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# THE CLEAN WATER RESTORATION ACT OF 2007

(110–116)

## HEARING

BEFORE THE

## COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

APRIL 16, 2008

Printed for the use of the
Committee on Transportation and Infrastructure

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# U.S. House of Representatives
## Committee on Transportation and Infrastructure

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Washington, DC 20515

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April 11, 2008

**SUMMARY OF SUBJECT MATTER**

**TO:** Members of the Committee on Transportation and Infrastructure

**FROM:** Subcommittee on Water Resources and Environment Majority Staff

**SUBJECT:** Hearing on the Clean Water Restoration Act of 2007.

### PURPOSE OF HEARING

On Wednesday, April 16, 2008, at 11 a.m., in Room 2167 Rayburn House Office Building, the Committee on Transportation and Infrastructure will receive testimony from the U.S. Environmental Protection Agency ("EPA"), the U.S. Army Corps of Engineers ("Corps"), the U.S. Department of Justice ("DOJ"), the U.S. Department of Agriculture's Natural Resources Conservation Service ("NRCS"), representatives of State and local governments, environmental, agricultural, and industry interests, legal practitioners, and other stakeholders on the Clean Water Restoration Act of 2007.

### BACKGROUND

This memorandum briefly summarizes the authorities of the Federal Water Pollution Control Act, commonly known as the Clean Water Act, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," including wetlands. It also briefly summarizes the actions of the judicial and executive branches of government related to the jurisdictional reach of the Clean Water Act, including recent Supreme Court decisions affecting the Act.

Finally, the memorandum highlights several uncertainties that have arisen since the two recent Supreme Court decisions with respect to the Act's ability to comprehensively and consistently meet the goals of fishable and swimmable waters. The memorandum describes in greater detail several uncertainties that have been raised by individual states, legal scholars, and the regulated community, resulting from the *SWANCC* and *Rapanos* decisions, and the Corps and EPA implementation guidance.

For a more detailed explanation on the history and structure of the Clean Water Act, please refer to the Summary of Subject Matter for the Committee on Transportation and Infrastructure Hearings on the Status of the Nation's Waters, including Wetlands, under the Jurisdiction of the Federal Water Pollution Control Act, July 17 and 19, 2007. [Available on the Committee's webpage http://www.house.gov/transportation or at the Committee office (202-225-4472).]

**Historical Background of the Clean Water Act:**

Congress enacted the Federal Water Pollution Control Act Amendments of 1972, more commonly referred to as the Clean Water Act, to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."

The Clean Water Act represented a fundamental shift towards improving and protecting water quality in the nation. From the early days of the nation until 1972, the Federal government's interests and responsibilities related to protecting the nation's waters evolved in conjunction with common understandings of the importance and utility of water – starting from the protection of watercourses as a means of waterborne transportation and the movement of refuse from populated areas. As attitudes on the value of water, including wetlands, changed, so did Federal authorities related to preserving and protecting such waters.[1]

Starting with the Water Quality Act of 1948, Congress frequently revisited the issue of Federal legislation to improve water quality. While the initial enactments were an improvement over traditional Federal authorities, they were largely ineffective at achieving significant improvements in overall national water quality. This was, in part, because they relied too heavily on state efforts to establish individual state water quality standards, resulting in a patchwork of state water pollution control efforts, with national efforts limited to only interstate waters and where requested by individual states to resolve intrastate conflicts. For example, as noted in the Report of the Senate Committee on Public Works in 1971:

> Through a narrow interpretation of the definition of interstate waters the implementation [of the] 1965 Act[2] was severely limited. Water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source. Therefore, reference to the control requirements must be made to the navigable waters, portions thereof, and their tributaries.[3]

The Clean Water Act of 1972 realigned Federal and state responsibilities for protecting water quality by instituting a national system requiring individual permits for discharges of pollutants to the nation's waters. Unlike earlier Federal efforts, the Clean Water Act established a "Federal floor" for the protection of water quality and wetlands, but allows states to administer their own programs (including the establishment of stricter standards than the Federal standard) should states apply for and have such programs approved by the Administrator of EPA.[4]

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[1] *See* Meltz, Robert and Copeland, Claudia. CRS Report for Congress: The Wetlands Coverage of the Clean Water Act is Revisited by the Supreme Court: *Rapanos v. United States* (Updated March 17, 2008) (*hereinafter* "CRS report") at 2.
[2] The Water Quality Act of 1965 (P.L. 89-234).
[3] Report of the Senate Public Works Committee, *Federal Water Pollution Control Act Amendments of 1971*, (Report No. 92-414), page 77.
[4] To date, 45 individual states have approved NPDES programs under section 402 of the Clean Water Act; the States of Alaska, Idaho, Massachusetts, New Hampshire, and New Mexico (and the District of Columbia) do not have approved

By establishing a uniform baseline for the protection of the nation's waters, including wetlands, the Clean Water Act ensured that all states and communities start from a level playing field with respect to water quality standards, and avoided potential conflicts between upstream and downstream states instituting conflicting water standards for the same waterbody. In addition, the Clean Water Act attempted to avoid the potential for states with differing water quality standards to be at competitive disadvantages for encouraging economic growth, but rather has facilitated states interested in establishing stricter water quality standards to do so, without the fear that they will be placed at a competitive disadvantage to neighboring states.[5]

**U.S. Supreme Court Decisions Affecting Federal Jurisdiction:**

The U.S. Supreme Court has issued three distinct rulings on the jurisdictional scope of the Federal Clean Water Act – in 1985, 2001, and 2006.

In the first case, *United States v. Riverside Bayview Homes, Inc.*,[6] (*Riverside Bayview*) the Supreme Court unanimously upheld the Corps' jurisdiction over wetlands adjacent to jurisdictional waters, and held that such wetlands were "waters of the United States" within the meaning of the Clean Water Act.

In the second case, *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*[7] ("*SWANCC*"), the Court issued a 5-to-4 decision that overturned the authority of the Corps of Engineers to regulate intrastate, isolated waters, including wetlands, based solely upon the presence of migratory birds (i.e., the Migratory Bird Rule).

In the final case, *Rapanos v. United States* and *Carabell v. U.S. Army Corps of Engineers*[8] (hereinafter collectively referred to as "*Rapanos*"), the Court issued a 4-1-4 opinion that failed to produce a clear, legal standard on Clean Water Act jurisdiction. To the contrary, the *Rapanos* decision produced three distinct opinions on the appropriate scope of Federal authorities under the Clean Water Act: (1) the Scalia "relatively permanent/flowing waters" test, supported by 4 justices; (2) the Kennedy "significant nexus" test, and (3) the Stevens dissenting opinion, supported by the remaining 4 justices, advocating for maintenance of existing EPA and Corps authority over waters and wetlands.[9]

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NPDES programs, and such programs are administered by EPA. To date, 2 individual states have approved dredge and fill permit programs under section 404 of the Clean Water Act; these states are Michigan and New Jersey.

[5] *See generally*, Amicus Brief of the States of New York, Michigan et. al in Support of Respondents, *Rapanos v. United States of America.*

[6] *See* 474 U.S. 121 (1985).

[7] *See* 531 U.S. 159 (2001). While the holding of the *SWANCC* case was very narrow, ruling that the Corps could not use the presence of migratory birds on an individual waterbody as the sole basis for protecting the waterbody under the Clean Water Act, this decision marked the first time that the Supreme Court called into question Federal authority over U.S. waters under the Clean Water Act.

[8] The Supreme Court granted *certiorari* in both *Rapanos v. United States*, No. 04-1034, and *Carabell v. Army Corps of Engineers*, No. 04-1384, and consolidated the cases for review. *Rapanos v. United States*, 126 S.Ct. 2208 (June 19, 2006).

[9] According to a CRS Report on the *Rapanos* decision, "scientists contend that there are no discrete, scientifically supportable boundaries or criteria along the continuum of waters/wetlands to separate them into meaningful ecological or hydrological compartments. . . . [Terms] such as "isolated waters" and "adjacent wetlands" are artificial legal or regulatory constructs, not valid scientific classifications." *See* CRS Report.

During consideration of the *Rapanos* case, the Bush administration argued in support of broad Federal authority under the Clean Water Act, consistent with the dissenting opinion of Justice Stevens. For example, according to the *Brief for the United States*:

> If the statutory phrase [navigable waters, including waters of the United States] were read to exclude non-navigable tributaries, then discharges of such materials as sewage, toxic chemicals, and medical wastes into those tributaries would not be subject to the [Clean Water Act's] permitting requirements, no matter how clear the link between the non-navigable tributary and the traditional navigable water or how strong the evidence that such discharges would impair the quality of traditionally navigable waters downstream.[10]

**Administrative Implementation of the *Rapanos* Decision**

On June 5, 2007, the Corps and EPA released regulatory guidance on implementing the *Rapanos* decision.[11] The guidance was developed as an attempt to ensure that jurisdictional determinations and administrative enforcement actions (regarding Clean Water Act violations) take into consideration the legal analysis of the *Rapanos* decision.

The guidance provides Clean Water Act protection to waters that meet either the Scalia or Kennedy tests. Individual permit applications must, on a case by case basis, undergo a jurisdictional determination, based on the Scalia or the Kennedy tests.[12]

According to the guidance, and the Scalia test, the Corps and EPA would likely determine that the Clean Water Act applies to traditional navigable waters, wetlands adjacent to traditional navigable waters, non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries flow year-round or have continuous flow at least seasonally, or wetlands that directly abut such tributaries.

For all other waters, including wetlands, that fall outside of these categories, the guidance recommends that the Corps and EPA apply the "significant nexus" test. This test is applied based on a fact-specific analysis to determine whether a "significant" connection exists between a traditional navigable water and either a non-navigable tributary that is not relatively permanent; a wetland adjacent to a non-navigable tributary that is not relatively permanent; or a wetland adjacent to but that does not directly abut a relatively permanent non-navigable tributary.

The guidance document also states that the Corps and EPA will generally not assert jurisdiction over swales or erosional features (e.g., gullies, small washes characterized by low volume, infrequent, or short duration flow, or ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water, regardless of their potential impacts to water quality. This exclusion is consistent with the Corps' general practices

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[10] *See* Brief for the United States, *Rapanos v. United States*, (No. 04-1034), at 20. <http://www.usdoj.gov/osg/briefs/2005/3mer/2mer/2004-1034.mer.aa.html>.

[11] U.S. Environmental Protection Agency and U.S. Army Corps of Engineers. 2007. "Clean Water Act Jurisdiction: Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States" (June 5, 2007).

[12] However, as noted below, the applicable test for determining jurisdiction in a particular waterbody is controlled by the latest judicial interpretation of the highest court in the region.

related to jurisdictional scope, as described in the November 13, 1986 implementation regulations, which excluded certain non-tidal drainage and irrigation ditches, artificial lakes or ponds, artificial reflecting or swimming pools or other small ornamental bodies of water, and water-filled depressions created on dry land incidental to construction activities.[13] Since 1986, these types of waterbodies have been excluded from the jurisdictional reach of the Clean Water Act unless, on a case-by-case determination, the Corps or EPA find that such waters are a water of the United States.

## CONCERNS RAISED ABOUT IMPACTS OF THE *SWANCC* AND *RAPANOS* DECISIONS

Individual states, legal scholars, and the members of the regulated community have all expressed concern that the *Rapanos* decision, and the subsequent agency guidance, have created significant uncertainty and confusion in the implementation of Clean Water Act – the implications of which are still undetermined.[14] Although often characterized as affecting only the Corps (and EPA) authorities to regulate dredge and fill activities in the nation's waters, including wetlands, the implications of the *Rapanos* decision, and the subsequent agency guidance, have raised questions in a broad array of Clean Water Act authorities, as well as other environmental statutes aimed at protecting water quality.

The following is a list of concerns that have been raised by states and other stakeholders following the *SWANCC* and *Rapanos* decisions, and the Corps and EPA implementation guidance:

**(1) Inconsistent Judicial Tests for Determining Jurisdiction;**
**(2) Uncertainty and Delay in State and Local Construction Projects;**
**(3) Impact on the Control of Point Sources of Pollution;**
**(4) Obstacles for States to Address the *SWANCC/Rapanos* Coverage Gap;**
**(5) Potential for States to Lose State Clean Water Act Funding; and**
**(6) Implications of *SWANCC/Rapanos* on other Environmental Authorities.**

**Inconsistent Tests for Determining Jurisdiction:**

Following the *Rapanos* decision, the Corps and EPA issued an agency guidance memorandum "to ensure nationwide consistency, reliability, and predictability in [the Corps' and EPA's] administration of the [Clean Water Act]."[15] Again, this guidance was developed by the administration as an attempt to ensure that jurisdictional determinations and administrative enforcement actions (regarding Clean Water Act violations) take into consideration the legal analysis of the *Rapanos* decision.[16]

However, because of a lack of a clear legal test in *Rapanos*, Federal courts around the country have adopted widely differing interpretations of which waters are protected under the Clean Water Act—interpretations which establish the controlling test within the various judicial circuits across the nation, and overturn the applicability of the Agency guidance.

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[13] *See* 51 Fed. Reg. 41206, 41217 (Nov. 13, 1986).
[14] *See generally*, CRS Report.
[15] *See* Environmental Protection Agency and Army Corps of Engineers. 2007. "Clean Water Act Jurisdiction: Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States" (June 5, 2007) at 4.
[16] Yet, because the *Rapanos* guidance document was not a rulemaking, it does not have the force of law, and does not provide any substantive or procedural rights to affected individuals.

For example, in at least 15 states, including the State of Illinois, Indiana, Wisconsin, California, Oregon, Washington, Arizona, Montana, Idaho, Nevada, Alaska, Hawaii, Alabama, Georgia, and Florida, the Clean Water Act only applies to waters with a "significant nexus" to traditional navigable waters – the "Kennedy test." This means that some waters that flow throughout the year might not be protected if they are located too far from or are too tenuously connected to navigable waters.

In 8 other states, the Clean Water Act applies to both continuously flowing or permanent waters (the "Scalia test"), and waters with a "significant nexus" to navigable waters – similar to the Agency guidance. These include the States of Maine, Massachusetts, New Hampshire, Puerto Rico, Rhode Island, Connecticut, Kentucky, and Minnesota.

However, within the jurisdiction of the U.S. Court of Appeals for the 5th Circuit, two separate opinions in two different states, Mississippi[17] and Louisiana,[18] each have utilized a different test for determining jurisdiction; yet the U.S. Court of Appeals for the 5th Circuit failed to take a position outlining which test would control for determining jurisdiction within the circuit.

Accordingly, despite the availability of the Corps/EPA guidance, the legal test for determining the scope of the Clean Water Act varies dramatically throughout the country, depending on the State, Corps District, EPA region, or judicial circuit in which the activity or potential discharge may occur. For example, the State of Missouri commented that portions of the State are represented by 5 Corps district offices, in addition to EPA Region 7, each with potentially inconsistent approaches to jurisdictional determinations.[19]

**Uncertainty and Delay in State and Local Construction Projects:**

As noted by the Corps and EPA, "the Court's split decision is causing uncertainty among agency field personnel and the general public regarding the scope of Federal jurisdiction under the [Clean Water Act's] section 404 program. As a result, many jurisdictional determinations and their associated permitting actions have been delayed."[20] Yet, the release of the *Rapanos* guidance, itself, has had little practical effect in easing permitting delays, but has merely continued much of the regulatory confusion and delay created by the lack of clear legal standard by the two Supreme Court decisions.

In October 2007, John Paul Woodley, the Assistant Secretary of the Army (Civil Works) testified before the Committee that the cause of this uncertainly was the *Rapanos* decision and the decision of the Corps and EPA to utilize the Kennedy "significant nexus" test as part of its implementation guidance. According to Secretary Woodley, prior to the *Rapanos* decision, the Corps and EPA were not required to demonstrate a "significant nexus" to a navigable waterbody in order to utilize the Clean Water Act authorities.

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[17] *See* United States v. Lucas, 516 F.3d 316 (CA5 (Miss)) (2008).
[18] *See* In re Needham, 354 F.3d 340 (CA5 (La)) (2003).
[19] *See* Comments of the State of Missouri Department of Natural Resources, EPA-HQ-OW-2002-0282 (*Rapanos* Guidance).
[20] *See* EPA and Army Corps of Engineers Guidance Regarding Clean Water Act Jurisdiction after Rapanos, 72 Fed. Reg. 31,824, 31,825

However, under the current system, the Corps and EPA must engage in a case-by-case determination for every waterbody or wetland that is not a "traditionally-navigable water" or does not demonstrate a relatively permanent/continuous flow of water.

The result has been that, across the nation, there has been a significant slowdown in the processing of permits by the Corps – estimated by the Corps to be as much as 60 to 90 additional days per permit application. For example, at its hearing last July, the Committee received testimony from a Minnesota County Public Works Director who commented on one individual highway project that, as a result of the regulatory confusion and requirements for jurisdictional determinations following the *Rapanos* decision, was facing significant delays and cost increases in a state where "the local and state requirements are more restrictive than the Corps."

The ramifications of this slowdown and delay are felt by many public and private stakeholders, including many State and local public works agencies charged with responsibility over the nation's infrastructure. For example, the American Association of State Highway and Transportation Officials ("AASHTO") noted that the *Rapanos* guidance "has substantially increased permit processing times and documentation requirements....For example, one State reports that prior to the *Rapanos* guidance, Section 404 permitting typically took no more than 120 days, but is now taking eight to nine months."

Similarly, this lack of a national standard for determining what types of waterbodies are considered covered by the Clean Water Act, and the formal reliance on case-by-case determinations, have resulted in increased variation among the various Corps district offices and divisions. According to AASHTO, "Corps districts interpret the guidance differently [and there] is a lack of understanding by Corps districts on how to apply the guidance."

**Impact on the Control of Point Sources of Pollution:**

While the facts of the *Rapanos* decision centered on the filling of four Michigan wetlands, and the application of section 404 of the Clean Water Act, the implications of this decision have called into question the operation of the entire Clean Water Act, including the ability of the Act to protect against discharges of pollutants from point sources.

The structure of the Clean Water Act prohibits the "discharge of any pollutant," except in compliance with a permit. This phrase is further defined as including the "additional of any pollutant to the navigable waters from any point source." Accordingly, the uncertainty raised by the *Rapanos* decision on the term "navigable waters" is equally applicable to the ability of EPA or State authorities to prevent the discharge of pollutants from point sources under section 402 – the National Pollutant Discharge Elimination System ("NPDES") program.

As a result, under *Rapanos*, previously regulated point source dischargers many no longer be required to comply with existing Federal discharge limits, or in the cases of an approved State NPDES program, State discharge limits, should the discharge be located in a non-jurisdictional waterbody. For example, in *United States v. Robinson*,[21] the United States Court of Appeals for the 11th Circuit overturned the criminal conviction of a pipe manufacturer in Alabama for discharging

[21] 2007 WL 3087419 (C.A. 11 Ala.)

"process wastewater...including hydraulic oil, excess iron, and trash" into a local creek on the grounds that the creek may not have been a "navigable water" of the United States.

EPA estimates that between 53 to 59 percent of the total length of streams in the United States (excluding Alaska) would be considered non-navigable waters,[22] for which Clean Water Act jurisdiction is uncertain following the *Rapanos* decision. In addition, according to EPA, at a minimum, 16,730 individual NPDES permits, or approximately 40 percent of all existing NPDES permits, are located on headwater, intermittent, or ephemeral streams (i.e., waterbodies that are likely to be non-navigable in fact) that, prior the *Rapanos* decision, were clearly within the jurisdictional reach of the Clean Water Act.[23] This number includes approximately 4,600 permits for publicly owned treatment works, 1,500 permits for other sewerage systems (not publicly owned), 64 permits for petroleum refineries, and 55 industrial chemical facilities.

In the two years since *Rapanos*, individual dischargers have started to challenge Clean Water Act authority over existing NPDES permits on the grounds that the waterbody into which the discharge occurs is outside the scope of Federal (or State) authority. According to EPA, individual point source permit holders have started to petition the Agency and the States that they are no longer required to comply with their existing NPDES permits because the waterbody into which they discharge is no longer subject to the Clean Water Act.[24]

**Obstacles for States to Address *SWANCC/Rapanos* Coverage Gap**

The Clean Water Act instituted a partnership between the Federal and State governments for the protection of water quality. This partnership is evident in the very structure of the Clean Water Act, which established broad national goals of "restoring and maintaining the chemical, physical and biological integrity of the Nation's waters," but established a policy to "recognize, preserve, and protect" the rights of States to address pollution sources and plan for the development and use of lands and water resources.

The Act also established the policy that the individual States implement the permitting programs authorized by the Act, including the point source permit program (section 402), and the program to regulate dredge and fill activities in waterbodies, including wetlands (section 404). To this end, the Clean Water Act provides specific authority for individual States to assume authority for and manage both the 402 and 404 programs within their states. To date, 45 individual states have approved NPDES programs under section 402, but only 2 individual states have approved dredge and fill permit programs under section 404 of the Clean Water Act (Michigan and New Jersey).

As stated earlier, the Clean Water Act authorizes a "Federal floor" for the protection of water quality, but allows states to implement more stringent programs to protect water quality within their individual state borders. Individual state water quality programs vary in both form and

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[22] *See* Letter from Ben Grumbles, Assistant Administrator for EPA's Office of Water to Jeanne Christie, Association of State Wetland Managers, dated January 9, 2005.
[23] *See* Letter from Linda Boornazian, Environmental Protection Agency to Joan Mulhern, Earthjustice, dated May 18, 2007 (FOIA No. HQ-RIN-00684-07)
[24] *See* Letter from Ben Grumbles, Assistant Administrator for EPA's Office of Water to the Honorable James L. Oberstar, dated January 11, 2008.

substance, with some states utilizing the Federal Clean Water Act as a baseline for the protection of state waterbodies, and other states adopting a more stringent approach.

Because of this variability in State water quality protection laws and regulations, the likely implications of the *SWANCC* and *Rapanos* decisions will impact different States differently. In those states that adopted individual state water quality programs more stringent than the pre-*SWANCC* Clean Water Act, the implications will be less[25] that those states that utilized the Clean Water Act as a baseline for individual state water quality programs.

However, for this second category of States, the *SWANCC* and *Rapanos* decisions have potentially created a Clean Water Act coverage gap – whereby waters and wetlands that were previously protected by the Clean Water Act, in the absence of affirmative State legislative or administrative action to cover these waters, would no longer covered.

This is especially true in states that, prior to *SWANCC* and *Rapanos*, utilized the Federal definition for determining the scope of State water pollution control authorities. For example, as noted in the comments of the State of New Mexico, which does not have an approved state 402 or 404 program, and where EPA administers the permitting program, it is the Federal definition of "waters of the United States" that dictates the jurisdictional scope of the Clean Water Act. In these states, any narrowing of water quality protection coverage at the Federal level would result in equal narrowing of coverage at the State level, without affirmative assumption by the State.[26]

Similarly, according to the Corps, "approximately 25 States have some limitations on their ability to establish environmental requirements that are more stringent than those called for under federal law. This ranges from notification requirements when programs proposed are more stringent, to strict prohibitions against state programs that are more stringent than the [Clean Water Act]."[27] These so-called "no more stringent" rules limit the ability of certain states to assume responsibility for the protection of waterbodies and wetlands that were once covered under the Clean Water Act, and turn "federal floors into regulatory ceilings" for the protection of water quality.[28]

This concern is shared by several States, including those States that manage their individual Clean Water Act programs. As noted in a March 2008 CRS report "[many] states are barred from enacting laws or rules more stringent than federal rules, or are reluctant to take action, due to budgetary and resource concerns, as well as apprehension that regulation will be judged to involve "taking" of private property and require compensation."[29]

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[25] However, even in states that have enacted comprehensive state Clean Water programs, the *Rapanos* decision and Federal implementation guidance have resulted in confusion and delay in the processing of permits. For example, the States of Michigan and Wisconsin submitted comments on the *Rapanos* guidance expressing concern with the delay in the Corps' processing of permits under section 404.

[26] *See* Comments of Secretary Ron Curry, New Mexico Environment Department, Docket EPA-HQ-OW-2002-0282 (*Rapanos* Guidance) and Comments of Director Steven Owens, Arizona Department of Environmental Quality, Docket EPA-HQ-OW-2002-0282 (*Rapanos* Guidance).

[27] *See* USACE "Questions and Answers for *Rapanos* and *Carabell* Decision. (June 5, 2007) < http://www.usace.army.mil/cw/cecwo/reg/cwa_guide/rapanos_qa_06-05-07.pdf>.

[28] *See* Andrew Hecht, Note, Obstacles to the Devolution of Environmental Protection: States' Self-Imposed Limitations on Rulemaking, 15 Duke Envtl. L. & Pol'y F. 105 (2004).

[29] *See* CRS Report at 18.

For example, in its public comments on the *Rapanos* guidance, the State of Colorado expressed concern "that a narrow reading of *Rapanos* reflected in the current EPA/Corps Guidance may result in a significant reduction in Federal protection of certain water resources in Colorado, thereby shifting to the State the burden of protecting such waters."[30] In addition, the State of Missouri noted that "[under the Missouri Clean Water Act, a water body could be considered as a water of the state while having no regulatory protection."[31] Finally, as noted by the State of Arizona, "a final decision ... that a water body is not jurisdictional [means that] the Clean Water Act protections previously applicable, are, in effect, presumptively lost for, at a minimum, that water body [and] shifts the burden from the federal government to the State to ensure that the Clean Water Act protections remain applicable to the water body requiring the State to devote its limited resources to this new effort."[32]

In sum, States may not be able to maintain existing levels of environmental protection in the absence of Federal protection due to a variety of factors, including budgetary constrains or individual State "no more stringent" laws.[33] Accordingly, following the *SWANCC* and *Rapanos* decision, there is significant uncertainty whether individual waterbodies, including wetlands, that were once protected under Federal law will have any level of protection against the discharges of pollution (or in the case of wetlands, against their draining and filling).

**Potential for States to Lose State Clean Water Act Funding**

The jurisdictional scope of the Clean Water Act is integral to the entire structure of the Act, not simply the limits of the regulatory authority over point sources and wetlands. For example, EPA utilizes a formula[34] based on the number and length of waterbodies within a State and the number of "potential point sources" on these waterbodies to determine the appropriate funding for state implementation grants (under section 106 of the Act). Section 106 grants are a major source of funding for state clean water protection programs, which a State may utilize for management of individual state clean water programs.

However, if certain waterbodies, or point sources dischargers on these waterbodies, are determined to be beyond the scope of the Clean Water Act, it is uncertain how this will affect an individual state's grant allocation under section 106. States, such as Arizona,[35] have expressed concern that they stand to lose significant portions of their 106 grant funding should certain types of waterbodies be excluded from the calculation of an individual state's jurisdictional waters. As noted in its comments on the *Rapanos* guidance, the State of Arizona estimated that, if certain intermittent and ephemeral streams were excluded from the scope of the Act, the State would lose protection

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[30] *See* Comments of the State of Colorado, EPA-HQ-OW-2002-0282 (*Rapanos* Guidance).
[31] *See* Comments of the State of Missouri Department of Natural Resources, EPA-HQ-OW-2002-0282 (*Rapanos* Guidance).
[32] *See* Comments of Director Steven Owens, Arizona Department of Environmental Quality, Docket EPA-HQ-OW-2002-0282 (*Rapanos* Guidance).
[33] *See* Andrew Hecht, Note, Obstacles to the Devolution of Environmental Protection: States' Self-Imposed Limitations on Rulemaking, 15 Duke Envtl. L. & Pol'y F. 105 (2004).
[34] *See* 35 C.F.R. §162 (2007).
[35] *See* Comments of Director Steven Owens, Arizona Department of Environmental Quality, Docket EPA-HQ-OW-2002-0282 (*Rapanos* Guidance). According to the Arizona Department of Environmental Quality, the State could lose up to 96 percent of its existing 106 grant funding should intermittent and ephemeral streams be excluded.

over *96 percent of its surface waters*, and, therefore, a significant portion of its Federal 106 grant allocation.

**Implications of *SWANCC/Rapanos* on other Environmental Authorities**

As stated earlier, because the term "navigable waters" appears throughout the Clean Water Act, the definition of this term (and any confusion on its scope) impact Clean Water Act authorities outside of the 402 and 404 programs. For example, the term "navigable waters" dictates the scope of the list of impaired waters under sections 303(d) and 305(b), the obligation to establish total maximum daily loads ("TMDLs") for impaired segments under 303(d)(1)(C), the authority for non-point source management grants under section 319, and the state certification authority under section 401 of the Act.[36]

The definition of "navigable waters" and "waters of the United States" also impacts other Federal environmental authorities and statutes aimed at protecting the nation's waters, including the Oil Pollution Prevention, Spill Prevention, Control, and Countermeasure Plan Requirements of section 311 of the Clean Water Act, and the Oil Pollution Act of 1990.[37]

**LEGISLATIVE PROPOSAL**

On May 22, 2007, Chairman James L. Oberstar, Congressmen Dingell and Ehlers, and 155 additional Members of Congress introduced H.R. 2421, the Clean Water Restoration Act of 2007. This legislation amends the Clean Water Act by substituting the phrase "navigable waters" with its existing definition "waters of the United States" to restore the protections over the nation's waters that existed prior to the *SWANCC* and *Rapanos* decisions. The phrase "waters of the United States" has been part of the Clean Water Act since its enactment in 1972, but its common-understood meaning has been defined for decades through Federal agency regulations.

In addition, the Clean Water Restoration Act defines the term "waters of the United States," utilizing the existing EPA and Corps regulatory definitions, located at 40 CFR § 122.2 (EPA) and 33 CFR § 328.3 (Corps) *(attached)*. H.R. 2421 defines the term "waters of the United States" as follows:

> The term 'waters of the United States' means 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."

Finally, the Clean Water Restoration Act includes a "Savings Clause" that reaffirms all existing Clean Water Act statutory permit exemptions. The following list of activities, which are currently exempt from the Clean Water Act permitting requirements, are incorporated into the "Savings Clause" of H.R. 2421.

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[36] *See* CRS Report at 14.

[37] 33 U.S.C. § 2701. The Oil Pollution Act has its origins in section §311 of the Clean Water Act, and accordingly, uses the same definition for "navigable waters" as contained in the Clean Water Act. *See* American Petroleum Institute v. Johnson, No. 02-2254 (D.C. Cir.) filed March 31, 2008.

Discharges related to:

- agricultural return flows (§402(l)(1));
- stormwater runoff from oil, gas, and mining operations (§402(l)(2));
- normal farming, silvicultural, and ranching activities (§404(f)(1)(A));
- maintenance of currently serviceable structures, such as dikes, dams, levees, groins, riprap, breakwaters, causeways, bridge abutments or approaches, and transportation structures (§404(f)(1)(B));
- construction or maintenance of farm or stock ponds or irrigation ditches, or maintenance of drainage ditches (§404(f)(1)(C));
- construction of temporary sedimentation basins on a construction site (§404(f)(1)(D));
- construction or maintenance of farm roads, forest roads, or temporary roads for moving mining equipment (§404(f)(1)(E)); and
- activities with respect to which a State has an approved program under §208(b)(4) of the Clean Water Act (§404(f)(1)(F)).

Proponents of H.R. 2421 contend that this legislation is necessary to restore the comprehensive protections provided by the Clean Water Act in meeting its goals of "fishable and swimmable waters," and restore the regulatory certainty that existed for almost three decades prior to the *SWANCC* and *Rapanos* decisions.

Critics of H.R 2421 contend that the bill would greatly expand the Federal regulatory jurisdiction of the Clean Water Act. They are concerned that the proposed definition of "waters of the Untied States" is ambiguous and has the potential for jurisdiction to be interpreted far more broadly than was understood in 2001, and causing more uncertainty, rather than clarifying the issue.

sludge or waste water treatment devices or systems, regardless of ownership (including federal facilities), used in the storage, treatment, recycling, and reclamation of municipal or domestic sewage, including land dedicated for the disposal of sewage sludge. This definition does not include septic tanks or similar devices. For purposes of this definition, "domestic sewage" includes waste and waste water from humans or household operations that are discharged to or otherwise enter a treatment works. In States where there is no approved State sludge management program under section 405(f) of the CWA, the Regional Administrator may designate any person subject to the standards for sewage sludge use and disposal in 40 CFR part 503 as a "treatment works treating domestic sewage," where he or she finds that there is a potential for adverse effects on public health and the environment from poor sludge quality or poor sludge handling, use or disposal practices, or where he or she finds that such designation is necessary to ensure that such person is in compliance with 40 CFR part 503.

*TWTDS* means "treatment works treating domestic sewage."

*Upset* is defined at § 122.41(n).

*Variance* means any mechanism or provision under section 301 or 316 of CWA or under 40 CFR part 125, or in the applicable "effluent limitations guidelines" which allows modification to or waiver of the generally applicable effluent limitation requirements or time deadlines of CWA. This includes provisions which allow the establishment of alternative limitations based on fundamentally different factors or on sections 301(c), 301(g), 301(h), 301(i), or 316(a) of CWA.

*Waters of the United States* or *waters of the U.S.* means:

(a) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(b) All interstate waters, including interstate "wetlands;"

(c) 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 would affect or could affect interstate or foreign commerce including any such waters:

(1) Which are or could be used by interstate or foreign travelers for recreational or other purposes;

(2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(3) Which are used or could be used for industrial purposes by industries in interstate commerce;

(d) All impoundments of waters otherwise defined as waters of the United States under this definition;

(e) Tributaries of waters identified in paragraphs (a) through (d) of this definition;

(f) The territorial sea; and

(g) "Wetlands" adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States. [See Note 1 of this section.] Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

*Wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

less than 30 days following the date of public notice during which time interested parties may prepare themselves for the hearing. Notice shall also be given to all Federal agencies affected by the proposed action, and to state and local agencies and other parties having an interest in the subject matter of the hearing. Notice shall be sent to all persons requesting a hearing and shall be posted in appropriate government buildings and provided to newspapers of general circulation for publication. Comments received as form letters or petitions may be acknowledged as a group to the person or organization responsible for the form letter or petition.

(b) The notice shall contain time, place, and nature of hearing; the legal authority and jurisdiction under which the hearing is held; and location of and availability of the draft environmental impact statement or environmental assessment.

## PART 328—DEFINITION OF WATERS OF THE UNITED STATES

Sec.
328.1 Purpose.
328.2 General scope.
328.3 Definitions.
328.4 Limits of jurisdiction.
328.5 Changes in limits of waters of the United States.

AUTHORITY: 33 U.S.C. 1344.

SOURCE: 51 FR 41250, Nov. 13, 1986, unless otherwise noted.

### §328.1 Purpose.

This section defines the term "waters of the United States" as it applies to the jurisdictional limits of the authority of the Corps of Engineers under the Clean Water Act. It prescribes the policy, practice, and procedures to be used in determining the extent of jurisdiction of the Corps of Engineers concerning "waters of the United States." The terminology used by section 404 of the Clean Water Act includes "navigable waters" which is defined at section 502(7) of the Act as "waters of the United States including the territorial seas." To provide clarity and to avoid confusion with other Corps of Engineer regulatory programs, the term "waters of the United States" is used throughout 33 CFR parts 320 through 330. This section does not apply to authorities under the Rivers and Harbors Act of 1899 except that some of the same waters may be regulated under both statutes (see 33 CFR parts 322 and 329).

### §328.2 General scope.

Waters of the United States include those waters listed in §328.3(a). The lateral limits of jurisdiction in those waters may be divided into three categories. The categories include the territorial seas, tidal waters, and nontidal waters (see 33 CFR 328.4 (a), (b), and (c), respectively).

### §328.3 Definitions.

For the purpose of this regulation these terms are defined as follows:

(a) The term *waters of the United States* means

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(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 purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a) (1) through (4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) (1) through (6) of this section.

(8) Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States.

(b) The term *wetlands* means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(c) The term *adjacent* means 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."

(d) The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

(e) The term *ordinary high water mark* means 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.

(f) The term *tidal waters* means those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

[51 FR 41250, Nov. 13, 1986, as amended at 58 FR 45036, Aug. 25, 1993]

### § 328.4 Limits of jurisdiction.

(a) *Territorial Seas.* The limit of jurisdiction in the territorial seas is measured from the baseline in a seaward direction a distance of three nautical miles. (See 33 CFR 329.12)

(b) *Tidal waters of the United States.* The landward limits of jurisdiction in tidal waters:

(1) Extends to the high tide line, or

(2) When adjacent non-tidal waters of the United States are present, the jurisdiction extends to the limits identified in paragraph (c) of this section.

(c) *Non-tidal waters of the United States.* The limits of jurisdiction in non-tidal waters:

(1) In the absence of adjacent wetlands, the jurisdiction extends to the ordinary high water mark, or

(2) When adjacent wetlands are present, the jurisdiction extends beyond the ordinary high water mark to the limit of the adjacent wetlands.

(3) When the water of the United States consists only of wetlands the jurisdiction extends to the limit of the wetland.

### § 328.5 Changes in limits of waters of the United States.

Permanent changes of the shoreline configuration result in similar alterations of the boundaries of waters of the United States. Gradual changes which are due to natural causes and are perceptible only over some period of time constitute changes in the bed of a waterway which also change the

# HEARING ON THE CLEAN WATER RESTORATION ACT OF 2007

**Wednesday, April 16, 2008**

HOUSE OF REPRESENTATIVES
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE,
*Washington, DC.*

The Committee met, pursuant to call, at 11:10 a.m., in Room 2167, Rayburn House Office Building, the Honorable James L. Oberstar [Chairman of the Full Committee] presiding.

Mr. OBERSTAR. The Committee on Transportation and Infrastructure will come to order.

Today we resume discussion of the future of the Federal Water Pollution Control Act, the Clean Water Act of 1972.

Over the past three decades, this legislation and its predecessors, going back to the work of my predecessor in Congress, John Blatnik, who once chaired this Committee and authored the very—well, not quite the very first, there was a 1948 Act, but the major restatement of purpose, statement of objectives for clean water was in 1956 with the Blatnik legislation that set up essentially the structure we have today, of grants to municipalities, although the grants are gone now, they are now replaced by loans, to build sewage treatment facilities. Mr. Blatnik said, at the end of the day you have to build a plant to clean up the waste. Two, an enforcement program; three, research and development. Those are essentially the three structures of the Act today.

That initiative, the Federal-State partnership created in 1956 and restated in 1965 and reaffirmed in 1972 is still the cornerstone of this legislation, and it has taken us from two-thirds of the Nation's waters being polluted and unaccepted for body contact activities, for fishing and recreational activities, to less than one-third of the waters not meeting fishable and swimmable standards. We have gone from the days of the Cuyahoga River catching fire and soap suds floating down the Ohio-Illinois river system, soap coming out of people's faucets when they turned on the water for drinking water, to dependable sources of clean water.

For over 30 years, the industrial sector, agriculture, municipalities worked in cooperation with States and the Federal Government, EPA, and the Corps of Engineers toward the purpose of the Act, stated in the opening paragraph: "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." That is in the opening paragraph of the Act.

And I say, parenthetically, I was chief of staff at the time we crafted that legislation. Many of the House-Senate conferences meetings were held right here in this room. We didn't have as

many seats for Members in those days, we only had these two rows; that lower row didn't exist at the time, so we had a big space. Those were rigorously debated conference meetings, over 10 months, not of cameo appearances, but intense discussions—Senators on the one side, House Members on the other, staff on both sides—and hammered out, piece by piece, the purpose and the specifics of that legislation.

Of course, not everybody was happy with the legislation, When Richard Nixon vetoed the Clean Water Act of 1972, Congress overrode by a 10 to 1 vote, overrode that veto. That meant that 90 percent of Republicans and 95 to 100 percent of Democrats voted to override.

Then along comes the Supreme Court and two decisions—the SWANCC case, Solid Waste Agency of Northern Cook County, in 2001, and the Rapanos case five years later—that confused the scene. As Justice Stevens said, "The decision needlessly weakened our principal safeguard against toxic water."

Left behind in the wake of those decisions was what you can charitably call regulatory confusion, maybe even chaos. But I believe that we can correct it. I think we can take the effect of the two Supreme Court decisions—confusion, inconsistency, uncertainty about how to apply the Act—and repair it. The goal of the 1972 Act was very clearly to avoid pollution havens. Upstream States didn't want to be in a position where downstream States could outdo them or attract business on the grounds that they wouldn't have to clean up as much as in other places. States clearly said to the Congress—the House, the Senate—we want a baseline consistent Federal standard so that industry could not be enticed from one State to a laissez faire State; and that is largely what prevailed over the ensuing 30 years.

Now we have a regulatory miasma. It wasn't created by the Congress, but it is our duty to clarify it. We need to look back at the fundamental principles of the Clean Water Act and its predecessor legislation to reaffirm the partnership between the Federal Government and the States to restore and maintain the integrity of the Nation's waters, and to proceed to continue with the central thrust of the Clean Water Act: a watershed approach to establishing and maintaining clean water.

A central purpose of the Clean Water Act was control of point sources—and establishing a basis for dealing with non-point sources was to be done in time—and to provide Federal financial support to the States to carry out their end of the bargain. The Clean Water Act, as amended, recognized very distinct categories of unique activities: agricultural return flows in the 1977 Act, agriculture return flows exempted; stormwater runoff from oil, gas, and mining exempted; maintenance of structures such as dikes, dams, levees, riprap, breakwaters, causeways, transportation structures exempted; construction or maintenance of farm or stock ponds and irrigation ditches, again, clear consensus, exempted; construction of temporary sedimentation basins exempted; moving of mining equipment, construction or maintenance of farm roads and forest roads, or temporary roads for mining equipment also exempted; and activities where States have an approved program to manage.

All those were part and parcel of the Clean Water Act which now are put in question by the Supreme Court decision.

Over the last seven years, I have laid on the table a proposal to address this regulatory uncertainty and chaos by what I consider to be misguided Supreme Court decisions, and after years of no action and no consideration, we have had a major hearing, we have launched a major debate nationally, and discussion within the Committee on the proposal I have set forward. The goal of the legislative proposal is to restore the Clean Water Act protections in place prior to the Supreme Court decision and not to extend the reach, not to go beyond that purpose. The pre-SWANCC and pre-Rapanos regulatory era define the universe of the Clean Water Act very broadly: to allow EPA and the Corps of Engineers and the States to address the water quality concerns where they found them and this broad, and largely undefined structure worked relatively well for over 30 years.

Now, implementation has also needed streamlining. There is no question about that. To the extent we can simplify practices, streamline permitting process, we ought to attempt to do that, provided we do not shortcut environmental values; and I welcome recommendations. Previous practice also was backed by science, viewing the natural water environment as interconnected, and that is a matter that needs to be continued, stressing the role of protecting geographically isolated, intermittent, in some cases so-called ephemeral headwater streams, to protect total water quality. It is a common sense approach. It is cost-effective and it is, in a practical sense, effective in protecting pollutants from entering a water body, much more efficiently than trying to remove them once they go downstream.

My legislation is not intended to ignite old debates that existed 35 years ago and that were resolved with the enactment of Clean Water Act, but to put the Clean Water Act back on the track that it was prior to these two Court decisions. We had a previous hearing in which we received a wide range of views. The purpose of today's hearing is to continue to receive specific recommendations from a wide range of affected and interested parties on how to proceed in the post-SWANCC-Rapanos era and what specific adjustments they recommend to the introduced bill.

I invite constructive proposals and remain open to adaptations to this bill, and I look forward to working with Mr. Mica and Mr. Boozman, along with Members on our side of the aisle, on constructive proposals to make these adaptations. And I reaffirm that the introduced bill is not an inflexible document, but a starting point for discussion, and I look forward to today's hearing.

I now recognize the distinguished gentleman from Florida, Ranking Member Mr. Mica.

Mr. MICA. Well, thank you, Mr. Chairman. I am pleased today to participate in the hearing on H.R. 2421. We are going to have an opportunity to carefully review Mr. Oberstar's proposed legislation that would fundamentally alter the course of water regulation. I believe Mr. Oberstar has some very good intentions, but we have to look at the consequences of the language that we have before us.

Mr. Oberstar and I usually try to work out our differences on most issues before the Committee, and I appreciate his willingness

to work with us. However, in its present form, H.R. 2421, I do not agree with the way the language has been drafted. And I might say that my interpretation is similar to hundreds of organizations representing millions of citizens across the Country. In fact, this is just some of the organizations, and I am going to ask if we can list them in the Congressional Record.

Mr. OBERSTAR. In the hearing record.

Mr. MICA. What did I say? Congressional Record. Sorry. In the hearing record.

[Information follows:]

## Submissions for the Hearing Record

The following organizations submitted written statements to the Committee on Transportation and Infrastructure in relation to the hearing on "The Clean Water Restoration Act."

These statements are on file with the Committee on Transportation and Infrastructure.

- American Forest & Paper Association
- American Petroleum Institute, American Exploration & Production Council, Independent Petroleum Association of America, Petroleum Equipment Suppliers Association, and US Oil & Gas Association (Joint Submission)
- American Road & Transportation Builders Association
- American Sportfishing Association, Ducks Unlimited, Izaak Walton League of America, National Wildlife Federation, Theodore Roosevelt Conservation Partnership, Trout Unlimited, and The Wildlife Society (Joint Submission)
- Associated Builders and Contractors, Inc.
- Associated General Contractors of America
- Statement of Commissioner Colleen Landkamer, Blue Earth County, Minnesota
- California Association of Sanitation Agencies and Association of California Water Agencies (Joint Submission)
- Central Arizona Water Conservation District
- Chamber of Commerce of the United States of America
- Statement of Brad Goehring, Goehring Vineyards Inc., Clements, CA.
- Imperial Irrigation District
- Mississippi Flyway Council
- National Association of Flood and Stormwater Management Agencies
- The National Association of Home Builders
- National Cattlemen's Beef Association
- National Stone, Sand & Gravel Association
- Oregon Cattlemen's Association

Mr. MICA. In addition, I have to say, again, in 16 years—and certainly in my short tenure as Ranking Member—I have never heard from so many people opposed to one piece of legislation. In fact, this is just a sampling—and I won't ask to have all these put in the record. This is just a sampling of correspondence I have in opposition to this particular piece of legislation. I did not solicit one letter or request.

I will have a request—I don't want to put these and some of the others in the record—I think it wouldn't do justice for the taxpayers, because it is pretty extensive—but I will have a request later on at the end of my remarks for unanimous consent to put some principal organizations' comments and letters in the record.

I am afraid, too, as Americans begin to realize the potentially harsh consequences of the legislation in its current form, that opposition will expand even beyond what we see here. Unlike the initial description of this bill, it in fact is far from being a simple restoration of what has been termed prior regulatory regime or practice. Put very simply, this legislation represents a hallmark example of pushing an agenda item right now that I think could be very disastrous to the economy and could have disastrous consequences to agriculture, personal land rights, the rights of States and localities to manage their own water resources.

It is said that this action is needed to clarify the jurisdictions of the Clean Water Act after recent Supreme Court decisions allegedly created some ambiguities. Again, I think Mr. Oberstar has very good intentions, but, again, we have to look at the consequences of the language and the action the legislation would institute. Some believe that the solution to this problem is just to expand Federal Government regulatory authority over everything, so under this bill, if you do that, there will be no limit. Certainly there will be no ambiguity because there is no limit to Federal jurisdiction over all things involving water. Unfortunately, the results would be an unprecedented and historic Federal jurisdictional grab, and I don't think that is the intent.

A person does not need to be a rocket scientist to recognize when you remove the word "navigable" from the jurisdictional description, navigable waters of the United States, what will really result is we will have a massive expansion of Federal regulatory authority. To suggest otherwise sort of defies any common sense interpretation of what you have done, again, with changing this language.

To subject ditches, retention ponds, stormwater runoff, water in a field, or pool in a backyard to be a body of water in need of Federal regulation somehow defies common sense. Federal regulation of virtually every wet area in the Country is not needed and it is not necessary. Unfortunately, there are some folks who do support this, and some on both sides of the aisle. Some of them may feel this is a quid pro quo for their environmental agenda.

However, creating the tools which will effectively cripple U.S. agriculture, energy production, economic development which will end up in a morass of lawsuits, new legal interpretations and entanglements, and over-reaching regulation, that is my fear. By throwing out 35 years of Clean Water Act jurisprudence, we will create chaos, I am afraid, unlike anything we have seen in the courts—

Federal courts, the Supreme Court—and attempting to redefine the new constitutional limits of Federal authority.

The reality is that there is no evidence that any endangered wetland or other important aquatic ecosystems are being destroyed or being harmed around the Nation as a result of the Supreme Court cases and the agency's new guidance. The guidelines in place protect the natural interest in clean water, while respecting the rights of individuals, States, Tribes, and local governments to manage their own resources.

The Committee has not even given time for the ink to dry on the new guidelines the Administration has issued with respect to specifically help move along the permitting backlog and also provide even more clarification beyond that of the 35-year legal structure. Unfortunately, sometimes facts are not allowed to interfere with political rhetoric or agendas and, in the end, H.R. 2421, I am afraid, will simply muddy the waters, ponds, pools, gutters, spouts, ditches in courtrooms across our great Nation. In fact, what I am concerned about is it will cloud, rather than clear, our water's future in this Country.

There are a large number of witnesses today, and the comments of the last panel may not be heard over the noise of the nightly cleaning crew that comes in late. This is going to go on for some time, folks. So let me share a couple of points that they make, not that I am making.

Mr. OBERSTAR. I will be here to hear them.

Mr. MICA. I am sure. And they will be part of the record, but I want a couple of them made up front here.

Mr. Shaffer, of the American Farm Bureau Federation, states that activists have already used the courts to drag agriculture operations into a regulatory quagmire. If H.R. 2421 were to become law, the Farm Bureau predicts that we can expect more litigation, more regulation, and an escalation of the cost to comply. The results will be harmful to the Nation's ability to competitively produce food and fiber. That is Mr. Shaffer of the American Farm Bureau.

Mr. Quinn, representing the National Mining Association, testifies that the proposed changes will greatly increase the time and costs required to move through the permitting process. The result would be a permitting system that is not capable of producing reasonable decisions in a reasonable time frame.

In addition, I am going to ask to have submitted by unanimous consent a letter from the United States Chamber of Commerce. They comment in a letter to the Committee that the existing State and local permitting programs will be made in conflict, if not completely eradicated, by H.R. 2421. Again, these are their comments, not mine. Land and water use decisions, the Chamber also says, that once belonged to State and local governments would become the jurisdiction of the Federal Government and the cost of complying with new regulations and requirements would amount to an unfunded mandate on the States.

These are a few of the comments, again, and I have a request. I would like, if I could, the Chamber of Commerce, Associated Contractors of America, and National Stone and Gravel Association, American Road and Transportation Builders, American Forest and

Paper Association, American Petroleum Institute, the Central Arizona Water Conservation District, the California Association of Sanitation Agencies, the Imperial Irrigation District, and the Oregon Cattlemen's Association as a sampling of these letters I received. I would like unanimous consent that they be made part of the record.

Mr. OBERSTAR. The Chair will evaluate the length of the documentation——

Mr. MICA. And if at least reference would be made.

Mr. OBERSTAR. Not all of the documentation is necessary, but it will be received for the hearing record, but not all documentation.

Mr. MICA. So, finally, a point that I want to make at this time, this probably couldn't come at a worse time, because right now we have troubled economic waters and this legislation, I am afraid if we move forward with it, would put another nail in our economic coffin, creating even more uncertainty than we already have in the marketplace and driving up the cost of producing almost any kind of U.S. product.

This legislation would also make it harder for our crippled housing industry, which has really taken some blows, to come back from its downturn and will require more regulation, spawn more litigation, and generally increase the cost of every new home constructed in America. This legislation would also have a dramatic negative impact on America's agribusiness. If you think food prices are high now, you have been to the store and seen sticker shock, this has potential for creating even higher food prices, cause further damage to United States manufacturing ability, and create an unprecedented flight of jobs to third world countries, because people will move those activities where you don't have this kind of regulation and litigation that will result.

I appreciate Mr. Oberstar's incredible dedication to values of clean water. He is committed, as I am, to making certain that our waters are clean and our streams, rivers, and navigable waters of the United States are protected. However, I believe that the Federal response must be measured in order to accomplish the ultimate goal and not actually take steps back. So I can't support the proposal in its present form, but I sincerely offer all the resources of the Committee.

I know Mr. Boozman is committed to work—he has just taken over as our Ranking Member—will work with Ms. Johnson, Mr. Oberstar, and the staffs are ready to work with you 24/7. So if we do correct some of the flaws in this legislation, we do it together in the best interest of the Country.

Thank you, and I yield back the balance of my time.

Mr. OBERSTAR. There was no balance of time.

[Laughter.]

Mr. OBERSTAR. The gentleman has as much time as he needs to express his views, and I appreciate the alarmist statement on the introduced bill. As I said at the outset, this is a proposal. For six years we haven't had a hearing on this legislation. We have now had one and we are going through a very extensive second hearing. We open this to all viewpoints and seek common understanding to address worst fears, worst concerns of people.

As I said in my opening remarks here and in the previous hearing, I invited constructive proposals and open to adaptations. This is not an inflexible document, the introduced bill. It is a starting point for discussion, and we need to understand what people's concerns are and to address this. The objective is to return to the pre-Rapanos, pre-SWANCC state of management of the Nation's waters and to assure that all the water we ever had and ever will have on earth is with us today and that we pass it on to the next generation in a better state than we found it.

I appreciate the gentleman's statement about letters and statements that he has received. We have got at least as many, if not more. We have over 300 organizations that are supporting the introduced bill. But, as I said, the objective is to make adaptations to move ahead, and we have our starting panel of very distinguished witnesses with specific expertise in the subject matter and very technical issues before us, and we will start with Assistant Secretary Woodley.

Mr. YOUNG. Mr. Chairman? May I ask for unanimous consent to submit for the record an opening statement?

Mr. OBERSTAR. The gentleman from Alaska is recognized and the opening statement will be submitted without objection.

Mr. RAHALL. Mr. Chairman, do all Members have that opportunity?

Mr. OBERSTAR. All Members will be given unanimous consent to include their statements for the record. It goes without saying.

Mr. BOOZMAN. Mr. Chairman?

Mr. OBERSTAR. Mr. Boozman.

Mr. BOOZMAN. Could I say something in my new position?

Mr. OBERSTAR. The gentleman is recognized.

Mr. BOOZMAN. Thank you, Mr. Chairman. This really is important. I want to thank you, first of all, for your hard work and the fact that you were there and a player in the original Clean Water Act. I think that this is something that we can look at. Sometimes Government screws things up, but the tremendous gains that have been made as a result of the Clean Water Act I think Congress can be very, very proud of.

I grew up in Fort Smith, Arkansas and occasionally went fishing on the Arkansas River, and in the 1960s, early 1970s the place was a cesspool. Now, people water ski and things like that, again, as a direct result of the actions of this.

I do think, though, that the Supreme Court made a correct decision based on the Constitution in that there are boundaries over Federal intrusion on State and local jurisdiction. The extent of Federal jurisdiction should not be boundless. State and local governments and, indeed, private property owners should have a role in managing their resources. The Federal agencies are getting experience with the new guidelines. I think we would like to see some recommendations at a later date from the agencies that suggest legislative changes that need to be made, if any, to help them run a program in an efficient manner and in a way that protects the important water resources, but also protects the rights of States, local governments, and personal property owners to manage their own resources.

I am concerned that the Chairman's bill, H.R. 2421, the Clean Water Restoration Act, will substitute a more reasoned approach to the regulation of important waters and, instead, expand it to the fullest extent to cover activities that were never intended to be covered. And I think we will hear testimony today that that even extends perhaps even to activities that take place on dry land and even in the sky. We don't even truly know the extent of the bill's reach. That would be determined over time to the extensive litigation that the bill would cause. But it is hard to imagine a more expansive piece of legislation.

So I look forward to hearing the witnesses today. And then again, I hope that if we do embark on a significant change, that we will do the due diligence that was done in the last Congress, that if we look at the history, the testimony, the tremendous amount of work that went into that as we tinker with this, I hope that we will do the due diligence of the future.

Thank you very much, Mr. Chairman.

Mr. OBERSTAR. Thank you for your comments. I look forward to working with the gentleman and with Members of both sides of the aisle to achieve the purpose of this legislation, simply to restore the original purpose and operation of the Clean Water Act.

Now we will begin with Mr. Woodley. Secretary, welcome. Thank you.

**TESTIMONY OF SECRETARY JOHN PAUL WOODLEY, JR., ASSISTANT SECRETARY OF THE ARMY FOR CIVIL WORKS; CHIEF ARLEN LANCASTER, UNITED STATES DEPARTMENT OF AGRICULTURE, NATURAL RESOURCES CONSERVATION SERVICE; THE HONORABLE BENJAMIN H. GRUMBLES, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ASSISTANT ADMINISTRATOR FOR WATER; AND JOHN C. CRUDEN, DEPUTY ASSISTANT ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE, ENVIRONMENT AND NATURAL RESOURCES DIVISION**

Mr. WOODLEY. Good morning, Mr. Chairman and Members of the Committee. I am pleased to be here this morning to speak to you about the Army's Clean Water Act Regulatory Program and its implementation.

This Administration has supported the Regulatory Program and wetlands protection by requesting increases in funding from $138 million in fiscal year 2003 to $180 million in fiscal year 2009, a 30 percent increase. The Corps will continue to administer this program to the best of its ability with the resources provided, but certainly, Mr. Chairman, we will need the Administration's fiscal year 2009 request to be fully funded if we are to provide the level of effective environmental protection and timely service to permit applicants that we have provided in the past.

We have also worked to improve the program performance predictability and transparency. A new compensatory and mitigation rule was published earlier this month; new and improved nationwide permits were issued in March of last year; a new web-based tool is now on record and document information on authorized activities and mitigation; and we have implemented the GAO rec-

ommendations related to documentation, mitigation monitoring, database development, and interagency coordination.

Now I would like to briefly discuss how the two Supreme Court decisions, SWANCC and Rapanos, have affected the regulatory program and how we have responded.

In SWANCC, the Supreme Court held in 2001 the Corps could not assert Clean Water Act jurisdiction over isolated, non-navigable, intrastate waters based solely on their use as habitat by migratory birds.

Clarifying guidance was published by Army Civil Works and EPA reflecting this decision on the use of the migratory bird rule as the sole basis of jurisdiction. As a result of that decision, the Corps—and then in Rapanos, in 2006, the Supreme Court required that Federal jurisdiction extended only to water bodies that are traditional navigable waters or that significantly affect the physical, chemical, or biological integrity of traditional navigable waters.

As a result of the Rapanos decision, the Corps will continue to, first, categorically assert clean water jurisdiction over traditional navigable waters, wetlands adjacent to traditional navigable waters, relatively permanent tributaries, and wetlands directly abutting such relatively permanent tributaries. Second, the Corps will determine whether certain waters have a significant nexus with traditional navigable waters. This means the Corps will determine and document whether or not a tributary, together with its adjacent wetlands, has more than an insubstantial or speculative effect on the chemical, physical, and/or biological integrity of the downstream navigable water. The kind of water falling into this category includes non-relatively permanent tributaries, wetlands adjacent to such tributaries, and wetlands adjacent but not directly abutting relatively permanent tributaries. Third, the Corps will generally not assert jurisdiction over erosion features, upland swales, small washes, and many ditches excavated wholly in and draining only uplands.

Based on the 62,000 comments received, of which 1500 are substantive, and 18,000 jurisdictional determinations made, the agencies are considering whether to revise, reissue, or suspend that guidance.

Mr. Chairman, I understand that the intent of H.R. 2421 is to recapture those isolated and ephemeral features and associated wetlands that were determined not to be jurisdictional in the Supreme Court holdings in SWANCC and Rapanos, regardless of whether they affect the physical, chemical, and biological integrity of navigable waters. The Supreme Court in these decisions limited its jurisdiction based on interpretations of the intent of Congress, and in implementing the Court's decision, our approach has been not to focus on a particular physical or geographical target for limits of jurisdiction, but to make these determinations based on a scientific, fact-based analysis with the potential effects of these waters and their adjacent wetlands on the physical, chemical, and biological integrity of navigable waters the focus of the current law.

We do have several serious concerns with the draft legislation as we understand it. First, it appears the general consequence of the legislation would be to extend jurisdiction beyond those waters de-

termined not to be jurisdictional under SWANCC and Rapanos. This appears to go beyond the original intent of Congress in establishing jurisdictional reach of the Clean Water Act, which reflected a careful balance between legitimate and important Federal interest in protecting water quality and equally important and longstanding interest of the States in managing and allocating water within their boundaries.

In addition to these serious concerns, we have a number of questions that we would like to ask and the Committee may consider: Is it appropriate to upset the Federal-State balance established in the original Clean Water Act? How will removing this term "navigable" from the Clean Water Act affect the implementation? Will this extension of Federal jurisdiction significantly increase cost to small landowners and other interests? And what would be the budgetary workload and processing time implications for Corps regulatory jurisdiction?

Because the bill specifically refers to perennial and intermittent waters, one might conclude that the bill intends that ephemeral features, which are currently evaluated under the Corps significant nexus test are intended by the bill to actually be removed from Federal jurisdiction. Further, it is not clear whether the phrase "activities affecting waters of the United States" might mean, as the term seems to be essentially without boundaries.

Mr. Chairman, certainly, we look forward to working with the Committee to explore these questions and to ensure that any legislative change in the Clean Water Act is carefully thought through with all of its implications considered.

Mr. OBERSTAR. Thank you, Mr. Secretary. I think those comments are very targeted, very specific, and I will come back to you with questions about specifics.

Now, Mr. Lancaster, Chief of the Natural Resources Conservation Service at USDA. Thank you for being with us.

Mr. LANCASTER. Thank you, Mr. Chairman, Members of the Committee. Thank you for the opportunity to discuss the activities of the National Resources Conservation Service. My full statement has been submitted for the record.

Mr. OBERSTAR. Without objection, the statement will be included in the record.

Mr. LANCASTER. NRCS works to assist producers in meeting their conservation goals through our technical and financial assistance programs. We support private landowners and conservation partners in efforts to restore, enhance, and maintain our Nation's natural resources, including valuable water and wetland resources.

It is clear from our experience that farmers and ranchers know that profitable farming and maintaining clean water supplies go hand in hand.

Based on data from NRCS's national resources inventory, farmers and ranchers are protecting and restoring wetlands at historic rates. Between 1997 and 2003, agricultural producers across the Nation achieved an average net gain of 44,000 acres of wetlands each and every year. USDA is also contributing significantly to the President's goal for overall increases in wetlands by protecting, improving, and restoring 3 million acres of wetlands by 2009. On

Earth Day last year, progress towards that 3 million acre goal stood at nearly 2.8 million acres.

A number of USDA's activities greatly contribute towards those wetland and water quality objectives, including our conservation compliance activities, STET voluntary land retirement programs, and our conservation cost share assistance programs.

USDA utilizes conservation compliance authorities to discourage the production of agricultural commodities on converted wetlands and highly erodible lands. For purposes of the Food Security Act, wetlands compliance, known as Swampbusters, and highly erodible land requirements must be met. Violations result in loss of eligibility for USDA benefits.

Through Swampbuster, producers have sharply reduced wetland conversions from agricultural uses, from 235,000 acres per year before 1985 to 27,000 acres per year from 1992 through 1997; and our reviews of Swampbuster efforts indicate continued increasing producer compliance levels for the program.

Highly erodable land compliance associated with our conservation programs has resulted in a reduction of nationwide soil erosion of 43 percent from 1982 through 2003, and a corresponding reduction in nitrogen and phosphorus entering our Nation's waters.

I would be remiss if I did not also mention USDA has proposed a third compliance mechanism for the next Farm Bill. The Sodsaver proposal would discourage conversion of range land and native grassland in a manner similar to the current Swampbuster provisions for the conversion of wetlands.

USDA also offers important land retirement programs that assist in the creation, improvement, and restoration of wetlands. The Wetlands Reserve Program, or WRP, is a voluntary program through which landowners restore and protect wetlands, in most cases with long-term or permanent easements. Private landowners have enrolled over 1.9 million acres in this program through fiscal year 2007, and demand for WRP continues to grow as producers seek to continue to enroll their lands in this important program.

The Conservation Reserve Program helps producers safeguard environmentally sensitive land. Producers enrolled in CRP plant perennial vegetation to improve water quality, control soil erosion, and enhance wildlife habitat in return for rental payments.

A majority of the over 34 million acres enrolled in CRP consist of environmentally sensitive upland fields; however, USDA has also enrolled 2 million acres of wetlands with associated protective buffers in this program.

One of the key focuses of NRCS regarding water quality improvements are a voluntary working lands program such as the Environmental Quality Incentives Program, or EQIP. EQIP helps producers achieve both their conservation and business goals, as well as meet regulatory challenges. Between 2002 and 2006, nearly 185,000 participants received more than $3 billion in cost share and incentive payments under EQIP for the implementation of structural and management conservation practices.

An example of work in the regulatory realm, since 2002, NRCS has helped producers develop 32,000 comprehensive nutrient management plans that can help animal feeding operations comply with regulatory requirements should their operations fall under the

Clean Water Act's Concentrated Animal Feeding Operation, or CAFO, provisions.

In summary, USDA believes that NRCS authorities for wetlands compliance and restoration activities under the Farm Bill would not be affected by the proposed legislation. Since our authorities are not associated with the Clean Water Act, the change in definition would not impact our implementation. It is, however, possible that enactment of H.R. 2421 would lead to more producers falling under the regulatory purview of the Clean Water Act, which in turn could lead to increased compliance costs for producers and demands for our already over-subscribed assistance.

As we look ahead, Mr. Chairman, it is clear that farmers and ranchers are making significant wetland improvements and water quality gains through voluntary incentive-based activities. We want to build on that success. The challenges before the Nation to protect and improve wetland resources will require the dedication of all available resources, the skills and expertise of NRCS staff, contributions of volunteers, continued collaboration with partners—including local, State, and Federal agencies—to provide farmers and ranchers the best information and assistance possible to better able them to continue to protect, enhance, and restore our wetland resources.

I would be happy to respond to any questions.

Mr. OBERSTAR. Thank you very much. I appreciate your excellent statement, which I found very fascinating. I read the entire statement. I appreciate very much your contribution.

Now Ben Grumbles, Assistant Administrator, U.S. EPA, but better known as a former staff member of the Committee.

Mr. GRUMBLES. Thank you, Mr. Chairman. Always an honor to appear before you and your colleagues on this great Committee.

As you know, the objective of the Clean Water Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters, and that includes wetlands. All wetlands and waters have value. All wetlands and waters have some ecological functions. But not all wetlands and waters are subject to Federal regulation under the Clean Water Act, and I think you know that very well.

This Country has made tremendous progress to achieve that objective of the Clean Water Act as it relates to wetlands. In the 1970s, this Country was losing 290,000 acres a year of wetlands. Now we estimate that there is actually a net gain of wetlands, 32,000 acres a year. That doesn't mean we can't and shouldn't stop working hard to use the regulatory tools, because we are losing certain valuable wetlands and we need to continue to be vigilant. And in that regard, this Administration is fully committed to protecting and restoring wetlands, and not just ensuring no net loss, but as the President stated on Earth Day, moving towards an overall gain in the quality and quantity of the Nation's wetlands.

John Paul Woodley and I are very pleased with the compensatory mitigation rule that was recently issued. We feel that that is a market-based way to help ensure no net loss of wetlands and it is a sign of 21st century ways to conserve wetlands and protect them.

The SWANCC and Rapanos guidance are very important; they are in response to the Supreme Court decisions. The Rapanos guid-

ance that John Paul Woodley and I issued in June of last year we believe provides needed clarity and helps to increase consistency and predictability in light of the Supreme Court decisions. But we also realize much more work needs to be done. The guidance laid out specifics of not just one of the tests, the Scalia test or the Kennedy test, but described both of them and that we would use either one; and it was accompanied by a very detailed handbook and instruction manual.

We took nine months of comments and have been field-testing that guidance. The received comments, essentially, to summarize it crudely, many in the regulated community thought we went too far, and some in the environmental community thought we didn't go far enough. We also got some very good comments about suggestions on how to streamline the process in terms of jurisdictional determinations. We are taking that very seriously and we are looking to our next steps to review, revise, or suspend the guidance in the coming weeks.

In terms of your legislation, H.R. 2421, Mr. Chairman, I am encouraged by the comments you have made at this hearing about being open to change and clarification and adaptability. As is stated in our written testimony, in mine, we do have concerns about the legislation in its current form, programmatic impacts in particular. I think it is very important to be able to answer those relevant questions about the prior converted crop lands and about waste treatment systems, very important existing exemptions that aren't addressed directly in the legislation.

I also think it is very important to look at other areas, such as permit streamlining and how can the agencies and Congress work to provide more incentives and encouragement for States to assume the 404 program under 404(g) and (h). Only a couple States have done that to date, and we think, in the interest of federalism and increased wetlands conservation, that is a very important area for the Congress to look at.

Mr. Chairman, we stand ready to work with you and your colleagues to improve the legislation. We are very committed to ensuring continued progress on implementing the guidance and working to use the tools under the Clean Water Act, as well as other tools, cooperative conservation tools, with our partners at USDA and Interior to continue to work to protect and restore America's wetlands and waters. We feel that by working together we can all make progress towards that objective of restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters, including wetlands.

Thank you.

Mr. OBERSTAR. Thank you very much, Mr. Grumbles, Mr. Secretary, for your contribution, for your thoughts. I know that in you we have a seasoned, experienced practitioner and that we can work our way through these issues. Your comments on streamlining, I think, are very important. We look forward to pursuing your further thoughts about that and your reaffirmation of the no-net loss policy of the first Bush Administration and affirmation, as Mr. Woodley said, that the Clean Water Act is a key part of the President's wetlands policy. Those are very, very important contributions.

Mr. Cruden, we do have a vote in progress; we have 10 minutes remaining. I would like to have your statement on record before we break for the vote.

Mr. CRUDEN. Mr. Chairman and Members of the Committee, thank you very much for inviting me to testify. You have my full statement. I am a Deputy Assistant Attorney General with the Environment and Natural Resources Division at Department of Justice. We do all of the Federal environmental litigation, including well over 7,000 cases involving over 70 statutes. An important statute, one that we are dedicated to enforce and protect is the Clean Water Act, and we normally do that on behalf of the Environmental Protection Agency and the Corps of Engineers. They, of course, have broader authority and administrative enforcement, which we are not often involved in.

When we litigate any of our cases, but particularly those involving the Clean Water Act—whether or not we are enforcing against a company that is illegally discharging or we are trying to protect wetlands—our first step is always to look at the statute. And, as has been repeated today many times already, that statute directs us to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.

The cornerstone of that great statute is section 301, which prohibits the discharge of a pollutant from a point source without a permit. As all of you know, the discharge of a pollutant is defined by the Act as any addition of any pollutant to navigable waters, and navigable waters is further defined as the waters of the United States. EPA and the Corps of Engineers have regulations defining and implementing that term, and we have been litigating those issues for many years.

A significant trio of Supreme Court decisions have focused on Clean Water Act issues in general, and more specifically, section 404, which is the wetlands protection section.

The Riverside Bayview decision in 1985 addressed one key issue, and that was whether or not the Corps was authorized to require landowners to obtain permits before discharging fill material into wetlands adjacent to navigable bodies of water and their tributaries. The Supreme Court unanimously agreed.

Then later, in SWANCC, the Supreme Court decided that isolated, non-navigable, intrastate waters did not become waters of the United States based solely on migratory bird usage.

The Rapanos case, however, requires a bit more explanation. The judgment of the Supreme Court was to vacate the two decisions of the Sixth Circuit, but there was no majority opinion. Instead, we had five separate opinions, including a plurality opinion authored by Justice Scalia and a concurring opinion by Justice Kennedy.

But I want to point out one thing that is often overlooked about the Rapanos decision. The one issue that all Justices agreed on is that they rejected the position that waters of the United States were limited to navigable—in fact—waters. That was rejected.

But the plurality opinion has a two-part test: whether the wetlands in question are near waters with a relatively permanent flow and, if they are, whether the wetlands are adjacent to those waters in the sense of having a continuous surface connection. Justice Kennedy concurred in the judgment of the Court, but he had a dif-

ferent standard. He asserts that we should be looking at whether or not the specific wetland in question possesses a significant nexus to the traditional navigable waters.

Applying Rapanos has been challenging. The Department has vigorously litigated the position that we can establish jurisdiction by meeting either the test authored by Justice Scalia or the test authored by Justice Kennedy. We believe that is the best way to fulfill the statutory mandate and is in keeping with the decision.

In the 22 months since Rapanos was decided, the Department has now filed more than 45 briefs in over 30 Federal court proceedings in which this issue was in question. Right now we have about 20 decisions applying the Federal Rapanos standards. In my prepared testimony there is a table summarizing those decisions. We have done well in many cases, but not in all.

Our intent at the Department of Justice is to move aggressively forward in every case to protect wetlands and to do that consistent with the statute, the core regulations, and applicable case law.

I look forward to your questions. Thank you.

Mr. OBERSTAR. Thank you for a very thoughtful and far-reaching discussion of the Act and of the court cases, and for the substantive backup in your written statement, which will be included in the record. I want to explore those issues further with you.

But we will recess for the vote and resume within 15 minutes after completion of the last vote in this series.

Committee stands in recess.

[Recess.]

Mr. OBERSTAR. I have a question for Mr. Cruden that I thought would be the lead-off question, but we will wait until he returns.

Mr. Grumbles and Mr. Woodley, when he returns, what would be the effect of leaving in place the term "navigable waters" where it appears in the Clean Water Act, not deleting that reference, as proposed in the introduced bill, and including legislative reference to the prior—that is, prior to Supreme Court decision—regulatory rules published by EPA and the Corps?

Mr. GRUMBLES. A reference to all of the regulatory rules published by EPA and the Corps or some of them?

Mr. OBERSTAR. Or some selected ones that are pertinent to the issues that we are concerned about. Pertinent to, let us say, the eight exemptions provided in the Clean Water Act on which there is a regulatory body.

Mr. GRUMBLES. Well,——

Mr. OBERSTAR. And a reference to prior converted farmland.

Mr. GRUMBLES. And waste treatment systems?

Mr. OBERSTAR. Yes.

Mr. GRUMBLES. My initial response is—well, the obvious initial response is that this would be something that we would want to look at, the lawyers in the agency, EPA in particular, to see how that would play out, the new language you are adding. I am assuming your question also assumes that you would keep in language in the bill that uses a new term, in lieu of using the term "discharge" uses the term "activities," that any activities affecting waters of the U.S. would be subject to permitting. So I think that would still——

Mr. OBERSTAR. The question is—that is a separate issue——

Mr. GRUMBLES. Okay.

Mr. OBERSTAR.—because the question with respect to that matter is does that extend beyond the reach of the Clean Water Act as we knew it prior to SWANCC.

Mr. GRUMBLES. Right.

Mr. OBERSTAR. That is a separate question you can answer.

Mr. GRUMBLES. I think there could also be some questions asked about the applicability date or retroactivity of the language of the legislation. I would say that we would need to look at it closely and carefully. I would also say that by leaving in the term "navigable waters," that would be a step towards reducing a potential wave of litigation over constitutional issues. It still, I think, would be important to look at the full array of what the bill would look like, even if you change it to leave in the term "navigable waters" and then, as I understand the question, you would then be referencing in some way—and I think it would be important to see exactly how you would reference all the existing regs that the Corps and EPA have issued; you said eight exemptions or provisions. So it is something we would commit to look at and to give you our best guess on what the impact would be.

Mr. OBERSTAR. I don't know if you can read it up there on the screen. This is a document of the specific EPA and Corps regulations: all waters currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters subject to the ebb and flow of the tide and the regulatory practice associated therewith.

Mr. GRUMBLES. If the intent is to try to more closely restore, rather than expand, jurisdiction, that is probably an important step in the right direction. I think, seriously, we would need to have our lawyers for the EPA and the Corps look at it more carefully, but——

Mr. OBERSTAR. Would you say conceptually that that would remove, subject to parsing words, uncertainty about application of the Clean Water Act post-SWANCC-Rapanos to a status quo ante?

Mr. GRUMBLES. Then I would ask what is the bill doing. You are attempting to overturn certain aspects of the SWANCC decision and the Rapanos decision to prevent the application of a significant nexus test or a relatively permanent waters test. I think by leaving in navigable, that is a step towards reducing potential constitutional litigation. I think what we would want to focus on in your question is exactly how you would reference what stature you would give in the reference to those existing regs while you are also adding additional provisions in the bill, new terms.

Mr. OBERSTAR. Since the concern is that changing the language as I initially proposed to do would create a great deal of uncertainty about the future, then let us leave in place navigable waters, return to the language of the conference report that said the Committee of Conference intends the widest possible application of the term "navigable waters" and "waters of the United States" to include watersheds, and that is the spirit in which the Act was administered up until SWANCC-Rapanos. So I want to restore the status quo ante.

And then the separate question is prior to SWANCC-Rapanos, did EPA and the Corps need to identify a jurisdictional nexus to

a navigable water in order to assert jurisdiction of the Clean Water Act?

Mr. GRUMBLES. Well, John Paul, if you want to also weigh in on this. Prior to SWANCC and Rapanos, under our regulations, we laid out at least seven different ways to assert jurisdiction over waters, including wetlands. One was traditional navigable waters test. We did have, in particular, one for tributaries, asserting jurisdiction over tributaries and also for adjacent wetlands. The SWANCC case was focused in on the (a)(3) waters of the regs, which is intrastate, non-navigable, isolated waters, and there we have taken the view that there needs to be some connection to commerce, an interstate commerce connection.

Mr. OBERSTAR. Have any waters lost protection as result of the two Supreme Court cases? Are there bodies of water that were considered protected pre-SWANCC-Rapanos and lost that protection subsequently?

Mr. GRUMBLES. Well, in our guidance and, so far, lessons learned in the nine months since implementation of the guidance, the June 2007 guidance, our guidance did not categorically exclude, and we didn't interpret the Supreme Court various decisions to categorically exclude certain waters. What we have found is there has been a slight, not significant, decrease in coverage in some respects, and, Mr. Chairman, obviously, when you get further up in the watershed, towards the headwaters, more into some of the ephemeral streams that are really based on the weather patterns, we have observed that there may be less likelihood of jurisdiction under the Federal Clean Water Act in those cases.

Mr. OBERSTAR. And that is a very important point. If you consider the case of New York City, which acquired the entire watershed upstate, from which their drinking water is drawn, in order to have total control of it, so they wouldn't have to go through regulatory proceedings—they just bought the land—they understand that the watershed is the beginning point of any introduction of toxics into the stream. So they acquired the watershed.

Mr. GRUMBLES. The other point is the truly isolated, intrastate, non-navigable waters, such as ponds or certain wetlands. The SWANCC case was clear that the agencies could not rely on that migratory bird, the language in the preamble of the regs, to assert jurisdiction over those. So the record is very clear that we have not seen jurisdiction asserted over isolated, intrastate, non-navigable waters in many instances.

Mr. OBERSTAR. I will come back to the migratory birds.

I just want to ask Secretary Woodley to give your response to the question I raised. Although you weren't here for the first part of the question, but you understand what I am getting at.

Mr. WOODLEY. Yes, sir. I think that the reduction in asserted jurisdiction was much more significant under the rule in the SWANCC decision than we have experienced under the Rapanos decision, although the Rapanos decision has yet to have enough experience under it to say for sure. The difference is that under the Rapanos decision, you are essentially questioning how far in the tributary system the Federal jurisdiction should go, so that you assume that the waters are connected to larger water bodies, and the

question is how far up that tributary system should we extend Federal jurisdiction.

The previous rule under the regulation was that we would assert jurisdiction over any tributary that showed an ordinary high water mark, whether ephemeral, intermittent, or perennial, and our guidance is, we believe, in line with the decision or with the opinion of Justice Kennedy, which was that the ordinary high water mark is a consideration and should be used, but he seemed to indicate that it was not sufficient by itself. We had been having a rule that the ordinary high water mark was sufficient by itself. So what we are looking for now is other indications of significant contribution or potential for impact on navigable water in addition to the ordinary high water mark.

Mr. OBERSTAR. See, there is this very extraordinary situation that results from these decisions. Are you doing a Scalia interpretation, are you doing a Kennedy interpretation, are you doing a somebody else's interpretation? These judges are sort of legislating from the bench, and when they were appointed they were given the charge to interpret the Constitution.

Mr. Cruden, my last question for this panel is my reading of the two Court cases, I do not find any question raised by the Court as to the constitutionality of the Clean Water Act.

Mr. CRUDEN. Yes and no. Neither of those decisions, as you have correctly stated, deal with the constitutionality of the statute, and they state that in the opinions. On the other hand, I have to say both decisions, certainly the SWANCC decision, written by then Chief Justice Rehnquist, and the decision in Rapanos, both say they are not dealing with the constitutional issues because the opinions are invalidating or addressing the regulatory issues. Although that is one way of not reaching the constitutional issues, both cases express some concern about constitutional issues.

I will say, in response to the other question about sort of the evolution of litigation—maybe this is helpful. When I am talking to my own lawyers about how we have evolved through these three Supreme Court cases, I very often tell them that we have gone through three different eras of litigation, which I describe as the test of "where," the test of "whether," and the test of "what." By that I mean that before SWANCC we were litigating "whether" or not something was a wetland, and very often we were proving soil hydrology or the ordinary high water mark. Then SWANCC came out and then we started litigating "where" the location of the wetland was. By that I mean, was there a hydrological connection? I think we are now going into a third era of litigation, which is "what" is that wetland. That is, "what" is the value of that wetland or, in Justice Kennedy's words, is there a significant nexus between the wetland and the traditional navigable waters? So each one of these Supreme Court cases have pushed us in litigation in a different direction than we had been before that case.

Mr. OBERSTAR. Thank you all for your contribution.

I now recognize the gentleman from Arkansas, Mr. Boozman.

Mr. BOOZMAN. Thank you, Mr. Chairman.

Again, I want to thank all of you all for the hard work, working as a team. You all have a great story to tell in the sense that the agencies have really made a tremendous impact.

Today, when I read the testimony of the proponents of the legislation, it seemed like they were really saying two things. First of all, one of their arguments was that this bill would just clarify, go back to the criteria that you all were using prior to the Rapanos decision, and that there would be no additional jurisdiction. The other argument is that the language in the bill makes it such that instead of having the problems of not knowing what was regulated, this would make it much easier in that we would have less litigation.

Can you address the first one? Again, when we compare what you were using prior to the decision that struck things down and tightened things up a little bit, can you compare that to the scope of the bill in question? In reading your testimony, I think, again, to me, it was pretty evident that you feel like the scope is going to be changed dramatically. Is that correct?

Mr. GRUMBLES. I will start. A couple points I would make, Congressman. One is the term activities, by including in the bill that it is not just the discharge of dredged or fill material that triggers a permitting requirement, but that it is activities that would do so, begs a lot of questions for the scope, how much broader might that be, does that pick up certain non-point source activities, and I think——

Mr. BOOZMAN. So could that be building?

Mr. GRUMBLES. It can be a wide array of different things, sources of diffuse pollution, but it could be building or——

Mr. BOOZMAN. But the reality is it really could be almost anything, couldn't it? I mean, that is what it is saying, is that whatever it is is affecting, then it is.

Mr. GRUMBLES. Well, it is a term that would, just from my perspective as an implementor, it would need a lot more clarification as to what it really means, and it likely would be expanding.

Mr. BOOZMAN. But it would broaden the scope of your jurisdiction.

Mr. GRUMBLES. Probably, yes. And the other point is findings are findings, but the findings do lay out a ray of additional provisions, constitutional authorities that might be used, so without further clarification could also be the basis for additional litigation, or at least uncertainty as to how the drafters really intended the bill to be implemented.

Mr. BOOZMAN. So you would say that—again, we have got 30 years of kind of grappling with the other intent—this really would put us back essentially starting over, wouldn't it, as far as trying to figure out what it means?

Mr. GRUMBLES. I wouldn't go that far. I would say that it has been a long time since the Congress has amended the 404 program, the Clean Water Act as it relates to 404 in a meaningful way, and that by adding new terms, it would require a lot of clarification and probably a fair amount of legislative history as well; and when you add new terms to an area of the law that has been one of the most litigated in the history of the Country, it is likely to add additional litigation, even if the bill is not that long.

Mr. BOOZMAN. Right.

Secretary Woodley, in your testimony, again, in my reading it, it seemed to indicate that you felt like the jurisdiction would be enhanced a fair amount. Can you comment on that, potentially?

Mr. WOODLEY. Yes, sir, probably. And I would certainly identify the same thing that Assistant Administrator Grumbles identified, and then the reference—I am a little confused in that context by the reference to intermittent and non-ephemeral streams in that same section, because we now assert jurisdiction over quite a few ephemeral streams even under the current rule, and if it was intended that those not be included, then that would actually be a contraction of jurisdiction. So there are certain elements of the statutory language that would be very much open to litigation going forward is the most I would say.

Mr. BOOZMAN. H.R. 2421, reading the statute, could that apply to groundwater?

Mr. GRUMBLES. Well, I was going to say that that is a fair question. From an EPA perspective, as we look at the geographic scope of the Clean Water Act, it is a fair question to ask. Congressman, I don't have a legal conclusion on that; I think that is a fair question to ask. And that is another example of an area that the Committee might want to clarify, as to it intent on the scope, because if the answer were yes, that would be a significant change in practice.

Mr. BOOZMAN. In your testimony, you mentioned that you had some concerns about the exemptions, the prior converted crop land and waste treatment systems, and the potential implication of the omission of those. What are the potential implications of omission?

Mr. GRUMBLES. One would be litigation, but the most important one is, over the years, since 1993, the agency, EPA, has had a regulation on the books that said prior converted crop lands, if they were converted prior to December 23rd, 1985, it would not be waters of the United States for purposes of the Clean Water Act regulation. It may well be the intent of the drafters to leave that in place; it is just that when there are certain savings clauses and provisions that are in the bill and you leave some of them out, such as the prior converted crop land one, it could be interpreted as meaning to change that. So that would lead to regulation of those prior converted crop lands if that——

Mr. BOOZMAN. The other thing is, again, for you guys, are there other potential regulatory emissions at risk. And then also the very fact that you are leaving it out, I mean, that is a statement in itself, isn't it?

Mr. GRUMBLES. It can well be. The other one that we have discussed both in the 402 permitting program and in the 404 program is the importance of the waste treatment system exclusion. And I know the Chairman has mentioned something about clarifying that as well, but that is a good example of one that people have commented on and that we have asked the question as well, is how would the bill, as it is currently drafted, apply, would it affect that or change it or reduce the ability to use that important exemption.

Mr. BOOZMAN. Well, thank you, guys.

Thank you, Mr. Chairman.

Mr. OBERSTAR. Mr. Rahall.

Mr. RAHALL. Thank you, Mr. Chairman. And a special thank you to you for holding today's hearing at the request of several Members of this Committee. The witnesses have been certainly very professional in their responses and targeted, and all of us deeply appreciate that.

Mr. Chairman, in my capacity as Chairman of the House Natural Resources Committee, I am certainly well aware how sensitive issues involving clean water are, and that our national parks, forests, and wildlife refuges would be in greater peril than they already are if the waters within them were not suitable to support their various ecosystems. Our Committee has regularly dealt with issues involving reserve water rights, Indian water rights, sediments and irrigation policies, etc., and what I have certainly found is that old maxim out West applies, that is, whiskey is for drinking and water is for fighting over.

[Laughter.]

Mr. RAHALL. Now, I don't mean that to be the case here today, certainly not during this hearing, but there are concerns, which have already been expressed, that many of us have with the current bill as currently crafted, and certainly I am very happy to hear Chairman Oberstar mention that it is a work in progress and open to a great deal of discussion and work as we proceed.

But the one phrase that has caught a lot of our attentions, and I believe you answered part of this question during your response to Chairman Oberstar, although I missed the initial question, and that is the phrase "unintended consequences."

Now, I do not doubt the intent of the bill's proponents who say that the pending measure would simply return things back to the way they were prior to the Rapanos decision. My concern is that by pulling a thread, we may unravel the universe. In this case, by removing the term of art "navigable waters" from the statute, we may adversely impact the entire Clean Water Act regulatory universe.

So with that, Mr. Chairman, I do want to thank you for this additional day of hearings and ask Mr. Woodley, if I might, and Administrator Grumbles, Secretary Woodley and Administrator Grumbles, in both of your testimonies you mentioned this phrase, your concern over the removal of the term "navigable waters" and the effect other provisions of the Clean Water Act may be affected and the regulatory program. So I would like to ask both of you, if you would, to just go into that just a little bit further and elaborate on what the unintended consequences of such an action as removing the term "navigable waters" would be. As I say, I believe you both have responded in some form to this previously, but if you could just target in a little bit more on it.

Mr. WOODLEY. Yes, sir. I guess the main point is that the statute to date has seemed to make a distinction between those waters that are and ought to be subject to Federal jurisdiction within this program and those which are not, so that essentially, there is somewhere on the landscape, a line that the Federal Government should remain and the Corps of Engineers should remain on its side of that line when it asserts its jurisdiction. Right now, that line is tethered to, under the cases that we have had, navigable waters, and you define that line by its relationship to navigable

waters. If there is to be no line, then that is a very important decision. But it does not appear to be the intent of this Act that there be no line. If there is to be a line, then we need to make certain we know what it is tethered to. So that is the difficulty with removing "navigable waters" and not using navigability as a base. Navigable waters are not the only waters that we regulate, but they are the tether to which our regulatory jurisdictional line is moored.

Mr. RAHALL. If you pull that thread, then the whole universe may unravel.

Mr. WOODLEY. That is more dramatic than I would put it.

Mr. GRUMBLES. Mr. Chairman, thank you for the question. The Administration vigorously defended the Clean Water Act in the Rapanos decision, and the SWANCC decision as well, to make sure that there wasn't an outcome that said only navigable waters or, more precisely, only waters that are navigable in fact are covered by the Clean Water Act. In our view, and I know it is the Chairman's view, that would be inconsistent with congressional intent and the way the Clean Water Act has worked. So the key for us has been, in this discussion, this debate, avoiding unnecessary litigation or potential constitutional litigation, not as it being unconstitutional on its face to remove the word "navigable," but really more, in my view, as applied to specific circumstances or cases where you might get unintended consequences. And as John Paul Woodley has stated, we have always used that as a basis—it is not the only basis—so it would be a new area if the word were deleted from the Clean Water act.

The other unintended consequence is really, as we said, when you are amending one of the most heavily litigated sections of environmental law in the Nation's history, it needs to be very clear what key terms really mean, particularly if you are also deleting some terms from the statute. And we have got a lot of regulations, not just for the 404 wetlands program, but for the streams and waters under 402, that we would want to look at carefully for potential unintended consequences by removing terms or adding new undefined terms to the statute that the bill would do in its current form.

Mr. RAHALL. Thank you.

Secretary Woodley, you mentioned in your testimony that H.R. 2421 may upset the balance between the Federal interest in protecting water quality and the interest of States in managing and allocating land and water resources. Could you elaborate on that, please?

Mr. WOODLEY. Yes, sir. And I bring to this discussion a certain perspective I had. Before I joined the Federal Administration, I was responsible for, among other things as Secretary of Natural Resources of the Commonwealth of Virginia, I had responsibility for the State programs for wetlands regulation, and I believe that the States are very pleased, in general, and are very accepting of the very broad Federal role in wetlands regulation. But I believe that is true as long as it is clearly tied to the historic Federal interest in navigability and commercial navigation in interstate commerce.

When the Federal Government moves into an area, as you know, Congressman, it has a very strong tendency to take over everything related to that area, so I believe that the States would want to un-

derstand—and I think that we on the Federal side would want to understand—exactly what role we were leaving for the States to undertake in this arena; the Clean Water Act gives the States a very important role as it is currently established, and we want to be certain that we are not making changes to that that people won't like in the future.

Mr. RAHALL. Thank you.

Thank you, Mr. Chairman.

Mr. OBERSTAR. The gentlewoman from Michigan, Mrs. Miller.

Mrs. MILLER. Thank you very much, Mr. Chairman. I am so appreciative of all the witnesses being here today. I heard all your testimony; I have missed a couple questions, so hopefully this one hasn't been asked.

It is interesting, this entire debate over this piece of legislation. As you gentlemen might know, the Rapanos case actually came from Michigan and the companion case to the Supreme Court actually emanated from my congressional district, a piece of property about 20 miles from my home; maybe only 10. It is not very far, anyway. So my constituents and our entire State, obviously, has been following all the litigation to the Supreme Court and the subsequent introduction of this legislation. And I appreciate the Chairman's comments at the beginning that really the goal of the legislation is not to go beyond what the standard was before the Supreme Court action and sort of looking at previous practice.

One of the reasons, probably one of the largest reasons I even ran for Congress was because of protecting of our magnificent Great Lakes. So I am a huge proponent of, obviously, the Clean Water Act, and I would be a person that you would think would naturally be predisposed to want to support this legislation.

However, I do have a lot of consternation as well: that it is overly broad, that it is too far reaching. And I think much of that has been talked about already, but I guess I would just throw out generally for the panel do you have any suggestions on how our Committee might amend this legislation in its current form to really try to achieve our goal, which is to get back to previous practice prior to the Supreme Court decisions without leading to additional litigation and getting us right back into the soup and where we find ourselves today?

Mr. GRUMBLES. I would offer a couple observations, Congresswoman.

One is, I think it is a step in the right direction to consider revising the bill not to delete the term, navigable waters. I think all of us agree that the Clean Water Act applies to more than just traditionally navigable waters or waters that are navigable in fact, but that could lead to a lot of questions and concerns or unintended consequences.

Congresswoman, I also think that there are some key provisions in the bill that need clarification, the use of the word, activities, rather than discharge of dredge or fill material. But activities, that is not speaking to geographic jurisdiction but the types of activities that would trigger Federal permitting requirements, and I think that one needs to be more focused and discussion on what that really means and also what the implications would be. It would

probably be picking up a lot of previously unregulated types of activities.

The other, some of the other, as we were discussing, is that the bill does incorporate or attempts to reflect a large percentage of regulations that the Corps and EPA have on the books, but it doesn't do it all in toto. Therefore, you have to ask questions about well, by leaving out some of the exemptions or provisions, does that mean that those exemptions or provisions are affected in some way? And so, that is an area that needs to be considered further and clarified.

Mrs. MILLER. Let me just, if I can understand your answer, so you think we should delineate the term, activities to more closely get to what the Congress' intent is?

Mr. GRUMBLES. Well, my view is that that is a controversial component of the bill and that the Committee should discuss further as to whether or not that is an appropriate approach to take in the bill, expanding the activities jurisdiction, potentially expanding it.

But if the Committee were to decide to do that, I think it would certainly be helpful to EPA and everyone else to understand better what that phrase, that word, activities, means because that could apply to a wide array of things and actually lead to greater confusion or uncertainty than the current situation.

Mrs. MILLER. I only have 30 seconds here, but what about prior converted cropland and some of these that are not exempted? What is your thought about that language?

Mr. GRUMBLES. And there isn't language in the current version of the bill on that, and I guess the point is it is one of the examples that comes to mind as a regulation that is on the books in the EPA regulations that is not specifically referenced or waived in or there is not a savings clause with respect it.

So it does prompt the question of what would be the implications? Does this bill in some way reduce or adversely affect the existing regulation that exempts prior converted cropland?

Mrs. MILLER. Thank you very much, Mr. Chairman.

Mr. OBERSTAR. Good questions, good points to raise.

I just want to observe, Mr. Grumbles, that the regulations already address activities. I compiled a list of current EPA and Corps regulations that I would propose to address in the body of the substitute legislation, including the meaning of waters of the United States means those waters which are used or could be used for industrial purposes by industries and interstate commerce, all impoundment of waters, tributaries of waters, territorial sea and the wetlands. Those are already listed in Corps-EPA regulations as activities.

If we limit it, does that define the scope of activities?

Mr. GRUMBLES. When I think of the provisions, I don't think of those so much as activities. I think of those as categories of waters—the A1, A5, A7, A3 as categories of waters—more than the types of activities that trigger a permitting requirement.

So what I would like to do, Mr. Chairman, is talk further with you and your staff about exactly what you are attempting to do.

Mr. OBERSTAR. The attempt is to define where the waters are and to list, describe those waters and to define them as activities, but that is fine.

The term, prior converted cropland, though, does not appear in the Clean Water Act, in the body of the Clean Water Act at all.

Mr. GRUMBLES. Right.

Mr. OBERSTAR. We did not make reference and I did not make reference in my bill to items that were not in and savings clauses that were not in the Clean Water Act as amended, but including prior converted cropland is another step that I certainly am open to.

Mrs. Tauscher.

Mrs. TAUSCHER. Thank you, Mr. Chairman, for holding this hearing, and I think that H.R. 2421, the Clean Water Restoration Act, is a very good bill and should be passed.

These recent Supreme Court decisions have created a situation, I think, that really no one can live with. The current jurisdiction on certainty is not viable, and we must work to clarify this issue.

I think the current version of the bill is a good step. Bills always can be perfected. That is what the process is about. We call it curing. So the more we have people give us input, the better off we are going to be.

But I do believe that it is an important step to reaffirm the existing Clean Water Act exemptions in the bill because manmade conveyances, ditches, treatment lagoons were never considered as waters of the United States and are important to the successful treatment of wastewater. In California, where we lead the Nation in many things, including this issue, we would like to know that wastewater treatment exemption is included in the legislation.

So, Administrator Grumbles, you know I am concerned, as many people are, about the impact of SWANCC and Rapanos and that they are having on our decisions here today.

Recently, a letter by Associate Administrator, Christopher Bliley, to the Committee, the EPA declined to pursue enforcement actions 304 times between July of 2006 and December of last year because of concerns that the water was not jurisdictional due to the Rapanos decision. These instances include point source discharges, oil spills and the 404 program.

Can you describe what one of these instances might look like and, for example, what would a Section 311 oil spill look like and what would EPA typically do in that situation?

Mr. GRUMBLES. I will take a stab right here, but I think it would be best to also commit to get back to you.

Mrs. TAUSCHER. For the record.

Mr. GRUMBLES. For the record, for something that is more thorough and perhaps more accurate because I don't know the specifics of it.

What you have is an example where the agency, using its enforcement discretion, makes decisions as to how strong of a case it might have and also the gravity of the harm and takes these into consideration on whether to move forward with an enforcement action. Jurisdictional questions or potential legal obstacles to successful enforcement action could include arguments that the waters are not jurisdictional under the Clean Water Act.

The 311 program uses the same definition of waters of the United States for spills, spills that could be spills on land but spills that are close enough that could get into the water or potentially

have the potential to get into the water, and those could be jurisdictional under the 311 program.

We find that in our efforts to implement the Clean Water Act after SWANCC and Rapanos, that based on the tests—and we will use either the Scalia test or the Kennedy significant nexus test—it may be more difficult to successfully assert jurisdiction cases when you go further up to the reaches of the watershed where there is less of a connection or less apparent of a connection to a traditionally navigable water.

Mrs. TAUSCHER. You can see why we are concerned. Three hundred and four times in an 18-month period is a lot of times. It is a lot of bad things happening, and it is a lot of nothing then happening.

What our concern justifiably is that precedent has not been set that these are now not things that are being acted on. Precedent, as you know, in this town and in the Federal Government sometimes supersedes reality and even wise judgment.

What our concern is that there is now been this long time where many things have happened that are bad and that nothing has been done and that the precedent now is set that those did not meet a test, and that test is ambiguous because of these decisions. So we come right back to where we were, and I think that we have real concern about that.

I am not a lawyer. I don't play one on television, but I do write laws which is a very dangerous thing, apparently. So I think that what we are trying to do here and what we need help and cooperation on is to get out of this ambiguity.

Mr. GRUMBLES. We support that, and John Paul Woodley and I, our two programs, are committed to increasing the predictability, the certainty, the jurisdictional scope.

Then in addition to that, based on the Supreme Court decisions, we know that it is very important to work with the States, our State partners to increase stewardship, to help develop programs, build capacity for State wetlands protection programs so that for those waters that may not be covered by the Clean Water Act even before the Supreme Court decisions.

Mrs. TAUSCHER. I agree with you, but if the Chairman will indulge me, we don't want to go back to a 50-State patchwork quilt again. That doesn't help us either because we all know if we can all name five instances where these waters area actually borders and are shared by numbers of States. So we don't want to go to do that either.

We need the Federal Government to speak clearly and predictably, and we need to get past the situation that we have now which has too much ambiguity, too much time where bad things have happened, and there has been no action that has caused a precedent where people cannot expect what will happen and where we find ourselves, I think, in a decline of protection as opposed to the kind of thing that the American people expect us to have.

I appreciate your efforts. I appreciate your agreement to work with us. I know that you have a record of doing that.

Mr. Chairman, once again, thank you for a great hearing.

Mr. OBERSTAR. I thank the gentleman.

Mrs. Drake, the gentlewoman from Virginia.

Mrs. DRAKE. Thank you, Mr. Chairman.

Thank you, gentlemen, for all being here.

I think we can all agree that there is just a sort of a lack of understanding, a lack of what the definitions are.

Mr. Chairman, in your opening statements, I really appreciate that you talked about improvements that have been made since the Clean Water Act has come into play. I think often we don't do that, and that is to really recognize that we have made some great strides, that we certainly have more work to do, but I would want to bet that every person sitting in this room wants the end result of this to be to protect our environment and to make sure we aren't doing things that are harmful and to find the balance that we are all looking for.

I sat in the first hearing and what really struck me was we were all asking the same questions over and over and over again, and it was an example of definitions and what does it mean by using these new terms and are we really talking about unintended consequences and the example of pulling the thread and the universe unraveling.

But my question is have your agencies done something almost like a comparison or an outline of this is existing law, this is the way you interpret this new bill to be?

Because we have all heard the Chairman say that he is open to recommendations. He wants input. This is a starting point. The more I listen to people, including today, I think people want an easier process. They want to know that things are being done with certainty and that people aren't waiting 8 years and $250,000 worth of costs to move a project forward.

So one of my questions is in trying to understand what this bill is and does this bill really clarify like we hear or does this bill have such unintended consequences because there are no definitions. Even the question of Mr. Boozman about groundwater, how do we interpret?

So have you laid out this is existing law, this is what it would be under the new proposed bill?

Then my other half of that question, if we can get to it, is how difficult for you has it been since the Supreme Court decisions? Has it been completely impossible to determine how you are supposed to regulate this and, at the same time, would this bill make it clearer?

That is where we are all coming from. I think we all want the same thing, and we want the same answer. We just want to make sure that we lay it out properly, that we all know where it is going.

Mr. WOODLEY. Congresswoman, certainly in preparation for the hearing, the agencies did analysis basically sufficient for us to express the areas in which we would like to, going forward in particular, work with the Committee to seek a deeper understanding of what the actual practical impact of some of these provisions would be. So there is some of it. We have conducted some analysis. I wouldn't describe it as exhaustive or in depth.

Mrs. DRAKE. But it is an outline?

Mr. WOODLEY. We have begun, certainly, that effort and we intend to continue working, as we all said in our testimony, with the Committee and with the Chairman and all the Members to craft

as good a product as we can because we are the ones that will end up with it in our in-boxes at the end of the day. The one thing that a regulatory program needs more than any other is clarity and certainty.

Then, in answer to your second question, I think that the people of our wetlands regulatory program in the Corps have responded magnificently to this challenge of having a very interesting Supreme Court decision that had no majority opinion and gave rise to very interesting questions. We worked with in a very collegial way with EPA and throughout an interagency process to provide our best understanding to the field of what the Supreme Court was doing and what the decisions meant. I think that our regulators are taking time to understand that.

The real fact on the ground is that our old rule that I was talking about with the ordinary high water mark was fairly easy to administer.

The new one requires more information, more understanding. Some people would say that that is actually a good thing, but you have to pay for it like all good things and that means people have to do more analysis, more measurement, more going out on the ground, more science to establish the significant nexus that we require for jurisdiction.

Mrs. DRAKE. Are you able to share that comparison with us so that we are able to understand what we are doing and what we are putting on your plates? Is that possible for the agencies to share that with us?

Mr. WOODLEY. Certainly, we will, Congresswoman, going forward.

Mrs. DRAKE. Thank you.

Mr. WOODLEY. You can see, as far as sharing, in my written testimony, it lays out the main points that we would like to raise at this time.

Mr. GRUMBLES. I would just add that we feel that the guidance that was issued in June has been a helpful and useful tool so that we can continue to carry out the Clean Water Act. We are making jurisdictional determinations. We have made over 18,000 since the guidance was issued. We are continuing to carry out and enforce the Clean Water Act provisions.

It does add a complexity since the Supreme Court decision, having to make significant nexus analysis. We feel the guidance has helped us in that respect.

But we also know, based on the 63,000 comments we got during the public comment period, that we have some additional work to do, consideration. Whether it is revising the guidance or reissuing it or suspending it and taking another approach, we know that we are going to be doing some additional outreach and technical assistance and training and workshops to help add as much clarity and certainty to the current landscape we have since the Supreme Court decision.

Mrs. DRAKE. Thank you very much.

Thank you, Mr. Chairman.

Mr. OBERSTAR. Mrs. Miller would like to be recognized for a brief intercession.

Mrs. MILLER. Just for one other, in full transparency, Mr. Chairman, as well, I talked about the Rapanos case and the companion case having emanated from the State of Michigan. Actually, I got a report from CRS about the Rapanos case and what it all means.

But the original case, Riverside Bayview Homes, that the Supreme Court went into in 1985 is in my home township, and I was a township supervisor about that time. That was the original Supreme Court venture into how far the Army Corps of Engineers has to go with their permitting process.

This was an individual who had a large tract of land, obviously wetlands. It is next to a very large beach area there. When we were building the Interstate 696, he started pulling all of this fill dirt from the interstate and just filling this place in.

The Corps of Engineers stopped this individual, Mr. George Schorr, who is subsequently deceased now. He threatened a Federal judge. They put him in jail. When he came out, it was like One Flew Over the Cuckoo's Nest, this poor guy. But anyway, at any rate, he was definitely filling in a wetlands area.

I just mentioned that. So this was back in 1985. I really have been following all of these issues. It feels like they all come out of my particular region. So we have a lot of this activity going on.

Mr. OBERSTAR. Are you saying we have you to thank for all this litigation and the Supreme Court actions?

Mrs. MILLER. I clearly remember being at the local level when this particular development. He was putting in underground all the water. The sewer, the fire hydrants were still back in this wetlands area, and that was where he was getting all the fill dirt.

But that was the first, I believe, that the Supreme Court got into whether or not the Corps of Engineers, where your jurisdiction emanated from for permitting. I just mention that.

Mr. OBERSTAR. We can't thoroughly blame you. That was Mr. Bonior's district at the time. We will blame him.

Mr. WOODLEY. Mr. Chairman?

Mr. OBERSTAR. Mr. DeFazio.

Mr. WOODLEY. I think I should assure the Congresswoman that we are operating a national program in every district in the Country and not merely in hers.

Mr. OBERSTAR. Yes, we fully understand.

Mr. DeFazio.

Mr. DEFAZIO. Thank you, Mr. Chairman.

Mr. Chairman, I don't think we can live with the uncertainty of the Rapanos decision and some of the ill intended effects that can grow from that. On the other hand, as you know, I have expressed some concern, and you have indicated here today some flexibility in terms of the wording of this legislation. I am hopeful this hearing will lead us down that path.

I, like Mrs. Miller, have been charged with implementing both my State and Federal regulations in this area when I was county commissioner and out looking at depressions in the earth. In Oregon, those depressions fill with water a fair amount of the time in the winter and then determining plant structure and soil types and all sorts of things to determine whether or not we were dealing with an ephemeral wetland or just the Oregon landscape itself.

That is what is of particular concern to me with the bill as written here.

When we talk about all intrastate waters, then we talk about activities affecting those waters, really the crux of this bill is: What is a water?

Before Rapanos, we had to consider what water was within Federal jurisdiction or, in my case, Federal or State because we had protections in both areas. Now we have to consider what is water and then I guess we would have to go through some rulemaking. I certainly think we need some honing in on this issue, and I think others from the Northwest might agree.

At what point does water running down any slope in the western side of Oregon, Washington and northern California constitute—I mean as raining is running off, which it is today since we are having an abnormally late, cold, wet winter—does that constitute water that would be regulated by the Federal Government when activities affect it: timber harvesting, Christmas tree harvesting, other activities, certainly building, affect drainage from those areas?

I mean there is a whole host of issues that I think are out there. I guess I would ask these particular experts, do they agree with that?

I have read through all the testimony, and I am getting this through reading other testimony that will come later because I am not a lawyer. I have been charged with trying to implement this stuff, but I am not a expert on it.

Would you share? Do you think that is a fair characterization of where this might take us? What is water?

Mr. WOODLEY. Yes, sir. Yes, sir, I do.

Mr. DEFAZIO. Then how would we deal with that issue, like particularly in the instance I have talked about where we have a slope in the State of Oregon today and for 180 or 200 days this year there has been water running down that slope, but that happens to be all of western Oregon, Washington and northern California?

Would that become potentially regulated?

Mr. WOODLEY. Yes, sir, I would think that you would have to. As I would read the statutes, it would appear to be sufficiently broad to give you a very, very strong argument that all of those rivulets that you describe would be jurisdictional waters of the United States.

Mr. DEFAZIO. Okay. I have a bunch of them in my back yard. Does anybody else agree with that or want to comment?

Mr. GRUMBLES. Congressman, I would just say that I think the key is to be able to clarify what the terms are in the bill and that it could, in its current form, it could be more than simply restoring, probably is more than simply restoring jurisdiction. It could be expanding jurisdiction in some respects, and I think that is certainly the case by using the activities phrase that you mentioned earlier.

The other dialogue we have been having in the hearing is the need to also make clear that when you are referencing or incorporating some of the existing exemptions in the regulations, exemptions from Federal jurisdiction, but you don't reference them, others are those others like prior converted cropland exemption or

waste treatment systems exemption. Does that mean that those are now repealed or, in some way adversely affected?

So the basic point, I think, from an EPA perspective is that we would want to work with the Committee to clarify terms and also understand what the provisions mean in the bill because, in its current form, it could lead to more uncertainty and a broadening of jurisdiction in some cases and certainly that could lead to litigation as well.

Mr. DEFAZIO. Okay. Thank you.

Thank you, Mr. Chairman.

Mr. OBERSTAR. Mr. Westmoreland.

Mr. WESTMORELAND. Thank you, Mr. Chairman. Thank you for yielding.

Just to kind of follow up on that, so it is the belief of at least, I think, three of the panel members—I don't know about Mr. Lancaster—that this would broaden the scope of the Clean Water Act?

Mr. LANCASTER. Let me just clarify on our position. We are not the regulatory agency. The authorities for our program are not affected, but we work with the producers.

Certainly when you are looking at the regulatory agencies and if there is uncertainty among those agencies of what the legislation intends and how they would enforce it, our workload may be affected. But in terms of what we do as an agency, how we work with producers, how we enforce our small bit of regulatory authority, which is conservation compliance, it is not affected by the Clean Water Act. So my silence is really just a reflection of what our agency's role in regard to the Clean Water Act.

Mr. WESTMORELAND. Mr. Woodley, I know there for a while you all had a very big backlog of 404 permits and people trying to get those. Is that backlog down now and do you think that this bill, as it is written today, would put more of a burden on what the Corps actually does and actually lengthen some of the time of this permitting process?

Mr. WOODLEY. I believe that we have, to some degree, reduced our backlog although it remains unacceptably high. Part of that is one of the reasons that we have increased our budget for this activity in every year that I have presented a budget until the one just presented for 2009 in which we kept it level for 2008 to 2009 in spite of the fact that our budget overall for the Corps of Engineers Civil Works was reduced.

My answer is that I don't have a detailed work analysis for how this would go. The current is true, that you would have to recognize that the Supreme Court decision also calls for a great deal of analytical work to be done.

So if that analytical work was less than had to be done under this, then the fact that this might potentially increase the geographical scope might wash out. If the geographical scope of our jurisdiction led to more permits but each permit required less work, we might not have a regulatory burden, but I think we would want to understand that.

In any case, I believe that this program will continue to need substantial increases in resources devoted to it just in order to make as efficient as it can be.

Mr. WESTMORELAND. Should I take that as a maybe?

Mr. WOODLEY. Yes, sir.

Mr. WESTMORELAND. Okay. I didn't know if it was a yes or a no but a maybe.

Mr. WOODLEY. A strong maybe.

Mr. WESTMORELAND. Okay.

Mr. Grumbles, what is the EPA's opinion of this as far as how you and Mr. Woodley have worked together, the Corps and the EPA have worked together as far as coming up with regulations that you have put into effect since the two Supreme Court rulings?

It seems to me like those have been pretty effective and really have kind of streamlined somewhat of what the system really had been before those two Supreme Court decisions came down. I look at it as at least getting you two together to work and to come up with something that you could both agree with.

In light of your testimony that these wetlands are actually increasing every year, it doesn't seem like the Supreme Court decision had a negative impact on what is really happening to our wetlands and, if it has done anything else, improved the 404 process. Am I right or wrong?

Mr. GRUMBLES. On the first point, I think there is no doubt that we have increased coordination efforts because we wanted to and also because we needed to with the uncertainties from the Supreme Court. And so, we need to continue to work on that and improve that because the regulated community as well as the environmental community heed to have as seamless as possible a coordination between the two agencies.

EPA's role is not as the primary permitting agency but laying out the guidelines, the procedures and also making the ultimate call on geographic jurisdiction or exemption questions, but we feel like we have made good progress and we work together closely and identify policy issues and elevate those to headquarters as needed.

On the other question or comment, I think there are two aspects to look at. One, the President's new goal for the Nation that he announced on Earth Day 2004 was, aside from the regulatory programs and the no net loss goal that is part of our regulatory programs, he wants to see an overall gain in wetlands using voluntary stewardship programs and that coupled with the regulatory program under the Clean Water Act or other regulatory provisions is the way to go.

There is no doubt in my mind and from an EPA perspective that the Supreme Court decisions have caused concern in part because of the uncertainties for the regulated community and for us on carrying out the Clean Water Act. We think we are doing as good a job as we can. We need to review or revise or make appropriate changes to the guidance we issued in the regulated community.

But while we do that we think it is very important to use, with the Farm Bill tools that they have, the other programs, Interior programs and work closely with the States to increase their capacity for State wetlands programs. We think that will help us all focus on not just the regulatory legal issues after the Supreme Court decision but on reaching the greater goal which is an overall gain in wetlands, and we feel that we are making progress on that respect.

Mr. WESTMORELAND. Mr. Chairman, if I could just ask Mr. Cruden, a yes, no or maybe?

Mr. OBERSTAR. A very brief answer.

Mr. WESTMORELAND. That is right, a very brief answer, a very simple question. Do you think taking the word, navigable, out will cause more litigation?

Mr. CRUDEN. I don't think it will reduce litigation.

Mr. WESTMORELAND. Thank you.

Mr. OBERSTAR. Mr. Baird.

Mr. BAIRD. I thank the Chairman for holding this hearing, and I thank our witnesses for most informative testimony.

Mr. Woodley—bluntly, to all of the witnesses—one of the things I hear back home a lot is the time it takes to get a permit, and it is difficult. You have difficult decisions to make, often technical questions to be answered, but also some personnel issues and logistical issues.

Whether or not this bill were to become law, that issue of permitting time and speed and efficiency needs to be addressed. I wonder if you might comment a little bit about what more can be done in that regard and then also if you would add to that how this bill would possibly impact or the lack of this bill would impact that.

Mr. WOODLEY. Yes, sir. We are working on two fronts to continue to improve our processing time equation. We have established nationwide standards for processing of all types of Corps permits and, where they are not met, then we are applying these management tools to this issue.

The first is the one I mentioned. That was that we have, and the Congress has strongly supported our efforts, increased the resourcing for the regulatory program. We suffered a setback in that regard during fiscal year 2007 in which time we were operating under a yearlong continuing resolution. Our funding was frozen at the 2006 level.

The passage of the fiscal year of 2008 bill in, I believe it was, January of this year has finally freed up the increased revenues or increased resources to make a real difference in the districts.

Wherever I go, the district commanders and the regulatory chiefs are telling me that they are beginning to see those resources. They have recruitment on the streets. So if anyone knows a bright and talented young biologist or life science person or someone who is interested in regulatory, this is a great time to join the Corps of Engineers.

The other part that we are working on is business process transformation, using the principles of the lean system that traces back to the Toyota manufacturing for quality and to remove as much of the time as we possibly can, and get everything put together as quickly as possible and improve our business processes. We mapped our business processes for the regulatory program, and it was not a pretty sight.

So we have gone into that process and created the teams necessary to eliminate redundancies and really squeeze the non-value added time out of that, hopefully, by moving the resources because we have no intention of solving any problem just by throwing money at it. We are moving the resources up, bringing the inefficiencies down. We really hope we will see substantial increases.

This legislation, I don't give you any details on what it how it would be, but other than the fact that any increase in uncertainty or things that people have to relearn is a setback. I could tell you that.

Mr. BAIRD. I appreciate it. I get that.

Mr. WOODLEY. We will make this work. If this is passed by Congress, I assure you the Corps of Engineers will move heaven and earth to make it work.

Mr. BAIRD. Great. I appreciate that.

Mr. Grumbles, I only one minute left. You seemed ambiguous about the issue to which aquifers are protected and who has regulatory authority over the protection of aquifers. Do you want to chat about that a little bit?

Mr. GRUMBLES. Thirty seconds worth, I would say the Clean Water Act understands that groundwater is important to surface water and to the whole ecosystem, but it doesn't provide regulatory authority to the Federal Government for activities, discharges into aquifers or groundwater.

Mr. BAIRD. Even if an aquifer connects directly to a waterway, even though you can trace it?

Mr. GRUMBLES. Well, no. Then that is where the interesting legal aspects get into it. If there is a close, a very close hydrologic connection, then in some cases the courts have found that that is sufficient enough of a connection. But, generally, the general rule is that aquifers are not regulated under the Clean Water Act. Groundwater isn't.

The point is the question came up about the legislation, the bill in its current form. I think it is a fair question to ask and it can be answered by the Committee, what is the intent of the bill? Would it be changing that general rule in some way?

Mr. BAIRD. It is an intriguing thing that the source of the drinking water for the majority of Americans is not protected under the Clean Water Act. I will leave that for another hearing at some point.

Mr. GRUMBLES. Well, it is in the sense of not in a regulatory sense. In terms of planning and financial assistance and working with States to use their authorities, there is a recognition that it is a holistic watershed approach. But in terms of 402 or 404, the regulatory aspects, it is really not.

Mr. BAIRD. Thank you very much.

Mr. OBERSTAR. You are saying there is a connection, though, with groundwater or with aquifers and where that connection can be demonstrated, the regulatory process has covered.

Mr. GRUMBLES. Yes, that is true.

Mr. OBERSTAR. Under current law.

Mr. GRUMBLES. Under current law and the definition. I mean there is a difference between groundwater and aquifers.

As John Paul Woodley would say better than anyone, you go down certain inches into the soil, water, moisture under the surface is part of the definition of a wetland which would be regulated under the Clean Water Act, using our current regulations.

Aquifers, the general rule has been discharges into groundwater aquifers is that it is not, but it gets into some case by case determinations in some situations where a discharge into groundwater

is so closely connected to a water of the United States, that some courts have found that that is enough to have Federal jurisdiction.

Mr. OBERSTAR. Mr. Larsen.

Mr. LARSEN. Thank you, Mr. Chairman. Really, Mr. Chairman, thanks for holding this hearing. I know many of us had asked for an additional hearing to hear from additional people. I, for one, appreciate it and a little while later, maybe around midnight, you will be hearing from Skagit County Commissioner Don Munks who is on panel three. I appreciate the chance to be here.

A lot of the discussion between now and actually previous has been people for or against H.R. 2421. Just listening to this testimony, it sounds like it is really more of a matter of are you sort of navigable waters plus or are you waters of the United States minus. Maybe if we look at that rubric, we might have a better chance of coming to a conclusion on legislation to address the problem that the Chairman and many others are trying to address.

For Mr. Woodley, I would be interested. Can you briefly describe the difficulty in applying two standards as your guidance seems to propose, the plurality standard and the Kennedy standard?

Mr. WOODLEY. Yes, sir. I don't believe we have had a significant difference in doing that because in almost every case, if it meets the plurality standard, it will also meet the Kennedy standard. There is a theoretical possibility of meeting the plurality standard without meeting the Kennedy standard, although I don't believe I have ever seen that in the real world.

Mr. LARSEN. Also, Mr. Woodley, if the legislation proposed was signed into law—and for you, Mr. Grumbles, too—would the Corps and EPA have to promulgate new regulations or could you simply apply the 2007 guidance document?

Mr. WOODLEY. I believe we would be called upon to issue new regulations to properly implement the new legislation.

Mr. LARSEN. Mr. Grumbles?

Mr. GRUMBLES. You said the bill in its current form?

Mr. LARSEN. In its current form.

Mr. GRUMBLES. I think it would behoove both the agencies to work to provide some greater clarity or certainty as to what terms meant and how we were going to be interpreting those terms and implementing them through regulations.

Mr. LARSEN. Yes.

Mr. Cruden, on page 10 of your testimony, you discuss a Seventh and a Ninth District Court decision, the Seventh Circuit being the U.S. v. Gerke and the Ninth Circuit, Northern California River Watch v. City of Healdsburg.

On the Ninth Circuit decision, in your testimony, you said that the court initially stated that Kennedy's concurrence was the controlling law, that the significant nexus test was controlling, but that DOJ filed a motion asking the court to clarify the statement by recognizing—this is from your testimony—by recognizing that jurisdiction may also be established under the plurality standard.

In that case the Ninth Circuit, at least initially, not only applied the Kennedy standard but said the Kennedy standard only applied?

Mr. CRUDEN. That is correct, before they amended their opinion. Then, after we filed the brief, they amended their opinion and added a few words to limit their decision to that particular.

Mr. LARSEN. The language here is for our case.

Mr. CRUDEN. Yes, and so we believe that gives us some ability in the future in the Ninth Circuit to argue in a specific factual setting that the plurality decision, if it was applicable, could be used. That was not decided at all.

Mr. LARSEN. Okay. I haven't been through your entire testimony, but has there been a case since Rapanos where you have filed an amicus brief for the opposite? That is a court used the plurality standard solely and neglected to apply a significant nexus?

Mr. CRUDEN. No. All of the courts that we have dealt with so far have been using either the Kennedy test or both tests. That has been where we are.

As I have mentioned in my testimony, we take the position we could meet either test. As you know from reading it, the First Circuit has agreed with us. The Eleventh Circuit recently disagreed with us.

Mr. LARSEN. Disagreed? The Eleventh Circuit disagreed with you on applying?

Mr. CRUDEN. The Eleventh Circuit applied solely the Kennedy test.

Mr. LARSEN. So the Eleventh Circuit applies solely.

In the Ninth Circuit, they agreed to say in this case, Kennedy applies.

Mr. CRUDEN. That is correct.

Mr. LARSEN. But, as a general rule, we are going to apply both.

The Eleventh Circuit came to a conclusion that we are only going to apply the Kennedy, thank you very much, Department of Justice.

Mr. CRUDEN. That is correct. It was a case called Robison. It was in a criminal context.

We strongly disagree with the decision. We filed en banc very recently. The Eleventh Circuit denied our en banc petition, but two judges dissented. That case is under review right now.

Mr. LARSEN. Where is the Eleventh?

Mr. CRUDEN. Atlanta.

Mr. LARSEN. Atlanta, okay.

If I just might, Mr. Chairman.

Mr. OBERSTAR. Very briefly. We are about to have votes, and there are other Members.

Mr. LARSEN. Then that is fine, Mr. Chairman. I appreciate it very much. Thank you.

Mr. OBERSTAR. Mr. Petri.

Mr. PETRI. Thank you very much, Mr. Chairman. I appreciate your scheduling this very important hearing and introducing legislation that raises the issue.

I would just like to state that I hope that as we move forward in considering that legislation you are open to, on the basis of testimony and other discussion, refine it. As you know, there has been considerable pushback to either the perceived or actual breadth of the legislation and some uncertainty as to how it would actually be interpreted as far as some respects of the bill are concerned.

I think the intent is to try to help clarify things and to restore disputes that have come up or differences, resolve differences of interpretation in different parts of the Country and different courts.

Mr. OBERSTAR. If the gentleman would yield, I was very explicit in my opening remarks about open to change, open to adaptation.

The purpose of this hearing is to get a range of views on the implications of the bill as introduced. I explored with the present panel various adaptions of the existing language in the bill, and I will be happy to discuss the matter with the gentleman further.

Mr. PETRI. Thank you, because I do know that before the Supreme Court decision, we had considerable legislative business having to do with Corps of Engineers perceived or actual jurisdiction down to small subdivisions and other developments, and it really was not what you would call an elegant administrative situation. They just did not have the administrative capability to deal with a lot of the smaller issues, and the result was considerable frustration and confusion among our constituents.

So I am hoping that if we do address this, that we do it in a way that reduces confusion rather than recreates it.

I would just ask Mr. Ben Grumbles, who has always sat there but has sat on both sides of the legislative divide, being a hard-working staff member on this Committee and now being in the executive branch, if you have any advice as to how we might improve the legislation that is currently before us.

Mr. GRUMBLES. Thank you, Congressman.

As I mentioned a little bit earlier before you came in the hearing room, we stand ready to work with the Committee as does the Corps, I know.

There are some key terms in the bill or questions that have arisen. One is the reference to activities triggering a need for a permit. The other is clarifying whether or not certain exemptions that may not be stated in the statute but are in the regulations, whether they would be affected in some way by the bill in its current form.

Then we also think it is important to look at some of the other aspects of the bill: the Federal-State relationship and potential unintended consequences. And, then the key one is having further discussion about the advisability or not of deleting that phrase, navigable waters.

So those are some of the areas that EPA and the Army Corps look forward to having further discussions with the Committee on.

Mr. OBERSTAR. Mr. Salazar.

Mr. SALAZAR. Thank you, Mr. Chairman. I appreciate, first of all, your willingness to listen to us and your willingness to have this hearing.

I think I am the only farmer left in the whole Committee. So my question is for Mr. Lancaster.

As you know, there has been widespread support for the wetlands reserve program and the EQIP and WRP programs which have apparently netted a net gain in wetlands throughout the United States. I guess I would ask you in light of what is currently before us, this current legislation, do you believe it would have a negative impact on the net gain of wetlands and how much of that net gain?

I think that Mr. Grumbles talked about the 44,000 acres, if I am correct. Was it you? Forty-four thousand? How much of that is actually agricultural land?

Mr. LANCASTER. For agriculture, the number is 44,000 acres a year. I believe that the total number is?

Mr. GRUMBLES. Thirty-two thousand through the National Wetlands Inventory that the Department of the Interior Fish and Wildlife Service issues.

Mr. SALAZAR. Okay. What I would like you to focus on, as we have been focusing on all the negatives on the current legislation, I would like for you to make a positive recommendation as to how we make this better as the Chairman has clearly stated that he is willing to work with all of us to make this a better place for all Americans.

Mr. LANCASTER. Again, I will confine myself to our programs. Our programs are voluntary incentive-based programs. Landowners choose of their own volition that they would like to enroll lands in the Wetlands Reserve Program for 30 years or permanently, and those are decisions where they need to take into consideration what activities will they be able to continue to use those lands for, what liability are they incurring as we make these decisions.

Likewise with the Environmental Quality Incentive Program, our cost share program. Landowners are making a significant investment. As you know, in agriculture, it is difficult to make small changes to your operation. There are significant costs associated with those changes.

So the question really is what certainty does a producer have in their decisionmaking? If I agree to enroll my land permanently in the Wetlands Reserve Program, to give up my right to use that land for anything other than quiet enjoyment and whatever compatible use I might negotiate with the agency, what risk do I face with regard to the Clean Water Act in any definition of activity and what those activities might be?

So it is difficult for me to answer from an NRCS perspective because how we work will not change. Who we work with, and when we work with them may change based on the scope of how this legislation might be implemented.

My suggestion again would be to be clear in the intent, clear in the legislative language, clear with the regulatory agencies so that producers have some certainty. If I am going to enroll my land—and many producers, as you know, are land rich but cash poor—if I am going to enroll my retirement program and my children's retirement program in a permanent wetland, what uses will I have, what liability will I be subjected to?

My advice again on this is to work closely with the regulatory agencies to make clear the intent of the legislation so that the regulations that come out can be as clear as possible, so that certainty can be provided for those landowners who are, to date, taking great strides in enrolling their lands in these programs. Demand for our program far exceeds available funding. Producers are doing the right thing. They want to do the right thing.

The question for me from them really is what certainty do we have that we will not be penalized in the future for these actions?

Mr. SALAZAR. Thank you, Mr. Chairman.

I will yield back so that the other two Members can ask questions before we vote.

Mr. OBERSTAR. I thank the gentleman and very much appreciate his participation and his substantive contributions to our discussion on the pending bill.

Mr. Space.

Mr. SPACE. Thank you, Mr. Chairman. Again, thank you for calling this hearing.

Mr. OBERSTAR. I should observe that there are 9 plus minutes remaining on this vote and 426 have not yet voted.

Mr. SPACE. Thank you, and I will keep it brief.

Mr. Lancaster, I want to direct my question to you and anyone else on the panel could feel free to contribute if you feel it is appropriate.

You know I am hearing a lot from the farmers in my district who are very concerned about the proposed language of 2421. I think that there is a lot of hyperbole surrounding this. I mean I am getting complaints from farmers who are worried that mud puddles and bird baths will become subject to EPA and the Corps of Engineers oversight. Clearly, there was some exaggeration.

I am trying to figure out a way to cut through the hyperbole and make an accurate assessment of the kinds of producers and activities, in particular with respect to farming and agriculture, that might be subject to expanded jurisdiction under the revised language that would not be subject to such jurisdiction right now.

In your testimony, you indicate that that is the case. I would be curious as to know whether you have any specific activities or producers that would be affected.

Mr. LANCASTER. Congressman, again, the question for us as we work with producers is the uncertainty. The legislation, as introduced, I believe it has both deleted the term "navigable" and changed the term "discharges" to "activities."

Both of those result in questions: What activities would now be subject to this? What activities would enjoy the savings clause? Which activities would require permits? Which activities, as the Corps and EPA might promulgate regulations, might be considered normal farming activities if activities might change in any way?

So the question is not this is what the legislation will do or won't do for us, but for the producers I have interacted with, as we look at implementing our program, it is more a question of uncertainty. What could it do?

I think that is the question that Assistant Administrator Grumbles and Secretary Woodley have discussed, which is they view this as an expansion which would then beg the question for the producer, how am I affected by that expansion?

Right now, through USDA, we simply don't know. There could be no effect on producers who are affected by the savings clauses. The legislation may or may not include prior converted cropland and how producers might be affected who have those designations on their land. But the question really right now is just the uncertainty.

I would have to defer to my colleagues who would be implementing it.

Mr. SPACE. I guess it would depend on the interpretation by the various administrative agencies as well as judicial interpretation. We don't have time to go into that. I wish we did.

But I would be curious to know if and, in fact, welcome any member of the panel that might offer suggestions to provide more clarity in the legislation to avoid those uncertainties, minimize permit processing times, and perhaps even expand or develop the savings clause or exemptions to help bring clarity and brevity to the process.

Again, I thank you, Mr. Chairman, for this opportunity. I yield back.

Mr. OBERSTAR. I thank the gentleman.

Ms. Hirono.

Ms. HIRONO. Thank you very much.

I have a pretty basic question. There are all kinds of fears being expressed about this legislation, and my colleague next to me just expressed some from his constituents, and we have all heard those.

My question is, though, since there is so much confusion that was attendant to these two decisions which were supposed to hopefully clarify the Clean Water Act but they did not, and then the guidance, those having guidance based on these confusing decisions. There are those who say, well, let's let the guidance proceed, let's implement them, et cetera.

Don't you think that it makes sense for Congress to really focus on being the voice that provides the clarification because, after all, it is the language that Congress comes up with that is going to be interpreted by the courts?

At this juncture, as we sit here with this bill and in the environment of, well, Congress, you don't have to do anything because it is too confusing, I don't want us to be in a position where we are not moving forward on this bill in a reasonable way with your help and with the help of others in the community.

Mr. Grumbles, what are your views on this?

Mr. GRUMBLES. Congress has a hugely important role in this, obviously, and you are correct as you ask the question.

EPA believes in working that the Corps, that it is a sequencing process where it makes sense for the agencies who are closest to the ground to develop guidance as we did, to road test, to see how it is playing out which we have done and continue to do. Then from there, we can make our decisions about whether to revise the guidance or reissue it or suspend it and take a different approach while we are working with Congress on this issue.

So we don't have an official position yet on whether legislation is needed at this time, but we certainly have an official position of wanting to work with the Congressional Committees, whether it is in oversight hearings to review what is happening or to get views on proposed legislation.

Ms. HIRONO. Well, the reason I ask the question in that way is really your guidance is based on very confusing case law, and so I don't see why we should proceed in that vein as opposed to Congress saying, all right, we are going to provide the statutory language that will clarify matters.

Thank you.

Mr. OBERSTAR. We now have four votes in progress, and three minutes remaining which could take as much as forty minutes. So we will remain. We will be in recess at least until 10 minutes after the conclusion of the last vote.

The Committee stands in recess.

[Recess.]

Mr. OBERSTAR. The Committee will resume its sitting.

I appreciate the patience of all the witnesses, especially those of the first panel who have been here a very long time, unfortunately, the interruption of votes.

I have just one, perhaps one question or a series of questions.

Mr. Grumbles, EPA testifies that waters of the United States is an important factor but not the only factor in determining whether an NPDES permit is needed for a particular discharge. Then your testimony refers to Justice Scalia's comment that his construct of the Act does not necessarily affect enforcement of Section 402 related to point sources.

Now there is only one prohibition on a discharge of pollutants in Section 301 and one definition of navigable waters in Section 502. Is there a distinction to be made between waters where it is unlawful to discharge a pollutant without complying with 402 and the waters where it is unlawful to discharge without complying with Section 404?

Mr. GRUMBLES. Well, Mr. Chairman, I think what I am attempting to convey is that it is true; we all agree that there is one definition, one waters of the U.S. in the Clean Water Act, and that applies to 402 and 311 and 303 as well as 404.

The point we are trying to make is the point that Justice Scalia made, and that is in 402, it doesn't have to be a direct discharge into waters. It could be an indirect discharge into waters. So that is why he was describing, as I recall, in his portion of the case, that the standard or test he is laying out in the 404 construct may not affect aspects of enforcement under 402 because there could be a 402 discharge further upstream that doesn't directly get into waters of the U.S. but indirectly gets into waters of the U.S., and that is our view as well.

We recognize in one of the important aspects of this whole challenge for us in implementation of the Rapanos guidance and considering additional guidance under other sections of the Act is working closely with our State partners to see what their experiences are, if there are in fact impacts on non-404 programs.

Mr. OBERSTAR. Yes, very good. You did a good job of threading your way through the complexities here, but if I were a State regulator, if I were a contractor or a builder or an advocate for an environmental organization, I would find it very difficult to try to understand. Are we dealing with the mind of Scalia? Are we dealing with the mind of Kennedy? Are we dealing with neither?

We spent two years holding the hearings, crafting the language, ten months in House-Senate conference, writing what we thought was very clear, very specific. Then, 30 years later, the Court is confused about its interpretation of the bill, and now we are confused about what the Court means.

So I am trying to bring some clarity back to it. You have helped with your explanations.

Further, you have the loosely described Kennedy test and the Scalia test. Kennedy discussed traditional navigable waters, and Scalia addresses continuously flowing or permanent waters.

Mr. Cruden, is there a distinction or a difference or is there a difference without a distinction?

Mr. CRUDEN. No. There is clearly a difference. As you rightly point out, that is the opinion's wording, that there be continuous flowing waters. Yet, there are footnotes in the Scalia opinion that elaborate those words, where he makes it clear that seasonal flow may well be included in his definition of continuous flowing.

So when we are applying Rapanos—and I told you that our position is we could meet the jurisdictional standard by either one—we have to apply not only his text but his footnotes as well. So that complicates our job of trying to explain to courts what we think the correct standard is when we are trying to establish and protect wetlands.

Mr. OBERSTAR. Secretary Woodley, do you concur in that view about these two differing assessments by the two judges?

Mr. WOODLEY. Yes, sir. I think that almost any navigable water is either subject to the ebb and flow of tide or continuously flowing, but there are many continuously flowing waters that we would not consider to be navigable.

But we certainly expect to take jurisdiction over all of them if they are tributary, as they almost always are, to a navigable water downstream.

Mr. OBERSTAR. If you take the Scalia theory or approach of indirect discharges, which Mr. Cruden described just a moment ago, do rivers and streams then become conveyances under the Clean Water Act?

Mr. CRUDEN. There is a portion of the opinion by Justice Scalia that suggests that as a plausible argument. We have not had to make that argument because we have been able to establish that the pollutant ultimately found its way into a jurisdictional water.

But you are absolutely right, Mr. Chairman. That is one of the things that Justice Scalia suggests might be an avenue to distinguish a Section 402 action from a Section 404 action.

Mr. OBERSTAR. Well, we certainly could pursue that further and try to understand who then is the permit holder, but I think for the purposes of this panel and for the purposes of revision of the introduced bill, I think we have an understanding.

First of all, the Court did not describe the Clean Water Act as unconstitutional, though in your analysis it leaves open a question yet to be determined perhaps that could be raised by someone else.

We need to further understand Mr. Grumbles' activities in referenced in the language in the bill and its application to or inclusion of certain specific provisions in current EPA-Corps regulations.

Third, your understanding—yours, Mr. Grumbles, yours, Secretary Woodley—of what would be the effect of and how appropriately we could word leaving the term, navigable waters, where it is exists now in the Clean Water Act, in the existing statute, but referencing prior EPA-Corps regulations that are prior to the Supreme Court, so we don't leave a lot of misunderstandings. We want to continue prior existing practices, how we could do that.

Then, fourth, your assessment or guidance on language to include prior converted cropland, which is not included in any reference in the Clean Water Act but has come up in regulations, and

how we could include that term with clarity and with reference to regulatory practice in a revised bill.

Correct?

And, we can count on your combined legislative counsel, not as a statement of Administration position but as a response to the clarifying questions.

Mr. WOODLEY. Yes, sir.

Mr. OBERSTAR. Thank you.

Mr. Hall.

Mr. HALL. Thank you, Mr. Chairman, and thank you to our witnesses for your patience among other witnesses and your expertise.

I have a strong farming presence in my district, and concerns have been expressed to me about reaction to the Supreme Court rulings and the future of clean water regulation under the CWRA.

It is my understanding that the savings clause contained in the bill would ensure that agricultural activities will be treated exactly as they were before the Supreme Court's ruling. I would ask you, is that your understanding?

This will be for everybody. Using my friend, Mr. Boozman's term, the plural of y'all, having spent some time in Nashville, all y'all being asked this question.

Is it your understanding that the treatment of agricultural activities will be the same as before the ruling, would any retroactive permits be necessary for previously unregulated activities, and could you comment on your view of the impact of this legislation on the regulation of activities like the maintenance of diversion ditches, grass waterways, temporary wet spots and existing NRCS conservation programs?

Mr. Cruden, you would like to start?

Mr. CRUDEN. I am probably not the right one to address the various issues associated with the current legislation. So I will actually pass that to Mr. Grumbles.

Mr. GRUMBLES. I will, with Arlen Lancaster and John Paul, if he wants.

We have had a lot of discussion in the hearing about potential impacts on agricultural activities particularly with the bill in its current form.

I think the prior converted cropland exemption is one of the key issues that the bill may raise. It is not addressed in the bill. What I have heard the Chairman say is that they want to work with us further to recognize that there is an existing regulation that does exempt prior converted cropland from 404. By not mentioning it in the bill, it raises a question of whether or not it would be overtaken, overturned by the bill, superseded.

The other key one, Congressman, is the use of the word, activities, rather than the more specific term, discharge of pollutant or dredge or fill material. By saying it is activities affecting waters that trigger the need for a permit, that could bring in certain agricultural activities that hadn't previously.

Mr. HALL. Practices.

Mr. GRUMBLES. Practices that had not previously been.

Now, in the saving clause, there are references to 404(f) and the exemptions for silvicultural and agricultural normal farming which are intended to preserve those actions. So I think from an EPA

standpoint, in looking at the jurisdictional scope of the bill and potential impacts, I think we still have some question and we would need to work on clarifying that.

Then you raise the issue of retroactivity, and I think that is a good question to raise for further discussion in the Committee. EPA, with our colleagues, stand ready, willing and able to work with the Committee to try to clarify or address those concerns about agricultural activities that might be pulled in or, in some way, adversely affected by the bill in its current form.

Mr. HALL. Allow me, unless you are dying to add to that, since I only have a little bit of time left, to ask Secretary Woodley, which specific categories of water bodies would H.R. 2421 encompass that had never been regulated before under the Clean Water Act and where specifically do you see those categories identified?

Mr. WOODLEY. I think that the most obvious examples of that, Congressman, are the playa lakes and prairie potholes which are extremely interesting and very significant wetland or aquatic resources and which have a great value as wetlands habitat and for other purposes.

But their characteristic is that they are unconnected to other water bodies by surface flow. They are connected to each other and to other water bodies by groundwater flow typically. And so, in times of drought, they will go way down and then they will pop back up as the groundwater. But they never typically fill up to such a degree that they overflow and form a channel that then can be linked downstream to a navigable water course.

That is more an issue related to the jurisdiction determination in the SWANCC case than it is related to the more recent Rapanos and Carabell cases.

Mr. HALL. Thank you, Mr. Woodley.

My time is expired but, Mr. Chairman, I just wanted to comment that we have in my district a number of superfund sites, and some of them happen to be either on or adjacent to wetlands. So we are very concerned about this Solomonic decision that we are trying to make about exactly how you define where the protection extends to because, sooner or later, it all winds up downstream.

I yield back. Thank you.

Mr. OBERSTAR. I thank the gentleman.

The gentleman from Tennessee, Mr. Duncan, former Chair of the Water Resources Subcommittee.

Mr. DUNCAN. Thank you very much, Mr. Chairman.

I am not going to ask any questions, but I would like to make a few comments. First of all, I know we need to get on to the other panels, but the Congress has done great things in regard to the environment over the last 40 or 45 years. Chairman Oberstar has been a leader on most of those pieces of environmental legislation because most of them have come in whole or in part through this Committee, and I think we should be very proud of that.

Mr. Grumbles said a few minutes ago or earlier today that in some of his recent work over the last few months in regard to the SWANCC and Rapanos decisions, that some of the regulated community thought he had gone too far and some of the environmental community didn't think he was going far enough. I don't know any-

body on either side who has worked with Mr. Grumbles, who doesn't have great respect for his knowledge in this area.

I am sure that on some of those earlier pieces of environmental legislation, probably it was the same way, that the environmental community thought they had never gone far enough, and maybe some of the regulated community thought they were going too far.

It is true, I think, that this Country has done more in regard to the environment than any other country in the world really and has gone further, and we have cleaner water. I know I have traveled all over Europe and other parts of the world, and we certainly have cleaner water than any country I have ever been into.

But can you do more? Can you do better? Sure, you can always try and do more and do better, and you should always try to do that.

On the other hand, we have to try to strike a balance at some point because some of the environmental laws in the past have really hurt the smallest companies or the little guys in any industry. I remember a few years ago, when I chaired the Water Resources Subcommittee, we had a hearing in regard to wetlands, and we had some very small farmers in here who broke down and cried because the effect of some of the rulings on them and their livelihood.

I can tell you that one of my grandfathers was a subsistence farmer in Tennessee. He had 10 children and an outhouse and not much more. So I can tell you my biases and my sympathies are with the little guys, and I have been told that this legislation could have a very harmful effect on some of the smallest farmers and some of the smallest operators in this area.

So I think what we need to try to do is reach some type of balance to make sure that we are not just helping the big giants that are affected by all of this.

I read part of the Rapanos decision in which the judge in that case said: "I don't know if it is just a coincidence that I just sentenced Mr. Gonzalez, a person selling dope on the streets of the United States. He is an illegal person here. He is not an American citizen. He has a prior criminal record.

So, here, we have a person who comes to the United States and commits crimes of selling dope, and the government asks me to put him in prison for 10 months; and then we have an American citizen who buys land, pays for it with his own money, and he moves some sand from one end to the other, and the government wants me to give him 63 months in prison."

The judge said, "Now if that isn't our system gone crazy, I don't know what it is, and I am not going to do it."

Then a few months ago, the Knoxville New Sentinel had a front page story in which they said: "Each month's KUB bill forces Annie Moore to make some tough choices. The 68 year old great grandmother lives on a fixed income from disability payments. She recently received a final notice for the $483.96 she owes KUB for utilities at her East Knoxville home."

Then it says, "After seeing their sewer bills more than double in the past two years, Moore and other customers are wondering why KUB is proposing water and natural gas rate increases. It is making me live like I never lived before, Moore said. So she eats simple

foods, buys only the most important of her medications, goes without luxuries like coffee." She considers coffee a luxury and so forth.

I guess what I am getting at in a roundabout, inarticulate way is that I think whatever we come up we need to keep people like Annie Moore in mind, and we need to keep the subsistence farmers in mind because I have noticed over the years that all the environmentalists seem to come from very wealthy or very upper income families, and that is good for them.

But we need to keep the little guys in mind and not just do some legislation that is only going to help the big giants and, hopefully, we can reach some middle ground approach where we can do that.

Thank you, Mr. Chairman.

Mr. OBERSTAR. I thank the gentleman for those very thought provoking comments and for his own personal experience. It is always defining for all of us.

I have no further questions.

Mr. Boozman?

No further questions from the gentlewoman from Virginia?

So we will hold this panel in appreciation and dismissed for the afternoon. Thank you very much for your splendid contributions.

Our second panel consists of Professor Mark Squillace, Professor William Buzbee—Professor Squillace from the University of Colorado School of Law and Buzbee from Emory Law School in Atlanta—Professor Jonathan Adler of Case Western Reserve University School of Law and Ms. Virginia Albrecht, a Partner in Hunton and Williams in Washington, D.C. on behalf of the Waters Advocacy Coalition.

Oh, and I see that the House has entertained a motion that the Committee rise. Well, that is a procedural motion.

We will begin with Professor Squillace.

**TESTIMONY OF PROFESSOR MARK SQUILLACE, DIRECTOR, NATURAL RESOURCES LAW CENTER, UNIVERSITY OF COLORADO SCHOOL OF LAW; PROFESSOR WILLIAM W. BUZBEE, DIRECTOR, ENVIRONMENTAL AND NATURAL RESOURCES LAW PROGRAM, EMORY LAW SCHOOL; PROFESSOR JONATHAN H. ADLER, DIRECTOR, CENTER FOR BUSINESS LAW AND REGULATION, CASE WESTERN RESERVE UNIVERSITY SCHOOL OF LAW; AND VIRGINIA S. ALBRECHT, PARTNER, HUNTON AND WILLIAMS, LLP ON BEHALF OF THE WATERS ADVOCACY COALITION**

Mr. SQUILLACE. Thanks, Mr. Chairman and Members of the Committee.

My name is Mark Squillace. I am Professor of Law at the University of Colorado Law School and Director of the Natural Resources Law Center there.

I am very happy to appear today before this Committee to offer my support for the Clean Water Restoration Act of 2007. I share the Chairman's view of this legislation, that it does nothing more than restore Congress' intent when it adopted the Federal Water Pollution Control Act of 1972.

I want to take a moment to just briefly address this issue that has been coming up regarding navigability and whether we should preserve this phrase, navigable waters, in the current legislation.

I think the heart, really, of the proposed legislation is the removal of that phrase, and the reason is it has always been a square peg trying to fit in this round hole of the Clean Water Act.

The phrase, navigable waters, came from the old 1899 Rivers and Harbors Act, particularly Section 13 of that law which was known as the Refuse Act, and that statute used the phrase, navigable waters. This is part of sort of the history of how we got this phrase into the law.

But when Congress adopted the Clean Water Act in 1972, it never intended that navigable waters should be the basis upon which jurisdiction was limited. In fact, the statute makes clear it was designed to protect the physical, biological and chemical integrity of all of our Nation's waters. And so, the idea that somehow we should be limited to navigable waters in a traditional kind of sense, I think is just wrong.

One of the great ironies, I think, of what has happened as a result of the Rapanos decision is that the Clean Water Act is now arguably narrower in scope than the old Rivers and Harbors Act itself because the Rivers and Harbors Act in Section 13 specifically adds the phrase, and their tributaries, to the phrase, navigable waters. We, of course, don't have that in the Clean Water Act.

I think it is unfortunate that there is this impression that somehow we can keep the phrase, navigable waters, and still accomplish the goals that Congress intended way back in 1972.

I want to get into some of the more particular issues regarding the legislation and my concerns about the legislation, and I think there is a lot of reason to be concerned about protecting our clean waters.

We have talked a little bit about wetlands today. It is true that we have made some strides, although we might argue about how much we have improved our situation with wetlands, but it is fair to say that we have lost more than half of our wetlands since we settled this Country. Yet, the 5 percent of the land base that now remains as wetlands is the sole home for one-third or more of our endangered species and it comprises, it includes more than 31 percent of our plant species throughout the lower 48 of the United States.

We have also made good progress on our Nation's waterways in the past 36 years, but there is a long way still to go. Indeed, 40 percent of our waterways still fail to meet State-established water quality standards for those waters.

So where do we go from here? How do we improve the current situation?

Unfortunately, I think that the Supreme Court's recent decisions in the two cases that have been much discussed today have exacerbated the problems that already exist with protecting our clean water. These decisions have forced agencies into these complex ad hoc, site-specific judgments about whether certain waters have a significant nexus with traditional navigable waters.

It is my belief that the implication of this obligation seriously compromises our government's ability to protect our Nation's waters, and we can only fix this problem through legislation.

We have already heard, at some length, two of the principal objections that have been raised to this legislation. One is the claim

that the proposed legislation usurps State and local authority. A second is that the proposed legislation expands the scope of Federal authority far beyond what Congress originally intended.

I would like to briefly address both of those issues and, if time permits, to suggest a couple of places for improving the law.

First, regarding the proper role of State and Federal Governments, it is worth noting here we are dealing with water, and we all recall from high school science class that water exists in a unitary hydrologic cycle. Trying to draw lines between that which should be regulated by the Federal Government and that which should be regulated by the States and local governments will necessarily be arbitrary, and it thus should be no surprise to us that the Supreme Court's recent decisions have led to a state of regulatory chaos.

The Corps is now issuing more than 100,000 time-consuming, often complex and difficult jurisdictional determinations each year. As we have already heard from Mr. Cruden, the number of cases that the Justice Department is seeing, contesting these jurisdictional determinations is increasing at a fairly high rate.

Think of the resources we are spending, drawing lines that might otherwise be spent protecting our Nation's waters.

Of course, if the Federal Government really lacked jurisdiction or constitutional authority to engage in this practice or if the States were clamoring to preempt Federal authority in this area, perhaps this issue would have more resonance. But Congress plainly does have constitutional authority under the Commerce Clause and the Treaty Clause and perhaps some other authorities, and the only clamoring I am hearing from the States is their enthusiasm for broad Federal regulation.

For me, one of the most telling facts about the Rapanos decision was the fact that 34 States and the District of Columbia signed an amicus brief supporting broad Federal jurisdiction in that case. That hardly sounds like a situation where the States are asking for more regulatory power.

The other concern that we have heard about is the fact that the Clean Water Act does more than restore but really expands the scope of the regulatory power under the law. I know that the proposed legislation has raised some special concerns for some of the people in the western States who believe that it may interfere with the States' authority to regulate water rights, and I would like a moment, if I can, to try to address that issue.

Mr. OBERSTAR. I would like you to summarize it because we are running short.

Mr. SQUILLACE. Okay, I will try to do that.

The bottom line here is that the statute preserves in its language, the Wallop Amendment protecting States' rights. It preserves the specific exemptions from Section 404 for the construction and maintenance of stock ponds and irrigation ditches and for normal farming and ranching activities and, under Section 2, for discharges comprised entirely of agricultural return flows.

If I could make just one more point, Mr. Chairman, and it concerns my State of Colorado and some of the issues that are raised with regard to navigability there. We have talked a lot about the problem of navigability here, and it is not well known that there

is a 1913 decision from the Colorado Supreme Court that essentially finds that there are no navigable waters in the State of Colorado.

That may sound surprising, but there is a 1979 case, not so long ago, where the Supreme Court of Colorado held that the Colorado River itself is not a navigable water, and I think it won't be long before someone, at least, decides to challenge the authority to even regulate under the Clean Water Act in the State of Colorado.

Thank you very much, Mr. Chairman.

Mr. OBERSTAR. Thank you, Professor Squillace.

I see we have six minutes remaining on this vote. I think, since there is only one vote, we should break at this point and come back promptly, forthwith.

[Recess.]

Mr. BAIRD. [Presiding.] The Committee will reconvene.

We apologize for the interruption, and the situation is that we expect another series of votes in a little bit. But so that we can continue with the testimony, I know some of you have flights to catch. We apologize for the duration of this proceeding, and we are grateful for your indulgence.

I think we left off with Mr. Buzbee about to speak.

Mr. Buzbee, thank you. We look forward to your comments.

Mr. BUZBEE. Thank you very much, Mr. Chairman and Members of the Committee.

I am Bill Buzbee. I am a Professor of Law at Emory Law School in Atlanta. There, I direct the Environmental and Natural Resources Law Program.

I have been involved with issues concerning what are protected waters of the United States for several years, first representing a bipartisan group of EPA administrators before the Supreme Court in Rapanos in an amicus brief, and I have testified in two previous rounds of Senate hearings involving this issue.

I am going to make three basic points. The first is that the Restoration Act is necessary in light of weakening of the Clean Water Act by the Supreme Court in SWANCC and Rapanos.

Mr. Chairman, my clock is not working, in any event.

Mr. BAIRD. Then your time is now up.

[Laughter.]

Mr. BUZBEE. Thank you so much. I am glad I traveled here.

As I was saying, there are three main points I am making. The first is that the Restoration Act is necessary in light of weakening of the Clean Water Act by the Supreme Court in SWANCC and Rapanos. The second is the Restoration Act is a sound, limited, focused amendment restoring the reach of the law. Then, third, I want to address some of the criticisms and questions about the reach of the restoration act raised today and in testimony submitted for today.

So, first, regarding the weakening of the Clean Water Act, I would say the current situation is not acceptable. I think every witness agrees the Clean Water Act has been a resounding success, but that doesn't mean it can remain unchanged.

It has been substantially weakened by the Supreme Court. The Supreme Court, in SWANCC and Rapanos, unsettled a bipartisan, three decade, broadly protective view about what counts as waters.

Now the decisions and the responsive guidance have undercut the Act in three ways:

It has undercut this broad, shared view about what counts as waters and removed many waters from protection, especially after the SWANCC case.

As the previous panel said, it has fostered a confusing regulatory and jurisprudential mess with splintered judicial approaches, regulatory interpretative uncertainty, delay, regulatory inattention and inertia—a wonderful situation.

The cases substituted judicial views of policy that really downplayed or ignored the Clean Water Act's integrity goals, disregarded previous Supreme Court precedents and, especially important, they eliminated longstanding deference given to agencies in this area.

Very important, as the Chair said shortly before the break, the weakening of the Clean Water Act here is not just about Section 404 and wetlands as some people seem to imply in their focus. The provision about what counts as waters of the United States is the jurisdictional hook for the whole statute, including the industrial pollution discharge permits and oil spill provisions. Anyone looking at the reach of the statute has to think about this repercussion of these cases.

So there are four options:

One is to do nothing. I don't think that is an option. There are real harms happening. I was happy to hear a consensus that there is a need to do something here today.

A second is just allow litigation to work it out. I don't think that is going very well.

Another is to implore regulators to fix the mess. That would be the third option. Because the Supreme Court's rulings are direct Clean Water Act constructions, I think there is greatly reduced latitude for a regulatory cure.

Then last is to pass a curative piece of legislation. So, let me turn to that.

It is hard to imagine a more limited and focused corrective piece of legislation. What it does is it takes a key interpretative regulatory definition and makes it part of the statute, and that is all it does. It is very focused.

It makes clear the statutory intent to reach water within Federal constitutional powers. This is important because concern about the intended reach of the statute has driven some of the Supreme Court's limiting constructions.

It is also very important because it does not monkey with other provisions. Its very focused aspect is part of the beauty of it.

Then, lastly, in the findings, it has sound factual and scientific findings that are clearly well based and important to consider.

Today, there has been some confusion about this language of activities which is in that key definitional clause. Let me turn to that for a moment. The language of 404, Subsection 24, lists off. It enumerates the sorts of waters that are protected by name and then it says, "to the fullest extent that these waters or activities affecting these waters are subject to the legislative power of Congress under the Constitution."

What this provision does, this is kind of a jurisdictional sweep-up provision that says these sorts of waters are protected if they are within Federal constitutional power or activities affecting them are. It is not separately creating a category of activities that is subject to regulation.

Only if the enumerated waters are implicated are they reached. Then you have to turn to the separated operative provisions of the Clean Water Act, and only then if you have a point source discharge under Section 301 and it doesn't fall within the nationwide or other sources of flexibility does the Federal Government have jurisdiction. So I think people have misunderstood and looked at that word in isolation instead of in context.

Second, as Professor Squillace said, leaving in this "navigable waters" language would completely undercut the entire purpose of this bill. The Supreme Court has twice, in very important and recent cases, fastened upon that word and used that word in part to drive the limiting constructions of the Act. If you leave that word in, I think this bill will basically do little or nothing, and that would be a mistake.

Now, let me address a few criticisms in my few remaining seconds. One, is this limitless Federal power, as several people have said? The answer is no. It is all linked to these enumerated waters. It is not unprecedented. The sorts of waters protected have been in the regulations for three decades.

Second, does it reach every conceivable sort of colorable waters such as ditches, drains and bird baths? The answer is clearly not. They are not listed there. I looked very hard. Okay.

Is groundwater reached? No. They are not among the enumerated waters. The Clean Water Act can reach groundwater through some other provisions as Mr. Grumbles stated in the previous panel. I don't see these particular language choices as upsetting that particular statutory balance.

Lastly, is this constitutional? Is the language about legislating to the limit of constitutional power appropriate or, in any way, itself a constitutional problem, as some commentors suggested? On that front, I would say definitely not. You all have to legislate against the background of what the Supreme Court has done, and the Supreme Court has read the statute not to reach to the limit of Federal constitutional power. If you want to reach that far, you need to state so or the Supreme Court and lower courts will find it to be inadequate.

Then, lastly, there is this kind of theory that this law would crowd out, and then I will stop—this is truly my last point—would crowd out or undo the federalism balance in the Act, and it does no such thing. All of the cooperative federalism provisions remain in the Act. All of the savings clauses remain in the Act. There is nothing in this law that does more than take the regulatory provision regarding protected waters and make it statutory.

Thank you.

Mr. BAIRD. Thank you, Professor Buzbee.

Professor Adler.

Mr. ADLER. Thank you, Mr. Chairman and Members of this Committee. It is certainly a pleasure to be here today, and I appreciate

the opportunity to present my views on the Clean Water Restoration Act to this Committee.

My name is Jonathan Adler. I teach environmental, administrative and constitutional law at Case Western Reserve University. Case Western is in Cleveland.

Earlier this morning, it was mentioned that the Cuyahoga River no longer burns and that this is a tribute to the Clean Water Act. I should just note, being that I live in the Cleveland area now, the Cuyahoga River is not the only industrialized river in the United States that burned. In fact, rivers in the United States used to burn quite a lot in the late 19th and early 20th Century, and that problem was largely dealt with and solved well before the Clean Water Act was adopted. Being from Cleveland, I feel I just need to point that out.

On the Clean Water Restoration Act, I just want to make three brief points:

First, this bill asserts authority well beyond the regulatory authority that was understood and applied under the Clean Water Act originally.

Second, the bill will do nothing to reduce regulatory uncertainty—uncertainty that, I should note, predates SWANCC and Rapanos—and in fact, this bill may increase regulatory uncertainty.

Third, this bill will do little, if anything, to improve Federal environmental protection or encourage a meaningful Federal-State partnership.

As written, the Clean Water Restoration Act would assert authority over all bodies of water and wetlands irrespective of any connection to navigable waters.

Some of my colleagues on this panel may think that the definitions of "all interstate and intrastate waters and their tributaries" and "all impoundments of the foregoing" are self-evident and necessarily limited. I don't share that confidence. Without a rulemaking by the agencies implementing this language, it could certainly be interpreted quite expansively by courts.

This would be the first time that a Federal statute would assert authority without any reference to the Federal Government's historic interest in navigability and interstate waters, and I think that adoption of this law could provoke conflict and backlash in this area not seen since the 1989 revisions to the Federal Wetland Delineation Manual, the action that is often credited with sparking the rise of the property rights movement.

The uncertainty in the scope of Federal jurisdiction over waters and wetlands did not begin with SWANCC and Rapanos. Specifically under Section 404, there has been uncertainty and conflict in litigation since the Clean Water Act was enacted. In fact, the Army Corps of Engineers and the EPA disagreed on the scope of the Clean Water Act initially, and it took litigation in Federal District Court to resolve that dispute. There has been litigation and uncertainty ever since.

As I noted before, in the 1980s and 1990s, several different agencies had varying and competing delineation manuals as to what constituted a wetland. The General Accounting Office issued several reports during that period, noting that different agencies had

different definitions of what constituted a wetland. Even within the Corps of Engineers, there could be differences about what would constitute a wetland or what could be subject to Federal regulation.

In 1989, the Tabb Lakes decision invalidated the Migratory Bird Rule and held it couldn't be used in the Fourth Circuit. So, at least in the Fourth Circuit, the scope of Federal jurisdiction that was determined in SWANCC had already been the law because of that court's decision.

The claim that this legislation asserts jurisdiction to the limits of constitutional authority doesn't provide certainty, and it doesn't answer the question of the scope of Federal authority. In fact, it asks the question because to say the Federal Government is going to regulate to the limits of its constitutional authority still leaves open the question of how broad the Federal Government's constitutional authority is. The Supreme Court hasn't answered that question.

What it has said in both the SWANCC and the Rapanos decisions is that there is a limit to Federal regulatory jurisdiction and that the Clean Water Act, if read more broadly than the Court interpreted, could reach those limits and could raise constitutional difficulties.

The Court was explicit about this in the SWANCC decision and, in both the Scalia and Kennedy opinions in Rapanos, the Court was explicit about this again: that to read the Clean Water Act to reach beyond those waters that have a significant nexus to navigable waterways is to raise difficult constitutional questions. To pass a bill that reaches those limits is to force agencies and courts to spend years figuring out precisely what those limits are.

The problem of site-specific and case by case jurisdiction determinations which the agencies now struggle with can be addressed through rulemaking. In fact, we have known since the Lopez decision in 1995 that the Corps of Engineers' and EPA's regulations had federalism difficulties. Many commentators noted that at the time. We have known that before the SWANCC decision they had difficulties.

The agencies have refused to issue new rules and refused to have new rulemakings that could resolve this. In the Rapanos decision, three justices specifically called upon the agencies to go through a rulemaking process so as to resolve this ambiguity.

I should just lastly note that if the goal is to enhance the protection of waters and wetlands, what the Federal Government should be doing is not trying to cast as broad a net as possible, to rope in and assert jurisdiction over all the lands and waters it possibly can. Rather it should focus limited agency resources on those areas that the Federal Government, as the Federal Government, can do the most good.

The reality is the EPA and Corps of Engineers do not have unlimited budgets. They do not have unlimited man hours. We have a choice of either telling them they can regulate many things without providing them with priorities, without giving them a guide to where they should be focusing their resources, or we can target their efforts and focus on those water resources and those resources related to waters where the Federal Government has a distinct in-

terest that States and local governments are not capable of addressing.

The question is not do States want to regulate more but whether or not they would and are capable if the Federal Government focused on those things where the Federal Government has the greatest interest. I think that is the direction that both the agencies and this Committee should look if it wants to improve the quality of environmental protection under the Clean Water Act.

Thank you.

Mr. BAIRD. Thank you, Professor Adler.

Ms. Albrecht.

Ms. ALBRECHT. Thank you for the opportunity to testify today.

My name is Virginia Albrecht. I am a partner at Hunton and Williams here in Washington and really have spent about the last 25 years of my professional life thinking about the Clean Water Act, getting permits all over the Country.

Today, I am here representing the Waters Advocacy Coalition which is a very large group of public and private organizations who have gotten together over the last 15 months in response to H.R. 2421 and who have shared concerns, many of which have been raised and I think quite well developed in the earlier phases of this hearing. We are very glad to be here today and also to hear the Chairman say that he is interested in hearing some comments and options for this legislation.

I wanted to make four points today about the bill. The first, of course, is that it doesn't merely restore the previous Clean Water Act, but it does in fact expand, and I think that has been very well developed earlier.

The one point I would like to make in addition is that the use of the term, navigable waters, as Mr. Woodley pointed out and I think the government was pointing out, was that use of that term is really an expression by Congress that there are some waters that are Federal and some waters that are State. It is a recognition that we need to draw a line.

If you don't use the term, navigable waters, you are going to have to have something else in the legislation that will clearly be a base line for saying what is Federal and what isn't Federal, unless the purpose of the legislation is to say everything is Federal. We would think that that would be a big problem if the Clean Water Act were changed to eliminate the idea of any State waters. So that is one point.

The second point is, just to make it clear, it is not true that the Clean Water Restoration Act is merely a repeat of the existing regulations under the Clean Water Act. We have this little side by side comparison up there, and you can see when you look. Actually, I don't know if you can read that. It is a little far away.

On the left side is H.R. 2421 and on the right side are the Corps' and EPA's existing regulations, and there are some very, very significant differences here. One is the indication of trying to regulate all intrastate waters. The other is the regulation of activities and, whatever that means, it is ambiguous and it will invite litigation.

When litigation comes, the language of this statute will matter. In a careful reading of the way this bill is written right now, it says they are going to regulate all intrastate waters. Courts will look at

that and say, all means all, just like daily meant daily for total maximum daily loads.

It will be very, very hard, in the face of a statute that regulates all intrastate waters, for the agencies to create any exemptions or for the courts to recognize something less than every water.

As Professor Adler pointed out, that gives rise to the question: What are the waters? What is a water body? All those questions are out there.

Then three, thinking about returning, and I wanted to make the point that we are talking about returning to a time when jurisdiction was certain and the permitting program ran in a smooth and functional way. As one who has been very actively involved in this permitting program really since the early eighties, I can tell you for sure that there never really has been a time when it was clear and concise.

In 1993, working with another colleague who had actually recently retired from the Corps of Engineers, I did a year-long FOIA study of all 38 Corps districts and how long it took to get through the permit process. In 1993, which is 15 years ago, it took about a year for the average permit to get through the process. We also found in 1993 that half the permits applications that were submitted were withdrawn before a decision was made.

I think that is still happening today, but the point is that in 1993, that period of time in which we did the study, what we found was a permitting process that was already broken. So there isn't a pre-SWANCC nirvana to return to is the basic point.

If what is happening now is that there is some concern about some features not being regulated, I think the point would be to identify the features that are of concern and then think about what protections are out there and what could be done for those features. But we haven't really understood that so far, and so it has been kind of difficult to come to grips with that.

We are very glad to be here today, and we would be happy to take questions.

Mr. BAIRD. I thank our witnesses.

The situation is we are now about six minutes from a vote, so we will have to go to that. There are two votes, I understand, following this. We would expect, hopefully, to be back in about 20 minutes at the earliest, more likely 25 minutes, I would guess.

Those on the panel might not want to run away too far, but the rest of you can probably count on we probably won't likely reconvene sooner than 20 to 25 minutes.

It is my understand that the Chair, Chairman Oberstar, intends to convene the third paneling after questioning of this panel. The questioning of this panel could easily take a half hour or so, I would wager.

So we appreciate your indulgence, as those of you who are trying to plan flights. For what it is worth, we go through this every week ourselves. It is no consolation to you, but we will be back in about, hopefully, 15 to 25 minutes, somewhere in there.

[Recess.]

Mr. OBERSTAR. [Presiding.] The Committee will resume its sitting, with apologies again to witnesses and participants for the repeated interventions on the House Floor, but that is part of the leg-

islative process, and with great appreciation to Mr. Larsen and Mrs. Drake for sitting in while the last votes were underway and I was caught up with other things.

Oh, and Mr. Baird also was here. So I greatly appreciate it.

I would like to ask this panel a question I asked the previous panel. What would be the legal implications of leaving the word "navigable" associated with waters, in the various places it appears in the body of the existing Clean Water Act but attaching to it, fixing to it reference to pre-SWANCC and Rapanos practice, that is, the administrative regulations issued?

Mr. SQUILLACE. I will try that one, Mr. Chairman.

My sense is that if you leave the phrase, navigable waters, in the statute, that it is an invitation for additional litigation over the issues.

Justice Kennedy's concurring opinion in particular in the Rapanos case, I think suggests that he is not willing to read out the word, navigable, from the statute. If you use the word, navigable, or you use the phrase, navigable waters, he wants to give it some meaning and he wants to give it a traditional kind of meaning.

As I testified earlier, it is just my sense that that is not what the statute is about. I think that if we are going to be honest about what we are trying to accomplish with the Clean Water Act, it is not anything to do with navigation. So my strong preference would be to see this phrase eliminated from the statute.

Mr. OBERSTAR. Thank you.

Professor Buzbee?

Mr. BUZBEE. Yes, thank you.

I would concur. As I said earlier in my brief, very quick remarks, the Supreme Court has twice focused on the word, navigable, and given it a separate content, and that has partly shaped the decisions that have limited the reach of the Clean Water Act. I think that the Supreme Court looks at legislation and judicial opinions as an interactive process. If you all come back with a new piece of legislation that retains the word, navigable, I think they will read that as a well-advised decision to retain navigable as a limitation on jurisdiction.

It also important what the Restoration Act does is takes the regulatory definition. There has long been that legislative history about the intent to legislate to the limit—I think the exact language by Representative Dingell, I won't quote—but to legislate broadly, and that wasn't enough already for the Supreme Court. So even if you try to do it now in effect but leave in the word, navigable, I think it will largely undercut the reason for this very statute.

Mr. OBERSTAR. Ms. Albrecht?

Ms. ALBRECHT. Yes, I think the word, navigable waters, can have an extremely broad meaning as we have seen over the years. And so, you can use the word and go back to the word, navigable waters, and still get very, very, very broad jurisdiction.

Mr. OBERSTAR. But if we tie with it, you are not forgetting the second point I made.

Ms. ALBRECHT. Right. Yes.

Mr. OBERSTAR. Tying with it the preexisting regulation or regulatory scheme.

Ms. ALBRECHT. Right, and I think that second question about preexisting regulatory scheme, I think I would have to know more about exactly what it was that you are talking about because there is some ambiguity there.

But I think that the use of the term, navigable waters, is a way to express that there are some waters that are Federal and there are some waters that are State. It gives heft to the idea of cooperative federalism and that the role of the States in managing their land and water resources is important, and we are not going to override that.

Mr. OBERSTAR. You think that the two separate Court opinions were making that distinction, drawing a distinction between the extent of Federal jurisdiction and the extent of State jurisdiction?

Ms. ALBRECHT. I think that they were recognizing that there was a place for the States and that when Congress passed the Clean Water Act, that it was building on the idea that the States have a very, very important role, and they were trying to give effect to that. So the phrase, navigable waters, is an expression of Congress' recognition of that important role.

I think that if you keep the phrase and you still say we are trying to go broadly, you would have a lot of possibility of getting there, what you are trying to get to.

Mr. OBERSTAR. Mr. Adler?

Mr. ADLER. Well, I certainly agree that leaving the word, navigable, in the statute would indicate that Congress understood that there are some waters that are not Federal waters and that are State waters.

But I think that if the legislation were to try and adopt, either by paraphrasing or using direct language, the pre-SWANCC regulations that were on the books, there would still be problems. One reason is that certainly the Migratory Bird Rule that was invalidated in SWANCC had already been invalidated in the Fourth Circuit some 20 years earlier, or not 20, some 10 years earlier.

Mr. OBERSTAR. Was the Court saying that the Migratory Bird Rule is not sufficient to establish authority for regulating such waters?

Mr. ADLER. I think that after the Supreme Court's Lopez decision in 1995, it has been recognized by many commentators that the regulations on the books, in particular, Section A(3) of the EPA-Corps regulations were problematic because they asserted authority over waters and wetlands in excess of the sort of authority discussed in Lopez.

Mr. OBERSTAR. Had the term, Migratory Bird Act or Rule, been left out of the regulation, would the Court have come to a different conclusion?

Mr. ADLER. In SWANCC, I don't think so. I think in both SWANCC and Rapanos, the Court recognized that Federal regulatory jurisdiction is not unlimited and that in the absence of a very clear line, either from Congress or from the regulatory agencies, the Court would try and craft one. I think in both SWANCC and Rapanos, that is what the Court tried to do.

I think what the Court signaled in both cases, consistent with its prior federalism decisions, is that the one answer that is not acceptable is a regulatory interpretation that asserts authority over all waters, Federal and otherwise.

Mr. OBERSTAR. Can you, Ms. Albrecht, craft bright-line language to distinguish between Federal and State jurisdiction? Not here

Ms. ALBRECHT. I was going to say, here today?

Mr. OBERSTAR. Not right here, not right here and now. But, yes or no, do you think that is possible?

Ms. ALBRECHT. Yes, I think it might be, but I can't do it today.

Mr. OBERSTAR. Well, neither could I.

Ms. ALBRECHT. I think that the problem with A(3) right now and the problem with A(3) since the Lopez decision was that A(3) premises Federal jurisdiction on a potential effect on commerce. What the Court really said was potential effect is kind of this limitless, boundless kind of idea.

In fact, in Lopez, what they said was we need an actual, not a potential, effect. We need a substantial, not—what was it?

Mr. ADLER. Substantial effect.

Ms. ALBRECHT. We need a substantial and actual effect.

I think if you kind of take those kinds of ideas and you begin to think about what you can do under traditional authority over navigable waters, there are ways to do things. I am not quite sure, sitting here today right now, but I would love to have an opportunity to think about it.

Mr. OBERSTAR. Give it some thought.

Let me ask Professor Squillace and Professor Buzbee the same question. Can you make a distinction, if necessary?

Mr. SQUILLACE. I don't think one can make a distinction that is not simply going to lead to more litigation. I think the problem that we have here is that in order to adequately regulate the Nation's waters, we need to have the Federal Government in charge of the program.

We have the States involved in adopting their own permitting programs. Most of them have done so under the Section 402 program. Most of them have opted not to do that under the Section 404 program, but certainly that opportunity is there for them. I think only in that way can we avoid what has become almost a nightmare of litigation and difficulty in terms of trying to distinguish waters that are supposedly jurisdictional and those that are not.

I think we would be much better off if we just got rid of that distinction and had the resources of the Federal Government and the State Governments focusing on protecting our Nation's waters.

Mr. BUZBEE. I would agree with those comments.

I just had a couple points. One is in looking at this and your figuring out your power, I don't agree with the commentors to my left who suggested that Lopez declares Section A(3) unconstitutional.

I think if you look at the Supreme Court's decisions from Lopez through the Morrison case up to the case of Gonzalez, the Supreme Court has made quite clear that this Committee has abundant power, as does Congress, to regulate waters that are important to commerce, commercial activities that harm waters, and that really does cover almost all situations you can imagine, that people just

tend not to destroy waters of the United States or pollute unless they are imbued with commerce.

Mr. OBERSTAR. Very important distinctions, very important contributions, and I appreciate it.

Before I go to other Members, I just want to say I would have loved to have the opportunity to argue this case before the Supreme Court from my perspective and at least cause the justices to read the opening paragraph of the 1972 Act.

[Laughter.]

Mr. OBERSTAR. The purpose of this Act is to establish and to maintain the chemical, physical and biological integrity of the Nation's waters. That covers everything in the Act.

But justices don't do this. They don't go to the Committee report. They don't go to the report of conference because justices say, if Congress meant what they said here, then they would have written it over there in the law. I know. I have been through this for 40 years.

Yet, in the Committee report, we were very clear to say with the term: Maintaining the term, navigable waters, we intend the broadest application of that term, so as to manage by watershed.

Well, now we have a whole body of regulatory action and court cases, and we have to untangle this, as they say in French, pannier des crabes. We are thinking our way through it. The translation is basket of crabs, but we would say a can of worms.

[Laughter.]

Mr. OBERSTAR. Mrs. Drake.

Mrs. DRAKE. Thank you, Mr. Chairman.

I would like to thank all four of you for being here and listening to your testimony, I think, really encapsulated what we as Members of Congress have been struggling with in the first hearing and in the hearing today. Two of you said something exact opposite of the other two of you.

I would like to challenge, Mr. Chairman, that when you are working on the line, if the four of you could work on some definitions that maybe we could agree with because we still, underneath it all, hear the same argument that we want clarification and we don't want to diminish the Clean Water Act, but we want to have that clarification and definitions and not feel like we are taking an action that is doing something totally different than what we thought.

I would like to follow up on the testimony with two questions, two follow-up questions.

First, Professor Adler, to follow up on the Lopez case, I wonder if you could tell us how that 1995 Supreme Court decision would impact jurisdictional decisions in the future if 2421 were enacted.

Mr. ADLER. Well, I think it would still color the way that Federal courts would interpret the scope of the Federal Government's constitutional authority, and I think that is not only because of the Lopez decision itself. It is because SWANCC and Rapanos made that clear.

The SWANCC decision said that it was interpreting the law narrowly because it doesn't want to declare an act of Congress unconstitutional and to not interpret the law narrowly would have forced

the Court to look closely at whether or not portions of the Clean Water Act were unconstitutional.

In the Rapanos decision, Justice Kennedy's concurrence made very explicit that he was adopting the approach that the SWANCC court adopted and made very explicit again that that approach, in his view, was necessary to avoid potentially troubling and constitutionally questionable interpretations of the law.

So from Lopez through SWANCC and Rapanos, we see the Supreme Court saying consistently that the Federal Government's authority is very broad, it is very extensive, but it is not unlimited. If Federal legislation does not contain language that clearly limits the scope of that or the scope of regulatory authority to ensure that it stays within constitutional bounds, then the courts may have to challenge the constitutionality of the statute.

What the Court did in SWANCC and Rapanos is it used the word "navigable" as a way of saying: Okay, this is an indication that Congress understood its power was not unlimited, and so we are going to use that as the way to understand that there is a limit on Federal power. There is a point at which Federal power ends and exclusive State power begins.

That is a principle that I don't think we can get away from. It has been a principle since our Nation's founding, and it is a principle the Court continues to reaffirm.

I think this statute, on the lines of the statute, either the statute particularly asserts authority over all intrastate waters without defining what that means and is asserting authority beyond the scope of Federal jurisdiction, in which case we have lots of legal problems and lots of litigation, or it is simply asserting the tautology, that it is asserting Federal authority as far as Federal authority goes without giving us any idea of where that line is.

Either way, courts and agencies are going to have to figure that out to avoid the sorts of constitutional problems that the Supreme Court was trying to avoid in SWANCC and Rapanos.

To say we are going to regulate as much as we can but not say how much that is leaves to other parties to answer that question. I think the legislation, as written, does that. So it doesn't avoid the constitutional problem, and it doesn't provide clarity because it doesn't answer the most important question, which is how far ultimately does the regulation go?

Mrs. DRAKE. Thank you for that.

Professor Squillace, it sounded like from your testimony that you believe all water should be considered Federal water. What we have just heard from Professor Adler, I think, you would disagree that we have the authority to go to that.

Mr. SQUILLACE. Yes. I am glad you raise that question because I do want to be clear about this. What we are talking about in this new definition is not a regulatory provision. That is we are not talking about the Federal Government having regulatory responsibility over all of these waters just because that is what they are.

What we are talking about is defining the scope of those activities that might be subject to regulation under the other provisions of this statute such as 404 and 402. So, for example, if someone is discharging dredged or fill material into the waters of the United States as newly defined, that would be subject to Federal regula-

tion. If someone was discharging a pollutant into the waters of the United States from a point source, that would be subject to regulation under Section 402 of the Act.

So I think it is important to recognize that just because the waters are named in the definitional provision, in the provision that is in the new definition of waters of the United States, that does not translate into broad regulatory power over those provisions, absent some other regulatory standard.

Mrs. DRAKE. If I could just ask Ms. Albrecht if you could comment on what we just heard and your understanding of that.

Ms. ALBRECHT. From what I understand, I don't think I agree with it.

I think if you call something a water of the United States, you are saying that it is subject to Federal regulation when certain activities happen in that place. If the outcome of this legislative effort were that every single water in the United States was a water of the United States, every single water would be subject to Federal permitting requirements.

Now one of the interesting and puzzling questions in the bill as it is now written is, as the Clean Water Act now is, it regulates discharges of pollutants from point sources to navigable waters, the language that you came up with in 1972 which has served us very well.

What this present bill has is the language also about activities affecting. Although it is not exactly clear what is meant by this language about activities affecting, I think one plausible reading of it is that that is an attempt to regulate not only discharges but to regulate activities that would affect these waters of the United States, which would take you probably or possibly outside the waters of the United States. I mean outside the waters.

So if you had an activity up here that was affecting a water of the United States, the activity up here might be regulated. Just, there is some ambiguity here about what is the meaning of that.

I think that whenever you have new legislation, you are going to have to have a rulemaking. The agencies are going to have to figure out what it means. There will be litigation about what do these words mean.

The words that are in H.R. 2421 are very absolute. You have the words, all intrastate waters. You have the words, to the fullest extent of Congress' legislative power under the entire Constitution, not just the Commerce Clause. Those are very broad words, and a court looking at that will say—I mean could say—could say that means that Congress intended to regulate every single water to the extent of whatever its authority is.

As Professor Adler is pointing out, it sort of begs the question, what is that authority and where does it end?

And so, the only way you would find it really is ultimately through litigation. So, in a way, what would happen is that Congress would end up throwing it back to the courts, which I don't think is what you want to do.

I think you are trying to solve a problem here, and I respect that, and we want to work with you on that.

Mrs. DRAKE. Thank you. I believe that we are trying to solve a problem, but it sounds to us that we are making the problem bigger.

So, thank you, Mr. Chairman. I will yield back.

Mr. OBERSTAR. Very good, very good discussion of a very complex subject matter. I just point out that what is intended is a three-part test, the point source discharge from that point source and the waters.

Mr. Larsen.

Mr. LARSEN. Thank you, Mr. Chairman.

For Mr. Squillace, I don't understand what you were saying regarding navigable being in the statute. It is in the statute, perhaps with the qualifications that the Chairman has pointed out, and it is in the conference report apparently from 1972.

I haven't seen that, but since the Chairman was here then, working on that, I am certainly not going to doubt him nor would I doubt him if he said it without evidence. I would certainly stand behind what he had to say.

So I don't understand your comments. To me, it makes it sound like either you disagree with it or that Congress made an error. Your conflict isn't a legal conflict. It is that you just don't think it ought to be in there.

Mr. SQUILLACE. Yes, fair point, and let me try to address it as best I can.

I think when Congress chose to use the phrase, navigable waters, they were simply borrowing that language from the Rivers and Harbors Act, and I frankly don't think they really thought about it in the context of traditional navigable waters.

I take that in part from the fact that, as the Chairman has already noted, Congress said quite explicitly in the conference report in the bill that it intended the broadest possible constitutional interpretation of that jurisdiction under the Clean Water Act. That is not navigable waters, and so that sort of explanation of what Congress intended didn't fit that phrase, navigable waters.

As I have already mentioned, and I think it is absolutely clear if you look back at the legislative history, there is no doubt in my mind that Congress intended to go well beyond the Rivers and Harbors Act in a particular Section 13 of the Refuse Act in setting out the jurisdiction of the Clean Water Act. Yet, the Rivers and Harbors Act provision specifically includes tributaries of navigable waters as well as navigable waters.

Mr. LARSEN. Right.

Mr. SQUILLACE. We are in this ironic situation now where, because of the Rapanos case, we have a court interpretation that seems to be narrower than the Rivers and Harbors Act on which it was based. Ironically, I say because I think Congress clearly intended it to be broader.

Mr. LARSEN. Okay. For Professor Buzbee and Professor Adler, I will just pick on you two rather than have all four of you because it seems that perhaps you two differ maybe on some things, and so it might be more fun.

Listening to Secretary Woodley from the Corps, he seemed to say, and I think I will mix up some metaphors here, but that there was a need for the agency to draw a line to which to tether regu-

lator guidance. At least that seemed to be his point of view, from the Corps' point of view presumably.

So, on this issue of drawing a line or having a stake in the ground, whatever metaphor you want, upon which the regulatory agencies can attach themselves in order to create guidance, does it not make sense to have a tether, a bright line, whatever terms we have been using or, if it doesn't, then upon what should the agencies develop their regulatory guidance because they are going to have to based it on something because they are going to have to defend it sometime?

Mr. BUZBEE. Well, I would say that perhaps most importantly the best way to get clarification is to take what, at this point, is a statute that doesn't define waters of the United States, take that regulatory definition as does the Restoration Act and put it in. That would be the biggest clarification of the Clean Water Act you could imagine because then the Army Corps and EPA would know exactly what the key provisions are they need to look to and it would make them statutory.

I thought it was striking that when one of the representatives, Congressmen, asked Mr. Cruden, would the Restoration Act lead to an increase in litigation. His answer was it would not lead to a decrease in litigation, and so he was very careful with this.

I think that this would add clarity. So I think that is the best way.

As far as drawing a bright line, if you are suggesting that maybe there is some way without legislation you can get a bright line, I don't think you can.

I think that this an area that is pervaded by blurry edges and judgment calls. You need agencies exercising expertise, and they long have. I think the idea behind the Restoration Act is to give that power back to regulators who are much better at this than our Supreme Court justices.

Mr. ADLER. As you suggested, I do disagree with my colleague a little bit.

First of all, the legislation, as it is written, doesn't simply incorporate the existing regulations. It omits certain phrases. It summarizes certain phrases. I think, in some respects, it is potentially even broader than at least portions of the existing Federal regulations.

And, as I have already noted and as many commentators have noted, the existing regulations have problems and have had problems since the Lopez decision for a variety of reasons. The Army Corps of Engineers and EPA have decided for the last 13 years not to revise their regulations though, as I know Ms. Albrecht has pointed out on numerous occasions, they have said I think probably at this point 15 or 20 times, that they were going to issue new regulations and clarify the scope of their rules. They haven't done so.

That is going to be necessary whether legislation passes or not because unless legislation is going to have the level of detail and intricacy that is possible through a notice and comment rulemaking, the agencies are going to still have to spell out: Okay, how do we know that this water is within Federal authority? How do we know it is something that may affect commerce or that has a substantial effect on commerce?

The agencies are still going to have to spell that out.

What I would argue is important to do if we want clarity now and want to get away from the very difficult and very time-consuming, case by case, situation-specific analysis that the agencies are forced to go through now is this Committee—I don't know if you could force them but essentially encourage—strongly encourage the agencies to do what, again, three justices in the Rapanos decision called upon the agencies to do; which is to use their expertise, use their understanding of ecological interconnection to spell out what it is that constitutes a significant nexus to navigable waterways because that would both take care of the constitutional problem, because it would tether the assertion of jurisdiction to the ultimate source of Federal authority in this area which is some connection to interstate waterways and navigability.

It would also allow for regulatory definitions to take into account contemporary scientific understanding.

As the Kennedy opinion, the Roberts opinion, the Breyer opinion all made very clear, the Court will be very deferential to that sort of decision and that sort of rulemaking and, in fact, courts will be more deferential to the Corps of Engineers and the EPA laying out what it is that establishes the significant nexus than they will be to ad hoc, case by case jurisdictional determinations made in the context of a given enforcement action or given case of litigation. The Robison case in the Eleventh Circuit bears that out.

The courts are going to be less deferential to the arguments made by a given enforcement agent in a given context much as Justice Kennedy notes, though, they will be a lot more deferential to the agency saying, in most cases, these sorts of ecological features are indicative of a significant nexus.

Justice Kennedy made very clear that the agencies can be over-inclusive. If they give a reason why in most cases a certain ecological feature is going to provide that significant nexus, as Justice Kennedy said in his concurrence, that will be good enough. In fact, he justified the Riverside Bayview Homes decision on precisely that ground.

I think that is the only way to get not perfect certainty, not an absolute bright line, but at least to get a dramatic step towards the level of certainty that this Committee and the environmental community and the regulated community all want.

Mr. LARSEN. Thank you.

Mr. OBERSTAR. The gentleman's time has expired.

Mr. Ehlers.

Mr. EHLERS. I have no questions at this time, Mr. Chairman.

Mr. OBERSTAR. Mr. Salazar.

Mr. SALAZAR. Thank you, Mr. Chairman.

I have a couple of questions for Professor Squillace. In your testimony, you talked about how there were two court cases that actually declared the Colorado River not navigable, right, but it is my understanding that the river is still handled and regulated under the Clean Water Act, correct?

So I guess what I am asking you is what difference would it make whether the river is not navigable or navigable? For example, many of my friends have actually floated down the river on rafts, and so I would consider it navigable to a certain extent.

Could you expand on what you meant by that statement?

Mr. SQUILLACE. Sure. I hope I can call you as a witness to that effect if we get into litigation over whether the Colorado River is navigable. There is more discussion about that.

I was expecting this question. I am not surprised to hear it. I guess what I would say is that there is a real problem with the way in which the current law has been construed in the Rapanos case in this specific regard.

There is a case out of, I want to say, the Eleventh Circuit, the Robison case, that involves a decision, a situation just as you are talking about, where the individual who was subject to the Clean Water Act got an NPDES permit, accepted that he needed one, had it for years, and ultimately was caught essentially violating, deliberately violating the statute.

He was indicted on 25 criminal counts for violating the statute. He told his employees to lie about the violations. It was really a parade of horribles in this case.

His defense was, well, these weren't waters of the United States. Ultimately, I think the case has not been fully resolved, but essentially he won in the Eleventh Circuit. The Court sent it back to determine whether or not it meant the significant nexus test that Justice Kennedy set out.

There was all along an acceptance, and there has been for years in many of these cases, that the Clean Water Act applies. But now the Rapanos case, I think, has allowed an opening, if you will, to challenge all of these issues.

I share your sort of skepticism, I guess, about the validity of these decisions of the Colorado Supreme Court. You, fairly I think, point out that perhaps there is more than one test for navigability that might play out.

The Court really hasn't been very helpful in ferreting that out for us, and I honestly think that the only way to address this problem is to really get beyond navigability. It has never been about navigability with the Clean Water Act. It has been about clean water.

There are lines that we need to draw. We should talk about where those lines are, but I think that we ought to do that in a way that doesn't deal with a concept that really doesn't have much meaning in terms of keeping our Nation's waters clean.

Mr. SALAZAR. But you do agree with me that the Colorado River is regulated under the Clean Water Act?

Mr. SQUILLACE. I would agree.

Mr. SALAZAR. Whether it is navigable or not?

Mr. SQUILLACE. I would agree that, as for now, people accept that they are subject to regulation when they discharge pollutants from a point source into the Colorado River.

Mr. SALAZAR. Just briefly, could you expand a little bit? I know that in your testimony, you talked about water is an article of commerce. I am not quite sure what you mean by that.

Mr. SQUILLACE. Well, the Supreme Court has made clear in an old case called Sporhase v. Nebraska that water is an article of commerce. In that case, they specifically prevented the State of Nebraska from denying a Colorado farmer the right to take water from Nebraska into Colorado. So we know from that Supreme Court decision, water is in fact an article of commerce.

That doesn't mean—and I want to emphasize this—that the Congress has not been deferential toward the States in allowing each State to adopt its own system of regulating water, but it does mean at the end of the day that the Federal Government has a broad authority to regulate water as commerce.

Mr. SALAZAR. Thank you.

I yield back, Mr. Chairman.

Mr. OBERSTAR. I thank the gentleman and the witnesses.

Mr. Hayes? No questions.

Mr. Hall.

Mr. HALL. Thank you, Mr. Chairman, and thank you to our witnesses for your illuminating testimony.

We have in New York, I think, a strong sentiment in favor of, certainly an official position in the State of New York, which I share, is strongly in favor of the passage of the Clean Water Restoration Act with some concerns on both sides about the possible expansion.

I know some people who have private ponds or, in some cases, natural ponds or lakes on their property which have no inlet but do have a seasonal outlet. They are concerned about their lakes suddenly becoming Federal regulated, or ponds, something quite small, because they flow into something that flows into something that eventually is navigable and/or that eventually will fall into this definition whether the word, navigable, is not.

As a sailor, I can tell you that I totally agree with Mr. Squillace's statement that navigability has really nothing to do with it. It was just a way of trying to define where the line was. I have sailed through some pretty polluted waters and some very clean waters, and the boat doesn't seem to care.

[Laughter.]

Mr. HALL. I will just speak about my own home on a hillside in Duchess County, New York, where we have two neighbors living up the hill from us with leach fields. When it rains heavily, when we have the three 50-year floods that we had in the last four years, some of the driveways look like they might be navigable.

My next neighbor down the hill has a stream. It is a full year-round stream and a pond flowing behind the house. It runs eventually into, I think, the Great Swamp and from there into the Ten Mile that goes to Connecticut and eventually into Long Island Sound.

So it is very hard to draw the line, and I agree that we need, if it is possible without using the word, navigable, to find the clearest possible line especially because the courts will change. This Court seems to be less friendly to regulation than some. Some of us hope that we will, in the future, have a court that will be more friendly to regulation, but that vacillation should be reined by the legislation.

In the wake of the rulings of the Court and subsequent Administration guidance, it seems as if several polluters that were previously required to obtain permits are now trying to buck that requirement by arguing that the waters should never have been regulated in the first place. If this trend continues without a restoration of an original congressional intent, what would the impact be

on the effort to ensure that our waters are fishable and swimmable?

This would be to Mr. Squillace, first, please.

Mr. SQUILLACE. I think we don't know is the answer. At least I don't know the answer to what impact that is going to have. I think what we can say, though, is that there will be many discharges that will simply not be regulated, at least not by the Federal Government.

Now one of the difficulties that we have here is that many of the States have good programs to try to regulate beyond what the Federal Government does, and I don't want to take away from what the States are able to do, but I think it is difficult when we don't know exactly where these lines are for us to know who should do what.

I think part of the reason that the States have been so overwhelmingly supportive of broad Federal authority is because it is simply easier to have the Federal Government broadly in charge of most of our waters in this Country and allowing the States to play a role through the process that is established under the Clean Water Act. The States seem entirely comfortable with that.

I think that if we don't do that, then I don't know what exact impact that is going to have on our waters. Certainly there is at least a significant risk that there will be adverse impacts on those waters.

Mr. HALL. Professor Buzbee?

Mr. BUZBEE. I would agree with that.

Just, there are several instances. The Robison case was mentioned, where criminal law violators of Section 402 have sought to escape the Federal Government's jurisdiction based on this.

There are cases involving oil spill regulations that the American Petroleum has litigated and claimed that the spill regulations can no longer reach as far as the Federal Government has asserted because of these laws cases.

Then there are several instances involving some lakes and ponds, and also I have heard of some of these permits out West where a permittee has claimed the Federal Government cannot reach them any longer.

So I think your question is does the law, as it stands now, cut back on Federal protections? The answer is clearly yes.

Even more important is everyone, including the witnesses, clearly agree the SWANCC case clearly cut back on Federal jurisdiction. I think every witness here would agree the SWANCC case cut back on Federal protections. So, in that respect, Rapanos is having the effect we are seeing now, and SWANCC has long been understood to reduce Federal protections.

Mr. HALL. Mr. Chairman, my time is expired, but would you allow the other witnesses to answer the same question, please.

Mr. OBERSTAR. Very good.

Mr. HALL. Thank you.

Mr. ADLER. Yes. I would just say very briefly, certainly Federal regulation has been restricted some, but it is not clear that that necessarily means meaningful environmental protection has been restricted. The most expansive Federal regulation is not always the best way to protect the environment both because, in many cases,

State and local governments are capable of intervening and they are more likely to intervene if the boundaries between the State and the Federal Government are clear.

If the States know there is a gap to fill, they are more likely to fill it than if it is unclear that there is a gap to fill. Evidence of that, for example, is after the SWANCC case, quite a few States including my own Ohio introduced legislation to regulate isolated waters. Some passed very quickly and those that didn't pass stalled once the Army Corps of Engineers and EPA, contrary to most commentators, said: We can, through our guidance, kind of wave our hands and pretend as if the SWANCC decision didn't do anything, which is one of the things that ended up leading to Rapanos.

When they reintroduced uncertainty into the scope of Federal jurisdiction, the States were suddenly much less aggressive in trying to fill that gap. It is not that States wouldn't like the Federal Government to regulate for them, just as the States wouldn't like the Federal Government to pay for their roads or pay for other things.

The question is will States, if they recognize there is a gap and the definition of that gap is clear, act to fill that gap and to protect those waters that are important to States and local communities? I think they will do so a lot more than we have given them credit for and are more likely to do so where we can clarify the nature of the boundary between the Federal and State governments.

Ms. ALBRECHT. I rest.

Mr. HALL. Thank you, Mr. Chairman.

Mr. OBERSTAR. Thank you very much.

I just point out that there are at least 25 States that have legislation establishing no more restrictive requirement or stringent requirements than those that exist in Federal law. So there could be some very significant gaps.

I hold this panel dismissed with a great appreciation for your comments and for the striking divergence in views.

Ms. Albrecht, Professor Adler, I asked for your comments and your legislative suggestions on prior converted cropland, navigable waters and the accompanying regulatory framework and other items, and I hope you can do that within the next 30 days.

Ms. ALBRECHT. Okay.

Mr. ADLER. Sure.

Ms. ALBRECHT. We will work on it.

Mr. OBERSTAR. Thank you very much.

Mr. SQUILLACE. Thank you, Mr. Chairman.

Mr. OBERSTAR. On our next panel, we will make one adaptation for a witness who has a flight problem. That is if he doesn't get out of here soon, he will miss his flight.

Chris Petersen, President of the Iowa Farmers Union; Brett Hulsey, Dane County Supervisor, Madison, Wisconsin; Kristin Jacobs, Broward County Commissioner, Fort Lauderdale, Florida; Robert Cope, Commissioner, Lemhi County, Salmon, Idaho speaking for the National Association Counties; and the Honorable Don Munks, Skagit County Commissioner for the State of Washington, Mount Vernon.

**TESTIMONY OF THE HONORABLE BRETT HULSEY, DANE COUNTY SUPERVISOR, DISTRICT 4, MADISON, WISCONSIN; CHRIS PETERSEN, PRESIDENT, IOWA FARMERS UNION; THE HONORABLE KRISTIN JACOBS, BROWARD COUNTY COMMISSIONER, DISTRICT 2, FORT LAUDERDALE, FLORIDA; THE HONORABLE ROBERT COPE, COMMISSIONER, LEMHI COUNTY, SALMON, IDAHO ON BEHALF OF THE NATIONAL ASSOCIATION OF COUNTIES; AND THE HONORABLE DON MUNKS, SKAGIT COUNTY COMMISSIONER, DISTRICT 1, MOUNT VERNON, WASHINGTON**

Mr. HULSEY. Thank you, Mr. Chairman.

It is a pleasure to be here today. I decided to give a little slideshow to brighten things up.

I am Brett Hulsey, Dane County Supervisor and, yes, the PowerPoints work. So, Dane County encompasses Madison, Wisconsin.

[Slide shown.]

Mr. HULSEY. Dane County, Wisconsin encompasses Madison, Wisconsin, the University of Wisconsin and the largest agricultural county in Wisconsin. We are the 89th largest agricultural county in the Nation and one of the top tourism counties is Dane County. So we balance many of these issues on a daily basis.

[Slide shown.]

Mr. HULSEY. In addition to this, we have many challenges as well. Closed beaches, the one on the left is a closed beach in my district. The discharge on the right is coming from an upstream area. We are a headwaters area ourselves.

I have been on the county board for 10 years. I am the Chair of the Lakes and Watershed Commission, and I am also Chair of our Personal Finance Committee. So I try to combine your zeal with Congressman Obey's finances at the county level. Sometimes, I succeed.

[Slide shown.]

Mr. HULSEY. So, basically, the issue here is that recent Supreme Court decisions have created chaos, as you have mentioned before. About 59 percent of our surface streams are no longer or at risk of losing protection. That is drinking water to 100 million Americans, roughly 1 in every 3 Americans. Twenty million acres of wetlands are at risk.

We believe and I believe that your solution is a reasonable step forward to solving the chaos.

So, I first got involved in Clean Water Act issues, actually safe drinking water issues, in 1993 when the crypto outbreak in Milwaukee killed more than 100 people and sickened 400,000. It was the largest waterborne disease outbreak in modern U.S. history.

We have 400 individual permits, getting to your comment, Mr. Salazar, that dump to, that emit to ephemeral streams and headwater streams in Wisconsin.

[Slide shown.]

Mr. HULSEY. My concern is that we would allow slaughterhouses, feed lots, if this chaos continues, to emit directly to drinking water sources in our State and that we could have a recurrence of the crypto outbreak.

[Slide shown.]

Mr. HULSEY. As we see, and this slide is from a recent Seattle Times article, we are seeing drinking water supply issues. This is from Congressman Larsen's district north of Seattle, a Seattle Times story: Worry About Drinking Water Supplies.

[Slide shown.]

Mr. HULSEY. And this is what counties face today. The headline on the left and the picture to the left is from my county. The picture on the right is an example of where the road builder and construction engineers should have better considered wetlands in creating this reflecting pond below that diamond eight interchange.

Floods are not new, however. We have seen this since the Bible. Unfortunately, as Jesus said, you build your house on your rock and it will withstand the flood.

[Slide shown.]

Mr. HULSEY. The main problem is we have seen a huge growth in flood insurance payments in the billions of dollars.

[Slide shown.]

Mr. HULSEY. There was a mention about real estate. Wetlands do not usually increase the value of real estate. Here is an example where they make it very difficult to sell in our county.

We have had about $50 million of flood damage in our county since 1993.

[Slide shown.]

Mr. HULSEY. As you can see, there is a very steady pattern of flood damages across the Country. In your own district, it is Aitken County. In Congressman Larsen's district, you are actually in one of the highest flood disaster declaration areas in the Nation.

[Slide shown.]

Mr. HULSEY. It tends to be about a third of the declarations are from floods but about two-thirds of the damages from floods, and it varies a little bit by region.

[Slide shown.]

Mr. HULSEY. But we see a huge increase in flood damage due to habitat destruction, probably climate change and also flood plain development.

[Slide shown.]

Mr. HULSEY. This is a 1993 flood. Again, you see highway structures under water.

[Slide shown.]

Mr. HULSEY. This is the before and after for St. Charles County right north of St. Louis, and there was a huge amount of flooding there. Congressman Carnahan's father was a great champion in moving the people out of the flood plain.

[Slide shown.]

Mr. HULSEY. So, basically, what I am saying in my remaining few seconds is that we need the Clean Water Restoration Act for two reasons. One is to protect people from deadly pathogens in their drinking water. Two is to protect people from flooding. Either you care about these things or you don't, and your solution is the best solution to the problem I have seen.

We hope others will come forward, but if you care about these things, you have to do something about it because the current court-created chaos cannot continue.

Thank you, Mr. Chairman.

Mr. OBERSTAR. Thank you very much for your presentation.

We will go now to Mr. Petersen.

Mr. PETERSEN. Thank you, Chairman Oberstar and Ranking Member Mica and Members of the Committee. We appreciate the opportunity to testify today.

My name is Chris Petersen, and I am the President of the Iowa Farmers Union. I have been involved in production agriculture for 35 years. Presently, my wife and I maintain a 30-head sustainable Berkshire sow herd on our farm near Clear Lake, Iowa. That is north central Iowa.

In 2001, I started my own business doing consulting work with a network of independent family farmers, grassroots environmental activists and consumers consulting on concentrated animal feeding operations, family farm issues, food quality and safety issues and all other rural issues.

Iowa Farmers Union policy states that our environment is best protected by family farmers who have a long-term interest in the productivity of the land and the healthy, safe and pure supply of our water. In constructing national policy to address the issues associated with water quality, we support the following actions:

Efforts in research that addresses the issue of nonpoint source pollution;

Concentrated animal feeding operations being required to post appropriate bonds to cover the cost of cleaning up any contamination of surface and groundwater resources. When posting these bonds, CAFOs should also be required to develop and submit waste storage closure plans;

A national policy that discourages polluters from shopping among the States for the lowest environmental standards and encourages States and localities to establish standards beyond the Federal minimums;

Cost-sharing provisions targeted to small and medium-sized farms;

Responsibility for submitting a waste management plan and complying with waste management provisions being shared by the owner of the livestock and the operator of the facility;

And, I guess taking that a little further, responsibility and liability for environmental and pollution problems being shared between the vertical integrators and the contract farmers on all livestock feeding operations.

By changing the word of the Act to simply waters, a national set of guidelines can be established for eligible waterways, creating uniformity in the jurisdiction process and expediting the subsequent permitting process. Additional time devoted to determining jurisdiction comes at a great cost to both farmers and taxpayers. Like many aspects of agricultural policy, a clear and concise method of determining jurisdiction and permitting encourages farmers and ranchers to be proactive stewards of water resources.

Restoring clean water practices to the methods used before 2001 would not cause unwarranted hardships on farmers nor would it deliver them into a state of constant fear of EPA or the Corps. Above all, agricultural producers are eager to highlight the unique set of circumstances that warrant attention when formulating clean water laws.

In this legislation, the current regulatory exemptions related to farming, forestry, ranching and infrastructure maintenance that have been in place since 1977 could not be overruled. Activities such as plowing, seeding, cultivating and harvesting along with the construction and maintenance of farm or stock ponds, irrigation ditches and farm or forest roads have been exempted from the permitting requirements and would remain so under your proposed legislation.

I do encourage you to include the exhaustive list of agricultural-related exemptions in future reauthorizations of the Act as cited by you, Chairman, in your opening statement.

Water pollution damage is uneven in scope and severity because it occurs when farming is done at the non-farmer owned industrialized, commercialized levels. The ultimate challenges facing lawmakers is how to account for the differences between family farming operations and non-farmer owned industrialized, commercialized levels of agriculture.

Family-sized producers should not be penalized either through statute or financial burdens for the irresponsible actions of massive corporate agriculture outfits who conduct business with little regard for the environmental sustainability.

I am just about done here.

What will help farmers and ranchers in the future is a less cumbersome and more expedient process by which agriculture, EPA and the Corps can come to a consensus of what problems do or do not need to be addressed and the most common sense by which challenges can be resolved and solved. We support your legislation, and it needs to be passed to address the chaos of the last few years.

I just want to make it very clear that I am a family farmer. I am very environmentally conscious, and a clean environment and clean water are very essential to every single citizen of the United States.

Being a good steward of the land and clean water is not elitist or a process of the wealthy. It is something that needs to happen in this Country.

Thank you very much.

I am sorry, but I have a plane to catch. If there are any questions, please address it through our National Farmers Union office, and I will be more than happy to answer your questions.

Mr. OBERSTAR. Are you flying Northwest?

Mr. PETERSEN. United, actually.

Mr. OBERSTAR. Oh, well, you got a little better shot at it then, at making that flight then, but you really need to leave right now if you have a 7:45.

[Laughter.]

Mr. OBERSTAR. So, if we include the ag-related exemptions with the savings clause and include reference to prior converted farmland as we have discussed earlier today, which you heard, that would make the bill more acceptable than you already consider it to be?

Mr. PETERSEN. Yes, exactly. Farmers, basically, don't have any problem, at least I don't and the farmers I run don't—there are tens of thousands of us—with doing the right things for better stewardship and clean water.

Mr. OBERSTAR. Thank you very, very much for your contribution.

Mr. PETERSEN. Thank you.

Mr. OBERSTAR. Ms. Jacobs.

Ms. JACOBS. I guess it is almost good evening at this point, but thank you, Mr. Chair and Members of the Committee, for giving us and me the particular honor to be able to talk to you today about the Clean Water Restoration Act, and I would ask that my comments today be recorded as a part of the record.

I have been a Broward County Commissioner for 10 years, representing the Nation's 14th largest county and the State of Florida's second largest county by population. I am also a member of the South Florida Water Management District's Water Advisory Commission which comments on policies for the 16 counties in middle to lower part of the State of Florida, from the Kissimmee chain of lakes all the way to Key West.

Broward County is bordered on the east by the Atlantic Ocean and on the west by the Everglades, extending, as I like to say, from the seagrass to the sawgrass. In fact, two-thirds of our county is Everglades protected land. These natural environments are connected by a network of 1,800 linear miles of canals throughout our county, and the stewardship of our water resources and protection of them from flooding and drought are important responsibilities not only to Broward County but to governments across the Country.

Broward County's environmental quality is an integral part of our economic health with approximately 10 million visitors—yes, I said 10 million—to our county per year, who enjoy our natural resources as well as our local businesses.

Having served as Broward County's mayor during Hurricanes Katrina and Wilma, which was the worst storm to hit Broward County in 55 years, I saw firsthand how the protection of our environmental efforts supports the flood protection infrastructure that meets of our citizens to be safe in their homes and their businesses.

Without protection, careful monitoring and regulation, pollutants in surface waters and stormwater could easily threaten the nearshore Everglades habitats. Our county has benefitted greatly from those protections afforded us by the Clean Water Act over the last several decades.

The Clean Water Restoration Act should be supported by this Committee and by Congress. The bill is consistent with the views of many prior Federal court decisions which held that Congress intended to give the terms, navigable waters and waters of the United States, the broadest permissible constitutional interpretation. The bill clarifies Congress' intent by restoring the agency's definition, providing a plain meaning of waters of the United States, and resulting in more traditional consistent regulation. Simply put, the bill restores the scope of Federal jurisdiction, no more and no less.

What the bill does not do is expand Federal jurisdiction or preempt State or local jurisdiction as to water or to land use. The savings clause preserves existing exemptions from Federal regulation. Public infrastructure, maintenance and water supply projects would not be treated differently than before SWANCC and Rapanos.

The bill would continue to allow for stricter local standards, which Broward County has higher standards than that which is set by the State of Florida, and does not propose to change the current authority of States to manage permitting, grant and research programs.

However long it took to get a Corps permit in 1993, one thing is sure, that post-Rapanos it is going to be even more difficult to get those permits and longer if we don't change the situation as it currently stands.

The bill has been criticized as introducing regulation of swales and ditches. The role of the Federal Government in these areas is not changed by passage of this bill. Swales are prevalent throughout Broward County and are part of a water quality treatment system, and treatment is provided prior to discharge in canals or water bodies.

Ditches are already defined as a point source in Subsection 502.14 of the Act. The Clean Water Act allowed discharges of pollutants from such sources to waters of the U.S. when they comply with Section 402's NPDES program. The bill will simply not expand or even disturb regulation of ditches under the Act.

Concerns about expanded regulation of public infrastructure, maintenance and water supply projects are also misplaced. When such projects affect isolated wetlands or very intermittently existing waters, it can accommodate reasonable Federal regulation given the 5-year and 10-year and sometimes longer timeframes that are involved in capital funding, land use acquisition and zoning decisions.

I would point out to you that Broward County has one of the unique roles throughout our State that we have countywide land use authority, and we have not had it challenge by the Clean Water Act so far and don't expect it to be changed as passage of this bill, hopefully, occurs. The lower risk of challenges and litigation and the restoration of a uniform minimum level of protection of our waters nationwide is what would result from this bill's passage.

Mr. Chair, most of Broward County's congressional representatives are among the 175 co-sponsors of your bill, and I am proud that they are.

As for my opposing colleagues at NACO, I have no doubt that they are very sincere in their concerns that this legislation might preempt their local authority and make permitting requirements even more onerous. Broward County respectfully disagrees.

Let me assure the Members of this Committee, the Broward County Board of County Commissioners supports strong water quality protections and legislation that retains the original intent of the Clean Water Act to restore and maintain the integrity and quality of our Nation's waters, and we have ensconced that in a resolution that I would provide for anyone that would like to see a copy.

Restoring the Clean Water Act protections to all of our water bodies is crucial as counties across the Nation are dealing with massive flooding, lack of drinking water and new threats of unregulated industrial pollution to our streams and drinking water sources.

As a brand new grandmother, I think we can safely say that this bill has some steps to go to reach clarification. I urge you today to go through those steps to try to find that bridge that links some of the issues for language which you clearly, very well laid out for us this morning, Mr. Chair, and I would ask that ultimately this bill pass this Congress for the good of this Nation, for the good of our county, for the good of my grandchild and those still to come.

I thank you so much for the privilege of offering my testimony to you today.

Mr. OBERSTAR. Thank you very much. Grandmothers are coming awfully young these days.

[Laughter.]

Mr. OBERSTAR. You must be very pleased with the legislation that Congress enacted over the President's veto to restore the Everglades in the Water Resources Development Act.

Ms. JACOBS. Oh, yes, sir. Yes, sir.

Mr. OBERSTAR. Over $2 billion to that initiative.

Ms. JACOBS. It is one of the most important things to happen in the State of Florida.

Mr. OBERSTAR. Commissioner Cope.

Mr. COPE. Thank you, Mr. Chairman.

My name is Cope, as you know. I am here representing the National Association of Counties, better known as NACO. I am privileged to serve as the Chairman of their Environment, Energy and Land Use Committee.

As you may well know, NACO officially opposes the Clean Water Restoration Act. That was done through the process of a resolution to that effect was approved by four committees, steering committees of the organization, three of them unanimously.

That doesn't mean that every county—you have heard Dane county and Broward County—oppose it. That is not unusual. I notice from the votes that you had taken today, it is pretty rare that you get unanimity on the floor of the House. I think that probably happens also in most places. But the vast majority of counties have a basic problem with the type of philosophy that this Act has.

Make no mistake about it, the issue is not clean water. When we talk about the protections and all the pollutant problems we have, this issue is jurisdiction rather than quality.

All of us fully support clean water. It is essential in my area of the West where we get 11 inches of moisture a year and we don't have enough water to go around. Both the quantity and the quality are vital to our very survival, but jurisdiction does not necessarily bring with it, protection.

In fact, most of the big pollution we have in my neck of the woods comes from the sludge that runs off the ground after the forest fires that is due to the great protection that we managed to put in place on our public lands. We have discovered the hard way that Federal jurisdiction doesn't necessarily work out best for the environment and for its people.

We do have some suggestions we would like to make. Overall, we do feel that the word, navigable, needs to stay in place, but it needs to be defined.

There is a wide range of definitions of navigability across this Country. In Idaho, the definition of a navigable stream is any

stream that will float a six inch log in high water, and it doesn't state how long the log has to be or how far it has to float. I think there is some room for improvement on that definition, myself, and I think we could have one that would establish what we are actually talking about.

There are partnerships that need to be strengthened and restored among Federal, State and local governments. I think this is absolutely vital, and I very much fear that if we decide that all the waters come under Federal jurisdiction, we have the potential to lose some of those partnerships.

I am absolutely convinced that we lose flexibility. We have never felt comfortable with spandex regulations nationwide. One size doesn't fit all. I realize that things happen. My colleague here from Iowa talked about the things they have, but Iowa and Idaho are different, and the standards that will work very well along the Missouri and Mississippi valleys on the two sides of the State fail miserably in the Salmon and the Snake.

The same types of background for some types of heavy metals you may find on the coast of Lake Erie in Ohio won't function on the Pacific Coast of Oregon. Just for one thing, the arsenic levels are higher for the background.

I do believe fully that some allowances have to be made for geographical differences. If we try to put a blanket on the entire Country, we are going to find places too loose and places it is too tight. I see no avoiding that.

We fully believe that that government governs best which is closest to the people. I think, from my experience, county government tends to do that well.

I heard today a broad list of exceptions to the Act that have been in place and stayed in place, but somehow on the ground they don't seem to happen that way all the time. We had Secretary Woodley who sat here—what is his name? I can't remember now—and told us all the things that the Corps didn't do, but I think he is missing talking to some of these people because it doesn't seem to be uniformly applied.

A classic example we had just recently in my county, again the forest service wanted to do a little campground improvement at Meadow Lake. It is up about 9,000 feet. It drains into nothing. It is a glacial basin. The Corps decided they had to be permitted.

The forest service said: Why? It doesn't connect to anything? It is just a basin there.

They said, well, don't you have some people go up and recreate.

Well, yes, there are campers that come up.

Do they come from out of State?

Well, there are some that come out of Montana.

Well, that is interstate commerce, so it is now Federal jurisdiction.

These are real case scenarios that are happening.

We also feel one of our prime projects has been the Upper Salmon Basin Model Watershed Project. We have done a great deal of work in Central Idaho for riparian enclosures, building up fences. We do culvert replacement, stream reconnection. It is funded mainly through Bonneville Power Administration monies. Those monies cannot be committed more than 24 months in advance.

We are barely making the permit applications now. I think if we get any more load onto the Corps and extend that time at all, we have deleterious environmental effects because we won't be able to perform the actions that we have out there.

I say again, the issue here is not clean water. It is not the environment. It is a question of jurisdiction and in doing what is most effective and right.

When we have situations with the forest service, we have two Federal agencies who are having to develop parallel programs in concert with each other, both of them at taxpayer expense. When we also have the Bonneville Power situation with the model watershed, we are failing to provide some of the really good environmental effects that we can have just because our time delays become too great.

I really believe that man is capable of developing his own environment and modifying his own environment for the better and that not all activities men do are necessarily bad. We can do beneficial things.

I would like and I believe NACO would like to see the flexibility for local government to utilize the expertise that we have on the ground and do that best efficiently, and I believe the Act, in the form it currently has, doesn't take that into consideration.

Thank you.

Mr. OBERSTAR. Thank you very much, Commissioner Cope. We appreciate your statement.

Commissioner Munks from Skagit County.

Mr. MUNKS. Skagit County, you got it right. That is good.

Thank you, Chairman Oberstar and distinguished Members of this Committee.

It is an honor and privilege to testify before you today on some significant concerns that my constituents have in regard to the Clean Water Restoration Act of 2007. I would like to thank Congressman Larsen for graciously working with the people of Skagit County to provide us with this opportunity.

I hail from one of the richest agricultural valleys in the Western Hemisphere, nestled between the alpine mountains of the North Cascades and the crystal clear seas of Puget Sound. The Skagit River is the longest river draining into Puget Sound and is home to all five species of Pacific Salmon as well as steelhead and bull trout. We have four other rivers and hundreds of tributaries.

As a fourth generation Skagit County farmer, my great grandfather settled on the pristine banks of Fidalgo Bay in the 1950s, where my family resides to this day. We have great respect for the land and the waters of our beautiful county.

Although we were experiencing significant pressures of growth from the north to Vancouver, BC, and from the south to Seattle, Washington, the strength of our agriculturally-based economy has motivated our citizens to be good stewards of that land. We harvest the finest red potatoes in the world, produce hundreds of acres of stunning world famous tulips, provide a significant portion of cabbage and other kohlrabi crop seeds for the entire world as well as being on the cutting edge of production for blueberries, strawberries and raspberries.

Other Puget Sound counties have sat back and watched their farmland disappear. Working with farm families and advocacy groups, we have worked hard to keep agriculture viable. We have protected more than 5,000 of our 90,000 acres of fertile farmland from future development with our Farmland Legacy Program which allows us to purchase conservation easements, protecting our open spaces and productive farmlands for eternity. County taxpayers voted to impose this tax on themselves. We allow only one farm home every 40 acres of ag land.

Our bays and estuaries support more than 93 percent of the overwintering waterfowl in western Washington including the Western High Arctic goose, Trumpeter swans, black brant plus many other species.

In 1995, the county commissioners created the Clean Water Shellfish Protection District to clean up our saltwater bays for shellfish harvests.

In 2004, we instructed our health department to work with rural property owners to form community councils in problem areas and, with our expertise in State grants and Federal grants, replaced the faulty septic systems.

County departments consider salmon recovery in all of our actions and pursue grant funding for salmon enhancements.

Today, we tax our citizens to monitor water quality and habitat, administrative lake districts, enforce water quality compliance and operate onsite sewage programs. We work hand in hand with other organizations such as conservation districts, fisheries enhancements, watershed councils and local tribes to ensure our water is clean.

So, with that being said, why am I, Don Munks from Skagit County, here today to testify against Clean Water Restoration Act of 2007?

It is obvious that fellow commissioners and I, along with thousands of community members, are strong advocates of clean water and are willing to tax ourselves to back up our values.

Our main concern is that the bill proposes the word, navigable, to be eliminated from the definition of waters of the U.S. in the Clean Water Act. This would effectively put all bodies of water or perceived bodies of water under Federal jurisdiction, even those waters currently under State authority.

Let me liken this crisis to a national emergency due to a natural disaster. History has shown that those communities that wait for Federal intervention suffer devastating loss. While many pointed their finger at FEMA in the Katrina disaster, the real disaster was in the inability of the first responders at the local level to react.

In regard to clean water, we are the first and best responders and have been very productive. By removing our ability to be first responders and saddling us with a cumbersome permitting process, we would be faced with a huge impact that may require a Clean Water Act permit for routine tasks. Requiring Clean Water Act permit for gutters, driveways, driveway cultures, agricultural ditches, farm ponds and roadside ditches would dramatically increase the time required to process permits and create a backlog of projects for the Corps to add to an already significant backlog.

Annually, hundreds of small projects currently being completed by county forces and moderate permit requirements would require a permit from the Corps. In addition, private property owners currently able to construct would be required to obtain a Corps permit. Not only does this greatly increase the permit applications required, but it adds additional burdens to the Corps to process the thousands of additional permits they will receive every year.

Many of these projects have short allowed construction windows due to salmon spawning. The increased length of time to obtain permits will often result in the project being deferred until the next year to enable construction during the fish window. During the delay, the need for the project that promotes clean water continues or increases. We will miss grant deadlines and be burdened with additional staff time.

The intent of your bill is fine. We all want clean water. But by dramatically expanding the jurisdiction of the Corps of Engineers, you will stymie the efforts of Skagit County, our dike and drainage districts and our advocacy and resources groups to continue work toward a common goal.

We ask you for the opportunity to continue to be first responders for clean water by not saddling us with additional bureaucracy. As we help you on the ground make our water cleaner and healthier, please help us with legislation that is clear and simplifies our permitting process.

Thank you.

Mr. OBERSTAR. Thank you very much for your testimony and for the concerns you have raised, and let me begin there.

You said the legislation would cost additional money and create delays and complexity. In fact, without action, counties all over the Country and especially in my own congressional district have said it is costing them millions of dollars and additional personnel they have to hire, delays, paperwork to comply with this confusing complexity of post-Rapanos and SWANCC decisions and the regulatory guidance issued by both the Corps and the EPA. They and many others have appealed for clarity.

So the bill I introduced was to establish clarity.

As you and Commissioner Cope are concerned, if removing the term, navigable, from the Clean Water Act would create additional concerns or confusion for you, if we leave it in and attach to it the regulatory regime prior to the two Supreme Court decisions, do you have a problem with that?

Mr. COPE. My question, Mr. Chairman, would be which regulatory regime?

We have seen, over the 20 years leading up to this Rapanos decision a change, in your jurisdiction authority. I think it wasn't so much that the Corps misread the original intent as they just gradually expanded their authority a little farther, a little farther until finally it reached the point that somebody pushed back, and it was the Solid Waste Authority of Northern Cook County.

Mr. OBERSTAR. Well, in this Committee in 1977, we addressed the concerns arising out of the Corps' vast expansion, which we thought was an overreach in implementing 404. In 1977, right here in this Committee room, we limited the scope and directed the

Corps, as they have done from 1977 through 2001, to follow a much more specific regulatory regime.

So I have referenced it to the previous panel, the EPA and Corps panel earlier today. Waters of the United States and waters of the U.S. means—these are words drawn from the Corps regulations prior to the Rapanos and SWANCC decisions—"All waters currently used or were used in the past or may be susceptible to use in interstate or foreign commerce, including waters subject to the ebb and flow of the tide; all interstate waters including interstate wetlands; all waters such as intrastate lakes, rivers, streams, including intermittent streams."

These are words from the regulatory scheme of the Corps of Engineers and of EPA. If we include, by reference, those provisions that were intended to be covered in the savings clause that I included in the introduced bill, Mr. Grumbles and Secretary Woodley said they thought that would be acceptable.

So the provisions of the bill that I introduced say nothing in the Act will be construed as affecting the Secretary of the Army or the Administrator of EPA under the following provisions, and there are eight listed, eight categories.

So, all right, if eliminating the term, navigable, causes people a lot of heartburn and regulatory uncertainty, let's put it back in but retain the regulatory certainty of the existence of those regulations prior to the Supreme Court decisions.

Mr. COPE. I think if that were defined to where we can really have a good boundary on where those limits sit, I think we can deal with that.

Mr. OBERSTAR. They are going to come back to the Committee and be specific about that.

Mr. COPE. The key to the problem we have had with that particular language is we see what it includes, but the boundaries are so wide, we are not real sure that there is anything exempted according to that language.

So we would like to see some definitions. As I say, navigability I think could be better defined. I think we can make it work.

Mr. OBERSTAR. But on the other hand, your State is one of those 25 States that has prohibited itself from establishing regulatory regime more stringent than that of the Federal Government.

Mr. COPE. That is true, but we also have a very effective Department of Environmental Quality that works very closely with the health districts and with the counties, and it works rather well.

Mr. OBERSTAR. You cited that in your testimony, but I just want to point that out.

Mr. MUNKS. Mr. Chairman?

Mr. OBERSTAR. Yes.

Mr. MUNKS. You had asked the question. Could I answer it too, please?

Mr. OBERSTAR. Sure.

Mr. MUNKS. I don't disagree with what you are wanting to do, and I applaud you for wanting to put the word, navigable, back in.

I think that what Mr. Cope said was very accurate. We want clarification of jurisdiction. We have spent a number of years defining what the jurisdiction is between the Federal Government and their agencies, the State Government and their agencies, and local

government, whether it is counties or cities and how we all act together.

The State of Washington has been very progressive in everything they do. We have a tremendous amount of regulation, and we have a requirement that sets a minimum but allows us to do anything above that that we want to put in place. So we have, over the years, developed what it is we are going to do, how it is we are going to do it to protect these waterways that we have.

It is very difficult to protect them especially with the interaction, as Supervisor Hulsey said. We have a lot of flooding, maybe the worst flooding areas as a whole in the Country, but we have mountain to sea.

It is all a watershed, and we have a lot of area that is regulated by the Federal Government. It is off limits to do anything to avoid the flooding. And so, as we deal with that flooding and the aftermath of the water after that flooding, we are continually cleaning up.

We have tremendous growth that we are trying to take care of, more in what I call the metropolis area. That is to the south. That is in Congressman Larsen's area.

But we have been imposing upon ourselves a lot of regulation. So putting navigable back in, as you said you were open to do, clarifying some of the jurisdictional issues and the definitions of what it is we are going to get accomplished.

We work very well with the Corps, but the Corps in my district is different with definition than the Corps in Commissioner Cope's district and is different than almost every district in the United States. So we have kind of morphed into this interaction of how we permit process and how we get things done.

Mr. OBERSTAR. Thank you for that expansion.

As I say, I am open to discussion of the subject. I want to get us back to pre-SWANCC and Rapanos, pre-Kennedy test, pre-Scalia test, and to eliminate, confusion to the Corps, the EPA and to local interests and State interests.

I want to restore the purpose of the Clean Water Act which I understand very clearly. However, we get there, I want to do that. So we are having this discussion.

Mrs. Drake.

Mrs. DRAKE. Thank you, Mr. Chairman, and again thank you all for being here.

I think I want to start with Mr. Cope and Mr. Munks. I did hear you say, and I appreciate your saying it, that you think we need much better clarification and definition in the bill that is being proposed. But other than defining better, navigable waters, with the existing Clean Water Act, do you think it needs to be better defined?

I know you have said you worked with it over the years and things have changed. Can you tell us, with what you have been working with now, since these two Supreme Court hearings, do we need a better definition of that or not?

Mr. COPE. I am going to defer most of this to Mr. Munks because my county is 92 percent Federal land, and basically everything is a 404 or a 402 stream. So, as far as exactly what is and is not included within the Clean Water Act, I am not horribly familiar.

I can only tell you theoretically, from what I understand, irrigation-induced wetlands are exempt and they never are in our county.

With that, I will turn it over to Don.

Mrs. DRAKE. Mr. Munks did make an interesting point of people feel there are different sets of rules based on which Army Corps district you are in, and I am sorry Secretary Woodley wasn't here to hear that because I have told him that. I have heard that form people in adjoining States to us as well when my constituents are working across State lines.

Mr. MUNKS. Congresswoman, I appreciate the question because it kind of brings up what we are dealing with in the State of Washington. Understand, the State of Washington is split in half. There is a west side and an east side, and the water situation is completely different.

On one side, we are inundated with water, record snowfalls. Lots of water comes down all of the rivers and follows up the tributaries on the west side. Now, on the east side, they are putting the water on the ground and creating their wetlands and their wet areas that they have to deal with.

So it is kind of different on each side, but we have over the years put together a jurisdictional coalition between what the Corps will regulate through the 404 process and an expedited process that we go through that isn't as onerous as the 404 depending on what the project. That is in conjunction with the State Department of Ecology.

And so, as a local county, when we have a project to do, if it is something that we are going to have to do with the Corps, we go directly to the Corps and they solicit from the State Department of Ecology, and Fish and Wildlife comment, and from the Federal agencies as well.

But otherwise, with all other aspects of what we want to permit, we go to Fish and Wildlife, our State Fish and Wildlife, we go to our State Department of Ecology, and we put out to the tribes what it is that we are wanting to do. Now, in Skagit County, we have four tribes that we deal with.

With their issues, with salmon, ESA issues, the process should be very onerous, but we have simplified it with these understandings of how we are going to cooperate together and who has what jurisdiction. That is kind of what we are afraid that we are going to lose, the years of cooperation that have been established and what may change from that.

Now I very much am an advocate for clean water. That is something that is very important to me, and I chair the Water Quality Committee for the National Association of Counties. But we know that we want to keep a process in line or if it is changed at the Federal level, quickly establish what the bottom line in that legislation is so we can quickly adapt what we are doing, so we don't lose this opportunity.

In our area, we have a very narrow fish passage window that we can work in water, and if we miss it, we lose our grants. If we miss it, we lose that year. If we miss it, we have flooding.

Mr. HULSEY. Representative Drake?

Mrs. DRAKE. I just wanted to ask the two of you something a little different.

Mr. HULSEY. Can I follow up on that one real quick?

Mrs. DRAKE. Just a minute. Let me get this out.

That is you have heard the testimony about some people wanting all waters to be Federal waters. You have heard the concern that waters would be considered Federal waters. I just wondered, with both you and Ms. Jacobs, if you have a concern if all water was considered Federal water, if that wouldn't have an impact on your counties and decisions that you currently make today becoming Federal decisions?

Mr. HULSEY. We have a unique situation in Wisconsin. We are the first and only State to fill the SWANCC loophole after it passed. It was a bipartisan measure signed by a Republican governor.

So, as far as the isolated wetland issue goes, our State has stepped in, and I think it actually shows a good model for what Congressman Oberstar is trying to accomplish for the whole Country because we have not seen major disruptions in our 404 process. Our counties still don't need permits for ditch maintenance. We never did. Our large ditches, if we do need a permit, if they do drain to a navigable water, then we get a general permit.

Mrs. DRAKE. Would you agree that this bill might need better clarifications and definitions like Ms. Jacobs said in order to be really comfortable that it wouldn't do sort of an unintended consequence?

Mr. HULSEY. Our DNR water experts who—again, we filled the loophole once, so we probably know more than anybody else about it—support the bill as written. Our governor supports because he says, why should Wisconsin be the only State?

Some people say, well, let the States do it. You have State waters. You have national waters.

When I go to visit my 70 year old mother in Oklahoma, I want to know there isn't some feed lot dumping pathogens into Lake Hefner, the source of her drinking water. I want to know that her home isn't at risk of flooding because of upstream uncontrolled wetland destruction. So that is why we need a Federal bill.

I am fine with the bill the way it is written right now, but if navigable waters with the exploration of activities makes others more comfortable, that is fine.

The point is when you see those flood pictures before, many of those don't qualify as wetlands because they are under water in April. They are dried out by the growing season in June.

So I am not sure. While I appreciate getting back to where we are is a good start, we are spending millions and billions of dollars to move people out of places that they got a wetland permit to build their house in.

I was sorry that the Member from North Carolina left here, but the Member from Washington, I looked at the wetland permits in these high flood, high hazard counties, and typically the Corps grants 90 to 100 percent of those permits to build in places that are going to be flooded and bought out 10 or 20 years later. I mean there is compelling national reason for you to have the strongest

possible regulation because you and we are going to have to pay to clean up the mess.

Mrs. DRAKE. Ms. Jacobs, did you want to add something quickly? I know we have other questions.

Ms. JACOBS. Just quickly because Commissioner Hulsey said much of what I wanted to say, and that is that the intent of this bill is to get us back to where we were. Our county has built out from north to south, east to west, under the existing Clean Water Act with 1,800 linear miles of canals and multiple water bodies. We are good shape, and we did it all working with the Corps.

The biggest concern is we are now in a redevelopment mode, and we are getting more dense. We expect almost another million people in the next 20 years. So redevelopment, even in these economically depressed times, is still going on in Broward County.

I have land use attorneys that are telling me the first thing they are going to do since the Rapanos is go check their malpractice insurance because they don't know how to weigh in. They don't know what to tell their clients about whether or not they need a permit.

So the economic stimulus that will occur by making the clarifications necessary with this bill are really important to Broward County on top of the fact that we believe there are substantial water bodies that would be removed from the State's calculation for grants. If those are removed, our State would not receive the amount of Federal dollars it does now for Clean Water Act funding, and that would roll downhill and, of course, affect our counties—so, clarification of the bill.

The reason why: I think there is room between what concerns of other areas of the country are having over language. What I keep hearing throughout the day, as Congress has said repeatedly, is that we are basically on the same page. We just have some discrepancy over the wording to get us there, and I think we can find that language change, and I am hoping that we do.

Mrs. DRAKE. That is what I have heard from everyone all day. They want the clarification. They want it more simple, but they want to understand what the language means, and there is a lot of concern about what the language means.

Ms. JACOBS. The only thing I would say about that is that I do believe that there are lots of folks, and some may be in this room and some are not, and some may be in that stack of papers that was demonstrated today, that would love to see a rollback of the Clean Water Act. They are not eager to see it is proposed now, and they are throwing out red herrings.

So, when we talk about language and our willingness to discuss language, I want to make it clear that we want true discussions that are valuable to the point and not red herrings that are raising concerns such as by some of the groups. Here is a picture of a ditch at the edge of a road, a gutter basically, and the headline says: No Boats Needed: New Clean Water Bill Would Make Gutters Waters of the U.S. Well, this simply isn't true.

Mrs. DRAKE. Ms. Jacobs, I have been in two hearings on this issue, and I have not heard that.

Ms. JACOBS. Well, here it is.

Mrs. DRAKE. What I hear from people is they are very anxious to protect our water, to not have our properties flooding, but they

want to make sure that they are not unraveling the universe, as Congressman Rahall said earlier today.

So, thank you very much. I will yield back, Mr. Chairman.

Mr. OBERSTAR. We are not going to unravel the universe, and we are not going to unravel the Clean Water Act. That is for sure.

We are going to clarify and strengthen and make sure that we return to the pre-Rapanos decision.

Mr. Larsen.

Mr. LARSEN. Thank you, Mr. Chairman. Again, Mr. Chairman, I want to thank you for this hearing today and thank you for accommodating us in the Pacific Northwest.

Mr. Baird and Mr. DeFazio and I, last year, got together and talked about who we could invite to this hearing and collectively decided that Commissioner Munks would be the ideal person. He doesn't believe it, but we all do. I think it is important to know that Commissioner Munks' comments really do come from not only with his heart in Skagit County but somebody who has had to work through these problems.

I may have one question here, but I think the point that we wanted to make out of the Pacific Northwest is that there is a west side of the States, Washington and Oregon, which is also the wet side of the States in Washington and Oregon, and we get a lot of water. It is all relative, but in a relatively small place. It hits the Cascades, and it comes back at us.

On top of that, we have—Don mentioned—the fish window. The Federal Government has listed the Puget Sound chinook and the bull trout as endangered or threatened species. So we are dealing with that on top of a lot of other regulations, some of which we have adopted ourselves, our growth management act.

The concern you hear is one more set of uncertainties as a result of not just the SWANCC and Rapanos decisions but the current language of the proposed legislation. That is what you are hearing coming out the Pacific Northwest.

So to hear you, Mr. Chairman, say that you are open to, I think you used the word, adaptations is heartening for us. We are looking forward to working with you on that.

I think another thing I also heard today, though, is for those calling for the passage of H.R. 2421 as is. It may not be as simple as doing that since we have heard from attorneys on both side the issue. We have heard from counties on both sides of the issue. We are probably going to hear from agriculture on both sides of the issue. We heard from the agencies having a set of concerns as well. So we have plenty more work to do.

I think you are going to get a commitment from us to work and try to get to a solution. We won't be guaranteeing that we are all going to agree, but certainly this hearing itself has given us a lot to work on.

I will just conclude with a question for Commissioner Munks, a question of ditches. When I hear people don't have to get permits for ditches, I want to move there, frankly. Can you give us a little bit of experience about tide gates and ditches where we come from?

Mr. MUNKS. It is interesting where we come from because the first settlers that came there saw that the most fertile ground was the land that was under water part of the day, and the tides went

out, and it was open. So it was full of silt, some of the richest land you are going to find.

So what they did is they established dikes, built drainage canals, build drainage ditches, put tide gates on it to now allow the saltwater to come back in on it, drained it off and, over a period of years, finally got to the point where they could grow just about any crop they want. So they are very adamant about keeping that saltwater off of it.

Now, as Congressman Larsen said, from the west end of Skagit County where we get normally about 40 inches of rain a year to the east end where we get about 120 inches of rain a year, where we wind up in the mountains and we get some of the largest snowfalls of anywhere in the world, water is an issue. It is a problem.

How we get that water from the mountain to the ocean is critical. All the cities established on these rivers because they were navigable passageways when the county was first established. So we have all of our build-up or the majority of our build-up of population is along the rivers.

These drainage ditches and what they perform to keep the water off of the land also worked to help us with fish restoration projects. They allow us to create an area from where these smolts and fry are developing before they go out to the saltwater. As we worked through these various avenues of these tide gates and everything else, we have ourselves put in what we call self-regulating tide gates which do allow for these young salmon to come and go into the saltwater, but it is still the draining of the land that is most important.

Now for every process we go through, as a county, as a commissioner talking to my staff, we take a look first off at what is the impact going to be to fish and what is the impact going to be to the quality of the water, and we monitor that quality.

So when we replace a culvert, when we work in the ditches, we do it at times of year where we are going to have the least amount of impact on that species. It is a very onerous process that costs us a lot of extra money, but we do it to ourselves. We work with our State agency, Fish and Wildlife and with the Department of Ecology and the tribes to do those projects, and we thank you very much for the money you give us to help do that too. It is extremely important.

We are a little bit different where we are, but we have put all kinds of standards on our ourselves in the State of Washington, and Oregon does the same thing.

So I think it is important to understand that, from me, the Federal Government is to establish what is going to be the law and then, from there, establish what authority you are going to give to States and local governments because it is us on the ground level that are dealing with doing the projects and creating the fixes from all the people that are moving into our area. That is very onerous.

Mr. OBERSTAR. Thank you. Thank you for your very thoughtful presentation. It just underscores the wide differences that we have throughout these United States. By crafting the Clean Water Act, we established the Federal-State partnership under which there was a floor of certainty and of continuity.

Mr. Salazar.

Mr. SALAZAR. Thank you, Mr. Chairman.

Just a brief comment, I really enjoyed your comments, Commissioner Cope and Commissioner Munks.

I think what we are looking at is really a Country that has different water laws throughout the Country. In the western States, we have, I guess in some areas, plenty of water. But in Colorado and Idaho and many areas, we are very sparsely populated States with some water and most of it goes for irrigation.

Your comment, Mr. Chairman, on some States, and I don't know if Colorado is one of the States that has a lesser of water standards, but we don't have quite the demand, that you do back here in the East where it is heavily populated, on water quality issues.

May I make the suggestion? I understand that all of us are here for clarification. It seems like everybody wants good, clear clarification.

We want less litigation. I mean I am all for that. Colorado has the largest per capita water attorneys of any State in the Country.

Maybe your suggestion as to what clarification means to you would be a good thing.

Mr. Chairman, would you accept maybe a list of what they would like to see in the clarification?

Mr. OBERSTAR. It is pretty much the same issues I have charged previous panels with clarifying or explaining, starting with Mr. Woodley and the Corps of Engineers and Mr. Grumbles for the EPA and the Justice Department, to be clear on what you mean about the categories of categorical exemptions that exist in the Clean Water Act and how we transfer those forward into this language.

If, as an option—instead of, as my introduced bill does, deleting the word, navigable—if we retain the word, navigable, and accompany that term with prior existing regulatory structure of the Corps and of EPA in the several categories that I have already spelled out, give us your take on language to be sure that we are being very clear about the application of those terms.

If we state in future legislation the term, prior converted farmland, what clarifications are needed? What definition of prior converted farmland is needed to be sure that we don't establish a new term that creates additional regulatory confusion?

There is a body of regulatory management of that term. Give us your language about that clarification.

Mr. HULSEY. Mr. Chair, a quick point on that, we are the number one farming county in Wisconsin. What we are seeing occasionally is farmers using prior converted to drain the lands—that is fine—but then selling that for development. So we do need a backstop in there to make sure that that land isn't then rolled over and is immediately flood-prone.

Mr. OBERSTAR. Once farmland is no longer farmland, it no longer enjoys the exemption. That is clear in already existing practice.

Mr. HULSEY. But there are many attempts to move forward without that because it, many times, doesn't meet the hydrologic qualifications for a wetlands.

Mr. OBERSTAR. The purpose of the language back in 1972 was to protect farmers, give farmers certainty about managing their land,

and that is the way that provision has been managed all throughout these years.

Subsequently to enactment of the Clean Water Act, the term, prior converted farmland, came into use in pursuance of the agricultural exemption: normal farming, silvicultural and ranching activities, agricultural return flows, maintenance and construction of farm or stock ponds, irrigation ditches, maintenance of drainage ditches, maintenance of farm roads, forestry road, et cetera.

Those are specific references in the Clean Water Act that apply to the term, prior converted farmland. Once it is no longer farmland, those exemptions don't pertain.

Mr. SALAZAR. Well, Mr. Chairman, reclaiming the time that I don't have left, I would just like Mr. Cope to respond to that suggestion if you don't mind.

Mr. OBERSTAR. No, no. No time comes out of your allotment.

Mr. COPE. Thank you, Mr. Salazar.

What I would like to point out is after the debate we had at the NACO conference last summer, NACO formed a task force comprised of two members from each of several committees and boards who have been participating by conference call and face to face meeting to try to come up with suggestions to do exactly what you are asking us to do. That work has been in progress for several months now. Still, we have a ways to go, but we are working on that.

As we speak, there are people who are trying to come up with ideas to help clarify and improve the function of the Clean Water Act.

Mr. SALAZAR. I yield back, Mr. Chairman.

Mr. OBERSTAR. Mrs. Napolitano?

Mrs. NAPOLITANO. Thank you, Mr. Chair, and I am sorry I haven't been here to listen to most of it, but I was chairing my own Subcommittee hearing on water today, Indian water rights.

I have some questions that might have already been addressed, but one of them is how is the Act affecting water supplies as they implement more recycling and reuse programs in order to address decreasing amounts of water they are receiving from rivers, lakes and other traditional sources?

That is a big concern of ours in our Subcommittee. It is going to be affecting a lot. You don't have any worry because you have a lot of water, you have a lot of rainfall. But some of those in the arid west, we have to start thinking about that impact.

Mr. COPE. Truthfully, ma'am, we have very little effect on water supply and recycle from the Clean Water Act.

It is ESA that affects us because they want more instream flow for migrating salmon and for bull trout, and they have replaced a lot of our old flood irrigation with sprinkler systems which has actually decreased the recharge. So we are compounding the problem by jumping to conclusions that may well constitute a temporary stop-gap solution but, in the long run, may be harmful.

But these aren't Clean Water Act actions, so I can't really address at that. We are so short of water, we would very much appreciate it if western Washington and Oregon would send some of that water on to us.

Mrs. NAPOLITANO. So would we in California.

Ms. JACOBS. Well, as a native of California, I was born and raised in San Diego and moved to Florida when I grew up. Looking for another sunny place to move to when I was young, there was really only one choice.

The water issues that we faced in California are very similar to those which we face in Broward County. In fact, when I joined the commission 10 years ago and went to my first water advisory board meeting, I was stunned to sit there and hear folks saying, wringing their hands, where can we find more water?

I kept thinking we need to better use the water that we have because at 60 inches a year we are getting all that we need. It is that we are just not conserving it properly.

So there are many programs that are my pet projects that we are really excited to talk about them. Today is not the time, but I am happy to share with you some of the national models that Broward County has set up and most recently in dealing with the issues of reuse, saltwater intrusion which is moving in and, of course, seepage from the Everglades into Broward County because it sits lower than the Everglades lands.

With so many miles of canal systems, 31 cities and 28 water utilities in one regional government, it has been a herculean effort to try to draw them all to the same page. The State Legislature actually has a bill that has passed the Senate and it is moving through the House right now. It is a bill that will cause Broward County to spend upwards of $800 million within the next 15 years to build a plant for 1 of the 28, to build a plant that will deal with reuse.

The problem for Broward County is that with so many canal systems, we are in a very sensitive environment where you have a three-tiered coral reef system, the nearshore environment where, with 1,800 miles of canals, you can imagine the runoff would impact the coral reef system or the backpumping into the Everglades which, of course, is being cost-shared with the Federal Government to clean it up because of nutrient overloading.

So we are pursuing efforts with the State to try to be a little more reasonable with the ways in which we can use reuse. It is an important part of going forward for our county but most importantly is finding the grant funds to build these very expensive plants and try to draw all of these different cities and our sister counties, both Miami-Dade to the South and Palm Beach County to the north, into joint efforts to build treatment plants such as Tampa's desalinization plant that was, of course, cost-shared by its water management district. We don't enjoy that, but we are moving forward.

Mrs. NAPOLITANO. But you do see that that might affect some of the water suppliers because of the lesser water?

Ms. JACOBS. You mean as far as the bill? No, I don't. I believe, we believe that the bill, as it is currently structured, does not take away from the State's existing powers and works with them.

Our position today is that there seems to be those who believe that, and we think that language clarification will pull us to the same side.

Mrs. NAPOLITANO. That is what I was trying to get to is that it does not affect.

Mr. HULSEY. But the biggest challenge is the 402 section that allows dischargers to discharge to ephemeral streams and headwaters. There are 400 of those permits in Wisconsin. So you could conceivably have a slaughterhouse putting deadly pathogens into a ditch that was ephemeral, making up all of that, and then that would be the water source of someone downstream. A hundred and ten million Americans get their water out of headwater streams.

Another concern is we are seeing drawdown even from groundwater. Even a place that gets 40 inches of rain a year, our groundwater drawdown is such that we are starting to have seepage in from the lakes into our groundwater supply. We don't want that to happen because we have 130,000 dairy cattle. We still have a few cows in Wisconsin.

But as a Great Lakes State, I should tell you that you are welcome to all of our water as long as it is 12 ounce cans.

Mrs. NAPOLITANO. I hear you.

Well, I thoroughly support this bill that Chairman Oberstar has put through and thank him for working with some of my individual water provider to addressing some of the concerns that they brought forth on wastewater treatment because they were concerned that that would affect them adversely.

I know he is willing to work with us, so I have no problem bringing some of the issues that my folks in my area in Los Angeles County and the rest of the State, for that matter, have in regard to recycle, reuse, storage and all those waters.

I am just wanting to ensure that whatever loopholes they are talking about, that they are not allowed to continue, that we continue to provide clean water for everybody. Somehow there has to be a way to change it, to close the loopholes so that the attorneys are not the ones that benefit but the people benefit.

Thank you, Mr. Chair. I yield back.

Mr. OBERSTAR. Ms. Hirono.

Ms. HIRONO. Thank you, Mr. Chair.

One of the major concerns is that after the SWANCC and Rapanos decisions, that there were waters and activities that had come under the CWA jurisdiction would no longer be covered, and therefore the States would have to step in to fill in the gap. I heard Mr. Hulsey say that Wisconsin is one State that had stepped after the SWANCC decision to fill in the gap. It seems as though Washington State had also done that and Idaho, and I commend your States for doing that.

My question is, do you know if all of the other States have the regulatory framework and resources in place to fill in the gaps as your States have?

Mr. HULSEY. I would just say, from Wisconsin, I don't believe so. I have worked in about 40 States in doing different flood reports and other efforts, and there is a huge variability of staff, huge variability. Some States have 401. Some don't.

Obviously Florida and the State of Washington; I believe Michigan has addressed some of these issues. Minnesota, Indiana, Ohio have addressed parts of it, but they haven't done the full SWANCC fix, and I don't believe anybody has done the full Rapanos fix yet.

Ms. JACOBS. Speaking just for Florida, we have not. There are revenue estimators right now looking at Florida's budget, esti-

mating that we are $4 billion short for this year. The way that they are finding those dollars is you would be surprised, through the Environmental Protection Division and those dollars in addition to other areas.

So, when we talk about resources and personnel resources that are being scaled back, not just on the State level but also on the county level, we have cut $100 million out of our budget last year by amendment, one that was recently passed through the actions of the State and reductions in property values. We expect another $100 million to be taken out of our budget.

Last year, we had to let over 200 employees go, and we are looking at numbers that are twice that this year in our own staff.

So, financial resources, personnel resources as a State and a county are becoming ever in shorter supply, and I believe that that gap is going to be reflected not just in the State of Florida but is ultimately going to result in the uneven balance of a standard of water quality nationwide, which is what the Act intended to do.

Ms. HIRONO. That says to me that we should have a sense of urgency about making sure that the regulatory scheme is in place to protect the people.

By the way, Ms. Jacobs, I am glad that you showed us that picture of a ditch that some people are saying would be covered under this bill as water, that that would be covered, because those are the kinds of questions that have come to me also. People are saying, well, is the puddle in my back yard going to be covered? So, clearly, we need to get the information and education out on what we are trying to do here.

Thank you. I yield back.

Mr. OBERSTAR. Mr. Hayes, the gentleman from North Carolina.

Mr. HAYES. Thank you, Mr. Chairman.

I heard from someone outside that Supervisor Hulsey was sorry North Carolina was gone. Well, we are back. My wife is from Wisconsin. They don't call it the Mad City for no good reason.

Thank you all for being here.

Mr. Chairman, thank you for putting this together today.

I am not a lawyer, but I have seen them do it on television. They say we are going to stipulate. Well, I am going to stipulate that everybody here and back home wants clean water. So we don't have to talk about that anymore, but there are some very troubling issues.

This is a bill, in its present form, that I could not and would not support. I have experience in farming, construction, manufacturing, a whole host of things, and the folks that I know best in my district would be devastated by the bill in its present form. But, remember: Clean water, vitally important.

A very honest question—I will get the titles right—Commissioner Jacobs, I was just in Broward and Palm Beach Counties last week. I am a huge fan of the Everglades. Bass fishing, I mean that is a big deal.

So my question to you is this bill in its present form is drawn to greatly favor the Florida Everglades, watery States. If this bill were closely drawn to reflect Nevada and Arizona and places like that, would it be as popular to you?

I am kind of kidding you, but it is a serious question too.

Ms. JACOBS. I understand it is, and I have to respectfully disagree that this bill treats the Clean Water Act today any differently in its intent, I believe and so does our staff, our attorneys and those who work not only for us but for the State that have looked at this bill.

There may be some language changes that will help draw the clarification on the issues that have been raised today, but there are substantial areas where we think that they may find that harmony in language, but overall we believe that this bill, in its present form, closely mirrors the existing Clean Water Act and the original intentions of Congress in addition to the savings clauses that it picks up and mirrors within this language.

Then, finally, I would say that when we talk about language, there is a difference between what the Clean Water Act originally said and the regulatory steps that have been put in place by the EPA and the Corps. If it takes adopting those standards that have been applied by the EPA and the Corps all the way up to Rapanos, then let's mirror in the bill's Act, and you get to the same place. That is where I think the difference lies.

So I don't agree. Our county doesn't agree that it is substantially different, but we think that language changes will get us to where need to be.

Mr. HAYES. You made an important point, but you didn't answer my question. If this were drawn to reflect Nevada or a dry State, it would not work so well.

Back to the Corps, I think you mentioned the Corps. The Corps in North Carolina is very active. We have a tremendous number of wetlands and a whole host of issues. They have not come to me and said that they want the Clean Water Bill revised in its present form.

The only point being we didn't create the Corps, but we create the regulations that they operate under. We did create the EPA.

If you come to 435 of us to try to get your problem solved so that it fits 50 States, history will tell you. How many of you all have watched the program, John Adams, the series?

Ms. JACOBS. Every Sunday.

Mr. HAYES. Great series, but what I got from that and related to this is those 13 at that point had very different issues, very different ways of dealing with them, and the 10th Amendment was dropped in there to make sure of the sovereignty of the States. Taking in account the conscience of the people, if you couldn't govern yourself, you couldn't govern the Country, that was the way it worked best.

So, again, I appreciate the patience of all of you who have been here and have not even come to the witnesses table yet, but again I want to make the point for my constituents, that in its present form it does not do what we want. It is very harmful and the 10th Amendment.

Commissioner Cope?

Mr. COPE. I would like to comment on that also, and I appreciate that comment, Congressman.

I have been a commissioner for better than seven years, but I have been a cow veterinarian for over a third of a century. I will tell you for a fact I learned more practical knowledge about cattle

from old ranchers at 3:00 in the morning in calving barns than I ever did sitting in a university classroom, listening to professors.

There is a tremendous amount of knowledge out there at the local level that I very much fear, as I said earlier, we may be bypassing by using a set of standards of one size fits all and overriding the people that really know what the water is about out there.

This is about water quality, and I am still a little confused. I have been infected with just about every infectious disease that cattle can pass on to humans with the exception of tuberculosis. I am still trying to figure out exactly which pathogens are coming out of the slaughterhouse. I have been infected with cryptosporidium more times than I can count.

It is not a public health issue, and it is not a water quality issue. As I said, it is about jurisdictional and about local authority, and that is what the whole issue truly is.

I appreciate your bringing that up. Thank you.

Mr. HAYES. I am out of time. I think Commissioner Munks would like to make a comment.

Mr. MUNKS. Just real quickly, a lot of what has been said, I think that maybe the State of Washington does things a little bit differently, but we heavily regulate what can and can't be built in our State.

We would never allow slaughter facilities or any other toxic facilities to dump straight into the water systems. They have very strict requirements within our area for what can and can't be done and how they have to contain runoff on their entire property to process it before it can ever be released into any body of water anywhere.

So, yes, I mean I think the one size doesn't fit all but, Chairman Oberstar, I very much appreciate this hearing. I very much appreciate your willingness to take a look at language that could help resolve what the differences are between those that are for, those that are opposed to because of most of it comes down to language. Most of it comes down to the definitions that are being put in it and how it affects the jurisdiction of each of the entities.

So I very much appreciate the opportunity to be here.

Mr. HAYES. Mr. Chairman, I appreciate your comments about crafting this to get the job done. We talk a lot up here about one size fits all. The mental picture of that does not work nearly as well for me as Commissioner Cope's spandex analogy. If you have been by the gym lately, spandex doesn't work for everybody.

Thank you, Mr. Chairman.

Mr. OBERSTAR. It depends on the body you are putting it on.

Mr. HULSEY. Sometimes it works better than Lycra.

[Laughter.]

Mr. OBERSTAR. I just want to make it clear to the gentleman from North Carolina, the bill was not drafted in any way to favor one part of the Country over another. In fact, governors of water-short States, of Arizona, New Mexico and Montana, support the bill in its introduced form.

But, as I have said, since there are concerns about the application of the bill as introduced, we are having this hearing to explore

ways in which we can overcome those concerns and achieve the purpose of protecting the clean water of this Country.

Mr. HAYES. If I gave the impression that it was drawn for one against the other, that was not my intention. But when you draw for 50, it is hard to make every one fit like that spandex. Thank you very much.

Mr. HULSEY. But the goals of the Clean Water Act, Mr. Chair, water that is safe for swimming, beaches that are safe for swimming, fish that are safe to eat, is one goal that does fit all, and we are not there yet.

Mr. HAYES. And everybody agrees.

Mr. OBERSTAR. That is exactly it.

Mr. Bishop, you have been very patient, waiting over here.

Mr. BISHOP. Mr. Chairman, I am very anxious to hear the testimony of Mr. Tierney from the New York State DEC. So, in the interest of time, I will pass.

Mr. OBERSTAR. The gentleman's gracious gesture is most appreciated by the Chair and the remaining witnesses.

I want to thank this panel and invite your contribution to the dialogue and further refining the provisions that I have already laid out on the table. Thank you very much for your contributions.

We are going to add to panel four, Alex Matthiessen, President of the Hudson Riverkeeper, who has to leave here at 7:40. You are going to have to talk fast.

Ms. Joan Card, Director of the Water Quality Division of the Arizona Department of Environmental Quality; Robert Trout, Denver, Colorado from the Trout, Raley, Montano Law Firm; James Tierney, Assistant Commissioner for Water Resources, New York Department of Environmental Conservation; Mr. Mark Pifher, Aurora Water Director, Aurora, Colorado.

We welcome you to the witness table and thank you very much for participating with us this evening.

Mr. Matthiessen, we will begin with you.

**TESTIMONY OF ALEX MATTHIESSEN, HUDSON RIVERKEEPER AND PRESIDENT, RIVERKEEPER, INC.; JAMES M. TIERNEY, ASSISTANT COMMISSIONER FOR WATER RESOURCES, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION; JOAN CARD, DIRECTOR, WATER QUALITY DIVISION, ARIZONA DEPARTMENT OF ENVIRONMENTAL QUALITY; ROBERT V. TROUT, TROUT, RALEY, MONTANO, WITWER AND FREEMAN, P.C.; MARK PIFHER, DIRECTOR, AURORA WATER ON BEHALF OF THE NATIONAL RESOURCES ASSOCIATION, THE WESTERN URBAN WATER COALITION AND THE WESTERN COALITION OF ARID STATES**

Mr. MATTHIESSEN. Thank you, Mr. Chairman and Members of the Committee for the opportunity to testify before you today.

My name is Alex Matthiessen. I am the Hudson Riverkeeper and President of Riverkeeper, Inc., a New York environmental organization that, for more than three decades, has principally depended on the Clean Water Act to protect the Hudson River, its tributaries and the New York City drinking water supply which serves over nine million people, half the State's population.

The Hudson is an internationally-heralded model for waterway restoration, and it is largely because of the Clean Water Act and the ability that groups like ours have had to use it to protect the State's waters.

I appear before you today on behalf of the Waterkeeper Alliance, a coalition of over 100 waterkeeper programs across the Nation, all working to protect their local rivers, bays, sounds, lakes and estuaries.

In my testimony, I will briefly address the negative impact that the SWANCC and Rapanos decisions have already had on New York's water resources which is the basis for our strong support for passage of the Clean Water Restoration Act.

By enacting CWRA, Congress simply would be reaffirming a prior Congress' intent to protect our Nation's extensive and interconnected water resources from pollution and degradation. This legislation is of utmost importance if this Nation ever hopes to fulfill Congress' original promise of eliminating pollution from our Nation's waters, a goal we have missed by 22 years to date and, sadly, are still many years away from achieving.

Previous witnesses have chronicled for you the current and still largely impaired state of our Nation's waters today and the deleterious impact that the SWANCC and Rapanos decisions have rendered and will continue to render on them. I will focus on the State of New York's waters and the challenges we face in trying to protect and restore them, challenges now greatly exacerbated by these ill-advised Supreme Court decisions.

In New York, approximately 37 percent of the State's river miles and 77 percent of the State's lakes, including the Great Lakes, are impaired. Additionally, the fish in 41 percent of New York's waters are not safe to eat, and New York's wetlands are disappearing fast.

An estimated 60 percent of New York's original wetland acreage has been lost to development. The pollution filtration and aquifer recharge provided by the region's wetlands is extremely important to ensure the delivery of safe drinking water to nearly half the State's resident population. Close to 40 percent of New York's remaining wetlands are located at the headwaters of the Hudson River and its tributaries.

Representing a combined 16,000 square mile area, these headwaters feed New York's Hudson River watershed and New York City's drinking water watershed which provides over 1.5 billion gallons of prizewinning unfiltered drinking water to over 10 million people each day. But these watershed areas are vulnerable because they are inundated with isolated wetlands and ephemeral streams, water resources that no longer enjoy clear protection in a post-SWANCC and Rapanos world.

Allow me to give you just two examples of the Corps' arbitrary, inconsistent and legally erroneous no jurisdiction determinations subsequent to SWANCC and Rapanos.

The Lysander wetland, a 19-acre freshwater wetland located in Lysander, New York in Onondaga County, represents an excellent illustration. In 2001, when local residents realized that plans were underway to fill the Lysander wetland and construct housing on the site, they presented the Corps with a 1957 and 1962 map of the area. These maps depicted a brook that had been channeled

underneath their adjacent subdivision, and it flowed from the Lysander wetland into the Seneca River, a navigable water of the United States.

Ignoring this information, the Corps issued a no jurisdiction determination in 2003, stating that the site at issue was an isolated wetland. When the homeowners subsequently pressed the Corps to reconsider, the Corps explained that the Buffalo District, as a matter of post-SWANCC legal interpretation, no longer considered hydrological connections to navigable waters through manmade water conveyances sufficient for establishing Clean Water Act jurisdiction.

The homeowners took the case to the New York State Attorney General's Office. After conducting its own investigation, the attorney general filed a notice of intent to sue the Corps and EPA in November 2004.

In response to this legal challenge, the EPA ultimately reversed the Corps' decision. The citizens ultimately prevailed but at enormous cost and waste of time and taxpayer dollars.

The Annsville Creek wetland provided another alarming illustration of the Corps' inability to effectively protect wetlands, post-Rapanos. In October, 2007, the Corps found that a wetland in Peekskill, New York was isolated and non-jurisdictional despite being only 50 feet away from Annsville Creek, a tributary of the Hudson River, flowing south out of the highlands into Peekskill Bay.

Despite acknowledging that the wetland is situation on top of a former landfill and may be contributing to the pollution of Annsville Creek, the Corps determined that its hydrological connection to the creek through a swale feature was nonjurisdictional. The Corps purportedly found it significant that water only flows from the wetland to Annsville Creek and not in the other direction.

The Corps also determined that the wetland lacked a significant nexus to an intermittent stream that directly flows into the Annsville Creek despite substantial evidence to the contrary.

Both of these cases illustrate the myriad problems created by arbitrary and legally flawed Corps' jurisdictional determinations, post-SWANCC and Rapanos, and a need for costly litigation in order to preserve wetlands and waterways that should, from the outset, be clearly protected under the Clean Water Act.

To make matters worse for us in New York, the DEC, our State environmental agency, only regulates wetlands that are 12.4 acres or larger except in those cases where a wetland can be shown to be of local unusual importance by the DEC commissioner. With the loss of protection under SWANCC and Rapanos, there is now no clear Federal or State protection for thousands of small but hydrologically significant wetlands throughout New York State that are threatened by development.

Without clear and strong guidance from Congress on the broad jurisdictional reach of the Clean Water Act as currently outlined in the Clean Water Restoration Act, Riverkeeper simply cannot fulfill its mission of acting on the public's behalf to protect the Hudson River and other vital New York waters. CWRA will put an end to the state of confusion that SWANCC and Rapanos have engendered among relevant Federal agencies and return to the status quo of

a Clean Water Act regulation that was in place for 30 years prior to 2001.

Rather than expanding the reach of the Clean Water Act, as CWRA's opponents have disingenuously argued, the CWRA amendments merely conform the statutory text of the Clean Water Act to the EPA and Corps implementing regulations that were in place for more than 30 years prior to the upheaval caused by the SWANCC and Rapanos decisions.

Now, more than ever, Congress must pass the Clean Water Restoration Act to reaffirm the statute's original intent which accordingly to the language of the Act itself, as has been pointed out today, was to restore and maintain the chemical, physical and biological integrity of the Nation's waters and make our Nation's treasured waters fishable and swimmable once again. Needless to say, fulfillment of that goal is long overdue.

Thank you very much, and I also just want to thank you very much for giving me the chance to jump onto this fourth panel and try and catch the 8:00 train home. My staff attorney is five months pregnant and getting her home at 1:00 or 2:00 would get me in steep trouble with her husband, I am sure. So, thank you very much.

Mr. BISHOP. [Presiding.] Thank you very much and thank you for your patience today.

Mr. Tierney, I know you have a flight to catch as well.

Mr. TIERNEY. Thank you, Congressman Bishop.

I really appreciate the opportunity to speak with you here today and, this, we find is a critical issue.

Now my name is Jim Tierney. I am the Assistant Commissioner for Water Resources in the State of New York, and that means in my purview I have flood control, flood protection, wastewater treatment plants, a lot of clean water and safe drinking water responsibilities. So I wanted to share a few things on a State perspective on this, which I think is important, and I think in some ways I can speak on behalf of many States, and I will explain why.

The Clean Water Act has been integral to the protection of our Nation's waters for more than 30 years. Unfortunately, the ruling of the United States Supreme Court, particularly in Rapanos in my way of thinking, jeopardizing the Federal water pollution protections for the majority of the Nation's rivers, streams and wetlands.

So the State of new York formally and the governors behind this support the Clean Water Restoration Act of 2007. Our understanding of this legislation, our reading of it is that it truly is in the nature of a restoration.

For over 30 years, the Clean Water Act was understood as regulating the discharge of pollutants, including fill, into traditional navigable waters, their non-navigable tributaries and wetlands adjacent to these water bodies. This view of the scope of the Act was contained in regulations promulgated by both the Environmental Protection Agency and the Army Corps of Engineers and, more precisely, was embodied in the regulatory definition of the term, waters of the United States. This legal, this regulatory definition is fundamental to the full scope and jurisdiction of the Act.

While New York and the vast majority of States have expressed strong support for this EPA and this Army Corps regulation—I

want to stress this to you—indeed, 34 States joined in an amicus curiae brief before the Supreme Court, which supported this regulatory definition in the Rapanos case, 2 States supported amicus briefs on the opposite side.

Now, New York strongly would like to say we concur with the scientific and technical findings of the Act. We actually find these findings to be just simply excellent and, in a way, tell it all with respect to the scientific connection, scientifically demonstrated connection between all waters.

New York, as Alex mentioned, has lost 60 percent of its wetlands since early colonial times. Many other States have suffered even higher losses. I want to underscore that restoration efforts to get back what we have lost are difficult and time consuming, and a great fear that we have is that once our wetlands and small streams are lost and the biodiversity which they foster is lost, it may be difficult or impossible to reestablish this.

Preserving wetlands and small streams through effective Federal statutory and regulatory programs is environmentally beneficial, economically effective and provides reasonable certainty for the regulated community.

I just say flatly that we just simply don't know, and the experts on my staff don't know how you fulfill the purpose of the Clean Water Act to restore and maintain the physical, the chemical and the biological integrity of our Nation's waters without protecting the headwater streams and the headwater wetlands. We don't know how you do that. So the Clean Water Act, at a minimum, has to fulfill that function.

We see Rapanos and the mischief involved in some of the Rapanos decisions as walking far away from that, and so that undercuts the fundamental purpose of the Clean Water Act. We do wish that certain Supreme Court members had read the fundamental purpose of the Clean Water Act when they were coming up with these interesting and innovative mechanisms to try and define what the scope of waters of the United States are.

Now, with just a little more time left, I want to speak in terms of rebuttal and in terms of State interest. There is something called 401 water quality certification which gives the States, as a whole, regulatory authority over certain Federal permits and Federal actions.

If you shrink the definition of what constitutes a water of the United States, you shrink the States' regulatory authority over hydroelectric dams, nuclear power plants, all FERC facilities and FERC-regulated facilities and other Federal permits issued by the Army Corps of Engineers. So this shrinking of the definition of the waters of the United States expands the scope of Federal preemption over very important things to the State of New York.

It also doesn't address upstream pollution into downstream areas. For instance, Arkansas and Oklahoma have sued each other famously over a number of years over upstream pollution going to a downstream State.

The Clean Water Act presents a remedy to States, a legal remedy that supplanted previous Federal common law. By shrinking the scope of the term, waters of the United States, you literally take away a very valid and very useful interstate remedy. Frequently,

these things are worked out without getting into lawsuits, but sometimes, frankly, we have to tell our fellow States, do we need to sue you or are we going to work this out?

Drinking water quality, flooding, dam safety and the like, all these things are closely connected to the integrity of our headwater wetland and our headwater streams. When you eliminate the wetlands, if you fill the wetlands, if you fill streams, water moves downstream ferociously.

A cubic foot of water is 62.4 pounds. More of it rolling down the stream literally rips it apart. It adds a lot of turbidity to the drinking water supply, and that has to either be filtered out or it can cause waters that are previously unfiltered water supplies, such as New York City's drinking water supply, to need filtration.

I want to underscore this with you because we really believe that if you deregulate these wetlands, if you deregulate the controls over these wetlands, if you don't correct the Rapanos decision, we think the New York City drinking water supply, for example, is at risk. If you simply have two four-hour periods of turbidity over five NTUs—that is pretty clear water—getting into the New York City distribution system, it could result in an automatic filtration order under current Federal law, under current Federal regulations.

This is a $10 billion issue for us. To operate that plant each day would be another million dollars. So there is huge economic cost as well.

I want to mention one other thing. Our worst case that has been presented, and I will sum up quickly, is that small streams, that small wetlands and some of these ditches, as people talk about, would be regulated. That can be handled through a very efficient and very effective general permit process.

The worst case on the other side, that these small wetlands and streams can be filled or you can pour oil into them and it is not requiring a Clean Water Act permit, is not handled by the other side. I haven't seen anybody respond to that effectively.

Thank you for your time.

Mr. BISHOP. Mr. Tierney, thank you very much.

Ms. Card.

Ms. CARD. Thank you. Mr. Chairman and Members of the Committee, thank you for the opportunity to testify today regarding H.R. 2421, the Clean Water Restoration Act of 2007.

I am the Director of the Water Quality Division of the Arizona Department of Environmental Quality. The Arizona Department of Environmental Quality implements a number of water quality protection programs in our State, including the Federal Clean Water Act.

Arizona's governor, Governor Janet Napolitano, issued a letter of support for the legislation, and we thank you. We thank Chairman Oberstar for introducing this legislation, the co-sponsors and this Committee for your leadership in this area of great importance to our State.

The Arizona Department of Environmental Quality has very serious concerns about the potential impact of the Rapanos decision on clean water programs in Arizona. The decision could minimize, if not devastate, surface water quality protections that have been implemented in Arizona under Federal leadership at least since the

1972 amendments. While the decision alone is of grave concern, the implementation guidance jointly issued by the EPA and the Corps further puts Arizona's waters at great risk.

Our specific concern for Arizona stemming from the Rapanos decision and guidance is the potential elimination of Clean Water Act protections particularly Section 402, point source permitting protections for ephemeral and intermittent or nonperennial waters and headwaters streams.

Arizona's landscape includes a vast network of these nonperennial streams: 96 percent of the stream miles in Arizona are nonperennial, and most of them are a significant distance from the Colorado River. The Colorado River through the Grand Canyon has been deemed by the Army Corps of Engineers as Arizona's only traditional navigable water. I have included a map and graphs with my written testimony that illustrates these points.

Arizona's largest water body, second in size only to the perennially flowing Colorado River, is the Gila River. The Gila River, an interstate stream originating in our neighboring State of New Mexico, drains two-thirds of the land area in Arizona.

The Gila flows intermittently in wetter years, but in times of long-term drought such as we are presently experiencing, this massive water body is largely dry and any flow is highly disconnected. The Gila's main tributaries include the Salt, Santa Cruz and Hassayampa Rivers which are very large and mainly ephemeral streams.

Arizona's largest and fastest growing counties, Maricopa, Pima and Pinal Counties—I believe Maricopa is the Country's fastest growing county—are located in the heart of the mostly ephemeral Gila River drainage. Subdivisions require sewage treatment facilities, and many of these facilities construct outfalls and discharge to ephemeral arroyos in these neighborhoods. These facilities currently hold Clean Water Act point source permits for discharges of wastewater that are protective of aquatic life, agricultural irrigation, livestock watering and body contact uses.

Without Clean Water Act protections, the Arizona Department of Environmental Quality will be unable to require permits that are protective of these uses I have just listed. Arizona law prohibits the Arizona Department of Environmental Quality from being more stringent than the Federal Act.

Arizona's nonperennial stream water quality has benefitted from Clean Water Act protection since the early 1970s when 402 point source permits were issued for several facilities discharging wastewater to ephemeral streams, including permits for major publicly-owned treatment works serving the cities of Tucson and Phoenix and discharging large amounts of effluent to the Salt and Santa Cruz Rivers which are tributaries to the Gila River as I just described.

Combined, these facilities treat over 200 million gallons per day of municipal and industrial sewage and still discharge to these large ephemeral waters under Section 402 point source permits. The Rapanos decision and guidance have presented the opportunity for these large POTWs and other dischargers in Arizona to argue that their discharges do not require Clean Water Act pollution limits after more than 30 years of such limits.

The impacts of the Rapanos decision and guidance in Arizona may be widespread, impacting surface water quality standards for nearly all of our surface streams and nearly all of our 160 Section 402 permits for wastewater and stormwater discharges to waters other than the Colorado River.

Without these Federal Clean Water Act protections which have been in place for 35 years, my agency may not be able to protect Arizona streams for aquatic life uses for species like Arizona's native Gila and Apache trout. We may not be able to protect surface streams for agricultural irrigation use or livestock watering, and we may not be able to prohibit wastewater discharges to our most pristine, high quality streams like Sabino Creek and the Little Colorado River. I have also included pictures of those water bodies in my written testimony.

Our governor and the Arizona Department of Environmental Quality support the Clean Water Restoration Act of 2007 because it ensures the longstanding pre-Rapanos Clean Water Act programs and protections remain in place to protect the surface water resources in our State.

Thank you.

Mr. BISHOP. Thank you very much.

Mr. Trout.

Mr. TROUT. Good evening, Mr. Chairman and Members of the Committee.

My name is Robert Trout. I am an attorney in private practice in Denver, Colorado. I have been practicing law for about 32 years in water rights and water quality issues, representing both private and public entities. Right now, I am general counsel for the Northern Colorado Conservancy District which is the largest agricultural water supplier on a wholesale basis in the State of Colorado.

I have been asked by Congressman Salazar to testify this evening to bring to your attention really the problems that the definitions in the bill potentially raise for agriculture, particularly irrigated agriculture in Colorado.

As you probably all know, Colorado does not receive enough natural rainfall for growing crops without artificial irrigation. So virtually all crops grown in Colorado are grown using water that is diverted from streams or pumped out of wells, applied to the crops and then either seeps into the ground or runs off to nearby swales, drainages and rivers.

In Colorado and most western States, we have a somewhat unique set of laws that govern the allocation of water which we call our water rights laws. In Colorado and I think most other western States, water, under the constitution, is declared to be the property of the public, but it is subject to appropriation by private citizens.

Those private citizens have the right to divert water from the streams, apply it to irrigation, and then whatever is left runs back to the streams. These rights are determined in State adjudication proceedings and are considered to be private property rights under both Federal and State constitutions.

In Colorado, farmers and I am personally, obviously, not a farmer. My grandfather was, but he actually farmed in Washington State. So I had never the privilege of having to operate an irrigated

farm, but most of my clients do, and they use a number of methodologies for irrigating farms.

One of the oldest is what we call flood irrigation where you simply flood the field with water, and you let it sit there a while, and it runs off or seeps into the ground.

As modern technology has evolved and people have tried to become more efficient with water use, they now use what we call furrow irrigation. The field actually has furrows. Water runs down those furrows between the lines of plants, and you can use the water a lot more efficiently that way or you can use sprinklers.

In Colorado, these privately constructed facilities and the water that is in them is considered to be private property. Once the water is diverted from a stream in Colorado until it comes back to the stream, it is considered the appropriator's private property.

Our State definition of waters of the State, which is the parallel definition from the Federal definition, excludes those waters. Thus, if you modify the Clean Water Act as the way this bill proposes, to include waters which potentially are in the process of use, it will expand the definition as it applies in Colorado.

The problems with the bill that we see from the respect of agriculture really come from the fact that we do believe it expands the traditional definition of what the Clean Water Act covers. You have heard a lot of testimony today about the fact that it includes activities and also that the definition states the intent to assert jurisdiction as far as constitutionally possible, and that is not certainly how the Act has been interpreted in the past.

One term used in the Act is wet meadows. In Colorado, and I think Congressman Salazar himself, it is not uncommon to have hay fields that you flood. Well, once those hay fields have been flooded and they may be near the stream, they are a wet meadow. So the question that arises in our minds is are such fields, once they are irrigated or because they are irrigated, do they become subject to the jurisdiction of the Clean Water Act?

The same with flood irrigation alfalfa fields which also may be flooded completely for a while and then not used.

Also, the term, wetlands, really causes a lot of consternation among people who operate ditches in our State. Ditches leak and, because they leak, it is not uncommon for wetlands to form below a ditch for a half an acre, maybe an acre, maybe less, maybe more in areas where the ditch leaks.

Well, we obviously are trying to be more efficient in the use of our water, and the question that arises in our mind is if that ditch is lined or that seepage is stopped, that has an effect on the wetland. Is that regulated under the statute as it is proposed?

I will tell in Colorado, in the Omaha Ditch of the Corps of Engineers, currently that is not regulated. That is not considered to be a water of the United States.

Finally, farms have many impoundments of water. They have stock ponds. They have ponds used to store water before it is applied to irrigation. They have small reservoirs.

The definition that includes impoundments of the foregoing, particularly coupled with the language that the intent is to extend the legislative power of Congress as far as possible under the Constitution, raises serious concerns as to whether all of those, for practical

purposes, private ponds would be regulated under the Act. Remember, these are ponds that do not discharge to any other waters. The water simply is pumped out or run out by gravity until to be used for its intended purpose.

In response to the Chairman's request that witnesses discuss the manner in which this legislation could be improved, there are two things that could be done to really remedy these issues. One would be to have a specific exemption for irrigated agriculture, that waters that are in the process of being used for irrigation are not waters of the United States. That exemption is not in the statute now.

There is an exemption from Section 402 discharge requirements, but that applies to return flows. There is an exemption from 404 permit requirements, but that doesn't apply to discharge requirements.

The concern we see is application of pesticides to an irrigated field potentially could require a discharge permit under this definition. If the Committee and the Congress wish to go forward with a clarification, there should be a specific exemption for such things.

Thank you very much.

Mr. OBERSTAR. [Presiding.] On that point, isn't irrigation a normal farming activity?

Mr. TROUT. It is in Colorado, yes. Yes.

Mr. OBERSTAR. It is all throughout the Midwest. It is all throughout the area.

Mr. TROUT. I understand it is becoming common in the United States.

Mr. OBERSTAR. Yes. So it is covered by the exemption for normal farming activities.

Mr. TROUT. Which exemption are you referring to?

Mr. OBERSTAR. Irrigation. You are saying you wanted a special reference to irrigation, but irrigation is considered a normal farming activity.

Mr. TROUT. But which exemption from the Clean Water Act are you referring to now?

Mr. OBERSTAR. The exemptions in the Clean Water Act that are included by specific reference in the introduced bill.

Mr. TROUT. There are two exemptions. There is an exemption 402.

Mr. OBERSTAR. Agricultural return flows.

Mr. TROUT. That is correct.

Mr. OBERSTAR. Normal farming, silvicultural and ranching activities.

Mr. TROUT. The agricultural return flows exemption applies to agricultural return flows.

Mr. OBERSTAR. Yes.

Mr. TROUT. Water applied.

Mr. OBERSTAR. Normal farming activities includes irrigation.

Mr. TROUT. Are you referring to the exemption on Section 404?

Mr. OBERSTAR. The savings clause in the bill.

I don't want to take from Mr. Pifher's time right here. I just wanted to make that point. We will come back to it.

Mr. TROUT. Okay.

Mr. PIFHER. Good evening. My name is Mark Pifher. I am Deputy Director of Water Resources for Aurora Water, the third largest

municipality in Colorado. I was formerly the Director, though, of the Colorado Water Quality Control Division.

I am here today on behalf of certain western municipal interests. Bob was covering agriculture. I cover the urban areas, in particular, members of the Western Urban Water Coalition, the Western Coalition of Arid States and the National Water Resources Association. Each of these municipal entities face the daunting challenge of providing reliable, sustainable and safe water supply as well as wastewater and stormwater services to their many citizens.

Water is a scarce and precious resource in the West, and we are all dedicated to its preservation and wise use. Therefore, we applaud the efforts of the Chair here to forge a bill that would meet everyone's need.

We believe that if we work together, identify our common interests as I think has been done by some of the panels here today, we can protect our resources and their many uses including irrigated agriculture, municipal use and aquatic life and we can ensure that the Clean Water Act remains the sound foundation for water quality protection that it has been for over 30 years.

I would like to focus my particular comments, though, on infrastructure needs for western municipal entities and, in particular, how the bill is currently drafted may impede that infrastructure construction.

In the West, we have growing populations, and unfortunately we have shrinking water supplies. Climate change, which we all believe is real, is only going to exacerbate that situation. Therefore, we need to adapt, and that includes adaptive measures that are related to infrastructure. Let me give you a few examples.

First, we will have an increased reliance, I think, on reuse and recycling projects as Mrs. Napolitano referenced. I think they are very important.

We will have the installation, I think, and maintenance responsibilities associated with new stormwater control structures including artificial wetlands.

We are going to have an expanded use, I think, of groundwater recharge projects, and Mr. Grumbles addressed the groundwater question.

We will have the installation, I think, of additional best management practices to control nonpoint source runoff which is the remaining, I think, most significant uncontrolled source of pollutants today.

We are going to have to have the construction of additional storage reservoirs to capture snowmelt, including some high elevation storage. We will have replacement of leaking and old and aging infrastructure and pipes and pipelines.

We are going to have to carefully manage our water, including releasing water to support threatened and endangered species.

We are going to have to learn to use, I think, what we used to consider to be wastewater like produced water from energy development that is occurring today in the West and place it to beneficial use.

But each of these activities requires the construction of new or replacement of infrastructure.

If the Clean Water Act embraces all waters to the extent they are subject to the legislative power of Congress under the Constitution and all activities affecting those waters, the Act could be interpreted by the courts to embrace all groundwater, all draining activities, all associated recreational activities, traditional flood control activities and stormwater control activities, all activities on Federal lands in source water protection areas.

The permitting burden on municipalities could increase significantly as more western gullies, washes, dry stream beds, intermittent streams that flow only in response to precipitation, and effluent and dependent and isolated waters, and activities on public and private land surrounding such waters are now found to be by the courts within the scope of the Act.

Equally important, thought, to the extent there is a new Federal nexus, there may be triggered additional NEPA reviews which are very costly and very expensive for municipal entities.

On the wastewater side, there will also be a need for new infrastructure. Small towns will face additional burdens, utilizing lagoon treatment technology. Constructed wetlands will be a less attractive wastewater treatment alternative. Zero discharge options may be eliminated. Reclamation projects may be more difficult to permit.

Similar constraints will be faced, we are fearful, by stormwater control entities.

Relative to climate change, I think we will see a need for increase storage to buffer us through drought times, enhanced stormwater management to handle those extreme rainfall events that the scientists are predicting, increased underground storage of water and expansion of water collection systems including pipelines and a construction of desalinization projects and a utilization of brackish waters. Again, if the definition of waters of the United States overly broad, these projects will similarly face increased regulatory burdens.

In conclusion, western municipalities along with State Governments and the EPA are partners in the implementation of the Act. We currently expend enormous financial resources in meeting and exceeding water treatment and wastewater discharge requirements. We recognize the value of our water resources.

We want to diligently work to protect them, including in arid climates as referenced by Arizona. There is no intent to exempt large municipal discharges. However, to the extent statutory changes are needed, they should not add to Federal oversight, reduce local flexibility, add to infrastructure costs or increase litigation opportunities.

We certainly stand ready to work with this Committee in forging some amendments that will work for all people involved.

Thank you.

Mr. OBERSTAR. Thank you, Mr. Pifher.

I am particularly sensitive to your comments about water-short western States. Early last year, this Committee, as one of our first pieces of business, moved legislation through the Subcommittee, the Full Committee and through the House to provide $1,800,000,000 in grant funds to water-scarce States to do exactly the things that you were describing.

Regrettably, as we affectionately call them, the other body, hasn't acted on that bill. If your Senators and others would get going and find a way to do something other than appoint ambassadors and judges, then we would get on with the critical business of this.

Mr. PIFHER. We will see what we can do to help.

Mr. OBERSTAR. I will go to Mr. Bishop to start with.

Mr. BISHOP. Thank you very much, Mr. Chairman.

I know Mr. Tierney has a plane to catch, so I will respect that and simply say that I have a couple of questions which I would like to submit to you in writing and ask you to respond in writing so that it may become part of the permanent record.

I thank you for your testimony, and I thank you for your patience and, most importantly, I thank you for your service to the people of New York. We are very fortunate.

Mr. TIERNEY. Well, thank you. Thank you, Congressman Bishop.

Mr. OBERSTAR. That is it?

Mr. BISHOP. I yield back the balance of my time.

Mr. BOOZMAN. Very good. We need to remember.

Mr. OBERSTAR. Mr. Boozman.

Mr. BOOZMAN. Thank you, Mr. Chairman.

Mr. Tierney, I was in New York earlier last week with a field hearing with Mr. Hall, and I want to compliment the State of New York. The testimony was excellent. It was just a very, very good hearing. I learned a lot. I hope that it was helpful for us to be down there and do the hearing.

I guess my concern is this, in your testimony, you cite that 35, or whatever, people joined with the amicus brief, saying that they were opposed to rolling back the provisions, okay, prior to the ruling.

Mr. TIERNEY. Yes, sir.

Mr. BOOZMAN. In other words, they supported the things that were in place. That is fine, but we are not arguing that. We are arguing not those provisions. We are arguing the potential provisions for this new legislation.

Now, in your closing deal, you said, "This is the guidance the States are seeking from Congress, and I believe H.R. 2421, by reaffirming and articulating the original intent of the Clean Water Act, frames the Federal wetland and small stream regulation effectively. By clearly defining this issue, the States will be able to, once again, with the Federal Government, effectively regulate all connected wetlands and streams."

But we have had a situation today where the four regulating agencies that testified, and you were probably here. I can barely remember it now because it was a while ago, but all of them voiced concerns that this was a fairly significant departure from the pre-Rapanos decision. Okay?

They were basically saying, when you talk about all interstate and intrastate waters, they testified that that might include groundwater also. They also said that there was no exclusion for wastewater treatment in the holding ponds. They also testified that it didn't include prior converted cropland.

I would submit that those 35, when you talk in those terms, you are not going to have 35 people support that for 35 jurisdictions, and I guess my concern is that.

The other thing that you mention in your testimony is that somehow this clears this up. Now I am just a guy from Arkansas, but we had four very intelligent people that are regulators. They agreed on two things. They agreed that it extended the jurisdiction significantly. They also agreed that they were confused, and it wasn't clearing anything up for them.

We had another panel, the lawyers that were here. Again, we had two for, two intelligent guys, two against that made very good arguments. We have had the last panel, and now we have you.

So, again, I just don't see either one of those things being the way it should be.

Mr. TIERNEY. Okay. I will try and be brief.

There certainly are a few clarifications that were talked about today that are in the EPA and Army Corps regulations which could be cited and clear those up, clear up those items.

The concern I have, I think particularly with Mr. Grumbles' statements, is he wants to keep the term, navigable, in this definition. Now we can go through and work through getting a better definition of what is covered if that is what people want. I would love to work with you on that. But as soon as you add in the term, navigable, then it is the source of all sorts of mischief.

Mr. BOOZMAN. I understand, but isn't all inter and intrastate water, again excluding the wastewater, doesn't that bother you a bit?

Mr. TIERNEY. It actually doesn't. In the State of New York, groundwater is a water of the State of New York under our program, but certain other things are not. We regulated groundwater because the Federal Government doesn't do it and as the statute doesn't say groundwater.

The EPA regulations and the Army Corps regulations didn't say groundwater. It was never understood as being true groundwater that would be involved in the program. So that didn't bother me, given 35 years of experience with this had operated.

Mr. BOOZMAN. So, with your experience, you feel like that this takes us just back to pre-Rapanos, no further?

Mr. TIERNEY. Yes, sir.

Mr. BOOZMAN. For the Country, not for New York but for the Country?

Mr. TIERNEY. I believe for the Country. The Army Corps and the EPA regulations that were passed in 1975 were very broad, and those were enacted near the time when the Clean Water Act was first passed. That regulatory definition is very similar to what is in the draft of the bill right now.

I just want to emphasize there is a practical hard-headed attribute to this, and it has to do with general permits. Army Corps, EPA, the State of New York, other States issue general permits for these nonsensical things like people say, well, puddles could be involved.

The general permits basically could say those are excluded. Those aren't involved. We could define it in a way. Nobody is going to call a manure lagoon a water of the United States. I heard somebody say, well, could manure lagoons somehow end up being regulated?

So the way that those issues, those sort of odd linguistic uncertainties that are involved in anything in the English language, could be handled is through these general permits or some clarifications that the Chairman has talked about today.

Mr. BOOZMAN. I guess, with all due respect, I mean that is your opinion, but the problem is the regulators that are going to enforce that, they don't agree with that opinion.

Mr. TIERNEY. Here is the problem.

Mr. BOOZMAN. That is a major problem.

Mr. TIERNEY. If I may, let me pose the problem back to you. If somebody right now dumps poison in a dry stream, a dry stream bed or in a wetland that is not connected, that won't flow into a stream for a week. A week later, it rains and it flows in. That is not regulated under the Clean Water Act under a definition which takes away these small headwater streams and wetlands from regulations. Now something else might cover it.

So I would pose it to you, sir, as the problem on your side where at some point that would flow into a stream, whenever it becomes a stream and stops being a point source is a very serious problem that I don't think the people who are opposed to this bill have truly grappled with the implications of it.

Mr. BOOZMAN. Okay. So, pre-Rapanos, well, first of all, if there is a nexus and all that stuff, and basically there is, that is not necessarily true. You know the statement about dumping in.

But, again, my concern is that we are hearing lots of arguments that there is expansion over the pre-Rapanos. I think if you read this literally, and we are talking about the legislation. We are talking about making this law. Then there is a fairly significant expansion.

The other thing is the best evidence of this thing not clearing things up is the testimony that we are getting.

So, again, I do appreciate your efforts, and I really appreciate the work that I saw going on in New York State. Thank you.

Mr. TIERNEY. I thank you very much, sir. I guess I am going to have to run.

Mr. OBERSTAR. Mr. Tierney, you have a train to catch.

Mr. TIERNEY. Thank you.

Mr. OBERSTAR. I just want to say your example was not theoretical. There was an actual case in California, a dry irrigation ditch in which a poisonous substance was dumped. It rained substantially a week later. The runoff killed 60,000 fish.

Thank you very much for your contribution.

Mr. Salazar.

Mr. SALAZAR. Thank you, Mr. Chairman.

I wanted to especially thank Mr. Trout and Mr. Pifher for coming all the way from Colorado and being so patient. As you know, that is the way Congress works.

I just have a question for Mr. Trout. I know that you testified that under Colorado water law the farmer basically takes possession of the water and it becomes a private property right until it is used and returned to the stream.

With regard to the current legislation, and I know the Chairman has alluded to it, that prior converted cropland is excluded. Is that what you understand?

Mr. TROUT. Let me address that in two ways. First of all, to go back to the little discussion the Chairman and I had, he is correct that there are two exemptions in the current bill and in current law that address agriculture. One of them, and this is Section 6.1 of the bill, provides an exemption from Section 402 for agricultural return flows.

Now, at least our understanding of return flows is what flows off the farm after the irrigation has occurred. It is not the water applied to the farm. That is a different thing. So there is an exemption for if a farmer irrigates, it flows into a stream, they do not need what we call an NPDES permit.

The other exemption, which I think the Chairman was referring to is Section 3 or Subsection 6.3, which is an exemption under Section 404 of the Act for discharge of dredged and fill materials from normal farming, silviculture and ranching activities which we make great use of in Colorado.

But my point is that if the definition is expanded sufficiently to cover what currently are not considered to be waters of the United States, such as wet meadows that are also irrigated, there is no current exemption under the Act for discharges under Section 402. There is an exemption for discharges under Section 404.

So the application of a chemical to a wet meadow, which is also an irrigated field, would be regulated and would require a permit. We know that from the Talent litigation we had in California a number of years ago.

Now, if the intention of the Committee is to really exempt all agricultural or silvicultural operations, what you would have to do is you would have to, in effect, add a Section 402 exemption to what is now the 404 exemption. If you did, the concerns that I have expressed really would go away because then, I think, farming operations would have a complete exemption. Other people may have a problem with that.

You mentioned prior converted cropland. As we know, the definition of prior converted cropland, at least in the USDA, the Department of Agriculture regulations, starts at the point that these are lands that were wetlands before. A lot of these lands I am talking about in Colorado were never wetlands before they were irrigated. Because they are irrigated, they may now be wetlands or at least a wet meadow.

So having an exemption for simply prior converted croplands does not exempt all of the lands that I am talking about. It probably would exempt some. It might exempt your lands if they are right down on the river, but it wouldn't exempt people's lands who are up from the river and were not historically part of the flood plain but are still now a hay meadow.

Did that answer your question? I am sorry I took so long.

Mr. SALAZAR. Mr. Chairman, are you amenable to those types of amendments?

Mr. OBERSTAR. The gentleman has described accurately to a point, but he does not reflect in his comment that there are situations in current law, in pre-Rapanos/SWANCC law, where there is not an exemption for pesticide application.

My purpose is not to expand it to cover that nor to cover anything or exempt anything that is not already exempted.

Mr. TROUT. If I may respond, Mr. Chairman, you are absolutely correct which is a problem that we, my clients who run irrigation ditches have a real issue with in the sense that complying with that is difficult to control things.

But my point is that if you expand the definition of what is a water of the United States to cover what are traditionally considered to be irrigated croplands, then you are triggering a discharge permit.

Mr. OBERSTAR. But the law cannot be internally contradictory. If we exempt something and you think there is broader language that provides broader application, the broader application cannot override the very clear, specific exemption.

Mr. TROUT. Well, that is correct.

I guess what I am suggesting is if you want to address the problems that other witnesses have described but still provide an exemption for agricultural activities and address these other issues by expanding the general definition of waters of the United States but still not put undue burdens on agriculture, you may have to extend the 402.

Mr. OBERSTAR. You provide some language for us, at my invitation, that does this without curtailing the current Clean Water Act nor expanding its application.

Mr. TROUT. I certainly will try to do that. I will work with Congressman Salazar to do so. Thank you very much.

Mr. OBERSTAR. Okay.

Mr. SALAZAR. Thank you, Mr. Chairman. Could I just take a minute?

Mr. Pifher, I know that we have talked a lot about the NEPA compliance concerns of new water projects. Can you expand on that a little bit?

Also, I would like you to address the issue of interstate water compacts. Is there going to be any effect from this legislation as it currently stands on interstate water compacts?

Mr. PIFHER. Relative to NEPA compliance, Representative Salazar, a concern would be that if you have a project. As an example, Aurora is currently constructing a recycling-reuse project that has been widely praised including by the environmental community at a cost to its ratepayers of $750 million, but it includes a 34-mile delivery pipeline to pipe back to the city, return flows that have gone through reclamation and treatment.

In the permitting of that project, we redesigned the project time and time again to try to avoid crossing waters of the United States and wetlands, and we microtunneled to avoid waters of the United States and wetlands. But when all was said and done, there were four or five instances where we just couldn't avoid that without great expense and difficulty including crossing ditches, irrigation ditches. Therefore, we went to the Corps of Engineers and said, we would like a nationwide permit, but we do not want to trigger NEPA review.

They said, well, in light of the fact it is a 34-mile pipeline, it is a long corridor, and you only have four or five small crossings, that will not trigger NEPA review. It won't federalize the project.

But if you had to have a jurisdictional determination and there was a jurisdictional determination on numerous such crossings, the

NEPA process would be triggered. You would wind up undoubtedly spending millions of additional dollars and two or three additional years going through that process in order to bring on that water delivery system which, in our case, was critical to get online because our storage after the 2002 drought had dropped to 25 percent. It was a critical need.

So that is an example under NEPA.

As far as interstate compacts, that is a very difficult question. I guess one concern would be when you talk about the full reach of Congress under the Constitution and all activities that may affect waters. You could have situations where you have water bodies covered by interstate compacts like the Colorado or the Arkansas, for example, where the downstream State would look at activities in the upstream State that could cause some water quality degradation in the downstream State and therefore object to that activity.

That could include water diversion activities in the upstream State that simply remove flow from the river and therefore deplete flows that the downstream State believes are necessary to support some of its designated beneficial uses like aquatic life. That would lead to interstate friction.

So I don't think it is unresolvable, but it is something we need to think through.

Mr. SALAZAR. Thank you, Mr. Chairman. I yield back.

Mr. OBERSTAR. I appreciate the gentleman's comments and the responses.

Mrs. Napolitano.

Mrs. NAPOLITANO. Mr. Chair, I think the questions that I have deal more with recycled water and drugs in water, pharmaceuticals in potable water, those kinds of areas.

But I am very much interested in how some of those laws affect the State of California and the western States simply because there is going to be an increase in need of additional water, whether it is recycled, reused, farm water putting back to use, drainage ditch water. I think we are going to have to look for every puddle to be able to ensure that we do have water for the future, for economic reasons as well as for reasons of health.

I am very much in tune with some of the issues you bring up, but in the end I think maybe we sometimes make a mountain out of a molehill in trying to add to an already existing issue. Sometimes I am finding out that the attorneys are the ones who benefit more out of the litigation—sorry, sir—than the benefit to the users and to the end result which would be the delivery of potable water to the people that need it, for agricultural uses also.

So I would consider being able to understand what impacts or what loopholes or what language there would be that would tie some of this up that does not allow for the abuse in the future if this bill goes through with amendments that might necessary. So, if anybody has a comment to that, I would like to hear it, especially by the attorneys.

Mr. TROUT. As you can tell, my comments are aimed primarily at agricultural issues. Certainly, the people that I work with share your concern about pharmaceuticals in water. The big irrigation

district that I work with is now discussing whether we would start testing for such things.

I guess on a personal attorney's note, I would disagree with you about sort of characterization of the statute. The common joke among the people I work with, attorneys and scientists who work on this, is that if this bill passes it will put our kids through college because we think it will actually cause more controversy and more litigation as the Federal Government pushes the limits of the Congress' constitutional authority. That, I think we have seen from the Supreme Court's opinions.

The Supreme Court didn't view it that way when it interpreted the statute. It viewed that it was interpreting the statute as written and didn't have to get to the constitutional issues. So, if we have to litigate on constitutional issues, it probably won't be me, but that is the view of it kind of in the trenches of the people who look at this.

Mrs. NAPOLITANO. How do we avoid that?

Mr. TROUT. I am not a Republican by the way. I would call myself a conservative Democrat, but I will give you my conservative response which is maybe wait a year or two and see how the current regulations work out. I mean we all agree, I think, that the Supreme Court did nobody favors in the Rapanos case. They really created the muddle, but that is not the first time the Supreme Court has done that.

Give the Administration, the current one and perhaps the next one, some opportunities to try to work through that rather than create new legislation which really adds a full layer, again, of complexity on it. That is the view of a conservative lawyer.

Mrs. NAPOLITANO. But wouldn't it be also true that if this bill were to be enacted, that that might conceivably be then reinterpreted by the Supreme Court?

Mr. TROUT. Oh, I guess I have no doubt that if this bill was enacted the Supreme Court would read and then decide what is Congress' constitutional limit and assertable authority.

Mrs. NAPOLITANO. Wouldn't that then preclude some of the filings to be able to challenge it?

Mr. TROUT. Litigation is not that general. I guess I would put it that way.

Mrs. NAPOLITANO. That is being simplistic, I know.

Mr. TROUT. You are right. In 30, 40 years, probably you are correct.

But, as you know, in our world, things get decided on a case by case basis. You get one decision like the SWANCC decision which was limited specifically to the Migratory Bird Rule. There are many other sources of Federal jurisdiction over waters. So you would have to have a series of decisions over time to build up a body of law.

Mrs. NAPOLITANO. Which brings me then to my statement originally which is how do we close those loopholes? How do we address the issues? I don't mean for every single one but to be able to have the intent of the law be actually carried as a protector of human beings and essential to agriculture and the economy.

Mr. TROUT. I will be honest. At this point, I don't have an answer for you. Sorry.

Mrs. NAPOLITANO. Thank you, Mr. Chair. I yield back.

Mr. OBERSTAR. Ms. Hirono.

Ms. HIRONO. I just have a short comment.

Mr. Trout, great name, by the way. You said that maybe what we should be doing is letting the guidance take place, and there have been some thousands of cases that have already gone through the process, I suppose, using that guidance.

But my concern is that those provisions really flow from very confusing Supreme Court decisions. That is why I asked the first panel.

I think it is up to Congress to try and lay out the law as clearly as possible, avoiding unintended consequences, because it is the privy of the courts to then interpret our statutes, not the other way around. And so, Congress often comes in, disagreeing with what the Court has done and provides the kind of clarity.

So I am not so sure that what we should be doing is waiting a couple of years for guidance that really put in play court decisions that did not provide the kind of clarity that we want. I don't know that that is what we ought to be doing either.

It is more a comment than a question.

Mr. TROUT. Okay. That is certainly your prerogative.

Ms. HIRONO. Thank you, Mr. Chairman.

Mr. OBERSTAR. Mr. Carney.

Mr. CARNEY. No questions at this time. Thank you, Mr. Chairman.

Mr. OBERSTAR. I have a question for Ms. Card and appreciation for your testimony and for the strong position of your governor in a very lucid statement in support of the introduced bill.

We have information from EPA that certain publicly-owned treatment works, POTWs, Section 402 agencies in Arizona are petitioning that they are no longer covered by the Clean Water Act, submitting statements to EPA saying they are no longer covered as a result of the Court cases.

You said that Arizona is prohibited by State law from filling the gap left behind by pulling back on the law as a result of the Rapanos decision. How will Arizona then be able to address those facilities if the Clean Water Act doesn't cover, if the State Government can't do any better than current law and current law now has been downrated by the Court case?

Ms. CARD. Yes, Mr. Chairman, I am familiar with what you are referencing. As I said in my testimony, my agency would no longer be able to protect the stream for aquatic life uses, for agricultural irrigation, for livestock watering. With respect to some pollutants, livestock watering has more stringent health-based standards than drinking water does. So it would create a tremendous gap potentially for huge discharges of wastewater.

Mr. OBERSTAR. And the State won't be able to protect its citizens as it has been doing up until now?

Ms. CARD. No under current State law, that is correct.

Mr. OBERSTAR. That is a very serious gap.

You have heard the discussion. You have sat here intently, listening all day about retaining the language in the Clean Water Act where it appears referencing navigable waters of the United States, retaining it but accompanying that, tying to it—I have said, riv-

eting to it—the regulatory practices so that we spell out what has been in place prior to the two Court decisions to assure that there is clarity and continuity and no expansion nor retraction of the Clean Water Act.

What would be your reaction to that?

Ms. CARD. Well, Mr. Chairman, I agree that some useful points have been made at this hearing which, of course, is the point of the hearing and the legislative process itself.

With respect to the navigability test and the concerns I have raised in my statement about ephemeral and intermittent streams and headwaters streams protection, the navigability test is not helpful in Arizona. As I mentioned, 96 percent of our waters are nonperennial. According to the Corps, our only navigable water is the Colorado River, and our headwaters streams are in some cases 200 miles from the Colorado River.

In the Rapanos case, Justice Kennedy wrestled with a 10-mile difference between waters, and so the navigability test has not served us well or potentially will not serve us well under the Rapanos decision.

The Clean Water Act, prior to the Rapanos decision, served us very well. We have a 1975 Arizona Federal District Court opinion in which the judge said, dry arroyos are tributaries of navigable waters, period, and discharges of toxic mine waste require permits under the Clean Water Act even if it is to a dry arroyo which, of course, is non-navigable.

So, with respect to toxic discharges to dry streams in Arizona, that has been long settled and undisputed and noncontroversial. The problem with the Rapanos decision and guidance is it potentially turns that on its head.

Mr. OBERSTAR. Can you craft language to establish or retain that pre-Rapanos authority for Arizona and similar States?

Ms. CARD. Well, again, if it is clear in the Act that intermittent and ephemeral and headwaters streams are protected, I think there is probably more than one way to do that in this legislation.

Mr. OBERSTAR. Would you provide some language for the Committee?

Ms. CARD. I would be happy to wrestle with that.

Mr. OBERSTAR. Thank you.

Mr. Boozman.

Mr. BOOZMAN. Mr. Chairman, just for a second, if you don't mind.

I was just curious, Ms. Card. Is that by State constitution that the law is such that it can't supersede the Clean Water Act?

Ms. CARD. Mr. Chairman and Congressman, no, that is State statute.

Mr. BOOZMAN. I guess the obvious question is why? Why don't you change the law?

Ms. CARD. Because I am not the Arizona Legislature, and I can't speak for them.

Mr. BOOZMAN. What is your opinion as to why they can't change the law?

Ms. CARD. Well, I don't think it has been presented to them yet, and I can certainly imagine the potential for me to be making this same plea at the Arizona Legislature.

We think the problem is immediate. It needs to be addressed now, and that it is properly addressed by the Federal Government. Just because Arizona is an arid State doesn't mean we are deserving or in need of less protection from pollution than wet States.

Mr. BOOZMAN. Do you think your legislators would be upset if they had the possibility of all interstate and all intrastate and possibly groundwater being controlled?

Ms. CARD. Mr. Chairman and Congressman, again, I can't speak for them. I know that the bill has been controversial, and I am sure there are members of the Arizona Legislature who would be concerned.

Mr. BOOZMAN. Good. Thank you. Thank you for testimony. I thank all of you very much.

Ms. CARD. You are welcome.

Mr. OBERSTAR. I want to thank this panel for their contributions, and I look forward to submissions as the Chair has requested. Thank you for being here with us for this very long day.

Our next panel: Mr. Tim Recker, the Iowa Corn Growers; Mr. Carl Shaffer for the Pennsylvania Farm Bureau; Mr. Harold Quinn for the National Mining Association; Mr. Darrell Gerber, the Clean Water Action Alliance of Minnesota; and Ms. Linda Runbeck for the American Property Coalition in Minnesota.

To this panel, again, my apologies that the interventions of the votes this afternoon have stretched out the hearing time. But, as you can tell and you have sat here very patiently, listening, you are the best informed panelists. You have heard everything, and you have seen this is a very intensely debated subject with very strong feelings.

It has been a productive day, and you are adding to it. We look forward to hearing from you.

Mr. Recker.

**TESTIMONY OF TIM RECKER, IOWA CORN GROWERS; CARL SHAFFER, PRESIDENT PENNSYLVANIA FARM BUREAU; HAROLD P. QUINN, JR., SENIOR VICE PRESIDENT, LEGAL AND REGULATORY AFFAIRS, NATIONAL MINING ASSOCIATION; DARRELL GERBER, CLEAN WATER ACTION ALLIANCE OF MINNESOTA; AND LINDA RUNBECK, AMERICAN PROPERTY COALITION.**

Mr. RECKER. Thank you, Mr. Chairman, and it has been a productive day for an Iowa farm boy to come and listen to this kind of good discussion on water quality. It has been informative.

Mr. Chairman and Members of the Committee, thank you for the opportunity to testify today on the legislative hearing of the H.R. 2421, the Clean Water Restoration Act. I ask that my statement be recorded for the hearing.

Mr. OBERSTAR. All statements will be included in full in the record.

Mr. RECKER. Thank you.

My name is Tim Recker. I am President of the Iowa Corn Growers. I am from Arlington, Iowa, where I grow corn and soybeans. I operate a wean to finish livestock operation.

In addition to farming with my brother, I actually own an excavating business and do farm drainage, and it is quite the contrary

of all the talk we have had here today about irrigating. We actually, in Iowa, have to drain the excess water out. So I would love to build that pipeline to the people who need that water and put a meter on it.

Before addressing the issue at hand, though, I would like to first sincerely thank the Committee for the hard work and devotion to the completion of the Water Resources Development Act, WRDA. WRDA 2007 authorizes critical projects and inland waterways including the modernization of seven locks along the upper Mississippi River, which I am very close to, and the Illinois River, a project that will dramatically the ability to deliver crops to the global marketplace.

Last year marked the largest corn crop in history. However, it is not just about growing more corn. It is about how we grow it. On our farm, we are always looking at problems and trying to find out new ways to address soil quality, cleaner water, improvement in production and profitability. We are farming sustainability.

All across the Country, corn farmers are involved in numerous State, local and national programs, programs that complement the goals of the Clean Water Act by protecting environmentally sensitive land from crop production and encouraging other on-farm conservation methods.

For example, the Farm Bill conservation program has recognized unique abilities and the limitations of farmers. As a result, we are making important environmental gains using voluntary and, I will stress, locally led incentive-based programs to reduce soil erosion, improve water quality and increase wildlife habitat.

Corn growers believe that H.R. 2421 would fundamentally alter the longstanding appropriate and beneficial use of the term, navigable. This proposed legislation expands the regulatory authority of the U.S. Environmental Protection Agency, the U.S. Corps of Engineers in all interstate waters, essentially all wet areas within the State including impoundments, groundwater, ditches, pipes, streets, gutters and so on.

Additionally, it grants EPA and the Corps authority to regulate virtually all activities, private and public, that may affect the waters of the United States, regardless of whether that activity is occurring in or what it may impact the water at all.

Likewise, 2421 would create significant new administrative responsibilities without fully analyzing the implementation of funding of such requirements.

The backlog permits has been estimated between fifteen and twenty thousand with a time lapse of several years. So I ask the Committee, how would they address the needs of a regulated community when the already significant delays of today turn into massive delays of tomorrow?

We are concerned that H.R. 2421 would eliminate the existing regulatory limitations authorized by both Democrat and Republican administrations, allowing common sense uses such as prior converted cropland and waste treatment systems. Furthermore, the savings clause does not exempt anything from the broad definition of waters of the United States nor does it capture exemptions found in statutory definitions such as agriculture stormwater exemption.

Not all agricultural activities enjoy the benefit of an explicit statutory exemption. For example, pesticide use is not covered by the explicit statutory exemption. This extremely important agriculture production activity can involve the deposit or unintended drift of pesticides into areas deemed to be waters of the United States.

Similarly, the application of fertilizer and other vital farming activities may incidentally add material to the waters of the United States and are not exempted by statute or addressed in the savings clause.

Despite our opposition to 2421, we do agree that regulatory clarity must be achieved. The Supreme Court recommended that regulatory action consistent with its decision in Rapanos be conducted. While Congress can always change laws, we note that the Supreme Court did not cite in Rapanos a need for new legislative meaning being given to the Clean Water Act jurisdictional waters in order for such regulatory action to be successful.

In our view, the job of Congress should now be to force the Corps and EPA to follow through on the Supreme Court recommendations to conduct a formal rulemaking, allowing all affected parties to contribute to the process which would have a goal of establishing clear Federal jurisdiction under the Clean Water Act.

In conclusion, corn growers urge you to recognize the significant problems that H.R. 2421 would create if enacted and thoroughly analyze and discuss the consequences of this legislation before moving forward. As it is currently written, we have no choice but to oppose H.R. 2421.

Mr. Chairman, Members, thank you for the opportunity to testify at this late time.

Mr. OBERSTAR. Thank you, Mr. Recker.

This is not really late for this Committee. We go much later.

Mr. Shaffer.

Mr. SHAFFER. Thank you, Mr. Chairman.

Mr. Chairman and Members of the Committee, my name is Carl Shaffer. I own a farm in Columbia County, Pennsylvania, where I raise green beans, corn and wheat.

As President of the Pennsylvania Farm Bureau and a member of the American Farm Bureau Federation Board of Directors, I am pleased to offer this testimony on behalf of over 42,000 rural and farm family members of the Pennsylvania Farm Bureau. The policy positions I will discuss and those included in my written testimony are shared by more than six million members of the American Farm Bureau Federation.

Mr. Chairman, farmers are no nonsense folks who understand that words matter. It is clear to us that Congress intended to use the term, navigable waters, when it passed the Clean Water Act in 1972.

The bill we are discussing today deletes the term, navigable waters, and deleting this term expands—it does not restore—the scope of Federal regulation. This bill would sweep many agricultural activities into the scope of Federal regulation simply because these activities would occur near some isolated ditch that would be deemed at water of the United States. Furthermore, prior converted croplands would be classified as Federally-regulated wetlands.

If that is the case, I would be required to get a Federal permit to grow crops on land that I have been farming for three decades. Surely, there are more productive ways to spend America's tax dollars.

Pennsylvania has more than 83,000 miles of rivers and streams, most of which are State waters. This legislation would require a substantial increase in funding for the Corps of Engineers. This bill is a call for bigger government.

How, under the current budget deficit, does Congress intend to pay for additional regulatory enforcement or will more unfunded mandates be passed on to local municipalities to monitor and regulate Federal waters?

In Pennsylvania, stream health and aquatic rebirth are improving each year. One of our largest dairy farms in the State is a favorite trout fishing location of former President Jimmy Carter. Spruce Creek, with its high quality cold water fishery designation is an example of the environmental stewardship and success already in place through agricultural practices.

Next week, 16 Pennsylvania streams in 11 different counties will be adopted as wilderness trout streams. Wild trout are an excellent indicator of water quality and stream health.

In the 1980s, Pennsylvania gained more than 4,600 acres of wetlands within the Chesapeake Bay Watershed. The State's Department of Environmental Protection showed an increase of 2,500 acres of wetlands from 2000 to 2006. Today, more than 400,000 acres of wetlands are found through the Commonwealth.

Each year, the Keystone State has seen an increase in voluntary nutrient management planning from fewer than 2,000 acres in the early 1990s to 1.3 million acres today. Farmers are already good stewards of the land and the water without a Federal mandate.

Moreover Pennsylvania's State Conservation Commission implemented the dirt and gravel road program to reduce erosion and sediment pollution. The program is based on the principle that an informed and empowered local effort is the most effective way to curb pollution. This effort stabilized more than 1 quarter of a million square feet of streams at more than 1,500 sites across the Commonwealth since 1997.

Federal jurisdiction over these small streams would only complicate an already successful program. Pennsylvania successfully monitors and regulates water quality through more than a dozen laws, regulations and initiatives, some of which are outlined in my written testimony.

In December of 2007, I co-wrote an editorial with Secretary Kathleen McGinty of the Pennsylvania Department of Environmental Protection, discussing State regulatory requirements that are effective for our unique geographic location. Imposing a one size fits all regulation over 50 States will nullify or complicate productive State efforts like the in Pennsylvania.

In January, DEP Deputy Secretary Cathleen Myers noted, "Pennsylvania's Chesapeake Bay Compliance Plan requires 25 million pounds of nutrient reduction from our farmlands, nearly 5 times the reduction required of our sewage treatment plants. Pennsylvania farmers are rising to the challenge, laying claim to more

than half of all the nitrogen reductions made by farmers in the multistate watershed."

Farmers and ranchers across the Country are already working with State officials to meet water quality requirements. Adding the Corp of Engineers or the EPA to the existing regulatory equation is simply not an option. For these reasons, we oppose H.R. 2421 and urge that it not be approved by the Committee.

We very much appreciate your interest on this issue and the opportunity to submit this testimony. Thank you very much.

Mr. OBERSTAR. Thank you very much for your presentation.

Did you say that Pennsylvania farmers are accounting for half of the 25 million pound reduction in nutrients?

Mr. SHAFFER. In the Chesapeake Bay Watershed.

Mr. OBERSTAR. Pennsylvania farmers alone are accounting for that?

Mr. SHAFFER. Yes, yes, of the multistate watershed.

Mr. OBERSTAR. That is an enormous contribution.

Mr. SHAFFER. And it has been done, I am proud to say, through a lot of voluntary programs that we have actually implemented and started on our own in Pennsylvania as farmers of the State, the Keystone State.

Mr. OBERSTAR. Much of the problem, more than 70 percent of the problem in the Chesapeake Bay is upland runoff in Maryland, Delaware, West Virginia and Pennsylvania. If you have made that contribution, that is very, very significant. Compliments.

I also thank you for the testimony from the Farm Bureau.

Last year, I invited the Farm Bureau to testify at our hearings, and the president chose not to. I invited your national legislative director; he chose not to testify. Happily, Kevin Papp, President of our Minnesota Farm Bureau did testify.

I will have some follow-up questions for you later.

Mr. SHAFFER. Thank you.

Mr. OBERSTAR. Thank you.

Mr. Quinn.

Mr. QUINN. Thank you, Mr. Chairman, Members of the Committee. We appreciate the invitation to be here and share our views on the legislation.

My name is Hal Quinn, and I am appearing on behalf of the National Mining Association.

I know it has been a long day for all of you, and you have already heard ample testimony on the question of whether this legislation.

Mr. OBERSTAR. We haven't heard everything, though.

Mr. QUINN. On the question of whether it changes or restores the original intent or changes the intent, I don't believe I am going to add to that well today. We will stand on our written submission on that question, which we would agree with the viewpoints of those who expressed earlier that we believe it would change the intent that we see from at least the text and the structure of the statute.

But I think what we heard earlier today is that clearly the legislation, if enacted, would change the status quo as we know it at this moment. In that regard, I just wanted to address two concerns.

First, if it does change the status quo as we know it today, what will the effect be on existing businesses and landowners who have

made investments, planned activities and taken action on those activities under a different understanding of the law than might appear in this legislation if enacted?

Will those investments be protected? Will they be grandfathered? How will those situations be accommodated and can they be accommodated under the law?

Second and probably more important to us today is if it does change the status quo, we will certainly see greater pressures placed on the existing permitting infrastructure under the Clean Water Act program. In that regard, we have already seen an overburdened system that, because of delays in terms of obtaining reasonable decisions in reasonable timeframes, erodes confidence in the process and is simply unresponsive to the demands placed on the program.

The permitting system is expensive and is protracted. In terms of expense, the expense is not that simply in terms of gathering the data and submitting an application. Also the more significant cost, particularly to capital-intensive industries like the ones I represent, comes from the delays in obtaining permissions and authorizations to proceed.

For every delay in receiving those authorizations or permits, we lose net present value in our investment because our return on that capital is deferred, our employees are idled and, at that point in time, we have to reconsider. Both investors and others have to reconsider where they deploy their risk capital in terms of not only this Country but in other countries as well if they present a lower regulatory risk.

Now assuring a responsive permitting system requires substantial investment of public resources just to meet the current demands on that process, let alone ones that might be increased or engendered by changes in the law. In addition to providing more resources, we think that system, the permitting system can be improved and become more efficient by identifying and seizing upon opportunities for permitting efficiencies.

One of the goals of the Clean Water Act that is often overlooked is to prevent needless duplication and unnecessary delays. We believe there are opportunities that exist where there are other overarching environmental laws and regulatory programs that already require certain industries or businesses to examine and address the effect of their activities on water resources.

We have provided as part of our testimony at least two examples of where we think this duplication exists, and as a consequence there are opportunities to coordinate those particular programs better so that we can avoid needless delay and duplication of trying to protect the same resource by collecting data, the same data different ways but really for the same purpose.

I bring with me today, and I apologize for the size of the exhibit, Mr. Chairman, but this is a photograph of a permit application put together three years ago for a coal mine in Congressman Rahall's district. This is a combination of what we call our SMCRA, surface mining and reclamation, permit that has extensive data and analysis on the impact of our operations on both surface and groundwater in the surrounding watershed as well as the Clean Water

Act 402 permit and the Section 404 permit and the State 401 water quality certification.

I can assure you there are a number of items within these binders and data that are duplicative. Perhaps if these programs are coordinated, we could be relying on certain data and certain decisions made by certain regulators for the purposes of making decisions under other programs.

As you can see from the size of this, just moving these permits around is an occupation hazard in itself, but this is just to point out that we think there are opportunities to make the process more responsive to the regulated, not maybe in all cases but in certain cases.

Let me just conclude with the observation, we know that this legislation is motivated by the desire to restore and maintain the integrity of the waters of our Nation, and we share that goal. We just question whether before we proceed to expand the law's reach, whether greater attention ought to be brought first, and the greatest threat to that goal might be a nonresponsive and inflexible permitting system that is incapable of bringing reasonable decisions in reasonable timeframes to the people who are subjected to the law.

I thank you again for your attention to this matter at this late hour.

Mr. OBERSTAR. Thank you very much, Mr. Quinn. I appreciate that graphic you presented. I will come back to that in a moment after the other testimony.

Mr. Gerber.

Mr. GERBER. Thank you, Chairman Oberstar and Members of the Committee for inviting me to testify before you today and also for sticking around so long and bearing with us all.

My name is Darrel Gerber. I am the Program Coordinator for Clean Water Action Alliance out of the Minneapolis, Minnesota office. We are the largest membership-based environmental organization in the State. We are also a part of Clean Water Action, a national organization with over a million members.

Our primary mission is to ensure that we have clean and safe water now and into generations to come. We do this by organizing. Whether it is people at the grassroots level, coalitions or broader campaigns, we organize to protect people's environment, health, economic well-being and community quality of life.

The Clean Water Restoration Act has been a priority issue for Clean Water Action's grassroots policy and mobilization campaign since it was first introduced. Since then, our members have sent hundreds of thousands of communications to Congress, asking or actually urging for passage of the Clean Water Restoration Act. In our work with over a million members in more than 20 States, people tell us that passing the Clean Water Restoration Act is the right thing to do.

Today's hearing is a critical junction for the Clean Water Act. The important question before you today is do we want to throw out 35 years worth of progress in cleaning up our waters or do we want to continue working to make our waters fishable, swimmable and drinkable?

The people we talk to across the County and even those in independent polls resoundingly state the cleanup must move forward.

Unfortunately, through the actions of the Supreme Court, the EPA and the Corps, we are moving backwards. Fifty-nine percent of the waters nationally are at risk of losing protection under the Clean Water Act. EPA's own estimates show that drinking water sources for over 110 million people are at risk to pollution due to the reduction in waters covered by the Clean Water Act.

Protections for our waters are being eroded by Federal policies put in place since 2003 in response to several Supreme Court decisions. The Supreme Court in SWANCC and Rapanos misread the law and congressional intent as to what waters should be protected. This, coupled with the lack of clear consensus offered by the split Rapanos decision, a decision in which there was no majority opinion on waters covered and, even worse, where the opinion of a single justice with no other concurring justices has often been interpreted to carry the day.

Besides that, the test that Justice Kennedy created, the significant nexus test, offers no clarity as to what waters the Clean Water Act covers.

Recent EPA and Corps policies and guidance have created an even further fog of confusion and have gone beyond what the Supreme Court ruled in order to restrict even further the Clean Water Act coverage. An example of this fog of confusion is a lake in western Minnesota. There, the confusion over what the Clean Water Act protects led to an obviously incorrect determination by field Corps staff.

If you go about 35 miles east of Fargo, North Dakota, which is on the western border of Minnesota, along Highway 10 you get to Boyer Lake. This is a 310-acre lake, has a public boat ramp on the north side and is a popular fishing lake where you can get bass, bluegill, northern pike and walleye. The Minnesota DNR periodically stocks the lake with hundreds of thousands of walleye, yet this lake was found to not fall under the scope of the Clean Water Act.

Quick actions fortunately led to a reversal of this decision, but the fact that it occurred at all indicates that there are clearly problems on the ground trying to determine what the new EPA and Corps policies mean. The reversal is good news for Boyer Lake, but at the same time the Corps is still trying to determine if the Clean Water Act programs apply to Bah Lakes, a similar lake only 85 miles away.

We have already heard about the impacts of flooding around other parts of the Country, and Minnesota of course is no stranger. Whether tragic like those in the southeastern part of the State last fall or not, they generally prove to be devastating to those who live, work or own property nearby.

There were also other severe droughts across the Country last year. Lake Lanier in Georgia dropped to astonishingly low levels. Lake Superior, up by us, was lower than it has been seen forever. Parts of the West have also experienced extended multiyear droughts.

What we are learning about the impacts of global warming is that we can expect this to occur even more. Global warming changes our water cycles which will contribute to more intense and heavy rainfalls and deeper droughts. We also know that many of

the hydrological features now excluded or threatened to be excluded from protection are the very same natural features most necessary to lessen the impacts from this flooding and drought.

Clean Water Action members know that restoring protection for all of our waters is important and look to Congress to take action by passing the Clean Water Restoration Act. Now, more than ever, we need Federal water protections that meet the original goals of the Clean Water Act to ensure that our water is fishable, swimmable and drinkable.

Thirty years from now, we want to be able to look back on this day and this time and be able to say Congress stopped the erosion of clean water protections and got back to the important business of restoring and maintaining clean water for all.

Mr. OBERSTAR. Thank you, Mr. Gerber. We greatly appreciate your testimony.

Ms. Runbeck, thank you for your patience throughout this long day.

Ms. RUNBECK. Well, thank you, Mr. Chairman, for the invitation and the opportunity to present on the Clean Water Restoration Act. I certainly admire your stamina. You have undertaken many, many complex issues in this current session and are doing a wonderful job.

But, yes, my name is Linda Runbeck, and I am with the American Property Coalition. I am also a former State Senator from Minnesota.

For the benefit of those who don't know some of our activities, we have been out doing workshops and town hall meetings about the Clean Water Restoration Act and informing people about what it proposes to do, and so I am here to express really the concerns of sort of average middle Americans about this bill.

These are the people that have most of their net worth tied up in lakes and lots and land and homes and acres, and so they do fear that this bill is a direct threat to them. I have to agree. I believe that it is.

Certainly, they will pay and pay dearly. They are going to pay in lost values. They are going to pay in lost production capacity. They are going to pay in excessive legal fees to protect their right to use their land as they see fit.

Keep in mind, these are not people that have staffs of lawyers, for the most part. They don't comb through the specs and the regs. So these are people like most of us.

I encourage you, as you put this legislation together, to please consider average Americans and to take a look at how this will affect them. Perhaps it is time to put a few words pertaining to education, pertaining to training and technical assistance. I think certainly after all these years of the Clean Water Act, it is time to take a little friendlier attitude towards the people that it regulates, especially now if it is going to be far more expanded and the regulators as well.

But I do believe the bill has morphed into a national land use control act, and that is certainly a result of the words, activities affecting these waters. Everything and every body exists in a watershed, and therefore there isn't much that escapes this law. It cer-

tainly does expand government's reach far beyond the physical boundaries of water bodies and buffers.

I think it is important to realize that an activity does not have to take place in water in order for it to be regulated. I think it is also important to think about the fact that waters can be affected directly or indirectly. I don't know that those words have been talked about too much, but certainly then an activity that takes place on a hilltop or a mountaintop 25 miles from a water could very much be under regulation, and the Federal Government would and could stop those activities. So I think there are very real concerns.

We did provide a map, and I guess those are on the overheads, just to show sort of illustratively the difference between the existing law and H.R. 2421. As you can see, H.R. 2421 becomes virtual, total control by the Federal Government, and that has been pretty well covered today, I would say.

We have heard a lot about the confusion in the law, and I would just add that certainly what it means for those, again, who are regulated is that the line, the certainty that they are hoping for in the statute is absent. I think what a vague law means, and hopefully Congress will not pass such a law, is that the litigators representing various special interests are going to use their citizen lawsuit opportunity and forcibly expand and broaden the scope of the Act.

So there is too much that can happen after it leaves your hands, and we would urge you not to allow that to be.

Just a real quick point on how I think the bill destroys incentives for those people who love habitat and have wanted to create wetlands. We have a lot of those folks in Minnesota. I think what we will find and we are finding, in fact, is that activity is fraught now with catch-22s and enormous costs that pretty much then discourage anybody from thinking about creating a wetland habitat.

We have seen polls over the last few months that show that there is very little public support for expanding the Federal Government's control over land and waters, and I will just cite the National Center for Public Policy Research, a very nice piece of polling. They gave very explicit descriptions of the pros and the cons, and yet 54 percent of Americans, we could say if we extrapolate, said that they would oppose this bill.

You look regionally and find out that in New England, 58 percent oppose it; in the Farm Belt, 59 percent oppose it; in the mountain States, 62 percent would oppose it.

I think the poll is one thing, but I think most people do not realize that the Federal Government is actually considering regulating nearly dry land, and this is an example. This is from Kanabec County in Minnesota, and this is a wetland. This gentleman is spending $160,000 to date to do some. He wants to put an RV site on his wetland, and so far he has no decisions made. So there is an endless bureaucratic morass that exists even now.

The American public probably does not understand that this is what is to be regulated, virtually, except for a couple days, a couple weeks of the year, dry land.

One more point that I will quickly make is that we are getting assurance that there are clauses that are going to protect the ex-

emptions in ag as well as silviculture. In Minnesota, I just want you to know that now an NRCS permit must be also accompanied by a WCA permit. That is Minnesota's Wetlands Conservation Act.

You have situations where the NRCS permit is approved, but the WCA permit is denied. So the State law is overriding some of those exemptions.

Finally, Mr. Chairman, I would urge you to develop a bipartisan solution. I know in Minnesota when parties, differing parties, reach log jams, good folks like Senator Doug Johnson would say: Get together. Don't come to us until you have a bill you all agree on because we are not going to waste our time on these kinds of very partisan differences. Work them out yourselves.

So I would urge you to get the parties together, come up with some resolutions similar to what we have talked about today, and please don't forget that I think now, 35 years after the Clean Water Act, people have become such advocates and fans of wetlands, of clean water, of local initiatives, of putting in vegetation on their shorelines to prevent fertilizers and so on from entering land. These are community projects now. The voluntary efforts talked about here are everywhere.

I don't think we really need the command and control system that this bill continues to use and probably should not, given the much smaller areas now that would come under this scope, smaller areas of impact and land and water bodies.

Thank you very much, Mr. Chairman.

Mr. OBERSTAR. Thank you for your contribution, for your comments. I can just about picture where that photo was taken.

Ms. RUNBECK. I am certain you can.

Mr. OBERSTAR. Mr. Boozman had a pressing commitment to make, and he has been very patient. I want to recognize the gentleman.

Mr. BOOZMAN. Well, thank you very much, Mr. Chairman. I have about 25 people that journeyed from Arkansas to see the pope.

Mr. OBERSTAR. There are going to get you instead.

Mr. BOOZMAN. Yes. I told them that I would meet them at 6:30, and they are about worn out. So, anyway, I have another event I have to run too, but I want to thank all of you for your testimony.

I also want to thank you, Mr. Chairman and Mr. Mica. The hearing today has been very, very good. We have had a broad, very diverse group of people testifying from all walks that represent this and truly from just all kinds of viewpoints which is very, very valuable. So I really do appreciate it. It has been very, very helpful to me.

I really appreciate you, especially. I am leaving now. I appreciate your hanging in and being so patient, but it really is important that you are up here. So, thank you very much for making the trip.

Mr. OBERSTAR. Thank you, Mr. Boozman, for your participation throughout the day and for your diligent attention to the specifics and the testimony of all the witnesses.

Mr. Salazar.

Mr. SALAZAR. Mr. Chairman, I have to reiterate what Mr. Boozman said. I am amazed at your stability and strength. I think you are the only Member of Congress that can run 12 or 14-hour

Committee hearings, but we applaud you for that, sir. It must be your biking.

Let me just tell you, Ms. Runbeck, I just notice a comment that you made about making this a bipartisan bill. I can assure that water is not a partisan issue.

Mr. Recker, Mr. Shaffer, Mr. Quinn, I sympathize with exactly where you are coming from. I am a farmer, and I also have the same concerns, but I also have to applaud the Chairman who has actually given us this opportunity to be able to discuss something.

I would urge all of us, instead of just saying no, to just say how can we work together to make this better for all Americans?

This issue is an issue of jurisdiction, I believe. It is an issue of the expansion of the current law. Some believe it is not; some believe it is. And so, what I would urge you to do is to submit your comments as to how we can make this an issue that we can all digest.

I share, Mr. Shaffer, the same issue as you do. I farm 3,000 acres back in Colorado. I have never had to request a 404 permit or anything like that to irrigate my meadows.

But, please, this is what I ask. Let's work in a cooperative manner. This isn't a partisan issue. Everyone drinks water, Democrats and Republicans alike, and we all want clean water.

I think I agree with you, farmers are the best stewards of the land in my opinion, but let's try to figure out how we can work in a bipartisan way.

So, thank you, Mr. Chairman, and I applaud you once again. Thank you so much for allowing us to have this hearing. I know that in December you had some concerns about it, and you were gracious enough to open this up to not only the proponents but the opponents of the current legislation.

Thank you so much.

Mr. OBERSTAR. I appreciate that very, very much. I would say we would have had the hearing sooner, earlier in the year, had I not had to have a hip replacement.

I think the program has the same kind of congestion in it that my hip, my former hip had, a lot of old growth of arthritis. It has been removed and a new part, a 40-year part installed. I have done 92 miles on my bicycle since then, and I am going to keep on going.

I am refreshed and renewed and ready for the rest of this and the coming session.

Mr. SALAZAR. A 24-hour hearing?

Mr. OBERSTAR. No, no, no, not 24-hour hearings. No. The latest on record was the hearing I held several years ago on smoking aboard aircraft. We started at 11:30 and went until midnight. The longest total hours was our Deepwater hearing last year where we found the misdeeds of the Coast Guard and corrected those.

Mrs. Napolitano.

Mrs. NAPOLITANO. Thank you, Mr. Chair.

I have a couple of questions, and I am not sure whether I should defer them because I agree with my colleague, Mr. Salazar. I wasn't here for the early part of your session, but I have been at your sessions where they go for a few hours, and I can tell you that it brings out a lot of information that I need to be able to continue working with my colleagues and, of course, with my district.

I know that he has held numerous workshops with us, asking us to go back to our districts and get input and bring it back so that it can be a better bill. So I applaud him because very few Chairs that I know actually continue to seek information and to get that input so that becomes a bill that is palatable, that is workable and that is beneficial to all.

Mr. Chair, I thank you for that.

Now for the question: Mr. Recker, in your testimony, you refer to Congress' clear intent in its use of the term, navigable, in statute. In your opinion, what is your interpretation of what Congress' intent is in using the phrase, waters of the United States?

I had a problem with that too in the beginning? In the statute, Section 502.7 is specifically there defining the phrase, navigable waters to be waters of the United States.

Mr. RECKER. I look at it as making a determination between navigable and all waters of the United States. That is how I interpret it.

Waters of the United States is waters of the United States. Navigable waters are specific, and I interpret the other as all waters.

Mrs. NAPOLITANO. Okay, because in going back with some of my water people—as I call my sanitation districts, the water basins—especially sanitation had an issue with and some of the cities with the possible interpretation and possible litigation necessary to be able to defend some of what might be construed as a violation of those waters in terms of pollution, if you will.

Mr. Shaffer, while Pennsylvania may have the ability to protect its own waters, does it have the ability to promote water quality protections in the other States such as Ohio, New York, Delaware, New Jersey, West Virginia or Maryland?

In addition, Ohio and West Virginia are no more stringent States. If they have lower water quality standards than Pennsylvania and some of the waters come into your State, what implications for Pennsylvania water quality would you face and what could Pennsylvania do about it?

Mr. SHAFFER. Well, we have a pretty good working relationship. For instance, we have what is known as the Susquehanna River Basin Commission which includes New York and goes right on down to the Chesapeake Bay. So that is a commission that constantly works with all the partners, all the States, in trying to work together and to develop water quality issues. That would be one example I would give you.

Then in the western part of our State, the Allegheny River Basin, there is also a commission down there where it has to do because in Pittsburgh, the three rivers all come together. So it is——

Mrs. NAPOLITANO. A working relationship?

Mr. SHAFFER. A working relationship, yes.

Mrs. NAPOLITANO. So there is no issue there for being able to have some kind of implication?

Mr. SHAFFER. We, I say farmers and agriculture, have a voice on the Susquehanna River Basin Commission. They reach out to us, so we can discuss our issues simply like I came here tonight to explain from my point of view as a farmer how this would affect different things.

Therefore, in the Susquehanna River Basin Commission, for example, we are able to have our input, so we can work out for the best quality solution for everybody.

Mrs. NAPOLITANO. Thank you, sir, and thank you all for your patience.

Thank you, Mr. Chair.

Mr. OBERSTAR. Thank you, Mrs. Napolitano.

Mr. Carney.

Mr. CARNEY. Thank you, Mr. Chairman. Once again, I stand in awe of your ability to last through these things. I remember the FAA hearing we had a couple weeks ago, pretty remarkable. I truly believe you will probably have to get your 40-year hip replaced again.

My questions are for Mr. Recker and Mr. Shaffer primarily.

First of all, Mr. Recker, how far are you from Backbone State Park?

Mr. RECKER. I went to Starmont School. I graduated from Starmont. So it is part of the school district, and I know it well.

Mr. CARNEY. I graduated from North Lynn. I played football at Starmont a lot.

Mr. RECKER. Great, and I played against you.

Mr. CARNEY. Yes, I know. So, here it goes, buddy.

[Laughter.]

Mr. CARNEY. This is for both Mr. Shaffer and Mr. Recker. What kind of relationships do you have with your State's environmental regulatory agencies? Are they good ones, bad ones?

Mr. Recker, first.

Mr. RECKER. Yes. I work with four watersheds that have kind of a new concept, and it is taking ownership of that watershed and empowering the farmer because we think that the landowner or stakeholder knows exactly what should be done with the help of county commissioners, with DNR and with Federal help with technical assistance. So we bring them, all the stakeholders, together.

The amazing thing is when we draw the line around the map and we tell that farmer, you are part of that watershed, the Maquoketa Watershed, farmers that have been farming for 50 years didn't realize what the name of their watershed is. Once they know they are part of a group and they actually can do something collectively, it is amazing what takes place.

The first question they want to ask is, what is the impairment and how do we fix it? That is their attitude.

So, yes, in Iowa, we work very closely, and we encourage working together with every agency.

Mr. CARNEY. Mr. Shaffer?

Mr. SHAFFER. In my testimony, I indicated some of the things that we do, but here are some other things.

We started a program with our Department of Environmental Protection. It is a coordinator program where if someone is reported to the department, a farmer is reported to the Department of Environmental Protection by someone, rather than the DEP person being the first line out to the farmer to tell them they have to straighten out, we have a farmer within that area that will go to his neighbor and say, hey, listen, you know you have a problem here. You really ought to correct this and get it straightened out.

Now, if they refuse to do it, then it is out of our hands. But a lot of times we find that approach, hearing from another farmer, is less intrusive than if you hear somebody from enforcement, and it has really been a success. I mean we got a lot more accomplished and cleaned up the environment a lot better than if we have to go through the regulatory agency every time.

Also, we developed an ag advisory board to our Department of Environmental Protection that meets once a month, and it is a group of farmers. By statute, they have to have the opportunity to comment on any one of the department's regulations that has to do with agriculture.

Now the department doesn't have to listen to them, naturally, by comment, but at least it provides the Department of Environmental Protection all the information possible because I truly believe the more information you have, the better the decisionmaking process will be.

So I think and as I said with Kathleen McGinty, our Secretary of DEP, we co-authored an editorial letter together, stating how much progress agriculture has made in the cleaning up and our contribution towards cleaning up of the Chesapeake Bay.

Mr. CARNEY. That is good.

As you know, the Susquehanna River runs through almost all of the counties in my district in Pennsylvania. So I consider it kind of our river actually, and your efforts are very much appreciated. I am very proud of what Pennsylvania has been able to do for its part for cleaning up the waterways.

Can you talk about the farmers' willingness to manage the nutrient management program in Pennsylvania and what farmers are specifically doing to implement the plan voluntarily? Can you talk about that a little bit?

Mr. SHAFFER. We started that. I am proud to say we are ahead of the curve. We started that several years ago, introducing a nutrient management plan.

As a matter of fact, after 10 years, we went over it again because technology and science had showed that phosphorus could be a problem as well. So we included phosphorus.

What the nutrient management plan has done is provided for the amount of animals you have, there is a number given to that. You need X amount of acreage, for instance, to apply the nutrients from those animals. Therefore, you have to show that you are only applying the amount of nutrients that a crop can be taking up. So that has been a very successful plan.

We have implemented that years ago because, listen, understand one thing. What people miss is the land, the water are our tools. We need the land and the water. We need good land, good water to keep farming and stay in business. Our farmers realize that.

Therefore this being proactive and voluntary with these nutrient management plans, it has really been a success story, I am proud to say.

Another thing in agriculture, one thing about farmers, they are very proud of accomplishments. They feel they have to accomplish something. What I have a concern of something like this is if you keep moving the target on them, they get very frustrated.

In other words, they have a plan. They see what they are trying to attain. If you keep having a moving target, it really frustrates them and their willingness to accomplish what they need to do.

Mr. CARNEY. I thank you for your testimony.

Mr. Chairman, I will have another round of questions.

Mr. OBERSTAR. Thank you.

Ms. Runbeck, you mentioned a poll or several polls you discussed. I don't want to have dueling polls, but the Associated Press, this recent March, mid-March, conducted a poll on citizens' concerns on environmental issues. Pollution of drinking water was named the number one issue by well over 53 percent and others go down the list.

I don't want to legislate by poll, but I do want to say that citizen concerns about clean water are very high on the list of the anxieties that people feel about the world in which we live.

You also suggested that if my bill were enacted, there would be a bureaucratic morass. We have one right now in the aftermath of Rapanos and SWANCC. There are 30,000 permit applications pending with the Corps of Engineers. There is an average three-month waiting period for each permit, which is substantially up compared to what it was prior to Rapanos and SWANCC.

We need to reduce the backlog that exists, and I propose that the current state of uncertainty about the law is creating this bureaucratic backlog and complexity for the Corps of Engineers. We don't have enough people to process the existing permit applications which they were able to process rather readily prior to SWANCC and Rapanos and approved 99 percent of permit applications submitted.

But let me come to, I think, your concern—although you weren't this specific about it—that deleting the term, navigable, from the places where it appears in the current Clean Water Act would expand its definition.

Suppose I just leave in place, navigable water, where it appears but attach to it the specific application by regulatory proceedings of the Corps and of EPA, as I have expressed earlier in the day. Does that allay your concerns?

Push the button on your microphone, please. I want to hear every word.

Ms. RUNBECK. Actually, I think the big fear is not so much necessarily the definitions of water because I think States have inched toward those definitions. It really is the activities affecting those waters.

Mr. OBERSTAR. You mean the word, activities, as it appears in the introduced bill?

Ms. RUNBECK. Right, right.

Mr. OBERSTAR. Is that the specific term?

Ms. RUNBECK. That is an entirely new, never before regulated area of concern.

There is an infinite number of questions about who is going to decide and what is the nature of this activity and how it affects the water. Does it happen over time? Does it happen under what conditions and who is going to do the regulation? There are just many, many questions, and I would suspect it would.

When I spoke to one Corps of Engineers official because I said, well, how much more time and how much bigger workload will that require of you agency?

He said, I don't know. Ask the EPA. It won't require any new work from us, but ask the EPA.

So it is a matter that is quite undefined.

Mr. OBERSTAR. I asked that very question earlier in the day of EPA and of the Corps of Engineers and asked them specifically to address the current regulations, and I specified which ones, that would be covered by the term, activities. They allowed as how they could be very clear about what is meant by activities because they have been regulating them for the past 30 years.

So we will get the Corps and the EPA definition and be glad to share that with you and get your comment on it.

Ms. RUNBECK. That would be fine.

I think just to sort of fill in a gap here, I am watching the wetlands rulemaking in Minnesota, and they are looking at the same issue. You know there is much discussion about this term, direct and indirect impact. So it just a little different way of phrasing it, but it is a wide open door, it does appear, to litigation, to uncertainty.

I mean how is anyone to know, short of having these specifically defined? I wouldn't imagine you would really want to because that is too limiting too. It is a difficult area.

Mr. OBERSTAR. I think the thrust of testimony throughout the day has been: Give us more clarity in the application of the law. Give us more specificity.

I am moving in that direction through the hearing process. We are getting much more specific issues raised.

Mr. Recker, let me ask you, in what ways have your farming activities been affected post-SWANCC and Rapanos compared to regulation, pre-SWANCC and Rapanos?

Mr. RECKER. I can probably safely say that there haven't been changes to it that I can speak of right now.

Actually, I can tell you, though, for the last 20 years since I have been farming, 22 years, that we have continually increased the amount of conservation that we use on our farm. That has been voluntarily led, with government programs but voluntary on my part, to say we want to do the right thing because we want to have clean waters.

In northeast Iowa, we have some of the best trout ponds, well, trout streams anywhere. So we are very conscious about what happens to our waters.

I can say I have seen no regulation, and I would not want to see.

Mr. OBERSTAR. Do you have any pending permits that you have had to submit for the Corps of Engineer?

Mr. RECKER. No.

Mr. OBERSTAR. Or the EPA?

Mr. RECKER. No.

Mr. OBERSTAR. Mr. Shaffer, have you had any?

Mr. SHAFFER. No. No, sir. I don't have any.

Mr. OBERSTAR. So the application of the Clean Water Act has been true to its stated language to exempt normal agricultural activities.

Mr. SHAFFER. Up to this point.

Mr. OBERSTAR. You have not been subject to any permitting.

Mr. SHAFFER. Right, right.

One concern I would have, just to elaborate on what Mr. Recker said, is the EQIP program has been a very successful program where cost shares have gone to farmers for conservation practices. Our farmers in Pennsylvania utilize that program wherever possible to help improve the environment.

Now, if we have to go to the Army Corps or EPA to get a permit to put some of these practices out there, I think it is going to have more of a deterrent for farmers.

Mr. OBERSTAR. But that is my point, if you haven't been subjected to a permit up to now.

Mr. SHAFFER. No, not up to now. No.

Mr. OBERSTAR. Then the language that continues this exemption remains in place and continues your exemption. Yes?

Mr. SHAFFER. From what I have read and I am told, now understand, I am just a farmer. I am not a legislator or a lawyer, but it is my understanding that wherever there is a gray area—and I think I have heard enough today that there is a gray area—usually it turns around to bite me.

With all due respect, that is what I am concerned about, that is not very, really explicit enough, that it will be left up to somebody else's interpretation, and that is my greatest fear of that.

Mr. OBERSTAR. All right, you tell me whether this is gray. Nothing in this Act, including any amendment made by this Act, shall be construed as affecting the authority of the Secretary of the Army Corps or the Administrator of the Environmental Protection Agency under the following provisions of the Federal Water Pollution Control Act, the Clean Water Act of 1972.

Nothing in this Act shall be construed as affecting the authority—that is not gray. That is very clear, isn't it?

Shall be construed, not shall be attributed. You can't imagine something. Nothing shall be construed. That is very, very clear, specific, binding legislative language. I have been writing legislation for 34 years, and I know that it is.

Relating to the discharges of stormwater from oil, gas and mining, Mr. Quinn, operations and related to discharges of dredged or fill materials from normal farming, silviculture—that is timber harvesting—and ranching activities. Pretty clear and specific, isn't it?

Nothing shall be construed as affecting the authority under the provisions of the Act.

That has been in place since 1972, and you have not had to file for a permit. Mr. Recker hasn't had to file for a permit. We say in this language, you won't have to do it in the future either.

So it can't be a gray area. It can't be misconstrued. It is very specific.

What is gray is now there is a Kennedy test. There is a Scalia test. There is a question mark test. And, there is a great deal of uncertainty, although they, the judges, have stayed away from farming and ranching activities. They didn't mess with that in the basic law.

But I want to ask you about the prior converted farmland. Although the Clean Water Act does not refer to prior converted farm-

land, the practice has been to treat land that is farmed under those provisions that I cited, that are in the 1972 Act as exempt from permitting, from regulation.

Once farming stops, once the farmer ceases to farm the land, sells it for a subdivision, for housing, for a shopping center, it then becomes subject to the permitting provisions of the Clean Water Act. Do you have a problem with that?

Mr. SHAFFER. Yes, sir, I do.

Mr. OBERSTAR. It is not going to be used for farming now.

Mr. SHAFFER. I understand. But understand, in the first place, I think in 1993, President Clinton promulgated an exemption for prior converted cropland regardless of the use.

Now, understand that a lot of farmers are land rich and cash poor. Their whole assets are tied up in their land. If they are not able to pass that along to their children or whatever, that is their retirement. To devalue the land that way would have a great hardship on a lot of our farmers that might depend on that for their retirement.

Mr. OBERSTAR. I have discussed with Soil Conservation Service representatives in the State of Minnesota in my district and elsewhere around the State. That is the way the law has been interpreted in Minnesota, and the SCS people tell me that sales of farmland have not been diminished because that land no longer has the protection of farmland. The value of land does not diminished because of that.

Mr. SHAFFER. Well, I can assure you in Pennsylvania, if the land returns and gets a wetland designation, it reduces its value considerably.

Mr. OBERSTAR. Do you think then a shopping center should be exempted from the provisions of the Clean Water Act as farming activities are?

Mr. SHAFFER. No. What I said was—

Mr. OBERSTAR. If that farmland is sold for a shopping center, do you think the exemptions should continue? Is that what you are advocating?

Mr. SHAFFER. No.

I think a point should be made. The State, as I said in my testimony, we have, every year, increased net gains in wetlands. Our biggest destroyer of wetlands in the State of Pennsylvania is the Department of Transportation. They are the biggest ones.

We have implemented different activities where we can buy into a pool. So, if you are destroying a small acre of a wetland, maybe you can buy into a pool that would create five acres of wetland to offset it, for example.

Mr. OBERSTAR. That is separate from the question that I am asking.

Mr. Recker, do you have a comment on that?

Mr. RECKER. You were talking about a shopping mall. Should you build on a wetland?

Mr. SHAFFER. That is where I am confused.

Mr. OBERSTAR. No. I am saying if farmland, prior converted farmland, it has been operated as a farm and no longer is going to be operated as a farm. It is going to be sold to a developer who

is going to put a shopping center in there or a housing development in it.

That is happening all through the south part of my congressional district. Farmland is being sold. Soybean fields are no longer pushing beans. They are pushing up houses.

Should that exemption continue?

Mr. RECKER. Just an example that I would give is I actually had a project that was a wetland, that was farm ground. They decided to make it into a baseball diamond. Permitting went very quickly, and we were able to utilize it for a baseball diamond.

Mr. OBERSTAR. So then you find no problem?

Mr. RECKER. Well, I am not sure if I find any problem. If I had that ground as farm ground, I would not be able to use that for land use of that. I couldn't. I couldn't put farming practices on that wetland and actually be able to farm that, but we were able to put a baseball diamond actually in that particular property.

Mr. OBERSTAR. Whether you converted to a farm is a different issue from the one I am posing of whether farmland, which is exempted from the provisions of the Clean Water Act, converted to other activity should lose its exemption.

Mr. RECKER. No.

Mr. OBERSTAR. You don't have?

Mr. RECKER. Well, I don't, but prior converted in my mind was ground that was once deemed as wet or hydric in soils.

Mr. OBERSTAR. And converted to agricultural purpose.

Mr. RECKER. Actually because of drainage.

Mr. OBERSTAR. Yes.

Mr. RECKER. Under subsurface drainage, we were able to improve it.

Mr. OBERSTAR. Right.

Mr. RECKER. So, once that has been improved and it should not have to revert back to a wetland, no matter what the use is. It has been improved. It is no longer a wetland.

Mr. OBERSTAR. But the exemption is for farming activity. The exemption in the law is for farming activity. That is the current law. That has been since and, in fact, before 1972.

If it loses the character of farmland, should it also lose the exemption? You might want to think about that.

Mr. SHAFFER. Would I be allowed to give testimony regarding that?

Mr. OBERSTAR. Pardon me?

Mr. SHAFFER. Would you mind if I submitted further written testimony regarding that?

Mr. OBERSTAR. I said, think about it. Think about it and get back to us.

Mr. SHAFFER. I would appreciate that.

Ms. RUNBECK. Mr. Chairman?

Mr. OBERSTAR. Yes, Ms. Runbeck.

Ms. RUNBECK. If I could, just a comment on prior converted wetland and the experiences where I am noting in Minnesota, those exemptions seem to be sliding away. The new AD-1026 form which the farmer signs to get their ag subsidies has been changed, and now you sign. When you do sign it, you are authorizing a wetlands redetermination.

Some of these redeterminations now are returning land. They are now acres and acres of wetlands. So it does seem to be.

Mr. OBERSTAR. Aren't those, as I understand it, lands that are under State law, not covered by the Federal law?

Ms. RUNBECK. No. These are farmed wetlands. I mean farmed croplands that have been farmed for decades.

Mr. OBERSTAR. You mean EPA departments are changing the permitting?

Ms. RUNBECK. Yes.

Mr. OBERSTAR. I would like you to submit some specific evidence of that. That would be very useful for our purpose.

Ms. RUNBECK. Okay, I will do that.

Mr. OBERSTAR. Now, turn a corner and say if we retain the language in current law, rather than delete it as my introduced bill would propose, to go back to the pre-Rapanos and SWANCC. If we retain the term navigable waters, but attach to it, to be very clear about what is to be covered and protected, the regulatory activities of the Corps and of EPA specified in the law, specifically referenced in the law, to make it clear that the term, navigable waters, applies in the way, pre-Rapanos and SWANCC, that the Corps and EPA applied them, would that be acceptable to you?

Mr. SHAFFER. To be perfectly honest with you, as I said, I am not a legislator or a lawyer and, if you allow me to, I would like to respond to that in writing after seeking some counsel on it.

Mr. OBERSTAR. That would be welcome.

Mr. SHAFFER. I am the first to admit it.

Mr. OBERSTAR. I invited the Farm Bureau to do that way back last year and still haven't received an answer from them. So, if you can get one, that would be good.

Mr. SHAFFER. I would.

Mr. OBERSTAR. Or give me your own. Give me your own as a farmer.

Mr. SHAFFER. I would be glad to.

Mr. RECKER. I would just like to be able to see how they cleared up the word navigable, what language they used to clear that up.

Mr. OBERSTAR. All the practice that was in place prior to SWANCC and Rapanos, people were complaining about that. It is just that the Court decision has changed the landscape with respect to the application of the Act. I am trying to get it back to where it was prior to this confusion of who is following Scalia, who is following Kennedy, who is following the justices in between.

Mr. Gerber, thank you very much for your testimony, your comments. Give me your thoughts about retaining the term, navigable, but bringing with it the burden of previous practice.

Mr. GERBER. Thank you. With your deference, I would like to also ask for some time to really look at that, particularly after seeing the specific language because I think it does really matter.

Mr. OBERSTAR. Sure.

Mr. GERBER. One of the things that we would have to look at is how that change in language meets the original intent of the Clean Water Act as well as meeting the intent of this bill to actually return us to that time and also taking into account the focus of the Supreme Court on those particular words and really look at just what do we run a risk of still going backwards.

Mr. OBERSTAR. Thank you.

I thank all the witnesses at this table and those previous in the day.

We are getting now down to specifics, away from hyperbole, away from alarmism, away from even from hysteria that has been stirred from time to time and place to place. This is a complicated issue.

I think every panel today has said, we want to sustain clean water. The question is how?

I come back to a point I made time and again. All the water there ever was or ever will be on planet Earth is with us today. We are sending expeditions to Jupiter, to Venus, to Mars to look for water. We have it right here. We have to protect it.

Every day, 40 trillion gallons of moisture passes over the continental United States. About half of that falls from the atmosphere and is absorbed before it reaches the ground.

The amount that reaches the ground or 625 billion gallons are available. Half of that is absorbed or runs off. The rest is what we can use, about 320 billion gallons a day.

It is enough to sustain life if we protect it, and we are the only ones who can. Nature can't do it without our help. So our charge, your charge is to help us protect this precious resource and pass it on to the next generation in better shape than we found it.

Mr. Carney, did you have another question you wanted to ask?

Mr. CARNEY. Unfortunately, I wanted to get involved in the language issues, but you guys already did that. I appreciate that.

But I do want to make a quick observation, Mr. Chairman, that having this kind of dialogue is absolutely essential to getting a clean water bill that has the common sense practices in it that enable us, one, to sustain the water resources of this planet and this Country but also to enable those at the witness table to do what they do. I agree with Mr. Shaffer and Mr. Recker that the land and the water are the tools and to enable those craftsmen to use those tools properly is the right thing to do.

I come to the conclusion tonight actually that we are sort of in violent agreement about a lot of this stuff and that common sense is being injected by both sides and that a solution is very near at end.

I thank you for the opportunity and for holding this testimony, sir, and everybody at the table. I think it is good news from here. Thank you very much.

Mr. OBERSTAR. Thank you, Mr. Carney.

I would be remiss, Mr. Recker, if I didn't thank you for your acknowledgment of our work on the Water Resources Development Act. That was six years worth of worth that we got through in the first session of this Congress, and then we had to override a presidential veto to get it passed.

In the history of the Congress, there have been 1,493 vetoes of acts of Congress by all the Presidents in history. Only 106 were overridden until last fall. That was the 107th.

Mr. RECKER. Well, we thank you for your hard work on the Committee.

Mr. OBERSTAR. An earlier override was on the Clean Water Act by a vote of 10 to 1.

It is important. I am just going to say this one thing.

Round trip barge traffic from Clinton, Iowa, to the world's most important agricultural export facility, New Orleans, is 820 hours because the barge tows are 1,200 feet in length and except for Alton, Illinois, the locks are 600 feet.

So each barge tow has to be broken in half. Send 600 feet through. The next 600 feet through. Latch them together. Take all that time and go down the next one and do it all over again.

Grain, as you know, moves in international markets on as little as an eighth of a cent a bushel. If you are adding that transportation cost to the hard work you have put into your beans and corn and other agriculture commodities that you are exporting, think of Brazil.

Just look at a map of Brazil. That point that sticks out in the south Atlantic Ocean, that is Recife. That is the port of Recife Just below, there is the port of Santos. The port of Santos is the point of export for soybeans which Brazil is developing in fast amounts to the same markets that we are selling, in West and East Africa and the Pacific Rim, and they have a 2,500-mile advantage over us. That is a six-day sailing advantage.

It is a huge transportation cost advantage over us, and we have not modernized the locks on the Mississippi, Ohio and Illinois Rivers since the 1930s except for Alton, Illinois. That is shameful.

I said when I took the Chairmanship of the Committee, we are going to do the unfinished business of the Congress, and we got it done. I appreciate the participation of my colleague, Mr. Mica, and all the Members on the Republican side. There was an overwhelming support for that legislation because we know it means productivity, mobility, competitiveness for America.

Thank you for listening to the sermon and thank you for your participation today.

The Committee is adjourned.

[Whereupon, at 9:59 p.m., the Committee was adjourned.]

**Committee on Transportation and Infrastructure**

**Hearing on "the Clean Water Restoration Act of 2007"**
**Wednesday, April 16, 2008**

**Statement – Congressman Jason Altmire (PA-04)**

Thank you, Chairman Oberstar, for holding today's hearing to further examine and discuss the Clean Water Restoration Act of 2007.

Over 35 years ago, Congress passed the Clean Water Act to improve the water quality of our nation's lakes, rivers, streams, and other waterways. The effects of this legislation have been remarkable - since enactment the amount of pollutants found in our nation's waterways have been reduced substantially.

Many believe that the two recent decisions issued by the Supreme Court – *Solid Waste Agency of Northern Cook County v. Corps of Engineers* in 2001 and *Rapanos v. United States* in 2006 – have significantly rolled back protections provided by the Clean Water Act. The Clean Water Restoration Act, introduced by the Chairman, intends to address these and ensure that our waterways remain clean and safe for generations to come. I look forward to hearing our witnesses' thoughts on this legislation and their suggestions on ways that it could be improved.

Chairman Oberstar, I would like to again thank you for holding today's hearing. I yield back my time.

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Congressman Tim Bishop (NY-01)
Statement for the Record
Committee on Transportation and Infrastructure
April 16, 2008

Mr. Chairman, I want to thank you for allowing me to submit this statement for the record on such an important issue.

I am proud to support the Clean Water Restoration Act that will preserve critically important water pollution prevention and treatment programs necessary to preserve healthy waterways, ecosystems and economic interests that rely upon clean water.

In my state of New York, which is bordered by the Great Lakes on the west and by the Atlantic Ocean and Long Island Sound on the east – and includes major bodies of water within the state such as the Finger Lakes – we understand the importance of clean water to public health, the environment, and the economy. Today, however, the nation's most important water quality law – The Clean Water Act of 1972 – is threatened as a result of two Supreme Court decisions and subsequent actions by the EPA and the Army Corps of Engineers that roll back safeguards in place for 35 years to protect our streams, rivers, lakes and wetlands.

My constituents need clean water for drinking, to strengthen flood protection programs, and to preserve fish and wildlife habitats; and clean water is vital to certain industries such as commercial fishing, tourism and recreation. However, recent intrusions on the Clean Water Act's historically broad protections have been weakened considerably by the Supreme Court decisions and thus now apply only to certain waters that are "navigable in fact," "provide a significant nexus," or permanently flowing. Many other bodies of water will no longer be covered by the law with any degree of certainty or predictability.

For over three decades, states have relied upon the Clean Water Act's core provisions to structure their water pollution programs. Accordingly, while states play a vital role in administering provisions of the Act, they would be heavily burdened – both administratively and financially – if forced to assume sole responsibility for regulating all polluting activities, including "dredge and fill" activities, headwater streams, and wetlands adjacent to tributaries that are not traditionally navigable in fact.

Even where states, like New York, have comprehensive water pollution control programs, not all of the state's important waters originate within our borders. Although headwaters of many of New York's rivers and streams originate within the state, the actions of other states influence the quality and quantity of shared bodies of water including Long Island Sound, Lakes Erie, Ontario and Champlain, the Niagara, Delaware and Allegheny Rivers, the Batten Kill, and the New York-New Jersey Harbor. The shared economic, social and ecological benefits of these waters are undermined without the federal protections afforded by the Clean Water Act.

In fact, every one of the lower 48 states share their major water sources with one or more other states, increasing the need to stop pollution at its source. Therefore, it is essential to maintain consistency among water pollution programs throughout the country. Strong nationwide protection ensures that upstream states cannot export pollutants to downstream communities. Our country's rivers, lakes, streams and wetlands depend upon this layer of federal protection to guarantee that pollution does not poison or destroy these waters.

**STATEMENT OF THE HON. JOHN BOOZMAN**
**HEARING ON**
**H.R. 2421, THE "CLEAN WATER RESTORATION ACT OF 2007"**
**APRIL 16, 2008**

- The simple description of the Supreme Court *Rapanos* decision is this: We now have a requirement that a water must show a significant connection to a navigable water to be federal jurisdiction. And I believe the Supreme Court made the correct decision.

- The extent of federal jurisdiction should not be boundless. State and local governments, and indeed private property owners, should have a role in managing their resources.

- The Army Corps of Engineers and the Environmental Protection Agency have guidance that shows their field offices how to carry out their programs consistent with current law and the Supreme Court decisions. As with any new guidance, there were some delays and confusion as the agencies began working with the new guidance.

- Now that the Corps of Engineers and the Environmental Protection Agency have gotten enough experience with the guidance, decisions are being rendered at about the same rate as before the Supreme Court case.

- Nothing is broken, nor does anything need to be fixed. The agencies know what to do, and they are carrying out the permitting program.

- The Chairman's bill, H.R. 2421, the "Clean Water Restoration Act," will substitute this reasoned approach to the regulation of important waters and instead expand it to the fullest extent to cover activities that were never intended to be covered, perhaps even activities that take place on dry land or even in the sky.

- We don't even truly know the extent of the bill's reach. That would be determined over time by the extensive litigation that the bill would cause. But it is hard to imagine a more expansive piece of legislation.

- Like many others, I believe the Supreme Court got it right. If there is no significant nexus to a navigable water, how ecologically or economically important could that ephemeral stream or wetland really be? A better question to ask is what is the federal interest in these types of waters?

- The Army Corps of Engineers tells me that out of the 18,250 jurisdictional determinations they have considered June 5, 2007 and December 31, 2007, only 61 cases involving "significant nexus" are still classified as "OPEN" and under discussion at EPA and Corps headquarters. That is less than half of a

percent of all applications and most of these cases involve less than half an acre of impacted land.

- Clearly, the Corps of Engineers and the Environmental Protection Agency are implementing the new guidance and working out the very few remaining differences.

- There is no crisis; the sky is not falling; and respectfully, the Chairman's legislation is, at best, confusing and unnecessary.

**OPENING SATEMENT OF**
**THE HONORABLE RUSS CARNAHAN (MO-3)**
**HOUSE TRANSPORTATION AND INFRASTRUCTURE COMMITTEE**

**Hearing on:**
**Clean Water Restoration Act**
**April 16, 2008**
**11:00 AM**

#####

Thank you Chairman Oberstar and Chairman Mica for holding this hearing to discuss the Clean Water Restoration Act.

For over thirty-five years, the Clean Water Act has forced substantial improvements in the water quality of the United States. Without these important protections our constituents could not rely on a clean drinking water supply or be able to safely swim or fish in our waterways. Passage of the Clean Water Act was a defining moment in our great nation's history as we took a significant step to improving the quality of our waterways.

A very significant achievement of the Clean Water Act was the establishment of a "Federal floor" for the protection of water quality and wetlands nationwide, while allowing states to establish stricter standards if they are approved by the Administrator of the Environmental Protection Agency. In my home state of Missouri, bordered on the east by the Mississippi River and divided by the Missouri River flowing from our western border with Kansas to the eastern border with Illinois, a uniform baseline for the protection of the nation's waters, including wetlands, is critical to ensure all states start with a level playing field. Also, it helps states, like Missouri, avoid conflicts between upstream and downstream states who institute conflicting water standards for the same body of water.

I join Chairman Oberstar and many of my colleagues concern that two recent decisions by the Supreme Court have created uncertainty and confusion about which waters are protected under the Clean Water Act. I find it deeply troubling that the Environmental Protection Agency and the Army Corps of Engineers are making case-by-case decisions on whether waters are within the scope of the Act. This is inefficient at best and confusing at worst.

In Missouri, the Environmental Protection Agency estimates that fifty-eight percent of the streams have no other streams flowing into them and that sixty-six percent of the intermittent and ephemeral streams that do not flow year round. As a result of the Supreme Court decisions these smaller water bodies are among those that the extent of Clean Water Act protections has been questioned. This is deeply troubling to me because almost half of Missourians receive some of their drinking water from areas containing these smaller streams. Additionally, there are over fifteen hundred facilities located on

these smaller streams that have permits under federal law regulating their pollution discharges. If the recent Supreme Court decisions interpret the Clean Water Act not to include these small streams then these facilities would not be required to have a permit to discharge industrial waste or sewage. I am truly concerned about the vast wetlands in Missouri that are vulnerable to losing Clean Water Act safeguards as a result of the Supreme Court decisions.

Since the passage of the Clean Water Act we have made a great deal of progress in cleaning up our waters, which was a major goal of the Act. This progress will be greatly hampered if a large percentage of the nation's waters are left outside the definition of the Clean Water Act.

In closing I commend Chairman Oberstar for introducing the Clean Water Restoration Act so we can continue to protect our valuable water resources. Finally, I would like to thank all our witnesses for joining us today.

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**THE HONORALBE RUSS CARNAHAN (MO-3)**
**HOUSE TRANSPORTATION AND INFRASTRUCUTRE COMMITEE**

**Hearing on**
**The Clean Water Restoration Act**
**April 16, 2008**

**QUESTIONS**

The following questions are for the Honorable John Woodley and Benjamin Grumbles.

1. Just last month many counties throughout Missouri, including Jefferson and St. Genevieve counties in the district I represent, experienced a great deal of flooding. Unfortunately, this flooding has caused deaths and property losses statewide. Both wetland and small streams play a critical role in absorbing these floodwaters. I understand that an acre of wetlands can absorb more than a million gallons of water. If these streams and wetlands lose Clean Water Act protection and are destroyed, wouldn't it likely exacerbate flooding problems like those my home state of Missouri has experienced? If you do not believe this would exacerbate flooding, what scientific evidence can you provide me to support your view?

2. According to the Missouri Department of Natural Resources, Missouri has approximately 171,000 miles of streams, of which more than 145,000 miles are headwater or intermittent, so any reduction of Clean Water Act protections for these waters could affect nearly **85% percent of the streams in my state**. These streams play a critical roll in everyday life, as 62.3 percent of Missourians get their drinking water from river and stream sources. Also, many headwater and intermittent streams have regulated sewage discharge permits associated with them for small and large cities as well as operations that concentrate domestic animals for feeding and processing. Do you have any scientific evidence that water quality in the country will not worsen if these headwaters and seasonal streams are cut out of the Clean Water Act? Put differently, do you believe that seasonal streams and rivers have any effect on the physical, chemical, and biological integrity of the nation's waters? What scientific evidence can you provide the committee to support your view?

3. In 2003 the Missouri Department of Conservation's staff determined that approximately 660,000 acres (35%) of the 1,868,550 acres of wetlands in Missouri could be adversely affected by the Supreme Court's SWANNC decision (Solid Waste Agency of Northern Cook County v. Army Corps of Engineers) and other policies that cut back protections for so-called "isolated" waters. These wetlands provide valuable wildlife habitat, filtration of nutrients and other pollutants, and floodwater storage. Do you have any scientific evidence that water quality in the country will not worsen if these wetlands are cut out of the Clean Water Act? Put differently, do you believe that wetlands, including isolated wetlands, have any effect on the physical, chemical, and biological integrity of the nation's waters? What scientific evidence can you provide the committee to support your view?

**OPENING STATEMENT OF REP. STEVE COHEN**

Transportation and Infrastructure Full Committee Hearing

"Hearing on the Clean Water Restoration Act of 2007"

April 16, 2008

One of the most historic and momentous presidential veto overrides of the past century occurred approximately 35 years ago today, when the U.S. Congress overrode President Nixon's veto to enact the Federal Water Pollution Control Act Amendments of 1972, commonly referred to as the Clean Water Act.

When this bill was enacted in 1972, only one-third of the nation's waters meet water quality goals. Today, two-thirds of our nation's waters now meet water quality goals. Unfortunately, recent U.S. Supreme Court decisions have raised uncertainties with respect to the Act's ability to comprehensively meet the goals of fishable and swimmable waters.

In *Solid Waste Agency of Northern Cook Country v. Army Corps of Engineers*, the Supreme Court opinion brought into question the intention of the phrase "navigable waters." A subsequent ruling in *Rapanos v. United States* in 2006, further called into question the jurisdictional scope of the Clean Water Act, all but limiting its scope to waters that are connected to traditional navigable waters. The four dissenting justices in that case, argued in support of maintaining the existing agency authority.

As a result of these rulings, certain water bodies, including wetlands and other geographically isolated bodies may be excluded from protection under the Clean Water Act.

I am pleased to join 176 bipartisan Members as a cosponsor of H.R. 2421, the Clean Water Restoration Act, which clarifies federal jurisdiction over our nation's waters. This legislation amends the Clean Water Act by substituting the phrase "navigable waters" with its existing definition "waters of the United States" to restore the protections over the nation's waters that existed prior to the *SWANCC* and *Rapanos* decisions.

I look forward to hearing from our witnesses from the Army for Civil Works, the Environmental Protection Agency and others today as we examine this legislation.

STATEMENT OF
THE HONORABLE JERRY F. COSTELLO
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
HEARING ON THE CLEAN WATER RESTORATION ACT OF 2007
WEDNESDAY, APRIL 16, 2008

Thank you, Mr. Chairman for holding this hearing on HR 2421, the Clean Water Restoration Act of 2007.

Since its enactment, the Clean Water Act has resulted in improvements in the health of our nation's waters, protecting them from pollution and destruction. Under current law and court decisions made in 2001 and 2006, regulatory agencies are redefining jurisdiction, creating confusion amongst stakeholders.

The House Transportation and Infrastructure Committee has held two previous hearings on legislation to clarify the Clean Water Act. In listening to my constituents involved in the farming and mining communities, there is concern with any expansion of regulatory authority within the Clean Water Act. I have been told by my constituents that HR 2421 seeks to regulate puddles, ditches and things of that nature, creating unease and in some cases a misconception over what this legislation seeks to accomplish.

I am committed to working with Chairman Oberstar and other members as well as affected stakeholders for the protection and restoration of our nation's wetlands and waterways. Providing open discussions and hearings like this will hopefully clarify this issue while continuing to preserve and protect the health and safety of our water system and strive to improve people's water quality.

With that, I welcome the witnesses here today, and look forward to their testimony.

**Opening Statement**
**Congressman Vernon J. Ehlers**
**Transportation & Infrastructure Committee hearing on**
**The Clean Water Restoration Act (H.R. 2421)**

**Wednesday, April 16, 2008**
**11:00am**

- Although I anticipate that much of this hearing will revolve around the interpretation of legal terms such as "navigable waters" and "waters of the United States," it is important that we not lose sight of the basic intent of the Clean Water Restoration Act – which is to protect our waters from pollution.

- It was not long ago that many people declared our Great Lakes in danger of dying. Congress, in the wake of the devastating problems in the Cuyahoga River and Lake Erie in 1969, moved to pass the Clean Water Act in 1972.

- It is undeniable that since 1972, the Clean Water Act has dramatically improved the water quality and overall health of our nation's waters, especially in the Great Lakes.

- However, in order to sustain the progress we have made, Congress needs to clarify the scope of the Clean Water Act.
    - We have the legislative responsibility to address the confusion and the uncertainty that has arisen out of the Supreme Court's rulings in the *SWANC* case in 2001, and the *Rapanos* and *Carabel* cases 2006.
        - Because the Supreme Court has reached disparate conclusions on the interpretation of the Clean Water Act, the lower courts now have no clear guidance.
    - In addition to providing guidance to the courts, we need to provide clarity and certainty to the regulatory agencies, which have been bogged down with lawsuits and a lack of guidance on how to proceed in many situations.
    - We also need to provide clarity, certainty, and consistency to the public, so businesses and land owners know the rules.
- Part of the guidance Congress must provide is to what extent wetlands and headwaters are covered by the Clean Water Act.

- Wetlands and headwaters are extremely important to the overall health of downstream waters because pollution that is discharged into wetlands and headwaters will find its way into tributaries, and eventually flow into larger "navigable" waters.
- Once pollution enters larger "navigable" waters, it is often too late to reverse the environmental damage that began upstream. It is much easier to identify and eliminate pollution upstream.

- The Clean Water Restoration Act (H.R. 2421) will clarify that wetlands and headwaters are covered under the Clean Water Act by striking the phrase "navigable waters of the United States," and inserting, "waters of the United States."
  - Although Congress used the term "navigable" in 1972, the Clean Water Act made it clear that it always intended "navigable waters" to mean "waters of the United States. [33 U.S.C. section 1362(7)].

- The Clean Water Restoration Act also provides protection to the waters of the United States to the "fullest extent of the legislative authority of Congress under the Constitution."
    - This language mirror's the original intent of Congress, which can be found in the conference committee report to the Clean Water Act, which expressly states that the phrase "navigable waters" should be given "the broadest possible constitutional interpretation." [Conference report S.Rept. 92-1236 at 144, *reprinted in* 1972 U.S. Code Congressional and Administrative News 3776, 3822].

- I am concerned that without this clarifying legislation, the EPA and the Army Corps of Engineers will continue to be bogged down by jurisdictional uncertainties.

- If the status quo remains unchanged, I envision more pollution, more lawsuits, more challenges, more confusion, and more permitting backlogs.

- That is not in the best interest of the agricultural community, the property development or construction industries, or other regulated communities. And it is certainly not in the interest of the environment.

- Thank you Mr. Chairman and I look forward to hearing from our witnesses today and to learn more about this important issue.

STATEMENT OF THE HONORABLE WAYNE T. GILCHREST FOR THE RECORD, U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE HEARING ON APRIL 16, 2008 ON H.R. 2421, THE CLEAN WATER RESTORATION ACT

Thank you, Chairman Oberstar and Ranking Member Mica, for your leadership in developing sensible policy to address the question of federal jurisdiction over waters of the United States and for holding this important hearing.

The question of federal jurisdiction over waters of the United States is one of the most significant of our time. Along with climate change, this question has impacted and will increasingly impact the U.S. economy through conflicts over land uses that will affect environmental conservation, as well as farming, real estate development, and other land uses that drive local business and economic growth, food prices, water quality and supply, and other critical policy issues. Indeed, this question will be increasingly impacted by the effects of climate change on our hydrologic cycle, further exacerbating the problems of ensuring affordable food and water for a burgeoning human population in many parts of the nation. It is not a question that can stand much more delay in its resolution.

Through its definition of "Traditional Navigable Waters" (TNW) and its test for regulatory jurisdiction for waters that are not TNWs, current federal Guidance for regulatory implementation of the Rapanos and Carabell Supreme Court decisions leaves many small, headwater streams and wetlands unprotected. However, the Chesapeake Bay's nine largest tributaries contribute 93% of the total fresh water to Chesapeake Bay, about half of the Bay's total water volume. They and over 40 other major tributaries to the Bay are fed through a network of 110,000 streams and 1.7 million wetlands, most of which are non-navigable tributaries and non-tidal wetlands. This intricate network means that upstream pollution to small water bodies has a significant impact on downstream tributary rivers and the Chesapeake Bay. The quality of water in the headwater streams and wetlands of the 64,000 square mile Chesapeake Bay watershed is inseparably bound to the health of the Sassafras, Chester, Choptank, Wicomico, Nanticoke, Patuxent, Susquehanna, Potomac, Rappahannock, James, and other large tributaries that flow to the Bay and to the health of the Bay itself.

The problem? How can we meet Clean Water Act requirements to restore the Chesapeake Bay and remove it from the list of "impaired waters"? Under the pressure of accommodating a growing human population in the Chesapeake Bay watershed (up to 170,000 people per year), the enormous expense of monitoring and restoring the Chesapeake Bay has resulted in--as the Environmental Protection Agency recently reports in its 2007 Chesapeake Bay Health and Restoration Assessment, no progress. Over 20 years and billions of dollars later—no progress. As EPA, the University of Maryland, and other institutions report, nutrients and sediment are moving more rapidly than we thought into the Bay through human activities upland, while best management practices meant to slow them down are doing less than we hoped.

The EPA reports, *"If current development trends continue, an additional 250,000 acres of watershed land will become impervious between 2000 and 2010 and 9.5 million more acres of forests will be threatened by development by 2030."* There is a direct correlation between the amount of impervious surface in the watershed and the loss of hydrologic function, as well as the lack of progress in restoration, of the Chesapeake Bay watershed. In order to save the Bay, we need a fundamental

change toward our governance, protection, and management of the watershed's hydrologic cycle. The Clean Water Restoration Act, while not perfect in my view, can serve as a foundation to a productive discussion about how we do this—in the Chesapeake Bay watershed and around the nation.

Recent United States Supreme Court decisions in *SWANCC v. USACE and Rapanos v. United States* coupled with the Environmental Protection Agency (EPA) / US Army Corps of Engineers (USACE) guidance recently published in response to *Rapanos* have further clouded Congress' intent when it passed the Clean Water Act. As a result, many streams and wetland areas are now at risk, as new agency guidance limits the authority of regulatory agencies to regulate pollution discharges into certain waterways, especially intermittent headwater streams and wetlands. From feedback I receive from my constituents, the question of federal jurisdiction over waters of the United States has never been less clear than it is now, putting our farmers at risk of future litigation. These rulings and guidance affect the entire nation, yet the Chesapeake Bay watershed will be specially impacted.

In Maryland, EPA estimates that 59 percent of the streams have no other streams flowing into them, and that 19 percent do not flow year-round. Under varying interpretations of the most recent Supreme Court decision, these smaller water bodies are among those for which the extent of Clean Water Act protections has been questioned. EPA also says that 3,690,933 people in Maryland receive some of their drinking water from areas containing these smaller streams and that at least 215 facilities located on such streams currently have permits under the federal law regulating their pollution discharges. Accordingly, Maryland joined over 30 states in asking the Supreme Court to uphold broad legal protections for small tributaries and their adjacent wetlands.

As advocates for sensible resolution of our nation's growing water supply and water quality challenges, I urge my colleagues that Congress must act to clarify its intent with regard to federal jurisdiction over waters of the United States. I urge them to engage in an informed and meaningful discussion, to recognize the flaws in our existing approach to the management of the natural water features important to the hydrologic cycle, to discard hyperbole and rhetoric, to hold our stakeholders accountable for the information they share with us as equal partners in this effort, and most of all, to keep an open mind in review of today's testimony and the possibilities for securing both the economic and environmental benefits of water in the Clean Water Restoration Act.

I look forward to the testimony from today's witness in helping to clarify why we need to restore the wetland protections that existed prior to the SWANCC, Rapanos, and Carabell decisions of the U.S. Supreme Court.

# STATEMENT

## OF THE HONORABLE JOHN MICA
## COMMITTEE ON TRANSPORTATION & INFRASTRUCTURE

## HEARING ON H.R. 2421,
## THE CLEAN WATER "RESTORATION" ACT

**April 16, 2008**

- Today we will review Mr. Oberstar's legislation to fundamentally alter the course of water quality regulation.

- Mr. Oberstar and I usually work out our differences on most issues before the Committee, but unfortunately we do not agree on this particular issue – nor do hundreds of organizations representing millions of citizens across the country.

- In addition we have heard from multitudes of ordinary citizens who are concerned about the intrusion of the federal government into local land use and individual property rights.

- As Americans begin to realize the harsh consequences of this legislation, opposition will expand. Unlike the initial description of this bill, it is far from being the simple restoration of an earlier regulatory regime.

- Put very simply, this legislation is a hallmark example of pushing yet another agenda item of disastrous consequence to our economy, U.S. agriculture, personal land rights, and the rights of states and localities to manage their own local water resources.

- It is said that this action is needed to clarify the jurisdiction of the Clean Water Act after recent Supreme Court decisions allegedly created some 'ambiguity.'

- Some believe that the solution to this problem is to just expand federal government regulatory authority over <u>everything</u>, and so

under this bill there will be no limit – no 'ambiguity' - to federal jurisdiction over all things involving water.

- Unfortunately, the results will be an unprecedented and historic federal jurisdiction grab.

- A person does not need to be a rocket scientist to recognize when you remove the word "navigable" from the jurisdictional description "Navigable waters of the United States" that what will result is a massive expansion of federal regulatory authority.

- To suggest otherwise simply defies common sense.

- To subject ditches, retention ponds, storm water runoff, water in a field, or a pool in a backyard to be a body of water in need of federal regulation defies common sense. Federal regulation of virtually every wet area in the country is not needed or necessary.

- This is the ultimate political quid-pro-quo for environmental extremism. ~~Creating~~ It creates the tools to effectively cripple U.S. agriculture, energy production, and economic development through law suits, new legal interpretations, and overreaching regulation.

- By throwing out 35 years of Clean Water Act jurisprudence, we will create absolute chaos as the Federal courts, including the Supreme Court, attempt to redefine the new Constitutional limits of Federal authority.

- The reality is that there is **no** evidence that any endangered wetlands or other important aquatic ecosystems are being destroyed around the nation as a result of the Supreme Court cases and the agencies' new guidance.

- The guidelines in place protect the national interest in clean water while respecting the rights of individuals, states, tribes, and local governments to manage their own resources.

- This Committee has not even given time for the ink to dry on new guidelines the Administration has issued with respect to this issue specifically to help move along the permitting backlog and provide even more clarification beyond that of the 35 year legal structure.

- Unfortunately, sometimes the facts are not allowed to interfere with political rhetoric.

- In the end, HR 2421 will simply muddy the waters, ponds, pools, gutterspouts, ditches, and court rooms across our great Nation – it will cloud rather than clear our water future.

- There are a large number of witnesses today and the comments of the last panel may not be heard over the noise of the nightly cleaning crew. Let me share a couple of points they make.

- Mr. Shaffer of the American Farm Bureau Federation states that litigious activists have already used the courts to drag agricultural operations into a regulatory quagmire. If H.R. 2421 were to become law, the Farm Bureau predicts that we can expect more litigation, more regulation, and an escalation of the costs to comply. The result would be harmful to the Nation's ability to competitively produce food and fiber.

- Mr. Quinn representing the National Mining Association testifies that the proposed changes will greatly increase the time and cost required to move through the permitting process. The result would be a permitting system that is not capable of producing reasonable decisions in a reasonable timeframe.

- In addition, the Chamber of Commerce of the United States comments in a letter to the Committee that existing state or local permitting programs will be made in conflict if not completely eradicated by H.R. 2421. Land and water use decisions that once belonged to state and local governments would become the jurisdiction of the federal government, and

the cost of complying with the new requirements would amount to an unfunded mandate on states.

- With the economy in troubled waters, this legislation would put another nail in the economic coffin creating even more uncertainty in the marketplace and driving up the cost of producing almost any U.S. product.

- This legislation would make it harder for our crippled housing industry to come back from its downturn and will require more regulation, spawn more litigation, and generally increase the cost of every new home.

- This legislation would also have a dramatic negative impact on America's agri-business, raising food prices, cause further damage to United States manufacturing, and create an unprecedented flight of American jobs to Third World Countries.

- Mr. Oberstar's dedication to the values of clean water is noble. However, I believe the federal response must be measured in order to accomplish the ultimate goal, and I cannot support his proposal in its present form.

UNANIMOUS CONSENT REQUEST TO ADD TESTIMONY TO THE RECORD

- Mr. Chairman, I ask unanimous consent that some of the letters and testimony the Committee has received for the record be made a part of the written record of this hearing. Specifically, the letters and testimony of:
    - Chamber of Commerce of the United States of America (letter dated July 17, 2007)
    - National Association of Home Builders
    - Associated General Contractors of America
    - Associated Builders and Contractors, Inc.
    - National Stone, Sand And Gravel Association
    - American Road and Transportation Builders Association
    - American Forest and Paper Association

- American Petroleum Institute and associated organizations (letter dated November 2, 2007)
- Central Arizona Water Conservation District
- California Association of Sanitation Agencies
- Imperial Irrigation District, California
- Oregon Cattlemen's Association

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Statement of Rep. Harry Mitchell
House Transportation and Infrastructure Committee
4/16/08

**--Thank you Mr. Chairman.**

**--It has been 35 years since Congress passed the Clean Water Act, and the difference it has made has been enormous.**

**-- Back in 1972, when the landmark legislation was first enacted, only one-third of our nation's waters met water quality goals. Today, approximately two-thirds of our nation's waters meet these goals.**

**2**

**--That's serious progress, and I think we can all take pride in that.**

**--Closer to home, the Act has proven invaluable to Arizona, a state with limited water resources, and unique environmental challenges.**

**--The act has long protected our lakes and streams and canals for drinking, irrigation, wildlife and recreation.**

**3**

**--Clearly we must maintain these protections.**

**--The question is: in light of recent Supreme Court decisions which have caused so much confusion, what's the best way for us to do this?**

**--Fortunately, we have a lot of experts here today to help us answer this question.**

**--I look forward to today's hearing, and at this time, I yield back.**

N/C
For record

Nick Rahall

**Opening Remarks of U.S. Rep. Nick J. Rahall, II**
**Committee on Transportation and Infrastructure**
**Hearing on Clean Water Restoration Act of 2007**
**April 16, 2008**

Thank you Mr. Chairman.

Certainly, I am sensitive to issues involving clean water. In my capacity as the chairman of the Natural Resources Committee, I am well aware that our national parks, forests and wildlife refuges would be in greater peril than they already are if the waters within them were not suitable to support their various ecosystems.

On my committee we also regularly deal with issues involving reserved water rights, Indian water rights settlements and irrigation policies.

And what I have found is that the old maxim out West applies: Whiskey is for drinking; water is for fighting over.

I do not mean that to be the case today, during this hearing.

But I do have concerns over the legislation before us as currently crafted. And that concern is one of unintended consequences.

I do not doubt the intent of this bill's proponents who say that the pending measure would simply return things back to the way they were before the *Rapanos* decision.

**My concern is that by pulling a thread, we may unravel the universe. In this case, by removing the term of art "navigable waters" from the statute we may adversely impact the entire Clean Water Act regulatory universe.**

**So I want to thank you, Mr. Chairman, for granting this additional hearing day. You and I are two of the few Members remaining on this committee who are veterans of the last time the Congress amended the Clean Water Act in a major way back in 1987. And as you will recall, that effort transcended a single Congress.**

**We are grappling with an issue of fundamental importance to this Nation, and I would urge caution in our deliberations. Thank you.**

Mr. Chairman,

The Clean Water Act of 1972 has played a vital role in helping ensure clean water for us, our children and grandchildren.

We must build on the legislation of prior Congresses to work for the welfare and betterment of the American people.

The Clean Water Restoration Act provides an understanding for the EPA and Army Corps of Engineers to continue such practices.

By striking "navigable" from the phrase "navigable waters of the United States" we provide clarity for an imprecise process.

We adopt a definition that has been used for the past 30 years by the EPA and Corps, which applies a well known and tested definition to "waters of the United States."

Hopefully this will help eliminate jurisdictional and permitting issues and provide exemption for traditionally unregulated waters.

All the while, we are keeping our waters clean for drinking, fishing and other forms of recreation.

However, it is necessary to ensure a balance between the interests of our health and the interests of those who are affected by the restrictions of legislation.

Many concerns have been posed regarding this bill, such as Constitutionality and expanded federal authority.

Several of my farmers have expressed fears about this bill and it is important that we retain the savings clause and make sure they're concerns are addressed.

Some concerns have greater validity than others, but I'm glad you called this hearing today to draw attention to this vital issue.

The original intentions of the Clean Water Act must be preserved with the Clean Water Restoration Act.

I support the underlying bill as it stands and I remain open to potential improvements to it as it moves through the legislative process.

**Statement for the Record for Congressman Walz**
**Hearing on the Clean Water Restoration Act of 2007**

I want to thank Chairman Oberstar and Ranking Member Mica for calling today's hearing on the Clean Water Restoration Act of 2007.

Today's hearing is laying the groundwork to help us find a solution to the problem of water degradation. In order to address the problems created by recent court rulings and a lack of clear guidance from the EPA and the Army Corps of Engineers, we are going to hear today from a variety of perspectives on this issue. I think that with their help, we can find a solution that will help us ensure that the original intent of the Clean Water Act is honored.

Also, I want to thank Darrell Gerber for traveling here at my invitation to be a witness before the Committee. Darrell is from Minneapolis, MN, where he is a Program Coordinator for the Clean Water Action Alliance. The Alliance, a state chapter of Clean Water Action with 60,000 members in Minnesota, is working to ensure that we have clean and safe water now and for generations to come. I look forward to hearing his testimony today.

**Statement from Congressman Don Young**
**Full Committee Hearing on Clean Water Restoration Act (H.R. 2421)**
**April 18, 2008**

With more than 3 million lakes, 12 thousand rivers, thousands of streams, creeks, and ponds, and more coastline than the other 49 states combined, the Clean Water Act has and will continue to have a monumental impact on the economy, transportation, and development of Alaska.

Over 40 percent of Alaska is classified as wetlands and Alaska contains 63 percent of the total wetland acreage in the United States (excluding Hawaii) according to the U.S. Fish and Wildlife Service.

In June 2007 the Environmental Protection Agency (EPA) and the Corps of Engineers issued new guidance on issuing dredge and fill permits, known as section 404 in the Clean Water Act, as a result of the recent Rapanos Supreme Court case. The guidance says that the Corps analysis would have to either find a permanent surface hydrologic connection or a "significant nexus" between the wetland in question and the water quality of the nearest traditional navigable water, in order to have federal jurisdiction.

This was necessary and proper guidance that was issued, as the 1972 Clean Water Act, derived its authority from the Commerce Clause and was intended by Congress to apply to "navigable waters" because navigable waters affected waterborne commerce.

Though I have complete and total respect for my Chairman, I must respectfully disagree with the need for this legislation. The federal government already has too much regulatory authority over intrastate waters and the "Clean Water Restoration Act" will only expand its authority over states. The original intent of Congress will be changed from "navigable waters" to "waters of the United States." And by asserting authority over all wet areas "subject to the legislative power of Congress under the Constitution" as the bill states, we disregard original congressional intent.

With the current challenges of economic development and mining being stifled because of the environmental community, expanding the scope of the Clean Water Act will do more damage and cause more confusion. Oil and gas operations, road transportation projects, and mining, undertaken where permafrost persists or where there are

seasonal wet areas, would likely become subject to federal jurisdiction even if these waters never reach "navigable waters." With a need for more permits nationwide, the Corps and the EPA will have an increased workload which will lead to permitting delays. The end result is more litigation, higher costs for construction projects and resource development, and prolonged delays.

**Questions for Mr. Woodley and Mr. Grumbles**

The Fairbanks North Star Borough has been in litigation over the last 7 months with the U.S. Army Corps of Engineers over a dispute concerning whether property the Borough would like to turn into a park, is a wetland under Clean Water Act jurisdiction. The Corps is claiming the property is a wetland because of a hydrologic connection in the groundwater even though there is no surface water connection. In this case, it appears that the Corps is not adhering to the guidance that was issued last year.

Q. When you issued new guidance in June of last year did you intend "groundwater" to be a hydrologic connection?

Q. How can you justify the need for someone to get a permit for disrupting "groundwater" when there is no impact on "navigable waters?"

Q. Why is it necessary to assert federal jurisdiction over wetlands without a "hydrologic connection?"

Q. What are the direct (cost paid to the Corps) and indirect (cost paid to environmental attorneys) costs for a developer to get a permit issued and how much has that increased over the last 10 years?

Q. On average, how long does it take to issue a jurisdictional wetlands permit?

Q. Has the length of time increased dramatically over the last 10 years? If so, how much time and why?

Q. Will the "Clean Water Restoration Act" increase the number of permits that need to be issued?

Q. Will the length of time to issue a permit increase if the "Clean Water Restoration Act" were implemented?

Q. Now more than ever, the radical environmentalists are suing federal agencies over permits that have been issued, adding to time and money to every construction project. Will the "Clean Water Restoration Act" result in increased litigation?

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TESTIMONY ON
THE CLEAN WATER RESTORATION ACT OF 2007

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

BEFORE THE
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
U.S. HOUSE OF REPRESENTATIVES

APRIL 16, 2008

Thank you, Mr. Chairman and members of this subcommittee, for the invitation to testify regarding the Clean Water Restoration Act of 2007 (CWRA). My name is Jonathan H. Adler, and I am Professor of Law and Director of the Center for Business Law and Regulation at the Case Western Reserve University School of Law, where I teach several courses in environmental, administrative, and constitutional law.

I greatly appreciate the opportunity to present testimony on the potential implications of the Clean Water Restoration Act of 2007. This legislation has potentially significant implications for federal environmental regulation and the federal-state balance in environmental law. These are issues of particular interest to me. For the past fifteen years I have researched and analyzed federal regulatory policies, with a particular focus on the intersection of federalism and environmental protection. Substantial portions of my research have focused on wetland conservation programs, including federal regulation of wetlands under Section 404 of the Clean Water Act and the proper role of the federal regulation in environmental conservation. This research has led to numerous academic

articles and book chapters on the subject, including articles in the *Harvard Environmental Law Review*, *Environmental Law*, and the *Supreme Court Economic Review*.[1]

The issue of wetland conservation is also of some personal interest to me. Our backyard in Hudson, Ohio extends into wetlands adjoining a conservation area that is protected by privately owned easements, and I am committed to outdoor recreational activities, including hunting and fishing, that rely upon the ecosystem services that wetlands provide. Thus, I appreciate the opportunity to share my views on this proposed legislation, and its potential implications, with the committee today.

* * *

The Clean Water Restoration Act of 2007 (CWRA) has three stated purposes: 1) To reaffirm Congress' original intent with regard to federal regulatory jurisdiction; 2) To clarify the scope of federal regulatory jurisdiction over "waters of the United States"; and 3) To enhance the environmental protection of such waters. Yet the CWRA neither conforms to the original meaning of the 1972 Federal Water Pollution Control Act, nor is it likely to achieve its other purposes. To the contrary, the CWRA will exacerbate existing uncertainty about the scope of federal regulatory authority and, if anything, impede efforts by federal agencies to set meaningful regulatory priorities that could enhance federal environmental protection efforts. In short, the CWRA will not accomplish what it sponsors and supporters intend.

**Congressional Intent in the Federal Water Pollution Control Act**

As enacted in 1972, the Federal Water Pollution Control Act, aka the "Clean Water Act," struck a balance between federal and state authority to control water pollution. The Act asserted vigorous federal regulatory authority to protect navigable waterways, yet also preserved the ability of state and local governments to maintain their preexisting regulatory programs without federal interference. While expanding federal regulatory authority to reach at least some non-navigable waters, the Act also reaffirmed the essential role of state governments in environmental protection. Specifically, the Act declared Congress' intent "to recognize, preserve, and protect the primary responsibilities of States" in protecting land and water resources. The CWRA would assert federal regulatory jurisdiction over "*all*" intrastate waters and activities affecting such waters, potentially reaching many private land and activities never before regulated by the CWA and displacing state and local authority.

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[1] Publications relevant to the issues under consideration by this committee include: *When Is Two A Crowd? The Impact of Federal Action on State Environmental Regulation*, 31 HARVARD ENVIRONMENTAL LAW REVIEW 67 (2007); *Reckoning with* Rapanos*: Revisiting "Waters of the United States" and the Limits of Federal Wetland Regulation*, 14 MISSOURI ENVIRONMENTAL LAW & POLICY REVIEW 1 (2006); *Jurisdictional Mismatch in Environmental Federalism*, 14 NYU ENVIRONMENTAL LAW JOURNAL 130 (2005); *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 IOWA LAW REVIEW 377 (2005); *The Ducks Stop Here? The Environmental Challenge to Federalism*, 9 SUPREME COURT ECONOMIC REVIEW 205 (2001); *Swamp Rules: The End of Federal Wetlands Regulation?* REGULATION, Vol. 22, No. 2 (1999); *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetlands Regulation*, 29 ENVIRONMENTAL LAW 1 (1999).

There is also no indication that, in 1972, Congress sought to impose federal regulatory authority over the tens of millions of acres of private land that exhibit wetland characteristics or are occasionally inundated. Indeed, when the Act was adopted, the U.S. Army Corps of Engineers explicitly rejected an expansive interpretation of the Act's jurisdiction. Nor is there anything in the Act suggesting that Congress sought to impose regulatory controls on those wetlands and purely intrastate waters that lack any meaningful connection to navigable waters of the United States. Yet the CWRA would do just that, as if the word "navigable" had never been in the original statute.

As written, the CWRA would extend federal regulatory jurisdiction to all "intrastate waters" and "all impoundments" of such waters. As a consequence, it potentially extends jurisdiction to many waters and places that have *never* been subject to federal regulatory authority, including many ditches, irrigation and drainage systems, stock ponds, depressions, constructed water features, and perhaps even groundwater. Whatever the merits of such a broad assertion of federal regulatory authority, it cannot be defended on the grounds that it "restores" the original intent of the 1972 Act. Indeed, Congress has *never* passed legislation that would explicitly authorize such far-reaching regulatory authority over local waters and private land as would the CWRA.

**Regulatory Certainty**

There has certainly been confusion and inconsistency in federal jurisdictional determinations under the Clean Water Act since the Supreme Court's decision in *Rapanos v. United States*.[2] Lower courts have adopted varying interpretations of the decision and its implications for federal jurisdiction. Yet this legal confusion did not begin with *Rapanos* and will not end with enactment of the CWRA. There has been litigation, uncertainty, inconsistency and confusion over the scope of federal regulatory jurisdiction – and, in particular over the scope of "waters of the United States" covered by the Clean Water Act – since the enactment of the law in 1972.

In 1975, a federal court was called upon to resolve disputes over whether wetlands were included in the Act's definition of "navigable waters.[3] Thereafter courts wrestled with the assertion of jurisdiction over adjacent wetlands and the so-called "migratory bird rule."[4] The latter was invalidated by the U.S. Court of Appeals for the Fourth Circuit in 1989.[5] Controversy and confusion over what constituted a jurisdictional water reigned throughout the late 1980s and early 1990s due to varying wetland delineation manuals and agency definitions of what constitutes a wetland.[6] While both the Corps and EPA purported to apply a consistently broad understanding of federal jurisdiction, jurisdictional determinations were inconsistent and repeatedly subject to court challenge.

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[2] 126 S.Ct. 2208 (2006).
[3] *See* Natural Resources Defense Council v. Callaway, 392 F. Supp. 685 (D.D.C. 1975).
[4] *See, e.g.*, United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985); Hoffman Homes v. EPA, 999 F.2d 256 (7th Cit. 1993).
[5] *See* Tabb Lakes v. United States, 715 F. Supp. 726 (E.D. Va. 1988), *aff'd*, 885 F.2d 866 (4th Cir. 1989).
[6] *See* U.S. GAO, WETLANDS OVERVIEW: PROBLEMS WITH ACREAGE DATA PERSIST (1998) (noting inconsistencies across agencies in wetland definitions).

The Supreme Court's decision in *United States v. Lopez*,[7] which invalidated the Gun-Free School Zones Act for exceeding the scope the federal government's power to regulate commerce among the several states, raised additional questions about the scope of federal regulatory jurisdiction over waters and wetlands lacking a substantial connection to navigable waters. At the time, even supporters of broad federal regulatory jurisdiction recognized the potential vulnerability of federal environmental regulations, particularly those adopted pursuant to the CWA.[8] Considering the wetland regulations then on the books, Georgetown University's Richard Lazarus concluded that the Army Corps' rules were "clearly out of bounds post-*Lopez*," and would need to be rewritten.[9] Yet neither the Army Corps nor the EPA sought to revise their jurisdictional regulations, and numerous legal challenges ensued.

Against this backdrop, the Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (*SWANCC*)[10] should have been no surprise. In *SWANCC* the Court adopted a narrow construction of the CWA so as to avoid potential constitutional problems, such as those that would attend an assertion of federal regulatory authority based on nothing more than the presence of migratory birds. After *SWANCC*, the uncertainty continued. The Army Corps and EPA refused to revise their regulations or recognize that *SWANCC* had any meaningful impact on their jurisdiction at all. Nonetheless, agency delineations remained inconsistent. Despite any claims that the limits of the Army Corps' jurisdiction were relatively clear, the U.S. GAO found both inter- and *intra*-office variation in jurisdictional determinations by the Army Corps.[11]

In *Rapanos v. United States*,[12] the Supreme Court again reaffirmed the existence of both statutory and constitutional limits on the scope of federal regulatory jurisdiction over private lands and waters. The Court rejected the Army Corps' and EPA's expansive interpretation of their own authority, and reaffirmed that federal regulatory authority only extends to those wetlands that have a "significant nexus" to navigable waters of the United States.

As in the *SWANCC* decision, a majority of the Court adopted a narrow construction of the meaning of "waters of the United States" so as to ensure that the Clean Water Act did not exceed the scope of federal authority under the Commerce Clause. As Justice Kennedy explained: "In *SWANCC*, by interpreting the Act to require a significant nexus with navigable waters, the Court avoided applications--those involving waters without a significant nexus--that appeared likely, as a category, to raise constitutional difficulties and federalism concerns. . . ."[13] Justice Kennedy's *Rapanos* opinion embraced this same approach. Specifically, he explained that this aspect of the *SWANCC* precedent

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[7] 514 U.S. 549 (1995).
[8] *See, e.g.*, David A. Linehan, *Endangered Regulation: Why the Commerce Clause May No Longer Be Suitable Habitat for Endangered Species and Wetlands Regulation*, 2 TEX. REV. L. & POL. 365 (1998); Lori J. Warner, *The Potential Impact of* United States v. Lopez *on Environmental Regulation*, 7 DUKE ENVTL. L. & POL'Y F. 321 (1997).
[9] Richard J. Lazarus, *Corps Slips on* Lopez, *FWS Wins*, ENVTL. F., Mar.-Apr. 1998, at 8.
[10] 531 U.S. 159 (2001).
[11] U.S. GAO, WATERS AND WETLANDS: CORPS OF ENGINEERS NEEDS TO EVALUATE ITS DISTRICT OFFICE PRACTICES IN DETERMINING JURISDICTION (February 2004).
[12] 126 S. Ct. 2208 (2006).
[13] 126 S.Ct. at 2246 (Kennedy, J., concurring in the judgment)

limited the scope of federal jurisdiction sufficiently to prevent any jurisdictional problems. Wrote Kennedy, "as exemplified by SWANCC, the significant-nexus test itself prevents problematic applications of the statute."[14]

*SWANCC* and *Rapanos* make clear that a majority of justices on the Supreme Court continue to take the idea that ours is a government of limited and enumerated powers seriously. While the federal government has broad and far-reaching authority to adopt environmental protections, that authority is not without limits, and does not extend to each and every parcel that may, at times, be inundated or exhibit wetland characteristics. Any CWA reforms that fail to respect the constitutional limits on federal regulatory authority risk exceeding constitutional limits and will inevitably provoke legal challenges that will produce additional uncertainty.

The CWRA will not end confusion and litigation over the scope of federal regulatory authority. To the contrary, as written the bill guarantees that such confusion and litigation will continue. Under the new definition of "waters of the United States" proposed by the bill, federal regulatory jurisdiction under the CWA will extend to all "waters" and "activities affecting" such waters that are "subject to the legislative power of Congress under the Constitution." Yet because the bill makes no effort to define what such waters are, this will still require courts to determine the scope of federal regulatory authority. Stating that Congress intends to regulate to the fullest extent of Congressional power to regulate does not resolve the question at all. Instead, it punts the question to the judiciary, and requires federal courts to define the constitutional scope of Congressional power as cases are brought to federal court.

As noted above, the "significant nexus" requirement articulated in *SWANCC* and *Rapanos* serves to ensure that federal regulations do not exceed the scope of constitutional authority. Eliminating a significant nexus requirement, as the CWRA appears to do, does not eliminate the constitutional limits on federal power, but it does raise the prospect that some applications of the act will reach, if not exceed, such limits. This is a recipe for even more litigation, and continuing inconsistent application of federal jurisdiction.

With or without the CWRA, the surest way to bring greater certainty to the scope of federal regulation under the CWA is for the Army Corps and EPA to undertake a notice and comment rulemaking to more clearly define when, and under what conditions, waters and wetlands constitute a part of the "waters of the United States." Under *SWANCC* and *Rapanos*, the Army Corps and EPA retain ample authority to identify those ecological factors and characteristics that are indicative of a "significant nexus" to navigable waters, so as to facilitate more consistent and predictable jurisdictional determinations by regional offices, courts, and private landowners. Indeed, three of the opinions in *Rapanos* encourage the Army Corps and EPA to do just that.

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[14] *Id.* at 2250.

**Improving Environmental Protection**

In responding to the *Rapanos* decision, Congress should not repeat the mistake made by the Army Corps and EPA of seeking to assert the broadest possible interpretation of "waters of the United States." Adopting a new, expanded definition of "waters of the United States" that exceeds the scope of the CWA as interpreted in *Rapanos* and *SWANCC* is not in the interest of the regulated community nor does it best serve the cause of wetland conservation. Rather it is a recipe for further litigation and uncertainty as to the scope of federal regulations.

If Congress seeks to improve federal environmental protections of waters of the United States, it should not seek the indiscriminate expansion of federal regulatory authority. Rather, Congress should encourage the Army Corps and EPA to focus their regulatory efforts so as to maximize their effectiveness. Legislation is not necessary for this. The Army Corps and EPA retain all the tools they need to focus existing federal regulations through a notice and comment rulemaking.

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

Limiting federal regulatory authority would certainly create room for the expansion of state and local regulatory efforts. Over-expansive assertions of federal regulatory authority may preclude, discourage, or otherwise inhibit state and local governments from adopting environmental protections where state efforts would be worthwhile. Contrary to common perceptions, state wetland regulation preceded federal regulatory efforts.[15] Indeed, the first state wetland conservation statutes were adopted more than a decade before the Army Corps and EPA began regulating the dredging and filling of wetlands. Since then, many states have stayed well ahead of the federal government, adopting more innovative or protective wetland conservation programs. By developing jurisdictional regulations that establish a "significant nexus," in part, by focusing on those instances in which there is a particular federal interest, the Army Corps and EPA could maximize wetland conservation by complementing and supplementing, rather than supplanting, state efforts. Congress should encourage such efforts, yet this is not what the CWRA would do.

Lawmakers should note that nothing in *SWANCC* and *Rapanos* prevents the Army Corps and EPA from recognizing that the effective scope of the Act's prohibition on the discharge on pollutants without an NPDES permit. As the Scalia plurality noted, the CWA prohibits *any* unpermitted discharge of a pollutant into "waters of the United States."[16] This would seem to include indirect discharges. Therefore, removing an intermittent stream from federal jurisdiction under Section 404

[15] This history is summarized in Adler, *Wetlands infra*, at 40-54.
[16] *See* 126 S.Ct. at 2227 (Scalia, J., plurality).

would not mean that discharges into that stream that reached navigable waters would be unregulated. To the contrary, such discharges would still appear to constitute clear violations of the Act.

It is also important for federal policymakers not to lose sight of the fact that federal regulation is not the only means for advancing wetland conservation. Indeed, the experience of federal conservation programs that rely upon incentives and cooperation with private landowners compares quite favorably with the conflicts and inconsistencies of federal wetland regulations.[17] Federal support for the protection of waterfowl habitat dates back some seventy years to the sale of "duck stamps" to hunters that created a dedicated source of revenue for conservation of an estimated 4.5 million acres. Other programs under which the federal government enters into private agreements with landowners to restore wetlands on their property, while subsidizing the cost of restoration and the purchase of a permanent or multi-year easement to ensure that the wetland is protected, are particularly cost-effective when compared to mandated mitigation under the CWA. Adopted pursuant to the federal spending power, rather than the Commerce Power, such programs are also not confined by the constitutional limits on federal regulatory authority, nor do they generate the litigation and conflict of federal controls on private land-use decisions. The effectiveness of such programs is undermined, however, by the existence of ethanol subsidies and other programs that increase commodity prices, and increase the costs of setting land aside for conservation purposes.

Insofar as some types of wetlands, such as prairie potholes, may be particularly likely to lie beyond the scope of federal regulation – the language of the CWRA notwithstanding – incentive programs remain a viable conservation option. Indeed, enlisting private landowners and conservation organizations through incentive programs has conserved hundreds of thousands of acres of wetlands and was the driving force behind the attainment of "no net loss" of wetlands during the 1990s. There is no reason why this cannot continue, despite the limitations on federal regulatory jurisdiction. It would be a tragedy were an inordinate focus on maximizing regulatory jurisdiction to come at the expense of sufficient support for alternative means of encouraging wetland conservation. If this Committee is truly interested in improving environmental conservation, this is where it should direct its efforts.

* * *

In conclusion, I recognize the Committee's desire to provide greater regulatory certainty and enhance federal environmental protection efforts. Regulated entities and the conservation community both stand to benefit from greater clarity about the scope of federal jurisdiction. Yet the CWRA will not provide such certainty. To the contrary, enactment of the CWRA ensures years of litigation and regulatory conflict, neither of which will enhance federal conservation efforts. Despite the best of intentions, the CWRA will do little to achieve its worthwhile goals.

Thank you again for the opportunity to present my views on this important subject, Mr. Chairman. I hope that my perspective has been helpful to you, and will seek to answer any additional you might have.

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[17] *See id.* at 54-62. *See also* Jonathan H. Adler, *Money or Nothing: The Adverse Environmental Consequences of Uncompensated Land-Use Controls*, 49 BOSTON COLLEGE LAW REVIEW 301 (2008).

**TESTIMONY OF**

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**APPEARING ON BEHALF OF**
**THE WATERS ADVOCACY COALITION**

**BEFORE THE COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE**
**U.S. HOUSE OF REPRESENTATIVES**
**HEARING ON "THE CLEAN WATER RESTORATION ACT OF 2007"**

**APRIL 16, 2008**

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**APRIL 16, 2008**

Thank you for the opportunity to testify before you today on the Clean Water Restoration Act of 2007 ("CWRA"). My name is Virginia S. Albrecht, and I am a partner with the law firm Hunton & Williams. For more than twenty years, my practice has focused on the Clean Water Act (referenced hereafter as "CWA" or the "Act") and other major environmental statutes. I have represented a wide range of clients regarding CWA issues, including local governments, local water districts, developers, agricultural and mining interests, and trade associations. I have litigated CWA issues in the United States Supreme Court and the lower federal courts. I am also an Adjunct Professor at the University of Miami School of Law, where I teach a class on wetlands regulation under the Act.

I appear before you today on behalf of the Waters Advocacy Coalition ("WAC" or the "Coalition"), which is a broad-based coalition of both public and private organizations who depend on our nation's water resources to provide vital services, such as building the homes we live in, protecting our homes from destructive floods, growing and manufacturing the food, fiber, and paper products we consume, and providing the energy we use in our homes and businesses. The Coalition's members include: The American Council of Engineering Companies, the American Farm Bureau Federation®, the American Forest & Paper Association, the American Public Power Association, the American Road and Transportation Builders Association, the Associated General Contractors of America, CropLife America, the Edison Electric Institute, the

Fertilizer Institute, the Foundation for Environmental and Economic Progress, the Industrial Minerals Association North America, the International Council of Shopping Centers, the National Association of Counties, the National Association of Flood & Stormwater Management Agencies, the National Association of Home Builders, the National Association of Industrial Office Properties, the National Association of Manufacturers, the National Association of REALTORS®, the National Association of State Departments of Agriculture, the National Cattlemen's Beef Association, the National Corn Growers Association, the National Council of Farmer Cooperatives, the National Mining Association, the National Multi Housing Council, the National Pork Producers Council, the National Stone, Sand and Gravel Association, Responsible Industry for a Sound Environment, and the Western Business Roundtable.

The diverse set of public and private actors who comprise the Waters Advocacy Coalition share a common interest in preserving and protecting our nation's water resources. WAC members appreciate the role water plays in our nation's livelihood and depend on a healthy water supply in order to conduct their own affairs. Further, WAC members are regulated by and participate in the wetlands permitting program established by the CWA. WAC's public sector members are the state and local administrators of these same CWA permitting programs. While many WAC members are themselves dependent on sustainable water resources, all are dependent on the state and federal governments' roles in providing a sensible, predictable set of laws and regulations governing those same resources.

My testimony today concerns the unintended consequences that the CWRA could have on the CWA's successful protection and management of our nation's water resources. The substance of my testimony can be summarized by the following four basic points:

1. The successes of the last 35 years will not alone yield the solutions for the next 35 years. The significant water challenges we face today as a nation demand more cooperative federalism, not more federal regulation.

2. While proponents of the CWRA contend that the proposal seeks only to restore federal authority taken away by the Supreme Court, a fair reading of the plain text of the CWRA simply does not support that contention.

3. Altering the Act's definitional structure could have dire and unintended consequences by imposing further regulatory burdens on states and local communities, usurping state authorities to manage vital water resources, including groundwater, and imposing substantial costs and delays in the replacement of aging water infrastructure.

4. If Congress wants to fix this problem, it will direct EPA and the Corps to develop comprehensive regulations that provide greater clarity and predictability regarding the extent and limit of federal jurisdiction.

## I. The Clean Water Act's Carefully Designed Framework, Including Its Partnership Between The States And The Federal Government, Has Been Successful In Protecting Our Nation's Water Resources.

There is no question that the CWA has been successful in improving and maintaining the quality of our nation's waters. These successes are well documented. For example, since 1972, total oxygen-demanding pollution from sewage treatment plants across the country has been cut by nearly 50 percent, despite major increases in the amount of sewage sent to those plants for treatment[1] and a nearly 90 million person increase in the country's population.[2] Further, while leading up to the CWA's passage, the nation witnessed on average the staggering loss of over 450,000 acres of wetlands per year, by 1998 our nation had reversed decades of decline with an

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[1] *See* U.S. EPA, PROGRESS IN WATER QUALITY: AN EVALUATION OF THE NATIONAL INVESTMENT IN MUNICIPAL WASTEWATER TREATMENT (EPA-832-R-00-008) (as updated in 2004); *see also* http://www.epa.gov/waterscience/criteria/nutrient.

[2] According to the U.S. Census Bureau, the total U.S. population was 209,896,000 in 1972 and 299,398,484 in 2006, the last year for which a population estimate is available. According to these figures, the country's population increased by 89,502,484. *See* U.S. Census Bureau, Annual Estimates of the Population for the United States, Regions, and States and for Puerto Rico: April 1, 2000 to July 1, 2006, at tbl. 1 (2006) (providing 2006 population estimate); U.S. Census Bureau, Statistical Abstract of the United States: 2008, at 7 (2008) (providing 1972 population estimate).

overall *increase* of 32,000 acres per year.[3] Further testament to the success of the CWA is the annual removal of 690 billion pounds of pollutants from industrial sources that would otherwise have been discharged to our nation's waters.[4] These are but a few examples of the CWA's successes. For a fuller discussion of these successes, I commend for this Committee's reading the October 17, 2007, letter from the Waters Advocacy Coalition to Chairman Oberstar and Ranking Member Mica, which is attached hereto as Exhibit A.

The CWA of 1972 was the product of extensive and thoughtful Congressional deliberations over a period of years. The Act was the culmination of 19 days of bicameral public hearings, 171 witnesses, 6,400 pages of testimony, 45 different mark-up sessions, 39 separate sessions of Senate and House conferences, and numerous days of raucous floor debate.[5] The process yielded a carefully crafted mix of complementary regulatory and non-regulatory programs to be carried out by the state and federal governments. To implement this system of "cooperative federalism," the CWA, among other things, has provided billions of dollars in federal grants to the states for the construction of sewage treatment plants; established broad watershed programs to identify impaired waters and address their impairments; established regulatory programs to control the discharge of pollutants to waters of the United States, including discharges of storm water associated with industrial, construction, and municipal activities and "indirect" discharges through integrated sewer drainage systems. The CWA also

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[3] U.S. EPA, DRAFT 2007 REPORT ON THE ENVIRONMENT: SCIENCE REPORT (May 2007), *available at* http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=140917.

[4] T. Mehan, *The Clean Water Act: An Effective Means to Achieve a Limited End*, WATER ENVIRONMENT AND ENGINEERING MAGAZINE (Oct. 2007); *see also* U.S. EPA, 2000 WATER QUALITY INVENTORY, *available at* http://www.epa.gov/305b/2000report.

[5] *See* S. 2770, A Legislative History of the Water Pollution Control Act of 1972, Cong. Research Serv., vol. 1, at 189 (statement of Sen. Cooper); *see also Hearing on the Twentieth Anniversary of the Passage of the Clean Water Act Before the Senate Comm. on Environment and Public Works* (1992) (statement of Sen. Muskie), *reprinted in Clean Water Act Thirty-Year Retrospective*, Association of State and Interstate Water Pollution Control Agencies, xiii (2004).

requires many industrial facilities to take personal stock of the chemicals they use and store, and to develop plans to manage, prevent, report, and employ countermeasures to minimize the potential impacts of spills that threaten streams, rivers, lakes, and wetlands.

It is essential to recognize the critical importance of the states in this process. Much of the burden for overseeing the CWA's requirements is shouldered by the states, who are on the front line of monitoring, assessing, and protecting the health of our nation's waters. The federal government works hand-in-hand with the states through cooperative federalism—the architectural underpinning of the CWA. Cooperative federalism is a simple yet complex principle. It is simple in that it recognizes the *independent* authorities that the federal government and states can bring to bear in a coordinated fashion. It is complex in that it requires a careful balancing of interests and can be easily upset through either overreaching by the federal government or abdication of responsibility by the state.

As Congress understood full well in 1972, cooperative federalism is essential to the continued protection and well-being of our nation's water resources. While Congress's power under the CWA was founded in the Commerce Clause, the states' authorities are derived from their broader police powers, which, importantly, include the power to regulate land and water use in the interests of public health, safety, and welfare. Congress recognized this important distinction in declaring the CWA's goals and policies. Specifically, section 101(b) of the Act provides that "[i]t is the policy of the Congress to recognize, preserve, and protect the *primary responsibilities and rights of States* to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter." Likewise, section 101(g) of the Act enunciates "the policy of Congress that the

authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated, or otherwise impaired by this chapter." Pursuant to these policies, Congress charged the states—not the federal government—to adopt water quality standards, identify impaired waters, and develop programs to redress their impairment, including pollution from non-point sources not subject to federal regulation under the CWA. These policies are inextricably intertwined with local decisions involving purely local activities affecting land and water resources. Such decisions remain the exclusive and proper province of the states. Congress's judgment in 1972 to limit its authority to "navigable waters" (defined as "the waters of the United States") reflects the fact that Congress understood that some waters are federal and some are not, and that the nation's water resources are best protected by building on the separate yet complementary roles of state and federal governments. The Act's division of labor between state and federal regulation has served the nation well for more than 35 years.

## II. The CWRA Would Fundamentally Change The Clean Water Act By Adopting An Expansive Definition Of The Term "Waters of the United States."

The CWRA, as drafted, would effectively destroy the CWA's careful calibration of federal and state authority and would replace it with overriding federal regulation over virtually every water body in the nation. The CWRA would delete the term "navigable waters" and replace it with the term "waters of the United States." The legislation defines "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, steams (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.

The bill appears to abandon the cooperative federalism policies of sections 101(b) and 101(g). And instead of preserving the states' independent authorities to plan the development and use of land and water resources and to allocate water within each state's jurisdiction, the CWRA relegates the states to the role of handmaiden of the federal government. Its only recognition of the states is in section 3, where it "*preserv[es] for States the ability to manage permitting, grant, and research programs to prevent, reduce, and eliminate pollution . . . .*" In other words, the states are allowed to administer programs designed and dictated by the federal government. This is a far cry from the independent and primary authorities recognized in the CWA. The authority to regulate local matters would tip dangerously in favor of the federal government, thereby defeating the careful calibration that Congress achieved in 1972 through the text and structure of the CWA.

Three elements of the CWRA's proposed new definition of "waters of the United States" deserve special attention. First, the bill defines "waters of the United States" as including "all intrastate waters," which finds no definition in the legislation. Applying basic dictionary definitions to the term, "all intrastate waters" could be interpreted reasonably to mean any or all waters found within a state, no matter how small or seemingly unconnected to a federal interest. Under this apparently boundless concept, the federal government could rightly regulate storm sewers, drainages, and roadside ditches and activities related thereto. To date, the federal government has generally refrained from exercising such expansive jurisdiction under the CWA, reasonably interpreting such geographic features and waters as the dominion of state and local officials. Construction and maintenance of ditches in the United States historically have been a basic function of local and state governments—to control drainage, irrigate crops, and provide flood control, among other things. Take roadside ditches as an example. State and local

governments construct and maintain ditches along roadways for the purpose of keeping our roadways safe and free from standing water. In many cases, these ditches also serve as corridors for essential water infrastructure pipes. Unfortunately, the CWRA would transform ditches into federally-regulated conveyances of "intrastate waters." And the function of a ditch would no longer be simply to provide for safe roads and other health and safety functions critical to local communities. Ditches would also have to meet the panoply of the CWA's federally-mandated water quality standards and permitting requirements. A local government would have to obtain a permit under the CWA every time it engaged in ditch maintenance. The overall burden on state and local governments would be substantial, as there are more than 4 million miles of roads in this country.[6]

The phrase "all intrastate waters" could also be used as a basis to exert federal jurisdiction over groundwater. Groundwater—that is, water which is stored underground in aquifers or is otherwise not exposed on the surface of land—traditionally has been governed by the states. Many states have developed complex and comprehensive regulatory schemes for protecting the groundwater within their borders. The CWRA could usurp important state and local controls over groundwater resources, as the term "all intrastate waters" could be reasonably interpreted as including groundwater. States, local communities, and private property owners would no longer be free to manage these aquifers and other groundwater sources. Instead, states and local interests would be subjugated to federal permits and other forms of federal approvals for activities affecting groundwater.

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[6] *See* U.S. DEP'T OF TRANSP., FEDERAL HIGHWAY ADMIN., HIGHWAY STATISTICS 2006 § V, Roadway Extent, Characteristics and Performance, Table HM-10, *available at* http://www.fhwa.dot.gov/policy/ohim/hs06/htm/hm10.htm (estimating federal, state, and local roadways in the United States as covering 4,016,734 miles).

A second element of the CWRA's definition of "waters of the United States" that warrants special attention is its defining of "waters of the United States" as including "activities affecting" waters. The CWRA does not say what "activities affecting" means, thus, we are left to reasonably conclude that the CWRA intends quite literally to give federal authorities jurisdiction to control any activity that has any impact on any water in the United States. This focus on activities related to water would represent a new frontier for the CWA. In its current form, the CWA regulates only "discharges of pollutants," a term defined under the Act as meaning "any addition of any pollutant to navigable waters."[7] The proposed legislation would significantly expand the regulatory reach of the CWA, as the Act would no longer be focused simply on "additions" to navigable waters, but instead could also reach any "activities affecting" any intrastate water. Authorizing federal regulation of "activities affecting" any water would obliterate the point source/non-point source distinction that is the foundation for the current statute's allocation of authority between the federal and state governments and section 101's commitment to state primacy in land use and water allocation decision-making.

Third, the CWRA defines "waters of the United States" based on the fullest extent of Congress's legislative powers, whereas the current statute exercises only Congress's Commerce Clause powers. Specifically, the legislation identifies a seemingly boundless universe of waters (among others, "all intrastate waters") and claims authority to regulate these waters as "waters of the United States . . . *to the fullest extent that these waters, or activities affecting these waters, are subject to the legislative power of Congress under the Constitution.*" By invoking the Treaty

[7] The CWA defines the term "discharge of a pollutant" as meaning "(A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft." 33 U.S.C. § 1361(12). "Discharges" are prohibited under section 301 of the Act unless authorized by a permit under section 402 or 404 of the Act.

Power, the Property Clause, the Necessary and Proper Clause, and any other part of the Constitution "to the fullest extent," the legislation opens a Pandora's box of endless federal power which will likely preempt state and local authority and will certainly undermine the "cooperative federalism" policy that has served us so well since 1972.

These three components of the legislation's definition of "waters of the United States" would stretch the CWA beyond its original design. Although the legislation includes a so-called "savings clause," the provisions therein do not exempt any waters or areas from the broad definition of "waters of the United States." The savings clause merely exempts certain *activities* from being considered "discharges." Moreover, since CWRA no longer premises jurisdiction on the presence of a "discharge" but rather appears to regulate *all* "activities affecting" waters, the impact of the "savings clause" is hard to predict. Although certain activities would not be regulated as discharges (as under section 404(f) of the current CWA), presumably they would still be regulable as "activities affecting" waters. Moreover, even if this language is ultimately determined to exempt certain activities from regulation, that does not mean that the place where the activity takes place is not a water of the United States. Thus, although, for example, maintenance of an irrigation ditch would not be a regulated activity (under one reading of the savings clause), the ditch itself would remain a water of the United States and all other activities in or affecting the ditch would be subject to CWA regulation. Finally, the savings clause does not mention existing regulatory exemptions that have been in place for several Administrations, thus calling into question the continued viability of those exemptions.

In sum, the CWRA proposes expanding the CWA in an unprecedented manner. Never before has Congress so broadly defined federal jurisdiction as extending to "all intrastate waters." Rather, Congress saw fit to link federal CWA jurisdiction to "navigable waters." Never

in the history of the CWA has the federal government been granted authority to regulate "activities affecting" water bodies; rather, its regulation has always been directly related to water itself. Never in the history of the CWA has the federal government been granted sweeping authority to regulate to the fullest extent of Congress's legislative power; on the contrary, Congress's authority has always been based on the Commerce Clause. Thus, rather than "restoring" the CWA, the CWRA's new definition of "waters of the United States" would fundamentally alter the CWA's regulatory framework.

## III. The CWRA's Definition Of "Waters of the United States" Would Have Unintended Consequences For The Clean Water Act's Regulatory Programs, And Would Not Provide Clarity Regarding The Scope Of Clean Water Act Regulation.

The CWA is a complex statute consisting of interrelated regulatory programs premised on the states and the federal government having independent authority over our nation's water resources. Much like tugging on a loose thread can unravel a whole sweater, changing the Act's key jurisdictional terms (*i.e.*, "navigable waters" and "waters of the United States") will likely unravel the Act's intricate system of regulations, funding, and incentives aimed at improving our nation's waters. The CWRA would substantially alter the scope and design of a series of regulatory programs under the CWA. Second, and consequently, the CWRA will neither bring clarity to the CWA nor "restore" it to its original design. I will discuss each category of these unintended consequences in turn.

### A. The CWRA's Unintended Consequences For Clean Water Act Regulatory Programs

The CWA is a complex statute consisting of multiple regulatory and non-regulatory programs. Its most well known component is perhaps the section 402 permitting regime that regulates discharges of "pollutants" from "point sources" into "waters of the United States." The CWA, however, is much more than a permit regime. It also includes a water quality program

established under section 303 that could be negatively impacted by the CWRA's new definition of "waters of the United States."

States establish water quality programs, monitor progress toward meeting standards, identify "impaired waters," and establish pollution budgets for impaired waters. In addition, 45 states operate the NPDES permitting program under authority delegated to them by EPA. By treating ditches, drainages, and storm sewer conveyances as waters of the United States, the CWRA will extend all of the CWA regulations to these "waters."

For example, section 303 requires states to establish ambient water quality standards for the "navigable waters" covered under the Act. The Act requires these standards to be set at levels to "protect the public health or welfare, enhance the quality of water" and serve the purposes of the Act. By replacing the term "navigable waters" with the term "waters of the United States" (defined to include "all intrastate waters"), the CWRA would substantially expand the number of water bodies for which states would have to establish water quality standards and monitor progress. Water quality standards would have to be established for ditches, drains, and pipes.

Section 303 also requires states to establish additional requirements for waters when the Act's normal permit controls are insufficient to ensure that the water quality standards will be satisfied. These additional requirements or pollution budgets are known as "total maximum daily loads" or "TMDLs." *See* 33 U.S.C. § 1313(d). As with all CWA water quality standards, these TMDL requirements are only applicable to "navigable waters." Thus, if the term "navigable waters" is replaced with the CWRA's broad definition of "waters of the United States," TMDL requirements will have to be established for many new water bodies. Many states are concerned, and rightly so, that the CWRA could significantly expand the costs and

requirements to monitor and assess all waters, such as storm sewers and ditches, not currently subject to these requirements, thereby diverting scarce and important state and federal resources away from more ecologically and environmentally sensitive water bodies. Expanding the reach of the 303 program would also cause further economic hardship to communities already coping with impacts of the 303 program affecting growth.

CWRA threatens yet more unintended consequences of placing substantial new burdens on state and local governments. Under the current CWA, state and local governments are both regulators and regulated. They have autonomy to manage some water without interference from the federal government, and are simultaneously regulated by the federal government with respect to other waters. By expanding the scope of federal jurisdiction, the CWRA would expand the federal government's regulation of state and local governments.

The CWRA would also allow the federal government to exert greater authority over communities and storm sewer systems by subjecting those systems to more NPDES permitting requirements. While many medium and large size communities are already subject to NPDES requirements for their municipal separate storm sewer systems ("MS4s"), all communities, regardless of size and whether they are currently subject to EPA's MS4 requirements, would be subject to the NPDES permitting program. Moreover, communities could be required to obtain hundreds of NPDES permits to cover each and every point source discharge at which a pollutant enters a storm sewer or drainage ditch, based on the legislation's sweeping expansion of federal authority over "all intrastate waters."[8] Local officials would bear the responsibility of securing

[8] The CWA's permit regime prohibits discharges of pollutants into "navigable waters" unless the discharge is authorized by a permit. *See* 33 U.S.C. § 1311(a). Permits may be issued under section 402 of the Act for the discharge of pollutants into "navigable waters" from "point sources" a defined term that encompasses most industrial actors who convey wastewater into our nation's waterways. *See* 33 U.S.C. § 1342 (section 402 permit program); *see also* 33 U.S.C.

permits and the burden and expense of achieving the limits established for the permit. It is important to bear in mind that failure to obtain permits can result in civil or possibly even criminal penalties.

### B. The CWRA's Unintended Creation Of Ambiguity Regarding The Scope Of Clean Water Act Regulation

The WAC members appreciate that this legislation is designed in part to bring clarity to the CWA in the aftermath of the U.S. Supreme Court's 2006 decision in *Rapanos v. United States*, 126 S. Ct. 2208 (2006), and its 2001 decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001). There is no question that these recent decisions have highlighted questions regarding the scope of the CWA—albeit ones that existed before, and were not created by, those decisions. The CWRA, however, would not eliminate the uncertainty regarding the CWA. The CWRA merely replaces one set of questions regarding the CWA with a new set of questions.

Specifically, by regulating "all intrastate waters," the CWRA shifts the central question from being "What water is federal?" to "What is a water?" If this legislation is passed, EPA, the Corps, and the general public will have to consider and determine where regulation begins. But unlike with the current version of the CWA, they will not have decades of case law, regulations, and guidance to consult for reference. Instead, EPA, the Corps, and the general public will have to determine from scratch how far the CWA reaches. EPA and the Corps will be required to promulgate regulations defining "waters of the United States" under the new statute. It will be no easy task. At what point does rainfall running across the landscape become a "water"? At what point does a puddle become a vernal pool? Would groundwater be a water of the United

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§ 1362(14) (defining "point source"). Permits may also be issued under section 404 for the discharge of dredged and fill material into "navigable waters." *See* 33 U.S.C. § 1344.

States? Ditches? Gutters? These are just a few of the questions that would have to be resolved if the CWRA is enacted.

Contrary to those who contend that CWRA will resolve uncertainty, the CWRA would create uncertainty by inviting litigation over the scope of the CWA. In particular, EPA and the Corps would be subject to lawsuits if they did not regulate "all" intrastate waters. The absolute language of the CWRA would leave the agencies very little room or discretion to limit their jurisdiction. Courts could interpret the word "all" to mean "all" and therefore compel the agencies to regulate every "intrastate water"—no matter how small, how infrequent, or how local in nature. If it is a "water," it would be a "water of the United States" within the meaning of CWA.

The CWRA would also create uncertainty for local governments in that it places local governments at risk of losing their autonomy over land use decisions. As I discussed earlier, the proposed legislation's new definition of "waters of the United States" includes not only almost all "waters" in the United States, but also "activities affecting" such waters. The legislation does not limit "activities affecting" "waters of the United States." Consequently, because local land use plans, building codes, and floodplain regulations may all "affect" water, they could become subject to federal regulation.

Importantly, the CWRA will also exacerbate the already difficult and costly task of updating our nation's aging water infrastructure. As this Committee is fully aware, our nation faces an estimated shortfall of between $300 and $500 billion over the next 20 years to maintain and upgrade community water systems that profoundly impact the quality of our nation's waters. Expanding the federal government's regulation to all waters, including storm sewers, drainages, and roadside ditches, will invariably increase the costs to local communities seeking to replace

leaking sewers and wastewater pipes and delay replacement as local agencies seek permits (and negotiate mitigation requirements) associated with necessary improvements to public infrastructure.

The future of our nation's waters and the intractable problems we collectively face depend upon our ability to respond innovatively, flexibly, and through adaptive management. Many of our nation's waters are impacted by excess nutrients, sediments, pathogens, oil and grease, and other pollution that emanates from non-point sources and urban storm water runoff. Communities, however, are rising to meet the challenge through the adoption of more cost-effective and environmentally sensitive green infrastructure solutions, such as constructed wetlands, infiltration trenches, detention ponds, and rain gardens, as well as restoring riparian streams and buffers. These management practices work by filtering polluted water and removing pollutants before they enter our streams, rivers, and lakes. Under the CWRA, these activities would be subject to NPDES permits. By expanding federal jurisdiction, we risk stifling these innovative solutions at a point and time we need them most.

## IV. The Nation's Waters Would Be Better Served By An Administrative Rulemaking That Could Resolve Uncertainties About The Scope Of Federal Jurisdiction Under The Clean Water.

The members of WAC believe that the overall intent behind the CWRA is an admirable one, *i.e.*, protection of our nation's aquatic resources. Unfortunately, however, the CWRA seeks to fix something that is not broken. The CWA is not the problem. Rather, it is the agencies' administration of the CWA that is the problem.

For years, the agencies have openly admitted that they needed to enact regulations that better define the scope of "waters of the United States" under the CWA.[9] For years, the general

[9] On April 23, 1990, EPA included on its semiannual regulatory agenda its intent to promulgate a rulemaking to revise the definition of "waters of the United States" by October

public has eagerly awaited the agencies' action. After years of temporizing, EPA and the Corps took a preliminary step in January 2003 toward promulgating regulations defining "waters of the United States" by issuing an Advance Notice of Proposed Rulemaking. Unfortunately, they never carried through with this effort. As was the case before the Supreme Court's 2001 *SWANCC* decision, federal regulators continue to apply the CWA without the benefit of a comprehensive set of regulations. Since *Rapanos* was decided in 2006, the agencies continue to avoid their duty to promulgate regulations—despite the fact that Justice Breyer in *Rapanos* characterized the Court's opinion as "call[ing] for the Army Corps of Engineers to write new regulations, and speedily so." *Rapanos*, 126 S. Ct. at 2266 (Breyer, J., dissenting).

The WAC members believe that the solution to resolving uncertainties regarding the CWA is not to substantially revise the Act as this legislation proposes. There is no need to reinvent the wheel. Rather, Congress should make the agencies do their job. Congress has already created a brilliant, complex, and largely effective statutory framework—that is the CWA that is on the books today. Congress should not have to substantially recreate that law simply because the agencies have failed to clarify the precise scope of the Act.

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1990. EPA did not meet that deadline. Since that time, EPA has repeatedly included its intent to revise the definition of "waters of the United States" in semiannual regulatory agendas, and has repeatedly failed to act on that intent. *See* 55 Fed. Reg. 45,134, 45,162 (Oct. 29, 1990); 56 Fed. Reg. 17,980, 18,008 (April 22, 1991); 56 Fed. Reg. 54,012, 54,042 (Oct. 21, 1991); 57 Fed. 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, 60,645 (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, 22,345 (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); 67 Fed. Reg. 74,051, 74,215 (Dec. 9, 2002); 67 Fed. Reg. 75,168, 75,299 (Dec. 9, 2002).

Importantly, even if Congress were to pass this legislation, it would not be a quick fix. Rather, we would still find ourselves in the position that we are in today—*i.e.*, waiting on the agencies to promulgate rules to implement Congress's directive. Indeed, given the substantial reworking of the Act that the CWRA proposes, the agencies would likely have to promulgate an entire new body of regulations covering many more issues than simply the scope of the term "waters of the United States." The public has been waiting for years for the agencies to promulgate regulations on this relatively discrete issue, and there is no telling how many more years they would take to promulgate regulations on the many new uncertainties that this legislation would create.

In conclusion, I would again like to emphasize on behalf of the members of the Waters Advocacy Coalition that we support and appreciate Congress's ultimate goal of protecting our nation's water resources. The CWRA, however, is not the vehicle for achieving these goals and, in fact, would have many unintended consequences that undermine the CWA's successful framework for protecting our nation's waters. The CWRA would also not resolve any questions that the Supreme Court may have raised regarding federal agencies' application of CWA programs. Those questions can be and should be resolved by Congress requiring the agencies themselves to conduct a rulemaking, with vigorous Congressional oversight to ensure that the rule furthers the "cooperative federalism" policy.

**Exhibit A**

October 17, 2007

Dear Chairman Oberstar and Ranking Member Mica:

On behalf of the members of the Waters Advocacy Coalition, we commend you for holding this hearing on the 35th Anniversary of the Clean Water Act (CWA) to highlight the successes and future challenges of the CWA. Over the last 35 years, the progress our nation has made in restoring the chemical, physical and biological integrity of our nation's waters is truly extraordinary. Not only have we reversed the historic trend of wetlands losses, but we have restored streams and rivers degraded by pollution. After many years, these waters are thriving again with life (see Attachment). We recognize that but for the collaborative efforts of the U.S. EPA, States, Tribes and industry, such progress would not have been possible.

While we have made significant strides to improve water quality, the next 35 years will focus on updating antiquated infrastructure and addressing sources of pollution inextricably intertwined with land use activities. Solutions will be more complex and costly, and will invariably require a greater commitment to fostering the federal-state framework critical to the CWA's success.

Toward this end, in 1972, Congress affirmed its long-standing deference to State water law in Section 510 of the CWA, which states "[e]xcept as expressly provided in this chapter, nothing in this chapter shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." 33 U.S.C. § 1370. Congress also reaffirmed its constitutional obligation to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources. . ." 33 U.S.C. § 1251(b). Congress understood that water and land use are inextricably linked and that the primary authority over such matters should continue to reside with the States. In that vein, we would encourage Congress to support the continued efforts of States and communities to protect local water resources through incentives, grants, and technical assistance.

In our attachment, we have summarized a few examples of the dramatic successes achieved by the Federal government, the States, and the regulated community working together to carry out the goals of this landmark legislation. While we acknowledge the additional work ahead, we take great joy in reflecting upon the 35th Anniversary of this remarkable law and how far we have come.

Thank you for your consideration.

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
The Fertilizer 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 Manufactures
National Association of Realtors
National Association of State Departments of Agriculture
National Cattlemen Beef Association
National Corn Growers Association
National Mining Association
National Multi Housing Council
National Pork Producers Council
National Stone, Sand and Gravel Association
Responsible Industry for a Sound Environment
Western Business Roundtable

**Clean Water: 35 Years of Progress**

The Clean Water Act of 1972, as it stands today, has been responsible for astounding success in improving the health of surface water everywhere in the United States. For example,

1. In the mid-1970's, 30-40% of surface waters monitored met water quality goals. By 2000, 60 – 70 % of waters met their goals.

2. In 1972, only 141.7 million people were served by wastewater treatment facilities, and only 60% of those people were served by secondary treatment or better. Today, 222.8 million people (over 1.5 times as many as 35 years ago) are served by wastewater treatment facilities; nearly 99% of those people are served by secondary treatment or better.

3. Since 1972, total oxygen-demanding pollution from sewage treatment plants across the country has been cut by nearly 50%, despite a major increase in the amount of sewage sent to these plants for treatment.

4. Water quality standards have now been set for every river, stream, lake, and bay in the country. These standards protect aquatic life and human health, and reflect numeric criteria published by EPA for about 190 pollutants.

5. By the end of 2006, monitoring has shown that about 39,000 waterbodies still do not meet their water quality standards. However, States have now developed (and EPA has approved) over 25,000 individual clean-up plans for cutting pollution and for meeting standards. EPA estimates that all remaining plans will be completed within 10 years.

6. Since 1972, EPA has regulated pollution discharges from 56 major categories of industry, and updates its regulations regularly. EPA's regulations specify limits for industrial discharges which reflect the application of the best available control technology for existing sources and the best demonstrated control technology for new sources.

7. Since 1972, EPA and States have issued over 60,000 individual discharge permits to limit pollution with best available technologies and in many cases, to require even more stringent limits to solve local water quality problems. About 15,000 concentrated animal feeding operations are also covered, plus more than 500,000 stormwater sources.

8. From the 1950s to the 1970s, an average of 458,000 acres of wetlands were being lost each year. By the 1986-1997 time period, the loss rate had declined to 58,600 acres per year. In the most recent study period, 1998-2004, wetland area <u>increased</u> at a rate of 32,000 acres per year.

9. There are many regional and local examples of clean water progress over the last 35 years:

    a. In 2006, whitefish returned to the Detroit River for the first time since 1976.

    b. The extent of submerged aquatic vegetation (which is important to healthy ecosystems) nearly doubled in the Chesapeake Bay from 1978 to 2005.

    c. Atlantic salmon disappeared from the Connecticut River in the late eighteenth century as a result of overfishing and massive pollution. Salmon were first seen again in the late 1970s and were first observed to spawn and reproduce in 1991 – for the first time in about two hundred years.

**Sources**


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2. Communication from Bob Bastian, Senior Environmental Scientist, USEPA Municipal Support Division. Based on Progress in Water Quality: An Evaluation of the National Investment in Municipal Wastewater Treatment, EPA832-R-00-008, June 2000, updated 2004.

3. *ibid.*

4. Communications with EPA water quality standards staff. Also, EPA Current Water Quality Criteria, http://www.epa.gov/waterscience/criteria/wqcriteria.html (September 28, 2007)

5. EPA National TMDL Report, http://iaspub.epa.gov/waters/national_rept.control (September 28, 2007)

6. EPA 2006 Section 304(m) Plan, 76648 Federal Register, Vol. 71, No. 245 (December 21, 2006), p. 76648

7. "Growth of the NPDES Permits Program," charts prepared by USEPA Permits Division, October 2007.

8. Draft 2007 Report on the Environment: Science, USEPA, May 2007 http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=140917

9. a. "The Clean Water Act: An Effective Means to Achieve a Limited End," article by Tracy Mehan scheduled for publication in *Water Environment and Engineering* Magazine, October 2007. Also, 2000 Water Quality Inventory, USEPA, http://www.epa.gov/305b/2000report/

   b. Draft 2007 Report on the Environment: Science, USEPA, May 2007 http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=140917

   c. "Salmon Return to Old Spawning Spot, Two Centuries Later," New York Times, December 4, 1991.

May 1, 2008

The Honorable James Oberstar
Chairman
Committee on Transportation and Infrastructure
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

On behalf of members of the Waters Advocacy Coalition (WAC), I would like to thank you for the opportunity to present testimony before the Committee on H.R. 2421, the *Clean Water Restoration Act of 2007*. We believe the hearing held April 16 provided for a constructive exchange regarding the implications of the changes that H.R. 2421 would make to the Clean Water Act.

While there was diversity of opinion among the witnesses on some issues, we do believe that during the presentation of oral statements and under close questioning by members of the Committee, some points of general agreement began to emerge. Certainly there was broad agreement that the Clean Water Act has been instrumental in helping this nation dramatically improve the quality of the nation's waters. Fundamental to that progress has been the federal-state partnership on which the Clean Water Act is premised, which includes a recognition that not all waters are or necessarily should be subject to federal jurisdiction.

The Committee's dialogue with the witnesses from the Department of Justice, the EPA, and the Corps of Engineers points to a conclusion that retaining a division between federal and state jurisdiction over waters is important to preserving the constitutionality of the Clean Water Act and to maintaining the cooperative federalism structure that has been the foundation of the Act's successes. Further, having the dividing line tethered to the term "navigable waters" is key to avoiding "unnecessary litigation or potential constitutional litigation."

Similarly, the hearing firmly established that authorizing federal jurisdiction to be asserted when an activity affects a water of the United States would expand federal permitting requirements to activities not presently regulated under the Clean Water Act and actually lead to greater confusion and uncertainty in the Act's implementation. This aspect of H.R. 2421 was recognized by federal and non-federal witnesses as a highly controversial expansion of existing Clean Water Act jurisdiction.

We also believe a clear consensus emerged that the current exemptions for prior converted cropland and waste treatment systems must be preserved and that failure to do so would be

highly problematic for implementation of the Act. While the witnesses, particularly the federal witnesses, did not attempt to describe all their questions or concerns related to H.R. 2421, we think one concern raised by Mr. Lancaster, Chief of the Natural Resources Conservation Service (NRCS), is particularly illustrative of the potential for unintended consequences from enactment of H.R. 2421. Mr. Lancaster pointed out that, while the changes proposed by H.R. 2421 do not seek to amend the operation of the NRCS programs, they would very likely alter the bargain struck by a landowner upon enrollment of his lands in an NRCS program, potentially reducing the available uses remaining to the landowner and increasing liability exposure under the Clean Water Act. Surely, H.R. 2421 does not intend such a result, yet its enactment would prove a rude awakening to the many landowners throughout the country who have entered into voluntary agreements under an NRCS program or other similar programs.

Finally, WAC believes that the Committee discussion continues to show that, while under the Clean Water Act there is a distinction between federal waters (tethered to the concept of navigable waters (broadly construed)) and state waters, the actual line of demarcation prior to *SWANCC* and *Rapanos* was not static. Rather, that line was subject to continuous redefinition based on the combination of guidance, regulation, and litigation interpreting the Clean Water Act since it was passed in 1972. That process is still continuing with the issuance of the agencies' recent interim guidance applying *Rapanos*. We believe the result of that process will assure that federal jurisdiction continues for the vast majority of waters, and reaffirm state responsibility for the remainder.

We believe any Congressional action must be careful to respect a federal-state balance and constitutional boundaries and to avoid unnecessary litigation and unintended consequences. Towards that end and in response to your letter seeking suggestions by May 1, WAC believes that any viable legislative proposal, at a minimum, must

- Maintain the term "navigable waters" in the CWA;
- Maintain all regulatory exemptions such as prior converted cropland and waste treatment systems;
- Eliminate the reference to "activities" affecting waters;
- Eliminate the overbroad reference to "all intrastate waters" as waters of the United States; and
- Eliminate any and all references asserting jurisdiction to the fullest extent of the legislative authority of Congress under the Constitution, retaining reliance on the authority of Congress under the Commerce Clause.

We believe that bringing into federal jurisdiction "isolated, intrastate waters" and "all ephemeral waters" raises constitutional concerns and the likelihood of more litigation and uncertainty in the future, and would undermine the Act's very effective federal-state partnership. As Mr. DeFazio

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WAC

The Honorable James Oberstar
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(D-OR) observed during the hearing, the reference to all intrastate waters shifts the focus of the debate from "what water is federal?" to "what is water? . . . At what point does rain running off . . . any slope in the western side of Oregon . . . constitute water that would be regulated by the federal government . . .?" *See* Hearing Transcript. To avoid these complications, we recommend that such features be addressed at the state level and through incentive programs.

WAC also recommends that, as an alternative, the Committee consider directing the agencies to initiate a rulemaking, as urged by the Supreme Court justices, to define key terms and provide certainty to the public and the states about which waters are federally jurisdictional and which waters are jurisdictional to the states. Such a rulemaking will allow for broad public participation and assist the states in assuring that state programs are adequate to address waters that are not under federal jurisdiction.

In conclusion, WAC would like to thank you for the opportunity to participate in the recent legislative hearing. The dialogue was helpful and constructive. Whether there is sufficient convergence to lead the way to agreement on legislative language remains to be seen, but the Waters Advocacy Coalition welcomes the opportunity to be part of that discussion inasmuch as our membership would be deeply affected by the proposed changes.

Sincerely,

Virginia S. Albrecht

Virginia S. Albrecht
(202) 955-1943

**About the Waters Advocacy Coalition**

The Waters Advocacy Coalition is active in working to protect our nation's wetlands and water resources as members of the regulated community and/or co-regulators and is comprised of both public and private organizations.

Members include: American Council of Engineering Companies; American Farm Bureau Federation®; American Forest and Paper Association; American Iron and Steel Institute; American Road and Transportation Builders Association; Associated General Contractors of America; CropLife America; Edison Electric Institute; The Fertilizer 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 and Stormwater Management Agencies; National Association of Home Builders; National Association of Industrial and 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; Public Lands Council; RISE – Responsible Industry for a Sound Environment; United Egg Producers; and Western Business Roundtable.

# Testimony of William W. Buzbee

**Professor of Law**
**Emory Law School**
**Atlanta, Georgia 30322**
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**Hearing Regarding The Clean Water Restoration Act of 2007**
**U.S. House of Representatives**
**Committee on Transportation and Infrastructure**
**April 16, 2008, 11 a.m.**
**Room 2167 Rayburn House Office Building**

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 Clean Water Restoration Act of 2007. The Restoration Act is of crucial importance 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) (*Rapanos).* 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 and bold new assertions from polluters about reduced protections for previously jurisdictional "waters of the United States." These cases, and resulting confusion, have reduced the protections afforded to America's waters. 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, regulatory skirmishing, and attendant litigation resulting from the somewhat uncertain intersection of these three important cases. In my testimony, I will review these recent developments that explain the need for the Restoration Act, ending with my 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 the United States Senate Committee on Environment and Public Works about the implications of the *Rapanos* decision. More recently, I testified at a December 2007 hearing of the Senate Committee on Environment and Public Works, also discussing the implications of these cases, regulatory and judicial developments since *Rapanos.* I, as did other witnesses, also offered brief commentary on the Restoration Act.

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, Cornell, and Illinois Law Schools.

**II. The Importance of Addressing Reduced Protections for America's Waters:**

Probably the key question your committee faces is whether any amendment of the Clean Water Act is necessary or worth the effort. Despite calls by some opponents of the Restoration Act to maintain the Clean Water Act's protections without any new legislative actions, the law's protections have in reality been substantially undercut by the Supreme Court's two recent decisions regarding what sorts of waters are federally protected. Maintaining the current status quo means favoring a weakened Clean Water Act. A goal of maintaining the Act's three decades of protections counsels in favor of supporting the Restoration Act. As discussed more below, in regulatory, permit and litigation settings, polluters are using these cases in efforts to escape federal jurisdiction. Pollution dischargers long subject to federal permits are now claiming they are beyond federal reach.

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 congressional and agency 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 just about wetlands, a common hot-button political issue. The Clean Water Act's core 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 401 (provisions providing for state input into federally licensed projects), 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. 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 and new grounds for polluter claims of impunity. 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 and subject to contestation. The Supreme Court's decisions have left many waters unprotected, or at least created regulatory uncertainty about what is protected.

If, for example, a stream bed in a dry southwestern state 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. And in areas of scarce water and often scarce government resources, shared federal and state efforts to protect precious water are essential. For this reason, Arizona and numerous other states sought in the Supreme Court and in subsequent related regulatory comments to maintain longstanding protections. Such states are motivated in some instances by state laws prohibiting states from offering environmental protections beyond that provided by federal law. As Arizona's Governor recently stated, "[w]hile we have some outstanding 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." Uncertainties created by the Supreme Court's recent decision make especially vulnerable water supplies in areas where water is most precious.

**III. *Rapanos, SWANCC,* and the Need for the Restoration Act:**

The Supreme Court's recent CWA decisions in *SWANCC* and *Rapanos,* both of which recast 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 Court's *SWANCC* and *Rapanos* decisions.

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

Despite disagreement about the implications of *Rapanos,* virtually all commentators 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 traditional navigable waters in the sense of used 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-1970s, 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 last year to Committee Chairman 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, in language echoing the Supreme Court's conclusions in the earlier *Riverside Bayview Homes* case, "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 long-standing, explicit provisions of regulations regarding what are protected as waters. 40 C.F.R. 230.3; 33 C.F.R. 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 in *Rapanos* 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 Has Unsettled the Bipartisan Three Decade Consensus and Weakened the Clean Water Act by Limiting Its Reach**

The Supreme Court's recent rulings in *SWANCC* and *Rapanos* have together reduced the reach of the CWA, engendered regulatory confusion, and given polluters newfound artillery to oppose application of federal anti-pollution laws, regulations and permits. Any calls now for leaving the CWA untouched are comments of supporters of an undercut and weakened CWA. If clean water remains a national priority, as it has been for over three decades of bipartisan consensus, then new legislative action is necessary. At stake is far more than just wetlands, but the core of federal power to protect America's waters from industrial pollution and preserve America's waters for their many crucial economic, agricultural, ecological, and recreational uses.

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 provided 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 despite the presence of other CWA regulatory provisions that could protect isolated waters.

*Rapanos* presented different sorts of challenges. It too involved what "waters" are protected, but overlapped substantially in the questions presented 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 traditional navigable waters 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. They 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 interpretations of the post-*Rapanos* 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 Bayview Homes* decision. Wetlands adjacent to traditionally navigable waters remain protected due to their hydrological and ecological functions. All justices also continue to agree that the Clean Water Act protects more than just traditional navigable waters. The key

regulations defining what count as "waters of the United States" were not struck down. Indeed, *Riverside Bayview Homes* explicitly approved of the application of 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.

I think that there is a correct, soundest read of *Rapanos* that focuses on what views of federal jurisdiction garnered five or more votes of the justices. Such a read limits the harms of *Rapanos,* at least if we could be confident that regulatory stakeholders, regulators, and judges would agree. As I discuss below, however, it is becoming increasingly clear that confusion, not agreement, reigns in the courts and regulatory venues. For this reason alone, coupled with the undoubted harms caused by *SWANCC,* curative legislation is needed.

Nevertheless, it is worth brief explanation for how one derives this soundest reading of *Rapanos.* I first offered this view over a year ago in Senate testimony, but since that time far more significant legal voices have used similar reasoning. In briefs, testimony, and regulatory explanations, the Department of Justice, the Environmental Protection Agency, and the Army Corps of Engineers have utilized similar logic. Under this soundest read, 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. A majority of the justices also state the sorts of waters Justice Scalia's opinion protects are jurisdictional.

Before discussing Justice Kennedy's opinion, it is important to state clearly that Justice Scalia's opinion that advocating greatly limiting the CWA's reach 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. To state it simply, his limiting language garnered only four votes, but his articulation of what sorts of waters are protected garnered eight or nine supporting votes. 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 Homes* 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." This claim makes sense because of a majority of Supreme Court justices would protect both kinds of waters.

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 possibly 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.

Lastly, no five-justice majority in *Rapanos* cut back on federal regulatory power under the Commerce Clause. The Court in granting certiorari had considered making this a constitutional decision under the Commerce Clause, a goal numerous industry, property rights and anti-regulation groups had supported in their briefs. 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 my 2006 and 2007 testimony before the Senate Environment and Public Works Committee, as well as its 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.

Despite the strong basis for this read of *Rapanos,* it is important to note that, in application, no protective interpretive consensus has emerged. As discussed below, the Court's fragmented *Rapanos* opinions, coupled with the *SWANCC* decision, have led to lower court and regulatory confusion, rollback, numerous polluter claims of lost federal jurisdiction, and lost federal protections.

**IV. The Need for the Restoration Act:**

**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 outlier 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 decision last year in *United States v. Robison*, 505 F.3d 1208 (11th Cir. 2007), *reh'g en banc denied*, 2008 WL 794982 (11th Cir. March 27, 2008) (with an opinion by judges dissenting from the denial). In almost every respect, that 2007 11th Circuit 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 waters that are navigable in the traditional sense. 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.

It is also worth emphasizing that this is one of numerous settings where *SWANCC* and *Rapanos* have been used not to weaken wetlands protections, but to escape core

protections against industrial pollution discharges into America's waters, under Section 402 of the CWA.

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 closed 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.

Similarly, other litigation reveals the expansion undercutting of the CWA caused by these decision. The American Petroleum Institute has sought, with some recent success, to obtain judicial agreement that federal oil spill regulations exceed federal power. Other polluters have sought regulatory agreement that they are no longer subject to federal CWA NPDES permit obligations. Those efforts have met with mixed success, and will surely soon end up in the courts.

**b. Post-*Rapanos* and *SWANCC* Regulatory Confusion and Rollback**

The disparate approaches by lower courts mean 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. The comment phase for this guidance just ended, but its initial version reveals serious problems. It has received substantial critical comments from all sides.

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 protected 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 this Committee 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. In press reports and news releases by some watchdog groups, there have been instances already where the Army Corps has initially reclassified substantial lakes as no longer subject to federal protection. Upon review by more senior corps officials or US EPA, those redesignations have been reversed, but they indicate the risks posed by the law as it stands.

In addition, it is important to recall that EPA itself calculates that over 100 million Americans get their drinking water from public water supply systems that intake water from source water protection areas containing first order headwater or seasonal (intermittent/ephemeral streams). If these somewhat more attenuated sorts of waters are not protected, they can be degraded with impunity from federal law. Either Americans will drink more sullied waters, or states and municipalities will have to devote more resources to cleaning that water. Relatedly, many regions of the country struggle with degraded waters that, through the Total Maximum Daily Load (TMDL) program of the CWA, can force point source dischargers to reduce their levels of discharged pollution. With more degraded feeding waters, point sources such as factories and their many employees will feel the regulatory pinch.

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 year, I've closely been studying the Clean Water Restoration Act. 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. I address here both why I believe it is sound, and also seek to address some criticisms leveled by opponents of the bill.

**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.

The Restoration Act really is a focused, direct, legislative amendment making statutory the longstanding regulatory definition of the sorts of waters protected by the CWA. These categories of waters have been subject to similar protections under regulations in place since the late 1970s, 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 traditional navigable 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, letters, and past testimony, 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. It reaches both activities that are economic or commercial causing harms to specified sorts of waters, and also protects waters that are themselves of economic or commercial significance individually or in the aggregate. These are sound, core sorts of justifications for federal constitutional power.

Hence, when waters or activities affecting those waters have the sorts of linkages justifying federal legislative power, then the waters 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 in 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 more recent and 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. A similar constitutional perspective applied to the Restoration Act reveals its sound constitutional footing.

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 strongly reaffirmed that the test of constitutionality of Commerce Clause regulation looks at activities in the aggregate. Federal law "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 in any event 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 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. These other portions of the CWA remain untouched by the focused amendment offered in the Restoration Act.

**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.

If, as I have heard is under consideration, the previously regulatory exclusion for waste treatment systems may be codified into statutory law, I see a risk and a possible solution. The risk is that more expansive reads of this exemption might be read as ratified by a new statute. Of particular risk are occasional efforts to dam, impound or otherwise redirect or change a natural water body and call it a waste treatment system, thereby carving it out from federal protection. EPA has in regulations rejected such efforts, but in application has at least once sought to approve such impoundment of natural waters. That effort was, I believe, judicially rejected, but mainly for lack of adequate explanation or justification. I suggest that if such an exemption is to be made statutory, it explicitly include only upland, manmade waste treatment systems.

**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, leading to judicial and regulatory confusion. 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 Congress. Restoring these longstanding protections through the Clean Water Restoration Act's focused and limited amendments to the Clean Water Act makes ecological, economic, and legal sense.

SCHOOL OF
LAW

EMORY

May 1, 2008 (via email attachment and 1st class mail)

The Honorable James L. Oberstar
Chairman
Committee on Transportation and Infrastructure
United States House of Representatives
Washington D.C. 20515

Dear Chairman Oberstar:

Thank you for your letter of April 18, 2008 soliciting additional reactions and suggestions regarding the Clean Water Restoration Act. I stand by my earlier submitted and spoken hearing testimony, but here offer a few more focused responsive comments.

Most significantly, I remain of the view that the Restoration Act is a sound, limited, and well crafted bill. It is a bill of great importance. The currently weakened Clean Water Act is being seized upon already to allow or excuse polluting activities long subject to regulation. I thought it notable that despite opponents' many dramatic claims about the Act's provisions in advance of the hearing, the actual testimony and responses to hearing questions revealed far less major objections.

For example, despite arguments about constitutional flaws in lobbying documents and some written testimony, there was virtually no such claim in comments offered in person. This is not surprising---it will be a rare setting where "waters of the United States" or activities harming them will not be reachable by the federal government under the United States Constitution. Most harms to waters result from commerce and economic activity, and it would be a rare setting where the sorts of waters defined in the bill would not also individually and in aggregate be themselves of commercial significance. Other constitutional provisions also will often justify federal regulation. Congress's declaring its intent to legislate to the limit of its power obviously does not preclude a court later drawing a different constitutional line. Nevertheless, once the Supreme Court reads a statute as not going to the limit of Congress' power, as it did in the *SWANCC* case, it is important to be explicit about the intended congressional reach to ensure courts do not protect a lesser set of waters than is constitutionally reachable. I think the hearing, and the lack of attention to constitutional objections, provided a notable silence on this issue.

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A few points were raised more pointedly. I here respond to those few points and questions.

*(1) Retain "navigable waters"?*

The issue raised most frequently by the Chairman and some witnesses concerned whether Congress could keep the words "navigable waters" in the law and achieve the legislative goal of restoring the Clean Water Act to where it stood pre-*SWANCC*. As I stated in person at the hearing, this would be problematic and could compromise the effectiveness of the Restoration Act. A Supreme Court majority in *SWANCC* and *Rapanos* attached considerable significance to the word "navigable" in limiting the protections of the Clean Water Act. Numerous cases over the years attach significance to legislative use of terms of art that have been construed by courts, especially the Supreme Court, then left in the law at the time of later amendments If left in, courts would likely give "navigable" content similar to the Supreme Court's most recent opinions construing the term. Equally problematic, the Restoration Act bill's heart has long been the deletion of the term and substitution with "waters of the United States," and then codifying longstanding regulatory provisions specifying the sorts of waters protected. The specific history of this piece of legislation might also lead courts to read significance into the reinsertion of this term at this date. No matter how much you or other legislators might in legislative discussions try to make your intentions clear, many judges and justices are now textualists; they would focus on the enacted text and other authoritative interpretations. There is a real risk "navigable" would retain the limiting content the Supreme Court recently gave it in *SWANCC* and *Rapanos*—interpretations that are causing real-world harm to water bodies today. I fear such an action could undermine the bill of its intended effect.

*(2) Use of "activities" in the new Section 4(24) definition of "waters of the United States"*

The second issue that was raised in pre-hearing testimony and given some attention by early panels included the language in Section 4 (24) of the Restoration Act bill, where Congress offers a definition of what sorts of waters are protected. In particular, several witnesses seemed to suggest that the language about "activities affecting these waters" somehow created a new category of activities subject to the Clean Water Act's reach. I think that this is a complete misreading of this bill. If it is passed, I think no one will seriously make the arguments made at the hearing. Still, I will here explain the logic of this provision and offer a possible linguistic addition that might address some concerns of witnesses and legislators. I nonetheless conclude with the recommendation that you not change this language.

First, this provision as currently drafted makes sense and is important. It defines the sorts of waters protected, and only mentions "activities" in language directly tied to the specified sorts of waters. The language lists protected waters, then says "to the fullest extent that these waters or activities *affecting these waters* are subject to the legislative power of Congress under the Constitution." (emphasis added) This is a clean-up or sweep-up provision making clear that Congress intends for this law to protect these

waters to the extent the waters themselves, or the activities harming them, are subject to federal legislative power. Hence, only specified sorts of waters are protected, but if there is a debate about federal constitutional power, Congress is signaling that if the water or the activity causing harm *to that water* is within federal constitutional power and covered by the statute, it is protected. This would reduce litigation over whether a water body is used commercially when there is no doubt that a commercial operation is causing harm to that water. I therefore think the language is fine and logical. In addition, because the Restoration Act would retain the Clean Water Act's requirements regulating "discharges" of "any pollutant" from a "point source," the use of this phrase simply does not have the effect some have alleged.

Still, if you would like to address these claims and still maintain the important meaning of this phrase, there are two possible responses. One could add the following few words before "activities" to make clear the law is not creating some freestanding new category of reachable activities. You could insert the following italicized language on line 21 of page 7 of H.R. 2421, between the words "or" and "activities:" *"the discharges of any pollutant resulting from, or incidental to,"* then continue with the word "activities." The amended language would therefore read as follows:

"[after listing of sorts of waters protected], to the fullest extent that these waters, or the discharges of any pollutant resulting from, or incidental to, activities affecting these waters, are subject to the legislative power of Congress under the Constitution."

In the alternative, a findings provision in the public law could be added that would contain the same language, making clear in the enacted law the intent to reach listed sorts of waters if the waters, or the activities harming them, are within federal jurisdiction.

Nevertheless, I think the bill as initially drafted is cleaner and clearer, and makes sense. And this language is important, so for the sake of clarity and easy discovery by future generations of interpreters of the Clean Water Act, the language is better placed in what will become the codified amended Clean Water Act itself. And clarifying the intent to focus on "waters" and the "activities" harming them is critical since Justice Rehnquist's majority opinion in *SWANCC* declared the need for a clearer statement from Congress about what it meant to protect or regulate, and also expressed uncertainty whether under the law the Court should focus on the water itself or the activity causing the water harm. Somewhere in the actual enacted law, language to this effect is needed.

*(3) Add a specific reference to the intent restore the law to its state pre-SWANCC?*

In addition, while I think that retaining "navigable" in the Clean Water Act and this bill is a bad idea, the Chair's idea of making the bill more explicit in referencing the *SWANCC* and *Rapanos* decisions is a fine idea. Perhaps you should add a new Section 4 to the Restoration Act's Section setting forth "Purposes." A new Section 4 could read:

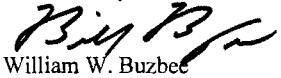
"to restore the Clean Water Act, including the interpretive discretion it vested in its implementing agencies, to where it stood prior to the United States Supreme Court decisions in Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001) and United States v. Rapanos, 126 S. Ct. 2208 (2006)."

The language about "interpretive discretion" is suggested as a way to avoid arguments that the law and its interpretations are to be frozen as they stood right before *SWANCC*. Furthermore, Congress has on numerous occasions specifically referenced particular Supreme Court decisions, especially where the intent is to legislatively overrule or limit those decisions' effects. For a couple of recent examples, see Section 2(b)(6) of The Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, and Section 2(2) and 3(4) of the Civil Rights Act of 1991. For analysis of similar responsive legislative drafting, as well as legislative failures to revise language after a Supreme Court decision, see William N. Eskridge, Interpreting Legislative Inaction, 87 Michigan Law Review 67 (1988).

Nevertheless, on balance, I think the bill as drafted is sound, focused, and important. The key definitional language is virtually verbatim taken from longstanding regulatory language, thus providing some stability in the law and allowing future stakeholders to build on three decades of regulatory interpretations and implementing actions. Without this bill, the law will remain weakened and in a state of confusion. Unless the law is corrected and restored, industrial dischargers, spillers of oil, and others eager to engage in more dredging and filling of waters, all will continue to take advantage of the weakened Clean Water Act left by the Supreme Court. These harms are happening now. Maintaining the status quo, as opponents advocated in their testimony, actually means endorsing a weakened Clean Water Act and greater pollution into America's most precious resource.

If I can be of any further assistance to you, whether in working on the bill or clarifying my suggestions, you, your legislative colleagues, and legislative staff, are all welcome to contact me directly in whatever way is easiest.

Sincerely yours,



William W. Buzbee
Professor of Law
Director, Emory Environmental and Natural
Resources Law Program

**Written Testimony of**

**Joan Card**
**Water Quality Division Director**
**Arizona Department of Environmental Quality**

**Before the United States House of Representatives**
**Transportation and Infrastructure Committee**
**Regarding "The Clean Water Restoration Act of 2007"**

**April 16, 2008**
**Rayburn House Office Building**
**Washington D.C.**

Mr. Chairman and members of the Committee, thank you for the opportunity to testify today regarding H.R. 2421, the Clean Water Restoration Act of 2007. The Arizona Department of Environmental Quality implements a number of water quality protection programs in our state, including the Federal Water Pollution Control Act and amendments, known as the Clean Water Act. Arizona's Governor, Governor Janet Napolitano, issued a letter of support for the legislation and we thank you, Chairman Oberstar, for introducing this legislation, and the co-sponsors, and this Committee for your leadership in this matter of importance to our state. We also thank Senator Feingold in the Senate for introducing S. 1870 in the Senate.

The Arizona Department of Environmental Quality has very serious concerns about the potential impact of the 2006 United States Supreme Court plurality decision in the *Rapanos* and *Carabell* cases, 165 L. Ed. 2d 159 (2006), hereinafter, the Decision, on Clean Water Act programs in Arizona. The Decision could minimize, if not devastate surface water quality protections that have been implemented in Arizona at least since the 1972 Amendments. While the Decision alone is of grave concern, the implementation guidance jointly issued by the Environmental Protection Agency and the Army Corps of Engineers, 72 Fed. Reg. 31824 (June 8, 2007), hereinafter, Guidance, further puts Arizona's waters at great risk.

The *Rapanos* Decision arises out of cases involving jurisdiction over construction activities on or around "four Michigan wetlands, which lie near ditches or man-made drains that eventually empty into traditionally navigable waters . . . ." 165 L. Ed. 2d at 164. It is, therefore, from our perspective, highly unfortunate that the Decision and Guidance are expected to have such an enormous impact on the quality of Arizona's arid environment and the health of its citizens. We believe that a different set of facts presented to the Court, for example facts involving a large discharge of pollutants to an ephemeral stream, necessarily would have led to a different conclusion that would have been more protective of the environment.

As Governor Napolitano stated in her September 26, 2007 letter of support: "The implementation of the Clean Water Act in Arizona long has protected Arizona's

wetlands, streams, canals, and lakes for drinking, wildlife, recreation, tourism and irrigation, to name a few important uses of our water resources. Arizona and the federal government combined properly have spent millions since the enactment of the Federal Water Pollution Control Act to assess water quality throughout our state and to protect those uses through point source permitting, Total Maximum Daily Load studies and monitoring, Section 319 nonpoint source grants, and other Clean Water Act programs. The Clean Water Restoration Act of 2007 offers a recognition and ratification of these critical efforts to protect the scarce and precious water resources in our arid state."

Like other states, Arizona devotes significant resources to Clean Water Act programs. Since the late 1970s, Arizona has developed and implemented surface water quality standards, performed Total Maximum Daily Load studies, and monitored, assessed and reported surface water quality under Sections 303 and 305 of the Clean Water Act; since 2000 Arizona has approved over $11 million in non-point source water quality improvement grants. Since 1973, Arizona has participated in the issuance of point source permits under Section 402 of the Clean Water Act and since 2003 has issued and enforced Section 402 point source permits under a delegation from the EPA. If as a result of the *Rapanos* Guidance ephemeral and intermittent waters are deemed non-jurisdictional, all Clean Water Act protections for these water bodies may be lost. Such a result would seriously impede my agency's ability to achieve its mission to protect and enhance the quality of Arizona's environment.

Our specific concern for Arizona stemming from the *Rapanos* Decision and Guidance is the potential elimination of Clean Water Act protections, particularly Section 402 point source permitting protections, for ephemeral and intermittent, or non-perennial, waters. Ephemeral waters are those streams that contain surface flow only in response to precipitation and intermittent waters are those streams that contain continuous surface flow only part of the year, for example, from a seasonal spring or in response to snow melt. Arizona's landscape includes a vast network of these non-perennial streams. In cooperation with the United States Geological Survey, we recently have quantified this network and determined that approximately 96% of the stream miles in Arizona are non-perennial. See attached Arizona Streams map, November 27, 2007.

Arizona's largest water body--second in size only to the perennially flowing Colorado River, which forms the western border we share with Nevada and California--is the Gila River. The Gila River, an interstate stream originating in our neighboring state of New Mexico, drains two thirds of the land area in Arizona to the Colorado River a few miles north of the Mexican Border and the Colorado River Delta of the Gulf of California. The Gila flows intermittently in wetter years, but in times of long-term drought, such as we presently are experiencing, this massive water body is largely dry and any flow is highly disconnected. The Gila's main tributaries include the Salt, Santa Cruz, and Hassayampa Rivers, which are very large and mainly ephemeral streams. See attached Important Rivers, Streams and Washes of Arizona.

Arizona's largest and fastest growing counties, Maricopa, Pima and Pinal Counties, are located in the heart of the mostly ephemeral Gila River drainage. Subdivisions require

sewage treatment facilities and many of these facilities construct outfalls and discharge to ephemeral arroyos in these neighborhoods. These facilities currently hold Clean Water Act point source permits for discharges of wastewater that are protective of aquatic life, agricultural irrigation and livestock watering, and body contact uses. Without Clean Water Act protections, the Arizona Department of Environmental Quality will be unable to require permits that are protective of these uses. Arizona law prohibits the Arizona Department of Environmental Quality from being more stringent than the federal Clean Water Act. We will be unable to assure the public and water users that these discharges of wastewater in the desert are not harmful to the environment.

Arizona's non-perennial stream water quality has benefited from Clean Water Act protections since the early 1970s when Section 402 point source permits were issued for several facilities discharging wastewater to ephemeral streams, including permits for major publicly owned treatment works (POTWs) serving the cities of Tucson and Phoenix and discharging large amounts of effluent to the Salt and Santa Cruz Rivers, which are tributaries to the Gila River, as described above. Combined, these facilities treat over 200 million gallons per day of municipal and industrial sewage and still discharge to these large ephemeral waters under Section 402 point source permits. The Rapanos Decision and Guidance have presented the opportunity for these large POTWs and other dischargers to argue that their discharges do not require Clean Water Act pollution limits, known as effluent limits.

Further, in 1975, the United States District Court for the District of Arizona ensured Clean Water Act protection for small ephemeral streams, or arroyos. The Court held that: "[A] legal definition of 'navigable waters' or 'waters of the United States' within the scope of the Act includes any waterway within the United States also including normally dry arroyos through which water may flow, where such water will ultimately end up in public waters such as a river or stream, tributary to a river or stream, lake, reservoir, bay, gulf, sea or ocean either within or adjacent to the United States." *United States v. Phelps Dodge Corp.*, 391 F.Supp. 1181, 1187 (1975). This Arizona District Court decision long ago set the stage for the standard that dischargers to desert waters must obtain Clean Water Act Section 402 permits to be in compliance with the law.

As this Committee well knows, the Clean Water Act provides for the development and implementation by the states of water quality standards for the nation's surface waters that are protective of the water bodies' uses as designated by the states. Since 1980 Arizona has included express protections for ephemeral water bodies in Clean Water Act standards promulgated in rule under Arizona law and approved by EPA. This has been necessary to protect the large ephemeral streams, like the Salt and Santa Cruz Rivers, receiving discharges from large POTWs, but also is necessary to protect ephemeral arroyos from pollution caused by smaller municipal dischargers and industrial dischargers, such as uranium and hard rock mines.

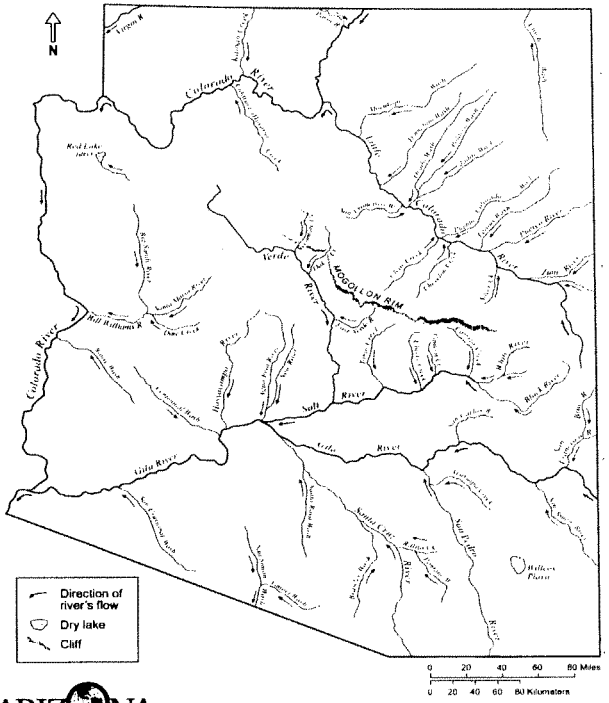
The Clean Water Act also has provided a valuable tool to protect tribal resources in Arizona. Central Arizona tribes, such as the Gila River Indian Community, the Ak-Chin Indian Community and the Tohono O'Oodham Nation, inhabit Reservations with

ephemeral stream networks also tributary to the Gila River. These Communities have been severely impacted by growth surrounding their Reservations. The Clean Water Act point source permitting process and permit conditions have assured these Communities that point source discharges that may reach their Reservations have sufficient water quality protections. Moreover, we have worked with the Ak-Chin Indian Community to stop a proposal for effluent discharges to three arroyos upstream of the Community. The Community's elders and elected leaders objected to the proposal because the Tribe values highly, for cultural reasons, the ephemeral nature of the washes. Arizona will propose in its update of Clean Water Act water quality standards a prohibition on discharges into these special arroyos. Without the Clean Water Act's applicability to ephemeral streams, these protections are not possible.

Though the amount of surface water in Arizona, in dry and normal years, is well below the amount of surface water in many parts of the United States, the rate of pollutant loading to Arizona streams is not significantly different. Arizona's non-perennial streams require at least the same protections from pollution as do perennial streams in order to protect the overall quality of our environment, aquatic life and the people who use those streams.

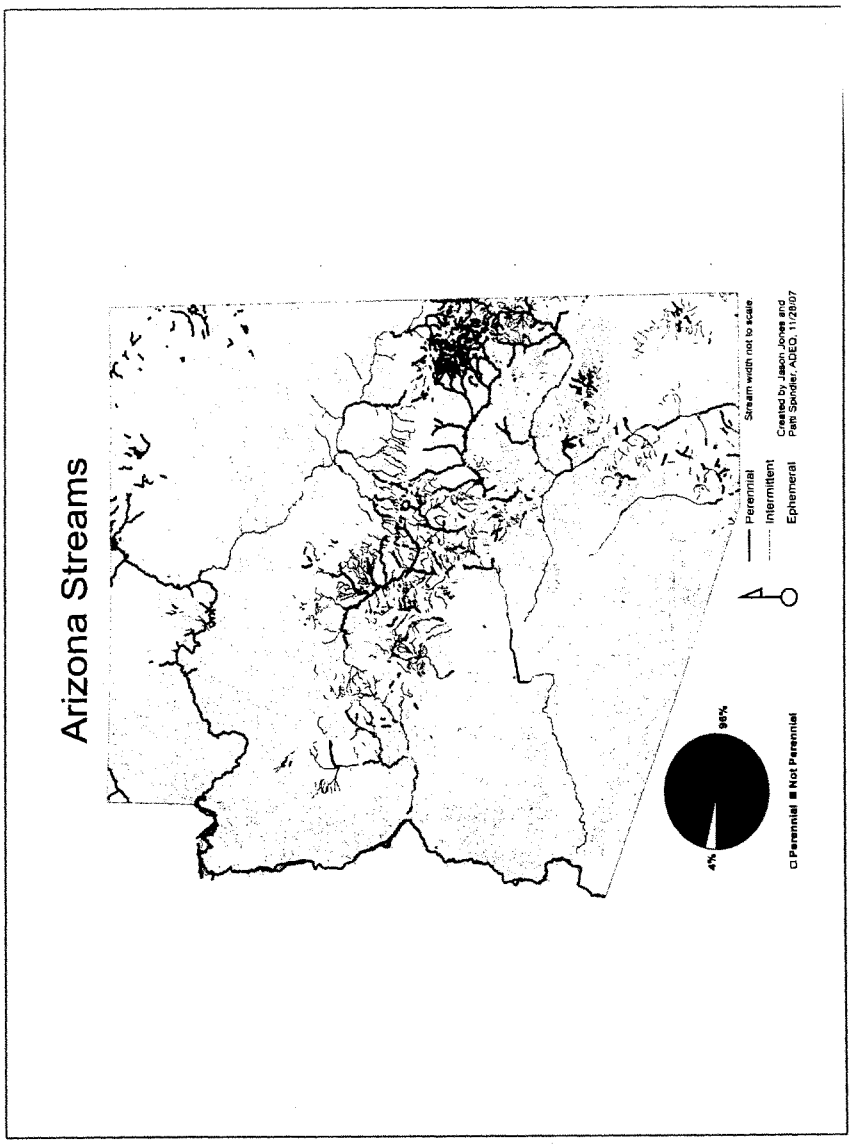
In sum, the impacts of the *Rapanos* Decision and Guidance in Arizona may be widespread, impacting surface water quality standards for nearly all of our surface streams and nearly all of our 160 Section 402 permits for wastewater and stormwater discharges to waters other than the Colorado River. Without these federal Clean Water Act protections, which have been in place for 35 years, my agency may not be able protect Arizona streams for aquatic life uses, including Endangered Species Act listed species like Arizona's native Gila and Apache Trout; we may not be able to protect surface streams for agricultural irrigation use or livestock watering, and we may not be able to prohibit wastewater discharges to our most pristine, high quality streams, like Sabino Creek and the Little Colorado River. See attached photographs. Our Governor and the Arizona Department of Environmental Quality support the Clean Water Restoration Act of 2007 because it ensures the longstanding, pre-*Rapanos*, Clean Water Act programs and protections remain in place to protect the surface water resources in our state. In the Governor's words, in times of explosive growth, long term drought and the impacts of climate change, these water resources are "far too precious to waste."

## Important Rivers, Streams and Washes of Arizona



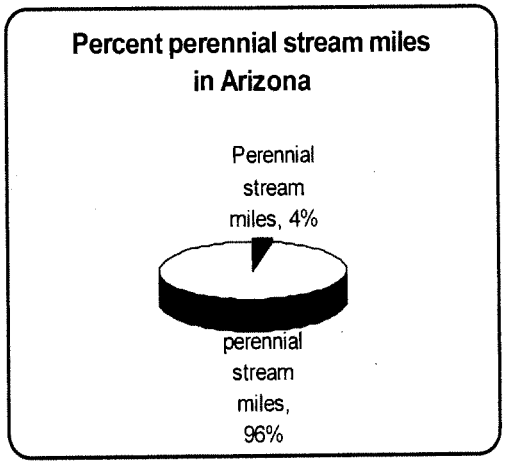

ARIZONA GEOGRAPHIC ALLIANCE

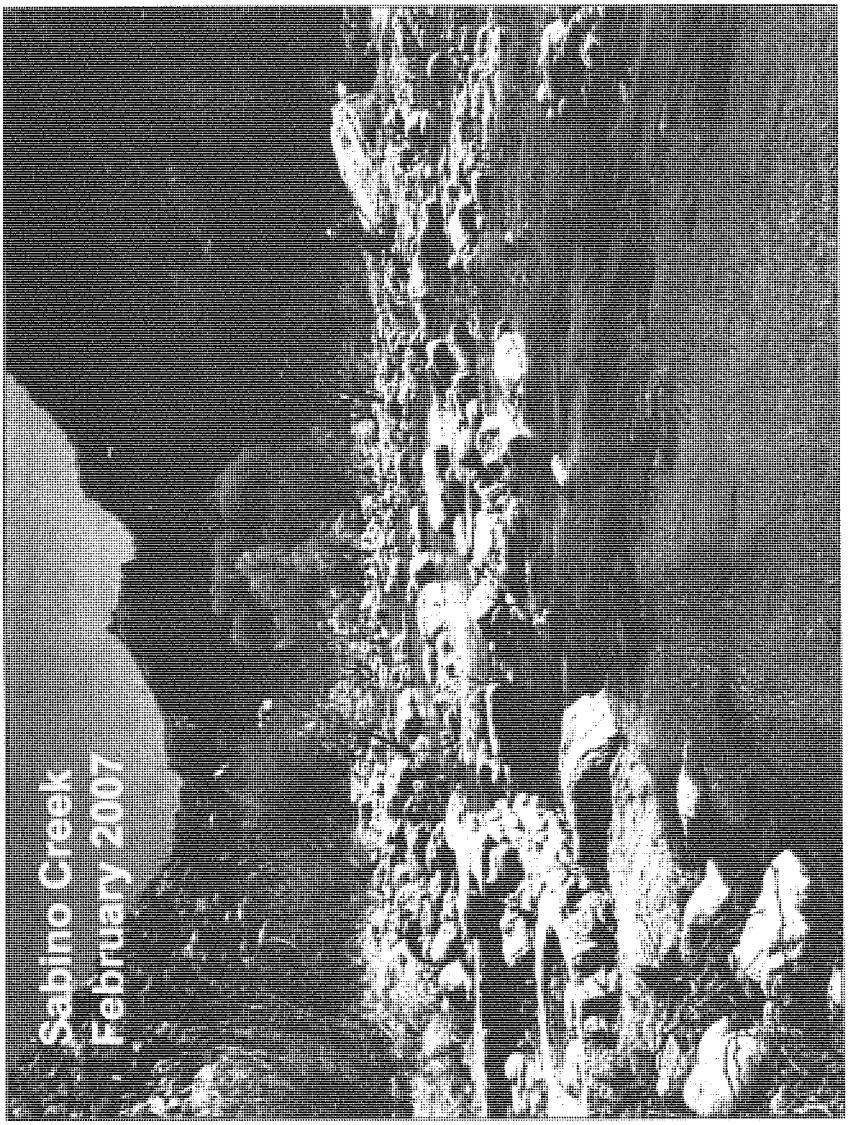
Courtesy: Arizona Geographic Alliance
Department of Geography, Arizona State University
Barbara Trapido-Lurie

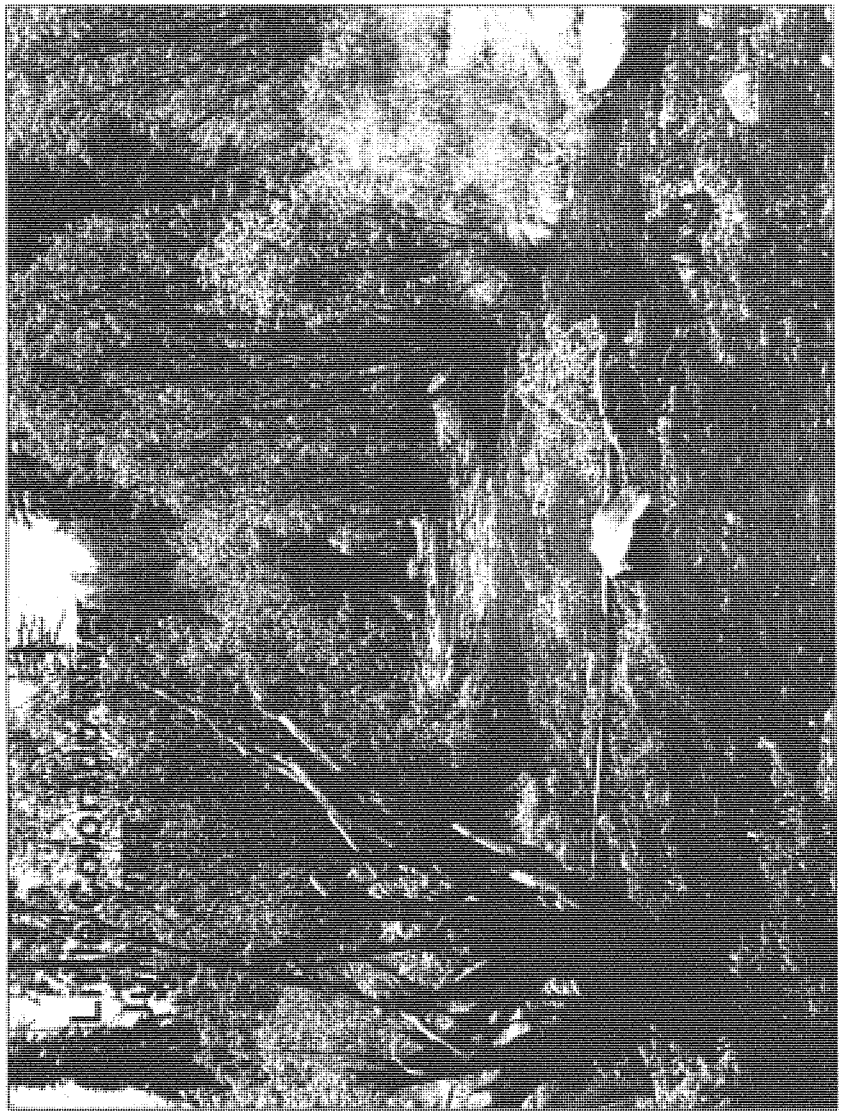

Arizona Streams
Perennial
Intermittent
Ephemeral
Stream width not to scale.
Created by Jason Jones and
Patti Spindler, ADEQ, 11/28/07
96%
4%
Perennial
Not Perennial

| Stream type | Stream miles, statewide (%) | Stream miles, Non-Indian |
|---|---|---|
| Predicted perennial 2007 | 5592 (3.7%) | 4778 (5.3%) |
| Non-perennial 2007 | 144322 (96.3%) | 85597 (94.7%) |
| Total stream miles | 149914 | 90375 |

5592
144322




Sabino Creek
February 2007



## Upper Hassayampa River June 2007

**Corps 'not involved' with sand removal**

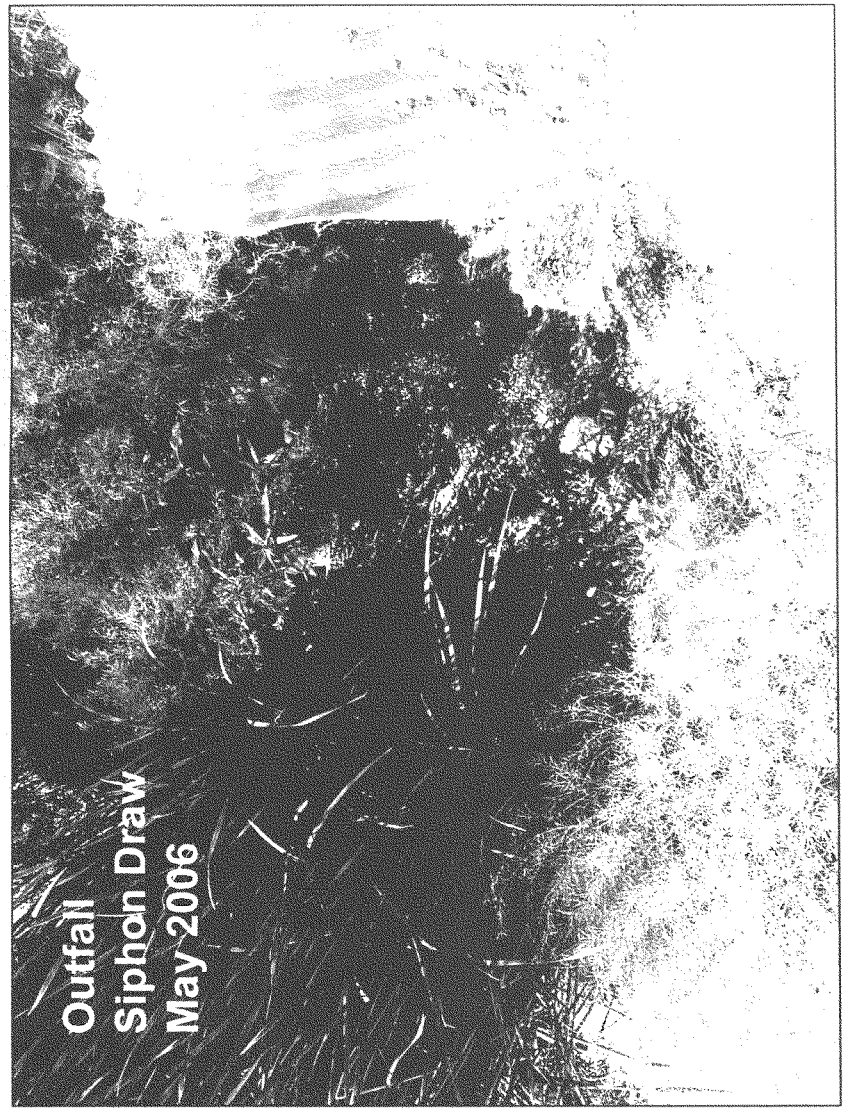
**Doug Balcomb, The Wickenburg Sun**

**March 13, 2008**

**[The], PE, Chief of the Arizona Section Regulatory Branch of the U.S. Army Corps of Engineers recently clarified the role of the Corps in the decision-making process of the bypass through downtown Wickenburg, which is under construction. In a talk to the Wickenburg Rotary Club on Tuesday, March 4, [the Chief] stated that the Corps was not involved in decisions regarding the removal of sand from the Hassayampa River bed or the proposal [illegible] on the east side of the river needed for the [illegible] Since [illegible] 2006 decision by the U.S. Supreme Court [illegible] the Clean Water Act, previously the Corps had [illegible] nearby wetlands, even those that are [illegible] no longer the case.**

Lee Pearson and Alan Hall

www.wickenburg-az.com


Outfall
Siphon Draw
May 2006

Siphonaria
May 2nd

WR


# ARIZONA DEPARTMENT OF ENVIRONMENTAL QUALITY

1110 West Washington Street • Phoenix, Arizona 85007
(602) 771-2300 • www.azdeq.gov

Janet Napolitano
Governor

Stephen A. Owens
Director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April 30, 2008

The Honorable James L. Oberstar, Chairman
U. S. House of Representatives
Committee on Transportation and Infrastructure
Washington D.C. 20515

Dear Chairman Oberstar:

Thank you for the opportunity to testify at the April 16 Full Committee hearing on the Clean Water Restoration Act of 2007 and for your commitment to protect water quality throughout our Nation.

You have requested "specific legislative suggestions to legislatively restore Clean Water Act protection to waters, including wetlands that were subject to the Clean Water Act prior to *SWANCC* and *Rapanos*." As indicated in my testimony, Arizona's principle concern relates to the potential impact of the *Rapanos* decision on Arizona's Section 402 Program, known as the Arizona Pollutant Discharge Elimination System, or AZPDES, as it relates to Arizona's ephemeral, intermittent and headwaters streams. Nevertheless, we have concerns about the impact of *SWANCC* and *Rapanos* on all Clean Water Act programs in Arizona.

The introduced version of the Clean Water Restoration Act strikes the phrase "navigable waters" throughout the Clean Water Act. Many concerns in opposition to this concept have been raised. While we support the introduced bill as a clarification of pre-*Rapanos* jurisdiction as generally applied by the agencies and courts over the 35 year history of the Act, we believe that our concerns also may be addressed without striking the navigability requirement so long as the legislation clearly preserves the "tributary rule." This concept holds that tributaries of navigable waters, no matter their order, size or distance, are subject to the Clean Water Act's programs and requirements.

For example, to alleviate our concern about *Rapanos*' impact on the AZPDES programs, we would support legislation that amended the Act's reach to "navigable waters and their tributaries, including intermittent and ephemeral streams, and wetlands adjacent to either." With respect to isolated waters, we support protection of "intrastate lakes," "wetlands," "sloughs," "wet meadows," "playa lakes," and "natural ponds," all of which have been regulated as jurisdictional by the agencies under the Code of Federal Regulations. Further, we support the inclusion in the legislation of all existing regulatory exemptions from Clean Water Act jurisdiction, including the exemption for "prior converted cropland" that is being used to grow crops.

Finally, we are mindful that federal agency implementation of the Section 404 permitting program long has been controversial across the Nation and of late its application has been controversial in Arizona. We support a simplified and more flexible process for states to assume delegation of all or part of the Section 404 program to help ensure proper program scope and clarity.

We are honored and grateful for the opportunity to assist your effort to protect our Nation's water quality.

Sincerely,

Joan Card

Joan Card, Director
Water Quality Division

**STATEMENT OF**

**THE HONORABLE ROBERT COPE**
**COUNTY COMMISSIONER**
**LEMHI COUNTY, ID**

**ON BEHALF OF THE NATIONAL ASSOCIATION OF COUNTIES**

**THE CLEAN WATER RESTORATION ACT OF 2007**

**BEFORE THE HOUSE TRANSPORTATION AND INFRASTRUCTURE COMMITTEE**

**APRIL 16, 2008**

**WASHINGTON, DC**

25 Massachusetts Avenue, NW | Suite 500 | Washington, DC 20001 | 202.393.6226 | fax 202.393.2630 | www.naco.org

Chairman Oberstar, Ranking Member Mica, and distinguished members of the Transportation and Infrastructure Committee, thank you for the opportunity to testify on behalf of the National Association of Counties (NACo).

My name is Robert Cope and I am an elected county commissioner from Lemhi County, ID. I also serve as Chairman of NACo's Environment, Energy and Land Use Steering Committee, a large and diverse committee representing many county views. I have been a county commissioner seven years and a past President of the Western Interstate Region Board of Directors.

As a county commissioner and as an appointed NACo chair, I take my responsibilities very seriously, as do our nation's elected and appointed county officials. Let me stress our nation's counties believe in the Clean Water Act (CWA) and its accomplishments. The CWA was instrumental in cleaning our waterways. State and local governments play an important role in implementing the CWA and we do our part proudly. Our counties work very hard in meeting the goals of the Clean Water Act while bearing a heavy responsibility to protect the health, welfare, and safety of their citizens, as well as maintain and improve their quality of life. Counties have risen to the challenge, while protecting the environment through a variety of environmentally-oriented and cost-effective programs.

I want to thank you for allowing me to be apart of today's hearing on H.R. 2421, Clean Water Restoration Act (CWRA), a bill that was meant to clarify jurisdictional water issues. Unfortunately, as written, NACo cannot support the bill. Removing the word "navigable" from the definition of the CWA act will have expensive, far-reaching and unintended consequences for local as well as state governments.

NACo did not come to this conclusion lightly – four committees of over 300 people, a 125 member board of directors, and several thousand NACo members – vetted our position and came to this conclusion.

Let me emphasize again that counties are not opposed to the CWA, we support it. However, we are opposed to what we see as an alarming expansion of the federal reach of the Act under the proposed bill. Any reasonable person would understand that, from a definitional standpoint, there is a difference between "waters of the U.S." and "navigable waters of the U.S." Since 1972, the word "navigable" has had meaning – it has been fought over and clarified through court battles. The word "navigable" sets boundaries between federal and state waters, it states where federal waters end and state waters begin. Taking out the word "navigable" removes those boundaries. Furthermore, the bill makes no attempt to clarify through statue what congressional intent is or is not.

If the sponsors do not intend to regulate specific activities or wet areas, they need to clearly state that. Otherwise, this bill could and probably will be interpreted very broadly, going far beyond where the current Act goes. This will lead to even more confusion and costly lawsuits about what is and is not jurisdictional. That is why we believe that CWRA is an expansion.

The bill's sponsors state that the purpose of the bill is to restore the historical protections of CWA. To what time period? It is our experience that since CWA was passed in 1972, there has never been a fixed set of jurisdiction definitions in place. These have been ever-changing in regulations and guidance. For example, in the 1970's manmade ditches were not considered "waters of the U.S." In the 1980's, manmade ditches were generally not "waters of the U.S." however, that determination was made on a case-by-case basis. By 2000, only ditches in upland areas were not considered "waters of the U.S."

We agree with the sponsors of the bill that certainty is needed in the jurisdictional process, however, we do not believe that H.R. 2421 is the mechanism in which to get there. As written, there are no governing boundaries defining where federal waters end and a state's waters begin. Additionally, we believe it would create significant bureaucratic obstacles and lead to increased costs to counties without enhancing environmental protections of waterways and wetlands. Essentially, it would mean more paperwork for us, without ensuring clean water.

It is important to remember that counties are both the regulators and the regulated when it comes to the Clean Water Act (CWA). It is on the regulated front that counties may take the biggest hit, especially in the Army Corps of Engineers (USACE) 404 permit program. Once a project requires a 404 permit, it then triggers application of other federal laws. This ultimately means additionally costs and time delays.

We are not saying that the permit process is not a valuable program, because it is, as long as everything is not considered potentially jurisdictional. The bill needs to clearly define what is and is not jurisdictional, rather than leaving it up to the agencies for interpretation.

Additionally, we have several other concerns: removing the word "navigable" from the definition of the Clean Water Act (CWA); including intrastate waters and tributaries in the definition; and including all activities affecting these waters. We believe that these changes will drastically expand federal clean water act jurisdiction.

Counties are out there pursuing proactive water projects at the local level, with these goals in mind, and have had amazing results. NACo is proud of these counties. For example, Lake County, Illinois, balances protection of wetlands and water resources with economic development through its countywide Watershed Development Ordinance (WDO). Over 3, 856 acres of isolated wetlands were protected through the WDO. The WDO has reduced flooding incidences, countywide, while ensuring economic growth and protecting important resources. Orange County, Florida, a low-lying, rapid growth area, promotes community involvement on floodplain management activities, while promoting wetlands conservation and stormwater management. Worcester County, Maryland, restored county stream banks through its Stream Restoration, Enrichment and Attitudes for Success (SEAS) program. SEAS offered at-risk youth the opportunity to participate in scientific research by restoring stream banks and monitoring water quality. These are just a few of the county-driven water quality programs nationwide that have produced positive results. We would encourage further investment and collaboration for these local-based programs.

Additionally, NACo has a number of assistance programs to educate and support counties in water and wetlands resource management. NACo has provided technical and financial assistance to counties on a range of water resources topics including: wetlands restoration, watershed management and source water protection. County best practices are shared throughout the membership through conference workshops, publications and fact sheets. The longstanding Five Star Wetland Restoration program is a collaborative effort of NACo, the Wildlife Habitat Council and the National Fish and Wildlife Foundation to provide 'seed' grants for community-based wetland and stream-bank restoration projects around the country. To date, over 16,800 acres of wetlands have been enhanced and 109 miles of streams have been restored through 433 projects.

There also has been some confusion about the NACo policy process itself, how do we set policy, etc. This process will be explained later in the testimony.

One of the basic tenets of NACo philosophy centers on a state and local governments' responsibility to oversee state and local planning policies, processes and decisions. Counties are responsible for a wide range of activities designed to protect the health and well-being of their citizens. The fear is that H.R. 2421 may preempt some of these ingrained local land use decisions. This stems from the fear that, H.R. 2421, as written, may be interpreted extremely broadly by both the Courts and the regulators.

While a broad interpretation would affect counties on many different levels, no more so than in the Army Corps of Engineers 404 permit program. There could be limitless possibility of future federal permits required to do things such as construct a new driveway or simply cross a swale on an individual's property.

Counties are responsible for a number of manmade ditches, such as storm channels and road-side ditches. Currently, they face tremendous challenges getting permits approved in a timely manner. For example, in some California counties this becomes a detriment when debris clogs storm channels, which in turn floods homes. The county then deals with angry residents who don't understand why the county has to wait for 404 permit approval before they can clean the channel out.

Additionally, state and federal money is sometimes tied to county road projects, if a project is delayed due to delayed 404 permit approval, the county faces losing much needed money to complete a road project. Just last week when one of our elected county engineers from Ohio, David Brand, testified before the Senate Environment and Public Works Committee, he stated that in his experience "most permits get denied the first time" they are submitted. The total length of time "is closer to 12 months" for approval, rather than the three months stated by the bill's sponsors.

The cost associated with getting these permits can be costly, especially for a rural county who does not have the manpower, knowledge, or the extra monies. If a project is delayed due to delayed 404 permit approval, the county faces losing much needed money to complete a road project or at the very least yearly cost increases currently averaging 10% per year.

NACo recognizes that the current system is not ideal. Our counties would like to have certainty in the jurisdictional process and overall in the Clean Water Act. However, we also recognize that a one-size-fits-all system will not work. Geographical features differ widely across this nation. Any federal plan needs to take into account these regional differences and plan accordingly. CWRA is essentially a one-size-fits-all approach, sweeping all waters and perceived waters into its definition.

That indeed was the major tenet of Supreme Court Justice Scalia's Plurality decision in the *Rapanos* case when he wrote, "In applying the definition [of waters of the United States] to "ephemeral streams," "wet meadows" storm sewers and culverts, "directional sheet flow during storm events," drain tiles, man-made drainage ditches, and dry arroyos in the middle of the desert, the Corps has stretched the term "waters of the United States" beyond parody. The plain language of the statue does not authorize this "Land is Waters" approach to federal jurisdiction" 126 S.Ct. at 2222 (2006). The CWRA, as written, could be interpreted extremely broadly by both the Courts and the regulators, without regard for state and local responsibilities that the current act maintains.

As stated before, we do agree on the fact that, there are areas within the CWA that are not working as well as they could be. However, we do not believe this bill is the answer. Ultimately, this bill will cause more bureaucracy and paperwork than clean water.

Who are counties?

There are 3,066 functioning county governments nationwide. They range in size from 26 square miles to over 87, 000 square miles. Similarly, the population of counties varies tremendously from 67 residents to just under 10 million. But, it's important to remember that most of the counties in this nation, over 2,200 counties, are considered rural, because they have a population of less than 50,000 people.

Local governments, especially those in the under 50,000 category, provide many services on very limited budgets. Elected officials are often part time, with minimal support staff. Their average budgets are approximately $18 million. And they stretch these budgets over a wide variety of mandatory expenses from education, public welfare, health care, highways, police, to fire. Local governments are the direct service providers for our citizens, the first line of defense, where the rubber meets the road. Our counties pride themselves on at the local level, doing more with less.

Counties have risen to the challenge, by protecting the environment through a variety of environmentally-friendly and cost-effective programs. You have heard this through previous testimony on the House side from Benjamin H. Grumbles, Assistant Administrator for Water at the U.S. EPA. He stated that the United States Environmental Protection Agency (EPA) has leveraged $25 billion through the Clean Water State Revolving Loan Fund into $61 billion in wastewater infrastructure and water quality projects over the last 19 years as a result of partnerships with state and local government (Committee on Transportation and Infrastructure, United States House of Representatives, October 18, 2007).

County Responsibilities in CWA

Counties have a unique role in the protection of natural resources for they are both the regulator and the regulated under the Clean Water Act. In the role of regulator, counties administer a number of CWA programs that regulate water quality: storm water management and flooding, water quality management plans, Total Maximum Daily Load (TMDLs), etc. Additionally, many states require, as part of the state water acts, primary implementation at the local level. Coastal zone management acts in Alaska and California, fresh water acts in Massachusetts, Connecticut, Florida and Maryland, and in Virginia. An increase in the scope of CWA jurisdiction would increase the local scope in all these programs.

In the role of the regulated, counties are responsible for a number of public infrastructure projects, including roads and manmade ditches that would require wetland permits. We've heard nightmarish stories from our counties who have had jurisdictional problems on projects. NACo has documented both commonplace and extreme stories. Some Washington and California state counties tell us they have mitigation requirements in the millions...just for one road project.

CWA Permit Process

When a project is deemed jurisdictional, that means the project requires a federal CWA permit. In my experience, these are cumbersome, expensive, and time-consuming to obtain.

Once jurisdictional, the project is then subjected to a multitude of regulatory requirements required under CWA. It triggers application of other federal laws like environmental impact statements, NEPA and impacts on ESA. These involve studies and public comment periods, all of which can cost both time and money. And often, as part of the approval process, the permit requires the applicant to "mitigate" the environmental impacts of the proposed project, sometimes at considerable expense.

Additionally, the Army Corps of Engineers who oversees the 404 permit program is already significantly behind in processing permits. All this bill would do is increase the number of projects that are deemed jurisdictional, while increasing the Corps' burden. This is folly.

One such example centers on the spraying of pesticides. Let's say that there has been an outbreak of West Nile Virus and the county has to quickly respond by spraying mosquito breeding grounds to kill the larva. Under this bill, technically, the spraying would be a point source affecting the waters. The county would have to wait for a permit before it could spray, leaving its citizens further at risk. Far-fetched? Not anymore. Due to the Ninth Circuit's *Talent* decision, municipalities and private landowners in Washington state are required to get permits for spraying activities that have the potential to flow into streams, wetlands, lakes, constructed drainage systems (including ditches), or other waters.

Current NACo Policy Regarding CWRA

This past July, NACo membership chose to build on their existing language and passed a resolution in opposition to removing the word "navigable" from the CWA. The policy also opposes any expansion of Army Corps of Engineers authorities. This language was approved through four NACo steering committees, the Board of Directors and the NACo membership.

Prior to this position, NACo had policy to oppose any efforts to classify manmade ditches (such as roadside ditches, etc.), streets and gutters as "waters of the U.S." This policy was first passed over five years ago and has been reaffirmed every year since.

NACo Policy Process

The NACo resolutions process provides the membership with the ability to create national policies affecting county governments. The process is intended to be as open as possible, in order to allow participation from the entire membership. More importantly, it is vital to note that all policy is originated and passed by NACo members. It is vetted via a through process, moving from steering committee to the Board of Directors and ultimately, to the NACo membership, as a whole, to review.

NACo has eleven policy setting steering committees, including the Environment, Energy and Land Use Steering Committee. Steering committees annually review and make recommendations on issues and legislation through resolutions and the platform process. The policy development process initiated by the steering committees leads to the publication of the American County Platform, which NACo uses as a guide to deliver the county government message to the Administration, Congress and the American public. The platform contains our long term policy and can only be changed once a year at the Annual Conference.

Resolutions, on the other hand, are meant for short term policy issues. They are valid, anywhere from several months to one year, depending on whether they were passed at the Annual Conference or and the Legislative Conference.

The policy process is completely member-driven. The policies are only submitted by NACo members and only voted on by NACo members. Like all important issues, there will be opponents to agreed upon policies, but the wishes of a loud vocal minority cannot prevail over the majority.

Intrastate Waters in the CWRA

We have concerns with several phrases within the bill, beyond the "navigability" issue. First, is the classification of "intrastate" waters as "waters of the U.S." with CWRA. This is problematic since historically, states have been responsible for setting water quality standards in intrastate waters.

We believe CWRA would impose significant new administrative requirements on state and local governments. This means that the states would be required to expand their current water quality designations to include all waters within the state, not just high priority waters. It would change reporting and attainment standards, including preparation of total maximum daily loads and allocations where necessary.

For example, many counties, in the role of regulator, have their own watershed/storm water management plans that would also have to be modified based on federal and state changes. Counties would then have to oversee all of the "waters" within its border. Changes at the state level would impact comprehensive land use plans, floodplain regulations, building and/or special codes, watershed and stormwater plans, etc.

Local governments, large and small, are also responsible for a number of public infrastructure projects that may be impacted by the proposed changes. These include: roads, gutters, and ditches; drainage channel maintenance; pesticide application, mosquito control, and fire retardant sprays; sewers and wastewater disposal, including settling ponds; water supply, transfers, and rights; solid waste disposal; county owned/operated airports; stormwater detention infrastructure; erosion control; maintenance/construction of county-owned schools, nursing homes, hospitals, any municipal buildings; marinas, dams, and reservoirs; parks, greenways, and forestlands; cleanup/ rebuild after natural disasters; and economic development.

To classify "intrastate" waters as "waters of the U.S.," will eliminate the current separation between the state and federal government, bringing the federal government into local land use decisions. Federal preemption of state and local law presents a very serious challenge to our constitutional system of federalism. By preempting state and local laws, you reduce the ability of state and local governments to do their job effectively. If a local government has been preempted, then its ability to respond quickly is taken away.

Groundwater and the CWRA

Currently, most states specifically list groundwater in their definition for "waters of the State." However, if intrastate waters are classified as "waters of the U.S." the language as written, could be interpreted broadly to mean every wet area within a state, including groundwater. Additionally, the bill could be interpreted in future rulemaking, to include ditches, gutters and streets.

Tributaries, AKA Ditches in the CWRA

Ditches are pervasive in counties across the nation and, until recently, were never considered to be jurisdictional by the Corps, until after the 2001 *Solid Waste Agency of Northern Cook County* (SWANCC) Supreme Court decision. Since SWANCC, both the courts and the Army Corps of Engineers have classified ditches, including roadside ditches, as tributaries. CWRA classifies tributaries as "waters of the U.S." This designation is important for counties, since many counties construct and maintain roads and dit

In Ohio, the history of these ditches go back to the 1800's and must be maintained in order to provide the drainage purpose they were constructed for. In Madison County this directly affects over half of the land, the majority of which drains directly to the two Darby National Scenic Rivers. We have managed this resource and ditches concurrently at the local level very well.

Numerous NACo members have voiced concern regarding officials at local Corps offices deciding to regulate man-made ditches as jurisdictional waters under the CWA. While some Corps offices regulate ditches, other offices have continued the existing policy of not regulating them. This expansive and inconsistent application of the law frustrates many counties' ability to provide and conduct vital projects for the public.

For example, one Midwest county received Federal Highway Authority funding to replace two old county bridge structures. The Corps determined that because the project would impact 300 feet of a roadside ditch, the county would have to go through the individual permit process.

The county disagreed with the determination but decided to acquiesce to the Corps rather than risk further delay and the withdrawal of federal funding. The cost associated with going through the Corps process required the county to significantly scale back its intended project in order to stay on time and budget. Ultimately, the project's completion was still delayed by several months.

The delay that can result from regulating local drainage features is evidenced by another Midwestern county that wanted to conduct a storm water improvement project to address local flooding concerns. The project entailed adding a second structure to a concrete box culvert and replacing a corrugated metal culvert. These structures were deemed jurisdictional by the Corps because they had a "bank on each side" and had an "ordinary high water mark." Thus, the county was forced to go through the individual permit process.

The delay associated with going through the federal process nearly caused the county to miss deadlines that would have resulted in the forfeiture of its grant funds. Moreover, because the project was intended to address flooding concerns, the delay in its completion resulted in the flooding of several homes during heavy rains. The county was also required to pay $10,000 in mitigation costs associated with the impacts to the concrete and metal structures.

Ultimately, no changes were recommended by the Corps to the project, and thus, no additional environmental protection was provided by going through the federal process.

"…Activities affecting these waters" in the CWRA

The bill goes on to include "activities affecting these waters." While the intent may be to limit nonpoint and point sources going into major water sources, it could be interpreted quite differently. This language could be interpreted broadly to allow the federal regulation of any and all activities that "affect" waters. The examples listed under intrastate waters are good examples because many are based on previous court cases and Army Corps of Engineers decisions. It is possible that a nonpoint source 10's to 100's of miles away could be regulated, even though there is no direct hydrological connection. This definition does not exist anywhere in current law or regulation.

As written, the bill leaves more questions than answers. This bill does nothing to bring about clean water; it only dooms us to more legal wrangling at the federal level and uncertainty at the local level. It will lead to more lawsuits over the interpretation of limits, not less. The sponsors of the bill state that its purpose is to restore historic protections for waters (prior to the 2001 SWANCC decision). That is a difficult to believe when the bill does nothing more than removes words from the original act. Restoring by rewriting is a new concept. However, the truth is, since the CWA passed in 1972, the determination of what is "navigable" or jurisdictional has changed through the years because of the lack of clear language and agency rulemaking.

I want to assure you that counties are committed to keeping our waterways safe for generations to come. We do believe that the objective of clean water is attainable however we also believe that it will take a variety of methods to reach that goal. Primarily, we need strong partnerships among all levels of government, flexibility, and workable definitions that do not create an

unnecessary burden on local governments, and incentives that bring all levels of government to the table, like the Clean Water Act did. We have some ideas and would love to share them with you.

To that end, last summer the President of NACo set up the Waters of the U.S. Task Force within NACo, comprised of NACo members, to study alternative CWA language proposals beyond the issue of navigability. This task force has been meeting on a biweekly schedule. They will present their recommendations to NACo membership this July. At that point, I should have a more detailed plan to present to you. In the meantime, I can provide some suggestions based on our existing policy:

1). Collaboration among all levels of government - We need coordinated federal, state and local programs to manage, protect, conserve and restore water resources in local communities, including innovative and non-regulatory approaches. We believe the federal government should provide financial and other incentives to support the most cost effective, multi-jurisdictional watershed planning and management programs to meet water quality goals. This should include loans and grants to counties to meet all CWA mandates imposed on counties. The use of loan or grants should be tailored to the specific needs and capacity of each county, including the county's ability to pay.

2). Flexibility – We recognize that it will take a coordination of various programs to ensure clean water. We believe that local governments should be involved in all levels of water management planning, however, there needs to be an acknowledgment that a one-size-fits-all strategy will not work. Geographic features differ widely across this nation, as do local ecological features. The decisions on how to protect them is best left up to state and local governments. State and local governments should have the flexibility to implement programs that will protect public health balanced with environmental and economic impacts. Additionally, we support flexible and voluntary water quality trading policies that control and reduce watershed nonpoint pollution.

3). Wetlands mitigation requirements - NACo supports a requirement to offset unavoidable wetland loss by mitigating, restoring through enhancement of existing wetlands, or creating new wetlands, when public need requires that public facilities, utilities, or improvements be developed over sensitive ecological areas. Additionally, local streets, gutters and human made ditches should not be classified as "waters of the U.S."

4). Water conservation, reclamation, recycling, reuse and desalination incentives and projects – Water scarcity issues used to be known strictly as a western problem. In the past several years, however, it has become a national problem. Local governments are the first line of defense when weighing their options on how to best protect their citizens, and lack of clean, affordable water is no exception. Many counties nationwide have been on the cutting edge of technology, integrating water resources planning into their local land use plans and everyday lives. Whether it is water conservation, reclamation, or reuse, local governments and innovative individuals are out there making dreams a reality. NACo supports federal financial and technical assistance to state and local governments to design, implement, and evaluate appropriate water conservation measures. Further research and grant programs

should focus on water reclamation, recycling, reuse, and desalination. Federal reserved water rights should be determined in state courts and administered based on local and state water conservation and development plans.

These are just a few of the ideas that I can offer on behalf of NACo until our task force completes its work this July. I want to assure you that counties are committed to keeping our waterways safe for generations to come. We look forward to working with you and other members to build an effective partnership among all levels of government for this purpose. I believe that we can achieve this vision together. I would be glad to entertain any questions from the committee.

April 30, 2008

The Honorable James Oberstar
Chairman
Committee on Transportation and Infrastructure
2165 Rayburn House Office Building
Washington, DC 20515-2215

Dear Chairman Oberstar:

Thank you for your letter dated April 18th, 2008 on the Clean Water Restoration Act (H.R. 2421) hearing before the House Transportation and Infrastructure Committee. I would like to thank you for the opportunity to testify on behalf of the National Association of Counties (NACo).

As you do, NACo treasures the Clean Water Act (CWA). The Act has been instrumental in cleaning up this nation's water and waterways. Counties play an important role in implementing the Clean Water Act and we do our part proudly. Our nation's elected and appointed county officials work very hard in meeting the goals of the Clean Water Act while bearing a heavy responsibility to protect the health, welfare, and safety of their citizens, as well as maintain and improve their quality of life. Counties have risen to the challenge, while protecting the environment through a variety of environmentally-oriented and cost-effective programs.

One of the basic tenets of NACo philosophy centers around a state and local governments' responsibility to oversee state and local planning policies, processes and decisions. Counties are responsible for a wide range of activities designed to protect the health and well-being of their citizens. The fear is that H.R. 2421 may preempt some of these ingrained local land use decisions. This stems from the fear that, H.R. 2421, as written, could be interpreted extremely broadly by both the Courts and the regulators.

NACo recognizes that the current system is not ideal. To that end, NACo's President Eric Coleman set up the Waters of the U.S. Task Force within NACo, comprised of NACo members, to study alternative CWA language proposals beyond the issue of navigability. This task force has been meeting on a biweekly schedule since last year. They will present their recommendations to NACo membership this July. Because of this task force's on-going work, we are unable to present to you legislative language at this time. However, I can provide some suggestions based on NACo's existing policy:

1) Collaboration among all levels of government - We need coordinated federal, state and local programs to manage, protect, conserve and restore water resources in local communities, including innovative and non-regulatory approaches. We believe the federal government should provide financial and other incentives to support the most cost effective, multi-jurisdictional watershed planning and management programs to meet water quality goals. This should include loans and grants to counties to meet all CWA mandates imposed on counties. The use of loan or grants should be tailored to the specific needs and capacity of each county, including the county's ability to pay.

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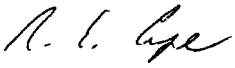
2) Flexibility – Our counties would like to have certainty in the jurisdictional process and overall in the Clean Water Act. However, we also recognize that a one-size-fits-all system will not work. Geographical features differ widely across this nation, as do ecological features. Any federal plan needs to take into account these regional differences and plan accordingly. The decisions on how to protect them is best left up to state and local governments so they have the flexibility to implement programs that will protect public health balanced with environmental and economic impacts. We also recognize that it will take a coordination of various programs to ensure clean water. Additionally, we support flexible and voluntary water quality trading policies that control and reduce watershed nonpoint pollution.

3) Wetlands mitigation requirements - NACo supports a requirement to offset unavoidable wetland loss by mitigating, restoring through enhancement of existing wetlands, or creating new wetlands, when public need requires that public facilities, utilities, or improvements be developed over sensitive ecological areas. Additionally, local streets, gutters, human made ditches and prior converted croplands should not be classified as "waters of the U.S."

4) Water conservation, reclamation, recycling, reuse and desalination incentives and projects – Water scarcity issues used to be known strictly as a western problem. In the past several years, however, it has become a national problem. Local governments are the first line of defense when weighing their options on how to best protect their citizens, and lack of clean, affordable water is no exception. Many counties nationwide have been on the cutting edge of technology, integrating water resources planning into their local land use plans and everyday lives. NACo supports federal financial and technical assistance to state and local governments to design, implement, and evaluate appropriate water conservation measures. Further research and grant programs should focus on water reclamation, recycling, reuse, and desalination. Federal reserved water rights should be determined in state courts and administered based on local and state water conservation and development plans.

These are just a few of the ideas that I can offer on behalf of NACo until our task force completes its work this July. I want to assure you that counties are committed to keeping our waterways safe for generations to come. We look forward to working with you to build an effective partnership among all levels of government for this purpose. I believe that we can achieve this vision and I look forward to working with you.

Sincerely,



Robert E. Cope,
County Commissioner – Lemhi County, ID
Chairman, NACo's Environment, Energy and Land Use Steering Committee

CC: Ranking Member John L. Mica

# Department of Justice

STATEMENT

OF

JOHN C. CRUDEN
DEPUTY ASSISTANT ATTORNEY GENERAL
ENVIRONMENT AND NATURAL RESOURCES DIVISION

BEFORE THE

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
U.S. HOUSE OF REPRESENTATIVES

ENTITLED

"THE CLEAN WATER RESTORATION ACT OF 2007"

PRESENTED ON

APRIL 16, 2008

STATEMENT OF
DEPUTY ASSISTANT ATTORNEY GENERAL JOHN C. CRUDEN
BEFORE THE
HOUSE TRANSPORTATION AND INFRASTRUCTURE COMMITTEE
APRIL 16, 2008

## INTRODUCTION

Chairman Oberstar, Representative Mica, and Members of the Committee, I am pleased to be here today to discuss jurisdiction under the Federal Water Pollution Control Act (the Clean Water Act or CWA). I am joined by Benjamin Grumbles, the U.S. Environmental Protection Agency Assistant Administrator for Water, John Paul Woodley, Jr., Assistant Secretary of the Army for Civil Works, and Arlen L. Lancaster, Chief, Natural Resources Conservation Service, U.S Department of Agriculture. They will provide an overview of national policy and guidance, as well as EPA, Corps of Engineers, and Agriculture responsibilities, under the CWA. I will focus on litigation handled by the Department of Justice in response to the Supreme Court's decision in Rapanos v. United States, 547 U.S. 715 (2006).

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

In this testimony, I will first provide a brief overview of our CWA docket. I will then outline the statutory and U.S. Supreme Court background for the Rapanos decision, the position of the United States in that litigation, and the Supreme Court holding. I will then turn to what actions the Department of Justice has taken since the issuance of the decision and the current status of Rapanos-related litigation in the lower courts.

As this Committee knows, however, the position of the United States in litigation is expressed in briefs we file with the courts. Our legal position must be tied to the facts and take into account the precedent within the jurisdiction in which we are litigating. In addition, because we litigate cases on behalf of the United States, we coordinate with potentially affected Federal agencies before we file a brief. Accordingly, although I will describe to you our work related to this important decision, my testimony should not be used in litigation in any particular case. Instead, the position of the United States in any litigation will be articulated in the context of that case.

AN OVERVIEW OF OUR CLEAN WATER ACT DOCKET

The Department of Justice's primary role with regard to the CWA is to represent the Environmental Protection Agency ("EPA"), the Army Corps of Engineers ("Corps"), and any other Federal agency that might be involved in litigation that arises pursuant to the CWA.

ENRD and U.S. Attorneys across the country frequently bring actions to enforce the CWA. Three sections in ENRD handle CWA enforcement actions. Civil enforcement cases are generally handled by our Environmental Enforcement Section, except cases brought pursuant to CWA section 404, which are handled by our Environmental Defense Section or U.S. Attorneys' Offices. Criminal enforcement of the CWA is handled by our Environmental Crimes Section and U.S. Attorneys' Offices.

CWA civil judicial enforcement actions generally begin with a referral or investigation by another Federal agency, whether it is EPA or the Corps, regarding alleged violations of the CWA. By the time we receive a referral, the agency in question has usually considered all avenues for resolving the dispute administratively, and has carefully considered whether judicial enforcement is the appropriate course of action. Upon receiving the agency's recommendation, we conduct our own internal independent review and analysis to determine whether there is sufficient evidence to support the elements of the violation and whether the case is otherwise appropriate for judicial action. If we determine that judicial enforcement is warranted, we prepare a complaint and then typically offer to engage in pre-filing settlement discussions in accordance with Executive Order 12988.

Many environmental violations, including CWA-type violations, are addressed and resolved by State and local governments. In the wetlands area, most Federal enforcement of the CWA occurs at the administrative level and is carried out by EPA and the Corps, and does not involve the Department of Justice. In this regard, I note the Corps implemented an administrative appeals process in 2000. The process allows disputes over whether a site is subject to Corps jurisdiction under the CWA (so-called "jurisdictional determinations") to be resolved before a matter gets to the point of potential litigation, which is when the Department of Justice would get involved.

ENRD also defends Federal agencies that are being sued in connection with the CWA. Such actions can take a variety of forms. For example, affected parties will sometimes bring an action against the Corps or EPA challenging the grant or denial of a CWA permit. Regulated entities, environmental interests, and public entities such as municipalities may also seek judicial review when the Corps or EPA makes broader policy decisions such as those embodied in a rulemaking. Finally, Federal agencies can be sued for discharging pollutants into waters of the United States if they have not complied with the applicable requirements of the CWA.

In sum, the Division, in conjunction with U.S. Attorneys' Offices across the nation, litigates CWA actions that involve the United States. Our docket is significant, involving both defensive cases and civil and criminal enforcement. One part of the CWA docket is wetland actions, which are clearly impacted by the Supreme Court's decision almost two years ago in Rapanos.

STATUTORY AND CASE LAW CONTEXT FOR THE RAPANOS DECISION

Clean Water Act and Regulations

Congress enacted the CWA in 1972 "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" as provided in section 101(a). A key mechanism adopted by Congress to achieve that purpose is a prohibition contained in section 301(a) on the discharge of any pollutant, including dredged or fill material, into "navigable waters" except in compliance with the Act. The CWA defines the term "discharge of a pollutant" in section 502(12)(a) as "any addition of any pollutant to navigable waters from any point source . . . ." It defines the term "pollutant" in section 502(6) to mean, among other things, dredged spoil, rock, sand, and cellar dirt. The CWA provides in section 502(7) that "[t]he term 'navigable waters' means the waters of the United States, including the territorial seas." Corps and EPA regulations at 33 C.F.R. 328.3(a) and 40 C.F.R. 230.3(s) define the term "waters of the United States" for purposes of the wetlands program.

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

U.S. Supreme Court Decisions Prior to *Rapanos*

In United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985), and subsequently in Solid Waste Agency of Northern Cook County v. United States Army Corps of Eng'rs, 531 U.S. 159 (2001) (SWANCC), the Supreme Court addressed the proper construction of the CWA terms "navigable waters" and "the waters of the United States." In Riverside Bayview, the Court framed the question before it as "whether the [CWA], together with certain regulations promulgated under its authority by the [Corps], authorizes the Corps to require landowners to obtain permits from the Corps before discharging fill material into wetlands adjacent to navigable bodies of water and their tributaries." 474 U.S. at 123. The Court unanimously sustained the Corps' regulatory approach as a reasonable exercise of the authority conferred by the CWA. At the same

time, however, the Court declined "to address the question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water . . . ." Id. at 131-32 n.8.

In SWANCC, the Supreme Court in 2001 faced an issue undecided in Riverside Bayview, and it rejected the Corps' construction of the term "waters of the United States" as encompassing intrastate, nonnavigable, isolated ponds based solely on their use as habitat by migratory birds. 531 U.S. at 171-72. The Court explained that, if the use of isolated ponds by migratory birds were found by itself to be a sufficient basis for Federal regulatory jurisdiction under the CWA, the word "navigable" in the statute would be rendered meaningless. Id. at 172. The Court stated that "[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." Id. A clear expression of Congressional intent, the Court opined, was particularly necessary "where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." Id. at 173. The Court found no such clear indication of Congressional intent in this context.

Following the SWANCC decision, ENRD litigated a number of cases involving CWA jurisdiction, ultimately resulting in decisions by eight Circuit Courts of Appeal (including the Sixth Circuit in Rapanos and Carabell), seven of which generally held that the SWANCC decision applied only to intrastate, non-navigable, isolated bodies of water, and did not affect jurisdiction over tributaries to navigable-in-fact waters or wetlands adjacent to such tributaries. See, e.g., United States v. Johnson, 437 F.3d 157 (1st Cir. 2006), cert. denied, 128 S.Ct. 375 (2007); United States v. Deaton, 332 F.3d 698 (4th Cir. 2003); United States v. Gerke Excavating, Inc., 412 F.3d 804 (7th Cir. 2005), cert. denied, 128 S.Ct. 45 (2007); Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526 (9th Cir. 2001); United States v. Hubenka, 438 F.3d 1026 (10th Cir. 2006), cert. denied, 127 S.Ct. 114 (2007); Parker v. Scrap Metal Processors, Inc., 386 F.3d 993 (11th Cir. 2004).

## THE RAPANOS DECISION

### Lower Court Decisions in *Rapanos* and *Carabell*

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

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

The Supreme Court granted certiorari, in part, on the question whether jurisdiction under the CWA extends to wetlands that are adjacent to tributaries of navigable-in-fact waters. (The Court also granted certiorari on the question whether such an interpretation of the CWA was constitutional, but ultimately did not reach this question.) The United States argued before the Supreme Court that the Corps and EPA acted reasonably in defining the CWA term "the waters of the United States" to include wetlands adjacent to tributaries of navigable-in-fact waters. Petitioners, on the other hand, argued that only wetlands actually abutting traditional navigable waters are included within the statutory term (Rapanos); and that the CWA does not extend to wetlands that are hydrologically separated from any navigable water (Carabell).

The Supreme Court Decision in *Rapanos* and *Carabell*

The Supreme Court vacated and remanded both cases for further proceedings. In summary, four Justices, in a plurality opinion authored by Justice Scalia, concluded that "the lower courts should determine . . . whether the ditches or drains near each wetland are 'waters' in the ordinary sense of containing a relatively permanent flow; and (if they are) whether the wetlands in question are 'adjacent' to these 'waters' in the sense of possessing a continuous surface connection that creates the boundary-drawing problem we addressed in *Riverside Bayview*." 547 U.S. at 757. Justice Kennedy, who concurred in the judgment of the Court, established a different standard, concluding that the cases should be vacated and remanded to determine "whether the specific wetlands at issue possess a significant nexus with navigable waters." Id. at 787. Chief Justice Roberts joined in the plurality opinion and also wrote a concurring opinion. Justice Stevens, in a dissenting opinion joined by Justices Souter, Ginsburg, and Breyer, would have affirmed the decisions by the lower courts. Justice Breyer also wrote a separate dissenting opinion.

The plurality opinion, authored by Justice Scalia, first concluded that the petitioner's argument that the terms "navigable waters" and "waters of the United States" are limited to waters that are navigable in fact "cannot be applied wholesale to the CWA." Id. at 730. Citing the text of CWA Section 502(7) and 404(g)(1), Justice Scalia opined that "the Act's term 'navigable waters' includes something more than traditional navigable waters." Id. at 731. In particular, the Court's plurality opinion emphasized that the relevant statutory text refers not merely to all "water of the United States," but to "the" waters of the United States—meaning bodies of water such as "streams, oceans, rivers and lakes," but not every ditch or other body that may contain water. Id. at 732-33.

Accordingly, the plurality determined that "the waters of the United States" refers to "only relatively permanent, standing or flowing bodies of water. The definition refers to water as found in 'streams,' 'oceans,' 'rivers,' 'lakes,' and 'bodies' of water 'forming geographical features.'" Id. (footnote and citation omitted). The plurality stated that the phrase does not include "ordinarily dry channels through which water occasionally or intermittently flows." Id. at 733. This interpretation gathered further support, reasoned the plurality, from the Act's additional use of the term "navigable waters," as those words confirm that CWA jurisdiction lies not over every body of water, but over only those "relatively *permanent* bodies of water." Id. at 734. The Corps' interpretation of the term "the waters of the United States," the plurality concluded, was not based on a permissible construction of the statute.

Justice Scalia elaborated on the plurality's standard in a footnote. He stated:

> By describing "waters" as "relatively permanent," we do not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought. We also do not necessarily exclude *seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months--such as the 290-day, continuously flowing stream postulated by Justice Stevens' dissent. . . . It suffices for present purposes that channels containing permanent flow are plainly within the definition, and that the dissent's "intermittent" and "ephemeral" streams . . . that is, streams whose flow is "[c]oming and going at intervals . . . [b]roken, fitful," . . . or "existing only, or no longer than, a day; diurnal . . . short lived" . . . are not.

Id. at 732-33 n.5 (citations omitted).

Responding to arguments about the purposes of the CWA, the plurality noted that only its construction of the statutory text comported with the stated "'policy of Congress'" to ensure preservation of the States' roles in preventing and reducing pollution. Id. at 737. By contrast, Justice Scalia explained, an overly expansive interpretation ascribed to this text would significantly impinge on the States' traditional and primary authority over land and water use, and would encourage the Corps to function as a de facto regulator, as if it were a "local zoning board." Id. at 738. Later, the plurality opinion pointed out that, ultimately, it is the language of the Act actually passed by Congress that is controlling. Id. at 751-52; see also id. at 745 (rejecting arguments that narrowing the CWA jurisdictional language would "hamper federal efforts to preserve the Nation's wetlands" and reasoning that the Court had before it only the statutory text adopted by Congress, not a "Comprehensive National Wetlands Protection Act").

Finally, the plurality found insufficient legislative evidence of Congressional "acquiescence," reasoning that its precedents have required "overwhelming evidence" to support an argument that Congress had acceded to an agency's interpretation, and that this evidence was simply lacking here. Id. at 750.

The plurality also examined the factor of the adjacency of the wetlands under review to "the waters of United States." Justice Scalia concluded that "*only* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act. Wetlands with only an intermittent, physically remote hydrologic connection to 'waters of the United States' do not implicate the boundary-drawing problem of *Riverside Bayview*, and thus lack the necessary connection to covered waters that we described as a 'significant nexus' in *SWANCC*." Id. at 742 (citation omitted).

The plurality opinion stressed that the decision should not affect dischargers under sections 301 and 402 of the CWA. In response to arguments that this opinion would "frustrate enforcement against traditional water polluters [under CWA sections 301 and 402] . . .," the plurality concluded: "That is not so." Id. at 742,743. The plurality went on to say that "from the time of the CWA's enactment, lower courts have held that the discharge into intermittent channels of any pollutant *that naturally washes downstream* likely violates [section 301], even if the pollutants discharged from a point source do not emit 'directly into' covered waters, but pass 'through conveyances' in between." Id. at 743 (citation omitted).

Justice Kennedy did not join the plurality's opinion, but instead authored an opinion concurring in the judgment. He agreed with the plurality that the statutory term "waters of the United States" extended beyond water bodies that are navigable-in-fact. For these waters, he explained, the starting point for analysis must be the Riverside Bayview and SWANCC decisions:

> *Riverside Bayview* and *SWANCC* establish the framework for the inquiry in the cases now before the Court: Do the Corps' regulations, as applied to the wetlands in *Carabell* and the three wetlands parcels in *Rapanos,* constitute a reasonable interpretation of "navigable waters" as in *Riverside Bayview* or an invalid construction as in *SWANCC?* Taken together these cases establish that in some instances, as exemplified by *Riverside Bayview,* the connection between a nonnavigable water or wetland and a navigable water may be so close, or potentially so close, that the Corps may deem the water or wetland a "navigable water" under the Act. In other instances, as exemplified by *SWANCC*, there may be little or no connection. Absent a significant nexus, jurisdiction under the Act is lacking.

Id. at 767.

Justice Kennedy observed that "[t]he required nexus must be assessed in terms of the statute's goals and purposes" (id. at 779):

> Congress enacted the law to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), and it pursued that objective by restricting dumping and filling in "navigable waters," §§

> 1311(a), 1362(12). With respect to wetlands, the rationale for Clean Water Act regulation is, as the Corps has recognized, that wetlands can perform critical functions related to the integrity of other waters--functions such as pollutant trapping, flood control, and runoff storage. 33 CFR § 320.4(b)(2). Accordingly, wetlands possess the requisite nexus, and thus come within the statutory phrase "navigable waters," if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as "navigable." When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term "navigable waters."

Id. at 779-80.

Justice Kennedy concluded that "[a]s applied to wetlands adjacent to navigable-in-fact waters, the Corps' conclusive standard for jurisdiction rests upon a reasonable inference of ecologic interconnection, and the assertion of jurisdiction for those wetlands is sustainable under the Act by showing adjacency alone." Id. at 780. With respect to wetlands adjacent to nonnavigable tributaries, Justice Kennedy explained that: "[a]bsent more specific regulations, . . . the Corps must establish a significant nexus on a case-by-case basis[.]" Id. at 782. He also suggested that once "an adequate nexus is established for a particular wetland, it may be permissible, as a matter of administrative convenience or necessity, to presume covered status for other comparable wetlands in the region." Id.

Justice Kennedy did not agree with the plurality's interpretation of "waters of the United States" and agreed with the dissent "that an intermittent flow can constitute a stream. . . . It follows that the Corps can reasonably interpret the Act to cover the paths of such impermanent streams." Id. at 770 (citation omitted). Justice Kennedy also disagreed with the plurality's approach to adjacency, concluding that "the Corps' definition of adjacency is a reasonable one, for it may be the absence of an interchange of waters prior to the dredge and fill activity that makes protection of the wetlands critical to the statutory scheme." Id. at 775. And he disputed the plurality's analysis about a broader CWA interpretation raising Commerce Clause or other federalism concerns, reasoning that the "significant nexus" standard avoids those concerns, even putting aside questions about the "waters' aggregate effects," see id. at 777 (citing Wickard v. Filburn, 317 U.S. 111 (1942)). By the same token, Justice Kennedy went on to disagree with the dissent's reading of the statute insofar as its interpretation would read the term "navigable" out of the statute. He noted that "the dissent would permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters." Id. at 778.

In his concurring opinion, Chief Justice Roberts noted that the Corps and EPA did not proceed with plans to develop a regulation to clarify the scope of waters subject to the CWA following the SWANCC decision. He observed that "[a]gencies delegated rulemaking authority under a statute such as the Clean Water Act are afforded generous

leeway by the courts in interpreting the statute that they are entrusted to administer." Id. at 758.

The four dissenting Justices would have affirmed the lower courts' opinions and upheld the Corps' exercise of jurisdiction in these cases as reasonable. Justice Stevens also concluded: "In these cases, however, while both the plurality and Justice Kennedy agree that there must be a remand for further proceedings, their respective opinions define different standards to be applied on remand. Given that all four Justices who have joined this opinion would uphold the Corps' jurisdiction in both of these cases--and in all other cases in which either the plurality's or Justice Kennedy's test is satisfied--on remand each of the judgments should be reinstated if *either* of those tests is met." Id. at 810 (footnote omitted).

DEPARTMENT OF JUSTICE RESPONSE TO THE RAPANOS DECISION

In Rapanos, no opinion commanded a majority of the Court. In his concurring opinion, Chief Justice Roberts observed that lower courts "will now have to feel their way on a case-by-case basis." Id. at 758. He did, however, provide guidance, saying that "[t]his situation is certainly not unprecedented. See *Grutter v. Bollinger,* 539 U.S. 306, 325 . . . (2003) (discussing *Marks v United States*, 430 U.S. 188 . . . (1977))." Id. Since Rapanos was decided, the Supreme Court has examined another fragmented decision in the Texas redistricting case, League of United Latin American Citizens v. Perry, 548 U.S. 399 (2006). Based on these decisions and others, the Department of Justice has advised courts that it believes that a particular water body may be regulated under the CWA if it satisfies either the Rapanos plurality's or Justice Kennedy's standard.

In the 22 months since Rapanos was decided, this has been an area of active litigation. The Department of Justice has filed more than 45 briefs in more than 30 federal court proceedings in which geographic jurisdiction under the CWA was a significant issue, including briefs in nine of the thirteen Courts of Appeal. For the convenience of the Committee, attached to this statement are two charts showing post-Rapanos court filings by the United States and judicial decisions applying the Rapanos standards, as of March 27, 2008. In six cases in which the United States prevailed in asserting jurisdiction after Rapanos, the losing party sought certiorari and the Supreme Court has denied those petitions. The cases are United States v. Johnson, 467 F.3d. 56 (1st Cir. 2006), cert. denied, 128 S. Ct. 375 (2007); United States v. Morrison, 178 Fed. Appx. 481 (6th Cir. 2006), cert. denied, 127 S.Ct. 1485 (2007); United States v. Gerke Excavating, Inc., 464 F 3d. 723 (7th Cir. 2006), cert. denied, 128 S.Ct. 45 (2007); United States v. Heinrich, 184 Fed. Appx. 542 (7th Cir. 2006), cert. denied, 127 S.Ct. 2974 (2007); United States v. Hubenka, 438 F.3d 1026 (10th Cir.), cert. denied, 127 S.Ct. 114 (2006); Baccarat Fremont Developers v. U.S. Army Corps of Eng'rs, 425 F. 3d 1150 (9th Cir. 2005), cert. denied, 127 S.Ct. 1258 (2007).

One key issue in pending and decided cases is our position that the United States may establish CWA jurisdiction under either the plurality's standard or Justice Kennedy's standard articulated in the Rapanos decision. This position has met with

mixed results. The First Circuit has agreed with the United States, as have district courts in Minnesota, Kentucky, Connecticut, and Florida. United States v. Johnson, supra; United States v. Bailey, 516 F. Supp. 2d 998 (D. Minn.), appeal dismissed, No. 07-3533 (8th Cir. 2007); United States v. Cundiff, 480 F. Supp. 2d 940 (W.D. Ky.), appeal filed, No. 07-5630 (6th Cir. 2007); Simsbury-Avon Preservation Soc'y, LLC v. Metacon Gun Club, Inc., 472 F. Supp. 2d 219 (D. Conn.), appeal pending, No. 07-0795CV (2d Cir. 2007); United States v. Evans, No. 3:05 CR 159, 2006 WL 2221629 (M.D. Fla. Aug. 2, 2006). See also United States v. Lucas, 516 F.3d 316 (5th Cir.), reh'g en banc denied (2008) (upholding criminal conviction on grounds that that the United States had established CWA jurisdiction under each of the standards articulated in Rapanos).

Other courts have concluded that Justice Kennedy's "significant nexus" standard is applicable, including the Eleventh Circuit, the Ninth Circuit, and the Seventh Circuit, as well as district courts in Oregon, Indiana, Illinois, California, and Pennsylvania. United States v. Robison, 505 F.3d 1208 (11th Cir. 2007), petition for reh'g en banc denied (2008); Northern California River Watch v. City of Healdsburg, 496 F.3d 993 (9th Cir. 2007), cert. denied, 170 L.Ed.2d 61 (2008); United States v. Gerke Excavating, supra; United States v. Cam, No. 05-141-KI (D. Or. Dec. 21, 2007); United States v. Fabian, 522 F. Supp. 2d 1078 (N.D. Ind.), mot. for recons. denied, (2007); United States v. Lippold, No. 06-30002, 2007 WL 3232483 (C.D. Ill. Oct. 31, 2007); Environmental Protection Information Center v. Pacific Lumber Co., 469 F. Supp. 2d 803 (N.D. Cal. 2007); United States v. Pozsgai, No. 88-6545 (E.D. Pa. March 8, 2007), appeal pending, No. 07-1900 (3rd Cir. 2007).

We believe that the opinions of the Seventh and the Ninth Circuits do not foreclose the use of the plurality standard to establish jurisdiction. The Seventh Circuit in United States v. Gerke remanded that case for further proceedings in light of Rapanos and stated that "Justice Kennedy's proposed standard . . . must govern the further stages of this litigation . . . . " 464 F.3d at 725. The Court recognized, however, that cases may occasionally arise in which Justice Kennedy "would vote against federal authority only to be outvoted 8-to-1," and it did not specify what it regarded as the proper disposition of such a case. Id. The Ninth Circuit, in a citizens' suit, Northern California River Watch v. City of Healdsburg, initially stated that Justice Kennedy's concurrence was the controlling law. We filed a motion, as amicus curiae, asking the Court to clarify this statement by recognizing that jurisdiction may also be established under the plurality standard. The court subsequently withdrew its earlier opinion and issued a new opinion that concluded that Justice Kennedy's standard provides "the controlling rule of law for our case," 496 F.3d at 999-1000 (emphasis added), and found that the waters at issue met this standard.

The Department and others have litigated some cases to the point of a merits decision on CWA jurisdiction. Given the standards articulated in Rapanos, the determination in each case is highly fact specific. For example, the Fifth and Ninth Circuits and district courts in Oregon, Minnesota, Indiana, Kentucky, Pennsylvania, and Florida have found CWA jurisdiction. United States v. Lucas, supra; Northern California River Watch v. City of Healdsburg, supra; United States v. Moses, 496 F.3d 984 (9th

Cir.), reh'g en banc denied, (2007), petition. for cert. filed (2008) (07-1195); United States v. Cam, supra; United States v. Bailey, supra; United States v. Fabian, supra; United States v. Cundiff, supra; United States v. Pozsgai, supra; United States v. Evans, supra. In other cases, the Ninth Circuit and district courts in Connecticut and Texas have found CWA jurisdiction to be lacking. San Francisco Baykeeper v. Cargill Salt Division, 481 F.3d 700 (9th Cir. 2007); Simsbury-Avon Preservation Soc'y, LLC v. Metacon Gun Club, Inc., supra; United States v. Chevron Pipe Line Co., 437 F. Supp. 2d 605 (N.D. Tex. 2006).

While many decided cases so far have involved jurisdiction over wetlands under section 404 of the CWA, some decisions concern other CWA programs. See, for example, United States v. Lucas, supra (section 402); United States v. Robison, supra (section 402); San Francisco Baykeeper v. Cargill Salt Division, supra (section 402); United States v. Lippold, supra (section 402); United States v. Evans, supra (section 402); United States v. Chevron Pipe Line Co., supra (section 311).

CONCLUSION

In closing, I would like to assure the Committee that the Department of Justice takes seriously its obligation to protect public health and the environment and to enforce and defend the existing laws. The Rapanos decision is significant. We will continue to review all pending and potential cases to determine whether the waters involved meet the standards articulated in the Rapanos decision.

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

**Attachment to Statement of John C. Cruden**

## Chart One

## Post-Rapanos Court Filings by the United States (As of March 27, 2008)

| Case Name and Court | Type of Case | Nature of Filing | Date Filed |
|---|---|---|---|
| **Supreme Court Cases** | | | |
| Charles Johnson v. United States, No. 07-9 (S. Ct.) | Clean Water Act (CWA) 404 Civil Enforcement | Opposition to Petition for Certiorari | Aug. 31, 2007 |
| Gerke Excavating, Inc. v. United States, No. 06-1331 (S. Ct.) | CWA 404 Civil Enforcement | Opposition to Petition for Certiorari | June 6, 2007 |
| Paul A. Heinrich v. United States, No. 06-1271 (S. Ct.) | CWA 404 Civil Enforcement | Opposition to Petition for Certiorari | May 21, 2007 |
| Joseph Morrison v. United States, No. 06-749 (S. Ct.) | CWA 404 Civil Enforcement | Opposition to Petition for Certiorari | Jan. 30, 2007 |
| Baccarat Fremont Developers v. United States Army Corps of Engineers, No. 06-619 (S. Ct.) | Challenge to CWA 404 Permit Determination | Opposition to Petition for Certiorari | Jan. 3, 2007 |
| John Hubenka v. United States, No. 05-11337 (S. Ct.) | CWA 404 Criminal Enforcement | Opposition to Petition for Certiorari | Aug. 7, 2006 |
| | | | |
| **Appellate Cases** | | | |
| United States v. George Rudy Cundiff, Nos. 05-5469, 05-5905, 07-5630 (6th Cir.) | CWA 404 Civil Enforcement | Merits Brief | Feb. 21, 2008 |
| United States v. Charles Barry Robison, No. 05-17019-EE (11th Cir.) | CWA 402 Criminal Enforcement | Opposition to Defendants' Petition for Rehearing En Banc | Jan. 18, 2008 |
| (see above) | (see above) | Petition for Rehearing En Banc | Dec. 13, 2007 |

| | | | |
|---|---|---|---|
| (see above) | (see above) | Merits Brief | Oct. 2, 2006 |
| Simsbury-Avon Preservation Society v. Metachon Gun Club, Inc., No. 07-0795CV (2nd Cir.) | CWA Citizen Suit | Amicus Curiae Brief | June 19, 2007 |
| United States v. David H. Donovan, No. 07-1220 (3rd Cir.) | CWA 404 Civil Enforcement | Merits Brief | May 18, 2007 |
| United States v. Robert J. Lucas, No. 06-60289 (5th Cir.) | CWA 404 and 402 Criminal Enforcement | Merits Brief | Mar. 22, 2007 |
| United States v. C. Lynn Moses, No. 06-30379 (9th Cir.) | CWA 404 Criminal Enforcement | Merits Brief | Mar. 1, 2007 |
| (see above) | (see above) | Response in Opposition to Motion for Summary Disposition | Sept. 8, 2006 |
| United States v. Paul A. Heinrich, No. 05-3199 (7th Cir.) | CWA 404 Civil Enforcement | Opposition to Petition for Panel Rehearing and Rehearing En Banc | Nov. 14, 2006 |
| United States v. Gerke Excavating, Inc., No. 04-3941 (7th Cir.) | CWA 404 Civil Enforcement | Opposition to Petition for Rehearing En Banc | Nov. 1, 2006 |
| (see above) | (see above) | Petition for Panel Rehearing to Clarify the Court's Opinion of September 22, 2006 | Sept. 28, 2006 |
| (see above) | (see above) | Circuit Rule 54 Position Statement | Aug. 18, 2006 |
| United States v. Charles Johnson, No. 05-1444 (1st Cir.) | CWA 404 Civil Enforcement | Reply in Support of Motion to Vacate and Remand | Oct. 2, 2006 |
| (see above) | (see above) | Motion to Vacate and Remand and Response in Opposition to Petition for Rehearing En Banc | Sept. 11, 2006 |

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| San Francisco Baykeeper v. Cargill Salt Division, Nos. 04-17554 and 05-15051 (9th Cir.) | CWA Citizen Suit | Amicus Curiae Supplemental Letter Brief | Aug. 28, 2006 |
| June Carabell v. United States Army Corps of Engineers, No. 03-1700 (6th Cir.) | Challenge to CWA 404 Permit Determination | Reply in Support of Motion to Remand to the District Court with Instructions to Remand to the Army Corps of Engineers for Application of the Appropriate Legal Standard and Further Factual Development | Aug. 25, 2006 |
| (see above) | (see above) | Motion for Remand to the District Court with Instructions to Remand to the Army Corps of Engineers for Application of the Appropriate Legal Standard and Further Factual Development | July 31, 2006 |
| United States v. D.J. Cooper, No. 05-4956 (4th Cir.) | CWA 402 Criminal Enforcement | Opposition to Second Motion for Post-Conviction Release | Aug. 23, 2006 |
| Northern California River Watch v. City of Healdsburg, No. 04-15442 (9th Cir.) | CWA Citizen Suit | Motion as Amicus Curiae to Clarify the Court's Opinion | Aug. 23, 2006 |
| Baccarat Fremont Developers v. United States Army Corps of Engineers, No. 03-16586 (9th Cir.) | Challenge to CWA 404 Permit Determination | Supplemental Authority Letter | July 31, 2006 |
| United States v. John Rapanos, No. 03-1489 (6th Cir.) | CWA 404 Civil Enforcement | Motion for Remand to the District Court for Further Proceedings Regarding Regulatory Jurisdiction | July 31, 2006 |
| Greater Gulfport Properties v. United States Army Corps of Engineers, No. 05-60243 (5th Cir.) | Challenge to Corps' of Engineers' CWA Jurisdictional Determination | Response to Supplemental Authority Letter | July 26, 2006 |

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| **District Court Cases** | | | |
| United States v. Mastec North America, No. 06-6071 (D. Or.) | CWA 404 Civil Enforcement | Closing Argument | Mar. 24, 2008 |
| United States v. Keith David Rosenblum, Cr. No. 07-294 (D. Minn.) | CWA 402 Criminal Enforcement | Response to Defendant's Objections | Jan. 28, 2008 |
| (see above) | (see above) | Objections to Magistrate's Report | Jan. 11, 2008 |
| (see above) | (see above) | Opposition to Motion to Dismiss | Nov. 13, 2007 |
| United States v. Gerald Lippold, Cr. No. 06-30002 (C.D. Ill.) | CWA 402 Criminal Enforcement | Opposition to Defendant's Motion to Dismiss Superceding Indictment for Violation of Due Process | Oct. 5, 2007 |
| United States v. Ivan Cam, CR 05-141-KI (D. Or.) | CWA 404 Criminal Enforcement | Opposition to Motion to Withdraw Guilty Plea | Aug. 27, 2007 |
| United States v. Massey Energy Co., Civ. No. 2:07-0299 (S.D. W. Va.) | CWA 402 Civil Enforcement | Opposition to Motion to Dismiss | Aug. 24, 2007 |
| United States v. Charles Johnson, Civil Action No. 99-12465-EFH (D. Mass.) | CWA 404 Civil Enforcement | Motion to Govern Proceedings on Remand | Apr. 19, 2007 |
| American Petroleum Institute v. Stephen Johnson, No. 1:02CV02247 PLF (D.D.C.) | Challenge to EPA's Spill Prevention, Control, and Countermeasure Rule under CWA 311 | Reply Memorandum in Support of Cross-Motion for Summary Judgment | Mar. 30, 2007 |

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| (see above) | (see above) | Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of EPA's Cross-Motion for Summary Judgment | Dec. 20, 2006 |
| United States and State of Ohio v. Ike Parker, Civil Action No. 3:91 CV 7482 (N.D. Ohio) | CWA 404 Civil Enforcement | Opposition to Motion to Dissolve Consent Decree | Mar. 16, 2007 |
| United States v. Gary Bailey, Civil Action No. 05-2245 (D. Minn.) | CWA 404 Civil Enforcement | Reply Memorandum in Support of Summary Judgment | Mar. 14, 2007 |
| (see above) | (see above) | Memorandum in Opposition to Defendant's Motion for Summary Judgment and in Support of Plaintiff's Motion for Summary Judgment | Feb. 1, 2007 |
| United States v. Sea Bay Development Corp., Civil Action No. 2:06-cv-624 (E.D. Va.) | CWA 404 Civil Enforcement | Opposition to Motion to Dismiss | Feb. 27, 2007 |
| United States v. George Rudy Cundiff, Civil Action No: 4:01-CV-6-M (W.D. Ky.) | CWA 404 Civil Enforcement | Post-Hearing Brief Concerning "Waters of the United States" | Feb 9, 2007 |
| (see above) | (see above) | Pre-Hearing Brief | Jan. 18, 2007 |
| United States v. John Pozsgai, Civil Action No. 88-6545 (E.D. Pa.) | CWA 404 Civil Enforcement | Memorandum Demonstrating that the *Rapanos* Decision Does Not Provide Grounds for Post-Judgment Relief | Sept. 28, 2006 |
| United States v. Rowland A. Fabian, Civil Action No. 2:02CV495RL (N.D. Ind.) | CWA 404 Civil Enforcement | Response to Supplemental Brief on *Rapanos/Carabell* | Aug. 31, 2006 |
| (see above) | (see above) | Supplemental Brief Following *Rapanos/Carabell* | Aug. 17, 2006 |

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| United States v. Ronald Robert Evans, Sr., Case No. 3:05-cr-159(S4)-J-32MMH (M.D. Fla.) | CWA 402 Criminal Enforcement | Opposition to Defense Motion to Dismiss Count Five | July 20, 2006 |
| (see above) | (see above) | Memorandum Re: Supreme Court's *Rapanos* Decision | July 7, 2006 |

# Chart Two
# Judicial Decisions Applying the Rapanos Standards (As of March 27, 2008)[1/]

| Cir. | Case | Citation | Standard Applied/Result |
|---|---|---|---|
| 1st | **United States v. Charles Johnson, No. 05-1444 (1st Cir. Oct. 31, 2006), petition for rehearing and rehearing en banc denied Feb. 21, 2007, petition for certiorari denied Oct. 9, 2007** | **467 F.3d 56** | **Case remanded to district court; U.S. may establish Clean Water Act (CWA) jurisdiction under either the plurality's or Justice Kennedy's standard** |
| 2nd | Simsbury-Avon Preservation Society v. Metachon Gun Club, Inc., Civil Action No. 3:04cv803 (D. Conn. Jan. 31, 2007), appeal pending (2nd Cir. No. 07-0795CV) | 472 F. Supp. 2d 219 | Summary judgment granted in favor of defendant; evidence did not establish CWA jurisdiction under either the plurality's or Justice Kennedy's standard |
| 3rd | United States v. John Pozsgai, Civil Action No. 88-6545 (E.D. Pa. March 8, 2007), appeal pending (3rd Cir. No. 07-1900) | Not reported | Rapanos did not prevent a finding of contempt of prior court order; Justice Kennedy's standard satisfied |
| 4th | None | | |
| 5th | **United States v. Robert J. Lucas, No. 06-60289 (5th Cir. Feb. 1, 2008), petition for rehearing en banc denied March 4, 2008** | **516 F.3d 316** | **Criminal conviction under CWA affirmed; evidence presented at trial supported plurality's, Justice Kennedy's, and dissent's standards** |
| | United States v. Chevron Pipe Line Co., Civil Action No. 5:05-CV-293-C (N.D. Tex. June 28, 2006) | 437 F. Supp. 2d 605 | Civil action under CWA 311 dismissed; applied prior 5th Cir. precedent |

[1/] Appellate decisions are in bold.

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| 6th | United States v. George Rudy Cundiff, Civil Action No: 4:01-CV-6-M (W.D. Ky. March 29, 2007), appeal pending (6th Cir. No. 07-5630) | 480 F. Supp. 2d 940 | U.S. may establish CWA jurisdiction under either the plurality's or Justice Kennedy's standard; jurisdiction established under both |
| 7th | **United States v. Gerke Excavating, Inc., No. 04-3941 (7th Cir. Sept. 22, 2006), petition for rehearing and rehearing en banc denied Dec. 1, 2006, petition for certiorari denied Oct. 1, 2007** | **464 F.3d 723** | **Case remanded to district court for application of Justice Kennedy's standard** |
| | United States v. Rowland A. Fabian, Civil Action No. 2:02CV495RL (N.D. Ind. Mar. 29, 2007), motion for reconsideration denied Oct. 5, 2007 | 522 F. Supp. 2d 1078 | CWA jurisdiction established; Justice Kennedy's standard satisfied |
| | United States v. Gerald Lippold, Criminal No. 06-30002 (C.D. Ill. Oct. 31, 2007) | 2007 WL 3232483 | Motion to dismiss indictment on due process grounds denied under Justice Kennedy's standard |
| 8th | United States v. Gary Bailey, Civil Action No. 05-2245 (D. Minn. Sept. 25, 2007), appeal dismissed (8th Cir. Dec. 19, 2007, No. 07-3533) | 516 F. Supp. 2d 998 | CWA jurisdiction established under Justice Kennedy's standard (but stated CWA jurisdiction may be established under either the plurality's or Justice Kennedy's standard) |
| | United States v. Keith David Rosenblum, Criminal No. 07-294 (D. Minn. March 3, 2008) | 2008 WL 582356 | Defendant's motion to dismiss for lack of jurisdiction denied; Justice Kennedy's standard not applicable to discharges to a publicly owned treatment works |

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| 9th | **San Francisco Baykeeper v. Cargill Salt Division, Nos. 04-17554 and 05-15051 (9th Cir. Mar. 8, 2007)** | **481 F.3d 700** | **District court opinion finding CWA jurisdiction reversed; plaintiff failed to establish CWA jurisdiction on asserted regulatory ground and Justice Kennedy's standard not satisfied*** |
| | **United States v. Moses, No. 06-30379 (9th Cir. Aug. 3, 2007), petition for rehearing en banc denied September 24, 2007, petition for certiorari filed March 19, 2008** | **496 F.3d 984** | **Criminal conviction under CWA affirmed; Justice Kennedy's standard satisfied*** |
| | **Northern California River Watch v. City of Healdsburg, No. 04-15442 (9th Cir. Aug. 6, 2007) (vacating 457 F. 3d 1023), petition for certiorari denied Feb. 19, 2008** | **496 F.3d 993** | **District court decision finding CWA jurisdiction affirmed; Justice Kennedy's standard satisfied** |
| | Environmental Protection Information Center v. Pacific Lumber Co., No. C 01-2821 MHP (N.D. Cal. Jan. 8, 2007) | 469 F. Supp. 2d 803 | Plaintiff's motion for summary judgment denied; Justice Kennedy's standard not satisfied* |
| | United States v. Ivan Cam, CR 05-141-KI (D. Or. Dec. 21, 2007) | Not reported | Motion to withdraw guilty plea denied; Justice Kennedy's standard satisfied |
| 10th | None | | |
| 11th | **United States v. Charles Barry Robison, No. 05-17019 (11th Cir. Oct. 24, 2007), petition for rehearing en banc denied March 27 2008** | **505 F.3d 1208** | **Criminal conviction vacated and remanded to district court for application of Justice Kennedy's standard** |
| | United States v. Charles Barry Robison, No. CV-04-PT-199-S (N.D. Ala. Nov. 7, 2007) | 521 F. Supp. 2d 1247 | Rapanos did not establish a new standard for tributaries; case reassigned to new judge |

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| | United States v. Ronald Robert Evans, Sr., Case No. 3:05-cr-159(S4)-J-32MMH (M.D. Fla. August 2, 2006) | 2006 WL 2221629 | U.S. may establish CWA jurisdiction under either the plurality's or Justice Kennedy's standard; there was probable cause to believe that discharges occurred into jurisdictional waters under either standard |
| DC | None | | |
| Fed | None | | |

*These cases within the Ninth Circuit were issued after the initial decision and prior to issuance of the amended decision in Northern California River Watch v. City of Healdsburg. In the amended decision, the Ninth Circuit stated that the Rapanos concurrence "provides the controlling rule of law for our case" and that the concurring opinion would constitute "the narrowest ground to which a majority of the Justices would assent if forced to choose in almost all cases." Healdsburg, 496 F.3d 993, 999-1000 (9th Cir. 2007), cert. denied, 170 L.Ed.2d 61 (2008). The amended decision in Healdsburg, issued by the Ninth Circuit on August 6, 2007, revised the language in its prior decision of August 10, 2006, which had stated that Justice Kennedy "provides the controlling rule of law." Healdsburg, 457 F.3d 1023, 1029 (9th Cir. 2006) (vacated).

# Clean Water Restoration Act (CWRA)
# H.R. 2421

Testimony of Darrell Gerber
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**Clean Water Restoration Act (CWRA)**
**H.R. 2421**

**Testimony of Darrell Gerber**
**Program Coordinator**
**Clean Water Action Alliance, Minneapolis, Minnesota**
**Clean Water Action, Washington DC**

On behalf of Clean Water Action, I am pleased to offer our comments on the Clean Water Restoration Act. I am the Program Coordinator for Clean Water Action Alliance in Minneapolis, Minnesota where I work on water and energy issues. Clean Water Action Alliance, a state chapter of Clean Water Action with 60,000 members in Minnesota, is working to ensure that we have clean and safe water now and for generations to come. Clean Water Action, with over one million members nationwide, is a national organization working for clean, safe and affordable water, prevention of health-threatening pollution, creation of environmentally safe jobs and businesses, and empowerment of people to make democracy work. Clean Water Action organizes strong grassroots groups, coalitions and campaigns to protect people's environment, health, economic well-being and community quality of life.

The Cleon Water Restoration Act has been a priority issue for Clean Water Action's grassroots policy and mobilization campaigns since its first introduction in early 2004. Clean Water Action's policy and organizing staff nationwide have focused considerable effort on understanding recent federal policy threats to Clean Water Act protections and on mobilizing our members and other organizations and individuals to seek constructive solutions.

Today's hearing is important because the stakes couldn't be higher for the Clean Water Act. Historically, the Clean Water Act (Act) has protected the nation's lakes, rivers, streams and wetlands from pollution and destruction. Today, many water bodies are being denied the Act's protections. Polluters argue that Supreme Court decisions from 2001 and 2006 mean that the law's safeguards are only available for "navigable" water bodies (or for waters that have significant linkages to such water bodies). They claim the Act no longer protects numerous wetlands, streams, rivers, lakes and other waters that were historically covered.

Clean Water Action believes that recent Federal agency policy threatens to undermine the fundamental goals of the Act. At issue is the definition of "water of the United States," a definition which lays out the scope of many of the Act's provisions. In this testimony we will discuss: the importance of clean water to the nation's health and prosperity, especially the importance of the tributaries and wetlands currently at greatest risk of pollution and destruction from loss of Clean Water Act jurisdiction; the historic, broad scope of the 1972 Clean Water Act; the implications of the *SWANCC* and *Rapanos* decisions and the Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) policy guidance issued in the wake of those cases; the need

for a Congressional response and finally, why the Clean Water Restoration Act (CWRA) is the best and most appropriate action for Congress to take to keep the Clean Water Act's promise of clean and healthy water.

We trust this testimony and the information it provides will be helpful to the Committee in its deliberations on this issue. Your work is vital to the health of our communities today and far future generations. Thank you for the opportunity to provide our comments to this committee.

***Background***

Our contention is that current EPA and Corps implementation of the Clean Water Act undermines the intent of the Act and threatens the health of our nation's water. Events since a Supreme Court ruling in 2001 have resulted in a policy situation that necessitates corrective action by Congress.

The Supreme Court held in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*) that non-navigable, intrastate, "isolated" waters could not be classified as "waters of the United States" based solely on the government's so-called "Migratory Bird Rule," which protected aquatic habitat used by migrating birds. The Court made this ruling despite legislative history and intent and Supreme Court precedent in *Riverside Bayview*, *Oulette* and numerous lower court cases broadly interpreting the jurisdictional scope of the law.

The holding in *SWANNC* placed restrictions on the waters covered by the Clean Water Act but focused narrowly, only addressing the use of a single rule for determining jurisdiction. However, the opinion prompted additional broader attacks on protection of non-navigable waters. Some were through the courts[1] but the most insidious attacks were by the EPA and Corps.

***Advanced Notice of Proposed Rulemaking and Guidance***

On January 15, 2003, the EPA and the Corps published an Advance Notice of Proposed Rulemaking (ANPRM) raising questions about the jurisdiction of the Clean Water Act. Simultaneously, they released a guidance memo to their field staff regarding Clean Water Act jurisdiction over certain so-called "isolated," non-navigable, intrastate waters (the term "isolated" waters appears nowhere in the Clean Water Act itself, but was a term used by the Court in *SWANCC*). The agencies claimed these actions were necessary because of the *SWANCC* case, but both the guidance memo and the ANPRM went far beyond the Court's holding.

The Guidance took effect right away and had an immediate impact on many of the nation's wetlands, creeks, ponds, and streams. It told the Corps and EPA staff to stop asserting jurisdiction over so-called "isolated" waters without first obtaining

[1] In the wake of *SWANCC*, the courts generally did not follow the worst implications of the decision, though it still did lead to a cut back on legal protections. See, e.g., *U.S. v. Rapanos*, 376 U.S. 629, 638 (6th Cir. 2004) ("the majority of courts have interpreted *SWANCC* narrowly to hold that while the CWA does not reach isolated waters having no connection with navigable waters, it does reach inland waters that share a hydrological connection with navigable waters.").

permission from Headquarters.[2] No similar instructions were issued to get permission before allowing unregulated pollution or destruction of these waters. The EPA itself estimated that as many as 20 million acres of wetlands – 20 percent of the remaining wetlands in the continental U.S. – were "isolated," meaning they were placed at risk of losing federal Clean Water Act protections under the 2003 policy.[3]

The ANPRM announced the Administration's intention to consider even broader changes to Clean Water Act coverage through rulemaking. Specifically, the notice questioned whether there is *any* basis for asserting Clean Water Act jurisdiction over any so-called "isolated" water, even those used in or affecting interstate commerce. Fortunately, overwhelming opposition to the proposed rulemaking from Congress (including 218 members of the House); state water pollution control agencies; fish and wildlife agencies; natural resources agencies; hunting and angling groups; environmental organizations; and the public (over 130,000 individual citizens submitted comments, overwhelmingly in the negative) caused then-EPA Administrator Michael Leavitt to announce that the Administration would drop the rulemaking.[4]

The damaging ANPRM was withdrawn, but the EPA did not withdraw the Guidance. Left in place is its one-way policy requiring staff to call for permission to protect waters but not requiring permission to choose not to protect waters, allowing them to be polluted or destroyed. Using data provided by the agencies, it is estimated that the Corps are making well over 1,000 *SWANCC*-related "no jurisdiction" determinations a year. In contrast, in the 4 years since the 2003 policy was adopted, fewer than 20 cases were elevated to EPA or Corps headquarters by field staff seeking to assert jurisdiction over disputed waters. In an August 2004 report based upon Corps records, Earthjustice, National Wildlife Federation, Natural Resources Defense Council and Sierra Club found numerous examples of the Corps using the *SWANCC* decision and the 2003 Guidance to decline jurisdiction over waters that were clearly previously covered by the Clean Water Act. Those waters the Clean Water Act was found to not cover include an 86-acre lake, a 150-mile-long river, a 4,000-acre tract of wetlands and a 70-mile-long canal – leaving these waters and many others vulnerable.[5]

To add to the opposition to the 2003 Guidance, on May 18, 2006, the U.S. House of Representatives voted 222-198 to approve an amendment that would block the use of Federal funds to implement the contested policy. The Senate, however, passed no EPA-Interior appropriations bill in 2006, so the House amendment did not become law. Unfortunately, the EPA and Corps continue to follow this policy – despite the

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[2] 68 Fed. Reg. 1995, 1997-98 (Jan. 15, 2003) ("field staff should seek formal project-specific HQ approval prior to asserting jurisdiction over waters based on other factors listed in 33 CFR 328.3(a)(3)(i)–(iii)").

[3] *See* Eric Pianin, *Administration Establishes New Wetlands Guidelines; 20 Million Acres Could Lose Protected Status, Groups Say*, Washington Post, at A5 (Jan. 11, 2003) ("The new regulation would shift responsibility from the federal government to the states for protecting as much as 20 percent of the 100 million acres of wetlands in the Lower 48 states, according to official estimates.").

[4] *See* Stevens, J., Dissenting Opinion, Slip Op. at 10 n.4 (describing agencies' effort to revise regulations and noting that "almost all of the 43 States to submit comments opposed any significant narrowing of the Corps' jurisdiction – as did roughly 99% of the 133,000 other comment submitters").

[5] *See* Earthjustice, NWF, NRDC, and Sierra Club, *Reckless Abandon: How the Bush Administration is Exposing America's Waters to Harm*, Aug. 2004.

overwhelming, bipartisan opposition to it and despite the harm that it has already caused.

***The Rapanos Decision and Its Three Major Opinions***

In the wake of *SWANCC*, the lower courts largely rejected the claims of those opposed to Clean Water Act protections. However, in October 2005 opponents were able to convince the Supreme Court to take up two other cases – *Rapanos v. U.S.*, and *Carabell v. U.S. Army Corps of Engineers* – that together questioned the extent to which the law protects non-navigable tributaries and their adjacent wetlands.

In the *Rapanos* and *Carabell* cases, the Bush Administration argued that the Clean Water Act and its implementing regulations properly encompass and protect both tributaries of "traditionally navigable" waters and the wetlands adjacent to these streams and rivers. This position was supported by briefs filed by more than 30 State Attorneys General and nine members of Congress who helped pass the Clean Water Act in 1972, its amendments in 1977, or both. Also filing supporting briefs were: four former EPA administrators who served under Republican and Democratic administrations; a coalition of hunting and angling groups and businesses; state water pollution control officials, wetland managers, fish and wildlife agencies, and floodplain managers; New York City; numerous western resources councils; Macomb County (MI) and many environmental, public health and conservation groups.

The *Rapanos* petitioners and some supporting organizations argued that the Clean Water Act does not protect non-navigable tributaries and only covers those wetlands directly adjacent to traditionally navigable waters.[6] In its decision (which addressed the *Rapanos* and *Carabell* as consolidated cases), the Supreme Court had no majority opinion but split 4-1-4 in its analysis of the Clean Water Act and the extent to which the law covers tributaries and wetlands.[7] Consequently, the Court did not invalidate the agency's existing rules, and the various opinions suggested three different tests for determining whether streams and other tributaries and wetlands adjacent to those waters remain under the scope of the Clean Water Act.

The four-justice plurality, in an opinion written by Justice Scalia, significantly limits the law's scope. Focusing on a 1954 dictionary definition of "waters" more than the language, purpose, or history of the Clean Water Act (a law they characterize as "tedious"), Justice Scalia, joined by Chief Justice Roberts and Justices Thomas and Alito, concluded that:

> "[T]he phrase 'the waters of the United States' includes only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] ... oceans, rivers, [and] lakes.' "[8]

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[6] The petitioners in the *Carabell* advanced a more limited argument, claiming that it was impermissible for the Corps to regulate a wetland as "adjacent" to a protected water body – and therefore subject to the CWA – if it lacked a hydrological connection with the water body. Brief of Petitioners, *Carabell v. U.S. Army Corps of Eng'rs*, at 12-13 (Dec. 2, 2005).

[7] *Rapanos v. U.S.*, 126 S.Ct. 2208 (2006).

[8] *Id.* at 2225 (plurality opinion).

The opinion also required that wetlands have a "continuous surface connection" to such waters in order to receive protection.[9] The opinion even seemed to indicate that the plurality might believe that water bodies must be interstate (or connected to interstate waters) in order to be "waters of the United States."[10]

Justice Kennedy, in a separate concurring opinion, would require the agencies to show a physical, biological or chemical linkage – a "significant nexus" – between a water body and a navigable body to protect it.[11] For tributaries, Justice Kennedy says that, applied consistently, existing rules "may well provide a reasonable measure of whether specific minor tributaries bear a significant nexus with other regulated waters to constitute 'navigable waters' under the Act."[12] For wetlands adjacent to non-navigable tributaries, Justice Kennedy suggested that are different ways to show a "significant nexus", depending on the kind of water to which the wetland is adjacent.[13]

While he concurred that the *Rapanos* and *Carabell* cases should be remanded, Justice Kennedy completely rejects Justice Scalia's reasoning. Indeed, he stated that Justice Scalia's plurality opinion "is inconsistent with the Act's text, structure, and purpose."[14]

In dissent, Justice Stevens, joined by Justices Souter, Ginsburg and Breyer, wrote that the existing agency regulations reflect a reasonable interpretation of the statutory phrase "waters of the United States," especially in light of the Court's unanimous 1985 decision in *US* v. *Riverside Bayview Homes*, which upheld the application of these very same rules.[15] In rejecting the rationale of both of the other opinions, these four dissenting justices stated that the sum of Justice Scalia's test and Justice Kennedy's test is the protection of all waters previously covered by agency regulations.[16] In other words, the agencies should continue to protect the streams and wetlands as before. An important point, too, is that although Justice Scalia and Kennedy's tests may well permit the law to reach many of the same waters the Clean Water Act historically protected, the practical effect is to make numerous jurisdictional questions subject to a vague case-specific analysis.[17]

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[9] *Id.* at 2226.
[10] *Id.* at 2220 n.3 (stating that the phrase "of the United States" traditionally "excludes intrastate waters, whether navigable or not" and suggesting that the CWA's use of the phrase "retains some of its traditional meaning").
[11] *Id.* at 2248 (Kennedy, J., concurring).
[12] *Id.* at 2249.
[13] *Id.* ("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.").
[14] *Id.* at 2246.
[15] *Id.* at 2255.
[16] *Id.* at 2265 & n. 14.
[17] *id.* at 2250 (Kennedy, J., concurring) ("[T]he end result in these cases and many others to be considered by the Corps may be the same as that suggested by the dissent, namely, that the Corps' assertion of jurisdiction is valid. Given, however, that neither the agency nor the reviewing courts properly considered the [significant nexus] issue, a remand is appropriate, in my view, for application of the controlling legal standard.").

***The Aftermath of Rapanos***

What water bodies remain protected after *Rapanos*? That is unclear. For instance, one can make a case for retaining strong Clean Water Act protections for tributary streams and their adjacent wetlands because there is no five-Justice majority rationale in *Rapanos* for restricting jurisdiction over wetlands adjacent to non-navigable tributaries;[18] indeed no specific water was determined to be non-jurisdictional in *Rapanos*. Likewise, as noted above, the Court's holding in *SWANCC* was ultimately a narrow one that permits the agencies to protect geographically "isolated" water bodies. Consistent with these principles, an interpretation could be that the agencies charged with implementing the law continue to protect the Nation's water bodies identified in their regulations. They would also provide meaningful guidance for their field staff and the public, showing how to develop facts to help support jurisdictional determinations (i.e., relationship to interstate commerce for "isolated" waters and "significant nexus" or "continuous surface connection" for wetlands adjacent to non-navigable tributaries).

However, there are strong indications from the past year that this protective view of *Rapanos* will not carry the day. Rather, as discussed below, there have been a number of interpretations of the decision and its conflicting opinions, with the net result being that confusion still reigns.

**Many Cases, Many Approaches to deciphering *Rapanos***

The first court decision dealing with *Rapanos* following the Supreme Court's decision is an example of the problems messy and vague opinions can unleash. The case, *United States v. Chevron Pipeline Company*,[19] involved a spill of approximately 126,000 gallons of crude oil from a corroded Chevron pipeline that flowed into an unnamed tributary and an intermittent stream near Snyder, Texas.[20] Chevron contended that there was no flowing water in the Creek or its tributary when the spill and the company's initial cleanup actions occurred. The Justice Department argued that this did not mean that the Clean Water Act did not protect the stream.[21] The government argued that, during times that there was flow in the Creek, there was an unbroken connection from the stream to Rough Creek and then to the Double Mountain Fork of the Brazos River.[22]

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[18] As discussed further below, EPA and the Corps, among others, have interpreted the *Rapanos* opinion to place limitations on non-navigable tributaries themselves, as opposed to limiting the decision to the wetlands adjacent to non-navigable tributaries. We believe this is in error. Justice Kennedy indicated that the Corps could properly assert categorical jurisdiction over tributaries by applying its regulations consistently. 126 S. Ct. at 2249 (noting that the Corps asserted jurisdiction over tributaries having an "ordinary high water mark" under § 328.3(e), Justice Kennedy concluded: "Assuming [this standard] is subject to reasonably consistent application, it may well provide a reasonable measure of whether specific minor tributaries bear a sufficient nexus with other regulated waters to constitute 'navigable waters' under the Act."). Indeed, both *Rapanos* and *SWANCC* involved water bodies in categories other than tributaries ("other waters" and "[w]etlands adjacent to waters," respectively).

[19] 437 F.Supp.2d 605 (N.D. Tex., 2006),

[20] The case is also discussed in more detail in a later section.

[21] Brief of the U.S. at 2-3.

[22] Id. at 11.

In its decision, the court notes that there is no majority opinion in *Rapanos*, and in trying to make sense of the Supreme Court's decision, found that Justice Kennedy's "significant nexus" test was not sufficiently clear to follow as a guide to the lower courts.[23] The court therefore chose to rely on the Scalia plurality opinion to support its conclusion that the U.S. could not impose fines on Chevron for spilling crude oil into the tributary and creek because they were not "waters of the United States."[24]

Additional lower court cases favorably citing the Scalia plurality may well follow, in view of the fact that litigants have argued that it should be the governing test.[25] This makes little sense; five Justices explicitly rejected the plurality opinion, and Justice Kennedy noted that it "makes little practical sense" and "is inconsistent with the Act's text, structure, and purpose."[26]

Other lower courts have followed different paths. Some lower courts have determined that Justice Kennedy's "significant nexus" test is now the controlling legal opinion, despite the fact that he alone embraced the "significant nexus" approach as the Clean Water Act test for jurisdiction.[27] Still others have determined that if either the Scalia "relatively permanent flow" or the Kennedy "significant nexus" test are met, the disputed waterbody will remain under Clean Water Act jurisdiction.[28]

The confusion shown in courts trying to divine the meaning and significance of the *Rapanos* 4-1-4 split is strong evidence in itself that long-settled case law and expectations under the Clean Water Act have been up-ended by the Supreme Court. Even after the *SWANCC* decision, the lower courts were fairly uniform in their interpretation of the precedent set by that case.[29] Now, in the post-*Rapanos* world, it seems clear already that the lower courts are likely to be much more divergent in their opinions on what water bodies the Clean Water Act should now protect or not protect.

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[23] *See* 437 F.Supp.2d at 612-15 (saying "[b]ecause Justice Kennedy failed to elaborate on the 'significant nexus' required, this Court will look to the prior reasoning in this circuit,")

[24] *Id.* (noting similarity of receiving water to a kind of water body discussed in plurality opinion and saying "the United States failed to direct the Court to evidence showing whether any oil from the spill actually reached 'the navigable waters of the United States' – as that term is defined in [prior circuit precedent] or in the Supreme Court's plurality opinion in *Rapanos*.").

[25] *See, e.g.*, Brief Amicus Curiae of Pacific Legal Foundation, National Federation of Independent Business Legal Foundation, and Building Industry Association of Washington in Support of Plaintiffs, *American Petroleum Inst. v. Johnson*, No. 1:02CV02247, at 9-13 (Mar. 1, 2007).

[26] 126 S.Ct. at 2242 & 2246.

[27] *See, e.g., Northern California River Watch v. City of Healdsburg*, 457 F.3d 1023, 1029 (9th Cir. 2006) ("Justice Kennedy ... provides the controlling rule of law"); *United States v. Gerke*, 464 F.3d 723, 724 (7th Cir. 2006) ("in *Rapanos*, [the narrowest ground] is Justice Kennedy's ground"); *Environmental Protection Information Ctr. v. Pacific Lumber Co.*, No. C 01-2821 MHP (N.D. Ca. January 8, 2007) (following *Healdsburg*); *United States v. Pozsgai*, No. 88-6546, at 3 (E.D. Pa. 2007) ("[f]or purposes of this litigation, I will apply Justice Kennedy's test").

[28] See, e.g. *United States v. Johnson*, 467 F.3d 56, 66 (1st Cir. 2006) (jurisdiction appropriate under "either the plurality's or Justice Kennedy's standard"); *Simsbury-Avon Preservation Soc'y, LLC v. Metacon Gun Club, Inc.*, 472 F.Supp.2d 219 (D. Conn. 2007) (evaluating citizen suit under both plurality and Justice Kennedy standards); *U.S. v. Evans*, 2006 WL 2221679, 19 (M.D. Fla., Aug. 2, 2006) ("this Court will consider the jurisdictional requirement for 'waters of the United States' to be met if the affidavits satisfy either the plurality's test . . . or the general parameters of Justice Kennedy's concurrence").

[29] See *U.S. v. Rapanos*, 376 U.S. 629, 638 (6th Cir. 2004) ("the majority of courts have interpreted *SWANCC* narrowly to hold that while the CWA does not reach isolated waters having no connection with navigable waters, it does reach inland waters that share a hydrological connection with navigable waters.").

**New Guidance from EPA and the Corps Makes Things Worse**

Last year, the EPA and Corps issued another policy "guidance" – this one interpreting the *Rapanos* decision – that threatens to accelerate the speed at which the nation's water quality programs are going in reverse.[30] This new policy will leave many waters without the clear, categorical Clean Water Act protections from pollution and destruction that have safeguarded them for the last three decades. Instead of categorically protecting many streams and wetlands the new policy will leave continued Clean Water Act coverage of these waters to an unworkable, speculative, case-by-case analysis by the EPA and Corps.

Briefly stated, the Guidance says that field staff generally should exercise jurisdiction over water bodies that either the *Rapanos* plurality or Justice Kennedy would cover, as the dissent in *Rapanos* advocated.[31] That summary belies the complexity and vagueness that pervade the rest of the documents in the Guidance. Close examination of the Guidance reveals that when the agencies made interpretive decisions about how to apply the *Rapanos* tests, they frequently erred on the side of being less protective of clean water than called for in the *Rapanos* plurality. Specifically, the policy:

- Leaves in place the 2003 EPA/Corps policy that significantly undermined protections for water bodies that are geographically "isolated" and other intrastate waters.[32,33] This means that the various new tests for Clean Water Act jurisdiction under the *Rapanos* decision – the "relatively permanently flowing" test and the "significant nexus test" – will be piled on top of the "isolated waters" test from the 2003 policy creating a tangled, snarled mess out of the law.[34]

- Significantly restricts the ability – when implementing the "significant nexus" standard – to protect waters by demonstrating the collective importance of waters "similarly situated" over a large, regional scale.[35] Thus, the agencies can only consider each headwater stream segment and its associated

[30] U.S. EPA & U.S. Army Corps of Eng'rs, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States (June 5, 2007).
[31] *Id.* at 3.
[32] *Id.* at 4 n. 18.
[33] As noted above, that 2003 policy was strongly repudiated by the U.S. House of Representatives in a bipartisan vote.
[34] On a related point, even though Justice Kennedy explained that the absence of a hydrological connection between a wetland and a covered water body may provide a "significant nexus" between the two, *see* 126 S.Ct. at 2251 (Kennedy, J., concurring) ("Given the role wetlands play in pollutant filtering, flood control, and runoff storage, it may well be the absence of hydrologic connection (in the sense of interchange of waters) that shows the wetlands' significance for the aquatic system."), the new policy suggests that staff cannot demonstrate jurisdiction over so-called "isolated" waters by demonstrating a "significant nexus."
[35] In the course of explaining why it is reasonable to afford Clean Water Act protection to wetlands, for instance, Justice Kennedy gave an example of how small waters in the upper Mississippi watershed contribute nutrient pollution that creates an enormous "dead zone" in the Gulf of Mexico. 126 S.Ct. at 2246-47. In contrast, the "guidance" only allows agencies to consider the collective impacts for wetlands next to just one tributary, defined as one particular order of a stream.

wetlands in isolation – ignoring the very significant combined impact of all headwater streams and associated wetlands in the "region" on the rivers or lakes downstream.[36] This will make it vastly more difficult to protect many small streams with intermittent or ephemeral flow and their associated wetlands under the Clean Water Act.

- Imposes new jurisdictional hurdles for the protection of tributary streams, despite the fact that the cases at issue in *Rapanos* involved the application of the rules governing adjacent wetlands, not the streams themselves.[37]

- Creates extreme uncertainty about how to implement the "significant nexus" standard in practice. It does so by laying out a series of factors that to consider, without providing any roadmap as to how to evaluate these factors. For instance, although it says, "[p]rincipal considerations when evaluating significant nexus include the volume, duration, and frequency of the flow of water in the tributary and the proximity of the tributary to a traditional navigable water," it also instructs field personnel to look at a range of ecologic factors. The policy does not say how staff should balance these considerations if they point in different directions.[38,39]

- Says that jurisdictional determinations for tributaries should focus on the characteristics (flow, etc.) of a stream at its "farthest downstream limit," apparently without regard to whether other portions of the stream might have conditions more supportive of jurisdiction under the various announced tests.[40]

- Announces, and then partially retracts, a presumption that certain kinds of geographic features are not "waters of the United States," without providing useful guidance on how to tell the difference between protected features and those that are not.[41]

The "case-by-case" analysis embodied in the new policy no longer guarantees protections for many streams and rivers that do not flow all year long – streams and

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[36] *Id.* at 9.
[37] *Id.* at 1.
[38] *Id.* at 9-10.
[39] The Corps also issued an "Instructional Guidebook" to accompany the policy, and the guidebook contains a number of photos to illustrate the kinds of waters that the "guidance" might affect. Interestingly, although the guidebook has 11 photos of non-relatively permanent waters that flow into traditionally navigable waters, and thus would be jurisdictional under the "guidance" only if a "significant nexus" could be shown, the Corps does not indicate which, if any, of these water bodies is jurisdictional. Indeed, as best we can determine, the agencies did not include – anywhere in the myriad "guidance" materials released in June – any single example of a water body that the agency believes is connected by a "significant nexus" to a traditionally navigable water.
[40] *Id.* at 5 n. 21.
[41] *Compare id.* at 11 ("Swales or erosional features (e.g., gullies, small washes characterized by low volume, infrequent, or short duration flow) are generally not waters of the United States because they are not tributaries or they do not have a significant nexus to downstream traditional navigable waters.") *with id.* ("Certain ephemeral waters in the arid west are distinguishable from the geographic features described above where such ephemeral waters are tributaries and they have a significant nexus to downstream traditional navigable waters.").

rivers that the Clean Water Act had previously protected for some time. The required case-by-case review will effectively eliminate protections for some streams and rivers, even though the Supreme Court did not strike down existing agency regulations that protect these tributaries.

If past is prologue, these jurisdictional challenges will likely be resolved haphazardly and in many cases incoherently in the EPA Regions, the 38 Corps districts, and then in the courts, further muddying the legal waters regarding the scope of "waters of the United States."[42]

**Nevertheless, those waters are important**

The Court, EPA and Corps have removed Clean Water Act protections from a wide array of waters. The question, then, is whether or not this matters and whether or not this threatens the stated goal of the Clean Water Act to"restore and maintain the chemical, physical, and biological integrity of the Nation's waters".

The question of the correct scope of Clean Water Act protections is not a trivial one. Water is one of our most precious national assets. As a recent EPA draft report on the state of the environment observes:

> *"The nation's water resources have immeasurable value. These resources encompass lakes, streams, ground water, coastal waters, wetlands, and other waters; their associated ecosystems; and the human uses they support (e.g., drinking water, recreation, and fish consumption). The extent of water resources (their amount and distribution) and their condition (physical, chemical, and biological attributes) are critical to ecosystems, human uses, and the overall function and sustainability of the hydrologic cycle."*[43]

When Congress passed the Federal Clean Water Act Amendments of 1972, it broadly defined the water resources to protect, recognizing that "[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled *at the source*"].[44] This was a wise and elegant marriage of science and law; because all water bodies serve important functions in the natural environment and are part of an overall hydrologic system, the scope of the law had to be as broad in order to be effective.

As scientists have overwhelmingly documented, small streams and wetlands perform essential roles in our environment, storing floodwater, removing and processing pollutants that would contaminate downstream waters and providing critical habitat for many species of fish and other aquatic life. Safeguarding these waters from pollution is fundamentally important to keeping drinking water sources clean and minimizing flood risks in our communities.

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[42] *See* Government Accountability Office, *Waters and Wetlands: Corps of Engineers Needs to Better Support its Decisions for Not Asserting Jurisdiction,* GAO-05-870, Sept. 2005; *see also Reckless Abandon, supra.*
[43] U.S. EPA, EPA's 2007 Report on the Environment: Science Report, External Review Draft, at p. 3-6 (May 2007).
[44] S. Rep. No. 92-414, p. 77 (1972)

The February 2007 issue of *Journal of the American Water Resources Association* enlisted experts on America's waterways to discuss what role headwaters play in the overall status and safety of the nation's water supply by maintaining the physical, chemical and biological integrity of downstream waters. An article summarizing the collection observes:

> "[S]cientific evidence does not support the existence of a bright line separating headwater streams from downstream waters within these integrated hydrological systems. Via hydrological connectivity, headwater, intermittent and ephemeral streams cumulatively contribute to the functional integrity of downstream waters; hydrologically and ecologically, they are a part of the tributary system."[45]

Similarly, the September 2003 issue of the *Journal of the Society of Wetlands Scientists* contained numerous studies documenting the functions performed and values provided by wetlands, including so-called "isolated" wetlands. One article predicted the extent of isolated wetlands in 72 study areas based on a U.S. Fish and Wildlife Service (FWS) survey. The study sites included areas where specific types of "isolated" wetlands were known to occur (including Prairie Pothole marshes, playas, Rainwater Basin marshes and meadows, terminal basins, sinkhole wetlands, Carolina bays, and West Coast vernal pools). The study found that isolated wetlands constituted a significant proportion of the wetlands resource across the country: eight study areas had more than half of their wetland area designated as isolated, while 24 other areas had 20-50 percent of their wetland area in this category.[46] These wetlands perform many of the same important functions as wetlands that are not considered geographically "isolated" from other waters. Making a distinction between "isolated" and non-isolated wetlands for the regulatory purposes of protecting water quality does not make scientific sense.

In another example, EPA studies have drawn the connection between upstream wetlands and headwaters in the Chesapeake Bay watershed and the physical, chemical and biological integrity of the Chesapeake Bay and its navigable tributaries downstream. EPA Region III studies encompassing the Chesapeake Bay watershed show that headwater streams (first and second order streams) comprise about half of the many streams in the Bay watershed, and about half of these headwater streams flow intermittently at times.[47] EPA Region III studies show that about 36% of the area's remaining wetlands are associated with headwaters. Therefore, the watershed's non-navigable streams and adjacent wetlands comprise a large percentage of the watershed's hydrologic system.

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[45] Tracie-Lynn Nadeau and Mark Cable Rains, *Hydrological Connectivity Between Headwater Streams and Downstream Waters: How Science Can Inform Policy*, Journal of the American Water Resources Association, 118, 129 (Feb. 2007).

[46] *Geographically Isolated Wetlands of the United States*, Ralph W. Tiner (Sept. 2003) 23(3).

[47] *Consolidated EPA Region III Response to the Advanced Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "waters of the United States"* at 10, Appendix E at 3 (2003).

Similarly, EPA Region III compiled studies within the Bay watershed demonstrating that many of these remaining wetlands remove up to 90% of nitrogen and phosphorus pollution from runoff.[48] Nitrogen and phosphorus pollution cause eutrophication, the most significant threat to Chesapeake Bay watershed restoration.[49]

Nationwide, smaller streams are a significant percentage of the nation's overall hydrologic system. According to EPA, first-order streams comprise 53 percent of total stream miles, and intermittent (including ephemeral) streams comprise 59 percent of the total.[50] Over 100 million Americans get their drinking water from public water systems that intake water reliant, in some part, upon these streams; in 27 states, more than 1 million residents get drinking water impacted by these streams.[51] These headwater and intermittent streams also are utilized as discharge points for wastewater for over 14,000 industrial and municipal facilities with individual NPDES permits under the Clean Water Act.[52] If federal anti-pollution safeguards for these streams are significantly constricted, pollution could jeopardize public health as well as the physical, chemical and biological integrity of these waters.

**Legislative History Confirms the Intended, Broad Scope of Protection**

By the 1960s, the deterioration of the nation's waters was alarmingly evident. Symbolic of their disastrous state was the Cuyahoga River, running through Cleveland, Ohio into Lake Erie. It carried so much industrial waste in the 1950s and 1960s that it caught fire on more than one occasion. Lake Erie itself contained enough municipal and industrial waste and agricultural runoff that it supported algae blooms forty miles long and was near becoming biologically dead. Spills off the coast of California blanketed hundreds of miles of coastline with oil. Waterways in many cities across the country were sewage receptacles for industrial and municipal waste. The rate of wetlands loss was approximately 450,000 acres per year.[53] Leaving the problem to individual states and piecemeal federal law to resolve was clearly not working.

Public outcry demanded a strong response. There was a general – and accurate – perception that past approaches relying on state-by-state water quality standards alone was not cleaning up the waters and, indeed, waters were deteriorating. There was a need for a broader federal role to address water pollution.

And Congress responded. The 1972 Act was hailed as the first truly comprehensive federal water pollution legislation. Congressman Blatnik, Chairman of the House Public Works Committee, characterized it as a "landmark in the history of

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[48] *Id.*, Appendix D, Literature Review at 13-14.
[49] *See e.g.*, Chesapeake 2000 Agreement, Water Quality Protection and Restoration, at 5
[50] *See* Letter of Jan 9, 2006 from Benjamin Grumbles, Assistant Administrator of EPA.
[51] See attached, "Table 1: State by State NHD Analyses of Stream Categories and Drinking Water Data" (prepared by U.S. EPA).
[52] See attached, " State by State Analyses of Individual NPDES Permits on NHD Intermittent/Ephemeral and "Start Reach" Streams That Have Location Data in PCS" (prepared by U.S. EPA).
[53] Frayer et.al. "Status and Trends of Wetlands and Deepwater Habitats in the Conterminous United States, 1950s to 1970s," USFWS National Wetlands Inventory (April 1983).

environmental legislation."[54] Senator Randolph, Chairman of the Senate Committee on Public Works, said "[i]t is perhaps the most comprehensive legislation that the Congress of the United States has ever developed in this particular field of the environment." [55]

The law's comprehensive nature was a response to the failure of existing water pollution laws. As Senator Edmund Muskie told the Senate when introducing the bill that was to become the new Clean Water Act: "The committee on Public Works, after 2 years of study of the Federal water pollution control program, concludes that the national effort to abate and control water pollution is inadequate in every vital aspect."[56]

It is clear that the intent of Congress when passing the Clean Water Act was to embrace the broadest possible definition of "navigable waters" when it defined that term as "all waters of the United States." The very first sentence of the 1972 statute states, "The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[57, 58] To achieve this objective, Congress adopted a general prohibition on discharging pollutants from point sources into "navigable waters" without a permit[59], and gave the fullest effect to this and other provisions of the law by defining that term as "waters of the United States."[60]

Both the House and Senate versions of the bills to amend the Federal Water Pollution Control Act (FWPCA) were written to expand federal authority to control and ultimately eliminate discharges of water pollution across the country.[61] Both the House and Senate sought to restructure the nation's federal authority to control water pollution while drawing upon much of the language of earlier versions of the FWPCA as well as the Rivers and Harbors Act (RHA). Thus, in their respective bills, both bodies initially borrowed the term "navigable waters" from the RHA, and included a definition that itself used the term "navigable."[62]

However, in the reports discussing their respective versions of the legislation, both the House and Senate expressed concern about potential narrow interpretations of what waters they intended the Act to cover. The House Public Works Committee stated its concern as follows:

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[54] Legislative History of the Water Pollution Control Act Amendments of 1972, Ser. No. 93-1 (1973).
[55] *Id.*
[56] 117 Cong. Rec. 17397 (daily ed. Nov. 2, 1971).
[57] 33 U.S.C. § 1251.
[58] The House report explains "The word 'integrity'... is intended to convey a concept that refers to a condition in which the natural structure and function of ecosystems is maintained." H.R. Rep. No. 92-911 at 76-77 (1972). Similarly, the Senate report stated, "Maintenance of such integrity requires that any changes in the environment resulting in a physical, chemical or biological change in a pristine waterbody be of a temporary nature, such that by natural processes, within a few hours, days or weeks, the aquatic ecosystem will return to a state functionally identical to the original." 1972 U.S.C.C.A.N. at 3742.
[59] 33 U.S.C. §1311(a)
[60] 33 U.S.C. § 1362(7).
[61] H.R. 11896, 92nd Cong. (1971); S. 2770 92nd Cong (1971).
[62] In the Senate, the definition read "the term navigable waters means the navigable waters of the United States, portions thereof, and the tributaries thereof, including the territorial seas and the Great Lakes. S. 2770, 92nd Cong. § 502(h) (1971). The House bill's definition read, "The term 'navigable waters' means the navigable waters of the United States, including the territorial seas." H.R. 11896, 92nd Cong. 502(8)(1971).

> "The Committee is reluctant to define the term 'navigable waters.' This is based on the fear that any interpretation would be read narrowly. This is not the Committee's intent. The Committee fully intends 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."[63]

The Senate Committee on Public Works stated:

> "Through a narrow interpretation of the definition of interstate waters the implementation of 1965 Act was severely limited. Water moves in hydrologic cycles and it is essential that discharges of pollutants be controlled at the source."[64]

While the House report focused upon the need for a broad constitutional interpretation of the Act's scope, and the Senate report spoke to the scientific reality of the interconnected nature of waters, both bodies signaled their desire not to constrain the reach of the Act to those waters previously protected primarily on the grounds of navigability.

When the House and Senate met in conference committee, they took an additional step to ensure that the definition of "navigable waters" did not result in unduly narrow interpretations. As discussed in the report of the conference committee, the House version of the definition was accepted into the final bill, but the word "navigable" was deleted from the definition. Thus, the new definition read, "[t]he term 'navigable waters' means waters of the United States, including the territorial seas."[65]

The Conference report spoke to this change, using the exact terminology of the earlier House Public Works Committee report in confirming that the term "must be given the broadest constitutional interpretation," and expressing that the interpretation of this definition must be "unencumbered by agency determinations which have been made or may be made for administrative purposes."[66]

Finally, the debate in Congress on final passage of the Act confirmed the conference report's intent to give the law broad scope. For example, Congressman John Dingell Jr. explained the definition in his statement to the House on the conference committee bill:

> "The conference bill defines the term "navigable waters" broadly for water quality purposes. <u>It means all "the waters of the United States" in a geographical</u>

[63] H.R. Rep. No. 92-911 at 76-77 (1972).
[64] S. Rep No. 92-414, 92nd Cong. 77 (1971).
[65] S. Rep. No. 92-1236, 92nd Cong.144 (1971).
[66] Id.

> sense. It does not mean "navigable waters of the United States" in the technical sense as we sometimes see in some laws."[67]

After reviewing the broad extent of the Commerce Clause authority, Representative Dingell went on to state:

> Thus, this new definition clearly encompasses all water bodies, including main streams and their tributaries, for water quality purposes. No longer are the old, narrow definitions of navigability, as determined by the Corps of Engineers, going to govern matters covered by this bill. Indeed, the conference report states on page 144: The conferees fully intend that the term navigable waters be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes.[68]

Thus, Congress quite intentionally expanded the Act's jurisdictional scope in 1972 through the Act's new and ambitious pollution reduction goals. Congress chose not to retain the traditional definition of the jurisdictional term "navigable waters" from the Rivers and Harbors Act or limit its jurisdictional reach as in earlier versions of the FWCPA.[69] Instead, Congress deleted the word "navigable" from the "navigable waters" definition of the 1972 Act, thereby asserting federal jurisdiction over all "waters of the United States" as necessary to achieve its stated objective to rid the nation's waters of pollution.

Historically, the law has been construed by the courts to apply to a wide variety of waters. Long before *Rapanos* and *SWANNC*, the Supreme Court recognized that the Act was designed to establish "an all-encompassing program of water pollution regulation," and "applies to all point sources and virtually all bodies of water."[70]

Many of the protections built into the Clean Water Act – including the requirement that point sources discharging pollutants into waters must have a permit – are triggered only when the body of water in question is a "water of the United States." [71] Likewise, the Act's core permit program – the § 402 National Pollutant

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[67] *See* House consideration of the report of the Conference Committee, Oct. 4, 1972, compiled in Legislative History of the Water Pollution Control Act Amendments of 1972, Ser. No. 93-1, 93rd Cong. (1973), at 250-251 (emphasis added).

[68] *Id.*

[69] The definition of "navigable water" in earlier version of the FWCPA had made express reference to "navigability." 211 80 Stat. 1253.

[70] *Intl. Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987) (emphasis added; internal quotations omitted). *See also U.S. v. Earth Sciences, Inc.*, 599 F.2d 368, 375 (10th Cir. 1979) ("It seems clear Congress intended to regulate discharges made into every creek, stream, river or body of water that in any way may affect interstate commerce"); *NRDC v. Callaway*, 392 F.Supp. 685, 686 (D.D.C. 1975) ("Congress by defining the term 'navigable waters' . . . to mean 'the waters of the United States, including the territorial seas,' asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution.").

[71] See 33 U.S.C. § 1311(a) (generally prohibiting the "discharge of any pollutant" without compliance with other requirements of the Act); id. § 1362(12) (defining "discharge of a pollutant" to mean "any addition of any pollutant to navigable waters from any point source"); id. § 1362(7) (defining "navigable waters" to mean "the waters of the United States"). .

Discharge Elimination System (NPDES) program – applies to "navigable waters," *i.e.*, to "the waters of the United States."[72] Accordingly, the evolution of § 402 offers highly relevant contextual evidence concerning the proper interpretation of the definition. The § 402 NPDES program was designed to supersede the preexisting permit program under the 1899 Refuse Act. Section 402 provides that permits previously issued under the Refuse Act would thenceforth constitute NPDES permits, and that no further Refuse Act permits would be issued.[73] Tellingly, the 1899 Refuse Act does not merely govern discharge into traditionally navigable waters. To the contrary, it encompasses discharge "into any navigable water of the United States, <u>or into any tributary</u> of any navigable water from which the same shall float or be washed into such navigable water."[74]

Thus, to conclude that non-navigable tributaries of traditionally navigable waters are exempt, one would have to believe that the 1972 Congress <u>cut back</u> the geographic scope of the predecessor statute.[75] The notion that Congress intended any such cutback is untenable. To the contrary, faced with rivers literally catching fire due to pollution,[76] the 1972 Congress concluded that "the previous legislation was 'inadequate in every vital aspect'" – and responded by enacting a "comprehensive" statute whose intent "was clearly to establish an all-encompassing program of water pollution regulation."[77] In direct contradiction to this approach, exclusion of certain non-navigable tributaries would dramatically shrink federal water pollution regulation back to a narrow geographic scope not seen since the McKinley Administration.

The 1977 Amendments to the Act further confirm the inclusive nature of the law's scope. During the deliberations on those amendments, attempts were made to narrow the waters covered by the Act (and by the Refuse Act). Under the proposed narrowing language, the permitting safeguards of those statutes would have encompassed only traditionally navigable waters, together with wetlands that were either "contiguous or adjacent" to such waters and "periodically inundated."[78] Numerous Senators objected to the proposal as a significant weakening of the law and stressed that excising certain waters would undermine the basic structure of the Act; for example, Senator Baker emphasized that

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[72] § 502(7).
[73] 33 U.S.C. §§ 1342(a)(4) & (5).
[74] 33 U.S.C. § 407 (emphasis added).
[75] Indeed, the cutback would be dramatic. See Letter of Jan 9, 2006 from Benjamin Grumbles, Assistant Administrator of EPA, attached as appendix to Brief Amicus Curiae of Assn. of State Wetlands Managers in Rapanos, 2006 WL 139206 (Jan. 13, 2006) (estimating that over half of all U.S. streams are not traditionally navigable); L. Wood, Don't Be Misled: CWA Jurisdiction Extends to All Non-Navigable Tributaries of the Traditional Navigable Waters and to Their Adjacent Wetlands, 34 Envtl. L. Rptr. 10187, 10193 n.32 (2004) (in the Missouri River watershed, there are by conservative estimate 559,669 miles of traditional navigable waters plus tributaries, of which traditional navigable waters represent only 3,151 miles—less than 1%). Even if only a fraction of these tributaries were to be left out of the scope of the Clean Water Act's protections – such as those lacking "relatively permanent flow" or a demonstrable "significant nexus" to traditional navigable waters – the water pollution impacts would be significant.

[76] *see U.S. v. Ashland Oil and Transp. Co.*, 504 F.2d 1317, 1326 (6th Cir. 1974),
[77] *Milwaukee v. Illinois*, 451 U.S. 304, 317-19 (1981).
[78] *See, e.g.*, Legislative History of the Clean Water Act of 1977 (October 1978), at 901.

> "[c]omprehensive jurisdiction is necessary not only to protect the natural environment but also to avoid creating unfair competition. Unless Federal jurisdiction is uniformly implemented for all waters, dischargers located on nonnavigable tributaries upstream from the larger rivers and estuaries would not be required to comply with the same procedural and substantive standards imposed upon their downstream competitors."[79]

However, though such language was passed by the House, the Senate – and ultimately Congress as a whole – rejected it."[80]

***The Problem with What Clean Water Act Protections Have Become***

Across the country, after both *SWANCC* and *Rapanos*, the agencies have issued policy directives that, if followed, would curtail Clean Water Act protections more than the Court required. As we have noted, the January 2003 EPA and Corps Guidance directed field staff to stop applying Clean Water Act protections to virtually all so-called "isolated" waters without prior permission from agency Headquarters in Washington, D.C. This policy directive far exceeds the scope of the *SWANCC* ruling, effectively denying protection to many waters that still warrant it under existing regulations. This Guidance remains in effect despite a large volume and breadth of critical comments that led the Agency to forego rulemaking, and despite the previously noted 2006 bipartisan U.S. House vote in opposition to the policy reflected in the Guidance.

Last June's new Guidance, which makes matters worse, erroneously indicates that tributary streams which do not flow all year will not be uniformly protected, even though tributaries to various protected water bodies have long been covered by the law, and even though the Supreme Court's decision did not require such a result. Moreover, the agencies have read the Court's ruling too broadly by largely ignoring parts of the decision that would allow the government to protect water bodies when they collectively are important to water quality.

This policy activity has led to a precarious state of affairs when it comes to protecting water bodies from pollution and destructive activity:

- Based on EPA /Corps records, a wide variety of waters have been denied Clean Water Act safeguards in recent years, including a 150-mile-long river in New Mexico, thousands of acres of wetlands in one of Florida's most important watersheds, a 69-mile long canal used as a drinking-water supply in California, and an 86-acre lake in Wisconsin that is a popular fishing spot.
- An estimated 53-59% of America's stream miles outside of Alaska are seasonal waters or headwater streams (or both), representing over 1.8 million river miles. Depending on whose interpretation of current law prevails, many of these

[79] *Id.* at 920.
[80] *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 136-37 (1985).

streams could be at risk of losing protection, or at least be harder to protect in practice.

- These small streams contribute to the public drinking water sources of over 110 million people.
- Based on available geographic information, over 14,000 industrial and municipal facilities have permits that limit their pollution discharges into these streams and rivers. Some opponents of comprehensive Clean Water Act protections have relied on the Court's decisions to argue that they do not need such permits to discharge to these types of waterways.
- EPA and the Corps acknowledge that they have not been enforcing requirements of their Clean Water Act regulations for numerous so-called "isolated" water bodies. There are roughly 20 million acres of "isolated" wetlands in the continental U.S.

The cases below highlight on-the-ground problems with current implementation and demonstrate why CWRA is necessary to restore the longstanding protections originally intended by Congress.

***U.S. v Chevron Pipe Line Company***

On August 24, 2000, a pipeline operated by the Chevron Oil Pipeline Company failed, spilling 126,000 gallons of oil into an unnamed, west Texas Creek. The creek was dry at the time, as are almost 60 percent of the nations' streams for a portion of the year. Many dry creeks need Clean Water Act protections from oil spills because water will flow through them carrying pollutants downstream into the watershed. In this case, 500 feet from where the oil spill occurred, the unnamed creek runs into Ennis Creek (another intermittent stream), which flows for 17 miles before reaching Rough Creek, which is also intermittent. Almost 30 miles downstream, Rough Creek discharges in to Double Mountain Fork of the Brazos River. Eighty-two miles downstream, it meets the Brazos River, the nearest body of water capable of supporting navigation.

These creeks are not dry all the time. "During times of water flow, there is an unbroken surface water tributary connection from the unnamed tributary, [where the oil spill occurred] ...into the Brazos River," according to the Justice Department. For over 30 years, the Clean Water Act protected tributaries like this one and countless other waters from illegal discharges of oil and other pollutants. This protection is essential to meet the basic Clean Water Act goal of restoring and maintaining the chemical, physical and biological integrity of the nation's waters.

Yet in this case, a Federal trial court in Texas ruled that because no water was flowing in the unnamed tributary at the time of the oil spill and the government had not demonstrated that the oil had reached a navigable-in-fact-water, the Clean Water Act did not apply. The District Court issued a decision just days after the *Rapanos* decision leading the Texas judge to conclude that denying protections to these streams was consistent with *Rapanos*.

The *Chevron* decision suggests that a water body many not be protected from oil pollution unless the government can show that it is "navigable" or directly adjacent to such a water. It also indicates that the company responsible for the discharge will not be liable under the Clean Water Act unless the pollution can be demonstrated to have reached a navigable-in-fact water or water body adjacent to such water. Such a demonstration will be time and resource intensive and has never before been required under the Clean Water Act. Yet unless the required "nexus" can be established, oil or waste can be dumped into the creek with virtually no Clean Water Act oversight.

***Land O Fewer Lakes***

Recently, two large lakes in Minnesota nearly lost their protection against pollution under the Clean Water Act. Although the initial decisions to drop Clean Water Act protections were overturned – one by EPA and Corps headquarters together, one by EPA alone – the cases underscore the threat to the health and safety of Minnesota's waters and waters nationwide as polluters and developers try to shrink the scope of the federal law.

Boyer Lake is a 310-acre lake in Becker County, Minnesota, about 35 miles east of the North Dakota border off of Highway 10. According to Minnesota's Department of Natural Resources (DNR), "northern pike, largemouth bass, walleye and panfish are all popular targets of anglers on this lake," and the DNR stocks the lake with walleye (including over 400,000 walleye fry in 2005). There is a public boat ramp built on the northwest shore and additional boat access from the highway. The DNR website touts that, "Boyer is a relatively scenic lake in prairie country with several small islands, bays, and peninsulas."

Bah Lakes, a 70-acre lake, is located about 75 miles northwest of Minneapolis on the border between Grant and Douglas counties. The lake is usually covered with up to 10-feet of water. Canoeing, as well as bird watching, cross-country skiing, hiking, hunting, and snow shoeing are some of the activities reportedly enjoyed in, on, and around the lake. There is public access to the lake from County Road 19, along which there is room for pullouts and parking. Ducks Unlimited is working to implement a conservation easement to preserve habitat around Bah Lakes. Several hotels, resorts and campgrounds exist in the nearby area.

Despite the use of these waters by boaters, the local Corps office initially concluded that each of these lakes is an "isolated, non jurisdictional water with no substantial connection to interstate (or foreign) commerce." This determination would have removed Clean Water Act protection for these two lakes, meaning that the Act would no longer constrain polluters from discharging into, or even destroying, nearly 400 acres of Minnesota's fresh water lakes.

These misguided determinations were ultimately reversed, keeping Clean Water Act protections in place. Officials in EPA and Corps headquarters overturned one decision, Boyer Lake. In the case of Bah Lakes, however, the Corps would not endorse EPA's ruling that that water was still protected by the Clean Water Act.

The fact that federal officials first concluded that the Clean Water Act did not cover such large and productive bodies of water shows that the threat to so-called "isolated" waters is significant. These examples – particularly the fact that Corps headquarters would not overturn the Bah Lakes determination – indicate that some regulatory officials may misunderstand what the Clean Water Act protects, or simply lack the commitment to implement the law, or both.

***Avondale Creek***

Avondale Creek is a continuously flowing stream in north Birmingham, Alabama feeding into Village Creek. After 28 miles, Village Creek flows into Bayview Lake, which was created by damming the creek. Locus Fork flows out of the lake for 20 miles before it reaches the Black Warrior River, which is traditionally-navigable-in-fact.

In June of 2005 – after one of the longest environmental crimes trials in history – a jury in Birmingham found McWane, Inc., a pipe manufacturer, and company managers guilty of knowingly discharging oil, lead, zinc and grease into Avondale Creek in violation of the Clean Water Act. The district court sentenced McWane to 60 months' probation and a fine of $5million. The individuals were sentenced to fines ranging from $35,000 to $90,000 and to varying lengths of probation. The convictions stemmed from "systematic discharges of process waste water into a creek and efforts by the company officials to hide these discharges from state and federal regulators," according to the U.S. Department of Justice. The alleged Clean Water Act and other health and safety violations at McWane facilities across the U.S. were so extensive that a PBS Frontline documentary, "A Dangerous Business," featured them.

October 24, 2005 these convictions were overturned on appeal. The ruling stemmed from, what we believe was, a misinterpretation of the *Rapanos* ruling. The McWane defendants challenged their conviction, claiming that the government had not shown that Avondale Creek was protected by the Clean Water Act as interpreted by *Rapanos*. The US Court of Appeals for the Eleventh Circuit ruled that Justice Kennedy's test from *Rapanos* is controlling and requires the government to show a "significant nexus" between a given body of water and a navigable-in-fact one to trigger protections. The court therefore reversed the conviction and remanded the case for a new trial, saying "[t]he government did not present any evidence...about the possible chemical, physical or biological effect that Avondale Creek may have on the Black Warrior River."

For over 30 years, the CWA protected Avondale Creek and countless other waters from pollution. Now, due to *Rapanos*, the Eleventh Circuit says that the government must show evidence of the effects of Avondale Creek on the Black Warrior River to protect the creek, something that will take time and resources never previously required.

The impact of the Supreme Court's split decision in *Rapanos* on this case is telling. The judge who presided over the original McWane trial took himself off the case after the Eleventh Circuit overturned the convictions, saying, "I am so perplexed by the way the law applicable to this case has developed that it would be inappropriate for me to

try it again." The judge went on to say, "I will not compare the [*Rapanos*] 'decision' to making sausage because it would excessively demean sausage makers." In particular, the judge seemed dismayed that no opinion received a majority and that the key terms were left vague. He was further dismayed that the Eleventh Circuit only looked to a singular opinion, Justice Kennedy's, with the result that, "parties, lawyer, and trial judges are charged with determining what one well-positioned Justice might decide."

***Confusion and Complexity are Causing Other Problems***

What have the changes to Clean Water Act jurisdiction from the Court's decisions and resulting EPA/Corps Guidances meant for the regulatory process? Those tasked with implementing the Clean Water Act are mired in confusing directives that place an increased burden on them. The determination of whether or not a water body is "significantly" connected to a navigable one is now laborious and expensive. It is also sometimes quite speculative, requiring EPA and/or Corps staff to navigate a web of conflicting steps and aids to determine jurisdiction. The examples above illustrate some of the mistakes introduced when jurisdictional determinations are unnecessarily complicated.

In addition to mistakes, the current situation also leads to a dramatic decrease in issuance of permits. In particular, the requirement to treat many jurisdictional determinations on a case-by-case basis can add significant time to permits. Marcus Hall, Director of Public Works in St. Louis County, Minnesota, previously testified before this committee about how the post-*Rapanos* permitting process would "...add anywhere from four to six months to the process, more than doubling the current process time."[81] In this case, the cumbersome permitting process may add $1 to 2 million per year to a $25 to 30 million per year road maintenance budget for the county. It is not only St. Louis County impacted by the slower permitting. Anyone who requires a permit from the Corps, EPA or state agencies related to water quality stands to be affected by the increased burden placed on these regulating agencies.

***A Broad Scope of Protection is Needed Because it Affects Numerous Clean Water Act Programs***

The Clean Water Act has one definition of "waters of the United States" that is the same for all of the Act's provisions.[82] That definition lays out the scope for many of the Act's provisions: the general prohibition against discharging pollutants into waters without a permit (§ 301); the law's two major permitting programs, the National Pollution

[81] Hall, Marcus J, P.E., Public Works Director/County Engineer, Public Work Department, St. Louis County, Minnesota from testimony before the U.S. House Committee on Transportation and Infrastructure. "Status of the Nation's Waters, including Wetlands, Under the Jurisdiction of the Federal Water Pollution Control Act," held July 17, 2007 in Washington, D.C.

[82] *See, e.g.*, Brief of the U.S. Gov't in *Rapanos* at 21 ("the term 'waters of the United States' "defines the scope of regulatory jurisdiction to be exercised under other provisions of the CWA.").

Discharge Elimination System permits (§ 402) and the dredge and fill permits (§ 404); water quality standards and total maximum daily loads (§ 303); the oil spill liability prevention and liability provisions (§ 311); and more.

In particular, because CWA section 301(a) broadly prohibits the discharge of any "pollutant" to such waters from any "point source" without a permit,[83] the "waters of the United States" are the same, irrespective of whether the pollution is regulated by a permit under the National Pollutant Discharge Elimination (NPDES) program of CWA § 402 or the "dredge-and-fill" program of § 404.[84, 85] For example, in a quest for loopholes, American Petroleum Institute (API) and Marathon Oil Company have mounted a frontal attack on a 2002 Environmental Protection Agency regulation defining which waters are protected by Clean Water Act §311 – the Act's principal safeguard against oil spills. The statutory term "navigable waters" and its definition as "waters of the United States" govern the scope of this program as well.[86] This illustrates that the Court rulings in *Rapanos* and *SWANNC* and the EPA/Corps guidance effectively extend well beyond the § 404 permits directly addressed. These rollbacks threaten the heart and soul of the Clean Water Act.

***The Clean Water Restoration Act as a Solution***

For the past five years the Clean Water Act's jurisdictional scope has been eroded through the backdoor of the judiciary and through the Bush Administration EPA and Corps. While this whittling away of the Act has been ongoing, proponents of clean water have employed a conservative and transparent strategy of reaffirming the original intent of Congress by proposing to clarify the central statutory definition of the Clean Water Act: this is precisely what the Clean Water Restoration Act (CWRA) achieves. Sec. 2 of the Act states clearly this purpose:

> *The purposes of this Act are as follows:*
> *(1) To reaffirm the original intent of Congress in enacting the Federal Water Pollution Control Act Amendments of 1972 (86 Stat. 816) to restore and*

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[83] *see* 33 U.S.C. §§ 1311(a), 1362(12),

[84] *See id.* § 1342(a) (providing for NPDES permits for "discharge of any pollutant"), § 1362(12) ("[t]he term 'discharge of a pollutant' . . . means . . . any addition of any pollutant to navigable waters from any point source"), § 1344(a) (providing for permits for "discharge of dredged or fill material into the navigable waters"); *see also* Oral Argument Transcript, *Rapanos v. U.S.*, at 57 (Feb. 21, 2006) (statement of Solicitor General Clement) ("whatever this Court decides for purposes of the 404 jurisdiction, it's necessarily deciding for purposes of the 402 jurisdiction of the EPA.").

[85] At least some of the opponents of the Clean Water Restoration Act even concede that the definition of "waters of the United States" applies to Clean Water Act programs beyond the § 404 dredge and fill permit program. See Waters Advocacy Coalition, *Reasons To Oppose the "Clean Water Restoration Act of 2007," H.R. 2421* (noting that the definition of "waters of the U.S." affects waters subject to water quality standards, effluent limitation guidelines (which are relevant to the Act's § 402 NPDES permit program) and, the setting of Total Maximum Daily Loads (TMDLs)); *see also* Brief of *Amici Curiae* Croplife America et al., *Rapanos v. U.S.*, at 4 (Dec. 2, 2005).

[86] Interestingly – perhaps even comically – in their briefs in this case, API cites to Congressman Dingell's famous floor statement giving broad meaning to the term "navigable waters" to try to claim that the 1972 legislation meant the exact opposite, which is that Congress was primarily concerned with navigability. Congressman Dingell has submitted an amicus brief in that case to dispel them of that argument.

*maintain the chemical, physical, and biological integrity of the waters of the United States.*

*(2) To clearly define the waters of the United States that are subject to the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.).*

*(3) To provide protection to the waters of the United States to the fullest extent of the legislative authority of Congress under the Constitution.*

CWRA achieves the stated purposes by removing the language whose interpretation has been the basis for the Court's rulings in *SWANNC* and *Rapanos*, 'navigable waters', and replacing it with the term 'waters of the United States.' It then goes on to define 'waters of the United States' as:

> *"...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.'."*

The language defining 'waters of the United States' is taken from rules used by the Corps and EPA to determine jurisdiction for waters under the Clean Water Act in place prior to the *SWANNC* and *Rapanos* decisions.[87]

The Clean Water Restoration Act is necessary to address the problems created by the current combination of uncertain Court rulings and weakening EPA and Corps guidances. First, CWRA restores the jurisdictional coverage of the Clean Water Act to a baseline that previously existed in order to 'restore and maintain the chemical, physical, and biological integrity of the Nation's water'. The baseline jurisdictional scope CWRA returns to are the well-established rules in place at the time of the *SWANNC* ruling. Returning to this baseline will return the Clean Water Act to a place where it is better able to meet the original Congressional intent as well as the stated purpose of the Clean Water Act. Additionally, CWRA removes the opaque language that the EPA and Corps have reinterpreted, replacing it with a clear statement of Congressional intent.

Second, it provides additional clarity as to which waters the Clean Water Act covers and which it does not. This is clarity beyond that of both Supreme Court rulings, particularly those in the split decision of *Rapanos*, and those in the EPA and Corps guidances. The CWRA definition will be familiar to those working with the Clean Water Act, since it comes from previous EPA and Corps rules.[88] CWRA will lessen the complexity and uncertainty introduced to the permitting processes since the *Rapanos* decision. As previously stated, this has caused a marked slow-down in the permitting process, affecting operational capacity of the regulating agencies and introducing new delays and costs into private and public development.

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[87] 33 C.F.R 328.3 (a) and 40 C.F.R. 230.3 (s)

[88] 33 C.F.R 328.3 (a) and 40 C.F.R. 230.3 (s)

The third problem that CWRA addresses is the threat to programs important to the stated goals of the Clean Water Act. The Clean Water Act had originally aimed to eliminate pollution from the nation's waters by 1983. This goal has not been achieved, and we continue to suffer from numerous lakes, rivers and streams that do not meet either the fishable or the swimmable goals of the Clean Water Act. We cannot afford to go backwards by reducing the scope of the Clean Water Act's protections when we should be moving forward to achieve its goals. The Clean Water Restoration Act returns protections to waters we know scientifically are critical to restoring and maintaining the chemical, physical and biological integrity of our nation's waters.

The Clean Water Restoration Act eliminates the most immediate threat to Dredge and Fill Permits (§ 404) but also protects other important Clean Water Act programs. By defining more clearly the jurisdictional scope of the Clean Water Act, the CWRA will also fend off jurisdictional challenges to other important sections. This includes the general prohibition against discharging pollutants into waters without a permit (§ 301), the National Pollution Discharge Elimination System permits (§ 402), water quality standards and total maximum daily loads (§ 303), the oil spill liability prevention and liability provisions (§ 311), and more.[89] Defining the waters covered by the Clean Water Act as CWRA does will better allow states to achieve the reductions in direct and indirect discharges necessary to reduce pollutant levels in our impaired waters. For example, the Total Maximum Day Load (TMDL) program[90]requires both that the total capacity for pollutants be set for a body of water as well as the creation of a plan to reduce inputs into the body in order to meet pollutant load threshold. Removal of bodies of water from jurisdictional scope of the Clean Water Act will threaten the ability of agencies to develop implementation plans that meet the requirements of the program.

Congressional action to address the proper jurisdictional scope of the Clean Water Act, through the Clean Water Restoration Act, is also an appropriate step to take in lieu of relying on EPA and Corps rulemaking. Our contention is that the Court's incorrect interpretations of the Act and Congresses' previous intent cannot be overruled by agency regulations. The agencies are bound to base their rulemaking upon the Court opinions. Moreover, the agencies have proven themselves ill equipped to respond effectively to the Courts' confusing opinions. The Guidance issued last year by the Corps and EPA in response to the *Rapanos* decision took nearly a year to release – and it still fails to provide clear answers to the fundamental questions of how to determine many water bodies' status under the Clean Water Act. The *Rapanos* decision laid out a complex array of conditions to determine jurisdiction but leaves opportunity to issue categorical determinations. This would allow some certainty in those cases rather than having to rely on case-by-case analyses. The EPA and Corps draft guidance failed to take advantage of this opportunity, instead opting to take the more burdensome route. Despite the legislative history of the Act and despite the measured reasoning of the Court, the Bush Administration's agencies have reduced blanket protections for important waters of the United States and generated a fog of

[89] *See, e.g.*, Brief of the U.S. Gov't in *Rapanos* at 21 (the term 'waters of the United States' "defines the scope of regulatory jurisdiction to be exercised under other provisions of the CWA.").
[90] § 303

confusion for federal and state regulators, the regulated community and the public. It is necessary at this time for Congress to once again step in and provide certainty and clarity as to what the jurisdictional definitions are for the Clean Water Act.

***Concerns About the Clean Water Restoration Act are Unfounded***

During the public debate and in conversations we have had concerning the Clean Water Restoration Act a number of concerns have been raised. Some come from people trying to discern the impact of CWRA. Some are based upon different interpretations of language. Unfortunately, many others are motivated more by rhetoric and a desire to cloud and confuse the discussion. We would like to take the opportunity to address some of the most common here.

One of the central arguments put forth is that the definition of 'waters of the United States' in CWRA is too broad, and that it would expand the jurisdiction of the Clean Water Act beyond what it was before the Supreme Court's *SWANNC ruling*. These claims have gone so far as to suggest that the definition would cover any accumulation of water including swimming pools, hot tubs, puddles in your yard and birdbaths. Instead, CWRA relies on previous agency regulations that broadly protected water bodies.[91] The broad scope of this language, which was in practice for over 30 years until SWANCC, did not lead agencies to regulate all wet areas. They recognized that some waters are not generally considered 'waters of the United States'.[92] These unregulated waters include, but are not restricted to, swimming pools, hot tubs, rain puddles and birdbaths. In addition, the Clean Water Act clearly distinguishes between "navigable waters" and "ground waters." If CWRA becomes law, and the term "waters of the United States" replaces "navigable waters" throughout the law, the statute will still distinguish between "waters of the United States" and "ground waters."

Alarm has also been raised that CWRA will amend the Clean Water Act to cover, not to just what waters are covered under the law, but also what "activities" might take place in those waters and adjacent lands. The term "activities" appears in the bill[93] only to help identify the water bodies that Congress intends to protect (just as the existing EPA and Corps rules protect waters when their use or degradation could affect interstate commerce). Furthermore, the Clean Water Act's core permitting programs apply only to activities that result in the discharge of pollutants from specified "point sources" into protected waters, and nothing in the bill changes that long-standing limitation of the Act.

The Clean Water Act as it currently stands offers a wide variety of generous exemptions to what waters regulated under the act. Many have raised concerns that CWRA will eliminate or limit these existing exemptions. Instead, the bill does not change existing limitations in the Clean Water Act and specifically names those portions of the

[91] 33 C.F.R 328.3 (a) and 40 C.F.R. 230.3 (s)
[92] See Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41,217 (November 13, 1986.
[93] Sec. 4, (3).

Clean Water Act it will not affect. The "Savings Clause"[94] begins by stating that "[n]othing in this Act (including any amendment made by this Act) shall be construed as affecting ..." It then goes on to list the exemptions it will not modify:

(1) Agricultural return flows.

(2) Discharges of stormwater runoff from oil, gas, and mining operations.

(3) Discharges of dredged or fill materials from normal farming, silviculture, and ranching activities.

(4) Discharges of dredged or fill materials for the purpose of maintenance of currently serviceable structures.

(5) Discharges of dredged or fill materials for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches and maintenance of drainage ditches.

(6) Discharges of dredged or fill materials for the purpose of construction of temporary sedimentation basins on construction sites.

(7) Discharges of dredged or fill materials for the purpose of construction or maintenance of farm roads or forest roads or temporary roads for moving mining equipment.

(8) Discharges of dredged or fill materials resulting from activities with respect to which a State has an approved program under section 208(b)(4) of such Act.

Another concern is that CWRA will not stand up to lawsuits questioning its constitutionality. The extent to which Congress can use its Commerce Clause powers to assert Clean Water Act jurisdiction was not questioned by the Court until the SWANNC decision in 2001. Even then, the Court never ruled that Congress cannot broadly protect streams, wetlands and other waters. In fact, the Supreme Court's opinion in *SWANNC* signals that Congress should enact a clear statement of its intention to protect the nation's waters to the full extent of its constitutional power. CWRA does this. CWRA is drafted to make clear that Congress is exercising its Constitutional power to protect waters in the public interest. As the Environmental Law Institute recently concluded, "[a] principled reading of the relevant cases . . . suggests that a comprehensive legislative scheme to protect the entire Nation's waters . . . should be upheld as constitutional." [95]

A common comment from some is that CWRA is a "federal power grab," expanding Clean Water Act protections to intrastate waters that were previously regulated only by states and localities. Not surprisingly, the vast majority of States

[94] Sec. 6

[95] Jay Austin and Bruce Myers, "Anchoring the Clean Water Act: Congress's Constitutional Sources of Power to Protect the Nation's Water," an Environmental Law Institute White Paper, July 2007.

opposed rollbacks of the regulations on which CWRA is based when they were suggested in 2003, and over 30 States urged the Supreme Court last year to uphold broad protections for small streams and their adjacent wetlands. Since its introduction, CWRA already has gained the endorsement of many state officials across the country as well as the Association of State Wetland Managers and the Association of State Floodplain Managers. CWRA does not expand historic protections or interfere with State or local government rights over such issues as water allocation or zoning. Instead, state water protection programs commonly depend on the Clean Water Act, which has provided a nationwide minimum level of pollution control for water bodies – including wholly intrastate waters – since the 1970s. Some state laws also limit whether and how a state can adopt protections stricter than federal law, leaving protections to water quality within many states wholly dependent on the Clean Water Act and other federal regulations.

Beyond that, protection of our nation's waters has always required a cooperative effort between the federal government and state governments. One way this occurs is through delegation of some permitting and regulatory responsibilities to state governments by the EPA. This is the case for the NPDES permits. The EPA delegates to nearly every state responsibility for implementing NPDES permits for pollution discharges into waters within their borders. Reductions in the scope of waters covered under the CWA directly reduce those states' ability to protect their waters through the NPDES program.

States who do have additional programs in place to protect their lakes, rivers, streams and wetlands still depend on a broad Clean Water Act jurisdiction even if they may appear to be able to work on their own. In most cases, the state programs are buttressed by or even depend on the jurisdictional scope of the Clean Water Act. If the baseline provided by the Clean Water Act is lowered, the states are left to fill in the void or run the risk of not meeting their locally accepted water quality goals.

Additionally, the Clean Water Act was originally created as a response to the patchwork of state and federal laws that proved ineffective at protecting water quality in small sub-watersheds to major rivers and lakes to huge systems such as the Chesapeake, Mississippi, Colorado, Columbia, the Everglades, the Great Lakes and countless others. Rolling back the jurisdiction footprint of the Clean Water Act risks a return to a system that is again dependent on a patchwork of state programs. There is no reason to expect that an approach that was previously ineffective will somehow now prove to be adequate to "restore and maintain the chemical, physical and biological integrity of the Nation's waters."

One questionable claim is that the Court's decisions in *SWANNC* and *Rapanos* have increased clarity as to the jurisdictional scope of the Clean Water Act in the face of uncertain and inconsistent agency implementation. Many of the arguments as to the great complexity and uncertainty introduced since the *SWANNC* decision are presented above. However, to summarize, the *SWANNC* decision focused narrowly on an agency approach to regulating some 'isolated' bodies of water that was rarely used. *Rapanos*, on the other hand, was a 4-1-4 split decision that cannot be interpreted as providing additional clarity on the ground. Instead, it offers a variety of different holdings and conditions for determining jurisdictional scope that already have been

and surely will continue to be interpreted in widely disparate ways. Rather than clarity as to whether or not a body is covered, the Court rulings and the attendant confusing guidances in effect, require case-by-case evaluation of many smaller waterbodies. This situation is not only burdensome for regulators and the regulated but it also adds increased uncertainty and cost to development projects.

Many of the folks in Minnesota and across the country are concerned how CWRA will impact agricultural operations, commodity and farm economies, and rural communities. The contention is that CWRA will negatively impact not only the ability for family farms to operate but also property values and operation of larger commodity businesses as well as the rural communities that depend so heavily on agriculture. As stated above, the exemptions already in place for many normal agricultural operations will remain untouched. Additionally, it returns the Clean Water Act to a baseline jurisdictional scope under which we have operated for considerable time. In considering the impact of CWRA, it is also important to consider the costs to rural communities and agriculture of doing nothing. There is a certain undertone that clean water is not good business. Instead, the economies of many rural communities are inescapably tied to the presence of good, clean water. Many rural areas depend on recreational hunters, anglers and birders for tourism that represents a significant portion of their economies. The economic viability of tourism will be directly impacted by the availability of healthy, clean water in their parks and waterfronts. In addition, most small communities do not have the resources available to larger cities and metropolitan areas pay for and to operate new treatment plants or more complex technological approaches to provide clean drinking water to their residents. This puts them to a greater degree at the mercy of the quality of water that arrives at their drinking water sources, no matter whether as groundwater or surface water.

***Conclusion***

In 1972, David Zwick, former Clean Water Action Executive Director, and Marcy Benstock authored Water Wasteland, laying out in detail the myriad of problems facing our American waterways and communities. This compendium of water issues and analysis of the failure of the then fractured state system of water oversight was used as part of the intellectual framework for writing and passing the Clean Water Act of 1972. At that time, the Farm Bureau and many of the same forces that are now opposing the Clean Water Restoration Act (CWRA) opposed the Clean Water Act. As a price for passage of the law, most agricultural activities and those of the oil and gas industry were left out of the law. Nor was groundwater effectively covered in the law. Those interests opposed setting a minimum set of federal water protections in 1972 and their opposition to CWRA is nothing more than a confirmation of that rigid stand today.

Despite all the hyperbole of CWRA being a vast expansion of federal power over the waters and lands of the United States, what CWRA does in reality is to assert that since the *SWANCC* and *Rapanos* Supreme Court rulings, two EPA and Corps joint Guidances are further degrading the federal water protection floor and seeding confusion, delay and regulatory uncertainty. The first rule of how to get out of a hole is to recognize you are in one and to stop digging. CWRA does not fix the deficiencies of

the Clean Water Act. CWRA does not extend the reach of the Clean Water Act. CWRA does say emphatically that it is time to bring sanity back to our federal approach to the scope of what waters are afforded federal protection and that these waters shall be treated like any other waters under the law. The short history of jurisdictional determinations since *SWANCC* and *Rapanos* and the myriad state and federal court cases since these decisions point to one irrefutable fact – critical waters are losing protection and the functions and values of those waters will be lost forever. It is time to stop digging the hole any deeper and to come back to the level playing field that existed before these court decisions and unwise policy actions. Passing CWRA does not mean that there will be an expansion of protections, only that the programs of the Clean Water Act, such as the direct discharge permitting program and the oil spill and prevention program will once again protect those waters previously protected.

Thank you for your attention to the health of our nation's water resources.

# CLEAN WATER ACTION

May 1, 2008

The Honorable Jim Oberstar
U.S. House of Representatives
Washington, D.C. 20515

Dear Representative Oberstar:

Thank you for the opportunity to submit comments and suggestions on the language of the Clean Water Restoration Act. Clean Water Action views the Clean Water Restoration Act (CWRA) as a defensive action to restore the jurisdictional scope of the Clean Water Act to where it was prior to the 2001 *SWANCC* and 2006 *Rapanos* cases. As such, CWRA is already a compromise in that it does not address the myriad deficiencies of the original Clean Water Act. These recognized deficiencies contribute to the inability to meet the Act's stated goals, to "restore and maintain the chemical, physical and biological integrity of the waters of the United States."

A number of alleged problems with the Clean Water Restoration Act have been cited by opponents of the legislation and some suggestions for changes have been put forward. Below are Clean Water Action's responses to some of these claims and suggestions.

**Leaving the word "navigable" in the Clean Water Restoration Act**
Clean Water Action opposes this suggestion. We find there to be no need for the change. The Clean Water Act was not meant to be, and Congress should not suggest it is, about navigation. It is about pollution control. The change threatens to send a message to the courts that Congress really does intend for "navigability" to be a defining characteristic of waters protected by the Clean Water Act. In practice as well as through definition in the Clean Water Act, the law's scope has been interpreted very broadly by past administrations, both Democratic and Republican. This change could lead to further restrictions on the jurisdiction of the Clean Water Act and is wholly unacceptable.

**Removing the word "activities" from the bill and replacing it with "discharges"**
Clean Water Action believes this is unnecessary. It is based upon an argument that the use of "activities" in the bill introduces the possibility of expanding the jurisdiction of the Clean Water Act to cover activities, rather than the traditional limitation to covering waters and the impact of activities on the water. CWA feels this is a misreading of the bill.

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**Explicitly stating that the Act does not have jurisdiction over groundwater**
We oppose this suggestion. While groundwater is not regulated as a water of the United States under the Clean Water Act it does have an established role outlined in the Act. For instance, groundwater can act as a conveyance between a direct pollution discharge point and a jurisdictional water. This connection may require the issuance of a NPDES permit in order to protect the jurisdictional water. Explicitly stating that groundwater is not covered by the Clean Water Act threatens to upset the important connective role of groundwater in the Clean Water Act.

**Introducing broad exemptions**
A number of suggestions have been made that can be broadly categorized as introducing exemptions that are not currently included in the Clean Water Act. Clean Water Action opposes all suggestions of this type. The exemptions currently referenced in the Savings Clause of CWRA already exist in statute due to compromises made at the time of the original passage of the Clean Water Act and through subsequent actions by Congress.

The exemptions are quite permissive and broad as they stand. Additional exemptions introduced into statute at this time will erode the scope of the Clean Water Act and threaten further the viability of the Act to meet the purposes intended by Congress when passed into law in 1972. The exemptions currently in EPA and Corps rules are not incongruent with nor nullified by CWRA. However, if the Committee does consider new exemptions, we wish to make a few observations:

- Exemptions for "waste treatment systems," from being considered as waters of the United States – this exemption currently exists in EPA and Corps rules. While it is reasonable to exclude waters within manmade waste treatment structures the current rules have recently been abused to allow unintended pollution. Introducing this exemption into statute threatens to codify current unacceptable practices.

- Exemption of prior converted cropland – this is another exemption that is in EPA and Corps rules. The language in the rules does not adequately reflect the leeway regulators must have in order to judge the reasonableness of claims and thus does not reflect actual practice. This exemption should not be transferred into statute.

- Exemption for irrigated cropland – this is an unnecessary exemption to include as current practice is such that irrigated cropland that would return to an upland, when irrigation ceases, is simply not considered a water regulated by the agencies. Although a witness at the hearing suggested that the term "wet meadow" in CWRA could include such cropland, it would not. Instead, "wet meadow" is a recognized type of wetland (see http://epa.gov/owow/wetlands/types/wmeadows.html).

Thank you again for the opportunity to comment on the Clean Water Restoration Act and the opportunity to testify on its behalf. I look forward to continuing to work with you, and don't hesitate to contact me with any questions.

Sincerely,

Darrell Gerber
Minnesota Program Coordinator
Clean Water Action
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cc: Ryan Seiger

**Testimony of**
**Benjamin H. Grumbles**
**Assistant Administrator**
**U.S. Environmental Protection Agency**

**Before the**
**Committee on Transportation and Infrastructure**
**United States House of Representatives**

**April 16, 2008**

Good morning Mr. Chairman and Members of the Committee. I am pleased to be here this morning to speak to you about the Environmental Protection Agency (EPA) and US Army Corps of Engineers (Corps) joint regulatory program under Clean Water Act (CWA) section 404. My testimony focuses on the agencies' implementation of the U.S. Supreme Court decision in the consolidated cases *Rapanos v. United States* and *Carabell v. United States* (*Rapanos*.) The Corps and EPA have worked closely together in implementing these decisions, and will continue to do so as we work to further improve the reliability, transparency, and predictability of the Section 404 regulatory program that protects the nation's vital water resources. .

## I. Our Commitment to Wetlands Protection and an Effective Section 404 Program

A primary goal of the Clean Water Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," including wetlands. Wetlands help protect water quality, store flood waters, absorb coastal storm surges, support commercially valuable fisheries and migratory waterfowl,

and provide primary habitat for myriad wildlife and fish species.

Since enactment of the Clean Water Act in 1972, the annual rate of wetlands loss has been significantly reduced from an estimated 290,000 acres per year in the 1970's to a net gain of approximately 32,000 acres of wetlands per year during the period between 1998 to 2004. This has been achieved through a combination of Federal, Tribal, and State regulatory activities and environmental restoration and protection projects in partnership with many state and local agencies and conservation groups. In 1988, then President Bush adopted the National Wetlands Policy Forum recommended national goal of "no net loss" of wetlands. More recently, President George W. Bush has challenged the country to go beyond no net loss of wetlands to achieve an overall increase of this vital aquatic resource. On Earth Day 2004, President Bush established a new goal to expand the nation's wetlands by restoring, improving, and protecting 3 million wetland acres by Earth Day 2009. Last year's report on the progress of achieving the goal highlighted that 2.8 million of the 3 million acres of wetlands had been restored, improved, and protected. It also noted that the Administration and its partners are on track to exceed the 3 million acre target by Earth Day 2008.

The Clean Water Act's section 404 program has played an important role in maintaining the quality and quantity of our nation's aquatic resources. Under section 404, any person planning to discharge dredged or fill material into waters of the United States must first obtain authorization from the Corps (or a tribe or state approved to administer the section 404 program). A discharge may be

authorized only when there is no practicable alternative with less adverse effect on the aquatic ecosystem, appropriate steps have been taken to minimize potential adverse effects to the aquatic ecosystem, and unavoidable effects have been offset by appropriate compensatory mitigation. Authorization may be in the form of an individual permit or a general permit. In practice, the vast majority of projects (92+% in 2006) are authorized by general permits, which require less paperwork by the project proponent and the agencies than an individual permit application, because the activities authorized by these permits have no more than minimal effects on the aquatic environment. Individual permit applications receive a more comprehensive review because, for the most part, these projects are larger, more complex, and involve a greater potential to adversely affect aquatic resources.

EPA and the Corps have worked together to administer Clean Water Act section 404 since its enactment in 1972. The Corps has the primary day-to-day implementation responsibility for the section 404 regulatory program, including the review and authorization of activities involving the discharge of dredged or fill material in wetlands and other waters, and performs the vast majority of jurisdictional determinations associated with the program. EPA developed, in consultation with the Corps, the Section 404(b)(1) Guidelines, which are the environmental criteria that the Corps applies when deciding whether to issue a section 404 permit. In addition, EPA interprets statutory exemptions from section 404 permitting requirements, coordinates with states or tribes that choose to administer the section 404 program, and is responsible for determining the

geographic scope of Clean Water Act programs, including section 404. EPA and the Corps share section 404 enforcement responsibilities.

EPA and the Corps, in coordination and cooperation with other federal, tribal, and state agencies, continue to advance the goal of an overall net gain in wetlands, while further improving the effectiveness, predictability, and transparency of the section 404 program. These actions include such initiatives as the Compensatory Mitigation for Losses of Aquatic Resources Rule (Mitigation Rule). The Corps and EPA are promoting greater consistency, predictability and ecological success of mitigation projects under the Clean Water Act through this new rule published on April 10, 2008. This rule changes where and how mitigation is to be completed, but maintains existing requirements on when mitigation is required. The rule also preserves the requirement for applicants to avoid and minimize effects to aquatic resources before proposing compensatory mitigation projects to offset permitted effects. This rule will help establish innovative standards to promote no net loss of wetlands from permitted activities by improving wetland conservation and restoration in a watershed context. Another initiative is the Corps investing in a new database management system, ORM2, a web-based tool to improve the management of the Corps' regulatory programs, including recording effects of authorized activities and the permanence of compensatory mitigation projects. The Corps and EPA are working together on a new computer interface so that the agencies' staff can have access to relevant data both in ORM2 as well as in EPA databases. EPA also continues to collaborate with our partners, such as the Department of

Agriculture (USDA), the U.S. Fish and Wildlife Service (US FWS), and the National Oceanic and Atmospheric Administration (NOAA) to enhance our Clean Water Act regulatory and non-regulatory tools in order to further protect wetlands. For example, EPA's Wetlands Program staff has worked with USDA in the development of guidance on constructed wetlands and water quality improvements. We are continuing to collaborate closely with US FWS to update and digitize the National Wetlands Inventory and report the status and trends of the nation's wetlands. EPA also continues to support state and tribal efforts to protect wetland resources through Wetland Program Development Grants, which build capacity in areas such as monitoring, development of wetlands water quality standards, and identification of sites for restoration.

## II. The Supreme Court Decisions in *SWANCC* and *Rapanos*

In 2001, the Supreme Court held in *SWANCC* that Clean Water Act jurisdiction could not be asserted over non-navigable, intrastate, isolated waters based solely on the presence of migratory birds. EPA and the Corps issued joint guidance regarding the decision in January 2003, clarifying that the "migratory bird rule" may not be used as the sole basis for jurisdiction over such waters. 68 FedReg. 1991. In 2006, the Supreme Court issued three substantive opinions in *Rapanos* focusing on the current jurisdictional reach of the Clean Water Act, with none of the opinions having majority support. 126 S.Ct. 2208.

In an opinion written by Justice Scalia, a plurality of the Court concluded that "waters of the United States" protected by the Clean Water Act should

extend only to "relatively permanent, standing or continuously flowing bodies of water" connected to traditional navigable waters, and to "wetlands with a continuous surface connection to" such relatively permanent waters. 126 S.Ct. 2208, 2225-27.

Justice Kennedy concurred with the plurality that the cases should be remanded, but disagreed with the plurality's analysis. He concluded that a wetland is a "water of the United States" under the Act "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 the wetland's effect on the navigable water is "speculative or insubstantial", Justice Kennedy would consider the wetland non-jurisdictional. 126 S.Ct. 2208, 2248. Justice Stevens wrote a dissenting opinion, joined by three other justices, which concluded that the Corps of Engineers' decision to treat the wetlands at issue as jurisdictional was a reasonable interpretation in light of the ambiguity of that statutory term and the important water quality role of wetlands.

### III. The Interagency *Rapanos* Guidance

Following the Supreme Court's ruling in *Rapanos,* EPA and the Corps issued guidance to their section 404 field staff on June 5, 2007. The *Rapanos* Guidance implements the Supreme Court ruling by clarifying that traditionally navigable waters and their adjacent wetlands plus relatively permanent waters and wetlands with a continuous surface connection to such relatively permanent

waters are subject to jurisdiction under the Act. In addition, the guidance states that jurisdictional determinations for non-navigable, non-relatively permanent waters and their adjacent wetlands, as well as for wetlands adjacent to but not directly abutting relatively permanent waters, are to be based on reliable data which demonstrate that they significantly affect the chemical, physical, or biological integrity of the Nation's waters. Over the past 10 months, EPA and the Corps have been working together to apply the Guidance in a fair, consistent, and effective manner. The *Rapanos* Guidance itself clarifies how section 404 field staff should apply the R*apanos* decision to assess the scope of waters covered by the Act The *Rapanos* Guidance focuses on those provisions of the Corps and EPA regulations at issue in *Rapanos* – 33 CFR §328.3(a)(1), (a)(5) and (a)(7) and 40 CFR §230.3(s)(1), (s)(5), and (s)(7), which govern the jurisdictional status of traditional navigable waters, tributaries, and adjacent wetlands. Based on existing case law governing split decisions, the Guidance clarifies that the agencies will assert jurisdiction over waters that satisfy either the plurality standard or the standard articulated by Justice Kennedy. Specifically, the Guidance states that the following categories of waters are jurisdictional: all traditional navigable waters and their adjacent wetlands, all relatively permanent waters and any abutting wetlands, and non-relatively permanent waters, their adjacent wetlands and wetlands adjacent to but not abutting relatively permanent waters if a science-based, fact-specific analysis indicates that they have a significant nexus to a downstream traditional navigable water. Consistent with Justice Kennedy's direction that wetlands should be considered together with

similarly situated lands, the Guidance further clarifies that significant nexus determinations should evaluate the tributary at issue and all of its adjacent wetlands holistically, and determine that there is a significant nexus if the tributary and wetlands collectively have a significant impact on the chemical, physical, and biological integrity of a downstream navigable water.

The *Rapanos* Guidance did not discuss "isolated" waters that might be jurisdictional under 33 CFR 328.3(a)(3) or 40 CFR 230.3(s)(1). The circumstances under which such waters might be found jurisdictional consistent with the *SWANCC* decision have been described in interagency guidance issued by EPA and the Corps in January 2003.

The agencies issued a number of related documents concurrently with the Guidance in June 2007 to aid in implementation of the *Rapanos* decision. For example, we issued an Instructional Manual and Jurisdiction Form as technical assistance to field staff to assist in making jurisdictional determinations (JDs) consistent with the *Rapanos* Guidance. We established a temporary, enhanced interagency coordination process to ensure that JDs involving either significant nexus determinations or "isolated" (a)(3) waters were reviewed by staff from both agencies, with an opportunity to elevate complicated determinations or policy questions to agencies' headquarters. This coordination process also revised a provision in the January 2003 guidance by requiring that <u>all</u> "isolated" (a)(3) JDs be sent to headquarters for review, not just those asserting jurisdiction. The enhanced coordination procedure expired on [date}, having served its purpose, except for the provision dealing with (a)(3) waters, which remains in effect.

Through the close cooperation of EPA and Corps field staff, and evaluation of the relatively small number of cases elevated to headquarters for further review, we identified a number of implementation issues that would benefit from additional clarification, and we are currently working expeditiously to address these issues. We also developed a number of "Q&As" discussing issues associated with the *Rapanos* decision, the Guidance, and the agencies' implementation of section 404 in light of those developments. In addition, we have been providing joint web-assisted training for our field staff on how to implement the *Rapanos* decision, are planning field-based joint training, and have given numerous presentations at public conferences.

Our primary purpose in issuing the Guidance and associated technical documents, coupled with training, was to ensure a clear understanding of jurisdictional determination documentation requirements and foster a high level of national consistency in jurisdictional determination documentation and decisions in the section 404 program.

To help ensure the public keeps informed as we implement *Rapanos* in the section 404 context, EPA and the Corps have established websites devoted to all Guidance-related materials [ http://www.epa.gov/owow/wetlands and http://www.usace.army.mil/cw/cecwo/reg/cwa_guide/cwa_guide.htm] . This allows the public (as well as agency staff) to have one place to check for the latest updates, clarifications, and revisions. Corps Districts are also now posting all jurisdictional determinations on their public websites.

IV. ***Rapanos* Guidance Implementation**

The Corps has the primary responsibility under the Clean Water Act (CWA) for work related to the issuance of Section 404 permits. Under the coordination agreement, EPA staff is working closely with them on some of those determinations, particularly those few with unusual or ambiguous circumstances which require more careful judgment in application of the Guidance. Based on data Corps headquarters has gathered from its 38 District offices, 18,619 JDs have been finalized for those waters addressed by the Guidance (e.g., traditional navigable waters and their adjacent wetlands, relatively permanent waters with abutting wetlands, other waters requiring application of the significant nexus standard ) since release of the *Rapanos* Guidance in June 2007. Further details regarding these finalized JDs have been provided by EPA to the Committee. In addition to these statistics on waters directly addressed by the *Rapanos* decision, approximately 1,050 JDs involving (a)(3) waters have been completed.

As part of coordination, Corps District and EPA Regional field staff discussed draft JDs involving significant nexus analyses, resolving data and other concerns at the staff level wherever possible. It is important to note that only a small percentage of draft JDs have required additional coordination between the Corps and EPA, and discussions regarding the vast majority of those are concluded at the staff level. Where issues have arisen that require additional clarification, the draft JDs are raised to the agencies' headquarters for resolution. As of March 14, ninety five significant nexus-related draft JDs have

been elevated to headquarters, representing about one half of one percent of the JDs conducted during this time frame, and less than ten percent of the total under interagency coordination, further indicating the success of discussions at the field level.

The interagency coordination procedures currently call for EPA and Corps headquarters to receive all draft (a)(3) waters-related jurisdictional determinations. Between June, 2007, and March 14, 2008, a total of 1,048 draft jurisdictional determinations involving (a)(3) waters have been submitted to EPA headquarters. Of those, over 150 have been reviewed by EPA and Corps headquarters staff and sent back to the Districts for reconsideration as potentially jurisdictional under provisions of the regulatory definition of "waters of the US" other than (a)(3) for additional information-gathering regarding potential jurisdictional bases.

## V. Public Comments and Next Steps Regarding the *Rapanos* Guidance

When EPA and the Corps issued the interagency *Rapanos* Guidance in June 2007, we sought public comments on the guidance and committed to reissue, revise, or suspend the guidance in light of those comments and the agencies' implementation experience. We received over 62,000 public comments (including about 1500 substantive comments and over 60,000 form letters and e-mails) during a seven-month comment period which ended on January 21, 2008.

Commenters identified a number of areas where greater clarity would

promote more timely and consistent JDs. EPA and the Corps are working as expeditiously as possible to evaluate the comments and the issues that have arisen during the first nine months of implementation, and will announce the results of this review shortly. In the meantime, Corps Districts and EPA Regions will continue to use the guidance on an interim basis to make JDs until such time as it is reissued, revised, or suspended. Lessons learned through implementation of the Guidance and information provided in the public comments will be used to inform the agencies' determination whether to reissue, revise, or suspend the Guidance.

## VI. Implications of *Rapanos* Decision on Other CWA Programs

The government's long-standing position is that there is only one definition of "waters of the US" and it is the same for all CWA programs, including section 404, section 402 (National Pollutant Discharge Elimination System, or NPDES), section 311 (oil spills) and section 303 (water quality standards). While the definition of "waters of the US" is the same, the CWA provides these programs with different authorities and responsibilities for protecting those waters. As a result, the joint EPA-Corps *Rapanos* Guidance does not discuss implementation of the *Rapanos* decision outside the section 404 context.

For example, "waters of the U.S." is an important, but not the only factor in determining whether an NPDES permit is needed for a particular discharge. Justice Scalia noted in the plurality decision that "...there is no reason to suppose that our construction today significantly affects the enforcement of §

[402]. 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.'" (emphasis in original). 128 S.Ct. 2208, 2227. This acknowledges that discharges that may reach "waters of the U.S." through a "conveyance" before reaching the "waters of the U.S." will continue to need a permit under the NPDES program.

Similarly, the Clean Water Act section 311 oil spill response program responds to discharges or substantial threats of discharges of oil into waters of the U.S. and adjoining shorelines. Jurisdictional issues often arise in connection with EPA's deployment of staff upon receipt of a notice of a spill or threat of a spill to inland waters. In those situations where an on-scene response is deemed appropriate, EPA coordinates closely with the U.S. Coast Guard's National Pollution Fund Center (NPFC). The NPFC will reimburse EPA's removal costs incurred in response to a discharge or substantial threat of a discharge of oil into waters of the U.S. or adjoining shorelines. To date, the NPFC has not found any EPA oil spill response actions to be ineligible for reimbursement after *Rapanos.*

The case-by-case analysis called for under *Rapanos* and reflected in the Guidance has generated the important benefit of greater coordination among the Clean Water Act section 404 program and other CWA programs within EPA, and has also led to the much greater coordination between EPA program offices and the Corps. For example, when assessing a potential significant nexus between a waterbody and downstream traditional navigable water, the Corps and EPA 404 programs have been working with EPA's Water Quality Standards program to

understand the relevance of the water quality standards set for those waters and the impairments and causes of impairment found in those downstream waters. Similarly, section 404 staff have been coordinating closely with section 402 NPDES staff on jurisdictional decisions having direct or indirect implications for waters on which discharges are currently authorized under section 402. Coordination with the Office of Enforcement and Compliance Assurance also has been important to ensure that the jurisdictional determinations associated with any ongoing and future enforcement cases are consistent with the *Rapanos* decision and the Guidance.

## VII. H.R. 2421

We understand that H.R. 2421, the "Clean Water Restoration Act of 2007," would remove the word "navigable" from the description of covered waters, and that its stated purpose is to protect the waters of the United States to the fullest extent of the legislative authority of Congress under the Constitution.

As described in detail above, we are strongly committed to protection of wetlands and believe we are doing a good job under the current statutory framework. However, we have serious concerns about the potential effects of HR 2421. These are discussed in more detail in Secretary Woodley's testimony. However, I will briefly mention a few here. We are concerned that application of the legislation may raise potential constitutional and programmatic issues associated with removal of the term "navigable waters" from the Act. Similarly, we are concerned about the effect of the bill on existing CWA programs, including the use of the term "activities" rather than "discharge" in describing the

scope of regulation. Both these changes might be construed to expand the scope of CWA authorities in unintended ways and lead to protracted litigation. Another concern is that the bill fails to include the long-standing regulatory exemptions from jurisdiction for "prior converted cropland" and waste treatment systems. We'd like to better understand the reasons behind and potential implications of this omission. Finally, the bill also seems likely to have implications for states and tribes, who work collaboratively with EPA and the Corps to achieve the Act's water quality goals. It appears to alter the Federal-State balance of authorities and responsibilities crafted in the original Clean Water Act and may have different effects in different regions of the country, which will need to be carefully considered.

**VIII. Conclusion**

Mr. Chairman, EPA and the Corps remain committed to using the full range of our regulatory and non-regulatory tools to protect America's wetlands and waters. The agencies will continue to work collaboratively to implement our responsibilities in a manner consistent with the Clean Water Act and its implementing regulations, as these have been interpreted by the courts. I look forward to the opportunity to coordinate with the Chairman and this Committee as we work to achieve these important goals. I appreciate your interest and would be pleased to answer any questions you or the Members of the Committee might have.

MAY 01 2008

The Honorable James L. Oberstar
Chairman
Committee on Transportation and Infrastructure
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Thank you for your letters of April 18, 2008, to each of us who participated in the federal agency panel at the April 16, 2008, hearing on the Clean Water Restoration Act of 2007 (H.R. 2421). We have coordinated our response with the U.S. Department of Agriculture and the U.S. Department of Justice (DOJ) and are answering on their behalf as well.

We support the Clean Water Act's (CWA) objective of restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters. As you appropriately recognized at the start of the hearing, we have made great progress since enactment of the CWA in 1972 towards accomplishing this goal. We will continue to use the full range of our regulatory and non-regulatory tools to protect and enhance America's wetlands and waters.

The President's keen interest in wetlands conservation – especially the Prairie Pothole Region of the upper midwestern U.S. – prompted him to move U.S. policy beyond the goal of "no net loss" that is attainable through the regulatory program to a goal of an overall gain in wetlands that is achievable only through the additional effort of active conservation. On Earth Day 2004, the President set a goal to protect, improve, and restore 3 million acres by 2009. On Earth Day 2008 – last week – we announced achievement of this goal ahead of schedule with 3.6 million acres of wetlands protected, improved, or restored.

Thus we share a common interest with you in effective wetlands conservation. We believe it can be realized through active wetlands conservation on the scale of millions of acres, in part by continuing to ensure no net loss under the wetlands regulatory program, which affects only about 25,000 acres of wetlands per year. Our answer to your question, therefore, is that we seek to move beyond the pre-SWANCC (531 U.S. 159 (2001)) situation that instigated years of litigation, towards a new paradigm characterized by the conservation of millions of acres of wetlands. This new situation can be created through stabilizing the regulatory program and establishing new capacities for state and tribal wetlands conservation.

Our specific legislative suggestions focus on reaffirming a balance in the roles and responsibilities of the federal government with those of the states established by Congress in the original CWA, so that administrative policymaking can continue refining effective methods for jurisdictional determinations. Consistent with this focus would be to establish a strong state and tribal primacy policy for wetlands conservation both within federal jurisdiction and beyond federal jurisdiction. States and tribes have traditionally had primary responsibility for management of land and water resources within their boundaries.

The original framers of the Act made clear their intent to preserve this authority, while still providing for rigorous federal protection of aquatic resources, and we continue to believe that they struck an appropriate balance. At best, the regulatory program can only achieve "no net loss" of wetlands by compensating for the approximately 25,000 acres of permitted wetlands loss annually. As stated previously, our vision is to move beyond this "no net loss" of wetlands achieved through mitigation and sustain an overall increase in the quality and quantity of wetlands. Toward this vision we have already contributed approximately 800,000 acres per year for the last 4 years through ongoing protection, improvement, and restoration activities.

The necessary limit in the reach of federal jurisdiction calls for a vigorous state and tribal role in the active wetland conservation necessary for achieving an overall increase in the quality and quantity of the Nation's wetlands. In order to further enhance the state role in promoting wetland conservation, we would support targeted legislative revisions designed to promote state assumption of wetlands conservation within federal jurisdiction, much has already been accomplished for point-source pollution control. Forty-five states have already assumed primary responsibility for the Section 402 NPDES permitting program, with oversight and enforcement support from EPA and DOJ, while only two states (New Jersey and Michigan) have assumed primacy for the Section 404 program.

Paired with affirmation of federal jurisdiction and establishing a state and tribal primacy policy, there is also a need for continuous improvement in the regulatory program. Toward this improvement, our recent implementation of the Act has focused on two principal issues: clarifying the means of determining which of the Nation's wetlands and streams significantly affect navigable waters, and improving the programmatic function of CWA programs, including CWA Section 404. These on-going efforts have included and been informed by our experience interpreting the SWANCC, and Rapanos (547 U.S. 715 (2006)) decisions, our several revisions of the Nationwide Permit system, our recently promulgated Mitigation Rule, and our partnership and outreach to states. From this experience we have the following suggestions regarding legislation.

First, regarding the clarification of CWA jurisdiction, we are currently working to provide administrative clarification of the recent Supreme Court decision in Rapanos. Our interpretations of the SWANCC and Rapanos decisions have been published in guidance and are focused on clarifying the means of determining CWA jurisdiction.

These decisions have prompted us to develop a site-specific, factual method of determining whether a wetland or other waterbody significantly affects the chemical, physical, or biological features of traditional navigable waters. Currently, jurisdiction of the CWA clearly includes large classes of wetlands and other waters beyond traditional navigable waters including, for example, all streams and their adjacent wetlands which together have a significant nexus to a traditional navigable water. We believe that inclusion of the term "navigable waters" in the CWA provides an important indication of Congress's intended basis of authority in enacting the statute, and serves to bolster the regulatory framework that continues to support our jurisdictional determinations. We believe that practical experience implementing the SWANCC and Rapanos guidance is the best foundation for making jurisdictional determinations that are ecologically accurate, cost-effective, and workable for all affected interests in the permitting process.

Second, there is a need to protect two elements of current law that would be affected by H.R. 2421: the exemptions and the focus on discharges. Continued exemptions from the permitting requirement of the CWA for "prior converted cropland" and for certain "waste treatment systems" designed to meet the requirements of the Act are critical to the effective implementation of the Act and are consistent with its objective and goals. Further, Section 301, together with Sections 402 and 404 of the Act, limit the scope of regulated activities to those involving a "discharge" to waters originating from a point source. The agencies believe it is important to continue to rely on the use of the term "discharge" rather than terms like "activities" which may be construed to imply a broader scope of regulation.

Third, we would be pleased to discuss with the Committee specific suggestions to remove impediments to state assumption of Section 404 in order to further support state conservation efforts. As noted above, since enactment of the CWA in 1972, only two states have chosen to meet the Act's requirements to assume the Section 404 wetlands permitting program compared to 45 states that have assumed the Section 402 program. Enhancing state and tribal wetlands protection capacities under the CWA would be especially useful in promoting greater conservation results in the Prairie Pothole Region of the upper midwestern U.S.

Finally, we suggest revising the Act to extend the term of general permits authorized under Sections 402 and 404 from five years to ten. The CWA currently limits the terms of general permits to five years requiring the Corps and EPA to go through a lengthy reissuance process every five years. This process does not always yield substantive improvements to the permits but often delays timely reissuance and can result in lack of permit coverage for the regulated public. Recent court decisions are requiring the Corps to reissue permits through formal APA rulemaking which is likely to contribute to further delays and expense. Extending this limit would not prevent the Corps or EPA from reissuing these permits in a shorter time frame when change is needed, but would save regulatory resources that currently must be devoted to reissuance even when the existing permits appear to be working well.

We hope you find our suggestions helpful as you and your Committee colleagues consider legislative improvements to the Act. The agencies will continue to work collaboratively to implement our responsibilities consistent with the objective and goals of the CWA. We look forward to coordinating with the Chairman and your Committee as we strive to achieve these important goals.

Sincerely,

Benjamin H. Grumbles
Assistant Administrator for Water
U.S. Environmental Protection Agency

John Paul Woodley, Jr.
Assistant Secretary (Civil Works)
U.S. Department of the Army

cc: Congressman John L. Mica
Ranking Minority Member, House T&I Committee

**Testimony of**

**The Honorable Brett Hulsey**

**Supervisor from Dane County, Wisconsin**

**In Support of the Clean Water Restoration Act, H.R. 2421/S. 1870**

**Before the U.S. House Transportation and Infrastructure Committee**

**April 16, 2008**

Thank you, Chairman Oberstar, Ranking Member Mica, and members of the committee for allowing me to testify today on the Clean Water Restoration Act.

My name is Brett Hulsey and I am a Dane County Supervisor and Chair of the Lakes and Watersheds Commission which has authority over all waters of the county. Dane County is the largest agricultural county in Wisconsin, home to the Yahara Chain of lakes, the capitol of Wisconsin, and many outstanding trout streams and fisheries. We have led the nation with many clean water innovations including an award-winning county stormwater ordinance that protects trout streams from thermal pollution.

I have served on the Dane County board for 10 years, but been involved in clean water and wetlands issues for 20 years writing a number of reports on drinking water safety, wetlands, flooding, and clean water. For this, the Federal Emergency Management Agency gave me their highest honor, the Distinguished Public Service Award, in 2000 and *Men's Fitness* Magazine named me a "Clean Water Champion" in 1996. I am also member of the National Association of Counties Environment, Energy and Land Use Steering Committee and former chair of the Water Subcommittee.

My county constituents place a high value on the quality of our lakes, streams and drinking water. They want clean safe water for recreation – for swimming, boating and fishing. They understand that protecting drinking water sources from pollution makes for better quality water coming out their taps and protects our health and safety at a lower cost.

As Chair of the county Personnel and Finance Committee, I also understand the costs of flooding to taxpayers. We have experienced five major floods costing local residents and the county $50 million since 1993. Our citizens want to prevent flood damage in the most environmentally protective and cost-effective ways possible to avoid the costs of repairing homes and infrastructure damaged by flooding. They also want to avoid the costs of cleaning up waters that have been needlessly polluted by others.

We saw the importance of protecting headwater streams and isolated wetlands during the Mississippi River floods of 1993 killed more than 50 and cost at least $16 billion. Our county is at the headwaters of the Yahara River that flows to the Rock River and to the Mississippi River that drains 40% of the continental United States.

One *Restoration Ecology* study showed that restoring just 3% of the Mississippi River watershed to wetlands would have prevented this flood. Protecting wetlands is one of the most cost-effective ways to reduce flooding because they store more flood water than any other wetland. After these floods, I worked with FEMA and state agencies to purchase more than 10,000 homes and structures and move them out of harms' way.

Yet recent Supreme Court rulings in *SWANCC* and *Rapanos* threaten these longstanding protections for many of our nation's streams and wetlands. The Environmental Protection Agency studies show that the headwater, intermittent and ephemeral streams make up 59 percent of the nation's streams. These streams have been long protected under the Clean Water Act.

The EPA estimates that some 20 million acres of wetlands, one-fifth of the remaining wetlands in the lower 48 states, could lose protections based on its interpretation of these Supreme Court decisions. This would allow developers to drain wetlands, build new homes that would then be flooded, and have to be purchased by local government and taxpayers. There is a compelling reason to protect these wetlands and headwater streams from development in the first place.

These headwater streams and wetlands provide essential services to our counties and communities by:

- Protecting Our Drinking Water Sources – According to EPA data, headwater streams that are at risk of losing Clean Water Act protections provide drinking water for more than 111 million citizens, more than one-in-three Americans. Failing to protect these streams from pollution or destruction could ruin drinking water supplies and burden our counties and communities with higher drinking water treatment costs.

  In 1993, a parasite outbreak in Milwaukee killed more than 100 people and sickened 400,000. To address the largest waterborne disease outbreak in modern U.S. history, I wrote the *Danger on Tap* report that revealed widespread illness and some deaths flow from uncontrolled releases into drinking water sources. Fortunately, the 1996 Safe Drinking Water Amendments addressed *Cryptosporidium*, but the Supreme Court rulings could allow livestock feedlots, slaughterhouses, and sewage plants to discharge dangerous pollutants directly into drinking water source streams without a permit.

- Maintaining Drinking Water Supplies – With large parts of the country struggling with low drinking water supplies, headwater stream systems play a crucial role to ensure water flows in downstream rivers and streams and recharge groundwater

supplies. Altering these streams in ways that increase runoff rather than allowing water to soak into the ground can result in less groundwater recharge and less water in streams during drier seasons. Protecting our headwater streams is a critical requirement for addressing droughts.

- Protecting Water Quality – Intact small streams and wetlands act like natural filters to cleanse and protect water quality. Their ability to trap sediments suffers as the landscape is altered, resulting in larger quantities of sediment and pollutants flowing downstream, where it can fill reservoirs and navigation channels, damage fisheries, eliminate recreational spots and increase drinking water filtration costs.

  For instance, in our county University of Wisconsin studies show that more than 20% of the phosphorous and nitrogen going in Lake Mendota each year come from less than 1% of the land being developed. These pollutants cause excess weed and algae blooms that close beaches and make swimming unsafe. This pollution comes from runoff from new development that is far worse per acre than runoff from farms and existing communities. That is why we must protect the headwaters of streams and wetlands so we can control this pollution source.

  Healthy small streams also have the capacity to capture nutrients and filter the water, which would otherwise harm downstream water quality and increase drinking water treatment costs.

- Reducing Flooding Risk - This is of particular concern with hundreds of counties now suffering from flooding from torrential rains. Flood damage costs the nation an average of $9.6 billion a year according to the U.S. Department of Commerce-NOAA, up from just $2 billion a few years ago. This flooding causes significant loss of life and property, and is likely to increase due to climate change and increased floodplain development. The National Flood Insurance Program awarded nearly $16 billion in flood claims in 2005 alone, according to FEMA. The flood costs to county and local governments are usually not fully paid for.

  Small streams and wetlands provide natural flood control, as they can absorb significant amounts of rainwater, runoff and snowmelt and release it slowly to reduce flooding. The EPA estimates that an acre of wetlands can store 1 – 1.5 million gallons of floodwaters.

  Isolated wetlands act like teacups to store floodwater while bottomland wetlands or more like linear sponges to soak up floodwater.

  My 1999 study *Permitting Disaster in the Upper Mississippi River Basin* shows that states with the worst wetland loss had the worst flood damage in the 1993 Mississippi River flood. Missouri, Illinois, and Iowa have drained more than 85-89% of their original wetlands, according to the U.S. Fish and Wildlife Service. These three states made up two-thirds or almost $12 billion of the $15.7 billion total costs estimated by the National Weather Service from the Midwest 1993

flood. The other six states all had more than 50% of their wetlands remaining and made up less than $4 billion of the total costs. We ran a regression analysis of this data that showed that 80% of the variation in flood costs can be explained by wetland destruction in the state. A USDA study estimated that restoring wetlands could reduce a 100 year flood by 10% alone, and by up to 39% combined with conservation tillage and Conservation Reserve Program lands.

When these natural wetlands are filled and eliminated, the runoff can exceed the absorption capacity of small streams. The result is larger is often larger and more frequent flooding downstream. Another study from the Illinois Water Survey showed that areas with more wetlands had less intense flooding.

These studies show a compelling reason to protect isolated wetlands to protect us from flooding.

If these headwaters and wetlands are no longer protected, communities like mine will face higher costs to provide safe drinking water and to control and repair damage from flooding. In addition, our constituents could lose swimming, fishing and other recreational opportunities which contribute to quality-of-life benefits that are vitally important but difficult to quantify.

For our county, clean water is a major economic driver as we have a world class sport fishery, sailing and boating lakes, and we are one of the top Ironman triathlon venues in the world because of our clean lakes. These events bring million of dollars of tourism into our county. But recent beach closings have put this economic engine at risk and we have launched a major effort to continue progress to clean up the lakes.

**Trouble on the Horizon**

But the current clean water chaos is not acceptable. Thousands of water polluting facilities have permits to dump into intermittent and ephemeral waters and headwater streams, the waters most at risk based on some interpretations of Supreme Court decisions. In Wisconsin alone, EPA data shows at least 212 individual NPDES permits regulate pollution discharges into headwater streams and another 191 individual NPDES permits regulate discharges into intermittent and ephemeral streams.

If left without Clean Water Act protections, polluters could dump animal waste, oil, other pollutants, or fill material into our streams and wetlands without a permit. By not regulating pollution discharges into these streams, we are effectively encouraging more pollution dischargers to locate in these areas to escape regulation. That would force counties like mine to spend more tax money to achieve more stringent discharge limits, imposing greater unfunded mandates on our communities, to assure that receiving waters meet water quality standards.

**County Concerns Addressed**

Some county officials are understandably concerned about unnecessary delays in Clean Water Act permitting. Following the *Rapanos* ruling, the EPA and Corps of Engineers adopted complex new guidance for determining whether waters are within the scope of the Clean Water Act. Because of the uncertainty about which waters are protected, Corps staff must complete a lengthy jurisdictional determination form for the water in question. This often leads to long delays in the permitting process before the actual Clean Water Act permits are considered.

The solution to this problem is for Congress to clarify which waters are protected. The current chaos does not protect historic waters and is not a reasonable solution. The current chaos has also created a need to increase Army Corp staff and funding to maintain past permit processing rates. The most cost-effective way to address this issue is Congressional clarification, not additional appropriations.

Some have suggested that no federal action is needed, but that each state should adopt laws as it sees fit to fill the gaps left by these Supreme Court decisions. A few states like Wisconsin have passed laws restoring protections to isolated wetlands after the *SWANCC* decision. Unfortunately, Wisconsin's SWANCC fix does not protect headwater streams. I agree with Wisconsin Governor Jim Doyle, who wrote in support of the Clean Water Restoration Act:

> "The Clean Water Act was meant to prevent a state-by-state approach, because all water flows downstream and the discharges in one state can significantly hamper water quality protection in another. Having a basic federal standard is essential for safeguarding economic values such as public water supplies, fisheries, and recreation—the Great Lakes and the Mississippi River, which border Wisconsin, are prime examples of how one state alone cannot protect water quality."

When you drink water in any state, you should know that livestock feedlots and slaughterhouses are not dumping deadly pathogens into your drinking water. We need a national solution.

Some have argued that the Clean Water Restoration Act somehow represents a vast expansion of Clean Water Act protections, but the facts show otherwise. It deletes the term "navigable waters," which was defined as the "waters of the United States, including the territorial seas." And it codifies the rules defining waters of the United States that were in place for decades. This change in the law would take us back to where the Clean Water Act was before the *SWANCC* and *Rapanos* decisions. It would restore the law's scope, not expand it.

Some preposterous concerns are that this will mean roadside ditch and rain gutter regulation. The rain gutter on my house was not regulated by the Clean Water Act before

these court decisions, and I am confident that it won't be regulated after the Clean Water Restoration Act is enacted. By the way, my gutters flow to a rain barrel and raingardens allowing the water to soak into the ground.

There is some county concern over ditches, some of which are natural streams that have been straightened and deepened to speed the flow of water. But our county Highway and Land and Water Departments heads tell me we maintain most road ditches without requiring permits. If permits are needed on larger projects, they are usually general permits that are easily obtained. Some larger ditches often connect to rivers and need Clean Water Act protections.

The need to protect larger ditches was illustrated by a case in our county where cow manure spilled into a drainage ditch then flowed into the West Branch of the Sugar River, killing hundreds of trout and other fish. This stream was a top trout stream and the first water body in Wisconsin to be removed from the 303(d) list by implementing voluntary conservation practices and habitat improvement to address non-point pollution. The county, farmers and conservation groups spent hundreds of thousands of dollars and hours to restore this trout stream. If the current chaos is allowed to continue, we might not be able to protect streams like this.

Another example is a recent criminal enforcement case conducted by the EPA, the Missouri Department of Natural Resources and the Missouri Department of Conservation. Last January these agencies investigated a situation in Hermondale, Missouri, involving the discharge of oil and other pollutants to a ditch by a biodiesel plant. According to the EPA, this discharge was responsible for killing approximately 100,000 fish downstream. A criminal prosecution is ongoing but measures are needed to ensure that these pollution spills are not allowed because of the current Supreme Court decision.

These cases illustrate the need for Congress to protect all waters of the U.S. Otherwise polluters may be able to discharge to small streams with impunity. The current chaos puts almost 60% of the nation's streams at risk.

Finally, some counties have concerns about state assumption and funding for clean water programs. Our county has taken responsibility for a regional stormwater permit for 14 communities and I understand the Clean Water Act allows local governments to assume parts of the program. Our county has also funded a Land and Water Legacy Fund of more than $2.5 million per year to clean up storm sewer outfalls, protect buffer strips on farm fields, and restore wetlands. This is in spite of state and federal budget cuts for clean water funding. I know you support restoring cuts to the Clean Water and Safe Drinking Water SRFs.

However, these issues pale when compared to the scope of the Clean Water Act. Unless the Clean Water Restoration Act is passed, almost 60% of the nation's streams, 20% of our wetlands and drinking water sources serving almost one-third of the nation will lack adequate protection. Your first priority should be to restore that protection, then get

greater funding and expand partnerships with counties, states, and other local governments.

**Conclusion**

In conclusion, as a county official with 20 years experience in clean water protection and programs, I urge you to pass the Clean Water Restoration Act to protect our drinking water from uncontrolled pollution, protect isolated wetlands to reduce flooding, and protect headwater streams to make our waters safe for drinking, fishing and swimming.

Thank you for all you do to protect our safety and clean water. I will be happy to try to answer any questions your might have.

Contact information: Dane County Supervisor Brett Hulsey, phone: 608-238-6070, email: hulsey@co.dane.wi.us.

Testimony of

The Honorable Kristin Jacobs

Broward County Florida

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Before the Committee on Transportation and Infrastructure

U.S. House of Representatives

On the Clean Water Restoration Act

April 16, 2008

Mister Chair and members of the Subcommittee, I am Kristin Jacobs, a County Commissioner and past Mayor of Broward County, Florida, a member of the South Florida Water Management District's Water Resources Advisory Committee, and Broward County's Water Advisory Board. Within Broward County, I have also been a champion of our award-winning NatureScape program and the Water Matters program, promoting environmentally sustainable landscaping and water resource conservation. Thank you for the opportunity to discuss the Chairman's legislation, HR 2421, the Clean Water Restoration Act.

I have been a County Commissioner for ten years, representing the nation's fourteenth largest and the State of Florida's second largest county by population. There are approximately 1.8 million souls residing in Broward County, and you can be sure that water, clean water, is of great importance to us. In addition, our county is bordered on the east by the Atlantic Ocean, and on the west by the Everglades, extending, as I like to say, "from Seagrass to Sawgrass." These natural environments are connected by a network of canals that expand across Broward County. With precious natural resources on both sides of our very urban environment, and this extensive canal system, the stewardship of our water resources is an important responsibility.

Broward County's citizens and businesses have let me know that they need the assistance of their local, regional, state, and federal governments to ensure the quality of our natural resources and their protection from flooding and drought. Broward County has some 1,800 miles of canals, and without protection, careful monitoring, and regulation, pollutants in stormwater runoff could easily threaten nearshore and Everglades habitats as the water makes its way out the inlets to the ocean or back into the River of Grass. Broward County relies on groundwater for our drinking water, and our hydrogeology, shared with the other South Florida counties, allows a high level of interaction between our surface water and groundwater. The protection of surface waters is a crucial part of the protection of our drinking water resources. Broward County's environmental quality is also an integral part of our economic health, with approximately ten million visitors per year enjoying our natural resources and local businesses. I served in our emergency operations center during Hurricanes Katrina and Wilma and saw first hand how the protection of our environment supports the flood protection infrastructure to meet the needs our citizens to be safe in their homes and businesses.

As I began to speak to my colleagues from different parts of the country about HR 2421 and whether the legislation could be considered a possible expansion of federal authority to regulate water bodies, it became clear that there were widely varying views. After consultation and discussion with professional water managers and attorneys familiar with water law and the permitting process, I'm happy to provide my view today, and hope that you will give it your full consideration.

**Support for the Clean Water Restoration Act**

The Clean Water Restoration Act should be supported by this Committee and Congress because it clarifies Congress' intent as to the scope of federal agency jurisdiction, providing a plain meaning and more rational results in its application than exists today after the *Rapanos* decision of the United States Supreme Court. In *Rapanos*, the Court clearly struggled to determine whether the federal regulations promulgated under it were inconsistent with Congressional intent, resulting in a confusing plurality of opinions. The Clean Water Act defined the term "navigable waters" as "waters of the United States, including the territorial seas," and left to federal agencies the job of defining that standard. The Clean Water Restoration Act's replacement of "navigable waters" with "waters of the United States" and adoption of the proposed definition of "waters of the United States" clarifies Congressional intent in support of long-standing federal regulations that have been in effect for many years prior to *Rapanos*, restoring the scope of federal jurisdiction; no more and no less. This would assist future courts and the regulated community to avoid the litigation necessary to interpret the confusing plurality of opinions in *Rapanos* and to rely on the substantial jurisprudence developed in applying the federal agencies' prior definition, resulting in more rational and consistent decisions about the viability and legality of proposed projects and the scope of federal regulation. That this bill would restore the intent of Congress in passing the Clean Water Act is supported by prior decisions of many federal courts, which have held that Congress intended to give the terms "navigable waters" and "waters of the United States" the broadest permissible constitutional interpretation. See *U.S. v. Eidson*, C.A. 11 (Fla.) 1997, 108 F.3d 1336 (cert. denied), *U.S. v. Byrd*, C.A.7 (Ind.) 1979 609 F.2d 1204, and *U.S. v. Zanger*, N.D.Cal 1991, 767 F.Supp. 1030.

This bill should also be supported for its measured approach to clarifying Congress' intent. It does not expand federal jurisdiction, preempt the traditional roles of state and local governments in water quality protection or land use, or disturb the regulation of federal projects by state and local governments. Section 6 of the bill, the savings clause, preserves the existing exemptions from federal regulation in Subsection 404(f) of the Clean Water Act. Further, by adopting the standards in use just prior to the *Rapanos* decision, the bill would not change the federal regulation of public infrastructure and other projects of local governments, which are commonly developed under planning and financing horizons of 5, 10 or more years. Florida, for instance, requires that local governments adopt 10-year plans for the development of water supplies as a part of its comprehensive land use plans.

The bill also preserves the Clean Water Act's recognition of the role of state and local government constitutional powers by not amending Subsections 101(b) and 404(t). Subsection 101(b) affirms the primary responsibilities and rights of States to control pollution and to plan the development and use of land and water

resources. Subsection 404(t) clearly indicates that federal permitting requirements do not preclude or deny such state powers, including state authority to regulate the discharge of dredged or fill material and regulate the activities of the federal agencies' projects. States need to have the primary role in making decisions about the development of land and water, and this bill continues the federal government's commitment to that balance of powers, allowing state and local governments to continue providing adequate water supplies, flood protection, and land use planning and zoning.

Finally the bill does not propose to change the current authority of states to manage permitting, grant and research programs and to prevent and eliminate pollution, even by adopting more proactive standards than those provided as minimums by federal programs. Because the bill will not disturb the role that Florida, Broward County, and many other state and local governments have chosen by adopting more protective standards than comparable federal programs or by obtaining delegations of those federal programs, it continues to support the existing role of state and local governments in the protection of our water resources. The continuation of this balanced approach helps our citizens obtain the benefit of having minimum and consistent standards across the nation, while allowing for the development of higher levels of protection when state and local governments need to respond to local needs. Even with such state and local programs in some areas of the nation, the continued partnership of the federal government to provide the minimum protections of the Clean Water Act provides the assurances needed by our citizens, businesses and governments of the nation's commitment to securing our future environmental and economic health. Continuing the roles of this partnership intact, rather than allowing a substantial confusion of the role of the federal government, is the best way to meet the objective of the Clean Water Act to restore and maintain the integrity and quality of the nation's waters.

**Addressing Criticisms of the Clean Water Restoration Act**

The Clean Water Restoration Act has been criticized as expanding federal jurisdiction to swales, ditches and gutters, and raised concerns about the effect of expanded jurisdiction and the potential for federal permitting delays on construction and maintenance projects of local governments. However, the role of the federal government in these areas is not changed by passage of the bill in any manner other than restoring the settled expectations of the regulated community and state and local governments that have been in place for over 20 years.

Swales are prevalent throughout Broward County. They are part of a water quality treatment system and, therefore not subject to the water quality requirements of the Clean Water Act. The stormwater/water quality treatment ponds to which they may discharge are similarly treated under the Clean Water Act. In order to meet the objectives of the Clean Water Act, however, current law

requires that water quality treatment is provided prior to discharge to canal or water bodies, which are already "waters of the United States." Water quality in Broward County's canals and the rivers, streams and lakes of other parts of our nation, are already protected by the Clean Water Act's NPDES and TMDL programs. This bill will not change the role of the federal government in relation to such swales, ponds, or canals or amend the NPDES or TMDL programs to reach new water bodies, waterways, their tributaries or headwaters.

A concern about this bill causing expanded regulation of ditches has also been raised. However, this bill does not change the way ditches are treated under the Clean Water Act. Ditches are already defined as a "point source" in Subsection 502(14) of the Act. The Clean Water Act allows discharges of pollutants from such point sources to waters of the United States when they comply with Section 402's NPDES program. The adoption of a definition of "waters of the United States" that is consistent with past federal agency rules will simply not expand or even disturb the current treatment of ditches under the Act.

Concerns about expanded regulation of public infrastructure and maintenance projects are similarly misplaced. *Rapanos* may have indicated to governmental entities considering such projects an opportunity to avoid the costs and time involved in obtaining federal permits for the class of projects only affecting isolated wetlands or very intermittently existing waters. However, the federal government's permit processing time frames can be reasonably accommodated when such projects require 5 or 10 year capital plans, land acquisition and use decisions, and competitive bidding processes that are commonly used through the nation. The existence of Clean Water Act nationwide and other efficient general authorizations address most projects that do not already require this level of time and planning, so it is a very narrow class of public projects that could have suddenly sprung up that would not be able to accommodate a return to the federal definition of "waters of the United States" that was in force up until December of 2006. Additionally, the plurality opinions in *Rapanos* have made it harder for public and private projects alike to anticipate what types of projects will qualify for a federal permit. The restoration of the prior federal definitions would lessen the confusion and uncertainty that public and private projects alike face after *Rapanos* when planning for major infrastructure or capital projects. The bill's adoption of the long-standing federal regulatory definition into statute would actually settle many of the questions raised in past court cases under the Act and provide a better basis for courts to construe the plain meaning of the Clean Water Act, lessening the risks of unpermittable projects and costly litigation.

Finally, concerns about preemption of state and local land use authority have been raised in connection with regulation of flow volumes from stormwater and run off from impervious surfaces. After thorough review by our attorneys and water managers, the basis for such concerns is unclear at best. The Act's relation to land use planning and zoning was neither changed by *Rapanos* nor would it be by the Clean Water Restoration Act. How such flows may affect

waters of the United States was the subject of nonpoint source pollution protections through certain types of NPDES permitting before and after *Rapanos*, under programs such as the Municipal Separate Storm Sewer System permitting program. Broward County is the lead permittee for such a "MS4" permit that includes almost all of the municipalities within the County, and its requirements to reduce nonpoint source pollution from runoff and land uses have neither supplanted the County or municipal roles to make land use decisions nor frustrated our responsibilities in meeting state requirements for comprehensive land use and water supply planning.

Mister Chair, I am pleased to note that among the 175 cosponsors of your bill are most of Broward County's Congressional Representatives. As for my opposing colleagues at NACo, particularly in the western states, I have no doubt that they are sincere in their concerns that this legislation would preempt their local government authority and make their permitting requirements even more onerous. I respectfully disagree.

In closing, let me assure the members of this committee that the Broward County Board of County Commissioners supports strong water quality protections and legislation that retains the original intent of the Clean Water Act. Restoring the Clean Water Act protections to all our water bodies has taken on even greater significance as counties across the nation are dealing with massive flooding, lack of drinking water, and new threats of unregulated industrial pollution to our streams and drinking water sources. Restoring Clean Water Act protections for small streams and isolated wetlands that the recent Supreme Court *SWANCC* and *Rapanos* decisions have put in doubt will protect our children's water resources for decades to come.

Mr. Chair and Members of the Committee, thank you so much for the privilege of offering my testimony today.

**STATEMENT OF ARLEN L. LANCASTER, CHIEF**
**NATURAL RESOURCES CONSERVATION SERVICE**
**U.S. DEPARTMENT OF AGRICULTURE**
**BEFORE THE**
**U.S. HOUSE OF REPRESENTATIVES**
**COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE**

**April 16, 2008**

Chairman Oberstar, Ranking Member Mica and Members of the Committee, thank you for the opportunity to appear before the Committee to discuss the Clean Water Restoration Act of 2007 (H.R. 2421) and the activities of the Natural Resources Conservation Service (NRCS). Through the technical assistance and program assistance that NRCS delivers, our employees work in partnership with private landowners and our conservation partners to take proactive steps to restore, enhance, maintain and improve our Nation's valuable wetland resources.

Farmers and ranchers know that sound, profitable farming and maintaining clean water supplies go hand in hand; and through our technical assistance, cost-share, easement, and stewardship programs, we are assisting the agriculture and forestry sectors to realize their tremendous potential to provide positive environmental benefits.

Based on data from the NRCS National Resources Inventory (NRI), an annual statistical survey of natural resource conditions and trends on nonfederal land in the 48 contiguous States, America's farmers and ranchers are protecting and restoring wetlands at unprecedented rates. Between 1997 and 2003, agricultural producers across the Nation achieved an average net gain of 44,000 acres of wetlands each and every year. Several USDA programs that I will describe contribute significantly to the accomplishment of the President's goal for an overall increase in wetlands by protecting, improving, and restoring 3 million acres of wetlands by 2009. On Earth Day last year, 2007, progress toward the 3 million-acre goal stood at nearly 2.8 million acres.

Producers who participate in USDA conservation programs have proven themselves as good stewards of the land and NRCS local employees work closely with them and other Federal and State partners to improve our Nation's wetlands. The scale of wetlands conservation produced by these partnerships is far larger than acreages protected and mitigated under the Clean Water Act.

As HR 2421 changes two fundamental elements of the Clean Water Act, we cannot currently be certain how it may affect NRCS programs and the producers we serve. HR 2421 changes the definition of waters of the United States. The bill also appears to extend the current focus of the Act on protecting navigable waters to regulating "activities affecting these waters." Where we can already determine an effect on NRCS programs, we say so below. Further clarity requires further study. I look forward to working with

the Committee to ensure that regulatory requirements effectively serve their purposes without hindering conservation through active management.

### *USDA's Conservation Programs*

The focus of NRCS's conservation efforts is squarely centered upon working lands and upon ensuring that these lands continue to produce valuable agricultural commodities and contribute to local economies, while at the same time protecting soil quality, water quality, wetlands, fish and wildlife habitat and other natural resources. One of the mission areas assigned to NRCS by Congress is to help farmers, ranchers and other private landowners enhance, maintain, improve and restore our Nation's wetland resources. We have authorities to accomplish these activities through both conservation compliance and wetland restoration.

**Conservation Compliance**

In 1985, the Highly Erodible Land Conservation (HEL) and Wetland Conservation (Swampbuster) compliance provisions were introduced, with amendments added in subsequent Farm Bills. The purpose of these provisions is to remove certain incentives to produce agricultural commodities on converted wetlands and highly erodible land, unless the highly erodible land is protected from excessive soil erosion.

One result of implementation of the HEL provision is a reduction in total soil erosion of 43 percent between 1982 and 2003. Concomitant reductions in nutrient runoff associated with soil erosion have reduced the quantities of nitrogen and phosphorous entering the Nation's waters.

Swampbuster applies to the conversion of wetlands for the production of agricultural commodities. A producer's failure to comply with Swampbuster results in the loss of eligibility for USDA benefits. We implement the Swampbuster provision by providing farmers with wetland determinations on their fields based on criteria outlined by Congress in the 1985 Food Security Act. NRCS maintains a list of the plants and soils associated with wetlands and uses these technical tools, in conjunction with an evaluation of the hydrology of the area, to conduct wetland determinations. These determinations stay in effect as long as the land is used for agricultural purposes or until the producer requests a review. Equipped with a wetland determination, farmers are able to manage their farming operations and protect their wetland resources, while maintaining their eligibility for USDA payments.

The wetland conservation provisions have sharply reduced wetland conversions for agricultural uses, from 235,000 acres per year before 1985 to 27,000 acres per year from 1992 through 1997. Our reviews of Swampbuster efforts indicate continued increasing producer compliance levels for the program.

The changes outlined in HR 2421 for the definition for navigable waters would have no impact on the Swampbuster provision, which is governed by the wetlands provisions in the 1985 Food Security Act and not the Clean Water Act.

I would be remiss if I did not mention that USDA has proposed a third compliance mechanism for the next Farm Bill. The Sodsaver proposal would discourage conversion of rangeland and native grassland in a manner similar to the current Swampbuster provisions for the conversion of wetlands.

**Wetlands Reserve Program**

NRCS programs also contribute to the creation, improvement, and restoration of wetlands. In 2004, on Earth Day, President Bush set as a goal the overall increase in our Nation's wetlands by creating, improving, and protecting at least 3 million wetland acres by 2009. One of the principal programs available to private landowners to achieve that goal is the Wetlands Reserve Program (WRP). This program is a voluntary program through which landowners are paid to remove eligible lands from agricultural production if those lands are restored to wetlands and protected, in most cases, with a long-term or permanent easement. Landowners receive compensation for the rights they forgo associated with protecting the land, and are provided with assistance to defray all or part of the restoration expenses. The goal of WRP is to maximize wetland functions and values and wildlife benefits. One of the important functions and values of wetlands is improved water quality and quantity. Properly functioning wetlands have a tremendous positive impact on water quality. Private landowners have enrolled over 1.9 million acres in this program through FY 2007, an amount equivalent to the combined size of the States of Delaware and Rhode Island. Demand for WRP continues to grow as producers seek to restore, enhance and create wetlands on their property.

**Conservation Reserve Program**

The Conservation Reserve Program (CRP) is a voluntary program administered by the Farm Service Agency (FSA) to help agricultural producers safeguard environmentally sensitive land. Producers enrolled in CRP plant perennial vegetation to improve water quality, control soil erosion, and enhance wildlife habitat. In return, FSA provides participants with rental payments and cost share assistance. Contract duration for CRP is between 10 and 15 years.

CRP protects millions of acres of topsoil from erosion and is designed to safeguard the Nation's natural resources. By reducing water runoff and sedimentation, CRP protects groundwater and helps improve the condition of lakes, rivers, ponds, and streams. The perennial vegetative cover planted on CRP lands is a major contributor to increased wildlife populations in many parts of the country.

A majority of the land enrolled in CRP consists of environmentally sensitive upland fields. USDA, however, has also enrolled about 2.0 million acres of wetlands with

associated protective buffers that support 2 million ducks per year and over 1.9 million acres of other buffers and filter strips to protect rivers, streams, and other waterways from chemical and fertilizer runoff and soil erosion.

**Environmental Quality Incentives Program**

NRCS utilizes its technical assistance authorities and financial assistance programs to help producers achieve their conservation goals. NRCS implements the Environmental Quality Incentives Program (EQIP) to help farmers and ranchers implement structural and management conservation practices on their land. The 2002 Farm Bill reauthorized EQIP and substantially increased its funding. Between FY 2002 and FY 2006, close to 185,000 participants received almost $3.1 billion in cost share and incentive payments under EQIP. This successful program has seen increasing demand (many States have significant application backlogs) as producers implement conservation practices to attain their conservation goals and provide public benefits.

In addition, many producers rely on USDA programs such as EQIP to assist them in meeting regulatory requirements. As an example, animal feeding operations may use EQIP, as well as the Conservation Technical Assistance Program (CTAP), to develop comprehensive nutrient management plans (CNMPs). These plans help ensure that animal manure is applied to land at a rate that does not exceed crop needs. Since 2002, NRCS has helped producers develop 32,000 CNMPs, which can help animal feeding operations comply with regulatory requirements should they fall under the purview of the Clean Water Act's Concentrated Animal Feeding Operation (CAFO) provision. Currently, about 20,000 farm operations across the country are potentially subject to the CAFO rule, promulgated by the Environmental Protection Agency, of which about 15,000 are projected to need permits for discharge to "waters of the United States." Expanding the definition of "waters of the United States" could potentially result in more animal feeding operations having to obtain Clean Water Act permits because more CAFOs could be found to discharge pollutants to covered waters. We note that compliance costs to such producers are not reflected in the current estimates of the cost of the rule.

In fiscal year 2007, NRCS made the decision to use authorities under the Farm Bill to allow the use of EQIP financial assistance funds for CNMP development so that our drive to write plans for all livestock farmers that need them will be accelerated. To even further accelerate the production of CNMPs, NRCS is partnering with EPA, Purdue University, the University of Tennessee and the University of Missouri to enhance the Manure Management Planner software technology that will lessen the time it takes to produce a CNMP, enhance the accuracy of the output, and make the plan easier for the farmer to understand and use.

To ensure that these efforts, as well as other conservation programs are having the beneficial impacts intended by Congress, in 2003 NRCS initiated the Conservation Effects Assessment Project (CEAP). The objective of this effort is to provide decision-makers with a scientific accounting of environmental benefits achieved through

conservation programs. This initiative involves not only NRCS, but also the Agricultural Research Service, the Cooperative State Research Education and Extension Service, other Federal agencies, and scientists at several land grant universities. Research and assessment efforts are currently underway and results will be available in the near future.

***Summary***

In total, USDA believes that NRCS authorities for wetlands compliance and restoration activities under the Farm Bill would not be affected by HR 2421. Since our authorities are not connected to the Clean Water Act, the change in definition would not impact the implementation of USDA's programs. It is possible that enactment of HR 2421 would lead to more producers falling under the regulatory purview of the Clean Water Act, which in turn could lead to increased compliance costs for producers. However, at this time we are not able to provide a detailed analysis of its impact on U.S. agriculture.

As we look ahead, it is clear that the challenges before the Nation to protect and improve wetland resources will require the dedication of all available resources – the skills and expertise of the NRCS staff, the contributions of volunteers, and continued collaboration with partners including local, State and Federal agencies. We will continue to provide farmers and ranchers the best information possible to better enable them to make informed decisions about wetland resources.

This concludes my statement. I will be glad to answer any questions that Members of the Committee might have.

RIVERKEEPER.

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## I. Introduction

Thank you, Mr. Chairman and members of the Committee, for the opportunity to testify before you today. My name is Alex Matthiessen. I am the Hudson Riverkeeper and President of Riverkeeper, Inc. ("Riverkeeper"), a New York environmental organization that works to protect New York area water resources. In my testimony today, I will briefly describe the recent erosion of long-standing protections under the Clean Water Act, and the negative impacts these rollbacks have had on efforts to preserve these vital water resources.

## II. Executive Summary

Riverkeeper strongly urges all Members of Congress to act swiftly in passing the Clean Water Restoration Act ("CWRA") to reaffirm Congress' original intent to protect our nation's interconnected water resources, including watersheds, wetlands and tributaries, from pollution. This legislation is of utmost importance to the future of clean water in the United States and demands our full support. Two sharply divided, controversial Supreme Court decisions, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* ("*SWANCC*") in 2001[1] and *Rapanos et ux., et al. v. United States* ("*Rapanos*") in 2006[2] have thrown federal and state agencies into total confusion as to when they have CWA jurisdiction. Together, these decisions have created great uncertainty over which waters are to be afforded protection under the Clean Water Act. Although the Clean Water Act mandates broad protection of "waters of the United States," the definition of that term has been left to agency regulations promulgated by the U.S. Army Corps of Engineers ("Corps") and U.S. Environmental Protection Agency ("EPA"). Since the above-mentioned Supreme Court rulings, developers have attempted to capitalize on the confusion caused by these decisions to build in wetland areas that previously had been protected under the CWA.

[1] 531 U.S. 159 (2001).

[2] 547 U.S. 715 (2006).

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Historically, judicial interpretations of the Clean Water Act have recognized the value of conserving and maintaining healthy wetlands, headwater streams and other waters.[3] In recent years, however, opponents of the Clean Water Act—largely industry, developers and landowner groups as well as Supreme Court Justices Scalia, Thomas, Alito and Chief Justice Roberts—have argued that Congress never intended an expansive view of federal authority to protect the nation's waters. These opponents point to the use of the term "navigable," which appears throughout the Clean Water Act, as an indication of Congress' intent to tie Clean Water Act jurisdiction with traditional concepts of navigability. These opponents have attempted to place into question whether Congress intended the Clean Water Act to protect certain streams, rivers, wetlands and other waters that are not "traditionally navigable", i.e., "navigable in fact." If the scope of the Clean Water Act were to be reinterpreted in this way, as most recently suggested by petitioners in *Rapanos*, over 98 percent of the nation's waters would be excluded from federal protection under the CWA—a proposition absurd on its face.[4] Clearly, such a narrow interpretation would render the Clean Water Act meaningless and would be in direct derogation of the CWA's goals and objectives.

For our nation's waters to be truly protected from pollution and degradation, as envisioned by Congress in originally enacting the Clean Water Act, the health of wetlands, rivers, streams, lakes and coastal waters must be protected. The scientific evidence for protecting such waters is clear and unambiguous. All of our nation's waters are connected through hydrologic cycles and must be given equal protection, as Congress originally intended when it enacted the Clean Water Act in 1972. The U.S. has already lost too many of these valuable water resources. The National Research Council has posited that the objectives of the Clean Water Act "cannot be achieved if wetlands are not protected."[5] The degradation and destruction of these vital water resources will only serve to increase water pollution, exacerbate flooding, threaten public health, deplete drinking water sources, and reduce and potentially extinguish endangered or threatened wildlife species.

Even before the CWA was weakened by the Supreme Court in its recent rulings, our nation's waters were in trouble. Today, approximately 45 percent of the nation's waters still do not meet water quality standards for supporting fishing and swimming, a goal of the CWA that was supposed to have been reached by 1983.[6] In New York, approximately 37% of the state's river miles and 77% of the state's lake waters are impaired.[7] Additionally, the fish in approximately 41% of New York's waters are not safe for consumption and nearly all of the

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[3] *See, e.g., United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

[4] *See* Testimony of John Quarles, Acting Administrator of the U.S. Environmental Protection Agency Before the Committee on Transportation and Infrastructure, U.S. House of Representatives, March 3, 1977. *See also*, L. Wood, *Don't be Misled: CWA Jurisdiction Extends to All Non-Navigable Tributaries of the Traditional Navigable Waters and to Their Adjacent Wetlands*, 34 Envtl. L. Rptr. 10187, 10192-10193 & n.32 (2004) (concluding that fewer than 1% of the stream miles within the Missouri River watershed are traditional, navigable waters).

[5] National Research Council, *Compensating for Wetlands Loss under the Clean Water Act.* (2001).

[6] Statement of G. Tracy Mehan III, Assistant Administrator for Water, U.S. EPA, Before The Committee on Environment and Public Works, United States Senate, October 8, 2002.

[7] Food and Water Watch, *Clear Waters: Why America Needs a Clean Water Trust Fund.* (2007).

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State's Great Lakes waterways are seriously degraded.[8] In March 2008, the New York State Department of Environmental Conservation ("DEC") released a report stating that an estimated $36.2 billion will be needed over the next twenty years to repair, replace, or update New York's municipal wastewater infrastructure.[9] Currently, the New York State Department of Health is compiling data for a Drinking Water Needs Survey, which is expected to demonstrate that at least $20-22 billion will be needed for New York State's drinking water infrastructure over the next twenty years.[10]

Now, more than ever, Congress must pass the Clean Water Restoration Act to reaffirm its original intent in enacting the Clean Water Act, which according to the language of the Act, itself, is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters"[11] and make our nation's treasured waters fishable and swimmable once again.

## III. Background: Riverkeeper and the Clean Water Act in New York State

Riverkeeper is the Hudson River's leading citizen-based clean water advocacy organization, employing legal action, education and advocacy to enforce federal, state and local laws designed to protect the public's right to clean water. We work on behalf of a diverse population of New Yorkers—from urban dwellers residing in New York City to local fishermen and blue collar families who live and work in the rural Hudson Valley. Riverkeeper (including its predecessor, the Hudson River Fishermen's Association, Inc.) has over 42 years of experience combating pollution of the Hudson River.

In 1966, our founder, Robert H. Boyle and a group of recreational and commercial fishermen launched the Hudson River Fishermen's Association ("HRFA"), who set out to reclaim the Hudson River from polluters. At that time, the River was heavily polluted and disease-ridden as towns and factories treated the Hudson River like an "open sewer."[12] Determined to reverse the decline of the Hudson River, Bob Boyle unearthed a little known 19th century law—the Federal Refuse Act of 1899—and used this law to confront polluters head on.[13] In fact, in 1969, HRFA became the first organization in American history to receive a bounty against polluters under the Federal Refuse Act.[14]

Without a doubt, the landmark passage of the Federal Water Pollution Control Act in 1972, renamed the Clean Water Act in 1977 (hereinafter referred to as "Clean Water Act" or

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[8] *Id.*

[9] New York State Department of Environmental Conservation, *Wastewater Infrastructure Needs of New York State*. (March 2008).

[10] *Id.* at 3 n1.

[11] 33 U.S.C. § 1251(a).

[12] John Cronin & Robert F. Kennedy, Jr., The Riverkeepers 19, 55 (1997).

[13] The Federal Refuse Act is section 13 of the Rivers and Harbors Act of 1899. *See* 33 U.S.C. § 407.

[14] The Riverkeepers at 42-49.

"CWA"), has enabled groups like Riverkeeper to stop polluters in their tracks. The CWA stands as the last and best deterrent to reckless pollution and unchecked development. Today, in sharp contrast to its polluted past, the Hudson is internationally heralded as a model for river restoration and remains one of the most biologically rich waterways on earth. In 1998, the Hudson was named an American Heritage River, one of only fourteen rivers nationwide to receive that designation. Riverkeeper's success in restoring the Hudson has inspired the creation of "waterkeepers" on more than 177 waterways across the globe.

At any given time, Riverkeeper is involved in dozens of cases against polluters—all aimed at protecting the integrity of the Hudson, its tributaries, the Croton watershed, or other waters that affect New Yorkers' water supply. These cases include investigations, litigation, environmental review of development projects, citizen actions, regulatory review, and lobbying of local, state, and federal policy issues. In the past, Riverkeeper has successfully challenged the illegal activities of some of the largest and most notorious polluters for violations of the CWA. Currently, Riverkeeper is working on pollution cases throughout the New York City Harbor, and the Lower, Middle and Upper Hudson Valley Regions.

In 1970, a sister organization, the Natural Resources Defense Council ("NRDC"), sought to protect the Ockawamick, an intermittent tributary to the Hudson located in upstate New York. The Philmont Finishing Company, a cleaner and finisher of woolens, was discharging wastewater and spent materials from its outfall into a dry trench, which emptied into the creek some 50 yards away. In their investigation, the authors reported that life in the river had been killed for a stretch of several miles downstream and that several children who had gone swimming in the stream had become seriously ill.[15] The enactment of the CWA two years later gave groups like NRDC and Riverkeeper the leverage we needed to stop this kind of rampant pollution of the Hudson River's tributaries and creeks.

Sadly, as a consequence of major federal rollbacks to the Clean Water Act since 2001, creeks such as the Ockawamick are once again vulnerable to becoming industrial dumping grounds that harm our environment, threaten our economic prosperity and harm the health of our communities, inevitably reversing 30 years of progress made on the Hudson.

In New York State, the Hudson River watershed and the New York City drinking water supply watershed—the two resources Riverkeeper is charged with protecting—are under intense pressure from increased suburban development, stormwater runoff and point source pollution. The region needs strong CWA protection more than ever.

## IV. The Clean Water Restoration Act (H.R.2421/S.1870) is Necessary to Restore the Original Intent of Congress in Passing the Clean Water Act

As its title clearly indicates, the Clean Water Restoration Act ("CWRA") seeks to reaffirm and restore the original intent of the Clean Water Act; it does not propose any broad new rule or program obligations, but rather seeks to incorporate statutory language that has been included in the Corps' and EPA's implementing regulations since 1977.[16] For the last 35 years,

[15] Arthur E. Nathan, Natural Resources Defense Council Rivers and Harbors Project 1970—Philmont, NY (1970).

[16] *See infra* n.20.

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federal agencies and courts have correctly taken a broad view of federal regulatory jurisdiction under the CWA and extended protection to critically important water resources, including small wetlands and headwater streams. However, since the Supreme Court's decisions of 2001 and 2006, federal jurisdiction over certain types of water resources has been whittled away, through agency policy directives and conflicting circuit court interpretations of new, judicially created terms that are not contained in the CWA.

A. *Original Intent of the Clean Water Act*

In enacting the Clean Water Act, Congress fully intended that all of the Nation's waters be protected from unregulated pollution, degradation and destruction. The Clean Water Act was enacted by Congress with a sweeping objective: "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[17] The CWA established two clear goals that are equally bold and ambitious: (1) that the discharge of pollutants into navigable waters be eliminated by 1985; and (2) that wherever attainable, an interim goal of water quality be attained which provides for "swimmable and fishable" waters by 1983.[18] (Emphasis added).

B. *Historic Origin of the Term "Navigable" Waters*

While the intent and goals of the CWA to maintain water quality are clear, the current legal confusion stems from the recent exploitation of the term "navigable". While the CWA regulates pollution and discharge of dredge or fill material to "navigable" waters, the CWA defines "navigable" waters merely as "waters of the United States."[19] Regrettably, the term "waters of the United States" is not explicitly defined in the CWA, but rather in Corps and EPA regulations.[20]

The terms, "navigable waters" and "navigability" were used by Congress in the Rivers and Harbors Act of 1899, an early precursor to the CWA, to define federal authority over the Nation's waterways.[21] When Congress enacted the Rivers and Harbors Act, its aim was not to protect water quality, but rather to prevent physical interference with, or obstruction to transportation and commerce on our Nation's waterways, which were of vital import to the American economy at that time. Federal authority under the Rivers and Harbors Act was asserted under the Commerce Clause of the U.S. Constitution.[22]

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[17] 33 U.S.C. § 1251(a).

[18] *Id.*

[19] 33 U.S.C. § 1362, CWA § 502(7).

[20] *See* 40 CFR § 230.3 (EPA regulatons) and 33 CFR § 328.3(a)(1)-(7) (Corps regulations). The Corps defines "waters of the United States" to include: [a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce including all waters which are subject to the ebb and flow of the tide; [a]ll interstate waters including interstate wetlands; [a]ll 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...; [t]ributaries of waters identified in paragraphs (a)(1)-(4) of this section; and [w]etlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(6) of this section.

[21] 33 U.S.C. § 403.

[22] U.S. CONST. art. I, § 8, cl. 3.

Yet the specific legislative history of the CWA explains why Congress included the term "navigable" waters in the CWA and also makes clear that it intended this term be given a much more expansive interpretation than that relied upon in the Rivers and Harbors Act. CWA section 502(7) defines "navigable" waters to mean the "waters of the United States, including the territorial seas."[23] An accompanying Senate Conference Report states that Congress intended the term "navigable waters" to be given "the broadest possible Constitutional interpretation."[24] In addition, early versions of the CWA first used the term "interstate waters" to define jurisdiction.[25] However, in 1961 Congress amended the CWA to adopt the term "navigable waters" in order to achieve broader coverage.[26] In these earlier versions, the word, "navigable" was also included within Section 502(7)'s definitional provision for "waters of the United States."[27] In enacting the Clean Water Act in 1972, however, the Conference Committee deleted the word "navigable" from Section 502(7) and expressed its intent to reject prior geographic limits on the scope of federal water protection measures.[28]

C. *Recent Attacks on the CWA*

For the past 30 years, the Corps and EPA implementing regulations have embodied Congress' intent by defining "waters of the United States" as broadly as constitutionally permissible. These "waters of the United States" include a wide range of waterbodies, including wetlands and headwater streams.[29] Prior to 2001, caselaw supported these expansive definitions. Yet recent Supreme Court decisions and subsequent policy guidances have seriously undermined the jurisdictional reach of the CWA, chipping away at the types of waterbodies that may be protected. Rather than resolving any ongoing interpretational conflicts, the Supreme Court has merely changed the terms of the debate, resolving one conflict while creating new terms and rules that have caused confusion and invited new rounds of litigation.

In January 2001, the U.S. Supreme Court held in *Solid Waste Agency of Northern Cook County v. United States* ("*SWANCC*") that the Corps had exceeded its authority under the Clean Water Act by asserting regulatory jurisdiction over so-called "isolated" wetlands where the sole basis for doing so was their use by migratory birds.[30] Although the Court's narrow decision was strictly limited to waters that are "non-navigable, isolated, [and] intrastate whose *sole basis* for the assertion of regulatory jurisdiction under the CWA was their use as habitat by migratory birds," Chief Justice Rehnquist's dictum stated that the term, "navigable waters" could not be read out of the statute and that the term had the import of "showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or

[23] 33 U.S.C. § 1362, CWA § 502(7).

[24] *See* Conference report S.Rept. 92-1236 at 144, *reprinted in* 1972 U.S. Code Cong. & Admin. News 3776, 3822.

[25] *Id.*

[26] Pub. L. No. 87-88, Section 8(a), 75 Stat. 208 (June 20, 1961).

[27] *Id.*

[28] *Compare* S. Conf. Rep. No. 1236, 92d Cong., 2d Sess. 144 (1972) with H.R. Rep. No. 911 92 Cong., 2d Sess. 356 (1972).

[29] *See supra* n.20.

[30] 531 U.S. 159 (2001).

had been navigable in fact or which could reasonably be made so."[31] Thus, the issue of navigability was revived.

In 2003, following *SWANCC*, the Corps and EPA announced an Advance Notice of Proposed Rulemaking ("ANPRM"), soliciting comments on how the Corps and EPA should redefine their regulatory definitions of "waters of the United States."[32] The ANPRM far exceeded the scope of *SWANCC*'s narrow holding. After receiving an unprecedented 133,000 comments in opposition, the rulemaking was stopped.[33] However, that same year, the Corps and EPA issued a policy guidance in lieu of regulations that remain in effect today.[34] This policy guidance directs Corps and EPA staff to immediately cease asserting jurisdiction over "isolated" waters based on their use as habitat for endangered species or crop irrigation as well as any intrastate, non-navigable waters, including streams and wetlands, which they might consider "isolated." Instead, Corps and EPA staff must first gain permission from agency headquarters in Washington, D.C. before extending protections to any potentially "isolated" waters. Strikingly, Corps and EPA staff are not then required to defend or even document how these decisions are made. According to the EPA's own estimates, this 2003 policy directive affects the agency's ability to protect 20 million acres of so called "isolated" wetlands and other water bodies throughout the United States.[35]

On May 18, 2006, in direct response to the many controversies surrounding the 2003 guidance, the U.S. House of Representatives adopted an amendment to an FY2007 appropriations bill barring EPA from spending funds to further implement the new policy.[36] Although the amendment received strong, bipartisan support (passed by a 222-198 vote), the 109th Congress adjourned in December 2006 before taking final action. No further action has since been taken and, unfortunately, the 2003 guidance remains in full force today.

Just as *SWANCC* and the subsequent policy guidance have removed protections for certain wetlands, the 2006 Supreme Court decision in the consolidated cases, *Rapanos v. United States* and *Carabell v. United States Army Corps of Engineers*, has added to the confusion about which waters are protected by the CWA.[37] Unlike *SWANCC*, these cases were not about wetlands, but rather about intermittent streams and navigability. In *Rapanos*, the Court examined whether the law protects non-navigable tributaries and their adjacent wetlands. Petitioners argued that Clean Water Act protections should apply only to "traditional navigable" waters and those wetlands and streams "directly adjacent" to those "traditional navigable" waterways. In reaching its decision, the Court was sharply divided, resulting in a rare 4-1-4 split

[31] *Id.* at 172.

[32] *See* 68 Fed. Reg. 1991 (January 15, 2003).

[33] According to EPA, over 99% of these comments were opposed to a new rule. U.S. Government Accountability Office, *Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction*, GAO-04-297 (February 2004).

[34] *See* 68 Fed. Reg. 1997 (January 15, 2003).

[35] Eric Pianin, "Administration Establishes New Wetlands Guidelines," *The Washington Post*, January 11, 2003; p. A05. *See also* Douglas Jehl, "U.S. Plan Could Ease Limits on Wetlands Development," *The New York Times*, January 11, 2003.

[36] H.R. 5386 (2006).

[37] 126 S.Ct. 2208 (2006).

decision that has, yet again, spurred extensive litigation across the country. *Rapanos* represents an even greater threat to the CWA, calling into question Congress' authority to regulate our nation's vital network of small headwater streams and associated wetlands.

Because it is not a majority, the plurality opinion written by Justice Scalia, and supported by Justices Thomas, Alito and Chief Justice Roberts is not controlling, but sheds an ominous light on the direction the Court could move in the future. It held that wetlands adjacent to non-navigable tributaries are "waters of the United States" *only if* the tributary to which the wetland is adjacent is a "relatively permanent" waterbody and the wetland has a "continuous surface connection" with the tributary. The *Rapanos* plurality opinion articulates an exceptionally narrow and restrictive reading of the CWA's jurisdiction over "waters of the United States" which, if controlling, could erase the past 30 years of progress made in protecting our nation's water resources from degradation and destruction. Additionally, the plurality opinion would remove from CWA jurisdiction all intermittent or ephemeral flows of water and limit federal jurisdiction only to wetlands with a "continuous surface connection" to water bodies that fit within Scalia's newly articulated definition of "waters of the United States."

In the concurring opinion, Justice Kennedy articulated a "significant nexus" test for determining which waters should be considered "waters of the United States" under the Clean Water Act, requiring that wetlands or waters falling within the scope of the CWA's Section 404 jurisdiction possess a "significant nexus" to waters that are or were "navigable in fact" or that "could reasonably be so made." According to Kennedy, a "significant nexus" will be found to exist where the wetland or water, alone or in combination with similarly situated lands, has a significant effect on the chemical, physical and biological integrity of traditional navigable waters. This "significant nexus" test requires an administratively burdensome, "labor intensive" case by case analysis that has already proven difficult to apply.[38] The unfortunate end result is that with no controlling, majority opinion, lower courts have been left, yet again, to grapple with how to interpret the scope of the Clean Water Act over "waters of the United States."

In an apparent attempt to clarify the confusing effects of the *Rapanos* split decision, the EPA and Corps issued new policy guidance in June 2007.[39] In reality, this guidance has left very little "clarified." The new guidance instructs EPA and Corps staff to incorporate a confusing combination of the Scalia and Kennedy tests articulated in *Rapanos*.[40] In effect, this guidance threatens to subject many streams, rivers and wetlands in need of protection to a speculative and cumbersome case by case analysis that does not even reflect a majority opinion among the Supreme Court Justices. Like the 2003 policy guidance, this directive implicates the entire CWA, not just Section 404.

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[38] Environmental Law Institute, *The Clean Water Act Jurisdictional Handbook for Wetlands* at 22 (2007 Edition).

[39] 72 Fed. Reg. 31824 (June 8, 2007).

[40] Individual permit applications must undergo jurisdictional determinations based first on the Scalia test and then, if necessary, on the Kennedy "significant nexus" test.

D. *SWANCC and Rapanos Have Far Reaching Impacts on All Clean Water Act Programs*

The effects of *SWANCC* and *Rapanos* and the two EPA/Corps policy guidances are far reaching and impact the entire Clean Water Act, not just Sections 404 and 402. Almost every Clean Water Act program relies on the definition of "navigable waters" to include all "waters of the United States" as that term has been broadly interpreted for the last 35 years by the EPA and Corps, prior to the *SWANCC* and *Rapanos* decisions. Thus, in addition to Sections 402 (national pollutant discharge elimination system) and 404 (dredge and fill), the regulatory scope of Sections 303 (water quality standards program),[41] 401 (state water quality certification program)[42] and 311 (oil spill program)[43] of the Clean Water Act as well as the Oil Pollution Act will be severely undermined and weakened by this unprecedented, restrictive re-interpretation of the term "navigable waters."

E. *The Confusion Caused by SWANCC and Rapanos Has Resulted in Inconsistent Corps' Jurisdictional Determinations and Has Spurred Considerable Litigation Nationwide*

Clean Water Act jurisdiction is truly in a state of flux, resulting in a barrage of inconsistent lower court rulings and Corps jurisdictional determinations. As reported by the Government Accountability Office, subsequent to *SWANCC*, Corps districts across the country no longer agree on the basic rules of law they must apply when making 404 jurisdictional decisions, thus issuing vastly inconsistent determinations.[44]

In the short time span since *Rapanos* was handed down, there have been at least four Courts of Appeals rulings and eight federal district court rulings, reflecting the struggle courts are having interpreting *Rapanos*.[45] Thus far, these rulings have also been vastly inconsistent, an outcome predicted by the Chief Justice, himself, in his concurring opinion. Chief Justice Roberts: "[i]t is unfortunate that no opinion commands a majority of the Court on precisely how to read Congress' limits on the reach of the Clean Water Act. Lower courts and regulated entities will now have to feel their way on a case-by-case basis."[46] Some courts have relied solely on the

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[41] This section of the CWA requires States to design water quality standards and criteria for navigable waters so as to protect public health and welfare. 33 U.S.C. § 1313.

[42] This section of the CWA requires any applicant for a Federal license or permit that may result in any discharge to navigable waters to provide State certification. 33 U.S.C. § 1341.

[43] Both Section 311 of the Clean Water Act and the Oil Pollution Act provide the EPA and U.S. Coast Guard with the authority to establish a program for preventing, preparing for, and responding to spills that occur in "navigable waters" of the United States. *See* 33 U.S.C. § 1321 and 33 U.S.C. § 2701 et seq.

[44] U.S. Government Accountability Office, *Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction*, GAO-04-29 (February 2004).

[45] Environmental Law Institute, *The Clean Water Act Jurisdictional* Handbook at 55-61 (2007 Edition).

[46] 126 S. Ct. at 2236.

Scalia plurality view.[47] Some courts have looked solely to the Kennedy "significant nexus" test.[48] Other courts have taken the dissenters' suggestion that a wetland satisfying either the plurality *or* the Kennedy significant nexus test will be jurisdictional.[49] These inconsistent decisions make evident that passage of CWRA is urgently needed to restore consistency and uniformity for courts and agencies wrestling with how to interpret the muddled scope of Clean Water Act jurisdiction.

### F. *CWRA Would Eliminate Definitional Ambiguity*

CWRA will put an end to the state of confusion that *SWANCC* and *Rapanos* have engendered among relevant federal agencies and return to the "status quo" of CWA regulation that was in place for 30 years, prior to 2001. Specifically, CWRA would amend and clearly define "waters of the United States" to include "intrastate" and "intermittent" waterbodies and wetlands by 1) replacing the term "navigable waters," throughout the Act, with the term "waters of the United States," and 2) correctly defining "waters of the United States" as "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." These amendments merely conform the statutory text of the CWA to the EPA and Corps implementing regulations in place for more than 30 years prior to the upheaval caused by *SWANCC* and *Rapanos*.[50]

## V. The Importance of Wetlands and Intermittent and Headwater Streams

### A. *All Waters Are Hydrologically Connected*

There is no dispute among scientists that all of our nation's waters are connected through hydrologic cycles.[51] So-called "isolated waters," including geographically isolated wetlands, remote tributaries, ephemeral and intermittent creeks and streams, although lacking a surface connection to navigable waters, have other hydrologic connections to, and very much affect the quality of, navigable waters through groundwater connections and flood and erosion control. Indeed, almost no headwater streams, wetlands, and small ponds – even those that do not have an obvious or year-round surface water connection with other waters – can truly be considered "isolated" from a scientific perspective. Thus, even waters that have no apparent surface water connection serve as integral parts of watersheds, performing essential functions affecting the

[47] *United States v. Chevron Pipe Line Co.*, 437 F.Supp.2d 605 (N.D. Tex. 2006).

[48] *Northern California River Watch v. City of Healdsburg*, 457 F.3d 1023 (9th Cir. 2006); *United States v. Gerke Excavating, Inc.* 464 F.3d 723 (7th Cir. 2006).

[49] *United States v. Evans*, 2006 Westlaw 2221629, *19 (M.D. Fla. Aug. 2, 2006).

[50] *See supra* n.20.

[51] The definition for "waters of the United States" as proposed by the plurality in *Rapanos* to mean only "relatively permanent, standing or flowing bodies of water" such as streams, rivers, lakes, and other bodies of water "forming geographic features" is flat out wrong and dangerous. Scalia's definition gives no consideration to these well established scientific principles. Instead, Scalia's definition is based on his purported "common sense" and a 1954 dictionary definition for "waters".

health of water systems. There is abundant scientific evidence that pollution dumped into the upper reaches of watersheds not only damages and destroys these important smaller water systems, but also ends up harming lakes, rivers and coastal waters located in the watershed as well.[52]

B. *The Ecological Importance of Intermittent and Headwater Streams*

Our nation's network of headwater streams and creeks, including "ephemeral" and "intermittent" streams, constitute some of the country's most critical natural water resources. It is estimated that small or headwater streams comprise up to 80% of the nation's stream network.[53] Scientific studies have demonstrated, moreover, that ephemeral and intermittent streams, despite their small size,[54] have major impacts on larger water bodies downstream. Collectively, these small streams and creeks contribute to the public drinking water supplies of over 110 million people nationwide. When water is present, these streams help filter and process pollutants, recharge groundwater and supplement drinking water sources for much of the country. They improve water quality through nutrient cycling and sediment trapping and retention. They also offer an enormous array of habitat for plants and animals. EPA reports that over 40% of the 37,000 national pollutant discharge elimination system (NPDES) permits (with locational data available) discharge into either start reaches or intermittent/ephemeral streams, excluding Alaska.[55] EPA estimates that *Rapanos* could remove Clean Water Act protection from as many as 53-59% percent of the nation's waters (outside of Alaska) which are either headwater streams or intermittent or ephemeral streams.[56] This represents nearly 2 million river miles. Many scientists and environmental groups believe that this is a conservative estimate and believe that as many as 90% of the nation's waters could lose federal protection.[57] EPA also estimates that 34% of industrial and municipal dischargers that are currently subject to CWA Section 402 permits are located on these stream segments; of even greater concern is that the public drinking water systems which use intakes on these streams provide drinking water to over 110 million people.[58]

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[52] *See generally*, Judy L. Meyer, et. al., *Where Rivers are Born: The Scientific Imperitive for Defending Small Streams and Wetlands* (September 2003).

[53] *Id.* at 3.

[54] These small streams and wetlands may be so small that they do not appear on topographic maps.

[55] Grumbles, Benjamin H., Assistant Administrator for Water, EPA, letter to Ms. Jeanne Christie, Association of State Wetland Managers, January 9, 2005, p. 2.

[56] *Id.* at 3.

[57] See Lance D. Wood, *Don't Be Misled: CWA Jurisdiction Extends to All Non-Navigable Tributaries of the Traditional Navigable Waters and to Their Adjacent Wetlands*, 34 Envtl. L. Rep. 10187 (2004); *see also*, Jeremy A. Colby, *SWANCC: Full of Sound and Fury, Signifying Nothing...Much?*, 37 J. Marshall L. Rev. 1017 (2004).

[58] *See supra* n.56.

*Alex Matthiessen, Riverkeeper, 828 S. Broadway, Tarrytown, NY 10591, 914-478-4501 x227*

C. *The Ecological Importance of Wetlands*

Wetlands are transitional areas that act as buffers between open waters and uplands and provide functions vital to our environment and public health. Wetlands filter pollution, purify our drinking water, and protect rivers, lakes, and coastal waters from pollution, such as sediment, nutrients, chemical contaminants, and bacteria. In addition, wetlands recharge groundwater aquifers, protect coasts and homes from floods by absorbing flood waters and provide habitat for threatened and endangered plant and animal species. These wetlands represent a considerable amount of the United States' ecological diversity and provide habitat for a considerable portion of the nation's flora and fauna.[59]

The Association of Wetlands Managers ("ASWM") has estimated that at least 20-25% of the total wetland acreage in the United States may be affected by *SWANCC*.[60] According to ASWM, that figure could be as high as 70-80% of total wetland acreage when intermittent streams and their adjacent wetlands are exempted from regulation, as suggested by *Rapanos*.[61] Non-regulation of these wetlands, in the wake of *SWANCC* and *Rapanos*, could virtually eliminate wetlands such as prairie potholes, playa lakes and vernal pools.

D. *The Economic Importance of Protected Waters and Wetlands*

Protecting the health and integrity of our nation's waters and wetlands also has profound economic implications. The United States Fish & Wildlife Service's 2006 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation found that 87.5 million U.S. residents 16 years old and older participated in wildlife-related recreation in 2006 alone.[62] In that same year, 30 million people fished, 12.5 million hunted, and 71.1 million participated in at least one type of wildlife-watching activity including bird-watching, wildlife observation and photography. In total, these wildlife recreationists spent $122.3 billion on their wildlife recreational activities, approximately one percent of the nation's gross domestic product.[63] These hunters, anglers, birdwatchers and photographers rely on abundant stocks of fish, waterfowl and other wildlife species, none of which can survive without healthy, functioning wetlands and waters.

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[59] A total of 274 at risk plant and animal species are supported by isolated wetlands. A total of 86 plant and animal species listed as threatened, endangered, or candidates under the Endangered Species Act are supported by isolated wetlands habitats. A majority (52%) of these listed species are completely dependent on isolated wetland habitat for their survival. *See* Comer, P., K. Goodin, A. Tomaino, G. Hammerson, G. Kittel, S. Menard, C. Nordman, M. Pyne, M. Reid, L. Sneddon, and K. Snow. *Biodiversity Values of Geographically Isolated Wetlands in the United States*. NatureServe, Arlington, VA. (2005).

[60] Kusler, Jon, The Association of State Wetland Managers, *The SWANCC Decision: State Regulation of Wetlands to Fill the Gap* (March 2004).

[61] *Id.*

[62] U.S. Department of the Interior, Fish and Wildlife Service, and U.S. Department of Commerce, U.S. Census Bureau, *2006 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation* at 5. (2006).

[63] *Id.*

In New York, 4.6 million people participated in wildlife-associated recreation in 2006, spending a total of $3.5 billion on wildlife-related expenditures within the state.[64] In 2006, freshwater fishing alone brought in $88 million in state and local tax revenues, $366 million in salaries, wages and business earnings and created 10,208 jobs.[65] These expenditures clearly provide a vital economic resource for local communities throughout New York.

## VI. Impact of the Current Regulatory Regime on New York's Residents and Environment

### A. *Removing Federal Protection from Non-Navigable Streams and Isolated Wetlands Jeopardizes the Health and Welfare of Nearly 10 Million New Yorkers*

It is estimated that over 60 percent of New York's original wetland acreage has been lost to development. Of New York's 2,562,000 acres of original wetland acreage, only 1,025,000 acres remain today.[66] Close to 40 percent of these remaining wetlands are located at the headwaters of the Hudson River and its tributaries. These headwaters feed into New York's Hudson River watershed and New York City's drinking water supply, comprising a combined 16,000-square-mile-area that covers parts of New York, New Jersey, Vermont, Massachusetts, and Connecticut. Today, these watershed reservoirs are particularly vulnerable to degradation because they are inundated with "isolated" wetlands and ephemeral streams—water resources which no longer enjoy clear protection in a post *SWANCC* and *Rapanos* world.[67] The New York City drinking water supply watershed ("NYC watershed") covers approximately 2,000 square miles of land in the Hudson Valley and Catskill Mountains, east and west of the Hudson River and contains close to 28,000 acres of wetlands and over 2,300 miles of small streams.[68] The system contains 19 reservoirs and 3 controlled lakes that sit in 3 sub-watersheds: the Croton, the Catskill, and the Delaware. The NYC watershed supplies 1.5 gallons of prize-winning unfiltered drinking water to 9 million people on a daily basis. The Hudson River watershed supplies public drinking water to another one million people and contains approximately 12,305 miles of perennial streams, 65 direct perennial streams, and hundreds of small, intermittent streams. The pollution filtration and aquifer recharge provided by the region's smaller wetlands and waters is extremely important to ensure the delivery of safe drinking water to nearly half the state's resident population.

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[64] This includes both NYS residents as well as persons who traveled to New York for the purpose of these activities. *Id.* at 97-98.

[65] American Sportfishing Association, *Sportfishing in America: an Economic Engine and Conservation Powerhouse* at 8. (Revised January 2008).

[66] Association of State Wetland Managers Association, *State Wetland Programs* at http://www.aswm.org/swp/newyork9.htm (site last visited on April 6, 2008).

[67] More than 60 percent of these two watersheds are made up of headwater streams, small waterways, adjacent wetlands, and so-called "isolated" wetlands. *See* U.S. Army Corps of Engineers, Regulatory Guidance Letter, No. 01-1, October 31, 2001.

[68] *See* New York City Department of Environmental Protection Bureau of Water Supply, Quality and Protection, *Wetlands in the Watersheds of the New York City Water Supply System: Results of National Wetlands Inventory* (1997).

Today, New York's vital water resources are under increased development pressure. In 2000, the National Trust for Historic Preservation designated the Hudson Valley as one of America's most endangered historic places, citing sprawl as the chief culprit.[69] According to the New York State Department of Conservation, "growth is reflected in the frequent listing of occurrence of streambank erosion, failing and/or inadequate on-site septic systems, and municipal discharges as primary sources of water quality impairments."[70]

The East-of-Hudson portion of the NYC watershed (i.e. Croton system) is suffering from an onslaught of real estate development. The trend is inevitable: as the Corps, citing *SWANCC* and *Rapanos*, declines to assert 404 jurisdiction on an increasing basis, developers are eagerly pushing into every remaining unoccupied corner of the watershed, paving wetlands with parking lots and roadways, filling fragile streams, building in stream, lake and wetland buffers, excavating hillsides, and clearing forestland. These heavy construction activities have significant impacts on water resources. Runoff from new residential development is 10 to 16 times greater than that of predevelopment and is the leading threat to water quality in the United States.[71]

Aging wastewater treatment systems across the Hudson River watershed are increasingly causing contaminants such as disease causing pathogens, fecal coliform bacteria, as well as toxins, oil and other pollutants to leach into creeks and wetlands. These systems are reaching their design capacities sooner than originally expected due to the rampant population growth of the region.[72] This growth, combined with a lack of meaningful state monitoring and enforcement has caused many of these water treatment systems to fall into disrepair, consistently violating their own discharge permits.

Although the NYC watershed is protected and enforced by the historic 1997 Watershed Memorandum of Agreement ("MOA"), it is not a self-enforcing agreement and thus requires that New York City and all signatories adhere to its provisions.[73] For instance, the MOA provides a framework by which New York City can meet the requirements of the EPA's Filtration

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[69] See National Trust For Historic Preservation, *America's 11 Most Endangered Historic Places 2000: Hudson River Valley, New York State*, available at http://www.nthp.org/11most/2000/hudson.htm.

[70] *See* NYS Department of Environmental Conservation, *The 1999 Lower Hudson River Basin Waterbody Inventory and Priority Waterbodies List* at 6 (1999).

[71] U.S. Environmental Protection Agency, *National Pollutant Discharge Elimination System - Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges, Final Rule*, 64 Fed. Reg. 68722, 68729 (1999), *citing* Wolman and Schick, *Effects of Construction on Fluvial Sediment, Urban and Suburban Areas of Maryland, Water Resources Research* 3(2):451-64 (1967).

[72] *See supra* n.70.

[73] The Memorandum of Agreement was negotiated by New York City, New York State, the U.S. Environmental Protection Agency, watershed municipalities, and five environmental groups: Riverkeeper, New York Public Interest Research Group, Catskill Center, Trust for Public Land and Open Space Institute.

Avoidance Determination ("FAD").[74] In June 2007, the EPA granted New York City a new agreement granting it a FAD for the West-of Hudson (i.e. Catskill/Delaware system) NYC watershed.

Due to the continued degradation of the East-of-Hudson NYC watershed, the EPA is now requiring New York City to construct a Croton Water Treatment Plant filtration water treatment plant, expected to cost City ratepayers $3 billion to complete, and hundreds of millions of dollars per year to operate and maintain.[75]

Should New York City fail to properly protect the West-of-Hudson portion of the NYC watershed in the future and lose its FAD determination, City ratepayers will be faced with the exorbitant cost of building and operating a filtration plant for the Catskill/Delaware system—which, in 2007, was estimated to cost $10 billion to construct and $400 million in annual maintenance and operation costs.[76]

B. *Wetlands Destruction in New York State Since the SWANCC Ruling*

Currently, New York's Environmental Conservation Law solely regulates wetlands that are 12.4 acres or larger.[77] Wetlands less than 12.4 acres are regulated only if deemed to be of "unusual local importance" by the DEC Commissioner.[78] Consequently, New York has historically relied on the Corps to protect the vast majority of smaller wetlands throughout the State. Since 2001, however, the Corps has largely stopped regulating isolated wetlands,[79] claiming it lacks the legal authority to do so as a result of the Supreme Court's *SWANCC* decision and the subsequent 2003 Corps/EPA policy guidance that followed in its wake.

The result of these federal rollbacks is that hundreds of wetlands threatened by development in New York are currently not being protected by either the state or the federal government. In September 2005, the Environmental Integrity Project reported that New York is among the top fifteen states which has suffered wetlands losses following the federal rollbacks.[80]

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[74] Under the Safe Drinking Water Act, all drinking water taken from surface water sources must be filtered to remove microbial contaminants. The law allows EPA to grant a waiver from this requirement to water suppliers if they demonstrate that they have an effective watershed control program and that their water meets strict quality standards. *See* 42 U.S.C. § 300f et. seq.

[75] Bronx Council for Environmental Quality, "NYC DEP is building the Croton Water Filtration Plant (CWTP)", available at http://www.bceq.org/CWTP (last visited April 9, 2008).

[76] New York Department of Environmental Conservation, "Ten-Year Extension Approved for Protection of Catskill/Delaware Watershed, available at http://www.dec.ny.gov/environmentdec/36807.html (last visited April 9, 2008).

[77] See N.Y. Envtl. Conserv. Law § 24-0101, *et. seq.*

[78] N.Y. Envtl. Conserv. Law § 24-0301.

[79] So-called "isolated" waters and wetlands are defined by caselaw as intrastate, intermittent waters lacking a year-round surface connection or other "significant nexus" to a jurisdictional "water of the U.S." From a scientific, hydrologic standpoint, extremely few wetlands truly are isolated and lack a surface or groundwater connection to other waterways.

[80] Schaeffer, Eric and Himmelsbach, Dan. *Drying Out: Wetlands Opened for Development by U.S. Supreme Court and U.S. Army Corps.* Environmental Integrity Project (Sept. 15, 2005).

Similarly, staff in the New York State Attorney General's Office recently reviewed all state-wide Corps' wetland permit determinations since the EPA/Corps policy guidance was issued (New York District 2002-2004, Buffalo District 2001-2004). Approximately 45% of the applications received were found to be non-jurisdictional by the Corps. Of those, only one application was found that qualified for regulation under State law.[81]

The "Lysander wetland," a 19-acre freshwater wetland located in Lysander, New York (Onondaga County) presents an excellent illustration of the Corps' arbitrary, inconsistent and legally erroneous no-jurisdiction determinations subsequent to *SWANCC*.[82] In 2001, when residents of a residential subdivision adjoining the Lysander wetland realized that plans were underway to fill the Lysander wetland and construct housing on the site, they presented the Corps with 1957 and 1962 maps of the area. These maps depicted a brook that had been channeled underneath their adjacent subdivision that had flowed from the Lysander wetland into the Seneca River, a navigable water of the United States.[83] Ignoring this information, the Corps issued a no-jurisdiction determination in 2003, stating that the site at issue was an "isolated" wetland and that it had no discrete waterway flowing from it and no natural stream draining out of it.

When the homeowners subsequently pressed the Corps to reconsider, the Corps explained that the Buffalo District, as a matter of post-*SWANCC* legal interpretation, no longer considered hydrological connections to navigable waters through man-made water conveyances sufficient for establishing Clean Water Act jurisdiction.[84] The homeowners took the case to the New York State Attorney General's office. After conducting its own investigation, the Attorney General filed a Notice of Intent to Sue the Corps and EPA in November 2004. In response to this legal challenge, the EPA ultimately reversed the Corps' decision.

The "Annsville Creek wetland" provides yet another alarming illustration of the Corps' inability to effectively protect wetlands post *Rapanos*.[85] In October 2007, the Corps found that a wetland in Peekskill, New York was "isolated" and non-jurisdictional despite being only fifty feet away from Annsville Creek, a tributary of the Hudson River flowing south out of the Highlands into Peekskill Bay that is subject to the "ebb and flow of the tide" of the Hudson River. Despite acknowledging that the wetland "is situated on top of a former landfill and may be contributing to the pollution of Annsville Creek," the Corps determined that its hydrologic connection to the creek through a swale feature was non-jurisdictional. The Corps purportedly

[81] This information is not published, but was orally presented in a lecture at a wetlands conference in Albuquerque, NM in October, 2005.

[82] Information regarding this site was obtained through the Attorney General's Notice of Intent to Sue the EPA and Corps, dated November 15, 2004 in addition to oral conversations with the New York Attorney General's Environmental Protection Bureau held on November 28, 2007.

[83] Specifically, the maps indicated that a section of the brook had been channeled through an 18 inch-pipe in the 1960s to facilitate their subdivision's construction and that the brook flows for approximately one-half mile through this pipe and an open ravine before emptying into the Seneca River.

[84] This interpretation is not legally warranted under SWANCC's narrow holding.

[85] *See* http://www.nan.usace.army.mil/business/buslinks/regulat/jurisdct/West/Oct07/pdf/2007-264-EJE.pdf

found it significant that water only flows from the wetland to Annsville Creek, and not in the other direction. The Corps also determined that the wetland lacked a "significant nexus" to an intermittent stream which directly flows into the Annsville Creek despite multiple factors being present for a finding of jurisdiction on that basis as well.

Both of these cases illustrates the myriad problems created by arbitrary and legally flawed Corps' jurisdictional determinations post-*SWANCC* and *Rapanos* and the need for costly litigation in order to preserve wetlands and waterways that should, from the outset, be clearly protected under the Clean Water Act.

## VII. A Federal Solution is Required

### A. *New York Law Does Not Protect Smaller Wetlands*

Without strong federal protection mandated by the Clean Water Act, regulation and enforcement of the nation's interconnected waterways will be left in the hands of fifty separate states in a piecemeal, uncoordinated fashion. Because the nation's system of waters is highly interconnected, discharges of pollutants into non-navigable tributaries and adjacent wetlands in one state will affect the biological and chemical health of waters in downstream states. It was recognition of this basic principle that demanded the creation of the CWA 35 years ago. Many state wetlands programs derive their scope directly from the CWA and rely on the CWA as their sole source of legal protection for such wetlands.[86] In most states, filling the gap created by these federal rollbacks in Corps jurisdiction will require new statutes and regulations, new staffing, new training and additional funding.

In fact, two thirds of the United States currently lack regulatory programs that comprehensively address wetlands and isolated wetlands in particular.[87] While states like New York struggle to interpret CWA under *SWANCC* and *Rapanos*, clear guidance from the U.S. Congress would swiftly alleviate the existing confusion.

Although New York is one of the "fortunate" states that does in fact have existing state wetlands protection laws, its current statute, the New York State Freshwaters Act, is not equipped to fill the glaring gaps in coverage created by *SWANCC* and *Rapanos*. Hundreds of wetlands smaller than 12.4 acres throughout New York are now vulnerable to development.

Since 2004, New York State legislators, along with concerned citizens and environmental groups such as Riverkeeper, have pushed for an amendment to the current New York law, entitled "The Clean Water Protection/Flood Prevention Act." This legislation would allow New

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[86] According to the Association of State Wetland Managers, state and local wetlands regulations will only partially fill the gap in federal wetland regulation for so called "isolated wetlands" in fourteen states. "Little protection will be provided in the rest." *See* Jon Kusler, Esq., *Model State Wetland Statute to Close the Gap Created by SWAANC.*

[87] *See, e.g.*, Association of State Wetlands Managers, *State Wetlands Programs*, at http://aswm.org/swp/index.htm (last visited April 7, 2008). *See also* Jon Kusler, Esq., *Model State Wetland Statute to Close the Gap Created by SWAANC.* "Thirty-six states have limited or no wetland regulations applying to isolated wetlands. These states either lack state statutory enabling authority or (if they have authority pursuant to water quality statutes) have not established wetland permitting systems. . ."

York to regulate wetlands one acre or larger, and ensure that these smaller wetlands that previously had fallen under federal protection will continue to receive State protection. While versions of this bill have been introduced into the New York State Assembly and Senate since 2004, it remains unclear whether the bill will be successfully passed into law in the near future.

## VIII. A Strong CWA is Vital to Protecting New York State's Waters

Removing federal protection from these smaller waterways and isolated wetlands will also mean loss of the federal citizen suit provisions provided under the CWA on these waterbodies, a crucial tool that Riverkeeper and other environmental organizations have used to control pollution when government agencies have failed to bring enforcement action.

The effective loss of the citizen suit provision would deal a devastating blow to water quality in the region. Currently, Riverkeeper relies heavily on the citizen suit provision of the CWA to prosecute polluters and deter would-be-violators on the Hudson River and throughout the NYC watershed.[88]

Riverkeeper receives hundreds of pollution complaints annually, the majority alerting us to violations on smaller wetlands and waterways. Throughout our history, we have been involved in thousands of Clean Water Act prosecutions against raw sewage dischargers, developers who have illegally filled wetlands, or industries that have discharged toxic chemicals in excess of permit levels or without a permit at all!

As previously discussed, the effects of *SWANCC* and *Rapanos* have broad implications for enforcement of all CWA programs, including Section 402's NPDES permitting program. Severely understaffed and in perpetual budgetary crisis,[89] the New York DEC, the agency delegated by the EPA to enforce Section 402 of the CWA in New York State, has a truly abysmal record in administering the State Pollution Discharge Elimination System ("SPDES") permitting program.[90]

Today, more than 8,000 facilities cumulatively discharge tens of billions of gallons of municipal and industrial wastes into New York's waters every day, amounting to over 54 billion gallons per day.[91] Because of the DEC's highly flawed permitting practices,[92] 90% of these

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[88] See 33 U.S.C. § 1365. Citizen suits are initiated by a "Notice of Intent to Sue," which triggers a 60-day notice period before the actual lawsuit can be filed. Citizen suits can force injunctions and penalties of up to $32,500 per day for violations of the CWA.

[89] During Governor Pataki's Administration from 1995-2006, the DEC suffered drastic staff cuts and a hiring freeze. Overall, the agency lost between 700 and 800 employees, including experienced scientists and engineers. Under Governor Spitzer's current Administration, a mere 109 new employees have been added to the DEC. Only ten of these new positions appear to be earmarked for the DEC's SPDES permit program.

[90] In 1975, the EPA and DEC executed a delegation agreement giving DEC full responsibility for enforcement of the provisions of the Clean Water Act in New York State. This agreement remains in effect today and enables New York to establish is own water pollution permit program, the SPDES program.

[91] Environmental Advocates of New York, *Muddying the Waters: The Unknown Consequences of New York's Failed Water Pollution Permitting Program* at 7 ("EANY Report") (2007).

facilities do not receive the five-year technical reviews required under the CWA.[93] Shockingly, nearly 80% (1,150) of the 1,450 major and significant-minor SPDES permits in the State's inventory have not been substantially reviewed in more than 10 years.[94] Given DEC's irresponsible and illegal enforcement practices, it is clear that the burden of enforcing the Clean Water Act falls on groups like Riverkeeper.

Without clear and strong guidance from Congress on the broad jurisdictional reach of the Clean Water Act, as currently outlined in the Clean Water Restoration Act, Riverkeeper simply cannot fulfill its mission of acting on the public's behalf to protect the Hudson River and other vital New York waters.

I thank you for the opportunity to testify before you today and I strongly urge Congress to act swiftly in passing the Clean Water Restoration Act.

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[92] In response to staff shortages and increasing backlog of SPDES permits, DEC implemented a ranking scheme entitled, "Environmental Benefit Permit Strategy" (EBPS), designed to be a prioritization mechanism for permit review. Each year, after ranking the SPDES permitted facilities, the DEC only reviews the top 10% permits. According to the DEC's website, "[W]e simply do not have enough staff to grind out extensive technical reviews every five years for all SPDES permits."

[93] This information was recently uncovered through Environmental Advocates of NY's Freedom of Information Law ("FOIL") request to the DEC. *See* EANY Report.

[94] EANY Report at 7.

RIVERKEEPER®

April 22, 2008

The Honorable James L. Oberstar
Chairman
U.S. House of Representatives
Committee on Transportation and Infrastructure
2165 Rayburn HOB
Washington, D.C. 20515

VIA U.S. MAIL

Dear Chairman Oberstar:

Thank you for inviting me to testify before the House Committee on Transportation and Infrastructure regarding "The Clean Water Restoration Act" on April 16, 2008. It was a true honor and privilege to represent Riverkeeper and the Waterkeeper Alliance and to be able to express our strong support for this vital legislation. Per your request, I will be submitting specific suggestions to the Committee by May 1, 2008 on how you might further clarify the Clean Water Restoration Act.

Sincerely,

Alex Matthiessen
Hudson Riverkeeper
& President

Thank you Mr. Chairman for your leadership on this critical issue.

Best,
Alex

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RIVERKEEPER®

April 30, 2008

The Honorable James L. Oberstar
Chairman
U.S. House of Representatives
Committee on Transportation and Infrastructure
2165 Rayburn HOB
Washington, D.C. 20515

VIA U.S. MAIL AND FASCIMILE

Dear Chairman Oberstar:

Thank you for the opportunity to provide suggestions on ways "the Clean Water Restoration Act of 2007" (H.R. 2421) might be clarified to ensure our nation's waters receive full restoration of Clean Water Act protections that existed for over thirty years prior to the Supreme Court's highly controversial and misguided *SWANCC* and *Rapanos* decisions. Riverkeeper strongly supports your commitment to H.R. 2421, and we share your view that passage of this legislation is necessary to eliminate the regulatory confusion and judicial chaos caused by these Supreme Court rulings. As made evident throughout the text of H.R. 2421, the main purpose and goal of the Clean Water Restoration Act is "[t]o reaffirm the original intent of Congress in enacting the Federal Water Pollution Control Act Amendments of 1972 (86 Stat. 816) to restore and maintain the chemical, physical, and biological integrity of the waters of the United States."

Before giving our specific suggestions for revising H.R. 2421, Riverkeeper wants to restate our support for the current bill's deletion of the term, "navigable" from the Clean Water Act. In the aftermath of *SWANCC* and *Rapanos*, the term "navigable waters" remains highly contentious, with the potential to undermine the clearly articulated goals and intent of the Clean Water Act (the "Act"). The Clean Water Act was enacted by Congress in 1972 to protect and enhance water quality by controlling the pollution and degradation of our nation's waters, *not* to enhance or protect navigability. As illustrated in *SWANCC* and *Rapanos*, the Clean Water Act's term, "navigable waters" has dangerously opened the door for opponents of strong federal water pollution measures to challenge and undermine the basic tenets of the Act itself, arguing that the Act solely encompasses waters that are "traditionally navigable" or that physically abut such "traditionally navigable" waters. In *Rapanos*, for example, the Supreme Court erroneously stated that: "the Act's use of the traditional phrase 'navigable waters' (the defined term) further confirms that it confers jurisdiction only over relatively permanent bodies of water."[1] This narrow reinterpretation is wholly contradictory to the text, history, and purpose of the Clean Water Act as well as to the agency regulations promulgated by the United States Environmental

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Protection Agency ("EPA") and the United States Army Corps of Engineers ("Corps") which have broadly defined "waters of the United States" for over thirty years. The Clean Water Act was intended to cover a vast array of hydrologically connected water resources, including watersheds, wetlands, tributaries, geographically isolated, intrastate waters, and intermittent, ephemeral, and headwater streams. Many of these aforementioned waters do not comprise "relatively permanent bodies of water" on a year-round basis but, nonetheless, have major impacts on larger water bodies downstream through pollution filtration, groundwater recharge and flood control. Removing the antiquated term, "navigable waters" from the Clean Water Act is needed in order to restore the protection of waters that existed prior to *SWANCC* and *Rapanos* and to provide much needed clarification for the Supreme Court's future judicial interpretations.

Additionally, Riverkeeper wants to restate our belief that H.R. 2421 should retain the broad definition of "waters of the United States" as currently drafted in Section 4(24) of the bill. Riverkeeper firmly believes that this broad definition will fulfill the ultimate goal of the Clean Water Restoration Act—to restore and reaffirm the Clean Water Act protections to those waters, including wetlands, which were lost as a result of the *SWANCC* and *Rapanos* decisions.

**On behalf of Riverkeeper and the Waterkeeper Alliance, I would suggest the following changes to H.R. 2421:**

1. **H.R. 2421 should state that the EPA and Corps can continue to exclude the regulatory exemptions, "prior converted farmlands" and "waste treatment systems," from Clean Water Act jurisdiction but should not convert these regulatory exemptions into statutory exemptions.** Riverkeeper understands that Section 6 of H.R. 2421 (the "Savings Clause"), as currently drafted, is intended to include only those previously existing statutory exemptions found under the Clean Water Act or amendments thereto. The "prior converted farmlands" and "waste treatment systems" exemptions have never been codified in the Clean Water Act and should properly remain regulatory exemptions. It is neither necessary nor beneficial to turn these two regulatory exemptions into statutory exemptions. (Doing so would merely preclude the EPA and Corps from amending these regulatory exemptions at a later date.) We suggest that Congress insert language into H.R. 2421 which makes clear its intent that the EPA and Corps retain their ability to exempt these two specific activities from Clean Water Act jurisdiction per their existing agency regulations.

2. **Section 4(24) of H.R. 2421 should be revised in one of two ways:**

    a. **Delete the term, "activities affecting these waters" in its entirety; OR**

    b. **Rephrase the term to read: "discharges of a pollutant resulting from activities affecting these waters."**

    Opponents of H.R. 2421 argue that the term, "activities affecting these waters" found in Section 4(24) expands the Clean Water Act to apply to new activities not currently regulated. Riverkeeper believes that these opponents are not reading the bill fairly, because the Clean Water Act requires permits only for activities that result in the

discharge of pollutants from specified "point sources" into protected waters. There is nothing in H.R. 2421 which would change this long-standing limitation of the Clean Water Act. Nonetheless, in an attempt to further clarify H.R. 2421 and ensure its swift passage, Riverkeeper suggests these two alternative draft changes to the language of Section 4(24).

It is my sincerest hope that Congress will continue to recognize the importance of safe, clean water to the nation's public health, economic prosperity, and ecological integrity. I commend you and the Committee for your hard work and dedication in working to ensure the passage of H.R. 2421 to achieve this imperative goal.

Thank you again for this opportunity. Please feel free to contact me, should you require further assistance.

Sincerely,

Alex Matthiessen
Hudson Riverkeeper
& President

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[i] *Rapanos v. United States*, 547 U.S. 715, 734.

SKAGIT COUNTY
BOARD OF COMMISSIONERS

DON MUNKS, First District
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1800 Continental Place
Mount Vernon, WA 98273
360-336-9400

# CLEAN WATER RESTORATION ACT OF 2007

## *Testimony by Skagit County Commissioner Don Munks*
### *Skagit County, Washington*

It is an honor and a privilege to testify before you today on some significant concerns that my constituents have in regard to the Clean Water Restoration Act of 2007. I would like to thank Congressman Rick Larsen for graciously working with the people of Skagit County to provide us with this opportunity.

I hail from one of the richest agricultural valleys in the western hemisphere nestled between the alpine mountains of the North Cascades and the crystal clear seas of Puget Sound. The Skagit River is the largest river draining into Puget Sound and is home to all five species of Pacific salmon as well as steelhead and bull trout.

As a fourth generation Skagit County farmer, my great grandfather settled on the pristine banks of Fidalgo Bay in the 1850s, where my family resides to this day. We have great respect for the land and waters of our beautiful county.

Although we are experiencing significant pressures of growth from the North to Vancouver, British Columbia and from the south to Seattle, Washington, the strength of our agriculturally based economy has motivated our citizens to be good stewards of the land. We harvest the finest red potatoes in the world, produce hundreds of acres of stunning world famous tulips, provide a significant portion of cabbage and other kohlrabi crop seeds for the entire world, as well as being on the cutting edge of production for blueberries, strawberries, and raspberries.

Other Puget Sound counties have sat back and watched their farmland disappear. Working with farm families and advocacy groups we've worked hard to keep agriculture viable. Today we've protected more than 5,000 of our 90,000 acres of fertile farmland from future development with our Farmland Legacy program which allows us to purchase conservation easements protecting our open spaces and productive farmlands for eternity. Skagit County taxpayers are positive about paying this property tax to preserve their rural lifestyle and protect agriculture. Surveys show they value this program.

In 1966 a progressive group of elected officials established our first zoning ordinance and shortly after passed a "Large Acreage Lot Size, establishing a 30 acre minimum lot size on agricultural

land. We've since increased that lot size to 40 acres. Without this progressive vision our county would have been victim to urban sprawl.

Our bays and estuaries support more than 93 percent of the overwintering waterfowl in Western Washington including the Western High Arctic Goose, Trumpeter swans, black brant, plus many other species.

In 1995, the Skagit County Commissioners created the Clean Water (Shellfish Protection) District in response to the State Health Department's closure of shellfish harvesting in our bays. Our response was successful in repairing failing sewage systems and improving water quality to keep shellfish harvesting open. In 2004 when shellfish harvests were again threatened we voluntarily increased regulatory mandates related to water quality and water resource protection.

Today we tax our citizens to monitor water quality and habitat, administrate lake districts, enforce water quality compliance and operate onsite sewage programs. We work hand in hand with other organizations such as Skagit Conservation District, Skagit Fisheries Enhancement, Skagit Watershed Council and local tribes to insure that our water is clean.

In October of this year, the Skagit County Board of Commissioners signed a resolution to take a pro-active approach on critical areas involving agriculture and salmon recovery. We ordered Skagit County departments to consider salmon recovery in all of our actions, and pursue grant funding for salmon enhancement.

So, with that being said, why am I, Don Munks, from Skagit County, here today to testify against the Clean Water Restoration Act of 2007?

It's obvious that fellow commissioners and I, along with thousands of community members, are strong advocates of clean water and are willing to tax ourselves to back up our values.

Our concern, our main concern, is that the bill proposes the word "navigable waters" to be eliminated from the definition of "waters of the U.S," in the Clean Water Act. This would effectively put all bodies of water or "perceived" bodies of water under federal jurisdiction, even those waters currently under state authority.

Let me liken this crisis to a national emergency due to natural disaster. History has shown that those communities that wait for federal intervention suffer devastating loss. While many pointed their finger at FEMA in the Katrina disaster, the real disaster was in the inability of the first responders at the local level to react. In regard to clean water we *are* the first and best responders and have been very proactive.

By removing our ability to be first responders and saddling us with a cumbersome permitting process, we would be faced with a huge impact that may require a Clean Water Act Permit for routine tasks. Requiring a Clean Water Act permit for gutters, driveway culverts, agricultural ditches, farm ponds and roadside ditches would dramatically increase the time required to process permits and create a backlog of projects for the Corps of Engineers to add to an already very significant backlog. Annually, hundreds of small projects currently being completed by County forces with moderate permit requirements would require a permit from the Corps of Engineers. In addition, private property owners currently able to construct would be required to obtain a Corps permit. Not only does this greatly increase the permit applications required, but it adds additional burden to the Corps of Engineers to process the thousands of additional permits they will receive each year.

Comparing current permit requirements to what the future may hold if HR 2421 is not amended would add several additional possible permits and assessments, including:

- Prepare Biological Evaluation (Requiring a Consultant)
- Conduct Archeological Assessment if on tribal lands
- Wetlands Delineation
- Prepare Joint Aquatic Resources Permit Application (JARPA)
- SEPA/NEPA determination

The Corps of Engineers would distribute for consultation to:

- US Fish and Wildlife
- National Oceanic and Atmospheric Administration (NOAA)
- Tribes

Each of these activities increases the length of time to permit a project, and increases project cost.

The United States Corps of Engineers already has a significant backlog of permits. Permits that now take one month to a year, could now stretch as far as six years. Many of these projects have short allowed construction windows, due to salmon spawning. The increased length of time to obtain permits will often result in the project being deferred until the next year, to enable construction during the "fish window". And during the delay, the need for the project that promotes clean water continues or increases. We will miss grant deadlines, be burdened with additional staff caught in the morass of unproductive bureaucracy, and to be honest, lose the will to continue to work proactively to promote clean water.

The intent of your bill is fine. We all want clean water, but by dramatically expanding the jurisdiction of the Corps of Engineers, you will stymie the efforts of Skagit County, our dike and drainage districts, and our advocacy and resource groups to continue to work together toward a common goal.

We ask you for the opportunity to continue to be the "first responders" for clean water by not saddling us with additional bureaucracy. Please do not delete the word "navigable" from the waters of the U.S. in the Clean Water Act.

We've worked hard for decades to protect our natural resources and keep our water clean. Without our recommended change these proactive efforts could be lost forever in the morass of federal regulation and bureaucracy.

Please leave the word "navigable" in the Clean Water Act that has existed since the 1970s and let us do our part for clean water in Puget Sound. Ongoing funding issues with the Corps of Engineers have bottlenecked many good projects. Allow local jurisdictions to maintain and improve the quality of water that travels from the mountains to the sea through Skagit County.

Sincerely,

Don Munks

Don Munks
Skagit County Commissioner
1800 Continental Place
Mount Vernon, Washington 98273

SKAGIT COUNTY
BOARD OF COMMISSIONERS

DON MUNKS, First District
KENNETH A. DAHLSTEDT, Second District
SHARON D. DILLON, Third District

May 1, 2008

United States Representative
Jim Oberstar
D.C. Office
2365 Rayburn HOB
Washington, D.C. 20515
(202) 225-6211

Dear Congressman Oberstar,

I appreciate the opportunity to testify in regard to the 2007 Clean Water Act bill last month. This letter is in response to your request for more clarity of our position Unfortunately for my constituents in Skagit County and me, the Clean Water Restoration Act as proposed does not clearly define changes being made to the original Clean Water Act Without a clear definition of HR 2421 it is difficult for me to submit definitive language.

If you could answer some of our questions, which would establish a guideline for us to answer your request:

1. Define the criminal penalties in your bill and what acts qualify as "criminal."
2. Give us examples of categories that would fall under the new authority caused by the expansion of jurisdiction of the Clean Water Act.
3. Define what will be the "fullest extent that activities affecting these waters are subject to the legislative power of Congress under the Constitution."
4. Define exactly what authority is now left with state, county, and city governments under this bill.

Under the Washington State Growth Management Act we operate under stringent guidelines established in our comprehensive plan and development codes. Please define us how the federal government would be involved in issuing land use permits in counties and cities.

Thanks again for giving us the opportunity to work with you to clarify these very important issues

Sincerely,

BOARD OF COUNTY COMMISSIONERS
SKAGIT COUNTY, WASHINGTON

Don Munks

1800 CONTINENTAL PLACE, MOUNT VERNON, WA 98273 PHONE (360) 336-9300 FAX (360)336-9307

# Iowa Farmers Union

## Testimony of Chris Petersen

**Before the**
**U.S. House of Representatives**
**Committee on Transportation and Infrastructure**

**Concerning The Clean Water Restoration Act of 2007**

**Wednesday, April 16, 2008**
**Washington, D.C.**

**STATEMENT OF CHRIS PETERSEN**

**PRESIDENT, IOWA FARMERS UNION**

**BEFORE THE U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE**

**CONCERNING THE CLEAN WATER RESTORATION ACT OF 2007**

**APRIL 16, 2008**

Chairman Oberstar, Ranking Member Mica and members of the committee, thank you for the opportunity to testify today. My name is Chris Petersen, and I am the president of the Iowa Farmers Union (IFU). I have been involved in production agriculture for 35 years. My wife and I maintain a 30-sow Berkshire herd on our farm near Clear Lake, Iowa. We produce 400 pigs a year, all of which are sold locally or to niche pork companies (no packers). We also raises vegetables for area restaurants, and bale and sell hay commercially.

As a beginning farmer, I raised corn and soybeans on 400 acres. The farm depression of the 1980's forced changes in how my family has approached farming and kindled my desire to speak out about the conditions of farmers through 1999. In 2000 I started my own business as an independent consultant working with a network of independent family farmers, grassroots environmental activists and consumers consulting on concentrated animal feeding operations (CAFO), family farm issues and all other rural/agriculture issues.

IFU recognizes that the purpose of the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act (Act), is to provide clean, safe and useable waters for citizens of the United States. At the same time, the Act reminds us that preserving clean water is a shared responsibility to be borne equally by all who use, benefit from and rely upon a healthy, safe supply of water.

*Iowa Farmers Union Policy in Regard to Water and the Environment*

Iowa Farmers Union policy states that our environment is best protected by family famers who have a long-term interest in the productivity of the land and the safety and purity of our water. In regard to protecting water quality, the protection of our groundwater resources is critical not only to continuing farm operations, but as a source of drinking water for the vast majority of rural residents. Any legislation or regulations affecting groundwater should balance these interests in an effort to keep groundwater from becoming contaminated in the first place and to move quickly to clean up already contaminated sources of drinking water.

In constructing national policy to address the issues associated with water quality, we support the following actions:

- Efforts in research that address the issue of non-point source pollution;
- Concentrated Animal Feeding Operations (CAFOs) be required to post the appropriate bonds to cover the cost of cleaning up any contamination of ground and water resources. When posting these bonds, CAFOs should also be required to develop and submit waste storage closure plans;
- National minimum guidelines, or standards that give primacy for implementation and flexibility in regional planning to the states. A national policy should discourage polluters from "shopping" among the states for the lowest environmental standards and encourage states and localities to establish standards beyond the federal minimums;
- Cost-share provisions targeted to small and medium-sized farmers. Responsibility for submitting a waste management plan and complying with the waste management provisions should be shared by the owner of the livestock and the operator of the facility;
- Increasing funding for the Environmental Quality Incentive Program (EQIP) which provides federal cost-share and technical assistance to enable farmers to comply with environmental requirements;
- Family farmers being appointed to serve as advisers to any federal agency when a national waste standard is developed;
- Targeting water subsidies to family-sized farm operations to conserve water and taxpayer dollars; and
- Responsibility and liability for environmental and pollution problems being shared between vertical integrators (owner) and farmers on all livestock feeding operations.

*Administering Clean Water Policy in the Agriculture Sector*

The original intent of Congress when it enacted the Federal Water Pollution Control Act Amendments of 1972 was to restore and maintain the chemical, physical and biological integrity of the waters of the United States. Since 1992, governments at all levels have struggled to redesign environmental policy for the twenty-first century. The Environmental Protection Agency (EPA) has tried to re-invent environmental regulation though use of community-based environmental protection, collaborative decision making, pubic-private partnerships and enhanced flexibility in rulemaking and enforcement.

IFU believes that EPA policies should be administered uniformly throughout the nation. EPA should strive to stop the practice of targeting specific regions with stricter standards than applied in non-target regions. Failure to curb this practice will result in an exodus of sensitive industries, including family farming, thereby jeopardizing the economic viability of producers and other rural residents.

Current language grants EPA and the Army Corp of Engineers (Corp) authority to regulate only the "navigable" waterways of the United States. The ambiguity associated with the term "navigable" causes problems in regard to how to accurately define the scope of jurisdiction for these regulatory agencies. By changing the wording of the Act to simply "waters," a national set of guidelines can be established for eligible waterways,

creating uniformity in the jurisdiction process and expediting the subsequent permitting process. Additional time devoted to determining jurisdiction comes at great cost to both farmers and tax payers. Like many aspects of agricultural policy, a clear and concise method of determining jurisdiction and permitting encourages farmers and ranchers to be proactive stewards of water resources. Therefore, we urge lawmakers to clarify the Act and reduce the burdensome litigation and paperwork currently experienced by producers, regulators and the courts.

Changing the current wording to read "waters" of the United States restores us to the world before 2001. Supreme Court cases have done little or nothing but cause additional confusion and perpetuate a lack of consensus. Simply stated, we need legislative reform that addresses jurisdiction, not permitting. If questions or concerns regarding the permitting protocol exist, then we urge the committee to have that conversation with stakeholders in the future. Fear over changes in the permitting system should not interfere with passing legislation that clarifies the jurisdiction of EPA and the Corp.

My members spend the vast majority of their time on their family farming and ranching operations. Day-to-day, these producers do not realize a drastic difference between the pre and post "SWANCC world." Restoring clean water practices to the methods used before 2001 would not cause unwarranted hardships on farmers, nor would it deliver them into a state of constant fear of EPA or Corps. Above all, agriculture producers are eager to highlight the unique set of circumstances that warrant attention when formulating clean water laws.

In an article written for the May-June National Wetlands Newsletter, Sen. Russ Feingold, D-Wis., discussed the implications of adopting a statutory definition of "waters of the United States" based on longstanding goals of protecting the nation's waters. He stressed that a reauthorized Act would not change the activities regulated by EPA or Corps. Current regulatory exemptions related to farming, forestry, ranching and infrastructure maintenance that have been in place since 1977 could not be overruled. Activities such as plowing, seeding, cultivating and harvesting, along with construction and maintenance of farm or stock ponds, irrigation ditches and farm or forest roads have been exempted from permitting requirements and would remain so under his proposed legislation. We encourage you to include the exhaustive list in further reauthorizations of the Act. Moreover, IFU supports the following agriculture-related exemptions realized by our members:

- Discharges composed entirely of agricultural return flows;
- Discharges of stormwater runoff from oil, gas and mining operations;
- Discharges of dredged or fill materials from normal farming, silviculture and ranching activities;
- Discharges of dredged or fill materials for the purpose of maintenance of currently serviceable structures;
- Discharges of dredged or fill materials for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches and maintenance of drainage ditches;

- Discharges of dredged or fill materials for the purpose of construction of temporary sedimentation basins on construction sites;
- Discharges of dredged or fill materials for the purpose of construction or maintenance of farm roads or forest roads or temporary roads for moving mining equipment;
- Discharges of dredged or fill materials from activities with respect to which a state has an approved program under section 208(b) (4) of such an Act.

*Recognizing the Unique Characteristics of Agriculture in Water Policy*

Farmers and ranchers like myself and other IFU members endorse aggressive approaches to maintaining clean water supplies and taking responsibility for agriculture practices that contribute pollutants to fresh water.

It is important to keep in mind that although it is time to address agriculture's contribution to water pollution, the damage is uneven in scope and severity. It tends to occur where farming is done at industrial levels and fresh water resources are vulnerable. Therefore, blanket regulations are unwise and hard to justify to producers.

Determining the relationship between what runs off of a given parcel of land and how it affects water quality is complicated. How manure and fertilizer are spread and how land is tiered and tilled each contribute to unique circumstances on individual farming practices. Therefore, when crafting water policy careful consideration must be given to the agriculture sector and its distinct challenges in meeting guidelines and national mandates. Farmers should not suffer from flawed policies, just as our fresh water supply should not be jeopardized by lax standards and a backlog of regulatory discrepancies.

*Conclusions*

It is important to know what progress has been made toward the goals of the Act and whether the goals themselves provide a useful meaningful basis for federal water pollution-control policy. Any legislation impacting clean water must be clear enough for farmers and ranchers to be able to predict which lands and waters will be covered.

Farmers and ranchers should applaud efforts by Congress to clarify the intent of clean water legislation, ensuring that all waters of the United States remain valuable for drinking, fishing, swimming and a variety of other economically viable uses, many of which are put into practice on family farms and ranches around the country.

Farmers and ranchers have long acknowledged that clean, safe water is critical to the success of their agriculture operations. What will help farmers and ranchers in the future is a less cumbersome and more expedient process by which agriculture, EPA and the Corps can come to a consensus about what problems do or do not need to be addressed and the most practicable way by which challenges can be solved.

The ultimate challenge facing lawmakers is how to account for the differences between family farming operations and industrial agriculture. Family-sized producers should not be penalized, either through statue or financial burdens, for the irresponsible actions of massive corporate agriculture outfits who conduct business with little regard for environmental sustainability.

Interactions with our nation's natural resources do not need to set agricultural producers in opposition to the environment. As IFU members have demonstrated for many generations, farmers, ranchers and fishermen are our best environmental stewards and their astute understanding of the natural world deserves to be recognized and rewarded.

With that Mr. Chairman, I thank you again for the opportunity to testify. I would be pleased to take any questions and thank all of the members of the committee for their support and work on these important issues.

Chris Petersen, President
Iowa Farmers Union

In regard to protecting water quality, the protection of our groundwater resources is critical not only to continuing farm operations, but as a source of drinking water for the vast majority of rural residents. Any legislation or regulations affecting groundwater should balance these interests in an effort to keep groundwater from becoming contaminated in the first place and to move quickly to clean up already contaminated sources of drinking water.

In constructing national policy to address the issues associated with water quality, we support the following actions:

- Efforts in research that address the issue of non-point source pollution;
- Concentrated Animal Feeding Operations (CAFOs) be required to post the appropriate bonds to cover the cost of cleaning up any contamination of ground and water resources. When posting these bonds, CAFOs should also be required to develop and submit waste storage closure plans;
- National minimum guidelines, or standards that give primacy for implementation and flexibility in regional planning to the states. A national policy should discourage polluters from "shopping" among the states for the lowest environmental standards and encourage states and localities to establish standards beyond the federal minimums;
- Cost-share provisions targeted to small and medium-sized farmers. Responsibility for submitting a waste management plan and complying with the waste management provisions should be shared by the owner of the livestock and the operator of the facility;
- Increasing funding with lower subsidy caps for Environmental Quality Incentive Program (EQIP) which provides federal cost-share and technical assistance to enable more farmers to comply with environmental requirements;
- Family farmers being appointed to serve as advisers to any federal agency when a national waste standard is developed;
- Targeting water subsidies to family-sized farm operations to conserve water and taxpayer dollars;
- Responsibility and liability for environmental and pollution problems being shared between vertical integrators (owner) and farmers on all livestock feeding operations; and
- Adequately funding the Environmental Protection Agency in order to allow the Agency and its programs to fulfill their environmental obligations.

Iowa Farmers Union believes that EPA policies should be administered uniformly throughout the nation. EPA should strive to stop the practice of targeting specific regions with stricter standards than applied in non-target regions. Failure to curb this practice will result in an exodus of sensitive industries, including family farming, thereby jeopardizing the economic viability of producers and other rural residents.

My members spend the vast majority of their time on their family farming and ranching operations. Day-to-day, these producers do not realize a drastic difference between the pre and post "SWANCC world." Restoring clean water practices to the methods used before 2001 would not cause unwarranted hardships on farmers, nor would it deliver them into a state of constant fear of EPA or Corps. Above all, agriculture producers are eager to highlight the unique set of circumstances that warrant attention when formulating clean water laws.

Moreover, IFU supports the following agriculture-related exemptions realized by our members:

- Discharges composed entirely of agricultural return flows;
- Discharges of stormwater runoff from oil, gas and mining operations;
- Discharges of dredged or fill materials from normal farming, silviculture and ranching activities;
- Discharges of dredged or fill materials for the purpose of maintenance of currently serviceable structures;
- Discharges of dredged or fill materials for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches and maintenance of drainage ditches;
- Discharges of dredged or fill materials for the purpose of construction of temporary sedimentation basins on construction sites;
- Discharges of dredged or fill materials for the purpose of construction or maintenance of farm roads or forest roads or temporary roads for moving mining equipment;
- Discharges of dredged or fill materials from activities with respect to which a state has an approved program under section 208(b) (4) of such an Act.

Before the U.S. House of Representatives
Committee on Transportation and Infrastructure

Hearing on H.R. 2421
"The Clean Water Restoration Act of 2007"

Testimony of
Mark T. Pifher
Deputy Director, Aurora Water
City of Aurora
15151 E. Alameda Parkway, Suite 3600
Aurora, Colorado 80012
303-739-7317

Submitted on behalf of municipal members of
Nation Water Resources Association (NWRA),
Western Urban Water Coalition (WUWC) and
Western Coalition of Arid States (WESTCAS)

April 16, 2008

Mr. Chairman and Members of the Committee, my name is Mark Pifher and I am here today to provide the perspective of Western municipal water and wastewater utilities who share concerns over the current language contained in the "Clean Water Restoration Act of 2007." This group includes certain members of the Western Urban Water Coalition (WUWC)[1], the National Water Resources Association (NWRA), and the Western Coalition of Arid States (WESTCAS), such as Las Vegas, Tucson, Phoenix, Metropolitan Water District of Southern California, San Diego County Water Authority, Las Cruces, Colorado Springs, and Albuquerque. Over the years, I have been an active member of these organizations participating, in particular, on their Clean Water Act committees. I am also the immediate past director of the Colorado Water Quality Control Division, where I was responsible for the state implementation of all aspects of the Clean Water Act and the Safe Drinking Water Act. However, I do not appear today on behalf of the Division or the State of Colorado. I am currently the Deputy Director for Water Resources in Aurora, Colorado, the state's third largest municipality and the sponsor of an innovative $750 million dollar water reuse project, which is now under construction and which was recently favorably referenced in a New York Times article on Western water supply challenges.

**I. Introduction**

Western municipalities, and in particular their water, wastewater and stormwater utilities, always have been, and will remain, strong supporters of the basic tenets of the federal Clean Water Act. After all, this statutory program assists in protecting and enhancing the source water upon which these cities rely to provide clean, safe drinking water to their citizens. It is these same municipalities who are partners with the state and EPA in implementing the pretreatment, stormwater and source water assessment programs; who construct wetlands as natural purification alternatives; who install, operate and maintain reuse and recycled water supply projects to maximize a scarce resource; who invest in the technology and plant improvements necessary to restore our impaired waterbodies under the total maximum daily load (TMDL) program; and who engage in pollutant trading efforts in order to assist under-funded nonpoint sources. Hence, I appear before you today not to undermine any efforts at strengthening water quality protection, but simply to express concerns over the potential impacts of the language found in H.R. 2421, with the hope that together we can address any legitimate concerns.

With the above as background, let me briefly identify some of the potential issues from the perspective of "on-the-ground" Western entities with water supply and wastewater/stormwater treatment responsibilities.

**II. Expansion of traditional federal jurisdiction and creation of uncertainty.**

As proposed, the bill would redefine "waters of the United States" so as to include the full panoply of wet areas from mud flats to intermittent streams to prairie potholes 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

[1] "WUWC members from San Francisco, Portland, Seattle, and East Bay Municipal Utility district do not join in this testimony."

Constitution." I will leave it to others, including our University professor panelists, to address the legal fine points of the Commerce Clause, the Supremacy Clause, the Necessary and Proper Clause and other constitutional provisions that may be brought to bear under this very expansive definition. For purposes of my testimony, I will simply note that in interpreting this language one would assume that the courts, which unfortunately will see many cases should the legislation be adopted, would look, in part, to the "Findings" section of the bill for guidance. There are a number of references, under this section which, depending upon how they are ultimately interpreted, may create the necessary federal nexus where such a connection did not previously exist. These references from Section 3 include the following:

- "Any part of an aquatic system" that may be interconnected with surfaces waters, potentially including "groundwater."
- Certain ephemeral and seasonal streams (depending on how they are ultimately defined).
- The "draining" of wetlands.
- Source water protection areas (as compared to the waterbodies therein).
- Bird watching, photography and general recreational activities.
- Bird and wildlife protection under treaties.
- The protection of federal "land".
- Flood control activities.

The above references, when combined with the fact that the new definition of "waters of the United States" would now encompass "activities affecting these waters" as compared to the waters themselves, may result in an expansion of jurisdiction under the Act that will unduly constrain state and local flexibility, while greatly increasing the time and costs associated with meeting water supply and wastewater treatment obligations. It may impinge upon local land use and water resource planning and undermine the timely completion of necessary projects, such as those authorized in the recent WRDA legislation.

**III. Impacts on Western water supply activities.**

Much of the West is rapidly growing, yet "water short." As noted below, the situation may only be exacerbated by forecasted climate change. The expansive language of the legislation could unduly complicate, delay, and increase in cost the installation of necessary water supply infrastructure or, in a worst case scenario, foreclose certain water supply options altogether. For example:

- As more waterbodies are determined to be jurisdictional, the construction of necessary water delivery infrastructure, e.g. wells, ditches, canals, pipelines, diversion structures, etc. will more often require Section 404 dredge and fill permits from the Corps.
- Even if Section 404 permits, be they "nationwide" or "individual" in nature, can be obtained for such infrastructure projects, there is a greater chance that the newly

created federal nexus will be pervasive enough to trigger NEPA review for activities occurring within the infrastructure corridor. This too will greatly increase project time and costs, as the entire NEPA process, from alternatives analysis to the final ROD, would need to be followed.

- Normal and necessary infrastructure maintenance, repair and replacement activities could now similarly trigger regulatory review, be they related to pipelines, ditches, canals, reservoirs, etc.
- Certain routine activities, such as the use of blow off valves along water supply pipelines, could require regulatory approval if located in close proximity to what would now be considered "jurisdictional waters."
- Should the EPA "water transfers rule" as previously proposed not be adopted and/or the courts determine that the mere transfer of water from one waterbody to another requires an NPDES permit, the reach of such regulated transfers could expand in proportion to the increased reach of jurisdiction over waterbodies.
- Given the enormous federal land footprint in the West, many Western storage and conveyance facilities are currently located on these lands. New "high elevation" storage options, and even many lower elevation alternatives, would be similarly located on Forest Service or BLM lands. There may be greater difficulty securing permit renewals or obtaining permits in the first instance for such facilities given the expansive language in the bill.
- On a related note, the West is the home to many American Indian tribes to which a trust responsibility is owed. This is reflected in the need to meet tribal water allocations, which often times requires the construction of water storage and conveyance facilities. This legislation may make meeting those obligations even more expensive and difficult, leaving long term municipal water supply options in doubt.
- Recovery programs and habitat conservation plans under the Endangered Species Act are often times dependent upon water management activities, including water infrastructure installation. Making completion of these activities more onerous and expensive is counter productive and simply adds to the burden of project sponsors such as Western municipal water suppliers.
- New energy development activities, such as coal bed methane production, can have associated water discharges which create both eco-systems and valuable water supplies for other beneficial uses, including municipal supply. Flexibility in the treatment of such water sources, which are often discharged to dry arroyos, may be lost.

**IV. Impacts on Western municipal wastewater discharge activities.**

Western wastewater treatment facilities face a host of challenges, not the least of which is often-times the absence of any significant dilution flows at the point of discharge. "End-of-pipe" effluent limits are common. In many places, the wastewater discharge constitutes the majority of the flow (effluent dominated) or all of the flow (effluent dependent) in the stream. In addition, many treatment systems belong to financially

challenged small, rural municipalities who utilize lagoon technology, with periodic groundwater or surface water discharges. Any expansion of CWA jurisdiction may further complicate, or increase in cost, wastewater treatment efforts at a time when infrastructure monies are already in short supply. For example:

- The construction of necessary wastewater collection systems and associated lift stations may more often trigger Section 404 review, increasing costs and delays.
- With the reach of the Act now encompassing all ephemeral and intermittent streams, normally dry washes and isolated waterbodies, including isolated wetlands, previously exempt discharges for which no NPDES permit was required may now fall within the permitting scheme.
- Formerly, "zero discharge" activities, i.e., land application facilities and certain lagoon facilities, may now require permits due to potential groundwater impacts or surface water discharges to formerly non-jurisdictional waters.
- The use of "constructed wetlands" for treatment, if such are found to be jurisdictional, may be a less attractive treatment alternative. Regulatory constraints may limit their use, despite the cost effectiveness and environmental enhancements associated therewith.
- Recent efforts by EPA and stakeholders to develop policies governing water quality standards for effluent dependent and even effluent dominated waterbodies, including the advancement of a net environmental benefit concept designed to ensure the continuation of ecosystem supporting discharges, may prove more difficult.
- The bill may eliminate the exemption under current regulations for wastewater treatment systems.
- The bill may hinder the development and implementation of wastewater reclamation and reuse projects depending upon their design, e.g. groundwater recharge, and location, e,g, discharging to normally dry streambeds.
- Expanded jurisdictional issues might discourage innovative treatment technologies from being applied to produced water resulting from oil and gas production, or might discourage saline and brackish water treatment for augmenting sparse water supplies.

**V. Impacts on Western stormwater control activities.**

Much of EPA's focus over the last few years has been on controlling wet weather flows. Municipalities, along with the states, have been front line players in attempting to achieve stormwater related water quality protection goals. This includes both the utilization of local land use authority and the construction of municipal stormwater control facilities, including retention and detention basins. Once again, as noted below, climate change may only add to the difficulty and costs associated with these activities. Further CWA regulatory constraints may similarly increase the local burden. For example:

- The construction of new stormwater collection and retention/detention infrastructure may face the same additional Section 404 regulatory burdens faced by those constructing water and wastewater infrastructure.
- Similarly, the maintenance, repair and replacement of such stormwater infrastructure may become more difficult.
- The geographic areas where stormwater can be channeled without triggering regulatory consequences may be more closely circumscribed.
- As is the case with wastewater treatment options, the use of constructed wetlands may become a less attractive alternative.
- The cost of best management practice (BMP) implementation may significantly increase, as more areas would qualify as "waters of the United States" warranting protection.
- The proposed language changes may adversely impact stormwater management activities that are limited to water supply enhancement, such as: stormwater management projects that are being proposed on a watershed scale as a means to increase the availability of water supplies for western municipalities through large surface water harvesting projects; stormwater capture and infiltration through shallow basins to the subsurface for groundwater recharge; and green building projects that capture stormwater from rooftops and parking structures for reuse.

**VI. Impacts of climate change.**

In the West, municipalities are closely following the science of climate change and proactively developing climate adaptation strategies. If current projections hold true, there may be earlier and potentially more rapid snow melt runoff (the source of much needed water storage); less precipitation in the form of snow and more in the form of rain; more intense, flashy summer storm events; an overall drop in basin-wide precipitation; and an increase in evaporation and evapotransporation, increasing overall water demands. In response to these predictions, western municipalities may find it necessary to:

- Increase reservoir storage so as to capture snowmelt and rain events when available and create additional "buffering" capacity for dry periods.
- Enhance stormwater management systems to handle extreme rainfall events, including flooding.
- Maximize hydropower generation to off-set infrastructure costs and reduce carbon footprints.
- Increase "underground" storage through recharge systems.
- Expand water collection systems, including pipelines, ditches, canals, etc.
- Take advantage of desalinization technologies for inland brackish and saline water resources and for water produced in association with oil and gas production.
- Capture and manage water from cloud seeding projects.

To the extent these types of responsible and forward looking adaptation measures require either infrastructure or the discharge of water, any expansion of the reach of "jurisdictional waters" will only complicate, delay, and increase in cost their implementation.

## VII. Conclusion

Western municipal interests face daunting challenges in the years ahead as they strive to meet both water supply and wastewater/stormwater treatment obligations. They are partners, along with EPA and the states, in the Clean Water Act regulatory regime and are dedicated to the protection of our most valuable resource – water. However, as we move forward, the language of the Act must be clear, so as to avoid costly litigation and regulatory delays, and flexible, so as to be able to adapt to changing conditions and new hydrologic scenarios, while proceeding with appropriate water resource planning at the state and local level.

In addition, the long recognized deference to state and local control over land use and water development activities, as embodied in Sections 101(b), 101(g) and 510 of the Act, must be honored. Though the goals of H.R. 2421 are laudable, the current language affords neither clarity nor flexibility, and constitutes a federal intrusion on traditional local perogatives. Western municipalities nevertheless stand prepared to work cooperatively with Congress and other stakeholders on solutions to clearly identified problems, so as to insure that the over-arching goals of the Act, as originally envisioned by Congress, are met.

**City of Aurora**

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April 29, 2008

The Honorable James Oberstar, Chairman
Committee on Transportation and Infrastructure
U.S. House of Representatives
Washington, DC 20515

RE: H.R. 2421

Dear Mr. Chairman:

I wish to thank you for the opportunity to present testimony on behalf of municipal members of the National Water Resources Association (NWRA), Western Urban Water Coalition (WUWC), and Western Coalition of Arid States (WESTCAS). As partners with the EPA and the states in ensuring that the goals of the Clean Water Act are continuously met, including through substantial investment in water, wastewater, and stormwater infrastructure, these entities remain dedicated to a strong, yet workable clean water program.

We were pleased to hear that you consider the current version of H.R. 2421 to be "a starting point" in the dialogue over potential amendments to the Act. We would like to provide our assistance in reaching a resolution of the debate over appropriate statutory language which maintains the necessary federal/state balance, respects private property rights, and does not unduly constrain our ability to meet future infrastructure requirements, including those necessary to respond to climate change. Municipalities and their rural neighbors must be in a position to provide reliable and affordable water supplies, while simultaneously protecting and enhancing the waters we all value. To that end, we offer the following observations:

- The bill language should be as brief and precise as possible, hopefully eliminating the confusion and delays associated with good-faith agency efforts to respond to the Rapanos and SWANCC decisions. This includes elimination of the extensive "findings" in H.R. 2421 which, in and of themselves, raise questions of interpretation.

- The long-standing reference in the Act to "navigable" should be retained so as to help avoid both the constitutional and on-the-ground implementation concerns identified by EPA, the Corps of Engineers, and other hearing witnesses if all side-boards to jurisdiction are eliminated.

- The reference to "activities affecting these waters" must be deleted as it raises a host of unanswered questions surrounding its interpretation and threatens to undermine State and local control over land and water use decisions.

- The regulatory exemptions for wastewater treatment systems and prior converted crop land should be maintained and similar exemptions should be noted for infrastructure directly associated with stormwater control, water conveyance and agricultural irrigation practices.

- To the extent there is found to be a need to encompass certain intrastate, isolated, intermittent, ephemeral or otherwise hydrologically disconnected waterbodies under the "federal" umbrella, ensure that the states have a lead role in the identification of such waterbodies and that their case-by-case protection be tied to meeting the underlying goals of the Act.

In conclusion, WUWC, NWRA, and WESTCAS believe that to the extent modifications to the Act are necessary in response to the Rapanos and SWANCC decisions, such amendments should embody the above principles so as to avoid the confusion, federal encroachment and inevitable litigation associated with the currently proposed language. We stand ready to work cooperatively on more specific statutory language as time allows and the legislative process moves forward. In that regard, we would suggest that convening an expert panel representing various stakeholder interests, with an opportunity for further public input, may be a useful approach to closing the gap between the many divergent interests.

I've been requested to represent that Robert Trout, who testified on behalf of agricultural interests at the April 16th hearing, joins in these comments. Thank you for your consideration.

Sincerely,

Mark Pifher
Deputy Director of Water Resources

**STATEMENT OF**
**HAROLD P. QUINN, JR.**
**EXECUTIVE VICE PRESIDENT**
**THE NATIONAL MINING ASSOCIATION**
**Before the**
**UNITED STATES HOUSE OF REPRESENTATIVES**
**COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE**
**Relating to**
**H.R. 2421**
**THE CLEAN WATER RESTORATION ACT OF 2007**

**APRIL 16, 2008**

My name is Hal Quinn, executive vice president and general counsel, for the National Mining Association (NMA). NMA appreciates the invitation to testify about H.R. 2421, "The Clean Water Restoration Act of 2007."

NMA is the national trade association representing producers of most of America's coal, metals and industrial and agricultural minerals; the manufacturers of mining and mineral processing machinery, equipment and supplies; and the engineering and consulting firms, financial institutions and other firms serving the mining industry.

**Introduction**

The development of the energy and mineral resources required by our Nation involves a unique set of technological, logistical and economic considerations. Given that coal and minerals are fixed in location, we could hardly go about the business of finding, producing and supplying them for our society without incurring water or land features where water may pass. So, our members have a vast amount of experience with questions about which waters fall within the purview of the Clean Water Act (CWA) as well as the myriad of permitting and performance standards that protect them.

**Restoration or Revision**

We respect that the sponsors of H.R. 2421 consider the legislation a clarification of congressional intent on the CWA's jurisdictional reach. However, we believe that the bill would alter the statutory intent as gleaned from its text and structure.

The CWA is a comprehensive and complex statute. To be sure, the question of where waters of the United States begin and end has proven to be a

difficult one. Nonetheless, the answer must at least start with "navigable waters" which provides the statutory context for the obligation to obtain a permit before discharging a pollutant. 33 U.S.C. § 1311(a), 1362(12)(A) (making it unlawful to discharge a pollutant into navigable waters without a permit). *See also id.* at § 1342(b), § 1344(a). In defining the term 'navigable waters' as waters of the United States, it has been recognized that Congress intended to regulate at least some waters that would not be meet the traditional understanding of navigable. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985).

The recognition that Congress intended to authorize the regulation of some waters that do not meet the classical understanding of navigability does not carry with it the notion that the term "navigable" has no effect at all on the meaning of waters of the United States. As the Supreme Court held, "[t]he term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA." *Solid Waste Agency of Northern Cook County v. U.S. Army of Corps of Eng'rs (SWANCC)*, 531 U.S. 159, 172 (2001). In that regard, it begins with waters navigable in fact or which could reasonably be so made, *id.* (citing *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377 (1940); and, at its outer bounds, could not extend further than allowed under the Commerce Clause such as discharges of pollutants into nonnavigable waters that substantially affect interstate commerce. *Cf., Riverside Bayview*, 474 U.S. at 133.

It is from this framework that the jurisdictional instruction is derived that the CWA reaches those waters with a "significant nexus" to traditionally navigable water. *SWANCC*, 531 U.S. at 167. *See also Rapanos v. United States*, 126 S. Ct. 2208, 2225 (2006) (Kennedy, J., concurring in judgment). Although this instruction admittedly does not carry the precision all would desire, when those bounds are reached it does not leave a gap in protection. Where waters of the United States end, waters of the state still remain and there is no reason to suppose that the states are inadequate to the task of protecting those resources. Indeed, the core policies informing the administration of the CWA include recognition of the states historic role in managing their water resources and their primary responsibility and rights to plan the development and use of land and water resources. 33 U.S.C. § 1251(b), (g).

H.R. 2421 alters fundamentally this framework. First, deletion of the term "navigable waters" removes the historic bounds of regulation. No longer would waters need any sort of nexus or connection—let alone a significant one—with navigable or even interstate waters for the federal government to assert jurisdiction over any water or land over which water may pass. Moreover, removing "navigable" as the reference point eliminates the Commerce Clause power as the outer bounds of the federal government's reach. This is further confirmed by the insertion of a reference to "the legislative power of Congress under the Constitution," which packs even

more weight behind calls for more expansive assertions of federal regulatory powers over land and water.

The legislation would also alter the historic context of CWA regulation. Under the current regulatory definition of waters of the United States, nonnavigable and non-interstate waters may be regulated if their use or degradation would affect interstate or foreign commerce. Under the legislation's definition, federal jurisdiction turns upon whether "activities affecting these waters" are subject to any legislative power of Congress. In short, waters become federalized not due to any discharge to waters that affects commerce, but simply because an "activity" that falls within the constitutional realm of Congress' legislative powers affects waters. Such changes could potentially unleash a significant and substantial federal usurpation of the traditional powers of state and localities in land use and water resource management. For businesses like mining, changing the jurisdictional reach of the law poses grave dangers of compromising their investments and compliance strategies for existing operations and facilities developed under a different understanding.

**The Overburdened CWA Permitting System**

Putting aside the question about Congress' original intent, undoubtedly H.R. 2421 would change the existing status quo. As a consequence, the proposed changes to the CWA would have a measurable effect on the existing regulatory burdens borne by businesses, landowners and governments.

The existing permitting system is already overwhelmed. The CWA § 402 National Pollutant Discharge Elimination System (NPDES) program has backlogs for renewals of expiring permits for existing facilities. The CWA § 404 dredge and fill program administered by the U.S. Army Corps of Engineers reportedly has a backlog of pending permit applications or notices involving more than 5,000 project proposals.

The time and costs incurred to navigate the permitting process is protracted and expensive. One study found the mean cost of preparing an individual permit application under CWA § 404 to exceed $270,000, excluding the expenses related to satisfying permit stipulations such as mitigation and design changes to the proposed project. David L. Sunding & David Zilberman, *Non-Federal and Non-Regulatory Approaches to Wetlands Conservation: A Post SWANCC Exploration of Conservation Alternatives* (Jan. 2003).

The expense in preparing a permit application is only part of the costs associated with an overburdened permitting system. The delays in receiving permits necessary to begin or continue an enterprise comprise an even more significant cost. According to the Sunding & Zilberman study, on average, CWA § 404 individual permits required a total of 788 days to prepare and obtain a decision, with 405 of those days involving the agency's

deliberations. *Id.* at 8. For capital intensive industries like mining, a delay of weeks or months can mean substantial losses in the net present value of a project. These risks unduly delay returns on investments and cause investors to look elsewhere in deploying their investment capital.

We believe it ill-advised to make such fundamental changes in the law when the existing permitting system appears ill-equipped to respond. The current state of affairs has eroded confidence in the process and frustrated the investments and plans of businesses and landowners. Forcing more permit traffic on to an already constrained regulatory infrastructure will only increase that frustration and makes the regulatory program less credible.

Upgrading the permitting system so that it can be responsive to the requirements of the regulated community will require a substantial investment. The expense and delays arise from a lack of sufficient resources as well as increasingly complex issues. However, there are opportunities to improve permitting efficiencies for some industries that are already subject to a myriad of state and federal environmental programs that overlap and duplicate the CWA in terms of their purpose and goals.

One of the goals of the CWA is to "prevent needless duplication and unnecessary delays" in the law's implementation, including encouraging a "drastic minimization of paperwork and interagency decision procedures." 33 U.S.C. § 1251(f). The domestic mining industry already operates under a robust and comprehensive set of state and federal laws that prescribe substantive goals and procedures to prevent or minimize adverse impacts to environmental resources. In many cases, these laws and programs require the assessment and protection of the same water resources that are targeted by the CWA. We have appended to this statement a brief overview of the permitting and performance standards for coal mines nationally under the Surface Mining Control and Reclamation Act (SMCRA), 30 U.S.C. 1201 *et seq.*, and the planning, permitting and operational requirements for mining minerals on public lands under the Federal Land Policy Management Act (FLPMA), 43 U.S.C. § 1732 (as implemented in 43 C.F.R. Subpart 3809).

Our suggestion here is not that these laws should supplant the CWA. Rather, given the overlap there is potential for greater efficiencies for the regulated and regulators in terms of permitting steps, timelines, public participation, collection of environmental resource information, analysis of impacts and development of mitigation measures.

**Conclusion**

NMA supports the goals of the CWA to restore and maintain the integrity of our Nation's waters, but we do not believe changing the federal reach of that law is necessary in order to achieve them. A greater threat to the CWA's goals may be a permitting system that is not capable of producing reasonable decisions in a reasonable timeframe.

**FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976:**

- ***In General*** – Permitting Authority for Hardrock Mining on Federal Lands.
- ***Environmental Standard*** (43 U.S.C.A. § 1732(b)) – Requires the Secretary of Interior to "take any action necessary to **prevent unnecessary or undue degradation** of the lands" in managing the public lands.
- ***Surface Management Regulations*** (43 C.F.R. Subpart 3809) – Establishes procedures and standards to ensure that "anyone intending to develop mineral resources on the public lands [ ] **prevent unnecessary or undue degradation of the land and reclaim disturbed land**." 43 C.F.R. § 3809.1(a).

- **Plan of Operations** – Required, except for "casual use" operations or mining operations that will cause a cumulative surface disturbance of 5 acres or less. 43 C.F.R. §§ 3809.10, 3809.11, 3809.21, 3809.31. The plan of operations "must demonstrate that the proposed operations would **not result in unnecessary or undue degradation of public lands**."

  ***Plan of Operations Must Include*** (43 C.F.R. § 3809.401):

  1. Water Management Plans
  2. Quality Assurance Plans
  3. Spill Contingency Plans
  4. Reclamation Plans

     *Including Plans for:*

     - Regrading and Reshaping
     - Mine Reclamation
     - Riparian Mitigation
     - Wildlife Habitat Rehabilitation
     - Topsoil Handling
     - Revegetation
     - Isolation and control of acid-forming, toxic, or deleterious materials
  5. Monitoring Plan

     *Examples of Monitoring Programs:*

     - Surface & Groundwater Quality & Quantity
     - Air Quality
     - Revegetation
     - Wildlife Mortality
  6. Interim Management Plan
  7. Reclamation Cost Estimate

***Performance Standards Applicable to Plan of Operations*** (43 C.F.R. § 3809.420):

1. Land-use Plans
2. Mitigation Measures
3. Concurrent Reclamation
4. Compliance with all other laws
5. Specific Standards:
   - Air Quality
   - Water Quality
   - Disposal & Treatment of Solid Wastes
   - Fisheries, Wildlife, & Plant Habitat
   - Cultural Resources
   - Acid Forming, Toxic, or Other Deleterious Materials
   - Leaching Operations & Impoundments

➢ ***Public Notice & Comment & Judicial Review*** (43 C.F.R. §§ 3809.411(c) & 3809.800 – 3809.809) – BLM will publish a notice of the availability of the plan of operations in a local newspaper of local circulation and will accept public comment for at least 30 calendar days. A party adversely affected by a decision under these regulations may either (1) petition the State Director or appropriate BLM State Office to review the decision; or (2) directly appeal a BLM decision to the Office of Hearings and Appeals.

**SURFACE MINING CONTROL AND RECLAMATION ACT:**

➢ ***In General*** – Permitting authority for surface coal mining operations to **"assure that surface coal mining operations are so conducted as to protect the environment."** 30 U.S.C.A. § 1202(d).

➢ ***Surface Coal Mining & Reclamation Permit*** (30 U.S.C.A. §§ 1256 – 1259) – Prior to engaging in or carrying out any surface coal mining on federal lands, a valid surface coal mining and reclamation permit must be obtained from OSM. SMCRA Regulations establish permit requirements for exploration that will remove more than 250 tons of coal or that will occur on lands designated as unsuitable for surface coal mining operations. 30 C.F.R. Part 772.

***Permit Application – Statutory Requirements*** (30 U.S.C.A.§ 1257(b), 1258, 1259, & 1260(c)):

1. Information Requirements

   ***Including***:

   - Various maps showing land to be affected, including topographical maps and cross-section maps.
   - Name of the watershed and location of stream or tributary into which surface and pit drainage will be discharged.
   - A determination of the probable hydrologic consequences of mining and reclamation operations both on and off the mine site, including sufficient data for an assessment of probable cumulative impacts on the hydrology of the area.
2. Reclamation Plan
3. Insurance Certificate
4. Blasting Plan
5. Schedule of all notices of violations of SMCRA and air or water environmental protection laws received in connection with any surface coal mining operations within the three-year period prior to the date of the application.
6. Performance Bond

***Permit Requirements for Exploration*** (30 C.F.R. Part 772) – Includes Description of:

1. Cultural or Historical Resources
2. Archaeological Resources
3. Endangered & Threatened Species
4. Measures to Comply with Performance Standards
5. Various Maps of Areas of Proposed Exploration and Reclamation

***Permit Application – Minimum Requirements for Information on Environmental Resources*** (30 C.F.R. Part 779):

1. Cultural, Historic, & Archaeological Resources
2. Climatological Information
3. Vegetation Information
4. Soil Resources Information
5. Land Use Information
6. Various Maps

***Permit Application – Minimum Requirements for Reclamation and Operation Plan*** (30 C.F.R. Part 780):

1. Information on Proposed Mining Operations & Existing Structures
2. Blasting Plan & Monitoring System
3. Air Pollution Control Plan
4. Fish & Wildlife Information
5. Reclamation Plan
   - Compliance with Environmental Performance Standards (*See* below)
   - Estimate of Reclamation Cost and Timetable
   - Plan for Backfilling, Soil Stabilization, Compacting, & Grading
   - Plan for Removal, Storage, & Redistribution of Topsoil, Subsoil, and Other Material
   - Plan for Revegetation
   - Description of Measures to Maximize the Use and Conservation of Coal Resources
   - Measures to Seal or Manage Mine Openings
   - Description of steps to comply with Clean Air Act, Clean Water Act, and other applicable air and water quality laws and regulations and health and safety standards
6. Hydrologic Information
7. Geologic Information
8. Land Use Information
9. Siltation Structures, Impoundments, Banks, Dams, & Embankments
10. Protection of Publicly Owned Parks & Historic Places
11. Disposal of Excess Spoil

➢ ***Environmental Performance Standards*** (30 U.S.C.A. §§ 1251 & 1265) – Any surface coal mining operations authorized on federal land must meet **all applicable environmental performance standards** provided in SMCRA and its implementing regulations. These standards are deemed necessary "to minimize damage to the environment and to productivity of the soil and to protect the health and safety of the public." 30 U.S.C.A. § 1201(d).

***Environmental Performance Standards*** (30 C.F.R. Subpart 816 & 817):

1. Casing and Sealing of Drilled Holes
2. Removal, Timing, Storage, & Redistribution of Topsoil & Subsoil
3. Ground-water & Surface-water Protection & Monitoring; Acid Drainage; Water Rights & Replacement
4. Water Quality Standards & Effluent Limitations
5. Diversions
6. Sediment Control Measures
7. Siltation Structures
8. Discharge Structures
9. Impoundments
10. Postmining Rehabilitation of Sedimentation Ponds, Diversions, Impoundments, and Treatment Facilities
11. Stream Buffer Zones
12. Coal Recovery
13. Use of Explosives
14. Disposal of Excess Spoil
15. Coal Mine Waste
16. Stabilization of Surface Areas
17. Protection of Fish, Wildlife and Related Environmental Values
18. Contemporaneous Reclamation
19. Backfilling and Grading
20. Revegetation
21. Cessation of Operations
22. Postmining Land Use

- ***Public Notice & Comment & Judicial Review*** – SMCRA provides citizens the opportunity to participate in rule making, permit approval, bond release, inspections, and enforcement.

1. ***Rulemaking*** – Public notice and comment is provided prior to the promulgation of rules implementing SMCRA. 30 U.S.C.A. §§ 1202(i) & 1251.
2. ***Permit Issuance*** – Applicants for a surface coal mining and reclamation permit must file a copy of his application for public inspection with the recorder at the courthouse of the county or an approved public authority where the mining is proposed to occur. 30 U.S.C.A. § 1257(e). In addition, the applicant must also place an advertisement in a newspaper of general circulation in the locality of the proposed site at least once a week for four successive weeks notifying the public on the filing of the mine permit application and reclamation plan. 30 U.S.C.A. §§ 1257(b)(6) & 1263(a). Any person with an interest that may be adversely affected by a proposed operation may file written objections to a proposed or revised permit application and request an informal conference. 30 U.S.C.A. § 1263(b). The regulating agency is required to issue within 60 days after the informal conference a written decision with supporting reasons for its grant or denial of a permit application. 30 U.S.C.A. § 1264. The applicant or any interested person may request a hearing to review the reasons for the decision. 30 U.S.C.A. § 1264(c); 30 C.F.R. § 775.11.

HAROLD P. QUINN, JR.
*Executive Vice President & General Counsel*

May 1, 2008

The Honorable James Oberstar
Chairman
Committee on Transportation and Infrastructure
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Thank you for the opportunity to present testimony on behalf of the National Mining Association (NMA) before the Committee on Transportation and Infrastructure on H.R. 2421, The Clean Water Restoration Act of 2007. NMA also appreciates your invitation to provide suggestions for the Committee's consideration to reaffirm the goals of the Clean Water Act (CWA).

Reflecting upon our understanding of the intent of the Clean Water Act as well as the testimony at the hearing, we offer for your consideration the following observations. First, the term "navigable waters" reaches a broad set of waters and wetlands, and yet has always provided the benchmark for discerning the line between federal waters and state waters that secures both the federal-state partnership and the constitutional limits of the Act under the Commerce Clause. Toward that end, "navigable waters" should be maintained as a cornerstone of the jurisdictional ambit of the Act. Second and closely related, the use of phrases such as "activities affecting these waters" and invoking the fullest extent of the legislative power of the Congress also should be avoided. Such language fundamentally changes the historic understanding of the law's structure and reach. Third, reference to "all intrastate waters" should be avoided so that state and local prerogatives with respect to land use and water resources are not displaced or usurped by federal agencies. Finally, there are important exemptions and policies that must be maintained to avoid upsetting settled expectations and creating grave regulatory uncertainty. For example, the waste treatment system exemption reconciles the demands of the Act with its goals by accommodating best practices and technologies necessary to meet the Act's requirements.

We, like other witnesses at the hearing, believe the legislation will create greater uncertainty that will impede our mutual objectives of protecting our nation's water quality. As we set forth in our testimony, the overburdened and inefficient permitting system poses one of the greatest threats to meeting this goal. We submit that providing state and federal agencies sufficient resources to respond to the increasing permitting burdens placed upon landowners and businesses

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merits attention. Moreover, greater efficiencies through streamlining permit processes for overlapping and duplicative regulatory programs would reduce some of the burdens on both the regulators and regulated community

Again, thank you for the opportunity to appear before the Committee and provide testimony on behalf of the National Mining Association.

Sincerely,

Harold P. Quinn, Jr.

**Written Statement of**
**Tim Recker**
**President**
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**5505 NW 88th Street, Suite 100**
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**(515) 225-9242**

**Regarding the**
**Clean Water Restoration Act of 2007 (H.R. 2421)**

**Presented to the**
**Committee on Transportation and Infrastructure**
**U.S. House of Representatives**

**April 16, 2008**

Mr. Chairman and members of the Committee, I am Tim Recker, President of the Iowa Corn Growers Association. I am from Arlington, Iowa where I grow corn and soybeans, and operate a wean-to-finish hog operation. In addition to farming with my brother, Jim, for 21 years, I own Recker Excavating.

On behalf of the Iowa Corn Growers Association as well as the National Corn Growers Association, I appreciate the opportunity to testify at this legislative hearing on H.R. 2421, the Clean Water Restoration Act (CWRA). Before addressing the issue at hand, I must first sincerely thank this Committee for your hard work and devotion to completion of a Water Resources Development Act (WRDA).

In the seven years since the Congress passed the last WRDA bill, a significant number of needs have arisen for our nation's inland waterways. WRDA 2007 addresses many of those issues by authorizing critical projects on the inland waterways, including the modernization of seven locks along the Upper Mississippi and Illinois River, a project that will dramatically improve our ability to deliver crops to the global marketplace. Your diligence was key in successfully obtaining WRDA's enactment.

Last year marked the largest corn crop in history. However, it's not just about growing more corn; it's about how we grow it. We are mindful of the need to balance environmental stewardship with the maintenance of a long-term, dependable food, feed and fuel supply. Through proactive agricultural practices and technologies, we have made significant efficiency gains and improvements in our environmental footprint.

We are dependent upon the integrity of our soil and other natural resources for our livelihood. We work tirelessly to protect and improve the land. In the case of corn production, farmers understand that satisfying the demands of a growing world population must not come at the expense of ecological health, human safety or economic viability. Accordingly, for decades corn growers have adhered to a principle of continuous improvement and an incessant pursuit of greater efficiency. As a result, significant benefits to society have been achieved by modern agriculture and improvements in production efficiency will continue to lessen the environmental impacts of food production.

The Federal Water Pollution Control Act of 1972, more popularly referred to as the Clean Water Act (CWA), has made astonishing progress in restoring the chemical, physical and biological integrity of our nation's waters. Not only have we reversed the historic trend of wetlands losses, but we have restored streams and rivers degraded by pollution.

Additionally, corn farmers are involved in numerous state, local and national programs that complement the goals of the CWA by protecting environmentally sensitive land from crop production and encouraging other on-farm conservation measures. For example, farm bill conservation programs have recognized the unique abilities and limitations of farmers. As a result, we are making important environmental gains using voluntary, locally led incentive-based programs to reduce soil erosion, improve water quality and increase wildlife habitat.

In Iowa, the Conservation Reserve Enhancement Program (CREP) is available in 37 Soil and Water Conservation Districts in the tile-drained region of North Central Iowa. The program is designed to remove excess nitrogen to protect water quality. Financial incentives are provided to private landowners to develop and restore wetlands that intercept tile drainage from agricultural watersheds. Water quality monitoring completed by researchers at Iowa State University has confirmed that CREP wetlands remove 40-90% of the nitrate and 90+% of the herbicide in tile drainage water from upper-lying croplands. Today, Iowa CREP includes 27 implemented sites with 36,430 watershed acres protected and 19,576 tons of nitrogen removed.

However, the regulatory landscape has been, and remains, very confusing despite what we believe to be Congress' clear intent in its use of the term "navigable" in the statue. Jurisdiction as defined through the regulatory program has been a moving target over the 35-year history of the CWA, leading to and sparked by litigation and ever-broadening implementation by federal agencies. But there is no question in our minds about whether the term navigable in the statute was intended by Congress, and what was meant.

The term "navigable waters" has been around since the early 1800s to describe those waters that are clearly subject to federal control. It has been well-settled in law that the federal regulatory authority over "navigable waters" is based on Congress' power to regulate navigation under the Commerce Clause. It is clear that Congress intended to use the term "navigable waters" when it passed the CWA in 1972. The conference report specifically states that "Congress intends the term 'navigable waters' be given its broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." In making the statement in the conference report about regulating navigable waters, Congress

was exercising its authority under the Commerce Clause. Maintaining the term "navigable waters" makes it clear that, while Congress has asserted its broad authority under the Commerce Clause, this jurisdiction is not limitless. Moreover, there are decades of cases that define the term which is why the CWA and many other statutes use that term as a fundamental basis for identifying federal waters in contrast to state waters.

Despite these implicit Commerce Clause limitations, the regulatory program has intended to drift beyond these boundaries and it has taken the courts to bring us back. In 1986, for example, the agencies asserted jurisdiction based on a waterbody's potential use for migratory birds. Consequently, all water everywhere that could be used by birds was subject to federal jurisdiction. During this time, no set level of jurisdiction existed and jurisdictional determinations were inconsistent at best. The Supreme Court decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, et al. (SWANCC)*, 531 U.S. 159 (2001) found that there were significant constitutional questions raised by the breadth of jurisdiction under this standard in addition to ruling that this standard went far beyond the jurisdiction established by Congress in the CWA. The Supreme Court once again examined the extent of federal jurisdiction under the CWA in its decision on the consolidated cases of *Rapanos v. the United States* (*Rapanos*) and *Carabell v. U.S. Army Corps of Engineers (Carabell), Rapanos v. United States*, 126 S.Ct. 2208 (2006). The Rapanos decision rejected the agencies' "any hydrological connection" theory of jurisdiction because it raised significant constitutional concerns.

The Supreme Court decisions in *SWANCC* and *Rapanos* did not confuse the jurisdiction of the Corps, but they were the direct response to ambiguous and undefined terms in use by the regulatory program such as "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.

H.R. 2421 would face similar constitutional challenges and prolonged, costly litigation, because it would go beyond the geographic scope and original intent, erasing the very framework of the CWA. Unfortunately, H.R. 2421 would not achieve the objective of clarity but instead have the opposite effect. Our specific concerns with H.R. 2421 are described below:

**Navigable Waters**

As stated above, Congress knew what it was doing by including the term "navigable" in the original definition of jurisdictional waters under the CWA, and the policy effect of this intention was and remains critically important. H.R. 2421 deletes the term "navigable waters" from the CWA. It is our understanding that the purpose of the deletion is to eliminate the requirement that Federal jurisdiction over U.S. waters is based upon the Commerce Clause under the Constitution. However, deleting the term "navigable waters" from the statute also calls into question section 101(b) of the CWA declaring Congress' intent for States to have the primary responsibility for land and water decisions. Therefore, if all waters are subject to federal control, then what if any would be controlled by the State?

The bill's omission of current regulatory language providing for a connection to the Commerce Clause and the proposed statutory language extending federal jurisdiction to the fullest extent empowered under the Constitution will clearly expand current authorities and obliterate the Federal-State partnership embodied in the CWA. The term "navigable waters" preserves a balance with the States.

Deleting the term from the statute does not clarify the original intent of the CWA; it changes it. The term "navigable waters" should not be deleted from the CWA.

**All Instrastate Waters**

The proposed definition of "waters of the United States" provided by H.R. 2421 states that "all interstate and intrastate waters and their tributaries" are subject to CWA regulation, "including lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, lakes natural ponds..." In my book, all means all. The language is quite clear; all waters will be federal waters and this is most certainly an expansion of current federal jurisdiction.

H.R. 2421 would grant the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) federal regulatory authority over all "intrastate waters," erasing any distinction between federal waters and state waters. This would move the CWA beyond protecting wetlands and waterways and transform it into a vehicle for regulating virtually every wet area in the nation – from irrigation ditches to man-made lagoons to possibly even groundwater which has always been regulated at the state level. H.R. 2421 does not give any limitation on what should or should not be considered as a "water of the United States," and therefore all waters of any kind located within any state could be swept into jurisdiction.

Furthermore, the new definition would nullify existing regulations that interpret the current definition, thus wiping out various regulatory exclusions.

**Activities Affecting Waters**

The proposed definition first broadly defines "waters of the United States" subject to the law, and then authorizes regulation "to the fullest extent that these waters, or *activities affecting these waters*, are subject to the legislative power of Congress under the Constitution." A reference to "activities" in the definition of "waters" diverges from the format of the CWA, which prohibits the "discharge of any pollutant" (section 301) and authorizes permits for discharges of pollutants from point sources (section 402) and discharges of dredged and fill material (section 404), not "activities." This language is unprecedented in current law or existing regulations and is extremely ambiguous.

For example, this language could be read broadly to allow the regulation of all activities that "affect" waters. In other words, regardless of whether an activity is occurring in or near water, the fact that an activity may impact a "water of the United States" would allow the activity to be regulated under the CWA. Federal permits would be required for daily or routine land management activities that are traditionally reserved for state or local consideration such as

pumping irrigation water from one area to another or the use of farm drainage features. The introduction of undefined terminology such as "activities" and "affecting" provides federal agencies and courts with considerable room for expansive interpretation, placing an incredible burden beyond what was envisioned by the 1972 Act.

Currently, general maintenance jobs performed by Recker Excavating, including creating tile outlets, stream diversions, stabilizing stream banks, and others, simply require notification to the local Natural Resources Conservation Service office and the Iowa Department of Natural Resources. Proposed changes would require me to obtain a federal permit prior to starting my work which could delay my work and that of my customer.

**Congress' Constitutional Authority**

H.R. 2421 proposes to extend federal jurisdiction and regulate activities affecting waters of the United States "to the fullest extent" of Congress' authority under the Constitution. This is clearly an expansion of the existing CWA and its regulations, which link coverage under the Act to Congress' authority under the Commerce Clause. Under H.R. 2421, anything subject to the Treaty Power or reachable through the Property Clause and the Necessary and Proper Clause or other parts of the Constitution could provide a basis for jurisdiction. The reach of such power is far from clear. The Supreme Court and constitutional scholars have been debating the scope of each of these constitutional clauses since 1789.

Should H.R. 2421 become law, litigation inevitably will involve not just the scope of the statute but the scope of Congress' constitutional authority, because that is the only limit this legislative proposal clearly acknowledges (but does not define). We are concerned that this legislative approach will place critical regulatory decisions in the hands of constitutional lawyers and result in costly litigation to resolve the constitutional reach of federal jurisdiction into "intrastate waters." In effect, Congress would abdicate its legislative responsibilities, leaving it to the court system to determine what waters are subject to regulation.

**Regulatory Exemptions**

Existing regulations, although very broad, create several important exemptions and specifically tie the jurisdictional status of waters to the Commerce Clause of the Constitution. The proposed statutory definition does neither.

Proponents of the bill claim that following revisions to the statutory definition, H.R. 2421 will preserve the regulations regarding the scope of the waters of the U.S. that pre-date *SWANCC*. We believe this to be a fundamentally incorrect reading of the legislative and policy effects of H.R. 2421. The broad statutory changes in H.R. 2421 would trigger a new rulemaking under the Administrative Procedures Act in order to implement the new definition. As a result, every existing regulatory provision would be open to reconsideration, re-proposal and, for those who disagreed with the outcome, litigation. This also could open up the regulatory equivalent of Pandora's Box with a re-write of the Total Maximum Daily Loads (TMDL), Confined Animal Feeding Operation (CAFO), or Spill Prevention, Control and Countermeasure (SPCC) rules (to name a few) and impact stormwater exemptions or even interstate water compacts.

The enactment by Congress of a broad statutory definition of the term "waters of the United States" without acknowledgement of any specific limitations or of the agencies' authority to create such limitations will make it difficult, if not impossible, for the agencies to maintain existing or carve out future regulatory limitations. For those in production agriculture, we are specifically concerned that H.R. 2421 would eliminate the agencies' ability to continue the common sense regulatory exemptions for prior converted cropland and waste treatment systems, including treatment ponds or lagoons. Without either a statutory or regulatory exemption, in many cases, prior converted croplands would be classified as wetlands. If the area is declared a wetland, a federal permit is required. The elimination of this exclusion would affect 55 million acres of farmland in the U.S.

To suggest that the protection of prior converted croplands and waste treatment systems are not affected by the text of H.R. 2421 is a fundamental misreading of the bill.

**The Savings Clause**

While H.R. 2421 contains some paraphrases of the language used in the existing CWA exemptions for a very narrow set of discharges, the impact of this section is far-reaching – not for what it does but for what it does not do. Simply put, H.R. 2421 does not protect the referenced exemptions; the only thing that is protected by this section of the bill is the authority of the Administrator. The "savings clause" does not state that the enumerated exemptions, or any other exemption in existing law or regulation, "shall" be exempted from federal jurisdiction under the CWA. Should H.R. 2421 become law, the exemptions themselves are left wholly unprotected when new regulations are mandated.

Furthermore, the "savings clause" does not exempt anything from the broad definition of "waters of the United States." It exempts only certain activities from being considered "discharges." For example, maintenance of an irrigation ditch would not be considered a "discharge," but the ditch itself would still be subject to CWA jurisdiction and all other activities affecting the ditch would be regulated. The "savings clause" also fails to adopt the important regulatory exclusions for prior converted cropland and water treatment systems.

Additionally, H.R. 2421 does not incorporate exemptions found in statutory definitions, such as the agricultural stormwater exemption. However, not all agricultural activities enjoy the benefit of an explicit statutory exemption. For example, pesticide use is not covered by an explicit statutory exemption. Crop protection is an extremely important agricultural production activity, however, it may involve the deposit or drift of pesticides into areas deemed "waters of the United States." In effect, H.R. 2421 would ignore the authority of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) which requires rigorous scientific tests on crop protection products to ensure that the products can be used without unreasonable adverse water quality risks. Similarly, the application of fertilizer and other vital farming activities that may incidentally add material to "waters of the United States" are not exempted by statute or addressed in the "savings clause" of H.R. 2421.

The confusion created by the "savings clause" is one of many opportunities created by this legislation for third party activist lawsuits which do little to actually improve the quality of our nation's waters and put this country's food production at risk.

In conclusion, we believe that H.R. 2421 would fundamentally alter the longstanding, appropriate and beneficial use of the term "navigable" to help delineate the scope and reach of the CWA. This use of the term "navigable" was understood and intended by Congress when the CWA was passed. H.R. 2421 would also wipe away decades-worth of jurisprudence alongside CWA federal regulations. Likewise, H.R. 2421 would create significant new administrative responsibilities without fully analyzing the implementation and funding imposition of such requirements. The backlog of permits has been estimated to be between 15,000 – 20,000 with an average time lapse of up to several years from submission to approval/denial of any individual permit. How does the Committee plan to address the needs of the regulated community when the already significant delays of today turn into the massive delays of tomorrow?

Mr. Chairman and members of the Committee, corn growers urge that you recognize the significant problems that H.R. 2421 would create if enacted and thoroughly analyze and discuss all consequences of this legislation before moving forward. As it is currently written, we have no choice but to oppose H.R. 2421.

Despite our opposition to H.R. 2421, we do agree that regulatory clarity must be achieved. The Supreme Court recommended that regulatory action consistent with its decision in *Rapanos* be conducted. While Congress can always change laws, we note that the Supreme Court did not cite in *Rapanos* a need for a new legislative meaning be given to CWA jurisdictional waters in order for such regulatory action to be successful. In our view, the job of Congress now should be to force the Corps and EPA to follow through on the Supreme Court recommendation to conduct a formal rulemaking. This would allow all affected parties to contribute to a process which would have the goal of establishing a workable, clear concept of federal jurisdiction under the CWA.

Soil, water, sunlight and nature's other resources are the most important tools a farmer has. Agriculture producers use these resources with care so that future generations can continue to work the land as producers of food, feed, fiber and fuel. Environmental stewardship begins on private lands, and corn growers are committed to leaving our environment in better shape than we found it. Once again, I appreciate the opportunity to provide you with these comments and would be happy to respond to any questions.

April 16, 2008

**Congressional Hearing**
**on**
***"The Clean Water Restoration Act of 2007"***

**United States House of Representatives**
**Committee on Transportation and Infrastructure**

Statement
by

**Linda C. Runbeck**
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State Senator (MN – ret.)
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Mr. Chairman and members of the Committee: Thank you for this opportunity to present testimony today on the *Clean Water Restoration Act.* My name is Linda Runbeck, President of the American Property Coalition, a grass-roots organization that promotes local and regional alternatives to environmental policy. We believe the best way to achieve water quality and other environmental goals is through leadership at the local level, exactly the opposite approach suggested in the *Clean Water Restoration Act.*

**CWA Shifts to National Land Use Control**

Mr. Chairman, the goal of the *Clean Water Act* was to make the nation's rivers, lakes and streams both fishable and swimmable. Unfortunately, progress towards that goal has fallen short. While the CWA has succeeded in reducing industrial discharges, point source pollution from municipal waste plants has taken their place, swamping those gains. Billions have been spent, but the nation's water treatment infrastructure requires continued heavy lifting to finish the job of cleaning up point source pollution. In some small rural communities, nearly 100 in Minnesota, that can't afford a treatment plant,

straight pipe discharge of waste still goes directly right into lakes and rivers, according to a recent report in the StarTribune in Minnesota. Yet, today we're looking at HR 2421, a bill that amounts to national land use control that literally will re-shape the lives and livelihoods of Americans. HR 2421 has come in through the backdoor masquerading as a so-called simple clarification of the *Clean Water Act* when it is not. Rather, this bill has the potential to transform the *Clean Water Act* into a full-blown national land use control act. In it, federal agencies are given unlimited jurisdictional boundaries to intrude on every activity where Americans are involved with land and water. A more appropriate moniker would be the Nationalized Land and Water Control Act. As Reed Hopper of Pacific Legal Foundation observed in written testimony, *"...this bill pushes the limits of federal power to an extreme not matched by any other law, probably in the history of this country."*

**CWA Expansion Would Regulate 'Activities Affecting Waters'**

The bill would open the door to federal regulation of even insignificant, small depressions of mostly dry land, isolated wetlands, arroyos in the desert, sandflats, ditches and gutters, areas scarcely recognizable as 'waters of the U.S'. It doesn't end there: this bill would also, for the first time ever, authorize federal regulation of any 'activities affecting water'. And to be clear, 'activities' might have a direct impact or an indirect impact on waters. So, regulated 'activities' could be take place on a hilltop or a mountain-top 25 miles from a water, and the feds would still have the power to bring that activity to an immediate halt. For those not familiar with our work, we've conducted numerous workshops informing people of this pending bill, and in every city we've been, people stare in utter disbelief. They're going to do what? The federal government? On my private property? This bill is a wolf in sheep's clothing. The added language, "activities affecting these waters" has the potential to expand the federal government's regulatory authority far beyond the physical boundaries of water bodies or their buffers. No matter where an activity takes place, it may have the potential to affect "water" as broadly as it is defined. What activities? Measured in what way? Over what period of time? Under what conditions? All the questions regarding 'activities' regulation remain unanswered. The regulatory takings implicit in this bill, considering the millions of acres affected and the added costs of doing business or not doing business on one's land, are monumental. The ones who stand to lose will be the retirees, families, farmers, home builders, growers, sportsmen, ranchers, small business owners – those with their net worth tied up in homes, lots or land. This bill is about wresting control, from property owners, of the nation's lands and waters.

**Vagueness Leaves More Confusion, More Issues Thrown into Courts**

Far from simplifying, the *Clean Water Restoration Act* would achieve the opposite: broadening the scope of the *Act* far beyond its original intent and creating even more confusion over what is or is not to be regulated. The shame is that Congress, should it pass this bill, will have abdicated its role and transferred power from elected officials to the courts and appointed officials. The absence of clear and consistent standards will lead to abuse. Just as in Reed Hopper's example of a COE bureaucrat heard to say, "a

wetland is whatever we want it to be", now under HR 2421, bureaucrats with the same unbridled zeal will say "an '*activity*' is whatever we want it to be".

The bill also offers a convenient scapegoat for Congress to shifts the costs (and the blame) associated with water clean-up onto property owners and local governments. At the same time, Congress fails to provide them any meaningful measuring stick as the bill contains no national water quality standards. The same criticism has been made of the original *Clean Water Act.* Clemson University economist, Bruce Yandel wrote, "The *Clean Water Act* did not establish a system of national water quality standards as the *Clean Air Act* had established for air quality. Instead the CWA adopted a vague goal concerning fishable and swimmable water quality." Absent any measurable water quality standards or cost-benefit analyses or effective assessment mechanisms, this bill has the potential to exhaust the resources of individuals and local governments. Finally, after intruding on the freedoms and pocketbooks of millions of Americans, this bill can provide us no assurance that the nation's water quality will be improved.

**Criminal Penalties and Citizen Lawsuits Retained from Original CWA**

The bill retains two punitive features from the original *Clean Water Act* – the criminal penalties and the opportunity for citizen lawsuit abuse. The expanded scope of the bill would put many more Americans at risk of the harsh criminal penalties of the original *Clean Water Act* - knowing violators face a maximum three-year prison sentence and fines of $50,000 per violation. The punishment simply doesn't fit the crime given the expanded jurisdiction to isolated wetlands, non-navigable waters and patches of almost dry land. Sadly, it will breed over-compliance in landowners, i.e., a tendency driven by fear to avoid out-of-line penalties -- similar to someone driving 30 mph in a 55 mph zone because they're afraid of the over-zealous cop.

The other punitive feature retained in this bill from the original *Act* is the citizen lawsuit. Unlike most laws where a person has standing in court only if they're personally injured, in environmental law, anyone anywhere can claim harm and bring a lawsuit. With this provision, both private landowners and public lands users have a bullseye on their back for harassment and exorbitant legal defense costs. Furthermore, this bill's inexplicably vague language allows special interest groups to forcibly broaden the statute's jurisdiction through court verdicts. Should this bill be enacted, instead of clarifying long-standing confusion in the original *Act*, it would erase 35 years of jurisprudence and turn the clock back on land and water regulation.

**A Federal Wetlands Management Bureaucracy Will Be Required**

Even the exemptions for agriculture and silvaculture stand to be compromised. Today, in Minnesota, federal exemptions for agriculture are being trumped by the state's *Wetlands Conservation Act.* A farmer's permit application approved under NRCS may be denied under Minnesota's WCA. In Minnesota, areas of almost dry land no bigger than 20 ft x 20 ft, the size of an average family room in a typical American home, are subject to regulation. Our wetlands bureaucracy grows in size and scope as it implements functions

such as wetlands delineation, replacement, monitoring, and enforcement as well as a wetland-banking and credits program, and a vegetation management program. With too much discretion in their hands, we see regulators getting carried away with outright nonsense in the name of environmental protection. A former colleague of mine was denied a permit to remove a large patch of poison ivy on the hillside in his backyard. According to the local government agent, the denial was because poison ivy is a natural substance.

One attorney in a large Minnesota law firm which handles hundreds of wetlands cases, said: "We have a bureaucratic nightmare for the landowner that made a mistake in good faith. Instead of the government having the burden and expense of proving the landowner was wrong, the burden is on the landowner to prove up the negative...There's a lot of nervousness out there."

**Majority Opposes Federalization of all 'Waters'**

There is little public support for greater federal control over lands and waters. Even when presented with arguments on both sides, respondents to a poll conducted in February by the National Center for Public Policy Research were opposed to this legislation by a margin of 54 – 46. More telling were the results when broken out by region. Opposition in the Mountain States was 62%; in the Farm Belt, 59% and in New England, 58%. A poll conducted in the Chairman's own district in northern MN in the late summer of 2006 asked respondents if they'd be more or less likely to support a candidate who "authored legislation to transfer control of all Minnesota lakes, streams and wetlands to the federal government." Seventy-eight percent said they would be "less likely."

**Local Initiatives Ensure Accountability and Common-Sense**

A grass-roots response is the optimal way to achieve cost-effective, common-sense solutions to most environmental problems. As Jonathan Adler wrote in the May 6, 1996 issue of National Review, "Most environmental problems are regional or local in nature, and they should be dealt with accordingly. Washington bureaucrats cannot hope to set rational priorities for every community in the nation, nor should they be allowed to try." Local initiatives are the only way to ensure accountability and broad-based public support. This has been demonstrated repeatedly throughout the country. For example, in 1998, a group of local citizens and county supervisors in California developed their own plan for managing two national forests and a portion of a third. That plan was written into law in 1998 led by U.S. Senator Dianne Feinstein. In Minnesota, prominent democrats and republicans joined forces in the '90's to produce local plans for nationally significant rivers. This was done through county joint powers agreements resulting in a very successful and popular alternative to proposed federal designations under the Wild and Scenic Rivers Act. This kind of approach needs to be given serious consideration with respect to the *Clean Water Act.*

In conclusion, given the local nature of ditches, gutters, isolated wetlands, small depressions in fields, and prairie potholes, the American people deserve something better than a centralized national land use bill imposed on an unsuspecting American public. Congress should take the time to get it right. The right way would be to: 1) establish goals; 2) authorize completion of a comprehensive assessment of the quality of the nation's waters; 3) establish priorities, costs, and a realistic timetable for achieving water quality goals; 4) complete the task of bringing the remaining point sources into compliance; and 5) allow local governments and local citizens the opportunity to develop local and regional alternatives that will ensure the broadest public support in order to achieve the desired results.

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May 1, 2008

The Honorable James Oberstar, Chairman
Committee on Transportation and Infrastructure
Room 2165
Rayburn House Office Building
Washington, DC 20515

Dear Representative Oberstar:

Thank you for the opportunity to further discuss H.R. 2421. I can assure you that the American Property Coalition seeks improvement of the nation's waters for the benefit of present and future generations of Americans.

To that end, the American Property Coalition supports local and regional alternatives to federal environmental initiatives. As such, we cannot support legislative language in H.R. 2421 that we believe is fundamentally flawed in terms of governance. It is only at the grass-roots level where cost-effective, common sense solutions to environmental problems will be found. And it is only at the grass-roots level where good will and consensus-building on a non-partisan basis can prevail.

There is precedence for establishment of such local and regional solutions. In Eastern California, for example, the Quincy Library Group, made up of a coalition of several counties and citizens of diverse backgrounds produced a management plan for two national forests and a portion of a third that ultimately was approved by Congress with the active leadership and support of Senator Diane Feinstein.

In northern Minnesota, a plan for designating many high quality rivers under the federal Wild and Scenic Rivers Act was replaced by a local rivers initiative that received bi-partisan support from the Minnesota Legislature. This initiative also earned praise from former U.N. Ambassador Jeanne Kirkpatrick, Ukrainian Minister of the Environment Yuri Sherbak, and Grigory Reznichenko, head of the largest environmental organization in the former Soviet Union.

This concept can be successful on a watershed basis. County Commissioners Robert Cope and Don Munks testified on positive initiatives in their respective states and regions. Here in Minnesota, two Democrat legislators recently introduced a bill that will produce a citizen-based plan for the Rainy-Lake of the Woods watershed in the northern part of the state.

It would be counterproductive and a travesty for these kinds of locally-led, problem-solving enterprises to be compromised by onerous and expansive federal legislation. Instead, citizens should be empowered and encouraged to actively participate in meaningful environmental projects close to where they live and work. Most people want

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fundamental change in the way we govern ourselves. And we firmly believe that the change needs to come from the bottom up, and not from the top down.

As Barak Obama said in a recent speech, *"This is what change looks like when it comes from the bottom up."*

We challenge the basic assumption of H.R. 2421 that only federal control of all "waters", which in your words includes even those that are geographically isolated as well as waters that are intrastate, intermittent, ephemeral or headwater streams, assures the continued clean up of our waterways.

In fact, it's clear that under federal control, water quality achievement has fallen short. Point source pollution, the original goal of the Clean Water Act, remains unsolved and today's biggest polluters are municipal wastewater plants.

*Rapanos* and *SWANCC* brought long-needed relief from a confusing and arbitrary enforcement system. Now, new Corps of Engineer's regulations have recently been introduced which should be given the necessary time to be implemented, put to the test, and modified if necessary.

Consequently, we believe that no legislation is necessary at this time. Rather, the Federal Government should focus its efforts on promoting local and regional alternatives to water quality goals.

Thank you again for allowing us to participate formally in this important issue. Please let us know how we can be of further assistance.

Sincerely,

Linda C. Runbeck
President

P.S. At the close of the hearing on April 16th, you focused on exemptions in the bill for agriculture and silvaculture. It is critical to point out that such exemptions are tenuous at best given recent trends at the federal agency and state levels that effectively nullify such exemptions. For example, permitting under NRCS is now often overridden by state permit requirements under Minnesota's Wetlands Conservation Act (WCA). WCA can and often does deny projects that NRCS approves!

Similarly, the newest version of the ag subsidy form, AD-1026, vacates for all practical purposes the Prior Converted wetlands exemptions under the 1985 farm bill. Farmers are forced to authorize a new wetlands determination in order to stay in the program, and these determinations are enumerating wetlands and buffers that never existed under the 1985 law.

# Statement of the American Farm Bureau Federation

TO THE
HOUSE COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
REGARDING: THE CLEAN WATER RESTORATION ACT

APRIL 16, 2008

600 Maryland Ave. SW | Suite 1000W | Washington, DC 20024 | p. 202.406.3600 | f. 202.406.3606 | www.fb.org

*AFBF is the unified national voice of agriculture working through our grassroots organizations to enhance and strengthen the lives of rural Americans and to build strong, prosperous agricultural communities.*

**Farm Bureau** represents more than 6,000,000 member families across the nation and Puerto Rico with organizations in approximately 2,500 counties.

**Farm Bureau** is an independent, non-governmental, voluntary organization of families united for the purpose of analyzing their problems and formulating action to achieve educational improvement, economic opportunity and social advancement and, thereby, to promote the national well-being.

**Farm Bureau** is local, county, state, national and international in its scope and influence and works with both major political parties to achieve the policy objectives outlined by its members.

**Farm Bureau** is people in action. Its activities are based on policies decided by voting delegates at the county, state and national levels. The American Farm Bureau Federation policies are decided each year by voting delegates at an annual meeting in January.

Mr. Chairman and members of the House Committee on Transportation and Infrastructure, my name is Carl Shaffer. I own and operate a farm in Columbia County, Pennsylvania, where I raise green beans for processing, corn and wheat. I am the president of the Pennsylvania Farm Bureau, and I am pleased to offer this testimony, not only on behalf of our organization but also on behalf of the American Farm Bureau Federation and farmers and ranchers nationwide. We appreciate the invitation to comment at this legislative hearing on H.R. 2421, the Clean Water Restoration Act (CWRA).

Without question, the Federal Water Pollution Control Act of 1972, better known as the Clean Water Act (CWA), has been one of our nation's most successful environmental statutes. It is responsible for astounding success in improving the health of surface water everywhere in the United States. With that success, however, has come controversy. The regulatory reach of the federal Water Pollution Control Act, almost since the law's inception, has engendered many heated conflicts – over the federal/state relationship, over the question of "navigability" and – perhaps most critically – over the use of private property. The regulatory reach of the CWA, in particular, has kept courtrooms busy as the issue has made its way from the federal district and circuit courts to the United States Supreme Court on several occasions. Anyone who has ever had to deal with the Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA) can relay horror stories about regulatory creep, narrowing exemptions and ever-broadening interpretations of just what constitutes water or a wetland.

The scope of federally regulated waters is extremely important to farmers and ranchers because determinations of areas subject to or excluded from federal CWA regulation directly impact agricultural land. In fact, the jurisdictional reach asserted by the federal agencies has been and continues to be extensive in all cases and excessive in many. Over the 35-year history of the act, litigious activists have used our nations' courtrooms to convince judges to assert federal regulation of local canals, ditches and drains as "waters of the United States." This has had the effect of dragging agricultural operations into a regulatory quagmire that farmers never imagined could exist. For example, the use of herbicides, which are registered and fully regulated by EPA under the federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), now requires an NPDES permits in several western states. It is important to note that this legal and regulatory exercise comes with little or no real gain in water quality in rivers and streams. In fact, it significantly drains resources from the bottom line of many farmers and ranchers, and it results in additional costs for regulators. If H.R. 2421 was to become law, we predict more litigation and an escalation of the costs to comply both for regulators and the regulated community.

Farmers and ranchers are small business owners with a strong practical sense. We recognize and understand that words matter. It is clear to us that Congress intended to use the term "navigable waters" when it passed the CWA in 1972 – or it would not be there. H.R. 2421 would delete the term "navigable waters" from the CWA. It is our view, and that of many legal experts, that deleting this term from the 1972 act would fundamentally expand, not simply restore, the scope of areas that would be subject to federal regulation. The purpose of the deletion, as we understand it, is to sever any connection of federal

jurisdiction over U.S. waters from "navigable waters" and the Commerce Clause under the Constitution. Whether some intended to do that in 1972 may be open to debate; whether Congress did so is not. The history of the act amply demonstrates that the term "navigable waters" was and is at the root of the federal government's regulatory jurisdiction and should remain a part of the statute.

As currently drafted, H.R. 2421 would expand the geographic scope of CWA jurisdiction. Expanding jurisdiction will sweep many agricultural and forestry activities into the scope of CWA regulation simply because such activities are conducted near some isolated ditch, swale, wash, erosion feature or ephemeral stream that would be deemed a "water of the United States."

The legislation being discussed here today represents the most sweeping change to the law since its enactment in 1972. I would like to highlight several of the fundamental changes to the CWA that would occur if H.R. 2421 is enacted:

***Navigable Waters:*** One has only to read the history of the CWA to recognize that Congress intended to use the term "navigable waters." CWA section 101(b) states "[i]t is the policy of the Congress to recognize, preserve, and protect the *primary responsibilities and rights* of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter." CWA § 101(b) [emphasis added]. If all waters are subject to federal control, then few if any waters would be controlled by the states. Use of the term "navigable waters" clearly reflects the intended objective in the act to anchor and preserve this balance with the states. Moreover, it does so without jeopardizing – as some claim – the nation's ability to protect our waters. Deleting the term "navigable waters" from the CWA and replacing it with "waters of the United States" is an alteration to existing law that would unhinge the CWA from the Commerce Clause of the Constitution. Furthermore, as a new congressional pronouncement on federal regulatory jurisdiction, this alteration would have the effect of *wiping the slate clean* and effectively require a complete *do-over* of this part of the code of federal regulations, as well as 35 years of CWA judicial precedent.

It is important to note that H.R. 2421 contains a lengthy set of findings. These findings do not re-assert the "primary responsibilities and rights of the states." In fact, finding (14) explicitly reserves to states the rights and responsibilities only to "manage permitting, grant, and research programs to prevent, reduce, and eliminate pollution, and to establish standards and programs more protective of a State's waters than is provided under Federal standards and programs." This is a far cry from the language of 1972. It confirms for many the belief that H.R. 2421 is designed not to restore the Act's parameters but to expand them.

***All Intrastate Waters:*** H.R. 2421, for the first time ever, extends federal jurisdiction to all "intrastate waters," erasing any distinction between federal waters and state waters. The intent is to make all waters federal waters. A consequence would be that essentially any wet area within a state – in fact, within the entire country – including ditches, pipes,

streets, municipal storm drains, gutters, erosion features, desert washes and even groundwater would be considered a "water of the U.S."

***"Activities affecting these waters":*** This language has no precedent in the 1972 Act, subsequent amendments or existing regulation. It opens a door to federal regulators that is unprecedented in the law, and it opens up jurisdiction not just to "waters" but to dry land such as ditches or farm drainage features. The CWA today regulates discharges, not land-based activities. No reasonable reading of the provision can lead to any conclusion other than that it will impose burdens far beyond those envisioned in the original law.

***Regulatory Exemptions***: The new definition of "waters of the United States" in H.R. 2421 would require federal agencies to conduct new rule-makings under the Administrative Procedures Act in order to implement the new statutory designation. As a consequence, every existing regulatory provision would be open to reconsideration, amendment and, for those who disagree with the outcome, litigation. There is nothing in H.R. 2421 that would ensure continuance of the existing regulatory safeguards as they exist today. In fact, many believe just the opposite: that H.R. 2421 would eliminate the agencies' abilities to continue the common sense regulatory exemptions for prior converted cropland and waste treatment systems. Without either a statutory or regulatory exemption, in many cases prior converted croplands would be classified as federally regulated wetlands and would require a federal permit. To suggest that the protection of prior converted croplands and waste treatment systems is not affected by the text of H.R. 2421 is a fundamental misreading of the bill.

My own farm had drain tiles installed nearly 30 years ago, to make some of the wetter areas of the property into practical and productive agricultural land to feed and fuel our nation. H.R. 2421 could essentially re-open a 30-year can of worms and impose federal protections on my prior-converted cropland. This would only create additional work for farmers like me – as well as government officials – to apply for and issue a federal permit to do what I have been doing for three decades. As a result, there would be no discernable increase in water quality. Surely, there are more productive ways for America's tax dollars to be spent.

***The extent of Congress's constitutional authority***: The proposed statutory language extending federal jurisdiction to the fullest extent empowered under the Constitution will clearly expand current authorities. This ambiguous legislative approach will place critical regulatory decisions in the hands of constitutional lawyers and result in costly litigation to resolve the constitutional reach of federal jurisdiction into "intrastate waters." The bill's omission of current regulatory language providing for a connection to the Commerce Clause and the proposed statutory language extending federal jurisdiction to the fullest extent empowered under the Constitution will clearly expand current authorities.

Pennsylvania has more than 83,000 miles of rivers and streams, more than many states in the union. Most of these waters are currently listed as state waters. H.R. 2421, as currently written, would require a substantial increase in funding for the Corps and EPA

to handle the expected increase in demand for permits. This bill is essentially a call for bigger government. How, given the current budget deficit, does Congress intend to pay for additional regulatory enforcement? Will additional unfunded mandates be passed on to local municipalities to monitor and regulate federal waters?

***The Savings Clause:*** This section of H.R. 2421 contains some of the language used in the existing statutory exemptions for a very narrow set of discharges. The savings clause, however, does not exempt anything from the broad definition of "waters of the United States." Nor does it capture exemptions found in statutory definitions, such as the agricultural storm water exemption. As noted above, not all agricultural and forestry activities enjoy the benefit of an explicit statutory exemption. Pesticide use, the application of fertilizer, and fire suppression activities, are just some examples of vital farming or forestry activities that may incidentally add material to "waters of the United States" and are not exempted by statute or addressed in the "Savings Clause" of H.R. 2421.

***Successes of State Regulation:*** One item of specific interest to many supporters of this bill is that of wetlands. Pennsylvania is making great strides in administering programs to create and restore wetlands that serve the purpose of filtering and purifying water. In a 1994 study funded by the Chesapeake Bay Program, the National Wetlands Inventory concluded that between 1982 and 1989, "Pennsylvania gained 4,683 acres of wetland within the Chesapeake Bay watershed, indicating a significant shift to a gain of wetland resources for the first time." A Dec. 14, 2007, presentation by Pennsylvania's Department of Environmental Protection showed an increase of 2,500 acres in wetlands from 2000 to 2006. In 1995, Pennsylvania's Department of Environmental Protection reworked the entire permitting process to bring the state to lose less than 75 wetland acres annually. Pennsylvania also instituted a wetland mitigation program which has been used on numerous occasions by Pennsylvania Department of Transportation. According to the U.S. Fish and Wildlife Service's National Wetlands Inventory, roughly 404,000 acres of wetlands are now found throughout the commonwealth.

Many of Pennsylvania's waters are well known for their outstanding fishing characteristics. The compact Spruce Creek Valley, home to more than 5,000 dairy cows on multiple farming operations nestled between two mountains, boasts a renowned fly-fishing stream that has been noted as one of President Carter's favorite angling spots. The stream, Spruce Creek, meanders through acres of cultivated land with a history of liquid manure application, yet it provides a fly-fishing experience that is sacred among fly-fishing enthusiasts throughout Pennsylvania and neighboring states. Spruce Creek with its High Quality - Cold Water Fishery (HQ-CWF) designation is an example of the environmental stewardship successes already in place through agricultural practices.

Stream health and aquatic rebirth in the Keystone State are improving each year. An example of this will occur at the Pennsylvania Fish Commission meeting scheduled for next week (April 21 and 22, 2008) where 16 streams – in 11 different counties– will be presented to the Commission for adoption as Wilderness Trout Streams. The Pennsylvania Fish Commission defines such a stream as "a remote, natural and unspoiled

environment where man's disruptive activities are minimized." Wild trout are an excellent indicator of water quality and stream health.

Pennsylvania also has an effective nutrient management program in place. Each year, the commonwealth sees an increase in volunteer nutrient management planning – in the early 1990s fewer than 2,000 acres were enrolled in Pennsylvania's nutrient management program; today this program covers 1.3 million acres. This demonstrates farmers' and ranchers' desires to be good stewards of the land and to protect our natural resources for future generations. In truth, we are already doing so without federal jurisdiction over all bodies of water.

Additionally, Pennsylvania's State Conservation Commission implements the Dirt and Gravel Road Program. This program is an innovative effort to fund environmentally sound maintenance of unpaved roads that have been identified as sources of erosion and sediment pollution. The program is based on the principle that informed and empowered local effort is the most effective way to stop pollution. The Dirt and Gravel Road program has stabilized one quarter of a million square feet of streams near 640 miles of rural roads at more than 1,500 sites across the commonwealth since 1997. These state and local efforts are significantly reducing sediment discharge. Federal jurisdiction over these small streams would only complicate an already successful program.

Farmers, ranchers and landowners all across the country are already working with state and local officials to comply with water quality requirements. Adding the Corps of Engineers or the EPA to the existing regulatory equation will not only make conservation more difficult to accomplish but could stop good conservation efforts altogether.

Pennsylvania's agricultural community and our state's environmental regulatory agency, the Department of Environmental Protection, have taken significant steps in working cooperatively to improve our water quality. This positive effort has provided measurable benefits to the citizens of the commonwealth who live near or use waterways downstream. Days before this hearing was originally scheduled in December of 2007, I co-wrote an editorial with Secretary Kathleen McGinty of the Pennsylvania Department of Environmental Protection. The editorial appeared in *The Harrisburg Patriot* newspaper discussing regulatory requirements imposed at the state level which are effective for our unique geographic location. It seems counter-intuitive to impose a one-size-fits-all federal regulation over all 50 states nullifying productive state efforts or making access to such programs more difficult by adding additional levels of bureaucracy.

Our Department of Environmental Protection has publicly recognized the significant contribution that Pennsylvania's farmers have made in improving water quality in the state's waterways. On January 17, 2008, while speaking before the State Conservation Commission, Deputy Secretary Cathleen Curran Myers noted: "Pennsylvania's Chesapeake Bay Compliance Plan requires 25 million pounds of nutrient reduction from our farmlands – nearly five times the reduction required of our sewage treatment plants

... Our farmers are rising to the challenge, laying claim to more than half of all the nitrogen reductions made by farmers in the multi-state watershed thus far."

In Pennsylvania, water quality improvements have been made as a result of the following state regulations and initiatives (as well as others, not mentioned below):

- Pennsylvania Erosion and Sediment Control Regulations
  *All farms must implement best management practices (BMPs) to control erosion and sedimentation for all disturbed lands, including plowing and tilling activities. Written erosion and sedimentation (E&S) control plans must be kept on site for all plowing and tilling activities that disturb 5,000 square feet or more. Plans must contain plan maps, soils maps, waters of the Commonwealth, drainage patterns, Best Management Practices, descriptions of tillage systems used and schedules.*
- Mandated State Standards for Storage and Land Application of Manure
  *Every animal farmer, regardless of the farm's size or animal concentration, must operate his or her farm and manage animal manure in a manner that is consistent with the practices and standards identified in DEP's "Manure Management Manual for Environmental Protection." Any practice that substantially deviates from the Manual's practices and practices must obtain specific approval or permit from DEP.*
- Pennsylvania Clean Streams Law
  *Prohibits discharges of animal waste into streams. The degree of penalties to be assessed are based on the willfulness of the violation, the damage or injury that occurs to the waters or natural resources of the Commonwealth, the costs for correcting or mitigating the damages, and other relevant factors. Substantial penalties are often assessed on violations that result in fish kills or other serious injury to aquatic life.*
- Pennsylvania's Nutrient and Odor Management Act
  *Prohibits Concentrated Animal Feeding Operations (CAFOs), Concentrated Animal Operations (CAOs) and any operation receiving animal manure from a CAFO or CAO from mechanically land applying the manure within 100-feet of a perennial or intermittent stream with a defined bed or bank; a lake; or a pond. Exceptions exist where a qualified 35-foot vegetated buffer is established along the water bodies. Recent statutory and regulatory changes to the Act also require the development and implementation of nutrient plans that prevent the pollution of both nitrogen and phosphorus into waters of the Commonwealth and that prevent nutrient runoff from off-farm sites on which manure generated from a CAFO or CAO farm is applied.*
- Pennsylvania Concentrated Animal Feeding Operation (CAFO) Program
  *Requires either National Pollutant Discharge Elimination System (NPDES) general or individual permits for animal operations with over 1,000 Animal Equivalent Units (AEUs) and CAOs with over 300 AEUs. Pennsylvania's CAFO permitting program has been expanded to include: poultry operations that use dry manure handling systems and are CAOs with more than 300 AEUs or that have 1,000 or more AEUs; horse operations that are CAOs with more than 300 AEUs or that have 1,000 or more AEUs; or any animal operation defined as a large*

*CAFO under the Federal CAFO Regulations. The scope of farms required under state law to obtain NPDES permits is broader than the scope of farms required to obtain NPDES permits under federal law.*

- Best Management Practices Manual for Pennsylvania Livestock and Poultry Operations
  *This manual was developed to outline Best Management Practices (BMPs) which can assist livestock and poultry operations in their effort to protect local and regional natural resources, and to allow them to successfully integrate into the neighboring community. Some of the BMPs described are mandatory due to current regulations; other voluntary efforts are suggested to assist producers in addressing specific concerns.*
- Pennsylvania Fish and Boat Code
  *Prohibits the placement or allowance of any substance harmful to fish into streams. In addition to imposition of fines, a person who places or allows a substance into a stream is required to pay damages for fish that are killed or injured as a result of the substance being introduced into the stream. Penalties and damages are in addition to any penalties that may be assessed under the Clean Streams Law.*
- Pennsylvania Stream Protection Program
  *Allows streams to upgrade to High Quality (HQ) or Exceptional Value (EV) protection status. The program regulates activities and discharges adjacent to upgraded streams.*
- Pennsylvania Dam Safety and Encroachment Act
  *Permits are required for activities located in, along or across streams or wetlands. Pennsylvania's wetland protection regulations exceed federal requirements.*
- Pennsylvania Flood Plain Management Act
  *The construction of manure storage facilities in a flood plain must meet upgraded construction standards.*

In conclusion, H.R. 2421 will not only expand the act's reach of federal regulatory jurisdiction, but it also will likely cause a new wave of litigation over matters of jurisdiction that have been somewhat settled. H.R. 2421's proposed statutory change to describe federally regulated waters does nothing to clarify or eliminate the confusion over federal jurisdiction. In fact, many believe amending the law in this fashion will actually relegate the question of jurisdiction to the courts. We all know that EPA and the Corps of Engineers have avoided their responsibility to do a rule-making and have a track record of using policies and guidance documents to erode exemptions, expand jurisdiction and inject federal regulation and oversight onto more and more private land in a manner that invites conflict.

Prior to the Supreme Court's ruling in *Solid Waste Agency of Northern Cook County (SWANCC)*, federal agencies attempted to assert jurisdiction over any water body that may potentially be used by migratory birds that fly between or among states. The Supreme Court stated that this "bird rule" went too far and had no relation to the CWA. The Court, in *SWANCC*, recognized and relied upon the CWA's use of "navigable" in the

context of the act's description of federal jurisdiction to conclude that the scope of areas where federal agencies may regulate is limited. Legislation that asserts jurisdiction to what was in existence prior to *SWANCC* does not "restore" federal authority; it would explicitly authorize such jurisdiction for the first time. Moreover, it would authorize federal control as broad or broader than the "bird rule."

In summary, H.R. 2421 would apply the broadest possible interpretation of the CWA, subject only to constitutional limits, and would remove the regulatory boundaries to federal jurisdiction that Congress intended to draw in the CWA throughout its 35-year existence. For these reasons, we oppose H.R. 2421 and urge that it not be approved by the committee. From our perspective (and one that is shared by the Supreme Court), Congress should direct the agencies to conduct a rule-making to resolve any outstanding disputed questions of jurisdiction.

We appreciate your interest in this issue and the opportunity to submit this testimony.

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April 28, 2008

Representative James. L. Oberstar
United States House of Representatives
Committee on Transportation and Infrastructure
2165 Rayburn House Office Building
Washington, D.C. 20515

Chairman Oberstar:

I would again like to thank you for inviting me to testify before the committee on the subject of the Clean Water Act and, in particular, H.R. 2421. I appreciated the opportunity to discuss this topic with you and other members of the committee. In this letter, I would like to offer additional information to supplement my earlier testimony and to address in writing the questions directed to me in the course of the hearing.

In your opening statement, you indicated that your intent was to take Clean Water Act (CWA) regulation back to a time and place before the Supreme Court decisions, and *"not to extend the reach, not to go beyond that purpose"* – to restore, in other words, the *status quo ante*. I appreciate this perspective and the invitation to testify to bring some practical experience to the important goal of protecting water quality. In addition, I hope my comments will help to inform members' views of exactly what the *status quo ante* really was. Some might incorrectly infer that there was a time when no controversy existed or that the law and regulations were black-and-white. That is manifestly not the case. Farmers and ranchers well understand that significant problems in interpretation of the CWA existed pre-SWANCC, and we have first-hand knowledge of the ever-changing interpretation of federally regulated waters espoused by the Corps and EPA that characterized the pre-SWANCC era. We are also all too familiar with the uncertain, idiosyncratic and vague definitions of jurisdictional wetlands that helped to fuel the issues that have been before this committee for years (if not decades).

During the 1980s and 1990s, the Corps and EPA had at least three delineation manuals, countless guidance documents and lists of subjective and ambiguous wetland indicators and criteria. The only parts and pieces of this miasma that did not evolve or were not victims of regulatory creep were those few regulations that had the benefit of full public review and comment through the rulemaking process. Whether the Corps or EPA had the goal of creating moving targets within their programs and positing policies that were, and still are, jurisdictionally vague, that was clearly the effect. The lack of definitive rulemaking has been problematic for the program, landowners and the Courts. It has resulted in unclear, inconsistent and confusing jurisdictional concepts that have frustrated anyone who has had the misfortune to deal with it.

I would also like to address several of the questions you posed during the hearing.

You asked –

*"Do you have any pending permits that you've got to submit to the Corps of Engineers or the EPA?"*

Fortunately, under current law and regulations, farmers and ranchers by and large do not have to seek 404 permits. But if the plain language contained in H.R. 2421 becomes law, it will be entirely possible that every ditch and swale on my property would be become a "water of the United States." Even if this is not the intent, the plain language of the legislation will result in litigation and a court will decide not only the geographic scope of the CWA but to what extent the Corps and EPA can regulate the hydrologic cycle. It appeared to be a consensus within the government panel that testified before the committee that significant questions need to be answered regarding the legal interpretation of the bill.

My concerns can be simply put: the "Savings Clause" does not exempt anything from an extremely broad and pervasive interpretation of what would constitute federally regulated "waters of the United States." Nor does it capture all exemptions found in statutory definitions, such as the agricultural stormwater exemption. Not all agricultural and forestry activities enjoy the benefit of an explicit statutory exemption. Pesticide use, for example, is not covered by an explicit statutory exemption – even though pesticide use consistent with FIFRA label requirements is protective of water quality. This extremely important agricultural production activity can involve the deposit or drift of pesticide into areas deemed "waters of the United States." Similarly, the application of fertilizer, fire suppression activities, and other vital farming or forestry activities that may incidentally add material to "waters of the United States" are not exempted by statute or addressed in the "Savings Clause" of H.R. 2421. It is quite clear, therefore, that changing the CWA in the manner proposed in the legislation leaves an undecided question as to future CWA permits and extends an open invitation to those who wish to sue landowners.

In addition, the language *"activities affecting these waters"* has no precedent in the 1972 Act, subsequent amendments to the Act, or existing regulations. It opens a door to Federal regulators that is literally unprecedented in the law, opening up jurisdiction not just to "waters" but to dry land, ditches or farm drainage features. A fundamental principle of the CWA is the regulation of discharges (discharges of pollutants from point sources in Section 402 and discharges of dredge and fill materials in Section 404), not land-based activities. A reasonable reading of the "activities" provision will lead to the conclusion that it will impose burdens far beyond those envisioned in the original CWA.

I mention these because in the course of the questions directed to me, the savings clause was cited as "very, very clear, specific, binding legislative language." The history of the Act since its enactment in 1972 is replete with instances when the Corps and EPA construed binding legislative language in a manner that effectively narrowed the normal farming exemption. In reality, the current farming exemptions have been eroded over time and have not protected farming as originally envisioned. For example, regulators misconstrue what constitutes plowing and what is an ongoing farming operation. Prior to the Supreme Court decision in SWANCC, the Corps tried to exclude temporary rice levies as not meeting the normal farming exemption. Even now, the Corps and EPA have narrowed what they consider normal farming practices in an attempt limit crop rotational practices. Currently, a number of Corps districts contend farmers need permits to switch the use of their land between pasture grazing and row croplands. Too often, non-farmer regulators decide for themselves what is a normal farming practice and the result is more regulation of farmers.

You also asked –

*"I want to ask you about the prior converted farmland . . . the practice has been to treat farmland as exempted form permitting from regulation, but once the farm – once farming stops, once the farmer ceases to farm the land, sells it for subdivision, for housing, for a shopping center, it then becomes subject to the permitting provisions of the Clean Water Act. Do you have a problem with that?"*

Yes I do. Your statement is fundamentally inconsistent with the 1993 regulation that exempts prior converted cropland from the definition of "waters of the US." This regulation is separate and should not be confused with the 404 (f) statutory exemption and is a designation made regardless of use.

The absolute exclusion of prior converted farmland from federal regulation involves two aspects of particular importance to our nation's farmers. First, the regulation in question has been a part of the *Code of Federal Regulation* for over 14 years now and it explicitly exempts prior converted farmland from the definition of "waters of the United States." Second, once a farmer's land is designated as prior converted cropland and outside the jurisdiction of the CWA, that designation does not change regardless of use. This is one of the very few things that the Corps and EPA have in "black and white."

In 1993, the Clinton Administration conducted a rulemaking to incorporate into the regulatory definition of "waters of the United States" a long-standing Corps and EPA policy excluding prior converted cropland (PCC) from the definition of "waters of the United States" regardless of how the property was used. This final Corps and EPA regulation notified agricultural producers of the regulatory requirements and clarified which areas would not be regulated as "waters of the United States," period.

In addition to farmers and ranchers, it clarified for the entire economy, and financial institutions specifically, that the market value of the land – on which financial decisions were based – would not change due to restrictions in land use from federal regulation. With approximately 55 million acres of PCC, there are significant financial risks to thousands of farmers and hundreds of banks nationwide if Congress rolls back this Clinton era regulation. Such an abrupt policy shift would immediately generate significant financial uncertainty at a time when banking and credit risk are already problematic and causing problems through out our entire economy. In addition, changing this important regulatory exemption will devastate and devalue the assets of the many landowners currently making plans to sell development rights or give conservation easements.

The Clinton Administration took great pains to consider the comments of those that opposed the use of PCC for non-agricultural uses and explicitly document their rationale in defining the geographic scope of CWA jurisdiction to exclude PCC –

> *"we believe that excluding PC cropland from the definition of waters of the U.S. is consistent with EPA's and the Corps' paramount objective of protecting the nation's aquatic resources. By definition, PC cropland has been significantly modified so that it no longer exhibits its natural hydrology or vegetation. Due to this manipulation, PC cropland no longer performs the functions or has values that the area did in its natural condition. PC cropland has therefore been significantly degraded through human activity and, for this reason, such areas are not treated as wetlands under the Food Security Act. Similarly, in light of the degraded nature of these areas, we do not believe that they should be treated as wetlands for the purposes of the CWA."*

The Clinton Administration further justified this important action by stating –

> *"except for a brief period of time after the adoption of the 1989 Federal Manual for Identifying and Delineating Jurisdictional Wetlands (1989 Manual), the Section 404 program has generally not considered such farmed areas as meeting the regulatory definition of wetlands under the CWA. The Corps ceased using the 1989 Manual in August, 1991 at the direction of Congress (Energy and Water Development Appropriations Act of 1992, Publ L. 102-580) and began using its earlier 1987 Corps of Engineers Wetlands Delineation Manual (1987 Manual) for wetlands delineations."*

It is important not to minimize or denigrate the nature of farmland as an asset. Land is generally the largest and most valuable asset that a farmer has. It serves as the critical source of collateral by which farmers are able to secure loans and other debt financing vital to operating their farm businesses. It also serves as the major source for farm families to learn about successful farm management practices and plan for their retirement. The value of land is directly based on how it can be used. Land whose potential for future use is severely restricted through regulation becomes valueless, striking at the very core of economic needs that farm

families must sustain to keep their farms viable. This question is not novel, but it has already been considered extensively by the Corps and EPA during the rulemaking:

> *"In response to commentators who oppose the use of PC croplands for non-agricultural uses, the agencies note that today's rule centers only on whether an area is subject to the geographic scope of CWA jurisdiction. This determination of CWA jurisdiction is made regardless of the types or impacts of the activities in those areas (emphasis added).*

The owners of the more than 55 million acres of prior converted farmland, of whom I am one, are deeply troubled if Congress does not fully understand, even today, fifteen years after it became effective, the proper regulatory treatment of PCC. Any change to this long-standing regulation would signal an abrupt and controversial departure from existing treatment under the law. In fact, many farmers fear that that is exactly the goal of the environmental groups that are pressing so hard for passage of H.R. 2421, and is why most people feel the goal of the legislation is not, as some state, to "restore" the Act but to further broaden its regulatory reach into areas where it has never been valid.

The regulatory reach of the Clean Water Act has been one of the most contentious and controversial aspects of the law. Any change in this policy will generate tremendous financial uncertainty and rekindle long-standing controversy and opposition from the agricultural community.

Thank you for the opportunity to submit these supplemental comments for the record. I look forward to working with you to fully explore the potential impacts of this legislation to avoid any unintended and unnecessary regulation of agriculture.

Sincerely,

Carl T. Shaffer

Carl T. Shaffer
President

58 CFR 45008

RULES and REGULATIONS

DEPARTMENT OF DEFENSE

Department of the Army

Corps of Engineers

33 CFR Parts 323 and 328

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 110, 112, 116, 117, 122, 230, 232 and 401

Clean Water Act Regulatory Programs

Wednesday, August 25, 1993

- **PART 328--DEFINITION OF WATERS OF THE UNITED STATES**

6. The authority citation for part 328 continues to read as follows:

Authority: 33 USC 1344.

7. Section 328.3(a) is amended by adding a new paragraph (a)(8) that reads as follows:

§328.3 Definitions.

* * * * *
(a) * * *
(8) Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.
* * * * *

- **Preface**: On February 28, 1992, the Federal government agreed to settle a lawsuit brought by the North Carolina Wildlife Federation and the National Wildlife Federation (North Carolina Wildlife Federation, et al. v. Tulloch, Civil No. C90-713-CIV-5-BO (E.D.N.C. 1992)) involving CWA Section 404 as it pertains to certain activities in waters of the United States. In accordance with the settlement agreement, the Corps and EPA proposed changes to their regulations on June 16, 1992 to clarify that mechanized landclearing, ditching, channelization, and other excavation activities involve discharges of dredged material when performed in waters of the United States, and that these activities would be regulated under Section 404 of the CWA when they have or would have the effect of destroying or degrading waters of the United States, including wetlands. 57 FR 26894. In addition, the Corps and EPA agreed to propose to incorporate into the Section 404 regulations the substantive provisions of Corps Regulatory Guidance Letter (RGL) 90-8 to clarify the circumstances under which the placement of pilings have the effect of "fill material" and is subject to regulation under Section 404. The agencies stated that the proposal would not affect, in any manner, the existing statutory exemptions for normal farming, ranching, and silviculture activities in Section 404(f)(1).

In addition to the changes proposed in accordance with the settlement agreement, the Corps and EPA proposed to incorporate into the Section 404 regulations the substantive provisions of Corps RGL 90-7 to clarify that prior converted croplands are not waters of the United States for purposes of the CWA. EPA also proposed conforming changes to the definitions of "waters of the United States" and "navigable waters" for all other CWA program regulations contained in 40 CFR parts 110, 112, 116, 117, 122, and 401 to provide consistent definitions in all CWA program regulations.

Overall, these changes were proposed in order to promote national consistency, more clearly notify the public of regulatory requirements, ensure that the Section 404 regulatory program is more equitable to the regulated public, enhance the protection of waters of the United States, and clarify which areas in agricultural crop production would not be regulated as waters of the United States.

- **V. Revision to the Definition of Waters of the United States to Exclude Prior Converted Cropland**

A. Background and Rationale for the Final Rule.

The agencies proposed to add language in the definition of waters of the U.S. providing that the term does not include prior converted ("PC") cropland, as defined by the National Food Security Act Manual (NFSAM) published by the Soil Conservation Service (SCS). PC cropland is defined by SCS as areas that, prior to December 23, 1985, were drained or otherwise manipulated for the purpose, or having the effect, of making production of a commodity crop possible. PC cropland is inundated for no more than 14 consecutive days during the growing season and excludes pothold or playa wetlands. EPA and the Corps stated in the preamble to the proposal that we were proposing to codify existing policy, as reflected in RGL 90-7, that PC cropland is not waters of the United States to help achieve consistency among various federal programs affecting wetlands.
Some commentors supported the proposed change. They felt that it was important for EPA, the Corps and the Department of Agriculture to follow consistent procedures and policies, because to do otherwise undermines the credibility and effectiveness of federal wetlands protection programs. Other commentors opposed the change in its entirety or took issue with specific aspects of the PC cropland definition that they believed were inappropriate. We have decided to retain the approach contained in the proposed rule. The reasons for this approach and responses to comments opposing the proposal are discussed below.

As stated in the preamble to the proposal, we are excluding PC cropland from the definition of waters of the U.S. in order to achieve consistency in the manner that various federal programs address wetlands. One commentor argued that such consistency is not a "goal of the CWA," and that it was therefore not appropriate to base wetlands policy on this consideration. We believe, however, that effective implementation of the wetlands provisions of the Act without unduly confusing the public and regulated community is vital to achieving the environmental protection goals of the Clean Water Act. The CWA is not administered in a vacuum. Statutes other than the CWA and agencies other ***45032** than EPA and the Corps have become an integral part of the federal wetlands protection effort. We believe that this effort will be most effective if the agencies involved have, to the extent possible, consistent and compatible approaches to insuring wetlands protection. We believe that this rule achieves this policy goal in a manner consistent with the language and objectives of the CWA.

Moreover, we believe that excluding PC cropland from the definition of waters of the U.S. is consistent with EPA's and the Corps' paramount objective of protecting the nation's aquatic resources. By definition, PC cropland has been significantly modified so that it no longer exhibits its natural hydrology or vegetation. Due to this manipulation, PC cropland no longer performs the functions or has values that the area did in its natural condition. PC cropland has therefore been significantly degraded through human activity and, for this reason, such areas are not treated as wetlands under the Food Security Act. Similarly, in light of the degraded nature of these areas, we do not believe that they should be treated as wetlands for the purposes of the CWA.

The altered nature of PC cropland was discussed in RGL 90-7, in which the Corps concluded that cropped conditions constitute the "normal circumstances" of such areas. The Corps contrasted PC cropland with "farmed wetlands," defined by SCS as potholes and playas with 7 or more consecutive days of

inundation or 14 days of saturation during the growing season, and other areas with 15 or more consecutive days (or 10 percent of the growing season, whichever is less) of inundation during the growing season. Because the hydrology of farmed wetlands has been less drastically altered than it has for PC cropland, the Corps stated in RGL 90-7 that farmed wetlands continued to retain their basic soil and hydrological characteristics, and that such areas should therefore be considered to be wetlands.

B. Technical Validity of Excluding PC Cropland From Regulation Under Section 404

Several commentors argued that it was not technically valid to treat all PC cropland as non-wetlands. These commentors pointed out that the SCS definition of PC cropland excludes areas that are inundated for more than 14 consecutive days a year, and they argued that this requirement was inconsistent with EPA's and the Corps' regulatory definition of wetlands, which includes areas that have wetland hydrology due to inundated or saturated soil conditions.

We believe that these commentors have oversimplified the relationship between the SCS definition of PC cropland and the wetlands definition under Section 404. In fact, except for a brief period of time after the adoption of the 1989 Federal Manual for Identifying and Delineating Jurisdictional Wetlands (1989 Manual), the Section 404 program has generally not considered such farmed areas as meeting the regulatory definition of wetlands under the CWA. In 1986, the Corps issued RGL 86-9, which interpreted the phrase "normal circumstances" in our regulatory definition of wetlands as referring to an area's characteristics and use in the present and recent past. Under this interpretation, cropped areas did not constitute wetlands where hydrophytic vegetation has been removed by the agricultural activity. In the 1989 Manual, EPA and the Corps modified this approach and evaluated whether a cropped area retained wetland hydrology to the extent that wetland vegetation would return if the cropping ceased. Under the 1989 Manual, therefore, the phrase "normal circumstances," as applied to agricultural areas, meant the circumstances that would be present absent agricultural activity. The Corps ceased using the 1989 Manual in August, 1991 at the direction of Congress (Energy and Water Development Appropriations Act of 1992, Publ L. 102-580) and began using its earlier 1987 Corps of Engineers Wetlands Delineation Manual (1987 Manual) for wetlands delineations. EPA is currently also using the Corps' 1987 Manual in implementing Section 404 (See 58 FR 4995, January 19, 1993). While the 1987 Manual does not address application of the "normal circumstances" phrase as it relates to areas in agricultural production, both agencies continue to follow the guidance provided by RGL 90-7, which interprets our regulatory definition of wetlands to exclude PC cropland.

The evolution over the last several years in the EPA and Corps policy for delineating wetlands in agricultural areas attests to the difficult technical, legal and policy considerations that bear on this issue. We therefore disagree with commentors who seemed to believe that ascertaining the jurisdictional status of PC cropland is a cut-and-dried technical question readily resolved by reference to generally accepted delineation methodologies. In utilizing the SCS definition of PC cropland for purposes of Section 404 of the CWA, we are attempting, in an area where there is not a clear technical answer, to make the difficult distinction between those agricultural areas that retain their wetland character sufficiently that they should be regulated under Section 404, and those areas that been so modified that they should fall outside the scope of the CWA. As is inevitable where the government engages in such line-drawing, we recognize that the particular line we have chosen to draw is not perfect. Two areas that are inundated for 14 days and 15 days a season respectively may not, in fact, differ materially in terms of their function and values. This criticism, however, could be made no matter where we chose to draw the line between wetlands and non-wetlands. We believe that the distinctions under the Food Security Act between PC cropland and farmed wetlands provides a reasonable basis for distinguishing between wetlands and non-wetlands under the CWA. In addition to the fact that we believe this distinction is an appropriate one based on the ecological goals and objectives of the CWA, adopting the SCS approach in this area will also help achieve the very important policy goal of achieving consistency among federal programs affecting wetlands.

C. Role of SCS PC Cropland Determinations

In the preamble to the proposal, we stated that jurisdictional determinations under the CWA can only be made by EPA and the Corps. While we stated we would accept and concur in SCS determinations to the extent possible, this rule does not alter the final authority of EPA regarding CWA jurisdiction.
This discussion in the preamble was criticized by commentors from several angles. Some commentors

were concerned that the proposed rule effectively "delegated" EPA's and the Corps' authority regarding CWA jurisdiction to SCS. Some of these commentors urged that SCS be required to obtain Corps (or EPA) concurrence for the purposes of making PC cropland determinations. From the other side, commentors argued that EPA and the Corps should not be allowed to make an independent judgment at a site, and should be required to defer absolutely to SCS determinations.

In response to these comments, we note that today's rule does not "delegate" EPA's ultimate authority for determining the scope of geographic jurisdiction under the CWA. At the same time, we believe it is critical that duplication between the SCS's wetlands program and the CWA Section 404 ***45033** program be reduced. In that regard, we believe that farmers should generally be able to rely on SCS wetlands determinations for purposes of complying with both the Swampbuster program and the Section 404 program. In order to make this reliance possible, we are working with SCS to develop appropriate procedures, including monitoring, for coordinating wetland determinations by the agencies. We are also working with SCS to develop field guidance for implementing the 1987 Corps Manual to clarify procedures for identifying wetlands in areas managed for agriculture, and are expediting current efforts to revise the SCS's NFSAM to provide greater consistency between our wetlands delineation procedures. Moreover, we are also developing an interagency training program with SCS and other agencies to ensure that agency field staff are properly trained, and that standard, agreed-upon methods are utilized in making wetland determinations. However, in order to clarify the relationship between determinations made by SCS and the Corps or EPA, we have added language to the rule itself stating that the final authority regarding CWA jurisdiction remains with EPA.

We also disagree with commenters who stated that SCS should be required to obtain EPA or Corps concurrence in their PC cropland determinations. First, since SCS is the administering agency under the Food Security Act, we do not believe it would be appropriate to require that SCS obtain the concurrence of other federal agencies before making determinations under that statute. Moreover, requiring EPA/Corps concurrence on every PC designation made by the SCS would be an inefficient use of our limited resources, since a site being evaluated by SCS may not be one where a regulated activity will occur (i.e., a discharge of dredged or fill material not exempt under Section 404(f)). In those cases, a Section 404 delineation will not be necessary at all, and expending our resources on delineations in such cases would be a waste of taxpayer money. In light of EPA's ultimate statutory responsibility for determining the scope of CWA jurisdiction, we cannot satisfy commentors who argued that we should be required to defer absolutely to SCS determinations. However, recognizing SCS's expertise in making these PC cropland determinations, we will continue to rely generally on determinations made by SCS.

Many commentors expressed concerns about the alleged lack of consistency and reliability in SCS prior converted cropland determinations. These commenters stated that most SCS PC cropland determinations are made based on aerial photos, and they argued that site visits were necessary to accurately delineate wetlands under Section 404. As discussed earlier, the SCS, in consultation with the Corps and EPA, is working to improve the consistency of its prior converted cropland determinations.

D. Expand Exclusion to All Agricultural Areas

Some commentors argued that the exclusion of agricultural areas should not be limited to land that meets the SCS definition of PC cropland but that the exclusion should apply to any agricultural area that is not inundated for more than 14 consecutive days during the growing season. While these commentors believed there would be advantages to treating all agricultural areas similarly in this manner, we believe that such considerations are outweighed by the importance of achieving the goal of consistency with the PC definition under the Food Security Act.

E. Incorporation of NFSAM Into EPA/Corps Regulations

Several commentors made the procedural argument that adoption of the NFSAM by reference into EPA's and the Corps' regulations violated the Administrative Procedure Act. These commentors pointed out that the NFSAM had not yet gone through rulemaking when it was adopted by SCS and they argued that reference to the NFSAM in the proposed rule was not legally adequate. Other commenters questioned the appropriateness of incorporating the NFSAM into EPA's and the Corps' regulatory provisions when the agency that developed the manual (SCS) uses it as a guidance document. Some commentors also felt that EPA and the Corps should retain the flexibility to follow future revisions to the NFSAM made by

SCS.
As explained above, one of the primary reasons that EPA and the Corps are amending the definition of waters of the United States to exclude prior converted croplands is to ensure consistency in the way various federal agencies are regulating wetlands. We believe that consistency with SCS policy will best be achieved by our utilizing the NFSAM in the same manner as SCS, i.e., as a guidance document used in conjunction with other appropriate technical guidance and field testing techniques to determine whether an area is prior converted cropland. We also agree with the commentors' arguments about the need to be able to maintain consistency with SCS in the future when revisions are made to the NFSAM; incorporating one version of the manual into EPA's and the Corps' regulations would impair our ability to follow future revisions to the NFSAM in administering Section 404. The final rule, therefore, continues to exclude prior converted cropland from the definition of waters of the United States, but does not specifically incorporate by reference the provisions of the NFSAM. EPA and the Corps will, however, implement this exclusion in a manner following the guidance contained in the NFSAM and appropriate field delineation techniques, and will continue to rely, to the extend appropriate, on determinations made by SCS. The Corps and EPA will continue to work with SCS on procedures for implementing the prior converted cropland portion of the NFSAM. We will also issue policy guidance directing our field staff to utilize the guidance in the NFSAM when determining the presence of wetlands on agricultural lands. By codifying our existing policy that prior converted croplands are not waters of the U.S., the final rule strengthens the regulatory basis for not regulating these areas under Section 404. The fact that we have not incorporated by reference the actual provisions of the NFSAM into our rules does not undercut our ability to maintain this consistency. Rather, as explained above, we believe that utilizing the NFSAM as a guidance manual, as it is used by SCS, will enhance consistency in the administration of the Food Security and Clean Water Act programs.

F. Section 404(f) Exemptions

Some commentors expressed concern that codifying Regulatory Guidance Letter 90-7 would eliminate all exemptions for agricultural activities under Section 404(f)(1)(A) of the Act. Other commentors felt that the rule was not needed and that prior converted croplands should be considered exempt under the Section 404(f) normal farming activities exemption.
As previously stated in this preamble, today's rule will not eliminate or in any way effect the exemptions for normal farming, ranching, or silviculture activities in Section 404(f)(1). Moreover, the exemptions apply only to discharges and not to the issue of whether an area is within the geographic scope of Section 404.

G. Criteria for Abandonment

Some commentors expressed concerns that the abandonment rule was not clear. A few commentors opposed ***45034** the use of prior converted croplands for non-agricultural uses. One commentor objected to the fact that there is no mechanism providing for "recapture" into Section 404 jurisdiction of those prior converted croplands that revert back to wetlands. One commentor objected to the requirement that a prior converted cropland is considered abandoned unless it is used for the production of an agricultural commodity at a regular interval, stating that it should include use for any agricultural production, including hay and pastureland.
The Corps and EPA will use the SCS provisions on "abandonment," thereby ensuring that PC cropland that is abandoned within the meaning of those provisions and which exhibit wetlands characteristics will be considered wetlands subject to Section 404 regulation. While we agree that SCS's abandonment provisions may be complex, SCS has been applying these provisions for several years in implementing the Swampbuster program, and farmers have become familiar with the standards used to determine whether a property has been "abandoned." If EPA and the Corps were to use different abandonment provisions in implementing today's rule, we believe the resulting inconsistency between the two regulatory programs would serve only to create confusion as to which standards are applicable to the same parcel of property. In response to commentors who opposed the use of PC croplands for non-agricultural uses, the agencies note that today's rule centers only on whether an area is subject to the geographic scope of CWA jurisdiction. This determination of CWA jurisdiction is made regardless of the types or impacts of the activities that may occur in those areas. The agencies also note that today's rule will provide a mechanism for "recapturing" into Section 404 jurisdiction those PC croplands that revert back to wetlands where the PC cropland has been abandoned. Finally, in response to the request that a PC cropland not be considered abandoned if the area is used for any agricultural production, regardless of whether the crop is an agricultural commodity, we note that SCS's abandonment provisions do

recognize that an area may be used for other agricultural activities and not be considered abandoned. In particular, PC cropland which now meets wetland criteria is considered to be abandoned unless: For once in every five years the area has been used for the production of an agricultural commodity, or the area has been used and will continue to be used for the production of an agricultural commodity in a commonly used rotation with aquaculture, grasses, legumes or pasture production.

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April 30, 2008

The Honorable James Oberstar
Chairman
Committee on Transportation and Infrastructure
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Thank you once again for providing me the opportunity to present testimony before the Committee on H.R. 2421, the Clean Water Restoration Act of 2007. Overall, I believe there was broad agreement that the Clean Water Act has helped to bring about dramatic improvement in the quality of the nation's waters. I also believe that much of that progress has resulted from the federal-state partnership and that the foundation of that partnership is a recognition that not all waters are, nor need be, subject to federal jurisdiction.

We further believe it is important to preserve the constitutionality of the Clean Water Act and the appropriate balance that has been the foundation of the Act's success. Central to this balance is maintaining all references to "navigable waters."

With respect to assuring that we continue to make progress on achieving the goals of the Clean Water Act, we believe that perhaps the most appropriate first course of action – one which we have advocated for some time which has yet to be undertaken – is to have the agencies undertake a thorough rulemaking that clarifies the regulatory reach of the CWA and draws a clean distinction between federal waters and state waters. We believe the committee could appropriately direct such an undertaking through legislation. Such an exhaustive vetting though the rulemaking process would help to clarify protections for all waters, with federal protection encompassing the vast majority of waters and states retaining responsibility for the remainder, consistent with existing language in the Clean Water Act.

In response to your letter seeking suggestions, the Pennsylvania Farm Bureau believes any viable legislative proposal must:

- Maintain the term "navigable waters" in the CWA;
- Protect and maintain all regulatory exemptions such as prior converted cropland and waste treatment systems;
- Eliminate all references to "activities" affecting waters; and
- Eliminate all references to "intrastate waters."

Regarding extending federal jurisdiction to "isolated, intrastate waters" and all "ephemeral waters" we recommend that Congress consider addressing the protection of these waters through incentive programs and funding for state initiatives.

Thank you again for the opportunity to participate in the recent legislative hearing. The information was both helpful and constructive.

Sincerely,

Carl T. Shaffer

Carl T. Shaffer
President

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**Testimony of Mark Squillace**
Professor of Law and Director, Natural Resources Law Center
University of Colorado School of Law
**Before the U.S. House of Representatives**
**Committee on Transportation and Infrastructure**
***The Clean Water Restoration Act of 2007*, H.R. 2421**

**16 April 2008**

The Honorable James E. Oberstar, Chairman
Committee on Transportation and Infrastructure
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Oberstar:

Thank you for the opportunity to appear before the Committee on Transportation and Infrastructure in support of the Clean Water Restoration Act of 2007. This legislation is critically important not only to protect and conserve our diminishing wetlands, but also to assure broad federal authority over all pollution discharges into our nation's waters. In my testimony this morning I wish to make four points.

1. Our wetlands are a national treasure and we, as a nation, have already sacrificed far too much of this irreplaceable resource.
2. Maintaining the integrity of our nation's waters depends upon maintaining broad federal regulatory authority.
3. Recent Supreme Court decisions have severely constrained federal authority, created confusion about the scope of the Clean Water Act, and diverted significant agency resources away from protecting our nation's waters. These problems can be effectively addressed only by the Congress.
4. The proposed Clean Water Restoration Act of 2007 will effectively address the problems that the Supreme Court's recent decisions have created with the current law.

I will also suggest several minor changes to the proposed legislation that I believe will help clarify congressional intent.

## The Importance of Wetlands and the Extent of Wetlands Loss

Wetlands are prized for many reasons. They provide important ecosystem services to plant, animal, and human communities; they serve as natural wastewater treatment facilities, filtering out pollutants and improving water quality; and they absorb the impact of floods and storms and stabilize runoff by retaining water and releasing it gradually.

Wetlands also serve important aesthetic functions. In addition to providing natural ecosystems along coastal areas, they support many species of birds and other wildlife that provide recreational enjoyment for millions of people. The EPA has described wetlands as "nurseries of life" because countless plants and animals rely on them for food, habitat, and breeding grounds. Although they cover less than 5 percent of the land surface, wetlands host 31 percent of all plant species in the lower 48 states. They are among the most fertile and biologically productive ecosystems in the world, rivaling tropical rainforests and coral reefs in the number and diversity of species they support. More than one-third of threatened or endangered species live only in wetlands, and many species depend on wetlands to reproduce.

Wetlands are also vitally important to our marine resources. They provide an essential link in the life cycle of 75 percent of the fish and shellfish commercially harvested in the United States, and up to 90 percent of the recreational fish catch. Two-thirds of all fish consumed worldwide depend on coastal wetlands at some stage in their life cycle.

Given the important ecological role that wetlands play, the extent of wetlands loss over the past two centuries is shocking. Scientists estimate that we have lost 53 percent of the original wetlands acreage in the lower 48 states over a 200-year period between the 1780's and 1980's—a staggering loss of an average of approximately 66 acres of wetlands (or about 50 football fields) every hour of every day for 200 years. While the rate of wetlands loss has slowed over the past 25 years, the quality of our remaining wetlands has continued to decline.

### The Need for Broad Federal Authority

If Congress accepts, as I do, that wetlands destruction and water pollution must be regulated and controlled at some level of government, then the only remaining question is at what level of government should that regulation occur? Should regulation occur at the state or federal government, or should it be delegated to some local authority? I believe that when properly understood to encompass all of the federal government's constitutional authority, the Clean Water Act strikes exactly the right balance. It gives plenary authority to the federal government while reserving to the states the opportunity to approve and

manage individual permitting programs and decisions. Water is an article of commerce. It exists in a unitary, hydrologic cycle and flows across our state and national borders. Efforts to restrict the federal government's jurisdiction by distinguishing waters that might or might not have a nexus to navigable waters, as the Supreme Court's *Rapanos* decision appears to require, serve no useful purpose. All of our nation's water and all of our remaining wetlands warrant protection. A federal program that encompasses only some of our waters and wetlands will inevitably force states to adopt supplemental program that are likely to promote inconsistency, confusion, delays, and significant new administrative costs. And all of this will result in a program that is less protective of our nation's waters and wetlands.

In discussions of federal environmental laws, one often hears complaints about burdensome federal programs. Yet the Clean Water Act is remarkable for the broad support that it has received from both the states and private parties. One of the most astonishing facts about the *Rapanos* case is that 34 states and the District of Columbia filed an amicus brief in support of the federal government's broad construction of the statute.[1] Only two states – Utah and Alaska – filed a brief supporting Mr. Rapanos. And while Justice Scalia complained in his plurality opinion in *Rapanos*, that the U.S. Army Corps of Engineers "exercises the discretion of an enlightened despot," the evidence suggests that most permit applicants view their experience dealing with the Corps very favorably. Kim Diana Connolly, *Survey Says: Army Corps No Scalian Despot*, 37 ELR 10317 (2007).

### The Problems Caused by the Supreme Court's Construction of the Phrase "Navigable Waters" under the Clean Water Act

The Clean Water Act regulates the discharge of pollutants and of dredged and fill materials into "navigable waters" which it defines to encompass the "waters of the United States." 33 U.S.C. § 1362(7). The statute does not further define the term "waters of the United States," but the conference report on the legislation makes clear that Congress intended the "broadest possible constitutional interpretation." S. Rep. No. 92-1236, at 144 (1972). On the floor of the House, Congressman John Dingell explained further that – "this new definition [of navigable waters] clearly encompasses all water bodies, including main streams and their tributaries, for water quality purposes. No longer are the old, narrow definitions of navigability…going to govern…." 118 Cong. Rec. 33,756-57 (Oct. 4, 1972).

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[1] In alphabetical order, these states are: Arizona, Arkansas, California, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Illinois, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Washington, and Wisconsin.

Unfortunately, a majority of the Supreme Court has been unwilling to accept these expressions of congressional intent. In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC),* 531 U.S. 159 (2001), the Court held that the Clean Water Act did not give the Corps the authority to regulate intrastate ponds used by migratory birds because, according to the majority, in enacting the Clean Water Act Congress did not intend "to exert anything more than its commerce power over navigation." *Id.* at 168 n.3. Four justices – Stevens, Ginsburg, Souter, and Breyer – dissented and would have deferred to the expansive interpretation of the Clean Water Act put forward by the EPA and the U.S. Army Corps of Engineers.

More recently in *Rapanos v. United States*, 126 S.Ct. 2208 (2006), a four-judge plurality concluded that for purposes of §404 of the Clean Water Act, which requires permits for discharges of dredged and fill material into waters of the United States, federal jurisdiction "includes only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes." *Id.* at 2225. Writing for the plurality, Justice Scalia conceded that there was an "inherent ambiguity" in attempting to draw a line between water and land, and so he deferred to the Corps' decision to include wetlands that actually abut "traditional navigable waters." *Id.* Beyond this, however, he refused to recognize the Corps' authority. Writing separately, Justice Kennedy took a broader view of the law than the plurality, but he would still demand a "significant nexus" between the wetlands and traditional navigable waters. Once again, the four dissenters in *SWANNC* dissented in *Rapanos* for much the same reason as they did in *SWANCC*.

Whether one agrees or disagrees with the legal analysis in the various Supreme Court opinions construing the phrase "navigable waters," one thing seems clear. As currently construed by the Supreme Court, the Clean Water Act does not encompass the full scope of federal power under the constitution. As a result, the federal government currently lacks the statutory authority to fully control water pollution discharges and wetlands destruction activities. Moreover, the divergent opinions from the Supreme Court have created a significant amount of confusion as to the scope of federal power. At best, this leads to expensive and time-consuming ad hoc reviews of the nexus between wetlands and non-navigable waters and navigable waters to determine whether or not the federal government has regulatory jurisdiction. At worst, it leads to gaps in the regulation of environmentally damaging activities, inconsistent decisions, and an agency reluctant to test the full scope of its power. The confusion and uncertainty created by the current state of the law virtually invites litigation.

It makes no sense to continue down this road. If we agree as a policy matter that water pollution should be regulated regardless of the site of its release, and if we agree that our remaining wetlands should be protected wherever they are located, then we ought not

waste time and government resources fighting over jurisdictional issues. The law should be amended to restore Congress' original intent.

Perhaps the best way to understand the mischief that has been created by the *Rapanos* decision is to look at two recent cases applying that decision. In the first case, *United States v. Chevron Pipe Line Co.*, 437 F.Supp.2d 605 (N.D. Tex. 2006), the United States brought an action against Chevron Pipe Line after a corroded pipeline leaked 3,000 barrels of oil into an ephemeral creek. The action was brought under the Oil Pollution Act, which imposes strict liability for natural resource damages and removal costs for the discharge of oil "into or upon the navigable waters or adjoining shorelines." 33 U.S.C. § 2702(a). As with the Clean Water Act, "navigable waters" are defined in the Oil Pollution Act as "waters of the United States." *Id.* at § 2701(21). The unnamed creek that received the discharge flows into Ennis Creek, which flows into Rough Creek, and then to the Double Mountain Fork of the Brazos River. The spill occurred 500 feet upstream of the confluence with Ennis Creek and extended to that confluence. However, the evidence showed that there was no flowing water in the creek from the time of the spill in August 2000 until October 12, 2000, when the first rainfall event occurred. Chevron Pipe Line claimed that by the time of the rainfall, it had completed remedial measures. The United States produced evidence indicating that extensive areas of oil contaminated soil remained until some time after October 12. Nonetheless, relying in large part on the *Rapanos* decision, the district court concluded that Chevron's motion for summary judgment should be granted because there was no evidence "that the site of the farthest traverse of the spill is *navigable-in-fact* or adjacent to an open body of navigable water." 437 F. Supp.2d at 615. *See also, San Francisco Baykeeper v. Cargill Salt Division*, 481. F.3d 700 (9th Cir. 2007), suggesting that only wetlands adjacent to navigable waters, and not other water bodies, are covered by the Clean Water Act.

An even more disturbing decision was recently announced by a three-judge panel of the 11th Circuit Court of Appeals in a criminal prosecution for Clean Water Act violations. *United States v. Robison*, 505 F.3d. 1208 (11th Cir. 2007) involved not a §404 permit but rather a §402 permit, which governs discharges of pollutants into waters of the United States. The defendants had obtained a §402 permit authorizing pollution discharges into Avondale Creek, which flowed continuously into Village Creek, and then into Bayview Lake and Locust Fork, and ultimately into the navigable Black Warrior River. The defendants had repeatedly and knowingly violated their permit, ordered employees to violate the permit, and lied to the EPA about what they were doing. The Justice Department brought a 25-count indictment against the defendants. The district judge dismissed two counts, and the jury convicted on 20 of the remaining 23 counts. On appeal to the 11th Circuit, the Court held that while the trial court decision could be sustained under either the four-person plurality opinion in *Rapanos*, written by Justice Scalia, or the four-person dissenting opinion of Justice Stevens, the decision should nonetheless be

reversed because the trial judge had failed to instruct the jury on Justice Kennedy's significant nexus test, which, the court held, was the governing law of the *Rapanos* case.

While a good argument can be made that the courts in both the *Chevron Pipe Line* and *Robison* misapplied *Rapanos*, it is hard to argue with the fact that *Rapanos* has caused considerable confusion as to the scope of the current law and has greatly increased the government's burden in proving its case. Of course, if there were a reasonable disagreement about the need to regulate oil spills or pollution discharges that occur in creeks and streams that ultimately flow into "traditional navigable waters," perhaps the administrative costs of proving these cases would be worth it. But I believe that a substantial consensus exists in this country for regulating these pollution discharges into virtually any water body even where the connection to traditional navigable waters may seem remote and speculative. Thus, no policy justification exists for the burdens imposed by the *Rapanos* decision.

### The Clean Water Restoration Act of 2007

The Clean Water Restoration Act of 2007 would amend the current law defining the phrase "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.

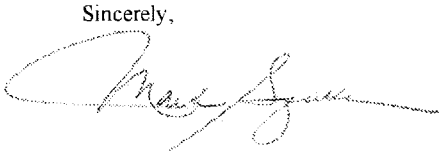
Wisely, the proposed legislation also strikes the phrase "navigable waters" entirely from the statute. This change reflects the important observation that the Clean Water Act is a pollution statute and has nothing to do with navigation. Although Congress' broad intent may have been clear, the historic reference in the statute to "navigable waters" was a mistake and this correction is long overdue. I have two suggestions that would further improve this legislation. First and most importantly, many other federal laws build off of the Clean Water Act in using the phrase "navigable waters" to establish the scope of the federal government's jurisdiction. A thorough review of all such legislation is critically important so that similar changes can be made to this other legislation as well. One important example, relevant to the *Chevron Pipe Line* case, is the Oil Pollution Act, which, like the Clean Water Act limits its scope to "navigable waters" defined simply as "waters of the United States." 33 U.S.C. § 2701(21). Other laws that use the phrase "waters of the United States," such as the Non-indigenous Aquatic Nuisance Prevention and Control Act of 1990, 16 U.S.C. §471 *et seq.*, should be reviewed and considered to determine whether a complementary amendment should be adopted.

Second, while the new proposed definition of "waters of the United States" seems clear, Justice Scalia's opinion in *Rapanos* relies on a dictionary definition of the word "waters" to severely limit the meaning of that phrase. While use of a common dictionary would seem inappropriate where Congress provides the definition to be used, Congress might nonetheless consider adopting a phrase that is more descriptive of its intent such as "constitutional waters." If jurisdiction under the Clean Water Act is extended to all *constitutional waters*, little doubt would remain about Congressional intent.

Thank you for the opportunity to appear before the Committee on Transportation and Infrastructure. My views on this matter are more fully developed in a recently published article entitled. *From "Navigable Waters" to "Constitutional Waters": The Future of Federal Wetlands Regulation*, 40 MICH. J. OF L. REF. 799 (2007), *available at* http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=40171.

Please let me know if I can provide any additional information regarding my support for the Clean Water Restoration Act of 2007.

Sincerely,



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MAY 16 2008

May 1, 2008

The Honorable James E. Oberstar, Chairman
Committee on Transportation and Infrastructure
U.S. House of Representatives
Washington, DC 20515

**RE: Follow- up to April 16th Testimony before the U.S. House of Representatives Committee on Transportation and Infrastructure on *The Clean Water Restoration Act of 2007*, H.R. 2421**

Dear Mr. Chairman:

Thank you for the opportunity to provide legislative suggestions for improving the Clean Water Restoration Act of 2007. I have several suggestions.

First and foremost, I urge your continued support for removal of the phrase "navigable waters" from the Clean Water Act. The Clean Water Act never was about navigability. The phrase came from the 1899 Rivers and Harbors Act (RHA). The focus of the RHA was on obstructions to navigation. Section 13 of that statute, known as the Refuse Act, included a provision that prohibited the discharge of refuse into navigable water "*or its tributaries*" without first obtaining a permit from the Corps of Engineers. 33 U.S.C. §407 (2000).

In contrast to the RHA, the focus of the Federal Water Pollution Control Act of 1972 (now known as the Clean Water Act) was always on pollution. *It never had anything to do with navigation*. The primary purpose of the Clean Water Act is "*to restore and maintain the chemical, physical, and biological integrity of the Nation's waters*." 33 U.S.C. §1251. Unfortunately, in drafting the Clean Water Act, Congress retained the phrase "navigable waters" and it defined the phrase ambiguously to mean "waters of the United States." Congress' intent, however, was clear. The Conference Report on the legislation expressly declared Congress' intent "*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.*" S. Conf. Rep. No. 1236, 92d Cong., 2d Sess. 144 (1972).

Notwithstanding this clear expression of Congressional intent, a majority of the Supreme Court has not been willing to credit the legislative history of the Act and has relied instead on a more traditional definition of the phrase "navigable waters." Thus, Justice Kennedy's concurring opinion in *Rapanos* makes the Corps' jurisdiction over wetlands dependent

"upon the existence of a significant nexus between the wetlands in question and *navigable waters in the traditional sense*." As noted above, Congress plainly did not intend that the Courts would construe the phrase "navigable waters" in any traditional sense. Indeed, one of the great ironies of the *SWANCC* and *Rapanos* decisions is that they construe jurisdiction under the Clean Water Act more narrowly than exists under the old Refuse Act, because the Refuse Act explicitly encompasses tributaries of navigable waters. Few would argue that the Clean Water Act was intended to broaden federal authority well beyond the Refuse Act.

At the hearing on April 16, 2008, Congressman Rahall expressed concern that removing the phrase "navigable waters" could begin an unraveling of the statute in a way that could not be predicted or controlled. Implicit in this concern is the suggestion that the Clean Water Act might be construed to cover virtually all waters. But no one should find this troubling. The whole point of the original statute and of the Restoration Act is to encompass all waters that might contribute to water pollution in the United States. The vast majority of States support this broad construction because it assures a unitary system for managing water quality. Moreover, under the Clean Water Act, States remain free to adopt more stringent standards than are required by the federal law, and they may assume regulatory responsibility for the statute's permitting programs. Indeed, one of the chief advantages of the Restoration Act is that by covering essentially all waters that might contribute to water pollution, regulators and the regulated community will no longer be forced to engage in protracted disputes, often involving litigation, over the question of whether the federal government has jurisdiction over the particular waters. The Army Corps of Engineers alone currently performs an estimated 100,000 jurisdictional determinations each year. These time-consuming and costly determinations do nothing to promote clean water. The Restoration Act will largely make these determinations unnecessary. The savings in government and private resources will be enormous.

This analysis is not intended to diminish the concerns that some have raised that the revised definition of "waters of the United States" as proposed in the Restoration Act might broaden the Clean Water Act to encompass agricultural lands or minor artificial water bodies. Since the Restoration Act will simply bring the statute back to where it was before the *SWANCC* and *Rapanos* decisions, the extent of this problem should not be overstated. Moreover, the EPA and the Corps have shown themselves to be quite adept at promulgating general permits for minor activities that might otherwise be construed to require an individual permit. Many of these permits do not even require pre-construction notice. Furthermore, it is important to remember that the definition of "waters of the United States" is not by itself a regulatory provision. Thus, waters that are encompassed by the definition are generally subject to regulation only if, for example, they receive a discharge of dredged or fill material, or of a pollutant from a point source.

Nonetheless, if it would further ease concerns to include in the Restoration Act several additional narrowly-tailored exceptions, this should not raise serious objections. Set forth

below are descriptions of three (3) possible categories of waters that might be exempted from the definition of "waters of the United States" that are of particular concern to farmers and ranchers in Western states and that relate to the use of State water rights.

(1) Irrigation practices in the West sometimes result in the artificial creation of "wet meadows." Wet meadows are expressly included in the proposed definition of "waters of the United States." Nonetheless, since at least 1990, the EPA and Corps have agreed not to regulate activities on "prior converted cropland" even if those lands were wetlands so long as they were converted to agricultural production before December 23, 1985. An express statutory exemption for prior converted cropland consistent with the current agency policy would help insure that these agricultural lands are not treated as "waters of the United States."

(2) Wetlands are sometimes created artificially as a result of normal leakage from earthen irrigation ditches. As water resources become more scarce, farmers and state regulators are encouraging concrete lining of ditches to conserve water. This, however, could have the affect of drying up these artificially created wetlands. Section 404(f)(1)(C) specifically authorizes the construction or maintenance of irrigation ditches without subjecting these activities to the §404 regulatory program. Moreover, the fact that these wetlands might dry up as a result of ditch maintenance activities would not appear to subject these dry lands to regulatory jurisdiction unless those activities result in a discharge onto those wetlands. Nonetheless, more explicit language that excludes from the definition of "water of the United States" the incidental drying up of wetlands resulting from ditch maintenance activities would not be objectionable.

(3) Water transfers are becoming more commonplace throughout the West as water needs change. The transfer of water resources from one location or use to another could result in a discharge of sediments and other pollutants from one field to another. While the discharge of transferred water that contains pollutants into a new water body should still be subject to regulation under §402 of the Clean Water Act, consistent with the Supreme Court's decision in *South Florida Water Management District v. Miccosukee Tribe*, 541 U.S. 95 (2004), transfers of use of agricultural water from one location to another should not normally trigger regulation under the Clean Water Act. Section 404(f)(1)(a), which exempts from the §404 program, normal farming activities, would appear to encompass agricultural water transfers, but clarifying language might avoid future conflicts.

Beyond these suggestions, I would like to respond to concerns raised about the phrase "activities affecting these waters" in the proposed definition of "waters of the United States." Critics of this language have suggested that the Restoration Act would extend the scope of the Clean Water Act beyond waters and would encompass activities affecting those waters as well. A careful reading of the language, however, shows that the phrase cannot be read as its critics suggest. Rather, it is merely intended to make clear that the

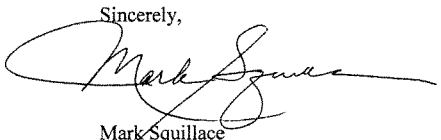
*waters* described in the "waters of the United States" definition are subject to regulation under the Clean Water Act if the waters or activities affecting the waters are within the scope of Congress' constitutional power. So, for example, waters that support bird watching activities, which could most likely be regulated by the Congress under its commerce or treaty power, would be encompassed by the Clean Water Act. Of course, waters that support commercial activities like bird watching, or that implicate treaty rights or responsibilities are probably encompassed by the definition of "waters of the United States," even without the phrase "activities affecting these waters," but the phrase adds clarity to the definition.

Finally, for the sake of further clarity, the committee might consider jettisoning both phrases "waters of the United States" and "navigable waters" altogether and substituting in their place a term that is more descriptive of the Committee's intent, such as "constitutional waters." This would make it much harder for the courts to resort to common dictionary meanings of ambiguous terms or phrases like "waters" in interpreting the scope of the law.

I fully understand and share the concern expressed by Congressman Rahall that the Congress should avoid amending the Clean Water Act in a way that leads to unintended consequences. But the only unraveling of the Clean Water Act that has occurred has come about as a result of the Supreme Court's *SWANCC* and *Rapanos* decisions. The Clean Water Restoration Act of 2007 is a measured response that simply takes the scope of the law back to where it was under the EPA and Corps regulations before the *SWANCC* decision. I urge its early passage.

If I can provide any additional assistance to the Committee or its staff in moving this legislation forward, please do not hesitate to contact me.

Sincerely,



Mark Squillace
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Written Testimony of
James M. Tierney
Assistant Commissioner for Water Resources
New York State Department of Environmental Conservation

Before the

United States House of Representatives
Transportation and Infrastructure Committee

Hearing on
The Clean Water Restoration Act of 2007
April 16, 2008

Washington, DC

Good morning Chairman Oberstar, Ranking Member Mica, and Members of the Full Committee on Transportation and Infrastructure. My name is James M. Tierney and I am the Assistant Commissioner for Water Resources of the New York State Department of Environmental Conservation in the administration of Governor David Paterson. Thank you for the opportunity to testify today about the importance of restoring the protections afforded by the Clean Water Act to America's lakes, streams, rivers and wetlands.

The Clean Water Act has been integral to the restoration and protection of our Nation's waters for more than 30 years. Unfortunately, rulings by the United States Supreme Court in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (SWANCC) in 2001 and *Rapanos v. U.S.* (Rapanos) in 2006 jeopardize federal water pollution protections for the majority of the nation's streams, rivers, and wetlands.

New York, therefore, strongly supports HR. 2421, the "Clean Water Restoration Act of 2007." This legislation would truly be in the nature of a "restoration." For over three decades following the enactment of the Clean Water Act in 1972 it was understood that the Act regulated the discharge of pollutants, including fill, into "traditional" navigable waters, their non-navigable tributaries, and wetlands adjacent to these water bodies. This definition of what constitutes "waters of the United States" was contained in long-standing regulations promulgated by both the Environmental Protection Agency and the Army Corps of Engineers[1] – a legal definition that is fundamental to the scope and jurisdiction of the Clean Water Act.

While I only speak here on behalf of New York State, it is important to stress that the vast majority of the States recently expressed strong support for the long-standing definition of "waters of the United States" that was contained in these EPA and Army Corps regulations since

[1] 33 C.F.R. § 328.3(a)(1), (5), (7) (Corps definition); 40 C.F.R. § 230.3(s)(1), (5), (7) (EPA definition); 40 Fed. Reg. 31,320, 31,324-25 (July 25, 1975).

1975. Indeed, some 34 States and the District of Columbia joined an *amicus curiae* brief (http://rapanos.typepad.com/briefs/NewYork.pdf and http://www.eswr.com/1105/rapanos/rapamicstates.pdf) which supported this regulatory definition in proceedings before the U.S. Supreme Court during the controversial *Rapanos* matter. The position expressed in the states' *amicus* brief concerning the scope of the "waters of the United States" protected under the Clean Water Act is essentially identical to that presented in the Clean Water Restoration Act of 2007.

I would also like to express New York's strong technical and scientific concurrence with the legislative findings of the Clean Water Restoration Act of 2007. These findings are an excellent and scientifically valid summary of the environmental and economic connections between all waters, connections that extend from the largest bodies to small tributaries and headwater wetlands.

New York has lost an estimated 60% percent of its wetlands since early colonial times. Many other States have suffered even greater losses. Therefore, we as a Nation need to protect and enhance those wetlands that remain. The Clean Water Restoration Act of 2007 is critical to achieving that goal.

**Importance of Clean Water to New York State**

New York benefits from some of the most extraordinary water resources in the country, ranging from Long Island Sound to Lake Champlain and the Adirondack mountain lakes to Niagara Falls and the Great Lakes. New York is blessed with water resources that include over 52,000 miles of rivers and streams, nearly 7,900 lakes and ponds, 600 miles of Great Lakes coastline, 1,530 square miles of estuaries and 120 linear miles of Atlantic Ocean coastline.

New York's abundant water resources are integral to the State's economy and environmental quality. Industries have located in New York State because of our water supply. Tourism and recreation thrives along New York's waterways, and important events in the history of our Nation are intrinsically linked to New York's water resources – such as Henry Hudson's travels up the river now named after him; the Battle of Saratoga during the American Revolution that helped to change the course of our history; and the welcoming of millions of immigrants to our Nation at Ellis Island. Clean water – so greatly tied to New York's past, present and future – is essential for drinking water, economic development, tourism and recreational activities, fish and wildlife habitat, and many other activities in New York.

New York has developed a solid track record in the preservation of the quality of many streams, wetlands, lakes and groundwater resources, and the improvement of water bodies which were polluted in the past. Working with EPA, we have developed and implemented comprehensive plans for the Hudson River Estuary, Long Island Sound, Lake Erie, Lake Ontario and Lake Champlain. State officials continue to work with our local and federal colleagues and other interested parties to clean up Onondaga Lake, the New York-New Jersey Harbor, the Buffalo River and other waters.

Together with New York City, upstate communities, EPA and many other parties, in 1997 New York negotiated and implemented an agreement to ensure that a high quality, unfiltered drinking water supply is available for the daily use of the over eight million residents and visitors to the City, as well as at least one million users in Westchester, Orange, Ulster and Putnam Counties – about half of the population of New York. This "New York City Watershed" is the largest unfiltered drinking water supply in the country, providing approximately 1.3 billion gallons of drinking water every day.

Through the implementation of a comprehensive watershed protection program, EPA has granted New York City a waiver from the Safe Drinking Water Act's mandate to filter drinking water supplies. This waiver has, in turn, saved the City of New York a projected $8 to $10 billion that would otherwise be necessary to construct a water filtration plant, as well as approximately $1 million a day to maintain and operate this plant. Wetland and stream protection programs, including very small streams and headwater wetlands, have been critical components of this highly successful drinking water watershed protection effort.

**States' Reliance on the Clean Water Act**

None of the improvements that we have made in New York's water resources could have occurred without the active participation of the federal government. Congress has been at the forefront of these efforts, through past actions to create and reauthorize the Clean Water Act and the Safe Drinking Water Act, as well as through annual appropriations to fund the mandates of these laws. Recent attacks on the Clean Water Act's traditionally broad protections for all types of waters would leave only certain waters – such as those that are "navigable-in-fact" or permanently flowing – covered by the law with any degree of certainty or predictability. This is not consistent with scientific understanding of the connections between waters and fails to offer sufficient environmental protections.

States have relied on the federal Clean Water Act for the past 35 years to set criteria and establish programs to ensure that their waterways are clean and safe. For many reasons, states such as New York need a federal program that serves as a consistent and strong national "floor."

Simply put, water flows downhill. It is an important fact that affects each of the lower 48 States. All of these states have water bodies that are downstream of one or more of the other states. For example, New York, Pennsylvania, New Jersey and Delaware share the Delaware River. Therefore, the need to stop pollution at its source, in the headwaters, is important to every state. New York takes this responsibility seriously. For example, we are actively working with local stakeholders to implement a "Tributary Strategy" for the New York portion of the Chesapeake Bay watershed that identifies pollutant source reductions that can be achieved. This strategy identifies actions that can be taken to help restore a valuable national resource that is approximately 300 miles downstream of New York's border.

In addition, wetlands generally drain into adjacent tributaries or other waters, and the health of the lower reaches of watersheds relies on the health and vitality of tributaries and their adjacent wetlands. Federal agencies have properly applied the CWA to both non-navigable tributaries and to the wetlands adjacent to them for more than 30 years. To do otherwise would frustrate the Clean Water Act's purpose of restoring and maintaining the physical, chemical and biological integrity of the Nation's waters. For these reasons, New York strongly supports continued federal protection for these wetlands and other waters, including intermittent and headwater streams. New York protects all surface and ground waters of the State, including intermittent and headwater streams, through the State Pollutant Discharge Elimination System (SPDES), which has been approved by EPA to meet the requirements of the Clean Water Act.

It is essential to maintain a strong federal floor for water pollution programs throughout the country through the Clean Water Act. Otherwise, there could be a "race to the bottom" as financially hard-pressed States reduce environmental protections to obtain a perceived economic advantage. Our country's rivers, lakes, streams and wetlands depend on federal protections to guarantee that pollution does not poison or destroy these waters. It is not likely that alternative conservation programs or regulatory programs at the state or local level will provide adequate or appropriately broad surrogate protections should the jurisdiction of the Clean Water Act be reduced.

Over the past three decades, the states have relied on the Act's core provisions and have structured their own water pollution programs accordingly. While states play a vital role in administering parts of the Act, they would be heavily burdened, both administratively and financially, if forced to assume sole responsibility for regulating fill activities in wetlands adjacent to non-navigable tributaries and in smaller streams. The proposed clarification is needed to prevent a reduced role for citizens, who can file suits under the Act's citizen suit provisions. Limiting the definition of the term "waters of the United States" limits the rights of citizens. States themselves might lose significant authority to seek relief from pollution discharged into unprotected waters of up-stream states.

**Further Legal Challenges to the Definition of Navigable Waters**

EPA relied upon the Clean Water Act's broad authority in defining navigable waters in developing regulations to implement the federal oil spill prevention program (Section 311(j) of the CWA). The American Petroleum Institute and Marathon Oil challenged the definition of "waters of the Unites States" in EPA's spill prevention regulations - the same definition used elsewhere in its Clean Water Act regulations - seeking to limit the extent to which the federal program would apply to damaging oil spills for many of the nation's streams, creeks and wetlands (see *American Petroleum Institute v. Johnson* and *Marathon Oil Company v. Johnson*). New York State intervened in these cases. By restricting the scope of the term "waters of the United States," the state's waters would be afforded less protection under federal law and therefore more vulnerable to pollution.

Oil spills have caused extensive and expensive environmental damage in New York. Nationally, more than 9,000,000 gallons of gasoline escape into the environment annually during the course of transportation, storage, sale or use. Contaminated private and public drinking water wells in New York, as well as traditional navigable waters, have resulted from these spills. If the challenge by the oil companies is successful, fewer waters in New York would be afforded protection from oil spills and hazardous waste discharges under Section 311 of the Clean Water Act. New York would lose its ability, granted by the Oil Pollution Act of 1990, to file cost recovery claims with the federal government for oil spill clean ups undertaken in wetland areas. Such a decision would leave New York State with less money in its Oil Spill Fund to properly address the more than 20,000 active spills statewide. In just one New York watershed, the eastern shores of Lake Ontario, there are approximately 10,600 acres of wetlands, 65% of which are not adjacent to navigable waters. Therefore, if the oil companies prevail, pollution would be allowed into these waters with no remedy under the Clean Water Act.

Unfortunately, this possibility came one step closer to reality last week. On March 31st the US District Court for the District of Columbia ruled against EPA and interveners, including New York State. This ruling is further evidence of why Congress must act now to reaffirm and clarify the Clean Water Act.

**Support for the Continuation of CWA Protections**

Wetlands and adjacent tributaries are extremely important for downstream water quality. For example, an analysis of Lake Champlain by Vermont and New York concluded that of the estimated 647 metric tons of phosphorus (which tends to deplete dissolved oxygen and thereby create low oxygen conditions in which most aquatic life cannot survive) entering the lake from all sources each year, 573 tons — 89% — entered the Lake through its tributaries, most of which are non-navigable and intrastate waters.

In addition, headwater streams and isolated wetlands greatly enhance biodiversity or the variety and composition of biotic life. In New York alone, isolated wetlands provide habitat for hundreds of species of animals and plants, including more than 20 rare animals and 140 rare plants. Headwater streams are so critical for maintaining biodiversity that a panel of scientists, writing in the Journal of the American Water Resources Association, concluded: "Degradation and loss of headwaters and their connectivity to ecosystems downstream threaten the biological integrity of entire river networks."

Moreover, headwaters are vital in their own right. EPA has found that non-navigable tributaries in the mid-Atlantic region contain 558 separate sources of drinking water, serving a population of 5.2 million people. Headwater streams comprise about 53% of the total stream length in the lower 48 states.

Similarly, certain non-navigable bodies of water and wetlands in the New York City Watershed have been designated as Critical Resource Waters because of their importance in assuring the

purity of the City's water. New York City has successfully provided quality drinking water, in part, by protecting the wetlands and headwater streams north of the city that feed the reservoirs the City uses as sources of drinking water.

Clearly, states find all types of waters important to the health and safety of their citizens. Wetlands, their adjacent streams and tributaries as well as other small streams and tributaries are extremely important to protect our communities from flooding. These systems naturally absorb flood waters during heavy rain events and then release those waters after rain events. In 2007, New York experienced a significant flooding in some of our communities, including Westchester, Rockland, Ulster and Orange Counties. The damages, just to public properties in Westchester County, totaled $38 million from floods caused by a nor'easter'. If damages from this one storm to public and private properties in all the affect counties were combined, they would easily reach into the hundreds of millions of dollars. In New York, we are concerned that, if small wetlands and streams are removed from protection under the Clean Water Act, increased flooding would be likely, and the financial losses would be dramatic.

Without wetlands, fish and wildlife species lose much-needed habitat that, in turn, seriously impacts hunting, fishing and other recreational activities that are important to regional economies. Wetlands also reduce the natural filtering of water contaminants and sediments flowing from tributaries to the lakes, streams and rivers, and when they are lost we witness increased stagnation and noxious algae growths that foul beaches and shorelines. For that reason, New York is taking many steps to restore wetlands in areas such as Jamaica Bay in New York City and along the shores of Lake Ontario. We have undertaken successful wetlands restoration projects in the Upper Susquehanna region of New York's Southern Tier, and have restored wetlands as a successful technique to prevent flooding in some regions of the state.

Restoration efforts are costly, difficult and time-consuming. Our greatest fear is that, once wetlands and the biodiversity which they foster is lost, it may be difficult or impossible to re-establish. Preserving wetlands and small streams, through effective federal statutory and regulatory directives, is environmentally beneficial, economically effective, and provides reasonable certainty to the regulated community.

**Conclusion**

Clearly articulated Congressional guidance on the regulation of headwater wetlands and small streams is clearly needed to protect these wetlands, and to prevent the future need for costly restoration efforts. As New York argued in the amicus brief filed in the *Rapanos* case:

> "It is not enough for the Clean Water Act to be invoked only when there is proof that a specific discharge is connected to navigation or interstate movement. Even if the chances are small that any particular discharge will reach a downstream State or a traditional navigable waterway, collectively such discharges have an enormous effect – often the dominant effect – on water quality and quantity...

> Comprehensive coverage under the Clean Water Act is necessary to maintain the balance between federal and State authority established by the Act."

This is the guidance that the states are seeking from Congress. I believe that HR. 2421, by reaffirming and articulating the original intent of the Clean Water Act, frames the federal role in wetland and small stream regulation effectively. By clearly defining this issue, the states will be able to once again work with the federal government to effectively regulate all connected wetlands and streams.

Thank you for providing me with the opportunity to testify.

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**Assistant Commissioner**
**Office of Water Resources, 14th Floor**
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Alexander B. Grannis
Commissioner

May 12, 2008

The Honorable James L. Oberstar
Chairman, Committee on Transportation and Infrastrueture
U.S. House of Representatives
2165 Rayburn House Office Building
Washington DC 20515

Dear Representative Oberstar:

Thank you for the opportunity to present testimony before the House Committee on Transportation and Infrastructure on the Clean Water Restoration Act of 2007. I was pleased to provide New York's perspective on the scope of the Clean Water Act and appreciate this additional opportunity to expand upon our views by providing specific legislative suggestions on H.R. 2421. New York's suggestions are straight-forward.

**A. Remove the term 'navigable waters.'**

Of first importance is the removal of the term "navigable waters" from the Clean Water Act in the manner stated in the current version of the H.R. 2421. This term has been a source of great confusion recently in the *SWANCC* and *Rapanos* decisions, where some on the Supreme Court have sought to incorrectly infuse navigability-in-fact as a limitation on the scope of waters protected by the Act. New methods of statutory interpretation have moved away from reviewing the overall purpose of the Act in legal analyses, instead invoking a "dictionary definition" mode of statutory construction. Courts have increasingly looked at the term 'navigable waters' when interpreting the Act to the exclusion of the Act's fundamental "objective" to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." This unfortunate confusion will remain as long as the term 'navigable waters' remains in the Act.

As discussed in testimony presented to the Committee, one simply cannot fulfill the fundamental "objective" of the Act to "restore and maintain the chemical, physical and biological integrity of the Nation's waters" by only protecting a portion of the waters. Small streams and wetlands are important in their own right. And, of course, if headwater wetlands, small streams and ephemeral streams are polluted, poisoned or filled that harm will adversely affect down stream waters and habitats. Those who seek to maintain the term 'navigable' certainly appear to be arguing for a constriction of the scope of the Clean Water Act's jurisdiction and protections in a manner that will ultimately lead to its failure.

**B. Employ the long-standing EPA and Army Corps regulatory definition.**

The second recommendation is to incorporate into the H.R. 2421 the definition of the term "waters of the United States" that has been employed by the EPA and the Army Corps of Engineers since 1975. See 33 C.F.R. § 328.3(a) (Army Corps definition); 40 C.F.R. § 230.3(s) (EPA definition); 40 Fed. Reg. 31,320, 31,324-25 (July 25, 1975). In New York's opinion, H.R. 2421 does an excellent job of restoring this original scope of the Act's protections as it is now written. As evidenced by this original regulatory definition, the interpretation of the scope of protected 'waters of the United States' was not viewed by the implementing agencies as being limited in any way by the concept of these waters needing to be navigable or navigable-in-fact.

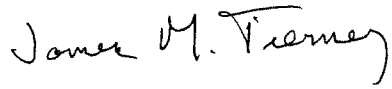
One alternative that the Committee may wish to consider is simply incorporating these identical and long-standing regulatory provision into the Act as the applicable definition of the term 'waters of the United States.' Such an action would be in the nature of a restoration of the scope of the Act prior to *SWANCC* and *Rapanos*, while fundamentally resolving any and all incorrect, even alarmist, assertions that H.R. 2421 represents an expansion of the jurisdiction of the Act. Incorporation by reference of these regulatory provisions would have the added benefit of maintaining all the jurisprudence and agency guidance associated with the interpretation and implementation of this key definitional and jurisdictional provision of the EPA's and Army Corps' regulations.

* * * * *

It is not surprising that 34 States and the District of Columbia joined an *amicus curiae* brief in proceedings before the Supreme Court during the controversial *Rapanos* matter in an attempt to maintain the protections of the Act. The position expressed in the states' *amicus* brief concerning the scope of the 'waters of the United States' protected under the Clean Water Act is essentially identical to that presented in the Clean Water Restoration Act of 2007.

Again, thank you for the opportunity to provide New York State's perspective on this very important issue.

Sincerely,



James M. Tierney
Assistant Commissioner for
Water Resources

**BEFORE THE U.S. HOUSE OF REPRESENTATIVES**
**COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE**

**Hearing On**
**"The Clean Water Restoration Act Of 2007"**
**HR – 2421**

**110th Congress, 2nd Session**

Testimony of ROBERT V. TROUT
Trout, Raley, Montaño, Witwer & Freeman, P.C.
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**April 16, 2008**

Mr. Chairman and members of the Committee, my name is Robert Trout. I have been asked by Congressman Salazar to appear before you today to discuss the perspective of certain agricultural interests in the State of Colorado, which I believe are representative of concerns shared by many agricultural producers in the west. I do not appear on behalf of the State of Colorado or its agencies or instrumentalities. Nor will I tackle the constitutional issues raised by the bill, which will be addressed in a different panel.

I have over thirty-two years of experience dealing with water resources allocation and water quality issues in the west, representing public and private clients in resolving conflicts over water quality and quantity. I currently represent the Northern Colorado Water Conservancy District, which, along with the U.S. Bureau of Reclamation, operates the Colorado-Big Thompson Project in Colorado. The Colorado-Big Thompson Project is one of the largest suppliers of water for agricultural irrigation in Colorado. As an initial matter, I wish to make it abundantly clear that I do not appear before you today to oppose efforts to improve and protect the quality of the waters of the United States. Nor do I oppose efforts to improve the definition of the natural systems over which the federal government intends to assert jurisdiction for purposes of protecting our nation's waters, so as to avoid needless conflicts over the scope of that jurisdiction. It is certainly in the interest of all responsible organizations and individuals in this country to support efforts to see that the quality of our nation's waters is restored and protected.

For over a century, agriculture in the western United States has depended, in significant part, on the use of water for irrigation purposes. This remains true today. In fact, irrigation is

becoming more prevalent throughout the United States, even in areas that had traditionally relied solely upon rainfall to grow crops. In the western United States, agricultural water supplies were obtained first by diversion from surface streams into a ditch or canal, and then from the ditch or canal into a lateral and from the lateral onto the farm field where the water was spread by various techniques that generally are referred to as flood irrigation. In more recent times, the use of sprinkler systems has become more prevalent, as has reliance on ground water pumped from high capacity wells, either as a sole source of supply or to supplement the surface water diversions.

In the State of Colorado, as well as in a number of other western states, the waters of surface streams, together with the tributary groundwater, have always been the property of the public subject to the right of its citizens to appropriate those waters for beneficial use, including agriculture. The right to appropriate the unappropriated waters of the State of Colorado for beneficial use is enshrined in our State's Constitution, Art. XVI, Sec. 5. Once water has been appropriated for a beneficial use, such as irrigation, the right to divert water under a specific priority date is considered to be a private property right. These rights are determined in state adjudication proceedings and state officials administer water rights in accordance with the priority dates in their decrees, but so long as the water is used for the decreed beneficial purpose without waste, there is no further state regulation until the water has served its beneficial purpose for irrigation.

A variety of methodologies are used to apply these waters efficiently for irrigation, including the impoundment of waters diverted from the streams in small off-channel reservoirs

from which an adequate head of water can be obtained to efficiently irrigate a field or from which water may be pumped for application through sprinklers. These privately constructed facilities located entirely on private land traditionally have been considered to be the property of the farmer. Colorado water quality statutes recognize this very important distinction. Instead of trying to define what constitutes waters of the state in terms of various physical features, the relatively simple definition contained in Colorado's Water Quality Control Act declares that all surface and underground waters that are contained in or flow through the state constitute the waters of the state, and then excludes waters that are subject to appropriation until the beneficial use and treatment have been completed. *See* C.R.S. § 25-8-103(19). Modifications to the Clean Water Act's jurisdictional scope will affect the viability of this definition, however, because state regulation of water quality must be consistent with federal standards.

Let me give you some examples of the problems created by the definition of waters of the United States contained in the proposed bill. First, the term "wet meadows" describes agricultural fields that exist throughout Congressman Salazar's district, the State of Colorado, and most of the Mountain West. "Wet meadows" are irrigated hayfields or pastures. They are wet for the very reason that the adjoining alfalfa field, potato field, or corn field is wet – because the agriculturalist operating the property has diverted water by way of ditches or wells and applied it to that tract of land to produce hay or forage. These "wet meadows" are not considered waters of the state; they are private agricultural properties being irrigated with water that has been reduced to private possession. The practice of flood irrigating meadows is particularly prevalent in areas where streamflows are dependent upon snowmelt and snowmelt runoff and where supplies are available for only a very short duration of time. The common

practice is to divert water when it's available, create a wet meadow environment that will produce a hay or forage crop, then allow the meadow to dry later in the year so that a harvest can occur. This is the practice in the fields of Congressman Salazar, his neighbors, and his constituents. Wet meadows, created through lawful agricultural practices should not be included in your definition.

Second, the broad definition of "wetlands," without any limitation, encompasses the numerous small wetlands created not by natural processes, but rather by leakage from irrigation facilities and practices. While they possess all of the appearances of a wetland, their existence is entirely dependent on the maintenance of the agricultural practice. If the particular agricultural practice is changed, the wetland environment will be eliminated. For example, irrigation ditches always seep and leak. If seepage from an irrigation ditch has occurred for several years, it is entirely possible for wetland plant communities to develop in the seepage area. Should the owner of the irrigation ditch wish to improve the efficiency of the ditch through canal lining or other practices, the wetland itself could be eliminated, but the definition in the current language implies that the wetland would be subject to the regulatory authority of federal officials. A simple modification to the definition of wetland to include only naturally occurring wetlands would eliminate that conflict.

Finally, I would also suggest that the term "all impoundments of the foregoing" contained in the definition of waters of the United States would cover a variety of private water management structures used by agriculture throughout the West. Presumably included within that phrase would be off-channel irrigation reservoirs constructed for purpose of managing

irrigation water supplies prior to their distribution on farm fields; stock ponds built and maintained for purposes of watering livestock; terracing that is done throughout the western United States for purposes of capturing precipitation and holding the water for a sufficient period of time to permit it to seep into the ground; dead level flood irrigated fields constructed with berms around the fields and then entirely flooded as a means of efficient and uniform irrigation; and corrugated or channel irrigated fields where water is introduced into the field and maintained between constructed ridges for purposes of securing more efficient and uniform irrigation. All of these practices involve the impoundment of water, but they are the result of the appropriation of water that has been removed from natural streams for the purpose of applying it to beneficial use. These facilities and the water within them are the result of private farming practices on private land, not publicly accessible facilities. All of these facilities should be excluded from the definitions in this bill.

I recognize that the treatment or status of various structures that manage and control the flow of water vary from state to state, but the committee needs to be aware of the direct conflict between the treatment of water diverted for agricultural use in the State of Colorado and the proposed definition for waters of the United States. If the committee adopts the definition as written, it will be proposing to regulate waters which have been diverted under a constitutionally recognized private property right in the State of Colorado and are subject to the use and disposition by the owner. The water in these agricultural facilities should not be considered waters of United States, and in fact are not considered waters of the State of Colorado. Clarifying the definition of waters of the United States may well serve the interests of all of us in light of the confusion that is apparent after the *Rapanos* decision. However, creation of an

overbroad definition can only create additional misunderstandings and litigation, which would not serve the important interests of protecting and preserving our nation's waters. Thank you very much for the opportunity to speak to you today.

# DEPARTMENT OF THE ARMY

## COMPLETE STATEMENT

## OF

## THE HONORABLE JOHN PAUL WOODLEY, JR.
## ASSISTANT SECRETARY OF THE ARMY (CIVIL WORKS)

## BEFORE

## COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
## UNITED STATES HOUSE OF REPRESENTATIVES

## ON

## The Clean Water Restoration Act of 2007

**April 16, 2008**

Good morning Mr. Chairman and Members of the Committee. I am very pleased to be here this morning to speak to you about the Army's Regulatory Program and its implementation pursuant to the Clean Water Act. My testimony briefly summarizes the Army's responsibilities under the Clean Water Act, describes the significant progress that we have made improving program performance over the years, and makes observations about the future of the Regulatory Program in consideration of key challenges and opportunities. My testimony also will detail a number of serious concerns and questions raised by H.R. 2421, "The Clean Water Restoration Act of 2007".

**Overview of the Clean Water Act**

A primary goal of the Clean Water Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," including wetlands. Wetlands are among the Nation's most valuable and productive natural resources, providing a wide variety of functions and services. They help protect water quality, store flood waters, support commercially valuable fisheries and migratory waterfowl, and provide primary habitat for myriad wildlife and fish species.

The Clean Water Act is a key part of the President's wetlands policy. As the basis for the regulatory program, the Act ensures the continuation of the "no net loss" policy established by President George H.W. Bush. The Act has enabled the Administration to employ other programs of the Army Corps of Engineers (Corps), Environmental Protection Agency (EPA), and the Departments of Interior, Agriculture, and Commerce to build on "no net loss" toward an overall increase in wetlands acreage.

In the 35 years since its enactment, the Clean Water Act, together with The Food Security Act, including swampbuster, ongoing public and private wetlands restoration programs, and active Tribal, State, local, and private protection efforts, has helped to prevent the destruction and degradation of hundreds of thousands of acres of wetlands and similar impacts to thousands of miles of rivers and streams. The average annual net rate of wetland loss across the nation was reduced from about 460,000 acres per year between the mid 1950s and mid 1970s, to 32,000 acres of annual net gain between 1988 and 2004. This has been achieved through a combination of Federal, Tribal, and State regulatory activities and environmental restoration and protection projects in partnership with many state and local agencies and conservation groups. In 2004, President George W. Bush announced an ambitious new initiative to achieve an overall increase in wetlands by restoring, creating and protecting 3 million acres of wetlands over 5 years. The Administration and our partners are on track to exceed the 3 million acre target by Earth Day 2008, one year early.

The Clean Water Act section 404 program has played an important role in maintaining the quality and quantity of our Nation's aquatic resources by requiring that permit applicants avoid adverse effects to these resources whenever possible, and minimize those effects that cannot be entirely avoided. Only after applicants have avoided and minimized adverse effects to the extent feasible does the Corps then work with them to develop acceptable compensatory mitigation projects for unavoidable impacts to aquatic resources that restore the functions and services they provided. Operating within a framework of "no net loss," the Corps has consistently required well

above a one-to-one compensation ratio for unavoidable effects on a regional and national basis.

**Implementation of Section 404 of the Clean Water Act**

The Corps and the U.S. Environmental Protection Agency (EPA) have worked together to administer the Clean Water Act since the 1970s. Through the agencies' efforts, wetlands, and the aquatic environments of which they are an integral part, are protected and the environmental and economic benefits provided by these valuable natural resources are realized while allowing important development projects to go forward.

The Corps has the primary day-to-day implementation responsibility for Section 404, which covers discharges of dredged and fill material into waters of the United States, including wetlands. Any person planning to discharge dredged or fill material first must obtain authorization from the Corps (or a Tribe or State approved to administer the section 404 program) in the form of an individual permit or a general permit before undertaking the activity. In practice, the vast majority of projects (more than 92% in 2006) are authorized by general permits, which require less paperwork by the project proponent and the agencies than an individual permit application, because the activities authorized by these permits have no more than minimal effects on the aquatic environment. Individual permit applications receive a more comprehensive review because, for the most part, these projects are larger, more complex, or involve a greater potential effect on significant aquatic resources. Corps Regulatory Program staff review permit applications and their District Engineers decide whether to issue or

deny authorizations for proposed activities. The Corps also initiates certain compliance and enforcement actions.

EPA's role under Section 404 of the Clean Water Act includes approving and overseeing State or Tribal assumption of the Section 404 program, determining the geographic scope of jurisdiction for the CWA as a whole, including Section 404, interpreting statutory exemptions from permitting requirements, reviewing Corps or State issued permits where appropriate, and sharing enforcement responsibilities with the Corps. EPA also developed, in consultation with the Corps, the Section 404(b)(1) Guidelines (*Guidelines*) which are the environmental criteria that the Corps applies when deciding whether to authorize an activity and to allow a project to move forward.

**Corps Successes and Future Challenges**

This administration has supported the regulatory program and wetlands protection by requesting increases in funding from $138 million in FY 2003 to $180 million in FY 2008 (same in FY 2009), a 30 percent increase (in nominal dollars). While the regulatory program received its requested level of funding for FY2008 ($180 million), the Continuing Resolution (CR) in 2007 froze the regulatory program at the FY2006 level of $158 million. The Corps will continue to administer the program to the best of its ability with the resources provided, but needs the Administration's FY2009 request to be fully funded if we are to provide the level of effective environmental protection and timely service to permit applicants that we have provided in the past.

The Corps, in coordination and cooperation with other Federal, tribal, state, and local agencies, continues to advance the no-net-loss goal while further improving program performance, predictability, and transparency through the following actions:

1. Just this month, the Corps and the EPA published a final compensatory mitigation rule to improve performance and consistency, and update a number of guidance documents in one place, drawing heavily on input from the National Research Council. This rule will provide for evaluating compensatory mitigation strategies in a watershed context, improve performance by requiring improved monitoring and ensuring that project success is evaluated against scientifically-defensible ecological performance standards, and add timeframes and predictability to the approval process for mitigation banks and In-Lieu-Fee arrangements.
2. In March 2007, the Corps published a new and improved package of *Nationwide Permits*, general permits whereby activities with minimal effects can be authorized quickly and efficiently, while protecting the aquatic environment. While many of the permits are similar to those in the previous round (permits must be reissued every 5 years) the new permits generally provide for greater environmental protection, for example by requiring pre-construction notification and Corps project-specific review for a much larger group of activities. Together with the final mitigation rule, the new permits should provide significantly enhanced protection of aquatic resources and compensation for unavoidable impacts.

3. The Corps, with support from EPA, has invested in a new database management system, ORM2, a web-based tool to improve the management of the Corps' regulatory programs including recording impacts of authorized activities and the performance of compensatory mitigation projects. This system eventually will be linked to spatial tools and a robust geographic information system enabling regulators and the public to more carefully consider watershed factors in the permit evaluation process. The database was installed for use Corps-wide in June 2007 and the GIS component is scheduled for implementation in the 2008-2009 timeframe.
4. The Regulatory Program has been studied by the Government Accountability Office five times since 2000 and the Corps has implemented nearly all of the GAO recommendations, including the improvement of documentation practices and mitigation project monitoring, database development, enhancing inter-agency coordination, implementing consistency initiatives and improving productivity and efficiency through the utilization of an authority in WRDA 2000 (Sec. 214) which allows the Corps to accept funds from public entities to hire additional staff. Additionally, Memorandums of Understanding with other agencies for energy and transportation projects are integrating regulatory processes and environmental reviews, which will improve overall productivity and efficiency.
5. In June 2007, the Corps and the EPA signed and released guidance to the field and the public regarding the U.S. Supreme Court decisions in *Rapanos v. United States & Carabell v. United States (Rapanos)*. This inter-agency guidance

focuses on using the two standards established by the Supreme Court (the Plurality standard and Justice Kennedy's significant nexus standard) in order to produce well-documented jurisdictional decisions, and enhance consistency nationwide. The Guidance also established a temporary enhanced coordination protocol between the Corps and EPA to monitor application of the guidance and promote consistency. The agencies allowed this protocol to partially expire on January 21, 2008, after determining that its purpose had been served. Through the protocol, hundreds of cases were reviewed and sufficient information was obtained to ensure greater nationwide consistency and identify areas where additional refinement of the Guidance may be appropriate. In addition, the agencies are currently completing their review of the comments received on the Guidance and will announce the results of that review shortly. Since the expiration of the temporary protocol, the Corps and EPA have returned to our prior coordination procedures, although all JDs for isolated waters based on the (a)(3) interstate commerce factors are still reviewed by both EPA and the Corps.

6. The Army is deploying Lean Six Sigma (LSS) to accelerate business transformation. In the Regulatory Program, a LSS pilot analysis for Individual Permits and jurisdictional determinations was performed in the South Pacific Division (FY 2005), and at the Seattle District (FY 2006). An additional study was performed at Mobile District in FY 2007. A final report with recommendations is being produced as a resource for all Districts to use. These recommendations cover process improvements, such as streamlining, powering

down decision-making, and relationship building with stakeholder interests, demonstrating the Army's commitment to wisely use allocated program funds.

These key actions are enabling the Corps to make better permit decisions, further protect wetlands and other aquatic resources, improve the performance of compensatory mitigation projects, and expand the public's access to information on proposed projects and compensatory mitigation activities.

Now I would like to briefly discuss how the two Supreme Court decisions, SWANCC and Rapanos, have affected the Regulatory Program and how we have responded.

**SWANCC and Rapanos Decisions**

In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (SWANCC), the Supreme Court held that the Corps could not assert Clean Water Act jurisdiction over isolated, non-navigable, intrastate waters based solely on their use as habitat by migratory birds.

Clarifying agency guidance regarding the SWANNC decision was provided in the *Federal Register* on January 15, 2003 (68 FR 1991). First, the guidance eliminated the use of the Migratory Bird Rule as the sole basis for jurisdiction. Second, it required that field staff must seek formal project-specific headquarters approval prior to asserting jurisdiction over any isolated water body based solely on (a)(3) interstate commerce factors (33 CFR 328.3(a)(3)). Under a portion of the post-Rapanos enhanced coordination procedure that still remains in effect, field staff must also seek headquarters approval before denying jurisdiction over isolated waters.

In the *Rapanos* decision, the Supreme Court addressed the following two questions: (1) whether wetlands that are adjacent to non-navigable tributaries of traditional navigable waters are part of "the waters of the United States" within the meaning of the Clean Water Act, and (2) whether application of the Act to the wetlands at issue in the Rapanos case is a permissible exercise of congressional authority under the Commerce Clause. In this case, the Justices issued three separate substantive opinions, with no single opinion commanding a majority of the Court. Both the plurality opinion, authored by Justice Scalia, and Justice Kennedy's opinion determined that the cases at issue should be remanded back to the district court for reconsideration using an appropriate jurisdictional standard. However, these two opinions identified different standards. The agencies determined that it was appropriate to assert jurisdiction over waters that satisfy either standard, and this is the approach we adopted in our June 2007 Guidance.

**Corps and EPA Reaction to the Rapanos Decision**

In June 2007, the EPA and the Army signed and issued a joint memorandum interpreting the Rapanos decision and providing guidance to the field and the public for implementation of Section 404: *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States.* The Guidance is intended to aid field staff in making timely jurisdictional determinations in accordance with the Court's decision, using available staff resources. These determinations are to be based on case-specific facts demonstrating that waters are navigable-in-fact (including adjacent wetlands), relatively permanent (including directly

abutting wetlands), or significantly affect the chemical, physical, and biological integrity of navigable waters. As a result of the Rapanos decision, the Corps will:

- Implement the Clean Water Act jurisdictional standards articulated by the Court in the plurality and Kennedy opinions.
- Categorically assert Clean Water Act jurisdiction over the following classes of water bodies: traditional navigable waters; wetlands adjacent to traditional navigable waters; non-navigable tributaries of traditional navigable waters that are relatively permanent (i.e., tributaries that typically flow year-round or have continuous flow at least seasonally); and wetlands that directly abut such relatively permanent tributaries.
- Assert jurisdiction over the following classes of waters when a science-based, fact-specific analysis determines that those waters have a significant nexus with traditional navigable waters: non-navigable tributaries that do not typically have continuous flow at least seasonally; wetlands adjacent to such tributaries; and wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary. A significant nexus exists if the tributary, together with its adjacent wetlands, has more than an insubstantial or speculative effect on the chemical, physical, and/or biological integrity of downstream traditional navigable waters.
- Generally, not assert jurisdiction over erosion features, upland swales, small washes (characterized by low volume, infrequent, and short duration flow), and many ditches excavated wholly in and draining only uplands.

Additionally, the EPA and Corps have developed several supporting documents, including a *Jurisdictional Determination Reporting Form* and an *Instructional Guidebook* to support the form. The form was developed to document the rationale and findings of jurisdictional determinations. Approved determinations are made available for public review as they are published on district regulatory web pages. The *Instructional Guidebook* is an 80-page document that further discusses the guidance provided in the joint memorandum, as well as providing additional references for making and documenting jurisdictional determinations.

When the guidance was announced, we issued a Federal Register notice requesting public comments on experience applying the guidance during the first six months of implementation. We further indicated that the agencies, within nine months from the date of issuance, would review and revise, reissue or suspend the guidance after carefully considering the public comments received and field experience with implementing the guidance. We extended the public comment period for an additional 45-day period through January 21, 2008. Over 62,000 comments were received (including about 1500 substantive comments and over 60,000 form letters) and over 18,000 jurisdictional determinations were finalized. As noted above, we will be announcing the results of our review of the comments and initial experience implementing the guidance shortly.

The EPA and Army also signed implementing guidance which:

- Modified the *SWANNC* guidance by requiring field staff to seek formal project-specific headquarter approval prior to asserting or declining jurisdiction over any

non-navigable, isolated, intrastate water body based solely on 33 CFR 328.3(a)(3) (links to interstate commerce);

- Required that all actions undergoing a "significant nexus" evaluation be available for review by EPA; and
- Allowed EPA field staff an opportunity to request a higher level review if there was a disagreement.

In accordance with the above guidance, Corps and EPA headquarters have reviewed or are reviewing 684 jurisdictional determinations involving isolated waters and 61 jurisdictional determinations involving "significant nexus" evaluations since June of 2007. We are working closely with the staff at EPA headquarters to wrap up the remaining unresolved cases and have not been accepting new cases for Headquarters review since the temporary Coordination Process expired on January 21, 2008 (except for Headquarters review of JDs involving the (a)(3) factors).

**H.R. 2421**

Based upon discussions with Committee staff, it is my understanding that the intent of HR 2421 is to capture those isolated and ephemeral features and associated wetlands that were determined to not be jurisdictional under the Supreme Court holdings in SWANCC and Rapanos, regardless of whether they affect the chemical, physical, chemical and biological integrity of navigable waters. Both the SWANCC and Rapanos decisions identified limits on Clean Water Act jurisdiction based on their interpretation of the intent of Congress. It is our understanding that under HR 2421, the jurisdiction of the Clean Water Act would be extended to an unspecified limit of Congress's legislative power under the Constitution.

In implementing the Court's decision, our approach has not been to focus on a particular target for the limits of jurisdiction. Rather, we have tried to ensure that jurisdictional determinations for ephemeral waters and their adjacent wetlands are based on a scientific, fact-based analysis of their potential effects on the chemical, physical, and biological integrity of navigable waters. We have not tried to either systematically expand or systematically limit jurisdiction, but have asserted jurisdiction where the science and the facts show that the legal standards for jurisdiction are satisfied.

We have several serious concerns with H.R. 2421 as drafted. . First, it appears that the consequence of the legislation will be to extend the jurisdiction beyond those waters determined to be not jurisdictional under the SWANCC and Rapanos decisions. This appears to go beyond the original intent of Congress in establishing the jurisdictional reach of the Clean Water Act, which reflected a careful balance between the legitimate and important Federal interest in protecting water quality and the equally important and long-standing interest of States in managing and allocating land and water resources within their boundaries. HR 2421 also goes beyond any interpretations of jurisdiction advanced by the agencies in the 30 years preceding the SWANCC and Rapanos decisions. For example, it is not clear whether the bill would require any link to interstate commerce for a water to be jurisdictional.

A second concern is that the bill could open up a whole new line of litigation regarding the limits of Congress's legislative power under the constitution, creating additional uncertainty and unpredictability for the environment, the regulated community, and State and Federal agencies. The Corps and EPA are in the early

stages of implementing the recent Court decisions. A legislative change at this time would render useless our significant investment in implementing the Court's decisions and making the guidance as clear and useful as possible, and would almost certainly initiate a new round of uncertainty and litigation.

In addition to these serious concerns, there are a number of questions that the Committee should consider in order to understand the significant implications of the bill.

The first question is whether it is appropriate to upset the Federal-State balance established in the original Clean Water Act by extending Federal jurisdiction to essentially all isolated waters and every ephemeral aquatic feature on the landscape, without conducting a case-by-case, science-based analysis of their impacts on the chemical, physical and biological integrity of navigable waters, for which the constitutional basis of Federal authority is clear. A second question is how removing the term "navigable" from the Clean Water Act might affect the implementation of other provisions of the CWA and the Corps regulatory program, and how this change might affect the regulated community, the regulatory agencies, the authorities of the respective States, and current exemptions provided for in statute and regulation. A third question is whether this extension of Federal jurisdiction would significantly increase the costs of small landowners, manufacturers, farmers, and transportation and energy projects, and whether there would be commensurate environmental benefits to justify these increased costs. Also, what would be the budgetary, workload, and processing time implications for the Corps regulatory program, as well as the Clean Water Act regulatory programs of other Federal, Tribal and State agencies if they were

suddenly faced with a significant increase in CWA permit applications for activities and resources with no significant nexus to navigable waters?

Another important question is whether or not HR 2421 would result in a new round of litigation that would have to be resolved by the Courts from scratch, upsetting 30 years of established Court precedent about where the limits of jurisdiction lie. One view is that the current disagreements about the limits of jurisdiction would simply be relocated on the landscape—the limits of Congressional legislative power under the Constitution rather than the import of the word "navigable." It seems unlikely that the result would be additional clarity or predictability for either regulatory agencies or the regulated community.

Finally, as a practical matter, the Committee should consider how HR 2421 would affect different parts of the country in different ways. We suspect that the impacts may be quite different in places like Alaska and Florida, where much of the landscape is wet or adjacent to wet areas, from the arid West, or the Great Plains, where many water courses have water flowing in them only occasionally, with limited habitat functions.

**Conclusion**

In conclusion, my office and the U.S. Army Corps of Engineers remain fully committed to protecting America's waters as intended by Congress and expected by the American people. Although there are on-going legal and policy challenges facing the Army's Regulatory Program, currently the program is operating robustly, protecting the environment, and supporting over $220 billion in economic development annually. I have personally visited each of the 38 District Regulatory Programs, and I have found

Corps of Engineers regulators to be highly professional individuals, committed to the goals of the National Regulatory Program. I am very proud of their many accomplishments, and the Nation is indeed fortunate to have this dedicated workforce, who has earned and deserves all of our support. We stand ready to work with the Committee to explore the questions I have raised in my testimony and to ensure that all implications are considered.

Mr. Chairman, this concludes my testimony. I appreciate your interest and would be pleased to answer any questions you or the Members of the Committee might have.

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