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INTERPRETING THE RAPANOS/CARABELL SUPREME COURT DECISION

HEARING

BEFORE THE

SUBCOMMITTEE ON FISHERIES, WILDLIFE, AND WATER

OF THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

SECOND SESSION

AUGUST 1, 2006

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INTERPRETING THE RAPANOS/CARABELL SUPREME COURT DECISION

TUESDAY, AUGUST 1, 2006

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
SUBCOMMITTEE ON FISHERIES, WILDLIFE, AND WATER,
Washington, DC.

The subcommittee met, pursuant to notice, at 2:30 p.m. in room 406, Dirksen Senate Office Building, the Honorable Lincoln Chafee (chairman of the committee) presiding.

Present: Senators Chafee, Inhofe, Jeffords, Lautenberg, Murkowski, and Clinton.

OPENING STATEMENT OF HON. LINCOLN CHAFEE, U.S. SENATOR FROM THE STATE OF RHODE ISLAND

Senator CHAFEE. Good afternoon. This is the Subcommittee on Fisheries, Wildlife and Water, and a hearing on The Water of the United States: Interpreting the Rapanos/Carabell Decision.

Welcome to today's subcommittee hearing. This is of course as a result of the recent U.S. Supreme Court decision in the joint cases of Rapanos v. United States and Carabell v. U.S. Army Corps of Engineers.

As you know, the Constitution creates a Government of limited power. Congress can only enact legislation in areas that are specifically set out under the Constitution. Congress is specifically prohibited from enacting legislation in other areas, leaving this authority to the States for the 10th Amendment. In the 10th Amendment, it says the power is not delegated to the United States by the Constitution or reserved to the States respectively or to the people. Every law enacted by Congress must be based on one of the powers enumerated in the Constitution. The framers of the Constitution gave Congress broad power to regulate immigration, national security and economic activity between the States and left most of the powers to the States.

However, Section 8 of Article I states that the Congress shall have the power to regulate commerce among the several States. This is the Commerce Clause, and it is the most powerful provision in the Constitution providing Congress the authority to enact legislation in a host of areas, including environmental protection.

The Clean Water Act is one of our most successful environmental statutes, aimed at restoring and maintaining the chemical, physical and biological integrity of the Nation's waters. Originally enacted in 1948, the Act was amended numerous times until it was reorganized and expanded in 1972. Among the provisions include in the

1972 Act was Section 404, which in combination with Section 301(a) requires persons wishing to discharge dredged or fill material into navigable waters to obtain a permit from U.S. Army Corps of Engineers.

At the same time, Congress defined navigable waters under the broad term of the waters of the United States, and indicated in the conference report to the 1972 Act that this new phrase was intended to be given "the broadest possible constitutional interpretation." The new definition for "navigable waters" was retained during the 1977 amendments to the Clean Water Act, after Congress debated and ultimately rejected amendments that would have narrowed the corps' jurisdiction under the Section 404 program.

Solid Waste Energy of Northern Cook County v. The Army Corps of Engineers. In this case, the Supreme Court limited the authority of Federal agencies to extend the Clean Water Act protections to non-navigable, interstate, isolated wetlands based solely on their use by migratory birds.

The Rapanos and Carabell cases, and the Supreme Court's ruling once again raise significant questions in relation to the comprehensive nature of the Clean Water Act. In crafting the Clean Water Act in 1972 and amending the law in 1977, what geographic scope did Congress intend the Clean Water Act to encompass? Further, is the application of the Clean Water Act to the wetlands at issue in these cases a permissible exercise of Congressional authority under the Commerce clause of the Constitution?

On June 19th, the Supreme Court held by a vote of 5-4 that the judgments of the Sixth Circuit in the joint cases of Rapanos and Carabell be vacated and remanded both cases to the lower court for further consideration. We are now here to analyze the Supreme Court's ruling in these cases. The Rapanos case arose as a civil enforcement action filed by the United States in 2000, seeking penalties for the filling of Michigan wetlands without a Clean Water Section 404 permit. The Carabell petitioners were denied a Corps permit to fill in the wetlands on their property near Lake St. Clair in order to construct 130 condominium units.

The Court presented us with a total of five opinions. In the Scalia plurality decision, four justices supported a more constrictive interpretation of the term "waters of the United States." Through this interpretation, the plurality would place limits on waters flowing intermittently or ephemerally, exempt non-navigable interstate isolated waters associated with the SWANCC decision I referred to earlier from coverage under the Act, and require that wetlands covered by the Act be only those with a continuous surface connection to traditionally navigable waters.

The Stevens and Breyer dissenting opinions stated that the corps' existing approach regarding wetlands regulation is the correct interpretation of the Clean Water Act. It is Justice Kennedy's opinion that one must look at most closely. While Kennedy agreed with the plurality to remand the cases, he rejects the plurality's arguments regarding the need for continuous surface connection. Instead, Justice Kennedy sets up a "significant nexus" test, also raised in SWANCC, that requires regulators to determine on a case by case basis if wetlands have a significant nexus with navigable waters.

We have two panels of witnesses here today to assist the subcommittee and members of the full committee in interpreting the Rapanos/Carabell decision. Our two panels include witnesses representing the Federal Government as well as two legal experts and two witnesses representing the regulated and environmental community.

As Congress continues to assess this ruling and determine whether legislative remedies are necessary to clarify the intent of the Clean Water Act, we look forward to your testimony and your interpretation of the joint cases. We also hope you will be able to shed some light on the situation.

I am joined by the Chairman of the full committee, Senator Inhofe; Senator Murkowski; the Ranking Member of the subcommittee, Senator Clinton; Senator Jeffords, Ranking Member of the full committee; and Senator Lautenberg. I will now turn to the Ranking Member of the subcommittee, Senator Clinton.

[The prepared statement of Senator Chafee follows:]

STATEMENT OF HON. LINCOLN CHAFEE, U.S. SENATOR FROM THE STATE OF RHODE ISLAND

Good morning. Welcome to today's subcommittee hearing on the recent U.S. Supreme Court decision in the joint cases of Rapanos v. United States and Carabell v. U.S. Army Corps of Engineers.

As you know, the Constitution creates a Government of limited power Congress can only enact legislation in areas that are specifically set out under the Constitution. Congress is expressly prohibited from enacting legislation in other areas, leaving this authority to the States per the Tenth Amendment "The powers not delegated to the United States by the Constitution are reserved to the States respectively, or to the people".

Every law enacted by Congress must be based on one of the powers enumerated in the Constitution. The Framers of the Constitution gave Congress broad power to regulate immigration, national security and economic activity between the States, and left most other power with the States.

However, Section Eight of Article I states that "the Congress shall have the power to regulate Commerce among the several States". This is the Commerce Clause and it is the most powerful provision in the Constitution providing Congress the authority to enact legislation in a host of areas including environmental protection. A key Supreme Court case regarding the Commerce Clause was in 1942 when the Supreme Court upheld legislation that allowed USDA to set quotas on local wheat growing. The Court noted that while crops regulated may never actually enter into interstate commerce, such local activity, coupled with similar activity in other States as an aggregate has a direct impact on interstate commerce. Since then using the "aggregate effects test" or "substantial effects test," Congress has passed broad ranging environmental legislation such as the Clean Water Act, which we are here to discuss today.

The Clean Water Act is one of our most successful environmental statutes, aimed at restoring and maintaining the chemical, physical and biological integrity of the Nation's waters. Originally enacted in 1948, the Act was amended numerous times until it was reorganized and expanded in 1972.

Among the provisions included in the 1972 Act was Section 404, which in combination with Section 301(a) requires persons wishing to discharge dredged or fill material into "navigable waters" to obtain a permit from the U.S. Army Corps of Engineers.

At the same time, Congress defined "navigable waters" under the broad term of "the waters of the United States," and indicated in the conference report to the 1972 Act that this new phrase was intended to be given "the broadest possible constitutional interpretation".

The new definition for "navigable waters" was retained during the 1977 Amendments to the Clean Water Act, after Congress debated and ultimately rejected amendments that would have narrowed the corps' jurisdiction under the Section 404 Program.

The last time the Supreme Court ruled on a major Clean Water Act case was in 2001 with Solid Waste Agency of Northern Cook County v. Army Corps of Engineers (SWANCC). In this case, the Supreme Court limited the authority of Federal agencies to extend Clean Water Act protections to non-navigable, intrastate, "isolated" wetlands based solely on their use by migratory birds.

The Rapanos and Carabell cases and the Supreme Court's ruling have once again raised significant questions in relation to the comprehensive nature of the Clean Water Act In crafting the Clean Water Act in 1972, and amending the law in 1977, what geographic scope did Congress intend the Clean Water Act to encompass? Did the U.S. Army Corps of Engineers act reasonably in interpreting the term "waters of the United States" as it appears in the Act to encompass a broad range of wetland areas? Further, is the application of the Clean Water Act to the wetlands at issue in these cases a permissible exercise of Congressional authority under the Commerce Clause of the Constitution?

Additionally, the Clean Water Act has broad authority over not only the wetlands permitting program, but also programs such as the Section 301 program governing discharges of pollutants; requirements to obtain permits prior to discharge under Section 402; water quality standards under Section 303; and oil spill liability, prevention, and control measures under Section 311, among others. All of these programs utilize the one definition of "navigable waters" that applies to the entire Clean Water Act.

On June 19th, the Supreme Court held, by a vote of 5-4 that the judgments of the Sixth Circuit in the joint cases of Rapanos and Carabell be vacated, and remanded both cases to the lower court for further consideration. We are now here to analyze the Supreme Court's ruling in these cases.

The Rapanos case arose as a civil enforcement action filed by the United States in 2000, seeking penalties for the filling of Michigan wetlands without a Clean Water Act Section 404 permit. The question posed by this case is the Army Corps of Engineers' jurisdiction over wetlands that are adjacent to non-navigable tributaries of traditionally "navigable" waters.

The Carabell petitioners were denied a corps permit to fill in the wetlands on their property near Lake St. Clair in order to construct 130 condominium units. The question posed by this case is the Federal Government's jurisdiction over wetlands that are not hydrologically connected to any "waters of the United States".

The Court presented us with a total of five opinions—Justice Scalia issued a plurality opinion along with Chief Justice Roberts, Justice Thomas, and Justice Alito. Chief Justice Roberts wrote a separate opinion concurring with the plurality. Justice Kennedy wrote an opinion concurring in the judgment of the plurality. Justice Stevens, with whom Justices Souter, Ginsberg, and Breyer joined, wrote a dissenting opinion. Justice Breyer also issued his own separate dissenting opinion.

In the Scalia plurality decision, four justices supported a more constrictive interpretation of the term "the waters of the United States". Through this interpretation, the plurality would place limits on waters flowing intermittently or ephemerally; exempt non-navigable, intrastate, "isolated" waters addressed in SWANCC from coverage under the Act; and require that wetlands covered by the Act be only those with a continuous surface connection to traditionally "navigable waters".

The Stevens and Breyer dissenting opinions state that the corps' existing approach regarding wetlands regulation is the correct interpretation of the Clean Water Act. It is Justice Kennedy's opinion that one must look at most closely. While Kennedy agreed with the plurality to remand the cases, Kennedy rejects the plurality's arguments regarding the need for a continuous surface connection. Instead, Justice Kennedy sets up a "significant nexus" test also raised in SWANCC that requires regulators to determine on a case-by-case basis if wetlands have a significant nexus with navigable waters.

We have invited two panels of witnesses here today to assist the subcommittee and members of the full committee in interpreting the Rapanos/Carabell decision. Our two panels include witnesses representing the Federal Government, as well as two legal experts and two witnesses representing the regulated and environmental communities. As Congress continues to assess the Rapanos/ Carabell ruling and determine whether legislative remedies are necessary to clarify the intent of the Clean Water Act, we look forward to your testimony and your interpretation of the joint cases. We also hope you will be able to shed some light on the situation.

Senator CHAFEE. Senator Clinton.

OPENING STATEMENT OF HON. HILLARY RODHAM CLINTON, U.S. SENATOR FROM THE STATE OF NEW YORK

Senator CLINTON. Thank you very much, Mr. Chairman. At the outset, I ask unanimous consent that a letter about the Rapanos/Carabell decision, signed by the Crotan Watershed Clean Water Coalition, be made a part of the record. Senator Chafee. Without objection, so ordered.

[The referenced letter can be found on page 123.]

Senator CLINTON. This is an extremely important hearing, as it goes to the heart of the Clean Water Act, which I believe is one of our Nation's greatest environmental success stories. We should just think back, before the Clean Water Act was enacted, rivers were so polluted they caught on fire. And wetlands were routinely filled with the blessing and even the assistance of the Federal Government.

Thanks to those who crafted this invaluable statute back in 1972, and those who have implemented and enforced it ever since, we have come a very long way in cleaning up our Nation's rivers, lakes, streams and coastlines, and in protecting valuable wetlands. But we still have work to do. The most recent water quality report for New York, for example, from 2002, indicates that 14 percent of our rivers and streams, 75 percent of our lakes, ponds and reservoirs, and 52 percent of our bays and estuaries are impaired, meaning they are not suitable for at least one designated use, such as recreation, drinking water, or fishing. So the implications of the Rapanos/Carabell decision are incredibly important.

While the 4-1-4 decision of the Court largely left the protections of the Clean Water Act intact, it was a close call. Justice Scalia's reasoning, supported by Justices Roberts, Alito and Thomas, would have eliminated protections for millions of acres of wetlands, tributaries and intermittent or ephemeral streams. That would have been a devastating result.

The litigation centers, as the Chairman said, on the definition of the waters of the United States, a term that governs much more than just the wetlands fill program. In fact, that definition also applies to permits for discharge of pollutants, water quality standards, oil spill liability, prevention and control measures and enforcement. So the full range of Federal water quality protections is at issue. That is why so many stakeholders, including New York Attorney General Elliott Spitzer and 32 other attorneys general, 4 former EPA administrators, the City of New York and many others filed amicus briefs supporting the Government's position in this case.

The Government's position very briefly was, "the corps and EPA have acted reasonably in defining the Clean Water Act term the 'waters of the United States' to include wetlands adjacent to tributaries of traditional navigable waters. The connection between traditional navigable waters and their tributaries is significant in practical terms, because pollution of the tributary has the potential to degrade the quality of the traditional navigable waters downstream. If tributaries of traditional navigable waters are covered by the Clean Water Act, then wetlands adjacent to those tributaries are covered as well."

That is the Government's position. I obviously agree with it. And I want to highlight one reason why this is so important to New York. Millions of New Yorkers rely on New York City's drinking water, which has historically in many blind tasting tests been considered the best water, the best tap water in America.

Now, New York City negotiated an agreement with the EPA 10 years ago whereby the city did not have to filter water from its Catskills reservoirs. The water quality is highly dependent on the protection and treatment provided naturally within the nearly 2,000 square miles of land that drain into the city's 19 collecting reservoirs, including the extensive wetlands, approximately 25,800 acres in the watershed area. That is why New York City filed an amicus brief, because they did an inventory of the wetlands in their watershed. Nearly 10,000 acres, or 40 percent, are not subject to regulation by New York or the city, because these are very small wetlands. But they are significant and provide very important water quality benefits.

So the city thus relies on the Federal Government protection of its wetlands. So how we define the waters of the United States is not some abstract matter for New Yorkers. It has profound impact for the quality of our drinking water and on our water rates. And that is just one example of why this issue is so important. I think Congress needs to clarify this position and restore the strongest possible Federal protections for our Nation's waters under the Clean Water Act. This is a success story, and we should not abandon the States and localities who have relied on this Act for more than 30 years.

So Mr. Chairman, thank you for holding this important hearing, and I hope that we will be able to reach bipartisan agreement on legislative solutions.

[The prepared statement of Senator Clinton follows:]

STATEMENT OF HON. HILLARY RODHAM CLINTON, U.S. SENATOR FROM THE STATE OF NEW YORK

Thank you Mr. Chairman.

At the outset, I ask unanimous consent that a letter about the Rapanos-Carabell decision signed by the Croton Watershed Clean Water Coalition be made a part of the record.

This is an extremely important hearing, as it goes to the heart of the Clean Water Act, which is one of our greatest environmental success stories. Before its enactment, rivers were so polluted they caught on fire. And wetlands were routinely filled with the blessing or even assistance of the Federal Government.

Thanks to those who crafted this invaluable statute back in 1972 more than 30 years ago and those who have implemented and enforced it ever since, we have come a long way in cleaning up our Nation's rivers, lakes, streams, and coastlines, and in protecting valuable wetlands.

But we still have work to do. The most recent water quality report for New York, from 2002, indicates that 14 percent of rivers and streams, 75 percent of lakes, ponds and reservoirs, and 52 percent of bays and estuaries are "impaired," meaning that they are not suitable for at least one designated use, such as recreation or drinking water.

So the implications of the Rapanos-Carabell decision are very important.

While the "4-1-4" decision of the Court largely left the protections of the Clean Water Act intact, it was a close call. Justice Scalia's reasoning, supported by Justices Roberts, Alito and Thomas, would have eliminated protections for millions of acres of wetlands, tributaries, and intermittent or ephemeral streams. That would have been a devastating result.

The litigation centers on the definition of "the waters of the United States," a term that governs much more than just the wetlands fill program under directly at

issue in the case. In fact, that definition also applies to permits for discharge of pollutants, water quality standards, oil spill liability, prevention and control measures, and enforcement.

So the full range of Federal water quality protections is at issue.

And I think that is why so many stakeholders including the New York Attorney General and 32 other attorneys general, 4 former EPA Administrators, the city of New York, and many others filed amicus briefs supporting the Government's position in this case.

I want to briefly outline what the Government's position in the case was. The Government argued that, quote: "the corps and EPA have acted reasonably in de fining the CWA term the waters of the United States' to include wetlands adjacent to tributaries of traditional navigable waters. The connection between traditional navigable waters and their tributaries is significant in practical terms, because pollution of the tributary has the potential to degrade the quality of the traditional navigable waters downstream. If tributaries of traditional navigable waters are covered by the CWA, then wetlands adjacent to those tributaries are covered as well." End quote.

I agree with that assessment, and I want to highlight one reason why this is so important to my State, and in particular, to the millions of New Yorkers who rely on New York City's drinking water. As I think my colleagues are aware, New York City negotiated an agreement with the EPA in 1997 whereby the city does not have to filter water from its Catskill reservoirs. But that water quality is highly dependent on the protection and treatment provided naturally within the nearly 2,000 square miles of land that drain into the City's nineteen collecting reservoirs, including the extensive wetlands approximately 25,800 acres in that watershed area. As I mentioned before, New York City filed and amicus brief in this case, and I want to read a portion of that brief. Quote: "Based on the City's inventory of wetlands in the watershed of its water supply, nearly 10,000 acres, or 40 percent of these wetlands are not subject to regulation by New York State or the City because these smaller wetlands, which nonetheless provide significant water quality benefits, approximately 4,300 acres, or 43 percent, lack regular, obvious surface connections to surface waters The City thus relies on Federal protection of smaller wetlands within its watershed." End quote.

So how we define "the waters of the United States" is not an abstract matter for New Yorkers. It has profound impacts for the quality of their drinking water, and on their water rates, as building a filtration plant would cost billions of dollars.

That's just one example of why this issue is so important to my constituents.

I think Congress needs to act to clarify this position, and to restore the strongest possible Federal protections for our Nation's waters under the clean Water Act. We should not abandon States and localities, who have relied on the Act for more than 30 years.

Mr. Chairman, I thank you for holding this important hearing, and I hope that we can follow this with a hearing in the fall to look at possible legislative solutions.

Senator CHAFEE. Thank you, Senator Clinton.

Senator Inhofe.

OPENING STATEMENT OF HON. JAMES M. INHOFE, U.S. SENATOR FROM THE STATE OF OKLAHOMA

Senator INHOFE. Thank you, Chairman Chafee, for holding the subcommittee hearings. I would observe this is the first subcommittee hearing in this room since it has been rebuilt. So that steps it up a little bit.

The Federal authority to regulate discharges into "waters of the United States" rests on the Constitution's Commerce Clause. The discharge must in some way impact, we are talking about what the law is and what the courts have interpreted, impact interstate navigable waters. Many have sought to broaden this authority in the name of protecting the environment. However well-intentioned they may be, those who seek to expand Federal jurisdiction must do so within the bounds of the Constitution.

We have wrestled unnecessarily with how to define the point at which the corps and the EPA exceed not just Congressional intent

but constitutional limitations since the passage of the Act in 1972. I agree with Senator Clinton on the significance of that successful Act in 1972. In its most recent decision on the matter, the Supreme Court has clearly sought to rein in the corps and narrow Federal jurisdiction. In the 2001 SWANCC decision, the Court struck down the corps' jurisdiction over non-navigable, isolated, intrastate wetlands. However, the corps and EPA failed to issue new regulations reflecting the corps' decision, instead pursuing a case by case analysis for these areas.

In June of this year, the Court again visited the question of where the limits on Federal control over local land use decisions lie. While the Court didn't go as far as I believe it should have in its Rapanos decision, the Court ruled that the corps had overstepped its authority by regulating areas as wetlands over which it had no jurisdiction. The plurality issued a strong defense of the Constitution. Justice Kennedy agreed that the corps had overreached and sent the case back to the Sixth Circuit for rehearing. In doing so, Justice Kennedy stated, "The dissent concludes that the ambiguity in the phrase navigable waters allows the corps to construe the statute as reaching into all non-isolated wetlands." This, though, seems incorrect.

The Clean Water Act, in addition to protecting the navigable waters, also protects the rights of the States to regulate and oversee waters within their borders. State and local Governments are fully able to step in and protect these water bodies as they see fit. Indeed, in most cases, this is the most appropriate means of protecting these areas.

There are State and local environmental regulatory programs for isolated waters within 35 States. While many would argue that these are lacking resources, States have not stepped up to protect these areas because they have not needed to. They have yielded their authority to the Federal bureaucracy, all to eager to expand its power to regulate local land use. This trend must be reversed.

Most of these intrastate, non-navigable areas are on private property. Behind me are some pictures of these intrastate, non-navigable areas. I say areas, because you will notice that most of them are dry. The Constitution protects the right of property owners to develop that property as he sees fit. The determination that a dry wash is a wetland immediately devalues that land and infringes on the right of an individual to use his land.

Numerous State and local permits in regulations govern as appropriate the development of these properties. The decision on how to use these resources most appropriately belongs at the State and local levels of Government, where land use and community planning decisions belong.

For those who might argue that this is just those property rights people being paranoid, we have heard that over and over again, here is a quote from a letter that EPA Region IX recently sent to the area Corps office, arguing that more Federal intrusion was needed to develop projects that have the support of the local communities in the State in which they are planned: "Through our permitting programs, the Federal Government is playing a central role [in this development]." It is not the right or the responsibility of the Federal Government to play a central role in any development.

How we define waters of the United States is critical to protect the rights of citizens, local Governments and States to regulate their lands.

I hope the EPA and the corps will issue new definitions consistent with the Rapanos/Carabell decision that fully accounts for the constitutional limitations.

And I would like to say, we will have a witness on the second panel from Oklahoma who is very familiar with some of the problems that we have out there. We have, I say to my fellow Senators, one county called Kingfisher County in Oklahoma, very arid county. It is very rare that there is any water. In fact, I don't think any wetlands really exist there. I can remember during a town hall meeting there, one of the farmers who had 360 acres said that they had declared a problem with an acre and a half which destroyed the value of his entire property.

And I have also felt, and I know that this view is not enjoyed by other members of this committee, or by many members of this committee, that having served on the local level of Government, having been a private property owner, having been on the State level, I have always felt that decisions made closer to the people are the best decisions. And that is consistent with my feelings about these court decisions and about the property rights involved in today's hearing.

I would ask unanimous consent, Mr. Chairman, I have an article from the Environmental Law Institute which gives an excellent history of the definition of navigable waters. I ask unanimous consent that it be inserted into the record at the conclusion of my remarks. Senator Chafee. Without objection, so ordered.

[The referenced article can be found on page 124.]

[The prepared statement of Senator Inhofe follows:]

STATEMENT OF HON. JAMES M. INHOFE, U.S. SENATOR FROM THE STATE OF OKLAHOMA

First, I want to thank Chairman Chafee for holding this subcommittee hearing on the effects of the recent Supreme Court decisions. Federal authority to regulate discharges into "waters of the U.S." rests on the Constitution's Commerce Clause. The discharge must in some way impact interstate navigable waters. Many have sought to broaden this authority in the name of protecting the environment. However well-intentioned they may be, those who seek to expand Federal jurisdiction must do so within the bounds of the Constitution.

We have wrestled unnecessarily with how to define the point at which the corps and EPA exceed not just Congressional intent but Constitutional limitations since passage of the Act in 1972. In its most recent decisions on the matter, the Supreme Court has clearly sought to rein in the corps and narrow Federal jurisdiction. In the 2001 SWANCC (pronounced SWANK) decision, the Court struck down the corps' jurisdiction over nonnavigable, isolated, intrastate wetlands. However, the corps and EPA failed to issue new regulations reflecting the corps decision instead pursuing case-by-case analyses for these areas.

In June of this year, the Court again visited the question of where the limits on Federal control over local land use decisions lie. While the Court did not go as far as I believe it should have, in its Rapanos decision, the Court ruled that the corps had overstepped its authority by regulating areas as wetlands over which it has no jurisdiction. The plurality issued a strong defense of the Constitution. Justice Kennedy agreed that the Corps had overreached and sent the case back to the sixth circuit for rehearing. In doing so, Justice Kennedy stated, "[the dissent] concludes that the ambiguity in the phrase navigable waters' allows the corps to construe the statute as reaching all non-isolated wetlands'. . . This, though, seems incorrect."

The Clean Water Act in addition to protecting navigable waters also protects the rights of the States to regulate and oversee waters within their borders. State and

local Governments are fully able to step in and protect these waterbodies as they see fit. Indeed, in most cases this is the most appropriate means of protecting these areas. There are State and local environmental regulatory programs for isolated waters in 35 States. While many would argue that these are lacking resources, States have not stepped up to protect these areas because they have not needed to. They have yielded their authority to a Federal bureaucracy all too eager to expand its power to regulate local land use. This trend must be reversed.

Most of these intrastate, nonnavigable areas are on private property. Behind me are some pictures of these intrastate nonnavigable areas. I say areas because you will notice that most of them are dry. The Constitution protects the right of the property owner to develop that property as he sees fit. The determination that a dry wash is a wetland immediately devalues that the land and infringes on the right of the individual to use his land. Numerous State and local permits and regulations govern, as appropriate, the development of these properties. The decision on how to use these resources most appropriately belongs at the State and local levels of Government where land use and community planning decisions belong.

For those who might argue, that this is just those property rights people being paranoid, here is a quote from a letter that EPA Region 9 recently sent to the area corps office arguing that more Federal intrusion was needed into development projects that have the support of the local communities and the State in which they are planned, "Through our permitting programs, the Federal Government is playing a central role [in this development]." It is not the right or responsibility of the Federal Government to play a central role in any development. How we define "waters of the U.S." is critical to protecting the rights of citizens, Governments and States to regulate the use of their lands. I hope the EPA and the corps will issue a new definition consistent with the Raplocal Govanos/Carabel decision that fully accounts for the constitutional limitations on their authority.

Senator CHAFEE. Senator Jeffords.

OPENING STATEMENT OF HON. JAMES M. JEFFORDS, U.S. SENATOR FROM THE STATE OF VERMONT

Senator JEFFORDS. Mr. Chairman, I am pleased to be here today at this oversight hearing evaluating the implications of the Rapanos/Carabell Supreme Court decision on the jurisdiction of the Clean Water Act.

The Clean Water Act was passed in 1972 to restore and maintain the chemical, physical and biological integrity of the Nation's waters. It was a landmark statute that completely overhauled the Nation's clean water programs. We have made significant progress in cleaning up our waters, but we have more to do.

Just a few months ago, the EPA issued its first assessment of the water quality in streams nationwide that are too shallow to support boat traffic, and found that 42 percent of them are in poor condition. In the northeast, 51 percent of these streams, many of which are fantastic fishing spots, are in poor condition.

Upon hearing these numbers, my natural reaction is, let's take action and help these waters recover. I am concerned that this Court decision, which I feel is completely contrary to the Congressional intent, would take us in the opposite direction, limiting clean water protections and leading to dirtier water.

For example, in January the EPA stated in a letter that about 59 percent of the length of shallow streams in this Country flow only part of the year. This is one of the categories of waters that could be excluded from the Clean Water Act protections under some interpretations of the Supreme Court decision. I ask that the EPA's letter be entered into the record at this point.

Senator CHAFEE. Without objection, so ordered.

[The referenced letter can be found on page 48.]

Senator JEFFORDS. This test would ignore the fact that it is patently obvious to any observer that the water flows downstream from small bodies of water to larger ones. Sometimes it rains, sometimes it doesn't. Just last week, it rained about 2 inches in the Phoenix, AZ area, causing widespread flooding. Some streams in that region recorded a one foot increase in flow over the course of 2 hours. I am certain that any polluting sitting in those stream beds was washed downstream. This example shows that even if a shallow stream flows only part of the year, pollution will still make it downstream.

With regard to the Administration planned response in this Court decision, I have a few concerns. The EPA depends heavily on the President's goal of "overall gain" in wetlands to give reassurance that wetlands will remain protected. Today, I will be sending a letter to the President with several of my colleagues asking some detailed questions about the program. For instance, overall gain is a two-side question. You measure gains and you measure losses. Then you balance the equation and figure out how you are doing. I am concerned that wetland losses may not be included in your calculations, providing an overall optimistic view of the status of threatened waters nationwide.

Second, I am concerned that the Administration will issue guidance in response to this case that is overly broad, just as they have done in response to previous Supreme Court decisions. Mr. Chairman, in 1977, my predecessor, Senator Bob Stafford of Vermont, stated, "The 1972 Federal Water Pollution Act exercises comprehensive jurisdiction over the Nation's waters to control pollution." It is a simple concept that Congress clearly needs to clarify with legislation in the wake of the Supreme Court decision.

Thank you, Mr. Chairman.

[The prepared statement of Senator Jeffords follows:]

STATEMENT OF HON. SENATOR JIM JEFFORDS, U.S. SENATOR FROM THE STATE OF VERMONT

Mr. Chairman, I am pleased to be here today at this oversight hearing evaluating the implications of the Rapanos Carabell Supreme Court Decision on the jurisdiction of the Clean Water Act.

The Clean Water Act was passed in 1972 to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. It was a landmark statute that completely overhauled the nation's clean water programs.

We have made significant progress in cleaning up our waters, but we have more work to do. Just a few months ago, the EPA issued its first assessment of the water quality in streams nationwide that are too shallow to support boat traffic and found that 42 percent of them are in poor condition. In the northeast, 51 percent of these streams, many of which are fantastic fishing spots, are in poor condition.

Upon hearing these numbers, my natural reaction is, let's take action and help these waters recover. I am concerned that this Court decision, which I feel is completely contrary to Congressional intent, could take us in the opposite direction, limiting clean water protections and leading to dirtier water.

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over the course of only a few hours. I am certain that any pollution sitting in those streambeds was washed downstream. This example shows that even if a shallow stream flows only part of the year, pollution will still make its way downstream.

With regard to the Administration's planned response to this Court decision, I have a few concerns. The EPA depends heavily on the President's goal of an "overall gain" in wetlands to give reassurance that wetlands will remain protected.

Today I will be sending a letter to the President with several of my colleagues asking some detailed questions about the program. "Overall gain" is a two-sided question you measure gains and you measure losses, then you balance that equation and figure out how you're doing. I am concerned that wetland losses may not be included in your calculations, providing an overly optimistic view of the status of these threatened waters nationwide.

Second, I am concerned that the Administration will issue guidance in response to this case that is overly broad, just as they have done in response to previous Supreme Court decisions.

Mr. Chairman, in 1977 my predecessor, Senator Bob Stafford of Vermont, stated, "The 1972 Federal Water Pollution Control Act exercised comprehensive jurisdiction over the Nation's waters to control pollution."

It is a simple concept that Congress clearly needs to clarify with legislation in the wake of this Supreme Court decision.

Senator CHAFEE. Thank you, Senator Jeffords.

Senator Murkowski.

OPENING STATEMENT OF HON. LISA MURKOWSKI, U.S. SENATOR FROM THE STATE OF ALASKA

Senator MURKOWSKI. Thank you, Mr. Chairman. Thank you for holding the hearing today.

For about 30 years now, the courts have wrestled with how we define waters of the United States, and for about 30 years or more, they have produced different and certainly conflicting opinions. When the Supreme Court heard and decided the SWANCC case, the Solid Waste Agency of Northern Cook County, I think it raised hopes that the country would finally get some clear guidance. But that guidance has not been forthcoming, either from the Court or from the agencies or from Congress.

The SWANCC decision did provide some rays of light. First, it indicated that not all wetlands can be considered navigable waters within the meaning of the Act. I guess I look at that and say, it is so self-evident that I find it amazing that there would be those that would argue otherwise.

Secondly, it suggested that in order to be protected, a wetland must have a significant nexus with navigable waters. I think that too, seems self-evident. But the Court was reluctant to take that step of defining the term "significant nexus" and it was this test that is left for either the Agency or for Congress.

As far as the Clean Water Act itself, I don't think that there is anything at fault with the Act. The Act itself is clear. What is less clear, what is muddy is the implementation. This suggests to me that the Administration should take steps to clarify it.

When we talk about the issue of how we define our waters of the United States and wetlands, this clearly affects all States, and we are hearing that from the committee members today. But it has significant impact to the State of Alaska. First, in the State of Alaska, we have some 174 million acres of wetlands. This is more than all of the other States combined.

Secondly, much of those wetlands are vastly different in character than wetlands in the other States, many of our wetlands are frozen for nine or so months out of the year, and they are underlain

by a layer of permafrost. So their hydrologic functions are completely different than what you might see in other parts of the country.

Now, I'm certainly not suggesting these wetlands are without value, but that their value may stem from different considerations than those perhaps envisioned by the Clean Water Act, and in that vein can't be appropriately addressed by that Act. I want to make sure people understand, I am looking at this and suggesting that one size perhaps does not fit all. And rather than attempt to force all wetlands into a mold for which they are not well suited, it seems better to seek to clarify their status, which can best be done by administrative rulemaking.

A majority of the Supreme Court justices appear to agree. Justice Breyer's summary calls for regulations to be written speedily. Chief Justice Roberts pointed out that the failure to establish a rule in response to the SWANCC case helped ensure the result of the most recent cases. The Agency has had ample opportunity to act, and indeed the Corps and the EPA began the process after the SWANCC case, but unfortunately, by the beginning of 2004, that effort was abandoned, which leaves us now in a state of limbo.

In April of 2003, the State of Alaska provided some very extensive comments for the previous rulemaking attempt. And these comments continue to be of value, as they clearly explain why not all wetlands are equal. In addition, in January of 2004, after that effort was abandoned, the State registered its dismay in a letter in which the Governor noted that asserting Clean Water Act jurisdiction over all wetlands without limitation would lead to a patchwork of conflicting court decisions and create uncertainty for all those involved, which is precisely our current situation.

Mr. Chairman, I do have copies of both of these documents, the April 2003 comments from the State, as well as the January 2004, which I would like to have included as part of the record for this hearing.

Senator CHAFEE. Without objection, so ordered.

[The referenced documents can be found on page 111.]

Senator MURKOWSKI. Mr. Chairman, I have one more paper prepared by the State which again argues that this matter demands a clear and consistent approach and that rulemaking is the appropriate measure to take.

Senator CHAFEE. Without objection, that will be included also.

[The referenced paper can be found on page 118.]

Senator MURKOWSKI. So with that, Mr. Chairman, again I thank you for conducting the hearing this afternoon and look forward to the comments of the witnesses.

[The prepared statement of Senator Murkowski follows:]

STATEMENT OF HON. SENATOR LISA A. MURKOWSKI, U.S. SENATOR FROM THE STATE OF ALASKA

Mr. Chairman, I want to thank you for holding this hearing. The country is deeply divided on the issue of appropriate wetlands protections, and the gap isn't getting any narrower. For 30 years or more, the courts have wrestled with how to define "waters of the United States." For 40 years or more, they have produced different and conflicting opinions.

When the Supreme Court heard and decided the Solid Waste Agency of Northern Cook County (SWANCC) case, it raised hopes that the country would finally get

some clear guidance. Unfortunately, such guidance has not been forthcoming, either from the court, or from the agencies, or from Congress.

The SWANCC decision did provide some rays of light. First, it indicated that not all wetlands can be considered navigable waters within the meaning of the Act. That is so self-evident it is mind-boggling to think there are those who argue otherwise.

Second, it suggested that in order to be protected, a wetland must have a "significant nexus" with navigable waters. That too, seems self evident.

However, the court was reluctant to take the activist step of defining the term "significant nexus." That task is left either for the Agency or for Congress.

Mr. Chairman, there are times when allowing another entity make the first move can be productive, and I believe this is one of those times.

I don't think there is anything at fault with the Clean Water Act itself. The Act is clear it is the implementation that is muddy. That suggests to me that the Administration should take steps to clarify it.

This issue affects every State, but Alaska more than most, for two reasons: first, because Alaska has 174 million acres of wetlands, more than all the other States combined; and second, because much of those wetlands are vastly different in character than wetlands in other States frozen 9 months of the year and underlain by permafrost, so their hydrologic functions are completely different.

Even the most casual observer if willing to look at the science of wetlands management rather than the politics of it, must accept the idea that not all wetlands serve the same function, nor are they equally important in cleaning and conditioning water resources, nor are they equally important in mitigating storm damage.

Make no mistake I am not suggesting these wetlands are without value, but that their value may stem from different considerations than those envisioned by the Clean Water Act, and cannot therefore be appropriately addressed by that Act. One size does NOT fit all.

Some people seem to believe that when it comes to wetland protection, the Clean Water Act is the only option. But that is not true.

In fact, Alaska's wetlands would be protected without Federal law, because Alaska's Constitution mandates that its resources be managed under sustainable use principles, and the resulting pollution control statutes are among the nation's strictest. In many ways that is purely self-interest; our Constitution was drafted in response to decades of Federal mismanagement, and we knew that keeping valuable resources such as fish and game populations at useful, productive levels meant conserving their habitats, as well.

Rather than attempt to force all wetlands into a mold for which they are not well-suited, it seems better to seek to clarify their status, which can best be done by administrative rulemaking. A majority of Supreme Court justices appear to agree. Justice Breyer's summary calls for regulations to be written "speedily." Chief Justice Roberts pointed out that the failure to establish a rule in response to the SWANCC case helped ensure the result of the most recent cases.

The agency has had ample opportunity to act. Indeed, the Corps and the EPA began the process after the SWANCC case. Unfortunately, by the beginning of 2004, the effort was abandoned, leaving behind the limbo in which we now find ourselves.

In April, 2003, the State of Alaska provided extensive comments for the previous rulemaking attempt. Those comments continue to be of value, as they clearly explain why not all wetlands are equal. In addition, in January of 2004, after the effort was abandoned, the State registered its dismay in a letter in which the Governor noted that asserting Clean Water Act jurisdiction over all wetlands without limitation would lead to a "patchwork" of conflicting court decisions and create uncertainties for all those involved precisely our current situation.

Mr. Chairman, if there is no objection, I would like to have both those documents added to the record for this hearing.

More recently, the State prepared yet another paper addressing this issue in the context of the most recent decision. Once again, it argues that this matter is demands a clear and consistent approach and that rulemaking is the way to achieve it.

I must agree and would like to submit this paper for the record as well.

Thank you, Mr. Chairman. I look forward to hearing from our witnesses, and hope very much they will support the completion of a sensible and comprehensive rulemaking effort.

Senator CHAFEE. Thank you, Senator Murkowski.

Senator Lautenberg.

OPENING STATEMENT OF HON. FRANK R. LAUTENBERG, U.S. SENATOR FROM THE STATE OF NEW JERSEY

Senator LAUTENBERG. Thank you, Mr. Chairman.

Mr. Chairman, I listened with interest and not a lot of surprise, but some disappointment when we hear that the value of properties looms as the largest consideration. I think there is something for the value of lives that has to be included in our review and our commentary.

For more than three decades, the Clean Water Act has improved the lives of every American. It has protected our Nation's rivers, lakes, wetlands, streams and other waters. But now in the wake of disturbing legal reasoning by Justice Scalia and three of his colleagues on the Supreme Court, the protections of the Clean Water Act are in serious danger.

Since 1972, the Clean Water Act has prohibited the discharge of pollution from point sources into our Nation's waters without a permit. But in the recent Rapanos decision, Justice Scalia, joined by Justices Thomas, Roberts and Alito, attempted to invent two new exceptions to the Clean Water Act that would endanger thousands of streams and wetlands. First, they asserted that only streams that run continuously, year-round, are protected under the Clean Water Act. Based upon EPA estimates, this would leave almost 60 percent of our Nation's streams with no protection under the Clean Water Act.

Secondly, Justice Scalia's opinion asserted that only those wetlands that have a continuous surface flow of water into the streams they adjoin are protected under the Act. This interpretation would similarly exclude tens of millions of acres of wetlands from Federal protection. If this interpretation of the Clean Water Act were actually to prevail, streams and wetlands across the country would suddenly lose their Federal protection. These waters could be left open to unpermitted dumping of industrial pollution, sewage waste and to dredging and filling.

We hear about the fact that State supervision can take care of many of these things. But when they flow into streams, those streams cross touch many States on their way to their final destination. To ignore the fact that the contamination could be transmitted so quickly and so easily I think is dangerous. The results would be devastating: more pollution downstream, significant loss of wildlife habitat, increased flooding and great drought in the final analysis.

This weakening of the Clean Water Act would affect the quality of the water we drink and the rivers, lakes and streams where our children fish and swim. The only good news about Justice Scalia's opinion is that he was only able to get three of his colleagues to agree with it. Four Justices dissented, and Justice Kennedy took a middle-ground approach. But he sharply criticized Justice Scalia's opinion, saying that it is "without support in the language and purposes of the Act" or in our case interpreting it.

Now, I will be interested to hear from today's witnesses how EPA and the Army Corps plan to continue protecting the Nation's wetlands, streams and other waters in light of the recent Supreme Court decision. Even though a majority of Justices did not agree with Justice Scalia, the Rapanos case is an open invitation for pol-

luting industries to keep using the courts to reduce the number of waters protected by the Clean Water Act.

We have got to act, Congress has got to act to reaffirm the historic scope of the Clean Water Act. Senator Feingold's Clean Water Authority Restoration Act, S. 912, of which I am an original cosponsor, would do just that. I hope we can have a hearing on the Feingold bill as soon as possible.

Mr. Chairman, I look forward to hearing from today's witnesses.

[The prepared statement of Senator Lautenberg follows:]

STATEMENT OF HON. SENATOR FRANK R. LAUTENBERG, U.S. SENATOR FROM THE STATE OF NEW JERSEY

Mr. Chairman, for more than three decades, the Clean Water Act has improved the lives of every American. It has protected our Nation's rivers, lakes, wetlands, streams and other waters. But now, in the wake of disturbing legal reasoning by Justice Scalia and three of his colleagues on the Supreme Court, the protections of the Clean Water Act are in danger.

Since 1972 the Clean Water Act has prohibited the discharge of pollution from "point sources" into our Nation's waters without a permit. But in the recent Rapanos decision, Justice Scalia, joined by Justices Thomas, Roberts and Alito, attempted to invent two new exceptions to the Clean Water Act that would endanger thousands of streams and wetlands.

First they asserted that only streams that run continuously year-round are protected under the Clean Water Act. Based upon EPA estimates, this would leave almost sixty percent of our Nation's streams with no protections under the Clean Water Act. Second, Justice Scalia's opinion asserted that only those wetlands that have a continuous surface flow of waters into the streams they join are protected under the Act. This interpretation would similarly exclude tens of millions of acres of wetlands from Federal protections.

If this interpretation of the Clean Water Act were actually to prevail, streams and wetlands across the country would suddenly lose Federal protections. These waters could be left open to unpermitted dumping of industrial pollution, sewage, and waste, and to dredging and filling. The results would be devastating more pollution downstream, significant loss of wildlife habitat, increased flooding and greater drought.

This weakening of the Clean Water Act would affect the quality of the water we drink, and the rivers, lakes and streams where our children fish and swim. The only good news about Justice Scalia's opinion was that he was only able to get three of his colleagues to agree with it. Four justices dissented, and Justice Kennedy took a middle ground approach. But he sharply criticized Justice Scalia's opinion saying that it is "without support in the language and purposes of the Act or in our cases interpreting it."

I will be interested to hear from today's witnesses how EPA and the Army Corps plan to continue protecting the nation's wetlands, streams and other waters in light of the recent Supreme Court decision. Even though a majority of Justices did not agree with Justice Scalia, the Rapanos case is an open invitation for polluting industries to keep using the courts to reduce the number of waters protected by the Clean Water Act.

Congress should act to reaffirm the historic scope of the Clean Water Act. Senator Feingold's Clean Water Authority Restoration Act (S. 912), of which I am an original co-sponsor, would do just that. I hope we can have a hearing on the Feingold bill as soon as possible.

Mr. Chairman, I look forward to hearing from today's witnesses.

Senator CHAFEE. Thank you, Senator Lautenberg.

I do have a statement by Senator Feingold which I would like to submit for the record. I do anticipate a hearing on any legislation that might be proposed at another date.

[The prepared statement of Senator Feingold follows:]

STATEMENT OF HON. RUSS FEINGOLD, U.S. SENATOR FROM THE STATE OF WISCONSIN

I appreciate the leadership of Senator Chafee and Senator Clinton in holding today's subcommittee hearing on interpreting the effect of the U.S. Supreme Court's recent decision in the joint cases of Rapanos v. United States and Carabell v. U.S. Army Corps of Engineers on the waters of the United States. I also appreciate the offer from Senator Chafee's office to work to hold a subsequent hearing on legislative responses in the wake of the most recent Supreme Court decision. As the lead sponsor of S. 912, the Clean Water Authority Restoration Act, I look forward to testifying about the issues surrounding, and the need for, legislation that will ensure that the waters of our country are protected as originally intended by the Clean Water Act. I believe that this legislation is now needed more than ever and I appreciate the willingness of the subcommittee to press ahead on this most important issue.

When the Clean Water Act was passed in 1972, its stated purpose was to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." For most of the past 30 years, the Clean Water Act has been interpreted to provide protection for the myriad waters that enhance and contribute to human health and well-being, the economy, and the environment. Unfortunately, over the past few years, the fundamental purpose of the Clean Water Act has been questioned and jeopardized by Supreme Court decisions.

In the 2001 case Solid Waste Agency of Northern Cook County v. Army Corps of Engineers (SWANCC), the U.S. Supreme Court limited the authority of Federal agencies to extend Clean Water Act protections to non-navigable, intrastate, "isolated" waters based solely on their use by migratory birds. Now, with the Rapanos/Carabell decision, four Justices indicated that they believe that the Clean Water Act applies only to "permanent, standing or continuously flowing bodies of water." Thus, the American public now knows that the Supreme Court is one vote away from a majority that would jeopardize roughly 60 percent of the Nation's rivers and streams and all of the wetlands adjacent to them. And, to put these bodies of water into perspective, according to the Environmental Protection Agency 110 million Americans get their drinking water from sources that include the very intermittent and ephemeral bodies of water that the four justices said were not protected by the Clean Water Act. Fortunately, five Justices rejected this radical rewrite of the Act and that opinion does not have the force of law. Nonetheless, the waters protected by the Clean Water Act for the last three decades are still in jeopardy.

While I hope today's hearing delves in depth into the recent cases, it is clear to me that Congress must act and that time is most definitely of the essence. Every single day that goes by, streams and wetlands are lost. For example, following the SWANCC decision, the relevant agencies have been issuing approximately 400 no jurisdiction' determinations a quarter 1,600 per year. While some of these may have merit, I worry that many of them do not and that they represent a loss for the water resources that all citizens of our country depend upon. I also am concerned about what will happen based on the most recent decision, and unfortunately, I need not look far for an indication of what will come. For example, a fifth circuit district court judge, in a case looking at an oil spill, essentially discarded Justice Kennedy's opinion in Rapanos/Carabell, saying that, "This test [the significant nexus] test leaves no guidance on how to implement its vague, subjective centerpiece." The fifth district judge went on, "Because Justice Kennedy failed to elaborate on the significant nexus' required, this Court will look to the prior reasoning of this circuit." The judge then relied heavily on Justice Scalia's opinion in the Rapanos/Carabell decision to rule that the Federal Government had no ability under the Clean Water Act to take action against a major oil company for spilling oil into an intermittent stream.

Enough is enough. Congress must provide the needed leadership to step in and clarify the intent of the Clean Water Act. Such action must ensure that all waters of the United States, waters that are valuable for drinking, fishing, swimming, and a host of other economically vital uses not just navigability are protected. I look forward to working with the members of the subcommittee to pass such vital legislation.

Senator CHAFEE. And now we will proceed to our first panel. We have the Honorable Ben Grumbles, Assistant Administrator for the EPA Office of Water; the Honorable John Paul Woodley, Jr., Assistant Secretary for Civil Works for the U.S. Department of the Army; and Mr. John Cruden, Deputy Assistant Attorney General of the

Environment and Natural Resources Division of the U.S. Department of Justice.

Welcome, and let's start with Mr. Grumbles.

STATEMENT OF THE HONORABLE BENJAMIN H. GRUMBLES, ASSISTANT ADMINISTRATOR FOR WATER, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; AND JOHN PAUL WOODLEY, JR., ASSISTANT SECRETARY OF THE ARMY FOR CIVIL WORKS, DEPARTMENT OF THE ARMY

Mr. GRUMBLES. Thank you, Mr. Chairman.

Mr. Chairman, this Administration is pro-wetlands. This Administration is pro-wetlands, because we recognize wetlands are at the core of this country's rich cultural heritage and are central to its prosperity and future. The Administration is supportive of wetlands programs, restoring and protecting them, because we recognize their central importance.

The President reaffirmed the no net loss goal and has also stated a bold new goal for this country of gaining wetlands, moving beyond just the no net loss goal. The no net loss goal of the Administration was reaffirmed in 2002, when it also established a multi-agency, 17 step mitigation action plan to make progress on compensatory mitigation and restoring wetlands that were unavoidably lost due to development activities.

Even more importantly, on Earth Day 2004, the President established this new goal of gaining wetlands, of increasing the quality and quantity of wetlands throughout the country and tasks the Federal agencies specifically with the goal of using the tools of cooperative conservation to restore, create, improve and protect 3 million acres by 2009.

Since Earth Day 2004, the Administration has been taking a variety of positive, pro-wetland steps to make progress on those ambitious goals. One of the things I would like to mention is that in the President's budget request, fiscal year 2007 request, the Administration is requesting $403 million for the USDA's Wetlands Reserve program. That is over $150 million above and beyond the previous request. It will lead to a total of 250,000 acres in the Wetlands Reserve program.

There are other activities beyond the budget, but particularly in the 2007 budget, Assistant Secretary Woodley will describe the regulatory program for the Corps of Engineers, implementing Section 404 and the importance of those resources in that program to help protect and restore wetlands. U.S. EPA has a variety of programs as well to advance the goals of the President on wetlands as well as the goal of the Clean Water Act, which Senator Clinton and others on the panel have stated. It is critically important, and that goal is to restore and maintain the chemical, physical and biological integrity of the Nation's waters. Because we recognize that wetlands are a central part of that effort, we are using the tools we have under cooperative conservation, as well as under the Clean Water Act.

EPA is working closely with the Army Corps of Engineers, because our two agencies share the Clean Water Act Section 404 program on several important initiatives and efforts. One of them I want to mention is the proposed wetlands mitigation rule, which

was proposed earlier this year. This is a science-based, results-oriented rule that will help us use market-based approaches to continue to make progress toward the goal of no net loss of wetlands throughout the country.

We are also working closely in multiple Agency efforts to heed the advice of the National Academy of Sciences. When they issued a report several years ago, they said more work needs to be done on the science of wetlands restoration and protection, to ensure that we do continue to make progress towards that no net loss goal. We are fulfilling that objective, working on that as well as with the mitigation rule.

These are all important activities, they are important steps recognizing cooperative conservation plus the regulatory tools and non-regulatory tools under the Clean Water Act are all important to help us meet the President's objectives and goals for wetlands protection.

The purpose of this hearing, this extremely important hearing, is to focus on the decision, the Rapanos/Carabell decision. Immediately after the decision, the EPA and the Army Corps sent field guidance to our staffs, telling them, continue to carry out your programs, carry out authorities and programs under the Clean Water Act. Defer for a while on making any new interpretations of this new decision, and on changing jurisdictional delineation procedures, so that we could work on interim guidance. We are now working on interim guidance, developing it. We hope to get it issued as soon as possible. It will be an important tool to help us to continue to use the Clean Water Act as a valuable tool. The focus of that guidance will be to add clarity and consistency so that we can continue to use tools available under the Clean Water Act.

In closing, Mr. Chairman, I would just like to say that all wetlands have value. The question is what tools, what authorities, what programs and at what level of Government are available to help continue to advance in an effective, efficient and equitable manner these wetlands protection and restoration goals. It will take all of us working together, all of us working together, to achieve that. We look forward to working with you.

At this point, I would like to turn it over to Assistant Secretary Woodley. Mr. Chairman, thank you.

Senator CHAFEE. Thank you, Mr. Grumbles. Mr. Woodley, welcome.

Mr. Woodley. Thank you, Senator. It is wonderful to see you again, and also the members of the committee and subcommittee.

I certainly associate myself with my very distinguished colleague's remarks. Congress enacted the Clean Water Act, as has been indicated, to restore and maintain the physical, chemical and biological integrity of the Nation's waters, including wetlands, through programs such as Section 404, administered by my Agency. That section regulates discharges of dredged or fill material, helping to protect wetlands and aquatic environments, of which they are an integral part, and maintain the environmental and economic benefits provided by these valuable natural resources.

The Bush administration has shown its support for the continuing protection of wetlands by proposing to increase funding for the Corps of Engineers' regulatory budget from $138 million in fis-

cal year 2003 to $173 million proposed in fiscal year 2007, which amounts to about a 25 percent increase. I encourage members, particularly those of you who may know appropriators, to examine that request that we have pending in fiscal year 2007. The corps is responsible for the day to day administration, including reviewing permit applications and deciding whether to issue or deny permits. In that context, we make more than 100,000 jurisdictional determinations and provide over 80,000 written authorizations in a given year. The data do indicate that we are achieving our goal of a no net loss of wetlands in the 404 regulatory program.

Mr. Grumbles has described some of the actions we have taken to improve the program in recent years, in conjunction with our colleagues at EPA. But certainly should not be neglected the efforts that the corps has underway pursuant to its aquatic ecosystem restoration mission, which includes many projects that have restored and are restoring hundreds of acres of wetlands and streams every year. Indeed, Mr. Chairman, I hope to see you in Rhode Island later this year at the Lonsdale Marsh project, which is restoring some very valuable wetlands in the State of Rhode Island. These actions, as well as others, will enable us to better protect and improve these resources and tell us where and how to restore, enhance and protect these important resources.

We are now working together with our colleagues at the EPA to understand and implement the June 2006 Supreme Court decision that has been described here today. The judgment of the Court was to vacate and remand these two cases for further proceedings. Those proceedings will be undertaken. In addition, the Court introduced different tests for evaluating and determining jurisdiction for tributaries to traditional navigable waters and their adjacent wetlands. These tests will have important implications for the administration of the Clean Water Act.

As my colleague indicated, we have issued interim guidance that seeks to advise our subordinates in the field of their responsibilities under this ruling. Since that has been issued, we have been working very closely with our colleagues at the Department of Justice to interpret the decision, to arrive at an understanding of its legal implications and its impacts on the scope of the definition of waters of the United States protected under the Clean Water Act. We are now working on joint EPA/Corps of Engineers interim guidance to clarify our jurisdiction in light of these decisions, with the focus, of course, on the critical issue of defining the term "significant nexus" as used by Justice Kennedy in applying that rule to the field. We certainly hope that this guidance will move us beyond our disagreements over how widely we assert jurisdiction and having an approach that is not about a larger or smaller jurisdiction, but about better results using the tools that we have to provide clarity for the public and ensure consistency and predictability in our jurisdictional determinations nationwide.

Thank you very much for the opportunity to address you today.

Senator CHAFEE. Thank you very much, Mr. Woodley. Mr. Cruden, welcome.

STATEMENT OF JOHN C. CRUDEN, DEPUTY ASSISTANT ATTORNEY GENERAL, ENVIRONMENT AND NATURAL RESOURCES DIVISION, UNITED STATES DEPARTMENT OF JUSTICE

Mr. CRUDEN. Chairman Chafee and other members of the Committee and Subcommittee, thank you for inviting me here to talk about an extremely important case right now. I am a Deputy in the Environment and Natural Resources Division, and as most of you know, that is one of the litigating divisions of the Department of Justice. We have responsibility for over 70 statutes in the environment and natural resources arena, and we appear in court representing virtually every Federal agency.

One of the statutes that we have responsibility for is the subject of this hearing today, which is the Clean Water Act. And one part of that statute is what we are narrowly addressing today, and that is what I refer to as the 404 program, which is our wetlands protection area.

As has already been said, Federal wetlands took on significance with the Clean Water Act amendments of 1972 and 1977, and the corps and EPA implemented those in regulations in 1974, 1977 and 1986. There have been numerous decisions involving certainly the Clean Water Act, and more specifically wetlands law. But clearly the most important are the three most recent ones by the Supreme Court, which Senator Chafee has already mentioned: the unanimous Riverside Bayview decision in 1985; the divided SWANCC decision in 2001; and now the splintered Rapanos decision that was just decided.

When we are appearing in court, we go back to the statute to try to tell the court the significance of that statute. And we very often start with the goal of the Clean Water Act, which has already been stated as restoring and maintaining the chemical, physical and biological integrity of the Nation's waters. Specifically in wetland areas, the statute prohibits the discharge of a pollutant by any person without a permit. Discharge of a pollutant is further defined as the addition of a pollutant to navigable waters. And then navigable waters is defined as "waters of the United States." So that is how we get to "waters of the United States," through a series of definitions.

The corps and EPA have promulgated regulations and they have substantially the same definition of "waters of the United States," and that is what we have been applying in court. In Riverside Bayview, the Supreme Court held that the corps had acted reasonably in interpreting the Act to require permits for discharges of fill material into wetlands adjacent to waters of the United States. In SWANCC, however, the Supreme Court held that isolated, nonnavigable intrastate waters did not become waters of the United States based on migratory bird usage.

Now let's turn to Rapanos. Rapanos is actually two cases. The Supreme Court was once again reviewing the phrase, "waters of the United States." In the first case, Rapanos, that was a developer who without a permit filled about 54 acres of wetlands that were adjacent to tributaries of navigable-in-fact water bodies.

But there was another case. The second case, Carabell, involved a permit applicant who was denied authorization to fill wetlands that were physically proximate to, but they were divided by about

a four-foot berm from, a navigable-in-fact water body, Lake St. Clair.

The judgment of the Supreme Court was to vacate the decisions of the Sixth Circuit and remand both cases for further proceedings. There is no majority opinion. Instead, we have a plurality opinion of four Justices, a concurring opinion by Justice Kennedy and a dissent by four Justices. Chief Justice Roberts also wrote a separate concurring opinion to the plurality. Justice Breyer wrote a separate concurring opinion to the dissent.

The plurality opinion authored by Justice Scalia concluded that the lower court should determine whether the ditches or drains near each wetland are waters in the ordinary sense, containing a relatively permanent flow, and if they are, whether the wetlands in question are adjacent to those waters in the sense of having a continuous surface connection.

Justice Kennedy concurred in the judgment of the Court, but he has a separate and different test, concluding that the cases should be vacated and the test should be whether the specific wetlands at issue possess a significant nexus with navigable waters.

It is a challenge to discern clarity in this particular case. I think Chief Justice Roberts in his concurring opinion said it best: "It is unfortunate that no opinion commands a majority of the Court on precisely how to read Congress's limits on the reach of the Clean Water Act. Lower courts and regulated entities will now have to feel their way on a case-by-case basis." Senators, that is what we have been doing since the time of this opinion. It would not surprise you to know that in many cases we sought more time from courts, so that we could coordinate with a lot of other people and work with the Environmental Protection Agency and the Corps of Engineers.

In some cases we have had to take positions. We have already settled two cases. We have already filed a new case. And today, we are advising the Sixth Circuit in Rapanos and Carabell what we think the next step should be. We advised in both cases that we think that the test should be when you are applying the Rapanos and Carabell decision, that in order to determine "waters of the United States," we ought to be able to meet either test, either the test of the plurality or the concurring test by Justice Kennedy.

I look forward to your questions about in this very important decision, and I am pleased you are having this hearing. Thank you.

Senator CHAFEE. Thank you very much, panelists, for your testimony. We will have a 5 minute round of questioning. Seeing how you ended up, Mr. Cruden, on some of the questions I wanted to ask, maybe I could just get some details. You are saying that you will apply both the plurality test, either the plurality test or the Kennedy test?

Mr. CRUDEN. That is correct.

Senator CHAFEE. But not both? Maybe you could give me a further description of how that will work.

Mr. CRUDEN. We believe that the rule of law that comes out of this will in fact allow us to apply either test in a particular factual situation. I say that for three reasons. First of all, I believe that Chief Justice Roberts, in his concurring opinion, pretty much pushed us in that direction when he said lower courts and regu-

lated entities will now have to feel their way on a case-by-case basis. He went on to say, this situation is certainly not unprecedented. And he cites two decisions, a Marks decision, which was an old obscenity decision, and a decision of Grutter v. Bollinger, which is an affirmative action case.

In both of those decisions, they were also fragmented decisions. In the one case, the obscenity case, the Court applied the plurality opinion. In the other case, the affirmative action case, which goes back to the well-known Bakke decision, they applied the single opinion by Justice Powell. So I think that Justice Roberts pushes us in the direction of applying either one of the two tests.

In the dissent, Justice Stevens says that "I actually think the more appropriate test in the future would be either test as well." So we have that out of the opinion. And then frankly, I think there is just an element of common sense. If in fact we meet Justice Scalia's test, that probably means eight Justices would agree. If we meet Justice Kennedy's test, we probably would satisfy five Justices. Therefore I think going forward we will have to see what courts say in reaction to our proposal. But I do believe that we will have, we should have the ability to meet either one of the tests in order to establish waters of the United States.

Senator CHAFEE. Thank you very much. I don't want to put you on the spot, but you mentioned some decisions that the Justice Department has pursued since the Supreme Court decision. Can you tell us in any detail about those? You have settled some, you said, and brought new action on others. Can you give us any details on what has happened in your department since the Supreme Court decision?

Mr. CRUDEN. In two cases that we settled, one in Michigan and one in Georgia, frankly we had been negotiating those before the Rapanos decision came out. Both of them involved wetlands. And after the decision came out, we went back to the parties and said, would you still like to continue negotiating? They did, and we were able to finish then. So notwithstanding the decision, there are parties who still wanted to settle.

Recently, last week, we filed a case in Virginia. The case involved a housing project for senior citizens and individuals who, without a permit, essentially filled in what we think are the headwaters of a stream. We believe that act would probably meet either of the tests. So we have filed that as a new complaint.

Third, we were recently challenged in a criminal case. An individual was indicted in Florida because in a labor camp, he bypassed the septic tank that was holding human excrement and let it run directly into a river. He attempted to use Rapanos to say that "I should not be charged with this crime, because that was not a continuous flowing river." We disagreed with him, and we do not believe Rapanos stands for that position.

[Laughter.]

Senator CHAFEE. Thank you, Mr. Cruden.

Mr. Woodley, under the Kennedy significant nexus test, requiring agencies to determine on a case by case basis what constitutes a significant nexus between a wetland and navigable in fact waterway, who has the burden of illustrating the nexus? Will it be the property owners applying for permits or the agencies themselves?

Mr. Woodley. Senator, I believe it is the responsibility of the agency to advise property owners as to our views on jurisdictional determinations. And we do that under the current law. We will provide a landowner with a jurisdictional determination upon request.

Senator CHAFEE. Very good. The five minute round moves quickly, so I will turn to Senator Clinton.

Senator CLINTON.Thank you, Mr. Chairman.

Mr. Cruden, I believe that the first district court to apply Rapanos is U.S. v. Chevron Pipeline Company. That is an oil spill case in Texas that seemed to dismiss Justice Kennedy's significant nexus test and focused instead on Justice Scalia's plurality opinion. In this case, the Court ruled that EPA lacks authority under the Clean Water Act to enforce the law against an oil company that spilled 126,000 gallons of oil into a tributary stream that was dry part of the year, wet part of the year and several miles from the nearest navigable water.

What is your opinion of this case, and what implications does it have for other Clean Water Act programs?

Mr. CRUDEN. Senator, you are correct that that is a decision that has come out. I think it is the only one. And we are still in the appeal period. I want to say at the outset that the time has not run for us to make an appeal decision on that case. So I don't want anything I say to indicate what we are going to do yet, because we simply have not made up our mind.

But this is a case, as you indicate, brought under the Oil Pollution Act, which still has the magical phrase "waters of the United States" but is a little bit different law. That statute also covers discharges to adjoining shorelines, which if you think about it makes sense, because if you have a discharge in a pipeline spill case, it very often goes down the shoreline into the water of the United States.

We allege that the rough equivalent of four or five swimming pools worth of oil was discharged in an oil break and went into a tributary. And I have seen pictures of that tributary flowing with water, but not all of the year. Not all of the year, and perhaps not at the time that the discharge occurred.

So based on that, we brought the case. But we asked the court—because we brought it before Rapanos—we asked the court, don't do anything, stay it until Rapanos is decided. But the court did not agree with us. So the court went forward anyway and both parties filed pleadings. Almost immediately after the Rapanos decision, before we filed anything with the court about what Rapanos meant, the judge gave the decision that you were just talking about.

Although the court mentions both the Kennedy test and what I call the plurality test, it seems that the court was more focusing on the plurality.

Senator CLINTON. Mr. Cruden, I am going to have to interrupt you. I am sorry, because our time is so short. If you characterize the Kennedy test as significant nexus, what is the characterization of the Scalia test? The human excrement test? I mean, what is it?

Mr. CRUDEN. No, the Scalia test is in fact tied to—it, he has a long explanation of the statutory phrase and places great emphasis on the fact of "waters," in "waters of the United States." So for the

plurality test, in order for there to be a water of the United States, he has defined that as relatively permanent flow. That is what——

Senator CLINTON. But again, but then we come to the problem in the Chevron case, where in many parts of the country, we heard from Chairman Inhofe, sometimes it is dry and sometimes it is wet. And when it is wet, it flows. And it flows somewhere, or it goes into the ground and maybe into an aquifer. So the water is present at certain times of the year.

So, you know, I find it very difficult because of the complexity and the confusion in the plurality opinion, as to exactly what it means. And let me just drive forward a little bit further here. As you noted in your brief before the Supreme Court, effective regulation of the traditional navigable waters would hardly be possible if pollution of tributaries fell outside the jurisdiction of those responsible for maintaining water quality downstream. And I agree with this, I think it is a common sense principle.

Now, do you anticipate then that there will be increasing numbers of challenges based on this confusing plurality opinion from people who disregard the principle that waters are in many instances are interconnected?

Mr. CRUDEN. Of all the things that I am confident about this opinion, it is that we are going to litigate it and its application a lot. But I will say with regard to your point—about the fact that pollution actually does go downstream in those classic pollution cases. By the way, human excrement is in fact a pollutant. In responding to that case, we referred to Justice Scalia. Because Justice Scalia, in the case of what we would call classic polluters, said no court has held that that a pollutant has to go directly into the waters of the United States. It can actually wash downstream——

Senator CLINTON. Well, exactly.

Mr. CRUDEN [continuing]. in those instances, which I think is common sense——

Senator CLINTON. But the court in Chevron concluded that dumping 126,000 gallons of oil that could get into the tributaries was not. So I think that is what argues so strongly for us trying to sort this out. So thank you.

Senator CHAFEE. Thank you, Senator Clinton.

Senator INHOFE. Mr. Cruden, let me just ask you first of all, there is always an assumption that if you are in the Senate you are a lawyer. That isn't always the case. There are several of us up here who are not.

So I would like to have you explain a couple of things to the nonlawyers. In Rapanos/Carabell, five Justices voted to vacate the Sixth Circuit decisions. The last time I read the Constitution, there were nine Justices. So I think that is a majority. And in your statement, you said "Based on all these decisions, the Department of Justice has advised courts that it believes the applicable standard to determine if a wetland is governed by the Clean Water Act is whether either the Rapanos plurality is or Justice Kennedy's test is met in a particular fact situation."

I would just like to have you explain, because there are a lot of them who are still saying that the Court's minority would set national policy. And I would like to have you explain to us that any-

one could possibly argue that the opinion of a minority of the Supreme Court would rule.

Mr. CRUDEN. In this case, of course, we don't have an overall majority opinion. And the plurality decision consciously disagrees with the concurring decision by Justice Kennedy and vice versa. They are two different tests. They are apples and oranges in approach.

This is not the first time in our history that we have had to interpret when the Supreme Court simply does not have a majority opinion. So when Chief Justice Roberts referred us to the Marks decision, we know that as an old obscenity law case. In the obscenity law case somebody got convicted of obscenity. And the question on appeal was, what law applied. And it was another case like this one, where there were just a lot of different views.

And what the Supreme Court said in Marks is, well, the narrowest position or maybe the one that has the greatest commonality is the one that would control. So I think Justice Roberts was doing his best to point us in a direction to help us decide what the standard would be.

Senator INHOFE. Okay, that is fine. But five is still majority.

Mr. CRUDEN. Five is still a majority.

Senator INHOFE. Mr. Grumbles, first of all, let me thank you for coming out and talking about the commitment that this Administration and this President has to wetlands. I appreciate it, and we know his initiatives are very far reaching. But there are a lot of people who are going to be criticizing him no matter what he does. It is kind of like his Clear Skies initiative, which is the most far-reaching reduction, mandated reduction in pollutants SO_X, NO_X and mercury, of any program, of any President, of any administration in history. And yet people are still criticizing him.

I have some pictures up here, Mr. Grumbles, and first of all, as my colleagues would know, Mr. Grumbles and I worked together in the House committee many, many years ago. These are a few pictures of areas designated as waters of the United States. However, you will note that there is not any water in the pictures. Doesn't water of the United States need water, would be my first question. And where in the Congressional history of the statutes does it say Congress intended to regulate land through the Clean Water Act?

Mr. GRUMBLES. Mr. Chairman, thank you for that question. Because it is an important opportunity for us to explain that waters of the United States, the term that is used throughout the statute, where it is in the definitions, is not simply traditional navigable waters. It can be adjacent waters and it can get into the tributary system.

A key question is, Justice Scalia in the plurality opinion acknowledges that you don't always need the hydrology to be there every point in time, that there can be seasonal rivers. And of course, an important part of the discussion of the whole case is in the committee opinion and also in the dissenting opinion about the importance of flow and duration and volume.

So the point is that over the years, as the agencies have interpreted the statute and implemented the regulations, we have recognized that it is not just the hydrology, it is hydrophytic vegetation, etc., it is soil, you look at a variety of factors.

Senator INHOFE. Let me ask you, because time is going fast here, it was confusing to me when you used the term significant nexus. I would like to have each one of you define nexus for me.

Let's start with you, Mr. Cruden. Your definition.

Mr. CRUDEN. Well, Justice Kennedy says in order for the water to be a water of the United States, there must be a significant nexus between that tributary or that wetland and a navigable water.

Senator INHOFE. Secretary Woodley.

Mr. Woodley. I think that the court is trying to describe, or the Justice is trying to describe some kind of hydrological connection.

Senator INHOFE. A connection or a relationship?

Mr. Woodley. Yes, sir.

Senator INHOFE. You think?

Mr. Woodley. That's what I think.

Senator INHOFE. What do you think, Mr. Grumbles?

Mr. GRUMBLES. I don't think that you have an agreement among the Justices in the Court. But the key, Justice Kennedy——

Senator INHOFE. No, I am just talking about defining nexus.

Mr. GRUMBLES. He basically says that the nexus is when you have wetlands either alone or in combination with similarly situated lands in the region, that significantly affect the chemical, physical and biological integrity of what are commonly known as traditional navigable waters. Senator Inhofe. Wouldn't it be a good idea at some point to have a definition drawn out so you don't have to think and we can know? Thank you, Mr. Chairman.

Senator CHAFEE. Thank you, Senator Inhofe.

Senator Jeffords.

Senator JEFFORDS. Mr. Grumbles, in 2003, I exchanged correspondence with the Agency regarding the jurisdictional status of Lake Champlain. I ask unanimous consent that copies of these letters be included in the record.

Senator CHAFEE. Without objection, so ordered.

[The referenced letters can be found on page 48.]

Senator JEFFORDS. At the time, EPA stated "Lake Champlain and its tributaries are currently jurisdictional under the Clean Water Act." Has the situation changed with Lake Champlain as a result of the Supreme Court decision?

Mr. GRUMBLES. Senator, I don't know. I think we need to look at the specific facts of the situation on Lake Champlain. I can't give you a definitive answer on that. I would like to, because I want to be accurate, get back to you on that specifically. One of the issues for us as we work together to issue joint interim guidance to the field as soon as we can is to interpret the decision, Rapanos/Carabell decision, as it relates to tributaries and adjacency. So I would like to be able to get back to you on that specific Lake Champlain question.

Senator JEFFORDS. How will the Army Corps, Mr. Woodley, document on the ground decisions regarding the Clean Water Act jurisdiction in the wake of this decision, and make that information available to Congress and the public?

Mr. Woodley. Senator, we have substantially increased and improved our documentation and our efforts to make things available in response to our work that we have been trying to do to under-

stand the implications of the SWANCC decision. So my current impression is that those procedures are pretty robust and afford a substantial opportunity for the public to examine our decision-making in a transparent way. I am delighted to revisit it if I should hear that in fact that is not taking place in the field.

Senator JEFFORDS. Thank you.

Mr. Grumbles, I have a three part question for you. Are wetlands important to water quality and flood control? Do pollutants flow downstream from small tributaries to larger bodies of water? And when it rains in a normally dry area, as it did in Phoenix, Arizona last week, are the contents of dry stream beds carried downstream with the water?

Mr. GRUMBLES. Senator, I think a clear answer to the first question is yes, and a clear answer to the second question is yes. On the third question, I think it really does depend on the specific, the hydrologic, the conditions of a particular tributary or water body.

I can also tell you, one of the areas that we are working together and interpreting and reviewing the decision is how it relates to desert washes and dry arroyos and other water bodies or tributaries that may not be season rivers, but may also significantly affect chemical, physical and biological integrity of downstream navigable waters.

Senator JEFFORDS. Mr. Cruden, does the Justice Department anticipate that the Rapanos decision will lead to increased challenges to the Administration's authority to protect tributaries and adjacent wetlands? And do you anticipate that any changes will be limited within the wetlands program?

Mr. CRUDEN. Senator, any time we have a case of this nature, almost always we can anticipate increased litigation that comes out of it. I once figured out the number of reported cases we had between the SWANCC decision in 2001 and now. I think we had about 17 or 18 court of appeals decisions and about the same number of district court decisions. And that was SWANCC—a more narrow case.

So Senator, I am confident that we will litigate this for the foreseeable future.

Senator JEFFORDS. I expect you will.

Mr. Grumbles, the Clean Water Authority Restoration Act would take the EPA's and the Corps' definition of waters and add it to the statute. Wouldn't this bill have essentially the same effects as the position taken by the Administration and court?

Mr. GRUMBLES. Senator, I appreciate the question and feel confident in saying that on an issue of this importance, and when there is legislation or a legislative proposal that the best way to get an Administration position is to seek one. I don't believe we have an Administration position, I don't believe we have been asked to take a position on the legislation.

But I can also say, I know all of us, appreciate the opportunity to begin this dialogue, to work with Congress, Senators, members in the House on authority questions, budgetary questions about the ambitious wetlands goals of the Administration, and also to try to provide technical assistance if you have questions about legislative as opposed to regulatory as opposed to budgetary responses to the decision.

Senator JEFFORDS. Thank you very much.

Senator CHAFEE. Senator Murkowski.

Senator MURKOWSKI. Thank you, Mr. Chairman.

Mr. Grumbles and Mr. Woodley, both of you have referred to working on an interim guidance to add some clarity on this issue. You have used the term guidance, joint interim guidance, interim guidance. This suggests to me that perhaps we are not moving forward on proposed rulemaking. I am not entirely certain what it is that we mean when we say this interim guidance. Can you clarify for me?

Mr. GRUMBLES. I can start and say that we simply have not made a decision as to whether or not to do a rulemaking. A priority for us has been to issue guidance to the field as soon as we can. So where we are in the process right now is putting our maximum effort at working, coordinating with the Department of Justice on interpreting and providing useful guidance that will advance and help improve the clarity and consistency of the jurisdictional decisions and determinations.

Senator MURKOWSKI. But if that is what you are trying to do, why don't you give that clarity through the rulemaking?

Mr. GRUMBLES. We will certainly, and I can assure you we are going to give it every consideration and look at whether or not rulemaking is the best approach. For me, one of the first decisions and factors to ask in choosing whether to not a rulemaking or legislative or some other process is appropriate is: is this approach going to advance the ambitious wetlands goals of the President.

We are focused on the results, and focusing on the results, we then want to ask about timing and complexities of a rulemaking. And all of those factors we are going to be taking into account. But we just simply have not made the decision yet about a rulemaking. We hear and we understand that many interests and several Justices have signaled that that might be the right way to go.

Senator MURKOWSKI. Let me ask you, Mr. Cruden, because you have indicated that if there is one thing that is certain, it is litigation. Wouldn't it help you, rather than having some interim guidance and some suggestions coming out of the field, to have something more concrete through a rulemaking process?

Mr. CRUDEN. Certainly changes in legislation or changes in regulation, all of those, can provide more certainty. I do not want to minimize the importance of Agency guidance, largely because you can do it faster and it can actually help people provide some understanding right away. As we have seen right now in this hearing, there are a lot of different views about what this opinion means and its application.

So to the extent that a guidance can come out and deal with some of those areas, it just comes out a lot faster, and I think it is helpful to the public to have that.

Senator MURKOWSKI. I mentioned in my opening statement, that many wetlands in Alaska are just different. We have more of them, and they have different hydrological functions. Would you not agree that when we are dealing with frozen wetlands most of the year, when you are dealing with an underlying permafrost area, that it may be a different animal than what we see down here? Am I correct in that? I throw that out to any of you.

Mr. Woodley. Yes, Senator. You are correct.

Mr. GRUMBLES. You are.

Senator MURKOWSKI. Then given that, and recognizing that the application, the Federal application of the Clean Water Act, is intended to control that pollution, the contribution of pollution to navigable waters, why should activities in a permafrost wetland, where you really can't have that kind of a contribution, why should it be then under the same Federal control? I am trying to understand. I know it is different up there. We have kind of a cookie cutter application, which is what we deal with when we deal with Federal laws.

So how can we best move forward in a State like Alaska, where we are trying to do the right thing with our wetlands, with a one size fits all approach? Mr. Woodley?

Mr. Woodley. Senator, a large part of the difficulty with the administration of this program is the fact that we are essentially seeking to apply universal principles to an infinitely varied landscape. All land is unique. So we are grappling with the issue that you raise for Alaska in every part of the country, and we have improvements that we are seeking to make. I hope that you are aware of them. I would like the opportunity to discuss them with you in greater detail when I have more time. We are seeking ways to apply these universal principles to the unique situation that you do find in Alaska.

I have, by the way, been to the permafrost. I don't know if you have visited our permafrost tunnel.

Senator MURKOWSKI. Yes.

Mr. Woodley. It is a unique engineering research facility that we manage outside of Fairbanks. I am not in doubt about the matters that you raise, or the special situation that Alaska presents in our arena of wetlands regulation.

Senator MURKOWSKI. I will look forward to talking with you when both of us have a little more time. Thank you, Mr. Chairman.

Senator CHAFEE. Thank you, Senator Murkowski. I would like to thank the panel also for their testimony and answers to the questions—I am sorry. You came in behind me, Senator Lautenberg. You were gone for a while and you came back. My apologies. Senator Lautenberg.

Senator LAUTENBERG. Thanks, Mr. Chairman. I know that you never intend to be unfair, and I respect and appreciate it greatly.

Mr. Grumbles, how does EPA track the volume of wetlands in existence at all? Is that a process?

Mr. GRUMBLES. Senator, we work with our Federal partners, U.S. Fish and Wildlife Service specifically, carries out with other Federal agencies support the National Wetlands Inventory. We also work closely with the Army Corps of Engineers as they carry out their regulatory program on tracking wetlands loss, permitting.

Senator LAUTENBERG. That being the case, do you have anything quickly at hand that tells us where the volume or the area to that wetlands covered, before let's say, going back 5, 6 years? Some indication of whether or not there was a net loss or net growth in wetlands? Mr. Grumbles. I think maybe one of the most useful, not the only but one of the most useful documents is the National Wet-

lands Inventory that was recently issued by the Fish and Wildlife Service, tracking wetlands losses.

Senator LAUTENBERG. Do you recollect whether or not there was a reduction in the last 6, 8, 10 years?

Mr. GRUMBLES. I do, and we feel it is very important, there is a positive trend in reducing the loss of wetlands. When you look at 460,000 acres a year being lost back in the 1950s and 1960s to in the 1990s then much less——

Senator LAUTENBERG. Due to the Clean Water Act?

Mr. GRUMBLES. Yes. And the most recent Fish and Wildlife Service National Wetlands Inventory has indicated that there is a net increase in wetlands with an important asterisk, and that is that some of those wetlands, using the Coarden methodology, include wetlands that may not have as much ecological value as other wetlands. That is an important asterisk that the Administration provided when we released that report.

Senator LAUTENBERG. Would that period of time include a broader interpretation of CWA or do you think that what we see in the plurality—Mr. Cruden, I am still trying to figure out how four out of eight votes gets to be a plurality. But the fact is that with this so-called plurality opinion, is that a, wouldn't that be a narrowing of the area covered, protected under the wetlands statutes?

Mr. GRUMBLES. I think the methodology that has been used for that National Wetlands Inventory over the last several decades, it doesn't align exactly with the Clean Water Act definition. It certainly doesn't take into account Supreme Court decisions over the last few years. It can be a much broader category of wetlands than the legal defined term in the Clean Water Act, the defined term of navigable waters.

Senator LAUTENBERG. Because if we narrow it to the navigable or nexus thereunto, I think there would be, how much of a percentage of streams and wetlands do you think might change positively or negatively if left without Clean Water Act protection?

Mr. GRUMBLES. Senator, I appreciate the question. I would say it is extremely hard to quantify. We have the National Hydrography Data Base that is an approach to try to measure the number of perennial and non-perennial streams. It is very hard, it is somewhat like apples and oranges.

Senator LAUTENBERG. Forgive me, Mr. Grumbles.

Mr. Chairman, what I would say is, this is a fairly available bit of data. Can I ask if you would get back to me with some of these comparisons?

Mr. GRUMBLES. I would be happy to do that, Senator.

Senator LAUTENBERG. Do you think before the clock goes out on me, what would be the implications for the protection of drinking water if we narrow the definition of what the Clean Water Act ought to administer?

Mr. GRUMBLES. We view the available tools under the Clean Water Act are critically important for source water protection, thinking upstream, acting upstream to protect those who live downstream and drink from the water. So one of the reasons why the wetlands program is a central part of our cooperative conservation efforts and efforts under the Clean Water Act is because pro-

tecting the watershed upstream also can protect source waters that are used for drinking water downstream.

Senator LAUTENBERG. If you are talking about small, some of the tributaries, the small streams that run into navigable waters, we have all seen unfortunately in the changes in the environmental condition that flooding is not unusual, torrential rains and then a drought. But during that torrential rain period, I mean, these wetlands become, these little streams become an important part of the flow. I think that before we remove that protection from some of those streams that we have to look at it very carefully. I hope that regulatorily or legislatively, Mr. Chairman, that we are going to be on the lookout for that.

I thank you all for your testimony.

Senator CHAFEE. Thank you once again, panelists, for your answers to the questions and your testimony. We will try and have our laws adhere to the Constitution. And any further questions will be submitted for the record. Hopefully the panelists will respond.

We will now proceed to our second panel. We have Dr. Jonathan Adler, Associate Professor of Law with the Case Western Reserve University School of Law; Dr. William Buzbee, Professor of Law and Director of the Environmental and Natural Resources Law Program with Emory Law School; Mr. Chuck Clayton, Immediate Past President with the Izaac Walton League of America; and Mr. Keith Kisling, with the National Wheat Growers and National Cattlemen's Beef Association.

I would like to welcome you all here today. As mentioned for the previous panel, I hope that your entire statement can be submitted for the record and your testimony can be limited to 5 minutes.

Dr. Adler, whenever you are ready.

STATEMENT OF JONATHAN H. ADLER, PROFESSOR OF LAW, CO-DIRECTOR, CENTER FOR BUSINESS LAW AND REGULATION, CASE WESTERN RESERVE UNIVERSITY SCHOOL OF LAW

Mr. ADLER. Thank you, Mr. Chairman, and members of the subcommittee, for the invitation to testify today on the Rapanos decision and its implications for wetlands protection.This issue is of particular interest to me, both given that a large share of my academic research has focused on wetlands conservation and the proper role of the Federal and State Governments in that conservation, and also because I am a fairly active outdoor recreationist and recognize the ecological services that much of my recreational activity depends upon and provided by wetlands.

It has already become clear in this hearing that Rapanos is a very important case. Unfortunately, given the breakdown of the votes, it leaves many things ambiguous. But I think it is important not to understate what the opinion also makes very clear. Despite the lack of a single majority opinion, the Court did provide a discernible holding that the Clean Water Act only extends to those waters and wetlands that have a significant nexus to navigable waters of the United States. This indicates, among other things, that Clean Water Act jurisdiction over private lands is significantly more limited than Federal regulators have been willing to acknowledge in recent years.

I think it also indicates the need for revisions to the current regulations defining waters of the United States under the Clean Water Act, because the existing regulations are no longer consistent with applicable Supreme Court precedent. Indeed, I would argue, they have not been consistent with Supreme Court precedent for at least the past 5 years.

In terms of the specifics of the Rapanos holding, as has already been noted, the Supreme Court in Marks v. United States held that when a fragmented court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those members who concurred in the judgment on the narrowest grounds. The judgments here were to vacate and remand the lower court opinions of the Sixth Circuit Court of Appeals; so therefore, the concurring opinion of Justice Kennedy and the grounds of the agreement between Justice Kennedy and the plurality authored by Justice Scalia form the holding of the Court.

I don't think that one can cut and paste from the Scalia opinion and Stevens opinion to put together a holding of the Court, because the Stevens opinion was not part of the holding. Also because the Scalia opinion is written in terms where it establishes what is necessary for Federal jurisdiction, but makes clear it is not setting forth what would be adequate for jurisdiction. So for example, the Scalia opinion says that continuous flow is necessary but not adequate for establishing jurisdiction.

In determining that a significant nexus between a given water or wetland and navigable waters is necessary, the Rapanos Court largely followed the reasoning adopted by the Supreme Court in SWANCC, Solid Waste Agency of Northern Cook County Army Corps of Engineers. Indeed, I would note the Court here is unanimous on the fact that the SWANCC opinion held that isolated waters that have no hydrological connection to navigable waters of the United States are beyond the scope of the Clean Water Act. That is something the Federal Government had not acknowledged, that is something that many policy makers have not acknowledged. But it is interesting that all nine Justices in Rapanos acknowledge that that is in fact what SWANCC held.

I think it is also important to note here in Rapanos that Justice Kennedy and the plurality both explicitly agree that however important given environmental considerations may be, that does not justify ignoring, stretching or distorting the text of the statutes passed by Congress. That is not the Court's job. In Justice Kennedy's words, he said that environmental concerns provide no reason to disregard limits in the statutory text. I would further add that environmental concerns also provide no reason to disregard limits in the Constitution.

Insofar as current Federal regulations purport to define waters of the United States to include intrastate waters that are isolated or that do not maintain a significant nexus to navigable waters, they exceed the holdings of both Rapanos and SWANCC. Similarly, as both the plurality and Justice Kennedy noted, the Corps of Engineers' current regulatory definition of what constitutes a tributary exceeds the scope of what the Clean Water Act will allow. Both opinions rejected the corps' current formulations.

Until the Corps and EPA promulgate regulations that are consistent with Rapanos and SWANCC, they will have to engage in a case-by-case determination of what falls within Federal jurisdiction. This is not in the interest of the regulated community. It is not in the interest of the Federal Government, in terms of ensuring that Federal resources are effectively and efficiently focused and targeted on meeting Federal goals, and it is not in the interest of environmental conservation, because it means the Corps of Engineers will have an extremely difficult time fulfilling its conservation purpose.

I would also suggest that in developing new regulations, the Corps should not make the mistake that it has made in the past of seeking to assert the broadest possible interpretation of waters of the United States. Rather, it should take the opportunity to adopt a definition of significant nexus that is in accord with the purposes, all of the purposes, of the Clean Water Act, and focus on those waters where the Federal interest is greatest, so the Federal Government is concentrating on those matters of greatest concern to the Federal Government, and allowing State and local Governments and non-governmental entities to play the important role they have historically played in helping us to meet the conservation challenges that we face with regard to water quality and wetlands.

Thank you very much, Mr. Chairman.

Senator CHAFEE. Thank you, Dr. Adler.

Dr. Buzbee, welcome.

STATEMENT OF WILLIAM W. BUZBEE, PROFESSOR OF LAW, DIRECTOR OF ENVIRONMENTAL AND NATURAL RESOURCES LAW PROGRAM, EMORY LAW SCHOOL

Mr. BUZBEE. Thank you, Senators. I thank the Senators and their staff for this opportunity to discuss the Rapanos decision. I should say that in addition to being a professor at Emory Law School, I had the privilege in the Rapanos case of co-authoring a brief for a bipartisan group of four former EPA administrators. They expressed strong, united support of the Bush administration's position seeking to sustain these long-existing protections of America's waters.

As is quite clear after all the witnesses, the Supreme Court's decision is not the height of clarity. But I do think looking at this case and the other cases that have come before it, we can glean some fairly clear legal precepts that should guide all of us in the future.

I will organize my comments into three sections. The first, briefly, is why were the stakes in Rapanos so high. Second is what did the Court actually do to the law in Rapanos, and here, the witnesses disagree with each other, including me. And then third, what is the appropriate political response to Rapanos.

First, as several of the Senators indicated in their statements, the stakes in Rapanos were huge. The question of what count as waters of the United States is the linchpin of the statute. It applies not just to the wetlands protection, but it also applies to the Section 402 industrial discharge portions of the Clean Water Act. Any waters that are not Federal are not Federal for both programs. And Americans care a great deal about pollution into America's rivers.

Despite the stakes in this case, in the end, a majority of the U.S. Supreme Court declined the opportunity to weaken the law's protections. But then the question is, where is the law left? There is no single majority opinion in this case speaking for five or more justices. So what we must then do is look at votes and opinion content to understand the decision and where the law is left.

Most confusingly, what you have is a situation where five Justices agreed that the Army Corps of Engineers had to do better in establishing its jurisdiction, but five Justices overwhelming agreed with a broad protective rationale for jurisdiction under the Clean Water Act. It is this tension between concurrence in the judgment and the concurrence in the rationale that creates analytical difficulties.

It is important to understand that five Justices, Justice Kennedy in concurrence and Justice Stevens with Souter, Ginsburg and Breyer in dissent, strongly and explicitly in their language disagreed with virtually all aspects of the plurality opinion by Justice Scalia. In addition, Justice Scalia at some length attacked Justice Kennedy's opinion. The suggestion by some witnesses today that the Scalia and the Kennedy opinions express agreement and should be read together I find puzzling. There are five Justices in agreement, but it is hard to put Scalia and Kennedy together in any way.

The question is then what do we do in interpreting these splintered sets of opinions? As stated by the previous panel, the key swing opinion is that of Justice Kennedy. Both by itself and also looked at with the dissenting opinion with which Justice Kennedy agrees and vice versa, most of the statute's protections do remain intact.

I want to state very clearly that I do not believe that Justice Scalia's opinion for a plurality of Justices represents the law. Justice Scalia and his fellow plurality Justices basically limit Federal protections to relatively permanent standing or continuous flowing waters. This view, had it been the Court's, would have discarded about three decades of established regulatory approaches and established Court precedent. The other Justices do agree that at least this many waters are protected. But five Justices believe Justice Scalia's opinion is way too narrow.

Justice Kennedy explicitly and repeatedly rejects the Scalia opinion as captured in his line that the Scalia opinion is "inconsistent with the Act's text, structure and purpose." It is hard to be more clear than that. To make Supreme Court law, you need five Justices in agreement, five Justices agreeing, assenting to the Court's rationale. Justice Scalia came up one vote short. Justice Kennedy's opinion is the key. His significant nexus test creates an overwhelming overlap both with existing regulatory approaches as well as with the approaches articulated in the dissents. There are five Justices saying the Clean Water Act's integrity goals remain standing. Five Justices agree that non-navigable tributaries must be covered if they and similar or comparable waters are needed to protect navigable waters downstream. Five Justices aligned make a Supreme Court precedent, and Kennedy plus the dissenters had overwhelming agreement.

Again, the dissenters would have gone even further, but five Justices agree overwhelmingly on the rationale. So in the end, I agree that after Rapanos, waters protected would include both, and I emphasize both, waters that were protected under the Scalia opinion, a small set, plus the waters that would be protected under the Kennedy opinion, a much larger set.

Then the question is, what are political responses, something I am sure you are all weighing. Justice Kennedy's approach does leave most protections in place, but as Mr. Cruden stated earlier, I think there is no doubt that this case will spawn a great deal of litigation, litigation over applications of it and litigation over any regulations, if new regulations are forthcoming. The risk here is of course that with new industry and real estate developer language to play with, the Army Corps of Engineers may begin to essentially fold its cards, fear litigation and too quickly decline jurisdiction.

Somewhat surprising was an interim statement they gave to the field where they said, for the interim, let's shrink jurisdiction down to Section 10 of the Rivers and Harbors Act. That is where the law stood in 1899. I hope that this is not an indication of where the law is going to go. At this point, under any fair reading of Rapanos, SWANCC and Riverside Bayview Homes, a great deal of the law still stands.

Now, can the Federal agencies cut back on the waters protected? I don't think they have much latitude to do so. The statute is still in place. It has been in place. Any regulations must conform to the statutory language, Riverside Bayview Homes, SWANCC language, as well as the Rapanos decision and Justice Kennedy's opinion.

Senator CHAFEE. Dr. Buzbee, the time has run up, unfortunately.

Mr. BUZBEE. Thank you.

Senator CHAFEE. Would you like to add a sentence or two to wrap up?

Mr. BUZBEE. Sure. I guess my main response is that my sense today is there is much discussion over whether there should be a regulatory or legislative fix. I think a legislative fix enacting into law regulatory protections in place for three decades would do a great deal to promote stability in the law and allow people to continue using wisdom they have built up over three decades, whether they be Republicans or Democrats. Thank you.

Senator CHAFEE. Thank you, sir.

Mr. Clayton, welcome.

STATEMENT OF CHUCK CLAYTON, THE IZAAK WALTON LEAGUE OF AMERICA

Mr. CLAYTON. Thank you, Mr. Chairman and members of the Committee. I really appreciate the time today to give you our points on this litigation.

I am the immediate past president of the Izaak Walton League. We have been around since 1922. We are a science-based conservation organization. We have about 40,000 members. We all avid sportsmen and women. We have 20 State divisions with 300 local chapters across the United States.

We are joined in these comments today with a lot of organizations. My comments also represent the views of Americans who belong to many organizations: the Izaak Walton League, American

Fisheries Society, American Fly Fishing Trade Association, American Sportfishing Association, Bass/ESPN Outdoors, Berkley Conservation Institute, National Wildlife Federation, Trout Unlimited and the Wildlife Society. So that is quite a number of sportsmen.

As a land-owning resident of South Dakota and an avid hunter and angler, I appreciate the opportunity to share my views with the Committee and to illustrate just how the recent U.S. Supreme Court decision in the joint cases Rapanos and Carabell is affecting wetlands and stream protection where it matters most: out on the ground. Frankly, the benefits of extending comprehensive protections to the waters such as non-navigable headwater streams and seasonally dry potholes are numerous and undeniable. Among their functions, these various forms of water improve the water quality by retaining and recycling nutrients such as nitrogen and phosphorous, which left unchecked lead to oxygen exhausting algae blooms and dead zones, such as red tides. Wetlands trap tremendous amounts of sediment, leading directly to clear, healthier downstream waters that otherwise would be choked by sunlight depleting sedimentation. When left intact, wetlands lessen the devastation caused by floods and storms, like that which we so painfully witnessed during the Gulf Coast storms of 2005.

In addition to the important water quality functions that all wetlands perform and headwater streams play, they also provide critical habitat for many species of fish and wildlife, including numerous species that are listed as threatened and endangered. Salmon and trout use cold water headwaters for spawning. These streams often are intermittent and ephemeral. And as such, their protection under the Clean Water Act was left open for debate by the Supreme Court's decision in Rapanos.

These ephemeral and intermittent streams make up nearly 60 percent of the streams of the United States. Losing them would be yet another barrier to restoring native trout runs and salmon and shad runs. Other non-game fish, such as large mouth bass and northern pike use varied types of wetlands and headwaters for the same purposes. Each specific type of wetland provides a certain set of conditions, including the proper food and cover necessary for the survival of that specific species of fish. And by temporarily storing water, even isolated wetlands ensure that downstream flows remain both cool and relatively constant, critical elements for healthy fish populations, but also important elements to fight and stave off the negative effects of drought.

The thousands of small wetlands that make up the prairie pothole region of the Dakotas, often referred to as North America's duck factory, annually support four million pairs of waterfowl that depend on high quality wetlands for nesting and the rearing of their young. The Supreme Court's decision in Rapanos leaves the status of virtually all prairie potholes in limbo. Losing these wetlands to development would put the future of these ducks in grave peril, and many other species also wetland-dependent. For example, deer, pheasants, quail and many songbirds, as well as reptiles and amphibians, such as turtles and frogs, depend on healthy wetlands and are a key component of their habitat during the year.

The benefits of wetlands are important for people, too. Thirty-four million anglers and 13 million hunters rely on clean water and

healthy fish and wildlife populations that isolated wetlands support. These sportsmen and women contributed directly to the sustained economic growth and viability of communities across the United States, to the tune of about $70 billion, with a B, annually.

The economic benefit stems not just from hunters and anglers but also birdwatching, one of the most popular and fastest-growing pastimes in the Nation, which pumps millions more into local economies. Outside of recreation, wetlands are also vital to three-fourths of America's commercial fish production, which is worth about $111 billion. If wetlands were left unprotected from agricultural, residential and commercial development, the economic loss would be staggering.

Despite the benefits, the protection of wetlands and many other waters has been bogged down by the bureaucratic misrepresentations, allowing important Clean Water Act determinations to be made on an ad hoc basis. While the Administration did a good job of defending the protection of wetlands and streams in the Rapanos case, they have not sufficiently led the way for consistent, vigorous use of the Clean Water Act to protect these vital resources. For instance, over a six month span in 2005, the Omaha region of the U.S. Army Corps of Engineers, which includes parts of six States, including my home State of South Dakota, the corps deemed that at least 2,676 acres of wetlands, lakes, streams and other waters fell outside the scope of the Clean Water Act. This approach to protecting our most important watershed resources is just not working.

The Supreme Court decision in Rapanos further muddied the waters by providing little clarification to the agency officials in how they should proceed to protect the waters and providing no meaningful direction in how the Clean Water Act is to be applied. If this decision fails to provide what Government land managers and environmental regulators so desperately need, a clear formula for protecting our valuable water resources, protection should be the rule, not the exception. The conservation of our most important water resources now depends on the leadership in Congress to make the Clean Water Act explicitly inclusive to all wetlands and lakes and streams. The Environmental and Public Works Committee is currently considering legislation that would plainly codify the protection of these resources, the Clean Water Restoration Act.

Senator CHAFEE. Mr. Clayton, you have gone over the time. A few seconds to wrap up.

Mr. CLAYTON. I would be happy to answer any questions at the end.

Senator CHAFEE. Thank you. Well done.

Mr. CLAYTON. Talk about a little fish in a big pond—no pun intended.

Senator CHAFEE. Well, you could make an auctioneer.

[Laughter.]

Senator CHAFEE. Mr. Kisling, welcome.

STATEMENT OF KEITH KISLING, NATIONAL ASSOCIATION OF WHEAT GROWERS, NATIONAL CATTLEMEN'S BEEF ASSOCIATION

Mr. KISLING. Chairman Chafee and the committee, I appreciate the opportunity today to come before you and testify. It is quite an honor, I must say.

My name is Keith Kisling. I am from Burlington, OK. I am here today testifying on behalf of the National Association of Wheat Growers and the National Cattlemen's Beef Association. I raise 1,500 head of stocker cattle on wheat pasture and 900 to 1,000 cattle on a backgrounding lot. Additionally, I grow wheat on more than 3,000 acres.

Currently, I am chairman of the Oklahoma Wheat Commission and am past chairman of the U.S. Wheat Associates. That is the marketing arm for wheat growers in our country. My family has been farming and ranching for more than 35 years.

Where I farm and ranch in northwest Oklahoma, we are constantly challenged by the timing and lack of rainfall for crops and pasture. We are accustomed to dealing with uncertainty in weather and climate conditions. However, as landowners regulated under the Clean Water Act, we desperately need regulatory certainty.

Members of NAWG and NCBA are on the land every day raising and growing food for our Nation and the world. We produce the cheapest and most plentiful supply of food in the world. Our producers respect and love the land in a way occasional visitors to the land may have difficulty comprehending. We know that food production must be sustainable for it to be economically viable in the long run.

Approximately 70 percent of the land in the lower 48 States is owned privately. A substantial portion of this land is used for the production of food, which is arguably the most important use for the land. The production of food in our country cannot be taken for granted. Farmers and ranchers in other countries are increasingly able to produce comparable food at less cost to the American market. American producers face an ever-tightening web of regulations. While many, if not all, of the environmental and work-safety regulations are well intended and address demands of society for use of the land, it must also be recognized that limiting and ultimately choking the ability of farm and ranch operations to earn a living will come at a considerable cost.

Private property rights are perhaps the most important principle in our Nation's laws and customers, against abusive Government conduct. People want to be left alone to use their property as they see fit. While we understand that Government can and should regulate private conduct in certain carefully prescribed instances, we expect in this country that regulation will be pursuant to law.

With regard to the recent Supreme Court decision in Rapanos, we see some common ground between Justice Scalia's opinion and Justice Kennedy's concurrence as a starting point to mold a rational policy on wetlands. According to the Supreme Court, the EPA and the Army Corps of Engineers must adopt a new regulation clarifying the judicial reach of the Clean Water Act. We concur wholeheartedly. We are pleased the Court sustained and reaffirmed

our long-held view that Federal agencies operating under the Act do not have unlimited authority to regulate private activities.

Two fundamental things would benefit landowners. First, agencies should in a timely manner issue a final Agency action when asked to make a wetlands jurisdictional decision. Currently, the only means for a landowner to challenge a jurisdictional decision is to violate the law or seek a costly permit. Second, the 1987 Wetlands Delineation Manual is nothing more than Agency guidance subject to change at Agency whim. The manual lacks the due process afforded to landowners under the Administrative Procedures Act.

Much agricultural protection land has some kind of water on it, either permanently or intermittently. Without clear notice of the extend of the Government's regulatory reach provided by rule, producers will always be uncertain about the extent they can use their land without running afoul of the proscriptions in the Act.

Much has been made of Justice Kennedy's proposed significant nexus test for determining whether a wetland is within the reach of Government regulation under the Act. It may be that jurisdictional determinations for wetlands will have to be done on a case by case basis to some extent. However, the Supreme Court has offered some bright lines in the SWANCC decision and the common elements in Rapanos for excluding certain waters from the reach of the Act. There is just too much room for the different interpretations by agencies and courts about which lands are regulated as navigable waters and which activities are exempt. The current situation leaves farmers and ranchers with too much uncertainty and a significant risk of endangering activities that will engage in huge fines, jail time and the forfeiture of the use of their private property.

Thank you.

Senator CHAFEE. Thank you very much, Mr. Kisling.

The Chairman of the full Committee would like to ask the first round of questions, which will be limited to five minutes, as was the past round.

Senator INHOFE. Thank you, Mr. Chairman.

First of all, let me thank you for allowing me to go first, and my colleagues for allowing me to. I have a Senate Armed Services required attendance that I am already late for. But I wanted you to know, Mr. Kisling, how refreshing it is to have someone come up from Oklahoma and say things that are so logical. I am reminiscent a little bit about what happened 40 years ago this year. I came before this committee as a young State legislator, complaining about the property rights that were affected by Lady Bird's Highway Beautification Act of 1965. Now here we are 40 years later, still worrying about property rights.

So I appreciate the common sense you bring, and it runs in your whole family, I might add.

I want to show you a few pictures here. These are areas that the corps is permitted, as navigable waters, under the Clean Water Act. If this were your farm, Mr. Kisling, would you know that these are navigable waters subject to Federal jurisdiction?

Mr. KISLING. No, sir, I wouldn't. I have some instances in my neighborhood that would be close to some of these that are called

wetlands. For a little information, I read the Rapanos ruling on my way here. It gave me a real insight on what is happening in wetlands that I didn't really know.

And I think I understand now why EPA and the Corps of Engineers have expanded in the last 10 years their regulations and the way they penalize us on some of the things that are happening. I think it could be, we wonder if maybe it is the money that they get or if it is the power that they want.

But I understand now that we spend $1.7 billion a year just for private permits, which was really not understandable to me. We also in that $1.7 billion, it takes $760 billion just to fulfill that permit. So we spend a lot of money doing those things.

I just think that we need a bright line, we need something to show us some direction on the farm as to whether to go, whether we are within the regulation or whether we are not within the regulation.

Senator INHOFE. Do you mean you are so naive as to suggest that we define a wetland?

Mr. KISLING. Yes, Senator. I would like to see us have some direction, so that we don't cross over that line and it cost us 63 days in jail.

Senator INHOFE. You heard the example in my opening statement I made about Kingfisher County. You and I are familiar with Kingfisher County. Sometimes there is an advantage to not being a lawyer, because you read the Constitution and really know what it says. And taking property without due process is something that has become very commonplace.

So I think you used the word certainty. And that is really what you are talking about, isn't it? You want certainty, you want a definition, you want the farmers in Oklahoma and throughout America to know in advance what they can and can't do, and to know what a definition of a wetland is? Is that the certainty you are looking for?

Mr. KISLING. Yes, sir.

Senator INHOFE. I think it is very reasonable.

Mr. KISLING. Senator Inhofe, we have gone from the illustration that Ms. Clinton gave a while ago of the pipes, dumping sediment, dumping pollution into the streams to our potholes, our buffalo wallows in the middle of a wheat field today. That correlation has come a long way. Now they say that this little pothole in the middle of a wheat field and a duck flies away and gets in a tributary, or a molecule floats away or gets into a tributary is the connection. This is the distance that we have come since 1972 and the Clean Water Act.

Senator INHOFE. I appreciate your remarks.

And Dr. Adler, I appreciate your being back. You testified in our Gas Price Act, which is one that I still have hopes for. Let me just get something on the record with you. Following the League of Latin American Citizens v. Perry, some of the EPA have indicated that they believe future courts would uphold a regulation that complies only with the dissent, where it overlaps with Kennedy, using the League decision as justification. Do you agree with that?

Mr. ADLER. I am not sure what the League decision adds to that. The binding standard is Marks, which I quoted in my testimony.

I think the LULAC decision, if one looks at it—and it is certainly a case that is a mess and hard to get through—it complies with Marks. The holdings of that case are all those instances where five Justices agree on a judgment, and concur in this judgment. Whether you are looking at that case or whether you are looking at Bakke or you are looking at Grutter, you don't see things characterized as holdings that rely upon language in opinions that don't concur in the judgment. The reason for that is that such language is dicta, it has no legally binding force.

In this case, that problem is compounded because there are places in Scalia's opinion where he makes clear that he is merely noting what an outer bound of Clean Water Act jurisdiction would be in his view. He is not saying what the precise test should be. In fact, in one of the footnotes he says explicitly that what is often cited as the test of the plurality is merely what is necessary but not necessarily adequate for the establishment of jurisdiction. That would be something very thin to rest jurisdiction on, trying to put that together with the dissent that didn't join the judgment.

So I think the focus should be on Kennedy's opinion, just as in the Bakke decision the focus was on Justice Powell's opinion.

Senator CHAFEE. Thank you, Dr. Adler. Thank you, Mr. Chairman, for taking me out of order.

Thank you, Senator Inhofe.

Senator Jeffords.

Senator JEFFORDS. Dr. Buzbee, in his separate concurring opinion, Chief Justice Roberts says that because there is no opinion commanding a majority, then "lower courts and regulated entities will now have to feel their way case by case." This seems to indicate that there is no binding precedent set by this decision. What do you interpret the case by case statement to mean?

Mr. BUZBEE. It is a slightly puzzling statement. I guess I have a couple of things to say about it. One is his statement there clearly does not constitute a majority view of the Supreme Court. That is his view about how people should work with this case.

I think looking at this case, there are five Justices in overwhelming agreement about the protective rationale under the Clean Water Act. I think that is what lower courts and agencies and all people trying to comply with the Act need to look to from now on. I think there will be some case by case application, because it is a new case and people are going to have to figure out what it means. In that sense, I think he is stating a clearly correct point. But I don't think it is case by case in the sense of no law.

Senator JEFFORDS. Mr. Clayton, in 2003, in comments to the EPA, Vermont, my State, stated "If the Corps of Engineers loses jurisdiction over waters, what are merely tributaries to navigable waters, then many activities will go unregulated, and there is a great potential for the degradation of streams." Knowing that outdoor recreation accounts for 22 percent of all visitors to Vermont, how do you think a lack of protection for small streams in Vermont would affect our local communities?

Mr. CLAYTON. Senator, thank you for the question, but I am not very familiar with Vermont. I live out in the heartland, in the northern plains of South Dakota. I can tell you that in the State of South Dakota, we have an $86 million fishing industry, and that

is tourists coming to fish in South Dakota, because we have quite a few unspoiled waters.

Sixty-five percent of our wetlands have not been drained, as opposed to States like Iowa, where 95 percent have been drained. That would be a huge hit for our State economy, because our State economy, the second biggest industry is tourism, between the hunting and the fishing. So I can just tell you from my own experience in my own State, it would be a huge hit to our economy.

Senator JEFFORDS. Well, I appreciate hearing that. I think my people feel the same way.

Mr. Clayton, what do you think of the proposition that it can be left largely to the States to determine which streams and wetlands should be protected from pollution? And based on your own experience, would this be a workable approach?

Mr. CLAYTON. Senator, I have been a wetlands advocate forever. I can identify with Mr. Kisling here about the idea that he should have one place he can go and get delineation of wetlands, etc.

But so far, you have noticed here this afternoon nothing has worked. I don't believe States should, would or could take care of wetland delineations and wetland problems. We have a navigable river in South Dakota that runs from almost the North Dakota border down to the southern border of South Dakota, dumps into the Missouri River and continues down to the Gulf. There is no way one single State should have that kind of jurisdiction over wetlands, etc. Right now, that river is not flowing, because we are in an extended drought.

So what we would we do about that? That just kind of introduces you to some of the problem. But what is happening right now cannot be taken care of by State jurisdiction, we don't believe.

Senator JEFFORDS. Thank you.

Dr. Buzbee, do you believe that the agencies are required to rewrite their regulatory definitions of waters of the U.S. in response to the Supreme Court's decision? Or can the agencies continue to implement the law under their existing regulations?

Mr. BUZBEE. My view is if you look at the Justice's votes, there is no majority striking down the regulations. This case concerned a particular application of the regulations in two different circumstances. Several Justices basically expressed the desire that the agency go back and look at the regulations again.

But there is a world of difference between the Supreme Court striking down a regulation, something that it does occasionally, and does so usually with great clarity, and Justices expressing a desire that the Army Corps and the EPA clarify the law. I think several Justices would like to see clarification in the law, but they are not mandating it. As the EPA witness earlier stated, the agencies have to weigh many factors in deciding whether it is worth issuing new regulations.

Senator JEFFORDS. Dr. Buzbee, can you explain whether you believe this decision will affect parts of the Clean Water Act, other than the wetlands program, and if so, why?

Mr. BUZBEE. Yes, absolutely. As several people have stated, and I mentioned about the definition of waters, this is not just a case about wetlands. This case is about what count as waters, and most critically, that includes the pollution control provisions of so-called

NPDES permits, the pollution discharge permits from factories and various waste facilities are protected or subject to Section 402. Only if waters are Federal are people prohibited from discharging, except in compliance with Section 402. So this is a case that concerns wetlands, as well as pollution discharges.

Senator JEFFORDS. Thank you.

Senator CHAFEE. Thank you, Senator Jeffords.

Dr. Buzbee, you suggest at the end of your testimony that we are obviously looking for a legislative fix. And how are we going to accomplish that, without exceeding the constitutional restrictions in the Commerce Clause as defined by the Supreme Court? What advice can you give us?

Mr. BUZBEE. I guess I would say I don't think there would be any constitutional issue, that the Restoration Act, at least the versions I have seen earlier, really are trying to take three decades of regulatory approaches and turn them into statute. They have not been struck down on constitutional grounds. Only one case found a constitutional problem, and that was the SWANCC case involving migratory birds in isolated wetlands. There the court said it would interpret the statute to avoid a constitutional question.

If you look at Rapanos, five Justices do not see a constitutional problem with protecting tributaries and wetlands, such as are at issue in this case.

Senator CHAFEE. And Dr. Adler, can you comment on Dr. Buzbee's legislative fix?

Mr. ADLER. Yes. I am not sure that Professor Buzbee and I would agree on that. Justice Kennedy, for example, in his concurring opinion in Rapanos, says that the reason why there aren't any federalism concerns with the Clean Water Act is because there is a significant nexus requirement. And that requirement essentially protects the application of the Act from federalism-type concerns. And he does not disavow the opinion he joined in SWANCC, which suggested that a broader application of Federal authority would raise significant federalism concerns.

I would also note that if one looks at text of the regulations themselves, the regulations the corps has not revisited significantly or meaningfully in some time, there is language in those regulations which on its face appears to be at odds with some of the Supreme Court's federalism cases, even despite the medical marijuana case of last year, in part because the Supreme Court test is that regulations must control activities that have a substantial effect on interstate commerce.

The test of the regulations purports to assert Federal jurisdiction over things that could affect interstate commerce. There are two potential problems there. One is the fact that it is a conditional effect, rather than an actual effect. And two, that it is a sample effect as opposed to a significant effect. So in two respects, the regulations could potentially be broader than the Court's doctrine.

This isn't just my view. For example, Professor Richard Lazarus at Georgetown wrote a column back in 1995, just after the Lopez decision, saying that the Corps of Engineers, as written at the time, were "clearly out of bounds" given the Lopez decision. He argued at the time that the Corps of Engineers could rewrite its regulations to achieve most of the same environmental goals without

those constitutional problems. But the Corps of Engineers has not sought to do so, and that has led to some of the cases like SWANCC and like this.

Senator CHAFEE. Do you recommend Congress have some action as a result of the Supreme Court decision?

Mr. ADLER. I think that the administrative process can actually handle this. I think the level of detail and specificity that would be required to develop a set of regulations that are tailored to the ecological considerations involved in wetland protection, and the fact that they are different from place to place, that is accomplished more easily in the administrative process than in the legislative process.

And I don't think it is simply a question of adopting a one paragraph definition of what constitutes a water of the United States. I think it requires a more detailed process of what it is that creates a significant nexus between a given wetland or water and navigable waters. I think the administrative process whatever its faults, would do that more effectively.

Senator CHAFEE. Do you agree with that, Dr. Buzbee?

Mr. BUZBEE. I don't, primarily for one reason, and that is, any new regulatory definition, if promulgated in a final sort of way, would itself undoubtedly, to litigation challenge, whether the regulations sought to strengthen the regulations, just hold them constant or weaken them. Legislation, in contrast, would stand a real chance of keeping a law stable and as it has been now for about three decades. I think avoiding litigation and uncertainty would address many people's concerns, be they environmentalists or be they cattle ranchers, around the country.

Senator CHAFEE. And Mr. Kisling, in your experience and your members' experience, has the State done a good job of regulating wetlands in Oklahoma? Are there strong State laws that require you to obtain permits in order to fill wetlands?

Mr. KISLING. Yes, Senator, I think they have. I have several wetlands on my farms. And we are kind of regulated on how we can farm, what types of practices that we can do on these farms that have wetlands on them.

Senator CHAFEE. Can you describe the wetlands? Are they year-round?

Mr. KISLING. Yes. The wetland I am talking about in particular are buffalo wallows, that happened a long time ago when the buffalo roamed in our area. They pressed down this land really hard and made a hard bottom to it. We farmed over those some, but we haven't been able to fill them in, and they will still hold a little bit of water.

Senator CHAFEE. Year-round?

Mr. KISLING. Well, I haven't dumped an inch of rain out of my rain gauge since October. So this year, no, but a lot of years, yes. We are not able to go in with a deep ripper and open those up. So a lot of times, yes, they do have a little bit of water in them, and you can't fill those like you do everything else, or you are illegal. You can't fill them or you are illegal. There have been a lot of neighbors turned in from trying to fill those with dirt, so that they don't hold water.

Senator CHAFEE. Do you think you should be able to farm those wallows?

Mr. KISLING. The way their interpretation is now of the connection, if an animal, a goose or a duck, and there is water in those, flies to a creek or a drainage ditch, and deposits that little bit of water in that drainage ditch from that wetland——

Senator CHAFEE. I don't think we should stretch it too far. I am not disagreeing with that. But in your experience, these seem to be almost year-round in most years wetlands. Is it worth it? Do you think we should set the precedent nationwide, fill in these year-round wetlands? I am sure you could make a little extra money growing your crops there.

Mr. KISLING. He said it shouldn't affect, the price of the property shouldn't be what we emphasize here, it ought to be people. But I don't think, and I agree that it should be people, but we live right here in that area where it is. We are not going to drink that water ourselves if it is polluted. So I don't think that that area should be considered a wetlands with that strict distinction. So that is why I think there needs to be a yellow line, some kind of a bright line there, so we know whether we have crossed that line or not.

Senator CHAFEE. I think that is what we are going to try and do, as Senator Inhofe said, give some certainty here. The Supreme Court has made that task, presented that task to us. Dr. Adler is saying it can be done administratively, Dr. Buzbee is saying it can be done legislatively. That is why we are having this hearing.

I am grateful for your testimony and your experience and bringing what you see on the ground in your farms in Oklahoma here to us in Washington. Mr. Clayton, likewise.

Senator Lautenberg.

Senator LAUTENBERG. Thank you. I appreciate how courteous were to permit our Chairman to ask his questions. So I kind of didn't want to be forgotten a second time. But you are very kind.

[Laughter.]

Senator LAUTENBERG. It is interesting to me to learn some of the definitions that we will occasionally get from the witness table. I did not know arithmetically that plurality is when both sides are equal. So thanks for clearing up that definition, Dr. Buzbee.

I will tell you what surprises me, and I am so disappointed that Senator Inhofe is not here, because I don't get a chance to punch back when he is saying things, and I wait for the opportunity when he is finished, but then he disappeared. But we differ on a lot of things. He often talks about the pizza parlor which has been fined and penalized for throwing trash in the wrong place.

I look at my State, the most crowded State, the most densely populated State in the country. We have more people per square mile. But Mr. Kisling, we also oddly enough have more horses per square mile than any other State in the country. That is always a surprise. Because it is not that we have that many horses, but we have very few acres. So it works out. In any event, the question that comes up, is the country better off for Government regulation or Government contribution in any way? When I hear some folks talk that say they want to get Government out of their lives, and let us be alone and so forth. But the problem is, our actions often affect our neighbors and other people's lives. So I think some regu-

lation is in order. I believe in the free spirit of America, I have devoted my life to it, pretty much. In my business, 30 years in business, fairness and equity, as well as my 20 years in the United States Senate. Mr. Kisling, do your cattle graze at all?

Mr. KISLING. Yes, sir.

Senator LAUTENBERG. Do they graze on any Federal lands?

Mr. KISLING. No, sir.

Senator LAUTENBERG. Do you get the benefit of any support programs in wheat?

Mr. KISLING. Yes, sir.

Senator LAUTENBERG. You do. Because I know that you mentioned the fact, is it considered a drought in Oklahoma? Forgive me for not knowing.

Mr. KISLING. Yes, sir, we are very dry. We had half a wheat crop this year.

Senator LAUTENBERG. Wow. It is terrible, because we could give you some water from New Jersey, but we don't have a way of transmitting it.

But so, there is a Government program, I take it. Has business been pretty good in your farming and ranching overall?

Mr. KISLING. The cattle industry has been very good the last few years.

Senator LAUTENBERG. Very good. Even with the fat scare and all that stuff? People went back to eating good steaks when they see them. So is it fair to say that there is some benefit from some Government intervention in this case? I mean, if they help you endure drought in your farming area, it is a worthwhile program, I would say, to keep people in business. Do Oklahomans buy bottled water at all, do you know?

Mr. KISLING. Yes, sir, we do.

Senator LAUTENBERG. They do. Why don't they just trust us to be good neighbors? And you and I, we all know why. But Dr. Buzbee, you recommend a legislative solution and your colleague at the table, Dr. Adler, recommends an administrative solution. But to me, it depends on whose administration it is that tells you where we ought to go. So I think legislative we ought to try to iron it out, just to be sure. I am hoping that the Supreme Court doesn't complicate things further, as we have seen by the inability to get a majority opinion there. Wouldn't you say that the Supreme Court decision in the Rapanos case is likely to lead to more litigation by industries seeking to undo the protections of the Clean Water Act?

Mr. BUZBEE. Yes, I do think so. I think that despite the fact that the case didn't really unsettle the law, there is new language, and Justice Kennedy's test gives lawyers the opportunity to fashion new challenges and tests and probe at the law. So I think we are virtually certain to see a great deal of new litigation.

Senator LAUTENBERG. What weight should be given based on the numerical relationship in the Court to Justice Scalia's opinion? Where do we go with that?

Mr.BUZBEE. Is the question directed to me, Senator?

Senator LAUTENBERG. Yes.

Mr. BUZBEE. Thank you. My sense is that the Justice Scalia opinion, the plurality, which states a limitation on the Clean Water Act, does not command the necessary five votes. To the extent con-

tinuously flowing or permanent waters might protect some waters that otherwise wouldn't be, I think you have a unanimous court saying that certainly should be at least enough. I think in the end, Justice Kennedy's opinion is really the key under any number of rationales, Justice Kennedy's opinion is the key, stating the significant nexus test. That leaves most of America's waters protected.

Senator LAUTENBERG. I close, Mr. Chairman, but I have to say to Mr. Kisling, I enjoyed hearing his testimony. Don't be fooled by Senator Inhofe. Now, he is a friend of mine. We don't agree on anything.

[Laughter.]

Senator LAUTENBERG. But I consider that we are good friends. So don't believe what he says that Oklahoma is the only place where common sense exists, please.

[Laughter.]

Senator LAUTENBERG. Thanks very much, Mr. Chairman.

Senator CHAFEE. Thank you, Senator Lautenberg. Thank you, Senator Jeffords.

If there are no further questions, there may be questions that we will submit for the record. Hopefully you will be able to respond as soon as you can. Once again, thank you for testifying.

Yes, Senator Jeffords.

Senator JEFFORDS. I only wanted to do that, because I want everybody to sit down, because I want to praise you for holding this hearing. It was done beautifully, well prepared. I may not see you again for a while.

Senator CHAFEE. Thank you, Senator Jeffords. We are on August recess in a week.

Senator JEFFORDS. That is right.

Senator CHAFEE. We will reconvene in September. Thank you again, gentlemen.

[Whereupon, at 4:53 p.m., the subcommittee was adjourned.]

[Additional statements submitted for the record follow.]

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

JANUARY 9, 2005

Ms. Jeanne Christie
Executive Director
Association of State Wetland Managers
2 Basin Road
Wjndham, Maine 04062

Dear Ms. Christie:

Thank you for your letter of December 19, 2005, indicating that the Association of State Wetland Managers (ASWM) is developing an amicus brief in support of the Federal Government in the two cases currently before the U.S. Supreme Court, Rapanes v. United States and Carabell v. U.S, Army Corps of Engineers. I appreciate ASWM's interest in these important cases.

Your letter requests information on a nationwide scale regarding the extent of nun-navigable tributaries and adjacent wetlands, as well as on the number of drinking water intakes and Clean Water Act (CWA) National Pollutant Discharge Elimination System (NPDES) permits on such waters. The Environmental Protection Agency (EPA) has received information from the public and conducted its own data search on these and related issues. Much of the data, for example, are extracted from national data sets and compared to information provided to EPA in public responses to the 2003 Advance Notice of Proposed Rulemaking (ANPRM) for the Clean Water Act Regulatory Definition of "Waters of the United States." Most of the

data used to conduct these analyses is publicly available. While these data represent a factual summary of information obtained from the public and from Government data sets, we have included any appropriate caveats where assumptions have been necessary in order to respond to your specific questions.

Some of the analyses and data are identified below as preliminary because they are still being peer reviewed. Data and analyses reviewed and approved through an outside peer review process include the NHD methodology and analysis using start reaches and intermittent/ephemeral waters as a conservative approximation for "non-navigable" waters, and the location of NPDES dischargers into such waters.

The extent of non-navigable tributaries is difficult to estimate nationwide because navigability is not a parameter included in national databases. For example, the publicly available National Hydrology Dataset (NHD) maintained by the U.S. Geological Survey docs not distinguish between navigable and non-navigable waters. Instead, the NHD characterizes stream reaches based on flow characteristics such as perennial and intermittent/ephemeral. We are providing data on the linear extent of intermittent/ephemeral streams and "start reaches," stream segments in the NHD that lie at the head of the tributary system and have no other streams flowing into them, because streams with these characteristics arc likely to be non-navigable waters. We believe that the length of streams in these two categories provides a conservative range of the extent of non-navigable waters in the United States.

Based on available 1:100,000 scale data from the NHD, we estimate that 53 percent of stream kilometers (2,915,824 km) in the U.S. outside Alaska are start reaches. Similarly, queries to the NHD indicate that 59 percent (3, 214,641 km) of the total kilometers of streams in the U.S., excluding Alaska, are intermittent/ephemeral, This information suggests that the linear extent of non-navigable waters ranges from between 53-59 percent of the total length of streams in the U.S., excluding Alaska. These estimates appear consistent with those submitted by States commenting in response to the ANPRM. EPA has conducted a preliminary analysis to estimate the number of wastewater sources authorized under the Clean Water Act's Section 402 permits program to discharge into either start reaches or intermittent/ephemeral streams nationwide based on data from the NHD and EPA's national database for the NPDES program, the Permit Compliance System (PCS), excluding Alaska. An analysis of PCS data from June 2004 shows that approximately 85 percent of the individual permits (approximately 37,000 out or 43,000 permits in PCS at that time) have data necessary for determining the location of discharges with respect to intermittent/ephemeral streams and start reaches. As noted above, these water features from NHD have characteristics of non-navigable waters. EPA estimates that over 40 percent of the 37,000 permits with locational data discharge into either start reaches or intermittent/ephemeral streams, excluding Alaska. Approximately 28 percent of these discharges are from municipal sewage treatment systems, systems that treat domestic sewage as well as wastewater from commercial and industrial users. The other 72 percent include an array of discharges from over 500 industrial categories, ranging from elementary and secondary schools to petroleum refining to industrial organic chemical facilities. The discharges covered by this estimate represent most of the individual discharges but do not include the much larger number of discharges covered by storm water and non-storm water general permits (permits that cover multiple, typically smaller, discharges, for which EPA lacks sufficient locational data). These data also are consistent with data submitted by States commenting in response to the ANPRM.

We have also developed a preliminary estimate of public drinking water system intakes receiving water from start reaches or ephemeral/intermittent streams, based on NHD data and information regarding source water protection areas (SWPAs). Preliminary estimates indicate that over 85 percent of identified SWPAs (for surface water intakes used us a drinking water source) included start reaches, and approximately 60 percent contain intermittent/ephemeral streams. In total, over 90 percent of surface water protection areas contain start reaches or intermittent/ephemeral streams. Public drinking water systems which use these intakes (as well as other sources) are estimated to provide drinking water to over 110 million people. Of the over 14,000 public water supply systems using surface waters, RPA has located (on the NHD) and mapped SWPAs for over 7,400 intakes (excluding Alaska but including Puerto Rico) serving 5, 646 public water supply systems. For the purposes of this analysis, SWPAs encompass the drainage area of up to 15 miles upstream from a drinking water intake, and any SWPA that contains at least one start. reach or intermittent/ephemeral stream is included in the count. Please note that this analysis is preliminary, but nonetheless illustrates the important relationship between public health and the water quality of headwater, intermittent, and ephemeral streams.

EPA remains committed to the protection of aquatic resources under the CWA. AS you know , President Bush announced an aggressive new national goal to move beyond no net loss of wetlands in America to achieve an overall increase of the Nation's wetlands. The President's challenge is to restore, improve and protect at least three million additional acres of wetlands over the next 5 years. For the President's Initiative, EPA committed to restore 6,000 acres of wetlands by 2009 and to improve 6,000 acres of wetlands by 2009. We are currently putting together a tracking and reporting system to measure progress towards these goals. Thank you again for your interest in these cases. If you have further questions, please feel free to contact me or call Dave Evans, Director of the Wetlands Division, at (202) 566-0535.

Benjamin H. Grumbles Assistant Administrator

STATEMENT OF BENJAMIN H. GRUMBLES, ASSISTANT ADMINISTRATOR FOR WATER U.S. ENVIRONMENTAL PROTECTION AGENCY AND JOHN PAUL WOODLEY, JR., ASSISTANT SECRETARY OF THE ARMY FOR CIVIL WORKS, DEPARTMENT OF THE ARMY

Good afternoon, Mr. Chairman and members of the committee. We welcome the opportunity to present joint testimony to you today on issues concerning Clean Water Act (CWA) jurisdiction over waters of the United States. Our testimony will address the status of Federal jurisdiction in light of the Supreme Court ruling in Rapanos v. United States and Carabell v. United States. In particular, our testimony will provide background information on our agencies' roles and responsibilities under the CWA, summarize the Rapanos and Carabell decision, and discuss the steps our two agencies are undertaking to ensure all CWA programs, including section 404, are implemented in a manner consistent with the CWA.

OVERVIEW OF ADMINISTRATION WETLANDS POLICY

From "No-Net-Loss" to Net Gain of Wetlands

President Bush established, on Earth Day 2004, a national goal to move beyond "no net loss" of wetlands and to attain an overall increase in the quantity and quality of wetlands in America. Specifically, the President established a goal to increase, improve, and protect three million acres of wetlands by 2009. Since the President announced this objective, EPA, the corps, the U.S. Department of Agriculture (USDA), and the Department of Interior (DOI) have restored, created, protected or improved 1,797,000 acres of wetlands. We now have 588,000 acres of wetlands that did not exist in 2004, we have improved the quality of 563,000 wetland acres that already existed, and we have protected the high quality of 646,000 acres of existing wetlands.

These accomplishments were achieved by assuring no net loss of wetlands through the regulatory requirements of the 404 program, and also through Federal agency conservation programs, including those administered by EPA, the corps, USDA, DOI, and the Department of Commerce.

To sustain this commitment to wetlands conservation, the President's 2007 budget proposes $403 million, an increase of $153 million over the 2006 level, to enroll 250,000 acres into the USDA's Wetlands Reserve Program (WRP). This program is crucial to the President's national wetlands initiative and, if enacted, the budget request would enable an annual enrollment of 250,000 acres, an increase of 100,000 acres over fiscal year 2006, and would bring total cumulative enrollment to more than 2.2 million acres. In addition, restored wetlands enrolled in the USDA's Conservation Reserve Program reached 2 million acres as of June, 2006. These restored wetlands are the result of several initiatives, including the 500,000 acre Bottomland Hardwood Timber Initiative and the new 250,000 acres Non– Floodplain Wetland Restoration Initiative.

Congress is an essential partner in the President's conservation agenda, and we look forward to continuing our collaboration with you towards reaching our wetlands goals.

Equally necessary to our continued commitment to wetlands conservation is the 404 regulatory program. Congress enacted the CWA "to restore and maintain the chemical, physical, and biological integrity of the nation's waters", including wetlands, through programs such as section 404. Wetlands are among the Nation's most valuable and productive natural resources, providing a wide variety of functions. They help protect water quality, reduce downstream flooding by storing flood waters, maintain flows and water levels in traditional navigable waters during dry periods, support commercially valuable fisheries, and provide primary habitat for wildlife, fish, and waterfowl. Wetlands are at the core of this country's rich natural heritage and are central to its healthy, prosperous future.

Since 1990, it has been the goal of the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) to achieve no net loss of wetlands in the section 404 program. Under section 404, any person planning to discharge dredged or fill material to waters of the U.S. must first obtain authorization from the corps (or a Tribe or State approved to administer the section 404 program), through issuance of an individual permit, or must be authorized to undertake that activity under a general permit. In practice, the vast majority of projects (95 percent in 2003) are authorized under general permits, which require less paperwork by the project proponent than an individual permit application. In terms of the section 404 program, the no net-loss goal is being accomplished through avoidance, minimization, and compensation for unavoidable impacts to aquatic resources. Corps' data show that we continue to achieve no net loss of wetlands in the 404 regulatory program. However, it is only one of the tools in the Administration's efforts to achieve an overall increase in wetlands nationwide.

In the 34 years since its enactment, the CWA section 404 program—together with Swampbuster, ongoing public and private wetlands restoration programs, and active State, Tribal, local, and private protection efforts—has helped to prevent the destruction of hundreds of thousands of acres of wetlands and the degradation of thousands of miles of rivers and streams. The annual rate of wetland loss, from development as well as subsidence and other natural causes, is estimated to have been reduced from 460,000 acres per year in the 1950's to 60,000 acres annually between 1986 and 1997, and recent data indicates that we are achieving an annual net gain in certain types of wetland acreage and continuing to reduce the net loss of other types.

EPA and Corps Responsibilities Under Section 404

The EPA and the corps coordinate to implement the section 404 program under the CWA, which regulates discharges of dredged or fill material, helping to protect wetlands and the aquatic environments of which they are an integral part, and maintain the environmental and economic benefits provided by these valuable natural resources.

The corps is responsible for the day-to-day administration of the section 404 program, including reviewing permit applications and deciding whether to issue or deny permits. Annually, the corps staff makes approximately 100,000 jurisdictional determinations, and reviews more than 80,000 individual permits and general permit authorizations. EPA comments on these permits as part of the public interest review process. EPA's role under CWA section 404 includes coordinating with States or Tribes that choose to administer the section 404 program, interpreting statutory exemptions from the permitting requirement, and sharing enforcement responsibilities with the corps. EPA also develops and implements, in consultation with the corps, the section 404(b)(1) guidelines, which are the environmental criteria that the corps applies when deciding whether to issue section 404 permits.

In addition to its activities under section 404, EPA coordinates implementation of numerous other CWA provisions that involve "waters of the United States." For example, EPA and approved States and Tribes issue permits under section 402 for discharges of pollutants other than dredged and fill material, and EPA reviews and approves water quality standards developed by approved States and Tribes under CWA Section 303.

Cooperative Implementation of Section 404 and Wetlands Protection

EPA and the corps have a long history of working together closely and cooperatively in order to fulfill our important statutory duties on behalf of the public. In this regard, the corps and EPA have concluded a number of written agreements to further these cooperative efforts in a manner that promotes predictability, consistency, and effective environmental protection. For example, on March 28, 2006, the U.S. Army Corps of Engineers and EPA published a proposed set of new standards to promote "no net loss" of wetlands and streams. This proposed "mitigation rule" represents a collaborative effort between the corps and EPA to develop a consistent set of science-based standards to compensate for unavoidable impacts to wetlands, streams, and other aquatic resources. The rule establishes a single set of standards that all forms of compensation must satisfy, and that is based on better science, increased public participation, and innovative market-based tools.

Implementation of the comprehensive, multi-agency Mitigation Action Plan (MAP) [December, 2004] and the Mitigation Regulations will improve the ecological performance and results of compensatory mitigation, and we are committed to ensuring that these two complementary efforts work together. To that end, we are making adjustments to some of the timelines for release of remaining MAP guidance documents to ensure that they are in harmony with the mitigation rule. The public com-

ment period closed on the proposed mitigation rule on June 30, 2006, and the agencies are in the process of reviewing comments.

Intergovernmental cooperation extends well beyond EPA and the corps. An important component of successful implementation of the CWA section 404 program is a close working relationship with States and Tribes. States and Tribes may assume operation of the section 404 program, and to date two have done so (Michigan and New Jersey). Many States and Tribes have chosen to protect wetlands under State/Tribal law, while working cooperatively with the Federal agencies without formally assuming the 404 program.

The Administration remains committed to a strong Federal-State partnership to protect the Nation's waters. Annually, EPA has awarded an average of $15 million to help enhance existing or develop new wetlands protection programs at the State, Tribal, and local levels. The Bush administration has asked Congress to appropriate an additional $1 million for these important programs as part of its fiscal year 2007 budget request.

In addition to the grants mentioned above, EPA provides funding assistance for a variety of CWA programs involving wetlands and other waters. For example, EPA awards grants to States and Tribes to implement projects and programs to reduce "nonpoint" sources of pollution, to support approaches of controlling stormwater and other "wet weather flows," and to reduce and prevent pollution of specific waters such as the Great Lakes and the Chesapeake Bay. The Agency also advances the President's Cooperative Conservation agenda through collaborative efforts such as the 5 Star Grants Program and the National Estuaries Program.

SUPREME COURT DECISION IN RAPANOS AND CARABELL

The judgment of the Supreme Court was to vacate and remand both cases for further proceedings. In summary, four Justices, in a plurality opinion authored by Justice Scalia, concluded that "the lower courts should determine . . . whether the ditches or drains near each wetland are 'waters' in the ordinary sense of containing a relatively permanent flow; and (if they are) whether the wetlands in question are 'adjacent' to these 'waters' in the sense of possessing a continuous surface connection that creates the boundary-drawing problem we addressed in Riverside Bayview." 126 S. Ct. at 2235. Justice Kennedy, who concurred in the judgment of the Court, established a different test, concluding that the cases should be vacated and remanded to determine "whether the specific wetlands at issue possess a significant nexus with navigable waters." Id. at 2252. Chief Justice Roberts joined in the plurality opinion and also wrote a concurring opinion. Justice Stevens, in a dissenting opinion in which Justices Souter, Ginsburg, and Breyer joined, would have affirmed the decisions by the lower courts. Justice Breyer also wrote a separate dissenting opinion.

The plurality opinion, authored by Justice Scalia, first concluded that the petitioner's argument that the terms "navigable waters" and "waters of the United States" are limited to waters that are navigable in fact "cannot be applied wholesale to the CWA." Id. at 2220. Citing CWA Section 502(7) and 404(g)(1), Justice Scalia opined that "the Act's term 'navigable waters' includes something more than traditional navigable waters." Id. Then, after reviewing the statutory language, the plurality concluded that "waters of the United States," includes "relatively permanent, standing or flowing bodies of water. The definition refers to water as found in 'streams,' 'oceans,' 'rivers,' 'lakes,' and 'bodies' of water 'forming geographical features.'" Id. at 2221 (citation omitted). The phrase does not include "ordinarily dry channels through which water occasionally or intermittently flows." Id. The corps' interpretation of the term "the waters of the United States," the plurality concluded, was not based on a permissible construction of the statute.

Justice Scalia elaborated on this test in footnotes. He stated:

By describing "waters" as "relatively permanent," we do not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought. We also do not necessarily exclude seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months-such as the 290-day, continuously flowing stream postulated by Justice Stevens' dissent. . . .

It suffices for present purposes that channels containing permanent flow are plainly within the definition, and that the dissent's "intermittent" and "ephemeral" streams . . . that is, streams whose flow is "[c]oming and going at intervals. . . [b]roken, fitful," . . . or "existing only, or no longer than, a day; diurnal . . . short lived" . . . are not. Id. at 2221 n.5 (citations omitted).

The plurality then examined the factor of the adjacency of the wetlands under review to "waters of United States." Justice Scalia concluded that "only those wet-

lands 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 'adjacent to' such waters and 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, and thus lack the necessary connection to covered waters that we described as a 'significant nexus' in SWANCC." Id. at 2226 (citation omitted and emphasis in original).

In response to arguments that this opinion would "frustrate enforcement against traditional water polluters [under CWA sections 301 and 402] . . . " the plurality concluded: "That is not so." Id. at 2227. The plurality went on to say that "from the time of the CWA's enactment, lower courts have held that the discharge into intermittent channels of any pollutant that naturally washes downstream likely violates [section 301], even if the pollutants discharged from a point source do not emit 'directly into' covered waters, but pass 'through conveyances' in between." Id. (citation omitted).

Justice Kennedy did not join the plurality's opinion, but instead authored an opinion concurring in the judgment. He agreed with the plurality that the statutory term "waters of the United States" extended beyond water bodies that are navigable-in-fact. Justice Kennedy, however, concluded that wetlands are "waters of the United States" where "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. at 2248. The concurrence by Justice Kennedy stated, in relevant part, that "[a]s applied to wetlands adjacent to navigable-in-fact waters, the corps' conclusive standard for jurisdiction rests upon a reasonable inference of ecologic interconnection, and the assertion of jurisdiction for those wetlands is sustainable under the Act by showing adjacency alone." Id. With respect to wetlands adjacent to nonnavigable tributaries, Justice Kennedy explained that: "[a]bsent more specific regulations, . . . the corps must establish a significant nexus on a case-by-case basis[.]" Id. at 2249.

Justice Kennedy did not agree with the plurality's interpretation of "waters of the United States" and agreed with the dissent "that an intermittent flow can constitute a stream. . . . It follows that the corps can reasonably interpret the Act to cover the paths of such impermanent streams." Id. at 2243 (citation omitted).

In his concurring opinion, Chief Justice Roberts wrote that "[i]t is unfortunate that no opinion commands a majority of the Court on precisely how to read Congress' limits on the reach of the Clean Water Act. Lower courts and regulated entities will now have to feel their way on a case-by-case basis. This situation is certainly not unprecedented. See Grutter v. Bollinger, 539 U.S. 306, 325. . . (2003) (discussing Marks v United States, 430 U.S. 188. . . . (1977))." 126 S. Ct. at 2236.

The four dissenting Justices would have affirmed the lower courts' opinions and upheld the corps' exercise of jurisdiction in these cases as reasonable. Justice Stevens also concluded: "In these cases, however, while both the plurality and Justice Kennedy agree that there must be a remand for further proceedings, their respective opinions define different tests to be applied on remand. Given that all four Justices who have joined this opinion would uphold the corps' jurisdiction in both of these cases-and in all other cases in which either the plurality's or Justice Kennedy's test is satisfied-on remand each of the judgments should be reinstated if either of those tests is met." Id. at 2265.

The Department of Justice testimony will elaborate further on the effect of the Supreme Court Decision.

STEPS TO CLARIFY CWA JURISDICTION AFTER THE RAPANOS AND CARABELL DECISION

The Rapanos and Carabell decision has important implications for administration of the CWA.

The United States will fully implement the CWA consistent with the Rapanos and Carabell decision. The Agencies are working closely with the U.S. Department of Justice to interpret the decision and its impacts on the scope of "waters of the United States" protected under the CWA. In particular, we are working on joint EPA/corps guidance clarifying CWA jurisdiction in light of the Rapanos and Carabell decision. It is our hope that the guidance moves us beyond disagreement over how widely we assert jurisdiction, and toward an agreement on how effective we are in protecting wetlands that provide ecological and social benefits. The development of guidance should not be about bigger or smaller jurisdiction but about better results.

In the meantime, our field staff continues to administer CWA programs. To ensure consistent interpretation of the scope of "waters of the U.S." in light of Rapanos

and Carabell, EPA and the corps issued immediate guidance to field staff shortly after the decision, indicating that: the field staff should continue to process permit authorizations; to the extent circumstances permit, the field staff should temporarily delay making jurisdictional calls beyond the limits of the traditional section 10 navigable waters; and where delays are not possible and permit actions require taking a position on CWA jurisdictional scope, such determinations should be deferred, where possible, until further guidance is provided by Headquarters of both agencies.

In summary, EPA and the corps are working quickly to develop interim guidance regarding the tests defined by the Supreme Court in the Rapanos/Carabell decision, in order to provide clarity for the public and to ensure consistency among CWA jurisdictional determinations nationwide.

CONCLUSION

The agencies remain fully committed to protecting all CWA jurisdictional waters as was intended by Congress. Safeguarding these waters is a critical Federal function because it ensures that the chemical, physical, and biological integrity of these waters is maintained and preserved for future generations. Our goal in moving forward is to clarify what waters are properly subject to CWA jurisdiction in light of the Rapanos/Carabell decision and afford them full protection through an appropriate focus of Federal and State resources in a manner consistent with the Act. Working collaboratively and in cooperation with the Department of Justice, EPA and the corps will continue to assess CWA jurisdiction in light of Rapanos/Carabell issuing additional guidance and refinements as appropriate. We also wish to emphasize that although the Rapanos/Carabell decision and our testimony today focus on Federal jurisdiction pursuant to the CWA, other Federal or State laws and programs continue to protect waters and wetlands that may no longer be jurisdictional under the CWA following these decisions.

Thank you for providing us with this opportunity to present this testimony to you. We appreciate your interest in these important national issues that are of mutual concern.

RESPONSES BY BENJAMIN GRUMBLES TO ADDITIONAL QUESTIONS FROM SENATOR CHAFEE

Question 1. While I understand informal guidance has been issued by the corps and EPA on the Rapanos/Carabell cases, how quickly does the Administration expect to release formal guidance addressing the Supreme Court's ruling? Would you provide this subcommittee with some indication of what will be in this guidance?

Response. EPA and the corps are coordinating now to prepare guidance for our field offices to address the Supreme Court decision in Rapanos. The guidance will provide additional clarity to agency staff, regulated parties, states, and the public to ensure that jurisdictional determinations are consistent with the Rapanos decision. We will provide the Subcommittee on Fisheries Wildlife and Water with a copy of the guidance when it is completed.

Question 2. In 2003, EPA and the corps issued guidance to their field staffs on how to implement the §404 program in accordance with SWANCC and lower court decisions interpreting SWANCC. Some groups believe that the corps and EPA took an unduly narrow approach in the 2003 guidance, narrower than was required by SWANCC. How will the new guidance that EPA and the corps are developing in response to the Rapanos ruling affect the 2003 guidance?

Response. We anticipate that the new guidance will focus only on issues raised by the Rapanos decision. The regulations at issue in Rapanos and Carabell were 33 CFR 328.3(a)(1), (a)(5), and (a)(7), not (a)(3) (the provision at issue in SWANCC).

Question 3. Is there any specific type or category of tributaries or wetlands that you believe the agencies cannot continue to protect because of the Rapanos decision?

Response. The agencies respectfully request to defer our answer to this question until we have completed our joint guidance addressing the Court's decision in Rapanos. We will provide a copy of that guidance to the Subcommittee when it is completed.

Question 4. Earlier this year, you stated that EPA is putting together a tracking and reporting system to measure progress toward the President's commitment to restore 6,000 aces of wetlands and improve another 6,000 acres of wetlands by 2009. What is the status of that tracking and reporting effort?

Response. The President's Earth Day 2004 Wetlands Initiative announced a performance-based goal to restore, enhance, and protect at least three million wetland acres over the next 5 years. In support of this goal, EPA and other Federal agencies

have been coordinating closely with other Federal, State, Tribal, local, and private entities to track and report our progress in meeting this goal.

Among the several Federal Agencies working to meet the President's wetlands goal, EPA's commitment is to achieve an increase of at least 6,000 acres of restored wetlands and 6,000 acres of enhanced wetlands over the 5-year period. EPA is currently tracking progress against this commitment as part of the Office of Water's National Water Program Performance Reports. Under this measure EPA currently counts wetland acres restored or enhanced under Wetland Five Star Restoration Grants, the National Estuary Program, and CWA §319 nonpoint Source grants. The measure does not count acres restored or enhanced through enforcement or CWA §404 mitigation.

At mid-year of fiscal year 2006, the cumulative total of acres restored or enhanced under EPA's programs since April 2004 was 97,940 acres. These acres are included in The Council on Environmental Quality's April 2006 report, "Conserving America's Wetlands 2006: Two Years of Progress Implementing the President's Goal," published in April 2006. The CEQ report indicates a total of 1.797 million acres of wetlands have been restored, improved, or protected in the United States since April 2004.

Question 5. Many groups-especially States-worry about the implications of Rapanos and SWANCC for the geographic scope of sections of the Clean Water Act other than the Section 404 Program, that utilize the same jurisdictional phrase "navigable waters". The Oil Pollution Act uses the phrase as well. Justice Scalia's plurality opinion addresses this concern, saying that his opinion does not considerably reduce the scope of the 402 program (NPDES permit program) that is central to the Act. Do you agree that the plurality opinion does not affect the jurisdictional reach of §402, or other Clean Water Act provisions (such as Sections 301, 202, 309, 311, and 401), or are there still reasons for concern on this point?

Response. The agencies respectfully request to defer our answer to this question until we have completed our joint guidance addressing the Court's decision in Rapanos. We will provide a copy of that guidance to the Subcommittee when it is completed.

RESPONSES BY BENJAMIN GRUMBLES TO ADDITIONAL QUESTIONS FROM SENATOR INHOFE

Question 1. Both the plurality and concurrence indicated that the application of the ordinary high water mark definition to determine upstream limits of jurisdiction has led the agencies to exceed the jurisdictional limits of the Clean Water Act. To determine the upstream limits, will you be revising the definition of ordinary high water mark, or will you be using a different test altogether?

Response. The agencies respectfully request to defer our answer to this question until we have completed our joint guidance addressing the Court's decision in Rapanos. We will provide a copy of that guidance to the subcommittee when it is completed.

Question 2. While a majority in the Rapanos case has rejected the use of the ordinary high water mark, I would like to ask a question about it because I think it shows just how far astray the corps has gone with its regulatory program. In its 2004 report, the GAO found that "districts in the arid West developed a method for identifying the jurisdictional boundaries of dry channels that flood occasionally, expanding several times their normal size." How is this consistent with the ordinary high water mark, which according to numerous administrative documents and court cases does not include annual flood elevation or annual spring floods?

Response. The agencies respectfully request to defer our answer to this question until we have completed our joint guidance addressing the Court's decision in Rapanos. We will provide a copy of that guidance to the subcommittee when it is completed.

Question 3. Many desert drainages are just a few feet wide, carry water for only a few hours a year, and rarely, if ever, carry water to traditional navigable waters. Gage data maintained by Maricopa County, AZ from 1993 to 2000 shows that South Mountain Fan, a desert drainage in Phoenix, carried water for only 7 hours during the 7-year period. It is more than 100 miles from the Colorado River. Do you think such a feature should be regulated as "water of the United States?" Under what authority?

Response. The agencies respectfully request to defer our answer to this question until we have completed our joint guidance addressing the Court's decision in

Rapanos. We will provide a copy of that guidance to the subcommittee when it is completed.

Question 4. Obtaining a Section 404 permit in Arizona has been made more difficult because EPA Region IX has been routinely objecting to the corps' permitting of large-scale, master-planned communities in Arizona. Region IX asserts that if any part of a project requires a Section 404 permit, then the entire project is federalized and requires the most time-consuming and costly of all environmental documentation under the National Environmental Policy Act, an environmental impact statement. The corps regulations say that the corps NEPA analysis should be limited to the part of the project that is subject to Federal control and responsibility. Do you believe that Federal agencies should be regulating the entire project?

Response. The National Environmental Policy Act (NEPA) requires Federal agencies to integrate environmental values into their decision making processes by considering the environmental impacts of their proposed actions and reasonable alternatives to those actions. The NEPA process generally includes an evaluation of the environmental effects, direct, indirect and cumulative, of Federal actions. The public has an important role in this process. There are three levels of analysis depending on whether or not a Federal action could significantly affect the environment. These three levels include: categorical exclusion determination; preparation of an environmental assessment/finding of no significant impact (EA/FONSI); and preparation of an environmental impact statement/ record of decision (EIS/ ROD). If an Agency determines that the environmental effects of a proposed major Federal action will be significant, an EIS is prepared. As defined in the Council on Environmental Quality's regulations implementing NEPA at 40 C.F.R. §1508.18, the term "'major Federal action' includes actions with effects that may be major [i.e. significant] and which are potentially subject to Federal control and responsibility." Thus, it is appropriate for the corps to prepare an EIS when its action, specifically issuance of a Federal permit under the §404 program, would have significant environmental impacts, direct, indirect or cumulative. This is a case-by-case inquiry.

Question 5. Beside 33 C.F.R. §328.3(a)(1), is there any other category of "water" in the current definition of "waters of the United States" whose regulation will always be consistent with the governing rationale of Rapanos?

Response. The agencies respectfully request to defer our answer to this question until we have completed our joint guidance addressing the Court's decision in Rapanos. We will provide a copy of that guidance to the subcommittee when it is completed.

Question 6. EPA Region IX claims that ephemeral washes-shallow dirt paths in the desert-are "Aquatic Resources of National Importance" and are attempting to federalize all private development in the Arizona and Nevada deserts by blocking and delaying 404 permits. There is no EPA definition of an ephemeral wash yet, the EPA declares them all "wetlands" necessary to preserve. With thousands of these washes in the desert does the EPA suggest that all private development should be managed by the Federal Government?

Response. In light of the Supreme Court's decision in Rapanos, EPA and the corps will need to make case-by-case determinations whether a particular water body is a "water of the United States" under the Clean Water Act. For waters that are subject to Clean Water Act jurisdiction, the CWA §404 permitting process provides a mechanism for private development to go forward while ensuring that important aquatic resources, including wetlands, are protected.

Question 7. Which regulations, if any, survive Rapanos? How does Rapanos affect these sections of the 33 CFR 328.3 regulation? (a)(5)—tributaries (of other waters included in the definition) (a)(7)—wetlands adjacent (to other waters included in the definition) (c)—the definition of "adjacent" (e)—the definition of "ordinary high water mark"

Response. The agencies respectfully request to defer our answer to this question until we have completed our joint guidance addressing the Court's decision in Rapanos. We will provide a copy of that guidance to the Subcommittee when it is completed.

RESPONSES BY BENJAMIN GRUMBLES TO ADDITIONAL QUESTIONS FROM SENATOR JEFFORDS

Question 1. During the hearing, I asked the following questions:

Are wetlands important to water quality and flood control? Do pollutants flow downstream from small tributaries to larger bodies of water? When it rains in a nor-

mally dry area, as it did in Phoenix, AZ last week, are the contents of dry streambeds carried downstream with the rainwater?

Your responses were yes, yes, and it depends. Can you please elaborate on each response, and for my last question can you provide a complete description of a situation in which a pollutant located in a dry streambed would not be carried downstream with rainwater?

Response 1a. Yes, adjacent wetlands provide a variety of different functions "in place," the benefits of which are realized in the immediately surrounding landscape, but which also have repercussions for the integrity of waters downstream. Among the most prominent of these are flood control and augmentation of water quality. The immediate effects of floodwater detention within a given hydrologic regime are felt most clearly immediately downstream of the detention, so wetlands that detain floodwaters protect areas immediately downstream; as these effects are aggregated across a large landscape they gain greater importance for mitigation of flood flows in navigable-in-fact waters. The same may be said of wetlands' ability to augment water quality. For an individual wetland, this is most pronounced, for example, where it lies immediately upstream of a drinking water intake. But in the aggregate, such wetlands can have increasingly important effects on the quality of downstream waters.

The functions of individual wetlands are due in part to their interaction with adjacent lands and other wetlands; flood control and water quality functions are determined by number, extent, and position of wetlands within the watershed. Wetlands improve water quality by accumulating nutrients, trapping sediments, and transforming a variety of substances. In many watersheds, wetlands receive dissolved and suspended compounds and materials from larger areas; therefore they may have a disproportionate effect on water quality.

Riverine wetlands retain runoff waters that contribute to flood peaks, mostly because of their location adjacent to a stream. These wetlands retain surface, subsurface, and/or groundwater that originates from upland areas, gradually releasing it to streams, which can be important for maintaining baseflow. Headwater wetlands are important for regulating water flow to downstream rivers. Peak flows in a stream are directly related to the total amount of wetland within the watershed, or the amount of wetlands in headwaters of that watershed. In other words, fluctuations are moderated by presence of wetlands which provide flood storage capacity, and headwater wetlands are in the best position to control flooding. A watershed that has fewer wetlands may be subject to more intense peak flows because of less wetland flood storage capacity.

Wetlands located next to surface waters improve water quality by trapping sediments, removing nitrogen, removing other nutrients, and trapping sediments laden with phosphorous because they receive water before it reaches the stream channel. Such wetlands provide important functions for natural improvement of water quality because of their ability to filter water and transform chemical compounds in water.

Response 1b. In general, pollutants are able to flow downstream from small tributaries to larger bodies of water. For example, downstream water quality is influenced by headwater—first and second order—streams because headwaters are among the sources that feed large streams, rivers, and lakes. This close connection means that degraded water quality is transported downstream as water from impacted headwaters flows into larger streams, rivers, and lakes within the watershed, affecting the water quality of these downstream water bodies. While it may be true that an individual headwater stream may not significantly impact downstream water quality, the cumulative effects of many degraded headwater streams within a single watershed are often ecologically important.

As discussed below, there may be certain instances where pollutants do not flow downstream, depending on volume of flow and the qualities of the pollutant.

Response 1c. Based upon the information above, in most cases pollutants deposited in a dry stream bed will move downstream during flow events. However, the ability of rainwater to carry contents (i.e., pollutants) of a dry stream downstream depends upon the volume of flow and the qualities of the pollutant in the stream bed. For example, if the pollutant is a large dense material that would not be able to be carried by the volume of flow, it will remain in the stream bed unless influenced by other conditions (such as a change in bed slope, etc.). In addition, if the precipitation event is not enough to generate surface flow in an ephemeral stream, such an event will not result in movement of pollutants in a streambed.

Question 2. When the EPA issued your Advanced Notice of Proposed Rulemaking in 2003, in addition to asking whether the regulations should define "isolated waters", the EPA also invited views "as to whether any other revisions are needed to the existing regulations on which waters are jurisdictional under the CWA." At

the time, I was assured that this was standard language that EPA included in almost every ANPRM, that the scope of the rulemaking was narrow. I was quite surprised, therefore, when I read in Justice Roberts' concurring opinion, the following footnote, attempting to refute Justice Stevens' assertion that the EPA ANPRM was narrow, limited to questions about jurisdiction over isolated, intrastate, non-navigable waters. Justice Roberts' states, "The scope of the proposed rulemaking was not as narrow as Justice Stevens suggests, post, at 10, n. 4 (dissenting opinion). See 68 Fed. Reg. 1994 (2003) ("Additionally, we invite your views as to whether any other revisions are needed to the existing regulations on which waters are jurisdictional under the CWA")". This interpretation of this phrase directly contradicts the EPA's description of the intent of this rulemaking. Justice Stevens' description of the facts is completely consistent with the explanation I received from EPA at the time. Was the ANPRM issued by the Administration in response to SWANCC of narrow intent, as explained to me at the time, or was the ANPRM issued by the Administration of broad intent, as misinterpreted by Justice Roberts? Given the misinterpretation of the Agency's use of this phrase in the ANPRM in this case by Justice Roberts, will the EPA eliminate the use of this language from its standard parlance in ANPRM documents in the future?

Response 2a. EPA published an Advance Notice of Proposed Rulemaking in the Federal Register on January 15, 2003, (68 FR 1991) "in order to obtain early comment on issues associated with the scope of waters that are subject to the Clean Water Act (CWA), in light of the U.S. Supreme Court decision" in SWANCC. The ANPRM posed two specific questions on which it solicited comments: whether links to interstate commerce provide a basis for determining CWA jurisdiction over isolated, intrastate, non-navigable waters, and whether and the agencies should define "isolated waters" in regulation. While the ANPRM focused on the implications of SWANCC, to ensure that all potential jurisdictional issues raised by the SWANCC decision were subject to public input, EPA invited comment more broadly on its regulations defining "waters of the United States." EPA's statements to you were accurate that the intent of the ANPRM was narrow, and focused on the questions about jurisdiction over isolated, intrastate, non-navigable waters, notwithstanding the opportunity provided the public to comment on issues beyond those specifically posed in the ANPRM.

Response 2b. When EPA chooses to seek early public input through an ANPRM, we try to ensure that the public is able to comment on all potential issues it believes may be relevant to the matter on which the Agency seeks input. The purpose of an ANPRM is not to propose for comment an Agency position, but rather to specify issues on which the agency wants and needs the views of and data from interested stakeholders and the general public. Therefore, in some cases, it is appropriate to use language like that used in the SWANCC ANPRM to ensure that commenters will consider and provide input on the issues raised by the ANPRM questions as well as additional issues they think are relevant. In contrast, in a notice proposing actual regulatory revisions (i.e., a Notice of Proposed Rulemaking), the issues on which comment is sought are narrowed to those specific regulations the Agency proposes to revise.

Question 3. You spoke about the President's goal to, ". . . move beyond 'no net loss' of wetlands and to attain an overall increase in the quantity and quality of wetlands in America." The term "overall increase" means that more wetlands are created per year than are destroyed. Missing from the Administration's 2006 wetlands report is the number of acres of wetlands that were destroyed or compromised during the period measured in the report. How many acres of wetlands were destroyed or compromised between 2004 and 2006?

Response. The Corps of Engineers is charged with the day-to-day administration of the CWA section 404 permit program. According to corps' estimates, during fiscal year 2005 applicants requested authorization to impact more than 30,000 acres of wetlands. For this same period, final Department of the Army permits authorized applicants to impact approximately 20,000 acres of jurisdictional waters, resulting in avoidance of more than 10,000 acres of wetlands due to efforts of the corps permit managers to work with applicants to avoid and minimize impacts. In addition, the corps required applicants to provide more than 56,000 acres of wetlands to compensate for the unavoidable, permitted impacts. The corps requires greater than 1:1 mitigation ratios to insure mitigation success to meet the no net loss goal.

Question 4. Mr. Grumbles, what does the EPA plan to do to ensure continued protections for the nation's waters in the wake of the Rapanos/Carabell decision?

Response. EPA and the corps have a long history of working together closely and cooperatively in order to fulfill our important statutory duties on behalf of the pub-

lic, and we expect this cooperative approach to continue as we implement the Clean Water Act as interpreted by the Rapanos decision.

In this regard, the corps and EPA have concluded a number of written agreements to further these cooperative efforts in a manner that promotes predictability, consistency, and effective environmental protection. For example, on March 28, 2006, the U.S. Army Corps of Engineers and EPA published a proposed set of new standards to promote "no net loss" of wetlands and streams. This proposed "mitigation rule" represents a collaborative effort between the corps and EPA to develop a consistent set of science-based standards to compensate for unavoidable impacts to wetlands, streams, and other aquatic resources. The rule establishes a single set of standards that all forms of compensation must satisfy, and that is based on better science, increased public participation, and innovative market-based tools.

Intergovernmental cooperation extends well beyond EPA and the corps. An important component of successful implementation of the CWA section 404 program is a close working relationship with States and Tribes. States and Tribes may assume operation of the section 404 program, and to date two have done so (Michigan and New Jersey). Many States and Tribes have chosen to protect wetlands under State/Tribal law, while working cooperatively with the Federal agencies without formally assuming the 404 program.

The Administration remains committed to a strong Federal–State partnership to protect the Nation's waters. Annually, EPA has awarded an average of $15 million to help enhance existing or develop new wetlands protection programs at the State, Tribal, and local levels. The Bush administration has asked Congress to appropriate an additional $1 million for these important programs as part of its fiscal year 2007 budget request. In addition to the grants mentioned above, EPA provides funding assistance for a variety of CWA programs involving wetlands and other waters. For example, EPA awards grants to States and Tribes to implement projects and programs to reduce "nonpoint" sources of pollution, to support approaches of controlling stormwater and other "wet weather flows," and to reduce and prevent pollution of specific waters such as the Great Lakes and the Chesapeake Bay. The Agency also advances the President's Cooperative Conservation agenda through collaborative efforts such as the 5 Star Grants Program and the National Estuaries Program.

Question 5. Mr. Grumbles, the Clean Water Authority Restoration Act would take the EPA's and corps' definition of "waters" and add it to the statute. Wouldn't this bill have essentially the same effect as the position taken by the administration in Court?

Response. The Administration has not stated a position regarding the Clean Water Authority Restoration Act. Similarly, EPA has not assessed how the Clean Water Authority Restoration Act relates to the legal arguments made in court. The Agencies appreciate the interest that the bill's cosponsors have in strong protection of the Nation's aquatic resources.

Question 6. Mr. Grumbles, it seems inevitable that the Rapanos-Carabell decision will affect Clean Water Act programs other than wetlands. I understand there is already one case in court challenging the scope of the Agency's oil spill prevention and liability program under section 311 based on the Supreme Court's decisions. What are the implications of the Rapanos-Carabell decision for all of the other Clean Water Act programs administered by your Agency?

Response. The agencies respectfully request to defer our answer to this question until we have completed our joint guidance addressing the Court's decision in Rapanos. We will provide a copy of that guidance to the subcommittee when it is completed.

Question 7. During the hearing, I inquired as to the jurisdictional status of Lake Champlain and its tributaries post-Rapanos-Carabell. You indicated that you did not know if the jurisdictional status of the Lake and its tributaries had changed, and that you would provide an answer for the record. Please indicate if the jurisdictional status of Lake Champlain and its tributaries has changed post-Rapanos-Carabell.

Response. Clean Water Act jurisdiction over Lake Champlain, as an interstate water that is "traditionally navigable," as courts have interpreted this term, is unaffected by the Supreme Court decision in Rapanos. Regarding jurisdiction over tributaries to Lake Champlain, it would be necessary to gather additional facts about each tributary in order to make a determination regarding potential effects in light of Rapanos.

Question 8. In April, the EPA issued its first Wadeable Streams assessment, focusing specifically on streams that could be measured without a boat. You found that 42 percent of such streams nationwide are impaired. In January of 2005, the EPA wrote a letter suggesting that about 53 percent of all streams nationwide are

non-navigable. Given this information, of the 42 percent of streams that are impaired, about how many would lose protections if the jurisdictional test in the Scalia opinion were to become the standard?

Response. The Scalia test indicates that waters that are traditionally navigable or wetlands immediately adjacent are jurisdictional, as well as tributaries that are "relatively permanent" and wetlands that have a continuous surface connection to such waters. As discussed above, the joint EPA/corps guidance is still pending.

As discussed in the January 9, 2006 letter, the extent of non-navigable tributaries on a national scale is difficult to estimate because "navigability" and "relatively permanent" are not parameters included in national databases. For example, the NHD does not distinguish between navigable and non-navigable waters.

Question 9. On June 1, the New England Regional Administrator of the EPA wrote an opinion piece entitled, "Wetlands Can Help Reduce Flooding." It stated, ". . . one of the driest spring seasons in decades transformed into two weeks of heavy rainfall, causing major flooding—Can our natural environment keep pace with such extremes? The answer may be "yes," so long as we keep wetlands around to help mitigate the effects of extreme weather." In a world where we are beginning to see the effects of global climate change, we are likely to be looking for mitigating actions in the near future. Mr. Grumbles, can you describe how wetlands can help mitigate the impacts of flooding?

Response. Wetlands provide a variety of different functions "in place," the benefits of which are realized in the immediately surrounding landscape, but which also have repercussions for the integrity of waters downstream. Among the most prominent of these is flood control. The immediate effects of floodwater detention within a given hydrologic regime are felt most clearly immediately downstream of the detention, so wetlands that detain floodwaters most clearly protect areas immediately downstream; it is as these effects are aggregated across a large landscape that they gain importance for mitigation of flood flows in navigable-in-fact waters.

The ability of wetlands to reduce the impacts of floodwaters can also mitigate for excessive flows during times of flooding, allowing navigable-in-fact waters to constantly maintain their navigability. An analysis of the 1993 floods of the Mississippi River concluded that the excessive flow, caused in part by wetlands loss, contributed to severe disruptions in navigation along the Mississippi mainstem. Barge traffic was closed on the majority of mainstem rivers from July 11–August 15, 1993, with severe limitations continuing until November of that year. The navigation industry lost an estimated $300 million per month, with Illinois alone losing more than $165 million, according to the Interagency Floodplain Management Review Committee report, "Sharing the Challenge: Floodplain Management into the 21st Century" (Washington, DC: Government Printing Office, 1994, p. 19).

Question 10. Did the EPA approve the Army Corps guidance that restricts Clean Water Act jurisdiction to Section 10 of the Rivers and Harbors Act?

Response. We are assuming that you are discussing the guidance to their respective field staffs that EPA and the corps issued shortly after the Rapanos decision. EPA and the corps coordinated the agencies' respective initial guidance to the field, and agreed that it would be best to delay new jurisdictional determinations outside the scope of traditionally navigable waters pending release of the Rapanos interim guidance. However, the corps' initial guidance called for continued issuance of new general and individual permits in order to minimize impacts to ongoing activities subject to regulation under Section 404, and noted that modifications could be made to such permits if appropriate following issuance of the interim guidance. The corps initial guidance did not indicate that CWA jurisdiction after Rapanos was limited to Section 10 waters.

Question 11. What actions has the EPA taken to work with the Army Corps to implement the findings of the 2005 GAO report recommending that the corps require detailed rationales for non-jurisdictional decisions and finalize with EPA the additional guidance to help the districts make certain jurisdictional decisions?

Response. Together, the EPA and the corps have been taking several steps to enhance data collection and other elements of program implementation. For example:

- The corps worked with EPA to create a reporting form to guide jurisdictional analysis and record the basis for determination.
- All CWA §404 jurisdictional determinations are required to be posted on the District web sites for public access.

Based on 2 years of posted JD data and the Rapanos decision, the Agencies are updating the questions and developing a single form to document all jurisdictional decisions.

Future guidance will continue to focus on improvements to documentation in response to these inconsistencies.

RESPONSES BY BENJAMIN GRUMBLES TO ADDITIONAL QUESTIONS FROM SENATOR BOND

Question 1. Provide and describe, if available, the statutory, regulatory or case law authority for Federal regulation of runoff.

Response. The principal source of authority for EPA's regulation of storm water is section 402(p) of the Clean Water Act. 33 U.S.C. §1342(p). Amendments to the CWA in 1987 added section 402(p), which directs EPA to implement, in two phases, a program for addressing storm water discharges. Section 402(p)(4) requires that EPA establish regulations setting forth permit application requirements for storm water discharges associated with industrial activity and municipal separate storm sewer systems serving populations of 100,000 or more. Section 402(p)(5) requires EPA to study additional classes of storm water discharges. Section 402(p)(6) directs EPA to issue regulations (based on the results of the studies under section 402(p)(5)) to designate additional classes of storm water discharges to be regulated to protect water quality and to establish a comprehensive program to regulate such designated sources. EPA's regulations governing storm water discharges are found at 40 C.F.R. §§122.26, 122.30–122.37.

EPA's "Phase II" storm water regulations were largely upheld by the United States Court of Appeals for the Ninth Circuit in Environmental Defense Center v. EPA, 344 F.3d 832 (9th Cir. 2003).

EPA's storm water regulations were amended most recently on June 12, 2006 in response to an amendment to the CWA passed in the Energy Policy Act of 2005. See, 71 Fed. Reg. 33628–33640.

Under the CWA, EPA also regulates discharges from concentrated animal feeding operations (CAFOs) and land application areas under the control of CAFOs, which consist, in part, of storm water runoff. See. 33 U.S.C. §§1362(14), 1342. EPA's regulations governing discharges from CAFOs are primarily found at 40 C.F.R. §122.23 and 122.42(e). "Agricultural storm water discharges" are not subject to permitting requirements under the CWA. See 33 U.S.C. §§1362(14)

Question 2. How, if available, is the Federal Government authorized to limit actions creating runoff where no runoff existed before? Example scenario: construction of a parking lot which has the effect of creating runoff. Please provide examples and descriptions of the Federal statutory and regulatory authority that would be used, examples of any applicable Federal guidance, determinations or case law, and any permitting process required to undertake the action.

Response. EPA regulates the discharge of storm water through the NPDES permitting program under section 402 of the CWA. EPA does not, however, regulate land use decisions under the CWA. These decisions are generally covered by local ordinances or zoning codes. The NPDES storm water program covers discharges of storm water from municipal storm sewer systems, industrial facilities, and construction sites (generally those disturbing an acre or more of land).

Under these three categories of discharges, runoff from individual parking lots is not regulated by the NPDES storm water program and individual parking lots would not require NPDES permits for the runoff flowing from them, except in limited instances where the storm water from the parking lot is a "storm water discharge associated with industrial activity" as that term is defined in 40 C.F.R. §122.26(b)(14). Regarding construction of a parking lot, EPA regulations require the construction site operator to obtain an NPDES permit for storm water discharges occurring during the construction of the lot if one acre or more of land is disturbed. 40 CFR §§122.26(b)(14)(x) and 122.26(b)(15).

EPA and authorized States do have the authority to permit other discharges: (1) for which storm water controls are needed based on wasteload allocations that are part of a total maximum daily load, (2) that contribute to a violation of a water quality standard, or (3) that are a significant contributor of pollutants to waters of the United States. 33 U.S.C. §1342(p)(2)(E); 40 C.F.R. §122.26(a)(9)(i)(C), (D).

If a facility takes actions to create a storm water discharge that does not, in itself require an NPDES permit, but discharges storm water through a municipal separate storm sewer system (MS4) that is subject to NPDES requirements, there may be storm water control measures required by the MS4 operator that apply to the discharger. MS4 permits typically require the municipal permittee to implement storm water management programs to protect water quality. Such a municipal storm water management program may establish requirements for facilities that discharge storm water into the MS4.

Question 3. How, if available, is the Federal Government authorized to limit actions allowing runoff where the potential runoff is currently blocked? Example scenario: removal or compromising of a physical barrier, such as a berm, adjacent to a parking lot, thereby allowing runoff from the parking lot. Please provide examples

and descriptions of the Federal statutory and regulatory authority that would be used, examples of any applicable Federal guidance, determinations or case law, and any permitting process required to undertake the action.

Response. As discussed above, section 402(p) of the CWA directs EPA to develop NPDES regulations for storm water discharges. The regulations EPA developed under section 402(p) require NPDES permits for certain classes of storm water discharges, including storm water discharges associated with industrial activity, storm water discharges from certain construction activities and discharges from many municipal separate storm sewer systems (MS4). If a facility takes actions to create a storm water discharge that is subject to the NPDES program, the discharge must be authorized by an NPDES permit and will be subject to the requirements of the permit. Additionally, EPA has authority to require NPDES permits for other storm water discharges that impact water quality. 33 U.S.C. §1342(p)(2)(E); 40 CFR 122.26(a)(9)(i)(C), (D).

Similar to the scenario described in the previous question, if a facility discharges storm water through an MS4 that is subject to NPDES requirements, there may be storm water control measures required by the MS4 operator that apply to the discharger.

Question 4. How, if available, are State or local Governments authorized to limit runoff as described above? Provide examples of such authority.

Response. Forty-five States administer NPDES programs approved by EPA under CWA section 402(b). Such programs must have legal authority to implement provisions set forth in EPA's regulations. See 40 C.F.R. §123.25. (States are not precluded from omitting or modifying provisions in EPA's regulations if they impose more stringent requirements.) Among the provisions in EPA's regulations that States must have legal authority to implement in an approved NPDES program is 40 C.F.R. §122.26 Storm water discharges. See 40 C.F.R. §123.25(a)(9).

States with approved programs, like EPA, have authority to require an NPDES permit where storm water controls are needed based on wasteload allocations that are part of a total maximum daily load, or for discharges that contribute to a violation of a water quality standard, or that are a significant contributor of pollutants to waters of the United States. 33 U.S.C. §1342(p)(2)(E); 40 C.F.R. §122.26(a)(9)(i)(C), (D). Examples of the use of this designation authority include Connecticut's designation of all storm water discharges directly related to retail, commercial, and/or office services whose facilities occupy five acres or more of contiguous impervious surface; and Vermont's permit requirement for storm water discharges from existing and new development and redevelopment sites.

Finally, EPA regulations require local Governments or other entities that operate large or medium MS4s to have adequate legal authority, under statute, ordinance or contract, to prohibit illicit discharges, control storm water discharges from industrial and other sources, carry out inspections, require compliance, and perform other functions. See 40 C.F.R. §122.26(d)(2)(i). Authority for controls implemented by small MS4 operators is similarly provided under State, tribal or local law. See, e.g., 40 C.F.R. §122.34(b)(3)(ii)(B).

RESPONSES BY BENJAMIN H. GRUMBLES TO ADDITIONAL QUESTIONS FROM SENATOR MURKOWSKI

Question 1. Your testimony states that the EPA and corps are working on joint "guidance" clarifying Clean Water Act jurisdiction. That's an interesting term that suggests you are not moving forward on a formal rulemaking? Is that the case? And if so, why not proceed to rulemaking? Isn't this matter important enough to warrant the added certainty that would create?

Response. The Agencies are considering the need for rulemaking in light of the Rapanos decision. At this time, the Agencies recognize the importance and urgency of providing clarity to our field staff and the public to ensure that jurisdictional determinations, administrative enforcement actions, and other relevant agency actions are consistent with the Rapanos decision. Our immediate focus is on providing this clarity in a timely manner.

Question 2. Do you agree that wetlands that are frozen for a majority of the year, and which are underlain by permafrost, may serve different ecological and hydrological functions from more traditional unfrozen wetlands?

Response. While frozen wetlands have a very different mixture of plant life than other wetlands, according to the National Research Council (NRC), permafrost wetlands often perform the same functions as other wetlands. The NRC writes, "Furthermore, studies of the National Wetlands Working Group (1988) in Canada show that permafrost wetlands have the same functions as other kinds of wetlands. . . .

permafrost wetlands do not differ in their essential characteristics from other wetlands." (National Research Council. 1995. Wetlands: Characteristics and Boundaries. Washington, DC: National Academy of Sciences, p. 152). The agencies have also recognized, however, that the specific circumstances that are present in Alaska are not found elsewhere in the United States and are working to ensure that implementation of the Federal wetlands program reflect these differences.

Question 3. If the application of Federal permitting under the Clean Water Act is intended to control a contribution of pollutants to navigable waters, why should activities in a permafrost wetland where there can be no such contribution be under the same control?

Response. While the functions performed by permafrost wetlands often are the same as other wetlands, the agencies do recognize that the circumstances in Alaska where permafrost wetlands are found, are different from those found elsewhere in the United States. The agencies are working to ensure that implementation of the Federal wetlands program in Alaska effectively reflects those circumstances.

Question 4. Does it not make sense to regulate a particular parcel of land for the values it actually has, rather than the values that might be held by some other parcel of land in another location?

Response. As discussed above, implementation of the CWA section 404 program in Alaska reflects circumstances found in the State. For example, section 404 program implementation in Alaska reflects that it may not be practicable to provide compensatory mitigation through wetlands restoration or creation in areas where there is a high proportion of land which is wetland. In cases where potential compensatory mitigation sites are not available due to abundance of wetlands in a region, and a lack of enhancement or restoration sites, compensatory mitigation is not required under the section 404(b)(1) Guidelines that guide permitting decisions. Some section 404 program adaptations have been made to ensure effective public participation by all Alaskan communities. For example, announcements of potential permit actions and other section 404 program activities are translated into Native Alaskan languages so as to be able to better engage them in the public process associated with section 404.

STATEMENT OF JOHN C. CRUDEN, DEPUTY ASSISTANT ATTORNEY GENERAL, ENVIRONMENT AND NATURAL RESOURCES DIVISION, U.S. DEPARTMENT OF JUSTICE

INTRODUCTION

Chairman Chafee, Senator Clinton, and members of the subcommittee, thank you for inviting the Department of Justice to testify about a recent and important environmental case, Rapanos v. United States,—U.S.—, 126 S. Ct. 2208 (2006), in which the Supreme Court addressed the jurisdictional scope of the Clean Water Act (CWA) in two consolidated cases, Rapanos v. United States, 376 F.3d 629 (6th Cir. 2004) and Carabell v. United States Army Corps of Eng'rs, 391 F.3d 704 (6th Cir. 2004). I am pleased to be joined by Benjamin Grumbles, the Assistant Administrator for Water, U.S. Environmental Protection Agency, and John Paul Woodley, Jr., Assistant Secretary of the Army for Civil Works. They will provide an overview of national wetlands protection policy under the CWA as well as EPA and Corps of Engineers responsibilities while I will focus more on litigation by the Department of Justice.

I am the Deputy Assistant Attorney General, Environment and Natural Resources Division (ENRD or the Division), U.S. Department of Justice. The Division is responsible for representing the United States in litigation involving environmental and natural resources statutes, and wetlands litigation under the CWA is a part of our responsibilities. We defend Federal agencies when their administrative actions are challenged, and we also bring enforcement cases against individuals or entities that violate environmental and natural resources statutes. The Division has a docket of well over 7,000 pending cases and matters, with cases in nearly every judicial district in the Nation. We litigate cases arising from more than 70 different environmental and natural resources statutes.

In this testimony, I will first provide a brief overview of our CWA docket, in particular those cases involving wetlands. I will then outline the statutory and U.S. Supreme Court background for the Rapanos decision, the position of the United States in that litigation, and the Supreme Court holding. I will then turn to what actions the Department of Justice has taken since the issuance of the decision, the standard of law we believe is applicable on remand of those two cases, and several key issues that might arise from the decision.

As this subcommittee knows, however, the position of the United States in litigation is expressed in briefs we file with the courts. Our legal position must be tied

to the facts and take into account the precedent within the jurisdiction in which we are litigating. In addition, because we litigate cases on behalf of the United States, we coordinate with potentially affected Federal agencies before we file a brief. Accordingly, although I will describe to you our preliminary thinking about this important decision issued over a month ago, my testimony should not be used in litigation in any particular case. Instead, the position of the United States in any particular case will be articulated in the context of that case.

AN OVERVIEW OF OUR CLEAN WATER ACT DOCKET

The Department of Justice's primary role with regard to the CWA is to represent the Environmental Protection Agency ("EPA"), the Army Corps of Engineers ("corps"), and any other Federal Agency that might be involved in litigation that arises pursuant to the CWA. We frequently defend Federal agencies that are being sued in connection with the CWA. Such actions can take a variety of forms. For example, affected parties will sometimes bring an action against the corps when it makes a case-specific decision, such as the grant or denial of a CWA permit. Regulated entities, environmental interests, and public entities such as municipalities may also seek judicial review when the corps and EPA make broader policy decisions such as those embodied in a rulemaking. Parties may also sue EPA for failure to perform a non-discretionary duty under the CWA. Finally, Federal agencies can be sued for discharging pollutants into waters of the United States if they have not complied with the applicable requirements of the CWA. In ENRD, we have an Environmental Defense Section that specializes in defending the actions of Federal agencies, including EPA and the corps, when they are challenged in court in connection with the CWA.

ENRD also brings actions to enforce the CWA. Three sections in ENRD handle CWA enforcement actions. Civil enforcement cases are generally handled by our Environmental Enforcement Section, except wetlands cases brought pursuant to CWA section 404, which are handled by our Environmental Defense Section or by U.S. Attorney's Offices. Criminal enforcement of the CWA is handled by our Environmental Crimes Section, usually in conjunction with local U.S. Attorney's Offices.

CWA civil judicial enforcement actions generally begin with a referral or investigation from another Federal agency, whether it is EPA or the corps, regarding alleged violations of the CWA. Often by the time we receive a referral, the agency in question has exhausted all avenues for resolving the dispute administratively, and has carefully considered whether judicial enforcement is the appropriate course of action. Upon receiving the Agency's recommendation, we conduct our own internal, independent inquiry and analysis to determine whether there is sufficient evidence to support the elements of the violation and whether the case is otherwise appropriate for judicial action. If we determine that judicial enforcement is warranted, we explore possibilities for achieving settlement of the alleged violations without litigation.

The vast majority of environmental violations, including CWA-type violations, are addressed and resolved by State and local Governments. In the wetlands area, most Federal enforcement of the CWA occurs at the administrative level and is carried out by EPA and the corps, and does not involve the Department of Justice. In this regard, I commend the corps for implementing an administrative appeals process in 2000. The process allows disputes over whether a site is subject to corps jurisdiction under the CWA (so-called "jurisdictional determinations") to be resolved before a matter gets to the point of potential litigation, which is when the Department of Justice would get involved. The Department also litigates cases regarding discharges into nonnavigable tributaries of navigable-in-fact waters.

In sum, the Division, in conjunction with U.S. Attorney Offices across the nation, litigates CWA actions that involve the United States. The wetlands caseload is a portion of ENRD's case responsibilities. On average, we handle about 10-15 new wetlands enforcement cases each year on behalf of the EPA or the corps. In addition, there have been a few criminal cases involving wetlands.

STATUTORY AND CASE LAW CONTEXT FOR THE RAPANOS DECISION

Clean Water Act and Regulations

Congress enacted the CWA in 1972 "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" as provided in section 101(a).[1]

[1] The 1972 legislation extensively amended the Federal Water Pollution Control Act (FWPCA), which was originally enacted in 1948. Further amendments to the FWPCA, which were enacted in 1977, changed the popular name of the statute to the Clean Water Act. Pub. L. No. 95-217,91 Stat. 1566; 33 U.S.C. 1251 note.

One of the mechanisms adopted by Congress to achieve that purpose is a prohibition contained in section 301(a) on the discharge of any pollutant, including dredged or fill material, into "navigable waters" except pursuant to a permit issued in accordance with the Act. The CWA defines the term "discharge of a pollutant" in section 502(12)(a) as "any addition of any pollutant to navigable waters from any point source . . . ." It defines the term "pollutant" in section 502(6) to mean, among other things, dredged spoil, rock, sand, and cellar dirt. The CWA provides in section 502(7) that "[t]he term 'navigable waters' means the waters of the United States, including the territorial seas." [2] While earlier versions of the 1972 legislation included the word "navigable" within that definitional provision, the Conference Committee deleted that word and expressed the intent to reject prior geographic limits on the scope of Federal water-protection measures. Compare S. Conf. Rep. No. 1236,92d Cong., 2d Sess. 144 (1972), with H.R. Rep. No. 91 1,92 Cong., 2d Sess. 356 (1972) (bill reported by the House Committee provided that "[t]he term 'navigable waters' means the navigable waters of the United States, including the territorial seas").

The CWA establishes two complementary permitting programs through which appropriate Federal or State officials may authorize discharges of pollutants from point sources into the waters of the United States. Section 404(a) of the CWA authorizes the Secretary of the Army, acting through the corps, to issue a permit "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." Under Section 404(g), the authority to permit certain discharges of dredged or fill material may be assumed by State officials. Pursuant to Section 402 of the CWA, the discharge of pollutants other than dredged or fill material (sewage, chemical waste, and biological materials) may be authorized by the EPA, or by a State with an approved program, under the National Pollutant Discharge Elimination System (NPDES) program.[3]

U.S. Supreme Court Backdrop for the Rapanos Decision

In United States v. Riverside Bawiew Homes, Inc., 474 U.S. 121 (1985), and subsequently in Solid Waste Agency of Northern Cook County v. United States Army Corps of Eng'rs, 53 1 U.S. 159 (2001) (S WANCC), the Supreme Court addressed the proper construction of the CWA terms "navigable waters" and "the waters of the United States." In Riverside Bawiew, the Court framed the question before it as "whether the [CWA], together with certain regulations promulgated under its authority by the [corps], authorizes the corps to require landowners to obtain permits from the corps before discharging fill material into wetlands adjacent to navigable

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[2] For purposes of the Section 402 and 404 permitting programs, as discussed below, the current EPA and corps regulations implementing the CWA include substantively equivalent definitions of the term "waters of the United States." The corps defines that term to include: (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide; (2) All interstate waters including interstate wetlands; (3) All other waters such as intrastate lakes, rivers, streams (including internlittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce. . . ;(4) All impoundment of waters otherwise defined as waters of the United States under the definition; (5) Tributaries of waters identified in paragraphs (a)(l) through (4) of this section; (6) The territorial seas; (7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(l) through (6) of this section. 33 C.F.R. 328.3(a); see 40 C.F.R. 230.3(s) (EPA). The regulations define the term "wetlands" to mean "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas." 33 C.F.R. 328.3(b). The term "adjacent" is defined to mean "bordering, contiguous, or neighboring," and the regulations state that "[w]etlands separated from other waters of the United States by man-made dikes or bamers, natural river berms, beach dunes and the like are 'adjacent wetlands.'" 33 C.F.R. 328.3(c).

[3] Congress established a mechanism under Section 404(g)(l) by which a State may assume responsibility for administration of the Section 404 program with respect to "the discharge of dredged or fill material into the navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce . . . including wetlands adjacent thereto). . . ." If the EPA Administrator approves a proposed State program, the corps is directed under Section 404(h)(2)(A) to "suspend the issuance of permits . . . for activities with respect to which a permit may be issued pursuant to such State program. . . ." Under a State-administered program, EPA and the corps retain authority under Section 404(h)(l)(D)-(F) to forbid or impose conditions upon any proposed discharge permit. EPA also retains enforcement authority under Sections 404(n) and 309 to issue compliance orders and commence administrative, civil, and criminal actions to enforce the CWA. A similar State authorization program exists for the NPDES program under Section 402(b) of the CWA.

bodies of water and their tributaries." 474 U.S. at 123. The Court unanimously sustained the corps' regulatory approach as a reasonable exercise of the authority conferred by the CWA. At the same time, however, the Court declined "to address the question of the authority of the corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water. . . . "Id. at 131-132 n.8.

In SWANCC, the Supreme Court in 2001 faced an aspect of the question reserved in Riverside Bawiew, and it rejected the corps' construction of the term "waters of the United States" as encompassing "isolated," intrastate, nonnavigable ponds based solely on their use as habitat for migratory birds. 53 1 U.S. at 171-172. The Court explained that, if the use of isolated ponds by migratory birds were found by itself to be a sufficient basis for Federal regulatory jurisdiction under the CWA, the word "navigable" in the statute would be rendered meaningless. Id. at 172. The Court also looked to the well-established doctrine that "[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." Id. A clear expression of Congressional intention, the Court opined, was particularly necessary "where the administrative interpretation alters the Federal-State framework by permitting Federal encroachment upon a traditional State power." Id. at 173. The Court found no clear indication of Congressional intention in this context. Following the SWANCC decision, a significant amount of litigation ensued, ultimately resulting in seven of eight Circuit Courts of AppeaI generally holding that the SWANCC decision applied to intrastate, non-navigable, isolated bodies of water, and did not affect jurisdiction over tributaries to navigable-in-fact waters or wetlands adjacent to such tributaries. See, eg., United States v. Johnson, 437 F.3d 157 (1st Cir. 2006); United States v. Deaton, 332 F.3d 698 (4th Cir. 2003), cert. denied, 541 U.S. 972 (2004); United States v. Gerke Excavating, Inc., 412 F.3d 804 (7th Cir. 2005), petition for cert. manted and jud-pent vacated, 74 U.S.L.W. 3714 (U.S. June 26,2006) (No. 05–623); Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526 (9th Cir. 2001); United States v. Hubenka, 438 F.3d 1026 (10th Cir. 2006), petition for cert. pending (U.S. May 17, 2006) (No. 05–1 1337); Parker v. Scrap Metal Processors. Inc., 386 F.3d 993 (1 lth Cir. 2004).

THE RAPANOS DECISION

Lower Court Decisions in Rapanos and Carabell

In Rapanos, the Supreme Court addressed the jurisdictional scope of the CWA in two consolidated cases. The first case, Rapanos v. United States, involved a developer who, without a permit, filled 54 acres of wetlands adjacent to tributaries of navigable-in-fact water bodies. 376 F.3d 629 (6th Cir. 2004). The District Court found Federal jurisdiction over the wetlands because they were adjacent to "waters of the United States" and held petitioners civilly liable for CWA violations. The Sixth Circuit affirmed the District Court's decision and found the wetlands within the scope of the CWA's protections based on the wetlands' hydrologic connections to tributaries of navigable-in-fact waters.

The second case, Carabell v. United States Army Corps of Engineers, involved a permit applicant who was denied authorization to fill wetlands physically proximate to, but separated by a berm from, a tributary of a navigable-in-fact waterbody. 391 F.3d 704 (6th Cir. 2004). The District Court found the wetlands to be within the scope of the CWA's protections over the wetlands because they were adjacent to tributaries of navigable-in-fact waters. The Sixth Circuit affirmed the District Court on the basis that a "significant nexus" existed between the wetlands at issue and an adjacent nonnavigable tributary of navigable-in-fact waters.

The Supreme Court granted certiorari, in part, on the question of whether jurisdiction under the CWA extends to wetlands that are adjacent to tributaries of navigable-in-fact waters.[4]

The United States argued before the Supreme Court that the corps and EPA acted reasonably in defining the CWA term "the waters of the United States" to include wetlands adjacent to tributaries of navigable-in-fact waters. Petitioners, on the other hand, argued that only wetlands adjacent to (abutting) traditional navigable waters are included within the statutory term (Rapanos); and that the CWA does not ex-

[4] The Supreme Court also granted certiorari on the question of whether such an interpretation of the CWA was constitutional. The United States argued that as applied to the wetlands filling activities under review, the CWA's ban on unauthorized pollutant discharges was a permissible exercise of Congress' power to regulate (a) the channels of interstate commerce and (b) activities that substantially affect interstate commerce. The Supreme Court did not reach this question in the Rapanos decision.

tend to wetlands that are hydrologically isolated from any navigable water of the United States (Carabell).

The Supreme Court Decision in Rapanos

The judgment of the Supreme Court was to vacate and remand both cases for further proceedings. In summary, four Justices, in a plurality opinion authored by Justice Scalia, concluded that "the lower courts should determine . . . whether the ditches or drains near each wetland are 'waters' in the ordinary sense of containing a relatively permanent flow; and (if they are) whether the wetlands in question are 'adjacent' to these 'waters' in the sense of possessing a continuous surface connection that creates the boundary-drawing problem we addressed in Riverside Bayview." 126 S. Ct. at 2235. Justice Kennedy, who concurred in the judgment of the Court, established a different test, concluding that the cases should be vacated and remanded to determine "whether the specific wetlands at issue possess a significant nexus with navigable waters." Id, at 2252. Chief Justice Roberts joined in the plurality opinion and also wrote a concurring opinion. Justice Stevens, in a dissenting opinion in which Justices Souter, Ginsburg, and Breyer joined, would have affirmed the decisions by the lower courts. Justice Breyer also wrote a separate dissenting opinion.

The plurality opinion, authored by Justice Scalia, first concluded that the petitioner's argument that the terms "navigable waters" and "waters of the United States" are limited to waters that are navigable in fact "cannot be applied wholesale to the CWA." Id. at 2220. Citing CWA Section 502(7) and 404(g)(l), Justice Scalia opined that "the Act's term 'navigable waters' includes something more than traditional navigable waters." Id. Then, after reviewing the statutory language, the plurality concluded that "waters of the United States," includes "relatively permanent, standing or flowing bodies of water. The definition refers to water as found in 'streams,' 'oceans,' 'rivers,' 'lakes,' and 'bodies' of water 'forming geographical features.'" Id. at 2221 (citation omitted). The phrase does not include "ordinarily dry channels through which water occasionally or intermittently flows." Id. The corps' interpretation of the term "the waters of the United States," the plurality concluded, was not based on a permissible construction of the statute.

Justice Scalia elaborated on this test in footnotes. He stated:

By describing "waters" as "relatively permanent," we do not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought. We also do not necessarily exclude seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months-such as the 290-day, continuously flowing stream postulated by Justice Stevens' dissent. . . .

It suffices for present purposes that channels containing permanent flow are plainly within the definition, and that the dissent's "intermittent" and "ephemeral" streams . . . that is, streams whose flow is "[c]oming and going at intervals . . . [b]roken, fitful," . . . or "existing only, or no longer than, a day; diurnal short lived" . . . are not. –Id. at 2221 n.5 (citations omitted).

The plurality then examined the factor of the adjacency of the wetlands under review to "waters of United States." Justice Scalia concluded that "only 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 'adjacent to' such waters and 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, and thus lack the necessary connection to covered waters that we described as a 'significant nexus' in SWANCC." Id. at 2226 (citation omitted and emphasis in original).

In response to arguments that this opinion would "frustrate enforcement against traditional water polluters [u]nder CWA sections 301 and 4021 . . ." the plurality concluded: "That is not so." Id. at 2227. The plurality went on to say that "from the time of the CWA's enactment, lower courts have held that the discharge into intermittent channels of any pollutant that naturally washes downstream likely violates [section 3011, even if the pollutants discharged from a point source do not emit 'directly into' covered waters, but pass 'through conveyances' in between." Id. (citation omitted).

Justice Kennedy did not join the plurality's opinion, but instead authored an opinion consuming in the judgment. He agreed with the plurality that the statutory term "waters of the United States" extended beyond water bodies that are navigable-in-fact. Justice Kennedy, however, concluded that wetlands are "waters of the United States" where "the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biologi-

cal integrity of other covered waters more readily understood as 'navigable.'" Id. at 2248. The concurrence by Justice Kennedy stated, in relevant part, that "[a]s applied to wetlands adjacent to navigable-in-fact waters, the corps' conclusive standard for jurisdiction rests upon a reasonable inference of ecologic interconnection, and the assertion of jurisdiction for those wetlands is sustainable under the Act by showing adjacency alone." Id. With respect to wetlands adjacent to nonnavigable tributaries, Justice Kennedy explained that:

"[a]bsent more specific regulations, . . . the corps must establish a significant nexus on a case-by-case basis[.]" Id. at 2249.

Justice Kennedy did not agree with the plurality's interpretation of "waters of the United States" and agreed with the dissent "that an intermittent flow can constitute a stream. . . . It follows that the corps can reasonably interpret the Act to cover the paths of such impermanent streams." Id. at 2243 (citation omitted).

In his concurring opinion, Chief Justice Roberts wrote that "[i]t is unfortunate that no opinion commands a majority of the Court on precisely how to read Congress' limits on the reach of the Clean Water Act. Lower courts and regulated entities will now have to feel their way on a case-by-case basis. This situation is certainly not unprecedented. See Grutter v. Bollinger, 539 U.S. 306, 325 . . . (2003) (discussing Marks v United States, 430 U.S. 188. . . (1977))." 126 S. Ct. at 2236.

The four dissenting Justices would have affirmed the lower courts' opinions and upheld the corps' exercise of jurisdiction in these cases as reasonable. Justice Stevens also concluded: "In these cases, however, while both the plurality and Justice Kennedy agree that there must be a remand for further proceedings, their respective opinions define different tests to be applied on remand. Given that all four Justices who have joined this opinion would uphold the corps' jurisdiction in both of these cases-and in all other cases in which either the plurality's or Justice Kennedy's test is satisfied-on remand each of the judgments should be reinstated if either of those tests is met." Id. at 2265.

DEPARTMENT OF JUSTICE RESPONSE TO THE RAPANOS DECISION

Following this decision, ENRD is taking steps to ensure that the legal positions already taken on behalf of the Federal Government in litigation are consistent with Rapanos, regardless of where a case arises or which agency is involved in a particular case. In addition to taking the necessary steps to ensure that our existing cases are consistent with Rapanos, we established a process that the positions we take in all Rapanos-related litigation going forward are internally consistent and appropriately coordinated within the Federal Government. We have and will continue to devote particular attention in our CWA cases to assure that there is a factually and legally sound basis, consistent with Rapanos, before asserting jurisdiction over the aquatic resources in question.

The Division convened an internal group of experienced attorneys to begin assembling and reviewing cases which could be impacted by the decision. We also began coordinating with the responsible Federal agencies, who were conducting similar reviews, to discuss the ramifications of the decision. Subsequently, the United States has sought extensions of time as necessary in filed cases; advised our attorneys nationwide to coordinate any post–Rapanos filings with our team of experienced attorneys so that our positions are accurate and consistent; and undertaken a detailed review of potentially affected cases. By letter of July 14, 2006, Michael A. Battle, Director of the Executive Office for United States Attorneys, and Sue Ellen Wooldridge, Assistant Attorney General, Environment and Natural Resources Division, wrote to United States Attorneys concerning the procedure for coordination of any filing that may raise issues related to the Rapanos decision.

Although we are moving carefully to ensure that the Federal agencies with programmatic responsibility over wetlands have adequate time to evaluate the case and advise the Department of Justice on implementing the decision, we have continued to take necessary steps to protect wetlands. For instance, we have finalized settlements that were being negotiated prior to Rapanos and where the parties still found settlement to be desirable after the ruling. In one case, for instance, we recently lodged a consent decree that requires a developer to pay a $600,000 civil penalty and restore streams and wetlands filled, without a permit, associated with construction of a golf course and related facilities in the State of Georgia. In another case, the United States recently settled a matter involving the unpermitted harvesting of peat from rare and environmentally significant peat bogs in the State of Michigan. The defendant in that case is required to restore the majority of the bog affected by the peat mining and to donate more than 2,800 acres of peatland to the State.

We have also filed pleadings in pending cases advising courts of the opinion. In one case, the United States has opposed criminal defendants' efforts to use Rapanos

to suppress evidence obtained in a search warrant. In that case, the defendants argue that the Rapanos case reaches the actions of the defendants, who piped raw, untreated human excrement directly into a creek that flows into the St. John's River in Florida.

We are just beginning to see courts apply the Rapanos decision. In another case, within days of the Supreme Court's decision, a District Court in Texas granted an oil pipeline company's motion for summary judgment, holding that the United States had not established that the discharge of at least 3,000 barrels of oil from a pipeline into an intermittent creek reached navigable-in-fact waters of the United States. The deadline for appeal of that decision has not yet passed.

In Rapanos, no opinion commanded a majority of the Court. In his concerning opinion, as we have noted, Chief Judge Roberts observed that lower courts "will now have to feel their way on a case-by-case basis." 126 S. Ct. at 2236. He did, however, provide guidance, saying that "[t]his situation is certainly not unprecedented. See Grutter v. Bollinger, 539 U.S. 306,325 . . . (2003) (discussing Marks v United States, 430 U.S. 188 . . . (1977))." Id, Since Rapanos was decided, the Supreme Court has examined another fragmented decision in the Texas redistricting case, Leame of United Latin American Citizens v. Perry, U.S. , 126 S. Ct. 2594,2607 (2006). Based on all of these decisions, the Department of Justice has advised courts that it believes the applicable standard to determine if a wetland is governed by the CWA is whether either the Rapanos plurality's or Justice Kennedy's test is met in a particular fact situation. Based on this standard, the Department of Justice filed a new wetland enforcement case last week. This case involves alleged CWA Section 404 and 402 (stormwater) violations during the construction of a senior housing development near Lynchburg, VA.

Although ENRD is reviewing CWA cases to determine whether this opinion impacts what we previously advised various courts in which litigation is pending, Rapanos dealt primarily with the status of wetlands. In the plurality opinion, Justice Scalia stressed that the decision does not affect dischargers under sections 301 and 402 of the CWA. He stated that any person clearly remains responsible for the "addition of any pollutant to navigable waters," and that includes a "pollutant that naturally washes downstream . . ." 126 S. Ct. at 2227 (citations omitted).

I would like to mention another facet of our post-Rapanos activities: working cooperatively with the States as we have done for many years. In general, we have made great strides to improve Federal–State cooperation and coordination in environmental protection generally. When the SWANCC decision was issued, we worked closely with the States and hosted a national conference and training session on wetlands protection and enforcement. The Division anticipates continuing this close work with the States. Should this opinion result in some wetlands not being covered by the CWA, States clearly have the option-as they have done in the past-of enacting legislation that would provide such protection.

CONCLUSION

In closing, I would like to assure the subcommittee that the Department of Justice takes seriously its obligation to protect public health and the environment and to enforce and defend the existing laws. The Rapanos decision is significant and the Federal agencies are diligently reviewing their cases and procedures to assure that we satisfy the newly announced standards. We will continue to review all pending and potential cases to determine whether the waters involved meet the standards articulated in the Rapanos decision.

I would be happy to answer any questions that you may have about my testimony.

RESPONSES BY JOHN C. CRUDEN TO ADDITIONAL QUESTIONS FROM SENATOR CHAFEE

Question 1. When courts are attempting to apply this complicated decision in future cases, do you believe they will apply the plurality test or the Kennedy test?

Response. As I mentioned in my opening statement, no opinion commanded a majority of the Court in Rapanos. Five Justices agreed that the judgments of the Sixth Circuit in the two consolidated cases under review should be vacated and the cases remanded for further proceedings. All Members of the Court agreed that the term "waters of the United States" encompasses some non-navigable tributaries and adjacent wetlands. Rapanos v. United States, U.S. , 126 S. Ct. 2208, 2220 (plurality opinion); id. at 2241 (Kennedy, J., consuming in the judgment); id. at 2255 (Stevens, J., dissenting). Four Justices interpreted the term as covering "relatively permanent, standing or continuously flowing bodies of water," Id. at 2225 (plurality opinion), that are connected to traditional navigable waters, id. at 2226–27, as well as

wetlands with a continuous surface connection to such water bodies, id. at 2227. Justice Kennedy would have held that the term encompasses wetlands that "possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." Id. at 2236 (Kennedy, J., consuming in the judgment); see id. at 2248 (wetlands "possess the requisite nexus" 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'). The four dissenting Justices, who would have affirmed the Court of Appeals' application of the pertinent regulatory provisions, also concluded that the term "waters of the United States" encompasses, inter alia, all tributaries and wetlands that satisfy either the plurality's standard or that of Justice Kennedy. Id. at 2265 (Stevens, J., dissenting).

In post-Rapanos filings in litigation, the Department of Justice has asserted that Clean Water Act jurisdiction over a particular wetland or other water exists if-the plurality's Justice Kennedy's test is met. This position is supported by the Rapanos decision and other case law. In his concurrence, Chief Justice Roberts wrote that "[i]t is unfortunate that no opinion commands a majority of the Court on precisely how to read Congress' limits on the reach of the Clean Water Act. Lower courts and regulated entities will now have to feel their way on a case-by-case basis." Id. at 2236. He further noted that "[t]his situation is certainly not unprecedented. See Grutter v. Bollinger, 539 U.S. 306, 325 . . . (2003) (discussing Mark v. United States, 430 U.S. 188 . . "In these cases, however, while both the plurality and Justice Kennedy agree that there must be a remand for further proceedings, their respective opinions define different tests to be applied on remand. Given that all four Justices who have joined this opinion would uphold the U.S. Army Corps of Engineers' (corps) jurisdiction in both of these cases—and in all other cases in which either the plurality's or Justice Kennedy's test is satisfied—on remand each of the judgments should be reinstated if either of those tests is met." Id. at 2265. The Department's position also reflects common sense. If the facts of a particular case satisfy the plurality test, this likely means that at least eight Justices would agree that Federal jurisdiction exists. Similarly, if the facts of a case meet the Kennedy test, this likely means that five Justices would agree that Federal jurisdiction is established. For further analysis of the Marks, Grutter, and other relevant cases, see the response to Senator Inhofe's second question.

Question 2. Row difficult will Justice Kennedy's "significant nexus" test be to measure whether a wetland or tributary is covered by the Clean Water Act in future Department of Justice enforcement and litigation proceedings?

Response. The answer to this question depends in large part on how the "significant nexus" test is interpreted and applied by U.S. Environmental Protection Agency (EPA), and the corps, as the expert regulatory agencies, and by the courts. To date, there have been very few lower court decisions addressing the issue. As noted during the August 1 hearing, EPA and the corps are currently drafting guidance addressing how the tests articulated in the Rapanos case should be applied in determining Federal regulatory jurisdiction under the Clean Water Act. In describing the "significant nexus" test, Justice Kennedy points in his opinion to a number of factors which regulatory agencies are accustomed to measuring in aquatic environments to show that wetlands "significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as a 'navigable.'" 126 S. Ct. at 2248. I am confident we will be able to demonstrate adequate evidence of the jurisdictional status of wetlands and other waters in the future.

Question 3. Why do you believe the Supreme Court issued such a convoluted judgment in this case? Where will the lower courts now head in terms of the 6th Circuit remand, as well as other Circuits on similar Clean Water Act cases?

Response. Rapanos and Carabell are complex cases that raised important issues of statutory interpretation. While the Supreme Court decision does not have a majority position, we will work diligently to protect jurisdictional wetlands nationally consistent with the decision.

With regard to the status of the two Sixth Circuit cases, on August 2, 2006, the United States Court of Appeals for the Sixth Circuit issued an order remanding United States v. Rapanos, No. 03-1489, to the United States District Court for the Eastern District of Michigan for further proceedings consistent with the ruling of the Supreme Court. On August 1, 2006, the United States filed a motion in the Sixth Circuit in Carabell v. United States Army Corps of Engineers, No. 03-1700, seeking a remand to the District Court with instructions to remand the case to the corps for application of the appropriate legal standard and further factual development. Because the Carabell case involves a challenge to the corps' assertion of jurisdiction over wetlands, for which a permit was denied, judicial review of the action

is governed by the Administrative Procedure Act ("APA"), and the court reviews an administrative record compiled by the agency in making its determination. In this regard, the Carabell case is different from the Rapanos case, which is a civil enforcement action brought by the United States seeking injunctive relief and the imposition of civil penalties. Hence, Rapanos does not involve judicial review of an Agency action under the MA and the record is developed in the District Court in such actions. For that reason, the Government did not seek a remand to the Agency in Rapanos but only a remand to the District Court. The Sixth Circuit has not yet ruled on the Government's motion for a remand in the Carabell case.

Question 4. Has the Department had to deal with criminal defendants attempting to use the Rapanos case as a defense yet?

Response. Yes. As I mentioned during the hearing, some criminal defendants have sought the dismissal of Clean Water Act charges against them, arguing that the United States no longer has jurisdiction over their conduct. United States v. Evans, No. 3:05-cr-159-J-32HTS (M.D. Fla.). The United States opposed this interpretation; and on August 2, 2006, the District Court denied the motion. That opinion is available at 2006 WL 2221629 (filed Aug. 2, 2006). Other defendants have sought reversal of their convictions after lengthy trials, based on the jurisdictional discussions in the Rapanos opinions. United States v. Moses, No. 06–30379 (9th Cir.); United States v. Cooper, No. 05–4956 (4th Cir.).

Question 5. Will Rapanos negatively impact the ability of the Department to pursue an action against the common polluter who may, for example, throw a chemical into streams?

Response. While some defendants in enforcement actions brought pursuant to sections 301 and 402 of the Clean Water Act may assert that they are entitled to defenses based on Rapanos, we will vigorously oppose such assertions. We do not believe that those defenses should ultimately prevail. See, e.g., United States v. Evans, No. 3:05-cr-159-J-32HTS, 2006 WL 2221629 (M.D. Fla. Aug. 2, 2006). The Rapanos plurality agrees. In response to arguments that the Rapanos decision would "frustrate enforcement against traditional water polluters [under Clean Water Act sections 301 and 4021 . . .," Justice Scalia concluded: "That is not so." Id. at 2227. Justice Scalia went on to say that "from the time of the CWA's enactment, lower courts have held that the discharge into intermittent channels of any pollutant that naturally washes downstream likely violates [section 3011, even if the pollutants discharged from a point source do not emit 'directly into' covered waters, but pass 'through conveyances' in between." Id. (citation omitted).

Question 6. What is the role of States in protecting waters not addressed by the Federal Clean Water Act? On a State-by-State basis, are there equivalent protections for intrastate, isolated wetlands and intermittent and ephemeral streams?

Response. States have the authority to regulate waters that are not addressed under the Clean Water Act. Section 510 of the Clean Water Act provides: "Except as expressly provided in this chapter, nothing in this chapter shall. . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." Following Solid Waste Agency of Northern Cook County v. United States Army Corps of Eng'rs, 531 U.S. 159 (2001) (SWANCC), some States enacted legislation specifically designed to protect isolated wetlands; and some States had expansive authority to regulate such wetlands before the SWANCC decision on which they could rely. The Department understands that some States regulate isolated wetlands and intermittent and ephemeral streams, but protections vary from State to State, and some States have no provisions for the protection of these waters beyond the Federal Clean Water Act. Because of the States' important and independent authority, we will continue to work with the Association of State Wetland Managers and others to support State efforts.

RESPONSES BY JOHN C. CRUDEN TO ADDITIONAL QUESTIONS FROM SENATOR INHOFE

Question 1. You testified "In SWANCC, however, the Supreme Court held that isolated non-navigable intrastate waters did not become waters of the United States." Given the Court's affirmative statement that these areas are not waters of the United States, how can the Government continue to regulate ephemeral washes and other seasonal flows that do not have a connection to an adjacent waterbody?

Response. In Solid Waste Agency of Northern Cook County v. United States Army Corps of Eng'rs, 531 U.S. 159 (2001) (SWANCC), the Supreme Court held that use of non-navigable, isolated, intrastate waters as habitat by migratory birds was not

by itself a sufficient basis for the exercise of Federal regulatory jurisdiction under the Clean Water Act. Id. at 166-74. The Supreme Court did not rule on the validity of other grounds for asserting jurisdiction over such waters, or invalidate the current Federal regulations defining "waters of the United States" (33 C.F.R. 328.3(a); see also 40 C.F.R. 230.3(s)), nor did SWANCC address tributaries that may ultimately connect to traditional navigable waters.

With regard to the question of Clean Water Act regulation of ephemeral or seasonal waters following the Rapanos decision, the Department of Justice defers to EPA and the corps as the expert regulatory agencies to identify types of waters that meet the plurality's test or Justice Kennedy's "significant nexus" test. As noted during the August 1 hearing, EPA and the corps are currently drafting guidance addressing how the tests that were articulated in the various opinions in the Rapanos case should be applied in determining Federal regulatory jurisdiction under the Clean Water Act.

I note that Rapanos involved two consolidated cases in which the Clean Water Act had been applied to pollutant discharges into wetlands adjacent to non-navigable tributaries of traditional navigable waters, and the Supreme Court decided only the question of whether the Sixth Circuit properly determined those wetlands to be "waters of the United States" under the Clean Water Act. As we discussed during the hearing, the Department of Justice has asserted that Clean Water Act jurisdiction over a particular wetland or other water exists if the plurality's Justice Kennedy's test is met.

In the plurality, Justice Scalia concluded that "the lower courts should determine . . . whether the ditches or drains near each wetland are 'waters' in the ordinary sense of containing a relatively permanent flow; and (if they are) whether the wetlands in question are 'adjacent' to these 'waters' in the sense of possessing a continuous surface connection that creates the boundary-drawing problem we addressed in Riverside Bayview." 126 S. Ct. at 2235. The plurality opinion concluded that the term "waters of the United States" "does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall." Id. at 2225. In footnote five of his opinion, however, Justice Scalia stated: "By describing 'waters' as 'relatively permanent,' we do not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought. We also do not necessarily exclude seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months. . . ." Id. at 2221.

Justice Kennedy concluded that the Rapanos and Carabell cases should be vacated and remanded to determine "whether the specific wetlands at issue possess a significant nexus with navigable waters." Id. at 2252. He recognized the significance of some "irregular flows" for "a statute concerned with downstream water quality." Id. at 2242. Justice Kennedy agreed with those Justices joining Justice Stevens' dissenting opinion that "the corps can reasonably interpret the Act to cover the paths of such impermanent streams." Id. at 2243; see id. at 2260–62.

Question 2. In response to one of my earlier questions, you stated "And what the Supreme Court said in Marks is . . . the narrowest position or maybe the one that has the greatest commonality is the one that would control." To quote from the case, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." (Marks v. U.S. 430 U.S. 188 (1977)). The precedent established by Marks then is not that the narrowest position or the one with the greatest commonality holds. It is that the narrowest position of those who concurred in the result of the case and in Rapanos, that is those who concurred in the remand of the case. In particular, both Kennedy and the plurality held that neither hydrological connection nor the ordinary high water mark are sufficient to establish jurisdiction.

Do you agree therefore that the only appropriate position for the Administration to take as it moves forward is that the holding is the overlap between Kennedy and the plurality which would limit Federal jurisdiction?

Response. No. As I stated during the hearing, the position of the Department of Justice is that wetlands jurisdiction can be satisfied under the Rapanos decision by meeting either the plurality's test or Justice Kennedy's test. Further, there isn't any real overlap between the plurality and Kennedy opinions. As the Solicitor General recently advised the Supreme Court: "Neither of those grounds for decision is inherently narrower than the other, thus making it logically impossible to identify a consensus narrowest position among the views of the Justices who concurred in the judgment." Brief of the United States in the U.S. Supreme Court in Opposition to the Petition for a Writ of Certiorari at 13 n.4, Hubenka v. United States, No. 05–1337 (U.S. filed August 7, 2006) (U.S. Hubenka brief).

To conclude that the Marks decision compels finding and applying an overlap between the plurality and Kennedy opinions is also a misreading of both the Marks decision and the other decision cited by Chief Justice Roberts in his concurring opinion in Rapanos, Btter v. Bollinger, 539 U.S. 306 (2003). In Marks, interpreting a prior Supreme Court decision on obscenity, the Supreme Court relied on an earlier decision, Memoirs v. Massachusetts, 383 U.S. 413 (1966), and held that "[t]he view of the Memoirs plurality therefore constituted the holding of the Court and provided the governing standards." 430 U.S. at 194. In Grutter, again faced with interpreting a Supreme Court decision in which there was no majority, the Court endorsed the opinion of a single Justice who had concurred in the outcome of the original decision. 539 U.S. at 323-25.

Recently, the Solicitor General advised the Supreme Court of the position of the United States concerning the application of Marks to the Rapanos case. Brief of the United States in Opposition to the Petition for a Writ of Certiorari in Hubenka v. United States, as noted above. The following is an extract from the U.S. Hubenka brief at 12-14 (footnote omitted):

In some fractured decisions, the narrowest rationale adopted by one or more Justices who concur in the judgment may be the only controlling principle on which a majority of the Court's Members agree. In that situation, application of the rule announced in Marks provides a sensible approach to determining the controlling legal principles of the case. But in Rapanos, as in some other instances, no opinion for the Court exists and neither the plurality nor the concurring opinion is in any sense a "lesser included" version of the other. In that instance, the principles on which a majority of the Court agreed may be illuminated only by consideration of the dissenting Justices' views. The dissenting opinions, by emphasizing controlling legal principles on which a majority of the Court agrees, may thereby contribute to an understanding of the law created by the case. And once those principles have been identified, sound legal and practical reasons justify a rule that a lower Federal court should adhere to the view of the law that a majority of this Court has unambiguously embraced. See Waters v. Churchill, 511 U.S. 661, 685 (1994) (Souter, J., concurring)(analyzing the points of agreement between plurality, concurring, and dissenting opinions to identify the legal "test that lower courts should apply," under Marks, as the holding of the Court); cf. League of United Latin American Citizens v. w, 126 S. Ct. 2594, 2607 (2006)(analyzing concurring and dissenting opinions in a prior case to identify a legal conclusion of a majority of the Court); Alexander v. Sandoval, 532 U.S. 275,281–282 (2001)(same).

Consideration of the dissenting Justices' views is consistent with the underlying purpose of the specific rule announced in Marks, because it enables lower courts to discern the governing rule of law that emerges from a fractured decision of the Court. Cf. Rapanos, 126 S. Ct. at 2236 (Roberts, C.J., concerning) (noting the need to look to Marks in view of the absence of an opinion commanding a majority of the Court). And the application of that approach here clearly supports finding the existence of Federal regulatory jurisdiction whenever the legal standard of the plurality or of Justice Kennedy's concurrence is satisfied, since a majority of the Court's Members would find jurisdiction in either of those instances. See id. at 2265 (Stevens, J., dissenting). Accordingly, in light of the fact that at least eight Members of the Court would find jurisdiction on the undisputed facts of this case, further review is unwarranted.

RESPONSES BY JOHN C. CRUDEN TO ADDITIONAL QUESTIONS FROM SENATOR JEFFORDS

Question 1. In your testimony you state that the Department of Justice has advised courts that it believes the standard to determine if a wetland is governed by the Clean Water Act is if the plurality or Justice Kennedy's test is met. Can you describe in a more concrete manner the types of waters that would be included in the jurisdiction of the Clean Water Act under this test?

Response. The Department of Justice defers to EPA and the corps as the expert regulatory agencies to identify types of waters that meet the plurality's test or Justice Kennedy's "significant nexus" test. As noted during the August 1 hearing, EPA and the corps are currently drafting guidance addressing how the tests articulated in the Rapanos case should be applied in determining Federal regulatory jurisdiction under the Clean Water Act.

In several filings, the United States, following coordination with the regulatory agencies, has advised courts that the facts of the particular case would satisfy the tests in Rapanos.

• Brief of the United States in the U.S. Supreme Court in opposition to the Petition for a Writ of Certiorari, Hubenka v. United States, No. 05-11337 (filed August 7, 2006)(plurality test);

• Letter of the United States to the 9th Circuit Court of Appeals, Baccarat Fremont Developers v. U.S. Army Corps of Eng'rs, No. 03-16586 (filed July 31, 2006)(Kennedy test);

• Brief of the United States to the District Court, United States v. Fabian, No. 2:02CV495RL (N.D. Ind. filed August 17, 2006)(Kennedy test).

Question 2. In your testimony, you mentioned the Texas redistricting case, League of United Latin American Citizens v. Perry. Can you elaborate on how the Supreme Court's findings in the case impact your interpretation of this decision?

Response. Please see the response to Senator Inhofe's second question, which discusses the relevance of League of United Latin American Citizens v. Perry and other cases to interpretation of fractured decisions of the Supreme Court.

Question 3. As the Justice Department noted in its brief Supreme Court, "effective regulation of the traditional navigable waters would hardly be possible if pollution of tributaries fell outside the jurisdiction of those responsible for maintaining water quality down stream." Can you explain how the Justice Department believes that this common-sence principle can be implemented in the wake of this decision?

Response. As discussed above, all Members of the Supreme Court agreed that the term "waters of the United States" encompasses some non-navigable tributaries and adjacent wetlands. 126 S. Ct. at 2220 (plurality opinion); id. at 2241 (Kennedy, J., concurring in the judgment); id. at 2255 (Stevens, J., dissenting). The extent to which the Federal Government can protect the water quality of navigable-in-fact waters by regulating discharges of pollution to their non-navigable tributaries will depend to a large extent on how the Rapanos decision is interpreted and implemented by EPA, the corps, and the lower courts.

Question 4. Does the Justice Department anticipate that the Rapanos-Carabell decision and adjacent wetlands, and do you anticipate that any changes will be limited within the wetlands program?

Response. The Department of Justice anticipates that at least initially it will face increased challenges to agency action under the Clean Water Act based on the Rapanos decision. That is to be expected with a complex decision in which there is no majority opinion and five separate opinions. A significant amount of litigation occurred after the Supreme Court's decision in Solid Waste Agency of Northern Cook County v. United States Army Corps of Eng'rs, 531 U.S. 159 (1991), resulting in more than 35 decisions in District Courts and Courts of Appeal. The United States may also face challenges to the status of waters under various Clean Water Act programs based on the tests articulated in Rapanos. Although Rapanos involved only section 404, the Clean Water Act has one definition of "waters of the United States" for purposes of various programs, including dredge and fill (section 404), the National Pollutant Discharge Elimination System (NPDES) (section 402), oil spill prevention and liability (section 31 l), and water quality standards (section 303).

Question 5. How many cases already in the lower courts are going to be affected by this decision?

Response. While we do not know how often or when defendants or parties to litigation will raise the Rapanos case, the United States has already filed pleadings interpreting Rapanos in some cases, including those cited in response to your first question, and we expect more in the future. As described in my written hearing statement, in addition to taking the necessary steps to ensure that our existing cases are consistent with Rapanos, we have established a process to ensure that the positions we take in all Rapanos-related litigation going forward are internally consistent and appropriately coordinated within the Federal Government. The Division convened an internal group of experienced attorneys to begin assembling and reviewing cases which could be impacted by the decision. We also began coordinating with the responsible Federal agencies, who were conducting similar reviews, to discuss the ramifications of the decision. Subsequently, the United States has sought extensions of time as necessary in filed cases; advised our attorneys nationwide to coordinate any post Rapanos filings with our team of experienced attorneys so that our positions are accurate and consistent; and undertaken a detailed review of potentially affected cases. By letter of July 14, 2006, Michael A. Battle, Director of the Executive Office for United States Attorneys, and Sue Ellen Wooldridge, Assistant Attorney General, Environment and Natural Resources Division, wrote to United States Attorneys concerning the procedure for coordination of any filing that may raise issues related to the Rapanos decision.

Question 6. The first district court decision to apply Rapanos-Carabell is, I believe, an oil spill case in Texas that seemed to dismiss Justice's Kennedy's "significant

nexus" test and focus instead on Justice Scalia's plurality opinion. In this case, the court ruled that EPA lacks authority under the Clean Water Act to enforce the law against an oil company that spilled 126,000 gallons of oil into a tributary stream that was dry part of the year and several miles from the nearest navigable water. What is your opinion of this case, and what implications does it have for other Clean Water Act programs?

Response. The Department of Justice does not believe that the interpretation set forth in the District Court's opinion is correct, but because this case has not yet been concluded, it would be inappropriate to comment further now.

Question 7. Would it make it easier for the Justice Department to defend agency decisions to protect streams, tributaries, wetlands and other "waters of the United States" if Congress were to pass legislation reaffirming the historic reach of the Clean Water Act?

Response. The Administration has not been requested to provide, and has not developed, a position on any currently pending bill addressing "waters of the United States." When such a request is formally made to the Administration, the Department of Justice typically participates, along with other affected Executive Agencies, in the development of a single Administration position on the bill. Of course, any proposed legislation drafted before the Rapanos decision came out must now be re-evaluated in light of that decision.

Question 8. During the hearing, Mr. Kisling states that he believes the commonalities between the plurality decision and Justice Kennedy's decision should determine jurisdiction of the Clean Water Act. Can you comment on this interpretation?

Response. I do not agree. Please see the response to Senator Inhofe's second question.

RESPONSES BY JOHN C. CRUDEN TO ADDITIONAL QUESTIONS FROM SENATOR BOND

Question 1. Provide and describe, if available, the statutory, regulatory or case law authority for Federal regulation of runoff.

Response. Assistant Administrator Grumbles will respond to this question, which was also posed to him.

Question 2. How, if available, is the Federal Government authorized to limit actions creating runoff where no runoff existed before? Example scenario: construction of a parking lot which has the effect of creating runoff. Please provide examples and descriptions of the Federal statutory and regulatory authority that would be used, examples of any applicable Federal guidance, determinations or case law, and any permitting process required to undertake the action.

Response. Assistant Administrator Grumbles will respond to this question, which was also posed to him.

Question 3. How, if available, is the Federal Government authorized to limit actions allowing runoff where the potential runoff is currently blocked? Example scenario: removal or compromising of a physical barrier, such as a berm, adjacent to a parking lot, thereby allowing runoff from the parking lot. Please provide examples and descriptions of the Federal statutory and regulatory authority that would be used, examples of any applicable Federal guidance, determinations or case law, and any permitting process required to undertake the action.

Response. Assistant Administrator Grumbles will respond to this question, which was also posed to him.

Question 4. How, if available, are State or local Governments authorized to limit runoff as described above? Provide examples of such authority.

Response. Assistant Administrator Grumbles will respond to this question, which was also posed to him.

RESPONSE BY JOHN C. CRUDEN TO AN ADDITIONAL QUESTION FROM SENATOR MURKOWSKI

Question 1. You indicated that the Department of Justice is taking steps to ensure its internal and external legal positions are consistent and coordinated in the context of the recent Supreme court ruling. What is Justice's view on the merits of rulemaking versus the "guidance" described by your colleagues? Would Justice support or oppose a rulemaking effort, and why?

Response. As Assistant Administrator Grumbles stated during the August 1 hearing, rulemaking is one among several actions that the Administration is considering in response to the Rapanos decision.

Rulemaking takes time-certainly well over a year to develop a final rule, in part, because of the important public notice and comment provisions called for under the Administrative Procedure Act. Agency guidance, which is not binding, can be developed and disseminated quickly. Guidance can assist regulators, the regulated community, and the public to understand and consistently apply statutes, regulations, and applicable case law. Guidance can help ensure that Clean Water Act jurisdictional determinations, administrative enforcement actions, and other agency actions are consistent with the Rapanos decision. Guidance does not substitute for statutory or regulatory requirements, but can provide timely implementation to assist the public. As noted during the August 1 hearing, EPA and the corps are currently drafting guidance related to the Rapanos decision. The Department believes such guidance could be extremely useful in implementing the Rapanos decision.

STATEMENT OF JONATHAN H. ADLER, PROFESSOR OF LAW, CO-DIRECTOR, CENTER FOR BUSINESS LAW AND REGULATION, CASE WESTERN RESERVE UNIVERSITY SCHOOL OF LAW

Thank you, Mr. Chairman and members of this subcommittee, for the invitation to testify on the Supreme Court's decision in Rapanos v. United States and its implications for wetland conservation. My name is Jonathan H. Adler, and I am a Professor of Law and co-director of the Center for Business Law and Regulation at the Case Western Reserve University School of Law, where I teach several courses in environmental law and constitutional law.

For the past 15 years I have researched and analyzed Federal regulatory policies, with a particular focus on the intersection of federalism and environmental protection. Substantial portions of my research have focused on wetland conservation programs, including Federal regulation of wetlands under Section 404 of the Clean Water Act and the proper role of Federal regulation in conservation policy. This research has led to numerous academic articles and book chapters on the subject, including articles in Environmental Law, the Supreme Court Economic Review, and Regulation.[1] The issue of wetland conservation is also of some personal interest to me. Our backyard in Hudson, Ohio extends into wetlands adjoining a conservation area, and I am committed to outdoor recreational activities, including hunting and fishing, that rely upon the ecosystem services that wetlands provide. Thus, I appreciate the opportunity to share my views with the committee today.

Rapanos v. United States, 126 S.Ct. 2208 (2006), is only the latest chapter in the effort to define the meaning of "waters of the United States," and the scope of Federal regulatory jurisdiction, under the Clean Water Act (CWA). Although no single opinion commanded a majority of the justices, the Court did provide a discernible holding: The CWA only extends to those waters and wetlands that have a "significant nexus" to navigable waters of the United States. This holding indicates that CWA jurisdiction over private lands is far more limited than Federal regulators have been willing to acknowledge. A majority of the Court explicitly rejected the expansive interpretation adopted by the U.S. Army Corps of Engineers, Environmental Protection Agency, and most lower courts. Indeed, this is the second time in only 6 years that the Court has so ruled. Due to Rapanos, the primary bases upon which the U.S. Army Corps of Engineers and the Environmental Protection Agency asserted regulatory jurisdiction are no longer valid. Unless these agencies wish to engage in a costly and inconsistent case-by-case approach to determining Federal jurisdiction, a new rulemaking is required to ensure that Federal regulations conform the applicable law.

1REGULATORY JURISDICTION UNDER THE CLEAN WATER ACT

Federal regulations define wetlands as "areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that

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[1]See, e.g., The Ducks Stop Here? The Environmental Challenge to Federalism, 9 SUPREME COURT ECONOMIC REVIEW 205 (2001); Swamp Rules: The End of Federal Wetlands Regulation? REGULATION, Vol. 22, No. 2 (1999); Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetlands Regulation, 29 ENVIRONMENTAL LAW 1 (1999). See also Jurisdictional Mismatch in Environmental Federalism, 14 NYU ENVIRONMENTAL LAW JOURNAL 130 (2005); Judicial Federalism and the Future of Federal Environmental Regulation, 90 IOWA LAW REVIEW 377 (2005); When Is Two A Crowd? The Impact of Federal Action on State Environmental Regulation, HARVARD ENVIRONMENTAL LAW REVIEW (2006)(forthcoming).

under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." 33 C.F.R. §328.3(b). Yet it is not a given parcel's wetland characteristics, but its connection to naviagable waters of the United States that forms the basis for Federal jurisdiction.

The CWA, by its terms, only extends to "navigable waters of the United States." Yet the CWA defines "navigable waters" as "the waters of the United States. 33 U.S.C. §1362 (7). This definition extends Federal jurisdiction beyond those waters traditionally used for navigation, but it is still limited; the phrase of "navigable waters" is still relevant in jurisdictional determinations. As the Supreme Court has explained, "Congress intended the phrase 'navigable waters' to include at least some waters that would not be deemed 'navigable' under the classical understanding of that term." Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC), 531 U.S. 159, 171 (2001) (internal quotations omitted). Nonetheless, there is no "basis for reading the term 'navigable waters' out of the statuteThe term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." Id. at 172.

The Supreme Court first considered the scope of the corps' regulatory authority in 1985 in United States v. Riverside Bayview Homes, 474 U.S. 121 (1985). Here, the Court unanimously concluded that the Corps could reasonably define "waters of the United States" to include "wetlands adjacent to navigable bodies of water and their tributaries." Id. at 123. The Court based this holding on the corps' conclusion that such wetlands "are inseparably bound up with the 'waters of the United States.'" Id. at 131. In so holding the Court did not "express any opinion" on whether Federal regulatory jurisdiction could be further extended to cover "wetlands that are not adjacent to bodies of open water." Id. at 131-32 n.8.

In 2001, in Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC), 531 U.S. 159 (2001), the Court reaffirmed, but refused to extend, the holding of Riverside Bayview Homes. Specifically, the Court held that the CWA does not confer Federal regulatory jurisdiction over isolated, intrastate waters. Rather, the CWA only reaches those waters or wetlands that have a "significant nexus" to navigable waters. Id. at 167. Of note, the Court refused to defer to the Army Corps' statutory interpretation because to do so would "invoke the outer limits of Congress' power" to regulate private lands. Id. at 172. The Court refused to endorse an interpretation of the Act that would potentially exceed the scope of the Federal commerce clause in some of its applications.

As this Committee is aware, application of SWANCC by regional Corps offices[2] and lower Federal courts was quite inconsistent.[3] This led to substantial uncertainty as to the current scope of Federal regulatory jurisdiction under the CWA.[4] Rapanos resolves some, though not all, of the uncertainty generated by the SWANCC opinion. Rapanos makes clear that, under SWANCC, Federal regulatory jurisdiction under the CWA does not extend to non-navigable, isolated, intrastate waters, irrespective of whether migratory birds are used to provide the basis for jurisdiction. Indeed, the Court was unanimous on this point. See, 126 S.Ct. at 2217 (Scalia, J., plurality); id. at 2244 (Kennedy, J., concurring in the judgment); id. at 2256 (Stevens, J., dissenting). Waters and wetlands that lack any discernible hydrological connection to navigable waters are beyond the scope of the CWA. The Court also made clear that the standard adopted by most Federal appellate courts,

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[2] See U.S. GENERAI, ACCOUNTING OFFICE, Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction, GAO-04-297, Feb. 2004.

[3] See, e.g., United States v. Deaton, 332 F.3d 698 (4th Cir. 2003) (interpreting SWANCC narrowly); United States v. Rapanos, 339 F.3d 447 (6th Cir. 2003) (same); United States v. Rueth Dev. Co., 335 F.3d 598 (7th Cir. 2003)(same); compare In re Needham, 354 F.3d 340 (5th Cir. 2003) (after SWANCC Federal jurisdiction only extends to wetlands adjacent to navigable waters); Rice v. Harken Exploration Co., 250 F.3d 264 (5th Cir. 2001)(same).

[4] See, e.g., Lance D. Wood, Do Not Be Misled: CWA Jurisdiction Extends to All Non-Navigable Tributaries of the Traditional Navigable Waters and to Their Adjacent Wetlands, 34 ENVTL. L. REP. 10187, 10189, 10195 (2004) (noting SWANCC was "ambiguous" and courts have been "inconsistent" in their interpretations); Amended Statement of Patrick Parenteau, Professor of Law, Vermont Law School, before the House of Representatives Committee on Government Reform, Sept. 19, 2002 ("The decision has created substantial uncertainty regarding the geographic jurisdiction of the Clean Water Act."); Position Paper on Clean Water Act Jurisdiction Determinations Pursuant to the Supreme Court's Jan. 9, 2001 Decision, Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, Associate of State Wetland Managers, Dec. 2001 ("The section 404 regulatory program has been in turmoil ever since the Supreme Court's SWANCC decision.").

including the Sixth Circuit, was too deferential to the Army Corps and failed to ensure that regulated wetlands actually had a "significant nexus" to navigable waters.

THE HOLDING OF UNITED STATES V. RAPANOS

In United States v. Rapanos, the Court was called upon to address whether, and in what circumstances, regulatory jurisdiction under the CWA extends to wetlands that are not adjacent to waters that are navigable in fact. Whereas prior decisions produced clear majorities, the Rapanos court split into three groups. Four justices joined a plurality opinion, announcing the judgment of the Court and construing the CWA narrowly to excude such wetlands. Four justices joined a dissent that called for near-absolute deference to the Atiny Corps' construction of its own jurisdiction under the CWA. And one justice joined the judgment of the Court, rejecting the expansive interpretation of Federal jurisdiction adopted by the Federal Government and endorsed by the U.S. Court of Appeals for the Sixth Circuit, but also adopting a broader (and more ambiguous) interpretation of the CWA than that urged by the plurality. The result is what some would term a "4-1-4" split.

The lack of a majority opinion in Rapanos necessarily creates some uncertainty and ambiguity, but it does not preclude the existence of a holding that is binding on lower courts and Federal regulators. As explained in Marks v. United States, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." 430 U.S. 188, 193 (1977). The judgment of the Court in Rapanos was to vacate and remand the decisions of the U.S. Court of Appeals for the Sixth Circuit in United States v. Rapanos, 376 F.3d 629 (6th Cir. 2004) and Carabell v. United States Army Corps of Engineers, 391 F.3d 704 (6th Cir. 2004). Therefore, the concurring opinion of Justice Kennedy, and the grounds of agreement between Justice Kennedy and the plurality opinion authored by Justice Scalia, form the holding of the Court.

The central holding of Rapanos is that a "significant nexus" between a given water or wetland and navigable waters is a necessary predicate for regulatory jurisdiction under the CWA. As Justice Kennedy explained "the corps' jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in a traditional sense." 126 S. Ct. at 2248 (emphasis added); see also id. at 2241 ("Absent a significant nexus, jurisdiction under the Act is lacking.").[5] In this regard, the Rapanos court largely followed the reasoning adopted by the Court in SWANCC, where the Court had previously held that "waters of the United States" only applies to those waters and wetlands that have a "significant nexus" to navigable waters, and rejected the jurisdictional theories put forward by the Federal Government and many amici.

Whereas the Sixth Circuit and Federal regulators had maintained that any hydrological connection between a given wetland and navigable waters would be sufficient to assert Federal regulatory jurisdiction, a majority of the Court rejected this view. A "mere hydrologic connection," by itself, will not be enough to establish jurisdiction in all cases. 126 S. Ct. at 2251. The connection must be significant. Justice Kennedy elaborated on what such a connection must entail:

wetlands possess the requisite nexus, and thus come within the statutory phrase "navigable waters," if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as "navigable." When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the term "navigable waters." 126 S. Ct. at 2248.

Whereas it is reasonable for the corps to presume jurisdiction over wetlands adjacent to truly navigable waters—that is "waters that are or were navigable in fact, or that could reasonably be so made" 126 S.Ct. at 2236—absent a greater ecological connection, adjacency to a nonnavigable tributary by itself will not be enough to establish jurisdiction. 126 S.Ct. at 2252.

Justice Kennedy also joined the plurality and rejecting the dissent's willingness to defer to any conceivable regulatory interpretation of "waters of the United States," no matter how broad. As Kennedy noted, "the dissent would permit Federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may fallow into traditional navigable waters. The deference owed to the corps' interpretation of the statute does not extend so far." Id.

[5] As Justice Kennedy further noted, "navigable waters" are "waters that are or were navigable in fact, or that could reasonably be so made." Id. at 2236.

at 2247. Justice Kennedy observed that "the dissent reads a central requirement out—namely the requirement that the word 'navigable' in 'navigable waters' be given some importance." Id. As Justice Kennedy and the plurality both made clear, "the word 'navigable' in the Act must be given some effect." Id. Another implication of Justice Kennedy's opinion is that the current regulatory definition of tributaries is also overbroad, insofar as it allows for the assertion of jurisdiction with little regard for the actual connections between a given ditch, swale, gully, or channel with actual navigable waters. Here again, Justice Kennedy was in agreement with the plurality.

While there is some amount of agreement between Justice Kennedy's concurrence and the dissenting justices, it would be wrong to view any part of Justice Stevens' dissent as a "holding" of the Court. Nothing in the dissent constitutes a portion of the judgment of the Court, so nothing in the dissent is legally binding. As the Supreme Court noted in Marks, the holding of the Court is "that position taken by those Members who concurred in the judgments on the narrowest grounds." 430 U.S. at 193 (emphasis added). Moreover, Justice Kennedy's concurring opinion explicitly rejected Justice Stevens' near-limitless approach to Federal jurisdiction, so the latter provides no useful guide for determining the CWA's jurisdictional limits.

The urgency or importance of some environmental concerns provides no justification for adopting a more expansive view of Federal regulatory jurisdiction or adopting a more lenient approach to statutory interpretation. According to a majority of the Court, such policy considerations cannot trump the text of the statute itself. As Justice Kennedy noted, in explicit agreement with the plurality, "environmental concerns provide no reason to disregard limits in the statutory text." 126 S.Ct. at 2247. Moreover, as I will explain below, not every environmental concern is best addressed through the expansion of Federal regulation. More Federal environmental regulation does not always produce greater environmental protection.

THE EFFECT ON PRE-EXISTING REGULATIONS

One clear implication of the Court's decision in Rapanos is that the current Federal regulations used by the Army Corps of Engineers and Environmental Protection Agency to define the scope of the CWA are no longer valid. For instance, insofar as Federal regulations purport to define "waters of the United States" to include intrastate waters "the use, degradation, or destruction of which could effect interstate commerce or foreign commerce," 33 C.F.R. §28.3(a)(3) and wetlands adjacent to such waters 33 C.F.R. §328.3(a)(7), they far exceed the holdings of both SWANCC and Rapanos. The Court also rejected the current regulatory definition of what constitutes a "tributary" in 33 C.F.R. §328.3(a)(5) as overbroad.

Courts owe substantial deference to the Army Corps and EPA in their assessment of the ecological connections between types of wetlands and water systems and navigable waters. Yet those regulations currently on the books do not establish such a connection, and provide no assurance that those wetlands over which the Corps' asserts jurisdiction in fact have a "significant nexus" to the waters of the United States. Until the Corps and EPA promulgate regulations that identify those wetland characteristics that are sufficient to establish such a nexus, in at least the majority of cases, the corps will be forced to "establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries." 126 S.Ct. at 2249. This will necessarily increase the administrative burden of wetland enforcement, generating increased uncertainty and delays in permit reviews. IT will also limit the corps' ability to ensure that the ecological goals of the Section 404 program are being met.

Some of these problems may have been avoided had the Army Corps and EPA revised their regulations in response to the SWANCC decision, a point made by the Chief Justice in his concurrence. In January 2003, the Army Corps and EPA issued an advance notice of proposed rulemaking to clarify the scope of regulatory jurisdiction under the CWA.[6] In December 2003, however, the Army Corps and EPA announced they would not issue a new rulemaking. One reason given for this decision was Federal courts had narrowly interpreted SWANCC' s impact. Whether or not the Army Corps and EPA were correct in this assessment—and I believe most lower courts adopted an unjustifiably narrow reading of SWANCC, a view vindicated by the Rapanos holding—this justification for continuing to rely upon the pre-existing Federal regulations is no longer valid. To the contrary, it is incumbent upon the

[6]Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States," 68 Fed. Reg. 1991 (Jan. 15, 2003).

Army Corps and EPA to develop and promulgate new regulations defining the scope of "waters of the United States" under the CWA.

THE PATH AHEAD

In developing new implementing regulations, the Federal Government should not repeat the mistake of seeking to assert the broadest possible interpretation of "waters of the United States." Adopting a regulatory interpretation that is potentially at odds with Rapanos and SWANCC is not in the interest of the regulated community nor does it best serve the cause of wetland conservation. Refusing to abide the letter and spirit of the Supreme Court's decision is a recipe for further litigation, court losses, and regulatory uncertainty. It would also represent a missed opportunity to harmonize Federal regulations with current law and the Federal Government's particular conservation interests.

Federal regulatory resources are necessarily limited. For this reason, Federal resources are best utilized if they are targeted at those areas where there is an identifiable Federal interest or the Federal Government is in particularly good position to advance conservation goals. For example, there is an undeniable Federal interest in regulating the filling or dredging of wetlands where such activities would cause or contribute to interstate pollution problems or compromise water quality in interstate waterways. Where the effects of wetland modification are more localized, however, the Federal interest is less clear. Not coincidentally, in the latter case, the basis for Federal jurisdiction is also more attenuated.

Limiting Federal regulatory authority to the areas of greatest Federal interest would certainly create room for the expansion of State and local regulatory efforts. Over-expansive assertions of Federal regulatory authority may preclude, discourage, or otherwise inhibit State and local Governments and non-governmental conservation organizations from adopting environmental protections where such efforts would be worthwhile. Contrary to common perceptions, State wetland regulation preceded Federal regulatory efforts. Indeed, the first State wetland conservation statutes were adopted more than a decade before the Army Corps and EPA began regulating the dredging and filling of wetlands. Since then, many States have stayed well ahead of the Federal Government, adopting more innovative or protective wetland conservation programs. Yet it also appears that greater conservation efforts by non-Federal actors may have been "crowded out" by an overzealous interpretation of Federal jurisdiction. If the Federal Government will regulate everything, there is less incentive for other entities to act. Insofar as Federal efforts are inefficient, misdirected, or ineffective—all charges that have been leveled against the Section 404 program—this reduces environmental conservation. By developing jurisdictional regulations that establish a "significant nexus," in part, by focusing on those instances in which there is a particular Federal interest, the Army Corps and EPA can maximize wetland conservation by complementing and supplementing, rather than supplanting, non-Federal efforts.

It is also important for Federal policymakers not to lose sight of the fact that Federal regulation under the CWA is not the only means for advancing wetland conservation. Indeed, the experience of Federal conservation programs that rely upon incentives and cooperation with private landowners compares quite favorably with the conflicts and inconsistencies of Federal wetland regulations. Federal support for the protection of waterfowl habitat dates back over 70 years to the sale of "duck stamps" to hunters that created a dedicated source of revenue for conservation of an estimated 4.5 million acres. Other programs under which the Federal Government enters into private agreements with landowners to restore wetlands on their property, while subsidizing the cost of restoration and the purchase of a permanent or multi-year easement to ensure that the wetland is protected, are particularly cost-effective when compared to mandated mitigation under the CWA. Such programs are also not confined by the jurisdictional limits of the CWA, nor do they generate the litigation and conflict of Federal controls on private land-use decisions.

Insofar as some types of wetlands, such as prairie potholes, may be particularly likely to lie beyond the scope of Federal regulation, incentive programs remain a viable conservation option. Indeed, enlisting private landowners and conservation organizations through incentive programs has conserved hundreds of thousands of acres of wetlands and was the driving force behind the attainment of "no net loss" of wetlands during the 1990s. There is no reason why this cannot continue, despite the limitations on Federal regulatory jurisdiction. Private landowners, who own the majority of wetlands in this nation, are far more willing to cooperate with conservation organizations and Government agencies when doing so does not increase the threat of Federal regulation. It would be a tragedy were an inordinate focus on

maximizing regulatory jurisdiction to come at the expense of sufficient support for alternative means of encouraging wetland conservation.

Mr. Chairman and members of this subcommittee, I recognize the importance of these issues to you and your constituents, and I commend your efforts to examine what, if any, Congressional or administrative response to the Rapanos decision is appropriate. I hope that my perspective has been helpful to you, and will seek to answer any additional you might have.

RESPONSES BY JONATHAN H. ADLER TO ADDITIONAL QUESTIONS FROM SENATOR CHAFEE

Question 1. In the plurality's opinion, Justice Scalia seems to indicate that while he supports a more narrowed scope of the Clean Water Act for the purposes of the Section 404 wetlands permitting program, he does not support a similar narrowing of the Act's authority for other programs, such as the National Pollutant Discharge Elimination System (NPDES) Program. What is your position on this issue?

Response. While the definition of "waters of the United States" is the same for all sections of the Clean Water Act, narrowing the scope of "waters of the United States" does not have the same practical effect on the NPDES program that it does on the Section 404 program. The 404 program, by its terms, only applies to the deposit of material into waters of the United States. The NPDES program may have a broader reach, however. NPDES permits may be required for "upstream" activities that occur outside of the "waters of the United States" that nonetheless result in discharges of pollutants into "waters of the United States." As the Scalia plurality correctly notes, the Act prohibits any unpermitted discharge of a pollutant from a point source into "waters of the United States." Further, Justice Scalia writes,

"from the time of the CWA's enactment, lower courts have held that the discharge into intermittent channels of any pollutant that naturally washes downstream likely violates §1311(a), even if the pollutants discharged from a point source do not emit "directly into" covered waters, but pass "through conveyances" in between."

In other words, actions that cause the pollution of waters and wetlands that are beyond the scope of the Clean Water Act could nonetheless be subject to the act if they result in such discharges into "waters of the United States" from ditches, channels, or other conveyances that may not themselves be otherwise covered by the Act. In this way, the narrowing of the Act's jurisdiction does not have as great an impact on the NPDES program as it does upon Section 404.

Question 2. It is often suggested that if Clean Water Act jurisdiction over wetlands is reduced by judicial or regulatory decision, states and local Governments could act to fill in the resulting gap. That point was often raised after SWANCC, but the States tell us that only a few of them actually modified their laws or regulations in response to that decision. What do you believe will be the response of the States to the Rapanos decision? Do you believe States will act to fill regulatory gaps created by the ruling?

Response. Many States already provided protection for isolated waters and wetlands prior to the SWANCC decision. After the SWANCC decision, numerous States that did not already provide regulatory protection of isolated waters considered the adoption of new rules or statutes to cover any potential gap created by the Court's decision. Some of these States, such as Ohio, adopted new legislation. Others adopted new administrative rules. Still others waited to see how the decision would be interpreted before deciding whether additional State rules were necessary.

Before many States could act the Federal Government and lower courts made clear that they would interpret SWANCC very narrowly, reducing the need for State or local Governments to act. Therefore, it should not be surprising that more States did not adopt additional wetland protections. In addition, the continuing operation of the Federal wetland regulatory program may serve to discourage the adoption of more protective State programs.

In order to encourage more States (and other non-Federal entities) to take action to conserve wetlands, the Federal Government should move quickly to resolve remaining uncertainty about the scope of Federal regulatory authority under the Clean Water Act. This would be best achieved through a notice and comment rulemaking. As long as there is uncertainty about how Rapanos will be applied, States will have less incentive to act.

Question 3. Both SWANCC and the Rapanos plurality suggested that the Corps' broad interpretation of its Clean Water Act jurisdiction "pushes the envelope" of the Federal commerce power. If Congress pursues a legislative clarification of the Act's reach, how far can it go without exceeding its power under the Commerce Clause?

Response. The precise scope of Congress's power to regulate commerce among the several States is a matter of some dispute. Under current Supreme Court precedent, this power can be used to regulate A) channels of interstate commerce, B) instrumentalities or persons and things in interstate commerce, and C) those activities that have a substantial effect on interstate commerce.

As the Supreme Court made clear in Gonzales v. Raich, 545 U.S. 1 (2005) if Congress uses the commerce power to erect a broad, nationwide regulatory scheme focused on economic activities, such regulations are not unconstitutional merely because they may encompass some activities that, taken in isolation, do not have such an effect on interstate commerce. This would suggest that Congress has broad power to regulate economic activities that lead to the destruction of wetlands as part of a larger economic regulatory scheme. This does not mean, however, that Congress's power extends to cover any and all activities that effect any and all lands with certain wetland characteristics, irrespective of those lands' connections to interstate commerce or navigable waters of the United States. In this regard it is worth noting that Justice Kennedy's concurrence, insofar as it limits Federal authority to those wetlands that have a "significant nexus" to navigable waters, ensures that the Clean Water Act does not exceed the scope of Congress's enumerated powers.

Consideration of the limits of the Federal commerce power should not obscure the fact that the broadest assertion of Federal regulatory authority is not necessarily the most prudent exercise of such authority. The Federal Government has a greater interest in some environmental matters than in others. In particular, the Federal interest is greatest where Federal authorities have a comparative advantage in protecting particular environmental resource, such as may be the case with transboundary resources (e.g. navigable rivers and streams that cross State lines and interstate watersheds) or scientific research. The Federal interest is less strong in the case of relatively isolated intrastate waters and wetlands that States and localities are fully capable of protecting. The Federal Government can maximize the value of a Federal water pollution control program by focusing its efforts on those areas where the Federal interest is the greatest or States are particularly unable or unlikely to act. A program that is focused in this fashion is unlikely to exceed the scope of the commerce power.

Question 4. Since the Rapanos ruling, a number of different stakeholders have suggested that Congress should legislate in order to clarify what is the extent of regulatory jurisdiction to protect wetlands. One current proposal is the Clean Water Authority Restoration Act, S. 912, which would provide a broad statutory definition of "waters of the United States." Some say that the statutory definition in that bill would conform the Clean Water Act to the administrative definitions used by the Corps and EPA prior to the SWANCC decision, but others say that the bill is even broader than the Corps and EPA rules. What is your interpretation of the definition in that legislative proposal?

Response. S. 912 limits the definition of "waters of the United States" to the extent that such waters "are subject to the legislative power of Congress under the Constitution." In my view, this language limits the scope of Federal jurisdiction to the scope of Congress's commerce power. Insofar as the prior Army corps and EPA regulations, as interpreted and implemented by the two Agencies, exceeded the scope of the Federal commerce power, S. 912 is less expansive.

There is language in S.912 that could suggest a more expansive interpretation, however. For instance, finding 13 asserts that "Activities that result in the discharge of pollutants into waters of the United States are commercial or economic in nature." This finding suggests that all sorts of non-economic activities—including personal activities that individual landowners take on their own private land—are subject to Federal jurisdiction, irrespective of their economic character. This is problematic. A bald declaration by Congress that a given activity is "economic in nature" does not make it so. See, e.g., United States v. Morrison, 529 U.S. 598 (2000) (noting and rejecting Congressional findings that gender-motivated violence is an economic activity).

RESPONSES BY JONATHAN H. ADLER TO ADDITIONAL QUESTIONS FROM SENATOR INHOFE

Question 1. In response to a question from Senator Jeffords, Mr. Clayton expressed concerns about the ability of States to "take care of wetland delineations and wetland problems." As an example he cited a river that runs from most of North Dakota and South Dakota stating that "There is no way one single State should have that kind of jurisdiction over wetlands." In your testimony you speak about

history of State wetland regulation. Can you please comment on Mr. Clayton's concerns?

Response. I believe that the concerns expressed by Mr. Clayton are misplaced. Nothing in the Rapanos decision in any way limits current Federal authority over interstate waters, such as rivers that run from one State into another. Nor does anything in Rapanos limit current Federal authority over wetlands adjacent to such waters. Further, insofar as the modification of nonadjacent wetlands could have a significant effect on such interstate waters, and thus have a "significant nexus" to such waters, they too remain subject to Federal regulatory authority under the Clean Water Act.

Question 2. There are numerous cooperative voluntary Federal programs designed to protect wetlands, including the Partners for Fish and Wildlife program of which I am a strong supporter, the Wetlands Reserve Program, North American Wetlands Conservation Program and the Conservation Reserve Program. Through these programs millions of acres have been protected across the country. These programs have successfully resulted in the protection thousands if not millions of acres of duck habitat in the Dakotas. Are these programs that respect the rights of private property owners but also protect the environment, an effective means of ensuring the protection of areas about which Mr. Clayton's members are concerned?

Respons.e These programs are a very cost-effective and efficient means of conserving and restoring wetlands and other ecologically valuable lands. One reason these programs are so effective is that they enlist private landowners as partners in conservation, and encourage environmental stewardship on private land. By contrast, regulatory proscriptions of private land use engender hostility and resentment, and often discourage private landowners from cooperating in conservation efforts. Another reason these programs are particularly effective is because they are targeted upon the maintenance and protection of particular ecosystem services, such as the provision of waterfowl habitat. The section 404 program, on the other hand, is not targeted on the protection of particular ecosystem services. To the contrary, as I noted in my testimony, many regulatory decisions under section 404 are made without any meaningful consideration of the ecological impacts.

Question 3. In Chief Roberts concurrence, he states that "no opinion commands a majority of the Court on precisely how to read Congress' limits on the reach of the Clean Water Act."(emphasis added). However, Professor Buzbee argues that Justice Roberts was in fact arguing that there was no majority opinion of the court. Do you agree that Justice Roberts was arguing that there was not a majority opinion of the Court particularly a majority that agreed to remand the case to the 6th Circuit?

Response. While no single opinion articulated a rationale for the Court's holding that was accepted by five members of the Court, a majority of the Court did agree to remand the two cases to the U.S. Court of Appeals for the Sixth Circuit. This majority formed the basis of the Court's judgment. Further, as explained in Marks v. United States, there is a majority holding: "that position taken by those Members who concurred in the judgments on the narrowest grounds." 430 U.S. 188, 193 (1977). Under this standard, the concurring opinion of Justice Kennedy, and the grounds of agreement between Justice Kennedy and the plurality opinion authored by Justice Scalia, form the holding of the Court.

RESPONSES BY JONOTHAN H. ADLER TO ADDITIONAL QUESTIONS FROM SENATOR JEFFORDS

Question 1. You state in your testimony that you are a fairly active outdoor recreationist and that wetlands provide many "ecological services" on which your recreation depends. What types of outdoor recreation do you participate in, and what ecological services do wetlands provide to you? Do you believe the extent to which those "ecological services" are available is likely to change as a result of the Rapanos—Carabell decision?

Response. Since I was a child, and attended a school that spent one day each week at a rural farm, I have been an active outdoor recreationist, with an interest in hiking, backpacking, camping, wildlife viewing, fishing, and hunting, among other activities. These recreational activities rely upon many ecosystem services provided by wetlands, including habitat for both aquatic and terrestrial species.

These interests continue to the present. Indeed, immediately following the Committee's August 1 hearing, I left for a fly fishing trip with my father in western Montana. My current home in located alongside Summit County, Ohio's hike and bike trail that winds along the Cuyahoga National Park, our community relies upon

local well water, and my backyard opens into locally protected wetlands. Thus, my interest in wetlands and the ecosystem services they provide is more than academic.

Whether the availability of the ecosystem services upon which my (and many others') recreational activities rely will be negatively affected by the Rapanos decision depends primarily upon the responses of Federal agencies, the Congress, State and local Governments, and conservation organizations. If the Federal Government responds to Rapanos like it did to the SWANCC decision, I believe this will lead to continued litigation, conflict, and regulatory uncertainty—all of which will discourage the development of new conservation strategies that can protect wetlands and the ecosystem services that they provide. On the other hand, if the Federal Government takes the opportunity to refocus its efforts on those waters and wetlands in which the Federal interest is the greatest, and makes the boundaries of Federal authority clear to State and local Governments, I think that many States will augment their existing wetland conservation efforts to complement those of the Federal Government, and the net result will actually be an overall improvement in wetland conservation.

Question 2. One of Congress' clear goals in the Clean Water Act is to ensure all Americans have clean and safe water for drinking water supplies, fishing, swimming and other recreation, and so on. But leaving it to the States cannot guarantee this goal is met, especially if some States do not enact strong clean water laws. Isn't ensuring all Americans have access to clean water a legitimate Federal goal?

The Federal Government clearly has a role in preventing one State from imposing environmental harms upon another. If an upstream State dumps pollution that harms a downstream State, the latter State should have a Federal remedy. At present, however, relatively little of the Clean Water Act (or, indeed, of Federal environmental law as a whole) is focused upon such concerns. Such a policy can ensure that all Americans have access to the level of water quality that they desire.

Where pollution occurs in a given State, and the costs of that pollution are not externalized on downstream jurisdictions, the Federal interest is less clear. Indeed, I do not accept the premise that Federal officials care more about the health and safety of local communities more than do those communities themselves; nor do I believe that Federal officials are better able to make the various economic and environmental trade-offs required to set water quality goals.

The lesson of uniform Federal mandates is that national "one-size-fits-all" approaches too often become "one-size fits-no-one In the case of water quality, this committee is well aware that Federal drinking water mandates forced some communities to squander valuable public health resources testing for nonexistent contaminants. This was not in the public interest, and Congress should seek to avoid such mistakes in the future.

Question 3. In the wake of the SWANCC decision, how many States stepped in and adopted laws to make sure that the so-called "isolated" waters at issue in that case were protected by State law? How many did not?

Response. In the wake of the SWANCC decision, at least 19 States considered or adopted additional protections for isolated waters. Ohio, for example, adopted an "emergency measure" to protect isolated wetlands in July 2001. Wisconsin, Indiana, North Carolina, and South Carolina are among those States that took action in response to the SWANCC decision. The specific site at issue in SWANCC is also instructive. After it became clear that the Federal Government did not have the authority to prevent the construction of a balefill on the site, local Government agencies that had previously supported the project acted quickly to stop the project and conserve the land at issue.

Those States that did not enact protections for isolated wetlands after SWANCC failed to act for one of several reasons. First, some States already had statutory or regulatory protections for isolated wetlands in place. Indeed, several States have long maintained greater wetland protections than the Federal Government. Among the States that the Association of State Wetland Managers reports have comprehensive wetland protection programs are Connecticut, Florida, Maine, Maryland, Massachusetts, Michigan, Minnesota, Michigan, New Hampshire, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Virginia. Over 20 States now provide some protection for the sort of isolated freshwater wetlands most affected by the SWANCC decision.

Some States were likely discouraged from acting due to the tremendous uncertainty about the extent to which State action was necessary after SWANCC, including conflicting Agency applications and an interpretive split in the lower courts. This sort of uncertainty discourages States from acting insofar as it is less clear what the benefits of additional State action will be.

It is also important to note that neither SWANCC nor Rapanos did anything to limit the scope of incentive-based conservation programs, such as those referenced

in my testimony. Insofar as some of these programs are focused on the conservation of isolated wetlands, they may also serve to fill some of any regulatory "gap" created by these decisions.

Question 4. Since about half of the States have opted to rely on Federal protections with State laws saying that clean water or other environmental laws can be "no stricter than" Federal laws, doesn't that undermine your theory that these are largely State matters, and as a practical matter, doesn't it mean that these States will have a difficult time stepping in to protect streams, other tributaries and wetlands if these waters do not have Federal protections?

Response. Not at all. To the contrary, the fact that many States have decided to adopt Federal standards confirms the claim I have made in my research that Federal regulatory decisions can effect State regulatory decisions. For whatever reason, some States have decided that Federally mandated standards are equal or greater than the levels necessary for the protection of environmental values within those States. If Federal protection contracts, nothing prevents States from revisiting this decision. So long as Federal law does not preempt more expansive State regulations, States remain free to adopt new regulatory protections, as many States have done in the past decade.

Question 5. How do you explain that fact that a majority of States filing a brief in the Rapanos—Carabell cases—34 plus the District of Columbia—argued on the side of the Bush administration in favor of strong Federal protections, and only 2 argued for weaker Federal standards?

Response. State Governments have always preferred for the Federal Government to pay for and provide services and programs that States are fully capable of providing. Therefore, the amicus briefs filed by the various states prove nothing other than States would like for the Federal Government to devote its resources to protect ecological values that are important in these States. That State Governments would prefer Federal regulation—thereby avoiding having to dedicate their own resources to such programs (and avoiding having to take responsibility and be accountable for the consequences of any public disapproval with the implementation of the program)—says nothing about the extent to which States are capable and willing to adopt programs of their own. Indeed, as I noted in my testimony, the history of wetland regulation provides strong evidence that States are both willing and capable of adopting effective wetland conservation measures. Insofar as Congress believes that these programs are insufficient, it would be more effective for the Federal Government to encourage and support the expansion of such programs than to seek to implement the broadest Federal regulations over top of State programs.

Question 6. You have written elsewhere that "[I]t seems likely that some environmental statutes exceed the scope of the Commerce Clause power . . . " In particular, you have identified the Clean Water Act as a statute that is particularly vulnerable. But in his testimony, Professor Buzbee states that five justices explicitly rejected the arguments made in Rapanos—Carabell that the Commerce Clause limits the ability of Congress to assert Federal Clean Water Act authority over the tributaries and wetlands at issue in the case. Do you agree that the Commerce Clause arguments were rejected by a majority of the Rapanos—Carabell Court?

Response. No. As in the SWANCC decision, a majority of the Court adopted a narrow construction of the meaning of "waters of the United States" so as to ensure that the Clean Water Act did not exceed the scope of the Commerce Clause. As Justice Kennedy noted in his concurrence:

In SWANCC, by interpreting the Act to require a significant nexus with navigable waters, the Court avoided applications--those involving waters without a significant nexus—that appeared likely, as a category, to raise constitutional difficulties and federalism concerns. . .

as exemplified by SWANCC, the significant-nexus test itself prevents problematic applications of the statute.

This does not constitute a rejection of commerce clause arguments. To the contrary, commerce clause concerns lie behind the interpretation adopted by the Court in Rapanos just as they did in SWANCC.

Question 7. In 2003, in response to the EPA's rulemaking on this subject, my home State of Vermont commented that, "While the State could amend its statutes to allow for regulation in smaller watersheds, the net result would be to shift the costs of regulation from the Federal Government to the State." This appears inconsistent with your belief that States are clamoring to take over clean water regulation on their own. How do you respond to these comments?

Response. I have never claimed that States are "clamoring to take over clean water regulation on their own." Rather, I have claimed that sates are willing and able to do so if the Federal Government reduced its role. I have also noted that

State Governments may well prefer to have services provided to their citizens at the cost and expense of the Federal Government, and that State officials may wish to avoid the responsibility for implementing potentially controversial regulatory programs.

Question 8. In 2003, my home State of Vermont commented to EPA in response to the Agency's rulemaking on this topic that a reduction in Federal permit jurisdiction will shrink the State's opportunity under section 401 of the Act to ensure that Federal projects comply with State water quality standards. In this manner, States' rights would actually be limited by reducing the jurisdiction of the Clean Water Act. How do you respond to this point?

Response. I have not fully examined the potential impact on section 401, but I would be surprised if the impact was all that significant. Given that section 401 applies to Federal projects, however, it would be relatively easy for congress to impose greater protections for State interests in all Federal projects without extending the scope of CWA authority.

Question 9. You suggest that the Federal Government's interest in preventing purely intrastate pollution of waterbodies is less than clear. Does the Federal Government have an interest in the safety of drinking water supplies? What about the health of fisheries? Are you suggesting that Congress or the agencies might not be able to protect intrastate lakes from industrial discharges?

Response. If congress sought to focus on industrial discharges, as such, I do not believe there would be any constitutional barrier to such regulations under current Commerce Clause jurisprudence. Similarly, I think that current precedent would not in any way preclude the comprehensive regulation of fisheries. Such regulations are quite different from the control of private land-use and each and every parcel exhibiting wetland characteristics for a sufficient portion of the year. To suggest that the scope of Federal regulation far exceeds the scope of legitimate Federal interests is not to say that the Federal Government should have no role.

In the case of drinking water supplies, I think that the adoption of Federal standards has been a mixed blessing, and it is clear that some States concur with this assessment, as States have filed suit in Federal court to block the implementation of Federal standards that those States did not believe were in the best interests of their citizens.

Question 10. Why do you believe that new regulations are the answer when this is fundamentally a matter of what Congress intended to protect?

Response. I believe that Federal regulations can be adopted more quickly and can provide greater certainty than new legislation. Irrespective of whether Congress enacts revisions to the Clean Water Act, administrative regulations will be required to fill out the interstices and resolve inevitable ambiguities left in the statutory language. Furthermore, the Corps and EPA have the administrative expertise to address such specific concerns in a manner that Congress do esnot.

Question 11. One reason you advocate limiting the scope of waters protected by the Federal law is that Federal regulatory resources are limited. Do States have the resources to protect these waters? Please be specific as to which parts of State budgets are robust enough to ensure water quality protection.

States are already responsible for the bulk of frontline environmental management and enforcement. States conduct the vast majority of environmental inspections and initiate the bulk of environmental enforcement actions. In the specific context of wetlands, many State already have wetland protection programs of their own, and quite a few of these programs exceed the scope and protectiveness of the Federal Section 404 program.

If this committee is concerned that States lack the resources to play a greater role in wetland protection it could make it easier for States by either a) reducing the burden of existing environmental mandates on State Governments, or b) providing States with funding for State wetland programs.

Question 12. You claim that "Justice Kennedy's concurring opinion explicitly rejected Justice Stevens' near-limitless approach to Federal jurisdiction, so the latter provides no useful guide for determining the CWA's jurisdictional limits." Since Justice Kennedy says that the "plurality's opinion is inconsistent with the Act' s text, structure, and purpose," is it safe to assume that you believe that Justice Scalia's approach is entitled to no weight?

Response. No. Justice Scalia's plurality opinion—unlike Justice Stevens dissent—forms part of the majority in support of the court's judgment. Justice Scalia's opinion is thus relevant in determining the scope of the Court's holding in a way that Justice Stevens' is not.

RESPONSES BY JONATHAN H. ADLER TO ADDITIONAL QUESTIONS FROM SENATOR MURKOWSKI

Question 1. As an expert in this field, can you discuss the concept of a "significant nexus" as applied to remote wetlands in northern Alaska that are not connected to navigable waters, where wetlands are frozen much of the year and where the wetlands are underlain by an impermeable layer of permafrost?

Response. I am not all that familiar with the specific ecological conditions of remote wildlands in Northern Alaska, so I do not feel qualified to comment on this decision will effect such lands.

Question 2. We heard Mr. Gumbles and Mr. Woodley suggest that their agencies' next step in this process is to provide "guidance" on the way Agency representatives should respond to the Rapanos ruling. In your opinion as an expert, what are the relative merits and detriments to such "guidance" in comparison to establishing a formal rule?

Response. A guidance can serve to inform the regulated community how the Federal Government plans to respond to the Rapanos decision. Guidance documents can be issued relatively quickly, but such documents do not bind the public, however, nor do they receive significant deference from courts. As a result, a guidance document can only provide a limited amount of regulatory certainty, and should not be used as more than an interim measure. To provide real certainty as to the scope of Federal regulatory authority under the CWA post-Rapanos, the Army Corps and EPA should initiate a Notice of Proposed Rulemaking in order to develop new regulations defining the scope of "waters of the United States."

Question 3. In your opinion, if a given wetland has no significant nexus with navigable waters, are there State, municipal, or Federal laws other than the Clean Water Act that could be used to protect its value for wildlife habitat, recreation or other purposes?

Response. Numerous States and local Governments have wetland protection statutes of their own. In addition, there are several incentive-based Federal programs that fund the conservation and restoration of wetlands that are not limited to those wetlands that have a significant nexus with navigable waters.

TESTIMONY OF WILLIAM W. BUZBEE PROFESSOR OF LAW, DIRECTOR OF ENVIRONMENTAL AND NATURAL RESOURCES LAW PROGRAM EMORY LAW SCHOOL

I thank the Senators and their staff for this opportunity to discuss the Supreme Court's recent decision in the joint cases, Rapanos v. United States and Carabell v. U.S. Corps of Engineers (hereinafter, Rapanos).

I am a Professor of Law at Emory Law School, where I direct Emory's Environmental and Natural Resources Law Program. During my legal career I have worked for a private law firm, for industry, for municipal and State clients, and also for environmental groups. I will be a Visiting Professor for a portion of this coming year at Cornell Law School, have been a Visiting Professor at Columbia Law School, and have also, for Columbia and Amsterdam Law Schools in Europe, taught lawyers, judges and Government officials seeking an introduction to American law. I am a graduate of Columbia Law School and Amherst College.

I suspect that I was invited here primarily due to my involvement with the Rapanos case. I co-authored a friend of Court amicus curiae brief on behalf of a bipartisan group of four former administrators of the United States Environmental Protection Agency, or EPA. These four administrators—Carol Browner, Russell Train, Douglas Costle, and William Reilly—all shared the same goal of preserving thirty years of consistent approaches to protecting the "waters of the United States." Despite their different years of Government service, different political parties, and even despite some disagreements with aspects of the current administration's policies, they and I filed an amicus brief in strong support of the Bush administration's position seeking to sustain these long-existing protections of America's "waters."

The Supreme Court's Rapanos decision, with a fragmented series of opinions and no single majority opinion, undoubtedly was less than the height of clarity. Still, as I'll discuss more in a moment, it and still good Supreme Court precedent does create some clear boundaries for what is the law and makes quite clear the choices faced by the nation's legislature. I'll organize my comments into three sections:

1) Why were the stakes in Rapanos so high;
2) What did the Court actually do to the law in Rapanos;
3) What are appropriate political responses to Rapanos.

I. THE STAKES IN RAPANOS

The consolidated Rapanos and Carabell cases attracted a great deal of attention, and for good reason. The issue in these cases could not have been more central to the protections and huge benefits created by the Clean Water Act. What kinds of wetlands and tributaries that are not "navigable in fact" are protected from pollution discharges, dredging or filling under the statute? In both cases, real estate developers sought permission to fill in areas characterized as protected jurisdictional waters by the Army Corps of Engineers. One case involved a wetland adjacent to a tributary of a traditionally navigable water, while the other dealt with wetlands separated by a manmade berm from an adjacent tributary.

This question about which "waters" are protected by the Clean Water Act is the linchpin of the statute. Only such jurisdictional "waters" are subject to National Pollution Discharge permits under Section 402 of the statute, the key statutory provision protecting waters from industrial pollution discharges, including toxic effluents. Similarly, only such jurisdictional waters are protected by Section 404 and related "dredge and fill" regulations from frequent industry and developer pressures to fill in wetlands or tributaries. America's waters are much cleaner now due to broad protection of such waters from direct pollution discharges, as well as preservation of wetlands and tributaries for their pollution trapping, flood control, runoff storage, and use as breeding grounds, as well as for their heavy use for fishing, hunting and recreational purposes.

The Clean Water Act's explicit text talks about its goal of "restoring and maintaining the chemical, physical and biological integrity of the Nation's waters." If the Supreme Court in Rapanos had accepted the arguments of the real estate developer petitioners and aligned parties and had limited protection only to navigable-in-fact waters, most of America's long-protected waters would have lost Federal protection. Huge swaths of the West, where rains are infrequent and many tributary beds sit empty much of the year, or wetlands and tributaries near the beginning of river basins, were at risk. Decades of environmental progress stood in the balance.

Over thirty years of consistent regulatory treatment has protected far more than just rivers usable by large ships. Most importantly, in 1985 in the Riverside Bayview Homes case, the Supreme Court unanimously agreed that Federal jurisdiction extends to wetlands adjacent to navigable-in-fact waters. The Court reached this decision with heavy emphasis on the ecological and hydrological functions of such waters, and the need for deference to expert regulators' judgments and statutory language reflecting the goal of protecting such waters. The Supreme Court agreed with regulators in Riverside that far more than just navigable-in-fact (or "traditional navigable") waters are federally protected. The only exception to this consistent protection is the Supreme Court's bare majority ruling in 2001 in Solid Waste Agency of Northern Cook County (SWANCC), where the Court held that Federal law does not protect isolated wetlands purportedly reached by Federal law due to migratory bird use. The Rapanos case thus presented a major opportunity for opponents of the Clean Water Act's broad jurisdiction. In the end, however, a majority of the U.S. Supreme Court declined the opportunity to weaken the law's protections.

II. WHAT THE RAPANOS COURT ACTUALLY DECIDED

The reconfigured Supreme Court, with newly appointed Chief Justice Roberts and Justice Alito, produced a series of opinions in Rapanos. Sadly, there is no single majority opinion speaking for five or more justices upholding these long-established protections of America's waters. We then must look at votes and opinion content to understand the decision. Most confusingly, five justices agreed that the Army Corps of Engineers had to do more to establish its jurisdiction in these two consolidated cases, but five justices overwhelmingly agreed with a broad protective rationale for jurisdiction in these cases. Five justices? Justices Kennedy in concurrence, and Justices Stevens, Souter, Ginsburg, and Breyer in dissent, strongly and explicitly disagreed with virtually all aspects of a plurality opinion penned by Justice Scalia.

The question for all of us today, regulators, and those interpreting the law, is what does all of this add up to? Where is the law left? Counting heads and parsing Rapanos and the Court's other major "waters of the United States" decisions, there actually remains a great deal of clarity. Most protections of the Clean Water Act's long-established regulations remain. Significantly, no justice claims to overrule or cut back the Court's unanimous 1985 Riverside decision. Adjacent wetlands remain protected due to their hydrological and ecological functions. All justices also continue to agree that the Clean Water Act protects more than just "navigable-in-fact" waters. The key regulations defining what count as "waters of the United States" were not struck down. A majority of justices also are sticking with the lack of Federal protection for isolated wetlands reached due to migratory bird use.

So how do we interpret these splintered set of opinions? As Chief Justice Roberts basically states in his own brief concurring opinion, through citations to earlier Court opinions, the narrowest opinion that shares greatest ground with other justices becomes the key opinion for future application. The key swing opinion is that of Justice Kennedy. Both by itself, and also if looked at with the Justice Stevens dissenters' opinion with which Justice Kennedy agrees repeatedly, most of the protections long established under the statute and implementing regulations remain intact.

Before discussing Justice Kennedy's opinion, it is important to state clearly that Justice Scalia's opinion for a plurality of justices does not represent the law. Relying heavily on a dictionary created over a decade before the statutory language at issue, Justice Scalia and his fellow plurality justices claimed that waters are federally protected only if they are relatively permanent standing or continuously flowing waters. This view, if the Court's, would have constituted a revolutionary discarding of long-established regulatory approaches, as well as a radical rejection of the twenty-year-old Riverside Bayview Court precedent (although these justices do not concede such an intent or effect).

However, Justice Scalia does not have the votes to speak for the Court. Justice Kennedy repeatedly rejects the Scalia opinion's approach as "inconsistent with the Act's text, structure, and purpose," as do the dissenters. For Supreme Court opinions to constitute law, you need to find five justices in agreement, five justices in assent regarding the rationale for the decision. Justice Scalia came up one vote short. It is only a plurality opinion because of agreement on the need for a remand.

Justice Kennedy's opinion is the key. Justice Kennedy picks up on SWANCC language to assert that there must be a "significant nexus" between wetlands or tributaries to navigable waters or waters that could be navigable for them to be jurisdictional waters subject to Federal protection. Critically important, the sorts of significant links he sets forth are many and are sensitive to the statute's focus on biological and ecological integrity. Wetlands or tributaries can be federally protected if "alone or in combination with" similar lands and waters, they "significantly affect the chemical, physical or biological integrity of other covered waters more readily understood as 'navigable.'" Non-navigable tributaries are "covered" if alone or with "comparable" waters they are significant. In addition to giving due heed to the usual goals of protecting water quality and fishery resources long protected and affirmed in Riverside Bayview Homes, Justice Kennedy further refers to "integrity" goals, as well as concern with "functions . . . such as pollutant trapping, flood control, and runoff storage." Only if wetlands or tributaries have insubstantial linkages and effects, alone or in combination with other similar lands or waters, might they lose protection. Justice Kennedy's "significant nexus" articulation ends up creating an overwhelming overlap with long-established regulatory approaches, as well as with the approaches articulated in the Justice Stevens Rapanos dissent for four other justices.

Also significant is Justice Kennedy's and the dissenters' repeated call for deference to expert regulators' judgments about the significance of both categories of waters and particular waters subject to jurisdictional determinations. Justice Kennedy clarifies the many types of uses and functions that are federally protected, but leaves to regulators room to assess the significance of areas that might, upon first examination, not look like protected waters. Such deference is notably lacking in the Justice Scalia opinion.

When Justice Kennedy and the dissenters apply their approaches to the Rapanos and Carabell facts, both intimate that on remand Federal jurisdiction looks likely to be found. Justice Kennedy differs from the dissenters in asking the Army Corps to do a better job in establishing the nexus he articulates.

Lastly, no five-justice majority in Rapanos cut back on Federal regulatory power under the Commerce Clause. The Court in granting certiorari had considered making this a constitutional decision under the Commerce Clause, a goal numerous industry, property rights and anti-regulation groups had supported in their briefs. Five justices, however, explicitly rejected these arguments. The Justice Scalia plurality would have used constitutional concerns to read the statute narrowly and limit Federal power, but only four justices adopted this view. If anything, the five justices rejecting a Commerce Clause attack broadened Federal power from where it might have gone after SWANCC.

In the United States judicial system, five aligned votes by Supreme Court justices make a binding precedent. As indicated by the brief concurring opinion of Chief Justice Roberts, if the Court is splintered, the narrowest opinion, here Justice Kennedy's, would be the key. As the Chief Justice states through his citation to Marks v. Whitney, the question is whether a "single rationale explaining the result enjoys the assent of five Justices." Here, Justice Kennedy's concurring Rapanos opinion

shares substantial overlap with the dissenters' approaches. The dissenters would have deferred even more than Justice Kennedy to regulators' judgments, but in all parts of their opinion, the dissenters would protect waters at least to the extent set forth by Justice Kennedy. They repeatedly and explicitly agree with the rationales for Federal protection set forth in the Justice Kennedy concurrence. Whether taken by itself as the "narrowest opinion," or as an opinion with underlying rationales agreed upon by five justices, Justice Kennedy's opinion is the key.

III. POLITICAL RESPONSES TO RAPANOS

The next question is how the political branches should respond to Rapanos. The Clean Water Act's protections have not been disastrously curtailed, as many feared. Justice Kennedy's approach in fact appears to leave most protections in place. He and the plurality justices, however, do now demand a more rigorous regulatory showing of the significance of waters before they can be deemed "waters of the United States."

They indicated that this significance can be shown either in new promulgated regulations or perhaps policy or interpretive documents, or on a case-by-case basis.

I believe that although the content of the law has not changed significantly, Justice Kennedy's forcing the Army Corps to establish more authoritatively waters' significance will have harmful effects. I anticipate more regulatory challenges by permit seekers. Administrative agencies like the Army Corps respond to many pressures, but most are risk averse and seek to avoid litigation. Justice Kennedy's "significant nexus" test, while in substance mainly a modest re-articulation of the law and regulations as they stood, does add some new language that lawyers and permit seekers will isolate and seek to use. He also did require a remand in these cases, even though he anticipated that the Government's assertion of jurisdiction was justifiable. With increased industry and developer pressure, the risk is that the Army Corps will too readily fold, declining jurisdiction where it anticipates litigation or a strong regulatory challenge. Vast swaths of hugely important wetlands and tributaries around the country are at risk.

This leaves three remaining main questions. Can the Army Corps and U.S. EPA either in regulations or specific permitting decisions cut back on Clean Water Act protections long afforded? The second question is whether the legislature needs to act. The third concerns which response is preferable.

I believe that only quite modest agency modifications of what "waters" are protected could comport with the law. Any regulations must conform to unchanged statutory language with its explicit "integrity" goals, the Riverside Bayview Homes decision, and Justice Kennedy's concurring Rapanos decision. Any change in new regulations would have to confront old regulations and justify any change. Justice Kennedy's emphasis on the statute's integrity goals and functions such as pollutant trapping, flood control, and runoff storage, along with these other legal authorities, establish boundaries on what agencies can now do. Any significant cutting back on protected waters would deserve judicial rejection and legislative criticism. It would also surely engender litigation. Strengthening the regulatory justifications for current regulatory definitions would be more likely to withstand attack, but any changes of a strengthening sort would still provoke litigation challenging either new regulations or case-specific regulatory judgments.

Should the legislature act, either in addition to or in lieu of regulatory action? I think that the legislature should seriously consider enacting into statutory law protections like those long afforded by decades of Clean Water Act regulations articulating what sorts of "waters of the United States" are protected. For several reasons, this seems a more prudent and effective approach than hoping for a regulatory fix. First, this is not a politically partisan issue, but a series of regulatory judgments that have long been retained, over three decades, by both Republican and Democratic administrations. The Bush administration in Rapanos asked the Court to uphold the Federal assertions of jurisdiction and stood by existing regulations. The Bush administration was joined by dozens of States, my bipartisan group of four former EPA administrators, and many environmental groups. This is truly a rare area of bipartisan agreement, and an area where the States and Federal Government are in overwhelming agreement.

Such a legislative fix, making statutory these stable regulatory interpretations, would create several benefits. First, they would promote stability in the law by retaining categories and approaches deeply engrained in the law, and well known to Federal and State regulators and lawyers and engineers counseling the private sector. Second, by enacting a legislative fix, we could avoid virtually inevitable costly and confusing litigation challenging any new regulations regarding "waters." Such a statutory amendment could also preclude the risk that the confusing Rapanos

opinions will be misread by judges, as already has happened in one trial court in Texas, where a judge read the Justice Scalia plurality as the key, rendering the Federal Government powerless to respond to an oil spill in a tributary bed. Lastly, the durable regulatory judgments that would now be statutory law are well grounded and tested. To protect America's waters does require more than just attention to continuously flowing rivers. It would be a rare step in American law if this legislature stood by and allowed a substantial weakening of the Clean Water Act's protection. Retention of bipartisan, well-established regulatory policy through legislative action would thus create many benefits that would be lacking with new regulatory action.

This past year, the South and Northeastern United States have experienced catastrophic incidents where storms causing floods led to devastating and costly losses.

These losses occurred even with the fruits of three decades of regulatory protections for wetlands and tributaries. If executive agencies or legislators now use Rapanos as an excuse to cut back on protection of wetlands and tributaries, future storms will cause even more devastating floods. Pollution control progress will cease. Huge portions of the United States, especially where water is scarce or where rivers originate, could lose Federal protection from pollution discharge requirements, as well as dredging and filling prohibitions. I hope that the Senate will take steps to discourage any such backwards steps.

I thank this committee for this opportunity and would be pleased to answer any questions.

RESPONSES BY WILLIAM W. BUZBEE TO ADDITIONAL QUESTIONS FROM SENATOR CHAFEE

Question 1. Based on the opinions of the plurality and Justice Kennedy, do you believe isolated, intrastate, nonnavigable wetlands are now completely outside the geographic boundaries of Federal jurisdiction? Does this continue to be based solely on the Migratory Bird Rule, or is it more extensive?

Response. I do not believe that Rapanos changed or modified the impact of the SWANCC ruling, nor could it. Rapanos involved different questions, but in parsing the SWANCC ruling Justice Kennedy necessarily had to characterize the SWANCC precedent. He did so, largely reiterating its core holding and language. SWANCC dealt with particular wetlands found to be isolated and jurisdictional only because they were used by migratory birds. It did not involve a case where the Army Corps claimed jurisdiction under other portions of its Clean Water Act regulations. How the Court would deal with other regulatory justifications for jurisdictional determinations could not be resolved by SWANCC, nor could it be resolved in Rapanos, apart from the particular settings presented by each case.

Most significantly, Justice Kennedy's "significant nexus" test offers a variety of rationales for holding waters jurisdictional, even where waters may lack a direct hydrological connection. He also harmonizes the still good law articulated in the Riverside Bayview Homes decision, which clearly stated that adjacent wetlands are legitimately subject to protection under the Clean Water Act and its regulations. Putting these passages together, I think it clear that other rationales for protecting "waters" remain available under Army Corps regulations, and that SWANCC and Riverside Bayview Homes both remain good law that must be applied along with Rapanos.

Question 2. On June 28th, the U.S. District Court for the Northern District of Texas ruled in U.S. v. Chevron Pipe Line Company that the defendant in the case is not subject to Clean Water Act or Oil Pollution Act penalties stemming from an oil spill because the waters in question are not subject to jurisdiction under the statutes.

In the opinion, U.S. District Judge Sam Cummings stated he relied on 5th Circuit Court of Appeals precedent rather than the plurality ruling in Rapanos because the Supreme Court failed to provide clear guidance on which waters are jurisdictional under Rapanos.

Based on your experience, how will the past precedents of the Circuit Courts versus the Supreme Court's ruling in Rapanos be used to address the scope of the Clean Water Act?

Response. This district court opinion is an unusual ruling that I believe will and should be rejected by other courts. The District Court basically found Justice Kennedy's opinion difficult to apply, so simply reverted to the Justice Scalia plurality opinion that commanded only a minority of the justices, as well as to his own circuit's pre–Rapanos precedent. As I discuss more at length in response to your third question, and to the first question of Senator Inhofe, all courts working with the

Rapanos case need to figure out the legal rationale assented to by at least five justices of the Supreme Court. The opinion garnering majority support was by Justice Kennedy, whose rationales for protecting "waters" was explicitly joined in most respects by the four dissenters. They would have gone even further, but they undoubtedly and explicitly stated overwhelming agreement with Justice Kennedy's articulation of the law regarding what sorts of waters are protected by the Clean Water Act. Justice Kennedy also agreed with their rationales, acknowledging that in application, their approaches might differ little. Those five justices also explicitly rejected the Justice Scalia plurality opinion's articulation of the law.

The obligation of executive agencies and lower courts, and even the Supreme Court in future cases where it construes its own precedents, is to apply the legal rationale that commands a Supreme Court majority. This is often difficult work, but the Supreme Court's position in our legal system and the importance of abiding by precedents under the doctrine of stare decisis demands nothing less. I believe the district court erred in turning to Justice Scalia's plurality opinion and its own circuit's precedents pre-dating the Court's Rapanos decision. Lower court precedents must be re-analyzed in light of later Supreme Court decisions. Minority Supreme Court views are not the law.

Question 3. The Supreme Court's plurality ruling in the recent Texas redistricting case League of United Latin American Citizens, et al. v. Perry, et al., appears to raise into question the long-standing high court precedent of how to interpret plurality rulings. Rather than a controlling opinion of the Court being determined on the "narrowest grounds", it now appears that more leeway would be provided to individual justices to "mix and match" their views in developing a controlling opinion. What is your view on how plurality decisions should be interpreted based on this recent Texas case decision?

Response. This question relates to the Marks precedent and the issue of how lower courts and executive agencies should work with cases resulting in fragmented decisions. I see Latin American Citizens more as illuminating and confirming the core logic of Marks, than changing or "call[ing] into question" how one deals with cases resulting in fragmented opinions, with none commanding a clear majority on all results. To answer your question requires a brief reexamination of these interrelated precedents about how one construes Court precedents. The bottom line, however, is that if one goes back to look at Marks, discussion of Marks in Grutter and an array of lower court decisions, and the Court's clear majority portions of the Latin American Citizens opinion authored by Justice Kennedy, they all point in the same direction. The question is whether one can find in several opinions a shared rationale (or what some might call the law articulation) adding up to a majority of the Supreme Court. By this, I mean a shared explanation of what the law requires courts and agencies to do in this and future similar situations.

In Marks, the earlier case being construed resulted in fragmented decisions, but common rationale strains and agreements on the relief provided were agreed to by five justices. Describing that setting in that particular case, Marks confirmed that the common strains of the five justice's opinions added up to a majority Supreme Court precedent. There, in Marks, five justices "assented" to a common "rationale," as well as relief provided.

The analytical problem left unresolved by Marks is what courts should do when a precedent involves the less common setting of a majority that agrees on the relief ordered (a remand to the lower court and probably ultimately the Army Corps in Rapanos), but the majority articulation of a legal rationale involves a different majority of justices.

It is the latter situation that agencies, courts and litigants confront in the Rapanos precedent, where the Court broke down into a 4–1–4 configuration. The Justice Scalia opinion was joined by only three other justices. As the Rapanos decision states, Justice Scalia's opinion only announced the judgment of the Court, not an opinion for the court. In addition, Justice Scalia's opinion explicitly rejected the approaches articulated by the Justice Kennedy concurrence in the judgment, as well as the approaches of the dissenters. Justice Kennedy, in turn, agreed only with the plurality opinion's judgment that there was a need for a remand, explicitly rejecting the rationale stated by Justice Scalia's plurality opinion. In contrast, Justice Kennedy repeatedly embraced the dissenters' articulation of the law, and the dissenters repeatedly embraced the criteria articulated by Justice Kennedy to be applied in determining what sorts of waters are protected by the Clean Water Act. In short, five justices agreed on the judgment that a remand in the case was required, but five justices (Kennedy plus the dissenters) were in overwhelming agreement on the legal standard to be applied on remand and in future similar disputes over whether a "water" is jurisdictional and hence subject to a permit determination under the

Clean Water Act. Five justices agreed that at least the waters protected by Justice Kennedy's "significant nexus" test deserved protection.

Latin American Citizens is important because it does exactly what I above and in my submitted testimony stated was required in figuring out Supreme Court majorities. Justice Kennedy, in Latin American Citizens, in a section commanding a clear numerical Court majority, characterizes the earlier Vieth case as commanding a majority in the Court's refusal to hold nonjusticiable certain sorts of gerrymandering allegations. Justice Kennedy states that "a plurality of the Court in Vieth would have held such challenges to be nonjusticiable political questions, but a majority declined to do so." 126 S. Ct. at 2607. What is key is the following citation. To explain the existence of what the Supreme Court calls "a majority," he cites to his earlier opinion in Vieth concurring in the judgment, plus three dissenting opinions adding up to four additional votes that agreed with this conclusion. Id. Clearly, a majority of the Supreme Court agrees that a Court majority does not require agreement on rationale and relief. If the issue is what legal rationale is to be applied in the future, one must find at least five justices in agreement, regardless of whether they agree on the relief to be provided.

Your question asks whether this allows one to "mix and match." I would not use that exact characterization, but this case does confirm that the obligation of agencies and courts on remand and future similar cases is always to look and see if a rationale commanded the assent of five or more justices. Latin American Citizens does make clear that majorities do not require justices all to agree on the relief provided, just the rationale stating the Court's law articulation.

Question 4. In your testimony, you mention that only four justices adopted the view that Federal regulatory power should be cut back under the Commerce Clause? Would you explain for us in more detail why the majority of the Court rejected a Commerce Clause attack in this case?

Response. I believe that the numerous commerce linkages implicated here, ranging from the real estate developers who sought to develop the areas found to be jurisdictional waters, to the significance of such waters for other commercial purposes such as fishing, hunting, tourism, recreation and municipal uses, to the importance of such waters for flood control, filtration, and ecosystem functions, made it a relatively easy case. In addition, the Court's recent majority opinion in Gonzales v. Raich confirmed the several sorts of commercial linkages that can be constitutionally sufficient, plus it further affirmed that Commerce Clause analysis requires courts not to look at each challenged action in isolation, but (as stated by Justice Kennedy in language assented to by four other justices in Rapanos, quoting Raich), "[W]hen a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence."

Question 5. Both SWANCC and the Rapanos plurality suggested that the Corps' broad interpretation of its Clean Water Act jurisdiction "pushes the envelope" of the Federal commerce power. If Congress pursues a legislative clarification of the Act's reach, how far can it go without exceeding its power under the Commerce Clause?

Response. If Congress sought to regulate isolated wetlands lacking a hydrological link to other waters, based on use by birds alone, it might encounter Court resistance. After all, the Court in SWANCC explained its limiting read of the Clean Water Act as necessary to avoid Commerce Clause problems. However, the numerous other long-established rationales for protecting wetlands, tributaries and other waters, many of which were reviewed by Justice Kennedy and the dissenters in Rapanos, involve a wide array of commerce linkages. If anything, scientific studies from recent decades greatly strengthen the scientific and regulatory judgment that many waters not usable by large ships have huge commercial significance nevertheless. In addition, because most activities that threaten wetlands and tributaries are undoubtedly commercial—frequently real estate, agricultural, industrial or transportation activities—most threatening activities are commercial in nature and hence undoubtedly reachable under the Commerce Clause. If carrying of a gun restricted by Federal law was the relevant activity in Lopez, or gender motivated violence was the relevant activity in Morrison, then surely the activities threatening to cause harms are likewise relevant in looking at Clean Water Act regulation.

Question 6. What other types of Clean Water Act cases, and questions pertaining to Federal jurisdiction, do you believe may rise to the Supreme Court in the near future?

Response. I expect that all persons and groups concerned with protecting or developing in or near possible "waters of the United States" will be looking closely at all regulatory challenges. Especially with a complicated case such as Rapanos, litigants and regulators will try to clarify and likely push the law in new directions. Uncer-

tainty spawns litigation. I am uncertain which sorts of cases might end up in the Supreme Court; I expect the Court will allow lower courts and litigants to work with and perhaps clarify the implications of Rapanos before they would grant a petition for a writ of certiorari again in a Clean Water Act case.

Question 7. You mention in your testimony that a legislative fix to clarify the categories of "waters" covered by the Clean Water Act is necessary and the most prudent course of action. Are there any categories of waters currently covered by Federal regulations that should not be covered in a future legislative fix?

Respose. My answer to question five largely provides my answer. Short of drafting legislating that seeks affirmatively to challenge the Supreme Court by reasserting jurisdiction in the limited circumstances found excessive in SWANCC, I believe that abundant science and economic analysis would support efforts to protect one of America's most precious resources, its waters.

Question 8. Since the Rapanos ruling, a number of different stakeholders have suggested that Congress should legislate in order to clarify what is the extent of regulatory jurisdiction to protect wetlands. One current proposal is the Clean Water Authority Restoration Act, S. 912, which would provide a broad statutory definition of "waters of the United States." Some say that the statutory definition in that bill would conform the Clean Water Act to the administrative definitions used by the Corps and EPA priority to the SWANCC decision, but others say that the bill is even broader than the Corps and EPA rules. What is your interpretation of the definition in that legislative proposal?

Response. I have not seen any of the versions of S. 912 for several months, so I may be commenting on a draft that has been supplanted by another. Based on the April 27, 2006 draft I saw this summer, it struck me as a fair attempt to make statutory the approaches and rationales used during the past several decades through Clean Water Act regulations, and underlying judgments leading to and explaining those regulations. Its key definition of "waters of the United States" is virtually identical to the interpretation long considered settled, as reflected in case decisions, textbooks, and treatises up until 2001, when SWANCC and now Rapanos created regulatory uncertainty.

RESPONSES BY WILLIAM W. BUZBEE TO ADDITIONAL QUESTIONS FROM SENATOR INHOFE

Question 1. Mr. Buzbee, you testified that the law of the land is now the opinions of Justice Kennedy and Justice Stevens. You argued to us that those five Justices "assented regarding the rationale for the decision." The only significance to any agreement between Scalia and Kennedy is the vote on the remand.

Would you agree that the plurality and Justice Kennedy voted to determine the result of the decision that the case was remanded back the 6th Circuit? Would you also agree that the plurality and Justice Kennedy concurred in the judgment-that the case was remanded to the 6th Circuit?

Response. For my far more complete response to this question and question two, please see my answer to question three of Senator Chafee. In brief, I believe that the key opinion articulating the rationale of five justices of the Supreme Court is that of Justice Kennedy. Justice Kennedy agreed with the specific relief ordered by the Court a remand to the court below but otherwise he and the Justice Scalia opinion disagreed on virtually every point. The result, in the sense of the judgment regarding relief, had Justice Kennedy's agreement, but the result in the case articulating the legal rationale for application by the court below, executive agencies in the future, and lower courts, is that of Justice Kennedy. Five Justices agreed with his rationale, although four would have preferred a more expansive definition consistent with the last three decades of regulatory approaches.

Question 2. Would you please describe the basis for your legal opinion, in particular how it conforms to the long established Supreme Court Marks decision and subsequent precedent whereby the Court stated "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." (Marks v. U.S. 430 U.S. 188 (1977)) .

Response. My response to this question is provided at length in response to question three of Senator Chafee.

RESPONSES BY WILLIAM W. BUZBEE TO ADDITIONAL QUESTIONS FROM SENATOR JEFFORDS

Question 1. Can you explain whether you believe this decision will affect parts of the Clean Water Act other than the wetlands program and if so, why?

Response. Yes, any interpretation of what count as "waters of the United States" will influence not just efforts to protect wetlands and their tributaries from filling activity, but also what sorts of waters are protected from point source discharges from industrial and municipal sources regulated by Section 402 of the Clean Water Act. For this reason, interpretations of Rapanos are of huge importance to all efforts to protect America's waters.

Question 2. Are you familiar with the oil spill case from Texas that is, I believe, the first to interpret the Rapanos Carabell decision and do you have any thoughts on the implications of this case for agency efforts to enforce the Clean Water Act?

Response. Yes, as I explained at greater length in response to question two of Senator Chafee, this case appears unsound and contrary to Supreme Court majority law and the usual obligation of lower courts to apply that law. If that decision's approach becomes more widely accepted, it would turn Rapanos into a huge loss for the environment. If intermittent streams and rivers are no longer Federally protected from accidental or even intentional pollution, that would constitute a massive undercutting of long-established interpretations of the Clean Water Act. Fortunately, I believe that this opinion is in error and expect it will be reversed on appeal and rejected by other courts.

Question 3. In his separate concurring opinion, Chief Justice Roberts says that, because there is no opinion commanding a majority, "Lower courts and regulated entities will now have to feel their way on a case-by-case basis." This seems to indicate that there is no binding precedent set by this decision. What do you interpret this "case-by-case" statement to mean?

Response. I am uncertain about what Chief Justice Roberts meant. It is important to note that the Chief Justice did not command a Court majority in his brief concurrence. In fact, no other justice joined his opinion. If he was just saying that lower courts and agencies will now need to work with a confusing decision, he is probably making an accurate prediction; the "significant nexus" test does require case-by-case analysis. If he was expressing the view that because there is no single majority opinion, that there therefore is no majority Court rationale for lower courts to apply, then I find it puzzling. As discussed in response to question three of Senator Chafee, Marks and Latin American Citizens, and the fragmented decisions each discuss, together make clear that a majority assenting to a rationale can and often is constructed by examining several opinions together, looking for their commonalities. Much as several opinions in Vieth added up to what a Supreme Court majority in Latin American Citizens called a majority view, Justice Kennedy's opinion plus his overwhelming commonalities with the dissenters in Rapanos add up to a majority view.

Question 4. In his testimony, Mr. Kisling argues that the test for jurisdiction should be the commonalities between the Scalia and the Kennedy opinions. Do you believe that the Agencies are required to rewrite their regulatory definitions of "waters of the US" in response to this Supreme Court decision or can the agencies continue to implement the law under their existing regulations?

Response. First, I do not think Mr. Kisling's view is supportable. When two opinions explicitly disagree with each other, rejecting virtually all of each other's articulations of the law, I do not believe any precedents support joining them together to claim a majority view.

Second, while several opinions expressed the hope that regulatory definitions of "waters of the United States" would be amended, this was a not a challenge to those regulations, plus no opinion claimed to be striking down existing regulations. Many aspects of those regulations were not at issue in Rapanos, plus Rapanos and its companion case, Carabell, were "as applied" challenges. Absent legislative or regulatory correction, agencies will need to construe and apply their regulations consistent with Rapanos, but there is no Court mandate to amend the regulations.

Question 5. You testified that it would be helpful, in your opinion, for Congress to clarify the law. Can you elaborate on your views about the Clean Water Authority Restoration Act and do you believe that it would reaffirm and clarify the law?

Response. Yes, as stated above in response to questions seven and eight of Senator Chafee, I do believe that the version of S. 912 I've read would reaffirm and clarify the law by restoring the law to where it stood before the law was somewhat unsettled by SWANCC and now Rapanos.

Question 6. In the Department of Justice testimony, Mr. Cruden explained that the Department believes that waters will fall under the Clean Water Act jurisdiction if those waters meet either the jurisdictional tests set forth by Justice Scalia or Justice Kennedy's opinions. Can you comment on this interpretation?

In a limited sense, I agree. If you picture the three major opinions that of the Justice Scalia plurality, that of Justice Kennedy concurring in the judgment, and that of Justice Stevens and his fellow dissenters as each setting forth a percentage of waters that would be protected, Justice Scalia would protect a quite small percentage of waters, typically only those permanently standing or continuously flowing. Justice Kennedy would protect far more under his "significant nexus" test. The dissenters largely agree with Justice Kennedy in explaining what sorts of waters are protected by the Clean Water Act, but they probably would go even further, mainly due to their greater willingness to defer to regulators' assessments about what waters deserve protections. This all means that probably nine justices would protect at least the waters protected by the Justice Scalia opinion, five would protect those falling under Justice Kennedy's test, and four would be protected under the dissenters' views. For this reason, Mr. Cruden is correct. Frankly, however, I find it hard to imagine waters that would be protected by Justice Scalia and not also be protected by Justice Kennedy. In addition, I should add that I am unaware of any sound scientific or empirical basis for Justice Scalia's view of how and why waters should be protected. The only risk in Mr. Cruden's statement is that one must be clear that the extensive limitations on protections articulated by the Justice Scalia plurality do not command a Court majority.

Question 7. In the wake of the SWANCC decision, how many States stepped in and adopted laws to make sure that the so-called "isolated" waters at issue in that case were protected by State law? How many did not?

Response. I unfortunately have not seen or conducted such a survey. My impression from conversations with regulators and others around the country is that few States have stepped into the breach and created new protections once Federal law was limited.

RESPONSES BY WILLIAM W. BUZBEE TO ADDITIONAL QUESTIONS FROM SENATOR MURKOWSKI

Question 1. You suggested in your written testimony that either the executive or legislative branch could use Rapanos "as an excuse to cut back on protections of wetlands and tributaries" which would allow future storms to cause even more devastating floods. But any areas with a "significant nexus" with navigable waters are protected under Rapanos. Are you suggesting the wetlands that protect coastal Louisiana, do not have a "significant nexus" with navigable waters?

Response. No, I did not mean to imply such a meaning. I only meant that interpretive uncertainties potentially generated by Rapanos could lead policymakers or interest groups eager to cut back on the Clean Water Act's protections to use Rapanos as a catalyst to weaken existing law. Also, agencies wary of litigation might err on the side of avoiding conflict, and decline jurisdiction where they should find it. A Court majority in Rapanos agrees that "waters" can be protected for an array of reasons, including their importance for flood control, pollutant trapping, and runoff storage. Those rationales and many others under Army Corps regulations should leave coastal Louisiana wetlands subject to Federal protection under the Clean Water Act.

My concerns were prompted in part by a July 5 interim communication by the Army Corps to regulators in the field. That "Interim Guidance" instructed that until the implications of Rapanos were assessed, regulators should not make jurisdictional determinations or refer matters to the Department of Justice for enforcement actions unless the waters at issue fall under Section 10 of the Rivers and Harbors Act. Section 10 protects far fewer waters than Section 404 of the Clean Water Act and its regulations. Given the numerous Army Corps regulations regarding "waters" not even challenged in Rapanos and the 2001 SWANCC ruling, plus the overwhelming protections retained by Justice Kennedy's opinion, I find this interim communication puzzling and contrary to the obligation of all executive agencies to abide by Supreme Court decisions, as well as their own regulations.

Question 2. You've stated that "vast swaths of hugely important wetlands and tributaries around the country are at risk," and that the Corps of Engineers may decline to protect them. Do you personally agree or disagree with the Supreme Court's view that some wetlands do not come under the Clean Water Act? How would you distinguish such exempted areas?

Response. I think that even the Army Corps regulations and interpretive documents given a constraining read in SWANCC do not claim to make all wetlands Federally protected. I think that these long-standing regulations interpreting "waters of the United States," as well as underlying regulatory materials explaining and further fleshing out those regulations, have been long- tested and have a sound basis. In this assessment, I note that my view is shared by the Bush administration, which argued for retaining the regulatory protections challenged in Rapanos, as well as over 30 States that also joined briefs in support of the administration's defense of these cases and these long-standing regulations. In addition, scientific studies concerning the importance of wetlands and tributaries seem to strengthen the regulatory basis for protecting such waters. It remains a sound regulatory design for Federal jurisdiction to be broad, but allow the Army Corps to grant permits where an activity does not pose a threat to such waters. In addition, nationwide permits, mitigation, and compensatory banking provide further flexibility in this regulatory scheme.

STATEMENT OF CHUCK CLAYTON, THE IZAAK WALTON LEAGUE OF AMERICA

Mr. Chairman, members of the committee, my name is Chuck Clayton. I am the immediate Past National President of the Izaak Walton League of America, dedicated since 1922 to science-based conservation policy. The League has over 40,000 members and supporters, consisting of avid sportsmen and women, and others who simply enjoy the outdoors. We have 20 State divisions and more than 300 local chapters across the nation. The League advocates common sense conservation and I am proud to continue that tradition with my remarks today. My comments also represent the views of millions of Americans who belong to the many organizations who have joined the Izaak Walton League in submitting this testimony, including American Sport fishing Association, BASS/ESPN Outdoors, Berkeley Conservation Institute, Trout Unlimited.

As a landowning resident of South Dakota, and an avid hunter and angler, I appreciate this opportunity to share my views with the committee, and to illustrate just how the recent U.S. Supreme Court decision in the joint cases Rapanos and Carabell is affecting wetland and stream protection where it matters most, on the ground. Frankly, the benefits of extending comprehensive protections to waters such as non-navigable headwater streams and seasonally dry potholes are numerous and undeniable. Among their many functions, these various forms of waters improve water quality by retaining and recycling nutrients such as nitrogen and phosphorus, which when left unchecked, lead to oxygen exhausting algae blooms and dead zones. Wetlands also trap tremendous amounts of sediment, leading directly to clearer, healthier downstream waters, that otherwise would be choked by sunlight depleting sedimentation; and when left intact, wetlands lessen the devastation caused by floods and storms, like that which we so painfully witnessed during the Gulf Coast storms of 2005.

In addition to the important water quality functions that all forms of wetlands and headwater streams play, they also provide critical habitat for many species of fish and wildlife, including numerous species that are listed as threatened and endangered. Salmon and trout use cold headwaters for spawning, these streams may often be intermittent or ephemeral, and as such their protection under the Clean Water Act was left open for debate by the Supreme Court's decision in Rapanos. These ephemeral and intermittent streams make up nearly 60 percent of the streams in the United States, losing them would be yet another barrier to restoring native runs of trout, salmon, and shad.

Other important game fish, such as largemouth bass and northern pike, use varied types of wetlands and headwaters for many of the same purposes. Each specific type of wetland provides a certain set of conditions, including the proper food and cover, necessary for the survival of that specific species of fish. By temporarily storing water, even isolated wetlands ensure that downstream flows remain both cool and relatively constant, critical elements for healthy fish populations, but also important elements in the fight to stave off the negative effects of drought.

The thousands of small wetlands that make up the prairie pothole region of the Dakotas, often referred to as North America's "duck factory," annually support four million pairs of waterfowl that depend on high quality wetlands for nesting and the rearing of their young. The Supreme Court's decision in Rapanos leaves the status of virtually all prairie potholes in limbo. Losing these wetlands to development would put the future of these ducks in grave peril. Many other species are also wetland dependent. For example, deer, pheasants, quail, and many songbirds, as well

as reptiles and amphibians such as turtles and frogs depend on healthy wetlands as a key component of their habitat during the year.

The benefits of wetlands are important for people, too. Thirty-four million anglers and 13 million hunters rely on the clean water and healthy fish and wildlife populations that isolated wetlands support. These sportsmen and women contribute directly to the sustained economic growth and viability of communities across the United States, to the tune of about $70 billion annually. The economic benefit stems not just from hunters and anglers, but also from bird watching, one of the most popular and fastest growing pastimes in the Nation, which pumps millions more into local economies. Outside of recreation, wetlands are also vital to three-fourths of America's commercial fish production, which is worth about $111 billion. If wetlands are left unprotected from agricultural, residential, and commercial development, the economic loss would be staggering.

Despite the benefits, the protection of wetlands and many other waters has been bogged down by bureaucratic misinterpretations, allowing important Clean Water Act determinations to be made on an ad hoc basis. While the Administration did a good job of defending protection of wetlands and streams in the Rapanos case, they have not sufficiently led the way for consistent, vigorous use of the Clean Water Act to protect these vital resources. For instance, over a 6-month span in 2005, in the Omaha region of the U.S. Army Corps of Engineers, which includes parts of six States, including my home State of South Dakota, the corps deemed that at least 2,676 acres of wetlands, lakes, streams, and other waters fell outside the scope of the Clean Water Act. This approach to protecting our most important water resources is just not working.

The recent Supreme Court decision in Rapanos, further muddied the waters, providing little clarification to agency officials for how they should proceed to protect these important waters and providing no meaningful direction on how the Clean Water Act is to be applied. The decision fails to provide what Government land managers and environmental regulators so desperately need: a clear formula for protecting our valuable water resources. Protection should be the rule, not the exception. The conservation of our most important waters now depends on the leadership of Congress to make the Clean Water Act more explicitly inclusive of all wetlands, streams, and lakes. The Environment and Public Works Committee is currently considering legislation that would plainly codify the protection of these key resources. The Clean Water Authority Restoration Act (S. 912) would make real progress towards definitively granting important protections to water resources. Congress must pass this legislation. We in the conservation community believe that the Clean Water Act was written to be applied in the broadest fashion, to ensure that all waters of the United States are protected by the power of law. All wetlands and streams, no matter how isolated or intermittent, warrant strict protections under the Clean Water Act, because even the most isolated wetlands are part of an intricate hydrological web, upon which entire ecosystems, including humans, rely.

Mr. Chairman, this concludes my remarks. Again, on behalf of the aforementioned conservation organizations, I would like to thank you for this opportunity to share the views of the Izaak Walton League and our partners. I would be happy to respond to any questions that the members of the committee may have.

RESPONSES BY CHUCK CLAYTON TO ADDITIONAL QUESTIONS FROM SENATOR CHAFEE

Question 1. Your description of the prairie pothole region of the Dakotas as North America's "duck factory" provides quite a vivid image as to the number of waterfowl that utilize these areas for nesting and the rearing of young. Given the Supreme Court's lack of clarity in Rapanos regarding Federal jurisdiction over isolated wetlands, why is it important that the Federal Government retain Federal jurisdiction to protect prairie potholes? Is it possible for State laws in the Dakotas to fill the gap if Federal protections are removed?

Response. President Theodore Roosevelt adamantly maintained that the States need Federal help to fulfill State goals, and this observation is truer than ever in today's increasingly interconnected world. In the case of natural resources that are relied upon by several States, Federal regulation is necessary to ensure that the interests of all States are upheld. Though "isolated" wetlands may not physically cross State lines, they provide services that extend far beyond the area in which they are located. The draining of a prairie pothole in one watershed may have repercussions that extend to neighboring watersheds, and even across State lines.

The Association of State Wetland Managers (ASWM) notes that "Thirty-six States have limited or no wetland regulations applying to isolated wetlands. These States

either lack State statutory enabling authority or, if they have authority pursuant to water quality statutes, have not established wetland permitting systems due to lack of funds, staff, perceived need and/or political will." Since the SWANCC decision, most of the wetlands reviewed by the corps have been found to be exempt from the Clean Water Act. For example, the corps found that the affected wetlands in North Dakota were exempt in 69 of the 77 projects it has reviewed since March 30, 2004. Wetlands were determined to be exempt in 54 out of 125 cases reviewed in South Dakota since April 27, 2004. (Environmental Integrity Project, 2006)

Question 2. The Supreme Court's decision in Rapanos appears to raise into question Federal jurisdiction over isolated wetlands as well as some categories of ephemeral and intermittent streams. How prevalent are these types of wetlands and streams in South Dakota? What would happen if Federal protections for these areas were removed?

Response. According to the SD Dept. of Game Fish and Parks, "shallow, temporary and seasonal wetlands comprise 92 percent of all wetlands in the [prairie pothole region] of eastern South Dakota."µ Further, in a study of Clark County, 94-95 percent of wetland basins, or about 98 percent of the wetland area in the study region, could be considered "isolated" and therefore at risk of losing all Federal Clean Water Act protections.µIf Federal protections were removed, there are no State regulations in place to safeguard this acreage from the threats of development and agriculture.

"Potential real losses of wetlands in South Dakota resulting from loss of CWA are difficult to predict, but some experts (Bismark USFWS HAPET office staff) estimate that substantial losses of isolated temporary wetlands could lead to a 50% decrease in duck production in the Prairie Pothole Region." (SD Dept of Game, Fish and Parks, 2003)

The U.S. Fish and Wildlife Service estimates that each acre of small wetland reduces flood damage to roads by $6.11 per year. If one applies this value to all eastern South Dakota wetland basins less than one acre in size (73 percent), the total flood prevention value related to roads totals over $4 million. Each acre of small wetland also provides $29.23 worth of flood damage protection to agricultural land per year. (SD Dept of Game, Fish and Parks)

Question 3. There is a great deal of difference between wetlands, streams and tributaries in the East versus the West. Do you find the Supreme Court's decision in Rapanos unfairly limits Federal protections over wetland and stream areas in the West versus the East? How should this be remedied?

Response. Wetlands, streams and tributaries differ not just over large continental regions, but also locally, so that diverse types of streams and wetlands can occur within the same watershed. Discerning the type of wetlands present is a task best performed by qualified hydrologists, because even the smallest wetlands can provide immense ecological benefit, benefits which, if lost, may prove to be irreplaceable by any man-made alternative. The Clean Water Act was written to be necessarily broad, so that it could be molded to cast the widest possible net of protection, a net of protection that includes all waters of the United States,' a designation not beholden to regional bias. While many of the wetlands in the East may be easily discernible, like the Florida Everglades and the marshes of the Chesapeake Bay, the often less clearly delineated wetlands of the West deserve equal protections, especially given that region's perennial water issues. All wetlands, no matter how ephemeral, are interwoven as part of an intricate hydrological web, clearly constituting a significant nexus to those qualified to make such distinctions. "All waters of the U.S.,' defined as broadly as possible, should be the benchmark of protection under the Clean Water Act.

As a property owner and sportsman in South Dakota, what is your experience with the Federal wetlands permitting process? In your opinion, has it been a fair and streamlined process, or does it place onerous burdens on property owners in your region?

The Federal wetlands permitting process in South Dakota, as pointed out in my testimony, has not been very effective in protecting our wetlands. It is cumbersome and as the GAO study pointed out, not been much of a deterrent to wetland drainage (GAO Report GAO-05-870). At least these projects that are subjected to the permitting process have been put through an environmental and public interest review to determine what damages such activities might create. Allowing such activities to proceed without any review will provide economic benefit to a few at the potentially great expense to others. I personally feel that if we would appoint one agency to be the lead on wetland determinations, while adhering to the Memorandum of Agreement (MOA), signed by the Corps, EPA and USF&W on wetland issues, all stake holders would be treated more fairly.

RESPONSES BY CHUCK CLAYTON TO ADDITIONAL QUESTIONS FROM SENATOR INHOFE

Question 1. Justice Kennedy's test would have the corps make decisions on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries. Some of your members must be private landowners. Do you not agree that they would want more certainty than provided in the Kennedy test?

Response. Many of our members are landowners. We feel the Kennedy test is the result of Rapanos. We also know that "all waters of the U.S.", as described in the CWA, are important to all stake holders in this issue. The CWA, as passed by congress, has been weakened and muddied by Supreme Court decisions, administrative rule making and other governmental organizations trying to apply their spin on the meaning of the English language. The CWA was passed by the congress to avoid the "pay me know or pay me later" scenario, of the people in the upper reaches of watersheds polluting our waters, and later users having to pay billions of dollars to clean the water up for uses like bathing and drinking. If we want more certainty, congress needs to pass the Clean Water Authority Restoration Act (S. 912). The CWA was not passed by the EPA, the Corps, the administration or the USF&W. It is a law passed by congress, and the congress needs to clarify it.

Question 2. You mentioned that you do not believe States "would take care of wetland delineations and wetland problems." As an example you point to a navigable river that runs from "almost the North Dakota border down to the southern border of South Dakota, dumps into the Missouri River and continues down to the Gulf. There is no way one single State should have that kind of jurisdiction over wetlands." Most discharges into the river would most likely be governed by Section 402 of the Clean Water Act. Both South Dakota and North Dakota have been delegated authority by EPA to implement and enforce Section 402, thus overseeing discharges into the river. Do you disagree with the delegation of this authority to the States? Resource issues aside because I know that is a problem that must be addressed, if the States can regulate all other pollutants into a river that flows between States, why wouldn't we trust them to also regulate wetlands?

Response. States that have been delegated Section 402 Point Source programs were required to first demonstrate that their State programs are at least as protective as the Federal Clean Water Act. Thus, delegation of this important program to States was accomplished while still retaining a Federal "floor" for protections that applied in all States and territories. States can establish stricter standards, but none can establish weaker standards. Only two States have been delegated Section 404 authority, New Jersey and Michigan. To be granted this delegation, both States had to prove that their dredge and fill permitting programs were at least as protective as Federal law.

Because most State laws evolved to work with, rather than in place of, Federal laws, only a third of States have independent dredge and fill protections and most are far less protective than Section 404. Eliminating Clean Water Act protections for even some wetlands, streams, and other waters, eliminates any Federal "floor" in protections and leaves waters subject to a patchwork of State, regional and local protections. This is important because degradation caused by dredge and fill activities can have profound impacts downstream, just as direct discharges of pollutants can. Dredge and fill activities frequently release pollutants formerly held in bottom sediments, allowing these pollutants to migrate far downstream and be taken up by aquatic life. Additionally, fine sediment particles can migrate far downstream, smothering fish spawning habitat and increase water filtration costs.

Changes in section 404 jurisdiction would diminish use of one tool used by many States to control activities affecting wetlands. Most States have utilized CWA section 401 water quality certification programs in addition to or in lieu of specific regulatory statutes. But, where Federal jurisdiction does not exist and no section 404 or other Federal permit is required, section 401 certification also is not required and thus is not available as a tool for the State to evaluate the proposed activity. State programs supplement but do not substitute for Federal jurisdiction. Additionally, State regulations do not generally apply to Federal lands. Some of the States with the largest isolated wetland acreages provide little or no State protection, including Alaska, Louisiana, Texas, North Dakota, South Dakota, South Carolina, North Carolina, Georgia, Nebraska, Kansas, and Mississippi. Though States are currently afforded the opportunity to assume section 404 program authority, only two States (Michigan and New Jersey) have taken advantage of this—partly due to the resource burden that would be required. (CRS Report-Feb 2001)

Question 3. Mr. Clayton, in your testimony you mention that the Corps determined 2,676 acres of wetlands as non jurisdictional in 6 States over a 6 month pe-

riod. On what basis did the corps rule they were not wetlands? How many wetland acres did the Corps protect during that same time frame?

You present this number as means to show how many areas you believe to be wetlands were developed. However, from 2002 through 2004 through USDA wetland protection programs 1,653,000 acres of wetland areas have been protected. How would you define the jurisdictional boundaries or is it your view that every possible area in the country that may receive a very limited amount of rainfall should be a regulated by the Federal Government?

Response. According to the corps, it evaluates more than 85,000 permit requests annually. Of those, more than 90 percent are authorized under a general permit. Less than 0.3 percent of the remaining permit applications are ultimately denied.

From January 2004 until May 2006, the Corps made 2,794 non-jurisdictional determinations in the 15 most affected States. These determinations opened between 16,000 and 23,500 wetland acres to development. Approximately 75 percent of these non-jurisdiction determinations made by the Corps apply to wetland areas which are, or could be, habitat for migratory bird species and 12.5 percent apply to endangered species habitat.µ(Environmental Integrity Project, 2006)

The corps has received several requests from environmental groups for information on all non-jurisdictional determinations made by its 38 districts. GAO found that only 5 percent or less of the files in four of the five districts contained a detailed rationale, while 31 percent of the files in the fifth district contained such a rationale. The percentage of files that contained no rationale whatsoever as to why the Corps did not assert jurisdiction ranged from a low of 12 percent to a high of 49 percent in the five districts. The remaining files contained partial rationales. (GAO Report GAO-05-870)

Following the Supreme Court's January 2001 ruling, the Corps is generally not asserting jurisdiction over isolated, intrastate, non-navigable waters using its remaining authority. Since January 2003, EPA and the Corps have required field staff to obtain headquarters approval to assert jurisdiction over waters based solely on links to interstate commerce. Only eight cases have been submitted, and none of these cases have resulted in a decision to assert jurisdiction. According to project managers, they are reluctant to assert jurisdiction over these kinds of waters because of the lack of guidance from headquarters and perceptions that they should not be doing so. (GAO Report GAO-05-870)

According to the latest USFWS Status and Trends of Wetlands Report, there has been an overall gain of 191,750 wetland acres from 1998 to 2004. However, as the report itself acknowledges, most of this gain was in the freshwater pond category, which includes ornamental ponds, golf course hazards, and aquaculture production facilities. "Without the increased pond acreage, wetland gains would have failed to surpass losses during the timeframe of this study. The creation of artificial freshwater ponds has played a major role in achieving the national wetland quantity objective." (Dahl, 2006) Yet deep-water systems are unable to provide the same functions and values offered by vegetated wetlands, which we are continuing to lose at a rate of 82,500 acres each year.

Responses by Chuck Clayton to Additional Questions from Senator Jeffords

Question 1. In your testimony you talked about the impact of hunting and angling on local economies. If the excise taxes traditionally spent on conservation were no longer available, I expect those dollars would then have to come from some other source. What would be the impact on the Federal budget, and what other sources of funds would you expect local communities to turn to as a replacement?

Response. According to the U.S. Fish and Wildlife Service, the excise tax on hunting gear (commonly referred to as the Pittman-Robertson tax) generates an average of $200 million each year, a total of $4.2 billion since the tax was enacted in 1937. These dollars are spent to conserve the fish and wildlife habitat that hunters and anglers rely on to pursue their sport, but other outdoor enthusiasts, who pay no such tax, also enjoy the conservation benefit of sportsmen's dollars. If wetlands continue to be drained, filled, and polluted, hunters and anglers across the country will lose interest in pursuing vanishing fish and game that no longer have the habitat necessary to maintain healthy populations. Government at all levels would be unable to bridge this gap in funding for conservation, and the protection of our fragile natural resources would be in jeopardy. This exodus of hunters and anglers from the landscape will leave a wide gulf in the local economies that rely on hunters and the $30 billion they spend on their sport each year, spending that supports a million

jobs nationwide. The economic benefit of hunting and angling is real; the economic loss of hunters and anglers would be devastating.

Question 2. Based on the track record of the agencies implementing previous Supreme Court decisions, do you think the implementation of the Rapanos—Carabell decision should be left to the Administration to do a rulemaking?

Response. The Clean Water Act is one of Congress' most profound environmental achievements, and improving it should not be left to any Presidential administration. The current Administration has illustrated that it is comfortable protecting golf course ponds and sewage lagoons as functioning wetlands, while at the same time allowing high-value ephemeral and intermittent wetlands to fall to the bulldozer and the plow; a short-sighted philosophy that encourages "wetland" quantity at the cost of wetland quality. The Court's decision implies the need for Congressional clarification of the Clean Water Act, in order to more explicitly define precisely what constitutes a "a water of the United States," and thereby what wetlands deserve protection. Only Congress can hold robust hearings on these important issues in order to gather input from stakeholders and concerned citizens alike, and in the end, only Congress can declare its original intent. This is exactly what would be accomplished by passage of the bill, you and Senator Feingold introduced, the Clean Water Authority Restoration Act.

Question 3. What do you think of the proposition that it can be left largely to the States to determine which streams and wetlands should be protected from pollution, and based on your experience, would this be a workable approach?

Response. No. In the case of natural resources that are relied upon by several States, Federal regulation is necessary to ensure that the interests of all States are upheld. Though "isolated" wetlands may not physically cross State lines, they provide services that extend far beyond the area in which they are located. The draining of a prairie pothole in one watershed may have repercussions that extend to neighboring watersheds, and even across State lines.

State and local wetlands regulatory programs supplement but do not substitute for Federal jurisdiction. Additionally, State regulations do not generally apply to Federal lands. Some of the States with the largest isolated wetland acreages provide little or no State protection, including Alaska, Louisiana, Texas, North Dakota, South Dakota, South Carolina, North Carolina, Georgia, Nebraska, Kansas, and Mississippi. The Association of State Wetland Managers (ASWM) notes that "Thirty-six States have limited or no wetland regulations applying to isolated wetlands. These States either lack State statutory enabling authority or, if they have authority pursuant to water quality statutes, have not established wetland permitting systems due to lack of funds, staff, perceived need and/or political will."

Question 4. Some of the other witnesses today noted that the Administration did not change the regulations defining the "waters of the US" following the Supreme Court's 2001 Clean Water Act decision. Did your organization or the other hunting and fishing advocacy groups you are representing today take a position on that rulemaking proposal?

Response. Yes. Following the Supreme Court's decision in 2001, the Izaak Walton League and many other hunting and fishing advocacy groups urged the U.S. Environmental Protection Agency to provide additional guidance on key terms in the decision, such as significant nexus, tributary and adjacent, in order to insure that the narrow legal interpretations embodied in the SWANCC decision did not get lost as it filtered down to the field offices of the Corps and EPA. Following the 2003 release of the administration's Advance Notice of Proposed Rulemaking (ANPRM), however, the League criticized the Corps and the EPA for suggesting a retreat from Federal Clean Water Act jurisdiction that goes considerably beyond that required by the Supreme Court's decision. The League published an in-depth legal analysis of the SWANCC ruling, which determined that the decision's limited scope left intact the broad regulatory authority of the EPA and the corps to protect most of the waters of the U.S.—including many of the so-called "isolated waters." Our position remains that Congress clearly intended the Clean Water Act to cover all waters of the United States. In order to keep the Act's promise of clean waters for all communities across the nation, Congress must take up the responsibility for safeguarding Federal CWA protections for all waters of the United States.

In addition, more than 99 percent of the 135,000 comment letters and 39 of 42 States that commented on the ANPRM, opposed the proposed weakening of Federal Clean Water Act protections.

Question 5. Do you believe that the Administration is required to rewrite their regulatory definitions of "waters of the US" in response to the Rapanos—Carabell decision, or can the agencies continue to implement the law under their existing regulations?

Response. The Court's decision in Rapanos does not require the Administration to rewrite the regulatory definition of the phrase "waters of the U.S." However, the various agencies tasked with protecting wetlands and implementing the Clean Water Act, have not, and therefore cannot continue to, successfully implement the law under their existing regulations. Business as usual isn't working, and we are losing thousands of acres of wetlands each year. It is apparent that the Clean Water Act does require clarification, but the Act originated in Congress, Congress must be the ones to provide that clarification.

STATEMENT OF KEITH KISLING, NATIONAL ASSOCIATION OF WHEAT GROWERS, NATIONAL CATTLEMEN'S BEEF ASSOCIATION

INTRODUCTION

My name is Keith Kisling and I come from Burlington, OK. I am here today testifying on behalf of the National Association of Wheat Growers (NAWG) and the National Cattlemen's Beef Association (NCBA). I raise 1,500 head of stocker cattle on wheat pasture and 900-1,000 cattle on a backgrounding lot. Additionally, I grow wheat on more than 3,000 acres. Currently, I am the Chairman of the Oklahoma Wheat Commission and am the past Chairman of the U.S. Wheat Associates, which is the marketing arm for wheat growers in our country. My family and I have been in the business of farming and ranching for more than 35 years, and I am a third generation producer.

Members of NAWG and NCBA are on the land everyday raising and growing food for our nation and the world. We produce the cheapest and most plentiful supply of food in the world. Our producers respect and love the land in a way occasional visitors to the land may have difficulty comprehending. We know that food production must be sustainable for it to be economic in the long run.

Approximately 70 percent of the land in the lower 48 States is owned privately. A substantial portion of this land is used for the production of food which is arguably the most important use for this land. The production of food in our country cannot be taken for granted. Farmers and ranchers in other countries are increasingly able to produce comparable food at lower cost to the American market. Additionally, society also looks to this private land and associated waters for many other services, including habitat for wildlife, clean water, and open space, most notably. American producers face an ever tightening web of regulations which economically marginalizes an increasing number of operations. While many, if not all, of the environmental and work-safety regulations are well-intended, it must also be recognized that limiting and ultimately choking the ability of farm and ranch operations to earn a living will come at a considerable cost to the Nation.

The single biggest threat to wildlife values in the world is fragmentation of landscapes. Given the enormous pressures to subdivide and develop land in this country, farms and ranches are the most important buffers to slowing the tide of development. There is also a considerable human cost to disregarding the needs of farms and ranches. The families who settled our country and made a living from the land provided a critical service to our nation and deserve the respect and support of society. While times change and so must people, hopefully our ability and desire to support our history and cultural heritage does not. Respect for this history includes respect for buildings and artifacts. But it also includes respect for the people who made the buildings and artifacts. We are diminished as a people if we lose our connection with the past and the people who continue to bridge the past with the future.

The challenge for society in using private lands is to strike a sensible balance between the demands of food production and conservation of natural resources. Unfortunately, the United States through both Republican and Democratic administrations has completely abdicated its responsibility to strike a balance between protecting wetlands and the respecting people who make their living on the land. Not only has no balance been struck, but in fact, regulation has been allowed to proceed unlawfully and directly at odds with teachings from the leading Supreme Court cases on the issue. This Congress and this Administration cannot allow this situation to continue. Fortunately, the Supreme Court provided a roadmap for resolving the situation in its recent decision in Rapanos v. United States, 126 S. Ct. 2208 (2006).

1. NEED RULEMAKING

Section 404 of the Clean Water Act (CWA) authorizes the Corps of Engineers to issue permits for the discharge of dredge and fill materials into navigable waters

of the United States. In Solid Waste Agency of Northern Cook County v. Army Corps of Engineers, (SWANCC), 531 U.S. 159 (2001), the Supreme Court ruled the corps could not require a permit to fill isolated wetlands because such wetlands are not waters of the United States and are not subject to the regulatory reach of the Clean Water Act. This limitation on the reach of the CWA has never been implemented by the corps in a rulemaking. Instead, the corps continues to assert jurisdiction over every conceivable presence of water on the land. In Rapanos, 126 S. Ct. 2208 (2006), the Court observed that even after SWANCC, the Government continued to regulate "roadside ditches"; tributaries consisting of "an intermittent flow of surface water through approximately 2.4 miles of natural streams and manmade ditches"; "irrigation ditches and drains that intermittently connect to covered waters"; and, "washes and arroyos" in the middle of the desert. Rapanos, 126 S. Ct. at 2217–18.

The need for rulemaking was emphasized by Justices Kennedy, Breyer, and Chief Justice Roberts in Rapanos. As Chief Justice Roberts observed;

Rather than refining its view of its authority in light of our decision in SWANCC, and providing guidance meriting deference under our generous standards, the corps chose to adhere to its essentially boundless view of the scope of its power. The upshot today is another defeat for the Agency.

Rapanos, 126 S. Ct. at 2236.

Nobody benefits from the Government's failure to act in this arena. Without a rule, a Federal assertion of jurisdiction over waters will always be subject to a legal challenge for failure to comply with the Administrative Procedures Act. Not only will the agency be defeated again without a rule but so will those members of the public who are concerned with protecting as much water resources as possible within the actual jurisdiction of the corps.

Of course, agriculture producers are also big losers from Government regulation without a rule. Because agriculture producers control so much private land in this country, much of the land has some kind of water on it either permanently or intermittently. Without clear notice of the extent of the Government's regulatory reach provided by a rule, producers will always be uncertain about the extent they can use their own land without running afoul of the proscriptions in the CWA.

Both the overzealous Government regulation and the failure to provide adequate notice about the extent of authority to regulate result in serious infringement of the rights of producers to use their own property. Private property rights are perhaps the most important bulwark enshrined in our nation's laws and customs against abusive Government conduct. People want to be left alone to use their property as they see fit. While we understand the Government can and should regulate private conduct in certain carefully prescribed instances, we expect in this country that that regulation will be pursuant to law.

In the case of waters of the United States, the Government has clearly been regulating the use of private property beyond the authority conferred by the CWA. In its decisions in SWANCC and Rapanos, the Supreme Court has worked to check this usurpation of congressional authority by the executive branch of Government, albeit to no avail as of this time. Those interested in protecting civil liberties, and of course the producers themselves, are the big losers. The time for the Government to issue a rule in conformance with the law is certainly upon us.

2. CONTENT OF THE REGULATIONS

The Supreme Court in Rapanos offered guidance on this question as well. As an initial matter, it may be worth dispelling confusion that apparently swirls around the wetlands community as to what was the rule issued by the Court in the case. If the interested community cannot come to agreement on this point, it is hard to imagine an agreement forming on what should be the content of the regulations.

When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds." Marks v. United States, 430 U.S. 188, 193 (1977) (emphasis added). For Rapanos, the opinions that "concurred in the judgment" were Justice Scalia's four-justice plurality and Justice Kennedy's concurrence, not Justice Stevens and the dissent. Accordingly, the Administration should look to the common elements of the Scalia and Kennedy decisions to determine the new standard for CWA jurisdiction. There appears to be at least two elements Kennedy and the plurality agreed on:

1. Hydrologic Connection

Hydrologic connection in the sense of an interchange of waters between a wetland and a navigable in fact body of water is not enough by itself to show a "significant

nexus" between the wetland and the water to support an assertion of jurisdiction by the corps. 126 S. Ct. at 2251. Justice Kennedy emphasized the importance of frequency of flow, volume of flow, and proximity to traditional navigable waters in determining whether a nonnavigable water has a "significant nexus" with traditional navigable waters. Justice Scalia's plurality opinion requires a continuous connection from nonnavigable water to navigable water. Thus, remote and insubstantial connections will not suffice under either test.

2. Identification of Jurisdictional Tributaries

Justice Kennedy criticized the corps' existing standard for identifying tributaries as overbroad:

> [T]he corps deems a water a tributary if it feeds into a traditional navigable water (or tributary thereof) and possesses an ordinary high water mark. . . . [A]though this standard presumably provides a rough measure of the volume and regularity of flow . . . , the breadth of this standard—which seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water carrying only minor water volumes towards it—precludes its adoption as the determinative measure of whether adjacent wetlands are likely to play an important role in the integrity of the aquatic system comprising navigable waters as traditionally understood.

126 S. Ct. at 2249. Justice Scalia was similarly skeptical of the corps' and EPA's regulation of ditches, drains, gutters, and gullies.

These points of agreement do not so much identify an affirmative standard for regulation, as they identify limitations on corps authority, as does the SWANCC Court's decision excluding isolated wetlands from the reach of regulation, that must be reflected in promulgated rules.

Much has been made of Justice Kennedy's proposed "significant nexus" test for determining whether a wetland is within the reach of Government regulation under the Clean Water Act. Because of the variety of circumstances in which water exists on the land, it may very well be that jurisdictional determinations for wetlands will have to be done on a case-by-case basis to some extent. It is also true, however, that the Supreme Court has offered some bright lines in SWANCC and the common elements in Rapanos for excluding certain waters from the reach of the CWA.

Thank you for this opportunity to testify today. I will be pleased to take any questions you may have.

RESPONSE BY KEITH KISLING TO AN ADDITIONAL QUESTIONS FROM SENATOR INHOFE

Question. Can you please describe again for the Committee the wetlands that are on your property? As I understand buffalo wallows, they were formed by the continuous wallowing of buffalos on the ground to rid themselves of insects. The soils are packed so tightly that the spots have become impervious. When there is below average rainfall, they have little to no water in them and when there is above average rainfall, the water enters the wallow from rainfall and escapes through evaporation. Are the "wetlands" on your property buffalo hollows? Do they have a hydrological connection to any neighboring waterbodies? Are they adjacent to any neighboring waterbodies? Are they entirely intermittent, nonnavigable, intrastate waterbodies?

Response. The wetlands where I farm in the Central Great Plains ecoregion may have been used by the buffalo. To my knowledge, they are not adjacent to any neighboring waterbodies.µ I would say they are isolated intrastate wetlands.

RESPONSES BY KEITH KISLING TO ADDITIONAL QUESTIONS FROM SENATOR JEFFORDS

Question 1. While not everyone who lives in a rural area is a farmer, everyone in rural areas must drink water. The regulation of what may or may not come in contact with water might impose costs on a farmer, but it also saves costs down the road. If a stream, river, or lake never becomes polluted, fewer tax dollars must be spent to clean the water for household use. If groundwater stays clean, fewer impurities will find a way into a rural neighbor's well. How do you and your neighbors in Oklahoma reconcile with these benefits?

Response. Farmers and ranchers want to cut out unnecessary costs to keep their operations economically viable and we want clean water like all Americans. We face more costly regulations now than any other time since I have been farming. Wetland regulations are an example of where many farmers and ranchers have found

themselves trapped in the corps regulatory grip when they simply dug a ditch or moved a little dirt around on their property. Fortunately, Farm Bill conservation programs are available to help offset many burdensome regulatory costs. One only needs to look at the record participation in voluntary, incentive-based conservation programs to understand the willingness of farmers to conserve natural resources and the need to use these programs to offset the enormous and costly burdens of heavy-handed regulations.

Question 2. In your testimony, you state that, rather than adopt the limitation on regulation of isolated waters that you believe the SWANCC case called for, you believe that ". . . the corps continues to assert jurisdiction over every conceivable presence of water on the land." This is not consistent with the data collected by the GAO which found in its report of September 2005 that, "Since the Supreme Court's January 2001 ruling, the corps is generally not asserting jurisdiction over isolated, intrastate, nonnavigable waters using its remaining authority." The report goes on to say that, "Only 8 cases have been submitted to headquarters to obtain approval for asserting jurisdiction based solely on links to interstate commerce, and none of them have resulted in a decision to assert jurisdiction." On what data do you base the statement in your testimony? Please provide specific examples.

Response. About six to eight months ago, a farmer initiated a project to improve the drainage on 11 of the 130 acres he has under center pivot irrigation. Before he conducted any work, he contacted USDA's Natural Resources Conservation Service and his State regulatory Agency to get approval and was told that they did not consider his land to be a wetland. Afterward, the corps wrote him a letter explaining that they had reviewed his information and did consider his proposal an attempt to fill "11.8 acres of wetland." The corps said he needed a section 404 permit and he would have to restore or create wetlands at a ratio of 1.5 acres of compensatory mitigation to one acre of wetland adversely impacted. The corps indicted that he needed approximately 17.7 acres of restored and/or created wetland, which they figured would cost him about $77,000.

The corps' claim to jurisdiction over this property is based upon a hydrologic connection of the field to an unnamed wetland which is adjacent to another unnamed wetland which is adjacent to an unnamed tributary which is adjacent to the non-navigable creek, which is said to be a tributary to the non-navigable upper reach of a river.

The scary part of this example is this; the navigable portion of any water is more than 160 miles as the crow flies from this land. The tenuous hydrologic connection that exists between the farmland and the corps "tributary" is generated by runoff and only "occasionally" exits this farmers' property through a culvert in a levee that his center pivot irrigation system uses to make its circle. The frequency and volume of the surface water runoff is generally very limited. In fact, the flow through the unnamed wetland is non-existent most of the year. Any water that leaves this property continues through property immediately abutting his property. If any water reaches the adjoining property, it encounters various water management structures designed to obstruct and prevent the surface flow into the unnamed tributary.

The 130 acres and the 11.8 acres the corps is calling a "wetland" have been farmed for almost a century. This land is not navigable water; it's nowhere near navigable water. If this land can be regulated as navigable waters, just about any land can.

Question 3. You raise the issue of property rights. In the Supreme Court decision in Bayview Homes, this issue was explicitly addressed. The Court found that, "Neither the imposition of the permit requirement itself nor the denial of a permit necessarily constitutes a taking." The Court goes on to say that there is Federal legislation providing the authority to provide compensation for takings that may result from the corps' exercise of jurisdiction over wetlands. I have read nothing in Rapanos-Carabell that addresses this question in any manner. Can you articulate in more depth where in the decision we are reviewing during this hearing that issue is addressed?

Response. If I own a tractor, I should be able to use it in the normal conduct of my farming operations. From my perspective, when the Federal Government takes something away—it's a taking. Rapanos and Carabell were just trying to use their land. If the corps designates an area on my property as a wetland, preventing me from using my property, that is a taking. The Rapanos decision is all about private property rights.

Question 4. In your written statement you say, "In its decision in SWANCC and Rapanos, the Supreme Court has worked to check this usurpation of congressional authority by the executive branch of the Government. . . " In the Rapanos-Carabell case, the Administration provided pages of legislative and regulatory history sup-

porting their case. Can you tell me exactly which part of the legislative history of the Clean Water Act supports your view that the executive branch of the Government has gone beyond the authority granted them by Congress?

Response. I am not an attorney but as a citizen, I have should be able to understand the Government's interpretation of the word navigable. As a citizen, I understand it to be as the dictionary defines it "sufficiently deep and wide to provide passage of vessels. Navigable waters—provides passage for vessels." The term navigable must be related to a common understanding. It is common sense that the average citizen should be able to understand what Congress had in mind as its authority in enacting the CWA.

In reading through the Legislative History, Congressman Dingell talked about defining the term "navigable waters" broadly" His statement in context supported including waterways which would be "susceptible of being used (in interstate commerce)—with reasonable improvement," as well as those waterways which include sections presently obstructed by falls, rapids, sand bars, currents and floating debris."[1] Senator Muskie made the following statement—"One matter important throughout the legislation is the meaning of the term "navigable water of the United States". . . The term "navigable waters" includes all waters bodies, such as lakes, streams, and rivers, regarded as public navigable waters in law which are navigable in fact. It is further intended that such waters shall be considered to be navigable in fact when they form, in their ordinary condition by themselves or be uniting with other waters or other systems of transportation, such as highways or railroads, a continuing highway over which commerce is are or may be carried on with other States or with foreign countries in the customary means of trade an travel in which commerce is conducted to day (1972). In such case the commerce on such waters would have a substantial economic effect on interstate commerce."[2]

In sum, I am sure there is a lot of legislative history but I believe the plain language and the above history of the 1972 amendments suggest that Congress intended for the word navigable to mean "navigable in fact".

Question 5. In your testimony, you state that, ". . . the Administration should look to the common elements of the Scalia and Kennedy decisions to determine the new standard for CWA jurisdiction." You base this statement on Marks v. United States. During the hearing, neither the Department of Justice, Dr. Adler or Dr. Buzbee, professors of law, agreed with your interpretation. On what legal basis do you assert that the common elements of Scalia and Kennedy should be used as the standard for CWA jurisdiction?

Response. Professor Adler testified "therefore, the concurring opinion of Justice Kennedy and the grounds of the agreement between Justice Kennedy and the plurality offered by Justice Scalia form a holding of the Court." Further, Marks v. United States represents the view of the Supreme Court as to how to determine the rule that results from a divided court. Chief Justice Roberts, in his concurring opinion, indicated that, "this situation is certainly not unprecedented," and pointed to Marks v. United States.

Question 6. In your testimony, you state that, "Justice Kennedy emphasized the importance of frequency of flow, volume of flow, and proximity to traditional navigable waters in determining whether nonnavigable water has a "significant nexus" with traditional navigable waters." On the contrary, Justice Kennedy spends pages 12-14 of his opinion specifically refuting the viewpoint offered by Justice Scalia on these issues. On page 13 of Justice Kennedy's opinion he states, "The plurality's first requirement—permanent standing water or continuous flow. . . makes little practical sense." On page 15, he states, "The plurality's second limitation—exclusion of wetlands lacking a continuous surface connection to other jurisdictional waters—is also unpersuasive." Justice Scalia writes that the dissent's rationale for determining Clean Water Act jurisdiction is "demonstrably inadequate." Your testimony implies that the Kennedy and Scalia opinion are in agreement on these issues. On which specific passages in Justice Kennedy's opinion do you base your statements?

Response. In part "B" of Justice Kennedy's opinion, he refers to the Corps' existing standard for "tributaries." His opinion states that the corps' existing standard,

"may provide a reasonable measure of whether specific minor tributaries bear a sufficient nexus with other regulated waters to constitute "navigable waters" . . . Yet the breadth of this standard . . . leaves wide room for regulation of drains, ditches, and streams remote form any navigable-in-fact waters and carrying only minor water-volumes—preclud[ing] its adoption as the determinative measure of

[1] Legislative History 250-51. Representative Dingell's statement

[2] Legisltative History 178. Senator Muskie's floor statement in support of the 1970 act. See 116 Cong. Rec. 8985; see also H.R. Rep. No. 92-1323, 31 (quoting the same language).

whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood . . . Indeed, in many cases wetlands adjacent to tributaries covered by this standard might appear little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in SWANCC." (page 25)

Further, Justice Kennedy states " . . . mere hydrologic connection should not suffice in all cases; the connection may be too insubstantial for the hydrologic linkange to establish the required nexus with navigable waters as traditionally understood." (page 28).

He goes on to argue that Rapanos must be reheard because "the record gives little indication of the quantity and regularity of flow in the adjacent tributaries—a consideration that may be important in assessing the nexus." (page 29)

Finally, Justice Kennedy states ". . . the corps bases its jurisdiction solely on the wetlands' adjacency to the ditch opposite the berm on the property's edge. As explained earlier, mere adjacency to a tributary of this sort is insufficient; a similar ditch could just as well be located many miles from any navigable-in-fact water and carry only insubstantial flow towards it." (page 30).

Question 7. Your testimony indicates that you tend to agree that the Clean Water Act should not protect certain wetlands and tributary streams. Do you have an estimate about what percentage of the Nation's streams and wetlands should not have Federal protection under your view of the current law?

Response. No.

Question 8. There is only one definition of "waters of the U.S." under the Clean Water Act. Do you agree that whatever intermittent streams and wetlands are "too remote" in your view to be regulated should not be covered by any Clean Water Act program, including those designed to prevent raw sewage from entering such waterbodies?

Response. States, including Oklahoma have health and safety codes that dictate how individuals must handle and treat "raw sewage." No one in Oklahoma can lawfully discharge "raw sewage" anywhere—period. So my State has taken care of that health problem without the help of the Corps and EPA.

Question 9. In your testimony, you say there is a need for agency rulemaking to clarify the Clean Water Act to let landowners and others know what the law is and in the interest of "those members of the public who are concerned with protecting as much water resources as possible within the actual jurisdiction of the Corps". But you didn't say anything about what Congress should do. As the body that enacted the Clean Water Act, doesn't it make more sense for Congress to say what waters should be covered by the Clean Water Act?

Response. Like all businessmen and women, farmers and ranchers need a clear set of rules by which to plan and run their businesses. Even if Congress were to more clearly identify what waters should be covered by the Clean Water Act, the Corps and EPA would still be required to issue regulations implementing the new statutory definition. The agencies must act to conform their regulatory practice to the Supreme Court's decisions in SWANCC and Rapanos. The call for such regulations was loud and clear in the Rapanos decision.

Question 10. You suggest that the way to read the opinions is to find the places where the plurality and Justice Kennedy agree, and you say that the agencies should do a rulemaking, but Justice Kennedy and the plurality don't agree about what the agencies could accomplish in rulemaking. In fact, Justice Kennedy points out that "because the plurality presents its interpretation of the Act as the only permissible reading of the plain text. . . the corps would lack discretion, under the plurality's theory, to adopt contrary regulations." Are you hoping that the agencies will change the rules to mirror Justice Scalia's opinions?

Response. As I've indicated above, the common elements from Scalia's plurality opinion together with Kennedy's concurring opinion provide the rule to be applied from the Rapanos decision. I would point out though that Justice Scalia's opinion does track the plain language of the text and would be far easier for the regulated community to understand than the current Federal interpretations or Kennedy's significant nexus test.

FRANK H. MURKOWSKI
GOVERNOR
GOVERNOR@GOV.STATE.AK.US

P.O. BOX 110001
JUNEAU, ALASKA 99811-0001
(907) 465-3500
FAX (907) 465-3532
WWW.GOV.STATE.AK.US

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

January 12, 2004

The Honorable Mike Leavitt
Administrator
U.S. Environmental Protection Agency
Ariel Rios North, Room 3000
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dear Administrator Leavitt:

We are very disappointed that the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (COE) have suspended rulemaking to clarify the definition of "waters of the United States." Your decision relegates 174 million acres of Alaska wetlands to jurisdictional limbo. Suspending the rulemaking process will leave unanswered the basic question of which wetlands are "waters of the United States" and thus subject to federal jurisdiction, and which are not. Without jurisdictional clarity, wetland protection will suffer, as will responsible proximal development.

Absent the rulemaking process, we assume that EPA and the COE will default to the current practice of asserting jurisdiction over essentially all Alaska wetlands. This, despite the clear wording and intent of the Clean Water Act and recent court rulings that federal wetland jurisdiction, is not boundless.

In Alaska and elsewhere, the question of wetland jurisdiction will continue to be decided by the courts instead of the experts. We have seen a flurry of court cases resulting in a patchwork of differing approaches across the country, and confusion within and among the states regarding when federal jurisdiction may or may not be claimed. The resulting case-by-case approach results in uncertainty as to how the business of the permittees, the states, and indeed the federal government itself, is to proceed.

The rulemaking process would have provided the opportunity for public and professional debate on the basic question of what factors describe a "significant nexus" between wetlands and navigable waters, whether the relationship between navigable waters and wetlands can be defined in functional terms as we have suggested, and ultimately how far the federal reach must go to achieve its interests in navigable waters. Enclosed is a copy of Alaska's comments on the EPA and COE January 15 and February 28, 2003, Advance Notice of Proposed Rulemaking on the Clean Water Act

Regulatory Definition of "Waters of the United States." It provides a detailed picture of the challenges faced by Alaska due to the current, and largely inconsistent, assertion of federal jurisdiction.

I urge you to proceed with the rulemaking. We are a state committed to protecting our wetland resources, and need a clear jurisdictional framework to succeed.

Sincerely yours,

Frank H. Murkowski
Governor

Enclosure

cc: John Iani, EPA Region 10, Regional Administrator
Ernesta Ballard, Commissioner, Alaska Department of Environmental Conservation

STATE OF ALASKA

Frank H. Murkowski, Governor
410 Willoughby Avenue, Suite 303
Juneau, Alaska 99801-1795
PHONE: (907) 465-5300
FAX: (907) 465-5274
TDD/TTY: (907) 465-5040
http://www.state.ak.us/dec/

April 16, 2003

Water Docket
Environmental Protection Agency
Mail Code 4101T
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

Subject: Docket ID No. OW-2002-0050
ANPRM on the Clean Water Act Regulatory Definition of "Waters of the United States," Federal Register, Vol. 68, No. 10, p. 1991, January 15, 2003; Vol. 68, No. 40, February 28, 2003, p. 9613

We are pleased to provide comments on behalf of the State of Alaska in response to the Advance Notice of Proposed Rulemaking (ANPRM) on the Clean Water Act Regulatory Definition of "Waters of the United States." We also want to thank the Environmental Protection Agency (EPA), the Corps of Engineers (COE), and the federal administration for focusing on an area of federal action so badly in need of clarity and consistent direction.

Our comments come from three perspectives: as a regulator, as a Clean Water Act (CWA) permittee, and as the state with the greatest affected resources. Alaska has 33,904 miles of shoreline, over three million lakes, over 15,000 anadromous fish streams, and over 174 million acres of wetlands. Our stake in this issue is greater than all other states combined. We therefore expect strong consideration given to our perspectives and recommendations.

This is an excellent opportunity for EPA and the COE to re-focus on the mandates under the CWA. The administrative broadening of the Congressional scope of coverage under the CWA over many years is an example of "mission creep" and has resulted in federal encroachment into the states' rights to manage their own land use and development issues. This result flies in the face of Congress' express recognition that states have the primary responsibility to "prevent, reduce, and eliminate pollution" and the clear reality that, when a state has the ability and the will to protect its natural resources, the environment is best served by leaving such management decisions to that state.

Our comments are premised on our belief that federal jurisdiction over state waters has clear and limited boundaries and accordingly, states should be afforded much deference in land use and natural

resource management. Further, where there is federal jurisdiction, water quality standards adopted by states with EPA concurrence are the preferred means to achieve the CWA goals. The best outcome for Alaska, and the Alaskan environment, is when Alaskans are in control.

LEGAL ANALYSIS AND COMMENT

The issue of the jurisdictional reach of the CWA has always been contentious. Controversy in Alaska initially centered on whether Congress intended any regulation of wetlands through the CWA, with the COE saying no while EPA argued that wetlands of any nature were waters of the United States. This split continued until the mid 1970s and was not finally resolved until 1985 when the Supreme Court issued its decision in *U.S. v. Riverside Bayview Homes*, 474 U.S. 121 (1985), holding that wetlands proximate and adjacent to navigable waters were regulated under the CWA.

Since that time differences between the agencies' application of this holding, the inability to develop a joint wetlands delineation manual, and differing applications by courts resulted in continuing uncertainty. In the face of such uncertainty, the decision by the Supreme Court in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) (hereafter "*SWANCC*"), brought clear closure to one issue, the migratory bird rule, and an opportunity for clarity in other uncertain areas. Remarkably, to date that clarity has not emerged and we have seen no change in the long arm extended by the federal government over our lands and waters.

Courts considering wetlands jurisdiction post-*SWANCC* split into two camps. On the one hand, the Fifth Circuit found *SWANCC* to represent a significant change in the Supreme Court's view of CWA jurisdiction, limiting that jurisdiction to instances where water is actually navigable or adjacent to an open body of navigable water. *See D.E. Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001). Other courts followed suit. For example, in *U.S. v. Rapanos*, 190 F. Supp.2d 1011 (E.D. Mich. 2002), the court held that even if there is a hydrological connection between wetlands and navigable waters, the wetlands may still be considered "isolated" for purposes of the CWA. The court went on to find that the CWA did not confer jurisdiction over wetlands that were merely adjacent to non-navigable tributaries of navigable waters. Other courts have reached similar conclusions. *See, e.g., U.S. v. RGM Corp.*, 222 F. Supp.2d 780 (E.D. Va. 2002); *FD&P Enterprises, Inc. v. Corps of Engineers*, 2003 WL 124761 (D.N.J. Jan. 15, 2003).

In contrast, some courts, including the Ninth Circuit, have given *SWANCC* small effect, limiting federal jurisdiction to a small category of "isolated" waters. These courts strain to find continuing federal CWA jurisdiction where there is only a minimal hydrological connection to navigable waters. In *Headwaters, Inc. v. Talent Irrigation District*, 243 F.3d 526 (9th Cir. 2001), the Ninth Circuit found that non-navigable irrigation canals which flowed into tributaries of navigable waters were within the jurisdiction of the CWA. The court limited the application of *SWANCC* only to isolated wetlands with no hydrological connection to navigable waters. Again, other courts have reached similar conclusions. *See U.S. v. Interstate General Co.*, 152 F. Supp.2d 843; *U.S. v. Buday*, 138 F. Supp.2d 1282 (D. Montana 2001); *U. S. v. Lamplight Equestrian Center, Inc.*, 2002 WL 360652 (N.D. Ill. 2002).

Following *SWANCC*, all courts agree that the touchstone for CWA jurisdiction is navigable water. There seems to be general agreement that navigable waters, their tributaries, and wetlands "inseparably bound up with the 'waters' of the United States" each come within the jurisdiction of the CWA. The issue to be decided in determining CWA jurisdiction is how removed from navigable water a wetland may be and what factors are part of that determination. Chief Justice Rehnquist described the need for a "significant nexus" between the wetland and navigable water. The principal challenge for this rulemaking is to describe that nexus. We strongly urge the agencies to do so and to do so in a way that, to the maximum extent possible, establishes a bright line easily followed by the states, federal agencies, and courts. To do less invites decades of continued uncertainty and disparate results.

The most logical way to reconcile the *SWANCC* decision with its predecessor, *Riverside Bayview Homes*, is to draw the jurisdictional line as follows: navigable waters and their tributaries are included within the term "navigable waters," as defined in the CWA. Wetlands that are adjacent to navigable waters or their tributaries are included so long as there is a "significant nexus" between the wetland and the navigable waters. The *SWANCC* court did not set out specific criteria for finding a significant nexus, leaving that to later courts and to the affected federal agencies, through exercises such as this proposed rulemaking.

While no clear consensus has yet emerged from the courts, most have assumed, in line with Justice Stevens' dissent in *SWANCC*, that a significant nexus requires more than a mere hydrological connection. In struggling with what more is required, some courts have focused on whether discharges to the wetland in question will have a substantial injurious impact on the chemical, physical, or biological integrity of the navigable water. *See, e.g., FD&P Enterprises, Inc., supra.* Alaska supports the view that the "significant nexus" test must include a high probability that legitimate federal interests in the subject navigable waters may be impacted (not the simple opportunity presented by a mere hydrological connection). We believe it is necessary for EPA and the COE to establish a specific and "use-related" relationship between adjacent wetlands and navigable waters or their tributaries. Alaska strongly urges that this question be addressed through this rulemaking.

Definition of "Waters of the United States"

If the approach outlined above is taken, several corollaries emerge with respect to existing regulations that define CWA jurisdiction. First, we note that the "category 3" definitions in 33 CFR 328.3(a)(3) and 40 CFR 230.3(s)(3) no longer have validity as a definition for "waters of the United States." These definitions are based on Commerce Clause analysis, disregarding the relation to navigable waters. This approach was rejected in *SWANCC*. Wetlands that fit within the category 3 definitions may or may not be within the jurisdiction of the CWA under *SWANCC*. Thus, at this point, they serve no useful purpose in defining waters subject to CWA jurisdiction and should be stricken from the regulatory definition.

Second, the reference to "tributary" in subsection (5) needs further definition. For example, in Alaska the COE has concluded that intermittent drainage ditches along airports and highways are subject to CWA jurisdiction. The obviously strained rationale is that the ditches potentially have a hydrological connection to waters of the United States and, over time, may develop wetlands

vegetation and soils. Intermittent streams should fall within the purview of the states and not the jurisdiction of the CWA. *See U.S. v. RGM Corp, supra.* Similarly, networks of man-made drainage ditches excavated on dry ground do not come within the jurisdiction of the CWA. *See U.S. v. Newdunn*, 195 F. Supp.2d 751 (E.D. Va. 2002). Alaska can be a very wet place where streams and tributaries come and go with the seasons. Tributaries should make a significant and regular contribution to the instream flow of the subject navigable waterway.

Third, subsection (7), which would include all waters adjacent to jurisdictional waters, is insufficient. As described above, it is possible for a wetland to be adjacent, yet not meet the significant nexus test established in *SWANCC*. The current regulation has no concept of distance, hydrological connectivity, or the possibility of impacts on navigable waters. Even a cursory look at the lands found in Alaska demonstrates why the *SWANCC* significant nexus requirement is needed.

Alaska contains almost unimaginably vast wetlands. Of the state's total land mass of 403 million acres, over 40 percent (174.6 million acres) are classified as wetlands by the U.S. Fish and Wildlife Service. Put another way, if all of Alaska's wetlands were put together, they would occupy a land mass as big as Texas. On Alaska's North Slope Coastal Plain the numbers are even more striking, with approximately 83 percent of its 20 million acres classified as wetlands. Even in the rugged mountainous Southeastern Alaska, with its steep wooded slopes, high peaks, and glaciers, the potential wetlands occupy an astonishing 22 percent of the land. As one might expect, the sheer magnitude of the wetlands in Alaska yields anomalous results when the broad pre-*SWANCC* jurisdictional criteria of the CWA are applied.

In Alaska, wetlands can be very large and many miles from navigable waters. It is illogical and unnecessary to assert federal jurisdiction, based on adjacency to navigable waters, as to wetlands at a significant distance from those waters. *See U.S. v. Rapanos, supra* (wetland 20 miles away was not adjacent even though there may have been a hydrological connection).

In addition, in vast areas of Alaska permafrost underlies the soils. In these areas the water table is perched on the permafrost, resulting in saturated soils that support hybrid vegetation. While such areas may technically meet the wetlands test, there is no real connection to navigable waters and therefore such areas are not subject to CWA jurisdiction under *SWANCC*. Indeed, were the permafrost to melt, the water would drain and the "wetland" would cease to exist. Unlike wetlands in temperate zones, arctic wetlands, lying on top of thousands of feet of frozen permafrost, are not connected to aquifers. Because water on top of permafrost travels across the frozen tundra surface in "sheet flow" these wetlands provide little function in controlling surface runoff. Water may need to travel hundreds of miles to reach navigable water. In our view *SWANCC* leaves no room for the COE to assert CWA jurisdiction in these areas, as they now do.

Another example of the difficulty in applying broad jurisdictional criteria in Alaska comes from the steep wooded slopes of Southeast Alaska. Many of these slopes are classified as wetlands as they satisfy the wetlands criteria (soils, vegetation and hydrology), ultimately drain to marine waters and thus are viewed as within the CWA jurisdiction. It seems unlikely that Congress contemplated such a result. This is not to say that these lands do not provide valuable functions, such as wildlife habitat. However, those are not functions that should be protected by the CWA. Rather they are peculiarly within the expertise and interests of the states and should be regulated by the states under state water quality standards and permitting programs. For purposes of the CWA, federal jurisdiction over

adjacent wetlands should be limited to those wetlands with a significant nexus to navigable water. In our view, this should require a high probability of an adverse impact on a legitimate federal interest in the subject navigable water, not just a mere hydrological connection.

PROGRAMMATIC ANALYSIS AND COMMENT

Application of *SWANCC* to Selected CWA Sections

The CWA sections cited in the ANPRM all include the term "navigable waters." It would not make sense to have the same term mean different things in different sections of the Act. Accordingly, whatever final regulatory decisions are made by EPA and the COE regarding coverage of the term "navigable waters" for Section 404 should also apply wherever that term appears. In the following discussion, Alaska explores what that may mean in practice for several sections where the term appears.

Section 404 – Permits for Dredged or Fill Material – Section 404 is clearly limited to navigable waters, their tributaries, and wetlands that are adjacent to those waters and tributaries – waters, which if physically altered, could affect navigation. Section 404 is a permitting tool whose primary purpose is to protect navigability; its secondary purpose is to protect navigable waters for other uses. There are other, more appropriate CWA tools whose primary purpose is to protect navigable waters for other uses (see discussion on Section 303 and 402 below).

There are situations where isolated waters may serve (just as uplands do) a direct use to protect the navigable waters, their tributaries and adjacent wetlands such as flood control or urban runoff catchment. In such cases, the State is emphatic – Section 404 is **not** the correct tool for these isolated waters, however, there are other CWA planning tools (Section 208) that are appropriate and that fall within state and local planning jurisdiction.

The Department of Environmental Conservation (Department) has developed general criteria for deciding which CWA Section 404 permit applications will be certified/denied by the state and on which applications the Department will waive certification. The first step in this "triage" begins with a use determination. The criteria essentially result in State waiver of certification on all permits associated with isolated waters that do not serve a high value function such as urban runoff filtration, important groundwater recharge areas, fish and wildlife habitat, high recreation or economic use, or supporting subsistence food gathering. State and local planning for some of these functions and uses fall under the CWA mandates (although not Section 404), and are most appropriately addressed by the states. While the state has certified/denied Section 404 permits for "isolated" waters that have a high value function, we have done so only because the COE asserted jurisdiction. *SWANCC* has clearly affirmed that protection of these high value functions is the responsibility of the states. Alaska has the authority to preserve the functions of isolated waters that are important to the State, using our water quality standards and our own authorities. Hence, there is no gap in coverage created by the COE and EPA asserting jurisdiction over only those waters described in the CWA as affirmed by *SWANCC*.

Section 402 NPDES, and Section 401 Certification – The regulatory programs established under these sections are limited by the CWA, as reinforced by the *SWANCC* and *Bayview* decisions, to

navigable waters, their tributaries, and wetlands that are adjacent to those waters and tributaries. Planning and protection for all other waters are appropriately left to the states and local governments. Alaska has State wastewater discharge permitting authority that applies to all waters of the State. *See* Alaska Administrative Code 72. As such, there is no "gap" in coverage in Alaska for wastewater permitting associated with isolated waters.

Section 303 Water Quality Standards and Implementation Plans – Under Section 303, the states are appropriately given the responsibility to establish water uses, water quality criteria, and to decide which waters the uses and criteria apply to. Even though Section 303(c) refers to designating uses for navigable waters, in fact Alaska's water quality standards apply to all waters, including groundwater. *See* 18 Alaska Administrative Code 70. Presumably many states, like Alaska, have written their standards broadly, and EPA has approved such standards without limiting their application to navigable waters. Accordingly, we see no need for any changes to the current approach to state and EPA implementation of Section 303. However, to ensure appropriate and adequate protection of waters and land use within the State, Alaska may consider establishing additional water uses (and criteria) under State water quality standards. This regulatory approach would allow us to protect certain functions of isolated waters that are important from a State perspective such as fish and wildlife, tourism, or subsistence use. Clearly, state water quality standards that apply to waters outside of CWA jurisdiction do not extend CWA jurisdiction to those waters.

Section 311 Oil and Hazardous Substance Liability – Section 311(b)(1) addresses oil spills to navigable waters. The post-*SWANCC* delineation of navigable waters should pertain. Alaska State law already provides protection from spills for all other waters in the state and thus applying post-*SWANCC* jurisdictional limits will have no adverse environmental impacts. *See* Alaska Statutes 46.03.740-900.

Section 208 Areawide Waste Treatment Management - Past Section 208 activities seem to have been primarily focused on planning for waste treatment systems, however, it includes broad state/local planning responsibilities that also include "urban storm water runoff systems," "identification of open space and recreation opportunities that can be expected to result from improved water quality, including consideration of potential use of lands associated with treatment works and increased access to water-based recreation," and procedures and methods to control construction activity sources of pollution including land use requirements. This little-used CWA tool may be critically important for states and local governments to make appropriate decisions about the uses and functions of waters that fall outside of CWA regulatory program's jurisdiction.

State Protection of Wetlands

The ANPRM requests information about the availability and effectiveness of other Federal or State programs for the protection of aquatic resources and practical experience with their implementation. It is our understanding that 17 states have already developed programs similar to CWA Section 404 that may cover isolated waters outside the scope of Section 404. Given the clear direction of *SWANCC* and *Bayview* to EPA and the COE regarding the reach of the CWA, it is critical that states be provided the federal support envisioned in the CWA to develop a credible program that protects non-jurisdictional waters which serve functions that are important to the individual states.

Alaska law contains broad authorities to protect the important uses of our waters, including certain functions of non-jurisdictional waters. Alaska intends to proceed to ensure that those uses are protected using the appropriate mix of State and local planning, regulatory efforts, education, and the many ongoing voluntary activities. As Alaska considers revisions to our water quality standards, we will (1) evaluate the functional uses of our non-jurisdictional waters, (2) determine which of those uses should be protected, (3) establish criteria designed to protect each of the uses, and (4) determine and implement the appropriate mix of state and local tools, including land use planning efforts, for protecting those uses. Alaska has the will, the ability, and the State laws and regulations to do the job competently and professionally.

Please direct any questions you have on the State's comments to Lynn Kent, Water Quality Programs Manager (907) 465-5312, Lynn_Kent@dec.state.ak.us.

Thank you for the opportunity to comment on the ANPRM.

Sincerely,

Ernesta Ballard
Commissioner
Department of Environmental Conservation

Gregg D. Renkes
Attorney General

Tom Irwin
Commissioner
Department of Natural Resources

Kevin Duffy
Commissioner
Department of Fish and Game

Mike Barton
Commissioner
Department of Transportation and Public Facilities

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State of Alaska

Position on the Reach of Federal Wetlands Jurisdiction
Under the Clean Water Act

July 24, 2006

The Wetlands Situation

For more than thirty years, the courts have struggled with the definition of "waters of the United States," a term on which the scope of the Clean Water Act's wetlands jurisdiction rests. Left with only the broadest of statutory and regulatory definitions, the courts have produced contradictory decisions, resulting in a split among several of the federal circuit courts about the extent of federal regulatory jurisdiction over wetlands.

Those anxiously awaiting the result of the Supreme Court's recent review of the *Rapanos* and *Carabell* cases hoping that it would finally and deftly resolve the disparity in lower court decisions and illuminate the way ahead were disappointed. Absent convergence towards a workable definition of "waters of the United States" among federal circuit courts and lacking clear direction from the Supreme Court, the answer to the very basic question of which wetlands are "waters of the United States" subject to federal jurisdiction, and which are not, remains as elusive today as ever. It is now clear that we cannot rely on the courts for an answer. Rulemaking is needed from the executive branch.

Earlier Cases: *Riverside Bayview* and *SWANCC*

Even though the courts have been unable to articulate a clear policy, the Supreme Court has produced hints of guidance and introduced useful concepts in two milestone cases: *Riverside Bayview* and *SWANCC*.

In *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (*Riverside Bayview*), the Supreme Court held that federal jurisdiction extends beyond navigable waters to adjacent wetlands. This core *Riverside Bayview* finding is now widely accepted.

While *Riverside Bayview* extended federal jurisdiction to adjacent wetlands, the Supreme Court decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers,* 531 U.S. 159 (2001) *(SWANCC),* established limits as to which wetlands are truly adjacent to navigable waters. According to the Supreme Court, the test for adjacency and, hence, federal jurisdiction is one of whether there exists a "significant nexus" between the wetlands and navigable waters. While somewhat ill-defined, the "significant nexus" concept makes sense. It both extends and limits federal jurisdiction to

those wetlands over which the federal government must be able to exert control in order to achieve its objective of protecting navigable waters.

Rapanos Decision

The Supreme Court's recent June 19, 2006 split decision in *Rapanos et ux., et al. v. United States*, does little to clarify the issue. As Chief Justice Roberts writes in his concurrence in the judgment, "[l]ower courts and regulated entities will now have to feel their way on a case-by-case basis." Slip Opinion, Roberts' Concurrence, at 2.

Alaska's Stake in the Issue

Alaska has 174 million acres of wetlands – more wetlands than all other states combined, according to U.S. Fish and Wildlife Service estimates.

Not only is Alaska endowed with vast wetlands, many of Alaska's wetlands are fundamentally different than those found elsewhere in the U.S. Vast tracts of wetlands are frozen nine months of the year and are underlain by permafrost that never melts. Each of Alaska's wetland types comprises unique habitats and serves specific functions, but often they are not the same as those of wetland types found in other parts of the country.

Many States Support the Status Quo – Not Alaska

A number of states support unlimited federal jurisdiction for what we expect is a variety of reasons. As noted by Justice Kennedy in his concurrence, 33 states plus the District of Columbia filed an *amicus* brief in the *Rapanos* litigation because ". . . among other things . . . the [Clean Water] Act protects downstream States from out-of-state pollution that they cannot themselves regulate." Slip Opinion, Kennedy's Concurrence, at 20. Some states simply may not want to assume the responsibility and work of wetlands protection. Some may accept the faulty premise that the degree of protection afforded wetlands will somehow be less if regulation falls to states instead of the federal government.

None of the reasons for unlimited federal wetlands jurisdiction apply in Alaska. The State of Alaska does not share borders with other states. We view the responsibility and work associated with wetlands protection as a welcome obligation arising from the national policy, as established by the Clean Water Act, "to recognize, preserve, and protect the primary responsibilities and rights of the States . . . to plan the development and use . . . of land and water resources . . ." particularly in areas that lie beyond the national interest in navigable waters. 33 U.S.C. 1251(b).

Those that presume important wetlands will be lost as a result of delineating federal and state jurisdiction are mistaken. To Alaskans that care deeply about the intrinsic value of Alaska's ecosystems the presumption is offensive. The degree of protection afforded wetlands needs to reflect their importance and function, not whether they fall under federal or state jurisdiction.

State Wetlands Protections

When Alaska was a Territory prior to 1959, the United States government wielded exclusive jurisdiction for managing Alaska's ocean and coastal resources. Centralized federal management allowed the use of fish traps with devastating impacts to Alaska's salmon populations. The desire of Alaskans to protect fisheries resources with local management was a preeminent motivation for petitioning Congress to grant Alaska statehood.

With the intent of providing protections lacking under federal stewardship, Alaska's Constitution was drafted to mandate management of all natural resources on a sustained yield basis. The State's pollution control statutes require conservation and protection of natural resources and the environment. Alaska law contains broad authorities to protect the important uses of all waters.

Alaska's wetlands are well-protected under Alaska law.

The Case for Rulemaking

While the Supreme Court in *Rapanos* was divided in how far federal jurisdiction extends, there was no shortage of calls for rulemaking. In fact, a majority of the justices noted the need for rulemaking. Justice Breyer summarizes that today's opinions, taken together, call for the Army Corps of Engineers to write regulations, and speedily so." Slip Opinion, Breyer's Dissent, at 2. Chief Justice Roberts pointed out the failure of the administrative agencies to finalize a proposed 2003 rulemaking, something which would have been accorded judicial deference:

> Agencies delegated rulemaking authority under a statute such as the Clean Water Act are afforded generous leeway by the courts in interpreting the statute they are entrusted to administer. See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842-845 (1984). Given the broad, somewhat ambiguous, but nonetheless clearly limiting terms Congress employed in the Clean Water Act, the Corps and the EPA would have enjoyed plenty of room to operate in developing *some* notion of an outer bound to the reach of their authority.

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

Slip Opinion, Roberts' Concurrence, at 1-2.

In response to the Advance Notice of Proposed Rulemaking referred to in the Chief Justice's concurrence, the State of Alaska provided detailed comments in a seven-page letter signed by the Alaska Attorney General and Commissioners of the Departments of Environmental Conservation, Fish and Game, Natural Resources, and Transportation and Public Facilities. In a cover letter to these comments, Governor Murkowski wrote, "[a] clear and certain regulatory definition of the "Waters of the United States," consistent with the decision of the United States Supreme Court on the appropriate reach of federal jurisdiction under [the] Clean Water Act, is long overdue."

When the EPA and the Corps later abandoned the rulemaking effort, Governor Murkowski wrote then EPA Administrator Mike Leavitt that Alaska was

> very disappointed that [EPA] and the [Corps] have suspended rulemaking to clarify the definition of "waters of the United States." Your decision relegates 174 million acres of Alaska wetlands to jurisdictional limbo. Suspending the rulemaking process will leave unanswered the basic question of which wetlands are "waters of the United States," and which are not. Without jurisdictional clarity, wetland protection will suffer, as will responsible proximal development.

From Alaska's perspective, the failure to more clearly define, through rulemaking, the reach of a law as important as the Clean Water Act is a striking example of federal indolence and has resulted in tremendous regulatory inefficiency, waste of resources nationally, and endless litigation. The status quo is intolerable, and erodes the rights of states, pursuant to both the Clean Water Act and the United States Constitution, to be the primary managers of the lands and waters within their respective state boundaries.

<u>What is Needed: A Rulemaking that Implements the "Significant Nexus" Test</u>

In *Rapanos*, Justice Kennedy charts a rulemaking course:

> [t]hrough regulations or adjudication, the Corps may choose to identify categories of tributaries that, due to their volume of flow (either annually or on average), their proximity to navigable waters, or other relevant considerations, are significant enough that

> wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters.

Slip Opinion, Kennedy's Concurrence, at 24. In short, Justice Kennedy reiterated support for the *SWANCC* "significant nexus" test.

The State of Alaska agrees. The Corps and EPA should define and codify in regulation the "significant nexus" concept. A "significant nexus" exists when there is a high probability that wetlands disturbance will violate Clean Water Act protections in navigable waters of the United States or their tributaries. A mere hydrological connection to navigable water is not enough.

With a rulemaking, the federal agencies could make clear for their staff, applicants, and the public that a hydrological connection -- while a factor -- does not alone support jurisdiction. Even Justice Kennedy recognized that such a connection "should not suffice in all cases; the connection may be too unsubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood." Slip Opinion, Kennedy's Concurrence, at 28.

Wetlands science should be the basis for determining whether and which wetlands serve important water quality functions. Regulations are needed to ensure that the "significant nexus" policy is implemented with utmost technical integrity. At a minimum, new rules must provide for the different wetland ecosystems found throughout the nation's individual states, and allow for more balanced state and federal management responsibilities than the broad brushed approach currently asserted by the federal agencies.

No New Legislation is Needed

There is no need for new federal legislation to deal with the jurisdictional issue. The national environmental policies enshrined in the Clean Water Act are not at fault and the State of Alaska would object to suggestions otherwise.

Conclusion

Given the continuing uncertainty that remains in the wake of the Supreme Court's decision in *Rapanos*, it is time to clarify, through a rulemaking, the extent of federal regulatory jurisdiction over wetlands under the Clean Water Act. No one expects the effort will be easy. Worthwhile efforts seldom are. On the other hand, leaving the situation "as is" perpetuates a costly and inefficient process with the likelihood of inconsistent decisionmaking in both the administrative and judicial arenas -- an intolerable situation that diminishes the goals and policies of the Clean Water Act.

CWCWC

CROTON WATERSHED CLEAN WATER COALITION

Mission:

CWCWC is an alliance of organizations and individuals joining together for a common goal of preserving, protecting, and improving the quality of the waters in the Croton watershed and to providing alternatives to filtration.

9 Old Corner Road
Bedford, New York 10506
Ph: 914-234-3179
914-234-6470
Fax: 914-234-6139
E/mail:
marianr451@aol.com
crotonwshed@aol.com
Web site:
www.newyorkwater.org

Regional contacts:

Putnam County
Ann Fanizzi
Ph: 845-228-4265
E/mail: geesewatch@aol.com

Westchester County
Marian Rose, PhD
Ph: 914-234-3179
E/mail: marianr451@aol.com

Bronx Borough
Fay Muir
Ph: 718-944-4668
E/mail: fumir@aol.com

Manhattan Borough
David Ferguson
Ph: 212-989-0519

July 26, 2006

The Honorable Hillary R. Clinton
U.S. Senate
476 Russell Senate Office Building
Washington, DC 20510

Dear Senator Clinton:

We are concerned about the Supreme Court Rapanos/Carabell decision and the prior decision of SWANCC. Congress ought to act to fix these with S. 912.

Sincerely,

M. Rose

Marian Rose, President
CWCWC

Ken Baer

Ken Baer, Chair
Sierra Club-
Atlantic Chapter

John Keane

John Keane, Conservation
Chair, Trout Unlimited-
Croton Watershed Chapter

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NEWS & ANALYSIS

Could *SWANCC* Be Right? A New Look at the Legislative History of the Clean Water Act

by Virginia S. Albrecht and Stephen M. Nickelsburg

For over two decades courts and agencies have assumed that the Clean Water Act (CWA) grants the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) jurisdiction over the nation's waters to the full extent of the U.S. Congress' authority under the U.S. Constitution's Commerce Clause. This belief led the Corps and EPA to assert CWA jurisdiction over virtually all waters in the nation, including navigable waters; non-navigable tributaries; adjacent wetlands; and non-navigable, isolated, intrastate waters and wetlands.

In early 2001, however, the U.S. Supreme Court rejected the Corps' assertion of authority over a non-navigable, isolated, intrastate water in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (*SWANCC*).[1] The Corps had claimed jurisdiction under its "migratory bird rule," which asserted jurisdiction over waters that, among other things, "are or would be used as habitat by . . . migratory birds which cross state lines."[2] Pointing to statements in the Act's legislative history that the term "navigable waters" was to be given "the broadest possible constitutional interpretation, unencumbered by agency determinations which have been made or may be made for administrative purposes," the Corps defended the migratory bird rule as an exercise of federal power over things having a "substantial effect" on commerce—the broadest basis of federal power under the Commerce Clause.[3] Rejecting this argument, the Supreme Court held that Congress did not intend to exercise its power over things "affecting commerce" in passing the CWA.[4] Instead, according to the Court, Congress intended to exercise only its authority over navigation.[5]

This holding works a major change in the landscape of water and wetland regulation. Although *SWANCC* specifically involved only the migratory bird rule, its reasoning applies to any CWA regulation founded on an "affecting commerce" theory of the commerce power, and should apply to much more than that.[6] Rather than rubber-stamp federal jurisdiction under the almost-anything-goes "affecting commerce" theory, courts and agencies must now ask whether federal jurisdiction over a particular geographic feature was in fact intended by Congress. Jurisdiction over the traditional navigable waters has certainly been authorized, as *SWANCC* recognized, by the plain language of the CWA. To regulate beyond the navigable waters, however, courts and agencies must now look for a clear statement of congressional intent—like, for instance, the clear congressional intent to regulate wetlands actually abutting navigable waters that was recognized in *United States v. Riverside Bayview Homes*.[7]

The lower courts' and agencies' response to *SWANCC* has been mixed. One court of appeals has articulated a broad vision of the import of *SWANCC* for federal jurisdiction. In *Rice v. Harken Exploration Co.*,[8] the U.S. Court of Appeals for the Fifth Circuit stated that "[u]nder *Solid Waste Agency*, it appears that a body of water is subject to regulation under the [CWA] if the body of water is actually navigable or is adjacent to an open body of navigable water."[9] The court held that several intermittent streams are not "navigable waters" and that connections through groundwater cannot establish jurisdiction under the Act. Several district courts have followed suit.[10]

Virginia S. Albrecht and Stephen M. Nickelsburg are attorneys at Hunton & Williams, Washington, D.C. Virginia S. Albrecht has been practicing environmental law for more than 20 years and has been lead counsel on landmark §404 cases including *Hoffman Homes, Inc. v. Administrator, U.S. EPA*, 975 F.2d 1554, 22 ELR 21547 (7th Cir. 1992), 999 F.2d 256, 23 ELR 21139 (7th Cir. 1993), and *National Mining Ass'n v. Corps of Eng'rs*, 145 F.3d 1399, 28 ELR 21318 (D.C. Cir. 1998). Stephen M. Nickelsburg is a former law clerk to the Hon. Anthony M. Kennedy of the U.S. Supreme Court and to the Hon. J. Harvie Wilkinson III of the U.S. Court of Appeals for the Fourth Circuit.

1. 531 U.S. 159, 31 ELR 20382 (2001).
2. Although commonly referred to as a "rule," the migratory bird rule was announced in a legal memorandum prepared by EPA's general counsel in 1985. It was later referenced in the *Federal Register*, *see* 51 Fed. Reg. 41208, 41217 (Nov. 13, 1986), but it was never promulgated through notice-and-comment rulemaking.
3. The commerce power is extremely broad, at least in modern interpretation. It includes three separate categories of regulatory authority: the authority to regulate the instrumentalities of interstate commerce, the authority to regulate channels of interstate commerce, and the authority to regulate other activities and things that alone or in the aggregate have a substantial effect on interstate commerce. *See* United States v Lopez, 514 U.S. 549, 558-59 (1995).
4. *See SWANCC*, 531 U.S. at 172-74, 31 ELR at 20384-85.
5. *See, e.g.*, *id.* at 168 n.3, 31 ELR at 20383 n.3.
6. Examples of cases based on the theory that the CWA is as broad as Congress' power to regulate things "affecting commerce" include United States v. TGR Corp., 171 F.3d 762, 764-65, 29 ELR 21059, 21060 (2d Cir. 1999), United States v. Eidson, 108 F 3d 1336, 1341-42, 27 ELR 20853, 20854-55 (11th Cir. 1997), Leslie Salt Co. v. United States, 55 F.3d 1388, 1394-95, 25 ELR 21046, 21049-50 (9th Cir. 1995), Quivira Mining Co. v. EPA, 765 F.2d 126, 129-30, 15 ELR 20530, 20531-32 (10th Cir. 1985), United States v. Texas Pipe Line Co., 611 F.2d 345, 347, 10 ELR 20184, 20184 (10th Cir. 1979), United States v. Ashland Oil & Transp. Co., 504 F.2d 1317, 1325, 4 ELR 20784, 20788-89 (6th Cir. 1974), and United States v. Phelps Dodge Corp., 391 F. Supp. 1181, 1185-86, 5 ELR 20308, 20310-11 (D. Ariz. 1975).
7. 474 U.S. 121, 16 ELR 20086 (1985). On June 10, 2002, the U.S. Supreme Court issued a writ of certiorari to the U.S. Court of Appeals for the Ninth Circuit in *Borden Ranch Partnership v. Corps of Eng'rs*, No. 01-1243 (9th Cir. June 10, 2002), which presents questions regarding the activities the Corps is authorized to regulate under the CWA.
8. 250 F.3d 264, 31 ELR 20599 (5th Cir. 2001).
9. *Id.* at 269, 31 ELR at 20600.
10. *See* United States v. Rapanos, 190 F Supp. 2d 1011 (E.D. Mich. 2002) (rejecting jurisdiction over wetlands and stating that *SWANCC* "establish[es] a mode of analysis for this Court"), United States v. Needham, Nos. 01-1897, 01-1898 (W.D. La. Jan. 22, 2002)

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Other courts, however, have attempted to limit *SWANCC* to its facts, stating that the Supreme Court's holding extends only to the migratory bird rule or to non-navigable, isolated, intrastate waters.[11] The agencies have likewise sought to limit *SWANCC*'s effect on the scope of their jurisdiction. A joint EPA/Corps memorandum issued immediately after *SWANCC* sought to limit the decision to waters for which jurisdiction was based "solely on the presence of migratory birds."[12]

There are several possible reasons for this resistance to *SWANCC*. Agencies are seldom willing to cede jurisdiction once exercised. And the lower courts, although they have no institutional investment in broad agency jurisdiction, nonetheless face long-entrenched assumptions that the CWA extends to the broadest possible constitutional bounds. Moreover, although the *SWANCC* opinion itself is clear, it is written in Chief Justice William H. Rehnquist's signature spare style, expending only a few paragraphs in rejecting the broad theory of CWA jurisdiction and offering no detailed discussion of why the conventional wisdom has been wrong.

The thesis of this Article is that the resistance to *SWANCC* is unfounded, and that the history of the Federal Water Pollution Control Act (FWPCA) Amendments of 1972 shows that the Court's interpretation of Congress' original intent is correct. The second and third parts of the Article examine the history of federal jurisdiction over "navigable waters" under the CWA and other, older statutes. Given the Act's remedial purpose, could Congress really have meant (as the Supreme Court appears to have said) to premise the geographic scope of the Act on traditional concepts of "navigability"? What did Congress mean when it stated that the term "navigable waters" should be given "the broadest possible constitutional interpretation," and what were the "agency determinations" that Congress had sought to overrule? This examination shows that before 1972 the Corps had taken a cramped view of "navigable waters" that was far narrower than the case law would have allowed, that Congress intended to expand federal jurisdiction beyond those previous administrative determinations to reach the broadest possible constitutional interpretation of the term "navigable waters," and that Congress' reliance on its power over navigation is fully consistent with the remedial purposes of the Act. Extending federal jurisdiction to *all* navigable waters and imposing a new permit requirement for discharges into those waters was at the time a significant expansion of federal authority that would dramatically improve the chemical and biological integrity of the nation's waters.

The fourth part of the Article sets forth the facts, holding, and reasoning of *SWANCC*. The next part examines the implications of *SWANCC* for federal CWA jurisdiction, with specific focus on the Corps' §404 program. The final part examines the arguments that are being made for a narrow reading of *SWANCC* and explains why they cannot be squared with the opinion.

History of Federal Authority Over the Navigable Waters: The Traditional Definition of the Navigable Waters and the Rivers and Harbors Act of 1899

The Traditional Definition of the Navigable Waters of the United States

The Constitution does not mention "navigable waters." Federal regulatory authority over the navigable waters is instead based on the Commerce Clause, which gives Congress the power to "regulate Commerce with foreign Nations, and among the several States."[13] Chief Justice John Marshall first wrote in *Gibbons v. Ogden*[14] that Congress' power to regulate navigation is inherent in its power to regulate interstate and foreign commerce:

> Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations, which shall exclude all laws concerning navigation . . . . All America understands, and has uniformly understood, the word "commerce," to comprehend navigation. . . . The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it.[15]

Gibbons involved Congress' power to regulate maritime commerce by licensing vessels operating in the coastal trade. In *Gilman v. Philadelphia*,[16] the Supreme Court made clear that Congress' power to regulate interstate commerce also includes the power to control "all the navigable waters of the United States which are accessible from a State other than those in which they lie," and that this power includes the power to keep those waters free of obstructions.[17] Congress exercised this authority in the late 19th century by passing the Rivers and Harbors Act, which authorized the predecessor of the Corps to protect navigation by regulating construction, dredge, and fill activities in the navigable waters of the United States.[18]

At the time of the passage of the Rivers and Harbors Act, the "navigable waters of the United States" had a specific meaning, based in admiralty law. This definition was articulated in *The Daniel Ball*[19]:

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for com-

(affirming bankruptcy court's decision that drainage ditch and bayou are outside federal jurisdiction); United States v. Newdunn Assocs., 195 F. Supp. 2d 751, 32 ELR 20573 (E.D. Va. 2002) (rejecting jurisdiction over wetlands adjacent to drainage ditches).

11. *See, e.g.*, Headwaters v. Talent Irrigation Dist., 243 F.3d 526, 533, 31 ELR 20535, 20537 (9th Cir. 2001); United States v. Interstate Gen. Co., 152 F. Supp. 2d 843, 846-47, 31 ELR 20750, 20751 (D. Md. 2001); United States v. Krilich, 152 F. Supp. 2d 983, 991 n.13, 31 ELR 20787, 20789 n.13 (N.D. Ill. 2001); Idaho Rural Council v. Bosma, 143 F. Supp. 2d 1169, 1178 (D. Idaho 2001); United States v. Buday, 138 F. Supp. 2d 1282, 1289 (D. Mont. 2001).

12. Memorandum from Gary S. Guzy and Robert M. Anderson, Supreme Court Ruling Concerning CWA Jurisdiction Over Isolated Waters (undated; released Jan. 19, 2001) [hereinafter Guzy-Anderson Memorandum].

13. U.S. CONST. art. I, cl. 8.

14. 22 U.S. (9 Wheat.) 1 (1824).

15. *Id.* at 189-90.

16. 70 U.S. (3 Wall.) 713 (1865).

17. *Id.* at 724-25.

18. 33 U.S.C. §§401-413.

19. 77 U.S. (10 Wall.) 557 (1871).

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> merce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the Acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.[20]

The Daniel Ball's definition established a two-part test for navigability, requiring: (1) that the water in its ordinary condition presently be capable of being used by vessels to transport interstate commerce; and (2) that the water form a continuous highway with other waters over which commerce could be transported to other states.[21] Several subsequent judicial interpretations ultimately expanded the definition of the navigable waters of the United States, at least for Commerce Clause purposes,[22] to include waters that are now, that have been in the past,[23] or that are susceptible to use with reasonable improvements[24] by vessels in interstate or foreign commerce. This Article will refer to these waters—the "navigable waters of the United States" as defined in *The Daniel Ball* and as expanded in later cases such as *Economy Light & Power Co. v. United States*[25] and *United States v. Appalachian Electric Power Co.*[26]—as the "traditional navigable waters."

The Rivers and Harbors Act of 1899

The Scope of the Rivers and Harbors Act

Before 1972, the most significant statutory exercise of Congress' commerce power over navigation was the Rivers and Harbors Act of 1899. The language of the Rivers and Harbors Act, judicial interpretation of that language, and Congress' perceptions in the early 1970s of the shortcomings of that Act are critical to an understanding of Congress' intent in passing the CWA in 1972.

Two sections of the Rivers and Harbors Act have been influential in the Corps' regulation of navigable waters. First, under §10 of the Act, "[t]he creation of any obstruction . . . to the navigable capacity of any of the waters of the United States" without the consent of Congress is forbidden, and a Corps permit is required to build "structures . . . in any water of the United States, outside harbor lines," or "to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of [waters] within the limits of any breakwater or of the channel of any navigable water of the United States."[27] Second, §13, also known as the Refuse Act, makes it unlawful to throw, discharge, or deposit refuse matter into any navigable water of the United States or tributary thereof without a Corps permit.[28] Section 10 uses the terms "navigable waters of the United States" and "waters of the United States" interchangeably, and those terms have been interpreted to extend only to the traditional navigable waters.[29]

In addition, the Corps' jurisdiction under §§10 and 13 includes certain activities affecting the navigable capacity of the navigable waters. First, because activities occurring outside the navigable waters might "obstruct[ ] the navigable capacity" or "alter or modify the course, condition, or capacity" of the navigable waters, the Corps has at times regulated such activities under §10.[30] These activities have included dams erected in upstream, non-navigable portions of

20. *Id.* at 563.

21. *See, e.g.*, Minnehaha Creek Watershed Dist. v. Hoffman, 597 F.2d 617, 621-22, 9 ELR 20334, 20335-36 (8th Cir. 1979).

22. Cases and commentators have stressed that the definitions of the "navigable waters" for admiralty purposes and for the purpose of determining the ownership of submerged lands—another area in which the concept of "navigability" is important—are distinct from the definition of "navigable waters" for Commerce Clause purposes. *See, e.g.*, Kaiser Aetna v. United States, 444 U.S. 164, 10 ELR 20042 (1979); THOMAS J. SCHOENBAUM, 1 ADMIRALTY & MARITIME LAW §3-3, at 66-67 (2d ed. 1994) ("The admiralty concept of navigable waters is related to but in certain respects differs from . . . constitutional, statutory, and property law concepts."); Francis W. Laurent, *Judicial Criteria of Navigability in Federal Cases*, 1953 WIS. L. REV. 8, 9 & n.4 (same). Nonetheless, there is a good deal of overlap in the cases. Courts have relied on *The Daniel Ball*'s definition for all three purposes, and have at times cited indiscriminately from one or the other line of cases without making the distinction clear. *See* Glenn J. MacGrady, *The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, and Some Doctrines That Don't Hold Water*, 3 FLA. ST. U. L. REV. 511, 587 & n.401 (1975).

23. *See* Economy Light & Power Co. v. United States, 256 U.S. 113, 123 (1921) ("past use").

24. *See* United States v. Appalachian Elec. Power Co., 311 U.S. 377, 407-09 (1940) ("susceptible with reasonable improvement").

25. 256 U.S. 113 (1921).

26. 311 U.S. 377 (1940).

27. 33 U.S.C. §403. Section 10 states more completely:

> [T]he creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside harbor lines . . . ; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

Id.

28. *See* 33 U.S.C. §407. The Refuse Act states more completely:

> It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; and it shall not be lawful to deposit, or cause, suffer, or procure to be deposited material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water . . . whereby navigation shall or may be impeded or obstructed . . . .

Id.

29. *See, e.g.*, United States v. Stoeco Homes, Inc., 498 F.2d 597, 608-11, 4 ELR 20390, 20393-94 (3d Cir. 1974).

30. *See* 33 C.F.R. §322.3 (stating that §10 permits are required for "structures and/or work in or affecting navigable waters of the United States").

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waters that affect water levels and flows in downstream navigable waters.[31]

Second, §13 bars the discharge of "any refuse matter of any kind or description . . . into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water."[32] It also bars the "deposit" of "material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water . . . whereby navigation shall or may be impeded or obstructed."[33] This provision, therefore, by its terms bars the discharge of material to non-navigable tributaries and to the banks of the navigable waters, if material placed in those waters or on those banks is washed into the navigable waters and (for material placed on the banks) if it obstructs navigation.

The Rivers and Harbors Act as a Water Pollution Control Statute and Congressional Frustration With the Corps' Limited Interpretation of "Navigable Waters"

In the 1960s and early 1970s, legislators, agencies, and commentators began to look to the Rivers and Harbors Act as a tool for controlling pollution in the nation's waters.[34] Because the Corps' traditional focus under the Act had been on navigation, not on pollution control, proponents of this goal met with early frustration. Congressional hearings from the early 1970s demonstrate several areas of contention.

One initial question was whether the Corps had the authority to expand its review of projects beyond their effects on navigation to include their effects on the broader environment. In the late 1960s the Corps broadened its permitting process to include a "public interest review" of the environmental impacts of permitted projects. This expanded review was ultimately upheld in the courts, and is not the subject of this Article.[35]

Another significant issue (and the focus of this Article) was the scope of the Corps' geographic jurisdiction. Key members of Congress felt that the Corps was not reaching as far as it could, or should. Three main points were in dispute. First, until 1970, the Corps had declined to require permits for the installation of structures, dredging, or filling shoreward of the harbor lines, even though such areas could be regulated under *The Daniel Ball*'s limited definition of "navigable waters."[36] This allowed individuals to fill tidal areas below the mean high waterline and out to the harborlines without federal review. In March 1970, the House Committee on Government Regulations criticized this limitation as being inconsistent with the Rivers and Harbors Act, and in May 1970, the Corps published a rule to regulate this practice.[37]

Second, some members of Congress believed that the Corps had unduly limited its regulation to waters that are presently navigable—the old *Daniel Ball* definition. These legislators were concerned that the Corps had "narrowly defined the waters to which these statutory provisions apply, and thus severely limited the scope of the law."[38] In hearings in 1972, Congress criticized the Corps' failure to regulate waters that should have been regulable under judicial decisions such as *Economy Light & Power Co.* and *Appalachian Power Co.*:

> The corps' regulations currently define navigable waters as those "which are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition," for conducting trade or travel "in the customary modes of trade and travel on water." 33 C.F.R. 209.260(a). That language is based on similar language used over 100 years ago in the Supreme Court's opinion in *The Daniel Ball* . . . .
>
> However, more recent judicial opinions have substantially expanded that limited view of navigability to include waterways which could be "susceptible of being used . . . with reasonable improvements," as well as those waterways which include sections presently obstructed by falls, rapids, sand bars, currents, floating debris, etc. *United States v. Utah*, 283 U.S. 64 (1931); *United States v. Appalachian Power Co.*, 331 U.S. 377, 407-410, 416 (1940); *Wisconsin Public Service Corp. v. Federal Power Commission*, 147 F.2d 743 (CA7, 1945), *cert. denied*, 325 U.S. 880; *Wisconsin v. Federal Power Commission*, 214 F.2d 334 (CA7, 1954), *cert. denied*, 348 U.S. 883 (1954); *Namekagon Hydro Co. v. Federal Power Commission*, 216 F.2d 509 (CA7, 1954); *Puente de Reynosa, S.A. v. City of McAllen*, 357 F.2d 43, 50-51 (CA5, 1966); *Rochester Gas and Electric Corp. v. Federal Power Commission*, 344 F.2d 594 (CA2, 1965); *The Montello*, 87 U.S. (20 Wall.) 430, 441-42 (1874); *Economy Light & Power Co. v. United States*, 256 U.S. 113 (1921).[39]

Finally, the committee pushed the Corps to assert jurisdiction over wholly intrastate, navigable lakes. The question whether the traditional navigable waters included only those waters that formed a continued interstate highway for waterborne commerce, as *The Daniel Ball* and *Gilman* seemed to imply, or whether intrastate navigable waters could be linked to interstate commerce through overland connections such as highways and railroads, was a significant constitutional issue at that time. For example, the gen-

31. *See* United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 708 (1899) ("[A]nything, wherever done or however done, within the limits of the jurisdiction of the United States, which tends to destroy the navigable capacity of one of the navigable waters of the United States, is within the terms of the prohibition" of the Rivers and Harbors Act.).

32. 33 U.S.C. §407.

33. *Id.*

34. *See, e.g.*, H.R. REP. No. 92-1333 (1972); H.R. REP. No. 92-1323 (1972); H.R. REP. No. 91-917 (1970); United States v. Republic Steel Corp., 362 U.S. 482 (1960) (discharge of industrial solids is the creation of an obstruction within the meaning of §10 of the Act); United States v. Standard Oil Co., 384 U.S. 224 (1966) (discharge of aviation fuel is discharge of "refuse" under the Refuse Act); Robert L. Potter, *Discharging New Wine Into Old Wineskins: The Metamorphosis of the Rivers & Harbors Act of 1899*, 33 PITT. L. REV. 483, 487-89 (1972).

35. *See, e.g.*, Zabel v. Tabb, 430 F.2d 199, 1 ELR 20023 (5th Cir. 1970).

36. *See* H.R. REP. No. 91-917, at 6-10 (criticizing this limitation). On the West Coast, moreover, the Corps had defined its jurisdiction to extend to the mean high tideline, and Congress pushed the Corps to assert jurisdiction farther, to the mean higher high tideline. *Id.* at 27.

37. *See* 35 Fed. Reg. 8280 (May 27, 1970) (amending 33 C.F.R. §209.150).

38 H.R. REP. No. 92-1323, at 27; *see also id.* at 5 ("The [C]orps has thus far taken too narrow a view of its jurisdiction and responsibilities over navigable waterways, but the [C]orps plans to publish broadened regulations on navigability in the near future.").

39. *Id.* at 29-30.

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eral counsel of EPA issued an opinion in 1971 stating that overland connections were insufficient to establish federal jurisdiction over intrastate lakes for the purpose of the FWPCA.[40] The House Committee, however, urged the Corps to adopt an interpretation of traditional navigable waters that included intrastate navigable lakes:

> Another instance of the [C]orps' limited view of its responsibilities has been its opinion that it cannot exercise jurisdiction over waters which, although clearly navigable, do not "form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by waters." (33 C.F.R. 209.260(a).) For example, the Acting Chief of Engineers informed the subcommittee, by letter of February 20, 1970, that Lake Chelan—a body of water 55 miles long and almost 2 miles wide in the State of Washington, and clearly navigable—"is not considered by the Corps of Engineers to be a navigable waterway of the United States," because "navigation on Lake Chelan cannot form a part of either the interstate or international system."
>
> This limited view reflected the 1879 dictum in *The Daniel Ball, supra*, that to constitute navigable waters of the United States they must "form, by themselves, or by uniting with other waters, a continuous highway over which . . . commerce is conducted by water."
>
> The U.S. Constitution contains no mention of navigable waters. The authority of Congress over navigable waters is based on the Constitution's grant to Congress of "[p]ower . . . To regulate commerce with Foreign Nations and among the several States . . . ." (Art. I, sec 8, clause 3.) *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). Although most interstate commerce 150 years ago was accomplished on waterways, there is no requirement in the Constitution that the waterway must cross a State boundary in order to be within the interstate commerce power of the Federal Government. Rather, it is enough that the waterway serves as a link in the chain of commerce among the States as it flows in the various channels of transportation (highways, railroads, air traffic, radio and postal communication, waterways, etc.). The "gist of the Federal test" is the waterways' use "as a highway," not whether it is "part of a navigable interstate or international commercial highway." *Utah v. United States*, 403 U.S. 9, 11 (1971) . . . .[41]

The committee concluded its hearings by urging the Corps to assert a more expansive definition of the "navigable waters of the United States," including

> all waterways . . . which are now, or were, or may in the future be, capable of being used for purposes of interstate or foreign commerce, irrespective of whether the waterway itself crosses a State line, irrespective of whether, when, how, or by what mode, such use actually occurs, and irrespective of the quantity or kind of items of commerce such use affects. Furthermore, if any substantial part of a waterway was, is, or may be capable of carrying materials or persons traveling in interstate commerce, the whole of that waterway should be viewed and administered by the [C]orps as being within its jurisdiction over navigable waters of the United States.[42]

In short, this definition would have required the Corps to regulate all of the "traditional navigable waters" (as defined in *The Daniel Ball, Economy Light & Power Co.*, and *Appalachian Power Co.*) and to assert jurisdiction over intrastate lakes on the basis of overland links between those lakes and traditional navigable waters.

On September 9, 1972, the Corps responded to Congress' concerns by expanding its definition of navigable waters of the United States to include all of the "traditional navigable waters."[43] At about the same time that the Corps was promulgating this regulation, Congress was finalizing the FWPCA Amendments of 1972.

The FWPCA

The 1972 FWPCA Amendments

The 1972 Amendments dramatically changed the approach of the FWPCA, now known as the CWA. Before 1972, the FWPCA had addressed water pollution by funding state and municipal water treatment systems and by requiring the establishment of state water quality standards.[44] This approach had been largely ineffective in controlling individual discharges of pollution. The 1972 Amendments addressed this problem by instituting a system requiring individual permits for discharges to navigable waters—which was a dramatic expansion of the federal role. The CWA now prohibits "the discharge of any pollutant by any person," except in accordance with a permit issued pursuant to the Act.[45] The "discharge of a pollutant" means "any addition of any pollutant to navigable waters from any point source."[46] The "navigable waters" are in turn defined as "the waters of the United States, including the territorial seas."[47] The Act does not further define the "waters of the United States."

The immediate question posed by this statutory structure is the meaning of the term "waters of the United States"—which is the term the courts and agencies have cited in support of a broad interpretation of federal jurisdiction. The only previous statutory use of the term appears to

40. *See* EPA General Counsel Opinion (Dec. 9, 1971).

41. H.R. Rep. No. 92-1323, at 30.

42. *Id.* at 31-32.

43. *See* 37 Fed. Reg. 18279 (Sept. 9, 1972); *see also* Charles D. Ablard & Brian Boru O'Neill, *Wetland Protection & Section 404 of the Federal Water Pollution Control Act Amendments of 1972: A Corps of Engineers Renaissance*, 1 Vt. L. Rev. 51, 62 (1976) noting

> four recent jurisdictional expansions by the Corps: the inclusion of historical navigable waters of the United States; the inclusion of waters susceptible to navigation after improvement; the inclusion of coastal waters subject to the ebb and flow of the tide; and the expansion of the definition of the limit of the ebb and flow of the tide from the mean high-water mark to the mean higher high-water mark on the West Coast.

Id. at 62. *See also* Garrett Power, *The Fox in the Chicken Coop: The Regulatory Program of the U.S. Army Corps of Engineers*, 63 Va. L. Rev. 503, 514-15 (1977) (describing changes in the Corps' jurisdictional regulations). Two courts later held, however, that overland links could not establish an interstate connection for the purposes of the Rivers and Harbors Act. *See* Hardy Salt Co. v. Southern Pac. Transp. Co., 501 F.2d 1156, 1168 (10th Cir. 1974); Minnehaha Creek Watershed Dist. v. Hoffman, 597 F.2d 617, 623-24, 9 ELR 20334, 20336 (8th Cir. 1979).

44. *See* Robert V. Percival et al., Environmental Regulation: Law, Science & Policy 881 (2d ed. 1996). The origin of the FWPCA can be traced to the Water Quality Act of 1948. *See* Water Quality Act, ch. 758, 62 Stat. 1155 (1948).

45. 33 U.S.C. §1311, ELR Stat. FWPCA §301.

46. *Id.* §1362(12), ELR Stat. FWPCA §502(12).

47. *Id.* §1362(7), ELR Stat. FWPCA §502(7).

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have been in §10 of the Rivers and Harbors Act, which used it interchangeably with the term "navigable waters of the United States." It is therefore possible that Congress intended to use the term as it had in the Rivers and Harbors Act—to invoke the generally accepted basis for federal jurisdiction over the national waters, and to distinguish the waters of the United States from the waters of the states.

The legislative history of the term "waters of the United States" is not clear. As first proposed, neither the House nor the Senate versions of the CWA included the term "waters of the United States." Instead, each included the term "navigable waters," and each defined that term differently. The House Bill defined "navigable waters" as "the navigable waters of the United States, including the territorial seas."[48] The Senate Bill defined "navigable waters" as "the navigable waters of the United States, portions thereof, and the tributaries thereof, including the territorial seas and the Great Lakes."[49]

The final compromise eliminated "tributaries" from the Senate bill and "navigable" from the House bill, defining the "navigable waters" as simply "the waters of the United States." In explanation, the Conference Report adopted a portion of the language of the preceding House Report: "The conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes."[50] This is the language that has traditionally been relied upon to support broad interpretations of federal jurisdiction. Despite its apparent breadth, however, when placed in context this passage is, as the government conceded in *SWANCC*, "somewhat ambiguous."[51]

On one hand, the statement that the term "navigable waters" should be "given the broadest possible constitutional interpretation . . . unencumbered by agency determinations" could be interpreted—and until *SWANCC* had been widely interpreted—to mean that Congress intended to assert jurisdiction to the broadest extent of its constitutional commerce power, including over activities and/or waters that have a substantial effect on interstate commerce.[52] The Supreme Court has divided Congress' commerce power into three broad categories: the power to regulate the "channels of interstate commerce," to regulate the "instrumentalities of commerce," and to regulate "those activities having a substantial relation to interstate commerce . . . , *i.e.*, those activities that substantially affect interstate commerce."[53] The broadest of these categories is Congress' power over things substantially affecting interstate commerce.[54]

On the other hand, the conferees' language could be interpreted, as the Supreme Court in *SWANCC* read it, to mean simply that Congress intended to override previous, unduly narrow agency interpretations to assert its broadest constitutional authority over *the traditional navigable waters*. This would include the fullest definition of the navigable waters as developed in *The Daniel Ball* and its progeny, such as waters landward of the harborlines, waters susceptible for use in navigation with reasonable improvements, waters subject to the ebb and flow of the tide, and the then-highly controversial jurisdiction over intrastate lakes that Congress had been urging at the time the Act was passed. As noted above, a major issue in several committee hearings in the early 1970s had been the Corps' failure to use the Rivers and Harbors Act to reach all of the traditional navigable waters and large intrastate lakes.[55] If, as seems likely, the interpretations at issue in those committee hearings were the limited "agency determinations" to which the Conference Report referred, then this is the better reading of the conferees' language.[56]

Indeed, although the agencies have generally argued that the deletion of "navigable" from the definition of "navigable waters" indicates that Congress intended to broaden the definition of "navigable waters," the contrary could also be true. The deletion of "tributaries" from the Senate Bill and the adoption of language very close to the House Bill could indicate that Congress intended the "navigable waters" to conform to their contemporary understanding, without the artificial limits that had been the subject of discussion between Congress and the Corps.

The statements of the floor managers do not absolutely resolve this question—they are merely the statements of single legislators—but they do provide some context. One widely quoted statement is that of Rep. John D. Dingell (D-Mich.), the House floor manager for the bill. Representative Dingell declared that the bill "defines the term 'navi-

48. H.R. 11896, 92d Cong. §502(8) (1972), *reprinted in* 1 CONGRESSIONAL RESEARCH SERVICE, LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 1069 (1973) [hereinafter LEGISLATIVE HISTORY]. According to the accompanying House Report:

> One term that the Committee was reluctant to define was the term "navigable waters." The reluctance was based on the fear that any interpretation would be read narrowly. However, this is not the Committee's intent. The Committee fully intends that the term "navigable waters" be given the broadest possible constitutional interpretation, unencumbered by agency determinations which have been made or may be made for administrative purposes.

H.R. REP. NO. 92-911, at 131 (1972), *reprinted in* 1 LEGISLATIVE HISTORY 818.

49. S. 2770, 92d Cong. §502(h) (1971), *reprinted in* 2 LEGISLATIVE HISTORY 1698. The accompanying Senate Report explained that

> [t]he control strategy of the Act extends to navigable waters. The definition of this term means the navigable waters of the United States, portions thereof, tributaries thereof, and includes the territorial seas and the Great Lakes. Through a narrow interpretation of the definition of interstate waters the implementation [of the] 1965 Act was severely limited. Water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source. Therefore, reference to the control requirements must be made to the navigable waters, portions thereof, and their tributaries.

S. REP. NO. 92-414, at 77 (1971), *reprinted in* 2 LEGISLATIVE HISTORY 1495.

50. S. REP. NO. 92-1236, at 144 (1972), *reprinted in* 1 LEGISLATIVE HISTORY 327. *Compare* H.R. REP. NO. 92-911, *supra* note 48.

51. *SWANCC*, 531 U.S. at 168 n.8, 31 ELR at 20385 n.8. By contrast, the Supreme Court found the statute itself to be "clear." *See id.* at 172, 31 ELR at 20386 ("We find §404(a) to be clear . . . .").

52. *See, e.g.*, United States v. Ashland Oil & Transp. Co., 504 F.2d 1317, 1325, 4 ELR 20784, 20788-89 (6th Cir. 1974).

53. United States v. Lopez, 514 U.S. 549, 558-59 (1995).

54. *See id.* at 556-57.

55. *See supra* notes 35-44 and accompanying text.

56. The broad statement of intent in the Conference Committee was drawn verbatim from the House Committee report. Because the House definition of navigable waters included only "the navigable waters of the United States," it may be that the House, too, had in mind the "broadest constitutional interpretation" of federal power over the traditional navigable waters, which the House Committee on Government Operations had been urging the Corps to adopt.

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gable waters' broadly for water quality purposes," meaning "all 'the waters of the United States' in a geographical sense," and not "'navigable waters of the United States' in the technical sense as we sometimes see in some laws."[57] Although years of administrative gloss have made this statement seem quite broad to the present-day reader, at the time it was uttered it may have simply indicated an intent to override the Corps' specific, narrower practices that were at issue in the early 1970s. Indeed, Representative Dingell stated explicitly, "[n]o longer are the old narrow definitions of navigability, as determined by the [C]orps of Engineers, going to govern matters covered by this bill," and proceeded to quote verbatim two long paragraphs from the 1972 Committee on Government Operations Report that had urged the Corps to assert its jurisdiction over the full, traditional "navigable waters" under the Rivers and Harbors Act and over intrastate navigable lakes.[58] Representative Dingell did not contend that the CWA was a radical break from contemporary understanding. To the contrary, he emphasized that "[t]he new and broader definition is in line with more recent judicial opinions."[59] Other widely quoted, superficially broad statements can be similarly understood when placed in context.[60]

In sum, the legislative history of the 1972 Amendments suggests that Congress did, indeed, intend to broaden significantly the reach of federal regulatory authority over the nation's waters. But the debate was framed in terms of the traditional navigable waters—specifically, how far federal power could reach if the term *navigable waters* was given its "broadest possible constitutional interpretation." Thus, in referring to the "agency determinations" that had "encumbered" federal jurisdiction, the committee reports and floor statements were referring to the interpretations that had been at issue in the immediately preceding period under the Rivers and Harbors Act. Rather than sweep away all distinction between the waters of the United States and the waters of the states (as the modern agencies would do), when read in context this legislative history indicates that Congress intended a far narrower—but at the time expansive, hard-fought, and constitutionally controversial—purpose: to force the Corps to assert its jurisdiction to the fullest constitutional definition of the navigable waters, and to assert ju-

57. 1 LEGISLATIVE HISTORY 250-51. Representative Dingell's full statement provides:

> [T]he conference bill defines the term "navigable waters" broadly for water quality purposes. It means all "the waters of the United States" in a geographical sense. It does not mean "navigable waters of the United States" in the technical sense as we sometimes see in some laws.
>
> The new and broader definition is in line with more recent judicial opinions which have substantially expanded that limited view of navigability—derived from the Daniel Ball case (77 U.S. 557, 563)—to include waterways which would be "susceptible of being used . . . with reasonable improvement," as well as those waterways which include sections presently obstructed by falls, rapids, sand bars, currents, floating debris, et cetera[.] *United States v. Utah*, 283 U.S. 64 (1931); *United States v. App[a]lachian Power Co.*, 331 U.S. 377, 407-410, 416 (1940); *Wisconsin Public Service Corp. v. Federal Power Commission*, 147 F.2d 743 (CA7, 1945), *cert. denied*, 325 U.S. 880; *Wisconsin v. Federal Power Commission*, 214 F.2d 334 (CA7, 1954), *cert. denied*, 348 U.S. 883 (1954); *Namekagon Hydro Co. v. Federal Power Commission*, 216 F.2d 509 (CA7, 1954); *Puente de Reynosa, S.A. v. City of McAllen*, 357 F.2d 43, 50-51 (CA5, 1966); *Rochester Gas and Electric Corp. v. Federal Power Commission*, 344 F.2d 594 (CA2, 1965); *The Montello*, 37 U.S. (20 Wall.) 430, 441-42 (1874); *Economy Light & Power Co. v. United States*, 256 U.S. 113 (1921).
>
> The Constitution contains no mention of navigable waters. The authority of Congress over navigable waters is based on the Constitution's grant to Congress of "Power . . . to regulate commerce with Foreign Nations and among the several States . . ." (art. I, sec. 8, clause 3). *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). Although most interstate commerce 150 years ago was accomplished on waterways, there is no requirement in the Constitution that the waterway must cross a State boundary in order to be within the interstate commerce power of the Federal Government. Rather, it is enough that the waterway serves as a link in the chain of commerce among the States as it flows in the various channels of transportation—highways, railroads, air traffic, radio and postal communication, waterways, et cetera. The "gist of the Federal test" is the waterway's use "as a highway," not whether it is "part of navigable interstate or international commercial highway." *Utah v. United States*, 403 U.S. 9, 11 (1971); *U.S. v. Underwood*, 4 ERC 1305, 1309 (D.C., Md., Fla., Tampa Div., June 8, 1972).
>
> Thus, this new definition clearly encompasses all water bodies, including main streams and their tributaries, for water quality purposes. No longer are the old, narrow definitions of navigability, as determined by the corps of Engineers, going to govern matters covered by this bill. Indeed, the conference report states on page 144:
>
> "The conferees fully intend that the term navigable waters be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes."

Id.

58. The second and third paragraphs of Representative Dingell's statement come almost verbatim from the House Committee on Government Operations' 1972 Report, *see supra* notes 40 and 42-43, which had urged the Corps to assert broader jurisdiction over the traditional navigable waters. *See* H.R. REP. No. 92-1323, at 29-30 (1972). As noted above, in these sections the committee urged the Corps to assert jurisdiction over waters "susceptible of being used . . . with reasonable improvement" for navigation, and waters that formed links in the chain of commerce through their connection with highways or railroads. *Id.* at 29-30.

59. 1 LEGISLATIVE HISTORY 250-51.

60. Like Representative Dingell's, Sen. Edmund S. Muskie's (D-Me.) widely quoted summary includes a discussion of the traditional definition of navigable waters as well as a discussion of waters that form a link in the chain of commerce through overland connections:

> One matter of importance throughout the legislation is the meaning of the term "navigable waters of the United States."
>
> The conference agreement does not define the term. The Conferees fully intend that the term "navigable waters" be given the broadest possible interpretation unencumbered by agency determinations which have been made or may be made for administrative purpose.
>
> Based on the history of consideration of this legislation, it is obvious that its provisions and the extent of application should be construed broadly. It is intended that the term "navigable waters" include all water bodies, such as lakes, streams, and rivers, regarded as public navigable waters in law which are navigable in fact. It is further intended that such waters shall be considered to be navigable in fact when they form, in their ordinary condition by themselves or by uniting with other waters or other systems of transportation, such as highways or railroads, a continuing highway over which commerce is or may be carried on with other States or with foreign countries in the customary means of trade and travel in which commerce is conducted to day. In such case the commerce on such waters would have a substantial economic effect on interstate commerce.

1 LEGISLATIVE HISTORY 178. The third paragraph of this passage does not come from the Conference Report at all; it comes from Senator Muskie's floor statements in support of the 1970 Act. *See* 116 CONG. REC. 8985 (1970); *see also* H.R. REP. No. 92-1323, 31 (quoting the same language).

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risdiction over intrastate navigable waters having an overland, i.e., rail or highway, connection to interstate commerce. When read in context, this history therefore supports the Supreme Court's conclusion in *SWANCC* that Congress intended in 1972 to exercise its commerce power over navigation, and not its power over all things affecting interstate commerce.

The Definition of Navigability Under the 1972 Amendments

Two Conflicting Views of CWA Jurisdiction

In light of this historical context, it is not surprising that the broad, modern interpretation of federal CWA jurisdiction was not universally apparent immediately after the Amendments were adopted in 1972. In fact, EPA and the Corps initially developed sharply differing interpretations of the scope of the "navigable waters" and "waters of the United States." The Corps, viewing the 1972 Amendments through the prism of its contemporaneous experience before the House Committee, adopted a definition that incorporated the concerns Congress had articulated in the years preceding the passage of the 1972 Amendments. EPA, on the other hand, adopted a new and different approach.

According to EPA, the term "navigable waters," when defined as "waters of the United States," included any waters in or on which activity might affect interstate commerce. This was a significant change from the pre-1972 FWPCA, which EPA had interpreted narrowly.[61] In 1973, EPA's general counsel explained the reasoning behind this broad theory of jurisdiction:

> We have investigated the origin and history of the term "navigable waters of the United States," in order to determine the significance of the deletion of the word "navigable." That phrase, as it was construed in early Supreme Court decisions, depended upon the application of two tests. First, the waters in question were required to be navigable in fact, which meant that they must be capable of being used by vessels in carrying goods in commerce. Second, the phrase "of the United States" meant that the waters had to be capable of being used in interstate commerce. Accordingly, the deletion of the word "navigable" eliminates the requirement of navigability. The only remaining requirement, then, is that pollution of waters covered by the bill must be capable of affecting interstate commerce.[62]

There are several problems with this analysis. Even taking EPA on its own terms, if the phrase "of the United States" means "that the waters had to be capable of being used in interstate commerce," then deleting the term "navigable" should result in federal jurisdiction over waters "capable of being used in interstate commerce." But EPA converts "waters . . . capable of being used in interstate commerce" to all *pollution* of waters capable of *affecting* interstate commerce. This is a non sequitur. Moreover, it converts criteria of navigability into a rationale for broad federal authority under an "affecting commerce" theory.

The same problem is evidenced in EPA's description of the meaning of the first part of the definition: the term "navigable." According to EPA, "navigable" means "capable of being used by vessels in carrying goods in commerce," a phrase denoting both the concept of navigability and the concept of use in commerce. The only meaning added by the second part of the definition ("of the United States") is therefore the concept that the commerce be "interstate." The deletion of the word "navigable" simply leaves the idea that the waters had to be "interstate." It does not allow EPA to claim jurisdiction over waters on the ground that the pollution of those waters could affect interstate commerce.

EPA contended that its analysis came from the "origin and history" of the term "navigable waters of the United States." But an examination of the origin of the term further demonstrates that EPA's conclusion is ahistorical as well as illogical. The classic exposition of that term is that of the Supreme Court's opinion in *The Daniel Ball*. That case identifies "navigable in fact" as signifying that waters are "used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." Thus, the term "navigable" includes both the concept that the waters be used by vessels and the concept that the waters be used in commerce. The phrase "of the United States . . . *in contradistinction from the navigable waters of the States*" means that the waters "form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water."[63] The phrase "waters of the United States, . . . in contradistinction from the navigable waters of the States" therefore distinguishes interstate from intrastate waters.

Nonetheless, EPA adopted this reasoning, and ensuing EPA regulations for the federal national pollutant discharge elimination system program defined the navigable waters to include:

> (1) All navigable waters of the United States;
> (2) Tributaries of navigable waters of the United States;
> (3) Interstate waters;
> (4) Intrastate lakes, rivers, and streams which are utilized by interstate travelers for recreational or other purposes;
> (5) Intrastate lakes, rivers, and streams from which fish or shell fish are taken and sold in interstate commerce;
> (6) Intrastate lakes, rivers, and streams which are utilized for industrial purposes by industries in interstate commerce.[64]

61. EPA General Counsel Opinion (Dec. 9, 1971) (declaring that "navigable waters of the United States" require an interstate *water* connection).

62. EPA General Counsel Opinion (Feb. 6, 1973).

63. The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1871).

64. 40 C.F.R. §125.1(o) (1974); *see also* 38 Fed. Reg. 13528, 13529 (May 3, 1973). EPA actually took several months to arrive at this definition. The six categories of waters were first proposed in a memorandum by Associate General Counsel Alan Eckert, issued on November 14, 1972. EPA's initial regulation for state programs, announced in December 1972, did not articulate these categories. It simply incorporated by reference the statutory definition of "navigable waters." *See* 37 Fed. Reg. 28390, 28392 (Dec. 22, 1972) (promulgating 40 C.F.R. §124.1(n)). In January 1973, EPA's proposed regulation for the federal national pollutant discharge elimination system program likewise simply recited the statutory definition: "the waters of the United States, including the territorial seas." 38 Fed. Reg. 1362, 1363 (Jan. 24, 1973). In February the above cited General Counsel's Opinion publicly stated that the "waters of the United States" included "at least" the six categories of waters, but substi-

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The Corps, on the other hand, rejected EPA's broad interpretation. Instead, the Corps viewed the CWA as requiring it to assert jurisdiction over all the traditional navigable waters, including those traditional navigable waters that it had previously declined to regulate. As noted above, this interpretation makes sense in light of the historical context. Congress had repeatedly urged the Corps to discard earlier, limited interpretations of its jurisdiction and to expand its interpretation of its authority to include the full extent of the "traditional navigable waters."[65] Accordingly, the Corps responded in its 1972 regulatory definition of the "navigable waters of the United States" and again in its 1974 definition of the "waters of the United States" by asserting jurisdiction over the full scope of the "traditional navigable waters."

In the preamble to the 1974 rule setting forth the Corps' first CWA §404 permitting program, the Corps explained, stating:

> Section 404 of the FWPCA uses the term "navigable waters" which is later defined in the Act as "the waters of the United States." The Conference Report, in discussing this term, advises that this term is to be given the "broadest possible Constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." We feel that the guidance in interpreting the meaning of this term which has been offered by this Conference Report—to give it the broadest possible Constitutional interpretation—is the same as the basic premise from which the aforementioned judicial precedents [interpreting the "navigable waters of the United States"] have evolved. The extent of Federal regulatory jurisdiction must be limited to that which is Constitutionally permissible, and in this regard, we feel that we must adopt an administrative definition of this term which is soundly based on this premise and the judicial precedents which have reinforced it. Accordingly, we feel that in the administration of this regulatory program both terms should be treated synonymously.[66]

The Corps therefore defined "navigable waters" to include "those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce . . . ."[67] The Corps further explained which criteria would qualify a water body as "navigable," including "past, present, or potential presence of interstate or foreign commerce" and "physical capabilities for use by commerce."[68] In short, the Corps, as it had done in 1972, asserted jurisdiction over all the traditional navigable waters.

The *Callaway* Case

The Natural Resources Defense Council (NRDC) challenged the Corps' definition, and in 1975 the U.S. District Court for the District of Columbia held that the definition was illegally narrow.[69] In an order without an opinion, the court declared in *Natural Resources Defense Council v. Callaway*[70] that Congress had "asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the constitution."[71] "Accordingly," the court declared, "as used in the Water Act, the term ["navigable waters"] is not limited to the traditional tests of navigability."[72] The court ordered the Corps to develop regulations "clearly recognizing the regulatory mandate of the Water Act."[73]

The Corps' Response

After the *Callaway* decision, the Corps proposed regulations in early 1975 to attempt to establish the new bounds of its jurisdiction.[74] Upon receiving public comments, the Corps promulgated interim final regulations later that year.[75] These regulations regulated most linear water bodies below the headwaters.[76] These regulations also established

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tuted "interstate" for "intrastate" in the definitions of the final three. *See* EPA General Counsel Opinion (Feb. 6, 1973). Not until May 1973 did EPA finally promulgate the complete definition cited above, with the explanation that "[t]he definition of 'navigable waters' has been clarified by incorporating additional language." 38 Fed. Reg. at 13528-29.

65 *See supra* notes 35-44 and accompanying text.

66. 39 Fed. Reg. 12115 (Apr. 3, 1974).

67. 33 C.F.R. §209.120(d)(1).

68. *Id.* §209.260(d).

69. Natural Resources Defense Council v. Callaway, 392 F. Supp. 685, 5 ELR 20285 (D.D.C. 1975).

70. 392 F. Supp. 685, 5 ELR 20285 (D.D.C. 1975).

71. *Id.* at 686, 5 ELR at 20285.

72. *Id.*

73. *Id.*

74. *See* 40 Fed. Reg. 19766 (May 5, 1975).

75. *See id.* 31320 (July 25, 1975).

76. The Corps' 1975 regulations defined "navigable waters" to include coastal waters and wetlands; navigable rivers, lakes, and streams; artificial channels and canals connected to navigable waters; wetlands adjacent to navigable waters; and

> (c) Rivers, lakes, streams, and artificial water bodies that are navigable waters of the United States up to their headwaters and landward to their ordinary high water mark;
>
> . . . .
>
> (e) All tributaries of navigable waters of the United States up to their headwaters and landward to their ordinary high water mark;
>
> (f) Interstate waters landward to their ordinary high water mark and up to their headwaters;
>
> (g) Intrastate lakes, rivers and streams landward to their ordinary high water mark and up to their headwaters that are utilized:
>
> (1) By interstate travelers for water-related recreational purposes;
>
> (2) For the removal of fish that are sold in interstate commerce;
>
> (3) For industrial purposes by industries in interstate commerce;
>
> (4) In the production of agricultural commodities sold or transported in interstate commerce;
>
> . . . and
>
> (i) Those other waters which the District Engineer determines necessitate regulation for the protection of water quality.

Id. at 31323-24. In 1975, the Assistant Secretary of the Army for Civil Works, Victor Veysey, testified before Congress that the Corps' expanded permit procedure "will not apply to: (A) Headwaters of streams—above the point of regular flow less than 5 second feet, (B) small lakes and ponds, [and] (C) coastal or inland wetlands above the navigation servitude not frequently inundated." *Development of New Regulations by the Corps of Engineers, Implementing Section 404 of the Federal Water Pollution Control Act Concerning Permits for Disposal of Dredge or Fill Material Before the House Subcomm. on Water Resources of the Comm. on Public Works and Transportation*, 94th Cong. 6 (1975); *see also id.* at 13. Assistant Secretary Veysey reported that the headwaters would mark "the termination of any permit requirement," *id.* at 13, observing that "these

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a phase-in period, under which the Corps would gradually assert jurisdiction over waters upstream of the traditional navigable waters.[77]

In 1977, the Corps issued its final rule, which modified the Corps' approach.[78] The Corps' final regulations defined the "waters of the United States" as:

> (1) The territorial seas . . . . ;
> (2) Coastal and inland waters, lakes, rivers, and streams that are navigable waters of the United States, including adjacent wetlands;
> (3) Tributaries to navigable waters of the United States, including adjacent wetlands (manmade nontidal drainage and irrigation ditches excavated on dry land are not considered waters of the United States under this definition);
> (4) Interstate waters and their tributaries including adjacent wetlands; and
> (5) All other waters of the United States not identified in paragraphs (1)-(4) above, such as isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the Untied States, the degradation or destruction of which could affect interstate commerce.[79]

The 1977 final regulations exempted areas above the headwaters from the §404 permit requirement, establishing by rule that discharges into "non-tidal rivers, streams and their impoundments including adjacent wetlands that are located above the headwaters" were "hereby permitted."[80] In practical effect, the 1975 and 1977 regulations were quite similar: the Corps would require permits for dredge or fill activities in the traditional navigable waters, and in non-navigable tributaries, but not above the headwaters.

The CWA Amendments of 1977

At roughly the same time that the Corps was amending its regulations, Congress again amended the FWPCA. A major topic of the congressional debates over these amendments was the scope of the Corps' jurisdiction after *Callaway*. A bill was proposed in the House that would have defined "navigable waters" for the purposes of §404 as "all waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce," and that would have expressly authorized the regulation of adjacent wetlands.[81] A similar definition was proposed in the Senate, but was defeated in a close vote.[82] The different bills were sent to the Conference Committee, and in the end Congress left the definition as it was.

Congress ultimately passed revisions to §404 that made it clear that adjacent wetlands were to be included within the Corps' jurisdiction over navigable waters.[83] These provisions also included exemptions to §404 designed to avoid regulating certain, mostly agricultural activities, a grant of authority to the Corps to issue general permits, and a grant of authority to the states to petition to administer

> [their] own individual and general permit program for the discharge of dredged or fill material into the navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce . . . including wetlands adjacent thereto) within [their] jurisdiction.[84]

The Supreme Court addressed the implications of these provisions in *SWANCC*.[85]

Further Expansion of the Definition of "Waters of the United States," and the Supreme Court's Decision in United States v. Riverside Bayview Homes

Expansion of the Definition of "Waters of the United States"

Since the 1977 Amendments, EPA's notion of what constitutes "effects" on interstate commerce has steadily expanded, and EPA's and the Corps' regulations have followed suit. Currently, the Corps and EPA define "waters of the United States" as follows:

> (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
> (2) All interstate waters including interstate wetlands;
> (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of 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

decisions would be better made within States—certainly on the smaller bodies of water and the upper branches of rivers—than to bring them to the Federal Government." *Id.* at 8. The Secretary testified that these waters lie well within the state's traditional authority over land and waters. As the Secretary opined, a headwaters cutoff would avoid subjecting individual farmers to the §404(a) permit requirement. *See id.* at 13 ("And I would suspect that most of your farmers would not be operating within areas that would have more than 5 second-feet flow.").

77. The Corps announced that:

> Department of the Army permits will be required for the discharge of dredged material or of fill material into navigable waters in accordance with the following phased schedule:
> (a) *Phase I*: After the effective date of this regulation, discharges of dredged material or of fill material into coastal waters and coastal wetlands contiguous or adjacent thereto or into inland navigable waters of the United States and freshwater wetlands contiguous or adjacent thereto are subject to the procedures of this regulation.
> (b) *Phase II*: After July 1, 1976, discharges of dredged material or of fill material into primary tributaries, freshwater wetlands contiguous or adjacent to primary tributaries, and lakes are subject to the procedures of this regulation.
> (c) *Phase III*: After July 1, 1977, discharges of dredged material or fill material into any navigable water are subject to the procedures of this regulation.

40 Fed. Reg. at 31326.

78. *See* 42 Fed. Reg. 37122 (July 19, 1977).

79. *Id.* at 37144.

80. *Id.* at 37146 (quoting 33 C.F.R. §323.4-2).

81. H.R. 3199, 95th Cong. §16 (1977), *reprinted in* 4 LEGISLATIVE HISTORY 1183.

82. *See* 123 CONG. REC. 26710, 26728 (1977).

83. *See* 33 U.S.C. §§1288(i)(2), 1344(g), ELR STAT. FWPCA §§208(i)(2), 404(g).

84. *Id.* §1344(e)-(g), ELR STAT. FWPCA §404(e)-(g).

85. The Court held that neither the failure of the proposals to overrule *Callaway* nor the addition of the agricultural and other exemptions indicated Congress' acquiescence in the full scope of the Corps' 1977 regulations. *See SWANCC*, 531 U.S. at 169-71 & n.7, 31 ELR at 20383-84 & n.7.

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(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purposes by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States;

(5) Tributaries of waters identified in paragraphs (a)(1) through (4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section.[86]

Riverside Bayview Homes

In 1985, the Supreme Court upheld the Corps' jurisdiction over wetlands adjacent to navigable waters in *Riverside Bayview Homes*[87] The Court held that wetlands adjacent to navigable waters were "waters of the United States" within the meaning of the CWA.

The respondent in *Riverside Bayview Homes* owned "80 acres of low-lying, marshy land near the shores of Lake St. Clair in Macomb County, Michigan."[88] Those waters were "adjacent to a body of navigable water, since the area characterized by saturated soil conditions and wetland vegetation extended beyond the boundary of respondent's property to Black Creek, a navigable waterway."[89] As the government described them in its briefing before the Court, "there is direct, unimpeded access from the mid-east boundary of Riverside's property to additional marshes and the open waters of Black Creek, a navigable water of the United States. . . . Indeed, it would not be an exaggeration to state that one could, after wading through a cattail marsh, swim directly from Riverside's property into the Great Lakes."[90] The Supreme Court held that the CWA could reasonably be interpreted to include such "adjacent wetlands" in the "waters of the United States," since Congress "intended . . . to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term."[91]

The Court therefore approved the Corps' regulation of wetlands adjacent to navigable waters as a reasonable construction of the CWA. The Court pointed to three congressional actions in support of the reasonableness of the Corps' construction. First, the Court noted that Congress had considered limiting the reach of §404 after the *Callaway* decision, and had declined to do so. Second, the Court noted that even those who would have limited the Corps' jurisdiction would have authorized the Corps to regulate wetlands immediately adjacent to otherwise navigable waters. Third, the Court pointed to other sections of the Act that appeared to contemplate the regulation of wetlands.[92] Although the Court reserved the question whether the CWA authorized the Corps to "regulate discharges of fill material into wetlands that are not adjacent to open waters,"[93] the regulation of wetlands directly abutting open, navigable waters was found to be consistent with the Act.

The Migratory Bird Rule

In 1986, the Corps included in the preamble to one of its regulations a statement that the "waters of the United States . . . also include the following waters," those:

a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or

b. Which are or would be used as habitat by other migratory birds which cross state lines; or

c. Which are or would be used as habitat for endangered species; or

d. Used to irrigate crops sold in interstate commerce.[94]

This became known as the migratory bird rule, and was soon the subject of significant litigation. One court held that the migratory bird rule was illegally promulgated without notice and comment,[95] but the Corps continued to apply the rule outside that federal circuit. Several courts held that it was consistent with the CWA on the ground that Congress intended the CWA to be extended to the fullest extent of its commerce authority, including its authority over activities having a substantial effect on interstate commerce.[96] Another court held the rule invalid, then vacated its opinion and issued a second opinion rejecting the government's jurisdictional claims on different grounds.[97]

The *SWANCC* Decision

Facts and Holding of SWANCC

In *SWANCC*, the Supreme Court took up the validity of the Corps' claim of jurisdiction over several small ponds in northern Illinois. The petitioner in *SWANCC* was a municipal corporation formed by 23 suburban Chicago cities and villages to manage their municipal waste. As part of their comprehensive solid waste management plan, these municipalities had purchased a site for the purpose of developing a new landfill (or balefill). The site had once housed a sand

86. 33 C.F.R. §328.3 (Corps regulations); *see also* 40 C.F.R. §122.2 (EPA regulations).

87. *Riverside Bayview Homes*, 474 U.S. at 121, 16 ELR at 20086.

88. *Id.* at 124, 16 ELR at 20087.

89. *Id.* at 131, 16 ELR at 20088.

90. *See* Edgar B. Washburn, *Current Status of the 404 Regulatory Programs*, ALI WETLANDS L. & REG. (May/June 2001) (quoting Reply Brief for the United States at 2 (*Riverside Bayview Homes*)). At oral argument, the government again asserted that "this is in fact an adjacent wetland, adjacent—by adjacent, I mean it is immediately next to, abuts, adjoins, borders, whatever other adjective you might want to use, navigable waters of the United States." *Id.* (quoting Official Tr. at 5-6 (*Riverside Bayview Homes*)).

91. 474 U.S. at 133, 16 ELR at 20089.

92. *See id.* at 135-39, 16 ELR at 20088-89.

93. *Id.* at 131 n.8, 16 ELR at 20088 n.8.

94. 51 Fed. Reg. at 41217.

95. *See* Tabb Lakes, Ltd. v. United States, 715 F. Supp. 726, 729, 19 ELR 20672, 20673 (E.D. Va. 1988), *aff'd*, 885 F.2d 866, 20 ELR 20008 (4th Cir. 1989).

96. *See* Solid Waste Agency of N. Cook County v. Corps of Eng'rs, 191 F.3d 845, 850, 30 ELR 20161, 20162-63 (7th Cir. 1999); Leslie Salt Co. v. United States, 55 F.3d 1388, 25 ELR 21046 (9th Cir. 1995); Leslie Salt Co. v. United States, 896 F.2d 354, 360, 20 ELR 20477, 20480-81 (9th Cir. 1990).

97. *See* Hoffman Homes, Inc. v. EPA, 975 F.2d 1554, 22 ELR 21547 (7th Cir. 1992) (holding the migratory bird rule to be invalid) (vacated); Hoffman Homes, Inc. v. EPA, 999 F.2d 256, 23 ELR 21139 (7th Cir. 1993) (rejecting jurisdiction as unsupported by substantial evidence).

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and gravel strip mine, and the trenches and other depressions left by the mining had formed permanent and seasonal ponds ranging from less than one-tenth of an acre to several acres in size and from several inches to several feet in depth. These "isolated ponds" were used by a variety of migratory birds.

After several years of review, the state of Illinois approved the project, attaching conditions intended to mitigate its adverse environmental impacts. But the Corps, claiming jurisdiction over the site pursuant to its migratory bird rule, denied the project a §404 permit. The municipalities sued.

The municipalities made two arguments. First, they claimed that the CWA extended only to "navigable waters" as traditionally understood. The migratory bird rule, which was justified by Congress' broader authority to regulate things having a substantial effect on interstate commerce, was not authorized under this traditional understanding of navigable waters.[98] Second, the municipalities argued that the Corps' claim of jurisdiction exceeded even Congress' broadest constitutional authority.[99] The Supreme Court decided only the first of these issues, and concluded that the Corps had extended federal jurisdiction beyond the scope of the CWA.

The Court's Reasoning

Holding that Congress did not authorize the Corps to regulate to the full extent of the commerce power, the Supreme Court invalidated the migratory bird rule in its entirety. According to the Court, "33 C.F.R. §328.3(a)(3), as clarified and applied to petitioner's balefill site pursuant to the 'Migratory Bird Rule,' exceeds the authority granted to [the Corps] under §404(a) of the CWA."[100] The "navigable waters" regulated by the CWA do not stretch so far.

The Supreme Court reached its conclusion after evaluating the plain meaning of the statute, its legislative history, and the contemporaneous interpretations of the Corps, as well as the Court's own precedent. The Court found the migratory bird rule to exceed the Corps' jurisdiction under the plain language of the CWA. Moreover, the Court observed that a broader interpretation, without a clear statement from Congress that a broad interpretation was intended, would violate the Court's duty to avoid statutory interpretations that expand federal power at the expense of the traditional authority of the states.[101]

The Rule and the Regulation Violate the Statutory Text, as Supported by the Legislative History and Context

The first basis for the Court's conclusion was the plain meaning of the statute: the CWA grants jurisdiction only over "navigable waters." The Corps had argued that the omission of the term "navigable" from the statute's definition of "navigable waters," i.e., the "waters of the United States," signified a broader reach, but the Court did not agree. According to the Court, "[t]he term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made."[102] Because the migratory bird rule and the regulation that it "clarified" were justifiable only by reference to Congress' broader power to regulate activities substantially affecting interstate commerce—not by Congress' "commerce power over navigation"[103]—they exceeded the scope of the CWA. As the Court observed, "this is a far cry, indeed, from the 'navigable waters' and 'waters of the United States' to which the statute by its terms extends."[104]

An analysis of the legislative history yielded the same conclusion. The Corps had argued that the statute's drafters intended to expand agencies' authority to the fullest extent of Congress' power over things "affecting commerce"—and based its argument largely on the 1972 Conference Report's statement that "[t]he conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes."[105] The Supreme Court specifically rejected that argument. According to the Court, "neither this, nor anything else in the legislative history to which respondents point, signifies that Congress intended to exert anything more than its commerce power over navigation."[106] Although the Court did not rebut the government's position with an affirmative case of its own, the discussion of the legislative history in the second and third parts of this Article indicates that the Court was correct.

The Supreme Court also relied on the Corps' own early interpretation of the statute. The Corps' original regulations had defined the "navigable waters" according to their traditional understanding: "[T]hose waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce."[107] Moreover, in determining whether a water was jurisdictional, it was "the water body's capability of use by the public for purposes of transportation or commerce which [was] the determinative factor."[108] The Supreme Court concluded that these regulations captured the true meaning of the CWA, quoting verbatim the Corps' first definition of "navigable waters," which *Callaway* had rejected in 1975:

> [T]he Corps' *original* interpretation of the CWA, promulgated two years after its enactment, is inconsistent with that which it espouses here. Its 1974 regulations defined §404(a)'s "navigable waters" to mean "those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce." 33 C.F.R. §209.120(d)(1). The Corps emphasized that "[i]t is the water body's capability of use by the public for purposes

98. *See SWANCC*, Brief for the Petitioner at 13-32.

99. *See id.* at 36-50.

100. Solid Waste Agency of N. Cook County v. Corps of Eng'rs, 531 U.S. 159, 174, 31 ELR 20382, 20385 (2001) (citations omitted).

101. *See id.* at 172-75, 31 ELR at 20384-85.

102. *Id.* at 172, 31 ELR at 20384.

103. *Id.* at 168 n.3, 31 ELR at 20383 n.3

104. *Id.* at 173, 31 ELR at 20384.

105. *Id.* at 168 n.3, 31 ELR at 20383 n.3.

106. *Id.*

107. *Id.* at 168, 31 ELR at 20383 (quoting 33 C.F.R. §209.120(d)(1) (1974)).

108. *Id.* (quoting 33 C.F.R. §209.260(e)(1) (1974)).

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> of transportation or commerce which is the determinative factor." §209.260(e)(1).[109]

The government, said the Court, "put forward no persuasive evidence that the Corps mistook Congress' intent in 1974."[110] In other words, the Corps' original definition correctly captured the intent of the statute: to protect the navigable waters as traditionally understood.

The Supreme Court then rejected the argument that Congress in 1977 acquiesced in the Corp's jurisdictional expansion. Because Congress had amended the CWA at around the same time that the Corps had issued new regulations in conformance with *Callaway*, and because Congress rejected House and Senate proposals to overrule *Callaway*, the Corps argued that Congress had "recognized and accepted a broad definition of 'navigable waters' that includes non-navigable, isolated, intrastate waters."[111] The Court rejected the premise that Congress had endorsed or acquiesced in the Corps' 1977 regulations. Calling congressional acquiescence "a particularly dangerous ground on which to rest an interpretation of a prior statute," the Court "conclude[d] that respondents have failed to make the necessary showing that the failure of the 1977 House bill demonstrates Congress' acquiescence to the Corps' regulations or the 'Migratory Bird Rule.'"[112]

The Court Limited Its Opinion in *Riverside Bayview Homes* to Wetlands Abutting Open, Navigable Waters

The Supreme Court also rejected the argument that jurisdiction over the wetlands in *SWANCC* was authorized by its opinion in *Riverside Bayview Homes*. In so doing, the Court severely limited the reasoning of *Riverside Bayview Homes* and reinstated the traditional navigable waters as the touchstone for federal jurisdiction under the Act.

Two aspects of the opinion in *SWANCC* limit the reasoning of *Riverside Bayview Homes*. First, the Supreme Court held in *SWANCC* that the term "navigable" continues to define the scope of the CWA, despite language in *Riverside Bayview Homes* stating that "the term navigable as used in the Act is of limited import."[113] In fact, the Court concluded that the statutory term "navigable" implied that Congress intended to assert its jurisdiction over the traditional navigable waters:

> We said in *Riverside Bayview Homes* that the word "navigable" in the statute was of "limited effect" and went on to hold that §404(a) extended to non-navigable wetlands adjacent to open waters. But it is one thing to give a word limited effect and quite another to give it no effect whatever. The term "navigable" has at least the import of showing us what Congress had in mind as its authority for enacting the [CWA]: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.[114]

The "plain text" of the statute, according to the Court, was "clear."[115] Moreover, the Court emphasized that its holding in *Riverside Bayview Homes* "was based in large measure upon Congress' unequivocal acquiescence to, and approval of, the Corps' regulations interpreting the CWA to cover wetlands adjacent to navigable waters."[116]

The second aspect of *SWANCC* restricting the reasoning of *Riverside Bayview Homes* severely limited the scope of the congressional acquiescence that the Court was willing to recognize. In *SWANCC*, the Corps argued that Congress had acquiesced to all of the Corps' 1977 regulations, which had extended the Corps' jurisdiction to virtually all waters and wetlands in response to the *Callaway* decision.[117] The Supreme Court in *SWANCC* rejected that argument, holding that the congressional acquiescence accepted in *Riverside Bayview Homes* did not extend so far. Instead, the Court held, the congressional debates over the 1977 Amendments "centered largely on the issue of wetlands preservation."[118] Because the government could point to "no persuasive evidence" that Congress intended to endorse the Corps' other broad claims of jurisdiction in 1977, the Court rejected the claim that the 1977 Amendments approved the Corps' full post-*Callaway* assertion of jurisdiction.[119]

SWANCC therefore refocuses CWA jurisdiction on the text of the Act and the clear intent of Congress. *SWANCC* emphasizes that the Court's acceptance of the acquiescence argument in *Riverside Bayview Homes* had been premised on Congress' clear intent to regulate wetlands that "actually abut" navigable waters such as those at issue in that case. After *SWANCC*, *Riverside Bayview Homes* cannot stand for the proposition that federal agencies have jurisdiction over any area that the agencies believe is "inseparably bound up" with the navigable waters. Jurisdiction can now be asserted over other areas outside the traditional navigable waters only if similar clear congressional intent can be found.

"Significant Constitutional and Federalism Questions" Required the Rejection of the Corps' Interpretation of Its Jurisdiction

The Supreme Court was also especially concerned that the Corps' primary argument in support of the migratory bird rule—that the rule "falls within Congress' power to regulate intrastate activities that 'substantially affect' interstate commerce"—raised "significant constitutional questions."[120] "Where an administrative interpretation of a statute invokes the outer limit of Congress' power," the Court reminded, "we expect a clear indication that Congress intended that result."[121] This is especially true if "the administrative interpretation alters the federal framework by permitting federal encroachment on a traditional state power."[122]

The CWA contains no such clear statement. To the contrary, "Congress chose to 'recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water re-

109. *Id.* at 168, 31 ELR at 20383 (emphasis in original).

110. *Id.*

111. *Id.* at 169, 31 ELR at 20384.

112. *Id.* at 169-70, 31 ELR at 20384.

113. *Riverside Bayview Homes*, 474 U.S. at 133, 16 ELR at 20089.

114. 531 U.S. at 172, 31 ELR at 20384.

115. *See id.* at 170, 172, 31 ELR at 20384.

116. *Id.* at 167, 31 ELR at 20383.

117. *See id.* at 168-69, 31 ELR at 20383-84.

118. *Id.* at 170, 31 ELR at 20384 (quoting *Riverside Bayview Homes*, 474 U.S. at 136, 16 ELR at 20090).

119. *See id.* at 171, 31 ELR at 20384.

120. *Id.* at 173, 31 ELR at 20384.

121. *Id.* at 172-73, 31 ELR at 20384.

122. *Id.* at 173, 31 ELR at 20384.

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sources.'"[123] Here, "[r]ather than expressing a desire to readjust the federal-state balance," Congress had explicitly preserved the preexisting authorities of the states.[124] The application of the migratory bird rule, however, "would result in a significant impingement of the States' traditional and primary power over land and water use."[125] "[T]o avoid the significant constitutional and federalism questions raised by respondents' interpretation," the Court declined to adopt the Corps' proffered justification for its rule and regulation.[126]

Implications of *SWANCC*

It is obvious after *SWANCC* that the migratory bird rule is no longer valid. But the reasoning of *SWANCC* has much broader implications. Two principles stand out. First, the Corps' 1974 regulations, which were limited to the traditional navigable waters, properly captured Congress' intent in regulating the "navigable waters" in 1972. Second, any expansion of that original geographic scope—for instance, to wetlands adjacent to the navigable waters—must be proven with reference to a clear congressional statement.

The Corps' 1974 Definition Properly Captured the Geographic Reach of the 1972 FWPCA Amendments

After *SWANCC*, the starting point for the analysis of federal jurisdiction is the traditional navigable waters, as defined in *The Daniel Ball, Economy Light & Power Co.*, and *Appalachian Power Co.*[127] The Supreme Court's opinion states more than once that Congress' use of the term "navigable waters" signifies that Congress intended to exercise its traditional authority over navigable waters, and not its broader power over all things that substantially affect commerce.[128] In so stating, the Court expressly endorsed the Corps' 1974 interpretation of the statute (which had expanded the Corps' jurisdiction to the full scope of the traditional navigable waters, as members of Congress had been urging), and expressly rejected the broader view the Corps adopted in 1977 (which expanded the Corps' jurisdiction much farther to match that asserted by EPA).

The Court's view of Congress' intent, while contrary to conventional wisdom 25 years after *Callaway*, is consistent with the historical context and legislative history of the FWPCA Amendments of 1972. To the extent the legislative history of the FWPCA Amendments assert an intention that "the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes,"[129] that intention should be read in the context of the specific "agency determinations" that were at issue in 1972, and the specific constitutional questions that were the subject of debate at that time.

As discussed above, Congress had expressed frustration in the early 1970s with the Corps' narrow interpretations of its jurisdiction over the "navigable waters of the United States" under the Rivers and Harbors Act. Specifically, Congress had urged the Corps repeatedly to assert jurisdiction consistent with several judicial decisions that had expanded the meaning of the term "navigable waters" and to expand its interpretation of the meaning of "navigable waters" to include wholly, intrastate, navigable waters that were connected to other intrastate navigable waters through overland links. In light of this background, it appears that Congress intended the coverage of the CWA to define "navigable waters" to overcome the Corps' prior limiting constructions. This expanded meaning would include: waters that were or had been navigable in fact or which could reasonably be so made; waters landward of the harbor lines; and intrastate, navigable waters that are linked to intrastate commerce via overland connections. Any waters beyond these "navigable waters" were to remain "waters of the State."

A Clear Congressional Statement Must Be Shown to Regulate Waters Beyond the Traditional Navigable Waters

The second principle of the *SWANCC* opinion is that the regulation of areas outside the traditional navigable waters—such as the regulation of wetlands adjacent to navigable waters approved in *Riverside Bayview Homes*—must be justified with a clear showing of congressional intent. No longer can federal CWA jurisdiction be justified by showing that an activity "substantially affects commerce." The Court held that although the Conference Report included the statement that the conferees "intend that the term 'navigable waters' be given the broadest possible Constitutional interpretation . . . neither this, nor anything else in the legislative history . . . , signifies that Congress intended to exert anything more than its commerce power over navigation."[130] Accordingly, previous judicial decisions that were based upon an "affecting commerce" rationale are now of dubious value.[131]

Furthermore, *SWANCC* makes clear that in view of Congress' commitment in the CWA to preserve and protect the primary responsibility of the state to control the use of land and water resources, and in view of general principles of statutory construction in the area of federal/state relations, the CWA should not be read to expand jurisdiction into the traditional sphere of the states absent a clear statement to that effect. In *Riverside Bayview Homes*, for instance, the Supreme Court acknowledged that Congress had clearly intended to include "adjacent wetlands" within the "waters of the United States." *SWANCC* explained this holding as being based largely upon Congress' "unequivocal acquiescence" to the regulation of wetlands adjacent to navigable waters. The CWA therefore does not grant the agencies

123. *Id.* at 174, 31 ELR at 20385 (quoting 33 U.S.C. §1251(b), ELR STAT. FWPCA §101).

124. *Id.*

125. *Id.*, 31 ELR at 20384.

126. *Id.*, 31 ELR at 20385.

127. *See supra* section entitled *The Traditional Definition of Navigable Waters of the United States.*

128. *See* 531 U.S. at 168 & n.3, 31 ELR at 20383 & n.3 (finding no evidence "that Congress intended to exert anything more than its commerce power over navigation"); *id.* at 172, 31 ELR at 20384 ("The term navigable has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made."); *id.* at 173-74, 31 ELR at 20384 (refusing to inquire whether federal jurisdiction was "within Congress' power to regulate intrastate activities that 'substantially affect' interstate commerce," and electing instead to "read the statute as written").

129. S. Rep. No. 92-1236, at 144 (1972), *reprinted in* 1 LEGISLATIVE HISTORY at 327.

130. 531 U.S. at 168 n.3, 31 ELR at 20383 n.3.

131. *See supra* note 6 and cases cited.

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broad authority to regulate any waters they believe have a nexus with the traditional navigable waters. Instead, federal jurisdiction must be established by an affirmative grant from Congress, as shown by the statute's clear text or by evidence of clear congressional intent.

The Arguments for a Narrower Reading of *SWANCC*, and Why They Are Wrong

Agencies and commentators disappointed with *SWANCC* have been working to limit its holding. Their arguments can be grouped into five broad categories: arguments limiting *SWANCC* to its facts; arguments substituting new jurisdictional tests, especially a "significant nexus" test; arguments expanding *Riverside Bayview Homes*; arguments resuscitating the "affecting commerce" test; and arguments based on the general remedial purposes of the CWA.

Limiting SWANCC *to Its Facts*

The first category of argument attempts to limit *SWANCC*'s holding to the facts of the case. Some argue that *SWANCC* applies only to non-navigable, isolated, intrastate waters. Some argue even more narrowly that *SWANCC* applies only to non-navigable, isolated, intrastate waters for which jurisdiction is based solely on the presence of migratory birds.[132] These arguments ignore the Supreme Court's rationale, which was necessary to its holding. And "[w]hen an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound."[133] The rationale of *SWANCC* has implications far broader than isolated waters.

SWANCC "establish[es]" a new "mode of analysis" for the consideration of jurisdictional questions.[134] The Supreme Court could not have reached its ultimate decision in *SWANCC* without first: (1) rejecting the proposition that Congress intended to reach all activities "affecting interstate commerce" when it passed the CWA; (2) concluding that Congress intended instead in 1972 to exercise its power over navigation; and (3) concluding, based on overwhelming evidence of congressional intent, that Congress in 1977 had acquiesced in the Corps' regulation of wetlands that actually abut navigable waters but had not acquiesced to the rest of the 1977 regulations which had formed the basis for the Corps' purported jurisdiction over the waters at issue in *SWANCC*. These decisions necessarily implicate not only the Corps' assertion of jurisdiction over isolated waters, but also its assertion of jurisdiction over any water that is not navigable within the traditional meaning of the term. Jurisdiction over all sorts of non-navigable waters has until now been justified solely under the assumption that Congress intended to exercise its full powers under the Commerce Clause. Jurisdiction over those waters must now be justified, if at all, by reference to the actual intent of Congress in 1972 and 1977.

One court of appeals has recognized that the import of *SWANCC* extends to more than isolated waters. In *Rice*, the Fifth Circuit stated that "[u]nder *Solid Waste Agency*, it appears that a body of water is subject to regulation under the [CWA] if the body of water is actually navigable or is adjacent to an open body of navigable water."[135] The court in *Rice* held that several intermittent streams were not "navigable waters" under the Act and that connections through groundwater could not establish CWA jurisdiction after *SWANCC*. Three district courts have held that a bayou and ditch[136] and wetlands hydrologically connected to navigable waters[137] are outside federal jurisdiction.

Other courts have limited *SWANCC* to either the migratory bird rule or to non-navigable, isolated waters.[138] None of these cases has offered a careful analysis of the rationale of *SWANCC*, however. Instead, these cases have relied on broad, pre-*SWANCC* precedent that was based on the "affecting commerce" theory of CWA jurisdiction and that rejected "navigability" as a limit on jurisdiction under the Act.[139] Courts eventually will have to reconcile these prior holdings with the rationale in *SWANCC*—and, as the Fifth Circuit has recognized, it is the recent Supreme Court precedent that will govern. If the Corps cannot point to either (1) traditional navigability, or (2) affirmative congressional authorization of jurisdiction, it should not have jurisdiction over the property at issue.

Substituting New Jurisdictional Tests

The second category of post-*SWANCC* argument for broad federal jurisdiction seeks to substitute new jurisdictional tests. Several tests have been floated in court filings and in commentary: for example, that the Corps has jurisdiction over any wetland or water with a "significant nexus" to navigable waters[140]; that the Corps has jurisdiction over any wetland or water that is "inseparably bound up with" navigable waters[141]; that the Corps has jurisdiction over any wetland or water with a "hydrological connection" to a navigable water[142]; that the Corps has jurisdiction over any wetland or water that is part of the "tributary system" to a navigable water[143]; and that the Corps has jurisdiction over areas

132. Shortly after *SWANCC* was announced, the General Counsel of EPA and the Chief Counsel of the Corps issued a memorandum opining that even the Corps' "other waters" (or "isolated waters") regulation, §328.3(a)(3), retained some vitality. *See* Guzy-Anderson Memorandum, *supra* note 12.

133. Seminole Tribe v Florida, 517 U.S. 44, 67 (1996).

134. United States v. Rapanos, 190 F. Supp. 2d 1011, 1015 (E.D. Mich. 2002).

135. *Rice*, 250 F.3d at 269, 31 ELR at 20600.

136. *See* United States v. Needham, Nos. 01-1897, 1898 (W.D. La. Jan. 22, 2002).

137. *See Rapanos*, 190 F. Supp. 2d at 1011; United States v. Newdunn Associates, 195 F. Supp. 2d 751, 32 ELR 20573 (E.D. Va. 2002).

138. *See, e.g.*, Headwaters v. Talent Irrigation Dist., 243 F.3d 526, 533, 31 ELR 20535, 20537 (9th Cir. 2001); Deaton v. United States, No. MJG-95-2140 (D. Md. Jan. 29, 2002); United States v. Interstate Gen. Co., 152 F. Supp. 2d 843, 31 ELR 20750 (D. Md. 2001); United States v. Krilich, 152 F. Supp. 2d 983, 991 n.13, 31 ELR 20787, 20789 n.13 (N.D. Ill. 2001); Idaho Rural Council v. Bosma, 143 F. Supp. 2d 1169, 1178 (D. Idaho 2001); United States v. Buday, 138 F. Supp. 2d 1282, 1289 (D. Mont. 2001).

139. *See supra* note 6 and cases cited.

140. *See* Guzy-Anderson Memorandum, *supra* note 12, ¶ 5(b)(1).

141. *See* Brief for the United States, at 31, United States v. Interstate Gen. Co., No. 01-4513 (4th Cir. 2001).

142. *See* Brief for the United States, at 6, FD&P Enterprises, Inc. v. Corps of Eng'rs, No. 99-3500 (D.N.J. 2001).

143. *See* Brief for the United States, at 50, *Interstate Gen. Co.* (No. 01-4513); Supplemental Brief for the United States as *Amicus Curiae*, at 12-13, Support of Panel Rehearing in Rice v. Harken Exploration Co. (5th Cir. 2001); Guzy-Anderson Memorandum, *supra* note 12, ¶ 6(d).

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on the basis of physical conditions that ceased to exist long before the passage of the 1972 Amendments.[144] These new "tests," untethered to any showing of congressional intent and devoid of substantive meaning (what is a "significant nexus" after all?), would vest vast discretion in the regulatory agencies to claim jurisdiction on an arbitrary, case-by-case basis. Indeed, jurisdiction under each of these tests has been suggested to extend to any water or wetland from which a drop of water can flow downstream and end up in a navigable water.[145] The migratory water molecule has been substituted for the migratory bird.

None of these tests is drawn from the text or history of the CWA. For example, nowhere does the text of the Act include the phrase "significant nexus" or "inseparably bound up with" the navigable waters. Nor does the legislative history include either of those phrases. Instead, those phrases are drawn out of context from a section of the Supreme Court's opinion in *SWANCC* that explained that Congress affirmatively authorized the Corps to assert jurisdiction over certain wetlands, and that stressed that those wetlands (in contrast to the waters at issue in *SWANCC*) had an especially close relationship with navigable waters.[146] In articulating these words of description and limitation, however, the Court did not purport to announce a new test for jurisdiction. Indeed, the Court made clear that the text of the statute and congressional intent were the sole basis for agency jurisdiction. This is not surprising, for the Corps and EPA, like any agency, may act only upon the affirmative authorization of Congress.

Moreover, the import of these alternative tests implicates the very concerns that animated the Court in *SWANCC*. For if, as the government has contended, any water or wetland having a potential downstream hydrological connection with a navigable water has a "significant nexus" to that water and is jurisdictional, any connection between an upland site and a navigable water, no matter how remote, infrequent, or brief, would be sufficient for federal jurisdiction.[147] If the mere fact that a drainage pattern can be traced, over great distances, from a higher elevation parcel to a lower elevation navigable water could establish jurisdiction, federal CWA authority would extend to the smallest of ditches, swales, and rivulets, regardless of their relation to actual navigability and regardless of whether Congress actually intended to grant jurisdiction over those remote areas.

This result cannot be squared with the reasoning of *SWANCC*—which, far from affirming broad assertions of agency jurisdiction, rejects the jurisdictional rationale advanced by the agencies since 1975. If, as the Supreme Court stated in *SWANCC*, Congress in 1972 intended to regulate only the navigable waters, then the original CWA did not include non-navigable tributaries. And no case has yet examined the text or legislative history of the 1977 Amendments to determine whether Congress acquiesced in the Corps' post-*Callaway* jurisdiction over non-navigable tributaries—or, if Congress did, how far upstream it intended to authorize the agencies to go.[148] Careful analysis would certainly show that Congress never acquiesced in federal jurisdiction over the upper reaches of tributaries—even the Assistant Secretary of the Army in 1975 disavowed any intent to regulate non-navigable streams above their headwaters,[149] and the legislative history contains no clear statement of congressional intent to the contrary. These waters lie well within the states' traditional authority over land and water resources, and far beyond any possibility of navigation. Rather than constructing new, even broader jurisdictional tests, the agencies should be examining the intent of Congress to determine how far the nation's legislature intended them to extend the federal regulatory authority.

Expanding Riverside Bayview Homes

The third category of argument seeks a broad interpretation of the Court's prior decision in *Riverside Bayview Homes*, at the expense of the Court's later decision in *SWANCC*. Some have argued that *Riverside Bayview Homes* approved the Corps' very expansive regulatory definitions, including the Corps' definition of "adjacent" and the Corps' assertion of jurisdiction over a variety of marginal waters under the rubric of "tributaries."[150] This is not the case. As the *Riverside Bayview Homes* Court stated and the *SWANCC* Court emphasized, the wetland at issue in *Riverside Bayview Homes* "actually abut[ted] on a navigable waterway," a factual setting that did not require the Court to decide whether the

144. *See* Joint Case Management Conference Statement in San Francisco Baykeeper v. Cargill, Inc., No. C-96-2161, No. C-98-4388 (N.D. Cal. 2001).

145. *See* United States v. Rueth Dev. Co., 2001 U.S. Dist. LEXIS 22944 (N.D. Ind. Sept. 25, 2001), *vacated in part*, 2002 U.S. Dist. LEXIS 3483 (Feb. 21, 2002).

146. *See SWANCC*, 531 U.S. at 167-68, 31 ELR at 20383 (internal citations omitted):

> [O]ur holding [in *Riverside Bayview Homes*] was based in large measure upon Congress' unequivocal acquiescence in, and approval of, the Corps' regulations interpreting the CWA to cover wetlands adjacent to navigable waters. We found that Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands "inseparably bound up with the waters of the United States."
>
> It was the significant nexus between the wetlands and "navigable waters" that informed our reading of the CWA in *Riverside Bayview Homes*. . . . In order to rule for respondents here, we would have to hold that the jurisdiction of the Corps extends to ponds that are not adjacent to open water. But we conclude that the text of the statute will not allow this.

Id. at 167-68, 31 ELR at 20383.

147. *See* Brief for the United States in United States v. Deaton, No. MJG-95-2140 (D. Md. Jan. 29, 2002).

148. The word "tributary" is not used in the CWA, and neither EPA nor the Corps has ever published a definition of the term. The 1972 and 1977 Congresses would likely be greatly surprised by the agencies' current attempts to use the concept of "tributaries" to assert federal jurisdiction over intermittent streams, drainage ditches, and ephemeral waters, which have only occasional (if any) connection to the navigable waters.

149. *See supra* note 77.

150. *See* Guzy-Anderson Memorandum, *supra* note 12, n.4; Brief for the United States, at 34-35, United States v. Interstate Gen. Co., No. 01-4513 (4th Cir. 2001). This argument is based upon the Court's statement of the question presented in *Riverside Bayview Homes*: "[W]hether the Clean Water Act . . . together with certain regulations promulgated under its authority by the Army Corps of Engineers, authorizes the Corps to require landowners to obtain permits from the Corps before discharging fill material into wetlands adjacent to navigable waters and their tributaries." *Riverside Bayview Homes*, 474 U.S. at 123, 16 ELR at 20086. Because the Court in *Riverside Bayview Homes* did not address the validity of the Corps' jurisdiction over the water to which the wetland at issue was "adjacent," much less how far up a non-navigable tributary federal jurisdiction might theoretically extend, this argument grossly overstates the "holding" of *Riverside Bayview Homes*.

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Corps' regulations and definitions were otherwise valid.[151] Nothing in *Riverside Bayview Homes* purports to consider or approve federal jurisdiction over a wetland that does not immediately adjoin a navigable water and have a regular surface hydrological connection to that water. There is no basis in that case to support jurisdiction, as the Corps has suggested, over wetlands that do not "actually abut" navigable waters, over uplands wetlands that drain via overland surface runoff to navigable waters at lower elevations, or over wetlands connected only through groundwater.

Resuscitating the "Affecting Commerce" Test

A fourth argument that continues to arise in commentary and in briefs is that the Corps has the authority to regulate certain marginal waters or wetlands based on the "substantial effects" that activities in those waters might have on interstate commerce.[152] This argument is squarely foreclosed by the analysis in *SWANCC*.[153] Employing a substantial effects test to reach waters lying beyond navigable waters is entirely inconsistent with Congress' intent to exercise its traditional "commerce power over navigation."[154] Moreover, such an argument raises the same constitutional questions the Court found problematic in *SWANCC*. These constitutional questions are not limited to hydrologically isolated wetlands. They arise by virtue of the substantial effects test itself—which is the most far-reaching basis of congressional authority under the Commerce Clause.[155]

These constitutional concerns are especially acute where the Corps attempts to assert jurisdiction over areas within "the States' traditional and primary power over land and water use," as were the isolated waters in *SWANCC* and as are many of the marginal waters and wetlands the Corps continues to attempt to regulate. Regulating drainage ditches, ephemeral waters, and wetlands that are not immediately adjacent to navigable waters will extend the federal government into the "primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources" every bit as much as does the regulation of the waters at issue in *SWANCC*.[156] It is for this reason that the Supreme Court elected in *SWANCC* to "read the statute as written," i.e., to extend to "navigable waters." After *SWANCC*, there should never be an occasion for the Corps or EPA to invoke the irrelevant federal power over activities having "substantial effects" on commerce.

Invoking the Environmental Purposes of the CWA

The final argument for a narrow reading of *SWANCC* is founded on a basic purpose of the CWA: "[T]o restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[157] If there is no federal jurisdiction over a particular parcel, the argument goes, this remedial congressional purpose will be thwarted.

This argument proves too much. No one disputes the environmentally remedial purpose of the CWA—indeed, the Court in *SWANCC* nowhere questioned the biological purposes of the migratory bird rule.

> But no legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.[158]

If the only question to be asked were whether the regulation of a class of waters or wetlands would benefit the physical and biological integrity of the nation's waters, there would be no limit to federal jurisdiction. The decision in *SWANCC* makes clear, however, that Congress intended to effectuate that purpose in a specifically defined area of federal geographic jurisdiction. Regardless of the statute's environmental purpose, one must examine the text and intent of the statute to determine its scope.

The absence of federal geographic jurisdiction does not mean that important waters and wetlands will go unprotected. The federal government has nonregulatory programs that create incentives to conserve or restore wetlands,[159] and private groups commonly buy or preserve wetlands.[160] Many states have their own wetlands programs, and many who had left them dormant have expanded them after *SWANCC*.[161] A system of limited but effective federal jurisdiction coupled with such revitalized state efforts is the very system of federalism the CWA strove to attain, and is entirely consistent with the original purposes of the Act and with the Supreme Court's analysis in *SWANCC*.

Conclusion

The *SWANCC* decision repudiates two decades of conventional wisdom regarding federal jurisdiction under the CWA. Although the opinion may have come as a surprise after decades of assuming the Act extends to the maximum bounds of the Commerce Clause, re-reading the history of the Act in its historical context suggests that the Supreme Court was correct. Jurisdictional regulations that were promulgated on the premise that the Corps' jurisdiction was unbounded should now be reconsidered under a more restrained understanding of agency authority. The Corps and EPA, after all, may only act upon the authorization of Congress. Before the agencies stretch their jurisdiction outside the navigable waters into the traditional range of local land use planners, they must inquire whether Congress intended them to do so.

151. *See* 474 U.S. at 135, 16 ELR at 20089; *see also SWANCC*, 531 U.S. at 167, 31 ELR at 20383.

152. *See, e.g.*, Guzy-Anderson Memorandum, *supra* note 12, ¶ 5; Brief for the United States in FD&P Enterprises v. Corps of Eng'rs, No. 99-3500 (D.N.J.).

153. *See SWANCC*, 531 U.S. at 173-74, 31 ELR at 20384 (declining to consider whether the migratory bird rule was supported by the "substantial effects" test because of the "significant constitutional questions" involved in "evaluat[ing] the precise object or activity that, in the aggregate, substantially affects interstate commerce").

154. *See id.* at 163 n.8, 31 ELR at 20385 n.8.

155. *See* United States v. Lopez, 514 U.S. 549, 558-59 (1995).

156. *SWANCC*, 531 U.S. at 174, 31 ELR at 20385 (quoting 33 U.S.C. §1251(b), ELR STAT. FWPCA §101(b)).

157. 33 U.S.C. §1251(a), ELR STAT. FWPCA §101(a).

158. Rodriguez v. United States, 480 U.S. 522, 525-26 (1987) (emphasis added).

159. The Wetlands Reserve program provides federal wetlands protection funding for the purchase of temporary or permanent easements. *See* 16 U.S.C. §3837-3837f. The Swampbuster program conditions U.S. Department of Agriculture farm benefits on agricultural wetland protection. *See* 16 U.S.C. §3821(a).

160. The Nature Conservancy may be the most familiar of these groups. *See* http://www.nature.org (organization website cataloguing wetland protection efforts).

161. *See, e.g.*, *Isolated Wetlands Remain Protected Under State Rules, Commission Says*, Daily Env't Rep. (BNA), Mar. 10, 2001, at A-4.

American Rivers • Audubon• Clean Water Action
Earthjustice • Environmental Integrity Project • Friends of the Earth
Natural Resources Defense Council • River Network • Sierra Club
U.S. Public Interest Research Group

August 1, 2006

The Honorable Lincoln D. Chafee, Chairman
The Honorable Hillary Rodham Clinton, Ranking Member
Subcommittee on Fisheries, Wildlife and Water
Environment and Public Works Committee
United States Senate
Washington, DC 20510

RE: Comments of Clean Water Network Groups on the *Rapanos* Decision and Implications for the Nation's Waters

Dear Chairman Chafee and Ranking Member Clinton:

Thank you for holding today's hearing on the Clean Water Act and the impact of the Supreme Court's decision in the *Rapanos* case on the nation's water resources that the Act is designed to protect. We hope this hearing will be the first step towards Congressional action to reaffirm the scope of the Clean Water Act's protections to address concerns raised by this decision. We ask that this letter, discussing our analysis of the *Rapanos* decision, the effects it may have in regulating polluting activities, and the need for a Congressional response, be entered into the record for the hearing.

In addition to representing the views of the undersigned organizations, this letter also represents the position of the Clean Water Network, a coalition of more than 1,000 groups across the country working to ensure the continued effective implementation of the Clean Water Act. Collectively, we support Congressional passage of the Clean Water Authority Restoration Act (S. 912) to reaffirm longstanding federal safeguards for the nation's waters, including streams, wetlands, lakes, rivers, and coastal waters.

The federal Clean Water Act is one of the Nation's most important, effective and popular environmental laws. The law's popularity is not surprising, as Americans expect to have safe drinking water, clean beaches, flood protection, fish and wildlife habitat, economic development, and overall community health – all values that the Clean Water Act helps protect. We hope that the Subcommittee will keep this basic premise in mind as it considers how to respond to the Supreme Court's *Rapanos* decision.

Summary of Major Points

- ***Rapanos v. United States* does not change the scope of the "waters of the United States" protected by the Clean Water Act because there is no five-justice majority of the Court holding that the existing law or implementing regulations are invalid.**

- **Nevertheless, *Rapanos v. United States* muddies the legal waters and will invite additional litigation and further attempts by polluters to pick apart the law and argue that certain streams, rivers, and wetlands should no longer be protected.**

- **The *Rapanos* decision does indicate that the Corps and EPA should at the very least extend Clean Water Act protection to "significant nexus" wetlands and tributaries.**

- **There is, in fact, a "significant nexus" between tributaries and wetlands and the traditional navigable waters in their watersheds because wetlands and tributaries affect the chemical, physical, and biological integrity of the nation's navigable waters.**

- **Having to prove this "significant nexus" standard is met – a test that appears nowhere in the law adopted by Congress – will make it more difficult, time consuming, and expensive for the Corps and EPA to implement the law and more uncertain that they will do so effectively.**

- **To address these problems, Congress needs to reaffirm its intent to control pollutants at the source and to reassert protection for the nation's streams, rivers, and wetlands by enacting the Clean Water Authority Restoration Act. In fact, only Congress (not the regulatory agencies or the courts) can act to ensure the continued protection for all "waters of the United States" that have been covered by the Clean Water Act for the last 34 years.**

The stakes in these cases couldn't be higher for the Clean Water Act. The law has one definition of "waters of the United States" that is the same for all of the Act's provisions: the general prohibition against discharging pollutants into waters without a permit (§ 301); the law's two major permitting programs, the National Pollution Discharge Elimination System permits (§ 402) and the dredge and fill permits (§ 404); water quality standards and total maximum daily loads (§ 303); the oil spill liability prevention and liability provisions (§ 311); and more. *See, e.g.,* Brief of the U.S. Gov't in *Rapanos* at 21 (the term 'waters of the United States' "defines the scope of regulatory jurisdiction to be exercised under other provisions of the CWA.").

Below is our brief analysis of the three major opinions in the case, followed by a more detailed explanation of each of our major points.

The Rapanos Decision and Its Three Major Opinions

In the *Rapanos* and *Carabell* cases, the Bush administration argued that the Clean Water Act and its implementing regulations properly encompass and protect tributaries of "traditionally navigable" waters and the wetlands adjacent to these streams and rivers.

This position was supported by briefs filed by more than 30 state attorneys general, nine members of Congress who helped pass the Act, four former EPA administrators who served under Republican and Democratic administrations, a coalition of hunting and angling groups and businesses, state water pollution control officials, wetland managers, fish and wildlife agencies, and floodplain managers, and many environmental, public health and conservation groups.

The *Rapanos* petitioners argued that the Clean Water Act does not protect non-navigable tributaries and only covers those wetlands directly adjacent to traditionally navigable waters.

Joining in this position filing briefs with the Court were two states, one member of Congress (who was not in Congress when the Act was adopted), homebuilders, the oil industry, representatives of the mining industry, pesticide manufacturers, sewage treatment plant operators, the Farm Bureau, and others.

In its decision (which addressed the two consolidated cases) the Supreme Court had no majority opinion but split 4-1-4 in its analysis of the Clean Water Act and the extent to which the law covers tributaries and wetlands.

Focusing on a 1954 dictionary definition of "waters" more than the language or history of the Clean Water Act, Justice Scalia, joined by Chief Justice Roberts and Justices Thomas and Alito concluded that:

> [T]he phrase 'the waters of the United States' 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.' *** The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.

Further, these justices said that wetlands can only be "waters of the U.S." when there is "a continuous surface connection to bodies that are 'waters of the United States' in their own right." (As Justice Stevens points out in his dissent, **no** party or friend of the court even made this "waters" argument to the Court.) The opinion even seems to indicate that water bodies must be interstate (or connected to interstate waters) in order to be "waters of the United States."

Justice Kennedy, writing for himself, states that Justice Scalia's plurality opinion "is inconsistent with the Act's text, structure, and purpose." While he concurred that the cases should be remanded, Justice Kennedy completely rejects Justice Scalia's reasoning; instead, his opinion says there must be a "significant nexus" between the water at issue and some navigable-in-fact water for the Clean Water Act to apply. Specifically, he concludes, "the connection between a

nonnavigable water or wetland and a navigable water may be so close, or potentially so close, that the Corps may deem the water or wetland a 'navigable water' under the Act."

In dissent, Justice Stevens, joined by Justices Souter, Ginsburg and Breyer, says that the existing agency regulations reflect a reasonable interpretation of the statutory phrase "waters of the United States," especially in light of the Court's unanimous 1985 decision in *US v. Riverside Bayview Homes*, **which upheld the application of these very same rules**. While rejecting the rationale of both of the other opinions, these four justices stated that, since they would protect all of the waters that Justice Scalia's test would protect and all of the ones Justice Kennedy's test would protect, the agencies should continue to protect streams and wetlands if they qualify under either test.

The Supreme Court's decision thus raises several significant issues that we hope the Subcommittee – and Congress as a whole – will take into consideration when determining how to respond to the Supreme Court's decision.

- ***Rapanos v. United States* does not change the scope of the "waters of the United States"**

protected by the Clean Water Act because there is no five-justice majority of the Court holding that the existing scope of the law or its implementing regulations are invalid.

There was no majority decision in *Rapanos v. United States*[1] and therefore no unambiguous legal precedent to be derived from it, except for the obvious principle that the Clean Water Act protects more than just the traditionally navigable waters and the wetlands that abut them. *See,* Roberts, C.J., Concurring Opinion, Slip Opinion at 2 ("[N]o opinion commands a majority of the Court on precisely how to read Congress' limits on the reach of the Clean Water Act.").

Justice Kennedy joined the four justices in the plurality **only** for the ultimate judgment to vacate and remand the two decisions of the U.S. Court of Appeals for the Sixth Circuit. In Justice Kennedy's view, the Sixth Circuit did not apply the correct analysis to establish a significant nexus between the wetlands at issue and the traditionally navigable waters downstream. Yet, his opinion clearly holds out the strong possibility that, on remand, the government's position regarding the wetlands and streams at issue in the two cases may be upheld. *See, e.g.,* Kennedy, J., Concurring Opinion, Slip Op. at 26 ("[T]he end result in these cases and many others to be considered by the Corps may be the same as that suggested by the dissent, namely, that the Corps' assertion of jurisdiction is valid. Given, however, that neither the agency nor the reviewing courts properly considered the [significant nexus] issue, a remand is appropriate, in my view, for application of the controlling legal standard.").

Justice Kennedy explicitly **rejects** virtually every aspect of Justice Scalia's and his plurality's reasoning and *sides with the four dissenting justices* at most every turn. Most importantly, Justice Kennedy rejects the plurality's two limitations on the scope of "waters of the United States" as "inconsistent with the Act's text, structure, and purpose." *Id.* at 19.

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[1] *Rapanos et al v. United States*, Nos. 04-1034 and 04-1384, 547 U.S. ___ (2006) (together with *Carabell et al v. United States,* decided June 19, 2006).

First, he agrees with the dissent that "waters of the United States" may include intermittent streams and other waters that are not permanent or continuously flowing. *See, id*, at 12-13 ("The plurality's first requirement – permanent standing water or continuous flow ...makes little practical sense in a statute concerned with downstream water quality." He notes that "[T]he dissent is correct to observe that an intermittent flow can constitute a stream, in the sense of 'a current or course of water or other fluid, flowing on the earth,' ... while it is flowing .... It follows that the Corps can reasonably interpret the Act to cover the paths of such impermanent streams.").

Second, Justice Kennedy agrees with the dissent that "waters of the United States" may include wetlands that do not have a continuous surface connection to permanently flowing tributaries. Justice Kennedy notes, in particular, that *Riverside Bayview* addressed this question and concluded that adjacency alone could serve as a valid basis for Clean Water Act regulation even for "wetlands that are not significantly intertwined with the ecosystem of adjacent waterways." *Id.* at 15. Indeed, Justice Kennedy reasons that it is precisely the absence of a continuous surface connection that makes many wetlands important to the health of downstream waters:

> In many cases, moreover, filling in wetlands separated from another water by a berm can mean that flood water, impurities, or runoff that would have been stored or contained in the wetlands will instead flow out to major waterways. With these concerns in mind, the Corps' definition of adjacency is a reasonable one, for it may be the absence of an interchange of waters prior to dredge and fill activity that makes protection of the wetlands critical to the statutory scheme.

Id. at 18. *See also id.* at 29 ("Given the role wetlands play in pollutant filtering, flood control, and runoff storage, it may well be the absence of hydrologic connection (in the sense of interchange of waters) that shows the wetlands' significance for the aquatic system").

Consequently, there are only four votes on the Supreme Court – not a majority – for narrowing the scope of "waters of the United States" in the manner advocated by Justice Scalia.

This is fortunate, because the extremely narrow view of Clean Water Act jurisdiction advocated by the Scalia plurality would have had the effect of wiping out all Clean Water Act protections for approximately 59 percent of the nation's streams and rivers as well as all of the wetlands adjacent to these waterbodies – the vast majority of the wetlands remaining in the country. Among many other important functions and values, small and non-continuous streams and rivers help form the source of drinking water supplies for 100 million Americans.

There are also four votes on the Court for upholding without reservation the EPA's and Corps' three-decades-old interpretation of the statutory term "waters of the United States" as broadly applying to all tributaries and all wetlands adjacent to them:

> The Army Corps has determined that wetlands adjacent to tributaries of traditionally navigable waters preserve the quality of our Nation's waters by, among other things, providing habitat for aquatic animals, keeping excessive sediment and toxic pollutants out of adjacent waters, and reducing downstream flooding by absorbing water at times of

> high flow. The Corps' resulting decision to treat these wetlands as encompassed within the term 'waters of the United States" is a quintessential example of the Executive's reasonable interpretation of a statutory provision.

Stevens, J., Dissenting Opinion, Slip Op. at 2.

Justice Kennedy supplied the fifth vote for remand based on a "significant nexus" test. That test protects far more waters than the Scalia plurality's very narrow vision of the Clean Water Act's jurisdiction. The implications of the "significant nexus" test – which, notably, is not a test that has ever been adopted by Congress – are discussed further below. But first, there is another important point the Subcommittee should consider.

- ***Rapanos v. United States* muddies the legal waters and will invite additional litigation and other attempts by polluters to pick apart the law and argue that certain streams, rivers, and wetlands should no longer be protected.**

When analyzing the implications of the Rapanos split decision, the Subcommittee will undoubtedly hear differing and even conflicting views on how the Clean Water Act can and will be implemented in its wake. One conclusion that seems beyond dispute, however, is that this fractured ruling of the Supreme Court will lead to increased efforts by entities wishing to pollute or destroy streams and wetlands without regulation to work to make these waters unprotected by federal law.

The plurality opinion suggests a "permanent and continuous flow" test that aims to be categorical and not dependent upon an analysis of different waters' role in the aquatic system. Although it does not even represent a majority decision, lawyers for developers and industry will doubtless seek to have lower courts adopt its language and reasoning.

In fact, polluters challenging Clean Water Act jurisdiction are already suggesting that looking at the plurality test is an option for reviewing courts, even though five justices rejected its rationale.

Unfortunately, the first court to deal with *Rapanos* since the decision was rendered seemed to give weight to the plurality opinion. *See United States v. Chevron Pipeline Company*, Civ. No. 5:05-CV-293-C, slip op. at 14 (N.D. Texas, June 28 2006) (citing plurality in a decision ruling that oil spill into a non-navigable tributary did not violate the Clean Water Act). Other examples are sure to follow even though the plurality opinion was explicitly rejected by five Justices, and "makes little practical sense" and is "inconsistent with the Act's text, structure, and purpose." Kennedy. J., Concurring Opinion, Slip Op. at 19.

Justice Kennedy's test would allow EPA and the Corps to continue to protect streams and wetlands where a "significant nexus" exists – and there are clearly four other Justices who would support protection of these waters as well. Yet this new test is, in fact, untested. While Justice Kennedy's opinion provides many specific examples of connections that would meet his test, he is not entirely clear regarding what more is required now than in the past. The Corps, EPA, and the lower courts are left to navigate these turbid waters.

This muddying of the legal waters opens the floodgates for developers, mining companies, sewage plant operators, the oil industry, and other polluters to challenge the EPA's and Corps' authority to protect streams and wetlands from pollution and destruction. It also means that the Corps and EPA are going to have to spend time and resources collecting information to determine whether certain waters have a sufficient "significant nexus." At a minimum, in many instances, more time and resources will be needed for the agencies to defend their determinations in court. Given the agencies' already limited program resources, a flood of jurisdictional challenges could literally bring their permitting programs to a grinding halt, leaving many important wetland and stream resources unprotected.

Thus, even though the "significant nexus" test may be satisfied as a scientific as well as legal matter (as noted below), some developers and other polluters will likely bet that the EPA and Corps will be unable or unwilling to marshal the resources to defend its jurisdiction in particular instances.

It also does not help that the Corps presently seems paralyzed by the splintered *Rapanos* decision. *See* Email from Mark Sudol, Chief, Regulatory Branch, "Interim Guidance on the Rapanos and Carabell Supreme Court Decision" (July 5, 2006) (instructing field personnel to "delay making CWA jurisdictional determinations for areas beyond the limits of the traditional navigable waters" for a three-week period).

If past is prologue, these jurisdictional challenges will likely be resolved haphazardly and in many cases incoherently in each of the Corps' 38 Corps districts, and then in the courts, further muddying the legal waters regarding the scope of "waters of the United States." *See* Earthjustice, NWF, NRDC, and Sierra Club, *Reckless Abandon: How the Bush Administration is Exposing America's Waters to Harm,* Aug. 2004; Government Accountability Office, *Waters and Wetlands: Corps of Engineers Needs to Better Support its Decisions for Not Asserting Jurisdiction,* GAO-05-870, Sept. 2005.

- **The *Rapanos* decision does indicate that the Corps and EPA should at the very least extend Clean Water Act protection to "significant nexus" wetlands and tributaries.**

As noted above, Justice Kennedy supplied the fifth vote for remand and, with his opinion, he supplied a "significant nexus" test that contains several components.

First, for tributaries, Justice Kennedy says that, applied consistently, existing rules "may well provide a reasonable measure of whether specific minor tributaries bear a significant nexus with other regulated waters to constitute 'navigable waters' under the Act." Kennedy, J., Concurring Opinion, Slip Op. at 24. Justice Kennedy never explicitly states whether the "significant nexus test" needs to be applied to tributaries themselves, as opposed to the wetlands adjacent to them, but his language above indicates that some smaller tributaries might have to meet the test to receive the Act's protection.

Second, for wetlands, Justice Kennedy says they "possess the requisite nexus, and thus come within the statutory phrase 'navigable waters,' if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and

biological integrity of other covered waters more readily understood as 'navigable.' When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'" *Id.* at 23. Accordingly, for wetlands adjacent to actually navigable waters, the existing regulations reflect a "reasonable inference of ecologic interconnection," so such wetlands can remain categorically protected in the future. *Id.* For wetlands adjacent to non-navigable tributaries, Justice Kennedy says that the nexus test needs to be applied for the time being on a case-by-case basis, and allows that "[w]here an adequate nexus is established for a particular wetland, it may be permissible, as a matter of administrative convenience or necessity, to presume covered status for other comparable wetlands in the region." *Id.* at 25.

Justice Kennedy's "significant nexus" test thus indicates that the EPA and Corps may qualify wetlands and tributaries as meeting the test either individually or in the aggregate, and based upon consideration of a broad range of ecological factors to establish significant nexus, including the *absence of hydrological connection,* and not just the permanence of standing water and continuity of flow suggested by the plurality. Justice Kennedy also clearly allows that the agencies may designate categories of wetlands and tributaries, perhaps on a watershed or other regional basis, that meet the significant nexus test.

Justice Kennedy clearly expects that his significant nexus test can be met by the *Rapanos* and *Carabell* wetlands, and indicates that the ultimate scope of waters covered by his test will likely be essentially the same as those protected by the EPA and Corps for nearly 30 years and supported by the dissent. *See, id.* at 26 ("[T]he end result in these cases and many others to be considered by the Corps may be the same as that suggested by the dissent, namely, that the Corps' assertion of jurisdiction is valid"). Nevertheless, Justice Kennedy's test would impose an additional burden on the Corps and EPA to document a "significant nexus" between certain regulated wetlands and non-navigable tributaries and navigable waters.

- **There is, in fact, a "significant nexus" between wetlands and tributaries and the navigable-in-fact waters in their watersheds because wetlands and tributaries affect the chemical, physical, and biological integrity of the nation's navigable waters.**

While imposing an additional burden to establish under the existing statute and regulations, there is, in fact, a "significant nexus" between tributaries and wetlands and the navigable-in-fact waters in their respective watersheds because almost all wetlands and tributary rivers and streams affect the chemical, physical, and biological integrity of traditionally navigable waters. As the EPA and Corps recognize in their regulations, the Court recognized in *Riverside Bayview,* and Justice Kennedy and the dissent recognized in their opinions, wetlands store water, reducing erosion and flooding, providing water supply in drought conditions, filtering pollutants and cleansing downstream waters, and providing fish and wildlife habitat for species that use downstream waters. *See, e.g.,* Kennedy, J., Concurring Opinion, Slip Op. at 8, 15, 18, 20-21, 23-24, 27-29. *See also,* Stevens, J., Dissenting Opinion, Slip Op. at 2, 4, 6, 10-11, 13-14, 23-24.

The four dissenting justices conclude that, to the extent a "significant nexus" is even required, the existing regulations reflect that wetlands adjacent to non-navigable tributaries have such a

nexus to other protected waters. *See,* Stevens, J., Dissenting Opinion, Slip Op. at 23 ("To the extent that our passing use of this term has become a statutory requirement, it is categorically satisfied as to wetlands adjacent to navigable waters or their tributaries"). These four Justices go on to state that it is "clear that wetlands adjacent to tributaries of navigable waters generally have a 'significant nexus' with the traditionally navigable waters downstream. Unlike the 'nonnavigable, isolated, intrastate waters' in *SWANCC*, these wetlands can obviously have a cumulative effect on downstream water flow by releasing waters at times of low flow or by keeping waters back at times of high flow. This logical connection alone gives the wetlands the 'limited' connection to traditionally navigable waters that is all the statute requires ...." *Id.* (internal citation omitted).

The significant nexus required by Justice Kennedy can be demonstrated in the context of watershed studies, many of which already exist. *See, e.g.,* Kennedy, J., Concurring Opinion, Slip Op. at 20-21 (noting the connection between nutrient runoff in the Mississippi River Basin and the oxygen-depleted "Dead Zone" in the Gulf of Mexico, and the role that wetlands play in trapping and filtering nutrient runoff if they are not dredged and filled); *see also* Stevens, J., Dissenting Opinion, Slip Op. at 22 (referencing studies showing that anadramous trout and salmon often spawn in intermittent streams). Thus, the agencies already have ample scientific evidence that the types of streams and wetlands now at issue can meet the "significant nexus" test.

For example, EPA studies have drawn the nexus between upstream wetlands and headwaters in the Chesapeake Bay watershed and the physical, chemical, and biological integrity of the Chesapeake Bay and its navigable tributaries downstream. EPA Region III studies that encompass the Chesapeake Bay watershed show that headwater streams (first and second order streams) comprise about half of the many streams in the Bay watershed, and about half of these headwater streams flow intermittently at times. *See,* Consolidated EPA Region III Response to the Advanced Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "waters of the United States" at 10, Appendix E at 3 (2003). EPA Region III studies show that about 36% of the area's remaining wetlands are associated with headwaters. So, the watershed's non-navigable streams and adjacent wetlands comprise a large percentage of the watershed's hydrologic system.

Similarly, Region III compiled studies within the Bay watershed demonstrating that many of these remaining wetlands remove up to 90% of nitrogen and phosphorus pollution from runoff. *Id.,* Appendix D, Literature Review at 13-14. Nitrogen and phosphorus pollution cause eutrophication, the most significant threat to Chesapeake Bay watershed restoration. *See e.g.,* Chesapeake 2000 Agreement, Water Quality Protection and Restoration, at 5.

Watershed-based studies such as these in other parts of the country should provide the basis for Corps and EPA jurisdictional determinations that meet Justice Kennedy's significant nexus test. Where such studies do not already exist, the EPA and Corps may have to gather and compile like information if the "significant nexus" test applies.

• **Having to prove a "significant nexus" – a standard that appears nowhere in the law adopted by Congress – will make it more difficult, time consuming, and expensive for the Corps and EPA to implement the law and more uncertain that they will do so effectively.**

While careful analysis of the splintered *Rapanos* decision shows that it can be applied so as to protect myriad water bodies, the absence of a majority opinion, the tone of the plurality decision, and the lack of specificity of Justice Kennedy's "significant nexus test" all serve to muddy the legal waters surrounding the question of Clean Water Act geographic jurisdiction and will likely make it harder for the EPA and Corps to fulfill their responsibilities – indeed, their legal duty – under the Clean Water Act to protect the waters of the United States.

In addition to creating additional burdens for the federal resource protection agencies, it is important for the Subcommittee to know that the confusion created by the *Rapanos* decision also creates uncertainty, reduced protection, and additional workload burdens for states attempting to protect their wetlands and waterways. *See, e.g.,* Kennedy, J., Concurring Opinion Slip Op at 20 ("[I]t is noteworthy that 33 States plus the District of Columbia have filed an *amici* brief in this litigation asserting that the Clean Water Act is important to their own water policies. See Brief for States of New York et al. 1-3. These *amici* note, among other things, that the Act protects downstream States from out-of-state pollution that they cannot themselves regulate").

- **Congress needs to reaffirm its intent to control pollutants at the source and to reassert protection for the nation's streams, rivers, and wetlands by enacting the Clean Water Authority Restoration Act. In fact, only Congress (not the regulatory agencies or the courts) can guarantee the continued protection for all "waters of the United States" that have been covered by the Clean Water Act for the last 34 years.**

When Supreme Court justices consult outdated dictionaries to try to divine the meaning of a statutory term – in this case "waters of the United States" – it is time for Congress to step in and reaffirm what *Congress* means by the term. When Congress enacted the Clean Water Act, it clearly intended to control pollutants at the source rather than downstream where little more than damage control can be accomplished. *See e.g., Riverside Bayview*, 474 U.S., at 133 (quoting S. Rep. No. 92-414, p. 77 (1972) (quoting S. Rep. No. 92-414, p. 77 (1972), "Water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled *at the source*") (emphasis added). Congress clearly and correctly recognized that controlling pollution at the source required asserting broad jurisdiction over the Nation's waters.

Congress can reaffirm the agencies' long-standing definition and interpretation of "waters of the United States" by enacting the **Clean Water Authority Restoration Act, S. 912.** This bill adopts a statutory definition of "waters of the United States" that is based on the regulatory definition that has been used by EPA and the Corps for nearly 30 years.

Congress must act for at least three reasons.

First, as discussed above, various industries and other entities that wish to be free to pollute and even destroy the Nation's waters with impunity will continue to work to unravel the Clean Water

Act, arguing to lower courts and the agencies themselves that certain rivers, wetlands, and streams are no longer protected by the Clean Water Act because of the *Rapanos* decision. At a minimum, even if the agencies attempt to protect wetlands and tributaries broadly, and consistent with the decision, the Corps and EPA will be tied up in wasteful litigation while wetlands and streams are polluted or destroyed without federal Clean Water Act protection.

Second, there is a real concern that the agencies will use this decision as an opportunity to roll back the Act's protections, as they attempted to do in the wake of the Court's 2001 *SWANCC* decision. *See* Stevens, J., Dissenting Opinion, Slip Op. at 10 n.4 (describing agencies' effort to revise regulations and noting that "almost all of the 43 States to submit comments opposed any significant narrowing of the Corps' jurisdiction – as did roughly 99% of the 133,000 other comment submitters").

Even if the agencies direct their field offices to continue to protect the full range of water bodies consistent with the "significant nexus" test and the best reading of the fractured opinion, there is a threat that long-protected streams, wetlands, and rivers will still be in jeopardy of losing federal anti-pollution protections. This happened after the *SWANCC* decision because the agencies issued "guidance" that raised more questions about the Court's opinion than it answered, causing confusion in the field and leading to the pollution of many waters that, legally, remained protected.

In the short-term, we urge the Subcommittee to use its oversight authority to make sure that the EPA and Corps move proactively through new guidance to their field staff to establish a "significant nexus" on an individual and categorical basis wherever necessary to assure continued assertion of jurisdiction over the nation's waters, including tributaries and wetlands. There is no question that the significant nexus exists as a scientific matter. But there is a question whether the EPA and Corps, working with the States and other partners, will muster the resources – and the will – to document the significant nexus on a categorical, regional and case-by-case basis to retain Clean Water Act jurisdiction over non-navigable tributaries and adjacent wetlands.

Third, it is most important to emphasize that only Congress can ensure that the Supreme Court's decision does not lead to future cases with devastating results for water protection. *See e.g.,* Kennedy, J. Concurring Opinion Slip Op. at 21 ("[B]ecause the plurality presents its interpretation of the Act as the only permissible reading of the plain text … the Corps would lack discretion, under the plurality's theory, to adopt contrary regulations …. New rulemaking could have averted the disagreement here only if the Corps had anticipated the unprecedented reading of the Act that the plurality advances.") In other words, even if the EPA and Corps do issue guidance that outlines how the newly-announced "significant nexus" test can be utilized to protect all waters historically protected by the Clean Water Act, this is no insurance against future court decisions questioning whether Congress intended these waters to be protected.

In the wake of the *Rapanos* decision – which, at its core, theorized about what Congress intended when it passed the Clean Water Act – it is clear that the ultimate solution to this issue is for Congress not only to reiterate what it intended in 1972, but to reaffirm its agreement today with

the goal of the Clean Water Act: to ensure that all of the nation's waters will someday be protected from pollution and destruction.

For the future health and safety of the nation's waters – and the communities that rely upon them – the only real solution to the problems raised and challenges created by the Supreme Court's Rapanos decision is for Congress to pass the Clean Water Authority Restoration Act. We hope today's hearing is the first step towards doing so, expeditiously.

Thank you for considering our views,

Sincerely,

Andrew Fahlund
Vice-President for Conservation
American Rivers

April Gromnicki
Assistant Director of Public Policy
National Audubon Society

Paul D. Schwartz
National Policy Director
Clean Water Action

Joan Mulhern
Senior Legislative Counsel
Earthjustice

Karla Raettig
Counsel
Environmental Integrity Project

Sara Zdeb
Legislative Director
Friends of the Earth

Jon Devine
Senior Attorney
Clean Water Project
Natural Resources Defense Council

Don Elder
President
River Network

Navis Bermudez
Washington Representative
Sierra Club

Christy Leavitt
Clean Water Advocate
U.S. PIRG

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