S. HRG. 110–1232

THE CLEAN WATER ACT FOLLOWING THE RECENT SUPREME COURT DECISIONS IN SOLID WASTE AGENCY OF NORTHERN COOK COUNTY AND RAPANOS-CARABELL

HEARING

BEFORE THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

DECEMBER 13, 2007

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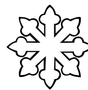

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THE CLEAN WATER ACT FOLLOWING THE RECENT SUPREME COURT DECISIONS IN SOLID WASTE AGENCY OF NORTHERN COOK COUNTY AND RAPANOS-CARABELL

THURSDAY, DECEMBER 13, 2007

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
Washington, DC.

The full committee met, pursuant to notice, at 9 a.m. in room 406, Dirksen Senate Office Building, Hon. Barbara Boxer (chairman of the full committee) presiding.

Present: Senators Boxer, Inhofe, Barrasso.

OPENING STATEMENT OF HON. BARBARA BOXER, U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator BOXER. Welcome, everybody. And I am starting this 30 seconds early. We have a horrific schedule today, and we want to hear from you. So I have determined we are going to waive all opening statements, including that of myself and the Ranking Member.

We are dealing here with a couple of Supreme Court decisions that deal with the Clean Water Act. I would ask unanimous consent to place into the record, in addition to my own opening statement, that of any other member and also Senator Russ Feingold, who sent a statement in. He has a bill on the subject.

[The referenced prepared statement of Senator Boxer was not submitted in time for print.]

[The referenced prepared statement of Senator Feingold was not submitted in time for print.]

Senator BOXER. So we are going to get started right away. I welcome all members and our panel. We will start with Hon. Ron Curry. We are going to have 5 minutes per, we are going to have to end this in 35 minutes. So please, sir, go ahead.

STATEMENT OF HON. RON CURRY, CABINET SECRETARY, NEW MEXICO ENVIRONMENT DEPARTMENT

Mr. CURRY. Good morning. My name is Ron Curry. I am Cabinet Secretary of the New Mexico Environment Department in the administration of Governor Bill Richardson.

Senator BOXER. Sir, I can't hear you. Thank you.

Mr. CURRY. My name is Ron Curry. I am Cabinet Secretary of the New Mexico Environment Department in the administration of

Governor Bill Richardson. I want to thank you for allowing me to be here today to talk about the Clean Water Act, which has been our Nation's main tool in ensuring the continued protection of the water we drink, enjoy for recreation and that wildlife communities rely on.

Unfortunately, the effectiveness of this tool has been blunted by two recent Supreme Court decisions. This is especially troubling in New Mexico, an arid State that has relied on the Clean Water Act to help us protect our limited but very precious water resources. It is important for us all to remember, I think, that the Clean Water Act is one of our Nation's great successes. My objective today is to urge you to support the solution that clears the waters that have been muddied, and I encourage you to join Governor Richardson in supporting the Clean Water Restoration Act.

Prior to these Supreme Court decisions, the scope of the Clean Water Act was interpreted broadly to provide protection for all the Nation's water bodies, from small upland streams that flow intermittently in response to storm events to the numerous wetlands that provide shelter for wildlife and create a natural filtration system for our aquifers. These waters are valued, just as we placed value on the large rivers that are conduits for commerce and industry.

As the person that is charged by Governor Richardson with protecting New Mexico's very limited water supply from pollution, I can tell you that basing the decision on what water deserves to be clean by whether or not you can float a boat on it is complete lunacy. These court decisions do not take into account the types of intermittent water flows found in the Southwest, which experiences a dry season as well as a monsoon season in New Mexico. There are times in the summer months when you can't even float a small raft down the mighty Rio Grande, which is New Mexico's main surface water water resource.

Nowhere have the limitations created by these two recent Supreme Court decisions been felt more acutely than in the desert Southwest. We simply have no water to waste there, and therefore, water we have and its quality is of utmost importance to the continued health of our citizens and the future economic development of our region. By excluding isolated, interState, non-navigable streams and waters from protections previously guaranteed in the Clean Water Act, these decisions could remove Federal protections for more than 90 percent of our State's water bodies, because they only flow intermittently.

Additionally, waters within the closed basins that cover up to one fifth, one fifth of New Mexico would also be left vulnerable to pollution. This includes 84 miles of perennial streams, 3,900 miles of intermittent waters, 4,000 playa wetlands and numerous headwater springs, cienegas and isolated wetlands. Threatened basins include the Tularosa, Mimbres, San Augustine, Estancia and Salt in central, south central and southwestern New Mexico. The water beneath just one of those basins, the Salt, has been estimated by the U.S. Geological Survey to contain as much as 57 million acre feet of water, including 15 million that is potable.

Finally, the Southwest is currently in the grips of a year's long drought, putting our already limited water resources at an even

higher premium. To weaken environmental oversight now, we believe, is to invite disaster.

Removing the protections afforded by the Clean Water Act from the critical portions of our Nation's aquatic systems and protecting only selected reaches of our waters will result in real costs for our citizens, costs to the economy, the environment and to our quality of life. The citizens of New Mexico depend on the protection of a clean environment and a sustainable water supply. If we are to ensure that New Mexico's waters and the Nation's waters are protected now and for future generations, we must act collectively to restore the purpose, the scope, the clarity and the predictability of the Clean Water Act, so that it will once again serve as the primary and comprehensive protection of our Nation's water.

Thank you.

[The prepared statement of Mr. Curry follows:]

STATEMENT OF HON. RON CURRY, CABINET SECRETARY, NEW MEXICO ENVIRONMENT DEPARTMENT

INTRODUCTION

My name is Ron Curry and I am the Cabinet Secretary of the New Mexico Environment Department in the administration of Governor Bill Richardson. Thank you for the opportunity to provide testimony regarding the importance of restoring Clean Water Act protections to many of America's rivers, lakes and streams.

The Clean Water Act has been our nation's main tool in ensuring the continued protection of the water we drink, enjoy for recreation and that wildlife communities rely upon. Unfortunately, the effectiveness of this tool has been blunted by two recent Supreme Court decisions. The court's rulings in Solid Waste Agency of Northern Cook County v. Corps of Engineers (SWANCC) in 2001 and Rapanos et ux., et al. v. United States (Rapanos) in 2006 have severely limited the waters that receive protection under the Clean Water Act. This is especially troubling in New Mexico, an arid State that has relied on the Clean Water Act to help us protect our limited but precious water resources.

It is important for us to remember that the Clean Water Act is one of this nation's successes. Waters that thirty years ago were thick with waste discharges now support thriving recreational and economic activities. The U.S. Environmental Protection Agency's broad policy of ensuring protection for nearly all waters was a benefit to everyone. Our quality of life improved and so did the sustainability of aquatic species and wildlife. But now those protections are mired in widespread confusion and bureaucratic gridlock because it is no longer clear what waters will continue to be protected. My objective today is to urge your support for a solution that clears waters that have been muddied and encourage you to join Governor Bill Richardson in supporting the Clean Water Restoration Act (S. 1870).

THE PROBLEM

Prior to these Supreme Court decisions, the scope of the Clean Water Act was interpreted broadly to provide protection for all the nation's water bodies, from small upland streams that flow intermittently in response to storm events, to the numerous wetlands that provide shelter for wildlife and create a natural filtration system for our aquifers. These waters were valued, just as we place value on the large rivers that are conduits for commerce and industry. First in 2001, and again last year, the courts scaled back these broad protections, defining "navigable waters" narrowly. These decisions have created great uncertainty for Federal, State and local officials as well as communities and land owners regarding what waters are protected.

In effect, the Supreme Court has ruled that there are two classes of water, one class that can be tied directly to "navigability" and deserves Federal protection from pollution, and a second class that is completely abandoned or must undergo a case by case "significant nexus" test whereby tributaries or wetlands would be dropped from protection if the government cannot directly prove they empty into navigable waters. As the man charged by Governor Richardson with protecting New Mexico's limited water supply from pollution, I can tell you that basing the decision on what

water deserves to be clean or whether or not you can float a boat on it is lunacy. These Court decisions do not take into account the types of intermittent water flows found in the Southwest, which experiences a dry season as well as a "monsoon" season. There are times in the summer months when you can't even float a boat down the mighty Rio Grande, New Mexico's main surface water resource.

To put it another way, many of you today have glasses of water before you. As an analogy, imagine that these glasses collectively made up all the waters of the United States. Before the 2001 SWANCC decision, the water in those glasses was protected by the Clean Water Act. However, today, because the SWANCC and Rapanos decisions, as much as one half of those glasses may no longer be protected.

I want you all to have good, clean water in those glasses, but if these Supreme Court decisions stand, I just can't say for sure if you will.

The Clean Water Restoration Act solves this problem by replacing the term "navigable waters of the United States" with "waters of the United States." This fix simply restores protections that were in place for three decades during which time the quality of America's rivers, lakes, wetlands and streams improved dramatically. It also restores Congress' original intent when it passed the Clean Water Act in 1972, to protect our nation's water resources for future generations.

LOCAL IMPACT

Nowhere have the limitations created by these two recent Supreme Court decisions been felt more acutely than in the desert Southwest. We simply have no water to waste, and therefore the water we have—and its quality—is of utmost importance to the continued health of our citizens and the future economic development of our region. By excluding isolated, intrastate, non-navigable waters from protections previously guaranteed under the Clean Water Act, these decisions could remove Federal protections from more than 90 percent of our state's waterbodies because they flow only intermittently. Additionally, waters within closed basins that cover up to one fifth of New Mexico would also be left vulnerable to pollution. This includes 84 miles of perennial streams, 3,900 miles of intermittent waters, 4,000 playa wetlands, and numerous headwaters, springs, cienegas and isolated wetlands. Threatened basins include the Tularosa, Mimbres, San Augustine, Estancia and Salt in central, south central and southwestern New Mexico.

These misguided rulings also threaten New Mexico's precious, limited groundwater resources—the source of 90 percent of our clean drinking water. Surface water bodies are often directly linked to groundwater resources. Unregulated, damaging surface dumping will therefore ultimately lead to pollution in the aquifer. We cannot allow this to happen. The water beneath just one of these basins—the Salt—has been estimated by the U.S. Geological Survey to contain as much as 57 million acre feet of water, including 15 million that is potable. That could prove to be a vital, and needed, future water supply for the rapidly growing city of Las Cruces in southern New Mexico. However, if this aquifer is allowed to be polluted by surface dumping, its benefits for future New Mexicans will be severely curtailed.

New Mexico also supports efforts to ensure this bill preserves our traditional powers over our groundwater resources.

Finally, the Southwest is currently in the grips of a years-long drought, putting our already limited water resources at an even higher premium. To weaken environmental oversight now is to invite disaster. That is why Governor Richardson has taken an aggressive leadership position on this issue.

STATE ACTIONS

Governor Richardson has been a leader on the issue of restoring protections to New Mexico's waters. In March 2003, he filed formal comments with the U.S. Environmental Protection Agency petitioning that New Mexico's closed basins and other imperiled waters remain protected under the Federal Clean Water Act. He also strongly supported the Clean Water Authority Restoration Act of 2003, a precursor to the legislation before you today.

More recently, Governor Richardson successfully opposed oil and gas drilling in the Valle Vidal of Northern New Mexico, and in order to protect its world class trout streams, he fought to have those streams listed as Outstanding National Resource Waters. He is also fighting to protect the Salt Basin Aquifer (whose untapped water resources I mentioned before) from energy development at Otero Mesa. Governor Richardson recently launched a multi-million dollar effort—the first in State history—to provide a State funding source for river ecosystem restoration. Finally, he also led an effective collaboration with the State of Texas to address salinity issues in the lower Rio Grande. States can do a lot, but without lasting Federal Clean

Water Act protection, the state's efforts to restore and defend its waters could be severely eroded.

CLEAN WATER RESTORATION ACT

Removing protections afforded by the Clean Water Act from critical portions of our nation's aquatic systems and protecting only selected reaches of our waters will result in real costs for our citizens—costs to the economy, the environment and to our quality of life.

The Clean Water Restoration Act of 2007 provides a logical and practical solution by restoring the traditional scope of the Clean Water Act and clarifying the purpose of the Act based on long-standing regulatory definitions. This is not an expansion of Federal authority but a return to a clear and comprehensive common goal. This action will also allow continued state-Federal partnerships to provide streamlined and efficient regulatory programs such as those that have been in operation for more than 30 years.

The Citizens of New Mexico depend on the protection of a clean environment and sustainable water supply. If we are to ensure that New Mexico's waters and the nation's waters are protected now and for future generations, we must act collectively to restore the purpose, the scope, the clarity and the predictability of the Clean Water Act so that it will once again serve as the primary and comprehensive protection of our Nation's waters.

Thank you for inviting me here today to testify on this important issue. I look forward to your questions.

Senator BOXER. Thank you very much.

Senator Inhofe.

Senator INHOFE. Yes, for clarification, the gentleman said something about the particular legislation that has been introduced. This is not a hearing on that legislation, even though it is a hearing on the underlying——

Senator BOXER. That is correct. But I think colleagues can say whether they are for it.

Senator INHOFE. Oh, that is fine.

Senator BOXER. That is true, we are not having a hearing on that legislation at this time.

Dr. Scott Yaich, Director of Conservation Operations, Ducks Unlimited. Welcome, sir.

STATEMENT OF SCOTT C. YAICH, DIRECTOR, CONSERVATION OPERATIONS, DUCKS UNLIMITED

Mr. YAICH. Thank you.

Madam Chairman and members of the Committee, my name is Dr. Scott Yaich, and I am the Director of Conservation Operations at Ducks Unlimited's national headquarters.

I appreciate the opportunity to speak today on behalf of Ducks Unlimited and our more than one million supporters, as well as for the National Wildlife Federation, Trout Unlimited, Wildlife Management Institute, Theodore Roosevelt Conservation Partnership, Pheasants Forever, Izaak Walton League and The Wildlife Society. DU's mission is to conserve, restore and manage wetlands and associated habitats for North America's waterfowl and for the benefits they provide other wildlife and the people who enjoy and value them. DU and our partners are science-based conservation organizations, so our perspectives on the Clean Water Act are grounded in wetland and water related scientific disciplines.

To ensure that we begin with a common understanding, it is worthwhile to State that, from a scientific perspective, a wetland is an area that has hydric soils and is subject to being flooded or saturated for a portion of the growing season, and supports or is

capable of supporting wetland vegetation. Also, there are at least two different perspectives from which the definition of "waters of the United States." can be viewed: the legal perspective and the scientific one. The former is currently a legal uncertainty and the latter is a reality.

From a scientific perspective, "waters of the United States." is an inclusive term reflecting the fact that the Nation's waters are interconnected. The legal definition of the waters and wetlands that should be jurisdictional under the Clean Water Act should be the large sub-set of those waters that must be regulated to fulfill the objective of the Act, which is to "maintain and restore the chemical, physical and biological integrity of the Nation's waters."

I would like to emphasize five primary points in my comments this morning. The first is that of the original 221 million acres of wetlands in the U.S., over half have already been lost. This has significantly reduced the ability of the remaining wetlands and other waters to fulfill Federal and public interests, among them the capability of the Nation's wetlands to support internationally shared waterfowl populations.

I spent 17 years working in Arkansas, much of it in the Cache and White River Basins, historically among the most important wintering waterfowl habitats in North America. Arkansas has lost almost 80 percent of these wetlands, and the numbers of waterfowl coming into the region now are consequently much lower than they once were.

My second point is that wetlands serve important ecological and societal functions in addition to providing wildlife habitat. Wetlands hold water and provide natural flood control during times of high rainfall and subsequently slowly release it and help maintain baseflows of streams and rivers. In Minnesota, for example, watersheds with higher percentages of remaining wetlands and lakes have been shown to have lower levels of damaging flooding.

Wetlands also recharge aquifers, such as the High Plains Aquifer shared by eight States. Along the South Platte River in Colorado, geographically isolated wetlands provide water directly to the river via groundwater connections. The water from some wetlands there can take 12 years to reach the river, but because of the demonstrated certainty of these significant hydrologic nexuses, the water in these wetlands has economic value and is being bought and sold as part of an interState and Federal agreement.

The negative side of these kinds of connections between geographically isolated wetlands and other waters is that the water can transport pollutants. For example, in one county in Michigan, there are a number of geographically isolated wetland Superfund sites from which compounds such as polychlorinated biphenyls and heavy metals have leached into aquifers, private drinking wells and ultimately to the Clinton River.

Scientific studies and wetland systems across the Country document these hydrologic and ecologic linkages between wetlands and other waters. These studies support my third point, which is that virtually all wetlands, in combination with similar wetlands in a region, do possess significant nexuses with navigable and other waters and have a direct effect on their quantity and quality. In the Rapanos decision, Justice Kennedy strongly indicated the impor-

tance he placed on the aggregate impacts of wetland loss when he stated that an example of the public purposes that should be served by the Clean Water Act was to address water quality issues such as the Gulf of Mexico's hypoxic or dead zone. This problem can only be addressed by approaching it at the interState landscape scale, including protecting or restoring some of those 60 million acres of wetlands in the Mississippi River watershed whose losses contributed to the hypoxia problem.

My fourth point is that as a result of the Supreme Court decision and subsequent agency guidance not being based upon the best available wetland science, tens of millions of acres of wetlands across the Country are now at significantly increased risk of being lost. Although Justice Kennedy's significant nexus test provides a science-based conceptual approach to wetland regulation, the nature of the nexuses between wetlands and other waters makes such as test virtually impossible to efficiently apply in a regulatory context. The net effect, then, has been decreased protection of wetlands, increased regulatory uncertainty and increased administrative burdens and processing times required for permits.

So, my concluding point is that due to the nature and almost universal scope of the connections between wetlands and other waters of the U.S., fulfilling the primary purposes of the Clean Water Act requires that the wetland protections that existed prior to the SWANCC decision must be restored. Legislation that clarifies that central point is the only apparent remedy for restoring the necessary Clean Water Act protections.

Thank you.

[The prepared statement of Mr. Yaich follows:]

STATEMENT OF SCOTT C. YAICH, DIRECTOR, CONSERVATION OPERATIONS, DUCKS UNLIMITED

Mr. Chairman, members of the Committee, my name is Dr. Scott Yaich. I am the Director of Conservation Operations at Ducks Unlimited's (DU) National Headquarters in Memphis, Tennessee. I am certified as a Professional Wetland Scientist and Certified Wildlife Biologist by the Society of Wetland Scientists and The Wildlife Society, the professional organizations of these respective scientific disciplines. I have worked for DU since 2001, and previously served as Wetlands Program Coordinator and Assistant Director for the Arkansas Game and Fish Commission for 13 years. My current duties include responsibility for overseeing DU's scientific review and response to issues related to the Clean Water Act.

I appreciate the opportunity to present our testimony to you today on behalf of Ducks Unlimited. Our organization was founded in 1937 by concerned and farsighted sportsmen conservationists. Our mission is to conserve, restore, and manage wetlands and associated habitats for North America's waterfowl, and for the benefits these resources provide other wildlife and the people who enjoy and value them. DU has grown from a handful of people to an organization of over 1,000,000 supporters who now make up the largest wetlands and waterfowl conservation organization in the world. With our many private and public partners we have conserved over 12 million acres of habitat for waterfowl and associated wildlife in the U.S., Canada, and Mexico. Ducks Unlimited is a science-based conservation organization. Every aspect of our habitat conservation work is rooted in the fundamental principles of scientific disciplines such as wetland ecology, waterfowl biology, hydrology, and landscape ecology. Thus, our perspectives on the Clean Water Act and related issues are based on our extensive grounding in these scientific disciplines.

DEFINITION OF "WATERS OF THE UNITED STATES"

There are at least two vastly different but ultimately closely intertwined perspectives on the focus of this hearing, i.e., the definition of "waters of the U.S." The one that is the subject of debate and controversy is the legal definition of "waters of the

U.S." for purposes of delineating the water bodies and wetlands that fall within the regulatory jurisdiction of the Clean Water Act. This legal definition of "waters of the U.S." is one with which Ducks Unlimited claims no special expertise. However, because much of our on-the-ground conservation work involves impacts to wetlands and other waters, DU, like the rest of the "regulated community," is subject to all the requirements of the Sec. 404 regulatory process. This exposes us to both sides of the issue and provides us a first-hand awareness of the perspectives of the regulated community.

The other perspective of the definition of "waters of the U.S." is the one in which Ducks Unlimited has genuine expertise, and that is the ecological perspective. Because this definition relates to the real, physical world and is not simply a legal construct, it is something to which we can apply science. Scientifically, as we will explain, virtually all "waters of the U.S." (including wetlands) are interconnected, and from an ecological perspective "waters of the U.S." must therefore be an inclusive definition. To achieve the objective of the Clean Water Act, i.e., "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," it therefore makes sense that the scientific definition should inform the more restrictive legal definition which seeks to define the subset of the Nation's waters that needs to be protected by the Clean Water Act in order to achieve its objectives.

Our testimony will therefore primarily address the scientific perspective of the definition of "waters of the U.S." and wetlands in particular, and on the ecological, economic and societal consequences and potential impacts of the broad regulatory interpretations of the U.S. Supreme Court's narrow decisions in the Solid Waste Agency of Northern Cook County and Rapanos-Carabell cases.

WETLAND STATUS AND TRENDS

The Clean Water Act (CWA) has been an important component of the national framework of wetland conservation for over 30 years. It has been one of the most successful environmental programs in the nation's history, and many aspects of the country's water quality have improved measurably since 1972. Although the CWA has likely contributed to past declines in the rate of wetland loss, recent judicial decisions and regulatory actions have put much of the nation's remaining wetland resources at increased risk of loss by effectively removing them from Federal CWA jurisdiction.

The status of wetlands in the United States provides important context for our concerns about the extent to which they are protected by the Clean Water Act. Over 50 percent of the estimated 221 million acres of wetlands originally present in the United States have been lost. Although the rate of wetland loss has decreased since the mid–1950's, at least in some measure due to the passage of the Clean Water Act in 1972, recent studies document that nationwide losses of wetlands that are most important to waterfowl and other wildlife continue to exceed 80,000 acres per year. Discounting the addition of ponds that have little wildlife value, the Nation has had a net loss of over 16 million acres of wetlands since the mid–1950's. Since 1986, the Nation has lost over 2 million acres of vegetated wetlands and 1.4 million acres of freshwater marshes, among the most important types of wetlands for waterfowl and other wildlife. These kinds and magnitudes of losses not only have a cumulative negative impact on the waterfowl that our one million supporters care so passionately about, but also on the nation's water quality and other Federal interests.

WETLAND VALUES AND FUNCTIONS

Wetlands as Wildlife Habitat: Wetlands provide a broad array of ecosystem functions, each carrying some measure of ecological and societal value. For example, the millions of small wetlands of the prairie pothole region (PPR) of Minnesota, North and South Dakota, Montana and Iowa are among the most important wetlands to waterfowl on the continent. However, of the approximately 20 million potholes that once existed in the northern U.S., only about 7 million remain. Over 95 percent of the potholes in Minnesota and Iowa have been drained or filled.

An estimated 50 percent of the average total annual production of ducks comes from the pothole region, and in wet years 70 percent or more of the continent's duck production can originate in the PPR. One analysis suggested that duck production in the pothole region of the U.S. would decline by over 70 percent if all wetlands less than 1 acre in size were lost. However, wetland losses far less than this would significantly impact waterfowl numbers, and could result in closed waterfowl seasons with related economic impacts. In addition, 38 percent of the breeding ducks in the PPR of the Dakotas are associated with temporary and seasonal wetlands and wetlands less than one acre in size embedded in cropland. These wetland categories

are at the greatest risk of loss in the absence of adequate Clean Water Act protections.

Unfortunately, significant losses of potholes continue to occur. The U.S. Fish and Wildlife Service's most recent report on wetland status and trends for 1998–2004 stated that, "Notable losses of freshwater vegetated wetlands occurred in the Prairie Pothole Region of eastern North and South Dakota, western Minnesota and Iowa." The report also stated that 82,500 acres of freshwater wetlands across the country were lost annually during that period, with 85 percent being smaller than five acres in size, and 52 percent smaller than one acre. Small wetlands are among the most productive and valuable as habitat for wildlife.

The prairie pothole region is but one example of a landscape that has lost a significant proportion of its wetlands, with the remaining wetlands being at significant risk. Wetland systems such as the playa lakes of the southern plains, vernal pools of California, and rainwater basins of Nebraska have been negatively impacted to a similar degree, or worse. Less than 400, fewer than 5 percent, of the original rainwater basins remain in Nebraska today. This means that migrating waterfowl are increasingly concentrated and increasingly dependent upon this diminished resource. Approximately 50 percent of the mid-continent mallards and 90 percent of mid-continent white-fronted geese depend upon these few wetlands during migration. When such large numbers of waterfowl are abnormally concentrated on so few water bodies, they are highly susceptible to outbreaks of virulent disease that can kill large percentages of whole populations. Thus, the continued declining trends in wetlands across the nation's breeding, migration and wintering waterfowl habitats pose a significant threat to their future, to the future of waterfowl hunting, and to the other wetland-dependent and wetland-associated wildlife resources.

Waterfowl are a valuable interState and international economic resource. Approximately 1.8 million waterfowl hunters expended almost $1 billion in 2001 for hunting related goods and services, resulting in a total estimated economic output of $2.3 billion, 21,415 jobs, and over $300 million in State and Federal tax revenue. Approximately 18 percent of waterfowl hunting in 2001 took place in a State other than the one in which the participant resided. For example, in North Dakota, 47 percent of the state's waterfowl hunters were non-residents, and in Arkansas over 42 percent of 89,000 waterfowl hunters in 2002 traveled there from other states. Furthermore, commerce tied to the waterfowl resource and other wetland-associated fish and wildlife is not restricted to hunting. In 2001, nearly 20 million people participated in watching waterfowl and shorebirds, with an associated economic output of approximately $9.8 billion.

Hydrologic Functions and Values of Wetlands: Wetlands provide important ecological goods and services to the Nation through the hydrologic functions they serve. For example, a primary function of wetlands is to store water, and this equates to protection of downstream landowners and communities from flooding. Floods cause an estimated $3.7 billion in annual damage in the U.S., and wetland losses have exacerbated this by causing "more flood for less rain." The 1993 Midwest flood was (before Katrina) the largest flood disaster in U.S. history, causing $16 billion in damages. Approximately 60 million acres of wetlands in the Mississippi River watershed have been lost. Not entirely coincidentally, the three states with 75 percent of the damage in the 1993 flood (Illinois, Iowa and Missouri) have lost 89 percent, 85 percent and 87 percent of their wetlands, respectively. The water storage function of our remaining wetlands is even more important now because, since the flood of 1993 in the St. Louis area alone and on land that was underwater in 1993, there have been 28,000 new homes built, population has increased by 23 percent, 6,630 acres of commercial development has occurred, and there has been a total of $2.2 billion in new development.

Another example is the Red River Basin of northwest Minnesota and the eastern Dakotas. Approximately 75 percent of wetlands in this region have been drained, and the downstream portions of the area now experience major floods every 4–6 years, and a flood classified as "devastating" every 10 years. Small pothole basins in the Devil's Lake watershed in North Dakota could store 72 percent of the total runoff from a 2-year frequency flood and approximately 41 percent of the total runoff from a 100-year frequency flood. In a study of flooding in Massachusetts, the U.S. Army Corps of Engineers determined that flood damages would increase by $17 million per year if the 8,400 acres of wetlands in the Charles River basin were drained. Thus, wetland protection is a critical element of reducing flood damage along the nation's waterways, a hazard to which such areas are increasingly susceptible as a result of wetland loss.

Other Wetland Functions: Virtually all wetlands improve the quality of water that they receive and then discharge, doing so through either direct, physical means such as trapping sediment and associated chemical constituents, or storing and recycling

nutrients and other chemicals. Evidence of the societal value of such water quality services is demonstrated by the actions of New York City to initiate a $250 million program to acquire and protect up to 350,000 acres of wetlands and riparian lands in the Catskills. The city is taking this action to protect the quality of its water supply as an alternative to constructing water treatment plants that could cost as much as $6–8 billion. In South Carolina, the wetland services provided by the Congaree Swamp negated the need for a $5 million wastewater treatment plant. Ducks Unlimited recently entered into a partnership with the National Association of Clean Water Agencies to help facilitate these kinds of actions.

WETLANDS AT RISK: SCIENCE AND THE LEGAL/REGULATORY LANDSCAPE

Estimating Wetlands at Risk: There are ranges of estimates of the percentage of the nation's wetlands that have had Clean Water Act protections withdrawn from them as a result of the SWANCC and Rapanos/Carabell decisions in the U.S. Supreme Court, and the subsequent regulatory interpretations by the U.S. Army Corps of Engineers (USACE) and Environmental Protection Agency (EPA). The agencies estimated that 20 million acres would no longer be covered by the CWA as a result of the SWANCC decision. The Association of State Wetland Managers estimated it to be 30–60 million acres, or approximately 30–60 percent of the remaining wetlands. In the wake of the Rapanos/Carabell decision which resulted in the withdrawal of more wetlands from CWA jurisdiction, estimates have ranged from 40–80 million acres.

In the wake of the SWANCC decision, Ducks Unlimited scientists reported in September 2001 the results of an assessment of the potential impact of the decision on wetlands in the landscapes most important to waterfowl. The post-SWANCC guidance had not yet been released, so a range of scenarios was evaluated. However, the worst-case scenario was closest to what has unfolded since 2001. This assessment estimated that up to 96 percent of the wetlands in the prairie pothole region and the Gulf Coast might no longer be considered jurisdictional (76 percent and 86 percent of the area extent of wetlands in these regions, respectively). In the Great Lakes region, up to 90 percent of the remaining wetlands (33 percent of the wetland acreage) were considered at risk, whereas 88 percent of the wetlands (12 percent of the wetland acreage) of the mid-Atlantic Coast region were at risk. Overall, the vast majority of small, non-adjacent wetlands in the areas examined were put at significant risk of loss as a result of the SWANCC decision. The post-Rapanos guidance simply adds to the wetlands considered at risk in that evaluation.

It is difficult, at best, for the scientific community to develop such estimates because terms such as "geographically isolated wetland" and "adjacent wetland" are legal constructs that lack any grounding in science. From a scientific standpoint, virtually all of the nation's wetlands are linked to downstream or down slope navigable waters in one way or another. Although wetlands can be geographically isolated from navigable waters, and they can be sufficiently distant as to be referred to as non-adjacent in a colloquial sense, they almost always possess a hydrologic and/or ecologic nexus with navigable-in-fact waters. An appreciation of this fact is critical to understanding why the restoration of Clean Water Act protections is essential if the Nation is to fulfill the Act's explicit purpose, which is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."

Significant Nexuses Between Geographically Isolated Wetlands and Navigable Waters Are the Rule: There are many examples of direct connections between navigable waters and wetlands that may on the surface appear to have no linkages between them, but the vast preponderance of related scientific studies document the significance of these connections to achieving the purposes of the CWA. During wet cycles in the pothole region, for example, water tables rise and surface water levels reach outlet elevations for most geographically isolated potholes, thereby augmenting other connections to downstream navigable waters. In the aggregate, these connections have a significant impact on downstream water quality and can significantly affect flood levels. These types of connections are demonstrable for many other wetland systems.

In addition, geographically isolated and other wetlands very often contribute to groundwater recharge, and this groundwater then moves down slope toward flowing streams that ultimately terminate in navigable waters. For example, 20–30 percent of the water loss from prairie wetlands can be seepage to groundwater. Subsequent groundwater discharge into flowing streams over 16 miles away from these geographically isolated wetlands has been documented. The sand hill wetlands of Nebraska have direct linkages to the High Plains (Ogallala) aquifer, as do playa lakes farther south, and these wetlands are important recharge sites for the aquifer,

which stretches over thousands of miles and provides groundwater that is shared by eight states. Water is being withdrawn from this aquifer faster than it is being recharged, so additional loss of these types of geographically isolated, but hydrologically and ecologically connected wetlands will only exacerbate the decline of the aquifer with negative economic affects on farming, ranching, and communities in the region, and will result in the direct loss of critical wildlife habitat. In addition, this aquifer discharges naturally to flowing streams and springs that lead to the Platte, Republican and Arkansas Rivers. These linkages not only provide a connection that can affect water quality, but that are also important for maintaining base flows of navigable waters and their tributaries. If climate change, as is widely predicted, results in an increasingly variable climate with more frequent and severe drought in many areas, protecting wetlands that hold and slowly release water to downstream users will be increasingly important for maintaining wildlife habitat, and for providing the water that supports local and regional economies.

In fact, the South Platte River in Colorado already has an economy built upon complex hydrologic models that incorporate knowledge of the time that water takes to move from sometimes far-removed, geographically isolated wetlands, to the river. Water has been valued and traded based on the knowledge that, in the example of the Tamarack project, it will take over a year for water in a wetland to makes its way to the river where it can then be used for base flows to support wildlife needs, irrigation, or other economic uses. The Brush Prairie Wetlands project is established on the basis of a 5-year transit time from the wetlands to the river, and the Little Bijou reservoir is 8 miles from the river with water being traded 12 years in advance of its transit via groundwater to the river. It is the certainty, significance, and predictability of these hydrologic nexuses that allows this water to be traded as a commodity with real value as part of an interstate/Federal agreement.

The negative side of these kinds of hydrologic nexuses between geographically isolated wetlands and flowing waters is that pollutants can also be carried into navigable waters along with the water. For example, there are a number of Superfund sites in Macomb County, Michigan, the same county as the Carabell wetlands (June Carabell, et al. v. United States Army Corps of Engineers), in which volatile organic compounds, polychlorinated biphenyls, heavy metals and other compounds have leached from geographically isolated disposal sites into groundwater aquifers, private drinking water wells, and ultimately to the Clinton River. Without jurisdiction over geographically isolated wetlands, this kind of problem could become more widespread.

Thus, wetland science clearly demonstrates the linkages that almost always exist between geographically isolated wetlands, remote tributaries, groundwater, and navigable waters, supporting the science-based contention that adjacency and significant nexus for determining jurisdictional wetlands must be interpreted from a functional perspective if water quality and quantity is to be protected as intended by the CWA.

Science and the Post-Rapanos Guidance: Unfortunately, because of the variable and interacting interpretations of the scientific information and judicial perspectives of the nine justices, the Rapanos/Carabell decision ultimately created more uncertainty than previously existed. Five justices clearly understand that to fulfill the explicitly stated purpose of the Clean Water Act, wetlands and other waters with a significant nexus to navigable waters and Federal interests must be encompassed within the act's jurisdiction. Justice Kennedy's opinion was the pivotal one, and he articulated the concept of a significant nexus test, laying out the legal basis for a science-based conceptual approach with which to assess the jurisdictional status of wetlands and other waters. He explicitly stated that ecologic and hydrologic linkages, such as flood water storage, between wetlands and navigable waters should be considered. Most importantly for wetland ecosystems such as the prairie pothole region, rainwater basins, and playa lakes, he stated that the connections between navigable waters and the wetland in question in combination with similar wetlands in the region should be considered in a significant nexus test. In addition, he gave a strong indication of the importance he placed on such aggregate impact considerations when he stated that an example of the important public purposes that should be served by the Clean Water Act was to address water quality issues such as the huge hypoxic zone in the Gulf of Mexico, a significant problem that can only be addressed by protecting and restoring many wetlands across the interState landscape of the Mississippi River watershed. Thus, his opinion provided the opportunity to apply a scientific foundation for assessing jurisdictional status of all wetlands, regardless of distance or degree of isolation from navigable waters.

Unfortunately, however, due to the nature of the above-described types of ecologic and hydrologic connections that exist between most wetlands and navigable waters, Justice Kennedy's significant nexus test is virtually impossible to apply scientifically

and efficiently within an administrative and regulatory context. Thus, the agencies apparently struggled while developing the post-Rapanos guidance. Ironically, the net effect of the guidance is that it is in many ways the worst of all worlds it decreases the level of certainty and clarity that existed before the SWANCC and Rapanos cases, dramatically reduces the scope of Clean Water Act protections to the nation's wetlands, and increases the administrative and regulatory burden on the agencies, thereby increasing the time required to adequately process permit applications.

WETLAND PROTECTION AND PUBLIC OPINION

The public consistently demonstrates a fundamental concern for having clean, abundant water, and wetlands and other natural habitats that support healthy fish and wildlife populations and the associated recreational pastimes. A nationwide survey documented that 15 times more citizens believed there were too few wetlands than those who believed there were too many. The same survey showed that 91 percent of the public stated that it was important to protect and conserve wetlands, with only 3 percent being neutral or considering it unimportant. Furthermore, survey after survey has reinforced that the American public has a deep concern about water quality and has high expectations for water conservation. A recent Harris interactive poll documented that 74 percent of U.S. adults agreed that "protecting the environment is so important that requirements and standards cannot be too high, and that continuing environmental improvements must be made regardless of cost."

Thus, the American public, including Ducks Unlimited's million supporters, expect that the health of our wetlands and other waters will be maintained for their individual interests and for the collective good of the Nation.

CONCLUSIONS

This brief review outlines some of the key aspects of wetland and aquatic ecology that provides the scientific basis for protecting wetlands within the framework of the Clean Water Act, and including them within the legal definition of "waters of the U.S." Some of the most important points are:

- a majority of the nation's wetlands have already been lost, and this has had a negative impact on the remaining wetlands and waters of the U.S. and related Federal and public interests;
- wetlands serve important ecologic and societal functions, including providing critical habitats for waterfowl and other wildlife, providing flood control and base flows for rivers, streams and groundwater aquifers, and protecting and improving the quality of water that flows downstream to other users; and, these functions have an increasing value as wetlands continue to be lost;
- as a consequence of recent Supreme Court decisions and subsequent interpretations by agencies that resulted in a regulatory framework that has not relied upon the best available science to "restore and maintain the chemical, physical and biological integrity of the Nation's waters," millions of acres of wetlands are now at significantly increased risk of loss due to the withdrawal of important CWA protections and increased regulatory uncertainty;
- science supports the generalization that virtually all wetlands, in combination with similar wetlands in a particular region, possess significant hydrologic and ecologic nexuses with navigable waters and have a direct effect on the quantity and quality of such waters;
- fulfillment of the primary purpose of the Clean Water Act requires the restoration of wetland protections that existed prior to the SWANCC decision.

In light of all the above, it is clear that the nation's remaining wetlands are at significant risk of loss, and the waterfowl, other wildlife, and related interests that depend upon these wetlands are similarly at risk. Passage of legislation such as the Clean Water Restoration Act is the only apparent remedy for restoring wetland protections that are at least as strong as those that existed prior to 2001. Wetland and hydrologic science provides the basis for such protection under the Clean Water Act.

RESPONSES BY SCOTT C. YAICH TO ADDITIONAL QUESTIONS FROM SENATOR BOXER

Thank you for the opportunity to address the five questions that Senator Boxer posed in follow-up to the December 13, 2007 Environment and Public Works Com-

mittee hearing on the topic of the Clean Water Act and wetland conservation. My answers appear below, following the questions as requested.

Question 1. Carl Strock, the former Chief of Engineers for the Army Corps of Engineers has testified before this Committee about the role that wetlands play in natural flood control. During significant flooding, wetlands can act as a natural sponge, soaking in excess water. As a wetlands scientist, do you agree with this assessment and could you elaborate on these effects and benefits for the Committee? What role do wetlands play in protecting the integrity of traditional navigable waters and their tributaries from adverse effects of major weather events, such as Hurricane Katrina?

Response. Wetlands, including geographically isolated wetlands, serve a critical function in any watershed in storing and holding water and associated pollutants (including sediment) that otherwise could flow swiftly and directly to navigable waters via their tributaries. Thus, they play a significant role in regional water flow regimes by intercepting storm runoff and storing and releasing those waters in a delayed fashion, either through surface or groundwater discharge. The presence of many wetlands decreases runoff velocity and volume by releasing water over an extended period, the net effect being to abate flooding by lowering and moderating the peaks of flood stages, thereby reducing flood damages. Study after study clearly documents this relationship, for example: one study showed that the presence of wetlands in watersheds was a significant factor in the reduction of 50-to 100-year floods; for selected watersheds in Minnesota the mean annual flood increases were inversely related to the percentage of lakes and wetlands within the watersheds; the decrease of 80 percent of the storage capacity of the Mississippi River as a result of levees and loss of forested and other wetlands is widely considered an important factor in the increased frequency of flooding along the Mississippi River; for relatively low frequency floods (those occurring with 100-year interval or greater, but those with the greatest potential for catastrophic losses) the increase in peak streamflow was significant for all sizes of streams when wetlands were removed from the watershed. Viewed on the whole, these kinds of studies provide a clear illustration that the collective contributions of small wetlands distributed across a landscape, and often located within topographically higher portions of the watershed and geographically isolated from flowing waters, can exert a very significant and demonstrable cumulative effect on floodwater storage and water quality improvement.

The Prairie Pothole Region is the most important waterfowl breeding area on the North American continent. A number of studies concluded that the loss of 2/3 of these pothole wetlands has contributed significantly to flooding and increases in associated damages along the Red River of North Dakota and in portions of Minnesota and Iowa. Small wetlands in the Devil's Lake watershed in North Dakota (many, if not most, geographically isolated) could store 72 percent of the total runoff from a 2-year frequency flood and approximately 41 percent of the total runoff from a 100-year frequency flood. Studies in landscapes with other types of isolated wetlands have similarly demonstrated that drainage of such wetlands results in increased peak flows of navigable waters and their tributaries.

The net effect of wetland loss and the loss of floodwater storage capacity, from the perspective of a landowner or community living downstream of the wetland losses, is simply stated as "more flood for less rain." It is not entirely coincidental, for example, that the states of Illinois, Iowa, and Missouri experienced 75 percent of the approximately $16 billion of damage in the 1993 Midwest floods (the largest flood disaster in U.S. history before Katrina). These three states have lost 89 percent, 85 percent, and 87 percent of their wetlands, respectively. And, without adequate wetland protection and associated regulatory controls, there is an increased risk of flood damage. For example, on land that was underwater in 1993 in the St. Louis area alone, there have been 28,000 new homes built, a human population increase of 23 percent, 6,630 acres of commercial and industrial development, and a total of $2.2 billion in new development. These people, businesses, communities, their insurers, and taxpayers cannot afford to be subjected to "more flood for less rain."

As an illustration of the recognized value of these types of functional contributions of wetlands (including those that are isolated) to flood abatement in a watershed, the city of Boston is acquiring 5,000 acres of wetlands in the Charles River watershed to avoid the necessity of constructing a $100 million dam for flood control. In a related study, the U.S. Army Corps of Engineers determined that flood damages would increase by $17 million per year (in 1972 dollars) if the 8,400 acres of wetlands in the Charles River basin were drained. The University of North Dakota has studied flood control options in the Red River basin, where 75 percent of the wetlands have been drained and there is now a major flood every 4–6 years and a devastating flood every 10 years. These researchers have demonstrated that the storage

of flood water in the basin using non-structural flood control mechanisms (including wetland conservation) would cost an estimated $32–37 per acre-foot of water, compared to $91/acre——foot to $213/acre-foot using conventional structural approaches (e.g., dams and levees). They indicated that the $2–3 billion in flood damages resulting from a 1997 flood could have been avoided with less than a $90 million investment in non-structural flood control, including wetland conservation.

With respect to coastal storm events such as Hurricane Katrina, it is known that coastal marshes can reduce the extremely damaging effects of storm surges. It was estimated that the storm surge of Hurricane Andrew, for example, was reduced by 4.4 to 6 feet by coastal marsh. As a general estimate, storm surge is reduced by approximately one foot for every 2.7 miles of wetlands. Thus, the extensive loss of coastal marsh that has taken place along the Gulf Coast resulted in greater damage to inland areas from Hurricanes Katrina and Rita than would otherwise have occurred.

Question 2. Many of southern California's waterways flow intermittently, yet they provide critically important habitat to numerous species of wildlife. Can you elaborate on the ways seasonal streams are important for fish and wildlife habitat?

Response. I must admit that I am a wetland scientist and not a stream scientist, so there are others who could provide much stronger and more complete answers to this question. For that I apologize, but I will attempt to provide some perspective and information related to the topic of intermittent streams, by relating below a section (written by a colleague, Dr. Helen Neville of Trout Unlimited) taken from a soon-to-be-released jointly published report.

"Small springs and streams can have tremendous biological value, even when intermittent, unconnected to waters outside the State (i.e., "terminal"), or ephemeral. In the Southwest, [including southern California,] many streams and even mainstem rivers are at least spatially intermittent, drying up in all or portions of their run during dry seasons. Yet, despite not using them at certain times of the year, trout and other fishes, amphibians, and many aquatic invertebrates in the Southwest are adapted to persisting in these environments, by either moving to seek deeper waters and re-colonizing previously dry reaches when available, or becoming dormant until flow levels increase. These seasonally dry streams not only provide habitat that simply adds more space in which these organisms can live, but they provide specific and unique habitat some species require during certain life stages. For instance, small and even intermittent streams provide important spawning and rearing habitat for trout, with requisite lower flows for early life stages and protection from competitors or predators that cannot spawn in or use these smaller habitats. Furthermore, because of their complex nature, small headwater streams provide a diversity of habitat and are important sources of biodiversity. Species such as salamanders, minnows and aquatic insects often have very small geographic ranges, and in many cases substantial proportions of their ranges are found only in first or second order streams. Additionally, many waters in the Southwest are considered terminal, but because they are the majority of waters in some regions they encompass large amounts of habitat for many species. In Nevada, for instance, terminal waters comprise the entire range for important federally listed species such as Lahontan cutthroat trout.

Aside from providing habitat directly, small streams including those that are intermittent or ephemeral provide an essential interface between land and water and upstream and downstream habitats. Many organisms depend on allochthonous sources of food, or food which is deposited in water from terrestrial habitats, and the transfer of these food types is much greater in these small streams characterized by a higher land-water interface. These streams also export adult emerging aquatic insects to terrestrial systems, providing an important food source for higher levels in the food chain. According to [one] study, emerging adult stream insects can provide 25-100 percent of the energy to organisms such as birds, bats, salamanders, beetles, spiders, and these organisms support yet many others of recreational and ecological value higher in the food chain. Desert streams can be particularly productive in this sense because warmer water temperatures facilitate rapid insect growth and a greater flux of food to terrestrial organisms. In fact, as the authors of the Baxter study put it, in streams of arid ecosystems "the export of emergent insects may be essential to fuel terrestrial predators." Furthermore, small streams transfer invertebrates and organic material to downstream reaches that are critical for the maintenance of species in these habitats. In one case, fishless headwater streams were estimated to export enough drifting insects and other invertebrates to support approximately half of the fish production in downstream waters."

Question 3. This Committee has spent a considerable amount of time on the issue of global warming this year. What are the likely impacts of global warming on wet-

lands and other waters of the United States? What are those likely impacts on water quality, wildlife, and America's recreation economy?

Response. Climate change likely will affect wetlands, waterfowl, and water quality and quantity in a variety of ways. Some degree of climate impacts is predicted for wetlands and other habitats in nearly every region important to waterfowl in North America. Increasing greenhouse gas concentrations will cause a rise in air, soil and water temperatures—including wetlands, lakes, streams, rivers, estuaries, and oceans—which will challenge even the most adaptive wetland plants and animals. Changes in precipitation and more intense storm events associated with intense rainfall and associated erosion will have a negative impact on streams and wetlands in some areas. While it is certain that climate plays an important role in the health, functioning and distribution of wetlands, specifically how and to what extent climate change will impact particular regions and the wetlands there is not yet predictable with certainty.

Wetland and waterfowl habitat conservation presents opportunities to reduce net CO_2 emissions to the atmosphere or to increase the net uptake of carbon from the atmosphere through biological carbon sequestration. Protecting these habitats will help the country prevent or mitigate some climate change impacts. One of the most significant and costly impacts of climate change is the sea level rise that will cause inundation of coastal areas, shoreline erosion, and destruction of important wetland and mangrove ecosystems. In past eras of sea level rise, wetland systems could naturally retreat inland, but roads and coastal infrastructure has precluded this option along much of the U.S. coastline. Thus, the area of coastal wetlands is predicted to diminish greatly during this century. Reduction in coastal marsh habitats is expected to be most severe along the U.S. Gulf and Atlantic coasts where effects of sea level rise is compounded by subsidence and freshwater and sediment diversions.

Water quality and quantity can also be affected by climate change in several ways. According to the EPA Climate and Policy Assessment Division, in a warmer climate, higher temperatures, increased evaporation, and changes in precipitation could significantly influence runoff in the Mississippi Alluvial Valley. Lower river flows, lake levels, and groundwater levels in the summer would affect water availability and increase competition among domestic, industrial, and agricultural uses of water, as is being observed in other parts of the Southeast. Declining groundwater levels are already a significant concern throughout parts of Mississippi, Louisiana and Arkansas. Warmer and drier conditions, particularly when accompanied by sea level rise, could compound problems of inadequate water supplies due to higher demand and lower flows. If increased precipitation occurred, it could help alleviate some water supply problems, but would increase flooding, erosion, and levels of pesticides and fertilizers in runoff from agricultural lands, a major water quality issue there.

The quality of groundwater is also being degraded in several areas of the U.S. by a variety of factors that could be made worse as a result of climate change, including saltwater intrusion. As groundwater pumping increases to serve municipal and agricultural demand along the coast and less recharge occurs, groundwater aquifers are increasingly affected by seawater. Surface water supplies, which are more sensitive to climate change and variability, are being relied upon more, which further exacerbates water quantity conflicts.

From an economic perspective, sportsmen and sportswomen spend approximately 12 million days hunting waterfowl annually in the U.S. Waterfowl viewing is also popular among the more than 46 million birders. The effects of increased drought in the Prairie Pothole Region of the northern U.S. and central Canada, brought on by climate change, could significantly reduce the average population of ducks. Declines in duck numbers would have an impact on waterfowl hunting and viewing opportunities and a subsequent loss of revenue associated with waterfowl-related recreation. Declines from loss of breeding habitat could be exacerbated by loss of migratory habitat. In 2001, there were 1.8 million waterfowl hunters who spent nearly 30 million recreational days each year hunting waterfowl. They expended nearly $1 billion annually for waterfowl hunting on trips and equipment (not including boats, campers, vehicles, etc.). This economic activity generated a total economic output of $2.3 billion, 21,415 jobs, and $725 million in employment income, in addition to over $330 million in taxes. Waterfowl hunting is big business and any major changes in hunting opportunity as a result of climate change will have significant impacts on that business.

Question 4. Many scientists agree that wetlands provide significant water quality benefits. Could you explain how healthy wetlands help improve the quality of water that our families depend on each day? Do wetlands lessen the need for water treatment infrastructure, and if so, are there cost savings to communities?

Response. It is well established that wetlands provide significant water quality benefits by trapping, precipitating, transforming, recycling, and/or exporting many of its chemical and waterborne constituents. They serve as a natural buffer zone between upland drainage areas and open or flowing water. They can improve water quality by removing heavy metals and pesticides from the water column, and by facilitating the settling out of sediment particles to which many pollutants are attached. Wetlands remove excess nutrients, e.g., phosphorus and nitrogen compounds, by incorporating them into plant tissue or the soil structure and by fostering an environment in which microbial and other biological activity pulls these compounds out of the water, thereby enhancing its quality.

Importantly, water quality contributions of wetlands can occur no matter where the wetland occurs on the landscape, and even geographically isolated waters also serve as chemical and nutrient sinks, trapping and holding these compounds. For example, it has been shown that when water naturally filters through Delmarva bays instead of being circumvented through drainage canals to flowing waters, it flows through groundwater pathways and reaches the Chesapeake Bay with much of its nitrogen having been removed. Nitrogen is one of the principal pollutants of concern in the waters of the Chesapeake Bay. In another study, a wetland receiving discharges of treated sewage removed 4.9 tons of phosphorous, 4.3 tons of ammonia, and 138 pounds of nitrate each day, while adding 10 tons of life-supporting oxygen to water entering a tributary to the Delaware River.

Even geographically "isolated" playa lake wetlands can improve the water quality of storm runoff, with the water quality in some playas being better than that found in storm runoff entering wetlands. Playas are often a source of groundwater recharge, so this wetland function contributes to maintaining the quality of groundwater used for drinking and irrigation and shared by several states. Because some of this groundwater discharges naturally into streams and springs, from a functional perspective, there is therefore a significant nexus between the status and water quality of the playas and the status and water quality of groundwater aquifers, and finally flowing waters and tributaries.

It has been demonstrated recently that some wetlands in California were able to remove an average of 69 percent of the selenium contained within agricultural runoff to the wetlands, thereby naturally reducing the availability of this trace element which becomes toxic when it is bioaccumulated through the food chain. Studies have also shown the ease with which changes in the chemistry of surface waters, including wetlands, are transported and reflected in the water quality of groundwater. For example, where protection has been lax and toxic chemicals have been introduced into some isolated wetlands in the same county in Michigan in which the Rapanos wetlands are located, domestic water supply wells have been contaminated and the wetlands and immediate vicinity had to be declared a superfund site.

The increased flood flow that is directly associated with the loss of wetlands is an important factor in streambank erosion, which is a significant water quality problem in many downstream areas in the U.S., contributing significantly to sediment pollution loads in flowing waters. Sedimentation, including streambank erosion, has created navigation and ecological problems on the Illinois River.

The tangible economic value of water quality services provided by wetlands, including isolated wetlands, is demonstrated by the example of New York City in which conserving wetlands enabled the city to save billions of dollars. A program was initiated to acquire and protect up to 350,000 acres of wetlands and riparian lands in the Catskills at the cost of several hundred million dollars to protect and maintain the city's drinking water quality to EPA standards. This action by the city has successfully maintained the quality of its water supply as an alternative to constructing water treatment plants which could cost as much as $6-8 billion plus annual operating costs of $300 million. In South Carolina, a study documented that without the wetland services provided by the presence of Congaree Swamp a $5 million wastewater treatment plant would be required.

These are but a few examples of how wetlands benefit water quality, communities, and individual taxpayers and homeowners. If wetlands are unprotected and continue to be lost, the quality of the nation's surface and groundwater will inevitably suffer, and the costs of treating drinking water and water for other domestic uses will unavoidably increase.

Question 5. Once streams, tributaries, wetlands and other aquatic habitat are filled and lost, is there any effective way to mitigate for or replace such losses?

Response. Again, being a wetland scientist, I will speak to the question from a wetland perspective. Although not a stream scientist, I am aware that restoration of stream habitats is an art and science that is still in its earliest stages. It lags behind the science of wetland restoration and mitigation, thus the issues and con-

cerns I will point out relative to wetlands are even more serious concerns when viewed from the perspective of streams and tributaries.

There are two perspectives from which to view the effectiveness of mitigation of wetland losses regulatory effectiveness, and functional effectiveness. Both were addressed by the National Academy of Sciences in 2001 in their exhaustive examination and 322-page report on "Compensating for Wetland Losses Under the Clean Water Act." It is important to note that they conducted their review prior to the U.S. Supreme Court's SWANCC decision. Their primary conclusion was that "the goal of no net loss is not being met for wetland functions by the mitigation program, despite progress in the last 20 years." Another conclusion was that "performance expectations in the Section 404 permits have often been unclear, and compliance has often not been assured nor attained." Thus, even before the SWANCC and Rapanos decisions, wetland losses were not being effectively mitigated. With the removal of millions of acres of wetlands from regulatory protection in the wake of SWANCC and Rapanos, it is safe to say that wetland losses in the U.S. are being mitigated even less in 2008 than they were at the time of the National Academy of Sciences report.

From the standpoint of whether the functions of wetlands and other aquatic habitats can be effectively replaced or mitigated, the answer must be qualified. The most accurate overarching answer would be, "no, there is no effective way to mitigate for or replace such losses." However, that answer must be qualified because some will point out that some individual wetland functions can be mitigated in a reasonably effective way. For example, a hypothetical 100-acre wetland that averages 2 feet in depth could provide a floodwater storage function for 200 acre-feet of water. If that wetland were drained or filled, that water storage function could be mitigated with an excavated 10-acre hole that was 20 feet deep.

However, without the vegetation that naturally occurred in the 100-acre wetland and which could not be regenerated in the artificial waterbody, that 10-acre water-filled hole would not provide mitigation for the wildlife habitat that was lost with the 100-acre wetland. It would also not be able to provide the water quality maintenance and improvement functions that were being provided in the natural wetland. Other functions would similarly not be effectively replaced.

Thus, while some studies document adequate mitigation of some wetland functions in replacement wetlands, at a national scale the broad spectrum of functions provided by natural wetlands is not being completely and cost-effectively mitigated. This fact underscores the importance of protecting the Nation's remaining wetlands. It is far more effective and efficient to protect existing wetlands than it is to attempt to replace wetland functions through artificial mitigation. As a result of the uncertainties associated with the nascent art and science of stream restoration, this is even truer for streams and tributaries.

On behalf of Ducks Unlimited, I would like to express my appreciation for the opportunity to provide answers to Senator Boxer's questions, and expand upon our testimony on this critical issue. I hope that my answers will provide perspectives that are useful to the committee members.

Senator BOXER. Thank you, sir. Just perfect timing.

Our next speaker is Duane Desiderio, Legal Affairs, Staff Vice President, for the National Association of Home Builders. Welcome, sir.

STATEMENT OF DUANE DESIDERIO, LEGAL AFFAIRS, STAFF VICE PRESIDENT, NATIONAL ASSOCIATION OF HOME BUILDERS

Mr. DESIDERIO. Thank you, Madam Chair, Ranking Member Inhofe and distinguished members of the Committee. Thank you for the opportunity to testify on behalf of the National Association of Homebuilders.

NAHB represents over 235,000 corporate members that in turn employ millions of individuals in all facets of the residential construction industry. NAHB's members are proud to be part of the Clean Water Act's great success. As they provide housing for our Nation's citizens, our members avoid and minimize impacts on aquatic resources through residential site design and routinely provide mitigation beyond project impacts.

As you are well aware, the housing industry is experiencing one of the greatest downturns in history. This has had a profound effect on the national economy, as housing affordability and finance have been severely impacted throughout 2007. NAHB believes that Congress should focus its limited time and resources on legislation to help homeowners overcome the current crisis rather than pursue measures that will restrict the industry's ability to recover.

Recent legislation proposals that would expand the Clean Water Act's scope to cover virtually all intraState waters would harm our already distressed industry. Stretching the Act to include features like isolated ponds, ephemeral washes and drainage ditches will require the agencies to process thousands of more permits, straining an already-burdened regulatory program.

Such changes would not be consistent with the original intent of Congress when it enacted the Act back in 1972. Current supporters of expansive Federal control cite to a 1972 conference report that the term "navigable waters" must be given the broadest possible constitutional interpretation. That statement must be placed in proper historic context.

Back in 1972, Congress expressed frustration that the Army Corps was not regulating to the fullest extent regulated by case law. Courts had confirmed that traditional navigable waters encompassed waters that are wholly intraState, which served as links in the chain of commerce and connected to land-based channels of transportation. Congress sought to expand Federal power to encompass features like Lake Chelan in Washington State, a body of water 55 miles long, almost 2 miles wide, and navigable in fact but intraState, and not connected to other water-based highways of commerce. This is what the 1972 conferees had in mind when they wanted to give the broadest possible constitutional interpretation to the phrase navigable waters. The founders of the Clean Water Act had no intent to subject isolated ponds, ephemeral washes, upland ditches or the like to Federal control.

Sweeping such features within the Federal regulatory net would raise serious constitutional questions. As the Supreme Court stated in the 2001 SWANCC case, regulation of isolated intraState waters invokes the outer limits of Congress' navigation authority. It also overrides the usual balance of Federal and State powers so intrinsic to our constitutional framework.

In a case prior to SWANCC, the Fourth Circuit Court of Appeals declared illegal Corps and EPA regulations over intraState lakes, wetlands, prairie potholes and other features that lacked any nexus whatsoever to traditional navigable waters. As the Fourth Circuit wrote in this case, were this regulation a statute duly enacted by Congress, it would present serious constitutional difficulties. Thus, if Congress now enacted legislation of such immense jurisdictional magnitude, it would immediately raise the specter of its constitutionality.

Advocates for a broader jurisdictional scope also maintain that the Supreme Court's recent decision in Rapanos confused the regulatory landscape. It is true that Rapanos failed to garner a majority of the Court. However, five Justices did agree to important principles that have provided necessary and valuable instruction. Chief among them is that while non-navigable features can be subject to

the Clean Water Act, they must bear more than a hypothetical or potential connection to traditionally navigable waters.

As Justice Kennedy wrote in concurrence, when wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the phrase navigable waters. As a result of this consensus among the Justices, lower courts are now taking a close look at the facts before them to determine if a particular non-navigable water feature has the required connection to navigable in fact waters. Clean Water Act law and policy only stand to gain as the agencies develop better factual evidence in the field to support their jurisdictional determinations over private property.

Thank you for your consideration. I look forward to answering your questions.

[The prepared statement of Mr. Desiderio follows:]

STATEMENT OF DUANE DESIDERIO, LEGAL AFFAIRS, STAFF VICE PRESIDENT, NATIONAL ASSOCIATION OF HOME BUILDERS

Madame Chair, Ranking Member Inhofe, and distinguished members of the Committee, thank you for the opportunity to testify on behalf of the National Association of Home Builders (NAHB). My name is Duane Desiderio and I am Staff Vice President for Legal Affairs at NAHB. I appreciate the opportunity to talk about the case law and legislative history surrounding the Clean Water Act (CWA) over the past 35 years. NAHB is a Washington, DC.-based trade association representing 235,000 corporate members that, in turn, employ millions of individuals in the home building, remodeling, multifamily construction, property management, subcontracting, design, housing finance, building product manufacturing, and light commercial construction industries. NAHB's chief goal is to provide and expand opportunities for all consumers to have safe, decent and affordable housing.

NAHB and its members have been advocates of the CWA since its inception. The CWA has helped the Nation make significant strides in improving the quality of our water resources. Due to the nature of home building activities, NAHB members must often obtain section 402 and 404 permits for their home building projects. Beyond the permit requirements, our members regularly design their projects to avoid sensitive areas, showcase natural resources, and mitigate adverse impacts. As an organization, NAHB has tirelessly advocated for the CWA and an associated permitting scheme that is consistent, predictable, timely, and focused on protecting true aquatic resources. NAHB has also strongly supported implementing measures that honor the congressional intent to provide a cooperative Federal and State program where the Corps' and EPA's efforts are complemented by states' efforts.

As you are well aware, while NAHB and its members have continued to work with the Corps and EPA on required permits, the housing industry has been experiencing one of the greatest housing downturns in recent memory. Housing affordability, accessible housing and housing finance, primary components to NAHB's mission and philosophy, have been severely impacted throughout 2007. NAHB believes that Congress should focus its limited time and resources on legislation to help homeowners overcome the current crisis, rather than pursue legislative ideas that will restrict the industry's ability to recover.

By improving its implementation, removing redundancy, and further clarifying roles, the CWA can do an even better job at facilitating compliance and protecting the aquatic environment. For years, landowners and regulators alike have been frustrated with the continued uncertainty with the scope of Federal jurisdiction over "the waters of the United States" under the CWA. However, legislative amendments or changes to the CWA that would vastly increase Federal regulatory power over private property, and open the door for increased litigation and permit requirements, will not benefit the home building industry. Such proposed changes are not consistent with the original legislative intent of the CWA back in 1972. They would also represent a marked departure from Supreme Court decisions and raise significant constitutional questions. This testimony will show:

1. In 1972, the 92d Congress was frustrated that, at that point in time, the Corps was taking a too-narrow view of its authority over traditional navigable waters. Thus, in enacting the CWA, Congress intended to expand jurisdiction to cover all aquatic links in the chain that served as a highway of interState commerce. The

original intent of the CWA framers in 1972 was to include a greater number of waters that served as channels of interState commerce, as long as they connected to land-borne modes of transportation—even though such aquatic features were themselves intraState and did not connect to other waterbodies. Review of the legislative history reveals that, in 1972, Congress did not intend to sweep all intraState features that did not support commercial traffic, such as isolated waters, drainage ditches, and erosional depressions, into the Federal regulatory net.

2. Prior to Solid Waste Agency of Northern Cook County (SWANCC), there was rampant confusion in the courts regarding the CWA's scope. Several of the U.S. circuit courts of appeals questioned the validity of the migratory bird rule, the primary theory used by Federal agencies to assert CWA jurisdiction over isolated, intraState waters in the pre-SWANCC era. One court went so far as to strike regulations of the U.S. Army Corps of Engineers ("Corps") as illegal, because they raised significant questions under the Commerce Clause of the U.S. Constitution. Contrary to the belief held by those who now seek CWA expansion beyond all magnitude, SWANCC clarified the pre-existing confusion in the courts regarding the status of isolated waters.

3. While the Rapanos decision did not garner a majority of the Court to articulate an over-arching test for CWA jurisdiction to apply in all situations, there are many areas of consensus among the five Justices who concurred in the judgment. Questions remain after Rapanos, but that case has clarified many points of law to which the lower courts are now adhering. Chief among them is that a majority of the Court stated that CWA jurisdiction could not be supported though a remote, attenuated connection to traditional navigable waters. Moreover, the Justices called for agency rulemaking, and the Federal Government's recent effort to address Rapanos with field guidance should be given a chance to work.

CONGRESS'S INTENT IN 1972, WHEN IT ENACTED THE CLEAN WATER ACT, WAS TO EXPAND ONLY THE SCOPE OF TRADITIONAL NAVIGABLE WATERS SERVING AS HIGHWAYS OF COMMERCE.

The Conference Report supporting the 1972 Act states:

The conferees fully intend 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.

S. Rep. No. 92-1236, at 144 (1972), reprinted in 1 congressional Research Serv., Legisl. Hist. of the Water Pollution Control Act Amends. of 1972, at 327 (hereafter, "CWA Legislative History"). To gain a full understanding of what the 1972 conferees actually intended, it is critical to consider the full context of congressional action in the water arena back in the 1970's. Scrutiny of the legislative history shows that the 1972 CWA indeed expanded the Federal role over water features, to advance the national effort to control water pollution. The crucial point, however, is this: Congress's intent in 1972 was to enlarge the scope of waters that served as highways for commerce. Its purpose was not to assert Federal authority over all intraState waters that had remote, trivial, or tenuous connections to interState commerce.

A. Early 1970's congressional Oversight Regarding the Rivers and Harbors Act.

In the months immediately preceding the CWA's 1972 enactment, Congress held hearings regarding the Corps's implementation of the Rivers and Harbors Act of 1899 ("RHA"). Among other things, the RHA outlaws "obstruction to the navigable capacity of any of the waters of the United States," and authorizes the Corps to issue permits for excavation or fill within "any navigable water of the United States." RHA section 10, 33 U.S.C. § 403. Congress expressed frustration that, at that time, the Corps took a too-constrictive view of its RHA jurisdiction over traditional navigable waters. See generally Virginia S. Albrecht and Stephen M. Nickelsburg, Could SWANCC Be Right? A New Look at the Legislative History of the Clean Water Act, 32 ELR 11042, 11044–46 (2002). A 1972 report from the House Committee on Government Operations stated that the Corps "narrowly defined the waters to which [the RHA's] provisions apply, and thus severely limited the scope of the law." H.R. Rep. 92–1323, at 27. Congress believed that the Corps unnecessarily bounded its RHA purview to the time-worn test for navigability announced 100 years earlier in The Daniel Ball, 77 U.S. 557, 563 (1870), that waters are "navigable in law when they are navigable in fact. And they are navigable in fact when they are used, or susceptible of being used, in their ordinary condition, as highways for commerce, over which trade or travel are or may be conducted." The House Committee believed that the Corps had ignored jurisprudence from the first

half of the 20th century, where the Supreme Court recognized that Federal authority stretched to encompass non-navigable waters that may be made navigable-in-fact with "reasonable improvements." United States v. Appalachian Elec. Power Co., 311 U.S. 377, 407-09 (1940). See also Econ. Light & Power Co. v. United States, 256 U.S. 113, 118 (1921) (non-navigable points on Des Plaines River "above the head of steamboat navigation" regarded as navigable-in-law).

Accordingly, in 1972 hearings, the House took the Corps to task for not exercising RHA jurisdiction consistent with modern judicial expansions. The Government Operations Committee reported that Corps regulations at that time "were based on similar language used over 100 years ago in. . . The Daniel Ball," but:

[M]ore 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.

H.R. Rep. No. 92-1323, at 29-30. Those "recent judicial opinions" cited by the House were nine cases from 1874 through 1965, including Appalachian Power and Economy Light. None of those decisions involved anything remotely resembling a drainage ditch, an ephemeral wash, or an isolated pond. Rather, this 1972 House Report endorsed Federal regulation over non-navigable features, or non-navigable segments of navigable waters, as needed to service the constitutional power to regulate navigation under the Commerce Clause:

The plenary Federal power over commerce must be able to develop properly with the needs of that commerce which is the reason for its existence. It cannot properly be said that the Federal power over navigation is enlarged by the improvements to the waterways. It is merely that improvements make applicable to certain waterways the existing power over commerce.

Appalachian Power, 311 U.S. at 409 (emphasis supplied). Thus, the court cases considered by Congress in its early 1970's review of the RHA upheld Federal authority over non-navigable features, but only as necessary to effectuate the Federal navigation power.

The 1972 House strongly encouraged the Corps to extend its regulations beyond the limits of The Daniel Ball, and to encompass large intraState bodies of water that connect as part of a land-based chain of commerce including roads, railroads, and other transportation channels. What Congress had in mind for Federal protection, which had escaped Corps regulation to that point in the early 1970's, were bodies of water like Lake Chelan in Washington State:

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. . . ." 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."

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 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 highway." Utah v. United States, 403 U.S. 9, 11 (1971). . . .

H.R. Rep. No. 92-1323, at 30 (emphasis supplied). The Government Operations Committee thus urged the Corps to enlarge its RHA jurisdiction, to regulate "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 when, how or by what mode, such use actually occurs, and irrespective of the quantity or kind of items of commerce such use affects." Id. at 31-32. Following this congressional oversight, the Corps expanded its regulations. See 37 Fed. Reg. 18279 (Sept. 9, 1972).

Thus, the issue for Congress in the early 1970's, while it deliberated the extent of the RHA's reach and Corps administrative interpretations there under, was that the agency did not go as far as it needed in regulating traditional navigable waters. Congress perceived ample room within the available bounds of the navigation power under the Commerce Clause—which the Corps was not exercising.

B. Legislative History of the 1972 Clean Water Act.

The legislative debate surrounding enactment of the Federal Water Pollution Control Act Amendments of 1972 draws important context from Congress's contemporaneous RHA analysis. Indeed, key Members of Congress who endorsed 1972 CWA reform cited portions of the RHA legislative history verbatim to explain their views of the new law.

It was logical for the CWA amenders to place heavy reliance on the congressional reports regarding the RHA. Both statutes depend on concepts of navigability as touchstones for their jurisdictional reach. Rep. John D. Dingell (D-MI), the House floor manager for the 1972 CWA, cited key passages from the House Government Operations Committee report discussed above, in making his personal statement on the CWA conference bill. In remarking on the conferees' new definition of "navigable waters" as "the waters of the United States" (which remains the current definition codified at 33 U.S.C. § 1362(7)), Rep. Dingell stated:

The new and broader [CWA] definition is in line with more recent judicial opinions which have substantially expanded that limited view of navigability—derived from the Daniel Ball case . . .—to include waterways "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, et cetera. . . .

1 CWA Legislative History, at 250 (emphasis supplied); compare to H.R. Rep. No. 92-1323, at 29-30 (discussed supra p. 5). Thus, just like Congress's study of the RHA, Rep. Dingell sought the same expansion of "navigable waters" beyond The Daniel Ball test, but he did so here for CWA purposes. And as evidence of these "more recent judicial opinions," Rep. Dingell cited the same nine court cases as the House did in its RHA report, including the Supreme Court decisions in Appalachian Power and Economy Light. Ibid. He drew a direct connection between the new CWA definition of "navigable waters" as "the waters of the United States," and the outmoded view that frustrated Congress during its parallel RHA review: "No longer are the old, narrow definitions of navigability, as determined by the [C]orps. . . going to govern matters covered by this [conference] bill." Id. at 251 (emphasis supplied).

Moreover, in opining on the new, broader "navigable waters" definition in the CWA conference bill, Rep. Dingell recalled the identical concern that the House addressed in the RHA context—namely, that Federal authority over the Nation's waters needed to cover wholly intraState bodies that are part of a highway of commerce (although they are not themselves connected to a continuous, water-based channel of navigation). Again, he used the same reasoning, wording, and case law from the Government Operations Committee RHA report on the Lake Chelan situation:

Although most interState commerce 150 years ago was accomplished on waterways, there is no requirement in the Constitution that the waterways 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 serve 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 a navigable interState or international commercial highway." Utah v. United States, 403 U.S. 9, 11 (1971). . . .

1 CWA Legislative History 250-51 (statement of Rep. Dingell) (emphasis supplied); compare to H.R. Rep. No. 92-1323, at 30 (discussed supra p. 6).

The sentiments of Sen. Edmund Muskie (D-ME) echoed those of Rep. Dingell. He remarked that the conference bill's new definition of "navigable waters" should be "given the broadest possible interpretation unencumbered by agency determinations," to keep with his intent that:

[S]uch 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 today. In such case the commerce on such waters would have a substantial economic effect on interState commerce.

1 CWA Legislative History at 178 (statement of Sen. Muskie) (emphasis supplied).

Accordingly, Rep. Dingell and Sen. Muskie certainly intended for the term "navigable waters" to mean something more than features presently navigable-in-fact. Appalachian Electric and similar cases allowed them to effectuate their intent. These decisions clarified that, consistent with Commerce Clause power, congressional authority over traditional navigable waters could extend to "reasons unrelated to navigation." John F. Baughman, Balancing Commerce, Geography and His-

tory: Defining the Navigable Waters of the United States, 90 Mich. L. Rev. 1028, 1040 (1992). Furthermore:

The Court [in Appalachian Electric] dropped the requirement that the waterway be navigable in its natural state. Rather, as long as a waterway could be made navigable through reasonable improvements, it would qualify as navigable. It is not even necessary that the improvements be made, or even authorized, just possible. The [C]ourt also endorsed the concept of 'indelible navigability,' under which a waterway once found to be navigable in fact remains permanently navigable in law. . . . Finally, the Court examined the physical characteristics of the river itself to demonstrate its capacity to support navigation. Under the Appalachian Electric doctrine the definition of navigable waters is extremely broad. . . .

Ibid (citations omitted and emphasis supplied). Accordingly, with the scope of traditional navigable waters now greatly enhanced, and with the Supreme Court's endorsement that Congress's authority over traditional navigable waters was plenary, regulation on a vastly expanded universe of waters could be justified by virtually any purpose, even if unrelated to navigation—such as environmental protection. This was what the CWA conferees had in mind when they wanted to give "the broadest possible constitutional interpretation" to the phrase "navigable waters." S. Rep. No. 92-1236, at 144 (1972), reprinted in CWA Legislative History, at 327. They accordingly defined "navigable waters" to mean "the waters of the United States."

But by no means did they intend to cover all water "in" the United States, as S. 1870, the "Clean Water Restoration Act of 2007," would do.[1] The expansion of jurisdiction that the 1972 Congress had in mind pertained to intraState features like Lake Chelan, which where not themselves part of a continuous highway of water-based commerce but provided linkages to land-based channels like roads, railroads, and telegraph lines. Thus, when the 1972 CWA conferees stated their intent was to give "navigable waters" the "broadest possible constitutional interpretation unencumbered by agency determinations," their context was the broadest possible authority over traditional navigable waters, insofar as they served as channels of interState commerce.

This is a key aspect of the Supreme Court's holding, almost 30 years later, in SWANCC. In grounding the intent of the 1972 legislature, the Court identified the CWA's constitutional basis as Congress's "commerce power over navigation," 531 U.S. at 165 n.2. The Court explained that, back in 1972, Congress intended to exercise "its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." Id. at 172. Parsing through the CWA's legislative history shows that the SWANCC Court was faithful to that original intent.

To conclude, the 1972 CWA significantly expanded Federal jurisdiction over water features. But that expansion solely pertained to the scope of traditional navigable waters, to encompass non-navigable features that affected navigation, or isolated intraState features that provided a link in the chain of commerce. There is no indication in the 1972 CWA's history that Congress intended to exponentially stretch Federal authority to the extremes contemplated in S. 1870. Congress's focus in 1972 was indeed to provide "the broadest possible constitutional interpretation" of traditional navigable waters, insofar as such bodies affect navigation or provide linkages to channels of interState commerce. However, there is simply no evidence that the CWA's founders sought to subject isolated ponds, erosional drainages, upland ditches, or the like, to Federal control.

II. Questions of CWA Jurisdiction Have Always Been Complicated. They Were Confusing in the Era Before SWANCC, and They Remain Confusing Today.

Advocates of S. 1870 seek to obtain the clarity they perceive existed from the era before the 2001 Supreme Court decision in Solid Waste Agency of Northern Cook County v. United States Army Corps of Eng'rs (SWANCC), 531 U.S. 159 (2001). This myth must be dispelled. As the legal scholarship prior to SWANCC overwhelmingly shows, questions about the CWA's scope were as hotly contested then as they are today.[2] An analysis of the case law bears out the CWA jurisdictional controversy between 1985 and 2001.

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[1]1 S. 1870 would re-define "waters of the United States" to mean "all waters subject to the ebb and flow of the tide, the territorial seas, and all interState and intraState waters and their tributaries, including lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, natural ponds, and all impoundments of the foregoing, to the fullest extent that these waters, or activities affecting these waters, are subject to the legislative power of Congress under the Constitution." S. 1870, § 4(3), lines 14-25 (emphasis supplied).

[2]See, e.g., Michael C. Blumm and D. Bernhard Zaleha, Federal Wetlands Protection Under the Clean Water Act: Regulatory Ambivalence, Intergovernmental Tension, and a Call for Re-

Continued

A. Pre-SWANCC Cases.

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985), sowed the seeds for the pre-SWANCC confusion. The Court decided that wetlands which "actually abut[ted] on a navigable waterway" were "adjacent" within Corps regulations and properly subject to CWA authority. Id. at 135. The Court specifically left open the question of whether the CWA covered "wetlands that are not adjacent to bodies of open water." Id. at 131, n. 8. Following Riverside Bayview, courts and stakeholders struggled with this unanswered question. Debate swirled around the statutory propriety and constitutional validity of the regulatory vehicles used by Federal agencies to extend their professed authority over isolated intraState waters—namely, the "other waters" regulation and the "migratory bird rule."

In defining "the waters of the United States," Corps and EPA regulations cover: waters that are or could be used for navigation; tidal waters; interState waters; tributaries of jurisdictional waters; and wetlands adjacent to jurisdictional waters. 33 C.F.R. § 328.3(a)(Corps); 40 C.F.R. § 230.3(s)(EPA). They also profess to cover:

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 construction of which could affect interState commerce. . . .

Id. § 328.3(a)(iii)(Corps); § 230.3(s)(iii)(EPA). This regulation remains on the agencies' books today.[3] Further, in the preamble to 1986 CWA regulations, the agencies defined "other waters" within (a)(iii) to include those waters:

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. . . .

51 Fed. Reg. 42,206, 41,217 (Nov. 13, 1986). Reading subsection (a)(iii) and the migratory bird rule conjunctively, the Corps and EPA deemed that a wetland (or "other water") had a sufficient effect on commerce if it could possibly be used by migratory birds crossing State lines. Accordingly, the migratory bird rule was "a limiting rule with no limits." J. Blanding Holman, After United States v. Lopez: Can the Clean Water Act and the Endangered Species Act Survive Attack? 15 Va. Envtl. L.J. 139, 197 (1995). CWA control was thereby extended to "other waters" that were susceptible to possible bird use—and what backyard puddle, schoolyard field, or farm lot pond isn't subject to possible bird use? Indeed, under the Corps's delineation guidelines, an area can be completely dry at the surface for 365 days per year, year in and year out, and still qualify as a jurisdictional wetland. See Environmental Laboratory, Dep't of the Army, Technical Rep. Y-87-1, Corps of Engineers Wetland Delineation Manual 34-41 (Jan. 1987). Thus, before SWANCC, the migratory bird rule brought into Federal jurisdiction millions of shallow, damp low spots throughout the United States, because birds "could" use them.

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form, 60 U. Colo. L. Rev. 695, 713 (1989) ("[t]he issues of which waters and which activities are subject to [CWA] regulation have been at the heart of most of the controversy surrounding the program"); Stephen M. Johnson, Federal Regulation of Isolated Wetlands, 23 Envtl. L. 1, 42 (1993) ("the dispute regarding the Federal Government's jurisdiction to regulate isolated wetlands remains unresolved"); J. Blanding Holman, After United States v. Lopez: Can the Clean Water Act and the Endangered Species Act Survive Attack? 15 Va. Envtl. L.J. 139, 195 (1995) ("[t]he regulation of isolated wetlands under the CWA based on the migratory bird rule was on tenuous Commerce Clause grounds even before Lopez was decided in the spring of 1995); Deanne E. Parker, Will United States v. Lopez Substantially Affect Federal Constitutional Authority to Regulate Isolated Wetlands? 16 J. Energy Nat. Resources & Envtl. L. 453 (1996) ("[o]ne of the most controversial assertions of Federal jurisdiction is the regulation of isolated wetlands under the umbrella of the Clean Water Act"); Marni A. Gelb, Leslie Salt Co. v. United States: Have Migratory Birds Carried the Commerce Clause Across the Borders of Reason? 8 Vill. Envtl. L. J. 291 (1997) (Ninth Circuit decision on migratory bird rule "exemplifies the controversy concerning the proper scope of the CWA's jurisdiction"); Vickie V. Sutton, Wetlands Protection—A Goal Without a Statute, 7 S.C. Envtl. L.J. 179, 204 (Fall 1998) (discussing "the need to find a genuine Constitutional grounding for the protection of wetlands, the Constitutional basis of wetlands regulation, and the conflicts with State property laws"); Jonathan H. Adler, Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetlands Regulation, 29 Envtl. L. 1,4 (1999) ("[t]he Federal wetlands regulations promulgated under section 404 of the Clean Water Act have been one of the more contentious areas of Federal environmental policy for the past several years, spawning substantial litigation and political controversy").

[3] S. 1870 would essentially codify the (a)(iii) regulation. See supra n. 1 (nearly identical language of S. 1870's definition of "waters of the United States" compared to (a)(iii) regulation). However, as will be discussed below, the U.S. Court of Appeals for the Fourth Circuit struck the (a)(iii) regulation as illegal because it presented serious constitutional questions as to its validity under the Commerce Clause. United States v. Wilson, 133 F.3d 251 (4th Cir. 1997).

The infinite scope that the "other waters" regulation and the migratory bird rule attempted to achieve predictably rendered them targets for court challenges throughout the 1990's—belying any claims of jurisdictional clarity before SWANCC. When the Corps applied the bird rule to assert jurisdiction over certain wetlands in the Commonwealth of Virginia, the landowner argued the rule was invalid. The U.S. Court of Appeals for the Fourth Circuit agreed, upholding a district court decision that the bird rule was illegal under the Administrative Procedure Act because it was a substantive rule that was never subject to notice and comment rulemaking proceedings. Tabb Lakes, Ltd. v. United States, 715 F. Supp. 726 (E.D. Va. 1988), aff'd, 885 F.2d 866 (4th Cir. 1989). In response to Tabb Lakes, the Corps and EPA issued guidance that they "intend to undertake as soon as possible an APA rulemaking process regarding jurisdiction over isolated waters." See U.S. EPA and U.S. Dep't of Army, "Clean Water Act Section 404 Jurisdiction Over Isolated Waters in Light of Tabb Lakes v. United States" (Jan. 24, 1990). Almost 18 years later, the agencies still have not initiated such a rulemaking.

The Seventh Circuit seriously struggled with the bird rule in the decade before SWANCC. In Hoffman Homes, Inc. v. EPA, 961 F.2d 1310 (1992), a home builder filled a 0.8 acre isolated, intrastate, bowl-shaped depression, without a permit. EPA deemed the feature a jurisdictional wetland. The agency presented no evidence that migratory birds or any other wildlife used the area, but it nonetheless issued a compliance order and required site restoration. After a lengthy evidentiary hearing, an administrative law judge decided EPA had no CWA authority over the isolated wetland because it had no effect on interState commerce. But then EPA's chief judicial officer reversed, imposing a $50,000 fine and deciding that the wetland had a "minimal, potential effect" on interState commerce because migratory birds could use the area. Id. at 1312. Following these contradictory administrative challenges—even EPA did not know how to treat isolated wetlands at this time—the courts became involved. The Seventh Circuit found "the Clean Water Act does not give the EPA the authority to regulate isolated wetlands. Isolated wetlands, unlike adjacent wetlands, have no hydrological connection to any waterbody." Id. at 1314. Moreover, the Seventh Circuit further decided that the isolated wetland was "not within the reach of the Commerce Clause," and this was a "second reason" to reverse EPA. Id. at 1317. Because "EPA ha[d] not even attempted to construct a theory of how filling [the wetland] affects interState commerce," application of the bird rule in this instance could not be sustained under the Commerce Clause: "The idea that the potential presence of migrating birds itself affects commerce is. . . far-fetched." Id. at 1320.

EPA then petitioned for rehearing, and the Seventh Circuit vacated its prior decision with no explanation and a directive for the parties to explore settlement to moot the need for a court decision. Hoffman Homes, Inc. v. EPA, 975 F.2d 1554. Those discussions failed, and the case went back to the original panel for a new decision. This time, the Seventh Circuit flip-flopped on its policy decision but maintained its judgment against EPA. The court now decided that the migratory bird rule was consistent with the CWA and within Commerce Clause limits. Hoffman Homes, Inc. v. EPA, 999 F.2d 256, 261 (7th Cir. 1993). Thus, the same Seventh Circuit panel reached contradictory opinions on the migratory bird rule and its constitutional implications—in the same case and on the same set of facts—in under 18 months.

A Ninth Circuit case from the same period wended a similarly tortured path through the judicial system. In Leslie Salt Co. v. United States, 700 F. Supp. 476 (N.D. Cal. 1989), the Corps mobilized the bird rule to assert CWA authority over calcium chloride pits at a salt mining site, which collected rainwater that migrating birds could possibly use. The district court stated its role was "not to sit as a super-ecologist" (id. at 478), and it decided that the pits did not fall within the (a)(iii) regulation: "the mere ponding of water on otherwise dry land is not enough to convert that land into 'other waters.'" Id. at 485. On appeal, a 2–1 Ninth Circuit panel reversed, 896 F.2d 354, 360 (9th Cir. 1990). The court rendered the "legal conclusion" that the Commerce Clause could be satisfied upon a showing that migratory birds and one endangered species "may have used the property." Id. at 360-61. A dissent, however, decided that the pits were not "other waters" because "there is nothing in the record to show that water flows directly or indirectly. . . [from the pits] into another body of water." Id. at 361 (Rymer, J., dissenting). There was a remand back to the trial court (820 F. Supp. 478 (N.D. Cal. 1992), followed by another appeal, where the Ninth Circuit decided its prior decision "cannot be considered clearly erroneous"—hardly a ringing judicial endorsement that the Commerce Clause permitted regulation of any wet spot due to potential bird use. 55 F.3d 1388, 1396 (9th Cir. 1995). The Ninth Circuit admitted that the migratory bird rule "certainly tests the limits of Congress's commerce powers and, some would argue, the bounds of reason."

Id. But, "while Cargill's arguments might well deserve closer consideration," the court had enough of the issue and refused to re-consider its prior decision. Id. Moreover, the Ninth Circuit dodged the conclusion reached by the Fourth Circuit in Tabb Lakes, as to whether the bird rule required public notice and comment proceedings. The court stated if that issue was submitted earlier in the proceedings, "a much more detailed examination of the migratory bird rule's effect on agency decision-making might be in order." Id. at 1394.

A request was then put to the Supreme Court to address the validity of the bird rule, but certiorari was denied. Cargill, Inc. v. United States, 516 U.S. 955 (2005). However, Justice Thomas issued a rare dissent from the denial of certiorari. In light of the Court's decision in United States v. Lopez, 514 U.S. 549 (1995) from the immediately prior term, he expressed "serious doubts about the propriety of the Corps' assertion of jurisdiction" based on migratory bird use. Cargill, 516 U.S. at 958 (Thomas, J. dissenting from cert. denial). Justice Thomas further questioned the validity of the (a)(iii) regulation, because "[t]he 'other waters' provision. . . does not require an activity substantially affect interState commerce, only that the activity 'could affect interState or foreign commerce.'" Id. (original emphasis). All of this "stretches Congress' Commerce Clause powers beyond the breaking point." Id.

It would take another 6 years before the high Court considered the merits of the migratory bird rule in SWANCC. In the interim, the Fourth Circuit widened the judicial divide on CWA authority. United States v. Wilson, 133 F.3d 251 (4th Cir. 1997), struck the Corps's (a)(iii) regulation as illegal because it brushed against the Constitution's outer limits. The court found the "other waters" regulation "is unauthorized by the Clean Water Act as limited by the Commerce Clause and therefore is invalid." Id. at 254:

The [(a)(iii)] regulation requires neither that the regulated activity have a substantial effect on interState commerce, nor that the covered waters have any sort of nexus with navigable, or even interstate, waters. Were this regulation a statute, duly enacted by Congress, it would present serious constitutional difficulties, because, at least at first blush, it would appear to exceed congressional authority under the Commerce Clause. . . . [A]s a matter of statutory construction, one would expect that the phrase "waters of the United States" when used to define the phrase "navigable waters" refers to waters which, if not navigable in fact, are at least interState or closely related to navigable or interState waters.

Id. at 257 (underscoring original; italics supplied). The Fourth Circuit further found that a jury instruction "intolerably stretche[d]" CWA jurisdiction because it "included adjacent wetlands 'even without a direct or indirect surface connection to other waters of the United States.'" Id. at 258 (original emphasis). Following the Wilson decision, the Corps and EPA issued a memorandum stating that they intended to initiate a rulemaking on the (a)(iii) regulation. See U.S. EPA and U.S. Dept. of Army, "Guidance for Corps and EPA Field Offices Regarding Clean Water Act Section 404 Jurisdiction Over Isolated Waters in Light of United States v. James J. Wilson" (May 29, 1998). Almost a decade later, the agencies have not commenced a rulemaking on the validity of the (a)(iii) regulation or their CWA authority to regulate isolated waters.

Thus, the era of CWA jurisprudence leading up to SWANCC was most decidedly not clear. Then, as now, the courts struggled with questions regarding connections to interState waters, and there was no consensus on the required nexus between wetlands and traditional navigable waters. These very same issues are with us today, as stakeholders continue to consider the extent of CWA jurisdiction following SWANCC. As a congressional research report explains, "[f]ederal regulation of isolated waters—nonnavigable, intraState waters lacking surface hydrological connections to navigable waters—plainly raises the issue of whether an adequate nexus with interState commerce is present." Robert Meltz, congressional Research Service, "Report for Congress—Constitutional Bounds on Congress' Ability to Protect the Environment," at 9 (RL 30670; updated Dec. 18, 2002), at 9. The argument that S. 1870 would afford clarity to CWA jurisdiction, the likes which have not been seen since SWANCC, is not convincing. S. 1870 would simply bring us back to the present.

B. Solid Waste Agency of Northern Cook County

In 2001, the Supreme Court decided SWANCC, 531 U.S. 159 (2001). The case concerned whether CWA section 404(a) conferred Corps authority over isolated, seasonal ponds at an abandoned sand and gravel pit in suburban Chicago, because they were susceptible to migratory bird use. In briefing at the certiorari stage, the petitioners asked the Court to intervene to address the judicial confusion created by Tabb Lakes, Hoffman Homes, Leslie Salt and Wilson, as discussed above. The SWANCC Court itself recognized that it now had the opportunity to answer the unresolved and disputed question from Riverside Bayview, as to whether the CWA cov-

ered "'wetlands that are not adjacent to bodes of open water. . . ." Id. at 167-68 (citing Riverside Bayview, 474 U.S. at 131-132 n. 8).

The Court answered, "no." It identified the constitutional authority for the CWA as the "commerce power over navigation," 531 U.S. at 165 n.2, and explained that Congress intended to exercise "its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." Id. at 172. Former Chief Justice Rehnquist, writing for the majority, observed that the holding in Riverside Bayview "was based in large measure on Congress' unequivocal acquiescence to, and approval of, the Corps' regulations interpreting the CWA to cover wetlands adjacent to navigable waters." SWANCC, 531 U.S. at 167. The majority thus rejected the Corps's assertion of jurisdiction because "the text of the statute will not allow" coverage of ponds that "are not adjacent to open water." 531 U.S. at 168 (original emphasis). The Court found "§ 404(a) to be clear" that non-navigable isolated ponds fell outside the CWA's scope. Id. at 172. Otherwise, the word "navigable" in the CWA would "'not have any independent significance'" and "no effect whatever." Id. The majority reinforced the need for an "inseparable" relationship between non-navigable and navigable features: "It was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in Riverside Bayview Homes." Id. at 167 (emphasis added). Accordingly, finding no inseparable relationship between the non-navigable, isolated ponds at issue in SWANCC and a body of "open water," the Court held that the Corps's claim of jurisdiction "exceeds the authority granted to [the Corps] under section 404(a) of the CWA." Id. at 174. In the end, the Corps was unable to "overcome[e] the plain text and import" of the CWA, so its assertion of jurisdiction over isolated ponds received no deference. Id. at 170.

SWANCC also raised the constitutional question regarding the bird rule's validity under the Commerce Clause, but the Court avoided it by invoking the "clear statement" rule. "This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." Id. at 172–73. Where an agency interprets a statute in a manner that "invokes the outer limits of Congress's power" or "overrides. . . [the] usual constitutional balance of Federal and State powers," the Supreme Court "expect[s] a clear indication that Congress intended that result." Id. The majority found that the migratory bird rule was just such an interpretation that pressed against the outer boundaries of the Commerce Clause which, "though broad, is not unlimited." Id. at 173 (citing United States v. Morrison, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995)). SWANCC found "nothing approaching a clear statement from Congress that it intended § 404(a) to reach an abandoned sand and gravel pit. . . ." Id at 174. Furthermore, the clear statement requirement is "heightened" where an agency interprets a statute in a manner that would "alter[ ] the Federal-State framework by permitting Federal encroachment upon a traditional State power." Id. at 173. The regulation of land and water use within a state's borders is a traditional State function, and the Court found that claims of "Federal jurisdiction over ponds and mudflats falling within the 'Migratory Bird Rule would result in a significant impingement" of State prerogatives. Id. at 174 (citing Hess v. Port Authority Trans-Hudson Corporation, 513 U.S. 30, 44 (1994)). In the end, the Court held that the (a)(iii) regulation, "as clarified and applied to petitioner's balefill site pursuant to the 'Migratory Bird Rule'. . . exceeds the authority granted to respondents under § 404(a) of the CWA." Id. at 174.

Like any case, SWANCC did not resolve all of the pertinent statutory and constitutional questions implicated in the matter. And there has been some disagreement over the breadth of the Court's holding. Those advocating a narrow view State that the majority merely invalidated the bird rule and nothing more. However, much of the language in the Court's opinion goes beyond the bird rule, and instructs that all isolated, intraState waters are outside the CWA's scope. Indeed, the SWANCC dissenters adopted this broader view, reading the majority opinion as "excising" from the CWA "intermittent rivers, streams, tributaries and perched wetlands that are not contiguous or adjacent to navigable waters." Id. at 189, 190 n.14 (Stevens, J., dissenting). "[D]epending on which part of the opinion one looks at," SWANCC held "either that Congress never intended section 404 to extend to isolated waters at all, or that Congress never intended section 404 to extend to isolated waters solely on the basis of the migratory bird rule." Robert Meltz, congressional Research Service, "Report for Congress—Constitutional Bounds on Congress' Ability to Protect the Environment," at 9 (RL 30670; updated Dec. 18, 2002), at 10.

In any event, SWANCC afforded much needed clarity to the confusing and contradictory case law that preceded it. At a minimum, the migratory bird rule—the jurisdictional modus operandi of the Corps and EPA throughout the 1990's—was de-

clared illegal. The agencies could no longer base their jurisdictional determinations on it, and were forced to develop other theories that provide Federal jurisdiction over a body of water.

III. THE 2006 RAPANOS DECISION HAS HELPED CLARIFY THE CWA'S SCOPE.

To summarize thus far, as the CWA entered its third decade, two Supreme Court decisions provided directives on the Act's scope. First, Riverside Bayview in 1985 ruled that wetlands, though non-navigable themselves, were subject to Corps and EPA jurisdiction if they actually abutted a traditional navigable waterway. In these circumstances, they were "adjacent" and appropriately within Federal power. Second, SWANCC in 2001 decided an open question from Riverside Bayview, ruling that isolated, intraState waters fall outside the Act.

Thus, on one end of the jurisdictional spectrum, abutting wetlands are "in." On the other end of the spectrum, isolated, intraState features are "out." This was the jurisprudential landscape after 2001. But after the migratory bird rule was declared illegal, the Federal agencies needed a new rule for jurisdiction. Through litigation briefing and not from any deliberative rulemaking or policy process, they developed "the hydrologic connection theory." Like the bird rule before it, the hydrologic connection theory spawned much confusion and controversy in the courts.

A. Pre-Rapanos Cases.

Under the hydrologic connection theory, the Corps and EPA asserted CWA authority over non-navigable features simply if they had a possible aquatic link to jurisdictional waters. Cases abounded with similar fact patterns: wetlands lied next to an upland ditch, and water in that ditch flowed through a series of more non-navigable ditches, canals, and creeks, which ultimately connected to truly navigable waters miles away. The distant wetland would be deemed jurisdictional in either of two ways. First, the agencies would boldly claim that because of the hydrologic connection, the wetland was adjacent to the truly navigable water, no matter the distance between them. In the alternative, the agencies would assert that the non-navigable drainage ditch was a tributary to the truly navigable water, and that the wetland was therefore adjacent to a tributary. In either case, the agencies declared that every inch along the watercourse was subject to CWA coverage, as they traced drops of water from one point to the next.

United States v. Deaton, 332 F.3d 698 (4th Cir. 2003), cert. denied, 541 U.S. 972 (2004), exemplified the Corps's use of the hydrologic connection theory. The agency brought a civil action against the Deatons because they discharged fill without a section 404 permit, by digging a drainage ditch through wetlands on their property. That ditch drained into a rural roadside ditch fronting their parcel. The Corps claimed that the roadside ditch was a "tributary" to the navigable-in-fact Wicomico River, which lied eight miles away over a course punctuated by five culverts, three ponds, and five dams. They deemed the wetlands "adjacent" to the ditch "tributary" and were thus jurisdictional. Id. at 702–03. Nothing in the record showed that a single grain of sediment left the site and entered the roadside ditch, much less flowed downstream to reach a truly navigable water.

The Fourth Circuit upheld the Corps's jurisdiction. Ignoring the "clear statement" rule (see supra p. 17), the court leapfrogged to the constitutional issue first. Downplaying the specific roadside ditch at issue, the court asked whether, categorically, non-navigable tributaries to navigable waters could be regulated under the Commerce Clause. Id. at 707–08. It reasoned that any pollutant in a non-navigable tributary has the "potential to move downstream" and degrade navigable waters and, thus, the Corps's regulation of tributaries was constitutional. Id. at 709. Then the Fourth Circuit turned to the statutory question. It deferred to the agency's interpretation under the CWA that the roadside ditch was part of a "tributary system, that is, all of the streams whose water eventually flows into navigable waters." Id. at 710 (emphasis added). Because there was "a" remote nexus between the roadside ditch and the Wicomico River, the Fourth Circuit concluded that "[t]he Act thus reaches to the roadside ditch and its adjacent wetlands." Id. at 712.

The Fifth Circuit pointedly disagreed with Deaton. In In re Needham, 354 F.3d 340 (5th Cir. 2003), oil was pumped from a containment basin and spilled into a drainage ditch. The ditch flowed into Bayou Cutoff, which led to Bayou Folse, which was adjacent to Company Canal, "an open body of navigable water." Id. at 346. Because oil residue was found 10–12 miles away in Bayou Folse, which flowed "directly into" the navigable-in-fact Company Canal, the court found the spill "implicated navigable waters and triggered Federal regulatory jurisdiction. . . ." Id. at 347. It stressed there was a "significant nexus" between Bayou Folse and Company Canal. Id. However, the Fifth Circuit considered and rejected the government's ar-

gument that statutory "navigable waters" means "all waters . . . that have any hydrological connection with 'navigable water.'" Needham, 354 F.3d at 345. The Needham court recognized that Deaton accepted "this expansive interpretation" (id.), but declared that theory "unsustainable under SWANCC" because "[t]he CWA and the [Oil Pollution Act] are not so broad as to permit the Federal Government to impose regulations over 'tributaries' that are neither themselves navigable nor truly adjacent to navigable waters." Id. The court likewise held that "the term 'adjacent' cannot include every possible source of water that eventually flows into a navigable-in-fact waterway." Id. at 347. And it refused to defer to the hydrologic connection theory, because the position advanced by the government pushed "to the outer limits of the Commerce Clause and raise[s] serious constitutional questions. . . ." Id. at 345 n. 8.

Just as birds might stop anywhere, all water must flow somewhere. Thus, the hydrologic connection theory proved just as limitless, and therefore controversial, as the migratory bird rule; both jurisdictional tests presupposed Federal power based on potential connections to traditional navigable waters and interState commerce. It is thus unsurprising that judicial debate was re-ignited during the "hydrologic connection" years. The stage was set for the Supreme Court to re-engage in Rapanos v. United States, 126 S.Ct 2208 (2006). Indeed, as shown below, what SWANCC was for the migratory bird rule, Rapanos became for the hydrologic connection theory.

B. Rapanos and its Areas of Consensus.

Rapanos concerned two consolidated cases: Rapanos v. United States, 376 F.3d 704 (6th Cir. 2004), and Carabell v. U.S. Army Corps of Eng'rs, 391 F.3d 704 (6th Cir. 2004). They both followed the same, familiar fact-pattern: wetlands miles away from traditional navigable waters, that drained through multiple ditches, culverts, and creeks, which eventually flowed to traditional navigable waters. In both matters, the Sixth Circuit upheld Corps determinations that wetlands, connected through an attenuated aquatic chain to navigable-in-fact bodies, were jurisdictional.

The Court issued a 4-1-4 plurality opinion. Five of the Rapanos Justices concurred in the judgment that the Corps's assertion of jurisdiction under the hydrologic connection theory was impermissible, and they vacated the Sixth Circuits' decision affirming the agency's actions. See Rapanos, 126 S.Ct. at 2235 (Scalia, J., plurality); id. at 252 (Kennedy, J., concurrence). However, the Justices could not form a majority as to the proper test for CWA jurisdiction. Justice Scalia, writing for a plurality that included himself, Chief Justice Roberts, and Justices Thomas and Alito, decided that CWA coverage extended to "only those relatively permanent, standing, or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'stream[s,]. . . oceans, rivers, [and] lakes." Id. at 2225. The plurality also developed a jurisdictional rule for wetlands in particular: "[O]nly those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and 'wetlands,' are 'adjacent to' such waters and covered by the Act." Id. at 2226 (original emphasis).

Justice Kennedy, who concurred in the judgment, wrote separately for himself. He elevated the concept of "significant nexus," first used by the Court in SWANCC to describe the nature of the aquatic features in Riverside Bayview, to the appropriate test for jurisdiction: "[W]etlands 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.'" Rapanos, 126 S.Ct. at 2248 (Kennedy, J., concurring; emphasis supplied). "Consistent with SWANCC and Riverside Bayview and with the need to give the term 'navigable' some meaning, the Corps' jurisdiction over wetlands depends on a significant nexus between the wetlands in question and navigable waters in the traditional sense." Id. at 2249 (emphasis supplied.) Justice Stevens, writing in a dissent joined by Justices Breyer, Souter, and Ginsburg, would have accepted the hydrologic connection theory, upheld the Corps's exercise of jurisdiction, and affirmed the Sixth Circuit's decisions. Id. at 2252 (Stevens, J., dissenting).

Some have maligned Rapanos because the Justices failed to reach a majority opinion that announced the "correct" test for CWA jurisdiction, talismanic and overarching for all cases. Such criticism is unjustified. The Supreme Court has never announced a definitive test for CWA jurisdiction; in Riverside Bayview we learned that "actually abutting" wetlands are covered, and in SWANCC we learned that isolated, intraState waters are not. But while neither opinion articulated an uber-test for CWA jurisdiction, this does not diminish the important guidance they provided in ascertaining the Act's scope. The same holds true for Rapanos.

Moreover, advocates for legislation like S. 1870 have urged that the appropriate response to Rapanos is simply to cast the broadest possible regulatory net and cod-

ify Federal power over all intraState waters. That response would be needlessly extreme. It ignores that the five concurring Justices reached important consensus on many issues. They re-confirmed Riverside Bayview, that jurisdiction categorically extends to adjacent wetlands that actually abut navigable-in-fact waters.[4] They also re-confirmed SWANCC, that CWA jurisdiction cannot cover isolated aquatic features, at least to the extent where migratory bird use is offered to provide the requisite connection to interState commerce.[5]

The most significant clarification that Rapanos provided was that the five Justices agreed CWA jurisdiction does not reach non-navigable features merely because they are hydrologically connected to downstream navigable-in-fact water.[6] In short, the hydrologic connection theory was disapproved—just as the migratory bird rule was disapproved in SWANCC.

But there are other key areas of consensus as well. Review of Rapanos shows that five Justices would reach agreement on the following salient points:

1. Agency rulemaking is needed to clarify the CWA's jurisdictional scope. Even dissenting Justice Breyer wrote separately to emphasize this point.

- Chief Justice Roberts: The Agencies would be "afforded generous leeway" if they conducted a rulemaking interpreting statutory "navigable waters." Id. at 2235. "[T]he Corps and EPA would have enjoyed plenty of room to operate in developing some notion of an outer bound to the reach of their authority." Id. at 2236 (original emphasis).
- Justice Breyer: The various Rapanos opinions, "taken together, call for the Army Corps of Engineers to write new regulations, and speedily so." Id. at 2266.
- Justice Kennedy: "Through 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 ecosystem incorporating navigable waters." Id. at 2249.

2. The Sixth Circuit decided the question of CWA jurisdiction wrongly in both Rapanos and Carabell.

- Justice Scalia: "We vacate the judgments of the Sixth Circuit in both No. 04-1034 [Rapanos] and No. 04–1384 [Carabell], and remand both cases for further proceedings." Id. at 2235.
- Justice Kennedy: "In these consolidated cases I would vacate the judgments of the Court of Appeals and remand for consideration whether the specific wetlands at issue possess a significant nexus with navigable waters." Id. at 2252.

3. The CWA's scope is not restricted to traditional navigable waters.

- Justice Scalia: "The Act's term 'navigable waters' includes something more than traditional navigable waters. . . ." 126 S. Ct. at 2220. The Scalia plurality "af-

[4] Justice Scalia: "Riverside Bayview. . . explicitly rejected. . . case-by-case determinations of ecological significance for the jurisdictional question whether a wetland is covered, holding instead that all physically connected wetlands are covered." Rapanos v. United States, 126 S.Ct. 2208, 2233 (original emphasis). "Since the wetlands at issue in Riverside Bayview actually abutted waters of the United States, the case could not possibly have held that 'neighboring' wetlands came within the Corps' jurisdiction." Id. at 2226 n.10. Justice Kennedy: "When the Corps seeks to regulate wetlands adjacent to navigable-in-fact waters, it may rely on adjacency to establish its jurisdiction. Absent more specific regulations, however, the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries." Id. at 2249 (emphasis supplied).

[5] Justice Scalia: "Isolated ponds were not 'waters of the United States' in their own right [in SWANCC,] and presented no boundary-drawing problem that would have justified the invocation of ecological factors to treat them as such." Id. at 2226. Because SWANCC excluded isolated ponds from CWA jurisdiction "which, after all, might at least be described as 'waters' in their own right," then "a fortiori, isolated, swampy lands do not constitute 'waters of the United States.'" Id. at 2230 (original emphasis). Justice Kennedy: In SWANCC, the Corps "assert[ed] jurisdiction pursuant to a regulation called the 'Migratory Bird Rule'. . . . The Court rejected this theory." Id. at 224-41.

[6] Justice Scalia: Rejecting the Agencies' hydrologic connection theory in holding that the phrase "the waters of the United States" "cannot bear the expansive meaning that the Corps would give it." Id. at 2220. "[R]elatively continuous flow is a necessary condition for qualification as a 'water,' not an adequate condition." Id. at 2223 n.7. Justice Kennedy: "The Corps' theory of jurisdiction in these consolidated cases—adjacency to tributaries however remote and insubstantial—raises concerns that go beyond the holding of Riverside Bayview, and so the Corps' assertion of jurisdiction cannot rest on that case." Id. at 2250. "[M]ere hydrologic connection should not suffice in all cases; the connection may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood." Id. at 2251.

firmatively reject[ed]" an interpretation that the CWA "includes only navigable-in-fact waters." Id. at 2231.

- Justice Kennedy: "Congress' choice of words creates difficulties, for the Act contemplates regulation of certain 'navigable waters" that are not in fact navigable." Id. at 2247.

4. The word "navigable," in the phrase "navigable waters," has meaning.

- Justice Scalia: "[T]he traditional term 'navigable waters'. . . carries some of its original substance. . . ." Id. at 2222 (original emphasis).
- Justice Kennedy: "[T]he dissent reads a central requirement out [of the CWA]—namely, the requirement that the word 'navigable' in 'navigable waters' be given some importance." Id. at 2247. "Consistent with SWANCC and Riverside Bayview and with the need to give the term 'navigable' some meaning, the Corps' jurisdiction over wetlands depends on a significant nexus between the wetlands in question and navigable waters in the traditional sense." Id. at 2249.

5. A mere hydrological connection cannot provide the basis for CWA jurisdiction.

- Justice Scalia: Rejecting the Agencies' hydrologic connection theory in holding that the phrase "the waters of the United States" "cannot bear the expansive meaning that the Corps would give it." Id. at 2220. "[R]elatively continuous flow is a necessary condition for qualification as a 'water,' not an adequate condition." Id. at 2223 n.7.
- Justice Kennedy: Criticizing the dissent because it "would permit Federal regulation whenever wetlands lie alongside a ditch or drain, however remote or insubstantial, that may flow into traditional navigable waters." Id. at 2247. "The Corps' theory of jurisdiction in these consolidated cases—adjacency to tributaries however remote and insubstantial—raises concerns that go beyond the holding of Riverside Bayview [which extended the CWA to encompass wetlands that actually abut traditionally navigable waters], and so the Corps' assertion of jurisdiction cannot rest on that case." Id. at 2250. "[M]ere hydrologic connection should not suffice in all cases; the connection may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood." Id. at 2251.

6. Hypothetical, speculative, insubstantial, or eventual water flows do not support CWA jurisdiction.

- Justice Scalia: "[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 'stream[s,]. . . oceans, rivers, [and] lakes." Id. at 2225 (emphasis supplied). "[O]nly those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and 'wetlands,' are 'adjacent to' such waters and covered by the Act." Id. at 2226 (original emphasis).[7]

In discussing the boundary drawing problem, the Rapanos plurality noted that in Riverside Bayview the Supreme Court had acknowledged that there was an inherent ambiguity in drawing the boundaries of any "waters": "[T]he Corps must necessarily choose some point at which water ends and land begins. Our common experience tells us that this is often no easy task: the transition from water to solid ground is not necessarily or even typically an abrupt one. Rather, between open waters and dry land may lie shallows, marshes, mudflats, swamps, bogs-in short, a huge array of areas that are not wholly aquatic but nevertheless fall far short of being dry land. Where on this continuum to find the limit of 'waters' is far from obvious." Rapanos, 126 S.Ct. at 2225 (quoting Riverside Bayview, 474 U.S. at 132, 106 S.Ct. 455.) According to the Rapanos plurality, because of this inherent ambiguity, the Supreme Court in Riverside Bayview "held, the agency could reasonably conclude that a wetland that 'adjoin[ed]' waters of the United States is itself a part of those waters." Id. (citing Riverside Bayview, 474 U.S. at 132, 135, & n. 9, 106 S.Ct. 455).

- Justice Kennedy: "[T]he dissent would permit Federal regulation whenever wetlands lie alongside a ditch or a drain, however remote or insubstantial, that may eventually flow into traditionally navigable waters. The deference owed to the Corps' interpretation of the statute does not extend so far." Id. at 2247. "The Corps'

[7] For a wetland to be jurisdictional under the Scalia approach, the "continuous surface connection" he contemplated is not satisfied upon a mere running trickle to a body of water navigable in its own right; indeed, Scalia rejected the Corps's use of the "mere hydrologic connection" test. Rather, he makes clear that a "continuous connection" is one that implicates the difficult boundary-drawing question between land and water, of the sort that the Court addressed in Riverside Bayview. In this regard, the discussion of Scalia's methodology in United States v. Cundiff, 480 F.Supp.2d 940, 946-47 (W.D. Ky. 2007) is instructive:

theory of jurisdiction—adjacency to tributaries, however remote and insubstantial—raises concerns that go beyond the holding of Riverside Bayview; and so the Corps' assertion of jurisdiction cannot rest on that case." Id. at 2248 (emphasis supplied). "When. . . wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'" Id. at 2248 (emphasis supplied). In remanding Carabell back to the Sixth Circuit, Justice Kennedy stated that "[t]he conditional language in [the Corps's] assessments—'potential ability, 'possible flooding'—could suggest an undue amount of speculation and a reviewing court must identify substantial evidence supporting the Corps' claims. . . ." Id. at 2251 (Kennedy, J.). In Carabell, "the Corps based its jurisdiction solely on the wetlands' adjacency to the ditch opposite the berm on the property's edge. . . . [M]ere adjacency to a tributary of this sort is insufficient; a similar ditch could just as well be located many miles away from any navigable-in-fact water and carry only insubstantial flow toward it." Id. at 2252 (emphasis supplied).

7. Mere presence of an ordinary high water mark does not render a feature a jurisdictional "tributary," or the wetlands next to such a feature jurisdictional "adjacent wetlands."

- Justice Kennedy: "[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. . . . This standard presumably provides a rough measure of the volume and regularity of flow. [T]he breadth of this standard—which seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water-volumes toward it—precludes its adoption as the determinative measure of 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." Id. at 2248-2249.

8. CWA jurisdiction is not lost due to drought conditions.

- Justice Scalia: "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." Id. at 2221 n.5.

9. CWA jurisdiction is not lost simply because a waterbody is regularly wet during certain seasons and dry during others.

- Justice Scalia: Recognizing that the Los Angeles River would be jurisdictional under the CWA, and stating: "We. . . do not necessarily exclude seasonal rivers, which contain continuous flow during some months of the year but no fly during dry months—such as the 290-day continuously flowing stream postulated by Justice STEVENS' dissent. . . ." Id. at 2221, n.5. "[N]o one contends that Federal jurisdiction appears and evaporates along with water in such regularly dry channels." Id. at 2221, n.6.[8]
- Justice Kennedy: "The Los Angeles River, for instance, ordinarily carries only a trickle of water and often looks more like a dry roadway than a river. . . Yet it periodically releases water-volumes so powerful and destructive that it has been encased in concrete. . . over a length of some 50 miles. . . Though this particular waterway might satisfy the plurality's test, it is illustrative of what often-dry watercourses can become when rain waters flow." Id. at 2242 (emphasis supplied).

10. CWA jurisdiction can cover regular floods from waterbodies.

- Justice Scalia: In the statutory term "the waters of the United States," the phrase "'the waters' refers more narrowly to. . . 'the flowing or moving masses, as of waves or floods, making up such streams or bodies.'" Id. at 2220. "It seems to us wholly unreasonable to interpret the statute as regulating only 'floods' and 'inundations' rather than traditional waterways. . . ." Id. at 2221, n.4. Thus, the plurality believed regular floodwaters from permanent rivers and lakes are encompassed within "navigable waters." Importantly, however, the plurality also criticized Corps interpretations and case law concluding that lands within the 100-year floodplain are included in "the waters of the United States." Id. at 2218.
- Justice Kennedy: "The term 'waters' may mean 'flood or inundation,'. . . events that are impermanent by definition. . . ." Id. at 2242. "The Court in Riverside Bayview rejected the proposition that origination in flooding was necessary for

[8] These statements of the Scalia plurality were emphasized by the Ninth Circuit in United States v. Moses, 2007 WL 2215954 (9th Cir. Aug. 3, 2007), at 6, to find that a creek that "rises and becomes a rampaging torrent" during times of runoff is covered by the CWA.

jurisdiction over wetlands. It did not suggest that a flood-based origin would not support jurisdiction; indeed it presumed the opposite. . . . [A] continuous connection is not necessary for moisture in wetlands to result from flooding—the connection might well exist only during floods." Id. at 2244.

11. As a general matter "navigable waters" and "point sources" are not the same thing, and normally a feature cannot be both.

- Justice Scalia: "Most significant of all, the CWA itself categorizes the channels and conduits that typically carry intermittent flows or water separately from 'navigable waters,' by including them in the definition of 'point source.'" Id. at 2222. The CWA's definitions "conceive of 'point sources' and 'navigable waters' as separate and distinct categories. The definition of 'discharge' would make little sense if the two categories were significantly overlapping." Id. at 2223.
- Justice Kennedy: "[E]ven were the statute read [as the plurality does] to require continuity of flow for navigable waters, certain waterbodies could conceivably constitute both a point source and a water." Id. at 2243 (emphasis supplied).

Of course, all stakeholders would have benefited from an opinion in Rapanos that garnered a clear majority. However, proponents for legislative action in the 110th Congress ignore the important points of agreement among the five Justices, as outlined above—including the very first point enumerated (supra p. 23), where the Justices called for regulatory action. Not a single member of the Court thought the appropriate solution was for Congress to amend the CWA—much less to legislate a jurisdictional requirement to cover all intraState waters.

C. Post-Rapanos Cases.

The arc of judicial history interpreting the scope of statutory navigable waters is, by now, predictable: the Supreme Court issues an opinion on the meaning of "the waters of the United States," which clarifies certain questions but leaves others unanswered, and the open issues are subsequently debated in the lower courts. The 1985 Riverside Bayview opinion ruled that actually abutting wetlands are jurisdictional, but did not resolve the issue of isolated waters. The lower courts wrestled with that topic, issued conflicting opinions, and then in 2001 SWANCC decided that isolated waters are non-jurisdictional, at least insofar as the justification for regulating them is migratory bird use. But SWANCC did not address whether waters that are far away from traditional navigable waters could be regulated, if there is only a tenuous hydrological connection to navigable-in-fact features. Debate ensued in the lower courts on the hydrological connection issue, and in 2006, Rapanos showed that five Justices concurred that the hydrologic connection theory is not the appropriate test for CWA coverage.

Accordingly, Rapanos fits the pattern going back over 20 years, to Riverside Bayview in 1985. Now, in the post-Rapanos era, the lower courts are debating: Which opinion controls, the Scalia plurality or the Kennedy concurrence? Within the view of the Scalia plurality, what is a "relatively permanent waterbody" and when does a wetland have a "relatively continuous surface connection" to navigable-in-fact water? For purposes of Justice Kennedy's opinion, what does it mean for a wetland to have a "significant nexus" to a traditional navigable water?

Since Rapanos was decided, the lower courts are divided as to whether the controlling test for CWA jurisdiction derives from the Scalia opinion, the Kennedy opinion, or both. In his Rapanos dissent, Justice Stevens maintained that either the plurality or the concurrence should control in a given case.[9] Some lower courts have followed Justice Stevens' "either/or" view.[10] Other courts have adopted the position

[9] "[W]hile 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." Rapanos, 126 S.Ct. at 2265 (Stevens, J. dissenting).

[10] See, e.g., United States v. Johnson, 467 F.3d 56, 60 (1st Cir. 2006), reh'g and reh'g en banc denied ("We conclude that the United States may assert jurisdiction over the target sites if it meets either Justice Kennedy's legal standard or that of the plurality"); Simsbury-Avon Preservation Soc'y, LLC v. Metacon Gun Club, 472 F.Supp.2d 219 (D.Conn. 2007), appeal pending (2d Cir.) ("this Court will consider under both the plurality's and Justice Kennedy's standards the issue of whether the plaintiffs have demonstrated a genuine factual dispute about whether Metacon munitions are being discharged into the waters of the United States"); United States v. Cundiff, 480 F.Supp.2d 940, 944 (W.D. Ky. 2007) ("After a review of the case law, the court adopts the First Circuit's approach and concludes that the United States may establish jurisdiction over the Cundiff site if it can meet either Justice Kennedy's or the plurality's standard as set forth in Rapanos"). Cf. United States v. Sea Bay Development Corp., 2007 WL 1169188 at 3 (E.D. Va. Apr. 18, 2007) ("it is important to note" that Justice Stevens's dissent said that

Continued

that Justice Kennedy's "significant nexus" test is the sole determinant for CWA jurisdiction.[11]

While the courts differ on the controlling test for CWA jurisdiction, a significant pattern of consistency is definitely emerging in the post-Rapanos cases. Consistent with consensus points numbered 5 and 6 above (supra pp. 25–26), the lower courts are now taking a more thorough examination of the facts before them. In the cases before them, they are focusing on whether there is sufficient evidence of a close relationship between the non-navigable aquatic feature at issue and traditional navigable waters. The courts are largely in agreement in recognizing that proof of a tenuous and remote hydrologic connection is not sufficient; more is needed to invoke CWA jurisdiction. For example:

- In N. Cal. River Watch v. city of Healdsburg, 496 F.3d 993 (9th Cir. 2007), the court delved deeply into the facts and found a significant nexus between a pond, its surrounding wetlands, and navigable-in-fact water. The trial court "found that the concentrations of chloride in the groundwater between the Pond and the Russian River are substantially higher than in the surrounding area. Chloride, which already exists in the Pond due to naturally occurring salts, reaches the River in higher concentrations as a direct result of Healdsburg's discharge of sewage into the Pond. . . . At a monitoring well between the Pond and the River, the underground concentration is diluted to some 30 parts per million. Ultimately, a chloride concentration of 18 parts per million appears on the west side of the River. The district court thus found that chloride from the Pond over time makes its way to the River in higher concentrations than naturally occurring in the River. This finding was further supported by Dr. Larry Russell, one of River Watch's trial experts." Id. at 996–97.
- In San Francisco Baykeeper v. Cargill Salt Div., 481 F.3d 700 (9th Cir. 2007), the court found there was not sufficient proof of a "significant nexus" to support CWA jurisdiction. "By any permissible view of the evidence, the effect of Cargill's Pond on Mowry Slough is speculative or insubstantial; the Pond does not significantly affect the integrity of the Slough. First, there is no evidence that any water has ever flowed from the Pond to the Slough. One expert asked whether 'given the right hydrology conditions,' water could flow from the Pond to the Slough, answered that 'it is possible.' There is no evidence, however, that those 'right hydrology conditions' have ever existed or were likely to exist. This testimony fits the definition of 'speculative.'" Id. at 708.
- In United States v. Robison, 505 F.3d 1208 (11th Cir. 2007), the court remanded for a new trial because a jury instruction improperly allowed evidence of CWA jurisdiction upon a mere hydrologic connection. "[A] 'mere hydrologic connection' will not necessarily be enough to satisfy the 'significant nexus' test. . . .The district court here did not mention the phrase 'significant nexus' in its 'navigable waters' instruction to the jury or advise the jury to consider the chemical, physical, or biological effect of Avondale Creek on the Black Warrior River." Id. at 1222. "Here, the government failed to satisfy its burden. Although Wagoner (the EPA investigator) testified that in his opinion there is a continuous uninterrupted flow between Avondale Creek and the Black Warrior River, he did not testify as to any 'significant nexus' between Avondale Creek and the Black Warrior River. The government did not present any evidence, through Wagoner or otherwise, about the possible chemical, physical, or biological effect that Avondale Creek may have on the Black Warrior River, and there was also no evidence presented of any actual harm suffered by the Black Warrior River." Id. at 1223.
- In Simsbury-Avon Preservation Soc'y, LLC v. Metacon Gun Club, Inc., 472 F.Supp.2d 219, 230 (D. Conn. 2007), appeal pending (2d Cir), the court found no CWA jurisdiction over vernal pools and surrounding wetlands. "Plaintiffs' inconclusive water sampling data cannot buttress the rest of plaintiffs' record so as to dem-

"navigable waters" should be determined by either the Scalia plurality or the Kennedy concurrence).

[11] United States v. Robison, 505 F.3d 1208, 1221 (11th Cir. 2007) ("[W]e join the Seventh and Ninth Circuits' conclusion that Justice Kennedy's 'significant nexus' test provides the governing rule of Rapanos"); Northern California River Watch v. Healdsburg, 496 F.3d 993, 995 (9th Cir. 2007), cert. pet. filed, 76 USLW 3260 (Nov. 5, 2007, 07–625) ("In a 4–4–1 decision, the controlling opinion is that of Justice Kennedy who said that to qualify as a navigable water under the CWA the body of water itself need not be continuously flowing, but that there must be a 'significant nexus' to a waterway that is in fact navigable. Adjacency of wetlands to navigable waters alone is not sufficient"); United States v. Gerke Excavating, Inc., 464 F.3d 723, 724 (7th Cir. 2006), cert. denied, 128 S.Ct 45 (2007) ("When a majority of the Supreme Court agrees only on the outcome of a case and not on the ground for that outcome, lower-court judges are to follow the narrowest ground to which a majority of the Justices would have assented. . . . In Rapanos, that is Justice Kennedy's ground").

onstrate that a rational trier of fact could find the required substantial nexus. . . . [T]his is a case in which the 'wetlands' effects on water quality are speculative or insubstantial, [thus] fall[ing] outside the zone fairly encompassed by the statutory term 'navigable waters.' "

- In Envt'l Prot. Ctr. v. Pac. Lumber Co., 2007 WL 43654 (N.D. Cal. Jan. 8, 2007), at *14, another court emphasized the need to prove more than a mere hydrologic connection. "A hydrologic connection without more will not comport with the Rapanos standard in this case. Because the evidence indicates that certain of the Class II and all of the Class III streams are intermittent or ephemeral watercourses, EPIC must demonstrate that these streams have some sort of significance for the water quality of Bear Creek. None of the evidence offered by EPIC—field observations, the GIS map, or expert testimony—address this part of the substantial nexus standard."
- In United States v. Cundiff, 480 F.Supp.2d 940, 945 (W.D. Ky. 2007), the government met its evidentiary burden to prove the existence of a significant nexus to traditional navigable waters. The government expert testified that ditching activity "diminished the capacity of the wetlands in question to store water," and the resultant increases in frequency and extent of downstream flooding "impact[s] navigation, crop production in bottomlands, downstream bank erosion, and sedimentation" (emphasis supplied). Further, "[w]hen the acid mine drainage and associated sediments move too quickly downstream. . . there are direct and significant impacts to navigation (via sediment accumulation in the Green River. . . ." (Emphasis supplied.)

In summary, while issues are left to be resolved after Rapanos, the lower courts are solid on the point that the mere hydrologic connection theory is not the basis for CWA coverage. And, they are undertaking thorough record examinations of the evidence before them to determine if the requisite nexus exists between non-navigable features and traditional navigable waters. That some courts might find the required connection in certain cases, while others do not, is unsurprising. "[E]ach determination as to navigability must stand on its own facts." United States v. Appalachian Power Co., 311 U.S. 377, 403 (1940) (quoting United States v. Utah, 283 U.S. 64, 87 (1931)). Considering that the CWA imposes great intrusions into the uses of private property, and effects significant land use controls that are traditionally within the province of State and local governments, close judicial scrutiny of the proof offered by Federal regulators is a positive result generated by Rapanos. CWA law and policy only stand to gain as the agencies develop better factual evidence in the field to support CWA jurisdictional determinations.

The agencies have already made important strides in this regard. Their post-Rapanos field guidance is the opening salvo in discussions that will continue on the appropriate evidentiary showing for CWA jurisdiction. See Headquarters Memorandum to EPA Regions and Corps of Engineers Field Offices, CWA Jurisdiction Following the U.S. Supreme Court Decision in Rapanos v. United States (2007), available at http://www.usace.army.mil/cw/cecwo/reg/cwa—guide/app—a—rapanos—guide.pdfThe public has been asked to provide input on the Rapanos guidance package, and comments are due on January 21, 2008. This process must be given sufficient time to run its course.

IV. CONCLUSION

The entire history of the CWA, as it has been debated in Congress, implemented by the agencies, and considered in the courts, has been an effort to balance important public policy considerations within the framework of the Constitution and the principles of federalism. NAHB believes Congress must not expand the CWA's scope to cover all intraState waters for the following reasons:

1. Such an approach would greatly disserve the original intent of the 1972 Act, which struck a reasonable balance between modernizing Federal power over traditional navigable waters and maintaining State oversight of intraState waters that have no demonstrable nexus to channels of interState commerce;
2. A massive expansion of Federal control over all intraState waters raises serious constitutional questions. Certain legislative proposals pending before Congress would only resuscitate the very same constitutional debate that caused confusion in the courts and on the ground in the pre-SWANCC years; and
3. In the post-Rapanos era, the Federal agencies are finally starting to do the hard, factual work of evaluating evidence as to whether a particular non-navigable water feature has substantial connections to traditional navigable waters. Congress should allow this process to continue before seeking legislation.

There is no doubt that wetlands and other non-navigable features serve important ecological and societal functions. Their protection is necessary and is provided for by a cooperative effort between the Federal Government and the individual states.

CWA regulation cannot go to extreme lengths so as to subvert the Act's purpose to "recognize, preserve, and protect the primary rights and responsibilities of States" to control water resources and address water pollution within their borders. 33 U.S.C. at 1254(b) (emphasis supplied). With these considerations in mind, it would be highly controversial and constitutionally questionable for Congress to amend the CWA in a manner that protects all intraState waters. Such an approach would wander far astray from the 1972 Act's original intent. It would greatly undermine the careful balance among competing policies that Congress, the Supreme Court, and the Executive Agencies have been searching for in the 35 years since the CWA's enactment.

RESPONSES BY DUANE DESIDERIO TO ADDITIONAL QUESTIONS FROM SENATOR BOXER

Question 1. InsideEPA recently reported that the National Association of Home Builders requested to be allowed to bypass the jurisdictional step in the Clean Water Act permit process because, it said, the assessment process under Rapanos/ Carabell could take regulators "months or possibly even years to complete." Can you please explain in detail what difficulties and delays have been experienced by the Home Builders' Association members as a result of Rapanos/Carabell?

Response. The following issues affecting home builders have become evident since the Supreme Court decided Rapanos:

- Jurisdictional determinations (JDs) and Corps Section 404 permits are taking longer than ever;
- higher costs have resulted for those who submit JDs; and
- no quantified criteria or threshold requirements have been established for a significant nexus determination, required by the Rapanos Guidance issued by the Corps and EPA which is now subject to a notice and comment process.

While there are difficulties and delays regarding JDs and permit issuance since Rapanos, NAHB recognizes that not a single Member of the Court called for congressional action to resolve debate around CWA jurisdiction over the scope of statutory "navigable waters." Indeed, several Justices explicitly called upon the Corps and EPA to conduct rulemaking to determine the scope of their authority. See Desiderio Testimony at pp. 23–24. NAHB agrees that matters concerning interpretation of Rapanos are best left to the agencies. The notice and comment process on their joint Rapanos Guidance must be allowed to run its course and be followed by rulemaking proceedings. NAHB believes a rulemaking, rather than a legislative fix, is a more appropriate response to any delays.

- JDs and Permits are Taking Longer Than Ever. During his testimony before the House Transportation and Infrastructure Committee on October 18, 2007, Mr. John Woodley, Assistant Secretary of the Army for Civil Works, admitted that the Corps is taking longer to issue Section 404 permits because of the additional work for staff required by the new Guidance procedures. In addition, regulatory requirements at 33 CFR 325.2(d)(3) provide that District engineers must make decisions on permit applications not later than 60 days after receipt of a complete application. In practice, the Corps Districts have often been unable to meet that deadline. Statistics published on the Corps website indicate that in 2003 the average permit decision took about 6 months. However, since the Guidance, permit delays have become worse. Some Districts are now informing applicants that their permits are likely to take a minimum of 6–12 months.
- Higher Costs Have Resulted for Those who Submit JDs Information garnered from NAHB's members, their consultants, and from comments already submitted to the Rapanos Guidance docket, shows that costs have increased for those applicants who fill out the JD forms. The escalation in costs is due to the increased information needed to fill out the forms, and to the increased time and attention required to ensure that the application continues to move through the permitting process and is not disregarded for other applications that may get favored treatment for a variety of reasons, such as not requiring a significant nexus decision.
- No Quantified Criteria or Threshold Requirements Have Been Established for a Significant Nexus Decision Based on Science Page 6, Part C of the JD Form lists four questions to be considered to establish a significant nexus connection:
- Does the tributary, in combination with its adjacent wetlands (if any), have the capacity to carry pollutants or flood waters to traditional navigable waters (TNWs), or to reduce the amount of pollutants or flood waters reaching a TNW?
- Does the tributary, in combination with its adjacent wetlands (if any), provide habitat and lifecycle support functions for fish and other species, such as feeding, nesting, spawning, or rearing young for species that are present in the TNW?

• Does the tributary, in combination with its adjacent wetlands (if any), have the capacity to transfer nutrients and organic carbon that support downstream foodwebs?

• Does the tributary, in combination with its adjacent wetlands (if any), have other relationships to the physical, chemical, or biological integrity of the TNW?

The above questions are so subjective that they can be answered in the affirmative for virtually any wetland. Providing answers to these open-ended questions is burdensome, time consuming, and costly for NAHB's members. The agencies should resolve these problems as they work through their review of comments on the Rapanos Guidance. Again, NAHB believes the notice and comment process needs to run its course, followed by rulemaking proceedings; a legislative fix, is not an appropriate response to the delays.

Question 2. You say in your testimony that the Home Builders' Association has been an advocate for the Clean Water Act since its inception. As you know, the purpose of the Act is to "restore and maintain the chemical, physical and biological integrity of the Nation's waters."

• If a wetland, intermittent stream or other water is functionally connected to a navigable water or a tributary, in other words, if pollution or destruction of the wetland or intermittent stream could harm the chemical, physical or biological integrity of the navigable water, does the Home Builders' Association agree that there should be protection under the Clean Water Act?

Response. The question is unclear. The phrase "functionally connected" has no well-accepted meaning.

In any event, the question is premised on the phrase "could harm"—that is, whether pollution in a wetland or stream "could harm" a traditional navigable water. In the circumstance where impacts to an upstream aquatic feature might, potentially or hypothetically, harm a downstream traditionally navigable water, then under case holdings that upstream feature would not be covered by the Clean Water Act and would arguably exceed constitutional authority. For example, Justice Kennedy explained in Rapanos that, "[w]hen wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'" United States v. Rapanos, 126 S.Ct. 2208, 2248 (2006) (Kennedy, J., concurring). Similarly, the U.S. Court of Appeals for the Fourth Circuit struck regulations of the Corps that illegally based CWA coverage where destruction of "other waters" "could affect" interState commerce, because those regulations "require[d] neither that the regulated activity have a substantial effect on interState commerce, nor that the covered water have any sort of nexus with navigable, or even interstate, waters" (original emphasis). United States v. Wilson, 133 F.3d 251, 257 (4th Cir. 1997). And the U.S. Court of Appeals for the Second Circuit has ruled that the "Clean Water Act gives the EPA jurisdiction to regulate and control only actual discharges—not potential discharges, and certainly not point sources themselves." Waterkeeper Alliance, Inc. v. EPA, 399 F.3d 486, 505 (2d Cir. 2005) citing NRDC v. EPA, 859 F.2d 156, 170 (D.C. Cir. 1988) (original emphasis).

• Are there certain categories of wetlands, intermittent streams and other waters that the Home Builders' Association believes should not be protected by the Clean Water Act, even if that does result in harm to the chemical, physical or biological integrity of navigable waters and tributaries? If so, please list and describe in detail each category of water that in the Association's view should not be protected under the Act.

Please see answer to question #3, below, which provides principles for determining the extent of CWA coverage.

• Consider the case where a certain type of water, such as a wetland, taken together with other similar wetlands, is important and necessary to protecting the integrity of a nearby water that is navigable under the traditional definition of that term. But assuming that such a wetland, considered individually, does not meet the Rapanos/Carabell test for Clean Water Act jurisdiction, is it the view of the Home Builders' Association that there should be no protection of that wetland under the Act? What positions have the Association's representatives taken on this issue in communications with the Corps of Engineers and/or the Environmental Protection Agency since the Rapanos/Carabell decision was issued?

This question asks for an assumption that hypothetical wetlands "do[ ] not meet the Rapanos/Carabell test for Clean Water Act jurisdiction." (Emphasis supplied.) However, a majority of Justices in Rapanos/Carabell failed to agree on an overarching, definitive test to determine whether particular aquatic features are covered by the CWA. Please see answer to question #3, below, which provides principles for determining the extent of CWA coverage.

In any event, the question can be considered in light of the following statement from Justice Kennedy's opinion concurring in the Rapanos judgment:

"[W]etlands 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." Rapanos, 126 S.Ct. at 2248 (Kennedy, J., concurring; emphasis supplied).

Justice Kennedy stated that "the wetlands," to be considered jurisdictional, must have a significant (not speculative or insubstantial) effect on traditional navigable waters. Accordingly, his statement does not justify categorical license for jurisdiction over all wetlands in a region; the focus must be on "the" wetlands at issue in a given case, to determine if that particular feature is jurisdictional.

Further instruction is needed to explain the phrase "similarly situated." If that particular wetland alone does not have a significant effect on traditional navigable waters, then Justice Kennedy stated it could be combined only with other "similarly situated" wetlands. The phrase "similarly situated" has no reference point in any CWA case or regulation. While "similarly situated" is commonly used in cases concerning the Equal Protection Clause of the Fourteenth Amendment, it wholly lacks any well-accepted or understood meaning in the "navigable waters" context. Wetlands serve different functions and values, within and among varying watersheds and locations. Indeed, not all wetlands provide equivalent protection in terms of pollutant trapping, flood control, runoff storage, and habitat. Thus, before any wetland combination could occur to determine if particular wetlands are subject to the Act's coverage, the agencies would need to define "similarly situated" through rulemaking.

NAHB has taken no official position on the language quoted above from Justice Kennedy's opinion, and it has not offered any official interpretation to either the Corps or EPA.

Question 3. Does the Home Builders' Association agree with the jurisdictional test stated by Justice Scalia in the Rapanos/Carabell case, as described at page 21 in your testimony, or does it support some other test, and if so what is that?

Response. Although Rapanos announced no over-arching, definitive test to determine whether particular aquatic features are covered by the CWA., NAHB believes that the jurisdictional test articulated by Justice Scalia's plurality opinion must be considered and applied on a case-by-case basis because it has been adopted by four members of the Supreme Court. Likewise, Justice Kennedy's "significant nexus" test must be considered and applied on a case-by-case basis—although it cannot be considered a holding from Rapanos because only one member of the Court adopted it.

NAHB believes that the following principles are applicable to determine if a particular aquatic feature is subject to CWA coverage:

- Traditional navigable waters, and wetlands that actually abut them, are covered by the CWA. (See Desiderio Testimony at pp. 11–12.)
- Isolated, intrastate, non-navigable water features are not covered by the CWA. (See Desiderio Testimony at pp. 16–18.)
- Non-traditional navigable waterbodies that are intrastate, navigable-in-fact, and part of a chain of interState commerce, even though they are not part of a continuous navigable highway of commerce, are covered by the CWA (even though they are not traditional navigable waters). (See Desiderio Testimony at pp. 6–10.)
- A mere hydrological connection between an aquatic feature and a traditional navigable water does not render that feature a "navigable water" for purposes of the CWA. (See Desiderio Testimony at p 25.)
- Aquatic features that have only a hypothetical, speculative, insubstantial, or eventual connection to traditional navigable waters are not "navigable waters" for purposes of the CWA. (See Desiderio Testimony at pp. 25–26.)
- Mere presence of an ordinary high water mark does not render a feature a jurisdictional "tributary," or the wetlands next to such a feature jurisdictional "adjacent wetlands." (See Desiderio Testimony at p. 27.)
- CWA jurisdiction is not lost due to drought conditions. (See Desiderio Testimony at p. 27.)
- CWA jurisdiction is not lost simply because a waterbody is wet during certain seasons and dry during others. (See Desiderio Testimony at pp. 27–28.)
- CWA jurisdiction can cover regular floods from waterbodies. (See Desiderio Testimony at p. 28.)
- Point sources, such as ditches, storm detention ponds, and municipal separate storm sewer systems and components thereof, are not "navigable waters" for pur-

poses of the CWA. However, discharges of pollutants from such features require CWA permits. (See Desiderio Testimony at pp. 28–29.)

RESPONSES BY DUANE DESIDERIO TO ADDITIONAL QUESTIONS FROM SENATOR INHOFE

Question 1. Some have argued today that there is a point in the regulatory history to which we could return when jurisdiction was clear and agreed upon. Do you know of any such time that Congress could use as a benchmark should we decide that a legislative fix is in order?

Response. In terms of the regulatory history of the Clean Water Act since its enactment in 1972, the answer is "no." In terms of Federal regulation generally over water features, the answer is "yes." Before the CWA's enactment in 1972, it was relatively clear that Federal jurisdiction over water features extended only so far to reach traditional navigable waters as outlined by The Daniel Ball, 77 U.S. 557 (1871), and as modified by United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940) and other cases. Please see Desiderio Testimony pp. 4–5 for a discussion of these cases.

Question 2. In your written statement, you discuss the 1997 Wilson decision which preceded the Supreme Court's SWANCC decision. In the Fourth Circuit's decision, the Court found that the Corps' "other waters" regulation is unauthorized by the Clean Water Act as limited by the Commerce Clause. Does this decision provide us any insights as to what a Court might do were legislation passed that strikes the Commerce Clause as the basis behind congressional authority under the Clean Water Act?

Response. Yes, the Wilson decision does provide insight into a court's reaction into such a piece of legislation. Wilson struck the Corps's (a)(iii) regulation, because it purported to regulate "other waters" which, if degraded, "could affect" interState commerce. The Fourth Circuit declared that regulation illegal because it "require[d] neither that the regulated activity have a substantial effect on interState commerce, nor that the covered water have any sort of nexus with navigable, or even interstate, waters." Wilson, 133 F.3d at 257. Legislation that would purport to codify the "could affect" regulations would encounter the same constitutional questions. Please see Desiderio Testimony pp. 15–16 for a discussion of Wilson.

Question 3. Can you describe for the Committee what actions a homebuilder might take to protect local drinking water supplies during construction?

Response. The Environmental Protection Agency ("EPA") has determined that discharges from residential construction activities "consist predominantly of conventional pollutants"—namely, sediment. EPA has formally determined that toxics are not pollutants of concern from construction and development activities. Thus, the agency has removed the construction industry from its congressionally required list of industries that discharge toxic and non-conventional pollutants in non-trivial amounts. See 69 Fed. Reg. 53,705, 53,718 (Sept. 2, 2004); 71 Fed. Reg. 76,644, 76,664-65 (Dec. 21, 2006).

As to sediment, home builders undertake myriad measures under Federal, state, and local law—often duplicative and sometimes contradictory—to reduce erosion and retain stormwater onsite. They undertake these requirements regardless of whether drinking water supplies might be affected. The following is a brief summary of requirements that derive from the Federal CWA.

During construction activity, EPA's implementing regulations under the National Pollutant Discharge Elimination System ("NPDES") require home builders to obtain permit coverage for stormwater discharges. Under EPA's stormwater Phase I and Phase II rules, any residential construction site in the country that is one acre or larger in size is subject to permitting requirements; even single lots, in subdivisions one acre or larger, must satisfy NPDES controls or state-equivalent measures approved by EPA. Before securing Section 402 permit coverage a house a homebuilder must complete a Storm Water Pollution Prevention Plan ("SWPPP"). A SWPPP lays out the specific pollution control practices that will be implemented onsite to safeguard the environment during construction. A SWPPP must accompany the request for coverage under a construction general permit (CGP). The relevant permitting agency, which may be the EPA, a state, a tribe, or a municipality, must review and approve the SWPPP before construction may begin.

The SWPPP must not only identify all potential sources of pollution to storm water discharges from the construction site, but also identify Best Management Practices ("BMPs") the homebuilder will use to reduce pollutants in stormwater discharges to ensure CGP compliance. Examples of controls that must be addressed in the SWPPP include descriptions of temporary and permanent stabilization practices

(e.g., seeding of vegetation, geotextiles, vegetative buffer strips, and preservation of trees); and structures that divert flows of storm water or treat storm water onsite (e.g., construction entrance pads, vehicle washing to maintain sediment onsite, silt fences, inlet protection, sediment traps, and sediment basins). The SWPPP must also contain a regular inspection and maintenance schedule.

Drinking water supplies are protected by more stringent State or local ordinances or regulations. For example, building and site-development codes often impose additional erosion and sediment control BMPs on the homebuilder during construction. Land-use controls are also used to ensure that planned development will not compromise drinking water quality or groundwater discharge. States authorized to implement the Safe Drinking Water Act within their jurisdictions may also imposed additional barriers against sediment pollution through source water protection measures and additional onsite inspections. If there is an existing pollution problem with one or more pollutants affecting the quality of the local drinking water supplies, a Total Maximum Daily Load (TMDL) will specify waste load and load allocations for all pollution sources located on the stream or lake covered by the TMDL. In any case, all environmental requirements including any additional measures required to protect drinking water supplies must be addressed in the SWPPP and be approved by the permitting agency before construction may begin.

Senator BOXER. Thank you very much.

And our next speaker is George J. Mannina, Jr., attorney at law, O'Connor and Hannan, LLP. Welcome, sir.

STATEMENT OF GEORGE J. MANNINA, JR., ATTORNEY AT LAW, O'CONNOR AND HANNAN, LLP

Mr. MANNINA. Thank you, Madam Chairwoman and distinguished members of the Committee. Thank you for allowing me to appear before you today. I hope that the observations I might offer will be constructive to you as you chart your course for the future.

At the outset, let me say that there always has been and will be confusion about what is a jurisdictional water of the United States. Areas that were not jurisdictional in 1975 became jurisdictional through regulatory changes in 1977. Other changes were made in 1982 and 1986, bringing still other areas into the jurisdictional reach of the Clean Water Act, all absent any change in the legislation from the Congress.

Similarly, if you ask the question, what areas are wetlands, you would receive a different answer, depending upon what year you asked that question. Recently, the Government Accountability Office said that the Corps' district offices, all bound by the same set of regulations, are in fact using different standards to determine what is or is not subject to the jurisdiction of the Clean Water Act. And to digress for a minute, curiously, in 13 of the 16 Corps districts which the GAO surveyed, GAO found there was no written guidance by which the public could determine the standards being employed by the Corps to make these jurisdictional decisions.

I think you ladies and gentlemen of this committee and this Congress have a choice. You are at a crossroad as to which direction to go. You can take one direction and follow in the steps of your predecessors, Senators like Mr. Muskie and Mr. Bentsen, who grounded the Act in navigability. The Supreme Court has said that has some limits to it, but that was the wisdom of the Congress through all these years.

Alternatively, you could remove navigability from the Act and reach a far larger set of waters. There are some issues that you may wish to consider with respect to that. Specifically, let me recall the SWANCC case. The waters on the SWANCC site, and I litigated the SWANCC case, so I am familiar with this, those waters

were left over from strip mining. They were isolated ruts and trenches that filled with rain water. The Corps of Engineers said that they were not wetlands, they had no hydrological connection with any other water. The only basis for jurisdiction was the presence of migratory birds.

If your purpose is to protect every wet area in the United States, then overturning SWANCC will get you there. If your purpose is to stay with the concept of navigability as your predecessors did, then you choose a different direction. I have heard it said that it would be simpler to return to the pre-SWANCC era. I am not certain that is exactly correct. In the first instance, you would still have before you the issues identified in the 2004 GAO report about the Corps district offices employing different standards in applying the same regulations.

But in one respect it might be easier. The Government Accountability Office asked the Corps why they were using different standards, and the Corps people said, according to GAO, that we are truly, for the first time, wrestling with how to apply the regulations. Pre-SWANCC, virtually every area was jurisdictional because virtually every wet area could be subject to use by migratory birds. That made jurisdictional decisions somewhat easier.

If you return to the pre-SWANCC era and resurrect the migratory bird rule, you will be making those jurisdictional decisions easier because there will be a much larger set of areas subject to the jurisdiction. But that is your choice, and I would be more than happy to answer any questions that you might have.

Thank you.

[The prepared statement of Mr. Mannina follows:]

STATEMENT OF GEORGE J. MANNINA, JR[1]., ATTORNEY AT LAW, O'CONNOR AND HANNAN, LLP

Madam Chairwoman and distinguished members of the Committee, I am pleased to have the opportunity to appear before you. As this is an oversight hearing, it is not my purpose to suggest or recommend a course of action for this Committee. Instead, I will offer commentary on the State of the law which I hope will be constructive as you and your colleagues determine the appropriate course of action regarding whether and how to amend the Clean Water Act.

It may be helpful at the outset to recognize that there is, and always has been, uncertainty regarding what waters are jurisdictional under the Clean Water Act. Although Congress has never changed the definition of the term "navigable waters," the Corps of Engineers ("Corps") and the Environmental Protection Agency ("EPA") have, over the years, employed different regulatory definitions of what is a navigable water subject to the Clean Water Act. What was not jurisdictional in 1975 might have become jurisdictional in 1977, 1982, or 1986.

Not only has the regulatory definition of what is a jurisdictional navigable water changed, but the answer to the question "what is a wetland" has been different depending on what year the question was asked. Complicating the problem from the public's perspective is that as recently as 2004, the General Accounting Office ("GAO") reported that different Corps District Offices, all of which were bound by the same regulations and the same Wetlands Delineation Manual, were applying these documents very differently in determining what is a navigable water. What is an adjacent wetland in one Corps District might not be in another. What is a tributary in one District is not in another. GAO also reports that in 13 of the 16 District Offices it surveyed, there are no written standards the pubic can consult

[1] Mr. Mannina is a senior partner in the environmental law practice of O'Connor & Hannan, LLP and was retained by the Solid Waste Agency of Northern Cook County ("SWANCC") in challenging the jurisdiction of the Corps of Engineers under the Clean Water Act in the case which became Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001) ("SWANCC").

to understand the criteria used to determine Clean Water Act jurisdiction. It is no wonder the public is often confused.

I have heard it said that if we return to a simpler time, the era before Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers was decided, then this uncertainty would disappear because, in that era, everyone knew what was jurisdictional. I believe the issue is far more complex. That said, in one respect, returning to the pre-SWANCC era and resurrecting the Migratory Bird Rule might be easier. GAO, in its 2004 review of Clean Water Act jurisdictional decisionmaking, noted that jurisdictional decisions were easier pre-SWANCC because "nearly all waters and wetlands in the United States were potentially jurisdictional" under the Migratory Bird Rule. Thus, as GAO reports, in the pre-SWANCC era there was hardly an area which could not be jurisdictional because there was hardly a wet area which could not be used by birds. Generally, this made jurisdictional decisions easier.

However, resurrecting the Migratory Bird Rule will not necessarily end the jurisdictional debate. It would still leave uncertain issues such as what constitutes the ordinary high water mark of an area for jurisdictional purposes, are submerged drainage tiles a tributary, and how far can an insolated water be from a navigable-in-fact water and still be jurisdictional.

Returning to the pre-SWANCC era is also likely to resurrect constitutional questions that will need to be resolved by the Supreme Court regarding whether exercising Clean Water Act jurisdiction based on a migratory bird rule violates the Commerce Clause of the Constitution or unconstitutionally infringes on the balance of State and Federal powers regarding land management processes. I recognize strong arguments can be mustered on both sides of the constitutional debate and I do not pretend to be wise enough to predict what the Supreme Court will do. I only know that when these issues were presented in the SWANCC case, the Court said there were "significant constitutional questions" raised by the Migratory Bird Rule.

With that introduction, I would like to trace for the Committee the history of the regulatory interpretations given the term "navigable waters," including the origins of the Migratory Bird Rule, explain the history of wetlands delineation procedures, review the 2004 GAO Report which addresses Corps' jurisdictional practices, and suggest a few issues for your consideration.

I. OVERVIEW OF CLEAN WATER ACT JURISDICTIONAL REGULATIONS UNTIL 1986

The history of what constitutes a jurisdictional water under the Clean Water Act has been evolutionary. Although Congress has not changed the basic statutory provisions which define "navigable waters" as "waters of the United States," the manner in which the Corps and EPA have interpreted the jurisdictional reach of the Clean Water Act has changed over time. The Supreme Court traced part of this evolution in United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 123–124 (1985). Initially, the Corps interpreted the Clean Water Act as embracing no more than navigable waters and their adjuncts. See Permits for Activities in Navigable Waters or Ocean Waters, 39 Fed. Reg. 12115 (1974). After a judicial challenge to that definition, the Corps issued new regulations in 1975 redefining the term "waters of the United States" to also include tributaries of navigable-in-fact waters as well as interState waters and their tributaries and non-navigable intraState waters whose use could affect interState commerce. See 40 Fed. Reg. 31320 (1975).

In 1977, the Corps further revised its regulations, codifying the 1975 interim regulations as final regulations, creating the nationwide Permit program, and making regulatory changes by doing things such as eliminating the reference to the standard that wetlands needed to be periodically inundated, adding a definition of what constituted an "adjacent" wetland, and making clear that wetlands included swamps, bogs, and marshes. See 42 Fed. Reg. 37122, 37126–30 (1977).

In 1982 and various times thereafter, the Corps has changed the regulations. Some of the changes were technical and some, such as the Migratory Bird Rule, were significant. All of these changes regarding what is a "navigable water" have occurred without any definitional changes being adopted by Congress.

II. HISTORY OF THE MIGRATORY BIRD RULE

In 1985, 13 years after the Clean Water Act was passed, the Corps determined that the use of isolated waters by migratory birds could provide a sufficient interState commerce connection to support Clean Water Act jurisdiction. This one action brought millions of acres under Clean Water Act jurisdiction.

Despite the significant regulatory impact of the Migratory Bird Rule, it was not adopted using the traditional Administrative Procedure Act public notice and comment rulemaking procedures as had been the case up to that time under the Clean Water Act. Instead, the Migratory Bird Rule was born on November 8, 1985 through an unpublished memorandum issued to Corps District Offices by Brigadier General Patrick J. Kelly.[2] The change was prompted by a request from Senator George Mitchell during a Section 404 Oversight Hearing before the Committee on Environment and Public Works on July 15, 1985 that this matter be considered.[3]

The public was not advised of the Corps' rule change until 1 year after it was adopted. The notice to the public came in the preamble to new regulations issued under the Clean Water Act. See 51 Fed. Reg. 41206, 41217 (1986). In the preamble to the new regulations, the Corps commented that the requisite link with interState commerce for Clean Water Act jurisdiction may be satisfied by showing the presence of waters which "are or would be used as habitat" by migratory birds or endangered species. Notably, the Corps' preamble comment was not included in the actual text of the final regulations.

In considering what the public was told about this new policy, it is significant that the public notice of the Corps' new policy states the jurisdictional standard is whether the area contains waters which "are or would be used" as habitat by migratory birds. In contrast, Brigadier General Kelly's unpublished Memorandum to Corps offices directed the Corps to declare an area jurisdictional if it contains waters which "are or could be used" as habitat by migratory birds. "Would" is defined as expressing "habitual action." Webster's New World Dictionary (2d Ed.). "Could" is defined as "to be able." Id. The Corps advised the public the standard was "would be used" when, in fact, the Corps was employing a different "could be used" standard to decide Clean Water Act jurisdiction.

III. DOES THE TERM "NAVIGABLE WATERS" HAVE MEANING?

Under section 404, the Corps may regulate discharges into "navigable waters" which are defined as "waters of the United States." 33 U.S.C. 1362(7); 33 C.F.R. 328.3. In considering the meaning of these words, the Supreme Court said Congress chose the concept of navigability to anchor the Act and "it is one thing to give a word limited effect and quite another to give it no effect whatever." SWANCC, 531 U.S. at 172. One question this Committee may wish to consider as you debate the future of the Clean Water Act is what did your predecessors intend by using the term "navigable waters."

A. The 1972 Legislative History of the Term "Navigable Waters"

In choosing the term "navigable waters" to define Corps jurisdiction under the Clean Water Act, Congress selected a term with a clear historical meaning which did not include all wet areas of the United States. In 1871, the Supreme Court defined "navigable waters" as those waterways that:

> 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.

The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1871). However, this definition was viewed as too narrow to achieve Congress' purposes under the Clean Water Act.

Congressional debate preceding enactment of the Clean Water Act demonstrates Congress was grappling with the challenge of designing an effective scheme to end the pollution of our Nation's waters.[4] Given that goal, a program which only regulated discharges into traditional navigable waters such as rivers would be a futile exercise if discharges into connected tributaries and estuaries were not also regulated.

> The objective of this [Act] is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that . . .

[2] Memorandum to Corps District Offices from General Patrick Kelly, Deputy Director of Civil Water, November 8, 1985.

[3] At the Oversight Hearing, Senator Mitchell asked Richard Sanderson, EPA's Deputy Assistant Administrator for External Affairs, to confer with EPA's General Counsel concerning the use or potential use of an area by migratory birds or endangered species as a basis for Clean Water Act jurisdiction. In response, the EPA's General Counsel, Francis Blake, wrote a memorandum stating jurisdiction may be invoked if waters are used or could be used by migratory birds or endangered species. Brigadier General Kelly's memorandum was distributed to inform Corps District Offices of Mr. Blake's conclusion.

[4] This debate is reflected in the declaration of goals and policy in the Clean Water Act which states:

(1) it is the national goal that the discharge of pollutants into navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on water be achieved by July 1, 1983;

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited. . . .

33 U.S.C. 1251(a).

Although Congress wanted to go beyond the 1871 definition of navigability, Congress was clear that the Act was anchored by the concept of navigability. Congress intended that there be a dividing line between what was navigable and what was not and some areas were to be outside Corps jurisdiction. Much of the congressional debate focused on identifying that dividing line.

1. The Committee Reports

The Senate Committee Report explained congressional intent regarding the Act's jurisdictional reach as follows:

The control strategy 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. . . . Water moves in hydrological cycles and it is essential that the 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. 414, 92d Cong., 2d Sess., 77 (1972), reprinted in A Legislative History of the Water Pollution Control Act Amendments of 1972 ("Legislative History"), Volume II, at 1495. The Senate wanted to extend the concept of navigability as far as the tributaries of navigable waters which could contribute harmful pollutants to navigable rivers and streams.

Like the Senate, the House grounded the Act's jurisdictional reach in the concept of "navigable waters." The House also sought to go beyond the 1871 definition but, like the Senate, stopped short of saying all waters were jurisdictional. The House Committee Report stated:

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 too 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. . . .

H. Rept. No. 911, 92d Cong., 2d Sess., 137 (1972), reprinted in Legislative History, Volume II, at 818.

The tension between not wanting to be restricted by the 1871 definition of navigability, not being overbroad, but addressing the policy issue of water pollution is reflected in these reports. Congress did not need to be so vague if Congress wanted to ignore the concept, and limits, of navigability. Simple words would have sufficed to achieve that end. Instead, Congress stayed with the historical concept of navigability but sought through the explanation of congressional intent to extend its scope to include waters, such as non-navigable tributaries, which could contribute pollutants to traditionally navigable waters.

2. The floor Debate

The floor debates reflect the same tension in finding the dividing line between what is included in the Clean Water Act and what is not. In discussing the Conference Report, Senator Muskie, the floor manager for the Conference Report and one of the conferees, stated:

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 constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes.

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 com-

merce is conducted today. In such cases the commerce on such waters would have a substantial economic effect on interState commerce.

Legislative History, Volume I, at 178. Thus, previous agency determinations of navigability "made for administrative purposes" which had excluded non-navigable tributaries were not to be used. Instead, the Act's jurisdictional reach was to be grounded in the concept of navigation modified so as to include connected tributaries and other waterways such as intraState lakes which were part of the interState "highway over which commerce is or may be carried. . . ." Id.

Congressman Dingell, the floor manager in the House and also a conferee, gave a similarly detailed discussion of the intended meaning of the term "navigable waters" during House consideration of the Conference Report. Congressman Dingell stated:

The 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. Appalachian Electric Power Co., 311 U.S. 377, 407-410, 416, (1940); Wisconsin Public Service Corp. v. Federal Power Commission, 147 F.2d 743 (CA 7, 1945); cert. denied, 325 U.S. 880; Wisconsin v. Federal Power Commission, 214 F.2d 334 (CA 7, 1954) cert. denied, 348 U.S. 883 (1954); Namekagon Hydro Co. v. Federal Power Commission, 216 F.2d 509 (CA 7, 1954); Puente de Reynos, S.A. v. city of McAllen, 357 F.2d 43, 50-51 (CA 5, 1966); Rochester Gas and Electric Corp. v. Federal Power Commission, 344 F.2d 594 (CA 2, 1965); The Montello, 87 U.S. (20 Wall.) 430, 441-42 (1874); Economy Light & Power v. United States, 256 U.S. 113 (1921).

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 "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 a 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.

Legislative History, Volume I, at 250.

Like Senator Muskie, Congressman Dingell did not want to be bound by the traditional "narrow definitions of navigability" which excluded tributaries and waters which were no longer navigable because of obstructions. Like his Senate counterpart, Congressman Dingell wanted to reach waters serving "as a highway." Id. In fact, a review of the cases cited by Congressman Dingell as demonstrating the proper scope of the term "navigable waters" reveals that each involved a body of water that was used or could be used as a "link in the chain of commerce among the States." Id. Each case involved actual navigation, past, present or future, and most of the cases focused on waters that once were navigable for waterborne commerce but were no longer because of obstructions.[5] The Act was to be anchored in the concept of navigation for commerce.

[5] The Montello, 87 U.S. (20 Wall.) 430 (1874) (navigable waters to include all waters capable of use for waterborne commerce); Economy Light & Power Company v. United States, 256 U.S. 113 (1920) (all waters that had been previously used for waterborne interState commerce); United States v. Appalachian Electric Power Co., 311 U.S. 377 (1940) (all waterways that could be made navigable "with reasonable improvements"); Utah v. United States, 403 U.S. 9 (1971) (all waters that serve as a link in the chain of commerce in any states, a chain that could in-

Continued

The legislative history of the Clean Water Act in 1972 does not indicate that the Act was intended to reach all waters of the United States divorced from the concept of navigability. Rather, the jurisdictional reach of the Act was based on the concept of navigability, in Congressman Dingell's words, "as it flows in the various channels of transportation." Id.

In considering congressional intent, the Corps has recognized the limiting effect of navigability stating the Act does not cover all wet areas. See, e.g., 45 Fed. Reg. 33290, 33398 (1980) ("small, isolated wet areas may not be waters of the United States. . . . Including an 'exemption' for such areas might create the erroneous impression that, but for the exception . . . each puddle and damp spot would need a permit. . . ."); Memorandum in Support of Federal Defendants' Motion to Dismiss or in the Alternative for Summary Judgment and in Opposition to Plaintiffs' Motion for Partial Summary Judgment at 50, National Wildlife Federation v. Laubscher, 662 F. Supp. 548 (S.D. Tex. 1987) (No. G–86–37) ("Congress did not automatically include every waterbody, however isolated, within the coverage of the Act."). Similarly, a detailed review of the 1972 legislative history conducted by the Justice Department revealed no statement or comment to the effect that the Clean Water Act was intended to reach waters unconnected to waterborne commerce and the preservation of water quality. Respondent's [EPA] Petition for Rehearing and En Banc Reconsideration, Hoffman Homes, Inc. v. Environmental Protection Agency, 975 F.2d 1554 (7th Cir. 1992).

B. The Corps' Interpretation of congressional Intent and the 1977 Amendments to the Clean Water Act

As noted above, subsequent to passage of the Act in 1972, the Corps defined the term "navigable waters" to essentially parallel the Supreme Court's 1871 definition. This regulation was challenged and the court held Congress did not intend the term "navigable waters" to be "limited to the traditional tests of navigability." Natural Resources Defense Council, Inc. v. Callaway, 392 F. Supp. 685, 686 (D.D.C. 1975). The Corps was ordered to publish new regulations.

In response, the Corps issued interim final regulations that covered:

(1) all navigable coastal waters;

(2) all coastal wetlands, mudflats, swamps and similar areas that are contiguous or adjacent to other navigable waters;

(3) rivers, lakes, streams and artificial water bodies that are navigable;

(4) artificially created channels and canals used for recreation or navigation that are connected to navigable waters;

(5) tributaries of navigable waters;

(6) interState waters;

(7) intraState lakes, rivers and streams used (a) by interState travelers, (b) for removal of fish sold in interState commerce, (c) for industrial purposes by industries in interState commerce, and (d) in the production of agricultural commodities sold in interState commerce;

(8) freshwater wetlands contiguous or adjacent to other navigable waters; and

(9) other waters necessary for the protection of water quality such as intermittent rivers, streams, tributaries and perched wetlands that are not contiguous or adjacent to navigable waters.

40 Fed. Reg. 31321, 31324 (1975).

These regulations generated a firestorm of comment. Immediately, efforts were made in the Congress to restrict the Corps' jurisdiction under the new regulations.

On June 3, 1976, the House passed the Wright Amendment restricting the Corps' jurisdiction to traditionally navigable waters and adjacent wetlands. 122 Cong. Rec.

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clude other modes of commerce as well); United States v. Utah, 283 U.S. 64 (1931) (absence of waterborne commerce was not determinative of navigability if the river would be used for transport if obstructions were removed); Wisconsin Public Service Corp. v. Federal Power Commission, 147 F.2d 743 (7th Cir. 1945), cert. denied, 325 U.S. 880 (1945) (river that was used to float logs is navigable even if otherwise obstructed by falling rapids and sandbars); Wisconsin v. Federal Power Commission, 214 F.2d 334 (7th Cir. 1954), cert. denied, 348 U.S. 883 (1954) (damming a river which could still be used for transport does not make the river non-navigable); Namekagon Hydro Co. v. Federal Power Commission, 216 F.2d 509 (7th Cir. 1954) (river a navigable water citing Wisconsin v. Federal Power Commission); Puente de Reynosa, S.A. v. city of McAllen, 357 F.2d 43 (5th Cir. 1966) (prior actual navigation raises a presumption of potential navigation with reasonable improvements); Rochester Gas and Electric Corp. v. Federal Power Commission, 344 F.2d 594 (2d Cir. 1965), cert. denied, 382 U.S. 832 (1965) (previously navigable river should still be so considered if it could be used for navigation in the future with reasonable improvements); United States v. Underwood, 344 F. Supp. 486 (M.D. Fla. 1972) (waterway which can be made available for navigation by reasonable improvement is navigable.)

16565 (1976).[6] The Senate passed S. 2710 which included the Baker-Randolph Amendment that defined the term "navigable waters" to restrict the Corps.[7] The two bills had numerous provisions and the two chambers were unable to resolve their differences before Congress adjourned. However, as to the term "navigable waters," the House and the Senate were of one mind. The Corps was to be restricted to waters that had been, were, or could be used for navigation to transport commerce and to adjacent wetlands. The Corps' efforts to reach beyond these limits were rejected.

[T]he jurisdiction of the Secretary of the Army shall be limited to those portions of the navigable waters (1) that are subject to the ebb and flow of the tide shoreward to their mean high water mark (mean higher high mark on the Pacific coast), and (2) that have been used, are now used, or are susceptible to use as a means to transport interState commerce, up to the head of their navigation, and (3) that are contiguous or adjacent wetlands, marshes, shallows, swamps, mudflats, and similar areas.

122 Cong. Rec. 28778 (1976).

In the next Congress, the House passed H.R. 3199, the Federal Water Pollution Control Act Amendments of 1977, with a provision defining the term navigable waters that was identical to the Wright Amendment from the previous Congress. 123 Cong. Rec. 10434 (1977). S. 1952, introduced by Senator Muskie, did not change the definition of "navigable waters" but did exempt from Section 404 certain activities such as normal farming, ranching, and silviculture.

Although the Senate bill did not change the definition of "navigable waters," the debate makes it clear that no one supported the Corps' expanded definition of its jurisdiction. Senator Muskie stated:

[N]o Member of the Senate, so far as I know, defends Section 404. The Senator knows that I vigorously opposed the interpretation of Section 404 which the Corps of Engineers undertook to implement. . . . So the contest is really not between those who defend Section 404 and those who object to it but rather it is a competition between different methods of dealing with the problems created by the Corps' interpretation of Section 404.

A Legislative History of the Clean Water Act of 1977, A Continuation of the Legislative History of the Federal Water Pollution Control Act (1978) (also the "Legislative History"), Volume IV, at 903.

Senator Bentsen replied:

I would say to the Senator from Maine that I think that is a fair statement. . . . We are left with a scope of jurisdiction as defined by the courts, a jurisdiction that runs counter to the original intent of the legislation as passed by Congress.

Id. at 903.

Senator Domenici stated:

I think we have an opportunity here in the Senate to undo something that has grown up that we really never intended, and not to continue to ignore the fact that we never intended under Section 404 that the Corps of Engineers be involved in the daily lives of our farmers, realtors, people involved in forestry, anyone that is moving a little bit of earth anywhere in this country that might have an impact on navigable streams. We just did not intend that.

Id. at 924.

Senator Tower stated:

[L]ast year, as in this session of the 95th Congress, I introduced an amendment aimed at diminishing the control which the Corps of Engineers has acquired through judicial interpretation in the courts. . . . It is imperative that we make clear the terminology and bring it in line with the original intent of navigable waters.

Id. at 930.

Senator Dole stated:

[I]t is the mechanism and the extent of jurisdiction reflected in the administration of Section 404 that has been justifiably challenged. It is time that congressional intent is clarified.

Id. at 935.

Senator Hansen stated:

[6] The Wright Amendment to H.R. 9560 provided: The term "navigable waters" . . . shall mean 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. . . . 122 Cong. Rec. 16552 (1976). The Wright Amendment also defined the term "adjacent wetlands" as wetlands adjacent or contiguous to navigable waters. Id.

[7] The Baker-Randolph Amendment provided:

It is my belief that the adoption of this amendment would return the Federal Water Pollution Control Act to the State originally intended by Members of this Congress when the matter came before us in 1972.

Id. at 940.

Senator Muskie summed it up stating:

There is not a Senator on the floor, including the Senator who is speaking, who supports Section 404 as it has been interpreted and implemented by the Corps of Engineers. . . . Now, what the committee bill does is very simple. It undertakes to continue the Corps' traditional jurisdiction exercised since the Refuse Act of 1899 and before.

It was under that jurisdiction that the Corps for all these decades has policed and monitored and approved dredging in the waterways of our country and disposed of the dredged spoil wherever it chose without any consideration for the environmental values concerned or the damage that was done because of that insensitivity.

For the purpose of disciplining the Corps in that respect, Section 404 was enacted into law in 1972. The Corps proceeded to take that section and, by its interpretation, expand it far beyond any intent of the Congress so that it found itself threatening regulation in areas of the country which the Corps had never imagined it had any jurisdiction over.

Id. at 947–948.

All this over a regulation which clearly reached isolated waters such as intermittent rivers, streams, tributaries and perched wetlands only if it was necessary to protect "water quality."[8]

The objective of the 1972 Act is to protect the physical, chemical, and biological integrity of the Nation's waters. Restriction of jurisdiction to those relatively few waterways that are used or are susceptible to use for navigation would render this purpose impossible to achieve. Discharges of dredged or fill material into lakes and tributaries of these waters can physically disrupt the chemical and biological integrity of the Nation's waters and adversely affect their quality. The presence of toxic pollutants in these materials compounds this pollution problem and further dictates that the adverse effects of such materials must be addressed where the material is first discharged into the Nation's waters.

S. Rep. No. 370, 95th Cong., 1st Sess., 75 (1977), reprinted in Legislative History, Volume IV, at 708. The Report went on to delineate areas that were not intended to be covered by the Clean Water Act stating:

These specified activities should have no serious adverse impact on water quality. . . .

Id. at 710.

The concern was to cover waters affecting water quality, not every wet area.

The July 25, 1975 interim final regulations that were the target of this congressional attention were replaced by final regulations on July 19, 1977 which went even farther than the interim final regulations. 42 Fed. Reg. 37122 (1977). The final regulations, which parallel today's regulations, stated the Clean Water Act would reach navigable waters, their tributaries, adjacent wetlands and:

All other waters of the United States . . . 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 United States, the degradation or destruction of which could affect interState commerce.

42 Fed. Reg. 37144.

In the face of the overwhelming congressional sentiment to reject the less expansive interim final regulations, it does not seem logical to argue that Congress embraced the more expansive final regulations that were published in the later stages

[8] The Senate Committee Report stated:

of the 1977 congressional debate.[9] Nor does it seem logical to argue that in 1977 Congress embraced the Migratory Bird Rule which was announced in 1986.[10]

IV. THE WETLANDS DELINEATION MANUALS

Not only has the regulatory definition of what constitutes a "navigable water" changed over time, but the definition of what constitutes a wetland has changed.

Prior to 1989, the four Federal agencies involved in wetlands protection (Corps, EPA, Fish and Wildlife Service, and Soil Conservation Service[11]) had separate procedures and methodologies for delineating wetlands. To reconcile these differences, a 12-member committee of experts was appointed in 1988. The result was the 1989 Federal Manual for Identifying and Delineating Jurisdictional Wetlands. Michael S. Nagy; The Definition of "Wetlands" Under Section 404 of the Clean Water Act; Past, Present, and Future; 3 Journal of Environmental Law, 1993.

The 1989 manual replaced the Corps' 1987 Wetlands Delineation Manual as well as the delineation manuals used by other agencies. The Corps' 1987 manual had utilized a three-part test requiring the presence of hydrophytic vegetation, hydric soils, and wetlands hydrology.[12] The 1989 manual provided that jurisdictional wetlands existed if only two of the three elements were present. The 1989 manual specified that all three standards had to be met, but it permitted agencies to infer the presence of one standard based on the presence of the other two.

After the 1989 manual was published, controversy erupted based on the fact that significant amounts of acreage that had not been jurisdictional under the 1987 manual would suddenly become so. This controversy resulted in proposed changes to the 1989 manual which culminated in a 1991 manual for delineating wetlands. Like the 1989 manual, the 1991 manual affected the areas which would now be jurisdictional. One analysis suggested that applying the 1991 manual in Virginia would have resulted in 59 percent of previously identified wetlands in the State no longer being jurisdictional. W. R. Walker and S. C. Richardson; The Federal Wetlands Manual: Swamped by Controversy, Virginia Water Resources Research Center; Special Report No. 24; October 1991. Congress finally resolved the controversy with the passage of the Energy and Water Development Appropriations Act of 1993 containing a provision requiring the use of the Corps' 1987 manual.

My point is not to debate the relative merits of each delineation manual. The point is that experts can, did, and do disagree about what constitutes a wetland. The unexpert public is left confused. Even today, using the same delineation manual and the same Clean Water Act regulations, an area might be seen as jurisdictional in one Corps District Office and not jurisdictional in another.

V. APPLICATION OF EXISTING STANDARDS BY CORPS DISTRICT OFFICES VARIES BY OFFICE

Within the Corps' 38 District Offices, there are significant differences of interpretation regarding what areas are jurisdictional under the Clean Water Act. In 1994, the General Accounting Office conducted a survey of numerous Corps District Of-

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[9] An exhaustive search of the 1977 legislative history by the Justice Department produced only three "supporting" quotes. Senator Bentsen, who introduced an amendment to narrow the definition of navigable waters, complained that the Corps' regulation would cover "isolated marshes." 123 Cong. Rec. 26711 (1977). Senator Tower, who supported the Bentsen amendment, objected to the Corps' regulatory scheme because it covered "all surface waters and wetlands of the United States." Legislative History, Volume IV, at 930. Finally, Congressman Abnor stated that the Corps' regulatory program covered "virtually all wetlands." 123 Cong. Rec. 34852 (1977). Respondent's [EPA's] Petition for Rehearing and Suggestion of En Banc Reconsideration, Hoffman Homes, Inc. v. Environmental Protection Agency, 975 F.2d 1554 (7th Cir. 1992). These quotes appear to establish that Congress understood the potential reach of the new regulations and, as Senator Muskie made clear, rejected it. The debate was not over whether to reject the Corps' new definition of its jurisdiction, but how to reject it. The government's reliance on Congressman Abnor's statement is interesting in that the Congressman's statement was inserted into the congressional Record as an Extension of Remarks sandwiched between Congressman Lundine's financial disclosure and Congressman Michel's reprinting of an article in the Peoria Journal Star on race discrimination.

[10] See SWANCC, 531 U.S. at 170, "We conclude that the [Corps has] failed to make the necessary showing that . . . demonstrates Congress' acquiescence to the Corps' regulations or to the 'Migratory Bird Rule,' which, of course, did not first appear until 1986."

[11] The Soil Conservation Service was renamed the Natural Resources Conservation Service in October 1994.

[12] Hydrophytic plants are able to live in water, or in soil that is often saturated or low in oxygen. Hydric soils are formed when saturation occurs long enough to cause anaerobic (no oxygen) conditions. Hydrology is the pattern of flooding or saturation.

fices. That report, "Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction," GAO-04-297 (Feb. 2004) ("GAO Report"), found the following.

- Some District Office generally regulate all wetlands simply because they are located in the 100 year floodplain. Other District Offices do not use the 100 year floodplain as a jurisdictional basis. Still other District Offices consider locations within the 100 year floodplain as only one of many factors to be considered.
- Some District Offices use sheet flow (overland flow of water outside of a defined channel) as a basis for regulating an associated wetland because of a hydrological connection to the sheet flow. Other District Offices do not consider sheet flow between a wetland and a water when making jurisdictional determinations.
- Some District Offices regulate almost all wetlands located within 200 feet of other waters of the United States and generally do not assert jurisdiction beyond that distance. Other District Offices employ a 500 foot standard.
- Some District Offices assert jurisdiction over wetlands separated from other waters of the United States by manmade or natural barriers such as dikes and dunes provided that the separation is caused by no more than one such barrier. Other District Offices assert jurisdiction over wetlands separated from waters of the United States by more than one barrier. Still others regulate all wetlands within 200 feet of other waters of the United States regardless of the number of barriers separating the waters and the wetlands.
- An official in one District Office told GAO that if that official asked three different district staff to make a jurisdictional determination based on the lateral reach of waters of the United States using the ordinary high water mark standard, he would probably get three different decisions on what areas are subject to Clean Water Act jurisdiction.
- Some District Offices were fairly inclusive in finding a wetland jurisdictional if water flowed in a manmade surface conveyance between the wetland and a water of the United States. Other District Offices said that mere conveyance was insufficient and the ditch or channel must also have an ordinary high water mark or display wetlands characteristics. Still another District Office addresses which direction a water is flowing asserting that jurisdiction follows if the water flows from the wetland into a water of the United States. However, if the flow went from the water of the United States to the ditch into the wetland, the wetland would not be considered jurisdictional.
- With respect to whether the ditch itself is jurisdictional, some Districts assert jurisdiction over a ditch whenever it creates a connection between a wetland and a water of the United States. Other Districts indicated such a ditch might or might not be jurisdictional depending on factors such as whether the ditch had an ordinary high water mark, exhibits the three parameters of a wetland, or replaces a historic stream. For this second group of District Offices, a non-jurisdictional ditch could be filled without a Section 404 permit, thus severing the jurisdictional connection between the wetland and a water in the United States. Significantly, once that connection is severed, the previously jurisdictional wetland is rendered non-jurisdictional and can be filled without a Section 404 permit.
- Some District Offices use drain tiles (porous clay pipes buried below the surface to provide drainage) to establish a jurisdictional connection between a wetland and a water of the United States when the drain tiles replace a historic tributary. Other District Offices do not consider drain tiles to establish jurisdictional connections.
- Some District Offices considered storm drain systems as jurisdictional connections particularly when the storm drain system conveys the flow of a historic stream. Other District Offices used storm drain connections to establish jurisdiction even if those storm drain connections do not replace a historic tributary.

GAO Report at 17–26.

Notwithstanding the fact that every Corps office is bound by the same set of Federal regulations, the facts are that those regulations are interpreted differently in the various Corps regions, leaving the public subject to varying standards. Significantly, the public is often not apprised of the standards used by the Corps to determine jurisdiction. Specifically, of the 16 District Offices surveyed by GAO, only three had developed written documentation of their practices that they made available to the public. According to GAO: "The other 13 districts that we reviewed have not made documentation of their practices publicly available." GAO Report at 27.

VI. THE SWANCC PROJECT AND THE CORPS' JURISDICTIONAL DETERMINATION

It is within this regulatory milieu that the SWANCC case arose. However, before proceeding to the case itself, it may be helpful to review certain facts.

SWANCC was comprised of 23 suburban Chicago towns and villages. In compliance with Illinois law requiring communities to develop solid waste management plans, SWANCC developed a management plan for the disposal of non-hazardous solid waste for the 700,000 people in its member communities. Although the Corps ultimately rejected SWANCC's section 404 permit application, the Corps characterized SWANCC's solid waste management proposal as "an admirable plan" to manage waste for 20 years by emphasizing waste via reduction, recycling, and composting.

To accomplish this plan, SWANCC purchased a 533-acre site straddling Cook and Kane Counties to create a balefill a landfill where baled, rather than loose, waste is dumped. SWANCC proposed to use 410 acres in Cook County for the balefill. 298 of those acres had been used for sand and gravel strip mining from the 1930's to the 1950's. This strip mining left alternating linear spoil ridges and excavation trenches across the property. Some of the trenches and depressions left by the strip mining formed seasonal and sometimes permanent ponds. The ponds were isolated and the Corps never suggested the existence of any hydrological connection to any navigable lakes, rivers, or streams.

Prior to becoming involved in the section 404 process, SWANCC had obtained approval from the Cook County Zoning Board of Appeals in 1987 for the balefill project. After conducting ten public hearings and compiling what was determined to be the largest record of proceedings in its history, the Zoning Board recommended approval of the permit and the Cook County Board of Commissioners approved the permit by a 75 percent vote.

SWANCC also had the required State approvals. SWANCC had submitted a 1700-page application for the requisite permits under Illinois law and, in November 1989, the Illinois EPA approved a development permit for SWANCC. Subsequently the Illinois Department of Conservation reviewed SWANCC's plans and reported that any adverse impacts on State species would be mitigated through implementation of SWANCC's mitigation plan.

The uncertainty faced by the public regarding what are jurisdictional waters under the Clean Water Act was graphically demonstrated when SWANCC entered the Federal arena. Prior to the time the Corps asserted jurisdiction over SWANCC's site, SWANCC had twice asked the Corps if there were any Clean Water Act jurisdictional waters on the site. In response to SWANCC's first inquiry, the Corps advised SWANCC on April 17, 1986: "[T]he . . . site is not subject to our regulatory authority. . . ."[13] To be absolutely certain there were no CWA permitting issues SWANCC asked again. On March 4, 1987, the Corps again reaffirmed its lack of jurisdiction stating: "[T]he . . . site is not subject to our regulatory authority. . . ."[14]

Four months later, on July 8, 1987, the Illinois Nature Preserves Commission ("INPC") wrote the Corps stating that a brief visit to SWANCC's 410 acre site by INPC staff "resulted in the observation of a number of migratory bird species. . . ."[15] The letter did not State whether the migratory birds were observed on the actual depressions to be filled or on the remaining 392.4 acres. The letter contained no discussion of whether the birds actually used the specific depressions to be filled versus the non-jurisdictional upland treed areas on the site. The letter was devoid of any discussion of whether the low lying depressions to be filled provided a necessary habitat for the birds. Nevertheless, the Corps wrote the INPC on November 16, 1987 stating:

We have reviewed your letter and have determined that the water areas of the abandoned gravel pit do qualify as "waters of the United States" and are under our regulatory authority. . . . This determination is based on the following three criteria: 1/ that the proposed balefill site has been abandoned as a gravel pit; 2/ that the water areas and spoil piles have developed a natural character; and, 3/ that the

[13] Letter to Daniel P. Dietzler, Patrick Engineering, Inc., from James E. Evans, Chief, Construction Operations Division, Chicago District, Corps of Engineers, April 17, 1986.

[14] Letter to Daniel P. Dietzler, Patrick Engineering, Inc., from James E. Evans, Chief, Construction Operations Division, Chicago District, Corps of Engineers, May 4, 1986.

[15] Letter to Tom Slowinski, Regulatory Functions Branch, Chicago District, Corps of Engineers, from Brian D. Anderson, INPC, July 8, 1987.

water areas are used or could be used as habitat by migratory birds which cross State lines.[16]

Between July 8, 1987 and November 16, 1987, the Corps performed no surveys or analyses to determine if migratory birds actually used the 17.6 acres at issue versus the non-jurisdictional treed areas. In fact, the Corps never conducted any study to determine whether the birds used or even could use the 17.6 acres. Instead, relying exclusively on INPC's representation that migratory birds were observed somewhere on the 410 acre property, the Corps asserted jurisdiction over 17.6 acres of low lying trenches and ruts on the site. The jurisdictional theory employed by the Corps was that the mere presence of birds somewhere on the 410 acre site was sufficient to give the Corps jurisdiction over the 17.6 acres of strip mined depressions to be filled.

To say that SWANCC was confused by the Corps' decisionmaking process would be something of an understatement. Nevertheless, because it had no choice, SWANCC submitted a section 404 permit application in February 1990. In July 1994, the Corps denied the permit finding that the balefill was contrary to the public interest because it would break up a large contiguous forest which would cause unmitigatable impacts to birds species, SWANCC had not conclusively demonstrated that its proposal was the least environmentally damaging practicable alternative, and SWANCC had not demonstrated that its 23 municipal corporations had the capacity to finance in perpetuity long-term maintenance responsibilities and remediation should those problems arise.

VII. THE SUPREME COURT'S SWANCC DECISION

The meaning of the Supreme Court's ruling in SWANCC was, and has been, the subject of much debate. Many experts argued the SWANCC decision precluded the Corps from regulating isolated, intrastate, non-navigable waters. Others argued that the Court had only prohibited regulation of waters based exclusively on the Migratory Bird Rule. Although the second interpretation came to be that adopted by the Federal agencies and by many lower courts, it is interesting that Justice Kennedy in his concurring opinion and Justice Stevens, in his dissenting opinion in Rapanos v. United States, 126 S. Ct. 2208 (2006), interpreted SWANCC differently. Justice Kennedy stated: "In [SWANCC] the Court held, under the circumstances presented there, that to constitute 'navigable waters' under the Act, a water or wetland must possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be made so." Rapanos v. United States, 126 S. Ct. at 2236 (Kennedy, J., concurring). See also, id. at 2256, Stevens, J., dissenting: "[In SWANCC t]he Corps had asserted jurisdiction over the gravel pit under its 1986 Migratory Bird Rule . . . . The Court rejected this jurisdictional basis since these isolated pools . . . had no 'significant nexus' to traditionally navigable waters."

As noted earlier, some people have said that since the SWANCC decision there has been confusion about what areas are jurisdictional and, therefore, a return to the pre-SWANCC era will clarify matters. That may not be the case because, as the GAO Report documents, the regulatory definition of "waters of the United States" is subject to varying interpretations and at least some of those issues will remain even if we return to the pre-SWANCC era. However, it may be helpful to consider why these different approaches exist. Given that the Clean Water Act is 35 years old, one would think many of the issues identified by GAO would have been resolved by now.

When GAO asked the Corps to explain the varying jurisdictional practices in different Corps districts, the Corps offered two explanations. The first was that local conditions within districts often require the use of different standards. The second reason given by the Corps according to GAO was that: because nearly all waters were jurisdictional under the migratory bird rule, questions regarding the imprecise definition of adjacent wetlands and isolated waters were previously moot. When the Supreme Court struck down the migratory bird rule in 2001, districts had to rely on the key terms and the regulatory definition of waters in the United States which had not been well defined.

GAO Report at 26. The GAO Report states that both the Department of Defense and EPA "concurred with the report's findings . . . ." Id. at 29. In short, and in GAO's words, because of the Migratory Bird Rule "nearly all waters and wetlands in the United States were potentially jurisdictional" and, therefore, no other juris-

[16] Letter to Brian D. Anderson, INPC, from Jess J. Franco, Jr., District Engineer, Chicago District, Corps of Engineers, November 16, 1987. It should also be noted that in three separate letters to SWANCC dated April 21, 1988; March 23, 1989; and March 20, 1990 the Corps confirmed the isolated waters on SWANCC's property were not wetlands.

dictional standard was really required. Id. at 8. Now, the Corps is grappling with the absence of the Migratory Bird Rule and is applying the regulations actually promulgated pursuant to the notice and comment procedures of the Administrative Procedure Act.

VIII. CONSTITUTIONAL ISSUES IN SWANCC

Congress' power under the Commerce Clause extends to "three broad categories of activity: (1) the use of the channels of interState commerce; (2) the instrumentalities of interState commerce, or persons or things in interState commerce; and (3) those activities having a substantial relation to interState commerce, i.e., those activities that substantially affect interState commerce. United States v. Morrison, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549, 558-559 (1996). During the SWANCC Supreme Court litigation, the Corps conceded that the Migratory Bird Rule could only be sustained as an exercise of the third variety of regulatory power.

During the SWANCC litigation, the government's case regarding substantial effects on interState commerce was based on the cumulative effect that filling the isolated ponds on the SWANCC site would have on migratory bird habitat and on the ability people to pursue recreational and commercial activities associated with migratory birds. Although the Supreme Court has not adopted a categorical rule against cumulating the effects of an activity to find a substantial impact on interState commerce, it has emphasized that "thus far in our Nation's history our cases have upheld Commerce Clause regulation of intraState conduct only where that activity is economic in nature." Morrison, 529 U.S. at 613. The Migratory Bird Rule, however, prohibits activities that are not inherently economic or commercial. It applies equally to a private homeowner who plants a garden, landscapes the backyard, or fills in a damp patch to prevent mosquitoes, and to a commercial developer who bulldozes a marsh. Indeed, the Corps has taken the position that the Migratory Bird Rule regulates non-commercial "[a]ctivities such as walking, bicycling or driving a vehicle through a wetland" 58 Fed. Reg. 45008, 45020 (1993). Obviously, many of those activities are not commerce in the ordinary sense of that term.

There is a second constitutional issue to consider. Recall that during the SWANCC litigation, the government asserted that filling the isolated ponds on the SWANCC site could reduce the population of migratory birds which could impede the hunting, trapping, and observation of birds' activities for which people spend substantial sums and cross State lines, thereby impacting interState commerce. Given that approximately five billion birds migrate across North America each year and that migratory bird flyways cover the entire continental United States, this theory of jurisdiction would likely grant the Corps power over virtually every area of the United States. However, State and local control over land use is a well-established legal and constitutional principle. In United States v. Lopez, the Supreme Court noted that in considering the propriety of Federal jurisdiction under the Commerce Clause, one must also be cognizant of whether the exercise of Federal authority erodes the "distinction between what is truly national and what is truly local." 541 U.S. at 567.

The Court did not reach any constitutional issues in the SWANCC decision and thus never opined on whether the links between the isolated ponds on SWANCC's site and economic activity were sufficient or too attenuated to pass muster under the Commerce Clause. Nor did the Court opine on whether the ability of the Corps to use the Migratory Bird Rule to control project siting decisions would unconstitutionally impinge on land use and other authority reserved to the states. I recognize that distinguished scholars can and will disagree over these issues and a detailed exposition of these issues is not even attempted in this statement. However, it may be worth noting that in its decision in the SWANCC case, the Court did State there are "significant constitutional questions" raised by the application of the Migratory Bird Rule. SWANCC, 531 U.S. at 174. The Court went on to state: "Permitting [the Corps] to claim Federal jurisdiction over ponds and mudflats falling within the 'Migratory Bird Rule' would result in a significant impingement of the state's traditional and primary power over land and water use. [Citations omitted.]" Id.

IX. INTERPRETATION OF, AND REACTION TO, THE RAPANOS AND CARABELL DECISIONS

I am sure the Committee has been fully briefed by the staff on the substance of the Supreme Court's decision in Rapanos v. United States and I will not address that. Much of the post-Rapanos debate has focused on how the decision will be im-

plemented and what, if any, changes should be made to the existing definition of the term "navigable waters."

In considering definitional changes, it may be appropriate to begin by considering the statute's purposes and the purpose of any amendment. In that regard, S. 1870 is the successor to earlier proposals introduced soon after the SWANCC decision. A fundamental purpose of the legislation was to resurrect the Migratory Bird Rule and to apply Clean Water Act jurisdiction to waters such as those on SWANCC's site. Please recall that SWANCC's site was an abandoned strip mined gravel pit where water accumulated in the strip mine trenches. There was no connection between those isolated ruts and trenches and any navigable water or associated watershed. The only basis for Clean Water Act jurisdiction was to protect birds. Thus, a question which should be asked in considering amendments to the statute is whether the purpose of the Clean Water Act is to protect waters which are part of, and connected in some way to, a watershed, or whether the purpose of the Act is to protect migratory bird habitat even when there is no connection to the watershed. Depending on how one answers that question, the need for, and the structure of, any statutory changes may become clearer.

I raise this issue for your consideration because if it is the wisdom of this Committee and the Congress to enact S. 1870, you should do so with the awareness that this bill will not simply return us to the pre-SWANCC era by reinstating the Migratory Bird Rule. S. 1870 will alter the jurisdictional reach of the Clean Water Act by deleting the term "navigable waters" in the Act and replacing it with a definition of the term "waters of the United States." Such a change would be a fundamental departure from the original intent of the Congress detailed above which grounded the Act in the concept of navigability. In that regard, Supreme Court jurisprudence on the term "navigable waters" in the Clean Water Act indicates that the term "navigable waters" has a meaning that is less than all waters in the United States. As the Court noted in SWANCC: "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 [Clean Water Act]: its traditional jurisdiction over waters that were or had been navigable in fact or which could be reasonably be so made. [Citations omitted]." SWANCC, 531 U.S. at 172. By deleting the term "navigable waters" from the statute, the import of S. 1870 will be to reach all waters in the United States without any reference to navigability.

That such a change in the Clean Water Act would cut a wide swath across America is seen in the description of the Clean Water Act nationwide Permits ("NWP") recently reissued by the Corps. 72 Fed. Reg. 11092 (March 12, 2007). In approving each NWP, the Corps identified the types of activities covered. For example, NWP 29 covers residential construction by individual homeowners; NWP 39 covers commercial and institutional development including fire stations, schools, churches, hospitals, and libraries; and NWP 42 addresses recreational activities such as soccer and baseball fields, bike paths, hiking trails, nature centers, and campgrounds. I am not suggesting that such activities cannot impact water quality. I am only indicating that many people view the Clean Water Act as only affecting developers when, in reality, it affects many other interests. It may be worth noting in this regard that it is estimated that 75 percent of United States wetlands are privately owned. Roy R. Carricker, Wetlands and Environmental Legislation Issues, Journal of Agriculture and Applied Economics 26(1), July 1994.

If the intended result of S. 1870 is to reach all waters in the United States, Congress may also wish to consider whether there is merit to allowing the affected public to challenge jurisdictional decisions where individuals or entities feel Corps' jurisdiction has been improperly exercised. Although the likelihood of success for such a challenge may be limited given the language of S. 1870 and the deference courts accord Federal agencies, the reality is that the courts have generally taken the position that they lack jurisdiction over the Corps' jurisdictional determinations until an enforcement action is brought or a permit denied. See, e.g., Southern Pines Assoc. of the United States, 912 F.2d 713 (4th Cir. 1990); Hoffman Group v. Environmental Protection Agency, 902 F.2d 566 (7th Cir. 1990). Regardless of whether you agree or disagree with the decision in SWANCC, the facts are that SWANCC did not believe the Corps had properly asserted jurisdiction. However, because jurisdictional decisions cannot be challenged in court until after a permit has been denied or an enforcement action begun, SWANCC's 23 municipalities were compelled to spend approximately $4.5 million going through the permit process before having any opportunity to challenge whether the Corps was properly requiring SWANCC to do so. As it turns out, under the law as interpreted by the Supreme Court, SWANCC's municipalities were forced to spend $4.5 million applying for a permit which the Supreme Court said they did not need.

In this regard according to information contained in briefs filed before the Supreme Court in the Rapanos case, the average applicant for an individual permits spends 788 days to complete the permitting process and the mean cost is $271,596; while the average applicant for a nationwide permit spends 313 days and $28,915. These are only the process costs and exclude the costs of design changes and mitigation. Over $1.7 billion is spent each year by the public and private sectors in obtaining wetland permits. Rapanos, 126 S. Ct. at 2214, citing Sundling and Zilberman, The Economics of Environmental Regulation by Licensing: An Assessment of the Wetlands Permitting Process, 42 Natural Resources Journal 59, 74–76, 81 (2002).

As a final matter, I should also note that S. 1870 will likely trigger a debate among constitutional scholars and, if enacted, may well result in a Supreme Court decision defining, as S. 1870 puts it, the "legislative power of Congress under the Constitution." If Congress enacts S. 1870 as written it would not be surprising if some plaintiff raises the issue of the limits of Congress' power under the Commerce Clause and the relationship between Congress' power and those powers reserved to the states. I am not wise enough to predict what the Supreme Court might decide. But it is fair to say that any such decision may define Congress' power not only with respect to the Clean Water Act but also with respect to every other statute for which the Commerce Clause is a constitutional foundation.

X. CONCLUSION

I appreciate the opportunity to appear before you today and I hope my comments will be constructive in your deliberations. This Committee has many issues to consider. There is no doubt you will hear strongly held opinions, all supported by scholarly analyses. Sadly, because of the complexity of these issues, it may be that no matter what this Committee does, at the end of the day, we may find ourselves waiting for the next Supreme Court decision.

RESPONSES BY GEORGE J. MANNINA TO ADDITIONAL QUESTIONS FROM SENATOR BOXER

Question 1. You recently published an article titled, "Waters of the U.S.': Definition Remains in Doubt After Supreme Court Ruling" in which you talk about the Supreme Court's opinions in Rapanos/Carabell. You said that among the Rapanos/Carabell opinions the "areas of agreement were few" and "most assuredly there will be more litigation." In your written testimony for this hearing you say the opinions produced "uncertainty" and you describe the standards announced as "somewhat opaque."

- In your practice, (a) how does the uncertainty created by Rapanos/Carabell affect the advice you give your clients and other affected parties on Clean Water Act issues, and (b) how has this uncertainty played out in administrative and litigation proceedings that you have handled or observed?
- I assume you agree that since SWANCC and Rapanos/Carabell, there are now many more opportunities for your clients and others to argue that the waters they are impacting, including wetlands, are not subject to Federal jurisdiction. What are the types of arguments under SWANCC and Rapanos/Carabell that you are seeing in your practice?

Response. The article I wrote, referenced in your question, was written a few days after the Supreme Court issued its decision in Rapanos v. United States, notwithstanding the fact that the article was not published until almost 2 months later. It was in that article, not my written testimony, that I asserted the opinions produced uncertainty, and the standards were somewhat opaque. The uncertainty I identified immediately after the Court issued its decision existed on two levels. The first level of uncertainty was whether lower courts would adopt different interpretations of what jurisdictional standard to apply given the fact that no single opinion in the Rapanos decision commanded a majority. The second area of uncertainty was how the legal standard selected by the lower courts would be applied in fact specific situations.

Since the Supreme Court's decision in Rapanos, several district and appeals courts have wrestled with the question of the appropriate standard. As you know, most courts are gravitating toward Justice Kennedy's significant nexus standard. Thus, that area of uncertainty which existed at the time the court issued the Rapanos decision appears to be diminishing.

In considering whether the Rapanos decision created uncertainty regarding the application of the selected jurisdictional standard, it may be helpful to step back for perspective. Both the SWANCC and Rapanos decisions proceed from the assump-

tion, based on the legislative history of the Clean Water Act, that not every wet area found in the United States is a water of the United States. This provides a new level of certainty regarding what is properly within the jurisdiction of the Clean Water Act. The result, particularly after the Rapanos decision and the general application of the significant nexus standard, has been that the Corps of Engineers and the public are now, with respect to waters that are not clearly jurisdictional, examining each circumstance to determine if there is a biological, chemical, or physical connection sufficient to satisfy the significant nexus test. These are fact-specific issues. Unless Congress amends the Clean Water Act to provide for jurisdiction over every wet area, the Corps will continue to make fact-specific determinations. It should also be noted that fact-specifications determinations are not a departure from past practice. Indeed, the Rapanos decision did not change this practice. Instead, Rapanos provided more guidance on the factors to be considered in making these determinations.

The Corps of Engineers has long recognized that absent a standard in which every wet area is jurisdictional there may be some judgment regarding what is jurisdictional based on specific factual circumstances. Indeed, in 1980, the Corps specifically noted that the Clean Water Act does not make every wet area jurisdictional. 45 Fed. Reg. 33290, 33398 (1980) ("small, isolated wet areas may not be waters of the United States. . . . Including an 'exemption' for such areas might create the erroneous impression that, but for the exception . . . each puddle and damp spot would need a permit. . . ." Similarly, the Corps of Engineers, through the Department of Justice, asserted in 1987 that "Congress did not automatically include every waterbody, however isolated, within the coverage of the [Clean Water Act]." Memorandum in Support of Federal Defendants' Motion to Dismiss Or In The Alternative For Summary Judgment And In Opposition To The Plaintiffs' Motion For Partial Summary Judgment, at 50, National Wildlife Federation v. Laubscher, 662 F. Supp. 548 (S.D. Texas 1987). Thus, both SWANCC and Rapanos provided greater certainty in determinations regarding Clean Water Act jurisdiction by confirming that not every wet area is subject to jurisdiction under the Act and by providing further definition of the specific issues to be considered in making a jurisdictional determination. Since the Rapanos decision, there has been a more diligent effort to determine, for areas that are not clearly jurisdictional, whether the facts of a specific situation are sufficient to make the finding that an area has sufficient chemical, physical, or biological nexus to support a jurisdictional determination under the Clean Water Act.

Question 2. The Clean Water Act prohibits discharges of toxic chemicals from industrial facilities such as chemical plants and oil refineries into our streams and rivers under what is commonly known as the "NPDES" program.

- It is your opinion that the decisions in SWANCC and Rapanos/Carabell apply to the scope of waters protected under the NPDES program essentially the same way as those decisions apply to waters under the Section 404 program?
- Under Rapanos/Carabell, if a chemical factory is located next to an isolated wetland or a stream that is only flowing at certain times of the year ands in either case, that water does not have a significant nexus to a traditional navigable water, is it your understanding of Rapanos/Carabell that a chemical factory could dump all of the toxic pollution it wants into those water bodies without any control under the Federal Clean Water Act?
- Does it concern you that in many states there may be no legal constraints against polluting wetlands and intermittent streams under the Rapanos/Carabell decisions?

Response. In responding to your question about the extent to which the Rapanos decision will or will not impact the NPDES program, it may be helpful to quote from the plurality opinion in Rapanos which stated:

Respondents and their amici urge that such restrictions on the scope of "navigable waters" will frustrate enforcement against traditional water polluters under 33 U.S.C. § § 1311 and 1342 because the same definition of "navigable waters" applies to the entire statute, respondents contend that water polluters will be able to evade the permitting requirements of § 1342(a) simply by discharging their pollutants into non-covered intermittent water courses that lie upstream of covered waters. See Tr. of Oral Arg. 74-75.

That is not so. Though we do not decide this issue, there is no reason to suppose that our construction today significantly affects the enforcement of § 1342 inasmuch as lower courts applying § 1342 have not characterized intermittent channels as "waters of the United States." The Act does not forbid the "addition of any pollutant directly to navigable waters from any point source." But rather the "addition of any pollutant to navigable waters." § 1362(12)(A)(emphasis added); § 1311(a). . . . We

have held that the Act "makes plain that a point source need not be the original source of the pollutants; it need only convey the pollutant to 'navigable waters'." [Citations omitted.]

Rapanos v. United States, 126 Sup. Ct. 2208, 2227 (2006). Given that the four dissenting Justices would have upheld Clean Water Act jurisdiction in each circumstance presented to the Court, it is likely that at least eight Justices would form a majority around the position taken by the plurality Justices quoted above.

As to the precise example in your question, given the facts you set forth, it is likely that a significant nexus would be found given the volume and toxicity of the substances posited to exist. However, the policy issue is not limited to the example you present. Equally important is the issue of whether homeowners, schools, churches, libraries, and similar entities will be allowed to add a room to their house or build a school, church, or library if the project affects a small wet area which could be used by migratory birds given that one of the objectives of the legislation now pending before your Committee is to resurrect that rule. An example might be helpful. I am advised that a congregation of poor, African-Americans on Maryland's Eastern Shore once sought to construct housing for members of its congregation living in sub-standard conditions. Miraculously, the church raised the $300,000 needed to pay for the construction. However, the church learned that part of the land on which it sought to construct the new housing contained wet areas considered to be jurisdictional under the Clean Water Act. The Corps, exercising its jurisdictional and permitting authority, found another parcel of land existed that could be used for the housing project. Unfortunately, that land cost $300,000, which would have consumed all the money raised for actual construction. Since $300,000 was the only money the church had available, the church abandoned the project. Members of the congregation who would have benefited from improved housing continued to live in sub-standard housing conditions.

Finally, your question raises the issue of the legal restraints which may or may not exist pursuant to Section 404 of the Clean Water Act regarding jurisdiction over isolated waters of intermittent streams. The issue of legal constraints must begin with an analysis of the constitutional issues, a matter about which learned scholars will disagree. However, it might be helpful to review how the Commerce Clause issues were addressed in the SWANCC litigation.

Congress' power under the Commerce Clause extends to three broad categories of activity: (1) the use of the channels of interState commerce; (2) the instrumentalities of interState commerce, or persons or things in interState commerce; and (3) those activities having a substantial relation to interState commerce, i.e., those activities that substantially affect interState commerce. United States v. Morrison, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549, 558–559 (1996). During the SWANCC Supreme Court litigation, the Corps conceded that the Migratory Bird Rule could only be sustained as an exercise of the third variety of regulatory power.

During the SWANCC litigation, the government's case regarding substantial effects on interState commerce was based on the cumulative effect that filling the isolated ponds on the SWANCC site would have on migratory bird habitat and on the ability people to pursue recreational and commercial activities associated with migratory birds. Although the Supreme Court has not adopted a categorical rule against cumulating the effects of an activity to find a substantial impact on interState commerce, it has emphasized that "thus far in our Nation's history our cases have upheld Commerce Clause regulation of intraState conduct only where that activity is economic in nature." Morrison, 529 U.S. at 613. The Migratory Bird Rule, however, prohibits activities that are not inherently economic or commercial. It applies equally to a private homeowner who plants a garden, landscapes the backyard, or fills in a damp patch to prevent mosquitoes, and to a commercial developer who bulldozes a marsh. Indeed, the Corps has taken the position that the Migratory Bird Rule regulates non-commercial "[a]ctivities such as walking, bicycling or driving a vehicle through a wetland." 58 Fed. Reg. 45008, 45020 (1993). Those activities are not commerce in the ordinary sense of that term.

It should also be recalled that during the SWANCC litigation, the government asserted that filling the isolated ponds on the SWANCC site could reduce the population of migratory birds which could impede the hunting, trapping, and observation of birds' activities for which people spend substantial sums and cross State lines, thereby impacting interState commerce. Given that approximately five billion birds migrate across North America each year and that migratory bird flyways cover the entire continental United States, this theory of jurisdiction would likely grant the Corps power over virtually every area of the United States. However, State and local control over land use is a well-established legal and constitutional principle. In United States v. Lopez, the Supreme Court noted that in considering the propriety of Federal jurisdiction under the Commerce Clause, one must also be cog-

nizant of whether the exercise of Federal authority erodes the "distinction between what is truly national and what is truly local." 541 U.S. at 567.

The Court did not reach any of these constitutional issues in the SWANCC decision and thus never opined on whether the links between the isolated ponds on SWANCC's site and economic activity were sufficient or too attenuated to pass muster under the Commerce Clause. Nor did the Court opine on whether the ability of the Corps to use the Migratory Bird Rule to control project siting decisions would unconstitutionally impinge on land use and other authority reserved to the states. I recognize that distinguished scholars can and will disagree over these issues. However, it may be worth noting that in its decision in the SWANCC case, the Supreme Court stated there are "significant constitutional questions" raised by the application of the Migratory Bird Rule. SWANCC, 531 U.S. at 174. The Court went on to state: "Permitting [the Corps] to claim Federal jurisdiction over ponds and mudflats falling within the 'Migratory Bird Rule' would result in a significant impingement of the state's traditional and primary power over land and water use. [Citations omitted.]" Id. Thus, I believe the issue of legal restraints raised in your question will ultimately depend on a resolution of the constitutional issues.

RESPONSES BY GEORGE J. MANNINA TO ADDITIONAL QUESTIONS FROM SENATOR INHOFE

Question 1. You cite several excellent quotes from many of our former and a few of our current colleagues on the intent of Congress when it passed the Clean Water Act. The majority of members appear to be expressing concern that the Corps over reached on its authority in its 1975 regulations. What do these comments tell us about Congress' intent with regard to navigability and the Commerce Clause?

Response. The legislative history of the Clean Water Act documents that Congress wished to go beyond the traditional limits of navigability but did not wish to dispose of the concept of navigability and to place every wet area within the United States under the Clean Water Act. Congress intended to use a modified concept of navigability as the basis for Clean Water Act jurisdiction.

Senator Muskie, in managing the Conference Report on the 1972 legislation, made it very clear that waters are to be considered navigable and, therefore, jurisdictional "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 the states or with foreign countries. . . . In such cases, the commerce on such waters would have a substantial economic effect on interState commerce." A Legislative History of the Water Pollution Control Act Amendments of 1972 ("Legislative History"), Vol. 1, at 178. Congressman Dingell, the House floor manager of the Conference Report, similarly wished to reach waters serving "as a highway" for commerce. Id. at 250. Congressman Dingell went further by citing specific court decisions demonstrating the proper reach of the concept of navigation. Mr. Dingell stated these cases reveal that each body of water was one that was used or could be used as a "link in the chain of commerce among the states." Id. Thus, the Clean Water Act was anchored in the concept of navigation for commerce. The jurisdictional reach of the Act was based on the concept of navigability, in Congressman Dingell's words, "as it flows in the various channels of transportation." Id.

Question 2. The history you provide of SWANCC's dealings with the Corps is very enlightening. You raise a very interesting point about SWANCC having spent $4.5 million to find out from the U.S. Supreme Court that they did not need a permit. Importantly, that was taxpayer money for a plan that was approved by a 75 percent vote of the County Board of Commissioners. Would SWANCC have benefited from being able to challenge the Corps' jurisdictional determination earlier in the process?

Response. There is no question that SWANCC and the taxpayers of northern Cook County, Illinois would have benefited significantly from having the opportunity to challenge the jurisdictional determination of the Corps of Engineers before having to spend $4.5 million to apply for a permit which the Supreme Court determined the law did not require SWANCC to obtain. Simply put, under the current State of the law, the Corps of Engineers can make a jurisdictional determination and force private and public entities to spend millions of dollars to apply for a permit even when the Corps has no legal authority to require any such permit. Parties who do not believe the Corps is properly exercising jurisdiction should not be compelled to spend millions of dollars before they can find out whether the Corps had the authority to require a permit in the first place.

Senator BOXER. The last speaker is Mr. William Buzbee, Professor of Law, Director, Environmental and Natural Resources Law Program and a whole other lots of titles there, at Emory Law School.

Welcome, sir. And the vote has started, so we will have to end this at about 25 of.

STATEMENT OF WILLIAM W. BUZBEE, PROFESSOR OF LAW, DIRECTOR, ENVIRONMENTAL AND NATURAL RESOURCES LAW PROGRAM, EMORY LAW SCHOOL, DIRECTOR, CENTER ON FEDERALISM AND INTERSYSTEMIC GOVERNANCE

Mr. BUZBEE. Thank you very much, Madam Chairman. And members of the Committee, I thank the Committee for this opportunity to testify. My name is Bill Buzbee. As was said, I am a Professor of Law at Emory University School of Law.

In the Rapanos case, I served as co-counsel for a bipartisan group of former U.S. EPA administrators. My clients were aligned with the Bush administration, dozens of States and many environmental groups. We all joined in arguing that the Supreme Court should reject the major attack on the Clean Water Act presented by the Rapanos and Carabell challengers. We argued for maintaining longstanding protections of America's waters. We met with only partial success in the Supreme Court's ruling.

The Supreme Court's rulings in Rapanos and the earlier 2001 SWANCC case unsettled a three decade long bipartisan consensus in all of the branches about what sorts of protections should be afforded to America's waters. If you look closely at the decisions, neither decision required the agencies to forego protecting significant categories of water bodies. Nevertheless, the administrative and judicial fallout has been significant. There have been significant losses now of the sorts of waters protected.

The complicated 4–1–4 alignment of Justices in Rapanos has engendered uncertainty in the courts and in regulatory settings. Under the most charitable read you can give the Rapanos case, its net effect is still problematic. It substitutes a new case by case judicially monitored significant nexus test in place of a longstanding deferential approach allowing regulators to exercise ecological and scientific judgments in assessing what should be protected.

The issues at stake in Rapanos and the issues before you today are fundamental. What counts as a water of the United States is the key prerequisite to a host of different Federal Clean Water Act protections. This is not just an issue of wetlands, and it is not just about dredge and fill activities. If a water is not jurisdictional, then the Clean Water Act's protections are lost. Such waters would no longer be subject to the protections against and regulation of industrial discharges under Section 402 of the Clean Water Act. Oil spills under Section 311 of the Clean Water Act would no longer be subject to Federal jurisdiction. And then of course, Section 404's wetlands protections would be lost.

As witnesses Curry and Yaich have explained well, rivers, streams, lakes, ponds and wetlands serve crucial functions, even when they are small and even when their relationship to the remainder of the aquatic system is not immediately apparent. The protection of America's waters, if critical; the cost to clean up

America's waters is exorbitant. The bottom line is it makes great fiscal sense and environmental sense to protect America's waters. These longstanding protections are now in limbo. The current situation is really not acceptable. Everyone agrees the Clean Water Act has been a resounding success, and that is good to hear. But that doesn't mean it should remain unchanged. When you consider the on-the-ground impact of these two decisions and regulatory responses, there can be no serious question whether the Act has been weakened since 2001: it has.

The Supreme Court has unsettled this bipartisan, three decade long approach in three important ways. First, it has undercut this broad, shared view of what should count as waters, thus physically removing many waters from protection, especially after the SWANCC decision just referred to. It has fostered a confusing regulatory and jurisprudential mess, leading to splintered judicial approaches, regulatory interpretative uncertainty, delay, regulatory inattention and inertia.

My timer is not on but——

Senator BOXER. Go right ahead you have a minute left.

Mr. BUZBEE. OK, thank you. It has also substituted judicial views of policy that either downplay or ignore the Clean Water Act's integrity goals and disregard earlier Supreme Court precedents and eliminate longstanding deference.

So as I see it, there are four options before this Committee. One option is to do nothing. And I think that is really not an option—there are real harms on the ground happening every day. The second option is just to allow litigation and skirmishing before agencies to continue. That is also not an option. This is costly, uncertain, leading to splits in the circuits and delay. I have spoken to regulatory attorneys for industry who have talked about the difficulties post-Rapanos in just trying to get jurisdictional determinations. Now this delay is killing their businesses.

Option three is to implore regulators to fix this mess. Unfortunately, the Supreme Court's ruling was a direct interpretation of the Clean Water Act and has been interpreted by pretty much everyone as leaving limited latitude for regulatory correction.

The fourth option is to pass a law, such as the Clean Water Restoration Act. While I know today's hearing is not about that, I will briefly just sketch out the case for some sort of legislative fix. If there is to be a fix, it should be direct, it should be limited. This is just about what counts as a water of the United States. You don't need to unsettle the whole statute and so therefore, as in the Restoration Act bills I have seen, or the versions I have seen, changing a definition of the waters and returning those definitions to what has long been the regulatory interpretation makes great sense.

In addition, in contrast to some of the earlier witnesses, if you look at the entire history of the Clean Water Act——

Senator BOXER. Just finish your sentence.

Mr. BUZBEE [continuing].—it has long been understood that the Clean Water Act should be protecting waters to the extent ecologically necessary and also to the limit of constitutional power. I hope that the Senators will consider a bill such as this in the future.

Thank you very much.
[The prepared statement of Mr. Buzbee follows:]

TESTIMONY OF WILLIAM W. BUZBEE, PROFESSOR OF LAW, DIRECTOR, ENVIRONMENTAL AND NATURAL RESOURCES LAW PROGRAM, EMORY LAW SCHOOL, DIRECTOR, CENTER ON FEDERALISM AND INTERSYSTEMIC GOVERNANCE

My name is William Buzbee. I am a Professor of Law at Emory University School of Law, where I am director of Emory's Environmental and Natural Resources Law Program. I am pleased to accept this Committee's invitation to testify regarding the status of the Clean Water Act in light of the Supreme Court's decisions in Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001) (SWANCC) and the Supreme Court's ruling in United States v. Rapanos, 126 S. Ct. 2208 (2006). Since that time, the judicial and regulatory treatments of these cases and the earlier related United States v. Riverside Bayview Homes, 474 U.S. 121 (1985), have revealed an increasingly confused body of law. These cases, and resulting confusion, have reduced the protections afforded to America's waters. In addition, proposed legislation, The Clean Water Restoration Act of 2007 (hereinafter "the Restoration Act") is an important piece of legislation worthy of support. The Restoration Act offers, through a limited amendment of the Federal Water Pollution Control Act (known as the Clean Water Act (CWA), a means to restore protections long provided to America's waters, as well as greatly reduce legal uncertainty and attendant litigation resulting from the somewhat uncertain intersection of these three important cases. In my testimony, I will review these recent developments, ending with my preliminary, brief assessment of The Restoration Act.

I. RELATED WITNESS BACKGROUND

This is not my first involvement with the Supreme Court's interpretations of what is protected as a "water of the United States" under the CWA. As a result of my work on environmental law and federalism, I served as co-counsel for an amicus brief filed in Rapanos on behalf of a bipartisan group of four former Administrators of the United States Environmental Protection Agency (EPA). Those former US EPA Administrators included Russell Train, who served under Presidents Nixon and Ford, Douglas Costle, who served under President Carter, William Reilly, who served under the first President Bush, and Carol Browner, who served under President Clinton. Despite their different party backgrounds and years of service, all four shared the same views about the importance of retaining longstanding protections of America's waters.. Their brief was aligned in Rapanos with the Bush administration, several dozen states, many local governments, and an array of environmental groups. All asked the Supreme Court to uphold longstanding regulatory and statutory interpretations protecting wetlands and tributaries from dredging and filling regulated under Section 404 of the Clean Water Act and from direct pollution industrial discharges under Section 402 of the Clean Water Act and its National Pollutant Discharge Elimination System (NPDES) program. After the Court's ruling in Rapanos, I testified during the summer of 2006 before the Fisheries, Wildlife, and Water subcommittee of this Committee on Environment and Public Works about the implications of the Rapanos decision.

Earlier in my legal career, I counseled industry, municipalities, states and environmental groups about pollution control strategies and choices under all of the major Federal environmental laws. As a scholar, I have written extensively about related issues, with a special focus in recent years on regulatory federalism, especially environmental laws and their frequent reliance on overlapping Federal, State and local environmental roles. My publications have appeared in Stanford Law Review, Cornell Law Review, NYU Law Review, Michigan Law Review, University of Pennsylvania Law Review, and in an array of other journals and books. A related book on risk regulation and federalism focusing on preemption policy choice will be published by Cambridge University Press in 2008. I have taught at Emory since 1993, but also visited at Columbia and Cornell Law Schools.

II. THE STAKES

It is critical to understand that the Supreme Court's construction of the Clean Water Act and what is protected as a "water of the United States," and Congress's and agencies' responses to those decisions, determine not just where dredging and filling can occur beyond the reach of Federal law, but also whether industrial pollution discharges can escape regulation. What count as protected "waters" is not about some peripheral issue of outlandishly expansive stretching of Federal regulation, as

opponents of the CWA and the recently proposed Restoration Act often claim in near parodies of reality. The Clean Water Act's protections, and the protections against oil spills, are all implicated here. Only protected "waters of the United States" are subject to the protections of CWA Section 301 (the general prohibition against point source discharges of pollution into waters without a permit), Section 402 (the Federal industrial pollution discharge permit program), Section 404 (the dredge and fill provision critical to protection of wetlands and other waters), and oil spill provisions in Section 311. If the CWA's jurisdiction does not reach particular waters, they are lost from Federal CWA protection. Unless subject to some other statutory constraints, polluters could pollute with impunity. Make no mistake, the issue of what waters are protected is critical to the whole functioning of the CWA. The problem faced now is that two Supreme Court decisions since 2001 that construe the CWA have unsettled long-established regulatory interpretations, removed many waters from Federal protection, and created substantial regulatory uncertainty. The resulting environmental harms are real.

Certainly there are core protected waters beyond dispute. But once one moves to wetlands and tributaries, feeder streams, headwaters of America's precious rivers, and vast swaths of the country where heat and drought leave river and stream beds empty for parts of the year, then what are protected waters becomes critical. The Supreme Court's decisions have left many waters unprotected, or at least created regulatory uncertainty about what is protected. If, for example, an Arizona stream bed is not federally protected, it can be filled or be a dumping ground for industrial discharges, even if during periodic heavy rains that stream will then carry pollutants downstream or be blocked by newly unregulated filling activities. This is not a hypothetical worst case: In public comments on a regulatory guidance in 2003, Arizona estimated that up to ninety-five percent of its stream miles are intermittent or ephemeral. Uncertainty created by the Supreme Court's recent decisionmake vulnerable unprotected water supplies in areas where water is most precious.

III. RAPANOS, SWANCC, AND THE NEED FOR A LEGISLATIVE RESPONSE

Two important recent Supreme Court CWA cases about what count as protected waters of the United States have unsettled three decades of regulatory protections provided by the CWA. Those protections were embraced and even strengthened by both Republican and Democratic administrations over the years. This section of my testimony first briefly sketches out those longstanding, bipartisan views about the CWA's reach. I then turn to analysis of the two cases that unsettled these longstanding regulatory protections: Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC), 531 U.S. 159 (2001), and the Court's splintered 2006 decision in Rapanos, 126 S. Ct. 2208 (2006).

a. The Bipartisan, Three Decade Protection of Waters of the U.S.

Despite disagreement about the implications of Rapanos, virtually all commenters on the CWA agree that it has led to huge improvements in the quality of America's waters. By design, the CWA created a Federal floor of protection, giving states and local governments the power to be more protective, and also involving states in the implementation and enforcement process through delegated program structures.

Much of this success is attributable to expansive definitions of what count as, and are hence protected as, jurisdictional waters of the United States. Although the CWA speaks of "navigable waters," that term has since 1972 been defined in the statute as meaning "waters of the United States." Those 1972 amendments of what is now called the Clean Water Act stated the goal "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. Sec. 1251(a). To that end, the statute required discharges into waters to be prohibited unless allowed by a permit. Since 1972, and as now agreed by all members of the Supreme Court and repeatedly reaffirmed in the Court's last three major CWA cases concerning what is protected as a "water," the law clearly protects waters that are not navigable in the usual sense of that term; they need not be "navigable in fact" by shipping.

It has also long been part of the legislative, regulatory, and judicial history of the 1972 CWA that it was intended to protect waters to the limit of Federal legislative power under the Constitution. The House and Senate in 1972 reports both stated the intent to give the term "waters" its "broadest possible constitutional interpretation," 40 Fed. Reg. 19,766 (May 6, 1975) (citing S. Rep. No. 92–1236, at 144 (1972); H. Rep. No. 92–911, at 131 (1972), statements that the Supreme Court and lower courts long recognized when confronted with challenges to Federal jurisdiction.

Regulatory interpretations of what count as waters was unsettled and litigated for the first few years after enactment of the 1972 CWA. By the mid–1970's, however, an expansive interpretation of what waters are protected was promulgated and

strengthened up until the Supreme Court's cutting back on the CWA's reach in SWANCC. As Republican appointee and former U.S. EPA Administrator William Ruckelshaus recently stated in a letter to Representative James Oberstar in connection with hearings regarding the proposed Clean Water Restoration Act, EPA's regulatory interpretation of waters has long included "interState and intraState waters" and covers "non-navigable tributaries and wetlands." (Letter of July 17, 2007). As another past Republican U.S. EPA Administrator, Russell Train, stated, "a fundamental element of the Clean Water Act is broad jurisdiction over water for pollution control purposes. It has been well-established that water moves in interrelated and interdependent hydrologic cycles and it is therefore essential that pollutants be controlled at their source to prevent contamination of downstream waters." (Letter of July 17, 2007 to Representative James Oberstar). Similarly, former Republican U.S. EPA Administrator under the first President Bush, William Reilly, recently stated: "Since the Clean Water Act passed, U.S. courts and regulatory agencies have consistently complied with Congress' intent by interpreting the term 'navigable waters' to cover all interconnected waters, including non-navigable tributaries and their adjacent wetlands, as well as other waters with ecological, recreational, and commercial values, such as so-called 'isolated' wetlands and closed-basin watersheds common in the western United States." (Letter of July 6, 2007 to Representative James Oberstar). Democratic EPA Administrators concur. EPA Administrator Carol Browner, who served under President Clinton, recently expressed concern in written testimony with lost protections and regulatory rollback following the Rapanos decision. (July 19, 2007 Testimony of Carol M. Browner Before the Transportation and Infrastructure Committee, U.S. House of Representatives).

These understandings of CWA law and regulations are confirmed by the longstanding, explicit provisions of regulations regarding what are protected as waters. 40 C.F.R. 230.3; 33 U.S.C. 328.3(a). Even in the fiercely litigated cases leading to the Rapanos decision, this bipartisan political consensus about the importance of protecting a broad definition of waters held together. The Bush administration and the Solicitor General argued hard in briefs and before the Supreme Court for retention of the protections provided for three decades, regardless of the party in power in the White House or in the legislature.

b. The Supreme Court's Unsettling of the Bipartian Three Decade Consensus

In SWANCC, the Supreme Court in 2001 rejected the Federal Government's attempt to protect isolated waters from fill due to their use by migratory birds, as prohibited under an interpretive document referred to as the Migratory Bird Rule. The Court gave the Clean Water Act a limiting read, overcoming the usual deference to agency statutory interpretations, due to the Court's concerns that protecting isolated waters due to use by migratory birds would go too far and be at the limit of Federal power. The Court therefore found that such regulation was not intended by Congress in 1972. Importantly to constitutional arguments about the Restoration Act, the Court did not declare the statute unconstitutional, or even flesh out why the asserted jurisdiction was asserted to be at the bounds of Federal power, but instead said a statutory clear statement was needed to justify Federal protection of such waters. The Court basically punted on the question of the statute and exactly why and whether SWANCC presented a constitutional problem, acknowledging the issue but not resolving the validity of grounds for Federal power argued before the Court. It ultimately concluded that because the statute did not clearly State an intent to reach isolated waters that could be used by migratory birds, the Court would (and did) hold that the CWA did not reach the waters at issue in the case. By eliminating such "isolated waters" protected due to use by migratory birds from Federal protection, huge amounts of previously Federal waters are no longer subject to protection under the CWA. As mentioned below, it appears that regulators in the Army Corps and U.S. EPA have overly expansively read SWANCC, more generally ceasing to protect isolated waters despite the Supreme Court's more limited rejection of the migratory bird jurisdictional justification and the presence of other CWA regulatory provision that could protect isolated waters.

Rapanos presented different sorts of challenges. It too involved what "waters" are protected, but overlapped substantially with the earlier United States v. Riverside Bayview Homes case, 474 U.S. 121 (1985), where a unanimous Supreme Court protected wetlands adjacent to "lakes, rivers, streams, and other bodies of water . . . ." In Riverside Bayview, the Court focused overwhelmingly on the CWA's goals, the biological and ecological functions served by such wetlands and waters, and the difficulty in "choos[ing] some point at which water ends and land begins." Given this difficulty, the need to consider hydrological connections, and the law's anti-pollution goals, the Court deferred to the Army Corps' judgments.

Rapanos involved related questions of what sorts of tributaries and wetlands that are not "navigable in fact" are reached by the CWA. The reconfigured Supreme

Court, with newly appointed Chief Justice Roberts and Justice Alito, produced a series of opinions in Rapanos. No single majority opinion speaks for five or more justices in this case. No five justice majority, in an opinion or in shared opinion rationales, rejects these long-established protections of America's waters. Rapanos undoubtedly, however, makes for tough legal analysis and a confused legal terrain.

Due to the lack of a single majority opinion, we 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 the two consolidated cases leading to the Rapanos decision, 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 four dissenters to the remand judgment disagreed with Justice Kennedy's call for case by case significant nexus analysis. The did, however, overwhelmingly agree with the sorts of waters stated by Justice Kennedy to deserve protection.

Working with a 4–1–4 Court breakdown, with a judgment and majority rationales cutting in different directions, does present a challenge. As discussed below, it has led to confusion in the courts and a regulatory guidance that appears illegally narrow. Counting heads and parsing Rapanos and the Court's other major "waters of the United States" decisions, there actually should be a fair bit of remaining clarity, but in application confusion has reigned. Among the views of the law that should be broadly agreed upon, but have actually divided courts and regulators, are the following: 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. Indeed, Riverside Bayview Homes explicitly upheld them, SWANCC concerned an interpretive extension of those regulations, and Rapanos involved "as applied" challenges to Federal jurisdiction and no five justice majority struck down any of the underlying regulations. A majority of justices also are sticking with the lack of Federal protection for isolated wetlands reached due to migratory bird use, as the Court concluded in SWANCC. In Rapanos, five justices rejected expansive arguments about SWANCC and arguments seeking to further limit Federal constitutional power.

So how do we interpret this 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, except to the extent his crabbed view of the CWA might protect waters otherwise not protected by Justice Kennedy's concurrence. Relying heavily on a dictionary created over a decade before the statutory language at issue, Justice Scalia and his fellow plurality justices (Chief Justice Roberts, and Justices Scalia, Thomas, and Alito) read the CWA to reach only "relatively permanent, standing or continuously flowing bodies of water," and exclude areas where water "flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall." This view, had it been adopted by a Court majority, 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). This Justice Scalia plurality opinion hence garnered only three additional votes for its severely limiting view of what can be protected as a Federal water.

Nevertheless, in articulating the sorts of waters the plurality would protect, the plurality justices joining Justice Scalia's opinion do describe certain sorts of waters that could potentially not be protected by Justice Kennedy's generally more expansive view of what waters are subject to Federal jurisdiction. The dissenters, in an opinion by Justice Stevens, noted this possibility and thus said that both Justice Kenendy's and Justice Scalia's waters are protected: "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."

Justice Kennedy's opinion concurring in the judgment 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.

As now agreed upon by the Department of Justice, the Army Corps and EPA, and several (but not all) courts that have confronted the issue, 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 explicit focus on "chemical, physical and biological 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."

Under the Kennedy opinion, 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 joined by three 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.

Nevertheless, Justice Kennedy's opinion is problematic. Most significantly, his significant nexus test often calls for intensive case by case, water by water, analysis for Federal jurisdiction to be upheld. Thus, while he gives some weight to regulatory judgments and calls for deference, his concurrence does unsettle three decades of regulatory judgments long implemented and enforced by the Army Corps and U.S. EPA.

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 establish on a case by case basis the nexus test he articulates.

Last, 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. We today see similar arguments leveled against the Restoration Act. 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 testimony before the Senate Environment and Public Works Subcommittee on Fisheries, Wildlife, and Water, and in follow-up questions from the Senators, I offered fairly extensive additional analysis for why Justice Kennedy's opinion, as well as any additional waters possibly protected by Justice Scalia's opinion, both are now protected. As Justice Stevens noted in his dissent, both sorts of waters command majority support of the Supreme Court. Since that testimony and responses to questions are now part of the public record, I will not go further into this issue except to note, as I do below, that the Court's fragmented opinions have led to lower court and regulatory confusion, rollback, and arguable error.

IV. THE NEED FOR A LEGISLATIVE FIX

a. Post-Rapanos Judicial Confusion

Most Courts confronting issues of what waters are protected post-Rapanos have found that at least waters protected by Justice Kennedy's opinion are subject to Federal jurisdiction, but not all courts have agreed with the assertion by Justice Stevens in dissent and the Bush administration Department of Justice that both waters protected by Justice Kennedy and by Justice Scalia are protected under the CWA. A few courts have appeared to view Justice Scalia's opinion as most important. Most courts and scholars agree that generally Justice Kennedy's "significant nexus" test protects waters the Justice Scalia plurality would protect, but there remains a possibility that in some instances the plurality's focus on continuous connections and continuous flowing waters would protect some waters not reached by Justice Kennedy.

But disagreement remains, with resulting confusion for the private sector, regulators working in each jurisdiction, and uncertain effects on the environment. One district court in Texas, shortly after the Rapanos decision, found Justice Kennedy's opinion too confusing, appeared to follow the Scalia plurality opinion's approach and earlier court of appeals precedent, and found Federal law not to reach oil spillage into a stream bed because it was dry part of the year.

Of perhaps greater significance is the Eleventh Circuit's recent decision in United States v. Robison, 2007 WL 3087419 (11th Cir. Oct. 24, 2007). In almost every respect, that decision reveals the disastrous effects of the Supreme Court's recent decisions. The decision bottom line is that convictions for egregious violations of industrial pollution discharge permit requirements under Section 402 of the CWA were vacated and remanded due to court questions about the link of the receiving waters of Avondale Creek and downstream "navigable in fact" waters. There is no indication in the decision that the industrial polluter, the McWane foundry, had ever before claimed it did not need a NPDES permit, but the court read Rapanos to call into question the reach of Federal power. The court reached this remarkable decision due to its read of Rapanos. It read Justice Kennedy's opinion as the lone relevant opinion, disagreeing with some other circuits' conclusions and DOJ briefs arguing that both Justice Kennedy and Scalia waters are protected. As the Eleventh Circuit conceded, this mattered because the continuous water connections would likely have been easily reached by the Justice Scalia plurality opinion. The court struggled most in trying to apply the "significant nexus" test. It ultimately remanded due to its uncertainty about Federal jurisdiction over Avondale Creek and waters into which this substantial creek flowed. This opinion is likely in error in reading Justice Kennedy, since Justice Kennedy talks about certain sorts of waters as presumptively covered without the need for case-by-case proof, but the case demonstrates the confusion and harms sown by Rapanos. A long, costly criminal proceeding involving egregious violations and massive industrial discharges will need to be retried, and these violations may go unremedied.

District Court Judge Robert Propst, upon receiving the case on remand, sought to be released from further work on the case. In utter exasperation and a fair bit of humor, he detailed the many ways in which, in his estimate, the Supreme Court and then the 11th Circuit have left the law in an incoherent mess. He closing by asking a series of seven questions about where the law stands post-Rapanos, each of which is subject to debate. He then coins the phrase "justsurdity" to capture with a neologism "areas of the law which help to attain justice, but appear to be absurd when considered in light of common sense." The justsurdity noted (and coined) by Judge Propst has unsurprisingly led to regulatory uncertainty and arguably illegal rollback of the CWA's protections. b. Post-Rapanos and SWANCC Regulatory Confusion and Rollback

The disparate approaches by lower courts means that regulators seeking to acquiesce in the law of each circuit will need to try to apply their circuit's particular read of Rapanos. Disparities in what waters will be protected around the country will necessarily result. The CWA's longstanding goal to create a level environmental playing field for industry and the states has been frustrated.

In addition, a June 2007 interpretive guidance issued by US EPA and the Army Corps post-Rapanos generally parrots the DOJ's briefing position that both waters protected by Justices Kennedy and Scalia are within Federal jurisdiction, but it also in several places seems to cut back on those protections. This guidance is still in the comment phase, but its initial version reveals serious problems.

In particular, Justice Kennedy's concurrence focused a great deal on the CWA's integrity goals, as well as the need to protect waters that in combination with other similar or comparable waters would have a significant effect. The recent interpretive guidance largely omits reference to these "combination" waters, potentially removing

from Federal jurisdiction huge numbers of smaller similarly situated waters that in combination and in their cumulative impacts are critical to downstream water quality and quantity. Environmental groups in their comments question the legality of the guidance, asserting that by ignoring or deemphasizing these protective elements of Justice Kennedy's opinion, and failing to give weight to still effective regulations about protective waters, the guidance exceeds the bounds of the Army Corps' and EPA's interpretive discretion.

In comments on this draft guidance, among the many critics were Army Corps employees with the job of making such jurisdictional determinations. Their comments reveal that the Supreme Court's Rapanos decision and the guidance have added up to a recipe for delay, confusion, frustration of those seeking permits and regulators, and ultimately regulatory inattention. One employee estimated the guidance has quadrupled the time needed to make a jurisdictional call and left the jurisidictional lines in "100 shades of gray." Another said the guidance "creates a lengthy, confusing, and complicated jurisdictional determination form" that "no one really understands."

Similarly, since SWANCC, it appears that in considering more isolated sorts of waters, the Army Corps has expanded upon SWANCC's limited rejection of Federal power to protect isolated waters due to their use by migratory birds. It appears that some regions and perhaps the central Army Corps and EPA offices no longer even consider protecting isolated waters arguably protected under other regulatory rationales, even though they have the legal authority and responsibility to do so. This was confirmed recently in testimony before the House Committee on Transportation and Infrastructure on October 18, 2007 by Ben Grumbles, EPA's Assistant Administrator for Water. In response to questions from the Committee, Assistant Administrator Grumbles said:

Well, there are two guidances that we are working under, the 2003 SWANCC guidance and the basic point there is in the guidance we held open the possibility that there could be circumstances under A.3 paragraphs of our regulations where there could be an assertion of jurisdiction over isolated intraState non-navigable waters without relying on the migratory bird rule provisions. As a legal matter, that is still possible, but as a practical matter, we had not asserted jurisdiction over those types of wetlands based on that guidance, which is still in place. (emphasis added)

This concession is important. As stated by Assistant Administrator Grumbles, after SWANCC and Rapanos, the agencies are not protecting waters in accordance with regulations still in effect. They thereby are leaving unprotected an even larger universe of streams, wetlands, and other waters than required by the Court's decisions in SWANCC and Rapanos.

All of this uncertainty gives opponents of CWA jurisdiction an array of newfound arguments. It creates the near promise of litigation. This will predictably lead to agency reluctance to get mired in lengthy regulatory disputes and litigation. Unless an environmental group is nearby and ready to litigate, Army Corps and US EPA officials will be tempted to avoid conflict and find no Federal jurisdiction.

Thus, the regulatory bottom line is that far fewer waters are protected, uncertainty is rife about what waters are officially protected, regulators will be tempted to decline jurisdiction, and lots of litigation will result.

V. THE CLEAN WATER RESTORATION ACT'S LOGIC AND LEGALITY

Since my involvement with the Rapanos case and as part of my teaching and writing about environmental law, I have closely followed related regulatory and legislative developments. This fall, I've closely been studying the Clean Water Restoration Act, in both its House and Senate versions. For reasons I briefly address here, I believe the Restoration Act is sound and could help return the law to the definitions of waters protected for three decades by Republicans and Democrats alike.

a. Restoring longstanding bipartisan regulatory protections makes sense

The Restoration Act starts with extensive findings about the importance of America's waters and a finding about the commercial "substantial effects" of waters, as well as a reference to the sorts of economic, commercial activities causing the degradation of waters of the United States. Its key provision eliminates the use of the word navigable, substituting the longstanding definitional clause "waters of the United States." It then mentions the sorts of waters long protected under CWA regulations. It does not delete or modify other provisions. It really is a focused, direct, legislative amendment making statutory the longstanding regulatory definition of the sorts of waters protected by the CWA. The categories of waters have been subject to similar protections under regulations in place since the late 1970's, regulations retained and implemented by both Republican and Democratic administrations

since that time. It is also important to recall that the Bush administration in the Rapanos case argued for retention of those longstanding regulatory protections. Recent scientific publications confirm that the scientific basis is strong for the regulatory conclusion that tributaries, streams, wetlands and other waters far removed from navigable-in-fact waters perform significant ecological services, thereby protecting waters for valuable economic, commercial and recreational purposes.

This Act also does not by its terms undo the many statutory and regulatory sources of flexibility and exceptions long established under the CWA. These sources of flexibility tend to focus on particular sorts of activities. If waters lost from protection post-SWANCC or Rapanos are again subject to jurisdiction, it might bring some unscrutinized activities and linked waters back under Federal oversight, but the Restoration Act does not itself change in any categorical way the treatment of such activities.

As a matter of sound environmental policy, the longstanding protections sought to be revived in the Restoration Act have been invaluable. Even the well-funded opponents of the Restoration Act depend in businesses, personal lives, and recreation, on the existence of clean water. America's usually abundant potable water, except when excessively polluted, is perhaps our greatest resource and comparative advantage over rising economies around the world. Our chief economic competitors continue to struggle to remedy gross pollution harms and lack of safe water. Clean, unpolluted waters and preserved wetlands also remain critical to filter contaminants, provide natural habitat and biodiversity, and provide a buffer for storm harms. America's hugely profitable hunting, fishing and recreational tourism industries depend on preserving America's waters. Businesses will at times hope to escape regulation and maximize profits, but long-term, all benefit from America's clean waters. America's long commitment to clean water is crucial.

b. Broad language about constitutional power is necessary

In some comments and letters, critics of the Restoration Act have claimed that its provisions referring to the constitutional reach of the Act are in some way constitutionally problematic. With all due respect to those critics, I believe these arguments are based on a misreading of the Restoration Act, constitutional law, and key CWA case precedents.

First, several provisions of the Restoration Act directly seek to make clear the intent to protect waters of the United States to the limits of Federal legislative power. Most significantly, Section 4, in proposing to amend Section 502(24), states that the sorts of waters protected means "all waters [then specified waters are listed] . . . to the fullest extent that these waters, or activities affecting these waters, are subject to the legislative power of Congress under the Constitution."

This links to Section 2(3)'s statement of purposes, which states the purpose: "To provide protection to the waters of the United States to the fullest extent of the legislative authority of the Congress under the Constitution."

The findings provisions further provide linked language, stating in Section 3(8) that: "The pollution or other degradation of waters of the United States, individually and in the aggregate, has a substantial relation to and effect on interState commerce." Sections 3(9) to 3(12) further spell out these important water uses and values. Relatedly, Section 3(13) finds that "activities that result in the discharge of pollutants into waters of the United States are commercial or economic in nature." Later provisions State that the Restoration Act is a "necessary and proper means" of implementing various treaties and protecting Federal lands

First, there is nothing inherently constitutionally problematic about Congress in legislation stating its intent to legislate to the limit of Federal legislative power. After SWANCC and a number of other cases from recent decades where the Supreme Court and other courts have used "clear statement" requirements as a means to limit the reach of Federal law, such language is actually essential. If Congress wants to restore the CWA's protections, the most effective means to avoid limiting judicial constructions is to State clearly the intended reach of Federal power.

These provisions do not, however, result in making Federal power effectively limitless. All of these provisions specifically reference "these waters," which in turn refers back to the sorts of waters specified in Section 4. By eliminating the word "navigable," Congress also makes clear that the CWA continues not to have as a focus navigation and shipping sorts of usages, but anti-pollution goals. Hence, when waters or activities affecting those waters have the sorts of linkages justifying Federal legislative power, then they will be jurisdictional. Such specificity was not needed in 1972 or earlier, when the Supreme Court showed greater deference to the legislature, and when "clear statement" driven statutory interpretations were less common. In addition, at that time a statement about the intended constitutional reach could be put in legislative history and respected by courts, as it was in the case of

the CWA (and discussed earlier in my testimony). Many courts today would be unlikely to give weight to a legislative history statement.

This language is especially necessary in light of SWANCC which, while not making any declaration of unconstitutionality, did give the CWA a limiting read due to somewhat unspecified constitutional concerns, in part driven by the Court's attention to the word "navigable" and other provisions preserving and enlisting states to play ongoing roles in protecting America's waters. This Act addresses those concerns and removes the statutory hooks used by the majority in SWANCC. Four justices used similar interpretive moves in Rapanos. Congress must draft with cognizance of likely judicial reception, and in light of the reality of preceding related court decisions. These provisions are logical and necessary in light of preceding case law.

Can Congress constitutionally reach the sorts of waters specified in the Restoration Act? The answer is a resounding yes. As a matter of constitutional law, certainly Congress can protect waters that themselves "substantially affect" commerce and regulate activities that are themselves commercial or economic or nature. After all, in the Supreme Court's major Commerce Clause decisions in recent years, it has focused at times on the thing to be protected, while at other times focused on the nature of the activity that would, if not regulated, cause harm. Hence the Court focused its Commerce Clause analysis in the famous United States v. Lopez case on whether the handgun possession at issue had an established commerce link. 514 U.S. 549 (1995). In the later United States v. Morrison case, 529 U.S. 598 (2000), the Court focused on the lack of a commercial aspect to violence against women. In SWANCC, the Court's abbreviated and partial analysis focused on waters themselves (the thing protected), but acknowledged, without resolving the question of constitutionality, that other "activities" could influence its Commerce Clause constitutional analysis. In the Court's most thorough Commerce Clause analysis in the modern era, in the Hodel v. Indiana case, 452 U.S. 314 (1981) the Court looked at an array of ways Federal protections satisfied Commerce Clause requirements. A particularly thorough analysis of how environmental amenities like waters and endangered species can easily be regulated under our Constitution is provided by renowned conservative Fourth Circuit Judge J. Harvey Wilkinson in Gibbs v. Babbitt, 214 F.3d 483 (4th Cir. 2000). He examines activities causing harm, the inherent economic and ecological value of the protected wolf, and the economic value of activities dependent on the ongoing existence of the wolf.

In addition, constitutional scrutiny under the Commerce Clause does not focus on an act or activity or thing in isolation, but looks at them in the aggregate. In Gonzales v. Raich, 545 U.S. 1 (2006), the Supreme Court last year strongly reaffirmed that the test of constitutionality of Commerce Clause regulation looks at activities in the aggregate and "can regulate the entire class" of activity, without needing to prove the substantiality of each exercise of enforcement power. The Court declined to "excise individual applications" of regulatory power: "[w]here the class of activities is regulated and that class is within the reach of Federal power, the courts have no power to 'excise, as trivial, individual instances of the class.'" 545 U.S. at 22–23 (citations omitted). Hence, the regulation of home grown marijuana cultivated for medicinal purposes was found within the Federal commerce power. Given the aggregate importance of often small types of waters and possibly individually small environmental harms that in aggregate can be substantial, the Restoration Act is on sound footing.

There remain attenuated waters and completely non-commercial causes of harm that could, in application, be found beyond Federal power, but the Federal agencies have historically stopped short of regulating everything that technically could be considered a "water." As stated in a 1986 Federal Register statement found in 51 Federal Register at 41217:

For clarification it should be noted that we generally do not consider the following waters to be "Waters of the United States." However, the Corps reserves the right on a case-by-case basis to determine that a particular waterbody within these categories of waters is a water of the United States. EPA also has the right to determine on a case-by-case basis if any of these waters are "waters of the United States."

(a) Non-tidal drainage and irrigation ditches excavated on dry land.

(b) Artificially irrigated areas which would revert to upland if the irrigation ceased.

(c) Artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.

(d) Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating and/or diking dry land to retain water for primarily aesthetic reasons.

(e) Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States (see 33 CFR 328.3(a)).

To summarize, Congress can certainly State its intent to legislate on a particular subject (here, specified waters) to the limits of its constitutional powers. The particular subjects of regulation waters of the United States and the usually commercial or economic activities that harm them will almost always easily in application pass constitutional muster. Congress certainly stands on a sound factual and scientific footing in its Findings talking about the importance of these waters and the sorts of activities causing them harm. This is especially so given the usual ability to aggregate regulated activities or amenities to ascertain their "substantial" nature.

c. The Restoration Act retains longstanding CWA limitations and flexibility

In addition to the reality of just discussed presumptive carveouts from Federal jurisdiction, it is important to recall that the CWA has long had numerous provisions and interpretations rendering it quite flexible and effective in avoiding regulation of *de minimis* harms. As the current drafts of the Restoration Act reaffirm, the CWA explicitly carves out a substantial number of activities from the reach of the law. There is also the longstanding general or "nationwide" permit provisions that presumptively allow certain types of activities to proceed, typically upon mere notification to regulators and absent a regulatory objection. The statute and regulations promulgated pursuant to it also allow wetlands protections and Section 404's strongly protective dredge and fill provisions to be sidestepped in some settings with replacement of lost wetlands through mitigation banking or compensation. Perhaps most importantly, the mere finding of jurisdiction does not mean a permit denial. Many waters are subject to jurisdiction, but requested activity is permitted.

d. The Savings Clause could lead to confusion

The savings clause of the Restoration Act, Section 6, may make political sense as reassurance to important constituencies, but strikes me as unnecessary, tautological, and a possible recipe for litigation uncertainty. If the intent is to preserve some version of the status quo, it may provide both too much and too little.

By referencing a series of particular currently existing statutory provisions as "saved," the Act creates confusion. If those provisions remain in the law, as they do and would if the Restoration Act became law, then there is no need to say that they remain. That is evident in the law itself. Courts trying to make sense of this legislative choice will likely try to figure out a way to make it more than mere surplusage, but we can perhaps hope that they might see the political reality of statutory drafting intended to reassure.

I am aware that some stakeholders would like specific reference to particular regulatory exemptions and add language that they remain. This is, I believe, the worst possible way to use a savings clause. Any regulatory interpretation or exemption will have a core of likely accepted meaning, but will also have a history of additional regulatory interpretations and actions in implemented settings that could be viewed as legally problematic. Such legal concerns can be from stakeholders concerned with overly broad or narrow readings of a statute or regulation. It is difficult to control litigation that would surely flow from any specified "saving" of some regulatory exemptions. It would be far better to keep the Restoration Act clean and avoid yet more litigation over what is ratified, rejected, or impliedly not saved.

CONCLUSION

The Clean Water Act's longstanding protections of "waters of the United States" reflected a bipartisan view that held for three decades. That bipartisan regulatory approach suffered two major, problematic blows in the Supreme Court's SWANCC and Rapanos decisions. SWANCC undoubtedly cut back on the reach of federally protected waters. Rapanos was more of a mixed result, with most Federal protections remaining and potentially devastating narrowing of the CWA garnering only four Supreme Court votes. The case, however, resulted in such a confusing 4–1–4 alignment, with an underlying "significant nexus" test that is demanding and uncertain, that courts and regulators are struggling. Leaving the statute, cases and regulatory interpretations alone is not a viable and prudent option for Congress. Whether one is an environmentalist or homebuilder, jurisdictional uncertainty and delay are in no one's interest. A return to the bipartisan approaches to waters that worked for thirty years would be a sensible and constitutionally sound step for the Senate. Restoring these longstanding protections for America's waters makes ecological, economic, and legal sense.

RESPONSES BY WILLIAM W. BUZBEE TO ADDITIONAL QUESTIONS FROM SENATOR BOXER

Question 1. The Clean Water Act prohibits discharges of toxic chemicals from industrial facilities such as chemical plants and oil refineries into our streams and rivers, under what is commonly known as the "NPDES" program.

a) Are the decisions in SWANCC and Rapanos /Carabell applicable to the scope of waters protected under the NPDES program essentially the same as they apply to waters under the Section 404 program? If so, what are the implications of this?

Response. Yes. The issue of what are protected as "waters of the United States" is relevant to far more than just protection of wetlands under Section 404. Industrial discharges under Section 402's NPDES program are subject to Federal regulation only if they discharge into "waters of the United States." Similarly, the Clean Water Act's provisions regarding oil spills share the jurisdictional hook of a link to such waters, as do other important water quality provisions under the Act.

The Eleventh Circuit's 2007 decision in United States v. Robison, 2007 WL 3087419 (11th Cir. Oct. 24, 2007), concerning the status of Avondale Creek and egregious NPDES permit violations by the McWane foundry, reveals the broad mischief Rapanos can cause. The 11th Circuit required the government on remand to establish that this fairly significant receiving creek satisfied the new jurisdictional tests created by Rapanos. For reasons I have discussed in my submitted December 2007 testimony and earlier testimony from 2006 to this committee about Rapanos, I believe the court erred in saying that only waters protected by Justice Kennedy's "significant nexus" test are protected, but it is clear that the court is on sound footing in assuming that only "waters of the United States" are protected under the CWA's various provisions. I have heard, although not seen data on this, that some industrial dischargers have begun to seek release from NPDES permit obligations on the grounds that the Federal Government no longer has jurisdiction over the waters into which pollution flows. Further evidence of the broad import of the "waters" language is found in recent attacks by the American Petroleum Institute on regulations, claiming that Federal regulations overreach because fewer waters are now protected. This is evident in their briefs filed in the United States District Court for the District of Columbia in American Petroleum Institute v. Johnson and Marathon Oil Co. v. Johnson (Civil Action Nos. 02–2247 PLF and 02–2254 PLF).

b.) Under Rapanos/ Carabell, if a chemical factory is located next to an isolated wetland or a stream that is only flowing at certain times of the year and, in either case, that water does not have a significant nexus to a traditional navigable water, is it your understanding of Rapanos/Carabell that a chemical factory could dump all of the toxic pollution it wants into those water bodies without any control under the Federal Clean Water Act?

Yes, I believe that this is correct. I've looked around for recent analyses of how many industrial facilities discharge into intermittently flowing waters or headwaters. I believe that, according to EPA data, approximately 14,000 such facilities have been identified. Whether they are discharging industrial effluent, chemical facility effluent, treated sewage, or releases otherwise regulated by the CWA's oil spill provisions, the Federal Government only has jurisdiction, and the action is prohibited by the CWA, only if the receiving water is a "water of the United States." Under the hypothetical you pose, the waters at issue would probably not satisfy either Rapanos test garnering majority support about what sorts of waters are protected. It might remain covered by Federal law if one could establish that a point source discharge into a non-jurisdictional water would flow into a jurisdictional water, but such a claim of jurisdiction would likely be litigated due to uncertainties created by the Court's fragmented opinions and the somewhat uncertain new tests they utilize.

c.) Could the new interpretation announced in SWANCC and Rapanos/Carabell result in threats to Americans' drinking water sources?

Shrinking protections for what count as federally protected "waters" poses numerous risks to American's drinking water sources. Most directly, many Americans rely on private wells for drinking and often agricultural uses. Those wells are often recharged by nearby headwaters, streams, wetlands, and rivers. If more of these waters can be degraded with impunity from previously applicable Federal CWA protections, well water quality could be threatened. As we know from the earlier discussion Robison case, even fairly substantial flowing creeks may now escape Federal protection.

According to EPA data, more than 100 million Americans get their drinking water from public supply systems that intake water from source water protection areas containing first order headwater or seasonal (intermittent/ephemeral) streams. In 27

states, more than 1 million residents get drinking water from these systems. See attached, "Table 1: State by State NHD Analyses of

Stream Categories and Drinking Water Data" (prepared by U.S. EPA); Letter of US EPA's Benjamin Grumbles to Jeanne Christie (Jan. 9, 2005) (providing data regarding extent of non-navigable tributaries and adjacent wetlands and linked drinking water systems).

Relatedly, as New York City discussed in a brief it filed in the Rapanos case, cities like New York that rely on reservoirs for drinking water are threatened by newly degradable upstream waters. As New York City discussed, substantially increased water treatment expenses could be borne by cities and states if more polluted water sources require more costly treatment to comply with the Safe Drinking Water Act. Thus, drinking water is threatened and states and cities face increased water treatment expenses if waters, be they wetlands, creeks, or streams, are no longer subject to CWA protection.

d.) Should it concern Congress that in many states there may be no legal constraints against polluting wetlands and intermittent streams under the Rapanos/ Carabell decisions?

Yes, although the problem is more likely to be one of gaps than a complete lack of any law. As I further discuss in my answer to Senator Inhofe's question about whether State law stands as a bulwark of protection if Federal law is less comprehensive (as he asks about in connection with Arizona law), if Federal law's protections under the CWA are weakened or disappear, states will often have neither the laws nor the resources to step into the breach. Most states have some sort of law protecting waters, but Federal law undoubtedly has long provided additional protections on which most states have come to depend.

The CWA's weakening after Rapanos creates several sorts of problems and likely regulatory gaps in protection of America's waters.

First, one of the paramount reasons for creation of a national CWA with uniform, protective provisions and prohibitions was to deter a destructive "race to the bottom" where states would be tempted to offer regulatory laxity to attract or retain business with attendant tax and employment benefits. If whole categories of previously protected waters are now possibly beyond Federal protection, states will once again face the difficult choice between protecting their environment, and pleasing businesses that may argue for lowered regulatory requirement and threaten to invest in other jurisdictions.

Second, numerous states have enacted laws that prohibit their environmental regulators from adopting more protective regulations than required by Federal law and regulations. Professor Jerome Organ thoroughly analyzed this phenomenon in a 1995 article, Limitations on State Agency Authority to Adopt Environmental Standards More Stringent than Federal Standards: Policy Considerations and Interpretative Problems, 54 Maryland Law Review 1373 (1995). Recent Federal regulatory comments updated that study, finding that thirty states now have some versions of "no more stringent" laws. See Response to Clean Water Act ANPRM of National Wildlife Federation, Sierra Club, Earthjustice et al., April 6, 2003, at 117. In a 2006 presentation by Indiana's environmental commissioner, he indicated that such constrained states are often especially eager for the Federal Government to remain rigorously protective so State environments will not suffer. See www.in.gov/idem/commissioner/speeches/2006/eqsc—nmst—10-30-06.ppt

Third, states have come to depend on a productive, cooperative relationship with the Army Corps and EPA in protecting waters. To avoid government waste and unnecessarily redundant State and Federal requirement, many states have avoided creating duplicative State law. Instead, the states tailor their law so it complements longstanding Federal schemes and requirements. They often have done so as part of assuming obligations to implement and enforce Federal law as provided under the CWA's delegated program structures. State law then often follows or explicitly references Federal law. For this reason, in Supreme Court briefs and regulatory comments, numerous states have not seen Federal CWA protections as a hindrance, but as something crucial to preserve.

As a bipartisan group of former US EPA Administrators noted in their joint amicus brief in the Rapanos case, many states have created one streamlined and seamless regulatory process. This fact has been noted in regulatory comments filed in 2003 in response to a Advance Notice of Proposed Rulemaking regarding interpretation and application of the SWANCC ruling (hereinafter ANPRM Comments). See Michigan (ANPRM Comments at 14, 22); Delaware (ANPRM Comments at 15); and Vermont (ANPRM Comments at 2). Concerned with a post-SWANCC proposed rule that would have weakened Federal protections of waters, Montana objected: "[State] programs are strengthened and supported by their consistency with Federal rule."

Weakening Federal protections "would remove this consistency and support, leaving the programs vulnerable to diminishment by local legislative actions."

Of equal significance, many states have not enacted laws or regulations to protect wetlands, relying instead on Section 404 of the CWA, and supporting Federal regulatory activity under this provision. Such states have explicitly objected to weakening of Federal protection of "waters" due to how it would leave in-State wetlands vulnerable. As California stated in a 2003 regulatory comment:

California has historically relied on the Corps' protection of wetlands under CWA section 404 and has not established an independent wetland permitting program. Federal abdication in this important field would represent a dramatic shift in responsibility. We are certain that it would cause irreparable harm to the potentially affected waters. As with many other states, California will not be able to comprehensively replicate the Corps' regulatory role in the foreseeable future because of its current budget crisis. It is also completely unrealistic to expect local planning authorities to shoulder this responsibility.

Question 2. You have been involved in environmental law and the Clean Water Act for many years, both as a practicing lawyer and as a scholar. In your view, prior to SWANCC, was there any major problem or confusion with how the Act was being implemented, or were the jurisdictional requirements reasonably understood?

Response. I believe that the longstanding regulatory protections and definitions of waters, which have remained overwhelmingly consistent since 1977, have long been reasonably understood. As with any regulatory restriction, disputes over application of those implementing regulations still can and has given rise to disputes. The applicable regulatory requirements, however, were quite settled until the Supreme Court's decisions in SWANCC and Rapanos.

Question 3. Before SWANCC, was the Clean Water Act doing a good job in meeting the goal of protecting water quality? In your view will the SWANCC and Rapanos/Carabell decisions impact the effectiveness of the Act and, if so, how?

Response. The Clean Water Act has been one of America's great success stories, helping transform a nation of severely polluted waters into a country where many streams and rivers are now clean enough for fishing and swimming. It is true that prior to the CWA, pollution into some rivers was so severe that rivers could and did catch fire.

Nevertheless, the CWA coverage of pollution sources is not comprehensive; nonpoint source pollution is not addressed well, and its many provisions providing flexibility have in some areas reduced pollution reduction benefits. In addition, Section 303 surveys of impaired waters around the country reveal many waters that still fail to meet their designated uses and are not moving toward fishable and swimmable quality.

It is hard to see how SWANCC and Rapanos can do anything other than impair the effectiveness of the act. SWANCC explicitly eliminated a large category of waters from Federal protection; if a water was federally protected due only to migratory bird use of an isolated water, then it is now not protected. As I discussed in my pre-hearing submitted testimony concerning Federal regulators' application of SWANCC, it has been read much more expansively than required by the case. Other grounds for protecting isolated waters are apparently no longer considered, even though the Supreme Court was assessing only an application of the so-called "migratory bird" rule. The confusing Court fragmentation in Rapanos, coupled with the inherent challenges in construing Justice Kennedy's "significant nexus" test, have already resulted in disparate judicial treatments, industry claims of lost Federal jurisdiction, a guidance document that further shrinks Federal protections, and such a high degree of regulatory uncertainty that everyone involved confronts higher permitting uncertainty and costs. Regulators confronted with limited resources and time and nervous about litigation may therefore avoid close jurisdictional determinations. The net result will, at a minimum, mean reduced water protections, and regulatory and litigation delay.

Question 4. What do you predict for the next few years in terms of litigation and administration proceedings if Congress does not clarify the scope of Clean Water Act jurisdiction.

Response. As we've already seen (and as just discussed), more litigation, dispute-laden administrative proceedings, and disparate litigation standards are a virtual certainty if Congress does not act.

RESPONSES BY WILLIAM W. BUZBEE TO ADDITIONAL QUESTIONS FROM SENATOR INHOFE

Question 1. If Congress changes the statutory definition, what legal theory supports the continued validity of existing regulatory exclusions for prior converted cropland and waste treatment systems?

Response. Since the hearing focused on the status of the law after the Supreme Court's recent decisions, rather than a particular piece of proposed legislation, I am not positive what changed definition your question references. I will assume, however, that your question concerns an issue I have heard is under discussion, namely the status of current statutory or regulatory exclusions if Congress were to pass a legal amendment along the lines of the Clean Water Restoration Act. If, as was evident in the last version of the Restoration Act I have seen, a new statutory definition sought closely to track previous regulatory definitions of protected waters and make them statutory, and such a bill contained language trying neither to endorse nor overrule statutory or regulatory exclusions, then I think that is what it would likely achieve. The difficult task here for legislative drafters is to avoid inadvertently unsettling accepted exclusions, but also not inadvertently ratify every conceivable expansive and potentially illegal application of those exclusions. Thus, I would anticipate that core, accepted applications of the exclusions you reference would remain valid. Inappropriate stretching of those exclusions, however, would likely not implicitly be ratified by a bill like the Restoration Act. But all of this is hard to answer without knowing the exact legislative language you have in mind.

Question 2. On page 4 of testimony, you quote from the House and Senate reports "both stated that the intent to give the term "waters" it's broadest possible constitutional interpretation. The quote is actually that navigable waters be given the broadest possible interpretation. Isn't there a difference between navigable waters and waters?

Response. As long interpreted, the statutory term of art in the CWA, "navigable waters," has been defined as "waters of the United States." That phrase, in turn, has been understood to cover all of the waters of the United States, largely as interpreted in regulations in place since 1973, for EPA, and since 1977, for the Army Corps. As stated in legislative history materials, judicial opinions reflecting courts' (including the Supreme Court's) examination of the CWA, its enactment history, and the law itself, and in the regulations defining protected waters, the law was meant and interpreted to protect such waters to the limit of Federal constitutional power. Until the Supreme Court revived a focus on "navigable" in portions of its SWANCC decision, a focus on "navigability in fact" was largely absent. The Supreme Court in International Paper Co. v. Ouellette, 479 U.S. 481, specifically noted the CWA's "broad and comprehensive" scope that "applies to all point sources and virtually all bodies of water." In other cases, the Supreme Court has noted that "[n]avigability is but part of this whole" of the Federal Government's constitutional power to protect waters. United States v. Appalachian Power Co., 311 U.S. 377, 426–27 (1940). As then Justice Rehnquist wrote for the Court in Kaiser Aetna v. United States, 44 U.S. 164, 173 (1979), "[r]eference to navigability of a waterway adds little if anything to the breadth of Congress' regulatory power over interState commerce."

These Supreme Court precedents are themselves consistent with the CWA's language and structure, as well as legislative history statements. Navigability is a defined term of art, not a touchstone for the limits of the CWA jurisdiction. First, the statute itself has an explicit goal and focus on "chemical, physical, and biological integrity of America's waters." 33 USC Section 1251. In sections of the CWA focused on protecting water quality, numerous goals are identified, with navigability one of numerous goals, and a subsidiary focus at that. Section 1313(c) identifies goals of protecting public water supplies, protecting fish and wildlife, recreational and agricultural purposes, then adds a tag line "and also taking into account consideration their use and value for navigation."

As your question references, the 1971–72 legislative history of the CWA contains numerous references to the CWA as intended to, as stated then by Representative Dingell, move away from the "old narrow definitions of navigability" to, as stated by a conference report, give the term "'navigable waters'" "'the broadest possible constitutional interpretation."

It is thus unsurprising that all current Supreme Court Justices agree that the CWA "includes something more than traditional navigable waters." Rapanos, 126 S.Ct at 2220 (Scalia, J., for a plurality of the Court). The other Justices Justice Kennedy in his concurrence and the four dissenters were even more expansive in the extent to which waters that are not traditional navigable waters are protected.

Question 3. On page 5 of your testimony, you claim that an expansive view of pre-SWANCC jurisdiction can be based on "long-standing, explicit provisions regarding what are protected waters."

- Was there a "long-standing, explicit definition of "adjacent" prior to SWANCC?
- Was there a "long-standing, explicit definition of "ordinary high water mark" Prior to SWANCC?
- If so, why did the Corps repeatedly promise to clarify jurisdictional issues in Every Regulatory Agenda from 1990-2001?

Response. I believe that the Code of Federal Regulation definitions of protected "waters of the United States" in place since 1977 for the Army Corps have defined adjacent and "high water mark" in a consistent manner, and since 1979 for US EPA have defined adjacent in a consistent manner. I do not believe EPA has used a definition of "ordinary high water mark" in its regulations. I have not researched the context and nature of any particular promises by the Army Corps to revisit and clarify these particular terms in past regulatory agendas. I cannot speculate on what mix of regulatory tasks might have led them to State an intent to clarify a regulatory issue but not do so. Certainly many agencies these days face challenges due to limited budgets and expanding regulatory obligations. Agency failure to update old regulations is a common problem. I cannot, however, comment on the particular promise you reference.

Question 4. You spend some time in your testimony talking about Arizona. Isn't is true that

The Arizona Water Quality Control Act contains a definition of "Waters of the state"-A.R.S. Sec. 49-201(40)-that covers all watercourses, including intermittent and ephemeral waters, giving Arizona enforcement jurisdiction over any waters outside Federal jurisdiction?

Response. I am not an expert on Arizona law, and certainly cannot opine knowledgeably based on my own study about how Arizona has implemented its law or resources available for implementation and enforcement. Fortunately, Arizona has been active in responding to proposed regulatory guidances interpreting what should be protected as waters, and also joined a brief with many other states in Rapanos arguing for the Court to retain longstanding protections for America's waters. That brief and Arizona's comments reveal that Arizona, like most states, is eager for Federal law to remain strong and opposes weakening interpretations.

For example, in 2003 comments on the post-SWANCC ANPRM, Arizona describes its water protections as linked to and indeed intertwined with Federal law due to Arizona assuming responsibility for the CWA NPDES program, as provided under the CWA cooperative federalism "delegated program" structures. Its view is that if Federal CWA protections for "waters" are undercut, Arizona protections would similarly shrink:

> The proposed change will have a profound impact on the authority of State environmental protection agencies like ADEQ to implement its water quality management programs, to prevent pollution, and to maintain and protect the biological, chemical, and physical integrity of Arizona's waters. ADEQ is designated as the State agency for all purposes of the CWA (A.R.S. 849–202) and depends on the full implementation of its CWA programs to protect the state's water resources. These CWA programs are the state's core regulatory programs to prevent pollution of Arizona's streams and lakes. Alternative regulatory authorities are not available.

Arizona further stated concern that "[i]f the State loses the ability to protect water quality of ephemeral and intermittent streams, it may be impossible to protect water quality in the downstream streams, lakes and reservoirs into which they flow." Given State law prohibiting Arizona regulators from being more protective than Federal law, the State bluntly acknowledged that Arizona protections would shrink if Federal protections were lost:

> A re-definition of the regulatory definition of "waters of the United States" at the Federal level that restricts the jurisdictional scope of the Act and . . . will have a profound impact on ADEQ's ability to regulate the point source discharge of pollutants to Arizona surface waters—placing virtually 95 percent of the State's waters outside the CWA protections. There would be no prohibitions against discharges of pollutants (CWA 301), no requirements to get permits (402 and 4 04) and no enforcement provisions.

In comments submitted just last month, on December 5, 2007, on the post-Rapanos Guidance issued by the Army Corps and US EPA, Arizona reiterated these concerns, especially focusing on harms that would flow from lost protections for "ephemeral and intermittent, or non-perennial" waters. After describing its own laws and linkages to Federal law through assumption of Federal delegated program status under Section 402, Arizona's Department of Environmental Quality states

that "[i]f the Corps and EPA deem ephemeral and intermittent waters non-jurisdictional under the Guidance, or if the agencies fail to deem such waters jurisdictional, all Clean Water Act protections for these waters bodies may be lost." Arizona estimates that 96 percent of its stream miles are non-perennial.

Arizona's Governor, Janet Napolitano, recently wrote to Representative Oberstar expressing concern with lost protections of waters after the Rapanos decision, and in support of the Clean Water Restoration Act. Consistent with other regulatory statements by Arizona officials, Governor Napolitano stated that "[w]hile we have some outstanding water pollution control laws in Arizona, we rely on the Federal Clean Water Act to protect Arizona's surface water quality for many of our water uses."

In its Supreme Court Rapanos brief, Arizona and over thirty aligned states noted a further concern. Even if a State seeks in its law to be protective, the loss of uniform protective Federal standards would leave states vulnerable to interState movement of pollutants. In both its brief and in regulatory comments, Arizona further noted that it has long relied on Federal authorities to protect wetlands.

Thus, as indicated in these assorted statements, Arizona is like most states. It has some environmental laws of its own, but it has neither the desire nor the resources to take over if Federal protections are lost. State laws turning Federal law into the maximum allowable level of environmental protection further mean that any weakening of Federal law directly weakens many states' protections. Finally, gaps in coverage would inevitably result if Federal law were weakened in protecting "waters of the United States," especially because many states have not passed their own laws protecting wetlands and requiring permitting for "dredge and fill" discharges, as does Section 404 of the CWA.

Senator BOXER. Thank you.

First of all, I think Senator Inhofe and I both agree, this panel has been really terrific. Each of you is very passionate about your view. And I think you reflect, unfortunately, the split that will have on this Committee. This is a very passionate issue on either side.

Now, I just want to make some observations, and we are going to keep the record open for 5 days, because colleagues will want to send you questions. So I hope you will be available to answer those questions. I know I have a number.

But you know, when Mr. Mannina, you are a good lawyer, but in Section 502, the term navigable waters is defined by the very people that you cited. And it is defined as the waters of the United States, including territorial seas. So, I mean, to throw out that it said navigable waters, you are leaving out the fact that there was a definition.

But I don't have time to get into it, I will ask you that question how you can sort of forget to say that. That will be the question.

And then I will put into the record, without objection, a chart, a one page, by the EPA which shows that 11 million Americans receive drinking water from intermittent or ephemeral streams. So if we—I am sorry, 111 million Americans receive drinking water from these ephemeral streams or intermittent streams. Now, I don't know how the homebuilders feel that their people will feel when they have filthy, dirty drinking water because we can't act.

And the other question is, and I think the homebuilders were very eloquent on the point, saying, let the State do this. I haven't seen many homebuilders in my State rushing around asking our State to suddenly have a new regulatory system.

I do think that there are ways to fix this. We are certainly a long way from that because of the split on the Committee. This hearing is just the opening round. You have been terrific in making the record on both sides as to how people feel. But we will when we

come back next year have a hearing on some of the bills that are out there.

And Senator Inhofe, we have a couple of minutes. Would you like to close with a couple of statements?

Senator INHOFE. I am not sure we have a couple of minutes.

Senator BOXER. We have until 9:30. That is 2 minutes.

[Laughter.]

Senator BOXER. I took three, you can take two.

Senator INHOFE. Yes, we are going to have to go. But this happens to be one of the votes I have to make. Oddly enough, well, it is not oddly enough, it is usually the case, she is voting wrong and I am voting right, so we could cancel each other and just say here.

Senator BOXER. Let's put it this way: I am voting for reform.

Senator INHOFE. That is true.

I have a lot of questions I am going to ask for the record. I am sympathetic to you, Mr. Desiderio, because I used to do what your people do. I know the permitting process, you talked about the number of permits there would be under these various scenarios. I am interesting in knowing more about that and knowing what their capability is to do this. We can't just stop this machine called America.

And then you also referred to some of the intent of the conferees in 1972. You have given me a lot to look at and to read. All five of you have done a very good job of presenting your points of view.

We are going to get into this. I have problems in my State of Oklahoma. I recall very well in Kingfisher County, a very arid part of the State, going in there, made a declaration for just a very small part, which took away the use of 160 acres in the most arid part of Oklahoma. And there is not any uniformity. We have to correct the problem. There is a problem, we do agree on that.

So I think it is excellent testimony, we have lots of questions to send to you.

[The referenced material follows:]

Senator BOXER. Senator Inhofe, thank you so much. Thank you all. It has been short but sweet and very informative.

Thank you. We stand adjourned.

[Whereupon, at 9:30 a.m., the committee was adjourned.]

Statement of Senator Jon Kyl

Senate Environment and Public Works Committee

Concerning

"The Clean Water Act following the recent Supreme Court decisions in *Solid Waste Agency of Northern Cook County* and *Rapanos-Carabell.*"

Madam Chairman, Senator Inhofe, distinguished members of the Committee, I want to thank you for holding this oversight hearing on the Clean Water Act and specifically on the state of the "404 Program," as it is commonly called in my state of Arizona. I will defer largely to the legal experts and the regulated community testifying before this Committee on the regulatory history prior to the Supreme Court decisions except to say the scope of federal jurisdiction over waters in the 404 program has never been settled. Let's look at my home state of Arizona. In the late 1970s there was virtually no 404 program. To the extent a program existed, it was largely made up of nationwide permits that were not difficult to obtain. Today, the U.S. Army Corps of Engineers ("Corps") is claiming federal jurisdiction over dry washes in Arizona where the only standards being applied are evidence of flow. Asserting such broad federal jurisdiction inappropriately federalizes land use planning typically reserved to states and local governments.

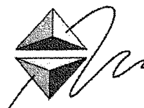
Both before and after the United States Supreme Court decisions in *SWANCC* and *Rapanos-Carabell*, the agencies and the regulated public-at-large have wrestled with the question: what is a navigable water under the Clean Water Act? The answer differs depending on when in history and where in the country the question is asked, although Congress has never changed the definition of "navigable waters" since enacting Section 404 as part of the 1972 comprehensive amendments to the Federal Water Pollution Control Act (now known as the Clean Water Act). The Government Accountability Office in its 2004 report cites numerous examples of inconsistencies between Corps districts in making jurisdictional determinations. Thus, despite what some folks may say, there is no jurisdictional heyday under the Clean Water Act to restore.

There have always been limits on federal jurisdiction under the Clean Water Act; the problem is that the agencies just refused to acknowledge them. Instead, the agencies have taken the broadest possible interpretation of their jurisdiction causing the current 404 regulatory program to resemble and function more like local land use regulation than water quality protection of our nation's wetlands. This perversion of the 404 program tramples our long history of federalism and respect for private property and results in overly burdensome, costly regulation with little to no real benefit to national water quality.

The Supreme Court in *SWANCC* and *Rapanos-Carabell,* tried to articulate some limits to federal jurisdiction under the Clean Water Act to finally bring some rationality to the 404 program. Had these decisions actually been applied, they almost surely would have served to limit federal jurisdiction in Arizona and across the arid southwest where ephemeral washes dominate. As a practical matter, however, the Corps has continued its extremely expansive reading and determined that most ephemeral washes are jurisdictional. The continued abuse of federal authority increases the number of applications for permits the Corps receives and the complexity of those applications. Increases in the number of applications and the complexity of those

applications leads to longer processing times, greater involvement by the federal government in state and local land planning, and increased costs.

I remind my colleagues that there is a line between water and land and between waters that are subject to federal regulation and waters that are subject to state regulation. To the extent Congress is poised to act to alter jurisdiction under the Clean Water Act, it should be to affirm these lines not eliminate them.



COMPLIANCE CONSULTANTS, INC.

Stephen D. Field, PhD, PE
Mary M. Field, PE

October 17, 2007
CCI # 07PLB01

Dear Honorable Committee Member:

I have read with consternation the proposed HR 2421. I am a civil/environmental engineer with over 25 years in the area of wastewater engineering and in wetlands management and permitting. As a professional working on the front lines of regulatory compliance, I am particularly knowledgeable of the "law of unintended consequences." I must point out that there is ALREADY a significant body of regulations targeting non-point source pollution which HR 2421 purports to address. The Section 319 regulations of the Clean Water act have been quite effective in reducing non-point sources of pollution in the Nation's waters. On a regular basis I or someone in my firm is working on measures such as Storm Water Pollution Prevention Plans, inspecting water control measures, or developing erosion control plans. These are ALL currently required under the Section 319 regulations. This resolution unnecessarily duplicates existing regulatory frameworks and programs and will result in either one or the other of the following:

1. A significant expansion in the number of personnel needed to implement the regulations, including but not limited to "other waters" delineators, biologists, and engineers; OR,

2. An increasingly backlogged system wherein existing regulatory personnel will be tasked to perform the additional functions with no additional support.

Based on my experience with the U.S. Army Corps of Engineers, who administers the wetland delineation and permitting process in Louisiana, Scenario 2 is much more likely to occur. Currently it is taking the Corps of Engineers anywhere from 4-12 months to review consultant-prepared wetland reports, thus further slowing economic growth and post-Katrina in our region. These Corps delineations must be completed before a permit application is even processed!

I beg you to reconsider your support for this bill- imagine if EVERY CONSTRUCTION PROJECT in your district would need a Corps of Engineers permit before going forward. This is a very real possibility if HR 2421 is passed. As of today, EVERY construction project in the country that impacts over ONE ACRE is already required to put into place a Storm Water

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Pollution Prevention Plan with structural and managerial controls under existing laws. These regulations are enforced differently across the country, but apply to all construction activity. The rules are currently self-implementing; the owner does not need concurrence from a regulatory agency prior to beginning construction, but is subject to enforcement if the plans he develops and implements are not working properly. If you are truly concerned about non-point source pollution, why not expand the funding for the regulatory programs that are already in place? I guess it is too much to hope for a bit of the "good old days" when the Environmental Protection Agency actually had funding to assist the regulatory community in achieving compliance with the existing rules.

As the owner of a woman-owned civil/environmental engineering firm, and a property owner in both Louisiana and Minnesota, I respectfully ask you to not support this "do-gooder" legislation. For those of you living in areas where wetlands regulation is not such a primary issue as it is here in Louisiana, please consider our experience in dealing with the bureaucracy that exists. Make no mistake, it will be duplicated and expanded across the country and I anticipate a virtual tsunami of protest from your constituents if and when the enabling legislation and following regulations are passed.

I look forward to working with you and your staff concerning this information.

Sincerely,
COMPLIANCE CONSULTANTS, INC.

Mary M. Field, PE

NATIONAL CATTLEMEN'S BEEF ASSOCIATION

1301 Pennsylvania Ave., NW, Suite #300 • Washington, DC 20004 • 202-347-0228 • Fax 202-638-0607

December 13, 2007

The Honorable Barbara Boxer
Chairwoman
Committee on Environment and Public Works
456 Dirksen Senate Office Building
Washington, DC 20515

Dear Madam Chairwoman:

The National Cattlemen's Beef Association appreciates this opportunity to provide a written statement to the Senate Committee on Environment and Public Works regarding the jurisdiction of the Clean Water Act. NCBA is the national trade association representing U.S. cattle producers with more than 28,000 individual members and 64 state affiliate, breed, and industry organization members. Together, NCBA represents more than 230,000 cattle breeders, producers, and feeders. NCBA works to advance the economic, political, and social interests of the U.S. cattle business and to be an advocate for the cattle industry's policy positions and economic interests. Our members are proud of their tradition as stewards and conservators of America's land, air, and water. They work hard every day to protect these precious resources.

While NCBA understands that the focus of today's hearing is on CWA jurisdiction and is not a legislative hearing, our comments address Senator Feingold's effort to redefine that jurisdiction. NCBA does not agree with Senator Feingold that S. 1870 "restores" Congressional intent regarding the extent of federal jurisdiction over our waters when the Clean Water Act was enacted in 1972. Instead, the bill ignores Congressional intent and greatly expands federal jurisdiction way beyond anything Congress imagined at the time of enactment.

U.S. cattlemen own and manage considerably more land than any other segment of agriculture and any other industry. Cattlemen graze cattle on approximately 666.4 million acres of the 1.938 billion acres of the contiguous U.S. land mass. Addition of the acreage used to grow hay, feed grains, and food grains would add millions more acres to the total lands under cattlemen's stewardship and private ownership.

Any change in the definition of "waters of the United States," therefore, directly affects many cattlemen because they own much of the land where wet areas are located. Deleting the word "navigable" from the definition of waters of the United States would have a profound and negative effect on America's beef cattle business. NCBA believes S. 1870 is unconstitutional, unnecessary and unjustifiable. We strongly oppose its passage and urge the Committee to reject this effort.

I. Overview of the Federal Clean Water Act

Congress enacted the Clean Water Act, to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 101(a). Section 301(a) of the CWA

prohibits the "discharge of any pollutant by any person" except in compliance with the Act. 33 U.S.C. 301(a). The term "discharge of a pollutant" is defined to mean "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. 502(12)(A). The CWA defines the term "navigable waters" to mean "waters of the United States, including the territorial seas." 33 U.S.C. 502(7).

The Clean Water Act has been tremendously successful. It is arguably the most successful environmental law on the books. Millions of miles of rivers, lakes, streams, wetlands, estuaries, ponds, and other waters are cleaner and functioning appropriately thanks to the CWA. EPA's most recent Water Quality Report to Congress indicates that approximately 59 percent of the waters assessed were fully meeting their designated uses. NCBA supports building on this success story with agriculture water quality programs that achieve and protect state designated uses, without being unreasonably burdensome on America's farmers and ranchers.

II. Congressional Intent

Since 1870, it has been well settled law that Congress' authority to regulate waterways is limited to regulating waters that could carry foreign or interstate commerce under the Commerce Clause of the U.S. Constitution. *The Daniel Ball,* 77 U.S. (10 Wall.) 557, 563 (1870). Thus, until recently, only waters that were navigable in fact, had been historically navigable, or were susceptible to navigation with reasonable improvement fell under federal jurisdiction, thereby excluding many wetlands. 39 Fed. Reg. 6113 (1974). It was not until 1968 that environmental and navigational factors began to be considered when determining federal jurisdiction. 33 CFR §209.120 (superseded by 72 Fed. Reg. 37, 133 (1977)).

With passage of the Clean Water Act in 1972, Congress acknowledged Constitutional limits and granted the federal government broad, but not unlimited, jurisdiction over our Nation's waters. There can be no clearer indication of Congressional intent with regard to the limits of federal jurisdiction than the fact that Congress used the term "navigable" repeatedly when establishing those limits and drafting and passing the CWA in 1972. If the term "navigable" meant nothing, the term would not have been used throughout the law. It is clear that Congress did not intend the CWA to regulate all waters of the United States. Rather, the stated goal of the CWA is to eliminate the discharge of pollutants into the Nation's "navigable" waters. Thus, Congress deliberately kept in place the constitutionally mandated system under which the states have "virtually plenary" authority to regulate intrastate, non-navigable waters. *California Oregon Power Co. v. Beaver Portland Cement Co.* U.S. (1935).

In fact, when the CWA was passed in 1972, Congress clearly recognized a partnership between the federal and state levels of government when it comes to protecting our waters. This recognition is set forth in Section 101(b) as follows:

> "It is the policy of Congress to recognize, preserve, and protect the primary responsibilities of States to prevent, reduce and eliminate pollution, to plan the development and use (including restoration, preservation and enhancement) of land and water resources..."

CWA 101(b). It is this provision and the use of the word "navigable" throughout the CWA to describe federal jurisdiction that recognizes an essential dividing line between federal and state jurisdiction.

Nevertheless, Senator Feingold has attempted to explain his introduction of S. 1870 by claiming that Congressional intent has been ignored in recent Supreme Court cases that have challenged the extent of federal jurisdiction under the CWA. It is Senator Feingold's stated desire to undo these decisions that he believes go too far in restricting the reach of federal jurisdiction, and to "restore" the original intent of Congress when it passed the Clean Water Act. Specifically, Senator Feingold has said he believes U.S. Supreme Court decisions in *SWANCC* and *Rapanos* (holdings briefly explained and cited below) have so restricted federal jurisdiction that Congressional intent regarding such jurisdiction must be reaffirmed. NCBA believes Senator Feingold and the other cosponsors of S. 1870 are mistaken. The *SWANCC* and *Rapanos* decisions did not contravene Congressional intent, rather the U.S. Supreme Court reasonably interpreted the law using the U.S. Constitution, the legislative history, and language of the CWA statute itself.

If one considers justifications of Senator Feingold, one not familiar with U.S. water regulation might think that states have skirted their responsibilities or are incapable of protecting their waters. Nothing could be further from the truth! States have very strict programs in place to protect their waters. To remove the word "navigable" from the CWA would take state authority away and give it to the federal government, violate the U.S. Constitution, contravene expressed Congressional intent, and subject cattle producers to unprecedented and unwarranted federal regulatory intrusion into their private business operations. Such a vast expansion of federal control must not be allowed. The federal-state partnership embodied in the CWA must be preserved.

III. Cattle Producers and the Clean Water Act

Two core provisions of the Act which directly affect cattle producers are: 33 U.S.C. 404, the program which authorizes the issuance of permits for the discharge of dredged or fill material to waters of the U.S., and 33 U.S.C. 402, the National Pollutant Discharge Elimination System (NPDES) program which authorizes the issuance of permits to discharge pollutants from point sources to waters of the U.S. Each of these provisions is discussed below.

A. The Section 404 Program

The Army Corps of Engineers and the EPA share responsibility for implementing and enforcing Section 404 of the CWA which authorizes the issuance of permits for the discharge of dredged or fill material into waters of the U.S. Therefore, the definition of "waters of the United States" is critical to determining the reach of this program. Until 1983, the Corps regulations limited section 404 coverage to truly navigable waters. When the Corps expanded its jurisdiction by regulation to include "wetlands adjacent to navigable waters and their tributaries," the expansion was challenged by Riverside Bayview Homes. *United States v. Riverside Bayview Homes, Inc.* 474 U.S. 121, 129 (1985). On December 4, 1985, the U.S. Supreme Court determined that Congress intended "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" and determined that adjacent wetlands that are "inseparably bound up with the 'waters of the United States'" fall under federal jurisdiction. *Id.* at 133.

In 2001, the Supreme Court considered whether "isolated waters" or ponds that are not traditionally navigable or interstate, nor tributaries thereof, nor adjacent to any of these waters fall under federal jurisdiction if migratory birds land on them from time to time. The Court held that the use of isolated non-navigable intrastate waters by migratory birds was not by itself a sufficient basis for the exercise of federal CWA jurisdiction. *Solid Waste Agency of Northern Cook County v. United States Army corps of Engineers,* 531 U.S. 159, 166-174 (2001) (SWANCC).

In 2006, the Court again considered the meaning of the term "waters of the United States" in *Rapanos v. United States,* 126 S. Ct. 2208 (2006). The case involved whether federal CWA jurisdiction extends to pollutant discharges into wetlands adjacent to non-navigable tributaries of traditional navigable waters. *Id.* at 2219. In a plurality opinion, four Justices agreed that waters of the United States covers "relatively permanent, standing or continuously flowing bodies of water" that are connected to traditional navigable waters, as well as wetlands with a continuous surface connection to such water bodies. *Id.* at 2225-2227. Justice Kennedy, concurring, determined that jurisdiction should include wetlands that "possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made," and "wetlands adjacent to navigable-in-fact waters." *Id.* at 2248.

It is not unreasonable, nor surprising, that the U.S. Supreme Court has extended CWA jurisdiction to some non-navigable waters, as discussed in the *SWANCC* and *Rapanos* decisions. In addition to expanding the reach of federal jurisdiction beyond truly navigable waters, the cases also provide a reasoned and thoughtful view of the limits of federal jurisdiction. Without such limits, federal jurisdiction would be boundless and would place an undue and unacceptable burden on the private property of cattle producers and others.

It is this kind of boundless jurisdiction that Senator Feingold's legislation would allow. There must be hundreds of millions of isolated, intrastate pools, ponds, and depressions filled with water on an intermittent basis, drainage and irrigation ditches, artificially irrigated areas, stock ponds, mud puddles, sloughs, and damp spots located on farm and ranch lands that are nowhere near any navigable waters, and provide very little if any environmental value. Surely, Senator Feingold understands and agrees that not all waters are the same in terms of their environmental function and value. To think that Senator Feingold intends to force farmers and ranchers to get section 404 permits whenever a cow or a plow affect one of these environmentally-insignificant waters is nothing less than shocking. Such an expansion of federal jurisdiction boggles the mind, is unwarranted, irrational, is not in the national interest, and would be disastrous for U.S. agriculture.

S. 1870 would result in the imposition of huge financial burdens on farmers and ranchers, would take away private property rights to the productive use of their land, and would do little to better our environment. It is one thing to regulate navigable waters and wetlands that have a significant nexus to those waters, because they have true environmental value. It is another thing to regulate

every wet area simply because it is wet, regardless of the fact that these areas provide very little if any environmental value.

NCBA supports a reasonable program for conserving and enhancing waters that have true environmental value. We believe such waters currently are being protected by state and federal governments. Any clarification of jurisdiction should take place within our regulatory processes, not in Congress. The EPA and the Army Corps of Engineers are very capable of doing this work. There is no need for this legislation.

B. The NPDES Permit Program and Cattle Operations

1. Overview

As noted above, the NPDES permit program regulates and authorizes discharges from "point sources" to waters of the U.S. Section 502(14) of the CWA specifically includes "concentrated animal feeding operations" (CAFOs) in the definition of the term "point source." The term "does not include agricultural stormwater discharges and return flows from irrigated agriculture." The EPA has defined the term CAFO to be a "lot or facility" where animals "have been, are or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12 month period and crops, vegetation, forage growth, or post harvest residues are not sustained in the normal growing season over any portion of the lot or facility," 40 CFR 122.23, and confine more than a threshold number of animals detailed in 40 CFR 122.23(b)(4). The threshold number for beef cattle is 1000 head. Smaller size feedlots can be determined to be CAFOs in certain defined situations.

Some of NCBA's members own CAFOs and are regulated under the federal NPDES permit program. Our members support efforts and work hard every day to ensure that CAFOs are environmentally sound operations. We are, however, concerned that some members of this Committee and others may be misled by activists who are opposed to the existence of CAFOs and want to create the perception that they are problematic for human health and the environment. Indeed, some activists are working hard to do away with CAFOs. We urge the Committee to pay attention to facts and scientific evidence rather than opinion, perception, and hype created by activists with anti-CAFO agendas.

The fact is, CAFOs are subject to a vast array of federal, state and local environmental laws and authority to deal with every conceivable environmental problem presented by them. The Clean Air Act, the Clean Water Act, FIFRA, soil conservation, dust and odor control, and nuisance laws apply broadly throughout the country to provide environmental protection from every aspect of animal agriculture operations. For example, the EPA has recently promulgated extensive new regulations to control discharges from CAFOs under the NPDES program. Indeed, there has been a significant shift over the past several years in federal efforts to regulate and prohibit production area discharges from CAFOs except in the most extreme circumstances. In addition, CAFOs must utilize and comply with strict nutrient management plans when land applying manure to agricultural fields to ensure that manure is applied at agronomic rates. Any violation of these requirements can result in substantial penalties and, in certain situations, imprisonment. NCBA urges the Committee to consider these new regulatory requirements that

ensure protection of our waters and give them time to work prior to issuing unjustified criticisms. Zero discharge from the production area means just that – zero discharge. Once this program is given time to work, it can no longer be claimed that CAFOs are a concern with regard to water quality.

2. NPDES Permit Program

The EPA or states with authorized NPDES permitting programs may issue general or individual NPDES permits allowing the discharge of pollutants to surface waters of the United States as long as certain conditions are met. The Clean Water Act includes both technology-driven limits and water-quality-based limits on pollution. The technology-driven limits in the form of effluent limitations aim to prevent pollution by requiring the installation and implementation of various forms of technology designed to reduce discharges. These limitations are dictated by the more general "effluent limitations guidelines" (ELGs) which are separately promulgated by the EPA. An effluent limitation is "any restriction established . . . on the quantities, rates and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into . . . water." Water quality based regulations apply once a given body of water's pollution level exceeds the level that a state deems acceptable for the body of water's intended use or function. These regulations may ratchet up the pollution control required of individual polluters. Permits also include extensive reporting and recordkeeping requirements to help ensure compliance with effluent limitations.

In February 2003, the EPA updated and issued a final rule governing regulation of CAFOs under the NPDES permit program. After its release, a number of environmental and agricultural organizations separately appealed several aspects of the rule. The appeals were consolidated and heard by the Second Circuit Court of Appeals on December 13, 2004, and a final decision was issued on February 28, 2005. The decision overturned several aspects of the 2003 rules, upheld several other challenged provisions, and remanded other issues for further consideration by the EPA. In June 2006, the EPA released its proposed rule to address the 2nd Circuit decision; a final rule is expected to be released in June 2007. All newly regulated CAFOs are required to submit to the permitting authority an NPDES permit application and nutrient management plan by February 27, 2009.

The provisions that were either not litigated or were upheld in the final rule of 2003, taken together with the proposed rule issued in June 2006 provide for a comprehensive approach to regulating CAFOs under the Clean Water Act, and ensure that no production area discharges will occur except in the most extreme circumstances. The regulations impose a zero-discharge limitation on the production area of a CAFO by prohibiting the discharge of pollutants into waters of the United States, except in the event of discharges that might occur during the worst 24-hour storm in a 25-year period. For many producers, this requirement means spending hundreds of thousands of dollars to build basins around portions of their feedyards to catch any runoff.

In addition, the CAFO rule establishes non-numerical effluent limitations in the form of best management practices (BMPs) for the land application and production areas of CAFOs. BMPs are measures or methods that have been determined to be the most effective, practical means of

preventing or reducing pollution from nonpoint sources. BMPs for the production area include daily and weekly inspections, maintenance of depth markers in lagoons to determine design capacity, and on-site recordkeeping. A BMP for the land application area requires that CAFOs develop and implement a nutrient management plan (NMP) that sets application rates designed to minimize phosphorus and nitrogen transport to surface waters in compliance with applicable technical standards, ensures adequate storage of manure and process wastewater, and prevents direct contact of animals with waters of the United States. These NMPs must be made available to permitting authorities and the public for review, comment, and hearing prior to issuance of a permit. After approval by the permitting authority, portions of the NMP must be included as enforceable terms and conditions of the producer's NPDES permit.

Sanctions for violation of a CAFO's NPDES permit include severe civil and criminal penalties for each day of violation. The basic monetary penalties range up to $32,500 per day. Stiffer penalties of as much as $50,000 per day, three years' imprisonment, or both, are authorized for criminal (negligent or knowing) violations of the Act. A fine of as much as $250,000, 15 years in prison, or both, is authorized for 'knowing endangerment', i.e. violations that knowingly place another person in imminent danger of death or serious bodily injury. Injunctive relief is also available. These penalties and sanctions are an effective deterrent to violations of the Clean Water Act.

Currently, CWA enforcement of the NPDES permit program is appropriately shared by the EPA and states, with states having primary responsibility. However, EPA has oversight of state enforcement and can bring a direct action whenever it believes a state has failed to take appropriate action or where states request EPA involvement. In addition, private citizens may bring suit against persons who violate the Clean Water Act or against the EPA or equivalent state official for failure to carry out the requirements of the Act.

IV. Conclusion

NCBA agrees that we need to continue to protect the quality of our Nation's surface and ground waters, but no expansion of federal jurisdiction is necessary to accomplish this goal. Federal agencies already have ample authority under existing law to protect water quality. It is essential that the partnership between the federal and state levels of government be maintained so that states can continue to have the essential flexibility to do their own land and water use planning. Senator Feingold's attempt at usurping authority over these issues and vastly expanding federal jurisdiction must not be allowed.

Statement of

The National Stone, Sand & Gravel Association

To the
Senate Environment and Public Works Committee

On the
"The Clean Water Act following the recent Supreme Court decisions in *Solid Waste Agency of Northern Cook County* and *Rapanos-Carabell.*"

December 13, 2007

Madam Chairman and Members of the Committee:

On behalf of the National Stone, Sand & Gravel Association (NSSGA), we are pleased to offer this testimony on the Clean Water Act (CWA) following the recent Supreme Court decisions in *Solid Waste Agency of Northern Cook County* and *Rapanos-Carabell*. NSSGA and its member companies have been involved in numerous court cases regarding jurisdictional issues surrounding the CWA. We recognize the goals of the CWA and support the regulators in implementing this complex law. Our members, however, believe the current CWA Section 404 program is inadequate in protecting wetlands and we are opposed to expanding the jurisdiction of the CWA due to the unintended consequences which could have a negative impact on, and limit access to, essential aggregate deposits.

According to the U.S. Geological Survey, NSSGA is the largest mining association by product volume in the world and represents the crushed stone, sand and gravel-or aggregate-industries. Our member companies produce more than 92 percent of the crushed stone and 72 percent of the sand and gravel consumed annually in the United States. More than three billion tons of aggregates (or 2.95 billion metric tons) were produced in 2006 at a value of approximately $21 billion, contributing nearly $40 billion to the GDP of the United States. Without these important commodities, the nation's infrastructure could not be built or maintained, and the commerce and quality of life would be severely reduced. The aggregates industry workforce is made up of about 118,000 men and women. Every $1 million in aggregate sales creates 19.5 jobs, and every dollar of industry output returns $1.58 to the economy. With over 11,000 operations nationwide, most Congressional Districts are home to multiple operations.

The members of the NSSGA recognize that the Earth's resources, upon which all life depends, are finite, and that wise environmental stewardship is necessary today to preserve the potential for a quality life for future generations. Accordingly, the Association adopted Environmental Guiding Principles which are attached in Appendix 1. The members of NSSGA also identify the concept of sustainability as a business approach that integrates environmental, social and economic aspects to ensure the long-term supply of aggregate materials to society. This month, NSSGA's Board of Directors adopted the sustainability principles which are attached in Appendix 2. As a highly regulated industry, NSSGA is proud that our members go above and beyond what the law and regulations require, wherever possible.

In addition NSSGA encourages its members to adopt and implement an Environmental Management System (EMS) program to meet its environmental requirements and improve its overall performance. An EMS is a continual cycle of planning, implementing, reviewing and improving the actions that an organization takes to meet its environmental goals. NSSGA developed its own EMS template for the aggregates industry that provides a logical step-by-step system for assigning responsibility, evaluating practices, procedures, and processes, and allocation of resources based on the Plan, Do, Act, Check management system approach. We would like to highlight the fact that in a letter dated May 28, 2002, the Environmental Protection Agency commended NSSGA for "developing EMS guidelines that will assist its members in meeting the criteria for the National Environmental Performance Track Program."

Post Rapanos Regulatory Environment
NSSGA believes the regulatory process is a precept fundamental to implementation of the nation's laws. The basic purpose of rulemaking is to afford stakeholders the due process required by law to provide a reasoned forum that allows all interested parties to comment on proposed rulemakings to ensure regulators have the most complete set of data and testimony so that informed decisions can be made. NSSGA has concerns about certain aspects of the wetlands guidance pursuant to the Supreme Court's decision in Rapanos. We plan to submit comments at the appropriate time on the implementation of the guidance industry.

Although NSSGA member companies are proud of their work in preserving the environment and ensuring a high quality of life for future generations, NSSGA strongly believes that the Section 404 program should do a better job of protecting important wetlands based on the value and function of those wetlands. The Section 404 program is often used to stop growth of any kind and has further been used to assert regulatory jurisdiction over incidental wetlands created in upland areas at aggregate mining properties before all mining and reclamation is completed.

Current Legislative Proposals
To date, only one bill has been introduced in the 110th Congress that deals with CWA jurisdiction and it is titled the "Clean Water Restoration Act" (S. 1870). NSSGA believes the bill would impose another layer of regulation on an already highly regulated industry at both the Federal and state level. Additionally, NSSGA is concerned that certain terms used in the bill are sufficiently vague that their interpretation could have severe unintended consequences on the future of our business.

NSSGA does not believe S. 1870 simply "restores the original intent of Congress" which was to "restore the chemical, physical and biological integrity of the nation's waters." NSSGA certainly believes and supports the restoration of the nation's waterways and wetlands. However, the "savings clause" in the bill does not directly address many of the waters that are found at aggregate operations, farming ponds, or other isolated, non-navigable, intrastate, upland water bodies created incidentally to any earth-moving activity.

By removing the term "navigable" from the CWA, the reach of the agencies now becomes one of theoretical hydrological interpretation rather than one of direct observation of a water conveyance system between a wetland/water of the U.S. and a flowing stream. In other words, the agencies will now have the ability to look at subsurface groundwater connections as opposed to physical above ground water conveyances or conduits. This IS an expansion from the CWA jurisdiction of the past at least for water bodies or wetlands that are removed from any adjacent or abutting flowing streams.

The legislation would create a one-size fits all approach to federal regulations by essentially declaring that all wet areas, infrequently wet areas, and any activities that may affect those wet areas are subject to federal jurisdiction under the CWA. Specifically, the approach taken in Section 4 of S. 1870 defines "Waters of the United States" with an inclusive list of types of water and does not list a single exclusion. NSSGA believes the courts will interpret Section 4 as not limiting jurisdiction in any way, thus extending CWA authority over any wet area or infrequently wet area and to any activity that may affect those areas. Regrettably, the legislation does not

differentiate between a spring mud puddle in the middle of an aggregate operation and an actual wetland that provides benefits to wildlife, flood protection, or water filtration.

For example, the legislation would allow CWA jurisdiction over man-made ponds in upland-areas at aggregate operations used in conjunction with the normal course of business. These ponds are used in a variety of ways, including: washing aggregate to meet the specifications of customers (notably state Departments of Transportation); for dust suppression to control fugitive dust; and for vehicle wheel washes to eliminate tracking of aggregate material onto the public right-of-way. These ponds may take on, over the course of time, various characteristics of hydric soils or hydric vegetation, even thought they are created in upland areas and have no hydrological connection to any flowing traditionally jurisdictional stream. Forcing these operations to obtain CWA permits for these incidentally created, man-made, isolated upland ponds is tantamount to bad public policy based on and poorly conceived science.

This legislation does not give the regulators the authority to exempt such ponds. To be more specific, the savings clause inserted into the legislation would, in our opinion, actually limit the regulators ability to make such common-sense determinations.

Another hurdle faced by aggregate operations with regard to S. 1870, is the vague phrase "activities affecting these waters" included in Section 4. These four simple words can be interpreted to mean different things by reasonable people because "activities" is not defined. NSSGA believes this will be a focus of additional unnecessary, expensive and time-consuming litigation.

This phrase also has the potential unintended consequence of giving the Federal government a veto over land-use planning power simply because any activity that is near wet areas or infrequent wet areas would need a CWA permit. For those citizen or environmental groups that oppose virtually all public works projects, this phrase would provide another means to oppose a project that has been approved at the local level. The unintended consequence of this language could virtually federalize local land use planning.

After an area has been mined, operators begin the process of reclamation and could again find themselves under the broad jurisdiction of the CWA proposed by S. 1870. During this reclamation period operators return the land to a useable form to benefit the local community. Some of the uses of reclaimed quarries include: nature preserves, recreation areas, golf courses, housing subdivisions, water reservoirs, industrial parks, shopping centers, or any other use approved by the local zoning board. Any man-made water body created incidentally to mining or reclamation would meet the broad CWA jurisdiction of S. 1870. Even if the pond is altered or expanded, this legislation would require a permit and possibly mitigation.

NSSGA also is concerned about the possibility of siting future aggregate operations. Currently it takes a considerable investment of time and money to locate a suitable deposit for mining, determine if the aggregate is of sufficient quantity and quality for development, and make it through the local, state and federal permitting process. For example, in California, a recent study warned that the state does not have sufficient aggregate reserves available to meet the needs of the communities unless additional deposits are located, permitted and developed within the next

15 years. However, it takes on average 12 years to site and permit a new aggregate operation within the state of California. Florida is experiencing similar difficulties in siting or expanding aggregate operations.

Legislation like S. 1870 could delay the permitting process further as all potentially jurisdictional areas must be identified, thus delaying an already over-taxed permitting process of the federal government as well as having unintended consequences on the aggregate operator's ability to conduct business.

Unfortunately, the savings clause that purportedly limits the impact on the mining sector actually creates more confusion. Section 6 is constructed in a manner that creates two major problems. First, only discharges of storm water would be exempted at aggregate operations, however other potential areas of CWA jurisdiction would stand. This will cause enormous confusion for those on the ground. Second, it is likely the courts will view the list of exemptions as limiting due to the simple fact that Congress inserted the list in the bill in the first place. If a specific activity is not listed then it could be reasonably assumed that Congress meant it to be within the jurisdiction of the CWA.

A worse case scenario would be the inability to site and permit new aggregate operations in areas with high growth rates. Considering that 40 percent of aggregate produced is used in road and transportation projects and another 20 percent in public works projects (schools, airports, water and sewer systems, etc.), the unintended consequence of this action would be to drive up the price for construction aggregate, as these basic raw materials needed to sustain the economic growth of an area must be imported from greater distances. This increased cost for new construction will be borne by the taxpayer.

Ultimately, this legislation that is said to provide the regulated community with more certainty will actually require additional permits, longer delays and higher costs for construction projects.

As introduced the Clean Water Restoration Act greatly expands the jurisdiction of the CWA and will have a number of severe impacts on the aggregates community. NSSGA urges Congress to reconsider this legislation and seek input from the regulated community on those areas where we can work together to protect waters and wetlands that truly are important to ecosystems and watersheds and those that provide valuable flood control and water purification.

NSSGA believes the Section 404 program can be improved by:

- Classifying wetlands based on value and function. Wetlands should be classified into three categories on a national, state or regional basis with "strict sequencing" in the high value wetlands; "public interest" (balancing) test in medium value wetlands; and automatic permit with mitigation requirements in lowest value wetlands.

- Developing incentive programs for private landowners to conserve wetlands on their property. Tax credits and other benefits encourage landowners to leave privately owned wetlands in their natural state and to manage such lands accordingly.

NSSGA is proud of the work our members do to protect the environment. By working together, wetlands that are truly valuable can be protected for the benefit of the environment, our nation's waters, and future generations while at the same time our members can continue to provide essential aggregate materials that sustain the quality of life enjoyed by all Americans.

Appendix 1

The NSSGA Board of Directors amended these Environmental Guiding Principles on February 11, 2001. The Environmental Guiding Principles were originally adopted January 20, 1991.

The National Stone, Sand and Gravel Association (NSSGA)

- Encourages its members to meet all established environmental regulatory requirements, and where possible to do better than the law and regulations require.
- Believes that environmental laws and regulations should be based on sound scientific, engineering and medical research and on established scientific, engineering and medical principles. To this end, NSSGA will work with lawmakers and regulators and make available the expertise of its member, staff and research facilities to help in shaping the nation's environmental policies.
- Encourages its members to adopt and implement an Environmental Management System (EMS) program to meet its environmental requirements and improve its overall performance. An EMS is a continual cycle of planning, implementing, reviewing and improving the actions that an organization takes to meet its environmental goals.
- Encourages its members to strive for excellence in environmental affairs and to provide leadership by example by demonstrating environmental stewardship in all aspects of their operations.
- Encourages its members to contribute to environmental enhancement by implementing programs such as landscaping and wildlife habitat development.
- Encourages its members to work with community leaders and citizens groups in developing plans for appropriate uses of the land in the community interest, once mining operations have been completed.
- Encourages its members to participate in communicating to the public the importance to society of an environmentally-responsible aggregate industry, and in educating the youth of our country in the wisdom of responsible environmental stewardship in a business setting.
- Believes that wise environmental stewardship is good business, and good for business.

Appendix 2

National Stone, Sand & Gravel Association's
Guiding Principles for Sustainable Aggregates Operations

The members of the National Stone, Sand and Gravel Association (NSSGA) identifies sustainability as a business approach that integrates environmental, social and economic aspects to ensure the long-term supply of aggregate materials to society. NSSGA recognizes that sustainable practices are necessary today to preserve the potential for a quality life for future generations.

Overarching Practices

- NSSGA members sustain the communities in which we operate by providing raw materials as natural building blocks for quality of life.
- We are conscious of the need to provide economic, social and environmental value for future generations, and the communities in which we operate.
- We demonstrate a strong and unwavering commitment to safety, health and the environment at our operations.
- We work with appropriate government bodies to establish effective, responsible and balanced laws and other requirements based on sound science.
- We encourage life cycle re-use of products during manufacturing and post consumer use.
- We maintain adequate aggregate resources in locations that minimize the life cycle impacts of the resource's extraction, delivery and use.
- We encourage proper land use development and planning within communities to ensure long-term aggregate resource availability.
- We adhere to the highest ethical business practices and transparency in all aspects of our operations.
- We recognize that profitability is essential to a sustainable industry and its continued ability to contribute to communities.

During the Mining Life Cycle of an aggregate operation, our members are encouraged to:

Planning Phase

- Develop a site-specific plan for post mining land use and/or reclamation that engages stakeholders in planning for future needs and interests.
- Plan for the prevention and/or minimization of environmental impacts.
- Adopt and implement an Environmental Management System program to properly manage potential environmental risks and requirements, and improve overall environmental performance.

Operational and Closure Phase

- Pursue new technologies and practices to improve the operational, safety, health and environmental efficiency of our operations.
- Invest in the personal and professional development of employees to ensure a strong workforce into the future.
- Ensure that employees are treated in a respectful and positive manner, and provide them with competitive compensation programs consistent with performance and industry practice.
- Identify, control and/or eliminate risks associated with occupational injuries and illnesses.
- Encourage employees and contractors to interact responsibly within the community in which we operate and serve.
- Work in partnerships to promote beneficial post-mining land use, including industrial, commercial, and residential and community development, agricultural production, and wildlife conservation, habitat creation and restoration.

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12/12/07

To: The Honorable Barbara Boxer, Chairperson and Members of The Senate Environment and Public Works Committee and Others

Re: SB 1870 the proposed rewrite of the CLEAN WATER RESTORATION ACT

Dear Decision-Makers:

We represent an agricultural and forestry county in the Willamette Valley of Oregon which is the recipient of abundant rainfall a good portion of many years. We are quite different from some other areas of our state and nation.

We, as land owners and natural resource producers, are already under adequate federal control as far as water quality is concerned. What you may not be aware of is that over half of Oregon's land area is already completely under the control of either the United States Forestry Service or the Bureau of Land Management!!! We also have pretty extensive state water quality laws. Our organization is actively involved in educating the property owners and helping them comply with these regulations.

Please let the states manage their own waters which we feel is our Constitution's intent.

We are in opposition to expanding Federal authority as is being proposed in Senate Bill 1870 and also in HR 2421.

Our elected Board contains professionals in the Land –Use genre. This includes a former State Representative, Professional Agronomist, Ag Drainage technician and local Ag producers from the Grass Seed Industry and Livestock producers. We have a good idea of the pulse of the Ag community and industry as a whole.

We trust you consider the depth of our involvement and concern with this issue and do not burden us with added federal control. That will only add further burden on the system and operators as a whole.

Thank you,

Linn Soil and Water
Conservation District Board

AF&PA®

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AF&PA STATEMENT FOR THE RECORD

SENATE ENVIRONMENT AND PUBLIC WORKS COMMITTEE HEARING

DECEMBER 13, 2007

AF&PA appreciates this opportunity to provide our views on S. 1870, the Clean Water Restoration Act. AF&PA is the national trade association of the forest, paper, and wood products industry. AF&PA represents more than 200 companies and related associations that engage in or represent the manufacture of pulp, paper, paperboard, and wood products.

AF&PA believes that S.1870 would result in a dramatic expansion of Clean Water Act (CWA or Act) jurisdiction and would have a significant adverse effect on the forest products industry.

We have three primary concerns. First, the use of the term "navigable waters" in the original Act was deliberate and reflected Congress's intent to ground CWA jurisdiction in the Commerce Clause, a clause frequently relied upon by Congress over the years as the basis for its authority to enact wide-ranging legislation. The bill would remove those words and insert the language "to the fullest extent that these waters, or activities affecting these waters, are subject to the legislative power of Congress under the Constitution." This is a significant - but ambiguous - expansion of the original jurisdiction of the Act, and will result in many legal challenges to determine the boundaries of agency authority.

The second concern pertains to the savings clause in the bill. Because the language of the bill is so broad and encompasses "all interstate and intrastate" waters," subject only to a very ambiguous limitation, it is critical that existing legislative and regulatory exemptions from jurisdiction are clearly preserved. We have some concerns with the wording of the savings clause in section 6 of the bill pertaining to its description of legislative exemptions, including those that are important to forest management activities. Our primary concern, however, is that the bill is silent on the existing regulatory exemptions, and that future courts interpreting the bill might nullify the existing regulatory exclusion for wastewater treatment ponds.

The wastewater treatment pond exemption is very important to the manufacturing segment of our industry. Approximately 75 percent of the larger AF&PA member manufacturing facilities are direct dischargers that treat their effluent before discharge; as compared to indirect dischargers, facilities that use publicly owned treatment works (POTWs) for treatment. Not all of those facilities have wastewater treatment ponds affected by the exemption, but this figure provides an indication of the potential negative

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impact on the industry if the exemption were nullified. Without the exemption, water entering waste treatment ponds would have to meet water quality standards, since these ponds would be classified as "waters of the United States." These ponds are critical to the water quality treatment process itself, and mills would have to find other extremely expensive, if not impossible, ways to treat their discharges.

Finally, the bill seems to extend CWA jurisdiction to "activities affecting these waters," a jurisdictional phrase that does not appear in the existing CWA or regulations. It could easily be argued that this language, if enacted into law, reflects congressional intent to expand existing CWA jurisdiction. This is another example of language that could be interpreted to apply CWA permitting requirements on activities critical to sustainable management of our forest resources. Specifically, for forest landowners, the legislation could require a permit for any wet area on the property, including puddles or ditches. Forcing landowners to obtain permits from USEPA and/or the Corps of Engineers would shackle them with severe time and cost burdens.

The United States forest products industry is dedicated to environmental protection and has made great strides in improving the quality of the water it discharges. The industry also has adopted and implemented numerous sustainable forestry practices meeting and exceeding environmental protection requirements. We are committed to protecting and restoring America's wetland and water resources and we support constructive measures to achieve these goals. However, we are concerned about the unintended consequences resulting from such a broad expansion of CWA authority that this bill envisions. For this reason, we respectfully oppose S. 1870.

Thank you for your consideration and we look forward to working with the committee as it begins discussions on this issue.

For more information please contact:

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The Clean Water Act Following the Recent Supreme Court Decisions in *Solid Waste Agency of Northern Cook County* and *Rapanos-Carabell*

Statement of the American Road and Transportation Builders Association

Submitted to the United States Senate Committee on Environment and Public Works

December 13, 2007

On behalf of its 5,000 member firms and public agencies nationwide, the American Road and Transportation Builders Association (ARTBA) would like to thank Chairman Boxer and Ranking Member Inhofe for examining the Clean Water Act (CWA) following the recent Supreme Court decisions in *Solid Waste Association of Northern Cook County v. United States Army Corps of Engineers* (*SWANCC*)[1] and *Rapanos v. United States* (*Rapanos*)[2].

ARTBA's membership includes public agencies and private firms and organizations that own, plan, design, supply and construct transportation projects throughout the country. ARTBA members are directly involved with the federal wetlands permitting program and undertake a variety of construction-related activities under the CWA. In the 35 years since the CWA's passage ARTBA has actively worked to combine the complementary interests of improving our nation's transportation infrastructure with protecting essential water resources. In doing so, we are proud to note the constant efforts of the transportation construction industry to minimize the effects of transportation infrastructure projects on the environment.

ARTBA has a long history of working to find common-sense solutions to environmental issues by seeking to protect natural resources and efficiently deliver of transportation improvements. The transportation construction industry and state departments of transportation have been grappling with wetlands issues for years and often face confusing and conflicting interpretations

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[1] *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001).

[2] *Rapanos v. United States*, 126 S.Ct. 2247 (2006).

on the scope of federal jurisdiction. Not knowing what is or is not a federally-jurisdictional wetland complicates long-term transportation planning because planners can never be sure where permits will or will be not required.

One of the main reasons for the success of the CWA is the Act's clear recognition of a partnership between the federal and state levels of government in the area of protecting water resources. The lines of federal and state responsibility are set forth in Section 101(b) of the CWA:

> "It is the policy of Congress to recognize, preserve, and protect the primary responsibilities of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation and enhancement) of land and water resources..."[3]

This structure of shared responsibility between federal and state governments allows states the essential flexibility necessary to protect truly ecologically important and environmentally sensitive areas within their borders while, at the same time, make necessary transportation infrastructure improvements. The success of the federal-state partnership is backed by dramatic results. Prior to the inception of the CWA, from the 1950s to the 1970s, an average of 458,000 acres of wetlands were lost each year. Subsequent to the CWA's passage, from 1986-1997, the loss rate declined to 58,600 acres per year and between 1998-2004 overall wetland areas increased at a rate of 32,000 acres per year.[4]

ARTBA supports the reasonable protection of environmentally sensitive wetlands with policies balancing preservation, economic realities, and public mobility requirements. Much of the current debate over federal jurisdiction, however, involves overly broad and ambiguous definitions of "wetlands." This ambiguity is frequently used by anti-growth groups to stop desperately needed transportation improvements. For this reason, ARTBA has, and continues to, work towards a definition of "wetlands" that would be easily recognizable to both landowners and transportation planners. As an example of this, official ARTBA policy recommends defining a "wetland" as follows: "If a land area is saturated with water at the surface during the normal growing season, has hydric soil and supports aquatic-type vegetation, it is a functioning wetland."

ARTBA has been also actively involved in CWA litigation concerning federal jurisdiction over the nation's waters and wetlands for the better part of the past two decades. ARTBA was a main participant in litigation spanning 14 years concerning the United States Army Corps of Engineers (Corps) "Tulloch Rule" regulating incidental fall back from dredging and filling operations. Also, ARTBA was involved in multi-year litigation over modifications to the Corps' Nationwide Permit (NWP) Program. Most important to this hearing, however, is that ARTBA filed amicus briefs representing the transportation construction industry's interests and opposing the expansion of Corps jurisdiction in *SWANCC* and *Rapanos*.

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[3] CWA §101(b).

[4] *Draft 2007 Report on the Environment: Science*, USEPA, May 2007, available at http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=140917.

Both *SWANCC* and *Rapanos* benefited the transportation project delivery process by setting limits on Corps' jurisdiction. Specifically, *SWANCC* struck down the so-called "migratory bird rule," which was being used by the Corps to assert jurisdiction over intrastate wetlands based on the flight patterns of migratory birds. The theory behind such an expansion of Corps authority was based on migratory birds being instruments of commerce due to the possibility of hunters, bird-watchers or other interested state parties crossing state lines to view them. ARTBA's brief to the Court took issue with the Corps theory of jurisdiction, noting:

> "[t]he almost 'limitless' expansion of federal authority inherent in the migratory bird rule allows the Corps to essentially arrogate federal power over state and local governments contrary to the express language of the CWA and fundamental principles of federalism."[5]

The "migratory bird rule" was a severe hindrance to transportation planners as it made federal jurisdiction extremely hard to predict. Project developers, not knowing the habits of migratory birds, were unable to tell what was and was not a jurisdictional wetland. Again, ARTBA's brief illustrated this point:

> "The Corps's expansion of jurisdiction to include all migratory bird habitat could have the practical effect of allowing the Corps to overturn state and local approvals of public works projects impacting isolated 'wet areas' based on an alleged federal interest in the 'aggregate' health of the Nation's migratory bird population."[6]

The Court agreed with the issues raised in ARTBA's brief and recognized expansion of federal jurisdiction would threaten the fundamental principles upon which the CWA was created. As then Chief Justice Rehnquist stated:

> "These are significant constitutional questions raised by respondents' application of their regulations, and yet we find nothing approaching a clear statement from Congress that it intended [the CWA] to reach an abandoned sand and gravel pit such as we have here. Permitting respondents to claim federal jurisdiction over ponds and mudflats falling within the 'Migratory Bird Rule' would result in a significant impingement of the States' traditional and primary power over land and water use. See, *e.g., Hess* v. *Port Authority Trans-Hudson Corporation,* 513 U.S. 30, 44 (1994) ('[R]egulation of land use [is] a function traditionally performed by local governments'). Rather than expressing a desire to readjust the federal-state balance in this manner, Congress chose to 'recognize, preserve, and protect the primary responsibilities and

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[5] *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001), Amicus Curiae Brief of the American Road and Transportation Builders Association, p.12.

[6] *Id.* at 13.

> rights of States … to plan the development and use … of land and water resources … .'"[7]

The decision in SWANCC was a victory reaffirming the balance of jurisdiction intended by the CWA. By striking down the "migratory bird rule" the Court recognized the role of state and local governments in continuing to protect important environmental resources while at the same time managing development needs without unnecessary delay or interference.

The CWA's jurisdictional scheme was brought before the Court once again in the *Rapanos* litigation. At issue in *Rapanos* were two separate wetlands cases which were consolidated for the Court's review. The Court was asked to decide whether the Clean Water Act allows Corps regulation of "isolated wetlands" that have no connection with "navigable waters." The Court was also asked to decide whether or not a tenuous connection between a wetland and "navigable water" is enough to allow regulation by the Corps, or if there is a minimal standard that should be applied. Once again, ARTBA explained the CWA's legislative scheme of state and federal shared responsibility to the Court:

> "By federalizing any wet area, no matter how remote from navigable waters, [this Court would adopt] an unprecedentedly broad jurisdiction of the geographic scope of CWA jurisdiction. As this Court held in *SWANCC*, the courts should be hesitant to intrude upon the delicate balance between federal and state regulation of land and water resources…In enacting the CWA, Congress did not seek to impinge upon the States' traditional and primary power over land and water use when setting out the scope of jurisdiction under the CWA."[8]

The Court's split decision in *Rapanos* preserved the CWA's essential jurisdictional balance by preventing sweeping federal authority over isolated wetlands and man-made ditches or remote wetlands with finite connections to navigable waters. However, because the Court's decision was not issued by a majority of the justices, these issues are currently being examined by lower courts on a case-by-case basis. While ARTBA applauds the fact the decision prevented an expansion of already inefficient federal wetlands regulation, we also recognize the need for clarity in *Rapanos'* wake in order to preserve the necessary balance between federal and state jurisdictions that is essential to the continuation of the CWA's success.

In decisions such as *Rapanos* where four justices agree in both the plurality opinion (authored by Justice Scalia) and the dissenting opinion (authored by Justice Stevens) and one Justice (Justice Kennedy) writes a concurrence, the effects of the opinion should be taken from the areas where the plurality and the concurrence agree. The Supreme Court has spoken to this point specifically, stating:

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7 *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 174 (2001).

8 *Rapanos v. United States*, 126 S.Ct. 2247 (2006), Amicus Curiae Brief of the American Road and Transportation Builders Association, p. 25.

> "[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 the members who concurred in the judgments on the narrowest grounds.'"[9]

In *Rapanos*, the five justices who agreed in the final judgment of the case were Justices Scalia, Thomas, Alito, Roberts and Kennedy. Thus, in responding to the *Rapanos* decision, the focus should be on those areas where agreement can be found among these five justices.

The Scalia plurality and the Kennedy concurrence agree on several points which should guide any regulatory or legislative response to the *Rapanos* decision. Most importantly, both Scalia and Kennedy disagreed with the existing Corps theory of jurisdiction that a wetland with tenuous and questionable connections to navigable water can be subject to federal jurisdiction if one molecule of water flows between both points. This has been termed by some as the "migratory molecule" theory of jurisdiction. Justice Kennedy specifically rejects the idea of the "migratory molecule" by noting that a "central requirement" of the Clean Water Act is "the requirement that the word 'navigable' in 'navigable waters' be given some importance."[10]

Justice Kennedy also explains the CWA's establishment of certain basic recognizable limits to the Corps' excluding man-made ditches and drains by refuting portions of Justice Stevens' dissent:

> "[t]he dissent would permit federal regulation whenever wetlands lie alongside a ditch or a drain, however remote and insubstantial, that eventually flow into traditional navigable waters. The deference owed to the Corps' interpretation of the statute does not extend so far."[11]

Further, Justice Kennedy notes such an over-expansive view of the Corps' authority is incompatible with the CWA:

> "Yet 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 and 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 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 the isolated ponds held to fall beyond the Act's scope in SWANCC."[12]

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

10 *Rapanos v. United States*, 126 S.Ct. 2247 (2006) (Kennedy, J. concurring).

11 *Id.*

12 *Id.* at 2249, referring to the holding in SWANCC

This leads to a central point of *Rapanos* echoed by members of the plurality, dissent and Justice Kennedy—there needs to be some sort of regulatory response from the Corps reflecting these limits on its jurisdiction. In his concurrence, Justice Kennedy states:

> "Absent more specific regulations, however, the Corps must establish a specific nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to navigable tributaries. Given the potential overbreadth of the Corps regulations, this showing is necessary to avoid unreasonable applications of the statute."[13]

Chief Justice Roberts was more direct with his wording, noting a regulatory response from the Corps has been long overdue, and should have been promulgated after the *SWANCC* decision first recognized the jurisdiction of the Corps needed to be limited:

> "Rather than refining its view of its authority in light of [the Court's] decision in *SWANCC*, and providing guidance meriting deference under [the Court's] 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."[14]

Finally, Justice Breyer's dissent warns a refusal from the Corps to issue a regulatory response to *Rapanos* will only result in more litigation:

> "If one thing is clear, it is that Congress intended the Army Corps of Engineers to make the complex technical judgments that lie at the heart of the present cases (subject to deferential judicial review). In the absence of updated regulations, courts will have to make ad hoc determinations that run the risk of transforming scientific questions into matters of law. This is not the system Congress intended. Hence, I believe that today's opinions, taken together, call for the Army Corps of Engineers to write new regulations, and speedily so."[15]

Thus, the one thing that is clear from the *Rapanos* decision is the need for a response recognizing the limits of Corps jurisdiction and clarifying the existing wetlands regulations. The response can be either administrative or legislative in nature. In crafting either type of response, ARTBA recommends the result be a clarified, consistent regulatory program that operates within the proper jurisdictional limits of the CWA as reflected in the *Rapanos* and *SWANCC* decisions. ARTBA is currently working to accomplish this objective in the United States Environmental Protection Agency (EPA)/Corps guidance released subsequent to the *Rapanos* decision. We also would like to offer several principles that should be the basis of any legislative initiative.

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13 *Id* at 2250.

14 *Id.* at 2236 (Roberts, C.J., concurring).

15 *Id.* at 2266 (Breyer, J., dissenting).

It is essential for any legislative clarification of federal wetlands jurisdiction to preserve the federal-state partnership embodied in the CWA. As both *Rapanos* and *SWANCC* stressed, a scheme of shared jurisdiction is necessary to carry out the original intent of the CWA. States need to be allowed to maintain full control over intrastate water bodies in order to allow them the flexibility to balance their own environmental needs with unique infrastructure challenges.

There have also been legislative responses attempting to solve the confusing issue of Corps jurisdiction. While ARTBA appreciates the desire of Congress to protect legitimately environmentally sensitive wetlands, we believe such efforts should not extend federal regulation to isolated areas that have no environmental value and have been removed from the Corps' jurisdiction by both *Rapanos* and *SWANCC*. Protecting an area simply for the sake of protection adds little from the standpoint of environmental quality, but can create needless, time-consuming regulatory complications. Specifically, removing the word "navigable" from the CWA would lend to this type of unnecessary regulation.

Also, ARTBA has repeatedly stated the involvement of multiple agencies (including EPA) in wetlands regulation only hinders the overall efforts of the Corps' permitting program. One of the principal problems that has plagued the 404 program is indecision and inaction, with no benefit for the environment. Justice Breyer reiterated this in his aforementioned *Rapanos* dissent, stating "If one thing is clear, it is that Congress intended the Army Corps of Engineers to make the complex technical judgments that lie at the heart of [federal wetlands jurisdiction]."[16] Congress reiterated this point in the National Defense Authorization Act for Fiscal Year 2004 by authorizing only one agency, the Corps, to issue 404 permitting program regulations. This direction should be continued. Thus, it should be the sole responsibility of the Corps to take the lead and build a stronger, more predictable compensatory mitigation program to both enhance environmental protection and provide a measure of certainty to regulatory staff and permit applicants. ARTBA continues to believe the Corps should be the principal agency administering the 404 wetlands regulatory program.

Many ARTBA members are directly involved in tremendously successful mitigation efforts as part of the projects they construct. ARTBA public official members also are integrally involved in the permitting process itself, as they regulate at the state and local level. A prime reason for the success of current mitigation efforts is the flexibility of individual states to delegate which wetlands to protect and direct mitigation efforts appropriately. Removing this flexibility and possibly mandate protection of all wet areas, no matter how environmentally important, could dilute both state and federal resources. Retaining state autonomy over wetland protection efforts is essential to maximize the efficiency of these programs and public sector resources. From a federal legislative perspective, mitigation should be declared as the preferred, first-choice method of wetlands restoration and development. The permitting process should be altered to require mitigation banking, provided that it is advantageous to both the environment and project sponsors. Federal mitigation regulations should place a premium on flexibility and not be bogged down by requirements offering no additional environmental protection and potentially leading to further delay of desperately needed transportation infrastructure projects.

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[16] *Id.*

ARTBA looks forward to continuing its long tradition of working with the Congress in order to build upon the success and address the future challenges of the CWA and its essential scheme of shared federal and state jurisdiction.

Statement of

The Associated General Contractors of America

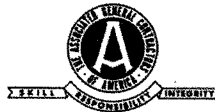
Presented to the

Committee on Environment and Public Works
United States Senate

For a hearing on

The Clean Water Act following the recent Supreme Court decisions in *Solid Waste Agency of Northern Cook County* and *Rapanos*

December 13, 2007



Building Your Quality of Life

The Associated General Contractors of America (AGC) is the largest and oldest national construction trade association in the United States. AGC represents more than 32,000 firms, including 7,000 of America's leading general contractors, and over 12,000 specialty-contracting firms. Over 13,000 service providers and suppliers are associated with AGC through a nationwide network of chapters. AGC contractors are engaged in the construction of the nation's commercial buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, waterworks facilities, waste treatment facilities, dams, water conservation projects, defense facilities, multi-family housing projects, site preparation/utilities installation for housing development, and more.

THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
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STATEMENT
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE
DECEMBER 13, 2007

I. Introduction

The Associated General Contractors of America (AGC) is pleased to submit these comments on federal jurisdiction over waters and wetlands of the United States under the Clean Water Act (CWA) following the recent U.S. Supreme Court decisions in *Solid Waste Agency of Northern Cook County (SWANCC)*[1] and *Rapanos*.[2] AGC strongly opposes S. 1870, the Clean Water Restoration Act of 2007, which would delete the term "navigable waters" from the CWA and subject all "waters of the United States," including all "intrastate waters," and all activities affecting such waters, to federal jurisdiction. AGC encourages the Administration to undertake and Congress to oversee a common sense rulemaking that would establish readily identifiable limits to federal jurisdiction over waters and wetlands.

Without clear definitions to guide field staff in the regulatory agencies, permitting decisions will continue to be arbitrary and inconsistent. Vague and ambiguous regulatory provisions will continue to cause confusion, deny the regulated community fair notice of what is required, and waste time and money; all with little benefit to the environment. This lack of clarity is unduly burdensome for critical public infrastructure and private projects.

To clarify the scope of CWA jurisdiction, in light of *SWANCC* and *Rapanos,* this Administration should move forward with a rulemaking, and Congress should encourage (and not pre-empt) this effort. The commonalities between Justice Scalia's plurality opinion and Justice Kennedy's concurrence in *Rapanos* not only provide a starting point to fashion a rational policy; they also provide the Administration with an opportunity to implement balanced, effective regulations in an area that has generated endless litigation for decades. The Administration has taken a necessary first step towards a rulemaking through the issuance of joint guidance to aid regulatory agencies in making jurisdictional determinations. However, AGC believes that the guidance on its own is insufficient to provide clarity to this issue.

II. Statement of Interest

AGC is the oldest and largest of the national trade associations in the construction industry. It is a non-profit corporation founded in 1918 at the express request of President Woodrow Wilson, and it now represents more than 32,000 firms in nearly 100 chapters throughout the United States. Among the association's members are nearly 7,000 of the nation's leading general contractors, more than 12,000 specialty contractors, and more than 13,000 material suppliers and service providers to the construction industry.

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[1] *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers, 531 U.S. 159, 168, 121 S.Ct. 675, (2001).*

[2] *Rapanos v. United States*, 547 U.S. ___, 126 S. Ct. 2208 (2006).

AGC members engage in the construction of commercial buildings and public works facilities, and they prepare the sites and install the utilities necessary for residential and commercial development. Many of their construction projects lie in "waters of the United States," within the meaning of the CWA, and therefore require federal permits. Whether any one project lies in such "waters" depends on the precise contours of that term.

Today, the contours are far from certain, and the uncertainty has become a great burden for AGC members to bear. The federal permits required for construction activity in "waters of the United States" are both costly and time-consuming to obtain. While their environmental purposes are laudable, they do add to the cost and delay of the completion of the private and public infrastructure that literally forms the foundation of our nation's economy.

At the same time, the penalties for failing to obtain a necessary permit can be severe. The civil fines can reach $32,500 per day per violation, and the criminal penalties for "negligent" violations can include fines of $50,000 per day per violation, three years' imprisonment, or both. As the "operators" of construction sites, both property owners and their construction contractors risk such fines and penalties for any failure to obtain a necessary permit. Courts have found both the owner and the constructor of a project to be responsible for compliance, at least where the contractor has control over the discharge activity, and whether or not the contractor reasonably relied on the owner to obtain a necessary permit.

AGC is committed to protecting and restoring the nation's water resources, but it does not believe that it is in the nation's best interest to expand the Clean Water Act beyond its original scope.

III. AGC Opposes S. 1870, the Clean Water Restoration Act of 2007

AGC strongly opposes S. 1870, the Clean Water Restoration Act of 2007, which would delete the term "navigable" from the CWA and replace it with a new legislative definition of "waters of the United States" that includes all "intrastate waters" and all "activities affecting these waters." AGC believes that S. 1870 neither "restores" the original intent of the CWA nor "clarifies" CWA jurisdiction; rather, S. 1870 would create the greatest expansion of the CWA since it was signed into law in 1972.

S. 1870 would grant the U.S. Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency (EPA) *for the first time ever* jurisdiction over all "intrastate waters"—essentially all wet areas within a state, including ground water, ditches, pipes, streets, municipal storm drains, gutters, and desert features, as well as authority over all "activities affecting these waters" (public or private, including construction), regardless of whether the activity is occurring in water or whether the activity actually adds a pollutant to the water.

S. 1870 changes the original intent of Congress in enacting the CWA from the Commerce Clause to the full "legislative power of Congress under the Constitution" and conflicts with CWA Sections 101(b) and 101(g), which state Congressional intent to "recognize, preserve, and protect the primary responsibilities and rights of the States" to control the development and use of local land and water resources and to "allocate quantities of water within [state] jurisdiction."

The practical impacts of S. 1870 are many and significant. The Corps and EPA would have unlimited regulatory authority over all intrastate waters, including, for example, waters now considered entirely under state jurisdiction. Such a broad expansion would require enormous resources not provided by the legislation, exacerbate an existing funding gap in the CWA regulatory program, and lead to longer permitting delays. In short, S. 1870's grab of state and local authority over water and land use would increase the cost of and delay or stop construction projects nationwide and slow economic growth.

In fact, a study of the CWA Section 404 permitting process found that obtaining a nationwide general permit took on average 313 days at a cost of $28,915. Moreover, obtaining an individual permit took on average 788 days at a cost of $271,000. *See* David Sunding and David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetlands Permitting Process*, 42 Nat. Resources J. 59 (Winter 2002).

IV. Supreme Court Provides Starting Point for Administrative Rulemaking

AGC seeks to ensure that the construction industry can continue to contribute to the nation's quality of life. In light of the U.S. Supreme Court's decisions in *Rapanos*, and for the reasons outlined below, AGC supports a rulemaking by the Administration to clarify federal limits over waters and wetlands and opposes legislation, such as S. 1870, the Clean Water Restoration Act of 2007, which would overly extend the jurisdictional reach of the CWA.

In the *Rapanos* decision, the Court vacated prior rulings by the U.S. Court of Appeals for the Sixth Circuit that the federal government has jurisdiction over wetlands connected in any way to actually navigable waters. These cases themselves involved wetlands adjacent to a series of drainage ditches, non-navigable creeks and culverts, and wetlands separated from a drainage ditch by a berm. In both cases, the Sixth Circuit held that the wetlands are "waters of the United States" because they are hydrologically connected to navigable waters.

The Supreme Court vacated these decisions—with a majority of the Court agreeing that the Corps had overstepped its bounds—and remanded the cases to the lower court for further inquiry into the facts. Four Justices (Justices Scalia, Thomas, Alito, and Chief Justice Roberts) reasoned that the CWA authorizes federal jurisdiction over "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,'" and that the statute excludes from federal jurisdiction "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall."[3] These four Justices also interpreted the CWA to cover "*only* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right" such that it is "difficult to determine where the 'water' ends and the 'wetland' begins."[4]

[3] Scalia, slip op. at 20-21.
[4] Scalia, slip op. at 23-24.

Justice Kennedy concurred in the judgment but for different reasons. He reasoned that the "significant nexus" standard is the operative standard for determining whether a non-navigable water should be regulated under the CWA. In his concurring opinion, he repeatedly emphasized the importance of the relationship to traditional navigable waters, stating that to be a "water of the United States," a non-navigable water must "perform important functions for an aquatic system incorporating navigable water,"[5] or "play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood."[6]

The remaining four Justices (Justices Stevens, Souter, Ginsburg, and Breyer) expansively interpreted the CWA to grant the Corps and the EPA jurisdiction over waters and wetlands only remotely connected to traditional navigable waters. While some have made much of the dissenting opinion, these four Justices did not concur in the judgment.

Chief Justice Roberts, lamenting this fractured result, pointed to *Grutter v. Bollinger*[7] and *Marks v. United States*[8] as a guide for lower courts in interpreting *Rapanos*. "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.'"[9] AGC believes it clear that it was Justice Kennedy who "concurred in the judgment on the narrowest grounds." AGC believes it equally clear that his opinion identifies important limitations on federal jurisdiction under the CWA and specific principles that the federal government must consider in making any jurisdictional determinations.

a. AGC Deems a 'Case-by-Case' Standard Unworkable

Following *Rapanos*, to establish that non-navigable water (including a non-navigable wetland) is a "water of the United States," AGC believes that the agencies must measure and establish the nature of the non-navigable water's connection to, and relationship with, traditional navigable waters. The agencies have not undertaken such a review in the past, and Chief Justice Robert lamented the "unfortunate" fact that, in the absence of any further guidance, "lower courts and regulated entities will now have to feel their way on a case-by-case basis."[10]

Proceeding on a case-by-case basis is unacceptable to AGC. It would greatly increase the costs associated with processing permits and the days spent waiting for their issuance. As noted by Justice Scalia in the plurality opinion, the regulated community is already spending about $1.7 billion annually to obtain CWA Section 404 discharge permits.[11] (What is more, the study he cites in support of this figure does not appear to include either the costs or time associated with ascertaining whether the property in question is appropriately subject to federal jurisdiction under the CWA.[12]) Given the

[5] Kennedy, slip op. at 24.
[6] Kennedy, slip op. at 25.
[7] 539 U.S. 306, 325 (2003).
[8] 430 U.S. 188, 193 (1977).
[9] *Id.* at 193.
[10] Roberts, slip op. at 2.
[11] Scalia, slip op. at 2.
[12] Sunding & Zilberman, "The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process," 42 Natural Resources J. 59, 74-76, 81 (2002).

issues that *Rapanos* has raised, applicants are likely to suffer even longer delays and incur additional costs while trying to determine whether or not their property is subject to federal jurisdiction.

b. AGC Calls for Administrative Proceedings

AGC believes that the *Rapanos* decision seriously conflicts with EPA's and the Corps' current regulations on "waters of the United States"[13] and that the two agencies need to launch an immediate effort to update those regulations. We agree with four of the Justices who specifically suggested a clarifying rule.[14] The Court's plurality noted "the immense expansion of federal regulation of land use that has occurred under the CWA—without any change in the governing statute—during the past five Presidential administrations."[15] AGC urges Congress to instruct the Corps and EPA to issue new rules that adhere to the commonalities between Justice Scalia's plurality opinion and Justice Kennedy's concurrence.

AGC believes it is clear that Justice Kennedy's opinion establishes important limitations on the Corps and EPA's authority to regulate work in water and wetlands and identifies certain principles that the Corps must consider in determining whether non-navigable waters have the requisite nexus with traditional navigable waters, as follows—

- The federal government may no longer regulate non-navigable waters or wetlands based solely on their mere hydrological connection to a navigable waterbody.
- The federal government may not rigidly insist that an "ordinary high water mark" is the appropriate measure for identifying jurisdictional tributaries.

[13] The existing CWA regulations 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 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 such waters:
(i) which are or could be used by interstate or foreign travelers for recreational or other purposes;
(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 impoundment of waters otherwise defined as waters of the United States under the definition;
(5) Tributaries of waters identified in paragraphs (a)(1)-(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)-(6) of this section.
Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA are not waters of the United States.
(8) Waters of the United States do not include prior converted cropland...
Different CWA regulations contain slightly different formulations of the definition. For simplicity's sake, these comments refer to the Corps' version at 33 CFR § 328.3(a). Other versions appear at, e.g., 40 CFR §§ 110.1, 112.2, 116.3, 117.1, 122.2, 230.3(s), and 232.2.

[14] *Rapanos v. United States*, 547 U.S. ___, slip op. at 25 (Kennedy, J. concurring); *Id.*, slip op. at 2 (Roberts, C.J. concurring); *Id.*, slip op. at 14 (Stevens, J. dissenting; and *Id.*, slip op. at 2 (Breyer, J. dissenting).

[15] Scalia, slip op. at 3.

- The federal government may no longer consider all "connected" waters to be tributaries and may not automatically assert jurisdiction over any wetland "adjacent" to such connected waters.
- The federal government may no longer regulate "isolated" waters and wetlands.

In *Rapanos*, Justice Kennedy rejected the Corps' practice of asserting jurisdiction over any non-navigable water that has any hydrological connection to any navigable water. Justice Kennedy holds that to be jurisdictional, a non-navigable waterbody's relationship with traditional navigable waters must be "substantial:"

> [M]ere hydrologic connection should not suffice in all cases; the connection may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood.[16]

Inappropriately, the government's principle test for jurisdiction has been any hydrological connection to traditional navigable waters. Based on the assumption that water flows downhill, the Corps has asserted jurisdiction over non-navigable waters without even considering how far they lie from navigable water, how frequently they carry water, or how much water they carry.

Now, to establish that a non-navigable water (including a non-navigable wetland) is a "water of the United States," it is apparent that the agencies must measure and establish the nature of the non-navigable water's connection to, and relationship with, traditional navigable waters. To illustrate this point, Justice Kennedy requires, for non-navigable wetlands, a showing that:

> [T]he 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.'[17]

Justice Kennedy also rejects the Corps' current approach to identifying "tributaries." Specifically, Justice Kennedy calls into question the Corps' use of "ordinary high water mark" (OHWM) as a measure for identifying tributaries. He starts by noting that the "Corps views tributaries as within its jurisdiction if they carry a perceptible 'ordinary high water mark.'[18] Ultimately, he concludes that the current regulations, as applied by Corps, stray too far from traditional navigable waters:

> [T]he breadth of this standard—which seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carry only minor water-volumes towards it—precludes its adoption as a determinative measure ... 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*.[19]

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[16] Kennedy, slip op. at 28.
[17] Kennedy, slip op. at 23.
[18] 33 CFR 328.4(c); 65 Fed. Reg. 12,823 (2000).
[19] Kennedy, slip op. at 24-25.

Justice Scalia was likewise unpersuaded by the Corps' treatment of "tributaries" and use of OHWM.[20] Inappropriately, the Corps has been using the presence of an OHWM (which it defines in terms of physical characteristics, not ordinary flow) to claim federal jurisdiction over many ditches, dry desert drainages, swales, and gullies.

In addition, Justice Kennedy rejects the government's notion that the Corps may regulate all wetlands that are adjacent to all tributaries. Justice Kennedy's rejection of the Corps' tributary standard leads him also to reject the Corps' practice of regulating all wetlands that are adjacent to all tributaries. He finds that "[a]bsent more specific regulations, ... the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries."[21] Justice Kennedy adds that the Corps "[t]hrough regulations or adjudication 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..." to have a significant nexus to navigable waters.[22] He repeatedly cautions that "insubstantial," "speculative," or "minor flows" are insufficient to establish a "significant nexus."[23]

Inappropriately, the Corps' current definition of "adjacent" purports to allow the federal government to control all wetlands that are "bordering, neighboring, or contiguous" to any of the waters covered in the regulation at Section 328.3(a)(1)-(7) (the seven categories of waters of the United States), including all tributaries, however defined.

Finally, Justice Kennedy confirms that nonnavigable, isolated, intrastate waters are not jurisdictional.[24] This was the opinion of the Court in its 2001 decision in *SWANCC*.[25] Some interests have disputed this interpretation, claiming that such waters are beyond the scope of the CWA only where the only basis for asserting federal CWA jurisdiction is the use of such waters by migratory birds. But the Court in *Rapanos* clarified its previous decision. Under the plurality opinion in *Rapanos*, all isolated water and wetlands are clearly outside the authority of the federal agencies under the CWA. Justice Kennedy in his concurring opinion cites *SWANCC's* "holding" that "nonnavigable, isolated, intrastate waters" are not "navigable waters . . . ."[26]

Following *SWANCC*, the Corps has continued to inappropriately regulate any water/wetland that is not isolated by claiming that all connected waters are tributaries.

In sum, Justice Kennedy's analysis in *Rapanos* calls into question the Corps' current regulations at 33 CFR Section 328.3(a)(5) (tributaries) and (a)(7) (adjacent wetlands). The definitions of "adjacent" at Section 328.3(c) and "ordinary high water mark" at 33 CFR Section 328.3(e) are similarly suspect. Further, Justice Kennedy is writing against

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[20] Scalia, slip op. at 6-9.
[21] Kennedy, slip op. at 25.
[22] Kennedy, slip op. at 24.
23 Kennedy, slip op. at 22-24.
[24] Current regulations define "isolated waters" as those non-tidal waters of the United States that are (1) not part of a surface tributary system to interstate or navigable waters; and (2) not adjacent to such tributary waterbodies. 33 CFR § 330.2(e)(2005).
[25] *Solid Waste Agency of Northern Cook County(SWANCC) v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001).
[26] Kennedy, slip. op. at 17.

the backdrop of *SWANCC*, in which the Supreme Court had previously rejected the "other waters" regulation at 33 CFR Section 328.3(a)(3).

V. Corps/EPA Joint Guidance Not Enough

On June 5, 2007 the Corps and EPA jointly issued guidance regarding the scope of CWA jurisdiction following *Rapanos*. The agencies also issued an accompanying instructional guidebook to aid regulators and the public in making jurisdictional determinations. During the first 180 days implementing the guidance, the agencies will accept public comments on related case studies and experiences. The agencies recently extended the comment period until January 21, 2008.

The guidance will influence regulators' decisions on whether CWA Section 404 discharge permits are required—*and whether they will be issued*—for construction activities impacting wetlands, tributaries, and other waters. It will also impact civil and criminal environmental enforcement. Many jurisdictional determinations beyond traditional navigable waters and their adjacent wetlands will be decided on a case-by-case basis according to a "significant nexus" test described in the guidance. The agencies also announced in the guidance hydrologic features that they generally will not assert jurisdiction over, including roadside ditches as long as they are excavated wholly in and only drain upland and do not carry a relatively permanent flow of water (i.e., less than three months).

AGC is evaluating the practical implementation of the joint guidance and will provide comments to the agencies as appropriate. However, AGC believes that the issuance of the guidance, imperfect or not, is a necessary and first step towards the Administrative rulemaking recommended by the Supreme Court in *Rapanos*.

VI. Conclusion

AGC strongly opposes S. 1870, the Clean Water Restoration Act of 2007, or similar legislation that would redefine federal jurisdiction under the CWA and pre-empt the administrative rulemaking the Supreme Court recommended and provided important direction for in *Rapanos*. The Administration has taken a first and necessary step by issuing joint Corps/EPA guidance. Rather than obstruct this effort, Congress should encourage and oversee a subsequent rulemaking to provide further and long overdue clarity to CWA jurisdictional issues involving waters and wetlands. Doing so will allow the regulated community to continue to deliver critical infrastructure projects in a timely and cost-effective manner, while protecting and enhancing the environment.

Thank you.

November 28, 2007

The Honorable James L. Oberstar
Chairman
Committee on Transportation and Infrastructure
United States House of Representatives
2165 Rayburn House Office Building
Washington, DC 20510

Dear Chairman Oberstar:

Once again, thank you for having your staff meet with the Waters Advocacy Coalition (WAC) earlier this month regarding H.R. 2421, the "Clean Water Restoration Act" (CWRA). During our November 7 meeting, your staff requested that WAC provide a letter describing the U.S. Army Corps of Engineers' (Corps') and Environmental Protection Agency's (EPA's) jurisdiction prior to the Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers* (*SWANCC*)[1]. As we explained during the meeting, based on our many years of experience with the Clean Water Act (CWA) regulatory programs, there was no fixed, certain understanding of jurisdiction pre-*SWANCC*. Rather, just as it is now, jurisdiction was uncertain, idiosyncratic and given to expansion. Accordingly, and in view of the November 28 deadline set by your staff, what follows is a general description of Corps and EPA jurisdictional concepts pre-*SWANCC* supported by citations to Corps and EPA guidance, agency reports, *Federal* Register notices and other informational sources.

The agencies' treatment of ditches is a good example of the inconsistencies existing before *SWANCC*. The Corps' position in 1975 was unequivocal: "[d]rainage and irrigation ditches have been excluded" from the definition of jurisdictional waters.[2] The 1977 regulations reinforced this view, stating "manmade nontidal ditches and irrigation ditches excavated on dry land are not considered waters of the United States."[3] The preamble to the Corps' 1977 regulations expanded on this view, noting:

> ...nontidal drainage and irrigation ditches that feed into navigable waters will not be considered 'waters of the United States' under this definition. To the extent that these activities cause water quality problems, they will be

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1 *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001)

2 40 Fed. Reg. 31,320, 31,321 (July 25, 1975).

3 42 Fed. Reg. 37,122, 37,144 (July 19, 1977).

> handled under other programs of the [CWA] including Section 208 and 402.[4]

During the 1980's and 1990's the Corps continued to maintain that man-made upland ditches were not jurisdictional, stating in a 1980 proposed rule "man-made, non-tidal drainage and irrigation ditches excavated on dry land are not considered waters of the United States."[5] This was further reflected three years later in a 1983 Corps' jurisdictional proposal directing "[w]aters of the United States do not include the following man-made waters: (1) non-tidal drainage and irrigation ditches on dry land, (2) irrigated areas which would revert to upland if the irrigation ceased."[6]

But, by the mid-1980's, their statements were not so absolute. In a Preamble to a 1986 rule, the Corps said only "we **generally do not consider** [drainage ditches and irrigation ditches excavated on dry land] to be waters of the United States."[7] This more equivocal approach marked the beginning of a "case-by-case" method for determining jurisdiction. By 2000, the Corps' view of its jurisdiction over ditches had expanded to the point that only "ditches constructed entirely in upland areas" were not covered.[8] At no point during this expansion of Corps' jurisdiction was the notice and comment rulemaking process ever initiated.

The Corps rationalized this expansion of jurisdiction by finding "non-tidal drainage ditches are waters of the United States if they extend the Ordinary High Water Mark [OHWM] of an existing water of the United States."[9] When commenters raised questions about the Corps' new view of ditches, the Corps response was confusing at best:

> The statement that non-tidal drainage ditches are waters of the United States if they extend the OHWM of an existing water of the United States is consistent with the final rule published in the November 13, 1986 Federal Register and applies to ditches constructed in waters or that connect waters. Nothing in the NWP [Nationwide Permit Program] notice was intended to change the November 13, 1986 Federal Register Notice which states that drainage ditches constructed entirely in upland areas are generally not considered to be waters of the United States.[10]

Thus, a ditch was generally not a water of the United States, except when it extended the OHWM.

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4 *Id.* At 37,127.
5 45 Fed. Reg. 62,732, 62,747 (Sept. 19, 1980).
6 48 Fed. Reg. 21,466, 21,474 (May 12, 1983).
7 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986).
8 65 Fed. Reg. 12,818, 12,823-24 (March 9, 2000)
9 *Id.*
10 *Id.* At 12,823.

The agencies' treatment of OHWM was similarly confused in the pre-SWANCC era (just as it is today). Originally used to define the boundary, or "limit" of CWA jurisdiction within a water body, OHWM morphed over the years into a means for determining the presence of a water body as well as the lateral and upstream boundaries of a water body.

In May of 1975, the Corps proposed to utilize OHWM as it had used OHWM under the Rivers and Harbors Act—i.e., to establish the lateral or shoreward limits of CWA jurisdiction in non-tidal waters. It defined OHWM to mean:

> the natural or clear line impressed on the land adjacent to the water body. It may be established by erosion or other easily recognized characteristics such as shelving, change in the character of the soil, destruction of terrestrial vegetation or its inability to grow, the presence of litter and debris, or other appropriate means which consider the characteristics of the surrounding area.[11]

In July of 1975, the Corps added a quantitative element (i.e., frequency of inundation) to the OHWM definition to ensure that the physical mark that would meet the criteria of OHWM would be indicative of "ordinary" conditions, explaining:

> ...with respect to inland fresh water means the line on the shore established by analysis of all daily high waters. It is established as that point on the shore that *is inundated 25% of the time* and is derived by a flow-duration curve for the particular water body that is based on available *water stage data*. It may also be estimated by erosion or equally recognized characteristics such as shelving, change in the character of the soil, destruction of terrestrial vegetation or its inability to grow, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding area.[12]

In 1977, the Corps "returned to our definition of 'ordinary high water mark' used in the administration of our 1899 Act permit program. We believe that in waters where no wetlands are present, this definition will include those areas that are part of the aquatic system along these freshwater lakes, rivers and streams, as this mark is intended to include those areas where water will be present with predictable regularity."[13] Thus, the Corps abandoned its use of quantitative measures of "ordinary" and reverted to purely physical evidence of a high water mark, explaining:

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11 40 Fed. Reg. 19,766, 19,772 (May 6, 1975).
12 40 Fed. Reg. 31,320, 31,325 (July 25, 1975).
13 42 Fed. Reg. 37,122, 37,129 (July 19, 1977).

> That line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.[14]

In conjunction with the development of OWHM, the Corps was also establishing the limits of its upstream jurisdiction in linear water bodies. In 1975, the Corps set the upstream limits of its jurisdiction as the "headwaters" or point on a stream where the average annual flow is five cubic feet per second.[15] The Assistant Secretary of the Army at the time further explained "[w]e put the dividing line at 5 cubic-feet of normal flow. Now, if it is smaller than that, the whole creek is outside the permit."[16] Two years later, in 1977, the Corps abandoned the use of "headwaters" and extended its jurisdiction to the entire surface tributary system and to any isolated water with an interstate commerce nexus.[17] Thus, pre-*SWANCC*, OHWM was an evolving concept measured by the presence of physical indicators which might have nothing to do with the ordinary presence of water.[18]

Following the alteration of the use of OHWM and adoption of the "Migratory Bird Policy" (MBP), the Corps proposed a new definition in 2000 for "ephemeral stream," which it considered to be a "water of the United States, provided it has an OHWM."[19] In asserting there could be jurisdiction over ephemeral streams via an OHWM, the Corps was directly contradicting guidance issued only five years before. In 1995, the Corps Baltimore District issued a statement noting:

> Since ephemeral streams, by definition, are always above the water table and receive no groundwater contribution, they act as rain gutters, conveying water for brief periods of time during and immediately following precipitation events. Because water is present in ephemeral streams for such brief periods, an [ordinary high water mark] does not develop within these channels.[20]

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14 33 C.F.R. §328.3(e).

15 40 Fed. Reg. at 31,325 (July 25, 1975).

16 *See 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: Hearing Before the House Comm. On Public Works and Transportation Subcomm. On Water Resources*, 94th Cong., 1st Sess. 15 (1975) (testimony of Victor Veysey, Assistant Secretary of the Army for Civil Works).

17 42 Fed. Reg. at 37,129.

18 *See* U.S. Army Corps of Engineers, South Pacific Division, *Final Summary Report: Guidelines for Jurisdictional Determinations for Waters of the United States in the Arid Southwest* (June 2001).

19 65 Fed. Reg. 12,818, 12,823 (March 9, 2000).

20 U.S. Army Corps of Engineers Baltimore District, Branch Guidance Letter No. 95-01 re: Identification of Intermittent Versus Ephemeral Streams – Not Ditches. (October 17, 1994).

The evolving and inconsistent nature of OHWM spurred the regulated community to request an official rulemaking to clarify the definition of OHWM. One year after the *SWANCC* decision, the Corps agreed that a rulemaking was in order, stating in a *Federal Register* notice that "we should look at improving the definition of the OHWM...[t]his will be the subject of a separate review."[21] At the time, though, the Corps instructed its district offices to make OHWM determinations on a "case-by-case basis."[22] To date, more than six years since SWANCC, there has been no regulatory effort to improve the definition of OHWM.

The changing nature of pre-*SWANCC* Corps jurisdiction can also be examined through the treatment of the term "adjacent" in relation to the proximity of wetlands to waters of the United States. "Adjacent" is currently defined as "...bordering, contiguous or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent' wetlands."[23] When the current definition of "adjacent" was adopted in 1977, the Corps explained "[t]he term would include wetlands that directly connect to other waters of the United States, or that are in reasonable proximity to these waters but physically separated from them by man-made dikes or barriers, natural river berms, beach dunes and similar obstructions."[24] In 1983, the Corps attempted to limit the definition of adjacent, to refer to wetlands "bordering, contiguous, or immediately neighboring and having a reasonably perceptible surface or subsurface hydrologic connection to a water of the United States."[25] While this definition failed, the Corps signaled again in 1986 an intent to once again revise the definition of "adjacent," noting "[t]hese definitions [including the new definition of 'adjacent'] would require the prior approval of the Environmental Protection Agency, which has not been forthcoming. Therefore, these new proposed definitions will not be adopted at this time."[26]

The lack of clarification regarding the definition of "adjacent" has resulted in multiple differing interpretations of how far federal authority extends. Several Corps districts defined "adjacency" based on varying interpretations of the proximity of a wetland to a jurisdictional water.[27] Thus, pre-*SWANCC*, there were many different notions of what constituted a wetland's "adjacency" to a jurisdictional water of the United States.

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[21] 67 Fed. Reg. 2,020, 2,026 (Jan. 15 2002).

[22] *Id.*

[23] 33 C.F.R. §328.3(c).

[24] 42 Fed. Reg. at 37,129. (July 19, 1977).

[25] 48 Fed. Reg. at 21,474. (May 12, 1983).

[26] 51 Fed. Reg. at 41,217. (Nov. 13, 1986).

[27] *See* U.S. Army Corps of Engineers Wilmington (NC) District, Internal Guidance Document (1989), as referenced in Bernard Goode, *A Discussion of* Adjacency (July 25, 1996) (Adjacency established where wetland is 200 to 300 feet from jurisdictional water); U.S. Army Corps of Engineers Buffalo District Letter (1990) as referenced in Bernard Goode, *A Discussion of* Adjacency (July 25, 1996) (Adjacency established where wetland is 200 feet from jurisdictional water); and U.S. Army Corps of Engineers New England Division, Internal Memorandum (1991) as referenced in Bernard Goode, *A Discussion of* Adjacency (July 25, 1996) (Adjacency established where wetland is 800 feet from jurisdictional water).

The adoption of the MBP in 1986 also highlighted the ever-changing nature of the Corps' view of its own jurisdiction. The MBP allowed the Corps to claim jurisdiction over any waterbody where birds could be present. In the same *Federal Register* notice announcing the MBP, the Corps also, once again, altered the scope of its jurisdiction as it pertained to the OHWM, noting in the 1986 preamble to the new CWA §404 regulations "...the upstream limit of Corps jurisdiction also stops where the ordinary high water mark is no longer perceptible."[28] The Corps had now morphed OHWM from a method of discerning the limits of jurisdiction within waterbodies to discerning the upstream limits of those waterbodies. By altering its use of OHWM, the Corps had gone from a two-step approach to determining its jurisdiction (i.e., (1) is the water body a water of the United States?, and (2) where is the boundary of federal jurisdiction in the water body?) to one question—is there a mark on the ground?— to determine the reach of federal authority.

Amidst all of the pre-*SWANCC* uncertainty surrounding the definitions of OHWM, "adjacency," ditches, and the MBP, the U.S. Court of Appeals for the Fourth Circuit struck down the MBP because it had not been adopted through a notice and comment rulemaking.[29] In response, the Corps and EPA issued a joint guidance memo in 1990 stating "EPA and the Corps intend to undertake as soon as possible an [Administrative Procedure Act] rulemaking process regarding jurisdiction over isolated waters."[30] The EPA restated its commitment to conduct a rulemaking by announcing its intent to revise the definition of "waters of the United States" on its April 1990 semiannual regulatory agenda.[31] The same promise to clarify the definition of 'waters of the United States' was made again in every EPA semi-annual regulatory agenda for the following eleven years.[32] Eleven years later, when the Supreme Court issued its decision in *SWANCC*, the agencies still had not undertaken a rulemaking, and the jurisdictional reach of the CWA remained in flux. In fact, no such proceeding has occurred since the *SWANCC* decision either.

In 1997 another court decision prompted Corps and EPA to renew their promise to conduct a rulemaking to clarify their jurisdiction over isolated waters. The same federal appeals court held that the agencies had exceeded their statutory authority by regulating waters that "could affect" interstate commerce.[33] Notwithstanding the court's unequivocal rejection of their jurisdictional theories, Corps and EPA issued guidance announcing their intention to conduct a rulemaking but directing field offices in the meantime to continue to assert jurisdiction over similar remote water bodies if there were an actual (as opposed to a potential) effect on commerce:

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28 51 Fed. Reg, 41, 206, 41, 217 (Nov. 13, 1986).

29 *Tabb Lakes, Ltd. V. United States*, 715 F. Supp. 726, 729 (E.D. Va. 1988), *aff'd*, 885 F.2d 866 (4th Cir. 1989).

30 Memorandum from John Elmore, Department of the Army, Directorate of Civil Works, and David Davis, EPA, Office of Wetlands Protection, Re: *Clean Water Act Section 404 Jurisdiction Over Isolated Waters in Light of Tabb Lakes v. United States*, at 2 (January 24, 1990).

31 55 Fed. Reg. 16,818, 16,845 (April 23, 1990).

32 *See infra* n. 36.

33 *United States v. Wilson*, 133 F.3d 251, 257 (4th Cir. 1997).

> Both the Corps and EPA will continue to assert CWA jurisdiction over any and all isolated water bodies, including isolated wetlands [within the Fourth Circuit] based on the CWA statute itself, where (1) either agency can establish an actual link between that water body and interstate or foreign commerce... Those actual connections with and effects on interstate or foreign commerce may include all of the types of actual effects on interstate or foreign commerce that the Corps and EPA have traditionally relied on: for example...use by migratory waterfowl, other game birds, other game birds, or other migratory birds that are sought by hunters, birdwatchers or photographers, or are protected by international treaty, thereby affecting interstate commerce...[N]otwitstanding the Fourth Circuit's decision in Tabb Lakes, Corps and EPA field offices should continue to assert CWA jurisdiction over all isolated, intrastate water bodies that serve as a habitat for migratory birds.[34]

The Corps and EPA once again, reiterated their intention to pursue an administrative rulemaking, noting "[i]n the near future, EPA and the Corps intend to promulgate a rule addressing the jurisdictional issues discussed in this guidance, with the full opportunity for public review and comment."[35] Once again, no rulemaking process was ever initiated and despite promises by EPA to address the issue during every year from 1990 through 2002[36], the regulated community is left with the same uncertainty it had faced before.

The jurisdiction of the CWA pre-*SWANCC* was, in many ways, like the jurisdiction of the CWA post-*SWANCC*—unclear, inconsistent and in flux. There were no set definitions for core jurisdictional concepts such as OHWM, "adjacency," or "isolated waters." This led to overbroad and unenforceable notions of jurisdiction like

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[34] Robert Wayland, Office of Water, EPA, and Charlie Hess, Director of Civil Works, U.S. Army Corps of Engineers, *Guidance for Corps and EPA Field Offices Regarding Clean Water Act Section 404 Jurisdiction Over Isolated Waters in Light of United States v. James J. Wilson* at 1, 5, and 6, n.3 (May 29, 1998).

[35] 126 S.Ct. 2247, 2236 (2006).

[36] 55 Fed. Reg. 45,134, 45,162 (Oct. 29, 1990); 56 Fed. Reg. 17,980, 18008 (April 22, 1991); 56 Fed. Reg. 54,012, 54,042 (October 21, 1991); 57 Fed. Reg. 17,378, 17,407 (April 27, 1992); 57 Fed. Reg. 52,024, 52,055 (Nov. 3, 1992); 58 Fed. Reg. 24,996, 25,028 (April 26, 1993); 58 Fed. Reg. 56,998, 57,030 (Oct. 25, 1993); 59 Fed. Reg. 21,042, 21,079 (April 25, 1994); 59 Fed. Reg. 58,200, 58,237 (Nov. 14, 1994); 60 Fed. Reg. 23,928, 23,965 (May 8, 1995); 60 Fed. Reg. 60,604, 60645 (Nov. 28, 1995); 61 Fed. Reg. 23,610, 23,651 (May 13, 1996); 61 Fed. Reg. 63,122, 63,168 (Nov. 29, 1996); 62 Fed. Reg. 22,296, 22345 (April 25, 1997); 62 Fed. Reg. 58,080, 58,126 (Oct. 29, 1997); 63 Fed. Reg. 22,602, 22,734 (April 27, 1998); 63 Fed. Reg. 62,348, 62,463 (Nov. 9, 1998); 64 Fed. Reg. 21,898, 22,037 (April 26, 1999); 64 Fed. Reg. 65,010, 65,141 (Nov. 22, 1999); 65 Fed. Reg. 23,430, 23, 574 (April 24, 2000); 65 Fed. Reg. 74,478, 74,612 (Nov. 30, 2000); 66 Fed. Reg. 26,120, 26,258 (May 14, 2001); 66 Fed. Reg. 62,240, 62,384 (Dec. 3, 2001); 67 Fed. Reg. 33,724, 33,864 (May 13, 2002) and 67 Fed. Reg. 74,051, 74,215 (Dec. 9, 2002).

the MBP. The courts recognized the need for regulatory clarity then, just as they recognize it now. The warnings of Chief Justice Roberts and Justice Breyer in last year's *Rapanos v. United States* decision reinforce the need for an administrative rulemaking. Chief Justice Roberts chided the agencies for not following through on these promises of regulatory clarity made pre-*SWANCC*:

> "Rather than refining its view of its authority in light of [the Court's] decision in *SWANCC*, and providing guidance meriting deference under [the Court's] 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."[37]

Finally, Justice Breyer's *Rapanos* dissent warns that a refusal from the Corps to follow through on its rulemaking promises will only result in more litigation:

> "If one thing is clear, it is that Congress intended the Army Corps of Engineers to make the complex technical judgments that lie at the heart of the present cases (subject to deferential judicial review). In the absence of updated regulations, courts will have to make ad hoc determinations that run the risk of transforming scientific questions into matters of law. This is not the system Congress intended. Hence, I believe that today's opinions, taken together, call for the Army Corps of Engineers to write new regulations, and speedily so."[38]

In conclusion, the common tie between pre-*SWANCC* and post-*SWANCC* perceptions of Corps' jurisdiction under the CWA lies in the repeated promises that have been made to achieve regulatory clarity. The Supreme Court decisions in *SWANCC* and *Rapanos* did not confuse the jurisdiction of the Corps, but they were the direct result of already ambiguous and undefined terms such as OHWM, "adjacency" and "isolated waters." Both *SWANCC* and *Rapanos* prevented the Corps from using the regulatory uncertainty it had fostered over the years as an excuse to expand jurisdiction beyond acceptable constitutional levels. The job of Congress now should be to force the Corps to follow through on promises to classify its jurisdictional scope which have been made for more than the past two decades and direct the Corps to initiate a full notice and comment rulemaking. This would allow all affected parties, including the regulated community, to contribute to a process which would have the goal of establishing a workable, clear concept of federal jurisdiction under the CWA.

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37 *Id.* at 2266 (Roberts, C.J., concurring).

38 *Id.* at 2 (Breyer, J., dissenting).

Once again, WAC would like to thank your staff for taking the time to meet with our members on this issue. We hope that this response was helpful to you and look forward to continuing to work with you on helping to restore clarity to the scope of the Clean Water Act.

Sincerely,

American Farm Bureau Federation®
American Forest & Paper Association
American Public Power Association
American Road and Transportation Builders Association
Associated General Contractors of America
CropLife America
Edison Electric Institute
Foundation for Environmental and Economic Progress
Industrial Minerals Association North America
International Council of Shopping Centers
National Association of Counties
National Association of Flood & Stormwater Management Agencies
National Association of Home Builders
National Association of Industrial Office Properties
National Association of Manufacturers
National Association of REALTORS®
National Association of State Departments of Agriculture
National Cattlemen's Beef Association
National Corn Growers Association
National Council of Farmer Cooperatives
National Mining Association
National Multi Housing Council
National Pork Producers Council
National Stone, Sand and Gravel Association
Responsible Industry for a Sound Environment
The Fertilizer Institute
Western Business Roundtable

New Senate Hearing E-mail and Fax Deadline Thursday, December 13, 2007
Congressional Testimony Questionnaire -- Hearing Date: Thursday, December 13, 2007
Testimony For The Record – The Clean Water Act and S 1870 -- Clean Water Restoration Act

Honorable James Inhoff,
U.S Senate

Regarding the Clean Water Act and S 1870, The Clean Water Restoration Act

I oppose the passage of S 1870, because the Bill over expenses the U.S. government power of wetlands! It expands the authority of the Federal government under the Clean Water Act (CWA) of 1972 to include all waters of the U.S. and activities affecting these waters. **This bill pushes the limits of federal power to an extreme not matched by any other law, in the history of this country."**

The 13 December 2007 hearing lays the groundwork for passage in the Senate of the Feingold bill (S 1870). Therefore, it is important Committee Members understand the regulatory situation is not clear, particularly prior to the SWANCC Supreme Court decision which is why proponents of the bill claim is the reason for enactment of the bill. The Fifth Circuit decision regards the EPA expanded definition of Waters of the U.S. made clear the Court believed the Agency had gone too far. This Bill, also, goes too far.

Below are my concerns and testimony regarding the Clean Water Act and S 1870, the inappropriately named Clean Water Restoration Act. It has little to do with clean water and is mostly about land use control.

The Bill as written will cause many onshore and State Water oil and gas producing facilities to be required to prepare Spill Prevention, Control and Countermeasure (SPCC) Plans. Also, if the Bill becomes a Statute many small businesses will be subject to the Storm Water Pollution Prevention Plan (SWPPP) rule, even though the facilities are remote from navigable waters. The imposition of SPCC and SWPP Plans will financially hurt small businesses and cause premature abandonment of stripper wells.

This and the Attachment are my testimony regarding the Clean Water Act and S 1870, The Clean Water Restoration Act. Please include it in the official record of the upcoming hearing on the Clean Water Act and any hearing on HR 1870. Please consider this E-mail as valid as the original.
h

Signature _George H. Holliday, PhD., P.E., BCEE
P.O. Box 2508 Bellaire , TX 77402

Attachment – George Holliday Testimony

--1. The jurisdiction of federal agencies under the Clean Water Act of 1972 should remain limited to navigable waters and not expanded to include all waters of the U.S., such as wetlands, sloughs, meadows, intermittent streams, prairie potholes, ponds, playa lakes, mudflats and sand-flats directly connected to navigable water.
-2. The Clean Water Act of 1972 should not be used as a tool for national land use controls or putting small businesses in jeopardy.
--3. The U. S. Supreme Court decisions of 2001 and 2006 that ruled in favor of local government and land owners should not be overturned by the proposed Clean Water Restoration Act (S 1870).
--4. Dry land and isolated wetlands should be excluded from federal jurisdiction under the Clean Water Act.
--5. Citizens cited for violation of regulations under the Clean Water Act should not face criminal penalties.
--6. National Water Quality goals should be achieved without violating constitutionally protected property rights.
--7. National Water Quality goals are best achieved by local and state governments, not federal agencies.
--8. 'Regulatory Takings' that devalue private property should be compensated under provisions of the 5th Amendment.
--9. National Water Quality goals should consider regional differences in landscapes and other ecological characteristics.
-10. Please vote no on S 1870, the Clean Water Restoration Act.
-11. Please do not give the Corps of Engineers regulatory control over property.

Signature s/ George Holliday
Name_George_Holliday____
E-Mail__ghhh@comcast.net________ Fax ______________________________
Phone ___713-668-7640________________
Address__P.O. Box 2508__________________________
City_Bellaire____________________ State TX_____ Zip_77402__________

P.O. Box 216 Klamath Falls, OR 97601 (541)-850-9007

December 11, 2007

The Honorable James Inhofe
Ranking Republican
Committee on Environment and Public Works
United States Senate
Washington, D.C. 20510

Dear Senator Inhofe:

On behalf of the members of the Family Farm Alliance (Alliance), I write to state our strong opposition to S. 1870, the "Clean Water Authority Restoration Act of 2007," (CWARA). Although its intent may be otherwise, this bill may actually create more uncertainty and confusion over the application and interpretation of the Clean Water Act (CWA), thereby contributing to litigation and leaving more interpretations to the courts and regulatory agencies.

The Alliance advocates for family farmers, ranchers, irrigation districts and allied industries in 17 Western states to ensure the availability of reliable, affordable irrigation water supplies. Our members use a combination of surface and groundwater, managed through a variety of local, state, and federal arrangements.

CWARA would appear to grant the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) unprecedented regulatory control over all "intrastate waters" - which some will interpret as essentially all wet areas within a state. Importantly, it fails to clarify any limits on this expanded and uncertain authority.

We are also gravely concerned about the broader implications associated with the redefining of "navigable waters" contemplated by this bill. There is already confusion over the waters to which Section 404 of the CWA applies; CWARA raises concerns regarding jurisdictional determination that apply to the entirety of the CWA. Rather than clarify jurisdictional questions, CWARA would create still more uncertainty as to even routine activities such as pumping irrigation water from one area to another. Such implications could have huge ramifications for simple operations that do not adversely impact the water quality of U.S. rivers and streams.

CWARA fails to recognize the primary right and responsibility of States to control local water use decisions, which appears to be inconsistent with Section 101(b) of the existing CWA. It also does not explain how an expanded federal presence in the water quality arena will impact the existing state processes that are already addressing the same issues CWARA purports to address. It is not as if there is a vacuum of clean water regulations; state regulatory processes are in place and they work.

Further, as the number of waters subject to federal water quality standards increases, untold time and resources will be spent at the local level dealing with the Corps and EPA, further encumbering a system that is already known to be overburdened and less then responsive. This adds yet another degree of uncertainty to farmers and ranchers who require a reliable water supply in order to secure

operating loans and other types of financing. To avoid this unintended but certain outcome, new CWA legislation should instead more narrowly and clearly define existing authority.

Already, unnecessary restrictions have been placed on private landowners trying to use their property and on the ability of local agencies to operate and maintain man-made canals and ditches. Also, as more Westerners look at agricultural waters to supply future municipal needs, more water treatment plants are being built off rivers and canal systems to treat surface water to drinking supply standards. For these interests, the CWARA could produce additional Section 404 permitting and delays, further impeding the exercise of vested property rights and food production, and disrupting the ability to efficiently move water to treatment plants.

As but one example, consider the routine maintenance of the thousands of miles of existing ditches and canals in the West that transport water for agricultural, municipal, and industrial uses. These facilities - some over a century old - require continual maintenance in order to serve the functions for which they were constructed. Such maintenance activities include routine activities like replacing concrete panels and riprap, stabilizing channels and channel banks stabilization, connecting pipes, and controlling aquatic weeds.

The purpose of this work is to better manage and conserve limited water supplies, and in many cases, to maintain flood carrying capacity. Generally, maintenance activities are performed during limited windows of time when there is little or no flow in the canal, and direct water quality impacts are therefore minimal or non-existent. In fact, many maintenance activities, such as bank stabilization, protect and enhance water quality, the goal of the CWA. Most of these activities currently do not require Section 404 permits.

However, as drafted CWARA could, and likely would, be interpreted to require Section 404 permits for many routine maintenance activities. Nationwide, we are told there is a current backlog of at least 15,000 CWA permit requests. Even the most straight-forward Section 404 permit can take months or years to process now – time that system operators don't always have. Further delays in meeting the expanded permitting requirements of CWARA will result in the disruption of vital water supply operations and deferral of maintenance activities necessary to assure supply reliability, flood protection and water quality.

Congress has a unique opportunity to instill a common-sense approach to protecting our water quality and related resources; one that steers clear of creating certain havoc in surface water operations throughout the country by clarifying that man-made ditches are not jurisdictional. Unfortunately, the proposed CWARA is ambiguous and will lead to uncertainty and litigation. We urge you to consider the appropriate protections already afforded U.S. waters under the CWA, particularly via existing state programs. Please reject the unprecedented federal expansion proposed in this bill, and instead find ways to streamline current CWA administration.

Western family farmers and ranchers urge <u>clarity</u>, not expansion of the Clean Water Act.

Sincerely,

Gene Martinez

Gene Martinez

ALSCO-Geyer ICE

Honorable James Inhofe
US Senate

Regarding Clean Water Act Hearing December 13, 2007

This hearing is laying the groundwork for movement in the Senate of the Feingold bill (S 1870), the Clean Water Restoration Act, and therefore it is important to have Committee Members understand that the Clean Water Act regulatory picture has never been clear, particularly prior to the SWANCC Supreme Court legal decision which is what proponents of the bill claim is the reason for enactment of the bill.

S 1870, The Clean Water Restoration Act, is really a massive Federal land and water power grab. It will use "wetlands" to take control over every farm, ranch, and piece of private property with any water on it or even if the landowner only engage in activities that might affect water.

It expands the authority of the Federal government under the Clean Water Act of 1972 to include all waters of the U.S. and activities affecting these waters.

It will give the Corps of Engineers control over most private property.

In the words of Reed Hopper of Pacific Legal Foundation, lead attorney in a landmark U.S. Supreme Court victory, "...this bill pushes the limits of federal power to an extreme not matched by any other law, probably in the history of this country."

Below are my concerns and testimony regarding S 1870, the inappropriately named Clean Water Restoration Act. It has little to
do with clean water and is mostly about land use control.

Please allow this Testimony to be submitted for the record for any additional hearings to be held on the Clean Water Act, S 1870, and the Clean Water Restoration Act.

Please consider a photocopy of this document as valid as the
original and include my testimony for the official record.

Beverly Baker
11132 Oak Grove Rd.
Fredonia, Tex 76842
heartofheart@hctc.net

A-1. The jurisdiction of federal agencies under the Clean Water Act of 1972 should remain limited to navigable waters and not expanded to include all waters of the U.S., such as wetlands, sloughs, meadows, intermittent streams, prairie potholes, ponds, playa lakes, mudflats and sandflats.
Agree

--2. The definition of wetlands under federal jurisdiction should be limited to those areas that are permanently wet or free flowing.

Agree...

--3. The Clean Water Act 1972 should not be used as a tool for national land use controls.

Agree...

--4. The Clean Water Act of 1972 should not be expanded to include activities affecting waters.

Agree...

--5. The U. S. Supreme Court decisions of 2001 and 2006 that ruled in favor of local government and landowners should not be overturned by the proposed Clean Water Restoration Act (S 1870).

Agree...

--6. Mostly dry land and isolated wetlands should be excluded from federal jurisdiction under the Clean Water Act of 1972.

Agree...

--7. The definition of pollutants under the Clean Water Act of 1972 should not include clean fill or natural material of any kind.

Agree...

--8. The term 'discharge' should not apply to the disturbance of soils or natural materials.

Agree...

--9. Citizens cited for violation of regulations under the Clean Water Act of 1972 should not face criminal penalties.

...Disagree

--10. National Water Quality goals should be achieved without violating constitutionally protected property rights.

Agree...

--11. National Water Quality goals are best achieved by local and state governments, rather than by federal agencies.

Agree...

--12. National Water Quality goals should consider priorities and costs

Agree...

--13. National Water Quality goals should consider regional differences in landscapes and other ecological characteristics.

Agree...

--14. 'Regulatory Takings' that devalue private property should be compensated under provisions of the 5th Amendment.

Agree...

--15. Access to and use and enjoyment of public lands and waters should be guaranteed under provisions of the Clean Water Act.

Disagree...

--16. 'Environmental' organizations have become too radical and have too much power and influence over federal legislation.

Agree...

--17. The Clean Water Restoration Act and other environmental legislation is often not about environmental protection, but about control over land, water, and people.

Agree...

--18. Please do not give the Corps of Engineers increased power to regulate more private land.

Agree...

- -

Honorable Congressman: I am a 5th generation farmer and rancher in Central Texas. We do not polute our water. We should have control of the water on our land just as the oil is owned by the land owner. Local districts know the area and can control their areas through their local boards. We do not need any more state or federal control over our land. Please consider the land owners' opinions when voting on these ammendments.

Thank you,
Beverly Baker

Honorable James M. Inhofe
United States Senate

Please accept the following as testimony regarding Senate Bill S1870. This legislation does far more than restore the Clean Water Act. It seeks to expand regulatory power far beyond the intent of Congress. In changing the language in the legislation from "navigable waters" of the United States to "waters of the United States", it seeks to override more local government regulation. It will create "one size fits all" regulation that, in the final analysis, will greatly expand federal regulatory powers. The original legislation has a long history of litigation precisely because it has been expanded to completely override local land use decisions.

In a country as vast as the United States, that encompasses such a wide variety of landscapes and water supplies, meeting National Water Quality goals is best left to local and state governments as the resources and needs are unique in each region. Expansion of the jurisdiction of federal agencies to include all the waters of the United States including intermittent streams, ponds, playa lakes, mudflats, sandflats and geological features as obscure as vernal pools creates more confusion and will inevitably cause more litigation over the question of exactly where federal jurisdiction ends with regard to private property.

Residents and property owners of the United States are losing more and more access to public lands and waters. This negatively impacts the recreational community.

Farmers and livestock producers, who are already feeling financial pressure, will lose the ability to use their land without taking extraordinary steps to meet federal regulatory restrictions that create delay use and increase costs by expanding the need for them to engage in the permitting process for any modification of their property without regard to its isolation from free-flowing water sources. The proposed legislation is a direct attack on our constitutional system of limited federal powers. It is bad legislation that does little to increase protection of U.S. waters while vastly increasing federal regulation.

Candace D. Oathout, Chair
Citizens Against Recreational Eviction – USA
4824 Georgia Ave N
Crystal, MN 55428

Honorable Barbara Boxer
Senate Environment and Public Works Committee

Dear Senator Boxer:

I certainly am apposed to S1870 - 2007. We do NOT need more confusing regulations that will offer the Corps of Engineers more opportunities for the taking of property without compensation and that will only lead to a flood of litigation.

Thank you, Joseph E. Patten

Testimony For The Record

The Clean Water Act and

S 1870 -- Clean Water Restoration Act

Committee on Environment and Public Works:

Minority Members (Republicans)

Regarding Clean Water Act Hearing December 13, 2007

Please consider my comments as testimony for the record

As a young man working in Washington in the early 1970's on environmental legislation including the Clean Water Act and National Land-use policy Act, I am disturbed by the content of proposed legislation in S 1870. My thoughts are that of a citizen:

Large partnerships now exist bringing citizens elected in county boards, county officials, state and federal agencies together...they are our national soil conservation districts. This legislation will seriously undermine such successful long-lived programs. National Water Quality goals are best achieved by citizens and local and state governments, rather than by federal agencies.

All waters of the U.S., such as wetlands, sloughs, meadows, intermittent streams, prairie potholes, ponds, playa lakes, mudflats and sand flats, sloughs and wet spots should not be considered fair prey for revised jurisdiction of federal agencies under the Clean Water Act of 1972. The Act is clear and is limited to navigable waters. Please do not change that.

The definition of wetlands under federal jurisdiction should be limited to those areas that are permanently wet and free flowing. Please use the long accepted geological terms for wetlands.

The Clean Water Act 1972 was specifically intended NOT TO BE USED AS A NATIONAL LAND USE CONTROL TOOL. This legislation is attempting to create new land control laws.

The U. S. Supreme Court decisions of 2001 and 2006 that ruled in favor of local government and landowners should not be overturned by the proposed Clean Water Restoration Act (S 1870).

As a geoscientist I learned definitions of spectrum on wetlands based on real

science, drought cycles, and bedrock. Lands which show up periodically wet, but are largely dry should not be included in this legislation as a tool for control. Please use more standard and accepted geoscience terms.

Recent natural landslides in Wyoming illustrate the wrong-headedness of including natural material as a pollutant. The definition of pollutants under the Clean Water Act of 1972 should not include clean fill or natural material of any kind.

The term 'discharge' is being wrongly inclusive of soil elements and natural materials. Please correct or remove such a major error.

National Water Quality goals should consider regional differences in geology, in landscapes and other ecological characteristics. True ecosystems are combinations of the geosystems and biosystems—please assure us that the full spectrum of these sciences is fairly studied and applied.

'Regulatory Takings' that devalue private property should be compensated under provisions of the 5th Amendment.

Access to and use and enjoyment of public lands and waters should be guaranteed under provisions of the Clean Water Act. The original legislation was crafted for the many uses of American resources and to enhance stewardship.

I am deeply troubled by so called "Environmental" organizations that are primarily about raising money, using radical means and methods, scare tactics and subreption rather than presently you with facts and alternatives. Please do not be overly swayed by the professionals who say they represent us. Please listen to knowledgeable citizens.

The Clean Water Restoration Act and other environmental legislation are often not about environmental protection, but about control over land, water, and people.

Please do not give the Corps of Engineers increased power to regulate more private land.

Citizens have long acted rapidly on protection of clean water in America. This legislation seems to undermine that long American tradition and place new laws and rights into the Army Corps jurisdiction. Please do not let that happen.

As one of the founders (in 1969) of the environmental movement in the West I encourage constant review of our efforts to protect the health of our habitat and citizenry, but not at the expense of removing from citizen control the ability to determine our own high levels of health safety and welfare. This proposed legislation seems to negatively alter existing successful programs.

Signature: *Wallace Ulrich*

Name: Wallace Lee Ulrich
E-Mail: wulrich@wyoming.com
Address: POB 1098, Jackson, Wyoming 83001

2. Honorable James Inhoff, Ranking Minority Member Senate Environment and Public Works Committee US Senate
SD-456 Dirksen Senate Office Building

1.

Testimony For Original Senate Hearing Date December 13, 2007

Testimony For The Record

The Clean Water Act and

S 1870 -- Clean Water Restoration Act

(National Wetlands Land Use Control Bill)

Honorable James Inhoff, Ranking Minority Member Senate Environment and Public Works Committee US Senate

SD-456 Dirksen Senate Office Building

US Senate

Regarding Clean Water Act Hearing December 13, 2007 (Testimony will be accepted until Thursday, December 20th).

This hearing is laying the groundwork for movement in the Senate of the Feingold bill (S 1870), the Clean Water Restoration Act, and therefore it is important to have Committee Members understand that the Clean Water Act regulatory picture has never been clear, particularly prior to the SWANCC Supreme Court legal decision which is what proponents of the bill claim is the reason for enactment of the bill.

S 1870, The Clean Water Restoration Act, is really a massive Federal land and water power grab. It will use "wetlands" to take control over every farm, ranch, and piece of private property with any water on it or even if the landowner only engage in activities that might affect water.

It expands the authority of the Federal government under the Clean Water Act of 1972 to include all waters of the U.S. and activities affecting these waters.

It will give the Corps of Engineers control over most private property.

In the words of Reed Hopper of Pacific Legal Foundation, lead attorney in a landmark U.S. Supreme Court victory, "...this bill pushes the limits of federal power to an extreme not matched by any other law, probably in the history of this country."

Below are my concerns and testimony regarding S 1870, the inappropriately named Clean Water Restoration Act. It has little to do with clean water and is mostly about land use control.

Please allow this Testimony to be submitted for the record for any additional hearings to be held on the Clean Water Act, S 1870, and the Clean Water Restoration Act.

Please consider a photocopy of this document as valid as the original and include my testimony for the official record.

Ken Shirley

Kenneth Shirley

- -

--1. The jurisdiction of federal agencies under the Clean Water Act of 1972 should remain limited to navigable waters and not expanded to include all waters of the U.S., such as wetlands, sloughs, meadows, intermittent streams, prairie potholes, ponds, playa lakes, mudflats and sand flats.

--2. The definition of wetlands under federal jurisdiction should be limited to those areas that are permanently wet or free flowing.

--3. The Clean Water Act 1972 should not be used as a tool for national land use controls.

--4. The Clean Water Act of 1972 should not be expanded to include activities affecting waters.

--5. The U. S. Supreme Court decisions of 2001 and 2006 that ruled in favor of local government and landowners should not be overturned by the proposed Clean Water Restoration Act (S 1870).

--6. Mostly dry land and isolated wetlands should be excluded from federal jurisdiction under the Clean Water Act of 1972.

--7. The definition of pollutants under the Clean Water Act of 1972 should not include clean fill or natural material of any kind.

--8. The term 'discharge' should not apply to the disturbance of soils or natural materials.

--9. Citizens cited for violation of regulations under the Clean Water Act of 1972 should not face criminal penalties.

--10. National Water Quality goals should be achieved without violating constitutionally protected property rights.

--11. National Water Quality goals are best achieved by local and state governments, rather than by federal agencies.

--12. National Water Quality goals should consider priorities and costs

--13. National Water Quality goals should consider regional differences in landscapes and other ecological characteristics.

--14. 'Regulatory Takings' that devalue private property should be compensated under provisions of the 5th Amendment.

--15. Access to and use and enjoyment of public lands and waters should be guaranteed under provisions of the Clean Water Act.

--16. 'Environmental' organizations have become too radical and have too much power and influence over federal legislation.

--17. The Clean Water Restoration Act and other environmental legislation is often not about environmental protection, but about control over land, water, and people.

--18. Please do not give the Corps of Engineers increased power to regulate more private land.

- -

Dear Sir or Madame,

This is an issue I feel very passionately about. I am not a rancher or farmer just a home owner with some land however the intimidation and fear caused by the Corps of Engineers willful abuse of the authority granted them by Congress to manage "navigable waters" has seriously eroded the free enjoyment of private land. The idea that Congress would now grant to the Corps of Engineers authority previously exerted unlawfully is one scary prospect.

I was advised to retain a Corps of Engineers approved expert to advise me whether or not I could build on my land. Because he found some plant life also found in wet land areas he advised me the only safe thing to do in today's world is declare it all wet lands effectively giving control of the use of my land over to the Corps. Through pains taking research I was able later to determine my land was not "wet lands". I resent the fear, intimidation and expense.

If you are in favor of the pending legislation please reconsider your position before degrading one of the pillars of our rights as Americans, the right to private property. If you are not in favor please take this legislation seriously and mount the most formidable opposition at your disposal.

Thank you for your consideration.

Ken Shirley

Kenneth E Shirley

E-Mail: ken@bpilabs.com Fax: 307-789-7932 Phone: 307-789-7288 ext.1004 Address: 97 South Red Willow Road, Evanston WY 82930

Testimony For The Record

3. The Clean Water Act and S 1870 -- Clean Water Restoration Act

(National Wetlands Land Use Control Bill)

From: Arlene Kovash

Vice President of Communications, American Agri-Women

Legislative Chair, Oregon Women for Agriculture

President, Polk County Women for Agriculture

Farmer, Monmouth, Polk County, Oregon

To the Committee:

I am horrified that a change to the Clean Water which would change the wording, "navigable waters" to "all waters of the U.S. and activities affecting these waters" would even be considered! There is not one thing we do that doesn't affect the waters of the United States, from growing your food to watering our lawns to flushing our toilets. Among many, many harms, this change will cause endless litigation from pseudo-environmentalists and consequently, endless expense for farmers. Please don't let this harmful change to the Clean Water Act get through the committee and **jeopardize our farmers and food supply and thus our national security!**

To further emphasize my opposition, I am including this questionnaire with my strong objection:

--1. The jurisdiction of federal agencies under the Clean Water Act of 1972 should remain limited to navigable waters and not expanded to include all waters of the U.S., such as wetlands, sloughs, meadows, intermittent streams, prairie potholes, ponds, etc.

AGREE

--2. The definition of wetlands under federal jurisdiction should be limited to those areas that are permanently wet or free flowing.

AGREE

--3. The Clean Water Act 1972 should not be used as a tool for national land use controls.

AGREE

--4. The Clean Water Act of 1972 should not be expanded to include activities affecting waters.

AGREE – This would be EVERYTHING you and I do!!

--5. The U. S. Supreme Court decisions of 2001 and 2006 that ruled in favor of local government and landowners should not be overturned by S 1870.

AGREE

--6. Mostly dry land and isolated wetlands should be excluded from federal jurisdiction under the Clean Water Act of 1972.

AGREE

--7. The definition of pollutants under the Clean Water Act of 1972 should not include clean fill or natural material of any kind.

AGREE

--8. The term 'discharge' should not apply to the disturbance of soils or natural materials.

AGREE

--9. Citizens cited for violation of regulations under the Clean Water Act of 1972 should not face criminal penalties.

AGREE – There aren't that many jails in the world to fit us all in when pseudo-

environmental groups get through with us!

--10. National Water Quality goals should be achieved without violating constitutionally protected property rights.

AGREE

--11. National Water Quality goals are best achieved by local and state governments, rather than by federal agencies.

AGREE

--12. National Water Quality goals should consider priorities and costs

AGREE

--13. National Water Quality goals should consider regional differences in landscapes and other ecological characteristics.

AGREE

--14. 'Regulatory Takings' that devalue private property should be compensated under provisions of the 5th Amendment.

AGREE

--16. 'Environmental' organizations have become too radical and have too much power and influence over federal legislation.

AGREE

--17. The Clean Water Restoration Act and other environmental legislation is often not about environmental protection, but about control over land, water, and people.

AGREE – This is so true!

--18. Please do not give the Corps of Engineers increased power to regulate more private land.

AGREE

Signature: Arlene L. Kovash (not sure how you sign an e-mail)

Name: Arlene Kovash

E-Mail: akovash@earthlink.net

Fax: 503-838-6851

Phone: 503-838-3512

Address: 11425 Pedee Creek Rd

Monmouth, OR 97361

11 December 2007

1. 1212 SW Theta Ct.
Pendleton, OR 97801

4. The Honorable Barbara Boxer (D-CA)
Senate Environment and Public Works Committee
US Senate
SD-456 Dirksen Senate Office Building
Washington, D.C. 20510

Following are my opinions on the Senate Bill 1870, called the Clean Water Restoration Act: In your position on the Senate Environment and Public Works Committee, I would hope you could use these opinions in making a judgement on this very onorous bill.

I believe that states, not the Federal Government, should have jurisdiction over all non-navigable streams and waterways. This Act is nothing more than a massive power and land grab that will abrogate the constitutional rights of the citizens of the United States. Even though it has been so abused, I strongly believe that the Clean Water Act of 1972 should not be used as a tool for federal land controls, and it should certainly not be expanded to include all activities affecting waters.

Supreme Court decisions of 2001 and 2006 regarding the Clean Water Act of 1972 should not be overturned by this act, and the definition of pollutants under the Clean Water Act of 1972 should not include clean fill or natural material of any kind, nor should the term "discharge" apply to disturbance of soils or other natural materials. Water quality goals must consider regional differences in ecological characteristics, and therefore are better stated and adjudicated by local governments–state and county. The "one size fits all" mentality of the Federal government can be shown to have been disastrous for private citizens as witnessed by the Endangered Species Act, the Clean Air Act and various and sundry other acts put together by legislators under the influence of the radical environment industry, and invariably leads to unintended consequences. This proposed act is precisely the same, and will lead to huge numbers of regulatory takings situations, which should be compensated under the 5th Amendment of our Constitution.

It appears to me and to most of my peers that citizens of this country are daily being overwhelmed by regulations that have no real purpose save that of further empowering the Federal Government and those few in the minority that believe everything exists for that purpose. As a citizen of these United States, I am fed up with these power grabs, and implore you to do what you can to stop them. I don't believe that this proposed Act has nearly as much to do with clean water as it has to do with power and the attempt by a few to abrogate the rights of the many.

Robert H. Heitmanek
Corresponding Secretary, Eastern Oregon Mining Association

cc: Honorable James Inhoff
Honorable Larry Craig

5.

Testimony for Senate Hearing December 13, 2007

1. Entitled:

The Clean Water Act following the recent Supreme Court decisions in Solid Waste Agency of Northern Cook County and Rapanos-Carabell.

To: Honorable Barbara Boxer, Chairman

Senate Environment and public Works Committee US Senate

Honorable James M. Inhofe, Ranking Minority Member

Senate Environment and Public Works Committee

From: Edwin Hardt, President

Eastern Oregon Mining Association

Dear Committee Members:

This testimony is for the record.

There are great concerns of constitutionality if Senate Bill, S 1870, is passed. We understand that from each State, Senators are elected to protect the interest of the States. This would include the sovereign jurisdiction of the States over the non-navigable waters within its boundaries.

Although the full committee hearing will specifically look at two Supreme Court decisions, the hearing on this subject will not be complete without some understanding of the history of law that dates back to our beginnings as a Nation. Some of this understanding is necessary to see that S 1870 leaves the foundation of statutes and case law that produced the State and Federal framework over the waters of the United States of America.

Who has the sovereign jurisdiction over the waters of the State and who has sovereign jurisdiction over the waters of the United States? We must recall our history as a Nation beginning. It was the thirteen original Colonies that declared independence in 1776. They fought and won the "Crown's title and interest" in the land and water within their respective borders. Those States then wrote the Constitution and established the Federal authority. "*As new states were forged out of the federal territories after the formation of the Union, they were admitted with the same rights, sovereignty and jurisdiction as the original states possess within their respective borders*," Banal Cattle Co. v. Arizona, 414 US 313,318 (1973).

Historically, Congress understood two important subjects when enacting and codifying the CWA:

The lack of U.S. Constitutional authority to impose Federal permits within the States' jurisdictional waters;

1. The State and Federal "framework" concerning jurisdiction over the land and water.

Understanding Federal authority over waters

In Article X (10), an amendment of the Constitution of the United States of America, it states, "*The power not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.*" Article X simply states that if the Constitution did not give authority, or power for Federal control, then the States or the people have the authority, if the Constitution did not prohibit it. The question can now be raised, what waters did the Constitution give to Federal control?

Article 1 Section 8 of the Constitution states, "*Congress shall have power to...define and punish...felonies committed on the high seas...*" and "*to exercise exclusive legislation...over...dock yards.*" In Section 9, it states, "*nor shall vessels bound to or from one state, be obliged to enter clear or pay duties in another.*" Commerce took place from the "high seas" and through navigable channels that were inland and both were supported by the "dock yards" for products between the States and from or to foreign countries. Therefore, the navigable waters have been traditionally under the Federal authority. However, there is no mention of tributaries or of waters other than navigable that would be subject to Federal control. The Constitution did state that it prohibits the States from imposing duties on vessels bound from one State to another, which thereby removes impediments to commerce from any State on the navigable waters. Since the Constitution did not place all waters under Federal control and did not prohibit the non navigable waters from State control, then under the Constitution, the non navigable waters are "reserved to the States...or to the people."

Congress further stipulated by the Prior Appropriation Water Act (1866), (43 USC 661-666), the States or the local governments in the territories would have control of the ground and surface waters within its jurisdiction. Congress also stated in statute that it would not "interfere" with State law concerning the "control," "use" and "appropriations" of the ground and surface waters in the public lands for "unpatented mining claims" within the States boundaries, 30 USC 612 (b). Finally, in the CWA itself, Congress stated that the States have the "primary responsibility" for pollution of the land and water, 33 USC 1251 (b), and preserved in statute again that, "*nothing in this chapter shall (1) preclude* [bar] *or deny the right of any state...or (2) be construed* [interpreted] *as impairing or in any manner affecting any right or jurisdiction of the States with respect to the water (including boundary water) of each state,*" 33 USC 1370.

One question remains in light of the facts presented above. How can S 1870 be allowed to continue, when it claims the power and "legislative authority" over intrastate and interstate waters, as well as, small and intermittent streams, ephemeral and seasonal streams and wetlands, all of which are not navigable? (Section 3. Findings # 5,6,7,9 &10) The U.S. Constitution, Federal Statutes and State Law do not allow for Federal authority over these waters described in the Bill.

State and Federal framework over the water:

In the navigable waters the Federal government has control for the expressed "purpose of navigation," 429 US 363,375-76 (1977), even though the States hold title to the "beds" of the navigable waters, 43 USC 1301. However, the jurisdictions are reversed in the public lands. Here the States have control of the water, "control," "use" and "appropriations," 43 USC 661-666, 30 USC 612 (b). The Federal Land Management agencies, Bureau of Land Management and the U.S. Forest Service control the "beds" of the non navigable "streams" in the public lands, 43 USC 1301 (f). State law governs the beds of streams within private property and State lands and all non navigable waters within its boundaries.

To pass as law S 1870 would really be a violation of the public trust, since the citizens in each State have elected to Congress members of the Senate, in part, to protect the sovereignty of the people concerning their jurisdictional rights to control the waters of the States. Therefore, when the CWA states that the policy of Congress is to *"recognize, preserve and protect... the rights of the states"* (33 USC 1251 (b)) and that nothing in the CWA "shall" preclude or deny the right of any State or be construed as impairing or affecting any right or jurisdiction of the States with respect to the water, including boundary water (33 USC 1370), then EOMA expects Congress to protect those rights for the people by placing this Bill in the trash can.

Edwin Hardt, President

Eastern Oregon Mining Association

PO Box 932

Baker City, Oregon 97814

11 December 2007

1. 1212 SW Theta Ct.
Pendleton, OR 97801

6. The Honorable Barbara Boxer (D-CA)
Senate Environment and Public Works Committee
US Senate
SD-456 Dirksen Senate Office Building
Washington, D.C. 20510

Following are my opinions on the Senate Bill 1870, called the Clean Water Restoration Act: In your position on the Senate Environment and Public Works Committee, I would hope you could use these opinions in making a judgement on this very onorous bill.

I believe that states, not the Federal Government, should have jurisdiction over all non-

navigable streams and waterways. This Act is nothing more than a massive power and land grab that will abrogate the constitutional rights of the citizens of the United States. Even though it has been so abused, I strongly believe that the Clean Water Act of 1972 should not be used as a tool for federal land controls, and it should certainly not be expanded to include all activities affecting waters.

Supreme Court decisions of 2001 and 2006 regarding the Clean Water Act of 1972 should not be overturned by this act, and the definition of pollutants under the Clean Water Act of 1972 should not include clean fill or natural material of any kind, nor should the term =93discharge=94 apply to disturbance of soils or other natural materials. Water quality goals must consider regional differences in ecological characteristics, and therefore are better stated and adjudicated by local governments=96state and county. The =93one size fits all=94 mentality = of the Federal government can be shown to have been disastrous for private citizens as witnessed by the Endangered Species Act, the Clean Air Act and various and sundry other acts put together by legislators under the influence of the radical environment industry, and invariably leads to unintended consequences. This proposed act is precisely the same, and will lead to huge numbers of regulatory takings situations, which should be compensated under the 5th Amendment of our Constitution.

It appears to me and to most of my peers that citizens of this country are daily being overwhelmed by regulations that have no real purpose save that of further empowering the Federal Government and those few in the minority that believe everything exists for that purpose. As a citizen of these United States, I am fed up with these power grabs, and implore you to do what you can to stop them. I don=92t believe that this proposed Act has nearly as much to do with clean water as it has to do with power and the attempt by a few to abrogate the rights of the many.

Robert H. Heitmanek
Corresponding Secretary, Eastern Oregon Mining Association

cc: Honorable James Inhoff
Honorable Larry Craig
Honorable Max Baucus
Honorable John Barrasso

Testimony For The Record
The Clean Water Act and
S 1870 -- Clean Water Restoration Act
(National Wetlands Land Use Control Bill)

Honorable JAMES M. INHOFE
US Senate

Regarding Clean Water Act Hearing December 13, 2007 (Testimony will be accepted until Thursday, December 20th).

This hearing is laying the groundwork for movement in the Senate of the Feingold bill (S 1870), the Clean Water Restoration Act, and therefore it is important to have Committee Members understand that the Clean Water Act regulatory picture has never been clear, particularly prior to the SWANCC Supreme Court legal decision which is what proponents of the bill claim is the reason for enactment of the bill.

S 1870, The Clean Water Restoration Act, is really a massive Federal land and water power grab. It will use "wetlands" to take control over every farm, ranch, and piece of private property with any water on it or even if the landowner only engage in activities that might affect water.

It expands the authority of the Federal government under the Clean Water Act of 1972 to include all waters of the U S. and activities affecting these waters.

It will give the Corps of Engineers control over most private property.

In the words of Reed Hopper of Pacific Legal Foundation, lead attorney in a landmark U.S. Supreme Court victory, "...this bill pushes the limits of federal power to an extreme not matched by any other law, probably in the history of this country."

Below are my concerns and testimony regarding S 1870, the inappropriately named Clean Water Restoration Act. It has little to do with clean water and is mostly about land use control.

Please allow this Testimony to be submitted for the record for any additional hearings to be held on the Clean Water Act, S 1870, and the Clean Water Restoration Act.

Please consider a photocopy of this document as valid as the original and include my testimony for the official record.

Signature Allen Robinson Print Your Name ALLEN ROBINSON

12-20-07

--1. The jurisdiction of federal agencies under the Clean Water Act of 1972 should remain limited to navigable waters and not expanded to include all waters of the U.S., such as wetlands, sloughs, meadows, intermittent streams, prairie potholes, ponds, playa lakes, mudflats and sandflats.

Agree...Disagree...No Opinion

--2. The definition of wetlands under federal jurisdiction should be limited to those areas that are permanently wet or free flowing.

Agree...Disagree...No Opinion

--3. The Clean Water Act 1972 should not be used as a tool for national land use controls.

Agree...Disagree...No Opinion

--4. The Clean Water Act of 1972 should not be expanded to include activities affecting waters.

Agree...Disagree...No Opinion

--5. The U. S Supreme Court decisions of 2001 and 2006 that ruled in favor of local government and landowners should not be overturned by the proposed Clean Water Restoration Act (S 1870)

Agree...Disagree...No Opinion

--6. Mostly dry land and isolated wetlands should be excluded from federal jurisdiction under the Clean Water Act of 1972.

Agree...Disagree...No Opinion

--7. The definition of pollutants under the Clean Water Act of 1972 should not include clean fill or natural material of any kind.

Agree...Disagree...No Opinion

--8. The term 'discharge' should not apply to the disturbance of soils or natural materials.

Agree...Disagree...No Opinion

--9. Citizens cited for violation of regulations under the Clean Water Act of 1972 should not face criminal penalties.

Agree...Disagree...No Opinion

--10. National Water Quality goals should be achieved without violating constitutionally protected property rights.

Agree...Disagree No Opinion

--11. National Water Quality goals are best achieved by local and state governments, rather than by federal agencies.

Agree...Disagree...No Opinion

--12. National Water Quality goals should consider priorities and costs

Agree...Disagree...No Opinion

--13. National Water Quality goals should consider regional differences in landscapes and other ecological characteristics.

Agree...Disagree...No Opinion

--14 'Regulatory Takings' that devalue private property should be compensated under provisions of the 5th Amendment.

Agree...Disagree...No Opinion STRONGLY AGREE

-15. Access to and use and enjoyment of public lands and waters should be guaranteed under provisions of the Clean Water Act.

Agree...Disagree...No Opinion

--16. 'Environmental' organizations have become too radical and have too much power and influence over federal legislation.

Agree .Disagree .No Opinion

--17. The Clean Water Restoration Act and other environmental legislation is often not about environmental protection, but about control over land, water, and people.

Agree .Disagree...No Opinion

--18 Please do not give the Corps of Engineers increased power to regulate more private land.

Agree. .Disagree.. No Opinion

Allen Robinson

12-20-07

December 12, 2007

The Honorable Jeff Bingaman
United States Senate
703 Hart Senate Office Building
Washington, DC 20510-3102

Re: Oppose the Clean Water Restoration Act, S.1870

Dear Senator Bingaman:

We are writing to tell you that we, the undersigned, oppose The Clean Water Restoration Act, S.1870 (as well as the House version, H.R. 2421), which will unnecessarily amend the Clean Water Act. S.1870 will result in an expansion of federal powers over waterways that is beyond Congressional intent in the original legislation.

The Clean Water Act was intended to address the "navigable" waters of the United States. The legislation before you will expand the federal government's authority to essentially *all* waters of this country. In his written testimony, Secretary of the New Mexico Environment Department stated that there is confusion about which waters are under the act and that all waters were interpreted to be protected under the Clear Water Act. It was because some over-zealous regulators in the federal government attempted to expand the authority of the act that the Supreme Court cases were needed to clarify the original intent. Contrary to Secretary Curry's contention, the law was intended to apply to "navigable" waters. The Senate should deny S.1870 and Congress should maintain the original scope of authority.

Again, we are extremely concerned that this expansion of federal power will extend to more waters than the Act was intended to, or should, address. As proposed, S.1870 would cause the waters in our livestock ponds and irrigation ditches to be included in those waters under the act and that is without question a tremendous threat to the rights of private property owners. Furthermore, the federal permitting that would be required is an intrusion on states rights.

Clearly, the Clean Water Act has been a success in improving the major waterways in this country. There is no reason to disregard the work that has been done toward improving our environment. However, the expansion of powers by the federal government is something that our founding fathers were very careful to limit, and in this case we sincerely hope that you follow that example and not allow S. 1870 to pass. S.1870 would create a burden upon the people that is undeniably not needed, nor desired by the majority of those that will be affected.

The Honorable Jeff Bingaman
December 12, 2007
Page 2

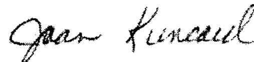
Should you have any questions, please feel free to contact any one of us. We thank you for your consideration of our request and urge you to take action to stop S.1870.

Respectfully,

Michael S. White
President
NM Farm & Livestock Bureau

Gary Bonestroo
President
Dairy Producers of New Mexico

Alisa Ogden
President
NM Cattle Growers' Assn.



Joan Kincaid
President
NM Wool Growers' Inc.

(signature not available)

Eddie Vigil
President
NM Assoc. of Conservation Districts

Brent Bullock
Executive Director
Pecos Valley Artesian Conservancy Dist.

Wayne Palla
Chairman
Dairy Farmers of America
Southwest Area Council

Mike G. Casabonne
President
NM Federal Lands Council

cc: Senator James Inhofe

December 12, 2007

The Honorable Pete Domenici
United States Senate
328 Hart Senate Office Building
Washington, DC 20510

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The Honorable Pete Domenici
December 12, 2007
Page 2

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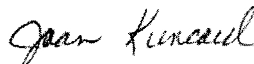
Respectfully,

Michael S. White
President
NM Farm & Livestock Bureau

Gary Bonestroo
President
Dairy Producers of New Mexico

Alisa Ogden
President
NM Cattle Growers' Assn.



Joan Kincaid
President
NM Wool Growers' Inc.

(signature not available)

Eddie Vigil
President
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Pecos Valley Artesian Conservancy Dist.

Wayne Palla
Chairman
Dairy Farmers of America
Southwest Area Council

Mike G. Casabonne
President
NM Federal Lands Council

cc: Senator James Inhofe

STATE ATTORNEYS GENERAL

A Communication from the Chief Legal Officers of the following States:

Washington, DC, California, Connecticut, Delaware, Guam, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Ohio, Oregon, Rhode Island, Vermont

December 11, 2007

The Honorable Barbara Boxer
Chair, U.S. Senate Environment & Public Works Committee
456 Dirksen Senate Office Building
Washington, DC 20510

The Honorable James M. Inhofe
Ranking Member, U.S. Senate Environment & Public Works Committee
456 Dirksen Senate Office Building
Washington, DC 20510

RE: S. 1870, Clean Water Restoration Act of 2007

Dear Chairperson Boxer and Senator Inhofe:

We submit this letter on behalf of the undersigned State Attorneys General to support enactment of S. 1870, the Clean Water Restoration Act of 2007. As the highest law enforcement officers in our respective states, we have important responsibilities for interpretation, implementation, and enforcement of the Clean Water Act and state programs modeled on that Act. Our actions to assure clean water for our states protect the health of our citizens, the livelihoods of many of those we serve, recreational opportunities, and the beauty of our natural environments. Our abilities to carry out the task of assuring clean waters for all will be significantly enhanced if the bipartisan Clean Water Restoration Act of 2007 is passed, which reestablishes the Clean Water Act's traditional reach to waters of the United States.

When it enacted the first strong national act to clean our nation's waters in 1972, and consistently through amendments and oversight after that, Congress endorsed a broad and strong scope for the Clean Water Act to restore our rivers and streams to chemical, physical, and biological integrity. We continue to work to achieve the law's important goals of cleaning up and maintaining our nation's waters using the framework of the law—setting standards, using a permitting system, and assuring strong and effective enforcement. Congress recognized from the beginning the important role of states in carrying out the program to achieve these clean water goals. States have structured many aspects of their own programs on the model of the federal law, and the federal law creates a floor that helps maintain consistency among state water pollution control programs throughout the country. A strong and clear federal law is critical to our roles as State Attorneys General in restoring our waters.

Unfortunately, in recent years the Courts have made enforcement of the law more difficult and thus the achievement of its important purposes more uncertain. In 2001, the Supreme Court in Solid Waste Agency of Northern Cook County (SWANCC) v. United States Army Corps of Engineers introduced some confusion as to what waters Congress intended to cover under the Clean Water Act. That problem was exacerbated by two additional Supreme Court decisions in June 2006.

These 2006 decisions—Rapanos v. United States and Carabell v. United States Army Corps of Engineers—raised doubts that the Clean Water Act extends to certain wetlands. Wetlands, of course, are important components of the ecosystem and significantly affect the quantity, quality, and biological integrity of downstream waters. They filter pollutants out of waters before they flow into our rivers and streams. Wetlands are home to myriad bird and fish species, act as essential breeding grounds, and provide the sites for birdwatching, fishing, hunting, and other activities critical to the environment and economies of many states. As State Attorneys General, we may challenge grants or denials of wetlands permits, or seek delegation of the wetlands programs, so we have a keen interest in the scope of this law. The Supreme Court's decisions make less clear what wetlands will be considered covered by the Act.

The recent uncertainty in scope of the Clean Water Act's coverage also affects what waters will be subject to the point source discharge programs of the Clean Water Act. The permits that the states or EPA issue under the point source program are among the most important and effective tools we have to control water pollution. In most of our states, the state is the primary issuer of permits and primary enforcer for that point source discharge program. The lack of clarity brought about by the recent decisions can lead to more litigation and can cause a serious problem for effective enforcement of this law and our mission to clean up and maintain the waters in our states.

Further, every state in the continental United States has waters that are downstream of another state, so we are affected by actions of other states and by the federal legal standard. A strong federal standard and federal program are essential to our state programs and to restoring and maintaining clean waters in our states.

Many states supported the federal government in asking the Supreme Court in the recent cases to uphold the historically broad scope of the Clean Water Act so that we could continue to clean up and maintain our waters and protect the health and welfare of our states' citizens and their environment. We want to keep working to meet the important goals that Congress had in mind when it enacted, amended, and strengthened the Clean Water Act through the years.

S. 1870, the Clean Water Restoration Act of 2007, clarifies that the Clean Water Act covers all waters, and every kind of water by changing the term "navigable waters" throughout the Act to "waters of the United States." "Waters" includes all waters (and similar ecological features) subject to the legislative power of Congress under the Constitution. As a result, S. 1870 restores the full protection of the Clean Water Act before the Court's recent decisions.

The Supreme Court has created ambiguity about the reach of the Clean Water Act. We urge the Senate to clean up the law by enacting the Clean Water Restoration Act of 2007 so that we can continue to clean up our nation's waters.

Thank you for your consideration.

Sincerely,

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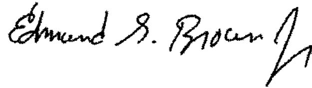
Attorney General of New Hampshire



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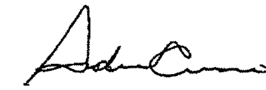

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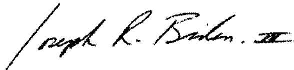

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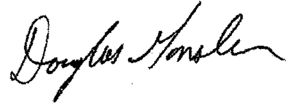

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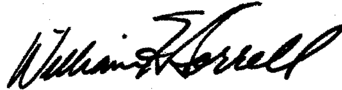

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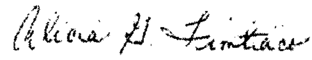

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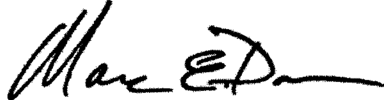

Marc Dann
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cc: U.S. Senator Russ Feingold