# AGENCY IMPLEMENTATION OF THE SWANCC DECISION

# HEARING

BEFORE THE

SUBCOMMITTEE ON ENERGY POLICY, NATURAL RESOURCES AND REGULATORY AFFAIRS

OF THE

COMMITTEE ON GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

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# AGENCY IMPLEMENTATION OF THE SWANCC DECISION

**THURSDAY, SEPTEMBER 19, 2002**

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON ENERGY POLICY, NATURAL RESOURCES AND REGULATORY AFFAIRS,
COMMITTEE ON GOVERNMENT REFORM,
*Washington, DC.*

The subcommittee met, pursuant to notice, at 10 a.m., in room 2154, Rayburn House Office Building, Hon. Doug Ose (chairman of the subcommittee) presiding.

Present: Representatives Ose, Duncan, Tierney, and Kucinich.

Staff present: Dan Skopec, staff director; Jonathan Tolman and Bob Sullivan, professional staff members; Yier Shi, press secretary; and Allison Freeman, clerk.

Mr. OSE. Welcome to the Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs.

This is the 10 a.m., September 19 hearing on the Agency Implementation of the SWANCC decision.

As many of you know, having been before this committee in the past, our procedures are to swear in our witnesses. We will do that by panel. I will forewarn everyone I expect a journal vote here shortly. I want to get the panel convened and underway accordingly.

We will have opening statements and then we will swear the panelists and take the testimony. Then other Members as they come, assuming they get here before we get to the witness testimony, will have opening statements.

It has been more than a year and a half since the Supreme Court issued its decision on Federal jurisdiction over wetlands. In July 2001, I wrote to both the EPA and the U.S. Corps of Engineers requesting that the agencies issue clarifying guidance and initiate a rulemaking to ensure that Federal regulations were consistent with the Supreme Court's decision. Today's hearing is in response to the fact that the agencies have yet to take even the most rudimentary steps to ensure the regulations are being consistently applied.

On January 9, 2001, the Supreme Court ruled that the Corps and EPA's claim of jurisdiction had exceeded their authority under the Clean Water Act in the case of *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers,* No. 99–1178. This is known commonly among wetland afficiandos as the SWANCC decision.

Section 404 of the Clean Water Act authorizes the Secretary of the Army through the Corps to issue permits for "the discharge of

dredged or fill material into navigable waters," as 33 U.S. Code Subsection 1344(a). In the SWANCC decision, the court reasoned that "it is one thing to give a word limited effect and quite another to give it no effect whatsoever. The term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the Clean Water Act: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." Whether one agrees or disagrees with the Supreme Court's decision, the fact remains that it significantly changed the jurisdiction of the Corps to regulate isolated waters.

On the last day of the previous administration, the Corps and EPA issued a joint memorandum to their regional offices. While this memo was swiftly issued, it appears to have done little to clarify Federal jurisdiction in light of the SWANCC decision. According to the memo, "Jurisdiction over such 'other waters' should be considered on a case-by-case basis in consultation with agency legal counsel."

This case-by-case approach has resulted in widely varying interpretations of the scope of jurisdiction by field offices of the Corps and EPA. In addition, there appears to be little consistency in what type of information and criteria are used for determining jurisdiction. Some regional offices are making jurisdictional determinations in the office using maps and aerial photography while others are conducting site visits.

Some Corps regional offices are asserting jurisdiction over what appear to be isolated intrastate waters on the basis that they are adjacent to other waters. In many of these cases, the term adjacent appears to be of elastic proportions. In other cases, the Corps is declaring ditches which are only infrequently wet as tributaries, even though the Corps has not defined the term tributary. This inconsistency—a primary concern of the Congress—inevitably leads to citizens in different parts of the country receiving different levels of treatment on such 404 applications as they may submit.

The current situation is creating confusion and chaos, not only for the regulated community but for States as well. Even a casual reading of the SWANCC decision suggests that it is the right and responsibility of the States to regulate isolated waters. The lack of action by Federal agencies to clarify the current situation hinders States in their ability to implement their own programs to protect wetlands.

In the absence of a clear demarkation of Federal jurisdiction, States will be unable to even determine the necessary scope of State wetland programs. While a few States, notably Ohio and Wisconsin, have passed legislation to address isolated waters in light of the SWANCC decision, most States appear reluctant to adopt programs until they know where Federal jurisdiction begins and where it ends.

In addition to State programs, there are numerous other Federal programs related to wetlands. Clear rules on Federal jurisdiction under Section 404 are equally important to ensure these other Federal programs can properly prioritize their resources. For example, the Wetlands Reserve Program reauthorized by the Farm Bill is expected to enroll 250,000 acres per year. By way of comparison, the

total acreage of wetlands permitted under the 404 Program last year was a tenth of that, about 25,000 acres.

In order to ensure that programs such as the Wetlands Reserve Program maximize environmental benefits, they should be designed to be complementary with the 404 Program. Until other Federal agencies understand the scope of jurisdiction under the 404 Program, it will be difficult, if not impossible, for them to effectively prioritize their programs.

In addition to general oversight over EPA, the Corps, and the Justice Department, this subcommittee also has jurisdiction over the regulatory process. While the SWANCC decision did not specifically vacate any Federal regulations, the broad rationale of the majority opinion at a minimum requires the clarification of a number of regulations relating to the 404 Program. The fact that the agencies have yet to initiate a rulemaking is disturbing. Hopefully in today's hearing, the agencies will provide some insight into how they will minimize the chaos their inaction has created before the entire program degenerates into a sodden mass of litigation with one set of standards in one part of the country and another set of standards in another part of the country, and a third, fourth or fifth set in a third, fourth or fifth part of the country.

[The prepared statement of Hon. Doug Ose follows:]

**Chairman Doug Ose**
**Opening Statement**
**Agency Implementation of the SWANCC Decision**
**September 19, 2002**

It has been more than a year and a half since the Supreme Court issued its sweeping decision on Federal jurisdiction over wetlands. In July 2001, I wrote to both the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) requesting that the agencies issue clarifying guidance and initiate a rulemaking to ensure that Federal regulations were consistent with the Supreme Court's decision. Today's hearing is in response to the fact that the agencies have failed to take even the most rudimentary steps to ensure that their regulations are being consistently applied.

On January 9, 2001, the Supreme Court ruled that the Corps and EPA's claim of jurisdiction had exceeded their authority under the Clean Water Act (CWA) in the case of Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers No. 99-1178 (SWANCC). Known commonly among wetland aficionados as the SWANCC decision.

Section 404 of the CWA authorizes the Secretary of the Army, through the Corps, to issue permits for "the discharge of dredged or fill material into navigable waters" (33 USC § 1344(a)).

In the SWANCC decision, the Court reasoned that "it is one thing to give a word limited effect and quite another to give it no effect whatever. The term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made."

Whether one agrees or disagrees with the Supreme Court's decision, the fact remains that it significantly changed the jurisdiction of the Corps to regulate isolated waters.

On the last day of the Clinton Administration, the Corps and EPA issued a joint memorandum to their regional offices. While this memo was swiftly issued, it appears to have done little to clarify Federal jurisdiction in light of the SWANCC decision. According to the memo, "Jurisdiction over such 'other waters' should be considered on a case-by-case basis in consultation with agency legal counsel."

This case-by-case approach has resulted in widely varying interpretations of the scope of jurisdiction by field offices of the Corps and EPA. In addition, there appears to be little consistency in what type of information and criteria are used for determining jurisdiction. Some regional offices are making jurisdictional determinations in the office, using maps and aerial photography, while others are conducting site visits.

Some Corps regional offices are asserting jurisdiction over what appear to be isolated intrastate waters on the basis that they are "adjacent" to other waters. In many of these cases, the term adjacent appears to be of elastic proportions.

In other cases, the Corps is declaring ditches, which are only infrequently wet, "tributaries," even though the Corps has not defined the term tributary.

This inconsistency inevitably leads to citizens across the country receiving unequal treatment from their government.

The current situation has created confusion and chaos not only for the regulated community but also for the States. Even a casual reading of the SWANCC decision suggests that it is the right and responsibility of the States to regulate isolated waters. The lack of action by Federal agencies to clarify the current situation hinders States in their ability to implement their own programs to protect wetlands. In the absence of a clear demarcation of Federal jurisdiction, States will be unable to even determine the necessary scope of State wetland programs. While a few States, notably Ohio and Wisconsin, have passed legislation to address isolated waters in light of the SWANCC decision, most States appear to be reluctant to adopt programs until they know where Federal jurisdiction begins and ends.

In addition to State programs, there are numerous other Federal programs related to wetlands. Clear rules on Federal jurisdiction under Section 404 are equally important to ensure that these other Federal programs can properly prioritize their resources. For example, the Agriculture Department's Wetlands Reserve Program reauthorized by the Farm Bill is expected to enroll 250,000 acres a year. By way of comparison, the total acreage of wetlands permitted under the 404 program last year was 1/10 of that -- 25,000 acres. In order to ensure that programs such as the Wetlands Reserve Program maximize environmental benefits, they should be designed to be complementary with the 404 program. Until other Federal agencies understand the scope of jurisdiction under the 404 program, it will be difficult, if not impossible, for them to effectively prioritize their programs.

In addition to general oversight over EPA, the Corps and the Justice Department, this Subcommittee also has jurisdiction over the regulatory process. While the SWANCC decision did not specifically vacate any Federal regulations, the broad rationale of the majority opinion, at a minimum, requires the clarification of a number of regulations relating to the 404 program. The fact that the agencies have yet to initiate a rulemaking is, frankly, disturbing.

Hopefully, at today's hearing, the agencies will provide some insight into how they will minimize the chaos their inaction has created, before the entire program degenerates into a sodden mass litigation.

Invited witnesses include: Dominic Izzo, Deputy Assistant Secretary for Civil Works, Department of the Army; Robert Fabricant, General Counsel, Environmental Protection Agency; Thomas Sansonetti, Assistant Attorney General for Environment and Natural Resources, Department of Justice; Virginia S. Albrecht, Hunton &Williams; M. Reed Hopper, Principal Attorney, Pacific Legal Foundation; Nancie G. Marzulla, President, Defenders of Property Rights; Raymond Steven Smethurst, Partner, Adkins, Potts & Smethurst; Gary Guzy, Partner, Foley Hoag, LLP; and Patrick Parenteau, Professor of Law, Vermont Law School.

Mr. OSE. I do want to welcome our witnesses today. As I said earlier, we are going to go ahead and swear our witnesses, as we do at every such hearing of this subcommittee. Before we do, I want to forewarn you I expect a journal vote here shortly. In the event of a journal vote, we will recess for as little time as possible. I will go over and vote, come back, and we then will continue with the hearing. Gentlemen, if you would rise.

[Witnesses sworn.]

Mr. OSE. I am told we have canceled the journal vote.

Our first witness today will be the Deputy Assistant Secretary for Civil Works, Department of the Army, Mr. Dominic Izzo. Mr. Izzo, we have your testimony, we have read it, so you don't need to go through it item by item. I would appreciate, as with the other witnesses also, if you could constrain your summary to 5 minutes.

**STATEMENTS OF DOMINIC IZZO, DEPUTY ASSISTANT SECRETARY FOR CIVIL WORKS, DEPARTMENT OF THE ARMY; ROBERT FABRICANT, GENERAL COUNSEL, EPA; AND THOMAS SANSONETTI, ASSISTANT ATTORNEY GENERAL, ENVIRONMENT AND NATURAL RESOURCES, DEPARTMENT OF JUSTICE**

Mr. IZZO. Good morning, Mr. Chairman.

I am pleased to be here to speak to you about the Supreme Court ruling called SWANCC. My testimony will focus on Army and EPA efforts to develop a comprehensive response to SWANCC that will faithfully implement the Supreme Court's ruling.

Before I begin, I am pleased to inform you that the Army and the EPA have agreed to engage in rulemaking to define the Federal role under the Clean Water Act and in particular to collect broad public input. Because the SWANCC decision focuses on Federal Clean Water Act jurisdiction, we believe it important to emphasize that the Federal Government is fully committed to preventing the unauthorized discharge of pollutants into all jurisdictional waters, including adjacent wetlands, as Congress intended.

Safeguarding these waters is a critical Federal function because it ensures that the chemical, physical, and biological integrity of these waters is maintained and preserved for future generations. We think it appropriate to highlight the importance of our collective water resource protection responsibilities under Section 404 because EPA and the Army share responsibility for this program, which protects all navigable waters including adjacent wetlands, and SWANCC itself involves Section 404.

We also note, as you mentioned, that provisions in the 2002 Farm Bill will provide protection for millions of acres of wetlands and other water resources, even if they are no longer under Clean Water Act jurisdiction.

Wetland losses have dropped substantially over the last 10 years. The Section 404 Program has played a pivotal role in protecting thousands of acres of environmentally sensitive wetlands through highly effective procedures that are designed to avoid, minimize, and mitigate for unavoidable losses. We will continue to fulfill this critical public purpose, and we are absolutely dedicated to the goal of no net loss of wetlands.

We also wish to emphasize that although SWANCC and our testimonies today focus on Federal jurisdiction, other Federal or State laws and programs may still protect the water and related ecosystems even if that water is no longer jurisdictional under the Clean Water Act following SWANCC.

SWANCC did not affect the Federal Government's commitment to wetlands protection through programs like the Food Security Act Swampbuster requirements and Federal agricultural program benefits. Nor did it affect restoration through such Federal programs as the Wetlands Reserve Program and grantmaking programs such as Partners in Wildlife and the Coastal Wetlands Restoration Program.

The SWANCC decision also highlights the role of States in protecting waters not addressed by Federal law. Prior to SWANCC, 15 States had programs that addressed isolated wetlands. Since SWANCC, additional States have considered or adopted legislation to protect isolated waters. Federal agencies have a number of initiatives to assist States in these efforts to protect wetlands. For example, EPA's Wetland Program Development Grants are available to assist States, tribes and local governments in building their wetland programs. The Department of Justice and other Federal agencies are cosponsoring a National Wetlands Conference with the National Governors Association and other groups. This conference is designed to promote close collaboration between Federal agencies and States in developing, implementing, and enforcing wetlands protection programs.

EPA and the Army share responsibility for the Section 404 Program, which protects wetlands and other aquatic resources. Under the Clean Water Act, any person planning to discharge dredged or fill material into navigable waters must first obtain authorization from the Corps through issuance of an individual permit or must be authorized to undertake that activity under a general permit.

Although the Corps is responsible for the day-to-day administration of the program, including reviewing permit applications and deciding whether to issue or deny permits, EPA has a number of important Section 404 responsibilities. In consultation with the Corps, the EPA develops the environmental criteria that the Corps applies when deciding to issue a permit. Under these guidelines, a discharge is not allowed if there are practicable alternatives with fewer adverse effects on the aquatic systems and appropriate steps must be taken to minimize potential adverse effects to the aquatic ecosystem and mitigate for unavoidable impacts.

EPA and the Corps have a long history of working together to fulfill our important statutory duties. For example, Army and EPA have concluded a number of written agreements, which are intended to further these cooperative efforts in a manner that promotes efficiency, consistency, and environmental protection. EPA and the Corps have organized a staff-level Interagency Work Group that includes EPA, Corps, and the Department of Justice.

Mr. OSE. Mr. Izzo, if I may, given the constraints of time, your 5 minutes has expired. The comments you have are in your testimony.

Mr. IZZO. They are indeed.

[The prepared statement of Mr. Izzo follows:]

**COMPLETE STATEMENT OF**

**DOMINIC IZZO**
**PRINCIPAL DEPUTY ASSISTANT SECRETARY OF THE ARMY FOR CIVIL WORKS**
**DEPARTMENT OF THE ARMY**

**AND**

**ROBERT E. FABRICANT**
**GENERAL COUNSEL**
**ENVIRONMENTAL PROTECTION AGENCY**

**BEFORE THE**
**SUBCOMMITTEE ON ENERGY POLICY, NATURAL RESOURCES AND REGULATORY AFFAIRS OF THE**
**COMMITTEE ON GOVERNMENT REFORM**
**U.S. HOUSE OF REPRESENTATIVES**

**SEPTEMBER 19, 2002**

Good morning, Mr. Chairman and Members of the Subcommittee. We welcome the opportunity to present joint testimony to you today about the Supreme Court ruling in Solid Waste Agency of Northern Cook County v. the U.S. Army Corps of Engineers, 531 U.S. 159 (2001), more commonly referred to as the SWANCC decision. Our testimony focuses on the progress our agencies have made to develop a comprehensive response to SWANCC that will ensure that the Court's ruling is faithfully implemented. As we will discuss, we have determined that we should engage in rulemaking to define the federal role under the Clean Water Act (CWA) and collect broad public input on important jurisdictional waters.

**Background**

Because the SWANCC decision and our testimony today focus on federal jurisdiction

under the CWA, we think it important to emphasize that the Federal government is fully committed to preventing the unauthorized discharge of pollutants into all CWA jurisdictional waters, including adjacent wetlands, as was intended by Congress. Safeguarding these waters is a critical Federal function because it ensures that the chemical, physical, and biological integrity of these waters is maintained and preserved for future generations. We think it is appropriate to highlight the importance of our collective water resource protection responsibilities under § 404 of the CWA since EPA and the Army share responsibility for the § 404 program which protects all navigable waters, including adjacent wetlands, and SWANCC itself involves § 404 of the Clean Water Act. Indeed, we were pleased by provisions in the 2002 Farm Bill that will provide protection for millions of acres of wetlands and other water resources even if they are no longer subject to jurisdiction under the CWA.

Wetland losses have dropped substantially over the past ten years. The § 404 program has played a pivotal role in protecting thousands of acres of environmentally sensitive wetlands through highly effective procedures that are designed to avoid, minimize, and mitigate for unavoidable losses. § 404 will continue to fulfill this critical public purpose.

We also wish to emphasize that although the SWANCC decision and our testimony today focus on federal jurisdiction pursuant to the CWA, other federal or state laws and programs may still protect a water and related ecosystem even if that water is no longer jurisdictional under the CWA following SWANCC. SWANCC did not affect the Federal government's commitment to wetlands protection through the Food Security Act's Swampbuster requirements and federal agricultural program benefits and

restoration through such Federal programs as the Wetlands Reserve Program (administered by the U.S. Department of Agriculture) grant making programs such as Partners in Wildlife (administered by the Fish and Wildlife Service), the Coastal Wetlands Restoration Program (administered by the National Marine Fisheries Service), the Five Start Restoration and National Estuary Program (administered by EPA), and the Migratory Bird Conservation Commission (composed of the Secretaries of Interior and Agriculture, the Administrator of EPA and Members of Congress).

The SWANCC decision also highlights the role of States in protecting waters not addressed by Federal law. Prior to SWANCC, fifteen States had programs that addressed isolated wetlands. Since SWANCC, additional States have considered or adopted legislation to protect isolated waters. The Federal agencies have a number of initiatives to assist States in these efforts to protect wetlands. For example, EPA's Wetland Program Development Grants are available to assist States, Tribes, and local governments build their wetland program capacities. The Department of Justice (DOJ) and other Federal agencies are co-sponsoring a national wetlands conference with the National Governor's Association, National Counsel of State Legislatures, the Association of State Wetlands Managers, and the National Association of States Attorney General. This conference is designed to promote close collaboration between Federal agencies and States in developing, implementing, and enforcing wetlands protection programs. EPA also is providing funding to the National Governors Association Center for Best Practices to assist states in developing appropriate policies and actions to protect intrastate isolated wetlands.

**Shared Responsibility for § 404 of the Clean Water Act**

EPA and the Army Corps of Engineers ("Corps") share responsibility for the § 404 program under the Clean Water Act, which protects wetlands and other aquatic resources and maintains the environmental and economic benefits provided by these valuable natural resources. Under § 404 of the CWA, any person planning to discharge dredged or fill material to "navigable waters" must first obtain authorization from the Corps (or a State approved to administer the § 404 program), through issuance of an individual permit, or must be authorized to undertake that activity under a general permit.

Although the Corps is responsible for the day-to-day administration of the program, including reviewing permit applications and deciding whether to issue or deny permits, EPA has a number of important § 404 responsibilities. In consultation with the Corps, the EPA develops the § 404(b)(1) Guidelines, which are the environmental criteria that the Corps must apply when deciding whether to issue permits. Under the Guidelines, a discharge is not allowed if there are practicable alternatives with fewer adverse effects on the aquatic ecosystem, and appropriate steps must be taken to minimize potential adverse effects to the aquatic ecosystem and mitigate for unavoidable impacts.

EPA and the Corps have a long history of working together closely and cooperatively in order to fulfill our important statutory duties on behalf of the public. For example, the Army and the EPA we have concluded a number of written agreements which are intended to further these cooperative efforts in a manner that promotes

efficiency, consistency, and environmental protection.

**The SWANCC Decision**

SWANCC involved a challenge to CWA jurisdiction over certain isolated, intrastate, non-navigable ponds in Illinois that formerly had been gravel mine pits, but which, over time, attracted migratory birds. Although these ponds served as migratory bird habitat, they were non-navigable and isolated from the tributary system of other waters regulated under the CWA. In SWANCC, the Supreme Court held that the Army Corps of Engineers had exceeded its authority in asserting CWA jurisdiction pursuant to § 404(a) over the waters at issue based on their use as habitat for migratory birds, pursuant to preamble language, commonly referred to as the Migratory Bird Rule. 51 Fed. Reg. 41217 (1986).

"Navigable waters" are defined in the CWA to mean "waters of the United States, including the territorial seas." 33 U.S.C § 1362. In SWANCC, the Court determined that the term *navigable* had significance in indicating the authority that Congress' intended to exercise in asserting CWA jurisdiction. After reviewing the jurisdictional scope of the statutory definition of navigable waters, the Court concluded that neither the text of the statute nor its legislative history supported the Corps' assertion of jurisdiction over the waters involved in SWANCC.

In SWANCC, the Supreme Court voiced "serious constitutional and federalism questions" raised by the Corps' interpretation of the CWA. The Court recognized that "Congress passed the CWA for the stated purpose of 'restoring and maintaining the

chemical, physical, and biological integrity of the Nation's waters'" and also noted that "Congress chose to 'recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources.'" SWANCC at 166-67. Given the Court's determination that the term navigable waters as used in § 404(a) of the CWA must be given some meaning, the Court determined that the Migratory Bird Rule was an invalid extension of the agency's authority under § 404(a) the CWA.

**Scope of Jurisdiction Generally, After SWANCC**

Because SWANCC limited use of the Migratory Bird Rule as a basis of jurisdiction over certain isolated waters, it has focused greater attention on CWA jurisdiction generally, and specifically over tributaries to jurisdictional waters and over wetlands that are "adjacent wetlands" for CWA purposes.

As indicated, the CWA defines the term navigable waters to mean "waters of the United States, including the territorial seas." The Supreme Court has recognized that this definition clearly includes those waters that are considered traditional navigable waters. In SWANCC, the Court noted that while "the word 'navigable' in the statute was of 'limited import'" (quoting Riverside Bayview Homes, 474 U.S. 121 (1985))," the term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." 531 U.S. at 172. In addition, the Court reiterated in SWANCC that "Congress evidenced its intent to

'regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." SWANCC (quoting United States v. Riverside Bayview Homes Inc., 474 U.S. 121, 133 (1985)). The Supreme Court has recognized in SWANCC and Riverside Bayview that the Corps has jurisdiction pursuant to § 404(a) of the CWA over wetlands that actually "abutted on a navigable waterway." SWANCC at 167; see generally Riverside Bayview. In rendering both decisions, the Court declined to address the exact limits of how far Congress extended federal jurisdiction beyond traditional navigable waters.

**Army and EPA Response**

The case law on the precise scope of federal CWA jurisdiction since SWANCC is still developing. The Corps, EPA, and DOJ have been monitoring these newly decided cases and have been working closely together in an effort to develop guidance concerning CWA jurisdiction following SWANCC. As you know, the EPA has final authority over CWA jurisdictional matters according to a prior Attorney General Opinion.

EPA and the Corps have organized a staff-level interagency workgroup that includes EPA, Corps, and DOJ participants and meets bi-weekly to exchange information, identify SWANCC-related issues arising in the field, and to keep staff informed of litigation developments on an ongoing basis. The interagency group has been very helpful in ensuring that all the issues are being considered, that the legal, policy, and practical implications of various approaches are fully analyzed, and that post-SWANCC case law is given due attention. We believe that this process is the best way to ensure a consistent approach on litigation and procedures for disseminating

information through our agencies.

We recognize that field staff and the public could benefit from additional guidance on how to apply the applicable legal principles in individual cases. Moreover, the Corps of Engineers and EPA have not updated their regulations in many years generally concerning CWA jurisdiction. Accordingly, our efforts have focused on determining what categories of water are jurisdictional or not jurisdictional, and where rulemaking might be advisable and necessary to reinforce the appropriate scope of CWA jurisdiction. We have determined that we should engage in such a rulemaking. A rulemaking also will allow us to garner public input on the important jurisdictional issues arising from SWANCC. What follows is a brief discussion of the issues that this may address.

SWANCC squarely eliminates CWA jurisdiction over isolated waters that are intrastate and non-navigable, where the sole basis for asserting CWA jurisdiction is the actual or potential use of the waters as habitat for migratory birds that cross state lines in their migrations. Accordingly, both agencies are now precluded from asserting CWA jurisdiction in such situations.

In light of SWANCC, questions have also been raised about whether there remains any basis for jurisdiction under the other rationales of 33 C.F.R. § 328.3(a)(3)(i)-(iii) over isolated, non-navigable, intrastate waters (i.e., use of the water by interstate or foreign travelers for recreational or other purposes; the presence of fish or shellfish that could be taken and sold in interstate commerce; use of the water for industrial purposes by industries in interstate commerce). The Corps and EPA plan to address this issue.

The Court in SWANCC determined that the term *navigable* had at least the significance of showing "what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." 531 U.S. at 172. Accordingly, traditional navigable waters remain jurisdictional following SWANCC. Traditional navigable waters are defined in case law and Army regulations to mean waters that are subject to the ebb and flow of the tide, or waters that are presently used, or have been used in the past, or may be susceptible for use, to transport interstate or foreign commerce. See 33 C.F.R. 328.3(a)(1).

CWA jurisdiction extends to waters, including wetlands, that are adjacent to navigable waters pursuant to the Supreme Court holding in Riverside Bayview Homes, which was endorsed in SWANCC as controlling law. Riverside Bayview found that a wetland adjacent to a traditional navigable water was jurisdictional and that "Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands 'inseparably bound up with' jurisdictional waters" 474 U.S. at 134. While wetlands adjacent to traditional navigable waters remain jurisdictional after SWANCC, the Supreme Court in Riverside Bayview Homes and SWANCC expressly declined to elaborate on the precise meaning of "adjacent." Corps of Engineers and EPA regulations currently define the term adjacent as "bordering, contiguous, or neighboring." 33 C.F.R. § 328.3(b). The Army and EPA are examining the issue of whether this definition should be the subject of future rulemaking.

For many years, EPA and the Corps have interpreted their regulations to assert jurisdiction over non-navigable tributaries of traditional navigable waters. Following

SWANCC, Federal courts have raised questions concerning the extent of CWA jurisdiction over non-navigable tributaries. These questions include the jurisdictional status of intermittent and ephemeral streams and waters that pass through man-made conveyances, and wetlands adjacent to these waters. The Army and EPA are examining whether a rulemaking should be pursued to address these questions.

**Conclusion**

The case law on CWA jurisdiction is still developing. The agencies will continue to monitor the emerging case law. The resolution of issues on appeal and the issuance of guidance should help to define and reinforce the appropriate scope of CWA jurisdiction. The agencies will continue to work closely together to issue appropriate guidance, in the form of internal policy statements and/or proposed revised regulations as soon as possible. We look forward to receiving stakeholder input on these important issues and are hopeful that this dialogue and ensuing rulemaking will minimize the potential for litigation and disputes generally over CWA jurisdiction. In the meantime, we encourage the public to confer with agency personnel about whether permits are required in circumstances where unresolved jurisdictional issues exist. Agency personnel will answer these questions on a case by case basis.

Thank you for providing us with this opportunity to present this testimony to you. We appreciate your interest in these important national issues that are of mutual concern.

Mr. OSE. Let us go to Mr. Fabricant, if we may. I appreciate your cooperation, Mr. Izzo, on that.

Mr. Fabricant for 5 minutes.

Mr. FABRICANT. Good morning.

I am Bob Fabricant, General Counsel of the Environmental Protection Agency. I welcome the opportunity to present testimony today on EPA's implementation of the SWANCC decision.

SWANCC involved a challenge to the Clean Water Act jurisdiction over isolated interstate, non-navigable ponds in Illinois that had been gravel pit mines but which over time attracted migratory birds. In SWANCC, the Supreme Court held that the Army Corps exceeded its authority in asserting jurisdiction over the waters based on their use as habitat for migratory birds. The Court concluded that neither the statute nor its legislative history supported the Corps assertion of jurisdiction over the waters involved in SWANCC.

Because SWANCC limited use of the migratory bird rule as a basis of jurisdiction over certain isolated waters, it focused greater attention on the jurisdiction over tributaries and over adjacent wetlands.

The case law and the precise scope of Federal jurisdiction since SWANCC is still developing. The Corps, EPA, and DOJ have been monitoring these newly decided cases and have been working closely together in an effort to develop guidance concerning Clean Water Act jurisdiction following SWANCC. EPA, Corps and DOJ have organized a staff-level Interagency Work Group that meets biweekly to exchange information.

We recognize that field staff and the public could benefit from additional guidance on how to apply the legal principles in individual cases. Accordingly, our efforts have also focused on determining where rulemaking might be advisable. A rulemaking would allow us to garner public input on important jurisdictional issues arising from SWANCC. SWANCC squarely eliminates jurisdiction over interstate, non-navigable, isolated waters where the sole basis for asserting jurisdiction is the use of the waters as habitat by migratory birds. In light of SWANCC, questions have also been raised about whether there remains any basis for jurisdiction under other rationales of our (a)(3) or other waters regulations.

The Court in SWANCC determined that the term navigable had at least the significance of showing what Congress had in mind as its authority for enacting the Clean Water Act. Its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be made so. Accordingly, traditional navigable waters remain jurisdictional following SWANCC.

Clean Water Act jurisdiction also extends to wetlands that are adjacent to navigable waters pursuant to the Supreme Court holding in Riverside Bayview Homes. While wetlands adjacent to traditional navigable waters remained jurisdictional after SWANCC, the Supreme Court has expressly declined to elaborate on the precise meaning of the term adjacent. Army Corps and EPA regulations currently define adjacent as bordering, contiguous, or neighboring. The Army and EPA are examining the issue of whether this definition should be the subject of future rulemaking.

For many years, EPA and the Corps have interpreted their regulations to assert jurisdiction over non-navigable tributaries of traditional navigable waters. Following SWANCC, Federal courts have raised questions concerning the extent of Clean Water Act jurisdiction over non-navigable tributaries. The Army and EPA are examining whether a rulemaking should be pursued to address these questions.

The case law in the Clean Water Act jurisdiction is still developing. The agencies will continue to monitor the emerging case law and work closely to issue appropriate guidance and/or proposed revised regulations. We look forward to receiving stakeholder input on these important issues.

Thank you for your time today.

Mr. OSE. Thank you, Mr. Fabricant. I appreciate your brevity.

Mr. Sansonetti, we are going to recess for a few minutes so I can go over and vote. In fact, we are having a vote on the journal. It was canceled and then put back on, so we are going to recess for 10 minutes and I will be back.

[Recess.]

Mr. OSE. Mr. Sansonetti for 5 minutes.

Mr. SANSONETTI. I am pleased to be here today to discuss the Department of Justice's response to the Supreme Court's decision in SWANCC. In my testimony, I will describe our work in connection with the Clean Water Act, the interpretation of which was at issue in SWANCC, and the efforts that we have made to ensure the positions we have taken in litigation are consistent with SWANCC. I will also briefly touch upon our efforts to improve Federal-State coordination and cooperation in wetlands protection and enforcement.

In my written testimony, I provided the subcommittee with a prospective on the breadth of our work. My division has a docket of approximately 12,000 pending matters, with cases in every judicial district in the Nation. The majority of our cases are defensive. Although some of these defensive cases involve the Clean Water Act, many more do not. In fact, litigation cases arise from over 70 environmental and natural resources laws. Even if one were to focus only on an enforcement docket, wetlands cases are only a small subset, 29 to be precise.

With that background, I will now discuss in more detail our role with regard to the implementation of the Clean Water Act. The Department of Justice's primary role with regard to the Clean Water Act is to represent EPA, the Corps, and other Federal agencies that might be involved in CWA litigation. That litigation can be either defensive or affirmative.

Our defensive litigation can take a variety of forms. For example, affected parties will sometimes bring an action against the Corps of Engineers when it grants or denies a permit. My written testimony describes Wetlands Action Network, a case in which we defended the Corps' decision to grant a permit to a developer in Southern California.

Affected parties may also seek judicial review of regulations or a guidance document. Finally, Federal agencies can also be sued for discharging pollutants into waters of the United States if they have not complied with the applicable requirements of the Clean Water Act.

We also bring affirmative litigation under the Clean Water Act. CWA civil enforcement actions generally begin with a referral or an investigation from EPA or the Corps regarding alleged violations. We then conduct or own internal, independent inquiry to determine whether we have sufficient evidence to bring the case and where there is appropriate judicial action.

If we determine that judicial enforcement is warranted, we also explore possibilities for achieving settlement of the alleged violations as appropriate. As I noted in my written testimony, the vast majority of environmental violations are addressed and resolved administratively by State and local governments. In the wetlands area, most Federal enforcement of the Clean Water Act is carried out by the EPA and the Corps at the administrative level and does not involve us. Thus, our work is only a small, albeit an important part of CWA implementation.

Just as with any other Supreme Court case, we try to ensure that the legal positions on behalf of the Federal Government are consistent with SWANCC. Accordingly, after SWANCC was decided in January 2001, about a year before I came on this particular job, we undertook a comprehensive review of our Clean Water Act docket. We scrutinized any case that involved isolated waters, the migratory bird rule, or analogous theories to determine whether SWANCC had undermined the geographic jurisdiction in the case and took action as appropriate.

In my written testimony, I gave two examples of cases in which we decided not to pursue enforcement claims in light of SWANCC, that is the Cargill Salt case and Borden Ranch. In addition to reviewing our existing cases for consistency with SWANCC, we established a process for ensuring the positions we take in litigation going forward are internally consistent and appropriately coordinated with the Federal Government. Thus, in addition to the review of all our perspective enforcement cases I described earlier, we also focused on whether there is a factually and legally sound basis consistent with SWANCC for proceeding in our Clean Water Act cases. We applied a similar process in our defense CWA-related litigation.

The Solicitor General, Ted Olson, also has an important role in ensuring nationwide consistency in the U.S. litigation positions. Anytime we seek to appeal from an adverse district court decision or seek to file an amicus brief in the circuit courts of appeal, it is the Solicitor General that must authorize the filing, regardless of whether the U.S. Attorneys Office or my division is handling the case. Each of our appellate filings to date has been authorized by the Solicitor General.

Our careful examination of our cases has paid off with some success in the courts. There are 24 cases in which we have filed SWANCC-related briefs in the Federal courts; 17 of those cases have resulted in a decision; 12 of those decisions agreed with the Government's position, 5 did not.

Given that we still have pending litigation in this area, I would be pleased to make available to any member of the subcommittee our briefs as they provide the best statement of our position in any particular matter.

We have also made great strides in improving Federal-State cooperation and coordination in environmental protection generally, and we are redoubling these efforts in connection with SWANCC. In December, we will host a national conference and training course designed in cooperation with several State associations, EPA, and the Corps to facilitate Federal-State partnerships in this important area. Consequently, I would like to assure the subcommittee that we are working hard to ensure the positions we take in litigation are consistent with our client agencies. I would be happy to answer any questions you may have about my testimony.

[The prepared statement of Mr. Sansonetti follows:]

# Department of Justice

STATEMENT

OF

THOMAS L. SANSONETTI
ASSISTANT ATTORNEY GENERAL
ENVIRONMENT AND NATURAL RESOURCES DIVISION

BEFORE THE

SUBCOMMITTEE ON ENERGY POLICY, NATURAL RESOURCES,
AND REGULATORY REFORM
COMMITTEE ON GOVERNMENT REFORM
U.S. HOUSE OF REPRESENTATIVES

CONCERNING

FEDERAL AUTHORITY TO REQUIRE WETLANDS DUMPING PERMITS

PRESENTED ON

SEPTEMBER 19, 2002

**STATEMENT OF**
**ASSISTANT ATTORNEY GENERAL THOMAS L. SANSONETTI**
**BEFORE THE**
**UNITED STATES HOUSE OF REPRESENTATIVES**
**COMMITTEE ON GOVERNMENT REFORM**
**SUBCOMMITTEE ON ENERGY POLICY,**
**NATURAL RESOURCES, AND REGULATORY AFFAIRS**
**September 19, 2002**

**INTRODUCTION**

Chairman Ose, Congressman Tierney, and Members of the Subcommittee, I am pleased to be here today to discuss the Department of Justice's response to the Supreme Court's decision in Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001), colloquially known as "SWANCC." In my testimony today, I will describe our work in connection with the Clean Water Act, the interpretation of which was at issue in SWANCC, and the efforts that we have made to ensure that the positions that we have taken in litigation are consistent with SWANCC. I will also briefly touch upon the work that we are doing with the States to improve state-federal coordination and cooperation in wetlands protection and enforcement.

One thing I want to do at the outset is to provide the Subcommittee with a perspective on the breadth of our work. The Environment and Natural Resources Division has a docket of approximately 12,000 pending matters, with cases in every judicial district in the nation. The majority of our cases are defensive, i.e. where we are defending the United States or particular federal agencies when they have been sued. Although some of these defensive cases involve the CWA, many more do not. In fact, we litigate cases arising from well over 70 different environmental and natural resource statutes, including the Comprehensive Environmental

Response, Compensation and Liability Act ("CERCLA"), the National Environmental Policy Act, the National Forest Management Act, the Coastal Zone Management Act, and the National Historic Preservation Act.

Even if one were to focus only on the affirmative, enforcement part of our docket, wetlands cases are only a small subset of those cases -- 29, to be precise. Moreover, we have many other enforcement actions focusing on violators of other provisions of the Clean Water Act, not to mention of the Clean Air Act, the Safe Drinking Water Act, the hazardous waste laws and a variety of other environmental laws. This enforcement work has resulted in significant gains for public health and the environment across the United States.

However, I will focus my testimony today on our Clean Water Act cases and, in particular, cases involving wetlands.

**AN OVERVIEW OF OUR CLEAN WATER ACT DOCKET**

The Department of Justice's primary role with regard to the Clean Water Act (CWA) is to represent the Environmental Protection Agency (EPA), the Army Corps of Engineers (Corps), and any other federal agency that might be involved in litigation that arises pursuant to the CWA. This litigation can be either defensive or affirmative.

As the word "defensive" suggests, in this type of litigation, we defend federal agencies that are being sued in connection with the CWA. Such actions can take a variety of forms. For example, affected parties will sometimes bring an action against the Corps of Engineers when it makes a case-specific decision, such as the grant or denial of a permit. Regulated entities, environmental interests, and other public entities such as States will also seek judicial review when the Corps and EPA make broader policy decisions embodied in a regulation or guidance

document. Finally, Federal agencies can also be sued for discharging pollutants into waters of the United States if they have not complied with the applicable requirements of the CWA. In my Division, which is the Environment and Natural Resources Division, we have an Environmental Defense Section that specializes in defending the actions of federal agencies, including EPA and the Corps of Engineers, when they are challenged in court in connection with the CWA.

One example of a defensive CWA case arose in the Chairman's home state of California. In Wetlands Action Network v. U.S. Army Corp of Engineers, 222 F.3d 1105 (9th Cir. 2000), we defended the Corps' decision to grant a real estate developer a permit to fill 16.1 acres of federally delineated wetlands near the Pacific Ocean in the Los Angeles area from a challenge by environmental groups. We prevailed on the CWA-based challenge to the Corps' decision in the district court, and on appeal, we prevailed on the remainder of the challenge to the permit as well. Wetlands Action Network, 222 F.3d at 1110.

We also bring affirmative litigation under the CWA. By "affirmative litigation," I am referring to enforcement cases, which can be either civil or criminal. Three sections in the Division handle Clean Water Act enforcement actions. Civil enforcement cases are handled by our Environmental Enforcement Section, with the exception of wetlands cases, which are handled by the Environmental Defense Section. Criminal enforcement of the CWA is handled by the Environmental Crimes Section, usually in conjunction with local U.S. Attorney's Offices.

CWA civil judicial enforcement actions generally begin with a referral or investigation from another federal agency, whether it is EPA or the Corps, regarding alleged violations of the CWA. Often by the time we receive a referral, the agency in question has exhausted all avenues for resolving the dispute administratively, and the agency has carefully considered whether

judicial enforcement is the appropriate course of action. Upon receiving the agency's recommendation, we conduct our own internal, independent inquiry and analysis to determine whether there is sufficient evidence to support the elements of the offense and whether the case is otherwise appropriate for judicial action. If we determine that judicial enforcement is warranted, we also explore possibilities for achieving settlement of the alleged violations without litigation as appropriate.

I refer to "judicial enforcement" for a reason. The vast majority of environmental violations, including CWA-type violations, are addressed and resolved administratively by state and local governments. In the wetlands area, most federal enforcement of the CWA occurs at the administrative level and is carried out by the EPA and the Corps, and does not involve the Department of Justice. Thus, our work is only a small, albeit important, part of CWA implementation and enforcement more generally. For instance, in the last five years, we have filed on average a dozen new wetland civil enforcement cases each year, with nearly half of those cases being settled at the time of filing.

**OUR RESPONSE TO *SWANCC***

SWANCC was an example of defensive litigation. In that case, the Corps of Engineers had asserted jurisdiction over a series of small ponds in Illinois, that the record indicated were isolated, intrastate, and non-navigable, and determined that the CWA required that the petitioner in that case, the Solid Waste Agency of Northern Cook County, needed to obtain a permit for construction of a type of landfill. The basis for the Corps' assertion of jurisdiction over the isolated ponds was evidence that they provided habitat for a large number of migratory bird species that cross interstate lines. However, the Supreme Court ruled that the Corps had

exceeded its statutory authority by requiring a permit for the filling of those ponds. In particular, the Court held that the Corps' practice of relying on the so-called "Migratory Bird Rule" to assert jurisdiction over non-navigable, intrastate, isolated waters was contrary to Congress' intent in the Clean Water Act.

Just as with any other Supreme Court case, we have striven to ensure that the legal positions taken on behalf of the federal government in litigation are consistent with SWANCC, regardless of where a case arises or which agency is involved in a particular case. Accordingly, after SWANCC was decided, the Department of Justice conducted a comprehensive review of its entire docket of Clean Water Act litigation. We carefully scrutinized any case that involved isolated waters, the Migratory Bird Rule, or any theory analogous to the Migratory Bird Rule, to determine whether SWANCC had undermined the basis for asserting Clean Water Act jurisdiction in that case. If we determined that the basis for jurisdiction in a particular case was undermined by SWANCC, we took appropriate action. For example, in Borden Ranch Partnership v. U.S. Army Corps of Engineers, in conjunction with EPA and the Corps, we re-examined the basis for jurisdiction over the one isolated vernal pool which had been destroyed and over which the court determined that there was jurisdiction, and notified the Ninth Circuit that we were withdrawing our enforcement claim regarding that vernal pool.

Another example of a case that we determined was affected by SWANCC was San Francisco BayKeeper v. Cargill Salt. That case involved a citizen suit under Section 402 of the Clean Water Act alleging that the defendant's salt-making operation had resulted in illegal discharges of pollutants into a waterbody some distance from the San Francisco Bay. The government also filed its own parallel enforcement action, which was stayed pending the result

of an appeal in the citizen suit case. In a decision rendered by the district court before SWANCC was handed down, the district court judge had sustained Clean Water Act jurisdiction over the water body based in part on the Migratory Bird Rule. After SWANCC was decided, the Justice Department filed an amicus brief in the Ninth Circuit Court of Appeals, in which we conceded that the district court's basis for finding jurisdiction could no longer be supported in light of SWANCC. We informed the Court that, if the case were remanded, the government would investigate whether there were any viable alternative bases for exercising CWA jurisdiction over the waterbody in question. After a careful inquiry, conducted in conjunction with EPA, the Justice Department subsequently decided to voluntarily dismiss its complaint in that case.

In addition to taking the necessary steps to ensure that our existing cases were consistent with SWANCC, we established a process for ensuring that the positions we take in all litigation going forward are internally consistent and appropriately coordinated within the federal government. Thus, in addition to the probing review of all of our prospective enforcement cases that I described earlier, we devote particular attention in our Clean Water Act enforcement cases to whether there is a factually and legally sound basis, consistent with SWANCC, for asserting jurisdiction over the aquatic resources in question before deciding to proceed. We carefully review such referrals or investigations to determine whether to proceed with judicial enforcement. We apply a similar process to our defensive CWA-related litigation.

Since SWANCC was decided in January 2001, we have filed briefs in at least 24 cases in which the scope of geographic jurisdiction under the Clean Water Act was a significant issue. These cases involve issues arising under the section 402 pollution discharge permit program, as

well as the section 404 program. We have made considerable efforts to review and coordinate each and every one of the briefs filed in those cases. In particular, we have assigned a team of attorneys with expertise in wetlands issues and the Clean Water Act to review all briefs addressing important SWANCC-related issues that are filed by the various trial and appellate sections within the Division. In addition to ensuring that the basic positions taken in the those briefs are internally consistent, our attorneys have also made great efforts to coordinate our positions with the appropriate agencies, primarily EPA and the Army Corps of Engineers. Moreover, our attorneys have worked proactively and cooperatively with U.S. Attorney's Offices, to share our experiences and expertise, and to ensure that the United States is speaking with one voice in the federal courts around the country.

The Solicitor General also has an important role in ensuring nationwide consistency in positions taken by the United States in litigation. Any time the Justice Department wishes to appeal from an adverse district court decision, and any time it wishes to file an amicus brief in the Circuit Courts of Appeal, the Solicitor General must authorize the filing. Indeed, the Solicitor General must also approve any decision not to appeal an adverse decision. These procedures apply to all cases, regardless of whether they are handled by a U.S. Attorney's Office or the Environment Division in Main Justice. Thus far, the Justice Department has filed three affirmative appeals and two appellate amicus briefs in SWANCC-related cases. Each of those filings has been authorized by the Solicitor General.

Our careful examination of our cases has paid off with success in the courts. Of the 24 cases in which we have filed SWANCC-related briefs in the federal courts, 17 have resulted in court decisions, and 12 of those have decisions have agreed with the government's position. But

as you can tell from the number of cases that have yet to produce court decisions, the post-SWANCC case law remains unsettled at this point. Indeed, the Justice Department is currently in the process of litigating at least six SWANCC-related cases in the Courts of Appeals for the Fourth, Fifth, Sixth, Seventh, and Ninth Circuits. Accordingly, I would be pleased to answer any question that you may have, and will also make available to the Subcommittee any brief of the United States that it requests, as they provide the best statement of the position of the United States in any particular matter.

I would like to mention another facet of our post-SWANCC activities: working cooperatively with the States. One of the basic teachings of SWANCC is that not every wetland or other aquatic area in the country is an appropriate subject of federal regulation under the Clean Water Act. At the same time, the Court acknowledged that any aquatic resources not covered by the Clean Water Act may appropriately be addressed by the States under state law.

The actions taken by States in response to SWANCC have varied tremendously. Some States, such as Wisconsin and Ohio, have enacted legislation providing new authority to fill the "gaps" created in federal regulatory jurisdiction by SWANCC and other federal court decisions. Other States are considering such legislation. Still other States are exploring ways to use existing regulatory and non-regulatory authorities and programs to address aquatic resources that can no longer be protected by the federal Clean Water Act. We have made great strides to improve federal-state cooperation and coordination in environmental protection generally, and in connection with SWANCC, we are redoubling our efforts in this regard. In particular, in December 2002, we will be hosting a national conference and training course, designed in cooperation with several State associations, EPA, and the Corps, to facilitate federal-state

partnerships in this important area.

**CONCLUSION**

In closing, I would like to assure the Subcommittee that the Department of Justice takes seriously its obligation to protect public health and the environment and to enforce and defend the existing laws. We work hard to ensure that the positions it has taken in litigation with respect to SWANCC are consistent and well-coordinated with EPA and the Army Corps of Engineers, and our efforts in this area are just a subset of the efforts that we make more generally to ensure that we take consistent positions in our court appearances across the United States. I would be happy to answer any questions that you may have about my testimony.

Mr. OSE. Thank you, Mr. Sansonetti.

Mr. Fabricant, on page ten of your testimony, you state, "The case law and Clean Water Act jurisdiction is still developing. The agencies will continue monitoring the emerging case law. Resolutions of issues on appeal and the issuance of guidance should help define and reinforce the appropriate scope of Clean Water Act jurisdiction." When I read this it suggests to me that the Corps and EPA are waiting for a number of cases in the queue to be decided before they can define jurisdiction under Section 404. Do I have an accurate understanding?

Mr. FABRICANT. No, actually the Army Corps and EPA retain the authority to move forward with guidance or rulemaking before those court cases are decided. We are not in a holding pattern waiting for those cases to be decided.

Mr. OSE. So you are prepared to issue rulemaking?

Mr. FABRICANT. We are actively working on rulemaking and the scope of the rulemaking so yes, we are prepared to move forward with rulemaking prior to those decisions being decided.

Mr. OSE. I want to come back to that.

Mr. Sansonetti, in your testimony you state, "The Department's primary role with regard to the Clean Water Act is to represent the Corps and EPA in litigation." I can only interpret that to mean that the Justice Department's is to defend the policies of the Corps and EPA?

Mr. SANSONETTI. Primarily, that is true, but of course they come to us in given circumstances and say in a particular factual situation, is this something that has already been decided by the courts. Since matters of adjacency, description of wetlands, what is a tributary are now being thought over in the courts, sometimes you have to look at these things on a case-by-case—not sometimes, all the time you must look at these on a case-by-case basis.

If there is a court holding that is out there such as SWANCC, then we can say if your particular factual situation matches that, then there is no jurisdiction. However, there are such a variety of factual situations out there right now that often the EPA and the Corps have to make a cut on whether or not they think they have jurisdiction. In some of those cases, people disagree with the result, and that has led to the litigations going on across the United States right now.

Mr. OSE. The net result is that since the Supreme Court's decision in SWANCC, we are waiting on some sort of guidance or rulemaking from the EPA and Corps, and then there are cases in the queue in front of different jurisdictions and courts of law. How do you know what policy to defend?

Mr. SANSONETTI. It can be difficult, that is why there are so many cases in the circuit courts right now. It would be beneficial, and I think both of the other panelists have stated they are going to take on rulemaking, the goal of which is going to be to provide a brighter line for American citizens to know exactly where jurisdiction will and will not lie. However, we also have to tell you what we are dealing with here, the statute passed by Congress and the regulations promulgated by these two agencies and their meanings, is something obviously the Judicial Branch is going to have a big say in.

There are approximately seven or eight cases that are in the circuit courts right now that are all percolating up from the district courts; some decided in favor of the Government, some decided against the government.

Mr. OSE. Has the Department made any determination in response to questions from the Corps or EPA as to what the meaning of adjacency or tributary or any of the other nebulous terms are?

Mr. SANSONETTI. We have worked with both agencies, and we have had to address the arguments presented by opposing counsel in briefs. Again, it is so detailed that I want to make sure I proffer those briefs to you for a detailed answer.

Mr. OSE. We will accept the briefs and put them in the record.

Mr. SANSONETTI. Sure. I would be glad to do that, sir, but those are topics that will need to be dealt with in the rulemaking.

[The information referred to follows:]

# Cases in Which U.S. Briefed SWANCC

*Courts of Appeals*

**Rice v. Harken Exploration Co.**, 250 F.3d 264 (5th Cir., April 25, 2001)

**United States v. Interstate General Co**, 2002 WL 1421411 (4th Cir. July 2, 2002) (unpublished)

**United States v. Krilich**, 2002 U.S. App. LEXIS 18445 (7th Cir., Sept. 9, 2002)

*District Courts*

**United States v. Buday**, 138 F. Supp. 2d 1282 (D. Mont., April 11, 2001)

**United States v. Stanley R. Lanski** (N.D. Ind., No. 3:00 ev 0287, May 7, 2001)

**United States v. Rueth Development Co.**, 189 F. Supp. 2d 874 (N.D. Ind., September 25, 2001, order vacated in part, February 21, 2002)

**United States v. Colvin** 181 F. Supp. 2d 1050 (C.D. Cal., December 28, 2001)

**Route 26 Land Development Association v. United States** (D. Del., Civ. No. 88-643)

**Paul and Rosemarie M. Hunter v. U.S. Army Corps of Engineers** (D. Utah, No. 1:01:CV0030)

**United States v. Deaton** (D. Md. No. MJG-95-2140, January 29, 2002)

**United States v. Lamplight Equestrian Center**, 2002 WL 360652 (N.D. Ill., March 8, 2002)

**United States v. Adam Bros. Farming, Inc.** (C.D. Cal., No. CV 00-7409 CAS, July 12, 2002)

**United States v. The New Portland Meadows, Inc.** (D. Or., Civ. No. 00-507-AS, Sept. 9, 2002)

**In re: Needham** (Bankr. W.D. La. No. 99-50242, July 30, 2001), aff'd, **United States v. Needham**, 2002 WL 1162790 (W.D. La., January 22, 2002)

**United States v. Rapanos**, 190 F. Supp. 2d 1011 (E.D. Mich. February 21, 2002)

**United States v. Newdunn**, 195 F. Supp.2d 751 (E.D. Va., April 3, 2002)

**United States v. RGM Corp.**, 2002 WL 1828278 (E.D. Va., July 26, 2002)

**June Carabell v. U.S. Army Corps of Engineers** (E.D. Mich., No. 01-72797)

**United States v. Bruce S. Dyer** (D. Mass., No. 00 CV 11013)

**FD& P Enterprises, Inc. v. U.S. Army Corps of Engineers** (D.N.J., No. 99-3500)

**United States v. Robert L. Hummel** (N.D. Ill., No. 00 C 5184)

**United States v. Phillips** (D. Mont.)

**United States v. John Pozsgai** (E.D. Pa., No. 88-6545)

**United States v. George Wilcox** (E.D. Ark., 4:99CV00806)

Mr. OSE. Are the interpretations of these nebulous terms the same regardless of district?

Mr. SANSONETTI. No. Different judges have ruled on different factual bases in different manners. You are correct.

Mr. OSE. Let me rephrase that. Do interpretations of these nebulous terms vary from EPA over Corps district office to Corps or EPA district office? Is there one standard or are there many standards?

Mr. SANSONETTI. It is not so much the standard, it is the application of those standards to a set of facts that really provides the problem.

Mr. OSE. Does the application vary from case to case?

Mr. SANSONETTI. It can, yes.

Mr. OSE. How does someone who would expect to be treated equally before the law have any certainty as to what the actual regulation says then?

Mr. SANSONETTI. They would have difficulty in so doing.

Mr. OSE. In the Borden Ranch case you cited in your written and oral testimony, you did actually examine the vernal pool issue there and in retrospect decided not to pursue that. You are, if I understand correctly, in front of the Supreme Court in early December on a horticultural practice related to Borden?

Mr. SANSONETTI. That is correct. The Borden Ranch case, the Department is presently in the process of drafting the Supreme Court brief, but the SWANCC issue is no longer involved.

Mr. OSE. Someone made a decision on the Borden Ranch case that the SWANCC decision no longer applied?

Mr. SANSONETTI. That is correct.

Mr. OSE. That was on the basis of isolated, intrastate water?

Mr. SANSONETTI. I believe that was the case, but it was determined after the division's review of the facts in the case matched against the SWANCC holding that particular count in the complaint should be dismissed, and it was. So the Supreme Court when it deals with this matter later this year will not have a SWANCC issue before it.

Mr. OSE. I am going to recognize the gentleman from Massachusetts.

Mr. TIERNEY. Thank you.

Mr. Izzo, you testified the agencies will be developing rulemaking and your words were, "to faithfully implement the Supreme Court's ruling." Are you saying the rulemaking will not contain any jurisdictional limits that are not provided in SWANCC or other Supreme Court decisions?

Mr. IZZO. No, sir, I am saying we haven't exactly settled on what the rulemaking will be and we are trying to work out the specific cases that will be included in the rulemaking.

Mr. TIERNEY. What rules, other than the migratory bird rule, have to be changed in order to be consistent with the SWANCC decision?

Mr. IZZO. We are still working on that because there are several of the other elements that have been called into question and could conceivably be included in the rulemaking, but we haven't reached a determination as to whether they should be in the rulemaking or not.

Mr. TIERNEY. You are saying SWANCC has called other elements into confusion?

Mr. IZZO. Yes, sir, SWANCC and the different opinions of the district courts.

Mr. TIERNEY. Let me stick to SWANCC because that is the controlling case, right?

Mr. IZZO. Yes, but the issue for us with SWANCC is that previously we had the migratory bird rule, which provided an umbrella over all the other jurisdictional issues.

Mr. TIERNEY. And, SWANCC gave you reason to want to deal with that in the new rulemaking?

Mr. IZZO. That is correct.

Mr. TIERNEY. That is all that SWANCC should reflect in new rules?

Mr. IZZO. I believe that is correct.

Mr. TIERNEY. That position would be consistent with the Department of Justice position, am I right, Mr. Sansonetti?

Mr. SANSONETTI. The position of the Department of Justice is best stated in our briefs.

Mr. TIERNEY. You are a great lawyer, I am sure, and if you have to argue in front of a judge, you can put what is in your briefs into some sort of verbal component, and I think we are going to ask you to do that now.

Mr. SANSONETTI. The law governing CWA jurisdiction is governed by the statute and the regulations. So we look to those in determining whether or not there is jurisdiction. The regulatory jurisdiction and the definition of waters in the United States as currently on the books authorizes these agencies to regulate four primary categories of water: traditional navigable waters, interstate waters, tributaries, adjacent wetlands, and four is isolated waters. It is only the last one that was touched upon in SWANCC, isolated waters. So we have pending enforcement cases, those I mentioned earlier, the ones on appeal, and each one deals with the first three categories that was not touched upon by SWANCC. So that gray area, if you will, is still out there in the judiciary and we will have to wait to see what happens.

Mr. TIERNEY. With respect to that one category that was dealt with in SWANCC, the Court based its decision on the migratory bird rule, correct?

Mr. SANSONETTI. It did.

Mr. TIERNEY. So when Mr. Izzo says that the only rule they would need to change would be that migratory bird rule, that would be consistent with the Department of Justice's position?

Mr. SANSONETTI. In that case, that is correct, but as I have stated before, there have been a number of cases filed by opponents to their decisions that would disagree with your statement and they have been winning. They have been winning at the lower court level, so we will have to see what happens when the matters are determined at the circuit court level. As I stated, in my testimony, 17 decisions—12 in favor of Government.

Mr. TIERNEY. So a distinct minority have gone the other way? The batting average is good.

Mr. SANSONETTI. The batting average so far is good. I guess it depends on which one gets to the Supreme Court first, and that one will have impact on all the remainder.

Mr. TIERNEY. Mr. Izzo and Mr. Fabricant, based on all that, I would say any decision your agencies might make with respect to rulemaking that do anything more than deal with the migratory bird rule would in essence be a policy decision, right?

Mr. FABRICANT. The Office of General Counsel would need to weigh in on litigation matters and litigation risks associated with revisions to the rulemaking. So it wouldn't be a pure policy matter. There would be litigation risks associated with some of the questions that have been raised by the Federal courts. So it would be a mix of the two.

Mr. TIERNEY. You obviously assess the risk, win, loss, and in which positions, but with respect to the actual issue that was in that Supreme Court decision, that deals with the migratory bird rule and that is what you need to address in the rulemaking. Anything beyond that is not occasioned by the SWANCC decision; you are doing that as a matter of policy.

Mr. FABRICANT. Clearly, the SWANCC decision is controlling law across the United States but other Federal courts raise legal issues that we need to factor into the rulemaking process. So it is a blend. In a rulemaking, the Office of General Counsel participates in a legal sufficiency review of rulemakings. It requires a blend of policy and legal analysis.

Mr. TIERNEY. It is amazing to me that in your rulemaking you would be looking at judicial decisions where there are issues that have been raised but no determination finally made. I understand how you look at a Supreme Court case. That is determinative and you are going to factor that into your rule, but it strikes me as being a bit unusual to say the least that you would choose to go beyond the Supreme Court decisions into lower court decisions where there is a distinct diversity of opinion. To me that is policymaking, a public policy choice this administration is making.

Mr. FABRICANT. Again, the rulemaking process that we agreed to is to put out a proposal. The exact scope of it hasn't been determined yet. We are still talking within the agencies and there is no predetermination of where that rulemaking might be finalized. Again, we are midstream in some of these cases. They may inform the final rule that eventually comes out or they may still be pending. Again, there is no decision that has been made today.

Mr. OSE. Mr. Duncan.

Mr. DUNCAN. Thank you for calling this hearing. I am sorry I was in other meetings and did not get to hear the testimony.

In another committee I chair, the Water Resources and Environment Subcommittee, we have had major hearings on these issues. What we see in almost every industry is that the Federal Government hands down so many rules and regulations and so much red tape, it hurts the little guy in every industry, hurts the small coal miner, the small logger, or the small farmer. In the two hearings we held several months ago, we had small farmers there crying, breaking into tears over what happened to them because of enforcement of wetlands regulations that were costing them so much money. You see these extremely big corporations that are happy

about all this because it drives out all their competition first from little guys and even the medium-sized businesses.

This is not related to the wetlands but in 1978, we had 157 small coal companies in eastern Tennessee. Now we have none. You don't just lose miners from that, you lose sales people, secretaries, lawyers, accountants and all sorts of jobs because of that. The same thing has happened in several other industries.

I understand from staff that the regulations in this area got so ridiculous that the Corps and EPA at one point had adopted what was called the Glancing Goose Test, allowing jurisdiction to be asserted over private property if a migratory bird so much as looked at it.

What I am wondering about now in this case from Cook County we have been talking about, the Supreme Court said that regulating isolated wetlands would beyond Congress' authority under the Commerce Clause because it would "result in a significant impingement of the States' traditional and primary authority over land and water use." Then you had Justice Stevens who said, "In its decision today, the Court draws a new jurisdictional line, one that invalidates the 1986 migratory bird regulation as well as the Corps assertion of jurisdiction over all waters except for actually navigable waters, their tributaries and wetlands adjacent to each." Really the Court said they found the original intent of Congress was not to give the EPA, the Army Corps, or anyone else jurisdiction over an extremely isolated wetland or some small area that would become a wetland possibly a few days each year, but this was meant to apply to actual navigable waters and their tributaries.

Is that what you all are working on now, you are trying to come up with regulations consistent with that decision or do you find the lower levels of the Army Corps and EPA and so forth are resisting that decision? Mr. Izzo.

Mr. IZZO. I don't think anybody in the lower levels of the Army Corps of Engineers is resisting that decision. It is just that this is a very complex issue. While SWANCC makes it clear that intrastate, isolated, non-navigable waters cannot be regulated solely based on use by migratory birds, there is a whole other category of things related to that which other court cases have called into question. We are trying to structure a rulemaking so that we can arrive at good rules to address that with public input, and that takes time. We have not completely defined the parameters of that rulemaking yet. I wouldn't say there is resistance at the lower levels of the Corps of Engineers, not by any means.

Mr. DUNCAN. Will you try to keep in mind what I have seen in this and so many other areas that when you come down with heavy-handed enforcement of all these rules and regulations, it is driving the little guys out of business, out of farming. It is hurting the small farms. Everybody in Congress on both sides says they are for the family farm, but everything the Federal Government has been doing is driving these people out. It helps the big giants. We come in with these supplemental appropriations bills and give them so more money trying to keep them in, but they are being forced out because they can't farm their property.

That is all I have to say, Mr. Chairman.

Mr. OSE. Thank you, Mr. Duncan.

Mr. Fabricant, I am interested in the process or the status of the process, Mr. Izzo, this may apply to you too, of the effort underway to actually initiate the rulemaking. In a very real sense, my concern is whether or not it's proceeding. I would like to know chapter and verse of the meetings that have taken place between EPA, the Corps, and the Council on Environmental Quality, what have you, to try and get this thing completed and out to the public for due process?

Mr. Fabricant. I can generally describe the process that has come up, and if you need more specifics, we can provide them. I am not sure I have all the detailed meetings for you today.

Several months after the SWANCC decision, we began our Interagency Work Group including the Army Corps of Engineers, EPA, the Department of Justice and that process in its early stages was looking at the SWANCC decision and developments regarding that decision and played several different roles, including coordinating cases as they came through in light of SWANCC.

Since then, we have been looking at whether additional national guidance could be helpful to the process and have continued that working group on virtually a weekly to bi-weekly basis of meetings that serve dual purposes, looking at and coordinating particular issues as they came up and trying to continue to move the ball regarding guidance and/or rulemaking.

Mr. OSE. Do you have dates, times, and who was in the meeting?

Mr. FABRICANT. I don't have them here today but I suspect there are some records of that we could certainly try to reconstruct.

Mr. OSE. The reason I ask is I don't think it is any secret that I am dissatisfied that after 18 months and the Supreme Court's decision, we still don't have anything that is even remotely close to being put out for proposed rulemaking. I am trying to find out who it is that is in charge of this so that instead of haranguing you I can go harangue them, if you will. If you could come up with that from an EPA standpoint, I would appreciate that.

Mr. Izzo, I would like to ask you the same question in terms of who at the Corps is participating in these conversations, when are they taking place, who is it that is driving the train so to speak? Is that available?

Mr. IZZO. Yes, sir, it is available certainly from peoples' calendars. EPA and Army have been engaged in, I would say, intense dialog on this for at least most of the summer. Prior to that, the discussions were occurring at the staff level for quite a bit of time, and I think I can safely say that they weren't progressing fast enough for our desires and that is why it was elevated to our level. We have been giving it intense attention to try and get to the point where we can do the rulemaking.

Mr. OSE. I appreciate that, but I want to go back to my question. I want to know who is involved and when the meetings have taken place, to see if there is a regular pattern of getting together or there isn't. Is the Army Corps of Engineers prepared to submit that to the committee for its edification?

Mr. IZZO. Yes, sir, we would be happy to.

Mr. OSE. Mr. Sansonetti, in the SWANCC decision, the Supreme Court stated, "We said in Riverside Bayview Homes that the word 'navigable' in the statute was of limited effect and went on to hold

that Subsection 404(a) extended to non-navigable wetlands adjacent to open waters. But it is one thing to give a word limited effect and quite another to give it no effect whatsoever. The term 'navigable' has at least the import of showing us what Congress has in mind as its authority for enacting the Clean Water Act, its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." That is the Supreme Court's actual writing in their decision.

In light of this decision, does the Justice Department believe there are alternative Commerce Clause connections other than navigation that give the Corps jurisdiction under Section 404?

Mr. IZZO. Again, the Department of Justice has addressed those constitutional arguments in a number of these briefs filed before U.S. District Courts and the Circuit Courts of Appeal. In particular, I am going to supply you with the brief in the *United States* v. *Deaton* case because that one has been to the Fourth Circuit and back. The District Court has recently held for the United States. The Deaton folks have obviously taken that back to the Fourth Circuit. Those are the issues involved in it, and I understand you will hear from the Deaton counsel later today. So the answer is that particular constitutional argument is in full litigation right now. The briefs speak for themselves. We will have to see what the Fourth Circuit says and the other circuits as well.

Mr. OSE. In summary, did the Justice Department's brief cite alternative Commerce Clause connections?

Mr. IZZO. They basically defend the Army Corps' decision in that particular wetland situation and state that the power through the regulations given to the Army Corps were jurisdictional in that case, yes.

Mr. OSE. My time has expired. I have additional questions. We will go to the gentleman from Massachusetts.

Mr. TIERNEY. I have just a couple more questions that will hopefully clarify some things.

In January 2001, the EPA General Counsel at that time, Gary Guzy, and the Corps General Counsel, Robert Anderson, issued a memorandum interpreting the Court's decision in SWANCC. Would both of you gentleman address whether or not that memorandum currently reflects the position of the EPA and the Corps?

Mr. FABRICANT. The memorandum is currently in effect, yes.

Mr. TIERNEY. So it has not been revoked?

Mr. FABRICANT. No, it has not.

Mr. TIERNEY. In the course of your rulemaking, are you going to in any way make an estimate of the numbers of acres of wetlands or miles of streams that might be affected depending on the way you interpret the rule, either narrowly and the migratory bird rule under SWANCC or more broadly if you go that route?

Mr. FABRICANT. I suspect in the course of the rulemaking that we would develop information and solicit comment from the regulatory community and public regarding those very types of issues.

Mr. TIERNEY. But that has not been done yet?

Mr. FABRICANT. To the best of my knowledge. I haven't seen that type of analysis sitting as the General Counsel.

Mr. TIERNEY. Mr. Izzo, you have seen nothing to that effect either?

Mr. IZZO. No, sir, I have not. SWANCC-related permits constitute a very small part of our workload so I would expect the total number of acres that would be affected one way or the other would be relatively small.

Mr. TIERNEY. Thank you. I have no other questions.

Mr. OSE. The gentleman from Tennessee?

Mr. DUNCAN. No.

Mr. OSE. Mr. Sansonetti, I want to go back to the line of questioning I was pursuing a moment ago. Corps regulations colloquially referred to as (a)(3) specify that water whose use cold affect interstate commerce is jurisdictional to the Corps. Are those regulations in (a)(3) consistent with SWANCC?

Mr. SANSONETTI. You are referring to Part 328, Definition of Waters in the United States, 328.3(a)(3) is the part that talks about all other waters such as interstate lakes, rivers, streams, mudflats, sandflats, wetland, etc. Obviously that particular section is one of those that is involved in the series of litigation out there.

We feel that the SWANCC decision referred to the application of a regulation; it did not strike out (a)(3), which is still in existence today. There is a Fourth Circuit case that has dealt with (a)(3) known as Wilson where they invalidated (a)(3) for the Fourth Circuit purposes but that particular decision has not made its way to the Supreme Court.

Mr. OSE. Is (a)(3) consistent or inconsistent with the SWANCC decision in the Department's opinion?

Mr. SANSONETTI. It is consistent as far as the fact that the regulation is in place and can be applied by the Corps. Where the fight comes is whether or not a particular fact situation falls within (a)(3), is a particular wetland adjacent, is a particular water body described correctly as a playa lake, is it a wet meadow? That is what a lot of the fights are about.

Mr. OSE. Section 328.1(a)(3)(i) describes waters which are or could be used by interstate or foreign travelers for recreational or other purposes. How does that relate to navigable waters?

Mr. SANSONETTI. I suspect as far as (3)(i) is concerned, it says "which are or could be used by interstate or foreign travelers for recreational or other purposes." I suppose if you have a boat, you can cross a lake and people can fish off it and take the fish to shore, that would be jurisdictional.

Mr. OSE. No. 2, "for which fish or shellfish are or could be taken or sold in interstate or foreign commerce."

Mr. SANSONETTI. Same answer. If you have folks taking out the shellfish and going to shore, that would constitute interstate or foreign commerce up on the borders of our country.

Mr. OSE. No. 3 is "which are used or could be used for industrial purposes by industries in interstate commerce."

Mr. SANSONETTI. That goes to the commerce nexus which is at debate in many of the cases.

Mr. OSE. So how does recreation, fishing, and industrial purpose relate to navigable waters, navigation in particular?

Mr. SANSONETTI. As I say, Congress wrote the law and so everyone is having to interpret exactly what you meant in that regard. The Courts have, in some instances, stated that if commerce is linked to (a)(3) (i), (ii) and (iii), then there is jurisdiction.

Mr. OSE. The Supreme Court's contention that giving the word limited effect, navigation in normal language means a putting along kind of thing.

Mr. SANSONETTI. It certainly has to have meaning but even in the SWANCC decision, in the discussion about navigability, a non-navigable tributary that leads directly to a navigable tributary was included as being jurisdictional. So the challenge to the rulemakers is going to be to determine where to draw the bright line in the gray area because you are correct, the word navigable does and should have meaning. Congress put it there, so to the degree that even the rulemaking that eventually comes out is going to be challenged, there is no doubt about that, whatever the eventual rulemaking is that comes out, we are still going to end up in court.

To the degree that the legislative branch is unhappy with that result, either the rulemaking itself or the executive branch, that is not what we meant Congress says, or you are unhappy with what the folks in the black robes say, this whole matter could potentially or should be right back here at Congress to the degree that we have done the wrong thing or made the wrong decision or you don't like what the courts say, then this needs to be amended to make it more clear, the law does.

Mr. OSE. If I interpret your remarks correctly, with all due respect, the comments of the Supreme Court as to the nexus between navigability are just being ignored. I don't see how fish or shellfish relate to navigability or how recreation relates to navigability. It is a very clear statement, it seems to me, in the SWANCC decision. I am not an attorney, but I live in the real world.

Mr. SANSONETTI. The regulations as developed by the Army Corps may or may not be correct. We will see in the courts, but I think what was tried to be laid out there were standards to use. You are trying to get at the word navigability. So if there were individuals using a water body for foreign travel, recreational purposes, shellfish, one would assume that the water body was of such size and ability to support commerce, and a ship that is on the water would be navigable. You wouldn't find a ship on a piece of water that was not navigable, of that size.

Mr. OSE. Mr. Duncan.

Mr. DUNCAN. No.

Mr. OSE. I will just keep going then.

I want to go back to the process by which we will get to published rules, even if it is just as draft for public comment. What is the hangup, Mr. Izzo and Mr. Fabricant, on finding some closure at the agency level for getting out a notice?

Mr. FABRICANT. Again, we have been dealing with the judicial decisions over the course of the last year as they talk about the SWANCC decision and how they have raised questions regarding SWANCC and how it should be applied. Again, it is a complex legal and policy issue we are dealing with and looking at individual fact patterns and how they apply to the standards that the Court laid out, and the questions that have been raised in the Federal courts.

With that kind of backdrop, we are trying to bring to closure, and we have elevated over the course of the summer the issues, and we are trying to refine what needs to be the subject of the rulemaking. So we do plan very soon to initiate that process publicly.

Mr. OSE. What does that mean, very soon? Is it kind of like the word navigable?

Mr. FABRICANT. I would hope we wouldn't need the Supreme Court to define it for me. We plan to elevate it within our offices within the next—soon.

Mr. OSE. Mr. Izzo, can you define what soon means?

Mr. IZZO. Sir, I think we are very close. As a matter of fact——

Mr. OSE. What does close mean?

Mr. IZZO. Close means we had hoped to avoid this hearing by getting it done by now.

Mr. OSE. Want to have another one?

Mr. IZZO. I don't think that will be necessary, sir. I think we are very close to this, and you will see satisfactory performance very soon.

Mr. OSE. What does close mean? What does very soon mean, Mr. Fabricant?

Mr. FABRICANT. Again, it is difficult for me to lay down a time line here today, because we do need to elevate it within our respective offices and get interagency review on our rule proposal as well as administration review.

Mr. OSE. What other agencies need to look at the rule before it comes out?

Mr. FABRICANT. As you transmit a rule proposal or advance notice to the Office of Management and Budget for OIRA review, an interagency process occurs where various agencies will look into and comment upon your proposed draft. Then there are the normal, traditional peer review and that process. Again, there is a process to actually finalizing the rulemaking portion.

Mr. OSE. When do you expect that finalization to occur?

Mr. FABRICANT. I can lay out for you the process. The specific process that OIRA requires is a 90-day review period.

Mr. OSE. That is after you finish?

Mr. FABRICANT. Correct, after Army Corps and EPA.

Mr. OSE. I am interested in these two agencies. When are you going to finish what you are supposed to finish?

Mr. FABRICANT. Very soon.

Mr. OSE. I am going to keep asking. What does very soon mean? It has been a year and a half, Mr. Fabricant.

Mr. FABRICANT. It is hard for me, without having the issue elevated within our particular agencies, to give you a hard and fast timeline but I could certainly return to the office and try to firm up a timeline for you within the next several days.

Mr. OSE. Do you have a certain date at which you have already targeted the issuance of this item?

Mr. FABRICANT. We have targeted a deadline for our next meeting to try to bring to closure our issues.

Mr. OSE. You have targeted a deadline. What does that mean?

Mr. FABRICANT. Early October. In early October, the first week of October, we are looking at a meeting to try to bring to closure the issues still outstanding.

Mr. OSE. Mr. Izzo, do you agree with that?

Mr. IZZO. Yes, sir. The only thing I would add is that this is obviously our top regulatory issue, so it gets full priority, I believe, from both agencies. While we cannot give you an exact date, we are

focused on the beginning of October and we are doing everything we can to get there quickly.

Mr. OSE. All I am trying to do is give both sides or all sides of this issue nongovernmental in nature the opportunity to exercise their due process rights. So what does the deadline for your next meeting mean?

Mr. FABRICANT. It means the working group, which includes Mr. Izzo and myself, will be meeting the first week of October to try to bring closure to the issues that are still outstanding and then elevate the principals within our agencies.

Mr. OSE. Is this your final meeting?

Mr. FABRICANT. We would hope it would be, but there are still pending issues as to the scope of the rulemaking that we need to resolve.

Mr. OSE. Of a legal nature, in front of courts and the like?

Mr. FABRICANT. Again, a blend of legal and policy matters that we are discussing.

Mr. OSE. So when do you expect to resolve those?

Mr. FABRICANT. Again, we hope in the first week of October so we can elevate it to principals within our agencies.

Mr. OSE. The first week of October would be—oh, I am going to get a date. The first week of October would mean what?

Mr. FABRICANT. Friday of the first week of October.

Mr. OSE. Give me a calendar. The first Friday of October is October 4. Is that the Friday you are referring to?

Mr. FABRICANT. Yes, Mr. Chairman. Again, I am representing EPA today.

Mr. OSE. If it were someone else, I would be asking the same questions.

Mr. FABRICANT. I understand. We hear you loud and clear to get this process moving and resolved. That meeting is intended to do that. Whether we can accomplish the goal, I am not certain, but it certainly is intended to do that on October 4.

Mr. OSE. I have my little Blackberry out here and I have gone to my calendar function and pulled up October 4. I have put in here the SWANCC—governing body—what do you call it?

Mr. FABRICANT. Interagency Work Group.

Mr. OSE. Interagency Work Group. Final meeting?

Mr. FABRICANT. Hopefully final meeting.

Mr. OSE. What does that mean?

Mr. FABRICANT. Our hope is that we can finalize at least at the Work Group level the open issues.

Mr. OSE. Hopefully is not good enough for me. I don't know how to spell it, so it is either the final meeting or it is not. Which is it?

Mr. FABRICANT. It is intended to be the final meeting.

Mr. OSE. Mr. Izzo, do you agree with that?

Mr. IZZO. Yes, sir, I do. That is the plan.

Mr. OSE. Once it leaves this final meeting on or before October 4, where does it go?

Mr. FABRICANT. If policy decisions have been made at that time and there is consensus, we bring it to principals to review and sign-off on.

Mr. OSE. What does that mean?

Mr. FABRICANT. It means it gets elevated within our agencies to individuals with rulemaking authority—Governor Whitman in my agency. Again, after those decisions are made and this process will be occurring concurrently to develop language to actually have a document ready as soon as possible, but there will certainly be some period of drafting after policy decisions have been made.

Mr. OSE. Mr. Izzo, where does it go on your side of the discussion?

Mr. IZZO. It would go to the Acting Assistant Secretary for the Army for Civil Works, Mr. Brownlee, for approval.

Mr. OSE. That would be Les Brownlee, right?

Mr. IZZO. Yes, sir.

Mr. OSE. Mr. Sansonetti, what role do you play in this?

Mr. SANSONETTI. If they ask us to attend their meetings, we attend and give them advice at the meetings, but they obviously make the final decision on performing rulemaking and take it to the top of their two agencies.

Mr. OSE. October 4? I have some more questions.

Mr. Duncan, do you have anything?

Mr. DUNCAN. No.

Mr. OSE. Mr. Sansonetti, is the Justice Department litigating any cases involving geographically isolated waters, whatever the word isolated means?

Mr. SANSONETTI. The answer is no.

Mr. OSE. None. On the basis of SWANCC, you made a decision that the Corps' jurisdiction does not extend to these waters?

Mr. SANSONETTI. There just happen to be no cases in the pipeline right now that deal with that.

Mr. OSE. Mr. Izzo, the Department of Interior has actually published a definition of isolated which reads as follows, "wetlands surrounded by upland may be considered isolated since they are separated from other wetlands by dry land. This is isolation from a geographic landscape or geomorphic perspective."

The question I have is, if a wetland is separated from a jurisdictional water by dry land, does the agency consider that wetland to be isolated?

Mr. IZZO. Well, sir, those decisions about the facts of an individual case would be made by our district personnel actually looking at the site, because it gets a little complicated in that. There are multiple definitions of these different types of wetlands out there. That would be the definition that would be applied.

Mr. OSE. The Administrator of the EPA under an elevation issue or otherwise?

Mr. IZZO. The EPA provides us the guidance for implementing these regulations, the environmental guidance, so we would follow their definition.

Mr. OSE. Mr. Fabricant, if a wetland is separated from a jurisdictional water by dry land, does the EPA consider that wetland to be isolated?

Mr. FABRICANT. As Mr. Izzo stated, it is a fact-specific analysis that occurs at the local level. What we would do is follow our regulatory language regarding adjacency and look to the definition which includes contiguous neighboring, bordering. The separation by a berm does not necessarily lead to a break in jurisdiction as

our regulations spell out, but it is a fact-sensitive analysis that needs to occur.

Mr. OSE. Has the EPA provided the Corps with a definition of contiguous?

Mr. FABRICANT. To the best of my knowledge, no, Mr. Chairman.

Mr. OSE. Is there a definition of the word contiguous in regulation or statute?

Mr. FABRICANT. I don't believe so.

Mr. OSE. Has the EPA provided the Corps with a definition of the word bordering?

Mr. FABRICANT. To the best of my knowledge, no.

Mr. OSE. Is there a definition in statute or regulation of the word bordering?

Mr. FABRICANT. To my knowledge, no.

Mr. OSE. Has the EPA given the Corps a definition of the word neighboring?

Mr. FABRICANT. Same answer, no.

Mr. OSE. Is there a definition in statute or regulation for the word neighboring?

Mr. FABRICANT. No, there is not. That sort of begs the question whether this might be an appropriate area to consider for additional rulemaking. It is currently being discussed within the agency.

Mr. OSE. I want to come back to my central point. Without a definition, without a standard, without cooperation between your agencies to move this forward, I don't care what your perspective is, whether you are over here or over there, this area is rife with opportunity for unequal treatment before the law. A citizen in one part of the country might be treated far differently than a citizen in another part of the country.

Mr. OSE. The gentleman from Ohio for 5 minutes.

Mr. KUCINICH. I thank the gentleman.

Mr. Sansonetti, the Justice Department has filed briefs in a number of post-SWANCC cases in the Federal District and Appeals Courts and some of those have been signed by you. These briefs have consistently argued that the Supreme Court's decision should be read narrowly, that the decision only held that the Clean Water Act did not authorize the Army Corps of Engineers to regulate isolated waters based solely on the presence of migratory birds under the so-called migratory bird rule. Do you stand by this position?

Mr. SANSONETTI. Of course, they are our briefs. We signed them.

Mr. KUCINICH. One DOJ brief states, "The regulations have consistently construed the act to encompass wetlands adjacent to tributaries to traditional navigable waters be they primary, secondary, tertiary, etc. since 1975, a construction that comports with Congress' intent to control pollution at its source and broadly protect the integrity of the aquatic environment." The question is, do you agree that in order to achieve the goals of the Clean Water Act to restore and maintain the physical, chemical, and biological integrity of the Nation's waters, pollution must be controlled at its source, including wetlands and small streams that are hydrologically connected to navigable waters?

Mr. SANSONETTI. The briefs speak for themselves as far as the legal position. In regard to your comments about what a policy

should be, I am afraid that particular question has to be answered by my clients. They are the ones that determine the policies involved with the Clean Water Act.

Mr. KUCINICH. Would one of the gentlemen like to respond?

Mr. FABRICANT. As a legal matter, we follow the statute in the Clean Water Act and associated regulations, and we have referred cases that have involved those types of issues to the Department of Justice who has submitted briefs on our behalf as we have laid out.

As a policy matter, I am a General Counsel speaking to the legal issue and would not address the policy matter here today.

Mr. KUCINICH. Mr. Fabricant, you mentioned bringing closure to a number of issues on October 4. Would you elaborate what those issues are?

Mr. FABRICANT. As referenced earlier, it is a series of questions raised by Federal courts in the wake of the SWANCC decision that we are looking at for a rulemaking.

Mr. KUCINICH. What are the issues?

Mr. FABRICANT. Issues such as intermittency of streams, culverting issues that have come up in particular cases. Those are examples of the things we are currently talking about specifically raised by Federal courts as questions in light of SWANCC.

Mr. KUCINICH. Thank you.

[The prepared statement of Hon. Dennis J. Kucinich follows:]

**Congressman Dennis Kucinich**
**September 19, 2002**
**Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs**
**Agency Implementation of the SWANCC Decision**

- When the Clean Water Act was passed in 1972, it was intended to clean up pollution in "the waters of the United States." Its purpose is to clean and prevent pollution in **all** the nation's waters, not just some. The Clean Water Act has survived previous attempts to limit its jurisdiction, such as the original Army Corps regulations that interpreted "waters" based on navigability, but were overturned by a Federal District Court. The broad interpretation of "waters" was reinforced in 1986, when the Corps explicitly named interstate waters and intrastate waters, such as lakes, rivers, streams, wetlands, wet meadows, playa lakes and natural ponds. The reason that all water bodies were included is simple. Water moves throughout a hydrologic cycle; it doesn't merely stay put in one lake or one aquifer. When it moves, it can bring pollution with it, so laws and regulations to reduce and eliminate water pollution must, by necessity, apply to all waters.

- The question of whether or not the CWA applies to isolated waters didn't even come up until the *SWANCC* decision. In fact, the word "isolated waters" was created during *SWANCC*. Congress never intended to create a distinction between "isolated waters" and other water bodies. "Isolated waters" is not a scientific term. It can be argued that "isolated waters" isn't even a term that makes sense, because water bodies that may seem separate to the naked eye, are in fact connected in other ways through water overflow and groundwater. The notion of separating out isolated waters from the Clean Water Act is antithetical to the purpose of the law, which is to reduce all water pollution.

- But isolated waters aren't the issue. The Supreme Court decision made no legal holding on isolated waters. The issue that *SWANCC* brought to light was the use of the Migratory Bird Rule to determine CWA jurisdiction; **not** isolated vs. other water bodies. This is what must be clarified.

- Since there has been such confusion over the meaning of *SWANCC,* and such differences in the way the law is being implemented, it is incumbent upon us to clarify the actual legal holding of *SWANCC*. The consequences of failing to do so in an accurate manner may threaten 20 - 60 percent of the waterways under the Clean Water Act.

- It was over a year ago, in a July 20, 2001 letter from EPA Administrator Whitman to members of this Subcommittee, that EPA and the Corps anticipated "providing direction in the next few months to the field on implementation of existing regulations in light of *SWANCC*." The delay has been too long, and the consequences of delay have been significant. I urge the agencies before us today to take swift action to clarify the *SWANCC* decision in keeping with the original Guzy memo, issued immediately after the decision.

Mr. OSE. I am advised that we have three votes scheduled, which will take who knows how much time, but they are scheduled very soon. I have some additional questions and I want to run through a couple quickly, then we will finish this panel. We will submit the additional questions in writing and would appreciate a response in a timely manner. Timely means a week to 10 days. I would be happy to give you a date if you like.

Mr. Sansonetti, is the Justice Department litigating any cases involving adjacent wetlands?

Mr. SANSONETTI. I believe the answer to that is yes but none of our current cases rely on the (a)(3) definition we discussed earlier for jurisdiction.

Mr. OSE. Is (a)(3) the only location where adjacency is a criteria in terms of wetlands?

Mr. SANSONETTI. I think not. I think (7) refers to wetlands adjacent to waters also.

Mr. OSE. Do you know whether or not we have a policy statement as to what is and what isn't adjacent to a wetland?

Mr. SANSONETTI. I believe the regulation says adjacent is bordering, contiguous, or neighboring and those are what the fights are about.

Mr. OSE. For which we have no statutory or regulatory definitions?

Mr. SANSONETTI. That is one of the items the Army Corps and the EPA are going to have to deal with in the rulemaking.

Mr. OSE. I am kind of curious how you all can take the position in a legal case when you don't have these items defined.

Mr. SANSONETTI. If a case is filed, you don't have a choice. If you are sued and they come to you because they have made a decision not to issue a permit and somebody says they should have issued a permit, and the fight is over adjacency, then I need to defend the Army Corps' cut on it. Sometimes it is because they granted a permit, many times it is because they didn't grant a permit.

Mr. OSE. In these discussions when these items are brought to you, do you flesh out a position on what adjacency is or is not?

Mr. SANSONETTI. They are certainly discussed and they will say in this particular instance, it was right next door to a navigable tributary and surely that must mean adjacent. In other instances, it is six miles away and somebody goes, are you sure? They say that is why we didn't say they needed a permit. Somebody else, an environmental group, somebody wanting to stop the activity says that it is close enough, you should have made them get a permit. So the topic comes up continuously on a case-by-case basis.

Mr. OSE. I would be curious about your experiences in court. How do you straddle these amorphous positions? I don't get it. You have a highly variable situation here. How do you prosecute your defense?

Mr. SANSONETTI. It is part of the joys of practicing law, Congressman.

Mr. OSE. So you don't know either.

Mr. Izzo, in the SWANCC decision, I want to go back to the term navigable. In the SWANCC decision, the Court found, and I talked to you about the quote on navigability, but that quote raises a number of questions about non-navigable waters, including non-

navigable tributaries. I want to run through a series of questions because I am trying to give you some food for thought, if you will, in this meeting that is going to be held very soon.

If a water is connected to a truly navigable water, must there be a continuous surface flow to render that water jurisdictional?

Mr. IZZO. If they are connected. If they are two bodies of water connected, I think there is clearly jurisdiction.

Mr. OSE. What about an ephemeral stream?

Mr. IZZO. There it gets a bit more particular and that is one of the issues we are looking at for rulemaking.

Mr. OSE. How about an agricultural ditch that was man made so as to drain a field?

Mr. IZZO. Again, those are issues that we are looking at for rulemaking because these get very complicated. For example, in a dry year, some of your ephemeral streams almost cease to exist by definition. You could go out there and with some of the public interested in getting permits, depending on the weather conditions, which can be long term, something that was a wetland several years ago may be gone now. We are wrestling with how to define those issues in a rulemaking.

Mr. OSE. It is my understanding that ephemeral streams in some areas of the country were not jurisdictional prior to SWANCC. Is that true?

Mr. IZZO. I don't know, sir.

Mr. OSE. Is there an upstream point on these ditches or ephemeral streams or tributaries at which a continuous flow would become sufficiently de minimis that it would no longer qualify as jurisdictional?

Mr. IZZO. Again, that is one of the issues that we need to look at for rulemaking. We understand the problem completely. That is why it has taken so long.

Mr. OSE. Is there a point at which flow would become sufficiently ephemeral or temporary that a stream or tributary or ditch would no longer qualify as jurisdictional?

Mr. IZZO. Same answer, sir.

Mr. OSE. The Clean Water Act does not incorporate into its jurisdiction groundwater by our reading. Does the agency consider a groundwater flow to be a connection that can establish jurisdiction over an upgradient water?

Mr. IZZO. I don't want to speak for the EPA, but I believe they stated in the past and the courts have agreed that groundwater itself generally does not constitute waters of the United States. However, under certain circumstances, that groundwater may provide a sufficient base for establishing a connection. Again, that is something we should look at through rulemaking.

Mr. OSE. You are suggesting this groundwater might be navigable?

Mr. IZZO. No, sir, I am not suggesting the groundwater might be navigable, but it might provide a sufficient connection hydrologically to establish adjacency.

Mr. OSE. So if they turned off the pump, it would no longer be adjacent?

Mr. IZZO. I wouldn't want to get at that.

Mr. OSE. Do you see the dilemma that constituents in everyone's district have?

Mr. IZZO. Yes, sir. I am very sympathetic to that and I would like to believe that our Corps regulatory people in the districts are also very sympathetic to that and that they are working with the regulated public to minimize these problems. I think that is why we have so relatively few cases that make it to Mr. Sansonetti.

Mr. OSE. Is there a single standard nationwide for defining adjacency?

Mr. IZZO. No, sir. That is what the rulemaking is about.

Mr. OSE. Is there a single standard nationwide for defining isolated waters?

Mr. IZZO. No, sir. Again, we are going to address those things in the rulemaking.

Mr. OSE. On October 4.

Mr. IZZO. On or before October 4.

Mr. OSE. At least at your level?

Mr. IZZO. At least at our level, yes, sir, we hope so.

Mr. OSE. I have to go vote.

I want to thank the witnesses for coming. I am determined that you shall put out a rule. I am not trying to tell you what the rule says, but I am intent on getting out a rule and getting the due process started for the benefit of the country.

The issues of what is in or not in the courts are not going to change. You are always going to have cases in court, so you might as well face that and get on with it.

Mr. Sansonetti, Mr. Fabricant, Mr. Izzo, we appreciate you coming. I am determined to get this thing out one way or the other. We deserve to know what the standards are. Whatever the rule is, it is, but get it out.

We are going to recess until 12:15 p.m., so I would recommend everyone go get a bite to eat. We have the room until 2 p.m. We will be finished by 2 p.m. I will be back at 12:15 p.m. We are in recess until then.

[Recess.]

Mr. OSE. We will reconvene the hearing of the Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs.

Joining us in our second panel are a number of witnesses: Virginia S. Albrecht, partner, Hunton & Williams; M. Reed Hopper, principal attorney, Pacific Legal Foundation; Nancie G. Marzulla, president, Defenders of Property Rights; Raymond Steven Smethurst, partner, Adkins, Potts & Smethurst; Gary Guzy, partner, Foley Hoag, L.L.P.; and Patrick Parenteau, professor of law, Vermont Law School. Welcome.

As I said earlier, we routinely swear our witnesses, so if you would all please rise and raise your right hand.

[Witnesses sworn.]

Mr. OSE. Let the record show the witnesses all answered in the affirmative.

We have received your written testimony; we have gone through it. In the interest of time given that we have another subcommittee coming in at 2 p.m., I would like to go through everyone's oral testimony. If you can summarize, that would be great. Why don't we

go to 4 minute summary periods. That will expedite things and we will go directly to questions.

Ms. Albrecht.

**STATEMENTS OF VIRGINIA S. ALBRECHT, PARTNER, HUNTON & WILLIAMS; M. REED HOPPER, PRINCIPAL ATTORNEY, PACIFIC LEGAL FOUNDATION; NANCIE G. MARZULLA, PRESIDENT, DEFENDERS OF PROPERTY RIGHTS; RAYMOND STEVEN SMETHURST, PARTNER, ADKINS, POTTS & SMETHURST; GARY GUZY, PARTNER, FOLEY, HOAG, L.L.P.; AND PATRICK PARENTEAU, PROFESSOR OF LAW, VERMONT LAW SCHOOL**

Ms. ALBRECHT. Thank you for holding this hearing and giving me the opportunity to come before you.

The SWANCC issue has been an issue of tremendous importance for our clients ever since SWANCC was decided and actually the issue of Clean Water Act jurisdiction long before SWANCC was decided.

Just to quickly summarize, I have given you extensive things including our Law Review article on the meaning of SWANCC and the legislative history behind the Clean Water Act.

Mr. OSE. Those of you who have submitted attachments and exhibits, those are all going to be entered into the record.

Ms. ALBRECHT. I want to make three points. First of all, SWANCC is about more than the migratory bird rule. The issue in the case was the Corps' application of the migratory bird rule to claim jurisdiction over these isolated wetlands, but the rationale the Supreme Court used in tackling that issue informs all decisions about what the Clean Water Act means.

In the case, the reason they held these isolated waters were not jurisdictional was the Court went back and said what was Congress trying to do when it passed the Clean Water Act and talked about how Congress was exercising its authority to regulate navigation. That gets to the passage that you were questioning the witnesses about earlier. The Court said the use of the term navigable indicates what Congress was trying to get to, its traditional authorities over navigation.

That means that jurisdictional theories based on effects on commerce are no longer valid theories because that isn't what Congress was trying to exercise. Those effects on commerce theories like use by out-of-State travelers, use for shellfish sold in interstate commerce, those kinds of things are unrelated to navigation.

We would say—developed quite extensively in the article attached—those kinds of jurisdictional theories are no longer valid after SWANCC.

Second, I wanted to make a point about the post-SWANCC cases that have been decided. Mr. Sansonetti talked about how the Justice Department has filed 24 briefs. There have been 17 decisions. It is really important to understand the procedural posture of most of those cases.

About half of those cases—not quite half—were situations in which one of the parties was trying to set aside a plea agreement, a guilty plea, a consent decree, or something else which had been entered into prior to SWANCC. After SWANCC came out, they

came back and said, "I want to change my mind, I don't want to take that plea."

In those situations, the courts uniformly looked at that and said, "You made your bed; you are going to lie in it. We are not going to go back and revisit that argument." In the cases in which the courts had been operating on a clean slate where they had been looking in the first instance at whether something is jurisdictional or is not, the Government has won about half of those cases and the people challenging the Government's jurisdiction have won about half of those cases. So there are profound issues that have come out and that are being decided.

A third point I would like to make is that when the migratory bird rule was in effect, because migratory birds are everywhere, everything was jurisdictional. All the other jurisdictional tests kind of fell by the wayside—what is tributary, what is adjacent, etc.

Now what has happened because the migratory bird rule did provide an umbrella and now that umbrella is gone, now these issues about what is meant by adjacency, what is meant by tributary, those are very, very important issues that need to be addressed.

One of the things that came earlier during testimony was whether or not a mere connection is enough. The Government in some cases has been advancing that theory and it is incorrect. I hope you will ask me some questions about it.

[NOTE.—Exhibits in support of statement of Ms. Albrecht may be found in subcommittee files.]

[The prepared statement of Ms. Albrecht follows:]

Statement of
Virginia S. Albrecht
Partner
Hunton & Williams

**Before the**
**Subcommittee on Energy Policy, Natural Resources,**
**and Regulatory Affairs of the Committee on Government Reform**
**United States House of Representatives**

**September 19, 2002**

Good morning, Chairman Ose and Members of the Subcommittee. I am Virginia Albrecht, a partner in the Washington, D.C., office of the law firm of Hunton & Williams. For nearly 20 years I have devoted my practice to wetlands, endangered species, and other federal programs that affect the use of land. I have advised clients on section 404 permitting matters throughout the nation, particularly in the West and in Florida, and have litigated many of the key wetlands cases, including the Tulloch Rule case, *National Mining Ass'n v. Corps of Engineers*, 145 F. 3d 1399 (D.C. Cir. 1998) (invalidating an agency rule claiming the authority to regulate excavation activities under the Clean Water Act), and *Hoffman Homes v. EPA*, 999 F. 2d 256 (7th Cir. 1993) (rejecting EPA assertion of jurisdiction over isolated wetland). In short, I have extensive on-the-ground experience with the regulatory regime under the Clean Water Act as it has been implemented in the past and as it is now being implemented.

I also serve as Director, Government Affairs, for the Foundation for Environmental and Economic Progress, a coalition of large land-holding companies, and am lead counsel to a coalition of trade associations here in Washington who are working together to enforce the United States Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*). The members of that coalition are the Building Industry Legal Defense Foundation, the Foundation for Environmental and Economic

Progress, the International Council of Shopping Centers, the National Association of Home Builders, the National Association of Industrial & Office Properties, National Association of Realtors, the National Federation of Independent Business Legal Foundation, the National Multi Housing Council/National Apartment Association, and the Real Estate Roundtable.

Thank you for the opportunity to provide testimony today on federal agency implementation of the *SWANCC* decision. *SWANCC* is only the second case since the passage of the Clean Water Act (CWA) in which the Supreme Court has addressed the geographic reach of federal jurisdiction under that Act. In ruling in *SWANCC* that the United States Army Corps of Engineers exceeded that jurisdiction by attempting to regulate non-navigable, isolated waters under its "Migratory Bird Rule," the Supreme Court set forth several principles which require the agencies to cease their attempts to claim jurisdiction over areas and features that are only remotely related to "navigable waters" and that are better managed under the traditional authorities of the states over land and water use.

Rather than reassess their jurisdiction in light of this dispositive Supreme Court decision, the agencies have failed to give direction to their staff or to the regulated community. The result is that some in the agencies have been able to work to retain as much jurisdiction as they can through novel and creative theories concerning the meaning of such terms as "tributary" and "isolated," neither of which is defined by existing regulations. For example, the Corps and EPA have claimed jurisdiction over remote ditches and wetlands on the theory that any "surface water connection," or any potential that a molecule of water could eventually mix with a downstream navigable water, creates federal jurisdiction. These attempts to replace the invalidated "Migratory Bird Rule" with a new "Migratory Molecule Rule" are unauthorized by the CWA, violate the letter and spirit of *SWANCC*, impose significant burdens on the regulated public (not

to mention the Corps' regulatory staff and budget), and provide little or no environmental benefit.

Instead of attempting to circumvent this important decision, the Corps and EPA should initiate a rulemaking to redefine their jurisdiction consistent with the CWA and *SWANCC* and provide the public clear guidance on the scope of federal jurisdiction.

## I. The *SWANCC* Decision

For years, federal agencies have asserted wide-ranging jurisdiction under the CWA on tenuous legal grounds. The CWA by its terms bars discharges only to "navigable waters," which it defines as the "waters of the United States, including the territorial seas."[1] Nonetheless, three years after the 1972 passage of the relevant provisions of the CWA, a district court held that the statute extended federal jurisdiction to the full extent of Congress's broad authority under the Constitution's Commerce Clause, including Congress's authority over activities that "affect interstate commerce."[2] That decision was never appealed (although it has now been overruled by *SWANCC*). Instead, the Corps and EPA gradually claimed jurisdiction over virtually all the waters in the nation, including navigable waters, their non-navigable tributaries, upper reaches of and drainage ways to those tributaries, ditches, swales, adjacent wetlands, and non-navigable, isolated, intrastate waters and wetlands.

### A. CWA an Exercise of Navigation Power, Not Congress's Power to Regulate Things "Affecting Commerce"

In *SWANCC*, however, in rejecting federal jurisdiction over a non-navigable, isolated, intrastate water, the Supreme Court held that Congress intended under the CWA to exercise only

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[1] 33 U.S.C. § 1362(7), (12).

[2] *NRDC v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975).

its authority over navigation. This decision requires a reassessment of agency practices under the CWA.[3]

Of critical importance to the Court's conclusion was the plain text of the CWA, which grants jurisdiction over only "navigable waters." The Court found that "[t]he term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the Clean Water Act: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made."[4] Because the Migratory Bird Rule was based on Congress's broader power to regulate activities substantially affecting interstate commerce–not on Congress's "commerce power over navigation"–the Migratory Bird Rule exceeded the scope of the CWA. As the Court observed, "this is a far cry, indeed from the 'navigable waters' and 'waters of the United States' to which the statute by its terms extends."[5]

### B. Clear Congressional Statement Required for Jurisdiction Beyond Traditional Navigable Waters

The Corps argued in *SWANCC* that it had the authority to regulate beyond navigable waters, citing *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985), which approved jurisdiction over a wetland that actually abutted a navigable waterway. The Supreme Court rejected that argument, however, and made clear that federal agencies may assert jurisdiction beyond navigable waters only if they can show clear congressional authority to do so. In so doing, the Court invoked the familiar canons of statutory construction that a clear congressional statement is required to authorize agency interpretations that push the limits of the commerce

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[3] For a complete discussion of the *SWANCC* decision, *see* Virginia S. Albrecht & Stephen M. Nickelsburg, *Could SWANCC Be Right? A New Look at the Legislative History of the Clean Water Act*, 32 ELR 11042 (September, 2002) at Exhibit 1.

[4] *SWANCC*, 531 U.S. at 172.

[5] *Id.* at 173.

power, and that a clear congressional statement is required to authorize agency interpretations that impinge on local control over land and water use. Because "Congress does not casually authorize administrative agencies to push the limit of congressional authority," the Court demanded a "clear indication that Congress intended that result."[6] To satisfy this "clear statement rule," the agency's interpretation must be "plain to anyone reading the [statute]."[7]

The clear statement rule has several purposes. It ensures, before agencies adopt and courts endorse statutory interpretations that push federal regulatory authority to its limits, that Congress has actually considered and authorized the agencies to do so–which preserves the essential lawmaking role of this branch of government. It provides clear guidance to the states as to how far federal regulation is authorized to go and provides states maximum discretion to fashion their own regulatory policies as they believe to be appropriate–as the Commonwealth of Virginia has set forth in a brief recently filed in the U.S. Court of Appeals for the Fourth Circuit.[8] And it provides clear guidance to the individuals, small businesses, and state and local agencies who must comply with the complicated and expensive regulatory regimes that are promulgated under the CWA.

Because the Migratory Bird Rule "invoke[d] the outer limits of Congress' power" and would "alter the federal-state framework by permitting federal encroachment upon a traditional state power," the Supreme Court rejected it.[9] The Court found no clear statement authorizing the Corps' regulations or the Migratory Bird Rule–indeed, "[r]ather than expressing a desire to

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[6] *Id.*

[7] *Gregory v. Ashcroft*, 501 U.S. 452, 467 (1991).

[8] *See* Brief of the Commonwealth of Virginia in *Kentuckians for the Commonwealth v. Rivenburgh*, Nos. 02-1736 and 02-1737 (4th Cir. 2002) at Exhibit 2.

[9] *SWANCC*, 531 U.S. at 173-74.

readjust the federal-state balance in this manner, Congress chose to 'recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources.'"[10] The Court, therefore, "read the statute as written to avoid the significant constitutional and federalism questions raised by [the Government's] interpretation" and limited the CWA to "the 'navigable waters' and 'waters of the United States' to which the statute by its term extends."[11]

### C. *Riverside Bayview* Interpreted to Authorize Jurisdiction Only Over Wetlands "Actually Abutting" Navigable Waterway

In so holding, the Supreme Court also clarified and limited the reasoning of its decision in *Riverside Bayview Homes*. In *Riverside Bayview Homes*, the Supreme Court approved a formal rule that asserted jurisdiction over wetlands adjacent to navigable waters. Although the Court had opined in *Riverside Bayview Homes* that Congress intended "to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term"[12] – *i.e.*, wetlands–*SWANCC* rejected the argument that the term "navigable" had been read out of the statute.[13] "In [*Riverside Bayview*]," the Court emphasized, it had "held that the Corps had § 404(a) jurisdiction over *wetlands that actually abutted on a navigable waterway*."[14] Furthermore, although the Corps argued that Congress had acquiesced in its 1977 regulations (which regulated "isolated waters") when it failed to overturn them when passing the 1977 CWA

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[10] *Id.* at 174 (quoting 33 U.S.C. § 1251(b)).

[11] *Id.*

[12] *Riverside Bayview Homes*, 474 U.S. at 133-34

[13] *SWANCC*, 531 U.S. at 172.

[14] *Id.* at 167 (emphasis added).

Amendments,[15] the Court read Congress's intentions far more narrowly. The 1977 debate "'centered largely on the issue of wetlands preservation,'" and the Court found no "acquiescence to the Corps' regulations or the 'Migratory Bird Rule.'"[16] In short, in 1977 Congress "unequivocal[ly]" considered the Corps' authority over wetlands abutting navigable waters.[17] Beyond that, the Court found no clear statement of congressional authority for broad Corps regulations.

## II. Agency Failure to Implement the Decision

With the Supreme Court having decided *SWANCC*, the executive branch has an unequivocal obligation to give meaning and effect to the decision. But it has failed to do so. Despite repeated promises by the agencies that national guidance is forthcoming, no guidance has been issued. The absence of national level policy that effectuates the *SWANCC* decision has led to numerous problems.

### A. Continued Reliance on "Affecting Commerce" Theories Rejected by Supreme Court

*SWANCC* clearly eliminates CWA jurisdiction over isolated waters that are intrastate and non-navigable, where the sole basis for asserting CWA jurisdiction is the actual or potential use of the waters as habitat for migratory birds. Similarly, jurisdiction cannot be based on the other rationales of 328.3(a)(3)(i)-(iii) (use of the water by interstate or foreign travelers for recreational or other purposes; the presence of fish or shellfish that could be taken and sold in interstate commerce; use of the water for industrial purposes by industries in interstate commerce). These factors, like the Migratory Bird Rule, are founded on an "affecting interstate commerce" theory

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[15] *Id.* at 168-71.

[16] *Id.* at 170.

[17] *Id.* at 167.

of jurisdiction, not on Congress's commerce power over navigation. Therefore, these other factors are impermissible in light of *SWANCC* and cannot be used as a basis for jurisdiction. Not only have the agencies failed to expressly dismiss these other factors as a permissible basis of jurisdiction, but the Los Angeles District of the Corps has issued regional guidance after *SWANCC* that specifically embraces the affects test and the other factors listed under 33 C.F.R. § 328.3(a)(3). *See* Exhibit 3.

### B. Development of New "Migratory Molecule" Theory to Recapture Lost Jurisdiction

Instead of faithfully implementing the *SWANCC* decision, the agencies have focused on reclaiming lost jurisdiction by inventing new interpretations of their existing regulations and procedures. Certain regulatory terms such as "isolated," "tributary," "interstate," and "impoundment" that are not defined by existing regulations have been ripe for reinterpretation by districts and regions eager to maintain broad jurisdiction. For example, with no definition of the term "isolated," the agencies have in effect claimed that no water is isolated under a theory that any hydrological connection to a navigable water, be it surface or underground, can establish federal jurisdiction over the upstream.

For example, on the eastern shore of Maryland, in tidewater Virginia, and in Bay County, Michigan, the Corps continues to claim regulatory jurisdiction over wetlands on property miles away from navigable waters, which have nothing to do with navigation. In such circumstances, the agencies have found jurisdiction by showing that a ditch or swale runs next to wetlands, continues downhill, eventually connects to other ditches, then creeks and overland, and eventually to navigable waters.[18] Often those "connections" stretch for miles and are made up of

[18] *See United States v. Deaton*, Civ. No. MJG-95-2140 (D. Md.), *appeal pending*, No. 02-1442 (4th Cir. 2002); *United States v. Newdunn Assocs.*, 195 F. Supp. 2d 751 (E.D. Va.), *appeal* (continued...)

narrow, shallow ditches and swales that seldom contain water. Many of the ditches that have been reborn as "tributaries" are nothing more than roadside ditches that lie alongside rural roadways throughout our nation. As long as a theoretical "hydrological connection" exists–in other words, if a molecule of water could run downhill and eventually reach a navigable water–the Corps claims jurisdiction. As we all know, rainfall flows downhill from wherever it falls in the drainage basin. *See* Exhibit 5. The Corps' "surface water connection" and "migratory molecule" theories would create jurisdiction throughout the nation.

In a similar vein, the Galveston District Corps of Engineers issued guidance after the *SWANCC* decision opining that "all wetlands/waters that lie within the 100-year floodplain [are] adjacent" as a "hydrologic[al] connection can exist during a flood event." *See* Exhibit 3. Given the flat topography of coastal cities like Houston, theoretically, the entire city could lie in the 100-year floodplain and thus be subject to federal jurisdiction. Other districts have pointed to underground hydrological connections through man-made storm-water drainage systems to establish jurisdiction.

**C. Assertion of New Definitions of "Interstate" Waters**

Similarly, the Los Angeles District, Arizona Section of the Army Corps of Engineers issued a "Special Public Notice" on August 21, 2002, that proposed to adopt a list of jurisdictional "interstate waters" for the State of Arizona and a small area in southeastern California. *See* Exhibit 3. The term "interstate waters" is not currently defined by the Corps' regulations, but the District's notice defines this term to mean "all waters that flow across state, *tribal*, or international boundaries" (emphasis added). Included on the "interstate waters" list are

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*pending*, No. 02-1594, 02-1480 (4th Cir. 2002); *United States v. RGM Corp.*, No. 2:01cv719 (E.D. Va. July 26, 2002); *United States v. Rapanos*, 190 F. Supp. 1011 (E.D. Mich.), *appeal pending*, No. 02-1377 (6th Cir. 2002).

several ephemeral washes that used to be regulated as non-navigable, isolated, intrastate waters under the Migratory Bird Rule. Now, under this new definition, these washes are considered to be "interstate waters" and jurisdictional because they flow both in the State of Arizona and onto tribal land.

### D. Continued Federal Intrusion on Land and Water Resources That are Traditionally the Province of State and Local Government

Through these new interpretations, local Corps Districts and EPA regions have fallen back to the familiar, continuing to assert jurisdiction over waters previously regulated under the Migratory Bird Rule, and thus intruding into the state and local sphere. This is contrary to *SWANCC*. *See* Exhibit 3 (Sacramento District Guidance, finding that the "Corps of Engineers jurisdiction has not been substantially changed" as a result of *SWANCC*). Nowhere is this problem more evident than in the arid southwest where the Corps of Engineers continues to assert jurisdiction over dry, ephemeral drainage ways. Ephemeral drainages are not wetlands. They are commonplace drainages, pervasive across the western landscape, which carry water only during occasional rainfalls. They are generally small, and most lack any surface connection to any true water of the United States, even when it rains.

Stream gauge data collected by the Flood Control District of Maricopa County, Arizona, illustrates this problem. *See* Exhibit 4. At the South Mountain Fan, one 40-foot-wide ephemeral drainage carried water only five times in seven years, and the average total elapsed flow for these five events was 1.4 hours. *See* Exhibit 4. At the Estrella Fan, a 70-foot ephemeral wash carried water only four times over seven years with an average depth of 0.4 feet. *See* Exhibit 4. As stated previously, prior to *SWANCC*, the Corps regulated such areas as "isolated waters" under the Migratory Bird Rule. After *SWANCC*, the agencies have

reinterpreted such dry land features to be "tributaries" and now, under the Los Angeles District Special Public Notice, potentially "interstate waters."

Similarly, in Orange County, California, the Corps pre-*SWANCC* asserted jurisdiction under the Migratory Bird Rule over hillside gullies that were one foot across and forty feet long and that do not connect with any other water. *See* Exhibit 4. In addition, at one 1,800-acre site in Northern Arizona, the Corps claimed jurisdiction over 43 discrete drainage ways that are similar in nature to the Maricopa County washes noted above. *See* Exhibit 4. Thirteen of these drainages were less than 0.10 acre and 12 were only three feet wide. None of these carry water regularly, but the Corps continues to assert jurisdiction over such areas, now claiming they are tributaries.

Not only is such an interpretation not supported by the Corps' existing regulations, it is patently inconsistent with the *SWANCC* decision. Asserting jurisdiction over these drainages federalizes land and water resources decisions that under *SWANCC* should be made by state and local governments. Moreover, continuing to regulate such areas leads to lengthy, burdensome, and costly permitting requirements, for both the federal government and the regulated public, and ultimately provides little environmental benefit.

**E. Inconsistent Jurisdictional Assertions**

The current approach of regulating on a case by case, district by district, region by region, basis is untenable and patently unfair to applicants as it leads to inconsistent jurisdictional determinations. For example, in Florida we have seen clients advised by one section of the Corps' Jacksonville District that no permit was required in light of the *SWANCC* decision for a wetland that was 50 feet from a man-made drainage canal. Yet, another section within the same Corps District required the applicant to obtain a permit for a wetland that was over 150 feet away from a similar man-made drainage canal. The field regulator made this determination even

though hydrological data showed that the wetland did not have a hydrological connection with the canal, even in a 100-year storm event, and was over a mile away from navigable water.

### F. Landowners Encouraged to Apply for Permit Rather Than Raise Jurisdictional Issues

Finally, and most pernicious of all, in the absence of national guidance implementing *SWANCC*, local regulators give landowners "friendly" advice that it will take months to sort out the implications of *SWANCC* for any particular piece of land and that it would just be a lot simpler for all concerned if the landowner would ignore federal jurisdictional limitations and simply apply for a permit. Such "advice" allows the agencies to dodge their legal responsibilities to "execute the law" and forces applicants into a lengthy and expensive permitting process to which they should not be subject. And obtaining a 404 permit is no small burden. A recent article in the *Natural Resources Journal* reports a survey of permit applicants that shows it takes two years to obtain an individual permit from the Corps and even about ten months for a nationwide permit. *See* Exhibit 6. The article also estimates that under the Corps 404 program the median cost for obtaining a nationwide permit is $11,800, while the median cost for an individual permit is $155,000. By contrast, the article concludes that other federal programs, such as USDA's Swampbuster and Wetlands Reserve programs on a per-acre conserved basis are much more cost-effective. (Swampbuster averages $2,215 per acre, and Wetlands Reserve averages $600 per acre. Private conservation efforts, for example by the Nature Conservancy, average $1,306 per acre.)

## III. New Rulemaking Required to Effectuate *SWANCC*

As these examples show, there is a strong need for national level guidance to effectuate the *SWANCC* decision. The agencies should conduct a formal notice-and-comment rulemaking to revise their jurisdictional rules. Some parts of those rules are illegal--for example, 33 C.F.R.

§ 328.3(a)(3) (the "other waters" provision), which claims jurisdiction based on assorted "affecting commerce" theories, such as use of the water by interstate travelers for recreation, the presence of fish or shellfish that could be used in interstate commerce, or use by industries engaged in interstate commerce. These jurisdictional theories have been nullified by *SWANCC*'s holding that the CWA is premised on Congress's power over navigation, not on its power to regulate things that affect commerce, and by previous Supreme Court cases limiting Congress's authority to regulate based on potential effects on commerce.[19] Thus, attempts to assert jurisdiction based on such "affecting commerce" theories as use by out-of-state visitors are no longer valid.

Other parts of the rule need clarification. Before *SWANCC* was decided, when the agencies assumed jurisdiction based on the presence of migratory birds, all waterbodies, no matter how small or remote, were subject to regulation because of course all of them had the potential for bird use. Now, however, sections of the regulations that had fallen into disuse are becoming important again. What is an "impoundment"? What is a "tributary"? Neither term is defined under the existing regulations. In the arid West, how do you distinguish surface runoff, which is not subject to CWA regulation, from a "tributary," which the Corps claims is jurisdictional? Ultimately, the agencies should conduct a rulemaking to articulate clearly and uniformly the proper scope of federal jurisdiction following *SWANCC*. This would reverse the current practice of allowing local offices to invent new, and often inconsistent, interpretations that ignore the ruling of *SWANCC*. A rulemaking would clarify and reinforce the proper scope of jurisdiction and allow the public to express its views on these important jurisdictional matters.

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[19] *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995).

Such a rulemaking would not only give all stakeholders an opportunity to participate in a decision of immense importance to our Nation's water pollution control efforts but would also provide the agencies with a comprehensive understanding of current federal, state, and local conservation efforts nationwide. For example, the federal government should want to assess the totality of wetland programs that currently exist both at the state and federal level. Federal programs such as the "Swampbuster," the "Conservation Reserve Program," and the "Wetlands Reserve Program" are existing, cost-effective, and successful programs for protecting wetlands. In fact, the Department of Agriculture's Swampbuster program has effectively discouraged farmers from converting wetlands into fastlands, especially in the regions of the United States that contain prairie potholes. With a full understanding of state and local regulatory programs that affect wetlands and other federal nonregulatory programs, the agencies can tailor federal regulatory efforts to the needs of the 21st Century.

Similarly, in a rulemaking, the agencies could assess existing state programs with an eye toward properly aligning federal and state responsibilities in a manner consistent with the congressional grant of federal jurisdiction under the CWA. A rulemaking would allow the federal government to understand better the nature and extent of state programs. It would also give the states clear direction about where federal authority ends and where state authority should begin. In fact, in the wake of *SWANCC*, several states have indicated a willingness to regulate those waters that the federal government cannot, either under existing state statutes or by enacting new state legislation.

For example, on January 25, 2002, the California State Water Resources Control Board issued a memorandum stating "[t]he thrust of the SWANCC decision is that regulation of inland, isolated waters is and should be under the primary authority of the state rather than the federal

government." *See* Exhibit 7. The memorandum also emphasized that the State of California is ready and willing to regulate those waters that may no longer be subject to federal jurisdiction under its "independent authority" under state law. Like California, many other states, such as Florida, Maryland, New Jersey, Michigan already had existing state statutes that protect wetlands, including isolated waters. Many other states, such as North Carolina, Wisconsin, Virginia, and Ohio, that did not regulate such areas when *SWANCC* was decided, have responded by enacting programs or by bolstering existing ones. *See* Exhibit 7.

By this, I am not suggesting that the agencies should in any way weaken federal environmental protection under the CWA. Far from it. Instead, the agencies should focus their scarce resources on regulating those waters that are truly "federal" in nature such as the traditional navigable waters and adjacent wetlands, thus maximizing federal environmental protection.

Ultimately, it is critical that the agencies implement *SWANCC* through a rulemaking so that the agencies, state and local governments, and the regulated public are certain of the proper scope of federal jurisdiction under the CWA.

Mr. OSE. Thank you.

Mr. Hopper for 4 minutes.

Mr HOPPER. I wish to thank you for the invitation to present the views of Pacific Legal Foundation on the significance of the SWANCC decision and the lack of direction from the EPA and the Corps as a result of that ruling.

The SWANCC decision was a warning about agency irresponsibility. The EPA and the Corps have a responsibility equal to the Supreme Court to ensure they act within the scope of their statutory and constitutional authority. This is a responsibility that the EPA and the Corps not only shirked but willfully abandoned. It was irresponsible for these executive branch agencies to disregard the plain language of the Clean Water Act and the intent of Congress, and champion an interpretation that in the words of the Court "pushed the very limit of congressional authority."

Because the agencies' interpretation created, rather than avoided, a constitutional conflict that likely would have resulted in invalidation of Section 404, the Supreme Court had to limit the scope of the Clean Water Act to save the 404 Program. To ensure the EPA and the Corps got the message and understood their responsibility, the Court in SWANCC clearly defined the reach of Federal authority under Section 404 of the Clean Water Act. The EPA and the Corps were put on notice that their jurisdictional claims over virtually all waters in the United States were statutorily, and likely constitutionally, invalid.

To underscore its warning about agency irresponsibility, the Court took pains to spell out the constitutional and federalism problems the agencies' course of conduct precipitated. As a result, the SWANCC decision should have put an end to the sweeping authority these agencies have so zealously but illegally exercised over non-navigable, non-adjacent, intrastate waters. But little has changed.

The EPA and the Corps have not revised their unlawful rules or issued a formal jurisdictional statement in keeping with SWANCC. To the contrary, to this day, these agencies maintain and represent in court that they have authority over any water that has a mere surface connection to a navigable water, no matter how distant or intermittent.

It is a remarkable breach of the public trust when Government officials seek to extend their authority beyond any reasonable interpretation of the statutory law they are commissioned to enforce. The EPA and Corps' expansion of the term navigable waters to encompass all other waters of the United States including, at times, potholes, puddles, and ditches is singular in its audacity. It is a double breach when the same officials refuse to follow a decision of the highest court that clearly delineates their statutory authority, like SWANCC, which is the focus of this hearing. Such officials usurp the role of both Congress and the courts and become a law unto themselves. We, the citizens, are left to conclude that the rule of law has no meaning and that Federal rules and regulations are based on bureaucratic whim.

Individuals in the regulated community have a right to know what the Government authorities expect them to do to comply with the law, but without a clear jurisdictional statement by the EPA

and the Corps, no one knows what these agencies may claim the law requires.

In the opinion of the Pacific Legal Foundation, these agencies have failed to meet a legal and a moral obligation to clarify their jurisdictional authority under Section 404 of the Clean Water Act as interpreted by the Supreme Court.

Thank you.

[The prepared statement of Mr. Hopper follows:]

September 19, 2002

Hearing on Agency Implementation
of
*Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*

Subcommittee on Energy Policy,
Natural Resources and Regulatory Affairs

Statement
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Mr. Chairman, members of the committee, I wish to thank you for this opportunity to express my views on the significance of the U.S. Supreme Court's January 9, 2001, landmark ruling in *Solid Waste Agency of Northern Cook County (SWANCC) v. United States Army Corps of Engineers*[1] and the lack of direction from the EPA and the Corps in response to that ruling.

The significance of the *SWANCC* decision is that the Supreme Court unambiguously limited the authority of the EPA and the Corps, under section 404(a) of the Clean Water Act, to waters that are traditionally navigable or to those waters (including wetlands) that are adjacent to traditionally navigable waters. Based on its earlier decision in *United States v. Riverside Bayview Homes, Inc.*[2], the High Court affirmed that the term "adjacent" means contiguous. The Court noted, for example, that it had held the Corps had jurisdiction over wetlands that "actually abutted on a navigable waterway"[3] and that Congress' concern in the Clean Water Act, was not all waters, but rather the protection of those waters "inseparably bound up with the 'waters' of the United States."[4] According to the Court, it was the "significant nexus between the wetlands and 'navigable waters'" that informed its reading of the Clean Water Act in *Riverside Bayview*.[5]

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

[2] 474 U.S. 121 (1985).

[3] *Id.* at 133.

[4] *Id.* at 134.

[5] 531 U.S. at 167.

Although the Supreme Court had accepted the Corps' assertion of authority over wetlands that actually abut a navigable waterway, in *Riverside Bayview* the Court had explicitly left open the "question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water...."[6] In *SWANCC*, the Court answered that question. It concluded, unequivocally, that the Corps does not have jurisdiction over nonnavigable, intrastate waters that are not contiguous to traditionally navigable waters. The Court stated that in order to rule for the federal government, it "would have to hold that the jurisdiction of the Corps extends to ponds that are *not* adjacent to open water. But we conclude that the text of the statute will not allow this."[7]

The Court also concluded that Corps jurisdiction must be constrained because its expansive regulation of intrastate, nonadjacent and nonnavigable waters raised serious constitutional concerns, interfered with traditional state authority, and conflicted with the objective of the Clean Water Act to uphold state powers over land and water use.

Most people would be surprised to learn that most, if not all, of our federal environmental laws, including the Clean Water Act, are Commerce Clause enactments. They would be even more surprised to learn that the filling of a small pond or pothole had anything to do with commerce among the states, or with foreign nations or the Indian tribes.[8] Nevertheless, the Corps claimed in *SWANCC* that the "Migratory Bird Rule" fell within Congress' power to regulate intrastate activities that "substantially affect" interstate commerce. To support this claim, the Corps made two unsurprising but totally inconsistent arguments. As the Court noted, the Corps had initially argued that it could regulate SWANCC's land because the sand and gravel pits were habitat for migratory birds. But later, for the first time in the Supreme Court, the Corps argued it could regulate SWANCC's land because the proposed landfill operation was plainly commercial in nature. The Court was clearly skeptical of these arguments and suggested they raised "significant constitutional questions"[9] and characterized the second argument as "a far cry, indeed, from the "navigable waters" and "waters of the United States" to which the statute by it terms extends."[10]

Although the Court did not rule on the constitutionality of federal regulation of nonadjacent, intrastate waters, the Court did determine that the Corps' interpretation of the Clean Water Act "invoke[d] the outer limits of Congress' power"[11] under the Commerce Clause and stated that

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[6] 474 U.S. at 131-132.

[7] 531 U.S. at 168 (emphasis in original).

[8] "Congress shall have power to ...regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. Art I. Sec. 8, Cl. 3.

[9] 531 U.S. at 173.

[10] *Id.*

[11] *Id.* at 172.

"Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority."[12] To avoid an obvious constitutional conflict, therefore, the Court brought the Corps back to safer waters--to traditional navigable waters and those contiguous thereto.

But the constitutional conflict raised another red flag in the minds of the Supreme Court justices; federal intrusion into state affairs. According to the Court, the concern raised by pushing the envelope on federal authority is heightened "where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power."[13] Simply stated, the Court recognized that permitting the Corps to claim federal jurisdiction over ponds and mudflats "would result in a significant impingement of the States' traditional and primary power over land and water use."[14] The Court did not need to speculate on this point. Reports of the EPA and Corps' heavy-handed enforcement of section 404 of the Clean Water Act are legion. By means of the section 404 permit process, the EPA and the Corps assume veto power over literally tens of thousands of land use projects nationwide every year, thereby usurping the traditional powers of state and local governments. By one measure, 75% of the approximately 100,000,000 acres[15] of the nation's wetlands are on private land subject to state and local control. Clearly, the Court's concern for federal intrusion into state affairs is justified. But the Court is not alone. Congress also shared this concern.

An explicit objective of Congress in promulgating the Clean Water Act was to "recognize, preserve, and protect the primary responsibilities and rights of States ... to plan the development and use ... of land and water resources."[16] Therefore, the Court read the Clean Water Act "to avoid the significant constitutional and federalism questions" raised by the government's interpretation.[17]

For the first time, in the *SWANCC* decision, the Supreme Court clearly defined the scope of federal authority under section 404 of the Clean Water Act. The EPA and the Corps were put on notice that their jurisdictional claims over "other waters" are statutorily, and likely constitutionally, invalid. Therefore, the *SWANCC* decision should have put an end to the sweeping authority these agencies have so zealously, but illegally, exercised over nonnavigable, nonadjacent, intrastate waters. But, little has changed.

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[12] *Id.* at 172-173.

[13] *Id.* at 173.

[14] *Id.* at 174.

[15] *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation*, Jonathan H. Adler, Environmental Law, Vol. 29, No. 1, 1999, pp. 26 and 52.

[16] 33 U.S.C. §1251(b).

[17] 531 U.S. at 174.

Since the High Court ruling over 18 months ago, we have seen no formal rulemaking from the EPA and the Corps redefining their Clean Water Act jurisdiction in light of *SWANCC*. To the contrary, except on a case-by-case basis, the EPA and the Corps appear to be conducting business as usual. When the Corps proposed reissuing its nationwide section 404 permits in August of 2001,[18] eight months after the *SWANCC* decision, the Corps never mentioned the case. Nor did it suggest that a change in jurisdictional wetlands had occurred or was in the offing. Instead, the Corps simply proposed to regulate wetlands under its nationwide permit program without distinguishing between adjacent and nonadjacent waters, as if the Supreme Court had never spoken. In fact, the Corps sought to extend its jurisdiction even beyond waters by including regulations to control upland buffer areas around mitigation wetlands.

In January of this year, the Corps finalized its rules for nationwide permits but refused to offer any guidance on the Corps' authority over wetlands even in response to public comments that the Corps had a duty to clarify the scope of its authority under *SWANCC*.[19] These nationwide permit regulations are now the subject of litigation.

In other recent litigation, the Corps continues to argue it has authority to regulate so-called adjacent wetlands that lie miles away from any navigable water body. For example, in *United States v. Newdunn Associates*[20] the Corps took the indefensible position that *SWANCC* does not bar it from regulating wetlands that do not abut a navigable waterway so long as there is a surface water connection between the wetland and open waters, ostensibly without regard to whether the "connection" is continuous or intermittent, natural or artificial, or contiguous or remote.[21]

In that case, the government filed suit in federal district court to enjoin Newdunn from filling wetlands on its property in Newport News, Virginia, without a section 404 permit. The issue before the Court was whether the Corps had jurisdiction to regulate the property. The Court first observed that even before *SWANCC* was decided, the Fourth Circuit had held in *United States v. Wilson*[22] that the Corps' "other waters" regulation (33 C.F.R. § 328.3(a)(3)) had already been declared invalid.[23] The Court next observed that the Corps had reinterpreted its authority under the Clean Water Act several times, each time pushing the limits of its congressional authority.[24] Finally turning to the case at hand, the Court concluded that only by means of "multiple drainage

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[18] 66 Fed. Reg. 42069 (August 9, 2001).

[19] 67 Fed. Reg. 2019 (January 15, 2002).

[20] 195 F. Supp. 2d 751 (April 3, 2002, VA ED).

[21] *Id.* at 756.

[22] 133 F.3d 251 (4th Cir. 1997).

[23] 195 F.Supp at 764.

[24] *Id.* at 765.

ditches, a culvert under a highway, and miles of non-navigable waters," were the wetlands on the Newdunn property "even remotely connected to navigable waters or a water body capable of use by the public for purposes of transportation or commerce."[25] Therefore, the court held that under *SWANCC* the wetlands on the Newdunn property fell outside the Clean Water Act.[26] To underscore its decision, the court declared it agreed with the sweep of *SWANCC* as understood by the four Supreme Court Justices in the dissent who stated that *SWANCC* "excluded wetlands and tributaries that are not contiguous or adjacent to navigable waters from the scope of the Corps' jurisdiction."[27]

The Corps has appealed this case to the Fourth Circuit, but it didn't stop there. Just a few months ago, almost as soon as the ink was dry on the *Newdunn* decision, the Corps was back in the same court, making the same argument, and with the same result.

RGM Corporation owns property in Virginia that contains seasonally wet fields and forests which the Corps has characterized as wetlands subject to federal regulation under the Clean Water Act. These wetlands are physically detached from an open waterway and lie about five miles from the nearest navigable waters--the Intracoastal Waterway. In an enforcement action brought by the Corps, the District Court for the Eastern District of Virginia relied on *SWANCC* and, ruling from the bench, held that Congress did not intend wetlands connected to waterways only by miles of man-made, often dry ditches to be so closely regulated by the Corps. "To believe otherwise," the Court held, "would set a dangerous precedent that almost any ditch in America could be construed as a public waterway under federal jurisdiction."[28]

Given the Corps' failure to issue a formal jurisdictional statement, its continued "business-as-usual rulemaking," and its dogged determined to expand its jurisdiction with the help of the lower courts, it is evident that the Corps is simply not going to take *SWANCC* for an answer. But this comes as no surprise as the Corps has established a pattern of undermining any judicial decision limiting its power under the Clean Water Act. Two examples illustrate the point.

In a case called *North Carolina Wildlife Federation v. Tulloch*,[29] a number of environmental groups sued the Corps claiming the Clean Water Act required the Corps to regulate essentially any soil movement in U.S. Waters. Rather than defend the law and its own regulations, the Corps cut a deal and agreed to propose harsher rules governing land-clearing activities. The Corps repealed the incidental soil movement exemption that it had earlier claimed was required by the Clean Water Act, and, in 1993, introduced an onerous regulation called the "Tulloch

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[25] *Id.* at 767.

[26] *Id.*

[27] *Id.* at 767-768.

[28] See bench ruling on May 7, 2002, *United States v. RGM Corporation*, No. 2:01CV719.

[29] Civ. No. C90-713-CIV-5-BO (E.D.N.C. 1992).

Rule." This controversial regulation prohibited any addition, including any redeposit, of dredged material into U.S. waters incidental to any activity.[30] Ironically, an accompanying press release from the White House stated: "Congress should amend the Clean Water Act to make it consisten with the agencies' rulemaking."[31] Under this rule, a permit would be required even when a bucket used to excavate material from the bottom of a river, stream, or wetland, is raised and soils or sediments fall from the bucket back into the water.[32] By requiring a permit for "any redeposit" of soil in a wetland, the "Tulloch Rule" gave the Corps unprecedented control over local land use -- a result never intended by Congress. According to the Court: "In effect the new rule subjects to federal regulation virtually all excavation and dredging performed in wetlands."[33]

After years of heavy-handed application of the "Tulloch Rule," the National Mining Association sued the Corps arguing the Corps had exceeded its regulatory authority under the Clean Water Act.[34] Both the district and appellate courts agreed. Based in part on the government's admission that the rule authorized the Corps, at its discretion, to require a permit to ride a bicycle across a wetland, the D.C. Circuit held that a fair reading of the Clean Water Act "cannot reasonably be said to encompass the situation in which material is removed from the waters of the United States and a small portion of it happens to fall back."[35] As a result, the court issued a nationwide injunction against the incidental fall-back rule.

But the Corps was undaunted. Even that clear limitation on the Corps' jurisdiction, like the *SWANCC* decision, did not stop the Corps from asserting authority over activity virtually identical to that which the Court held was not subject to the Act. For example, in a case called *Borden Ranch Partnership v. U.S. Army Corps of Engineers*,[36] which the Corps and EPA are now defending in the U.S. Supreme Court, these agencies claimed a west coast landowner had violated the law by filling wetlands without a permit. But the so-called filling of wetlands involved nothing more than "deep plowing" through various swales, or slopped depressions, for the purpose of planting vineyards. "Deep plowing" consists of pulling a shank through the dirt to break the hardpan and, like the incidental fallback prohibited by the illegal "Tulloch Rule," it results only in the incidental movement of the soil in situ.

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[30] See 33 CFR 323.2(d)(1)(iii).

[31] White House Office on Environmental Policy, Protecting America's Wetlands: A Fair, Flexible, and Effective Approach (August 24, 1993).

[32] 145 F. 3d at 1403.

[33] *Id.* at 1401.

[34] Mining Congress v. United States Army Corps of Engineers, 951 F.Supp 267 (D.D.C. 1997).

[35] National Mining Association v. U.S. Army Corps of Engineers, 145 F.3d 1399, 1404 (D.C. Cir 1998).

[36] 261 F.3d 810 (9th Cir 2001), U.S. Sup. Ct. No. 01-1243.

The second example that demonstrates the Corps' pattern of undermining adverse judicial determinations involves a case mentioned earlier, *U.S. v. Wilson*,[37] in which the Fourth Circuit Court of Appeals invalidated the Corps' "other waters" regulation implicated in *SWANCC*.[38] In that case, James Wilson was fined and sentenced to prison for filling wetlands in a large subdivision without a permit. On appeal, Wilson challenged the authority of the Corps to regulate wetlands that have no connection to interstate commerce or traditional navigable waters. With language strikingly similar to the holding in *SWANCC*, the court sustained Wilson's challenge stating: "[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."[39] Therefore the Fourth Circuit held that 33 C.F.R. § 328.3(a)(3) is invalid.

Under the Administrative Procedure Act a rule of general applicability, like 33 C.F.R. § 328.3(a)(3), that is "found to be ... in excess of statutory jurisdiction" shall be not only "held unlawful" but "set aside."[40] This means the rule will be invalid for any purpose, not just as applied to the parties in the case.[41] But the EPA and the Corps continue to apply the invalid regulation outside of the Fourth Circuit

It is a remarkable breach of the public trust when government officials seek to extend their authority beyond any reasonable interpretation of the statutory law they are commissioned to enforce. The EPA and the Corps' expansion of the term "navigable waters" to include "all other waters" of the United States including, at times, potholes, puddles and ditches, is singular in its audacity. It is a double breach when the same officials refuse to follow a decision of the highest court that clearly delineates their statutory authority, like the *SWANNC* decision which is the focus of this hearing. Such officials usurp the role of both Congress and the courts and become a

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[37] 133 F.3d 251.

[38] 33 C.F.R. § 328.3(a)(3) defines "waters of the United States" to include: "All other waters such as intrastate lakes, rivers, streams (including intermittent steams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters;

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purposes by industries in interstate commerce."

[39] *Id.* at 257.

[40] 5 U.S.C. § 706(2)(C).

[41] 145 F.3d 1409.

law unto themselves. We, the citizens, are left to conclude that the "rule of law" has no meaning and that federal rules and regulations are based on bureaucratic whim.

Aside from their duty to follow the law, government officials at the EPA and the Corps have a responsibility for fair and objective enforcement of the law. This cannot occur if the law is applied inconsistently. But inconsistent application of the law is a trademark of these two agencies. Their unwillingness to issue a clear and timely jurisdictional statement or to revise their illegal regulations, all but guarantees erratic ad hoc decision making. Since this result is predictable, we can only assume it is intended. So long as the EPA and the Corps fail to commit themselves to specific jurisdictional boundaries under the Clean Water Act, as delineated by the Supreme Court, their authority cannot be questioned except on a rare case-by-case basis.

In most instances landowners do not have the means, the time, or the will, to challenge assertions of Clean Water Act authority. It is not easy to ripen a case contesting federal jurisdiction. The courts have uniformly found that a land owner cannot seek judicial review of an EPA or Corps jurisdictional determination, no matter how absurd, unless the government makes a final decision on a section 404 permit application or instigates an enforcement action against the land owner. But these agencies have become adept at stringing land owners along so that they must either accede to the agencies' regulatory demands or they never get a final agency decision.

To illustrate, in *Moore v. United States*[42] taxpayers sought a refund of taxes paid to the Internal Revenue Service, arguing that they could claim as a loss the involuntary conversion of some of their investment property (called "the Boy Scout Tract") as a result of the land being reclassified as wetlands.[43] Though the Moores had not tried to obtain a section 404 permit, they argued that the denial of a permit should not be a prerequisite to their claim, because seeking a permit would have been futile. As reported by the Court, several experienced individuals, including Bernard Goode, an environmental consultant that had been a Corps employee for 34 years testified on the Moores' behalf:

> When asked for his opinion concerning the likelihood that a § 404 permit would be issued for the Boy Scout Tract, Goode testified: "It is my opinion that there was a very low likelihood that this project would have been approved." When asked about the likelihood that a § 404 permit for the Boy Scout Tract would have been formally denied, Goode testified:
>
> "It has been my experience in studying this very issue nationwide that there was a very low likelihood that the Corps would have denied the application. Because the Corps can't reach that point until they have gone through the full analysis, which includes the mitigation sequencing.
>
> "And it is a much more likely outcome that more and more information is requested until eventually the applicant loses staying power and either withdraws

[42] 943 F. Supp. 603 (E.D. Va. 1996)

[43] *Id.* at 607.

> the application himself, or the Corps says because of the lack of information to continue the valuation, the Corps withdraws the application.
>
> "And that is the outcome of well over half of the 404 applications.
>
> "Here in the Norfolk district I looked at some statistics and there is [sic] over 3/4 of the cases [that] end up being withdrawn for section 404 permit applications. Only one percent end up being denied."
>
> Goode's testimony on this latter point was corroborated by the Moores' other two expert witnesses. Robert Kerr, an environmental consultant with experience in over sixty § 404 permit applications, testified:
>
> "We advised the [Moores] that there was no chance of getting a permit.
>
> "We also told Mr. Moore [the Corps] would never reject the permit.
>
> "Because rejecting a permit could set a precedent also. And as the government's attorney stated, you have to have a permit denial to go for a taking.
>
> "Well, the Corps knows that and will not issue a denial, an open denial. They will just request additional information, and more additional information, and the more you give them the more they ask for . . . . They basically bleed a client to death financially until you have spent so much money on the alternatives analysis you've drained the profitability out of the project."
>
> Doug Davis, an environmental consultant who at one time worked in the Corps' wetlands program, testified that the likelihood of a permit being issued for the Boy Scout Tract was "as close to zero as it can get," and that a permit would not have been finally denied because projects like that contemplated for the Boy Scout Tract "just sort of wither on the vine and no final agency action is taken." In addition, both Kerr and Davis testified that completing the § 404 permit process in this case would have been a very lengthy and expensive proposition, costing hundreds of thousands of dollars.[44]

This excerpt demonstrates the remarkable leverage the Corps and the EPA have over section 404 permit applicants. With very little risk of a court challenge, they can scuttle a project with dilatory practices or condition approval on extraordinary demands. If a land owner is able to ripen a case and successfully challenge agency jurisdiction, it's only one case. In the absence of a rule of general applicability, it will not affect other similar cases of government overreaching. The lack of a jurisdictional statement therefore shields the EPA and the Corps from suit and allows them to continue to exercise authority over intrastate, nonadjacent, nonnavgiable waters that the Court in *SWANCC* determined are not subject to the Clean Water Act.

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[44] 943 F.Supp. at 612 (citations omitted).

Randy Peterson learned first hand how the EPA and the Corps take advantage of ambiguities in their jurisdiction to intimidate land owners. Mr. Peterson purchased a vacant lot in an industrial part of West Valley City, Utah. The property is surrounded by junkyards and lies next to a nonnavigable, manmade ditch. In furtherance of his goal to develop the property, Mr. Peterson invited the Corps to inspect his property for jurisdictional waters in 1998. Mr. Peterson was informed that his property contained wetlands subject to section 404 of the Clean Water Act and that he was required to remove any fill or debris that had been placed in the wetlands. Mr. Peterson questioned the Corps determination that his property contained wetlands and stated no fill had been placed on the property since he acquired it. Mr. Peterson also questioned the Corps' authority to regulate his property and requested that the Corps provide him with the legal basis for asserting jurisdiction.

After several months of back and forth communications, the EPA issued on August 16, 2000, Findings of Violation and Order for Compliance. This document only provided a general statement of authority and directed Mr. Peterson to removal all fill from the wetlands on his property. He was warned that failure to comply could subject him to heavy civil fines and even criminal prosecution.

On April 18, 2000, the Corps sent Mr. Peterson a letter claiming jurisdiction over Mr. Peterson's property based on 33 C.F.R. 328.3(a), defining "other waters" as waters of the United States, including playas and wetlands. Since Mr. Peterson's property was part of a playa (a complex of wetlands) it was subject to regulation. The letter also asserted the Corps had jurisdiction by virtue of the "Migratory Bird Rule" since an inspector had seen Canada Geese on the property. The EPA sent a similar letter dated September 18, 2000, citing various case authority that was either distinguishable from Mr. Peterson's situation or simply undermined, rather than supported, the agencies' claims of authority.

Most land owners would have yielded to the agencies' demands at this point rather than risk civil and criminal sanctions, but Mr. Peterson is made of sterner stuff. He was unwilling to accept the EPA and the Corps' jurisdictional claims pointing out that the "Migratory Bird Rule" had been challenged in litigation and a decision on its validity was then pending in the U.S. Supreme Court. He also pointed out that the Fourth Circuit in *United States v. Wilson* had already invalidated 33 C.F. 328.3(a), the Corps' "other waters" regulation. Therefore, these citations provided little support for the agencies' position.

After several months of unproductive communications, in which Mr. Peterson was branded "uncooperative" and threatened with punitive action, Mr. Peterson sent a letter to EPA Region 8, on August 16, 2001, demanding to know, among other things: (1) the specific areas on his property over which the EPA claimed jurisdiction; (2) the evidence the EPA had to establish a hydrological connection of his property to a navigable water; and, (3) the legal basis for characterizing the adjacent ditch as a creek. Mr. Peterson followed up this letter with some phone calls where he was informed that the EPA would not respond to his letter because "they did not feel it was necessary." Mr. Peterson never did receive an adequate response to his questions. But he did receive a partial, if bizarre, resolution of the matter in a letter dated October 16, 2001. In that letter, the EPA affirmed its authority over Mr. Peterson's property but

stated it was satisfied that Mr. Peterson had substantially complied with its Findings of Violation and Order for Compliance by removing the offending fill. The irony is that Mr. Peterson never removed any fill and is at a loss to understand the EPA's new stance.

Unfortunately, Mr. Peterson's experience with the bureaucratic juggernaut of the EPA and the Corps is not at an end. After several years of frustration and anxiety, not to mention the expenditure of considerable time and money dealing with the demands of these agencies, Mr. Peterson must now get a section 404 permit to develop his property. This is likely to result in another round of legal uncertainty for Mr. Peterson because the EPA and the Corps have not issued a jurisdictional statement that addresses the Supreme Court's decision in SWANCC that would exclude from federal regulation intrastate, nonadjacent and nonnavigable waters like those on his property.

The reality of the situation is that the EPA and the Corps are still looking for ways to expand their authority under the Clean Water Act. For them, an adverse Supreme Court decision like *SWANCC* is just a temporary setback; there are other arguments, other courts. Rather than embrace their responsibility to enforce the law as written, they would rewrite the law on a case-by-case basis to suit their own ends. They seem to have no regard for the limits of statutory or constitutional authority. Nor are they concerned with the impacts their onerous regulations have on the public at large. It is irresponsible for these agencies to stand by their claims of virtually limitless power over almost all nonnavigable waters when a straightforward reading of the Clean Water Act and the Supreme Court decision in *SWANCC* clearly restricts their jurisdiction.

The regulated community has a right to know what the law requires. Without a clear jurisdictional statement by the EPA and the Corps no one knows what the law requires. Therefore, these agencies have a legal and a moral obligation to clarify their jurisdictional authority under section 404 of the Clean Water Act as interpreted by the Supreme Court in *SWANCC*.

Thank you.

Mr. OSE. Thank you, Mr. Hopper.

Ms. Marzulla.

Ms. MARZULLA. Thank you for having me and I would like to echo what my two prior colleagues have said with respect to the SWANCC decision. I agree that the reach of the SWANCC decision goes beyond simply the migratory bird rule. It is very clear if you read the SWANCC decision that the Court is talking about the regulatory jurisdiction of the Corps and the EPA over isolated wetlands. The Court further underscores the point that the Clean Water Act is not coterminous with the Commerce Clause, so there very clearly are constraints put upon the jurisdictional authority of the these two agencies.

I would like to also step back a bit and talk generally about the wetlands program and how these two agencies' consistent overreaching and failure to abide by the clear language of the statute and engage in a rulemaking approach that is overly broad and vague has such tremendous impact on landowners.

I think it was a Congressman today who made the point that it is the small landowner, the small businessman, who suffers when you have agency rulemaking that goes so far beyond the reach of the statute, that they are the ones that bear the brunt of the agencies' failure to confine their authority to what Congress intended.

We urge this committee forward with its efforts to require the agencies to engage in the type of rulemaking that will implement SWANCC, that will confine their authority to what Congress intended. In some ways the issue before us today is who ultimately is going to decide what these agencies will do. Will the agencies continue with their approach of anything goes or will they alternatively confine themselves to the authority that Congress intended in the Clean Water Act?

We would urge that this subcommittee continue with close oversight. These are agencies that have a history of going off the reservation, and your oversight is welcome and appreciated.

[The prepared statement of Ms. Marzulla follows:]

Testimony of

NANCIE G. MARZULLA

on behalf of

DEFENDERS OF PROPERTY RIGHTS

on IMPLEMENTATION OF *SOLID WASTE AGENCY OF NORTHERN COOK COUNTY V. UNITED STATES ARMY CORPS OF ENGINEERS*

Before the

SUBCOMMITTEE ON ENERGY POLICY, NATURAL RESOURCES,
AND REGULATORY AFFAIRS
U.S. HOUSE OF REPRESENTATIVES

September 19, 2002

TESTIMONY OF NANCIE G. MARZULLA

September 19, 2002
Rayburn B-337
10:00 AM

Thank you, Mr. Chairman. I am Nancie Marzulla, President of Defenders of Property Rights, the only public interest legal foundation devoted exclusively to protecting property rights. When it is in the public interest to do so, we represent landowners in lawsuits in federal courts involving the U.S. Army Corps of Engineers and the Section 404 wetlands program. Defenders also filed an amicus curiae brief in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers,* 928 F. Supp. 946 (N.D. Ill. 1998*), aff'd*, 191 F.3d 845 (7th Cir. 1999), *rev'd*, 531 U.S. 159 (2001), when it was before the Supreme Court.

I would like to preface my remarks today by thanking the Chairman and the Subcommittee for the opportunity to address today the U.S. Army Corps of Engineers failure to engage in rulemaking implementing the *SWANCC* decision. I have two points to make. The first is that the Corps' failure to issue a new rule codifying the U.S. Supreme Court's decision in *SWANCC*, holding that the Corps does not have jurisdiction over isolated wetland, is causing enormous confusion among federal district courts because they now face two irreconcilable commands. On the one hand, federal district courts are bound by the U.S. Supreme Court's *SWANCC* decision. On the other hand, however, federal courts must defer to agency rulemaking.

This deference doctrine means that a court first looks to the agency's interpretation of its authority, and, as we have seen, often doesn't get beyond that first look.[1] This means that the Supreme Court's *SWANCC* decision is undermined by the refusal of the Corps, the lead agency entrusted with wetlands protection, to issue a new rule. Second, because local agency officials must follow the agency rules to guide their day-to-day decision making and enforcement actions, the Corps' refusal to engage in rulemaking codifying the *SWANCC* decision means that for day-to-day Corps' operations, the *SWANCC* decision is a nullity. While the Supreme Court cannot require the Corps to issue a new rule implementing *SWANCC* decision, Congress can. For this reason, we at Defenders of Property Rights urge this subcommittee to take steps to insure that the Corps' regulations are consistent with all Supreme Court holdings, including the *SWANCC* decision.

[1]While the Corps has not issued guidelines implementing *SWANCC,* the general counsel of the EPA, the agency that shares responsibility with the Corps for wetlands protection, published a memorandum with guidelines severely limiting *SWANCC* to its factual context. *See* Guzy, *infra* note 2. The Ninth Circuit followed the EPA's reasoning and held that irrigation canals that flowed intermittently into navigable waters were subject to CWA jurisdiction. *See Headwaters, Inc. v. Tanalt Irrigation District*, 243 F.3d 526 (9th Cir. 2001). Lower courts followed suit in limiting *SWANCC. See, e.g., United States v. Lamplight Equestrian Ctr., Inc.*, 2002 U.S. Dist. Lexis 3694 (N.D. Ill. 2002); *United States v. Krilich*, 152 F. Supp. 2d 983 (N.D. Ill. 2001); *United States v. Buday*, 134 F. Supp. 2d 1282 (D. Mont. 2001). *SWANCC* left no guidance as to the CWA's jurisdictional reach over waters that fell somewhere between isolated waters and wetlands directly adjacent to navigable waters. These courts, like the EPA, settled on the proposition that at least some connection to navigable waters confers CWA jurisdiction. That kind of proposition puts the property of many innocent people at risk.

A Fifth Circuit decision cuts the other way, extending *SWANCC*'s interpretation of the term "navigable waters" as used in the Clean Water Act to the same terms as they are used in the Oil Pollution Act. *See Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001). That court found that OPA. jurisdiction did not extend to intermittent streams since there was no record in the case that these streams were linked to open bodies of navigable water. Sadly enough, a decision like that of the Fifth Circuit, which puts real teeth into *SWANCC*, is in the minority.

## The SWANCC Decision

In *SWANCC,* the U.S. Supreme Court limited the Corps' jurisdiction to what Congress intended under the Federal Water Pollution Control Act ("Clean Water Act" or CWA), 33 U.S. §§ 1251-1376. *SWANCC* involved a garden-variety assertion of regulatory jurisdiction by the U.S. Army Corps of Engineers under Section 404 of the Clean Water Act over 17.6 acres of privately owned land. The facts of the case were a bit convoluted because in 1987, the Corps had initially concluded that it had no regulatory jurisdiction over the 17.6 acres of isolated wetland at issue in this case because the wetland did not meet the regulatory "definition of a wetland or lakes" or the broader definition of "'waters of the United States.'"

Later that same year, however, the Corps reversed its position and asserted that it did in fact have jurisdiction over the 17.6 acres because the land was or could be "habitat" for migratory birds. Accordingly, based on that interpretation, the Corps denied petitioner's wetland permit application.

In relying on the Migratory Bird Rule as a basis for its jurisdiction, the Corps left behind its statutory grant of authority. There is nothing in the Clean Water Act that authorizes the Corps to regulate wildlife habitat in non-navigable waters. Although the Corps' jurisdiction was based solely upon the agency's interpretation of its own jurisdiction, to which the federal court nevertheless deferred.

The district court held that it was required by the *Chevron* doctrine, set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984), to defer to the Corps' interpretation of its jurisdiction under the Section 404 permitting program of the Clean Water Act, explaining:

> The court must defer to an agency's interpretation of its own authorizing statute so long as that interpretation is reasonable and not in conflict with the expressed intent of Congress . . . Accordingly, the court must decide whether it was reasonable for the Army Corps of Engineers to interpret the statutory term "waters of the United States" to include intrastate waters that provide a habitat for migratory birds . . . To the extent that the actual language of the Clean Water Act reveals that Congress intended to protect wildlife, the Migratory Bird Rule would appear to be a permissible construction of that statute.

*SWANCC*, 998 F. Supp. at 954-55.

**REASONS WHY THE CORPS SHOULD CODIFY THE SWANCC DECISION**

**I. Because of the Judicial Deference Doctrine, Congress' Oversight Role over Federal Rulemaking Is All the More Important.**

In determining if Congress had delegated regulatory authority over non-navigable migratory bird habitat to the Corps, the federal district court in *SWANCC* held that it was required to "review [the Corps'] interpretation of a statute it is charged with administering under the standard outlined in *Chevron*." *See* 191 F.3d at 851. The *Chevron* or judicial deference doctrine holds that a court must defer to a reasonable interpretation of an ambiguous statute offered by the agency charged with administering the statute. *Chevron*, 467 U.S. at 844-45.

The *Chevron* doctrine rests in part on the practical premise that agencies have superior technical expertise upon which Congress is entitled to call upon in the enactment of statutes that delegate to these expert agencies the role of fleshing out the details of the regulatory scheme through regulations. However, as the Supreme Court has noted, the constitutional heart of *Chevron* consists of appropriate judicial deference to legislative enactments (including delegation of some policy-making to the executive branch) which underlies the separation of powers doctrine:

> Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's view of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices – resolving competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in the light of everyday realities. . . . The responsibilities for assessing the wisdom of such policy choices are not judicial ones: "Our Constitution vests such responsibilities in the political branches."

*Chevron*, 467 U.S. at 865-66 (quoting *TVA v. Hill*, 437 U.S. 153, 195 (1978)).

Although the Supreme Court has never held that the legal determination of what power Congress has delegated to an agency (and what regulatory power Congress has withheld) turns on the agency's policy determinations, rather than the traditional rules of statutory construction employed by the courts, courts favor deference in their decision making. *See, e.g.*, *INS v. Aguirre-Aguirre*, 526 U.S. 415 (2002); *Smiley v. Citibank*, 517 U.S. 735 (1996); *National Railroad Passenger Corp. v. ICC*, 503 U.S. 407 (1992); *Securities Industry Ass'n. v. Board of Governors of Federal Reserve System*, 847 F.2d 890 (D.C. Cir. 1988). Indeed, the Supreme Court has held that although judicial deference is appropriate to an agency's statutory interpretation, the reviewing court must nevertheless assure that the agency's interpretation is not "'inconsistent with the administrative structure that Congress enacted into law.'" *Food & Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) (quoting *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988)). In the FDA case, the Supreme Court held:

> In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning--or--ambiguity of certain words or phrases may only become evident when placed in context. It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." A court must therefore interpret the statute "as a symmetrical and coherent regulatory scheme," and "fit, if possible, all parts into an harmonious whole." Similarly, the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand. In addition, we must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency.

*Id.* at 1300-01 (citations omitted).

In *SWANCC*, the district court ignored these established canons of statutory construction, effectively converting the task of determining the outer limits of Corps jurisdiction from one of statutory construction into a policy matter to be decided by the Corps itself. By deferring to the agency's policy determination as to its jurisdiction under the Clean Water Act, or the Migratory Bird Rule which provides that the Corps can require a dredge and fill permit for isolated wetlands if the Corps believes that such wetlands are or could be habitat for migratory birds, the district court allowed the agency to define for itself the regulatory authority that Congress should have granted it as a policy matter, and not the legal question of whether Congress had, in fact, delegated such authority to the Corps.

## II. The Corps' Migratory Bird Rule Conflicts with Congress' Administrative Structure for Wildlife Protection, Which Does Not Grant Any Enforcement Authority to the Corps.

In consequence, the district court completely ignored the fact that Congress has developed an entirely separate scheme for migratory bird protection: the Migratory Bird

Treaty and the Migratory Bird Treaty Act of 1918, the treaty's implementing statute. 16 U.S.C.A. §§ 703-712 (West 1985 & Supp. 2000). Moreover, Congress has established special protections for particular species, *e.g.,* the Bald and Golden Eagle Protection Act, 16 U.S.C.A. §§ 668-668d, and generally for threatened and endangered species, the Endangered Species Act, 16 U.S.C.A. §§ 1531-1544. Congress has also created refuges, national seashores, wilderness areas, national parks, national marine sanctuaries and other specific designations that are designed to provide habitat for migratory birds and wildlife. *See, e.g.*, National Park Service Organic Act of 1916, 16 U.S.C.A. §§ 1-18f-3; Refuge Recreation Act of 1962, 16 U.S.C.A. §§ 460k-460k-4; Wilderness Act of 1964, 16 U.S.C.A. §§ 1131-1136; National Wildlife Refuge System Administration Act of 1966, 16 U.S.C.A. §§ 668dd-668ee; Fish and Wildlife Conservation Act of 1980, 16 U.S.C.A. §§ 2901-2912; National Marine Sanctuaries Act, 16 U.S.C.A. §§ 1431-1445b.

In this entire scheme, the Army Corps of Engineers has no role, except to follow the dictates of those lead agencies to which Congress has, in fact, delegated such authority. *See Bennett v. Spear,* 520 U.S. 154, 154 (1997) (noting Corps must seek biological opinion from Fish and Wildlife Service under Section 7 of the Endangered Species Act when proposed potentially affects certain wildlife). Indeed, had Congress wanted to give the Corps authority over wildlife habitat protection under any of these statutes, or to implicate the Corps' permitting authority under Section 404 of the Clean Water Act, there is no reason why it could not have done so.

In short, under the regulatory scheme adopted by Congress, there is nothing to even suggest that Congress ever intended that the Corps exercise the Clean Water Act's Section 404 permitting authority over isolated wetlands solely because of the presence of

migratory birds. The district court's decision to defer to the agency's policy determination regarding its own jurisdiction not only fails to take into account Congress' overall administrative scheme with respect to the Clean Water Act and numerous wildlife protection statutes, but also runs afoul of the inherent limitation of the Chevron doctrine – separation of powers. Since Congress evidently did not intend to delegate wildlife habitat protection authority to the Corps, the Corps' usurpation of that authority for itself turns on its head the very notion of separation of powers.

## III. The Corps' Migratory Bird Rule Conflicts with the Separation of Powers Doctrine.

The Migratory Bird Rule began life as an example contained in the preamble to a regulation interpreting the Corps' jurisdictional authority under the Clean Water Act. *See* 33 C.F.R. § 328.3(a)(3) (2000); Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 42,217 (1986). The proposed regulation, but not the preamble, was published for notice and comment. 51 Fed. Reg. 41,206. When the final rule was published, the Corps included in the preamble several examples of how the regulation might be applied by the Corps. 51 Fed. Reg. at 41,217. One of those examples, now known as the Migratory Bird Rule, states that the Corps may assert jurisdiction over an isolated wetland if the wetland is or could be habitat for migratory birds. Id.

The district court in *SWANCC* held that it was required to defer to the Migratory Bird Rule because, even though it was not published for notice and comment, the *Chevron* doctrine requires "the court [to] defer to the agency interpretation so long as it is based on a reasonable reading of the statute." *See* 191 F.3d at 851. In point of fact,

however, *Chevron* does not hold that a reviewing court must turn a "blind eye" to an agency's interpretation of its jurisdictional authority so long as the court can conclude it is "reasonable."

Indeed, subsequent decisions make it clear that even when deferring, the reviewing court must take steps to ensure that the agency's construction of a statute it is charged with enforcing is "reasonable, in light of the language, policies, and legislative history of the Act . . . " *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985) (examining statutory language, policies, and legislative history of the Clean Water Act to determine whether Congress intended for the Corps to exercise jurisdiction over adjacent wetlands); *see also Food & Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) (examining Congress' overall regulatory scheme in determining whether FDA had authority under the Food, Drug, and Cosmetic Act to regulate tobacco products).

Moreover, the rule of judicial deference to agency interpretation of a statute has no application where the issue before the court is: What authority did Congress delegate to the agency in the first instance? Neither of the two rationales set forth in *Chevron* (agency expertise and Congressional intent to delegate the power to implement a statute and make policy choices through regulation) applies when the court, as here, is required to define the extent of the agency's authority under a statute such as the Clean Water Act. *Chevron*, 467 U.S. at 842-45, 865-66.

First, the Corps has no particular expertise in determining the nature and extent of the authority of Congress granted to it under Section 404 or, for that matter, under any other statute authorizing Corps' activities. To the contrary, it is the court that possesses

both the expertise and the constitutional duty of interpreting the nature and extent of the power granted by Congress to an agency such as the Corps, and what power has not been so granted is therefore reserved to the States or the people themselves, respectively, under the Tenth Amendment. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); U.S. CONST. amend. X.

Second, Congress cannot have intended to delegate to the Corps the power to define its own authority under Section 404 of the Clean Water Act, for this would amount to delegate of legislative authority without any of the necessary standards or limitations. *See, e.g., Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 218 (1989); *Mistretta v. United States*, 488 U.S. 361, 371-74 (1989); *American Trucking Ass'n, Inc. v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999), *cert. granted Browner v. American Trucking Ass'n, Inc.*, 529 U.S. 1129 (2000) *and American Trucking Ass'n, Inc. v. Browner*, 530 U.S. 1202 (2000). The extent of the permitting authority delegated to the Corps by the Clean Water Act – i.e., over the permitting of dredge or fill material into navigable waters at specified disposal sites – does not and could not, consistent with separation of powers, include the authority to append "and migratory bird habitat" to that statutory authorization. *See* 33 U.S.C. § 1344 (West 1986 & Supp. 2000). Congress, in Section 404, gave the Corps regulatory power over certain activities – no more and no less – and no interpretation or regulation can augment that statutory authority.

Indeed, it may fairly be said that the sole measure of the lawfulness of a regulation is whether it falls within or without the power given that agency by Congress. *See United States ex rel. O'Keefe v. McDonnell Douglas Corp.*, 132 F.3d 1252, 1257 (8th

Cir. 1998) ("An agency's promulgation of rules without valid statutory authority implicates core notions of the separation of powers, and we are required by Congress to set these regulations aside.") (citing 5 U.S.C. § 706(2)(C) (1994)); *see also Chrysler Corp. v. Brown*, 441 U.S. 281, 308 (1979) (regulations must be struck down unless reviewing court is "reasonably [ ] able to conclude that the grant of authority contemplates the regulations issued."); *Transohio Savings Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598, 621 (D.C. Cir. 1992) ("Agency actions beyond delegated authority are 'ultra vires,' and courts must invalidate them.").

Thus, it is the role of the court in the first instance to determine the nature and extent of regulatory authority granted to an agency by Congress. When, as here, the court withholds it own legal analysis of the statute and defers to the agency's determination as to its own statutory authority, it becomes the agency and not the court that exercises the quintessentially judicial power of declaring what the law is.

## Conclusion

A memo drafted by the EPA's general counsel in the weeks following the *SWANCC* decision added to the confusion surrounding *SWANCC*'s implications.[2] The EPA conceded that the Supreme Court provided an "important new limitation" on how the EPA and the Corps can assert regulatory authority. The EPA failed to specify what that important new limitation was other than the invalidation of the Migratory Bird Rule. As a result of the confusion, EPA and Corps field offices have issued widely varying and

[2] *See* Gary Guzy and Robert Anderson, *Supreme Court Ruling Concerning CWA Jurisdiction over Isolated Waters*, (2001) <http://www.aswm.org/fwp/swancc/legal.pdf>.

often inconsistent interpretations of the jurisdictional scope of their CWA authority.[3] The lack of uniformity in *SWANCC* interpretation brought on by the absence of clear guidance from the EPA also burdens state and local governments, who should be brought in as equal partners in wetlands protection. States and localities cannot pick up the slack for wetlands protection without knowing the limits of what the EPA and Corps can do.

The EPA should provide clear guidelines with a view to really enforcing the *SWANCC* decision. Agencies cannot perform their proper duties without clear and intelligible guidelines. Regulatory bodies simply cannot be left to their own devices to delineate the outer limits of their authority. Rather, in our free society, it is the people acting through elected representatives that allocate power to agencies and determine the bounds of that power. Federal agencies charged with implementing the *SWANCC* decision should do so.

We recommend that the Corps:

- Adheres to *SWANCC* by clarifying that any assertion of jurisdiction over isolated wetlands without Congressional authorization is not permitted;
- Clarifies that Section 404 permits issued before *SWANCC* are invalid, as well as their mitigation requirements, supporting its district offices that already take this position;
- Restricts definitions of "tributary" and "adjacent" waters to include physical proximity to "open water" as an important consideration for

[3] *See* Pat Parenteau, *Position Paper on Clean Water Act Jurisdiction Determinations Pursuant to the Supreme Court's January 9, 2001 Decision, Solid Waste of Northern Cook County v. United States Army Corps of Engineers (SWANCC)* presented to Administrator Whitman, United States Environmental Protection Agency (Dec. 2001) <http://www.aswm.org/fwp/swancc/position.pdf>.

federal regulation, lest overzealous regulators encroach upon private property that has at best a tenuous connection to regulable water.

I would be happy to answer questions you may have.

Mr. OSE. Mr. Smethurst.

Mr. SMETHURST. I appreciate the opportunity to supplement my written remarks.

In 1975, a Federal District Court here in Washington found that the Corps' 1974 regulations did not regulate enough an ordered it to enlarge their coverage. In 2001, the U.S. Supreme Court found the Corps indeed had it right in their 1974 regulations, suggesting that the current regulations go too far. Consequently, I was heartened to hear from the preceding panel that both the EPA and the Corps are considering actually promulgating new regulations, because if there is one thing that the SWANCC case suggests, and everyone seems to pretty much ignore, is the fact that the regulations, as they currently exist, may indeed go well beyond what Congress intended in 1974.

I come from an area where I deal with three separate districts of the Corps of Engineers: Philadelphia, Baltimore, and Norfolk. I can tell you as a practical matter, from personal experience and discussion with those people in the field who do these delineations and deal with Corps staff people on a day to day basis, it is utter chaos out there. Not only is there a difference between districts in how these terms are being defined, but there is a difference between people in the same district.

There is guidance out there. It is not written down and it varies from district to district, and some within a district will comply with that guidance and others in the same district throw it in the trash can. So it depends upon in many cases who you are dealing with as to what you get on behalf of your client.

What are the other things that need to be addressed? There have been mentioned today tributaries. I would like to show you—as you have mentioned, I am counsel in the Deaton case—a couple of drawings I believe are on the screen. The first has to deal with the subject of both tributary and adjacency.

The Deaton property is that little triangle in the upper righthand corner of the drawing. It is sort of a stick drawing showing how water flows from the area of the Deaton property through a series of interconnected ditches, the major one of which I will show you in a moment.

It passes over five separate dams before it finally reaches the navigable waters of the Wicomico River which is a tidal, navigable river leading to the Chesapeake Bay from the city of Salisbury on Maryland's Eastern Shore. It is eight miles from the Deaton property via these ditches and one stream, the Beaver Dam Creek, before you finally get to the east prong of the Wicomico River.

Some of the questions in this case involve some of the very points mentioned so far. The Government contended that the ditch in front of the Deaton property, a county constructed, county maintained, roadside drainage ditch put there to drain water off the road so when it rains the road isn't flooded.

No. 2 shows you the beginning of this ditch viewed looking toward the Deaton property from the very beginning point of this ditch where it is nothing more than a slight swale in the ground. Water will go in that little swale when it rains. Other than that, probably not.

Picture No. 3 looks upstream from the northeasterly side of the Deaton property and this is what the stream looks like or the ditch looks like just at the point before it passes in front of the Deaton property. This is the water body argued to be a tributary.

Picture No. 4 depicts the roadside ditch, taken from where there is a pipe under the road—looking at the very end of this roadside ditch before it actually passes under the road and continues on as another ditch on the other side of the road.

In the Deaton case, we were dealing with the definition of tributary primarily and definition of adjacency. If we can go back to drawing No. 1, the U.S. District Court did not buy the tributary argument, but it did buy the adjacency argument, finding that wetland was adjacent to the Wicomico River eight miles away. That is one issue on appeal.

I will stop now since I have exhausted my time.

[The prepared statement of Mr. Smethurst follows:]

# TESTIMONY OF
# RAYMOND STEVENS SMETHURST, JR.

***Before the United States House of Representatives' Committee on Government Reform's Subcommittee On Energy Policy, Natural Resources, and Regulatory Affairs***

September 19, 2002

Mr. Chairman, Congressman Tierney, and Members of the Subcommittee, thank you for the opportunity to appear before you today to share my views on and experiences with federal wetland jurisdiction in light of the 2001 U.S. Supreme Court rulings in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers.*

## I. INTRODUCTION

I am Raymond Stevens Smethurst, Jr., a partner in the law firm of Adkins, Potts and Smethurst , LLP, located in Salisbury, Maryland. In offering this testimony, I represent myself as an attorney who has had an interest and been involved in riparian and wetland litigation for many years. As someone who attended several of the congressional hearings leading to the enactment of the Water Pollution Control Act Amendments of 1972, and was consulted about that legislation by then Maryland Congressman, The Honorable William Mills, I have had a keen interest in and been involved with the subsequent application of that law, particularly the section 404 program. I present myself as a person reasonably knowledgeable of the Clean Water Act in general and experienced with the Corps of Engineers' assertion of ever expanding section 404 jurisdiction in particular. I am here representing James and Rebecca Deaton, who in challenging that expansive jurisdictional claim, have had their small 12-acres of property tied up in litigation for approximately 10 years.

I have three goals in presenting this testimony to the Subcommittee. First, I will offer my analysis demonstrating how the Corps of Engineers ("Corps") and the Environmental

Protection Agency ("EPA") (collectively, the Agencies) are interpreting and enforcing the Clean Water Act ("CWA") in a manner that disregards both congressional intent and decisions of the U.S. Supreme Court. In permit determinations, enforcement actions and litigation, the Agencies are still asserting that property is subject to federal control under the CWA if a surface water flow, however small and irregular, links, across miles of the American landscape, a "wet" area with a water body (river, bay, ocean) that is indisputably subject to CWA jurisdiction. Of course this theory has no limiting principle; all water flows downhill and runs into other water. I intend to explain why this "mere connection theory" disregards the legislative and regulatory history of the CWA and the two Supreme Court decisions that to date have construed that history-namely, *United States v. Riverside Bayview Homes,* 474 U.S. 121 (1985)(*"Riverside Bayview"*), and *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs,* 531 U.S. 159 (2001) *("SWANCC").*

Second, I intend to provide you with a real-life demonstration of just how far into the American landscape the Corps' jurisdictional claim enables it to reach.. My clients, the Deatons, have been forced to litigate whether an ordinary, rural, roadside ditch that runs alongside their property can be elevated to the status of a "navigable water" and thus fall within the Agencies' control under the CWA. I do not believe that the Deatons' predicament is unique, but is shared by numerous other landowners throughout the country who are confronted by the Corps' and EPA's excessive jurisdictional claims.

My third and final goal is to impress upon the Subcommittee the dire need for rational guidance from the Agencies that is faithful to Congress's intent and the Supreme Court's rulings, rejects the "mere connection" theory, and clarifies the geographic scope of waters and

wetlands subject to the CWA.

## II. The Clean Water Act and the Agencies' Implementing Regulations.

The basic framework for modern federal regulation of water pollution was established when Congress adopted the Federal Water Pollution Control Act Amendments of 1972, which, after subsequent amendments, is now known as the Clean Water Act ("CWA"). Section 301(a) prohibits the discharge of pollutants (such as sediment) into "navigable waters" except in compliance with permits issued by the Corps or a qualifying state agency. 33 U.S.C. § 1311(a). One exception to the discharge prohibition is found in section 404. It authorizes the Corps to issue permits for the "discharge of dredged or fill material into the *navigable waters* at specified disposal sites." *Id.* § 1344(a) (emphasis added). The EPA oversees the Corps' section 404 permit program.

Congress limited the waters subject to CWA permitting requirements to "navigable waters." The CWA defines "navigable waters" as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). The U.S. Supreme Court confirmed that the fundamental element for determining if a particular water falls within the CWA's scope is whether that water has a connection to "navigation." *See* SWANCC, 531 U.S. 159 (2001).

Through regulation, the Corps has interpreted "waters of the United States" to mean:

> (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide [the "*traditionally navigable waters*"];
>
> (2) All interstate waters including interstate wetlands;
>
> (3) 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 destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purposes by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a)(1) through (4) of this section;

(6) The territorial seas; [and]

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section.

33 C.F.R. §328.3(a). "Wetlands" have been defined since 1977 as

> The term "wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

33 C.F.R. § 328.3(6). . Furthermore, the Corps defines "adjacent" as "bordering, contiguous, or neighboring." 33 C.F.R. §328.3(c). Thus, pursuant to these regulations, tributaries to navigable waters are subject to section 404 permitting requirements (*see* (a)(3)), as are wetlands adjacent to tributaries (*see* (a) (7)).

## III. The Corps' Regulation of the Deaton Property

In my view, the Agencies have ignored Congress' intent that "navigation" remain the determinative jurisdictional concept regarding the CWA's geographic reach. The Corps' regulatory contortions to read the term "navigable" out of the statute are exemplified by how it

has treated the property of my clients, James and Rebecca Deaton. The Corps claims that an ordinary, rural roadside ditch - more than eight miles away from an actual "navigable" river - is a "tributary" of that river subject to section 404 permitting requirements. Moreover, the Corps also deems portions of the Deatons' property to be "wetlands" even though they are not "wet" and argues that these "wetlands" are "adjacent" to that river. I believe these strained theories of CWA control, based simply on the fact that surface water may sometimes flow in an adjacent ditch and ultimately connect to a truly navigable river some distance away, must be rejected. Congress should send strong cautionary words that the Agencies are exceeding their authority in this regard.

**A. Description of Deaton Property**

The Deatons own 12 acres of property northeast of the City of Salisbury in the center of the Delmarva Peninsula, almost equidistant between the Atlantic Ocean and Chesapeake Bay. Like most of the peninsula, this area is low and flat and laced with bays, rivers and streams, most of which are tidal. In many areas, shallow groundwater rises and falls in predictable seasonal patterns, rising in the late winter and then falling off in the late spring.

Their property abuts a roadside drainage ditch that lies between the property and the county road (Morris Leonard Road). The ditch runs alongside the road, through a culvert under the road, and into another roadside ditch (sometimes called the "John Adkins Prong"), which in turn runs for 1700 feet into the "Klein Prong" or ditch. The Klein Prong runs through farmland and connects to the "Perdue Creek Prong," which runs for over a mile to an intersection with Beaverdam Creek, a non-navigable stream. Beaverdam Creek runs for 7.5 miles, over a privately owned dam, and then over three additional dams until it connects with

the East Branch of the Wicomico River. After clearing one last dam, it becomes the "Wicomico River", a tidal and navigable-in-fact tributary to the Chesapeake Bay, which lies an additional 25 miles downstream.

The Morris Leonard Road ditch (roadside ditch) is shallow, narrow, and only occasionally contains water. At the edge of the Deatons' property the ditch is simply a 6-8 inch deep swale less than two feet wide. At the culvert under Morris Leonard Road the ditch has a bottom width of only 2-3 feet. During the warm weather months, there is normally no water flowing in the roadside ditch - or, for that matter, in Perdue Creek Prong - except following a heavy rainfall.

The Deatons' property is located at one of the highest elevations in the county and as far from navigable waters as any property in the county. The Deatons purchased this property over a decade ago and planned to build five houses on it. Because the property contains a low spot in its center with poor drainage, the local health department would not approve the installation of sanitary drainfields to service the proposed housing. To alleviate this condition, James Deaton hired a contractor to excavate a ditch from the low spot, across the property, and out to the county roadside ditch.

The contractor began the Deatons' ditch in uplands at the Morris Leonard Road ditch. The excavator operator placed the soil removed in the excavation of the ditch in piles on either side (or both sides) of the ditch, an activity known as "sidecasting." The three-foot ditch excavated on the Deaton property starts and ends in non-wetland areas but passes through two wooded areas on the site that the Corps claim are wetlands – even though they are not at all similar to "swamps, marshes, bogs." *See* C.F.R. § 328.3(c). Along the remainder of the ditch,

excavated material was placed in concededly upland areas.

**B. The Corps Files Suit Against the Deatons**

The Corps filed suit against the Deatons in the U.S. District Court for the District of Maryland, alleging that when the Deatons dug the ditch on their property they discharged dredged or fill material into navigable waters without a permit, in violation of sections 301(a) and 404 of the CWA. The Corps sought an injunction prohibiting further discharges and requiring the Deatons to fill the ditch back in. The Corps' asserted two jurisdictional theories.

Although the site is miles away from any truly navigable water, the Corps nonetheless claims that the roadside ditch next to the Deaton property is subject to section 404 jurisdiction as a "tributary" of the Wicomico River. Alternatively, the Corps maintains that the wetlands on the Deatons' property are "adjacent" to the distant Wicomico River. To support claims of the ditch's "tributariness" and/or "adjacency," the Corps argues that CWA jurisdiction is appropriate because water from the roadside ditch can theoretically reach the Wicomico River through and over the series of ditches, intermittent streams, ponds, and dam barriers described above. The district court rejected the first theory but upheld the second. The case is now before the U.S. Court of Appeals for the Fourth Circuit and is scheduled to be argued in December.

## III. The Supreme Court's Decisions in *Riverside Bayview* and *SWANCC*

In my view, principles announced by the U.S. Supreme Court regarding the term "navigable waters" and "wetlands" unequivocally render the roadside ditch next to the Deaton property, and any presumed wetlands on the property beyond CWA's jurisdiction. Yet the

Agencies, both informally and formally, ignore important elements of Supreme Court holdings and reasoning, and persist in asserting authority not conferred on them by Congress to the detriment of property owners nationwide.

### A. *United States v Riverside Bayview Homes*

In *Riverside Bayview*, the Corps asserted jurisdiction over "low-lying marshy land" that was adjacent to a traditionally navigable water (see 33 C.F.R. § 328(a)(1)), the Black Creek. The question was whether the Corps' jurisdiction over "navigable waters" gave it authority to regulate "adjacent wetlands."

The Court agreed, in light of the specific facts of *Riverside Bayview,* that it was appropriate for the Corps to assert CWA jurisdiction over "adjacent wetlands." The Court reasoned that in defining "navigable waters" as "waters of the United States," Congress intended to regulate "at least some waters that would not be deemed 'navigable' under the classical understanding of that term." 474 U.S. at 133. The Court also held that it is "reasonable" for the Corps "to interpret the term 'waters' to encompass wetlands adjacent to waters as more conventionally defined," *id.* at 131, where it is difficult to tell where the water ends and the land begins. *Id.* at 132.

Subsequently in *SWANCC,* the Supreme Court itself described *Riverside Bayview* as upholding "jurisdiction over wetlands that *actually abutted* on a navigable waterway." *SWANCC,* 531 U.S. at 167 (emphasis added); *See United States v. Larkins*, 852 F.2d 189, 193 (6th Cir. 1988) (Merritt, J., concurring) (*Riverside Bayview's* holding "is limited...by the important fact that the wetlands ... were 'located *adjacent to a body of navigable water*'") (emphasis in original), *cert. denied*, 489 U.S. 1016 (1989). Nothing in *Riverside Bayview*

stands for the proposition that the Corps has the authority to regulate as an "adjacent" wetland every wetland area next to or near an intermittent stream, roadside ditch, swale, and drainage flow that is not likewise difficult to tell where the water body ends and the land begins. The Deatons property is illustrative: even when there is water in the roadside ditch, it is easy to tell where the water ends and the land begins.

Yet the Corps insists on claiming jurisdiction over wetlands, such as the ones on the Deatons' parcel, that do not "abut" navigable or "open" water and cannot be considered "adjacent" wetlands to navigable waters under any definition of that term. And the Corps has not shown and cannot show that Congress has ever authorized federal jurisdiction over the sort of remote wetlands, ditches, and drainways at issue on the basis of a remote surface water connection.

**B. *SWANCC***

In the Supreme Court's most recent decision interpreting the term "navigable waters", *SWANCC*, the property at issue included about 18 acres of ponds and small lakes that the owners wished to fill to construct a landfill. The ponds and small lakes were not hydrologically connected to any other waters; that is, there was no surface water connection between the ponds and any other waterbody. Nonetheless, the Corps asserted jurisdiction over the isolated ponds through its "other waters" regulation (33 C.F.R. § 328.3(a)(3)) and the fact that migratory birds utilized the ponds and lakes. It required the landowners to apply for a section 404 permit, which it then denied.

The Supreme Court ruled that a section 404 permit was not necessary because the isolated ponds could not be considered "navigable waters." The Court stated that questions of

CWA jurisdiction begin with Congress's "traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *SWANCC*, 531 U.S. at 172. The term "navigable waters" has a specific meaning, developed over centuries and well-established when Congress passed the CWA in 1972, that carefully distinguishes between the federal "waters of the United States" and the local "waters of the States."

There has been an effort both inside and outside the Agencies to minimalize *SWANCC* by maintaining that all the Court did was invalidate the Migratory Bird Rule. That approach is seriously flawed because it overlooks critical sub-holdings and reasoning of the decision. The Corps was defending its jurisdictional claim in part on the basis of its current regulations and its claim that Congress had acquiesced in those regulations. But the Supreme Court found that the Corps' current regulations did not reflect the intent of Congress at the time the 1972 Amendments were enacted. Instead, the Court held that the Corps 1974 regulations correctly reflected that intent. *Id.* at 168.

The Court also expressly found that there was "no showing that Congress acquiesced in the Corps' 1977 regulations." *Id.* at 170-71. These two findings are significant in two key respects. First, they demonstrate that the CWA does not support the "hydrological connection" theory; instead it addresses "navigable waters." Second, they demonstrate that the type of wetland claimed to exist on the Deatons' property is not jurisdictional – even if the roadside ditch is.

## IV. The Corps' 1974 Regulations Which The Supreme Court Has Pronounced Controlling Do Not Countenance The Subsequent Expansion Of It's Jurisdiction.

Immediately after the passage of the Federal Water Pollution Control Act Amendments of 1972, the Corps and EPA offered different interpretations of the "navigable waters" language and of a Conference Report statement that "the term 'navigable waters' [should] be given the broadest possible constitutional interpretation." S. Conf. Rep. No. 92-1236, 92d Cong., 2d Sess., p.144, *reprinted in* 1 CRS, Legislative History of the Water Pollution Control Act Amendments of 1972, at 327 (1973). Consistent with the text of the Act and likely guided by contemporaneous hearings regarding its jurisdiction, the Corps concluded that the 1972 Amendments granted jurisdiction to the broadest constitutional extent of the "navigable waters." 39 Fed. Reg. 12,115 (1974). By contrast, EPA claimed jurisdiction over all activities "affecting interstate commerce." 38 Fed. Reg. 13,528 (May 22, 1973). The Supreme Court has concluded that the Corps' 1974 definition captured the intent of the 1972 Amendments. *See SWANCC*, 531 U.S. at 168 ("Respondents put forward no persuasive evidence that the Corps mistook Congress' intent in 1974."). The "determination factor" in the jurisdictional inquiry is "the water body's capability of use by the public for purposes of transportation or commerce." *Id.*

The Corps' original jurisdictional regulations, promulgated two years after the enactment of the CWA in 1972, extended only to these traditional navigable waters – "those waters of the United States which are subject to the ebb and flow of the tide, and/or are

presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce" - 33 C.F.R. §209.120(d)(1) (1974) – and the Supreme Court has cited those regulations as illustrative of the scope of federal jurisdiction that Congress originally intended to authorize. *SWANCC*, 531 U.S. at 168. The "determinative factor" in the jurisdictional inquiry is "the water body's capability of use by the public for purposes of transportation or commerce." *Id.* (quoting 33 C.F.R. §209.260(e)(1) (1974)). There is no question that the Morris Leonard Road ditch – which is not, never was, and cannot be made navigable – does not meet the traditional definition of "navigable waters."

In 1975, a district court ordered the Corps to expand its jurisdiction to the maximum reach of the Commerce Clause. *See NRDC v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975). Rather than appeal that decision – which *SWANCC* has now overruled – the Corps set about redefining its jurisdiction. In 1975, the Corps adopted "interim final" regulations asserting jurisdiction over navigable waters and non-navigable tributaries up to the *headwaters*[1] – a cutoff point that excluded the upper reaches of tributaries and the ditches flowing into them – and over their adjacent wetlands. *See* 40 Fed. Reg. 31,320-21 (July 25, 1975). So although the Agencies now contend that since 1975, the "waters of the United States" include all tributaries, they tend to ignore the fact that the regulations *in that same rulemaking* asserted jurisdiction over tributaries only "*up to their headwaters*." 40 Fed. Reg. at 31,320-21, 31,324.

[1] The "headwaters" is the region "upstream of the point on the river or stream at which the average annual flow is less than five cubic feet per second." 40 Fed. Reg. at 31,325.

The roadside ditch next to the Deatons' property – characterized by the Corps as the "headwaters of Perdue Creek" – would have been excluded under this definition.

In fact, in 1975 the Assistant Secretary of the Army disavowed any intention of regulating areas above the headwaters. *See* Hearings, Subcommittee on Water Resources, Committee on Public Works and Transportation, *Development of New Regulations by the Corps of Engineers*, 94th Cong., 1st Sess. 15 (1975) ("We put the dividing line at 5 second-feet of normal flow. Now, if it is smaller than that, the whole creek is outside the permit."). These areas lie well within the States' traditional authority over land and waters, and far beyond any possibility of navigation. *See id.* at 8 ("[T]hese decisions would be better made within States – certainly on the smaller bodies of water and the upper branches of rivers – than to bring them to the Federal Government.").

In 1977, the Corps adopted final regulations asserting jurisdiction over navigable waters, non-navigable tributaries, and isolated waters without the headwaters limitation. 42 Fed. Reg. 37,122, 37,144 (July 19, 1977). But as a practical matter these, too, exempted activities above the headwaters and in isolated waters by granting a blanket or "general permit" for them. At the time Congress was passing the 1977 CWA Amendments, therefore, even the Corps declined to regulate remote ditches.

It is therefore unsurprising that the Congress' the 1977 Amendments to the Act include no clear statement authorizing jurisdiction over remote ditches as "waters of the United States." To the contrary, addressing the question whether permits would be required for activities in "poorly drained farm or forest land" much like the Deatons' parcel, Senator

Muskie stated:

> The type of drainage you have described in many cases would not require a permit since the drainage could be performed without discharging dredged or fill material in water, *or would occur in areas that are not true marshes or swamps intended to be protected by Section 404.*

4 Congressional Research Service, Legislative History of the Clean Water Act Amendments of 1977 at 1042-43 (1978) (emphasis added). Congress has not authorized, "clearly" or otherwise, federal jurisdiction over every ditch that is "hydrologically connected" to a navigable water.

Nor did Congress intend to regulate wetlands when it passed the 1972 Amendments. Those same 1974 regulations the Supreme Court in *SWANCC* deemed to reflect congressional intent did not claim regulatory authority over wetlands. They were mentioned only as a "factor"to be considered as a matter of policy when evaluating permit applications, and were defined as "those lands and water areas subject to regular inundation by tidal, riverine, or lacustrine flowage" that "[g]enerally included...inland and coastal shallows, marshes, mud flats, estuaries, swamps, and similar areas." 39 Fed. Reg. 12,115, 12,121 (1974). After the 1975 *Calloway* decision, the Corps proposed in its interim final regulations that its jurisdiction over "navigable waters" extend to contiguous or adjacent wetlands (such as mudflats, swamps and similar areas) periodically inundated. 40 Fed. Reg. 31,329, 31,321 (July 25, 1975). Then, in 1977, the Corps promulgated its current regulation defining "wetlands".

Although the Supreme Court in *Riverside Bayview* approved CWA jurisdiction over wetlands adjacent to traditional navigable or "open" waters, neither that decision nor its rationale supports the Agencies' jurisdictional claim over wetlands of the kind claimed to be

present on the Deatons' property. The Court's decision was predicated on two principle factors. First, it recognized that the wetlands in *Riverside Bayview* were "low lying, marshy land" and that where the "point at which water ends and land begins...is far from obvious." *Id.* at 124, 132. Second, it analyzed the legislative history of the 1977 Amendments as supporting the Corps' jurisdictional claim over wetlands adjacent to waters navigable in fact. *Id.* at 137. But it *expressly declined* to express an opinion as to the Corps' jurisdiction to regulate "wetlands that are not adjacent to bodies of open water" – referring to 33 C.F.R. §§ 323.2(a)(2) and (b) (1985). *Id.* at 131 n.8.

The wetlands claimed to exist on the Deatons' property satisfy neither of these criteria.

## V. The Need for Guidance Following *SWANCC*

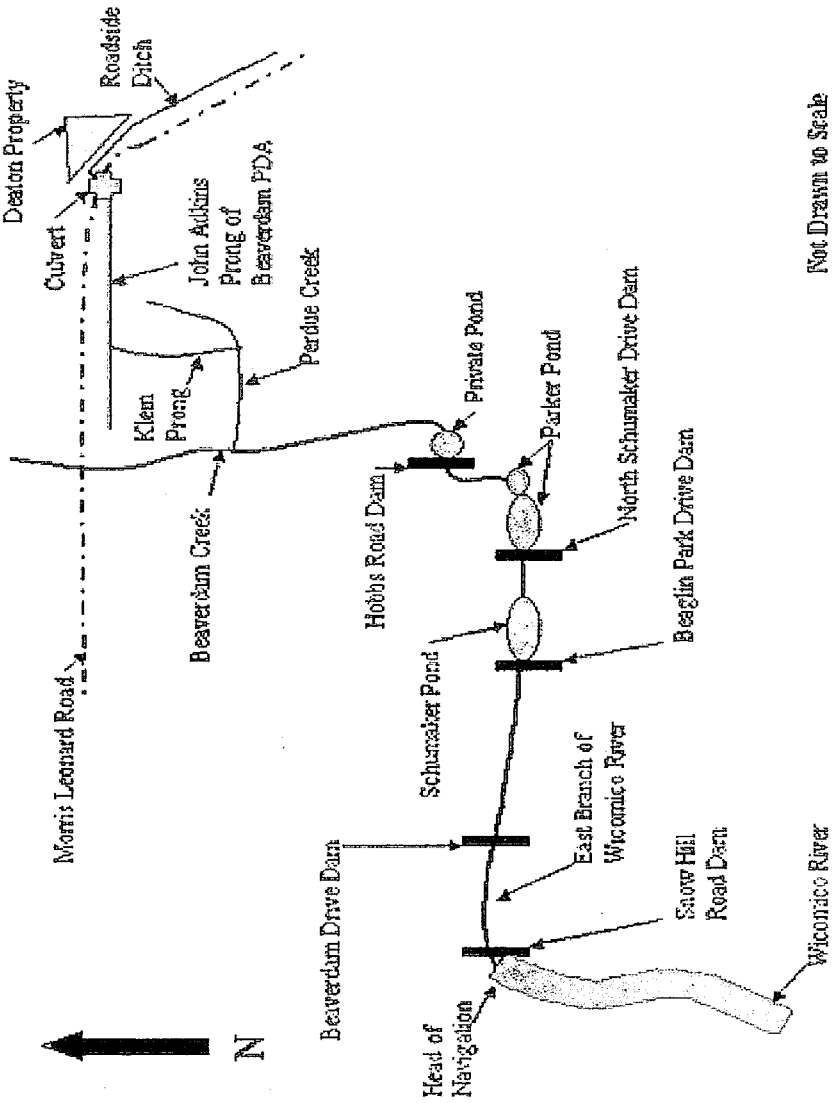
After SWANCC, it is clear that the Corps and EPA lack CWA jurisdiction over the type of "waters" and "wetlands" illustrated by the Deatons' case. Since that decision, the Agencies have nonetheless steadfastly refused or failed to reconsider objectively their CWA jurisdiction – in some instances attempting to thwart its holdings as to totally isolated waters. The Deatons are simply the latest poster-child in the Corps' strained jurisdictional attempts to regulate outside the CWA's parameters and beyond the limits announced in SWANCC and *Riverside Bayview* – for example, by calling isolated ditches "tributaries" or by claiming abutting property "adjacent" to truly navigable waters that lie miles and miles away.

Congress should no longer countenance the manner in which the Corps and EPA have been treating property owners like Mr. and Mrs. Deaton. Congress should direct the Agencies

to provide guidance faithful to its intent and to *SWANCC* and *Riverside Bayview* as follows:

- Before an aquatic resource is subject to the CWA's permit programs, the waterbody must be tidal, or navigable-in-fact, or navigable in the past, or can be made navigable with reasonable improvements.
- When the Agencies invoke their authority to regulate "adjacent wetlands," that wetland must actually abut a traditionally navigable water, must be wet (*i.e.*, "swamps, marshes, bogs". etc.), and be such that it is difficult to tell where water ends and land begins.
- The Agencies must provide guidance on defining a "tributary." In this regard, the Agencies should develop a common sense and a sound hydrologic definition, consistent with Congress' intent, on how far upstream from a traditionally navigable water the CWA can reach.
- Congress should make clear that the Agencies can not assert CWA jurisdiction under the tributary regulation, the adjacency regulation, or otherwise, simply because water from non-navigable areas flows and ultimately connects to a navigable waterway. There is no limiting principle to a theory that bases federal CWA authority on the notion that water molecules might migrate downhill and eventually flow into rivers, streams, and oceans.

Unless these questions are clarified, the Agencies will continue to regulate in a manner Congress did not intend and property owners like the Deatons will be burdened by uncalled-for litigation to protect their property and themselves.


Deaton Property
Roadside Ditch
Culvert
John Adkins Prong of Beaverdam PDA
Perdue Creek
Klein Prong
Morris Leonard Road
Beaverdam Creek
Hobbs Road Dam
Private Pond
Parker Pond
North Schumaker Drive Dam
Beaglin Park Drive Dam
Schumaker Pond
East Branch of Wicomico River
Beaverdam Drive Dam
Snow Hill Road Dam
Wicomico River
Head of Navigation
N
Not Drawn to Scale

Mr. OSE. Mr. Guzy.

Mr. GUZY. I am pleased to testify on the continuing vital importance of protecting our Nation's wetlands and water resources. America's wetlands need to be protected, they still can be protected after the SWANCC decision, and that decision did not justify yet another effort to attempt to roll back America's environmental protections.

Before going into detail, let me tell you briefly about my background. I have practiced environmental law for the last two decades, including private practice, at the Department of Justice litigating wetlands cases, and at the Environmental Protection Agency where I had the honor of serving as the agency's general counsel from 1998 to January 2001.

EPA and the Corps of Engineers protect our Nation's wetlands under the authority of the Clean Water Act. That law, which will celebrate its 30th anniversary next month, was propelled by pollution so bad that our Nation's rivers caught fire. Congress set forth some very straight forward goals in the act, that the chemical, physical, and biological integrity of the Nation's waters needed to be restored. This law has been a resounding success, returning significant portions of our landscape to health, to public enjoyment, and to economic prosperity. Yet many waters remain toxic.

The United States has lost nearly one-half of its historic wetlands, on the order of 100 million acres, and continues to lose at least 60,000 acres of wetlands each and every year. If we have learned anything from the science that has developed over the last 30 years, it is that ecosystems are related. They cannot be treated in isolation.

Protecting our Nation's wetlands is even more important for protecting public health than originally understood. We are learning that significant tracks of wetlands need to be restored, not lost, because they are understood to be essential and effective natural means for protecting us from flooding, cleansing our waters from pollution, purifying our drinking water, and providing crucial habitat.

We see this today in key areas from the Everglades in the Gulf of Mexico to the Great Lakes, from the Chesapeake to the San Francisco Bay delta, and the notion that some wetlands are truly ecologically isolated is increasingly being regarded by scientists as a myth of the past.

Federal regulation of wetlands was upheld by a unanimous Supreme Court in 1985 in Riverside Bayview Homes. There the Court ruled that Federal jurisdiction extended beyond traditionally navigable waters, requiring permits for fill in wetlands adjacent to navigable waters and their non-navigable tributaries. That is why the SWANCC decision represented a shift and why the Corps counsel and I, working with expert career staff from both agencies and from the Department of Justice, issued an explanatory memorandum shortly after the ruling.

What struck us most about that decision was how narrowly it was drawn. The Court did not rule on the constitutionality of the agency's interpretation, although it expressed some doubts, but instead the ruling holds that the assertion of jurisdictions beyond the act's authority when it involves all the following elements: intra-

state waters, that are non-navigable, are isolated, and where jurisdiction is based solely on the waters' use as habitat for migratory birds for their effect on interstate or foreign commerce.

Equally striking was that the Court went to great pains to preserve its earlier ruling in Riverside Bayview, which recognized the importance of a potential ecological connectedness between navigable waters and adjacent wetlands, even those beyond traditional navigable waters.

For isolated waters, the Court simply did not reach the question of whether some other rationale could demonstrate an effect upon interstate commerce, such as when their destruction or degradation impacts jurisdictional waters through flooding, erosion, or pollution.

As the SWANCC Court noted, Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands inseparably bound up with the waters of the United States. SWANCC cannot fairly be viewed as a sweeping reordering of wetlands authority, somehow tethered completely to 100 year old concepts of navigability. Nothing in SWANCC requires the wetlands rules to be rewritten.

As the Justice Department said in a brief, "the Supreme Court's refusal to expand Clean Water Act jurisdiction to isolated intrastate waters does not signal much less hold that the scope of Clean Water Act jurisdiction approved in Riverside Bayview should be cut back."

Rather than weakening wetland protections they need to be strengthened in common sense ways. Unfortunately, today many crucial wetlands are not being protected as the administration appears to be stepping back from asserting jurisdiction. Overall best estimates are that 20 to 30 percent of the Nation's wetlands are at risk if so called isolated wetlands are not federally protected.

What is needed now is straightforward guidance, and I believe there is no room under the current statute and the ongoing authority of Riverside Bayview to justify further limits on wetlands protection without a change in the underlying statute itself and thus no warrant for delaying protections by undertaking the broader regulatory process that the administration has spoken of.

If the real concern expressed by the regulated community is one of predictability and certainty, and that is a fair concern, then the easiest solution would be for Congress to amend the Clean Water Act to remove any doubt about jurisdiction over isolated wetlands. I commend to this subcommittee the recently introduced Oberstar-Dingell bill, which would reaffirm Congress' original intent to protect from destruction all water bodies, including wetlands, by replacing the term navigable waters throughout the act with the phrase "waters of the United States," and would help the Clean Water Act keep pace with the evolving science, and would recognize the passion Americans truly feel for protecting clean and healthy waters.

Thank you for the opportunity to testify and I look forward to answering your questions.

[The prepared statement of Mr. Guzy follows:]

**TESTIMONY OF GARY S. GUZY**

**BEFORE A HEARING OF THE U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON GOVERNMENT REFORM
SUBCOMMITTEE ON ENERGY POLICY,
NATURAL RESOURCES AND REGULATORY AFFAIRS**

**REGARDING IMPLEMENTATION OF THE *SWANCC* DECISION**

**September 19, 2002**

Thank you Chairman Ose and members of the Subcommittee for the invitation to appear here today. I am pleased to be able to provide some perspective on the approach currently employed by the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers to interpreting the Supreme Court's decision in Solid Waste Agency of Northern Cook County v. Corps of Engineers, 121 S.Ct. 675 (2001) (SWANCC), and on the continuing vital importance of protecting our nation's wetlands and water resources and not rolling back those protections.

Before I do, let me tell you briefly about my background. I have practiced environmental law for the past two decades. During this time, I have engaged in private law practice on behalf of private parties and states, and I have served as a line attorney at the U.S. Department of Justice, where I litigated numerous nationally important wetlands matters. I spent seven years in several senior level positions at the U.S. Environmental Protection Agency, including having the honor of serving as the Agency's General Counsel from 1998 through January 2001. I currently am a partner with the law firm of Foley Hoag LLP.

EPA and the Corps of Engineers protect our nation's wetlands under the authority provided by Congress in the Clean Water Act. That law has served this Nation enormously well as it nears its 30th anniversary next month. It was propelled by pollution so bad that our Nation' rivers themselves caught on fire. Congress, when enacting the Clean Water Act, set forth some

very straightforward goals, most particularly that the chemical, physical, and biological integrity of the Nation's waters needed to be restored. 33 U.S.C. 1251(a). This law has been a resounding success -- returning significant portions of our Nation's landscape to health, public enjoyment, and economic prosperity. The statute has been supported by seven Presidents of both parties and through 15 different Congresses.

Yet, as EPA reports in its Status and Trends review, nearly 40 percent of the nation's rivers, lakes, and streams have yet to achieve a level of cleanliness sufficient to sustain the intended uses of those waterbodies. Likewise, our Nation has lost nearly one-half of its historic wetlands, and it continues to lose at least 60,000 acres of wetlands per year. These areas are essential for protecting us from flooding, cleansing our waters from pollution, purifying our drinking water, and providing crucial habitat. After a huge investment in municipal wastewater and industrial end-of-pipe infrastructure, our Nation continues to grapple with the problems caused by non-point sources of pollution. When Congress modernized the Safe Drinking Water Act in the 1990s, it wisely recognized that protecting the sources of drinking water from encroachment was just as critical as treating the finished water. If we have learned anything from the science as it has developed over these past 30 years, it is that ecosystems are related and cannot be treated in isolation and that protecting our nation's wetlands is even more important for protecting public health than was originally understood.

Wetlands play a vital role in maintaining healthy ecosystems. According to a U.S. Fish and Wildlife Service Report published in June of this year, "[w]etlands are among the Nation's most scarce and valuable natural resources," providing "crucial" habitat for fish, wildlife, and plants. Geographically Isolated Wetlands: A Preliminary Assessment of their Characteristics and Status in Selected Areas of the United States, June 2002, *available at*

http://wetlands.fws.gov/Pubs_Reports/isolated/questions.htm. The EPA estimates that "[m]ore than one-third of the United States' threatened and endangered species live only in wetlands, and nearly half use wetlands at some point in their lives." U.S. EPA, Wetlands: Fish and Wildlife Habitat, July 2002, *available at* http://www.epa.gov/owow/wetlands/fish.html.

This recent Fish and Wildlife Service Report, "Geographically Isolated Wetlands," concludes that isolated wetlands -- which in many instances are the only remaining remnants of contiguous natural wetlands systems -- perform many of the same functions as other wetlands. Thus, isolated wetlands serve key ecological and economic roles. These wetlands provide temporary storage for excess rain and runoff, thereby reducing the impacts of floodwaters and helping reduce soil erosion caused by fast-moving water. Filling these areas can have significant detrimental impacts on the surrounding region. For example, several studies conclude that recent devastating flooding along the Red River can be linked to the loss of roughly two-thirds of the original 15 to 17 million acres of prairie potholes. *See, e.g.* Council on Environmental Quality, Environmental Trends 102 (1989); T.C. Winter, Hydrologic Studies of Wetlands in the Northern Prairie, *in* Northern Prairie Wetlands (Arnold Van der Valk, ed., 1989); L.J. Brun, et al., Stream Flow Changes in the Southern Red River Valley, 38 N.D. Farm Res. 1-14 (1981).

Isolated wetlands also help maintain water quality by slowly filtering excess nutrients, sediments, and pollutants before the water seeps into the nation's rivers, streams, and underground aquifers. Isolated wetlands help replenish water supplies by recharging aquifers and by storing water during wet seasons and releasing it slowly through underground channels into streams and rivers during the drier months.

In addition, isolated wetlands provide critical habitat values. The Prairie Pothole area of the Great Plains region, for example, is the primary breeding ground for 40 percent of North

America's dabbling ducks, including mallards, pintails, and canvasbacks. National Wildlife Federation & Natural Resources Defense Council, Wetlands at Risk: Imperiled Treasures, July 2002, at 10.

The recent Fish & Wildlife Service report finds that the total land mass of these wetlands is significant, with isolated wetlands comprising more than half of the total wetland acreage in 11 percent of the report's 72 study areas from around the country, while an additional 33 percent of the study areas had from 20 to 50 percent of their wetlands fall in the same category. Other regions had an even higher percentage of isolated wetlands, and some groups have suggested that 20 to 30 percent of the nation's wetlands overall are at risk if isolated wetlands are not protected.

Federal jurisdiction over wetlands was upheld by a unanimous Supreme Court in 1985 in United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985). The Court there ruled that federal jurisdiction extended beyond the traditionally navigable waters, requiring permits for fill material placed into wetlands adjacent to navigable waters and their tributaries. 474 U.S. at 123. That is why the January 9, 2001, split decision by the Supreme Court in SWANCC represented such a shift and required that the agency personnel receive clarification of that decision's legal meaning. While many commentators have raised questions about the logic and consistency of this ruling -- and it bears a vigorous dissent by four members of the Court -- it is the rule of the land that must be implemented by the agencies unless and until Congress sees fit to adopt a different approach.

Working with expert career staff from the Environmental Protection Agency and the Corps of Engineers, Corps of Engineers Chief Counsel Robert M. Anderson and I issued a Memorandum on this subject shortly after the Supreme Court's ruling. Perhaps the most striking aspect of the Court's decision is the narrowness of its holding. The Court did not rule on the

constitutionality of the agencies' interpretation of the Clean Water Act. Instead, the ruling holds that certain jurisdictional determinations are beyond the Act's authority, when they involve all of the following elements: (1) intrastate waters; (2) that are non-navigable; (3) isolated; *and* (4) where jurisdiction is based solely on the waters' use as habitat by migratory birds as the basis for their affect on interstate or foreign commerce. SWANCC, 531 U.S. at 162, 170-71, 174.

Equally striking was that the Court went to great pains to preserve its earlier ruling in Riverside Bayview Homes, which recognized the importance of the potential ecological connectedness between traditional navigable waters and wetlands adjacent to those waters *and their tributaries,* which are beyond the traditionally navigable waters. In view of these features, as well as the important goals of the Act which must be carried out by the federal agencies, we took care in delineating the several different types of wetlands still subject to Clean Water Act regulatory jurisdiction. For isolated waters, the Court did not reach the question of whether some other rationale could suffice under its logic to demonstrate federal regulatory jurisdiction -- such as when there is some other kind of hydrological connection; or when the destruction or degradation of those waters could impact other jurisdictional waters through flooding, erosion, or pollution, when they can no longer serve their important water retention or pollutant filtering functions. This approach would comport with the SWANCC court's recognition that, "Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands "inseparably bound up with the 'waters' of the United States."" 121 S. Ct. at 680 (cited by Brief for the United States, United States v. Rapanos, No. 02-1377 (6th Cir. July 11, 2002) at 23).

Let me be clear: this reading was compelled by respect for the Congressionally enacted goals of the Clean Water Act and the structure of the Supreme Court's ruling and not by any

political or ideological considerations. That this is an appropriate reading of SWANCC -- faithful to Congressional purpose -- has been confirmed by the weight of court decisions interpreting the case, see e.g., Headwaters, Inc. v. Talent Irr'n Dist, 243 F.3d 526 (9th Cir. 2001), and by several recent filings by the U.S. Department of Justice. Just last month the Department, in a brief signed by Assistant Attorney General Thomas L. Sansonetti, argued to the U.S. Court of Appeals for the Fourth Circuit that, "The Court's refusal to expand CWA jurisdiction to isolated, intrastate waters does not signal, much less hold, that the scope of CWA jurisdiction approved in Riverside Bayview should be cut back." Opening Brief for the United States, United States v. Newdunn Associates, No. 02-1594, at 38. Rather, the Justice Department claimed that, "SWANCC addressed only the portion of the regulations pertaining to water 'isolated' from the tributary system to traditional navigable waters and did not affect the well-established legal principle that CWA jurisdiction extends to wetlands adjacent to tributaries to traditional navigable waters." Id. at 37.

Some Members of Congress and commentators have suggested that the Supreme Court's SWANCC ruling should be viewed as a fundamental and sweeping re-ordering of wetlands authority. I respectfully submit that to reach that goal, however, would require the agencies to forsake their role as protectors of the Nation's waters and Congress to change the current statutory scheme. What is needed now is straightforward guidance to clarify any misunderstanding about the current situation harbored by those who apply these regulations day in and day out. While I agree that if the agencies were to undertake a more sweeping policy evaluation -- as opposed to the legal interpretation Mr. Anderson and I forwarded -- it generally should be accomplished through means of a transparent regulatory process, there is no room under the current statute and the on-going authority of Riverside Bayview Homes to reach a

substantially different result without a change in the underlying statute itself, and thus no warrant whatsoever for undertaking such a regulatory process.

These commentators ignore two other salient points. First, the mere assertion of regulatory jurisdiction does not conclusively mean that no fill or use of that property is permissible. Rather, there is a well-developed permitting process under Clean Water Act section 404 by which approximately 95 percent of the permit applicants receive authorization from the Corps of Engineers to engage in fill activity. Second, because of the structure of the Clean Water Act, whatever result pertains here also likely will apply to EPA's regulation of effluent discharges under the National Pollution Discharge Elimination System (33 U.S.C. 1341) and to oil discharges under the Oil Pollution Act (33 U.S.C. 2702). Thus, there may be no remedy under these sweeping interpretations for the discharge, for example, of CAFO wastes or oil spills directly into prairie potholes in places such as Iowa.

If the real concern expressed by the regulated community is one of predictability and certainty, then the easiest solution would be for Congress to amend the Clean Water Act to remove any doubt about jurisdiction over isolated waters. I commend to this Subcommittee the bill introduced by Congressman Oberstar, Ranking Member of the Committee on Transportation and Infrastructure, Congressman Dingell, Ranking Member of the Committee on Energy and Commerce, and Senator Feingold that would reaffirm Congress' original intent to protect from destruction *all* water bodies, including isolated wetlands. By replacing the term "navigable waters" throughout the Clean Water Act with the phrase "waters of the United States," and by providing a thorough and comprehensive definition to guide federal agencies and the courts in their efforts to interpret this phrase, the Clean Water Authority Restoration Act of 2002 will make important headway in achieving Congress' original goal of restoring and maintaining the

chemical, physical, and biological integrity of the Nation's waters. Indeed, it is telling that Representative Dingell, who managed the Clean Water Act on the Floor in 1972, is a sponsor of this bill to carry out his and that Congress' intent. This amendment would conform with the desires of the American public as well, who care deeply about preserving the fishing, swimming, and recreational opportunities provided by clean and healthy water, and recognize its importance to our Nation.

I thank the Subcommittee for this opportunity to testify and would be pleased to answer any questions you may have.

Mr. OSE. Thank you for coming.

Professor Parenteau.

Mr. PARENTEAU. Since it hasn't been said before, I will say it now, I think the Supreme Court got it wrong in SWANCC. I think rulemaking is a bad idea. I think what is needed is legislation clarifying the intent of Congress and restoring the law to where it was before the SWANCC decision scrambled it.

This is, after all, the Clean Water Act we are talking about. It is not the Navigation Improvement Act. I think the late Senator Muskie would be shaking his head right now if he had heard the discussion that took place in this room about the law he pioneered in 1972 to remediate the terrible circumstances that existed in the country at that time when rivers were spontaneously catching fire as a result of their mistreatment through industrial, municipal, and other discharges.

Navigable waters is defined in the Clean Water Act as "waters of the United States." Before the Clean Water Act was enacted in 1972, there was already a Federal program and a pollution control program under the Rivers and Harbors Act that dealt with traditionally navigable waters and their tributaries. Congress did not need to legislate a new law protecting those navigable waters, hence the reason they chose the term waters of the United States. One cannot read SWANCC without simultaneously reading the Riverside Bayview Court's opinion. That is, as suggested, a unanimous opinion of the Supreme Court. That is a remarkable feat.

That case involved a programmatic challenge to the 404 permit regs and did not involve just a simple site specific challenge such as we had in SWANCC. In Riverside the Court talked about the aquatic ecosystem being an integrated ecosystem. The Clean Water Act took a systemic approach. Water moves in hydrologic cycles, pollution has to be attacked at its source. You cannot protect navigable waters in the valleys where you find them, you have to protect them in the head waters where they begin. That is what the Clean Water Act has been doing successfully for 30 years.

Courts don't send messages, courts don't make policy, courts decide cases and controversies under Article 3 of the Constitution. The SWANCC case presented one of the most narrow, conceivable challenges. It presented a site specific challenge involving abandoned sand and gravel pits in northern Illinois where the sole basis of jurisdiction asserted, incorrectly as it turns out since this site sits on top of a drinking water aquifer, was used by migratory birds. That is all the case involved, that is the question the Court certified, that is the question the Court answered. It answered nothing else. The rationale of that opinion is not entitled to any more deference than the rationale in the Riverside case, and I would suggest to far less because Riverside was a unanimous opinion, the first time the Court had looked at the Clean Water Act, much more contemporaneous with the views of the Congress at that time, much stronger opinion, clearly the intellectual superior to the decision in the SWANCC case.

The SWANCC Court could have held that the regs were unconstitutional. That question was framed up as a Commerce Clause question. It did not do so. The Court could have held that the Corps and EPA regulations in the (a)(3) category we have been

talking about exceeded the scope of statutory intent and statutory authority. It did not do so. It was quite careful and quite precise in saying we are striking down the migratory bird rule, which is not a rule, rather it's language from the preamble to a rule. Rulemaking is not necessary to deal with that. SWANCC did not invalidate any rules. What is the point of a rulemaking? Rulemakings are to change the law. There is nothing that needs changing in the law as a result of SWANCC. This is a "SWANCC made me do it" kind of fig leaf we are talking about here today. That is what we are talking about, let us label it for what it is.

Rulemaking is a bad idea for the following reasons. What is the public going to comment on? What we have heard discussion about is the lower court opinions following SWANCC, which don't deal with (a)(3) waters which were dealt with in SWANCC, and whether or not we agree with the briefs the Justice Department has filed or the briefs the regulated community has filed? That is no kind of rulemaking the public can meaningfully participate in and at the end of the day, what are you going to do, side with the 10 percent that have held there are questions about whether SWANCC applies to adjacent wetlands, or are you going to side with the 90 percent who held it does not? So the rulemaking is a waste of time.

Finally, the importance of isolated wetlands, I will simply say this. It is indeed an irony that the Bush administration is announcing a rulemaking process that could result in the removal of major areas of vital wetlands from protection under the Clean Water Act, when it was President Bush, Sr. who pledged the Nation to a no net loss of wetlands policy, which has been phenomenally successful in reducing the rate from some 400,000 acres to 60,000 acres of loss a year.

President Bush, Sr. did not say, "No net loss of wetlands adjacent to navigable rivers and their tributaries." He said, "No net loss of wetlands." It was a good goal then, it is a good goal now. I hope this Congress would adhere to it.

Thank you.

[The prepared statement of Mr. Parenteau follows:]

STATEMENT OF PATRICK PARENTEAU
PROFESSOR OF LAW, VERMONT LAW SCHOOL

BEFORE THE HOUSE OF REPRESENTATIVES
COMMITTEE ON GOVERNMENT REFORM

REGARDING IMPLICATIONS OF
THE SUPREME COURT'S *SWANCC* DECISION

SEPTEMBER 19, 2002

INTRODUCTION

Mr. Chairman, members of the Committee, thank you for this opportunity to appear before you and provide these views on the implications of the Supreme Court's controversial and sharply divided decision in *Solid Waste Agency of Northern Cook County v Corps of Engineers*, 121 S.Ct. 675 (2001) (SWANCC ). Though the Supreme Court has issued controversial environmental decisions in the past, few have generated as much heated debate over what the decision means.[1] The decision has created substantial uncertainty regarding the geographic jurisdiction of the Clean Water Act, and has had a particularly destabilizing effect on the section 404 wetlands protection program. Many groups, including the states, the regulated community, and the conservation community, have called upon the responsible agencies, the Corps of Engineers and the Environmental Protection Agency, to issue more definitive guidance on how SWANCC is to be interpreted and applied in the field. Absent such guidance, jurisdictional determinations are being made on an ad hoc basis across the country, with frequent reports of

[1] See, for example, Funk, "The Court , the Constitution, and the Clean Water Act: *SWANCC* and Beyond," 31 ELR 10741 (July 2001) (arguing that the decision misread legislative intent and should be read narrowly); Albrecht & Nickelburg, "Could SWANCC Be Right? A New Look at the Legislative History of the Clean Water Act," 32 ELR 11042 (September, 2002) (arguing that the decision correctly interpreted congressional intent and should be read broadly). I side with those who believe the Court misread the statute and its legislative history, and that the

conflicting interpretations from one Corps District to another. The agencies have agreed that guidance is necessary, but have not been able to finalize it. Obviously, there are competing views within the Bush Administration as to how these difficult issues ought to be resolved.

WHAT'S AT STAKE

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opinion contains confusing and conflicting signals on how jurisdictional calls are to be made.

The stakes in this debate, particularly for wetlands conservation, are high.[2] According to the latest assessment by the U.S. Fish and Wildlife Service, issued the same day the SWANCC decision was released, the nation has lost 53% of its wetlands.[3] Out of an original inventory of 220 million acres of wetlands, approximately 105 million acres remain. The great majority of these are on private land and are vulnerable to development. Once scorned as wastelands, wetlands are now recognized as providing a host of "ecosystem services"–flood control, water purification, groundwater recharge, fish and wildlife habitat, carbon sequestration, recreation, etc.–of tremendous economical, ecological, and cultural importance to the nation. These values, however, are not reflected in market economics. Government policies and programs are needed to correct the failure of the market to account for these values. Due to a combination of federal and state policies, as well as private stewardship initiatives, the rate of wetland loss has been reduced dramatically. In particular the section 404 program, which relies primarily on compensatory techniques to offset wetland losses through restoration and enhancement of existing wetlands, and the "Swampbuster" provision of the Food Security Act of 1985,[4] have

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[2] Because it was interpreting the term "navigable waters," which is the jurisdictional basis for the entire CWA, the Court's decision has implications for a tremendous range of federal and state water quality programs, including the section 402 (NPDES) discharge permit program, the section 311 oil spill liability program, the section 302 water quality standards program, the section 303 (d) wasteload allocation (TMDL) program, the section 401 water quality certification program, and the section 404 dredge/fill permit program. However, I will focus on the impact on the section 404 program because that is where the decision is likely to have its most pronounced effects.

[3] See USDOI, *Status and Trends of Wetlands in the Coterminous United States 1986 to 1997*, January 9, 2001 (available at: http://wetlands.fws.gov/bha/SandT/SandTReport.html)

[4] See USDA's *National Resources Inventory*, January 9, 2001 (available at: http://www.nhq.nrcs.usda.gov/NRI )

stemmed the loss of wetlands. Nevertheless, the nation continues to lose almost 60,000 acres per year to urban development, agricultural conversion, energy extraction, highways, and other human activities.

Much of the credit for the reduction in acreage losses can be attributed to former President George Bush's adoption in 1989 of a national goal of "no net loss" of wetlands.[5] Though this goal has not been fully realized, the rate of wetland loss has declined by 80% in the past decade thanks in large part to federal policies and programs like 404.[6]

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[5] See National Academy of Sciences, *Compensating for Wetland Losses Under the Clean Water Act*, February 2001. NAS also concluded that, while the "no net loss" policy had helped reduce the areal extent of wetland losses, it has not been as effective at replacing wetland functions, which is the more critical need.

[6] Among the most important factors contributing to this success noted in the *Status and Trends Report* is "more vigilant regulation of activities that impact wetlands, elimination of incentives for wetland drainage, acquisition and conservation easements, public education and outreach about wetlands."

SWANCC has placed all this progress in jeopardy. Some want to use SWANCC as an opportunity to make major changes in the 404 program, rolling back federal protection for "isolated wetlands" across the country. Though the SWANCC Court's specific holding was very narrow,[7] some point to statements in the opinion suggesting a more profound change in the scope of federal jurisdiction under the CWA.[8] These interpretations seek to erase over two decades of legislative, regulatory and judicial history under the statute.[9] Until the SWANCC decision, the controlling legal principle had been that Congress intended federal jurisdiction under the CWA

[7] The precise question certified by the Court was: "Whether the Corps may assert jurisdiction over isolated, intrastate waters solely because those waters do or potentially could serve as habitat for migratory birds." The Court answered this question in the negative: "We hold that 33 CFR 328.3 (a) (3), as clarified and applied to petitioner's balefill site pursuant to the "Migratory Bird Rule" exceeds the scope of authority granted to respondents under §404 of the CWA."121 S.Ct. 675, at 684. Significantly, the Court stopped short of invalidating the underlying regulations. It simply ruled that the so-called Migratory Bird Rule–which was in fact not a "rule," but merely language in the preamble to the rule-- outran the Corps authority under the CWA.

[8] The most troubling of these is the following: "In order to rule for respondents we would have to hold that the jurisdiction of the Corps extends to ponds that are not adjacent to open water. But we conclude that the text of the statute will not allow this." 121 S.Ct. at 680. Taken at face value this statement would mean that the wetland in *Riverside*, which was not immediately adjacent to Lake St Clair, was not jurisdictional. Yet SWANCC specifically affirmed the Riverside holding that wetlands which have a "significant nexus" to navigable waters are jurisdictional. This is an example of why it is dangerous to place too much weight on isolated statements in the Court's opinion.

[9] See Albrecht & Nickelsburg, supra.n 1. A full response to the arguments made by these authors is beyond the scope of this statement. Suffice to say, I believe they have selectively emphasized portions of the legislative history of the CWA in general, and section 404 in particular, while ignoring or downplaying contrary evidence of congressional intent; have misread earlier Supreme Court cases, particularly the landmark, unanimous 1985 *Riverside Bayview* decision; and reached a conclusion that contravenes the central objective of the CWA to "restore and maintain the chemical, physical and biological integrity of the nation's waters."

to extend to "the limits of the Commerce Clause."[10] Literally tens of thousands of regulatory actions and hundreds of judicial decisions have been premised on this fundamental principle. The Supreme Court had declined numerous opportunities to review cases raising the very same issues presented in SWANCC. The argument that this longstanding principle should be jettisoned – along with an an untold number of wetlands, ponds, streams and other aquatic sites-- in the wake of a single case involving an abandoned sand and gravel pit in Northern Illinois ought to raise serious doubts among the members of Congress. It behooves this Committee to proceed cautiously, and with full, accurate information regarding the effect of changing the jurisdictional predicate of the nation's premier water quality law. Most importantly, I urge the Committee to base any action it may take on solid scientific evidence. These issues should not be approached from the standpoint of attempting to "maximize" or "minimize" federal regulatory authority. Rather, decisions ought to be made on the basis of what is required to achieve the purposes of the CWA, which are widely supported by the public. Absent a compelling legal and scientific case, I urge the Committee to discourage the Administration from proposing radical changes in a law that has served the nation well for over 30 years.

ESTIMATING SWANCC's IMPACT

Various estimates have been made of the impact that SWANCC could have, depending on how the Administration comes down on a number of issues subsumed under the jurisdictional

[10] Indeed, that is exactly what the House Report on the 1972 legislation said: "[O]ne term that the Committee was reluctant to define was the term "navigable waters." The reluctance was based on the fear that any interpretation would be read narrowly. The Committee fully intends the term "navigable waters" to be given the broadest possible constitutional interpretation." (H.R., No 92-911, at 131 (1972). Similar language was contained in the Senate and Conference reports. See A Legislative History of the Water Pollution Control Act Amendments of 1972,

rubric.[11] Following is a brief review of estimates by various entities:

Congressional Research Service (CRS)

Asked for its views shortly after the SWANCC decision came out, CRS had this to say:

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Serial No. 93-1, at 250-51 (1973).

[11] These include how to define key terms such as navigable-in-fact ( does it include intrastate lakes?); tributary (does it include intermittent streams?); adjacent (does it encompass the floodplain?); and significant nexus (does it include ecological relationships?). The answers to these questions will require more detailed scientific information than is currently available.

> Estimates of wetland acreage likely to be removed from the section 404 permitting program as a result of the SWANCC decision are very difficult to assess, in part because of questions about Corps and EPA interpretation of the ruling, but the decision may affect up to 79% of wetland acreage. One likely result is that in those cases where case-by-case evaluations will be required to determine if regulatory jurisdiction exists, the length of time to obtain 404 permits will be longer than in the past[12]

CRS also observed: "Plainly, the degree of section 404 program contraction occasioned by SWANCC will depend on which aspects of the decision shape the government's response."

The Association of State Wetland Managers (ASWM)

ASWM is a nonpartisan, non-profit organization whose mission includes "translating wetland science into fair and reasonable government policies," ASWM has estimated that, nationally, between 20% and 60% of wetlands could be at risk depending on how key terms such as "navigable-in-fact," "tributary," "adjacent," and "significant nexus" are defined in the wake of SWANCC.[13]

The US Fish and Wildlife Service (FWS)

In a preliminary report on the functions and values of "geographically isolated wetlands," FWS identifies 19 categories of "isolated wetlands" including such critical biological resources

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[12] Congressional Research Service, *The Supreme Court Addresses Corps of Engineers Jurisdiction Over "Isolated Waters": The SWANCC Decision*, February 16, 2002.

[13] See Kusler, *The SWANCC Decision and State Regulation of Wetlands*, March 2001 (available at: www.aswm.org) The report notes that losses will be highly variable from state to state depending on the extent of "isolated wetlands" and whether there are state laws that could fill the gap left by a federal pull-out.

as the prairie potholes (containing most of the nation's waterfowl breeding habitat), playa lakes (providing critical wintering habitat and groundwater recharge in arid regions), and vernal pools (containing aquatic organisms found nowhere else), as well as irreplaceable wetlands such as bogs and fens. Regarding the values represented by these wetlands FWS concludes:

> The profiles of isolated wetlands presented in this report show that many of the functions and benefits (e.g., water storage, nutrient retention and cycling, sediment retention, and wildlife habitat) ascribed to non-isolated wetlands are performed by isolated wetlands. Moreover, their geographic isolation and local and regional distribution place isolated wetlands in a rather unique position to provide habitats crucial for the survival of many plant and animal species (e.g., endemism and breeding grounds for numerous amphibian and bird species).[14]

Ducks Unlimited (DU)

DU has more than a little interest in the fate of prairie potholes, playa lakes and other "isolated wetlands" that provide critical habitat for the nation's migratory waterfowl. Adopting what I would call a "worst case" assumption regarding an interpretation of SWANCC, DU estimates that up to a million acres would be vulnerable if there was no protection under 404.[15]

National Wildlife Federation (NWF) and the Natural Resources Defense Council (NRDC)

NWF and NRDC have just released a report evaluating the benefits that "isolated wetlands" provide to different regions of the country, calling upon Congress to resolve the confusion and controversy that SWANCC has spawned by enacting legislation to clarify its intent

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[14] See Tiner et al, *Geographically Isolated Wetlands: a preliminary Assessment of Their Characteristics and Status in Selected Areas of the United States*," p 3, June 2002 (available at: http://www.nwi.fws.gov/Pubs_Reports/isolated/report.htm

[15] See Rochon et al, The SWANCC Decision: Implications for Wetlands and Waterfowl, September, 2001 (available at: http://www.ducks.org/conservation/404_report.asp) DU took into account the effect that state laws and Swampbuster would have in mitigating the impact of losing 404 protection for the isolated wetlands considered. DU noted that breeding and wintering habitat of waterfowl in the Central Flyway and elsewhere would be particularly vulnerable to the loss of federal protection.

regarding jurisdiction under the CWA.[16]

The important point concerning these various reports is that an overly broad interpretation of SWANCC has the potential to undo all of the wetland conservation efforts that have occurred over the 30 year history of the CWA and Swampbuster combined. Even a loss of only 1% of the "geographically isolated wetlands" identified in the FWS report would amount to millions of acres of vital aquatic resources. That total represents more than all of the wetlands that have been conserved through the 404 mitigation program, Swampbuster, and the set-aside programs under the Farm Bill. Not only will President George Bush's no net loss policy go by the boards, but the objective of the CWA to "restore and maintain the chemical, physical and biological integrity of the nation's waters" will not be achievable. In the *Riverside Bayview* case the Supreme Court, citing the legislative history of the 1972 Act, noted that "the word integrity refers to a condition in which the natural structure and function ecosystems is maintained." 106 S. Ct. at 462. "Structure and function" is exactly what wetlands provide. The scientific literature is loaded with information on the vital functions that wetlands provide to the aquatic ecosystem. Acre for acre there is no more valuable biological system in the country. The CWA's "systemic goals" simply cannot be achieved without protecting wetlands. Congress understood that in 1972, and reinforced the nation's commitment to wetlands conservation in the 1977 amendments by decisively rejecting proposals to roll back federal jurisdiction to traditional "navigable waters." It is unfortunate that the SWANCC Court failed to respect these legislative policies regarding protection of wetlands, but there is no reason for this Congress to compound that mistake.

[16] See NWF and NRDC, *Wetlands At Risk*, July 2002 (available at: www.nwf.org)

The nation has made a lot of progress cleaning up the most egregious sources of pollution, primarily through the discharge permit programs and the large federal investment in sewage treatment, but according to EPA's most recent report to Congress, close to 40% of the nation's waters–over 291,000 miles of rivers and streams--still do not meet water quality standards established by the states.[17] The primary cause of this impairment is "nonpoint" source pollution, or polluted runoff. Sediments and nutrients (phosphorous and nitrogen) are two of the most pervasive pollutants preventing rivers and lakes from meeting the basic standard of "fishable/swimmable" water. Wetlands are especially effective at filtering sediments and nutrients. Recent studies have shown that headwater streams–the ones most at risk from SWANCC-- are actually more effective at nutrient uptake than major rivers.[18] Not only do we need to preserve the remaining wetlands to achieve water quality goals, we must actively restore them wherever possible. Water does indeed "move in hydrologic cycles," as the 92d Congress presciently observed 30 years ago, and pollution must be attacked "at the source," throughout the watershed.

THE IMPACT ON THE STATES

Can the states fill the gap if the 404 program is "contracted?" In a word, no. At least not

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[17] See USEPA, National Water Quality Inventory Report to Congress (1998) (available at: http://www.epa.gov/305b/98report/)

[18] See Peterson et al, *Control of Nitrogen Export From Watersheds by Headwater Streams*, Science 292: 86-90 (2000)

now, and not without substantial federal assistance going forward. According to ASWM, only 15 states have laws regulating wetland alterations, and not all of them cover isolated waters. This means that at least 25 states–2/3d's of the country–have no programs to fill the gap. In the wake of SWANCC some states, such as Wisconsin, moved quickly to fill the gap. Others have been trying to do so. However, given staff and budget constraints, and the need for a major public education campaign to explain the sudden need for action by the states, it is not at all clear how many will be successful, especially in the absence of any federal assistance. Meanwhile, as the DU report points out, some of the most valuable isolated wetlands are located in regions of the country where there are no state wetland laws and where the Swampbuster program does not apply.

Over the years an effective state-federal partnership has been created under the CWA. That is not to say that there haven't been controversies and spirited disagreements over policies and priorities. But substantial progress has been made that could not have been made without a substantial involvement of both the federal and state governments. SWANCC threatens to undermine the strong partnership that exists under the 404 program and other water quality programs. For the 2/3d's of the states that do not have wetland programs, the major handle that states have had on activities that impact wetlands has been the section 401 water quality certification authority. Under this authority states are able to condition federal permits, including section 404 permits, on compliance with state water quality standards. This has proven to be a very effective way for states to control polluting activities they would not otherwise be able to control; for example, the licensing and re-licensing of hydro-electric dams by the Federal Energy

regulatory Commission (FERC).[19] If SWANCC is used to remove isolated waters form the jurisdiction of the CWA, states will lose the opportunity to condition 404 permits for activities that degrade such waters. Moreover, because states will not be able to include isolated waters in their water quality standards, they will lose leverage over FERC-licensed projects and other federally permitted discharges.

Having this floor of federal protection for wetlands "levels the playing field" so that those states who desire to protect wetlands are not disadvantaged by those who choose not to do so. States should not be penalized for protecting wetlands by having other states gain a competitive economic advantage by offering developers a free ride. Moreover, since wetlands are part of a larger aquatic ecosystem, the objectives of conservation cannot succeed if large areas are exempt. For example, where several states share a large watershed, such as the Chesapeake Bay, all of them must participate in the effort to control wetland losses which have figured prominently in water quality degradation. With active federal involvement there is a greater likelihood that all states will participate, or at least that the failure of one or more states will not scuttle the whole effort. In short, the feds provide both a prod and a safety net to undergird the efforts of states that want to be good stewards of the environment.

THE QUESTIONS POSED BY THE COMMITTEE

I have been given a copy of the 6 questions sent by the Committee to the EPA, and will

[19] Under the *First Iowa* case, states have long been preempted from imposing any conditions on hydro-electric dams. Section 401 carved out a specific exception to this blanket preemption to ensure compliance with state water quality standards approved under the CWA.

offer brief observation on each:

Q1. Does EPA intend to withdraw the memorandum issued on January 19, 2001? If so, does EPA intend to replace the memorandum with additional internal agency guidance? If so, when?

Comment: The 1/19/01 Memorandum was actually a joint Corps-EPA memorandum by their respective Offices of General Counsel. In my view the memorandum fairly interprets the SWANCC decision, and identifies the legal issues that should be addressed in more detailed agency guidance. The Department of Justice apparently agrees with the thrust of the memo since it continues to assert jurisdiction over non-navigable waters and adjacent wetlands where there is a hydrological connection with navigable waters The memo correctly points out that the decision only affects the "other waters" category under 33 CFR § 328.3 (a) (3), and that it only invalidated the use of migratory bird rule as the sole basis for asserting jurisdiction over non-navigable, intrastate, isolated waters.[20] The opinion left open the question whether there could be other bases for federal jurisdiction, such as water quality or flood control, that would have a significant nexus to navigable waters and interstate commerce. Agency guidance is clearly needed, and it should focus on what scientifically sound methodologies should be used in the field to establish the significant nexus between "isolated wetlands" and navigable waters.

Q 2. Does EPA intend to issue internal agency guidance and initiate a rulemaking clarifying the navigational nexus to regulated waters? If so, when?

Comment: It is not clear why a rulemaking is necessary to provide guidance. Again, SWANCC did not strike down any of the 404 regulations; it struck down the so-called Migratory Bird Rule,

[20] Specifically, SWANCC did not affect the category of adjacent wetlands under (a) (1). Nor did the Court address what "other waters" were intended to be covered by 404 (g) (1); for

which was simply language that had appeared in the preamble to the 1986 rulemaking.[21] All that is required to fix this problem is to develop better, more comprehensive guidance on what constitutes a "significant nexus."

Q 3. In SWANCC, the Supreme Court upheld a previous decision that supported CWA jurisdiction over wetlands adjacent to navigable waters. The Court observed that "adjacent" waters in the earlier case "actually abutted on a navigable waterway," and stressed that the prior decision reflected Congressional intent to regulate wetlands "inseparably bound up with" navigable waters of the United States. Does EPA intend to revise its regulatory definition of "adjacent.?

Comment: The case referred to is *United States v Riverside Bayview, Inc*, 106 S.Ct. 455 (1985) (Riverside). Unlike SWANCC, *Riverside Bayview* was a unanimous decision that read the legislative history of the CWA to confer broad jurisdiction over "waters of the United States," including adjacent wetlands. *Riverside Bayview* did not involve a wetland that "actually abutted a navigable waterway." It involved a portion of a larger wetland that was adjacent to Lake St. Clair, and that was wet as a result of groundwater levels, not over-flooding by the Lake. The fact that there was no direct hydrological connection between the wetland and the Lake was not deemed critical by the Court; rather, it was the ecological relationship of the wetland to the navigable water that the *Riverside Bayview* Court focused on.

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example, waters that are intrastate and isolated but navigable-in-fact under state law.

[21] See 51 Fed Reg. 41217 (1986).

In stark contrast to SWANCC, *Riverside Bayview* recognized the broad remedial purposes of the CWA , the fact that "water moves in hydrologic cycles, the need to attack pollution "at its source," and the need to take an "ecosystem approach" in order to achieve the statutory goal of restoring and maintaining the "chemical, physical, and biological integrity of the nations' waters." Nothing in SWANCC calls into question the regulation of adjacent wetlands, and there is no need for the agencies to change their long-standing approach to determining adjacency. As mentioned, the Department of Justice continues to take the position in court that adjacency is a flexible concept that looks to establish a hydrological and ecological connection with navigable waters, regardless of proximity to "open waters." To date, there have been approximately 17 cases decided since SWANCC came down, and in all but a handful (some of which are on appeal), the government has prevailed. I have information on these cases if the Committee would like it.

Q 4. In SWANCC, the Supreme Court struck down the jurisdiction over isolated wetlands. Does EPA have a regulatory definition of what constitutes an isolated water? If not, when does EPA intend to issue such a definition?

Comment: As discussed, I do not agree that SWANCC struck down all regulation of isolated wetlands. It clearly struck down use of migratory bird habitat as the sole basis for regulation of "intrastate, non-navigable, isolated waters." But it also acknowledged the legitimacy of regulating waters the have a "significant nexus' with navigable waters and wetlands that are "inseparably bound up with waters of the United States." The Court offered no guidance on how these concepts should be defined or applied. These are as much scientific determinations as legal, and they cannot be determined in the abstract. Moreover, given the *Riverside Bayview* Court's

strong endorsement of the CWA's "systemic" approach to water quality management, the agencies need to develop methodologies that will document the ecological relationships of classes of isolated wetlands to navigable waters. The FWS report mentioned above is a first step in this direction.

Q5. In addition to affecting EPA regulations regarding Section 404, the Supreme Court decision also appears to potentially affect other regulations. In particular, the CWA's Section 401 refers to certification for activities involving navigable waters. Does EPA anticipate that it will revise its regulations pertaining to section 401 water quality certifications?

Comment: As mentioned, any reduction in federal jurisdiction will negatively affect the ability of the states to condition federally permitted activities, including 404, to protect their water quality standards. This will make it harder for states to clean up "impaired waters," and may lead to degradation of waters that currently exceed standards.

Q 6. Does EPA ever require National Pollutant Discharge Elimination System (NPDES) permits for discharges into isolated waters? If so, how does the SWANCC decision effect [sic] the NPDES program?

Comment: Any guidance that EPA develops on the regulation of "isolated waters" will necessarily affect the scope of the NPDES program, as well as many other programs under the CWA. That is why extreme care must be taken in re-defining federal jurisdiction under the CWA. Mistakes will be very costly to the nation's water quality and biological diversity.

THE NEED FOR CONGRESSIONAL ACTION TO CLARIFY CWA JURISDICTION

One thing that everyone can agree upon is that SWANCC has generated a great deal of confusion and controversy over the geographic scope of the CWA. This is, of course, a lawyer's

fondest dream. It will take years of litigation to sort out all of the questions that SWANCC has raised, but not resolved. Regardless of which way the Administration goes with guidance, there is bound to be litigation over that as well. Though this may be good for those of us in the business of producing environmental lawyers, it is not necessarily good for the environment, or for the nation.

Congress can cut through all this by clarifying the scope of CWA jurisdiction to put the focus back on the aquatic ecosystem rather than artificial characterizations such as whether a wetland is "adjacent" or "isolated." Because the SWANCC Court based its decision on its reading of legislative intent, Congress is free to correct any misunderstanding of what Congress actually intends. This would not be the first time Congress has corrected the Court for misreading the CWA. Bills have been introduced by Representatives Dingell and Oberstar in the House (H.R. 5194) and by Senator Feingold in the Senate (S. 2780 ) to put the law back where it was before SWANCC scrambled it. That would be a good thing for America's priceless wetland heritage.

Mr Chairman, thank you for allowing me to share these thoughts. I look forward to your questions and to continuing the dialogue on these important matters.

Mr. OSE. Thank you.

I do want to get everyone's opinion in this first set of questions.

The Supreme Court stated, "We said in Riverside Bayview Homes that the word 'navigable' in the statute was of limited effect and went on to hold that Subsection 4049(a) extended to non-navigable wetlands adjacent to open waters but it is one thing to give a word limited effect and quite another to give it no effect whatsoever. The term 'navigable' has at least the import of showing us what Congress has in mind as its authority for enacting the Clean Water Act, that is, its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made."

Ms. Albrecht, given this rationale in the SWANCC decision, do you believe there are alternative Commerce Clause connections other than navigation that give the Corps and EPA jurisdiction under Section 404?

Ms. ALBRECHT. No. I think the Court is very clear that Congress was exercising its power over navigation. That means you have to find a navigation foundation for any assertion of jurisdiction. That means the Commerce Clause theories presently in (a)(3) are no longer valid.

Mr. OSE. You are talking about fishing and stuff like that?

Ms. ALBRECHT. Yes, and the visits by out-of-State visitors and things like that.

The Court actually in another part of the opinion, in addition to the part you are citing, when talking about the Commerce Clause arguments the Government had advanced, indicated great discomfort and declined even to really address those Commerce Clause arguments and indicated those Commerce Clause arguments were at the edge of the Commerce Clause, so really took the case back to look at what did Congress intend and look at the statute.

One other element was that the Court said when we are at the edges of the Commerce Clause, which the assertion of jurisdiction over isolated waters would take us, then we have to look for a clear congressional statement of intent to regulate those very far removed areas. We don't find that clear congressional statement. In fact, what we find is a clear congressional statement in which the Congress intends to preserve and protect the traditional authorities of State and local government to regulate land and water use.

The Court looked at this case and said, if we would allow the assertion of jurisdiction over these isolated waters, it would impinge on those traditional State and local functions, and we are not going to allow that without finding a clear congressional intent.

Mr. OSE. I think I got your answer. Your answer is no.

Ms. ALBRECHT. That is right.

Mr. OSE. Mr. Hopper, same question.

Mr. HOPPER. My answer is addressed by a footnote. I also answer no, but underscored by this footnote where the Court said—with reference to the legislative history—that "neither this nor anything else in the legislative history to which respondents point signifies that Congress intended to exert anything more than its commerce power over navigation."

I would even go so far as to suggest that Congress not only intended not to exercise its commerce power over anything other

than navigation, but it could not have done so and be consistent with the latest Supreme Court decisions in Lopez and Morrison.

Ms. MARZULLA. My answer is also emphatically no, and I will give you one quick example of why allowing the agencies to move beyond navigation essentially gives the agencies a blank check to declare a wetland, is what they believe is a wetland as opposed to what the statute requires with the term navigation.

I represent clients in Reno, Nevada that own what was once a ranch that was irrigated in the early 1900's with snowmelt from an adjacent mountain. The melted snow was carried down to the ranch via pipes and, with irrigation, you could grow crops. Obviously, the land is no longer used as a ranch, and our client planned to develop the property for an industrial park. The Corps originally delineated the land in 1987 as "not a wetland," which is not a surprising result given that the average rainfall is about 4 inches.

Subsequently, environmental groups objected, the Corps came in and redelineated, declaring that the pipelines were tributaries and the land was criss-crossed with these tributaries and hence, wetland. That is the type of wetland decisionmaking when you have rules that exceed the plain language of the statute.

Mr. OSE. So it is your position that there are no alternative Commerce Clause connections providing jurisdiction under Section 404?

Ms. MARZULLA. That is correct.

Mr. OSE. This is remarkable to get clarity in these answers. I hope the rest is as clear.

Mr. Smethurst.

Mr. SMETHURST. Prior to SWANCC, I would not have said "no" because the language in Riverside Bayview was not that precise, not that clear, but after SWANCC, I would say frankly to my surprise, I think the answer is no.

Mr. OSE. Mr. Guzy.

Mr. GUZY. I would differ with the other witnesses. I want to refer you to the rest of the language that you quoted from SWANCC when the Court notes that the term navigable is of limited import, it goes on to say, "and that Congress evidenced its intent to regulate at least some waters that would not be deemed navigable under the classical understanding of that term."

SWANCC itself recognizes that Congress' intent was to go beyond navigability. Navigability in and of itself is not the complete touchstone for the analysis. It goes on to explain that "Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands inseparably bound up with the waters of the United States."

I think if you look at that question, you begin to see an array of connections with navigable waters or waters of the United States where there can be a very fundamental impact. Take for example, recent flooding in the Red River where it has been linked to the demise of extensive expanses of prairie potholes that may be regarded as isolated wetlands, but the consequence of filling in those wetlands upstream is that they no longer can serve the purpose of isolating and filtering water; and all that water, and all that sediment, and all those pollutants went downstream to affect navigable waters themselves.

Let me add one more point, the consequence of all this. The consequence of a jurisdictional determination is that someone then has to come to the Corps of Engineers to apply for a permit, not that they cannot engage in an activity in and of itself. The experience has been that some 95 percent of permits are granted, not that people are prohibited from doing the fill activity itself.

I would submit that with a series of needed reforms, the Corps of Engineers and EPA are beginning to get it right for small property owners so that the wetlands rules aren't a burden on small property owners, although more clarification certainly could be helpful.

Mr. OSE. You are referring to the phrase where the Court extended to non-navigable wetlands adjacent to open waters?

Mr. GUZY. I was referring to the phrase—I am not sure what version of SWANCC you have—at 121 S. Ct. 680 where in the United States at 167 version, right after the Court says, "In so doing, we noted that the term 'navigable' is of limited import," and it goes on to say, "that Congress evidenced its intent to regulate at least some waters that would not be deemed navigable under the classical understanding of that term."

Mr. OSE. Not navigable.

Mr. GUZY. Yes. I am sorry.

Mr. OSE. Professor.

Mr. PARENTEAU. If I remember the question, I think my answer is yes.

Mr. OSE. The question is do you believe there are alternative Commerce Clause connections that give the Corps and EPA jurisdiction under Section 404?

Mr. PARENTEAU. Yes, I do. It is true that Congress' jurisdiction begins with navigable waters, but it certainly does not end there. That is the important point about the SWANCC decision. It did not strike down anything on constitutional grounds or Commerce Clause grounds. It barely addressed that other than to say if Congress means this, they need to say so more clearly.

In the Riverside case, which I find to be remarkably clear and unambiguous compared to SWANCC, the Court made a point of saying that the goals of the Clean Water Act cannot be accomplished without extending beyond traditional notions of navigable waters, hence their reference to the fact that the term navigable waters is of limited import.

Indeed, when the statute itself defines the term navigable waters as waters of the United States, one wonders why the SWANCC court went back to the term navigable waters. That was not, as Justice Stevens so aptly pointed out in dissent, the question presented. The question presented was, what did Congress mean in 1972 by the term waters of the United States, and the legislative history of the 1972 act made it absolutely clear. The conference report, the Senate report, the House report, these are the top level of legislative history. This is where courts place the most emphasis in looking for evidence of congressional intent and every one of those reports repeated the same thing which is, we are authorizing the agencies to exercise their authority to the limits of the Commerce Clause.

We have a parallel line of cases under the Endangered Species Act, a subject which probably raises more than a little hackles in the room, but nevertheless there are now five reported decisions, two of which are circuit court decisions, in both of which the Supreme Court denied cert, upholding the Endangered Species Act in the regulation of areas of the country far more isolated, far more intrastate than anything we are talking about here today.

Mr. OSE. What do you mean when you say they were denied cert?

Mr. PARENTEAU. What I mean is that the Supreme Court declined to review decisions of the lower courts upholding the constitutionality of the Endangered Species Act in circumstances which frankly raise much more significant questions about the authority of Congress to regulate purely intrastate matters than these.

Mr. OSE. That means the Supreme Court agreed with the lower court?

Mr. Parenteau. Right—well, we don't know whether they agreed or disagreed. All we know is that four of them didn't vote to review it, which is significant.

What I am saying is there is a body of law that hasn't been discussed. I would be happy to provide the committee with this and others if they would like to look at it, which has actually been looking at these questions of Commerce Clause authority in the context of intrastate land use activities and has concluded unanimously that the Federal Government has ample authority under the Commerce Clause to regulate activities like that. Granted, it is under a different statute, I am not saying you import it wholesale. What I am saying is that in terms of a constitutional analysis, the Government, and the Congress, and the executive branch have full use of all the arguments that have been made in Commerce Clause cases to bring economic activity within the power of government to regulate when they impact matters of national interest.

One of the great ironies of SWANCC, frankly, was that it struck down the regulation on the basis of migratory bird use. Justice Holmes in *Missouri* v. *Hollins* said, "There is scarcely a matter of greater national importance than protecting and preserving our migratory waterfowl." So the Court actually chose a case that was the worst case to choose from the standpoint of questioning Commerce Clause authority, because the Supreme Court has previously validated Federal authority with regard to migratory birds across the board.

Mr. OSE. Mr. Guzy, if I might, I think the Professor has an excellent point. It seems to me while you were at EPA, the claim of jurisdiction was based on the migratory waterfowl aspect and its connection to the Commerce Clause, and there were no other assertions that I am aware of other than migratory waterfowl.

There is an argument to be made that absent other assertions, that couldn't be made. I am unclear why the previous delineations or whatever you call them as it relates to jurisdictional waters only made the migratory waterfowl assertion.

Mr. GUZY. Before the SWANCC Court itself.

Mr. OSE. Or similar such situations, yes.

Mr. GUZY. I recall asking a fairly similar question myself. It is right that the SWANCC proceedings were quite lengthy. They extended over a very long period of time. The Corps initially had made a decision that site was not jurisdictional, then it went back and revisited it and ascertained that in fact there was significant migratory bird activity at the site.

I don't know if then they looked for other types of jurisdictional nexuses but in hindsight, it does become apparent that there may be some very significant concerns about the location of that facility above a drinking water aquifer. That is an example of the kinds of concerns that arise if you simply wipe out Federal jurisdiction over isolated wetlands.

Mr. OSE. The Corps' jurisdictional claim though, if I understand SWANCC on its reexamination, was based on the migratory waterfowl connection?

Mr. GUZY. I am sorry?

Mr. OSE. The Corps' jurisdictional assertion of this being subject to regulation was based on a revisit and a finding that the site in question in fact served migratory waterfowl?

Mr. GUZY. That is correct.

Mr. OSE. So the initial determination was this was not jurisdictional, then they went back and revisited it and on the basis on migratory waterfowl, and they made a jurisdictional claim?

Mr. GUZY. That is my memory of the circumstances in SWANCC.

Mr. OSE. And then, the Supreme Court at the end threw that out as a rationale for claiming jurisdiction?

Mr. GUZY. That is correct.

Mr. OSE. Anyone have anything to offer clarifying that or educating me? Mr. Smethurst.

Mr. SMETHURST. Because there was no connection between the migratory waterfowl and anything having to do with navigation, it wasn't a Commerce Clause decision.

Mr. OSE. It was a decision based on the actual intent of Congress in passage of the legislation?

Mr. SMETHURST. Yes, and that intent being directed primarily in the direction of navigation aspects of which migratory waterfowl simply don't have any relevance.

Mr. OSE. Professor Parenteau cited House and Senate report language and the actual conference committee and the recitation of the citations he made in terms of the legislative history and yet what I am hearing both in the initial panel and this panel is that the Court made a different citation of the history of this legislation, relying on the word navigable and its plain meaning, if you will. Am I misunderstanding this? Ms. Albrecht.

Ms. ALBRECHT. I think the legislative history, you need to read and read it carefully and what it says because it has been misconstrued consistently over the years, including a few sloppy references by courts.

In fact, what the conference report said was that the conferees intend that the term navigable waters be given "the broadest possible constitutional interpretation unencumbered by agency determinations which have been made previously for administrative purposes." They were talking about what is the meaning of navigable waters and in the situation, when you go back and look at

the legislative history, what you see leading up to the Clean Water Act was about a 5-year dialog between the Corps of Engineers and the Congress, in which the Corps of Engineers had been declining to exercise its full powers even under the Rivers and Harbors Act, that although it had jurisdiction over the navigable waters, it wasn't exercising jurisdiction to the full extent of the navigable waters.

What Congress did in that 5-year run up was to say we, "We want you to go to the full extent of the navigable waters." That is different from saying, "we want you to go to the full extent of commerce authority." The full extent of the commerce authority is a familiar jurisdiction that you all can exercise very frequently when you take jurisdiction over something that could have an effect on commerce and that can be very broad. This was tied specifically to this term navigable waters.

Mr. PARENTEAU. If I might be able to read directly from page six of my testimony, you can look it up, as they say. This is the language from the various reports. To me it is striking in terms of what the Supreme Court did in SWANCC.

"One term that the committee was reluctant to define, starting with the House report, this language carries through Senate and conference, the committee was reluctant to define the term 'navigable waters.' The reluctance was based on the fear that any interpretation would be read narrowly. The committee fully intends the term 'navigable waters' to be given the broadest possible constitutional interpretation."

You can cite other segments of the legislative history until the cows come home, as we say in Vermont, but it will not change the collective judgment of this body represented in these reports, not the views of individual Representatives and Senators, the views of the body itself. This stands as the definitive statement from 1972 on how that term was to be used. I challenge anybody to say that means navigation.

Mr. HOPPER. I will take that challenge.

Mr. OSE. Mr. Hopper, educate me a bit here. I have a copy of Washburn Law Journal.

Mr. PARENTEAU. Yes, Mr. Broom's article.

Mr. OSE. With the same citations and it says, "The committee fully intends that 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." Does that mean that the agencies shall not be asked or given the authority to interpret?

Mr. PARENTEAU. It means that the prior administrative determinations of what constitutes navigable waters aren't controlling anymore. It means it is a new day, a new statute, a brand new statute.

Mr. OSE. It says "which have been made or may be made." It is not retrospective, it is both.

Mr. PARENTEAU. Right. It is both. It is primarily retrospective because there were determinations that were very narrow but it is also forward looking because they are saying to the agencies, don't in the future confine yourselves to questions of navigability. We are talking about clean water. We are talking about restoring and

maintaining the chemical, physical, and biological integrity of the Nation's waters. That cannot be done within the confines of a statute limited to navigability. It cannot be done. What we are saying is the goal Congress set in 1972 was ridiculous.

Mr. OSE. The part I am struggling with here, and I am trying to get to where we provide the maximum level of protection for the quality of water we enjoy, but what I am trying to get to is the point where we have the certainty that Mr. Guzy was talking about earlier for people who are otherwise engaged in activities subject or not to jurisdiction, but also that leads us to a point that is substantiated both in law and practice and legislative history.

I understand your argument about clean water and the chemical composition and all that, but I am trying to get back to the actual law or the legislative history. I can tell you there are about three chemists in Congress right now, and you don't want us making chemical determinations, I can guarantee you.

So again, unencumbered by agency determinations which have been made or may be made for administrative purposes, that to me seems like a critical phrase here in terms of constraining who may or may not define navigable waters.

Mr. PARENTEAU. Unencumbered to me means don't think about it the way you used to think about it. Think about it in the context of protecting the aquatic ecosystem. As the Riverside Court said, the word integrity was further defined. This is an amazing point of sophistication I think in 1972. The term integrity was further defined to mean maintaining structure and function of the aquatic ecosystem. That is what wetlands do.

Mr. OSE. I went on to Washburn's article.

Mr. PARENTEAU. That is a student article, let us call it what it is. It wouldn't have gotten an "A" in my class, but go ahead. I have read it, I have thought about it.

Mr. OSE. The citation goes on to include the comments from Senator Muskie wherein he equated "the broadest possible constitutional interpretation with the waters' use as part of the continuing highway over which commerce is or may be carried on." This strikes too what I think some have highlighted—I think Mr. Smethurst in particular with the pictures he put up there—what is jurisdictional and what isn't, going back in the legislative history. I am trying to figure out how to reconcile a continuing highway over which commerce is or may be carried on with jurisdictional claims eight miles from the head waters of the Chesapeake Bay contributor or whatever.

Mr. HOPPER. I read to you earlier a portion of footnote 3 from SWANCC. I will read to you now its entirety. It relates to the comment the professor made where he cited the quintessential statement of intent in the legislative history showing that Congress wanted this to be interpreted to its fullest constitutional extent. I cite this as the quintessential statement of the Supreme Court on what that legislative history means.

"Respondents refer us to portions of the legislative history they believe indicate Congress' intent to expand the definition of navigable waters. Although the conference report includes the statement that the conferees intend that the term 'navigable waters' be given the broadest possible constitutional interpretation, neither

this nor anything else in the legislative history to which respondents point signifies that Congress intended to exert anything more than its commerce power over navigation."

"Indeed, respondents admit that the legislative history is somewhat ambiguous." So now we have the Supreme Court interpretation.

Mr. OSE. I can tell you there is some ambiguity in my mind here.

Mr. SMETHURST. This is why I made the statement earlier that I think one of the most significant aspects of the SWANCC decision is just exactly what Mr. Hopper read, because in effect the Supreme Court is saying if you want to see what Congress really intended by the 1972 legislation, go back and look at the 1974 regulations promulgated by the Corps. That is why I came here to urge you to urge the agencies to get on with either guidance or a reexamination of their regulations because implicit in what the Supreme Court is saying is the current regulations go too far.

Mr. OSE. I think the word ambiguity is an interesting word in this context.

I want to go on to another question. In the SWANCC decision, the Supreme Court stated, "In order to rule for respondents here, we would have to hold that the jurisdiction of the Corps extends to ponds not adjacent to open water but we conclude that the text of the statute will not allow this."

In your interpretation, Professor, how does this rationale in the SWANCC decision affect the jurisdiction of the Corps and EPA, if at all?

Mr. PARENTEAU. That is the most troublesome statement in the SWANCC decision. I have said that in the testimony. I acknowledge that is a troublesome statement. If you took that statement at face value, or to put it another way, if that were the holding of the case, we wouldn't be here talking about this the way we are talking about it.

You have to take statements like that in the context of statements that have been made in the past by the Supreme Court, namely the Riverside Bayview case, again, I cannot stress it enough, a unanimous decision, not a sharply divided five to four decision, a unanimous decision of the Supreme Court.

Under the SWANCC rationale, the wetland in Riverside probably wouldn't have been jurisdictional. There has been talk about that Riverside wetland being adjacent to or abutting open bodies of water. It was not. If you look at not only the decision in Riverside and the way Justice Stephens describes the decision in his dissent in SWANCC, and in fact, if you go back as I have to the transcripts of the oral argument in Riverside, it is quite clear that the area in question was far removed from the lake itself. It was part of a larger complex of wetlands. It was wet by virtue of groundwater and precipitation. There was no definite hydrological connection established between that wetland and the lake.

That is why the Riverside court goes into such detail talking about aquatic ecosystems and integrated approaches to dealing with water quality. It was an ecological approach that the Supreme Court used in Riverside. That is why the Court used the term significant nexus, not adjacency, not abutting, not open water. They

were talking about what is the significant nexus between the area to be regulated and navigable waters.

I fully agree the agencies are way behind in issuing guidance on what that term significant nexus means. That is where the focus ought to be. It ought to be on a scientifically sound methodology to determine in what circumstances do isolated wetlands have a significant nexus to navigable waters without regard to proximity. That is an irrelevancy in science. The question is, what function are these water bodies performing, and do those functions relate to the quality of navigable waters, not just quantity but quality of navigable waters?

That is where the inquiry ought to be, not on some phoney rulemaking about what lower courts are ruling in the wake of SWANCC. That is not going to get us anywhere.

Mr. OSE. Mr. Guzy, in your interpretation, this comment included in the Supreme Court's decision, how does this affect the jurisdiction of the Corps and EPA?

Mr. GUZY. I have actually sort of studiously refrained in my testimony so far from criticizing the SWANCC decision itself, because I do believe that for agencies who have to interpret it, it is the rule of the land but it is not all that exists. It doesn't exist in isolation.

Mr. OSE. Would you define that?

Mr. GUZY. It exists along with the other body of precedent including Riverside Bayview Homes. To me the language you just read actually is one place that illustrates the internal confusion in the decision itself. The analysis that the Chief Justice is talking about doesn't necessarily go only to open waters, the phrase that he uses, but rather when you go back to the language of the statute to waters of the United States and navigable waters of the United States, which may be other than open waters. They may, in fact, be a variety of things, tributaries, wetlands, a variety of things but not necessarily open waters. That is why I found this particular quotation interesting that you would choose it, because it really does illustrate the internal confusion and inconsistency in the decision itself.

The consequence of this holding, if you were to read it the way that you and Professor Parenteau suggest, is not limited under the structure of the Clean Water Act merely to 404 wetlands determinations. The act treats discharges under 402, which is the industrial effluent discharge section, and under the Oil Pollution Act provisions the same way in terms of the initial jurisdictional threshold of navigable waters of the United States.

That is why the consequence of a ruling that extreme could in fact be so severe, because not only would you be talking about the ability unregulated in a Federal manner to place fill into wetlands, you also potentially could be talking about the ability to discharge poisons such as arsenic, to discharge things such as oil contamination in a way that could have fundamental effects upon downstream neighbors. That is an enormous concern.

Mr. OSE. Mr. Smethurst? The question is whether or not this citation in the Supreme Court decision affects in your interpretation the jurisdiction of the Corps and EPA having to do with ponds and not adjacent to open water?

Mr. SMETHURST. I think, viewed in light of the legislative history and looking to the regulations the Corps promulgated in 1974 and even revised in the aftermath of the Calloway case in 1975, as the Supreme Court has noted, they are different. A wetland is not a water body. It has been brought in under the definition of waters of the United States from a regulatory standpoint, but you will not find any discussion of wetlands in the legislative history. In fact, in the original 1974 regulations, wetlands were not even regulated. They were merely a factor that the Corps was admonished to consider when making a permit decision under 404.

Mr. OSE. Are you saying that these things have been manufactured?

Mr. SMETHURST. Have been what?

Mr. OSE. Have been manufactured from a regulatory standpoint?

Mr. SMETHURST. From my experience, absolutely. Initially following the 1972 act, you didn't see much of a change. I have been dealing with this since 1972 and litigating cases since 1972. Most of them don't get to the level they are now. It wasn't, for instance, until 1985 approximately that you saw any assertion or any mention of the term wetland beyond marshes, swamps, and things like that.

The initial term that was applied when the Corps began to reach inland to things like what I call an isolated wetland isn't a pond, it is a forested wetland, it may not even have trees on it, may be a low area in the ground that has the requisite hydric soils and the hydrophitic vegetation. It may not actually look like a swamp but that is what was called in those days an upland wetland. You won't find that in any regulation, but that is what it was being called by the Corps of Engineer field people. That didn't happen until 1985.

Originally, if you go back and look, the concern of Congress, to the extent you can find any in the legislative history over wetlands, had to do with basically tidal marshes, estuaries, shallows, and things like that. In fact, Muskie, if I am not mistaken both at the time of the 1972 legislation and again as late as the 1977 amendments came out, was assuring other Members of Congress that this only applied to marshes, bogs, tidal flats, and things like that, and would not apply to inland wetlands.

The biggest problem these days is not with respect to your marshes, tidal flats, and so forth. It is the kind of property you see in the Deaton case, which I couldn't show you too well. It is nothing more than woods in which in the dead of winter, the soils are damp. You don't need to wear galoshes to walk around that property. That now meets the Corps' definition of a wetland. There is no water on it unless it is raining, but it meets the Corps' definition of a wetland. This is where things have sort of gotten out of control from a pure statutory, application standpoint.

Mr. OSE. Statutory or regulatory?

Mr. SMETHURST. Both.

Mr. OSE. I am not aware of any amendments to the Clean Water Act that would have attempted to define wetland or adjacency, open water.

Mr. SMETHURST. The Supreme Court in Riverside said essentially as a result of the 1977 amendments, Congress was deemed to have acquiesced in the Corps assertion of jurisdiction over certain wet-

lands. Those are basically the ones that immediately adjoin a water body where the Court said it is difficult to determine, from a practical standpoint, very understandably, where does the water end and the land begin.

If you go around the Chesapeake Bay and see where you have marshes adjoining actual open water, this is the kind of thing they were talking about. Those kinds of wetlands are clearly as a result of Riverside, Bayview jurisdictional.

Mr. OSE. Ms. Marzulla.

Ms. MARZULLA. I will continue along the vein that Mr. Smethurst was giving in his opinion. To answer your question directly, I read this language from SWANCC to send a very strong signal to the Corps and the EPA that their authority over isolated wetlands is limited, if not nonexistent. I recall that SWANCC is a statutory construction case. There the Court is asked to test the regulation, the assertion of jurisdiction against the statute. It is the language of the statute that governs the conclusion that the Court is supposed to reach. The Court can resort to legislative history only if the language is so vague, so ambiguous that they can't tell what the language means. Obviously, the Court felt that it did have to go back to legislative history. Finding that unhelpful, it made its best guess as to what navigable meant.

I would respectfully suggest, however, that the reason why courts are in confusion over wetland interpretation, why landowners are confused about what they can do, what they can't do, when they are going to be subject to million dollar civil penalties as the landowner in the Borden ranch case which now is before the Supreme Court had slapped on him, when they might be subject to criminal sanctions for violating wetland rules, is because the agencies have been making up wetland regulations for years. Congress has left the agencies basically to make it up as they go and because courts have rules that require them to defer to agency rulemaking, there has been no judicial check on agency rulemaking. The only check we have is Congress. We need your help, your involvement, because these agencies need very clear guidance to make sure they are doing what you want them to do.

Mr. OSE. Mr. Hopper, same question.

Mr. HOPPER. This language is the bright line rule that we are always looking for but seldom see in a court opinion. It clearly restricts, confines the jurisdiction of the Corps to traditional navigable waters and those that are immediately adjacent. There has been some suggestion that this cannot be read in isolation, that we need to go back and look at Riverside Bayview. But the court did that for us and told us quite explicitly what the court had held and what the court had not held, saying that in *United States* v. *Riverside Bayview,* we held that the Court had 404 jurisdiction over wetlands that actually abutted on a navigable waterway. That is what the Court held. Then it said, "Indeed in that case we did not express any opinion on the question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water." That is what the court did not hold in Riverside Bayview.

The reason for mentioning it is because the Court intended to answer it and in SWANCC it did so with that language you pre-

viously read: "In order to rule for respondents here, we would have to hold that the jurisdiction of the Corps extends to ponds that are not adjacent to open water"—notice they didn't use the word isolated—"but we conclude that the text of the statute will not allow this."

Mr. OSE. Ms. Albrecht.

Ms. ALBRECHT. I concur. I would like to also point out what was at stake in Riverside Bayview. I happen to have here the Government's brief in Riverside Bayview. This is how they describe those adjacent wetlands. They said, "There is direct, unimpeded access from the mid-east boundary of Riverside's property to additional marshes and the open waters of Black Creek, a navigable water of the United States. Indeed, it would not be an exaggeration to state that one could, after wading through a cattail marsh, swim directly from Riverside's property into the Great Lakes." That was the wetland that was described as adjacent and was held in Riverside Bayview to be jurisdictional. You could swim from the wetland to the Great Lakes. I think that is a very important issue.

Mr. OSE. A person or a fish?

Ms. ALBRECHT. I am not sure if it was a person. However, at oral argument, the Government lawyer said, "This is, in fact, an adjacent wetland, by adjacent I mean it is immediately next to, abuts, adjoins, borders, whatever other adjective you might want to use, navigable waters of the United States." This is what the Supreme Court in SWANCC was relying on, and I think the passage you are asking us about is an indication of the Supreme Court saying, "yes, we stand by our decision in Riverside Bayview in which we held that adjacent wetlands, meaning wetlands that are actually abutting a navigable waterway, are jurisdictional, but other waters that are not adjacent in that sense of the word, not actually abutting, are not jurisdictional because of the text of the statute, navigable waters will not allow it."

Mr. OSE. Here is the difficulty I have. I have a two o'clock hearing coming behind me and I have to clear out of here no later than 1:40 p.m. I have about 3,000 more questions for you all but we are not going to get them all done. With your cooperation, we will submit to you these questions in writing and we would appreciate a timely response, meaning very soon.

I do have an additional question I want to ask you. Given what may be accurately described as ambiguity in some of these issues, my good friend from Minnesota is attempting to remove the ambiguity from this issue by proposing an amendment to the Clean Water Act that will remove the word navigable from Section 404, thereby eliminating questions to whether or not congressional intent was that everything should be jurisdictional.

I don't want to prejudge that, but I would be curious about your position on Mr. Oberstar's proposal to effectively make every body of water jurisdictional to the Corps' effort. Ms. Albrecht.

Ms. ALBRECHT. I think before you went to that you would want to look at what the States are doing. And, a lot of States are regulating wetlands and have programs that address wetlands. I do a lot of work in California and Florida, two of the biggest development States. I do believe if the Corps of Engineers and EPA did not have a permitting program there, the wetlands in California

and Florida would be subject to the same strong protections. So I am doubtful that you need that strong Federal involvement to overwhelm the States. I would like the Federal Government to consider and I think one of the reasons you want a rulemaking is to draw a line so that the States will know where the Federal Government is not going to be regulating and then the States can make a determination.

The other thing I would say, and there are some examples in my attachments, the Federal Government has been regulating as tributaries hillside gullies, little rivulets that are one foot wide and forty feet long. Under no stretch of the imagination do those demand Federal regulation as important aquatic resources.

Mr. OSE. If I understand your response, you do not support Mr. Oberstar's proposal to amend the Clean Water Act to remove the word navigable from the writing thereof?

Ms. ALBRECHT. You are right.

Mr. OSE. Professor.

Mr. PARENTEAU. I do support it. The States are doing a fine job. One-third of the States have some legislation to address this problem, two-thirds do not. The problem is that without a floor of protection across the country provided by the Federal Government, we are going to lose substantial numbers of these wetlands. Maybe we will lose them because States don't have the capability to address and regulate them, maybe in some cases the States don't want to do that. Who knows. The point is, there is room for both Federal and State involvement in this program. There has been from day one. Some of the States have taken advantage of that, some have not. The ones that have taken advantage of it are supporting Federal jurisdiction over the remainder so that their efforts are not frustrated, and so that they are not economically disadvantaged by regulating development of wetlands when their sister States do not and attract away businesses to them on that basis. That is the principal, central reason you need national legislation when you are dealing with nationally important resources, which these clearly are.

The reason the current navigable restriction ought to be removed is why we are here today. It is a vexing, distracting, ultimately unsatisfying inquiry as to what in the world it means. That is not what we are talking about. What we are talking about is the chemical, physical, biological integrity of the Nation's waters, the aquatic ecosystem and all the important things that wetlands do to serve that. So we need legislation.

Mr. OSE. So you support Mr. Oberstar's proposed amendment?

Mr. PARENTEAU. Yes.

Mr. OSE. Mr. Hopper.

Mr. HOPPER. I oppose it. That word navigable is probably the only word that keeps that statute constitutionally valid. The Court in SWANCC established a three-part test. I think if you compare what you are saying might be proposed with the three-part test expressing the concerns of the court in SWANCC, it would fail.

First of all, the Court already indicated in SWANCC that the assertion of Corps jurisdiction over these non-adjacent ponds pushed the very limits of congressional authority, meaning it raised serious Commerce Clause concerns.

Second, the Court was concerned about federalism; specifically that there was undue impingement by the Federal Government into the State's power to control land and water use. Under the 404 program, the Corps and the EPA have veto power over local land use projects that affect jurisdictional waters. There can be no greater impingement. It would be more so under the proposed amendment.

Third, the current objective expressly stated in the act is to protect the States' power to control local land and water use. If this amendment were to pass, the objective of the statute would have to change. For the worse, I believe.

Mr. OSE. So you would oppose Mr. Oberstar's amendment?

Mr. HOPPER. Yes, absolutely.

Mr. OSE. Mr. Guzy.

Mr. GUZY. In addition to the reasons already stated, I would identify for you four reasons why I would suggest you and the rest of the subcommittee and the committee support Mr. Oberstar's effort.

First, certainty is always a good thing. We have heard a call for certainty from the regulated community. There apparently is some confusion among those out in the field and the agencies who are charged with applying this law, so giving them clarity would certainly be beneficial.

Second, much of what we have talked about today when you get right down to it has been something of a fiction that is a relic from how this law has developed. It is a fiction because as the science has developed, it has shown that isolated wetlands just really don't exist in actuality in ecosystems. They have in almost every instance some kind of connection to a greater ecosystem and to the kinds of things which the Clean Water Act is designed to protect, so this would modernize the Clean Water Act much the same way that Congress modernized the Safe Drinking Water Act in the 1990's when it recognized you want to look at the source of pollution as much as you want to protect the finished drinking water product.

Third, it would modernize it to address pollution, not just navigability.

Last, in addition to your friend Mr. Oberstar, I would point out, I think it is telling that your friend from Michigan, Mr. Dingell, is also a sponsor of that bill. He managed the 1972 amendments on the floor and he has said in his statements upon introduction of their bill that he wants to take this to get back to what that Congress' original intent was and that SWANCC has unfortunately taken us off that path.

For all those reasons, I think it is a very sound approach.

Mr. OSE. Ms. Marzulla.

Ms. MARZULLA. I oppose it, and my suggestion is that it would take the ambiguity from one word and put it on another. Again, if Congress wants to protect dry dirt and isolated prairie dustballs as wetland, then fine, Congress can do so. My suggestion is that Congress pass a wetland protection law, and let us have our fight out there, but leave the Clean Water Act to its purpose, to prohibit the discharge of a pollutant into the waters of the United States. It

was never designed to be a wetland protection law, that is why we are in this mess in the first place.

Mr. OSE. Mr. Smethurst.

Mr. SMETHURST. Two points. One, as currently drafted, I am not sure it would be wise to see the Federal Government become so intrusive in the lives of almost each and every citizen, because basically under that definition, as I read it, once that water leaves the down spout of your house, it is Federal water.

Two, I know the Corps of Engineers does not have the resources to administer that kind of jurisdiction. They don't have the resources today to administer this ever continuing, expanding jurisdiction they assert.

I heard the statement in here that 90 percent of the permits are approved. What they don't tell you is how many permit applications either aren't made because people cannot afford it or are withdrawn because they get hassled so long and harassed so long and delayed so long. Part of the reason even where there is no hassling and no intentional delay is simply because the Corps does not have the money to have the people in the field to take care of these cases. It is almost like social workers who have too darned many cases to deal with and they can't deal adequately with the cases that are assigned to them. Those are my reasons. So go slow is what I am saying.

Mr. OSE. For the reasons enunciated by each of you, Professor, you support putting all the waters wherever they may be under the jurisdiction of the Corps?

Mr. PARENTEAU. Assuming there is a scientifically valid methodology that identifies those areas that belong in the system, yes.

Mr. OSE. Mr. Guzy, you support it. Mr. Smethurst, you are skeptical at the least.

Mr. SMETHURST. Very skeptical.

Mr. OSE. Ms. Marzulla, you are definitely skeptical, if not in outright opposition. Mr. Hopper, you oppose. Ms. Albrecht, you oppose. OK. I have a clear understanding of where you all stand on that.

It is 1:41 p.m. and I want to express my appreciation to each of you for your patience today, given the votes. I do appreciate your rather remarkable attempts to educate me today. Most of it sank in, and I am grateful for your taking the time. Someday I might even be a student. Thank you for coming. We will be sending you questions. We would appreciate a timely response.

With that, we will adjourn.

[Whereupon, at 1:41 p.m., the subcommittee was adjourned, to reconvene at the call of the Chair.]

[The prepared statement of Hon. John F. Tierney and additional information submitted for the hearing record follows:]

Congressman John F. Tierney
Committee on Government Reform
Hearing on Federal Clean Water Act Jurisdiction
September 19, 2002

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Mr. Chairman, today the Energy Policy, Natural Resources, and Regulatory Affairs Subcommittee meets to consider the Supreme Court case, *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corp of Engineers*. It is incorrect, however, to believe that this is an arcane Court case that only impacts 17 acres of seasonal ponds in Illinois. The implications of this case are much larger than that. To be clear: The *SWANCC* case could, depending on its interpretation, negatively impact 20% to 60% of our nation's wetlands.

Let me stress the importance of wetlands: they provide significant environmental, biological, and economic benefits. Wetlands are the principal breeding ground and primary habitat for many species of migratory birds, amphibians, and fish. One third of all bird species and 43 percent of the federally listed threatened and endangered species rely on wetlands for survival.

Wetlands also play an important role in purifying our water. If half the existing wetlands in America were destroyed, it would translate into a cost of $62 billion per year in sewage treatment plant upgrades.

Wetlands also mitigate the effects of floods and droughts. One acre of wetlands can store more than 360,000 gallons of water if flooded to a depth of one foot.

In my district, wetlands help support the commercial fishing industry. More than 95 percent of commercially harvested fish and shellfish in the U.S. are dependent upon wetlands for their survival. The commercial fishing industry provides nearly 2 million jobs nationwide and contributes $152 billion to our economy. Recreational anglers, hunters, and birdwatchers spend tens of billions on equipment and travel.

Unfortunately, we have lost over half of our wetlands and continue to lose them at an alarming rate. And, on January 9, 2001, the Supreme Court dealt a devastating blow to clean water -- and to wetlands in particular -- when it came down with the *SWANCC* decision.

In a few weeks, the United States will celebrate the 30th Anniversary of the Clean Water Act. Today's hearing provides an excellent opportunity for the Administration to clarify what waters it considers jurisdictional under the Clean Water Act and affirm a narrow reading of the holding. I look forward to hearing from the witnesses.

Mr. Chairman, this is an extremely important issue and I thank you for holding this hearing. And I ask unanimous consent to hold the record open so members may submit speeches, additional materials, and ask written questions for the record.

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October 17, 2002

Mr. Dominic Izzo
Deputy Assistant Secretary of the Army
For Civil Works
Department of Defense
108 Army Pentagon
Washington, DC 20310

Dear Mr. Izzo:

I am writing to follow up on the Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs' September 19, 2002, hearing on agency implementation of the Supreme Court decision in *Solid Waste Agency of Northern Cook County v. Corps of Engineers* (SWANCC). Thank you again for your testimony at that hearing. As discussed at the hearing, I am submitting a series of written questions for your response. In addition to my questions, I have also attached several questions submitted by Representatives Waxman and Tierney. These questions, along with your written answers, will be included in the hearing record.

Please fax your response to the Subcommittee at (202) 225-2441 by November 13, 2002. If you have any questions about this request, please contact Subcommittee staff member Jonathan Tolman at (202) 226-4376. Thank you for your attention to this request.

Sincerely,

Doug Ose
Chairman
Subcommittee on Energy Policy,
Natural Resources and Regulatory Affairs

Attachment

cc: The Honorable Dan Burton
The Honorable John Tierney

**Questions from Chairman Ose**

**Guidance**

In your testimony, you stated that the Corps and EPA have been working to develop guidance concerning jurisdiction following SWANCC.

1. When will the Corps and EPA send this guidance out to district and regional offices?

2. Until this guidance is issued, what are the Corps and EPA doing to ensure consistency in the application of the regulatory program across the nation?

**Rulemaking**

In your testimony, you state that the Corps and EPA have determined that they should engage in a rulemaking to define the Federal role under the Clean Water Act (CWA). Under the Administrative Procedure Act, agencies are required to issue a proposed rule for public notice and comment. Prior to a proposed rule, however, agencies will often issue an advanced notice of proposed rulemaking in order to obtain information from the public to assist the agency in properly framing a proposed rule and ensuring an adequate scope.

3. Do the Corps and EPA intend to publish an advanced notice of proposed rulemaking in the Federal Register to ensure that their regulations are consistent with the rationale in the SWANCC decision? If so, when? And, how long will the public comment period be?

4. When do the Corps and EPA intend to issue a proposed rule for notice and comment?

In the SWANCC decision, the Supreme Court stated, "We said in Riverside Bayview Homes that the word "navigable" in the statute was of "limited effect" and went on to hold that §404(a) extended to nonnavigable wetlands adjacent to open waters. But it is one thing to give a word limited effect and quite another to give it no effect whatever. The term "navigable" has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made."

5. In light of the SWANCC decision, does EPA believe that there are alternative commerce clause connections, other than navigation, that give the agency jurisdiction under Section 404 of the CWA?

6. In particular, Corps regulations (33 CFR § 328.1(a)(3)) specify that waters, the use of which could affect interstate commerce, are jurisdictional. Do the Corps and EPA intend to modify or clarify these regulations in their forthcoming rulemaking or guidance?

Questions Submitted to Dominic Izzo, Principal Deputy Assistant Secretary of the Army for Civil Works, Department of the Army, by Reps. Waxman and Tierney

1) During the September 19, 2002, hearing, there was discussion of the fact that the EPA, Army Corps of Engineers, and DOJ (and perhaps others) met every few weeks to discuss the implications of the SWANCC holding and related caselaw. Please provide a list of the individuals who attended these meetings along with their job titles?

2) Please provide the following:

a) any drafts of guidance regarding the SWANCC decision and related caselaw;
b) any drafts of proposed rulemakings and drafts of a notice of a proposed rulemaking regarding the SWANCC decision and related caselaw (including any draft resulting from the 10/4/02 interagency meeting that was discussed at the September 19, 2002, hearing); and
c) minutes, reports, and notes pertaining to any interagency meetings regarding the SWANCC decision and related caselaw.

DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
CIVIL WORKS
108 ARMY PENTAGON
WASHINGTON DC 20310-0108

17 DEC 2002

REPLY TO
ATTENTION OF

Honorable Doug Ose
Chairman
Subcommittee on Energy Policy,
Natural Resources and Regulatory Affairs
Committee on Government Reform
United States House of Representatives
2157 Rayburn House Office Building
Washington, D.C. 20515-6143

Dear Mr. Chairman:

Due to Mr. Dominic Izzo's recent departure from the Office of the Assistant Secretary of the Army (Civil Works), I am replying to your letter of October 17, 2002, forwarding written questions for our response, as follow-up to the testimony presented at the September 19, 2002, hearing on agency implementation of the SWANCC decision. Our responses, which have been coordinated with the Environmental Protection Agency, are provided in the enclosed document.

Sincerely,

Geo. S. Dunlop

George S. Dunlop
Deputy Assistant Secretary of the Army
(Policy and Legislation)

Enclosure

**Responses to Questions from Chairman Ose**

1. In your testimony, you stated that the Corps and EPA have been working to develop guidance concerning jurisdiction following SWANCC. When will the Corps and EPA send this guidance out to the district and regional offices?

A. We hope to send this guidance to the field soon.

2. Until this guidance is issued, what are the Corps and EPA doing to ensure consistency in the application of the regulatory program across the nation?

A. EPA and the Corps have organized a staff-level interagency workgroup that includes EPA, the Corps, and DOJ participants and meets bi-weekly to exchange information, identify SWANCC-related issues arising in the field, and to keep staff informed of litigation developments on an ongoing basis. The interagency group has been very helpful in ensuring that all the issues are being considered, that the legal, policy, and practical implications of various approaches are fully analyzed, and that post-SWANCC case law is given due attention. We believe that this process is the best way to ensure consistency and the efficient dissemination of information through our agencies.

3. Do the Corps and EPA intend to publish an advanced notice of proposed rulemaking in the Federal Register to ensure that their regulations are consistent with the rationale in the SWANCC decision? If so, when? And, how long will the public comment period be?

A. As we mentioned in our testimony, we have determined that we should engage in rulemaking to address the scope of CWA jurisdiction. We have not decided whether to start this rulemaking with an advanced notice of proposed rulemaking. We hope to publish either an advanced notice of proposed rulemaking or a notice of proposed rulemaking soon. We have not decided how long the public comment period will be, but consistent with prior notices, we would expect to allow at least 30 days for the public comments.

4. When do the Corps and EPA and EPA intend to publish a proposed rule for notice and comment?

A. See answer to 3. If we start with an advanced notice of proposed rulemaking, we would expect to issue a proposed rule after reviewing the comments on the advanced notice.

5. In light of the SWANCC decision, does EPA believe that there are alternative commerce clause connections, other than navigation, that give the agency jurisdiction under Section 404 of the CWA?

A. The Department of Justice has addressed constitutional arguments in a number of briefs filed on behalf of the United States in the district and appellate courts after SWANCC, and those briefs were coordinated with EPA. The briefs in the US v. Deaton and US v. Newdunn cases in the Fourth Circuit Court have a particularly full discussion. We can provide copies of these briefs upon request. We expect that the interplay between the CWA and the commerce clause will be considered in the planned rulemaking as well.

6. In particular, Corps regulations (33 CFR § 328.1(a)(3)) specify that waters, the use of which could affect interstate commerce, are jurisdictional. Do the corps and EPA intend to modify or clarify these regulations in their forthcoming rulemaking or guidance?

A. We presume the question refers to 33 CFR 328.3(a)(3). We expect that section of the regulations to be considered in the forthcoming rulemaking or guidance.

Questions Submitted to Mr. Dominic Izzo, Principal Deputy Assistant Secretary of the Army (Civil Works), Department of the Army, by Representatives Waxman and Tierney

1) During the September 19, 2002, hearing, there was discussion of the fact that the EPA, Army, and DOJ (and perhaps others) met every few weeks to discuss the implications of the SWANCC holding and related case law. Please provide a list of the individuals who attended these meetings along with their job titles.

A. Sometime between January and November 2001, a staff-level interagency work group met approximately every other week to identify issues presented by the SWANCC decision, and to consider various approaches to the development of appropriate post-SWANCC guidance. In additions to representatives of various EPA Regional Offices who participated by telephone, the Corps of Engineers participants in interagency work group were:

Mr. Lance Wood, Assistant Chief Counsel, Environmental Law and Regulatory Programs, Office of the Chief Counsel, Corps of Engineers

Mr. Sam Collinson, Chief, Policy Development Section, Regulatory Branch, Corps of Engineers

Mr. Ted Rugiel, Regulatory Program Manager, Regulatory Branch, Corps of Engineers

EPA participants who routinely participated included the representatives listed below. However, there were other EPA representatives who participated, either in person or by telephone. The names and titles of those representatives aren't available to us, and they will have to be identified by EPA.

Ms. Donna Downing, Environmental Protection Specialist, Wetlands Division, U.S. Environmental Protection Agency

Ms. Tracie Nadeau, Environmental Protection Specialist Wetlands Division, U.S. Environmental Protection Agency

Ms. Cathy Winer, Attorney, Office of General Counsel, Water Law Office, U.S. Environmental Protection Agency

The following representatives of the Department of Justice routinely participated in the staff-level work group:

Mr. Steven Samules, Assistant Section Chief, Environment and Natural Resources Division, U.S. Department of Justice

Mr. Ethan Shenkman, Attorney, Environment and Natural Resources Division, U.S. Department of Justice

Since November 2001, meetings have taken place among Policy and Administration-level representatives of the Assistant Secretary of the Army (Civil Works), the Corps, EPA, DOJ, CEQ and OMB. The Army representatives included:

Mr. Dominic Izzo, Principal Deputy Assistant Secretary of the Army (Civil Works)

Mr. Robert Andersen, Chief Counsel, U.S. Army Corps of Engineers

Mr. Earl Stockdale, Deputy General Counsel of the Army (Civil Works & Environment)

Mr. Benjamin Cohen, Deputy General Counsel of the Department of Defense (Environment)

Mr. Avon Williams, Principal Deputy General Counsel of the Army

Due to Mr. Izzo's departure, the names of other agency participants in the Policyh/Administration-level meetings are not available to us.

2) Please provide the following:

a) any drafts of guidance regarding the SWANCC decision and related case law;

b) any drafts of proposed rulemaking and drafts of a notice of a proposed rulemaking regarding the SWANCC decision and related case law (including any draft resulting from the 10/24/02 interagency meeting that was discussed at the September 19, 2002, hearing); and

c) minutes, reports, and notes pertaining to any interagency meetings regarding the SWANCC decision and related case law.

The EPA and Army are separately contacting Congressmen Waxman and Tierney with regard to their request for drafts of guidance, drafts of proposed rulemaking, drafts of a notice of proposed rulemaking, and minutes, reports and notes of interagency meetings. Since EPA and Corps counsel, as well as the DOJ, were involved in the deliberations over post-SWANCC guidance/rulemaking, these documents, and the minutes, are "attorney-client privileged" papers, and they have been marked as such. In light of this, we hope to reach an agreement on a mutually acceptable alternative accommodation of the Congressmen's request.

October 17, 2002

The Honorable Robert Fabricant
General Counsel
Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dear Mr. Fabricant:

I am writing to follow up on the Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs' September 19, 2002, hearing on agency implementation of the Supreme Court decision in *Solid Waste Agency of Northern Cook County v. Corps of Engineers* (SWANCC). Thank you again for your testimony at that hearing. As discussed at the hearing, I am submitting a series of written questions for your response. In addition to my questions, I have also attached several questions submitted by Representatives Waxman and Tierney. These questions, along with your written answers, will be included in the hearing record.

Please fax your response to the Subcommittee at (202) 225-2441 by November 13, 2002. If you have any questions about this request, please contact Subcommittee staff member Jonathan Tolman at (202) 226-4376. Thank you for your attention to this request.

Sincerely,

Doug Ose
Chairman
Subcommittee on Energy Policy,
Natural Resources and Regulatory Affairs

Attachment

cc: The Honorable Dan Burton
The Honorable John Tierney

## Questions from Chairman Ose

**Guidance**

In your testimony, you stated that the Corps and EPA have been working to develop guidance concerning jurisdiction following SWANCC.

1. When will the Corps and EPA send this guidance out to district and regional offices?

2. Until this guidance is issued, what are the Corps and EPA doing to ensure consistency in the application of the regulatory program across the nation?

**Rulemaking**

In your testimony, you state that the Corps and EPA have determined that they should engage in a rulemaking to define the Federal role under the Clean Water Act (CWA). Under the Administrative Procedure Act, agencies are required to issue a proposed rule for public notice and comment. Prior to a proposed rule, however, agencies will often issue an advanced notice of proposed rulemaking in order to obtain information from the public to assist the agency in properly framing a proposed rule and ensuring an adequate scope.

3. Do the Corps and EPA intend to publish an advanced notice of proposed rulemaking in the Federal Register to ensure that their regulations are consistent with the rationale in the SWANCC decision? If so, when? And, how long will the public comment period be?

4. When do the Corps and EPA intend to issue a proposed rule for notice and comment?

In the SWANCC decision, the Supreme Court stated, "We said in Riverside Bayview Homes that the word "navigable" in the statute was of "limited effect" and went on to hold that §404(a) extended to nonnavigable wetlands adjacent to open waters. But it is one thing to give a word limited effect and quite another to give it no effect whatever. The term "navigable" has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made."

5. In light of the SWANCC decision, does EPA believe that there are alternative commerce clause connections, other than navigation, that give the agency jurisdiction under Section 404 of the CWA?

6. In particular, Corps regulations (33 CFR § 328.1(a)(3)) specify that waters, the use of which could affect interstate commerce, are jurisdictional. Do the Corps and EPA intend to modify or clarify these regulations in their forthcoming rulemaking or guidance?

Questions Submitted to Robert Fabricant, General Counsel, Environmental Protection Agency, by Reps. Waxman and Tierney

1) During the September 19, 2002, hearing, there was discussion of the fact that the EPA, Army Corps of Engineers, and DOJ (and perhaps others) met every few weeks to discuss the implications of the SWANCC holding and related caselaw. Please provide a list of the individuals who attended these meetings along with their job titles?

2) Please provide the following:

a) any drafts of guidance regarding the SWANCC decision and related caselaw;

b) any drafts of proposed rulemakings and drafts of a notice of a proposed rulemaking regarding the SWANCC decision and related caselaw (including any draft resulting from the 10/4/02 interagency meeting that was discussed at the September 19, 2002, hearing); and

c) minutes, reports, and notes pertaining to any interagency meetings regarding the SWANCC decision and related caselaw.

TOM DAVIS, VIRGINIA
CHAIRMAN

HENRY A. WAXMAN, CALIFORNIA
RANKING MINORITY MEMBER

ONE HUNDRED EIGHTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON GOVERNMENT REFORM
2157 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6143

Majority (202) 225–5074
Minority (202) 225–5051

February 11, 2003

The Honorable David M. Walker
Comptroller General of the United States
U.S. General Accounting Office
441 G Street, NW
Washington, DC 20548

Dear Mr. Walker:

I am writing to request that the General Accounting Office (GAO) conduct a study regarding federal agency regulations of jurisdictional waters under Section 404 of the Clean Water Act (CWA). On January 9, 2001, the Supreme Court ruled that the U.S. Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA) had exceeded their authority under the CWA by claiming jurisdiction over isolated waters in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* No. 99-1178 (SWANCC).

On the last day of the Clinton Administration, the Corps and EPA issued a joint memorandum to their regional offices. While this memo was swiftly issued, it appears to have done little to clarify Federal jurisdiction in light of the SWANCC decision. According to the memo, "Jurisdiction over such 'other waters' should be considered on a case-by-case basis in consultation with agency legal counsel."

This case-by-case approach resulted in widely varying interpretations of the scope of jurisdiction by field offices of the Corps and EPA. In addition, there appears to be little consistency in what type of information and criteria are used for determining jurisdiction. Some regional offices appear to be making jurisdictional determinations in the office, using maps and aerial photography, while others are conducting site visits.

In response to this situation, on September 19, 2002, the Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs held a hearing on agency implementation of the SWANCC decision. As one witness pointed out at the hearing, "I come from an area where I deal with three separate districts of the Corps of Engineers, Philadelphia, Baltimore and Norfolk. I can tell you as a practical matter, from personal experience and discussion with those people in

the field who do these delineations and deal with Corps staff people on a day to day basis, it is utter chaos out there."[1]

Also at the hearing, the Corps and EPA agreed to issue clarifying guidance and initiate a rulemaking on the definition of waters of the United States. On January 15, 2003, the agencies published an advanced notice of proposed rulemaking in the Federal Register (68 FR 1991).

While a welcome first step, the guidance appears to have done little to clarify key regulatory concepts central to establishing jurisdiction over waters of the U.S., including such concepts as isolated water, adjacent water and the extent of the tributary system. In the absence of national policy for establishing clear guidelines for these concepts, regional and district offices must still make jurisdictional determinations on a daily basis.

I request that GAO conduct a study into what criteria district and regional offices use in making these jurisdictional determinations and to what extent these criteria vary from region to region. Please address the following questions.

What criteria do district and regional offices use to determine if a water is isolated?

What criteria do district and regional offices use to determine if a water is adjacent to an actual navigable water or a tributary to an actual navigable water?

What criteria do district and regional offices use to define tributaries?

What criteria do district and regional offices use to determine when a tributary becomes sufficiently ephemeral, intermittent or the flow becomes sufficiently *de-minimus* that it ceases to be a jurisdictional water?

Finally, to what extent are these criteria formalized in agency documents or publications that are available to the public?

Thank you for your cooperation. Please contact Subcommittee staff member Jonathan Tolman at 226-4376 if you have any questions.

Sincerely,

Doug Ose
Chairman
Subcommittee on Energy Policy,
Natural Resources and Regulatory Affairs

cc: The Honorable Tom Davis
The Honorable Henry Waxman

1 Statement of Raymond S. Smethurst, p. 76.

# Statement of the American Farm Bureau Federation

**TO THE**
**HOUSE GOVERNMENT REFORM**
**ENERGY POLICY, NATURAL RESOURCES AND REGULATORY AFFAIRS**
**SUBCOMMITTEE**
**REGARDING**
**GOVERNMENT AGENCIES RESPONSE TO *SOLID WASTE AGENCY OF NORTHERN COOK COUNTY V. UNITED STATES ARMY CORPS OF ENGINEERS* RULING**

**September 19, 2002**

*600 MARYLAND AVENUE SW • SUITE 800 • WASHINGTON, DC 20024 • (202) 484-3600 • FAX (202) 484-3604*
*225 TOUHY AVENUE • PARK RIDGE, IL 60068 • (847) 685-8600 • FAX (847) 685-8896*
*Internet: http://www.fb.org*

**STATEMENT OF**
**THE AMERICAN FARM BUREAU FEDERATION**
**TO THE**
**HOUSE GOVERNMENT REFORM**
**ENERGY POLICY, NATURAL RESOURCES AND REGULATORY AFFAIRS**
**SUBCOMMITTEE**
**REGARDING**
**GOVERNMENT AGENCIES RESPONSE TO *SOLID WASTE AGENCY OF NORTHERN COOK COUNTY V. UNITED STATES ARMY CORPS OF ENGINEERS* RULING**

**September 19, 2002**

The American Farm Bureau Federation (AFBF) which represents farmers and ranchers from all 50 states and Puerto Rico, is pleased to offer this statement for the record to the Energy Policy, Natural Resources and Regulatory Affairs Subcommittee of the House Government Reform Committee regarding the response of government agencies to the ruling in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*.

AFBF's members produce virtually every commercial agricultural commodity in the United States. They own or lease significant amounts of land on which they depend for their livelihoods and upon which all Americans rely for food and other basic necessities. In recent years they have become increasingly subjected to restrictive laws and regulations that impair their ability to farm and ranch efficiently, and, in some instances, have eliminated their ability to farm and ranch altogether. The protection of wetlands under Section 404 of the Clean Water Act (CWA) poses one of the more onerous regulatory problems production agriculture faces today.

Federal agencies, especially the Environmental Protection Agency (EPA), Army Corps of Engineers (Corps) and the Fish and Wildlife Service, with the aid of the lower courts, have been expanding the reach of the Section 404 wetlands program.

The Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (SWANCC) repudiated what had become conventional wisdom regarding the reach of federal wetlands jurisdiction under the CWA. In SWANCC, the Supreme Court ruled that federal agencies cannot claim jurisdiction over ponds or wetlands simply because migratory birds use them as habitat – jurisdiction federal agencies have claimed since 1986.

The Corps had defended its "migratory bird rule" as an exercise of the federal power over activities having a "substantial effect" on interstate commerce – the broadest basis of federal power under the Commerce Clause. The Supreme Court, however, held that Congress did not intend to exercise its power over activities "affecting commerce" when it enacted the CWA. Instead, the Court said, Congress intended to exercise only its authority over navigation and federal jurisdiction under the CWA is limited to waters that are navigable in fact, like rivers and lakes, and to waters and wetlands that have a "significant nexus" to navigable waters, such as tributaries, streams, tidal wetlands and wetlands adjacent to open waters.

Importantly, while the Supreme Court decided SWANCC on statutory grounds, it stated the government's expansive interpretation of its jurisdiction under the CWA in the "migratory bird rule" raised "serious constitutional questions." First, there is a "significant constitutional question" whether birds supply a sufficient connection to commerce to bring all land and water used by birds within the federal government's "commerce power." Second, asserting such broad federal authority "would result in a significant infringement of the states' traditional and primary power over land and water use" – power reserved to the states by the Tenth Amendment. In other words, the Supreme Court clearly indicated its concern with such an expansive interpretive statement of jurisdiction from the Corps, and it warned that even if Congress should amend the CWA accordingly, such expanded jurisdiction would likely not be a proper exercise of government authority under the Court's interpretation of federalism and the Commerce Clause.

Response to SWANCC by the agencies and the lower courts has been mixed. As expected, the agencies have sought to limit SWANCC's effect on the scope of their jurisdiction. A joint EPA/Corps memorandum issued immediately after the decision sought to limit the decision to waters for which jurisdiction was based solely on the "migratory bird rule." The U.S. Department of Justice (DOJ) more recently has given the strongest indication of the government's resistance to the fallout from the SWANCC in its appeal of a decision by the U.S. District Court for the Eastern District of Michigan in *United States v. Rapanos*. There the district court had ruled that because the wetlands were 20 miles away from navigable waters, they did not fall under federal jurisdiction. In its brief on appeal, the DOJ argues, "The wetlands . . . were adjacent to tributaries of traditionally navigable waters. . . . SWANCC involved only hydrologically isolated waters." The DOJ's brief shows the government has a very narrow view of how to define isolated wetlands. According to the brief, the government believes wetlands adjacent to non-navigable tributaries that eventually connect to a navigable waterbody are still under the government's jurisdiction and should not be defined as isolated.

The government's resistance to SWANCC is, no doubt, the result of its reluctance to cede jurisdiction once exercised. And the lower courts, although they have no institutional investment in broad agency jurisdiction, nonetheless face long-entrenched assumptions that the CWA extends to the broadest constitutional bounds. Nevertheless, the SWANCC decision worked a major change in the landscape of water and wetland regulation, a change that should be reflected in the agencies' regulations.

AFBF believes the SWANCC decision clearly expresses the view that the reach of the CWA is not as expansive as the EPA and the Corps asserts. In SWANCC, the Supreme Court held that federal jurisdiction under the CWA to waters and wetlands that have "significant nexus" to navigable waterways. The Court also stressed the Corps' original regulatory interpretation properly reflected the intent of Congress in passing the CWA to regulate "those waters of the United States which are subject to the ebb and flow of the tide, and/or are . . . susceptible for use for purposes of interstate or foreign commerce."

AFBF believes farmers and ranchers have the right to know and understand the differences between those wetlands that are and those that are not jurisdictional for federal regulatory purposes. The question of CWA jurisdiction, the question of a jurisdictional wetland and the

regulatory definition of "adjacent" and "tributary" are policy and regulatory matters which should be resolved through a rulemaking process rather than on a case-by-case basis.

AFBF also believes the framework of "cooperative federalism" created by the CWA must be preserved. Among the expressed purpose of the CWA was to "recognize, preserve, and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution." Congress was careful to preserve the states' rights to regulate their own land and water resources. The states are perfectly capable of protecting wetlands and have been doing so increasingly since SWANCC. Even before SWANCC, as indicated by the amicus brief filed by the state of Alabama, every state in the nation had statutes that gave authority to protect waters and wetlands. Neither Congress nor the agencies should get in their way.

[Original date stamped January 19, 2001]

**MEMORANDUM**

**SUBJECT:** Supreme Court Ruling Concerning CWA Jurisdiction over Isolated Waters

**FROM:** Gary S. Guzy /s/
General Counsel
U.S. Environmental Protection Agency

Robert M. Andersen /s/
Chief Counsel
U. S. Army Corps of Engineers

**TO:** See Distribution

The purpose of this memorandum is to inform you of a significant new ruling by the Supreme Court pertaining to the scope of regulatory jurisdiction under the Clean Water Act (CWA) and to inform you of what is and is not affected by this ruling. Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, No. 99-1178 (January 9, 2001) ("SWANCC") involved statutory and constitutional challenges to the assertion of CWA jurisdiction over isolated, non-navigable, intrastate waters used as habitat by migratory birds.

Although the SWANCC case itself specifically involved section 404 of the CWA, the Court's decision affects the scope of regulatory jurisdiction under other provisions of the CWA as well, including the section 402 NPDES program and the section 311 oil spill program. Under each of these sections, the Agencies have jurisdiction over "waters of the United States." CWA § 502(7). Accordingly, the following discussion applies to any program that involves "waters of the United States" as that term is used in the CWA, and will be relevant to any

federal, state, or tribal staff involved in implementing sections 402, 404, 311, and any other provision of the CWA which applies the definition of "waters of the United States."[1]

In the 5-4 decision, the Supreme Court held that the Corps exceeded its statutory authority by asserting CWA jurisdiction over "an abandoned sand and gravel pit in northern Illinois which provides habitat for migratory birds." Slip op.

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[1]The SWANCC decision only addresses the scope of regulatory jurisdiction under the federal CWA. Therefore, the scope of regulatory jurisdiction over aquatic features under other federal statutes is not affected by this decision. In addition, the Clean Water Act explicitly provides that nothing in the Act "shall...be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." 33 U.S.C. § 1370. Therefore, nothing in the SWANCC decision alters the extent of State (or tribal) jurisdiction over aquatic features under State (or tribal) law.

at 1. The Court did not reach the question of "whether Congress could exercise such authority consistent with the Commerce Clause, U.S. Const., Art. I, § 8, cl. 3." Slip op. at 1. It summarized its holding as follows: "We hold that 33 C.F.R. § 328.3(a)(3) (1999), as clarified and applied to petitioner's balefill site pursuant to the 'Migratory Bird Rule,' 51 Fed. Reg. 41217 (1986), exceeds the authority granted to respondents under § 404(a) of the CWA." Id. at 14.[2] Although the

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[2] 33 C.F.R. § 328(a)(3) describes a subset of "waters of the United States": "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 destruction of which could affect interstate or foreign commerce . . . ."

The "Migratory Bird Rule" refers to an explanation, in the preambles to

Court held that the Corps' application of § 328.3(a)(3) was invalid in SWANCC, the Court did not strike down §328.3(a)(3) or any other component of the regulations defining "waters of the United States."

While the Court's actual holding was narrowly limited to CWA regulation of "nonnavigable, isolated, instrastate" waters based solely on the use of such waters by migratory birds, the Court's discussion was wider ranging. For example, the Court clearly recognized the CWA's assertion of jurisdiction over traditional navigable waters and their tributaries and wetlands adjacent to them. Slip op. at 6, 10. The Court also expressly declined to address certain other aspects of the scope of CWA jurisdiction. Slip op. at 10. As a result, the Court's opinion has led to questions concerning the effect of the decision on other waters within the definition of "waters of the United States" in agency regulations. Accordingly, this memorandum describes which aspects of the regulatory definition of "waters of the United States" are and are not affected by SWANCC.

1. In light of the Court's "conclu[sion] that the 'Migratory Bird Rule' is not fairly supported by the CWA," slip op. 6, field staff should no longer rely on the use of waters or wetlands as habitat by migratory birds as the sole basis for the assertion of regulatory jurisdiction under the CWA.

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1986 Corps regulations and 1988 EPA regulations, that waters that are or may be used as habitat for migratory birds are an example of waters whose use, degradation, or destruction could affect interstate or foreign commerce and therefore are "waters of the United States." 51 Fed. Reg. 41217 (1986); 53 Fed. Reg. 20765 (1988).

2. As noted above, the Court's holding was strictly limited to waters that are "nonnavigable, isolated, [and] instrastate." With respect to any waters that fall outside of that category, field staff should continue to exercise CWA jurisdiction to the full extent of their authority under the statute and regulations and consistent with court opinions.

3. The Court did not overrule the holding or rationale of United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985), which upheld the regulation of traditionally navigable waters, interstate waters, their tributaries, and wetlands adjacent to each. See id. at 123, 129, 139. Each of these categories is still considered "waters of the United States," as is discussed below in paragraphs 4 and 6.

4. Because the Court's holding was limited to waters that are "non-navigable, isolated, [and] intrastate," the following subsections of the regulatory definition of "waters of the United States"[3] are **unaffected** by SWANCC:

> "(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide" (see, e.g., SWANCC, slip op. at 7-8);
>
> "(2) All interstate waters including interstate wetlands" (see, e.g., CWA section 303(a)(1); Hodel v. Virginia Surface Mining and

[3]Different CWA regulations contain slightly different formulations of the definition. For simplicity's sake, this memo refers to the Corps' version at 33 C.F.R. § 328.3(a). Other versions appear at, e.g., 40 CFR §§ 110.1, 112.2, 116.3, 117.1, 122.2, 230.3(s), and 232.2.

Reclamation Ass'n, 452 U.S. 264, 282 (1981));

"(4) All impoundments of waters otherwise defined as waters of the United States under the definition [except subsection (a)(3) waters] " (implicit in SWANCC, slip. op. at 6);
"(5) Tributaries to waters identified in paragraphs (a)(1)[, (2), and] (4) of this section" (see, e.g., SWANCC, slip op. at 10);

"(6) The territorial seas" (see CWA section 502(7)); and

"(7) Wetlands adjacent to waters (other than waters which are themselves wetlands) identified in paragraphs (a)(1)[,(2), (4), (5), and] (6) of this section" (see, e.g., SWANCC, slip op. at 6; Riverside Bayview at 134-35, 139).[4]

5. The following subsections of the regulatory definition of "waters of the United States" **are, or potentially are, affected** by SWANCC:

"(3) 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 destruction of which could affect interstate or foreign commerce . . ."

a. Waters covered solely by subsection (a)(3) [5] that could affect interstate commerce solely by virtue of their use as habitat by migratory birds are no longer considered "waters of the United States." The Court's opinion did not specifically address what other connections with interstate commerce might support the assertion of CWA jurisdiction over "nonnavigable, isolated, intrastate waters" under subsection (a)(3). Therefore, as specific cases arise, please consult agency legal counsel.

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[4] "Adjacent" is defined by regulation as "bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes, and the like are 'adjacent wetlands.' " 33 C.F.R. § 328.3(d). This definition was approved in Riverside Bayview and is not undercut by SWANCC.

[5] Subsection (a)(3) is intended to cover waters that are not covered by the other subsections of § 328.3(a).

b. The Court's opinion expressly reserved the question of what "other waters" were intended to be addressed by CWA § 404(g)(1) (regarding state 404 programs). Factors not addressed in SWANCC may have a bearing on whether subsection (a)(3) may still be relied on as the basis for asserting CWA jurisdiction over certain "other waters." Jurisdiction over such "other waters" should be considered on a case-by-case basis in consultation with agency legal counsel. Factors that may be relevant to the analysis under 33 C.F.R. 328.3(a)(3) include, but are not limited to, the following:

(1) With respect to waters that are isolated, intrastate, and nonnavigable--jurisdiction may be possible if their use, degradation, or destruction could affect other "waters of the United States," thus establishing a significant nexus between the water in question and other "waters of the United States;"

(2) With respect to waters that, although isolated and intrastate, are navigable -- jurisdiction may also be possible if their use, degradation, or destruction could affect interstate or foreign commerce (examples of ways the use, degradation or destruction of a water could affect such commerce are provided at 33 CFR 328.3(a)(3)(i) – (iii)).[6]

c. Impoundments of subsection (a)(3) waters, tributaries of (a)(3) waters, and wetlands adjacent to subsection (a)(3) waters should be analyzed on a case-by-case basis in accordance with subparagraphs 5.a and 5.b immediately above. Such impoundments, tributaries and adjacent wetlands are also part of the "waters of the United States" if the waters they impound, are tributaries to, or are adjacent to are themselves "waters of the United States."

6. The Supreme Court's decision in SWANCC does provide an important new limitation on how and in what circumstances the EPA and the Corps can assert regulatory authority under the CWA. However, this decision's limited holding must be interpreted in light of other Supreme Court and lower court precedents, unaffected by the SWANCC decision, which precedents broadly uphold CWA jurisdictional authority. The following quotations from the Riverside

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[6]An example of an intra-state lake that is "isolated" (i.e., not part of the tributary system of traditional navigable waters or interstate waters) but which might reasonably be considered "waters of the United States" under subsections (a)(1) or (a)(3) is the Great Salt Lake in Utah. That "isolated" lake is navigable-in-fact (see United States v. Utah, 403 U.S. 9 (1971)), and has substantial connections with interstate commerce (see, e.g., Hardy Salt Co. v. Southern Pacific Transportation Co., 501 F. 2d 1156 (10th Cir. 1974)).

Bayview decision are provided to remind EPA and Corps field offices that most CWA jurisdiction remains basically intact after the SWANCC decision.

a. The Supreme Court's Riverside Bayview decision (at 123, 139) upheld the legality of the basic provisions of the Corps' CWA jurisdictional regulation, which the Court described (at 129) as follows: "The [Corps and EPA jurisdictional] regulation extends the Corps' authority under Section 404 to all wetlands adjacent to navigable or interstate waters and their tributaries."[7]

b. The Court in Riverside Bayview also stated, at 132-33, that:

> . . . Section 404 originated as part of the Federal Water Pollution Control Act Amendments of 1972, which constituted a comprehensive legislative attempt 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.' CWA§ 101, 33 U.S.C. § 1251. This objective incorporated a broad, systemic view of the goal of maintaining and improving water quality: as the House Report on the legislation put it, "the word 'integrity' . . . refers to a condition in which the natural structure and function of ecosystems is [are] maintained. . . . Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.' . . . In keeping with these views, Congress chose to define the waters covered by the Act broadly.

---

[7] The one specific part of the Corps' CWA jurisdiction that the Court did not reach in Riverside Bayview related to "wetlands that are not adjacent to bodies of open water" under 33 C.F.R. 328.3(a)(2) or (3). Riverside Bayview, 474 U.S. at 131, n. 8.

c. In Riverside Bayview, at 133-134, the Court quoted with approval the following language from the preamble to the Corps' 1977 regulations:

> " The regulation of activities that cause water pollution cannot rely on . . . artificial lines . . . but must focus on all waters that together form the entire aquatic system. Water moves in hydrologic cycles, and the pollution of this part of the aquatic system, regardless of whether it is above or below an ordinary high water mark, or mean high tide line, will affect the water quality of the other waters within that aquatic system. For this reason, the landward limit of Federal jurisdiction under Section 404 must include any adjacent wetlands that form the border of or are in reasonable proximity to other waters of the United States, as these wetlands are part of this aquatic system."

The Court went on to conclude, at 134, that: "In view of the breadth of federal regulatory authority contemplated by the Act itself . . . the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act."

d. In sum, the holding, the facts, and the reasoning of United States v. Riverside Bayview Homes continue to provide authority for the EPA and the Corps to assert CWA jurisdiction over, inter alia, all of the traditional navigable waters, all interstate waters, and all tributaries to navigable or interstate waters, upstream to the highest reaches of the tributary systems, and over all wetlands adjacent to any and all of those waters.

Any questions not answered by this guidance should be addressed to legal staff attorneys Cathy Winer (EPA) at (202) 564-5494 or Lance Wood (Corps) at (202) 761-8556.

Distribution:

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Assistant Administrator for Enforcement and Compliance Assurance (2201A)
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Deputy Commander, Civil Works, USACE

Regional Administrators, Regions I-X
Commanders, Major Subordinate Commands, USACE
Commanders, Engineer Districts, USACE
Elaine Davies, Acting Director, Office of Emergency and Remedial Response
Office Directors, Office of Water
Water Division Directors, Regions I-X
Regional Counsels, Regions I-X
Division and District Counsels, USACE

The Washington Post

THURSDAY, AUGUST 1, 2002

# Save the Prairie Potholes

IF YOU'RE not a farmer or a duck hunter you may never have heard of prairie potholes. These shallow ponds scattered across the Great Plains provide breeding grounds for ducks and way stations for migratory birds. They're among the wide variety of bogs, pools and inland basins, some water-filled for only part of the year, that play a critical role in maintaining wildlife, recharging underground aquifers and filtering sediment and pollutants away from groundwater. Far too many of them have been drained over the years to make way for cultivation. And the remaining ones are among the wetlands put in jeopardy by the Supreme Court last year when the justices ruled, in a 5 to 4 decision, that the Clean Water Act doesn't cover "isolated" wetlands because the statute is written to apply to navigable waters. Now a move is underway to restore federal protection to the prairie potholes and similar waters. It deserves strong support and prompt action by Congress.

In the 18 months since the court acted, local jurisdictions, courts and federal officials have grappled with the question of what constitutes an isolated wetland under the Supreme Court's ruling. The result has been a patchwork of conflicting decisions, including two federal court rulings that reached opposite conclusions about how much of a connection to navigable water was sufficient to bring a wetland under the reach of the act. Companion bills proposed in the House and Senate would end the confusion by amending the Clean Water Act to delete reference to "navigable" waters and making it clear the law is intended to protect all U.S. waters and wetlands.

That's how the law was understood prior to the court's ruling last year, and how it ought to be applied now. Reasserting its broad reach could prompt a constitutional challenge to Congress' power to regulate waters contained entirely within a single state, but wherever they are located, wetlands play a critical role in flood control and water filtration, as well as providing vital living space for birds and amphibians. Even those that appear isolated on the surface are part of a complex web of groundwater supply and wildlife habitat: It makes no sense to separate them from the overall effort to protect America's waters from pollution and degradation. The sooner the law's reach is restored, the better.

September 16, 2002

# Benefits of Seasonal Waters

Seasonal, or isolated, waters provide numerous benefits to society and actually can protect our property, our safety and contribute greatly to our economy and our quality of life. Some of the many benefits of these waters to society are listed below.

## Reduce Flooding

Wetlands of all types store water, which reduces flooding during heavy rainfall and replenishes water supplies during times of drought. This works because the wetland plants and soils absorb excess water and slowly release it back into streams, lakes and groundwater.

- One acre of wetlands can store more than 360,000 gallons of water if flooded to a depth of one foot.
- A U.S. Army Corps of Engineers study showed that loss of wetlands in the watershed of the Charles River near Boston would have caused $17 million in annual flood damage. Therefore, the Corps chose to purchase and preserve these wetlands instead of building expensive flood control structures.

## Purify Drinking Water

Wetlands of all types help purify drinking water by filtering polluted runoff. Wetland plants and soils trap sediments, accumulate excess nutrients, transform toxic substances such as pesticides and heavy metals into harmless substances, and can remove potentially dangerous microorganisms from surface water.

- Wetlands filter water more thoroughly and cost-effectively than man-made treatment plants. It would cost $5 million (in 1991 dollars) just to construct a water treatment plant to replace the water filtration capability of the Congaree Bottomland Hardwood Swamp in South Carolina.
- If half the existing wetlands in the country were destroyed, 684 million kilograms of additional nitrogen would contaminate our waters. That translates into more than $62 billion per year of sewage treatment plant upgrades in the United States.

## Strengthen the Economy

Wetlands of all types support many industries, including commercial fisheries, timber harvesting, and fur harvesting. Cranberries, blueberries, and wild rice also are grown in wetlands.

- More than 95 percent of commercially harvested fish and shellfish in the United States are dependent upon wetlands for their survival. The commercial fishing industry provides nearly 2 million jobs nationwide and contributes $152 billion to our economy.

For more information, contact:
Gwyn W. Rowland, (301) 548-0150 – ext.223, growland@iwla.org
Leah Miller, (301) 548-0150 ext. 219, leah@iwla.org

- Furs from wetland-dependent animals such as beaver, mink, nutria, otter and raccoon provides approximately $1 million per year to Maryland's economy.

### Provide Opportunities for Recreation

Seasonal waters also provide many recreational opportunities, including hunting and fishing, boating, hiking, and nature study. Wetlands are beautiful places that inspire art, poetry, and reflection.

- Recreational anglers spent $37.8 billion in 1996 on equipment and travel, according to the U.S. Fish and Wildlife Service.
- 3.1 million people 16 years old and older hunted migratory birds such as ducks, geese and doves in 1996, spending $720 million on equipment and $576 million on food, lodging, and land use fees (U.S. Fish and Wildlife Service).
- More than 1.5 million visitors are attracted to Virginia's Chincoteague National Wildlife Refuge each year to observe migratory birds in wetlands.

### Provide Wildlife Habitat

Seasonal streams and wetlands provide valuable habitat for wildlife. Migratory birds rely on wetlands for feeding, migration, and wintering grounds. Many amphibian and reptile species use wetlands as breeding habitat.

- One-third of all bird species rely on wetlands for survival. Even birds that do not live in wetlands year-round depend upon these habitats for food, shelter, and nesting sites. The Chesapeake Bay and its wetlands is the winter home of one-third of all the waterfowl using the Atlantic Flyway.
- Throughout the United States, 43 percent of the federally listed threatened and endangered species rely on wetlands for survival.

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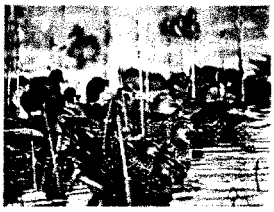
The Clean Water Authority Restoration Act of 2002

## Why Congress Needs To Adopt Legislation to Address The U.S. Supreme Court's Decision in Solid Waste Agency of Northern Cook County v. United States Army Corps (SWANCC)



### *THE SWANCC DECISION*

In the U.S. Supreme Court's decision Solid Waste Agency of Northern Cook County v. United States Army Corps (SWANCC), 531 U.S. 159 (January 9, 2001), a 5 to 4 majority limited the authority of federal agencies to use the so-called "migratory bird rule" as the basis for asserting Clean Water Act jurisdiction over non-navigable, intrastate, isolated wetlands, streams, ponds and other waterbodies. This means that the Environmental Protection Agency (EPA) and Army Corps of Engineers (Corps) can no longer use the federal Clean Water Act to protect a waterway solely on the basis that it is used as habitat for migratory birds.

In its discussion of the case, the Court went beyond the issue of the migratory bird rule and questioned whether Congress intended the Clean Water Act to provide protection for isolated ponds, streams, wetlands and other waters, as it had been interpreted to provide for the last 30 years. While not the legal holding of the case, the court's discussion has led many developers and some federal regulators to argue for a wholesale reinterpretation of Clean Water Act law and challenge federal protection of many non-navigable, isolated, intrastate waters.

In sum, this significant but narrow decision has resulted in a wide variety of interpretations by EPA and Corps officials that jeopardize protection for wetlands, streams and other waters. The wetlands at risk include prairie potholes, playa lakes, bogs, fens, vernal pools, Carolina bays and many others. These wetlands absorb floodwaters, prevent pollution from reaching our rivers and streams and provide crucial habitat for most of the nation's ducks and other waterfowl as well as hundreds of other bird, fish, shellfish and amphibian species. Loss of these waters would have a devastating effect on our economy and the environment.

Photo Courtesy of Carol W. Witham

### *NOW WHAT...*

Congress needs to re-establish the common understanding of the Clean Water Act's jurisdiction to protect all waters of the U.S. — the understanding that Congress held when the Act was adopted in 1972 — as reflected in the law, legislative history, and longstanding regulations, practice, and judicial interpretations prior to the *SWANCC* decision.

**H.R. 5194 and S. 2780 would restore the protection that existed for all waters and wetlands prior to the *SWANCC* decision by:**

**1)** Adopting a statutory definition of "waters of the United States" based on a longstanding definition of waters in the Corps' of Engineers' regulations (at 33 CFR 328.3.)

**2)** Deleting the term "navigable" from the Act to clarify that Congress's primary concern in 1972 was to protect the nation's waters from pollution, rather than just sustain the navigability of waterways.

**3)** Including a set of findings that explain the factual basis for Congressional assertion of constitutional authority over waters and wetlands, including those that are called "isolated."

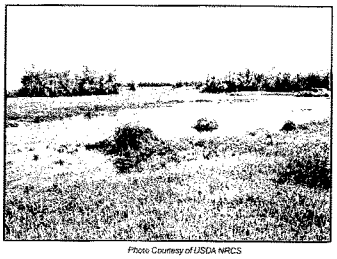


Photo Courtesy of USDA NRCS

## Endorsers of the Clean Water Authority Restoration Act of 2002

*As of July 26, 2002*

Photo Courtesy of Sarenda.com

**American Rivers**
**Association of State Wetlands Managers**
**Clean Water Action**
**Clean Water Network**
**Coast Alliance**
**Defenders of Wildlife**
**Earthjustice**
**Environmental Defense**
**Friends of the Earth**
**Izaak Walton League of America**
**Mineral Policy Center**
**National Audubon Society**
**National Wildlife Federation**
**Natural Resources Defense Council**
**Public Interest Research Group**
**Trout Unlimited**
**Sierra Club**
**Waterkeeper Alliance**
**Wildlife Management Institute**

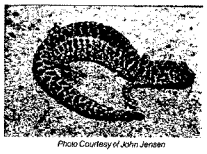


Photo Courtesy of John Jensen

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**The Association of State Wetland Managers, Inc.**
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December 10, 2001

Christine Todd-Whitman
U.S. Environmental Protection Agency
Ariel Rios Bldg. 1101A
1200 Pennsylvania Ave., NW
Washington, DC 20460

Dear Administrator Whitman:

The Association of State Wetland Managers and Association of State Floodplain Managers are profoundly concerned with the continuing lack of national guidance pursuant to the Supreme Court's January 9, 2001 decision Solid Waste of Northern Cook County v. United States Army Corps of Engineers. Our members report varying interpretations by field offices of the U.S. Army Corps of Engineers and a great deal of uncertainty and confusion on behalf of the regulated public as well as wetland professionals at all levels of wetland program management.

The lack of action by the Federal agencies to clarify the situation negatively impacts the ability of the states and local governments to explore and implement strategies to address the gap in federal protection. State and local governments and, in particular, state legislatures and local elected officials need to know the extent of the impact to waters in their state or locality to determine what state or local actions are appropriate. This information is also needed to generate appropriate public support and ensure ongoing concerns over duplication of effort between state and federal government are addressed. Estimates completed of the range of possible changes in jurisdiction identify 20 to 60% of the waters in the United State may be impacted. However the range of potential impact from state to state is much greater from little or no impact to greater than 70% of the waters within the state. States where the average rate of evaporation exceeds precipitation are where the largest impacts are likely to occur. In addition, in states with large wetland acreages, even a relatively small change in jurisdiction can affect millions of acres of isolated waters. Therefore, to prevent degradation and destruction of isolated waters as well as broader environmental problems, we are urging EPA to assert its authority for implementing the Clean Water Act and provide guidance.

We recommend that guidance take an inclusive approach to identifying waters of the U.S. consistent with EPA's past interpretation of the Clean Water Act and the considerable body of law that has developed over three decades supporting that approach.

Specifically Guidance should:

1. Clarify that SWANCC did not invalidate any of the regulatory provisions defining "waters of the U.S." All it invalidated was the "Migratory Bird Rule". Furthermore, SWANCC did not outlaw consideration of the use of wetlands by migratory birds, endangered species and other wildlife as factors to be considered in making jurisdictional determinations.
2. Articulate that SWANCC does not invalidate previously issued permits.
3. Adopt the Riverside Bayview "significant nexus" test for determining jurisdiction

4. over wetlands, and establish a presumption that all wetlands within or abutting the 100 year floodplain are to be considered "adjacent."
5. Clarify that the definition of "tributaries" includes groundwater tributaries and man-made structures, as well as all surface tributaries whether mapped or unmapped.
6. Clarify and expand the "significant impact on interstate commerce" test for jurisdictional determinations. Specifically, the guidance should emphasize that it is the "aggregate effect" of the regulated activities on interstate commerce that must be evaluated, not simply the effect of regulating a particular wetland fill.

Finally, EPA and the Corps should work aggressively with the states in the field to ensure there is agreement and understanding on the application of national guidance on a state basis so that: 1) consistent jurisdictional determinations occur and 2) states are able to make accurate estimates of the extent of the reduction in federal jurisdiction on a state by state basis.

This will better serve the regulated public and allow states to provide accurate analysis to their state leadership regarding the extent and consequences of the reduction in federal jurisdiction.

Only one third of the states currently protect isolated waters to some extent under state law. Since the SWANCC decision, approximately a half-dozen states have, or are attempting to take action to address the gap in jurisdiction. Not all these efforts will succeed. In addition, many states are unlikely to act in the near term due to a lack of in-house expertise relative to wetland regulatory programs, significant state fiscal constraints and a general perception in many states that these waters are not important.

Attached is an association position paper provides additional detail on the inconsistencies currently occurring in the field as well as the underlying reasoning that led to forwarding the recommendations outlined above.

If we can provide additional information to assist EPA in developing guidance or quantifying the issues facing the states, we will be pleased to do so. Please contact Jeanne Christie at (301) 292-4815 if you have any questions or requests.

Thank you.

Sincerely,

Jeanne Christie
Executive Director
Association of State Wetland Managers

Sincerely,

Larry Larson
Executive Director
Association of State Floodplain Managers

Cc: James Connoughton, CEQ
Michael Parker, Army
Tracy Meahan, USEPA

**Position Paper on Clean Water Act Jurisdiction Determinations Pursuant to the Supreme Court's January 9, 2001 Decision, Solid Waste of Northern Cook County v. United States Army Corps of Engineers (SWANCC)**
**Presented to Administrator Whitman, United States Environmental Protection Agency by the Association of State Wetland Managers and the Association of State Floodplain Managers, December 2001**

*Prepared by Pat Parenteau, Professor of Law, Vermont Law School*

The section 404 regulatory program has been in turmoil ever since the Supreme Court's SWANCC decision on January 9, 2001. The Association of State Wetlands Managers (ASWM) and Association of State Floodplain Managers have watched the situation grow increasingly more confusing and chaotic with each passing day. Our members report widely varying interpretations by field offices of the Corps and EPA regarding the jurisdictional scope of the 404 program in the wake of the Court's invalidation of the "Migratory Bird Rule" as the sole basis for federal regulation of non-navigable, isolated, and intrastate wetlands ("isolated wetlands") under the Clean Water Act. For example, Corps Districts in the semi-arid western states are taking the position that perennial streams are not jurisdictional if there is no "discernible high water mark" downstream in parts of the watershed with low annual precipitation rates (e.g. Kiawah Creek and Bijou Creek, Colorado and Great Divide Closed Basin, Wyoming). The South Pacific Division has issued guidance stating that jurisdiction over desert washes depends on the frequency of storm events.[1] In Wisconsin the Corps is refusing to regulate intrastate closed basin lakes of substantial size. Other Districts are not asserting jurisdiction over man-made ditches and canals that have replaced natural conveyances over time and were formerly regulated. In the absence of clear guidance, jurisdictional calls have become largely ad hoc and unpredictable. There does not appear to be consistency in what type of information and criteria are used for making jurisdictional calls for isolated waters. Some Corps Districts are making jurisdictional determinations in the office using aerial photography and maps, whereas other Districts are doing field investigations.

There is also confusion regarding the status of 404 permits issued pre-SWANCC for activities in isolated wetlands. Some Corps Districts are taking the position that such permits are no longer valid and enforceable, which is simply not the law.

According to the interpretation of the Corps Alaska District approximately one-third to one-half of the new general permit applications are no longer jurisdictional wetlands. This has serious and confusing ramifications for coastal management and wetland management plans adopted by the state and local governments.

This is an untenable situation for everyone concerned-- state and local governments, the regulated community, the conservation community, and most of all for the wetland resource itself. As confirmed in the recent report to Congress on the "Status and Trends of the Nation's

[1] U.S.C.O.E., South Pacific Division, Final Summary Report: Guidelines For Jurisdictional Determinations For Waters of the United States in The Arid Southwest, 7 (June, 2001).

Wetlands," the 404 program and other protection and restoration efforts have been instrumental in reducing wetland losses by 80% over the past decade. Just as the long-sought goal of "no net loss" of wetlands seemed to be within reach, the confusion surrounding SWANCC threatens to derail the program.

Further, the lack of action by the federal agencies to clarify the situation negatively impacts the ability of the states and local governments to explore and implement strategies to address the gap in federal protection State and local governments and, in particular, state legislatures and local elected officials need to know the extent of the impact to waters in their state or locality to determine what state or local actions are appropriate. This information is also needed to generate appropriate public support and ensure ongoing concerns over duplication of effort between state and federal government are addressed. Estimates completed of the range of possible changes in jurisdiction identify 20 to 60% of the waters in the United State may be impacted. However the range of potential impact from state to state is much greater from little or no impact to greater than 70% of the waters within the state. States where the average rate of evaporation exceeds precipitation are where the largest impacts are likely to occur. In addition, in states with large wetland acreages, even a relatively small change in jurisdiction can affect millions of acres of isolated waters. Therefore, to prevent degradation and destruction of isolated waters as well as broader environmental problems, we are urging EPA to assert its authority for implementing the Clean Water Act and provide guidance.

As the agency with the primary authority and responsibility for implementing the CWA, it falls to EPA to clarify the jurisdictional issues and get the 404 program back on track. Obviously, the interpretation of the SWANCC decision has implications for all of the CWA programs, including the NPDES permit program (§ 402), the water quality standards and continuing planning process (§ 303), the TMDL program (§ 303 (d)), the water quality certification provision (§ 401), the oil spill liability provision (§ 311), and others. It is therefore incumbent upon EPA to take action to prevent further erosion of federal jurisdiction. Although coordination with the Corps is necessary regarding the administration of the 404 program, and agreement on jurisdictional issues is desirable, the final authority on what constitutes "waters of the United States" under the CWA clearly rests with EPA as forth in the 1979 Opinion of the Attorney General (the Civilletti Opinion), and in the 1983 Memorandum of Agreement with the Department of Army regarding determination of waters of the United States.

We were encouraged when EPA and the Corps issued the January 19, 2001, Memorandum Re: "Supreme Court Ruling Concerning CWA Jurisdiction Over Isolated Waters" ("SWANCC Memo"), which correctly characterized the decision as "narrowly limited to Clean Water Act regulation of 'non-navigable, isolated, intrastate' waters based solely on the use of such waters by migratory birds."[2] The SWANCC Memo further noted that the decision must be

[2] The precise question the Court certified in SWANCC was:"Whether the Corps may assert jurisdiction over isolated, intrastate waters solely because those waters do or potentially could serve as habitat for migratory birds." The Court's answer was equally precise:"We hold that 33 CFR § 328.3 (a) (3), as clarified and applied to petitioner's balefill site pursuant to the 'Migratory Bird Rule' [citation omitted] exceeds the scope of the authority granted to respondents under § 404 of the CWA." Though the SWANCC Memo notes that the rationale is

interpreted in light of other Supreme Court precedents "which broadly uphold CWA jurisdictional authority."[3] Unfortunately, however, the SWANCC Memo introduced an element of uncertainty by also stating that the "the Supreme Court decision does provide an important new limitation on how and in what circumstances the EPA and the Corps assert regulatory authority under the CWA." It is not clear what "important new limitation" is contemplated beyond the invalidation of the migratory bird rule, but the ambiguity is spawning freelance interpretations that are undermining the integrity of the 404 program.

The Association of State Wetland Managers (ASWM) and the Association of State Floodplain Managers (ASFPM) urge EPA to develop specific guidance to insure that the narrow legal interpretation embodied in the SWANCC Memo does not get lost as it filters down to the field offices of the Corps and EPA. Specifically, we recommend that the guidance address the following major points:

1. Clarify that SWANCC did not invalidate <u>any</u> of the regulatory provisions defining "waters of the United States." All that it invalidated was the "Migratory Bird Rule," which was in fact not a rule but a policy and guidance document. Furthermore, SWANCC did not outlaw consideration of the use of wetlands by migratory birds, endangered species and other wildlife factors to be considered in making jurisdictional determinations; it merely ruled that such considerations could not serve as the sole basis for asserting jurisdiction. Clarification is needed on this point because some Corps personnel are citing SWANCC as a justification for declaring as non-jurisdictional intrastate waters that were formerly regulated.

2. Make it clear that SWANCC does not invalidate previously issued permits, and their terms and conditions should continue to be enforced, including mitigation requirements.

3. Adopt the Riverside Bayview "significant nexus" test for determining jurisdiction over wetlands, and establish a presumption that all wetlands within or abutting the 100 year floodplain are to be considered "adjacent." The guidance should require an assessment of the hydrological and ecological functions that particular wetlands perform within a watershed context. These include: flood control, erosion control, water quality maintenance, groundwater recharge, and conservation of biological diversity. Wetland scientists have never recognized the artificial regulatory distinction between "adjacent"

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in some respects broader than the holding, the preferential effect of the decision is limited to the result, not the rationale. It may take years of litigation to sort out the conflicting interpretations of what the Court meant by some of the statements in the opinion, but EPA must act now and adopt an interpretation consistent with its previous positions and faithful to the goals of the CWA.

[3] Significantly, the SWANCC Court reaffirmed the landmark 1985 decision in Riverside Bayview that CWA jurisdiction extends beyond traditionally navigable waters to include non-navigable waters and wetlands where there is a "significant nexus" between the wetlands and navigable waters. Further, the SWANCC Court acknowledged Congress' intent to regulate wetlands that are "inseparably bound up with waters of the United States."

and "isolated" wetlands, and there is now an opportunity to clarify that it is the function, not the label, that matters. For example, proper application of the significant nexus test would maintain 404 protection for important "isolated wetlands" such as the "prairie potholes," which not only serve as habitat for migratory birds but which provide crucial water storage capacity and erosion control that helps reduce flood peaks and sedimentation, and the resulting damage to downstream resources and water quality.[4] Similarly, forested wetlands in the Chesapeake Bay watershed have been shown to be remarkably effective at removing nitrogen and phosphorous, thereby acting as buffers to nutrient inputs to streams.[5] Excess nutrients are the principal cause of water quality impairment in the United States. Recent studies confirm the important role that headwater streams play in controlling nutrient export to rivers, lakes and estuaries.[6]

4. Clarify that the definition of "tributaries" includes groundwater tributaries and man-made structures, as well as all surface tributaries whether mapped or unmapped. The courts have adopted a common sense approach to this issue which holds that, for purposes of determining CWA jurisdiction, what matters is whether the discharge has the potential to adversely affect the "chemical, physical or biological integrity" of water. Courts have not required physical proximity to "open water" as a necessary predicate for federal regulation.

5. Clarify and expand the "significant impact on interstate commerce" test for jurisdictional determinations. Specifically, the guidance should emphasize that, under applicable Supreme Court decisions, it is the "aggregate effect" of the regulated activities on interstate commerce that must be evaluated, not simply the effect of regulating a particular wetland fill.[7] As the SWANCC Court acknowledged, "most discharges of dredge or fill material" involve the kind of economic activity that falls squarely within the Commerce Clause. The error the Court pointed to in SWANCC was the exclusive reliance on regulation for the benefit of migratory birds, an objective that the Court felt went beyond the intent of Congress in enacting the CWA. However, there are many other reasons to protect wetlands that are more directly related to the water quality goals that are clearly within the intent of Congress as interpreted by the Court in SWANCC and Riverside Bayview, and also within the scope of Congress' power under the Commerce

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[4] See A. P. Ludden, D. L. Frank & D. H. Johnson, "Water Storage Capacity of Natural Wetlands Depressions in the Devil's Lake Basin of North Dakota," 38 J. Soil & Water Cons. 45-48 (1983).

[5] P. J. Phillips, J. M. Denver, R. J. Shedlock, and P. A. Hamilton, Effect of Forested Wetlands on Nitrate Concentrations in Ground Water and Surface Water on the Delmarva Peninsula, 13 Wetlands 75-83 (1993).

[6] B. J. Peterson, et al, Control of Nitrogen Export From Watersheds By Headwater Streams, Science 292:86-90 (2001).

[7] See Lopez v United States, 514 U. S. 549 (1995); United States v Morrison, 120 S. Ct. 1740 (2000).

Clause.[8] Moreover, there is a growing body of information on the economic value of the many "ecosystem services" wetlands provide, which, in the aggregate, can have a substantial effect on interstate commerce.[9]

Finally, EPA and the Corps should jointly institute a program to clarify the extent of jurisdictional wetlands on a state-by-state or regional basis, to take account of the geographic and climatic differences that exist throughout the country. The State of Delaware has begun such an effort in conjunction with the Corps and EPA Region 3 with the goal of identifying all regulated wetlands as soon as practicable.

The approach suggested here is consistent with the way that EPA has interpreted the scope of CWA jurisdiction over the past three decades, and is strongly supported by the considerable body of law that has developed over that period of time. SWANCC did not erase this body of law. Indeed, in the decisions that have come down since the SWANCC decision, the courts continue to give a very broad reading to the term "waters of the United States." For example, in Headwaters v Talent Irrigation District, 243 F. 3d 526, 533 (9th Cir. 2001), the Ninth Circuit held that an irrigation ditch was a water of the United States because it was connected to an intermittent tributary of a navigable water. In Idaho Rural Council v Bosma, 143 F. Supp. 2d 1169, 1179 (D. Id. 2001), the court held that springs connected to non-navigable streams and groundwater connected to surface water were both "waters of the United States." In United States v Interstate General, 152 F. Supp. 2d 843,847 (D. Md. 2001), the court rejected a post-SWANCC challenge to a conviction for unpermitted discharges to wetlands adjacent to intermittent streams and artificial canals stating: "The SWANCC case is a narrow holding that only 33 CFR § 328.3 (a) (3), as applied by the Corps creation of the 'Migratory Bird Rule' is invalid pursuant to lack of congressional intent."[10]

In closing we urge EPA to show the leadership it has shown in the past on these difficult jurisdictional issues. The fallout from SWANCC has destabilized the 404 program and is

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[8] For example, in Hodel v Virginia Surface Mining & Recl. Assn., 452 U.S. 264, 282 (1981), the Court broadly upheld the power of Congress to regulate activities that cause air and water pollution with effects in more than one state.

[9] See G.C. Dailey, et al, Ecosystem Services: Benefits Supplied To Human Societies By Natural Ecosystems, Issues In Ecology, (Ecological Society of America, 1999). To cite two examples, the City of New York has embarked on a $250 million program to acquire and protect up to 350,000 acres of wetlands and riparian lands in the Catskills in order to protect the City's water supplies instead of constructing filtration plants, estimated to cost between $6 and $8 billion. The City of Boston is acquiring 5000 acres of wetlands in the Charles River Watershed to avoid construction of a $100 million dam for flood control.

[10] See also, United States v Buday, 138 F. Supp. 2d 1282 (D. Mont. 2001)(US had jurisdiction to regulate discharge to tributary of navigable water); United States v Krillich, 152 F. Supp. 2d 983 N.D. Ill 2001) ("isolated waters" are those without "any connection to any body of water."); Aiello v Town of Brookhaven, 136 F. Supp. 81,119 (discharge to pond and creek that flows into lake connected to navigable water is subject to 404 regulation).

threatening to do even more damage to nation's water quality goals. EPA has the authority to turn this situation around and the Association of State Wetland Managers and the Association of State Floodplain Managers stand ready to assist in any way we can.