Chapter 4

Regulation of Wetlands and Waters of the United States

I. Activities Regulated Under the Clean Water Act

A. The Rivers and Harbors Act

Corps of Engineers photo - Wikimedia

Before Congress enacted the Clean Water Act, federal regulation of wetlands was generally limited to regulation under the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 401, *et. seq.* Section 10 of the Act prohibits obstruction of navigable waters except in accordance with a permit issued by the Corps of Engineers, *see* 33 U.S.C. § 403, and Section 13 of the Act prohibits the deposit of refuse into the navigable waters. *See* 33 U.S.C. § 407. As explored further later in this chapter, though, the main focus of the statute was, and remains, protection of navigability of the nation's waters. The statutory definition of "navigable waters" is driven by that focus, and is limited to waters that are "subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce." 33 C.F.R. § 329.4. As a result, very few wetlands were or are regulated as "navigable waters" under the Rivers and Harbors Act.

B. The Clean Water Act

When Congress adopted the Federal Water Pollution Control Act Amendments of 1972, though, it greatly expanded federal regulation over a broad range of activities in wetlands and other waters, with a focus on protecting water quality rather than protecting navigation. *See* 33 U.S.C. § 1251(a) (providing that the objectives of the Act are to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters"). Indeed, in the Act, Congress established, as a national goal, "that the discharge of pollutants into the navigable waters be eliminated by 1985." *Id.* § 1251(a)(1).

Section 301: Perhaps the most important provision of the statute, for purposes of federal regulation of wetlands and other waters, is **Section 301**, which prohibits "the discharge of any pollutant by any person" except in compliance with Section 301 and with several other sections of the statute, including the sections that create the federal

permitting programs for point source discharges and discharges into wetlands. 33 U.S.C. § 1311(a). The statute further defines "the discharge of a pollutant" to mean the "addition of any pollutant to navigable waters from any point source". 33 U.S.C. § 1362(12). As a result, Section 301 requires permits and compliance with the other requirements of Section 301 for an activity if ***all*** of the following requirements are met:

Triggers for Section 301 prohibition

- there is an ***addition***
- of a ***pollutant***
- from a ***point source***
- into the ***navigable waters***
- by a ***person***

402 and 404 Permit Programs: The Clean Water Act creates two separate permit programs to regulate discharges of pollutants into navigable waters. While the Section 402 permit program, administered by EPA and the states, is the primary permitting program for point source discharges of pollution into the navigable waters, *see* 33 U.S.C. § 1342, most activities involving wetlands are governed by the Section 404 permit program. *See* 33 U.S.C. § 1344. Section 404 authorizes the Corps, rather than EPA, to issue permits when the regulated activity involves the "discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a) Nevertheless, EPA plays an important role in that permitting process, *see* 33 U.S.C. § 1344(b)-(c). In order for the federal govenment to have Section 404 jurisdiction over an activity in wetlands, therefore, there must be a "discharge of dredged or fill material" into "navigable waters."

Triggers for 404 Jurisdiction

- there is a ***discharge of dredged or fill material***
- into the ***navigable waters***

When wetlands are ditched, drained, filled or otherwise altered, several of the pre-requisites for regulation under sections 301 and 404 are easily met.

Point source: For instance, the Clean Water Act defines "point source" very broadly as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding

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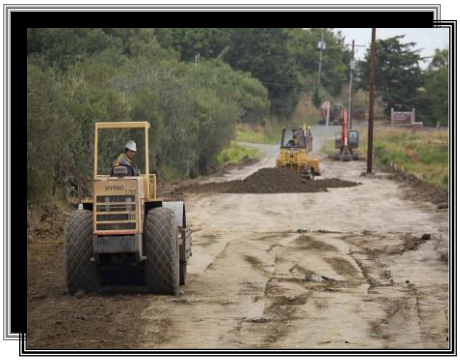
operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). Ditching, draining, or filling activities in wetlands usually involve heavy construction equipment, such as backhoes, excavators, or loaders, which clearly are "discernible, confined and discrete conveyances."



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Pollutant: Similarly, the statute defines "pollutant" to include "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6). Normally, activities impacting wetlands involve the placement, in wetlands, of rocks, soil, silt, organic debris or similar materials, all of which fit comfortably within the definition of "pollutant."

Person: The statute also defines "person" very broadly to include "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body." 33 U.S.C. § 1362(5). As a result, when wetlands are ditched, drained, filled or otherwise altered, it is normally not very difficult to demonstrate that the activity was undertaken by a "person."

Consequently, whether Section 301 prohibits ditching, draining, filling or otherwise impairing wetlands usually depends on whether the activity at issue involves an ***addition*** of a pollutant and whether the wetlands at issue are ***navigable waters***. Similarly, whether the federal government has jurisdiction under Section 404 over such activities impacting wetlands usually depends on whether the activity involves a ***discharge*** of dredged or fill material and whether the wetlands at issue are ***navigable waters***. Section II of this Chapter examines the scope of the federal government's jurisdiction over ***navigable waters*** at length, and Chapter 5 focuses on which activities in wetlands have been held to involve the ***addition*** of pollutants or the ***discharge of dredged or fill material***.

As Section II of this Chapter will describe, the Corps and EPA have defined the statutory term "navigable waters" to include certain wetlands. Before turning to a closer examination of the scope of federal jurisdiction over navigable waters, therefore, it may be helpful to examine the federal government's regulatory approach to defining and identifying wetlands in more detail.

C. Identifying and Delineating Wetlands

Definitions: Although the Clean Water Act does not include a statutory definition for "wetlands," both EPA and the Corps have adopted regulations that define "wetlands" as follows:

> those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

33 C.F.R. § 328.3 (b) (Corps' regulations); 40 C.F.R. § 230.3(t) (EPA's regulations).

While that definition is the primary definition of wetlands for purposes of the Clean Water Act, there are a few other definitions used by other agencies that have some responsibility over wetlands under the Clean Water Act. As noted in Chapter 2, the Fish and Wildlife Service has some responsibilities regarding wetlands under the Clean Water Act and several other federal statutes. In administering a National Wetlands Inventory, the Fish and Wildlife Service uses a definition of "wetlands" that is similar, but not identical, to the definition adopted by EPA and the Corps. Specifically, the Service defines wetlands as "lands transitional between terrestrial and aquatic systems where the water table is usually at or near the surface or the land is covered by shallow water. For purposes of this classification, wetlands must have one or more of the following three attributes: (1) at least periodically, the land supports predominantly hydrophytes, (2) the substrate is predominantly undrained hydric soil, and (3) the substrate is nonsoil and is saturated with water or covered by shallow water at some time during the growing season of each year." L. Cowardin, et al., U.S. Department of the Interior, Fish and Wildlife Service, *Classification of Wetlands and Deep-Water Habitats of the United States* (1979). In addition, the Natural Resources Conservation Service regulates wetlands under the Food Security Act, which has a similar, though not identical, *statutory* definition for wetlands, *see* 16 U.S.C. § 3801(27), but that agency also has some regulatory responsibilities over wetlands on agricultural lands under the Clean Water Act, as discussed below.

Chapter 1 of this book described the scientific bases for determining whether a particular geographic area constitutes a wetland (i.e. the presence of specific types of soils, vegetation and hydrology) and outlined the delineation process that is used to identify the boundaries of wetlands. Not surprisingly, the federal regulatory definitions focus on the three characteristics of wetlands that are central to delineation - vegetation, soils, and hydrology. Because the regulatory definition of wetlands adopted by EPA and the Corps may seem a little difficult to apply to a specific piece of property without further clarification, the federal agencies with jurisdiction over wetlands have provided guidance over the years to help staff and the regulated community determine the scope of the definition.

Delineation manuals: In 1987, the Corps adopted a Wetlands Delineation Manual that outlined tests and procedures that agency staff could use to determine whether a particular geographic area had the vegetation, soils and hydrology necessary to be classified as a wetland. The manual was a guidance document, rather than a rule, so it was not adopted pursuant to notice and comment rulemaking. In 1988, EPA adopted a different manual, also as a guidance document, which used *different* tests and procedures to delineate wetlands. W.S. Sipple, U.S. Environmental Protection Agency, *Wetland Identification and Delineation Manual* (1988). The EPA manual included a test that relied heavily on an analysis of vegetation for sites of 15 acres or less. Ralph W. Tiner, WETLAND INDICATORS: A GUIDE TO WETLAND IDENTIFICATION, DELINEATION, CLASSIFICATION, AND MAPPING 208-209 (CRC Press 1999).

Adding to the confusion, at the time, the Fish and Wildlife Service had its own procedures for identifying wetlands, based on the Cowardin definition outlined above, as did the Soil Conservation Service, which regulated wetlands under the Food Security Act. *See* Soil Conservation Service, U.S. Department of Agriculture, *National Food Security Act Manual* (1985). (Note: The Soil Conservation Service became the Natural Resources Conservation Service in a 1994 USDA reorganization.)

In order to eliminate the confusion caused by the sometimes conflicting guidance documents, in 1989, EPA, the Corps, the Fish and Wildlife Service and the Soil Conservation Service developed a uniform manual for delineating wetlands, *see* Fish and Wildlife Service, Environmental Protection Agency, Department of the Army, Soil Conservation Service, *Federal Manual for Identifying and Delineating Jurisdictional Wetlands* (1989). Like the predecessor documents, the interagency manual was a guidance document, rather than a rule, and was adopted outside of the notice and comment rulemaking process. Shortly afer its adoption, the interagency manual was criticized by landowners and organizations who claimed that the manual would expand jurisdiction to cover a much broader universe of areas as wetlands. *See* National Research Council, *Wetlands: Characteristics and Boundaries* 2 (The National Academies Press, 1995).

Because the manual was adopted informally, landowners challenged the use of the manual on the grounds that it was a legislative rule that was adopted in violation of the APA's notice and comment rulemaking procedures and was, therefore, invalid. The United States Court of Appeals for the Fourth Circuit addressed that issue in the following case:

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Hobbs v. United States

947 F.2d 941 (4th Cir. 1991)
cert. denied 504 U.S. 940 (1992)

Resources for the Case

Google Map of all the cases in the book
Unedited opinion (From Justia)

PER CURIAM:

These appeals arise from a civil enforcement action brought by the Environmental Protection Agency for alleged violations of the Clean Water Act ("CWA"), * * * by Phillip and Dorothy Hobbs as well as the couple's son and daughter-in-law, Paul and Donna Hobbs. The violations stem from the clearing, draining, and constructing of roads on approximately 50 acres of alleged wetlands to create hay fields. All of the Hobbses were subjected to penalties for violations of the CWA by the district court. The Hobbses appeal the district court's decision on various grounds. Finding none of their arguments persuasive, we affirm the district court's decision.

I.
A.

A brief review of the statute is necessary for an understanding of the law of this case. The Clean Water Act is a comprehensive statute designed to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." CWA § 101(a)(2) * * * In accordance with this mandate, the Act bars the discharge of pollutants into waters of the United States except in compliance with a permit issued under the Act. CWA § 301(a) * * * The term pollutant includes dredged and fill material consisting of soil, rock, and sand. CWA § 404 * * * The Hobbses do not contest that their discharge material fits within the definition of a pollutant.

The term "waters of the United States" is not explicitly defined under the statute. The Act does define "navigable waters," however, as waters of the United States. 33 U.S.C. § 1362(7). * * *

"Waters of the United States" is also defined as waters adjacent to other waters of the nation. 40 C.F.R. § 230.3(s); *United States v. Riverside Bayview Homes, Inc*., 474 U.S. 121 (1985). EPA defines "adjacent" as bordering, contiguous, or neighboring. 40 C.F.R. § 230.3(a). Moreover, wetlands separated from other waters of the United States by "man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands' " according to the EPA. 40 C.F.R. § 230.3(b). Finally, both the EPA and the Army Corps of Engineers ("Corps") define wetlands as:

> those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs,

and similar areas. 40 C.F.R. § 230(t); 33 C.F.R. § 328(b).

The EPA is authorized under the Act to issue a Finding of Violation and a Compliance Order for any violation of CWA § 301(a). 33 U.S.C. § 1319(a). Moreover, EPA may commence a civil action for appropriate relief for a violation of CWA § 301(a).

For the instant case, there are two relevant manuals for wetlands determinations, one produced by the EPA and the other by the Corps. Both manuals are used to aid in the determination of what constitutes wetlands. Each manual relies on three parameters to make a determination: hydrology, vegetation, and soils. The Corps of Engineers Delineation Manual was adopted in 1987. The EPA manual was adopted April 1988. There is also an interagency manual, adopted by the EPA and the Corps, which was adopted January 10, 1989. The joint manual, like the EPA manual, uses the three parameter test in a manner that expands the definition of wetlands. The jury was allowed to consider the multiparameter standard in each of the manuals.

II

Phillip and Dorothy Hobbs own about 169 acres in Ware Neck, Gloucester County, Virginia. The Hobbses' son and daughter-in-law, Paul and Donna, also own 37 acres in the county. The combined property contains approximately 206 acres ("Hobbses' property"). The jury found this parcel to be wetlands adjacent to the Ware River.

The Hobbses cleared, drained, and constructed roads on approximately 50 acres of wetlands to create hay fields. In the process, the elder Hobbs discharged, dredged, or filled material onto their wetlands in 1980, 1984, and 1985. The younger Hobbs did the same in 1986, 1987, and 1988. The Hobbses, however, did not apply for a § 404 permit from the Corps, as required by the CWA.

The Hobbses contend that they did not apply for a permit because they were under the impression that they were not required to do so. On September 29, 1988 an official of the U.S. Fish and Wildlife Service ("FWS") went to the Hobbses property and told Paul Hobbs they might be doing work on nontidal wetlands. The FWS official arranged a site visit by a Corps official. The Hobbses contend they overheard the two men talking and expressing doubt about whether the land was in fact wetlands. When Paul Hobbs asked about the property, the Corps official stated that "it was a grey area of enforcement for the Corps of Engineers ... and he didn't see where the [Hobbses] had ... done anything wrong." Moreover, the Corps employee told the Hobbses that he would get back to them about whether their land was wetlands; but he never told them whether the property was wetlands nor did the official tell them about a permit.

EPA issued the Hobbses a Findings of Violation and Compliance Order, or Administrative Order, on March 23, 1989. EPA subsequently amended the order on April 25, 1989.

III

On April 25, 1989, the Hobbses filed a complaint challenging the EPA's Findings of Violation and Compliance Order issued against them under § 404. On May 4, 1989, the district court issued a preliminary injunction allowing the Hobbses to continue to farm that portion of the land previously converted to hayfields. * * *

[At the trial level, EPA then filed a counterclaim against the Hobbses for illegally filling the wetlands and the court dismissed the Hobbses complaint against EPA. On EPA's counterclaim, a jury found that the Hobbses discharged pollutants onto wetlands on their land in violation of the Clean Water Act. The court allowed the defendants to continue to grow hay on the parcels that they had previously converted to hay fields, but ordered them to pay $300 in civil penalties and required them to take various actions to restore and/or preserve the other wetlands on their property. The defendants appealed the court's decision on several grounds, including an argument that the delineation manual(s) used by the government were substantive rules that were invalid because they were not adopted in accordance with the APA.]

IV

A

* * *

The second issue is whether the EPA's wetlands delineation manuals are interpretive guidance documents or substantive rules with binding legal effect in the determination of what constitutes wetlands under 40 C.F.R. § 230(t) and 33 C.F.R. § 328.3(b). Closely related to this matter is the question of whether the EPA Manual constitutes substantive rules subject to the Administrative Procedure Act ("APA") notice and comment requirements, 5 U.S.C. § 553.

The Hobbses contend that the EPA manual represents substantive rules subject to the public notice and comment requirements under the APA. Their argument in effect is the manual does not merely clarify and explain the process of wetlands determination, but rather expands federal jurisdiction.

Whether the manual is subject to APA depends on whether it constitutes interpretive rules or substantive rules. The former rules " 'are those which merely clarify or explain existing law or regulations,' and 'do not have the full force and effect of a substantive rule but [are] in the form of an explanation of particular terms.' " *American Hospital Ass'n v. Bowen*, 834 F.2d 1037, 1045 (D.C.Cir.1987) (citations omitted). In *Jerri's Ceramic Arts v. Consumer Products Safety Comm'n,* 874 F.2d 205 (4th Cir.1989), we noted the distinction between the two rules:

> An interpretive rule simply state[s] what the administrative agency thinks the statute means, and only "remind[s]" affected parties of existing duties ... [while] a

substantive or legislative rule has the force of law, and creates new law or imposes new rights or duties.

Id., 207. Moreover, this court held that in determining whether a rule was interpretive or substantive courts must consider the agency's intent. *Id.*, at 208.

The intent behind the manuals and absence of the force of law make it clear that they are interpretive rules. The EPA manual states in its preface that it was "developed to address the need for operational and jurisdictional guidance." Moreover, the manual states that the methods offered for wetlands determinations "are the recommended approaches."

While the EPA manual does not possess the force of law, the EPA manual does represent a significant change in the definition and an expansion of jurisdiction. The change in definition, however, is premised upon the making of certain scientific assumptions regarding the presence of the three parameters for a wetlands determination. The Hobbses point to nothing in the record to suggest any explicitly political motivation or policy consideration behind the change in the parameter test. Without a showing of intent or legal force, the manuals are no more than interpretive rules.

Questions and Comments

1. What procedures does the APA require agencies to follow when adopting interpretative rules? How do those procedures differ from the procedures required for substantive (legislative) rules?

2. Are interpretative rules entitled to *Chevron* deference? Do they carry the force of law? Why might the agencies have preferred to adopt the delineation manuals as interpretative rules, as opposed to substantive (legislative) rules?

3. Is an agency's characterization of a rule as "interpretative" or "substantive" outcome determinative? How does this court determine what type of "rule" EPA has adopted?

4. Remember that several federal agencies have jurisdiction over various aspects of wetlands regulation under the Clean Water Act and other statutes. Note that the violation in this case was first identified by a representative of the Fish and Wildlife Service, who arranged a visit by a representative of the Corps of Engineers, but that the enforcement action in the case was brought by EPA. Note, too, that the representatives of the various agencies appeared to view the severity of the violation differently. One of the defendants in the case argued that the government should be estopped from prosecuting him because he constructed the drainage ditches on the property under the supervision of and according to the design specifications of two Soil Conservation Service

employees. The court addressed that argument in a separate portion of the opinion. How do you think the court should have ruled? *See* *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990).

5. As Chapter 10 will explore more fully, the government does not need to prove that a defendant acted intentionally, or with any mental state, to prevail in a civil enforcement action under the Clean Water Act. Nevertheless, the government, and courts, are likely to consider the defendant's mental state when determining the severity of the penalties for violating the Act. Does it appear that the trial court considered the Hobbses mental state in determining the penalty for the defendant's conduct?

More Manuals: In 1991, the Corps and EPA developed updates to the 1989 manual and began a rulemaking process to adopt a new manual. *See* 56 Fed. Reg. 40,446 (Aug. 14, 1991). The 1991 proposal generated controversy when critics argued that it was grounded more in politics than science and would significantly *narrow* jurisdiction over wetlands. Environmental groups claimed that 30-80% of the areas regulated as wetlands under the 1989 manual would be excluded from regulation under the proposed 1991 manual. *See* Heimlich, R.E., K.D. Wiebe, R. Claassen, D. Gadsby and R.M. House, Economic Research Service, U.S. Department of Agriculture, *Wetlands and Agriculture: Private Interests and Public Benefits*, Agricultural Economic Report No. 765 (1998). The agencies ultimately abandoned the proposed rulemaking.

In response to criticism of the 1989 manual and concerns about the process that the agencies were using to develop the delineation manuals, in 1992, Congress included a rider in appropriations legislation for the Corps that prohibited the Corps from utilizing the 1989 interagency manual or any other manual adopted after the 1989 manual unless the manual was adopted pursuant to notice-and-comment rulemaking procedures. *See* Energy and Water Development Appropriations Act of 1993, Pub. L. No. 102-377, 106 Stat, 1315 (1992). In light of the legislation, the Corps returned to using its 1987 delineation manual to delineate wetlands under the Clean Water Act. Although the legislation did not apply to EPA, EPA also decided to use the Corps' 1987 manual to delineate wetlands under the Clean Water Act at that time. The Natural Resources Conservation Service, however, returned to its own National Food Security Act Manual.

In 1995, the National Academy of Sciences released a report on characterizing wetlands, *see* National Research Council, *Wetlands: Characteristics and Boundaries* (The National Academies Press, 1995) ("NAS Study"), that was prepared in response to a federal law that required the Academy to prepare such a study to assist in the development of a new federal wetlands delineation manual. *See* Departments of Veterans Affairs and Housing and Urban Development and Independent Agencies Appropriations Act of 1993, Pub. L. No. 102-389, 106 Stat. 1571 (1992). The report included a series of recommendations improving the 1987 Corps' manual, but also found that the approach that the agencies were using under that manual was

scientifically sound. *See* NAS Study, *supra,* at 12.

Although the National Academy of Sciences study suggested that there was a need for a "more efficient, more uniform, ... and more accurate" approach to delineating wetlands, *id.*, EPA and the Corps still use the Corps' 1987 delineation manual to delineate wetlands under the Clean Water Act. However, following up on recommendations in a 2002 Corps report, *see* James S. Wakeley, *Developing a Regionalized Version of the Corps of Engineers Wetlands Delineation Manual: Issues and Recommendations,* ERDC/EL TR-02-20 (Aug. 2002), the Corps adopted a series of 10 regional supplements to the delineation manual, with procedures and tests tailored to the specific vegetation, soils and hydrology conditions of each region. *See* U.S. Army Corps of Engineers, *Regional Supplements to the Corps Delineation Manual*, *available at*:
http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits/reg_supp.aspx

Division of authority for determining jurisdiction: As will be described more fully in Chapters 6 and 10, EPA plays an important role in the permitting process with the Corps and both agencies have enforcement authority under the Clean Water Act. In order to establish efficient coordination between the agencies in making jurisdictional determinations under the Act, EPA and the Corps entered into a Memorandum of Agreement in 1989, *see* *Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning the Determination of the Section 404 Permit Program and the Application of the Exemptions Under Section 404(f) of the Clean Water Act (Jan. 19, 1989)*, that gave the Corps the responsibility for performing "the majority of the geographic jurisdictional determinations" and provided that the Corps' determinations would be binding on the Government. The MOA did, however, authorize EPA to make jurisdictional determinations in "special cases" and recognized that EPA would be the lead agency in developing guidance on determining jurisdiction under the Act. *Id.* Because the agencies entered into the agreement in 1989, the MOA provided that the agencies would make determinations using the 1989 interagency delineation manual. *Id.* In 1993, the agencies amended the MOA to provide that determinations would be made using the 1987 Corps delineation manual, but left the rest of the agreement intact. *See* 58 Fed. Reg. 4995 (Jan. 19, 1993). While most jurisdictional determinations are covered by those MOAs, the Natural Resources Conservation Service takes the lead on delineating wetlands for purposes of the Food Security Act and delineates them using its own manual. *See* Environmental Protection Agency, Department of Defense, Department of Agriculture, Department of Interior, *Interagency Memorandum of Agreement Concerning Wetlands Determinations for Purposes of Section 404 of the Clean Water Act and Subtitle B of the Food Security Act*, (Jan. 6, 1994).

While the government agencies are ultimately responsible for determining the geographic limits of wetlands jurisdiction, landowners frequently retain consultants to delineate the wetland boundaries on their property in accordance with the 1987 Corps

manual prior to seeking an official jurisdictional determination from the government. States and professional organizations, such as the Society of Wetlands Scientists, provide training and certification for wetlands delineators, *see* Leah Stetson, Association of State Wetlands Managers, *State Wetland Delineator Certification Programs,* Wetland News (June-July 2007), but there is not a national certification program. An official jurisdictional determination, though, can be made only by the government. While the Corps and EPA rely on the same scientific tests to delineate wetlands nationwide, a 2004 General Accounting Office Report determined that those criteria are interpreted and applied unevenly by the various Corps district offices. *See* General Accounting Office, *Corps of Engineers Needs to Evaluate its District Office Practices in Determining Jurisdiction* GAO–04–297 (Feb. 2004).

Types of Jurisdictional Determinations: The Corps issues two types of jurisdictional determinations - "preliminary jurisdictional determinations" and "approved jurisdictional determinations." *See* U.S. Army Corps of Engineers, *Jurisdictional Determinations,* Regulatory Guidance Letter 08-02 (June 26, 2008) (hereinafter "RGL 08-02"). A "preliminary jurisdictional determination" is non-binding, cannot be appealed, and can be used only to indicate that there *may* be wetlands or waters on a piece of property. *See* 33 C.F.R. § 331.2. It cannot be used to indicate that wetlands or waters are *not* present. *See* RGL 08-02, §8. Landowners might seek preliminary jurisdictional determinations to waive questions regarding jurisdiction and move ahead expeditiously to obtain a development permit or the Corps might use a preliminary jurisdictional determination as the basis for a compliance order when site access may be impractical or unauthorized or in other circumstances when it is not possible to complete an approved jurisdictional determination in a timely manner. *Id.* § 4.

An "approved jurisdictional determination" is an official determination that "wetlands," "waters of the United States," or "navigable waters" are present on the property or *are not present* on the property. *See* 33 C.F.R. § 331.2. The "approved jurisdictional determination" precisely identifies the boundaries of those waters. *Id.* "Approved jurisdictional determinations" are valid for five years and can be challenged administratively. *See* RGL 08-02 §2. In addition, in United States Army Corps of Engineers v. Hawkes Co., et al., 136 S.Ct. 1807 (2016), the Supreme Court held that approved jurisdictional determinations are "final agency actions" that can be reviewed in court under the APA.

Resources

- A Corps' "approved jurisdictional determination" that wetlands exist on a site in Sacramento, California.

- Access the Corps JDs online for the Baltimore District or San Francisco District.
- Access the Unified Corps Database of JDs for all Districts
- EPA/Corps Memo re: Strengthening Transparency and Coordination in Jurisdictional determinations (Nov. 16, 2015)

Research Problem

Many of the Corps Districts post approved jurisdictional determinations on their websites, as noted above. Browse one of the Corps District's websites to find an approved jurisdictional determination where the Corps has determined that there are wetlands on the property that are waters of the United States, but where the wetlands are not adjacent to traditional navigable waters (TNWs). For that jurisdictional determination, please identify (1) the District; (2) the file number; and (3) the acreage of wetlands that qualify as waters of the United States. In addition, briefly summarize the connection between the wetlands and traditional navigable waters and the factors that demonstrate that the wetlands have a significant nexus to traditional navigable waters.

Hypothetical

Clarissa Darrow is an attorney with the EPA in the Atlanta Regional Office and has been contacted by an EPA investigator in the Water Branch of the Office regarding the illegal discharge of fill material into wetlands near Naples, Florida by the Valencia Citrus Company. Elvin Kagan, the corporate counsel for the Valencia Citrus Company, informed Darrow that before expanding their orchards last year, Valencia contracted with Carl Kramer as a consultant to delineate their property and determine whether there were any wetlands on the property that Valencia planned to develop. Kagan insisted that Valencia did not add any fill material to wetlands on the property until Kramer informed them that the wetlands were not "waters of the United States." If EPA has not yet instituted any enforcement proceedings against Valencia, and if Kramer is not independently represented by an attorney, may Darrow contact Kramer and question him without seeking approval from Kagan, as long as Kramer consents to the meeting? Could Darrow contact Kramer and question him if he were an employee of the Valencia Fruit Company? *See* American Bar Association, Model Rule of Professional Conduct 4.2 and 4.3 (and associated comments).

Section Quiz

Now that you've finished the material covering Section I of Chapter 4, why not try a CALI lesson on the material at http://www.cali.org/node/10694. It should only take about 15 minutes or less.

II. Waters of the United States

A. The Corps' Initial Interpretation

The scope of waters, including wetlands, that have been subject to jurisdiction under the Clean Water Act has ebbed and flowed over the years. The statute does not explicitly indicate that it covers wetlands. As noted above, the statute regulates various activities in "navigable waters," which Congress defined as "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). When the Corps first adopted rules to define the term "navigable waters," it used the definition that it had been using under the Rivers and Harbors Act. *See* 37 Fed. Reg. 18289 (Sep. 9, 1972).

> **1974 Corps definition of "navigable waters"**
>
> The term "navigable waters of the United States" and "navigable waters," as used herein mean those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been In the past, or may be In the future susceptible for use for purposes of interstate or foreign commerce. 33 C.F.R. 209.210(d)(1), 39 Fed. Reg. 12115 (April 3, 1974).

Under that definition, "navigable" really meant "navigable." In order to be a navigable water, the water had to be:

- currently navigable;
- historically navigable; or
- potentially navigable

The Corps' "navigable waters" definition was derived, historically, from a test established by the Supreme Court over one hundred years earlier in *The Daniel Ball*, 77 U.S. 557 (1870). In that case, the Court rejected the British common law approach that defined navigability based on the ebb and flow of the tide, and adopted a definition that focused on whether the waters "are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." 77 U.S. 563. The tie to commerce was significant, so the mere fact that one could float a canoe on the water was not dispositive if the water could not at least potentially be used as a highway of commerce for trade or travel. (For a primer on "navigability" prepared by American Whitewater, click here.)

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Environmental groups, including the Natural Resources Defense Council, felt that the Corps' regulatory interpretation of "navigable waters" was too narrow and that Congress intended to regulate a broader range of waters under the Clean Water Act than were regulated under the Rivers and Harbors Act. Accordingly, NRDC sued the Corps, and the Federal District Court for the District of Columbia issued the following decision.

Natural Resources Defense Council, Inc. v. Callaway
392 F.Supp. 685 (D.D.C. 1975)

AUBREY E. ROBINSON, Jr., District Judge.

* * * [The Plaintiffs'] Motion for Partial Summary Judgment on Count I of the Complaint is granted; and it is DECLARED that: * * *

Congress by defining the term ' navigable waters' in Section 502(7) of the [Clean Water Act] to mean 'the waters of the United States, including the territorial seas,' asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution. Accordingly, as used in the [Clean] Water Act, the term is not limited to the traditional tests of navigability. * * *

Defendants Howard H. Callaway, Secretary of the Army, and Lt. Gen. William C. Gribble, Chief, Army Corps of Engineers, are without authority to amend or change the

statutory definition of navigable waters and they are hereby declared to have acted unlawfully and in derogation of their responsibilities under Section 404 of the [Clean] Water Act by the adoption of the definition of navigability described at 33 C.F.R. § 209.210(d)(1), 39 Federal Register 12119 (April 3, 1974) and 33 C.F.R. 209.260; and it is ordered that Defendants Callaway and Gribble:

1. Revoke and rescind so much of 39 Federal Register 12115, et seq. (April 3, 1974) as limits the permit jurisdiction of the Corps of Engineers by definition or otherwise to other than 'the waters of the United States.'

2. Publish within fifteen (15) days of the date of this Order proposed regulations clearly recognizing the full regulatory mandate of the [Clean] Water Act.

3. Publish within thirty (30) days of the date of this Order final regulations clearly recognizing the full regulatory mandate of the [Clean] Water Act * * *.

Questions and Comments

1. Subsequent decisions examining the regulatory definition of "waters of the United States" frequently invoke the *Chevron* analysis, which accords agency rulemaking a degree of deference. Why did the Court not use that analysis in this case, and would the case have come out differently if the Court had used the *Chevron* analysis?

2. Would the deadlines that the court gave the agency to adopt proposed and final rules to define "navigable waters" be realistic today?

3. If the Court upheld the Corps' regulatory definition of "navigable waters," would many wetlands be regulated under the Clean Water Act?

4. How broad was the Corps' jurisdiction over "waters" after this decision? What limits did the Court impose on the Corps' authority to regulate waters? Would "navigable waters" need to be "navigable"?

B. Expanded Jurisdiction, Adjacent Wetlands and *Riverside-Bayview Homes*

In response to the court's decision in *N.R.D.C. v. Callaway*, the Corps amended its regulations to significantly broaden the definition of "navigable waters" under the Clean Water Act to advance the water quality protection purposes of the statute, as opposed to the navigability goals of the Rivers and Harbors Act. In 1975, the agency issued interim final regulations that included not only the traditional "navigable waters" that were regulated under the Rivers and Harbors Act, but also tributaries of those waters and "coastal wetlands" or "freshwater wetlands" that were contiguous to, or adjacent to, traditional navigable waters. *See* 40 Fed. Reg. 31320 (July 25, 1975). The 1975

regulations marked the first time that the Corps defined "navigable waters" under the Clean Water Act to include wetlands. The new regulations also asserted jurisdiction over intrastate lakes, rivers and streams (even if not traditionally navigable) if they were utilized in various ways for interstate commerce. Thus, while the regulations broadened the categories of waters within the Corps' jurisdiction, the agency limited its jurisdiction to waters with ties to interstate commerce.

In 1982, the Corps refined its regulations but did not significantly expand jurisdiction. Because the Clean Water Act defines "navigable waters" as "waters of the United States," the Corps adopted a regulatory definition of "waters of the United States" that included the following waters:

- the traditional navigable waters regulated under the 1974 regulations (33 C.F.R. § 323.2(a)(1));
- interstate waters and interstate wetlands (33 C.F.R. § 323.2(a)(2));
- intrastate waters the use, degradation or destruction of which could affect interstate or foreign commerce (33 C.F.R. § 323.2(a)(3));
- impoundments of water otherwise defined as waters of the United States under the definition (33 C.F.R. § 323.2(a)(4));
- tributaries of waters identified in paragraphs (a)(1) - (4) (33 C.F.R. § 323.2(a)(5));
- the territorial sea (33 C.F.R. § 323.2(a)(6)); and
- wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(6) (33 C.F.R. § 323.2(a)(7))

See 33 § C.F.R. 323 (1982).

Those rules were challenged in the following case, which made it to the U.S. Supreme Court in 1985.

United States v. Riverside Bayview Homes

474 U.S. 121 (1985)

Resources for the Case
Oral Argument Audio (from the Oyez Project)
Unedited opinion (From Justia)
Google Map of all the cases in the coursebook

JUSTICE WHITE delivered the opinion of the Court.

This case presents the question whether the Clean Water Act (CWA), 33 U.S.C. § 1251 *et seq.,* together with certain regulations promulgated under its authority by the Army Corps of Engineers, authorizes the Corps to require landowners to obtain permits from the Corps before discharging fill material into wetlands adjacent to navigable bodies of water and their tributaries.

I

The relevant provisions of the Clean Water Act originated in the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816, and have remained essentially unchanged since that time. Under §§ 301 and 502 of the Act, 33U.S.C. §§ 1311 and 1362, any discharge of dredged or fill materials into "navigable waters" -- defined as the "waters of the United States" -- is forbidden unless authorized by a permit issued by the Corps of Engineers pursuant to § 404, 33 U.S.C. § 1344. * * * After initially construing the Act to cover only waters navigable in fact, in 1975 the Corps issued interim final regulations redefining "the waters of the United States" to include not only actually navigable waters but also tributaries of such waters, interstate waters and their tributaries, and nonnavigable intrastate waters whose use or misuse could affect interstate commerce. 40 Fed.Reg. 31320 (1975). More importantly for present purposes, the Corps construed the Act to cover all "freshwater wetlands" that were adjacent to other covered waters. A "freshwater wetland" was defined as an area that is "periodically inundated" and is "normally characterized by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction." 33 CFR § 209.120(d)(2)(h) (1976). In 1977,the Corps refined its definition of wetlands by eliminating the reference to periodic inundation and making other minor changes. The 1977 definition reads as follows:

> "The term 'wetlands' means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas."

33 CFR § 323.2(c) (1978).

In 1982, the 1977 regulations were replaced by substantively identical regulations that remain in force today. *See* 33 CFR § 323.2 (1985).[2] Respondent Riverside Bayview Homes, Inc. (hereafter respondent), owns 80 acres of low-lying, marshy land near the shores of Lake St. Clair in Macomb County, Michigan. In 1976, respondent began to place fill materials on its property as part of its preparations for construction of a housing development. The Corps of Engineers, believing that the property was an "adjacent wetland" under the 1975 regulation defining "waters of the United States," filed suit in the United States District Court for the Eastern District of Michigan, seeking to enjoin respondent from filling the property without the permission of the Corps.

The District Court held that the portion of respondent's property lying below 575.5 feet above sea level was a covered wetland, and enjoined respondent from filling it without a permit. * * * Respondent appealed, and the Court of Appeals remanded for consideration of the effect of the intervening 1977 amendments to the regulation. * * * On remand, the District Court again held the property to be a wetland subject to the

[2] The regulations also cover certain wetlands not necessarily adjacent to other waters. *See* 33 CFR §§ 323.2(a)(2) and (3) (1985). These provisions are not now before us.

Corps' permit authority.

* * *

Respondent again appealed, and the Sixth Circuit reversed. * * *. The court construed the Corps' regulation to exclude from the category of adjacent wetlands -- and hence from that of "waters of the United States" -- wetlands that were not subject to flooding by adjacent navigable waters at a frequency sufficient to support the growth of aquatic vegetation. The court adopted this construction of the regulation because, in its view, a broader definition of wetlands might result in the taking of private property without just compensation. The court also expressed its doubt that Congress, in granting the Corps jurisdiction to regulate the filling of "navigable waters," intended to allow regulation of wetlands that were not the result of flooding by navigable waters. * * * Under the court's reading of the regulation, respondent's property was not within the Corps' jurisdiction, because its semiaquatic characteristics were not the result of frequent flooding by the nearby navigable waters. Respondent was therefore free to fill the property without obtaining a permit.

We granted certiorari to consider the proper interpretation of the Corps' regulation defining "waters of the United States" and the scope of the Corps' jurisdiction under the Clean Water Act, both of which were called into question by the Sixth Circuit's ruling. * * * We now reverse.

II

The question whether the Corps of Engineers may demand that respondent obtain a permit before placing fill material on its property is primarily one of regulatory and statutory interpretation: we must determine whether respondent's property is an "adjacent wetland" within the meaning of the applicable regulation, and, if so, whether the Corps' jurisdiction over "navigable waters" gives it statutory authority to regulate discharges of fill material into such a wetland. In this connection, we first consider the Court of Appeals' position that the Corps' regulatory authority under the statute and its implementing regulations must be narrowly construed to avoid a taking without just compensation in violation of the Fifth Amendment.

[The Court then held that neither the imposition of a permit requirement by the Clean Water Act nor the denial of a permit would necessarily constitute a taking. Accordingly, the Court held that it was not necessary to interpret the statute narrowly to avoid takings concerns.]

* * *

III

Purged of its spurious constitutional overtones, the question whether the regulation at

issue requires respondent to obtain a permit before filling its property is an easy one. The regulation extends the Corps' authority under § 404 to all wetlands adjacent to navigable or interstate waters and their tributaries. Wetlands, in turn, are defined as lands that are "inundated or *saturated* by surface *or ground water* at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." 33 CFR § 323.2(c) (195) (emphasis added). The plain language of the regulation refutes the Court of Appeals' conclusion that inundation or "frequent flooding" by the adjacent body of water is a *sine qua non* of a wetland under the regulation. Indeed, the regulation could hardly state more clearly that saturation by either surface or ground water is sufficient to bring an area within the category of wetlands, provided that the saturation is sufficient to, and does, support wetland vegetation. The history of the regulation underscores the absence of any requirement of inundation. The interim final regulation that the current regulation replaced explicitly included a requirement of "periodi[c] inundation." 33 CFR § 209.120(d)(2)(h) (1976). In deleting the reference to "periodic inundation" from the regulation as finally promulgated, the Corps explained that it was repudiating the interpretation of that language "as requiring inundation over a record period of years." 42 Fed.Reg. 37128 (1977). In fashioning its own requirement of "frequent flooding" the Court of Appeals improperly reintroduced into the regulation precisely what the Corps had excised. * * * Without the nonexistent requirement of frequent flooding,the regulatory definition of adjacent wetlands covers the property here. The District Court found that respondent's property was "characterized by the presence of vegetation that requires saturated soil conditions for growth and reproduction," * * * and that the source of the saturated soil conditions on the property was groundwater. There is no plausible suggestion that these findings are clearly erroneous, and they plainly bring the property within the category of wetlands as defined by the current regulation. In addition, the court found that the wetland located on respondent's property was adjacent to a body of navigable water, since the area characterized by saturated soil conditions and wetland vegetation extended beyond the boundary of respondent's property to Black Creek, a navigable waterway. Again, the court's finding is not clearly erroneous. Together, these findings establish that respondent's property is a wetland adjacent to a navigable waterway. Hence, it is part of the "waters of the United States" as defined by 33 CFR § 323.2 (1985), and if the regulation itself is valid as a construction of the term "waters of the United States" as used in the Clean Water Act, a question which we now address, the property falls within the scope of the Corps' jurisdiction over "navigable waters" under § 404 of the Act.

IV

A

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. *Chemical Manufacturers Assn. v. Natural Resources Defense Council, Inc.,*470 U. S. 116, 125 (1985); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,*467 U. S. 837,

842-845 (1984). Accordingly, our review is limited to the question whether it is reasonable, in light of the language, policies, and legislative history of the Act, for the Corps to exercise jurisdiction over wetlands adjacent to, but not regularly flooded by, rivers, streams, and other hydrographic features more conventionally identifiable as "waters."[8]

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§ 404(a) nor to the realities of the problem of water pollution that the Clean Water Act was intended to combat. In determining the limits of its power to regulate discharges under the Act, the Corps must necessarily choose some point at which water ends and land begins. Our common experience tells us that this is often no easy task: the transition from water to solid ground is not necessarily or even typically an abrupt one. Rather, between open waters and dry land may lie shallows, marshes, mudflats, swamps, bogs -- in short, a huge array of areas that are not wholly aquatic but nevertheless fall far short of being dry land. Where on this continuum to find the limit of "waters" is far from obvious. Faced with such a problem of defining the bounds of its regulatory authority, an agency may appropriately look to the legislative history and underlying policies of its statutory grants of authority. Neither of these sources provides unambiguous guidance for the Corps in this case, but together they do support the reasonableness of the Corps' approach of defining adjacent wetlands as "waters" within the meaning of§ 404(a). Section 404 originated as part of the Federal Water Pollution Control Act Amendments of 1972, which constituted a comprehensive legislative attempt "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." CWA § 101, 33 U.S.C. § 1251. This objective incorporated a broad, systemic view of the goal of maintaining and improving water quality: as the House Report on the legislation put it, "the word *integrity' . . . refers to a condition in which the natural structure and function of ecosystems [are] maintained."* H.R.Rep. No. 92911, p. 76(1972). Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for "[w]ater moves in hydrologic cycles, and it is essential that discharge of pollutants be controlled at the source." S.Rep.No. 92414, p. 77 (1972). In keeping with these views, Congress chose to define the waters covered by the Act broadly. Although the Act prohibits discharges into "navigable waters," *see* CWA §§ 301(a), 404(a), 502(12), 33 U.S.C. §§ 1311(a), 1344(a), 1362(12), the Act's definition of "navigable waters" as "the waters of the United States" makes it clear that the term"navigable" as used in the Act is of limited import. In adopting this definition of "navigable waters," Congress evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes, and to exercise its powers under

[8] We are not called upon to address the question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water, *see* 33 CFR §§ 323.2(a)(2) and (3) (1985), and we do not express any opinion on that question.

the Commerce Clause to regulate at least some waters that would not be deemed "navigable" under the classical understanding of that term. *See* S.Conf.Rep. No. 921236, p. 144 (1972); 118 Cong.Rec. 33756-33757(1972) (statement of Rep. Dingell). Of course, it is one thing to recognize that Congress intended to allow regulation of waters that might not satisfy traditional tests of navigability; it is another to assert that Congress intended to abandon traditional notions of "waters" and include in that term "wetlands" as well. Nonetheless, the 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. Following the lead of the Environmental Protection Agency, *see* 38 Fed.Reg. 10834 (1973), the Corps has determined that wetlands adjacent to navigable waters do, as a general matter, play a key role in protecting and enhancing water quality:

> "The regulation of activities that cause water pollution cannot rely on . . . artificial lines . . . , but must focus on all waters that together form the entire aquatic system. [*134] Water moves in hydrologic cycles, and the pollution of this part of the aquatic system, regardless of whether it is above or below an ordinary high water mark, or mean high tide line, will affect the water quality of the other waters within that aquatic system." "For this reason, the landward limit of Federal jurisdiction under Section 404 must include any adjacent wetlands that form the border of or are in reasonable proximity to other waters of the United States, as these wetlands are part of this aquatic system."

42 Fed.Reg. 37128 (1977).

We cannot say that the Corps' conclusion that adjacent wetlands are inseparably bound up with the "waters" of the United States -- based as it is on the Corps' and EPA's technical expertise -- is unreasonable. In view of the breadth of federal regulatory authority contemplated by the Act itself and the inherent difficulties of defining precise bounds to regulable waters, the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act. This holds true even for wetlands that are not the result of flooding or permeation by water having its source in adjacent bodies of open water. The Corps has concluded that wetlands may affect the water quality of adjacent lakes, rivers, and streams even when the waters of those bodies do not actually inundate the wetlands. For example, wetlands that are not flooded by adjacent waters may still tend to drain into those waters. In such circumstances, the Corps has concluded that wetlands may serve to filter and purify water draining into adjacent bodies of water, *see* 33 CFR§ 320.4(b)(2)(vii) (1985), and to slow the flow of surface runoff into lakes, rivers, and streams, and thus prevent flooding and erosion, *see* §§ 320.4(b)(2)(iv) and (v). In addition, adjacent wetlands may

> "serve significant natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing and resting sites for aquatic . . .

species."

§ 320.4(b)(2)(i). In short, the Corps has concluded that wetlands adjacent to lakes, rivers, streams, and other bodies of water may function as integral parts of the aquatic environment even when the moisture creating the wetlands does not find its source in the adjacent bodies of water. Again, we cannot say that the Corps' judgment on these matters is unreasonable, and we therefore conclude that a definition of "waters of the United States" encompassing all wetlands adjacent to other bodies of water over which the Corps has jurisdiction is a permissible interpretation of the Act. Because respondent's property is part of a wetland that actually abuts on a navigable waterway, respondent was required to have a permit in this case.[9]

B

Following promulgation of the Corps' interim final regulations in 1975, the Corps' assertion of authority under § 404 over waters not actually navigable engendered some congressional opposition. The controversy came to a head during Congress' consideration of the Clean Water Act of 1977, a major piece of legislation aimed at achieving "interim improvements within the existing framework" of the Clean Water Act. H.R.Rep. No. 95139, pp. 1-2 (1977). In the end, however, as we shall explain, Congress acquiesced in the administrative construction.

[The Court then cited portions of the legislative history of the enactment of the Clean Water Act of 1977 that demonstrated attempts to narrow the definition of navigable waters in the statute.]

* * *

The significance of Congress' treatment of the Corps' § 404 jurisdiction in its consideration of the Clean Water Act of 1977 is twofold. First, the scope of the Corps' asserted jurisdiction over wetlands was specifically brought to Congress' attention, and Congress rejected measures designed to curb the Corps' jurisdiction, in large part because of its concern that protection of wetlands would be unduly hampered by a

[9] Of course, it may well be that not every adjacent wetland is of great importance to the environment of adjoining bodies of water. But the existence of such cases does not seriously undermine the Corps' decision to define all adjacent wetlands as "waters." If it is reasonable for the Corps to conclude that, in the majority of cases, adjacent wetlands have significant effects on water quality and the aquatic ecosystem, its definition can stand. That the definition may include some wetlands that are not significantly intertwined with the ecosystem of adjacent waterways is of little moment, for where it appears that a wetland covered by the Corps' definition is, in fact, lacking in importance to the aquatic environment, or where its importance is outweighed by other values the Corps may always allow development of the wetland for other uses simply by issuing a permit. *See* 33 CFR § 320.4(b)(4) (1986).

narrowed definition of "navigable waters." 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. *See Bob Jones University v. United States,*461 U. S. 574, 599-601 (1983); *United States v. Rutherford,*442 U. S. 544, 442 U. S. 554, and n. 10 (1979).

Second, it is notable that even those who would have restricted the reach of the Corps' jurisdiction would have done so not by removing wetlands altogether from the definition of "waters of the United States," but only by restricting the scope of "navigable waters" under § 404 to waters navigable in fact *and their adjacent wetlands.* In amending the definition of "navigable waters" for purposes of § 404 only, the backers of the House bill would have left intact the existing definition of "navigable waters" for purposes of § 301 of the [*138] Act, which generally prohibits discharges of pollutants into navigable waters. As the House Report explained: "*Navigable waters,' as used in section 301, includes all of the waters of the United States, including their adjacent wetlands*." H.R.Rep. No. 95139, p. 24 (1977). Thus, even those who thought that the Corps' existing authority under § 404 was too broad recognized (1) that the definition of "navigable waters" then in force for both § 301 and § 404 was reasonably interpreted to include adjacent wetlands, (2) that the water quality concerns of the Clean Water Act demanded regulation of at least some discharges into wetlands, and (3) that whatever jurisdiction the Corps would retain over discharges of fill material after passage of the 1977 legislation should extend to discharges into wetlands adjacent to any waters over which the Corps retained jurisdiction. These views provide additional support for a conclusion that Congress in 1977 acquiesced in the Corps' definition of waters as including adjacent wetlands.

Two features actually included in the legislation that Congress enacted in 1977 also support the view that the Act authorizes the Corps to regulate discharges into wetlands. First, in amending § 404 to allow federally approved state permit programs to supplant regulation by the Corps of certain discharges of fill material, Congress provided that the States would not be permitted to supersede the Corps' jurisdiction to regulate discharges into actually navigable waters and waters subject to the ebb and flow of the tide, "including wetlands adjacent thereto." CWA § 404(g)(1), 33 U.S.C.§ 1344(g)(1). Here, then, Congress expressly stated that the term "waters" included adjacent wetlands.[11] Second, the 1977 Act authorized an appropriation of $6 million for completion by the Department of Interior of a "National Wetlands Inventory" to assist the

[11] To be sure, § 404(g)(1) does not conclusively determine the construction to be placed on the use of the term "waters" elsewhere in the Act (particularly in § 502(7), which contains the relevant definition of "navigable waters"); however, in light of the fact that the various provisions of the Act should be read *in pari materia,* it does at least suggest strongly that the term "waters," as used in the Act, does not necessarily exclude "wetlands."

States "in the development and operation of programs under this Act." CWA § 208(i)(2), 33U.S.C. § 1288(i)(2). The enactment of this provision reflects congressional recognition that wetlands are a concern of the Clean Water Act, and supports the conclusion that, in defining the waters covered by the Act to include wetlands, the Corps is "implementing congressional policy, rather than embarking on a frolic of its own." *Red Lion Broadcasting Co. v. FCC,*395 U. S. 367, 375 (1969).

C

We are thus persuaded that the language, policies, and history of the Clean Water Act compel a finding that the Corps has acted reasonably in interpreting the Act to require permits for the discharge of fill material into wetlands adjacent to the "waters of the United States." The regulation in which the Corps has embodied this interpretation, by its terms, includes the wetlands on respondent's property within the class of waters that may not be filled without a permit; and, as we have seen, there is no reason to interpret the regulation more narrowly than its terms would indicate. Accordingly, the judgment of the Court of Appeals is

Reversed.

Questions and Comments

1. The Supreme Court reviewed both the legality of the Corps' regulation and the legality of the Corps' interpretation of its regulation. Landmark Supreme Court administrative law decisions provide that an agency's interpretation of its own regulation is controlling unless it is plainly erroneous or inconsistent with the regulation. *See* *Auer v. Robbins*, 519 U.S. 452, 461 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). Did the Sixth Circuit use that approach when reviewing the Corps' interpretation of "adjacent wetlands"? Does the Supreme Court cite that precedent or apply that test in reviewing the Corps' interpretation of "adjacent" wetlands?

2. **Groundwater v. Surface Water:** Did the Corps' regulations require a surface water connection between wetlands and other waters for the wetlands to be considered "adjacent" to the waters? Was there a scientific justification for the Corps' interpretation and did the Court accord that any deference? Keep this in mind when reading the Supreme Court's decision in *Rapanos v. United States.* Incidentally, the Corps' current regulations define "adjacent" to mean "bordering, contiguous, or neighboring" and adjacent wetlands include wetlands "separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like." *See* 33 C.F.R. § 328.3(c)

3. In reviewing the legality of the Corps' rule that asserted jurisdiction over "adjacent wetlands," did the Court apply the *Chevron* analysis? Did the Court decide the case at Step 1 or Step 2? It is interesting to compare the Supreme Court's

application of the *Chevron* analysis in this case, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers,* and *Rapanos v. United States.*

4. **Navigability and the Commerce Clause:** Does the Court conclude that "waters" must be "navigable" to be regulated under the Clean Water Act? Is the Court's articulation of the breadth of the Corps' jurisdiction under the Act as broad as the *Callaway* court's?

5. Note the Court's focus on the purposes of the Clean Water Act and the legislative history. How does the Corps' interpretation of the statute advance the purposes of the statute or advance Congress' intent? This was a unanimous opinion from the Court and it is interesting to compare the statutory analysis in this case with the textualism adopted by the Supreme Court in many cases today.

6. **Legislative acquiescence**: What weight should courts accord to Congress' failure to enact legislation that overturns an agency's rules? Are you persuaded by the Court's discussion of Congressional acquiescence?

7. **Values and Functions**: Recall our discussion about the values and functions of wetlands in Chapter 1. The *Riverside Bayview* court acknowledges those values and functions in its opinion and defers to the Corps' scientific judgment in regulating adjacent wetlands because of the values and functions that they provide to the adjacent waters. Again, keep this in mind when reading the Supreme Court's decision in *Rapanos v. United States.*

8. **Adjacent to What?** As noted above, the Corps' 1982 regulations asserted jurisdiction over wetlands adjacent to traditional navigable waters, adjacent to interstate waters, adjacent to tributaries of traditional navigable waters or interstate waters, and adjacent to isolated, intrastate waters the use or misuse of which coud affect interstate commerce. Which portions of the Corps' regulations were challenged in the *Riverside Bayview* case? Did the Court express any opinion regarding the legality of regulating other wetlands?

9. **Post-Script:** The wetlands at issue in the *Riverside Bayview* case were not developed, but were later used as compensatory mitigation for another wetlands development. *See* Royal C. Gardner, *Lawyers, Swamps and Money* 200 (Island Press 2011).

C. Isolated Wetlands and Waters

In 1986, the year after the Supreme Court's decision in *Riverside Bayview Homes*, the Corps again amended its regulatory definition of "waters of the United States." The Corps did not change the categories of waters that would be regulated as "waters of the United States," but renumbered the regulations, so that the definition of "waters of the United States" now appears at 33 C.F.R. § 328.3. In both the 1982 and 1986

regulations, the Corps defined "waters of the United States" to include certain isolated, intrastate waters that were not traditional navigable waters but that could be regulated because of their ties to interstate commerce. The 1986 regulation, which used essentially the same language as the 1982 regulation, described the "isolated waters" that could be regulated as "waters of the United States" in the following manner:

> 33 C.F.R. 328.3(a)(3)
>
> All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes or natural ponds, the use degradation or destruction of which could affect interstate or foreign commerce, including any such waters:
>
> (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes;
> (ii) From which fish or shellfish could be taken and sold in interstate or foreign commerce; or
> (iii) Which are used or could be used for industrial purpose by industries in interstate commerce

Although the Corps did not make any significant changes to the categories of "waters of the United States" regulated in the rule itself, the agency provided further guidance in the ***preamble*** to the rule regarding the types of "isolated waters" that would be regulated under the Clean Water Act. *See* 51 Fed. Reg. 41206, 41217 (Nov. 13, 1986). For instance, the Corps indicated that certain isolated waters would generally not be regulated as "waters of the United States," although they could be regulated on a case-by-case basis. Those included non-tidal irrigation ditches; artificial lakes or ponds that are used for watering, irrigation, or settling basins; and various other artificially created waters.

The Migratory Bird Test: More significantly, though, the Corps clarified that isolated waters would generally be regulated under 33 C.F.R. § 328.3(a)(3) if the waters:

a. * * * are or would be used as habitat by birds protected by Migratory Bird Treaties;
b. * * * are or would be used as habitat by other migratory birds which cross state lines;
c. * * * are or would be used as habitat for endangered species; or

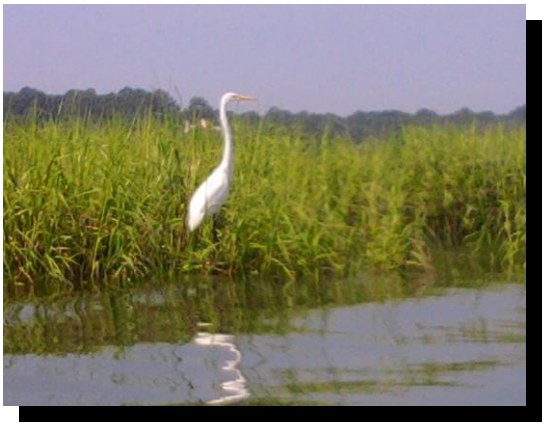

Photo by S. Johnson

d. used to irrigate crops sold in interstate commerce." *See* 51 Fed. Reg. at 41217.

As noted above, this "migratory bird rule" was not adopted as a regulation but included in the preamble to the regulation as guidance. In the years following the amendment of the rules, federal appellate courts reached opposing conclusions regarding the validity of the "migratory bird rule." The Ninth Circuit upheld regulation of artificial wetlands in basins that were formerly used in salt production on the grounds that the Corps had determined that the wetlands provided habitat for migratory birds and the endangered salt marsh harvest mouse. *See* *Leslie Salt v. United States,* 896 F. 2d 354 (9th Cir. 1990)*, cert. denied,* 486 U.S. 1126 (1991). The Seventh Circuit, reviewing EPA's version of the test, initially invalidated the test, *see* *Hoffman Homes, Inc. v. Administrator, United States EPA,* 961 F.2d 1310 (7th Cir. 1992), but later upheld it. *See* *Hoffman Homes, Inc. v. Administrator, United States EPA* 975 F.2d 1554 (7th Cir. 1992). The Fourth Circuit expressed deeper concerns and a divided panel of the Circuit suggested that the Corps exceeded its statutory authority in regulating isolated waters generally simply because they *could*, rather than *did*, affect interstate commerce. *See* *United States v. Wilson,* 133 F. 3d 251 (4th Cir. 1997).

The dispute over the Corps' authority to regulate isolated waters reached the U.S. Supreme Court in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers.* Sixteen years after *Riverside Bayview Homes*, the Court was reviewing another case focusing on the government's Clean Water Act jurisdiction over "waters of the United States." Unlike the unanimous decision in *Riverside Bayview Homes,* the *Solid Waste Agency* case generated greater division among the Court, which issued a 5-4 decision. Justices Rehnquist, O'Connor, Scalia, Kennedy and Thomas were in the majority, with Justices Stevens, Souter, Ginsburg, and Breyer dissenting.

Solid Waste Agency of Northern Cook County, v. United States Army Corps of Engineers, et al.

531 U.S. 159 (2001)

Resources for the Case

Oral Argument Audio (from the Oyez Project)
Map of the site - now the Heron Woods State Habitat Area - sold by SWANCC in 2001
Chicago Tribune news story re: permit denial
What is a balefill - Rhode Island Dept. of Envtl. Mgmt.
SWANCC website
Unedited opinion
Google Map of all the cases in the coursebook

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Section 404(a) of the Clean Water Act (CWA or Act), 86 Stat. 884, as amended, 33 U. S. C. §1344(a), regulates the discharge of dredged or fill material into "navigable waters." The United States Army Corps of Engineers (Corps), has interpreted §404(a) to confer federal authority over an abandoned sand and gravel pit in

northern Illinois which provides habitat for migratory birds. We are asked to decide whether the provisions of §404(a) may be fairly extended to these waters, and, if so, whether Congress could exercise such authority consistent with the Commerce Clause, U. S. Const., Art. I, §8, cl. 3. We answer the first question in the negative and therefore do not reach the second.

Petitioner, the Solid Waste Agency of Northern Cook County (SWANCC), is a consortium of 23 suburban Chicago cities and villages that united in an effort to locate and develop a disposal site for baled nonhazardous solid waste. The Chicago Gravel Company informed the municipalities of the availability of a 533-acre parcel, bestriding the Illinois counties Cook and Kane, which had been the site of a sand and gravel pit mining operation for three decades up until about 1960. Long since abandoned, the old mining site eventually gave way to a successional stage forest, with its remnant excavation trenches evolving into a scattering of permanent and seasonal ponds of varying size (from under one-tenth of an acre to several acres) and depth (from several inches to several feet). The municipalities decided to purchase the site for disposal of their baled nonhazardous solid waste. By law, SWANCC was required to file for various permits from Cook County and the State of Illinois before it could begin operation of its balefill project. In addition, because the operation called for the filling of some of the permanent and seasonal ponds, SWANCC contacted federal respondents (hereinafter respondents), including the Corps, to determine if a federal landfill permit was required under §404(a) of the CWA, 33 U. S. C. §1344(a).

Section 404(a) grants the Corps authority to issue permits "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." *Ibid*. The term "navigable waters" is defined under the Act as "the waters of the United States, including the territorial seas." §1362(7). The Corps has issued regulations defining the term "waters of the United States" to include "waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce . . . ." 33 CFR §328.3(a)(3) (1999).

In 1986, in an attempt to "clarify" the reach of its jurisdiction, the Corps stated that §404(a) extends to intrastate waters:

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

"b. Which are or would be used as habitat by other migratory birds which cross state lines; or

"c. Which are or would be used as habitat for endangered species; or

"d. Used to irrigate crops sold in interstate commerce."

51 Fed. Reg. 41217.

This last promulgation has been dubbed the "Migratory Bird Rule."[1] The Corps initially concluded that it had no jurisdiction over the site because it contained no "wetlands," or areas which support "vegetation typically adapted for life in saturated soil conditions," 33 CFR §328.3(b) (1999). However, after the Illinois Nature Preserves Commission informed the Corps that a number of migratory bird species had been observed at the site, the Corps reconsidered and ultimately asserted jurisdiction over the balefill site pursuant to subpart (b) of the "Migratory Bird Rule." The Corps found that approximately 121 bird species had been observed at the site, including several known to depend upon aquatic environments for a significant portion of their life requirements. Thus, on November 16, 1987, the Corps formally "determined that the seasonally ponded, abandoned gravel mining depressions located on the project site, while not wetlands, did qualify as 'waters of the United States' . . . based upon the following criteria: (1) the proposed site had been abandoned as a gravel mining operation; (2) the water areas and spoil piles had developed a natural character; and (3) the water areas [*165] are used as habitat by migratory bird *[sic]* which cross state lines." * * * During the application process, SWANCC made several proposals to mitigate the likely displacement of the migratory birds and to preserve a great blue heron rookery located on the site. Its balefill project ultimately received the necessary local and state approval. By 1993, SWANCC had received a special use planned development permit from the Cook County Board of Appeals, a landfill development permit from the Illinois Environmental Protection Agency, and approval from the Illinois Department of Conservation.

Despite SWANCC's securing the required water quality certification from the Illinois Environmental Protection Agency, the Corps refused to issue a §404(a) permit. * * *

Petitioner filed suit under the Administrative Procedure Act, 5 U. S. C. §701 *et seq*., in the Northern District of Illinois challenging both the Corps' jurisdiction over the site and the merits of its denial of the §404(a) permit. The District Court granted summary judgment to respondents on the jurisdictional issue, and petitioner abandoned its challenge to the Corps' permit decision. On appeal to the Court of Appeals for the Seventh Circuit, petitioner renewed its attack on respondents' use of the "Migratory Bird Rule" to assert jurisdiction over the site. Petitioner argued that respondents had exceeded their statutory authority in interpreting the CWA to cover nonnavigable, isolated, intrastate waters based upon the presence of migratory birds and, in the alternative, that Congress lacked the power under the Commerce Clause to grant such regulatory jurisdiction. The Court of Appeals began its analysis with the constitutional question, holding that Congress has the authority to regulate such waters based upon

[1] The Corps issued the "Migratory Bird Rule" without following the notice and comment procedures outlined in the Administrative Procedure Act, 5 U. S. C. § 553.

"the cumulative impact doctrine, under which a single activity that itself has no discernible effect on interstate commerce may still be regulated if the aggregate effect of that class of activity has a substantial impact on interstate commerce." * * * The aggregate effect of the "destruction of the natural habitat of migratory birds" on interstate commerce, the court held, was substantial because each year millions of Americans cross state lines and spend over a billion dollars to hunt and observe migratory birds.[2] * * * The Court of Appeals then turned to the regulatory question. The court held that the CWA reaches as many waters as the Commerce Clause allows and, given its earlier Commerce Clause ruling, it therefore followed that respondents' "Migratory Bird Rule" was a reasonable interpretation of the Act. * * * We granted certiorari, * * * and now reverse.

Congress passed the CWA for the stated purpose of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters." 33 U. S. C. §1251(a). In so doing, Congress chose to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter." §1251(b). Relevant here, §404(a) authorizes respondents to regulate the discharge of fill material into "navigable waters," 33 U. S. C. §1344(a), which the statute defines as "the waters of the United States, including the territorial seas,"§1362(7). Respondents have interpreted these words to cover the abandoned gravel pit at issue here because it is used as habitat for migratory birds. We conclude that the "Migratory Bird Rule" is not fairly supported by the CWA.

This is not the first time we have been called upon to evaluate the meaning of §404(a). In *United States v.Riverside Bayview Homes, Inc*., 474 U. S. 121 (1985), we held that the Corps had §404(a) jurisdiction over wetlands that actually abutted on a navigable waterway. In so doing, we noted that the term "navigable" is of "limited import" and that Congress evidenced its intent to "regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *Id*., at 133. But our holding was based in large measure upon Congress' unequivocal acquiescence to, and approval of, the Corps' regulations interpreting the CWA to cover wetlands adjacent to navigable waters. See *id.,* at 135–139. We found that Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands "inseparably bound up with the 'waters' of the United States." *Id.,* at 134.

It was the significant nexus between the wetlands and "navigable waters" that informed

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[2] Relying upon its earlier decision in *Hoffman Homes, Inc.* v. *EPA*, 999 F. 2d 256 (CA7 1993), and a report from the United States Census Bureau, the Court of Appeals found that in 1996 approximately 3.1 million Americans spent $1.3 billion to hunt migratory birds (with 11 percent crossing state lines to do so) as another 17.7 million Americans observed migratory birds (with 9.5 million traveling for the purpose of observing shorebirds). See 191 F. 3d, at 850.

our reading of the CWA in *Riverside Bayview Homes*. Indeed, we did not "express any opinion" on the "question of the authority of the Corps to regulate discharges of fill material into wetlands thatare not adjacent to bodies of open water . . . ." *Id.,* at 131–132, n. 8. In order to rule for respondents here, we would have to hold that the jurisdiction of the Corps extends to ponds that are *not* adjacent to open water. But we conclude that the text of the statute will not allow this.

Indeed, the Corps' *original* interpretation of the CWA, promulgated two years after its enactment, is inconsistent with that which it espouses here. Its 1974 regulations defined §404(a)'s "navigable waters" to mean "those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce." 33 CFR §209.120(d)(1). The Corps emphasized that "[i]t is the water body's capability of use by the public for purposes of transportation or commerce which is the determinative factor." §209.260(e)(1). Respondents put forward no persuasive evidence that the Corps mistook Congress' intent in 1974.[3]

Respondents next contend that whatever its original aim in 1972, Congress charted a new course five years later when it approved the more expansive definition of "navigable waters" found in the Corps' 1977 regulations. In July 1977, the Corps formally adopted 33 CFR §323.2(a)(5) (1978), which defined "waters of the United States" to include "isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce."

Respondents argue that Congress was aware of this more expansive interpretation during its 1977 amendments to the CWA. Specifically, respondents point to a failed House bill, H. R. 3199, that would have defined "navigable waters" as "all waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce." 123 Cong. Rec. 10420, 10434 (1977).[4] They also point to the passage in §404(g)(1) that authorizes a

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[3] Respondents refer us to portions of the legislative history that they believe indicate Congress' intent to expand the definition of "navigable waters." Although the Conference Report includes the statement that the conferees "intend that the term 'navigable waters' be given the broadest possible constitutional interpretation," S. Conf. Rep. No. 92– 1236, p. 144 (1972), neither this, nor anything else in the legislative history to which respondents point, signifies that Congress intended to exert anything more than its commerce power over navigation. Indeed, respondents admit that the legislative history is somewhat ambiguous. See Brief for Federal Respondents 24.

[4] While this bill passed in the House, a similarly worded amendment to a bill originating in the Senate, S. 1952, failed. See 123 Cong. Rec. 26710, 26728 (1977).

State to apply to the Environmental Protection Agency for permission "to administer its own individual and general permit program for the discharge of dredged or fill material into the navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce . . . including wetlands adjacent thereto) within its jurisdiction . . . ." 33 U. S. C. §1344(g)(1). The failure to pass legislation that would have overturned the Corps' 1977 regulations and the extension of jurisdiction in §404(g) to waters "other than" traditional "navigable waters," respondents submit, indicate that Congress recognized and accepted a broad definition of "navigable waters" that includes nonnavigable, isolated, intrastate waters.

Although we have recognized congressional acquiescence to administrative interpretations of a statute in some situations, we have done so with extreme care. * * * "[F]ailed legislative proposals are 'a particularly dangerous ground on which to rest an interpretation of a prior statute.'" *Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver, N. A.,* 511 U. S. 164, 187 (1994) (quoting *Pension Benefit Guaranty Corporation* v. *LTV Corp.,* 496 U. S. 633, 650 (1990)). A bill can be proposed for any number of reasons, and it can be rejected for just as many others. The relationship between the actions and inactions of the 95th Congress and the intent of the 92d Congress in passing §404(a) is also considerably attenuated. Because "subsequent history is less illuminating than the contemporaneous evidence," *Hagen* v. *Utah,* 510 U. S. 399, 420 (1994), respondents face a difficult task in overcoming the plain text and import of §404(a).

We conclude that respondents have failed to make the necessary showing that the failure of the 1977 House bill demonstrates Congress' acquiescence to the Corps' regulations or the "Migratory Bird Rule," which, of course, did not first appear until 1986. Although respondents cite some legislative history showing Congress' recognition of the Corps' assertion of jurisdiction over "isolated waters,"* * * as we explained in *Riverside Bayview Homes*, "[i]n both Chambers, debate on the proposals to narrow the definition of navigable waters centered largely on the issue of wetlands preservation." 474 U. S., at 136. Beyond Congress' desire to regulate wetlands adjacent to "navigable waters," respondents point us to no persuasive evidence that the House bill was proposed in response to the Corps' claim of jurisdiction over nonnavigable, isolated, intrastate waters or that its failure indicated congressional acquiescence to such jurisdiction.

Section 404(g) is equally unenlightening. In *Riverside Bayview Homes* we recognized that Congress intended the phrase "navigable waters" to include "at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *Id.*, at 133. But §404(g) gives no intimation of what those waters might be; it simply refers to them as "other . . . waters." Respondents conjecture that "other . . . waters" must incorporate the Corps' 1977 regulations, but it is also plausible, as petitioner contends, that Congress simply wanted to include all waters adjacent to "navigable waters," such as nonnavigable tributaries and streams. The exact meaning of §404(g) is not before us and we express no opinion on it, but for present purposes it is sufficient to

say, as we did in *Riverside Bayview Homes*, that "§404(g)(1) does not conclusively determine the construction to be placed on the use of the term 'waters' elsewhere in the Act (particularly in §502(7), which contains the relevant definition of 'navigable waters') . . . ." *Id.*, at 138, n. 11.* * *

We thus decline respondents' invitation to take what they see as the next ineluctable step after *Riverside Bayview Homes*: holding that isolated ponds, some only seasonal, wholly located within two Illinois counties, fall under §404(a)'s definition of "navigable waters" because they serve as habitat for migratory birds. As counsel for respondents conceded at oral argument, such a ruling would assume that "the use of the word navigable in the statute . . . does not have any independent significance." * * * We cannot agree that Congress' separate definitional use of the phrase "waters of the United States" constitutes a basis for reading the term "navigable waters" out of the statute. We said in *Riverside Bayview Homes* that the word "navigable" in the statute was of "limited effect" and went on to hold that §404(a) extended to nonnavigable wetlands adjacent to open waters. But it is one thing to give a word limited effect and quite another to give it no effect whatever. The term "navigable" has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made. See, *e.g.*,*United States* v. *Appalachian Elec. Power Co.,* 311 U. S. 377, 407–408 (1940).

Respondents— relying upon all of the arguments addressed above— contend that, at the very least, it must be said that Congress did not address the precise question of §404(a)'s scope with regard to nonnavigable, isolated, intrastate waters, and that, therefore, we should give deference to the "Migratory Bird Rule." See, *e.g.*, *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U. S. 837 (1984). We find §404(a) to be clear, but even were we to agree with respondents, we would not extend *Chevron* deference here.

Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result. See *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council,* 485 U. S. 568, 575 (1988). This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority. See *ibid.* This concern is heightened where the administrative interpretation alters the federal state framework by permitting federal encroachment upon a traditional state power. See *United States* v. *Bass,* 404 U. S. 336, 349 (1971) ("[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance"). Thus, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *DeBartolo*, *supra*, at 575.

Twice in the past six years we have reaffirmed the proposition that the grant of authority to Congress under the Commerce Clause, though broad, is not unlimited. See *United States* v. *Morrison,* 529 U. S. 598 (2000); *United States* v. *Lopez,* 514 U. S. 549 (1995). Respondents argue that the "Migratory Bird Rule" falls within Congress' power to regulate intrastate activities that "substantially affect" interstate commerce. They note that the protection of migratory birds is a "national interest of very nearly the first magnitude," *Missouri* v. *Holland,* 252 U. S. 416, 435 (1920), and that, as the Court of Appeals found, millions of people spend over a billion dollars annually on recreational pursuits relating to migratory birds. These arguments raise significant constitutional questions. For example, we would have to evaluate the precise object or activity that, in the aggregate, substantially affects interstate commerce. This is not clear, for although the Corps has claimed jurisdiction over petitioner's land because it contains water areas used as habitat by migratory birds, respondents now, *post litem motam*, focus upon the fact that the regulated activity is petitioner's municipal landfill, which is "plainly of a commercial nature." * * * But this is a far cry, indeed, from the "navigable waters" and "waters of the United States" to which the statute by its terms extends.

These are significant constitutional questions raised by respondents' application of their regulations, and yet we find nothing approaching a clear statement from Congress that it intended §404(a) to reach an abandoned sand and gravel pit such as we have here. Permitting respondents to claim federal jurisdiction over ponds and mudflats falling within the "Migratory Bird Rule" would result in a significant impingement of the States' traditional and primary power over land and water use. See, *e.g.*, *Hess* v. *Port Authority Trans-Hudson Corporation,* 513 U. S. 30, 44 (1994) ("[R]egulation of land use [is] a function traditionally performed by local governments"). Rather than expressing a desire to readjust the federal-state balance in this manner, Congress chose to "recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources . . . ." 33 U. S. C. §1251(b). We thus read the statute as written to avoid the significant constitutional and federalism questions raised by respondents' interpretation, and therefore reject the request for administrative deference.[8]

We hold that 33 CFR §328.3(a)(3) (1999), as clarified and applied to petitioner's balefill site pursuant to the "Migratory Bird Rule," 51 Fed. Reg. 41217 (1986), exceeds the authority granted to respondents under §404(a) of the CWA. The judgment of the Court of Appeals for the Seventh Circuit is therefore

Reversed.

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[8] Because violations of the CWA carry criminal penalties, see 33 U. S.C. §1319(c)(2), petitioner invokes the rule of lenity as another basis for rejecting the Corps' interpretation of the CWA. Brief for Petitioner 31–32. We need not address this alternative argument. See *United States v. Shabani,* 513 U. S. 10, 17 (1994).

Questions and Comments

1. Did the *Solid Waste Agency* case involve wetlands? If not, what implications does the case have for regulation of wetlands?

2. **Artificial Wetlands:** Note that the ponds in *Solid Waste Agency of Northern Cook County* were artificially created. Even though the Court did not find jurisdiction over the ponds in this case, man-made ponds and wetlands can be regulated as "waters of the United States" under the Clean Water Act. *See, e.g., Leslie Salt Co. v. United States*, 896 F.2d 354 (9th Cir. 1990); *Texas Mun. Power Agency v. EPA*, 836 F.2d 1482 (5th Cir. 1988).

3. Could the "migratory bird rule" have been challenged on procedural grounds? With what success?

4. The "migratory bird rule" was not adopted as a rule through notice and comment rulemaking. Is it appropriate, therefore, to use the *Chevron* analysis to review the Corps' decision? If *Chevron* doesn't apply, should courts accord the agency any deference? More or less than under the *Chevron* analysis? What weight should the Corps' 1974 rules carry, in light of the fact that the Corps rejected the reasoning behind them almost 25 years before the *Solid Waste Agency* decision?

5. Does the Court use the *Chevron* analysis in this case? If so, does it decide the case at step 1 or step 2? What canons of statutory analysis are central to the Court's holding?

6. In *Riverside Bayview Homes*, the Court interpreted the Clean Water Act broadly in accordance with its purposes and relied on evidence of Congressional acquiescence in the Corps' interpretation of the statute to uphold the Corps' regulation of adjacent wetlands. Does the Court ignore those purposes and evidence of Congressional acquiescence in this case? Does it focus on other statutory goals? The dissenting Justices argued for a broad interpretation of the statute consistent with the purposes articulated in *Riverside Bayview Homes.* They noted, for instance, that the statute protects significant natural biological functions, including food chain production, general habitat, and nesting spawning, rearing and resting sites for aquatic wildlife and that isolated waters provide those functions, regardless of whether they have any connection to traditional navigable waters. *See* 531 U.S. at 181-182 (Stevens, *dissenting*).

7. *Riverside Bayview Homes* and the D.C. District Court's *Callaway* decision seemed to approve a broad reading of jurisdiction under the Clean Water Act to extend to all waters that could be regulated under the Commerce Clause. Does the majority in this case adopt a narrower vision of the breadth of authority? The dissenting Justices argued that Congress' Commerce Clause power over

navigation is clearly more limited than Congress' Commerce Clause power generally. *See* 531 U.S. at 181 (Stevens, *dissenting*).

While the Court does not overrule *Riverside Bayview Homes,* the majority makes it clear that the prior case did not address isolated waters and that the Court upheld the regulation of adjacent wetlands in *Riverside Bayview Homes* because of the "significant nexus" between the wetlands and more traditional "navigable waters." Is the Court saying that the Corps can only regulate traditional navigable waters or waters that have some connection to traditional navigable waters? The dissenting justices asserted that the Court's decision could limit jurisdiction to actually navigable waters, their tributaries, and wetlands adjacent to each. *See* 531 U.S. at 177 (Stevens, *dissenting*)

8. How broad is the Court's decision in the *Solid Waste Agency* case? Is the Court simply striking down the migratory bird test, or is it invalidating the regulation of isolated waters more generally? If the Corps can regulate isolated waters after the *Solid Waste Agency* decision, which isolated waters can it regulate?

9. Did the Court reach the question of whether the regulation of isolated waters based on the migratory bird test violated the Commerce Clause? The dissent argued that such regulation was clearly constitutional. The portion of the dissenting opinion addressing that issue follows. Are you persuaded? For various views on the impact of the *Solid Waste Agency* decision shortly after the Court issued the decision, *see* Robin Kundis Craig, *Beyond SWANCC: The New Federalism and Clean Water Act Jurisdiction,* 33 Envtl. L. 113 (2003); Christine A. Klein, *The Environmental Commerce Clause,* 27 Harv. Envtl. L. Rev. 1 (2003); Bradford C. Mank, *The Murky Future of the Clean Water Act After SWANCC: Using a Hydrological Connection Approach to Saving the Clean Water Act,* 30 Ecology L.Q. 811 (2003). For an exploration of the issue published prior to the *Lucas* decision, *see* Stephen M. Johnson, *Federal Regulation of Isolated Wetlands,* 23 Envtl. L. 1 (1993).). For a defense of the constitutionalty of federal regulation of isolated wetlands, *see* Blake Hudson and Mike Hardig, *Isolated Wetland Commons and the Constitution,* 2014 B.Y.U. L. Rev. 1443.

JUSTICE STEVENS, with whom **JUSTICE SOUTER**, **JUSTICE GINSBURG**, and **JUSTICE BREYER** join, dissenting.

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IV

Because I am convinced that the Court's miserly construction of the statute is incorrect, I shall comment briefly on petitioner's argument that Congress is without power to prohibit it from filling any part of the 31 acres of ponds on its property in Cook County, Illinois. The Corps' exercise of its § 404 permitting power over "isolated" waters that serve as habitat for migratory birds falls well within the boundaries set by this Court's Commerce Clause jurisprudence.

In *United States v. Lopez*, 514 U. S. 549, 558-559 (1995), this Court identified "three broad categories of activity that Congress may regulate under its commerce power": (1) channels of interstate commerce; (2) instrumentalities of interstate commerce, or persons and things in interstate commerce; and (3) activities that "substantially affect" interstate commerce. Ibid. The migratory bird rule at issue here is properly analyzed under the third category. In order to constitute a proper exercise of Congress' power over intrastate activities that "substantially affect" interstate commerce, it is not necessary that each individual instance of the activity substantially affect commerce; it is enough that, taken in the aggregate, the class of activities in question has such an effect. *Perez v. United States*, 402 U. S. 146 (1971) (noting that it is the "class" of regulated activities, not the individual instance, that is to be considered in the "affects" commerce analysis); see also *Hodel*, 452 U. S., at 277; *Wickard v. Filburn*, 317 U. S. 111, 127-128 (1942).

The activity being regulated in this case (and by the Corps' § 404 regulations in general) is the discharge of fill material into water. The Corps did not assert jurisdiction over petitioner's land simply because the waters were "used as habitat by migratory birds." It asserted jurisdiction because petitioner planned to discharge fill into waters "used as habitat by migratory birds." Had petitioner intended to engage in some other activity besides discharging fill (i. e., had there been no activity to regulate), or, conversely, had the waters not been habitat for migratory birds (i. e., had there been no basis for federal jurisdiction), the Corps would never have become involved in petitioner's use of its land. There can be no doubt that, unlike the class of activities Congress was attempting to regulate in *United States v. Morrison,* 529 U. S. 598, 613 (2000) ("[g]endermotivated crimes"), and Lopez, 514 U. S., at 561 (possession of guns near school property), the

discharge of fill material into the Nation's waters is almost always undertaken for economic reasons. See V. Albrecht & B. Goode, *Wetland Regulation in the Real World*, Exh. 3 (Feb. 1994) (demonstrating that the overwhelming majority of acreage for which § 404 permits are sought is intended for commercial, industrial, or other economic use).[15]

Moreover, no one disputes that the discharge of fill into "isolated" waters that serve as migratory bird habitat will, in the aggregate, adversely affect migratory bird populations. See, e. g., 1 Secretary of the Interior, *Report to Congress, The Impact of Federal Programs on Wetlands: The Lower Mississippi Alluvial Plain and the Prairie Pothole Region* 79-80 (Oct. 1988) (noting that "isolated," phase 3 waters "are among the most important and also [the] most threatened ecosystems in the United States" because "[t]hey are prime nesting grounds for many species of North American waterfowl ... " and provide "[u]p to 50 percent of the [D. S.] production of migratory waterfowl"). Nor does petitioner dispute that the particular waters it seeks to fill are home to many important species of migratory birds, including the second-largest breeding colony of Great Blue Herons in northeastern Illinois, App. to Pet. for Cert. 3a, and several species of waterfowl protected by international treaty and Illinois endangered species laws, Brief for Federal Respondents 7.[16]

In addition to the intrinsic value of migratory birds, see *Missouri v. Holland*, 252 D. S. 416, 435 (1920) (noting the importance of migratory birds as "protectors of our forests and our crops" and as "a food supply"), it is undisputed that literally millions of people regularly participate in birdwatching and hunting and that those activities generate a host of commercial activities of great value.[17] The causal connection between the filling of wetlands and the decline of commercial activities associated with migratory birds is not "attenuated," *Morrison*, 529 U. S., at 612; it is direct and concrete. *Cf. Gibbs v.*

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[15] The fact that petitioner can conceive of some people who may discharge fill for noneconomic reasons does not weaken the legitimacy of the Corps' jurisdictional claims. As we observed in *Perez v. United States*, 402 U. S. 146 (1971), "[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class." Id., at 154 (internal quotation marks omitted).

[16] Other bird species using petitioner's site as habitat include the" 'Great Egret, Green-backed Heron, Black-crowned Night Heron, Canada Goose, Wood Duck, Mallard, Greater Yellowlegs, Belted Kingfisher, Northern Waterthrush, Louisiana Waterthrush, Swamp Sparrow, and Red-winged Blackbird.' " Brief for Petitioner 4, n. 3.

[17] In 1984, the U. S. Congress Office of Technology Assessment found that, in 1980, 5.3 million Americans hunted migratory birds, spending $638 million. * * * More than 100 million Americans spent almost $14.8 billion in 1980 to watch and photograph fish and wildlife. Ibid. Of 17.7 million birdwatchers, 14.3 million took trips in order to observe, feed, or photograph waterfowl, and 9.5 million took trips specifically to view other water-associated birds, such as herons like those residing at petitioner's site. * * *

Babbitt, 214 F.3d 483, 492-493 (CA4 2000) ("The relationship between red wolf takings and interstate commerce is quite direct-with no red wolves, there will be no red wolf related tourism ... ").

Finally, the migratory bird rule does not blur the "distinction between what is truly national and what is truly local." *Morrison*, 529 U. S., at 617-618. Justice Holmes cogently observed in *Missouri v. Holland* that the protection of migratory birds is a textbook example of a national problem. 252 U. S., at 435 ("It is not sufficient to rely upon the States [to protect migratory birds]. The reliance is vain ... "). The destruction of aquatic migratory bird habitat, like so many other environmental problems, is an action in which the benefits (e. g., a new landfill) are disproportionately local, while many of the costs (e. g., fewer migratory birds) are widely dispersed and often borne by citizens living in other States. In such situations, described by economists as involving "externalities," federal regulation is both appropriate and necessary. * * * Identifying the Corps' jurisdiction by reference to waters that serve as habitat for birds that migrate over state lines also satisfies this Court's expressed desire for some "jurisdictional element" that limits federal activity to its proper scope. *Morrison*, 529 U. S., at 612.

The power to regulate commerce among the several States necessarily and properly includes the power to preserve the natural resources that generate such commerce. *Cf. Sporhase v. Nebraska ex rel. Douglas*, 458 U. S. 941, 953 (1982) (holding water to be an "article of commerce"). Migratory birds, and the waters on which they rely, are such resources. Moreover, the protection of migratory birds is a well established federal responsibility. As Justice Holmes noted in *Missouri v. Holland*, the federal interest in protecting these birds is of "the first magnitude." 252 U. S., at 435. Because of their transitory nature, they "can be protected only by national action." *Ibid.*

Whether it is necessary or appropriate to refuse to allow petitioner to fill those ponds is a question on which we have no voice. Whether the Federal Government has the power to require such permission, however, is a question that is easily answered. If, as it does, the Commerce Clause empowers Congress to regulate particular "activities causing air or water pollution, or other environmental hazards that may have effects in more than one State," *Hodel,* 452 U. S., at 282, it also empowers Congress to control individual actions that, in the aggregate, would have the same effect. *Perez*, 402 U. S., at 154; *Wickard*, 317 U. S., at 127-128.[18] There is no merit in petitioner's constitutional argument.

Because I would affirm the judgment of the Court of Appeals, I respectfully dissent.

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[18] JUSTICE THOMAS is the only Member of the Court who has expressed disagreement with the "aggregation principle." *United States v. Lopez*, 514 U. S. 549, 600 (1995) (concurring opinion).

LEARN MORE

Although we haven't covered the Commerce Clause in detail here, there is a very helpful CALI exercise, authored by Professor Robin Juni, that examines the Commerce Clause and Federalism issues in the context of environmental law. If you are a law student at a CALI member school, you can access the lesson at: http://www.cali.org/lesson/1142

D. Repercussions of SWANCC - Isolated Waters, Non-Navigable Tributaries and Their Adjacent Wetlands

While it was clear that the Supreme Court invalidated the Corps' regulation of isolated waters based on the "migratory bird rule," it was unclear whether the Court was placing further limits on the Clean Water Act jurisdiction over "waters of the United States." As noted above, the *SWANCC* court indicated that Court's decision to uphold the regulation of adjacent wetlands in *Riverside Bayview* was based on the "significant nexus" between those wetlands and other waters and the *SWANCC* Court indicated that the term "navigable" in the Clean Water Act "has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." 531 U.S. at 172. Furthermore, in response to arguments that the legislative history of the Clean Water Act demonstrated that Congress intended that "navigable waters" be given "the broadest possible constitutional interpretation", the *SWANCC* Court stressed that the legislative history suggested that Congress only intended to exert its "commerce power over navigation." *Id.* at 168, n.3.

Consequently, it was unclear, after *SWANCC,* whether the Corps and EPA could continue to exercise jurisdiction over (1) isolated waters that have a sufficient connection to interstate commerce, other than through the "migratory bird rule"; and (2) non-navigable tributaries of traditionally navigable waters and wetlands adjacent to those non-navigable tributaries.

Depending on how the decision was interpreted, the impact on regulated waters could have been significant. A report prepared for the Association of State Wetlands Managers after the *SWANCC* decision suggested that if the Court's decision were interpreted to allow the government to regulate only traditionally navigable waters and wetlands adjacent to those waters, 80% of the nation's wetlands would be excluded from federal regulation under the Clean Water Act. *See* Jon Kusler, *State Regulation of Wetlands to Fill the Gap* 6 (Association of State Wetlands Managers, Inc., 2004). In that scenario, the major types of wetlands that would be unregulated included prairie

potholes, wet meadows, river fringing wetlands along non-navigable rivers and streams, many forested wetlands, playas, and vernal pools. *Id.* The report suggested that up to 95% of the waters in Arizona, 66% of Florida's wetlands and 90% of Wisconsin's wetlands could be outside of federal regulation, depending on the interpretation of the *SWANCC* decision. If, on the other hand, the *SWANCC* decision were interpreted to allow the government to regulate traditionally navigable waters, all of their tributaries, and wetlands adjacent to those waters and tributaries, only 40% of the nation's wetlands would be excluded from federal regulation. *Id.* at 7.

Although States could, theoretically, have regulated the waters that would no longer be subject to federal regulation after *SWANCC*, most States did not have such regulatory programs in place. At the time of the *SWANCC* decision, thirty-two States did not have programs to regulate isolated freshwater wetlands. *Id.* at 13. Prior to *SWANCC,* those States primarily relied on the federal regulatory program and their ability to participate in the permitting program through the Clean Water Act Section 401 certification process (described in Chapter 6) to protect those waters. *Id.* A few States, including Indiana, Ohio, North Carolina and South Carolina, expanded their State programs to regulate isolated wetlands after *SWANCC*, but many did not. *Id.* at 13-14.

1. Regulatory Response

Shortly after the Court's decision in *SWANCC*, the General Counsel of EPA and the Chief Counsel of the Corps issued a joint memorandum addressing the Court's ruling. In the guidance, the agencies adopted a narrow reading of the ruling. Although the agencies acknowledged that the decision invalidated jurisdiction over isolated waters based on the "migratory bird rule", the guidance suggested that regulators could determine, on a case-by-case basis, that isolated waters could be regulated under the Clean Water Act if their use, degradation, or destruction could affect interstate or foreign commerce and that non-navigable isolated waters might be regulated if they had a "significant nexus" to other waters of the United States. *Id.* §5. It would be more difficult and time-consuming to demonstrate the ties to interstate commerce on a case-by-case basis without relying on the "migratory bird rule," but the guidance suggested that such regulation was still appropriate after the *SWANCC* ruling.

The guidance also addressed the agencies' authority to regulate tributaries of navigable waters and wetlands adjacent to those tributaries. Specifically, the guidance provided that "the holding, the facts, and the reasoning of *United States v. Riverside Bayview Homes* continue to provide authority for the EPA and the Corps to assert jurisdiction over ... all of the traditional navigable waters, all interstate waters, all tributaries to navigable or interstate waters, upstream to the highest reaches of the tributary systems, and over all wetlands adjacent to any and all of those waters." *Id.*

Two years later, after a change in presidential administrations, the agencies updated their guidance. *See* 68 Fed. Reg. 1995 (Jan. 15, 2003). The 2003 guidance indicated that "generally speaking" the Corps would continue to assert jurisdiction over all

tributaries, including non-navigable tributaries, of navigable waters, and to wetlands adjacent to those tributaries. 68 Fed. Reg. at 1996. Regarding non-navigable isolated intrastate waters, the guidance expressed skepticism that the agencies could assert jurisdiction over those waters based on other ties to interstate commerce, but authorized regulators to continue to do so on a case-by-case basis with approval from Headquarters. *Id.*

In January 2003, the Corps and EPA also began the process of developing a new rule to clarify the definition of "waters of the United States" in light of the *SWANCC* decision by issuing an advance notice of proposed rulemaking. *See* 68 Fed. Reg. 1991 (Jan. 15, 2003). The agencies received more than 130,000 comments on the notice and the comments overwhelmingly supported a narrow interpretation of *SWANCC* and broad federal jurisdiction. *See* Jon Kusler, *State Regulation of Wetlands to Fill the Gap* 8 (Association of State Wetlands Managers, Inc. 2004). Forty-three States submitted comments and forty of those States encouraged the agencies to retain broad federal jurisdiction over "waters of the United States." *Id.* Many States were concerned that a broad reading of *SWANCC* would make it difficult to protect wetlands in their States. *Id.* After more than 200 members of Congress signed a letter, in November 2003, asking the Corps and EPA not to issue new rules, EPA announced, in December 2003, that the agencies would not be moving forward with new rules at that time. *Id.*

2. Legislative Response

While the agencies were developing guidance to respond to *SWANCC*, Congress was also focusing on the issue. In 2003, the Clean Water Authority Restoration Act was introduced in the House and Senate. *See* S. 473, 108th Cong. 1st Sess. (2003); H.R. 962, 108th Cong., 1st Sess. (2003). The legislation would restore an expansive definition of "waters of the United States" to include "all waters subject to the ebb and flow of the tide, the territorial seas, and all interstate and intrastate waters and their tributaries, including lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, natural ponds, and all impoundments of the foregoing, to the fullest extent that these waters, or activities affecting these waters, are subject to the legislative power of Congress under the Constitution." S. 473, § 4(3). The legislation did not pass, but was re-introduced in the 109th Congress, *see Clean Water Authority Restoration Act of 2005*, S. 912, 109th Cong., 1st Sess. (2005); H.R. 1356, 109th Cong., 1st Sess. (2005) and 110th Congress, *see Clean Water Restoration Act of 2007* in the 110th Congress, *see* H.R. 2421, 110th Cong., 1st Sess. (2007); S. 1870, 110th Cong., 1st Sess. (2007). Similar legislation, with a slightly narrower definition of "waters of the United States" was proposed in the 111th Congress, *see Clean Water Restoration Act of 2009* - S. 787, 111th Cong. 1st. Sess. (2009). Ultimately, however, none of those legislative proposals were successful.

3. Judicial Response

While the Executive and Legislative branches considered or debated appropriate

responses to the *SWANCC* decision, landowners brought many judicial challenges to federal jurisdiction over non-navigable tributaries and wetlands adjacent to those tributaries. Most of the courts, including the federal appellate courts, that addressed the question concluded that the Clean Water Act authorized regulation of those waters. *See* *Baccarat Fremont v. U.S. Army Corps of Engineers,* 425 F.3d 1150 (9th Cir. 2005); *United States v. Rueth Development Co.,* 335 F. 3d 598 (7th Cir. 2003); *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003); *Community Assn. For Restoration of Environment v. Henry Bosma Dairy*, 305 F.3d 943 (9th Cir. 2002); *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526 (9th Cir. 2001); *but see* *In re Needham,* 354 F.3d 340 (5th Cir. 2003). A 2004 Association of Wetlands Managers report noted that 28 of the 31 federal court decisions interpreting *SWANCC* at that time had interpreted the Clean Water Act broadly, either by interpreting "tributary" broadly to include non-navigable tributaries, by adopting a broad concept of "adjacency" or by adopting a broad concept of the significant nexus. *See* Jon Kusler, *State Regulation of Wetlands to Fill the Gap* 8 (Association of State Wetlands Managers, Inc. 2004).

It was not long, however, before the Supreme Court again weighed in on the definition of "waters of the United States." Before reading the next case, it might be helpful to look a little more closely at sections of the Corps and EPA regulations on "waters of the United States" that have not been described in detail above.

First, in determining jurisdiction over tributaries, the regulations include navigable and non-navigable tributaries, as long as the tributaries have a perceptible "ordinary high water mark" *See* 33 C.F.R. § 328.4(c) An "ordinary high-water mark" is a "line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas." 33 CFR §328.3(e). Consequently, the federal regulations assert jurisdiction over a wide variety of intermittent and ephemeral streams, ditches, and other non-navigable tributaries of navigable waters.

Second, the regulations define "adjacent" in a manner that is subject to generous interpretation. Specifically, "adjacent" means "bordering, contiguous, or *neighboring*" (emphasis added) and includes wetlands that are "separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like." *See* 33 C.F.R. 328.3(c) Prior to the *Rapanos* case, some of the Corps' offices had concluded that wetlands were "adjacent" to other bodies of water if they were hydrologically connected to the waters "through directional sheet flow during storm events" or if they were within the 100 year floodplain of the waters. *See* General Accounting Office, *Corps of Engineers Needs to Evaluate its District Office Practices in Determining Jurisdiction* GAO–04–297, 16-18 (Feb. 2004).

The Supreme Court was faced with challenges to the government's regulation of non-navigable tributaries of navigable waters and to regulation of wetlands adjacent to those

tributaries in the following case, *Rapanos v. United States.* The case was actually the consolidation of two separate Clean Water Act lawsuits: (1) an enforcement action against John Rapanos for filling wetlands, to build a shopping center, without a Clean Water Act permit; and (2) a challenge by Keith and June Carabell to the denial of a Clean Water Act permit to fill wetlands for a housing development. In both cases, the federal government asserted jurisdiction over the wetlands at issue not because the wetlands were adjacent to traditional navigable waters but because they were adjacent to non-navigable tributaries of navigable waters. In addition, in the *Carabell* case, the wetlands were separated from the non-navigable tributaries by a berm. Ultimately, the Supreme Court split 4-4-1 in deciding the case, so the decision has continued to muddy the waters on the scope of Clean Water Act jurisdiction over "waters of the United States."

RAPANOS V. UNITED STATES

547 U.S. 715 (2006)

Resources for the Case

Oral argument audio (from Oyez project)
EPA Administrative Order re: Rapanos property
Carabell permit application and Corps denial
Corps' EA and Public Interest Review - Carabell
Maps of the properties - Carabell; Rapanos
Unedited opinion
Google Map of all the cases in the coursebook

Justice Scalia announced the judgment of the Court, and delivered an opinion, in which **The Chief Justice, Justice Thomas,** and **Justice Alito** join.

In April 1989, petitioner John A. Rapanos backfilled wetlands on a parcel of land in Michigan that he owned and sought to develop. This parcel included 54 acres of land with sometimes-saturated soil conditions. The nearest body of navigable water was 11 to 20 miles away. 339 F. 3d 447, 449 (CA6 2003) (*Rapanos I*). Regulators had informed Mr. Rapanos that his saturated fields were "waters of the United States," 33 U. S. C. §1362(7), that could not be filled without a permit. Twelve years of criminal and civil litigation ensued.

The burden of federal regulation on those who would deposit fill material in locations denominated "waters of the United States" is not trivial. In deciding whether to grant or deny a permit, the U. S. Army Corps of Engineers (Corps) exercises the discretion of an enlightened despot, relying on such factors as "economics," "aesthetics," "recreation," and "in general, the needs and welfare of the people," 33 CFR §320.4(a) (2004). * * * The average applicant for an individual 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. * * * "[O]ver $1.7 billion is spent each year by the private and public sectors obtaining wetlands permits." *Id.*, at 81. These costs cannot be avoided, because the Clean Water Act "impose[s] criminal liability," as well as steep civil fines, "on a broad range of ordinary industrial and commercial activities." *Hanousek v. United States*, 528 U. S. 1102, 1103 (2000) (Thomas, J., dissenting from denial of certiorari). In this litigation, for example, for backfilling his own wet fields, Mr. Rapanos faced 63 months in prison and hundreds of thousands of dollars in criminal and civil fines. *See United States v. Rapanos*, 235 F. 3d 256, 260 (CA6 2000).

The enforcement proceedings against Mr. Rapanos are a small part of the immense expansion of federal regulation of land use that has occurred under the Clean Water Act—without any change in the governing statute—during the past five Presidential administrations. 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. On this view, the federally regulated "waters of the United States" include storm drains, roadside ditches, ripples of sand in the desert that may contain water once a year, and lands that are covered by floodwaters once every 100 years. Because they include the land containing storm sewers and desert washes, the statutory "waters of the United States" engulf entire cities and immense arid wastelands. In fact, the entire land area of the United States lies in some drainage basin, and an endless network of visible channels furrows the entire surface, containing water ephemerally wherever the rain falls. Any plot of land containing such a channel may potentially be regulated as a "water of the United States."

* * *

II

In these consolidated cases, we consider whether four Michigan wetlands, which lie near ditches or man-made drains that eventually empty into traditional navigable waters, constitute "waters of the United States" within the meaning of the Act. Petitioners in No. 04–1034, the Rapanos and their affiliated businesses, deposited fill material without a permit into wetlands on three sites near Midland, Michigan: the "Salzburg site," the "Hines Road site," and the "Pine River site." The wetlands at the Salzburg site are connected to a man-made drain, which drains into Hoppler Creek, which flows into the Kawkawlin River, which empties into Saginaw Bay and Lake Huron. * * * The wetlands at the Hines Road site are connected to something called the "Rose Drain," which has a surface connection to the Tittabawassee River. * * * And the wetlands at the Pine River site have a surface connection to the Pine River, which flows into Lake Huron. * * * It is not clear whether the connections between these wetlands and the nearby drains and ditches are continuous or intermittent, or whether the nearby drains and ditches contain continuous or merely occasional flows of water.

The United States brought civil enforcement proceedings against the Rapanos petitioners. The District Court found that the three described wetlands were "within federal jurisdiction" because they were "adjacent to other waters of the United States," and held petitioners liable for violations of the CWA at those sites. * * * On appeal, the United States Court of Appeals for the Sixth Circuit affirmed, holding that there was federal jurisdiction over the wetlands at all three sites because "there were hydrological connections between all three sites and corresponding adjacent tributaries of navigable waters." * * *

Petitioners in No. 04–1384, the Carabells, were denied a permit to deposit fill material in a wetland located on a triangular parcel of land about one mile from Lake St. Clair. A man-made drainage ditch runs along one side of the wetland, separated from it by a 4-foot-wide man-made berm. The berm is largely or entirely impermeable to water and

blocks drainage from the wetland, though it may permit occasional overflow to the ditch. The ditch empties into another ditch or a drain, which connects to Auvase Creek, which empties into Lake St. Clair. * * *

After exhausting administrative appeals, the *Carabell* petitioners filed suit in the District Court, challenging the exercise of federal regulatory jurisdiction over their site. The District Court ruled that there was federal jurisdiction because the wetland "is adjacent to neighboring tributaries of navigable waters and has a significant nexus to 'waters of the United States.' " * * * Again the Sixth Circuit affirmed, holding that the Carabell wetland was "adjacent" to navigable waters. 391 F. 3d 704, 708 (2004) (*Carabell*).

We granted certiorari and consolidated the cases, * * * to decide whether these wetlands constitute "waters of the United States" under the Act, and if so, whether the Act is constitutional.

III

The Rapanos petitioners contend that the terms "navigable waters" and "waters of the United States" in the Act must be limited to the traditional definition of *The Daniel Ball*, which required that the "waters" be navigable in fact, or susceptible of being rendered so. *See* 10 Wall., at 563. But this definition cannot be applied wholesale to the CWA. The Act uses the phrase "navigable waters" as a defined term, and the definition is simply "the waters of the United States." 33 U. S. C. §1362(7). Moreover, the Act provides, in certain circumstances, for the substitution of state for federal jurisdiction over "navigable waters … *other than* those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce … including wetlands adjacent thereto." §1344(g)(1) (emphasis added). This provision shows that the Act's term "navigable waters" includes something more than traditional navigable waters. We have twice stated that the meaning of "navigable waters" in the Act is broader than the traditional understanding of that term, *SWANCC*, 531 U. S., at 167; *Riverside Bayview*, 474 U. S., at 133. * * * We have also emphasized, however, that the qualifier "navigable" is not devoid of significance, *SWANCC*, *supra*, at 172.

We need not decide the precise extent to which the qualifiers "navigable" and "of the United States" restrict the coverage of the Act. Whatever the scope of these qualifiers, the CWA authorizes federal jurisdiction only over "waters." 33 U. S. C. §1362(7). The only natural definition of the term "waters," our prior and subsequent judicial constructions of it, clear evidence from other provisions of the statute, and this Court's canons of construction all confirm that "the waters of the United States" in §1362(7) cannot bear the expansive meaning that the Corps would give it.

The Corps' expansive approach might be arguable if the CWA defined "navigable waters" as "water of the United States." But "the waters of the United States" is something else. The use of the definite article ("the") and the plural number ("waters") show plainly that §1362(7) does not refer to water in general. In this form, "the waters" refers more narrowly to water "[a]s found in streams and bodies forming geographical features such as oceans, rivers, [and] lakes," or "the flowing or moving masses, as of waves or floods, making up such streams or bodies." Webster's New International Dictionary 2882 (2d ed. 1954) (hereinafter Webster's Second). * * * On this definition, "the waters of the United States" include only relatively permanent, standing or flowing bodies of water.[5] The definition refers to water as found in "streams," "oceans," "rivers," "lakes," and "bodies" of water "forming geographical features." *Ibid.* All of these terms connote continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows. Even the least substantial of the definition's terms, namely "streams," connotes a continuous flow of water in a permanent channel—especially when used in company with other terms such as "rivers," "lakes," and "oceans."[6] None of these terms encompasses transitory

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[5] By describing "waters" as "relatively permanent," we do not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought. We also do not necessarily exclude seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months—such as the 290-day, continuously flowing stream postulated by Justice Stevens' dissent (hereinafter the dissent), *post*, at 15. Common sense and common usage distinguish between a wash and seasonal river.

Though scientifically precise distinctions between "perennial" and "intermittent" flows are no doubt available, * * * we have no occasion in this litigation to decide exactly when the drying-up of a stream bed is continuous and frequent enough to disqualify the channel as a "wate[r] of the United States." It suffices for present purposes that channels containing permanent flow are plainly within the definition, and that the dissent's "intermittent" and "ephemeral" streams, *post*, at 16 (opinion of Stevens, J.)—that is, streams whose flow is "[c]oming and going at intervals … [b]roken, fitful," Webster's Second 1296, or "existing only, or no longer than, a day; diurnal … short-lived," *id.*, at 857—are not.

[6] The principal definition of "stream" likewise includes reference to such permanent, geographically fixed bodies of water: "[a] current or course of water or other fluid, flowing on the earth, as a *river, brook, etc*." *Id.*, at 2493 (emphasis added). The other definitions of "stream" repeatedly emphasize the requirement of *continuous flow*: "[a] *steady flow*, as of water, air, gas, or the like"; "[a]nything issuing or moving with *continued succession* of parts"; "[a] *continued current* or course; current; drift." *Ibid.* (emphases added). The definition of the verb form of "stream" contains a similar emphasis on continuity: "[t]o issue or flow in a stream; to issue freely or move in a *continuous flow or course.*" *Ibid.* (emphasis added). On these definitions, therefore, the

puddles or ephemeral flows of water.

The restriction of "the waters of the United States" to exclude channels containing merely intermittent or ephemeral flow also accords with the commonsense understanding of the term. In applying the definition to "ephemeral streams," "wet meadows," storm sewers and culverts, "directional sheet flow during storm events," drain tiles, man-made drainage ditches, and dry arroyos in the middle of the desert, the Corps has stretched the term "waters of the United States" beyond parody. The plain language of the statute simply does not authorize this "Land Is Waters" approach to federal jurisdiction.

In addition, the 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. The Act adopted that traditional term from its predecessor statutes. *See SWANCC*, 531 U. S., at 180 (Stevens, J., dissenting). On the traditional understanding, "navigable waters" included only discrete bodies of water. For example, in *The Daniel Ball*, we used the terms "waters" and "rivers" interchangeably. 10 Wall., at 563. And in *Appalachian Electric*, we consistently referred to the "navigable waters" as "waterways." 311 U. S., at 407–409. Plainly, because such "waters" had to be navigable in fact or susceptible of being rendered so, the term did not include ephemeral flows. * * *

Moreover, only the foregoing definition of "waters" is consistent with the CWA's stated "policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources … ." §1251(b). This statement of policy was included in the Act as enacted in 1972, *see* 86 Stat. 816, prior to the addition of the optional state administration program in the 1977 amendments, *see* 91 Stat. 1601. Thus the policy plainly referred to something beyond the subsequently added state administration program of 33 U. S. C. §1344(g)–(l). But the expansive theory advanced by the Corps, rather than "preserv[ing] the primary rights and responsibilities of the States," would have brought virtually all "plan[ning of] the development and use . . . of land and water

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Corps' phrases "intermittent streams," 33 CFR §328.3(a)(3) (2004), and "ephemeral streams," 65 Fed. Reg. 12823 (2000), are—like Senator Bentsen's " ' flowing gullies,' " *post*, at 16, n. 11 (opinion of Stevens, J.)—useful oxymora. Properly speaking, such entities constitute extant "streams" only while they are "continuous[ly] flow[ing]"; and the usually dry channels that contain them are never "streams." Justice Kennedy apparently concedes that "an intermittent flow can constitute a stream" only *"while it is flowing*," *post*, at 13 (emphasis added)—which would mean that the channel is a "water" covered by the Act only during those times when water flow actually occurs. But no one contends that federal jurisdiction appears and evaporates along with the water in such regularly dry channels.

resources" by the States under federal control. It is therefore an unlikely reading of the phrase "the waters of the United States." * * *

Even if the phrase "the waters of the United States" were ambiguous as applied to intermittent flows, our own canons of construction would establish that the Corps' interpretation of the statute is impermissible. As we noted in *SWANCC*, the Government's expansive interpretation would "result in a significant impingement of the States' traditional and primary power over land and water use." 531 U. S., at 174. Regulation of land use, as through the issuance of the development permits sought by petitioners in both of these cases, is a quintessential state and local power. *See FERC v. Mississippi*, 456 U. S. 742, 768, n. 30 (1982); *Hess v. Port Authority Trans-Hudson Corporation*, 513 U. S. 30, 44 (1994). The extensive federal jurisdiction urged by the Government would authorize the Corps to function as a de facto regulator of immense stretches of intrastate land—an authority the agency has shown its willingness to exercise with the scope of discretion that would befit a local zoning board. *See* 33 CFR §320.4(a)(1) (2004). We ordinarily expect a "clear and manifest" statement from Congress to authorize an unprecedented intrusion into traditional state authority. *See BFP v. Resolution Trust Corporation*, 511 U. S. 531, 544 (1994). The phrase "the waters of the United States" hardly qualifies.

Likewise, just as we noted in *SWANCC*, the Corps' interpretation stretches the outer limits of Congress's commerce power and raises difficult questions about the ultimate scope of that power. *See* 531 U. S., at 173. (In developing the current regulations, the Corps consciously sought to extend its authority to the farthest reaches of the commerce power. *See* 42 Fed. Reg. 37127 (1977).) Even if the term "the waters of the United States" were ambiguous as applied to channels that sometimes host ephemeral flows of water (which it is not), we would expect a clearer statement from Congress to authorize an agency theory of jurisdiction that presses the envelope of constitutional validity. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U. S. 568, 575 (1988). * * *

In sum, on its only plausible interpretation, the phrase "the waters of the United States" includes only those relatively permanent, standing or continuously flowing bodies of water "forming geographic features" that are described in ordinary parlance as "streams[,] … oceans, rivers, [and] lakes." *See* Webster's Second 2882. The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall. The Corps' expansive interpretation of the "the waters of the United States" is thus not "based on a permissible construction of the statute." *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc*., 467 U. S. 837, 843 (1984).

IV

In *Carabell*, the Sixth Circuit held that the nearby ditch constituted a "tributary" and thus

a "water of the United States" under 33 CFR §328.3(a)(5) (2004). *See* 391 F. 3d, at 708–709. Likewise in *Rapanos*, the Sixth Circuit held that the nearby ditches were "tributaries" under §328(a)(5). 376 F. 3d, at 643. But *Rapanos II* also stated that, even if the ditches were not "waters of the United States," the wetlands were "adjacent" to remote traditional navigable waters in virtue of the wetlands' "hydrological connection" to them. *See id.*, at 639–640. This statement reflects the practice of the Corps' district offices, which may "assert jurisdiction over a wetland without regulating the ditch connecting it to a water of the United States." * * * We therefore address in this Part whether a wetland may be considered "adjacent to" remote "waters of the United States," because of a mere hydrologic connection to them.

In *Riverside Bayview*, we noted the textual difficulty in including "wetlands" as a subset of "waters": "On a purely linguistic level, it may appear unreasonable to classify 'lands,' wet or otherwise, as 'waters.' " 474 U. S., at 132. We acknowledged, however, that there was an inherent ambiguity in drawing the boundaries of any "waters":

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

Because of this inherent ambiguity, we deferred to the agency's inclusion of wetlands "actually abut[ting]" traditional navigable waters: "Faced with such a problem of defining the bounds of its regulatory authority," we held, the agency could reasonably conclude that a wetland that "adjoin[ed]" waters of the United States is itself a part of those waters. *Id.*, at 132, 135, and n. 9. The difficulty of delineating the boundary between water and land was central to our reasoning in the case: "In view of the breadth of federal regulatory authority contemplated by the Act itself and the *inherent difficulties of defining precise bounds to regulable waters,* the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act." *Id.*, at 134 (emphasis added).[10]

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[10] Since the wetlands at issue in *Riverside Bayview* actually abutted waters of the United States, the case could not possibly have held that merely "neighboring" wetlands came within the Corps' jurisdiction. Obiter approval of that proposition might be inferred, however, from the opinion's quotation without comment of a statement by the Corps describing covered "adjacent" wetlands as those " 'that form the border *of or are in reasonable proximity to* other waters of the United States.' " 474 U. S., at 134 (quoting 42 Fed. Reg. 37128 (1977); emphasis added). The opinion immediately reiterated, however, that adjacent wetlands could be regarded as "the waters of the United States" in view of "the inherent difficulties of defining precise bounds to regulable waters," 474

When we characterized the holding of *Riverside Bayview* in *SWANCC*, we referred to the close connection between waters and the wetlands that they gradually blend into: "It was the *significant nexus* between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes*." 531 U. S., at 167 (emphasis added). In particular, *SWANCC* rejected the notion that the ecological considerations upon which the Corps relied in *Riverside Bayview*—and upon which the dissent repeatedly relies today, *see post*, at 10–11, 12, 13–14, 15, 18–19, 21–22, 24–25—provided an independent basis for including entities like "wetlands" (or "ephemeral streams") within the phrase "the waters of the United States." *SWANCC* found such ecological considerations irrelevant to the question whether physically isolated waters come within the Corps' jurisdiction. It thus confirmed that *Riverside Bayview* rested upon the inherent ambiguity in defining where water ends and abutting ("adjacent") wetlands begin, permitting the Corps' reliance on ecological considerations only to resolve that ambiguity in favor of treating all abutting wetlands as waters. Isolated ponds were not "waters of the United States" in their own right, *see* 531 U. S., at 167, 171, and presented no boundary-drawing problem that would have justified the invocation of ecological factors to treat them as such.

Therefore, only those wetlands with a continuous surface connection to bodies that are "waters of the United States" in their own right, so that there is no clear demarcation between "waters" and wetlands, are "adjacent to" such waters and covered by the Act. Wetlands with only an intermittent, physically remote hydrologic connection to "waters of the United States" do not implicate the boundary-drawing problem of *Riverside Bayview*, and thus lack the necessary connection to covered waters that we described as a "significant nexus" in *SWANCC*. 531 U. S., at 167. Thus, establishing that wetlands such as those at the Rapanos and Carabell sites are covered by the Act requires two findings: First, that the adjacent channel contains a "wate[r] of the United States," (i.e., a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the "water" ends and the "wetland" begins.

* * *

U. S., at 134—a rationale that would have no application to physically separated "neighboring" wetlands. Given that the wetlands at issue in *Riverside Bayview* themselves "actually abut[ted] on a navigable waterway," *id.*, at 135; given that our opinion recognized that unconnected wetlands could not naturally be characterized as " 'waters' " at all, *id.*, at 132; and given the repeated reference to the difficulty of determining where waters end and wetlands begin; the most natural reading of the opinion is that a wetlands' mere "reasonable proximity" to waters of the United States is not enough to confer Corps jurisdiction. In any event, as discussed in our immediately following text, any possible ambiguity has been eliminated by *SWANCC*, 531 U. S. 159 (2001).

VIII

Because the Sixth Circuit applied the wrong standard to determine if these wetlands are covered "waters of the United States," and because of the paucity of the record in both of these cases, the lower courts should determine, in the first instance, whether the ditches or drains near each wetland are "waters" in the ordinary sense of containing a relatively permanent flow; and (if they are) whether the wetlands in question are "adjacent" to these "waters" in the sense of possessing a continuous surface connection that creates the boundary-drawing problem we addressed in *Riverside Bayview*.

We vacate the judgments of the Sixth Circuit in both No. 04–1034 and No. 04–1384, and remand both cases for further proceedings.

* * *

Justice Kennedy, concurring in the judgment.

These consolidated cases require the Court to decide whether the term "navigable waters" in the Clean Water Act extends to wetlands that do not contain and are not adjacent to waters that are navigable in fact. In *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers,* 531 U. S. 159 (2001) (*SWANCC*), the Court held, under the circumstances presented there, that to constitute " 'navigable waters' " under the Act, a water or wetland must possess a "significant nexus" to waters that are or were navigable in fact or that could reasonably be so made. *Id.*, at 167, 172. In the instant cases neither the plurality opinion nor the dissent by Justice Stevens chooses to apply this test; and though the Court of Appeals recognized the test's applicability, it did not consider all the factors necessary to determine whether the lands in question had, or did not have, the requisite nexus. In my view the cases ought to be remanded to the Court of Appeals for proper consideration of the nexus requirement.

* * *

Riverside Bayview and *SWANCC* establish the framework for the inquiry in the cases now before the Court: Do the Corps' regulations, as applied to the wetlands in *Carabell* and the three wetlands parcels in *Rapanos*, constitute a reasonable interpretation of "navigable waters" as in *Riverside Bayview* or an invalid construction as in *SWANCC*? Taken together these cases establish that in some instances, as exemplified by *Riverside Bayview*, the connection between a nonnavigable water or wetland and a navigable water may be so close, or potentially so close, that the Corps may deem the water or wetland a "navigable water" under the Act. In other instances, as exemplified by *SWANCC,* there may be little or no connection. Absent a significant nexus, jurisdiction under the Act is lacking. Because neither the plurality nor the dissent addresses the nexus requirement, this separate opinion, in my respectful view, is

necessary.

A

The plurality's opinion begins from a correct premise. As the plurality points out, and as *Riverside Bayview* holds, in enacting the Clean Water Act Congress intended to regulate at least some waters that are not navigable in the traditional sense. *Ante,* at 12; *Riverside Bayview,* 474 U. S., at 133; *see also SWANCC, supra*, at 167. This conclusion is supported by "the evident breadth of congressional concern for protection of water quality and aquatic ecosystems." *Riverside Bayview, supra*, at 133; *see also Milwaukee v. Illinois*, 451 U. S. 304, 318 (1981) (describing the Act as "an all-encompassing program of water pollution regulation"). It is further compelled by statutory text, for the text is explicit in extending the coverage of the Act to some nonnavigable waters.

* * *

From this reasonable beginning the plurality proceeds to impose two limitations on the Act; but these limitations, it is here submitted, are without support in the language and purposes of the Act or in our cases interpreting it. First, because the dictionary defines "waters" to mean "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," *ante,* at 13 (quoting Webster's New International Dictionary 2882 (2d ed. 1954) (hereinafter Webster's Second)), the plurality would conclude that the phrase "navigable waters" permits Corps and EPA jurisdiction only over "relatively permanent, standing or flowing bodies of water," *ante,* at 13–14—a category that in the plurality's view includes "seasonal" rivers, that is, rivers that carry water continuously except during "dry months," but not intermittent or ephemeral streams, *ante,* at 13–15, and n. 5. Second, the plurality asserts that wetlands fall within the Act only if they bear "a continuous surface connection to bodies that are 'waters of the United States' in their own right"—waters, that is, that satisfy the plurality's requirement of permanent standing water or continuous flow. *Ante,* at 23–24.

The plurality's first requirement—permanent standing water or continuous flow, at least for a period of "some months," *ante,* at 13–14, and n. 5—makes little practical sense in a statute concerned with downstream water quality. The merest trickle, if continuous, would count as a "water" subject to federal regulation, while torrents thundering at irregular intervals through otherwise dry channels would not. Though the plurality seems to presume that such irregular flows are too insignificant to be of concern in a statute focused on "waters," that may not always be true. Areas in the western parts of the Nation provide some examples. The Los Angeles River, for instance, ordinarily carries only a trickle of water and often looks more like a dry roadway than a river. * * * Yet it periodically releases water-volumes so powerful and destructive that it has been encased in concrete and steel over a length of some 50 miles. * * * Though this particular waterway might satisfy the plurality's test, it is illustrative of what often-dry

watercourses can become when rain waters flow. * * *

* * *

It follows that the Corps can reasonably interpret the Act to cover the paths of such impermanent streams.

* * *

The plurality's second limitation—exclusion of wetlands lacking a continuous surface connection to other jurisdictional waters—is also unpersuasive. To begin with, the plurality is wrong to suggest that wetlands are "*indistinguishable"* from waters to which they bear a surface connection. *Ante,* at 37. Even if the precise boundary may be imprecise, a bog or swamp is different from a river. The question is what circumstances permit a bog, swamp, or other nonnavigable wetland to constitute a "navigable water" under the Act—as §1344(g)(1), if nothing else, indicates is sometimes possible, *see supra,* at 10–11. *Riverside Bayview* addressed that question and its answer is inconsistent with the plurality's theory. There, in upholding the Corps' authority to regulate "wetlands adjacent to other bodies of water over which the Corps has jurisdiction," the Court deemed it irrelevant whether "the moisture creating the wetlands … find[s] its source in the adjacent bodies of water." 474 U. S., at 135. The Court further observed that adjacency could serve as a valid basis for regulation even as to "wetlands that are not significantly intertwined with the ecosystem of adjacent waterways." *Id.,* at 135, n. 9. "If it is reasonable," the Court explained, "for the Corps to conclude that in the majority of cases, adjacent wetlands have significant effects on water quality and the aquatic ecosystem, its definition can stand." *Ibid*.

The Court in *Riverside Bayview* did note, it is true, the difficulty of defining where "water ends and land begins," *id.,* at 132, and the Court cited that problem as one reason for deferring to the Corps' view that adjacent wetlands could constitute waters. Given, however, the further recognition in *Riverside Bayview* that an overinclusive definition is permissible even when it reaches wetlands holding moisture disconnected from adjacent water-bodies, *id.,* at 135, and n. 9, *Riverside Bayview*'s observations about the difficulty of defining the water's edge cannot be taken to establish that when a clear boundary is evident, wetlands beyond the boundary fall outside the Corps' jurisdiction.

* * *

SWANCC, likewise, does not support the plurality's surface-connection requirement. *SWANCC's* holding that "nonnavigable, isolated, intrastate waters," 531 U. S., at 171, are not "navigable waters" is not an explicit or implicit overruling of *Riverside Bayview's* approval of adjacency as a factor in determining the Corps' jurisdiction. In rejecting the Corps' claimed authority over the isolated ponds in *SWANCC*, the Court distinguished adjacent nonnavigable waters such as the wetlands addressed in *Riverside Bayview*.

531 U. S., at 167, 170–171.

As *Riverside Bayview* recognizes, the Corps' adjacency standard is reasonable in some of its applications. Indeed, the Corps' view draws support from the structure of the Act, while the plurality's surface-water-connection requirement does not.

* * *

As the Court noted in *Riverside Bayview*, "the Corps has concluded that wetlands may serve to filter and purify water draining into adjacent bodies of water, 33 CFR §320.4(b)(2)(vii) (1985), and to slow the flow of surface runoff into lakes, rivers, and streams and thus prevent flooding and erosion, see §§320.4(b)(2)(iv) and (v)." 474 U. S., at 134. Where wetlands perform these filtering and runoff-control functions, filling them may increase downstream pollution, much as a discharge of toxic pollutants would. Not only will dirty water no longer be stored and filtered but also the act of filling and draining itself may cause the release of nutrients, toxins, and pathogens that were trapped, neutralized, and perhaps amenable to filtering or detoxification in the wetlands. * * * In many cases, moreover, filling in wetlands separated from another water by a berm can mean that flood water, impurities, or runoff that would have been stored or contained in the wetlands will instead flow out to major waterways. With these concerns in mind, the Corps' definition of adjacency is a reasonable one, for it may be the absence of an interchange of waters prior to the dredge and fill activity that makes protection of the wetlands critical to the statutory scheme.

* * *

It bears mention also that the plurality's overall tone and approach—from the characterization of acres of wetlands destruction as "backfilling … wet fields," *ante,* at 2, to the rejection of Corps authority over "man-made drainage ditches" and "dry arroyos" without regard to how much water they periodically carry, *ante,* at 15, to the suggestion, seemingly contrary to Congress' judgment, that discharge of fill material is inconsequential for adjacent waterways, *ante,* at 26, and n. 11—seems unduly dismissive of the interests asserted by the United States in these cases. Important public interests are served by the Clean Water Act in general and by the protection of wetlands in particular. To give just one example, *amici* here have noted that nutrient-rich runoff from the Mississippi River has created a hypoxic, or oxygen-depleted, "dead zone" in the Gulf of Mexico that at times approaches the size of Massachusetts and New Jersey. * * * Scientific evidence indicates that wetlands play a critical role in controlling and filtering runoff. * * * It is true, as the plurality indicates, that environmental concerns provide no reason to disregard limits in the statutory text, *ante,* at 27, but in my view the plurality's opinion is not a correct reading of the text. The limits the plurality would impose, moreover, give insufficient deference to Congress' purposes in enacting the Clean Water Act and to the authority of the Executive to implement that statutory mandate.

Finally, it should go without saying that because the plurality presents its interpretation of the Act as the only permissible reading of the plain text, *ante,* at 20, 23–24, the Corps would lack discretion, under the plurality's theory, to adopt contrary regulations. The Chief Justice suggests that if the Corps and EPA had issued new regulations after *SWANCC* they would have "enjoyed plenty of room to operate in developing *some* notion of an outer bound to the reach of their authority" and thus could have avoided litigation of the issues we address today. *Ante,* at 2. That would not necessarily be true under the opinion The Chief Justice has joined. New rulemaking could have averted the disagreement here only if the Corps had anticipated the unprecedented reading of the Act that the plurality advances.

B

While the plurality reads nonexistent requirements into the Act, the dissent reads a central requirement out—namely, the requirement that the word "navigable" in "navigable waters" be given some importance. Although the Court has held that the statute's language invokes Congress' traditional authority over waters navigable in fact or susceptible of being made so, *SWANCC,* 531 U. S., at 172 (*citing Appalachian Power*, 311 U. S., at 407–408), the dissent would permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters. The deference owed to the Corps' interpretation of the statute does not extend so far.

Congress' choice of words creates difficulties, for the Act contemplates regulation of certain "navigable waters" that are not in fact navigable. *Supra,* at 10–11. Nevertheless, the word "navigable" in the Act must be given some effect. See *SWANCC*, supra, at 172. Thus, in *SWANCC* the Court rejected the Corps' assertion of jurisdiction over isolated ponds and mudflats bearing no evident connection to navigable-in-fact waters. And in *Riverside Bayview*, while the Court indicated that "the term 'navigable' as used in the Act is of limited import," 474 U. S., at 133, it relied, in upholding jurisdiction, on the Corps' judgment that "wetlands adjacent to lakes, rivers, streams, and other bodies of water may function as integral parts of the aquatic environment even when the moisture creating the wetlands does not find its source in the adjacent bodies of water," *id.,* at 135. The implication, of course, was that wetlands' status as "integral parts of the aquatic environment"—that is, their significant nexus with navigable waters—was what established the Corps' jurisdiction over them as waters of the United States.

Consistent with *SWANCC* and *Riverside Bayview* and with the need to give the term "navigable" some meaning, the Corps' jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense. The required nexus must be assessed in terms of the statute's goals and purposes. Congress enacted the law to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U. S. C. §1251(a), and it pursued that objective by restricting dumping and filling in "navigable waters," §§1311(a), 1362(12). With respect to wetlands, the rationale for Clean Water Act

regulation is, as the Corps has recognized, that wetlands can perform critical functions related to the integrity of other waters—functions such as pollutant trapping, flood control, and runoff storage. 33 CFR §320.4(b)(2). Accordingly, wetlands possess the requisite nexus, and thus come within the statutory phrase "navigable waters," if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as "navigable." When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term "navigable waters."

Although the dissent acknowledges that wetlands' ecological functions vis-a-vis other covered waters are the basis for the Corps' regulation of them, *post,* at 10–11, it concludes that the ambiguity in the phrase "navigable waters" allows the Corps to construe the statute as reaching all "non-isolated wetlands," just as it construed the Act to reach the wetlands adjacent to navigable-in-fact waters in *Riverside Bayview*, *see post,* at 11. This, though, seems incorrect. The Corps' theory of jurisdiction in these consolidated cases—adjacency to tributaries, however remote and insubstantial—raises concerns that go beyond the holding of *Riverside Bayview*; and so the Corps' assertion of jurisdiction cannot rest on that case.

As applied to wetlands adjacent to navigable-in-fact waters, the Corps' conclusive standard for jurisdiction rests upon a reasonable inference of ecologic interconnection, and the assertion of jurisdiction for those wetlands is sustainable under the Act by showing adjacency alone. That is the holding of *Riverside Bayview.* Furthermore, although the *Riverside Bayview* Court reserved the question of the Corps' authority over "wetlands that are not adjacent to bodies of open water," 474 U. S., at 131–132, n. 8, and in any event addressed no factual situation other than wetlands adjacent to navigable-in-fact waters, it may well be the case that *Riverside Bayview's* reasoning—supporting jurisdiction without any inquiry beyond adjacency—could apply equally to wetlands adjacent to certain major tributaries. Through regulations [*781] or adjudication, the Corps may choose to identify categories of tributaries that, due to their volume of flow (either annually or on average), their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters.

The Corps' existing standard for tributaries, however, provides no such assurance. As noted earlier, the Corps deems a water a tributary if it feeds into a traditional navigable water (or a tributary thereof) and possesses an ordinary high-water mark, defined as a "line on the shore established by the fluctuations of water and indicated by [certain] physical characteristics," §328.3(e). *See supra,* at 3. This standard presumably provides a rough measure of the volume and regularity of flow. Assuming it is subject to reasonably consistent application, * * * it may well provide a reasonable measure of whether specific minor tributaries bear a sufficient nexus with other regulated waters to constitute "navigable waters" under the Act. Yet the breadth of this standard—which

seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water-volumes towards it—precludes its adoption as the determinative measure of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood. Indeed, in many cases wetlands adjacent to tributaries covered by this standard might appear little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in *SWANCC*. * * *

When the Corps seeks to regulate wetlands adjacent to navigable-in-fact waters, it may rely on adjacency to establish its jurisdiction. Absent more specific regulations, however, the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries. Given the potential overbreadth of the Corps' regulations, this showing is necessary to avoid unreasonable applications of the statute. Where an adequate nexus is established for a particular wetland, it may be permissible, as a matter of administrative convenience or necessity, to presume covered status for other comparable wetlands in the region. That issue, however, is neither raised by these facts nor addressed by any agency regulation that accommodates the nexus requirement outlined here.

This interpretation of the Act does not raise federalism or Commerce Clause concerns sufficient to support a presumption against its adoption. To be sure, the significant nexus requirement may not align perfectly with the traditional extent of federal authority. Yet in most cases regulation of wetlands that are adjacent to tributaries and possess a significant nexus with navigable waters will raise no serious constitutional or federalism difficulty. *Cf. Pierce County v. Guillen*, 537 U. S. 129, 147 (2003) (upholding federal legislation "aimed at improving safety in the channels of commerce"); *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U. S. 508, 524–525 (1941) ("[J]ust as control over the non-navigable parts of a river may be essential or desirable in the interests of the navigable portions, so may the key to flood control on a navigable stream be found in whole or in [*783] part in flood control on its tributaries … . [T]he exercise of the granted power of Congress to regulate interstate commerce may be aided by appropriate and needful control of activities and agencies which, though intrastate, affect that commerce"). As explained earlier, moreover, and as exemplified by *SWANCC*, the significant-nexus test itself prevents problematic applications of the statute. *See supra,* at 19–20; 531 U. S., at 174. The possibility of legitimate Commerce Clause and federalism concerns in some circumstances does not require the adoption of an interpretation that departs in all cases from the Act's text and structure. See *Gonzales v. Raich,* 545 U. S. 1, __ (2005) (slip op., at 14) ("[W]hen a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence" (internal quotation marks omitted)).

III

In both the consolidated cases before the Court the record contains evidence suggesting the possible existence of a significant nexus according to the principles outlined above. Thus the end result in these cases and many others to be considered by the Corps may be the same as that suggested by the dissent, namely, that the Corps' assertion of jurisdiction is valid. Given, however, that neither the agency nor the reviewing courts properly considered the issue, a remand is appropriate, in my view, for application of the controlling legal standard.

* * *

In these consolidated cases I would vacate the judgments of the Court of Appeals and remand for consideration whether the specific wetlands at issue possess a significant nexus with navigable waters.

Justice Stevens, with whom **Justice Souter**, **Justice Ginsburg**, and **Justice Breyer** join, ***dissenting***.

* * *

The narrow question presented in No. 04–1034 is whether wetlands adjacent to tributaries of traditionally navigable waters are "waters of the United States" subject to the jurisdiction of the Army Corps; the question in No. 04–1384 is whether a manmade berm separating a wetland from the adjacent tributary makes a difference. 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. Rejecting more than 30 years of practice by the Army Corps, the plurality disregards the nature of the congressional delegation to the agency and the technical and complex character of the issues at stake. Justice Kennedy similarly fails to defer sufficiently to the Corps, though his approach is far more faithful to our precedents and to principles of statutory interpretation than is the plurality's.

In my view, the proper analysis is straightforward. The Army Corps has determined that wetlands adjacent to tributaries of traditionally navigable waters preserve the quality of our Nation's waters by, among other things, providing habitat for aquatic animals, keeping excessive sediment and toxic pollutants out of adjacent waters, and reducing downstream flooding by absorbing water at times of high flow. The Corps' resulting decision to treat these wetlands as encompassed within the term "waters of the United States" is a quintessential example of the Executive's reasonable interpretation of a statutory provision. *See Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U. S. 837, 842–845 (1984).

Our unanimous decision in *United States v. Riverside Bayview Homes, Inc.,* 474 U. S. 121 (1985), was faithful to our duty to respect the work product of the Legislative and Executive Branches of our Government. Today's judicial amendment of the Clean Water Act is not.

* * *

Unlike *SWANCC* and like *Riverside Bayview*, the cases before us today concern wetlands that are adjacent to "navigable bodies of water [or] their tributaries," 474 U. S., at 123. Specifically, these wetlands abut tributaries of traditionally navigable waters. As we recognized in *Riverside Bayview*, the Corps has concluded that such wetlands play important roles in maintaining the quality of their adjacent waters, *see id.,* at 134–135, and consequently in the waters downstream. Among other things, wetlands can offer "nesting, spawning, rearing and resting sites for aquatic or land species"; "serve as valuable storage areas for storm and flood waters"; and provide "significant water purification functions." 33 CFR §320.4(b)(2) (2005); 474 U. S., at 134–135. These values are hardly "*independent*" ecological considerations as the plurality would have it, *ante*, at 23—instead, they are integral to the "chemical, physical, and biological integrity of the Nation's waters," 33 U. S. C. §1251(a). Given that wetlands serve these important water quality roles and given the ambiguity inherent in the phrase "waters of the United States," the Corps has reasonably interpreted its jurisdiction to cover non-isolated wetlands. See 474 U. S., at 131–135.

This conclusion is further confirmed by Congress' deliberate acquiescence in the Corps' regulations in 1977. *Id.,* at 136. Both Chambers conducted extensive debates about the Corps' regulatory jurisdiction over wetlands, rejected efforts to limit this jurisdiction, and appropriated funds for a " 'National Wetlands Inventory' " to help the States " 'in the development and operation of programs under this Act.' " *Id.,* at 135–139 (quoting 33 U. S. C. §1288(i)(2)). We found these facts significant in *Riverside Bayview, see* 474 U. S., at 135–139, as we acknowledged in *SWANCC. See* 531 U. S., at 170–171 (noting that "*[b]eyond Congress' desire to regulate wetlands adjacent to 'navigable waters*,' respondents point us to no persuasive evidence" of congressional acquiescence (emphasis added)).

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. *Riverside Bayview* made clear that jurisdiction does not depend on a wetland-by-wetland inquiry. 474 U. S., at 135, n. 9. Instead, it is enough that wetlands adjacent to tributaries generally have a significant nexus to the watershed's water quality. If a particular wetland is "not significantly intertwined with the ecosystem of adjacent waterways," then the Corps may allow its development "simply by issuing a permit." *Ibid*.[6] Accordingly, for purposes of

[6] Indeed, "[t]he Corps approves virtually all section 404 permit[s]," though often

the Corps' jurisdiction it is of no significance that the wetlands in No. 04–1034 serve flood control and sediment sink functions, but may not do much to trap other pollutants, *supra,* at 4–5, and n. 2, or that the wetland in No. 04–1328 keeps excess water from Lake St. Clair but may not trap sediment, *see supra,* at 5–6.

* * *

In final analysis, however, concerns about the appropriateness of the Corps' 30-year implementation of the Clean Water Act should be addressed to Congress or the Corps rather than to the Judiciary. Whether the benefits of particular conservation measures outweigh their costs is a classic question of public policy that should not be answered by appointed judges. The fact that large investments are required to finance large developments merely means that those who are most adversely affected by the Corps' permitting decisions are persons who have the ability to communicate effectively with their representatives. Unless and until they succeed in convincing Congress (or the Corps) that clean water is less important today than it was in the 1970's, we continue to owe deference to regulations satisfying the "evident breadth of congressional concern for protection of water quality and aquatic ecosystems" that all of the Justices on the Court in 1985 recognized in *Riverside Bayview,* 474 U. S., at 133.

* * *

Justice Kennedy's "significant nexus" test will probably not do much to diminish the number of wetlands covered by the Act in the long run. Justice Kennedy himself recognizes that the records in both cases contain evidence that "should permit the establishment of a significant nexus," *ante,* at 27, *see also ante,* at 26, and it seems likely that evidence would support similar findings as to most (if not all) wetlands adjacent to tributaries of navigable waters. But Justice Kennedy's approach will have the effect of creating additional work for all concerned parties. Developers wishing to fill wetlands adjacent to ephemeral or intermittent tributaries of traditionally navigable waters will have no certain way of knowing whether they need to get §404 permits or not. And the Corps will have to make case-by-case (or category-by-category) jurisdictional determinations, which will inevitably increase the time and resources spent processing permit applications. These problems are precisely the ones that *Riverside Bayview's* deferential approach avoided. *See* 474 U. S., at 135, n. 9 (noting that it "is of little moment" if the Corps' jurisdiction encompasses some wetlands "not significantly intertwined" with other waters of the United States). Unlike Justice Kennedy, I see no reason to change *Riverside Bayview's* approach—and every reason to continue to defer to the Executive's sensible, bright-line rule.

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requiring applicants to avoid or mitigate impacts to wetlands and other waters. GAO Report 8.

I would affirm the judgments in both cases, and respectfully dissent from the decision of five Members of this Court to vacate and remand. * * * In these cases, * * * while both the plurality and Justice Kennedy agree that there must be a remand for further proceedings, their respective opinions define different tests to be applied on remand. Given that all four Justices who have joined this opinion would uphold the Corps' jurisdiction in both of these cases—and in all other cases in which either the plurality's or Justice Kennedy's test is satisfied—on remand each of the judgments should be reinstated if *either* of those tests is met.[14]

* * *

Questions and Comments

1. In light of the fact that there was no majority opinion in the *Rapanos* case, it is a little difficult to determine precisely what further limits the Court placed on Clean Water Act jurisdiction. Parsing the opinions closely may help clarify what the Court did and did not hold. For instance, after *SWANCC*, some commentators believed that Clean Water Act jurisdiction might be limited to traditional navigable waters and adjacent wetlands. Did the plurality or any of the Justices adopt that narrow reading of the statute? Is the *SWANCC* focus on limiting jurisdiction to Congress' commerce power over navigation retained by a majority of the Justices? Is Justice Breyer a voice crying out in the wilderness?

2. As noted above, the *Rapanos* Court focused on whether non-navigable tributaries of traditional navigable waters were "waters of the United States" and on whether wetlands adjacent to non-navigable tributaries were "waters of the United States." What test does the plurality adopt to answer those two questions? Note the plurality's distinction between ephemeral or intermittent streams, on the one hand, and seasonal rivers or waters that dry up in extraordinary circumstances. Is the plurality sliding down a slippery slope?

3. Prior to *Rapanos*, the lower federal courts routinely deferred to the government's determinations that non-navigable tributaries of traditional navigable waters were "waters of the United States." Does the plurality ignore the *Chevron* analysis? In construing the statute, does the plurality focus on the water quality purposes of the statute or legislative history, as the *Riverside Bayview* Court had done? Why not? On what purposes of the statute does the plurality focus? Which statutory

[14] I assume that Justice Kennedy's approach will be controlling in most cases because it treats more of the Nation's waters as within the Corps' jurisdiction, but in the unlikely event that the plurality's test is met but Justice Kennedy's is not, courts should also uphold the Corps' jurisdiction. In sum, in these and future cases the United States may elect to prove jurisdiction under either test.

construction canons?

4. What do you think of Justice Scalia's tone in the plurality opinion? What did Justice Kennedy think about it? It is interesting to compare the plurality's factual description of the plight of John Rapanos, who "faced 63 months in prison and hundreds of thousands of dollars in criminal and civil fines" for "backfilling his own wet fields" with the factual descriptions provided by Justice Kennedy and the dissenting Justices, who point out that Rapanos threatened to "destroy" the consultant he hired to delineate his property unless the consultant destroyed the report that identified the wetlands on the property, and that Rapanos ignored numerous cease and desist orders from the State and EPA when he filled the wetlands.

5. Justice Kennedy wrote a separate opinion, concurring in the Court's judgment. Does Kennedy apply the *Chevron* analysis when determining whether the government can regulate "ephemeral" or "intermittent" streams? Why does Justice Kennedy feel such regulation is appropriate? Does he focus on the "significant nexus" in his analysis of the non-navigable waters?

6. What test does Justice Kennedy suggest should apply to determine whether wetlands can be regulated? Does he adopt a different test depending on whether the wetlands are adjacent to traditional navigable waters or whether they are adjacent to non-navigable tributaries? Is his interpretation of the statute based on the plain meaning of the text, the purposes of the statute, the legislative history, or some combination of all three? Does Kennedy apply the *Chevron* analysis? How does he respond to the plurality's federalism and constitutional concerns?

7. **Applying the "Significant Nexus" Test:** Does Kennedy believe that there must be a hydrological connection between the wetlands and a traditional navigable in fact water? Is a hydrological connection sufficient for Justice Kennedy? What types of connections between wetlands and a traditional navigable water might constitute a "significant nexus"? Would Kennedy focus only on the specific wetlands that the government seeks to regulate in determining whether the wetlands have a "significant nexus" to other waters? Do the plurality or dissenting Justices believe that such ecological connections are sufficient to establish jurisdiction?

8. Justice Stevens, in his dissenting opinion, argues for a straightforward application of the *Chevron* analysis. Steven's focus on the water quality protection purposes of the Clean Water Act, Congressional acquiescence, and deference to agency expertise echo the approach taken in the Court's unanimous *Riverside Bayview Homes* decision. Note how the dissenting Justices and Justice Kennedy, in his concurrence, rely heavily on science and the scientific expertise of agencies, in crafting their opinions.

9. **A Missed Opportunity?:** Justice Breyer, in a separate dissent, and Justice Roberts, in a separate concurring opinion, both lament the government's failure to adopt regulations to clarify the meaning of "waters of the United States" after *SWANCC* and both note that the government's regulations would have been accorded deference under *Chevron* if they had pursued that route. However, Justice Kennedy suggests, in his concurrence, that if the plurality's reasoning had been adopted by a majority of the Court, the Corps and EPA would not be accorded *Chevron* deference if, after the *Rapanos* decision, they adopted rules to clarify that ephemeral and intermittent streams were "waters of the United States" and to adopt a definition of "adjacent" similar to the approach that they were applying in practice before the decision. Why would those rules not be accorded *Chevron* deference? *See* *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005)

10. ***Rapanos* Post-script*:*** The United States finally settled the civil lawsuit against Rapanos in December 2008, and the defendants agreed to pay $150,000 in civil penalties, create 100 acres of wetlands, and preserve 134 acres of wetlands. The consent decree is available at: http://www2.epa.gov/sites/production/files/documents/rapanos-cd.pdf

11. ***Marks* or Counting Noses?:** The Justices divided 4-4-1 in *Rapanos*. Justice Roberts, in a concurring opinion, suggests that lower courts and regulated parties "will now have to feel their way on a case-by-case basis". 547 U.S. at 758 (Roberts, *concurring*). He provides some guidance on how the decision might be read by citing *Grutter v. Bollinger*, 539 U.S. 306 (2003) (*discussing Marks v. United States*, 430 U.S. 188 (1977)). The dissenting Justices suggest an alternative approach for reconciling the various opinions and developing a test for determining when it is appropriate to regulate "non-navigable tributaries" and wetlands adjacent to non-navigable tributaries? Compare the two approaches.

12. For various views on the impact of the *Rapanos* decision shortly after the Court issued the decision, *see* Robin Kundis Craig, *Justice Kennedy and Ecosystem Services: A Functional Approach to Clean Water Act Jurisdiction After Rapanos,* 38 Envtl. L. 635 (2008); Jamison E. Colburn, *Waters of the United States: Theory, Practice and Integrity at the Supreme Court,* 34 Fla. St. U. L. Rev. 183 (2007); Bradford C. Mank, *Implementing Rapanos - will Justice Kennedy's Significant Nexus Test Provide a Workable Standard for Lower Courts, Regulators and Developers?,* 40 Indiana L. Rev. 291 (2007); Mark Squillace, *From 'Navigable Waters' to 'Constitutional Waters',* 40 U. Mich. J.L. Reform 799 (2007); James Murphy, *Muddying the Waters of the Clean Water Act: Rapanos v. United States and the Future of America's Wetlands,* 31 Vt. L. Rev. 356 (2006).

E. **Post-Rapanos Developments**

After the *Rapanos* decision, there was confusion regarding whether jurisdictional determinations regarding non-navigable tributaries and wetlands adjacent to non-navigable tributaries should be made based on the plurality's test, Justice Kennedy's test, or both. To recap, the following chart highlights the differences between the plurality's opinion and Justice Kennedy's opinion.

	Non-Navigable Tributaries	***Wetlands Adjacent to Non-Navigable Tributaries***
Plurality	Jurisdiction exists if the water is a "relatively permanent, continuously flowing" body of water that flows into a traditional navigable water.	Jurisdiction exists if the wetlands have a "continuous surface connection" with a relatively permanent, continuously flowing body of water that flows into a traditional navigable water.
Kennedy	Jurisdiction exists if the water has a significant nexus to a traditional navigable water. A "significant nexus" exists where the water "either alone or in combination with similarly situated lands in the region, significantly affects the chemical, physical, and biological integrity" of a traditional navigable water.	Jurisdiction exists if the wetlands have a significant nexus to a traditional navigable water. A "significant nexus" exists where a wetland "either alone or in combination with similarly situated lands in the region, significantly affects the chemical, physical, and biological integrity" of a traditional navigable water.

Justice Stevens, for the dissenting Justices, wrote that Justice Kennedy's "significant nexus" test would "probably not do much to diminish the number of wetlands covered by the Act in the long run." 547 U.S. at 808 (Stevens, *dissenting*) However, just as elimination of the "migratory bird" test made it more time-consuming to document and support jurisdictional determinations over "isolated waters," the requirement that the Corps and EPA demonstrate a "significant nexus" between wetlands or non-navigable tributaries and traditional navigable waters would increase the time and resources necessary to document and support jurisdictional determinations over those waters.

Justice Kennedy's test would allow the Corps and EPA to regulate a much broader universe of "waters" than the plurality's test, but there are some "waters" that could be

regulated under the plurality's test that would not be regulated under Kennedy's test (waters that have continuous surface connections to traditional navigable waters, but for which the government cannot demonstrate a "significant nexus" to the traditional navigable water.)

Just as the *SWANCC* decision raised concerns that many isolated waters would be excluded from federal regulation, the *Rapanos* decision raised concerns that many non-navigable tributaries, including intermittent and ephemeral streams, and wetlands adjacent to those non-navigable tributaries, would be excluded from federal regulation. The Environmental Law Institute released a report that outlined, in great detail, the various types of waters that would be unprotected at the State level if not protected at the federal level. *See* Environmental Law Institute, *America's Vulnerable Waters: Assessing the Nation's Portfolio of Vulnerable Aquatic Resources since Rapanos v. United States*, (Aug. 2011). In a follow-up report, the Institute warned that 36 states have laws that could restrict the authority of state or local agencies to regulate, under their laws, waters that are excluded from federal regulation. *See* Environmental Law Institute, *State Constraints: State Imposed Limitations on the Authority of Agencies to Regulate waters Beyond the scope of the Federal Clean Water Act* 1 (May 2013). The restrictions include "absolute or qualified prohibitions that require state law to be 'no more stringent than' federal law; property rights limitations; or a combination of the two." *Id.* Once again, therefore, State environmental regulators were concerned that the Supreme Court's interpretation of the Clean Water Act could significantly harm their ability to protect waters and wetlands in their states.

1. 2008 Guidance

About a year after the Court's ruling in *Rapanos*, the Corps and EPA issued guidance to the Corps' district offices and EPA regional offices regarding the implications of the ruling for regulating "waters of the United States." The agencies took public comment on the guidance for seven and a half months and replaced the 2007 joint guidance document with a revised guidance document in December 2008. In essence, the guidance asserted jurisdiction over waters that would meet ***either*** the Kennedy or plurality tests. This is the approach that was suggested by the dissenting Justices in *Rapanos*, as Justice Stevens wrote, "Given that all four Justices who have joined this opinion would uphold the Corps' jurisdiction in both of these cases—and in all other cases in which either the plurality's or Justice Kennedy's test is satisfied—on remand each of the judgments should be reinstated if *either* of those tests is met." 547 U.S. at 810 (Stevens, *dissenting*). More specifically, the guidance provided that the agencies would assert jurisdiction over:

- Traditional navigable waters and wetlands adjacent to traditional navigable waters
- Non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year round or have continuous flow at least seasonally (e.g. typically three months), and wetlands that direct abut

such tributaries

Those are the waters that would be regulated under *Riverside-Bayview Homes* or the *Rapanos* plurality's opinion.

In addition, the guidance provided that the agencies would decide jurisdiction over the following waters based on a fact-specific analysis to determine whether they have a significant nexus with a traditional navigable water:

- Non-navigable tributaries that are not relatively permanent
- Wetlands adjacent to non-navigable tributaries that are not relatively permanent
- Wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary

Those are the waters that would be regulated under Justice Kennedy's "significant nexus" test from *Rapanos*.

The guidance also provided that the agencies *would not* exert jurisdiction over swales or gullies with low volume or short or infrequent flows or ditches that are excavated wholly in uplands and drain only in uplands. Many of the determinations that the agencies have made using the guidance have been upheld in court, as the following section describes in more detail. However, in January, 2018, the Justice Department issued a memorandum indicating that it will not bring enforcement actions in cases where guidance documents are used as the basis for proving violations of law, so the Department will likely be bringing fewer enforcement actions in cases where jurisdiction is not clear based on the language of the WOTUS regulations. *See* Amena H. Saiyid, *Justice Department Memo Muddies Enforcement of Water Permits,* 49 Env. Rep. 250 (Feb. 16. 2018).

2. Judicial Interpretation of *Rapanos*

As Justice Roberts surmised, courts have been feeling their way on a case-by-case basis to determine the reach of *Rapanos*. There has been a significant amount of litigation in the federal courts focusing on the meaning of "waters of the United States" after *Rapanos.* According to an Environmental Law Institute study, by May 2013, federal cases had been brought in two thirds of all of the states in the United States after *Rapanos* and every federal circuit court, other than the Second Circuit and Tenth Circuit, had issued an opinion in a case involving Clean Water Act jurisdictional issues similar to those in *Rapanos*. *See* Environmental Law Institute, *State Constraints: State Imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the scope of the Federal Clean Water Act* 4 (May 2013).

Three circuits have held that waters can be regulated if they meet *either* the "significant nexus" test *or* the plurality test. Three circuits have upheld the "significant nexus" test without ruling on whether the plurality test could be utilized in other cases. One circuit

has held that the "significant nexus" test is appropriate and the plurality test is not, and two circuits have resolved their cases without deciding which test should be used to determine jurisdiction.

The following chart outlines the split in jurisdictions:

Test	Circuits
Kennedy ***or*** Plurality	• 1st Circuit: *United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006) • 3rd Circuit: *United States v. Donovan*, 661 F.3d 174 (3d Cir. 2011) • 8th Circuit: *United States v. Bailey*, 571 F.3d 791 (8th Cir. 2009)
Kennedy / Silent on Plurality	• 4th Circuit: *Precon Development Corp. v. Corps*, 633 F.3d 278 (4th Cir. 2011); • 7th Circuit: *United States v. Gerke Excavating, Inc.*, 464 F. 3d 723 (7th Cir. 2006); • 9th Circuit: *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007)
Kennedy Only	• 11th Circuit: *United States v. Robison*, 505 F.3d 1208 (11th Cir. 2007) • 2nd Circuit: *Cordiano v. Metacon Gun Club , Inc.* 575 F.3d 199 (2d Cir. 2009)
Resolved Without Choosing	• 5th Circuit: *United States v. Lucas*, 516 F.3d 316 (5th Cir. 2008); • 6th Circuit: *United States v. Cundiff*, 555 F.3d 200 (6th Cir. 2009)

Two trends are clear from those decisions. First, the appellate courts generally agree that if a water satisfies Justice Kennedy's "significant nexus" test, it can be regulated as a "water of the United States." Second, none of the appellate courts have found that the *Rapanos* plurality test is a sufficient test, in and of itself, to determine jurisdiction.

3. 2011 Guidance and 2015 Rulemaking

While Courts have generally upheld the government's exercise of jurisdiction under Justice Kennedy's "significant nexus" test, the test is time consuming and resource

intensive, and implementation of the test on a case-by-case basis led to reductions in the scope of waters covered under the Clean Water Act. After the *Rapanos* decision, the Corps and EPA still preferred to assert jurisdiction broadly over categories of waters rather than making the jurisdictional determination on a case by case basis. Accordingly, the agencies continued to explore amending their "waters of the United States" guidance or adopting regulations to define the term more categorically.

In May 2011, the Corps and EPA prepared draft guidance to replace the 2008 guidance and published the draft guidance in the Federal Register for public comment. *See* 76 Fed. Reg. 24479 (May 2, 2011). The agencies received approximately 230,000 comments on the guidance, but did not take further steps to finalize the guidance. *See* Environmental Law Institute, *The Clean Water Act Jurisdictional Handbook, 2d ed.* 36 (May 2012).

Just as legislators proposed bills to respond to the Supreme Court's *SWANCC* decision, legislators introduced legislation to amend the Clean Water Act after the *Rapanos* decision. In April 2010, Representative Oberstar introduced the *America's Commitment to the Clean Water Act,* which was similar to the previous *Clean Water Restoration Acts,* and would establish broad jurisdiction over streams and wetlands. *See* H.R. 5088, 111th Cong. , 2d Sess. (2010) . Other legislators introduced bills to restrict Clean Water Act jurisdiction or to limit the Corps and EPA from finalizing the 2011 guidance or using it as the basis for a rulemaking. *See Defense of Environment and Property Act of 2012*, S. 2122, 112th Cong., 2d Sess. (2012), and *Preserve the Waters of the United States Act*, S. 2245, 112th Cong., 2d Sess. (2012) Like the post-*SWANCC* legislation, though, none of the *post-Rapanos* bills were enacted.

In September 2013, EPA released a draft study, *Connectivity of Streams and Wetlands to Downstream Waters*, that concluded that all tributaries, including intermittent and ephemeral streams, of downstream rivers are physically, chemically, and biologically connected to the downstream rivers. *Id.* at 1-3. It also found that wetlands and open waters in the flood plains of rivers and riparian areas are connected in the same way to downstream rivers as the tributaries are connected to those rivers. *Id.* at 1-3. Although the report did not find that isolated waters and wetlands that are outside of the floodplains of rivers have a similar connection to downstream rivers, it did suggest that a case-by-case analysis of such wetlands and waters could determine that they have an aggregate impact on downstream rivers. *Id.* at 1-4. EPA's Science Advisory Board then solicited public comment on the proposal, and the agency indicated that the study would be the basis for a proposed rulemaking to clarify the meaning of "waters of the United States." *See* United States Environmental Protection Agency, *Clean Water Act Definition of "Waters of the United States", available* at:
http://water.epa.gov/lawsregs/guidance/wetlands/CWAwaters.cfm

Based on that study, which was ultimately finalized in January 2015, the Corps and EPA issued a notice of proposed rulemaking to re-define "waters of the United States." *See* 79 Fed. Reg. 22188 (Apr. 21, 2014) (the "WOTUS" rule). In the proposed rule, the

agencies defined "waters of the United States" to include traditional navigable waters, interstate waters, the territorial seas, all impoundments of those three categories of waters, all tributaries of those three categories of waters and all waters, including wetlands, adjacent to those three categories of waters. *Id.* at 22262-22263. While the agencies were developing the rule, legislators introduced bills to prevent the agencies from finalizing the rule. *See Protecting Water and Property Rights Act of 2014,* S. 2496, 113th Cong., 2d Sess. (2014); *Waters of the United States Regulatory Overreach Protection Act*, H.R. 594, 114th Cong., 2d Sess. (2014).

On June 29, 2015, EPA and the Corps issued a final rule after providing a 200 day comment period and receiving more than 1 million comments on the proposal." *See* 80 Fed. Reg. 37054, 37057 (June 29, 2015). According to the agencies, the rule "makes the process of identifying waters protected under the [Clean Water Act] easier to understand, more predictable, and consistent with the law and peer-reviewed science." *Id.* at 37055. The Connectivity Study "provided much of the technical basis" for the rule. *Id.* at 37057. Although the rule reduced the circumstances in which agencies must determine, on a case-by-case basis, that waters have a "significant nexus" to traditional navigable waters, interstate waters or the territorial seas, the "significant nexus" standard remains an important element of the agencies' interpretation of the Clean Water Act. *Id.* at 37056. The agencies identified several categories of waters as "waters of the United States" in the final rule because the agencies concluded that the waters, as a class, had a "significant nexus" to traditional navigable waters, interstate waters or the territorial seas. By reducing the situations in which the Corps and EPA must conduct case-by-case analyses, the new rule was designed to make it easier for the agencies to determine that waters like those at issue in *Rapanos* were protected by the Clean Water Act. For an overview of the 2015 rule, *see* Environmental Law Institute, *EPA's "Waters of the United States" Rule: Substance and Significance*, 45 Envtl. L. Rep. 10995 (Nov. 2015).

The final rule identified eight categories of waters as "waters of the United States." *See* 33 C.F.R. § 328.3(a). The first three categories of waters have long been regulated as "waters of the United States," and include traditional navigable waters, *id.* § 328.3(a)(1), interstate waters (including interstate wetlands), *id.* § 328.3(a)(2), and the territorial seas. *Id.* § 328.3(a)(3). Any impoundments of those waters, *id.* § 328.3(a)(4), or tributaries of those waters, *id.* § 328.3(a)(5) are also "waters of the United States." The rule did not require the Corps or EPA to make a case-by-case determination that an impoundment or tributary of those waters is a "water of the United States." It includes all such impoundments or tributaries. The rule defined a tributary as "a water that contributes flow, either directly or through another water ... to [a traditional navigable water, interstate water or the territorial seas] that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark." *Id.* § 328.3(c)(3). Thus, the term was broad enough to include ephemeral and intermittent streams. For a useful overview of the importance of regulating small streams, *see* Dave Owens, *Little Streams and Legal Transformations,* 2017 Utah L. Rev. 1.

In addition to those five categories of "waters," the rule included, as "waters of the United States", waters that are adjacent to waters within any of those five categories of waters. *Id.* § 328.3(a)(6). While the prior regulation defined "waters of the United States" to include ***wetlands*** that were "adjacent" to other "waters of the United States," and defined "adjacent" to include "bordering, contiguous or neighboring," the new rule included "adjacent" ***waters,*** as opposed simply to "adjacent" ***wetlands***, and defined waters as "neighboring" based on the distances between those waters and specific features of other waters (i.e. ordinary high water mark, 100 year floodplain, high tide line). *Id.* § 328.3(c)(2).

While the prior regulation defined "waters of the United States" to include intrastate waters the use, degradation or destruction of which could affect interstate or foreign commerce, the new rule eliminates that category of "waters." However, some waters that may have been regulated under that "interstate commerce" category might still have been regulated under the new rule as the Corps and EPA include, in the "waters of the United States" definition, a new category that includes prairie potholes, Carolina bays and Delmarva bays, pocosins, Western vernal pools, and Texas coastal prairie wetlands, ***if*** those wetlands were determined, on a case-by-case basis, to have a significant nexus to a traditional navigable water, interstate water, or the territorial seas. *Id.* § 328.3(a)(7). While that decision must be made on a case-by-case basis, the rule clarified that the wetland types identified in the category (prairie potholes, bays, pocosins, vernal pools, and coastal prairie wetlands) "are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water..." *Id.*

Finally, the new rule included, in the definition of "waters of the United States," all waters located within the 100 year floodplain of a traditional navigable water, interstate water, or the territorial seas and all waters located within 4,000 feet of the high tide line or ordinary high water mark of any of the first five categories of waters of the United States ***if*** the waters are determined, on a case-by-case basis, to have a significant nexus to a traditional navigable water, interstate water or the territorial seas. *Id.* § 328.3(a)(8).

For purposes of making the case-by-case determination required for the final two categories of "waters of the United States," the rule defined "significant nexus" to mean that "a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical or biological integrity" of the other water. *Id.* § 328.3(c)(5). The rule also identified aquatic functions that are relevant to determine whether a water has a "significant nexus" to another water, including sediment trapping; nutrient recycling; pollutant trapping, transformation, filtering and transport; retention and attenuation of flood waters; runoff storage; contribution of flow; export of organic matter; export of food resource; and provision of life cycle dependant aquatic habitat. *Id.*

While the rule outlined eight categories of waters that ***are*** "waters of the United States,"

it also identified several categories of waters that are ***not*** "waters of the United States," including waste treatment systems, prior converted cropland, artificially irrigated areas that would revert to dry land, other artificial and constructed waters and ornamental pools, as well as depressions, various erosional features, puddles, groundwater, constructed stormwater control features, waste water recycling structures, and many types of ditches. *Id.* § 328.3(b). Most of those features were never regulated in the past, but the new rule was the first rule to explicitly codify the exemptions.

The agencies predicted that the new rule would reduce the scope of jurisdiction when compared to jurisdiction prior to the *SWANCC* decision, but could increase jurisdiction by 2.84 - 4.65% when compared to jurisdiction after the *Rapanos* decision. *See* U.S. EPA & U.S. Army Corps of Engineers, *Economic Analysis of the EPA-Army Clean Water Rule* vii (May 2015). They estimated that the annual costs for the regulation would range from $158.6 million to $306.6 million, while the annual benefits would range from $338.9 million to $349.5 million. *Id.* at x.

4. Aftermath of 2015 Rulemaking

a. Legal Challenges

Within the first two days after the agencies published the final rule, 27 states filed lawsuits challenging the rule. *See* Chris Marr, *More Than Half States Sue EPA to Block Rule on Water Jurisdiction*, 46 Env. Reporter 2012 (July 3, 22015). Within another two weeks, 14 agriculture and industry groups filed lawsuits, *see* Amena H. Saiyid and Anthony Adragna*, Chamber of Commerce Joins in Water Rule Lawsuit,* 46 Env. Reporter 2143 (July 17, 2015). Environmental groups, on the other hand, argued that the agencies did not go far enough in asserting jurisdiction over waters. Some of their criticisms are outlined in Patrick Parenteau, *A Bright Line Mistake: How EPA Bungled the Clean Water Rule*, 46 Envtl. L. 379 (2016) ,Craig N. Johnston & Gerald Torres, *Normal Farming and Adjacency: A Last Minute Gift for the Farm Bureau*, 46 Envtl. L. 395 (2016) and Amena H. Saiyid, *Endangered Species at Risk from Water Rule, Advocates Say,* 47 Env. Reporter 4027 (Nov. 4, 2016). Ultimately, approximately 100 parties filed 23 petitions for review of the rule in the federal appellate courts and 17 complaints challenging the rule in federal district courts. *See* Suzanne Murray, Mary Mendoza, and Lissette Villarruel, *States Challenge Clean Water Rule in Federal Courts*, American Bar Association Section of Environment, Energy and Resources, Water Quality and Wetlands Committee Newsletter, Vol. 14, No. 2, at 11, 12 (Aug. 2016).

On August 27, 2015, the day before the 2015 rule was supposed to take effect, the U.S. District Court for the District of North Dakota issued a preliminary injunction staying the rule in the 13 states that were parties to the lawsuit before that court. *See North Dakota v. U.S. Environmental Protection Agency*, 127 F.Supp. 3d 1047 (D. N.D. 2015). All of the appellate challenges were consolidated for review and, in October, 2015, the U.S. Court of Appeals for the Sixth Circuit issued a nationwide stay of the rule. *See In re Environmental Protection Agency,* 808 F.3d 804 (6th Cir. 2015). When the 2015

WOTUS rule was stayed, EPA and the Corps returned to applying the agencies' interpretation of "waters of the United States" that was in effect before the agencies adopted the new rule.

Since the Clean Water Act language is imprecise, most of the initial litigation regarding the rule focused on whether the federal district courts or appellate courts have jurisdiction to review the agencies' rule. In February, 2016, the Sixth Circuit ruled that it had original jurisdiction to hear the challenges to the rule. *See* *Murray Energy Corp. v. United States Department of Defense (In re: U.S.D.O.D.),* 817 F.3d 261 (6th Cir. 2016). In November, 2016, the National Association of Manufacturers asked the Supreme Court to review the Sixth Circuit's decision and, in January, 2017, the Court granted the petition for review. *See* Lars-Eric Hedberg, *Supreme Court to Decide Water Rule Challenge Venue,* 48 Env. Reporter 123 (Jan. 20, 2017). The Sixth Circuit then held its review of the rule in abeyance pending the Supreme Court review, as did many of the district courts hearing challenges to the rule.

b. Congressional Response

At the same time that States, regulated entities and environmental groups were challenging the rule in court, Senator Joni Ernst (R-Ia.) introduced a resolution in Congress to overturn the rule under the Congressional Review Act. *See* S.J. Res. 22, 114th Cong., 1st Sess. (2015). Although the resolution was passed by the House and the Senate, it was vetoed by President Obama on January 20, 2016. *Id.* In addition to attempting to repeal the rule under the Congressional Review Act, several members of Congress asked the Government Accountability Office (GAO) to review the manner in which EPA used social media in the rulemaking process to solicit comments on the rule and the GAO issued a report finding that some of the agency's actions violated prohibitions in federal appropriations laws against publicity, propaganda and lobbying. *See* U.S. Gov't. Accountability Office, GAO-B-326944, *Environmental Protection Agency – Application of Publicity or Propaganda and Anti-Lobbying Provisions* (2015). The violations identified by the GAO, however, were minor, and did not affect the validity of the agency's rule. For a thorough review of the use of social media by EPA and opponents of the 2015 "waters of the United States" rule in the rulemaking process, *see* Stephen M. Johnson, *#Better Rules: The Appropriate Use of Social Media in Rulemaking,* 44 Fla. St. U. L. Rev. 1 (2017). Legislative efforts to repeal the 2015 rule continued as an amendment was added to the 2018 Farm Bill to repeal the rule. *See* Amena Saiyid and David Schultz, *House Adds Water Rollback to Ill-Fated Farm Bill,* Bloomberg Environment, May 18, 2018. However, the Farm Bill was subsequently rejected by the House.

c. A Change in Administration and a Change in Direction

The election of Donald Trump as President marked the beginning of the end for the agencies' 2015 WOTUS rule. Less than two months after his inauguration, the President issued Executive Order 13,778, which directed EPA to rescind or revise the

WOTUS rule and to rescind or revise all orders, rules, guidelines or policies implementing or enforcing the rule. *See* 80 Fed. Reg. 37,054 (June 29, 2015). The Order micro-manages to a degree that is unusual for Executive Orders, in that it directs the agencies, when revising the WOTUS rule, to "consider interpreting the term 'navigable waters' … in a manner consistent with the opinion of Justice Antonin Scalia in Rapanos v. United States." *Id.* § 3. Scalia's opinion was the plurality opinion that has not been adopted by any of the federal appellate courts as the sole basis for determining jurisdiction under the Clean Water Act. In his statement at the time of issuing the Order, the President indicated, "I'm directing EPA to take action, paving the way for the elimination of this very destructive and horrible rule." *See* President Donald Trump, *Remarks by President Trump at Signing of Waters of the United States (WOTUS) Executive Order*. On the same day that the President issued the Order, EPA and the Corps announced their intention to review and rescind or revise the WOTUS rule. *See* 82 Fed. Reg. 12,532 (Mar. 6, 2017). In the notice, the agencies stressed that revision of the rule need not be based on a change in facts or circumstances, but can be based "on a reevaluation of which policy would be better in light of the facts", and the agencies indicated that they planned to consider interpreting "navigable waters" in a revised rule consistent with the plurality opinion in *Rapanos*. *Id.*

d. Two Step Rulemaking to Rescind and Replace the 2015 Rule

In response to President Trump's Executive Order, EPA and the Corps announced their plans to rescind and replace the 2015 rule through a two step process. *See* U.S. Environmental Protection Agency, Waters of the United States (WOTUS) Rulemaking: Rulemaking Process. As Step One of the process, the agencies indicated that they planned to rescind the 2015 rule and re-codify the regulatory regime that was in place before the 2015 rule was adopted, while the agencies developed a new rule to replace the 2015 rule. *Id.* The proposed Step One rule was published in the Federal Register on July 27, 2017. *See* 82 Fed. Reg. 34899 (July 27, 2017). The agencies received almost 700,000 comments on the proposal during a 60 day comment period and published a supplemental notice of proposed rulemaking in July 2018, seeking additional comment on the proposal.

As the second step of the process, EPA and the Corps planned to issue a new rule that re-defined "waters of the United States" in a manner consistent with the directives of the Executive Order. *See* U.S. Environmental Protection Agency, Waters of the United States (WOTUS) Rulemaking: Step Two – Revise.

e. Applicability Date Rulemaking

As EPA and the Corps progressed with the Step One rescission rulemaking, it became clear that the agencies would not be likely to finalize that rule before the Supreme Court issued a ruling that would determine whether the federal district courts or appellate courts had jurisdiction to hear challenges to the WOTUS rule. The agencies were concerned that, if the Supreme Court ruled that district courts, rather than appellate

courts, had jurisdiction to review the WOTUS rule, the nationwide stay of the 2015 rule imposed by the 6th Circuit would be vacated and that rule would again be effective, except in the 13 states where the District Court of North Dakota had enjoined the rule. In order to prevent that from happening, the Corps and EPA began ***another*** rulemaking addressing the 2015 WOTUS rule. On November 22, 2017, the agencies published a notice of proposed rulemaking to add an *"applicability date*" to the 2015 WOTUS rule, delaying the date that the 2015 rule would be "applicable" until 2 years after the applicability date rulemaking was finalized. *See* 82 Fed. Reg. 55542 (Nov. 22, 2017). The agencies only provided for a 21 day comment period on the rule and, on February 6, 2018, published a rule that effectively delayed the implementation of the 2015 WOTUS rule until February 6, 2020. *See* 83 Fed. Reg. 5200 (Feb. 6, 2018).

The applicability date rule was challenged on the date it was published by ten States, the District of Columbia, and environmental groups in three separate lawsuits in New York and South Carolina. *See New York v. Pruitt*, No. 1:18-cv-1030 (S.D. N.Y. Feb. 6, 2018); *Natural Resources Defense Council v. Environmetnal Protection Agency*, No. 18-cv-1048 (S.D. N.Y. Feb. 6, 2018); *South Carolina Coastal Conservation League v. Pruitt*, No. 2:18-cv-00330-DCN (S.D. S.C. Feb. 6, 2018). Several other environmental groups challenged the rule in the Northern District of California in June, 2018. *See Waterkeeper Alliance, Inc. v. Pruitt*, No. 18-cv-3521 (N.D. Cal. June 13, 2018).

f. Supreme Court ruling and resumption of district court challenges to the 2015 rule

As the agencies anticipated, on January 22, 2018, the Supreme Court issued an opinion in *National Association of Manufacturers v. Department of Defense*, 138 S.Ct. 617 (2018). In a unanimous decision, the Court held that challenges to the "waters of the United States" rule must be brought in the federal district courts, rather than the federal circuit courts. *Id.* Accordingly, the Court remanded the case to the U.S. Court of Appeals for the Sixth Circuit with instructions to dismiss the challenges in the circuit court for lack of jurisdiction. *Id.* On February 28, 2018, the Sixth Circuit vacated the nationwide stay of the 2015 rule and dismissed all of the consolidated circuit court lawsuits. However, since the applicability date rulemaking was finalized on February 6, 2018, delaying the 2015 WOTUS rule until 2020, EPA and the Corps continued to implement the "waters of the United States" rules that were in effect prior to the 2015 WOTUS rule, rather than the 2015 rule.

While the 6th Circuit dismissed the ***federal appellate court challenges*** to the 2015 rule, the Supreme Court's ruling opened the door for the resumption of the ***federal district court challenges*** to the 2015 rule. EPA and the Corps did not want to defend the 2015 rule in court, so they argued, in several lawsuits, that the challenges to the rule were moot or should be stayed in light of the fact that the agencies delayed the effective date of the rule until 2020. Nevertheless, on March 23, 2018, the District Court for the District of North Dakota, which had issued the stay of the 2015 rule in 13 States, rejected the agencies' arguments and resumed the litigation challenging the rule. Litigation resumed in several other district courts as well, including the Southern District

of Georgia, which enjoined the 2015 rule in the 11 States that were suing in that case. *See Georgia v. Pruitt*, No. 2:15-cv-0079 (S.D. Ga. June 8, 2018).

g. Invalidation of Applicability Date Rule

Although EPA and the Corps, pursuant to the applicability date rulemaking, applied the pre-2015 WOTUS rules for several months after the Sixth Circuit lifted the nationwide stay of the 2015 rule, the applicability date rule (also referred to as the "***suspension rule***") was invalidated by the U.S. District Court for the District of South Carolina on August 16, 2018. In *South Carolina Coastal Conservation League v. Pruitt*, 318 F. Supp. 3d 959 (D.S.C. 2018), the court issued a nationwide injunction of the rule, finding that the EPA and the Corps failed to provide an opportunity for meaningful comment on the rule and acted arbitrarily and capriciously in failing to reasonably explain their change in position regarding the 2015 rule. The United States District Court for the Western District of Washington reached a similar conclusion a few months later and also issued a nationwide injunction of the rule. *See Puget Soundkeeper Alliance v. Wheeler*, Case No. C15-1342-JCC (W.D. Wash. Nov. 26, 2018). After the applicability date rule was invalidated, the 2015 WOTUS rule was once again effective, except in the 24 States where the rule had been previously enjoined by district courts. But the 2015 rule would not be in force for long in any States.

h. The Step One and Step Two Rules are Finalized

On October 22, 2019, EPA and the Corps finalized the Step One rulemaking, which repealed the 2015 WOTUS rule and restored the pre-2015 regulatory regime. *See* 84 Fed. Reg. 56626 (Oct. 22, 2019). Before the rule took effect in December, three separate lawsuits were filed by States, conservation groups and ranchers in district courts in New Mexico, South Carolina, and New York, challenging the repeal. *See South Carolina Coastal Conservation League et al. v. Andrew R. Wheeler et al*., No. 2:19-cv-03006 (D.S.C. Oct. 23, 2019); *New York v. Wheeler*, No. 1:19-cv-11673 (S.D.N.Y., Dec. 20, 2019).

Six months after the agencies finalized the Step One rulemaking, they finalized the Step Two rulemaking and published the ***Navigable Waters Protection Rule*** to replace the pre-2015 regulatory regime. *See* 85 Fed. Reg. 22250 (Apr. 21, 2020). The final rule identified the following waters as "waters of the United States": (1) The territorial seas, and waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including waters which are subject to the ebb and flow of the tide; (2) Tributaries; (3) Lakes and ponds, and impoundments of jurisdictional waters; and (4) Adjacent wetlands. *See* 33 C.F.R. § 328.3(a). Interstate waters, which were defined as waters of the United States under most of the prior WOTUS rules, were no longer defined as "waters of the United States" unless they fit within one of the four categories identified in the rule. The rule also eliminated the case-by-case determination of jurisdiction for waters that have a "significant nexus" to other regulated waters.

The rule explicitly exempted 12 categories of waters, including ephemeral waters, from the definition of "waters of the United States." *See* 33 C.F.R. § 328.3(b). The rule also adopted new narrower definitions for "tributaries" and "adjacent", tied to the plurality opinion in *Rapanos*, which significantly reduced the scope of wetlands, streams, and intermittent waters that are regulated as "waters of the United States." *See* 33 C.F.R. § 328.3(c). A 2020 report from the External Environmental Economics Advisory Committee determined that the Navigable Waters Protection Rule eliminated protection for more than half of the nation's wetlands and 18% of the nation's streams. *See* E-EEAC*, Report on the Repeal of the Clean Water Rule and its Replacement with the Navigable Waters Protection Rule to Define Waters of the United States (WOTUS)* December 2020. The report also noted that it was unlikely that States would step in to regulate those waters, as States have not significantly increased their regulatory jurisdiction in the past when federal jurisdiction has decreased as a result of changes to the WOTUS definition.

Not surprisingly, the Navigable Waters Protection Rule generated a significant amount of litigation. Conservation groups, States, Native American Tribes, farmers, cattlemen, and others filed almost a dozen lawsuits challenging the rule in federal district courts around the country. *See, e.g., South Carolina Coastal Conservation League v. Wheeler,* No. 2:20-cv-01687-DCN (D.S.C., Apr. 29, 2020); *California v. Wheeler,* No. 3:20-cv-03005-RS (N.D. Cal., May 1, 2020); *Colorado v. EPA,* No. 20-cv-1461-WJM-NRN (D. Col. May 22, 2020); *Pascua Yaqui Tribe, et al v. EPA*, No. CV-20-00266-TUC-RM (D. Az., June 22, 2020), *New Mexico Cattle Growers Association v. Wheeler,* No. 1:19-cv-00988-JHR-SCY, (D. N.Mex., Apr. 27, 2020).

i. Another change in Administration and more rule changes

Before any of the district courts that were reviewing the Step One or Step Two rules from the Trump Administration reached the merits of the challenges to the rules, there was another change in Administration and another change in policy. After President Biden won the election in 2020, he revoked President Trump's WOTUS Executive Order and directed EPA and the Corps to review the Navigable Waters Protection rule, as well as dozens of other rules. *See* Executive Order 13990*, Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis*, Jan. 20, 2021; White House, *Fact Sheet: List of Agency Actions for Review*, Jan. 20, 2021. On June 9, 2021, EPA and the Corps announced that they would, once again, engage in rulemaking to revise the definition of "waters of the United States." The agencies indicated that they planned to propose an initial rule to repeal the Navigable Waters Protection rule and restore the regulatory regime that was in place prior to the 2015 rule, updated to be consistent with Supreme Court decisions. Following that, they planned to propose a new rule that would "further refine and build upon that regulatory foundation." *See* EPA, *Intention to Revise the Definition of "Waters of the United States",* June 9, 2021.

In light of those plans, the Biden Administration filed motions in the lawsuits challenging the Navigable Waters Protection rule, seeking a remand of the rule to the agencies without vacatur. Several of the courts remanded the rule to the agencies. *See, e.g., South Carolina Coastal Conservation League v. Regan,* No. 2:20-cv-01687-BHH (D.S.C., July 15, 2021) (Order Granting Motion for Voluntary Remand Without Vacatur). As the Navigable Waters Protection rule will remain in effect until the agencies adopt a rule to repeal it, developers are acting quickly to move ahead with projects in waters that were regulated prior to the rule and will be regulated again when the rule is repealed. *See, e.g.,* Stanley Dunlap & Jill Nolin, *Okefenokee Lovers Still Hope State, Biden Administration Will Halt Mine,* Ga. Recorder, Mar. 21, 2021. EPA and the Corps identified over 300 development proposals that were no longer regulated as "waters of the United States" under the Navigable Waters Protection rule. *See* Dino Grandoni, *Biden Pushes Protection for More Streams and Wetlands, Targeting a Major Trump Rollback,* Wash. Post, June 9, 2021.

Interviews

Jan Goldman Carter, Senior Manager and Counsel for the National Wildlife Federation's Wetlands and Water Resources Program, discusses the importance of the Clean Water Act's "waters of the United States" language as a foundation for wetlands protection. (YouTube).

Stephen Samuels, an Assistant Section Chief in the Environmental Defense Section of the Environment and Natural Resources Division of the U.S. DOJ, discusses the Supreme Court cases interpreting the breadth of the Clean Water Act jurisdiction over "waters of the United States", the interpretive difficulties the decisions have created, and the legislative and regulatory efforts to clarify the breadth of jurisdiction. (YouTube).

Resources

- Economic Analysis of 2015 "waters of the United States rule
- EPA Website for the "waters of the United States" rule
- Videos - Clear Protection for Clean Water (EPA); That's Enough ("Let it Go" Parody - Missouri Farm Bureau)
- EPA Infographic - Why Clean Water Rules
- EPA - Connectivity Study
- Analysis of the 2015 "waters of the United States" rule (CPR Blog)

Hypotheticals

1. Will McDonald owns a farm near Washington, Iowa. And on that farm, he has several prairie pothole wetlands. The nearest traditional navigable water, the Iowa River, is located about 20 miles from McDonald's farm. The wetlands are not adjacent to any creeks, streams or other watercourses. There is no evidence that the wetlands are connected by surface water or groundwater to the Iowa River or any other traditional navigable water. However, every spring, thousands of pintails, mallards, and Canada geese rely on the wetlands (in conjunction with other wetlands in the region), for nesting and habitat on their northerly migration. In addition, hundreds of birdwatchers from Illinois, Missouri and other states flock to the Washington area every year to observe the annual migration. Would McDonald need to obtain a Clean Water Act Section 404 permit or a Rivers and Harbors Act Section 10 permit from the Corps of Engineers if he wanted to fill the wetlands? Would your answer be different if it could be demonstrated that the wetlands on McDonald's property, in conjunction with other wetlands in the region, played a vital role in preventing flooding of the Iowa River?

2. Assume, instead, that the wetlands on McDonald's farm are not prairie pothole wetlands, but are adjacent to an unnamed intermittent stream that flows for a mile into a ditch, which is connected, after another mile, to the South Fork of Long Creek. The South Fork of Long Creek flows into Long Creek, which is a tributary of the Iowa River (which is located 20 miles from McDonald's farm). The wetlands on McDonald's property do not have a continuous surface connection to any traditional navigable water. There is also no evidence of a groundwater connection between the wetlands and a traditional navigable water. However, there is evidence that the wetlands, in conjunction with other wetlands in the region, play a significant role in filtering pollution and sediments that would otherwise be deposited in the Iowa River. Would McDonald need to obtain a Clean Water Act Section 404 permit or a Rivers and Harbors Act Section 10 permit to fill the wetlands on his property? Would your answer be different if it could be demonstrated that the wetlands provided important habitat for snakes that were listed on the state's list of endangered species?

3. Assume, finally, that McDonald lives near Burlington, Iowa and owns property adjacent to the Mississippi River. There are a few acres of wetlands on his property that are adjacent to the Mississippi River. Would McDonald need to obtain a Clean Water Act Section 404 permit or a Rivers and Harbors Act Section 10 permit to fill the wetlands on his property?

Chapter Quiz

Now that you've finished the material covering the federal government's Clean Water Act jurisdiction over "navigable waters" and "waters of the United States", why not try a CALI lesson on the material at http://www.cali.org/aplesson/10682 It should only take about a half hour or less.