UNITED STATES SENATE
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

TESTIMONY OF DUANE J. DESIDERIO ON BEHALF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS

THE CLEAN WATER ACT FOLLOWING THE RECENT SUPREME COURT DECISIONS IN *SOLID WASTE AGENCY OF NORTHERN COOK COUNTY* AND *RAPANOS-CARABELL*

DECEMBER 13, 2007

Madame Chair, Ranking Member Inhofe, and distinguished members of the Committee, thank you for the opportunity to testify on behalf of the National Association of Home Builders (NAHB). My name is Duane Desiderio and I am Staff Vice President for Legal Affairs at NAHB. I appreciate the opportunity to talk about the case law and legislative history surrounding the Clean Water Act (CWA) over the past 35 years. NAHB is a Washington, D.C.-based trade association representing 235,000 corporate members that, in turn, employ millions of individuals in the home building, remodeling, multifamily construction, property management, subcontracting, design, housing finance, building product manufacturing, and light commercial construction industries. NAHB's chief goal is to provide and expand opportunities for all consumers to have safe, decent and affordable housing.

NAHB and its members have been advocates of the CWA since its inception. The CWA has helped the Nation make significant strides in improving the quality of our water resources. Due to the nature of home building activities, NAHB members must often obtain section 402 and 404 permits for their home building projects. Beyond the permit requirements, our members regularly design their projects to avoid sensitive areas, showcase natural resources, and mitigate adverse impacts. As an organization, NAHB has tirelessly advocated for the CWA and an associated permitting scheme that is consistent, predictable, timely, and focused on protecting true aquatic resources. NAHB has also strongly supported implementing measures that honor the Congressional intent to provide a cooperative federal and state program where the Corps' and EPA's efforts are complemented by states' efforts.

As you are well aware, while NAHB and its members have continued to work with the Corps and EPA on required permits, the housing industry has been experiencing one of the greatest housing downturns in recent memory. Housing affordability, accessible housing and housing finance, primary components to NAHB's mission and philosophy, have been severely impacted throughout 2007. NAHB believes that Congress should focus its limited time and resources on legislation to help homeowners overcome the current crisis, rather than pursue legislative ideas that will restrict the industry's ability to recover.

By improving its implementation, removing redundancy, and further clarifying roles, the CWA can do an even better job at facilitating compliance and protecting the aquatic environment. For years, landowners and regulators alike have been frustrated with the continued uncertainty with the scope of federal jurisdiction over "the waters of the United States" under the CWA. However, legislative amendments or changes to the CWA that would vastly increase federal regulatory power over private property, and

open the door for increased litigation and permit requirements, will not benefit the home building industry. Such proposed changes are not consistent with the original legislative intent of the CWA back in 1972. They would also represent a marked departure from Supreme Court decisions and raise significant constitutional questions. This testimony will show:

1. In 1972, the 92nd Congress was frustrated that, at that point in time, the Corps was taking a too-narrow view of its authority over *traditional* navigable waters. Thus, in enacting the CWA, Congress intended to expand jurisdiction to cover all aquatic links in the chain that served as a highway of interstate commerce. The original intent of the CWA framers in 1972 was to include a greater number of waters that served as channels of interstate commerce, as long as they connected to land-borne modes of transportation—even though such aquatic features were themselves intrastate and did not connect to other waterbodies. Review of the legislative history reveals that, in 1972, Congress did not intend to sweep all intrastate features that did not support commercial traffic, such as isolated waters, drainage ditches, and erosional depressions, into the federal regulatory net.

2. Prior to *Solid Waste Agency of Northern Cook County* (*SWANCC*), there was rampant confusion in the courts regarding the CWA's scope. Several of the U.S. circuit courts of appeals questioned the validity of the migratory bird rule, the primary theory used by federal agencies to assert CWA jurisdiction over isolated, intrastate waters in the pre-*SWANCC* era. One court went so far as to strike regulations of the U.S. Army Corps of Engineers ("Corps") as illegal, because they raised significant questions under the Commerce Clause of the U.S. Constitution. Contrary to the belief held by those who now seek CWA expansion beyond all magnitude, *SWANCC clarified* the pre-existing confusion in the courts regarding the status of isolated waters.

3. While the *Rapanos* decision did not garner a majority of the Court to articulate an over-arching test for CWA jurisdiction to apply in all situations, there are many areas of consensus among the five Justices who concurred in the judgment. Questions remain after *Rapanos,* but that case has clarified many points of law to which the lower courts are now adhering. Chief among them is that a majority of the Court stated that CWA jurisdiction could not be supported though a remote, attenuated connection to traditional navigable waters. Moreover, the Justices called for agency

rulemaking, and the Federal Government's recent effort to address *Rapanos* with field guidance should be given a chance to work.

I. Congress's intent in 1972, When it Enacted the Clean Water Act, Was to Expand Only the Scope of Traditional Navigable Waters Serving as Highways of Commerce.

The Conference Report supporting the 1972 Act states:

> The conferees fully intend the term "navigable waters" be given the broadest possible constitutional interpretation, unencumbered by agency determinations which have been made or may be made for administrative purposes.

S. Rep. No. 92-1236, at 144 (1972), reprinted in 1 Congressional Research Serv., Legisl. Hist. of the Water Pollution Control Act Amends. of 1972, at 327 (hereafter, "CWA Legislative History"). To gain a full understanding of what the 1972 conferees actually intended, it is critical to consider the full context of congressional action in the water arena back in the 1970s. Scrutiny of the legislative history shows that the 1972 CWA indeed expanded the federal role over water features, to advance the national effort to control water pollution. The crucial point, however, is this: Congress's intent in 1972 was to enlarge the scope of waters *that served as highways for commerce.* Its purpose was *not* to assert federal authority over all intrastate waters that had remote, trivial, or tenuous connections to interstate commerce.

A. Early 1970s Congressional Oversight Regarding the Rivers and Harbors Act.

In the months immediately preceding the CWA's 1972 enactment, Congress held hearings regarding the Corps's implementation of the Rivers and Harbors Act of 1899 ("RHA"). Among other things, the RHA outlaws "obstruction … to the navigable capacity of any of the waters of the United States," and authorizes the Corps to issue permits for excavation or fill within "any navigable water of the United States." RHA section 10, 33 U.S.C. § 403. Congress expressed frustration that, at that time, the Corps took a too-constrictive view of its RHA jurisdiction over traditional navigable waters. See generally Virginia S. Albrecht and Stephen M. Nickelsburg, *Could SWANCC Be Right? A New Look at the Legislative History of the Clean Water Act,* 32 ELR 11042, 11044-46 (2002). A 1972 report from the House Committee on Government Operations stated that the Corps "narrowly defined the waters to which [the RHA's] provisions apply, and thus severely limited the scope of the law." H.R. Rep. 92-1323, at 27. Congress believed that the Corps unnecessarily bounded its RHA purview to the time-worn test

for navigability announced 100 years earlier in *The Daniel Ball,* 77 U.S. 557, 563 (1870), that waters are "navigable in law when they are navigable in fact. And they are navigable in fact when they are used, or susceptible of being used, in their ordinary condition, as highways for commerce, over which trade or travel are or may be conducted …." The House Committee believed that the Corps had ignored jurisprudence from the first half of the 20th century, where the Supreme Court recognized that federal authority stretched to encompass non-navigable waters that may be made navigable-in-fact with "reasonable improvements." *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407-09 (1940). See also *Econ. Light & Power Co. v. United States,* 256 U.S. 113, 118 (1921) (non-navigable points on Des Plaines River "above the head of steamboat navigation" regarded as navigable-in-law).

Accordingly, in 1972 hearings, the House took the Corps to task for not exercising RHA jurisdiction consistent with modern judicial expansions. The Government Operations Committee reported that Corps regulations at that time "were based on similar language used over 100 years ago in … *The Daniel Ball,*" but:

> [M]ore recent judicial opinions have substantially expanded that limited view of navigability to include waterways which could be "susceptible of being used … with reasonable improvements," as well as those waterways which include sections presently obstructed by falls, rapids, sand bars, currents, floating debris, etc.

H.R. Rep. No. 92-1323, at 29-30. Those "recent judicial opinions" cited by the House were nine cases from 1874 through 1965, including *Appalachian Power* and *Economy Light.* None of those decisions involved anything remotely resembling a drainage ditch, an ephemeral wash, or an isolated pond. Rather, this 1972 House Report endorsed federal regulation over non-navigable features, or non-navigable segments of navigable waters, as needed to service the constitutional power *to regulate navigation* under the Commerce Clause:

> The plenary federal power over commerce must be able to develop properly with the needs of that commerce which is the reason for its existence. *It cannot properly be said that the federal power over navigation is enlarged by the improvements to the waterways. It is merely that improvements make applicable to certain waterways the existing power over commerce.*

Appalachian Power, 311 U.S. at 409 (emphasis supplied). Thus, the court cases considered by Congress in its early 1970s review of the RHA upheld

federal authority over non-navigable features, but only as necessary to effectuate the federal navigation power.

The 1972 House strongly encouraged the Corps to extend its regulations beyond the limits of *The Daniel Ball*, and to encompass large intrastate bodies of water that connect as part of a land-based chain of commerce including roads, railroads, and other transportation channels. What Congress had in mind for federal protection, which had escaped Corps regulation to that point in the early 1970s, were bodies of water like Lake Chelan in Washington State:

> Another instance of the [C]orps' limited view of its responsibilities has been its opinion that it cannot exercise jurisdiction over waters which, although clearly navigable, do not "form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other states or foreign countries …." For example, the Acting Chief of Engineers informed the subcommittee, by letter of February 20, 1970, that *Lake Chelan—a body of water 55 miles long and almost 2 miles wide in the State of Washington, and clearly navigable*—"is not considered by the Corps of Engineers to be a navigable waterway of the United States," because "navigation on Lake Chelan cannot form a part of either the interstate or international system."
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> Although most interstate commerce 150 years ago was accomplished on waterways, *there is no requirement in the Constitution* that the waterway must cross a state boundary in order *to be within the interstate commerce power of the Federal Government.* Rather, it is enough that *the waterway serves as a link in the chain of commerce* among the States, as it flows in the various channels of transportation (highways, railroads, air traffic, radio and postal waterways, etc.) The "gist of the federal test" is the waterways' use "as a highway," not whether it is "part of a navigable interstate or international highway." *Utah v. United States,* 403 U.S. 9, 11 (1971) ….

H.R. Rep. No. 92-1323, at 30 (emphasis supplied). The Government Operations Committee thus urged the Corps to enlarge its RHA jurisdiction, to regulate "all waterways … which are now, or were, or may in the future be, capable of being used for purposes of interstate or foreign commerce,

irrespective of whether the waterway itself crosses a State line, irrespective of when, how or by what mode, such use actually occurs, and irrespective of the quantity or kind of items of commerce such use affects." *Id.* at 31-32. Following this congressional oversight, the Corps expanded its regulations. See 37 Fed. Reg. 18279 (Sept. 9, 1972).

Thus, the issue for Congress in the early 1970s, while it deliberated the extent of the RHA's reach and Corps administrative interpretations there under, was that the agency did not go as far as it needed in regulating *traditional navigable waters.* Congress perceived ample room within the available bounds of the navigation power under the Commerce Clause—which the Corps was not exercising.

B. Legislative History of the 1972 Clean Water Act.

The legislative debate surrounding enactment of the Federal Water Pollution Control Act Amendments of 1972 draws important context from Congress's contemporaneous RHA analysis. Indeed, key Members of Congress who endorsed 1972 CWA reform cited portions of the RHA legislative history verbatim to explain their views of the new law.

It was logical for the CWA amenders to place heavy reliance on the congressional reports regarding the RHA. Both statutes depend on concepts of navigability as touchstones for their jurisdictional reach. Rep. John D. Dingell (D-MI), the House floor manager for the 1972 CWA, cited key passages from the House Government Operations Committee report discussed above, in making his personal statement on the CWA conference bill. In remarking on the conferees' new definition of "navigable waters" as "the waters of the United States" (which remains the current definition codified at 33 U.S.C. § 1362(7)), Rep. Dingell stated:

> The new and broader [CWA] definition is in line with *more recent judicial opinions which have substantially expanded that limited view of navigability—derived from the Daniel Ball case* ...—to include waterways "susceptible of being used … with reasonable improvements," as well as those waterways which include sections presently obstructed by falls, rapids, sand bars, currents, floating debris, et cetera ….

1 CWA Legislative History, at 250 (emphasis supplied); compare to H.R. Rep. No. 92-1323, at 29-30 (discussed *supra* p. 5). Thus, just like Congress's study of the RHA, Rep. Dingell sought *the same expansion* of "navigable waters" beyond *The Daniel Ball* test, but he did so here for CWA purposes. And as evidence of these "more recent judicial opinions," Rep. Dingell cited *the same*

nine court cases as the House did in its RHA report, including the Supreme Court decisions in *Appalachian Power* and *Economy Light*. *Ibid.* He drew a direct connection between the new CWA definition of "navigable waters" as "the waters of the United States," and the outmoded view that frustrated Congress during its parallel RHA review: "No longer are the old, narrow definitions of navigability, as determined by the [C]orps … going to govern matters covered by *this [conference] bill*." *Id.* at 251 (emphasis supplied).

Moreover, in opining on the new, broader "navigable waters" definition in the CWA conference bill, Rep. Dingell recalled the identical concern that the House addressed in the RHA context—namely, that federal authority over the Nation's waters needed to cover wholly intrastate bodies that are part of a highway of commerce (although they are not themselves connected to a continuous, water-based channel of navigation). Again, *he used the same* reasoning, wording, and case law from the Government Operations Committee RHA report on the Lake Chelan situation:

> Although most interstate commerce 150 years ago was accomplished on waterways, there is no requirement in the Constitution that the waterways must cross a State boundary in order to be within the interstate commerce power of the Federal Government. Rather, *it is enough that the waterway serve as a link in the chain of commerce among the States as it flows in the various channels of transportation*—highways, railroads, air traffic, radio and postal communication, waterways, et cetera. The "gist of the Federal test" is the waterway's use "as a highway, not whether it is "part of a navigable interstate or international commercial highway." *Utah v. United States,* 403 U.S. 9, 11 (1971) ….

1 CWA Legislative History 250-51 (statement of Rep. Dingell) (emphasis supplied); compare to H.R. Rep. No. 92-1323, at 30 (discussed *supra* p. 6).

The sentiments of Sen. Edmund Muskie (D-ME) echoed those of Rep. Dingell. He remarked that the conference bill's new definition of "navigable waters" should be "given the broadest possible interpretation unencumbered by agency determinations," to keep with his intent that:

> [S]uch waters shall be considered to be navigable in fact when they form, in their ordinary condition by themselves or by uniting with other waters or other systems of transportation, such as highways or railroads, *a continuing highway over which commerce is or may be carried* on with other States or with foreign countries in the customary means of trade and travel in

> which commerce is conducted today. *In such case the commerce on such waters* would have a substantial economic effect on interstate commerce.

1 CWA Legislative History at 178 (statement of Sen. Muskie) (emphasis supplied).

Accordingly, Rep. Dingell and Sen. Muskie certainly intended for the term "navigable waters" to mean something more than features presently navigable-in-fact. *Appalachian Electric* and similar cases allowed them to effectuate their intent. These decisions clarified that, consistent with Commerce Clause power, congressional authority over traditional navigable waters could extend to "reasons unrelated to navigation." John F. Baughman, *Balancing Commerce, Geography and History: Defining the Navigable Waters of the United States,* 90 Mich. L. Rev. 1028, 1040 (1992). Furthermore:

> The Court [in *Appalachian Electric*] dropped the requirement that the waterway be navigable in its natural state. Rather, as long as a waterway could be made navigable through reasonable improvements, it would qualify as navigable. It is not even necessary that the improvements be made, or even authorized, just possible. The [C]ourt also endorsed the concept of 'indelible navigability,' under which a waterway once found to be navigable in fact remains permanently navigable in law …. Finally, the Court examined the physical characteristics of the river itself to demonstrate its capacity to support navigation. *Under the Appalachian Electric doctrine the definition of navigable waters is extremely broad ….*

Ibid (citations omitted and emphasis supplied). Accordingly, with the scope of traditional navigable waters now greatly enhanced, and with the Supreme Court's endorsement that Congress's authority over traditional navigable waters was plenary, regulation on a vastly expanded universe of waters could be justified by virtually any purpose, even if unrelated to navigation—such as environmental protection. *This* was what the CWA conferees had in mind when they wanted to give "the broadest possible constitutional interpretation" to the phrase "navigable waters." S. Rep. No. 92-1236, at 144 (1972), reprinted in CWA Legislative History, at 327. They accordingly defined "navigable waters" to mean "the waters *of* the United States."

But by no means did they intend to cover *all* water *"in"* the United States, as S. 1870, the "Clean Water Restoration Act of 2007," would do.[1] The expansion of jurisdiction that the 1972 Congress had in mind pertained to intrastate features like Lake Chelan, which where not themselves part of a continuous highway of water-based commerce but provided linkages to land-based channels like roads, railroads, and telegraph lines. Thus, when the 1972 CWA conferees stated their intent was to give "navigable waters" the "broadest possible constitutional interpretation unencumbered by agency determinations," their context was the broadest possible authority over *traditional navigable waters, insofar as they served as channels of interstate commerce.*

This is a key aspect of the Supreme Court's holding, almost 30 years later, in *SWANCC*. In grounding the intent of the 1972 legislature, the Court identified the CWA's constitutional basis as Congress's "commerce power over navigation," 531 U.S. at 165 n.2. The Court explained that, back in 1972, Congress intended to exercise "its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Id.* at 172. Parsing through the CWA's legislative history shows that the *SWANCC* Court was faithful to that original intent.

To conclude, the 1972 CWA significantly expanded federal jurisdiction over water features. But that expansion solely pertained to the scope of *traditional navigable waters,* to encompass non-navigable features that affected navigation, or isolated intrastate features that provided a link in the chain of commerce. There is no indication in the 1972 CWA's history that Congress intended to exponentially stretch federal authority to the extremes contemplated in S. 1870. Congress's focus in 1972 was indeed to provide "the broadest possible constitutional interpretation" of traditional navigable waters, insofar as such bodies affect navigation or provide linkages to channels of interstate commerce. However, there is simply no evidence that the CWA's founders sought to subject isolated ponds, erosional drainages, upland ditches, or the like, to federal control.

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[1] S. 1870 would re-define "waters of the United States" to mean "all waters subject to the ebb and flow of the tide, the territorial seas, and *all* interstate and *intrastate waters and their tributaries,* including lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, natural ponds, and all impoundments of the foregoing, to the fullest extent that these waters, or activities affecting these waters, are subject to the legislative power of Congress under the Constitution." S. 1870, § 4(3), lines 14-25 (emphasis supplied).

II. Questions of CWA Jurisdiction Have Always Been Complicated. They Were Confusing in the Era Before *SWANCC,* and They Remain Confusing Today.

Advocates of S. 1870 seek to obtain the clarity they perceive existed from the era before the 2001 Supreme Court decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Eng'rs* (*SWANCC*), 531 U.S. 159 (2001). This myth must be dispelled. As the legal scholarship prior to *SWANCC* overwhelmingly shows, questions about the CWA's scope were as hotly contested then as they are today.[2] An analysis of the case law bears out the CWA jurisdictional controversy between 1985 and 2001.

A. Pre-*SWANCC* Cases.

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985), sowed the seeds for the pre-*SWANCC* confusion. The Court decided that wetlands which "actually abut[ted] on a navigable waterway" were "adjacent" within Corps regulations and properly subject to CWA authority. *Id.* at 135. The Court specifically left open the question of whether the CWA covered "wetlands that are not adjacent to bodies of open water." *Id.* at 131, n. 8.

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[2] See, *e.g.,* Michael C. Blumm and D. Bernhard Zaleha, *Federal Wetlands Protection Under the Clean Water Act: Regulatory Ambivalence, Intergovernmental Tension, and a Call for Reform,* 60 U. Colo. L. Rev. 695, 713 (1989) ("[t]he issues of which waters and which activities are subject to [CWA] regulation have been at the heart of most of the controversy surrounding the program"); Stephen M. Johnson, *Federal Regulation of Isolated Wetlands,* 23 Envtl. L. 1, 42 (1993) ("the dispute regarding the federal government's jurisdiction to regulate isolated wetlands remains unresolved"); J. Blanding Holman, *After United States v. Lopez: Can the Clean Water Act and the Endangered Species Act Survive Attack?* 15 Va. Envtl. L.J. 139, 195 (1995) ("[t]he regulation of isolated wetlands under the CWA based on the migratory bird rule was on tenuous Commerce Clause grounds even before *Lopez* was decided in the spring of 1995); Deanne E. Parker, *Will United States v. Lopez Substantially Affect Federal Constitutional Authority to Regulate Isolated Wetlands?* 16 J. Energy Nat. Resources & Envtl. L. 453 (1996) ("[o]ne of the most controversial assertions of federal jurisdiction is the regulation of isolated wetlands under the umbrella of the Clean Water Act"); Marni A. Gelb, *Leslie Salt Co. v. United States: Have Migratory Birds Carried the Commerce Clause Across the Borders of Reason?* 8 Vill. Envtl. L. J. 291 (1997) (Ninth Circuit decision on migratory bird rule "exemplifies the controversy concerning the proper scope of the CWA's jurisdiction"); Vickie V. Sutton, *Wetlands Protection—A Goal Without a Statute,* 7 S.C. Envtl. L.J. 179, 204 (Fall 1998) (discussing "the need to find a genuine Constitutional grounding for the protection of wetlands, the Constitutional basis of wetlands regulation, and the conflicts with state property laws"); Jonathan H. Adler, *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetlands Regulation,* 29 Envtl. L. 1,4 (1999) ("[t]he federal wetlands regulations promulgated under section 404 of the Clean Water Act have been one of the more contentious areas of federal environmental policy for the past several years, spawning substantial litigation and political controversy").

Following *Riverside Bayview,* courts and stakeholders struggled with this unanswered question. Debate swirled around the statutory propriety and constitutional validity of the regulatory vehicles used by federal agencies to extend their professed authority over isolated intrastate waters—namely, the "other waters" regulation and the "migratory bird rule."

In defining "the waters of the United States," Corps and EPA regulations cover: waters that are or could be used for navigation; tidal waters; interstate waters; tributaries of jurisdictional waters; and wetlands adjacent to jurisdictional waters. 33 C.F.R. § 328.3(a)(Corps); 40 C.F.R. § 230.3(s)(EPA). They also profess to cover:

> All *other waters* such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or construction of which could affect interstate commerce ….

Id. § 328.3(a)(iii)(Corps); § 230.3(s)(iii)(EPA). This regulation remains on the agencies' books today.[3] Further, in the preamble to 1986 CWA regulations, the agencies defined "other waters" within (a)(iii) to include those waters:

> a. Which are or would be used as habitat by birds protected by migratory bird treaties; or
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> b. Which are or would be used as habitat by other migratory birds which cross state lines ….

51 Fed. Reg. 42,206, 41,217 (Nov. 13, 1986). Reading subsection (a)(iii) and the migratory bird rule conjunctively, the Corps and EPA deemed that a wetland (or "other water") had a sufficient effect on commerce if it could possibly be used by migratory birds crossing state lines. Accordingly, the migratory bird rule was "a limiting rule with no limits." J. Blanding Holman, *After United States v. Lopez: Can the Clean Water Act and the Endangered Species Act Survive Attack?* 15 Va. Envtl. L.J. 139, 197 (1995). CWA control was thereby extended to "other waters" that were susceptible to *possible* bird use—and what backyard puddle, schoolyard field, or farm lot pond isn't subject to *possible* bird use? Indeed, under the Corps's delineation guidelines,

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[3] S. 1870 would essentially codify the (a)(iii) regulation. See *supra* n. 1 (nearly identical language of S. 1870's definition of "waters of the United States" compared to (a)(iii) regulation). However, as will be discussed below, the U.S. Court of Appeals for the Fourth Circuit struck the (a)(iii) regulation as illegal because it presented serious constitutional questions as to its validity under the Commerce Clause. *United States v. Wilson,* 133 F.3d 251 (4th Cir. 1997).

an area can be completely dry at the surface for 365 days per year, year in and year out, and still qualify as a jurisdictional wetland. See Environmental Laboratory, Dep't of the Army, Technical Rep. Y-87-1, *Corps of Engineers Wetland Delineation Manual* 34-41 (Jan. 1987). Thus, before *SWANCC,* the migratory bird rule brought into federal jurisdiction millions of shallow, damp low spots throughout the United States, because birds "could" use them.

The infinite scope that the "other waters" regulation and the migratory bird rule attempted to achieve predictably rendered them targets for court challenges throughout the 1990s—belying any claims of jurisdictional clarity before *SWANCC.* When the Corps applied the bird rule to assert jurisdiction over certain wetlands in the Commonwealth of Virginia, the landowner argued the rule was invalid. The U.S. Court of Appeals for the Fourth Circuit agreed, upholding a district court decision that the bird rule was illegal under the Administrative Procedure Act because it was a substantive rule that was never subject to notice and comment rulemaking proceedings. *Tabb Lakes, Ltd. v. United States,* 715 F. Supp. 726 (E.D. Va. 1988), *aff'd,* 885 F.2d 866 (4th Cir. 1989). In response to *Tabb Lakes*, the Corps and EPA issued guidance that they "intend to undertake as soon as possible an APA rulemaking process regarding jurisdiction over isolated waters." See U.S. EPA and U.S. Dep't of Army, "Clean Water Act Section 404 Jurisdiction Over Isolated Waters in Light of *Tabb Lakes v. United States*" (Jan. 24, 1990). Almost 18 years later, the agencies still have not initiated such a rulemaking.

The Seventh Circuit seriously struggled with the bird rule in the decade before *SWANCC.* In *Hoffman Homes, Inc. v. EPA,* 961 F.2d 1310 (1992), a home builder filled a 0.8 acre isolated, intrastate, bowl-shaped depression, without a permit. EPA deemed the feature a jurisdictional wetland. The agency presented no evidence that migratory birds or any other wildlife used the area, but it nonetheless issued a compliance order and required site restoration. After a lengthy evidentiary hearing, an administrative law judge decided EPA had no CWA authority over the isolated wetland because it had no effect on interstate commerce. But then EPA's chief judicial officer reversed, imposing a $50,000 fine and deciding that the wetland had a "minimal, potential effect" on interstate commerce because migratory birds could use the area. *Id.* at 1312. Following these contradictory administrative challenges—even EPA did not know how to treat isolated wetlands at this time—the courts became involved. The Seventh Circuit found "the Clean Water Act does not give the EPA the authority to regulate isolated wetlands. Isolated wetlands, unlike adjacent wetlands, have no hydrological connection to any waterbody." *Id.* at 1314. Moreover, the Seventh Circuit further decided that the isolated wetland was "not within the reach of the Commerce Clause," and this was a "second

reason" to reverse EPA. *Id.* at 1317. Because "EPA ha[d] not even attempted to construct a theory of how filling [the wetland] affects interstate commerce," application of the bird rule in this instance could not be sustained under the Commerce Clause: "The idea that the *potential* presence of migrating birds itself affects commerce is … far-fetched." *Id.* at 1320.

EPA then petitioned for rehearing, and the Seventh Circuit vacated its prior decision with no explanation and a directive for the parties to explore settlement to moot the need for a court decision. *Hoffman Homes, Inc. v. EPA,* 975 F.2d 1554. Those discussions failed, and the case went back to the original panel for a new decision. This time, the Seventh Circuit flip-flopped on its policy decision but maintained its judgment against EPA. The court now decided that the migratory bird rule *was* consistent with the CWA and within Commerce Clause limits. *Hoffman Homes, Inc. v. EPA,* 999 F.2d 256, 261 (7th Cir. 1993). Thus, the same Seventh Circuit panel reached contradictory opinions on the migratory bird rule and its constitutional implications—in the same case and on the same set of facts—in under 18 months.

A Ninth Circuit case from the same period wended a similarly tortured path through the judicial system. In *Leslie Salt Co. v. United States,* 700 F. Supp. 476 (N.D. Cal. 1989), the Corps mobilized the bird rule to assert CWA authority over calcium chloride pits at a salt mining site, which collected rainwater that migrating birds could possibly use. The district court stated its role was "not to sit as a super-ecologist" (*id.* at 478), and it decided that the pits did not fall within the (a)(iii) regulation: "the mere ponding of water on otherwise dry land is not enough to convert that land into 'other waters.'" *Id.* at 485. On appeal, a 2-1 Ninth Circuit panel reversed, 896 F.2d 354, 360 (9th Cir. 1990). The court rendered the "legal conclusion" that the Commerce Clause could be satisfied upon a showing that migratory birds and one endangered species "may have used the property." *Id.* at 360-61. A dissent, however, decided that the pits were not "other waters" because "there is nothing in the record to show that water flows directly or indirectly … [from the pits] into another body of water." *Id.* at 361 (Rymer, J., dissenting). There was a remand back to the trial court (820 F. Supp. 478 (N.D. Cal. 1992), followed by another appeal, where the Ninth Circuit decided its prior decision "cannot be considered clearly erroneous"— hardly a ringing judicial endorsement that the Commerce Clause permitted regulation of any wet spot due to potential bird use. 55 F.3d 1388, 1396 (9th Cir. 1995). The Ninth Circuit admitted that the migratory bird rule "certainly tests the limits of Congress's commerce powers and, some would argue, the bounds of reason." *Id.* But, "while Cargill's arguments might well deserve closer consideration," the court had enough of the issue and refused to re-consider its prior decision. *Id.* Moreover, the Ninth Circuit dodged the conclusion reached by the Fourth

Circuit in *Tabb Lakes*, as to whether the bird rule required public notice and comment proceedings. The court stated if that issue was submitted earlier in the proceedings, "a much more detailed examination of the migratory bird rule's effect on agency decision making might be in order." *Id.* at 1394.

A request was then put to the Supreme Court to address the validity of the bird rule, but certiorari was denied. *Cargill, Inc. v. United States,* 516 U.S. 955 (2005). However, Justice Thomas issued a rare dissent from the denial of certiorari. In light of the Court's decision in *United States v. Lopez,* 514 U.S. 549 (1995) from the immediately prior term, he expressed "serious doubts about the propriety of the Corps' assertion of jurisdiction" based on migratory bird use. *Cargill,* 516 U.S. at 958 (Thomas, J. dissenting from *cert.* denial). Justice Thomas further questioned the validity of the (a)(iii) regulation, because "[t]he 'other waters' provision …does not require an activity substantially affect interstate commerce, only that the activity '*could* affect interstate or foreign commerce.'" *Id.* (original emphasis). All of this "stretches Congress' Commerce Clause powers beyond the breaking point." *Id.*

It would take another six years before the high Court considered the merits of the migratory bird rule in *SWANCC*. In the interim, the Fourth Circuit widened the judicial divide on CWA authority. *United States v. Wilson,* 133 F.3d 251 (4th Cir. 1997), *struck* the Corps's (a)(iii) regulation as illegal because it brushed against the Constitution's outer limits. The court found the "other waters" regulation "is unauthorized by the Clean Water Act as limited by the Commerce Clause and therefore is invalid." *Id.* at 254:

> The [(a)(iii)] regulation requires neither that the regulated activity have a substantial effect on interstate commerce, nor that the covered waters have *any sort of nexus* with navigable, or even interstate, waters. Were this regulation a statute, duly enacted by Congress, it would present serious constitutional difficulties, because, at least at first blush, it would appear to exceed congressional authority under the Commerce Clause …. [A]s a matter of statutory construction, one would expect that the phrase "waters of the United States" when used to define the phrase "navigable waters" refers to waters which, if not navigable in fact, are at least interstate or *closely related* to navigable or interstate waters.

Id. at 257 (underscoring original; italics supplied). The Fourth Circuit further found that a jury instruction "intolerably stretche[d]" CWA jurisdiction because it "included adjacent wetlands 'even without a direct or indirect surface connection to other waters of the United States.'" *Id.* at 258

(original emphasis). Following the *Wilson* decision, the Corps and EPA issued a memorandum stating that they intended to initiate a rulemaking on the (a)(iii) regulation. See U.S. EPA and U.S. Dept. of Army, "Guidance for Corps and EPA Field Offices Regarding Clean Water Act Section 404 Jurisdiction Over Isolated Waters in Light of *United States v. James J. Wilson*" (May 29, 1998). Almost a decade later, the agencies have not commenced a rulemaking on the validity of the (a)(iii) regulation or their CWA authority to regulate isolated waters.

Thus, the era of CWA jurisprudence leading up to *SWANCC* was most decidedly *not clear*. Then, as now, the courts struggled with questions regarding connections to interstate waters, and there was no consensus on the required nexus between wetlands and traditional navigable waters. These very same issues are with us today, as stakeholders continue to consider the extent of CWA jurisdiction following *SWANCC*. As a congressional research report explains, "[f]ederal regulation of isolated waters—nonnavigable, intrastate waters lacking surface hydrological connections to navigable waters—plainly raises the issue of whether an adequate nexus with interstate commerce is present." Robert Meltz, Congressional Research Service, "Report for Congress—Constitutional Bounds on Congress' Ability to Protect the Environment," at 9 (RL 30670; updated Dec. 18, 2002), at 9. The argument that S. 1870 would afford clarity to CWA jurisdiction, the likes which have not been seen since *SWANCC,* is not convincing. S. 1870 would simply bring us back to the present.

B. *Solid Waste Agency of Northern Cook County*

In 2001, the Supreme Court decided *SWANCC,* 531 U.S. 159 (2001). The case concerned whether CWA section 404(a) conferred Corps authority over isolated, seasonal ponds at an abandoned sand and gravel pit in suburban Chicago, because they were susceptible to migratory bird use. In briefing at the certiorari stage, the petitioners asked the Court to intervene to address the judicial confusion created by *Tabb Lakes, Hoffman Homes, Leslie Salt* and *Wilson,* as discussed above. The *SWANCC* Court itself recognized that it now had the opportunity to answer the unresolved and disputed question from *Riverside Bayview,* as to whether the CWA covered "'wetlands that are not adjacent to bodes of open water …." *Id.* at 167-68 (citing *Riverside Bayview,* 474 U.S. at 131-132 n. 8).

The Court answered, "no." It identified the constitutional authority for the CWA as the "commerce power over navigation," 531 U.S. at 165 n.2, and explained that Congress intended to exercise "its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Id.* at 172. Former Chief Justice Rehnquist, writing for the

majority, observed that the holding in *Riverside Bayview* "was based in large measure on Congress' unequivocal acquiescence to, and approval of, the Corps' regulations interpreting the CWA to cover wetlands adjacent to navigable waters." *SWANCC,* 531 U.S. at 167. The majority thus rejected the Corps's assertion of jurisdiction because "the text of the statute will not allow" coverage of ponds that "are *not* adjacent to open water." 531 U.S. at 168 (original emphasis). The Court found "§ 404(a) to be clear" that non-navigable isolated ponds fell outside the CWA's scope. *Id.* at 172. Otherwise, the word "navigable" in the CWA would "'not have any independent significance'" and "no effect whatever." *Id.* The majority reinforced the need for an "inseparable" relationship between non-navigable and navigable features: "It was the *significant nexus* between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes*." *Id.* at 167 (emphasis added). Accordingly, finding no inseparable relationship between the non-navigable, isolated ponds at issue in *SWANCC* and a body of "open water," the Court held that the Corps's claim of jurisdiction "exceeds the authority granted to [the Corps] under section 404(a) of the CWA." *Id.* at 174. In the end, the Corps was unable to "overcome[e] the plain text and import" of the CWA, so its assertion of jurisdiction over isolated ponds received no deference. *Id.* at 170.

SWANCC also raised the constitutional question regarding the bird rule's validity under the Commerce Clause, but the Court avoided it by invoking the "clear statement" rule. "This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." *Id.* at 172-73. Where an agency interprets a statute in a manner that "invokes the outer limits of Congress's power" or "overrides … [the] usual constitutional balance of federal and state powers," the Supreme Court "expect[s] a clear indication that Congress intended that result." *Id.* The majority found that the migratory bird rule was just such an interpretation that pressed against the outer boundaries of the Commerce Clause which, "though broad, is not unlimited." *Id.* at 173 (citing *United States v. Morrison,* 529 U.S. 598 (2000); *United States v. Lopez,* 514 U.S. 549 (1995)). *SWANCC* found "nothing approaching a clear statement from Congress that it intended § 404(a) to reach an abandoned sand and gravel pit …." *Id* at 174. Furthermore, the clear statement requirement is "heightened" where an agency interprets a statute in a manner that would "alter[ ] the federal-state framework by permitting federal encroachment upon a traditional state power." *Id.* at 173. The regulation of land and water use within a state's borders is a traditional state function, and the Court found that claims of "federal jurisdiction over ponds and mudflats falling within the 'Migratory Bird Rule would result in a significant impingement" of state prerogatives.

Id. at 174 (citing *Hess v. Port Authority Trans-Hudson Corporation,* 513 U.S. 30, 44 (1994)). In the end, the Court held that the (a)(iii) regulation, "as clarified and applied to petitioner's balefill site pursuant to the 'Migratory Bird Rule' … exceeds the authority granted to respondents under § 404(a) of the CWA." *Id.* at 174.

Like any case, *SWANCC* did not resolve all of the pertinent statutory and constitutional questions implicated in the matter. And there has been some disagreement over the breadth of the Court's holding. Those advocating a narrow view state that the majority merely invalidated the bird rule and nothing more. However, much of the language in the Court's opinion goes beyond the bird rule, and instructs that all isolated, intrastate waters are outside the CWA's scope. Indeed, the *SWANCC* dissenters adopted this broader view, reading the majority opinion as "excising" from the CWA "intermittent rivers, streams, tributaries and perched wetlands that are not contiguous or adjacent to navigable waters." *Id.* at 189, 190 n.14 (Stevens, J., dissenting). "[D]epending on which part of the opinion one looks at," *SWANCC* held "either that Congress never intended section 404 to extend to isolated waters at all, or that Congress never intended section 404 to extend to isolated waters solely on the basis of the migratory bird rule." Robert Meltz, Congressional Research Service, "Report for Congress—Constitutional Bounds on Congress' Ability to Protect the Environment," at 9 (RL 30670; updated Dec. 18, 2002), at 10.

In any event, *SWANCC* afforded much needed clarity to the confusing and contradictory case law that preceded it. At a minimum, the migratory bird rule—the jurisdictional *modus operandi* of the Corps and EPA throughout the 1990s—was declared illegal. The agencies could no longer base their jurisdictional determinations on it, and were forced to develop other theories that provide federal jurisdiction over a body of water.

III. The 2006 *Rapanos* Decision Has Helped Clarify the CWA's Scope.

To summarize thus far, as the CWA entered its third decade, two Supreme Court decisions provided directives on the Act's scope. First, *Riverside Bayview* in 1985 ruled that wetlands, though non-navigable themselves, were subject to Corps and EPA jurisdiction if they actually abutted a traditional navigable waterway. In these circumstances, they were "adjacent" and appropriately within federal power. Second, *SWANCC* in 2001 decided an open question from *Riverside Bayview,* ruling that isolated, intrastate waters fall outside the Act.

Thus, on one end of the jurisdictional spectrum, abutting wetlands are "in." On the other end of the spectrum, isolated, intrastate features are "out." This was the jurisprudential landscape after 2001. But after the migratory bird rule was declared illegal, the federal agencies needed a new rule for jurisdiction. Through litigation briefing and not from any deliberative rulemaking or policy process, they developed "the hydrologic connection theory." Like the bird rule before it, the hydrologic connection theory spawned much confusion and controversy in the courts.

A. Pre-*Rapanos* Cases.

Under the hydrologic connection theory, the Corps and EPA asserted CWA authority over non-navigable features simply if they had a *possible* aquatic link to jurisdictional waters. Cases abounded with similar fact patterns: wetlands lied next to an upland ditch, and water in that ditch flowed through a series of more non-navigable ditches, canals, and creeks, which ultimately connected to truly navigable waters miles away. The distant wetland would be deemed jurisdictional in either of two ways. First, the agencies would boldly claim that because of the hydrologic connection, the wetland was adjacent to the truly navigable water, no matter the distance between them. In the alternative, the agencies would assert that the non-navigable drainage ditch was a tributary to the truly navigable water, and that the wetland was therefore adjacent to a tributary. In either case, the agencies declared that every inch along the watercourse was subject to CWA coverage, as they traced drops of water from one point to the next.

United States v. Deaton, 332 F.3d 698 (4th Cir. 2003), *cert. denied,* 541 U.S. 972 (2004), exemplified the Corps's use of the hydrologic connection theory. The agency brought a civil action against the Deatons because they discharged fill without a section 404 permit, by digging a drainage ditch through wetlands on their property. That ditch drained into a rural roadside ditch fronting their parcel. The Corps claimed that the roadside ditch was a "tributary" to the navigable-in-fact Wicomico River, which lied eight miles away over a course punctuated by five culverts, three ponds, and five dams. They deemed the wetlands "adjacent" to the ditch "tributary" and were thus jurisdictional. *Id.* at 702-03. Nothing in the record showed that a single grain of sediment left the site and entered the roadside ditch, much less flowed downstream to reach a truly navigable water.

The Fourth Circuit upheld the Corps's jurisdiction. Ignoring the "clear statement" rule (see *supra* p. 17), the court leapfrogged to the constitutional issue first. Downplaying the specific roadside ditch at issue, the court asked whether, categorically, non-navigable tributaries to navigable waters could be regulated under the Commerce Clause. *Id.* at 707-08. It reasoned that any

pollutant in a non-navigable tributary has the "*potential* to move downstream" and degrade navigable waters and, thus, the Corps's regulation of tributaries was constitutional. *Id.* at 709. Then the Fourth Circuit turned to the statutory question. It deferred to the agency's interpretation under the CWA that the roadside ditch was part of a "tributary system, that is, all of the streams whose water *eventually flows* into navigable waters." *Id.* at 710 (emphasis added). Because there was "a" remote nexus between the roadside ditch and the Wicomico River, the Fourth Circuit concluded that "[t]he Act thus reaches to the roadside ditch and its adjacent wetlands." *Id.* at 712.

The Fifth Circuit pointedly disagreed with *Deaton.* In *In re Needham,* 354 F.3d 340 (5th Cir. 2003), oil was pumped from a containment basin and spilled into a drainage ditch. The ditch flowed into Bayou Cutoff, which led to Bayou Folse, which was adjacent to Company Canal, "an open body of navigable water." *Id.* at 346. Because oil residue was found 10-12 miles away in Bayou Folse, which flowed "directly into" the navigable-in-fact Company Canal, the court found the spill "implicated navigable waters and triggered federal regulatory jurisdiction …." *Id.* at 347. It stressed there was a "significant nexus" between Bayou Folse and Company Canal. *Id.* However, the Fifth Circuit considered and rejected the government's argument that statutory "navigable waters" means "all waters . . . that have any hydrological connection with 'navigable water.'" *Needham,* 354 F.3d at 345. The *Needham* court recognized that *Deaton* accepted "this expansive interpretation" (*id.*), but declared that theory "unsustainable under *SWANCC"* because "[t]he CWA and the [Oil Pollution Act] are not so broad as to permit the federal government to impose regulations over 'tributaries' that are neither themselves navigable nor truly adjacent to navigable waters." *Id.* The court likewise held that "the term 'adjacent' cannot include every possible source of water that eventually flows into a navigable-in-fact waterway." *Id*. at 347. And it refused to defer to the hydrologic connection theory, because the position advanced by the government pushed "to the outer limits of the Commerce Clause and raise[s] serious constitutional questions …." *Id.* at 345 n. 8.

Just as birds might stop anywhere, all water must flow somewhere. Thus, the hydrologic connection theory proved just as limitless, and therefore controversial, as the migratory bird rule; both jurisdictional tests presupposed federal power based on potential connections to traditional navigable waters and interstate commerce. It is thus unsurprising that judicial debate was re-ignited during the "hydrologic connection" years. The stage was set for the Supreme Court to re-engage in *Rapanos v. United States,* 126 S.Ct 2208 (2006). Indeed, as shown below, what *SWANCC* was for the migratory bird rule, *Rapanos* became for the hydrologic connection theory.

B. *Rapanos* and its Areas of Consensus.

Rapanos concerned two consolidated cases: *Rapanos v. United States,* 376 F.3d 704 (6th Cir. 2004), and *Carabell v. U.S. Army Corps of Eng'rs,* 391 F.3d 704 (6th Cir. 2004). They both followed the same, familiar fact-pattern: wetlands miles away from traditional navigable waters, that drained through multiple ditches, culverts, and creeks, which eventually flowed to traditional navigable waters. In both matters, the Sixth Circuit upheld Corps determinations that wetlands, connected through an attenuated aquatic chain to navigable-in-fact bodies, were jurisdictional.

The Court issued a 4-1-4 plurality opinion. Five of the *Rapanos* Justices concurred in the judgment that the Corps's assertion of jurisdiction under the hydrologic connection theory was impermissible, and they vacated the Sixth Circuits' decision affirming the agency's actions. See *Rapanos,* 126 S.Ct. at 2235 (Scalia, J., plurality); *id.* at 252 (Kennedy, J., concurrence). However, the Justices could not form a majority as to the proper test for CWA jurisdiction. Justice Scalia, writing for a plurality that included himself, Chief Justice Roberts, and Justices Thomas and Alito, decided that CWA coverage extended to "only those relatively permanent, standing, or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'stream[s,] … oceans, rivers, [and] lakes." *Id.* at 2225. The plurality also developed a jurisdictional rule for wetlands in particular: *"[O]nly* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and 'wetlands,' are 'adjacent to' such waters and covered by the Act." *Id.* at 2226 (original emphasis).

Justice Kennedy, who concurred in the judgment, wrote separately for himself. He elevated the concept of "significant nexus," first used by the Court in *SWANCC* to describe the nature of the aquatic features in *Riverside Bayview,* to the appropriate test for jurisdiction: "[W]etlands 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.'" *Rapanos,* 126 S.Ct. at 2248 (Kennedy, J., concurring; emphasis supplied). "Consistent with *SWANCC* and *Riverside Bayview* and with the need to give the term 'navigable' some meaning, the Corps' jurisdiction over wetlands depends on a significant nexus between the wetlands in question and navigable waters in the traditional sense." *Id.* at 2249 (emphasis supplied.) Justice Stevens, writing in a dissent joined by Justices Breyer,

Souter, and Ginsburg, would have accepted the hydrologic connection theory, upheld the Corps's exercise of jurisdiction, and affirmed the Sixth Circuit's decisions. *Id.* at 2252 (Stevens, J., dissenting).

Some have maligned *Rapanos* because the Justices failed to reach a majority opinion that announced the "correct" test for CWA jurisdiction, talismanic and overarching for all cases. Such criticism is unjustified. The Supreme Court has *never* announced a definitive test for CWA jurisdiction; in *Riverside Bayview* we learned that "actually abutting" wetlands are covered, and in *SWANCC* we learned that isolated, intrastate waters are not. But while neither opinion articulated an *über*-test for CWA jurisdiction, this does not diminish the important guidance they provided in ascertaining the Act's scope. The same holds true for *Rapanos.*

Moreover, advocates for legislation like S. 1870 have urged that the appropriate response to *Rapanos* is simply to cast the broadest possible regulatory net and codify federal power over all intrastate waters. That response would be needlessly extreme. It ignores that the five concurring Justices reached important consensus on many issues. They re-confirmed *Riverside Bayview,* that jurisdiction categorically extends to adjacent wetlands that actually abut navigable-in-fact waters.[4] They also re-confirmed *SWANCC,* that CWA jurisdiction cannot cover isolated aquatic features, at least to the extent where migratory bird use is offered to provide the requisite connection to interstate commerce.[5]

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[4] ***Justice Scalia:*** "*Riverside Bayview* … explicitly rejected … case-by-case determinations of ecological significance for the *jurisdictional* question whether a wetland is covered, holding instead that *all* physically connected wetlands are covered." *Rapanos v. United States,* 126 S.Ct. 2208, 2233 (original emphasis). "Since the wetlands at issue in *Riverside Bayview* actually abutted waters of the United States, the case could not possibly have held that 'neighboring' wetlands came within the Corps' jurisdiction." *Id.* at 2226 n.10. ***Justice Kennedy:*** "When the Corps seeks to regulate wetlands *adjacent to navigable-in-fact waters,* it may rely on adjacency to establish its 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 nonnavigable tributaries.*" *Id.* at 2249 (emphasis supplied).

[5] ***Justice Scalia:*** "Isolated ponds were not 'waters of the United States' in their own right [in *SWANCC*,] and presented no boundary-drawing problem that would have justified the invocation of ecological factors to treat them as such." *Id.* at 2226. Because *SWANCC* excluded isolated ponds from CWA jurisdiction "which, after all, might at least be described as 'waters' in their own right," then "*a fortiori*, isolated, swampy *lands* do not constitute 'waters of the United States.'" *Id.* at 2230 (original emphasis). ***Justice Kennedy:*** In *SWANCC,* the Corps "assert[ed] jurisdiction

The most significant clarification that *Rapanos* provided was that the five Justices agreed CWA jurisdiction does *not* reach non-navigable features merely because they are hydrologically connected to downstream navigable-in-fact water.[6] In short, the hydrologic connection theory was disapproved—just as the migratory bird rule was disapproved in *SWANCC*.

But there are other key areas of consensus as well. Review of *Rapanos* shows that five Justices would reach agreement on the following salient points:

1. **Agency rulemaking is needed to clarify the CWA's jurisdictional scope. Even dissenting Justice Breyer wrote separately to emphasize this point.**

   - ***Chief Justice Roberts:*** The Agencies would be "afforded generous leeway" if they conducted a rulemaking interpreting statutory "navigable waters." *Id.* at 2235. "[T]he Corps and EPA would have enjoyed plenty of room to operate in developing *some* notion of an outer bound to the reach of their authority." *Id.* at 2236 (original emphasis).

   - ***Justice Breyer:*** The various *Rapanos* opinions, "taken together, call for the Army Corps of Engineers to write new regulations, and speedily so." *Id.* at 2266.

   - ***Justice Kennedy:*** "Through 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

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pursuant to a regulation called the 'Migratory Bird Rule' …. The Court rejected this theory." *Id.* at 2240-41.

[6] ***Justice Scalia:*** Rejecting the Agencies' hydrologic connection theory in holding that the phrase "the waters of the United States" "cannot bear the expansive meaning that the Corps would give it." *Id.* at 2220. "[R]elatively continuous flow is a *necessary* condition for qualification as a 'water,' not an *adequate* condition." *Id.* at 2223 n.7. ***Justice Kennedy:*** "The Corps' theory of jurisdiction in these consolidated cases—adjacency to tributaries however remote and insubstantial—raises concerns that go beyond the holding of *Riverside Bayview*, and so the Corps' assertion of jurisdiction cannot rest on that case." *Id.* at 2250. "[M]ere hydrologic connection should not suffice in all cases; the connection may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood." *Id.* at 2251.

cases, to perform important functions for an aquatic ecosystem incorporating navigable waters." *Id.* at 2249.

2. The Sixth Circuit decided the question of CWA jurisdiction wrongly in both *Rapanos* and *Carabell*.

- ***Justice Scalia:*** "We vacate the judgments of the Sixth Circuit in both No. 04-1034 *[Rapanos]* and No. 04-1384 *[Carabell]*, and remand both cases for further proceedings." *Id.* at 2235.

- ***Justice Kennedy:*** "In these consolidated cases I would vacate the judgments of the Court of Appeals and remand for consideration whether the specific wetlands at issue possess a significant nexus with navigable waters." *Id.* at 2252.

3. The CWA's scope is not restricted to traditional navigable waters.

- ***Justice Scalia:*** "The Act's term 'navigable waters' includes something more than traditional navigable waters …." 126 S. Ct. at 2220. The Scalia plurality "affirmatively reject[ed]" an interpretation that the CWA "includes only navigable-in-fact waters." *Id.* at 2231.

- ***Justice Kennedy:*** "Congress' choice of words creates difficulties, for the Act contemplates regulation of certain 'navigable waters" that are not in fact navigable." *Id.* at 2247.

4. The word "navigable," in the phrase "navigable waters," has meaning.

- ***Justice Scalia:*** "[T]he traditional term 'navigable waters' … carries *some* of its original substance …." *Id.* at 2222 (original emphasis).

- ***Justice Kennedy:*** "[T]he dissent reads a central requirement out [of the CWA]—namely, the requirement that the word 'navigable' in 'navigable waters' be given some importance." *Id.* at 2247. "Consistent with *SWANCC* and *Riverside Bayview* and with the need to give the term 'navigable' some meaning, the Corps' jurisdiction over wetlands depends on a significant nexus between the wetlands in question and navigable waters in the traditional sense." *Id.* at 2249.

5. A mere hydrological connection can *not* provide the basis for CWA jurisdiction.

- ***Justice Scalia:*** Rejecting the Agencies' hydrologic connection theory in holding that the phrase "the waters of the United States" "cannot bear the expansive meaning that the Corps would give it." *Id.* at 2220. "[R]elatively continuous flow is a *necessary* condition for qualification as a 'water,' not an *adequate* condition." *Id.* at 2223 n.7.

- ***Justice Kennedy:*** Criticizing the dissent because it "would permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote or insubstantial, that may flow into traditional navigable waters." *Id.* at 2247. "The Corps' theory of jurisdiction in these consolidated cases—adjacency to tributaries however remote and insubstantial—raises concerns that go beyond the holding of *Riverside Bayview* [which extended the CWA to encompass wetlands that actually abut traditionally navigable waters], and so the Corps' assertion of jurisdiction cannot rest on that case." *Id.* at 2250. "[M]ere hydrologic connection should not suffice in all cases; the connection may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood." *Id.* at 2251.

6. Hypothetical, speculative, insubstantial, or eventual water flows do *not* support CWA jurisdiction.

- ***Justice Scalia:*** "[T]he phrase 'the waters of the United States' includes *only* those relatively permanent, standing, or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'stream[s,] … oceans, rivers, [and] lakes." *Id.* at 2225 (emphasis supplied). *"[O]nly* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and 'wetlands,' are 'adjacent to' such waters and covered by the Act." *Id.* at 2226 (original emphasis).[7]

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[7] For a wetland to be jurisdictional under the Scalia approach, the "continuous surface connection" he contemplated is *not* satisfied upon a mere running trickle to a body of water navigable in its own right; indeed, Scalia rejected the Corps's use of the "mere hydrologic connection" test. Rather, he makes clear that a "continuous connection" is one that implicates the difficult boundary-drawing question between land and water, of the sort that the Court addressed in *Riverside Bayview*. In this regard, the discussion of Scalia's methodology in *United States v. Cundiff,* 480 F.Supp.2d 940, 946-47 (W.D. Ky. 2007) is instructive:

- ***Justice Kennedy:*** "[T]he dissent would permit federal regulation whenever wetlands lie alongside a ditch or a drain, however remote or insubstantial, that may eventually flow into traditionally navigable waters. The deference owed to the Corps' interpretation of the statute does not extend so far." *Id.* at 2247. "The Corps' theory of jurisdiction—adjacency to tributaries, *however remote and insubstantial*—raises concerns that go beyond the holding of *Riverside Bayview*; and so the Corps' assertion of jurisdiction cannot rest on that case." *Id.* at 2248 (emphasis supplied). "When … wetlands' effects on water quality *are speculative or insubstantial,* they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'" *Id.* at 2248 (emphasis supplied). In remanding *Carabell* back to the Sixth Circuit, Justice Kennedy stated that "[t]he conditional language in [the Corps's] assessments—'potential ability, 'possible flooding'—could suggest an undue amount of speculation and a reviewing court must identify substantial evidence supporting the Corps' claims …." *Id.* at 2251 (Kennedy, J.). In *Carabell*, "the Corps based its jurisdiction solely on the wetlands' adjacency to the ditch opposite the berm on the property's edge …. *[M]ere adjacency* to a tributary of this sort *is insufficient;* a similar ditch could just as well be located many miles away from any navigable-in-fact water and *carry only insubstantial flow* towards it." *Id.* at 2252 (emphasis supplied).

In discussing the boundary drawing problem, the *Rapanos* plurality noted that in *Riverside Bayview* the Supreme Court had acknowledged that there was an inherent ambiguity in drawing the boundaries of any "waters": "[T]he Corps must necessarily choose some point at which water ends and land begins. Our common experience tells us that this is often no easy task: the transition from water to solid ground is not necessarily or even typically an abrupt one. Rather, between open waters and dry land may lie shallows, marshes, mudflats, swamps, bogs-in short, a huge array of areas that are not wholly aquatic but nevertheless fall far short of being dry land. Where on this continuum to find the limit of 'waters' is far from obvious." *Rapanos,* 126 S.Ct. at 2225 (quoting *Riverside Bayview,* 474 U.S. at 132, 106 S.Ct. 455.) According to the *Rapanos* plurality, because of this inherent ambiguity, the Supreme Court in *Riverside Bayview* "held, the agency could reasonably conclude that a wetland that 'adjoin[ed]' waters of the United States is itself a part of those waters." *Id.* (citing *Riverside Bayview,* 474 U.S. at 132, 135, & n. 9, 106 S.Ct. 455).

7. **Mere presence of an ordinary high water mark does not render a feature a jurisdictional "tributary," or the wetlands next to such a feature jurisdictional "adjacent wetlands."**

   - ***Justice Kennedy:*** "[T]he Corps deems a water a tributary if it feeds into a traditional navigable water (or tributary thereof) and possesses an *ordinary high-water mark …. This standard* presumably provides a rough measure of the volume and regularity of flow. *[T]he breadth of this standard*—which seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water-volumes towards it—*precludes its adoption as the determinative measure* of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood. Indeed, in many cases wetlands adjacent to tributaries covered *by this standard* might appear little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in *SWANCC*." *Id.* at 2248-2249.

8. **CWA jurisdiction is not lost due to drought conditions.**

   - ***Justice Scalia:*** "By describing 'waters' as 'relatively permanent,' we do not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought." *Id.* at 2221 n.5.

9. **CWA jurisdiction is not lost simply because a waterbody is regularly wet during certain seasons and dry during others.**

   - ***Justice Scalia:*** Recognizing that the Los Angeles River would be jurisdictional under the CWA, and stating: "We … do not necessarily exclude *seasonal* rivers, which contain continuous flow during some months of the year but no fly during dry months—such as the 290-day continuously flowing stream postulated by Justice STEVENS' dissent …." *Id.* at 2221, n.5. "[N]o one contends that federal jurisdiction appears and evaporates along with water in such regularly dry channels." *Id.* at 2221, n.6.[8]

   - ***Justice Kennedy:*** "The Los Angeles River, for instance, ordinarily carries only a trickle of water and often looks more like a dry

[8] These statements of the Scalia plurality were emphasized by the Ninth Circuit in *United States v. Moses,* 2007 WL 2215954 (9th Cir. Aug. 3, 2007), at *6, to find that a creek that "rises and becomes a rampaging torrent" during times of runoff is covered by the CWA.

roadway than a river … Yet it periodically releases water-volumes so powerful and destructive that it has been encased in concrete … over a length of some 50 miles … Though this particular waterway *might satisfy the plurality's test,* it is illustrative of what often-dry watercourses can become when rain waters flow." *Id.* at 2242 (emphasis supplied).

10. CWA jurisdiction can cover regular floods from waterbodies.

- ***Justice Scalia:*** In the statutory term "the waters of the United States," the phrase "'the waters' refers more narrowly to … 'the flowing or moving masses, as of waves or floods, making up such streams or bodies.'" *Id.* at 2220. "It seems to us wholly unreasonable to interpret the statute as regulating only 'floods' and 'inundations' rather than traditional waterways …." *Id.* at 2221, n.4. Thus, the plurality believed regular flood*waters* from permanent rivers and lakes are encompassed within "navigable waters." Importantly, however, the plurality also criticized Corps interpretations and case law concluding that lands within the 100-year flood*plain* are included in "the waters of the United States." *Id.* at 2218.

- ***Justice Kennedy:*** "The term 'waters' may mean 'flood or inundation,' … events that are impermanent by definition …." *Id.* at 2242. "The Court in *Riverside Bayview* rejected the proposition that origination in flooding was necessary for jurisdiction over wetlands. It did not suggest that a flood-based origin would not support jurisdiction; indeed it presumed the opposite …. [A] continuous connection is not necessary for moisture in wetlands to result from flooding—the connection might well exist only during floods." *Id.* at 2244.

11. As a general matter "navigable waters" and "point sources" are <u>not</u> the same thing, and normally a feature can not be both.

- ***Justice Scalia:*** "Most significant of all, the CWA itself categorizes the channels and conduits that typically carry intermittent flows or water separately from 'navigable waters,' by including them in the definition of 'point source.'" *Id.* at 2222. The CWA's definitions "conceive of 'point sources' and 'navigable waters' as separate and distinct categories. The definition of 'discharge' would make little sense if the two categories were significantly overlapping." *Id.* at 2223.

- ***Justice Kennedy:*** "[E]ven were the statute read [as the plurality does] to require continuity of flow for navigable waters, certain waterbodies ***could conceivably*** constitute both a point source and a water." *Id.* at 2243 (emphasis supplied).

Of course, all stakeholders would have benefited from an opinion in *Rapanos* that garnered a clear majority. However, proponents for *legislative* action in the 110th Congress ignore the important points of agreement among the five Justices, as outlined above—including the very first point enumerated (*supra* p. 23), where the Justices called for *regulatory* action. Not a single member of the Court thought the appropriate solution was for Congress to amend the CWA—much less to legislate a jurisdictional requirement to cover all intrastate waters.

C. Post-*Rapanos* Cases.

The arc of judicial history interpreting the scope of statutory navigable waters is, by now, predictable: the Supreme Court issues an opinion on the meaning of "the waters of the United States," which clarifies certain questions but leaves others unanswered, and the open issues are subsequently debated in the lower courts. The 1985 *Riverside Bayview* opinion ruled that actually abutting wetlands are jurisdictional, but did not resolve the issue of isolated waters. The lower courts wrestled with that topic, issued conflicting opinions, and then in 2001 *SWANCC* decided that isolated waters are non-jurisdictional, at least insofar as the justification for regulating them is migratory bird use. But *SWANCC* did not address whether waters that are far away from traditional navigable waters could be regulated, if there is only a tenuous hydrological connection to navigable-in-fact features. Debate ensued in the lower courts on the hydrological connection issue, and in 2006, *Rapanos* showed that five Justices concurred that the hydrologic connection theory is *not* the appropriate test for CWA coverage.

Accordingly, *Rapanos* fits the pattern going back over 20 years, to *Riverside Bayview* in 1985. Now, in the post-*Rapanos* era, the lower courts are debating: Which opinion controls, the Scalia plurality or the Kennedy concurrence? Within the view of the Scalia plurality, what is a "relatively permanent waterbody" and when does a wetland have a "relatively continuous surface connection" to navigable-in-fact water? For purposes of Justice Kennedy's opinion, what does it mean for a wetland to have a "significant nexus" to a traditional navigable water?

Since *Rapanos* was decided, the lower courts are divided as to whether the controlling test for CWA jurisdiction derives from the Scalia opinion, the

Kennedy opinion, or both. In his *Rapanos* dissent, Justice Stevens maintained that either the plurality or the concurrence should control in a given case.[9] Some lower courts have followed Justice Stevens' "either/or" view.[10] Other courts have adopted the position that Justice Kennedy's "significant nexus" test is the sole determinant for CWA jurisdiction.[11]

While the courts differ on the controlling test for CWA jurisdiction, a significant pattern of consistency is definitely emerging in the post-*Rapanos* cases. Consistent with consensus points numbered 5 and 6 above (*supra* pp. 25-26), the lower courts are now taking a more thorough examination of the

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[9] "[W]hile both the plurality and Justice KENNEDY agree that there must be a remand for further proceedings, their respective opinions define different tests to be applied on remand. Given that all four Justices who have joined this opinion would uphold the Corps' jurisdiction in both of these cases-and in all other cases in which either the plurality's or Justice KENNEDY's test is satisfied-on remand each of the judgments should be reinstated if *either* of those tests is met." *Rapanos,* 126 S.Ct. at 2265 (Stevens, J. dissenting).

[10] See, *e.g., United States v. Johnson,* 467 F.3d 56, 60 (1st Cir. 2006), reh'g and reh'g *en banc* denied ("We conclude that the United States may assert jurisdiction over the target sites if it meets either Justice Kennedy's legal standard or that of the plurality"); *Simsbury-Avon Preservation Soc'y, LLC v. Metacon Gun Club,* 472 F.Supp.2d 219 (D.Conn. 2007), appeal pending (2d Cir.) ("this Court will consider under both the plurality's and Justice Kennedy's standards the issue of whether the plaintiffs have demonstrated a genuine factual dispute about whether Metacon munitions are being discharged into the waters of the United States"); *United States v. Cundiff,* 480 F.Supp.2d 940, 944 (W.D. Ky. 2007) ("After a review of the case law, the court adopts the First Circuit's approach and concludes that the United States may establish jurisdiction over the Cundiff site if it can meet either Justice Kennedy's or the plurality's standard as set forth in *Rapanos"*). Cf. *United States v. Sea Bay Development Corp.,* 2007 WL 1169188 at *3 (E.D. Va. Apr. 18, 2007) ("it is important to note" that Justice Stevens's dissent said that "navigable waters" should be determined by either the Scalia plurality or the Kennedy concurrence).

[11] *United States v. Robison,* 505 F.3d 1208, 1221 (11th Cir. 2007) ("[W]e join the Seventh and Ninth Circuits' conclusion that Justice Kennedy's 'significant nexus' test provides the governing rule of *Rapanos*"); *Northern California River Watch v. Healdsburg,* 496 F.3d 993, 995 (9th Cir. 2007), *cert. pet. filed,* 76 USLW 3260 (Nov. 5, 2007, 07-625) ("In a 4-4-1 decision, the controlling opinion is that of Justice Kennedy who said that to qualify as a navigable water under the CWA the body of water itself need not be continuously flowing, but that there must be a 'significant nexus' to a waterway that is in fact navigable. Adjacency of wetlands to navigable waters alone is not sufficient"); *United States v. Gerke Excavating, Inc.,* 464 F.3d 723, 724 (7th Cir. 2006), cert. denied, 128 S.Ct 45 (2007) ("When a majority of the Supreme Court agrees only on the outcome of a case and not on the ground for that outcome, lower-court judges are to follow the narrowest ground to which a majority of the Justices would have assented …. In *Rapanos,* that is Justice Kennedy's ground").

facts before them. In the cases before them, they are focusing on whether there is sufficient evidence of a close relationship between the non-navigable aquatic feature at issue and traditional navigable waters. The courts are largely in agreement in recognizing that proof of a tenuous and remote hydrologic connection is not sufficient; more is needed to invoke CWA jurisdiction. For example:

- In *N. Cal. River Watch v. City of Healdsburg,* 496 F.3d 993 (9th Cir. 2007), the court delved deeply into the facts and found a significant nexus between a pond, its surrounding wetlands, and navigable-in-fact water. The trial court "found that the concentrations of chloride in the groundwater between the Pond and the Russian River are substantially higher than in the surrounding area. Chloride, which already exists in the Pond due to naturally occurring salts, reaches the River in higher concentrations as a direct result of Healdsburg's discharge of sewage into the Pond …. At a monitoring well between the Pond and the River, the underground concentration is diluted to some 30 parts per million. Ultimately, a chloride concentration of 18 parts per million appears on the west side of the River. The district court thus found that chloride from the Pond over time makes its way to the River in higher concentrations than naturally occurring in the River. This finding was further supported by Dr. Larry Russell, one of River Watch's trial experts." *Id.* at 996-97.

- In *San Francisco Baykeeper v. Cargill Salt Div.,* 481 F.3d 700 (9th Cir. 2007), the court found there was *not* sufficient proof of a "significant nexus" to support CWA jurisdiction. "By any permissible view of the evidence, the effect of Cargill's Pond on Mowry Slough is speculative or insubstantial; the Pond does not significantly affect the integrity of the Slough. First, there is no evidence that any water has ever flowed from the Pond to the Slough. One expert asked whether 'given the right hydrology conditions,' water could flow from the Pond to the Slough, answered that 'it is possible.' There is no evidence, however, that those 'right hydrology conditions' have ever existed or were likely to exist. This testimony fits the definition of 'speculative.'" *Id.* at 708.

- In *United States v. Robison,* 505 F.3d 1208 (11th Cir. 2007), the court remanded for a new trial because a jury instruction improperly allowed evidence of CWA jurisdiction upon a mere hydrologic connection. "[A] 'mere hydrologic connection' will not necessarily be enough to satisfy the 'significant nexus' test ….The district court here did not mention the phrase 'significant nexus' in its 'navigable waters' instruction to the jury or advise the jury to consider the chemical, physical, or biological effect of Avondale Creek on the Black Warrior River." *Id.* at

1222. "Here, the government failed to satisfy its burden. Although Wagoner (the EPA investigator) testified that in his opinion there is a continuous uninterrupted flow between Avondale Creek and the Black Warrior River, he did not testify as to any 'significant nexus' between Avondale Creek and the Black Warrior River. The government did not present any evidence, through Wagoner or otherwise, about the possible chemical, physical, or biological effect that Avondale Creek may have on the Black Warrior River, and there was also no evidence presented of any actual harm suffered by the Black Warrior River." *Id.* at 1223.

- In *Simsbury-Avon Preservation Soc'y, LLC v. Metacon Gun Club, Inc.,* 472 F.Supp.2d 219, 230 (D. Conn. 2007), appeal pending (2d Cir), the court found no CWA jurisdiction over vernal pools and surrounding wetlands. "Plaintiffs' inconclusive water sampling data cannot buttress the rest of plaintiffs' record so as to demonstrate that a rational trier of fact could find the required substantial nexus …. [T]his is a case in which the 'wetlands' effects on water quality are speculative or insubstantial, [thus] fall[ing] outside the zone fairly encompassed by the statutory term 'navigable waters.'"

- In *Envt'l Prot. Ctr. v. Pac. Lumber Co.,* 2007 WL 43654 (N.D. Cal. Jan. 8, 2007), at *14, another court emphasized the need to prove more than a mere hydrologic connection. "A hydrologic connection without more will not comport with the *Rapanos* standard in this case. Because the evidence indicates that certain of the Class II and all of the Class III streams are intermittent or ephemeral watercourses, EPIC must demonstrate that these streams have some sort of significance for the water quality of Bear Creek. None of the evidence offered by EPIC—field observations, the GIS map, or expert testimony—address this part of the substantial nexus standard."

- In *United States v. Cundiff,* 480 F.Supp.2d 940, 945 (W.D. Ky. 2007), the government met its evidentiary burden to prove the existence of a significant nexus to traditional navigable waters. The government expert testified that ditching activity "diminished the capacity of the wetlands in question to store water," and the resultant increases in frequency and extent of downstream flooding "*impact[s] navigation,* crop production in bottomlands, downstream bank erosion, and sedimentation" (emphasis supplied). Further, "[w]hen the acid mine drainage and associated sediments move too quickly downstream … *there are direct and significant impacts to navigation* (via sediment accumulation in the Green River …." (Emphasis supplied.)

In summary, while issues are left to be resolved after *Rapanos,* the lower courts are solid on the point that the mere hydrologic connection theory is not the basis for CWA coverage. And, they are undertaking thorough record examinations of the evidence before them to determine if the requisite nexus exists between non-navigable features and traditional navigable waters. That some courts might find the required connection in certain cases, while others do not, is unsurprising. "[E]ach determination as to navigability must stand on its own facts." *United States v. Appalachian Power Co.,* 311 U.S. 377, 403 (1940) (quoting *United States v. Utah,* 283 U.S. 64, 87 (1931)). Considering that the CWA imposes great intrusions into the uses of private property, and effects significant land use controls that are traditionally within the province of state and local governments, close judicial scrutiny of the proof offered by federal regulators is a positive result generated by *Rapanos.* CWA law and policy only stand to gain as the agencies develop better factual evidence in the field to support CWA jurisdictional determinations.

The agencies have already made important strides in this regard. Their post-*Rapanos* field guidance is the opening salvo in discussions that will continue on the appropriate evidentiary showing for CWA jurisdiction. See Headquarters Memorandum to EPA Regions and Corps of Engineers Field Offices, CWA Jurisdiction Following the U.S. Supreme Court Decision in *Rapanos v. United States* (2007), *available at* http://www.usace.army.mil/cw/cecwo/reg/cwa_guide/app_a_rapanos_guide.pdf The public has been asked to provide input on the *Rapanos* guidance package, and comments are due on January 21, 2008. This process must be given sufficient time to run its course.

IV. Conclusion

The entire history of the CWA, as it has been debated in Congress, implemented by the agencies, and considered in the courts, has been an effort to balance important public policy considerations within the framework of the Constitution and the principles of federalism. NAHB believes Congress must not expand the CWA's scope to cover all intrastate waters for the following reasons:

1. Such an approach would greatly disserve the original intent of the 1972 Act, which struck a reasonable balance between modernizing federal power over traditional navigable waters and maintaining state oversight of intrastate waters that have no demonstrable nexus to channels of interstate commerce;

2. A massive expansion of federal control over all intrastate waters raises serious constitutional questions. Certain legislative proposals pending before Congress would only resuscitate the very same constitutional debate that caused confusion in the courts and on the ground in the pre-*SWANCC* years; and

3. In the post-*Rapanos* era, the federal agencies are finally starting to do the hard, factual work of evaluating evidence as to whether a particular non-navigable water feature has substantial connections to traditional navigable waters. Congress should allow this process to continue before seeking legislation.

There is no doubt that wetlands and other non-navigable features serve important ecological and societal functions. Their protection is necessary and is provided for by a cooperative effort between the federal government and the individual states. CWA regulation cannot go to extreme lengths so as to subvert the Act's purpose to "recognize, preserve, and protect the *primary* rights and responsibilities of States" to control water resources and address water pollution within their borders. 33 U.S.C. at 1254(b) (emphasis supplied). With these considerations in mind, it would be highly controversial and constitutionally questionable for Congress to amend the CWA in a manner that protects all intrastate waters. Such an approach would wander far astray from the 1972 Act's original intent. It would greatly undermine the careful balance among competing policies that Congress, the Supreme Court, and the Executive Agencies have been searching for in the 35 years since the CWA's enactment.