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I. Introduction

Thank you, Mr. Chairman and members of the Committee, for the opportunity to testify before you today. My name is Alex Matthiessen. I am the Hudson Riverkeeper and President of Riverkeeper, Inc. ("Riverkeeper"), a New York environmental organization that works to protect New York area water resources. In my testimony today, I will briefly describe the recent erosion of long-standing protections under the Clean Water Act, and the negative impacts these rollbacks have had on efforts to preserve these vital water resources.

II. Executive Summary

Riverkeeper strongly urges all Members of Congress to act swiftly in passing the Clean Water Restoration Act ("CWRA") to reaffirm Congress' original intent to protect our nation's interconnected water resources, including watersheds, wetlands and tributaries, from pollution. This legislation is of utmost importance to the future of clean water in the United States and demands our full support. Two sharply divided, controversial Supreme Court decisions, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* ("*SWANCC*") in 2001[1] and *Rapanos et ux., et al. v. United States* ("*Rapanos*") in 2006[2] have thrown federal and state agencies into total confusion as to when they have CWA jurisdiction. Together, these decisions have created great uncertainty over which waters are to be afforded protection under the Clean Water Act. Although the Clean Water Act mandates broad protection of "waters of the United States," the definition of that term has been left to agency regulations promulgated by the U.S. Army Corps of Engineers ("Corps") and U.S. Environmental Protection Agency ("EPA"). Since the above-mentioned Supreme Court rulings, developers have attempted to capitalize on the confusion caused by these decisions to build in wetland areas that previously had been protected under the CWA.

[1] 531 U.S. 159 (2001).

[2] 547 U.S. 715 (2006).

Historically, judicial interpretations of the Clean Water Act have recognized the value of conserving and maintaining healthy wetlands, headwater streams and other waters.[3] In recent years, however, opponents of the Clean Water Act—largely industry, developers and landowner groups as well as Supreme Court Justices Scalia, Thomas, Alito and Chief Justice Roberts—have argued that Congress never intended an expansive view of federal authority to protect the nation's waters. These opponents point to the use of the term "navigable," which appears throughout the Clean Water Act, as an indication of Congress' intent to tie Clean Water Act jurisdiction with traditional concepts of navigability. These opponents have attempted to place into question whether Congress intended the Clean Water Act to protect certain streams, rivers, wetlands and other waters that are not "traditionally navigable", i.e., "navigable in fact." If the scope of the Clean Water Act were to be reinterpreted in this way, as most recently suggested by petitioners in *Rapanos*, over 98 percent of the nation's waters would be excluded from federal protection under the CWA—a proposition absurd on its face.[4] Clearly, such a narrow interpretation would render the Clean Water Act meaningless and would be in direct derogation of the CWA's goals and objectives.

For our nation's waters to be truly protected from pollution and degradation, as envisioned by Congress in originally enacting the Clean Water Act, the health of wetlands, rivers, streams, lakes and coastal waters must be protected. The scientific evidence for protecting such waters is clear and unambiguous. All of our nation's waters are connected through hydrologic cycles and must be given equal protection, as Congress originally intended when it enacted the Clean Water Act in 1972. The U.S. has already lost too many of these valuable water resources. The National Research Council has posited that the objectives of the Clean Water Act "cannot be achieved if wetlands are not protected."[5] The degradation and destruction of these vital water resources will only serve to increase water pollution, exacerbate flooding, threaten public health, deplete drinking water sources, and reduce and potentially extinguish endangered or threatened wildlife species.

Even before the CWA was weakened by the Supreme Court in its recent rulings, our nation's waters were in trouble. Today, approximately 45 percent of the nation's waters still do not meet water quality standards for supporting fishing and swimming, a goal of the CWA that was supposed to have been reached by 1983.[6] In New York, approximately 37% of the state's river miles and 77% of the state's lake waters are impaired.[7] Additionally, the fish in approximately 41% of New York's waters are not safe for consumption and nearly all of the

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[3] *See, e.g., United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

[4] *See* Testimony of John Quarles, Acting Administrator of the U.S. Environmental Protection Agency Before the Committee on Transportation and Infrastructure, U.S. House of Representatives, March 3, 1977. *See also*, L. Wood, *Don't be Misled: CWA Jurisdiction Extends to All Non-Navigable Tributaries of the Traditional Navigable Waters and to Their Adjacent Wetlands*, 34 Envtl. L. Rptr. 10187, 10192-10193 & n.32 (2004) (concluding that fewer than 1% of the stream miles within the Missouri River watershed are traditional, navigable waters).

[5] National Research Council, *Compensating for Wetlands Loss under the Clean Water Act.* (2001).

[6] Statement of G. Tracy Mehan III, Assistant Administrator for Water, U.S. EPA, Before The Committee on Environment and Public Works, United States Senate, October 8, 2002.

[7] Food and Water Watch, *Clear Waters: Why America Needs a Clean Water Trust Fund.* (2007).

State's Great Lakes waterways are seriously degraded.[8] In March 2008, the New York State Department of Environmental Conservation ("DEC") released a report stating that an estimated $36.2 billion will be needed over the next twenty years to repair, replace, or update New York's municipal wastewater infrastructure.[9] Currently, the New York State Department of Health is compiling data for a Drinking Water Needs Survey, which is expected to demonstrate that at least $20-22 billion will be needed for New York State's drinking water infrastructure over the next twenty years.[10]

Now, more than ever, Congress must pass the Clean Water Restoration Act to reaffirm its original intent in enacting the Clean Water Act, which according to the language of the Act, itself, is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters"[11] and make our nation's treasured waters fishable and swimmable once again.

III. Background: Riverkeeper and the Clean Water Act in New York State

Riverkeeper is the Hudson River's leading citizen-based clean water advocacy organization, employing legal action, education and advocacy to enforce federal, state and local laws designed to protect the public's right to clean water. We work on behalf of a diverse population of New Yorkers—from urban dwellers residing in New York City to local fishermen and blue collar families who live and work in the rural Hudson Valley. Riverkeeper (including its predecessor, the Hudson River Fishermen's Association, Inc.) has over 42 years of experience combating pollution of the Hudson River.

In 1966, our founder, Robert H. Boyle and a group of recreational and commercial fishermen launched the Hudson River Fishermen's Association ("HRFA"), who set out to reclaim the Hudson River from polluters. At that time, the River was heavily polluted and disease-ridden as towns and factories treated the Hudson River like an "open sewer."[12] Determined to reverse the decline of the Hudson River, Bob Boyle unearthed a little known 19th century law—the Federal Refuse Act of 1899—and used this law to confront polluters head on.[13] In fact, in 1969, HRFA became the first organization in American history to receive a bounty against polluters under the Federal Refuse Act.[14]

Without a doubt, the landmark passage of the Federal Water Pollution Control Act in 1972, renamed the Clean Water Act in 1977 (hereinafter referred to as "Clean Water Act" or "CWA"), has enabled groups like Riverkeeper to stop polluters in their tracks. The CWA stands

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[8] *Id.*

[9] New York State Department of Environmental Conservation, *Wastewater Infrastructure Needs of New York State*. (March 2008).

[10] *Id*. at 3 n1.

[11] 33 U.S.C. § 1251(a).

[12] John Cronin & Robert F. Kennedy, Jr., The Riverkeepers 19, 55 (1997).

[13] The Federal Refuse Act is section 13 of the Rivers and Harbors Act of 1899. *See* 33 U.S.C. § 407.

[14] The Riverkeepers at 42-49.

as the last and best deterrent to reckless pollution and unchecked development. Today, in sharp contrast to its polluted past, the Hudson is internationally heralded as a model for river restoration and remains one of the most biologically rich waterways on earth. In 1998, the Hudson was named an American Heritage River, one of only fourteen rivers nationwide to receive that designation. Riverkeeper's success in restoring the Hudson has inspired the creation of "waterkeepers" on more than 177 waterways across the globe.

At any given time, Riverkeeper is involved in dozens of cases against polluters—all aimed at protecting the integrity of the Hudson, its tributaries, the Croton watershed, or other waters that affect New Yorkers' water supply. These cases include investigations, litigation, environmental review of development projects, citizen actions, regulatory review, and lobbying of local, state, and federal policy issues. In the past, Riverkeeper has successfully challenged the illegal activities of some of the largest and most notorious polluters for violations of the CWA. Currently, Riverkeeper is working on pollution cases throughout the New York City Harbor, and the Lower, Middle and Upper Hudson Valley Regions.

In 1970, a sister organization, the Natural Resources Defense Council ("NRDC"), sought to protect the Ockawamick, an intermittent tributary to the Hudson located in upstate New York. The Philmont Finishing Company, a cleaner and finisher of woolens, was discharging wastewater and spent materials from its outfall into a dry trench, which emptied into the creek some 50 yards away. In their investigation, the authors reported that life in the river had been killed for a stretch of several miles downstream and that several children who had gone swimming in the stream had become seriously ill.[15] The enactment of the CWA two years later gave groups like NRDC and Riverkeeper the leverage we needed to stop this kind of rampant pollution of the Hudson River's tributaries and creeks.

Sadly, as a consequence of major federal rollbacks to the Clean Water Act since 2001, creeks such as the Ockawamick are once again vulnerable to becoming industrial dumping grounds that harm our environment, threaten our economic prosperity and harm the health of our communities, inevitably reversing 30 years of progress made on the Hudson.

In New York State, the Hudson River watershed and the New York City drinking water supply watershed—the two resources Riverkeeper is charged with protecting—are under intense pressure from increased suburban development, stormwater runoff and point source pollution. The region needs strong CWA protection more than ever.

IV. The Clean Water Restoration Act (H.R.2421/S.1870) is Necessary to Restore the Original Intent of Congress in Passing the Clean Water Act

As its title clearly indicates, the Clean Water Restoration Act ("CWRA") seeks to <u>reaffirm</u> and <u>restore</u> the original intent of the Clean Water Act; it does not propose any broad new rule or program obligations, but rather seeks to incorporate statutory language that has been included in the Corps' and EPA's implementing regulations since 1977.[16] For the last 35 years, federal agencies and courts have correctly taken a broad view of federal regulatory jurisdiction

[15] Arthur E. Nathan, Natural Resources Defense Council Rivers and Harbors Project 1970—Philmont, NY (1970).

[16] *See infra* n.20.

under the CWA and extended protection to critically important water resources, including small wetlands and headwater streams. However, since the Supreme Court's decisions of 2001 and 2006, federal jurisdiction over certain types of water resources has been whittled away, through agency policy directives and conflicting circuit court interpretations of new, judicially created terms that are not contained in the CWA.

A. *Original Intent of the Clean Water Act*

In enacting the Clean Water Act, Congress fully intended that all of the Nation's waters be protected from unregulated pollution, degradation and destruction. The Clean Water Act was enacted by Congress with a sweeping objective: "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[17] The CWA established two clear goals that are equally bold and ambitious: (1) that the discharge of pollutants into navigable waters be eliminated by 1985; and (2) that wherever attainable, an interim goal of water quality be attained which provides for "swimmable and fishable" waters by 1983.[18] (Emphasis added).

B. *Historic Origin of the Term "Navigable" Waters*

While the intent and goals of the CWA to maintain water quality are clear, the current legal confusion stems from the recent exploitation of the term "navigable". While the CWA regulates pollution and discharge of dredge or fill material to "navigable" waters, the CWA defines "navigable" waters merely as "waters of the United States."[19] Regrettably, the term "waters of the United States" is not explicitly defined in the CWA, but rather in Corps and EPA regulations.[20]

The terms, "navigable waters" and "navigability" were used by Congress in the Rivers and Harbors Act of 1899, an early precursor to the CWA, to define federal authority over the Nation's waterways.[21] When Congress enacted the Rivers and Harbors Act, its aim was not to protect water quality, but rather to prevent physical interference with, or obstruction to transportation and commerce on our Nation's waterways, which were of vital import to the American economy at that time. Federal authority under the Rivers and Harbors Act was asserted under the Commerce Clause of the U.S. Constitution.[22]

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[17] 33 U.S.C. § 1251(a).

[18] *Id.*

[19] 33 U.S.C. § 1362, CWA § 502(7).

[20] *See* 40 CFR § 230.3 (EPA regulatons) and 33 CFR § 328.3(a)(1)-(7) (Corps regulations). The Corps defines "waters of the United States" to include: [a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce including all waters which are subject to the ebb and flow of the tide; [a]ll interstate waters including interstate wetlands; [a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce…; [t]ributaries of waters identified in paragraphs (a)(1)-(4) of this section; and [w]etlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(6) of this section.

[21] 33 U.S.C. § 403.

[22] U.S. CONST. art. I, § 8, cl. 3.

Yet the specific legislative history of the CWA explains why Congress included the term "navigable" waters in the CWA and also makes clear that it intended this term be given a much more expansive interpretation than that relied upon in the Rivers and Harbors Act. CWA section 502(7) defines "navigable" waters to mean the "waters of the United States, including the territorial seas."[23] An accompanying Senate Conference Report states that Congress intended the term "navigable waters" to be given "the broadest possible Constitutional interpretation."[24] In addition, early versions of the CWA first used the term "interstate waters" to define jurisdiction.[25] However, in 1961 Congress amended the CWA to adopt the term "navigable waters" in order to achieve broader coverage.[26] In these earlier versions, the word, "navigable" was also included within Section 502(7)'s definitional provision for "waters of the United States."[27] In enacting the Clean Water Act in 1972, however, the Conference Committee deleted the word "navigable" from Section 502(7) and expressed its intent to reject prior geographic limits on the scope of federal water protection measures.[28]

C. *Recent Attacks on the CWA*

For the past 30 years, the Corps and EPA implementing regulations have embodied Congress' intent by defining "waters of the United States" as broadly as constitutionally permissible. These "waters of the United States" include a wide range of waterbodies, including wetlands and headwater streams.[29] Prior to 2001, caselaw supported these expansive definitions. Yet recent Supreme Court decisions and subsequent policy guidances have seriously undermined the jurisdictional reach of the CWA, chipping away at the types of waterbodies that may be protected. Rather than resolving any ongoing interpretational conflicts, the Supreme Court has merely changed the terms of the debate, resolving one conflict while creating new terms and rules that have caused confusion and invited new rounds of litigation.

In January 2001, the U.S. Supreme Court held in *Solid Waste Agency of Northern Cook County v. United States* ("*SWANCC*") that the Corps had exceeded its authority under the Clean Water Act by asserting regulatory jurisdiction over so-called "isolated" wetlands where the sole basis for doing so was their use by migratory birds.[30] Although the Court's narrow decision was strictly limited to waters that are "non-navigable, isolated, [and] intrastate whose *sole basis* for the assertion of regulatory jurisdiction under the CWA was their use as habitat by migratory birds," Chief Justice Rehnquist's dictum stated that the term, "navigable waters" could not be read out of the statute and that the term had the import of "showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or

[23] 33 U.S.C. § 1362, CWA § 502(7).

[24] *See* Conference report S.Rept. 92-1236 at 144, *reprinted in* 1972 U.S. Code Cong. & Admin. News 3776, 3822.

[25] *Id*.

[26] Pub. L. No. 87-88, Section 8(a), 75 Stat. 208 (June 20, 1961).

[27] *Id.*

[28] *Compare* S. Conf. Rep. No. 1236, 92d Cong., 2d Sess. 144 (1972) with H.R. Rep. No. 911 92 Cong., 2d Sess. 356 (1972).

[29] *See supra* n.20.

[30] 531 U.S. 159 (2001).

had been navigable in fact or which could reasonably be made so."[31] Thus, the issue of navigability was revived.

In 2003, following *SWANCC*, the Corps and EPA announced an Advance Notice of Proposed Rulemaking ("ANPRM"), soliciting comments on how the Corps and EPA should redefine their regulatory definitions of "waters of the United States."[32] The ANPRM far exceeded the scope of *SWANCC*'s narrow holding. After receiving an unprecedented 133,000 comments in opposition, the rulemaking was stopped.[33] However, that same year, the Corps and EPA issued a policy guidance in lieu of regulations that remain in effect today.[34] This policy guidance directs Corps and EPA staff to immediately cease asserting jurisdiction over "isolated" waters based on their use as habitat for endangered species or crop irrigation as well as any intrastate, non-navigable waters, including streams and wetlands, which they might consider "isolated." Instead, Corps and EPA staff must first gain permission from agency headquarters in Washington, D.C. before extending protections to any potentially "isolated" waters. Strikingly, Corps and EPA staff are not then required to defend or even document how these decisions are made. According to the EPA's own estimates, this 2003 policy directive affects the agency's ability to protect 20 million acres of so called "isolated" wetlands and other water bodies throughout the United States.[35]

On May 18, 2006, in direct response to the many controversies surrounding the 2003 guidance, the U.S. House of Representatives adopted an amendment to an FY2007 appropriations bill barring EPA from spending funds to further implement the new policy.[36] Although the amendment received strong, bipartisan support (passed by a 222-198 vote), the 109th Congress adjourned in December 2006 before taking final action. No further action has since been taken and, unfortunately, the 2003 guidance remains in full force today.

Just as *SWANCC* and the subsequent policy guidance have removed protections for certain wetlands, the 2006 Supreme Court decision in the consolidated cases, *Rapanos v. United States* and *Carabell v. United States Army Corps of Engineers*, has added to the confusion about which waters are protected by the CWA.[37] Unlike *SWANCC*, these cases were not about wetlands, but rather about intermittent streams and navigability. In *Rapanos*, the Court examined whether the law protects non-navigable tributaries and their adjacent wetlands. Petitioners argued that Clean Water Act protections should apply only to "traditional navigable" waters and those wetlands and streams "directly adjacent" to those "traditional navigable" waterways. In reaching its decision, the Court was sharply divided, resulting in a rare 4-1-4 split

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[31] *Id*. at 172.

[32] *See* 68 Fed. Reg. 1991 (January 15, 2003).

[33] According to EPA, over 99% of these comments were opposed to a new rule. U.S. Government Accountability Office, *Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction*, GAO-04-297 (February 2004).

[34] *See* 68 Fed. Reg. 1997 (January 15, 2003).

[35] Eric Pianin, "Administration Establishes New Wetlands Guidelines," *The Washington Post*, January 11, 2003; p. A05. *See also* Douglas Jehl, "U.S. Plan Could Ease Limits on Wetlands Development," *The New York Times*, January 11, 2003.

[36] H.R. 5386 (2006).

[37] 126 S.Ct. 2208 (2006).

decision that has, yet again, spurred extensive litigation across the country. *Rapanos* represents an even greater threat to the CWA, calling into question Congress' authority to regulate our nation's vital network of small headwater streams and associated wetlands.

Because it is not a majority, the plurality opinion written by Justice Scalia, and supported by Justices Thomas, Alito and Chief Justice Roberts is not controlling, but sheds an ominous light on the direction the Court could move in the future. It held that wetlands adjacent to non-navigable tributaries are "waters of the United States" *only if* the tributary to which the wetland is adjacent is a "relatively permanent" waterbody and the wetland has a "continuous surface connection" with the tributary. The *Rapanos* plurality opinion articulates an exceptionally narrow and restrictive reading of the CWA's jurisdiction over "waters of the United States" which, if controlling, could erase the past 30 years of progress made in protecting our nation's water resources from degradation and destruction. Additionally, the plurality opinion would remove from CWA jurisdiction all intermittent or ephemeral flows of water and limit federal jurisdiction only to wetlands with a "continuous surface connection" to water bodies that fit within Scalia's newly articulated definition of "waters of the United States."

In the concurring opinion, Justice Kennedy articulated a "significant nexus" test for determining which waters should be considered "waters of the United States" under the Clean Water Act, requiring that wetlands or waters falling within the scope of the CWA's Section 404 jurisdiction possess a "significant nexus" to waters that are or were "navigable in fact" or that "could reasonably be so made." According to Kennedy, a "significant nexus" will be found to exist where the wetland or water, alone or in combination with similarly situated lands, has a significant effect on the chemical, physical and biological integrity of traditional navigable waters. This "significant nexus" test requires an administratively burdensome, "labor intensive" case by case analysis that has already proven difficult to apply.[38] The unfortunate end result is that with no controlling, majority opinion, lower courts have been left, yet again, to grapple with how to interpret the scope of the Clean Water Act over "waters of the United States."

In an apparent attempt to clarify the confusing effects of the *Rapanos* split decision, the EPA and Corps issued new policy guidance in June 2007.[39] In reality, this guidance has left very little "clarified." The new guidance instructs EPA and Corps staff to incorporate a confusing combination of the Scalia and Kennedy tests articulated in *Rapanos*.[40] In effect, this guidance threatens to subject many streams, rivers and wetlands in need of protection to a speculative and cumbersome case by case analysis that does not even reflect a majority opinion among the Supreme Court Justices. Like the 2003 policy guidance, this directive implicates the entire CWA, not just Section 404.

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[38] Environmental Law Institute, *The Clean Water Act Jurisdictional Handbook for Wetlands* at 22 (2007 Edition).

[39] 72 Fed. Reg. 31824 (June 8, 2007).

[40] Individual permit applications must undergo jurisdictional determinations based first on the Scalia test and then, if necessary, on the Kennedy "significant nexus" test.

D. *SWANCC and Rapanos Have Far Reaching Impacts on All Clean Water Act Programs*

The effects of *SWANCC* and *Rapanos* and the two EPA/Corps policy guidances are far reaching and impact the entire Clean Water Act, not just Sections 404 and 402. Almost every Clean Water Act program relies on the definition of "navigable waters" to include all "waters of the United States" as that term has been broadly interpreted for the last 35 years by the EPA and Corps, prior to the *SWANCC* and *Rapanos* decisions. Thus, in addition to Sections 402 (national pollutant discharge elimination system) and 404 (dredge and fill), the regulatory scope of Sections 303 (water quality standards program),[41] 401 (state water quality certification program)[42] and 311 (oil spill program)[43] of the Clean Water Act as well as the Oil Pollution Act will be severely undermined and weakened by this unprecedented, restrictive re-interpretation of the term "navigable waters."

E. *The Confusion Caused by SWANCC and Rapanos Has Resulted in Inconsistent Corps' Jurisdictional Determinations and Has Spurred Considerable Litigation Nationwide*

Clean Water Act jurisdiction is truly in a state of flux, resulting in a barrage of inconsistent lower court rulings and Corps jurisdictional determinations. As reported by the Government Accountability Office, subsequent to *SWANCC*, Corps districts across the country no longer agree on the basic rules of law they must apply when making 404 jurisdictional decisions, thus issuing vastly inconsistent determinations.[44]

In the short time span since *Rapanos* was handed down, there have been at least four Courts of Appeals rulings and eight federal district court rulings, reflecting the struggle courts are having interpreting *Rapanos*.[45] Thus far, these rulings have also been vastly inconsistent, an outcome predicted by the Chief Justice, himself, in his concurring opinion. Chief Justice Roberts: "[i]t is unfortunate that no opinion commands a majority of the Court on precisely how to read Congress' limits on the reach of the Clean Water Act. Lower courts and regulated entities will now have to feel their way on a case-by-case basis."[46] Some courts have relied solely on the

[41] This section of the CWA requires States to design water quality standards and criteria for navigable waters so as to protect public health and welfare. 33 U.S.C. § 1313.

[42] This section of the CWA requires any applicant for a Federal license or permit that may result in any discharge to navigable waters to provide State certification. 33 U.S.C. § 1341.

[43] Both Section 311 of the Clean Water Act and the Oil Pollution Act provide the EPA and U.S. Coast Guard with the authority to establish a program for preventing, preparing for, and responding to spills that occur in "navigable waters" of the United States. *See* 33 U.S.C. § 1321 and 33 U.S.C. § 2701 et seq.

[44] U.S. Government Accountability Office, *Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction*, GAO-04-29 (February 2004).

[45] Environmental Law Institute, *The Clean Water Act Jurisdictional* Handbook at 55-61 (2007 Edition).

[46] 126 S. Ct. at 2236.

Scalia plurality view.[47] Some courts have looked solely to the Kennedy "significant nexus" test.[48] Other courts have taken the dissenters' suggestion that a wetland satisfying either the plurality *or* the Kennedy significant nexus test will be jurisdictional.[49] These inconsistent decisions make evident that passage of CWRA is urgently needed to restore consistency and uniformity for courts and agencies wrestling with how to interpret the muddled scope of Clean Water Act jurisdiction.

F. *CWRA Would Eliminate Definitional Ambiguity*

CWRA will put an end to the state of confusion that *SWANCC* and *Rapanos* have engendered among relevant federal agencies and return to the "status quo" of CWA regulation that was in place for 30 years, prior to 2001. Specifically, CWRA would amend and clearly define "waters of the United States" to include "intrastate" and "intermittent" waterbodies and wetlands by 1) replacing the term "navigable waters," throughout the Act, with the term "waters of the United States," and 2) correctly defining "waters of the United States" as "all waters subject to the ebb and flow of the tide, the territorial seas, and all interstate and intrastate waters and their tributaries, including lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, natural ponds, and all impoundments of the foregoing, to the fullest extent that these waters, or activities affecting these waters, are subject to the legislative power of Congress under the Constitution." These amendments merely conform the statutory text of the CWA to the EPA and Corps implementing regulations in place for more than 30 years prior to the upheaval caused by *SWANCC* and *Rapanos*.[50]

V. The Importance of Wetlands and Intermittent and Headwater Streams

A. *All Waters Are Hydrologically Connected*

There is no dispute among scientists that all of our nation's waters are connected through hydrologic cycles.[51] So-called "isolated waters," including geographically isolated wetlands, remote tributaries, ephemeral and intermittent creeks and streams, although lacking a surface connection to navigable waters, have other hydrologic connections to, and very much affect the quality of, navigable waters through groundwater connections and flood and erosion control. Indeed, almost no headwater streams, wetlands, and small ponds – even those that do not have an obvious or year-round surface water connection with other waters – can truly be considered "isolated" from a scientific perspective. Thus, even waters that have no apparent surface water connection serve as integral parts of watersheds, performing essential functions affecting the

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[47] *United States v. Chevron Pipe Line Co.*, 437 F.Supp.2d 605 (N.D. Tex. 2006).

[48] *Northern California River Watch v. City of Healdsburg*, 457 F.3d 1023 (9th Cir. 2006); *United States v. Gerke Excavating, Inc*, 464 F.3d 723 (7th Cir. 2006).

[49] *United States v. Evans*, 2006 Westlaw 2221629, *19 (M.D. Fla. Aug. 2, 2006).

[50] *See supra* n.20.

[51] The definition for "waters of the United States" as proposed by the plurality in *Rapanos* to mean only "relatively permanent, standing or flowing bodies of water" such as streams, rivers, lakes, and other bodies of water "forming geographic features" is flat out wrong and dangerous. Scalia's definition gives no consideration to these well established scientific principles. Instead, Scalia's definition is based on his purported "common sense" and a 1954 dictionary definition for "waters".

health of water systems. There is abundant scientific evidence that pollution dumped into the upper reaches of watersheds not only damages and destroys these important smaller water systems, but also ends up harming lakes, rivers and coastal waters located in the watershed as well.[52]

B. *The Ecological Importance of Intermittent and Headwater Streams*

Our nation's network of headwater streams and creeks, including "ephemeral" and "intermittent" streams, constitute some of the country's most critical natural water resources. It is estimated that small or headwater streams comprise up to 80% of the nation's stream network.[53] Scientific studies have demonstrated, moreover, that ephemeral and intermittent streams, despite their small size,[54] have major impacts on larger water bodies downstream. Collectively, these small streams and creeks contribute to the public drinking water supplies of over 110 million people nationwide. When water is present, these streams help filter and process pollutants, recharge groundwater and supplement drinking water sources for much of the country. They improve water quality through nutrient cycling and sediment trapping and retention. They also offer an enormous array of habitat for plants and animals. EPA reports that over 40% of the 37,000 national pollutant discharge elimination system (NPDES) permits (with locational data available) discharge into either start reaches or intermittent/ephemeral streams, excluding Alaska.[55] EPA estimates that *Rapanos* could remove Clean Water Act protection from as many as 53-59% percent of the nation's waters (outside of Alaska) which are either headwater streams or intermittent or ephemeral streams.[56] This represents nearly 2 million river miles. Many scientists and environmental groups believe that this is a conservative estimate and believe that as many as 90% of the nation's waters could lose federal protection.[57] EPA also estimates that 34% of industrial and municipal dischargers that are currently subject to CWA Section 402 permits are located on these stream segments; of even greater concern is that the public drinking water systems which use intakes on these streams provide drinking water to over 110 million people.[58]

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[52] *See generally*, Judy L. Meyer, et. al., *Where Rivers are Born: The Scientific Imperitive for Defending Small Streams and Wetlands* (September 2003).

[53] *Id*. at 3.

[54] These small streams and wetlands may be so small that they do not appear on topographic maps.

[55] Grumbles, Benjamin H., Assistant Administrator for Water, EPA, letter to Ms. Jeanne Christie, Association of State Wetland Managers, January 9, 2005, p. 2.

[56] *Id*. at 3.

[57] See Lance D. Wood, *Don't Be Misled: CWA Jurisdiction Extends to All Non-Navigable Tributaries of the Traditional Navigable Waters and to Their Adjacent Wetlands*, 34 Envtl. L. Rep. 10187 (2004); *see also*, Jeremy A. Colby, *SWANCC: Full of Sound and Fury, Signifying Nothing...Much?*, 37 J. Marshall L. Rev. 1017 (2004).

[58] *See supra* n.56.

C. *The Ecological Importance of Wetlands*

Wetlands are transitional areas that act as buffers between open waters and uplands and provide functions vital to our environment and public health. Wetlands filter pollution, purify our drinking water, and protect rivers, lakes, and coastal waters from pollution, such as sediment, nutrients, chemical contaminants, and bacteria. In addition, wetlands recharge groundwater aquifers, protect coasts and homes from floods by absorbing flood waters and provide habitat for threatened and endangered plant and animal species. These wetlands represent a considerable amount of the United States' ecological diversity and provide habitat for a considerable portion of the nation's flora and fauna.[59]

The Association of Wetlands Managers ("ASWM") has estimated that at least 20-25% of the total wetland acreage in the United States may be affected by *SWANCC*.[60] According to ASWM, that figure could be as high as 70-80% of total wetland acreage when intermittent streams and their adjacent wetlands are exempted from regulation, as suggested by *Rapanos*.[61] Non-regulation of these wetlands, in the wake of *SWANCC* and *Rapanos*, could virtually eliminate wetlands such as prairie potholes, playa lakes and vernal pools.

D. *The Economic Importance of Protected Waters and Wetlands*

Protecting the health and integrity of our nation's waters and wetlands also has profound economic implications. The United States Fish & Wildlife Service's 2006 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation found that 87.5 million U.S. residents 16 years old and older participated in wildlife-related recreation in 2006 alone.[62] In that same year, 30 million people fished, 12.5 million hunted, and 71.1 million participated in at least one type of wildlife-watching activity including bird-watching, wildlife observation and photography. In total, these wildlife recreationists spent $122.3 billion on their wildlife recreational activities, approximately one percent of the nation's gross domestic product.[63] These hunters, anglers, birdwatchers and photographers rely on abundant stocks of fish, waterfowl and other wildlife species, none of which can survive without healthy, functioning wetlands and waters.

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[59] A total of 274 at risk plant and animal species are supported by isolated wetlands. A total of 86 plant and animal species listed as threatened, endangered, or candidates under the Endangered Species Act are supported by isolated wetlands habitats. A majority (52%) of these listed species are completely dependent on isolated wetland habitat for their survival. *See* Comer, P., K. Goodin, A. Tomaino, G. Hammerson, G. Kittel, S. Menard, C. Nordman, M. Pyne, M. Reid, L. Sneddon, and K. Snow. *Biodiversity Values of Geographically Isolated Wetlands in the United States*. NatureServe, Arlington, VA. (2005).

[60] Kusler, Jon, The Association of State Wetland Managers, *The SWANCC Decision: State Regulation of Wetlands to Fill the Gap* (March 2004).

[61] *Id*.

[62] U.S. Department of the Interior, Fish and Wildlife Service, and U.S. Department of Commerce, U.S. Census Bureau, *2006 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation* at 5. (2006).

[63] *Id.*

In New York, 4.6 million people participated in wildlife-associated recreation in 2006, spending a total of $3.5 billion on wildlife-related expenditures within the state.[64] In 2006, freshwater fishing alone brought in $88 million in state and local tax revenues, $366 million in salaries, wages and business earnings and created 10,208 jobs.[65] These expenditures clearly provide a vital economic resource for local communities throughout New York.

VI. Impact of the Current Regulatory Regime on New York's Residents and Environment

A. *Removing Federal Protection from Non-Navigable Streams and Isolated Wetlands Jeopardizes the Health and Welfare of Nearly 10 Million New Yorkers*

It is estimated that over 60 percent of New York's original wetland acreage has been lost to development. Of New York's 2,562,000 acres of original wetland acreage, only 1,025,000 acres remain today.[66] Close to 40 percent of these remaining wetlands are located at the headwaters of the Hudson River and its tributaries. These headwaters feed into New York's Hudson River watershed and New York City's drinking water supply, comprising a combined 16,000-square-mile-area that covers parts of New York, New Jersey, Vermont, Massachusetts, and Connecticut. Today, these watershed reservoirs are particularly vulnerable to degradation because they are inundated with "isolated" wetlands and ephemeral streams—water resources which no longer enjoy clear protection in a post *SWANCC* and *Rapanos* world.[67] The New York City drinking water supply watershed ("NYC watershed") covers approximately 2,000 square miles of land in the Hudson Valley and Catskill Mountains, east and west of the Hudson River and contains close to 28,000 acres of wetlands and over 2,300 miles of small streams.[68] The system contains 19 reservoirs and 3 controlled lakes that sit in 3 sub-watersheds: the Croton, the Catskill, and the Delaware. The NYC watershed supplies 1.5 gallons of prize-winning unfiltered drinking water to 9 million people on a daily basis. The Hudson River watershed supplies public drinking water to another one million people and contains approximately 12,305 miles of perennial streams, 65 direct perennial streams, and hundreds of small, intermittent streams. The pollution filtration and aquifer recharge provided by the region's smaller wetlands and waters is extremely important to ensure the delivery of safe drinking water to nearly half the state's resident population.

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[64] This includes both NYS residents as well as persons who traveled to New York for the purpose of these activities. *Id*. at 97-98.

[65] American Sportfishing Association, *Sportfishing in America: an Economic Engine and Conservation Powerhouse* at 8. (Revised January 2008).

[66] Association of State Wetland Managers Association, *State Wetland Programs* at http://www.aswm.org/swp/newyork9.htm (site last visited on April 6, 2008).

[67] More than 60 percent of these two watersheds are made up of headwater streams, small waterways, adjacent wetlands, and so-called "isolated" wetlands. *See* U.S. Army Corps of Engineers, Regulatory Guidance Letter, No. 01-1, October 31, 2001.

[68] *See* New York City Department of Environmental Protection Bureau of Water Supply, Quality and Protection, *Wetlands in the Watersheds of the New York City Water Supply System: Results of National Wetlands Inventory* (1997).

Today, New York's vital water resources are under increased development pressure. In 2000, the National Trust for Historic Preservation designated the Hudson Valley as one of America's most endangered historic places, citing sprawl as the chief culprit.[69] According to the New York State Department of Conservation, "growth is reflected in the frequent listing of occurrence of streambank erosion, failing and/or inadequate on-site septic systems, and municipal discharges as primary sources of water quality impairments."[70]

The East-of-Hudson portion of the NYC watershed (i.e. Croton system) is suffering from an onslaught of real estate development. The trend is inevitable: as the Corps, citing *SWANCC* and *Rapanos*, declines to assert 404 jurisdiction on an increasing basis, developers are eagerly pushing into every remaining unoccupied corner of the watershed, paving wetlands with parking lots and roadways, filling fragile streams, building in stream, lake and wetland buffers, excavating hillsides, and clearing forestland. These heavy construction activities have significant impacts on water resources. Runoff from new residential development is 10 to 16 times greater than that of predevelopment and is the leading threat to water quality in the United States. [71]

Aging wastewater treatment systems across the Hudson River watershed are increasingly causing contaminants such as disease causing pathogens, fecal coliform bacteria, as well as toxins, oil and other pollutants to leach into creeks and wetlands. These systems are reaching their design capacities sooner than originally expected due to the rampant population growth of the region.[72] This growth, combined with a lack of meaningful state monitoring and enforcement has caused many of these water treatment systems to fall into disrepair, consistently violating their own discharge permits.

Although the NYC watershed is protected and enforced by the historic 1997 Watershed Memorandum of Agreement ("MOA"), it is not a self-enforcing agreement and thus requires that New York City and all signatories adhere to its provisions.[73] For instance, the MOA provides a framework by which New York City can meet the requirements of the EPA's Filtration

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[69] See National Trust For Historic Preservation, *America's 11 Most Endangered Historic Places 2000: Hudson River Valley, New York State*, available at http://www.nthp.org/11most/2000/hudson.htm.

[70] *See* NYS Department of Environmental Conservation, *The 1999 Lower Hudson River Basin Waterbody Inventory and Priority Waterbodies List* at 6 (1999).

[71] U.S. Environmental Protection Agency, *National Pollutant Discharge Elimination System – Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges, Final Rule*, 64 Fed. Reg. 68722, 68729 (1999), *citing* Wolman and Schick, *Effects of Construction on Fluvial Sediment, Urban and Suburban Areas of Maryland, Water Resources Research* 3(2):451-64 (1967).

[72] *See supra* n.70.

[73] The Memorandum of Agreement was negotiated by New York City, New York State, the U.S. Environmental Protection Agency, watershed municipalities, and five environmental groups: Riverkeeper, New York Public Interest Research Group, Catskill Center, Trust for Public Land and Open Space Institute.

Avoidance Determination ("FAD").[74] In June 2007, the EPA granted New York City a new agreement granting it a FAD for the West-of Hudson (i.e. Catskill/Delaware system) NYC watershed.

Due to the continued degradation of the East-of-Hudson NYC watershed, the EPA is now requiring New York City to construct a Croton Water Treatment Plant filtration water treatment plant, expected to cost City ratepayers $3 billion to complete, and hundreds of millions of dollars per year to operate and maintain.[75]

Should New York City fail to properly protect the West-of-Hudson portion of the NYC watershed in the future and lose its FAD determination, City ratepayers will be faced with the exorbitant cost of building and operating a filtration plant for the Catskill/Delaware system—which, in 2007, was estimated to cost $10 billion to construct and $400 million in annual maintenance and operation costs.[76]

B. *Wetlands Destruction in New York State Since the SWANCC Ruling*

Currently, New York's Environmental Conservation Law solely regulates wetlands that are 12.4 acres or larger.[77] Wetlands less than 12.4 acres are regulated only if deemed to be of "unusual local importance" by the DEC Commissioner.[78] Consequently, New York has historically relied on the Corps to protect the vast majority of smaller wetlands throughout the State. Since 2001, however, the Corps has largely stopped regulating isolated wetlands,[79] claiming it lacks the legal authority to do so as a result of the Supreme Court's *SWANCC* decision and the subsequent 2003 Corps/EPA policy guidance that followed in its wake.

The result of these federal rollbacks is that hundreds of wetlands threatened by development in New York are currently not being protected by either the state or the federal government. In September 2005, the Environmental Integrity Project reported that New York is among the top fifteen states which has suffered wetlands losses following the federal rollbacks.[80]

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[74] Under the Safe Drinking Water Act, all drinking water taken from surface water sources must be filtered to remove microbial contaminants. The law allows EPA to grant a waiver from this requirement to water suppliers if they demonstrate that they have an effective watershed control program and that their water meets strict quality standards. *See* 42 U.S.C. § 300f et. seq.

[75] Bronx Council for Environmental Quality, "NYC DEP is building the Croton Water Filtration Plant (CWTP)", available at http://www.bceq.org/CWTP (last visited April 9, 2008).

[76] New York Department of Environmental Conservation, "Ten-Year Extension Approved for Protection of Catskill/Delaware Watershed, available at http://www.dec.ny.gov/environmentdec/36807.html (last visited April 9, 2008).

[77] See N.Y. Envtl. Conserv. Law § 24-0101, *et. seq*.

[78] N.Y. Envtl. Conserv. Law § 24-0301.

[79] So-called "isolated" waters and wetlands are defined by caselaw as intrastate, intermittent waters lacking a year-round surface connection or other "significant nexus" to a jurisdictional "water of the U.S." From a scientific, hydrologic standpoint, extremely few wetlands truly are isolated and lack a surface or groundwater connection to other waterways.

[80] Schaeffer, Eric and Himmelsbach, Dan. *Drying Out: Wetlands Opened for Development by U.S. Supreme Court and U.S. Army Corps.* Environmental Integrity Project (Sept. 15, 2005).

Similarly, staff in the New York State Attorney General's Office recently reviewed all state-wide Corps' wetland permit determinations since the EPA/Corps policy guidance was issued (New York District 2002-2004, Buffalo District 2001-2004). Approximately 45% of the applications received were found to be non-jurisdictional by the Corps. Of those, only one application was found that qualified for regulation under State law.[81]

The "Lysander wetland," a 19-acre freshwater wetland located in Lysander, New York (Onondaga County) presents an excellent illustration of the Corps' arbitrary, inconsistent and legally erroneous no-jurisdiction determinations subsequent to *SWANCC*.[82] In 2001, when residents of a residential subdivision adjoining the Lysander wetland realized that plans were underway to fill the Lysander wetland and construct housing on the site, they presented the Corps with 1957 and 1962 maps of the area. These maps depicted a brook that had been channeled underneath their adjacent subdivision that had flowed from the Lysander wetland into the Seneca River, a navigable water of the United States.[83] Ignoring this information, the Corps issued a no-jurisdiction determination in 2003, stating that the site at issue was an "isolated" wetland and that it had no discrete waterway flowing from it and no natural stream draining out of it.

When the homeowners subsequently pressed the Corps to reconsider, the Corps explained that the Buffalo District, as a matter of post-*SWANCC* legal interpretation, no longer considered hydrological connections to navigable waters through man-made water conveyances sufficient for establishing Clean Water Act jurisdiction.[84] The homeowners took the case to the New York State Attorney General's office. After conducting its own investigation, the Attorney General filed a Notice of Intent to Sue the Corps and EPA in November 2004. In response to this legal challenge, the EPA ultimately reversed the Corps' decision.

The "Annsville Creek wetland" provides yet another alarming illustration of the Corps' inability to effectively protect wetlands post *Rapanos*.[85] In October 2007, the Corps found that a wetland in Peekskill, New York was "isolated" and non-jurisdictional despite being only fifty feet away from Annsville Creek, a tributary of the Hudson River flowing south out of the Highlands into Peekskill Bay that is subject to the "ebb and flow of the tide" of the Hudson River. Despite acknowledging that the wetland "is situated on top of a former landfill and may be contributing to the pollution of Annsville Creek," the Corps determined that its hydrologic connection to the creek through a swale feature was non-jurisdictional. The Corps purportedly

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[81] This information is not published, but was orally presented in a lecture at a wetlands conference in Albuquerque, NM in October, 2005.

[82] Information regarding this site was obtained through the Attorney General's Notice of Intent to Sue the EPA and Corps, dated November 15, 2004 in addition to oral conversations with the New York Attorney General's Environmental Protection Bureau held on November 28, 2007.

[83] Specifically, the maps indicated that a section of the brook had been channeled through an 18 inch-pipe in the 1960s to facilitate their subdivision's construction and that the brook flows for approximately one-half mile through this pipe and an open ravine before emptying into the Seneca River.

[84] This interpretation is not legally warranted under SWANCC's narrow holding.

[85] *See* http://www.nan.usace.army.mil/business/buslinks/regulat/jurisdet/West/Oct07/pdf/2007-264-EJE.pdf

found it significant that water only flows from the wetland to Annsville Creek, and not in the other direction. The Corps also determined that the wetland lacked a "significant nexus" to an intermittent stream which directly flows into the Annsville Creek despite multiple factors being present for a finding of jurisdiction on that basis as well.

Both of these cases illustrates the myriad problems created by arbitrary and legally flawed Corps' jurisdictional determinations post-*SWANCC* and *Rapanos* and the need for costly litigation in order to preserve wetlands and waterways that should, from the outset, be clearly protected under the Clean Water Act.

VII. A Federal Solution is Required

A. *New York Law Does Not Protect Smaller Wetlands*

Without strong federal protection mandated by the Clean Water Act, regulation and enforcement of the nation's interconnected waterways will be left in the hands of fifty separate states in a piecemeal, uncoordinated fashion. Because the nation's system of waters is highly interconnected, discharges of pollutants into non-navigable tributaries and adjacent wetlands in one state will affect the biological and chemical health of waters in downstream states. It was recognition of this basic principle that demanded the creation of the CWA 35 years ago. Many state wetlands programs derive their scope directly from the CWA and rely on the CWA as their sole source of legal protection for such wetlands.[86] In most states, filling the gap created by these federal rollbacks in Corps jurisdiction will require new statutes and regulations, new staffing, new training and additional funding.

In fact, two thirds of the United States currently lack regulatory programs that comprehensively address wetlands and isolated wetlands in particular.[87] While states like New York struggle to interpret CWA under *SWANCC* and *Rapanos*, clear guidance from the U.S. Congress would swiftly alleviate the existing confusion.

Although New York is one of the "fortunate" states that does in fact have existing state wetlands protection laws, its current statute, the New York State Freshwaters Act, is not equipped to fill the glaring gaps in coverage created by *SWANCC* and *Rapanos*. Hundreds of wetlands smaller than 12.4 acres throughout New York are now vulnerable to development.

Since 2004, New York State legislators, along with concerned citizens and environmental groups such as Riverkeeper, have pushed for an amendment to the current New York law, entitled "The Clean Water Protection/Flood Prevention Act." This legislation would allow New

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[86] According to the Association of State Wetland Managers, state and local wetlands regulations will only partially fill the gap in federal wetland regulation for so called "isolated wetlands" in fourteen states. "Little protection will be provided in the rest." *See* Jon Kusler, Esq., *Model State Wetland Statute to Close the Gap Created by SWAANC*.

[87] *See, e.g.*, Association of State Wetlands Managers, *State Wetlands Programs*, at http://aswm.org/swp/index.htm (last visited April 7, 2008). *See also* Jon Kusler, Esq., *Model State Wetland Statute to Close the Gap Created by SWAANC*. "Thirty-six states have limited or no wetland regulations applying to isolated wetlands. These states either lack state statutory enabling authority or (if they have authority pursuant to water quality statutes) have not established wetland permitting systems. . ."

York to regulate wetlands one acre or larger, and ensure that these smaller wetlands that previously had fallen under federal protection will continue to receive State protection. While versions of this bill have been introduced into the New York State Assembly and Senate since 2004, it remains unclear whether the bill will be successfully passed into law in the near future.

VIII. A Strong CWA is Vital to Protecting New York State's Waters

Removing federal protection from these smaller waterways and isolated wetlands will also mean loss of the federal citizen suit provisions provided under the CWA on these waterbodies, a crucial tool that Riverkeeper and other environmental organizations have used to control pollution when government agencies have failed to bring enforcement action.

The effective loss of the citizen suit provision would deal a devastating blow to water quality in the region. Currently, Riverkeeper relies heavily on the citizen suit provision of the CWA to prosecute polluters and deter would-be-violators on the Hudson River and throughout the NYC watershed.[88]

Riverkeeper receives hundreds of pollution complaints annually, the majority alerting us to violations on smaller wetlands and waterways. Throughout our history, we have been involved in thousands of Clean Water Act prosecutions against raw sewage dischargers, developers who have illegally filled wetlands, or industries that have discharged toxic chemicals in excess of permit levels or without a permit at all!

As previously discussed, the effects of *SWANCC* and *Rapanos* have broad implications for enforcement of all CWA programs, including Section 402's NPDES permitting program. Severely understaffed and in perpetual budgetary crisis,[89] the New York DEC, the agency delegated by the EPA to enforce Section 402 of the CWA in New York State, has a truly abysmal record in administering the State Pollution Discharge Elimination System ("SPDES") permitting program.[90]

Today, more than 8,000 facilities cumulatively discharge tens of billions of gallons of municipal and industrial wastes into New York's waters every day, amounting to over 54 billion gallons per day.[91] Because of the DEC's highly flawed permitting practices,[92] 90% of these

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[88] See 33 U.S.C. § 1365. Citizen suits are initiated by a "Notice of Intent to Sue," which triggers a 60-day notice period before the actual lawsuit can be filed. Citizen suits can force injunctions and penalties of up to $32,500 per day for violations of the CWA.

[89] During Governor Pataki's Administration from 1995-2006, the DEC suffered drastic staff cuts and a hiring freeze. Overall, the agency lost between 700 and 800 employees, including experienced scientists and engineers. Under Governor Spitzer's current Administration, a mere 109 new employees have been added to the DEC. Only ten of these new positions appear to be earmarked for the DEC's SPDES permit program.

[90] In 1975, the EPA and DEC executed a delegation agreement giving DEC full responsibility for enforcement of the provisions of the Clean Water Act in New York State. This agreement remains in effect today and enables New York to establish is own water pollution permit program, the SPDES program.

[91] Environmental Advocates of New York, *Muddying the Waters: The Unknown Consequences of New York's Failed Water Pollution Permitting Program* at 7 ("EANY Report") (2007).

facilities do not receive the five-year technical reviews required under the CWA.[93] Shockingly, nearly 80% (1,150) of the 1,450 major and significant-minor SPDES permits in the State's inventory have not been substantially reviewed in more than 10 years.[94] Given DEC's irresponsible and illegal enforcement practices, it is clear that the burden of enforcing the Clean Water Act falls on groups like Riverkeeper.

Without clear and strong guidance from Congress on the broad jurisdictional reach of the Clean Water Act, as currently outlined in the Clean Water Restoration Act, Riverkeeper simply cannot fulfill its mission of acting on the public's behalf to protect the Hudson River and other vital New York waters.

I thank you for the opportunity to testify before you today and I strongly urge Congress to act swiftly in passing the Clean Water Restoration Act.

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[92] In response to staff shortages and increasing backlog of SPDES permits, DEC implemented a ranking scheme entitled, "Environmental Benefit Permit Strategy" (EBPS), designed to be a prioritization mechanism for permit review. Each year, after ranking the SPDES permitted facilities, the DEC only reviews the top 10% permits. According to the DEC's website, "[W]e simply do not have enough staff to grind out extensive technical reviews every five years for all SPDES permits."

[93] This information was recently uncovered through Environmental Advocates of NY's Freedom of Information Law ("FOIL") request to the DEC. *See* EANY Report.

[94] EANY Report at 7.