

Testimony of William W. Buzbee

**Professor of Law
Emory Law School
Atlanta, Georgia 30322
Telephone: 404 727 6507
email: wbuzbee@law.emory.edu**

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

**The United States Senate Committee on Environment and Public
Works**

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Room 406, Dirksen Senate Office Building
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My name is William Buzbee. I am a Professor of Law at Emory University School of Law, where I am director of Emory's Environmental and Natural Resources Law Program. I am pleased to accept this Committee's invitation to testify regarding the status of the Clean Water Act in light of the Supreme Court's decisions in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*) and the Supreme Court's ruling in *United States v. Rapanos*, 126 S. Ct. 2208 (2006). Since that time, the judicial and regulatory treatments of these cases and the earlier related *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985), have revealed an increasingly confused body of law. These cases, and resulting confusion, have reduced the protections afforded to America's waters. In addition, proposed legislation, The Clean Water Restoration Act of 2007 (hereinafter "the Restoration Act") is an important piece of legislation worthy of support. The Restoration Act offers, through a limited amendment of the Federal Water Pollution Control Act (known as the Clean Water Act (CWA)), a means to restore protections long provided to America's waters, as well as greatly reduce legal uncertainty and attendant litigation resulting from the somewhat uncertain intersection of these three important cases. In my testimony, I will review these recent developments, ending with my preliminary, brief assessment of The Restoration Act.

I. Related Witness Background:

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

Earlier in my legal career, I counseled industry, municipalities, states and environmental groups about pollution control strategies and choices under all of the major federal environmental laws. As a scholar, I have written extensively about related issues, with a special focus in recent years on regulatory federalism, especially environmental laws and their frequent reliance on overlapping federal, state and local

environmental roles. My publications have appeared in *Stanford Law Review*, *Cornell Law Review*, *NYU Law Review*, *Michigan Law Review*, *University of Pennsylvania Law Review*, and in an array of other journals and books. A related book on risk regulation and federalism focusing on preemption policy choice will be published by Cambridge University Press in 2008. I have taught at Emory since 1993, but also visited at Columbia and Cornell Law Schools.

II. The Stakes:

It is critical to understand that the Supreme Court's construction of the Clean Water Act and what is protected as a "water of the United States," and Congress's and agencies' responses to those decisions, determine not just where dredging and filling can occur beyond the reach of federal law, but also whether industrial pollution discharges can escape regulation. What count as protected "waters" is not about some peripheral issue of outlandishly expansive stretching of federal regulation, as opponents of the CWA and the recently proposed Restoration Act often claim in near parodies of reality. The Clean Water Act's protections, and the protections against oil spills, are all implicated here. Only protected "waters of the United States" are subject to the protections of CWA Section 301 (the general prohibition against point source discharges of pollution into waters without a permit), Section 402 (the federal industrial pollution discharge permit program), Section 404 (the dredge and fill provision critical to protection of wetlands and other waters), and oil spill provisions in Section 311. If the CWA's jurisdiction does not reach particular waters, they are lost from federal CWA protection. Unless subject to some other statutory constraints, polluters could pollute with impunity. Make no mistake, the issue of what waters are protected is critical to the whole functioning of the CWA. The problem faced now is that two Supreme Court decisions since 2001 that construe the CWA have unsettled long-established regulatory interpretations, removed many waters from federal protection, and created substantial regulatory uncertainty. The resulting environmental harms are real.

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

III. *Rapanos*, SWANCC, and the Need for a Legislative Response:

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

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

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

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

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

Regulatory interpretations of what count as waters was unsettled and litigated for the first few years after enactment of the 1972 CWA. By the mid-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 to Representative James Oberstar in connection with hearings regarding

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

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

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

In *SWANCC*, the Supreme Court in 2001 rejected the federal government's attempt to protect isolated waters from fill due to their use by migratory birds, as prohibited under an interpretive document referred to as the Migratory Bird Rule. The Court gave the Clean Water Act a limiting read, overcoming the usual deference to agency statutory interpretations, due to the Court's concerns that protecting isolated waters due to use by migratory birds would go too far and be at the limit of federal power. The Court therefore found that such regulation was not intended by Congress in 1972. Importantly to constitutional arguments about the Restoration Act, the Court did not declare the statute unconstitutional, or even flesh out why the asserted jurisdiction was asserted to be at the bounds of federal power, but instead said a statutory clear statement was needed to justify federal protection of such waters. The Court basically punted on the question of the statute and exactly why and whether *SWANCC* presented a constitutional problem, acknowledging the issue but not resolving the validity of grounds

for federal power argued before the Court. It ultimately concluded that because the statute did not clearly state an intent to reach isolated waters that could be used by migratory birds, the Court would (and did) hold that the CWA did not reach the waters at issue in the case. By eliminating such “isolated waters” protected due to use by migratory birds from federal protection, huge amounts of previously federal waters are no longer subject to protection under the CWA. As mentioned below, it appears that regulators in the Army Corps and U.S. EPA have overly expansively read *SWANCC*, more generally ceasing to protect isolated waters despite the Supreme Court’s more limited rejection of the migratory bird jurisdictional justification and the presence of other CWA regulatory provision that could protect isolated waters.

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

Rapanos involved related questions of what sorts of tributaries and wetlands that are not “navigable in fact” are reached by the CWA. The reconfigured Supreme Court, with newly appointed Chief Justice Roberts and Justice Alito, produced a series of opinions in *Rapanos*. No single majority opinion speaks for five or more justices in this case. No five justice majority, in an opinion or in shared opinion rationales, rejects these long-established protections of America’s waters. *Rapanos* undoubtedly, however, makes for tough legal analysis and a confused legal terrain.

Due to the lack of a single majority opinion, we must look at votes and opinion content to understand the decision. Most confusingly, five justices agreed that the Army Corps of Engineers had to do more to establish its jurisdiction in the two consolidated cases leading to the *Rapanos* decision, but five justices overwhelmingly agreed with a broad protective rationale for jurisdiction in these cases. Five justices—Justices Kennedy in concurrence, and Justices Stevens, Souter, Ginsburg, and Breyer in dissent, strongly and explicitly disagreed with virtually all aspects of a plurality opinion penned by Justice Scalia. The four dissenters to the remand judgment disagreed with Justice Kennedy’s call for case by case significant nexus analysis. The did, however, overwhelmingly agree with the sorts of waters stated by Justice Kennedy to deserve protection.

Working with a 4-1-4 Court breakdown, with a judgment and majority rationales cutting in different directions, does present a challenge. As discussed below, it has led to confusion in the courts and a regulatory guidance that appears illegally narrow. Counting heads and parsing *Rapanos* and the Court’s other major “waters of the United States” decisions, there actually should be a fair bit of remaining clarity, but in application confusion has reigned. Among the views of the law that should be broadly agreed upon,

but have actually divided courts and regulators, are the following: Most protections of the Clean Water Act's long-established regulations remain. Significantly, no justice claims to overrule or cut back the Court's unanimous 1985 *Riverside* decision. Adjacent wetlands remain protected due to their hydrological and ecological functions. All justices also continue to agree that the Clean Water Act protects more than just "navigable-in-fact" waters. The key regulations defining what count as "waters of the United States" were not struck down. Indeed, *Riverside Bayview Homes* explicitly upheld them, *SWANCC* concerned an interpretive extension of those regulations, and *Rapanos* involved "as applied" challenges to federal jurisdiction and no five justice majority struck down any of the underlying regulations. A majority of justices also are sticking with the lack of federal protection for isolated wetlands reached due to migratory bird use, as the Court concluded in *SWANCC*. In *Rapanos*, five justices rejected expansive arguments about *SWANCC* and arguments seeking to further limit federal constitutional power.

So how do we interpret this splintered set of opinions? As Chief Justice Roberts basically states in his own brief concurring opinion, through citations to earlier Court opinions, the narrowest opinion that shares greatest ground with other justices becomes the key opinion for future application. The key swing opinion is that of Justice Kennedy. Both by itself, and also if looked at with the Justice Stevens dissenters' opinion with which Justice Kennedy agrees repeatedly, most of the protections long established under the statute and implementing regulations remain intact.

Before discussing Justice Kennedy's opinion, it is important to state clearly that Justice Scalia's opinion for a plurality of justices does not represent the law, except to the extent his crabbed view of the CWA might protect waters otherwise not protected by Justice Kennedy's concurrence. Relying heavily on a dictionary created over a decade before the statutory language at issue, Justice Scalia and his fellow plurality justices (Chief Justice Roberts, and Justices Scalia, Thomas, and Alito) read the CWA to reach only "relatively permanent, standing or continuously flowing bodies of water," and exclude areas where water "flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall." This view, had it been adopted by a Court majority, would have constituted a revolutionary discarding of long-established regulatory approaches, as well as a radical rejection of the twenty-year-old *Riverside Bayview* Court precedent (although these justices do not concede such an intent or effect). This Justice Scalia plurality opinion hence garnered only three additional votes for its severely limiting view of what can be protected as a federal water.

Nevertheless, in articulating the sorts of waters the plurality would protect, the plurality justices joining Justice Scalia's opinion do describe certain sorts of waters that could potentially not be protected by Justice Kennedy's generally more expansive view of what waters are subject to federal jurisdiction. The dissenters, in an opinion by Justice Stevens, noted this possibility and thus said that both Justice Kenendy's and Justice Scalia's waters are protected: "Given that all four Justices who have joined this opinion would uphold the Corps' jurisdiction in both of these cases—and in all other cases in which either the plurality's or Justice Kennedy's test is satisfied—on remand each of the judgments should be reinstated if either of those tests is met."

Justice Kennedy's opinion concurring in the judgment repeatedly rejects the Scalia opinion's approach as "inconsistent with the Act's text, structure, and purpose," as do the dissenters. For Supreme Court opinions to constitute law, you need to find five justices in agreement, five justices in assent regarding the rationale for the decision. Justice Scalia came up one vote short. It is only a plurality opinion.

As now agreed upon by the Department of Justice, the Army Corps and EPA, and several (but not all) courts that have confronted the issue, Justice Kennedy's opinion is the key. Justice Kennedy picks up on *SWANCC* language to assert that there must be a "significant nexus" between wetlands or tributaries to navigable waters or waters that could be navigable for them to be jurisdictional waters subject to federal protection. Critically important, the sorts of significant links he sets forth are many and are sensitive to the statute's explicit focus on "chemical, physical and biological integrity." Wetlands or tributaries can be federally protected if "alone or in combination with" similar lands and waters, they "significantly affect the chemical, physical or biological integrity of other covered waters more readily understood as 'navigable.'" Non-navigable tributaries are "covered" if alone or with "comparable" waters they are significant. In addition to giving due heed to the usual goals of protecting water quality and fishery resources long protected and affirmed in *Riverside Bayview Homes*, Justice Kennedy further refers to "integrity" goals, as well as concern with "functions . . . such as pollutant trapping, flood control, and runoff storage."

Under the Kennedy opinion, only if wetlands or tributaries have insubstantial linkages and effects, alone or in combination with other similar lands or waters, might they lose protection. Justice Kennedy's "significant nexus" articulation ends up creating an overwhelming overlap with long-established regulatory approaches, as well as with the approaches articulated in the Justice Stevens *Rapanos* dissent joined by three other justices.

Also significant is Justice Kennedy's and the dissenters' repeated call for deference to expert regulators' judgments about the significance of both categories of waters and particular waters subject to jurisdictional determinations. Justice Kennedy clarifies the many types of uses and functions that are federally protected, but leaves to regulators room to assess the significance of areas that might, upon first examination, not look like protected waters. Such deference is notably lacking in the Justice Scalia opinion.

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

When Justice Kennedy and the dissenters apply their approaches to the *Rapanos* and *Carabell* facts, both intimate that on remand federal jurisdiction looks likely to be

found. Justice Kennedy differs from the dissenters in asking the Army Corps to establish on a case by case basis the nexus test he articulates.

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

IV. The Need for a Legislative Fix:

a. Post-*Rapanos* Judicial Confusion

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

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

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

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

b. Post-*Rapanos* and SWANCC Regulatory Confusion and Rollback

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

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

In particular, Justice Kennedy's concurrence focused a great deal on the CWA's integrity goals, as well as the need to protect waters that in combination with other similar or comparable waters would have a significant effect. The recent interpretive guidance largely omits reference to these "combination" waters, potentially removing from federal jurisdiction huge numbers of smaller similarly situated waters that in combination and in their cumulative impacts are critical to downstream water quality and quantity. Environmental groups in their comments question the legality of the guidance, asserting that by ignoring or deemphasizing these protective elements of Justice Kennedy's opinion, and failing to give weight to still effective regulations about protective waters, the guidance exceeds the bounds of the Army Corps' and EPA's interpretive discretion.

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

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

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

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

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

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

V. The Clean Water Restoration Act's Logic and Legality:

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

a. Restoring longstanding bipartisan regulatory protections makes sense

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

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

Restoration Act does not itself change in any categorical way the treatment of such activities.

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

b. Broad language about constitutional power is necessary

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

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

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

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

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

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

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

Can Congress constitutionally reach the sorts of waters specified in the Restoration Act? The answer is a resounding yes. As a matter of constitutional law, certainly Congress can protect waters that themselves “substantially affect” commerce and regulate activities that are themselves commercial or economic or nature. After all, in the Supreme Court’s major Commerce Clause decisions in recent years, it has focused at times on the thing to be protected, while at other times focused on the nature of the activity that would, if not regulated, cause harm. Hence the Court focused its Commerce Clause analysis in the famous *United States v. Lopez* case on whether the handgun possession at issue had an established commerce link. 514 U.S. 549 (1995). In the later *United States v. Morrison* case, 529 U.S. 598 (2000), the Court focused on the lack of a commercial aspect to violence against women. In *SWANCC*, the Court’s abbreviated and partial analysis focused on waters themselves (the thing protected), but acknowledged, without resolving the question of constitutionality, that other “activities” could influence its Commerce Clause constitutional analysis. In the Court’s most thorough Commerce

Clause analysis in the modern era, in the *Hodel v. Indiana* case, 452 U.S. 314 (1981) the Court looked at an array of ways federal protections satisfied Commerce Clause requirements. A particularly thorough analysis of how environmental amenities like waters and endangered species can easily be regulated under our Constitution is provided by renowned conservative Fourth Circuit Judge J. Harvey Wilkinson in *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000). He examines activities causing harm, the inherent economic and ecological value of the protected wolf, and the economic value of activities dependent on the ongoing existence of the wolf.

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

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

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

- (a) Non-tidal drainage and irrigation ditches excavated on dry land.
- (b) Artificially irrigated areas which would revert to upland if the irrigation ceased.
- (c) Artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.
- (d) Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating and/or diking dry land to retain water for primarily aesthetic reasons.
- (e) Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel

unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States (see 33 CFR 328.3(a)).

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

c. The Restoration Act retains longstanding CWA limitations and flexibility

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

d. The Savings Clause could lead to confusion

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

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

I am aware that some stakeholders would like specific reference to particular regulatory exemptions and add language that they remain. This is, I believe, the worst

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

Conclusion:

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