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TESTIMONY ON
THE CLEAN WATER RESTORATION ACT OF 2007

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BEFORE THE
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
U.S. HOUSE OF REPRESENTATIVES

APRIL 16, 2008

Thank you, Mr. Chairman and members of this subcommittee, for the invitation to testify regarding the Clean Water Restoration Act of 2007 (CWRA). My name is Jonathan H. Adler, and I am Professor of Law and Director of the Center for Business Law and Regulation at the Case Western Reserve University School of Law, where I teach several courses in environmental, administrative, and constitutional law.

I greatly appreciate the opportunity to present testimony on the potential implications of the Clean Water Restoration Act of 2007. This legislation has potentially significant implications for federal environmental regulation and the federal-state balance in environmental law. These are issues of particular interest to me. For the past fifteen years I have researched and analyzed federal regulatory policies, with a particular focus on the intersection of federalism and environmental protection. Substantial portions of my research have focused on wetland conservation programs, including federal regulation of wetlands under Section 404 of the Clean Water Act and the proper role of the federal regulation in environmental conservation. This research has led to numerous academic

articles and book chapters on the subject, including articles in the *Harvard Environmental Law Review*, *Environmental Law*, and the *Supreme Court Economic Review*.¹

The issue of wetland conservation is also of some personal interest to me. Our backyard in Hudson, Ohio extends into wetlands adjoining a conservation area that is protected by privately owned easements, and I am committed to outdoor recreational activities, including hunting and fishing, that rely upon the ecosystem services that wetlands provide. Thus, I appreciate the opportunity to share my views on this proposed legislation, and its potential implications, with the committee today.

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The Clean Water Restoration Act of 2007 (CWRA) has three stated purposes: 1) To reaffirm Congress’ original intent with regard to federal regulatory jurisdiction; 2) To clarify the scope of federal regulatory jurisdiction over “waters of the United States”; and 3) To enhance the environmental protection of such waters. Yet the CWRA neither conforms to the original meaning of the 1972 Federal Water Pollution Control Act, nor is it likely to achieve its other purposes. To the contrary, the CWRA will exacerbate existing uncertainty about the scope of federal regulatory authority and, if anything, impede efforts by federal agencies to set meaningful regulatory priorities that could enhance federal environmental protection efforts. In short, the CWRA will not accomplish what it sponsors and supporters intend.

Congressional Intent in the Federal Water Pollution Control Act

As enacted in 1972, the Federal Water Pollution Control Act, aka the “Clean Water Act,” struck a balance between federal and state authority to control water pollution. The Act asserted vigorous federal regulatory authority to protect navigable waterways, yet also preserved the ability of state and local governments to maintain their preexisting regulatory programs without federal interference. While expanding federal regulatory authority to reach at least some non-navigable waters, the Act also reaffirmed the essential role of state governments in environmental protection. Specifically, the Act declared Congress’ intent “to recognize, preserve, and protect the primary responsibilities of States” in protecting land and water resources. The CWRA would assert federal regulatory jurisdiction over “*all*” intrastate waters and activities affecting such waters, potentially reaching many private land and activities never before regulated by the CWA and displacing state and local authority.

¹ Publications relevant to the issues under consideration by this committee include: *When Is Two A Crowd? The Impact of Federal Action on State Environmental Regulation*, 31 HARVARD ENVIRONMENTAL LAW REVIEW 67 (2007); *Reckoning with Rapanos: Revisiting “Waters of the United States” and the Limits of Federal Wetland Regulation*, 14 MISSOURI ENVIRONMENTAL LAW & POLICY REVIEW 1 (2006); *Jurisdictional Mismatch in Environmental Federalism*, 14 NYU ENVIRONMENTAL LAW JOURNAL 130 (2005); *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 IOWA LAW REVIEW 377 (2005); *The Ducks Stop Here? The Environmental Challenge to Federalism*, 9 SUPREME COURT ECONOMIC REVIEW 205 (2001); *Swamp Rules: The End of Federal Wetlands Regulation?* REGULATION, Vol. 22, No. 2 (1999); *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetlands Regulation*, 29 ENVIRONMENTAL LAW 1 (1999).

There is also no indication that, in 1972, Congress sought to impose federal regulatory authority over the tens of millions of acres of private land that exhibit wetland characteristics or are occasionally inundated. Indeed, when the Act was adopted, the U.S. Army Corps of Engineers explicitly rejected an expansive interpretation of the Act’s jurisdiction. Nor is there anything in the Act suggesting that Congress sought to impose regulatory controls on those wetlands and purely intrastate waters that lack any meaningful connection to navigable waters of the United States. Yet the CWRA would do just that, as if the word “navigable” had never been in the original statute.

As written, the CWRA would extend federal regulatory jurisdiction to all “intrastate waters” and “all impoundments” of such waters. As a consequence, it potentially extends jurisdiction to many waters and places that have *never* been subject to federal regulatory authority, including many ditches, irrigation and drainage systems, stock ponds, depressions, constructed water features, and perhaps even groundwater. Whatever the merits of such a broad assertion of federal regulatory authority, it cannot be defended on the grounds that it “restores” the original intent of the 1972 Act. Indeed, Congress has *never* passed legislation that would explicitly authorize such far-reaching regulatory authority over local waters and private land as would the CWRA.

Regulatory Certainty

There has certainly been confusion and inconsistency in federal jurisdictional determinations under the Clean Water Act since the Supreme Court’s decision in *Rapanos v. United States*.² Lower courts have adopted varying interpretations of the decision and its implications for federal jurisdiction. Yet this legal confusion did not begin with *Rapanos* and will not end with enactment of the CWRA. There has been litigation, uncertainty, inconsistency and confusion over the scope of federal regulatory jurisdiction – and, in particular over the scope of “waters of the United States” covered by the Clean Water Act – since the enactment of the law in 1972.

In 1975, a federal court was called upon to resolve disputes over whether wetlands were included in the Act’s definition of “navigable waters.”³ Thereafter courts wrestled with the assertion of jurisdiction over adjacent wetlands and the so-called “migratory bird rule.”⁴ The latter was invalidated by the U.S. Court of Appeals for the Fourth Circuit in 1989.⁵ Controversy and confusion over what constituted a jurisdictional water reigned throughout the late 1980s and early 1990s due to varying wetland delineation manuals and agency definitions of what constitutes a wetland.⁶ While both the Corps and EPA purported to apply a consistently broad understanding of federal jurisdiction, jurisdictional determinations were inconsistent and repeatedly subject to court challenge.

² 126 S.Ct. 2208 (2006).

³ See *Natural Resources Defense Council v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975).

⁴ See, e.g., *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); *Hoffman Homes v. EPA*, 999 F.2d 256 (7th Cir. 1993).

⁵ See *Tabb Lakes v. United States*, 715 F. Supp. 726 (E.D. Va. 1988), *aff’d*, 885 F.2d 866 (4th Cir. 1989).

⁶ See U.S. GAO, *WETLANDS OVERVIEW: PROBLEMS WITH ACREAGE DATA PERSIST* (1998) (noting inconsistencies across agencies in wetland definitions).

The Supreme Court’s decision in *United States v. Lopez*,⁷ which invalidated the Gun-Free School Zones Act for exceeding the scope the federal government’s power to regulate commerce among the several states, raised additional questions about the scope of federal regulatory jurisdiction over waters and wetlands lacking a substantial connection to navigable waters. At the time, even supporters of broad federal regulatory jurisdiction recognized the potential vulnerability of federal environmental regulations, particularly those adopted pursuant to the CWA.⁸ Considering the wetland regulations then on the books, Georgetown University’s Richard Lazarus concluded that the Army Corps’ rules were “clearly out of bounds post-*Lopez*,” and would need to be rewritten.⁹ Yet neither the Army Corps nor the EPA sought to revise their jurisdictional regulations, and numerous legal challenges ensued.

Against this backdrop, the Supreme Court’s decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*¹⁰ should have been no surprise. In *SWANCC* the Court adopted a narrow construction of the CWA so as to avoid potential constitutional problems, such as those that would attend an assertion of federal regulatory authority based on nothing more than the presence of migratory birds. After *SWANCC*, the uncertainty continued. The Army Corps and EPA refused to revise their regulations or recognize that *SWANCC* had any meaningful impact on their jurisdiction at all. Nonetheless, agency delineations remained inconsistent. Despite any claims that the limits of the Army Corps’ jurisdiction were relatively clear, the U.S. GAO found both inter- and intra-office variation in jurisdictional determinations by the Army Corps.¹¹

In *Rapanos v. United States*,¹² the Supreme Court again reaffirmed the existence of both statutory and constitutional limits on the scope of federal regulatory jurisdiction over private lands and waters. The Court rejected the Army Corps’ and EPA’s expansive interpretation of their own authority, and reaffirmed that federal regulatory authority only extends to those wetlands that have a “significant nexus” to navigable waters of the United States.

As in the *SWANCC* decision, a majority of the Court adopted a narrow construction of the meaning of “waters of the United States” so as to ensure that the Clean Water Act did not exceed the scope of federal authority under the Commerce Clause. As Justice Kennedy explained: “In *SWANCC*, by interpreting the Act to require a significant nexus with navigable waters, the Court avoided applications--those involving waters without a significant nexus--that appeared likely, as a category, to raise constitutional difficulties and federalism concerns. . . .”¹³ Justice Kennedy’s *Rapanos* opinion embraced this same approach. Specifically, he explained that this aspect of the *SWANCC* precedent

⁷ 514 U.S. 549 (1995).

⁸ See, e.g., David A. Linehan, *Endangered Regulation: Why the Commerce Clause May No Longer Be Suitable Habitat for Endangered Species and Wetlands Regulation*, 2 TEX. REV. L. & POL. 365 (1998); Lori J. Warner, *The Potential Impact of United States v. Lopez on Environmental Regulation*, 7 DUKE ENVTL. L. & POL’Y F. 321 (1997).

⁹ Richard J. Lazarus, *Corps Slips on Lopez, FWS Wins*, ENVTL. F., Mar.-Apr. 1998, at 8.

¹⁰ 531 U.S. 159 (2001).

¹¹ U.S. GAO, WATERS AND WETLANDS: CORPS OF ENGINEERS NEEDS TO EVALUATE ITS DISTRICT OFFICE PRACTICES IN DETERMINING JURISDICTION (February 2004).

¹² 126 S. Ct. 2208 (2006).

¹³ 126 S.Ct. at 2246 (Kennedy, J., concurring in the judgment)

limited the scope of federal jurisdiction sufficiently to prevent any jurisdictional problems. Wrote Kennedy, “as exemplified by *SWANCC*, the significant-nexus test itself prevents problematic applications of the statute.”¹⁴

SWANCC and *Rapanos* make clear that a majority of justices on the Supreme Court continue to take the idea that ours is a government of limited and enumerated powers seriously. While the federal government has broad and far-reaching authority to adopt environmental protections, that authority is not without limits, and does not extend to each and every parcel that may, at times, be inundated or exhibit wetland characteristics. Any CWA reforms that fail to respect the constitutional limits on federal regulatory authority risk exceeding constitutional limits and will inevitably provoke legal challenges that will produce additional uncertainty.

The CWRA will not end confusion and litigation over the scope of federal regulatory authority. To the contrary, as written the bill guarantees that such confusion and litigation will continue. Under the new definition of “waters of the United States” proposed by the bill, federal regulatory jurisdiction under the CWA will extend to all “waters” and “activities affecting” such waters that are “subject to the legislative power of Congress under the Constitution.” Yet because the bill makes no effort to define what such waters are, this will still require courts to determine the scope of federal regulatory authority. Stating that Congress intends to regulate to the fullest extent of Congressional power to regulate does not resolve the question at all. Instead, it punts the question to the judiciary, and requires federal courts to define the constitutional scope of Congressional power as cases are brought to federal court.

As noted above, the “significant nexus” requirement articulated in *SWANCC* and *Rapanos* serves to ensure that federal regulations do not exceed the scope of constitutional authority. Eliminating a significant nexus requirement, as the CWRA appears to do, does not eliminate the constitutional limits on federal power, but it does raise the prospect that some applications of the act will reach, if not exceed, such limits. This is a recipe for even more litigation, and continuing inconsistent application of federal jurisdiction.

With or without the CWRA, the surest way to bring greater certainty to the scope of federal regulation under the CWA is for the Army Corps and EPA to undertake a notice and comment rulemaking to more clearly define when, and under what conditions, waters and wetlands constitute a part of the “waters of the United States.” Under *SWANCC* and *Rapanos*, the Army Corps and EPA retain ample authority to identify those ecological factors and characteristics that are indicative of a “significant nexus” to navigable waters, so as to facilitate more consistent and predictable jurisdictional determinations by regional offices, courts, and private landowners. Indeed, three of the opinions in *Rapanos* encourage the Army Corps and EPA to do just that.

¹⁴ *Id.* at 2250.

Improving Environmental Protection

In responding to the *Rapanos* decision, Congress should not repeat the mistake made by the Army Corps and EPA of seeking to assert the broadest possible interpretation of “waters of the United States.” Adopting a new, expanded definition of “waters of the United States” that exceeds the scope of the CWA as interpreted in *Rapanos* and *SWANCC* is not in the interest of the regulated community nor does it best serve the cause of wetland conservation. Rather it is a recipe for further litigation and uncertainty as to the scope of federal regulations.

If Congress seeks to improve federal environmental protections of waters of the United States, it should not seek the indiscriminate expansion of federal regulatory authority. Rather, Congress should encourage the Army Corps and EPA to focus their regulatory efforts so as to maximize their effectiveness. Legislation is not necessary for this. The Army Corps and EPA retain all the tools they need to focus existing federal regulations through a notice and comment rulemaking.

Federal regulatory resources are necessarily limited. For this reason, federal resources are best utilized if they are targeted at those areas where there is an identifiable *federal* interest or the federal government is in particularly good position to advance conservation goals. For example, there is an undeniable federal interest in regulating the filling or dredging of wetlands where such activities would cause or contribute to interstate pollution problems or compromise water quality in interstate waterways. Where the effects of wetland modification are more localized, the federal interest is less clear. Not coincidentally, in the latter case, the basis for federal jurisdiction is also more attenuated.

Limiting federal regulatory authority would certainly create room for the expansion of state and local regulatory efforts. Over-expansive assertions of federal regulatory authority may preclude, discourage, or otherwise inhibit state and local governments from adopting environmental protections where state efforts would be worthwhile. Contrary to common perceptions, state wetland regulation preceded federal regulatory efforts.¹⁵ Indeed, the first state wetland conservation statutes were adopted more than a decade before the Army Corps and EPA began regulating the dredging and filling of wetlands. Since then, many states have stayed well ahead of the federal government, adopting more innovative or protective wetland conservation programs. By developing jurisdictional regulations that establish a “significant nexus,” in part, by focusing on those instances in which there is a particular federal interest, the Army Corps and EPA could maximize wetland conservation by complementing and supplementing, rather than supplanting, state efforts. Congress should encourage such efforts, yet this is not what the CWRA would do.

Lawmakers should note that nothing in *SWANCC* and *Rapanos* prevents the Army Corps and EPA from recognizing that the effective scope of the Act’s prohibition on the discharge on pollutants without an NPDES permit. As the Scalia plurality noted, the CWA prohibits *any* unpermitted discharge of a pollutant into “waters of the United States.”¹⁶ This would seem to include indirect discharges. Therefore, removing an intermittent stream from federal jurisdiction under Section 404

¹⁵ This history is summarized in Adler, *Wetlands infra*, at 40-54.

¹⁶ See 126 S.Ct. at 2227 (Scalia, J., plurality).

would not mean that discharges into that stream that reached navigable waters would be unregulated. To the contrary, such discharges would still appear to constitute clear violations of the Act.

It is also important for federal policymakers not to lose sight of the fact that federal regulation is not the only means for advancing wetland conservation. Indeed, the experience of federal conservation programs that rely upon incentives and cooperation with private landowners compares quite favorably with the conflicts and inconsistencies of federal wetland regulations.¹⁷ Federal support for the protection of waterfowl habitat dates back some seventy years to the sale of "duck stamps" to hunters that created a dedicated source of revenue for conservation of an estimated 4.5 million acres. Other programs under which the federal government enters into private agreements with landowners to restore wetlands on their property, while subsidizing the cost of restoration and the purchase of a permanent or multi-year easement to ensure that the wetland is protected, are particularly cost-effective when compared to mandated mitigation under the CWA. Adopted pursuant to the federal spending power, rather than the Commerce Power, such programs are also not confined by the constitutional limits on federal regulatory authority, nor do they generate the litigation and conflict of federal controls on private land-use decisions. The effectiveness of such programs is undermined, however, by the existence of ethanol subsidies and other programs that increase commodity prices, and increase the costs of setting land aside for conservation purposes.

Insofar as some types of wetlands, such as prairie potholes, may be particularly likely to lie beyond the scope of federal regulation – the language of the CWRA notwithstanding – incentive programs remain a viable conservation option. Indeed, enlisting private landowners and conservation organizations through incentive programs has conserved hundreds of thousands of acres of wetlands and was the driving force behind the attainment of “no net loss” of wetlands during the 1990s. There is no reason why this cannot continue, despite the limitations on federal regulatory jurisdiction. It would be a tragedy were an inordinate focus on maximizing regulatory jurisdiction to come at the expense of sufficient support for alternative means of encouraging wetland conservation. If this Committee is truly interested in improving environmental conservation, this is where it should direct its efforts.

* * *

In conclusion, I recognize the Committee’s desire to provide greater regulatory certainty and enhance federal environmental protection efforts. Regulated entities and the conservation community both stand to benefit from greater clarity about the scope of federal jurisdiction. Yet the CWRA will not provide such certainty. To the contrary, enactment of the CWRA ensures years of litigation and regulatory conflict, neither of which will enhance federal conservation efforts. Despite the best of intentions, the CWRA will do little to achieve its worthwhile goals.

Thank you again for the opportunity to present my views on this important subject, Mr. Chairman. I hope that my perspective has been helpful to you, and will seek to answer any additional you might have.

¹⁷ See *id.* at 54-62. See also Jonathan H. Adler, *Money or Nothing: The Adverse Environmental Consequences of Uncompensated Land-Use Controls*, 49 BOSTON COLLEGE LAW REVIEW 301 (2008).