**The Proposed “Waters of the United States” Rule**

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The definition of "Waters of the United States" ("WOTUS") proposed by the U.S. Corps of Engineers and the U.S. Environmental Protection Agency (Federal Register/Vol. 79, No. 76 Monday, April 21, 2014, 22,188-22,275) (the "Rule") should be adopted although it is not as inclusive of waters to be protected as it should be.[[2]](#footnote-2) The Rule is utterly consistent with the Commerce Clause, the intent of Congress in the Clean Water Act ("CWA"), the caselaw on what waters are to be protected from pollution and destruction, and the science regarding the importance of tributaries and adjacent wetlands to river systems. Certainly, the hysterical and apparently dishonest opposition to the scope of the Rule should not be allowed to affect the scope of the waters that should be protected under the CWA.

**I. The Hyperbole, Hysteria, and Fear Mongering against the Proposed Rule**

A study of the opposition to the proposed Rule would reveal much about the current heights of paranoia of many Americans as well as the depths of dishonesty or willful ignorance to which debate on policy issues has fallen. It is sufficient here to present an example of opposition to the Rule that appeared in an article signed by persons who might have been thought to be responsible spokesmen, a United States senator, albeit Rand Paul, and a state attorney general. In a recent opinion piece that appeared in The Hill (3/6/2015), "*EPA Water Rule is a Blow to American's Private Property Rights*," Senator Paul and Oklahoma Attorney General Scott Pruitt attacked the Rule designed to protect streams, wetlands, and other waterways, including waters that feed the drinking water supplies of one in three Americans. Senator Paul and Attorney General Pruitt state:

“President Obama’s Environmental Protection Agency currently stands poised to strike the greatest blow to private property rights the modern era has seen, through a proposed rule that radically expands EPA jurisdiction by placing virtually all land and water under the heavy regulatory hand of the federal government.

For years, the EPA’s regulatory jurisdiction has been limited to the “navigable waters” of the United States, a term that has always been understood to include only large bodies of water capable of serving as pathways for interstate commerce. Regulation of all other waters was, rightly, left to the states.

Unhappy with the limited scope of the jurisdiction given to it by Congress, the EPA and Army Corps of Engineers have simply redefined the meaning of “navigable waters” in an extraordinary way, to include virtually every body of water in the nation right down to the smallest of streams, farm ponds and ditches.

The result of this startling grab is that virtually every property owner in the nation will now be subject to the unpredictable, unsound and often Byzantine regulatory regimes of the EPA. Worse yet, the states are cut out of the loop altogether, leaving landowners to lobby distant federal bureaucrats when the system wrongs them — and wrong them it will.”

One so gullible as to believe this diatribe might think that the CWA now protects only water bodies large enough to carry barges, that the Rule proposal was the unsolicited act of tyrants intent on destroying basic liberties, and that no one will be able to change the water in her or his bird bath without a permit issued from Washington by black booted goose-stepping EPA bureaucrats.

The truth is much less dramatic. At the invitation, if not demand, of Chief Justice Roberts and other Justices, the Corps of Engineers and U.S. EPA have fashioned a rule that clarifies the scope of the CWA as it was left by a series of divided and vague Supreme Court decisions. If the Rule is adopted in its current form and properly applied, the law as to the scope of the CWA will be considerably contracted from what it was before the Supreme Court's decision in Solid *Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) (“*SWANC*”). Indeed, the scope of the law may be more limited than what it is under many interpretations of the current law given the Supreme Court's fragmented decision in *Rapanos v. United States*, 547 U.S. 715 (2006).

**II. The State of the Current Law and the need for the Rule**

A review of the CWA and the caselaw makes clear that the CWA now, without the Rule, is to be interpreted broadly to protect far many more waters than those that are traditionally navigable. Further, the need for administrative rules to clarify the meaning of "waters of the United States" has been broadly recognized by the courts.

**A. Statutory Language**

It should be admitted by all sides of the current debate that Congress was not at its most precise when it drafted the CWA language regarding what waters should be protected. Section 301 of the Act, 33 U.S.C. §1311, prohibits "the discharge of any pollutant" from a point source without a permit. Section 502(12) of the Act, 33 U.S.C. §1362 (12) defines "discharge of a pollutant" as the addition of a pollutant to "to navigable waters from any point source."[[3]](#footnote-3) Any idea, though, that Congress meant to limit the scope of the CWA to traditionally navigable waters is countered by the definition in Section 502(7) that the "term 'navigable waters' means the waters of the United States, including the territorial seas." No definition is provided in the Act of the term "waters of the United States" whatsoever. The term might be construed by a competent English speaker to include any water body whatsoever although, as we shall see, Justice Scalia finds more clarity here than is immediately apparent.

For background, it should be mentioned that the permits that can be obtained to discharge legally are Section 402 permits, National Pollutant Discharge Elimination System ("NPDES") permits, and Section 404 permits for "fills." Section 402, 33 USC §1342, allows a permit to pollute to be issued by U.S. EPA, or now generally a state authority that has received delegated authority such as the Illinois Environmental Protection Agency. Section 404 of the CWA, 33 USC §1344, authorizes the Corps of Engineers to issue permits for the discharge of "dredged or fill material" into the navigable waters. The distinction roughly is that discharging fill material replaces a portion of the water with dry land or changes the bottom elevation while discharging pollutants merely changes the chemical composition of the water. 33 CFR 323.2.

As will be seen bellow, most of the controversies have arisen in relation to activities to "fill" wetlands or other waters rather than to pollute them. The "distant bureaucrats" that the senator and the Oklahoma attorney general mention, then, will normally be officials of the Corps, which has district offices covering the various portions of Illinois in Chicago, Rock Island, Louisville Kentucky and St. Louis, Missouri.[[4]](#footnote-4)

**B. The Supreme Court's Decisions.**

***Riverside Bayview Homes***

Study of a unanimous 30 year-old Supreme Court decision that has never been questioned, is sufficient to refute most of the accusations that the proposed Rule constitutes a vast expansion of the CWA or a tyrannical assault on property rights. *United States v. Riverside Bayview Homes, Inc.,* 474 U.S. 121 (1985) answered in the affirmative the question “whether the Clean Water Act … together with certain regulations promulgated under its authority by the Corps of Engineers, authorizes the Corps to require landowners to obtain permits from the Corps before discharging material into wetlands adjacent to navigable bodies of water and their tributaries.” 474 U.S. at 123.

First, though, the Court shattered the “property rights” contention as a matter of law if not as a religious principle. The Sixth Circuit had held that the scope of the Clean Water Act should be interpreted narrowly for fear of allowing a taking without just compensation. The Court pointed out, however, that the requirement that one get a permit before destroying wetlands did not work any taking. Obviously, the very existence of a permit scheme meant that it was possible to get a permit and, thus, there might not be a “take” at all. 474 U.S. at 127. Only if the denial of the permit of a permit prevented any “economically viable” use of the land would there be a taking and, in that case, compensation could be sought from the treasury under the Tucker Act. 474 U.S. at 128.

The Court in *Riverside Bayview Homes* made clear that it would give considerable deference to the agencies interpretation of the CWA. 474 U.S at 131. Also, the Court made a point that has easily been missed in the fury of debate:

In determining the limits of its power to regulate discharges under the Act, the Corps must necessarily choose some point at which water ends and land begins. Our common experience tells us that this is often no easy task: the transition from water to solid ground is not necessarily or even typically an abrupt one. Rather between open waters and dry land may lie shallows, marshes, mudflats, swamps, bogs – in short a huge array of areas that are not wholly aquatic but nevertheless fall far short of being dry land. Where on this continuum to find the limits of “waters” is far from obvious. 474 U.S. at 132.

Further, the Court in *Riverside Bayview Homes* stated Congress “choose to define the waters covered by the Act broadly” and that the term “navigable” as used in the Act “is of limited import.” 474 U.S. at 133.

The Court in reversing the Sixth Circuit Court of Appeals squarely rejected the argument that the CWA should be construed to cover only traditionally navigable waters and held that activities in a wetland were subject to the Act although the wetland was certainly not navigable and was not even flooded by the adjacent water that was the source of jurisdiction. 474 U.S. at 134. Sounding sort of like the Sierra Club, the Court stated that it was enough that the wetlands at issue drained into the adjacent waters, that the wetlands might serve to filter or purify the water that went into the adjacent water or that the wetlands adjacent to lakes, rivers and streams “may function as integral parts of the aquatic environment” by providing important biological functions such as food chain production, nesting areas or habitat. 474 U.S. at 134-5.

***SWANCC***

Unanimity ended with the 5-4 *SWANCC* decision and the serious confusion began. *SWANCC* can be treated briefly here because, while *SWANCC* is of particular interest in Illinois because it arose outside Elgin, the Supreme Court decision really did not decide a whole lot.[[5]](#footnote-5)

In the course of working on environmental issues in Illinois, I have heard various versions of the real facts and politics that led to *SWANCC*. For purposes of this legal discussion it is sufficient to rely on Chief Justice Rehnquist’s summary of the case:

[The Corps] has interpreted §404(a) to confer federal authority over an abandoned sand and gravel pit in northern Illinois which provides habitat for migratory birds. We are asked to decided whether the provisions of §404(a) may be fairly extended to these waters, and, if so, whether Congress could exercise such authority consistent with the Commerce Clause, U.S. Const. I §8, cl.3. We answer the first question in the negative and therefore do not reach the second. 531 U.S. at 162.

While striking down the migratory bird rule, the *SWANCC* majority offered only a few hints of guidance as to the scope of the “waters of the United States.” The Court did hold that “isolated ponds, some only seasonal, wholly located within [a single state]” do not fall under the definition just because they serve as habitat for migratory birds. 531 U.S. at 171-2. The Court also stated that there would be significant constitutional questions if the WOTUS were held to reach an “abandoned sand and gravel pit” based on its use by migratory birds.

*SWANCC* also stated that waters covered by the CWA had to have some sort of relationship to traditionally navigable waters. The Court reasoned that by using the term "navigable" in the CWA, Congress gave a subtle hint. Using the “term navigable has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which reasonably could be so made.” 531 U.S. at 172.

***Rapanos***

In *Rapanos* there were five separate opinions, three of them lengthy. There was no majority.

Justice Scalia’s opinion written on behalf of four justices shows the “worse case scenario” for water quality and floodplains. It is doubtful that even Senator Paul could say with a straight face that Justice Scalia is a radical environmentalist bent on expanding federal powers. Study of this worse case scenario reveals that Justice Scalia agrees with much of what is in the proposed Rule that has set Senator Paul and others off to find their Minuteman muskets.

According to Justice Scalia, *Rapanos* involved 54 acres of land with sometimes saturated soil conditions near ditches or man-made drains that eventually emptied into traditional navigable waters 11 to 20 miles away. 547 U.S. at 719, 729. After bemoaning at some length the bureaucracy involved in getting a Section 404 permit and the history of the Corps enforcement of the petitioners, Justice Scalia accepts that non-navigable tributaries of traditionally navigable waters are WOTUS. However, based on a distinction between “water” and “waters” drawn from Webster’s New International Dictionary, Justice Scalia concludes that “waters of the United States” includes only “continuously present, fixed bodies of water, as opposed to ordinarily dry channel through which water occasionally or intermittently flows.” 547 U.S. at 732-3. In a footnote, Justice Scalia wrote:

By describing “waters” as “relatively permanent,” we do not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought. We also do not necessarily exclude seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months—such as the 290-day, continuously flowing stream postulated by JUSTICE STEVENS’ dissent, post, at 15. Common sense and common usage distinguish between a wash and seasonal river. (citations omitted)

In holding that the cases should be remanded, Justice Scalia concludes:

[T]he lower courts should determine, in the first instance, whether the ditches or drains near each wetland are “waters” in the ordinary sense of containing a relatively permanent flow; and (if they are) whether the wetlands in question are “adjacent” to these “waters” in the sense of possessing a continuous surface connection that creates the boundary-drawing problem we addressed in Riverside Bayview. 547 U.S. at 732 n.5

Thus, even the most conservative Justices adhere to a definition of WOTUS that allows that all tributaries of navigable waters that are “relatively permanent” and all wetlands that have a “continuous surface connection” to such relatively permanent tributaries are WOTUS.

The Scalia opinion did not command a majority. Justice Kennedy, while concurring in the judgment, wrote:

Consistent with SWANCC and Riverside Bayview and with the need to give the term “navigable” some meaning, the Corps’ jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense. The required nexus must be assessed in terms of the statute’s goals and purposes. Congress enacted the law to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,” 33 U. S. C. §1251(a), and it pursued that objective by restricting dumping and filling in “navigable waters,” §§1311(a), 1362(12). With respect to wetlands, the rationale for Clean Water Act regulation is, as the Corps has recognized, that wetlands can perform critical functions related to the integrity of other waters—functions such as pollutant trapping, flood control, and runoff storage. 33 CFR §320.4(b)(2). Accordingly, wetlands possess the requisite nexus, and thus come within the statutory phrase “navigable waters,” 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.” When, in contrast, wetlands’ effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term “navigable waters.” 547 U.S. at 779-80 (some citations omitted)

Justice Stevens in dissent mentioned the Supreme Court's practice to enter a judgment commanding the lower court to conduct any further proceedings pursuant to a specific mandate. 547 U.S. at 810. That practice, Stevens observed had, on occasion, made it necessary for Justices to join a judgment that did not conform to their own views. Justice Stevens concluded that, although the Justices voting to remand disagreed about the appropriate test to be applied, the four dissenting Justices, with their broader view of the scope of the CWA, would support a finding of jurisdiction under *either* the plurality's *or* Justice Kennedy's test, and that the Corps' jurisdiction should be upheld in all cases in which either test is satisfied. 547 U.S. at 810 n. 14.

Anyone saying that he clearly understands the scope of “waters of the United States” after *Rapanos,* is not to be trusted. [[6]](#footnote-6) The law following *Rapanos* is a mess and sorely in need of regulatory action.[[7]](#footnote-7) Justice Roberts in his concurring opinion made this point in no uncertain terms:

Five years ago, this Court [in SWANCC] rejected the position of the Army Corps of Engineers on the scope of its authority to regulate wetlands under the Clean Water Act. The Corps had taken the view that its authority was essentially limitless; this Court explained that such a boundless view was inconsistent with the limiting terms Congress had used in the Act.

Id., at 167–174. In response to the SWANCC decision, the Corps and the

Environmental Protection Agency (EPA) initiated a rulemaking

to consider “issues associated with the scope of waters that are subject to the Clean Water Act (CWA), in light of the U. S. Supreme Court decision in [SWANCC].” 68 Fed. Reg. 1991 (2003). The “goal of the agencies” was “to develop proposed regulations that will further the public interest by clarifying what waters are subject to CWA jurisdiction and affording full protection to these waters through an appropriate focus of Federal and State resources consistent with the CWA.” Ibid. Agencies delegated rulemaking authority under a statute such as the Clean Water Act are afforded generous leeway by the courts in interpreting the statute they are

entrusted to administer. See Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc., 467 U. S. 837, 842–845 (1984). Given the broad, somewhat ambiguous, but nonetheless clearly limiting terms Congress employed in the Clean Water Act, the Corps and the EPA would have enjoyed plenty of room to operate in developing some notion of an outer bound to the reach of their authority.

The proposed rulemaking went nowhere. Rather than refining its view of its authority in light of our decision in SWANCC, and providing guidance meriting deference under our generous standards, the Corps chose to adhere to its essentially boundless view of the scope of its power. The

upshot today is another defeat for the agency. It is unfortunate that no opinion commands a majority of the Court on precisely how to read Congress’ limits on the reach of the Clean Water Act. Lower courts and regulated entities will now have to feel their way on a case-by-case basis. (547 U.S. at 757-58, some citations omitted)

Basically *Rapanos* left the definition of the WOTUS with 4 justices finding that the CWA covers all waters that are connected to traditionally navigable waters that have water much of the time or most of the time and all wetlands that have a permanent connection to all of those tributaries that have water much or most of the time. Justice Kennedy has proposed a "significant nexus" test that the rest of the Justices found impracticable.[[8]](#footnote-8) The two things on which the whole Court appears to agree are that the CWA covers vast numbers of waters that are not traditionally navigable and that they would defer to the reasoned opinion of the expert agencies, with the Chief Justice criticizing the Corps for failing to adopt regulations already.

**Post-*Rapanos* Lower Court Decisions**

The Seventh Circuit had an immediate opportunity to consider *Rapanos* because its decision in *United States v. Gerke Excavating Inc.*, 412 F.3d 804 (7th Cir 2005) was remanded for further consideration in light of *Rapanos*. The result of this further consideration was a decision that Justice Kennedy's test should control because Justice Kennedy's decision was "the narrowest ground to which a majority of Justices would have assented if forced to choose." *United States v. Gerke Excavating, Inc.*, 464 F.3d 723 (7th Cir. 2006). Other circuits, based in part on Justice Steven's dissent, have held that CWA jurisdiction is present whenever either Justice Kennedy's "nexus" test or Justice Scalia "continuous connection to a semi-permanent water" test is satisfied. *United States v. Donovan*, 661 F.3d 174 (3d Cir. 2011)

While one may criticize the Rule that the Corps and U.S. EPA developed, under these circumstances, one cannot fairly criticize those agencies for undertaking to write rules or justly accuse the agencies of a huge power grab because the Rule extends coverage to many waters that are not traditionally navigable.

**III. The concerns voiced by Agribusiness Interests and other are baseless**

If one listens to the screaming about harm to agriculture and increased bureaucracy, one might think the CWA mainly regulates agriculture and the whole law is administered from the District of Columbia. In fact, the CWA hardly touches agricultural activities.[[9]](#footnote-9) First, there is broad exemption for agriculture from the prohibition against discharging pollutants because the definition of "point source" explicitly states that, "This term does not include agricultural stormwater discharges and return flows from irrigated agriculture." 33 USC §1362(14).[[10]](#footnote-10) Further, there is a very broad exemption from the prohibition against unpermitted fills for "normal farming, silviculture and ranching activities." 33 U.S.C. §1344 (f).

Even as to covered activities, the attacks on the Rule ignore the facts that:

- Numerous general permits allow many discharges and fills to go forward with essentially no regulation as long as the activities stay within the scope of the general permit, 33 CFR 330.1.[[11]](#footnote-11)

- The Section 402 NPDES program has already been delegated to state officials in all but a few states under 40 CFR Part 123, and is almost never run by “distant federal bureaucrats.”

-States can seek delegation of the 404 program under 33 U.S.C. §1344(h), but that few states have ever pursued this option, probably in part because Section 404 is administered by the Corps with numerous local offices.[[12]](#footnote-12)

- The draft Rule contains specific exclusions from the definition of WOTUS for artificially irrigated area, artificial lakes and ponds, artificial reflecting pools and swimming pools, small ornamental waters and water-filled depressions created incidental to construction activities, groundwater, and gullies and non-wetland swales. Draft 40 CFR 230.3(t)(5).

Finally, in terms of scientific support for the Rule, EPA's Office of Research and Development has finalized a report, "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence." The report concludes that the literature strongly supports the conclusion that the incremental contributions of individual streams and wetlands are cumulative across entire watersheds, and their effects on downstream waters should be evaluated within the context of other streams and wetlands in that watershed.[[13]](#footnote-13)

**IV Particular Problems that May be Further Addressed in the Final Rule.**

Leaving aside the extreme rhetoric, there are a number of issues involving the draft Rule. Basically, sections (1)-(4) of the draft Rule lists as WOTUS interstate waters and traditionally navigable waters. To my knowledge, no one has seriously questioned applicability of the CWA to those waters. Controversies have involved:

**Tributaries** - As has been seen, all of the Supreme Court Justices who have looked at the definition of WOTUS have included non-navigable tributaries as part of the definition although Justice Scalia stated that the covered tributaries have to have water most or much of the time. The Rule includes tributaries that have ephemeral, intermittent or perennial flow but only if they have a bed, a bank and an ordinary high water mark. The "upper limit of a tributary is established where the channel begins." 79 F.R. at 22,202. It is true that this definition would include some gulches that are dry much of the year, but, particularly in the west, such tributaries are critical to the health of the waters into which they flow.

**Ditches** - Although a pejorative term, there is nothing about calling a water body a "ditch" that makes it unimportant to water quality. Indeed, stream channelization and work in channelized streams has had severe impacts on water quality and flooding.[[14]](#footnote-14) None of the Supreme Court Justices have stated that "ditches" are not "waters" and lower courts have often found ditches to be waters of the United States. E.g. *Stillwater of Crown Point Homeowner's Assn v. Stiglich,* 999 F.Supp. 2d 1111 (N.D. Ind. 2014)(Smith ditch that flows into Main Beaver Dam Ditch, which is a tributary of Deep River which is a tributary of the Little Calumet River). The draft Rule in proposed 40 CFR 230.3(t)(3) and (4) actually excludes a number of ditches from the definition of WOTUS that should be included.[[15]](#footnote-15)

**Adjacent** - Consistent with *Lakeside Bayview Homes* and all of the opinions in *Rapanos,* the draft Rule includes wetlands that are "adjacent" to traditionally navigable waters and their tributaries. Draft CFR 230.3(s)(6) To be adjacent, the wetland or other water must be bordering, in the floodplain, or connected (surface or subsurface) to a jurisdictional water. Draft 40 CFR 230.3(u).

**Other waters** - Raising great concern in some sectors is the inclusion on the list of WOTUS of "other waters" on a "case-specific basis" that have a "significant nexus" to traditionally navigable and interstate waters. Draft 40 CFR 230.3(s)(6). One who has read *Rapanos*, however, knows that any wrath relating to the inclusion of this category should not be directed at the Corps or U.S. EPA but at Justice Kennedy. Government officials or citizens groups wishing to show that a water falls into this category will generally have to make a specific factual showing of why these waters are important to downstream waters. See, *Precon Dev. Corp. V. U.S. Army Corps*, 984 F. Supp. 2d 538 (E.D. Va. 2013)(wetlands adjacent to "Saint Brides Ditch" and the "2500 Foot Ditch" were waters of U.S. because they had a significant nexus to downstream waters by protecting them from nutrient pollution). The Corps and U.S. EPA should have included in the Rule a number of types of waters that are known to be critical to downstream waters as WOTUS without requiring a case-by-case consideration of them.[[16]](#footnote-16)

**Conclusion**

Adoption of the proposed WOTUS Rule will certainly not end all controversy regarding the scope of the "waters of the United States." The problem is by its nature a difficult matter of line-drawing based on the statutory language and the need to protect environmental systems. However, the Corps and U.S. EPA have done a good job of reconciling the intent of the CWA, the multiple controlling judicial opinions, and the relevant science. Adoption of the draft Rule is far preferable to allowing officials, the courts, regulated parties and the public to continue to lack any basis for determining the scope of the WOTUS other than vague and conflicting court opinions.

1. Thanks to Natalie Laczek, Esq. for help in editing a draft of this presentation. [↑](#footnote-ref-1)
2. Detailed comments on the draft Rules, including explanations as to why the applicable law and science requires that the Rules be strengthened, were filed November 14, 2014, by the Natural Resources Defense Council and other groups. Those comments are available at http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0880-16674. [↑](#footnote-ref-2)
3. And discharges to certain other marine waters not here relevant [↑](#footnote-ref-3)
4. <http://www.usace.army.mil/> [↑](#footnote-ref-4)
5. Following Justice Holmes who wrote that dissents are generally useless and undesirable, *N. Sec. Co. v. United States*, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting), the dissents in *SWANCC* and *Rapanos* will largely be ignored here. [↑](#footnote-ref-5)
6. After *Rapanos* was announced, I was asked by Michigan Public Radio what the decision meant. I had to answer that I had little idea as to what the decision meant except that I knew one thing, that Mr. Rapanos had better try to settle because he would lose under all the opinions. I was not surprised to learn later that Mr. Rapanos had agreed to pay a substantial fine and spend much more than the fine for wetlands mitigation. [http://www2.epa.gov/enforcement/rapanos-clean-water-act-settlement](http://www2.epa.gov/enforcement/rapanos-clean-water-act-settlement" \t "_blank) [↑](#footnote-ref-6)
7. To see the frustration of district court judges asked to make sense of this mess one may read *United States v. Robinson* 521 F. Supp. 2d 1247 (N.D. Ala. 2007) in which the judge reviews the *Rapanos* opinions and asks the district clerk to reassign the case because the judge was "so perplexed by the way the law applicable to this case has developed that it would be inappropriate for me to try it again." [↑](#footnote-ref-7)
8. Justice Scalia described Justice Kennedy's test as "perfectly opaque." 547 U.S. at 756 n. 15. [↑](#footnote-ref-8)
9. It does affect a few farmers who want to make a lot of money by selling their farms to developers, but this is not a point that has been highlighted by the Farm Bureau. [↑](#footnote-ref-9)
10. A dry weather flow of pollution from tile drains full of wet manure or polluted groundwater should not fall within this exemption. [↑](#footnote-ref-10)
11. The present nationwide general permits are listed at http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits/NationwidePermits.aspx. [↑](#footnote-ref-11)
12. Many of my clients would say that Section 404 has been very leniently enforced by the Corps except in cases, like *SWANCC,* where very powerful politicians have urged enforcement. [↑](#footnote-ref-12)
13. http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=296414. [↑](#footnote-ref-13)
14. Walter Dodds and Matt Whiles, Freshwater Ecology, Elsevir Press (2d Ed. 2010) pp. 124-5; Report of the Interagency Floodplain Management Review Committee, Sharing the Challenge, Floodplain Management for the 21st Century, (1994), (aka the Galloway Report) p. 16 available at http://fas.org/irp/agency/dhs/fema/sharing.pdf [↑](#footnote-ref-14)
15. See note 1 above, NDRC comment at 56-60. [↑](#footnote-ref-15)
16. See note 1 above, NRDC comment at 38-54. [↑](#footnote-ref-16)