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I thank the Senators and their staff for this opportunity to discuss the Supreme Court's recent decision in the joint cases, *Rapanos v. United States* and *Carabell v. U.S. Corps of Engineers* (hereinafter, *Rapanos*).

I am a Professor of Law at Emory Law School, where I direct Emory's Environmental and Natural Resources Law Program. During my legal career I have worked for a private law firm, for industry, for municipal and state clients, and also for environmental groups. I will be a Visiting Professor for a portion of this coming year at Cornell Law School, have been a Visiting Professor at Columbia Law School, and have also, for Columbia and Amsterdam Law Schools in Europe, taught lawyers, judges and government officials seeking an introduction to American law. I am a graduate of Columbia Law School and Amherst College.

I suspect that I was invited here primarily due to my involvement with the *Rapanos* case. I co-authored a friend of Court *amicus curiae* brief on behalf of a bipartisan group of four former administrators of the United States Environmental Protection Agency, or EPA. These four administrators—Carol Browner, Russell Train, Douglas Costle, and William Reilly— all shared the same goal of preserving thirty years of consistent approaches to protecting the “waters of the United States.” Despite their different years of government service, different political parties, and even despite some disagreements with aspects of the current administration's policies, they and I filed an amicus brief in strong support of the Bush Administration's position seeking to sustain these long-existing protections of America's “waters.”

The Supreme Court's *Rapanos* decision, with a fragmented series of opinions and no single majority opinion, undoubtedly was less than the height of clarity. Still, as I'll discuss more in a moment, it and still good Supreme Court precedent does create some clear boundaries for what is the law and makes quite clear the choices faced by the nation's legislature. I'll organize my comments into three sections:

- 1) Why were the stakes in *Rapanos* so high;
- 2) What did the Court actually do to the law in *Rapanos*;
- 3) What are appropriate political responses to *Rapanos*.

## I. The Stakes in *Rapanos*

The consolidated *Rapanos* and *Carabell* cases attracted a great deal of attention, and for good reason. The issue in these cases could not have been more central to the protections and huge benefits created by the Clean Water Act. What kinds of wetlands and tributaries that are not “navigable in fact” are protected from pollution discharges, dredging or filling under the statute? In both cases, real estate developers sought permission to fill in areas characterized as protected jurisdictional waters by the Army Corps of Engineers. One case involved a wetland adjacent to a tributary of a traditionally navigable water, while the other dealt with wetlands separated by a manmade berm from an adjacent tributary.

This question about which “waters” are protected by the Clean Water Act is the linchpin of the statute. Only such jurisdictional “waters” are subject to National Pollution Discharge permits under Section 402 of the statute, the key statutory provision protecting waters from industrial pollution discharges, including toxic effluents. Similarly, only such jurisdictional waters are protected by Section 404 and related “dredge and fill” regulations from frequent industry and developer pressures to fill in wetlands or tributaries. America’s waters are much cleaner now due to broad protection of such waters from direct pollution discharges, as well as preservation of wetlands and tributaries for their pollution trapping, flood control, runoff storage, and use as breeding grounds, as well as for their heavy use for fishing, hunting and recreational purposes.

The Clean Water Act’s explicit text talks about its goal of “restoring and maintaining the chemical, physical and biological integrity of the Nation’s waters.” If the Supreme Court in *Rapanos* had accepted the arguments of the real estate developer petitioners and aligned parties and had limited protection only to navigable-in-fact waters, most of America’s long-protected waters would have lost federal protection. Huge swaths of the West, where rains are infrequent and many tributary beds sit empty much of the year, or wetlands and tributaries near the beginning of river basins, were at risk. Decades of environmental progress stood in the balance.

Over thirty years of consistent regulatory treatment has protected far more than just rivers usable by large ships. Most importantly, in 1985 in the *Riverside Bayview Homes* case, the Supreme Court unanimously agreed that federal jurisdiction extends to wetlands adjacent to navigable-in-fact waters. The Court reached this decision with heavy emphasis on the ecological and hydrological functions of such waters, and the need for deference to expert regulators’ judgments and statutory language reflecting the goal of protecting such waters. The Supreme Court agreed with regulators in *Riverside* that far more than just navigable-in-fact (or “traditional navigable”) waters are federally protected. The only exception to this consistent protection is the Supreme Court’s bare majority ruling in 2001 in *Solid Waste Agency of Northern Cook County (SWANCC)*, where the Court held that federal law does not protect isolated wetlands purportedly reached by federal law due to migratory bird use.

The *Rapanos* case thus presented a major opportunity for opponents of the Clean Water Act's broad jurisdiction. In the end, however, a majority of the US Supreme Court declined the opportunity to weaken the law's protections.

## II. What the *Rapanos* Court Actually Decided

The reconfigured Supreme Court, with newly appointed Chief Justice Roberts and Justice Alito, produced a series of opinions in *Rapanos*. Sadly, there is no single majority opinion speaking for five or more justices upholding these long-established protections of America's waters.. We then must look at votes and opinion content to understand the decision. Most confusingly, five justices agreed that the Army Corps of Engineers had to do more to establish its jurisdiction in these two consolidated cases, but five justices overwhelmingly agreed with a broad protective rationale for jurisdiction in these cases. Five justices—Justices Kennedy in concurrence, and Justices Stevens, Souter, Ginsburg, and Breyer in dissent, strongly and explicitly disagreed with virtually all aspects of a plurality opinion penned by Justice Scalia.

The question for all of us today, regulators, and those interpreting the law, is what does all of this add up to? Where is the law left? Counting heads and parsing *Rapanos* and the Court's other major "waters of the United States" decisions, there actually remains a great deal of clarity. Most protections of the Clean Water Act's long-established regulations remain. Significantly, no justice claims to overrule or cut back the Court's unanimous 1985 *Riverside* decision. Adjacent wetlands remain protected due to their hydrological and ecological functions. All justices also continue to agree that the Clean Water Act protects more than just "navigable-in-fact" waters. The key regulations defining what count as "waters of the United States" were not struck down. A majority of justices also are sticking with the lack of federal protection for isolated wetlands reached due to migratory bird use.

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

Before discussing Justice Kennedy's opinion, it is important to state clearly that Justice Scalia's opinion for a plurality of justices does not represent the law. Relying heavily on a dictionary created over a decade before the statutory language at issue, Justice Scalia and his fellow plurality justices claimed that waters are federally protected only if they are relatively permanent standing or continuously flowing waters. This view, if the Court's, would have constituted a revolutionary discarding of long-established regulatory approaches, as well as a radical rejection of the twenty-year-old *Riverside Bayview* Court precedent (although these justices do not concede such an intent or effect).

However, Justice Scalia does not have the votes to speak for the Court. Justice Kennedy repeatedly rejects the Scalia opinion's approach as "inconsistent with the Act's text, structure, and purpose," as do the dissenters. For Supreme Court opinions to constitute law, you need to find five justices in agreement, five justices in assent regarding the rationale for the decision. Justice Scalia came up one vote short. It is only a plurality opinion because of agreement on the need for a remand.

Justice Kennedy's opinion is the key. Justice Kennedy picks up on *SWANCC* language to assert that there must be a "significant nexus" between wetlands or tributaries to navigable waters or waters that could be navigable for them to be jurisdictional waters subject to federal protection. Critically important, the sorts of significant links he sets forth are many and are sensitive to the statute's focus on biological and ecological integrity. Wetlands or tributaries can be federally protected if "alone or in combination with" similar lands and waters, they "significantly affect the chemical, physical or biological integrity of other covered waters more readily understood as 'navigable.'" Non-navigable tributaries are "covered" if alone or with "comparable" waters they are significant. In addition to giving due heed to the usual goals of protecting water quality and fishery resources long protected and affirmed in *Riverside Bayview Homes*, Justice Kennedy further refers to "integrity" goals, as well as concern with "functions . . . such as pollutant trapping, flood control, and runoff storage." Only if wetlands or tributaries have insubstantial linkages and effects, alone or in combination with other similar lands or waters, might they lose protection. Justice Kennedy's "significant nexus" articulation ends up creating an overwhelming overlap with long-established regulatory approaches, as well as with the approaches articulated in the Justice Stevens *Rapanos* dissent for four other justices.

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

When Justice Kennedy and the dissenters apply their approaches to the *Rapanos* and *Carabell* facts, both intimate that on remand federal jurisdiction looks likely to be found. Justice Kennedy differs from the dissenters in asking the Army Corps to do a better job in establishing the nexus he articulates.

Lastly, no five-justice majority in *Rapanos* cut back on federal regulatory power under the Commerce Clause. The Court in granting certiorari had considered making this a constitutional decision under the Commerce Clause, a goal numerous industry, property rights and anti-regulation groups had supported in their briefs. Five justices, however, explicitly rejected these arguments. The Justice Scalia plurality would have used constitutional concerns to read the statute narrowly and limit federal power, but only four

justices adopted this view. If anything, the five justices rejecting a Commerce Clause attack broadened federal power from where it might have gone after *SWANCC*.

In the United States judicial system, five aligned votes by Supreme Court justices make a binding precedent. As indicated by the brief concurring opinion of Chief Justice Roberts, if the Court is splintered, the narrowest opinion, here Justice Kennedy's, would be the key. As the Chief Justice states through his citation to *Marks v. Whitney*, the question is whether a "single rationale explaining the result enjoys the assent of five Justices." Here, Justice Kennedy's concurring *Rapanos* opinion shares substantial overlap with the dissenters' approaches. The dissenters would have deferred even more than Justice Kennedy to regulators' judgments, but in all parts of their opinion, the dissenters would protect waters at least to the extent set forth by Justice Kennedy. They repeatedly and explicitly agree with the rationales for federal protection set forth in the Justice Kennedy concurrence. Whether taken by itself as the "narrowest opinion," or as an opinion with underlying rationales agreed upon by five justices, Justice Kennedy's opinion is the key.

### III. Political Responses to *Rapanos*

The next question is how the political branches should respond to *Rapanos*. The Clean Water Act's protections have not been disastrously curtailed, as many feared. Justice Kennedy's approach in fact appears to leave most protections in place. He and the plurality justices, however, do now demand a more rigorous regulatory showing of the significance of waters before they can be deemed "waters of the United States." They indicated that this significance can be shown either in new promulgated regulations or perhaps policy or interpretive documents, or on a case-by-case basis.

I believe that although the content of the law has not changed significantly, Justice Kennedy's forcing the Army Corps to establish more authoritatively waters' significance will have harmful effects. I anticipate more regulatory challenges by permit seekers. Administrative agencies like the Army Corps respond to many pressures, but most are risk averse and seek to avoid litigation. Justice Kennedy's "significant nexus" test, while in substance mainly a modest re-articulation of the law and regulations as they stood, does add some new language that lawyers and permit seekers will isolate and seek to use. He also did require a remand in these cases, even though he anticipated that the government's assertion of jurisdiction was justifiable. With increased industry and developer pressure, the risk is that the Army Corps will too readily fold, declining jurisdiction where it anticipates litigation or a strong regulatory challenge. Vast swaths of hugely important wetlands and tributaries around the country are at risk.

This leaves three remaining main questions. Can the Army Corps and U.S. EPA either in regulations or specific permitting decisions cut back on Clean Water Act protections long afforded? The second question is whether the legislature needs to act. The third concerns which response is preferable.

I believe that only quite modest agency modifications of what “waters” are protected could comport with the law. Any regulations must conform to unchanged statutory language with its explicit “integrity” goals, the *Riverside Bayview Homes* decision, and Justice Kennedy’s concurring *Rapanos* decision. Any change in new regulations would have to confront old regulations and justify any change. Justice Kennedy’s emphasis on the statute’s integrity goals and functions such as pollutant trapping, flood control, and runoff storage, along with these other legal authorities, establish boundaries on what agencies can now do. Any significant cutting back on protected waters would deserve judicial rejection and legislative criticism. It would also surely engender litigation. Strengthening the regulatory justifications for current regulatory definitions would be more likely to withstand attack, but any changes of a strengthening sort would still provoke litigation challenging either new regulations or case-specific regulatory judgments.

Should the legislature act, either in addition to or in lieu of regulatory action? I think that the legislature should seriously consider enacting into statutory law protections like those long afforded by decades of Clean Water Act regulations articulating what sorts of “waters of the United States” are protected. For several reasons, this seems a more prudent and effective approach than hoping for a regulatory fix. First, this is not a politically partisan issue, but a series of regulatory judgments that have long been retained, over three decades, by both Republican and Democratic administrations. The Bush Administration in *Rapanos* asked the Court to uphold the federal assertions of jurisdiction and stood by existing regulations. The Bush Administration was joined by dozens of states, my bipartisan group of four former EPA administrators, and many environmental groups. This is truly a rare area of bipartisan agreement, and an area where the states and federal government are in overwhelming agreement.

Such a legislative fix, making statutory these stable regulatory interpretations, would create several benefits. First, they would promote stability in the law by retaining categories and approaches deeply engrained in the law, and well known to federal and state regulators and lawyers and engineers counseling the private sector. Second, by enacting a legislative fix, we could avoid virtually inevitable costly and confusing litigation challenging any new regulations regarding “waters.” Such a statutory amendment could also preclude the risk that the confusing *Rapanos* opinions will be misread by judges, as already has happened in one trial court in Texas, where a judge read the Justice Scalia plurality as the key, rendering the federal government powerless to respond to an oil spill in a tributary bed. Lastly, the durable regulatory judgments that would now be statutory law are well grounded and tested. To protect America’s waters does require more than just attention to continuously flowing rivers. It would be a rare step in American law if this legislature stood by and allowed a substantial weakening of the Clean Water Act’s protection. Retention of bipartisan, well-established regulatory policy through legislative action would thus create many benefits that would be lacking with new regulatory action.

This past year, the South and Northeastern United States have experienced catastrophic incidents where storms causing floods led to devastating and costly losses.

These losses occurred even with the fruits of three decades of regulatory protections for wetlands and tributaries. If executive agencies or legislators now use *Rapanos* as an excuse to cut back on protection of wetlands and tributaries, future storms will cause even more devastating floods. Pollution control progress will cease. Huge portions of the United States, especially where water is scarce or where rivers originate, could lose federal protection from pollution discharge requirements, as well as dredging and filling prohibitions. I hope that the Senate will take steps to discourage any such backwards steps.

I thank this Committee for this opportunity and would be pleased to answer any questions.