UNITED STATES V. CUNDIFF: SIXTH CIRCUIT DECISION MAKES *RAPANOS V. UNITED STATES* CONTROVERSY (NAVIGABLE) WATER UNDER A BRIDGE

I. INTRODUCTION

In 1972, the United States Congress enacted the Clean Water Act[1] ("CWA") with the goals of protecting wildlife, fish, and shellfish, guarding the recreational waters, and eradicating pollution discharged into "waters of the United States."[2] Under Section 404 of the CWA, the United States Army Corps of Engineers ("Corps") oversaw the issuance of permits required for anyone wishing to discharge dredged or fill material into "navigable waters."[3] For purposes of the CWA, the term "navigable waters" meant "waters of the United States."[4] Historically, the Corps broadly interpreted the term "waters of the United States" so that CWA jurisdiction included even some wetlands neither navigable nor connected to navigable waters.[5] Furthermore, the Corps's definition of "waters of the United States" included wetlands adjacent to other "navigable waters."[6] In 2006, the United States Supreme Court decision in *Rapanos v. United States*[7] addressed the extent of the Corps's CWA jurisdiction over wetlands neither navigable nor directly connected to "navigable waters."[8] However, the *Rapanos* decision failed to decide conclusively the extent of the Corps's CWA jurisdiction over wetlands, as the case deeply divided the Court, and a majority of the Court failed to support any one opinion.[9] Justice Scalia, joined by Justices Roberts, Thomas, and Alito, wrote for the plurality and established a two-part test to determine whether the CWA provides federal agencies jurisdiction over wetlands

1. Federal Water Pollution and Control Act, 33 U.S.C. §§ 1251-1387 (2006).
2. BRIAN W. BLAESSER & ALAN C. WEINSTEIN, FEDERAL LAND USE LAW & LITIGATION § 10:18 (2009).
3. 33 U.S.C. § 1344(a) (2006).
4. 33 U.S.C. § 1362(7) (2006).
5. DANIEL RIESEL, ENVIRONMENTAL ENFORCEMENT: CIVIL & CRIMINAL § 9.07 (2009).
6. 33 C.F.R. § 328.3(7) (2009).
7. 547 U.S. 715 (2006).
8. United States v. Rapanos (*Rapanos I*), 547 U.S. 715, 729-30 (2006).
9. *See Rapanos I*, 547 U.S. at 715 (demonstrating that four justices joined in the plurality opinion, one justice concurred in the judgment, and four justices dissented); Matthew A. Macdonald, Note, *Rapanos v. United States and Carabell v. United States Army Corps of Engineers*, 31 HARV. ENVTL. L. REV. 321, 324 (2007).

neither navigable nor directly connected to "navigable waters."[10] Justice Kennedy concurred in the judgment but filed a separate opinion that rejected the plurality's two-part test and instead created the significant nexus test.[11] Finally, Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, filed a dissent and suggested that CWA jurisdiction over wetlands would be proper if the wetlands in question met *either* the plurality test *or* Justice Kennedy's significant nexus test.[12] Since *Rapanos,* lower courts have struggled to determine whether to follow the plurality, Justice Kennedy's concurrence, or the dissent when deciding whether the Corps has CWA jurisdiction over particular wetlands as "waters of the United States."[13]

In *United States v. Cundiff*,[14] the United States Court of Appeals for the Sixth Circuit determined that the Corps could regulate certain wetlands under the CWA because those wetlands constituted "waters of the United States."[15] In *Cundiff*, the United States filed an action against Rudy Cundiff and his son Seth Cundiff (the "Cundiffs") after they drained wetlands located on their adjoining properties to make those properties more amenable to farming.[16] The United States' suit alleged the Cundiffs discharged pollutants into "navigable waters" in violation of the CWA.[17] Under the *Rapanos* plurality's test, the United States District Court for the Western District of Kentucky concluded the Corps had CWA jurisdiction to regulate the Cundiffs' drainage activities because their wetland properties constituted "waters of the United States" as those wetlands connected to traditional "navigable waters" and a continuous surface connection existed from those wetlands to "navigable waters."[18] The district court further concluded that Justice Kennedy's significant nexus test established CWA jurisdiction because of the significant nexus between the Cundiffs' wetland properties and the Green River.[19] The Cundiffs appealed the district court's grant of the United States' motion for summary judgment, dismissal of the Cundiffs' counterclaims, and the determination of civil penalties and injunctive relief.[20]

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10. *Rapanos I*, 547 U.S. at 718, 742.

11. *Id.* at 759-87 (Kennedy, J., concurring).

12. *Id.* at 810 (Stevens, J., dissenting).

13. *See* United States v. Cundiff (*Cundiff I*), 555 F.3d 200, 207-08 (6th Cir. 2009) (discussing the "bafflement" of the lower courts in determining which of the three *Rapanos I* opinions to apply).

14. 555 F.3d 200 (6th Cir. 2009).

15. *Cundiff I*, 555 F.3d at 213.

16. *Id.* at 204-05.

17. *Id.* at 205.

18. United States v. Cundiff (*Cundiff II*), 480 F. Supp. 2d 940, 946 (W.D. Ky. 2007).

19. *Cundiff II*, 480 F. Supp. 2d at 944-45.

20. *Cundiff I*, 555 F.3d at 205-06.

On appeal, the Sixth Circuit reviewed the application of the two *Rapanos* tests as applied to the Cundiffs' wetland properties.[21] Under Justice Kennedy's significant nexus test, the Sixth Circuit found enough chemical, biological, and physical evidence to establish a significant nexus between the Cundiffs' wetland properties and other "navigable waters" to allow CWA jurisdiction over those wetlands.[22] The Sixth Circuit also reasoned that the Cundiffs' wetland properties satisfied the two steps of the *Rapanos* plurality's test by broadening the scope of that test.[23]

This Note will first review the facts and holding of *Cundiff* and the Sixth Circuit's rationale employed to find that the Corps had CWA jurisdiction over the Cundiffs' wetland properties.[24] This Note will then provide a brief discussion of the CWA and relevant federal court decisions that address the issue of regulable wetlands under the CWA.[25] Next, this Note will demonstrate that courts can easily use either the *Rapanos* plurality's test or Justice Kennedy's significant nexus test to determine that wetlands are regulable as "waters of the United States."[26] This Note will then establish the following: (1) the Sixth Circuit correctly applied Justice Kennedy's significant nexus test to find that wetlands constituted "waters of the United States" based on Justice Kennedy's reasoning in *Rapanos* and a recent application of the significant nexus test in the Ninth Circuit; (2) the Sixth Circuit broadly applied the *Rapanos* plurality's test as demonstrated by a comparison of the Sixth Circuit's application of the test on the Cundiffs' wetland properties to the *Rapanos* plurality's reasoning and explanation of the test; and (3) the Sixth Circuit demonstrated that the debate over which *Rapanos* test controls is largely irrelevant because both tests may be applied to attain the same result.[27] This Note will conclude that the Sixth Circuit broadened the reach of the federal government under the *Rapanos* plurality's test because it disregarded the *Rapanos* plurality's intentions and used the *Rapanos* plurality's test more liberally to characterize wetlands as "waters of the United States."[28]

21. *Id.* at 210-13.
22. *Id.* at 210-11.
23. *See infra* notes 324-79 and accompanying text.
24. *See infra* notes 29-90 and accompanying text.
25. *See infra* notes 91-271 and accompanying text.
26. *See infra* notes 272-403 and accompanying text.
27. *See infra* notes 290-403 and accompanying text.
28. *See infra* notes 395-403 and accompanying text.

II. FACTS AND HOLDING

In *United States v. Cundiff*,[29] the United States filed an enforcement action against a father and son for allegedly violating the Clean Water Act[30] ("CWA") by discharging dredged material into wetlands that the Environmental Protection Agency ("EPA") and the United States Army Corps of Engineers ("Corps") considered "waters of the United States."[31] In *Cundiff*, the United States Court of Appeals for the Sixth Circuit determined that the wetlands in question constituted "waters of the United States" under the *Rapanos v. United States*[32] plurality's test and Justice Kennedy's significant nexus test.[33] In 1990, Rudy Cundiff ("Rudy") purchased property that contained approximately eighty-five acres of wetlands in Muhlenberg County, Kentucky.[34] Rudy took steps to alleviate excess water and remove trees on his wetland property to make that property more amenable to farming.[35] In 1991, the Kentucky Department of Environmental Protection's Division of Water and the Corps observed Rudy's drainage actions, which included making new ditches, filling material on wetland property, and clearing portions of the wetland property.[36] Suspecting Rudy's actions violated the CWA, the Corps began investigating into Rudy's activities.[37] The Corps found that Rudy failed to obtain a permit to dredge and fill his wetland property as required by Section 404 of the CWA.[38]

Beginning in 1992, state and federal officials initiated a series of meetings with Rudy in an unsuccessful attempt to convince Rudy to cease and desist his activities or obtain the correct Section 404 permits.[39] Despite the EPA's eventual involvement in the matter, Rudy continued to drain and clear his wetland property for his farming operation.[40] Consequently, the EPA issued to Rudy its first Order of

29. 555 F.3d 200 (6th Cir. 2009).

30. Federal Water Pollution and Control Act, 33 U.S.C. §§ 1251-1387 (2006).

31. United States v. Cundiff (*Cundiff I*), 555 F.3d 200, 205 (6th Cir. 2009). The CWA prohibited any unauthorized discharge of pollutants into navigable waters, which the CWA defined as "waters of the United States." *Cundiff I*, 555 F.3d at 206.

32. 547 U.S. 715 (2006).

33. *Cundiff I*, 555 F.3d at 213.

34. *Id.* at 204.

35. *Id.*

36. *Id.*

37. *Cundiff I*, 555 F.3d at 204-05.

38. *Id.*; United States v. Rapanos (*Rapanos I*), 547 U.S. 715, 789 n.1 (2006) (Stevens, J., dissenting) (stating that Section 404 of the CWA is codified as 33 U.S.C. § 1344).

39. *Cundiff I*, 555 F.3d at 205. The Corps issued Rudy a cease-and-desist order instructing him to desist in his activities without first obtaining a permit. *Id.*

40. *Id.* In 1997 Rudy planted wheat and cut down trees on the property. *Id.*

Compliance, demanding he immediately cease discharging pollutants.[41]

Subsequently in 1998, Rudy's son, Seth Cundiff ("Seth"), purchased property adjacent to the northern side of Rudy's property.[42] Together, Rudy and Seth's properties abutted Pond and Caney Creeks, two creeks which flowed into the Green River, a tributary of the Ohio River.[43] With Seth's knowledge, Rudy began filling, dredging, and clearing Seth's property.[44] Despite an EPA warning that Rudy's actions required a Section 404 permit, Rudy completed a two-hundred foot ditch stretching across the wetland properties.[45] As a result, the EPA served more Orders of Compliance on both Rudy and Seth Cundiff (the "Cundiffs") that required them to cease immediately their drainage activities and to restore the condition of the land.[46] Despite the EPA's Orders of Compliance, the Cundiffs failed to refill the ditches and restore the wetland properties.[47]

The United States brought a civil action against the Cundiffs for violating Section 301(a) of the CWA.[48] The United States filed a motion for summary judgment, which the United States District Court for the Western District of Kentucky granted upon its finding that the Cundiffs' drainage activities violated Section 301(a).[49] In January 2005, the bench trial to determine the remedy resulted in a permanent injunction against the Cundiffs from any other discharge not in compliance with the CWA and a civil fine of $225,000.[50]

The Cundiffs appealed the district court's grant of summary judgment and dismissal of the Cundiffs' counterclaims to the Sixth Circuit.[51] While the Cundiffs' appeal was pending, the United States Supreme Court issued its *Rapanos* decision.[52] As the *Rapanos* deci-

41. *Id.* The order instructed Rudy to "'immediately cease participating in or causing any additional discharges' of pollutants." *Id.*

42. *Id.* Seth's tract contains approximately 103 acres of wetlands. *Id.*

43. *Id.* at 204.

44. *Id.* at 205. Rudy leased Seth's property for a payment equal to the mortgage payment. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. United States v. Cundiff (*Cundiff II*), 480 F. Supp. 2d 940, 941 (W.D. Ky. 2007) (stating that Section 301(a) is codified as 33 U.S.C. § 1311(a)). "Illegality of pollutant discharges except in compliance with law except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a).

49. *Cundiff II*, 480 F. Supp. 2d at 941.

50. *Id.* Of the $225,000 penalty, $200,000 would be forgiven if the Cundiffs satisfactorily implemented the federal government's plan for restoration for the property. *Id.*

51. Brief for Appellant at 13, United States v. Cundiff, 555 F.3d 200 (6th Cir. 2009) (Nos. 05-5469, 05-5905, 07-5630).

52. *Cundiff II*, 480 F. Supp. 2d at 941.

sion discussed the CWA definition of "waters of the United States" as applied to wetlands, both the United States and the Cundiffs sought a limited remand of their case back to the district court to determine if the Cundiffs' wetland properties constituted "waters of the United States."[53] The Sixth Circuit granted the joint motion and remanded the case.[54]

On remand, the Cundiffs argued that their wetland properties did not satisfy the *Rapanos* test for determining if wetlands qualify as "waters of the United States" under the CWA.[55] Thus, the Cundiffs contended that the United States lacked CWA jurisdiction over their wetland properties.[56] Conversely, the United States argued that the Cundiffs' wetland properties qualified as "waters of the United States" under the new *Rapanos* test.[57]

In its opinion, the district court began its analysis by interpreting the *Rapanos* decision.[58] The district court recognized that the *Rapanos* case resulted in a split decision amongst the United States Supreme Court's Justices.[59] First, the *Rapanos* plurality determined that wetlands may qualify as "waters of the United States" under the CWA if those wetlands had a continuous surface connection with other "waters of the United States."[60] Thus, the district court stated that the *Rapanos* plurality's test required a finding that the channel adjacent to the wetland at issue contained a traditional "navigable water" and had a continuous surface flow to the wetland at issue.[61] The district court next determined that while Justice Kennedy concurred in the *Rapanos* judgment, he had rejected the *Rapanos* plurality's test and instead espoused his own test to determine whether certain wetlands constitute "waters of the United States."[62] Under the test put

53. *Id.* at 941-42.
54. *Cundiff I*, 555 F.3d at 205.
55. *Cundiff II*, 480 F. Supp. 2d at 942.
56. *Id.*
57. *Id.*
58. *Id.* at 942-43. The district court described the plurality's standard to require "'[f]irst, that the adjacent channel contains a "water of the United States," (i.e., a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the "water" ends and the "wetland" begins.'" *Id.* at 943 (citing Rapanos v. United States (*Rapanos I*), 547 U.S. 715, 742 (2006)). The district court then stated Justice Kennedy's concurring standard under his significant nexus test. *Id.* (discussing *Rapanos I*, 547 U.S. at 759 (Kennedy, J., concurring). Finally, the district court briefly mentioned the dissent's suggestion that either the plurality or Justice Kennedy's test could be utilized. *Id.* (discussing *Rapanos I*, 547 U.S. at 810 (Stevens, J., dissenting).
59. *Id.* at 943.
60. *Id.*
61. *Id.*
62. *Id.*

forth in Justice Kennedy's concurring opinion, a significant nexus must exist between the wetland and "navigable waters" for that wetland to qualify as "waters of the United States" under the CWA.[63]

Next, the district court examined case law of the various United States Circuit Courts of Appeals to determine which *Rapanos* test those federal circuit courts applied.[64] Adopting the United States Court of Appeals for the First Circuit's conclusion in *United States v. Johnson*,[65] the district court concluded that the United States obtained CWA jurisdiction over the Cundiffs' wetland properties if that property qualified as "waters of the United States" under either the *Rapanos* plurality's test or Justice Kennedy's significant nexus test.[66]

Under Justice Kennedy's significant nexus test, the district court found a significant nexus between the Cundiffs' wetland properties and the Green River.[67] Based on the United States' expert testimony, the district court concluded that the Cundiffs' wetland properties significantly affected the physical, biological, and chemical integrity of the Green River.[68] Therefore, the district court opined that under Justice Kennedy's significant nexus test, the Cundiffs' wetland properties qualified as "waters of the United States" under the CWA.[69]

Alternatively, the district court concluded that the Cundiffs' wetland properties qualified as "waters of the United States" under the CWA based on its application of the *Rapanos* plurality's test.[70] The United States' expert testimony established that both the Pond and Caney Creeks were relatively fixed waters flowing into the Green River, a "navigable water."[71] While the Cundiffs contended their wetland properties failed to meet the *Rapanos* plurality's test's continuous surface connection element because of the differences in elevation between their wetland properties and the nearby Pond and Caney Creeks, the district court concluded such a continuous surface connection existed between the Cundiffs' wetland properties and the abut-

63. *Id.* This significant nexus could be established "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." *Id.* (quoting *Rapanos I*, 547 U.S. at 780 (Kennedy, J., concurring)).

64. *Id.* at 944. The district court stated that the Ninth and Seventh Circuits have held that Justice Kennedy's approach is correct while the First Circuit agreed with the *Rapanos I* dissent and found that either the *Rapanos I* plurality's test or the significant nexus test was appropriate. *Id.*

65. 467 F.3d 56 (1st Cir. 2006).

66. *Cundiff II*, 480 F. Supp. 2d at 944.

67. *Id.* at 945.

68. *Id.*

69. *Id.*

70. *Id.* at 946.

71. *Id.* Testimony established "that water flows eastward through the South Channel into Pond Creek for all but a few weeks in a year of average rainfall" and that Pond and Caney Creeks had "significant quantities of flowing water." *Id.*

ting creeks.[72] Therefore, the district court concluded that under both Justice Kennedy's significant nexus test and the *Rapanos* plurality's test, the Cundiffs' wetland properties qualified as "waters of the United States" under the CWA and, therefore, the federal government had CWA jurisdiction to regulate that property.[73]

The Cundiffs submitted a supplemental appellate brief to the Sixth Circuit, stating that the *Rapanos* plurality's opinion correctly defined wetlands which are "waters of the United States" and that the Cundiffs' wetland properties failed to qualify as "waters of the United States" under that test.[74] After reviewing the CWA and *Rapanos*, the Sixth Circuit examined the *Rapanos* case in light of *Marks v. United States,*[75] a Supreme Court case instructing that when a court does not issue a majority opinion, lower courts should follow the "narrowest" concurring opinion.[76] The Sixth Circuit rejected both the United States's and Cundiffs' respective contentions that the *Marks* "narrowest" concurring opinion meant either the test that gave the United States the most CWA jurisdiction over the wetland properties or the test that gave the United States the least CWA jurisdiction over the wetland properties.[77] The Sixth Circuit acknowledged that applying the *Marks* rule to the *Rapanos* decision was difficult because none of the *Rapanos* concurring opinions logically connected in order to combine for five votes.[78] While the district court held that either test may be used to establish that the Cundiffs' wetland properties qualified as "waters of the United States" under the CWA, the Sixth Circuit refrained from making an ultimate conclusion as to which *Rapanos* test controlled because the court determined that the Cundiffs' wetland properties qualified as "waters of the United States" under both tests.[79]

First, the Sixth Circuit affirmed the district court's findings that the Cundiffs' wetland properties qualified as "waters of the United

72. *Id.* at 946-47. "Justice Scalia clearly did not intend that the water level of the wetland and the covered 'waters' must be completely level. Such a conclusion would completely eviscerate the plurality's recognition that a gradual transition can exist from water to land, *e.g.*, shallows, marshes, mudflats, swamps, bogs-in short." *Id.* at 947.

73. *Id.* at 947-48.

74. Supplemental Brief for Appellant at 6, 10, 13 United States v. Cundiff, 555 F.3d 200 (6th Cir. 2009) (Nos. 05-5469, 05-5905, 07-5630).

75. 430 U.S. 188 (1977).

76. *Cundiff I*, 555 F.3d at 206-08.

77. *Id.* at 209. The Cundiffs argued that "the 'narrowest' *Rapanos I* opinion is whichever one restricts jurisdiction the most" while the United States argued that the "narrowest" opinion was the one that gave the government the widest jurisdiction. *Id.*

78. *Id.* No concurring opinion "is a logical subset of another concurring opinion (or opinions) that, together, would equal five votes." *Id.*

79. *Id.*

States" under Justice Kennedy's significant nexus test.[80] The Sixth Circuit determined such a significant nexus existed, noting the wetland properties' short and long-term water storage abilities, ability to filter sediment and acid runoff, and plant and wildlife populations.[81] The Sixth Circuit also affirmed the district court's conclusion that the United States' expert testimony was credible and showed that the Cundiffs' drainage activities had negative implications on the Green River.[82] The Cundiffs argued that only laboratory tests could establish a "significant nexus" between the Cundiffs' wetland properties and the Green River.[83] The Sixth Circuit rejected this argument because the Cundiffs failed to support this contention, and the district court's conclusion was not clearly erroneous.[84]

Second, the Sixth Circuit affirmed the district court's finding that the Cundiffs' wetland properties qualified as "waters of the United States" under the *Rapanos* plurality's test.[85] The Sixth Circuit determined that the Cundiffs' wetland properties were adjacent to seemingly permanent water bodies connected to the Green River, a traditional "navigable water."[86] Additionally, the Sixth Circuit found no merit in the Cundiffs' different elevation argument.[87] Instead, the Sixth Circuit determined the existence of a continuous surface connection despite acknowledging the fact that "it was not readily apparent" that water perpetually flowed from the Cundiffs' wetland properties to the Green River.[88] The Sixth Circuit further determined that a continuous surface connection may exist whether the connection is natural or manmade.[89] Finally, the Sixth Circuit affirmed the district court's grant of summary judgment to the United States, the dismissal of the Cundiffs' counterclaims, and the imposition of remedies.[90]

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80. *Id.* at 210-11.

81. *Id.* at 211.

82. *Cundiff I*, 555 F.3d at 211; *Cundiff II*, 480 F. Supp. 2d at 945. The federal government's witnesses testified that because the Cundiffs' wetland properties no longer filtered upstream sites' drainage, the Green River had an increase in accumulation of sediment. *Id.*

83. *Cundiff I*, 555 F.3d. at 211.

84. *Id.* The Court reviewed the district court's factual findings for clear error. *Id.* at 206.

85. *Id.* at 211-13.

86. *Id.* at 211. The adjacent, relatively permanent water bodies were the South Channel, Pond Creek, and Caney Creek. *Id.*

87. *Id.* at 212.

88. *Id.*

89. *Id.* at 213. The Court noted that Rudy "went a long way towards creating a continuous surface connection when he dug or excavated ditches to enhance the acid mine drainage into the creeks and away from his wetlands." *Id.* at 212-13.

90. *Id.* at 215-18.

III. BACKGROUND

A. THE CLEAN WATER ACT

Congress originally enacted the Federal Water Pollution Control Act[91] ("Act") in 1948.[92] In 1972, Congress amended the Act into its current form.[93] Finally, in 1977, Congress again amended the Act and gave it the popular name, the Clean Water Act[94] ("CWA").[95] Congress stated the CWA's purpose was to preserve the quality of the Nation's waters.[96]

The CWA set up two permitting schemes for discharging pollutants into "navigable waters."[97] First, the CWA required that a person wishing to discharge dredged or fill material must first obtain a Section 404 permit from the Army Corps of Engineers ("Corps").[98] Second, the CWA established the National Pollutant Discharge Elimination System ("NPDES") where the Environmental Protection Agency ("EPA") issues permits prior to any other pollutant discharge.[99] While the permitting requirements may seem straightforward, the ambiguity of the CWA's terms created confusion as to when a person does or does not need an NPDES or Section 404 permit to discharge pollutants into "navigable waters."[100]

The CWA defined "navigable waters" as "waters of the United States."[101] This definition proved ambiguous, as the CWA failed to provide a definition of the term "waters of the United States."[102] Both the EPA and the Corps defined "waters of the United States" very broadly in their regulations.[103] The Corps defined "waters of the

91. Federal Water Pollution and Control Act, 33 U.S.C. §§ 1251-1387 (2006).

92. 61C AM. JUR. 2D *Pollution Control* § 718 (1999).

93. *Id.*; *see also* N. Cal. River Watch v. City of Healdsburg, 496 F.3d 993, 995 (9th Cir. 2007) ("The Clean Water Act of 1972 provides the foundation for this case.").

94. Federal Water Pollution and Control Act, 33 U.S.C. §§ 1251-1387 (2006).

95. 61C AM. JUR. 2D *Pollution Control* § 718 (1999).

96. 33 U.S.C. § 1251(a). "The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *Id.*

97. United States v. Cundiff (*Cundiff I*), 555 F.3d 200, 206 (6th Cir. 2009).

98. Federal Water Pollution and Control Act (Clean Water Act) § 404, 33 U.S.C. § 1344 (2006); *see generally* BRIAN W. BLAESSER & ALAN C. WEINSTEIN, FEDERAL LAND USE LAW & LITIGATION § 10:18 (2009) (discussing that Section 404 permits apply to developments that impact wetlands within CWA jurisdiction).

99. 33 U.S.C. § 1342.

100. Scott L. Greeves, Note, *Federal Regulation of the Discharge of Dredged or Fill Material into Wetlands: Options and Suggestions for Land Developers*, 19 J. CORP. L. 135, 138-39 (1993) [hereinafter Greeves, *Federal Regulation*].

101. 33 U.S.C. § 1362(7).

102. Greeves, *Federal Regulation*, 19 J. CORP. L. at 139; *see also* Matthew A. Macdonald, *Rapanos v. United States and Carabell v. United States Army Corps of Engineers*, 31 HARV. ENVTL. L. REV. 321, 321 (2007) (stating that "navigable waters" are "unhelpfully defined as 'the waters of the United States'").

103. *See* 33 C.F.R. § 328.3(a) (2009) (stating the definition of "waters of the United States") and 40 C.F.R. § 230.3(s) (2009) (stating the definition of "waters of the United

United States" as any water body used, or that could be used, for interstate commerce or for catching fish or shellfish supporting interstate commerce, as well as interstate wetlands, tributaries of "waters of the United States," and adjacent wetlands.[104] The EPA defined "waters of the United States" similarly.[105] Like the EPA's broad definition of "waters of the United States," the EPA also broadly defined the term pollutant as a variety of wastes, soil, sand, rocks, heat, garbage, and sewage.[106]

Under the CWA, the Corps and the EPA administered the Section 404 and NDPES permitting systems respectively unless individual states chose to do so and received approval from the EPA.[107] The EPA oversaw compliance and enforcement of the CWA and all permitting requirements.[108] A person in violation of the NDPES or Section 404 permitting requirements may be subject to civil penalties up to $25,000 per day of violation.[109] Furthermore, CWA violations could result in both civil and criminal enforcement actions.[110]

States"). Sections 328.3(a) and 230.3(s) both state the "term waters of the United States means: (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce . . . (2) All interstate waters including interstate wetlands; (3) All other waters . . . which could affect interstate or foreign commerce including any such waters: (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or (ii) From which fish or shellfish are or could be taken and sold in interstate commerce; . . . (7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (s)(1) through (6) of this section . . . . 33 C.F.R. § 328.3(a); 40 C.F.R. § 230.3(s).

104. 33 C.F.R. § 328.3(a).

105. *See* 40 C.F.R. § 230.3(s) (stating the definition of "waters of the United States"). Section 230.3(s) states the "term *waters of the United States* means: (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce . . . (2) All interstate waters including interstate wetlands; (3) All other waters . . . which could affect interstate or foreign commerce including any such waters: (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or (ii) From which fish or shellfish are or could be taken and sold in interstate commerce; . . . (7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (s)(1) through (6) of this section . . . . § 230.3(s).

106. *See* § 230.3(o). "The term pollutant means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials not covered by the Atomic Energy Act, heat, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal, and agricultural waste discharged into water." § 230.3(o).

107. 33 U.S.C. § 1342(b-c); 33 U.S.C. § 1344(a-h).

108. *See* 33 U.S.C. §§ 1344(n), (p), (s), 1319. However, states that have been delegated the permitting authority may also commence enforcement actions against violators. 33 U.S.C. § 1319(a)(1).

109. § 1319(d).

110. § 1319(b)-(c).

B. PERTINENT UNITED STATES SUPREME COURT DECISIONS REGARDING "WATERS OF THE UNITED STATES" DETERMINATIONS UNDER THE CLEAN WATER ACT

1. Rapanos v. United States: *The United States Supreme Court Gives Multiple Tests for Determining "Waters of the United States"*

In *Rapanos v. United* States,[111] the United States Supreme Court announced the test for determining if wetlands qualified as "waters of the United States" under the Clean Water Act[112] ("CWA").[113] In *Rapanos*, the Supreme Court considered whether four Michigan wetlands qualified as "waters of the United States" suitable for regulation under the CWA.[114] Three of the wetland sites belonged to John Rapanos ("Rapanos") while the fourth belonged to the Carabells.[115] The Supreme Court consolidated the Carabells' appeal with Rapanos's appeal for purposes of review.[116]

a. The Sixth Circuit Determines the United States Army Corps of Engineers Could Regulate Rapanos's Three Wetlands

In case No. 04-1034, the United States brought civil and criminal proceedings against John Rapanos ("Rapanos") for filling his wetlands without a Section 404 permit.[117] A manmade drain connected Rapanos's first wetland to Hoppler Creek, which ran into Kawkawlin River, which flowed into Saginaw Bay and Lake Huron.[118] Rapanos's second wetland flowed into the Tittabawassee River, and Rapanos's third wetland connected to Lake Huron via the Pine River.[119] The United States District Court for the Eastern District of Michigan ruled that Rapanos's wetland properties all fell under the federal government's Clean Water Act[120] ("CWA") jurisdiction due to their adjacency to other "navigable waters."[121] The United States Court of Appeals for the Sixth Circuit affirmed the district court, reasoning that Rapanos's three wetlands' hydrological linkages to "navigable waters" gave the federal government CWA jurisdiction.[122]

111. 547 U.S. 715 (2006).
112. Federal Water Pollution and Control Act, 33 U.S.C. §§ 1251-1387 (2006).
113. United States v. Rapanos (*Rapanos I*), 547 U.S. 715, 717 (2006).
114. *Rapanos I*, 547 U.S. at 729.
115. *Id.* at 729-30.
116. *Id.* at 730.
117. *Id.* at 720-21, 729.
118. *Id.* at 729.
119. *Id.*
120. Federal Water Pollution and Control Act, 33 U.S.C. §§ 1251-1387 (2006).
121. *Id. See also* United States v. Rapanos (*Rapanos II*), 376 F.3d 629, 633-34 (6th Cir. 2004) (describing the procedural posture of this case).
122. *Rapanos I*, 547 U.S. at 729-30.

b. The Sixth Circuit Determines the United States Army Corps of Engineers Could Regulate the Carabells' Wetland

In case No. 04-1384, the Carabells wished to fill their wetland, and the United States Army Corps of Engineers ("Corps") denied the Carabells' request for the required Section 404 permit to do so.[123] The Carabells' wetland connected to the Auvase Creek, which flowed into Lake St. Clair via ditches.[124] After exhausting administrative remedies, the Carabells challenged the Corps's denial of their Section 404 permit in the United States District Court for the Eastern District of Michigan.[125] The district court and subsequently the United States Court of Appeals for the Sixth Circuit found the federal government had jurisdiction over the Carabells' wetland under the Clean Water Act[126] ("CWA") because the wetland was adjacent to "navigable waters."[127]

c. The United States Supreme Court Analyzes What Test Applies in Determining if Wetlands Qualify as "Waters of the United States" under the Clean Water Act

The United States Supreme Court consolidated John Rapanos ("Rapanos") and the Carabells' cases in *Rapanos v. United States*[128] to decide whether wetlands qualified as "waters of the United States" under the Clean Water Act[129] ("CWA").[130] The *Rapanos* case fragmented the Supreme Court Justices and failed to produce a majority opinion.[131] Justice Scalia, joined by Justices Thomas, Alito, and Roberts, authored the plurality opinion with Justice Roberts and Justice Kennedy each filing a concurring opinion.[132] Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer filed the dissenting opinion with Justice Breyer also filing a separate dissent.[133]

The plurality first analyzed the CWA definition of "waters of the United States" utilizing rules of statutory construction and examining

123. *Id.* at 730.

124. *Id.* A manmade berm normally blocks drainage from the Carabells' wetland but occasionally the wetland overflows into the ditch. *Id.*

125. *Id. See* Carabell v. U.S. Army Corps of Eng'rs, 391 F. Supp. 2d 917, 918 (E.D. Mich. 2003) (stating the basis for bringing the action in the district court).

126. Federal Water Pollution and Control Act, 33 U.S.C. §§ 1251-1387 (2006).

127. *Rapanos I*, 547 U.S. at 730.

128. 547 U.S. 715 (2006).

129. Federal Water Pollution and Control Act, 33 U.S.C. §§ 1251-1387 (2006).

130. Rapanos v. United States (*Rapanos I*), 547 U.S. 715, 730 (2006).

131. *See Rapanos I*, 547 U.S. at 718 (showing that four Justices joined in the plurality opinion, one Justice concurred in the judgment, and four Justices dissented).

132. *Id.*

133. *Id.*

legislative intent.[134] The plurality interpreted the CWA definition of "waters of the United States" to require some permanence and continuous flow, thus the CWA definition included obvious waters such as lakes, rivers, and oceans.[135] This definition did not include periodic or occasional water flows, such as rainfall drainages.[136] The plurality also noted that in the past, the United States Army Corps of Engineers ("Corps") used its CWA jurisdiction to regulate wetlands, separated from other "navigable waters" by land or ditches, under the definition of "waters of the United States."[137] The plurality recognized that the Corps's regulations were attempts to stretch the definition of "navigable waters."[138]

However, the plurality recognized that in *United States v. Riverside Bayview Homes, Inc.*,[139] the Supreme Court deferred to the Corps's authority in defining wetlands as "waters of the United States."[140] In *Riverside Bayview*, the Supreme Court allowed the Corps to regulate wetlands because those wetlands were adjacent to "waters of the United States."[141] The plurality noted that the difficulty, at the time of the *Riverside Bayview* decision and in the present case, was in determining where the land ended and the water began.[142]

Thus, the plurality determined that for wetlands to qualify as "waters of the United States" under the CWA, a court must make a twofold finding.[143] First, the channels adjacent to the wetland must contain a "water of the United States."[144] Second, a continuous surface connection must exist so that the border between the wetland and

134. *See id.* at 730-39 (discussing the definition of "waters of the United States" under the CWA).

135. *Id.* at 739. "Waters of the United States" included only "relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams, . . . oceans, rivers [and] lakes.'" *Id.*

136. *Id.* "The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall." *Id.*

137. *Id.* at 740.

138. *Id.* at 738-39. "In developing the current regulations, the Corps consciously sought to extend its authority to the farthest reaches of the commerce power." *Id.* at 738.

139. 474 U.S. 121 (1985).

140. *Rapanos I*, 547 U.S. at 740 (discussing United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 132, 135 (1985)).

141. *Id.* (discussing the court's holding in *Riverside Bayview* that wetlands abutting "waters of the United States" were regulable based on the central reason that a boundary drawing problem existed).

142. *Id.* at 740, 742.

143. *Id.* at 742.

144. *Id.* ("First, that the adjacent channel contains a 'wate[r]' of the United States,' (i.e. a relatively permanent body of water connected to traditional interstate navigable waters) . . .").

the "waters of the United States" is indistinguishable.[145] The plurality noted that isolated bodies of water do not have a continuous surface connection.[146] Finally, the plurality rejected the United States' contention that this new test would allow greater pollution and evasion of the National Pollution Discharge Elimination System ("NPDES") permitting requirement because the test for whether a wetland is within the definition of "waters of the United States" will not only apply to Section 404 permits for dredged or fill material but also to NPDES permits for other pollutant discharges.[147]

Justice Kennedy concurred in the judgment but argued that a different analysis should apply when determining whether wetlands qualify as "waters of the United States" under the CWA.[148] Justice Kennedy opined that the plurality should have utilized the Supreme Court's *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*[149] significant nexus reasoning to determine if the CWA extends jurisdiction to the wetlands in question.[150] Justice Kennedy rejected the plurality's two factors in making the determination of whether a wetland qualified as a "water of the United States" under the CWA, stating the plurality's analysis lacked support from prior case law.[151] Justice Kennedy stated that instead, courts should look for a significant nexus between the wetlands and "navigable waters" to determine if the wetlands are within the CWA definition of "waters of the United States."[152] Justice Kennedy determined that a significant nexus existed if the wetlands significantly affected the various chemical, physical, and biological properties of the "navigable waters."[153] In his discussion of the facts of the case at issue, Justice Kennedy suggested that sediment and pollutant trapping, flood peak

145. *Id.* ("[S]econd, that the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins."). "[O]*nly* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are . . . covered by the Act. Wetlands with only an intermittent, physically remote hydrologic connection to 'waters of the United States' do not implicate the boundary-drawing problem of *Riverside Bayview* . . . ." *Id.*

146. *See id.* (stating that isolated ponds do not have the boundary-drawing problem that would cause them to be "waters of the United States").

147. *Id.* at 742-43.

148. *Id.* at 759 (Kennedy, J., concurring).

149. 531 U.S. 159 (2001).

150. *Rapanos I*, 547 U.S. at 759 (Kennedy, J., concurring).

151. *Id.* at 768.

152. *Id.* at 779. The plurality expressly criticized Justice Kennedy's test as impermissibly extending CWA jurisdiction and contrary to the CWA's statutory language. *Id.* at 756.

153. *Id.* at 780. A significant nexus will exist "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.'" *Id.*

deterrence, flood retention, and wildlife habitat creation may create such a significant nexus between Rapanos's and the Carabells' wetlands and "navigable waters."[154]

Finding fault with both the plurality's and Justice Kennedy's tests, Justice Stevens dissented, reasoning that the Supreme Court should have affirmed the United States Court of Appeals for the Sixth Circuit's ruling in both *United States v. Rapanos*[155] and *Carabell v. United States Army Corps of Engineers*[156] and deferred to the federal agencies' judgment in determining if wetlands qualify as "waters of the United States" under the CWA.[157] Justice Stevens determined that the Corps reasonably interpreted the definition of "waters of the United States" to include any non-isolated wetland.[158] Finally, Justice Stevens noted that while both the plurality and Justice Kennedy agreed that the cases should be remanded, the two opinions were in disagreement as to which test to apply.[159] Therefore, Justice Stevens stated that a lower court could determine if wetlands qualify as "waters of the United States" under the CWA if the wetlands in question meet either the *Rapanos* plurality's test or Justice Kennedy's test.[160]

2. Marks v. United States: *The United States Supreme Court Produces a Rule for When No Majority Standard Exists*

In *Marks v. United States*,[161] the United States Supreme Court announced the rule for determining the controlling opinion when five Justices fail to hold the same view.[162] In that case, the United States brought criminal charges against the petitioners for transporting obscene materials and conspiracy.[163] After an investigation, the Federal Bureau of Investigation ("FBI") discovered the petitioners had received several shipments of obscene films and showed those films at the Cinema X Theater in Newport, Kentucky.[164] A jury found all but

154. *See id.* at 783-85 (stating that "habitat, sediment trapping, nutrient recycling, and flood peak diminution, reduction flow water augmentation" would be evidence that the district court may use to establish a significant nexus between Rapanos's wetland properties and "navigable waters" and that "flood retention, recreation and conservation and overall ecology" would be evidence that a district court may use to establish a significant nexus between the Carabells' wetland and "navigable waters").

155. 376 F.3d 629 (6th Cir. 2004).

156. 391 F.3d 704 (6th Cir. 2004).

157. *Rapanos I*, 547 U.S. at 788 (Stevens, J., dissenting).

158. *Id.* at 796.

159. *Id.* at 810.

160. *Id.*

161. 430 U.S. 188 (1977).

162. Marks v. United States (*Marks I*), 430 U.S. 188, 193 (1977).

163. *Marks I*, 430 U.S. at 189.

164. United States v. Marks (*Marks II*), 520 F.2d 913, 915-16 (6th Cir. 1975).

one of the petitioners guilty.[165] Over the petitioners' objections, the United States District Court for the Eastern District of Kentucky reasoned that a new obscenity standard announced in *Miller v. California*[166] applied when instructing the jury.[167]

The United States Court of Appeals for the Sixth Circuit affirmed the district court on all grounds and determined that the district court's use of the *Miller* standard for "obscenity" was not erroneous.[168] The Sixth Circuit applied the *Miller* obscenity standard because, although the United States Supreme Court had announced *Miller* after the petitioners' indictment, the court determined that *Miller* had not changed the prior standard for distinguishing an obscenity from protected speech.[169] However, the Sixth Circuit determined the prior standard to have been the obscenity standard espoused in *Roth v. United States*,[170] and not the subsequent *Memoirs v. Massachusetts*[171] obscenity standard.[172] The Sixth Circuit determined *Memoirs* should not be given effect as the prior standard because *Memoirs* did not contain a majority opinion.[173] The case rose to the Supreme Court to decide whether the Sixth Circuit erred in determining that *Memoirs* could not have been the prior standard because it lacked a majority opinion and if so, whether the court incorrectly applied *Miller*.[174]

The Supreme Court first stated that United States Constitution's Ex Post Facto Clause did not limit retroactive application of judicial decisions, as the clause only limited retroactive application of legislative actions.[175] However, the Supreme Court found that the petitioner's right to have fair warning of what constitutes criminal activity did limit the retroactive application of judicial decisions.[176] Next, the Supreme Court found error in the Sixth Circuit's reasoning that because the *Memoirs* decision did not have a majority opinion that the decision failed to make any law.[177] Instead, the Supreme Court stated that when five Supreme Court Justices do not consent to an opinion, the controlling standard is the narrowest opinion assented

165. *Marks II*, 520 F.2d at 915.
166. 413 U.S. 15 (1973).
167. *Marks I*, 430 U.S. at 190-91.
168. *Marks II*, 520 F.2d at 919-22.
169. *Marks I*, 430 U.S. at 190-93.
170. 354 U.S. 476 (1957).
171. 383 U.S. 413 (1966).
172. *Marks I*, 430 U.S. at 192-93.
173. *Id.* at 192-93.
174. *Id.* at 188-89. The issue presented was whether the lower court should retroactively apply the new standard set forth in *Miller*. *Id.* at 189.
175. *Id.* at 191.
176. *Id.* at 191-92.
177. *Id.* at 192.

to by any of the concurring Justices.[178] Therefore, the Supreme Court determined the controlling opinion in *Memoirs* was the opinion that three of the concurring justices joined, as two other justices concurred on broader grounds.[179] Thus, the Supreme Court remanded the case to the district court to apply the *Memoirs* opinion's most narrow obscenity standard.[180]

Justice Brennan concurred in part and dissented in part, agreeing that the *Miller* decision should not have been applied to the petitioner's case, but arguing that the statute prohibiting transportation of obscene materials was overly broad and facially unconstitutional.[181] Justice Stevens also concurred in part and dissented in part, agreeing with the majority's opinion but finding error with the majority's First Amendment analysis.[182]

C. Pertinent United States Circuit Courts of Appeals Decisions Concluding that Either *Rapanos* Test May Be Used

1. United States v. Johnson: *The First Circuit's Determination*

In *United States v. Johnson*,[183] the United States Court of Appeals for the First Circuit concluded that wetlands could qualify as "waters of the United States" under the Clean Water Act[184] ("CWA") by satisfying either the *Rapanos v. United States*[185] plurality's test or Justice Kennedy's significant nexus test.[186] In *Johnson*, the United States brought a civil action against a group of Carver, Massachusetts cranberry farmers.[187] The United States alleged that the farmers discharged pollutants without a Section 404 permit in violation of the CWA.[188] The cranberry farmers contended that the United States did not have CWA jurisdiction over the sites in question because the wetlands did not qualify as "waters of the United States" under the

178. *Id.* at 193 (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976)). When "no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as the position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'" *Id.*

179. *Id.* at 193-94.

180. *Id.* at 196-97.

181. *Id.* at 197 (Brennan, J., concurring in part, dissenting in part).

182. *Id.* at 198 (Stevens, J., concurring in part, dissenting in part).

183. 467 F.3d 56 (1st Cir. 2006).

184. Federal Water Pollution and Control Act, 33 U.S.C. §§ 1251-1387 (2006).

185. 547 U.S. 715 (2006).

186. United States v. Johnson, 467 F.3d 56, 66 (1st Cir. 2006).

187. *Johnson*, 467 F.3d at 58.

188. *Id. See* United States v. Johnson, 437 F.3d 157 (1st Cir. 2006) (stating that the farmers violated the CWA by not obtaining the required Section 404 permit).

CWA.[189] The United States District Court for the District of Massachusetts granted the United States' motion for summary judgment stating that the cranberry farmers' wetlands hydrologically connected to the Weweantic River, a navigable waterway.[190] The cranberry farmers appealed the district court's grant of summary judgment, arguing that the Environmental Protection Agency ("EPA") regulation did not cover their wetlands, or in the alternative, that either the CWA or the EPA regulations were unconstitutional.[191] On appeal, the First Circuit affirmed the district court's decision in a divided opinion.[192]

The cranberry farmers then moved for a rehearing en banc noting that in light of the pending *Rapanos* decision, the First Circuit should wait to rehear the case until after the United States Supreme Court's *Rapanos* ruling.[193] The First Circuit agreed and waited to rehear the case pending the *Rapanos* decision.[194] On rehearing and after the Supreme Court issued *Rapanos,* the cranberry farmers argued in their supplemental petition that while the *Rapanos* plurality's opinion controlled, their wetlands failed to qualify as "waters of the United States" under the CWA upon application of either the *Rapanos* plurality's test or Justice Kennedy's significant nexus test, and therefore, the United States had no jurisdiction over their wetlands.[195] The United States argued that either the *Rapanos* plurality's test or Justice Kennedy's significant nexus test could be used to establish its CWA jurisdiction over the cranberry farmer's wetlands.[196]

In determining either the *Rapanos* plurality's test or Justice Kennedy's significant nexus test could be used to determine whether the cranberry farmer's wetlands fell under the CWA definition of "waters of the United States," the First Circuit relied on the decisions of two federal district courts and two federal circuit courts of appeals issued in light of *Rapanos*.[197] The First Circuit noted that the Middle District of Florida adopted the practice that either test was appropri-

189. *Johnson*, 467 F.3d at 58. The three sites in question were referred to as the Cross Street, Fosdick Street, and Forest/Fuller Street sites. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* Two members of the panel concurred for differing reasons and one member dissented. *Id.* One of the majority panelists thought that there was a significant nexus between the Weweantic River and the cranberry farmers' wetlands while the other member of the majority disagreed that a significant nexus was required and instead found the tributary system created the hydrological connection. *Id.*

193. *Id.* at 59.

194. *Id.*

195. *Id.* at 60.

196. *Id.*

197. *Id.* at 60-62.

ate.[198] The First Circuit also observed that the Northern District of Texas declined to follow *Rapanos* and relied on precedent within its circuit.[199] Finally, the First Circuit noted that the United States Court of Appeals for the Ninth Circuit and the Seventh Circuit found that Justice Kennedy's significant nexus test controlled.[200]

Next, the First Circuit looked to the Supreme Court's *Marks v. United States*[201] opinion for guidance.[202] The First Circuit noted that courts often struggled when applying *Marks*.[203] The First Circuit determined that the "narrowest" opinion could mean either the test that gave the federal government the most regulation authority or the term could mean the test that was the most restrictive on the federal government's authority.[204]

Due to the difficulties in applying *Marks*, the First Circuit embraced the *Rapanos* dissent's view that either Justice Kennedy's significant nexus test or the *Rapanos* plurality's test controlled.[205] The First Circuit distinguished *King v. Palmer*,[206] where the United States Court of Appeals for the District of Columbia opined that courts should never combine dissents with a concurrence in order to create a *Marks* majority.[207] Thus, the First Circuit vacated the case to the district court, stating that district court should apply either *Rapanos* test.[208]

2. United States v. Bailey: *The Eighth Circuit's Determination*

In *United States v. Bailey*,[209] the United States Court of Appeals for the Eighth Circuit determined that the United States Army Corps of Engineers ("Corps") had Clean Water Act[210] ("CWA") jurisdiction over wetlands if the wetlands at issue meet either the *Rapanos v.*

198. *Id.* at 60-61 (discussing United States v. Evans, No. 3:05 CR 159 J 32HTS, 2006 WL 2221629 (M.D. Fla. Aug. 2, 2006)).

199. *Id.* at 61 (discussing United States v. Chevron Pipe Line Co., 437 F. Supp. 2d 605 (N.D. Tex. 2006)).

200. *Id.* at 61-62 (discussing the cases of N. Cal. River Watch v. City of Healdsburg, 457 F.3d 1023 (9th Cir. 2006) and United States v. Gerke Excavating, Inc., 464 F.3d 723 (7th Cir. 2006)).

201. 430 U.S. 188 (1977).

202. *See Johnson,* 467 F.3d at 62-64 (analyzing the meaning of *Marks* and interpreting its authority).

203. *Id.* at 62.

204. *Id.* at 63.

205. *Id.* at 64-66.

206. 950 F.2d 771 (D.C. Cir. 1991).

207. *Johnson,* 467 F.3d at 65, (quoting King v. Palmer, 950 F.2d 771, 783 (D.C. Cir. 1991)).

208. *Id.* at 66.

209. 571 F.3d 791 (8th Cir. 2009).

210. Federal Water Pollution and Control Act, 33 U.S.C. §§ 1251-1387 (2006).

United States[211] plurality's test or Justice Kennedy's significant nexus test.[212] In *Bailey*, the United States brought an enforcement action against Gary Bailey ("Bailey") for failing to restore his wetland property after he discharged pollutants without a Section 404 permit in violation of the CWA.[213] The United States District Court for the District of Minnesota granted the United States' motion for summary judgment, finding the Corps's CWA jurisdiction and the restoration order proper.[214]

Bailey appealed to the Eighth Circuit claiming that the district court incorrectly found his wetland properties within the Corps's CWA jurisdiction and incorrectly entered an injunction against him to enforce the restoration order.[215] The Eighth Circuit held that either the *Rapanos* plurality's test or Justice Kennedy's significant nexus may establish CWA jurisdiction over wetlands, and affirmed that in Bailey's case, the district court was correct in allowing the Corps to exert CWA jurisdiction because Justice Kennedy's significant nexus test established jurisdiction over Bailey's wetland properties.[216]

In making its determination of the proper *Rapanos* test to apply, the Eighth Circuit examined the decisions of the other federal circuit courts of appeals.[217] Despite Bailey's contention that the *Rapanos* plurality's opinion controlled and the United States' argument that Justice Kennedy's significant nexus test applied, the Eighth Circuit found the United States Court of Appeals for the First Circuit's holding in *United States v. Johnson*[218] to be persuasive.[219] Thus, the Eighth Circuit joined the First Circuit in holding that the Corps could establish CWA jurisdiction over wetlands by meeting either *Rapanos* test.[220]

211. 547 U.S. 715 (2006).
212. United States v. Bailey, 571 F.3d 791, 799 (8th Cir. 2009).
213. *Bailey*, 571 F.3d at 794.
214. *Id.*
215. *Id.*
216. *Id.* at 799.
217. *Id.* at 798-99 (discussing the Seventh, Ninth, Eleventh, First, Fifth, and Sixth Circuits' opinions in recent cases).
218. 467 F.3d 56 (1st Cir. 2006).
219. *Bailey*, 571 F.3d at 799.
220. *Id.*

D. Pertinent United States Circuit Court of Appeals Decisions Concluding that Justice Kennedy's Significant Nexus Test is Controlling

1. United States v. Gerke Excavating Inc.: *The Seventh Circuit's Determination*

In *United States v. Gerke Excavating Inc.*,[221] the United States Court of Appeals for the Seventh Circuit concluded that courts must apply Justice Kennedy's significant nexus test when determining if wetlands qualify as "waters of the United States" under the Clean Water Act[222] ("CWA").[223] In *Gerke,* the United States brought a civil action against Gerke Excavating ("Gerke") for violating the CWA's Section 404 permit requirement for any discharges of dredged or fill materials into "navigable waters."[224] The United States succeeded in its motion for summary judgment, and the United States District Court for the Western District of Wisconsin issued a civil penalty on Gerke.[225] The Seventh Circuit affirmed the district court's decision, and the United States Supreme Court, in light of the its decision in *Rapanos v. United States*,[226] remanded the case back to the appellate court.[227]

In reaching its conclusion that Justice Kennedy's significant nexus test should be applied, the Seventh Circuit analyzed which *Rapanos* opinion was the "narrowest" under the *Marks v. United States*[228] doctrine.[229] The Seventh Circuit stated that even the *Rapanos* plurality identified Justice Kennedy's significant nexus test as narrower because it seemed to allow the United States Army Corps of Engineers ("Corps") to continue in its expansive reading of the statute.[230] The Seventh Circuit also noted that Justice Kennedy rejected the *Rapanos* plurality's two-factor test.[231]

In support of its conclusion that Justice Kennedy's significant nexus test controlled, the Seventh Circuit determined that in most cases, using the significant nexus test will cause an opinion to com-

221. 464 F.3d 723 (7th Cir. 2006).
222. Federal Water Pollution and Control Act, 33 U.S.C. §§ 1251-1387 (2006).
223. United States v. Gerke Excavating, Inc., 464 F.3d 723, 725 (7th Cir. 2006).
224. *Gerke*, 464 F.3d at 723.
225. *Id.*
226. 547 U.S. 715 (2006).
227. *Gerke,* 464 F.3d at 723-24.
228. 430 U.S. 188 (1977).
229. *Gerke,* 464 F.3d at 724-25.
230. *Id.* at 724. Justice Kennedy's opinion "'tips a wink at the agency [i.e., the Corps of Engineers], inviting it to try its same expansive reading again.'" *Id.*
231. *Id.* The two factors being the requirements that there be a continuous surface connection and that the site in question abuts to a "navigable water." *Id.*

mand five votes.[232] The Seventh Circuit reasoned that in a case where a particular wetland failed to meet Justice Kennedy's significant nexus test, and thus no resultant CWA jurisdiction existed, the *Rapanos* plurality would join Justice Kennedy.[233] In contrast, the Seventh Circuit reasoned that in a case where a particular wetland would meet Justice Kennedy's significant nexus test and not the *Rapanos* plurality's test, the *Rapanos* dissent would join Justice Kennedy.[234] Further, the Seventh Circuit reasoned that only rarely would a wetland in question meet the *Rapanos* plurality's test but not Justice Kennedy's significant nexus test, and thus cause the *Rapanos* dissenters to join the *Rapanos* plurality while Justice Kennedy stood alone.[235]

2. Northern California River Watch v. City of Healdsburg: *The Ninth Circuit's Determination*

In *Northern California River Watch v. City of Healdsburg*,[236] the United States Court of Appeals for the Ninth Circuit determined that Justice Kennedy's significant nexus test in *Rapanos v. United States*[237] was the correct test in determining whether a water body qualified under the Clean Water Act[238] ("CWA") as "waters of the United States."[239] In *Healdsburg*, Northern California River Watch sued the City of Healdsburg ("Healdsburg") for discharging wastewater into Basalt Pond (the "pond"), which contained wetlands, in violation of the CWA.[240] In 1971, Healdsburg built a wastewater treatment plant on a site north of the pond.[241] Healdsburg failed to obtain a National Pollutant Discharge Elimination System ("NPDES") permit to discharge wastewater into the pond.[242] The amount of wastewater discharged into the pond was large enough to fill the pond every few years.[243] This manmade pond lay to the west of the Russian River, separated by wetlands and a levee.[244]

The United States District Court for the Northern District of California concluded that the federal government could regulate the pond

232. *Id.* at 725.
233. *Id.*
234. *Id.*
235. *Id.*
236. 496 F.3d 993 (9th Cir. 2007).
237. 547 U.S. 715 (2006).
238. Federal Water Pollution and Control Act, 33 U.S.C. §§ 1251-1387 (2006).
239. N. Cal. River Watch v. City of Healdsburg, 496 F.3d 993, 995 (9th Cir. 2007).
240. *Healdsburg*, 496 F.3d at 997.
241. *Id.* at 996.
242. *Id.*
243. *Id.* Due to the amount of discharged wastewater, it is evident that the Pond drains to the surrounding aquifer. *Id.*
244. *Id.*

under the CWA because it qualified as a "water of the United States," and thus Healdsburg's discharge of wastewater constituted a violation of the CWA.[245] In making this determination, the district court noted that specific facts demonstrated that some sewage discharges into the pond eventually reached the Russian River.[246] Healdsburg appealed to the Ninth Circuit.[247]

On appeal, the Ninth Circuit first analyzed prior United States Supreme Court cases analyzing the CWA, and second, the Ninth Circuit discussed the correct definition of "waters of the United States."[248] Citing the United States Court of Appeals for the Seventh Circuit's opinion in *United States v. Gerke Excavating Inc.*[249] and the Supreme Court's opinion in *Marks v. United States*,[250] the Ninth Circuit stated that Justice Kennedy's significant nexus test in *Rapanos* controlled without giving any further discussion.[251]

After finding Justice Kennedy's significant nexus test superior to the *Rapanos* plurality's test, the Ninth Circuit applied the significant nexus test to the pond and found a significant nexus with navigable waterways because the pond and its wetlands were part of a larger wetland adjacent to "navigable waters."[252] The Ninth Circuit determined that a significant nexus existed because the pond physically connected with "navigable waters" as the pond clearly drained into the Russian River, and the water level corresponded between them.[253] Also, the pond and its wetlands affected biological aspects of the Russian River because the pond's wetlands supported many birds, fish, and other wildlife that were a part of the river's ecosystem.[254] Finally, a significant nexus existed due to the pond's chemical effects on the Russian River because the wetlands' drainage abilities caused changes in chloride levels in the river.[255]

3. United States v. Robison: *The Eleventh Circuit's Determination*

The United States Court of Appeals for the Eleventh Circuit adopted Justice Kennedy's significant nexus test in *Rapanos v. United*

245. *Id.* at 997.
246. *Id.* at 996.
247. *Id.* at 995.
248. *See id.* at 997-99 (discussing both the statutory and judicial authority regarding whether wetlands constitute "waters of the United States").
249. 464 F.3d 723 (7th Cir. 2006).
250. 430 U.S. 188 (1977).
251. *Healdsburg*, 496 F.3d at 999-1000.
252. *Id.* at 1000.
253. *Id.*
254. *Id.* at 1001.
255. *Id.* (finding that the side of the river where the wetlands drained had a higher concentration of chloride caused by the City of Healdsburg unlawful discharges of sewage into the wetlands).

States[256] for determining whether a wetland qualified as a "water of the United States" under the Clean Water Act[257] ("CWA").[258] In *United States v. Robison*,[259] McWane, Inc. ("McWane"), a large manufacturer of various iron products, discharged wastewater in violation of its National Pollution Discharge Elimination System ("NPDES") discharge permits.[260] The United States District Court for the Northern District of Alabama convicted McWane and its management for various criminal violations of the CWA ensuing from the discharges.[261] After being sentenced to probation and fines, McWane and McWane management appealed their convictions to the Eleventh Circuit arguing that the Avondale Creek, where the discharges occurred, was not a "navigable water" under the CWA as defined by *Rapanos*.[262] The United States argued that the Avondale Creek was a "navigable water" because of the creek's connection to Black Warrior River and Village Creek.[263] Moreover, McWane contended that the district court erred in instructing the jury because it used a pre-*Rapanos* test for determining "waters of the United States."[264]

On appeal, the Eleventh Circuit agreed that the *Rapanos* decision replaced earlier tests for determining "waters of the United States" and that the district court should have analyzed the case under the *Rapanos* ruling.[265] After examining the *Rapanos* opinions and relevant federal circuit courts of appeals determinations, the Eleventh Circuit concluded that Justice Kennedy's significant nexus test should apply.[266]

In reaching this conclusion, the Eleventh Circuit stated that it simply could not ignore the *Marks v. United States*[267] doctrine, which instructed lower courts to apply the higher court's narrowest concurring opinion when no majority opinion exists.[268] Using the *Marks* decision as a guide, the Eleventh Circuit equated "narrowest concurring opinion" as meaning the concurring opinion least restrictive of CWA

256. 547 U.S. 715 (2006).
257. Federal Water Pollution and Control Act, 33 U.S.C. §§ 1251-1387 (2006).
258. United States v. Robison, 505 F.3d 1208, 1222 (11th Cir. 2007).
259. 505 F.3d 1208 (11th Cir. 2007).
260. *Robison*, 505 F.3d at 1211-12.
261. *Id.* at 1211-12.
262. *Id.* at 1212-15.
263. *Id.* at 1215.
264. *Id.* at 1215-16. The *Rapanos I* decision occurred after the district court's ruling. *Id.* at 1216.
265. *Id.* at 1216.
266. *See id.* at 1217-21 (examining the plurality opinion, Justice Kennedy's concurring opinion, and the dissent opinion before stating that the governing rule in *Rapanos I* was Justice Kennedy's significant nexus test).
267. 430 U.S. 188 (1977).
268. *Robison*, 505 F.3d at 1221.

jurisdiction.[269] The Eleventh Circuit thus determined that Justice Kennedy's concurring opinion was the narrowest and least restrictive of CWA jurisdiction because Justice Kennedy rejected the *Rapanos* plurality's two-factor test for determining "waters of the United States."[270] Thus, by following *Marks*, the Eleventh Circuit adopted Justice Kennedy's significant nexus test.[271]

IV. ANALYSIS

In *United States v. Cundiff*,[272] the United States Court of Appeals for the Sixth Circuit concluded that the wetland properties at issue fell within the federal government's Clean Water Act[273] ("CWA") jurisdiction because those wetlands qualified as "waters of the United States."[274] In that case, the United States brought suit against both Rudy and Seth Cundiff (the "Cundiffs") alleging that they had violated the CWA by unlawfully discharging pollutants into "waters of the United States."[275] While the Cundiffs' appeal was pending, the United States Supreme Court issued its opinion in *Rapanos v. United States*,[276] in which the Supreme Court determined what wetlands constitute "waters of the United States" under the CWA.[277] Although concluding that courts may use either the *Rapanos* plurality's test or Justice Kennedy's significant nexus test to establish CWA jurisdiction over wetlands, the United States District Court for the Western District of Kentucky found that the Cundiffs' wetlands properties met both tests.[278] Therefore, the district court imposed a civil penalty on the Cundiffs and issued a permanent injunction, which prevented the Cundiffs from further discharging fill or dredged material into "waters of the United States."[279]

The Sixth Circuit affirmed the district court's findings that a significant nexus existed between the Cundiffs' wetland properties and navigable waters and that both prongs of the *Rapanos* plurality's test

269. *Id.*

270. *Id.* Specifically, the concurrence failed to adopt the "requirements that 'navigable waters' must be 'relatively permanent, standing or flowing bodies of water,'" and that there be a continuous surface connection. *Id.* at 1221-22.

271. *Id.* at 1222.

272. 555 F.3d 200 (6th Cir. 2009).

273. Federal Water Pollution and Control Act, 33 U.S.C. §§ 1251-1387 (2006).

274. United States v. Cundiff (*Cundiff I*), 555 F.3d 200, 213 (6th Cir. 2009). Under the CWA, the federal government may regulate any discharge into "navigable waters" which the CWA defined as "waters of the United States." *Cundiff I*, 555 F.3d at 206.

275. *Id.* at 205.

276. 547 U.S. 715 (2006).

277. *Cundiff I*, 555 F.3d. at 204.

278. United States v. Cundiff (*Cundiff II*), 480 F. Supp. 2d 940, 944, 947 (W.D. Ky. 2007).

279. *Cundiff I*, 555 F.3d at 205.

were satisfied.[280] In reviewing the district court's application of Justice Kennedy's significant nexus test, the Sixth Circuit found that the record supported the conclusion that a significant nexus existed because of the wetland properties' connections to the Green River.[281] Second, the Sixth Circuit stated that the disputed property met the *Rapanos* plurality's test because the wetland properties were adjacent to the Green River and because the wetland properties had a continuous surface connection to the Green River.[282] As the Cundiffs' wetland properties met both Justice Kennedy's significant nexus text and the *Rapanos* plurality's test, the Sixth Circuit refrained from making an ultimate decision as to which of the two *Rapanos* tests is the correct analysis for determining whether wetlands qualify as "waters of the United States" under the CWA.[283]

This Analysis will argue that while the Sixth Circuit applied correct analysis in determining the Cundiffs' wetland properties qualified as "waters of the United States" under the CWA, the *Cundiff* decision demonstrates that courts can similarly construe the two *Rapanos* tests.[284] This Analysis will explain that the Sixth Circuit correctly decided that the Cundiffs' wetland properties contained a significant nexus with "waters of the United States" under Justice Kennedy's test, and thus those wetland properties qualified as "waters of the United States" under the CWA.[285] This Analysis will then demonstrate that the Sixth Circuit interpreted and applied the *Rapanos* plurality's test broadly to find that the Cundiffs' wetland properties qualified as "waters of the United States" under the CWA.[286] Therefore, the Sixth Circuit determined the federal government had CWA jurisdiction over the Cundiffs' wetland properties under both *Rapanos* tests.[287] Consequently, this Analysis will conclude the Sixth Circuit's analysis demonstrated that the debate over whether the *Rapanos* plurality's test or Justice Kennedy's significant nexus test should apply as the appropriate test in determining whether a particular wetland qualifies as a "water of the United States" is irrelevant because courts can apply the *Rapanos* plurality's test broadly and in disregard of the plurality's intentions.[288] Thus, under such application, the *Rapanos*

280. *Id.* at 213.
281. *Id.* at 211.
282. *Id.* at 211-13.
283. *Id.* at 210. The court left the "ultimate resolution of the *Marks*-meets-*Rapanos* debate to a future case that turns on which test in-fact controls." *Id.*
284. *See infra* notes 290-403 and accompanying text.
285. *See infra* notes 290-323 and accompanying text.
286. *See infra* notes 324-79 and accompanying text.
287. *See infra* notes 290-379 and accompanying text.
288. *See infra* notes 380-403 and accompanying text.

plurality's test becomes more like Justice Kennedy's significant nexus test.[289]

A. JUSTICE KENNEDY'S SIGNIFICANT NEXUS TEST: THE SIXTH CIRCUIT PROPERLY DETERMINED THE CUNDIFFS' WETLAND PROPERTIES WERE "WATERS OF THE UNITED STATES" UNDER THIS TEST

A review of Justice Kennedy's concurring opinion in *Rapanos v. United States*[290] and prior case law from the United States Court of Appeals for the Ninth Circuit indicated the United States Court of Appeals for the Sixth Circuit properly applied Justice Kennedy's significant nexus test to Rudy and Seth Cundiff's (the "Cundiffs") wetland properties.[291] Justice Kennedy held that "waters of the United States" constituted those wetlands that contained a significant nexus with "navigable waters."[292] Justice Kennedy identified three factors to examine in determining whether a significant nexus existed between the wetlands in question and other waters more readily labeled as "navigable."[293] Since the Cundiffs' wetland properties met all three factors, the Sixth Circuit held that Justice Kennedy's significant nexus test was satisfied.[294] Moreover, in *Northern California River Watch v. City of Healdsburg,*[295] the Ninth Circuit recently applied Justice Kennedy's significant nexus test to find that wetlands qualified as "waters of the United States."[296] A comparison of the Ninth Circuit's application of Justice Kennedy's significant nexus test to the *Cundiff* court's application of that same test further demonstrated the Sixth Circuit correctly determined that the Cundiffs' wetland properties fell within CWA jurisdiction because those wetlands qualified as "waters of the United States."[297]

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289. *See infra* notes 380-403 and accompanying text.

290. 547 U.S. 715 (2006).

291. *See infra* notes 292-323 and accompanying text.

292. Rapanos v. United States (*Rapanos I*), 547 U.S. 715, 779 (2006).

293. *Rapanos I*, 547 U.S. at 780.

294. United States v. Cundiff (*Cundiff I*), 555 F.3d 200, 211 (6th Cir. 2009).

295. 496 F.3d 993 (9th Cir. 2007).

296. N. Cal. River Watch v. City of Healdsburg, 496 F.3d 993, 1001 (9th Cir. 2007).

297. *Compare Cundiff I*, 555 F.3d at 210-11 (explaining that the Cundiffs' wetland properties had chemical, biological, and physical connections to the Green River because they affected the pollutant, contaminant, and toxin levels in the Green River; provided habitat for wildlife and plants; and filtered water into the Green River) *with Healdsburg*, 496 F.3d at 1000-01 (stating that the Basal Pond (the "pond") had chemical, biological, and physical connections to the Russian River (the "river") because the pond had corresponding chloride levels to the river; supported wildlife populations; and had over a quarter of the pond's water volume flowing into the river).

1. *The Presence of Justice Kennedy's Three Factors Supports the Sixth Circuit's Determination that the Cundiffs' Wetland Properties Were "Waters of the United States"*

In his concurring opinion in *Rapanos v. United States*,[298] Justice Kennedy determined that wetlands qualified as "waters of the United States" under the Clean Water Act[299] ("CWA") if a significant nexus existed between those wetlands and other "navigable waters."[300] Justice Kennedy stated that a significant nexus would be found between wetlands and nearby "navigable waters" if those wetlands, either by themselves or with similar, nearby lands, affected the 1) chemical properties, 2) physical properties, and 3) biological properties of those nearby "navigable waters."[301]

In *United States v. Cundiff*,[302] the United States Court of Appeals for the Sixth Circuit correctly found a significant nexus existed between Rudy and Seth Cundiff's (the "Cundiffs") wetland properties and "navigable waters" because of the presence of the three effects (chemical, physical, and biological) that Justice Kennedy outlined in *Rapanos*.[303] Although Justice Kennedy failed to describe what factors would demonstrate that certain wetlands affected the chemical, physical, and biological factors of "navigable waters," the Justice made several suggestions in his descriptions of the wetland properties at issue in *Rapanos*.[304]

The existence of Justice Kennedy's suggested factors, which establish the requisite chemical, physical, and biological effects on nearby "navigable waters," in the Cundiffs' wetland properties supported the *Cundiff* court's assertion that the Cundiffs' wetland properties satisfied the significant nexus test.[305] Some of Justice Kennedy's

298. 547 U.S. 715 (2006).

299. Federal Water Pollution and Control Act, 33 U.S.C. §§ 1251-1387 (2006).

300. United States v. Rapanos (*Rapanos I*), 547 U.S. 715, 780, 787 (Kennedy, J., concurring).

301. *Rapanos I*, 547 U.S. at 780.

302. 555 F.3d 200 (6th Cir. 2009).

303. *Compare Rapanos I*, 547 U.S. at 779-80 (stating that wetlands that significantly affect biological, chemical, and physical properties of other waters easily classified as "navigable" posses the required significant nexus), *with* United States v. Cundiff (*Cundiff I*), 555 F.3d 200, 211 (6th Cir. 2009) (noting the Cundiffs' wetland properties' biological, chemical, and physical effects on the Green River).

304. *See Rapanos I*, 547 U.S. at 783-86 (instructing which aspects of Rapanos's and the Carabells' wetland properties the district court should look at in applying the significant nexus test and suggesting what constitutes such biological, chemical, and physical properties).

305. *Compare Rapanos I*, 547 U.S. at 783-86 (instructing which aspects of Rapanos's and the Carabells' wetland properties the district court should look at in applying the significant nexus test and suggesting what constitutes such biological, chemical, and physical properties), with *Cundiff I*, 555 F.3d at 211 (noting the Cundiffs' wetland properties' biological, chemical, and physical effects on the Green River). *See also* Mat-

suggested factors for identifying chemical, physical, and biological effects included sediment and pollutant trapping, flood peak deterrence, flood retention, and wildlife habitat creation.[306] In *Cundiff*, the Sixth Circuit focused on the United States District Court for the Western District of Kentucky's application of Justice Kennedy's significant nexus test.[307] The Sixth Circuit noted the wetland properties' short and long term water storage abilities, ability to filter sediment and acid runoff, and plant and wildlife populations.[308] Additionally, the United States' expert witnesses testified that negative implications occurred on the Green River since the Cundiffs began filling their wetland properties.[309] Those expert witnesses testified that because the Cundiffs' wetland properties no longer filtered upstream sites' drainage, the Green River had an increase in accumulation of sediment.[310] Thus, the similarity between Justice Kennedy's suggested factors qualifying wetlands as federally regulable "waters of the United States" under the CWA and those factors the Sixth Circuit identified on the Cundiffs' wetland properties established that the *Cundiff* court correctly asserted that the Cundiffs' wetland properties had a significant nexus with nearby "navigable waters."[311]

2. *A Recent Ninth Circuit Case Further Supports the Sixth Circuit's Decision that the Cundiffs' Wetland Properties Were "Waters of the United States" Under Justice Kennedy's Significant Nexus Test*

The United States Court of Appeals for the Ninth Circuit's determination that a significant nexus existed in *Northern California River*

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thew A. Macdonald, *Rapanos v. United States and Carabell v. United States Army Corps of Engineers*, 31 HARV. ENVTL. L. REV. 321, 329 (2007) [hereinafter *Rapanos/Carabell*] (discussing that although Justice Kennedy did not elaborate on what constitutes a significant nexus, the Justice did suggest a broad category of functions that may establish the significant nexus).

306. *Rapanos/Carabell*, 31 HARV. ENVTL. L. REV. at 329; *see Rapanos I*, 547 U.S. at 783-85 (stating that "habitat, sediment trapping, nutrient recycling, and flood peak diminution, reduction flow water augmentation . . ." as well as "flood retention, recreation and conservation and overall ecology" would be evidence that a district court could use to establish a significant nexus).

307. *Cundiff I*, 555 F.3d at 210-11.

308. *Id.* at 211.

309. *Id.* at 211; United States v. Cundiff (*Cundiff II*), 480 F. Supp. 2d 940, 945 (W.D. Ky. 2007).

310. *Cundiff I*, 555 F.3d at 211; *Cundiff II*, 480 F. Supp. 2d at 945.

311. *Compare Rapanos I*, 547 U.S. at 783-86 (suggesting that the testimony establishing that Mr. Rapanos's "wetlands were providing 'habitat, sediment trapping, nutrient recycling, and flood peak diminution, reduction flow water augmentation'" and that Mr. Carabell's wetlands were having "'effects on wildlife habitat and water quality . . . flood retention, recreation and conservation and overall ecology'" may be important to determining whether a nexus exists), *with Cundiff I*, 555 F.3d at 211 (noting the effects that the wetlands in the case have on the Green River).

Watch v. City of Healdsburg[312] supported the United States Court of Appeals for the Sixth Circuit's determination that a significant nexus existed in *United States v. Cundiff*[313] because many of the same determinative factors were present in both cases.[314] In *Healdsburg*, the wetlands at issue affected the chemical, physical, and biological aspects of the nearby Russian River, a traditional "navigable water."[315] The *Healdsburg* wetlands physically connected with a "navigable water" because those wetlands clearly drained into the Russian River, and the water level corresponded between them.[316] The *Healdsburg* wetlands affected biological aspects of the Russian River because those wetlands supported many birds, fish, and other wildlife that were a part of the river's ecosystem.[317] Finally, the wetlands had chemical effects on the Russian River because the wetlands' drainage abilities caused changes in chloride levels in that river.[318]

The Ninth Circuit's determination that the wetland properties in *Healdsburg* caused physical, biological, and chemical effects on the Russian River illustrates that the wetland properties in *Cundiff* affected the physical, biological, chemical composition of nearby "navigable waters."[319] Both the *Healdsburg* and *Cundiff* decisions involved wetlands that supported wildlife habitats.[320] Similarly, in both cases, water from the wetlands drained into a nearby river.[321] Finally, similar to the *Healdsburg* wetlands, the wetland properties in *Cundiff* af-

312. 496 F.3d 993 (9th Cir. 2007).

313. 555 F.3d 200 (6th Cir. 2009).

314. *Compare* United States v. Cundiff (*Cundiff I*), 555 F.3d 200, 211 (6th Cir. 2009) (explaining that the Cundiffs' wetland properties had biological, chemical and physical connections to the Green River), *with* N. Cal. River Watch v. City of Healdsburg, 496 F.3d 933, 1000-01 (9th Cir. 2007) (stating that the wetlands in question has biological, chemical, and physical connections to the Russian River).

315. *Healdsburg*, 496 F.3d at 1001.

316. *Id.* at 1000.

317. *Id.* at 1001.

318. *Id.* (finding that the side of the river where the wetlands drained had a higher concentration of chloride caused by Healdsburg's unlawful discharges of sewage into the wetlands).

319. *Compare Cundiff I*, 555 F.3d at 211 (explaining that the Cundiffs' wetland properties had biological, chemical and physical connections to the Green River), *with Healdsburg*, 496 F.3d at 1000-01 (stating that the wetlands in question has biological, chemical, and physical connections to the Russian River).

320. *Compare Cundiff I*, 555 F.3d at 211 (explaining that the Cundiffs' wetland properties provided "an important habitat for plants and wildlife"), *with Healdsburg*, 496 F.3d at 1001 (stating that the wetlands supported "substantial bird, mammal and fish populations").

321. *Compare Cundiff I*, 555 F.3d at 211 (explaining that the Cundiffs' wetland properties filtered the acid runoff from a mine nearby before the water entered the Green River), *with Healdsburg*, 496 F.3d at 1000 (stating that at least 26% of the wetlands' water volume eventually reached the Russian River).

fected certain chemical levels in the nearby river.[322] These similarities between *Healdsburg* and *Cundiff* demonstrated that the Sixth Circuit correctly determined that the Cundiffs' wetland properties had a significant nexus to "waters of the United States."[323]

B. THE *RAPANOS* PLURALITY'S TEST: THE SIXTH CIRCUIT DECIDED THAT THE CUNDIFFS' WETLAND PROPERTIES SATISFIED THE *RAPANOS* PLURALITY'S TEST BY BROADLY APPLYING THE TEST

As no federal circuit court of appeals has determined that the *Rapanos v. United States*[324] plurality's test alone is the correct test to apply, the only guidance in applying the plurality's test is the plurality opinion itself.[325] In *Rapanos*, the plurality stated that the United States Army Corps of Engineers ("Corps") must establish two steps in order to regulate wetlands under the Clean Water Act[326] ("CWA").[327] First, a channel adjacent to the wetland must be a "water of the United States."[328] Second, a continuous surface connection must exist between the "water of the United States" and the wetland.[329] The United States Court of Appeals for the Sixth Circuit broadly applied the *Rapanos* plurality's two-step test when it determined that the Cundiffs' wetland properties satisfied both steps.[330]

1. The Sixth Circuit Correctly Determined that the Cundiffs' Wetland Properties Were Adjacent to "Waters of the United States"

The *United States v. Cundiff*[331] court determined that Rudy and Seth Cundiff's (the "Cundiffs") wetland properties were adjacent to "waters of the United States" because of those wetlands' proximity to the South Channel, Pond Creek, and Caney Creek.[332] The *Rapanos v.*

322. *Compare Cundiff I*, 480 F. Supp. 2d at 945 (explaining that the Cundiffs' wetland properties affected the pollutant, contaminant, and toxin levels in the Green River), *with Healdsburg*, 496 F.3d at 1001 (stating that the chloride levels corresponded to where the wetlands drained into the Russian River).

323. *See supra* notes 312-22 and accompanying text.

324. 547 U.S. 715 (2006).

325. *See generally* BRIAN W. BLAESSER & ALAN C. WEINSTEIN, FEDERAL LAND USE LAW & LITIGATION § 10:18 (2009) (stating how the federal circuit courts have interpreted Rapanos v. United States (*Rapanos I*), 547 U.S. 715 (2006) and that no circuit has determined that only the plurality test applies).

326. Federal Water Pollution and Control Act, 33 U.S.C. §§ 1251-1387 (2006).

327. *Rapanos I*, 547 U.S. at 742.

328. *Id.*

329. *Id.*

330. *See infra* notes 331-379 and accompanying text.

331. 555 F.3d 200 (6th Cir. 2009).

332. United States v. Cundiff (*Cundiff I*), 555 F.3d 200, 204, 211 (6th Cir. 2009).

United States[333] plurality stated that in order for an adjacent property to be a "water of the United States" it had to be 1) relatively permanent and 2) be connected to "traditional interstate navigable waters."[334] The *Rapanos* plurality determined that "waters of the United States" had to be more than just intermittent or periodic channels of flow, as the plurality extensively examined the United States Army Corps of Engineers' ("Corps") attempt to stretch the definition of "waters of the United States."[335] In limiting the definition of "waters of the United States" to permanently flowing water bodies, the *Rapanos* plurality reasoned that there must be a clearer authorization from Congress to extend the definition to only ephemeral water flows.[336] As such, the *Rapanos* plurality expressed the view that there are limits to the definition of "waters of the United States," and that the Corps had previously attempted to exceed those limits.[337] Thus, these limits must guide the application of the *Rapanos* plurality's first step of determining whether a wetland's adjacent property is a "water of the United States."[338]

The United States Court of Appeals for the Sixth Circuit deferred to the United States District Court for Western District of Kentucky in finding that the South Channel, Caney Creek, and Pond Creek were permanent water bodies.[339] The district court determined that water flowed through the channel and creeks continuously and that they were relatively permanent.[340] Specifically, the United States' expert testimony established that water flowed through the South Channel almost all year and that Pond and Caney Creeks had significant amounts of flowing water.[341] In comparing the district court's findings with the *Rapanos* plurality's opinion, the Sixth Circuit correctly

333. 547 U.S. 715 (2006).

334. Rapanos v. United States (*Rapanos I*), 547 U.S. 715, 742 (2006).

335. *Rapanos I*, 547 U.S. at 738-39. "In developing the current regulations, the Corps consciously sought to extend its authority to the farthest reaches of the commerce power." *Id.* at 738.

336. *Id.* at 738.

337. *See id.* at 737-38 (stating that the Corps's definition of "waters of the United States" was an "expansive theory" and an impermissible construction).

338. *Compare Rapanos I*, 547 U.S. at 738-39 (stating that limits of the definition of "waters of the United States" so that the definition includes "only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes.'"), *with Rapanos I*, 547 U.S. at 742 (stating that the first step of the test to establish CWA jurisdiction over wetlands requires "that the adjacent channel contains a 'water of the United States' (i.e. a relatively permanent body of water connected to traditional interstate navigable waters)").

339. *Cundiff I*, 555 F.3d at 211-12.

340. *Id.* at 211-12 ("the district court found that the water flows through the channel into Pond Creek for all but a few weeks a year"); United States v. Cundiff (*Cundiff II*), 480 F. Supp. 2d 940, 946 (W.D. Ky. 2007).

341. *Cundiff II*, 480 F. Supp. 2d at 946.

reasoned that the South Channel, Pond Creek, and Caney Creek were permanent because of the flowing water present throughout the year.[342]

Second, in order for the Cundiffs' wetland properties to satisfy the *Rapanos* plurality's first step, not only did the South Channel, Pond Creek, and Caney Creek need to be permanent, but they also had to connect to traditional "navigable waters."[343] Both the Sixth Circuit and the district court found that the Green River satisfied this element.[344] However, both the Sixth Circuit and the district court engaged in little discussion on this point.[345] Despite the lack of analysis at both the district court and circuit court of appeals levels, the *Cundiff* courts correctly determined that the Green River was a traditional "navigable water" due to the *Rapanos* plurality's statements that rivers and streams were conventionally labeled "navigable waters."[346]

2. *The Sixth Circuit Determined that a Continuous Surface Connection Existed between the Cundiffs' Wetland Properties and "Waters of the United States"*

In *United States v. Cundiff*,[347] the United States Court of Appeals for the Sixth Circuit agreed with the district court that a continuous surface connection flowed from Rudy and Seth Cundiff's ("the Cundiffs") wetland properties to the South Channel to the Green River, satisfying the second step of the *Rapanos v. United States*[348] plurality's test.[349] The Sixth Circuit, however, broadened the meaning of "continuous surface connection," by allowing this connection to

342. *Compare Cundiff I* 555 F.3d at 211-12 (explaining that the South Channel, Pond Creek, and Caney Creek were "all 'relatively permanent bodies of water . . . .'"), *with Rapanos I*, 547 U.S. at 739 (stating the standard for "waters of the United States").

343. *See Rapanos I*, 547 U.S. at 742 (stating that the first step of the plurality's test was that "the adjacent channel contains a 'wate[r]' of the United States,' (i.e. a relatively permanent body of water connected to traditional interstate navigable waters)).

344. *Cundiff I*, 555 F.3d at 211-12.

345. *See Cundiff I*, 555 F.3d at 211; *Cundiff II*, 480 F. Supp. 2d at 946 (determining that the Green River was a traditional "navigable water" under the test without providing reasoning for such a determination).

346. *Compare Cundiff I*, 555 F.3d at 211 (stating that the Green River was a traditional "navigable water"), *with Rapanos I*, 547 U.S. at 734-35, 739 (stating that the phrase "waters of the United States" referred primarily to "'rivers, streams, and other hydrographic features more conventionally identifiable as waters'"); *see also supra* notes 71, 86 (explaining that both *Cundiff I* and *Cundiff II* determined the Green River was a traditional "navigable water").

347. 555 F.3d 200 (6th Cir. 2009).

348. 547 U.S. 715 (2006).

349. United States v. Cundiff (*Cundiff I*), 555 F.3d 200, 212-13 (6th Cir. 2009) (deferring to the district court's finding that the South Channel "provides a largely uninterrupted permanent surface water flow between the wetlands and traditional waterways").

exist for purposes of the *Rapanos* plurality's test, though the connection was not readily apparent and manmade.[350]

The *Rapanos* plurality created the continuous surface connection element to ensure that the definition of "waters of the United States" would not extend Clean Water Act[351] ("CWA") jurisdiction to isolated bodies of water.[352] Prior to *Rapanos*, the United States Army Corps of Engineers ("Corps") attempted to regulate wetlands without having CWA jurisdiction over the land and ditches separating the wetland from other "navigable waters.[353] In *United States v. Riverside Bayview Homes, Inc.*,[354] the United States Supreme Court only deferred to the Corps's judgment that wetlands were regulable as "waters of the United States" where it was difficult to determine where the wetland water ended and the land began.[355] As such, the *Riverside Bayview* opinion guided the *Rapanos* plurality in announcing that the Corps may only regulate those wetlands where a continuous surface connection existed so that the wetlands lacked a clear boundary between them and traditional "navigable waters."[356] Thus, the continuous surface connection limits the Corps's expansive categorization of wetlands as "waters of the United States" to only those wetlands lacking clear boundaries with "navigable waters."[357]

The Sixth Circuit applied the continuous surface connection element and found that there was an unclear demarcation between where the wetland ended and where the land began by misinterpreting the *Rapanos* plurality's intentions.[358] In *Rapanos*, the plurality stated that the essence of the continuous surface connection was the *unclear demarcation* between where the wetland ended and where the land began.[359] The Sixth Circuit found that the Cundiffs' wetland

350. *See infra* notes 351-79 and accompanying text.

351. Federal Water Pollution and Control Act, 33 U.S.C. §§ 1251-1387 (2006).

352. Rapanos v. United States (*Rapanos I*), 547 U.S. 715, 742 (2006).

353. *Rapanos I*, 547 U.S. at 740.

354. 474 U.S. 121 (1985).

355. *Rapanos I*, 547 U.S. at 740 (discussing United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 134 (1985)).

356. *See id.* (examining *Riverside Bayview* before announcing the test for "waters of the United States").

357. *See id.* at 747 (criticizing the dissent's deference to the Corps's expansive definition of covered waters under the CWA and stating that "the scope of ambiguity of 'the waters of the United States' is determined by a wetland's physical connection to covered waters . . ." and that deference to the Corps's interpretation is "mere legerdemain")

358. *Compare Cundiff I*, 555 F.3d at 212 (discussing that a continuous surface connection existed despite admitting that the surface connection was not readily apparent), *with Rapanos I*, 547 U.S. at 742 (stating that the essence of the continuous surface connection was the *unclear demarcation* between where the wetland ended and where the land began).

359. *See Rapanos I*, 547 U.S. at 742 (emphasizing that *"only* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their

properties did have a continuous surface connection with the creeks and Green River.[360] The Sixth Circuit made its findings despite acknowledging the fact that "it was not readily apparent" that water perpetually flowed from the Cundiffs' wetland properties to the "navigable waters" because those wetland properties were on a different elevation than the nearby creeks.[361] The Sixth Circuit relied on the district court's determination that the *Rapanos* plurality would recognize that even gradual transitions would constitute a continuous surface connection.[362] However, the district court interpreted this conclusion from the section of the *Rapanos* plurality's opinion that stated that determining the boundaries of "navigable waters" might be complicated when such "waters" directly connect to marshes, swamps, or similar water bodies.[363] Thus, the *Rapanos* plurality stated that these general and frequent boundary ambiguities should allow the Corps to extend CWA jurisdiction to wetlands that actually abutted "waters of the United States."[364] The *Rapanos* plurality never stated that the same boundary-drawing problem occurred when a continuous surface flow was not readily apparent and wetlands were on different elevation levels than regulable waters.[365] Thus, the Sixth Circuit incorrectly interpreted the *Rapanos* plurality's opinion to extend the boundary drawing problem to the Cundiffs' situation in order to find a continuous surface connection.[366]

Additionally, the *Rapanos* plurality clearly opined that a distant and intermittent hydrological connection did not satisfy the second step of its test's analysis because such a remote connection would not cause the problem of seeing where the water ends and the land be-

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own right, so that there is no clear demarcation between 'waters' and wetlands, are . . . covered by the Act." *Id.*

360. *Cundiff I*, 555 F.3d at 212; United States v. Cundiff (*Cundiff II*), 480 F. Supp. 2d 940, 947 (W.D. Ky. 2007).

361. *Cundiff I*, 555 F.3d at 212.

362. *Id.*; *Cundiff II*, 480 F. Supp. 2d at 947. The district court opined that the plurality "clearly did not intend that the water level of the wetland and the covered 'waters' must be completely level. Such a conclusion would completely eviscerate the plurality's recognition that a gradual transition can exist from water to land . . . ." *Cundiff II*, 480 F. Supp. 2d at 947.

363. *Cf. Cundiff II*, 480 F. Supp. 2d 946 (interpreting the *Rapanos I* plurality's discussion of *Riverside Bayview*).

364. *Rapanos I*, 547 U.S. at 740 (discussing *Riverside Bayview's* holding that wetlands abutting "waters of the United States" were regulable based on the central reason that a boundary drawing problem existed).

365. *See id.* at 740-42 (discussing the boundary drawing problem without addressing unapparent surface flows or elevation levels).

366. *Compare Cundiff I*, 555 F.3d at 212 (discussing that a continuous surface connection existed despite admitting that the surface connection was not readily apparent), *with Rapanos I*, 547 U.S. at 742 (stating that the essence of the continuous surface connection was the *unclear demarcation* between where the wetland ended and where the land began).

gins.[367] This statement provides further support that the Sixth Circuit misapplied the continuous surface connection element of the *Rapanos* plurality's test.[368] The Sixth Circuit misapplied the second element of the *Rapanos* plurality's test by stretching the meaning of continuous surface connection to the Cundiffs' unapparent connection, a connection that is more like a distant hydrological connection rather than a perpetual flow of water.[369]

Second, the Sixth Circuit considered the Cundiffs' drainage activities as further evidence of a continuous surface connection, albeit manmade.[370] However, the *Rapanos* plurality never suggested that a court could find a continuous surface connection based on manmade drainage activities.[371] In fact, the *Rapanos* plurality was silent about such manmade connections.[372] Therefore, the Sixth Circuit extended the definition of continuous surface connection to those deemed both natural and manmade.[373]

In summary, the Sixth Circuit erred in determining that the Cundiffs' wetland properties qualified as "waters of the United States" under the *Rapanos* plurality's test.[374] First, the Sixth Circuit correctly applied the first step of the *Rapanos* plurality's test to determine that an adjacent channel to the wetland was a "water of the United States."[375] The South Channel, Pond Creek, and Caney Creek were permanent and connected to the traditional "navigable waters;" specifically, they connected to the Green River.[376] Second, however,

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367. *Rapanos I*, 547 U.S. at 742 (stating that wetlands with a "remote hydrological connection to 'waters of the United States' do not implicate the boundary-drawing problem.").

368. *See infra* note 369 and accompanying text.

369. *Compare Cundiff I*, 555 F.3d at 212-13 (stating that a continuous surface flow existed despite the fact that the connection may not have been readily apparent), *with Rapanos I*, 547 U.S. at 742 (stating that the continuous surface connection must present the boundary drawing problem and that a "physically remote hydrologic connection" was not enough).

370. *Cundiff I*, 555 F.3d at 212-13.

371. *See Rapanos I*, 547 U.S. at 742 (discussing the continuous surface connection requirement without determining that such connections could be manmade).

372. *Id.*

373. *Compare Cundiff I*, 555 F.3d at 212-13 (determining that the Cundiffs created a continuous surface connection with their drainage activities), *with Rapanos I*, 547 U.S. at 742 (stating the continuous surface connection requirement without determining that manmade activities would satisfy the requirement).

374. *See supra* notes 324-73 and accompanying text.

375. *Compare Cundiff I*, 555 F.3d at 211-12 (explaining that the wetland properties were adjacent to the South Channel, Pond Creek, and Caney Creek, which were "all 'relatively permanent bodies of water connected to a traditional interstate navigable water, the Green River'"), *with Rapanos I*, 547 U.S. at 742 (stating that the first step of the plurality's test was that "the adjacent channel contains a 'wate[r]' of the United States,' (i.e. a relatively permanent body of water connected to traditional interstate navigable waters)").

376. *Cundiff I*, 555 F.3d at 211-12.

the Sixth Circuit incorrectly found that a continuous surface connection existed between the "waters of the United States" and the Cundiffs' wetland properties.[377] The Sixth Circuit incorrectly applied the *Rapanos* plurality's opinion so that a continuous surface connection existed even though surface flow of the Cundiffs' wetland properties was not readily apparent and resulted from manmade activities.[378] This misinterpretation of the *Rapanos* plurality's intentions reveals the weaknesses in the Sixth Circuit's application of the plurality's test.[379]

C. The Sixth Circuit Construed Both Tests Together

The United States Court of Appeals for the Sixth Circuit's determinations that Rudy and Seth Cundiff's (the "Cundiffs") wetland properties satisfied both *Rapanos v. United States*[380] tests demonstrated that courts may apply the *Rapanos* plurality's test broadly to be more like Justice Kennedy's significant nexus test.[381] In *United States v. Gerke Excavating, Inc.*[382] and in *United States v. Robison*,[383] both United States Courts of Appeals for the Seventh and Eleventh Circuits analyzed the *Marks v. United States*[384] doctrine as requiring lower courts to apply the "narrowest" *Rapanos* test.[385] In both cases, the Seventh and Eleventh Circuits announced Justice Kennedy's significant nexus test as the "narrowest" opinion in *Rapanos*.[386] As Justice Kennedy rejected the requirements of the *Rapanos* plurality's test, the Eleventh Circuit predicted that Justice Kennedy's significant nexus test would extend federal Clean Water Act[387] ("CWA") jurisdiction over wetlands more frequently than the *Rapanos* plurality's test.[388] Therefore, the Seventh, Ninth, and Eleventh Circuits have all chosen to adopt the *Rapanos* test that, in their view, would result in

377. *See supra* notes 347-76 and accompanying text.

378. *Compare Cundiff I*, 555 F.3d at 212-13 (stating that a continuous surface flow existed despite the fact that the connection may not have been readily apparent), *with Rapanos I*, 547 U.S. at 742 (stating that the continuous surface connection must present the boundary drawing problem and that a "physically remote hydrologic connection" was not enough).

379. *See supra* notes 347-378 and accompanying text.

380. 547 U.S. 715 (2006).

381. *See infra* notes 382-403 and accompanying text.

382. 464 F.3d 723 (7th Cir. 2006).

383. 505 F.3d 1208 (11th Cir. 2007).

384. 430 U.S. 188 (1977).

385. United States v. Gerke Excavating Inc., 464 F.3d 723, 724 (7th Cir. 2006); United States v. Robison, 505 F.3d 1208, 1221 (11th Cir. 2007).

386. *Gerke*, 464 F.3d at 724; *Robison*, 505 F.3d at 1221.

387. Federal Water Pollution and Control Act, 33 U.S.C. §§ 1251-1387 (2006).

388. *Robison*, 505 F.3d at 1221.

the broadest latitude of control for the United States Army Corps of Engineers ("Corps").[389]

The Sixth Circuit's decision in *Cundiff,* however, demonstrated that once Justice Kennedy's significant nexus test is met, the *Rapanos* plurality's test is also easily met despite its two-step restrictions.[390] The Sixth Circuit demonstrated that meeting both tests may be done by finding that even "relatively permanent" adjacent waterways are "waters of the United States."[391] Alternatively, a court may find a continuous surface connection even if the connection is not readily apparent.[392] Finally, a court may find the continuous surface connection in manmade activities.[393] In each of these ways, courts may apply the *Rapanos* plurality's test to more readily qualify wetlands as "waters of the United States" and be in line with findings under Justice Kennedy's significant nexus test.[394]

As it expanded the *Rapanos* plurality's test to more easily qualify wetlands as "waters of the United States," the Sixth Circuit strayed from the entire purpose of the *Rapanos* plurality's intentions in creating its two-step test.[395] The *Rapanos* plurality determined that the only significant nexus that may establish wetlands as "waters of the

389. *Compare Gerke*, 464 F.3d at 725 (demonstrating that the Seventh Circuit chose Justice Kennedy's test); *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 933, 995 (9th Cir. 2007) (demonstrating that the Ninth Circuit chose Justice Kennedy's test); and *Robison*, 505 F.3d at 1222 (demonstrating that the Eleventh Circuits chose Justice Kennedy's test), *with Robison*, 505 F.3d at 1221(demonstrating that Justice Kennedy's test will extend government control over wetlands more often than the plurality's test).

390. *See* United States v. Cundiff (*Cundiff I*), 555 F.3d 200, 210-13 (6th Cir. 2009) (stating first that the Cundiffs' wetland properties satisfied Justice Kennedy's significant nexus test and then applying the *Rapanos I* plurality's two-factor test to establish jurisdiction under the CWA as well).

391. *See Cundiff I*, 555 F.3d at 210-13 (finding that Justice Kennedy's significant nexus test established jurisdiction followed by the finding that the *Rapanos I* plurality's test established jurisdiction despite rejecting the Cundiffs' argument that the not readily apparent surface connection between the Cundiffs' wetland properties and the Green River defeated the continuous surface connection element).

392. *See id.* at 212 (finding the *Rapanos I* plurality's test established jurisdiction despite rejecting the Cundiffs' argument that the not readily apparent surface connection between the Cundiffs' wetland properties and the Green River defeated the continuous surface connection element).

393. *See id.* at 212-13 (stating that it does not make a difference whether the continuous surface connection is manmade or naturally formed).

394. *See supra* notes 347-79 and accompanying text.

395. *Compare Cundiff I*, 555 F.3d at 212-13 (finding the *Rapanos I* plurality's test established jurisdiction despite rejecting the Cundiffs' argument that the not readily apparent surface connection between the Cundiffs' wetland properties and the Green River defeated the continuous surface connection element and by stating that it does not make a difference whether the continuous surface connection is manmade or naturally formed), *with* Rapanos v. United States (*Rapanos I*), 547 U.S. 715, 742 (2006) (emphasizing that only those wetlands where there "is no clear demarcation between 'waters' and wetlands" satisfy the continuous surface connection element and not stating that manmade connections may establish this element).

United States" is a physical connection that makes the wetlands *indistinguishable* from "waters of the United States."[396] The *Rapanos* plurality criticized Justice Kennedy for rewriting the statute to extend CWA jurisdiction to all wetlands that affect the biological, physical, and chemical properties of "waters of the United States" because such a finding was contrary to the CWA statutory language.[397] However, the Sixth Circuit's determination that a continuous surface flow existed though it was not readily apparent ignored the *Rapanos* plurality's intent that only physical connections should allow the Corps to classify wetlands as "waters of the United States" under the CWA.[398] Thus, in applying the *Rapanos* plurality's test, the Sixth Circuit patterned the exact actions the plurality criticized in Justice Kennedy's test and in doing so deviated from the entire purpose of the plurality opinion.[399]

By broadening the test and deviating from the *Rapanos* plurality's intentions, the Sixth Circuit demonstrated that courts may merge both *Rapanos* tests into essentially the same test.[400] The Sixth Circuit's simple changes made while applying the *Rapanos* plurality's two steps allowed the Cundiffs' wetland properties to qualify as "water of the United States" as easily as they would qualify under Justice Kennedy's significant nexus test.[401] As such, the Sixth Circuit demonstrated that courts may construe either *Rapanos* test to achieve the same result.[402] Thus, the great *Rapanos* debate over whether the plurality's test or Justice Kennedy's significant nexus test should be applied to determine whether a wetland is a "water of the United States" under the CWA is largely irrelevant.[403]

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396. *Rapanos I*, 547 U.S. at 755.

397. *Id.* at 756. Whereas the CWA actually only extended jurisdiction to wetlands if they were "waters of the United States." *Id.*

398. *Compare Cundiff I*, 555 F.3d at 21 (finding the *Rapanos I* plurality's test established jurisdiction despite rejecting the Cundiffs' argument that the not readily apparent surface connection between the Cundiffs' wetland properties and the Green River defeated the continuous surface connection element), *with Rapanos I*, 547 U.S. at 742 (emphasizing that only those wetlands where there "is no clear demarcation between 'waters' and wetlands" satisfy the continuous surface connection element and specifically rejecting the use of other ecological factors to establish the continuous surface connection).

399. *Compare Cundiff I*, 555 F.3d at 212 (expanding the *Rapanos I* plurality's test by allowing the not readily apparent surface connection between the Cundiffs' wetland properties and the Green River to satisfy the continuous surface connection element and by stating that it does not make a difference whether the continuous surface connection is manmade or naturally formed), *with Rapanos I*, 547 U.S. at 755-56 (criticizing Justice Kennedy's test because it incorrectly substitutes the purpose of the CWA for the statute's text and thus is able to expand the Corps's jurisdiction over wetlands).

400. *See supra* notes 324-99 and accompanying text.

401. *See supra* notes 347-79 and accompanying text.

402. *See supra* notes 380-94 and accompanying text.

403. *See supra* notes 380-402 and accompanying text.

V. CONCLUSION

In *United States v. Cundiff*,[404] the United States Court of Appeals for the Sixth Circuit deemed the Cundiffs' wetland properties to be regulable under the Clean Water Act[405] ("CWA") as "waters of the United States," after applying the two *Rapanos v. United States*[406] tests.[407] In that case, the United States brought suit against a father and son, Rudy and Seth Cundiff (the "Cundiffs"), after the Cundiffs drained their wetland properties to make them more suitable for farming activities.[408] The United States' suit alleged that the Cundiffs violated the CWA by discharging pollutants into "navigable waters."[409] The United States District Court for the Western District of Kentucky determined that either *Rapanos* test was appropriate to determine whether the Cundiffs' wetland properties qualified as "waters of the United States" under the CWA and that the Cundiffs' wetland properties satisfied both *Rapanos* tests.[410]

The Sixth Circuit reviewed the district court's application of the two *Rapanos* tests on the Cundiffs' wetland properties.[411] Under Justice Kennedy's significant nexus test, the Sixth Circuit stated evidence of chemical, biological, and physical connections between the Cundiffs' wetland properties and other "navigable waters" sufficiently established that the Cundiffs' wetland properties qualified as "waters of the United States" under the CWA.[412] The Sixth Circuit further determined that the two steps of the *Rapanos* plurality's test were satisfied because the Cundiffs' wetland properties were adjacent to "waters of the United States" and had a continuous surface connection to that water.[413] The *Cundiff* court refrained from addressing the issue of which *Rapanos* test is proper under the United States Supreme Court's *Marks v. United States*[414] doctrine.[415]

In *Cundiff*, the Sixth Circuit demonstrated that despite the fact that the *Rapanos* plurality's test may have two more "restrictions" than Justice Kennedy's significant nexus test, courts can extend CWA

404. 555 F.3d 200 (6th Cir. 2009).
405. Federal Water Pollution and Control Act, 33 U.S.C. §§ 1251-1387 (2006).
406. 547 U.S. 715 (2006).
407. United States v. Cundiff (*Cundiff I*), 555 F.3d 200, 212 (6th Cir. 2009).
408. *Cundiff I*, 555 F.3d at 204-05.
409. *Id.* at 205.
410. United States v. Cundiff (*Cundiff II*), 480 F. Supp. 2d 940, 944, 947 (W.D. Ky. 2007).
411. *Cundiff I*, 555 F.3d at 210-13.
412. *Id.* at 211.
413. *Cundiff I*, 555 F.3d at 211-13.
414. 430 U.S. 188 (1977).
415. *Cundiff I*, 555 F.3d at 210.

jurisdiction over wetlands by loosely applying the plurality's test.[416] The Sixth Circuit correctly applied Justice Kennedy's significant nexus test as the court used properties similar to Justice Kennedy's suggestions in his concurring opinion and paralleled the application of the test in a recent United States Court of Appeals for the Ninth Circuit case.[417] The Sixth Circuit then broadly applied the *Rapanos* plurality's test by expanding the second step of the plurality's test to include continuous surface connections that are not readily apparent and those that are manmade.[418] Thus, while the Sixth Circuit did not need to determine which *Rapanos* test should be applied, it instead demonstrated that although courts usually identify the significant nexus as extending federal authority the furthest, the *Rapanos* plurality's test can also extend federal authority if applied broadly.[419]

The Sixth Circuit's opinion in *Cundiff* decreased the importance of the *Marks-Rapanos* debate while simultaneously confirming that many wetlands qualify as "waters of the United States" under the CWA. First, the Sixth Circuit's conclusions that the Cundiffs' wetland properties were "waters of the United States" under both Justice Kennedy's test and the *Rapanos* plurality's test show that the two tests will yield the same result in many situations. Therefore, the great amount of legal analysis given over the past few years to how courts should apply the *Marks* doctrine to *Rapanos* is less important than previously believed. Second, the Sixth Circuit's application of the *Rapanos* plurality's test demonstrates that courts are able to broaden the scope of the test in order to bring many wetlands under the United States Army Corps of Engineers' and Environmental Protection Agency's authority. Therefore, the view that Justice Kennedy's significant nexus test is more apt to extend CWA jurisdiction than the *Rapanos* plurality's test may be erroneous. Wetlands may qualify as "waters of the United States" under the *Rapanos* plurality's test just as easily as under Justice Kennedy's significant nexus test.

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416. *See supra* notes 324-79 and accompanying text.
417. *See supra* notes 290-323 and accompanying text.
418. *See supra* notes 347-79 and accompanying text.
419. *See supra* notes 380-403 and accompanying text.