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The Historic Navigability Test: How to Use It to Advantage in This Post-*Rapanos* World

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Editors' Summary: Since the Supreme Court's decision in Rapanos v. United States*, courts, practitioners, and scholars have continued to discuss the so-called Kennedy test and its significant nexus criterion. In this Article, authors William W. Sapp, Mina Makarious, and M. Allison Burdette explore the historic navigability test, one tool that can be used to establish a significant nexus to a traditional navigable water. The authors begin by providing a history of traditional navigable waters. They move on to discuss the* Rapanos *decision and, in particular, the important role played by traditional navigable waters in Justice Anthony M. Kennedy's significant nexus test. Then they discuss the three tests that have arisen in this country for determining whether a water is a traditional navigable water, elaborating on the historic navigability prong of the traditional navigability test. Finally, they discuss some key historic use cases to explain how this approach can be used to greatest effect.*

I. Introduction

It is your first post-*Rapanos*[1] wetlands case and you are searching for a way to strengthen your summary judgment brief on geographic jurisdiction. While you are wrestling with the nuances of the tests set forth in the opinions of Justices Antonin Scalia and Anthony M. Kennedy,[2] you decide to retrace in your mind the hydrologic connection between the cypress dome wetland that you are trying to protect and the nearest "traditional navigable water." The 15-acre wetland feeds into an intermittent stream that joins a small perennial stream a few hundred feet away. The small perennial stream then joins the much larger Cotton Creek after a two-mile reach. Cotton Creek then flows close to 35 miles before it empties into the sizeable Barge River. Faced with these facts, you know that your wetland is not going to survive the Scalia test because there is no "relatively permanent" surface water connection between the wetland and the other waters downstream. Thus, you are forced to rely on establishing a "significant nexus" under the Kennedy test between the wetland and the "traditionally navigable" Barge River almost 40 miles away.

You have attempted to paddle down Cotton Creek in a canoe so that you could argue that the creek was navigable in fact, but it was a slow trip because the creek was choked with sediment. As you found out later from some of the farmers in the area, sediment had washed into the creek from the nearby cotton farms over the past century. The creek, the farmers explained, was once much narrower and deeper. One farmer pulled out an old scrapbook that contained a picture of his great-grandfather loading bales of cotton onto a small flat-bottomed skiff. As evidenced by the photograph, many of the farmers on Cotton Creek used such skiffs to transport their cotton to the Barge River where they transferred their cargo onto larger boats for the remainder of the trip to market. As you are reflecting on that picture of the farmer poling his skiff down Cotton Creek, you think that there must be some way that it can help you establish that your cypress dome wetland is jurisdictional, but how?

This Article attempts to answer that question. While the scope of this Article is admittedly narrow, it provides a useful tool to an environmental attorney seeking to prove that a wetland is jurisdictional under Justice Kennedy's significant nexus test. In short, Justice Kennedy, in his concurring opinion in the 2006 U.S. Supreme Court wetlands case, *Rapanos v. United States*,[3] opined that a water body is protected by the Clean Water Act (CWA)[4] if it has a "significant

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1. Rapanos v. United States, 126 S. Ct. 2208, 36 ELR 20116 (2006).
2. *Id.* Justices Kennedy and Scalia authored competing opinions in the fractured *Rapanos* decision that purport to provide the appropriate test for deciding what waters are covered by the Clean Water Act. 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607.
3. 126 S. Ct. 2208, 2248, 36 ELR 20116 (2006).
4. 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607. In 1977, Congress renamed the Federal Water Pollution Control Act of 1972 the "Clean Water Act." Pub. L. No. 95-217, 91 Stat. 1566 (1977).

nexus" with a "navigable water in the traditional sense."[5] As we explain below, one test for determining whether a water body is a navigable water in the traditional sense is whether that water body has ever been used for commerce in the past. If the water body has been used, for example, by trappers to get their pelts to market, it would be considered a traditional navigable water even if it is not passable by large or small boats today.[6]

Thus, if one is attempting to show that a wetland adjacent to an intermittent stream is jurisdictional, the task might prove less onerous if a traditional navigable water were located close by. In the scenario described above, it would be much easier to prove that the cypress dome has a significant nexus with Cotton Creek, which is only 2 miles away, than it would be to prove the cypress dome has a significant nexus with the Barge River, which is almost 40 miles away. In order to make this argument, one would have to establish in court that the creek had been used for the transport of cotton. If one were successful in this argument, the court would find that the creek is a navigable water in the traditional sense, like the Barge River. To survive the Kennedy test, one would merely have to establish that the wetland has a significant nexus with the creek that is only two miles distant. It is this concept that we explore in this Article, namely, that by hitting the history books, talking to old timers, and visiting local archives, one can sometimes strengthen one's legal position in post-*Rapanos* jurisdictional cases.

We begin by providing a short history of traditional navigable waters and the role they have played in the development of this country. Then we discuss the *Rapanos* decision and, in particular, the important role played by traditional navigable waters in Justice Kennedy's significant nexus test. After that we discuss the three tests that have arisen in this country for determining whether a water is a traditional navigable water. We then elaborate on the historic navigability or "historic use" prong of the traditional navigability test. Finally, we discuss some key historic use cases to explain how this approach can be used to greatest effect.

II. A Word on the Navigability Nomenclature

When it comes to discussing navigable waters, courts and commentators use a myriad of terms in ways that are often confusing and imprecise. Even Justice Kennedy, in his attempt to clarify the jurisdictional reach of the CWA, states his significant nexus test in three different and potentially conflicting ways.[7] In contrast, in this Article we use the key terms such as traditional navigable waters with as much uniformity as possible. We begin by providing the following definitions and explanations.

We use the term "waters of the United States," which is found in the CWA,[8] to loosely refer to all waters in the country, *except* for those waters and wetlands that have no significant Commerce Clause nexus. We cannot offer a tight definition for this term because the federal courts are currently in the process of shaping this definition. It is difficult to craft a precise definition because, as we explain below, determining CWA jurisdiction has evolved into a fact-intensive undertaking.

Nonetheless, we consider the "waters of the United States" to be comprised of two distinct groups of waters: (1) traditional navigable waters and their "adjacent wetlands"; and (2) "non-navigable waters." Traditional navigable waters are waters that either with other waters or with land routes, establish or could establish a highway for the movement of commerce. Traditional navigable waters also include tidally influenced waters and are generally divided into three types of waters, which we refer to in this Article as "present use waters," "susceptible use waters," and "historic use waters." Present use waters are those waters commonly referred to as "navigable-in-fact waters." These waters are currently used for commerce. Susceptible use waters are those waters that could be used for commerce if reasonable improvements were made to them. And historic use waters are those waters that have been used in the past for commerce but are no longer navigable in fact and are not susceptible for use in commerce.[9]

Non-navigable waters comprise the remainder of the waters of the United States. Thus, the waters of the United States are the traditional navigable waters and their adjacent wetlands, plus the non-navigable waters.

III. A Brief History of Waterborne Commerce

To understand the origin of many of the terms discussed above, one must understand how important the traditional navigable waters are to the commercial development of this country. Although our major rivers still move a significant amount of commerce each year, the percentage of overall commerce moved on the roads and on rail has increased dramatically over the past century. In the early 1800s, for instance, a high percentage of goods in this country was shipped on the waterways as compared to about 16% today.[10]

In the past, logs destined for sawmills were floated down rivers instead of piled on 18-wheelers. Trappers looking to cash in on their season's hard labor loaded their beaver and otter pelts in canoes and paddled them down narrow and of-

5. *Rapanos*, 126 S. Ct. at 2248. In explaining his "significant nexus" test, Justice Kennedy uses the phrase "navigable waters in the traditional sense." It is generally understood that Justice Kennedy meant for this phrase to be used interchangeably with the more common phrase "traditional navigable waters." *See, e.g.*, U.S. Army Corps of Engineers/U.S. Environmental Protection Agency, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carabell v. United States*, 3 (June 5, 2007) [hereinafter Joint Guidance].

6. Economy Light & Power Co. v. United States, 256 U.S. 113, 123 (1921). If the creek were passable by small craft today, one could also argue that the creek is a traditional navigable water because it is susceptible, with reasonable improvements, for use as a commercial waterway. *See* United States v. Steamer Montello, 87 U.S. (20 Wall.) 430 (1874); FPL Energy Marine Hydro, Ltd. Liab. Co., v. Federal Energy Regulatory Comm'n, 287 F.3d 1151, 1157 (D.C. Cir. 2002); Alaska v. Ahtna, Inc., 891 F.2d 1404 (9th Cir. 1989). An article addressing the susceptibility or "float-a-boat" test that is discussed in these cases is forthcoming.

7. *See infra* Section V.

8. The CWA regulates the discharge of pollutants from point sources into the navigable waters. 33 U.S.C. §§1311(a), 1362(12). The Act defines the term navigable waters as the "waters of the United States and the territorial seas." *Id.* §1362(7).

9. William W. Sapp et al., *From the Fields of Runnymede to the Waters of the United States: A Historical Review of the Clean Water Act and the Term "Navigable Waters,"* 36 ELR 10190, 10191 (Mar. 2006).

10. Statement of J. Ron Brinson, President and C.E.O. of the Port of New Orleans Before the Transportation and Infrastructure Subcommittee, Committee on the Environment and Public Works, U.S. Senate, Washington, D.C. (May 16, 2000), *available at* http://epw.senate.gov/107th/bri_0516.htm.

tentimes rocky streams to get them to market. And plumage hunters in search of bird feathers for ladies' hats, rather than fight through the thick undergrowth, would pole their small boats up tiny streams in search of rare birds. In those days, water was the easiest way to transport goods, whether it was a barrel of flour or a hogshead of tobacco.

The location of our major cities also reveals the importance of water to the growth of our country. Cities such as Boston, New York, and San Francisco all grew up on protected harbors where the big ocean clippers unloaded their cargoes for transport on smaller boats headed to the interior. Cities such as Richmond, Washington, D.C., and Albany grew up at the fall lines of the James, the Potomac, and the Hudson Rivers. It was at these rapids that goods going upstream had to be unloaded onto still smaller boats for the rockier trip inland.

Because of the importance of the nation's waterways to commerce of all kinds, by the late 1800s a tragedy of the commons was brewing. Mill owners were building small dams to provide more power to their waterwheels; shipping companies were building wharfs far out into the shipping channels; states were granting monopolies to certain river commerce; and cities were using the rivers and harbors as dumping grounds for refuse. Disputes arose as shipping companies, harbor masters, and wharfing firms attempted to carve up the navigable waters pie. The federal courts, as discussed below, resolved some of these disputes, while the U.S. Congress attempted to resolve others. As each case was decided and each bill was passed, the body of law surrounding the meaning of the traditional navigable waters grew.

Many of the cases involved the interpretation of the phrase "navigable waters of the United States" that appears in the Rivers and Harbors Act of 1899.[11] Prior to passage of this Act, the U.S. Army Corps of Engineers (the Corps), although responsible for dredging and improving the nation's harbors and rivers for commerce, had no authority to prevent someone from building dams or bridges that blocked commerce on the rivers. This changed when Congress passed §§9, 10, and 13 of the Rivers and Harbors Act of 1899. These new provisions gave the Corps comprehensive regulatory authority over the nation's most important thoroughfares: the rivers and harbors. Sections 9 and 10 of the 1899 Act provide that without a permit from the Corps, one cannot construct a bridge, dam, or other structure in the navigable waters of the United States.[12] Section 13 provides that one cannot discharge refuse into the navigable waters of the United States.[13] As we explain in later sections of this Article, the federal courts have decided many cases by interpreting the extent of the Corps' regulatory authority under these provisions.

Although the Rivers and Harbors Act of 1899 has played a pivotal role in the development of the body of law surrounding the meaning of traditional navigable waters, other statutes and regulations have been important too. Many cases that involve the navigability issue have come from courts deciding cases under the Federal Power Act of 1920.[14] This act provides for the federal regulation and development of hydroelectric power. It authorizes the Federal Energy Regulatory Commission to issue licenses for dams and other similar projects that are located on navigable waters.[15] The earliest cases that shaped this body of law involved courts interpreting the reach of federal authority over waterborne commerce itself.[16]

However, it was not until Congress debated the CWA in the 1970s that anyone started referring to any of the nation's waters as traditional navigable waters.[17] It was in those debates that our legislators started to draw a distinction between the navigable waters that would be covered by the CWA and the traditional navigable waters that were covered by existing legislation such as the Rivers and Harbors Act of 1899.

IV. The CWA

In 1972, Congress passed the first comprehensive legislation that addressed water pollution. Congress gave the U.S. Environmental Protection Agency (EPA), which was only two years old, primary authority over administering the Act but gave some responsibilities under the Act to the Corps. The Corps has the day-to-day responsibility of regulating "discharges of dredged or fill material"[18] into the "waters of the United States" under the §404 program,[19] while EPA has the responsibility of regulating discharges of all other pollutants to those same waters under the §402 program.[20] EPA also has the responsibility of promulgating "guidelines"[21] covering §404 permit decisions and engaging in enforcement actions against unpermitted dischargers. Finally, EPA has veto authority over Corps permit decisions[22] as well as the final say (between the two agencies) on the jurisdictional reach of the CWA.[23]

This issue of the jurisdictional reach of the CWA has been climbing in importance over the last five years, namely because the Supreme Court has decided two cases on the subject since 2001.[24] Although the legislative history of the Act

11. *See* 33 U.S.C. §§401, 403, and 407.

12. 33 U.S.C. §§401 and 403.

13. 33 U.S.C. §407.

14. 16 U.S.C. §§791a-797, 798-824a, and 824b-825r, June 10, 1920, as amended 1930, 1935, 1936, 1948, 1949, 1951, 1953, 1956, 1958, 1960, 1962, 1968, 1970, 1978, 1980, 1982, 1986, 1988, 1990-1992, and 1996.

15. 16 U.S.C. §797(e).

16. *See, e.g.*, United States v. Steamer Montello, 87 U.S. (20 Wall.) 430 (1874).

17. *See*, *e.g.*, 123 CONG. REC. 26725 (daily ed. Aug. 4, 1977) (statement of Sen. Philip Hart (D-Mich.)), *reprinted in* 4 CRS, LEGISLATIVE HISTORY OF THE CLEAN WATER ACT OF 1977, at 939-40 (1978) [hereinafter CWA LEGISLATIVE HISTORY]; 123 CONG. REC. 10401 (daily ed. Apr. 5, 1977) (statement of Rep. William Harsha (D-Ohio)), *reprinted in* 4 CWA Legislative History, *supra* at 1280.

18. Certain discharges of dredged or fill material are exempt from regulation under §404. These categories include farming, silviculture, the maintenance of dikes, dams, and levees, and the construction of temporary sedimentation basins on a construction site. 33 U.S.C. §1344(f)(1).

19. *Id.* §1344(a); *EPA Overview of Wetlands Permitting*, http://www.epa.Gov/owow/wetlands/pdf/reg_ authority_pr.pdf.

20. Sapp et al., *supra* note 9, at 10204.

21. 33 U.S.C. §1344(b). The EPA guidelines are located at 40 C.F.R. §230.

22. 33 U.S.C. §1344(c).

23. 43 Op. Att'y Gen. 15 (1979).

24. *See* Lance D. Wood, *Don't Be Misled: CWA Jurisdiction Extends to All Non-Navigable Tributaries of the Traditional Navigable Waters and Their Adjacent Wetlands*, 34 ELR 10187, 10193 (Feb. 2004) (explaining that some contend that the CWA covers only 1% to 2% of the nation's waters); *see also* 123 CONG. REC. 26725 (daily ed. Aug. 4, 1977) (statement of Sen. Philip Hart (D-Mich.)), *reprinted in*

reveals that Congress intended for the scope of the CWA to cover nearly all of the nation's waters,[25] the Act itself is not as lucid. Under the Act, EPA and the Corps have the authority to regulate discharges of pollutants from point sources into the navigable waters. Congress then defined the term navigable waters as the waters of the United States. Several passages in the legislative history make it clear that the CWA's navigable waters/waters of the United States are much broader than the traditional navigable waters that had been the subject of so many court decisions over the prior 150 years.

After the CWA was signed into law, EPA immediately promulgated a broad definition of waters of the United States to implement the §402 program. The Corps, concerned about its own resources, promulgated a much narrower definition of the same term for the §404 program. The Corps' regulations were challenged on the grounds that this definition was not consistent with the intent of the CWA. In 1975, the Corps lost this case and was ordered to promulgate regulations consistent with those of EPA.

In 1977, Congress reauthorized the CWA. Which waters were covered by the CWA became one of the most hotly debated issues during the reauthorization hearings. At one point Sen. Lloyd Bentsen (D-Tex.) offered an amendment that would have limited CWA jurisdiction to the traditional navigable waters. The so-called Bentsen Amendment was defeated. Congress then went on to amend the CWA to exempt certain agricultural and silvicultural activities from regulation under §404. So, while the waters covered by the CWA were left unchanged in 1977,[26] some of the farming and logging activities in these waters were no longer regulated because of the new exemption for agriculture and silviculture activities.[27]

In 1985, the Corps had to defend its regulatory definition of waters of the United States in the first wetlands case to reach the Supreme Court. In *United States v. Riverside Bayview Homes, Inc.*,[28] the Court held that the Corps had properly exercised its administrative discretion when it determined that wetlands adjacent to a navigable waterway are jurisdictional. Stealing a quote from the CWA's legislative history, the Court explained that Congress recognized that "[p]rotection of aquatic ecosystems . . . demand[s] broad federal authority to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.'"[29] The Court found it instructive that the Bentsen Amendment—which would have narrowed the jurisdiction of §404 dramatically—was defeated in 1977, thus preserving the broad definition of waters of the United States contained in the Corps and EPA regulations.[30]

In 1986, confident that the CWA jurisdictional limits had been solidified by the *Riverside Bayview* decision, the Corps reorganized and clarified the regulations governing its regulatory program. In the preamble of these regulations, the Corps stated that if migratory birds use or would use an intrastate isolated water as habitat, then that water body would be considered a jurisdictional water of the United States.[31] This so-called migratory bird rule was challenged in the lower courts, but it was not until 2001 that such a challenge reached the Supreme Court.

The petitioner in the case, *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*,[32] had decided in the early 1990s that it wanted to construct a solid waste landfill in an abandoned gravel mine outside of Chicago. When the Corps discovered that migratory birds frequented the numerous ponds at the site, the Corps asserted jurisdiction and denied the permit. A divided 5 to 4 Court held in 2001 that the "migratory bird rule" was not an allowable basis for asserting jurisdiction and that the ponds were "a far cry, indeed, from the 'navigable waters' and 'waters of the United States' to which the statute by its term extends."[33] The question after the *SWANCC* decision became: If the "isolated" ponds in that case were beyond the limits of CWA jurisdiction, what other classes of water bodies might the Supreme Court consider outside CWA jurisdiction?

The federal courts of appeals and district courts in decisions handed down prior to *Rapanos* largely construed the *SWANCC* decision narrowly. The U.S. Courts of Appeals for the First, Fourth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits held that EPA and the Corps may continue to assert jurisdiction over non-navigable waters even if those waters are quite small and distant from traditional navigable waters.[34] Although no circuit held that CWA jurisdiction did not encompass non-navigable waters, the U.S. Court of Appeals for the Fifth Circuit stated in dicta something to the effect that the CWA covers traditional navigable waters and non-navigable waters adjacent to traditional navigable waters.[35] This was a much narrower standard than that determined by the other courts of appeals.

4 CRS, LEGISLATIVE HISTORY, *supra* note 17, at 939-40 (traditional navigable waters only constitute 1% to 2% of the nation's waters); 123 CONG. REC. 10401 (daily ed. Apr. 5, 1977) (statement of Rep. William Harsha (D-Ohio)), *reprinted in* 4 CWA LEGISLATIVE HISTORY, *supra* note 17, at 1280.

25. *See* Sapp et al., *supra* note 9.

26. *Id.* at 10212.

27. 33 U.S.C. §1344(f).

28. 474 U.S. 121, 106 S. Ct. 455 (1985).

29. *Id*. at 132-33 (citing S. REP. No. 92-414, at 77 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3742).

30. *Id*. at 135.

31. 51 Fed. Reg. 41206, 41217 (Nov. 13, 1986). The Corps had issued this guidance less formerly a year earlier in a memorandum to the field. Memorandum From Brig. Gen. Patrick J. Kelly to See Distribution on EPA Memorandum on Clean Water Act Jurisdiction Over Isolated Waters (Nov. 8, 1985).

32. 531 U.S. 159, 165, 31 ELR 20382 (2001).

33. *Id*. at 173.

34. *See, e.g.*, United States v. Charles Johnson et al., 467 F.3d 56 (1st Cir. 2006), *petition for reh'g & reh'g en banc denied*, Feb. 21, 2007, *petition for cert. filed*, June 28, 2007; United States v. Deaton, 332 F.3d 698, 33 ELR 20223 (4th Cir. 2003), *cert. denied*, 541 U.S. 972 (2004); United States v. Rapanos, 376 F.3d 629, 34 ELR 20060 (6th Cir. 2004) *vacated & remanded by* Rapanos v. United States, 2006 U.S. LEXIS 4887 (U.S., June 19, 2006); United States v. Gerke Excavating, Inc., 412 F.3d 804, 35 ELR 20128 (7th Cir. 2005), *petition for reh'g & reh'g en banc denied*, Dec. 1, 2006, *petition for cert. filed*, Apr. 2, 2007; Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526, 31 ELR 20535 (9th Cir. 2001); Parker v. Scrap Metal Processors, Inc., 386 F.3d 993, 34 ELR 20104 (11th Cir. 2004); United States v. Newdunn Assocs., L.L.P., 344 F.3d 407 (4th Cir. 2003), *cert. denied*, 541 U.S. 972 (2004).

35. Rice v. Harken Exploration Co., 250 F.3d 264, 31 ELR 20599 (5th Cir. 2001); In re Needham, 354 F.3d 340 (5th Cir. 2003).

V. *Rapanos* and *Carabell*

In 2006, the question of what waters are covered by the CWA reached the Supreme Court for a third and fourth time in *Rapanos* and in *Carabell v. U.S. Army Corps of Engineeers*.[36] The specific question in *Rapanos* was whether CWA jurisdiction extends to wetlands that do not abut a traditional navigable water.[37] The question in *Carabell* was whether CWA jurisdiction extends to a wetland that is separated from a tributary of a traditional navigable water by a man-made berm. In both cases, the Court found itself right in the middle of its two previous wetlands decisions, *Riverside Bayview* and *SWANCC.*

In *Riverside Bayview*, the Court had an easy time handing down a unanimous decision that wetlands adjacent to traditional navigable waters are covered by the CWA. In *SWANCC*, the Court handed down a 5 to 4 decision that lopped off certain "isolated waters" from CWA protection. In *Rapanos* and *Carabell*, the Court was forced to draw a line somewhere between *Riverside Bayview* and *SWANCC*. They were clearly not up to the task, and we are left to digest a fractured 4 to 1 to 4 decision.

Rapanos and *Carabell* involved four Michigan wetlands. All of the wetlands lay near ditches or man-made drains that eventually emptied into navigable-in-fact waters. In *Rapanos*, the petitioners decided to construct a shopping center on three sites that totaled 605 acres. When the petitioners learned from their consultant that the sites had approximately 141 acres of wetlands on them and that they would have to get a permit to fill them, they simply commenced filling them sans permit. Their fill activities only ceased after they received multiple cease and desist orders from state and EPA officials and after the federal government brought civil and criminal charges against them for filling in wetlands in violation of the CWA.[38] In the civil suit, the district court upheld the Corps' jurisdiction over all of the wetlands and ruled in the government's favor, finding violations at all three sites.[39] The Sixth Circuit upheld the lower court decision.[40]

In the second case, *Carabell*, the petitioners had applied for a wetlands permit to fill in 15.9 acres of forested wetlands, which drained into the Lake St. Clair watershed so they could build 130 condominium units. When the Michigan Department of Environmental Quality (MDEQ), which had assumed the wetlands regulatory program from the Corps under §1344(g), denied the permit, the petitioners appealed to a state administrative law judge (ALJ). The ALJ instructed the MDEQ to issue the permit conditioned on the petitioners modifying their proposal to eliminate 18 of the units. EPA objected to the modified permit and consequently the permit was transferred to the Corps to be processed. The Corps denied the permit. The petitioners challenged the permit denial in federal district court under the Administrative Procedure Act. The district court granted summary judgment in favor of the Corps.[41] The Sixth Circuit affirmed this decision.[42]

In both cases, the petitioners sought redress at the Supreme Court, which accepted their petitions and consolidated the cases. The cases were briefed and argued separately, but the Court issued one set of five opinions for the two cases.

The petitioners asserted that Congress had only intended the navigable-in-fact waters to be covered by the CWA.[43] In contrast, the U.S. Solicitor General argued that CWA jurisdiction extended to any water body that could find its way to a traditional navigable water.[44] During oral argument, despite entreaties by the Justices, neither side was willing to help the Justices draw a line between their respective all-or-nothing approaches.[45]

As stated above, the Justices split 4 to 1 to 4 and authored five separate opinions. Chief Justice John G. Roberts Jr. and Associate Justice Stephen G. Breyer wrote brief opinions in which they commented on the three main opinions authored by Justices Scalia, John P. Stevens, and Kennedy.[46] In his dissenting opinion, which was joined by Justices Breyer, Ruth Bader Ginsburg, and David H. Souter, Justice Stevens argued that the agency definition for waters of the United States was entitled to *Chevron* deference and that the government's position should have prevailed.[47]

Justice Scalia, who was joined by Chief Justice Roberts and Justices Clarence Thomas and Samuel A. Alito Jr., attempted to craft a new test for determining what waters should be included in waters of the United States. Adopting a position between those of the petitioners and the government, Justice Scalia opined that when Congress included the term waters of the United States in the CWA, it meant for that term to cover the following and nothing more: traditionally navigable waters streams that have a "relatively permanent flow," and any wetlands that have a "continuous surface connection" to those waters.[48] This test would leave a substantial number of headwater streams and wetlands adjacent to those streams unprotected by the CWA. But it would protect the non-navigable perennial and seasonal streams and their adjacent wetlands that the petitioners' approach would have left unprotected.

In his opinion, Justice Kennedy landed between Justice Scalia's opinion and the dissent authored by Justice Stevens. Justice Kennedy explained that in his view, waters of the United States included any water that had a "significant nexus" to a "navigable water in the traditional sense." We can only assume that Justice Kennedy meant the phrase navigable water in a traditional sense, to be synonymous with the term traditional navigable waters because he offers no explanation for using this entirely new phrase in his test for

36. 547 U.S. __ (2006), 391 F.3d 704, 34 ELR 20147 (6th Cir. 2004), *cert. granted*, 74 U.S.L.W. 3228 (U.S. Oct. 11, 2005) (No. 04-1034).

37. 376 F.3d 629, 34 ELR 20060 (6th Cir. 2004), *cert. granted*, 74 U.S.L.W. 3228 (U.S. Oct. 11, 2005) (No. 04-1034).

38. *Rapanos*, 126 S. Ct. at 2239 (2006).

39. *Id*.

40. *Rapanos*, 376 F.3d at 634.

41. Carabell v. Corps of Eng'rs, 257 F. Supp. 2d 917 (E.D. Mich. 2003).

42. *Carabell*, 391 F.3d at 704.

43. Brief of Petitioner, Rapanos v. United States, 2005 WL 240650 (2005) (No. 04-1034).

44. Brief of Government at 12, Rapanos v. United States, 2005 WL 779568 (2005) (No. 04-1034).

45. Chief Justice Roberts and Justice Scalia, in particular, prodded the petitioners and the government to suggest a middle ground.

46. *Rapanos*, 126 S. Ct. at 2235, 2266.

47. *Id.* at 2252-53. To view the *Chevron* case, see *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 14 ELR 20507 (1984).

48. *Rapanos*, 126 S. Ct. at 2235.

determining CWA jurisdiction.[49] To avoid confusion, we use the familiar term traditional navigable waters throughout the rest of this Article. The amount of waters that will be covered by this test will depend largely on how narrowly or broadly the courts and the federal agencies interpret the term significant nexus. Regardless, it can be said with certainty that the Kennedy test is generally more protective of wetlands and other waters than the Scalia test but is less protective than the Justice Stevens approach that would have preserved the status quo.

VI. Still More on the Traditionally Navigable Waters

As we said above, traditional navigable waters are made up of present use waters (waters that are used for commerce today); susceptible use waters (waters that could be used for commerce with reasonable improvements); and historic use waters (waters that once were used for commerce but are not susceptible for use today). Below we explain the first two to provide context, and then we focus on the third, which has the most relevance to our present inquiry.

A. Present Use Waters

English common law provides that the sovereign has jurisdiction over waters that were subject to the ebb and flow of the tides. When our federal government was formed, we adopted that same rule, so federal jurisdiction over the waters in this country initially extended to all tidally influenced waters. In 1871, the Supreme Court, in the seminal case *The Daniel Ball v. United States*,[50] extended this federal jurisdiction to many non-tidally influenced waters."[51] In the case, a steamship operator claimed that he was not subject to federal licensing requirements because he operated his ship—the *Daniel Ball*—on the non-tidally influenced Grand River in Michigan. In deciding the case, the Court held that to fall under federal jurisdiction, waters have to survive a two-part test. First, the waters have to be navigable in fact; that is, "they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce."[52] Second, the waters had to be navigable waters of the United States, that is, waters that "form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water."[53] The Grand River survived this test, so the steamship operator was required to license his vessel. From this case forward, it was clear that federal jurisdiction extended to non-tidally influenced waters.[54]

B. Susceptible Use Waters

In 1874, the Supreme Court developed further a concept that it had mentioned three years before in deciding *The Daniel Ball*; it was the idea of susceptibility. The Court was faced with a similar ship licensing dispute. In *United States v. Steamer Montello (The Montello)*,[55] the steamer's owners refused to license the steam vessel according to congressional regulations. Before the Supreme Court could decide the case, it needed to determine whether it had jurisdiction over the dispute. To do this, it had to determine whether Wisconsin's Fox River, on which the *Montello* operated, was navigable in fact. Prior to the construction of a series of locks and dams that had tamed the Fox River's waterfalls and rapids, the river had only been passable by small boats such as canoes. With the advent of the locks, steamers such as the *Montello* could navigate the river. The *Montello*'s owner argued that because the river was only navigable by ships such as the *Montello* after the improvements had been made, it should not be considered navigable in fact. Justice David Davis wrote in the opinion that

> [i]t would be a narrow rule to hold that in this country, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway. . . . If [a water is] capable in its natural state of being used for purposes of commerce, no matter what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway.[56]

Because commerce had made its way up and down the Fox River even before the locks were constructed, it was found to be a navigable-in-fact river that was susceptible to even further navigational improvements. Thus, the *Montello*, like the *Daniel Ball*, was required to obtain a federal license. Although both *The Montello* and *The Daniel Ball* played a major role in defining what traditional navigable water means, the navigability test that is more important for our present inquiry is the historic use test.

C. The Historic Use Test

Although *The Montello* foreshadowed the development of a historic use test for navigability, it was not until many years later that the test was firmly established. In 1921, the Supreme Court was confronted with a case that involved a river that had been navigable by fur trappers in its natural state but had been modified to such an extent that it was no longer navigable in fact. In *Economy Light & Power Co. v.*

49. *Id.* at 2248. Although it is generally understood the Justice Kennedy's test requires that the water at issue have a significant nexus to a traditionally navigable water, he does muddle the test by stating slightly different tests in at least two other places in his opinion. In one place he states that the water at issue must have a significant nexus to navigable waters. In another place he states that the water must have a significant nexus to a navigable-in-fact water. As will be further explained below, these respective tests would yield results far different than the traditionally navigable water test. For more on the significant nexus test, see THE CLEAN WATER ACT JURISDICTIONAL HANDBOOK 21 (Envtl. L. Inst. 2007).

50. 77 U.S. (10 Wall.) 557 (1871).

51. *Id.* at 563.

52. *Id.*

53. *Id.*

54. In *United States v. Holt State Bank*, 270 U.S. 49 (1926), the Supreme Court made it clear that the size of the boat participating in the commerce is immaterial in determining whether a water is navigable in fact. As the Court held:

> [N]avigability does not depend on the particular mode in which such use is or may be had—whether by steamboats, sailing vessels or flatboats—nor on an absence of occasional difficulties in navigation, but on the fact, if it be a fact, that the stream in its natural and ordinary condition affords a channel for useful commerce.

Id. at 56.

55. 87 U.S. (20 Wall.) 430 (1874).

56. *Id.* at 441.

United States,[57] the United States had sought to enjoin a power company from constructing a dam across the Des Plaines River in Illinois without the consent of Congress or the approval of the Corps. As discussed above, §9 of the Rivers and Harbors Act of 1899 provides that it is illegal to "construct . . . any bridge, dam, dike, or causeway over or in any . . . navigable water of the United States." Thus, the case turned on whether the Des Plaines River, at the point of the proposed dam, was a navigable water of the United States.

In its analysis of the case, the Supreme Court found that the construction of two canals had made the river impassable for modern commerce. However, the Court held that the current state of the river was not controlling. The Court relied on evidence that between 1675 and the early 1800s, several explorers had undertaken trips on the river. More importantly, fur trading—"the leading [form] of commerce in the western territory—was 'regularly conducted' on the river."[58] The evidence showed that the American Fur Company used the route until 1825. And, as the fur trading industry's importance grew in the region, supplies were also carried to the various settlements along the company's routes between Chicago, St. Louis, and other points. The route along the Des Plaines River only fell to disuse when fur trading "receded to interior portions of Illinois that could be reached more conveniently with horses."[59]

The Supreme Court, upon viewing the historical evidence, held that the portion of the Des Plaines River in question was navigable under the two-part test established in *The Daniel Ball*. The court explained:

> A river having actual navigable capacity in its natural state and capable of carrying commerce among the states is within the power of Congress to preserve for purposes of future transportation, even though it be not at present used for such commerce, and be incapable of such use according to present methods, either by reason of changed conditions or because of artificial obstructions.[60]

Through this holding, the Supreme Court broadened the reach of federal jurisdiction to certain waters that are no longer navigable in fact. In so doing, *Economy Light & Power* established the concept of "indelible navigability." As long as a court establishes that a water was once navigable in fact, it will always be at least navigable in law and subject to federal regulatory power.

Economy Light & Power provides most of the bases and limitations of the historical navigability test as it appears in its modern form. First, the Court insisted that the water had been used for commerce in the past. Second, by establishing the theory of indelible navigability, the Court made it difficult for Congress to lose jurisdiction over a water. "If [streams like the Des Plaines] are to be abandoned," Justice Mahlon Pitney wrote, "it is for Congress, not the courts, so to declare."[61] And with these words, the Supreme Court made it clear under the historic use test that once a water is found to be historically navigable, it will always be considered a traditional navigable water unless Congress specifically abandons it through legislation.

57. 256 U.S. 113 (1921).
58. *Id.* at 117.
59. *Id.*
60. *Id.* at 123.
61. *Id.* at 124.

VII. Post-*Rapanos* Cases

In cases since *Rapanos*, some litigants have argued that courts should apply the Scalia test.[62] However, courts have either applied the Kennedy test,[63] or indicated that jurisdiction may be established under either test.[64] It is not the purpose of this Article to debate which test is the correct one. It is simply to point out, that when one is using the Kennedy test to try to establish jurisdiction, it is important to remember that historic use waters are traditional navigable waters too, and that it may prove advantageous to explore whether any of the currently non-navigable waters making up the hydrologic connection were used for transporting commerce in the past. Such a discovery might make it easier to establish a significant nexus.

VIII. Joint EPA and Corps *Rapanos* Guidance

On June 5, 2007, nearly a year after the *Rapanos* decision was handed down, EPA and the Corps issued a joint guidance that provides the agencies' interpretation of the fractured *Rapanos* decision. Consistent with what the U.S. Department of Justice (DOJ) had been arguing in all of its jurisdictional cases since *Rapanos*, the joint guidance adopted the position that if a water is jurisdictional under either the Scalia test or the Kennedy test, then it is a water of the United States and protected by the CWA.[65] EPA and the Corps determined that they will assert jurisdiction over the following waters:

- Traditional navigable waters;
- Wetlands adjacent to traditional navigable waters;
- Non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally, e.g., typically three months; and
- Wetlands that directly abut such tributaries.[66]

The agencies also decided that they will determine jurisdiction over the waters listed below "based on a fact-specific analysis" to see whether they survive the Justice Kennedy significant nexus test:

- Non-navigable tributaries that are not relatively permanent;
- Wetlands adjacent to non-navigable tributaries that are not relatively permanent; and

62. *See, e.g.*, Brief *Amicus Curiae* of Pacific Legal Foundation, National Federation of Independent Business Legal Foundation, and Building Industry Association of Washington in Support of the Plaintiffs at 9-13, *American Petroleum Inst. v. Johnson*, No. 1:02CV02247 (D.D.C. Mar. 2, 2007).
63. *See, e.g.*, United States v. Gerke Excavating, Inc., 464 F.3d 723, 36 ELR 20200 (7th Cir. 2006), *petition for reh'g & reh'g en banc denied*, Dec. 1, 2006, *petition for cert. filed,* Apr. 2, 2007; Northern California River Watch v. City of Healdsburg, 457 F.3d 1023, 1029, 36 ELR 20163 (9th Cir. 2006).
64. *See, e.g.*, United States v. Charles Johnson et al., 467 F.3d 56 (1st Cir. 2006), *petition for reh'g & reh'g en banc denied*, Feb. 21, 2007, *petition for cert. filed*, June 28, 2007.
65. EPA/Corps, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States*, 3 (June 5, 2007).
66. *Id.* at 1.

- Wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary.[67]

The agencies also stated in the joint guidance that they generally will not assert jurisdiction under either the Scalia or the Kennedy test over the following features:

- Swales or erosional features, e.g., gullies, small washes characterized by low volume, infrequent, or short duration flow; and
- Ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water.[68]

The Corps and EPA then go on in the joint guidance to give their interpretations of the key phrases in the Kennedy test, traditional navigable waters and significant nexus.

In Appendix D to the joint guidance, the Corps and EPA offer their legal definition of traditional navigable waters.[69] In accordance with its existing regulations, the agencies define traditional navigable waters, "for purposes of the guidance" as those "waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide."[70] The agencies then point out that this definition encompasses all the navigable waters of the United States as defined in the Corps Rivers and Harbors Act regulations[71] and by "numerous decisions in the federal courts."[72] The Corps and EPA also included in their definition of traditional navigable waters "all other waters that are navigable-in-fact (*e.g.*, the Great Salt Lake, UT, and Lake Minnetonka, MN)."[73]

In the remainder of the appendix, the agencies discuss many of the Supreme Court decisions on navigability that we discuss in this Article, including *Economy Light & Power*. In the last paragraph of Appendix D, the agencies summarize their position on traditional navigable waters as follows:

> [W]hen determining whether a water body qualifies as a "traditional navigable water" . . . relevant considerations include whether a Corps District has determined that the water body is a navigable water of the United States pursuant to 33 C.F.R. §329.14, or the water body qualifies as a navigable water of the United States under any of the tests set forth in 33 C.F.R. §329, or a federal court has determined that the water body is navigable-in-fact under federal law for any purpose, or the water body is "navigable-in-fact" under the standards that have been used by the federal courts.[74]

Although the agencies do not highlight the historic use test in Appendix D, they do reference it in various ways. First, they point out that traditional navigable waters includes waters that were used for commerce in the past. Second, they state that Corps navigability studies conducted in the past will be considered in determining whether a water is a traditional navigable water. And third, they explain that past federal court cases holding a water was navigable in fact are also relevant in such determinations.

In the main body of the joint guidance, the agencies address the concept of significant nexus. Several aspects of this discussion bear heavily on our key inquiry in this Article, namely, how identifying historic use waters can be used to advantage under the Kennedy significant nexus test. The joint guidance provides that in determining whether a significant nexus exists between a wetland or tributary and a downstream traditional navigable water, the Corps and EPA will look at factors such as the "duration, frequency, and volume of flow," "water temperatures," "habitat," "physical proximity," "shared hydrological and biological characteristics," as well as other "ecological characteristics."[75] If the wetlands at issue, for instance, are a spawning area for fish that are found in the traditional navigable water that the wetland drains into, this is evidence that there is a significant nexus between the two water bodies. If the wetland "scores" high enough on enough of these factors, the Corps or EPA will determine that the wetland is jurisdictional. In the next section, we explain that the closer two water bodies are together, the easier it should be to demonstrate that they share a significant nexus.

IX. How Identifying Historic Use Waters Can Be Advantageous

In the scenario we described in the first paragraph of this Article, a wetland slated to be filled by developers emptied via an intermittent flow into an intermittent stream. The stream, in turn, emptied into the perennial Cotton Creek about two miles away. Cotton Creek then flowed approximately 35 miles before it emptied into the large navigable-in-fact Barge River. The premise we make in this Article is that it would be easier to establish that the wetland has a significant nexus with Cotton Creek at only 2 miles away than it would be to establish that the wetland has a significant nexus with the Barge River, which is close to 40 miles downstream. If this premise is true, and we believe that it is, then investing the extra time in researching the history of Cotton Creek may yield positive dividends. If it can be established that the creek was once used for commerce, then, as explained above, Cotton Creek would be a traditional navigable water. To round out the argument, if Cotton Creek is found to be a traditional navigable water, then all one has to establish to show that the wetland is protected under the CWA, is that the wetland has a significant nexus with Cotton Creek.

If you were attempting to establish a significant nexus in this scenario, you would consider the factors set forth in the joint guidance, as well as any you could draw straight from the Kennedy opinion. The ways in which the wetlands could impact the creek are numerous. The wetlands might serve as habitat for aquatic and terrestrial life that is also found at the creek. The wetland could retain floodwaters that would otherwise erode the banks of the creek. The wetlands might release nutrients that are necessary for aquatic life in the creek. The wetland could purify the water that flows to the creek.

67. *Id.*
68. *Id.*
69. Joint Guidance, app. D, at 1.
70. *Id.* (quoting 33 C.F.R. §328.3(a)(1); 40 C.F.R. §230.3(s)(1)).
71. 33 C.F.R. §329.
72. *See, e.g.*, United States v. Steamer Montello, 87 U.S. (20 Wall.) 430 (1874); Economy Light & Power Co. v. United States, 256 U.S. 113 (1921); and United States v. Holt State Bank, 270 U.S. 49 (1926).
73. Joint Guidance, app. D, at 1.
74. *Id.* at 5.
75. *Id.*

And the wetland could help regulate the chemistry of the creek. You would then apply those same factors cumulatively to any other wetlands in the area. Under Justice Kennedy's opinion, you could include any wetlands in the region. Under the joint guidance, you would be limited to considering other wetlands along the same reach of the intermittent stream. In either case, the question is the following: if all the wetlands under consideration were filled, would their destruction have a significant impact on the nearest traditional navigable water.

Of course, the wetland might have similar impacts on the large Barge River nearly 40 miles distant, but those impacts might be more difficult to demonstrate and more subtle. Although science might support your contention that minnows spawned in the wetland actually reach the Barge River, some federal judges might be reluctant to classify such an event as significant. It might be more persuasive to put your old farmer up as a witness with the picture of his great-grandfather paddling cotton down Cotton Creek two miles away. Most federal judges would probably agree that a minnow could swim two miles and then serve as a meal for trophy bass in the creek. If the judge is a fisherman, so much the better.

Although the number of cases where demonstrating historic use waters to improve the chances of establishing CWA jurisdiction under the Kennedy test will probably be small, in this post-*Rapanos* world, the jurisdictional stakes have risen. The authors are aware of two pending post-*Rapanos* cases in which these techniques are being employed to differing levels of success.[76] As more cases are litigated, it is likely that more wetlands attorneys will mix a little history into their case strategies. For those who do, the following section should prove helpful.

X. More Cases on the Historic Use Test

The *Economy Light & Power* case was only the beginning of the historic use waters case law. In this section, we go through several more cases where historic use of a river for commerce was the determining factor in establishing federal jurisdiction. These cases explain how the historic use test has been applied to different fact patterns and under different statutes. We identify the cases by the legal issue that was most prominent in each case.

A. Reasonable Improvements and Intermittent Commerce

Of the numerous pre-*Rapanos* cases involving historic use waters that have followed *Economy Light & Power*, perhaps none is more important or cited more often than *United States v. Appalachian Electric Power Co.*[77] The case involved regulations promulgated by the Federal Power Commission requiring the licensing of hydroelectric dams located on navigable waters. The Federal Power Commission initially declared the New River, which runs through Virginia and West Virginia, non-navigable. Two years later the commission reversed itself and adopted a resolution declaring the New River navigable.[78]

In reviewing the lower federal courts' findings of non-navigability, the Supreme Court first noted the highly factual nature of navigability determinations. "We do not purport now to lay down any single definitive test," wrote Justice Stanley Forman Reed. "We draw from the prior decisions in this field and apply them, with due regard to the dynamic nature of the problem to the particular circumstances presented by the New River."[79] In stating the current law, the *Appalachian Electric Power* Court recognized, as had courts from *The Montello* forward, that different types of commerce could exist to determine navigability.[80]

The use for commerce, it stated, need not be "continuous," explaining that "[e]ven absence of use over long periods of years, because of changed conditions, the coming of the railroad or the improved highways does not affect the navigability of rivers in the constitutional sense."[81] The Court proceeded to couple significant historical evidence with contemporary studies suggesting the New River could be made navigable with "reasonable" improvements.[82] The Court accepted surveys and reports published by government agencies as evidence that the river had been improved for navigability in the past.[83] Additionally, the Court discussed prior appropriations by the Virginia General Assembly made for the improvement of the river.[84] These official accounts were bolstered by the testimony of elderly residents that private boats and commercial ferries had sailed on the New River "in the days before railways and good roads."[85]

Appalachian Electric Power also explicitly recognized the concept of indelible navigability as it had been expressed in *Economy Light & Power*. In *Appalachian Electric Power*, the Court stated: "when once found to be navigable, a waterway remains so."[86] This is true, even if the waterway in its natural state required "reasonable" improvements to be navigable. As the Court explained: "The power of Congress over commerce is not to be hampered because of the necessity for reasonable improvements to make an interstate waterway available for traffic."[87] The decision thus clarified *Economy Light & Power*'s relation to *The Montello* by explicitly linking the former's reliance on historical use with the latter's low threshold for commercial activity.

76. In one of the cases the plaintiffs are attempting to convince the Court that the wetlands at issue are adjacent to a historic-use water. If the plaintiffs are successful in this attempt, the Court will not have to apply the case-by-case significant nexus test because both the Scalia and Kennedy tests acknowledge that wetlands adjacent to traditional navigable waters, in this case historic use waters, are jurisdictional.

77. 311 U.S. 377 (1940).

78. *Id.* at 401.

79. *Id.* at 404.

80. *Id.* at 408-09.

81. *Id.* at 409.

82. *Id.* at 416-17 ("The evidence of actual use of the Radford-Wiley's Falls section for commerce and for private convenience, when taken in connection with its physical condition make it evident that by reasonable improvement the reach would be navigable for the type of boats employed on the less obstructed sections.").

83. *Id.* at 413-14.

84. *Id.* at 414. Though these appropriations alone are not dispositive, reports by War Department engineers made "it clear that the Confederate government effected some improvements on the river." *Id.*

85. *Id.* at 416.

86. *Id.* at 408.

87. *Id.*

B. Using Historic Use to Establish Susceptibility

The *Appalachian Electric Power* decision was in a sense an extension of the Court's earlier decision in *United States v. Utah*.[88] In *Utah*, the United States had argued against navigability to preserve federal rights over submerged beds under portions of the Colorado River. If those waters were navigable waters of the United States, the title to their beds would have passed to Utah when it was admitted to the Union. If they were not then navigable, title would remain with the United States.[89] The Court held that because the rivers were susceptible to use for commerce, though they had not yet been used for that purpose, they were navigable waters and that title to the beds "vested in Utah when that state was admitted to the Union."[90]

This case is typically cited for creating the susceptible use test of navigability.[91] However, the Court's method for establishing susceptibility for commercial use descended directly from the backward-looking reasoning in *Economy Light & Power*. While the United States emphasized the "absence of historical data showing the early navigation of these waters by Indians, fur traders, and early explorers" between 1540 and 1869, the Court nonetheless found several instances of use on the portions of the Colorado in question.[92] These uses included exploration, pleasure, and the transport of passengers and supplies.[93] Though many of the trips occurred after Utah gained statehood, they were still indicative of the river's susceptibility for commercial use.[94] The Court's analysis had come to rely on historical, noncommercial use, even in showing future susceptibility for use.

C. Changes in a River's Course

Ten years after *Economy Light & Power*, the Supreme Court addressed a situation in which natural changes, rather than changes in the means of transporting goods, had led to a river's disuse.[95] The case involved a government proposal to build a dam, storage reservoir, and hydroelectric plant at Black Canyon[96] on the Colorado River subject to the Colorado River Compact.[97] Arizona protested the building of the dam without its permission.[98] Arizona argued that since the river was not navigable and the motive of the congressional action was not to improve navigability, the state's permission was required because of a "superior right" to the "unappropriated water of the Colorado river flowing within the state."[99] If the river was navigable, however, it would have been well within Congress' power to control the unappropriated waters of the Colorado flowing in Arizona.

The Supreme Court rejected both of Arizona's claims. First, it relied on *Economy Light & Power* in holding that "[c]ommercial disuse resulting from changed geographical condition, and a congressional failure to deal with them, does not amount to an abandonment of a navigable river or prohibit future exertion of federal control."[100] The portion of the river at Black Canyon had been navigable in the past. Evidence of navigability was given through several 19th-century congressional reports and maps of the region.[101] Additionally, Congress had appropriated $25,000 for the improvement of navigation on the Colorado River in 1884 and another $10,000 in 1892.[102] Since that time, however, only silt accumulations had made the river non-navigable. Unlike the facts in *Economy Light & Power*, the facts in the case concerning the hydroelectric plant at Black Canyon do not indicate any real changes in commercial activity, only in the condition of the river itself. The decision was in a sense a logical extension of the doctrine in *Economy Light & Power*. If changes in commerce do not change a river's navigability, then changes in natural activity should not either. Thus, based on the holding in this case, if a river was used for commerce in the past, changes to its course, such as silt buildup, cannot rob the river of its status as a traditional navigable water, even if the river is no longer navigable in fact, i.e., a present use water.

D. Type or Quality of Evidence Needed to Establish a Historic Use Water

In 1965, the U.S. Court of Appeals for the Second Circuit decided *Rochester Gas & Electric Corp. v. Federal Power Commission*.[103] This case helped to establish the type of evidence necessary to prove historic use. The case arose when the Federal Power Commission ordered Rochester Gas and Electric to apply for licenses for four hydroelectric projects on the Genesee River in upstate New York under §3(8) of the Federal Power Act's definition of navigability.[104] Rochester Gas refused and the case began.

The electric company first argued that the historic use test only applies to the Rivers and Harbors Act of 1899 and not to the Federal Power Act. The Second Circuit, citing ample precedent, decided that it was appropriate to apply the historic use test in the case.[105] The Court then found that the portion of the river that three of the dams were located on had historically been used to ship lumber and farm products.[106] The Court also found that this stretch of the river had been used for commerce in conjunction with the Erie Canal

88. 283 U.S. 64 (1931).

89. *Id.* at 440-41 ("The question of navigability is thus determinative of the controversy.").

90. *Id.* at 445-46.

91. *See* Sapp et al., *supra* note 9, at 10194 (discussing the susceptibility for future use test in *Utah*).

92. *Utah*, 283 U.S. at 81-82.

93. *Id.* at 82.

94. *See id.* at 83.

95. Arizona v. California, 283 U.S. 423 (1931).

96. The proposal was passed by Congress as "The Boulder Canyon Project Act," on December 21, 1928, subject to the conditions of the Colorado River compact. 43 U.S.C.A. §617-617t.

97. The Compact was signed by Arizona, California, Colorado, New Mexico, Nevada, Utah, and Wyoming "for the apportionment of the water of the river and it tributaries. It was ratified by Act of Congress on August 19, 1921, as c.72 42 Stat. 171. *Arizona*, 283 U.S. at 449.

98. Arizona Laws 1929, c. 102, §§1-4; *see also* Revised Code of 1928, §§3280-3286.

99. *Arizona*, 283 U.S. at 451.

100. *Id.* at 453-54.

101. *Id.* at 454 n.3.

102. *Id.*

103. 344 F.2d 594, 596 (2d Cir. 1965).

104. *Id.* at 595.

105. *Id.* at 596 ("Every court which has considered the question, including our own, has treated the quoted portions of United States v. Appalachian Elec. Power Co. as fully applicable to the definition of 'navigable waters' in Section 3(8)").

106. *Id.* at 597.

for a period of time commencing in 1825.[107] The Court ruled that this information was sufficient to establish the navigability of those portions of the Genesee River.[108] The Court found that the disuse of the river for commerce could be attributed to improved highways, the changed conditions of the sort discussed in *Appalachian Electric Power*.[109]

The Federal Power Commission could not, however, prove to the Court's satisfaction that the stretch of the river where a fourth dam was located was a historic use water. The Court was unwilling to base a navigability determination on the inferences the commission offered to support its position, that is that the names of the nearby towns—Portage and Portageville—suggested that commerce had moved down that stretch of the river.[110] Likewise, the Court was not swayed by the commission's argument that since there had been lumber mills at Mount Morris, a community downstream of the dam, "logs must have been floated downstream" on that portion of the river.[111] Finally, the Court was not convinced by the commission's evidence that the flow and slope of the river "compare[d] favorably with the flow and slopes of others rivers held to be navigable by the courts."[112]

The Court ruled that the commission had neither presented enough data on the *actual* navigability of the river in its present or reasonably altered state, nor supplied sufficient evidence of the historic use of the river around Mount Morris, Portage, and Portageville to establish jurisdiction. The Second Circuit's decision suggests an unwillingness to rubber stamp determinations of navigability made by federal agencies, such as the Federal Power Commission, when there is little concrete support for their positions. Nevertheless, the result in *Rochester Gas & Electric* may be read to actually grant greater validity to the historic navigability test.

E. Corps of Engineer Reports Versus Legislative Discussions

In *Jones v. Duke Power Co.*,[113] both parties relied heavily on a historic account of Cowan's Ford on North Carolina's Catawba River. The case involved the death of an employee of the power company. The employee was taking water samples for the company on Lake Norman, a large lake formed by the defendant's dam on the Catawba River. The plaintiff brought a wrongful death suit on behalf of his wife alleging that her employer, Duke Power, failed to provide a seaworthy vessel and failed to "initiate a prompt search" as required by federal law.[114]

Since both claims were based on maritime law, Duke Power moved to dismiss for lack of jurisdiction on the grounds that Lake Norman was not navigable.[115] Because the lake was not presently navigable, the court undertook a historic navigability analysis.[116] As the court explained, for the court to have jurisdiction, "it must be shown that at some time before the erection of the present dams, the Catawba River was in fact used for navigation up to and beyond the present site [of the dam]."[117] To support a claim of historic navigability, the plaintiff provided evidence of commercial activity on the river in the late 18th and early 19th century.[118] Additionally, the plaintiff showed that there was "considerable interest in making the river navigable during that period."[119] The North Carolina Legislature had discussed several projects to improve navigation, and a former governor had also championed such work. In response, Duke Power supplied the court with several reports by the Corps noting that the river contained "formidable" barriers to navigation.[120] After reviewing the evidence, the court held that the information about commerce on the river was not specific enough to the stretch of the river that had become Lake Norman.[121] The court found the evidence "ambiguous, scanty, and of uncertain competence" and only showed "sporadic and insubstantial activity on the river."[122] On the whole, the court determined that the river was more similar to those rivers that had been found nonnavigable by other courts rather than those that had been found navigable.[123]

Despite this result, the centrality of historical data to that inquiry demonstrates the role that the historic navigability test has assumed. *Rochester Gas & Electric* and *Jones* both firmly repeat the validity of the historical use test even as they fail to accept the adequacy of certain types of historical evidence. Neither case should be read to mean that evidence of actual historic use is easily discounted. The Supreme Court has repeatedly held that navigability exists where the transportation of logs was related to a commercial venture.[124] The major question is not the extent of the use. It is whether the use is conducted for a commercial purpose.[125]

F. Past Legislation and Court Findings Recognizing Navigability

In *Loving v. Alexander*,[126] the Virginia Commission of Game and Inland Fisheries and the Corps sought to build a coldwater fishery on the plaintiff's property. The Lovings

107. *Id.*

108. *Id.* ("We hold that petitioner's statements regarding use of the river channel from 1812 to 1840 constituted substantial evidence supporting the Commission's finding that the Genesee River is 'navigable waters' above the rapids and falls in Rochester.").

109. *Id.*

110. *Id.* at 598.

111. *Id.*

112. *Id.*

113. 501 F. Supp. 713, 714 (W.D.N.C. 1980).

114. *Id.* at 715.

115. *Id.*

116. *Id.* at 716.

117. *Id.* at 716-17.

118. *Id.*

119. *Id.*

120. *Id.* at 717.

121. *Id.* at 720.

122. *Id.* at 719.

123. *Id.* at 719-20.

124. *See, e.g.*, St. Anthony Falls Water Power Co. v. St. Paul Water Commissioners, 168 U.S. 349 (1897).

125. Harrison v. Fite, 148 F. 781, 783 (8th Cir. 1906) ("To meet the test of navigability as understood in the American law a water course should be susceptible of use for purposes of commerce or possess a capacity for valuable floatage in the transportation to market of the products of the country through which it runs."); *see also* George v. Beavark, 402 F.2d 977, 981 (8th Cir. 1968) ("There is no record evidence of past history or no suggestion of practicability in liberalizing the rule to hold that mere pleasure fishing (and that is what float fishing is) constitutes a stream navigable in fact when it always has been susceptible for use only for this purpose.").

126. 745 F.2d 861, 864 (4th Cir. 1984).

brought suit challenging the jurisdiction of the Corps over specific portions of the Jackson River. In its opinion, the Fourth Circuit made note of state legislation enacted in 1823 authorizing the construction of a dam across the river. The legislation specifically required that the builders of the dam take precautions "as not to obstruct the navigation of said river."[127] "The necessary inference," the court explained, "is a legislative recognition of boat traffic [in the relevant portion of the river.]"[128]

Loving is also notable because of the Fourth Circuit's reliance on evidence in prior state cases. The court did not use the cases as precedent for determining the specific navigability of the river, but rather alluded to the "numerous uncontradicted instances" in earlier cases "of the use of the upper Jackson to float articles of commerce along various stretches in the late 1800s-early 1900s."[129] The court used these examples as a roundabout way to make a finding of historic navigability. The *Loving* court's reliance on the findings in these prior cases demonstrates the variety of sources from which courts have accepted evidence of historic navigability.[130]

G. Using Government Documents

While the court in *Loving* relied, at least in part, on past documentation of navigability by a legislature and judicial decisions, the Seventh Circuit's 1973 decision in *United States. v. U.S. Steel Corp.*[131] cautions against basing determinations of non-navigability on the basis of official government documents. In *U.S. Steel Corp.*, the Corps alleged that U.S. Steel Corporation had violated the Rivers and Harbors Act of 1899 by discharging refuse from a drainpipe into the Grand Calumet River.[132] The steel company responded by asserting that the portion of the river at issue was not navigable in fact. To support this assertion, U.S. Steel attempted to introduce into evidence a list of water bodies for which the Corps required the approval of bridge plans. The premise was that if a water body was not on the list, it was not considered navigable in fact by the Corps when the list was prepared. The list did not include the Grand Calumet.[133] The district court's decision to exclude the list from evidence was affirmed by the Seventh Circuit. The Seventh Circuit explained that waters which did not require approvals for bridges from the Corps could not necessarily be considered "non-navigable" or abandoned by the Corps.[134] Thus, the Corps—and Congress generally—could not lose jurisdiction over a body of water simply by omitting it from a list of navigable-in-fact waters created for a specific governmental purpose.

H. Historical Use Determinations Are Reviewed for Clear Error

The Eleventh Circuit's 1995 decision in *Lykes Bros. v. U.S. Army Corps of Engineers*[135] emphasizes an important consequence of winning or losing a factual battle of the type found in *Jones*, *Loving*, or *U.S. Steel Corp.* In *Lykes*, the Corps appealed the district court's determination of non-navigability of portions of Florida's Fisheating Creek. The creek ran through land owned by Lykes Brothers. The company had felled 80 trees and posted no trespassing signs along the creek to block public access. The state sued to compel the removal of obstructions to public access. The district court dismissed the case and instructed the state to first seek administrative penalties. The state in turn sought and gained a determination of navigability from the Corps. Lykes then sued the Corps over that determination.[136] The lower court relied on historical evidence showing the use of only portions of the creek as well as alternative methods of transportation to determine that Fisheating Creek was not entirely navigable.[137] The Eleventh Circuit, in reviewing the case, noted that a finding of navigability was a factual finding and thus would be reviewed for clear error.[138] Thus, the historical record leading to the determination that Fisheating Creek was non-navigable would not be reviewed on appeal. Given the highly factual nature of historic navigability findings, this deferential standard of review places great importance on determinations of navigability made in the district court.

I. The Role of Congressional Abandonment

The 1950 case of *Montana Power Co. v. Federal Power Commission*[139] involves the concept of abandonment. The Montana Power Company challenged a federal regulation requiring it to apply for permits for its plants along the Missouri River. Citing *Economy Light & Power*, the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit held that portions of the river where four of the company's plants were located were historically navigable.[140] The court relied on evidence of 19th-century steamboat travel on the river, the travel of gold miners down that portion of the Missouri, and the use of the river for transportation of logs and timber.[141]

The Montana Power Company countered that regardless of historic navigability, power over the river had been abandoned by Congress. The company based its claims on a Corps report to Congress that noted that construction of a dam at Fort Peck would make the river non-navigable. Since the dam had been built after the report was issued and was reviewed by Congress, the company argued the dam's construction constituted congressional abandonment of its jurisdiction over that stretch of the river.[142] In

127. *Id.* at 866 (citing Acts of Assembly, ch. 43, passed Dec. 31, 1823).

128. *Id.*

129. *Loving*, 745 F.2d at 865.

130. In *United States v. Granite State Packing Co.*, for instance, the U.S. District Court for the District of New Hampshire held that a portion of the Merrimack River was navigable partially because of Henry David Thoreau's description of the area in 1839. 343 F. Supp. 57, 60 (D.N.H. 1972).

131. 482 F.2d 439 (7th Cir. 1973).

132. *Id.* at 442.

133. *Id.* at 453.

134. *Id.*

135. 64 F.3d 630, 26 ELR 20157 (11th Cir. 1996).

136. *Id.* at 633-34.

137. Lykes Bros. v. Corps of Eng'rs, 821 F. Supp. 1457, 23 ELR 21456 (M.D. Fla. 1993).

138. *Id.* at 634.

139. 185 F.2d 491 (D.C. Cir. 1950).

140. *Id.* at 494.

141. *Id.*

142. *Id.* at 495.

rejecting the argument, the court explained that "[a]bandonment of sovereign authority should not be lightly inferred from the actions of subordinate officers in the Executive Department."[143] The court instead sought "clear indication of abandonment."[144]

Based on this case it would seem that a congressional act specifically declaring a water no longer subject to federal jurisdiction would constitute abandonment, but that anything short of that would not. A statute that contains such an abandonment declaration is 33 U.S.C. §21. It provides that Bayou Cocodrie in Louisiana "to be not a navigable water of the United States within the meaning of the laws enacted by the Congress for the preservation and protection of such waters." Confronted with such a declaration, one would be hard pressed to argue that the water at issue is a traditional navigable water.

In contrast, if the Corps has simply omitted a water from a list of navigable waters, as was the case in *U.S. Steel Corp.*, a court would still be free to determine that the water was a traditional navigable water if provided with the appropriate evidence.[145] Additionally, it is important to recognize that abandonment may be later revoked to avoid detrimental effects on the navigable capacity of a waterway. In *Bridge Co. v. United States*,[146] the Supreme Court upheld a congressional provision that authorized Kentucky and Ohio to build a bridge over the Ohio River. The clause at issue in the case allowed Congress to withdraw its authorization if the bridge ever "substantially and materially obstructed" commerce on the Ohio.[146] Thus, even in cases where Congress appears to have abandoned its rights to a water, it may have made that abandonment conditional and, therefore, nonpermanent.

143. *Id.*

144. *Id.*

145. 482 F.2d at 453.

146. 105 U.S. 470, 476 (1881).

XI. Conclusion

So is the historic navigability test the panacea for all post-*Rapanos* cases? No, but it is a tool that can be used to advantage in some circumstances. The scenario described in the beginning of this Article is one such circumstance—the Kennedy test was the only test available, and the closest known traditional navigable water was 40 miles away. Certainly a case could be made establishing a significant nexus between the wetland at issue and the Barge River, but why not strengthen your position by establishing that Cotton Creek, which is only two miles from the wetland, is also a traditional navigable water under the historic navigability test.

If you are not lucky enough to happen upon an old-timer with a picture of his great-grandfather floating cotton down the creek at issue, you could try the following to establish that a creek is a historic use water: (1) visit libraries in the area and consult their newspaper and local history files; (2) visit county, state, and university archives; (3) ask the Corps for all navigability determinations performed in the area; (4) seek out the oldest members of nearby communities; or (5) simply type the creek name in Google®. If you do not have the time to do any of the above, then you can typically find a history student from a nearby college who would be more than willing to earn a little extra money doing some research. Environmental consultants are also an alternative. Most larger consulting firms have someone on staff who is equipped to do historical research. This research may yield little to show that the creek you are interested in was used for historic commerce, but, in the event that you find that commerce link, it could give you the advantage you need in this crazy post-*Rapanos* world.