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NAVIGATING THROUGH THE CONFUSION LEFT IN THE WAKE OF *RAPANOS*: WHY A RULE CLARIFYING AND BROADENING JURISDICTION UNDER THE CLEAN WATER ACT IS NECESSARY

KRISTEN CLARK*

INTRODUCTION

The contemporary version of the Clean Water Act ("CWA") was enacted through the 1972 amendments to the Federal Water Pollution Control Act of 1948, with the intent "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[1] In addition, the Clean Water Act has the ambitious goal that all waters in the United States be "fishable" and "swimmable."[2] With the 1972 amendments, Congress shifted away from state enforcement of water quality regulation and gave the Environmental Protection Agency ("EPA") and Army Corps of Engineers ("Army Corps") permitting authority under section 402 and section 404 of the CWA.[3]

Wetlands have only recently been recognized as a valuable natural resource.[4] In the past, it was common practice for wetlands to be drained and filled.[5] Now, section 404 of the CWA requires dischargers to obtain a permit from the Army Corps before discharging dredged or fill material into a wetland.[6] Wetlands encompass "swamps, marshes, bogs, bottom

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[1] 33 U.S.C. § 1251(a) (2012); SECTION OF ENV'T, ENERGY, AND RES., AM. BAR ASS'N, THE CLEAN WATER ACT HANDBOOK 11 (Mark A. Ryan ed., 3d ed. 2011). The specific provisions of the CWA establish water quality standards which serve as a benchmark for regulatory and non-regulatory programs to achieve that primary objective.

[2] *Clean Water Act*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/agriculture/lcwa.html (last updated Aug. 29, 2014), *archived at* http://perma.cc/WRW7-M7GK.

[3] ROBIN KUNDIS CRAIG, THE CLEAN WATER ACT AND THE CONSTITUTION 27 (2d ed. 2009).

[4] LINDA A. MALONE & WILLIAM M. TABB, ENVIRONMENTAL LAW, POLICY, AND PRACTICE 708 (2d ed. 2011).

[5] *Id.*

[6] 40 C.F.R. § 232.2 (2013); JAMES SALZMAN & BARTON H. THOMPSON, JR., ENVIRONMENTAL LAW AND POLICY 271 (3d ed. 2010) (explaining that dredged material means material that is excavated or dredged from waters of the United States. Fill materials mean any "pollutant" which replaces portions of the "waters of the United States" with dry land or which changes the bottom of a water body for a purpose).

lands, and tundra."[7] The discharge of dredged material is defined as "any addition of dredged material into, including redeposit of dredged material other than incidental fallback within the waters of the United States."[8] The discharge of fill material is "the addition of fill material into waters of the United States."[9]

Section 404 is not a statute that was designed with the purpose to preserve wetlands[10] and it has become highly contentious over the past decade.[11] Section 404 applies only to "navigable waters," defined by the CWA as all "waters of the United States including the territorial seas."[12] Understanding what falls within this term is crucial because discharges to water bodies that fall under the term "water[s] of the United States" "will require a permit under the CWA."[13] Landowners favor a limited scope of jurisdiction for EPA and the Army Corps, and they argue that section 404 does not apply to non-navigable wetlands.[14] Environmentalists and government regulators, on the other hand, want a broad interpretation of the scope of section 404.[15]

For a while, EPA used a broad interpretation of the scope of its authority, and courts and other actors gave deference to EPA's interpretation of the statute.[16] However, in the early 2000s, that changed with a series of Supreme Court cases culminating in *Rapanos v. United States*.[17] In *Rapanos*, the court split 4–1–4 with no opinion gaining a majority.[18] Multiple tests emerged from the case, and the limitations on EPA and Army Corps are unclear.[19] In the plurality opinion, a "relatively permanent" test emerged which requires a determination of whether there is a "relatively permanent flow" of water and a "continuous surface connection" between the wetland and the drainage ditches.[20]

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[7] MALONE & TABB, *supra* note 4, at 708.
[8] 40 C.F.R § 232.2.
[9] *Id.*
[10] MALONE & TABB, *supra* note 4, at 708.
[11] SALZMAN & THOMPSON, *supra* note 6, at 271.
[12] *Id.*
[13] SECTION OF ENV'T, ENERGY, & RES., *supra* note 1, at 11.
[14] SALZMAN & THOMPSON, *supra* note 6, at 271.
[15] *Id.*
[16] Stephen M. Johnson, *The Rulemaking Response to* Rapanos*, in* THE SUPREME COURT AND THE CLEAN WATER ACT 22, 22 (L. Kinvin Wroth ed., 2007).
[17] *Id.* at 22–23.
[18] *See* Rapanos v. United States, 547 U.S. 715, 718 (2006).
[19] *See, e.g.*, *id.*
[20] *Id.* at 732–33.

Justice Kennedy's opinion established a "significant nexus"[21] test whereby wetlands are covered by the statute if they significantly affect the chemical, physical, and biological integrity of traditional navigable waters.[22] This test imposes a significant burden on EPA and Army Corps because in order to establish a "significant nexus," they would have "to 'establish . . . on a case-by-case basis' that wetlands adjacent to non-navigable tributaries 'significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as "navigable."'"[23]

Both of these tests are narrower in scope than EPA's broader interpretation. Circuit courts disagree over which test applies, and the Supreme Court has yet to grant certiorari on cases which would clarify the issue.[24] Legislative efforts to address the issue, such as the Clean Water Restoration Act of 2009, have failed.[25] The confusion over which test should apply, as well as the lengthy case-by-case determinations required through the Kennedy opinion, have led to a decrease in agency efficiency and general enforcement.[26] As a result of Supreme Court cases and subsequent guidance, there are many waters that are now left unprotected.[27]

In the past, in an attempt to clear up the uncertainty, EPA and Army Corps have attempted rulemaking and issued guidance. In 2003, Army Corps and EPA announced that they were going to go through the rulemaking process.[28] They abandoned the effort by the end of the same year.[29] After two attempts (2008 and 2011), guidance has also proven to be insufficient to address the problems left in the wake of *Rapanos*. Industry officials and landowners are confused as to when a permit is necessary, and cases continue to be litigated on the issue. A change through the rulemaking process is necessary and beneficial, and will

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[21] *Id.* at 759.
[22] *Id.* at 780.
[23] *Id.* at 753.
[24] MALONE & TABB, *supra* note 4, at 743; Sean McLernon, *Clean Water Act Inconsistency Lingers Long After Rapanos*, LAW 360 (July 11, 2013, 6:09 PM), http://www.law360.com/articles/456546/clean-water-act-inconsistency-lingers-long-after-rapanos, *archived at* http://perma.cc/ZXW8-E5GJ.
[25] Clean Water Restoration Act, S. 787, 111th Cong. (2009).
[26] Jennifer L. Baader, *Permits for Puddles?: The Constitutionality and Necessity of Proposed Agency Guidance Clarifying Clean Water Act Jurisdiction*, 88 CHI.-KENT L. REV. 621, 622 (2013).
[27] *Overview: Clean Water Restoration Act of 2009*, CLEAN WATER ACTION, http://www.cleanwateraction.org/mediakit/overview-clean-water-restoration-act-2009 (last visited Oct. 27, 2014), *archived at* http://perma.cc/WJU2-NYTJ.
[28] *See* MALONE & TABB, *supra* note 4, at 723.
[29] *See id.*

finally clear up the issue of what constitutes a "navigable water" under the CWA.

In the rulemaking process, EPA relies on a scientific report as the basis for its draft rule.[30] Based on the findings in the scientific report, EPA has an opportunity to expand its jurisdiction to more closely resemble its original boundaries through the rulemaking process. Although the rulemaking process is time consuming, EPA needs a rule now because the confusion has lasted long enough, the Supreme Court has suggested that it will give *Chevron* deference to a rule, and the rule can re-establish broad jurisdiction while staying within the lawful confines of the CWA.

Because much of the confusion is a result of case and legislative history, Part I of this Note will discuss the history of the CWA, the case history surrounding the "navigable waters" confusion, and the current state of confusion. Part II will discuss EPA's opportunity to use scientific research to construct a broader scope of jurisdiction through the rulemaking process. Finally, Part III will discuss the benefits and detriments of adopting a rule and show (1) that it does not unlawfully expand CWA jurisdiction, (2) it is a necessary step towards protecting our nation's waters, and (3) it is important for a rule to be approved now.

I. PART I

A. History of the CWA

The contemporary CWA has its origins in the 1899 Rivers and Harbors Act and the FWPCA.[31] While the primary purpose of the Rivers and Harbors Act was to "ensure the free and open navigability of U.S. waters," it prohibited some discharges into navigable waters of the United States, making it an early tool against water pollution.[32] As industrialization increased, pollution received greater attention and the FWPCA was passed with the goal of protecting the nation's waters from chemical pollution.[33] In 1972, the FWPCA was amended with the intention to "restore and maintain the chemical, physical, and biological integrity of

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[30] *Documents Related to the Proposed Definition of "Waters of the United States" Under the Clean Water Act*, U.S. ENVTL. PROT. AGENCY, http://www2.epa.gov/uswaters/documents-related-proposed-definition-waters-united-states-under-clean-water-act (last updated Sept. 8, 2014), *archived at* http://perma.cc/A4Y2-QKJF.

[31] JOEL M. GROSS & KERRI L. STELCEN, CLEAN WATER ACT 5 (2d ed. 2012).

[32] *Id.*

[33] *Id.* at 6.

the Nation's waters."[34] When the amendments were enacted, the Act became known as the CWA, and it is the current federal law governing water pollution in the United States.[35]

Section 301(a) of the CWA prohibits unpermitted discharges of pollutants from point sources into "navigable waters."[36] To accomplish its goals, the CWA established two permitting methods. The first is the National Pollutant Discharge Elimination System ("NPDES"), established under section 402, which applies to all point source dischargers of all pollutants,[37] except "dredged and fill material." Point source dischargers of dredge and fill material fall under the permit program established under section 404.[38] The EPA administers the NPDES, and EPA and Army Corps jointly administer the section 404 permit program.[39] One of the goals of the 1972 amendments was to "repudiate limits that had been placed on federal regulation by earlier water pollution control statutes. . . ."[40] As a result of the amendments, for almost three decades there was broad federal jurisdiction over national waters.

Historically, Congress thought its power to regulate the nation's waters derived from the federal government's powers under the United States Constitution's Commerce Clause.[41] Because the Commerce Clause allows Congress to regulate commerce among the states, Congress believed that its power under the Commerce Clause was limited to navigable waterways. Therefore, when Congressional water legislation was passed, such as section 10 of the Rivers and Harbors Act, it only asserted authority over "navigable waters."[42] For this reason, when Congress drafted section 404 of the CWA, it used the same language. However, in order to broaden the

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[34] 33 U.S.C. § 1251(a) (2006).
[35] GROSS & STELCEN, *supra* note 31, at 7.
[36] 33 U.S.C. § 1311(a) (2006).
[37] Douglas R. Williams, *The Next Generation of Environmental and Natural Resources Law: What Has Changed in Forty Years and What Needs to Change as a Result: Toward Regional Governance in Environmental Law*, 46 AKRON L. REV. 1047, 1064 (2013) (citing Natural Res. Def. Council v. Costle, 568 F.2d 1369, 1377 (D.C. Cir. 1977) (holding that EPA lacks "authority to exempt categories of point sources from the permit requirements of § 402)).
[38] *See* 33 U.S.C. § 1344 (1987). *See also* OLGA L. MOYA & ANDREW L. FONO, FEDERAL ENVIRONMENTAL LAW: THE USER'S GUIDE 335 (2011).
[39] *See* CRAIG, *supra* note 3, at 27. *See also Section 404 Permitting*, U.S. ENVTL. PROT. AGENCY, http://water.epa.gov/lawsregs/guidance/cwa/dredgdis (last updated Mar. 13, 2013), *archived at* http://perma.cc/6LQX-55YH.
[40] United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 133 (1985).
[41] Baader, *supra* note 26, at 622.
[42] SALZMAN & THOMPSON, *supra* note 6, at 272.

jurisdiction of the CWA, Congress defined the term "navigable waters" to mean "waters of the United States."[43]

The CWA's legislative history supports the belief that Congress intended to make "the waters of the United States" encompass more waters than those traditionally thought of as navigable under prior programs such as the Rivers and Harbors Act.[44] According to the House report:

> One term the Committee was reluctant to define was the term "navigable waters." The reluctance was based on the fear that any interpretation would be read too narrowly. . . . "[t]he Committee fully intends that the term 'navigable waters' be given the broadest possible constitutional interpretation, unencumbered by agency determinations which have been made or may be made for administrative purposes."[45]

Congress's description of federal jurisdiction left room for interpretation and further development. Initially, Army Corps did not take advantage of its ability to take a broad view of its jurisdiction under the CWA. In *Natural Resources Defense Council v. Callaway*, environmental groups successfully challenged the position of Army Corps on CWA jurisdiction under section 404.[46] Army Corps took the narrow view that navigable waters only extended to "actually, potentially, or historically navigable waterways, which include few wetlands and virtually no freshwater wetlands."[47] Siding with the environmental groups, the district court concluded that Congress intended for CWA jurisdiction to go as far as its commerce powers permitted.[48]

The CWA gives EPA and Army Corps authority to define the term "waters of the United States."[49] Army Corps and EPA developed federal

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[43] *Id.*
[44] SECTION OF ENV'T, ENERGY, & RES., *supra* note 1, at 12.
[45] *Id.* (citing H.R. Rep. No. 92-911, at 131 (1972), reprinted in ENVTL. POLICY DIV., LIBRARY OF CONG., A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 818 (1973)).
[46] SALZMAN & THOMPSON, *supra* note 6, at 272.
[47] *Id.*
[48] *Id.*
[49] *See* U.S. ENVTL. PROT. AGENCY, SUPPLEMENTARY INFORMATION 5, *available at* http://op.bna.com/itr.nsf/id/rran-9d8qx7/$File/WOTUS%20scan.pdf (draft of proposed rule); *see also Leaked Draft of Water Jurisdiction Rule May Not Be Final EPA Position, Vilsack Says*, BLOOMBERG BNA (Jan. 17, 2014), http://www.bna.com/leaked-draft-water-n17179881420/,

regulations (last codified in 1986), which define the term "waters of the United States" as:

> (1) All waters which are currently used, or were used in the past, or may be susceptible to use in foreign commerce, including all waters which are subject to ebb and flow of the tide;
> (2) All interstate waters, including wetlands;
> (3) All "other waters" such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce . . .
> (4) All impoundments of waters otherwise defined as waters of the United States under this definition;
> (5) Tributaries of the waters identified in (1) through (4);
> (6) The territorial seas; and
> (7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (1) through (6).[50]

In the past, courts, including the United States Supreme Court, gave deference to EPA's interpretation of the statute when deciding cases that addressed CWA jurisdiction. In *United States v. Riverside Bayview Homes, Inc.,* the Supreme Court addressed whether section 404 applies to wetlands that are adjacent to navigable waterways but are not themselves navigable.[51] In its decision, the Court demonstrated *Chevron* deference, a standard which requires a court to defer to an agency's interpretation of a statute when the statute in question is ambiguous, where enforcement of such statute has been delegated to the agency, and where the agency's interpretation is not "arbitrary, capricious, or manifestly contrary to the

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archived at http://perma.cc/BLN4-LQXF (indicating that the draft rule does not necessarily reflect the final position of the EPA).

[50] 33 C.F.R. § 328.3(a) (2013) (Corps regulations); 40 C.F.R. § 122.2. (2013) (EPA regulations). 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 prevalance of vegetation typically adapted for life in saturated soil conditions." 40 C.F.R. § 122.2.

[51] Riverside Bayview Homes, Inc., 474 U.S. at 123.

statute."[52] The Court stated that adjacent wetlands are "inseparably bound up" with the waters that they border and upheld the Corps's inclusion of adjacent wetlands in its definition of "waters of the United States."[53] In reaching its decision, the Court stated that Congress acknowledged that in order to meet the broad objectives of the CWA, broad federal authority to control pollution would be needed because "[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source."[54]

B. Recent Supreme Court Cases Limiting the Scope of CWA Jurisdiction

Much of the confusion surrounding the interpretation of "navigable waters" is a result of Supreme Court decisions issued over the past decade in which the Court started to limit the breadth of the waters covered by the CWA. In the 1970s, when the CWA emerged in its current form, Congress had a successful track record of regulating aspects of society through its power over interstate commerce.[55] The Supreme Court frequently dismissed challenges to laws that have the Commerce Clause as their foundation.[56] Therefore, there was little incentive to defend the commerce rationale behind the major environmental laws and the Supreme Court upheld national environmental laws against attack.[57]

However, in a recent trend, the Court has been limiting Congress's power to regulate activities under the Commerce Clause. Recently, the Supreme Court has decided several cases which have chipped away at federal jurisdiction over national waterways. In *United States v. Lopez*, the Court ruled that regulation under the Commerce Clause is constitutional only when the regulated activity "substantially affects" interstate commerce.[58] This decision led to a number of challenges to existing federal statutes, including the CWA.[59]

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[52] *Id.* ("An agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress."); Chevron v. Natural Res. Def. Council, 467 U.S. 837, 844 (1984).
[53] *See* Riverside Bayview Homes, Inc., 474 U.S. at 134.
[54] *Id.*
[55] Bruce Myers & Jay Austin, *The Commerce Clause: Foundation for U.S. Environmental Law*, *in* PRINCIPLES OF CONSTITUTIONAL ENVIRONMENTAL LAW 37, 38 (James R. May ed., 2011).
[56] *Id.*
[57] *Id.*
[58] United States v. Lopez, 514 U.S. 549, 559 (1995).
[59] Myers & Austin, *supra* note 55, at 38.

1. *Solid Waste Agency of Northern Cook County (SWANCC) v. United States Army Corps of Engineers*

Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers ("*SWANCC*")[60] is the first of two cases which limited the prior broad federal jurisdiction under the CWA. Army Corps attempted to regulate isolated ponds at a proposed solid waste site because of the presence of migratory birds and the premise that birds generate interstate tourism business.[61] In a 5–4 decision, the Court held that the so-called "Migratory Bird Rule" exceeded the authority of Army Corps under section 404 of the CWA.[62] The Court clarified that in the *Riverside* case, "it was the significant nexus between the wetlands and 'navigable waters' that informed [the Court's] reading of the CWA."[63] The isolated ponds that had formed at the proposed waste site lacked the significant nexus.[64] Following the decision in *SWANCC*, regulators focused their attention on alternative bases for asserting jurisdiction under Army Corps's isolated waters jurisdiction—such as the existence of "adjacent wetlands."[65]

2. *Rapanos v. United States*

The second Supreme Court case to limit the scope of CWA protection for wetlands was *Rapanos v. United States*.[66] This case furthered the debate concerning what constitutes "adjacent wetlands."[67] Army Corps attempted to assert jurisdiction over a wetland adjacent to a tributary which ultimately flowed into a navigable water.[68] This case went before the Court five years after *SWANCC*, and it resulted in a 4–1–4 split decision, with no individual opinion commanding the majority of the court.[69] Based on the Court's historical use of *Chevron* deference, the case seemed

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[60] Solid Waste Agency of N. Cook Cnty. v. Army Corps of Eng'rs (SWANCC), 531 U.S. 159, 174 (2001); *see also* Rapanos v. United States, 547 U.S. 715 (2006).
[61] SWANCC, 531 U.S. at 165; GROSS & STELCEN, *supra* note 31, at 84.
[62] SECTION OF ENV'T, ENERGY, & RES., *supra* note 1, at 2; *see* SWANCC, 531 U.S. at 165.
[63] SECTION OF ENV'T, ENERGY, & RES., *supra* note 1, at 2.
[64] *Id.*
[65] ROBERT MELTZ & CLAUDIA COPELAND, CONG. RESEARCH SERV., RL33263, THE WETLANDS COVERAGE OF THE CLEAN WATER ACT (CWA): RAPANOS AND BEYOND, 6 (2013), *available at* http://nationalaglawcenter.org/wp-content/uploads/assets/crs/RL33263.pdf.
[66] Rapanos, 547 U.S. 715.
[67] MELTZ & COPELAND, *supra* note 65, at 7.
[68] *Id.*
[69] *Id.* at 8.

to warrant deference because it involved agencies' long-standing regulatory interpretations of an ambiguous statute on issues that required the agencies' scientific expertise.[70]

However, in its decision the Court abandoned its use of agency deference.[71] The Court's plurality opinion was unwilling to accord *Chevron* deference to the government's interpretation of the "Migratory Bird Rule" because the regulation interfered with the state's "traditional and primary power over land and water use" and "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."[72] Kennedy's concurring opinion ignores the *Chevron* framework altogether.[73] The dissent concluded "that either the statute clearly authorized the agencies' regulation of the wetlands at issue or the statute was at least ambiguous, so that the Court should defer to the agencies' reasonable interpretation at *Chevron* step two."[74]

The Court's refusal to grant *Chevron* deference could be viewed as another step in the Court's general erosion of *Chevron* deference.[75] This would have important implications for agencies as they take steps to respond to the *Rapanos* opinions.[76] There are indications, however, that the refusal of the Court to grant deference in *Rapanos* was a reaction to the agencies' failure to amend the regulations to be consistent with the Court's *SWANCC* decision.[77] Chief Justice Roberts criticized the

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[70] Johnson, *supra* note 16, at 23.
[71] *See id.*; SECTION OF ENV'T, ENERGY, & RES., *supra* note 1, at 3.
[72] SWANCC, 531 U.S. at 173–74.
[73] Johnson, *supra* note 16, at 23.
[74] *Id.*
[75] *Id.* at 24. The Supreme Court has issued several opinions that could be viewed as limiting the situations in which agencies' interpretations of federal statutes receive *Chevron* deference. *See, e.g.*, Gonzales v. Oregon, 546 U.S. 243, 268 (2006) (holding "[s]ince the Interpretive Rule was not promulgated pursuant to the Attorney General's authority, its interpretation of 'legitimate medical purpose' does not receive Chevron deference"); Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) (holding that "agencies are generally entitled to deference in the interpretation of statutes that they administer but a reviewing court, as well as the agency, must give effect to the unambiguously expressed intent of Congress"); Christensen v. Harris Cnty., 529 U.S. 576 (2000) (holding an "agency's interpretation of statute which is contained in opinion letter, policy statements, agency manuals, or enforcement guidelines, all of which lack force of law, do not warrant *Chevron*-style deference").
[76] Johnson, *supra* note 16, at 24.
[77] *Id.*

agencies for failing to amend their regulations and said that if the regulatory definition had been amended after *SWANCC*, the interpretation would have received "generous" deference under *Chevron* since the statute clearly delegated authority to the agency to define the scope of waters of the United States.[78] Supreme Court cases decided post-*Rapanos* indicate that agencies' interpretations of statutes will receive *Chevron* deference "when the statutes that the agencies are interpreting are ambiguous and the agencies have been delegated authority to issue interpretations of those statutes that have the force of law."[79]

Two different tests emerged from the *Rapanos* case. Justice Scalia's plurality opinion stated a "relatively permanent test": "waters of the United States" can be expanded beyond navigable waters to include "relatively permanent, standing or flowing bodies of water."[80] The test has two steps: first, an agency should determine if the water has a relatively permanent flow (which includes "seasonal rivers") or whether it exists for no longer than a day.[81] Second, the agency should determine whether there is a continuous surface connection between the wetland and other waters of the United States that are protected by the CWA.[82] If the continuous surface connection does not exist, then the wetland is not protected by the CWA.[83]

The second test that emerged from *Rapanos* in Justice Kennedy's concurring opinion is the "significant nexus" test. This test concluded that wetlands are covered by the CWA if they "possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made."[84] Wetlands fall within the "significant nexus" test if they "either alone or in combination with similarly situated lands in the region,

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[78] *Id.* at 34.
[79] *Id. See also* Verizon Commc'ns, Inc. v. Fed. Commc'n Comm'n, 535 U.S. 467 (2002); Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2000) (holding 1990 amendments to Clean Air Act regarding ozone in nonattainment areas were ambiguous as to long-term applicability which requires deference to EPA's reasonable interpretation).
[80] Brent Carson et al., *Draft Rulemaking Likely to Expand Clean Water Act Jurisdiction*, VAN NESS FELDMAN LLP (Sep. 19, 2013), http://www.vnf.com/1101, *archived at* http://perma.cc/UDL6-8LSB.
[81] *Id.*
[82] *Id.*
[83] *See id.*; SECTION OF ENV'T, ENERGY, & RES., *supra* note 1, at 3.
[84] SECTION OF ENV'T, ENERGY & RES., *supra* note 1, at 3; *see* SUPPLEMENTARY INFORMATION, *supra* note 49; *see also Leaked Draft of Water Jurisdiction Rule May Not Be Final EPA Position, Vilsack Says*, *supra* note 49 (indicating that the draft rule does not necessarily reflect the final position of EPA).

significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"[85]

C. Current State of Confusion

1. Lower Court Confusion

Since the *Rapanos* ruling, the government has decided that a definition that meets either of the *Rapanos* tests is sufficient, but EPA is still struggling to establish federal jurisdiction over some wetlands. Chief Justice John Roberts stated, "It is unfortunate that no opinion commands the majority of the Court on precisely how to read Congress's limits on the reach of the Clean Water Act. Lower courts and regulated entities will now have to feel their way on a case-by-case basis."[86] This prediction means circuit courts face an unclear path forward and are applying different tests.[87] Typically, courts apply the test of *Marks v. United States,* that "when a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'"[88]

The *Rapanos* ruling has been interpreted, applied, or cited in at least ninety cases in thirty-five states.[89] Once the court picks a test, it then has to decide how to interpret what Scalia or Kennedy said, and courts vary in this second interpretation as well. At least nine of the thirteen federal circuits have ruled on cases interpreting *Rapanos*, with varying results.[90] Two circuits decided to apply the Kennedy "significant nexus" test; two applied the Kennedy test but left available the option of applying the plurality test in the future; three circuits followed Justice Stevens's suggestion that a wetland meeting either test falls within the scope of CWA

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[85] Johnson, *supra* note 16, at 26.
[86] Rapanos, 547 U.S. 758.
[87] Lawrence Hurley, *Supreme Court's Murky Clean Water Act Ruling Created Legal Quagmire*, N.Y. TIMES (Feb. 7, 2011), http://www.nytimes.com/gwire/2011/02/07/07greenwire-supreme-courts-murky-clean-water-act-ruling-cr-33055.html, *archived at* http://perma.cc/7CJW-AY8Y.
[88] MALONE & TABB, *supra* note 4, at 742 (quoting Marks v. United States, 430 U.S. 188, 193 (1997)).
[89] *Updated Handbook Helps Navigate Post-Rapanos Clean Water Act*, ASS'N OF STATE WETLAND MANAGERS (June 12, 2012), http://aswm.org/wetlands-law/rapanos-carabell/2505-updated-handbook-helps-navigate-post-rapanos-clean-water-act, *archived at* http://perma.cc/BGR2-PRGP.
[90] MELTZ & COPELAND, *supra* note 65, at 7.

jurisdiction; and two circuits avoided the issue of which test to apply by holding that the wetland at issue in the case met the criteria of both tests.[91]

The First, Third, and Eighth Circuits decided that a water is protected if it meets either of the tests.[92] The First Circuit declined to apply the *Marks* test to the opinions in *Rapanos* because "[t]he cases in which Justice Kennedy would limit federal jurisdiction are not a subset of the cases in which the plurality would limit jurisdiction."[93] According to the court, "*Marks* is workable—one opinion can be meaningfully regarded as 'narrower' than another only when one opinion is a logical subset of other, broader opinions."[94] The Seventh and Ninth Circuits have held that Justice Kennedy's "significant nexus" test is controlling but left open the possibility of using the plurality test.[95] The Fifth and Sixth Circuits did not choose a controlling standard because the waters at issue satisfied both tests.[96] So far, no circuit court has held that only the plurality standard applies.[97]

In addition to the confusion in the circuit courts, at least one lower court judge, Senior U.S. District Judge Robert Propst, has verbalized his frustration with the state of the law, post-*Rapanos*.[98] When one of the cases he presided over had to be reheard in light of *Rapanos*, he refused to take the case a second time, claiming he was "so perplexed by the way the law applicable to this case has developed."[99]

So far, the Supreme Court has refused to take up the issue again, despite a request from both EPA and industry leaders.[100] In 2008, the Supreme Court turned down a government request to revisit *Rapanos*.[101]

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[91] *Id.*
[92] *Overview: Clean Water Restoration Act of 2009*, *supra* note 27; *see* SUPPLEMENTARY INFORMATION, *supra* note 49, at 228.
[93] MALONE & TABB, *supra* note 4, at 743 (quoting United States v. Johnson, 467 F.3d 56, 64 (1st Cir. 2006)).
[94] *Id.* (quoting Johnson, 467 F.3d at 63).
[95] *Id.* at 742. The Seventh Circuit remanded the case of *United States v. Gerke Excavating, Inc.* for further proceedings to determine whether there was a "significant nexus" between the wetland in question and a waterway that is in fact navigable. 464 F.3d 723 (7th Cir. 2006). In applying the test of *Marks v. United States*, the court in *Gerke* determined that Justice Kennedy's ground for reversing *Rapanos* was "narrower (so far as reining in federal authority is concerned) than the plurality's in most cases." *Gerke*, at 724–25. *See* SUPPLEMENTARY INFORMATION, *supra* note 49, at 228; *Marks*, 430 U.S. at 193 (providing the "narrowest grounds" test).
[96] SUPPLEMENTARY INFORMATION, *supra* note 49, at 228.
[97] *Id.*
[98] Hurley, *supra* note 87.
[99] *Id.*
[100] McLernon, *supra* note 24.
[101] MALONE & TABB, *supra* note 4, at 743.

The Court's refusal may be because the same splits remain, even though there are two new Justices on the Court.[102] The Court may also be waiting for the agencies to initiate a rulemaking.

2. Past Attempts at Rulemaking and Guidance

Past attempts by EPA and Army Corps to clarify through rulemaking and guidance have failed to end the *Rapanos* confusion. In January 2003, Army Corps and EPA issued an Advanced Notice of Proposed Rulemaking and sought comments "on issues associated with the scope of waters that are subject to the Clean Water Act in light of" *SWANCC*.[103] They received approximately 133,000 comments and 99% were opposed to a new rule.[104] Of the 43 states that commented, 41 voiced concerns about any rollback in jurisdictional reach.[105] In December 2003, the Administration abandoned the rulemaking effort.[106]

Guidance is not legally binding on EPA or Army Corps.[107] Guidance, therefore, does not receive *Chevron* deference.[108] Guidance was issued in 2008 and 2011, but it faced heavy criticism and has done little to clarify the term "navigable waters."[109] The 2008 guidance allows a water to fall within the scope of CWA jurisdiction if it meets either the Kennedy or plurality test.[110] The response to the guidance was overwhelmingly negative—some stakeholders argued that it did not go far enough in protecting wetlands, while others argued that it went too far.[111] Most stakeholders did agree that the guidance did not help with implementation of the "significant nexus" test, which according to the guidance is used on a case-by-case basis to decide which water bodies are "waters of the United States."[112]

The latest attempt at revising guidance, issued in 2011, still faces Congressional and industry criticism.[113] The intent of the guidance was to make the case-by-case analyses of "significant nexus" waters more clear. Similar to the 2008 guidance, the revisions would adopt the

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[102] Hurley, *supra* note 87.
[103] MALONE & TABB, *supra* note 4, at 723.
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] MELTZ & COPELAND, *supra* note 65, at 9.
[108] Johnson, *supra* note 16, at 24.
[109] MELTZ & COPELAND, *supra* note 65, at 15.
[110] *Id.* at 9, 12.
[111] *Id.* at 10–11.
[112] *Id.* at 12–13.
[113] *Id.* at 9–10.

Kennedy-test-or-plurality-test view, but it would expand upon the scope of the previous guidance.[114]

The 2011 guidance expands upon the 2008 guidance because it allows aggregation of streams and allows for watershed-wide aggregation for similarly situated wetlands and tributaries.[115] The 2011 guidance also allows EPA and Army Corps to consider more factors when evaluating whether there is a significant nexus, such as the existence of habitat that provides a spawning area for downstream species.[116]

The main concerns of the critics of the proposed guidance revisions were: (1) that it would broaden the scope of jurisdiction beyond what the CWA and Supreme Court's rulings permit; and (2) policy change through guidance is non-binding and generally not reviewable by courts.[117] A final version of the 2011 guidance was never published. EPA submitted the 2011 final guidance to the White House Office of Information and Regulatory Affairs in February 2012 and withdrew it in September 2013.[118]

D. Past Legislative Failures

Some argue that Congressional action is needed to resolve the issue of the scope of jurisdiction; however, Congressional attempts to solve the issue have also failed. Upset with the confusion that emerged in the wake of *Rapanos*, Congress wanted to clarify the issue and establish protection for more of the nation's waters by restoring the jurisdiction that existed prior to the Supreme Court's ruling.[119] The Clean Water Restoration Act was introduced in 2007 and again in 2009, where it was approved by the Senate Environment and Public Works committee, but failed to go before the Senate for a vote.[120] The bill would have deleted "navigable waters" from the CWA and defined "waters of the United States" using a rewritten version of the regulatory definitions used by EPA and Army Corps.[121] Instructions would also have been included to apply "waters of the United States" consistent with how EPA and Army Corps applied it prior to

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[114] *Id.* at 12.
[115] MELTZ & COPELAND, *supra* note 65, at 13–14.
[116] *Id.*
[117] *Id.* at 12.
[118] Katie Greenhaw, *Clarity on Clean Water Protection Is Coming, But How Long Will It Take?*, CTR FOR EFFECTIVE GOV'T (Oct. 8, 2013), http://www.foreffectivegov.org/clarity-clean-water-protection-is-coming-how-long-will-it-take, *archived at* http://perma.cc/LK5N-KYRB. *See also* MELTZ & COPELAND, *supra* note 65, at 13.
[119] MELTZ & COPELAND, *supra* note 65, at 19.
[120] *Id.* at 19–20.
[121] *Id.* at 20.

SWANCC.[122] The bill would have restored the broad jurisdiction and helped eliminate the confusion that resulted from the Supreme Court's meddling, but industry and agriculture groups were strongly against the Act.[123]

At this time, there is no indication that Congress will undertake similar legislation in the future since there are such strong, differing views on the subject. Following the 111th Congress's decision not to vote on the Act, a similar bill was not reintroduced in the 112th Congress.[124] In fact, bills were introduced to: (1) block the ability of EPA and Army Corps to issue revised guidance; and (2) narrow the definition of waters subject to CWA jurisdiction.[125] One challenge for legislatures is that the science behind the arguments for different scopes of jurisdiction is very complex and it is difficult to draw a line.[126]

II. EPA HAS AN OPPORTUNITY TO USE SCIENTIFIC RESEARCH TO BROADEN ITS JURISDICTION AND CLARIFY THE DEFINITION OF "WATERS OF THE UNITED STATES"

EPA announced in September 2013 that it sent the Office of Management and Budget a draft rule to clarify the uncertainty concerning the jurisdiction of the CWA that has arisen as a result of recent Supreme Court decisions.[127] EPA hopes to provide clarity over which waters fall within the scope of the CWA.[128] The draft rule relies on a scientific report entitled *Connectivity of Streams and Wetlands to Downstream Waters*, which is a review and synthesis of more than 1,000 pieces of peer-reviewed scientific literature.[129] EPA should use the rulemaking process to restore broad jurisdiction to the maximum extent possible within the confines of the Supreme Court decisions.

Based on the scientific report, it is possible for the agencies to argue for expanded jurisdiction over waters of the United States. The draft study reaches three initial conclusions:

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[122] *Id.*
[123] *Id.* at 20–21.
[124] *Id.*
[125] MELTZ & COPELAND, *supra* note 65, at 20–21.
[126] *Id.*
[127] *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (External Review Draft)*, U.S. ENVTL. PROT. AGENCY, http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=238345 (last updated Jan. 7, 2014), *archived at* http://perma.cc/US2K-CRV3.
[128] *Documents Related to the Proposed Definition of "Waters of the United States" Under the Clean Water Act, supra* note 30.
[129] *Id.*

> (1) "[s]treams, regardless of their size or how frequently they flow, are connected to and have important effects on downstream waters;" (2) "wetlands and open-waters in floodplains of streams and rivers and in riparian areas are integrated with streams and rivers;" and (3) there is insufficient information to determine the role isolated wetlands and open-waters [located outside of riparian areas and floodplains] play in the connectivity of downstream waters.[130]

The first conclusion has some major implications and indicates that federal jurisdiction may encompass all streams. The study concludes that streams, both individually and cumulatively, have a "strong influence on the character and functioning of downstream waters."[131] Additionally, tributary streams "are physically, chemically, and biologically connected to downstream rivers."[132] In *Rapanos,* the plurality test limited jurisdictional waters to those with a relatively permanent flow that had a continuous surface connection to a more traditional type of water.[133] The draft study appears to conclude that streams do not need either of those characteristics to impact the stated purposes of the CWA, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[134] This conclusion provides an opportunity for EPA to expand the scope of jurisdiction beyond the plurality test.

The second conclusion also provides an opportunity to expand beyond the plurality test. Currently, a wetland needs a direct surface water connection to a traditional water body in order to fall under CWA jurisdiction.[135] According to the study, wetlands and open waters in riparian areas and floodplains "are physically, chemically, and biologically connected with rivers."[136] This conclusion provides the potential for the agencies to create a clear test for regulating all wetlands that are located in floodplains and riparian areas as "waters of the United States" and would avoid the need for a "significant nexus," case-by-case analysis. This

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[130] Carson et al., *supra* note 80; SUPPLEMENTARY INFORMATION, *supra* note 49, at 19–20.
[131] OFFICE OF RES. & DEV., U.S. ENVTL. PROT. AGENCY, EPA/600/R-11/098B, CONNECTIVITY OF STREAMS AND WETLANDS TO DOWNSTREAM WATERS: A REVIEW AND SYNTHESIS OF THE SCIENTIFIC EVIDENCE 1-3 (2013) (study is ongoing and has not been formally disseminated by EPA, and does not represent EPA's determination or policy at this time).
[132] *Id.*
[133] Carson et al., *supra* note 80.
[134] *Id.*
[135] *Id.*
[136] OFFICE OF RES. & DEV., *supra* note 131, at 1–9.

is beneficial because it provides a "bright-line" test and has the potential to increase the scope of jurisdiction beyond both *Rapanos* tests.

The third conclusion, dealing with unidirectional wetlands, including some ponds and lakes, concludes that more data needs to be compiled and analyzed on these wetlands because the "type and degree of connectivity varies" and "it is difficult to generalize about their effects on downstream waters."[137] The study acknowledges that these wetlands serve important functions, but more information is needed before EPA can decide if it should expand jurisdiction to encompass these waters.[138] It is possible for more information to become available, and then the agencies can make an informed decision. In the meantime, the agency can still perform a case-by-case analysis for these wetlands.[139]

III. RULEMAKING

A. Benefits of Adopting a Rule

1. Rulemaking Has Benefits over Guidance

Up to this point, EPA and Army Corps have issued guidance instead of going through the rulemaking process. There are several reasons why they have preferred guidance. Fewer procedures are necessary for guidance, making it less costly than rulemaking and less time consuming.[140] In addition, it is possible for agencies to ensure some level of uniformity and provide advance notice to the community regarding their interpretation of the law.[141] Most importantly, it is a lot more difficult for individuals to challenge policies developed through guidance in court or through administrative channels.[142] While there are benefits to guidance, it is not advisable for EPA and Army Corps to continue to rely on guidance.

Many of the features of guidance that have made it appealing over the past decade have also created problems. One of the main benefits of the rulemaking process is that it has the force of law.[143] This would address one of the main criticisms of defining the scope of the CWA through

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[137] *Id.* at 14.
[138] *Id.*
[139] *Id.*
[140] Johnson, *supra* note 16, at 31.
[141] *Id.*
[142] *Id.* at 31–33.
[143] *Id.* at 34.

guidance, which is that it is not legally binding. The rulemaking process provides notice and the opportunity for public comment.[144] Courts tend to give rulemakings that follow the notice and comment procedure *Chevron* deference, whereas guidance is not given the same deference.[145] This is important because the Supreme Court declined to apply *Chevron* deference in *Rapanos*.[146] Chief Justice Roberts stressed that if Army Corps had amended its regulatory definitions, the interpretation would have been entitled to "generous" deference under *Chevron* since the statute delegated the agency authority to define the scope of waters of the United States.[147] This is preferable to the Court, which has less scientific expertise, deciding the scope of the CWA on the few cases that come before it. In addition, a final rule would be more difficult for a subsequent administration to undo because it requires more steps and has the force of law. This will provide more stability to an area that has been heavily litigated and plagued with uncertainty.

2. A New Rule Could Provide Many Benefits to Industry and Businesses

Almost immediately following EPA and Army Corps's announcement of their draft joint rulemaking, industry groups started their attacks on the rule.[148] The National Federation of Independent Business sent a letter claiming that the rule will have a significant economic impact on small businesses and that EPA was therefore required to follow procedures under the Regulatory Flexibility Act ("RFA").[149] Under its procedures, EPA must certify that the rule will not have a significant impact on small businesses or publish a flexibility analysis.[150] At the time of the

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[144] Alan Kovski & Amena H. Saiyid, *Backlash Against 'Guidance as Rulemaking' Leads to Actions in Federal Court, Congress*, BLOOMBERG BNA (July 15, 2011), http://www.bna.com/backlash-against-guidance-n12884902458/, *archived at* http://perma.cc/72HA-27WS.
[145] Johnson, *supra* note 16, at 34.
[146] *Id.*
[147] *See* Rapanos, 547 U.S. at 757–58 (Roberts, C.J., concurring); Johnson, *supra* note 16, at 34 (suggesting that the Chief Justice's opinion is confusing because he joined the plurality in suggesting that Army Corps's interpretation violates the plain meaning of the statute. This suggests that even if Army Corps had adopted their interpretations through rulemaking the Court would have invalidated the rules at *Chevron* step one, so the agency would not be given "generous" deference).
[148] Greenhaw, *supra* note 118.
[149] *Id.*
[150] *Id.*

attack, EPA had not made the rule available to the public, so the industry challenge was premature.[151]

The early attack indicates that industry groups will strongly oppose any rule promulgated by EPA and Army Corps. Industry groups should wait for more details about the rule to be released before challenging the rule. The rule will actually provide many benefits to industry groups and businesses. By providing clarity and predictability as to which waters fall under the jurisdiction of the CWA, a rule will reduce costs, minimize delays, and protect the health of the nation's waters.[152] These improvements will produce economic benefits to many of the nation's businesses and industries which rely on a reliable, abundant supply of clean water.[153] The proposed rule will also facilitate the ability of the United States Department of Agriculture and CWA to work in tandem to protect water quality and the environment by providing an incentive for greater participation by farmers and ranchers in conservation programs.[154] Industry actors will be more confident in their decisions because there will be greater clarity over which waters are protected and require a permit. This will also reduce costs associated with litigation, which has been very prevalent on this issue.

The proposed rule will likely not be a barrier to economic growth. An economic analysis of the possible impacts of past guidance found that while more wetlands would be covered by the permitting program, leading to some additional costs, the benefits to the public would substantially outweigh the costs.[155] One estimate lists the potential costs in the range of $63 to $185 million while the potential benefits range from $162 to $368 million.[156] In addition, the agencies are not proposing "changes to existing regulatory exemptions and exclusions, including those that apply to the agricultural sector that ensure the continuing production of food, fiber and fuel to the benefit of all Americans."[157] Therefore, industry

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[151] *Id.*
[152] *Documents Related to the Proposed Definition of "Waters of the United States" Under the Clean Water Act*," *supra* note 30.
[153] *Facts About the Waters of the U.S. Proposal*, U.S. ENVTL. PROT. AGENCY, http://www2.epa.gov/sites/production/files/2014-09/documents/facts_about_wotus.pdf (last visited Oct. 27, 2014).
[154] *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (External Review Draft)*, *supra* note 127.
[155] Greenhaw, *supra* note 118.
[156] *Id.*
[157] *Documents Related to the Proposed Definition of "Waters of the United States" Under the Clean Water Act*, *supra* note 30.

should not be so quick to oppose the rulemaking process because a new rule may provide them many benefits.

3. Benefits for Environment and Wildlife Recreation

Wetlands and the nation's waters serve many vital functions. Wetlands provide essential habitats for fish, shellfish, plant life, waterfowl, and other wildlife.[158] The estimated value of wetlands habitats to the global economy is about $15 trillion.[159] It is estimated that wetlands save the United States at least $30 billion in flood damage repair costs.[160] Wetlands provide flood and storm drainage protection, erosion control, water supply, and groundwater recharge.[161] Wetlands also provide a source for trapping, hunting, harvesting timber, fish, and shellfish, and energy production from peat.[162]

In addition, wetlands improve water quality by removing nutrients, producing oxygen, filtering sediments, and processing chemical and organic wastes.[163] Past guidance was expected to protect "streams and wetlands that support fishing and hunting, filter sediment and contaminants, reduce flooding, and contribute to drinking water supplies."[164] It is estimated that 117 million Americans get their drinking water from sources fed by waters that fall within the scope of jurisdictional uncertainty.[165]

After the *SWANCC* decision, environmental groups were concerned about the ecological ramifications.[166] Almost half of all U.S. wetlands are "isolated" and the ecological and pollution control functions that isolated wetlands perform are indistinguishable from those performed by adjacent wetlands.[167] One of the issues with the past guidance is that it incorporates the plurality opinion's presumption against jurisdiction for most common types of waters in the country, intermittent and ephemeral tributaries. To overcome the presumption, a "significant nexus" needs

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[158] MALONE & TABB, *supra* note 4, at 708.
[159] OFFICE OF WATER, U.S. ENVTL. PROT. AGENCY, EPA843-F-06-004, ECONOMIC BENEFITS OF WETLANDS 1 (2006), *available at* http://water.epa.gov/type/wetlands/outreach/upload/EconomicBenefits.pdf.
[160] *Overview: Clean Water Restoration Act of 2009*, *supra* note 27.
[161] MALONE & TABB, *supra* note 4, at 708.
[162] *Id.*
[163] *Id.*
[164] Greenhaw, *supra* note 118.
[165] *Id.*
[166] *See* DENNIS BUECHLER, FIVE CASE STUDIES ON THE EFFECTS OF THE *SWANCC* AND *RAPANOS* SUPREME COURT RULINGS ON COLORADO WETLANDS AND STREAMS 3 (2010).
[167] MALONE & TABB, *supra* note 4, at 723–24.

to be established, and this requires a significant amount of time and resources. According to an Army Corps official, a "significant nexus" analysis of jurisdiction is eight to ten times more resource-intensive.[168] The case-by-case analysis leads to delays in the permitting process and limits the number of investigations and enforcement actions that can take place.[169] Increasing the scope of the waters covered would allow EPA to avoid this case-by-case analysis for some of these wetlands, and will lead to more enforcement to protect the nation's valuable wetlands.

EPA prepared an economic analysis to accompany the 2011 guidance. The report estimated that the majority of cost increases would result from incremental permitting costs and mitigation expenses to the actors seeking section 404 permits.[170] However, the benefits would range from $162 million to $328 million annually, while the cost would range from $87 million to $171 million.[171] The benefits would result from water quality improvements.[172]

B. A Rule Based on the Scientific Study Does Not Unlawfully Expand CWA Jurisdiction

Congress intended for the term "navigable waters" to be given the broadest possible interpretation.[173] In addition, there is Supreme Court precedent supporting CWA jurisdiction over interstate waters without respect to navigability.[174] In *City of Milwaukee*, the Court reasoned that if the CWA protections only applied to navigable interstate waters, then downstream states would not be able to protect many of their waters from out-of-state pollution.[175] The CWA would not be a comprehensive regulatory scheme if it left so many waters unprotected.[176] In addition, the Supreme Court's decisions in *SWANCC* and *Rapanos* do not limit or constrain CWA jurisdiction over non-navigable interstate waters.[177] It is constitutional for the agencies to regulate interstate wetlands that fall within the boundaries outlined by the scientific studies.[178]

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[168] MELTZ & COPELAND, *supra* note 65, at 11–12.
[169] *Id.*
[170] *Id.* at 15.
[171] *Id.*
[172] *Id.*
[173] SECTION OF ENV'T, ENERGY, AND RES., *supra* note 1, at 12.
[174] *See* SUPPLEMENTARY INFORMATION, *supra* note 49, at 244.
[175] *Id.* at 248.
[176] *Id.*
[177] *Id.*
[178] *See* 33 C.F.R. § 328 (2013).

The proposed rule is not trying to unconstitutionally expand power, but is simply trying to restore jurisdiction to the original scope intended by Congress. According to EPA, the proposed rule is being promulgated to clarify the current uncertainty surrounding the jurisdiction of the CWA that has arisen out of recent Supreme Court cases.[179] The Supreme Court cases indicated that smaller waters needed some connection to larger waters in order to fall within the scope of the CWA.[180] EPA and Army Corps are focusing on clarifying protection of the network of smaller waters that feed into larger ones, to keep downstream water safe from upstream pollutants.[181] The agencies are also trying to protect "wetlands that filter and trap pollution, store water, and help keep communities safe from floods."[182] The agencies stress that they are not attempting to change existing regulatory exemptions and exclusions.[183]

The new rule would classify all streams, wetlands in riparian areas and floodplains, and open waters in riparian areas and floodplains as waters that are within the agencies' jurisdiction under "waters of the United States."[184] For unidirectional wetlands, more information is needed on the effects of these wetlands on downstream waters. If promulgated, this rule would be consistent with the plurality and concurring opinions in *Rapanos*.

The rule encompasses the plurality test because waters that (1) are adjacent to navigable-in-fact waters and (2) have a continuous surface connection to those waters fall under CWA jurisdiction.[185] It is important to note that *all* streams would likely be protected because this fills in a gap that exists when only the "significant nexus" test is used.[186] The rule also includes waters that satisfy the "significant nexus" test, thereby leading to a broad scope of jurisdiction. The scientific reports give the agencies the data they need to support the inclusion of smaller waters within the scope of the CWA. For isolated wetlands where more research

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[179] *Documents Related to the Proposed Definition of "Waters of the United States" Under the Clean Water Act, supra* note 30.
[180] *Draft Guidance on Identifying Waters Protected by the Clean Water Act*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/tp/pdf/wous_guidance_4-2011.pdf (last visited Oct. 27, 2014).
[181] 79 Fed. Reg. 37,078, 37,096 (June 30, 2014) (to be codified at 55 C.F.R. pt. 17).
[182] *Id.*
[183] *Id.*
[184] *See* 79 Fed. Reg. 22,188, 22,262 (Apr. 21, 2014) (to be codified at 33 C.F.R. pt. 328).
[185] Rapanos, 547 U.S. at 742.
[186] *See* United States v. Johnson, 467 F.3d 56, 64 (1st Cir. 2006) (pointing out that in the case of a small stream or brook with a surface connection, the plurality's criteria are met, but there would be no jurisdiction under Justice Kennedy's "significant nexus" test).

needs to be conducted on their impact on downstream waters, the agencies can perform a case-by-case "significant nexus" analysis. The new rule broadens the scope of the CWA jurisdiction to include protections that are similar to those invalidated by *Rapanos*, but the agencies now have the scientific data to meet the criteria established by the two tests, and it is likely that a majority of the Justices will uphold this rule.

C. Rulemaking Is a Necessary Step That Needs to Happen Now

Many different stakeholders, including members of Congress, state and local officials, industry, agriculture, environmental groups, and the public have requested that EPA undertake a rulemaking process.[187] After years of inadequate guidance following *SWANCC* and *Rapanos*, it is apparent that clarification is necessary. The *Rapanos* opinions of Kennedy, Breyer, and Roberts encourage a rulemaking to clarify what constitutes a "water of the United States." The Supreme Court has declined to take up the issue again, and Congress is not providing a legislative solution.

According to a March 2008 EPA memorandum, the permitting process has been severely impacted since *Rapanos* was decided.[188] Approximately 500 enforcement cases (a significant portion of the total) were negatively affected by the ruling and subsequent guidance.[189] Between July 2006 and December 2007, EPA decided not to pursue enforcement of more than 300 CWA violations because of jurisdictional uncertainty.[190] In an additional 147 cases, the priority of enforcement was lowered because of uncertainty about whether the waters were within the scope of the CWA.[191] Of the cases negatively affected, EPA decided not to move forward with enforcement due to jurisdictional uncertainty.[192]

After the *SWANCC* and *Rapanos* rulings, polluters asserted that many waters were not within the scope of the CWA, leaving many streams, creeks, and isolated wetlands vulnerable to contamination.[193] A 2008

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[187] *EPA and Army Corps of Engineers Clarify Protection for Nation's Streams and Wetlands: Agriculture's Exemptions and Exclusions from Clean Water Act Expanded by Proposal*, U.S. ENVTL. PROT. AGENCY, (Mar. 25, 2014), http://yosemite.epa.gov/opa/admpress.nsf/3881d73f4d4aaa0b85257359003f5348/ae90dedd9595a02485257ca600557e30, *archived at* http://perma.cc/S5QB-8PRE.

[188] *See Overview: Clean Water Restoration Act of 2009*, *supra* note 27.

[189] *Id.*

[190] *Id.*

[191] *Id.*

[192] MELTZ & COPELAND, *supra* note 65, at 11.

[193] Greenhaw, *supra* note 118.

investigation by the House Oversight and Transportation Committees concluded that drastic deterioration in EPA's enforcement program was directly attributable to the *Rapanos* decision and subsequent guidance.[194] EPA regulators estimated that more than 1500 major pollution investigations were discontinued or put on hold between 2006 and 2010.[195] It is clear that EPA is having difficulty protecting the nation's waters, and that litigation is likely whenever EPA pursues enforcement. It is imperative that a rule broadening and clarifying the scope of CWA jurisdiction is promulgated as soon as possible.

CONCLUSION

Ideally, Congress would pass legislation to clarify the scope of the CWA post-*Rapanos*. However, the political climate is not conducive to Congressional action, and the confusion surrounding which waters are protected has lasted long enough. In order to protect our nation's waters, EPA and Army Corps need to promulgate a rule that is consistent with recent Supreme Court rulings, using the latest scientific findings. The scientific findings support a broad interpretation of the scope of the CWA because streams and most wetlands are adjacent to navigable waters, have a surface connection to navigable waters, or have a "significant nexus" to navigable waterways downstream. Protecting these waters will provide benefits to the public, industry, and wetlands. A rule based on this scientific data should receive generous deference, which the Court declined to grant in *Rapanos*.

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[194] *Id.*
[195] *Id.*