

**TESTIMONY ON  
THE SCOPE OF “WATERS OF THE UNITED STATES”  
AFTER *RAPANOS V. UNITED STATES***

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**BEFORE THE  
SENATE ENVIRONMENT AND PUBLIC WORKS COMMITTEE  
SUBCOMMITTEE ON FISHERIES, WILDLIFE, AND WATER  
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Thank you, Mr. Chairman and members of this subcommittee, for the invitation to testify on the Supreme Court’s decision in *Rapanos v. United States* and its implications for wetland conservation. My name is Jonathan H. Adler, and I am a Professor of Law and co-director of the Center for Business Law and Regulation at the Case Western Reserve University School of Law, where I teach several courses in environmental law and constitutional law.

For the past fifteen years I have researched and analyzed federal regulatory policies, with a particular focus on the intersection of federalism and environmental protection. Substantial portions of my research have focused on wetland conservation programs, including federal regulation of wetlands under Section 404 of the Clean Water Act and the proper role of federal regulation in conservation policy. This research has led to numerous academic articles and book chapters on the subject, including articles in *Environmental Law*, the *Supreme Court Economic Review*, and *Regulation*.<sup>1</sup> The issue of wetland conservation is also of some personal interest to me. Our backyard in Hudson, Ohio extends into wetlands adjoining a conservation area, and I am committed to outdoor recreational activities, including hunting and fishing, that rely upon the ecosystem services that wetlands provide. Thus, I appreciate the opportunity to share my views with the committee today.

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*Rapanos v. United States*, 126 S.Ct. 2208 (2006), is only the latest chapter in the effort to define the meaning of “waters of the United States,” and the scope of federal regulatory jurisdiction, under the Clean Water Act (CWA). Although no single opinion commanded a majority of the

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<sup>1</sup> See, e.g., *The Ducks Stop Here? The Environmental Challenge to Federalism*, 9 SUPREME COURT ECONOMIC REVIEW 205 (2001); *Swamp Rules: The End of Federal Wetlands Regulation?* REGULATION, Vol. 22, No. 2 (1999); *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetlands Regulation*, 29 ENVIRONMENTAL LAW 1 (1999). See also *Jurisdictional Mismatch in Environmental Federalism*, 14 NYU ENVIRONMENTAL LAW JOURNAL 130 (2005); *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 IOWA LAW REVIEW 377 (2005); *When Is Two A Crowd? The Impact of Federal Action on State Environmental Regulation*, HARVARD ENVIRONMENTAL LAW REVIEW (2006)(forthcoming).

justices, the Court did provide a discernible holding: The CWA only extends to those waters and wetlands that have a “significant nexus” to navigable waters of the United States. This holding indicates that CWA jurisdiction over private lands is far more limited than federal regulators have been willing to acknowledge. A majority of the Court explicitly rejected the expansive interpretation adopted by the U.S. Army Corps of Engineers, Environmental Protection Agency, and most lower courts. Indeed, this is the second time in only six years that the Court has so ruled. Due to *Rapanos*, the primary bases upon which the U.S. Army Corps of Engineers and the Environmental Protection Agency asserted regulatory jurisdiction are no longer valid. Unless these agencies wish to engage in a costly and inconsistent case-by-case approach to determining federal jurisdiction, a new rulemaking is required to ensure that federal regulations conform the applicable law.

### **Regulatory Jurisdiction under the Clean Water Act**

Federal regulations define wetlands as “areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.” 33 C.F.R. § 328.3(b). Yet it is not a given parcel’s wetland characteristics, but its connection to navigable waters of the United States that forms the basis for federal jurisdiction.

The CWA, by its terms, only extends to “navigable waters of the United States.” Yet the CWA defines “navigable waters” as “the waters of the United States. 33 U.S.C. § 1362 (7). This definition extends federal jurisdiction beyond those waters traditionally used for navigation, but it is still limited; the phrase of “navigable waters” is still relevant in jurisdictional determinations. As the Supreme Court has explained, “Congress intended the phrase ‘navigable waters’ to include at least some waters that would not be deemed ‘navigable’ under the classical understanding of that term.” *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*, 531 U.S. 159, 171 (2001) (internal quotations omitted). Nonetheless, there is no “basis for reading the term ‘navigable waters’ out of the statute. . . . The term ‘navigable’ has at least 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 had been navigable in fact or which could reasonably be so made.” *Id.* at 172.

The Supreme Court first considered the scope of the Corps’ regulatory authority in 1985 in *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985). Here, the Court unanimously concluded that the Corps could reasonably define “waters of the United States” to include “wetlands adjacent to navigable bodies of water and their tributaries.” *Id.* at 123. The Court based this holding on the Corps’ conclusion that such wetlands “are inseparably bound up with the ‘waters of the United States.’” *Id.* at 131. In so holding the Court did not “express any opinion” on whether federal regulatory jurisdiction could be further extended to cover “wetlands that are not adjacent to bodies of open water.” *Id.* at 131-32 n.8.

In 2001, in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*, 531 U.S. 159 (2001), the Court reaffirmed, but refused to extend, the holding of *Riverside Bayview Homes*. Specifically, the Court held that the CWA does not confer federal regulatory jurisdiction over isolated, intrastate waters. Rather, the CWA only reaches those

waters or wetlands that have a “significant nexus” to navigable waters. *Id.* at 167. Of note, the Court refused to defer to the Army Corps’ statutory interpretation because to do so would “invoke[] the outer limits of Congress’ power” to regulate private lands. *Id.* at 172. The Court refused to endorse an interpretation of the Act that would potentially exceed the scope of the federal commerce clause in some of its applications.

As this Committee is aware, application of *SWANCC* by regional Corps offices<sup>2</sup> and lower federal courts was quite inconsistent.<sup>3</sup> This led to substantial uncertainty as to the current scope of federal regulatory jurisdiction under the CWA.<sup>4</sup> *Rapanos* resolves some, though not all, of the uncertainty generated by the *SWANCC* opinion. *Rapanos* makes clear that, under *SWANCC*, federal regulatory jurisdiction under the CWA does not extend to non-navigable, isolated, intrastate waters, irrespective of whether migratory birds are used to provide the basis for jurisdiction. Indeed, the Court was unanimous on this point. *See*, 126 S.Ct. at 2217 (Scalia, J., plurality); *id.* at 2244 (Kennedy, J., concurring in the judgment); *id.* at 2256 (Stevens, J., dissenting). Waters and wetlands that lack any discernible hydrological connection to navigable waters are beyond the scope of the CWA. The Court also made clear that the standard adopted by most federal appellate courts, including the Sixth Circuit, was too deferential to the Army Corps and failed to ensure that regulated wetlands actually had a “significant nexus” to navigable waters.

### **The Holding of *United States v. Rapanos***

In *United States v. Rapanos*, the Court was called upon to address whether, and in what circumstances, regulatory jurisdiction under the CWA extends to wetlands that are not adjacent to waters that are navigable in fact. Whereas prior decisions produced clear majorities, the *Rapanos* court split into three groups. Four justices joined a plurality opinion, announcing the judgment of the Court and construing the CWA narrowly to exclude such wetlands. Four justices joined a dissent that called for near-absolute deference to the Army Corps’ construction of its own jurisdiction under the CWA. And one justice joined the judgment of the Court, rejecting the expansive interpretation of federal jurisdiction adopted by the federal government and endorsed by the U.S. Court of Appeals for the Sixth Circuit, but also adopting a broader (and more

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<sup>2</sup> See U.S. GENERAL ACCOUNTING OFFICE, *Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction*, GAO-04-297, Feb. 2004.

<sup>3</sup> See, e.g., *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003) (interpreting *SWANCC* narrowly); *United States v. Rapanos*, 339 F.3d 447 (6th Cir. 2003) (same); *United States v. Rueth Dev. Co.*, 335 F.3d 598 (7th Cir. 2003)(same); compare *In re Needham*, 354 F.3d 340 (5th Cir. 2003) (after *SWANCC* federal jurisdiction only extends to wetlands adjacent to navigable waters); *Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001)(same).

<sup>4</sup> See, e.g., Lance D. Wood, *Do Not 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, 10189, 10195 (2004) (noting *SWANCC* was “ambiguous” and courts have been “inconsistent” in their interpretations); Amended Statement of Patrick Parenteau, Professor of Law, Vermont Law School, before the House of Representatives Committee on Government Reform, Sept. 19, 2002 (“The decision has created substantial uncertainty regarding the geographic jurisdiction of the Clean Water Act.”); Position Paper on Clean Water Act Jurisdiction Determinations Pursuant to the Supreme Court’s Jan. 9, 2001 Decision, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, Associate of State Wetland Managers, Dec. 2001 (“The section 404 regulatory program has been in turmoil ever since the Supreme Court’s *SWANCC* decision.”).

ambiguous) interpretation of the CWA than that urged by the plurality. The result is what some would term a “4-1-4” split.

The lack of a majority opinion in *Rapanos* necessarily creates some uncertainty and ambiguity, but it does not preclude the existence of a holding that is binding on lower courts and federal regulators. As explained in *Marks v. United States*, “[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.” 430 U.S. 188, 193 (1977). The judgment of the Court in *Rapanos* was to vacate and remand the decisions of the U.S. Court of Appeals for the Sixth Circuit in *United States v. Rapanos*, 376 F.3d 629 (6<sup>th</sup> Cir. 2004) and *Carabell v. United States Army Corps of Engineers*, 391 F.3d 704 (6<sup>th</sup> Cir. 2004). Therefore, the concurring opinion of Justice Kennedy, and the grounds of agreement between Justice Kennedy and the plurality opinion authored by Justice Scalia, form the holding of the Court.

The central holding of *Rapanos* is that a “significant nexus” between a given water or wetland and navigable waters is a necessary predicate for regulatory jurisdiction under the CWA. As Justice Kennedy explained “the Corps’ jurisdiction over wetlands depends upon the existence of a *significant* nexus between the wetlands in question and navigable waters in a traditional sense.” 126 S.Ct. at 2248 (emphasis added); *see also id.* at 2241 (““Absent a significant nexus, jurisdiction under the Act is lacking.”)<sup>5</sup> In this regard, the *Rapanos* court largely followed the reasoning adopted by the Court in *SWANCC*, where the Court had previously held that “waters of the United States” only applies to those waters and wetlands that have a “significant nexus” to navigable waters, and rejected the jurisdictional theories put forward by the federal government and many *amici*.

Whereas the Sixth Circuit and federal regulators had maintained that any hydrological connection between a given wetland and navigable waters would be sufficient to assert federal regulatory jurisdiction, a majority of the Court rejected this view. A “mere hydrologic connection,” by itself, will not be enough to establish jurisdiction in all cases. 126 S.Ct. at 2251. The connection must be significant. Justice Kennedy elaborated on what such a connection must entail:

wetlands possess the requisite nexus, and thus come within the statutory phrase “navigable waters,” if the wetlands, either alone or in combination with similarly situated lands in the region, *significantly affect* the chemical, physical, and biological integrity of other covered waters more readily understood as “navigable.” When, in contrast, wetlands’ effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the term “navigable waters.” 126 S.Ct. at 2248.

Whereas it is reasonable for the Corps to presume jurisdiction over wetlands adjacent to truly navigable waters – that is “waters that are or were navigable in fact, or that could reasonably be

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<sup>5</sup> As Justice Kennedy further noted, “navigable waters” are “waters that are or were navigable in fact, or that could reasonably be so made.” *Id.* at 2236.

so made” 126 S.Ct. at 2236 – absent a greater ecological connection, adjacency to a *nonnavigable* tributary by itself will not be enough to establish jurisdiction. 126 S.Ct. at 2252.

Justice Kennedy also joined the plurality and rejecting the dissent’s willingness to defer to any conceivable regulatory interpretation of “waters of the United States,” no matter how broad. As Kennedy noted, “the dissent would permit federal regulation whenever wetlands lie alongside a ditch or drain, *however remote and insubstantial*, that eventually may fallow into traditional navigable waters. The deference owed to the Corps’ interpretation of the statute does not extend so far.” *Id.* at 2247. Justice Kennedy observed that “the dissent reads a central requirement out—namely the requirement that the word ‘navigable’ in ‘navigable waters’ be given some importance.” *Id.* As Justice Kennedy and the plurality both made clear, “the word ‘navigable’ in the Act must be given some effect.” *Id.* Another implication of Justice Kennedy’s opinion is that the current regulatory definition of tributaries is also overbroad, insofar as it allows for the assertion of jurisdiction with little regard for the actual connections between a given ditch, swale, gully, or channel with actual navigable waters. Here again, Justice Kennedy was in agreement with the plurality.

While there is some amount of agreement between Justice Kennedy’s concurrence and the dissenting justices, it would be wrong to view any part of Justice Stevens’ dissent as a “holding” of the Court. Nothing in the dissent constitutes a portion of the judgment of the Court, so nothing in the dissent is legally binding. As the Supreme Court noted in *Marks*, the holding of the Court is “that position taken by *those Members who concurred in the judgments* on the narrowest grounds.” 430 U.S. at 193 (emphasis added). Moreover, Justice Kennedy’s concurring opinion explicitly rejected Justice Stevens’ near-limitless approach to federal jurisdiction, so the latter provides no useful guide for determining the CWA’s jurisdictional limits.

The urgency or importance of some environmental concerns provides no justification for adopting a more expansive view of federal regulatory jurisdiction or adopting a more lenient approach to statutory interpretation. According to a majority of the Court, such policy considerations cannot trump the text of the statute itself. As Justice Kennedy noted, in explicit agreement with the plurality, “environmental concerns provide no reason to disregard limits in the statutory text.” 126 S.Ct. at 2247. Moreover, as I will explain below, not every environmental concern is best addressed through the expansion of federal regulation. More federal environmental regulation does not always produce greater environmental protection.

### **The Effect on Pre-Existing Regulations**

One clear implication of the Court’s decision in *Rapanos* is that the current federal regulations used by the Army Corps of Engineers and Environmental Protection Agency to define the scope of the CWA are no longer valid. For instance, insofar as federal regulations purport to define “waters of the United States” to include intrastate waters “the use, degradation, or destruction of which could effect interstate commerce or foreign commerce,” 33 C.F.R. § 328.3(a)(3) and wetlands adjacent to such waters 33 C.F.R. § 328.3(a)(7), they far exceed the holdings of both *SWANCC* and *Rapanos*. The Court also rejected the current regulatory definition of what constitutes a “tributary” in 33 C.F.R. §328.3(a)(5) as overbroad.

Courts owe substantial deference to the Army Corps and EPA in their assessment of the ecological connections between types of wetlands and water systems and navigable waters. Yet those regulations currently on the books do not establish such a connection, and provide no assurance that those wetlands over which the Corps’ asserts jurisdiction in fact have a “significant nexus” to the waters of the United States. Until the Corps and EPA promulgate regulations that identify those wetland characteristics that are sufficient to establish such a nexus, in at least the majority of cases, the Corps will be forced to “establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries.” 126 S.Ct. at 2249. This will necessarily increase the administrative burden of wetland enforcement, generating increased uncertainty and delays in permit reviews. IT will also limit the corps’ ability to ensure that the ecological goals of the Section 404 program are being met.

Some of these problems may have been avoided had the Army Corps and EPA revised their regulations in response to the *SWANCC* decision, a point made by the Chief Justice in his concurrence. In January 2003, the Army Corps and EPA issued an advance notice of proposed rulemaking to clarify the scope of regulatory jurisdiction under the CWA.<sup>6</sup> In December 2003, however, the Army Corps and EPA announced they would not issue a new rulemaking. One reason given for this decision was federal courts had narrowly interpreted *SWANCC*’s impact. Whether or not the Army Corps and EPA were correct in this assessment – and I believe most lower courts adopted an unjustifiably narrow reading of *SWANCC*, a view vindicated by the *Rapanos* holding – this justification for continuing to rely upon the pre-existing federal regulations is no longer valid. To the contrary, it is incumbent upon the Army Corps and EPA to develop and promulgate new regulations defining the scope of “waters of the United States” under the CWA.

### **The Path Ahead**

In developing new implementing regulations, the federal government should not repeat the mistake of seeking to assert the broadest possible interpretation of “waters of the United States.” Adopting a regulatory interpretation that is potentially at odds with *Rapanos* and *SWANCC* is not in the interest of the regulated community nor does it best serve the cause of wetland conservation. Refusing to abide the letter and spirit of the Supreme Court’s decision is a recipe for further litigation, court losses, and regulatory uncertainty. It would also represent a missed opportunity to harmonize federal regulations with current law and the federal government’s particular conservation interests.

Federal regulatory resources are necessarily limited. For this reason, federal resources are best utilized if they are targeted at those areas where there is an identifiable *federal* interest or the federal government is in particularly good position to advance conservation goals. For example, there is an undeniable federal interest in regulating the filling or dredging of wetlands where such activities would cause or contribute to interstate pollution problems or compromise water quality in interstate waterways. Where the effects of wetland modification are more localized,

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<sup>6</sup> Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of “Waters of the United States,” 68 Fed. Reg. 1991 (Jan. 15, 2003).

however, the federal interest is less clear. Not coincidentally, in the latter case, the basis for federal jurisdiction is also more attenuated.

Limiting federal regulatory authority to the areas of greatest federal interest would certainly create room for the expansion of state and local regulatory efforts. Over-expansive assertions of federal regulatory authority may preclude, discourage, or otherwise inhibit state and local governments and non-governmental conservation organizations from adopting environmental protections where such efforts would be worthwhile. Contrary to common perceptions, state wetland regulation preceded federal regulatory efforts. Indeed, the first state wetland conservation statutes were adopted more than a decade before the Army Corps and EPA began regulating the dredging and filling of wetlands. Since then, many states have stayed well ahead of the federal government, adopting more innovative or protective wetland conservation programs. Yet it also appears that greater conservation efforts by non-federal actors may have been “crowded out” by an overzealous interpretation of federal jurisdiction. If the federal government will regulate everything, there is less incentive for other entities to act. Insofar as federal efforts are inefficient, misdirected, or ineffective – all charges that have been leveled against the Section 404 program – this reduces environmental conservation. By developing jurisdictional regulations that establish a “significant nexus,” in part, by focusing on those instances in which there is a particular federal interest, the Army Corps and EPA can maximize wetland conservation by complementing and supplementing, rather than supplanting, non-federal efforts.

It is also important for federal policymakers not to lose sight of the fact that federal *regulation* under the CWA is not the only means for advancing wetland conservation. Indeed, the experience of federal conservation programs that rely upon incentives and cooperation with private landowners compares quite favorably with the conflicts and inconsistencies of federal wetland regulations. Federal support for the protection of waterfowl habitat dates back over seventy years to the sale of “duck stamps” to hunters that created a dedicated source of revenue for conservation of an estimated 4.5 million acres. Other programs under which the federal government enters into private agreements with landowners to restore wetlands on their property, while subsidizing the cost of restoration and the purchase of a permanent or multi-year easement to ensure that the wetland is protected, are particularly cost-effective when compared to mandated mitigation under the CWA. Such programs are also not confined by the jurisdictional limits of the CWA, nor do they generate the litigation and conflict of federal controls on private land-use decisions.

Insofar as some types of wetlands, such as prairie potholes, may be particularly likely to lie beyond the scope of federal regulation, incentive programs remain a viable conservation option. Indeed, enlisting private landowners and conservation organizations through incentive programs has conserved hundreds of thousands of acres of wetlands and was the driving force behind the attainment of “no net loss” of wetlands during the 1990s. There is no reason why this cannot continue, despite the limitations on federal regulatory jurisdiction. Private landowners, who own the majority of wetlands in this nation, are far more willing to cooperate with conservation organizations and government agencies when doing so does not increase the threat of federal regulation. It would be a tragedy were an inordinate focus on maximizing regulatory

jurisdiction to come at the expense of sufficient support for alternative means of encouraging wetland conservation.

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Mr. Chairman and members of this subcommittee, I recognize the importance of these issues to you and your constituents, and I commend your efforts to examine what, if any, Congressional or administrative response to the *Rapanos* decision is appropriate. I hope that my perspective has been helpful to you, and will seek to answer any additional you might have.