

How States Can Help to Resolve the *Rapanos/Carabell* Dilemma

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I. INTRODUCTION

State governments are undertaking innovative initiatives on a number of important environmental policy challenges facing the United States today. Whether in response to inaction on the part of the federal government or to court decisions that have potentially adverse

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consequences, states are exercising their role in the federalist system to be “laboratories” for policy experimentation and offering solutions to policy challenges.¹ Individually and in regional coalitions, state governments are taking steps to reduce greenhouse gas emissions through cap-and-trade programs and automobile tailpipe standards;² developing renewable energy portfolio standards;³ working to restore and better manage major watersheds and water resources, such as the Chesapeake Bay and the Great Lakes;⁴ and enacting mercury emissions standards more stringent than current federal levels.⁵ States have also joined together to bring suit against the federal government in efforts to compel federal action to address climate change.⁶ While the high level of state activity and engagement is seen as welcome by many, patchwork state action does not always fill the void left by federal inaction.

The United States Supreme Court decision in the consolidated case *Rapanos v. United States* and *Carabell v. Army Corps of Engineers* (*Rapanos*)⁷ highlights the opportunities that states have to lead the nation on environmental policy while also demonstrating the limitations of state action without concomitant federal action. This decision, when coupled

1. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

2. See, e.g., Daniel B. Wood, *Battle Brews over California Emissions Rule*, CHRISTIAN SCI. MONITOR, Sept. 30, 2004, at 2, available at <http://www.csmonitor.com/2004/0930/p02s01-usgn.html> (discussing California’s greenhouse gas standards for motor vehicles); Regional Greenhouse Gas Initiative, About RGGI, <http://www.rggi.org/about.htm> (last visited Oct. 24, 2007) (describing the multistate agreement among Northeastern and Mid-Atlantic states to cap greenhouse gas emissions under a cap-and-trade program for power plants).

3. Office of Energy Efficiency & Renewable Energy, U.S. Dep’t of Energy, States with Renewable Portfolio Standards, http://www.eere.energy.gov/states/maps/renewable_portfolio_states.cfm (last visited Oct. 24, 2007).

4. Great Lakes Comm’n, Great Lakes Basin Compact, <http://www.glc.org/about/glbc.html> (last visited Sept. 13, 2007); Leslie J. Reliford, *Federal, State Governments Sign New Chesapeake Bay Agreement*, 12 ENVTL. UPDATE: A QUARTERLY PUBL’N OF ARMY ENVTL. NEWS (Fall 2000), available at <http://aec.army.mil/usaec/publicaffairs/update/fall00/fall0017.htm>.

5. See Anthony DePalma, *States Seek Tightening of Standards for Mercury*, N.Y. TIMES, Apr. 12, 2007, at B5, available at <http://www.nytimes.com/2007/04/12/nyregion/12mercury.html> (highlighting a seven-state agreement to press for federal action on mercury emissions following state efforts to reduce their own emissions); see also Doug Scott, *Illinois Mercury Rule Sets Significant Reductions, Rejects Trading*, ECOSTATES: J. ENVTL. COUNCIL STATES, Fall 2006, at 3, http://www.ecos.org/files/2503_file_ECOSTates_Fall_2006.pdf (discussing Illinois’s effort to reduce mercury emissions through regulations more stringent than those federally required).

6. See, e.g., *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007) (deciding a suit brought by Massachusetts and other states, as well as local governments and private organizations, about whether EPA has authority to regulate greenhouse gas emissions from automobiles under the Clean Air Act, and if so, whether EPA is required to regulate those emissions).

7. *Rapanos v. United States*, 126 S. Ct. 2208 (2006).

with previous Court decisions such as *Solid Waste Agency v. Army Corps of Engineers (SWANCC)*,⁸ has limited the reach of the Clean Water Act (CWA)⁹ and left federal and state regulators unclear as to whether the CWA still provides adequate jurisdiction for the federal government to regulate isolated and remote wetlands and ephemeral or intermittent waters. Following the *SWANCC* decision, a number of states enacted new laws to address the narrowing scope of the CWA and provided state-level regulation to protect wetlands at risk of losing protections under the CWA.¹⁰ With the Court decision in *Rapanos*, states again have a challenge and an opportunity. While the *Rapanos* decision leaves CWA jurisdiction over isolated or remote wetlands and ephemeral or intermittent waters unclear at best, it also provides an impetus for states to assert jurisdiction over these wetlands and waters in an effort to protect them. *Rapanos* also provides states an opportunity to work together regionally to better manage common water resources. While this is not necessarily an adequate substitute for uniform federal action, it may be preferable to the continued uncertainty offered by the Court, federal agencies, and Congress.¹¹

II. WETLANDS AND WATERS—THEIR VALUE AND IMPORTANCE TO STATES AND COMMUNITIES

Wetlands are areas that are inundated or saturated with water so that “water is the dominant factor determining the nature of soil development and the types of plant and animal communities living in the soil and on its surface.”¹² Water can be present at or near the surface of the soil in a

8. See generally *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng’rs*, 531 U.S. 159 (2001) (limiting federal jurisdiction over isolated wetlands).

9. 33 U.S.C. §§ 1251-1387 (2000).

10. See, e.g., WIS. STAT. § 281.36(1m)(a) (2005) (protecting, through state-level action, wetlands that the federal government no longer regulates).

11. The United States Congress has introduced legislation that would address Supreme Court decisions that have narrowed the scope of the CWA by broadening CWA jurisdiction to all waters of the United States, including intrastate waters, rather than just “navigable” waters. It is unclear, however, whether such legislation would be upheld by the Supreme Court as a constitutional exercise of congressional authority. Additionally, state and local governments might not prefer such a far-reaching exercise of federal authority over *all* wetlands and waters. For a critical analysis of introduced legislation, see Julie Ufner, *No Boats Needed: New Clean Water Bill Would Make Gutters “Waters of the U.S.”*, NAT’L ASS’N OF COUNTIES, <http://www.naco.org/Template.cfm?Section=Publications&template=/ContentManagement/ContentDisplay.cfm&ContentID=23787> (last visited Oct. 24, 2007).

12. EPA, Wetlands Definitions, <http://www.epa.gov/owow/wetlands/what/definitions.html> (last visited Oct. 24, 2007).

wetland for the entire year, or in some cases, only for parts of the year.¹³ Wetlands can be found on every continent except Antarctica, and are found throughout the United States in areas near the coasts, along floodplains near rivers and streams, in isolated low-lying inland areas surrounded by dry land, in wet prairies, and in tundra areas.¹⁴ In the West, where a large percentage of waters are intermittent and ephemeral, wetlands may not always appear wet or saturated with water.¹⁵ While some wetlands are remote or seemingly isolated, many are connected by tributaries or groundwater to large rivers and lakes, and are part of integrated watersheds that can cross local, state, and federal boundaries.¹⁶

Wetlands offer communities a host of ecological and economic benefits, including habitat for fish and wildlife, flood mitigation, improved water quality, reduced shoreline erosion, and a variety of recreational opportunities.¹⁷ Wetlands can store water and slowly release it, which allows groundwater to recharge and contributes to surface water flow during dry periods.¹⁸ Many communities rely on groundwater for their drinking water.¹⁹ An additional benefit of wetlands is that they can reduce property damage and loss of life during flooding, as a single acre of wetland can store between 1 and 1.5 million gallons of floodwater.²⁰ In many cases, preserving and restoring wetlands is one of the most cost-effective flood control methods.²¹ Wetlands provide mitigation from storm surge as well. Studies suggest that between one and four linear miles of coastal wetlands reduce the height of storm surge by

13. EPA, What Are Wetlands?, <http://www.epa.gov/owow/wetlands/vital/what.html> (last visited Oct. 24, 2007).

14. *Id.*

15. *Id.*; see also Clean Water Network, Weakening the Clean Water Act: What It Means for Arizona, <http://www.cleanwaternet.org/files/04%20AZ%20fact%20sheet.pdf> (last visited Oct. 24, 2007) (noting that, for example, more than ninety percent of Arizona's waters are considered ephemeral or intermittent according to the Arizona Department of Environmental Quality and the EPA).

16. EPA, What Is a Watershed?, <http://www.epa.gov/owow/watershed/whatis.html> (last visited Oct. 24, 2007) (defining watersheds as land areas where "all of the water that is under it or drains off of it goes into the same place" linking communities and wildlife habitats).

17. William S. Sipple, Watershed Acad., U.S. EPA, Wetland Functions and Values, available at <http://www.epa.gov/watertrain/pdf/WetlandsFunctions.pdf> (last visited Oct. 24, 2007).

18. EPA, Functions and Values of Wetlands (Sept. 2001), http://www.epa.gov/owow/wetlands/pdf/fun_val.pdf.

19. EPA, Ground Water & Drinking Water, <http://www.epa.gov/safewater/faq/faq.html#source> (last updated Sept. 20, 2007). According to the EPA, eighty percent of drinking water systems use groundwater as their source.

20. *Id.*

21. EPA, Wetlands: Protecting Life and Property from Flooding (May 2006), <http://www.epa.gov/owow/wetlands/pdf/Flooding.pdf>.

approximately one foot because wetlands absorb the surge.²² Wetlands improve water quality as well by slowing the flow of water and acting as a filter, removing pollutants.²³ One study found that wetlands are so effective at filtration that they can actually eliminate the need for wastewater treatment plants.²⁴

Additionally, wetlands provide diverse habitat for aquatic and terrestrial plant and animal life, including fish and waterfowl.²⁵ They also support commercial fishing and shellfish industries.²⁶ Approximately seventy-five percent of fish harvested commercially in the United States rely on estuaries (partially enclosed bodies of water where freshwater mixes with saltwater) at some point in their lifecycle for food, nesting, or habitat.²⁷ In turn, estuaries depend on wetlands to filter water in order to maintain a high level of water quality and provide a sufficiently healthy ecosystem and food chain to support these fish and shellfish.²⁸ Commercial fishing and related industries provide jobs and billions of dollars in tax revenues to states, while wetlands-related tourism, including hunting, bird-watching, and photography, contributes billions of dollars to the national economy.²⁹

The economic, recreational, and environmental benefits that wetlands and waters provide have led many states and the federal government to develop and implement policies to manage and protect

22. See *Coastal Landscape Battles Weather To Protect Mainland*, WATERMARKS, Mar. 2006, at 5-6, available at <http://www.lacoast.gov/watermarks/2006-03/watermarks-2006-03.pdf> (highlighting how wetlands can reduce storm surge impacts); see also *Expert Views on Hurricane and Flood Protection and Water Resources Planning for a Re-Built Gulf Coast: Hearing Before the Subcomm. on Water Resources and Environment of the H. Comm. on Transportation and Infrastructure*, 109th Cong. 11-36 (2005), available at <http://www.access.gpo.gov/congress/house/pdf/109hr/25916.pdf> (testimony of Sidney Coffee, Exec. Asst. to the Governor for Coastal Activities for Governor Kathleen Babineaux Blanco) (discussing Hurricane Katrina and its effects on Louisiana).

23. EPA, *supra* note 18 (noting that up to one-half of North American birds feed or nest in wetlands and over thirty percent of plant life in the coterminous United States are found in wetlands).

24. EPA, *Wetlands Water Quality and Hydrology*, <http://www.epa.gov/owow/wetlands/wqhydrology.html> (last visited Oct. 24, 2007).

25. EPA, *supra* note 18.

26. *Id.*

27. SUSAN-MARIE STEDMAN & JEANNE HANSON, NAT'L MARINE FISHERIES SERV., NAT'L OCEANIC & ATMOSPHERIC ADMIN., *HABITAT CONNECTIONS: WETLANDS, FISHERIES, AND ECONOMICS IN THE GULF OF MEXICO*, <http://www.nmfs.noaa.gov/habitat/habitatconservation/publications/habitatconnections/num4.htm> (last visited Oct. 24, 2007).

28. *Id.*

29. EPA, *supra* note 18.

them.³⁰ One of the most important federal laws that has helped to protect wetlands and other waters, the CWA, was the subject of interpretation and limitation in a series of Supreme Court decisions beginning in 1985, culminating in 2006 with the consolidated cases in *Rapanos*.³¹ As a result of the Court's decision in these cases, many remote wetlands and intermittent and ephemeral waters may no longer be protected under the CWA, and states must now determine how to manage and protect them.

III. THE CLEAN WATER ACT AND FEDERAL JURISDICTION IN QUESTION

In 1972, the United States Congress passed the CWA to regulate discharges of pollutants into "waters of the United States."³² The CWA set up a regulatory framework that recognized and preserved the role of the states in preventing, reducing, and eliminating pollution, as well as planning the development and use of land and water resources.³³

The CWA prohibits the discharge of dredge or fill material into navigable waters without a permit, defining navigable waters as "waters of the United States."³⁴ The United States Army Corps of Engineers (Corps), which administers the permitting program along with the United States Environmental Protection Agency (EPA), interprets "waters of the United States" expansively to include tributaries of navigable waters, waters that were once or could be made navigable, and wetlands, including those separated from waters of the United States by a man-made dike.³⁵

Federal jurisdiction over wetlands and intermittent or ephemeral waters under the CWA has been the subject of a series of Supreme Court cases, culminating in the June 2006 decision in *Rapanos*.³⁶ In 1985, the Court in *United States v. Riverside Bayview Homes, Inc. (Riverside Bayview)* unanimously held that the text, policies, and history of the

30. See, e.g., 33 U.S.C. §§ 1251-1387 (2000); see also, e.g., Ass'n of State Wetland Managers, State Wetland Programs, <http://aswm.org/swp/statemainpage9.htm> (last updated Apr. 4, 2005) (listing a number of states with wetlands regulations or programs).

31. *Rapanos v. United States*, 126 S. Ct. 2208 (2006).

32. 33 U.S.C. §§ 1344, 1362(7).

33. *Id.* § 1251(b).

34. *Id.* §§ 1344, 1362(7); *Rapanos v. United States*, 126 S. Ct. 2208, 2215-16 (2006) (discussing sections 404 and 502 of the CWA).

35. 33 C.F.R. § 328.3(a) (2004).

36. Extensive analysis of the case histories is not the objective of this Article. For more information and context on the relevant Court cases, see, for example, James Murphy, *Muddying the Waters of the Clean Water Act: Rapanos v. United States and the Future of America's Water Resources*, 31 VT. L. REV. 355 (2006); Jonathan Adler, *Reckoning with Rapanos: Revisiting "Waters of the United States" and the Limits of Federal Wetland Regulation*, 14 MO. ENVTL. L. & POL'Y REV. 1 (2006).

CWA allowed the Corps to require permits for the discharge of fill material into wetlands adjacent to “waters of the United States.”³⁷ In 2001, however, the Court in *SWANCC* held that the CWA did not extend federal jurisdiction to an isolated pond that provided habitat for migratory birds, which was regulated under the Corps’ Migratory Bird Rule.³⁸ With these decisions, the Court decided that on one end of the spectrum, wetlands located directly adjacent to waters clearly under the jurisdiction of the CWA were covered, while on the other end, a pond, isolated and regulated based on the presence of migratory birds, was not covered by CWA jurisdiction.

The Court’s decision in these cases left the reach of CWA jurisdiction unresolved. How tight a connection must a wetland or body of water have—through hydrology or geographic location—to a CWA-protected body of water in order for the wetland or water itself to be covered under the CWA? The Court attempted to answer this question in *Rapanos*.³⁹ Thirty-four states and the District of Columbia agreed with the federal government’s position in *Rapanos*, asking the Court to take a more expansive view of CWA jurisdiction by holding that the waters and wetlands at issue were covered under the CWA.⁴⁰ The consolidated cases provided the Court an opportunity to rule on whether ephemeral and intermittent waters, as well as remote wetlands, are subject to federal jurisdiction and therefore regulated under the CWA.

The Court could not reach consensus in *Rapanos*, however, resulting in a number of opinions and a lack of clarity as to the state of the law.⁴¹ Four Justices formed a plurality and held that only waters with “a relatively permanent flow” (probably not including ephemeral or intermittent waters) and wetlands that “are ‘adjacent’ to these ‘waters’ in the sense of possessing a continuous surface connection” (for example, a wetland where it was difficult to tell where the wetland ends and the waters begin) would be subject to federal jurisdiction and CWA

37. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 139 (1985).

38. Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng’rs, 531 U.S. 159 (2001).

39. 126 S. Ct. 2208.

40. Brief for States of New York et al. as Amici Curiae Supporting Respondents, *Rapanos*, 126 S. Ct. 2208 (No. 04-1034, 04-1384), available at <http://www.eswr.com/1105/rapanos/rapamicstates.pdf>. Two states joined other amici curiae in supporting the position that the Clean Water Act did not extend federal jurisdiction to the waters and wetlands at issue in *Rapanos*. For more information on their position, see Brief for States of Alaska et al. as Amici Curiae Supporting Petitioner, *Rapanos*, 126 S. Ct. 2208 (No. 04-1034, 04-1384), available at <http://www.eswr.com/1105/rapanos/rapakutahetal.pdf>.

41. See *Rapanos*, 126 S. Ct. at 2214.

protection.⁴² Justice Kennedy concurred, offering his own standard: Only those waters or wetlands that have a significant nexus to waters that were, are, or could be made navigable should be subject to federal jurisdiction and CWA protection.⁴³ A dissenting group of Justices argued that there was federal jurisdiction in the *Rapanos* cases.⁴⁴ The dissenters offered their own more expansive standard for the disposition of future cases, but stated that if federal jurisdiction could be found under the plurality test, they would support that finding; or if it could be found using Justice Kennedy's standard, they would support that finding as well.⁴⁵

Chief Justice Roberts was a member of the four-justice plurality but wrote a separate concurrence. He excoriated the Corps and EPA for failing to promulgate new regulations to guide decisions on where federal jurisdiction exists under the CWA post-*SWANCC*.⁴⁶ Although the Corps and EPA subsequently issued their long-awaited guidance, the situation is far from resolved. The agencies have stated that they will use Justice Kennedy's significant nexus test on a case-by-case basis—a decision that could lead to inconsistent implementation because different parts of the nation are regulated by different agency offices—to determine federal jurisdiction over certain intermittent and ephemeral waters, and remote or isolated wetlands (the precise types of waters and wetlands at issue in *Rapanos*).⁴⁷ While it does attempt to clarify federal jurisdiction, the agency guidance leaves many waters and wetlands potentially unregulated by the federal government. Further, the lack of a clear and articulated standard from the Court has left lower courts and federal agencies with the task of deciding federal jurisdiction over many wetlands and waters on a case-by-case basis, using either Justice Kennedy's significant nexus test or the plurality's permanent flow and

42. *Id.* at 2235.

43. *Id.* at 2236 (Kennedy, J., concurring).

44. *Id.* at 2265 (Stevens, J., dissenting).

45. *Id.* The dissenters offered their own broader standard for finding federal jurisdiction, but that standard had the support of only the four dissenting Justices, whereas Justice Kennedy's standard has his support plus the four dissenting Justices.

46. *Rapanos*, 126 S. Ct. at 2235-36 (Roberts, C.J., concurring).

47. Memorandum from Benjamin Grumbles, EPA Assistant Administrator for Water, and John Paul Woodley, Jr., Assistant Secretary of the Army, to the EPA Regions and Corps Districts (June 5, 2007), available at http://www.usace.army.mil/cw/cecwo/reg/cwa_guide/rapanos_guide_memo.pdf. The Corps and EPA now generally refuse to assert jurisdiction over certain ditches and swales (ditches were in part at issue in *Rapanos*), but will examine whether federal jurisdiction exists over non-navigable tributaries that *do not* have relatively permanent flow, wetlands adjacent to these tributaries, and wetlands adjacent to non-navigable tributaries that *do* have relatively permanent flow on a case-by-case basis. *Id.*

surface connection test.⁴⁸ This leaves states that had relied on the CWA for protection unsure which of their wetlands and waters the CWA still covers. Accordingly, states now may want to consider policy options to address the uncertainty of CWA jurisdiction.

IV. HOW STATES CAN PROTECT WETLANDS AND WATERS THAT HAVE UNCERTAIN FEDERAL STATUS

As a result of *Rapanos*, it will be difficult for states to determine which wetlands and waters are still subject to federal jurisdiction (and to CWA protections and requirements), particularly for ephemeral or intermittent waters and remote wetlands. The states' uncertainty is compounded by the fact that the ephemeral waters and remote wetlands that may no longer be subject to the CWA comprise a large percentage of their waters and wetlands.⁴⁹ In addition, EPA estimates that forty percent of point source discharges regulated under the CWA (excluding storm water permits and non-storm water general permits) come from intermittent, ephemeral, or very small perennial streams that may no longer be federally regulated following *Rapanos*.⁵⁰ EPA further estimates that ninety percent of the water protection areas providing drinking water for 110 million people in the United States are located in headwater areas of watersheds, which also may be subject to limits on federal regulation following *Rapanos*.⁵¹ States interested in resolving this uncertainty may seek to pursue their own policy options that clarify state jurisdiction over

48. Adler, *supra* note 36, at 14-19. Professor Jonathan Adler analyzed lower court interpretations of the Court's ruling in *Rapanos* and found that lower courts were applying the ruling with differing results. *Id.* For instance, Professor Adler found that the United States Court of Appeals for the Fifth Circuit could not find enough clarity in Justice Kennedy's significant nexus test and decided instead to apply prior reasoning from the Circuit, holding that no significant nexus exists between intermittent channels, creek beds, and adjacent navigable waters. *Id.* at 16 (citing *United States v. Chevron Pipe Line Co.*, 437 F. Supp. 2d 605 (N.D. Tex. 2006)). Adler also cites an opinion that did use Justice Kennedy's test: *United States v. Gerke Excavating*, 464 F.3d 723 (7th Cir. 2006). Adler highlights how the United States Court of Appeals for the Seventh Circuit in *Gerke* focused on whether the waters in question had a significant effect on the chemical, physical, and biological integrity of waters covered under the CWA. *Id.* The Seventh Circuit also offered that it would, as suggested by Justice Stevens in his dissent in *Rapanos*, look to apply the plurality opinion's reasoning where it would uphold CWA jurisdiction and where Justice Kennedy's test would not. *Id.* at 18. These examples of differing results demonstrate the need for states to consider asserting state jurisdiction over their wetlands and waters, as court opinions following *Rapanos* may not be consistent and some wetlands and waters will inevitably be protected under the CWA and others will not.

49. Clean Water Network, *supra* note 15.

50. Letter from Benjamin Grumbles, EPA Assistant Administrator for Water, to Jeannie Christie, Executive Director, Association of State Wetlands Managers (Jan. 9, 2006), available at <http://www.aswm.org/fwp/letterbg.pdf>

51. *Id.*

ephemeral or intermittent waters and isolated or remote wetlands and that also provide an alternative state-based regulatory framework to help ensure that these waters and wetlands are managed in accordance with state goals and objectives.

A. *Assessing Which Wetlands and Waters Are Still Subject to CWA Regulation*

Following *Riverside Bayview*, *SWANCC*, and *Rapanos*, many wetlands and waters may no longer be subject to federal jurisdiction. As a result, a state that relies exclusively on the federal process to protect these wetlands and waters may no longer have the jurisdictional reach necessary to comprehensively regulate the wetlands and waters of the state.⁵²

As a first step in determining what type of state-based jurisdictional approach to wetlands and waters a state may want to take, states can conduct an assessment of which wetlands and waters may no longer be covered by the CWA following *Rapanos*. Many states have assessment programs to determine the values and functions of their wetlands. For example, the Washington State Department of Ecology (Department of Ecology) leads a statewide effort to develop methods that assess how well the state's different wetlands perform various functions such as improving water quality or reducing floods.⁵³

States also can try to categorize what types of wetlands and waters are most at risk of losing CWA protections in order to provide guidance to state agencies, developers, landowners, and the public.⁵⁴ For example, Washington State examined its wetlands following the *SWANCC* decision and concluded that while some isolated wetlands would no longer be subject to federal jurisdiction under the CWA, they all would

52. See 33 U.S.C. § 1341 (2000). Many states have relied on CWA section 401 water quality certification as a main component of state water quality protection for wetlands and waters, but section 401 only provides states a means of protecting water quality for waters that are subject to federal jurisdiction; if certain waters or wetlands are no longer protected under the CWA, section 401 will not help states protect them. For more information, see Appendix A.

53. Wash. State Dep't of Ecology, Wetlands Function Assessment Project, <http://www.ecy.wa.gov/programs/sea/wfap/index.html> (last visited Oct. 24, 2007).

54. See generally Memorandum from Jon Kusler, Ass'n of State Wetland Managers, Inc., *The SWANCC Decision: State Regulation of Wetlands To Fill the Gap* (Mar. 4, 2004), available at <http://www.aswm.org/fvp/swancc/aswm-int.pdf> (offering estimates of how many wetlands in particular states were at risk of having no CWA protection following *SWANCC* and suggesting a number of options for federal, state, and local governments to fill the gaps in protection created by that decision).

be covered under the Washington State Water Pollution Control Act.⁵⁵ Similarly, Wisconsin analyzed its wetlands to determine which would be covered following the *SWANCC* decision and found that more than one million acres of wetlands that previously were protected under the CWA were no longer subject to federal jurisdiction and CWA protections.⁵⁶ States can undertake similar analysis now to determine the effect of *Rapanos* on their wetlands and waters.

B. State Approaches To Regulating Wetlands Not Covered Under CWA

Once states have determined which wetlands and waters likely are not covered under the CWA following *Rapanos*, they may decide to protect them based upon their importance and available regulatory resources. There are different ways in which states can assert jurisdiction to protect wetlands and waters no longer covered under the CWA. These different approaches are not necessarily mutually exclusive.

1. Comprehensive Approach

One of the most direct means of providing state protections of wetlands and waters no longer covered under the CWA is to assert state jurisdiction over all wetlands and waters in the state. Washington has done this through the State Water Pollution Control Act (essentially the state's version of the federal CWA), which gives the Department of Ecology broad jurisdiction to control and prevent pollution in all surface and underground waters in the state, including wetlands.⁵⁷ Another state statute, the Shoreline Management Act, provides the Department of

55. WASH. REV. CODE § 90.48 (2007); WASH. STATE DEP'T OF ECOLOGY, ISOLATED WETLANDS—CHANGES IN THE REGULATORY PROCESS (2001), <http://www.ecy.wa.gov/pubs/0106020.pdf>.

56. *Wetlands Regulation and the SWANCC Decision*, S. Comm. on Environment and Public Works, 108th Cong. (2003) (statement of P. Scott Hassett, Secretary, Wisconsin Department of Natural Resources), available at http://epw.senate.gov/hearing_statements.cfm?id=213198.

57. See WASH. REV. CODE § 90.48 (2007); ANDY McMILLAN, WASH. STATE DEP'T OF ECOLOGY, HOW ECOLOGY REGULATES WETLANDS (1998), available at <http://www.ecy.wa.gov/pubs/97112.pdf>. Although wetlands are not specifically mentioned in the Act, it provides broad enough jurisdiction to encompass all wetlands. According to Jon Kusler, California, like Washington, has asserted broad jurisdiction over its waters. Other states, such as Minnesota and New York, have adopted wetland protection statutes and regulatory regimes that are relatively comprehensive in nature. Although Kusler's paper specifically focused on state regulations to fill in gaps caused by *SWANCC*, it is important to note that it might be necessary to expand such regulation post-*Rapanos* to include intermittent and ephemeral waters, which were not the subject of the *SWANCC* case. See Kusler, *supra* note 54, at 18.

Ecology with additional authority over certain wetlands (approximately thirty percent of freshwater wetlands and all tidal wetlands) and requires local governments to work with the Department of Ecology to develop a Shoreline Master Program to regulate new development based on state laws and local needs.⁵⁸ The Shoreline Management Act also provides the Department of Ecology with authority to review local government decisions on the issuance of shoreline development permits, and to approve, condition, or deny (and in some cases appeal) them.⁵⁹ Other state statutes, such as the State Environmental Policy Act and the State Growth Management Act, provide additional avenues for the state to provide input and give technical assistance to local governments in protecting wetlands and waters.⁶⁰

2. Activity-Based Approach

Another approach to regulating wetlands and waters no longer covered under the CWA is to assert state jurisdiction based on the regulation of certain harmful activities. Virginia has done this by amending its Water Protection Permit Program to regulate activities such as excavation and fill activity in wetlands.⁶¹ Prior to amending the Water Protection Permit Program, state jurisdiction over nontidal wetlands in Virginia existed only if there was an application for a federal permit.⁶² The amendments allow the Virginia Department of Environmental Quality to assert jurisdiction and regulate wetlands based on the types of activities taking place regardless of whether federal jurisdiction exists.⁶³ For example, if someone wanted to excavate in a wetland that was not protected by the CWA and not otherwise subject to state jurisdiction, they would need to apply for a permit because excavating is a regulated activity.

3. Targeted Approach

Still another method for asserting jurisdiction is a targeted approach to reach wetlands left in uncertain federal status following *Rapanos*. While a comprehensive jurisdictional program such as Washington's seeks to ensure that no wetlands are left unregulated or unprotected, a

58. WASH. REV. CODE § 90.58 (2007); McMILLAN, *supra* note 57.

59. WASH. REV. CODE § 90.58; McMILLAN, *supra* note 57.

60. WASH. REV. CODE § 36.70(A); *id.* § 43.21(C); McMILLAN, *supra* note 57.

61. Va. Dep't of Env'tl. Quality, Wetlands Information, <http://www.deg.virginia.gov/wetlands/wetlands.html> (last visited Oct. 24, 2007).

62. *See id.*

63. VA. CODE ANN. § 62.1-44.5 (2004); Va. Dep't of Env'tl. Quality, *supra* note 61.

targeted approach seeks to close the gap in CWA jurisdiction left open by *Rapanos* while still utilizing the CWA water quality standards provision to protect federally regulated waters and wetlands, thereby conserving state regulatory resources.⁶⁴

For example, following the *SWANCC* decision, Wisconsin enacted legislation providing that the state would have jurisdiction over all nonfederal wetlands.⁶⁵ Under the statute, nonfederal wetlands are those over which the Corps no longer has jurisdiction, including wetlands where a discharge would not be subject to regulation under the CWA, as well as wetlands determined to be nonnavigable, isolated, or intrastate.⁶⁶ The state relies on the Corps to determine whether it has jurisdiction, but if the Corps makes no determination, the state will independently decide whether a wetland is federal or nonfederal.⁶⁷

The Wisconsin legislation was a specific response to the *SWANCC* decision, but should also close any gaps in federal jurisdiction following *Rapanos*. The Wisconsin legislation covers any wetlands deemed to be nonfederal because of subsequent interpretations of *SWANCC*,⁶⁸ such as the interpretation in *Rapanos*.⁶⁹ To address the uncertainty perpetuated by *Rapanos*, states taking the Wisconsin approach may consider regulating all nonfederal wetlands and waters, including any wetlands that are no longer subject to federal jurisdiction because of future court decisions. By expanding this approach to regulate all wetlands and waters deemed nonfederal—whether because of court decisions or federal government policy—states would address any potential reductions or changes in federal jurisdiction over wetlands and waters,

64. Many states rely on state water quality standards to protect their wetlands and waters. Under the CWA section 401, states can condition or restrict the issuance of federal CWA permits based on compliance with state water quality standards, so where CWA protections exist, not only are wetlands and waters subject to federal requirements, but they may be protected by state water quality standards as well. Relying on state water quality standards is only effective for wetlands or waters covered by the CWA, so this leaves a gap for wetlands and waters not covered by the CWA where states may seek to use the targeted approach. See 33 U.S.C. § 1341 (2000). For more information, see Appendix A.

65. See WIS. STAT. § 281.36(1m)(a) (2005).

66. Wis. Leg. Council, Water Quality Certification for Nonfederal Wetlands: 2001 Wisconsin Act 6 (Aug. 7, 2001), available at http://www.legis.state.wi.us/lc/publications/lm/lm_2001_04.pdf.

67. *Id.*

68. Press Release, Wisconsin Attorney General Peggy Lautenschlager, Lautenschlager Announces View on U.S. Supreme Court Decision Regarding U.S. Army Corps Regulation of Wetland Filling (June 19, 2006), available at http://www.doj.state.wi.us/news/2006/nr061906_ENV-2.asp.

69. *Rapanos v. United States*, 126 S. Ct. 2208 (2006).

thus ensuring protection for any wetland or water deemed beyond federal jurisdiction.

4. Other Approaches

There are other ways to target the gaps created by *Rapanos*. Some states, such as South Carolina, are considering new comprehensive legislation, as well as attempting to use existing authority and resources to cover as many wetlands and waters as possible.⁷⁰ Other states have taken steps to assert jurisdiction through an independent state-permitting process that does not rely on a determination of the federal jurisdictional status of the wetland at issue. For example, Ohio passed legislation following the *SWANCC* decision establishing a permitting process for isolated wetlands that were no longer covered under the CWA.⁷¹ Prior to *SWANCC*, Ohio had relied on the CWA's section 401 water quality standards provision to regulate isolated wetlands. Following the Court decision, many (if not all) were removed from federal jurisdiction under the CWA. Section 401 no longer applied to many isolated wetlands because the Corps no longer issued permits for these wetlands under section 404.⁷² In order to assert state jurisdiction and regulate these isolated wetlands, Ohio enacted legislation in 2001 to establish a state permitting process for isolated wetlands.⁷³ Similarly, Indiana, while continuing to utilize its section 401 water quality certification authority, also established independent state authority and jurisdiction over isolated wetlands no longer covered by the CWA or under section 401.⁷⁴

Following the *Rapanos* decision, states may want to act using the Indiana and Ohio approaches to establish state permitting processes for wetlands and waters that may no longer be covered under the CWA (and therefore not subject to state regulation under section 401). In addition to asserting state jurisdiction over isolated wetlands, states may want to consider asserting jurisdiction over ephemeral or intermittent streams, as well as wetlands not directly abutting "waters of the United States," in order to address the gaps created by *Rapanos*.

70. Mary D. Shadid & R. Cody Lenhardt, Jr., *Navigation of Troubled Waters: Wetland Regulation in South Carolina After Rapanos*, S.C. LAW., Sept. 2006, at 25.

71. OHIO REV. CODE ANN. § 6111.021 (2007); Ohio EPA, *Isolated Wetland Permits and 401 Water Quality Certifications in Ohio for Fiscal Year 2005* (2006), available at <http://www.epa.state.oh.us/dsw/401/401PermitSummary2005reduced.pdf>.

72. 33 U.S.C. § 1341 (2000). For more information, see Appendix A.

73. OHIO REV. CODE ANN. § 6111.021 (2007).

74. IND. CODE § 13-18-22 (2007); Ind. Dep't of Env'tl. Mgmt., 401 Water Quality Certification Program, <http://www.in.gov/idem/programs/water/401/index.html> (last visited Oct. 24, 2007).

V. CONCLUSION

As happened following the *SWANCC* decision in 2001, the Supreme Court has issued a decision in *Rapanos* that leaves states uncertain as to the status of their wetlands and waters under the CWA. For many states, the CWA has been a useful regulatory tool to protect interstate waters, wetlands, and water quality. Questions remain, however. It is unclear how the majority of lower courts will interpret the *Rapanos* ruling—although already there is much inconsistency.⁷⁵ It is also unclear how the Corps' new regulations promulgated to clarify federal jurisdiction will be interpreted and applied, and whether Congress will act to expand the CWA's jurisdictional reach.

States that want to resolve this uncertainty and assert their own jurisdiction have several options. While a number of states have revised their laws to address the limitations on CWA jurisdiction following *SWANCC*, there are many states that still do not provide jurisdiction over, and protection for, isolated wetlands made vulnerable post-*SWANCC*.⁷⁶

Asserting jurisdiction does not guarantee a particular result for water quality or wetlands protection, however. States have many innovative programs, both regulatory as well as voluntary partnership efforts, which seek to mitigate wetland loss, and, in some cases, even produce a net gain of wetlands. As states continue to act as stewards of their own wetlands and water resources, they can address the post-*Rapanos* uncertainty of the CWA's jurisdictional reach by taking a comprehensive jurisdictional approach, enacting activity-type regulation, or taking a targeted approach to the management of their own wetlands and waters.

75. See Adler, *supra* note 36 (discussing two lower court interpretations that differed on how and whether to apply Justice Kennedy's significant nexus test).

76. *Id.* at 24–25.

APPENDIX A—CWA SECTION 401 WATER QUALITY STANDARDS AND SECTION 404 STATE ADMINISTRATION

Both the Corps and EPA work with states that are seeking to streamline the CWA permitting process and to increase state input. Through section 401 of the CWA, states can review and approve, condition, or deny all federal permits that might result in a discharge to state waters, including wetlands.⁷⁷ This authority allows states to restrict or condition the issuance of a section 404 CWA permit, and other federal permits and licenses, primarily by deciding whether the activity at issue in a federal permit will comply with state water quality standards.⁷⁸ Using section 401, states also can determine whether the activity at issue will violate effluent (outflow such as pollution from sewage plant) limitations or other state water resource requirements.⁷⁹

States that seek to utilize section 401 water quality standards should, according to EPA guidance, have three primary components in their standards: designated uses, criteria protecting those uses, and an antidegradation policy.⁸⁰ At a minimum, state designated uses (based on the functions and values of wetlands) must meet the CWA goals of protecting fish, shellfish, and wildlife, as well as providing for recreation.⁸¹ For example, Indiana places requirements on federal permit applicants whose activities (such as filling, excavating, or clearing) might result in a discharge of pollutants into state waters, including wetlands.⁸² Such applicants must obtain a water quality certification from the state.⁸³ The Indiana Department of Environmental Management requires that the applicant “avoid impacts if possible, minimize any unavoidable impacts and provide compensatory mitigation for any remaining adverse impacts to wetlands and other waters.”⁸⁴ The state may also deny water quality certification if the applicant’s discharge will violate water quality standards.

In addition to using section 401 water quality authority, states may elect to take over the administration of parts of section 404 permitting (typically administered by the federal government), thereby providing a

77. 33 U.S.C. § 1341; EPA, Section 401 Certification and Wetlands, <http://www.epa.gov/owow/wetlands/facts/fact24.html> (last visited Oct. 24, 2007).

78. 33 U.S.C. § 1341; EPA, *supra* note 77.

79. 33 U.S.C. § 1341; EPA, *supra* note 77.

80. 33 U.S.C. § 1341; EPA, *supra* note 77.

81. 33 U.S.C. § 1341; EPA, *supra* note 77.

82. Ind. Dep’t of Env’tl. Mgmt., *supra* note 74.

83. IND. CODE § 13-18-22 (2007); Ind. Dep’t of Env’tl. Mgmt., *supra* note 74.

84. IND. CODE § 13-18-22 (2007); Ind. Dep’t of Env’tl. Mgmt., *supra* note 74.

streamlined regulatory process for applicants and allowing the state more control and input in the permitting process.⁸⁵ Upon federal approval, states can administer the section 404 permitting program in many areas of the state, and as a result the Corps would no longer process permits for those areas or waters then covered under the state program.⁸⁶ As of the writing of this Article, two states, Michigan and New Jersey, have received approval to administer portions of the section 404 permitting process.⁸⁷

In administering the section 404 permitting process, the state program must be consistent with the requirements of the CWA, but the state program may include some procedural differences and alternative policy choices as long as the program is not less stringent than federal requirements.⁸⁸ Michigan administers the section 404 program through the enactment of various state laws that provide a framework to “regulate dredge and fill activities in inland lakes and streams, wetlands, and the Great Lakes and connecting channels.”⁸⁹ While the Corps retains jurisdiction (or in some cases possesses concurrent jurisdiction with the state) over the traditionally navigable waters such as the Great Lakes and their connecting channels, the state independently administers the section 404 program for many other waters.⁹⁰ The federal government, through the EPA and the Corps, retains the authority to object to permits issued by the state as it would for permits issued by the Corps under section 404.⁹¹

85. 33 U.S.C. § 1344(g) (2000).

86. *See id.*

87. Mich. Dep’t of Env’tl. Quality, Michigan’s Administration of Section 404, <http://www.deq.state.mi.us/documents/deq-lwm-wetlands-404admin.pdf> (last visited Oct. 24, 2007).

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

APPENDIX B—POLICY OPTIONS CHART: CHANGES IN SCOPE OF
AUTHORITY

Policy Option	How It Affects Jurisdiction	Benefits	Considerations
Use Clean Water Act Section 401 to Implement Water Quality Standards	Allows states to condition the issuance of federal CWA permits so that they meet state water quality standards	Can supplement federal CWA permitting process	Only applies when a federal permit is necessary; does not provide state jurisdiction independent of federal jurisdiction
Comprehensive State-Based Approach	State asserts jurisdiction over all waters and wetlands in the state, regardless of federal jurisdiction	Allows state to regulate wetlands and waters regardless of changes in scope of federal authority	May lead to overlapping jurisdiction with federal government; to mitigate the consequences of this, states can collaborate with the federal government to streamline the permitting process to limit the burden on permit applicants
Activity-Based Regulations	State asserts regulating jurisdiction over activities (such as dredging or filling) rather than wetlands or waters	Can focus on regulation of potentially harmful activities and regulate those independent of whether there is comprehensive jurisdiction over waters or wetlands	Must determine and define which activities should be regulated; does not necessarily cover all waters and wetlands in the state
Targeted Approach	State automatically extends jurisdiction to any waters and wetlands not regulated by federal government	All wetlands are regulated by either federal or state governments	Requires state to monitor federal court cases affecting the reach of the CWA, and to create a process to determine which waters and wetlands are “nonfederal”