ENVIRONMENTAL LAW/ADMINISTRATIVE LAW--UNITED STATES v. RAPANOS: JUSTICE STEVENS'S SUGGESTION MAY NOT BE THE YELLOW BRICK ROAD, BUT IT IS THE BEST PATHWAY TO OZ

Kristen M. Sopet

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INTRODUCTION

The determination of which bodies of water are "navigable waters"1 under the Clean Water Act has been a source of continual disagreement among judges and jurisdictions.2 Although this issue has made its way to the Supreme Court three times thus far, a concrete definition of navigable waters has proven elusive.3

The most recent of these Supreme Court cases, United States v. Rapanos,4 established three different tests to determine whether a body of water is a navigable water: (1) the plurality test, authored by Justice Scalia, which focuses on the existence of surface water connections to traditionally navigable waters;5 (2) the test authored by Justice Kennedy in his concurring opinion, which requires a significant nexus to traditionally navigable waters;6 and (3) the test authored by Justice Stevens in his dissenting opinion, which calls for deference to the judgment of the Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA).7

Because no single test garnered majority support, circuits have split regarding which approach to adopt.8 Curiously, although three

1. 33 U.S.C. § 1362(7) (2000) ("The term 'navigable waters' means the waters of the United States, including the territorial seas.").
3. See Rapanos, 547 U.S. 715; SWANCC, 531 U.S. 159; Riverside Bayview Homes, 474 U.S. 121.
5. Id. at 742.
6. Id. at 759 (Kennedy, J., concurring) (citing SWANCC, 531 U.S. at 167, 172).
7. Id. at 788 (Stevens, J., dissenting) (citing Chevron U.S.A. Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842-45 (1984)).
8. See infra Part III.B.
circuits have adopted Justice Kennedy's significant nexus test,9 no court has yet applied the test of the plurality. On the other hand, three circuit courts and one district court have embraced not Justice Stevens's test, but a suggestion made in his dissent10—that lower courts faced with the daunting task of applying Rapanos find federal jurisdiction over a body of water if the test of either the plurality or Justice Kennedy is satisfied.11

Part I of this Note explores the history, purpose, and permit programs of the Clean Water Act and discusses attempts by the Supreme Court to clarify the definition of "navigable waters" before Rapanos. Part II explains the factual circumstances surrounding Rapanos and examines the three opinions cited most frequently by lower courts interpreting Rapanos. Part III contains an analysis of the precedential value of plurality decisions, a discussion of the strategies used to interpret plurality opinions, and a summary of lower court interpretations of Rapanos. Part IV describes the joint guidances issued by the EPA and the Corps, which address the definition of "navigable waters" and the degree of deference owed to such agency-issued guidances.

In Part V, this Note proposes that the lower courts that have employed Justice Stevens's suggestion of an either/or test have taken the correct approach for defining "navigable waters" in the wake of Rapanos. This assertion is supported by exploring the application of the tests commonly used to interpret plurality opinions to the situation presented in Rapanos. Finally, this Note suggests that because the EPA and the Corps, the governmental agencies responsible for the enforcement of the Clean Water Act, support application of an either/or test, lower courts should follow Justice Stevens's suggestion.

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9. United States v. Robison, 505 F.3d 1208 (11th Cir. 2007); N. Cal. River Watch v. City of Healdsburg, 496 F.3d 993 (9th Cir. 2007); United States v. Gerke Excavating, Inc., 464 F.3d 723 (7th Cir. 2006).
11. Rapanos, 547 U.S. at 810 (Stevens, J., dissenting).
I. THE DIFFICULTY OF DEFINING "NAVIGABLE WATERS" UNDER THE CLEAN WATER ACT

A. The Clean Water Act

1. The Evolution of the Clean Water Act

In 1899, Congress enacted the Rivers and Harbors Act (RHA)—earliest federal precursor to the current Clean Water Act.12 The RHA focused primarily on preventing the discarding of trash into waterways in order to minimize obstructions to navigation and trade.13 However, as industrialization consumed the nation, Congress attempted to address the ongoing chemical contamination in United States waters.14 The result was the 1948 Federal Water Pollution Control Act (FWPCA), which was specifically created to address water pollution rather than aid navigation as the RHA sought to do.15 The FWPCA was intended to be a state-led effort against pollution with minimal federal involvement.16 However, because enforcement was left to the states and...
prosecution was optional, the early FWPCA was largely ineffective.\(^\text{17}\) Amendments to the FWPCA before 1972 failed to redress the inability of the FWPCA to improve water quality and prevent pollution.\(^\text{18}\)

When, in January of 1969, a newsworthy oil spill occurred off the coast of California,\(^\text{19}\) and the polluted Cuyahoga River caught fire in June of that same year,\(^\text{20}\) the public began to demand a solution to the increasing problem of water pollution.\(^\text{21}\) Following the nation's first Earth Day in 1970, which symbolized the "increasing environmental consciousness of that period," public hearings about air and water pollution were held by a subcommittee of the Senate Committee on Public Works.\(^\text{22}\) In 1972, based on the Senate Committee's findings, Congress joined together to amend the FWPCA so that the federal government could take a more active role in preserving the environment.\(^\text{23}\)

The 1972 amendments significantly restructured the FWPCA. Although Congress did not remove the ability of the states to regulate water quality,\(^\text{24}\) the 1972 amendments required the federal government and its agencies to become more involved in the regulation of waters of the United States.\(^\text{25}\) For example, Congress gave the federal government the responsibility of enforcing the FWPCA and the ability to establish minimum national pollution control requirements.\(^\text{26}\) Additionally, the FWPCA provided for increased citizen

\[\text{References}\]

17. See Craig, supra note 13, at 22-24; Gross & Dodge, supra note 12, at 6.
23. President Nixon vetoed these amendments to the FWPCA, which became known as the Clean Water Act. Both Houses of Congress joined together to override his veto in one day. Adler et al., supra note 21, at 2; Gross & Dodge, supra note 12, at 7.
25. Federal Water Pollution Control Act Amendments of 1972, Pub. L. 92-500, 86 Stat. 816; see also Craig, supra note 13, at 7, 8.
participation in maintaining the quality of the nation’s waters.\textsuperscript{27} The revitalized and reorganized FWPCA became commonly known as the Clean Water Act (CWA) because of its commitment to a new regulatory philosophy aimed at the restoration of the nation’s waters.\textsuperscript{28}

2. The Purpose, Means, and Definitions of the Clean Water Act

The congressionally declared policy of the CWA is to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”\textsuperscript{29} In the CWA, Congress enumerated more specific objectives consistent with this established policy.\textsuperscript{30} These goals included: the elimination of pollution discharge into navigable waters by 1985; the prohibition of “toxic pollutants in toxic amounts”; and the construction of public waste treatment facilities aided by financial assistance from the federal government.\textsuperscript{31} Although many of these more specific goals have not been fully achieved, the waters of the United States have benefited from the enactment of the CWA.\textsuperscript{32}

To achieve the goals set forth in the CWA, Congress announced that any discharge of pollutants into navigable waters is illegal unless the dischargers have acquired certain permits.\textsuperscript{33} The two predominant permit programs authorized under the CWA are those found in section 402 “National Pollutant Discharge Elimination System” (NPDES)\textsuperscript{34} and section 404 “Permits for dredged or fill material.”\textsuperscript{35} In general, publicly owned treatment plants and industrial dischargers seek NPDES permits to gain governmental authorization to discharge limited levels of “allowable pollutants.”\textsuperscript{36}

\begin{itemize}
\item \textsuperscript{27} See 33 U.S.C. § 1251(e); CRAIG, supra note 13, at 7.
\item \textsuperscript{29} See 33 U.S.C. § 1251(a).
\item \textsuperscript{30} Id. § 1251(a)(1)-(7).
\item \textsuperscript{31} Id. § 1251(a)(1), (3)-(4); ADLER ET AL., supra note 21, at 5, 7.
\item \textsuperscript{32} See ADLER ET AL., supra note 21, at 19 (detailing trends of lower pollutant concentrations in monitored waters following the enactment of the Clean Water Act); Colburn, supra note 2, at 183-84.
\item \textsuperscript{33} 33 U.S.C. § 1311(a).
\item \textsuperscript{34} Id. § 1342.
\item \textsuperscript{35} Id. § 1344; see James Murphy & Stephen M. Johnson, Significant Flaws: Why the Rapanos Guidance Misinterprets the Law, Fails to Protect Waters, and Provides Little Certainty, 15 SE. ENVTL. L.J. 431, 434 (2007).
\item \textsuperscript{36} GROSS & DODGE, supra note 12, at 8.
\end{itemize}
NPDES permits are generally issued by the EPA and states that have obtained permitting authority under the CWA. On the other hand, it is primarily the Secretary of the Army, acting through the Corps, who issues section 404 permits, which are far more limited in scope because they apply only to the discharging of fill and dredge material. These permit programs apply only to "navigable waters," over which the CWA assigns federal jurisdiction.

The CWA defines "navigable waters" as "waters of the United States, including the territorial seas." Historically, the term "navigable waters," as defined by the CWA, has minimal relation to the actual navigability of waters. The EPA has expressed its belief that "navigable waters" is meant to be interpreted "as broad[ly] as constitutionally permissible under the Commerce Clause." However, determining exactly which bodies of water fall within the CWA definition of "navigable waters" has proven to be a difficult task for the federal courts.

B. Preliminary Judicial Attempts to Define "Navigable Waters"

1. Round 1: Wetlands Adjacent to Conventionally Navigable Waters

In United States v. Riverside Bayview Homes, Inc., the Supreme Court analyzed whether landowners must acquire permits before discharging fill material into wetlands that are adjacent to tradition-
ally navigable waters and their tributaries. The case arose from an attempt by the Corps to prevent Riverside Bayview Homes from filling low-lying, marshy land on its property in preparation for construction.

The Supreme Court unanimously agreed, with notable ease, that the marshy land was indeed a wetland adjacent to waters that are traditionally navigable according to the CWA definition. The Court determined that the lands were "inundated or saturated by surface or ground water" such that vegetation associated with traditional wetland conditions could thrive. Therefore, the wetlands were subject to federal jurisdiction.

Because lands determined to be wetlands may be subject to federal jurisdiction as waters of the United States, the Court first sought to determine whether the Corps should "exercise jurisdiction over wetlands adjacent to but not regularly flooded by rivers, streams, and other hydrographic features more conventionally identifiable as 'waters'" under the CWA. Based on the policy behind the CWA, its legislative history, and the decision by Congress to broadly define "waters" that are subject to federal jurisdiction under the CWA, the Court determined that the Corps's definition was reasonable. Because courts are generally required to give deference to an agency's construction of statutory terms if the interpretation is reasonable and does not conflict with congressional intent, the Court supported the Corps's definition of "waters of the United States." Thus, Riverside Bayview Homes was required to obtain a permit in order to fill its land.

44. *Id.* at 124.
45. *Id.* at 129 ("[T]he question whether the regulation at issue requires respondent to obtain a permit before filling its property is an easy one.").
46. *Id.* (citing 33 C.F.R. § 323.3(c) (1978)).
47. *Id.* at 129.
48. See *id.* at 129-30 (citing 33 C.F.R. § 323.2(c) (describing when a permit must be obtained in order to lawfully discharge certain types of materials into waters of the United States)).
49. *Id.* at 131.
50. *Id.* at 132-33.
51. *Id.* at 131 (citing Chem. Mfrs. Ass'n v. Natural Res. Def. Council, Inc., 470 U.S. 116 (1985); Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984)). Generally, an agency’s formal interpretation of an ambiguous term receives deference when it is reasonable. This standard is often referred to as *Chevron* deference. See *id.*; see also infra Part IV.B.
52. *Riverside Bayview Homes, Inc.*, 474 U.S. at 139.
2. Round 2: The Failure of the Migratory Birds Rule

In 1987, the Solid Waste Agency of Northern Cook County (SWANCC), a group of individuals from over twenty cities and villages in the Chicago area, purchased an abandoned mining site to use as a disposal location for nonhazardous solid wastes.\textsuperscript{53} Construction required the filling of some permanent and seasonal ponds at the site.\textsuperscript{54} The Corps exercised federal jurisdiction over the ponds and refused to issue a permit to SWANCC, not because the ponds were wetlands, but because over one hundred species of migratory birds lived at the ponds.\textsuperscript{55} Therefore, the question on appeal to the Supreme Court was whether—under this proposed “Migratory Bird Rule”—those ponds were reasonably defined as “waters of the United States,” and subsequently, whether a permit would be required to fill them.\textsuperscript{56}

Chief Justice Rehnquist, speaking for the majority, rejected the “Migratory Bird Rule” as inconsistent with the CWA and congressional intent.\textsuperscript{57} The Supreme Court determined that wholly intrastate and isolated ponds could not be navigable waters as such a reading would negate the meaning of the term “navigable.”\textsuperscript{58} The Court rejected the notion that it owed any deference to the Corps due to the clear meaning of the relevant section of the CWA and because the Migratory Bird Rule “push[ed] the limit of congressional authority” without indication that Congress intended to confer such power.\textsuperscript{59}

Because \textit{SWANCC} dealt with isolated ponds that were not considered wetlands, it appears as though this predecessor to \textit{Rapanos} should have very little to do with its decision. However, in \textit{SWANCC}, the concept of a significant nexus was introduced to the discussion of whether a body of water would be considered a “water of the United States.”\textsuperscript{60} The Court stated that the “signifi-

\begin{itemize}
\item \textsuperscript{53} Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs (\textit{SWANCC}), 531 U.S. 159, 162-63 (2001).
\item \textsuperscript{54} \textit{Id.} at 163.
\item \textsuperscript{55} \textit{Id.} at 164-65.
\item \textsuperscript{56} \textit{Id.} at 162. Specifically, the Corps determined that federal jurisdiction would extend to waters that served, or could serve, as habitat for those birds that were protected by the Migratory Bird Treatise, birds that flew interstate, or endangered animals. \textit{Id.} at 164.
\item \textsuperscript{57} \textit{Id.} at 167, 170.
\item \textsuperscript{58} \textit{Id.} at 162-63.
\item \textsuperscript{59} \textit{Id.} at 172-73. For a discussion about agency deference, see \textit{infra} notes 194-204.
\item \textsuperscript{60} \textit{SWANCC}, 531 U.S. at 167.
\end{itemize}
The term "significant nexus" was regrettably undefined by the Court. See id. 61

Id. at 168.


Justice Scalia, along with Justices Thomas, Alito, and Chief Justice Roberts, delivered the plurality opinion of the court. Id. at 715 (plurality opinion). Chief Justice Roberts also wrote a separate concurring opinion. Id. at 757 (Roberts, C.J., concurring).

Justice Kennedy was alone in his concurrence, which agreed with the judgment of the plurality, but offered an alternative rationale and test. Id. at 759 (Kennedy, J., concurring).

Justice Stevens's dissent was joined by Justices Souter, Ginsburg, and Breyer. Id. at 787 (Stevens, J., dissenting).
A. Justice Scalia's Plurality: It's What's on the Surface that Counts

Justice Scalia's opinion began with an expression of his abhorrence of the "despotic" tendencies of the Corps,\(^70\) and followed with an articulation of his fear that the whole United States could fit within the definition of "navigable waters" if expansion of federal jurisdiction under the CWA was not curtailed.\(^71\) Thus, the plurality opinion sought to rein in the ability of the Corps to interpret the CWA terms "navigable waters" and "waters of the United States" expansively by espousing a test that would be more restrictive.\(^72\)

According to the plurality, waters subject to federal jurisdiction under the CWA must be "continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows."\(^73\) Justice Scalia reached this conclusion through an analysis of the definition of "navigable waters" in the CWA.\(^74\) The CWA defines navigable waters as "the waters of the United States."\(^75\) Because the CWA included the definite article "the" alongside the plural form of water, Justice Scalia inferred that the CWA does not refer to water in general but "waters" as defined more narrowly by *Webster's New International Dictionary*, which excluded "transitory puddles or ephemeral flows of water."\(^76\)

Furthermore, Justice Scalia contended that previous interpretations of the term "navigable waters" supported his assertion that the CWA may exercise jurisdiction "only over relatively permanent

\(^{70}\) *Id.* at 721 (plurality opinion) ("In deciding whether to grant or deny a permit, the U.S. Army Corps of Engineers (Corps) exercises the discretion of an enlightened despot.").

\(^{71}\) *Id.* at 722. Justice Scalia noted: "[T]he entire land area of the United States lies in some drainage basin, and an endless network of visible channels furrows the entire surface, containing water ephemerally wherever the rain falls." Thus, he claimed, "[a]ny plots of land containing such a channel may potentially be regulated as a 'water of the United States.'" *Id.*

\(^{72}\) *Id.* at 731-32.

\(^{73}\) *Id.* at 733.

\(^{74}\) *Id.* at 732.

\(^{75}\) *Id.* (emphasis added) (citing 33 U.S.C. § 1362(7) (2000)).

\(^{76}\) *Id.* at 732-33 ("[T]he waters' refers more narrowly to water 'as found in streams and bodies forming geographical features such as oceans, rivers, [and] lakes,' or 'the flowing or moving masses, as of waves or floods, making up such streams or bodies.'" (second and third alterations in original) (quoting *Webster's New International Dictionary* 2882 (2d ed. 1954))).
bodies of water." The CWA adopted the term "navigable waters" from previous statutes, which conferred a traditional meaning to bodies of water as "only discrete bodies of water." Additionally, previous cases used the term "navigable waters" interchangeably with "rivers" and "waterways," again excluding ephemeral bodies of water—such as seasonal ponds or wetlands. As in *Riverside Bayview Homes* and *SWANCC*, Justice Scalia understood the term "navigable waters" to connote permanency of water.

Justice Scalia also looked to other language within the CWA to support this conclusion. The CWA classifies channels that typically carry water currents intermittently as "point sources," as opposed to "navigable waters," thereby distinguishing navigable waters from other waters that are not permanent. Along the same lines, he asserted that an expansive reading of the term "the waters of the United States," as proposed by the Corps, would be in opposition to the stated purpose of the CWA because it would remove control from the states by giving a federal agency broader jurisdiction.

Based on the determination that intermittent water flows are insufficient to establish federal jurisdiction, the plurality asserted that the only circumstances under which wetlands may be included in the definition of "waters of the United States" is if they have a "continuous surface connection to bodies" of water that are themselves navigable waters so that a clear distinction between the wetland and the navigable water does not exist. Therefore, a hydrological connection between the wetland and the navigable wa-

77. *Id.* at 734.
78. *Id.* (citing Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs (SWANCC), 531 U.S. 159, 180 (2001) (Stevens, J., dissenting)).
79. *Id.* (citing The Danielle Ball, 77 U.S. (10 Wall.) 557, 563 (1870)).
80. *Id.* (citing United States v. Appalachian Elec. Power Co., 311 U.S. 377, 407-09 (1940)).
81. *Id.* (citing SWANCC, 531 U.S. at 167, 172; United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 132 (1985)).
82. The CWA defines "point source" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14) (2000); *Rapanos*, 547 U.S. at 735 (citing 33 U.S.C. § 1362(14)).
83. *Rapanos*, 547 U.S. at 737. The stated policy of the CWA is "to recognize, preserve, and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources." 33 U.S.C. § 1251(b) (emphasis added); see also *Rapanos*, 547 U.S. at 737 (citing 33 U.S.C. § 1251(b)).
84. *Rapanos*, 547 U.S. at 742.
ters that is sporadic and physically remote will not justify federal
jurisdiction over the wetland.  

Thus, the test of the plurality to determine what wetlands may
be included in the definition of “waters of the United States” con­
tains two parts. First, the Corp must prove that the wetland at issue
is “a relatively permanent body of water connected to traditional
interstate navigable waters.” Second, the Corps must demon­
strate that there is a continuous surface connection between the
wetland and the water.

B. Justice Kennedy’s Concurrence: Looking for a More
Significant Connection

Alternatively, the test advocated by Justice Kennedy in his
concurring opinion contains only one requirement: the “wetland
must possess a ‘significant nexus’ to waters that are or were naviga­
ble in fact or that could reasonably be so made.” Justice Ken­
nedy, therefore, promoted application of the test first utilized in
SWANCC and ignored by the plurality and dissenting opinions.

Justice Kennedy would find a significant nexus between wet­
lands and a traditionally navigable water “if the wetlands, either
alone or in combination with similarly situated lands in the region,
significantly affect the chemical, physical, and biological integrity of
other covered waters more readily understood as ‘navigable.’ ”

This analysis must be conducted by the Corps on a case-by-case
basis in order to avoid unreasonable application of jurisdiction
under the CWA.

Unlike Justice Scalia, Justice Kennedy concluded that intermit­
tently flowing bodies of water can be “navigable waters” and there­
fore “waters of the United States,” provided that they possess the

85. Id.
86. Id.
87. Id.
88. Id. at 759 (Kennedy, J., concurring) (emphasis added) (citing Solid Waste
Agency of N. Cook County v. U.S. Army Corps of Eng’rs (SWANCC), 531 U.S. 159,
167, 172 (2001)).
89. See id. at 767 (“Because neither the plurality nor the dissent addresses the
nexus requirement, this separate opinion, in my respectful view, is necessary.”). How­
ever, Justice Scalia asserted that Justice Kennedy’s significant nexus test is a misinter­
pretation of the test proposed in SWANCC. Id. at 753 (plurality opinion). The true
significant nexus, according to Justice Scalia, is the physical surface connection between
the wetland and the body of water that is navigable-in-fact. Id. at 754.
90. Id. at 780 (Kennedy, J., concurring).
91. Id. at 782.
required "significant nexus."92 In order to support this assertion, Justice Kennedy examined the CWA and concluded, based on the text, that Congress had not excluded waters that were only intermittent.93 Offering an alternative interpretation of the definition of "point source" in the CWA,94 Justice Kennedy claimed that point sources do not, by definition, possess an intermittent water flow.95 Therefore, he reasoned that the plurality's assertion is unreasonably based on a "negative inference" that navigable water must possess a continuous flow because a point source must possess an intermittent flow.96 Further, Justice Kennedy disagreed with the plurality's interpretation of the dictionary definition of "waters" and determined that the definition also included "flood or inundation," which would include irregular waterways.97

Finally, Justice Kennedy explicitly rejected any surface water connection requirement between wetlands and adjoining waters.98 Based on his interpretation of Riverside Bayview, Justice Kennedy deduced that the Supreme Court expressly stated that it is irrelevant whether wetlands share water with adjacent bodies of water so long as the wetlands significantly affect the ecosystem.99 Although the Riverside Bayview Court did note the difficulty of determining the boundary between wetlands and waters in some circumstances, Justice Kennedy insisted that the Court's observation was not meant to exclude all wetlands that do not share an indistinguishable boundary with waters.100 Similarly, according to Justice Kennedy,

92. Id. at 769-70.
93. Id. at 770.
94. See supra note 82.
95. Rapanos, 547 U.S. at 771-72 (Kennedy, J., concurring).
96. Id. at 772 ("Nothing in the point-source definition requires an intermittent flow. Polluted water could flow night and day from a pipe, channel, or conduit and yet still qualify as a point source; any contrary conclusion would likely exclude ... streams from sewage treatment plants.").
97. Id. at 770 (internal quotation marks omitted) (quoting Webster's New International Dictionary, supra note 76, at 2882).
98. Id. at 772.
99. Id. at 772-73 ("[A]djacency could serve as a valid basis for regulation ... '[i]f it is reasonable ... for the Corps to conclude that in the majority of cases, adjacent wetlands have significant effects on water quality and the aquatic ecosystem ... .'" (quoting United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 135 n.9 (1985))).
100. Id. at 773 ("Riverside Bayview's observations about the difficulty of defining the water's edge cannot be taken to establish that when a clear boundary is evident, wetlands beyond the boundary fall outside the Corps' jurisdiction.").
SWANCC supported the assertion in Riverside Bayview that adjacent wetlands may be considered navigable waters.101

C. Justice Stevens's Dissent: Agency Deference and a Helpful Suggestion

In a separate dissent in Rapanos, Justice Stevens asserted that the Corps's interpretation should be deferred to because of the complicated and technical issues involved in determining what waters are subject to federal jurisdiction and the history of congressional acquiescence to the judgment of the Corps in such situations.102 Justice Stevens concluded that both Justice Kennedy and Justice Scalia reached the wrong conclusions through the use of incorrect and unsupported tests.103 Calling the result of Rapanos a "judicial amendment of the Clean Water Act," Justice Stevens claimed that the conclusion of the Corps—that wetlands adjacent to navigable waters are "waters of the United States" because they have a substantial impact on the quality of the nation's waters and surrounding ecosystems—should be sufficient to establish jurisdiction.104 Additionally, unlike Justice Kennedy's test, the deference for which Justice Stevens advocated does not require a case-by-case, "wetland-by-wetland inquiry."105

Justice Stevens supported his conclusion by explaining that Riverside Bayview and its reliance on United States v. Chevron Pipe Line Co.,106 which calls for deference to reasonable determinations by the Corps regarding federal jurisdiction, controlled the case and

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101. Id. at 774 (citing Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs (SWANCC), 531 U.S. 159, 171 (2001)).
102. Id. at 788 (Stevens, J., dissenting).
103. Id. at 787-88. Justice Stevens rejected the plurality's test as "utterly unpersuasive" because he disagreed with Justice Scalia's textual analysis of certain terms and his construction of the purpose of the CWA. Id. at 800-06. Additionally, Justice Stevens asserted that SWANCC was inapplicable to the case at hand because it dealt with "isolated waters," whereas the wetlands in Rapanos were connected to navigable waters via tributaries. See id. at 794-97. Justice Stevens also rejected Justice Kennedy's use of the significant nexus test, a judicially created test, reasoning that it did not give due deference to the Corps and would create additional work for determining jurisdictional coverage without significantly affecting the number of wetlands covered by the CWA. See id. at 807-09.
104. Id. at 788 (internal quotation marks omitted).
105. Id. at 797 (citing United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 135 n.9 (1985)).
issue at hand.\textsuperscript{107} In \textit{Riverside Bayview}, a unanimous Supreme Court held that federal jurisdiction under the CWA encompassed tributaries of traditionally navigable waters and wetlands adjacent to those tributaries, as well as wetlands adjacent to navigable waters.\textsuperscript{108} Justice Stevens asserted that the Supreme Court's decision was based solely on the conclusion that the Corps's determination of federal jurisdiction was reasonable, not, as the plurality states, that there existed a "continuous surface connection."\textsuperscript{109} Along the same lines, Justice Stevens buttressed his preference for deference to the Corps by highlighting Congress's "deliberate acquiescence in the Corps' regulations in 1977."\textsuperscript{110}

However, the most influential part of Justice Stevens's opinion has been his closing remarks.\textsuperscript{111} Acknowledging the future dilemma lower courts would face when deciding which of the two distinct tests from the concurring opinions to apply, Justice Stevens suggested that lower courts should find jurisdiction under the CWA if jurisdiction is found under either the plurality's test or Justice Kennedy's significant nexus test.\textsuperscript{112} Justice Stevens supported this approach as an attempt to address the unlikely situation in which the plurality's test will find jurisdiction but Justice Kennedy's will not.\textsuperscript{113} In such a case, courts that follow Justice Kennedy's test would reach a decision that is supported by only one Justice. If the courts were to apply the either/or test suggested by Justice Stevens, at least five Justices would support the holding.\textsuperscript{114} It is the aforementioned suggestion that this Note proposes is the proper guidance for lower courts under \textit{Rapanos}.

III. The Precedential Value of Plurality Decisions

A plurality opinion is "[a]n opinion lacking enough judges' votes to constitute a majority, but receiving more votes than any

\begin{itemize}
  \item \textsuperscript{107} \textit{Rapanos}, 547 U.S. at 792-93 (Stevens, J., dissenting) (citing \textit{Riverside Bayview Homes}, 474 U.S. at 123, 131, 133).
  \item \textsuperscript{108} \textit{See Riverside Bayview Homes}, 474 U.S. at 134; \textit{supra} notes 43-52 and accompanying text.
  \item \textsuperscript{109} \textit{Rapanos}, 547 U.S. at 792-94 (Stevens, J., dissenting).
  \item \textsuperscript{110} \textit{Id.} at 797 (citing \textit{Riverside Bayview Homes}, 474 U.S. at 135-39).
  \item \textsuperscript{111} \textit{See infra} Part III.B.2 for a discussion of the cases that have followed Justice Stevens's suggestion to resolve disputes that relate to \textit{Rapanos}.
  \item \textsuperscript{112} \textit{Rapanos}, 547 U.S. at 810 (Stevens, J., dissenting).
  \item \textsuperscript{113} \textit{Id.}
  \item \textsuperscript{114} \textit{Id.} For further discussion of this peculiar situation, \textit{see infra} notes 169-171 and accompanying text.
\end{itemize}
other opinion.” The Supreme Court is producing an ever-increasing number of plurality opinions. As such, it is necessary to explore the historical treatment of plurality opinions and how history determines the precedential value of Rapanos.

A. The Precedential Value of Plurality Decisions in General

Plurality decisions have been criticized because they are obstructive to the function of the law as a predictive tool. Thus, the trend of increased plurality opinions is troublesome because interpretation of such opinions is more burdensome on the lower courts that must invest valuable time and other resources in analyzing and applying them.

Some of the difficulty can be explained by examining how judicial scholars originally interpreted opinions. Judicial opinions were originally divided specifically into “the ratio decidendi (reason for deciding) and obiter dictum (stated by the way).” The ratio decidendi portion of the opinion possesses binding precedential effect; therefore, the challenge when interpreting opinions is determining what portion of the opinion is the court’s reason for deciding the case and what portion is simply dictum. When faced

117. Following an introduction to the importance of following precedent, Berry et al. explain that plurality opinions “muddy the waters and leave both lawyers and lower courts struggling to define the existing rule of law.” Berry et al., supra note 116, at 301-02. If the rule of law set in an opinion is unclear, lower courts will be unable to uniformly follow that precedent. See also James A. Bloom, Note, Plurality and Precedence: Judicial Reasoning, Lower Courts, and the Meaning of United States v. Winstar Corp., 85 WASH. U. L. REV. 1373, 1378 (2008).
119. Mark Alan Thurmon, Note, When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions, 42 DUKE L.J. 419, 423 (1992); see also Arthur L. Goodhart, Determining the Ratio Decidendi of a Case, 40 YALE L.J. 161 (1930) (examining the historical difficulty of ascertaining the ratio decidendi of a case and suggesting means by which to determine it).
120. Thurmon, supra note 119, at 423 (describing the difficulty that lower courts face when attempting to derive the binding ratio from dictum because “judges seldom describe their rulings using the[ ] terms "ratio decidendi and obiter dictum"). See generally Goodhart, supra note 119, at 164 (illustrating the difficulty of determining the ratio
with a plurality opinion, deciphering the ratio decidendi, or rationale of the judges, becomes increasingly more difficult without a clear majority of judges agreeing on a single reasoning to justify the outcome of the case.\(^{121}\)

It is this difficulty that led courts at common law and into the nineteenth century to conclude that the ratio decidendi of plurality opinions did not have binding precedential force;\(^{122}\) thus, the ratio decidendi was limited to the particular facts of the case being reviewed and the opinion was binding as to that result only.\(^{123}\) However, currently, the general understanding is that plurality opinions, if not mandatorily binding, are more than merely persuasive.\(^{124}\) For example, appellate courts and other lower courts faced with interpreting Rapanos, which would previously have been considered an incoherent plurality opinion, did not expressly reject the ruling or confine its rationale to the facts. Instead, the lower courts offered various explanations for supporting either Justice Kennedy’s concurring opinion\(^{125}\) or Justice Stevens’s dissenting opinion.\(^{126}\)

1. The Supreme Court Offers an Interpretive Method

Given the difficulty that lower courts face when interpreting plurality decisions and the various approaches available, the Supreme Court articulated a much-needed test for the interpretation of plurality decisions in 1977.\(^{127}\) In \textit{Marks v. United States}, the Supreme Court directed that “[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent...
of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'"

There are two models generally used to justify the *Marks* doctrine: the implicit consensus model and the predictive model. The implicit consensus model justifies the *Marks* doctrine by declaring that there is a “common thread” of reasoning that ties the concurring and plurality opinions together. The predictive model, on the other hand, justifies reliance on the opinions of the Justices who concur on the narrowest grounds because such reliance could be used to predict the outcome of the Supreme Court if it was again faced with a similar situation.

2. Limitations of the *Marks* Test and Emerging Alternatives

However lower courts decide to interpret the *Marks* doctrine, its application has been acknowledged as limited. The narrowest ground, in whatever way defined, “makes the most sense when two opinions reach the same result in a given case, but one opinion reaches that result for less sweeping reasons than the other.” In fact, the Supreme Court has stated that the *Marks* inquiry should not be pursued to “the utmost logical possibility” and has de-

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128. *Id.* at 193 (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976)). In *Marks*, the Court examined the plurality opinion of *Memoirs v. Attorney General of Massachusetts*, 383 U.S. 413 (1966), which discussed whether obscene materials should be afforded First Amendment protections. See generally *Marks*, 430 U.S. 188. The Court determined that the three Justices in *Memoirs* who concluded that obscene materials could not be shielded by the First Amendment comprised the narrowest grounds and, therefore, provided the governing rationale. *Id.* at 194. The narrowest grounds language and test were drawn from *Gregg v. Georgia*, 428 U.S. 153, in which the Court interpreted the plurality opinions in *Furman v. Georgia*, 408 U.S. 238 (1976), holding that the Justices concurring in judgment on the narrowest grounds would determine the binding rule of law. *Gregg*, 428 U.S. at 169 (citing *Furman*, 408 U.S. 238).


133. United States v. Johnson, 467 F.3d 56, 64 (1st Cir. 2006).

clined to apply the doctrine to all situations in which the test would be clearly suitable.135

Although not officially declared the new policy for interpreting plurality decisions, the recent trend appears to be determining to which rationale or rationales a majority of Justices—in the plurality as well as concurring and dissenting opinions—have agreed.136 For example, in League of United Latin American Citizens v. Perry,137 the Court examined the plurality opinion of Vieth v. Jubelirer138 and determined that the agreement between one concurring Justice and four dissenting Justices established a legal proposition with majority support.139 However, lower courts examining Rapanos have not yet fully adopted this new approach.

B. The Precedential Value of Rapanos: Lower Courts Pick Sides in the Navigable Waters Debate

Following the plurality decision in Rapanos, lower courts were left with the daunting task of determining which test to apply when faced with the question of whether certain wetlands constitute waters of the United States. Surprisingly, no circuit court has yet relied solely upon the surface connection test of the plurality. Instead, three circuits found federal jurisdiction under the CWA when Justice Kennedy's significant nexus test was satisfied,140 while three circuit courts and one district court, following Justice Stevens's suggestion, found jurisdiction if either the surface connection test or the significant nexus test was satisfied.141

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139. Perry, 548 U.S. at 414 (citing Vieth, 541 U.S. at 306 (Kennedy, J., concurring); id. at 317 (Stevens, J., dissenting); id. at 343 (Souter, J., dissenting); id. at 355 (Breyer, J. dissenting)).

140. See United States v. Robison, 505 F.3d 1208, 1221-22 (11th Cir. 2007); N. Cal. River Watch v. City of Healdsburg, 496 F.3d 993, 999-1000 (9th Cir. 2007); United States v. Gerke Excavating, Inc., 464 F.3d 723, 724-25 (7th Cir. 2006).

1. Courts That Follow Justice Kennedy

a. The Ninth Circuit

At issue in *Northern California River Watch v. City of Healdsburg* was the discharging of sewage into Basalt Pond, which is adjacent to the Russian River, near Healdsburg, California. The Ninth Circuit applied *Rapanos* to the case in order to determine whether Basalt Pond constituted a water of the United States and concluded that Justice Kennedy's significant nexus test was the controlling standard. Without exploring its reasoning in great detail, the Ninth Circuit relied on the Seventh Circuit's reasoning in *United States v. Gerke Excavating* and Justice Stevens's dissent in *Rapanos* for its conclusion that Justice Kennedy's opinion controlled because it was "the narrowest ground to which a majority of the Justices would assent if forced to choose in almost all cases."144

b. The Seventh Circuit

The *Gerke Excavating* case involved the unpermitted discharge of pollutants into waters by Gerke Excavating, Inc. To determine if the waters were "navigable waters" covered by the CWA, the Seventh Circuit examined *Rapanos* for the first time. Based on an analysis of the test established in *Marks*, the Seventh Circuit determined that Justice Kennedy's significant nexus test was the controlling rationale in *Rapanos*.

The Seventh Circuit reached this conclusion by determining that the significant nexus test is the "narrowest" test of those espoused in *Rapanos* because Justice Kennedy's test would provide for federal jurisdiction of more waters than the plurality opinion's surface water connection test. Therefore, the Seventh Circuit expressly equated "narrow" with the test that constricted federal authority the least. Interestingly, the Seventh Circuit acknowledged that in cases in which a "slight surface hydrological

143. *Id.*
144. *Id.* at 999 (citing *Rapanos v. United States*, 547 U.S. 715, 810 n.13 (2006) (Stevens, J., dissenting); *Gerke Excavating*, 464 F.3d at 724).
145. *Gerke Excavating*, 464 F.3d at 723.
146. *Id.* at 724.
147. *Supra* note 128 and accompanying text.
148. *Gerke Excavating*, 464 F.3d at 724 (citing *Marks v. United States*, 430 U.S. 188 (1977)).
149. *Id.*
150. *Id.* at 724-25.
connection” could be found, Justice Kennedy’s test would not find federal jurisdiction, though eight other Justices would find federal jurisdiction.\textsuperscript{151} However, the Seventh Circuit, without expressly stating that it would apply it, concluded that, because this would be a rare event, Justice Kennedy’s test “as a practical matter” was the narrowest test.\textsuperscript{152}

c. The Eleventh Circuit

In \textit{United States v. Robison}, the Eleventh Circuit officially took its turn deciphering \textit{Rapanos} when McWane, a large manufacturer of iron products, violated the permit it had obtained from the Corps by discharging pollutants from undesignated points in its plant in Birmingham, Alabama.\textsuperscript{153} McWane released the pollutants into the Avondale Creek, which eventually connected to the Black Warrior River.\textsuperscript{154}

After a thorough review of how previous circuit courts applied \textit{Rapanos},\textsuperscript{155} the Eleventh Circuit determined that Justice Kennedy’s concurring opinion provided the controlling test.\textsuperscript{156} According to the Eleventh Circuit’s reading of \textit{Marks}, courts may look to concurring opinions when interpreting a plurality opinion because concurring opinions have joined in the decision of the Supreme Court; however, dissenting opinions may not be considered because “[d]issenters, by definition, have not joined the Court’s decision.”\textsuperscript{157} The court also agreed with \textit{Gerke Excavating, United States v. Johnson}, and the \textit{Rapanos} dissenters that the significant nexus test is narrower because it will lead more frequently to the inclusion of bodies of water under federal jurisdiction than would the plurality’s test.\textsuperscript{158}

\begin{itemize}
  \item \textsuperscript{151} \textit{Id.} at 725.
  \item \textsuperscript{152} \textit{Id.}
  \item \textsuperscript{153} \textit{United States v. Robison}, 505 F.3d 1208, 1211-12 (11th Cir. 2007).
  \item \textsuperscript{154} \textit{Id.}
  \item \textsuperscript{155} \textit{Id.} at 1219-20.
  \item \textsuperscript{156} \textit{Id.} at 1222.
  \item \textsuperscript{157} \textit{Id.} at 1221 (citing \textit{King v. Palmer}, 950 F.2d 771, 783 (D.C. Cir. 1991) (en banc)).
  \item \textsuperscript{158} \textit{Id.} at 1221-22 (citing \textit{Rapanos v. United States}, 547 U.S. 715, 810 (2006) (Stevens, J., dissenting); \textit{United States v. Johnson}, 467 F.3d 56, 64 (1st Cir. 2006); \textit{United States v. Gerke Excavating, Inc.}, 464 F.3d 723, 724-25 (7th Cir. 2006)).
\end{itemize}
2. Courts that Find Jurisdiction if the Test of Either the Plurality or Justice Kennedy Are Satisfied

a. The First Circuit

The First Circuit examined *Rapanos* in *United States v. Johnson*, in which a group of Massachusetts cranberry farmers had released pollutants into three wetlands that connected hydrologically to the Weweantic River via tributaries. Unlike previous circuit courts, the First Circuit determined that federal jurisdiction under the CWA could be established under either Justice Kennedy's significant nexus test or the plurality's surface connection test.

After an in-depth analysis of *Marks*, the First Circuit adopted the either/or test suggested by Justice Stevens. Based on this analysis, the First Circuit determined that the narrowest ground is difficult to apply as it could be the one that is least restrictive of federal authority, as the Seventh Circuit concluded, the one that is most restrictive of federal authority, or the "less far-reaching-common ground" that is "more closely tailored to the specific situation" confronting the court. Due to the confusion surrounding the application of *Marks* and the difficulty of applying the test to *Rapanos*, the First Circuit determined that *Marks* should not govern which opinion controls. The First Circuit supported this decision further by highlighting the movement of the Supreme Court away from *Marks*.

Instead of reliance on *Marks*, the First Circuit advocated use of a method it referred to as the "common sense approach to fragmented opinions." This method requires that lower courts find "a legal standard which, when applied, will necessarily produce results with which a majority of the Court from that case would agree." The Second Circuit took a similar approach in *Tyler v. Bethlehem Steel Corp.*, when it held that the court must "find [the]
common ground shared by five or more justices,” not simply the single opinion in which a majority of justices joined.168

Following this method, the First Circuit advocated for Justice Stevens’s either/or test because it would most often result in a majority of Justices concurring in judgment regarding whether federal jurisdiction should be found.169 Specifically, the court found this to be the solution to the situation ignored by *Gerke Excavating*, in which, based on his espoused test, Justice Kennedy would be the lone Justice to conclude that a water with only a small hydrological surface water connection to traditionally navigable waters was not subject to federal regulation.170 The First Circuit held no discernable reservations about combining a dissenting opinion with a concurring opinion in the case of *Rapanos* because the Justices who agreed with the plurality decision and the Justices who joined Justice Stevens’s dissent would concur in judgment in the aforementioned circumstance based on the coinciding tests espoused in the various opinions.171

b. The Fifth and Sixth Circuits

The Fifth Circuit also determined that federal jurisdiction over wetlands should be found if the test of either the plurality or Justice Kennedy is satisfied.172 The case that presented the court with an opportunity to interpret *Rapanos* involved Mr. Lucas, a business owner, who installed county-required septic systems on his land in Mississippi before selling parcels to mobile home owners.173 Mr. Lucas’s land consisted of wetlands that connected to the Bayou Costapia, the Tchoutacabouffa River, and eventually the Gulf of Mexico.174 The Corps issued cease and desist orders to Mr. Lucas because it was concerned about the installation of septic systems on

169. *Johnson*, 467 F.3d at 64.
170. *Id.*
171. *Id.* at 65. Specifically, the First Circuit contrasted the situation in *King v. Palmer*, 950 F.2d 771 (D.C. Cir. 1991) (en banc), which discussed the holding of *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air (Delaware II)*, 483 U.S. 711 (1987), with the plurality opinion in *Rapanos*. See *Johnson*, 467 F.3d at 65. In *Delaware Valley*, the alternative tests developed by the dissenting Justices to resolve the issue at hand would be difficult to combine to form an obvious five-Justice majority. On the other hand, it is easy to see how the plurality’s surface water connection test and the dissent’s Corps deference approach in *Rapanos* could easily combine to form an eight-Justice majority. See *id.* (citing *King*, 950 F.2d 771).
172. See *United States v. Lucas*, 516 F.3d 316, 325 n.8 (5th Cir. 2008).
173. *Id.* at 322.
174. *Id.* at 324-35.
wetlands. Although the Fifth Circuit did not expressly declare that it would follow the rationale of the First Circuit, the court found that jury instructions containing elements of both the plurality and significant nexus test were not in error.

Most recently, in *United States v. Cundiff*, the Court of Appeals for the Sixth Circuit found that reconciliation between *Rapanos* and *Marks* was impossible but also unnecessary on the specific facts of the case. "Here," the court held, "jurisdiction is proper under both Justice Kennedy's and the plurality's tests (and thus also the dissent's)."

c. A district court decision

The District Court of Connecticut delivered its interpretation of *Rapanos* before the Second Circuit Court of Appeals had occasion to address the issue. In *Simsbury-Avon Preservation Society, LLC v. Metacon Gun Club, Inc.*, the defendant was accused of discharging pollutants into navigable waters because its outdoor gun range was surrounded by wetlands and a vernal pool that connected to Horseshoe Cove and ultimately to the Farmington River. Without much discussion, the court deferred to the "First Circuit's common-sense analysis" by finding federal jurisdiction if either the plurality test or Justice Kennedy's test is satisfied.

IV. The Corps and the EPA Join the Debate

A. Enter the Wizard: The EPA and the Corps Release Their Joint Guidance

In their respective *Rapanos* opinions, Justice Kennedy, Justice Breyer, and Chief Justice Roberts each specifically requested that the Corps and EPA issue a ruling regarding CWA jurisdiction over

175. Id. at 322.

176. Id. at 325 n.8. The jury was instructed to find that the wetlands in question were waters of the United States if they contained a significant nexus with adjacent navigable waters such that the wetlands had a notable effect on the "chemical, physical, and biological integrity of" the navigable waters. Id. at 323-24. Further, the jury was allowed to take into consideration the "flow rate of surface water between the wetlands" and the navigable waters. Id. at 324.

177. United States v. Cundiff, 555 F.3d 200, 210 (6th Cir. 2009).


179. Id. at 221, 223.

180. Id. at 226.
adjacent wetlands.\textsuperscript{181} The circuit split following \textit{Rapanos} lent support to the request of those three Justices.\textsuperscript{182} Additional pressure for a ruling came with the adoption of Justice Kennedy's significant nexus test by numerous jurisdictions, which will likely lead to courts expending a considerable amount of labor on the case-by-case inquiry.\textsuperscript{183}

On June 5, 2007, the EPA and the Corps released their joint interpretation of federal jurisdiction over wetlands adjacent to navigable waters.\textsuperscript{184} Although this interpretation is formal guidance, it is not legally binding.\textsuperscript{185} The EPA and the Corps adopted the suggestion of Justice Stevens's dissent, providing for jurisdiction if either the significant nexus test or the plurality test is satisfied.\textsuperscript{186} Environmentalists have responded positively to this guidance, as it allows for the establishment of jurisdiction over wetlands that are not directly connected to traditionally navigable waters, based on a significant nexus to surrounding wetlands collectively.\textsuperscript{187} However, environmentalists and industrial advocates alike find fault with the vagueness of the significant nexus test and the complications of administering it.\textsuperscript{188} Acknowledging that this guidance has not answered all questions remaining about jurisdiction under the CWA, the EPA and the Corps stated their intent to use rulemaking and policy practices to resolve continuing jurisdictional issues.\textsuperscript{189}

After receiving 66,047 public comments regarding the guidance, the EPA and the Corps released a revised guidance on De-

\begin{itemize}
\item \textsuperscript{182} MELTZ & COPELAND, supra note 181, at 9.
\item \textsuperscript{183} Id.
\item \textsuperscript{185} \textit{EPA & CORPS GUIDANCE 2007}, supra note 184 at 4, n.17 (2007) (The guideline is not "a regulation itself . . . [and] does not impose legally binding requirements on EPA, the Corps, or the regulated community, and may not apply to a particular situation. . . . Any decisions regarding a particular water will be based on the applicable statutes, regulations, and case law."); MELTZ & COPELAND, supra note 181, at 10.
\item \textsuperscript{186} \textit{EPA & CORPS GUIDANCE 2007}, supra note 184, at 1; Murphy & Johnson, supra note 35, at 445.
\item \textsuperscript{187} MELTZ & COPELAND, supra note 181, at 12-13.
\item \textsuperscript{188} Id. at 12.
\item \textsuperscript{189} Id. at 13 (citing \textit{EPA & CORPS GUIDANCE 2007}, supra note 184, at 1).
\end{itemize}
The revised guidelines clarify certain terms within the 2007 guidance, such as “tributary.” However, the EPA and the Corps did not move away from the either/or test as advocated in 2007. Specifically, both the 2007 guidance and the 2008 guidance assert that the agencies will exercise jurisdiction over wetlands with a continuous surface water connection to traditionally navigable waters as well as those that have a significant nexus to traditionally navigable waters. Though not binding, these guidance documents may be quite influential due to the deference and respect traditionally given to such agency interpretations.

B. Deference to Government Agencies

The agency deference approach, commonly referred to as Chevron deference, is the standard of review commonly used when the statutory interpretation of governmental agencies is challenged. This standard is derived from *Chevron v. Natural Resources Defense Council*, in which the Supreme Court addressed the decision of the EPA to permit states to group together certain pollution-emitting devices under a provision of the Clean Air Act.

The decision of the Court centered on whether the EPA’s construction of the term “stationary source” within the Clean Air Act, which was not clearly defined by Congress, was reasonable. The Supreme Court stated that two questions must be answered when

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191. EPA & CORPS GUIDANCE 2008, supra note 190, at 1 n.1.

192. Id. at 5, 7; EPA & CORPS GUIDANCE 2007, supra note 184, at 6-7.


195. Chevron, 467 U.S. at 840.

196. Id. at 840-41.
reviewing “an agency’s construction of the statute which it administers.”197 First, a court must determine if Congress has already specifically addressed the issue. If Congress has clearly expressed its intent, the court and the agency must give effect to the intent of Congress.198 If Congress’s intent is unclear, the court must then determine “whether the agency’s answer is based on a permissible construction of the statute.”199 If an agency’s interpretation is “arbitrary, capricious, or manifestly contrary to the statute,” it is not a permissible construction.200 However, to be a valid construction, the agency’s construction need not be “the only” possible construction.201

Furthermore, an agency’s construction of a statute that it has been entrusted to enforce has been given considerable weight by the courts.202 Thus, even if an agency’s interpretation is not afforded a high standard of deference under *Chevron*, the guidelines established by an agency should still be viewed by courts as considerably persuasive.203 The notion that agency interpretations have persuasive force, though not necessarily the power to bind, was established in *Skidmore v. Swift and Co.*, in which the Supreme Court declared in 1944,

> [w]e consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with

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197. *Id.* at 842.
198. *Id.* at 842-43.
199. *Id.* at 843.
200. *Id.* at 844.
201. *Id.* at 843 n.11 (citing FEC v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 39 (1981); Zenith Radio Corp. v. United States, 437 U.S. 443, 450 (1978)).
203. *See* *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); Nat’l Distrib. Co. v. U.S. Treasury Dep’t, 626 F.2d 997, 1019 (D.C. Cir. 1980) (“‘When an agency decision is ‘interpretative’ it is not binding on the courts in the same sense that ‘legislative’ rulemakings are. Agency interpretations are, of course,” to be considered when examining legislative intent.”).
earlier and later pronouncements, and all those factors which
give it power to persuade, if lacking power to control.\textsuperscript{204}

More recently, the Supreme Court affirmed that agency interpret-
tations are entitled to respect under \textit{Skidmore} even if they do not
qualify for \textit{Chevron} deference.\textsuperscript{205} Therefore, courts have tradition-
ally given great consideration to agencies’ interpretations of the
statutes that they must enforce.

\textbf{V. Courts Should Find Federal Jurisdiction over
Waters if the “Navigable Waters” Test of Either the
Plurality Opinion or Justice Kennedy’s Concurrence
Is Satisfied}

The definition of navigable waters under the CWA has been a
continual source of disagreement among judges, environmentalists,
industries, and the governmental bodies responsible for administ-
ring the Act. The plurality decision in \textit{Rapanos} has done little to
resolve the issue, as shown by the clear circuit split in which no
circuit relied on the plurality opinion. However, this Note suggests
that, in fact, \textit{Rapanos} provides a workable definition of navigable
waters if the suggestion of Justice Stevens is followed. The ap-
proach of finding jurisdiction if the test of either the plurality or
Justice Kennedy is satisfied is the “common sense approach.” Use
of the “common sense approach” to plurality-opinion interpreta-
tion is justified because the Supreme Court is moving away from
\textit{Marks}. Additionally, by following this test, the lower courts would
be showing the appropriate level of deference owed to the EPA and
the Corps.

\textbf{A. Marks Should Not Apply to Rapanos}

The only test articulated by the Supreme Court that is specifi-
cally intended for lower courts to use when interpreting plurality
decisions is the \textit{Marks} test.\textsuperscript{206} The \textit{Marks} test requires that “[w]hen
a fragmented Court decides a case and no single rationale explain-
ing the result enjoys the assent of five Justices, the holding of the

\begin{itemize}
\item \textsuperscript{204} \textit{Skidmore}, 323 U.S. at 140.
\item \textsuperscript{205} See \textit{United States v. Mead Corp.}, 533 U.S. 218, 227-28 (2001).
\item \textsuperscript{206} \textit{Marks v. United States}, 430 U.S. 188 (1977); \textit{see supra} note 128 and accom-
panying text.
\end{itemize}
court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."207

Although the Marks test is the Supreme Court’s only formal guidance for interpreting plurality decisions, the Court has acknowledged the limitations inherent in its application. Specifically, in Nichols v. United States, the Court observed that “[t]his test is more easily stated than applied” and that the test should not be pursued to its logical extreme “when it has so obviously baffled and divided the lower courts that have considered it.”208 Additionally, the Supreme Court has declined to apply the test in all situations.209

One reason for the troublesome application is that jurisdictions do not agree on the definition of the “narrowest ground.” This disagreement is exemplified by the courts that have interpreted Rapapnos. For example, according to the Seventh Circuit, the narrowest ground could be the rationale that restricts federal jurisdiction the least.210 However, as the First Circuit noted in Johnson, it is unlikely that the Supreme Court intended for this interpretation of Marks because it does not address situations in which the government is neither plaintiff nor defendant.211 Similarly, the First Circuit suggested that the narrowest ground could be the one that restricts federal jurisdiction the most.212 Alternatively, the First Circuit, relying on the Eleventh Circuit, concluded that the narrowest ground could be considered the rationale that is “the less far-reaching-common ground,” the one that is “more closely tailored to the specific situation the Court confronted.”213 The various interpretations of the term “narrowest ground” stand in direct opposition to one another, as the narrowest ground may be both the most

207. Id. at 193 (plurality opinion) (internal quotation marks omitted) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976)).
210. See Johnson, 467 F.3d at 63 (finding that the narrowest ground could be the opinion that restricts federal jurisdiction the least based on the cases involved directly with Marks); United States v. Gerke Excavating, Inc., 464 F.3d 723, 725 (7th Cir. 2006) (“[S]o as a practical matter the Kennedy concurrence is the least common denominator (always, when his view favors federal authority).”).
211. Johnson, 467 F.3d at 63.
212. Id.
213. Id. (internal quotation marks omitted) (quoting Johnson v. Bd. of Regents of the Univ. of Ga., 263 F.3d 1234, 1247 (11th Cir. 2001)). This interpretation is consistent with the results in Memoirs v. Attorney General of Massachusetts, 383 U.S. 413 (1966), and Furman v. Georgia, 408 U.S. 238 (1976). See Johnson, 467 F.3d at 63; see also supra Part III.B.2.a.
restrictive or least restrictive of federal jurisdiction. Therefore, the *Marks* test provides little real guidance to courts faced with the interpretation of a plurality opinion that involves federal jurisdiction, as found in *United States v. Rapanos*.

An additional factor rendering *Marks* difficult to apply to every plurality opinion, and in particular to *Rapanos*, is that *Marks* is workable “only when one opinion is a logical subset of other, broader opinions.” Because application of the *Marks* test is practical only when opinions fit together as subsets of one another, much like Russian dolls, the *Marks* test will not yield an intelligible result when applied to *Rapanos*. The cases from which the *Marks* test was derived—*Gregg* and *Furman*—support this conclusion.

In *Gregg*, the Supreme Court determined that the correct holding and narrowest ground in *Furman*, a previously decided plurality decision, was that the death penalty was not unconstitutional per se, but was unconstitutional as applied. Two Justices who comprised the plurality in *Furman* concluded that the death penalty was unconstitutional in all cases, while three Justices held that the death penalty was unconstitutional as applied. The two opinions comprising the plurality decision were, therefore, logical subsets of each other from which a narrowest ground could be derived. All five Justices held that the death penalty was unconstitutional, disagreeing only on *when* the death penalty would be unconstitutional.

The plurality decision in *Rapanos* is strikingly different from the plurality decision in *Furman*. The factual situations in which Justice Kennedy’s significant nexus test would restrict federal jurisdiction are not logical subsets of situations in which the plurality’s surface water connection test or Justice Stevens’s deference test would restrict jurisdiction. To illustrate, the plurality would find jurisdiction only when a small surface water connection exists be-

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215. *Johnson*, 467 F.3d at 63 (internal quotation marks omitted) (quoting *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc)). The Court clarified by stating that the “approach makes the most sense when two opinions reach the same result in a given case, but one opinion reaches that result for less sweeping reasons than the other.” *Id.* at 64.
218. *Id.* at 169.
219. *Johnson*, 467 F.3d at 63.
220. See *id.*; see also *United States v. Gerke Excavating*, Inc., 464 F.3d 723, 724-25 (7th Cir. 2006).
between a wetland and a stream and would require that a body of water be "continuously present" in order to constitute a navigable water. But, Justice Kennedy's test explicitly includes intermittent bodies of water and calls for a significant nexus between a wetland and a traditionally navigable water such that the wetland would have a substantial effect on the biological health of the other water. Finally, Justice Stevens's dissenting opinion simply requires deference to the judgment of the agencies. The tests of Justice Stevens, Justice Kennedy, and the plurality cannot be said to be logical subsets of one another; rather, they are entirely different tests that do not interrelate.

Furthermore, though the *Marks* test has not been completely abandoned, a new guideline for the interpretation of plurality opinions appears to be emerging in the Supreme Court. This new approach entails the examination by lower courts of all opinions in a fragmented plurality decision, including concurring and dissenting opinions, in order to determine what principles a majority of Justices have supported. In *Latin American Citizens v. Perry*, for example, the Supreme Court was faced with interpreting the plurality opinion of *Vieth v. Jubelirer*. Instead of applying the *Marks* test, the Court determined that the agreement between one concurring Justice and four dissenting Justices established a legal proposition with majority support. Therefore, *Marks* is no longer the sole test by which lower courts may analyze and apply plurality opinions.

Continued adherence to *Marks* in cases like *Rapanos*, where the opinions are not logical subsets of one another, is incongruent with the approach of the Supreme Court. Instead, the current

222. *Id.* at 769-70, 780 (Kennedy, J., concurring).
223. *Id.* at 792 (Stevens, J., dissenting).
224. The Supreme Court applied *Marks* in *O'Dell v. Netherland*, 521 U.S. 151 (1997). However, the narrowest ground in *O'Dell* was easily discernable, perhaps implying that the Supreme Court would call for selective application of *Marks*. Hochschild, supra note 135, at 281-82.
225. *Johnson*, 467 F.3d at 65.
227. See *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring); *id.* at 317 (Stevens, J., dissenting); *id.* at 343 (Souter, J., dissenting); *id.* at 355 (Breyer, J., dissenting).
228. See *Perry*, 548 U.S. at 414.
229. Thus, strict adherence to the *Marks* test, as the Court in *Robison* advocated, is not the correct manner by which to analyze the plurality opinion in *Rapanos*. See *Marks v. United States*, 430 U.S. 188 (1977); see *supra* Part III.A.2; infra note 233.
unofficial approach of the Supreme Court closely resembles the approach taken by Justice Stevens in *Rapanos* and the "common sense approach" advocated by the First Circuit in *Johnson*. By following Justice Stevens's suggestion to look to concurring and dissenting opinions to determine the principles and outcomes with which a majority of the court would agree, lower courts would be better able to correctly resolve the issues before them.

B. "The Common Sense Approach to Fragmented Opinions" Should Be Applied to *Rapanos*

As an alternative to the *Marks* test, the First Circuit Court of Appeals in *Johnson* suggested following the "common sense approach to fragmented opinions" adopted by at least two other circuit courts of appeal. This method requires locating the common ground shared by at least five Justices in a plurality decision and deriving a legal standard that, when applied by lower courts, would produce results with which a majority of Justices would agree.

Application of this common sense approach to the interpretation of plurality decisions would require lower courts to follow Justice Stevens's suggestion to allocate jurisdiction if the test of either Justice Kennedy or the plurality is satisfied. When jurisdiction is restricted or supported under the either/or test, a majority of the Supreme Court Justices would support the outcome, though their tests differ. Use of the either/or test avoids the peculiar situation in which, if Justice Kennedy's test alone controls, federal jurisdiction would not be supported even though an eight-Justice majority would find federal jurisdiction. Instead, assuming the Justices would adhere to their espoused tests, a majority of the Justices who decided *Rapanos* would support the decision regarding jurisdiction.

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230. *Johnson*, 467 F.3d at 65 (citing United States v. Williams, 435 F.3d 1148, 1157 (9th Cir. 2006); Tyler v. Bethlehem Steel Corp., 958 F.2d 1176, 1182 (2d Cir. 1992)).

231. Id. at 64-65; see also *Williams*, 435 F.3d at 1157 ("We need not find a legal opinion which a majority joined, but merely a legal standard which, when applied, will necessarily produce results with which a majority of the Court from that case would agree." (internal quotation marks omitted)); *Tyler*, 958 F.2d at 1182 ("In essence, what we must do is find common ground shared by five or more justices."); see also supra notes 166-168 and accompanying text.

232. See supra Part III.B.2.a.

233. Notably, this approach would require combining a concurring and dissenting opinion. The Eleventh Circuit in *Robison* took issue with the First Circuit looking to dissenting opinions to determine the appropriate test when faced with plurality decisions. United States v. Robison, 505 F.3d 1208, 1221 (11th Cir. 2007). *Robison* relied on *King v. Palmer*, 950 F.2d 771 (D.C. Cir. 1991) (en banc), to support its contention.
C. The EPA and the Corps Would Find Jurisdiction Under the Either/Or Test

Although the 2007 and 2008 guidelines issued by the EPA and the Corps are not legally binding on the courts,\(^\text{234}\) they are a noteworthy attempt by the agencies to tackle the complex issues affecting the administration of the CWA following *Rapanos*. Given that the EPA and the Corps are the governmental agencies responsible for administering the CWA, lower courts should show the same deference to their interpretation\(^\text{235}\) that the Supreme Court showed the Corps's construction of the statutory term in the first case to address the issue, *Riverside Bayview Homes*.\(^\text{236}\)

Because the guidelines are not official rulemakings, a high degree of deference is not likely to be mandatory. However, the interpretation of the EPA and Corps should be viewed as persuasive that dissenting opinions may not be combined under *Marks* to find the narrowest grounds. *Robison*, 505 F.3d at 1221. However, *Robison* advocated for a strict use of the *Marks* test and did not address the First Circuit's common sense approach. *Id.* ("We simply cannot avoid the command of *Marks*."). Because the *Marks* test should not be applied to *Rapanos*, the concerns of the Eleventh Circuit are irrelevant.

However, even if the test advocated in *Marks* was applicable to *Rapanos*, the dissenting opinion should be considered. In fact, the Eleventh Circuit's unwillingness to consider dissenting opinions is unreasonable. *King v. Palmer*, the case on which the Eleventh Circuit relies, analyzed the plurality opinion in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air (Delaware II)*, 483 U.S. 711 (1987); see *King*, 950 F.2d at 776-77; see also *Johnson*, 467 F.3d at 65 (citing *Delaware II*, 483 U.S. 711). The judges in *King* did not examine points of commonality among all of the opinions because the court relied on a literal reading of *Marks* and the fact that *Marks* had not yet been applied explicitly to situations in which dissenting and concurring votes could be combined. *King*, 950 F.2d at 784.

An alternative interpretation of *Delaware II* can be found in *Student Public Interest Research Group of New Jersey, Inc. v. AT&T Bell Laboratories*, 842 F.2d 1436, 1451 (3d Cir. 1998), in which the Third Circuit offered its interpretation of the guiding rule of law derived from *Delaware II*’s plurality decision. The Third Circuit utilized the *Marks* test but looked to the dissenting opinions as well. *Id.* ("Because the four dissenters would allow contingency multipliers in all cases in which Justice O'Connor [the concurring Justice] would allow them, her [concurring] position commands a majority of the court.").

\(^{234}\) See Nat'l Distrib. Co., Inc. v. U.S. Treasury Dep't, 626 F.2d 997, 1091 (D.C. Cir. 1980) (noting that agency guidelines are "not binding on the courts in the same sense that 'legislative' rulemakings are"); Kroll v. Cities Serv. Oil Co., 352 F. Supp. 357, 363 (N.D. Ill. 1972) (stating that "an interpretive rule is not binding upon the courts"); see also 73 C.J.S. Public Administrative Law and Procedure § 212 (2008); EPA & CORPS GUIDANCE 2007, supra note 184, at 4 n.16; MELTZ & COPELAND, supra note 181, at 10 ("The [EPA and Corps of Engineers'] guidance does not impose legally binding requirements on the EPA or the Corps . . . .")

\(^{235}\) 73 C.J.S., supra note 234, § 212.

\(^{236}\) See supra notes 43-48 and accompanying text.
by the courts.237 The guidelines were given thorough consideration, evidenced by the amount of time devoted to their development as well as the legal and scientific support cited in the document.238 Additionally, the 2007 and 2008 guidelines tackling this particular issue are internally consistent with one another, a key factor in determining the amount of deference a guideline should be given.239 Therefore, courts should consider these guidelines persuasive.240

Moreover, it is possible that these guidelines may be afforded *Chevron* deference.241 As the term "navigable waters" in the CWA is ambiguous in meaning, the construction assigned to the term by the EPA and the Corps should be given significant weight.242 The guidelines propose a construction of that statute that is not only reasonable in light of scientific data, but it is a permissible construction of the statute. Notably, the approach of the agencies mirrors the approach of the Supreme Court in *Rapanos*. In fact, it was suggested by Justice Stevens243 and is a combination of the tests stated in Justice Kennedy's concurrence and the plurality opinion.244 *Chevron* does not require that the agency's construction be the only possible reading of the statute. Rather, the interpretation must be a permissible construction that is not arbitrary, capricious, or con-

237. See Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) ("We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."); Nat'l Distrib. Co., Inc., 626 F.2d at 1019 ("Agency interpretations are, of course," to be considered when examining legislative intent.).

238. Compare EPA & CORPS GUIDANCE 2007, supra note 184 (adopting Justice Stevens's dissent that provides for jurisdiction if either the significant nexus test or the plurality test are satisfied), with EPA & CORPS GUIDANCE 2008, supra note 190 (revising certain terms within the 2007 guidance, such as "tributary," after receiving 66,047 public comments). See generally Skidmore, 323 U.S. 134 (holding that evidence of thorough consideration is an important factor when weighing how influential agency interpretations should be).


240. See Skidmore, 323 U.S. at 140.


242. See, e.g., Thorpe v. Hous. Auth. of City of Durham, 393 U.S. 268, 275-76 (1969); McClanahan v. Mulcrone, 636 F.2d 1190, 1191 (10th Cir. 1980); Dawson v. Andrus, 612 F.2d 1280, 1282-83 (10th Cir. 1980); Chrysler Corp. v. Tofany, 419 F.2d 499, 511-12 (2d Cir. 1969); 73 C.J.S., supra note 234, § 212.

243. See supra Part II.C.

244. See supra Parts II.A & B.
trary to the statute.245 Based on the legal and scientific support for the agency’s interpretation, the guidelines are clearly reasonable.

Furthermore, in their respective Rapanos opinions, Chief Justice Roberts and Justice Kennedy chastised the inaction of the EPA and the Corps following the decision in SWANCC,246 and suggested to the agencies that they clarify which wetlands are, in fact, navigable waters under the CWA.247 Moreover, in his dissenting opinion, Justice Breyer stated:

If one thing is clear, it is that Congress intended the Army Corps of Engineers to make the complex technical judgments that lie at the heart of the present cases . . . . In the absence of updated regulations, courts will have to make ad hoc determinations that run the risk of transforming scientific questions into matters of law. That is not the system Congress intended. Hence I believe that today’s opinions, taken together, call for the Army Corps of Engineers to write new regulations, and speedily so.248

These three opinions, read collectively, show the need for agency action in order to clarify the post-Rapanos confusion as well as demonstrate that at least a portion of the Supreme Court outwardly accepts that the EPA and the Corps are the authorities on this particular matter.

Therefore, when interpreting cases regarding the jurisdiction of the federal government under the CWA, and in particular cases regarding the definition of “navigable waters,” it would be reasonable for lower courts to rely on Justice Stevens’s either/or test because the administrative agencies of the CWA support use of this test, which reasonably clarifies an otherwise ambiguous statutory provision. Moreover, the EPA and Corps are the correct bodies to determine which waters fall within the definition of “navigable waters.”

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245. See supra notes 202-205 and accompanying text.
247. Rapanos v. United States, 547 U.S. 715, 758 (2006) (Roberts, C.J., concurring) (chastising the Corps for failing to refine a rulemaking regarding the scope of federal jurisdiction under the CWA following SWANCC and suggesting that the confusion resulting from Rapanos could be avoided if the agencies enacted some form of rulemaking); id. at 780-82 (Kennedy, J., concurring) (acknowledging the ability of the Corps to define which bodies are navigable waters); MELTZ & COPLEND, supra note 181, at 9.
CONCLUSION

In *Rapanos*, three different tests were advocated to establish whether the federal government would have jurisdiction over a body of water: (1) Justice Scalia’s surface water test;249 (2) Justice Kennedy’s significant nexus test;250 and (3) Justice Stevens’s deference test.251 While three circuits have adopted Justice Kennedy’s significant nexus test, no court has yet applied Justice Scalia’s test. However, three circuit courts and one district court have chosen to follow Justice Stevens’s suggestion that jurisdiction should be found if the test of either Justice Scalia or Justice Kennedy is satisfied.252

It is the last category of courts, which have applied an either/or test, that have ascertained the correct test in the wake of *Rapanos*. Lower courts should find federal jurisdiction over a body of water if the “navigable waters” test of either Justice Kennedy or the plurality is satisfied because the correct manner in which to analyze *Rapanos* is the “common sense approach” advocated by the First Circuit in *Johnson*.253 This approach achieves a better result than *Marks* and is similar to the newly emerging method supported by the Supreme Court. Moreover, adherence to this policy by lower courts would show the proper deference owed to the EPA and the Corps, the governmental bodies responsible for administration of the CWA, which support use of this test. Although Justice Kennedy’s test is not a yellow brick road that will lead directly to an Oz with all of the answers, it is the most reasonable and well-supported pathway in the *Rapanos* controversy.

Kristen M. Sopet

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249. Id. at 742 (plurality opinion).
250. Id. at 759 (Kennedy, J., concurring).
251. Id. at 788 (Stevens, J., dissenting).
253. *Johnson*, 467 F.3d 56.