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A New Clean Water Act

by Paul Boudreaux

Editors' Summary: The Supreme Court's new federalism has struck its strongest blows so far on the CWA. Last summer, in Rapanos v. United States, a sharply divided Court nearly struck down a large chunk of the Act's protection of wetlands and other small waterways—five years after an earlier decision had narrowed the reach of the Act because of its supposed overreaching into state prerogative. Why has the CWA been the Court's favorite target? One reason is that the statute was fatally flawed when enacted. Congress chose to cover "navigable waters," but its practical definition has never been clear. The result is a statutory and jurisprudential mess, with lessons that extend across issues of constitutional law, statutory construction, and, of course, federalism. Paul Boudreaux proposes in this Article to revise statutory language in order to revive the CWA. He suggests jettisoning the Act's reliance on the misguided term "navigable waters" and advocates that, instead, the statute should directly regulate activities that substantially affect interstate commerce, such as fisheries, migratory birds, floods, and agriculture. An Act whose limits are tied to the law of the commerce power would be shielded from the federalist ax.

I. Introduction

No field of law has felt the impact of the U.S. Supreme Court's revived federalism as sharply as the Clean Water Act (CWA).[1] This is ironic, considering that the Act has been remarkably successful in protecting the nation's waters from pollution and other degradation; indeed, it has served as a model for environmental laws in specific and regulatory law in general.[2] Yet the Court twice in recent years has restricted the reach of the Act, relying each time on the constitutional limits of congressional powers and on the vague fundamental terms of the Act itself. In 2006, the Court in *Rapanos v. United States*[3] confined the reach of the Act's linchpin term "navigable waters"[4] in a muddled decision that might prevent federal protection of many wetlands and other small water bodies.[5] As many feared, the fractured Court's decision (there was no majority opinion) in *Rapanos* merely muddied the statutory waters. As it now

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1. 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607. Although the statute as originally enacted in 1972 was formally called the Federal Water Pollution Control Act, Pub. L. No. 92-500, 866 Stat. 844 (1972), it is today more commonly called the Clean Water Act (CWA). The Act generally makes it unlawful to "discharge . . . any pollutant" into "navigable waters" without a permit. *Id.* §§1311(a), 1362(12). "Pollutant" is broadly defined to cover almost any addition of material. *See id.* §1362(6). For the specific category of discharges of "dredged or fill material," which most often occurs when someone is filling in a wetland or other small water body, permits are granted by the U.S. Army Corps of Engineers (the Corps), pursuant to §404 of the Act. *Id.* §1344. For other pollution, permits are granted by the U.S. Environmental Protection Agency (EPA), usually with the requirement that the polluter use a level of "best technology" to limit the amount of pollution. *See id.* §§1311(b), 1314(b).

2. *See, e.g.*, Oliver A. Houck, *TMDLs IV: The Final Frontier*, 29 ELR 10469 (Aug. 1999) (calling the CWA "the most successful environmental program in America"); Bruce Babbitt, *Between the Flood and the Rainbow: Our Covenant to Protect the Whole of Creation*, 2 ANIMAL L. 1, 2 (1996) (former Secretary of the U.S. Department of the Interior Bruce Babbitt calling the Act "the most successful of all our environmental laws").

3. 126 S. Ct. 2208, 36 ELR 20116 (2006).

4. The Act regulates pollution and dumping into "navigable waters." 33 U.S.C. §§1311(a), 1362(12) (generally, no polluting of "navigable waters" without a federal permit); *id.* §1441 (no filling in of "navigable waters" without a permit). The term "navigable waters" is defined as "the waters of the United States and the territorial seas," without further explanation. *Id.* §1362(7).

5. *Rapanos*, 126 S. Ct. at 2208. *Rapanos* addressed the issue of whether the filling in of wetlands that were close to, but not attached to, nearby rivers and lakes constituted a discharge into "navigable waters." *See id.* at 2214-15. The discharge of fill material into navigable waters requires a permit, under 33 U.S.C. §1441(a). Although a majority of Justices voted to vacate the judgments of the U.S. Court of Appeals for the Sixth Circuit, 376 F.3d 629, *vacated and remanded*, 391 F.3d 704 (6th Cir. 2005), which had held that the wetlands were indeed "navigable waters," there was no majority opinion of the Court. Thus, the Sixth Circuit is now forced to apply a new standard in the face of disagreement in the High Court as to what that standard should be.

stands, lower courts,[6] and perhaps the Court again, will yet have to decide whether each of the nation's thousands of wetlands—as well as ephemeral ponds, arroyos, and other single-state water bodies—are protected by the federal Act or subject only to the vagaries of state law.[7] Proposals seeking to redefine the key terms have been proposed in the U.S. Congress, although it is unlikely that a quick legislative fix would either attract the interest of many lawmakers or solve the fundamental faults with the Act's construction.[8]

I propose a new vision for the CWA. I recommend that the Act discard the difficult-to-apply statutory trigger that depends on the *location* of the water body. Under the existing system, the Act covers all "navigable waters," but not pollution of water bodies that do not fall within this ill-fitting term. If, as the federalist plurality in *Rapanos* suggested, the current Act is restricted to only "fairly permanent and continuous water bodies," then even truly harmful pollution of wetlands cannot be regulated by the Act in its current form.[9] Instead, I propose that the Act be refocused for the 21st century to regulate, instead, certain categories of *pollution*, regardless of location. This change would match the CWA with most other environmental laws, which are triggered by the level of environmental harm, not by location.[10] Under the proposed new conception, pollution and other degradation of water would be regulated if, as a category, it substantially affects interstate commerce. This is, of course, the limit of Congress' constitutional authority.[11] Thus, for example, the dumping of ecologically harmful gypsum into a water body would be covered if it would affect trade or migratory wildlife in more than one state, regardless of whether the affected water body is a river, lake, or isolated wetland. On the flip side, an activity that has only purely local effects, such as the filling in of a small pond that has no connection to other waters or commerce that moves interstate, would not be covered by the federal law. A proposal for revised statutory language is set forth in Part V.A. of this Article.

Such a new, action-triggered conception of the CWA would require government regulators to do more than simply place water bodies either in the box of covered, "jurisdictional" waters, or in the box of unregulated waters. I propose that this admittedly difficult job be given to the U.S. Environmental Protection Agency (EPA), which is in charge of most of the federal pollution statutory regimes.[12] Such work is necessary for the CWA to fulfill once again its promise of serving as a national system of protecting America's water bodies—and the people and ecosystems that depend on such waters—from unwanted harm.

II. A Short Dive Into the History of the Clean Water Act

The federal CWA holds a rather unclean history. In the Court's two major water law decisions of the current century, the Court in effect threw up its hands in resignation in trying to determine what Congress meant in 1972 by using "navigable waters" as the statute's primary trigger—with the exception that all agree that Congress did *not* mean to restrict the Act only to waters on which boats can navigate. In this section, I provide an assessment—admittedly opinionated and sometimes speculative—of the long but not particularly complicated history of this fateful, and ultimately unwise, choice.

A. Water Regulation Before 1972

Concerns over the condition of the natural world were largely local concerns in the first 100 years of the United States. In an era before man-made toxic liquids, towering smokestacks, or an understanding of epidemiology, pollution control—to the extent it existed—was left largely to local governments and the common law.[13] By the end of the

6. As of January 1, 2007, a number of courts of appeals have remanded cases to be reconsidered in light of *Rapanos*, instructing district courts to allow CWA regulation if the putative "water" at issue would fit either the test suggested in the concurring opinion of Justice Anthony M. Kennedy or the wider test suggested in the four-Justice minority opinion written by Justice John Paul Stevens. *See, e.g.*, United States v. Johnson, 467 F.3d 56, 36 ELR 20218 (1st Cir. 2006) (remanding); United States v. Gerke Excavating, Inc., 464 F.3d 723, 36 ELR 20200 (7th Cir. 2006) (remanding). These instructions are not spurred by binding precedent (*Rapanos* provided none), but presumably by the rationale that such an instruction probably would have been approved by five members of the Court in 2006.

   However, one district court opinion, *United States v. Chevron Pipe Line Co.*, 437 F. Supp. 2d 605, 36 ELR 20131 (N.D. Tex. 2006), cited Justice Antonin Scalia's plurality opinion in *Rapanos* to support its holding that the discharge of oil into a channel could not be regulated by the CWA because the channel did not hold water when the discharge occurred and thus was not a "navigable water." *Id.* at 612.

7. Wetlands serve to provide habitat for shellfish, birds, and other wildlife, act as a sponge to reduce flooding, protect shorelines from erosion, recharge groundwater aquifers, and trap sediment and pollution that otherwise would run into rivers and lakes. *See* U.S. EPA, *What Are Wetlands?*, http://www.epa.gov/owow/wetlands/vital/nature.html (last visited Jan. 12, 2007).

8. *See* C. Garvey, *Bills Floated on Wetlands Muddle*, 109 ROCK PRODUCTS 17 (2006), *available at* 2006 WL 14273188 (discussing legislative proposals to revise the CWA in response to *Rapanos*). Sen. Russ Feingold (D-Wis.) proposed in summer 2006 a bill to change "navigable waters" to "waters" and to clarify that the later term covers wetlands and intermittent water bodies. *See* S. 912, 109th Cong. (2006), *available at* http://thomas.loc.gov/cgi-bin/query/z?c109:S.+912.

9. *Rapanos*, 126 S. Ct. at 2226-27 (Scalia, J., writing for a plurality).

10. For example, the Clean Air Act (CAA) is triggered by any emission into the air of large amounts of hazardous air pollutants, see 42 U.S.C. §7512, and large amounts of the more common "criteria" air pollutants in nonattainment areas. *See id.* §§7502(c)(5), 7503. Similarly, the "Superfund" statute (also known as the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)) is triggered by a release of hazardous wastes or other hazardous substances into "the environment," which is broadly defined to include soil, water, and air, *id.* §9601(8), when such a release presents "an imminent and substantial danger to the public health or welfare." *Id.* §9604(a)(1). Because the reach of the statutes are not limited to activities that affect interstate commerce, these laws potentially are vulnerable to challenge. For a discussion of the potential vulnerabilities of environmental laws other than the CWA, see *infra* Part III.B.

11. In *Lopez v. United States*, 514 U.S. 549 (1995), the Court set forth a narrower interpretation of the commerce power than it had followed for more than half a century. Nonetheless, it reaffirmed that Congress may regulate activities that "substantially affect interstate commerce." *Id.* at 558-59. *Lopez* and related cases are discussed *infra* Part III.A.

12. For reasons of history, as explained *infra* Part II, the 1972 CWA divided responsibility between EPA, which holds the authority to grant permits to those seeking to discharge pollutants into navigable waters from a point source (and which may grant such permitting activity to state authorities), 33 U.S.C. §1342(a), (b), and the Corps, which holds the authority (with rarely used oversight by EPA) to grant permits for the discharge of "dredged or fill material" into navigable waters. *Id.* §1441(a)-(d). Much of the latter category involves the filling in of wetlands.

13. *See, e.g.*, ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 42-43 (3d ed. 2004) (briefly discussing the rise of environmental law from local control

19th century, however, cities such as Chicago and Cleveland restricted the placement of air-polluting industries in order to limit the noxiousness of the air.[14] Meanwhile, people understood that polluting water was harmful, but dumping wastes in rivers, lakes, and harbors served as an easy way to dispose of unwanted liquids and solids, including sewage.[15] These polluted waterways led to local outbreaks of cholera, typhus, and diphtheria.[16] In order to provide city residents with clean water, cities built reservoirs to collect rain water, largely without treatment.[17] None of this concerned the federal government.

What did spark national concern was the impediment to commerce of large-scale dumping in the nation's rivers and harbors. Because such water bodies are public "commons," people naturally find it appealing to dump their refuse in such commons, for which there is no private owner to complain.[18] Sometimes, such dumping impeded boat traffic. If governments tried to regulate such dumping, they often would be stymied by governmental boundaries. Major rivers, for example, often form local or state boundaries, complicating the matter of governmental jurisdiction.[19] Indeed, authorities in some states might have welcomed dumping that would affect adversely the neighboring state, thus helping commerce in one's home state.[20]

In response to a growing problem of dumping in the commercial waterways of an industrializing nation, Congress in 1899 enacted the Rivers and Harbors Act, as a way of bringing some federal control to the problem.[21] The statute regulated various activities of dumping into or blocking any "navigable water."[22] Congress used the term "navigable water" because its goal was to avoid pollution "whereby navigation shall or may be impeded or obstructed."[23] Indeed, an 1838 federal law had previously made it unlawful to engage in commerce on the "navigable waters" without a permit.[24] Facilitating such navigation, which no single state could fully control on its own (the quintessential Mark Twain era barge trip from St. Louis to New Orleans, for example, meant meandering into seven different states!), was a prime example of Congress' enacting a law to facilitate "commerce . . . among the several states."[25] Section 13 of the 1899 Act, often called by itself the Refuse Act, required a permit to dump any "refuse matter of any kind or description whatever . . . into any navigable water of the United States, or into any tributary of any navigable water . . . ."[26]

In the busier and more industrialized 20th century, Congress dipped it toes tentatively into further regulation of water pollution. It enacted a comparatively minor federal water law in 1948, which imported the term "navigable waters" from the 1899 Act,[27] and amended it a number of times before 1972, each time retaining the term "navigable waters."[28] Meanwhile, the 1960s saw an awakening of environmental consciousness in the nation,[29] highlighted by sensa-

to federal control) [hereinafter PLATER ET AL.]; FRED BOSSELMAN, COUNCIL ON ENVIRONMENTAL QUALITY, THE TAKING ISSUE: A STUDY OF THE CONSTITUTIONAL LIMITS OF GOVERNMENTAL AUTHORITY TO REGULATE THE USE OF PRIVATELY OWNED LAND WITHOUT PAYING COMPENSATION TO THE OWNERS 84 (1973) (discussing local 18th and 19th century laws that regulated urban health and the environment).

14. *See* Arnold W. Reitze Jr., *A Century of Air Pollution Control Law: What's Worked; What's Failed; What Might Work*, 21 ENVTL. L. 1549, 1575-77 (1991) (discussing the slow rise of "smoke" laws in the urban world, from 13th century laws in London to 19th century ordinances in American cities such as Chicago, Cleveland, and St. Louis).

15. *See, e.g.*, THEODORE STEINBERG, NATURE INCORPORATED: INDUSTRIALIZATION AND THE WATERS OF NEW ENGLAND 49, 191-239 (1991) (discussing the widespread dumping of pollutants into rivers in New England, America's first highly industrialized region, in the 19th century); CHARLES WARREN, MANAGING SCOTLAND'S ENVIRONMENT 128-31 (2002) (referring to the rivers near industrial areas in Scotland in the 19th century as being in effect "open sewers").

16. *See* WILLIAM CHARLES GRIFFIN, TAMING THE LAST FRONTIER 5 (1974) (discussing the harms caused by dumping of pollutants in urban rivers).

17. *See, e.g.*, Joel A. Tarr, *The City and the Natural Environment*, http://www.gdrc.org/uem/doc-tarr.html (discussing the construction of clean water urban reservoirs in the 19th century); Bryant Park Corp., *Bryant Park: History*, http://www.bryantpark.org/history/reservoir-square.php (last visited Jan. 12, 2007) (explaining the building of the Croton Distributing Reservoir in midtown Manhattan in the 1840s, "one of the greatest engineering triumphs of nineteenth-century America." The Manhattan reservoir is now Bryant Park, home to the central New York Public Library.).

18. *See, e.g.*, Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968) (explaining that people have an incentive to overuse and abuse commonly held resources). Try this experiment: When driving through a residential neighborhood, notice how the roadside changes when one passes a vacant lot. People are encouraged to dump their empty soda cans, cigarette butts, and other garbage on such property, because there is likely to be no owner there to complain. Moreover, without someone watching over such sites, they tend to quickly fill with refuse, which only encourages more littering. Many scholars have responded to Garrett Hardin's pessimism with arguments that the commons is not always doomed to tragedy, through means such as voluntary restraints, *see* Carol Rose, *The Comedy of the Commons*, 53 U. CHI. L. REV. 711 (1986), and the incentive to look elsewhere for additional resources, *see* Susan Jane Buck Cox, *No Tragedy of the Commons*, 7 ENVTL. ETHICS 49 (1985).

19. For most of their courses, both the Mississippi and Ohio Rivers, the two greatest waterways of the eastern United States, form a boundary among states. Most big cities of 19th century America, including Baltimore, Boston, Chicago, Cincinnati, Cleveland, New Orleans, New York, Philadelphia, Pittsburgh, St. Louis, and Washington, D.C., lay on large rivers, bays, or lakes that were major lanes of waterborne commerce.

20. If one dumps waste into the Ohio River at Evansville, Indiana, for example, much of the pollution is likely to affect Kentucky, across the river, and Illinois, downriver, as much or more than it would affect Indiana.

21. Ch. 425, 30 Stat. 1151 (1899) (codified as amended at 33 U.S.C. §§401-415).

22. *See, e.g.*, 33 U.S.C. §407 (unlawful to discharge "refuse" into the "navigable water" without a permit from the Corps). This section of the Rivers and Harbors Act is often called the Refuse Act.

23. *Id.*

24. 5 Stat. 304 (1838). In *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563-65 (1871), the Court held that Congress meant "navigable waters" to refer to whether a boat could in fact navigate on such water, and not the English practice of using this term to refer only to waters that were subject to the ebb and flow of the tides.

25. U.S. CONST. art. I, §8.

26. *Id.* §407. Section 9 of the Rivers and Harbors Act required a federal permit for any dam or structure that would cross a waterway and might impede navigation, *see id.* §401, while §10 required a permit for any other work that might hamper navigation. *See id.* §403.

27. Federal Water Pollution Control Act, Pub. L. No. 80-845, 62 Stat. 1155 (1948).

28. Amendments to the 1948 Act included the Water Pollution Control Act of 1956, Pub. L. No. 84-660, 70 Stat. 498; the Federal Water Pollution Control Act Amendments, Pub. L. No. 87-88, 75 Stat. 204 (1961); the Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903; the Clean Water Restoration Act, Pub. L. No. 89-753, 80 Stat. 1246 (1966); and the Water Quality Improvement Act of 1970, Pub. L. No. 91-224, 84 Stat. 91.

29. For a thoughtful discussion of the rise of environmental consciousness in the nation in the 1960s and 1970s, see PHILIP SHABECOFF, A FIERCE GREEN FIRE 91-145 (1993). *See also* PLATER ET AL., *supra*

tional and publicized incidents such as Cleveland's Cuyahoga River "catching on fire"[30]; the huge oil spill off the coast of Santa Barbara, California[31]; and the scandalous polluting of the James River in southern Virginia by kepone pesticide wastes.[32] This new spotlight on the problem of pollution was coupled with the 1960s' belief in federal legislation as a means of transforming America for the public good, just as Congress had recently done for civil rights and poverty, for example.[33] Perhaps in response to the growing concern over water pollution, the federal courts in the 1960s for the first time interpreted "refuse" under the 1899 Act to include liquid industrial wastes that had no effect upon navigation[34]; this new interpretation of the Rivers and Harbors Act was a wake-up call for new legislation to specify how and when polluters could discharge into the nation's waterways.[35] After Congress enacted the Clean Air Act (CAA) in 1970, which set up a massive and complex system for the federal and state governments each to play a role in decreasing air pollution,[36] Congress turned its attention to water pollution in 1972.

note 13, at 43-44 (giving a concise and opinionated overview of the public's opinion of the environment in the 20th century).

30. Countless sources have repeated the tale of the Cuyahoga River "bursting into flames." SHABECOFF, *supra* note 29, at 111. Prof. Jonathan H. Adler has explained more soberly that the infamous fire of 1969 was caused by an oil slick and various debris that were trapped under a railroad trestle. *See* Jonathan H. Adler, *Fables of the Cuyahoga: Reconstructing a History of Environmental Protection*, 14 FORDHAM ENVTL. L.J. 89, 90 (2002). Professor Adler, a federalist, also argues that local efforts had already made progress in cleaning up the Cuyahoga before the sensational 1969 incident. *See id.* at 90-97.

31. *See* KEITH C. CLARK, THE SANTA BARBARA OIL SPILL: A RETROSPECTIVE (2002), *available at* http://www.geog.ucsb.edu/-kclarke/Papers/SBOilSpill1969.pdf.

32. For a discussion of the James River kepone pollution and litigation, see William Goldfarb, *Kepone: A Case Study*, 8 ENVTL. L. 645 (1994), and William Goldfarb, *Changes in the Clean Water Act Since Kepone*, 29 U. RICH. L. REV. 603 (1995). For a summary of Goldfarb's telling of the kepone story, see PLATER ET AL., *supra* note 13, at 48-57.

33. The most famous social statute was the Civil Rights Act of 1964, which made unlawful race and sex discrimination in employment and accommodations. Pub. L. No. 88-352, 78 Stat. 243 (codified as amended at 42 U.S.C. §§2000e to 2000e-17 (2006)). A chief anti-poverty law was the Economic Opportunity Act of 1964, Pub. L. No. 88-452, 78 Stat. 508 (codified as amended at 42 U.S.C. §§2291-2995), which established the "head start" and community action programs.

34. *See* United States v. Standard Oil Co., 384 U.S. 224 (1966) (liquid pollution is "refuse" under the 1899 Act); United States v. Republic Steel, 362 U.S. 482 (1960). For a brief history of the transformation of the Refuse Act and its role as an impetus to the 1972 CWA, see PLATER ET AL., *supra* note 13, at 958-61.

35. The reinterpretation of the Rivers and Harbors Act in the 1960s after decades of dormancy is reminiscent of the Court's 1968 reinterpretations of a section of the Civil Rights Act of 1866, 42 U.S.C. §1982, to cover, for the first time, racial discrimination in housing by *private* landowners, not just by government. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). The Court's activism also presages the 21st century reinterpretation of the 1972 CWA in *Rapanos* and its 2001 predecessor, *Solid Waste Agency of N. Cook County v. Corps of Eng'rs (SWANCC)*, 531 U.S. 139, 31 ELR 20382 (2001) (holding that the term "navigable waters" does not include "isolated" wetlands).

36. The CAA is a quintessential example of cooperative federalism, through which the federal and state governments each play a role and each make important decisions in the regulatory scheme. Under the Act, the federal government creates a list of what are called the "criteria" pollutants (the most common air pollutants, such as sulfur dioxide and the pollutants that cause ozone), 42 U.S.C. §7408, and a list of the rarer but more dangerous "hazardous" air pollutants. *Id.* §7412. The federal government also uses science to develop the national ambient air quality standards (NAAQS)—that is, the maximum concentrations in the air of the criteria air pollutants that it considers to be safe. *Id.* §7409. Then, the states must develop plans to regulate, in effect by whatever means each state chooses, air pollution in the state to meet these levels. *Id.* §7410 (states must create "implementation plans"). Because of the cumbersomeness of this original system, and the tremendous latitude given to states, many of which failed to produce successful plans, Congress amended the CAA in 1977 and 1990 to make it more uniform nationwide, especially through the requirement of federal permits for some pollutants in some areas. *See, e.g., id.* §§7502(c)(5), 7503 (requiring permits and the use of specified technology levels for all major new and modified sources of pollution in areas in which the pollution levels have not attained NAAQS). For a brief history of the evolution of the CAA, see PLATER ET AL., *supra* note 13, at 552-57.

37. Section 301(a) of the Act, 33 U.S.C. §1311(a), requires compliance with permit and other provisions for a "discharge of a pollutant," which is defined as the addition of any pollutant from a point source into "navigable waters." *Id.* §1362(12). A discharge of "dredged and fill material" into "navigable waters" requires a permit under §404(a), 33 U.S.C. §1344(a).

38. In *Rapanos*, none of the opinions attempted to make a case for interpretation based on legislative history. Writing for a plurality, Justice Scalia cited the vague statutory "objective," 33 U.S.C. §1251(a), and the statute's "policy" of reserving "primary responsibilities" to the states to regulate water pollution, *id.* §1251(b), but little other history. *See* 126 S. Ct. at 2214, 2223; *see also id*. at 2252 (Stevens, J., dissenting) (citing the statutory "objective," but little other legislative history); *id.* at 2266 (Breyer, J., dissenting) (suggesting a broad interpretation, but citing no history). In *SWANCC*, the Court made only limited references to the legislative history, in large part because of the paucity of evidence. *See* 531 U.S. at 680-81. A similarly quick study was done in United States v. Riverside Bayview Homes, 474 U.S. 121, 133-34, 16 ELR 20086 (1985), the Court's first foray into determining the meaning of "navigable waters."

39. *Rapanos*, 126 S. Ct. at 2220-21 (Scalia, J., writing for a plurality).

40. *Id.* at 2252-53 (Stevens, J., dissenting) (citing Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-45, 14 ELR 20507 (1984) (when a statute is unclear, courts must defer to any reasonable interpretation by the federal agency authorized to administer the statute)).

41. *Id.* at 2242 (Kennedy, J., concurring in the judgment) (referring to a definition of "waters" as "flood or inundation," from the same 1954 *Webster's* dictionary that Justice Scalia had used). Justice Scalia noted that the example given in the dictionary is to Shakespeare, from which he then concluded that the meaning is merely "an alternative, somewhat poetic usage." *Id.* at 2221 n.4 (Scalia, J., writing for a plurality). The quotation in the dictionary—"the peril of waters, wind, and rocks"—comes from WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE act I, sc. 3. Indeed, a search of the term "waters" in the works of Shakespeare reveals a number of usages that seem to refer to floods or inundations. *See* RhymeZone, *Shakespeare Search*, http://www.rhymezone.com/r/ss.cgi?q=waters&mode=k (last visited Jan. 12, 2007) (result of search of "waters"). The poetic usage of "waters" is not reserved to Shakespeare, as shown by the famous biblical passage from Amos: "Let justice roll down like waters."

B. A Quick Dip Into the Fetid Waters of Interpreting the 1972 Clean Water Act

The task seems deceptively simple. What did Congress "mean" in 1972 when it based the CWA on whether the water being polluted is a "navigable water?"[37] A number of courts have examined the question and, in effect, given up.[38] As a result, in last year's *Rapanos* decision, Justice Antonin G. Scalia, a skeptic of interpreting federal laws broadly, opened up a dictionary to come up with a rather narrow construction in his plurality opinion.[39] Meanwhile, Justice John Paul Stevens, friendlier to broad congressional enactments, fell back on *Chevron* deference to an agency's interpretation of a vague statutory phrase, in his dissent.[40] In his concurrence with the judgment, Justice Anthony M. Kennedy argued for another definition, which Justice Scalia then implied was limited to Shakespearean poetry.[41] Meanwhile, le-

gal scholars have felled many trees (and will doubtless mow down many more after *Rapanos*) trying to figure out, on skimpy evidence, whether the history points toward either a broad or narrow interpretation of "navigable waters."[42]

It is not my intention in this Article to join either raft of interpretation. The question of congressional "intent" of a statute as significant as the CWA is complicated, of course, by disagreement over how to approach the inquiry. The author of the plurality opinion in *Rapanos*, Justice Scalia, is noted for his cogently reasoned objections to the use of legislative history.[43] If a legislative explanation is important enough, one objection goes, why wasn't it placed in the statute itself? And how do interpreters know whether a comment made in a report written by congressional staffers or a statement craftily placed in debate by a sole member of Congress constitutes the intent of all or even most of those who voted for the legislation?[44] Indeed, we do not know whether a majority of members of Congress held any common understanding of what "navigable waters" was supposed to mean, considering that Congress placed no such understanding in the final statute itself.

For present purposes, however, I mention a handful of pieces of evidence, if only to show the potential benefits of revising and clarifying the law. First, the term "navigable waters" is defined in the statute as "the waters of the United States, including the territorial seas."[45] This is of little assistance. In *Rapanos*, Justice Scalia concluded that absent any other compelling evidence, "waters" should be interpreted by a dictionary meaning that mentioned only relatively permanent bodies of water.[46] Other federalists have concluded that the phrase "of the United States" was meant to refer generally to waters that move through more than one state, in contrast to the remaining "waters of a state."[47] Interestingly, because the definition does not refer to whether boats can navigate, federalists do not argue that Congress meant to refer *exclusively* to waters that are navigable-in-fact.[48]

Advocates of narrow interpretation also point out that language in a draft Senate bill that would have explicitly included "tributaries" was removed before final passage.[49] But as Justice Scalia might remind us, a failed proposal does not mean that the legislators meant to make such a statutory exclusion; if Congress means to exclude something, it can state so in the enacted statute. Moreover, advocates of a *broad* interpretation cite a Senate report, which stated that the law was intended to cover "tributaries" and that "it is essential that discharge of pollutants be controlled at the source."[50] It seems impossible, therefore, to make any definitive conclusions about congressional intent from the differences between the draft and final legislation.

Indeed, legislatures often pass vague legislation because more explicit language would be controversial; under this theory, legislators expect the courts to sort out the uncertainties.[51] In the realm of environmental law, the use of a vague definition of "navigable waters" would not be the only example of knowing obfuscation. In the Endangered Species Act (ESA), for example, passed the year after the CWA, environmentalist drafters may have intentionally hidden one of the most significant requirements of the statute in the middle of a section with an innocuous title.[52] Such sleight of hand presumably may have led some conservatives to vote for (and perhaps even to President Richard M. Nixon's signing of) what they viewed as a rather minor law.[53] This kind of legislative gamesmanship might also serve as a spur to Justice Scalia's hostility to what he considers overreaching

Amos 5:23 (Am. Standard Version), *available at* http://bible.cc/amos/5-24.htm (last visited Dec. 21, 2006).

42. Perhaps the most notable work supporting a narrow interpretation of "navigable waters" has been Virginia S. Albrecht & Stephen M. Nickelsburg, *Could* SWANCC *Be Right? A New Look at the Legislative History of the Clean Water Act*, 32 ELR 11042 (Sept. 2002). This work relied in large part on the supposed motivation of Congress in 1972 as a desire to correct errors in the Corps' interpretation of the 1899 Rivers and Harbors Act. *See id.* at 11045-49.

    The literature arguing for a broad interpretation has been more extensive. Responding directly to Virginia Albrecht and Stephen Nickelsburg was Lance D. Wood, *Don't Be Misled: CWA Jurisdiction Extends to All Non-Navigable Tributaries of the Traditional Navigable Waters and to Their Adjacent Wetlands (A Response to the Virginia Albrecht/Stephen Nickelsburg* ELR *Article, to the Fifth Circuit's Decision* In re Needham*, and to the Supreme Court's Dicta in* SWANCC*)*, 34 ELR 10187 (Feb. 2004).

    Perhaps the most comprehensive work from academia has been William Funk, *The Court, the Clean Water Act, and the Constitution:* SWANCC *and Beyond*, 31 ELR 10741 (July 2001). Prof. William Funk argued, citing a U.S. Senate report of the CWA, that it was the intent of Congress "that 'navigable waters' be given the broadest possible constitutional interpretation." *Id.* at 10748-49 (citing H.R. Rep. No. 92-911, at 131 (1972)).

43. *See, e.g.*, Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 31 (1997).

44. *See id.* (objecting to the notion that courts can ascertain a unified "intent" of members of Congress outside the text of the statute).

45. 33 U.S.C. §1362(7).

46. 126 S. Ct. at 2220-21 (Scalia, J., writing for a plurality).

47. *See* Albrecht & Nickelsburg, *supra* note 42, at 11055.

48. *See SWANCC*, 531 U.S. at 171 (reiterating that "navigable waters" is not limited to waters that are navigable-in-fact). One piece of legislative history on this point is the statement in a congressional conference committee report of Rep. John Dingell (D-Mich.), who asserted that Congress intended to regulate at least some waters that would not be deemed "navigable" under more traditional meanings of the term. *See* 118 Cong. Rec. H33756-57 (statement of Rep. Dingell).

    After acknowledging that "navigable waters" are not limited to navigable-in-fact waters, the Court in *SWANCC* then concluded: "We cannot agree that Congress' separate definitional use of the phrase 'waters of the United States' constitutes a basis for reading the term 'navigable waters' out of the statute." 531 U.S. at 172. This passage appeared to assert that the Court would not allow Congress to define a phrase as it wished—an egregious usurpation of power to the courts.

49. *See* Albrecht & Nickelsburg, *supra* note 42, at 11047-48. A draft Senate bill had defined "navigable waters" as "the navigable waters of the United States, portions thereof, and the tributaries thereof, including the territorial seas and the Great Lakes." *See id.*

50. *See* S. Rep. No. 92-414, at 77 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3742.

51. *See, e.g.*, Ex parte Quirin, 317 U.S. 1, 29 (1942) (asserting that Congress intentionally left vague the offenses triable under color of war); James M. Auslander, *Reversing the Flow: The Interconnectivity of Environmental Law in Addressing External Threats to Protected Land and Waters*, 30 Harv. Envtl. L. Rev. 481, 502 (2006) (asserting that Congress sometimes leaves environmental law matters unclear for "political insularity").

52. *See* 16 U.S.C. §1536 (innocuously entitled "Interagency Cooperation"); *id.* §1536(a)(2) (imposing on all federal agencies the duty of consulting with an expert wildlife agency about whether a proposed action would "jeopardize" an endangered species before taking the action and imposing upon the agencies the duty of "ensuring" that such jeopardy does not occur).

53. For a suggestion that the meaty requirements of 16 U.S.C. §1536 "lay camouflaged" and that "the clunky prose style made it unlikely that many members of Congress realized what they were approving"; *see* Plater et al., *supra* note 13, at 777.

by federal agencies and federal courts in applying the law.[54] If congressional sponsors did not believe they could garner enough votes in favor of a clear, broad definition of the reach of an act, is it appropriate for agencies or courts to do it for them?

One of the most powerful—but not dispositive—arguments in favor of a broad interpretation is a practical argument. As asserted by Lance Wood, a senior attorney for the U.S. Army Corps of Engineers (the Corps), "the CWA would be completely ineffectual if non-navigable tributaries were not covered."[55] If the Act regulated only navigable-in-fact waterways, then polluters could avoid the Act simply by moving their discharges to watery areas, such as small tributaries, that are impassible to navigation. Such an interpretation would make the Act a nullity, Wood wrote.[56] Such an argument of practical interpretation might be expected to appeal to Justice Scalia, who has written that a useful method of statutory interpretation is to read the law so that it makes sense.[57] Indeed, in the Court's first foray into interpreting "navigable waters"—1985's *United States v. Riverside Bayview Homes*[58]—a deferential Court approved coverage of wetlands "adjacent to" navigable-in-fact waterways and their tributaries, in large part because of the difficulty of distinguishing between the types of water bodies.[59]

But statutes are often compromises, of course. The CWA is full of them: the law's crucial definition of "point source" pollution excludes "stormwater" runoff, despite the enormous amount of pollutants that run off fields and lawns into the nation's rivers.[60] Another exemption is provided in the wetlands-dumping section for "normal farming" activities,[61] which today constitute the largest single category of water pollution.[62] It is conceivable that at least some members of Congress viewed the "navigable waters" limitation as a way of dividing authority between the federal statute, which would cover only navigable-in-fact waters, and state law, which would cover all other water bodies. Wood argued that states are discouraged from enacting tough water pollution laws out of fear of driving business elsewhere—the so-called race-to-the-bottom.[63] While this may be true, it is also true that Congress is free to enact feeble, compromise laws and is free to leave certain realms of regulation to the states, as it does in many areas.[64]

Environmentalists point to language in the CWA's introduction that the statute's goal was to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[65] Such a task certainly would be facilitated by giving it a broad reach into wetlands, gulleys, and even man-made waterways. But this generalized statement does not mean that Congress meant to give "navigable waters" a specific and broad meaning, considering that it failed to set forth such a definition in the Act itself. On the flip side, Justice Scalia relied instead in *Rapanos* on other language in the Act's introductory section about the statute's retaining the "primary responsibilities" of the states for water pollution control.[66] Without any more specificity in details, this last statement seems to be merely a sop to federalists; both of the statements in the introduction seem like the kind of gauzy generalizations that strict judges such as Justice Scalia usually give little weight.[67]

Wood chastised the federalists for ignoring the fact that it has been "generally understood" for the past 30 years that the CWA's term "navigable waters" was meant to cover more than waters that are navigable-in-fact.[68] Indeed, both of the agencies that administer the Act have construed the term broadly. EPA early on considered almost any body of

54. Justice Scalia's jurisprudence has been marked by complaints about the heavy hand of government on private parties. One of the most famous was his quotation of an analogy likening government land use requirements to "extortion" in Nollan v. California Coastal Comm'n, 483 U.S. 825, 838, 17 ELR 20918 (1987). In *Rapanos*, he likened the Corps' permit program to that of an "enlightened despot" ruling over private property. 126 S. Ct. at 2214.

55. Wood, *supra* note 42, at 10195.

56. *Id*. at 10196.

57. *See, e.g.*, Babbitt v. Sweet Home Chapter of Communities for a Great Or., 515 U.S. 687, 715-29, 25 ELR 21194 (1995) (Scalia, J., dissenting) (interpreting a vague term in the ESA by using other sections of the Act in order to make the Act make sense as a whole).

58. 474 U.S. 121 (1985). Justice Byron White's majority opinion for a unanimous Court deferred to the Corps' interpretation of "navigable waters" to include all that are "adjacent" to navigable-in-fact waters. *Id.* at 131. It made sense to cover such waters, the Court reasoned, because their proximity to navigable-in-fact waters meant that as a category, discharge into such wetlands would be likely to affect the navigable-in-fact waters. *See id.* at 124. The Court's reasoning included a strong presumption of legality of an interpretation by the agency charged with administering the statute, consistent with *Chevron*, which had been decided just a year before. *See id.* at 131.

59. The Court reasoned that

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

Id. at 462.

60. 33 U.S.C. §1362(14).

61. *Id*. §1344(f)(a)(a).

62. *See, e.g.*, U.S. EPA, Water Quality Inventory 62 (1998).

63. *See* Wood, *supra* note 42, at 10194. For a good discussion of the phenomenon, see Kirsten H. Engel, *State Environmental Standard-Setting: Is There a "Race" and Is It "To the Bottom?,"* 48 Hastings L.J. 271, 375 (1997) (concluding that many state legislators are fearful of discouraging business).

64. In the CAA as originally amended, for example, states were granted nearly unfettered discretion as to how to regulate air pollution within the state to meet air quality requirements. *See* 42 U.S.C. §7410. Likewise, in the CWA, states are authorized to set their own water quality standards and then to take whatever steps they desire to meet these standards. *See id.* §1313. Outside of environmental law, a trend of federal law is to grant more discretion for states to follow their own course. In the landmark act (sometimes known as the Welfare Reform Act of 1996), for example, states were given wide leeway to set their own standards for the receipt of federal assistance money. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, §§101-16, 110 Stat. 2105 (amending 42 U.S.C. §§601-17).

65. 33 U.S.C. §1251(a).

66. *Id.* §1251(b).

67. Although the CWA's introduction asserts that it preserves to the states the "primary responsibilities" for water pollution control, it then goes on to impose very specific federal controls, including the requirement that point source polluters use certain levels of federally mandated technology in order to obtain a federally authorized permit to discharge their pollutants. *See id.* §§1311(b), 1314(b). It is difficult to see how such a system preserves primary responsibility in the states.

Justice Scalia warned in *Rapanos* against "substituting the purpose of the statute for its text," 126 S. Ct. at 2234, but failed to clarify how a court should reconcile a statue's textual "goals" and general "policies" with its more specific provisions.

68. *See* Wood, *supra* note 42, at 10192.

water to be "waters of the United States" for the purpose of regulating pollution discharges under §301 of the Act.[69] With a little prodding from EPA and the federal courts,[70] even the less environmentally minded Corps has, at least since 1975, interpreted the Act to cover a wide range of wetlands, under the permit system for the discharge of dredged or fill material in §404 of the Act.[71] The Corps' regulations have included wetlands that are "adjacent" to navigable-in-fact waters and those that are used by migratory birds.[72] An Achilles' heel of the "generally understood" assertion, however, is that such an argument is unlikely to persuade jurists, such as Justice Scalia, for whom the text of the statute, not what agency officials say they "understood," provides the only acceptable method interpreting a law.[73]

One final piece of history cited as evidence by advocates of broad interpretation of "navigable waters" was the statement in the 1972 congressional conference report that Congress "intend[ed] that the term 'navigable waters' be given the broadest possible constitutional interpretation."[74] The most obvious constitutional constraints are Article I's limitations on Congress' powers to legislate.[75] If Congress desired to cover as many water bodies as possible, its only real boundary was the interstate Commerce Clause, Article I, §8, which is the constitutional authority for most social and environmental legislation.[76] In the well-known history of the commerce power, addressed in Part III of this Article, the Court struck down much of modern social legislation in the early 20th century, only to reverse itself and uphold legislation against each and every legal challenge from 1937 until 1995, when a new generation of federalists, including Justice Scalia, revived the notion that there are some realms in which the states hold the exclusive power to regulate.[77] Although laws that "substantially affect" interstate commerce are still permitted, statutes that do not directly regulate commerce are vulnerable to this new federalist scrutiny.[78] Through *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (*SWANCC*)[79] and *Rapanos*, the CWA has suffered the sharpest blows of this new federalism.[80]

69. 33 U.S.C. §1311. EPA's broad interpretation of "waters of the United States" is set forth at 40 C.F.R. §230.3(s) (2006). The term includes even "intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds," if they "could affect" interstate commerce. *Id.* In practice, the interstate commerce link is often a given.

70. The Corps originally interpreted "navigable waters" more narrowly, to cover in effect only waters that are navigable-in-fact. In *Natural Resources Defense Council v. Callaway*, 392 F. Supp. 685, 686, 5 ELR 20285 (D.D.C. 1975), a district court held that Congress meant the term "navigable waters" to be as broad as possible under the Constitution and that the Corps' 1974 interpretation was thus unlawful. The Corps then took a number of steps to regulate more categories of waters. For a thorough explication of the early history of Corps administration of the Act, see Robert W. Haines, *Wetlands' Reluctant Champion: The Corps Takes a Fresh Look at "Navigable Waters,"* 6 ENVTL. L. 217, 218-24 (1975).

71. 33 U.S.C. §1344. As of early 2006, the Corps' definition of "waters of the United States," 33 C.F.R. §328.3, closely matched EPA's definition, 40 C.F.R. §230.3(s), set forth above. An "intrastate wetland" that affects interstate commerce is considered a "water" under §328.3(a)(3). This definition presumably was meant to refer to a wetland that lies only in one state (confusingly called an "intrastate wetland") but that in some way affects commerce across state lines (thus making it suitable for coverage by the Act). But the Corps' regulations further clarified that "waters" also included "[w]etlands adjacent to" places that are elsewhere categorized as "waters." 33 C.F.R. §328.3(a)(7). Thus, the regulations assume that there are wetlands (covered by §328.3(a)(7)) that do *not* affect interstate commerce but that are "adjacent to," say, a river that *does* affect interstate commerce. If, however, one can separate the wetland and river well enough to say that the river does affect interstate commerce but the adjoining §328.3(a)(7) wetland does not, it presumably would have to be the case that pollution from the one does not move to the other. In this case, it seems odd to include the (a)(7) wetland under the Act, considering that other types of water features, such as rivers and lakes, are excluded unless they affect interstate commerce. This morass of confusion could be cleared up in large part by focusing on the effect of the pollution, instead of trying to categorize the wetlands themselves. I discuss a potential solution in Part V of this Article.

72. The "adjacent" wetland provision is at 33 C.F.R. §328.3(a)(7), and is discussed *supra* note 71. The less formal Migratory Bird Rule, 51 Fed. Reg. 41216, 41217 (Sept. 19, 1986), was struck down by the Court in *SWANCC*, 531 U.S. at 174.

73. Judges' ignorance of what legal practitioners assume might be considered a flaw or a benefit; after all, for many years it was "generally understood" that the Fourteenth Amendment allowed government's separation of the black and white races. *See* Brown v. Board of Education, 347 U.S. 483 (1954) (the Fourteenth Amendment does not allow "separate but equal" public schools for blacks and whites), overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896). It was also "understood" that the First Amendment allowed public-figure plaintiffs to recover for negligent defamation, until judges concluded that the words of the First Amendment demanded greater protection of the individual. *See* Sullivan v. New York Times, 376 U.S. 254 (1965) (the First Amendment requires that people be allowed to speak about public figures without fear of losing a defamation suit, unless the speaker held "actual malice" in making the false statement).

Justice Scalia's jurisprudence is at times refreshing, in that it can cut through layers of accreted doctrine to get at the essence of the matter. *See, e.g.*, National Treasury Employees Union v. Von Raab, 489 U.S. 656, (1989) (Scalia, J., dissenting in a major drug-testing case for federal employees, and recognizing that such tests are largely "symbolic opposition" and that such a symbolic step cannot overcome the affront to personal dignity and rights that the test entails); Nollan v. California Coastal Comm'n, 483 U.S. 825, 838, 17 ELR 20918 (1987) (calling land use exactions "extortion," which many conservatives no doubt felt but were too delicate to say). Justice Scalia's jurisprudence, however, can also be frightening in its rejection of what many assume are commonly held values, such as his occasional rejection of the concept of judicial review of an agency when it suits him. *See* Lujan v. Defenders of Wildlife, 504 U.S. 552, 22 ELR 20913 (1992) (finding a lack of standing to challenge a wildlife policy).

74. S. CONF. REP. NO. 92-1236, at 144 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3776, 3822.

75. *See* U.S. CONST. art. 1, §8 (powers of Congress).

76. *See id.; see also, e.g.*, Hodel v. Virginia Surface Mining Ass'n, 452 U.S. 264, 11 ELR 20569 (1981) (upholding on commerce power grounds a federal law regulating the operation of strip mines); Katzenbach v. McClung, 379 U.S. 294 (1964) (upholding on commerce power grounds Title II of the 1964 Civil Rights Act, 42 U.S.C. §2000a, which prohibits race discrimination against public restaurant patrons).

77. The decision in *Lopez v. United States*, 514 U.S. 549 (1995), was the first time in more than half a century that the Court struck down a congressional statute as exceeding Congress' commerce power. For one thoughtful discussion of the dormancy and revival of Commerce Clause federalism, see John Shane, *Federalism's "Old Deal": What's Right and Wrong With Conservative Judicial Activism*, 45 VILLA. L. REV. 201 (2000).

78. *Lopez* struck down the relatively obscure Gun-Free School Zones Act, 18 U.S.C. §922(q) (1988); it was followed by United States v. Morrison, 529 U.S. 598 (2000), which overturned the relatively obscure Violence Against Women Act (VAWA), 42 U.S.C. §13981. In *SWANCC*, the Court for the first time used its revived federalism to curb a major federal statute, albeit through the means of using the limitations of the commerce power to construct a narrow statutory interpretation of the key term "navigable waters."

79. 531 U.S. 159, 31 ELR 20382 (2001).

80. The Court followed *SWANCC* with *Rapanos v. United States*, 126 S. Ct. 2208, 36 ELR 20116 (2006), in which a plurality of the Court would have narrowed "navigable waters" generally to include only relatively permanent water bodies, such as lakes, rivers, and streams. *See id.* at 2220-21 (Scalia, J., writing for a plurality).

Once the Commerce Clause enters the debate over interpreting the Act, we may see—perhaps ironically—some common ground under the positions of environmentalists such as Wood, who want the federal government to hold a wide power to regulate discharges into water, and federalists such as Justice Scalia, who scorn federal laws that usurp what he sees as state prerogative. These two sides must agree on these points: Congress may regulate water pollution as far as the Commerce Clause allows, but Congress cannot regulate beyond its constitutional power. Accordingly, as I endeavor to explain in Part V, it makes sense to re-craft the reach of the CWA under these criteria.

To conclude this otherwise largely fruitless excursion into the "meaning" of "navigable waters" and its definition in the 1972 Act, let me provide what I admittedly call a speculation as to what transpired in Congress in 1972. This speculation is no doubt overly simplistic, but it is consistent, I believe, with the evidence of Congress' actions. Environmentalists in 1972 of course desired a federal act that would cover as much water pollution as possible[81]; as explained below, the Act's most significant step was to require all "point source" polluters (that is, largely, industrial polluters) to cut back their pollution through the use of "best technology."[82] As with all national regulatory legislation, however, federalists opposed national arrogation of regulatory power that could be retained by the states.[83] Perhaps in order to assuage skeptics that the statute did nothing revolutionary, the drafters retained the linchpin term that had been used in national water law since the 1899 Rivers and Harbors Act—"navigable waters."[84] To give this somewhat elastic term a broader meaning, however, its definition was not explicitly tied to navigation-in-fact—that is, to whether boats can sail. To limit a statute only to pollution in navigable-in-fact waters would leave enormous stretches of the nation's waterways, including small tributaries that flow into navigable rivers, outside the Act (as *SWANCC*, *Rapanos*, and their progeny may yet do). Pollution dumped into nonnavigable waters would then, of course, often drift into the navigable ones. Perhaps the environmentalist drafters simply used a familiar and reassuring linchpin term ("navigable waters"), gave it a vague and potentially broad definition ("waters of the United States"), and then simply left it to the federal courts, which had a reputation for liberal and expansive interpretation of the laws back in 1972, to interpret the vague and conflicting terms. If this generalization is accurate, then Congress in 1972 took a gamble—a gamble that may have paid off for a few decades, but that is backfiring today, as a more conservative and federalist Court finally gets around to construing the vague statutory terms that it never fully clarified before in the 30-plus years of the CWA.

Finally, how does the Commerce Clause relate to the original meaning of the Act? In 1972, the congressional drafters probably did not consider the U.S. Constitution to be a serious impediment. After all, the Court had not struck down an act of Congress as going beyond the commerce power for more than 30 years (and would go more than 20 more years before finally doing so). In much of the major social legislation of the 1960s, statutes gave merely lip service to the theoretical limitation of the Commerce Clause. The Civil Rights Act of 1964, for example, conditioned prohibitions against race and sex discrimination in employment on an industry's "affecting interstate commerce."[85] In practice, however, the federal courts have paid almost no attention to this supposed restriction.[86]

By the 1970s, the Commerce Clause seemed like such an anachronism that Congress did not even bother to bow to the commerce power in the major environmental statutes enacted during the Nixon and Carter Administrations. The CAA of 1970 (under which, admittedly, it is easy to imagine much air pollution traveling across state lines) did not include any statutory Commerce Clause limitation[87]; the wildlife protections of the ESA of 1973 were not tied to commerce[88]; and the Superfund law of 1980 failed to limit federal cleanups of hazardous waste spills to those linked to interstate commerce.[89] In the cases of the ESA and Superfund, these omissions have come back to haunt these statutes in recent years, and may continue to do so.[90]

But no other environmental statute has suffered under the revived federalist scrutiny as much as the CWA, which also contains no explicit link to interstate commerce.[91] The water law has been the favorite target of the new federalists for a

81. Representative Dingell, a leading sponsor of the Act in the U.S. House of Representatives, stated on the floor of the House during the 1972 debate that "the conference bill defines the term 'navigable waters' broadly for water quality purposes." *See* House Consideration of the Report of the Conference Committee, Oct. 4, 1972, *reprinted in* A Legislative History of the Water Pollution Control Act Amendments of 1972, at 250-51 (1973).

82. *See* 33 U.S.C. §§1311(b), 1314(b).

83. President Nixon vetoed the measure because it would result in "extreme and needless overspending." *See* Message From the President of the United States Returning Without Approval the Bill (S. 2770) Entitled "The Federal Water Pollution Control Act Amendments of 1972," *cited in* Maria V. Maurrasse, Oklahoma v. EPA*: Does the Clean Water Act Provide an Effective Remedy to Downstream States or Is There Still Room Left for Federal Common Law?*, 45 U. Miami L. Rev. 1137, 1148 n.85 (1991). Congress overrode the veto.

84. *See* 33 U.S.C. §1311(a).

85. *See* 42 U.S.C. §2000e.

86. In practice, it is nearly impossible for an employer to argue successfully that it is not covered by Title VII. *See, e.g.*, Equal Employment Opportunity Comm'n v. Ratliff, 906 F.2d 1314, 1316-17 (9th Cir. 1990) (concluding that the use of business equipment made in a different state would be sufficient to justify regulation under the Commerce Clause). The court in *Ratliff* concluded that "[i]t is difficult to imagine any activity, business or industry employing 15 or more employees that would not in some degree affect commerce among the states." *Id.* (quoting A. Larson & L.K. Larson, Employment Discrimination §5.31, at 2-40 (1987)).

87. *See* 42 U.S.C. §7410 (requiring CAA implementation plans to meet NAAQS, with no mention of a requirement that the pollution affect interstate commerce).

88. *See* 16 U.S.C. §1538(a)(1)(B) (prohibiting the "take" of endangered species, with no requirement that either the take or the species affect interstate commerce).

89. *See* 42 U.S.C. §9604(a)(1) (authorizing a federal "response" to hazardous substance releases if they present a danger to public health or welfare, with no requirement that the release harm interstate commerce).

90. Leading challenges to the ESA under the Commerce Clause have been *Gibbs v. Babbitt*, 214 F.3d 483, 30 ELR 20602 (4th Cir. 2000) (holding that protection of the red wolf in North Carolina is justified through its fostering of tourism to see the red wolf); *National Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 28 ELR 20403 (D.C. Cir. 1997) (upholding protection of the Delhi Sands flower-loving fly in part because of the potential importance of biodiversity and genetic material to future commerce), *cert. denied*, 524 U.S. 937 (U.S. 1998). The leading challenge to the Superfund law has been *United States v. Olin Corp.*, 107 F.3d 1506, 27 ELR 20778 (11th Cir. 1997) (concluding that the Superfund law is permissible part of a national pollution protection program).

91. *See, e.g.*, 33 U.S.C. §1362(7) (definition of "navigable waters" includes no requirement of a link to interstate commerce).

number of reasons. First is the fact that the CWA imposes more burdens on private property owners; it requires permits for thousands of discharges each year—far more instances than the applications of the ESA or Superfund on private landowners.[92] Second is the fact that the CWA requires a permit for activities that perhaps appear to be small matters that do not justify "federal cases," such as the filling in of a small man-made pond in *SWANCC* or the discharge into a man-made ditch in the case of one of the landowners in *Rapanos*. Federal intervention in such cases must seem like unnecessary meddling to a federalist-minded jurist who is concerned with private property interests. Third, and finally, the CWA's linchpin term, "navigable waters,"[93] seems to imply, somehow, some explicit connection to interstate trade. But Congress gave the Act no such link. In Part V of this Article, I suggest how it could do so now.

III. Meanwhile, the Commerce Clause Seeps Toward the Clean Water Act

The Court's decision in *Rapanos*,[94] discussed in depth in Part IV.B., gave the federalists on the Court an opportunity to strike a blow against what they see as federal overreaching. But the fractured *Rapanos* decision raised more questions than it answered. The Court still has not clarified what "navigable waters" means. Nor has it delineated what limits the Commerce Clause places on national regulation of water pollution, or the bigger picture of how federal environmental protection fits with the Court's new-found federalism. To understand how the Constitution provides a boundary to the reach of the CWA, we must briefly review the remarkable history of the law of powers of Congress.

A. The Commerce Clause Revives, After a Long Drought, 1791-2006

The contorted history of the Commerce Clause is well known. Before the 20th century, Congress only rarely enacted legislation that generated a controversy over the interstate commerce power. Instead, pre-20th century debates more commonly concerned whether Congress could enact laws to help African Americans—first as slaves, and then as freed persons.[95] By the early 20th century, however, the movement that came to be known as Progressivism called for new national legislation to address the social and commercial problems of a more industrialized national economy.[96] As Congress responded to these matters, however, hidebound federal courts overturned statute after statute. In effect, the federalist-minded Court held that the Constitution did not authorize Congress to legislate in areas of social values, such as empowering workers at the expense of business, even if the law was imposed only on businesses that participated in interstate commerce. In the "child labor case" of 1918[97] and in the so-called sick chicken case of 1935,[98] the Court overturned popular social welfare statutes that were only tangentially related to interstate commerce. A famous conclusion came in the latter case, in which the Court asserted that the fact that the Great Depression was causing low wages and poor working conditions did not justify the federal law: "Extraordinary conditions do not create or enlarge constitutional power," the Court held.[99]

By the late 1930s, however, the law of Commerce Clause was transformed. One reason was that the Court was infused with new Justices, appointed by Nationalist-oriented President Franklin D. Roosevelt.[100] Another reason was the growing acceptance of the idea—still argued in effect by the Nationalist supporters of the CWA in *Rapanos*[101]—that extraordinary national problems *do* deserve wide-reaching national solutions. In *National Labor Relations Board v. Jones & Laughlin Steel Corp.*,[102] the Court in 1937 upheld a national collective bargaining labor law, in part through somewhat attenuated reasoning that because collective bargaining helps foster labor peace, it might help the national econ-

92. In 2003, for example, the Corps made 86,177 CWA permit decisions. Most of these were rather routine grants of nationwide or regional permits—meaning that the applicant's request fit within a category for which the Corps had already granted a permit—and the Corps denied only 299. *See* U.S. Army Corps of Engineers, *Regulatory Program*, http://www.usace.army.mil/inet/functions/cw/cecwo/reg/2003webcharts.pdf (last visited Jan. 21, 2007). By contrast, there were fewer than 1,000 Superfund sites in the nation as of 2006. *See* U.S. EPA, *Superfund Sites*, http://www.epa.gov/superfund/sites/query/queryhtm/nplccl1.htm (last visited Jan. 12, 2007). Justice Scalia began his plurality opinion in *Rapanos* with a complaint about the costs of the CWA dredge and fill permit program. *See* 126 S. Ct. at 2214.

93. *See* 33 U.S.C. §§1362(12), 1344(a).

94. 126 S. Ct. at 2208.

95. In the *Passenger Cases*, 48 U.S. (7 How.) 283 (1849), the Court held that Congress could regulate the importation of slaves, pursuant to U.S. CONST. art. 9, §1.

96. For a brief history of the rise of congressional legislation in the Progressive Era and into the 20th century, see GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 185-93 (5th ed. 2005).

97. In the "child labor case," *Hammer v. Dagenhart*, 247 U.S. 251 (1918), the Court struck down a federal law banning many forms of the employment of children by manufacturers that sold their wares across state lines. "The act in its effect does not regulate transportation among the States," the Court reasoned, "but aims to standardize the ages at which children may be employed . . . . The goods shipped are of themselves harmless." *Id.* at 274. The distinction—coherent if cruel—was that Congress may target a perceived harm in interstate commerce itself, but may not directly regulate local activity (such as employment), simply by imposing it on businesses that then traded across state lines. Local activity could only be regulated by the states or local authorities.

98. In the "sick chicken" case of 1935, *A.L.A. Schechter Poultry v. United States*, 295 U.S. 495 (1935), the Court reasoned that Congress exceeded its powers by authorizing a New Deal agency to impose a minimum wage and 40-hour work week for butchers in New York City. *See id.* at 520-21. Despite the fact that much of the butcher's poultry traveled across state lines, the Court found the law unconstitutional, in effect because Congress' motivation was not chickens, but rather the relationship between workers and employers. *See id.* at 527-30.

99. *Id.* at 528.

100. President Roosevelt replaced eight of the nine Justices between 1936 and 1942, when the Court issued *Wickard v. Filburn*, 317 U.S. 111 (1942), effectively closing serious Court review of Commerce Clause challenges for more than half a century. Another reason for the Court's shift may have been President Roosevelt's 1937 plan to expand the Court to 15 members, in order to get it to do his bidding; although the "Court-packing" idea was eventually rejected by Congress, it may have spurred mind-changes of a Justice or two as "the switch in time that saved nine." For a history of the Court-packing plan, see William E. Leuchtenberg, *The Origins of Franklin D. Roosevelt's Court-Packing Plan*, 1966 SUP. CT. REV. 347.

101. *See, e.g.*, 126 S. Ct. at 2258-59 (Stevens, J., dissenting) (arguing in part that "[t]he importance of wetlands protection is hard to overstate").

102. 301 U.S. 1 (1937).

omy.[103] Five years later, in *Wickard v. Filburn*,[104] the Court sustained an agricultural price-support bill that regulated how much wheat could be grown by each farmer, including wheat consumed by the farmer at home.[105] The law was a permissible regulation of interstate commerce, the Court in effect concluded, because even home-consumed wheat could affect the national wheat market (if farmers consumed home-grown wheat, it would decrease national demand and thus depress prices).[106] From *Wickard* came a crucial principle, still generally valid today, that Congress may regulate seemingly local activity if this activity has what *Wickard* called a "substantial economic effect,"[107] or what courts today call an activity that "substantially affects" interstate commerce.[108]

After *Wickard*, it was smooth sailing for Congress for almost the remainder of the century, as Congress legislated in more and more facets of American life, and the courts routinely held that the laws passed muster, as long as there was some conceivable link to interstate commerce[109] The extraordinarily deferential standard of judicial review allowed Congress to delve into regulatory worlds that would have been inconceivable in the early 20th century. The courts approved federal laws regulating loan-sharking,[110] the possession of various kinds of firearms,[111] killing bald eagles,[112] racial discrimination in employment, hotels, and restaurants (the holding in *Katzenbach v. McClung*[113] relied in part on the fact that barbecue ingredients traveled across state lines), and even the working hours of a state government's own employees.[114] One of the most significant and active new worlds of regulation has been the federal control of environmental law, which is addressed below.

The nearly unfettered discretion of Congress began to experience some clouds of uncertainty, however, in the conservative age of the 1980s, as President Ronald Reagan appointed federalist-minded Justices, including Justice Scalia, and elevated William H. Rehnquist to Chief Justice. After a number of years of quiet, these clouds resulted in a somewhat unexpected cloudburst called *United States v. Lopez*,[115] in which the Court struck down, for the first time in nearly 60 years, a statute as exceeding the commerce power. *Lopez* concerned a rather minor law, the Gun-Free School Zones Act,[116] but it revealed that a new Court majority was looking for ways to vindicate state and private prerogative over national authority. First, the Court rejected the judicial practice of unquestioning deference to Congress' finding of a link to interstate commerce, concluding that uncritical deference would allow Congress to justify almost any statute (which, of course, neatly summarized the jurisprudence of 1937-1995).[117] Next, the Court revived a disapproval of an *attenuated* link between the regulated activity (in *Lopez*, possessing a gun near a school) and the supposed interstate commerce (in *Lopez*, the national gun trade and the future economic contributions of young people).[118] The Court did not attempt, however—and to date has still not attempted—to set forth any standard for distinguishing between acceptable and unacceptable levels of attenuation. It would be problematic as a matter of public opinion, needless to say, to explicitly revive the discredited tests set forth in the "child labor" and "sick chicken" cases. Finally and most significantly, the Court relied in part on the tradition that states, not the federal government, have regulated small crimes.[119] Although a reliance on tradition enabled the court to decide *Lopez*, it provides little guidance for developing a coherent new law of the Commerce Clause.[120]

The Court in 2005 upheld, in *Gonzales v. Raich*,[121] a federal law that criminalized marijuana possession and overrode a state's authorization of the drug's use for medicinal purposes. While Chief Justice Rehnquist, Justice Sandra Day O'Connor, and Justice Clarence Thomas (who wrote a forceful separate dissent) stuck to their federalist guns and extended the rationale of *Lopez* to disapprove of the federal marijuana law,[122] Justices Scalia and Kennedy voted with the *Raich* majority, which, in a revival of pre-*Lopez* jurisprudence, deferred to Congress' argument of an attenuated link between the medical marijuana use and the national

103. *See id.* at 41-45 (concluding that the preservation of labor peace and the avoiding of "industrial strife" protects interstate commerce).

104. 317 U.S. 111 (1942).

105. *See id.* at 113-14 & n.2.

106. *See id.* at 121-31.

107. *Id.* at 125.

108. *See* United States v. Lopez, 541 U.S. 558-59 (1995).

109. One realm in which the new deference was especially prominent was criminal law, in which even seemingly local crimes became federal offenses if they involved the use of a telephone. Under 18 U.S.C. §844(e), for example, using a telephone or other "instrument of commerce" to make a bomb threat is a federal offense. *See* United States v. Gilbert, 181 F.3d 152 (1st Cir. 1999) (upholding the statute in a Commerce Clause challenge). By 1990, even the mere possession with intent to distribute a few grams of crack cocaine implicated federal law. *See* 21 U.S.C. §841(b)(1)(A)(iii) (mandatory minimums for felony possession of only 50 grams of crack cocaine); *id.* §812(c) (classifying marijuana as Schedule I controlled drug).

110. *See* United States v. Perez, 402 U.S. 146 (1971).

111. *See* Scarborough v. United States, 431 U.S. 563 (1977).

112. *See* Andrus v. Allard, 444 U.S. 51, 9 ELR 20791 (1979).

113. 379 U.S. 294, 304 (1964); *see also* Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) (upholding Title II of the 1964 Civil Rights Act, 42 U.S.C. §2000a, prohibiting race discrimination in accommodations).

114. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

115. 514 U.S. 549 (1995).

116. 18 U.S.C. §922(q) (1988).

117. *See Lopez* at 567-68. The Court wrote: "Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action," but it rejected an approach "to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Id.*

118. In the next case after *Lopez* to strike down a federal law, the Court wrote that "our decision in *Lopez* rested in part on the fact that the link between gun possession and a substantial effect on interstate crime was attenuated." United States v. Morrison, 529 U.S. 598, 612 (2000).

119. *Lopez* offered the specter that if gun crime can be regulated by Congress, it could then move to other "areas such as criminal law enforcement or education where States historically have been sovereign." *Lopez*, 514 U.S. at 564; *see also id.* at 567-68 (concluding that there must be distinction between "what is truly national and what is truly local").

120. If a gun offense must remain exclusively local, why not drug crime? In *Lopez*'s 2000 twin, *Morrison*, 529 U.S. at 598, the Court struck down the VAWA, which had authorized federal court jurisdiction for gender-bias-motivated violence, in the face of congressional findings that such violence discourages women from moving across state lines and participating to a full extent in the national economy.

121. 545 U.S. 1, 125 S. Ct. 2195 (2005).

122. *See* 125 S. Ct. at 2220 (O'Connor, J., dissenting); *id.* at 2228 (Thomas, J., dissenting).

market for the drug.[123] A cynic might suspect that these Justices welcome new federalism when it provides rhetorical victories, as in *Lopez* and *United States v. Morrison*,[124] but not when it threatens national laws they find important, such as the federal anti-marijuana law in *Raich*. In sum, the much-ballyhooed new federalism has, so far, created little in the way of workable rules for limiting congressional power in the 21st century.

Lopez and its progeny have, however, provided some fairly uncontroversial black-letter law of the Court's new requirements for the commerce power. Although this law offers mostly generalities, not concrete answers, it is unlikely that the Court would disavow the black-letter rules any time soon. Thus, any federal statute, including the CWA, must meet these black-letter requirements. According to *Lopez*, Congress may regulate three broad categories of activities under the Commerce Clause.[125] First, it may regulate the "channels" of interstate commerce; this covers interstate highways, railroads, and, of course, waterways on which interstate trade can travel.[126] Second, it may regulate "instrumentalities" of interstate commerce—meaning "people and things" that move or are traded across state lines (possibly including natural things such as migratory birds).[127] Third—and here is the most common focus of controversy—Congress may regulate an activity that is not interstate commerce itself if the activity "substantially affects" interstate commerce.[128] Under this category, the consumption of home-grown wheat could be regulated, as it was in *Wickard*, because such consumption affects the price of wheat in the national interstate market.[129] Presumably, this category would also include regulation of pollution that significantly hampered interstate commerce such as, for example, groundwater pollution that caused a significant decrease in groundwater-grown fruit and vegetables in California, America's leading agricultural state.[130]

In other cases, of course, there may be disagreement over whether a regulation substantially affects interstate commerce. Consider, for example, *Gibbs v. Babbitt*,[131] an appellate decision from 1999 upholding the power of Congress to reintroduce the red wolf to North Carolina through the ESA. The U.S. Court of Appeals for the Fourth Circuit majority concluded that interstate transportation of scientists and tourists generated by the wolf was sufficient to justify application of the ESA.[132] A dissenting judge, by contrast, did not consider such movement to be either "substantial" or "commerce."[133] Indeed, the standard raises nearly as many questions as it answers. Is it important whether the regulated activity itself is considered commerce or trade? Some court decisions and commentators have suggested that this fact does matter.[134] It seems illogical, however, to place a demerit on legislation that is clearly motivated by a desire to foster interstate commerce simply because the regulated activity is not commerce itself (for example, a federal law requiring the teaching of engineering science, which is important for global market competitiveness, in state public schools), while giving no such demerit to a law that directly regulated trade but that is not motivated by a desire to foster interstate commerce (for example, a law regulating the sale of hallucinogenic mushrooms, advocated by social conservatives for the supposed immorality of ingesting such fungi).[135]

Another question is how the magnitude of "substantial effect" should be assessed. Many cases and commentators have concluded that the effect on interstate trade does not have to be "substantial" by virtue of the particular regulated legal party's activities *alone*; what matters is whether the regulation as an *aggregated whole* substantially affects interstate trade.[136] (Thus, it is permissible for Congress to regulate the entire trucking industry, including a one-rig company that by itself holds no significant effect on interstate commerce).

Next is the question whether a court is limited to scrutinizing the effect on commerce of a statute as a whole, or whether it should go further and test the effect of each provision.[137] What if one severable provision appears to have no significant impact by itself, such as, perhaps, the controversial species reintroduction provisions of the ESA?[138] Moreover, if courts conclude that the protection of threatened species does indeed affect interstate trade in some sense, does this then give Congress carte blanche to impose any sort of law it wants as part of this effort, no matter how far removed from the interstate trade? (For example, could Con-

123. Justice Stevens wrote the Court's opinion. *See id.* at 2198. Justice Scalia concurred in the judgment. *See id.* at 2215.

124. 529 U.S. 598 (2000).

125. *See* 514 U.S. at 558-59.

126. *Id.* at 558 (citing Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964)), and asserting that Congress may regulate the "immoral and injurious uses" of such channels. Could Congress then regulate anything that crosses state lines on the ground that it is "immoral"—such as, for example, a gay couple who wants to use an interstate highway to travel to Vermont for a civil union ceremony? Here, of course, Congress would be motivated not by a desire to regulate commerce, but by a concern over morality, making it a dubious ground for federal regulation. This fact of motivation also distinguishes such a case from *Wickard*, in which Congress was worried about interstate commerce (the national wheat market), regardless of the fact that the law regulated local activity (the consumption of home-grown wheat) that took place in only one state.

127. *See id.* at 558.

128. *See id.* at 558-59.

129. *See id.* at 121-31.

130. *See* University of California, Improved Data on California's Agricultural Exports (1998), *available at* http://aic.ucdavis.edu/pub/briefs/brief8.html.

131. 214 F.3d 483, 30 ELR 20602 (4th Cir. 2000), *cert. denied sub nom.* Gibbs v. Norton, 531 U.S. 1145 (2001).

132. *See id.* at 492-94.

133. *See id.* at 506 (Luttig, J., dissenting).

134. In *Morrison*, the Court wrote that one reason for its decisions in both that case and *Lopez* was the "noneconomic" nature of the crimes. 529 U.S. at 609, 610; *see also* Jonathan H. Adler, *Commerce Clause Jurisprudence and the Limit of Federal Wetlands Protection*, 29 Envtl. L. 1, 34-35 (1999) (arguing that some regulation of wetlands is unjustified because the activity is "noncommercial").

135. For an argument that congressional motivation should play a major role in Commerce Clause cases, see Shane, *supra* note 77, at 221.

136. *See, e.g.*, *Wickard*, 317 U.S. at 127-28; *see also Raich*, 125 S. Ct. 2195 (seeming to approve of the aggregation principle). In *Lopez*, the Court seemed to state that if the activity regulated was not economic, then the aggregation principle did not apply, *see* 514 U.S. at 556-57.

137. *See, e.g.*, United States v. Olin Corp., 107 U.S. 1506, 1510, 27 ELR 20778 (11th Cir. 1997) (concluding that the Superfund law's cleanup order provision should be scrutinized under the commerce clause by aggregating all of the "on-site" effects of hazardous waste spills).

138. *See, e.g.*, Gibbs v. Babbitt, 214 F.3d 483, 488, 30 ELR 20602 (4th Cir. 2000) (challenge concerning the "experimental population" reintroduction rules for the red wolf in North Carolina), *cert denied sub nom.* Gibbs v. Norton, 531 U.S. 1145 (2001).

gress impose a requirement that all state public schools assign E.O. Wilson's book *Biophilia* as part of an effort to build a nationwide ethic of respect for species-friendly daily habits, which then might help conserve species, which then might foster future trade in genetic material?)[139]

Drawing the analysis more broadly, the Court's "substantially affects" standard is emblematic of the diffuseness of modern constitutional law and the fecklessness of applying so-called constitutional tests. Because of the uncertainties, the difficulties of line-drawing, and vagaries of choosing a level of generality, asking whether a regulation "affects" interstate commerce "substantially" simply returns the judge to square one. The test begs the question. If a particular judge believes in the principles that national problems deserve national solutions and that Congress' findings of links to interstate trade deserve deference, then this judge is likely to conclude that all federal statutes pass muster, as Justices Stevens and David H. Souter have done during their tenure on the Court.[140] Or if the law is one that a judge finds to be especially important, as perhaps Justice Kennedy did in the medical marijuana case, this judge is inclined to find that the law passes the test.[141] On the other hand, if a judge distrusts the federal bureaucracy and favors state prerogative, the judge is likely to conclude that some statutes do not affect commerce substantially enough. This is especially true if the substance of the law runs counter to the judge's libertarian streak, as the heavily bureaucratic, private-property-regulating nature of environmental law appears to do with Justice Scalia.[142]

Nonetheless, despite its problems, the black-letter law of *Lopez* concerning the Commerce Clause gives lawmakers a clear command: any effort to strengthen the CWA must be done with a close eye to fulfilling the requirement that the statute's regulations substantially affect interstate commerce, in a fairly straightforward manner.

B. The Commerce Clause Spills Into Environmental Law

While the Court was deferring to the boom of legislation set forth by a Democrat-dominated Congress of the 1960s and 1970s,[143] one of the biggest changes in the American legal landscape took place in environmental law. In 1960, there was no major federal statute addressing ecology or the physical environment; within the next 20 years Congress enacted complex statutes to establish federal wilderness areas,[144] control air pollution,[145] regulate water pollution,[146] protect endangered species,[147] impose ecological standards for the national forests,[148] regulate strip mining,[149] divide up Alaska,[150] and clean up hazardous waste spills.[151] To the dismay of federalists, these laws were revolutionary in large part because they insinuated federal control over private land use, whereas previously it had been subject only to state or local regulations. Thus it is not surprising that aggrieved private landowners have been aggressive in challenging the federal environmental laws under the Commerce Clause. Until *SWANCC*,[152] however, they had not been successful. The first challenge to reach the Court was *Hodel v. Virginia Surface Mining & Reclamation Ass'n*[153] in 1981, in which mining operators challenged a federal law that required specific methods for operating and landscaping closed strip mines. Writing for an extremely deferential Court majority, Justice Thurgood Marshall concluded that "when Congress has determined that an activity affects interstate commerce, the courts need inquire only whether the determination is rational."[154] Congress had asserted in the statute many ways in which strip mines could adversely affect commerce, such as by eroding land and destroying wildlife habitat.[155] For an unskeptical majority, such generalizations were sufficient to justify the entire statute,[156] despite a questioning concur-

139. The conceptual "distance" between the regulation and the interstate commerce inevitably raises the great dilemma of proximate causation—how close does an activity have to be to one of its effects to be considered the legal "cause?" For a discussion of proximate causation in the "take" of endangered species, see Paul Boudreaux, *Understanding "Take" in the Endangered Species Act*, 34 ARIZ. ST. L.J. 733, 756-61 (2002). *See also* E.O. WILSON, BIOPHILIA (1984).

140. Justices Stevens and Souter voted in favor of the government in *Lopez*, *Morrison*, *SWANCC*, *Raich*, and *Rapanos*.

141. Justice Kennedy, as well as Justice Scalia, voted against the government in *Lopez* but for the government in *Raich*.

142. Justice Scalia has written a number of strident opinions that appear to show an antipathy to government regulation of the environment when it hinders the use of private property. *See, e.g.*, United States v. Rapanos, 126 S. Ct. 2208, 2214-15 (2006) (Scalia, J., writing for a plurality) (complaining of the burden on landowners of the CWA's permit program); Bennett v. Spear, 520 U.S. 154, 27 ELR 20824 (1997) (holding that landowners had standing to sue the U.S. Fish and Wildlife Service (FWS) over their biological opinions under the Endangered Species Act (ESA)); Babbitt v. Sweet Home Chapter of Communities for a Great Or., 515 U.S. 687, 714, 25 ELR 21194 (1995) (Scalia, J., dissenting) (arguing for the exclusion of private property land disturbance from the definition of "take" under the ESA); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 23 ELR 20297 (1992) (holding that government regulation of coastal land that deprives the owner of all economically beneficial use of the property was an unconstitutional taking); Lujan v. Defenders of Wildlife, 504 U.S. 552, 22 ELR 20913 (1992) (finding a lack of standing to challenge a wildlife policy); Nollan v. California Coastal Comm'n, 483 U.S. 825, 838, 17 ELR 20918 (1987) (calling government land use exactions "extortion").

143. The Democratic party controlled both houses of Congress from January 1955 through January 1981, when the Senate turned Republican in the coattails of President Reagan after the 1980 election. Democrats occupied the White House from 1961 through 1969 (Presidents John F. Kennedy and Lyndon B. Johnson) and from 1977 to 1981 (President James E. Carter); even Republican President Nixon (1969 to 1974) was a supporter of some environmental legislation. *See* CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 25 (1990) (discussing President Nixon's leaning in favor of environmental protection).

144. *See* Wilderness Act of 1964, 16 U.S.C. §§1131-1136.

145. *See* 42 U.S.C. §§7401-7671q, ELR STAT. CAA §§101-618.

146. *See* 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§107-607.

147. *See* 16 U.S.C. §§1531-1544, ELR STAT. ESA §§2-18.

148. *See* National Forest Management Act of 1974, *id.* §§1601-1614, ELR STAT. NFMA §§2-16.

149. *See* Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§1201-1328, ELR STAT. SMCRA §§101-908.

150. *See* Alaska Native Interest Lands Conservation Act of 1980, 16 U.S.C. §§3101-3233.

151. *See* Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§9601-9675, ELR STAT. CERCLA §§101-405, which followed the regulatory Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§6001-6992k, ELR STAT. RCRA §§1001-11011.

152. 531 U.S. at 159.

153. 452 U.S. 264, 11 ELR 20569 (1981) (challenge to the Surface Mining Control and Reclamation Act of 1977).

154. *Id.* at 277.

155. *See id.* at 277-78 (citing 30 U.S.C. §1201(c) (1976 ed., Supp. III)).

156. *See id.* at 278-82 (deferring to Congress' findings).

rence from then-Associate Justice Rehnquist.[157] For the more actively federalist Court of 2007, the inquiry would no doubt have been more probing.

Since *Hodel*, perhaps the most frequently challenged environmental law has been the ESA. The ESA aggrieves many private landowners because of its potential to complicate land use by the unexpected appearance of a protected species on the land.[158] A number of U.S. courts of appeals have upheld key aspects of the statute, however. In *National Ass'n of Home Builders v. Babbitt*,[159] a business group challenged the application of the ESA to protect the Delhi Sands flower-living fly, a rare and endangered insect that lives only in certain sandy California soils; unfortunately for the developers, these soils lie in the midst of the economically booming desert region around Palm Springs.[160] Although the obscure fly holds no apparent direct connection to commerce and does not cross state lines, the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit (chosen by the plaintiffs undoubtedly because of its growing conservative reputation in the 1990s) held in a 2-1 decision that Congress is justified in protecting all species because of the interest in biodiversity, which might in the future provide economic benefits, including the use of unique genetic material to create useful drugs and other products.[161] Using less cosmic thinking, the Fourth Circuit concluded in *Gibbs*[162] that the ESA-authorized reintroduction of the red wolf to North Carolina, which annoyed some local landowners, was justified under the Commerce Clause because scientists and tourists traveled from other states to see the wolf or howl with it.[163] Somewhat curiously, the Supreme Court, which has seemed eager to review other aspects of environmental law for alleged overreaching,[164] has never granted certiorari in an ESA Commerce Clause case.[165]

Like the ESA, the Superfund law authorizes the federal government to regulate land use within a state. The government is authorized to order a private party to conduct a cleanup of land on which there has been a spill of hazardous waste; the law contains no requirement that the spill extend across state boundaries or affect interstate significantly.[166] In the most important appellate opinion to date, the U.S. Court of Appeals for the Eleventh Circuit in 1997 in *United States v. Olin Corp.*[167] overruled a district court opinion and held that an order to clean up a small spill, whose effects appeared to be limited to one state, was constitutionally justified as part of Congress' overarching desire to protect interstate commerce from hazardous waste pollution. This kind of reasoning—highly deferential to the government's assertions and willing to aggregate one incident within a fairly broad category of other incidents—is the kind of reasoning that the Court had abjured in *Lopez* two years earlier, when the Rehnquist Court rejected the government's assertions that federal outlawing of guns near schools was justified because it was part of a broad national effort to foster a less-violent, more economically "productive" citizenry.[168]

Had the Court granted certiorari in *Olin* and applied the same type of skepticism to the Superfund law that it applied to the gun law, *Olin* would now be considered a towering landmark in a reactionary revolution of constitutional law (of which *Lopez* would be a mere footnote) back to the strict federalism of the early 20th century. States rights would have celebrated its greatest triumph since before the Civil War. But certiorari was not sought in *Olin*, although it was sought (and denied) in the ESA cases[169] and in *United States v. Ho*,[170] in which the U.S. Court of Appeals for the Fifth Circuit upheld certain criminal provisions of the CAA. Why did the Rehnquist Court accept review and strike down the two obscure (and largely symbolic) laws in *Lopez* and *Morrison*, but ignore cases under the expensive and oft-criticized environmental laws?[171] I speculate that it might have

157. *See id.* at 307 (Rehnquist, J., concurring in the judgment). Justice Rehnquist appeared to be biding time until a majority of the Court agreed with his narrower and more skeptical view of the commerce power.

158. For example, §9(a)(1)(B) of the ESA makes it unlawful to "take" a protected species, regardless of whether the species is found on private land. The Court has upheld federal regulations that construe "take" to include incidental harm caused by land-modifying activity. *See* Babbitt v. Sweet Home Chapter of Communities for a Great Or., 515 U.S. 687, 25 ELR 21194 (1995).

159. 130 F.3d 1041 (D.C. Cir. 1997), *cert. denied*, 524 U.S. 937 (1998).

160. For information about the fascinating fly, see U.S. FWS, *Delhi Sands Flower-Loving Fly*, http://www.fws.gov/endangered/i/I0V.html (last visited Jan. 12, 2007).

161. 452 U.S. at 259-64.

162. 214 F.3d at 483.

163. *See id.* at 492-93. A number of tourists travel to participate in "howling events," during which the tourists join the wolf in its late-night orations. *See id.* at 493.

164. *See, e.g.*, Bennett v. Spear, 520 U.S. 154, 27 ELR 20824 (1997) (holding that an aggrieved landowner has standing challenge a "biological opinion" of the FWS that it provides to other agencies as part of the other agencies' duty to ensure that their actions do not "jeopardize" an endangered species, pursuant to 42 U.S.C. §1536(a)(2), (c)); Babbitt v. Sweet Home Chapter of Communities for a Greater Or., 515 U.S. 687, 25 ELR 21194 (1995) (narrowly approving, through deference, the regulations that interpret unlawful "take" under the ESA to include some forms of non-intentional harm and indirect harm, including habitat modification).

165. The High Court denied certiorari in both the *National Ass'n of Home Builders* fly case, 524 U.S. at 937, and in the wolf case, *sub nom.* Gibbs v. Norton, 531 U.S. 1145 (2001).

166. *See* 42 U.S.C. §9604(a)(1) (authorizing the president to engage in a "response"); *id.* §9606(a) (authorizing the president to order private parties to conduct a cleanup of land at which there has been a release of a hazardous substance that threatens human safety or the environment). There is no requirement that the agency make any determination that the spill or the threat extend across state boundaries or affect interstate commerce in any way.

167. 107 F.3d 1506, 1510-11, 27 ELR 20778 (11th Cir. 1997), *rev'g*, 927 F. Supp. 1502, 26 ELR 21303 (S.D. Ala. 1996). The Eleventh Circuit cited evidence that, as an aggregated category, "on-site" disposal of hazardous wastes affected interstate commerce by causing losses to agriculture and accidents caused by poor storage of such wastes. *See id.*

168. *See Lopez*, 514 U.S. at 563-64 (rejecting the government's justification through the assertion that gun violence near schools results in "a less productive citizenry").

169. *See Babbitt*, 524 U.S. at 937; *Gibbs*, 531 U.S. at 1145.

170. *See* 311 F.3d 589, 33 ELR 20117 (5th Cir. 2002), *cert. denied*, 539 U.S. 914 (2003).

171. Economists and conservatives have for years been critical of the environmental laws. One of the first major criticisms of the laws' expense and lack of balance between environmental protection and its costs was Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law*, 37 STAN. L. REV. 1333, 1340 (1985) (giving special attention to the costs of the CAA). The ESA is criticized for its goal of protecting imperiled species regardless of the cost. *See generally* CHARLES MANN & MARK PLUMMER, NOAH'S CHOICE (1995) (discussing the conservation of endangered species in the United States, the effects of the ESA, and suggesting a new balance between the needs of people and the environment); *see also* Tennessee Valley Auth. v. Hill, 437 U.S. 153, 207-10, 8 ELR 20513 (1978) (Powell, J., dissenting) (predicting that Congress would amend the ESA to reverse the absurd results that it creates in placing the protection of species above economically useful activities).

been because laws such as Superfund, the ESA, and the CAA are very popular with the public, who see them (perhaps with exaggeration) as protecting them from the insidious harms of toxic-generated cancer and other health threats (and protecting charismatic animals, in the case of the ESA).[172] Indeed, the Court has shown a reluctance to address directly the thorny issue of the constitutionality of the environmental laws, preferring rather to take potshots at the CWA in *SWANCC* and *Rapanos*.[173] But the increasingly Federalist Court is getter closer to scoring a direct hit.

IV. *Rapanos* Fails to Clear the Muddy Waters of the Clean Water Act

A. Ripples on the Way to Rapanos

The CWA is the federal environmental statute with the longest pedigree, dating back to the Rivers and Harbors Act of 1899.[174] It was also the first legislation of the modern era to give most of the regulatory and permitting decisions to the federal government (the CAA of 1970 originally vested states with most of the discretion on how to control air pollution).[175] Perhaps as a result, the CWA has the longest record of challenges by industry, seeking to avoid the costly demands of the statute. For example, the CWA was the law through which the Court in the 1980s held that statutory language giving citizens the right to sue polluters when the latter are "in violation"—a term used in many environmental laws[176]—does not generally authorize citizens to sue for a violation that has stopped by the time the lawsuit begins.[177] This was perhaps the biggest Court victory for business during the first two decades of the modern environmental era. The Act was also the vehicle for a partial reversal of this precedent, in effect, some 13 years later, when the Court held that citizens have standing to sue for monetary relief that goes to the government; this surprising decision has been the biggest victory for environmentalists in the high Court in the new century.[178]

Thus it is not surprising that the CWA has also been the most intensely litigated environmental law under the Court's skeptical new federalism. Hot on the heels of *Morrison*,[179] in which the Court in 2000 finally followed up *Lopez* by striking down another obscure statute, the Court granted certiorari in *SWANCC*, in which the plaintiff challenged the Corps' so-called Migratory Bird Rule.[180] This rule, which was never formally codified, was a somewhat crude attempt to incorporate some links to interstate commerce into the working definition of the Act's "navigable waters." The rule stated that the Act covered wetlands and other waters if they "are or would be" habitat for migratory birds that cross state or international borders, "are or would be" habitat for endangered species, or are used to irrigate crops "sold in interstate commerce."[181]

The federalists on the Court held a cornucopia of potential means of attacking the Corps' rule as exceeding the Commerce Clause. Did the Corps' odd use of the term "would be habitat" mean that a wetland was covered by the Act on the slim possibility that a migratory bird might use the wetland at some point in the distant future? Wasn't justifying the regulation of a water body simply because some of its water is used to irrigate crops the sort of attenuated link that the Court had just scolded Congress for in *Lopez* and *Morrison*? Moreover, the basic facts of the case—an Illinois county agency wanted to fill in a small, man-made pond that had been created by rainfall at a gravel pit—made it seem at first glance a superb case for challenging what federalists characterize as overreaching by the national government.[182] An obstacle to the Commerce Clause challenge was, however, a fairly strong connection to one facet of interstate commerce in the facts of the case. The pond was visited by hundreds of migratory birds,[183] and it was venerable precedent that Congress can legislate to protect migratory birds.[184] Indeed, the migratory birds might well be future

172. The Superfund law was spurred in part by publicity in the 1970s over a few hazardous waste dumps, including Love Canal, New York, and Times Beach, Missouri. *See, e.g.*, H.R. REP. No. 96-1016(I), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6122 (discussing Love Canal). Studies routinely show that a majority of Americans support environmentalism's goals, even if it is not always a high priority. *See, e.g.*, BELDEN & RUSSONELLO, CURRENT TRENDS ON PUBLIC OPINION ON THE ENVIRONMENT (1996), *available at* http://www.biodiversityproject.org/resourcespublicopiniontrends.pdf.

173. The Court skirted the Commerce Clause issue in both cases, suggesting but not concluding that a broad interpretation of "navigable waters" would violate the Commerce Clause. *See SWANCC*, 531 U.S. at 172-73 (relying on the avoidance-of-constitutional-issues doctrine); *Rapanos*, 126 S. Ct. at 2224 (Scalia, J., writing for a plurality) (concluding that a broad interpretation would "stretch the outer limits of the Congress' commerce power").

174. Ch. 425, 30 Stat. 1151 (1899) (codified as amended at 33 U.S.C. §§401-415).

175. The most significant requirement of the CWA is that any discharge of a pollutant into the navigable waters is permissible only by obtaining a permit under the Act. *See* 3 U.S.C. §§1311(a), 1362(12). Permits to discharge dredged and fill material—the way that wetlands are disturbed—is granted by the Corps. *Id.* §1441. Permits to discharge other pollutants are granted by EPA. *Id.* §1342(a). The most significant feature of such pollution permits is the requirement to use a certain level of pollution-controlling "best technology." *See id.* §1311(b). States may take over EPA's permitting duties upon showing that they can meet the Act's requirements. *Id.* §1342(b).

By contrast, the CAA as originally enacted gave states wide discretion in figuring out how to regulate air pollution to meet air quality requirements. *See* 42 U.S.C. §9610 (states granted discretion in creating implementation plans for air quality improvement).

176. The CWA authorizes citizen suits against violators who are "in violation" of the Act. *See* 33 U.S.C. §1365(a)(1). Similar language is found in the CAA, 42 U.S.C. §7604(a)(1), the ESA, 16 U.S.C. §1539(g)(1)(A), and RCRA, 42 U.S.C. §6972(a)(1)(A).

177. *See* Gwaltney of Smithfield v. Chesapeake Bay Found., 484 U.S. 49, 18 ELR 20142 (1987).

178. *See* Friends of the Earth v. Laidlaw Envtl. Servs., 528 U.S. 167, 30 ELR 20246 (2000) (holding that citizens are given "redress" by the award of monetary penalties to the government because such an award acts as a deterrent to future violators, thus giving redress to the plaintiff).

179. 539 U.S. at 598 (holding unconstitutional the VAWA, 42 U.S.C. §13891 with reasoning similar to that of *Lopez*).

180. 531 U.S. at 159. The Migratory Bird Rule was published at 51 Fed. Reg. at 41217.

181. *See* 51 Fed. Reg. at 41217. For another example of a federal court's rejection of a weak causal standard in applying 33 U.S.C. §1441, see *United States v. Wilson*, 133 F.3d 251, 28 ELR 20299 (4th Cir. 1997) (reversing criminal convictions on the ground that the regulatory definition of "waters of the United States," 33 C.F.R. §328.3(a)(3) (1993), violated the statutory authorization by applying to wetlands that merely "could affect" interstate commerce).

182. *See* 531 U.S. at 162-63.

183. *See id.* at 164.

184. *See* Missouri v. Holland, 252 U.S. 416 (1920) (ruling that Congress holds the power to implement migratory bird protection treaties with other nations through legislation that trumps the traditional state control of wildlife).

targets of permitted hunting—thus making them fairly solid examples of "instrumentalities" of interstate commerce that Congress unquestionably can protect.[185]

Instead of the problematic path of confronting the Commerce Clause directly, the federalists on the Court resorted to an ingenious logical sequence. They combined three contentions: (1) an assertion that the Corps' Migratory Bird Rule raised a serious question of whether it crossed over the boundary of the commerce power; (2) a precedent stating that courts should interpret statues to avoid such constitutional issues in statutory interpretation; and (3) an assertion of a supposed tradition of state control of water law—to conclude that the Migratory Bird Rule went beyond a proper interpretation of the Act's linchpin term, "navigable waters."[186] By deciding the case through statutory interpretation, the Court avoided having to resolve the thorny issue of the commerce power in relation to protecting wildlife. And by relying on non-traditional tools of statutory interpretation—the somewhat obscure doctrine of avoiding constitutional issues in statutory interpretation and the supposed tradition of state prerogative over water—the federalists also managed to overcome the obstacle of the *Chevron* doctrine,[187] which otherwise would have given the Corps discretion in interpreting "navigable waters," the key term that even the federalists had to admit Congress left unclear.

But *SWANCC*'s interpretation of the statutory term was limited to implying that "navigable waters" cannot encompass "isolated," non-navigable-in-fact water bodies.[188] Why didn't the Court narrow the term even further? The roadblock was the 1985 precedent of *Riverside Bayview Homes*, in which the Court—in an era of more dormant federalism—had held unanimously (including Justices Rehnquist and O'Connor, both of whom were essential to the five-Justice majority in *SWANCC*) that it was permissible for the Corps to cover wetlands that were "adjacent" to navigable-in-fact waterways under the term "waters of the United States."[189]

SWANCC thus was a victory for the new federalism but a limited one, and it turned out be a less momentous victory than it first appeared. With a few exceptions, lower courts after *SWANCC* found that single-state water bodies were covered by the Act, either because they affected interstate commerce in some way, or because of the ecological fact that they were not truly "isolated," by virtue of surface or underground hydrological connections.[190] As a means of limiting the federal government's regulation of water—a stated purpose of *SWANCC*—the decision was turning into a bust, as of 2006. Meanwhile, the Corps proposed a rulemaking to revise its definition of navigable waters (regulatory redefinition has been a fruitful means of constraining environmental law in the Administration of President George W. Bush)[191] but the Corps then abandoned the effort.[192] The disappointing (for federalists) results of *SWANCC* thus resembled the limited impact of the other seemingly great victory for libertarians under the Rehnquist Court, *Lucas v. South Carolina Coastal Council*,[193] which promised in 1992 an avenue for property owners to sue government successfully for regulatory "takings," but which later proved to be less than revolutionary in practice in the lower courts.[194] This situation must have been frustrating for federalist activists, both as litigators and on the Court.

For federalist advocates, the hope of *SWANCC* was running down the drain. The precedent of *Riverside Bayview Homes* as to "adjacent" wetlands had constrained the Court in *SWANCC* to rule only that "isolated" waters were not covered by the Act. The word "isolated" in reference to waters seems to refer to a hydrological connection, and environmental science is not usually a friend to federalists. It was ecological science, after all, that gave rise to the oft-repeated quotation of John Muir: "When we try to pick out anything by itself, we find it hitched to everything else in the universe."[195] This is not a prescription for boundary-minded federalism. And environmentalist scientists constantly remind lawmakers that "pollution knows no boundaries"[196]—again, a notion anathema to the idea of keeping the national government away from what the federalists

185. *See Lopez*, 514 U.S. at 558 (Congress may protect "things in interstate commerce . . . even though the threat may come only from intrastate activities").

186. *See* 539 U.S. at 172-74. The Court relied on the supposed "tradition" of state and local control of water and land and the doctrine of avoiding constitutional issues (citing Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council, 485 U.S. 568, 575 (1988)).

187. *See* 467 U.S. at 842-45 (when a statute is unclear, courts must defer to any reasonable interpretation by the federal agency authorized to administer the statue).

188. *See* 531 U.S. at 172-73 (implying that "isolated" and non-navigable-in-fact wetlands are not covered by the Act).

189. *See* 474 U.S. at 131-34 (upholding the Corps' regulation that had covered "adjacent" wetlands).

190. Cases holding that water features are covered by the CWA, despite *SWANCC*, include *United States v. Deaton*, 332 F.3d 698, 33 ELR 20223 (4th Cir. 2003) (wetlands near a ditch that sometimes drain to permanent waters); *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 31 ELR 20535 (9th Cir. 2001) (canals that held water intermittently but were connected to other tributaries of navigable waters); *Baccarat Fremont v. Corps of Eng'rs*, 425 F.3d 1150, 1156, 35 ELR 20212 (9th Cir. 2005) (wetlands separated by berms from navigable-in-fact channels); *Save Our Sonoran v. Flowers*, 408 F.3d 1113, 1118, 32 ELR 20764 (9th Cir. 2005) (washes and arroyos that spill into a permanent river after a rainstorm). One opinion that applied *SWANCC* to exclude a tributary because it was not "truly" adjacent to a navigable-in-fact water body was *In re Needham*, 354 F.3d 340, 34 ELR 20009 (5th Cir. 2003).

191. For criticism of the Bush Administration's use of administrative law to curb environmental protection, see Patrick Parenteau, *Anything Industry Wants: Environmental Policy Under Bush II*, 14 Duke Envtl. L. & Pol'y F. 363, 364 (2004); Lisa Schutlz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. Rev. 461, 507 (2003).

192. The Corps and EPA proposed a rulemaking in light of *SWANNC*, *see* 68 Fed. Reg. 1991 (2003), but then did not even issue a proposed rule. *See Rapanos*, 126 S. Ct. at 2235-36 (Roberts, J., concurring). The Corps' advice to field staff was to "continue to assert jurisdiction over traditional navigable waters . . . and, generally speaking, their tributary systems (and adjacent wetlands)." 68 Fed. Reg. at 1998. This failure to revise and shore up the regulatory breadth of the Act should be assessed as a serious error, as it surely emboldened federalists to attack the CWA from a new angle.

193. 505 U.S. 1003, 23 ELR 20297 (1992).

194. The *Lucas* Court itself expected that such "total takings" would be "relatively rare." In addition, Judge Stephen Williams, in *District Intown Props. Ltd. v. District of Columbia*, 198 F.3d 874, 886 (D. C. Cir. 1999), asserted that "few regulations will flunk this nearly vacuous test." *See generally* Michael C. Blumm & Lucus Ritchie, Lucas*'s Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 Harv. Envtl. L. Rev. 321, 324 (2005).

195. John Muir, My First Summer in the Sierra 211 (1911).

196. *See, e.g.*, John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 Md. L. Rev. 1183, 1220 (1995) ("As environmentalists are fond of saying, pollution knows no boundaries.").

view as state prerogative.[197] In sum, as of early 2006, the federalists' effort to limit national power by constraining the term "navigable waters" was simply drying up.

B. Navigating the Rapids of Rapanos

What other avenue was available for federalists? An answer was found in the Act's statutory definition of navigable waters as "the waters of the United States, including the territorial seas."[198] Until recently, this rather odd definition had seemed to be evidence for a broad interpretation, by virtue of the fact that it contained no reference to navigation-in-fact. Congress imposed no limit on the word "waters," thus providing support—however shaky—for as wide an interpretation as possible.

But the Court had never before endeavored to define precisely what is meant by "waters," a key to the entire Act. It could have sought clarification in many Court cases involving differing aspects of the CWA over the past 30 some years.[199] It could have done so in *Riverside Bayview Homes* in 1985. It certainly could have done so in *SWANCC* in 2001. But not until other federalist techniques came a cropper did the Court finally address the basic word of the CWA—"waters"—in *Rapanos* in 2006. In this decision, a plurality of the Court concluded that the simple word "waters" meant much less than how the regulatory agencies had interpreted it for the past 30 some years—by looking in the dictionary.[200]

As they had done in *SWANCC*, federalist advocates once again chose a compelling set of facts for their argument that the national government has overreached in its administration of the CWA.[201] Plaintiff John A. Rapanos wanted to fill in wetlands on his land in rural Michigan in the 1990s. Defying the Corps' conclusion that the sometimes-saturated wetlands were covered by the Act, Rapanos went ahead and filled the wetlands without a permit.[202] The Corps and the federal government eventually sued him for civil and criminal penalties.[203] Fellow petitioner June Carabell was denied a permit to fill in a wetland that was separated by a berm from a man-made ditch, itself often dry, that ran into Lake St. Clair, one mile away.[204] After losing in both the U.S. district court and in the U.S. Court of Appeals for the Sixth Circuit,[205] the property owners obtained a writ of certiorari.

The Court in June 2006 vacated the Sixth Circuit's judgments and remanded for reconsideration.[206] The Court issued no majority opinion, however. Justice Scalia wrote a plurality opinion in which Chief Justice John G. Roberts and Justices Thomas and Samuel A. Alito joined.[207] Justice Kennedy concurred in the judgment, but not with Justice Scalia's opinion or his reasoning, leaving the Sixth Circuit without a mandate from the Court on a proper standard for resolving the cases.[208] In dissent were Justices Stevens, Souter, Ruth Bader Ginsburg, and Stephen G. Breyer, who would have affirmed the Sixth Circuit's judgments for the government.[209]

For anyone who might näively conclude that *Rapanos*, like *SWANCC* before it, was either a dry question of statutory interpretation or merely an exercise in applying abstract federalist principles set forth in *Lopez*, the opening paragraph of Justice Scalia's plurality opinion was revealing. He did not at the outset address the issue of interpreting "navigable waters," discuss its definition as "the waters of the United States," or proclaim the principle that Congress holds limited powers under our constitutional system. Rather, he focused on the regulatory burden on those who seek to get a permit from the Corps under §404 of the Act,[210] and the large cost of the permitting program to private landowners, despite the irrelevance of these observations to interpreting the words of the statute.[211] He asserted that the Corps has exercised the discretion of an "enlightened despot"[212]; it is unlikely he meant to refer to the reputation of the Corps in the environmental community as being a pushover for big projects that disturb wetlands.[213] At the end of

197. *See SWANCC*, 531 U.S. at 174 (rejecting a "significant impingement on the States' traditional and primary power over land and water use"); *Lopez*, 514 U.S. at 563-64 ("Under the theories that the Government presents . . . it is difficult to perceive any limitation on federal power . . . .").

198. 33 U.S.C. §1362(7).

199. In addition to *SWANCC* and *Riverside Bayview Homes*, the Court heard CWA arguments over the years in, among others, *Friends of the Earth v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 30 ELR 20246 (2000); *PUD No. 1 of Jefferson Cty. v. Washington Dep't of Ecology*, 511 U.S. 700, 24 ELR 20945 (1994); *Gwaltney of Smithfield v. Chesapeake Bay Found.*, 484 U.S. 49, 18 ELR 20142 (1987); *Chemical Mfrs. Ass'n v. Natural Resources Defense Council*, 470 U.S. 116, 15 ELR 20230 (1985); *E.I. DuPont de Nemours & Co. v. Train*, 430 U.S. 112, 7 ELR 20191 (1977), and *EPA v. California ex rel. State Water Resources Council*, 426 U.S. 200, 6 ELR 20563 (1976).

200. *See* 126 S. Ct. at 2220-21 (Scalia, J., writing for a plurality) (using a dictionary to interpret "waters").

201. Federalists are no doubt annoyed even at the Corps' terminology, which asserts Corps "jurisdiction" over private property that are "waters." *See, e.g., Rapanos*, 126 S. Ct. at 2224 (Scalia, J., writing for a plurality) (complaining of the Corps' claim of "jurisdiction" over "immense stretches of intrastate land"). Justice Scalia did not clarify what he meant by "intrastate land"—after all, all land exists in only one state. It is the effect of pollution on interstate commerce that justifies federal regulation, of course, not whether the land is somehow "interstate."

202. *See id.* at 2214 (Scalia, J., writing for a plurality); *id.* at 2253 (Stevens, J., dissenting). Justice Scalia's opinion did not mention that Rapanos filled in his wetland after being told that he needed a permit, and without applying for one.

203. *See id.* at 2214 (Scalia, J., writing for a plurality).

204. *See id.*

205. *See* United States v. Rapanos, 376 F.3d 629, 34 ELR 20060 (6th Cir. 2004); Carabell v. Corps of Eng'rs, 391 F.3d 704, 34 ELR 20147 (6th Cir. 2004).

206. *See* 1265 S. Ct. at 2235.

207. *See id.* at 2214.

208. *See id.* at 2236 (Kennedy, J., concurring in the judgment).

209. *See id.* at 2252 (Stevens, J., dissenting).

210. 33 U.S.C. §1344.

211. The plurality did not then seek to justify their interpretation of "waters" through use of these facts—as they could not, of course, being ostensible opponents of judicial activism.

212. *Rapanos*, 126 S. Ct. at 2214.

213. Environmentalists have for years criticized the Corps as being too eager to grant permits. In 2003, for example, the Corps denied only 299 permits out of 86,177 permit evaluations (although many other cases no doubt involved the grant of permits after negotiation with the applicant). Some applications are denied without prejudice to refilling, while others are granted after negotiation. For a sample of the criticism of the Corps, see generally Committee on Mitigating Wetland Losses, Board on Environmental Studies and Toxicology, Water Science and Technology Board, & National Research Council, Compensating for Wetland Losses Under the Clean Water Act (2001); Oliver A. Houck, *Federalism in Wetlands Regulation: A Consideration of Delegation of Clean Water Act Section 404 and Related Programs to the States*, 54 Md. L. Rev. 1242 (1995). For a good series of news reports about how permits are granted in practice in Florida, see St. Petersburg

his plurality opinion, he claimed that the assertions set forth in the beginning of the opinion "are in no way the basis for our decision" (he was responding to dissenting Justice Stevens' contention that these beliefs informed the plurality's decision on the merits),[214] but it would be naïve to doubt that these perceived intrusions of the "enlightened despot" over private property were in the front of the minds of Justice Scalia and his fellow property rights-oriented colleagues: Justices Roberts, Thomas, and Alito.

Justice Scalia also noted in the first paragraph of his plurality opinion that Rapanos' fields were more than 10 miles away from the nearest "body of navigable water."[215] He meant, of course, a water body that is navigable-in-fact; he did not clarify that the Court has held consistently that the statutory term "navigable waters" is a category larger than waters that are navigable-in-fact.[216] Beyond this, the plurality opinion stayed far away from any discussion of hydrological science—the loophole that allowed lower courts to diminish the importance of *SWANCC*—except to assert that material used to fill in wetlands usually does not migrate elsewhere, unlike pollution in liquid form.[217] This lone scientific assertion supported, of course, the plurality's argument of severing most wetlands from the Act.

It is not my goal in this Article to scrutinize all of the numbing details of the *Rapanos* case—which, after all, included no majority opinion. Nor do I sort through the tedious arguments among the Justices over whether "adjacent" wetlands include only those that dissolve into a river or a lake, or, alternatively, include all those wetlands that are merely spatially close to a river or a lake—the distinction that formed the fundamental disagreement between plurality and dissent over how to interpret "the waters of the United States."[218] I will leave this task to other articles. Rather, my purpose here is to show how far removed from the reality of water pollution control the level of jurisprudential discussion has become, and to show the value of statutory reform.

As for Justice Scalia's plurality opinion, he determined the scope of the CWA in a simple manner—by opening up a dictionary. To be precise, he flipped the pages of the 1954 *Webster's New International Dictionary*.[219] (If only some court had thought to do this 30 years ago, millions of dollars in clean water compliance and litigation could have been avoided!) One definition of "water" referred to the plural form "waters" "[a]s found in streams and bodies forming geographical features such as oceans, rivers, [and] lakes."[220] From this rather vague statement, Justice Scalia leapt to the astonishingly precise conclusion that "[o]n this definition, 'the waters of the United States' include only relatively permanent, standing[,] or flowing bodies of water . . . as found in 'streams,' 'oceans,' 'rivers,' and 'lakes,' . . . as opposed to ordinarily dry channels through which water occasionally or intermittently flows . . . . None of these terms encompasses transitory puddles or ephemeral flows of water."[221]

Under such a narrowed construction, most intermittent wetlands in the nation would vanish from the coverage of the federal CWA, as would streambeds that are sometimes dry. This narrowing of the Act suited the plurality, of course, as this interpretation "is consistent with" the Act's introductory statement that states retain primary responsibility for pollution control, wrote Justice Scalia.[222] To interpret "waters of the United States" to cover most wetlands, as the Corps has done, Justice Scalia concluded, "stretched the term . . . beyond parody. The plain language of the statute simply does not authorize this 'Land is Waters' approach to federal jurisdiction."[223]

This holding could have been straightforward, if quite dramatic: wetlands simply are not covered by the CWA; only rivers, streams, oceans, and lakes are. But such a decision would have required overturning *Riverside Bayview Homes*, which even the four-Justice plurality was not willing or able to do. Instead, they read the 1985 precedent, which had held that the Act covered "adjacent" wetlands, as allowing the regulation of wetlands *only* if they have a "continuous surface connection" with a permanent water body otherwise covered by the Act.[224] This inclusion of some wetlands as "waters" did not come from the *Webster's* dictionary, of course, but by the constraints of precedent—a concession that dulled considerably the impact of the plurality's ostensibly straightforward method of statutory interpretation. If it is "beyond parody" to include wetlands as a category as "waters," why is it acceptable to include *some* wetlands, simply by virtue of their surface connections? And why not include other wetlands that hold perhaps an *underground* connection of equally important hydrological significance as a surface connection? Or perhaps include other wetlands whose destruction might significantly harm a facet of interstate commerce? The reason is that such wetlands simply weren't addressed in *Riverside Bayview Homes*, and this was as far as the plurality was willing to go.

Justice Scalia's opinion was noteworthy for a few other points. First, it was remarkable that an opinion about interpreting a statutory term did not include any effort whatso-

Times, *Vanishing Wetlands: Special Report*, http://www.sptimes.com/2005/webspecials05/wetlands/ (last visited Jan. 23, 2007).

214. 126 S. Ct. at 2233 (Scalia, J., writing for a plurality).

215. *Id*. at 2214.

216. *See Riverside Bayview Homes*, 474 U.S. at 132-33 (concluding that the Act's definition of "'navigable waters' as 'the waters of the United States' makes it clear that the term 'navigable' as used in the Act is of limited import" and approving of a definition that includes "adjacent" wetlands, without a requirement of navigability-in-fact).

217. *See* 126 S. Ct. at 2233 (Scalia, J., writing for a plurality).

218. *Compare id.* at 2226-27 (Scalia, J., writing for a plurality) (arguing for restricting "adjacent" wetlands to those with a "continuous surface connection" to more permanent "waters") *with id.* at 2252 (Stevens, J., dissenting) (arguing that spatial proximity is sufficient).

219. Why did Justice Scalia use the 1954 *Webster's New International Dictionary*? This dictionary appears to have been the most comprehensive dictionary of American English in existence in 1972. Interestingly, this 1954 edition (which was a revision of a 1934 edition), "takes a generally prescriptive (some would call this conservative) approach to word usage." Western Mich. U. Libraries, *Finding Word Information: English Language Dictionaries*, http://www.wmich.edu/~ulib/guides/find/dictionaries.php (last visited Jan. 12, 2007). By contrast, *Webster's Third New International Dictionary*, published in 1986, "takes a generally descriptive (some would call this liberal) approach to word usage." Western Mich. U. Libraries, *Finding Word Information: English Language Dictionaries*, http://www.wmich.edu/~ulib/guides/find/dictionaries.php (last visited Jan. 12, 2007). For legislative interpretation, a "descriptive" approach would seem to make more sense.

220. 126 S. Ct. at 2220-21 (citing WEBSTER'S NEW INTERNATIONAL DICTIONARY 2882 (2d ed. 1954)). Justice Scalia did not cite the Indo-European etymological root of "water," which is "wed," which means "wet." *Id.*

221. 126 S. Ct. at 2221 (Scalia, J., writing for a plurality).

222. *Id.* at 2223 (citing 33 U.S.C. §1251(b)).

223. *Id.* at 2222.

224. *Id*. at 2226-27.

ever at construing the congressional intent in enacting the CWA in 1972; but this is perhaps just as well after *SWANCC*, in which no side developed a compelling argument on this issue.[225] Second, and more troubling, is that it is extraordinary that an opinion rejecting an agency's detailed interpretation of a concededly vague statutory term failed to mention the law of deference to reasonable agency interpretations—the famous *Chevron* doctrine[226]—until its conclusion, by which time, of course, the plurality had already closed its book (literally, perhaps) on what it asserted was the only reasonable interpretation.

The plurality's opinion also was disturbingly muddled in its implication that *all* wetlands are excluded, unless they have a "continuous surface connection" with waters that are clearly covered. "In sum," Justice Scalia wrote, "the phrase 'the waters . . .' includes only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes.' [Citing *Webster's*]."[227] But it is a factual error to exclude all wetlands from "relatively permanent" bodies of waters. Many famous wetlands, including large stretches of Florida's Everglades, Louisiana's Atchafalaya Basin, and Virginia's Great Dismal Swamp, are permanently covered with water and form permanent geographic features.[228] According to the regulations of both the Corps and EPA, an area is called a wetland *not* necessarily because it's often dry, but because it holds standing *vegetation*, such as swamp trees, marsh grasses, and bog plants, that is accustomed to saturated water conditions.[229] Justice Scalia's chide about the illogic of "Land is Waters" indicated that he assumed that *all* wetlands are often or usually dry.[230] This simply is an error. Thus, the plurality failed to clarify whether they would include within the CWA wetlands that are "relatively permanent" or whether they would exclude these wetlands because they are not described "in ordinary parlance" as "streams, oceans, rivers, and lakes."[231] That such a fundamental misunderstanding appeared to underlie a large part of the plurality's reasoning is disturbing. It also gives support to the *Chevron* rationale that matters of statutory interpretation involving scientific judgments should be decided by expert agencies that understand environmental science, not jurists that look at a complicated matter only through a single lawsuit.

Moreover, while Justice Scalia's plurality opinion would have allowed coverage of "wetlands" with a "continuous surface connection," the opinion was maddeningly silent as to other sometimes-watery features, such as usually dry streambeds (called "arroyos" in the Southwest) that, when wet, send water on the surface directly to permanent water bodies, such as the rivers that are their outlet. Many arroyos in the Southwest, for example, are dry for most of the year but may flood during and right after occasional rainstorms.[232] Because most of these arroyos are tributaries of permanent rivers, such as the Colorado River, it is distinctly possible that material dumped into the arroyo when it is dry may end up in the Colorado River after a storm. Would the plurality exclude the arroyo from the Act because it is "intermittent" and perhaps not even "seasonably" wet (the plurality's one exception to the exclusion of "intermittent" features)?[233] The plurality failed to consider the implications of its constricted interpretation.

These criticisms of Justice Scalia's plurality opinion are not meant to imply that the other opinions offered fully satisfactory alternatives. Justice Kennedy, concurring only in the judgment to remand the decision for reconsideration by the lower courts, would have the Act protect non-permanent wetlands if they have a "significant nexus" to permanent water bodies.[234] The term comes from *SWANCC*, in which, Justice Kennedy asserted, the Court contrasted "isolated" wetlands with those having a "significant nexus" with navigable waters.[235] Such a test might make more ecological sense than the plurality's tighter restraint, in that it presumably would allow for protection of all wetlands that are

225. *See SWANCC*, 531 U.S. at 167-69 & n.5 (briefly discussing the legislative history and concluding that it is "somewhat ambiguous").

226. *See* 467 U.S. at 842-45 (holding that when a statutory term is unclear, courts must defer to reasonable interpretations of the term by agencies, who are, unlike courts, products of the political process).

227. *Rapanos*, 126 S. Ct. at 2225 (Scalia, J., writing for a plurality).

228. For information about the various land and water forms of the Everglades, Florida's great wetlands area, including the usually wet mangroves swamps and sawgrass marshes, see Park Vision, *Everglades National Park*, http://www.shannontech.com/ParkVision/Everglades/Everglades.html (last visited Jan. 12, 2007). Louisiana's Atchafalaya Basin is a wetland that is mostly a watery swamp. *See* National Audubon Socy., *Louisiana's Atchafalaya Basin*, http://www.audubon.org/campaign/wetland/atcha.html (last visited Jan. 12, 2007). The Great Dismal Swamp, which straddles the Virginia and North Carolina border, is also a wetland that is mostly a swamp, of course.

229. EPA's definition states:

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

40 C.F.R. §230.3(t) (2006). The Corps' regulatory definition is essentially identical. *See* 33 U.S.C. §328.3(b).

Swamps are areas with lots of trees; marshes are areas with grasses but few trees; bogs are areas with spongy vegetation. *See* U.S. EPA, *Wetland Types*, http://www.epa.gov/owow/wetlands/types/ (last visited Jan. 12, 2007). The *Oxford English Dictionary* refers to "wetlands" as "usually saturated with water." Oxford English Dictionary 77 (2d ed. 1989).

For more information about what makes an area a wetland, see Virginia Carter, U.S. Geological Survey, *Technical Aspects of Wetlands Wetland Hydrology, Water Quality, and Associated Functions*, http://water.usgs.gov/nwsum/WSP2425/hydrology.html (last visited Jan. 12, 2007). Virginia's Great Dismal Swamp was perhaps the first major wetland to be affected by European settlement of North America. *See* U.S. FWS, *Great Dismal Swamp National Wildlife Refuge*, http://www.fws.gov/northeast/greatdismalswamp/.

230. *See Rapanos*, 126 S. Ct. at 2222 (Scalia, J., writing for a plurality).

231. *Id.* at 2225. The Everglades is often described as a "river of grass," *see* Marjorie Stoneman Douglas, The River of Grass (1947), but perhaps the *Rapanos* plurality would have dismissed this usage as merely literary. *See id.* at 2220 n.4 (rejecting one definition of "waters" as merely "poetic").

232. *See* Arizona St. Univ., *Basics of the Arizona Monsoon & Desert Meteorology*, http://geography.asu.edu/aztc/monsoon.html (last visited Jan. 12, 2007) (explaining the summer "monsoon' season in Arizona).

233. *See Rapanos*, 126 S. Ct. at 2221 n.5 (allowing for "seasonal" rivers). Justice Scalia appeared not to understand that features such as arroyos may usually be dry but are predictably wet at certain times, such as after August thunderstorms.

234. *See id.* at 2236 (Kennedy, J., concurring in the judgment).

235. *See SWANCC*, 531 U.S. at 167. The plurality disagreed with this characterization that the "significant nexus" language was the key phrase in *SWANCC*. *See* 126 S. Ct. at 2231-31 & n.13 (Scalia, J., writing for a plurality).

hydrologically connected (even underground) to permanent water bodies. But Justice Kennedy did not endeavor to clarify precisely what "significant nexus" might mean, in terms of real-world scientific facts. What if hydrologists opine that *some* water molecules *might* migrate from the wetland to the permanent water body—would this be enough? Moreover, the Corps' expert witness testified at trial that the wetland that Rapanos filled might have helped to serve as a sponge to decrease water levels in the nearby navigable river during floods. Is this a sufficient "nexus"? These questions implicate the grand issue of legal or proximate causation—If X might have some effect on Y, does this make X a "legal cause" of Y?—that has perplexed generations of both law students and jurists.[236] The Court has in recent years been hesitant to delve into the quagmire of proximate causation in environmental cases, perhaps because the Justices have so little experience in an issue that is not often litigated under federal law.[237]

Moreover, the "significant nexus" standard fails to address the plurality's argument that the kind of discharges barred by the Act's §404[238]—fill or dredged material—are most often soil, rock, and sand, which are dumped precisely because they usually do *not* migrate to nearby navigable-in-fact waters. Indeed, why should the coverage of a wetland depend on a migration of *water* molecules, as opposed to a migration of *pollutants* in the water, which, after all, is what the CWA is designed to restrict? Moreover, could there be a "significant nexus" through some means other than water, such as that fishermen sometimes transfer bait from the wetland to the river, or, perhaps more importantly, that migratory birds use both? These are essential questions that Justice Kennedy's "significant nexus" proposal did not answer. In fact, a focus on the *activity* of polluting the water body, as opposed to a focus on the issue of *location* of the water body, can help in the development of a fresh approach to the reach of the CWA, which is addressed in the next part of this Article.

Finally, the four-Justice dissent in *Rapanos*, written by Justice Stevens, also failed to provide a fully satisfying construction of "waters of the United States."[239] Because he interpreted the protection of "adjacent" wetlands in *Riverside Bayview Homes* to include any wetland in spatial proximity to a permanent water body, Justice Stevens reasoned that both the wetlands at issue in *Rapanos* were automatically covered.[240] As to the broader question of the proper meaning of "waters of the United States," however, the dissenters were cramped by the precedent of *SWANCC* (in which all four of the *Rapanos* dissenters also disagreed at the time). In his *Rapanos* dissent, Justice Stevens resorted to some of the last refuges of statutory interpreters—deference to agencies, the general thrust of the statute, and congressional acquiescence. First, just as the Court had done in *Riverside Bayview Homes*, Justice Stevens in effect tossed up his hands as to what Congress meant by "waters of the United States" and deferred to the Corps' broad regulatory definitions (as necessarily limited by *SWANCC*, of course).[241] One long-term hitch with this approach from the viewpoint of environmentalism, however, is that it is inherently uncertain. The Corps would be free to expand or contract the reach of the Act, depending on the politics and viewpoints of the ruling administration. Over the past 30 years, environmentalists have pushed the Corps repeatedly to expand the scope of the Act, but there is little either in administrative law or in the vagueness of the Act itself to prevent the Corps from cutting back its regulatory interpretation—as, indeed, it may now do in response to *Rapanos*.[242]

The dissent's deferential approach was also less than satisfying in that it would allow coverage of wetlands by broad categorization: all intermittent wetlands would be covered as long as they are spatially close to permanent water bodies, regardless of whether there is any hydrological connection between the two features.[243] Why this level of generalization? Why not include all wetlands? Or why not include only those wetlands in which evidence shows that there is *likely* to be some water connection to the nearby navigable-in-fact water? In the wetland dumped into by Rapanos' fellow petitioner Carabell, for instance, Justice Stevens conceded that "water rarely if ever passes from the wetlands to the ditch [which led to a lake] or vice versa."[244] Alternatively, with the understanding that wetlands serve ecological functions such as providing habitat for birds and shellfish and serving as sponges for stormwater pollution,[245] why not include all ecologically valuable wetlands, including those that are *not* close to navigable-in-fact waters, or at least those wetlands that might have underground water connections? These points again lead to thinking about a more ecologically based approach to the Act, as discussed in the next part of this Article.

Justice Stevens also asserted the practical argument that in order to reach Congress' stated goal "to restore and maintain the chemical, physical, and biological integrity of the

236. For a quick dip into the issues surrounding "proximate causation," also called "legal causation," see RESTATEMENT (SECOND) OF TORTS §431(a) (1965) (allowing a "substantial factor[s] in bringing about the harm" to be considered a legal cause); Palsgraf v. Long Island R.R., 162 N.E. 99 (N.Y. 1928) (focusing on the issue of "foreseeability"); Overseas Tankship (U.K.) Ltd. v. Miller S.S. Co. ("Wagon Mound No. 2"), 1 A.C. 617, 644 (P.C. 1966) (holding that foreseeable risk of type of harm satisfies requirements of proximate cause). *See also* Buckner F. Melton Jr., *Clio at the Bar: A Guide to Historical Method for Legists and Jurists*, 83 MINN. L. REV. 377, 445-46 (1998) (discussing the evolution of proximate causation).

237. For example, in the Court case addressing the interpretation of "take" in the ESA, the Court seemed hesitant to read simple ideas of proximate causation into the Act, and misread the little that they did address. *See* Babbitt v. Sweet Home Chapter of Communities for a Great Or., 515 U.S. 687, 713-14, 25 ELR 21194 (1995) (O'Connor, J., concurring); *id.* at 732-33 (Scalia, J., dissenting). For my critical discussion of the Court's approach to the issue, see Paul Boudreaux, *Understanding "Take" in the Endangered Species Act*, 34 ARIZ. ST. L. REV. 733, 755-62 (2002).

238. 33 U.S.C. §1344(a).

239. *Rapanos*, 126 S. Ct. at 2252 (Stevens, J., dissenting).

240. *See id.* at 2255 (Stevens, J., dissenting).

241. *See id.* at 2252-53 (Stevens, J., dissenting) (citing *Chevron* deference); *id.* at 2262.

242. Because the *Chevron* doctrine allows an agency to adopt any one of a number of "reasonable" interpretations of a vague statutory term, the agency is free to change its interpretation, as long as the change is reasonable. *See* Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-45, 14 ELR 20507 (1984) (when a statute is unclear, courts must defer to any reasonable interpretation by the federal agency authorized to administer the statute).

243. *See id.* at 2255 (Stevens, J., dissenting) (deferring to the Corps' regulations covering wetlands "adjacent" to traditional navigable waters or their tributaries, 33 C.F.R. §§323.2(a), 323.3(a) (1985)).

244. *Id.* at 2254 (Stevens, J., dissenting).

245. *See id.* at 2252 (Stevens, J., dissenting) (discussing the ecological benefits of wetlands); *see also* the discussion of wetlands functions *supra* note 7.

Nation's waters,"[246] it makes sense to construe "waters" as broadly as possible. This is, of course, a tautology—if Congress meant "waters" to exclude intermittent wetlands, then the goal of the Act would be met without regulating them. Moreover, an argument of congressional intent is hampered by the fact that Congress oddly failed to clarify whether "waters" was meant to cover not only rivers, streams, and lakes, but also features such as swamps, marshes, and arroyos—something it easily could have done. In addition, relying on the fuzzy introductory statutory platitude of the goal "to restore . . . the . . . integrity of the Nation's waters" can be countered, of course, by the equally fuzzy introductory statutory platitude that the Act was intended to "preserve" and "protect" the "primary responsibilities of the States" to regulate and prevent water pollution[247]—Justice Scalia's preferred fuzzy source of interpretation.[248]

The final words on *Rapanos* belong to Chief Justice Roberts and Justice Breyer—both of whom wrote short separate opinions that, probably unwittingly, also help point to a solution for the CWA. Chief Justice Roberts, who joined the plurality, wrote separately to chastise the Corps for failing to revise its regulations in light of *SWANCC*.[249] While it certainly might have been useful for the Corps to have rewritten its regulations, it is unlikely that the Corps could have anticipated and promulgated the astonishingly narrow interpretation of the linchpin term of the Act set forth by Justice Scalia, Chief Justice Roberts, and their 1954 *Webster's* dictionary. On the flip side of the case, dissenting Justice Breyer also called for the Corps to rewrite its regulations.[250] According to Justice Breyer, however, the reach of the Act "extends to the limits of congressional power to regulate interstate commerce."[251] While perhaps heartening to environmentalists, this assertion has no basis whatsoever in the text of the Act. And like the Chief Justice, Justice Breyer also called on the Corps to respond to the decision with new regulations in light of *Rapanos*. But what sort of new regulations? Is the Corps supposed to read the tea leaves, cut back on its jurisdiction, and anticipate what approach might eventually garner five votes on the Court? Or, as Justice Breyer suggested, should the Corps cover any water-disturbing activity that substantially affects interstate commerce, while in effect ignoring the statutory limitation of "navigable waters"? Such a move would seem to be doomed, as it would clearly violate the holding in *SWANCC*. However, this suggestion—that law should look to the *activities* that degrade water, as opposed to arguing over issues of location and proximity—points to a new vision for statutory reform.

V. A New Vision for the Clean Water Act

As the extraordinary legal muddle created by *Rapanos* reveals, the legal crafting of the CWA, its implementing regulations, and its judicial interpretation all have been deeply flawed. Let's review the errors. First, it was an error for Congress to create a major new regulatory statute whose linchpin term—"navigable waters"—was not defined any further than the puzzlingly obtuse "waters of the United States." If it was the intent of drafters in 1972 to cover not only navigable-in-fact rivers and lakes but also water features such as sometimes-dry wetlands and arroyos, it was an error not to make this clear—an error that was a ticking statutory bomb that finally exploded (albeit in a somewhat sideways manner) in *Rapanos*. If the drafters gambled by enacting a seemingly limited "navigable waters" statute and then hoped that federal courts would construe the statute far more broadly than the term would seem to indicate, then this gamble, which may have paid off for many years, has finally proven to be a major error.

Since passage of the Act, the federal government has compounded the errors. Pushed by environmentalists, the once-reluctant Corps by starts and fits expanded the scope of its permit program to cover more and more water features over the past 30 years, without any unifying theory of its "jurisdiction."[252] While some of the regulations have included "interstate commerce" as a requirement,[253] in practice this has proven to be merely lip service; the location and geography of the water body, not the polluting activity, has been the focus of the jurisdictional decision.[254] These poorly crafted regulations have been errors.[255] Moreover, EPA, which administers much of the Act and in theory holds oversight authority of the Corps' dredge and fill permit program,[256] has failed to guide the Corps toward a more sensible and logical system of regulation. This too has been an error.

Finally, the federal courts have ruled schizophrenically as to the reach of the Act. In the 1970s, a district court ordered the Corps to expand its coverage of "navigable waters" to cover features that are not navigable-in-fact.[257] This deci-

246. 33 U.S.C. §1251(a).

247. *Id.* §1251(b).

248. *See Rapanos,* 126 S. Ct. at 2223 (Scalia, J., writing for a plurality) (citing 33 U.S.C. §1251(b)).

249. *See id.* at 2235-26 (Roberts, J. concurring).

250. *See id.* at 2266 (Breyer, J., dissenting).

251. *Id.*

252. The Corps' regulations defining "waters of the United States" are found at 33 C.F.R. §328.3 (2006).

253. The Corps' regulations state that "waters of the United States" include all waters that "are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce." 33 C.F.R. §328.3(a)(1) (2006). The terms "used in the past," "may be," and "susceptible" are bound to make a Federalist itch.

The inclusion of a required link to interstate commerce does not mean that the requirement is employed. In the federal employment discrimination law, Title VII of the Civil Rights Act of 1964, it has proven all but impossible for an employer to argue that it is not covered because of the interstate commerce requirement. *See*, *e.g.*, Equal Employment Opportunity Comm'n v. Ratliff, 906 F.2d 1314, 1316-17 (9th Cir. 1990) ("[i]t is difficult to imagine any activity, business or industry employing 15 or more employees that would not in some degree affect commerce among the states") (quoting Larson & Larson, *supra* note 86).

254. In *SWANCC*, for instance, the simple fact that migratory birds used the pond was sufficient for the Corps to assert "jurisdiction" over the pond. *See* 531 U.S. at 164-65. The Court failed to reach the issue of whether protecting migratory birds is a justifiable exercise of the commerce power, by the ingenious method of deciding that the matter raised a difficult question of constitutional law, and that statutes should be interpreted so as to avoid such difficult questions. *See id.* at 173-74.

255. For a rejection of the loose regulatory standard that "waters of the United States" include those that "could affect" interstate commerce, 33 C.F.R. §328.3(a)(3), see *United States v. Wilson*, 133 F.3d 251, 28 ELR 20299 (4th Cir. 1997) (reversing criminal conviction on the ground that the regulatory standard exceeded the statutory authorization).

256. *See* 33 U.S.C. §1344(c) (EPA may in effect veto the Corps' decision to grant a permit).

257. In the landmark decision of Natural Resources Defense Council v. Callaway, 392 F. Supp. 685, 686, 5 ELR 20285 (D.D.C. 1975), the U.S. district court held that Congress meant the term "navigable wa-

sion was not overturned, or even seriously questioned, by any appellate court for years. Only after the year 2000, with a more Federalist-minded judiciary, did the Court delve into the issue, one-quarter century later than it could have. First, the Court reasoned in *SWANCC* that navigable waters did not include isolated wetlands.[258] Then, in *Rapanos*, a plurality concluded that "waters" generally include only rivers, streams, oceans, and lakes.[259] This body of jurisprudence has failed to provide the sort of guidance that is needed both by private landowners and by environmental regulators.[260]

A unifying feature of this trail of errors has been the effort—ultimately unsuccessful—to fit the large round peg of an ecological protection program in the small square hole of the CWA's reliance on geographic terms—"navigable waters" and its definition as "waters of the United States." With the reach of the Act dependent solely on all-or-nothing decisions of geography and location—a water feature is either a part of "waters" or it is not—a crucial point is lost. This missing issue is whether the water pollution substantially affects interstate commerce. The law fails to ask whether the pollution is significant, and whether it is the kind of pollution that is a federal matter.

The CWA's focus on location, not pollution, runs counter to the usual practice under federal environmental law. The CAA, for example, generally extends the reach of its stationary source permit program to all sources of air pollution that hold the capacity to emit a certain tonnage of pollutants, and does not reserve regulation of harmful pollution in some locations to state prerogative.[261] Under the law regulating the handling of hazardous waste, waste must be bottled up, handled, transported, and disposed of according to strict federal requirements, regardless of the location of the waste's creation.[262] When a hazardous waste spill occurs, the Superfund law authorizes the government to respond with federal money and cleanup orders whenever such a spill threatens human health or the environment, regardless of the location of the spill.[263] Even the ESA prohibits harm to protected plants and animals regardless of the location—private or public property, water, land, or air—in which the harm occurs.[264]

The CWA diverges from the usual focus on regulating certain categories of environmentally harmful activity, regardless of location. It differs in that it reserves to the states the power to regulate water degradation in certain locations—those locations that are beyond the mysterious limit of "navigable waters." Because Congress is restricted by Article I of the Constitution, of course, there must be some limits to congressional legislation, if only in theory. But the Act remains muddled to this day, in large part because Congress chose a limitation based on location, not on the magnitude or effect of the polluting activity, and failed to clarify the division between federal and state authority.

The solution to the murkiness of the CWA, therefore, should be clear: *the CWA should be amended to refocus on water pollution and degradation that substantially affect interstate commerce, regardless of geography or location.* With such a revision, the Act would better fulfill Congress' goal of maintaining and restoring the integrity of the nation's waters, from large rivers to small wetlands, while at the same time giving the respect to state prerogative that is demanded by today's federalists.

When Congress passed the Act in 1972, it gave little thought to the constitutional limitations of the interstate Commerce Clause, for the simple reason that there were no real limits at the time. Congress had become so accustomed to courts' approving of any and all legislation against Commerce Clause challenges that it did not see a need to refer to interstate commerce in the text of the Act, unless "navigable waters" was meant to do so in a roundabout way.[265] Today, however, a viable CWA should be re-crafted so as to avoid the regulation of activities that are purely within state prerogative under the 21st century law of the commerce power.

A. A Revised Approach to the Reach of the Clean Water Act

Here is what could be done. The CWA should be amended to extend its reach to all those categories of pollution that the Court has held are permissible under the Commerce Clause, as set forth in *Lopez* and its progeny.

Some have questioned whether the CWA's provisions on wetlands-filling[266] fit at all within Congress' commerce

ters" to be as broad as possible under the Constitution and that the Corps' 1974 interpretation was thus unlawful, and remanded the matter to the Corps to revise their regulations. The Corps did not appeal *Callaway*.

258. *See SWANCC*, 531 U.S. at 171-72 (rejecting the Corps' inclusion of "isolated" waters within "navigable waters").

259. *See Rapanos*, 126 S. Ct. at 2224 (Scalia, J., writing for a plurality) ("[O]n its only plausible interpretation, the phrase 'the waters of the United States' includes only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes.' *See* Webster's Second 2882.").

260. *See id.* at 2235-26 (Roberts, J., dissenting) (noting that "Lower courts and regulated entities will now have to feel their way on a case-by-case basis."). Chief Justice Roberts blamed the Corps for its failure to revise its regulations after *SWANCC*; he failed, however, to lay any blame on the Court for its failure to agree on a definition of "waters of the United States." Moreover, the situation is worse than having to deal with issues on a "case-by-case basis"—as of 2007, there is no controlling law at all on what "waters of the United States" means in regard to wetlands and intermittent water features.

261. *See* 42 U.S.C. §§7661a-7661e (2006) (general rules for CAA for permits); *id.* §§7502(c)(5), 7503 (permit requirements for emitting pollutants from new major or modified sources in nonattainment areas). It is true that geography plays a role in permitting under the CAA, in that sources emitting into air quality control regions with worse pollution hold more permit requirements than those in areas with better pollution. *See, e.g.*, *id.* §7511-7511a (differing requirements for emission of ozone pollution in different areas, depending on the existing concentration of pollution). These distinctions are made because of air quality differences, not to reserve certain geographic areas to state prerogative.

262. *See* RCRA, 42 U.S.C. §§3001-3005 (regulation for handling hazardous waste, without reference to location).

263. *See id.* §9604(a)(1) (authorizing the president to engage in a "response" to such spills that "present an imminent and substantial danger to the public health of welfare," regardless of location); *id.* §9606(a) (president may order others to engage in a "response").

264. *See* 42 U.S.C. §1538(a)(1)(B) ("take" of protected species is unlawful "anywhere within the United States").

265. As noted in *supra* note 253, the Corps' regulations have included an interstate commerce requirement, but this is not in the statute itself. The regulations call for categorical "jurisdictional" decisions that place a water feature either wholly in or wholly out of the Act, regardless of whether a particular type of pollution or degradation would substantially affect interstate commerce in the aggregate. *See also SWANCC*, 531 U.S. at 164-65 (the fact that migratory birds used the pond was sufficient for the Corps to assert "jurisdiction" over any degradation of the pond).

266. *See* 33 U.S.C. §1344(a) (permit required for discharge of dredged or fill material into navigable waters).

power. Prof. Jonathan Adler, for instance, has argued that many types of wetlands degradation—especially those relating to domestic landscaping—are not "commercial" at all.[267] Putting aside the question of how often the filling in of puddles in suburban back yards results in the Corps' attention, this argument misses the significance of the post-*Wickard* Commerce Clause jurisprudence. While the destruction of a small domestic wetland might not be commercial per se, neither is the eating of home-grown wheat (the issue in *Wickard*),[268] the smoking of marijuana for medical purposes (the issue in *Raich*),[269] or the possession of crack cocaine.[270] These noncommercial activities may be regulated by Congress, however, because they substantially *affect* interstate commerce.[271] Moreover, to the extent that wetlands regulation is *motivated* by a desire to promote interstate commercial interests, such as the protection of fisheries and cleaning up rivers for drinking water, they hold stronger justifications to federal control than laws that appear to be motivated more by moral judgments, such as perhaps the federal law banning medical marijuana use.[272] Nonetheless, a corollary of Professor Adler's argument—that Congress holds the power to regulate the *activity* of wetlands degradation only when such activity either is commerce or substantially affects interstate commerce—should be a guide to revising the CWA in the climate of today's revived federalism.

Here is how the Act could be revised. First, the Act should explicitly regulate pollution of the "channels" of interstate commerce,[273] such as river systems in which commerce moves across state lines. Second, the Act should explicitly cover pollution that threatens "instrumentalities"—in other words, "person and things"—that move in interstate commerce.[274] This would allow the protection of migratory birds and other species that cross state lines. Third and most broadly, the Act should explicitly regulate pollution that, although not directly harming channels or things in interstate commerce, nonetheless "substantially affects" interstate commerce in some way.[275] Examples (of which there are many) include pollution that prevents a wetland from serving as a sponge that moderates interstate flooding, pollution that kills shellfish that are processed for oils that are sold in interstate commerce, and pollution that significantly decreases interstate hunting and recreational tourism at a popular wetland. Reserved to state prerogative would be those polluting activities that do not substantially affect interstate commerce. An example might be the filling in of a small wetland that held no link to interstate trade and in which the fill material is not expected to cross state lines.

Here is how a revision could fit into the CWA. Although both *Rapanos* and *SWANCC* focused on §404 of the Act,[276] which covers the dumping of dredged or fill material, often into wetlands, the true starting point for understanding the Act is §301(a).[277] This section broadly makes it unlawful to "discharge" a pollutant without a permit.[278] The term "discharge" currently is defined to mean the addition of any pollutant from a point source into "navigable waters."[279] A "pollutant" is defined to cover almost anything that can be dumped into water, including rock and sand.[280] Section 404 covers discharges into "navigable waters" of "dredged or fill material."[281]

A revised start to the CWA would target the activities of dumping any material, including dredge or fill, into watery areas, when such activities would substantially affect interstate commerce. The linchpin terms "navigable waters" and "waters of the United States" would be jettisoned.[282] Section 301(a) could be amended to state:

> (a) (1) It is unlawful to discharge any pollutant or material, including dredged or fill material, into a water area without a permit, as provided for in this Act, if such discharge would substantially affect interstate commerce.
>
> (2) The term "water area" includes—
>
> (A) any water body or water course whose water flows across state boundaries or into the territorial seas, including a river and all of its tributaries to their sources, regardless of whether it is naturally occurring or human-made, and regardless of whether it is wet or dry when the discharge occurs, and including the territorial seas; and
>
> (B) any area that is sometimes submerged or saturated with naturally occurring water on a regular basis or on a frequent basis, including a lake, a pond, or a wetland, as defined by regulations authorized to be promulgated by the Administrator of the Environmental Protection Agency.
>
> (3) The term "water area" does not include any water inside a building or any human-made outdoor water body that has been created for short-

267. *See supra* note 134 (contrasting these wetlands-filling actions to the commerce of mining in *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 11 ELR 20569 (1981)).

268. *See* Wickard v. Filburn, 317 U.S. 111 (1942).

269. *See* 545 U.S. at 1, 125 S. Ct. at 2195.

270. *See* 21 U.S.C. §841(b)(1)(A)(iii) (mandatory minimums for felony possession of only 50 grams of crack cocaine).

271. *See* United States v. Lopez, 514 U.S. 549, 558-59 (1995) (Congress may regulate activities that "substantially affect" interstate commerce).

272. Prof. John Shane has argued persuasively that it is the *motivation* of Congress to protect interstate commerce, rather than the question of whether the specific activity being regulated is commerce itself, that should be the guiding question in answering in commerce power cases. *See* Shane, *supra* note 77, at 221. Using motivation or "purpose" as the determinant, the federal law in *Raich* would be on far shakier grounds, while the wheat law in *Wickard* would be fully justifiable.

273. *See Lopez*, 514 U.S. at 558.

274. *See id.* at 278 (Congress may regulate to protect "things" in interstate commerce).

275. *See id.* at 558-59.

276. 33 U.S.C. §1344.

277. *Id.* at §1311(a).

278. More specifically, §301 makes "unlawful" the "discharge of any pollutant," except as in accordance with various provisions of the Act. *See id.* §1311(a). The most important of these provisions are the permit requirements of §402, for general pollution discharges, *id.* §1342, and of §404, for the discharge of "dredged or fill material," *id.* §1344.

279. *See id.* §1362(12).

280. *See id.* §1362(6).

281. *See id.* §1344(a).

282. The revision would also have to jettison the term "navigable waters" from the dredged and fill material section, as well. 33 U.S.C. §1344(a).

term use or for use as a swimming pool, or an industrial retaining pond, or an industrial water supply facility, in accordance with regulations promulgated by the Administrator of the Environmental Protection Agency.

(4) The term "substantially affect interstate commerce" means that the discharge, when accumulated within a category of similar discharges, would appreciably decrease or impair an aspect of interstate commerce.

(5) The term "appreciably decrease or impair an aspect of interstate commerce" refers to any of the following situations—

(A) the category of discharges into a water area in which there is a reasonable likelihood that the pollution or material that is discharged would move across or straddle state lines (either by surface or subsurface movement) or move into the territorial seas;

(B) the category of discharges holds a reasonable likelihood of decreasing or impairing a commercial activity with a national market, such as but not limited to commercial fishing, agriculture, industrial manufacture, or navigation, whether or not this commercial activity depends on the use of the water area into which the discharge is made;

(C) the category of discharges holds a reasonable likelihood of impairing the health or prosperity of migratory birds or other species that migrate among or between states;

(D) the category of discharges holds a reasonable likelihood of impairing plants, soils, land, or air, if such impairment would appreciably affect plants, soils, land, or air of more than one state;

(E) the category of discharges holds a reasonable likelihood of changing the geography of or water flow in a region, so that it becomes more susceptible to damage from floods, hurricanes, storms, tornadoes, earthquakes, or other damaging natural events; or

(F) the category of discharges holds a reasonable likelihood of appreciably decreasing or discouraging tourism across state lines.

(6) The Administrator of the Environmental Protection Agency is authorized to determine, in accordance with regulations, whether an activity is a discharge that substantially affects interstate commerce. The Administrator is directed to promulgate regulations to establish categories of activities that presumptively substantially affect interstate commerce, those that presumptively do not substantially affect interstate commerce, and those in which a further, specialized inquiry into the effect of the category on interstate commerce is necessary. The regulations will provide for an administrative mechanism for persons, or those who would otherwise be required to obtain a permit, to challenge the Administrator's regulatory presumptions. The Administrator's regulations and determinations will be subject to review under the Administrative Procedure Act.

(7) The Administrator is authorized to promulgate regulations that set forth an impact fee for permits granted for the discharge of material, including dredged or fill material, pursuant to this section. Such an impact fee will be based on the level of harm to the environment, ecology, and public health that is expected to be caused by the discharge or caused by development that is facilitated by the discharge, not to exceed $1,000,000 per acre of affected water area.

A CWA revised in this way would refocus the initial inquiry away from the confusing geography of "navigable waters" and "waters of the United States." Instead, the law would focus on the activity of discharging pollutants and material, including dredge or fill. EPA would create rules to designate certain categories of activities as being either presumptively covered by the Act, presumptively not covered, or those in the middle that would require a closer look. This triage system is borrowed from the regulations under the National Environmental Policy Act,[283] which authorizes agencies to categorize its actions into those that normally require the creation of an environmental impact statement (EIS), those that do not, and those in which the agency makes a further analysis of whether an EIS is necessary.[284] Probabilities would be based on a "likelihood" standard, not on slim possibilities or near certainties.[285]

The categories would be determined by the ways in which discharges can substantially affect interstate commerce. Because almost all "point source" pollution—that is, typically, pollution from industrial facilities and other ongoing operations—is discharged into flowing river systems that move among states or eventually flow into the territorial seas, such pollution would remain uncontroversial; it would be covered by the revised §301(a)(2)(A) and (5)(A), which in effect cover all pollution into river systems, including their tributaries.[286] The categories of presumptive *exclusions* would likely be some categories of discharges into wetlands or other small water areas. These water areas were, of course, the subject of the controversies in *Rapanos*, *SWANCC*, and *Riverside Bayview Homes*.[287]

283. 42 U.S.C. §§4321-4370f, ELR STAT. NEPA §§2-209.

284. *See* 40 C.F.R. §1501.4 (2006). These regulations of the Council on Environmental Quality authorize federal agencies to create lists of kinds of agency proposals that "normally require" an environmental impact statement (EIS), those that normally don't require an EIS, and those in which an "environmental assessment" is needed to determine whether an EIS is needed. *See id.* §1501.4(a), (b). An EIS is needed when a proposal would "significantly affect the quality of the human environment." 42 U.S.C. §4322(2)(C). An EIS studies the effects on the environment of a proposed agency action. *See* 42 C.F.R. §1502.10 (2006).

285. The default standard of proof in American civil law is the "more likely than not" standard. *See, e.g.*, Mitchell v. Gencorp, Inc., 165 F.3d 778, 783 n.3 (10th Cir. 1999) (quoting Allen v. Pennsylvania Energy Corp., 102 F.3d 194, 198 (5th Cir. 1996)).

Current Corps regulations cover all waters that "are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce." 33 C.F.R. §328.3(a)(1). The tem "susceptible" seems to imply a very low standard of probability.

286. Because water flows downhill until it reaches the sea, all river systems eventually reach the sea, with the exception of the small river systems of the western desert basins, where water dries up, often in "terminal lakes," without reaching the sea. *See* U.S. Geological Survey, *Hydrology of the Walker River Basin*, http://nevada.usgs.gov/walker/index.htm (last visited Jan. 12, 2007).

287. *See Rapanos*, 126 S. Ct. at 2216-17 (Scalia, J., writing for a plurality) (discussing the long controversy over CWA coverage of water

For dumping into wetlands, we might expect that a category of presumptively covered activities might be the dumping of a certain amount of material into any wetland that is known to support a large population of migratory birds. Such discharges may be reasonably likely to harm the health or prosperity of some migratory birds, triggering the revised §301(a)(5)(C). Thus the proposed revision would in effect revive the Migratory Bird Rule struck down in *SWANCC*.[288] Another category of presumptively covered activities might be discharges into a lake that is known to support a large number of fishermen who trade in the national fish market. Another category might be dumping into any wetland along the Gulf of Mexico or Atlantic Ocean, where coastal wetlands serve as a critical buffer to storm surges caused by hurricanes.[289]

On the flip side, categories of presumptively *excluded* activities might include discharges of small amounts of material into ponds or wetlands that do not appear to hold any connection to interstate commerce. This category might include the dumping of a small amount of fill material into a wetland that holds no hydrological connection to any other water area, that holds no migratory birds, that supports no fisheries or agriculture, and that does not serve to protect against flooding. Regulation of such dumping would be left to the state and local governments.

In the middle range would be categories of activities in which the potential effect on interstate commerce is less clear. This might include discharges into ephemeral wetlands and small single-state lakes in which possible links to interstate commerce, such as through subsurface water movement or by seasonal migratory birds, need further study. For these water areas, EPA would have to inquire more closely whether the discharge would affect interstate commerce in any of the listed ways, through an individualized analysis. Is some of the fill material dumped into the wetland likely to drift into a nearby river, smothering fish eggs? Is the wetland a seasonable home for a number of migratory birds that have just recently built nests around the wetland? Would destruction of a small pond lead to soil erosion that would harm farms across the nearby state border? If the answer to any of these questions is "yes," then the discharge would be covered by the federal CWA and its permit system. The revision proposed here cannot cover every potential complication, but it would guide the regulators in the right direction.

The proposal would grant the regulatory authority to EPA, not the Corps, which would be relieved of having to administer an environmental protection program within the context of a military organization. EPA has been given responsibility for administering the CWA, other than the dredge and fill permit program.[290] It makes sense to grant to the leading federal environmental agency the task of deciding these crucial environmental and ecological questions. If it were desirable to keep the dredge and fill permit program within the bailiwick of the Corps, it could easily replace EPA in the proposed revision.

B. Protecting Both Waters and Federalism

Both environmental and federalist interests would be served by the proposed revision. First, by focusing on the polluting activity, the revision would be superior to the interpretations of current law of both Justice Scalia's plurality and Justice Kennedy in *Rapanos*, both of which would exclude entire categories of water bodies from the Act simply because of their location, regardless of the potential effects of discharges on interstate commerce. For example, these five Justices apparently would remove from the Act any discharges into a wetland that is unconnected to a navigable river or lake, even if the wetland serves as a home for thousands of protected migratory sandhill cranes (one of the nation's most impressive and threatened species)[291] and migratory pintail ducks (one of the most popular targets for wetland hunting).[292] Under Justice Scalia's analysis, such a wetland would not be not covered because it does not fit within the *Webster's* dictionary definition of "waters" and does not have a continuous surface connection to a river, stream, or lake.[293] Even under Justice Kennedy's "significant nexus" approach, the wetland's isolation from navigable-in-fact water bodies probably would remove it from the Act.[294] By shifting away from asking about location and refocusing on the harm that the discharge might cause—in this case, the harm to the species that move across state lines—a revised CWA would more fully meet the goal of protecting ecosystems and commerce involving water.

But the proposal would not simply expand the reach of the CWA. Considering the Court's revived attention to federalism, the Act cannot ignore the limitations of the Constitution's Commerce Clause. Indeed, the Court in *SWANCC* has already narrowed the Act's potential reach because an agency's regulatory interpretation came too close to the

areas, such as wetlands, that are not "traditional interstate navigable waters").

288. The Court in *SWANCC* struck down the Corps' Migratory Bird Rule because it did not fit within the Court's interpretation of "navigable waters," thus avoiding the constitutional issue whether protection of migratory birds is a form of regulation of interstate commerce. *See* 531 U.S. at 173-74. The proposed revision to the Act would explicitly list an effect on migratory birds as a way of substantially affecting interstate commerce. Considering the precedent that protection of migration birds is constitutionally permissible, *see* Missouri v. Holland, 252 U.S. 416 (1920) (ruling that Congress holds the power to implement migratory bird protection treaties with other nations through legislation that trumps the traditional state control of wildlife), I believe that the proposed statutory provision would pass muster as a way of protecting "things" in interstate commerce. *See Lopez*, 514 U.S. at 558.

289. It is well-established that coastal wetlands serve as a buffer to protect humans from storm surges; similarly, wetlands near rivers and lakes serve as sponges to decrease flood levels. *See, e.g.*, U.S. EPA, *Wetlands*, http://www.epa.gov/owow/wetlands/ (last visited Jan. 12, 2007) (with cites to primary scientific sources); Juliet Eilperin, *Shrinking La. Coastline Contributes to Flooding*, WASH. POST, Aug, 30, 2005, at A7, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/08/29/AR2005082901875.html (last visited Dec. 21, 2006).

290. Under the current CWA, EPA, among other duties, sets the "best technology" levels for permits issued to point source polluters, *see* 33 U.S.C. §§1311(b), 1314(b), and issues point source pollution permits under the national pollutant discharge elimination system (NPDES). *See id.* §1342(a) (although states may take over this function, *see id.* §1342(b)).

291. For information about the sandhill crane, see Cornell Lab of Ornithology, *Sandhill Crane*, http://www.birds.cornell.edu/AllAboutBirds/BirdGuide/Sandhill_Crane.html (last visited Jan. 12, 2007).

292. For information about the northern pintail duck, see Cornell Lab of Ornithology, *Northern Pintail,* http://www.birds.cornell.edu/AllAboutBirds/BirdGuide/Northern_Pintail_dtl.html (last visited Jan. 12, 2007).

293. *See Rapanos*, 126 S. Ct. at 2225-27 (Scalia, J., writing for a plurality).

294. *See id.* at 2236 (Kennedy, J., dissenting).

outer limits of congressional power.[295] The proposed revision would explicitly link the federal permit requirement to activities that substantially affect interstate commerce. This requirement would free some small-scale water pollution from federal control and leave regulation up to the states. This is what federalism requires. For example, consider a housing developer that wishes to fill in a small, isolated pond or wetland on land that it owned. If the pond or wetland held none of the links to interstate commerce set forth in the revised Act, there would be no basis for federal regulation or a federal permit. Similarly, because the Act's trigger would depend on the effects of the pollution, as opposed to the location, the discharge of one kind of pollutant, e.g., a chemical that is harmful to fish and that tends to be suspended high in the water level, into a particular lake might be covered, while the discharge of another pollutant, e.g., a neutral material that tends to settle at the lake bottom, into the same lake might not require a permit.

Such conclusions might disturb environmentalists. But water pollution that does not affect interstate commerce holds no greater justification for national regulation than does the logging of trees on private land or the ripping up of native grasslands for crops—neither of which generally are subject to federal regulation. Allowing the degradation of local waters when there is no apparent link to interstate commerce is a small price to pay for shoring up the constitutional justification for more significant degradations of waters that are truly of national concern.

Moreover, by requiring more individualized analyses of the potential effects on interstate commerce of planned discharges, the proposed revision might entail more work for the regulators than under the current system, in which simple geography, such as proximity to a river or lake, is sufficient to trigger coverage. Such work might impose a significant new burden on an agency, either EPA or the Corps, which is habitually strapped for funds. This strain would be ameliorated by the receipt of money from impact fees imposed on those persons receiving permits. Fees would be based on the expected level of harm to the environment or the economy.[296] Moreover, an attention to individualized regulation is consistent with the Court's new view of government's relationship to private property. In the case of government "exactions" of property interests from landowners requesting a land use permit, the Court has held that the Fifth Amendment's Takings Clause requires an individualized determination of the specific impact that the permitted activity would generate.[297] It is not too much to demand that government give similarly focused attention to regulating discharges into water, at least in categories of cases in which it is not immediately clear that the discharge would substantially affect interstate commerce in any way.

Finally, the proposed revision does not address the *standards* for granting permits under the Act. For discharges of a pollutant that is not dredged or fill material, the current Act sets forth a system of "best technology" requirements to be written into national pollutant discharge elimination system permits, in order to curb (if not truly "eliminate") the amount of pollutants that enter the nation's waters.[298] States also are required to impose additional permit restrictions for discharges into especially polluted "impaired" waters, using a "total maximum daily load" mechanism and the state's water quality standards.[299] The proposed revision would not seek to change these permit criteria. For the discharge of dredged or fill material—which has been the primary focus both of the Court's jurisprudence and of this Article—the regulatory agency could incorporate the criteria that EPA has developed over the past 30 years. Prominent among these criteria are whether there are environmentally superior alternatives to the plan to fill in a wetland and whether the project's success is dependent on the use of water.[300] The rules also require permittees to minimize their adverse impact to wetlands, sometimes by helping wetlands elsewhere, including the buying of credits from wetlands mitigation banks.[301] Whether these criteria should be expanded, narrowed, or changed are separate topics that I leave for another day.

VI. Conclusion

It may seem naïve to propose an expansion of the CWA in an era in which the Court is skeptical of environmental laws that restrict the right to shape private property. But the Court's fractured decision in *Rapanos* reveals that the CWA was seriously flawed from the start. It also gives Congress an opening to craft a water law that more effectively exercises its constitutional commerce power and more intelli-

295. *See SWANCC*, 531 U.S. at 173-75 (choosing a narrow interpretation of "navigable waters" in part because the regulation of an activity with no apparent connection to interstate commerce would raise at least a serious question of exceeding the commerce power).

296. Governments are using increasingly often the tool of impact fees, which are imposed on private parties that are seeking a permit to do something on private property in a way that would do some harm to the public welfare, such as by increasing traffic or removing wildlife habitat. Through such fees, the government allows the private party to do what it wants—thus respecting private property "rights"—but discourages unnecessary harm by the deterrent of the fee. The fees also provide money for government to assess such impacts to the public welfare and to mitigate these harms with benefits elsewhere. For a general discussion of impact fees in land use, see James C. Nichols, *Impact Exactions: Economic Theory, Practice, and Incidence*, 50 Law & Contemp. Prob. 85 (1987).

297. *See* Dolan v. City of Tigard, 512 U.S. 374, 391, 24 ELR 21083 (1994) (holding that a city had to make an individualized determination of how much traffic a retail store's expansion would generate before imposing an exaction to take part of the retail store's property for a bike path that would ameliorate traffic).

298. *See* 33 U.S.C. §§1311(b), 1314(b) (setting forth the "best technology" requirements); *see id.* §1342 (establishing the NPDES).

299. *See* 33 U.S.C. §1313. Under this section, each state is required to set forth water quality standards—in effect, the maximum concentration of certain pollutants—for different categories of water. Using such standards, the state must then determine the total maximum daily load (TMDL) for each pollutant. The state is then required to allocate this TMDL among polluters, including both point source polluters and nonpoint source polluters. Because of the complexity of these tasks, many states are far behind in meeting their statutory obligations. For a good summary of the long and complicated history of trying to get states to meet their water quality requirements, see Houck, *supra* note 2.

300. *See* 40 C.F.R. §230.10(a) (EPA regulations guiding the granting of permits, including the guidelines that a permit will be denied if there is an environmentally superior "practical alternative" or if the project is not "water-dependent").

301. The duty to minimize the impact to the wetland is found at *id.* §230.10(d). Steps to minimize these impacts are at *id.* §230.75(d). For discussions of the practice of "off-site" wetlands mitigation banks, see Royal C. Gardner, *Banking on Entrepreneurs: Wetlands, Mitigation Banking, and Takings*, 81 Iowa L. Rev. 527, 541-42 (1996); Jonathon Silverstein, *Taking Wetlands to the Bank: The Role of Wetland Mitigation Banking in a Comprehensive Approach to Wetlands Protection*, 22 B.C. Envtl. Aff. L. Rev. 129 (1994).

gently respects the limits of congressional authority under the new federalism. Environmental protection still enjoys the support of a majority of Americans, and this includes the CWA, whether out of concern for the water supply, concern for strained wildlife habitats, or concern for ecosystem benefits that wetlands provide.[302] Indeed, with the recent publicity about the role that wetlands serve to buffer hurricane and storm floods, and the role that disappearing wetlands may have played in exacerbating the damage from 2005's Hurricane Katrina, this may be a very propitious time in which to take advantage of public support for preserving wetlands.[303] Merely revising agency regulations will not cure the fundamentally flawed approach of the Act's reliance on the location-based linchpin of "navigable waters." Revising the Act to target directly pollution that substantially impairs interstate commerce in any of a variety of ways would both improve the protection of our nation's waters and serve as a model for legislative reform.

302. *See, e.g.*, Harris Poll No. 77, *Three-Quarters of U.S. Adults Agree Environmental Standards Cannot Be Too High and Continuing Improvements Must Be Made Regardless of Cost*, http://www.harrisinteractive.com/harris_poll/index.asp?PID=607; Yale Center for Envt'l Law & Pol'y, *Environmental Poll: June 2005*, http://www.yale.edu/envirocenter/environmentalpoll.htm (last visited Jan. 12, 2007) (asserting a finding of "broad support for cleaning up air and water and a desire for more government involvement in environmental protection").

303. *See, e.g.*, Statement of Hon. H. Dale Hall, Director, FWS, Before Sen. Comm. on Env't & Pub. Works (Nov. 2, 2005) (Bush Administration official, citing the public's recognition of the need to preserve coastal wetlands, in light of Hurricane Katrina), *available at* http://epw.senate.gov/hearing_statements.cfm?id=248150; America's Wetland Foundation, *New Poll Shows Support for Coastal Restoration Gaining Momentum Statewide*, *available at* http://www.Americaswetland.com/article.cfm?id=383&cateid=2&pageid=3&cid=16 (last visited Jan. 22, 2007) (asserting that a 2006 poll "revealed that 66% of state residents are very concerned about loss of coastal wetlands in Louisiana").