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The Supreme Court Wades Through the Clean Water Act to Determine What Constitutes the "Waters of the United States." Rapanos v. United States

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THE SUPREME COURT WADES THROUGH THE CLEAN WATER ACT TO DETERMINE WHAT CONSTITUTES THE "WATERS OF THE UNITED STATES"

Rapanos v. United States[1]

I. INTRODUCTION

The Clean Water Act ("CWA")[2] makes it illegal to backfill "navigable waters" without a permit issued by the Army Corps of Engineers ("Corps").[3] "Navigable waters" is defined as the "waters of the United States," including the territorial seas.[4] The Corps, which is charged with determining when a permit is required under the CWA, interprets the "waters of the United States" expansively.[5] The Corps' changing interpretation of the definition of the "waters of the United States," has deliberately and continually expanded the definition of the "waters of the United States."[6]

In *Rapanos v. United States*, the United States Supreme Court once again addressed the definition of "navigable waters."[7] The Court held that the definition includes (1) "only relatively permanent, standing or flowing bodies of water, not intermittent or ephemeral flows of water, and (2) only those wetlands with a continuous surface connection to bodies that are waters of the United States in their own right are adjacent to such waters

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[1] 126 S. Ct. 2208 (2006) [hereinafter "*Rapanos II*"].
[2] The CWA is codified at 33 U.S.C. § 1251-1387 (2000).
[3] 33 U.S.C. § 1342(a).
[4] 33 C.F.R. § 328.3 (2006).
[5] *Id.*
[6] *Rapanos II*, 126 S. Ct. at 2216 (citing Natural Res. Def. Council, Inc. v. Callaway, 392 F. Supp. 685 (D.C. Cir. 1975)). "For a century prior to the CWA," "navigable waters" was interpreted "to refer to [the] interstate waters that are 'navigable in fact' or readily susceptible of being rendered so. After passage of the CWA, the Corps initially adopted this traditional judicial definition for the Act's term 'navigable waters.'" *Id.* (citations omitted). However, after "a District Court enjoined [the definition] as too narrow" in *Natural Resources Defense Council*, the Corps' established new regulations that "sought to extend the definition." *Id.*
[7] *Id.* at 2208.

and covered by the CWA."[8] By limiting the definition of "navigable waters," the United States Supreme Court has fulfilled the objective of the CWA and curbed the economic costs of receiving a permit, which could potentially allow for greater development and utilization of land.[9]

II. FACTS AND HOLDING

The Plaintiff, John A. Rapanos, backfilled "a parcel of land in Michigan that he owned and sought to develop."[10] The Plaintiff's land was located in Williams Township, Bay County, Michigan.[11] His 175 acre plot of land contained forested wetlands and cleared meadow areas.[12]

In 1988, Rapanos sought to sell his plot of land to developers, and began making plans to eliminate the vegetation and wetlands on his property.[13] Rapanos' lawyer contacted the Michigan Department of Natural Resources to receive approval of the development plan.[14] The Department notified Rapanos that he would need a permit before beginning the backfilling of his land since his property included wetlands protected under the CWA.[15] Rapanos, disobeying both the Michigan Department of Natural Resources and the Environmental Protection Agency ("EPA"), began backfilling the wetlands on his property without a permit.[16] The United States brought civil enforcement proceedings against Rapanos.[17]

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[8] *Id.*
[9] *Id.* at 2215.
[10] *Id.* at 2214. The land Rapanos backfilled was "near ditches or man-made drains that eventually empt[ied] into traditional navigable waters." *Id.* at 2211.
[11] *United States v. Rapanos*, 339 F.3d 447, 448 (6th Cir. 2003) [hereinafter "*Rapanos I*"].
[12] *Id.* at 448-49.
[13] *Id.* at 449. Rapanos sought to back-fill his land in order to make it more attractive to prospective buyers. *Id.*
[14] *Id.*
[15] *Id.* Rapanos hired a consultant who issued a report that stated his land contained between forty-nine and fifty-nine acres of wetlands. *Id.* "After receiving the report, Rapanos asked the consultant to destroy any paper evidence of the wetlands on his property and then threatened to fire him and sue if he did not comply." *Id.*
[16] *Id.*
[17] *Id.* at 447.

The district court found in favor of Rapanos and held that his land was "not 'directly adjacent to the navigable waters,'" and therefore, could not be regulated by the CWA.[18] The United States appealed the district court's decision and filed for summary judgment.[19] The United States Court of Appeals for the Sixth Circuit granted summary judgment in favor of the United States and determined that Rapanos' land was in fact within the CWA's definition of "navigable waters" since the wetlands on his parcel of land could potentially affect "navigable-in-fact-waters."[20] Based on the Sixth Circuit's decision, Rapanos was required to request a permit from the Corps, as required by the CWA, prior to backfilling the wetlands on his parcel of land.[21]

Rapanos appealed the Sixth Circuit's decision to the United States Supreme Court.[22] He admitted that the wetlands on his property had been backfilled before he received a permit.[23] He asserted that his wetlands, however, were "not subject to the [CWA] because of a lack of federal

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[18] *Id.* at 450 (quoting United States v. Rapanos, 190 F. Supp. 2d 1011, 1015-16 (E.D. Mich. 2002)).

[19] *Id.*

[20] *Id.* at 453. The CWA "defines 'navigable waters' as 'the waters of the United States, including the territorial seas.'" *Rapanos II*, 126 S. Ct. 2208, 2211 (2006) (quoting 33 U.S.C. § 1362(7) (2000)). "In the last three decades, [however,] the [Army Corps of Engineers ("Corps")] . . . have interpreted their jurisdiction over 'the waters of the United States' to cover 270[-]300 million acres of swampy lands in the United States." *Id.* at 2215. "The Corps has also asserted jurisdiction over virtually any parcel of land containing a channel or conduit – whether man-made or natural, broad or narrow, permanent or ephemeral – through which rainwater or drainage may occasionally or intermittently flow." *Id.* Given the broad definition and interpretation adopted by the Corps, the Sixth Circuit of the United States Court of Appeals held that Rapanos' "wetlands possess the requisite nexus, and thus come within the statutory phrase 'navigable waters', if the wetlands, alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters understood as navigable in the traditional senses." *Id.* at 2213.

[21] *Rapanos II*, 126 S. Ct. at 2214-15. The CWA authorizes the Administrator of the EPA to issue a permit for the discharge of a pollutant as defined by 33 U.S.C. § 1311(a). *Id.* at 2215. "Section 1344 authorizes the Secretary of the Army, acting through the Corps, to 'issue permits . . . for the discharge of dredged or fill material into the navigable waters at specified disposal sites.'" *Id.* at 2215-16 (quoting 33 U.S.C. § 1344(a), (d)).

[22] *Id.* at 2208.

[23] *Id.* at 2214-15.

jurisdiction."[24] Rapanos argued a lack of federal jurisdiction on the basis that his land was not a part of the "waters of the United States" as stated and required by the CWA.[25] He specifically pointed to the district court's determination that the wetlands on his land were not directly connected to "waters of the United States."[26]

The United States argued that "restrictions on the [definition] of 'navigable waters' will frustrate enforcement against traditional water polluters . . . [as] water polluters will be able to evade the . . . requirement [of a permit] . . . simply by discharging their pollutants into noncovered intermittent watercourses that lie upstream of [waters covered by the CWA]."[27] Furthermore, the United States contended that a "narrower interpretation of [the waters of the United States] will impose a more difficult burden of proof in enforcement proceedings . . . by requiring the [EPA] to demonstrate the . . . flow of the pollutant along the intermittent channel to traditional 'waters.'"[28]

The Supreme Court held[29] that the Corps' interpretation and definition of "waters of the United States" was too expansive and that the meaning of "waters of the United States" refers more narrowly to "water as found in streams and bodies forming geographical features."[30] Accordingly, the Supreme Court held that the term "navigable waters" under the CWA includes only "relatively permanent, standing or flowing bodies of water, not intermittent or ephemeral flows of water."[31] In

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[24] *Rapanos I*, 339 F.3d at 449.
[25] *Id.*
[26] *Id.* at 450.
[27] *Rapanos II*, 126 S. Ct. at 2227.
[28] *Id.*
[29] The Supreme Court consolidated the *Rapanos* case with Carabell v. United States Army Corps of Engineers, 391 F.3d 704 (6th Cir. 2004). *Id.* at 2208. In *Carabell*, the Plaintiffs were denied a permit to "fill in a wetland that was separated from a drainage ditch by an impermeable berm." *Id.* at 2211. The Plaintiffs filed a lawsuit against the Corps; however the District Court found federal jurisdiction over the land. *Id.* Given the need to determine the CWA's jurisdiction over wetlands in order to resolve both cases, the Supreme Court accordingly consolidated *Rapanos* and *Carabell*. *Id.* at 2220.
[30] *Id.* at 2220 (quoting WEBSTER'S NEW INT'L DICTIONARY 2882 (2d ed. 1954)).
[31] *Id.* at 2222.

> The restriction of "the waters of the United States" to exclude channels containing merely intermittent or ephemeral flow also accords with the

addition, the Court found that only those wetlands with a "continuous surface connection to bodies that are 'waters of the United States' on their own are adjacent to the waters and covered by the CWA."[32] Therefore, since Rapanos' wetlands did not have a direct and continuous surface connection to the "waters of the United States," he was not required to obtain a permit before backfilling his land.[33] Consequently, the Supreme Court vacated the Sixth Circuit's decision and remanded the case.[34]

III. LEGAL BACKGROUND

A. The Clean Water Act[35]

The objective of the CWA is to restore and maintain the "chemical, physical, and biological integrity of the Nation's waters."[36] The CWA also strives to "recognize, preserve, and protect the primary responsibilities and

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> commonsense understanding of the term. In applying the definition to "ephemeral streams," "wet meadows," storm sewers and culverts, "directional sheet flow during storm events," drain tiles, man-made drainage ditches, and dry arroyos in the middle of the desert, the Corps has stretched the term "waters of the United States" beyond parody. . . . In addition, the [CWA]'s use of the traditional phrase "navigable waters" further confirms that it confers jurisdiction only over relatively permanent bodies of water.

Id. (emphasis omitted). "The phrase '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.

[32] *Id.* at 2226. "Only those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and are covered by the [CWA]." *Id.* (emphasis omitted). Therefore, two findings are required to establish that wetlands, such as those at the Rapanos site, are covered by the Act. *Id.* at 2227. "First . . . the adjacent channel [must contain] a 'water of the United States,' (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters)." *Id.* Second, the wetland must have "a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins." *Id.*

[33] *Id.*

[34] *Id.* at 2208.

[35] 33 U.S.C. § 1251 (2000).

[36] *Id.* § 1251(a).

rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator [of the EPA] in the exercise of his authority."[37]

In addition, the CWA explicitly makes it unlawful to discharge dredge or fill material, without a permit, into navigable waters in order to preserve the waters of our nation.[38] The term navigable waters, as briefly defined by the CWA, are "waters of the United States, including the territorial seas." [39] The CWA does not provide any further definitions or clarity as to the appropriate interpretation of the "waters of the United States;" however it does define territorial seas as "the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles."[40]

The CWA prescribes authority to the Corps to issue permits for backfilling navigable waters.[41] The CWA assigned the task of issuing permits to the Corps and the Corps developed regulations to more specifically identify what constitutes the "waters of the United States" in order to determine when a permit is required.[42]

The Supreme Court has previously stated that an agency's construction of a statute, which it has been given authority to enforce, should be given deference if the construction is reasonable and is not inconsistent with the intent of Congress.[43] Therefore, the Court's review in disputes involving the determination of the "waters of the United States" is limited to the reasonableness of whether the Corps may exercise

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[37] *Id.* § 1251(b).
[38] *See id.* §§ 1251(b), 1342, & 1344.
[39] *Id.* § 1362(7).
[40] *Id.* § 1362(8).
[41] *See id.* § 1344. "The term 'Secretary' as used in this section means the Secretary of the Army, acting through the Chief of Engineers." *Id.* "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." *Id.* § 1344(a).
[42] *See* 33 C.F.R. § 328.3 (2006).
[43] *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985) (citing *Chemical Mfrs. Assn. v. Natural Res. Def. Council, Inc.*, 470 U.S. 116 (1985)) [hereinafter "*Riverside Bayview*"].

jurisdiction, given the "language, policies, and legislative history" of the CWA over the lands in question.[44]

B. The Corps Definition of the "Waters of the United States"

The Corps developed regulations that specify the meaning of "waters of the United States," as the term relates to the need for a permit to backfill land to "provide clarity and avoid confusion with other Corps of Engineer regulatory programs."[45] A sub-section of the Corp's regulation is as follows:

> (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, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

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[44] *Riverside Bayview*, 474 U.S. at 131.

[45] 33 C.F.R. § 328.1. "This section defines the term 'waters of the United States' as it applies to the jurisdictional limits of the authority of the Corps of Engineers under the [CWA]." *Id.* "It prescribes the policy, practice, and procedures to be used in determining the extent of jurisdiction of the Corps of Engineers concerning 'waters of the United States.'" *Id.*

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

* * *

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(6) of this section.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States.

* * *

(b) The 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. Wetlands generally include swamps, marshes, bogs, and similar areas.

> (c) The term "adjacent" means bordering, contiguous, or neighboring. 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."[46]

The paragraphs of the Corps' definition most relevant to the Rapanos case are in sections 328.3(a)(2), (a)(7), (b), and (c).[47] The Corps' interpretation of these paragraphs determines whether or not wetlands are protected by the CWA and fall within the Corps' jurisdiction to require permits prior to the backfilling of dredge materials.[48] However, when litigation ensues, it is ultimately the court's interpretation as to when a permit is required that prevails.

The Corps' interpretation of the "waters of the United States" has evolved over time and has increased in scope.[49] The increasingly expansive interpretation of the "waters of the United States" has fueled debates as to whether the Corps' authority is too far-reaching, as seen in the Court's decision in *Rapanos*.[50]

C. United States Supreme Court's Interpretation of "Waters of the United States"

1. United States v. Riverside Bayview Homes, Inc.[51]

In 1985, the Court presided over a dispute between the United States ("the Corps") and Riverside Bayview Homes, Inc. ("Riverside Bayview").[52] The dispute arose when Riverside Bayview backfilled its

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[46] 33 C.F.R. § 328.3.
[47] *Rapanos II*, 126 S. Ct. 2208, 2216 (2006).
[48] *Id.*
[49] *Id.* at 2216-17.
[50] *Id.* at 2208; *See also Riverside Bayview*, 474 U.S. 121 (1985); *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 531 U.S. 159 (2001) [hereinafter "*SWANCC*"].
[51] 474 U.S. 121 (1985).
[52] *Id.* at 124.

property near the shores of Lake St. Clair, Michigan.[53] The Corps asserted that Riverside Bayview's property were wetlands adjacent to navigable waters, and therefore covered by the CWA, which required a permit before the property was backfilled.[54] The district court found for the Corps, but the Court of Appeals for the Sixth Circuit reversed, stating that the Corps' authority under the CWA must be narrowly construed.[55]

The Supreme Court unanimously reversed the court of appeals decision and held that the "language, policies, and history of the CWA" compel a finding that the Corps' interpretation of the "waters of the United States" to include wetlands that were adjacent to navigable waters was in fact appropriate for the purpose of determining whether a permit was required prior to backfilling one's land under the CWA.[56] The Court further acknowledged that the Corps' authority under the CWA extends "to all wetlands adjacent to navigable or interstate waters and their tributaries."[57]

The Court defined the wetlands in question as "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,"[58] and stated that the wetlands in question were adjacent to a navigable waterway as required.[59] In addition, the Court did not find reason to interpret the Corps' regulation more narrowly than its terms would indicate, thereby

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[53] *Id.*
[54] *Id.*
[55] *Id.* at 125-26. The court of appeals further stated that Corps' authority must be narrowly construed to "avoid a taking without just compensation in violation of the Fifth Amendment." *Id.* at 126.
[56] *Id.* The Court stated that the primary question of whether the Corps may demand that Riverside Bayview Homes obtain a permit before filling its wetlands was "primarily one of regulatory and statutory interpretation: [the Court had to] determine whether [Riverside Bayview Homes'] property [was] an 'adjacent wetland' within the meaning of the applicable regulation, and , if so, whether the Corps' jurisdiction over 'navigable waters' gave it statutory authority to regulate discharges of fill material into such a wetland." *Id.*
[57] *Id.* at 129.
[58] *Id.* (emphasis omitted).
[59] *Id.* at 131.

following Congress' action in 1977 to maintain the broad jurisdiction of the Corps.[60]

In 1977, Congress was faced with the challenge of either narrowing or maintaining the current jurisdiction of the Corps.[61] Ultimately, Congress upheld the Corps' rather expansive jurisdiction for two reasons.[62] First, Congress was "concern[ed] that [the] protection of wetlands would be unduly hampered by a narrowed definition of 'navigable waters.'"[63] Second, Congress noted that those who would have restricted the Corps' jurisdiction would have done so "only by restricting the scope of 'navigable waters' . . . to waters navigable in fact and their adjacent wetlands."[64]

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[60] *Id.* at 135. "Following promulgation of the Corps' interim final regulations in 1975, the Corps' assertion of authority under section 404 over waters not actually navigable engendered some congressional opposition." *Id.* In both the House and Senate, the debate to narrow the definition of navigable waters centered specifically on wetlands. *Id.* at 136. Proponents of a more limited jurisdiction for the Corps asserted that the Corps' definition of "waters of the United States" far exceeded what Congress had intended when the CWA was enacted. *Id.* Opponents of the proposed changes asserted that limiting the definition of the "waters of the United States" would jeopardize wetland ecosystems, water quality, and aquatic environment in general. *Id.* In resolution, efforts to narrow the definition of the "waters of the United States" were abandoned and the Corps' broad jurisdiction was maintained. *Id.* at 137.

[61] *See id.* at 136.

[62] *Id.* at 138.

[63] *Id.* at 137. "[A] refusal by Congress to overrule an agency's construction of legislation is at least some evidence of the reasonableness of that construction, particularly where the administrative construction has been brought to Congress' attention through legislation specifically designed to supplant it." *Id.*

[64] *Id.* (emphasis omitted).

> Thus, even those who thought that the Corps' existing authority under [section] 404 was too broad recognized (1) that the definition of 'navigable waters' then in force for both [section] 301 and [section] 404 was reasonably interpreted to include adjacent wetlands, (2) that the water quality concerns of the Clean Water Act demanded regulation of at least some discharges into wetlands, and (3) that whatever jurisdiction the Corps would retain over discharges of fill material after passage of the 1977 legislation should extend to discharges into wetlands adjacent to any waters over which the Corps retained jurisdiction.

Id. at 138.

The Court in *Riverside Bayview* maintained consistency with Congress' 1977 interpretation of the Corps' statute.[65] Accordingly, the Court interpreted the Corps' statute to include the wetlands found on Riverside Bayview's property since (1) the wetlands were adjacent to a navigable waterway and (2) had "saturated soil conditions and wetland vegetation [that] extended beyond the boundary of respondent's [Riverside Bayview's] property to a navigable waterway."[66]

2. Solid Waste Agency of Northern Cook County v. Army Corps of Engineers[67]

Solid Waste Agency of Northern Cook County ("SWANCC") was a group of 23 suburban Chicago cities and towns that "united in an effort to locate and develop a disposal site for baled non-hazardous solid waste."[68] SWANCC located and purchased a 533 acre parcel of land that had been used as a sand and gravel pit by a mining operation for approximately three decades until 1960.[69] The sand and gravel pit, after being abandoned, eventually formed a "successional stage forest . . . and a scattering of permanent and seasonal ponds of varying size . . . and depth."[70] Before backfilling the land, SWANCC contacted the Corps to determine if a permit was required under the CWA.[71]

The Corps originally concluded it did not have jurisdiction over the land in question, as the site did not contain wetlands "or areas which support 'vegetation typically adapted for life in saturated soil conditions.'"[72] However, the Corps changed its determination "after the Illinois Nature Preserves Commission informed the Corps that a number

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[65] *See generally Riverside Bayview*, 474 U.S. 121.
[66] *Id.* at 131. The Court did not express an opinion as to whether the Corps has the authority to regulate the discharge of dredge or fill material into wetlands that are not adjacent to navigable waterways. *SWANCC*, 531 U.S. 159, 167 (2001).
[67] 531 U.S. 159 (2001).
[68] *Id.* at 162-63.
[69] *Id.* at 163.
[70] *Id.*
[71] *Id.*
[72] *Id.* at 164 (quoting 33 C.F.R. § 328.3(b) (2006).

of migratory bird species had been observed at the site."[73] The Corps then ruled it in fact had jurisdiction over the land in question pursuant to the Migratory Bird Rule,[74] which expanded the Corps' authority over those lands that are not necessarily connected to the "waters of the Untied States."[75] Based on the Migratory Bird Rule, the Corps did not issue SWANCC a permit to backfill its land.[76]

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[73] *Id.*

> The Corps found that approximately 121 bird species had been observed at the site, including several known to depend upon aquatic environments for a significant portion of their life requirements. Thus, on November 16, 1987, the 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.

[74] *Id.* at 164.

> In 1986, in an attempt to 'clarify' the reach of its jurisdiction, the Corps stated that [section] 404(a) extends to intrastate waters: (a) which are or would be used as habitat by birds protected by Migratory Bird Treaties; or (b) where are or would be used as habitat by other migratory birds which cross state lines; or (c) which are or would be used as habitat for endangered species; or (d) used to irrigate crops sold in interstate commerce.

Id.

[75] *Id.* at 164-65.

[76] *Id.* at 165. SWANCC made several attempts to mitigate the damage to migratory birds and in 1993 finally received a landfill development permit from the Illinois Environmental Protection Agency. *Id.* Despite receiving a permit from the Illinois Environmental Protection Agency, the Corps refused to grant a permit under the CWA. *Id.*

> The Corps found that SWANCC had not established that its proposal was the "least environmentally damaging, most practicable alternative" for disposal of non-hazardous solid waste; [and] that SWANCC [did not] set aside sufficient funds to fix any potential leaks thereby posed "unacceptable risk to the public's drinking water supply[;"] and that impact of the project upon area-sensitive species was unmitigatable since a landfill surface cannot be redeveloped into a forested habitat.

Id.

SWANCC filed suit against the Corps challenging the Corps' jurisdiction, specifically the use of the Migratory Bird Rule, and the validity of its denial to issue a permit under the CWA.[77] The district court granted the Corps' motion for summary judgment on the jurisdictional issue and SWANCC dropped its challenge over the Corps' permit refusal.[78] SWANCC appealed the district court's decision to the United States Court of Appeals for the Seventh Circuit and asserted that the Corps had "exceeded [its] statutory authority in interpreting the CWA to cover nonnavigable, isolated, intrastate waters based [on] the presence of migratory birds."[79] The court of appeals held that because the "aggregate effect of the 'destruction of the natural habitat of migratory birds' on interstate commerce . . . [would be] substantial[, as] each year millions of Americans cross state lines and spend over a billion dollars to hunt and observe migratory birds," the Corps' interpretation of the CWA and prescribed jurisdiction was not over-reaching.[80]

The Supreme Court granted certiorari and reversed the court of appeals decision by holding that the Migratory Bird Rule is not fairly supported by the CWA.[81] The Court concluded that the Corps' original interpretation of the CWA was inconsistent with its interpretation in this case.[82] Furthermore, the Court found the Corps' argument that Congress was aware of its expansive interpretation, to include those waters or lands that did not have a nexus to defined navigable waters during its 1977

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[77] *Id.*

[78] *Id.*

[79] *Id.* at 165-66. SWANCC also argued "in the alternative' that Congress lacked the power under the Commerce Clause to grant such regulatory jurisdiction." *Id.* at 166.

[80] *Id.* at 166. The court of appeals also determined that Congress does in fact have the authority to regulate waters "based [on] 'the cumulative impact doctrine, under which a single activity that itself has no discernible effect on interstate commerce may still be regulated if the aggregate effect of that class of activity has a substantial impact on interstate commerce.'" *Id.*

[81] *Id.* at 166-68.

[82] *Id.* at 168. In 1974, the Corps' regulation defined navigable waters "to mean 'those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce.'" *Id.* (quoting 33 C.F.R. § 209.120(d)(1) (2006)).

amendments to the CWA, failed.[83] The Court held that it cannot be assumed that Congress acquiesced to the Corps' expansive interpretation simply because Congress did not enact legislation that would have restricted the Corps' authority.[84]

Additionally, the Court held that "[p]ermitting [the Corps] to claim federal jurisdiction over ponds and mudflats falling within the 'Migratory Bird Rule' would result in a significant impingement of the States' traditional and primary power over land and water use," which is in direct opposition to the purpose of the CWA.[85] After performing a thorough analysis of the history and intent of the CWA, the Court held that the Migratory Bird Rule exceeded the authority granted to the Corps under the CWA, and thus, SWANCC was not required to obtain a permit from the Corps prior to backfilling its' land.[86]

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[83] *Id.* at 168-70.

[84] *Id.* at 170. The Court states that "[a]lthough we have recognized congressional acquiescence to administrative interpretations of a statute in some situations, we have done so with extreme care." *Id.* at 169. Moreover, "'failed legislative proposals are "a particularly dangerous ground on which to rest an interpretation of a prior statute."'" *Id.* at 169-70 (quoting Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 187 (1994)). The Court also supports its decision by stating that "[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." *Id.* at 683 (citing *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)).

[85] *Id.* at 174.

> Rather than expressing a desire to readjust the federal-state balance . . . , Congress chose to "recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources . . . ." "The Court will read the statute as written to avoid the significant constitutional and federalism questions raised by [the Corps'] interpretation, and therefore [this Court] reject[s] the [Corps'] request for administrative deference.

Id. (quoting 33 U.S.C. § 1251(b) (2000)).

[86] *Id.* at 174. The main argument underlying the dissent (by four justices) is that "because of the [CWA's] ambitious and comprehensive goals, it is necessary to expend the Corps' authority (jurisdictional scope) to include the Migratory Bird Rule. *Id.* at 687.

IV. INSTANT DECISION

A. The Plurality Opinion

The Supreme Court's plurality opinion,[87] in *Rapanos,* explicitly stated that the Corps' expansive approach to define "waters of the United States" is not consistent with the objective of the CWA.[88] The plurality further stated that the use of the article "the" and the plurality of "waters" establish that "waters of the United States" does not refer to water in general terms; therefore the definition must be interpreted strictly.[89] In addition, "[t]he restriction of the "waters of the United States" to exclude channels containing merely intermittent or ephemeral flow is consistent with the" general usage and understanding of the term "waters."[90] The Court found that the CWA's "use of the traditional phrase 'navigable waters'" further bolsters the Court's decision that the Corps' jurisdiction should be limited to only "relatively permanent bodies of water."[91]

Furthermore, the plurality stated that the restricted definition of the "waters of the United States" is congruent with "the CWA's policy to recognize, preserve, and protect the primary responsibilities and rights of the [s]tates to prevent, reduce, and eliminate pollution, and to plan the

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[87] The plurality of the court was comprised of Roberts, C.J., and Scalia, Thomas, and Alito, JJ. *Rapanos II,* 126 S. Ct. 2208, 2214. Scalia, J., filed the opinion of the Court, in which Roberts, C.J., and Thomas and Alito, JJ. joined. *Id.* Roberts, C.J., filed a separate concurrence, *id.* at 2235, and Kennedy, J., filed a concurrence in the judgment. *Id.* at 2236. The dissenting justices were Stevens, Souter, Ginsberg, and Breyer, JJ. *Id.* at 2252. Stevens, J., filed a dissenting opinion in which Souter, Ginsberg, and Breyer, JJ., joined. *Id.* Breyer, J., also filed a separate dissenting opinion. *Id.* at 2266.

[88] *Id.* at 2216. "The Corps' new regulations deliberately sought to extend the definition of 'the waters of the United States' to the outer limits of Congress' commerce power." *Id.*

[89] *Id.* at 2220. "'[T]he waters' refers more narrowly to water as 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.* "All of theses terms connote continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows." *Id.* at 2221.

[90] *Id.* at 2222.

[91] *Id.* (emphasis omitted).

development and use of land and water resources."[92] The plurality contended that the phrase "waters of the United States" can have only one plausible interpretation – "permanent, standing or continuously flowing bodies of water "forming geographic features" that are described in ordinary parlance."[93]

The plurality also acknowledged the difficulty of including wetlands as a subset of "waters of the United States."[94] Therefore, the plurality held that only "those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the CWA."[95]

Upon analysis of the meaning and appropriate definition of "navigable waters" as stated in the CWA, the plurality held that the current interpretation of "navigable waters" by the Corps is too broad and

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[92] *Id.* at 2223. The broad definition adopted by the Corps, would essentially bring "'all plan[ning of] the development and use . . . of land and water resources' by the States under federal control." *Id.* at 2224. "The broad definition of "the waters of the United States" would authorize the Corps to function as a *de facto* regulator of immense stretches of intrastate land; which would allow unprecedented intrusion into traditional state authority." *Id.*

[93] *Id.* at 2225. The phrase "'the waters of the United States' includes streams, oceans, rivers, [and] lakes, (as defined by Webster's New International Dictionary 2882 (2d ed.)), and does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall." *Id.*

[94] *Id.*

> The Corps must necessarily choose some point at which water ends and land begins. Our common experience tells us that this is often no easy task: the transition from water to solid ground is not necessarily or even typically an abrupt one. Rather, between open waters and dry land may lay shallows, marshes, mudflats, swamps, bogs – in short, a huge array of areas that are not wholly aquatic but nevertheless fall far short of being dry land. Where on this continuum to find the limit of 'waters' is far from obvious.

Id. Faced with this difficulty the Court held in *Riverside Bayview* "that a wetland that 'adjoined' waters of the United States is itself a part of those waters." *Id.*

[95] *Id.* at 2226 (emphasis omitted). Wetlands without a constant connection and therefore with only a "physically remote hydrologic connection to 'waters of the United States' . . . lack the necessary connection to [the] covered waters" protected under the CWA. *Id.*

therefore vacated the judgment of the Sixth Circuit and remanded the case for further proceedings.[96]

B. The Dissent

The dissenting justices argued the judiciary should give deference to the Corps' interpretation of what constitutes "waters of the United States;"[97] since it is the responsibility and expectation of the judiciary to "respect the work product of the Legislative and Executive [b]ranches of . . . [g]overnment."[98] In addition, the dissenting justices noted the Court's unanimous opinion in *Riverside Bayview*.[99] In *Riverside Bayview*, the Court framed the issue as "whether the [CWA] 'authorizes the Corps to require landowners to obtain permits . . . before discharging fill material into wetlands adjacent to navigable bodies of water and their tributaries;" not whether the Corps has jurisdiction "over 'wetlands that are not

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[96] *Id.* at 2235. Roberts, C.J., filed a concurrence opinion, which simply reiterated to the Corps that its authority is not limitless, as was mentioned previously in *SWANCC*. *Id.* (Roberts, C.J., concurring). Roberts, C.J., states, "rather than refining its [Corps'] view of its authority in light of our decision in *SWANCC*, . . . the Corps chose to adhere to its essentially boundless view of the scope of its power. The upshot today is another defeat for the agency." *Id.* at 2236. Finally Roberts, C.J., concludes that the definition of "the waters of the United States" must be interpreted to meet the objective of the CWA. *Id.* at 2235. Kennedy, J., concurred in the judgment and stated that this case needs to be remanded in order for there to be a determination if the term "navigable waters" as stated in the CWA" extends to wetlands that do not contain and are not adjacent to waters that are navigable in fact." *Id.* at 2236 (Kennedy, J., concurring).

[97] *Id.* at 2252 (Stevens, J., dissenting).

> The Army Corps has determined that wetlands adjacent to tributaries of traditionally navigable waters preserve the quality of our Nation's waters by, among other things, providing habitat for aquatic animals, keeping excessive sediment and toxic pollutants out of adjacent waters, and reducing downstream flooding by absorbing water at times of high flow. The Corps' resulting decision to treat these wetlands as encompassed within the term "waters of the United States" is a quintessential example of the Executive's reasonable interpretation of a statutory provision.

Id.

[98] *Id.* at 2253.

[99] *Id.* at 2255.

adjacent to bodies of open water.'"[100] Therefore, the Corps' jurisdiction and authority over whether particular wetlands constitute "waters of the United States" was not disturbed by the Court. In addition, the dissenting *Rapanos* justices mentioned that in 1977 Congress decided not to narrow the Corps' jurisdiction, and thus deference should be given to Congress' decision.[101]

Furthermore, the dissenting *Rapanos* justices pointed to the fact that the plurality failed to provide a clear definition as to what is considered intermittent versus relatively permanent waters, and therefore, they convolute the determination of "waters of the United States," as they are essentially leaving "litigants without guidance as to where the line [is drawn.]"[102] Most importantly, the dissenting justices concluded by stating that the plurality "disregards the fundamental significance of the [CWA]."[103] The CWA is "not merely another law," but was "viewed by Congress as a [complete overhaul] of the [then] existing water pollution legislation."[104] The justices further acknowledged that due to the uncertainty in defining "waters of the United States," a broad definition, and jurisdiction by the Corps should be adopted as it would advance the interests of the CWA.[105]

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[100] *Rapanos II*, 126 S. Ct. at 2255 & 2255 n.3 (citing *Riverside Bayview*, 474 U.S. 121, 131-32 (1985)).

[101] *Id.* at 2256.

> [C]oncerns about the appropriateness of the Corps' 30-year implementation of the [CWA] should be addressed to Congress or the Corps rather than to the Judiciary. Whether the benefits of particular conservation measures outweigh their costs is a classic question of public policy that should not be answered by appointed judges.

Id. at 2259.

> [T]he plurality disregards the fundamental significance of the [CWA] . . . . "Congress' intent in enacting the [CWA] was clearly to establish an all-encompassing program of water pollution regulation," and "the most casual perusal of the legislative history demonstrates that . . . views on the comprehensive nature of the legislation were practically universal."

Id. at 2262 (quoting *Milwaukee v. Illinois*, 451 U.S. 304, 318 (1981)).

[102] *Id.* at 2260 n.10.

[103] *Id.* at 2262.

[104] *Id.*

[105] *Id.*

V. COMMENT

In interpreting the intent and jurisdiction of a legislative act, the Court should defer to past rulings, construe the meaning of the act in a practical and easily applicable manner, and ensure that the rights preserved within the act are not impinged in order to allow for sound and logical judgments. The *Rapanos* plurality determined the Corps' interpretation of the "waters of the United States" was too expansive.[106] The Court reached its decision by analyzing the precise language used in the construction of the CWA and the traditional meaning of the words used, and reviewing prior court rulings in relation to the dispute at hand.[107] In addition, the Court utilized common-sense notions and reviewed the practicalities of the definition and the jurisdiction of the Corps.[108] Finally, the plurality recognized that the states have "'traditional and primary power over land and water use.'"[109] The plurality's approach to understanding the CWA and the rationale for its decision is clear, sound, just, and practical.

Private property rights, in order to protect landowners from abusive government conduct, are perhaps the most important rights protected by our nation's laws.[110] By limiting the Corps' jurisdiction and

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> The Act has largely succeeded in restoring the quality of our Nation's waters. Where the Cuyahoga River was once coated with industrial waste, "[t]oday, that location is lined with restaurants and pleasure boat slips." By curtailing the Corps' jurisdiction of more than 30 years, the plurality needlessly jeopardizes the quality of our waters. In doing so, the plurality disregards the deference it owes the Executive, the congressional acquiescence in the Executive's position that we recognized in *Riverside Bayview,* and its own obligation to interpret laws rather than to make them.

Id. at 2265 (citations omitted).

[106] *Id.* at 2208.

[107] *See generally Rapanos II*, 126 S. Ct. 2208 (2006).

[108] *Id.*

[109] *Id.* at 2224 (quoting *SWANCC*, 531 U.S. 159, 174 (2001)).

[110] Interpreting the effect of the U.S. Supreme Court's recent decision in the joint cases of Rapanos v. United States and Carabell v. U.S. Army Corps of Engineers on "The Waters of the United States", United States Senate – Environment and Public Works Committee, Subcommittee on Fisheries, Wildlife, and Water, (Aug. 1, 2006) (testimony of Keith Kisling, on behalf of National Association of Wheat Growers National Cattlemen's Beef

providing greater meaning to the intent of the CWA, the Court has provided a 'rule' that the people of the United States can utilize in determining what portions of their land may be protected and under government control.[111] Both "overzealous government regulation and the failure to provide adequate notice about the extent of authority to regulate [land] result[s] in [the] serious infringement of the rights" of landowners.[112] Though many landowners "understand the government can and should regulate private conduct in certain carefully prescribed instances," there is an expectation that in the United States it will be done in accordance with the law.[113] The Court's decision in *Rapanos* provides more clarity as to how far the Corps' jurisdiction will reach, and limits the Corps' jurisdiction according to the intent of the CWA.

The dissenting justices provide deference to the Corps, as it is the regulatory body given the authority to determine what constitutes the "waters of the United States."[114] They argue that the Corps' expansive interpretation should be upheld.[115] Though deference ought to be given to the Corps' interpretation of "waters of the United States," it is important to recognize that it is the judiciary's responsibility to provide oversight and ensure that jurisdictional authority provided in a legislative act is not overreached. If the Corps' interpretation were upheld based on deference, the question then arises - at what point does the Corps' jurisdictional reach extend beyond that of legislative intent?

A tangential and relevant issue that arises from *Rapanos* is the cost of CWA permits and the economic impact of development in comparison to the preservation of our aquatic lands and species. The National Association of Home Builders ("NAHB") estimates that housing developers pay on average $312,298 per site to comply with CWA permit fees and requirements, which is an estimated increase in housing costs of $1,400 to $7,000 per unit.[116] An increase in the cost to develop land

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Association). People want to have the freedom to use their property as they would like. *Id.*

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Rapanos II*, 126 S. Ct. at 2252.

[115] *Id.* at 2253.

[116] Rhonda Jackson, *Cleaning Up the Clean Water Act*, PROF. BUILDER (Sept. 1, 2006).

including building homes and industrial and commercial buildings could potentially lead to less development and growth of our economy. Thus, if the Corps' jurisdiction over the "waters of the United States" is expanded, this could have a stifling affect on the growth of our cities and towns. However, the impact on development must be compared to the impact on our lands and aquatic species.

Though preserving our lands and aquatic species is a concern and one of the objectives of the CWA, the freedom of the Corps to interpret (and expand) the definition of the "waters of the United States", is potentially a far greater concern. If the Corps is given unbridled authority, this creates the potential for inconsistent decisions made by the Corps, makes it difficult for land owners to determine when a permit is necessary, and does not allow for judicial oversight (checks and balances) as a standard to determine accuracy. Furthermore, the intent of the legislature, when enacting the CWA, will no longer be significant; which is contrary to our system of enacting and enforcing laws based on the Congress' intent and purpose.

VI. CONCLUSION

In Rapanos v. United States, the Supreme Court completed a thorough analysis of the CWA.[117] The Court acknowledged (and encompassed within its decision) the legislature's intent when drafting the CWA, the precise meaning of the words used within the CWA, and the difficulty of "line drawing" in determining what constitutes the "waters of the United States." The final decision ultimately calls for jurisdictional limitations to be placed on the Corps based on the purpose and intent of the CWA. Additionally, the final decision provides for greater clarity for property owners to determine what portion of their land may be protected by the CWA and regulated by the Corps.

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[117] *See generally Rapanos II*, 126 S. Ct. 2208.