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TO THE

UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE

HEARING ON
"STATUS OF THE NATION'S WATERS, INCLUDING WETLANDS, UNDER THE JURISDICTION OF THE FEDERAL WATER POLLUTION CONTROL ACT"

17 JULY 2007

Mr. Chairman, distinguished members of the Committee, good afternoon. It is indeed an honor and privilege to testify about a matter of compelling national significance: the regulation of wetlands and other waters of the United States. My name is Kim Diana Connolly and I serve as faculty at the University of South Carolina School of Law. My ultimate message today will boil down to one important truth: Congress must take immediate action and enact legislative language to straighten out the mess that regulating wetlands and other waters of the United States has become in recent years.

I have come to this conclusion after years of work in and study of what is known as the Clean Water Act. Since I was a child growing up on Cape Cod, I have been intrigued by wetlands and other waters of the United States. I attended the University of North Carolina at Chapel Hill to earn my undergraduate degree, and Georgetown University Law Center to earn my juris doctor degree. Between college and law school I worked as a VISTA volunteer and directed a small non-profit that focused on water

access and wastewater disposal in low-income rural North Carolina. Following law school I practiced here in Washington D.C. at a number of law firms, representing among other clients many different members of the permitted community in matters dealing with regulation under the Clean Water Act and other environmental laws. Once invited to join the faculty at the University of South Carolina School of Law, I began to devote much scholarly energy to analyzing the regulation of waters of the United States. I have thus written articles and chapters and co-edited a book on this subject, and spoken numerous times over the years at academic conferences and other venues. If you are interested in more details about my background you can find my full curriculum vitae at http://www.law.sc.edu/faculty/connolly/cv.pdf.

I have been asked by your committee staff to provide information about recent developments addressing the regulation of waters of the United States as the Committee considers this important issue. To understand the current state of play, however, I believe it important to first provide a bit of historical context.

As a nation, for more than a century we have recognized the value of waters to our economy and our way of life. As is true of many types of waters of the United States, wetlands can be found in every state in the nation. Wetlands and other waters differ depending on location due to a variety of factors including soil differences, topography, climate, hydrology, water chemistry, vegetation, and human impact. All wetlands provide various "functions and values" important to our nation, including some combination of water quality improvement, flood control, habitat for endangered and other species, recreational and educational activities and aesthetic values. *See generally* NAT'L ACAD. OF SCIENCES, NAT'L RESEARCH COUNCIL, WETLANDS: CHARACTERISTICS AND BOUNDARIES (1995), *available at* http://www.nap.edu/books/0309051347/html/index.html; U.S. Army Corps of Engineers, *Technical and Biological Information, available at* http://www.usace.army.mil/inet/functions/cw/cecwo/reg/techbio.htm; U.S. Envtl. Prot. Agency, *Functions and Values, available at* http://www.epa.gov/owow/wetlands/functions.html 07. Adjacent wetlands, tributaries of virtually all types and headwaters are inseparably bound up with other waters, and through their connectivity are essential to the maintenance of the quality of our nation's waters.

Congress provided authority to what has become the United States Army Corps of Engineers (Corps) to regulate certain activities related to the nation's waters back in

the 1800's through various Rivers and Harbors Acts. Then, in the light of increasing pollution and escalating awareness of the importance of a healthy environment, Congress enacted the Federal Water Pollution Control Act Amendments of 1972, which gave the primary responsibility for federal protection of the nation's waters to the newly-created United States Environmental Protection Agency (EPA), although the Corps retained permitting authority under Section 404 of the Act. The 1972 amendments were amended again in 1977 and given the additional name of the "Clean Water Act."

My research shows that, in 1972 and again in 1977, Members of Congress did their best to set forth a clear path for regulating agencies and the regulated public with respect to their intent on what the Act should cover. As I argued on behalf of a bi-partisan group of current and former Members of Congress in an Supreme Court amicus brief I was privileged to co-author last year, "[i]t is clear that the intent of Congress when passing the Clean Water Act was to embrace the broadest possible definition of 'navigable waters' when it defined that term as 'all waters of the United States.' In particular, Congress intended that term to embrace both tributaries as well as wetlands that are adjacent to traditionally navigable waters and wetlands adjacent to any tributaries connected to those waterways." The Congressional amicus brief also points out that "[b]ecause wetlands adjacent to traditionally navigable waters, or adjacent to tributaries to those waters, have significant impacts on traditionally navigable waters, Congress intended for them to be subject to regulation under the Clean Water Act". A copy of that brief is included as an attachment to this testimony.

Through the Clean Water Act, Congress sought to "restore and maintain the chemical, physical and biological integrity of our nation's waters." Section 404 of that new law was entitled "Permits for dredged or fill material." Under Section 404, "[t]he Secretary [of the Army] may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites." Without a Section 404 permit, someone discharging dredged or fill materials would, in most cases, be in violation of Clean Water Act Section 301, which directs that "[e]xcept as in compliance with this section and [various sections including Sections 402 and 404] of this Act, the discharge of any pollutant by any person shall be unlawful." The test as to where jurisdiction lies depends on the definition set forth in Section 502(7) of the Act, where the term "navigable waters" is defined as "the waters of the United States, including the territorial seas."

Despite the best efforts by many Members of Congress in the 1970's to be clear regarding their intent, debates ensued about the geographical scope of Section 404 and the definition provided in Section 502 virtually immediately after its passage in 1972. Following some lower court activity and further debate in Congress, in 1985 a unanimous United States Supreme Court made a very clear statement about the Act's intended scope through its unanimous decision in *Riverside Bayview Homes,* 474 U.S. 121 (1985). The Court held that Congress' actions and statements indicated intent, in passing the original Act and the 1977 amendments, to have the phrase "navigable waters" include wetlands, without regard to artificial geographic limitations. In fact, the Court went so far as to opine (unanimously) that "[i]n view of the breadth of federal regulatory authority contemplated by the Act itself and the inherent difficulties of defining precise bounds to regulable waters, 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." *Id.* at 134.

That unanimous court decision had lead the Corps and EPA to reconsider the breadth of appropriate federal regulatory reach. Both agencies issued slightly revised regulations about geographic jurisdiction with preamble language that came to be known as the "Migratory Bird Rule." Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,217 (1986) (*codified at* 33 C.F.R. §§ 320-330); Clean Water Act Section 404 Program Definitions and Permit Exemptions; Section 404 State Program Regulations, 53 Fed. Reg. 20,765 (1988) (*codified at* 40 C.F.R. §§ 232-233). That "Rule" asserted jurisdiction over certain intra-state waters based on their actual or potential use as a habitat for migratory birds. The Corps and EPA interpretation was upheld by a number of Circuit Courts over the years, but ultimately was ruled overbroad in 2001 by a 5-4 Supreme Court decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (SWANCC)*, 531 U.S. 159 (2001). The Court concluded in *SWANCC* that an abandoned sand and gravel pit without any surface connections to other waters (but that did provide habitat for many migratory birds) was beyond the regulatory authority granted by Congress through the Clean Water Act. Although the constitutionality of the underlying regulation was challenged by the permit applicant in that case, the Court did not reach that constitutional question in rendering a decision.

Following the *SWANCC* decision, there was major concern that it would eviscerate a very broad swath of regulation of the nation's waters. It did, many agree,

leave so-called "isolated" waters unprotected by federal law. Scientists and policy experts undertook (and continue to undertake) studies to understand what impact the decision has had on isolated wetlands, and what impact isolated wetlands have on the nation's waters. For a compiled bibliography of such studies, see the Association of State Wetland Managers website entitled *Wetlands Science: Isolated Wetlands* at http://www.aswm.org/science/isolated.htm.

Interestingly, almost all subsequent legal interpretations of the *SWANCC* decision by various courts as it applied to adjacent waters and tributaries found it to be very narrow. *See, e.g.*, Save Our Sonoran, Inc. v. Flowers, 408 F.3d 1113 (9th Cir. 2005); Treacy v. Newdunn Assocs. LLP, 344 F.3d 407 (4th Cir. 2003); United States v. Deaton, 332 F.3d 698 (4th Cir. 2003), *cert. denied*, 541 U.S. 972 (2004); Cmty. Ass'n for Restoration of Env't v. Henry Bosma Dairy, 305 F.3d 943 (9th Cir. 2002); Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526 (9th Cir. 2001). Post-*SWANCC* decisions were not, however, in universal agreement. *See* In re Needham, 354 F.3d 340 (5th Cir. 2003); Rice v. Harken Exploration Co., 250 F.3d 264 (5th Cir. 2001). Further, the agencies gave mixed signals as to how they were going to proceed in dealing with the issue of jurisdiction (for example, the Corps and EPA issued an Advanced Notice of Proposed Rulemaking that was subsequently withdrawn, and the varied interpretations of how to deal with *SWANCC* by Corps Districts nationwide led to Congressional inquiry and an internal call for data that was never summarized and made public). The permitted community became (perhaps understandably) more annoyed. Stakeholders on both sides continued to battle about interpreting geographic jurisdiction in individual decisions and on a broader policy level. During these years, the first (and second) Clean Water Authority Restoration Acts were introduced in Congress. Some progress was made on these bills, but perhaps because of the then-leadership in Congress, those legislative efforts did not receive the attention they deserved.

Then the United States Supreme Court got involved again, leading to its most recent set of opinions in *Rapanos v. United States*. My students beg for a simple explanation of what that case means, but I have no clear answer to such queries, except the obvious one – five justices voted to remand the consolidated *Rapanos* and *Carabell* cases. Otherwise, the mess this case has made of the jurisdictional scope of the Clean Water Act generally, and the Section 404 regulatory program in particular, is just beginning to be understood.

In *Rapanos*, ___ U.S. ___, 126 S.Ct. 2208 (2006), the Court sought to review a

set of consolidated cases from the Sixth Circuit: *United States* v. *Rapanos*, 376 F.3d 629 (6th Cir. 2004), and *Carabell* v. *United States Army Corps of Engineers*, 257 F. Supp. 2d 917 (2003). The history of these cases is very interesting – I have compiled a website beginning with the application of the Carabells to develop their property and the enforcement order brought against Mr. Rapanos when he went ahead with activities without a permit. The website provides summaries and links during the various appellate processes through the ultimate decision, and is designed both as a historical file and a teaching tool. See http://www.law.sc.edu/wetlands/rapanos-carabell/

Both of these cases involved wetlands that either the EPA or the Corps had concluded – and the lower courts directly reviewing these cases affirmed – were "[w]etlands adjacent to," 33 C.F.R. § 328.3(a)(7), "tributaries," *id*. § 328.3(a)(5), to "waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce," *id*. § 328.3(a)(1) in which the regulation of wetlands adjacent to tributaries was at issue following the *SWANCC* decision. The ultimate result of the Supreme Court review is a confusing state of affairs that frustrates all stakeholders who deal with waters of the United States (with the possible exception of lawyers and law professors).

In *Rapanos*, Justice Scalia's plurality opinion (joined by Chief Justice Roberts and Justices Alito and Thomas) would have limited the Clean Water Act's protection of "waters of the United States" to those bodies of water that are "relatively permanent, standing or continuously flowing." 126 S. Ct. at 2225. A lengthy and extreme construal of the CWA 404 permitting program accompanies this plurality interpretation, including labeling the U.S. Army Corps of Engineers an "enlightened despot," *id*. at 2214, and concluding that the permitting program is an "immense expansion of federal regulation of land use that has occurred under the Clean Water Act..." *Id*. at 2215. But that opinion only garnered four votes.

It was Justice Kennedy who provided crucial the fifth vote for remand. Justice Kennedy's opinion was far less broad in its interpretation, and in fact goes so far as to state that the plurality opinion is "inconsistent with the Act's text, structure and purpose." *Id*. at 2246. However, Justice Kennedy does throw an interpretative muddle into Clean Water Act jurisdiction by insisting that the proper approach would be finding a "significant nexus" test to be developed by the regulating agencies. *Id*. at 2252. In the meantime, he asks for "case-by-case" review by the Corps when it "seeks to regulate wetlands based on adjacency to nonnavigable tributaries." *Id*. at 2249.

By contrast, Justice Stevens and Justices Souter, Ginsburg, and Breyer in dissent would have upheld the lower court jurisdictional findings and deferred to the agency interpretations as reflecting Congressional intent. *Id*. at 2252. The remand result was lamented by those Justices as "creating additional work for all concerned parties. Developers … will have no certain way of knowing whether they need to get § 404 permits or not. And the agencies will have to make case-by-case (or category-by-category) jurisdictional determinations, which will inevitably increase the time and resources spent processing permit applications." *Id.* at 2264-5. The recently-issued guidance demonstrates the wisdom of this prediction.

As Chief Justice Roberts noted in a separate concurring opinion in Rapanos, "no opinion commands a majority of the Court on precisely how to read Congress' limits on the reach of the Clean Water Act. Lower courts and regulated entities will now have to feel their way on a case-by-case basis." *Id*. at 2236. Justice Stevens' opinion concluded that because all four Justices who joined the dissenting opinion would uphold the EPA and Corps jurisdiction in tests set forth by either the plurality (by a showing of a continuous surface connection between the wetlands and a relatively permanent body of water connected to a traditional navigable in fact water, even though there may be no significant nexus between the wetlands and the traditional navigable in fact water) or the concurrence (regulate wetlands adjacent to non-navigable waters if the wetlands have a significant nexus to a navigable in fact water) "on remand each of the judgments should be reinstated if either of those tests is met." *Id*. at 2265. But there is no clear roadmap for those left to decide what "navigable waters" means after this decision.

Accordingly, cases decided since *Rapanos* have been academically interesting, but leave stakeholders without much comfort that it will be easy to develop a clear test to will be applied in particular cases. Some interpretations have followed Justice Kennedy's "significant nexus" test. For example, in the Ninth and Seventh Circuits, analyses have been based on Justice Kennedy's test. Northern California River Watch v. City of Healdsburg, 457 F.3d 1023 (9th Cir., 2006), United States v. Gerke Excavating, Inc., 464 F.3d 723 (7th Cir., 2006). Yet the First Circuit expressed some doubts about these other circuits' approaches. United States v. Johnson, 467 F.3d 56 (1st Cir. 2006) A later Ninth Circuit analysis struggled to apply the various *Rapanos* jurisdictional tests to an isolated salt-processing pond. San Francisco Baykeeper v. Cargill Salt Div., 2007 U.S. App. LEXIS 5442 (9th Cir. 2007). And a District Court in Texas declined to apply *Rapanos*. United States v. Chevron Pipe Line Co., 437 F. Supp. 2d 605 (N.D. Tex.

2006). Many more cases are pending.

Earlier this summer, almost a year after the set of *Rapanos* opinions was issued, the Corps and EPA finally issued long-awaited formal guidance on *Rapanos* and how the term "navigable waters" was to be interpreted in terms of regulating waters of the United States, entitled *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States*. I use the term "guidance" loosely in this context, because it does not read as a document that I would find guiding in many cases if I were an EPA or Corps' employee trying to make a particularized decision with respect to a permit application. It leaves more questions unanswered than answered, and in my opinion also leaves unregulated waters that should be regulated based on both original Congressional intent and the language of the *Rapanos* opinion itself, particularly that of Justice Kennedy.

The guidance directs that the agencies automatically assert jurisdiction over the following limited set of waters: traditional navigable waters; wetlands adjacent to traditional navigable waters; non-navigable tributaries of traditional navigable waters that are relatively permanent (i.e., the tributaries typically flow year-round or have continuous flow at least seasonally); and wetlands that directly abut such tributaries. However, for other waters that used to be regulated under the former framework, the agencies now must perform a fact-specific analysis in each case to determine whether such waters have a "significant nexus" with a traditional navigable water. Waters requiring such an analysis include non-navigable tributaries that do not typically flow year-round or have continuous flow at least seasonally; wetlands adjacent to such tributaries; and wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary.

To perform the "significant nexus evaluation" agency personnel will have to "assess the flow characteristics and functions of the tributary itself and the functions performed by all wetlands adjacent to the tributary to determine if in combination they significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters." A "significant nexus" is defined to include consideration of hydrologic and ecologic factors. While each permit application or jurisdictional determination does require case-by-case work, such a level of analysis as directed by the guidance will, in the best case, almost surely paralyze an already overworked regulatory staff. In the worst case, it will mean jurisdiction will not be claimed for

waters that Congress (and Justice Kennedy) intended be covered by the Clean Water Act, because it is simply to difficult to do the requisite analysis.

The documentation that will be required for an assertion of jurisdiction is potentially daunting. As the guidance suggests, any given record will now need to reflect "all pertinent documentation and analyses" including perhaps (but not necessarily) maps, aerial photography, soil surveys, watershed studies, local development plans, literature citations, and references from studies pertinent to the parameters being reviewed. The level of documentation is anticipated to vary among projects, but what exactly will be enough is entirely unclear. This is sure to lead to frustration among applicants and staff on all levels, and many court battles.

Recent press coverage and other sources suggest that some stakeholder groups had access to early drafts of the guidance document and made strong comments on the original interpretation drafted by the regulatory agencies, which apparently was much broader in terms of interpreting covered waters than the final version. It would thus seem that these apparently one-sided comments may have led to a watered-down version of the guidance.

As the front-line regulator under the Section 404 program, the Corps performs its responsibilities primarily through delegation to district engineers and more than 1,000 regulatory personnel nationwide. On rare occasions, the decisions of district engineers may be "elevated" for review by the very small Corps headquarters' staff or an administrative appeal sought through regional offices. The EPA also has an important regulatory, enforcement and oversight role under 404, which includes the ultimate authority for determining which waters are "waters of the U.S." and the ability to veto permits that a issued by the Corps, an authority very rarely invoked. The EPA has even more authority under other sections of the Clean Water Act.

Each year, the Corps processes close to 90,000 permit applications and about 100,000 jurisdictional determinations under the Section 404 program. Significantly less than one percent of permit applications are denied. Thus the odds are that if you apply for a permit to undertake development or other activities under Section 404, you will receive such a permit. Now, admittedly it does require some investment of resources and take some time for the permit to be processed (particularly if it is a large-impact project necessitating a full individual permit application). But at the end of the day you are highly likely to be issued a permit and allowed to undertake activities in the waters

of the United States, if only you ask.

As my recent research has shown in an article published in the May issue of the Environmental Law Reporter entitled *Survey Says: Army Corps No Scalian Despot* (copy attached to this testimony), Customer Service Surveys filled out by applicants after undertaking the process of securing a Corps permit or jurisdictional determination surprisingly reveal that many applicants are delighted with the permitting process. Though some applicants do express concern about the time the permit process requires and have a few other complaints, an impressive percentage of applicants give the Corps perfect marks in their overall ranking of the permitting experience. This belies the claims made by a few permit applicants – and repeated by Justice Scalia in the *Rapanos* plurality opinion – that the Corps regulatory process is overly burdensome and excessively time-consuming for the permitted community. Not only do the data reflecting input from thousands of permitted community representatives nationwide demonstrate that this alleged level of permitting delays and burdens is inaccurate, the data also contradict claims of critics who say that the majority of the regulated community is extremely dissatisfied with what it perceives as an unnecessarily burdensome permitting process. Quite simply, applicants are for the most part not only content, but in many cases quite pleased, with their experiences seeking authorization from the Corps to undertake activities in waters of the United States. There is no reason to believe, therefore, that a return to the pre-*SWANCC* regulatory framework would be overly burdensome on those who must seek permits for activities they wish to undertake.

Yet despite this contentment with the current system, and my belief that Congress was clear back in the 1970's, it is my reluctant conclusion that the time has come to amend the Clean Water Act. One bill currently before Congress, H.R. 2421, the Clean Water Restoration Act, will go far in helping alleviate the confusion that has developed in recent times as to the intended scope of the Act. It should be enacted into law.

I personally believe that this bill could have gone farther in dealing with additional important issues facing our wetlands today. One such issue is jurisdiction over activities in wetlands and the debate that has developed subsequent to the so-called Tulloch rule and interpretations of the term "discharge." After the geographic jurisdictional quandary that H.R. 2421 is intended to address, I believe this is the most important issue facing our nation's waters today. Furthermore, the debate over

required mitigation measures is another critical area endangering the future of the nation's waters. Yet even without addressing the authority of the Clean Water Act in these other two other crucial areas, the bill currently before Congress would be an important positive step toward protecting the nation's waters.

I am aware that there are some who have questioned the constitutionality of the pending legislation. Constitutionality is important. Because our federal government is a government of limited powers, it is vital that federal law be based on authority granted pursuant to the United States Constitution. The primary clause of the constitution supporting the Clean Water Act (and many other environmental laws) is the Commerce Clause, U.S. Constitution, article I, section 8. Regulation of our nation's waters, including wetlands, is the quintessential example, in my opinion, of such commerce connections. A recent study by the non-partisan Environmental Law Institute examined this very issue, entitled *Anchoring the Clean Water Act: Congress's Constitutional Sources of Power To Protect the Nation's Waters* , *available at* http://www.elistore.org/reports_detail.asp?ID=11224 (copy attached). That study concluded that "[t]he Commerce Clause has served as the basis for nearly every major environmental and public health law passed by Congress, including the Clean Water Act. Despite repeated legal challenges to the constitutionality of these laws—including laws that of necessity regulate local, intrastate activities affecting land and water resources—neither the Supreme Court nor federal appellate courts have ever struck down an environmental statute as exceeding Congress's commerce power. Instead, the courts have reaffirmed that the Commerce Clause authorizes Congress to engage in three general categories of regulation: direct regulation of the 'channels' of interstate commerce; regulation of the 'instrumentalities' of interstate commerce, and persons or things in interstate commerce; and regulation of 'activities that substantially affect interstate commerce.'" I concur with this analysis, and it is my belief that this proposed legislation, like the Clean Water Act itself, is firmly grounded in the commerce power and that the issues raised by opponents should not derail this important undertaking.

One a related note, scientists have shown the crucial importance of wetlands and headwaters in terms of the ecological function of economically important navigable waters time and again. For example, in 2003, the Society of Wetlands Scientists devoted an entire issue of their quarterly peer-reviewed journal, WETLANDS Vol. 23, Issue 3 to the science of isolated wetlands, in a reflection on the *SWANCC* decision. These scientific articles demonstrated the importance of isolated wetlands to the overall health of varied ecosystems, and in some cases to the condition of nearby waters of the

United States. More recently, in February of this year, the Journal of the American Water Resources Association dedicated Vol. 43 Issue 1 (*available at* http://www.blackwell-synergy.com/toc/jawr/43/1) to scientific analysis of the impact of headwaters on water quality and related issues. I have provided copies of both of these issues to Committee staff for inclusion in the record. Such scientific assessments not only enrich our understanding of the resources as policy decisions are made, they also help assure that requisite commerce clause connections can be demonstrated to those who may express doubts.

I am also aware that some are interpreting H.R. 2421 as potential expanding the reach of the Clean Water Act into places as laughable as birdbaths and kiddie swimming pools, both of which inhabit my backyard. Such claims seem to me a red herring. The language in the pending legislation tracks regulatory language that was used for many years without such overreaching by Corps staff, and there is no reason to think that such interpretations would begin if such legislation were enacted. The legislation as written should reach only to those waters that are essential to the overall health of the nation's waters. A redefinition such as that proposed is not, in my opinion, overreaching. It would rather restore the authority Congress intended to grant decades ago, and which faulty interpretation has eroded. It would also eliminate the enormous confusion that exists in the wake of the *Rapanos* decision and the new guidance.

Before I close, let me remind the Committee members of something I covered briefly above and that you undoubtedly already know. The definition being debated now – the term "navigable waters" and what it means – is not unique to Section 404 of the Act. The term at issue – the definition in section 502 – applies to the entire Act. Thus, decisions made with respect to this definition apply to the Clean Water Act as a whole.

And finally, in closing, I reiterate something I wrote to conclude a recent piece published in a book of essays put out by the top-ranked environmental program at Vermont Law School entitled *Any Hope for Happily Ever After? Reflections on Rapanos and the Future of the Clean Water Act Section 404 Program* (copy attached). My essay was looking at whether a "happy ending" was possible in the recent jurisdictional debates discussed in this testimony. I wrote there:

> [I]t seems to be precisely some new magic words from Congress

> that are needed to rectify this situation. In the parlance of this essay, thus, the rulers of the land will have to revisit and reaffirm their original directive on protecting the nation's waters. Predictions on whether that will be able to happen will, of course, be mixed. But the 110th Congress, with its new political make-up, may offer some hope for passage of clarifying language. Something like the Clean Water Authority Restoration Act, which would redefine "waters of the United States" using the long-standing regulatory language as"all waters subject to the ebb and flow of the tide, the territorial seas, and all interstate and intrastate waters and their tributaries, including lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, natural ponds, and all impoundments of the foregoing, to the fullest extent that these waters, or activities affecting these waters, are subject to the legislative power of Congress under the Constitution." would be a definite step in the right direction, especially with respect to the jurisdictional matter...

Mr. Chairman and Members of the Committee, I again thank you for inviting me to speak with you today, and would be happy to answer questions at this time.

Attachments:

1. Brief of The Honorable John D. Dingell, The Honorable John Conyers, Jr., The Honorable Robert F. Drinan, The Honorable Gary W. Hart, The Honorable Kenneth W. Hechler, The Honorable Charles Mccurdy Mathias, Jr., The Honorable Paul N. Mccloskey, Jr., The Honorable Charles B. Rangel, And The Honorable Senator Richard Schultz Schweiker, As Amici Curiae In Support of The Respondent, Rapanos v. United States, Carabell v. United States Army Corps Of Engineers, Nos. 04-1034, 04-1384, Supreme Court of The United States, Jan. 13, 2006

2. *Any Hope for Happily Ever After? Reflections on Rapanos and the Future of the Clean Water Act Section 404 Program*, Vermont Law School publication *available at* http://it.vermontlaw.edu/VJEL/Rapanos/7-Connolly.pdf

3. *Survey Says: Army Corps No Scalian Despot,* 37 ENV'L LAW REPORTER 10317 (May 2007)

4. *Anchoring the Clean Water Act: Congress's Constitutional Sources of Power To Protect the Nation's Waters* , *available at* http://www.elistore.org/reports_detail.asp?ID=11224