

Jurisdictional Determinations and Judicial Scrutiny

Michael Riggins*

In the past two decades, the Supreme Court has significantly reduced the deference given to the “Jurisdictional Determinations” made by the Army Corps of Engineers under section 404 of the Clean Water Act. Previous to the Court’s holding in Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, the Court had continuously upheld the Corps’ interpretation of section 404’s jurisdictional reach. From Solid Waste Agency onwards, however, the Court has continuously raised the level of scrutiny applied to the Corps’ jurisdictional rules under section 404. This Note explores how the Supreme Court’s scrutiny of the Corps’ Jurisdictional Determinations has evolved, starting with the Court’s relatively lax approach in United States v. Riverside Bayview Homes and followed by the Court’s gradual heightening of scrutiny through Solid Waste Agency, Rapanos v. United States, and Hawkes v. Army Corps of Engineers. This Note then examines how the conservative thrust of this evolution, which limits the Corps’ regulatory authority, has undermined the environmental mission that Congress designed in the Clean Water Act.

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INTRODUCTION

*The Clean Water Act is unique in . . . being quite vague in its reach, arguably unconstitutionally vague.*¹

Justice Kennedy, long considered to have been the Supreme Court’s moderate center,² made this remark during oral argument in a case concerning the Clean Water Act’s (CWA) jurisdictional reach.³ The breadth of the CWA’s jurisdiction has increasingly been a source of legal controversy, and the Supreme Court has weighed in repeatedly on this issue.⁴ The Court’s attention has often fallen on section 404 of the CWA; that section gives the Army Corps of Engineers (the Corps) the power to determine whether particular bodies of water are subject to regulation under the Act.⁵ In large part, the controversy over

1. *Oral Argument, Army Corps of Engineers v. Hawkes Co.* (2016), <https://www.oyez.org/cases/2015/15-290> (at 19:09) [hereinafter *Hawkes Oral Argument*].

2. Alicia Parlapiano & Jugal K. Patel, *With Kennedy’s Retirement, the Supreme Court Loses Its Center*, N.Y. TIMES, June 27, 2018, at A22.

3. *Hawkes Oral Argument*, *supra* note 1. The phrase “Clean Water Act” is a popular catch-all for several pieces of environmental legislation that deal with water protection. This includes the Federal Water Pollution Control Act of 1948, which was completely rewritten by Congress under the Federal Water Pollution Control Act Amendments of 1972. Following this, Congress made major amendments to the CWA in both the Clean Water Act of 1977 and the Water Quality Act of 1987. This Note refers exclusively to the Clean Water Act of 1972 and its amendments. For more information, see SUMMARY OF THE CLEAN WATER ACT, EPA (last visited Sept. 26, 2018), <https://www.epa.gov/laws-regulations/summary-clean-water-act>.

4. See Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning the Determination of the Geographic Jurisdiction of the Section 404 Program Under Section 404(f) of the Clean Water Act (Jan. 19, 1989) [hereinafter *Memorandum of Agreement*].

5. This authority is based on a memorandum of understanding between the Corps and EPA. See *infra* note 28.

section 404 relates to the Corps' expansive view of the CWA's jurisdictional boundaries.

The preamble of the CWA states that the Act's purpose is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."⁶ Given the complex and interconnected nature of hydrological systems,⁷ restoring the "biological integrity of the Nation's Waters" requires a comprehensive regulatory approach to much of the nation's water resources. In order to effectuate the mandate of the CWA, the Corps developed the "jurisdictional determination" (JD) process to determine whether a particular water resource falls under the regulatory embrace of the CWA's water-protection mission. In the JD process, property owners voluntarily ask the Corps to determine if water resources on their property are subject to section 404 regulations.⁸ If the Corps finds that the property contains "waters of the United States," then the property owners must obtain a section 404 permit before any dredging or filling activity can take place on the property.⁹ Thus, the JD process is an essential part of the Corps' interpretation of section 404's jurisdictional reach.

Prior to the Supreme Court's recent interventions into the CWA's jurisdiction, the Corps utilized broad jurisdictional rules. These rules were designed both to honor the CWA's expansive environmental mission and make the jurisdictional boundaries of the CWA clear.¹⁰ Recent Supreme Court decisions, however, reversed those rules and instituted a more unstable, case-by-case analytical approach.¹¹ In particular, the fractured opinions starting from *Rapanos v. United States* reversed decades of judicial deference to the technical determinations that underpinned the JD process.¹² Under Justice Kennedy's

6. 33 U.S.C. § 1251 (2012).

7. See Craig Anthony Arnold, *Clean-Water Land Use: Connecting Scale and Function*, 23 PACE ENVTL. L. REV. 291, 313 (2006) (noting that "[d]espite common reference to the need to manage land use at the watershed level, the precise geographic level to which these proposals refer often is either unclear or an artificial selection more for administrative convenience than for ecological significance. In fact, hydrologic units of land exist in the natural world in 'nested' form and have varying scales of significance.").

8. See *infra*, Part II.

9. 40 C.F.R. § 232.2 (2019). "Dredging" means any excavation of the waters of the United States. *Id.* The Corps and EPA regard the use of mechanized earth moving equipment to conduct land-clearing, ditching, channelization, in-stream mining, or other earth-moving activity in waters of the United States as resulting in a discharge of dredged material. *Id.* "Filling" means the deposition of any material into the waters of the United States. *Id.* Under 40 C.F.R. § 232.2(2), these materials include: "rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure in the waters of the United States." *Id.*

10. This was not always voluntary, however. In *Natural Resources Defense Council, Inc. v. Callaway*, the District Court of D.C. ordered the Corps to issue new regulations broadening the meaning of "navigable waters" to match the broader water quality purposes of the CWA. 392 F. Supp. 685, 685 (D.D.C. 1975).

11. See, e.g., *Rapanos v. United States*, 547 U.S. 715 (2006); *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807 (2016).

12. *Rapanos*, 547 U.S. at 767 (Kennedy, J., concurring).

concurring opinion, which most courts have followed, the Corps must determine if wetlands adjacent to navigable waters have a “significant nexus” with those navigable waters.¹³ This decision forced the Corps to abandon its longstanding rule, which had automatically held that adjacent wetlands were subject to the CWA’s jurisdiction.¹⁴ Additionally, Justice Kennedy’s explanation of the “significant nexus” provided courts and the Corps with little guidance as to what qualifies as a significant nexus.¹⁵ The Corps’ old rule provided clarity for property owners—if their property contained wetlands adjacent to navigable waters (or their tributaries), they knew they were subject to the CWA’s provisions.¹⁶ Justice Kennedy’s “significant nexus” test now requires property owners to go through the JD process, in turn forcing the Corps to expend more resources to make these individual determinations.

Following *Rapanos*, the Court increased judicial scrutiny of the Corps’ jurisdictional processes once again in *Hawkes v. Army Corps of Engineers*.¹⁷ Prior to *Hawkes*, property owners were unable to sue over a JD with which they disagreed.¹⁸ In *Hawkes*, the Court held that JDs constitute “final agency action,” which, under the Administrative Procedure Act, allowed property owners to sue the Corps over JDs.¹⁹ After *Hawkes*, the Corps faces the prospect that each JD could be challenged in federal court, exposing the Corps’ technical determinations to judicial scrutiny. This is the final note in a rising crescendo of judicial scrutiny over section 404’s jurisdiction; altogether, these cases represent the significant reduction of deference given to the Corps’ jurisdictional rules under section 404.

This Note argues that the Court’s heightened judicial scrutiny undermines the JD process, which in turn undermines the Corps’ congressionally mandated environmental mission under the CWA. In the environmental context, the technical decisions made by federal agencies reflect complex determinations that attempt to account for ever-shifting environmental conditions.²⁰ Given ecosystems’ inherent changeability, environmental regulations that adopt a static view of nature will likely fail to uphold protective and preservationist goals of environmental legislation such as the CWA. Indeed, to “restore and maintain the

13. *Id.* at 765.

14. *Id.* at 792–93, (Stevens, J., dissenting).

15. *See id.* at 808–09. *See also* Kenneth S. Gould, *Drowning in Wetlands Jurisdictional Determination Process: Implementation of Rapanos v. United States*, 30 U. ARK. LITTLE ROCK L. REV. 413, 413 (2008).

16. *See Rapanos*, 547 U.S. at 809 (noting that developers who wish to fill wetlands will have no way of knowing whether they need a permit or not).

17. *See* 136 S. Ct. 1807 (2016).

18. *See id.* at 1813 (noting that the district court dismissed the case because it was not considered a “final agency action” subject to judicial review).

19. *Id.* at 1813.

20. *See* Julia M. Wondolleck & Steven L. Yaffee, MAKING COLLABORATION WORK: LESSONS FROM INNOVATION IN NATURAL RESOURCE MANAGEMENT 15–16 (2000); *see also* J.B. Ruhl, *Complexity Theory as a Paradigm for the Dynamical Law-and-Society System: A Wake-Up Call for Legal Reductionism and the Modern Administrative State*, 45 DUKE L.J. 849, 849 (1996).

chemical, physical, and biological integrity of the Nation’s waters,” agencies like the Corps should be given deference to fashion rules that reflect these ambitious environmental goals.²¹

Part I of this Note reviews the JD process itself, with explanation of how the process is currently administered by the Corps. Part II discusses how the Supreme Court gradually reduced deference to the Corps’ decision-making processes. Finally, Part III discusses how this heightened judicial scrutiny of the Corps’ decisions curtails the environmental mission of the CWA.

I. JURISDICTIONAL DETERMINATIONS IN OPERATION

The Corps uses JDs to determine whether particular water resources are subject to regulation under section 404 of the CWA. Section 404 regulates the discharges associated with dredge and fill activities into the “navigable waters”²² of the United States.²³ Through the CWA, Congress dramatically expanded the scope of “navigable waters” from its historical meaning as waterways necessary for commercial navigation in order to service a broad range of environmental goals.²⁴ Due to this expansion, the definition of “navigable waters” has come to include waters that are not navigable in fact, but whose regulation is required to uphold section 404’s permitting scheme.²⁵ Thus, some non-navigable water resources, on account of their connection to navigable waters, may be deemed “waters of the United States,” which are subject to regulation under the CWA.²⁶ For example, tributaries that feed into navigable waters may be too shallow to realistically meet the definition of “navigable” waters; these tributaries, however, directly affect the health of navigable waterways. In order to uphold congressional intent behind the CWA to protect and preserve the nation’s waters, the Corps must decide whether these waters are subject to the CWA’s jurisdiction. This determination is made through the JD process.²⁷

Under a Memorandum of Agreement (MOA) between the Corps and the Environmental Protection Agency (EPA), the Corps has the authority to

21. See 33 U.S.C. § 1251 (2012).

22. There is significant debate over the terms “navigable waters” and “waters of the United States,” as can be seen in the recent drama over the Obama-era CWA rulemaking. See *Waters of the United States (WOTUS) Rulemaking*, EPA (Apr. 24, 2019), <https://www.epa.gov/wotus-rule>. The term “navigable waters” appears in federal water regulations as early as 1899, when President McKinley signed the Rivers and Harbors Appropriation Act. Gary E. Parish & J. Michael Morgan, *History, Practice and Emerging Problems of Wetlands Regulation: Reconsidering Section 404 of the Clean Water Act*, 17 LAND & WATER L. REV. 43, 44 (1982). Under that Act, the major goal of the permitting scheme for navigable waters was to ensure that waterways were cleared for shipping traffic. *Id.*

23. 33 U.S.C. § 1344(a) (2012) (“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”).

24. See generally *id.* (providing a new definition of “navigable waters”). See also Parish & Morgan, *supra* note 22, at 44.

25. Parish & Morgan, *supra* note 22, at 45.

26. See *id.* at 48.

27. See *id.* at 56.

determine the “geographic jurisdictional scope” of section 404 waters of the United States.²⁸ The Corps has used the JD process to determine whether or not proposed infill of water resources on private property is subject to the section 404 permitting regime. As the process is voluntary, property owners are not required to seek out a JD from the Corps; property owners with water resources on their land may directly apply for a section 404 permit or they can use the JD process to determine if such a permit is necessary.²⁹ Thus, the JD process is a valuable tool for property owners who wish to avoid the expense and limitations that may result from a section 404 permit.

As a service to the public, the Corps has designed the JD process to provide various levels of assistance; importantly, property owners may choose between applying for an “approved” JD or a “preliminary” JD. The different types of JDs and their legal effects are described in the subpart below, followed by a brief explanation of the Corps’ reasons for utilizing the voluntary JD process.

A. *Approved JDs*

Approved JDs (AJDs) provide property owners with a legally enforceable determination as to whether or not their property is subject to section 404 of the CWA. The Corps defines AJDs as: “[a] definitive, official determination that there are, or that there are not, jurisdictional aquatic resources on a parcel and the identification of the geographic limits of jurisdictional aquatic resources on a parcel.”³⁰ If the Corps issues an AJD stating there are waters of the United States on a piece of property, then the property owner must apply for a section 404 permit before dredging or filling wetlands and other water resources.³¹ If, however, the AJD finds no jurisdictional waters on the property, the owner is free to pursue development without obtaining a section 404 permit.³² Finalized AJDs remain in force for five years, provided there are no major changes in the

28. See Memorandum of Agreement, *supra* note 4.

29. See U.S. Army Corps of Engineers, Regulatory Guidance Letter: No. 08-02, 1 (June 2008), <https://usace.contentdm.oclc.org/digital/collection/p16021coll9/id/1265> (*superseded by* Regulatory Guidance Letter 16-01) [hereinafter RGL 08-02] (“The Corps will provide . . . an approved JD to any landowner, permit applicant, or other ‘affected party’ when: (1) a landowner, permit applicant, or other ‘affected party’ requests an approved JD by name or otherwise requests an official jurisdictional determination, whether or not it is referred to as an ‘approved JD’”).

30. U.S. Army Corps of Engineers, Regulatory Guidance Letter: No. 16-01, 2 (Oct. 2016), <https://usace.contentdm.oclc.org/utills/getfile/collection/p16021coll9/id/1256> [hereinafter RGL 16-01].

31. See 40 C.F.R. § 232.3 (2019). There are some categorical exclusions within the CWA that allow for dredging and filling without filing for a permit. Under 40 C.F.R. § 232.2(2), the discharge of dredged materials does not include “[d]ischarges of pollutants into waters of the United States resulting from the onshore subsequent processing of dredged material that is extracted for any commercial use (other than fill).” *Id.* Additionally, § 232.2(3) exempts discharges associated with “normal farming, silviculture, and ranching activities” from section 404 regulation. *Id.*

32. Depending on the landowner’s development plans, other sections of the CWA may apply. Additionally, landowners must still comply with other federal, state, and local environmental regulations.

water resources on the property.³³ For landowners who wish to avoid the costs and limitations of the permitting process, AJDs are thus a valuable tool.³⁴

Property owners request AJDs at their discretion—they are not required to seek an AJD by law. AJDs, however, provide property owners with a definitive legal answer as to whether or not they need a permit before developing their water resources, thus making it likely that most property owners would apply for an AJD before investing in obtaining a permit or pursuing development.³⁵ Recently, the Supreme Court held that the Corps' findings in an AJD can serve as the basis for a lawsuit, allowing property owners to challenge an AJD in federal court.³⁶ In order to bring such a suit, the property owners must first go through the agency's internal appeals process.

The JD process has a two-step appeals process that is administered within the agency. Even before the Supreme Court's recent decision to allow property owners to sue over AJDs, the Corps' regulations specified that property owners could use this multi-step appeals process to contest AJDs with which they disagreed.³⁷ Property owners may begin the appeals process only after they have received a finalized AJD from the Corps. Once a property owner has received the final AJD, they may submit a "Request for Appeal" (RFA) to the district engineer who approved their AJD.³⁸ The district engineer can respond to the RFA in one of two ways: issuing a new AJD, or reaffirming the old AJD.³⁹ If the district engineer reaffirms the initial AJD, property owners can ask for another appeal, this time from the division engineer.⁴⁰ The division engineer can either uphold the work of the district engineer, or they can remand the JD back down to the district engineer for further consideration.⁴¹ If the division engineer affirms the old JD, the litigant will have exhausted the Corps' administrative

33. RGL 16-01, *supra* note 30, at 2–3 ("An AJD . . . will remain valid for a period of five years (subject to certain limited exceptions explained in RGL 05-02)").

34. As Justice Scalia noted in *Rapanos v. United States*, "The average applicant for [a section 404 permit] spends 788 days and \$271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and \$28,915—not counting costs of mitigation or design changes." 547 U.S. at 721.

35. Property owners who build without first consulting the Corps face the prospect of the CWA's impressive enforcement mechanism: fines. Under the CWA, if a person "knowingly" or "negligently" discharges into the waters of the United States, they may face fines that range from \$2,500 to \$100,000 *per day*. 33 U.S.C. § 1319 (1)–(2) (2012). They may also face between one and three years in prison. *Id.*

36. *Hawkes*, 136 S. Ct. at 1813. There are two possible sets of litigants who might sue under *Hawkes*: first, there are property owners who want to overturn positive AJDs; second, there are environmental groups who may want to challenge a negative AJD as part of an impact litigation strategy. Under *Hawkes*, both of these groups have the right to sue in federal court. *See id.* at 1814. Before seeking review in federal court, however, property owners must exhaust their options within the agency's appeals process. *See, e.g., Reiter v. Cooper*, 507 U.S. 258, 258 (1993).

37. RGL 08-02, *supra* note 29, at 2 (2016).

38. 33 C.F.R. § 331.6(a).

39. *Id.* § 331.6(c).

40. *See id.* § 331.10.

41. *Id.* § 331.10(b).

processes, and they may proceed to federal court to continue to challenge the AJD.⁴²

B. The Corps Believes the JD Process Is a Public Good

The JD process is a service provided voluntarily by the Corps for the public—there is no statutory requirement that compels the Corps to issue JDs.⁴³ As shown above, the JD process requires a great deal from both the Corps and from property owners. Indeed, the recent trend of judicial scrutiny in the Supreme Court has made the JD process ever more resource-intensive; after a series of recent decisions by the Court, the Corps must justify each permit with an individual examination, and property owners may now sue over JDs they dislike.⁴⁴ Meanwhile, these judicial mandates have not resulted in a raise in the Corps' regulatory budget—from 2011 until 2018, the Corps has been allocated between \$196 and \$205 million per year to carry out its regulatory responsibilities.⁴⁵ Why, in the face of this mounting judicial scrutiny, has the Corps continued this entirely voluntary program?

The Corps' stated answer is that JDs are a public service. In a "Regulatory Guidance Letter" the Corps briefly explained their thoughts on the purpose of the JD process: "[t]he Corps recognizes the value of JDs to the public and reaffirms the Corps commitment to continue its practice of providing JDs when requested to do so."⁴⁶ While the letter does not go on to explain the exact "value" of JDs, it does hint at it when it notes: "In [*Hawkes*] . . . several members of the Court highlighted that the availability of AJDs is important for fostering predictability for landowners."⁴⁷ Thus, it is likely that the Corps sees JDs as way to make the CWA more workable for the public.

The CWA is a complex piece of legislation, and the Corps likely views the JD process as a method through which it can provide property owners some assistance with their regulatory burdens. As the JD process is entirely voluntary, the Corps could simply stop offering JDs as a separate service distinct from the section 404 permitting process.⁴⁸ Instead, as the Corps' stated in its regulatory

42. *Id.* § 331.12.

43. While the JD process may not be statutorily required, the Corps can only exercise its authority where it has jurisdiction. Thus, even if the Corps did not provide the public with the JD process, the Corps would still be required to prove that the water resources it regulates are within the jurisdictional bounds of the CWA.

44. See *Rapanos*, 547 U.S. at 809 (Stevens, J., dissenting); *Hawkes*, 136 S. Ct. at 1813. See also *infra* Part III.

45. U.S. Army Corps of Engineers, "News Releases" (Last visited Oct. 2, 2018), <https://www.usace.army.mil/Media/News-Releases/>.

46. RGL 16-01, *supra* note 30, at 1.

47. *Id.*

48. In *Hawkes*, the Supreme Court made this exact point: "as the Corps acknowledges, the Clean Water Act makes no reference to standalone jurisdictional determinations." *Hawkes*, 136 S. Ct. at 1816.

guidance letter, even the prospect of future litigation has not yet shaken the Corps' dedication to the JD process.⁴⁹

A more strategic reading of the Corps' support for JDs is that the Corps relies on JDs as a shield against public and congressional criticism. When the Corps faces criticism over its enforcement of the CWA, it can use the JD process defensively to show that it is attempting to avoid regulatory overreach. For example, the JD process was strategically employed by the Corps' representative during Senate hearings on the Waters of the United States (WOTUS) rulemaking process.⁵⁰ During these hearings, congressional discontent with the WOTUS rulemaking spilled over into general discontent with the CWA.⁵¹ During a line of questioning between Senator Inhofe and the Assistant Secretary of the Army, Jo-Ellen Darcy, the senator questioned the proposed WOTUS rule's assertion of jurisdiction over land within 4,000 feet of a body water.⁵² Secretary Darcy, in response, carefully used the JD process as a shield for the Corps' jurisdictional reach:

Senator Inhofe: . . . 100 percent of the land in Virginia is within 4,000 feet of a body of water. 95 [percent] of the land in Oklahoma is within 4,000 feet of a body of water. So, all waters in Virginia and most in Oklahoma are potentially regulated . . . ?

Secretary Darcy: Citizens can ask the Corps to complete a jurisdictional determination of a property. Maps of jurisdictional waters are developed by the Corps when a landowner requests a jurisdictional determination. The jurisdictional analysis, including any maps that are developed, are based on site-specific information at the time the request is made.⁵³

Later in the same hearing, when asked about the total acreages for potential "waters of the United States," Secretary Darcy explained that "[t]he Corps provides site-specific, approved jurisdictional determinations to determine whether there are or are not waters of the U.S. present in a specific review area, generally only at the request of a landowner."⁵⁴ In each of these exchanges, Senator Inhofe challenged the Corps' jurisdictional decision-making process.⁵⁵ Each time, Secretary Darcy was able to refer back to the JD process as an effective shield for the Corps' assertions of jurisdiction.⁵⁶ In response to Senator Inhofe's demands, Secretary Darcy replied that she could not answer because such determinations are made on a case-by-case basis, rather than as a general

49. See RGL 16-01, *supra* note 30, at 1 (noting the Corps' commitment to providing AJDs).

50. *Oversight of the Army Corps of Engineers' Participation in the Development of the New Regulatory Definition of "Waters of the United States."* Hearing before the Subcomm. on Fisheries, Water, and Wildlife, 114th Cong. 111-34 (2015).

51. Only Republican senators were in attendance during these hearings. *See id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *See id.*

56. *See id.*

rule.⁵⁷ It is not that the Corps cannot determine what bodies of water are subject to the CWA; instead, the Corps readily undergoes an extensive and technical review when an individual landowner requests it.⁵⁸ This exchange demonstrates how the Corps can operationalize the JD process as a shield against regulatory-averse members of Congress.

Finally, the JD process may also serve as a protective measure against the Supreme Court, where some justices have recently begun to question the CWA's constitutionality.⁵⁹ Indeed, Justice Kennedy has directly cited the AJD process as an essential part of the CWA's broader legality: "The [CWA], especially without the JD procedure were the Government permitted to foreclose it, continues to raise troubling questions regarding the Government's power to cast doubt on the full use and enjoyment of private property throughout the Nation."⁶⁰ Thus, the Corps likely views the JD process as more than an attempt to determine the jurisdiction of the CWA—without it, both congressional and judicial critics of the CWA might be able to argue that the statute allows the government to arbitrarily subject private land to federal jurisdiction. The ever-increasing judicial scrutiny of the Corps' jurisdictional decisions likely played no small role in the Corps' decision to continue to facilitate the JD process. The following Part examines how the Supreme Court has slowly raised the scrutiny of the Corps' decisions under the CWA.

II. THE SUPREME COURT, DEFERENCE, AND JUDICIAL SCRUTINY OF JDS

*In view of the breadth of federal regulatory authority contemplated by the [CWA] and the inherent difficulties of defining precise bound to regulable waters, the Corps' ecological judgment . . . provides an adequate basis for a legal judgment.*⁶¹

*[T]he reach and systemic consequences of the Clean Water Act remain a cause for concern. As Justice Alito has noted in an earlier case, the Act's reach is "notoriously unclear" . . .*⁶²

These quotes, separated by three decades, represent the Supreme Court's growing discontent with the extent of the CWA's jurisdiction. *Riverside Bayview*, a case in the mid-1980s, marks the high point of the Court's deference to the Corps' jurisdictional determinations under section 404.⁶³ Over the thirty-year period following *Riverside Bayview*, the Court has gradually heightened the

57. *Id.*

58. *Id.*

59. See Hawkes Oral Argument, *supra* note 1.

60. *Hawkes*, 136 S. Ct. at 1817 (Kennedy, J., concurring).

61. Justice White, *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134 (1985).

62. Justice Kennedy, concurring, *U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807 (2016).

63. 474 U.S. 121 (1985).

level of judicial scrutiny applied to the Corps' determinations of jurisdiction. In this Part, this Note will examine the Court's trajectory towards increased scrutiny of the Corps' JD determination.

Before proceeding, the use of the phrase "judicial scrutiny" should be concisely defined. In particular, this Note's use of judicial scrutiny refers to the concept of "deference." Deference, in this context, refers to the level of inspection courts apply to the rules and regulations promulgated by federal agencies. For example, the Corps has issued a series of regulations concerning the meaning of the term "discharged materials," which appears—but is not defined—in the text of the CWA.⁶⁴ Therefore, the Corps must interpret what Congress meant by the term and develop a regulation that upholds the congressional intent behind the term. Once the regulation is issued, those who disagree with the agency's interpretation can seek judicial review in federal court. When faced with these questions, courts must decide whether the regulation in question is an appropriate interpretation of Congress's legislative intentions.⁶⁵ Courts can defer to agency interpretations, or they can challenge these interpretations—this is the essence of the term "deference."

The landmark decision in *Chevron v. NRDC* shows the high level of deference originally given to agency interpretations of regulations and was the original standard used in *Riverside Bayview* to determine the validity of regulations concerning wetlands adjacent to navigable waters.⁶⁶ In *Chevron*, the Court announced a new standard of deference that courts should give to the regulations crafted by federal agencies.⁶⁷ Under *Chevron*, federal courts must defer to reasonable agency interpretations of federal statutes, so long as Congress has not spoken precisely on the question at issue.⁶⁸

When determining if an interpretation of agency regulations is valid, a court must first ask whether Congress has addressed this question.⁶⁹ If Congress has directly addressed this question (either in the legislative history or the text of the statute itself), the agency must comply with that congressional directive.⁷⁰ If Congress has not spoken on the question at issue, the court moves to the second portion of the inquiry: is the proposed regulation a reasonable interpretation of

64. See 33 C.F.R. § 323.2(2)(i).

65. See *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 837 (1984).

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

67. *Chevron U.S.A., Inc.*, 467 U.S. at 865.

68. *Id.* at 842–43. The Court described the Chevron test in the following manner:

First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute . . . Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. *Id.*

69. *Id.*

70. *Id.*

the statute?⁷¹ When judging whether an interpretation is reasonable, a court should not “impose its own construction on the statute.”⁷² Instead, the court must decide whether the *agency’s* proffered regulation is a reasonable interpretation of the statute⁷³—thus, there may be other possible ways to craft regulation, but the only question before the court is whether the agency’s particular choice is a reasonable one. If the regulation is deemed reasonable, then *Chevron* deference applies, and the court should uphold the regulation.

This Part examines a line of Supreme Court opinions that have gradually lowered the deference accorded to the Corps’ determination of the CWA’s jurisdiction. First is *Riverside Bayview*, which shows the high point of judicial deference when the Court chose to give the Corps wide latitude in determining which water resources were covered by section 404’s reach.⁷⁴ Following that comes the Court’s decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*, marking the beginning of judicial scrutiny.⁷⁵ In *SWANCC*, the Court began raising the level of scrutiny applied to the Corps’ decisions in an effort to curtail what some members perceived as the overreach of the CWA’s jurisdiction. This Note then turns to the Court’s fractured decision in *Rapanos*, including a discussion of Justice Scalia’s plurality opinion, Justice Stevens’s dissenting opinion, and Justice Kennedy’s stand-alone concurring opinion.⁷⁶ Although *Rapanos* has not significantly changed the jurisdictional limits placed on the Corps, the various opinions in *Rapanos* can be seen as a window into the future of judicial deference to the Corps’ jurisdictional decisions. Finally, the Court’s recent decision in *Hawkes* provides more evidence that the Court is slowly constraining the Corps’ regulatory reach under section 404 of the CWA.⁷⁷

*A. The Old World of Judicial Deference: Riverside Bayview
in the Supreme Court*

In the decades following the passage of the CWA, the Supreme Court afforded the Corps wide jurisdictional latitude, as it generally deferred to the Corps’ interpretation of its jurisdiction under section 404. The most powerful example of this deference is the Court’s decision in *Riverside Bayview*, where the Justices upheld a Corps’ regulation concerning wetlands.⁷⁸ In that case, the litigants contested a rule issued by the Corps that classified wetlands on their property adjacent to navigable waters as waters of the United States, and thus

71. *Id.* at 843.

72. *Id.*

73. *Id.*

74. *See* 474 U.S. 121 (1985).

75. *See* 531 U.S. 159 (2001).

76. *See* 547 U.S. 715 (2006).

77. *See* 136 S. Ct. 1807 (2016).

78. *See* 474 U.S. 121 (1985).

falling under the purview of section 404.⁷⁹ The Corps had expanded its view of the CWA's jurisdiction on account of the intricate hydrological connections between wetlands and traditionally "navigable" waters.⁸⁰ In order to restore the "chemical, physical, and biological integrity of the Nation's waters,"⁸¹ the Corps issued a new regulation that expanded its jurisdiction to more water resources, such as wetlands, that did not cleanly align with the common understanding of "navigable" waters.⁸² As the Court itself noted:

On a purely linguistic level, it may appear unreasonable to classify "lands," wet or otherwise, as "waters." Such a simplistic response, however, does justice neither to the problem faced by the Corps in defining the scope of its authority under section 404(a) nor to the realities of the problem of water pollution that the Clean Water Act was meant to combat.⁸³

The Court's decisions turned on whether or not the Corps' regulations were a reasonable interpretation of the CWA.⁸⁴ Ultimately, the Court deferred to the Corps' judgment and upheld the regulation.⁸⁵

Riverside Bayview represents the highpoint of judicial deference to the Corps' interpretation of the CWA's jurisdiction. In *Riverside Bayview*, the Court applied the *Chevron* analysis to the Corps' regulation, ultimately deciding to uphold the Corps' interpretation of its jurisdictional authority.⁸⁶ The Court began by attempting to determine Congress's intent when it passed the CWA. Starting with the language of the CWA itself, the Court found that terms like "navigable waters" and "waters of the United States" were undefined by the statutory text.⁸⁷ Next, the Court looked through the legislative history associated with the CWA and its subsequent amendments. There, the Court noted that the Corps' assertion of jurisdiction over wetlands had been debated in the House and the Senate before the passage of an amendment to the CWA.⁸⁸ The Court found that the Congressional debates over this amendment did not yield a decisive answer about Congress's intent.⁸⁹ Importantly, the Court highlighted that Congress chose to reject an attempt at restraining the jurisdictional reach of section 404, suggesting congressional acquiescence to the Corps' expansive view of section 404's jurisdiction.⁹⁰

79. *Id.* at 124.

80. *Id.* at 133–34.

81. 33 U.S.C. § 1251.

82. *Riverside Bayview Homes*, 474 U.S. at 132.

83. *Id.*

84. *Id.* at 131.

85. *Id.* at 139.

86. *Id.* at 131. ("An agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress.")

87. *Id.* at 132.

88. *Id.*

89. *Id.* at 133.

90. *Id.* at 137.

Without a firm congressional answer, the Court turned to the second step in the *Chevron* inquiry—determining whether the Corps’ proffered regulation that infill of wetlands adjacent to navigable waters required permits was a reasonable interpretation of section 404’s jurisdictional reach.⁹¹ During this inquiry, the Court accepted the ecological determinations the Corps presented in its defense.⁹² The Court recognized that the Corps’ determination of the CWA’s jurisdiction was based on ecological science; in order to effectuate the mission of section 404, the Corps must account for the complex interplay between various water resources.⁹³ The Court emphasizes this reasoning in its opinion, quoting the Corps’ own justifications for the rule:

The regulation of activities that cause water pollution . . . must focus on all waters that together form the entire aquatic system. Water moves in hydrologic cycles, and the pollution of this part of the aquatic system . . . will affect the water quality of other waters within that system.⁹⁴

Based on these ecological findings, the Court held that the adjacent wetlands rule was a reasonable interpretation of the CWA.⁹⁵ Given the broad intent of the statute and the ecological evidence the Corps provided, the Court found that the Corps was implementing congressional policy rather than embarking “on a frolic of its own.”⁹⁶

In order for the Corps to honor the broad intent of the CWA, it crafted the adjacent wetlands rule; however, this regulation raised questions about the extent of Congress’s regulatory powers under the Constitution. Instead of scrutinizing the rule, the Court deferred to the Corps interpretation.⁹⁷ This judicial deference would last for almost two decades—it would not be until 2001 that the Court would begin to curtail the Corps’ jurisdictional rules.

B. Increased Judicial Scrutiny of JDs: SWANCC in the Supreme Court

The Supreme Court’s first blow to the jurisdictional reach of section 404 came in its decision in *SWANCC*. A decade and a half after *Riverside Bayview*, the Court’s decision in *SWANCC* marks the beginning of a period of ever-heightening judicial scrutiny of section 404’s jurisdiction.⁹⁸ Although the argument in *SWANCC* is about whether isolated ponds unconnected to navigable waters fall under the “waters of United States,”⁹⁹ the case is evidence of the

91. *Id.* at 131.

92. *Id.* at 133–34.

93. *Id.*

94. *Id.* (quoting 42 Fed. Reg. 37,128 (1970)).

95. *Id.*

96. *Id.* at 139 (quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 375 (1969)).

97. *Id.* at 133 (“[T]he evident breadth of congressional concern for protection of water quality and aquatic ecosystems suggests that it is reasonable for the Corps to interpret the term ‘waters’ to encompass wetlands adjacent to waters as more conventionally defined”).

98. *See* 531 U.S. 159 (2001).

99. *Id.* at 163.

Court's increasing scrutiny of the Corps' jurisdiction. Additionally, this case's language becomes the basis for later Supreme Court cases that deal directly with jurisdictional determinations.

In *SWANCC*, the Supreme Court overturned a Corps-issued rule that extended section 404's jurisdiction to isolated intrastate waters used by migratory birds. Unlike *Riverside Bayview*, the water resources at issue in *SWANCC* had no connections to "navigable" interstate waters.¹⁰⁰ Instead, the Corps' asserted that section 404's jurisdiction reached isolated water features, such as ponds, that are used by migratory birds.¹⁰¹ The Corps made this assertion under the premise that the Migratory Bird Rule gave them the authority to apply section 404 jurisdiction to intrastate waters.¹⁰²

Arguing against this so-called "Migratory Bird Rule" was a consortium of Chicago-area municipalities.¹⁰³ This group of local governments had purchased an old sand and grit mining site as a place to dump their nonhazardous solid waste.¹⁰⁴ The municipalities submitted the site for permitting review under section 404, as there were a number of ponds on the property that would be filled during the dumping process.¹⁰⁵ The Corps determined that these isolated ponds were used by migratory birds, thus requiring the municipalities to obtain a section 404 permit.¹⁰⁶ Although the municipalities had been able to secure the required state and local permits, the Corps refused to issue a permit for the proposed fill activity, as it was not the "least environmentally damaging, most practicable alternative" for disposal of nonhazardous solid waste.¹⁰⁷

Chief Justice Rehnquist, writing for the majority in *SWANCC*, found that the Migratory Bird Rule exceeded the Corps' authority under section 404.¹⁰⁸ Rehnquist, in an effort to distinguish this narrowing of jurisdiction from the expansive deference in *Riverside Bayview*, offered the following explanation: "It was the *significant nexus* between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes*."¹⁰⁹ Using this reasoning, *SWANCC* drew a new limit on section 404's jurisdiction; it would

100. *See id.* at 163–64.

101. *Id.* at 164.

102. *Id.*

103. *Id.* at 162.

104. *Id.* at 163.

105. *Id.*

106. *Id.*

107. *Id.* at 165.

The Corps found that [Solid Waste Agency] had not established that its proposal was the "least environmentally damaging, most practicable alternative" for disposal of nonhazardous solid waste; that *SWANCC*'s failure to set aside sufficient funds to remediate leaks posed an "unacceptable risk to the public's drinking water supply;" and that the impact of the project upon area-sensitive species was "unmitigatable since a landfill surface cannot be redeveloped into a forested habitat."

Id.

108. *Id.* at 170–71.

109. *Id.* at 167 (emphasis added).

appear that section 404's reach is somehow related to waters that have a "significant nexus" with navigable waters.¹¹⁰ Although Rehnquist acknowledges the *Riverside Bayview* Court's deferential approach to the meaning of "navigable waters," he insists that it is not "a basis for reading the term 'navigable waters' out of the statute."¹¹¹

The shift in *SWANCC* towards a narrower interpretation of the Corps' jurisdictional determinations not only threatened the purpose of the CWA, but also went against the Court's own reasoning in *Riverside Bayview*. As Justice Stevens noted in his dissenting opinion, the majority's "significant nexus" analysis is not supported by the reasoning in *Riverside Bayview*.¹¹² In that opinion, the Court deferred to the Corps' jurisdictional rules because Congress had considered the regulations and decided not to overturn them.¹¹³ Here, Stevens argues that the majority rejects the same legislative history the Court previously accepted in *Riverside Bayview*, thus going against its own reasoning.¹¹⁴ Indeed, the majority in *SWANCC* explicitly stated that "failed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute."¹¹⁵ This language contradicts the Court's reasoning in *Riverside Bayview*, where Congress's decision not to overturn the Corps' interpretation of section 404 was an important factor in the decision:

Although we are chary of attributing significance to Congress' failure to act, 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.¹¹⁶

Thus, the reasoning of the majority in *SWANCC* represents a decisive break with the deferential approach the Court had previously taken to interpreting the jurisdictional terms and reach of the CWA.

Justice Stevens's dissent highlights the ways in which the *SWANCC* majority fails to understand the scope of Congress's intent when it passed the CWA. According to Stevens, Congress intended for the CWA to vastly expand the scope of regulation of discharges into the nation's waters.¹¹⁷ Although Congress borrowed the term "navigable waters" from nineteenth century water-related legislation, Stevens averred that the CWA was designed to expand the meaning of this term: "Because of the [CWA's] ambitious and comprehensive goals, it was, of course, necessary to expand its jurisdictional scope. Thus, although Congress opted to carry over the traditional jurisdictional term

110. *Id.*

111. *Id.* at 172.

112. *Id.* at 175–76 (Stevens, J., dissenting).

113. *See supra*, Part II.A. for an explanation of these hearings.

114. *SWANCC*, 531 U.S. 159, 176–77 (2001) (Stevens, J., dissenting).

115. *Id.* at 170 (quoting *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 164 (1994) (internal quotations omitted)).

116. *United States v. Riverside Bayview Homes*, 474 U.S. 121, 137 (1985).

117. *SWANCC*, 531 U.S. at 180 (Stevens, J., dissenting).

‘navigable waters’ from [prior legislation], it broadened the definition of that term to encompass all waters of the United States.”¹¹⁸ Stevens points to Conference Reports on the CWA that were issued during the legislative reconciliation process, as these documents state that Congress intended “navigable waters” to “be given the broadest possible constitutional interpretation.”¹¹⁹ Altogether, Stevens’s dissent demonstrates both congressional support for expansive CWA jurisdiction and the ways in which the *SWANCC* majority was curtailing this jurisdiction.

SWANCC marks the beginning of the Court’s effort to raise the level of judicial scrutiny applied to section 404’s jurisdiction. Admittedly, the issue in *SWANCC* deals with the furthest possible extent of the CWA’s *constitutional* reach—after all, the waters the Corps asserted jurisdiction over were completely contained within the boundary of a state and were not interconnected with any navigable waters.¹²⁰ If the Court had allowed the Corps to assert jurisdiction over isolated ponds as “waters of the United States,” it would have substantially increased the amount of land subject to the Corps’ regulatory power.¹²¹ Although that outcome may have created certain constitutional questions about whether Congress can regulate intrastate activities, *SWANCC*’s true significance lies in how the Court would later turn to the reasoning in *SWANCC* as a basis for narrowing of section 404’s jurisdictional reach. *SWANCC* was merely the beginning of a crescendo of judicial scrutiny.

*C. Judicial Scrutiny Reaches its Current Heights:
Rapanos in the Supreme Court*

*The broader question is whether regulations that have protected the quality of our waters for decades, that were implicitly approved by Congress, and that have been repeatedly enforced in case after case, must now be revised in light of the creative criticisms voiced by the plurality and Justice Kennedy today.*¹²²

The Supreme Court’s fractured decision in *Rapanos v. United States* ushered in a new era of judicial scrutiny of the Corps’ section 404 jurisdictional determinations. *Rapanos* actually resulted in several competing opinions, with Justice Scalia writing for a conservative plurality, Justice Stevens writing for a liberal dissent, and Justice Kennedy issuing a concurring opinion to the plurality.¹²³ Although the practical effects of *Rapanos* have been mitigated by the Court’s inability to issue a binding majority opinion, the case signals a move against the CWA’s jurisdiction by the conservative members of the Court. As

118. *Id.*

119. *Id.* at 181 (quoting S. Conf. Rep. No. 92-1236, p. 144 (1972)).

120. *Id.* at 166 (majority opinion).

121. *Id.* at 174.

122. Justice Stevens, dissenting, *Rapanos v. United States*, 547 U.S. 715 (2006).

123. 547 U.S. at 715. Justice Roberts also issued a concurrence, but no other member of the Court has signed onto it, nor has it been used by any government agency. *See id.* at 757 (Roberts, J., concurring).

the Court becomes increasingly conservative with the addition of Justices Gorsuch and Kavanaugh, the likelihood that the plurality's opinion will become controlling has significantly increased.¹²⁴

As *Rapanos* is actually a combination of two cases with similar questions—*Rapanos v. United States Army Corps of Engineers* and *Carabell v. United States Army Corp of Engineers*—this analysis will briefly consider the facts of both cases. It will begin with Justice Scalia's plurality opinion, which offers a very constricted view of section 404's jurisdiction. The analysis then moves to Justice Stevens's spirited dissent, where he uses the Court's previous rulings to argue against narrowing section 404's jurisdiction. Finally, it will discuss Justice Kennedy's concurring opinion, which is the opinion the Corps relies upon today. Together, these fractured opinions demonstrate the Court's slow conservative shift away from the earlier deference of *Riverside Bayview* and towards a narrower conception of the Corps' regulatory authority.

1. *The Backstory to Rapanos and Carabell*

John Rapanos owned a 230-acre tract of land in Salzburg, Michigan, which he sought to develop into a shopping center.¹²⁵ Mr. Rapanos requested that the Michigan Department of Natural Resources (MDNR) inspect the site; after the inspection, a MDNR official told Mr. Rapanos that the land contained wetlands which were likely subject to section 404 jurisdiction.¹²⁶ At this time, the Corps still followed the jurisdictional rule from *Riverside Bayview*, which held that all wetlands adjacent to navigable waters or their tributaries were automatically considered to be "waters of the United States."¹²⁷

Instead of filling out the section 404 permit application from the MDNR, Mr. Rapanos hired a wetland consultant, Dr. Frederick Goff. When Dr. Goff came to the same conclusions as the MDNR, Mr. Rapanos threatened to "destroy" him and withheld payment until Dr. Goff agreed to retract his opinion.¹²⁸ Mr. Rapanos then hired a construction company to clear the land, fill in low spots, and drain the subsurface water.¹²⁹ Concurrently, Mr. Rapanos refused to let MDNR officials onto the property, ignored an MDNR cease and desist letter, and refused to obey an administrative compliance order issued by EPA.¹³⁰ The Department of Justice eventually filed suit, and a district court found that Mr. Rapanos had unlawfully filled in twenty-two acres of wetlands.¹³¹

124. Given Justice Kennedy's questioning of the CWA's constitutionality, there is a danger that these conservative justices may overturn the statute entirely. See Hawkes Oral Argument, *supra* note 1 (Justice Kennedy notes that the CWA is "arguably unconstitutionally vague").

125. *Rapanos*, 547 U.S. at 788–89 (Stevens, J., dissenting).

126. *Id.* at 789 (Stevens, J., dissenting).

127. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134 (1985).

128. *Rapanos*, 547 U.S. at 789 (Stevens, J., dissenting).

129. *Id.*

130. *Id.*

131. *Id.*

Mr. Rapanos hired construction teams to conduct “extensive” clearing and filling activities at two of his other properties (the Hines Road and Pine River sites)—again, without seeking a section 404 permit.¹³² As with the Salzburg site, EPA issued an administrative compliance order, and Mr. Rapanos once more ignored the agency.¹³³ Eventually, a district court found that Mr. Rapanos had filled seventeen acres of the Hines Road site and fifteen acres of the Pine River site without permits.¹³⁴

Prior to the destruction of wetlands at the Salzburg, Hines Road, and Pine River sites, each of these sites had connections to traditionally navigable waters.¹³⁵ At trial, Dr. Daniel Willard, a wetlands expert, testified that the destroyed wetlands had provided ecological functions such as “habitat, sediment trapping, nutrient recycling, and flood peak diminution.”¹³⁶ Dr. Willard’s testimony demonstrated how wetlands contribute to the health of traditionally navigable waters in ways that have little to do with the surface connection between these waters.

In contrast to *Rapanos*, the facts in *Carabell* feature landowners who were more willing to follow the Corps’ rules.¹³⁷ In *Carabell*, the owners of a twenty-acre tract of land sought a section 404 permit to dredge and fill the wetlands on their property.¹³⁸ The wetlands bordered a ditch that flowed into a drain that emptied into a creek, eventually merging into Lake St. Clair.¹³⁹ Between the wetlands and the ditch was a four-foot manmade berm that separated the wetlands from the ditch; water rarely passed from the wetlands to the ditch.¹⁴⁰

The Water Quality Unit (WQU) of the Macomb County’s prosecutor’s office countered the Carabells’ section 404 permit request. The WQU urged the Corps to deny the permit, as “[t]he loss of this high quality wetland area would have an unacceptable adverse effect on wildlife, water quality, and conservation of wetlands resources.”¹⁴¹ Eventually, the Corps sided with the WQU and denied the Carabells’ permit.¹⁴² The Corps’ denial letter highlighted the many functions that wetlands provide for wider ecological benefits.¹⁴³ These benefits, however, were not always related to the direct hydrological connections between wetlands and traditionally navigable waters. For example, the Corps stated that the

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 789–90 (“The Salzburg wetlands connected to a drain that flows into a creek that flows into the navigable Kawkawlin River. The Hines Road wetlands connected to a drain that flows into the navigable Tittabawassee River. And the Pine River wetlands connected with the Pine River, which flows into Lake Huron”).

136. *Id.* at 789–90.

137. *See Carabell v. U.S. Army Corps of Engineers*, 391 F.3d 704 (6th Cir. 2004).

138. *Id.* at 705.

139. *Id.*

140. *Id.*

141. *Rapanos v. United States*, 547 U.S. 715, 791 (2006) (Stevens, J., dissenting).

142. *Id.*

143. *See id.*

Carabells' property is a forested wetland that "provides valuable seasonal habitat for aquatic organisms and year round habitat for terrestrial organisms."¹⁴⁴ Although these habitats are important for wetland flora and fauna, there may be limited connections between the actual bodies of water themselves. According to the district and circuit courts, however, the Corps' "adjacent wetlands" rule allowed for the proper exercise of section 404 jurisdiction, as the Carabells' wetlands were adjacent to a tributary of traditionally navigable waters.¹⁴⁵

2. Justice Scalia's Plurality Opinion in *Rapanos*

The above facts demonstrate, especially in the case of the *Rapanos*, that the property owners engaged in numerous tactics meant to elide the reach of the CWA. Despite these facts, Justice Scalia's plurality opinion focuses on the cost of regulatory action for landowners like Mr. *Rapanos* and the Carabells.¹⁴⁶ For example, Scalia highlights both the average length of the permitting process (788 days) and its costs (\$271,596 per permit) as evidence of the CWA's overly expansive reach.¹⁴⁷ Additionally, Justice Scalia's recitation of the facts reviewed the civil and criminal penalties Mr. *Rapanos* faced.¹⁴⁸ Missing from this retelling, however, are the facts about Mr. *Rapanos*'s decision to disregard permitting procedures and subsequent regulatory notice.¹⁴⁹ The plurality uses these facts to undergird its argument that the Corps has overreached its jurisdiction; the quiet omission of Mr. *Rapanos*'s mendacious behavior paired with the effects of section 404 creates a picture of overly burdensome regulation that helps make the plurality's narrowing of jurisdiction seem reasonable.

For the plurality, the expansive jurisdictional reach of the CWA is the most pressing issue in *Rapanos*.¹⁵⁰ Justice Scalia's reasoning resonates with the majority in *SWANCC*: once again, the meaning of "navigable waters" in section 404 is a source of contention. The plurality, in opposition to the unanimous holding in *Riverside Bayview* and Justice Stevens's dissent in *SWANCC*, sought to restrict the Corps' broad interpretation of "navigable waters" (which are

144. *Id.*

145. *Id.* at 791–92.

146. *Id.* at 721 (plurality opinion).

147. *Id.*

148. *See id.* at 722.

149. *Id.*

150. The plurality opinion made its view of the Corps' expanding jurisdiction clear:

In the last three decades, the Corps and the Environmental Protection Agency (EPA) have interpreted their jurisdiction over "the waters of the United States" to cover 270–to–300 million acres of swampy lands in the United States—including half of Alaska and an area the size of California in the lower 48 States. *And that was just the beginning.* 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. at 722. (emphasis added).

defined as “waters of the United States” in the CWA).¹⁵¹ For the plurality, the Corps’ interpretation of the CWA was improperly broad, because it allowed the Corps to assert jurisdiction over water resources that were very distant from navigable waters. Additionally, the plurality found that the Corps’ assertion of section 404 jurisdiction over *temporary* water features—such as ephemeral streams or intermittent waterways—was too expansive.¹⁵² In a non-binding holding, the plurality announced their restrictive interpretation of the CWA’s jurisdiction: only those water features that have a “continuous surface connection” to traditionally navigable water bodies would fall under the reach of the CWA.¹⁵³

3. Justice Stevens’s Dissent in *Rapanos*

In contrast to the plurality opinion, Justice Stevens’s dissent highlights the Court’s departure from the deference formerly afforded to the Corps’ jurisdictional decisions. Justice Stevens, writing for himself and three other members of the Court, accurately describes the plurality opinion (and Justice Kennedy’s concurrence) as a reversal of the Court’s decisions in *SWANCC* and *Riverside Bayview*.¹⁵⁴ Two of Stevens’s points are relevant to this discussion: First, Stevens points out that the Court has already accepted the Corps’ assertion of wide-ranging jurisdiction under section 404;¹⁵⁵ second, Stevens asserts that Congress is the proper branch of government to address questions about the benefits and burdens of environmental regulation.¹⁵⁶ Although these themes will be discussed later in this Note,¹⁵⁷ a brief examination of Justice Stevens’s dissent in *Rapanos* highlights the Court’s departure from previous decisions over section 404’s jurisdiction.

Prior to *Rapanos*, the Supreme Court generally upheld the Corps’ application of section 404 jurisdiction to wetlands.¹⁵⁸ Justice Stevens’s dissent reveals how the “creative criticisms” of the plurality and Justice Kennedy fail to adhere to the Court’s already-settled jurisprudence.¹⁵⁹ According to Stevens, the proper analysis is “straightforward”: the Corps determined that wetlands

151. *Id.* at 731–32.

152. “The waters of the United States” include only relatively permanent, standing or flowing bodies of water. The definition refers to water as found in “streams,” “oceans,” “rivers,” “lakes,” and “bodies” of water “forming geographical features.” All of these terms connote continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows.

Id. at 732–33 (citation omitted).

153. *Id.* at 717.

154. *See id.* at 796–97 (Stevens, J., dissenting).

155. *Id.* at 792.

156. *Id.* at 799.

157. *See infra*, Part III.

158. *Riverside Bayview*, discussed *supra* Part II.A., is the paradigmatic case upholding Corps’ section 404 jurisdiction over wetlands. *Solid Waste Agency*, although limiting the Corps’ jurisdiction over ephemeral ponds, did not itself affect jurisdictional determinations over wetlands. *See supra* Part II.B.

159. *Rapanos v. United States*, 547 U.S. 715, 787–88 (2006) (Stevens, J., dissenting).

adjacent to tributaries of traditionally navigable waters provide an integral ecological function for the nation's waters.¹⁶⁰ The Corps' decision to treat wetlands as encompassed by the phrase "waters of the United States" is a "quintessential example" of a reasonable agency interpretation of a statutory provision.¹⁶¹

Buttressing this reasonable interpretation is the Court's decision in *Riverside Bayview*, which Stevens sees as controlling in this case.¹⁶² The facts of *Riverside Bayview* differ slightly from those in *Rapanos*; the wetlands in *Riverside Bayview* were directly adjacent to navigable waters,¹⁶³ while in *Rapanos*, the wetlands had a more attenuated connection to navigable waters.¹⁶⁴ Stevens points out, however, that the Court in *Riverside Bayview* framed the issue so broadly that it applies equally to the situation in *Rapanos*: "the question presented [is] whether the Clean Water Act 'authorizes the Corps to require landowners to obtain permits from the Corps before discharging fill material into the wetlands adjacent to navigable bodies of water *and their tributaries*.'"¹⁶⁵

Under Stevens's reasoning, *Rapanos* falls directly under *Riverside Bayview*; since the distance between the wetlands and the tributary does nothing to dilute their ecological connection, Stevens would have upheld the Corps' assertion of jurisdiction as proper.¹⁶⁶ Indeed, Stevens states that the ecological benefits of wetlands justify the Corps' automatic assertion of jurisdiction, even if a particular wetland provides few (or none) of these benefits.¹⁶⁷ Stevens noted "that jurisdiction does not depend on a wetland-by-wetland inquiry" and "it is enough that wetlands adjacent to tributaries generally have a significant nexus to the watershed's water quality."¹⁶⁸ For Stevens, so long as the Corps' jurisdictional rules are constitutional and within statutory bounds, the Court should generally uphold them rather than attempt to restrict them with judicial interpretations.¹⁶⁹

At the end, Stevens offers a final observation about these regulations: the question of whether the burdens and benefits of environmental legislation are justified is one best left to the legislative and executive branches of government.¹⁷⁰ Justice Stevens, in a brief aside, reasons similarly: "[w]hether the benefits of particular conservation measures outweigh their costs is a classic

160. *Id.* at 788.

161. *Id.*

162. *Id.* at 792.

163. *Id.*

164. *See id.* at 789–90.

165. *Id.* at 792 (emphasis in the original).

166. *Id.*

167. "The Corps' exercise of jurisdiction is reasonable even though not every wetland adjacent to a traditionally navigable water or its tributary will perform all (or perhaps any) of the water quality functions generally associated with wetlands." *Id.* at 797.

168. *Id.*

169. *Id.* at 799.

170. *Id.*

question of public policy that should not be answered by appointed judges.”¹⁷¹ Indeed, the Court adopted this very position in *Riverside Bayview*—there, the Court upheld the Corps’ jurisdictional rules because Congress chose not to overturn these rules.¹⁷² Stevens uses this point to question the plurality’s “exaggerated concerns” about the costs of environmental regulation.¹⁷³ According to Stevens, the fact that environmental regulations often increase costs for developments is an outcome that is best addressed by Congress.¹⁷⁴ Stevens finds comfort in the fact that many developers possess the means to “communicate effectively” with their representatives, thereby assuring that this question can be properly relegated to the Legislature and the Executive.¹⁷⁵

Justice Stevens’s dissenting opinion is the most in line with both ecological science and the broad environmental mission of the CWA. In contrast to the plurality, which voices concern for the constitutionality of the Corps’ jurisdiction, Stevens recognizes that environmental regulation poses challenges that requires agencies to apply a more general approach to jurisdiction.¹⁷⁶ Instead of forcing agencies to do an analysis of each wetland, Stevens would allow for wetlands to be categorically considered subject to the CWA.¹⁷⁷ Such a decision allows the Corps to quickly and efficiently deal with permitting, rather than consuming agency time with the rote question of whether or not particular water bodies are hydrologically connected to one another. Stevens’s dissent also provides a refreshing history of the environmental mission of the CWA—a crucial bit of history that reiterates the concerns that drove Congress to intentionally give the agencies implementing the CWA broad powers to protect the environment.¹⁷⁸ The environmental crises facing the United States in the latter half of the twentieth century made clear that agencies such as the Corps required wide jurisdictional powers in order to “restore and maintain” the nation’s waters to a healthy state.

4. *The Corps follows Justice Kennedy’s Concurrence “Significant Nexus” Rule in Rapanos, as Interpreted by the Fourth Circuit in Precon.*

Although Justice Kennedy’s concurrence received no support from the other members of the Court, the “significant nexus” standard he articulated within this opinion has been widely followed. This Part explores how Justice Kennedy’s singular opinion became the leading interpretation of *Rapanos*. Furthermore, this Part explains how *Rapanos* and the subsequent appellate court decision in *Precon* have combined to allow the Corps considerable jurisdictional

171. *Id.*

172. *See supra*, Part II.A.

173. *Rapanos v. United States*, 547 U.S. 715, 798 (2006).

174. *Id.* at 799.

175. *Id.*

176. *See id.* at 809.

177. *Id.* at 799.

178. *Id.*

reach while raising the pro forma requirements placed on the Corps during the JD process.

Justice Kennedy's lone concurrence in *Rapanos*, despite its lack of support from other members of the Court, is the current framework used by the Corps.¹⁷⁹ This is likely due to the malleability of Kennedy's "significant nexus" standard, which has allowed the Corps to maintain many of its old jurisdictional rules. The longevity of this standard is likely limited, given Justice Kennedy's resignation and the appointment of Justices Gorsuch and Kavanaugh. Previous to these judicial personnel developments, however, the Corps used Kennedy's "significant nexus" standard to shape many of their new rulemakings, including the Obama-era "Clean Water Rule."¹⁸⁰ Therefore, Kennedy's concurrence continues to play an important role in the Corps' jurisdictional determinations.

Despite the widespread application of Justice Kennedy's significant nexus standard, his concurrence provides little practical detail on how the standard should be administered. Kennedy begins his opinion by citing to *SWANCC* to support his standard: "[i]t was the significant nexus between wetlands and 'navigable waters,' the Court held, that informed our reading of the [CWA] in *Riverside Bayview Homes*."¹⁸¹ Although this language does appear in *SWANCC*, the case similarly provides little guidance as to the meaning of this phrase.¹⁸² Towards the end of his concurrence, Kennedy provides what seems like guidance about how to understand this "nexus":

Wetlands possess the requisite nexus [if they] alone or in combination with similarly situated lands . . . significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.' When . . . wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term "navigable waters."¹⁸³

Unfortunately, this definition leads to a myriad of questions in application. For example, what wetlands qualify as "similarly situated?" What are the standards for "significant" effects—is it a statistical calculation, an ecological determination, or something else? Kennedy's concurrence provides little guidance for these questions, which may explain why the Corps' chose to follow

179. See *Precon Dev. Corp. v. Army Corps of Eng'rs*, 603 F. App'x 149, 150–51 (4th Cir. 2015).

180. Towards the end of his second term, President Obama tasked the Corps and EPA to develop a final definition of the phrase "waters of the United States." President Trump, upon taking office, immediately ordered the agencies to recall the Obama-era definition. See generally *Clean Water Rule: Definition of "Waters of the United States"*, Final Rule, 80 Fed. Reg. 37,056 (June 29, 2015) (memorializing the Obama-era rule).

181. *Rapanos v. United States*, 547 U.S. 715, 767 (2006) (Kennedy, J., concurring) (quoting *SWANCC*, 531 U.S.159, 167 (2001) (internal marks omitted)).

182. As Justice Stevens observes in his dissent, the phrase "significant nexus" appears in only one sentence in *SWANCC*. *Id.* at 807 (Stevens, J., dissenting). Moreover, *SWANCC*, addressed truly isolated waters, which is different from the question of adjacent wetlands. *Id.* at 808–09. Thus, in Stevens's opinion, *Riverside Bayview* should control in this case because it addresses a substantially similar question. *Id.*

183. *Rapanos*, 547 U.S. at 780.

his opinion; given the lack of clear lines in the “significant nexus” standard, the Corps would be free to interpret “significant nexus” broadly.

The Fourth Circuit decision in *Precon Development Corp., Inc. v. Army Corps of Engineers* reflects the Corps’ liberal interpretation of Kennedy’s “significant nexus” standard.¹⁸⁴ The Fourth Circuit filled out Kennedy’s significant nexus standard by specifying the types of evidence that are necessary to uphold the Corps’ JDs.¹⁸⁵ Although *Precon* was decided several years after *Rapanos*, the Corps uses this decision as guidance for its significant nexus determinations.¹⁸⁶ The situation in *Precon* mirrors that of *Rapanos*: a developer wished to expand onto a small wetland parcel (4.8 acres), which was part of a 448-acre wetland.¹⁸⁷ These wetlands are bordered by a system of ditches that terminate in the Northwest River, seven miles away.¹⁸⁸

In practice, *Precon* gives the Corps wide latitude in its significant nexus determinations. For example, the court in *Precon* ultimately found that the Corps’ jurisdiction was proper because the Corps based its determination on ecological and hydrological facts. First, the Corps provided data about the flow of water between the wetlands and the Northwest River, thus proving that there was a hydraulic connection between the wetlands and “navigable waters.”¹⁸⁹ Second, the Corps’ provided the court with evidence that the Northwest River had a problem with low dissolved oxygen levels and that the wetlands at issue *could* trap nitrogen, thereby potentially abating the River’s oxygenation problem.¹⁹⁰ The court upheld the Corps’ significant nexus determination on the basis of this potentiality for future environmental benefits, thereby validating the Corps’ flexible interpretation of Kennedy’s ambiguous standard.¹⁹¹

Precon advanced several principles that the Corps has since incorporated into the JD process. First, “quantitative or qualitative evidence” may serve as a basis for the Corps’ jurisdiction.¹⁹² Second, expert evidence about the “statistical” significance of a particular nexus “sets the bar too high, as purely qualitative evidence may satisfy the significant nexus test.”¹⁹³ Third, the “ultimate inquiry” is about the collective effect of the wetlands; therefore, there is no particular function that a wetland must complete in order for there to be a

184. See 603 F. App’x at 150–51.

185. *Id.* at 151–52 (noting the types of evidence the significant nexus test considers).

186. Telephone interview with Stacey Jensen, Regulatory Program Manager, USACE (10/22/18). It was unclear whether the Corps updated the JD process to reflect *Precon*’s reasoning, or if the Corps uses *Precon* as a defense of already established practices. *Id.*

187. *Precon Development Corp.*, 603 F. App’x at 151.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* at 152.

193. *Id.*

significant nexus.¹⁹⁴ Finally, since the goal of the CWA is to protect and *maintain* the nation's waters, the Corps does not have to provide actual evidence of ecological impacts that could occur if a section 404 permit was granted: “[t]he Corps exercises its jurisdiction to *prevent* damage and thus cannot be expected to present evidence of the actual ecological impact of the wetlands on downstream waters.”¹⁹⁵ Taken together, *Precon* gives the Corps wide latitude to determine whether or not there is a significant nexus.

In the wake of *Rapanos*, the Corps has been able to avoid the strict jurisdiction limitations espoused by Scalia's plurality, which required “a continuous surface connection” between wetlands and “waters of the United States.”¹⁹⁶ Simultaneously, the Corps has interpreted Kennedy's concurrence broadly in order to justify its expansive jurisdiction over wetlands.¹⁹⁷ These clever maneuvers, however, do not mean that the Court's attempts to heighten the scrutiny applied to the Corps' jurisdiction determinations should not be taken as a serious threat to the goals of the CWA. Significantly, Kennedy's concurrence overturned the Corps' broad rules that automatically subjected wetlands to the CWA's jurisdiction.

The most important consequence of *Rapanos* is that the Corps must now make a case-by-case finding of jurisdiction for wetlands that are adjacent to tributaries. Even in *Precon*, the Corps presented evidence about the ecological systems at issue, rather than asserting that the general ecological benefits of wetlands suffice for a finding of jurisdiction under the CWA.¹⁹⁸ Moreover, the plurality's reasoning broke with the Court's deferential approach in both *Riverside Bayview* and *SWANCC*—given the addition of Justice Kavanaugh,¹⁹⁹ this approach seems like a probable reality if the Court re-examines this issue.

D. The Final Note: USACE v. Hawkes Makes JDs Appealable in Federal Court.

The last case in the rising crescendo of judicial scrutiny of the Corps' JDs is *USACE v. Hawkes*, where the Court held that AJDs²⁰⁰ can be appealed in federal court.²⁰¹ Before *Hawkes*, claimants could only challenge AJDs in court

194. *Id.* For example, some wetlands provide habitats for aquatic creatures, but fail to significantly impede flooding. *Id.* at 151. Under *Precon*, the lack of floodwater mitigation does not mean that these wetlands are precluded from jurisdiction. *Id.*

195. *Id.* at 152.

196. *Rapanos*, 547 U.S. at 717.

197. See *Precon Development Corp.*, 603 F. App'x at 150.

198. See *Precon Development Corp.*, 603 F. App'x at 152–53.

199. See generally Abrams Environmental Law Clinic, *A Review of Judge Brett Kavanaugh's Environmental Jurisprudence*, U. CHICAGO, (Sept. 2018), <https://www.law.uchicago.edu/files/Abrams%20Environmental%20Law%20Clinic%20Kavanaugh%20Report%204-Sept-2018.pdf>.

200. “Approved” Jurisdictional Determinations are the JDs issued by the Corps after they have made a specific finding about whether or not there are waters of the United States on a particular property (as opposed to Preliminary JDs). See Part I.A. of this Note for more information on this topic.

201. See 136 S. Ct. 1807 (2016).

after they began the application process for a section 404 permit (as in *Precon D*). Following *Hawkes*, any AJD can be challenged after a claimant goes through the agency appeals process. This result creates another layer of complication for the agency: before even issuing the permit, it may be faced with litigation. In the majority of cases, the hydrological connections required under Kennedy's "significant nexus" analysis will likely favor the agency;²⁰² in consequence, the decision in *Hawkes* opens the Corps to resource-intensive litigation to enforce rote decisions about its regulatory reach. Although the outcome in *Hawkes* was reasonable, the Court had equally reasonable arguments in favor of preserving the unappealable status of JDs. *Hawkes* thus represents the Court's continued heightening of scrutiny of the CWA's jurisdiction, as it creates even more difficulty for the Corps as it attempts to regulate the nation's waters.

The Supreme Court decided *Hawkes* in accordance with the basic tenets of administrative law. Under *Bennett v. Spear*, there are two conditions that must be met for AJDs to be "final" agency action and thus appealable: "First, the action must mark the consummation of the agency's decision-making process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow."²⁰³

As AJDs mark the Corps' final decision as to whether or not a parcel is subject to the CWA's jurisdiction and requires a section 404 permit for development, AJDs satisfy the first and second *Spear* factors.²⁰⁴ The Court found that final AJDs have legal consequences, as they let property owners know whether or not their land is subject to the CWA's jurisdiction, which may require owners to obtain permits before making changes to their land.²⁰⁵ The Court's view is perfectly reasonable—all eight justices concurred in the judgment—as AJDs are the Corps' final word on section 404's jurisdiction.²⁰⁶

Despite the reasonableness of the Court's decision regarding the appealability of AJDs, the Court could have also just as easily found that JDs should not be appealable—a decision which might have been more in line with the goals of the CWA. Because AJDs merely inform property owners about whether or not the CWA applies to their land, AJDs can be seen merely as an informative device, rather than final agency action by the Corps. In *Hawkes*, the Court adopted the perspective of a landowner who is unsure of whether their

202. Telephone interview with Sarah Vonderohe and Daria Snider, Environmental Consultants at Madrone Ecological Consulting. Both interviewees suggested that in the majority of their cases, it is clear that section 404 applies; it is only edge cases that present problems (10/15/18).

203. *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997).

204. *Hawkes*, 136 S. Ct. at 1814. Even the Corps agreed that AJDs meet the first *Spear* factor. *Id.* at 1813. The Court refers to *Spear* factors as "Bennett conditions." *Id.*

205. *Id.* at 1814.

206. *Hawkes*, 136 S. Ct. at 1807. At the time of the judgment the Court had only eight members, due to the recent death of Justice Antonin Scalia.

property is subject to the CWA's jurisdiction; the Corps' final AJD thus provides them with the necessary information to make decisions about their land.²⁰⁷

If the Court took an ex-ante view of the AJD process, they could have reasonably decided that legal consequences do not flow from AJDs. This would have required the Court to start from the perspective of a landowner who is unsure about whether their property is subject to section 404. If the landowner chose to build without pursuing an AJD, there is the possibility that the Corps might independently determine that the owner needed a 404 permit. If, instead, the landowner waited for an AJD and then found out that they needed a permit, they would be in substantially the same place as before: any development would require a permit. All the AJD did was inform the landowner that they needed a permit to avoid legal action from the Corps. The AJD confers no rights or duties to the recipient landowner; it merely informs the landowner of whether or not there are waters of the United States on their property. From this perspective, the AJD is not the source from which legal consequences flow; instead, from this viewpoint AJDs conform to the Corps' vision of the process, which sees them as a "public service."²⁰⁸

Although the Court did not err as a matter of law in its decision in *Hawkes*, this decision once again heightened the level of scrutiny applied to the Corps' jurisdictional determinations under section 404. Now, the case-by-case jurisdictional determinations required by *Rapanos* (in addition to all other AJDs) can all be appealed before the permitting process even begins. While it is likely that the Corps' may be able to succeed in many of these appeals, the prospect of having to devote resources to multiple lawsuits could result in the Corps' second-guessing their JDs. It bears repeating that the AJD process is a voluntary service performed by the Corps because of their desire to provide the public with greater clarity about they will apply the CWA. The Supreme Court has ratcheted up the pressure on the Corps to continually prove basics of hydrological science—water is interconnected between systems—again and again in federal court.

III. HEIGHTENED JUDICIAL SCRUTINY UNDERMINES THE EFFECTIVENESS OF SECTION 404'S ENVIRONMENTAL MISSION

As shown in the discussion above, the Court has increasingly lowered the deference given to the Corps' interpretation of section 404's jurisdictional reach. By embracing Kennedy's concurrence from the fractured decisions in *Rapanos*, however, the Corps has been able to maintain most of its jurisdictional reach; the automatic jurisdictional rules are gone, but the malleability of Kennedy's "significant nexus" analysis allows the Corps to reach most aquatic features that were covered by the Corps' older regulations. In addition, the Corps has made use of the *Precon* decision, which allows the Corps' to assert jurisdiction based

207. *Hawkes*, 136 S. Ct. at 1814.

208. RGL 16-01, *supra* note 30, at 1. See also *supra* Part I.B. for a discussion about the Corps' views of the JD process.

on the likelihood of “significant” effects to navigable waters, to avoid the more onerous burden of the case-by-case review required under *Rapanos*.²⁰⁹

However, the evolving nature of the Supreme Court challenges the Corps’ relative success in maintaining section 404’s expansive jurisdiction. Justice Gorsuch, who filled the vacancy after Justice Scalia’s death, is likely to continue the approach taken by his predecessor—in the case of the CWA, this would probably result in his support for Scalia’s standard in *Rapanos*, if not a broader challenge to the legal regimes surrounding these regulations.²¹⁰ Justice Kennedy, the author of the significant nexus standard, called into the question the constitutionality of the entire CWA shortly before his departure from the Court.²¹¹ Justice Kavanaugh, Kennedy’s replacement, has a history of siding against environmental regulation.²¹² Meanwhile, Justices Roberts, Alito, and Thomas—all members of the *Rapanos* plurality—remain on the Court. Thus, the Court currently has at least five justices who would likely support the more limiting language of the *Rapanos* plurality requiring a “direct hydrological connection” between wetlands and navigable waters, which could upend the Corps’ jurisdictional rules and severely limit the environmental mission of section 404.

The threat of heightened scrutiny to section 404’s ecological goals is best understood in the context of EPA’s promulgation of the “Clean Water Rule” under the Obama administration. EPA and the Corps decided to develop a new definition of “waters of the United States” in response to the Court’s increasing jurisdictional scrutiny of the CWA’s jurisdiction, as evidenced in the progression from *Riverside Bayview* and *SWANCC* to *Rapanos*.²¹³ That WOTUS rule was crafted with an eye towards the significant nexus standard; therefore, the recent conservative shift on the Court could stymie any rule based on Kennedy’s “significant nexus” standard.²¹⁴ If this WOTUS rule was implemented, it would

209. See Telephone interview with Jensen, *supra* note 186.

210. See Richard Lazarus, *Will Justice Gorsuch on Water Act Prove Different Than Scalia Would?*, ENVTL. L. INST. 15 (July/August 2017), http://environment.law.harvard.edu/wp-content/uploads/2017/09/LAZARUS_FORUM_2017_July.pdf. (noting that Justice Gorsuch differs from Scalia in that he would invalidate Chevron deference entirely).

211. See Hawkes Oral Argument, *supra* note 1.

212. See Abrams Environmental Law Clinic, *supra* note 199.

213. The Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) are publishing a final rule defining the scope of waters protected under the Clean Water Act (CWA or the Act), in light of the statute, science, Supreme Court decisions in *U.S. v. Riverside Bayview Homes*, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*, and *Rapanos v. United States (Rapanos)*, and the agencies’ experience and technical expertise.

See Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054, 37,056 (June 29, 2015).

214. Currently, President Trump has ordered EPA to repeal the 2015 WOTUS rule and craft a new rule. Definition of “Waters of the United States”—Recodification of Pre-Existing Rules, Proposed Rule, 82 Fed. Reg. 34,899 (July 27, 2017). This inquiry, however, is focused on the *judicial* response to the Clean Water Rule and the jurisdictional reach of the CWA. *Id.* at 34,901. The question is whether the

have made wetlands adjacent to tributaries (i.e. the wetlands at issue in *Rapanos*) automatically subject to section 404's jurisdiction. The rule is based on a significant nexus analysis that acknowledges that the hydraulic connections between wetlands and navigable waters are inextricable and not usually in need of case-by-case review.²¹⁵

This increased scrutiny of the jurisdictional reach of the CWA, specifically section 404, abrogates the environmental mission of the CWA by threatening developments designed to further the CWA's goals of protecting the nation's waters, such as the WOTUS rule. Although the rule has been rescinded by the Trump administration, the judicial threat to the future implementation of such a rule remains.²¹⁶ This threat undermines the congressional intent behind the CWA, which was meant to be a wide-ranging environmental statute.²¹⁷ Congress passed the CWA over presidential vetoes and widespread industry opposition in order to "restore and maintain" the nation's waterways, which had been seriously degraded by decades of industrial, agricultural, and urban pollution.²¹⁸ Judicial scrutiny of the jurisdictional reach of the statute threatens the scientific bases that inform these goals.

Much of the Court's scrutiny over the CWA emerges from the choice to focus on the exact wording of the statute, rather than the scientific evidence that informs these words and phrases. For example, the plurality in *Rapanos* goes to great lengths to tie the CWA's jurisdiction to the exact phrasing employed in the statute, analyzing the meaning of the article "the" and the etymology of the word "waters."²¹⁹ This kind of analysis stymies the congressional intent behind the words in the statute because it focuses narrowly on definite articles and the plural endings of words. Such analysis negates any attempt to use the scientific ideas that inform these words and phrases to help identify their meaning. A scientific analysis of the statute's language reveals connections that supersede the non-

Supreme Court would allow such a rule to go forward, not whether the rule will be able to overcome executive displeasure.

215. See generally, EPA & Dep't of the Army, *Technical Support Document for the Clean Water Rule: Definition of Waters of the United States* (May 27, 2015), https://www.epa.gov/sites/production/files/2015-05/documents/technical_support_document_for_the_clean_water_rule_1.pdf (providing technical support for the Clean Water Rule).

216. See *supra*, note 214.

217. See William L. Andreen, *The Evolution of Water Pollution Control in the United States - State, Local, and Federal Efforts, 1789-1972: Part II*, 22 STAN. ENVTL. L.J. 215 (2003).

218. *Id.*

219. The use of the definite article ("the") and the plural number ("waters") show plainly that section 1362(7) does not refer to water in general. In this form, "the waters" refers more narrowly to water "[a]s found in streams and bodies forming geographical features such as oceans, rivers, [and] lakes," or "the flowing or moving masses, as of waves or floods, making up such streams or bodies." Webster's New International Dictionary (2d ed. 1954) On this definition, "the waters of the United States" include only relatively permanent, standing or flowing bodies of water.

Rapanos v. United States, 547 U.S. 715, 732 (2006).

scientific expectations and strict dictionary definitions employed by the *Rapanos* plurality.

The question in *Rapanos*—how to judge the relationship between wetlands adjacent to tributaries of navigable waters—highlights the failure of heightened judicial scrutiny to take into account the scientific realities that underlie the CWA. This exact question was reviewed by EPA’s Scientific Advisory Board (SAB), which is composed of a group of appointed scientific experts, during EPA’s rulemaking process for the 2015 WOTUS rule.²²⁰ According to SAB, “the available science supports defining adjacency or determination of adjacency on the basis of functional relationships, not on how close an adjacent water is to a navigable water.”²²¹ This statement is in direct tension with the plurality’s analysis, which emphasizes the statute’s use of the term “navigable waters.”²²² In the plurality’s view, the distances between wetlands and navigable waters is a “mere hydrologic connection,” and is therefore not covered by the statute’s exact wording.²²³ Once more, the scientific analysis yields contrary results: “adjacent waters and wetlands should not be defined solely on the basis of geographical proximity or distance to jurisdictional waters.”²²⁴

The oral argument in *Rapanos* illustrates the plurality’s overemphasis on the plain meaning of the CWA’s language, rather than the environmental goals that inform the statute. For example, Justice Scalia questioned the government lawyer repeatedly over the meaning of the word “tributary.”²²⁵ According to Justice Scalia, such a term denotes natural land features and therefore man-made water systems, such as storm drains, do not qualify:

Justice Scalia: [Y]ou interpret tributary to include storm drains and ditches that only carry off rainwater. I mean, it makes an immense difference to the scope of jurisdiction of the Corps of Engineers. I mean, when you talk about adjacent to a tributary, I think, you know, maybe adjacent to the Missouri

220. The SAB “review[s] the quality and relevance of the scientific and technical information being used by the EPA or proposed as the basis for Agency regulations.” EPA, *EPA Science Advisory Board (SAB)*, (Jan. 9, 2017), <https://yosemite.epa.gov/sab/sabpeople.nsf/webcommittees/board>.

221. Science Advisory Board, *Draft Report to Assist Meeting Deliberations* (Sept. 17, 2014), <http://www.lawandenvironment.com/wp-content/uploads/sites/5/2014/09/SAB.pdf>.

222. For example:

[T]he Act’s use of the traditional phrase “navigable waters” (the defined term) further confirms that it confers jurisdiction only over relatively *permanent* bodies of water . . . [a]s we noted in *SWANCC*, the traditional term ‘navigable waters’—even though defined as ‘the waters of the United States’—carries *some* of its original substance That limited effect includes, at bare minimum, the ordinary presence of water.

Rapanos, 547 U.S. at 734. The plurality insists that the Act’s use of the word “navigable” restrains jurisdiction, despite the fact that “navigable” waters can be heavily polluted via non-navigable water sources. *Id.*

223. *Id.* at 740.

224. Science Advisory Board, *supra* note 221.

225. See *Oral Argument, Rapanos v. United States* (2006), <https://www.oyez.org/cases/2005/04-1034> (at 51:06).

River or something like that. No. You're talking about adjacent to a storm drain.

Paul Clement, government lawyer: Well, Justice Scalia, I think if you had in mind a tributary, you'd probably have in mind the Pine River which is at issue in one of these sites. And I think that's why that's not the way petitioners have presented this case.

Justice Scalia: Only because I don't know how a storm drain is a water of the United States. That's all. I mean, all of these terms that you're throwing around somehow have to come within a reasonable usage of the term, waters of the United States, and I do not see how a storm drain under anybody's concept is a water of the United States.²²⁶

Ultimately, this discontent is expressed in the plurality opinion in its requirement of a "continuous surface connection" between waterways.²²⁷ The scientific impact of the CWA's wording is undermined when "common sense" definitions are employed.²²⁸ Given Congress's intent in passing the Act, the scientific meaning should predominate over the common understanding.

Finally, heightened judicial scrutiny fails to account for the dynamic and changeable nature of hydraulic systems. EPA captures this sentiment through its discussion of the *potential* functions of an aquatic feature. According to EPA's Technical Support Document for the WOTUS rule, aquatic resources have innate and unexpressed abilities—or "potential"—to perform important functions in certain contexts.²²⁹ The significant nexus standard, which considers only the current functions of a particular water system, fails to capture this potentiality. Even under the permissive approach in *Precon*, the Corps must provide some evidence of the actual functions of the wetlands. This approach fails to appreciate that "both potential and actual functions play critical roles in protecting and restoring downstream waters as environmental conditions change."²³⁰ The Court's current jurisprudence fights this basic fact about the environment; the changeable nature of natural systems is both misunderstood and subordinated to other concerns.

CONCLUSION

Despite the challenges posed by heightened judicial scrutiny, the Corps and EPA should continue to develop rules that track the scientific understanding of hydraulic systems. There are, of course, some limits to the Corps' jurisdictional

226. *Id.*

227. *Rapanos*, 547 U.S. at 742.

228. Once more, the science behind the CWA's wording is contradicted by this misplaced focus on the dictionary definitions of the statute's terms: "The science also supports consideration of the temporal dimension of connectivity to define adjacent waters and wetlands. This is particularly important in arid systems with intermittent and ephemeral waters." Science Advisory Board, *supra* note 221.

229. EPA & Dep't of the Army, *supra* note 215.

230. EPA, Office of Research and Development, *Connectivity of Streams & Wetlands to Downstream Waters: A Review & Synthesis of the Scientific Evidence*, EPA/600/R-14/475F 28 (Jan. 2015), <https://www.tucson.ars.ag.gov/unit/publications/PDFfiles/2302.pdf>.

reach—it would be impractical and possibly unconstitutional for the Corps’ to have jurisdiction over *every* land feature that could potentially impact navigable waters. The Corps, however, has demonstrated, through the use of the JD process, that it is capable of making determinations that both honor constitutional boundaries and the scientific principles that are necessary for the CWA to work. The threat to the health of our nation’s waters comes not from an overly expansive CWA, but from a lack of flexibility.²³¹ The restraints on the CWA’s jurisdiction should not prevent the Corps from pursuing the limit of their constitutional authority when developing environmental regulations. After all, while Congress was able to express the objective of the CWA in a simple sentence, it has taken decades of work “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”²³²

231. Although not considered by this Note, it may be worth the Corps’ time and effort to explore how scientific understanding might change the limits of the federal and constitutional makeup of the United States’ political system. For example, hydrological systems are intimately connected to one another—how does this comport with the notion that the federal government may only regulate those things that affect interstate commerce? If interstate waterways are bound up in intrastate water bodies, where should the line be drawn?

232. 33 U.S.C. § 1251 (2012).

We welcome responses to this Note. If you are interested in submitting a response for our online journal, *Ecology Law Currents*, please contact cse.elq@law.berkeley.edu. Responses to articles may be viewed at our website, <http://www.ecologylawquarterly.org>.

