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## Changing Lead into Gold: Examining Agency Attempts to Use the Clean Water Act to Solve Ecosystem Degradation Issues

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# CHANGING LEAD INTO GOLD: EXAMINING AGENCY ATTEMPTS TO USE THE CLEAN WATER ACT TO SOLVE ECOSYSTEM DEGRADATION ISSUES

N. LINDSAY SIMMONS\*

For over thirty years the Environmental Protection Agency and Army Corps of Engineers have attempted to use the Clean Water Act for wetland conservation practices. This comment explores the legislative history behind federal regulation of waterways and whether the language or purpose of the Clean Water Act adequately aligns with wetland protection efforts. Specifically, it examines how the Clean Water Act emerged out of a national interest in water pollution control, while wetland protection efforts stem from a growing interest in ecosystem protection. The comment will examine how a series of Supreme Court decisions interpreted the Act consistently with the Act’s goal of pollution control and explores how the plain meaning and purpose of the statute does not directly support ecosystem protection. The comment then examines what the future of wetland protection looks like under the Act, in light of the Supreme Court decisions and a newly proposed regulation that redefines “waters of the United States.” The paper concludes that if the nation wishes to seriously pursue ecosystem protection goals, it must pass new legislation with those goals in mind rather than attempting to use a water pollution statute to solve ecosystem degradation issues.

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## INTRODUCTION

Wetland protection is the most prominent hot-button regulatory area under the Clean Water Act ("CWA" or "the Act").<sup>1</sup> The CWA has explicit authority over traditional aquatic ecosystems, such as lakes, tributaries, and rivers, but does not authorize jurisdiction over wetlands.<sup>2</sup> In 1972 Congress was spurred to create an Act that would address the rising

<sup>1</sup> See Mark S. Dennison & James F. Berry, *Challenging Wetland Regulation of Land Development*, 53 AM. JUR. TRIALS 511, 526 (2013) (noting the filling of wetlands has become one of the "most controversial areas of environmental protection law and policy.").

<sup>2</sup> See 33 U.S.C. §§ 1251–1387 (containing entire provisions for waterways such as lakes, rivers, and oceans, but no mention of authority over wetlands).

water pollution crises that plagued the nation.<sup>3</sup> The language in the Act reflects this focus. For instance, the main enforcement provision of the Act, § 301, prohibits the “discharge of any *pollutant* by any person.”<sup>4</sup>

Beginning in the late 1970s and continuing today, biologists, environmentalists, and governmental agencies such as the Environmental Protection Agency (“EPA”) and the Army Corps of Engineers (“Army Corps”) have recognized the importance of ecosystem protection, and especially wetland protection.<sup>5</sup> Thus, EPA and Army Corps began to seek regulatory methods for protecting wetlands. The CWA seemed like an obvious choice. Like the Act’s other jurisdictional waters, wetlands play a vital role for many of the nation’s aquatic organisms and many wetlands are inseparably linked to the water quality of other jurisdictional waters.<sup>6</sup> Thus, in 1977, Army Corps incorporated wetland protection into the § 404 permitting program.<sup>7</sup>

In response to these attempts, the Supreme Court has repeatedly interpreted the Act in accordance with pollution prevention values and has narrowed the agency’s authority to regulate wetlands under the Act.<sup>8</sup> Despite the Supreme Court’s continued narrowing of the CWA’s scope, EPA and Corps continue to attempt to protect these important ecosystems with the Act.<sup>9</sup> Most recently, the agencies have proposed issuing a new rule that attempts to keep the CWA’s jurisdiction over aquatic

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<sup>3</sup> See *History of the Clean Water Act*, U.S. ENVTL. PROT. AGENCY (April 17, 2013), <http://www2.epa.gov/laws-regulations/history-clean-water-act>, archived at <http://perma.cc/L56A-HWR7> (stating that public awareness and concern for controlling water pollution led to the amendments of the Federal Water Pollution Control Act of 1948, modifying it into the modern CWA).

<sup>4</sup> 33 U.S.C. § 1311 (2012) (emphasis added).

<sup>5</sup> See *Federal Programs*, U.S. ENVTL. PROT. AGENCY (Sept. 19, 2014), <http://www.epa.gov/greatlakes/fedprograms.html#epa>, archived at <http://perma.cc/9XXP-UBJ5>.

<sup>6</sup> See *National Water Quality Guidance Standards for Wetlands*, U.S. ENVTL. PROT. AGENCY (Sept. 18, 2014), <http://water.epa.gov/lawsregs/guidance/wetlands/quality.cfm>, archived at <http://perma.cc/ZUJ9-PMQD>.

<sup>7</sup> Section 404 governs a permitting scheme directed by Army Corps. 33 U.S.C. § 1344 (2012). It is one of two primary permitting schemes under the CWA, the second being § 402. 33 U.S.C. § 1311 (2012) (listing the two permitting schemes as exceptions for § 301’s prohibition against the discharge of pollutants). § 402 governs effluent discharges, while § 404 governs dredging and filling. 33 U.S.C. § 1324; 33 U.S.C. § 1344 (2012).

<sup>8</sup> See *Rapanos v. United States*, 547 U.S. 715, 724–26 (2006) (discussing the two prior Supreme Court decisions which analyzed Army Corps’s scope of authority over wetlands under the CWA).

<sup>9</sup> See Stephen M. Johnson, *The Rulemaking Response to Rapanos: The Government’s Best Hope for Retaining Broad Clean Water Act Jurisdiction*, in *THE SUPREME COURT AND THE CLEAN WATER ACT: FIVE ESSAYS* 36, 37 (L. Kinvin Wroth, ed., 2007).

ecosystems as broad as possible<sup>10</sup> while comports with the Court's most recent reading of the Act.<sup>11</sup>

This comment will examine whether the Act ever was, or ever can be, an effective tool for wetland protection in light of the Supreme Court's interpretive methods. The Introduction discussed the issue and provides an overview of the comment.<sup>12</sup> Part I will examine the history of the nation's federal statutory laws as they relate to the regulation of waterways and congressional motivation for passing them.<sup>13</sup> Part II will examine how the nation's views of wetlands have changed over the course of history and discern when and how EPA and Corps took up the mantle to protect them.<sup>14</sup> Part IV will examine the CWA in the context of statutory interpretation by examining cases that analyzed the CWA under differing approaches.<sup>15</sup> Part V will examine the future of wetland protection by examining agency and lower court interpretations of the Supreme Court decisions, including the agencies' newly proposed definition for "waters of the United States," and the lower court decisions that examine the enforcement § 404.<sup>16</sup> Section VI will conclude.<sup>17</sup>

## I. HISTORICAL PERSPECTIVE: EVOLUTION OF FEDERAL REGULATION OF NATIONAL WATERWAYS

Legislation pertaining to waterways has existed in the United States for over 100 years.<sup>18</sup> However, major legislation did not exist for environmental protection until the 1960s.<sup>19</sup> The two primary statutes that demonstrate the evolution of waterway legislation in the United States are the Rivers and Harbors Act of 1899 ("RHA") and the CWA.

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<sup>10</sup> See Kim Diana Connolly, *Any Hope for Happily Ever After? Reflecting on Rapanos and the Future of the Clean Water Act Section 404 Program*, in *THE SUPREME COURT AND THE CLEAN WATER ACT: FIVE ESSAYS* 47, 48 (L. Kinvin Wroth, ed., 2007).

<sup>11</sup> Definition of "waters of the United States" under the Clean Water Act, 79 Fed. Reg. 22188 (proposed Apr. 21, 2014).

<sup>12</sup> See *supra* Part I.

<sup>13</sup> See *infra* Part II.

<sup>14</sup> See *infra* Part III.

<sup>15</sup> See *infra* Part VI.

<sup>16</sup> See *infra* Part V.

<sup>17</sup> See *infra* Part VI.

<sup>18</sup> See David Lawrence Hankey, *Sections 9 and 10 of the Rivers and Harbors Act of 1899: The Erosion of Administrative Control by Environmental Suits*, 29 *DUKE L.J.* 170, 176-79 (1980) (discussing the earliest statutes passed by Congress regulating waterways).

<sup>19</sup> *Id.* at 172.

A. *Interstate Commerce Dependent on Interstate Travel: Congress Asserts its Authority over Interstate Waters Through the Rivers and Harbors Act*

During the 1800s, the federal government struggled to exert its constitutionally sanctioned power over interstate commerce.<sup>20</sup> The federal government's power to regulate interstate waterways for interstate commerce was a persistent area of contention.<sup>21</sup> The disputes often involved private parties obstructing interstate waterways, often sanctioned by state law.<sup>22</sup> These obstructions had a major impact on interstate commerce. The mid- to late 1800s experienced rapid growth in interstate travel and commerce.<sup>23</sup> Inventions such as the steamboat made interstate travel via rivers and other waterways an increasingly popular choice for trade.<sup>24</sup> The obstructions often frustrated vessels' abilities to continue forward or resulted in property damage to either the vessel or the obstructions.<sup>25</sup>

Consequently, the federal government brought a series of lawsuits under the commerce clause to prohibit the continued construction of such obstacles.<sup>26</sup> However, the court system largely refused to grant any remedy to the federal government in the absence of a congressional act providing it with authority to regulate interstate waterways.<sup>27</sup> Congress responded to these court decisions by passing a series of congressional actions, culminating in the creation of the RHA.<sup>28</sup> The RHA primarily serves two purposes. First, it prohibits the discharge of refuse into waterways without a permit.<sup>29</sup> Second, it prohibits the construction of structures, or any project involving excavating and filling waterways, without

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<sup>20</sup> See, e.g., *Gibbons v. Ogden*, 22 U.S. 1, 9–10 (1824) (discussing the basic parameters of congressional power over interstate commerce).

<sup>21</sup> See *id.* at 1–2 (discussing the circumstances of the complaint—involving a state-mandated exclusive use to an interstate waterway); see also *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. 245, 246 (1829) (discussing the circumstances of the complaint, involving a state authorized construction of a dam in an interstate waterway).

<sup>22</sup> *E.g., id.*

<sup>23</sup> *Hankey*, *supra* note 18, at 174–75.

<sup>24</sup> *Id.*

<sup>25</sup> See, e.g., *Willson*, 27 U.S. at 246 (stating that the constructed dam obstructed navigation of the waterway and that the defendants of the case broke and damaged the dam while navigating the waterway).

<sup>26</sup> *Hankey*, *supra* note 18, at 175.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 176–81.

<sup>29</sup> 33 U.S.C. § 407 (2012).

permission from Army Corps.<sup>30</sup> Both provisions facilitate federal control over obstacles impeding interstate travel through waterways.<sup>31</sup>

Facilitating interstate transportation remained the central purpose of the RHA until the 1960s.<sup>32</sup> The advent of environmental legislation in the 1960s, and specifically the National Environmental Policy Act ("NEPA"), began influencing Army Corps's application of the RHA.<sup>33</sup> Prior to the environmental movement, Army Corps approved permits for projects based strictly on navigability concerns.<sup>34</sup> After NEPA, Army Corps began considering environmental factors during the permitting process and imposing pollution controls on projects.<sup>35</sup> Before issuing a permit for a project, Army Corps is required to evaluate "all relevant factors."<sup>36</sup> Among the relevant factors, Army Corps began to consider how an issued permit would affect ecology, pollution, fish and wildlife, and conservation.<sup>37</sup> The case *Zabel v. Tabb* affirmed Army Corps's authority to consider environmental factors by stating that Army Corps has the authority under § 10 of the RHA to deny a permit for reasons unrelated to navigation.<sup>38</sup>

Despite Army Corps's efforts to expand the purview of the RHA, it suffered from a major constraint. Section 10 of the RHA specifically makes it unlawful to "excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of . . . any *navigable* water of the United States."<sup>39</sup> The character and purpose of the RHA, its goal of facilitating federal control over interstate commerce, shaped the interpretation of "navigable" under the Act.

The doctrine created in the 1870 case *The Daniel Ball* set forth a two-prong test to determine whether a water body is "navigable":

- 1) The water must, in its present condition, be capable of being used by vessels to transport interstate commerce;
- and

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<sup>30</sup> *Id.* at §§ 401, 403.

<sup>31</sup> Hankey, *supra* note 18, at 172.

<sup>32</sup> *Id.* at 172–73.

<sup>33</sup> *Id.*; *see also* Dennison & Berry, *supra* note 1, at 526.

<sup>34</sup> *See* Dennison & Berry, *supra* note 1, at 526; *see also* Hankey, *supra* note 18, at 172 (describing the reasons for the RHA's ratification and Army Corps's power prior to the environmental movement).

<sup>35</sup> Hankey, *supra* note 18, at 172–73.

<sup>36</sup> *Id.* at 182.

<sup>37</sup> *Id.*

<sup>38</sup> 430 F.2d 199, 203 (5th Cir. 1970).

<sup>39</sup> 33 U.S.C. § 403 (1964) (emphasis added).

2) it must form a continuous highway with other waters over which commerce could be transported to other states.<sup>40</sup>

*The Daniel Ball* standard persisted for decades.<sup>41</sup> While a series of Supreme Court decisions in the early to mid-1900s eroded the requirements for the first prong of the test to include those waters which may be made navigable after “reasonable improvements,” the second prong’s exclusive jurisdiction over only interstate waters remained strong into the 1970s.<sup>42</sup>

Until the 1970s, Army Corps stringently applied *The Daniel Ball* standard for defining “navigable waters.”<sup>43</sup> During the 1960s and 1970s, Congress pushed Army Corps to expand its definition so that more waters would be protected from environmental harm under the RHA—a request Army Corps continued to refuse.<sup>44</sup> *Zabel* established that Army Corps could account for environmental concerns while choosing to issue permits,<sup>45</sup> but without an expansive definition of “navigable” Army Corps only had authority over a portion of the water bodies that suffered from pollution.<sup>46</sup>

In 1972, Army Corps finally conceded and expanded its definition to include all “traditional navigable waters.”<sup>47</sup> The more expansive definition included “all waterways . . . capable of being used for . . . interstate or foreign commerce, irrespective of whether the waterway itself crosses a state line, [and] irrespective of . . . how, or by what mode . . . [the interstate commerce] occurs.”<sup>48</sup> Although Army Corps acquiesced to Congress’s requests, several circuits disagreed with this expansive application of the

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<sup>40</sup> *The Daniel Ball*, 77 U.S. 557, 564 (1870).

<sup>41</sup> See *Puente de Reynosa, S. A. v. City of McAllen*, 357 F.2d 43, 50 (1966) (addressing the defendant’s argument that the waterway in question is not “navigable” under *The Daniel Ball* standard).

<sup>42</sup> See *Minnehaha Creek Watershed Dist. v. Hoffman*, 597 F.2d 617, 623 (8th Cir. 1979) (stating that the first prong of *The Daniel Ball* test has been broadened, but the second prong, requiring a navigable interstate linkage by water, “has remained unchanged”).

<sup>43</sup> See Virginia S. Albrecht et al., *Could SWANCC be Right? A New Look at the Legislative History of the Clean Water Act*, 32 ENVTL. L. REP. NEWS & ANALYSIS 11042, 11049–50 (2002) (discussing the tension between Congress and Army Corps as they struggled to agree on a definition for “navigable waters”).

<sup>44</sup> *Id.* at 11050.

<sup>45</sup> *Zabel*, 430 F.2d at 203.

<sup>46</sup> See Albrecht et al., *supra* note 43, at 11045–46 (discussing how Congress pushed for Army Corps to assert authority over intrastate lakes; which Army Corps refused).

<sup>47</sup> *Id.* at 11046.

<sup>48</sup> *Id.*



RHA, finding *The Daniel Ball* standard to still be the appropriate test.<sup>49</sup> Although Army Corps ultimately failed at using the RHA for the expansive purpose Congress desired, Congress pursued its desire to regulate pollution in all waterways by finalizing the CWA the same year Army Corps passed its “traditional navigable waters” definition.<sup>50</sup>

*B. The Environmental Movement in the 1970s and the Congressional Push for a Cleaner, Healthier Environment*

During the 1960s and 1970s, the American people became increasingly concerned over the state of their environment.<sup>51</sup> A few key events precipitated the increasing cry for environmental laws pertaining to water quality.<sup>52</sup> One extreme example was the Cuyahoga River event in Cleveland Ohio in 1969, where oil and industrial wastes in the water caused the river to burst into flame.<sup>53</sup> Although this event garnered more attention than other instances of dramatic water pollution, it was not an isolated event. A series of studies conducted between the late 1960s to early 1970s reported a number of severe water quality issues in many of the nation’s waters.<sup>54</sup> In 1972 Congress responded by revising the 1948 Federal Water Pollution Control Act, shaping it into what is currently referred to as the “Clean Water Act.”<sup>55</sup>

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<sup>49</sup> See *Hardy Salt Co. v. S. Pac. Transp. Co.*, 501 F.2d 1156, 1168 (10th Cir. 1974) (stating that *The Daniel Ball* standard for “navigable waters” was intended to apply because it existed when the RHA was ratified, and because Congress was aware of the Supreme Court decision and standard when used as a term of art in the Act); see also *Minnehaha Creek Watershed Dist. v. Hoffman*, 597 F. 2d. at 623 (disagreeing with Army Corps’s attempt to expand the definition of “navigable waters” to include all waterways “which form a continuous highway which may consist of water, rail or road connections”).

<sup>50</sup> See Albrecht & Nicklesburg, *supra* note 43, at 11046.

<sup>51</sup> ERIN L. GORDON, HISTORY OF THE MODERN ENVIRONMENTAL MOVEMENT IN AMERICA 1 (June, 2012), available at [http://photos.state.gov/libraries/mumbai/498320/fernandesma/June\\_2012\\_001.pdf](http://photos.state.gov/libraries/mumbai/498320/fernandesma/June_2012_001.pdf).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> ROBERT W. ALDER ET AL., THE CLEAN WATER ACT 20 YEARS LATER 5 (1993). Some of these water pollutant issues included: tests showing that 30% of drinking water had elevated levels of chemicals exceeding the Public Health Service limits; high levels of mercury in various fish caught and sold for consumption; high levels of DDT in various consumable fish; as many as two million acres of shellfish beds closed due to elevated pollutants; and “record numbers of fish kills.” *Id.*

<sup>55</sup> *History of the Clean Water Act*, U.S. ENVTL. PROT. AGENCY (last updated July 8, 2014), <http://www2.epa.gov/laws-regulations/history-clean-water-act>, archived at <http://perma.cc/PGK3-K343>.

Prior to the 1972 revisions to the CWA, states had primary control over setting water pollution standards.<sup>56</sup> The 1948 version of the CWA provided funding to states to clean up the pollution in their waterways, but set few federal standards for pollution control.<sup>57</sup> The 1972 revisions to the Act were focused on the federal government taking a stronger stand on improving the nation's waters.<sup>58</sup> Congress's concern over the rising dangers of the nation's degraded water quality drove it to open the newly revised Act with several policy goals.<sup>59</sup> These goals include the elimination of the "discharge of pollutants into navigable water[ways]," the improvement of water quality to provide for the "protection and propagation of fish . . . [and] shellfish," and other general goals to eliminate pollutants from waterways.<sup>60</sup> They reflect the goal that led to the revisions' enactment: improving water quality by eliminating pollutants from the nation's waters.<sup>61</sup>

The theme of water quality improvement is repeated throughout the rest of the Act.<sup>62</sup> Provisions in the Act cover: oil spills, toxic pollutants, sewage, and funding research on the effects of various pollutants.<sup>63</sup> The Act was also developed to facilitate federal ability to enforce provisions seeking to improve water quality.<sup>64</sup> Before the 1972 revisions, the federal government was required to prove that a discharge caused harm in order to prohibit further discharges.<sup>65</sup> Section 301 provided the needed teeth for the Act to be an effective enforcement tool.<sup>66</sup> Section 301 specifically

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<sup>56</sup> See ALDER ET AL., *supra* note 54, at 6.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 7.

<sup>59</sup> See Clean Water Act, 33 U.S.C. § 1251 (2012).

<sup>60</sup> *Id.*

<sup>61</sup> See *id.* (including goals primarily encompassing the elimination of pollutants in navigable waters, the elimination of toxic pollutants in navigable waters, and fostering and financially supporting wastewater treatment).

<sup>62</sup> See 33 U.S.C. §§ 1312–30 (2012). Section 302 allows the Administrator to establish effluent limitations for point sources which may affect water quality. 33 U.S.C. § 1312. Section 303 provides authority to establish water quality standards. 33 U.S.C. § 1313. Section 305 requires states to annually report the state of the water quality of all navigable waters contained in the state. 33 U.S.C. § 1315. Section 311 creates a program for reducing the number of oil and hazardous waste spills. 33 U.S.C. § 1321. These are just a few examples of the dozens of provisions within the Act that specifically regulate pollution control or improving water quality. See 33 U.S.C. §§ 1251–1387.

<sup>63</sup> See 33 U.S.C. §§ 1251–1387.

<sup>64</sup> See 33 U.S.C. § 1319 (providing the Administrator of EPA with the authority to pursue enforcement actions whenever a person is in violation of the Act).

<sup>65</sup> ADLER ET AL., *supra* note 54, at 7.

<sup>66</sup> *Id.* at 8.

prohibits the discharge of any pollutant unless the discharge is in compliance with the Act.<sup>67</sup> The provision facilitated Congress's enforcement goals by shifting the burden of proof onto the discharger: the discharger must show that any discharges are permitted by the Act, rather than forcing the government to show that the discharges harm the waterway.<sup>68</sup>

Section 301 provides several ways for a discharge to be legal.<sup>69</sup> The most commonly used are the two permitting programs that allow the federal government to authorize discharges.<sup>70</sup> Section 402 created the National Pollution Discharge Elimination System ("NPDES") permitting program, which is used to regulate effluent discharges from point sources.<sup>71</sup> The same program is used by EPA to set effluent guidelines for industries.<sup>72</sup> The other permitting program is governed by § 404.<sup>73</sup> Like § 402, § 404 authorizes specific types of discharges pursuant to a permit. Where § 402 authorizes effluent discharges, § 404 authorizes discharges of solid materials, specifically dredged and fill materials.<sup>74</sup>

Given Army Corps's history of regulating the RHA, which also regulated dredged and fill material, Army Corps was charged with regulating the § 404 program.<sup>75</sup> Initially, Army Corps continued to interpret "navigable waters" narrowly, in line with its interpretation under the RHA.<sup>76</sup> In 1975, the Natural Resources Defense Council ("NRDC") challenged Army Corps's definition in *NRDC v. Callaway*.<sup>77</sup> The Court found that Congress intended for the term "waters of the United States" to assert "federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution," thus finding Army Corps could not limit its scope to "the traditional tests of navigability."<sup>78</sup> In response to the Court's decision, Army Corps promulgated a far more expansive rule in 1977, which extended jurisdiction over traditional

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<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> Clean Water Act, 33 U.S.C. § 1311 (2012).

<sup>70</sup> 33 U.S.C. §§ 1342, 1344 (2012).

<sup>71</sup> 33 U.S.C. § 1342 (2012).

<sup>72</sup> See ADLER ET AL., *supra* note 54, at 151.

<sup>73</sup> 33 U.S.C. § 1344 (2012).

<sup>74</sup> 33 U.S.C. §§ 1342, 1344 (2012).

<sup>75</sup> See Mark A. Chertok, *Federal Regulation of Wetlands*, SN085 ALI-ABA 1137, 1146 (2008) (stating that Army Corps was accorded authority over § 404 given its prior expertise over § 10 of the RHA).

<sup>76</sup> *Id.*

<sup>77</sup> 392 F. Supp. 685 (D.D.C. 1975).

<sup>78</sup> *Id.* at 686.

waterways such “as rivers, lakes, and streams,” and also asserted jurisdiction over wetlands.<sup>79</sup>

## II. WETLANDS: LATE BLOOMERS IN THE PUBLIC’S EYE FOR ECOLOGICAL PROTECTION

National interest in ecosystem protection is not new. In the early 1900s, President Theodore Roosevelt was famous for his focus on ecological protection.<sup>80</sup> He began several projects aimed toward protecting whole ecosystems, such as the National Wildlife Refuge System.<sup>81</sup> The nation’s interest in ecosystem protection has evolved throughout its history.<sup>82</sup> In early decades, many ecosystems were protected for their aesthetic beauty or their usefulness for outdoor activities such as fishing or hunting.<sup>83</sup> In the early 1970s, the nation grew more interested in curtailing the rise in endangered species and Congress passed the Endangered Species Act (“ESA”).<sup>84</sup>

Congress included §§ 5 and 7 in the ESA to protect ecosystems designated as “critical habitat” for endangered species.<sup>85</sup> In more recent decades, scientific studies show that certain ecosystems provide “services” that are beneficial to human and non-human life alike.<sup>86</sup> In some cases, these “ecological services” are not only beneficial, but their absence can cause catastrophic effects to both humans and non-humans.<sup>87</sup> Thus, interest in preserving ecosystems that provide services has grown in America.<sup>88</sup>

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<sup>79</sup> 42 Fed. Reg. 37122, 37144 (July 19, 1977).

<sup>80</sup> *The 5 Most Environmentally Friendly Presidents in U.S. History*, Scribol (Feb. 28, 2008), <http://scribol.com/uncategorized/the-5-most-environmentally-friendly-presidents-in-u-s-history>, archived at <http://perma.cc/L3Y6-MYVG>.

<sup>81</sup> *Id.*

<sup>82</sup> See *A History of Conservation*, DEL. DIV. OF FISH AND WILDLIFE, <http://www.dnrec.delaware.gov/fw/dwap/Pages/HistoryofCons.aspx>, archived at <http://perma.cc/ET7V-ZEYH> (last visited Nov. 13, 2014) (providing a timeline of different movements related to ecological conservation in America).

<sup>83</sup> *Id.* (describing “The Era of Game Management” between 1930 and 1965, which was spurred by an interest in maintaining populations of wildlife for fishing and hunting).

<sup>84</sup> James Salzman, *Evolution and Application of Critical Habitat Under the Endangered Species Act*, 14 HARV. ENVTL. L. REV. 311, 313 (1990).

<sup>85</sup> *Id.* at 311, 314–15.

<sup>86</sup> See *infra* Part II.B.

<sup>87</sup> *Id.*

<sup>88</sup> See *Ecosystem Research*, U.S. ENVTL. PROT. AGENCY, <http://www2.epa.gov/eco-research/ecosystems-services>, archived at <http://perma.cc/Y3BV-4YLJ> (last updated May 21, 2014) (discussing the growing interest in utilizing ecosystem services).

Prior to the past few decades, Americans had very little interest in preserving wetlands.<sup>89</sup> This Part will track the nation's history regarding wetlands. Part II.A will examine the historical perception of wetlands.<sup>90</sup> Part II.B will discuss the many ecosystem services that wetlands provide.<sup>91</sup> Part II.C will discuss how Army Corps has tried to promote the preservation of wetlands by using the CWA as a tool.<sup>92</sup>

A. *Venomous Streams which Breed Disease: A Historical Perspective of Wetlands*

In the seminal case of *Wilson v. Black Bird Creek Marsh Co.*, Chief Justice Marshall crystallized the American opinion of wetlands when he described the marsh that was the subject of the case as: “[i]t is one of those sluggish reptile streams, that do not run but creep, and which, wherever it passes, spreads its venom, and destroys the health of all those who inhabit its marshes.”<sup>93</sup> At best, wetlands were obstacles to overcome—land to be drained and filled in order to be used for agriculture.<sup>94</sup> More commonly, Americans viewed wetlands as sinister landscapes that bred disease.<sup>95</sup> Thus, between the 1600s and the latter half of the 1900s, Americans were encouraged to convert wetlands into fertile agricultural land.<sup>96</sup>

The movement to drain and fill wetlands was not merely culturally encouraged, but was often sanctioned and subsidized by law.<sup>97</sup> As late as the 1970s, Congress still subsidized individuals' conversion of wetlands into more “beneficial” purposes.<sup>98</sup> The Watershed Protection and Flood Prevention Act both directly and indirectly increased wetland

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<sup>89</sup> See THOMAS E. DAHL & GREGORY J. ALLORD, *History of Wetlands in the Conterminous United States*, in UNITED STATES GEOLOGICAL SURVEY WATER SUPPLY PAPER No. 2425, 19–25 (1996) (describing the history of American attitudes toward wetlands).

<sup>90</sup> See *infra* Part II.A.

<sup>91</sup> See *infra* Part II.B.

<sup>92</sup> See *infra* Part II.C.

<sup>93</sup> *Wilson v. Black Bird Creek Marsh Co.*, 27 U.S. 245, 249 (1829).

<sup>94</sup> See DAHL & ALLORD, *supra* note 89, at 20.

<sup>95</sup> See *id.*

<sup>96</sup> See *id.* at 19–25 (describing the process of draining and converting wetlands into agricultural land in the United States).

<sup>97</sup> *Id.* at 20 (stating that South Carolina authorized the conversion of swampy areas into agricultural land while North Carolina and Virginia surveyed them for reclamation into water transportation routes).

<sup>98</sup> *Id.* at 24.

drainage near flood-control projects.<sup>99</sup> The U.S. Department of Agriculture also helped facilitate wetland destruction by subsidizing projects converting wetlands into agricultural land.<sup>100</sup> These subsidies led to an average of 550,000 acres of wetlands lost per year between the mid-1950s to mid-1970s.<sup>101</sup> By the late 1970s and early 1980s,<sup>102</sup> public awareness of the importance of wetlands began to rise.<sup>103</sup> Americans now recognize wetlands as important natural resources that provide a plethora of ecological services.<sup>104</sup>

### B. *Wetland Ecological Services*

EPA defines 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 which is typically adapted for saturated soils.”<sup>105</sup> A wide variety of ecosystems fall under this definition.<sup>106</sup> EPA identifies at least four major varieties of wetlands, with at least twelve subcategories, including areas such as swamps, marshes, bogs, and wet meadows.<sup>107</sup>

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<sup>99</sup> *Id.* Directly, the Federal Government subsidized or facilitated wetland losses through public work projects, technical practices, and cost-shared drainage programs administered by the U.S. Department of Agriculture. DAHL & ALLORD, *supra* note 89, at 24. Indirectly, it subsidized many other agricultural projects which were accomplished through tile and open-ditch drainage. *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> Army Corps first recognized the importance of wetlands by including them within its interpretation of “waters of the United States” in 1977. 33 C.F.R. 323.2(a)(3) (1978). Wetlands came into more national focus in the mid-1980s when the first federal statute, the Emergency Wetland Resources Act of 1986, was passed to directly protect wetlands and the 1985 Supreme Court decision of *U.S. v. Riverside Bayview Homes Inc.*, in which the Court affirmed that the CWA could be used to extend to adjacent wetlands. See DAHL & ALLORD, *supra* note 89, at 24; 474 U.S. 121 (1985).

<sup>103</sup> See DAHL & ALLORD, *supra* note 89, at 24.

<sup>104</sup> See *infra* Part II.B.

<sup>105</sup> 33 C.F.R. § 328.3(b) (2013).

<sup>106</sup> See Scott G. Leibowitz et al., *Non-navigable Streams and Adjacent Wetlands: Addressing Science Needs Following the Supreme Court’s Rapanos Decision*, 6 FRONTIERS ECOLOGY & ENV’T 364, 366 (listing several varieties of wetlands which do not necessarily share a surface connection with a navigable stream).

<sup>107</sup> See U.S. ENVTL. PROT. AGENCY, TYPES OF WETLANDS (Sept. 2001), available at [http://water.epa.gov/type/wetlands/outreach/upload/types\\_pr.pdf](http://water.epa.gov/type/wetlands/outreach/upload/types_pr.pdf) (identifying major categories of wetlands).

Some of these are connected to adjacent waterways such as tributaries or rivers, but many are isolated<sup>108</sup> ecosystems.<sup>109</sup> Of the twelve sub-categories of wetlands, only two (tidal marshlands and mangrove swamps) definitely abut a waterway.<sup>110</sup> The rest, including wet meadows, vernal pools, playa lakes, all types of swamps, bogs, and fens may, or more often may not, lie adjacent to a waterway.<sup>111</sup> Each type of wetland plays a unique ecological role, and all are critical resources to hundreds of species.<sup>112</sup>

This Part will examine why wetlands warrant federal protection. Part II.B.1 will examine those wetlands that lie adjacent to more traditional waterways, such as lakes and rivers. It will discuss how these adjacent wetlands are beneficial to those adjacent waterways.<sup>113</sup> Part II.B.2 will examine the manner in which all wetlands provide ecological services in themselves, independent of a connection with other waterways.<sup>114</sup>

#### 1. Wetlands as Resources to Traditional Navigable Waters

Wetlands often act as buffer zones to other waterways, such as lakes and rivers. The wetlands acting as buffers benefit traditional navigable waters in the following ways:

*Sediment Removal and Shore Maintenance.* Development projects and agriculture primarily lead to soil erosion and sediment-enriched run-off.<sup>115</sup> Sedimentation impacts water quality in two ways. An excess of sediments in a waterway leads to turbidity, which in turn affects the water quality and impacts aquatic life.<sup>116</sup> Additionally, the majority of nutrients which enter into waterways as run-off are attached to sediment particles.<sup>117</sup> Wetlands prevent sedimentation in two ways. First, they act as a buffer for run-off, catching the excess sediment before it enters adjacent

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<sup>108</sup> Just how "isolated" a wetland is in relation to other waterways has been, and continues to be, the most central area of contention in wetland protection under the CWA. *See infra* Parts III–IV.

<sup>109</sup> *Wetland Types*, U.S. ENVTL. PROT. AGENCY, [http://water.epa.gov/type/wetlands/types\\_index.cfm](http://water.epa.gov/type/wetlands/types_index.cfm), archived at <http://perma.cc/FC23-3YER> (last updated July 16, 2013).

<sup>110</sup> *Id.*

<sup>111</sup> *See id.*

<sup>112</sup> *See Swamps*, U.S. ENVTL. PROT. AGENCY, <http://water.epa.gov/type/wetlands/swamp.cfm>, archived at <http://perma.cc/W3N2-ES7A> (last updated Oct. 10, 2012).

<sup>113</sup> *See infra* Part II.B.1.

<sup>114</sup> *See infra* Part II.B.2.

<sup>115</sup> *Turbidity and Sedimentation*, NOAA, <http://nerrs.noaa.gov/doc/siteprofile/acebasin/html/modules/watqual/wmtursed.htm>, archived at <http://perma.cc/Y6DG-MX96>.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

waterways.<sup>118</sup> Second, the root structures of the vegetation hold together the sediment and soil at shore-lines, preventing excess soil erosion.<sup>119</sup>

*Nutrient and Toxin Removal.* Buffer zones absorb large quantities of phosphorous<sup>120</sup> and nitrogen,<sup>121</sup> the two primary nutrients which lead to eutrophication.<sup>122</sup> Phosphorous and nitrogen are released from a range of anthropogenic sources, including agriculture, wastewater, and chemical runoff in storm-water.<sup>123</sup> Not only do wetlands act as pre-existing buffers for non-point sources of pollution such as agriculture,<sup>124</sup> but are also usable for supplemental treatment to pretreated waters, such as wastewater.<sup>125</sup> One study shows that one hectare of wetland can absorb as much as 50 percent of the phosphorous and nitrogen from wastewater from 60 people, and that one hectare can absorb up to 75 percent of the wastewater from 20 people.<sup>126</sup> Additionally, wetlands mitigate damage from materials such as heavy metals and other toxins that are harmful when consumed by humans or wildlife.<sup>127</sup> The wetland either absorbs the toxins into the soil of the wetland, or chemically alters them into a less harmful form.<sup>128</sup> The technique of using wetlands as a water treatment option is now so prevalent that these wetlands are now referred to as “treatment wetlands.”<sup>129</sup>

<sup>118</sup> See DYANNE SHELDON ET AL., *WETLANDS IN WASHINGTON STATE VOL. 1* 2-35-38, [http://www.ecy.wa.gov/programs/sea/wetlands/bas/vol1final/Chapter%202%20\\_Volume%201\\_.pdf](http://www.ecy.wa.gov/programs/sea/wetlands/bas/vol1final/Chapter%202%20_Volume%201_.pdf) (listing several studies examining the desired width for a wetland to be an effective buffer against sedimentation).

<sup>119</sup> *Wetlands and People*, U.S. ENVTL. PROT. AGENCY, <http://water.epa.gov/type/wetlands/people.cfm#erosion>, archived at <http://perma.cc/5A2M-E4VW> (last updated Mar. 6, 2012).

<sup>120</sup> See SHELDON ET AL., *supra* note 118, at 2–35 (noting that one study found the wetland to take up 80% of the available sediment).

<sup>121</sup> See Mats Jansson et al., *Wetlands and Lakes as Nitrogen Traps*, 23 *AMBIO* 320, 323–24 (1994) (discussing various studies on the uptake of nitrogen in wetlands used as buffers).

<sup>122</sup> J.W.G. Lund, *Eutrophication*, 180 *PROC. ROYAL SOC'Y LOND* 371, 371 (1972).

<sup>123</sup> See *Sources of Eutrophication*, WORLD RES. INST., <http://www.wri.org/our-work/project/eutrophication-and-hypoxia/sources-eutrophication>, archived at <http://perma.cc/ET4W-CAMZ> (listing the primary sources of nutrient pollution).

<sup>124</sup> William J. Mitsch et al., *Phosphorus Retention in Constructed Freshwater Riparian Marshes*, 5 *ECOLOGICAL APPLICATIONS* 830, 830 (1995).

<sup>125</sup> See Dale S. Nichols, *Capacity of Natural Wetlands to Remove Nutrients from Wastewater*, 55 *J. (WATER POLLUTION CONTROL FED'N)* 495 (1983) (finding that wetlands can take up high quantities of Nitrogen, Phosphorous, Iron, Calcium, and Aluminum from pretreated wastewater).

<sup>126</sup> *Id.* at 501–02, Figure 4.

<sup>127</sup> See *Functions and Value of Wetlands*, WASH. ST. DEPT. OF ENERGY, <http://www.ecy.wa.gov/programs/sea/wetlands/functions.html>, archived at <http://perma.cc/YMY6-AJ6U>.

<sup>128</sup> *Id.*

<sup>129</sup> See Stephen Cole, *The Emergence of Treatment Wetlands*, 32 *ENVTL. SCI. & TECH* 218A, 218A (1998); see also ROBERT H. KADLEC & SCOTT D. WALLACE, *TREATMENT WETLANDS* i



*Water Temperature Maintenance.* Forested wetlands provide cover over waterways, and thus help maintain a cooler water temperature.<sup>130</sup> Temperature control in waterways is important for several reasons.<sup>131</sup> First, cooler water is able to transport more dissolved oxygen than warmer water.<sup>132</sup> Dissolved oxygen is an important resource in aquatic ecosystems.<sup>133</sup> Some species of fish, especially sport fish such as trout and salmon, require higher levels of dissolved oxygen and thrive only in waters with cooler temperatures.<sup>134</sup> Additionally, most aquatic organisms are cold-blooded, and their metabolic rate is dependent on their environmental temperature.<sup>135</sup> When the environmental temperature is warmer, the species have a higher metabolic rate.<sup>136</sup> A higher metabolic rate creates a greater bodily demand for food and oxygen, while also causing the body to produce more waste.<sup>137</sup> Studies show that temperature moderation created by buffering wetlands is especially beneficial in the hotter months such as July.<sup>138</sup>

## 2. Intrinsic Values of Wetlands

In addition to their contribution to the health of adjacent waterways, wetlands provide a number of ecological services independent of adjacent waterways.<sup>139</sup>

*Groundwater Recharge.* Underground aquifers are replenished by water from the surface seeping through the ground into the aquifer.<sup>140</sup>

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(CRC Press 2009); Robert L. Knight et al., *The Use of Treatment Wetlands for Petroleum Industry Effluents*, 33 ENVTL. SCI. & TECH. 973, 973 (1999).

<sup>130</sup> See SHELDON ET AL., *supra* note 118, at 2-35-36 (listing several studies citing the optimal buffer widths adjacent to waterways in order to maintain temperature control).

<sup>131</sup> *Temperature Impacts on Stream Ecology*, WATER ENCYCLOPEDIA, <http://www.waterencyclopedia.com/Re-St/Stream-Ecology-Temperature-Impacts-on.html>, *archived at* <http://perma.cc/33NW-8UPW>.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Temperature Impacts on Stream Ecology*, WATER ENCYCLOPEDIA, <http://www.waterencyclopedia.com/Re-St/Stream-Ecology-Temperature-Impacts-on.html>, *archived at* <http://perma.cc/33NW-8UPW>.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> WASH. ST. DEPT. OF ENERGY, *supra* note 127.

<sup>140</sup> *Id.*

Wetlands are important resources for aquifers.<sup>141</sup> Since the water in a wetland seeps at a slow rate, filtration of the water can occur before it enters the aquifer.<sup>142</sup> Additionally, the slow rate of seepage provides a stable source of replenishment for the aquifer.<sup>143</sup>

*Flood Protection.* Wetlands act as sponges for surrounding lands and waterways.<sup>144</sup> The hydrology of wetlands often reduces flood peaks by absorbing water during high periods of flow, then slowly releasing the water thereafter.<sup>145</sup> Wetlands also absorb storm energy.<sup>146</sup> Coastal wetlands are especially important for flood protection.<sup>147</sup> They also help protect inlands from major storms such as hurricanes.<sup>148</sup> As hurricanes move further inland, the severity of storms decrease.<sup>149</sup> Coastal wetlands in particular can absorb immense amounts of energy from a hurricane, significantly reducing the severity of hurricanes before they reach human-populated inland areas.<sup>150</sup> Wetland loss can thus cause extreme consequences to human inhabited areas.<sup>151</sup>

Louisiana is one of the most prominent examples of how wetland destruction can cause harm to human civilizations during floods.<sup>152</sup> The wetlands in Louisiana stretch about 300 kilometers along its coast, and up to 130 kilometers inland.<sup>153</sup> These wetlands represent approximately 40 percent of the nation's continental wetlands, but 80 percent of the nation's wetland losses.<sup>154</sup> Of the remaining 3 million acres of wetlands left in Louisiana, about 75 square kilometers are lost annually.<sup>155</sup> The damages caused by hurricanes Katrina and Rita were largely due to the wetland

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<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> WASH. ST. DEPT. OF ENERGY, *supra* note 127.

<sup>146</sup> John Tibbetts, *Louisiana Wetlands: A Lesson in Nature Appreciation*, 114 ENVTL. HEALTH PERSPECTIVES A40, A42–43 (Jan. 2006), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1332684/>, archived at <http://perma.cc/LLE7-WY3M>.

<sup>147</sup> *See id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *See id.*

<sup>152</sup> *See Louisiana Coastal Wetlands: A Resource at Risk*, U.S. GEOLOGICAL SURVEY, <http://pubs.usgs.gov/fs/la-wetlands/>, archived at <http://perma.cc/8JMB-LYSN> (discussing the amount of wetlands lost in Louisiana).

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

loss.<sup>156</sup> The two hurricanes passed through areas of the Mississippi River Delta that had suffered the greatest wetland loss between 1932 and 1990.<sup>157</sup>

*Carbon Sequestration.* Peat-lands are unique ecosystems which are known for their ability to trap carbon from the atmosphere.<sup>158</sup> Peat-lands are wetlands primarily consisting of waterlogged dead and decaying plant material rather than normal soil.<sup>159</sup> This type of wetland makes up approximately half of all of the global wetlands.<sup>160</sup> Although they only cover about 3 percent of the Earth's surface, they currently store about 30 percent of all of the carbon on land.<sup>161</sup> Due to the unique anaerobic conditions of peat-lands, decay of plant material is slowed, and layers of still carbon-rich plant material becomes trapped underneath layers of new decaying vegetative material.<sup>162</sup> The dredging and draining of peat-lands in turn releases their stored carbon, hastening climate change.<sup>163</sup> Thus the importance of preventing the disturbance of peat-lands is twofold: the continued existence of the wetlands allows for their utilization for their carbon sequestration capabilities, while avoiding their destruction in order to prevent the release of great quantities of carbon into the air.<sup>164</sup>

*Habitat.* Wetlands are areas of high biodiversity. Nearly half of all threatened and endangered U.S. species use wetlands during their life cycle, and more than a third of all threatened and endangered species exclusively inhabit wetlands.<sup>165</sup> Wetlands are also a major stopping point for many migratory birds, especially waterfowl.<sup>166</sup> Not only is habitat protection important from a conservation standpoint, but it is important from an economic and aesthetic standpoint.<sup>167</sup> Wetlands provide a rich habitat for many natural resources of economic benefit such as consumable fish, timber, wild rice, and medicines.<sup>168</sup> Wetlands have also become

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<sup>156</sup> Tibbetts, *supra* note 146, at A40–43.

<sup>157</sup> *Id.*

<sup>158</sup> DANIELA RUSSI ET AL., THE ECONOMICS OF ECOSYSTEMS AND BIODIVERSITY FOR WATER AND WETLANDS 11 (2013) (discussing peat-lands' unique ability to sequester carbon).

<sup>159</sup> *Peatlands*, WETLANDS INT'L, <http://www.wetlands.org/?TabId=2737>, archived at <http://perma.cc/CEY2-P29K>.

<sup>160</sup> *Id.*

<sup>161</sup> See RUSSI ET AL., *supra* note 158, at 11.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> U.S. ENVTL. PROT. AGENCY, *supra* note 119.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

increasingly popular for their aesthetic and cultural values.<sup>169</sup> More than half of all U.S. citizens enjoy outdoor activities centered on wildlife, much of which is dependent on wetlands for continued survival.<sup>170</sup>

*Fishing Industry.* The fishing industry is a major source of jobs in the U.S. economy.<sup>171</sup> The fishing industry puts \$159 billion into the nation's economy per year and provides nearly two million jobs.<sup>172</sup> Wetlands are intrinsically intertwined in the fishing industry.<sup>173</sup> Three quarters of the nation's fish production depends on marshes and other wetland environments.<sup>174</sup> Many species of animals are dependent on wetlands for all or part of their life cycle, some of which humans commonly consume.<sup>175</sup> Even those species of fish that do not inhabit wetlands are often dependent on the benefits provided by wetlands.<sup>176</sup> "Wetlands cycle nutrients out of mud, sand, and water back into bays, lakes, and streams."<sup>177</sup> Thus, any food species that are freshwater, or spend some part of their life cycle in bays, are dependent on wetlands for their water filtration properties.<sup>178</sup>

A few key examples demonstrate the importance of wetlands to the fishing industry. The salmon industry in northern California has plummeted by 80 percent since the 1960s.<sup>179</sup> Investigation into this loss revealed that many of the spawning and juvenile grounds for the salmon included a great deal of wetlands destroyed in the 1960s.<sup>180</sup> Perhaps the pithiest example of the importance of wetlands for fisheries is their role in the shrimping industry in the Gulf of Mexico.<sup>181</sup> Shrimping is a major industry, creating half a million dollars of income for U.S. fishermen per year, and it was worth over \$838 billion between 1995 and 1996.<sup>182</sup> The industry is also nearly completely dependent on wetlands.<sup>183</sup> The National Marine

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<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> See *Fisheries, Wetlands and Jobs: The Value of Wetlands to America's Fisheries*, CLEAN WATER NETWORK (Mar. 1998), available at <http://www.pcffa.org/wetlands.pdf>.

<sup>172</sup> *Id.* at i.

<sup>173</sup> See *id.*

<sup>174</sup> *Id.*

<sup>175</sup> See *id.* at 1.

<sup>176</sup> See CLEAN WATER NETWORK, *supra* note 171.

<sup>177</sup> See *id.*

<sup>178</sup> See *id.*

<sup>179</sup> *Id.* at 5.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> See CLEAN WATER NETWORK, *supra* note 171.

<sup>183</sup> *Id.*

Fisheries Service estimates that 98 percent of fish and shellfish harvested from the Gulf of Mexico are wetland dependent.<sup>184</sup> Shrimp are especially dependent on wetlands, spending their juvenile life stages in marshes and mangrove forests.<sup>185</sup> The Gulf of Mexico Fishery Management Council has noted that the weakest link in sustaining the shrimping industry is the continual decline of these marshes and mangrove forests.<sup>186</sup>

C. *Wetlands and the Clean Water Act*

In 1977, five years after the original 1972 CWA revisions were finalized, wetlands received their first direct mention in a CWA regulation.<sup>187</sup> After coming under fire for its limited definition of “navigable waters” in *Callaway*,<sup>188</sup> Army Corps issued a new rule defining “waters of the United States.”<sup>189</sup> The new rule included “adjacent wetlands” for all inland waters and tributaries as well as any “isolated wetlands” that could affect interstate commerce if degraded.<sup>190</sup> In 1977, the CWA was in the process of receiving a new set of amendments.<sup>191</sup> A bill was proposed to define “navigable waters” for § 404 in a manner which would expressly authorize the regulation of wetlands; the bill was defeated.<sup>192</sup>

Army Corps’s inclusion of wetlands in its 1977 rule spurred a series of developments extending into the mid-1980s, focused on bringing wetlands into the fold of the CWA.<sup>193</sup> In 1980, EPA issued new guidelines for § 404 which purposely tied the maintenance of wetlands with the Act’s original goal of restoring and maintaining the chemical, physical, and biological integrity of the nation’s waters.<sup>194</sup> During the mid-1980s, both EPA

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<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> 42 Fed. Reg. 37144 (July 19, 1977).

<sup>188</sup> See 392 F. Supp. 685, 686 (D.D.C. 1975).

<sup>189</sup> 42 Fed. Reg. 37144 (July 19, 1977).

<sup>190</sup> *Id.*

<sup>191</sup> See Albrecht et al., *supra* note 43, at 11051.

<sup>192</sup> *Id.*

<sup>193</sup> See James K. Jackson & William A. Nitze, *Wetlands Protection Under Section 404 of the Clean Water Act—The Riverside Bayview Decision, Its Past and Future*, 7 PUB. LAND L. REV. 21, 38–39 (1986).

<sup>194</sup> See 40 CFR § 230.1 (2014) (stating that from a national perspective, the degradation or destruction of aquatic ecosystems such as wetlands is considered to be severely opposed to the Act’s goal of the restoration and maintenance of the chemical, physical, and biological integrity of the nation’s waters).

and Army Corps promulgated a series of regulations related to § 404 that provided Army Corps with stronger authority to regulate wetlands under the permitting program.<sup>195</sup> In 1986, wetlands received legislative attention when Congress passed the Emergency Wetlands Resources Act.<sup>196</sup> Under this Act, the federal government was authorized to purchase wetlands and to establish a National Wetlands Priority Conservation Plan.<sup>197</sup> The Act also placed more requirements on states to place a higher priority on wetland protection.<sup>198</sup>

Perhaps the biggest boon for wetland protection efforts was the 1985 Supreme Court decision of *United States v. Riverside Bayview Homes, Inc.*<sup>199</sup> The case resolved a sequence of cases that challenged Army Corps's authority to require a § 404 permit before filling a wetland.<sup>200</sup> Cognizant of Congress's ambiguity in defining the term "navigable waters," the Court found that Army Corps's definition of waters was reasonable.<sup>201</sup> It reasoned that Congress's evident concern for the protection of water quality suggests that Army Corps's interpretation to extend jurisdiction over adjacent wetlands was acceptable.<sup>202</sup> Recognizing wetlands' critical role to a waterway's water quality, the Court quoted Army Corps's determination regarding its authority over wetlands:

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. 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.<sup>203</sup>

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<sup>195</sup> See Jackson & Nitze, *supra* note 193, at 39.

<sup>196</sup> 16 U.S.C. § 3901 (1986).

<sup>197</sup> 16 U.S.C. §§ 3921, 3922 (1986).

<sup>198</sup> *Id.*

<sup>199</sup> 474 U.S. 121 (1985).

<sup>200</sup> *Id.* at 123.

<sup>201</sup> *Id.* at 133. The Court appeared to recognize not only Congress's ambiguity, but also its questionable intent behind its "broad" definition of "navigable waters." See *id.* The Court noted that 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." *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> 474 U.S. at 133–34.

The decision was a monumental step toward protecting a larger range of ecosystems, and one which relied heavily on the original legislative intent behind the Act: "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."<sup>204</sup> By focusing on the hydrologic cycle and vegetative communities rather than the physical attributes of the ecosystem, the court recognized the complex ecological relationship between wetlands and their adjacent waterways.<sup>205</sup>

The *Riverside Bayview* decision was critical in the modern world of federal wetland protection, but the purview of the decision was limited.<sup>206</sup> The Court tactfully did not state that wetlands are "waters of the United States," fitting into the definition for "navigable waters."<sup>207</sup> It only found that it is reasonable for Army Corps to regulate wetlands which are *adjacent* to "waters of the United States," due to the impact adjacent wetlands have on jurisdictional waters.<sup>208</sup>

### III. CONSEQUENCES OF STATUTORY INTERPRETATION ON ARMY CORPS'S REGULATION OF WETLANDS UNDER THE CLEAN WATER ACT

Just as Congress in the 1970s struggled to fit pollution controls into a statute aimed toward facilitating navigation,<sup>209</sup> Army Corps and EPA have struggled to fit ecosystem protection for wetlands into a statute primarily concerned with water pollution.<sup>210</sup> What *Zabel* accomplished for pollution control within the RHA context,<sup>211</sup> *Riverside Bayview* accomplished for wetland protection in the CWA.<sup>212</sup> *Zabel* affirmed that Army Corps has the authority to consider environmental concerns while issuing a permit under the RHA.<sup>213</sup> While this provided Army Corps with the ability to extend pollution controls to interstate waters, courts continuously found that the second prong of *The Daniel Ball* test still applied disallowing

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<sup>204</sup> *Id.* at 132.

<sup>205</sup> See Leibowitz et al., *supra* note 106, at 365–66 (discussing the complex biological and hydrological relationships between streams and wetlands).

<sup>206</sup> 474 U.S. 121, 139 (finding that Army Corps has authority over those wetlands that are adjacent to "waters of the United States").

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> See *supra* Part II.A.

<sup>210</sup> See *infra* Part III.A.

<sup>211</sup> See 430 F.2d 199, 203 (5th Cir. 1970) (affirming Army Corps's authority to consider environmental factors before issuing a permit).

<sup>212</sup> See 474 U.S. 121, 139 (1986) (affirming Army Corps's authority to regulate wetlands under § 404 when the wetland is adjacent to a navigable water).

<sup>213</sup> 430 F.2d at 203.

regulation of intrastate waters under the RHA.<sup>214</sup> *Riverside Bayview* similarly confirmed that Army Corps has authority to regulate the dredging and filling of wetlands.<sup>215</sup> However, the decision focused on how adjacent wetlands can affect the water quality of waterways, and did not touch on preserving wetlands because of their independent ecological value.<sup>216</sup> As Army Corps began to pass more expansive regulations to protect wetlands after the *Riverside Bayview* decision,<sup>217</sup> courts began to scrutinize the language of the CWA more closely to determine the acceptable parameters of the water pollution statute.<sup>218</sup>

This section will examine certain provisions of the CWA: §§ 404, 301, and 505, pursuant to the principles of statutory interpretation. Specifically, each section will focus on several key Supreme Court decisions that interpreted the CWA and how those interpretations have affected the protection of wetlands. This section will primarily examine two methods of statutory interpretation: Part III.A will discuss a typical textualist approach to statutory interpretation: it will examine those opinions which focus on the strict text of the CWA to ascertain meaning behind specific words and phrases used in the Act. Part III.B will focus on the imaginary reconstructive approach to statutory interpretation, where the Court examines the Act's purpose, goals, structure, and legislative history in order to ascertain what Congress likely intended by a word or phrase.

#### A. *Plain Meaning and Textualism*

Plain Meaning is the most prominent tool of statutory interpretation.<sup>219</sup> Indeed, the Supreme Court has held that when “the words of the statute are unambiguous, the ‘judicial inquiry is complete.’”<sup>220</sup> First,

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<sup>214</sup> See *Minnehaha Creek Watershed Dist. v. Hoffman*, 597 F. 2d 617, 623 (5th Cir. 1979) (stating that the second prong of *The Daniel Ball* test has “remained unchanged” for the application of the RHA).

<sup>215</sup> See 474 U.S. at 139.

<sup>216</sup> *Id.* at 134 (discussing Army Corps's conclusions that adjacent wetlands may serve to filter and purify water that drains into adjacent waterways).

<sup>217</sup> See, e.g., *SWANCC v. U.S. Army Corps of Engineers*, 531 U.S. 159, 164 (discussing 1986 “Migratory Bird Rule” promulgated by Army Corps to extend § 404 jurisdiction over intrastate waters used as habitat for certain types of birds).

<sup>218</sup> See *infra* Part III.A; Part III.B.

<sup>219</sup> See Katherine Clark & Matthew Connolly, *A Guide to Reading, Interpreting and Applying Statutes*, THE WRITING CTR. AT GEORGETOWN UNIV. LAW CTR. 3 (2006), available at <http://www.law.georgetown.edu/academics/academic-programs/legal-writing-scholarship/writing-center/upload/statutoryinterpretation.pdf>.

<sup>220</sup> *Desert Place, Inc. v. Costa*, 539 U.S. 90, 98 (2003) (citing *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992)).



textualists place significance on every word within a statute; no word is treated as surplusage.<sup>221</sup> Second, textualists often interpret statutes by the “ordinary” or “reasonable” meaning of the words within the statute.<sup>222</sup> Courts use several methods to ascertain a word’s “ordinary” meaning.<sup>223</sup> First, many statutes contain sections with statutory definitions.<sup>224</sup> Statutory definitions are the first and best source to ascertain the meaning of a word in a statute,<sup>225</sup> and govern how the term is defined.<sup>226</sup> Courts also often use dictionaries to find the “ordinary” meaning of words.<sup>227</sup> However, dictionaries may not contain a dispositive definition; many words have several alternate meanings.<sup>228</sup> Under these circumstances, the context of a word is often the best guide for ascertaining the most appropriate meaning.<sup>229</sup>

These principles are the guiding tools behind the textualist approach to statutory interpretation.<sup>230</sup> This section will examine how three major Supreme Court decisions interpreted language within the CWA following the textualist principles and how those interpretations have affected wetland protection. The cases examined are: *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (“SWANCC”),<sup>231</sup> *Rapanos v. United States*,<sup>232</sup> and *Gwaltney Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*<sup>233</sup>

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

Following the *Riverside Bayview* decision, the Supreme Court once again examined the scope of Army Corps’s authority over wetlands in

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<sup>221</sup> Clark & Connolly, *supra* note 219, at 6.

<sup>222</sup> *Id.* at 3.

<sup>223</sup> *Id.*

<sup>224</sup> *E.g.*, 33 U.S.C. § 1362 (2012).

<sup>225</sup> Clark & Connolly, *supra* note 219, at 3.

<sup>226</sup> Yule Kim, *Statutory Interpretation: General Principles and Recent Trends*, CONG. RESEARCH SERV. CRS-5 (Aug. 31, 2008), available at <http://www.fas.org/sgp/crs/misc/97-589.pdf>.

<sup>227</sup> *Id.* at CRS-6.

<sup>228</sup> *Id.* at CRS-6 to CRS-7.

<sup>229</sup> *Id.*

<sup>230</sup> See WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 742 (3rd ed. 2001) (discussing the principles behind New Textualism).

<sup>231</sup> 531 U.S. 159 (2001).

<sup>232</sup> 547 U.S. 715 (2006).

<sup>233</sup> 484 U.S. 49 (1987).

SWANCC.<sup>234</sup> The case involved the “Migratory Bird Rule,” passed one year following the *Riverside Bayview* decision.<sup>235</sup> The rule extended § 404 authority over any intrastate water used as habitat by birds protected under the Migratory Bird Treaties, birds that cross state lines, or any endangered species of birds.<sup>236</sup> The Petitioner purchased a site that contained several long-abandoned sand and gravel pits.<sup>237</sup> After long abandonment, a successional forest overtook the site and the pits became seasonal ponds often used by birds during migration.<sup>238</sup> Petitioner planned to transform the site into a disposal site for nonhazardous solid waste.<sup>239</sup> SWANCC applied for a § 404 permit, was denied, and filed suit.<sup>240</sup>

Like *Riverside Bayview*, the crux of the case hinged on the meaning of “navigable waters.”<sup>241</sup> The Court discussed several arguments presented by Army Corps in support of its defense of the Migratory Bird Rule, including legislative intent and history, but the Court focused its inquiry on the plain language of the statute.<sup>242</sup> It reasoned, “subsequent history is less illuminating than contemporaneous evidence . . . respondents face a difficult task in overcoming the *plain text* and import of § 404(a).”<sup>243</sup>

By this principle, the Court refused to interpret the Act in a manner that would treat the word “navigable” in “navigable waters” as mere surplusage.<sup>244</sup> The Court recognized that the term may have limited power, as discussed in *Riverside Bayview*, but “it is one thing to give a word limited effect and quite another to give it no effect whatever.”<sup>245</sup> Thus, the Court concluded that by including the word “navigable” in the CWA, Congress showed that to some degree it intended to extend CWA authority only over waters that are or could reasonably be made into navigable waters.<sup>246</sup>

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<sup>234</sup> 531 U.S. 159 (2001).

<sup>235</sup> *Id.* at 164.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.* at 163.

<sup>238</sup> *Id.* at 163–65.

<sup>239</sup> *Id.* at 163.

<sup>240</sup> 531 U.S. at 165.

<sup>241</sup> *Id.* at 165–66.

<sup>242</sup> *Id.* at 170.

<sup>243</sup> *Id.* (emphasis added).

<sup>244</sup> *Id.* at 172.

<sup>245</sup> *Id.*

<sup>246</sup> 531 U.S. at 172. Specifically, the Court asserted that Army Corps only has authority over those waters which “were or had been navigable in fact or could reasonably be made so.” *Id.*

*SWANCC* represents a straightforward application of the concepts behind the plain meaning theory.<sup>247</sup> The Court was compelled to give the word “navigable” *some* meaning; it refused to treat the word as mere surplusage.<sup>248</sup> The following Supreme Court decision to examine § 404’s scope over wetlands contained a far murkier application of the “plain meaning” doctrine.

## 2. *Rapanos v. United States*

*Rapanos v. United States* involved a landowner developing his property by filling wetlands.<sup>249</sup> The Petitioner filled the wetlands without obtaining a § 404 permit, and Army Corps sued.<sup>250</sup> The wetlands in question were not directly adjacent to a waterway, but did lie near ditches which emptied into traditional navigable waters.<sup>251</sup> Justice Scalia, a self-proclaimed textualist, announced the judgment of the Court in a plurality decision.<sup>252</sup> Given Scalia’s textualist approach, he focused heavily on the language used in the governing provisions.<sup>253</sup>

He began with the language in § 301, from which § 404 derives its power to regulate the dredging and filling of waterways and wetlands.<sup>254</sup> Section 301 provides that “the discharge of any pollutant by any person shall be unlawful.”<sup>255</sup> Scalia, recognizing that statutory definitions govern the meanings of words within the statute, looked to § 502, the definitions provision of the CWA, to ascertain the meaning of words in § 301.<sup>256</sup> First, he conceded that “pollutant” is defined broadly “to include not only traditional contaminants, but also solids such as ‘dredged spoil, . . . rock, sand, [and] cellular dirt.’”<sup>257</sup> However, what he found to be “most relevant,”

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<sup>247</sup> See Clark & Connolly, *supra* note 219, at 6 (stating that words in a statute cannot be treated as surplusage).

<sup>248</sup> 531 U.S. at 172. Courts will typically only treat a word in a statute as surplusage if the word is repugnant to the rest of the statute. Clark & Connolly, *supra* note 219, at 9.

<sup>249</sup> 547 U.S. 715, 719 (2006).

<sup>250</sup> *Id.* at 715.

<sup>251</sup> *Id.* at 729.

<sup>252</sup> *Id.* at 715. The opinion was not a majority vote, but a plurality. See *id.* Justice Scalia wrote for the Court, his opinion joined by Roberts, Thomas, and Alito. *Id.* Justice Kennedy concurred with the judgment but wrote a separate opinion. 547 U.S. at 759–87.

<sup>253</sup> See *id.* at 723 (examining several words or phrases in the governing CWA provisions to focus his analysis).

<sup>254</sup> See 33 U.S.C. § 1311 (2006).

<sup>255</sup> Rapanos, 547 U.S. at 723 (quoting 33 U.S.C. § 1311(a) (2006) (internal quotations omitted)).

<sup>256</sup> *Id.*

<sup>257</sup> *Id.* (quoting 33 U.S.C. § 1362(6) (2006)).

was that the CWA defines “navigable waters” as “the waters of the United States, including the territorial seas.”<sup>258</sup> From here, Scalia dove into an exposition focused on the singular word “waters” to eviscerate attempts by Army Corps and EPA to use the Act to protect wetlands beyond those directly adjacent to traditionally navigable waters.<sup>259</sup>

Scalia primarily focused on the fact that Congress specified authority over “the waters of the United States” rather than “water of the United States.”<sup>260</sup> He found that the dictionary defines “waters” as water found in “streams and bodies forming geographical features such as oceans, rivers, [and] lakes.”<sup>261</sup> Comporting with this definition, he concluded that the term does not encompass “transitory puddles or ephemeral flows of water.”<sup>262</sup> He found Army Corps’s definition, which included ephemeral streams, wet meadows, storm sewers and culverts, man-made drainage ditches, among others, to go “beyond parody” of the plain language within the statute.<sup>263</sup>

Constraining the term “waters” to this single definition found within the dictionary, Scalia concluded that what all of these “waters” have in common is relative permanence; all are either standing or flowing bodies of water.<sup>264</sup> He further concluded that including channels containing “merely intermittent or ephemeral flow” within the purview of the term “waters” would patently go against the “commonsense understanding of the term.”<sup>265</sup>

Under this interpretation, Scalia created a “continuous surface connection” test for wetlands.<sup>266</sup> He held that this interpretation was consistent with *Riverside Bayview* because that decision “rested upon the inherent ambiguity in defining where water ends and abutting (‘adjacent’) wetlands begin.”<sup>267</sup> Thus, Scalia interpreted *Riverside Bayview* to not stand for the inclusion of wetlands under CWA protection, but only a confirmation that an agency may regulate a wetland when it is difficult to ascertain where a navigable water ends and a wetland begins. Under Scalia’s test, a wetland is only governed by § 404 if it shares a surface

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<sup>258</sup> *Id.* (quoting 33 U.S.C. § 1362(7) (2006)).

<sup>259</sup> *See id.* at 723–28 (discussing his interpretation of “waters of the United States”).

<sup>260</sup> *Id.* at 732.

<sup>261</sup> 547 U.S. at 732 (quoting Webster’s New International Dictionary (2d ed. 1954) (internal quotations omitted)).

<sup>262</sup> *Id.* at 733.

<sup>263</sup> *Id.* at 734.

<sup>264</sup> *Id.* at 732.

<sup>265</sup> *Id.* at 733–34.

<sup>266</sup> *Id.* at 742.

<sup>267</sup> 547 U.S. at 742.

connection with a water body which would ordinarily be covered under the CWA.<sup>268</sup>

Scalia's conclusions rested on "plain meaning" concepts of statutory interpretation.<sup>269</sup> In some regards, Justice Scalia very adamantly utilizes the tools typically common to this approach. For instance, he finds support for his interpretation by referentially looking to the definitions section of the CWA.<sup>270</sup> He also uses the dictionary to assist him in ascertaining the meaning behind "waters,"<sup>271</sup> and discounts expansions to the term which would not comport with the "commonsense understanding" of the term.<sup>272</sup> However, Scalia ignores certain critical aspects behind the "plain meaning" theory in order to justify his conclusions.

As discussed previously, some dictionary terms have multiple alternative meanings.<sup>273</sup> Under such circumstances, the *context* of a word within a statute should be instructive in determining which meaning is most applicable.<sup>274</sup> Justice Kennedy, in his concurring opinion, notes that the term "waters" has more than one definition within the dictionary.<sup>275</sup> While Scalia largely hinges his holding by reasoning that the term "waters" clearly denotes a permanent or semi-permanent standing or flowing body of water, Kennedy notes that "waters" can also mean "flood or inundation," both of which are "impermanent by definition."<sup>276</sup> Thus, Kennedy focused his opinion on the larger context of the word within the statute by focusing on the overall purpose behind the CWA to discern meaning.<sup>277</sup>

### 3. *Gwaltney Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*

While the interpretation of § 301 in the context of § 404 has had the greatest and most direct impact on wetland protection efforts, statutory interpretations of other CWA provisions carry the potential to further

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<sup>268</sup> *Id.*

<sup>269</sup> *See id.* at 746, 755 (stating that Justice Kennedy's concurring opinion and the dissent are only able to reach their conclusions by largely "ignoring the text of the statute").

<sup>270</sup> *See id.* at 723 (referring to the definition of "navigable waters" as the primary starting point for his analysis); *see also id.* at 735 (finding that "most significant of all" the CWA defines channels and conduits of intermittent flows of water separately from "navigable waters" by including them in the definition for "point source").

<sup>271</sup> *Id.* at 732.

<sup>272</sup> 547 U.S. at 733–34.

<sup>273</sup> Kim, *supra* note 226, at CRS-6.

<sup>274</sup> *Id.* at CRS-6 to CRS-7.

<sup>275</sup> *Rapanos*, 547 U.S. at 770.

<sup>276</sup> *Id.*

<sup>277</sup> *See id.* at 760–78.

constrain these protections. Citizen suits pursuant to environmental statutes comprise the vast majority of enforcement actions.<sup>278</sup> For instance, between 1993 and 2002, citizen suits comprised seventy-five percent of all enforcement actions for cases involving the Endangered Species Act, the Clean Air Act, the Resource Conservation and Recovery Act, and the Clean Water Act.<sup>279</sup> Thus, any constraints on citizen suit provisions carry great potential to impact the viability of the majority of enforcement actions.<sup>280</sup>

Within the purview of § 505 of the CWA, the citizen suit provision, the seminal case of *Gwaltney Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*<sup>281</sup> did precisely that.<sup>282</sup> *Gwaltney* involved a § 402 violation to § 301.<sup>283</sup> A facility exceeded the conditions of its NPDES permit and Respondents sued pursuant to § 505.<sup>284</sup> The violations occurred between 1981 and 1984, with the last violation recorded in May, 1984.<sup>285</sup> Respondents filed their notice of intent to sue in February, 1984, and filed suit in June, 1984.<sup>286</sup> Section 505 of the CWA states that:

[A]ny citizen may commence a civil action on his own behalf . . . against any person . . . who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or State with respect to such a standard or limit.<sup>287</sup>

Because the Respondents in *Gwaltney* brought suit one month after the facility's last cited violation, the Court examined the meaning of "to be in violation of" within the context of § 505.<sup>288</sup> The majority found that the "most natural reading" of "to be in violation" is that the alleged violator

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<sup>278</sup> Edward Lloyd, *Citizen Suits and Defenses Against Them*, SR045 ALI-ABA 1141, 1146 (2010).

<sup>279</sup> *Id.*

<sup>280</sup> *Id.* (describing the large impact of citizen suits on the environmental enforcement landscape).

<sup>281</sup> 484 U.S. 49 (1987).

<sup>282</sup> *See id.* at 57 (stating that citizen-plaintiffs may only sue for violations which are continuous or intermittent).

<sup>283</sup> *See id.* at 52–53 (describing the statutory scheme of NPDES permits and the petitioner's violations to its permit).

<sup>284</sup> *Id.* at 54.

<sup>285</sup> *Id.* at 53–54.

<sup>286</sup> *Id.* at 54.

<sup>287</sup> 33 U.S.C. § 1365 (1982) (emphasis added).

<sup>288</sup> *See* 484 U.S. at 56 (stating that the Court would resolve the "three-way conflict" among circuits in determining when a defendant is in violation of the Act).

must be in a state of either continuous or intermittent violations.<sup>289</sup> The Court elaborated that this means there must be a reasonable likelihood that the past polluter will continue to pollute in the future.<sup>290</sup>

The Court supported its conclusion by examining the language in the remainder of § 505 and in the definitions section.<sup>291</sup> First, the Court found that language in § 505 is consistently in the present tense.<sup>292</sup> From there, it concluded that the definition of “citizen” contained the most helpful guide for present tense use in the Act.<sup>293</sup> The definition of “citizen” pertinently states: “a person . . . having an interest which *is* or *may be* adversely affected” by the defendant’s violations of the Act.<sup>294</sup> The Court concluded that this language “makes plain” that the use of the present tense in § 505 only allows redress from a violation that occurs in the present or future, but never the past.<sup>295</sup>

However, just as Justice Kennedy found that “waters” could have more than one meaning in *Rapanos*, Justice Scalia concluded that “to be in violation” has a more plausible meaning than what the majority found.<sup>296</sup> While in *Rapanos*, Kennedy’s dispute with Scalia’s interpretation was primarily over alternate definitions, Scalia’s dispute with the majority is over grammatical usage.<sup>297</sup> The majority concluded that “to be in violation” denotes an action, but Scalia emphasized that the language in § 505, “to be in violation,” as opposed to “to be violating,” or “to have committed a violation,” implies a state rather than an act: “the opposite of a state of compliance.”<sup>298</sup> He elaborated that in order for a violator to be in a “state of compliance,” she must take remedial steps “that clearly eliminate *the cause* of the violation.”<sup>299</sup>

Although Scalia claims that his standard and the Court’s would not differ in their practical application,<sup>300</sup> this conclusion is most likely only

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<sup>289</sup> *Id.* at 57.

<sup>290</sup> *Id.*

<sup>291</sup> *Id.* at 59.

<sup>292</sup> *Id.*

<sup>293</sup> *Id.*

<sup>294</sup> 33 U.S.C. § 1365 (1982) (emphasis added).

<sup>295</sup> 484 U.S. at 58.

<sup>296</sup> *Id.* at 67–69.

<sup>297</sup> Compare *Rapanos*, 547 U.S. 715, 770 (2006) (stating that a “full reading” of the dictionary definition for “waters” can have multiple meanings and does not inherently imply permanence), with *Gwaltney*, 484 U.S. at 69 (stating that the phrase “to be in violation” suggests a state, rather than an act).

<sup>298</sup> 484 U.S. at 69.

<sup>299</sup> *Id.* (emphasis added).

<sup>300</sup> *Id.* at 70. In fact, Scalia believes his standard would “almost certainly produce identical results in this lawsuit.” *Id.*

true for cases involving violations to § 402 NPDES permit violations.<sup>301</sup> Because the nature of a violation to a § 402 permit and a § 404 permit are vastly different, the “remedial steps” necessary to be in compliance with a § 402 permit are very different from those of a § 404 permit.<sup>302</sup> Violations to a § 402 permit stem from a facility discharging more pollutants than its permit allows.<sup>303</sup> When the facility ceases discharging excessively, it is in compliance.<sup>304</sup> Thus the violating act and state of non-compliance are one and the same—excessive discharges. Section 404 permits differ in that they do not involve effluent limitations, but involve a permit to fill a specific site.<sup>305</sup> When a violator has exceeded her permit, the *only* way in which she can come “into compliance” with her permit is to remove the excess fill until she returns to the parameters of her permit.<sup>306</sup> Thus, while someone violating a § 402 permit comes into compliance by ceasing prohibited acts—discharging pollutants, for example—a person violating § 404 does not come into compliance by ceasing the act of discharging because the fill remains in the waterway. By constraining the reading of § 505 to allow citizens to only sue when the violator is actively discharging, citizens have no way of enforcing § 404 when they only find a violation after a wetland has already been filled.

### B. *Purpose and Legislative History*

A second, often subsidiary approach to statutory interpretation is the use of the purposes and legislative history of a statute to ascertain

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<sup>301</sup> See *North Carolina Wildlife Federation v. Woodbury*, 1989 WL 106517, at \*3 (E.D.N.C. Apr. 25, 1989). Many subsequent courts that encounter § 505 citizen suits for § 404 violations cite the Scalia concurrence precisely because its application creates a very different result for § 404 cases involving fill materials. See *id.* (distinguishing between various types of permit violations; finding that Scalia’s concurrence only applies to those materials susceptible to remediation); see also *Mountain Park, GA v. Lakeside at Ansley, LLC*, 560 F. Supp. 2d 1288, 1294 (emphasizing Scalia’s language that states that a company would be “in violation” until it takes remedial measures that “clearly eliminate the cause of the violation”).

<sup>302</sup> See *Mountain Park*, 560 F. Supp. 2d at 1296 (distinguishing between a violation from a leachate plume which dissipates and dissolves over time, and that from fill material which stays intact and thus continues to have roughly the same net polluting effect years or decades after the deposit).

<sup>303</sup> See, e.g., *Gwaltney*, 484 U.S. at 53–54 (discussing the actions which led to the Gwaltney company violating its discharge permit).

<sup>304</sup> See *id.* at 70 (stating that the Court’s standard and Scalia’s would “produce identical results” in this lawsuit because the Petitioner, by no longer exceeding his NPDES effluent limitations, has taken remedial steps which cured all past violations).

<sup>305</sup> 33 U.S.C. § 1344(a) (2012).

<sup>306</sup> 33 U.S.C. § 1344(c) (2012) (authorizing the Administrator to place restrictions on areas for the purposes of a disposal site).



Congressional intent behind certain words.<sup>307</sup> Often referred to as imaginary reconstruction, the court attempts to use clues, such as statutory goals and legislative documents, to conclude what Congress most likely meant by a word or phrase within a statute.<sup>308</sup> This section will examine two cases, *Rapanos* and *SWANCC*, to show how the use of imaginary reconstruction has impacted the regulation of wetlands under § 404.

1. *Rapanos v. United States*

In *Rapanos*, Justice Kennedy employs an approach consistent with imaginary reconstruction.<sup>309</sup> Justice Kennedy opens his discussion by stating the central goal of the CWA.<sup>310</sup> Like Scalia, Kennedy initiates his analysis by examining the relevant statutory definitions applicable to § 301, and identifies the term “navigable waters” as the most relevant.<sup>311</sup> However, Kennedy dismisses Scalia’s approach of defining the term “waters” without consideration of the central goals and purpose of the CWA.<sup>312</sup> He states that a requirement of permanent standing or flowing water “makes little practical sense in a statute concerned with downstream water quality.”<sup>313</sup> While Scalia criticizes Kennedy’s opinion for “ignoring the text of the statute,”<sup>314</sup> Kennedy criticizes Scalia’s opinion for being “inconsistent with the Act’s text, structure, and *purpose*.”<sup>315</sup>

Kennedy ultimately hangs his hat on the “significant nexus” reasoning discussed in *Riverside Bayview*, and reiterated in *SWANCC*.<sup>316</sup> Quoting *Riverside Bayview*, Kennedy reaffirmed that “[i]f it is reasonable . . . for Army Corps to conclude that in the majority of cases, adjacent wetlands have significant effects on water quality and the aquatic ecosystem, its

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<sup>307</sup> See ESKRIDGE ET AL., *supra* note 230, at 680–81.

<sup>308</sup> See *id.* at 684 (characterizing imaginary reconstruction as an approach that uses available evidence to determine what the legislature likely intended by the language used in the statute).

<sup>309</sup> See 547 U.S. 715, 760–78 (2006).

<sup>310</sup> *Id.* at 759.

<sup>311</sup> See *id.* at 760 (stating that the “outcome turns on whether [“navigable waters”] reasonably describes certain Michigan wetlands Army Corps seeks to regulate”).

<sup>312</sup> *Id.* at 769.

<sup>313</sup> *Id.*

<sup>314</sup> *Id.* at 755.

<sup>315</sup> 547 U.S. at 776 (emphasis added).

<sup>316</sup> See *id.* at 767 (“it was the significant nexus between wetlands and ‘navigable waters . . . that informed our reading of the [Act] in *Riverside Bayview Homes*.” (quoting *SWANCC*, 531 U.S. 159 (2001)). Although *SWANCC* ruled in favor of the Petitioner on other grounds, the Court recognized that the “significant nexus” that existed between the wetland and navigable water in *Riverside Bayview* remained a legitimate application of Army Corps’s authority. *SWANCC*, 531 U.S. 159, 167 (2001).

definition can stand.”<sup>317</sup> He argued that the statute’s goals and purposes must inform the meaning of “significant nexus.”<sup>318</sup> If the wetland, either alone or when combined with similarly situated lands, affects the chemical, physical, and biological integrity of the regulated “navigable water,” then it has a sufficient “significant nexus” to be regulated under § 404.<sup>319</sup>

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

While *Riverside Bayview* and the Kennedy opinion in *Rapanos* represent the use of the CWA’s purpose to provide limited support for wetland protection, the Act’s goals do not always align with wetland protection goals. For instance, in *SWANCC* the inclusion of the word “navigable” within the statute was not the sole reason for the Court’s decision.<sup>320</sup> The Court found that Army Corps’s interpretation also raised “significant constitutional questions,” specifically regarding the States’ traditional power over “land and water use.”<sup>321</sup> In order to determine whether Congress intended to encroach on a traditional state power, the Court looked to § 101 of the CWA, the goals provision.<sup>322</sup> Section 101(b) states “[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to . . . plan the development and use (including restoration, preservation, and enhancement) of land and water resources.”<sup>323</sup> Based on this goal, the Court concluded that the statute intended, as much as possible, to avoid significant constitutional and federalism questions presented by a broad interpretation of “navigable waters,” thus choosing a more conservative interpretation.<sup>324</sup>

#### IV. FUTURE OF WETLANDS UNDER THE CLEAN WATER ACT

The future of wetland protection under the CWA is currently very murky. Supreme Court decisions have led to confusion in lower courts and governing agencies alike. This Part will examine the current state, and possible future, of wetland protection in light of currently developing law, as

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<sup>317</sup> *Rapanos*, 547 U.S. at 772–73 (quoting *Riverside Bayview*, 474 U.S. 121 (1985)).

<sup>318</sup> *Id.* at 779.

<sup>319</sup> *Id.* at 780.

<sup>320</sup> 531 U.S. at 174.

<sup>321</sup> *Id.*

<sup>322</sup> *Id.*

<sup>323</sup> 33 U.S.C. § 1251(b) (2000).

<sup>324</sup> 531 U.S. at 174.

well as how that developing law may be affected by the Supreme Court's current trend in statutory interpretation. Part IV.A will discuss EPA's current proposed rule, which attempts to clarify the meaning of "waters of the United States," and how that definition may be inconsistent with how the Supreme Court has read the Act. Part IV.B will examine the legacy of cases that have followed *Gwaltney*, and how they have tried to reconcile *Gwaltney*'s holding with § 404 enforcement actions. It will also discuss whether these lower court interpretations of *Gwaltney* are consistent with the original Supreme Court decision, and whether they would likely withstand the Court's interpretation of § 505 if the issue were to ever be re-examined by the Supreme Court in the context of § 404 violations.

A. *EPA and Corps's New Proposed Definition for "Waters of the United States"*

Despite the Supreme Court's continued narrowing of the CWA's jurisdiction over wetlands, EPA and Army Corps continue to try to clarify and solidify a place for wetlands under the Act.<sup>325</sup> In March, 2014, EPA proposed a new rule that would redefine "waters of the United States."<sup>326</sup> The newly proposed rule seeks to define "waters of the United States" in a manner that is "consistent with the science and the . . . Supreme Court cases."<sup>327</sup>

The most major change to the rule would delete the language in 33 CFR § 328.3(a)(3) that grants EPA and Corps jurisdiction over all "other waters"<sup>328</sup> that are or could be used for industrial purposes by industries in interstate commerce, and has replaced it with jurisdiction over all "other waters" that, on a case-by-case basis, have a significant nexus to a traditional navigable water.<sup>329</sup> The new language is an attempt to codify the Kennedy opinion in *Rapanos*, granting EPA and Corps authority over any wetland or other nonjurisdictional water that shares a "significant nexus" with a jurisdictional water, i.e., a navigable water.<sup>330</sup> However, the proposed rule suffers from a major potential weakness. The proposed rule,

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<sup>325</sup> Definition of "waters of the United States" under the Clean Water Act 79 Fed. Reg. 22188 (proposed Apr. 21, 2014).

<sup>326</sup> *Id.*

<sup>327</sup> *Id.* at 22192. According to the proposed rule, reconciling the science with the Supreme Court decisions is no easy task. *See id.* at 22195–96. The agencies discuss how "significant" is not a scientific term, but rather a determination of the agencies in light of the law and science. *Id.*

<sup>328</sup> 33 C.F.R. § 328.3(a)(3) (including wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds).

<sup>329</sup> 79 Fed. Reg. at 22192.

<sup>330</sup> *See id.* at 22211–17.

although careful not to classify wetlands as a navigable water, continues to refer to wetlands as “waters of the United States.”<sup>331</sup>

By choosing to remove and redefine its definition of “other waters” found in 33 CFR § 328.3(a)(3), EPA and Corps seem to assume that *Rapanos* and *SWANCC* were decided against the agencies because the wetlands in question were not interstate waters. This is clear from the fact that the new rule eliminated the language that granted EPA and Corps jurisdiction over intrastate waters, including lakes, rivers, and streams, but retains jurisdiction over any type of aquatic ecosystem that is “interstate” in nature, including wetlands.<sup>332</sup>

The policy reasons for this interpretation are consistent with the agency’s previous attempts to interpret the CWA in a manner that protects all aquatic ecosystems. Although intrastate aquatic ecosystems could not categorically be regulated under the CWA, the rule would still cover many of the nation’s aquatic ecosystems, including those that are intrastate, under the rule’s definition of “significant nexus.”<sup>333</sup> Consistent with the Act’s stated purpose, the rule would deem any aquatic ecosystem to have a “significant nexus” with a traditional waterway if that ecosystem itself or in the aggregate with similarly situated ecosystems had an impact on a traditional navigable waterway’s chemical, physical, or biological integrity.<sup>334</sup>

This interpretation is inconsistent with *SWANCC* and *Rapanos*. As discussed in Part III, the Supreme Court has interpreted the Act in a manner consistent with its original pollution control purpose, and has not expanded the scope of the Act beyond that.<sup>335</sup> Yet the new rule issued by EPA, while frequently discussing the Act’s pollution control purpose, also discusses how the new rule will have many environmental benefits; many of which are focused on preserving aquatic ecosystems and the benefits they provide beyond water quality.<sup>336</sup> The rule retains a strong emphasis on trying to protect a range of aquatic ecosystems, especially by trying to

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<sup>331</sup> See *id.* at 22191 (stating that “[w]aters of the United States” include wetlands); *id.* at 22193 (including interstate wetlands under the definition of “waters of the United States”); *id.* at 22197 (stating that some non-adjacent waters may have a significant nexus to traditional navigable waters).

<sup>332</sup> Compare *id.* at 22193 with 33 CFR § 328.3(a)(3).

<sup>333</sup> See 79 Fed. Reg. at 22211–17.

<sup>334</sup> *Id.* at 22211.

<sup>335</sup> See *supra* Part III.

<sup>336</sup> See Definition of “waters of the United States” under the Clean Water Act 79 Fed. Reg. at 22194 (mentioning that the rule may impact water quality, fisheries, recreation, and other ecological services); *id.* at 22214 (discussing biological connectivity of aquatic ecosystems, where some species may have different stages of their life cycle in different ecosystems).

retain authority over all interstate wetlands as well as demonstrating through hundreds of scientific studies the impact that one or an aggregate of “similarly situated” wetlands can have on a traditionally navigable waterway.<sup>337</sup>

The majority of the rule is consistent with the Kennedy opinion, and should be able to withstand Supreme Court scrutiny. However, in its attempt to gain wide-breadth jurisdiction over wetlands, EPA and Corps have not addressed some of the key points raised in *SWANCC* and *Rapanos* that may narrow the rule’s jurisdiction. For instance, in *SWANCC*, the most determinative point that led to the court finding against Army Corps was the fact that it held that “navigability” must have *some* meaning.<sup>338</sup> Specifically the Court held that the CWA only had jurisdiction over waterways that “were or had been navigable in fact or which could reasonably be so made.”<sup>339</sup>

Harkening back to *The Daniel Ball*, the Supreme Court today defines “navigable in fact” essentially the same way as the first prong of *The Daniel Ball* test. That is, the waterway must be susceptible to being used, in its ordinary condition, “as highways for commerce . . . modes of trade and travel on water.”<sup>340</sup> The court in *Callaway* concluded that the definition of “navigable waters” under the CWA cannot be limited to the traditional test for navigability, i.e., *The Daniel Ball* test.<sup>341</sup> Given that *The Daniel Ball* test consists of two prongs, and the Supreme Court has explicitly stated the first prong applies to the CWA’s jurisdiction, it is the *second* prong, the requirement that waters be interstate, that does not apply.<sup>342</sup> This interpretation is consistent with *SWANCC*, where the Court concluded that Army Corps could only claim jurisdiction over waters that are navigable in fact or could reasonably be made to be so.<sup>343</sup>

This is nearly the opposite of the approach EPA and Corps took in their proposed rule. They concluded that they retained jurisdiction over all interstate waters “including wetlands,” but gave up jurisdiction over all intrastate waters, including those which are navigable in fact,

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<sup>337</sup> See *id.* at 22200 (defending its continued inclusion of interstate wetlands in the definition of “waters of the United States”); *id.* at 22212–13 (discussing the definition of “similarly situated”); *id.* at 22222 (summarizing the scientific studies in support of the proposed rule).

<sup>338</sup> 531 U.S. 159, 172 (2001).

<sup>339</sup> *Id.*

<sup>340</sup> See *PPL Montana v. Montana*, 132 S.Ct. 1215, 1228 (2012) (quoting *The Daniel Ball*, 77 U.S. 557 (1870)).

<sup>341</sup> See *Natural Res. Def. Council, Inc. v. Callaway*, 392 F. Supp. 685, 686.

<sup>342</sup> See *The Daniel Ball*, 77 U.S. at 564.

<sup>343</sup> 531 U.S. at 172.

such as lakes, rivers, and streams.<sup>344</sup> EPA and Corps support their decision to continue to include interstate wetlands in their definition for “waters of the United States” primarily because they conclude that Congress intended the term “navigable waters” to include interstate waters without imposing a requirement that they be traditional navigable waters.<sup>345</sup> Although this is true, the limits on the expansion, as discussed, still require that the waters be navigable in fact, which would not include many types of interstate wetlands.

EPA and Corps’s jurisdiction over wetlands does not stem from them being “waters of the United States,” under the Supreme Court’s logic. In *Riverside Bayview*, *SWANCC*, and *Rapanos*, the Court never stated that wetlands were “waters” for CWA jurisdictional purposes.<sup>346</sup> What those cases continued to reiterate up through the Kennedy opinion was that it is the wetland’s *impact* on “waters of the United States” that grants Army Corps the authority to regulate them under the CWA.<sup>347</sup> Thus, these cases imply that without such an impact, a wetland, unless navigable in fact, can never fall under the CWA jurisdiction, because a wetland in itself is not a “water.”

Thanks to the enormous scientific undertaking that supports the rule’s conclusions regarding “other waters” impacts on traditional navigable waters, the rule, if passed, is still likely to protect many aquatic ecosystems, including wetlands. However, wetlands will likely never receive independent protection under the Act. Their protection is completely dependent on how they impact the water quality of downstream traditional navigable waterways, despite the enormous impact they can have on interstate commerce when destroyed.<sup>348</sup> If wetlands are to receive adequate protection in their own right, Congress must act as it did when the RHA ran up against its outer limits; Congress must pass a new statute with ecosystem protection in mind.

#### *B. Future of Enforcement for § 404 Actions*

*Gwaltney* resolved the limits of citizen suit enforcement for the CWA in the context of the § 402 permitting program, but many lower

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<sup>344</sup> See Definition of “waters of the United States” under the Clean Water Act 79 Fed. Reg. at 22192–93.

<sup>345</sup> *Id.* at 22200.

<sup>346</sup> See *supra* Parts II.C–III.

<sup>347</sup> See *id.*

<sup>348</sup> See *supra* Part I.B.

courts have declined to extend its logic to § 404 enforcement actions. The “continuous or intermittent” violation requirement decided in *Gwaltney* binds all subsequent cases involving citizen suits under the CWA.<sup>349</sup> However, *Gwaltney* did not specifically identify when a violation is no longer continuous.<sup>350</sup> In *Gwaltney*, the Petitioners had ceased exceeding the parameters of their NPDES permit a month before the suit.<sup>351</sup> The Court determined that if *Gwaltney* was no longer violating its NPDES permit, the citizen group could not sue.<sup>352</sup> While a violating action under §§ 402 and 404 may be substantially similar,<sup>353</sup> many courts have found that ongoing violations are very different under the two statutes.<sup>354</sup>

Courts have relied a great deal on the differences in pollutants to find ongoing violations in § 404 cases where violations would not exist in § 402 cases. The courts emphasize that, unlike other pollutants, the polluting effects of fill materials do not significantly dissipate or dissolve over long periods of time, and thus the harm caused by the violation continues until the fill is removed.<sup>355</sup> Emphatically, the courts repeat that when the effects of a defendant’s violation continue to injure a citizen’s interests, then the violation itself is ongoing.<sup>356</sup> These courts agree that it is unlikely Congress intended such a result.<sup>357</sup>

The courts secondarily rely on the “remedial measures” standard set forth by Scalia in his concurrence. Several federal district courts have found the Scalia concurrence to be a more reasonable test for § 404 violations because they conclude that “it is not the physical act of discharging . . . that

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<sup>349</sup> 484 U.S. 49, 67 (1987) (remanding the case in order to determine whether there was a good-faith allegation of a continuing violation).

<sup>350</sup> Aiello v. Town of Brookhaven, 136 F. Supp.2d 81, 120 (E.D.N.Y. 2001).

<sup>351</sup> 484 U.S. at 53–54.

<sup>352</sup> *Id.* at 64.

<sup>353</sup> See 33 U.S.C. §§ 1342, 1344. In both circumstances, the violator exceeds her permit by discharging an excess of allotted pollutants.

<sup>354</sup> See, e.g., *City of Mountain Park, GA v. Lakeside at Ansley, LLC*, 560 F. Supp.2d 1288, 1296 (N.D. Ga. 2008) (noting that most cases split on *Gwaltney*’s application dependent on the type of pollutant).

<sup>355</sup> *Id.*

<sup>356</sup> See *id.* at 1293; see also *North Carolina Wildlife Federation v. Woodbury*, 1989 WL 106517, at \*2 (1990) (stating that it is the consequences of a violation which leads to the injury that gives a citizen standing to sue); see also *Greenfield Mills, Inc. v. Goss*, 2005 WL 1563433 (N.D. Ind. June 28, 2005) (quoting *Woodbury* 1989 WL 106517).

<sup>357</sup> See *Mountain Park*, 560 F. Supp. 2d at 1296 (asserting that Congress probably intended to allow citizens to sue in cases involving a filled wetland); see also *Greenfield Mills*, 2005 WL 1563433, at \*5 (N.D. Ind. 2005) (finding that Congress surely did not desire an outcome where citizens could not sue for a violation that continues to cause them harm).

leads to the injury . . . but the consequences of the discharge.”<sup>358</sup> Courts have found the Scalia opinion applicable to § 404 violations because dredged materials continue to leach pollutants long after their initial discharge and because dredged materials can be removed from the waterway while pollutants governed by § 402 cannot.<sup>359</sup>

Although the majority of lower courts conclude that § 404 violations are distinctly different from § 402 violations, it is questionable whether their interpretation would hold up if examined by the Supreme Court.<sup>360</sup> Largely, the opinions rely on distinguishing the consequences of fill materials from other pollutants,<sup>361</sup> and by focusing on the “remedial measures” standard in Scalia’s *Gwaltney* concurrence.<sup>362</sup>

The majority in *Gwaltney* focused on the act of violating—whether it has occurred, is occurring, or is likely to occur again—but made no mention of differentiating between types of polluting materials.<sup>363</sup> In fact, specific language within the majority opinion seems to stand directly opposed to the lower courts’ reliance on the consequences of a violation: “the most natural reading” of “continuous violation” is whether there is “a reasonable likelihood that a past polluter will continue to pollute in the future.”<sup>364</sup> This language implies that the nature of a pollutant is irrelevant, and that the only pertinent question is whether the polluter is likely to act again in a manner which will violate his permit.<sup>365</sup>

The plain meaning of the text of the Act forms the foundation for statutory interpretation.<sup>366</sup> Given that the Supreme Court has already

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<sup>358</sup> See *Mountain Park*, 560 F. Supp. 2d at 1293–94; see also *Woodbury*, 1989 WL 106517, at \*2.

<sup>359</sup> See *Mountain Park*, 560 F. Supp. 2d at 1296; see also *Woodbury*, 1989 WL 106517, at \*3.

<sup>360</sup> See *Mountain Park*, 560 F. Supp. at 1296 (noting that the majority of cases dealing with fill materials deem them to constitute an “ongoing” violation while they remain in the water, while the majority of cases involving other types of pollutants adopt the stricter interpretation).

<sup>361</sup> *Id.* (noting that unlike other pollutants which dissipate and dissolve, the net polluting effect for fill materials is roughly the same over years or decades); see also *Woodbury*, 1989 WL 106517, at \*2 (stating that it is the consequences of a violation which leads to the injury that gives a citizen standing to sue); see also *Greenfield Mills*, 2005 WL 1563433, at \*4 (quoting *Woodbury*, 1989 WL 106517).

<sup>362</sup> See *Mountain Park*, 560 F. Supp. 2d at 1296 (partially relying on Scalia’s conclusion that a polluter is in violation “so long as it has not put in place remedial measures that clearly eliminate the cause of the violation”) (quoting *Gwaltney*, 484 U.S. 49, 69 (1987)); see also *Woodbury*, 1989 WL 106517, at \*2 (quoting *Gwaltney*, 484 U.S. at 69).

<sup>363</sup> See 484 U.S. at 56–67.

<sup>364</sup> *Id.* at 57.

<sup>365</sup> See *id.*

<sup>366</sup> See *Clark & Connolly*, *supra* note 219, at 3.



ruled on the plain meaning of “continuous violation,” there is a strong possibility that the definition will be extended to all types of violations.<sup>367</sup> If the majority opinion of *Gwaltney* is extended to § 404, many citizen suits, which represent the majority of all enforcement actions, will be unable to bring suit against violators who have filled wetlands beyond permit limits.<sup>368</sup> Under the *Gwaltney* holding, citizen groups would have to catch a violator while in the act of filling a wetland, and would be unable to pursue an action if the damage is already complete.<sup>369</sup>

#### CONCLUSION

Although the future of wetland protection under the CWA may seem dim, EPA and Army Corps continue to push for new regulations that will clarify wetlands' place under the Act.<sup>370</sup> The proposed rule re-defining “waters of the United States” would lean toward pushing the Kennedy opinion in *Rapanos* by filing a concurrent report emphasizing the importance of streams and wetlands on downstream waterways regardless of the size or permanence of the water body.<sup>371</sup> The report has synthesized the results of 1,000 scientific, peer-reviewed studies to arrive at this conclusion.<sup>372</sup> Remaining in line with prior Supreme Court decisions, the agencies strongly emphasize how the new rule is intertwined with the protection of water quality of larger downstream waterways.<sup>373</sup> However, the case law has forced EPA and Army Corps to bend over backwards trying to protect the nation's diverse set of ecosystems classified as wetlands into the purview of the CWA's language.<sup>374</sup> The rule epitomizes

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<sup>367</sup> See, e.g., *Connecticut Coastal Fishermen Ass'n v. Remington Arms Co.*, 989 F.2d 1305, 1313 (2d Cir. 1993) (finding that the residual effects of a pollutant as it dissolves in a waterway does not constitute a “continuing violation”).

<sup>368</sup> See Lloyd, *supra* note 278, at 1159.

<sup>369</sup> See 484 U.S. at 57.

<sup>370</sup> See Lenny Bernstein, *EPA moves to Clarify Clean Water Act Protections; GOP Lawmaker Slams Effort*, THE WASHINGTON POST (Sep. 17, 2013), [http://articles.washingtonpost.com/2013-09-17/national/42145039\\_1\\_clean-water-act-small-streams-and-wetlands-protections](http://articles.washingtonpost.com/2013-09-17/national/42145039_1_clean-water-act-small-streams-and-wetlands-protections), archived at <http://perma.cc/RHR2-DU6K>.

<sup>371</sup> *Id.*

<sup>372</sup> *Id.*

<sup>373</sup> See *Clean Water Act Definition of “Waters of the United States,”* U.S. ENVTL. PROT. AGENCY (Sep. 24, 2013), <http://www2.epa.gov/sites/production/files/2014-04/documents/fr-2014-07142.pdf>.

<sup>374</sup> See *Importance of Waters and Wetlands Documented in New EPA Report*, AMMOLAND (Oct. 11, 2013), <http://www.ammoland.com/2013/10/importance-of-waters-and-wetlands-documented-in-new-epa-report/#axzz2hqCP5rGS>, archived at <http://perma.cc/Y3ZM-CTEC>

the agencies' restraints in providing wetlands with adequate protection under a statute targeted for water quality.

Ultimately, the CWA is a pollution-control statute, and was never intended to be a statute for ecosystem protection.<sup>375</sup> Just as Congress became frustrated with trying to use the RHA as a primary tool for pollution control, Army Corps and EPA's efforts to protect wetlands through the CWA have continued to be frustrated. While the agencies are hard at work to promulgate new regulations which will solidify wetlands' place within the term "waters of the United States," prior Supreme Court decisions have already severely limited the extent to which the term can apply to these ecosystems.<sup>376</sup> Given that the language in the Act is focused almost exclusively on pollution control, the agencies have little room to make a case for ecosystem protection based on the Act's language.

Currently, it is only the *Riverside Bayview's* focus on the benefits wetlands provide to the water quality of adjacent water bodies that provides wetlands any protection under the Act at all; all subsequent case law released by the Supreme Court has constricted these protections rather than expanding them.<sup>377</sup> As science continues to reveal more benefits that all wetlands provide, the need to preserve these ecosystems is greater than ever. It may be time for Congress to recognize the Act's inherent weaknesses in providing ecosystem protections and draft new legislation that focuses on these values rather than bending an old statute into a new form.

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(stating that compilation of scientific data could not draw a broadly applicable conclusion for all types of wetlands under the CWA).

<sup>375</sup> See *SWANCC*, 531 U.S. 159, 172 (2001).

<sup>376</sup> *Id.*

<sup>377</sup> *Id.*