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RECKONING WITH RAPANOS: 
REVISITING “WATERS OF THE UNITED STATES” AND THE LIMITS OF FEDERAL WETLAND REGULATION

Jonathan H. Adler*

_Rapanos v. United States_¹ is the latest episode in the serial effort to identify the precise meaning of “waters of the United States.”² Federal courts have struggled to define the scope of federal regulatory jurisdiction under the Clean Water Act (“CWA”) since the law was adopted. _Rapanos_ notwithstanding, these efforts are likely to continue for years to come. The court’s splintered holding, and competing visions of the federal government’s proper role in environmental protection, will preserve the definition of “waters” as contested terrain.

Although no single opinion in _Rapanos_ commanded a majority of the Court, the Court delivered a discernible holding. Specifically, the Court held that CWA jurisdiction over private lands is limited. This is the second time in six years that the Court has so held.³ The Court rejected the expansive interpretation adopted by the U.S. Army Corps of Engineers, Environmental Protection Agency, and most lower courts,⁴ and reaffirmed that federal regulatory authority only extends to those wetlands that have a

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⁴ See, e.g., United States v. Gerke Excavating, Inc. (Gerke 1), 412 F. 3d 804 (7th Cir. 2005) (interpreting SWANCC narrowly); Carabell v. U.S. Army Corps of Eng’rs, 391 F.3d 704 (6th Cir. 2004) (same); United States v. Rapanos, 339 F.3d 447 (6th Cir. 2003) (same); United States v. Rueth Dev. Co., 335 F.3d 598 (7th Cir. 2003) (same); United States v. Deaton, 332 F.3d 698 (4th Cir. 2003) (same); compare In re Needham, 354 F.3d 340 (5th Cir. 2003) (after SWANCC federal jurisdiction only extends to wetlands adjacent to navigable waters); Rice v. Harken Exploration Co., 250 F.3d 264 (5th Cir. 2001) (same).
"significant nexus" to navigable waters of the United States. Nonetheless, the full implications of *Rapanos* will not be clear for years to come.

This article offers a preliminary assessment of the *Rapanos* decision and its implications for water pollution control and wetlands conservation. Part I of this article briefly surveys the history of litigation over the meaning of "waters of the United States" since the enactment of the CWA in 1972. While federal courts were initially quite sympathetic to expansive interpretations of federal regulatory authority, the Supreme Court has begun to accept meaningful limits on CWA jurisdiction. Part II describes the split decision in *Rapanos*. While there is a clear holding in *Rapanos*, the lack of a majority opinion will ensure continued litigation and uncertainty over the precise scope of federal regulatory authority under the CWA. Part III assesses how *Rapanos* has been applied by lower courts to date, finding that it has not taken long for different courts to apply the opinion in different ways. Part IV looks to the future, and discusses the opinion's potential implications for environmental protection and wetland conservation efforts by both the federal government and non-federal actors.

I. THE ROAD TO *RAPANOS*

Enacted in 1972, the Clean Water Act regulates the discharge of pollution into "navigable waters," which are defined, in turn, as "waters of the United States." It prohibits the "discharge of any pollutant" – defined to include dredged material, rock, sand, and solid or industrial waste – into navigable waters without a federal permit. Section 404 authorizes the U.S. Army Corps of Engineers, subject to oversight from the Environmental Protection Agency ("EPA"), to issue permits "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." Other provisions authorize the issuance of permits of other activities.

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7 33 U.S.C. § 1344(a), (c). Additionally, the Corps must give the Fish and Wildlife Service and National Marine Fisheries Service the opportunity to comment on permit applications. 33 C.F.R. § 320.4(c) (2005).
8 See, e.g., 33 U.S.C. § 1342(a) (providing for permits for the discharge of pollutants).
The Army Corps did not originally interpret "waters of the United States" to encompass wetlands and other areas that would not, in themselves, commonly be referred to as "waters." The EPA and environmentalist groups, on the other hand, believed that regulating wetlands was necessary to achieve the CWA's stated goal "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." In 1974, the Natural Resources Defense Council ("NRDC") sued the Corps arguing that "waters of the United States" encompassed all waters, including wetlands, irrespective of whether they were truly navigable. In 1975, the United States District Court for the District of Columbia agreed, holding that the CWA extended "federal jurisdiction over the nation’s waters to the maximum extent permissible under the Commerce Clause of the Constitution," including wetlands. The Corps acquiesced to this interpretation and declined to appeal.

Federal regulations subsequently promulgated by the Army Corps and the EPA defined "waters of the United States" to include 1) all waters used for interstate commerce; 2) all interstate waters and wetlands; 3) all tributaries or impoundments of such waters; and, most significantly:

[a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation, or destruction of which could affect interstate or foreign commerce including any such waters: (i) [w]hich are or could be used

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12 Id. at 686.
13 From a public choice perspective, that a federal agency would accept a court decision expanding the scope of its authority should not be at all surprising.
15 Id. § 328.3(a)(2).
16 Id. § 328.3(a)(4), (5).
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.¹⁷

This definition explicitly included “wetlands adjacent to waters (other than waters that are themselves wetlands).”¹⁸ These regulations greatly expanded the federal government’s regulatory authority over private land use.¹⁹ By some estimates, the Corps and the EPA asserted regulatory jurisdiction over “270 to 300 million acres of swampy lands in the United States.”²⁰

The Supreme Court first considered the scope of the Corps’ regulatory authority in 1985 in United States v. Riverside Bayview Homes, Inc.²¹ In Riverside, the Court unanimously concluded that the Corps could reasonably define “waters of the United States” to include “wetlands adjacent to navigable bodies of water and their tributaries.”²² The Court based this holding on the Corps’ conclusion that such wetlands “are inseparably bound up with the ‘waters’ of the United States.”²³ In so holding, the Court did not “express any opinion” on whether federal regulatory jurisdiction could be further extended to cover “wetlands that are not adjacent to bodies of open water.”²⁴ Following Riverside Bayview the Corps published an interpretation of its authority, commonly referred

¹⁷ Id. § 328.3(a)(3).
¹⁸ Id. § 328.3(a)(7).
²² Id. at 123.
²³ Id. at 134. See also SWANCC, 531 U.S. 159, 167 (2001) (“It was the significant nexus between wetlands and ‘navigable waters’ that informed our reading of the [Act] in Riverside Bayview Homes.”).
²⁴ Riverside Bayview, 474 U.S. at 131 n.8.
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to as the "migratory bird rule," stating that the Corps' regulatory authority extends to intrastate waters:

   a) Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or
   b) Which 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.

The Corps thereby effectively asserted its regulatory authority over all territory meeting the definition of waters or wetlands throughout the United States.

The Corps' expansive interpretation of its own regulatory authority did not go unchallenged. Numerous suits were brought challenging its interpretation of "waters," the "migratory bird rule," and even the constitutional authority for regulation of wetlands and isolated waters. By and large these challenges failed, even after the Supreme Court exhibited a renewed willingness to consider federalism limitations on the scope of federal regulatory authority.  

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25 The "migratory bird rule" should more properly have been referred to as the "migratory bird interpretation," as the Army Corps issued the interpretation without engaging in public notice and comment as required by section 553 of the Administrative Procedure Act. See SWANCC, 531 U.S. at 164 n.1.


27 See, e.g., Hoffman Homes, Inc. v. EPA, 999 F.2d 256 (7th Cir. 1993); United States v. Pozsgai, 999 F.2d 719 (3rd Cir. 1993); Leslie Salt Co. v. United States, 55 F.3d 1388 (9th Cir. 1995).

28 But see United States v. Wilson, 133 F.3d 251 (4th Cir. 1997).

In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* ("SWANCC"), a regional waste management agency challenged the assertion of federal jurisdiction over permanent and seasonal ponds that had formed in abandoned gravel pits. Because the waters in question were isolated, and neither adjacent to nor hydrologically connected to navigable waters, SWANCC contended that the land in question lay beyond the reach of federal regulation. The petitioners pressed their case on both constitutional and statutory grounds. The Court only reached the latter, citing federalism concerns—specifically the concern that a broad interpretation of the CWA would "push the limit of congressional authority" under the Commerce Clause—to hold that the Act did not reach isolated, intrastate waters. The Court refused to adopt a more expansive interpretation of the Act absent a "clear indication that Congress intended that result." By resolving the issue on statutory grounds, the Court avoided the need to address the extent to which Congress could regulate the use of isolated waters were it to adopt legislation explicitly for that purpose.

*SWANCC* reaffirmed, but refused to extend, the holding of *Riverside Bayview Homes*. Specifically, in *SWANCC* the Court held that the CWA does not confer federal regulatory jurisdiction over isolated, intrastate waters. Rather, the CWA only reaches those waters or wetlands that have a "significant nexus" to navigable waters.

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30 *531 U.S. 159 (2001).*
31 *Id. at 165-66.*
32 *Id.*
33 *Id. at 173.*
34 *Id. at 171.*
35 *Id. at 172.* In so doing, the Court rejected the argument that the Corps of Engineers' regulation was due deference under *Chevron USA v. NRDC.* *Id.* Although courts will generally defer to federal agency interpretations of ambiguous statutory language, the *SWANCC* majority found such deference to be inappropriate "where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." *Id. at 173.*
36 The dissent, on the other hand, did address the Commerce Clause issue and found the regulations in question to lie well within the outer limits of federal Commerce Clause authority. *Id. at 181-82* (Stevens, J., dissenting).
37 *Id. at 171.*
38 *Id. at 167.*
Consequently many prairie potholes and other isolated wetlands and waters were removed from the federal government’s regulatory jurisdiction. While the Court’s holding applied to all “waters” under the CWA, many commentators believed the opinion would have its greatest impact on wetlands conservation – as the regulation of wetlands, particularly those not adjacent to navigable waters, represents the farthest extension of CWA jurisdiction.  

Federal regulations define wetlands as “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.” Yet it is not a given parcel’s wetland characteristics, but its connection to waters of the United States that forms the basis for federal jurisdiction. As already noted, the CWA, by its terms, only extends to “waters of the United States.” The CWA extends federal jurisdiction beyond those waters traditionally used for navigation, but federal regulatory jurisdiction was still limited.

Application of SWANCC by lower federal courts as well as by regional Corps’ offices was quite inconsistent. Several circuits, including

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40 33 C.F.R. § 328.3(b) (2005).  
41 As the Supreme Court explained in SWANCC, “Congress intended the phrase ‘navigable waters’ to include ‘at least some waters that would not be deemed “navigable” under the classical understanding of that term.’” SWANCC, 531 U.S. 159, 171 (2001). Nonetheless, there is no “basis for reading the term ‘navigable waters’ out of the statute.” The term ‘navigable’ has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.” Id. at 171-172.  
the Fourth, 43 Sixth, 44 and Seventh, 45 read SWANCC narrowly – as urged by the EPA and Army Corps 46 – so as only to preclude federal regulation of isolated, intrastate, non-navigable waters. The Fifth Circuit, on the other hand, has read SWANCC more broadly to exclude waters that are neither navigable themselves nor adjacent to navigable waters, including wetlands, “puddles, sewers, roadside ditches and the like,” if such waters are not “truly adjacent to navigable waters.” 47

The federal government briefly considered revising its wetland regulations to account for the SWANCC decision. In January 2003, the Army Corps and the EPA issued an advance notice of proposed rulemaking to clarify the scope of regulatory jurisdiction under the CWA. 48 In December 2003, however, the Army Corps and the EPA announced they would not engage in a new rulemaking. As a result, variable interpretations and applications continued, creating substantial uncertainty as to the scope of federal regulatory jurisdiction under the CWA. 49 Despite the existence of nationally applicable regulations, similar

43 See United States v. Deaton, 332 F.3d 698 (4th Cir. 2003).
44 See United States v. Rapanos, 339 F.3d 447 (6th Cir. 2003).
45 See United States v. Rueth Dev. Co., 335 F.3d 598 (7th Cir. 2003).
47 See In re Needham, 354 F.3d 340, 345 (5th Cir. 2003); Rice v. Harken Exploration Co., 250 F.3d 264 (5th Cir. 2001). Although Needham and Rice specifically address the scope of federal regulation over “waters of the United States” under the Oil Pollution Act, both decisions note that federal jurisdiction under the OPA was intended to be coextensive with that under the Clean Water Act. Needham, 354 F.3d at 344; Rice, 250 F.3d at 267.
49 See, e.g., Wood, supra note 39, at 10,189 (noting SWANCC was “ambiguous” and courts have been “inconsistent” in their interpretations); Amended Statement of Patrick Parenteau, Professor of Law, Vermont Law School, before the House of Representatives Committee on Government Reform (Sept. 19, 2002), available at http://aswm.org/fwp/swancc/pp020919test.htm (“The decision has created substantial uncertainty regarding the geographic jurisdiction of the Clean Water Act.”); Association of State Wetland Managers & Association of State Floodplain Managers, Position Paper on Clean Water Act Jurisdiction Determinations Pursuant to the Supreme Court’s Jan. 9,
ecological conditions could produce different jurisdictional results in different parts of the country. This lack of uniformity, and the resulting circuit split, eventually led the Supreme Court to revisit the definition of “waters of the United States” in Rapanos.

II. RAPANOS AND CARABELL

Rapanos v. United States actually consisted of two cases out of the U.S. Court of Appeals for the Sixth Circuit that were consolidated by the Court: United States v. Rapanos and Carabell v. United States Army Corps of Engineers. In both cases, the petitioning landowners argued that their lands should not be subject to federal regulatory jurisdiction under the CWA. As applied to their lands, they argued, federal wetland regulations exceeded the scope of the CWA, and may even surpass the constitutional limits of the Commerce Clause.

The Carabells challenged an Army Corps decision denying them a permit to fill a small wetland on their property in Macomb County, Michigan. The Army Corps asserted jurisdiction over their property because it abuts a ditch that connects to a drain that empties into a creek which eventually connects to Lake St. Clair. The Carabells’ wetlands are hydrologically distinct from the ditch due to a man-made beam along the edge of the land, but the parcel is nonetheless “adjacent” to the ditch. According to the Army Corps, the close proximity of a ditch that eventually feeds into navigable waters is enough to make the Carabells’ land part of the “waters of the United States.”


50 376 F.3d 629 (6th Cir. 2004).
51 391 F.3d 704 (6th Cir. 2004).
52 Id. at 705-06.
53 Id. at 706.
54 Id. at 708.
55 Id. at 708-09.
John Rapanos may be a less sympathetic litigant, but the assertion of federal regulatory jurisdiction over his land was more ambitious than in the Carabell case. The wetlands at issue in Rapanos were over ten miles from the nearest navigable waterway. Nonetheless, the federal government maintained the lands were subject to federal regulation because water from the wetlands drained into a "man-made drain" that, in turn, drained into a creek that flowed into a navigable river. According to the federal government, this hydrological connection made the drain a "tributary" of navigable water so it could prosecute Mr. Rapanos for altering his land without a federal permit.

The Court failed to produce a majority opinion in Rapanos. Instead, the Court splintered 4-1-4. Five justices supported the judgment, vacating and remanding, the U.S. Court of Appeals for the Sixth Circuit's decisions upholding the Army Corps' assertion of regulatory jurisdiction, but could not reach full agreement on the rationale.

Four justices joined a plurality opinion authored by Justice Scalia reading the CWA quite narrowly. According to the plurality, federal jurisdiction over "waters of the United States" could only extend to "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 Act." Four justices joined a dissent that called for near-absolute deference to the Army Corps' construction of its own jurisdiction.

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56 It is undisputed that John Rapanos and his agents knowingly deposited fill material onto the relevant parcels without seeking to obtain a federal permit despite being informed of the existence of wetlands. Further, "Rapanos allegedly threatened to 'destroy'" an environmental consultant who concluded one of the parcels contained 48 to 58 acres of wetlands, and violated both state and federal cease-and-desist orders. Rapanos v. United States, 126 S.Ct. 2208, 2238-39 (2006) (Kennedy, J., concurring).

57 Id. at 2214 (Scalia, J., plurality).

58 Id. at 2219.

59 Id. Rapanos himself faced a sentence potentially exceeding five years in prison and hundreds of thousands of dollars in fines. Id. at 2215.

60 Justice Scalia's plurality opinion was joined by the Chief Justice and Justices Thomas and Alito. Id. at 2214. Justice Kennedy wrote an opinion concurring in the judgment. Id. at 2236. Justices Stevens, Souter, Breyer, and Ginsburg dissented. Id. at 2252.

61 Id. at 2215 (Scalia, J., plurality).

62 Id. at 2226.
jurisdiction under the CWA.\textsuperscript{63} The justice in the middle, Justice Kennedy, rejected the expansive interpretation of federal jurisdiction adopted by the federal government and endorsed by the Sixth Circuit, but also embraced a broader (and more ambiguous) interpretation of the CWA than that urged by the plurality.\textsuperscript{64} According to Justice Kennedy, neither the plurality nor the dissent adopted the jurisdictional test suggested by prior Supreme Court precedents.\textsuperscript{65}

The lack of a majority opinion in \textit{Rapanos} necessarily creates some uncertainty and ambiguity, but it does not deny the existence of a holding that is binding on lower courts and federal regulators. As explained in \textit{Marks v. United States},\textsuperscript{66} "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'"\textsuperscript{67} As the judgment of the Court was to vacate and remand the Sixth Circuit’s decisions in \textit{United States v. Rapanos}\textsuperscript{68} and \textit{Carabell v. U.S. Army Corps of Engineers},\textsuperscript{69} the concurring opinion of Justice Kennedy, and the grounds of agreement between Justice Kennedy and the plurality opinion authored by Justice Scalia, form the holding of the Court.

Under \textit{Rapanos}, "the Corps' jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in a traditional sense."\textsuperscript{70} As defined by Justice Kennedy, "to constitute "'navigable waters'' under the Act, a water or wetland must possess a 'significant nexus' to waters that are or were navigable in fact, or that could reasonably be so made."\textsuperscript{71} In this regard, the \textit{Rapanos} court largely followed the reasoning adopted by the Court in

\textsuperscript{63} Id. at 2252 (Stevens, J., dissenting).
\textsuperscript{64} Id. at 2236 (Kennedy, J., concurring).
\textsuperscript{65} Id. ("In the instant cases neither the plurality opinion nor the dissent by Justice Stevens chooses to apply" the applicable test).
\textsuperscript{66} 430 U.S. 188 (1977).
\textsuperscript{67} Id. at 193 (quoting Gregg v. Georgia, 428 U.S. 152, 169 n.15 (1976)).
\textsuperscript{68} 376 F.3d 629 (6th Cir. 2004).
\textsuperscript{69} 391 F.3d 704 (6th Cir. 2004).
\textsuperscript{70} \textit{Rapanos}, 126 S. Ct. at 2208, 2248 (Kennedy, J., concurring) (emphasis added); see also id. at 2241 ("Absent a significant nexus, jurisdiction under the Act is lacking.").
\textsuperscript{71} Id. at 2236.
SWANCC that "waters of the United States" only applies to those waters and wetlands that have a "significant nexus" to navigable waters.

Whereas the Sixth Circuit and federal regulators had maintained that any hydrological connection between a given wetland and navigable waters would be sufficient to assert federal regulatory jurisdiction, a majority of the Court rejected this view. A "mere hydrologic connection," by itself, is not enough to establish jurisdiction in all cases. The connection must be "significant." Justice Kennedy elaborated on what such a connection must entail:

wetlands possess the requisite nexus, and thus come within the statutory phrase "navigable waters," if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as "navigable." When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the term "navigable waters."

Whereas it is reasonable for the Corps to presume jurisdiction over wetlands adjacent to truly navigable waters – that is "waters that are or were navigable in fact, or that could reasonably be so made" – adjacency to a nonnavigable tributary will not, absent a greater ecological connection, establish jurisdiction.

Justice Kennedy also joined the plurality and rejected the dissent's willingness to defer to any conceivable regulatory interpretation of "waters of the United States," no matter how broad. As Kennedy noted, "the dissent would permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters. The deference owed

\[72\] Id. at 2251.
\[73\] See id. at 2236, 2241, 2248 (noting need for "significant" nexus).
\[74\] Id. at 2248 (emphasis added).
\[75\] Id. at 2236.
\[76\] Id. at 2252.
\[77\] Id. at 2247.
to the Corps’ interpretation of the statute does not extend so far.” Justice Kennedy observed that “the dissent reads a central requirement out — namely, the requirement that the word ‘navigable’ in ‘navigable waters’ be given some importance.” As Justice Kennedy and the plurality both made clear, “the word ‘navigable’ in the Act must be given some effect.”

The urgency or importance of some environmental concerns provides no justification for adopting a more expansive view of federal regulatory jurisdiction or adopting a more lenient approach to statutory interpretation. According to a majority of the Court, such policy considerations cannot trump the text of the statute itself. As Justice Kennedy noted, in explicit agreement with the plurality, “environmental concerns provide no reason to disregard limits in the statutory text.” This view contrasts with the dissent’s concern that limiting federal regulatory authority would portend environmental ruin.

As in the SWANCC decision, a majority of the Court adopted a narrow construction of the meaning of “waters of the United States” so as to ensure that the Clean Water Act did not exceed the scope of the Commerce Clause. As Justice Kennedy noted in his concurrence “[i]n SWANCC, by interpreting the Act to require a significant nexus with navigable waters, the Court avoided applications — those involving waters without a significant nexus — that appeared likely, as a category, to raise constitutional difficulties and federalism concerns.” Justice Kennedy’s Rapanos opinion did not reject this approach. To the contrary, he explained that this aspect of the SWANCC precedent limited the scope of federal jurisdiction sufficiently to prevent any jurisdictional problems. Wrote Kennedy, “as exemplified by SWANCC, the significant-nexus test itself prevents problematic applications of the statute.” This does not constitute a rejection of commerce clause arguments. To the contrary,

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78 Id. (emphasis added).
79 Id.
80 Id.
81 Id.
82 Id. at 2265 (Stevens, J., dissenting) (“By curtailing the Corps’ jurisdiction of more than 30 years, the plurality needlessly jeopardizes the quality of our waters.”).
83 Id. at 2246 (Kennedy, J., concurring).
84 Id. at 2250.
commerce clause concerns lie behind the interpretation adopted by the Court in *Rapanos* just as they did in *SWANCC*.

While there is some amount of agreement between Justice Kennedy’s concurrence and the dissenting justices, it would be wrong to view any part of Justice Stevens’ dissent as a “holding” of the Court. Nothing in the dissent constitutes a portion of the judgment of the Court, so nothing in the dissent is part of the actual holding of the case. As the Supreme Court noted in *Marks*, the holding of the Court is “that position taken by those Members who concurred in the judgments on the narrowest grounds.”

Moreover, Justice Kennedy’s concurring opinion explicitly rejected Justice Stevens’ near-limitless approach to federal jurisdiction, so the latter provides no useful guide for determining the CWA’s jurisdictional limits. One can speculate how the justices would line up in hypothetical future cases, and it is quite certain that the dissenting justices would uphold virtually any basis for jurisdiction accepted by a fifth justice, but that is distinct from suggesting that any part of the dissent constitutes a portion of the holding binding on federal agencies or lower courts.

III. *Rapanos* in the Lower Courts

*Rapanos* did not halt existing litigation over the scope of federal regulatory jurisdiction, nor did it ensure a uniform understanding of the CWA’s reach. Within months of the decision, after only a handful of lower courts were called upon to apply the *Rapanos* holding, divergent interpretations emerged.

The first case in which a federal appellate court applied *Rapanos* was *Northern California River Watch v. Healdsburg*. In *Healdsburg*, the Ninth Circuit upheld the Army Corps’ assertion of regulatory jurisdiction over “Basalt Pond,” a rock quarry alongside the Russian River in California. This outcome was not a surprise, as the pond was directly

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86 457 F.3d 1023 (9th Cir. 2006).
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adjacent to an indisputably navigable waterway. Nonetheless, the ruling rested on a misreading of Rapanos.

While the Ninth Circuit sought to follow Justice Kennedy’s opinion in upholding federal jurisdiction over the Basalt Pond it read his opinion too narrowly. The Basalt Pond is adjacent to a navigable water, the Russian River. Rather than base its conclusion on this fact, the court further explicated the ecological connections between the two waters, noting that “the district court made substantial findings of fact . . . that the adjacent wetland of Basalt Pond has a significant nexus to the Russian River” due to various physical, hydrological, and ecological connections.

This additional analysis was required, according to the Ninth Circuit, because “the mere adjacency of Basalt Pond and its wetlands to the Russian River is not sufficient for CWA protection.” Justice Kennedy’s concurring opinion in Rapanos may not be a paragon of clarity, but it says the opposite. Justice Kennedy’s opinion explains that the federal government can presume that wetlands adjacent to actual navigable waters have a “significant nexus” to such waters, and that additional evidence of an ecological connection is unnecessary for CWA jurisdiction. Specifically, “[a]s applied to wetlands adjacent to navigable-in-fact waters, the Corps’ conclusive standard for jurisdiction rests upon a reasonable inference of ecologic interconnection, and the assertion of jurisdiction for those wetlands is sustainable under the Act by showing adjacency alone.” This, Justice Kennedy noted, was “the holding of Riverside Bayview,” and he took pains to stress that he sought to base the Court’s holding on its prior precedents in Riverside Bayview and SWANCC. Only where wetlands are adjacent to non-navigable waters, as was the case for the wetlands at issue in the Carabell case, is additional evidence required. Thus, the Ninth Circuit reached the proper outcome in Healdsburg, but adopted an unduly narrow interpretation of Rapanos in the process.

87 Id. at 1026.
88 Id.
89 Id. at 1031.
90 Id. at 1030 (emphasis added).
91 Rapanos v. United States, 126 S. Ct. 2208, 2248 (Kennedy, J., concurring).
92 Id. at 2252 (noting mere adjacency to a tributary is not sufficient to establish jurisdiction).
Healdsburg is not the only interesting post-Rapanos decision. On June 28, 2006, the U.S. District Court for the Northern District of Texas held, in *United States v. Chevron Pipe Line Co.*, that Chevron Pipe Line was not liable for the discharge of oil into a nearby creek and stream bed that lacked a “significant nexus” to navigable waters of the United States. While acknowledging that *Rapanos* should control the outcome of the case, due to the ambiguities of Justice Kennedy’s controlling opinion, the district court largely relied on pre-*Rapanos* decisions within the Fifth Circuit for its holding:

Because Justice Kennedy failed to elaborate on the “significant nexus” required, this Court will look to the prior reasoning of this circuit. The Fifth Circuit has interpreted “the waters of the United States” narrowly. Without any clear direction on determining a significant nexus, this Court will “feel its way on a cases-by-case basis.” Thus, as a matter of law in this circuit, the connection of generally dry channels and creek beds will not suffice to create a “significant nexus” to a navigable water simply because one feeds into the next during the rare times of actual flow. Absent actual evidence that the site of the farthest traverse of the spill is *navigable-in-fact* or adjacent to an open body of navigable water, the Court finds that a “significant nexus” is not present under the law of this circuit.

As in *Healdsburg*, the specific result was defensible under *Rapanos*, though the reasoning was questionable. The district court did not misread Justice Kennedy’s opinion so much as it failed to apply the decision due to its lack of clarity. Rather than rely upon pre-*Rapanos* case law in isolation, the district court could have sought to harmonize those cases with *Rapanos*. This would not necessarily have altered the result, as the

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95 *Id.* at 615.
96 *Id.* at 613, 615 (citations omitted).
connection between the creek beds in question and any navigable-in-fact waters may have been too ephemeral and attenuated to satisfy the "significant nexus" requirement. Such an outcome, however, would have been more faithful to the lower court’s obligation to follow the Rapanos holding.

Not all lower courts have had as much trouble applying the Rapanos holding. The U.S. Court of Appeals for the Seventh Circuit, for example, appears to have adopted a proper reading of the decision in United States v. Gerke Excavating.97 Gerke Excavating had been fined for discharging pollutants into "waters of the United States" without a Clean Water Act permit.98 Gerke’s specific offense consisted of depositing fill material, in this case dredged stumps, roots, and sand, onto privately owned wetlands on a parcel near Tomah, Wisconsin, that it sought to develop.99 The wetlands in question, as described by the court, drain into "a ditch that runs into a nonnavigable creek that runs into the nonnavigable Lemonweir River, which in turn runs into the Wisconsin River, which is navigable."100

Gerke could not claim that the federal government sought to apply a novel interpretation of the CWA and applicable federal regulations. Instead, it argued that federal regulation of the land in question exceeded the scope of federal power under the Commerce Clause.101 Relying upon Gonzales v. Raich,102 Judge Richard Posner easily rejected Gerke’s claims in an opinion for a unanimous panel of the court.103 The Supreme Court accepted Gerke’s petition for certiorari, however, and then remanded the case for reconsideration in light of Rapanos.104

97 United States v. Gerke Excavating, Inc. (Gerke II), 464 F.3d 723 (7th Cir. 2006).
98 Gerke I, 412 F.3d 804, 805 (7th Cir. 2005).
99 Id.
100 Id.
101 Id. at 806.
102 545 U.S. 1 (2005).
103 Gerke I, 412 F.3d at 805.
On remand, the Seventh Circuit, in a per curiam opinion, explicated its understanding of the Court’s holding in Rapanos. Like the Ninth Circuit in Healdsburg, the Seventh Circuit relied upon Justice Kennedy’s concurring opinion. Unlike the Ninth Circuit, the Seventh correctly characterized Kennedy’s opinion:

The test he proposed is that "wetlands possess the requisite nexus, and thus come within the statutory phrase ‘navigable waters,’ if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’ When, in contrast, wetlands’ effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term ‘navigable waters.’"

Applying this test, the panel held, would require additional fact-finding, so it further remanded the case back to the district court.

Interestingly enough, the Gerke panel also picked up on the suggestion made in Justice Stevens’ Rapanos dissent that insofar as there are any waters or wetlands that would meet the jurisdictional test put forward by the plurality, but not that of Justice Kennedy, jurisdiction could be asserted nonetheless. Specifically, the panel observed, “[t]he plurality’s insistence that the issue of federal authority be governed by strict rules will on occasion align the Justices in the plurality with the

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105 Gerke II, 464 F.3d 723, 723-35 (7th Cir. 2006). This opinion was also likely written by Judge Posner, as it was published in a font typically used by Posner but not by other members of the court. See How Appealing, http://howappealing.law.com/092206.html#018005 (Sept. 22, 2006, 14:38 EST).
106 Gerke II, 464 F.3d at 724 (quoting Rapanos v. United States, 126 S. Ct. 2208, 2248 (2006)).
107 Id.
108 Rapanos, 126 S. Ct. at 2265 n.14 (Stevens, J., dissenting) (“I assume that Justice Kennedy’s approach will be controlling in most cases because it treats more of the Nation’s waters as within the Corps’ jurisdiction, but in the unlikely event that the plurality’s test is met but Justice Kennedy’s is not, courts should also uphold the Corps’ jurisdiction. In sum, in these and future cases the United States may elect to prove jurisdiction under either test.”).
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Rapanos dissenters when the balancing approach of Justice Kennedy favors the landowner.” The court further noted that this would be a “rare case,” and not in need of further explication in the instant case.

There are reasons to suspect this analysis may be overly solicitous of federal jurisdiction. While Justice Kennedy would certainly accept assertions of federal jurisdiction over many wetlands that the plurality opinion would place beyond the federal government’s reach, the set of parcels that would satisfy the plurality without satisfying Justice Kennedy is almost certainly a null set. According to the plurality, “relatively continuous flow is a necessary condition for qualification as a ‘water,’ not an adequate condition.” In other words, were there to be a wetland that is connected to a navigable water by a “relatively continuous flow” of water that is so inconsequential as to fail to satisfy Justice Kennedy’s requirement of a “significant nexus,” there is every reason to believe that it would fail to satisfy the plurality as well. At the very least, the plurality’s characterization of its own test as a necessary-but-not-sufficient basis for asserting jurisdiction should preclude any claim that Rapanos provides an 8-1 holding for the proposition that any “relatively continuous flow” will establish federal jurisdiction under the Clean Water Act.

Gerke Excavating will not be the last word on the meaning of Rapanos or the scope of “waters of the United States.” At the time of this article, additional cases are pending, and private landowners will continue to challenge aggressive assertions of federal jurisdiction. Moreover, courts may be asked to evaluate any regulations or guidance adopted by the federal government re-interpreting the scope of “waters of the United States” in light of Rapanos. Yet not all responses to Rapanos will be in the courts.

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109 Gerke II, 464 F.3d at 725.
110 Id. at 725.
111 Rapanos, 126 S. Ct. at 2223 n.7 (Scalia, J., plurality). See also id. at 2221 n.5 (“[W]e have no occasion in this litigation to decide exactly when the drying-up of a stream bed is continuous and frequent enough to disqualify the channel as a ‘wate[r] of the United States.’”).
112 There is the further problem with characterizing anything as a “holding” that is not part of the judgment under Marks.
IV. THE ROAD AHEAD

Not all responses to Rapanos will be in the courts. The federal government is in the process of generating a guidance document explaining how federal agencies should interpret the decision. It is possible that a notice-and-comment rulemaking and revised regulations will follow. In the meantime, agencies will seek to apply the decision on a case-by-case basis. State and local governments may respond as well, insofar as limits on federal jurisdiction create a need, or simply an opportunity, for greater environmental efforts at the state and local level.

One clear implication of the Court’s decision in Rapanos is that the current federal regulations used by the Army Corps of Engineers and Environmental Protection Agency to define the scope of the CWA are no longer valid. For instance, insofar as federal regulations purport to define “waters of the United States” to include intrastate waters “the use, degradation, or destruction of which could affect interstate commerce or foreign commerce,” and wetlands adjacent to such waters, they exceed the holdings of both SWANCC and Rapanos.

Courts owe substantial deference to the Army Corps and the EPA in their assessment of the ecological connections between types of wetlands and water systems and navigable waters. Yet those regulations currently on the books do not establish such a connection, and provide no assurance that those wetlands over which the Corps’ asserts jurisdiction in fact have a “significant nexus” to the waters of the United States. Until the Corps and the EPA promulgate regulations that identify those wetland characteristics that are sufficient to establish such a nexus, in at least the majority of cases, the Corps will be forced to “establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries.”

While Rapanos imposes limits on federal CWA jurisdiction, it nonetheless leaves federal regulators with substantial leeway in how to

113 Indeed, some of the Justices clearly expect new regulations to issue. See Rapanos, 126 S. Ct at 2266 (Breyer, J., dissenting) (“I believe that today’s opinions, taken together, call for the Army Corps of Engineers to write new regulations, and speedily so.”).
115 Id. § 328.3(a)(7).
116 Rapanos, 126 S. Ct. at 2249.
interpret “waters of the United States” in the future. Justice Kennedy’s concurring opinion calls upon the Army Corps and EPA to identify those ecological and other factors that could indicate that a given water or wetland has a “significant nexus” with navigable waters. Just as existing regulations presume that wetlands adjacent to navigable-in-fact waters have a “significant nexus” to such waters, Kennedy expects regulatory officials to identify other factors to serve as indicators of an ecological connection sufficient to establish jurisdiction.

Justice Scalia’s plurality opinion also offers federal regulators significant room to define the scope of “waters of the United States,” albeit not as much as would be provided by Justice Kennedy or the dissenting justices. Despite Justice Scalia’s focus on the text of the statute, his opinion avoids claiming that the precise scope of CWA jurisdiction is clear, and that no deference is due to the Corps of Engineers. To the contrary, while portions of the opinion appear to be offering an authoritative interpretation of the term “waters” in the CWA, that is not what the opinion actually does.

In administrative law terms, Scalia’s opinion rejects the Corps of Engineers’ interpretation at step two rather than step one of the familiar Chevron analysis.117 Indeed, Scalia quotes the language of step two – whether the agency has adopted a “permissible construction” of ambiguous statutory text in rejecting the Corps’ position rather than relying on the language of step one. His opinion explicitly notes that “‘waters of the United States’ is in some respects ambiguous,” and acknowledges that there is some “ambiguity” as to where land ends and water begins.118 All that is clear, according to the plurality, is that “[t]he Corps’ expansive interpretation of the waters of the United States’ is . . . not ‘based on a permissible construction of the statute.’”119 This reading of the plurality is reinforced by Chief Justice Roberts’ concurring opinion, which suggests that the statute is sufficiently ambiguous for the Army Corps of Engineers to “enjoy[] plenty of room to operate in developing some notion of an outer bound to the reach of their authority.”120 It also

118 Rapanos, 126 S. Ct. at 2226 (Scalia, J., plurality).
119 Id. at 2225.
120 Id. at 2236 (Roberts, C.J., concurring) (emphasis omitted).
suggests that the federal government would retain substantial ability to go back and define “waters of the United States” in fairly expansive terms, even if it could not rely upon a fifth vote from Justice Kennedy for a broad interpretation of the Act.\textsuperscript{121}

Just because the federal government retains substantial flexibility in defining the scope of “waters of the United States,” does not mean that this flexibility should be used to adopt the most expansive definition. In developing new implementing regulations, the federal government should not repeat the mistake of seeking to evade the judgment of the Supreme Court and assert the broadest possible interpretation of “waters of the United States” allowable under \textit{Rapanos}.\textsuperscript{122} Adopting a regulatory interpretation that is potentially at odds with \textit{Rapanos} and \textit{SWANCC} is not in the interest of the regulated community nor does it best serve the cause of wetland conservation. Refusing to abide by the letter and spirit of the Supreme Court’s decision is a recipe for further litigation and uncertainty as to the scope of federal regulations. It would also represent a missed opportunity to harmonize federal regulations with current law and the federal government’s particular conservation interests.

Federal regulatory resources are necessarily limited. For this reason, federal resources are best utilized if they are targeted at those areas where there is an identifiable \textit{federal} interest or the federal government is in a particularly good position to advance conservation goals.\textsuperscript{123} For example, there is an undeniable federal interest in regulating the filling or dredging of wetlands where such activities would cause or contribute to interstate pollution problems or compromise water quality in interstate waterways. Where the effects of wetland modification are more localized,

\textsuperscript{121} It is also worth noting that insofar as the plurality’s interpretation of “waters of the United States” was put forward in the absence of a permissible agency interpretation, the Army Corps would retain the ability to adopt an authoritative interpretation of the statutory language under \textit{National Cable & Telecommunications Ass’n. See Nat’l Cable & Telecomm. v. Brand X Internet Serv.}, 545 U.S. 967 (2005).

\textsuperscript{122} As Chief Justice Roberts noted in his concurring opinion, had the Army Corps completed a notice-and-comment rulemaking to develop new regulations responding to the Supreme Court’s \textit{SWANCC} decision, it may have avoided its “defeat” in \textit{Rapanos}. \textit{Rapanos}, 126 S. Ct. at 2236 (Roberts, C.J., concurring).

the federal interest is less clear. Not coincidentally, in the latter case, the basis for federal jurisdiction is also more attenuated.

Limiting federal regulatory authority would create room for the expansion of state and local regulatory efforts. Over-expansive assertions of federal regulatory authority may preclude, discourage, or otherwise inhibit state and local governments from adopting environmental protections where state efforts would be worthwhile. Contrary to common perceptions, state wetland regulation preceded federal regulatory efforts. Indeed, the first state wetland conservation statutes were adopted more than a decade before the Army Corps and EPA began regulating the dredging and filling of wetlands. Since then, many states have stayed well ahead of the federal government, adopting more innovative or protective wetland conservation programs. By developing jurisdictional regulations that establish a "significant nexus," in part, by focusing on those instances in which there is a particular federal interest, the Army Corps and EPA can maximize wetland conservation by complementing and supplementing, rather than supplanting, state efforts.

In the wake of the SWANCC decision, at least 19 states considered or adopted additional protections for isolated waters. Ohio, for example, adopted an "emergency measure" to protect isolated wetlands in July 2001. Wisconsin, Indiana, North Carolina, and South Carolina are among those states that took action in response to the SWANCC decision. The fate of the site at issue in SWANCC is also instructive.

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Once it became clear that the federal government did not have the authority to prevent the construction of a balefill on the site, local government agencies that had previously supported the project acted quickly to stop the project and conserve the land at issue.129

Those states that did not enact protections for isolated wetlands after SWANCC failed to act for one of several reasons. First, some states already had statutory or regulatory protections for isolated wetlands in place. Among the states that the Association of State Wetland Managers reports have comprehensive wetland protection programs are: Connecticut, Florida, Maine, Maryland, Massachusetts, Michigan, Minnesota, Michigan, New Hampshire, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Virginia.130 Including those states that acted in response to SWANCC, over 20 states now provide some protection for the sort of isolated freshwater wetlands most affected by the SWANCC decision.

Some states were likely discouraged from acting due to the tremendous uncertainty about the extent to which state action was necessary after SWANCC, including conflicting agency applications and an interpretive split in the lower courts. This sort of uncertainty discourages states from acting insofar as it is less clear what the benefits of additional state action will be.131 Moreover, as noted above, a federal regulatory presence can discourage states from acting on their own.

Numerous states filed amicus briefs in Rapanos arguing against the imposition of any limitation on federal jurisdiction over wetlands,132 but this does not mean states would not regulate if given the opportunity. State governments have always preferred for the federal government to pay for and provide services and programs that states are fully capable of providing. Therefore, the amicus briefs illustrate nothing other than states

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130 See Kusler, supra note 128, at 14.
131 See Adler, supra note 124.
132 Rapanos v. United States, 126 S. Ct. 2208, 2246 (Kennedy, J., concurring).
would like for the federal government to devote its resources to protect ecological values that are important in these states. That state governments would prefer federal regulation — thereby avoiding having to dedicate their own resources to such programs (as well as avoiding having to take responsibility and be accountable for the consequences of any public disapproval with the implementation of the program) — says nothing about the extent to which states are able and willing to adopt programs of their own.\footnote{3}

Apart from any actions taken by states to fill gaps in federal regulation left by \textit{Rapanos}, there is concern about the implication of the opinion on water pollution control efforts, such as the National Pollution Discharge Elimination System ("NPDES").\footnote{3} Yet the reduction of jurisdiction to regulate wetlands does not necessarily impose equivalent limits on the NPDES program. As the Scalia plurality opinion noted, the Clean Water Act prohibits \textit{any} unpermitted discharge of a pollutant into "waters of the United States." The discharge need not be direct. Further, Justice Scalia wrote, "from the time of the CWA's enactment, lower courts have held that the discharge into intermittent channels of any pollutant that naturally washes downstream likely violates § 1311(a), even if the pollutants discharged from a point source do not emit 'directly into' covered waters, but pass 'through conveyances' in between."\footnote{3} In other words, actions that cause the pollution of waters and wetlands that are beyond the scope of the Clean Water Act could nonetheless be subject to the act if they result in such discharges into waters of the United States. In this way, narrowing the Act's jurisdiction does not have as great an impact on the NPDES program as it does upon Section 404.

It is also important not to lose sight of the fact that federal regulation under the CWA is not the only means for advancing wetland conservation and water pollution control. Indeed, the experience of federal

\footnote{3} See also id. at 2224 n.8 (Scalia, J., plurality) ("[I]t makes no difference to the statute’s stated purpose of preserving States’ ‘rights and responsibilities’ ... that some States with to unburden themselves of them. Legislative and executive officers of the States may be content to leave ‘responsibility[y]’ with the Corps because it is attractive to shift to another entity controversial decisions disputed between politically powerful, rival interests.").


\footnote{3} \textit{Rapanos}, 126 S. Ct. at 2227 (Scalia, J., plurality) (emphasis omitted).
conservation programs that rely upon incentives and cooperation with private landowners compares quite favorably with the conflicts and inconsistencies of federal wetland regulations. Federal support for the protection of waterfowl habitat dates back many decades to the sale of "duck stamps" to bird hunters. This program created a dedicated source of revenue for conservation of an estimated 4.5 million acres of waterfowl habitat. Other programs under which the federal government enters into private agreements with landowners to restore wetlands on their property, while subsidizing the cost of restoration and the purchase of a permanent or multi-year easement to ensure that the wetland is protected, are particularly cost-effective when compared to mandated mitigation under the CWA. Such programs are also not confined by the jurisdictional limits of the CWA, nor do they generate the litigation and conflict of federal controls on private land-use decisions.

Insofar as some types of wetlands, such as prairie potholes, may be particularly likely to lie beyond the scope of federal regulation, incentive programs remain a viable conservation option. Indeed, enlisting private landowners and conservation organizations through incentive programs has conserved hundreds of thousands of acres of wetlands and was the driving force behind the attainment of "no net loss" of wetlands during the 1990s. There is no reason why this cannot continue, despite the limitations on federal regulatory jurisdiction. It would be a tragedy to place an inordinate focus on maximizing regulatory jurisdiction at the expense of providing sufficient support for alternative means of encouraging wetland conservation.

These programs are a very cost-effective and efficient means of conserving and restoring wetlands and other ecologically valuable lands. One reason these programs are so effective is that they enlist private landowners as partners in conservation, and encourage environmental stewardship on private land. By contrast, regulatory proscriptions of private land use engender hostility and resentment, and often discourage

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136 See Adler, supra note 125, at 54-66.
138 These programs are summarized in Adler, supra note 125, at 56-59.
139 Adler, supra note 125, at 56-57.
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private landowners from cooperating in conservation efforts. Another reason these programs are particularly effective is because they are targeted upon the maintenance and protection of particular ecosystem services, such as the provision of waterfowl habitat. The Section 404 program, on the other hand, is not targeted on the protection of particular ecosystem services. To the contrary, many regulatory decisions under section 404 are made without any meaningful consideration of the ecological impacts.

The federal government is not the only entity engaged in wetland conservation, let alone environmental protection more broadly. State and local governments have been active in wetlands protection for longer than the Army Corps and the EPA. Indeed, some states began wetland conservation before the EPA even existed.

CONCLUSION

By some accounts, Rapanos v. United States threatened to eviscerate federal wetland protection efforts. An article in Scientific American, "The End of the Everglades?," proclaimed that the case "jeopardize[d] 90 percent of U.S. wetland[s]." As a consequence, the Rapanos decision would "probably eclipse [the] importance" of current controversies such as domestic surveillance and the detention of enemy combatants.

This presentation of the stakes in Rapanos, like those of many activist groups on either side of the case, was exceedingly hyperbolic.


143 Id.
John Rapanos certainly put a very ambitious argument before the Court, arguing that federal jurisdiction extended no farther than truly navigable waters and their adjacent wetlands. Had the Court accepted this argument, it is conceivable that the vast majority of wetlands and other waters in the United States would no longer have been subject to the CWA. But this was never a plausible outcome in the case — and, in the end, not a single justice endorsed this theory.

Alarmist accounts are further misleading insofar as they equate the reduction of federal regulatory jurisdiction under the CWA with a reduction in environmental protection. Yet CWA regulation is not the only means employed by the federal government to conserve wetlands and other environmental resources, and the federal government is not the only source of environmental protection.

Whether Rapanos results in an erosion of environmental protection will be a function of how various institutions and entities respond. On the one hand, the decision limits the federal government’s statutory (if not constitutional) authority to regulate land-use and potentially polluting activities under the CWA. On the other, it may spur state and local governments to enhance their conservation efforts and induce policymakers at all levels of government to pursue more non-regulatory conservation strategies. If the latter course is adopted, Rapanos may well have a salutary effect on the protection of private rights to control land and environmental protection alike.

144 Rapanos, 126 S. Ct. at 2220 (Scalia, J., plurality).