

Testimony of George J. Mannina, Jr.¹
Before the Committee on Environment and Public Works
United States Senate

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

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

Not only has the regulatory definition of what is a jurisdictional navigable water changed, but the answer to the question “what is a wetland” has been different depending on what year the question was asked. Complicating the problem from the public’s perspective is that as recently as 2004, the General Accounting Office (“GAO”) reported that different Corps District Offices, all of which were bound by the same regulations and the same Wetlands Delineation Manual, were applying these documents very differently in determining what is a navigable water. What is an adjacent wetland in one Corps District might not be in another. What is a tributary in one District is not in another. GAO also reports that in 13 of the 16 District Offices it surveyed, there

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are no written standards the public can consult to understand the criteria used to determine Clean Water Act jurisdiction. It is no wonder the public is often confused.

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

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

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

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

I. Overview of Clean Water Act Jurisdictional Regulations Until 1986

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

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

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

II. History of the Migratory Bird Rule

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

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

The public was not advised of the Corps’ rule change until one year after it was adopted. The notice to the public came in the preamble to new regulations issued under the Clean Water Act. *See* 51 Fed. Reg. 41206, 41217 (1986). In the preamble to the new regulations, the Corps

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

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

commented that the requisite link with interstate commerce for Clean Water Act jurisdiction may be satisfied by showing the presence of waters which “are or would be used as habitat” by migratory birds or endangered species. Notably, the Corps’ preamble comment was not included in the actual text of the final regulations.

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

III. Does the Term “Navigable Waters” Have Meaning?

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

A. The 1972 Legislative History of the Term “Navigable Waters”

In choosing the term “navigable waters” to define Corps jurisdiction under the Clean Water Act, Congress selected a term with a clear historical meaning which did not include all

wet areas of the United States. In 1871, the Supreme Court defined “navigable waters” as those waterways that:

are used or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

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

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

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

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

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

- (1) it is the national goal that the discharge of pollutants into navigable waters be eliminated by 1985;
- (2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on water be achieved by July 1, 1983;
- (3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited....

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

1. The Committee Reports

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

The control strategy extends to navigable waters. The definition of this term means the navigable waters of the United States, portions thereof, tributaries thereof, and includes the territorial seas and the Great Lakes.... Water moves in hydrological cycles and it is essential that the discharge of pollutants be controlled at the source. Therefore, reference to the control requirements must be made to the navigable waters, portions thereof, and their tributaries.

S. Rep. No. 414, 92d Cong., 2d Sess., 77 (1972), *reprinted in A Legislative History of the Water Pollution Control Act Amendments of 1972* ("Legislative History"), Volume II, at 1495. The Senate wanted to extend the concept of navigability as far as the tributaries of navigable waters which could contribute harmful pollutants to navigable rivers and streams.

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

One term that the Committee was reluctant to define was the term "navigable waters." The reluctance was based on the fear that any interpretation would be read too narrowly. However, this is not the Committee's intent. The Committee fully intends that the term "navigable waters" be given the broadest possible constitutional interpretation....

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

The tension between not wanting to be restricted by the 1871 definition of navigability, not being overbroad, but addressing the policy issue of water pollution is reflected in these reports. Congress did not need to be so vague if Congress wanted to ignore the concept, and limits, of navigability. Simple words would have sufficed to achieve that end. Instead, Congress stayed with the historical concept of navigability but sought through the explanation of

Congressional intent to extend its scope to include waters, such as non-navigable tributaries, which could contribute pollutants to traditionally navigable waters.

2. The Floor Debate

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

One matter of importance throughout the legislation is the meaning of the term “navigable waters of the United States.”

The conference agreement does not define the term. The Conferees fully intend that the term “navigable waters” be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes.

Based on the history of consideration of this legislation, it is obvious that its provisions and the extent of application should be construed broadly. It is intended that the term “navigable waters” include all water bodies, such as lakes, streams, and rivers, regarded as public navigable waters in law which are navigable in fact. It is further intended that such waters shall be considered to be navigable in fact when they form, in their ordinary condition by themselves or by uniting with other waters or other systems of transportation, such as highways or railroads, a continuing highway over which commerce is or may be carried on with other States or with foreign countries in the customary means of trade and travel in which commerce is conducted today. In such cases the commerce on such waters would have a substantial economic effect on interstate commerce.

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

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

The conference bill defines the term “navigable waters” broadly for water quality purposes. It means all “the waters of the United States” in a geographical sense. It does not mean “navigable waters of the United States” in the technical sense as we sometimes see in some laws.

The new and broader definition is in line with more recent judicial opinions which have substantially expanded that limited view of navigability – derived from the *Daniel Ball* case (77 U.S. 557, 563) - to include waterways which would be “susceptible of being used *** with reasonable improvement,” as well as those waterways which include sections presently obstructed by falls, rapids, sand bars, currents, floating debris, *et cetera*, *United States v. Utah*, 283 U.S. 64 (1931); *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 407-410, 416, (1940); *Wisconsin Public Service Corp. v. Federal Power Commission*, 147 F.2d 743 (CA 7, 1945); *cert. denied*, 325 U.S. 880; *Wisconsin v. Federal Power Commission*, 214 F.2d 334 (CA 7, 1954) *cert. denied*, 348 U.S. 883 (1954); *Namekagon Hydro Co. v. Federal Power Commission*, 216 F.2d 509 (CA 7, 1954); *Puente de Reynos, S.A. v. City of McAllen*, 357 F.2d 43, 50-51 (CA 5, 1966); *Rochester Gas and Electric Corp. v. Federal Power Commission*, 344 F.2d 594 (CA 2, 1965); *The Montello*, 87 U.S. (20 Wall.) 430, 441-42 (1874); *Economy Light & Power v. United States*, 256 U.S. 113 (1921).

The U.S. Constitution contains no mention of navigable waters. The authority of Congress over navigable waters is based on the Constitution’s grant to Congress of “Power *** To regulate commerce with Foreign Nations and among the several states ***” (art. I, sec. 8, clause 3). *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). Although most interstate commerce 150 years ago was accomplished on waterways, there is no requirement in the Constitution that the waterway must cross a State boundary in order to be within the interstate commerce power of the Federal Government. Rather, it is enough that the waterway serves as a link in the chain of commerce among the States as it flows in the various channels of transportation - highways, railroads, air traffic, radio and postal communication, waterways, *et cetera*. The “gist of the Federal test” is the waterway’s use “as a highway,” not whether it is “part of a navigable interstate or international commercial highway.” *Utah v. United States*, 403 U.S. 9, 11 (1971); *U.S. v. Underwood*, 4 ERC 1305, 1309 (D.C., MD Fla., Tampa Div., June 8, 1972).

Thus, this new definition clearly encompasses all water bodies, including main streams and their tributaries, for water quality purposes. No longer are the old, narrow definitions of navigability, as determined by the Corps of Engineers, going to govern matters covered by this bill.

Legislative History, Volume I, at 250.

Like Senator Muskie, Congressman Dingell did not want to be bound by the traditional “narrow definitions of navigability” which excluded tributaries and waters which were no longer navigable because of obstructions. Like his Senate counterpart, Congressman Dingell wanted to reach waters serving “as a highway.” *Id.* In fact, a review of the cases cited by Congressman

Dingell as demonstrating the proper scope of the term “navigable waters” reveals that each involved a body of water that was used or could be used as a “link in the chain of commerce among the States.” *Id.* Each case involved actual navigation, past, present or future, and most of the cases focused on waters that once were navigable for waterborne commerce but were no longer because of obstructions.⁵ The Act was to be anchored in the concept of navigation for commerce.

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

In considering Congressional intent, the Corps has recognized the limiting effect of navigability stating the Act does not cover all wet areas. *See, e.g.*, 45 Fed. Reg. 33290, 33398 (1980) (“small, isolated wet areas may not be waters of the United States.... Including an

⁵ *The Montello*, 87 U.S. (20 Wall.) 430 (1874) (navigable waters to include all waters capable of use for waterborne commerce); *Economy Light & Power Company v. United States*, 256 U.S. 113 (1920) (all waters that had been previously used for waterborne interstate commerce); *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940) (all waterways that could be made navigable “with reasonable improvements”); *Utah v. United States*, 403 U.S. 9 (1971) (all waters that serve as a link in the chain of commerce in any states, a chain that could include other modes of commerce as well); *United States v. Utah*, 283 U.S. 64 (1931) (absence of waterborne commerce was not determinative of navigability if the river would be used for transport if obstructions were removed); *Wisconsin Public Service Corp. v. Federal Power Commission*, 147 F.2d 743 (7th Cir. 1945), *cert. denied*, 325 U.S. 880 (1945) (river that was used to float logs is navigable even if otherwise obstructed by falling rapids and sandbars); *Wisconsin v. Federal Power Commission*, 214 F.2d 334 (7th Cir. 1954), *cert. denied*, 348 U.S. 883 (1954) (damming a river which could still be used for transport does not make the river non-navigable); *Namekagon Hydro Co. v. Federal Power Commission*, 216 F.2d 509 (7th Cir. 1954) (river a navigable water citing *Wisconsin v. Federal Power Commission*); *Puente de Reynosa, S.A. v. City of McAllen*, 357 F.2d 43 (5th Cir. 1966) (prior actual navigation raises a presumption of potential navigation with reasonable improvements); *Rochester Gas and Electric Corp. v. Federal Power Commission*, 344 F.2d 594 (2d Cir. 1965), *cert. denied*, 382 U.S. 832 (1965) (previously navigable river should still be so considered if it could be used for navigation in the future with reasonable improvements); *United States v. Underwood*, 344 F. Supp. 486 (M.D. Fla. 1972) (waterway which can be made available for navigation by reasonable improvement is navigable.)

‘exemption’ for such areas might create the erroneous impression that, but for the exception ... each puddle and damp spot would need a permit....”); Memorandum in Support of Federal Defendants’ Motion to Dismiss or in the Alternative for Summary Judgment and in Opposition to Plaintiffs’ Motion for Partial Summary Judgment at 50, *National Wildlife Federation v. Laubscher*, 662 F. Supp. 548 (S.D. Tex. 1987) (No. G-86-37) (“Congress did not automatically include every waterbody, however isolated, within the coverage of the Act.”). Similarly, a detailed review of the 1972 legislative history conducted by the Justice Department revealed no statement or comment to the effect that the Clean Water Act was intended to reach waters unconnected to waterborne commerce and the preservation of water quality. Respondent’s [EPA] Petition for Rehearing and En Banc Reconsideration, *Hoffman Homes, Inc. v. Environmental Protection Agency*, 975 F.2d 1554 (7th Cir. 1992).

B. The Corps’ Interpretation of Congressional Intent and the 1977 Amendments to the Clean Water Act

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

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

- (1) all navigable coastal waters;
- (2) all coastal wetlands, mudflats, swamps and similar areas that are contiguous or adjacent to other navigable waters;
- (3) rivers, lakes, streams and artificial water bodies that are navigable;
- (4) artificially created channels and canals used for recreation or navigation that are connected to navigable waters;

- (5) tributaries of navigable waters;
- (6) interstate waters;
- (7) intrastate lakes, rivers and streams used (a) by interstate travelers, (b) for removal of fish sold in interstate commerce, (c) for industrial purposes by industries in interstate commerce, and (d) in the production of agricultural commodities sold in interstate commerce;
- (8) freshwater wetlands contiguous or adjacent to other navigable waters; and
- (9) other waters necessary for the protection of water quality such as intermittent rivers, streams, tributaries and perched wetlands that are not contiguous or adjacent to navigable waters.

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

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

On June 3, 1976, the House passed the Wright Amendment restricting the Corps' jurisdiction to traditionally navigable waters and adjacent wetlands. 122 Cong. Rec. 16565 (1976).⁶ The Senate passed S. 2710 which included the Baker-Randolph Amendment that defined the term "navigable waters" to restrict the Corps.⁷ The two bills had numerous provisions and the two chambers were unable to resolve their differences before Congress

⁶ The Wright Amendment to H.R. 9560 provided:

The term "navigable waters" ... shall mean all waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce....

122 Cong. Rec. 16552 (1976). The Wright Amendment also defined the term "adjacent wetlands" as wetlands adjacent or contiguous to navigable waters. *Id.*

⁷ The Baker-Randolph Amendment provided:

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

122 Cong. Rec. 28778 (1976).

adjourned. However, as to the term “navigable waters,” the House and the Senate were of one mind. The Corps was to be restricted to waters that had been, were, or could be used for navigation to transport commerce and to adjacent wetlands. The Corps’ efforts to reach beyond these limits were rejected.

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

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

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

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

Senator Bentsen replied:

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

Id. at 903.

Senator Domenici stated:

I think we have an opportunity here in the Senate to undo something that has grown up that we really never intended, and not to continue to ignore the fact that we never intended under Section 404 that the Corps of Engineers be involved in the daily lives of

our farmers, realtors, people involved in forestry, anyone that is moving a little bit of earth anywhere in this country that might have an impact on navigable streams. We just did not intend that.

Id. at 924.

Senator Tower stated:

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

Id. at 930.

Senator Dole stated:

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

Id. at 935.

Senator Hansen stated:

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

Id. at 940.

Senator Muskie summed it up stating:

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

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

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

Id. at 947-948.

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

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

All other waters of the United States ... such as isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce.

42 Fed. Reg. 37144.

In the face of the overwhelming Congressional sentiment to reject the less expansive interim final regulations, it does not seem logical to argue that Congress embraced the more expansive final regulations that were published in the later stages of the 1977 Congressional

⁸ The Senate Committee Report stated:

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

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

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

Id. at 710.

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

debate.⁹ Nor does it seem logical to argue that in 1977 Congress embraced the Migratory Bird Rule which was announced in 1986.¹⁰

IV. The Wetlands Delineation Manuals

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

Prior to 1989, the four federal agencies involved in wetlands protection (Corps, EPA, Fish and Wildlife Service, and Soil Conservation Service¹¹) had separate procedures and methodologies for delineating wetlands. To reconcile these differences, a 12-member committee of experts was appointed in 1988. The result was the 1989 Federal Manual for Identifying and Delineating Jurisdictional Wetlands. Michael S. Nagy, *The Definition of “Wetlands” Under Section 404 of the Clean Water Act; Past, Present, and Future*; 3 *Journal of Environmental Law*, 1993.

⁹ An exhaustive search of the 1977 legislative history by the Justice Department produced only three “supporting” quotes. Senator Bentsen, who introduced an amendment to narrow the definition of navigable waters, complained that the Corps’ regulation would cover “isolated marshes.” 123 Cong. Rec. 26711 (1977). Senator Tower, who supported the Bentsen amendment, objected to the Corps’ regulatory scheme because it covered “all surface waters and wetlands of the United States.” *Legislative History, Volume IV*, at 930. Finally, Congressman Abnor stated that the Corps’ regulatory program covered “virtually all wetlands.” 123 Cong. Rec. 34852 (1977). Respondent’s [EPA’s] Petition for Rehearing and Suggestion of En Banc Reconsideration, *Hoffman Homes, Inc. v. Environmental Protection Agency*, 975 F.2d 1554 (7th Cir. 1992).

These quotes appear to establish that Congress understood the potential reach of the new regulations and, as Senator Muskie made clear, rejected it. The debate was not over whether to reject the Corps’ new definition of its jurisdiction, but how to reject it. The government’s reliance on Congressman Abnor’s statement is interesting in that the Congressman’s statement was inserted into the Congressional Record as an Extension of Remarks sandwiched between Congressman Lundine’s financial disclosure and Congressman Michel’s reprinting of an article in the Peoria Journal Star on race discrimination.

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

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

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

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

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

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

V. Application of Existing Standards by Corps District Offices Varies by Office

Within the Corps' 38 District Offices, there are significant differences of interpretation regarding what areas are jurisdictional under the Clean Water Act. In 1994, the General Accounting Office conducted a survey of numerous Corps District Offices. That report, "Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction," GAO-04-297 (Feb. 2004) ("GAO Report"), found the following.

- Some District Office generally regulate all wetlands simply because they are located in the 100 year floodplain. Other District Offices do not use the 100 year floodplain as a jurisdictional basis. Still other District Offices consider locations within the 100 year floodplain as only one of many factors to be considered.
- Some District Offices use sheet flow (overland flow of water outside of a defined channel) as a basis for regulating an associated wetland because of a hydrological connection to the sheet flow. Other District Offices do not consider sheet flow between a wetland and a water when making jurisdictional determinations.
- Some District Offices regulate almost all wetlands located within 200 feet of other waters of the United States and generally do not assert jurisdiction beyond that distance. Other District Offices employ a 500 foot standard.
- Some District Offices assert jurisdiction over wetlands separated from other waters of the United States by manmade or natural barriers such as dikes and dunes provided that the separation is caused by no more than one such barrier. Other District Offices assert jurisdiction over wetlands separated from waters of the United States by more than one barrier. Still

others regulate all wetlands within 200 feet of other waters of the United States regardless of the number of barriers separating the waters and the wetlands.

- An official in one District Office told GAO that if that official asked three different district staff to make a jurisdictional determination based on the lateral reach of waters of the United States using the ordinary high water mark standard, he would probably get three different decisions on what areas are subject to Clean Water Act jurisdiction.
- Some District Offices were fairly inclusive in finding a wetland jurisdictional if water flowed in a manmade surface conveyance between the wetland and a water of the United States. Other District Offices said that mere conveyance was insufficient and the ditch or channel must also have an ordinary high water mark or display wetlands characteristics. Still another District Office addresses which direction a water is flowing asserting that jurisdiction follows if the water flows from the wetland into a water of the United States. However, if the flow went from the water of the United States to the ditch into the wetland, the wetland would not be considered jurisdictional.
- With respect to whether the ditch itself is jurisdictional, some Districts assert jurisdiction over a ditch whenever it creates a connection between a wetland and a water of the United States. Other Districts indicated such a ditch might or might not be jurisdictional depending on factors such as whether the ditch had an ordinary high water mark, exhibits the three parameters of a wetland, or replaces a historic stream. For this second

group of District Offices, a non-jurisdictional ditch could be filled without a Section 404 permit, thus severing the jurisdictional connection between the wetland and a water in the United States. Significantly, once that connection is severed, the previously jurisdictional wetland is rendered non-jurisdictional and can be filled without a Section 404 permit.

- Some District Offices use drain tiles (porous clay pipes buried below the surface to provide drainage) to establish a jurisdictional connection between a wetland and a water of the United States when the drain tiles replace a historic tributary. Other District Offices do not consider drain tiles to establish jurisdictional connections.
- Some District Offices considered storm drain systems as jurisdictional connections particularly when the storm drain system conveys the flow of a historic stream. Other District Offices used storm drain connections to establish jurisdiction even if those storm drain connections do not replace a historic tributary.

GAO Report at 17-26.

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

VI. The SWANCC Project and the Corps' Jurisdictional Determination

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

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

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

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

SWANCC also had the required state approvals. SWANCC had submitted a 1700-page application for the requisite permits under Illinois law and, in November 1989, the Illinois EPA

approved a development permit for SWANCC. Subsequently the Illinois Department of Conservation reviewed SWANCC's plans and reported that any adverse impacts on state species would be mitigated through implementation of SWANCC's mitigation plan.

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

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

We have reviewed your letter and have determined that the water areas of the abandoned gravel pit do qualify as "waters of the United States" and are under our regulatory

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

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

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

authority.... This determination is based on the following three criteria: 1/ that the proposed balefill site has been abandoned as a gravel pit; 2/ that the water areas and spoil piles have developed a natural character; and, 3/ that the water areas are used or could be used as habitat by migratory birds which cross state lines.¹⁶

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

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

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

VII. The Supreme Court's SWANCC Decision

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

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

When GAO asked the Corps to explain the varying jurisdictional practices in different Corps districts, the Corps offered two explanations. The first was that local conditions within

districts often require the use of different standards. The second reason given by the Corps according to GAO was that:

because nearly all waters were jurisdictional under the migratory bird rule, questions regarding the imprecise definition of adjacent wetlands and isolated waters were previously moot. When the Supreme Court struck down the migratory bird rule in 2001, districts had to rely on the key terms and the regulatory definition of waters in the United States which had not been well defined.

GAO Report at 26. The GAO Report states that both the Department of Defense and EPA “concluded with the report’s findings” *Id.* at 29. In short, and in GAO’s words, because of the Migratory Bird Rule “nearly all waters and wetlands in the United States were potentially jurisdictional” and, therefore, no other jurisdictional standard was really required. *Id.* at 8. Now, the Corps is grappling with the absence of the Migratory Bird Rule and is applying the regulations actually promulgated pursuant to the notice and comment procedures of the Administrative Procedure Act.

VIII. Constitutional Issues in SWANCC

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

During the *SWANCC* litigation, the government’s case regarding substantial effects on interstate commerce was based on the cumulative effect that filling the isolated ponds on the *SWANCC* site would have on migratory bird habitat and on the ability people to pursue

recreational and commercial activities associated with migratory birds. Although the Supreme Court has not adopted a categorical rule against cumulating the effects of an activity to find a substantial impact on interstate commerce, it has emphasized that “thus far in our Nation’s history our cases have upheld Commerce Clause regulation of intrastate conduct only where that activity is economic in nature.” *Morrison*, 529 U.S. at 613. The Migratory Bird Rule, however, prohibits activities that are not inherently economic or commercial. It applies equally to a private homeowner who plants a garden, landscapes the backyard, or fills in a damp patch to prevent mosquitoes, and to a commercial developer who bulldozes a marsh. Indeed, the Corps has taken the position that the Migratory Bird Rule regulates non-commercial “[a]ctivities such as walking, bicycling or driving a vehicle through a wetland ...” 58 Fed. Reg. 45008, 45020 (1993). Obviously, many of those activities are not commerce in the ordinary sense of that term.

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

The Court did not reach any constitutional issues in the *SWANCC* decision and thus never opined on whether the links between the isolated ponds on *SWANCC*’s site and economic

activity were sufficient or too attenuated to pass muster under the Commerce Clause. Nor did the Court opine on whether the ability of the Corps to use the Migratory Bird Rule to control project siting decisions would unconstitutionally impinge on land use and other authority reserved to the states. I recognize that distinguished scholars can and will disagree over these issues and a detailed exposition of these issues is not even attempted in this statement. However, it may be worth noting that in its decision in the *SWANCC* case, the Court did state there are “significant constitutional questions” raised by the application of the Migratory Bird Rule. *SWANCC*, 531 U.S. at 174. The Court went on to state: “Permitting [the Corps] to claim federal jurisdiction over ponds and mudflats falling within the ‘Migratory Bird Rule’ would result in a significant impingement of the state’s traditional and primary power over land and water use. [Citations omitted.]” *Id.*

IX. Interpretation of, and Reaction to, the *Rapanos* and *Carabell* Decisions

I am sure the Committee has been fully briefed by the staff on the substance of the Supreme Court’s decision in *Rapanos v. United States* and I will not address that. Much of the post-*Rapanos* debate has focused on how the decision will be implemented and what, if any, changes should be made to the existing definition of the term “navigable waters.”

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

of the Clean Water Act is to protect waters which are part of, and connected in some way to, a watershed, or whether the purpose of the Act is to protect migratory bird habitat even when there is no connection to the watershed. Depending on how one answers that question, the need for, and the structure of, any statutory changes may become clearer.

I raise this issue for your consideration because if it is the wisdom of this Committee and the Congress to enact S. 1870, you should do so with the awareness that this bill will not simply return us to the pre-*SWANCC* era by reinstating the Migratory Bird Rule. S. 1870 will alter the jurisdictional reach of the Clean Water Act by deleting the term “navigable waters” in the Act and replacing it with a definition of the term “waters of the United States.” Such a change would be a fundamental departure from the original intent of the Congress detailed above which grounded the Act in the concept of navigability. In that regard, Supreme Court jurisprudence on the term “navigable waters” in the Clean Water Act indicates that the term “navigable waters” has a meaning that is less than all waters in the United States. As the Court noted in *SWANCC*: “it is one thing to give a word limited effect and quite another to give it no effect whatever. The term ‘navigable’ has at least the import of showing us what Congress had in mind as its authority for enacting the [Clean Water Act]: its traditional jurisdiction over waters that were or had been navigable in fact or which could be reasonably be so made. [Citations omitted].” *SWANCC*, 531 U.S. at 172. By deleting the term “navigable waters” from the statute, the import of S. 1870 will be to reach all waters in the United States without any reference to navigability.

That such a change in the Clean Water Act would cut a wide swath across America is seen in the description of the Clean Water Act Nationwide Permits (“NWP”) recently reissued by the Corps. 72 Fed. Reg. 11092 (March 12, 2007). In approving each NWP, the Corps identified the types of activities covered. For example, NWP 29 covers residential construction by individual homeowners; NWP 39 covers commercial and institutional development including fire stations, schools, churches, hospitals, and libraries; and NWP 42 addresses recreational

activities such as soccer and baseball fields, bike paths, hiking trails, nature centers, and campgrounds. I am not suggesting that such activities cannot impact water quality. I am only indicating that many people view the Clean Water Act as only affecting developers when, in reality, it affects many other interests. It may be worth noting in this regard that it is estimated that 75% of United States wetlands are privately owned. Roy R. Carricker, Wetlands and Environmental Legislation Issues, *Journal of Agriculture and Applied Economics* 26(1), July 1994.

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

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

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

X. Conclusion

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