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BEFORE THE
U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
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Chairman Oberstar, Congressman Mica, and Members of the Committee, thank you for inviting me to testify about the scope of federal jurisdiction under the Clean Water Act in the wake of the Supreme Court's *Rapanos* decision. I am Robert V. Percival, the Robert F. Stanton Professor of Law and Director of the Environmental Law Program at the University of Maryland School of Law. I teach environmental law, constitutional law and administrative law and I am the lead author of *Environmental Regulation: Law, Science and Policy*[1], a leading environmental law casebook first published in 1992 and now in its fifth edition. Much of my scholarship has focused on the historical development of environmental law including extensive research on the environmental decisions of the U.S. Supreme Court.[2] Prior to joining the Maryland faculty I served as a law clerk to U.S. Supreme Court Justice Byron R. White.

The topic of this hearing is extremely important. The United States has been a world leader in the development of environmental law. During the 1970s and 1980s Congress, with overwhelming bipartisan support, enacted landmark legislation to protect

[1] Robert V. Percival, Christopher H. Schroeder, Alan S. Miller & James P. Leape, Environmental Regulation: Law, Science & Policy (5th ed. Aspen Publishing 2006).
[2] See, e.g., Robert V. Percival, Environmental Law in the Supreme Court: Highlights from the Marshall Papers, 23 Env. L. Rep. 10606 (1993); Robert V. Percival, "Greening" the Constitution – Harmonizing Environmental and Constitutional Values, 22 Envt'l L. 809 (2002); Robert V. Percival, Environmental Law in the Supreme Court: Highlights from the Blackmun Papers, 35 Env. L. Rep. 10637 (2005).

the environment. Due to the foresight of those Congresses, our water and air are much cleaner and our citizens are safer and healthier than in countries that only belatedly developed environmental law. Yet now, 35 year after enactment of the Federal Water Pollution Control Act, we find some of the most fundamental premises of our environmental laws under assault in the courts. Interest groups seeking to reap windfalls are urging the judiciary to create new loopholes in the vital legal infrastructure that protects our environment. In the face of this onslaught it is essential that Congress carefully monitor the state of environmental law and, when necessary, repair our legal safety net with new legislation.

My testimony begins with a historical review of the scope of federal authority under the Federal Water Pollution Control Act, now known as "The Clean Water Act." It reviews the enactment of this legislation and the Supreme Court's unanimous decision upholding its protections for wetlands in United States v. Riverside Bayview Homes, Inc. ("Riverside Bayview").[3] It then considers more recent decisions by the Supreme Court that have narrowed the scope of the Act's safeguards. While the *Riverside Bayview* Court unanimously deferred to the expert judgment of the agencies administering the legislation, this approach stands in sharp contrast with that employed by five members of the Court today. The testimony reviews the Court's sharply divided decision in 2001 in Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers ("SWANCC"), when it rejected application of the Clean Water Act to isolated wetlands.[4]

[3] 474 U.S. 121 (1985).
[4] 531 U.S. 159 (2001).

It then considers the Court's decision last year in Rapanos v. United States ("Rapanos")[5] where the Justices split 4-1-4 in addressing the scope of federal authority under the Act.

The *Rapanos* decision has left the most fundamental question one asks about any regulatory statute – to what does it apply – in a state of chaos. The confusion generated by *Rapanos* threatens to undermine not only the particular program challenged in the case – the §404 program to protect wetlands -- but also other programs that rely on the same jurisdictional term ("waters of the United States") interpreted by the Court. These include the Clean Water Act's §402 permit program for point source dischargers of water pollutants and the Act's oil spill prevention program. *Rapanos* has produced the bizarre result that the law currently defining the scope of federal jurisdiction reflects the view of a single Justice that was rejected by each of the eight other Justices. Moreover, no one seems to know how to apply the new "significant nexus" test created by that Justice. This has spawned new legal challenges and enormous uncertainty concerning the scope of federal authority. Guidance issued last month by EPA and the U.S. Army Corps of Engineers is unlikely to resolve these problems, which can best be solved through Congressional action to clarify the scope of federal authority under the Act.

I. THE FEDERAL WATER POLLUTION CONTROL ACT OF 1972

During the 1970s Congress by overwhelming, bipartisan majorities enacted a series of laws to ensure comprehensive protection of the environment. These laws established the first national regulatory programs to prevent air and water pollution, control toxic substances, ensure safe management of hazardous waste, and access to safe drinking water. They reflected the considered judgment of Congress that the existing

[5] 126 S.Ct. 2208 (2006).

patchwork of state and local legislation and common law remedies was woefully inadequate to prevent severe environmental degradation.

In the decades before enactment of these national regulatory programs, growing interstate pollution problems spawned disputes between states that were heard by the U.S. Supreme Court exercising its original jurisdiction.[6] In a series of decisions spawning seven decades, the Supreme Court responded to interstate pollution disputes by developing a federal common law of nuisance.[7] The Court actually issued injunctions setting limits on emissions of air pollutants from a copper smelter,[8] requiring New York City to halt ocean dumping of its garbage and to build a municipal incinerator,[9] and requiring the City of Chicago to build its first sewage treatment plant to reduce its diversion of water from Lake Michigan to flush away its untreated sewage.[10]

Until the 1970s, Congress had not established any comprehensive, national regulatory programs to protect the environment. To be sure, the Rivers and Harbors Act of 1899 ("RHA"), known as the Refuse Act, prohibited the discharge of refuse into any "navigable water" without a permit, but the purpose of this legislation was to protect against obstructions to navigation, rather than to protect water quality. After the end of World War II, Congress adopted legislation to assist states and local governments in

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[6] Article III, section 2 of the Constitution extends the judicial power to controversies between two or more states and to controversies between a state and citizens of another state. It specifies that the Supreme Court has original jurisdiction over cases in which a state shall be a party.

[7] The history of the federal common law of nuisance is discussed in detail in Robert V. Percival, The Clean Water Act and the Demise of the Federal Common Law of Interstate Nuisance, 55 Ala. L. Rev. 717 (2004).See, e.g., Missouri v. Illinois, 200 U.S. 496, 518 (1906); Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907); New York v. New Jersey, 256 U.S. 296 (1921); New Jersey v. City of New York, 284 U.S. 585 (1931); Illinois v. Milwaukee, 406 U.S. 91 (1972).

[8] Georgia v. Tennessee Copper Co., 237 U.S. 474 (1915).

[9] New Jersey v. City of New York, 284 U.S. 585 (1931).

[10] Wisconsin v. Illinois, 281 U.S. 696 (1930).

responding to growing environmental problems, but these laws did not impose national regulations to control pollution.

The Federal Water Pollution Control Act (FWPCA), enacted by Congress in October 1972, was the second major federal law to create a national regulatory program to protect the environment after adoption of the Clean Air Act Amendments of 1970. Congress boldly declared that the purpose of the FWPCA was "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[11] Frustrated with the slow progress of state and local efforts to control water pollution, Congress opted to create a comprehensive, national regulatory program. The key innovation in the legislation, which was amended and renamed the Clean Water Act in 1977, was its requirement that permits be obtained for all discharges from point sources into the waters of the United States. The Act creates two national permit programs – §404 governing discharges of dredged and fill material, which is administered by the U.S. Army Corps of Engineers ("Corps") subject to EPA oversight, and §402's National Pollutant Discharge Elimination System (NPDES) governing point source discharges of pollutants.

Both permit programs govern discharges from point sources to "navigable waters," defined broadly to mean "the waters of the United States, including the territorial seas."[12] While the "navigable waters" concept was partly an outgrowth of the RHA, Congress clearly intended to extend the reach of the Clean Water Act substantially beyond traditionally navigable waters because its purpose was to protect the environment in comprehensive fashion rather than to protect navigation. More than 98 percent of the nation's waters are not navigable in fact and the quality of navigable waters is

[11] 33 U.S.C. §1251(a).
[12] CWA §502(7), 33 U.S.C. §1362(7).

significantly affected by pollution entering their non-navigable tributaries and adjacent wetlands.

To achieve substantial reductions in the discharge of water pollutants, the Clean Water Act imposed industry-wide, technology-based effluent limits on industrial dischargers. In its 1973 report to Congress the Council on Environmental Quality explained: "Perhaps the predominate influence on the law was the universal recognition that basing compliance and enforcement efforts on a case-by-case judgment of a particular facility's impacts on ambient water quality is both scientifically and administratively difficult."[13]

Congress's power to protect the quality of nation's waters through a comprehensive regulatory program is amply supported in the Constitution. Article I, §8 of the Constitution gives Congress express power to provide for the "general Welfare of the United States," to regulate commerce "among the several States," and "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers."[14] Even as he was championing a new and more restrictive vision of Congressional power under the commerce clause, Supreme Court Justice William H. Rehnquist recognized the breadth of Congress's constitutional power to protect the nation's waters. Writing for the Court in 1979, he emphasized that federal constitutional authority was not limited in any way to the concept of navigability. "Reference to the navigability of a waterway adds little if anything to the breadth of Congress' regulatory power over interstate commerce. It has long been settled that Congress has extensive

[13] Council on Environmental Quality, Environmental Quality – 1973, at 171 (1973).
[14] U.S. Const. art. I, §8, cl. 1, 3, 18.

authority over this Nation's waters under the Commerce Clause."[15] Justice Rehnquist explained that: "The pervasive nature of Congress' regulatory authority over national waters was more fully described in United States v. Appalachian Power Co., 311 U.S. 377, 426 (1940): 'It cannot properly be said that the constitutional power of the United States over its waters is limited to control for navigation.'" Thus, he concluded that "congressional authority over the waters of this Nation does not depend on a stream's "navigability."[16]

Two years later in a landmark decision also authored by Justice Rehnquist, the Court held that the regulatory program established by the Clean Water Act was so comprehensive that it preempted the federal common law of interstate nuisance.[17] In his opinion for the Court, Justice Rehnquist declared that even though Congress had aopted a savings clause in 505(e) of the Act specifying that it did not restrict any statutory or common law right to relief, Congress "has occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency."[18] He explained that:

> "Congress' intent in enacting [the Clean Water Act] was clearly to establish an all-encompassing program of water pollution regulation. *Every* point source discharge is prohibited unless covered by a permit, which directly subjects the discharger to the administrative apparatus established by Congress to achieve its goals."."[19]

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[15] Kaiser Aetna v. United States, 444 U.S. 164, 173 (1979).

[16] Citing Wickard v. Filburn, 317 U.S. 111 (1942), Justice Rehnquist also observed that:

> "a wide spectrum of economic activities 'affect' interstate commerce and thus are susceptible of congressional regulation under the Commerce Clause irrespective of whether navigation, or, indeed, water, is involved. The cases that discuss Congress' paramount authority to regulate waters used in interstate commerce are consequently best understood when viewed in terms of more traditional Commerce Clause analysis than by reference to whether the stream in fact is capable of supporting navigation or may be characterized as 'navigable water of the United States.'" 444 U.S. at 174.

[17] City of Milwaukee v. Illinois, 451 U.S. 304 (1981).

[18] 451 U.S. at 317.

[19] 451 U.S. at 318 (emphasis in original).

Justice Rehnquist noted that the problems of controlling water pollution are "difficult" and "technical" – "doubtless the reason Congress vested authority to administer the Act in administrative agencies possessing the necessary expertise," and he opined that courts were "particularly unsuited" to resolving them through "sporadic" and "ad hoc" application of federal common law.[20] Thus, even the Justice most clearly associated with championing state sovereignty and constitutional limits on federal authority acknowledged the comprehensive scope of the Clean Water Act and the wisdom of deferring to the expert judgments of the agencies charged with implementing it.

II. THE SUPREME COURT'S *RIVERSIDE BAYVIEW* DECISION

The importance of preserving wetlands was not well appreciated a century ago. In 1900 the U.S. Supreme Court said of the draining and filling of swamps that "the police power is never more legitimately exercised than in removing such nuisances."[21] Since the birth of our nation more than half of the wetlands in the lower 48 states have been destroyed, reducing an estimated 220 million acres of wetlands to approximately 100 million acres today. Yet we now realize that wetlands perform vital services such as pollution and flood control and that they serve as crucial feeding and breeding grounds for fish and waterfowl.

In United States v. Riverside Bayview Homes, Inc.[22] the U.S. Supreme Court addressed the scope of the Clean Water Act by deciding whether the statutory definition "waters of the United States" extended to wetlands adjacent to navigable waters. Writing

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[20] 451 U.S. at 325.
[21] Leovy v. United States, 177 U.S. 621, 636 (1900).
[22] 474 U.S. 121 (1985).

for a unanimous Supreme Court, Justice Byron R. White noted that in 1975 the Corps had issued regulations defining the "'waters of the United States' to include not only actually navigable waters but also tributaries of such waters, interstate waters and their tributaries, and non-navigable intrastate waters whose use or misuse could affect interstate commerce. 40 Fed. Reg. 31,320 (1975)."[23] Assessing the validity of this regulatory definition, Justice White noted that it was appropriate for the Corps to consider the legislative history and underlying purposes of the Clean Water Act, which together "support the reasonableness of the Corps' approach of defining adjacent wetlands as 'waters' within the meaning of §404(a)."[24] Reviewing the Act's legislative history, Justice White observed: "Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.' S. Rep. No. 92-414, p. 77 (1972)."[25] Thus, he concluded that the use of the term "'waters of the United States' makes it clear that the term 'navigable' as used in the Act is of limited import" and that Congress intended "to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classic understanding of that term."[26]

While acknowledging the difficulty of defining jurisdictional boundaries with precision, the Court in *Riverside Bayview* ultimately a functional approach that deferred to "the Corps' and EPA's technical expertise" in interpreting the jurisdictional reach of §404 expansively to promote the goals of the Act:

> "In view of the breadth of federal regulatory authority contemplated by the Act itself and the inherent difficulties of defining precise bounds to regulable waters,

[23] 474 U.S. at 123-124.
[24] 474 U.S. at 132.
[25] 474 U.S. at 132-33.
[26] 474 U.S. at 133.

> the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act."[27]

Significantly, the Court went on to hold that federal jurisdiction over adjacent wetlands was not dependent on the flow of water between such wetlands and adjacent bodies of open water. Again, the Court based this judgment on deference to the Corps' conclusion "that wetlands adjacent to lakes, rivers, streams, and other bodies of water may function as integral parts of the aquatic environment even when the moisture creating the wetlands does not find its source in the adjacent bodies of water."[28] The Court's reasoning was not premised on any dictionary definition of "waters," but rather on the sensible notion that Congress intended to regulate wetlands whose degradation agency experts believe may interfere with its goal of providing comprehensive protection to water quality.

Riverside Bayview was not a controversial decision. The papers of the late Justice Thurgood Marshall reveal that Justice White's draft opinion was joined by all members of the Court within nine days after it initially had been circulated. Two weeks later, after purely stylistic changes were made in Justice White's initial draft, the unanimous decision was released on December 4, 1985.[29] The approach employed by the unanimous Court in *Riverside Bayview* was to interpret the scope of the Clean Water Act by examining its legislative history and purpose and granting proper deference to the ecological judgments of the agencies charged with implementing it. This approach represents the appropriate model for judicial review in areas as technical as environmental regulation.

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[27] 474 U.S. at 134.
[28] 474 U.S. at 135.
[29] Percival, Environmental Law in the Supreme Court: Highlights from the Marshall Papers, 23 Env. L. Rep. 10606, 13 (1993).

III. *SOLID WASTE AGENCY OF NORTHERN COOK COUNTY (SWANCC)*

A decade after *Riverside Bayview* was decided, the Supreme Court decided United States v. Lopez,[30] which spawned new challenges to the jurisdictional reach of the Clean Water Act. In *Lopez*, the Court held by a 5-4 majority that the Commerce Clause did not give Congress the authority to prohibit the possession of firearms in the vicinity of schools because the statute at issue regulated an activity that did not "substantially affect" interstate commerce. In Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers ("SWANCC") the Court was asked to consider whether Congress had the constitutional authority to apply §404 of the Clean Water Act to "nonnavigable, isolated, intrastate waters."

Relying on *Lopez*, the petitioner in *SWANCC* argued that Congress did not have the constitutional authority to require it to obtain a federal permit under §404(a) of the Clean Water Act before it filled an abandoned sand and gravel pit to create a landfill. After the sand and gravel pit closed in 1960 its excavation trenches became permanent and seasonal ponds, and the entire area was overgrown. When the county solid waste agency proposed to convert the site into a landfill, the Corps initially declined to assert §404 jurisdiction because it believed that the site contained no jurisdictional wetlands. Later, it reversed its position upon learning that the site was visited by over 100 species of migratory birds. In a preamble to its 1986 regulations, dubbed the "Migratory Bird Rule," the Corps had suggested that "waters of the United States" include waters that could be used as habitat by migratory birds or

[30] 514 U.S. 549 (1995).

endangered species or to irrigate crops sold in interstate commerce.[31] The Seventh Circuit upheld application of §404(a) to the isolated wetland, finding that because it served as habitat for migratory birds, substantial effects on interstate commerce could be inferred from the millions of hunters and bird watchers who travel interstate in pursuit of birds.

A sharply divided Supreme Court then reversed the Seventh Circuit's decision by the same 5-4 lineup of Justices who prevailed in *Lopez*.[32] However, the Court majority declined to reach the constitutional issue because it found that Congress had not intended to allow the Corps to regulated isolated wetlands. Stating that it expected a clear statement of Congressional intent to support "an administrative interpretation of a statute [that] invokes the outer limits of Congress' power," the Court majority concluded that the "Migratory Bird Rule" exceeded the Corps' authority under §404(a).[33] In a sharp dissent, Justice Stevens, joined by Justices Souter, Ginsburg and Breyer, argued that the Court had misapprehended the meaning of the 1972 Act and Congress's 1977 acquiescence in the Corps more expansive regulations.

The *SWANCC* majority sought to confine *Riverside Bayview* to its facts, while refusing to employ the functional approach Justice White had used in deferring to the Corps' ecological judgment concerning the impact of the wetlands on other jurisdictional waters. In its brief in *SWANCC* the Corps had argued that the term "isolated wetlands" is misleading. The Corps noted that while the term is used to

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[31] For a comprehensive discussion of the pre-*Rapanos* history of the Corps' regulations interpreting the scope of federal jurisdiction under the Clean Water Act 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 Env. L. Rep. 10187 (2004).
[32] Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001).
[33] 531 U.S. at 172, 174.

refer to waters that are remote from and lack a surface connection to navigable waters, isolated waters may have other hydrologic connections to, and affect the quality of, traditional navigable waters, e.g., through groundwater connections and by playing important roles in flood and erosion control. Thus, the Corps maintained that its regulation "reflects an effort to identify categories of waters the degradation of which can be expected to have significant interstate effects, making protection of the relevant waters an appropriate subject of federal concern."

The *SWANCC* majority's expressed constitutional concerns were rooted in the notion that regulation of isolated wetlands could significantly impinge on "the States' traditional and primary power over land and water use."[34] Yet the attorneys general of seven states (Iowa, Maine, New Jersey, Oklahoma, Oregon, Vermont, and Washington) had filed an amicus brief supporting the Corps' position in the case. They rejected the notion that the Migratory Bird Rule threatened state authority and argued that application of §404 to isolated wetlands protected states from the interstate impacts of wetlands degradation.

In January 2003 EPA and the Army Corps of Engineers solicited comment on how they should redefine "waters of the United States" in response to SWANCC.[35] The two agencies issued a joint memorandum to provide guidance concerning the impact of SWANCC on federal jurisdiction under the Clean Water Act (CWA).[36] The memorandum stated that SWANCC "squarely eliminates CWA jurisdiction over isolated waters that are intrastate and non-navigable, where the sole basis for

[34] 531 U.S. at 174.
[35] 68 Fed. Reg. 1991 (2003).
[36] 68 Fed. Reg. 1995 (2003).

asserting federal jurisdiction is the actual or potential use of the waters as habitat for migratory birds that cross state lines in their migrations."

Fearful that EPA and the Corps would adopt regulations providing a more restrictive definition of "waters of the United States," nearly all of the 43 States who responded to the agencies' request for comments opposed any significant narrowing of the Corps' jurisdiction, as did roughly 99% of the 133,000 other comments submitted. In December 2003 the agencies announced that they would not issue new regulations. Their announcement closely followed a White House meeting between President Bush and several hunting, fishing and conservation groups who urged the President not to weaken wetlands protections. Jim Range, chairman of the Theodore Roosevelt Conservation Partnership who attended this meeting, applauded the decision, saying: "It is hard to overestimate how vital wetlands are to the overall health of American wildlife. By clearly stating today that there will continue to be no net loss of wetlands, the President has given Americans who care about fish and wildlife a big reason to smile."[37]

SWANCC did not prove to be as damaging to protection of wetlands as some had initially feared because most lower courts, including the U.S. Courts of Appeal for the Fourth, Sixth, Seventh, Ninth and Eleventh Circuits, interpreted *SWANCC* as restricting federal authority only where it turned solely on the potential presence of migratory birds.[38] Only the Fifth Circuit concluded that after *SWANCC* federal jurisdiction extended only to waters that are actually navigable or adjacent to an open

[37] Thoedore Roosevelt Conservation Partnership, Press Release, "Bush Administration Stands by 'No Net Loss' of Wetlands, EPA and Army Corps of Engineers Won't Issue New Rule," Dec. 16, 2003.
[38] See United States v. Deaton, 332 F.3d 698 (4th Cir. 2003); United States v. Rapanos, 339 F.3d 447 (6th Cir. 2003); United States v. Gerke, 412 F.3d 804 (7th Cir. 2005); Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526 (9th Cir. 2001); Parker v. Scrap Metal Processors, Inc., 386 F.3d 993 (11th Cir. 2004).

body of navigable water.[39] However, the decision did create substantial uncertainties concerning the scope of federal jurisdiction under the Clean Water Act.

IV. THE *RAPANOS* DECISION

Confusion over the scope of federal jurisdiction under the Act was compounded in 2006 by the Supreme Court's *Rapanos* decision. The decision came about after the Court agreed to review two Sixth Circuit decisions that upheld federal jurisdiction over wetlands adjacent to the non-navigable tributaries of navigable waters. The *Rapanos* case involved three parcels of land near Midland, Michigan that each contain wetlands with a hydrologic connection to tributaries of navigable waters. Wetlands on two of the parcels drain intermittently through a manmade ditch to a creek that flows into navigable waters. Wetlands on the third site are in close proximity to the Pine River that flows into Lake Huron. After being advised by a consultant that he would need to obtain §404 permits to develop the land, John Rapanos, the owner of the parcel, ordered the consultant to destroy his report and hired contractors to perform $1 million worth of clearing and filling on the three sites. Deliberately defying both a cease-and-desist letter by the Michigan Department of Natural Resources and an administrative compliance order by EPA, Rapanos filled wetlands on each of the sites. He was convicted of a criminal violation of the Clean Water Act, fined $185,000 and sentenced to three years probation.

Although Rapanos's criminal conviction initially was vacated by the Supreme Court for reconsideration in light of *SWANCC*, the Sixth Circuit reinstated it and the Supreme Court subsequently denied review.[40] However, the Court later agreed to hear Rapanos'

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[39] In Rice v. Harken Exploration Co., 250 F.3d 264 (5th Cir. 2001) and In re Needham, 354 F.3d 340 (5th Cir. 2003).

[40] 339 F.3d 447 (6th Cir. 2003), cert. denied 541 U.S. 972 (2004).

appeal from a civil judgment against him in United States v. Rapanos.[41] It also agreed to review a case called *Carabell*, which involved a 20-acre tract of land, 16 acres of which is forested wetlands a mile from Lake St. Clair, the same Michigan lake whose proximity to the wetlands had been at issue in *Riverside Bayview*.

The Carabell property contains a drainage ditch, excavated from the wetland several decades before, which created an earthen berm composed of sidecasted material. While the berm blocks immediate drainage of surface water from the wetlands into the ditch, which is connected to a tributary of Lake St. Clair, it is overtopped when water levels are particularly high and it contains drainage cuts to facilitate water flow from the wetland into the ditch. While the Sixth Circuit had no problem finding that it was an adjacent wetland subject to federal jurisdiction under §404,[42] the Supreme Court agreed to review this decision and consolidated the case with the *Rapanos* case. On June 19, 2006, a sharply-divided Court split 4-1-4 in deciding the consolidated cases.

In an opinion authored by Justice Scalia, a plurality of four Justices (including Chief Justice Roberts, Justice Thomas and Justice Alito) endorsed a radically restrictive interpretation of "waters of the United States" that would have significantly narrowed the scope of federal jurisdiction under the Clean Water Act had it commanded a majority of the Court.[43] While rejecting the petitioners urging to rewrite the Act to apply only to waters navigable in fact or susceptible of being so rendered, the plurality relied on a 1954 dictionary definition of "waters" to conclude that it includes "only relatively permanent, standing or flowing bodies or water." Addressing the difficulty of squaring this conclusion with the Court's unanimous holding in *Riverside Bayview*, the plurality

[41] 376 F.3d 629 (6th Cir. 2004).
[42] Carabell v. U.S. Army Corps of Engineers, 391 F.3d 704 (6th Cir. 2004).
[43] Rapanos v. United States, 126 S.Ct. 2208 (2006).

creatively explained "*Riverside Bayview* rested upon the inherent ambiguity in defining where water ends and abutting ("adjacent") wetlands begin, permitting the Corps' reliance on ecological considerations *only to resolve that ambiguity* in favor of treating all abutting wetlands as waters."[44]

In an opinion authored by Justice Stevens, four dissenting Justices (including Justices Souter, Ginsburg & Breyer) argued that federal Clean Water Act jurisdiction extends to wetlands adjacent to non-navigable tributaries of navigable waters. They argued that the case was squarely controlled by the Court's unanimous decision in *Riverside Bayview* and that contrary interpretations were inconsistent with the legislative history and purposes of the Clean Water Act.

> "The Army Corps has determined that wetlands adjacent to tributaries of traditionally navigable waters preserve the quality of our Nation's waters by, among other things, providing habitat for aquatic animals, keeping excessive sediment and toxic pollutants out of adjacent waters, and reducing downstream flooding by absorbing water at times of high flow. The Corps' resulting decision to treat these wetlands as encompassed within the term 'waters of the United States' is a quintessential example of the Executive's reasonable interpretation of a statutory provision."[45]

Neither of these opinions commanded a majority of the Court because the decisive ninth vote was cast by Justice Kennedy who wrote an opinion concurring only in the judgment that the decision below should be reversed and the case remanded to the lower court. Fortunately, Justice Kennedy sharply rejected the radical narrowing of the Act advocated in the Scalia opinion and he acknowledged the importance of broadly protecting wetlands. While he agreed with much of the dissent, he supported a remand because he wanted the court below to apply a new standard he articulated in his concurrence. Justice Kennedy concluded that "to constitute 'navigable waters' under the

[44] 126 S.Ct. at 2226 (emphasis in original).
[45] Rapanos v. United States, 126 S.Ct. 2208, 2252 (Stevens, J., dissenting).

Act, a water or wetland must possess a 'significant nexus' to waters that are or were navigable in fact of that could reasonably be so made." Thus, in Justice Kennedy's view, to successfully assert federal jurisdiction under the Act the government must show that "the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable'." He noted that if the effects are only "speculative or insubstantial" the wetlands will not be subject to federal jurisdiction, but he concluded that a "reasonable inference of ecological interconnection" can be drawn for wetlands adjacent to navigable waters and that he would defer to "regulations defining for what wetlands adjacent to non-navigable tributaries of navigable waters such inferences reasonably can be made."[46]

Because he cast the decisive vote in the case, Justice Kennedy's view of the applicable law now appears to be controlling even though it was rejected by all eight of the other Justices. Justice Kennedy himself emphatically rejected the view of the four-Justice plurality opinion authored by Justice Scalia. He argued that the limitations it seeks to impose on federal jurisdiction "are without support in the language and purposes of the Act or in our cases interpreting it." He explained that the "plurality's first requirement -- permanent standing water or continuous flow, at least for a period of 'some months' -- makes little practical sense in a statute concerned with downstream water quality" and has no support in the statutory text even when dictionary definitions of "waters" are applied. Justice Kennedy argued that "exclusion of wetlands lacking a continuous surface connection to other jurisdictional waters -- is also unpersuasive" because wetlands are not "'*indistinguishable*' from waters to which they bear a surface

[46] Rapanos, 126 S.Ct. at 2248 (Kennedy, J., concurring in the judgment).

connection." Thus, he concluded that "the plurality's opinion is inconsistent with the Act's text, structure, and purpose."[47]

Justice Kennedy and the four dissenting Justices also rejected the plurality's notion that federal jurisdiction should be interpreted narrowly to avoid constitutional concerns. As Justice Kennedy emphasized in his opinion, 33 states and the District of Columbia filed an amicus brief supporting a broad interpretation of federal jurisdiction because it "protects downstream States from out-of-state pollution that they cannot themselves regulate".[48]

Addressing the administrative difficulties of applying his "substantial nexus" approach to defining federal jurisdiction, Justice Kennedy suggested that "[t]hrough regulations or adjudication, the Corps may choose to identify categories of tributaries that, due to their volume of flow (either annually or on average), their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters." For wetlands adjacent to navigable-in-fact waters, Justice Kennedy concluded that adjacency can be sufficient for the Corps to establish jurisdiction. "Absent more specific regulations, however, the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to non-navigable tributaries." Justice Kennedy states that "[w]here an adequate nexus is established for a particular wetland, it may be permissible, as a matter of administrative convenience or necessity, to presume covered status for other

[47] 126 S.Ct. at 2246 (Kennedy, J., concurring in the judgment).
[48] 126 S.Ct. at 2246 (Kennedy, J., concurring in the judgment).

comparable wetlands in the region."[49]

The four dissenting Justices agreed that Justice Kennedy's "significant nexus" test probably will "not do much to diminish the number of wetlands covered by the Act in the long run."[50] Indeed, Justice Kennedy himself noted that the very wetlands at issue in *Rapanos* and *Carabell* are likely to satisfy his "significant nexus" test. He concludes that

> "the end result in these cases and many others to be considered by the Corps may be the same as that suggested by the dissent, namely, that the Corps' assertion of jurisdiction is valid. Given, however, that neither the agency nor the reviewing courts properly considered the issue, a remand is appropriate, in my view, for application of the controlling legal standard."[51]

However, as the four dissenting Justices noted, by requiring site-specific assessments, Justice Kennedy's approach will impose an additional administrative burden that will delay the processing of permit applications and create greater uncertainty for all concerned. "These problems are precisely the ones that *Riverside Bayview*'s deferential approach avoided."[52]

For now, the end product of *Rapanos* is that the scope of federal jurisdiction under the Clean Water Act is highly confused. In an unusual concurring opinion, Chief Justice Roberts described the result of the 4-1-4 split as "unfortunate" because "no opinion commands a majority of the Court on precisely how to read Congress' limits on the reach of the Clean Water Act." As a result, he noted, "Lower courts and regulated entities will now have to feel their way on a case-by-case basis." Surprisingly, he suggested that the situation "readily . . . could have been avoided" if the Army Corps of Engineers had issued new regulations after *SWANCC* clarifying the limits of its

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[49] 126 S.Ct. at 2249 (Kennedy, J., concurring in the judgment).
[50] 126 S.Ct. at 2264 (Stevens, J., dissenting).
[51] 126 S.Ct. at 2250 (Kennedy, J., concurring in the judgment).
[52] 126 S.Ct. at 2265 (Stevens, J., dissenting).

jurisdictional reach. Citing *Chevron*, the Chief Justice noted "Given the broad, somewhat ambiguous, but nonetheless clearly limiting terms Congress employed in the Clean Water Act, the Corps and the EPA would have enjoyed plenty of room to operate in developing *some* notion of an outer bound to the reach of their authority."[53] Yet because the Chief Justice joined in full Justice Scalia's plurality opinion, which rejected any deference to a broader definition of "waters of the United States" than the one articulated by Justice Scalia, the Chief Justice's concurrence contributes further to the confusion.

While purporting to interpret Congressional intent, the opinions of the Justices in *Rapanos* reflect a much more fundamental split that permeates much of the Court's jurisprudence in reviewing regulatory decisions by administrative agencies.[54] Four Justices (Justices Scalia, Thomas, Chief Justice Roberts and Justice Alito) join an opinion expressing extreme hostility to a long-standing regulatory interpretation (referring to it as a 30-year old "entrenched executive error" and stating that it "would authorize the Corps to function as a de facto regulator of immense stretches of intrastate land--an authority the agency has shown its willingness to exercise with the scope of discretion that would befit a local zoning board").[55] Four other Justices (Justices Stevens, Souter, Ginsburg and Breyer) vote to uphold the regulation because they are willing to defer to the judgment of a federal agency that it is essential to achieving the Congressional purpose. The Justice in the middle – Justice Kennedy – acknowledges the importance of the regulatory goal while seeking to impose new procedural requirements on the agency to avoid overreaching.

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[53] 126 S.Ct. at 2236 (Roberts, C.J., concurring).
[54] For a more detailed discussion contrasting the precautionary and reactive approaches to environmental regulation embraced by different members of the judiciary, see Robert V. Percival, Environmental Law in the 21st Century, 25 Va. Env. L. J. 1, 9-18 (2007).
[55] Rapanos, 126 S.Ct. at 2224 (Scalia, J., plurality opinion).

Justice Scalia's group of Justices made highly exaggerated claims that §404 imposes high costs on landowners while appearing dismissive of the ecological costs of filling wetlands. Justice Kennedy correctly calls Scalia's opinion "unduly dismissive" of the "[i]mportant public interests . . . served by the Clean Water Act in general and by the protection of wetlands in particular."[56] In a footnote Justice Stevens criticizes the plurality's "antagonism to environmentalism" and its claim that his dissent is "policy-laden" by observing that "[t]he policy considerations that have influenced my thinking are Congress' rather than my own."[57] This debate illustrates the sharply contrasting views concerning the value of federal regulatory programs to protect the environment among the Justice currently on the Court, a split most recently illustrated by the Court's 5-4 decision in *Massachusetts v. EPA*.[58]

V. CONFUSION IN THE WAKE OF *RAPANOS*

The *Rapanos* decision has spawned considerable and understandable confusion over the scope of federal jurisdiction under the Clean Water Act. Within days of its announcement, legal challenges premised on *Rapanos* were being made to environmental enforcement actions far beyond the context of the §404 program. Nine days after *Rapanos* was decided a federal district court in Texas dismissed a federal enforcement action under the Oil Pollution Act for an oil spill from a pipeline that drained into two ephemeral streams in Texas before reaching open waters.[59] Like the Clean Water Act, the Oil Pollution Act defines "navigable waters" to mean "waters of the United States,

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[56] 126 S.Ct. at 2246 (Kennedy, J., concurring in the judgment).
[57] 126 S.Ct. at 2259 n.8 (Stevens, J., dissenting).
[58] 127 S.Ct. 1438 (2007) (A five-Justice majority – Justices Stevens, Kennedy, Souter, Ginsburg and Breyer -- held that the Clean Air Act does give jurisdiction to EPA to regulate emissions of greenhouse gases that contribute to global warming and climate change and that states have standing to challenge EPA's failure to regulate them over harsh dissents on each issue from Justice Scalia and Chief Justice Roberts, joined by Justices Thomas and Alito).
[59] U.S. v. Chevron Pipe Line Co., 437 F.Supp. 2d 605 (N.D. Tex. 2006).

including the territorial sea."[60] Noting that Justice Kennedy's "significant nexus" test "leaves no guidance on how to implement its vague, subjective centerpiece," the court instead applied "prior reasoning in this circuit" that had narrowly interpreted the scope of federal jurisdiction.

The U.S. Court of Appeals are split on the proper test to apply in the wake of *Rapanos*. The First Circuit has held that federal jurisdiction under the Clean Water Act may be asserted if *either* the test of the plurality *or* Justice Kennedy's "significant nexus" test is satisfied, though one dissenting judge in the 2-1 panel decision argued that only the plurality's "hydrological connection" test should apply instead.[61] The Seventh Circuit and Ninth Circuit have held that only Justice Kennedy's test is controlling.[62]

In a case in federal district court in Washington, D.C., the American Petroleum Institute and Marathon Oil Company are arguing that *Rapanos* has invalidated Oil Pollution Prevention and Response regulations adopted by EPA in July 2002 because their coverage is premised on a pre-*Rapanos* understanding of the scope of federal authority.[63] One group of amici in that case are arguing alternatively that "any legal standard as amorphous as the Kennedy 'significant nexus' test raises due process concerns and should be avoided."[64]

While only time will tell how lower courts sort out the confusion engendered by the Court's 4-1-4 split in *Rapanos*, it would be highly damaging for the environment if *Rapanos* leaves a significant portion of wetlands adjacent to the nonnavigable tributaries

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[60] 33 U.S.C. §2701(21).
[61] U.S. v. Johnson, 467 F.3d 56 (1st Cir. 2006).
[62] U.S. v. Gerke Excavating, Inc., 464 F.3d 723 (7th Cir. 2006); No. Calif. River Watch v. City of Healdsburg, 457 F.3d 1023 (9th Cir. 2006).
[63] American Petroleum Institute v. Johnson, No. 1:02-cv-02254-PLF (D.D.C.)
[64] Brief Amicus Curiae of Pacific Legal Foundation, et al., in Support of Plaintiffs in American Petroleum Institute v. Johnson, No. 1:02-cv-02254-PLF (D.D.C.), March 2, 2007.

of navigable waters unprotected by §404. Justice Kennedy's plurality opinion does not seem to contemplate such a result, though it may yet transpire due to the administrative difficulties of conducting case-by-case assessment under his amorphous "significant nexus" test. While Justice Kennedy and Chief Justice Roberts urged the Corps to issue new regulations to ease this burden, the guidance document released by EPA and the Corps last month does not appear to be directly responsive to these invitations.

On June 5, 2007, EPA and the Corps jointly issued a guidance document on "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States and Carabell v. United States*."[65] A Question and Answer sheet distributed with the guidance specifies that it is not intended to "either expand or contract CWA jurisdiction, but rather to effectively implement the decision by the Supreme Court in *Rapanos*."[66] The guidance generally provides federal jurisdiction may be asserted over waters that meet either Justice Kennedy's "significant nexus" test or the plurality's "hydrological connection" test.

The guidance states that the agencies will continue to assert jurisdiction over (1) traditional navigable waters, (2) wetlands adjacent to traditional navigable waters, (3) non-navigable tributaries of traditional navigable waters that are relatively permanent (with a typical year-round or seasonal flow), and (4) wetlands that directly abut such tributaries. It provides that jurisdictional decisions will be made "based on a fact-specific analysis to determine whether [the following] have a significant nexus with a traditional navigable water:" (1) non-navigable tributaries that are not relatively permanent, (2) wetlands adjacent to non-navigable tributaries that are not relatively

[65] 72 Fed. Reg. 31824 (June 8, 2007).
[66] Corps and EPA Responses to the *Rapanos* Decision, Key Questions for Guidance Release (June 2007).

permanent, and (3) wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary. Jurisdiction generally will not be asserted over swales or erosional features that carry low-volume, infrequent or short duration flows and ditches draining only uplands that do not carry a relatively permanent flow of water. The guidance is relatively nebulous concerning how to establish a site-specific showing of significant nexus, citing various considerations such as flow characteristics and functions of tributaries and hydrologic and ecologic factors.

It is not possible to predict with precision what effect the guidance and *Rapanos* will have over the scope of federal jurisdiction. Prior to the issuance of the Court's decision EPA stated that 53% of streams in the U.S. (excluding Alaska) were headwater streams and that 59% were either intermittent or ephemeral, putting them at risk if the Corps' interpretation of "waters of the United States" was rejected. EPA and the Corps now assert their belief that "many of these streams will be able to satisfy one of the standards established in the *Rapanos* decision."[67] The question of how difficult and expensive it will be to establish that these areas satisfy one of the standards remains an important concern.

The consequences of a substantially more restrictive interpretation of the scope of federal jurisdiction clearly extend beyond the §404 program. As the government noted in its brief in *Rapanos*, the same term "defines the scope of regulatory jurisdiction to be exercised under other provisions of the CWA. See, *e.g.*, 33 U.S.C. 1342 (pollutant discharge permits); 33 U.S.C. 1321 (oil-spill prevention and clean-up); 33 U.S.C. 1313 (water quality standards)."[68] Thus, it is not surprising that the confusion *Rapanos* created

[67] Ibid.
[68] Brief for United States, Rapanos v. United States, at 20.

for the §404 permit program is now spreading to other vital programs to protect the environment from water pollution and oil spills. A more restrictive interpretation of the scope of federal authority will enable polluters to dump their pollutants in areas not subject to federal jurisdiction.[69]

VI. CONCLUSION: CONGRESS SHOULD CLARIFY THE SCOPE OF FEDERAL JURISDICTION UNDER THE CLEAN WATER ACT

In light of the enormous confusion created by the Court's 4-1-4 split in *Rapanos*, Congress should act to amend the Clean Water Act to clarify the scope of federal jurisdiction over the "waters of the United States." In the wake of *Rapanos* lower courts are now applying either or both of two approaches that have been expressly rejected by a majority of the Justices of the Supreme Court. Indeed, the most prevalent response to *Rapanos* has been case-by-case application of the amorphous "significant nexus" test -- a test that is rejected by all the Justices of the Court save for its author, Justice Kennedy.

The *Rapanos* decision also has spurred litigation challenging other federal programs to prevent or remediate oil spills and to control other forms of water pollution. These are problems that cannot easily be fixed through an agency rulemaking or adjudication, which is likely to take years without resolving the fundamental interpretative split among the Justices that is at the root of *Rapanos*.

The simplest approach would be for Congress to return the scope of federal jurisdiction under the Clean Water Act to that which prevailed prior to *SWANCC* and *Rapanos*. This approach should command bipartisan support because it would endorse the very interpretation of "waters of the United States" so ably advanced by the Bush

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[69] 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 Env. L. Rep. 10187, 10195-96 (2004).

administration in both cases. This approach also would ensure that agencies need not revise regulations that predate *SWANCC* and *Rapanos*. It would promote legal stability by retaining long-held interpretations well known to agency officials and the private bar.

There is an easy way to accomplish this goal. Congress should adopt legislation making unmistakably clear that it intends for the scope of federal jurisdiction under the Clean Water Act to provide protection to the waters of the United States to the fullest extent of legislative authority under the Constitution. In a separate dissenting opinion in *Rapanos* Justice Breyer explained his view that "the authority of the Army Corps of Engineers under the Clean Water Act extends to the limits of congressional power to regulate interstate commerce." Congress should respond to *SWANCC* and *Rapanos* by simply confirming this understanding. Because the nation's waters "are so various and so intricately interconnected," the only way to achieve the Congressional goal of restoring and maintaining their "chemical, physical, and biological integrity" "is to write a statute that defines 'waters' broadly and to leave the enforcing agency with the task of restricting the scope of that definition, either wholesale through regulation or retail through development permissions."[70] This is what Congress tried to do, even though the Supreme Court has now ruled that Congress did not speak clearly enough for it to get the message.

To be sure, some of the Court's confusion is understandable because of the use of the term "navigable waters," which confusingly invokes an entirely different era of federal regulatory interest predating the birth of comprehensive federal programs to protect the environment. As discussed in Part I above,[71] a comprehensive federal regulatory program to protect the nation's waters rests on firm constitutional foundations

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[70] 126 S.Ct. at 2266 (Breyer, J., dissenting).
[71] See text at pp. 5-6, supra.

wholly apart from the concept of navigability, as even Justice Rehnquist explicitly acknowledged.[72]

Next spring while on sabbatical I will be teaching environmental law in China as a J. William Fulbright Scholar. I will have the privilege of working with some of China's top environmental law professors and public interest lawyers who are fighting against long odds to strengthen their country's environmental laws to combat horrendous pollution problems that seriously threatens public health. The U.S. has avoided the dire problems afflicting China's water resources today in large part because of the strength of our Clean Water Act. It would be most unfortunate if the U.S., which is urging developing countries to upgrade their environmental laws, were to allow erosion of the vital protections this Act provides.

Justice Scalia concluded part of his plurality opinion in *Rapanos* by dismissing fears that "narrowing the definition of 'the waters of the United States' will hamper federal efforts to preserve the Nation's wetlands." He deemed such fears irrelevant by blaming Congress for not enacting "a Comprehensive National Wetlands Protection Act," the "wisdom" of which he declared to be "beyond our ken." He concluded: "What is clear, however, is that Congress did not enact one when it granted the Corps jurisdiction over only 'the *waters* of the United States.'"[73] Congress is uniquely capable of setting Justice Scalia straight.

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[72] Kaiser Aetna v. United States, 444 U.S. 164, 173 (1979). See also Environmental Law Institute, Anchoring the Clean Water Act: Congress's Constitutional Sources of Power to Protect the Nation's Waters, July 2007.

[73] Rapanos v. United States, 126 S.Ct. at 2228 (2006).