thirty-fifth year in existence, but that anniversary might also mark a significant decline in its practical effect.

The Corps already faces sharp criticism for its declining enforcement of CWA wetlands regulations[243] and a lack of uniformity between district offices' exercises of jurisdiction.[244] Not only does the Corps make fewer field inspections to verify compliance than in the past,[245] it approves almost all § 404 permit applications it receives, as long as efforts are made to minimize or mitigate adverse effects on wetlands.[246] By undermining the Corps' jurisdiction when it actually denies permits for projects that pose harm, the plurality further sullies the Corps' reputation and leaves lower courts and the Corps' district offices without clear guidance to use in future proceedings.

Until the Corps issues new regulations or the Supreme Court announces a majority opinion in another case settling the issue of wetlands protection, lower courts will need to decide whether to rely on the plurality's test or continue to use precedent from their own districts and circuits to reach conclusions in cases pending before them. Thus, criticism for lack of uniformity may soon extend to courts required to decide wetlands controversies without direct guidance.

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242. *Rapanos*, 547 U.S. at 757–58 (Roberts, C.J., concurring).

243. Don Hopey, *It's open season for wetland development*, PITTSBURGH POST-GAZETTE, Nov. 14, 1999, http://www.post-gazette.com/regionstate/19991114WetLands2.asp (last visited Apr. 14, 2008).

244. U.S. GENERAL ACCOUNTING OFFICE, WATERS AND WETLANDS: CORP OF ENGINEERS NEEDS TO EVALUATE ITS DISTRICT OFFICE PRACTICES IN DETERMINING JURISDICTION, REPORT TO THE CHAIRMAN, SUBCOMMITTEE ON ENERGY POLICY, NATURAL RESOURCES AND REGULATORY AFFAIRS, COMMITTEE ON GOVERNMENT REFORM, HOUSE OF REPRESENTATIVES 3 (Feb. 2004), http://www.gao.gov/new.items/d04297.pdf.

245. Environmental News Service, *Watchdog Group Criticizes Army Corps Wetland Permit Process*, AMERISCAN, Oct. 24, 2003, http://www.ens-newswire.com/ens/oct2003/2003-10-24-09.asp (last visited Apr. 14, 2008).

246. WATERS AND WETLANDS, *supra* note 244, at 12. According to the GAO's study, in 2002, the Corps received 85,445 § 404 permit applications. *Id.* The Corps only denied 128 and applicants withdrew 4,143. *Id.*

V. CONCLUSION

By misapplying the *Chevron* test for regulation validity, the plurality in *Rapanos v. United States* does a severe disservice to the CWA and casts doubt on the jurisdiction of a Corps already hesitant to enforce its delegated CWA provisions. Rather than deferring to the Corps' established regulations regarding wetlands protection, the plurality imposes permanency and surface connection standards that have no bearing on whether pollutants introduced into upstream waters actually reach downstream waters. In doing so, the plurality ignores the clearly stated intent of Congress in creating the CWA: to eliminate all pollution of the Nation's waters. Instead, the plurality opts to dishonor Congress' clearly stated objectives, weaken the protection of the Nation's remaining wetlands, and tarnish one of the most monumental pieces of environmental legislation ever enacted in the United States.