Environmental Law & Property Rights

Point-Counterpoint: Repairing the Clean Water Act

Brent A. Fewell & James Murphy

The authors wish to dedicate this debate to the late Jim Range, one of the nation's most prominent advocates for natural resource conservation and a tireless proponent of clear air and water. Jim died in January 2009 after a courageous battle with kidney cancer. His cumulative influence on the modern-day conservation movement is inestimable and he leaves behind a legacy that will be experienced and lived by the public for decades and centuries to come. He was a rare breed in Washington, putting aside party politics and working in a bipartisan fashion to achieve what he believed was in the best interest of the public and the environment. Those of us who knew him were lucky and understand his enormous contributions. Those who did not have the privilege of knowing or working with Jim can get to know him and his amazing legacy better at www.jimrange.com.

Currently, the Federal Water Pollution Control Act (hereinafter referred to as the "Clean Water Act") protects "navigable waters" defined as "waters of the United States."[1] For most of the Act's history, the term "waters of the United States" has been broadly construed to mean virtually all surface waters, the regulation of such waters being necessary to fulfill the Act's objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[2] However, two recent Supreme Court decisions, *Solid Waste Agency of Northern Cook County (SWANCC) v. Army Corps of Engineers*[3] and *Rapanos v. United States*,[4] placed limits on the scope of the Act's jurisdictional reach, especially as it relates to isolated water bodies and those not having a significant connection to navigable waters.

In response, Congress has introduced the Clean Water Restoration Act (hereinafter referred to as the "Restoration Act"). Sponsors and proponents of the Restoration Act argue that it would restore the pre-*SWANCC* scope of CWA protections by removing the term "navigable" from the Act, defining the term "waters of the United States" in a manner consistent with the long-standing regulatory scope of the Act, and issuing findings that support Congress's constitutional authority to regulate such waters. The Restoration Act was introduced in previous Congresses in both the House[5] and the Senate, and currently it has been introduced in the Senate,[6] with a House bill expected soon.

[*The authors' analysis in this debate is based on the Clean Water Restoration Act as originally introduced in the House in the 110th Congress, which is substantially identical to the Act as introduced in the Senate in the 111th Congress in S. 787. Subsequent to the authors' drafting of this article, S. 787 passed out of the Senate Environment and Public Works Committee with certain changes on June 18, 2009. The phrase "to the maximum extent those waters, or activities affecting those waters, are subject to the legislative power of Congress under the Constitution" was removed from the definition section of the bill. Additionally, a "Rules of Construction" section was added that states the term "waters of the United States" shall be construed consistently with "the scope of Federal jurisdiction under th[e Clean Water] Act, as interpreted and applied by the Environmental Protection Agency and the Corps of Engineers prior to January 9, 2001 (including pursuant to the final rules and preambles published at 53 Fed. Reg. 20764 (June 6, 1988) and 51 Fed. Reg. 41206 (November 13, 1986); and... the legislative authority of Congress under the Constitution." The regulatory exemptions for prior converted cropland and waste treatment systems were also added to the definition section. Minor changes to the findings were made as well.*]

The stated purposes of the Act are as follows:

- to reaffirm the original intent of Congress in enacting the Clean Water Act of 1972 to restore and maintain the chemical, physical, and biological integrity of the waters of the United States;
- to clearly define the waters of the United States that are subject to the Act;
- to provide protection to the waters of the United States to the fullest extent of the legislative authority of Congress under the Constitution.

Critics of *SWANCC* and *Rapanos* argue that through these decisions the Supreme Court has limited and confused the scope of the federal government's authority to regulate waters of the United States, including non-navigable waters far upstream or remote from traditionally navigable waters. Others, however, contend that the Supreme Court's decisions reflect a reasonable interpretation of the Act and the limited scope of federal authority there under.

While proponents of the Restoration Action argue that legislation is needed to fix the problems caused by *SWANCC* and *Rapanos*, opponents question whether the federal government's authority should extend to regulating both interstate and intrastate waters. The following debate sets forth arguments for and against the Restoration Act and the significance of expanding federal authority in this area.

Specifically, this article addresses three key questions concerning the Restoration Act: (1) what would be the effect of deleting the term "navigable" from the Act; (2) would the Restoration Act withstand constitutional challenge; and (3) what effect would the Restoration Act have on the respective roles of the federal and state governments in managing water resources? This article will answer these questions in turn.

The Federalist Society: The CWRA proposes to delete the term "navigable" from the term "navigable waters of United States." What effect do you believe this amendment would have on federal jurisdiction?

Mr. Fewell: Let me begin by underscoring the environmental and legal significance of this issue. From my perspective, the starting point for this debate does not begin with the question of whether certain non-navigable waters, such as adjacent or isolated wetlands, or ephemeral or intermittent streams, are environmentally or ecologically important. These resources unquestionably provide a variety of environmental benefits, including wildlife habitat, groundwater recharge, water quality filtering, and flood protection that are beneficial. Many such waters are valuable and indeed worth protecting. The question is not whether they are important or should be protected, but rather protected by what means, by whom, and at what cost? It is the costs associated with the Restoration Act that I fear most, including the costs on state sovereignty and the further erosion of the rights of property owners and individual liberties.

At a point in American history already marked with unprecedented expansion of federal power, the Restoration Act, if enacted, would mark one of the most significant expansions of federal authority over private property and how property is used. The effect of the Restoration Act would grant new, sweeping federal authority over not only *all interstate and intrastate waters* but *all activities affecting* such waters. Thus, it represents an extension of both geographic- and activity-based authority, which would vastly expand federal regulation over all land use activities. If the Restoration Act were adopted, there would be few, if any, places or private activities that the federal government's authority could not and would not reach. Unfortunately, as drafted, the Restoration Act seems more intent on regulating land use than protecting water quality.

The Restoration Acts explicitly seeks to expand the federal government's power to the "fullest extent of the legislative authority of the Congress under the Constitution" invoking not only the Commerce Clause but the Necessary and Proper Clause and the Treaty Clause to protect species of fish, birds, and wildlife. Such expansion of authority beyond Congress's commerce power authority raises serious questions regarding the outer limits of Congress's constitutional authority—questions for which there are no clear answers.

Like veins and capillaries running through the human body, the vast network of rivers, tributaries, streams, and ditches in America reach deep across the country, into every state, region, local community and private property. As certain as gravity's effect, rain falls to the earth and either fills isolated depressions, percolates into the earth as groundwater, or flows downhill through ditches and drainages into ever larger streams, ponds, rivers, lakes and, in some cases, eventually to the ocean. Runoff that flows downhill invariably carves rills and ditches into the landscape that may or may not lead to navigable waters. Such ditches may be located in the headwaters, situated many tens or hundreds of miles away from the nearest downstream navigable water with little, if any, connection.

The landscape is dominated with manmade lakes, ponds, drainages, and ditches that are created for a number of commercial and non-commercial reasons. For example, roadside ditches and drainages are mandatory in most cases and designed to shed and move water away from the driving surface for safety reasons. These ditches and drainages, along with any other drainage or water feature, no matter how commercially or environmentally significant or insignificant, would be subject to federal jurisdiction under the Restoration Act.

While many of our nation's water bodies are navigable many are not. In fact, many streams and wetlands located in the headwaters of watersheds are not navigable in fact, have no significant connection to navigable waters, and are incapable of supporting commercial activity. Therefore, the Restoration Act raises several very important questions. What constitutes a "water of the United States"? Is it any water body, ditch, drainage, or erosion feature, regardless of how much or how long water is present or whether there is any meaningful nexus to navigable waters or commercial activities? Second, does the federal government have constitutional authority to regulate all waters, whether or not they are capable of supporting commerce or have a nexus to navigable waters? Third, should the federal government's authority extend to regulating any water body or activity that affects a water body that provides ecological benefits, such as wildlife habitat for migratory birds, fish, frogs, or salamanders? Will the Act merely become another habitat protection mandate from Congress?

To date the federal government's authority to regulate water bodies has been tethered to the concept of "navigability" and the Commerce Clause. The term "navigable" has been a part of the Act's lexicon since 1972 and, in fact, Congress used the term a total of 81 times in the legislation. The Restoration Act seeks to remove this term from the statute.

In 1972, when the Act was passed, Congress aspired to "restor[e] and maintain[] the chemical, physical, and biological integrity of [the] Nation's waters" by, among other things, "eliminating the discharge of pollutants into the navigable waters" by 1985.[7] And while Congress no doubt intended the Act to be used to clean up and safeguard the nation's waters, it likewise intended to erect some limits on the scope of the federal government's authority by the use of the term "navigability." Moreover, the clear object of the Act was to protect the chemical, physical and biological integrity of the nation's waters. Congress's object was not to protect every water body, nor to protect wildlife habitat *per se*.

The Supreme Court's decisions in both the *SWANCC* and *Rapanos* found that the federal government's authority under the Clean Water Act is deeply rooted in Congress's Commerce Clause power. For years, the EPA and the Corps of Engineers unlawfully applied the Migratory Bird Rule, which allowed the government to assert jurisdiction over non-navigable, isolated water bodies based solely on the fact that such waters provided habitat for migratory birds and endangered species. The Supreme Court in *SWANCC* rightly concluded that the Migratory Bird Rule simply went too far, and the history of the Act did not support such a broad interpretation of Congress's authority under its commerce power.

Even after *SWANCC*, the federal government asserted jurisdiction over non-navigable tributaries and ditches many miles removed from navigable waters and with no connection to water-borne commerce. Yet again, the Court in *Rapanos* concluded that the federal government had overreached

** Brent A. Fewell is an attorney with Hunton & Williams, and a former Deputy Assistant Administrator for EPA's Office of Water.*

its authority under the Act. Both the plurality and Justice Kennedy's concurring opinion in *Rapanos* start from a common understanding that the term "navigable waters" under the Act is deeply rooted in the concept of traditional navigable waters as that term is used under the Rivers and Harbors Act, waters which are navigable-in-fact (or reasonably susceptible to being made so) for purposes of a water-borne highway for the transport of goods in interstate commerce.[8] The *Rapanos* Court further recognized, however, that the meaning of "navigable waters" in the Act, although broader than the traditional understanding of navigable waters (and reaching, for example, non-navigable wetlands adjacent to navigable waters), must still be given some importance and limits. The importance according to Justice Kennedy is the presence of a "significant nexus" between the waters at issue and traditional navigable waters.

Proponents of the Restoration Act argue that the "significant nexus" standard is confusing and unworkable and fails to protect certain waters previously subject to federal jurisdiction, i.e., those without a significant nexus, such as ditches and ephemeral streams with little or no flow most of the year. Admittedly, determining the presence of a "significant nexus" has required additional agency resources and created a fair amount of confusion.

However, the Restoration Act goes far beyond "fixing" the confusion caused by *Rapanos* and *SWANCC* in that, if adopted, it would significantly expand federal authority to waters and activities affecting such waters never before subject to federal regulation. Prior to *SWANCC*, not all intrastate waters and activities affecting such waters were subjected to federal jurisdiction. Thus, the argument that the Restoration Act would merely turn the clock back to pre-*SWANCC* times is untenable.

All activities affecting the landscape, whether constructing a new home, road, or school, will invariably alter the movement of rainfall and have some affect on water, de minimis or otherwise. Consequently, all such activities would be subject to federal regulation under the Restoration Act, which makes no distinction between commercial, environmental, or ecological value of various waters or the significance of adverse impacts from activities affecting such waters. As such, it is virtually impossible to conceive of any land-disturbing activity that would not be subject to federal regulation under the Restoration Act.

Mr. Murphy: The Restoration Act seeks to restore the CWA's historical scope of protections by, in part, removing the confounding term "navigable" from the Act. Removal of the term "navigable" from the Act would have the effect of removing the confusion caused by *SWANCC* and *Rapanos* and firmly restore the historic scope of the Act's jurisdiction which existed prior to the Supreme Court's decision in *SWANCC*.

The Clean Water Act's purpose, history, and structure make clear that it is concerned with protecting the quality of our nation's waters, not protecting navigation. In light of *SWANCC* and *Rapanos*, removal of the term "navigable" is necessary to make clear Congress' original intent, and to restore full protections to our nation's waters.

The legislative history of the Act provides powerful statements demonstrating that by defining "navigable waters" as "waters of the United States," Congress intended to broadly protect waters well beyond any traditional concept of navigability. For instance, the 1972 Conference Report states that, "The conferees fully intend 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."[6] A 1972 floor statement by Representative John Dingell, a chief architect of the Act, further describes this intent: "[The] conference bill defines the term 'navigable waters' broadly for water quality purposes. It means all 'the waters of the United States' in a geographical sense."[7] When an attempt to narrow the Act's scope of protection was ultimately defeated in 1977, Senator Howard Baker reiterated this broad intent, noting that "once seemingly separate types of aquatic systems are, we now know, interrelated and interdependent. We cannot expect to preserve the remaining qualities of our water resources without providing appropriate protection for the entire resource."[8]

As such, until *SWANCC* the term "navigable" was given little notice by the courts. The Supreme Court in *United States v. Riverside Bayview Homes* found that "the Act's definition of 'navigable waters' as 'the waters of the United States' makes it clear that the term 'navigable' as used in the Act is of limited import. In adopting this definition of 'navigable waters,' Congress evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term."[9] Similarly, in *International Paper v. Ouellette*, the Supreme Court found that the Act "applies to... virtually all bodies of water."[10]

Other courts have similarly found Congress' intent to be broad. For instance, in one of the first major cases to consider the issue, *Natural Resources Defense Council v. Callaway*, the District of Columbia Federal District Court found that

> Congress by defining the term 'navigable waters' in Section 502(7) of the Federal Water Pollution Control Act Amendments of 1972... to mean 'the waters of the United States, including the territorial seas,' asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution. Accordingly, as used in the Water Act, the term is not limited to the traditional tests of navigability. [11]

Another early case, *United States v. Ashland Oil and Transportation Co.*, found that "Congress' clear intention as revealed in the Act itself was to effect marked improvement in the quality of the total water resources of the United States, regardless of whether that water was at the point of pollution part of a navigable stream."[12] In support of this conclusion, the Court relied on the legislative history of the Act:

> [T]he conference bill defines the term "navigable waters" broadly for water quality purposes. It means all "the waters of the United

** James Murphy is the Wetlands and Water Resources Counsel for the National Wildlife Federation.*

> States" in a geographical sense. It does not mean "navigable waters of the United States" in the technical sense as we sometimes see in some laws.... Thus, this new definition clearly encompasses all water bodies, including main streams and their tributaries, for water quality purposes. No longer are the old, narrow definitions of navigability, as determined by the Corps of Engineers, going to govern matters covered by this bill.[13]

The *Ashland Oil* Court went on to reach the obvious conclusion that:

> Congress knew exactly what it was doing and that it intended the Federal Water Pollution Control Act to apply, as Congressman Dingell put it, "to all water bodies, including main streams and their tributaries." Certainly the Congressional language must be read to apply to our instant case involving pollution of one of the tributaries of a navigable river. Any other reading would violate the specific language of the definition [of navigable waters as waters of the United States] and turn a great legislative enactment into a meaningless jumble of words.[14]

It is only in its most recent opinions that the Supreme Court indicated a need for some demonstrated linkage to traditionally navigable water bodies for a water way to be protected. In *SWANCC*, the Supreme Court ruled that "[t]he 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."[15] In *Rapanos*, while the Supreme Court failed to reach any majority consensus on what constitutes a "navigable water" for purposes of the Act, four Justices in a plurality opinion commented that "the Act's use of the traditional phrase 'navigable waters'... further confirms that it confers jurisdiction only over relatively *permanent* bodies of water."[16] In a solo concurring opinion, a fifth Justice, Anthony Kennedy, stated that, "Consistent with... the need to give the term 'navigable' some meaning, the Corps' jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense."[17]

Contrary to the water quality protection goals of the Act, the undue weight *SWANCC* and *Rapanos* have placed on the linkage between upstream waters and navigable waters in order to establish the Act's jurisdiction has proved confusing, administratively unworkable and has had the affect of making it harder or near impossible to protect a troubling number of water resources.

The resulting confusing has been disastrous. A circuit split has already developed regarding the application of the fractured *Rapanos* opinion, with courts disagreeing on the basic question of which *Rapanos* test applies.[18] Even if the question of which of the tests to apply can be worked out, it is unclear precisely what is required to assert jurisdiction under either test and which waters require the application of a case-by-case jurisdictional test.

As a result, both administrative and enforcement efforts under the Act have been greatly hindered. According to an EPA memo and a December 2008 Congressional memo, approximately 500 enforcement cases have either been shelved or hampered by the current legal confusion.[19] The 2008 Congressional memo described "overwhelming" stress levels and "plummeting" morale among U.S. Army Corps of Engineers and EPA workers assigned with administering the Act.[20] In appealing unsuccessfully to the Supreme Court for certiorari review of a recent Eleventh Circuit case that required the government to retry a criminal case involving the knowing discharge of industrial pollutants into a perennial stream, the Office of Solicitor General stated that having to apply the cumbersome Justice Kennedy test to all jurisdictional determinations in the states of the Eleventh Circuit would have added over 28,000 additional person hours of work time over the previous year.[21] And, most importantly, countless waters are not being protected, including wetlands vital to flood control, groundwater recharge, and habitat provision, and many streams that provide clean water and drinking supplies. Indeed, EPA estimates that approximately a third of the Nation's population rely in part on now at-risk streams for their drinking water.[22]

Simply put, the Act is currently broken. Removing the term "navigable" from the Act is a necessary step to make clear Congress's original intent to broadly protect all "waters of the United States." Removing the term "navigable" from the statute is critical in order to affirm the Act's purpose to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," rather than regulate navigation; restore the accepted pre-*SWANCC* jurisdictional scope without the clouds of confusion created by *SWANCC* and *Rapanos*; and enable the Act to properly function for the benefit of the environment, the regulated community, those charged with administering the Act, and the general public. Failure to remove this term will simply result in further legal wrangling and attempts to discern a jurisdictional limit that is incongruent with the purpose of the Act and the ecological realities that govern water resources.

The Federalist Society: Do you believe the CWRA, if adopted, would withstand constitutional challenge?

Mr. Fewell: The Constitution does not give Congress authority to regulate something simply because it wants to or because to do so would produce environmentally beneficial results. This debate must first be framed by the principle that the Constitution created a federal government of enumerated powers, not unlimited powers.[9] As James Madison wrote, "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."[10] Thus, there are certain limits on Congress's power and its ability to regulate.

As reminded by the Supreme Court in *U.S. v. Lopez,*[11] Congress's power to regulate *vis-a-vis* its interstate commerce power is not unbounded and has outer limits. The Supreme Court previously has warned against the dangers occasioned by ever expanding federal authority, which "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government."[12] In sum, Congress may only regulate activities that have a substantial economic effect

on interstate commerce.[13] However, there is simply no evidence that activities involving certain intrastate waters, including roadside ditches, have a substantial economic effect on interstate commerce.

Proponents of the Restoration Act also argue that this legislation will provide greater clarity and certainty regarding the scope of the federal government's authority over water bodies. And while on one hand I would agree that expanding the government's authority to regulate *all* waters without limits certainly clarifies the intended scope of the government's authority, it is naïve to believe that such a legislative fix will bring about more certainty or lessen the confusion. Because the Restoration Act tests and likely exceeds the outer limits of the federal government's constitutional authority, it poses a substantial threat to long-established rights of property owners. Consequently, it will no doubt spawn significant litigation and uncertainty, and will keep many lawyers busy for years to come.

Mr. Murphy: Congress has ample authority to protect the waters the Restoration Act would protect. Primarily, Congress can protect such waters pursuant to its power to regulate interstate commerce. Congress also has ample authority under its power to implement international treaties and its power to manage all federal property.[23] In addition to these powers, Congress has power to "make all Laws which shall be necessary and proper for carrying into Execution" its enumerated powers.[24]

It is important to note that the Supreme Court's decisions in both *SWANCC* and *Rapanos* did not rule on constitutional grounds. Thus, neither ruling placed constraints on the type of waters Congress has constitutional authority to regulate under the Act. In fact, Justice Kennedy characterizes his own significant nexus test in *Rapanos*—which, while difficult to discern and apply, is believed by most commentators to be broad in scope and certainly extends well beyond traditionally navigable waters—as raising no federalism or constitutional concerns.[25]

The Commerce Clause[26] grants Congress broad power to regulate interstate commerce. This power gives Congress authority to regulate not only economic matters, but environmental, public health, social concerns, and other matters that affect interstate commerce. Indeed, virtually all of the major environmental statutes Congress has passed rely on the Commerce Clause for authority. In the face of frequent constitutional challenges to these laws, neither the Supreme Court nor any federal circuit court of appeals has struck down one of these laws as exceeding Congress's constitutional authority.[27]

The Commerce Clause provides three prongs of power under which Congress may regulate natural resources: (1) channels of interstate commerce; (2) instrumentalities, and persons or things in interstate commerce, and (3) activities substantially affecting interstate commerce.[28] While there are persuasive arguments for protecting water as an instrumentality of Commerce and the Supreme Court has found water to be an article of commerce,[29] this response will focus on the channels and substantially affects prongs. The Restoration Act would be upheld under both these prongs.

Navigable bodies of waters serve as "channels" of commerce and the law clearly recognizes that. But Congress's power under the channels prong does not stop with waters that are themselves navigable. Congress also has power to protect navigable waters from flooding, watershed development, and pollution, all of which can require the regulation of waters beyond the navigable waters.[30] This has been recognized for well over a century. The 1899 Refuse Act—a precursor to the CWA's Section 402 program— made illegal the discharge of materials into "any navigable water of the United States, or into any tributary of any navigable water."[31] Additionally, in 1941, the Supreme Court recognized that "the power of flood control extends to the tributaries of navigable streams."[32]

The channels prong therefore gives clear authority for Congress to regulate not only navigable waters themselves, but far upstream to waters that may impact navigable waters. The scope of such waters is, from an ecological standpoint, encompassing of virtually all surface waters within the watersheds of navigable waters.

In addition to the "channels" prong, Congress also has vast authority to protect waters under the "substantially affects" prong of the Commerce Clause. This prong allows Congress to regulate resources and activities that in the aggregate have a substantial affect on interstate commerce. This includes regulated activities or behavior that may individually have little effect on interstate commerce, so long as Congress has a rational basis to conclude such activities in the aggregate substantially affect interstate commerce.

Two cases in particular illustrate the sweeping scope of Congress's authority under the substantially affects prong. In *Wickard v. Filburn*, the Supreme Court found that federal quotas on wheat production applied to a grower who grew a small amount of wheat for personal consumption.[33] The Supreme Court reasoned that "even if [the] activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce," and that, even though the wheat production at issue may be "trivial by itself," the grower's effect on interstate commerce, when "taken together with that of many others similarly situated, is far from trivial" as "[h]ome-grown wheat in this sense competes with wheat in commerce."[34]

This logic guided a more recent case, *Raich v. Gonzales*, where the Supreme Court upheld a federal ban on marijuana as it applied to intrastate use of medical marijuana that was neither bought nor sold. In *Raich*, the Court stated that "when a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence."[35] Central to the Court's decision was that the statute at issue was "a lengthy and detailed statute creating a comprehensive [regulatory] framework."[36] Furthermore, there need only exist a "rational basis" for Congress to conclude that activities taken in the aggregate substantially affect interstate commerce for its exercise of power to be proper.[37]

The Supreme Court and federal appeals court rulings that have addressed comprehensive environmental regulatory schemes confirm that Congress's power to regulate natural resources under the Commerce Clause is similarly broad. Noted conservative Judge Richard Posner found, in discussing the Clean Water Act, that "navigability is a red herring from the standpoint of constitutionality. The power of Congress to regulate pollution is not limited to polluted navigable waters."[38] In *Hodel v. Virginia Surface Mining and Reclamation Association*, the Supreme Court looked in part to Congressional findings that surface-mining destroyed or diminished the utility of land for economic activity, contributed to floods, polluted waters, and had other deleterious effects that could impact commerce to uphold a comprehensive federal statute that regulates such activities, including intrastate sites.[39] Several circuit courts have also consistently upheld the constitutionality of the Endangered Species Act, which many consider to be among the most far-reaching of environmental laws.[40]

The aggregate commercial impacts of "isolated" waters and headwaters are indeed substantial. Drainage and destruction of these so-called "isolated" waters has been a factor in causing enormous flooding costing billions of dollars in damages. For instance, The Wetlands Initiative estimated that restoring lost wetlands in the upper Mississippi River basin, many of them "isolated," would have contained the flood waters of the enormously destructive 1993 floods in the Mississippi basin.[41] As Justice Kennedy noted in his *Rapanos* opinion, it is the degradation and destruction of small streams and wetlands in the far reaches of the Mississippi basin that have collectively caused an enormous annual dead zone in the Gulf of Mexico that has devastating consequences for industries dependent on sea life in the Gulf.[42] Moreover, "isolated" waters like Prairie Potholes comprise some of the most vital habitat for waterfowl production in the United States.[43] Bird-watching and hunting dependent upon such species is a multi-billion dollar interstate industry. Additionally, filling and destroying wetlands, streams, and other water resources is inherently economic activity. As such, there is plainly a rational basis for Congress to conclude the water resources that would be protected by the Restoration Act and the activities that impact them have an aggregate substantial affect on interstate commerce.

Outside of the Commerce Clause, the treaty power and Property Clause also provide separate constitutional bases for Congress to regulate waters that would be covered under the Restoration Act.

The scope of the treaty power[44] is set forth in *Missouri v. Holland*.[45] This case involved the validity of the federal government to enforce regulations that protected migratory birds pursuant to migratory bird treaties against the state of Missouri, which contended that it had ownership of wild birds in the state. Justice Holmes, writing for the Court, found protection of migratory birds to be "a national interest of very nearly the first magnitude" and concluded that "[i]f the treaty is valid there can be no dispute about the validity of the statute under Article 1, Section 8, as a necessary and proper means to execute the powers of the Government."[46]

The United States is under multiple treaties to protect migratory birds, some of which specifically mention the protection of migratory bird environments.[47] In order to carry these treaties out, Congress has power to protect resources used by migratory birds, including so-called isolated waters.

Additionally, the Property Clause[48] gives Congress power not only to protect resources on public land,[49] but also conduct on non-federal land that affects federal lands and resources.[50] This power would permit Congress to regulate all waters on public land in addition to waters on private land that might affect such public waters.

In sum, Congress has ample power to assert protection over the waters covered by the Restoration Act.

The Federalist Society: What effect would the CWRA have on the respective roles of the federal and state governments in managing water resources?

Mr. Fewell: When Congress established the Clean Water Act, it wisely created a framework of cooperative federalism, whereby the states and federal government are required by law to work together to protect the quality of the nation's waters. This framework is an important recognition that states have long had the primary responsibility to manage both land and water resources within their own jurisdictions. As Congress stated,

> It is the policy of the Congress 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...[14]

In carrying out the goals of the Act, Congress also directed the federal government to "co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing waters."[15]

By defining all waters, including intrastate waters, as waters of the United States, and regulating activities affecting such waters, the Restoration Act could not represent a clearer and more direct abrogation of the States' primary responsibility to manage land and water resources. No longer would there be a cooperative partnership between the states and the federal government. There would be no room or need for cooperation in the protection of water quality, as the federal government would then have complete and absolute control over the resources and dominate the regulatory space.

Currently, waters are classified as either waters of the United States or waters of the state. All waters of the United States are likewise waters of the state, but not all waters of the state are waters of the United States. A recent review of states' definitions of "waters of the state" reveal that states tend to define their waters more broadly than the Act defines federal waters, including natural and manmade water bodies.[16] For example, Arizona defines "waters of the state" as

> all waters within the jurisdiction of this state including all perennial or intermittent streams, lakes, ponds, impounding reservoirs, marshes, watercourses, waterways, wells, aquifers, springs, irrigation systems, drainage systems and other bodies or accumulations of surface, underground, natural, artificial, public or private water situated wholly or partly in or bordering on the state.[17]

By federalizing all waters, including waters that heretofore have only been subject to state law, states will lose their primary role to plan and develop their land and water resources as they see fit. And, in fact, the question then becomes, what becomes of the states' role in managing and regulating their own water and land resources? Invariably, the states would become a mere extension of the federal government to carry out the goals and requirements of federal law.

In addition to the obvious consequences of the Restoration Act, there are many unintended consequences of federalizing intrastate waters that would prove difficult for states and their respective citizens. This is particularly true because the amount of waters subject to federal jurisdiction and, thus, all the requirements under the CWA, would be substantially increased. As a result, water quality standards would automatically extend to all such waters, including roadside ditches, and the attendant obligations under the Act for the states to regulate and ensure that such waters achieve such standards. And where a ditch failed to meet such standards, the states would be required to develop a pollution budget and plan to ensure future compliance. Increasing the universe of federal waters would also require shifting already limited resources away from protecting higher quality waters to those, in some cases, with very little environmental or ecological value. In addition, because these waters would be federal, any activities affecting them would be required to obtain federal permits, whether pursuant to §402 (for wastewater discharges) or §404 (for fill and dredge materials). Requiring federal permits (whether individual or general permits) would substantially increase in the permitting workload for states as well as increase the requirements on individuals in need of permits for activities that otherwise do not require federal permits. Lastly, an individual's failure to obtain a permit if required could also result in serious civil and/or criminal penalties under the CWA.

Proponents of the Restoration Act argue that without new federal authority, 60% of the nation's important waters, 50% of the nation's streams, and 20 million acres of wetlands are unprotected and imperiled.[18] This is hyping a crisis that simply does not exist. And the argument wrongly suggests that there are no rules or regulations protecting the vast majority of our nation's water resources. The fact is that most states have the authority to protect such water bodies and, in fact, are doing so. This argument also ignores the importance of cooperative federalism and the proper role of States in regulating intrastate waters and local activities affecting such waters.

While environmental groups have long argued that states do not have sufficient resources or political will to protect valuable water resources, there is simply no compelling evidence to support this claim.[19] All states have wetlands regulations in place that protect various levels of protection.[20] And in fact there is strong evidence to the contrary. As of 2004, states such as Minnesota, Michigan, Massachusetts, Rhode Island, Maine, New Hampshire, New York, New Jersey, Connecticut, Maryland, Virginia, Florida, Vermont, Pennsylvania, and Oregon had all adopted comprehensive wetland legislation.[21] As well, when *SWANCC* was decided, numerous states, including Indiana, Ohio, South Carolina, and North Carolina, took immediate steps to fill the gap by extending state programs to protect those waters that were no longer subject to federal jurisdiction. Such a response by those states was appropriate and healthy and a signal that the CWA and its framework of cooperative federalism is working. This is not to suggest that states cannot do more nor that the federal government should not expect them to do more. However, this notion that all these wetlands and important waters are unregulated is simply not true.

It is also important to distinguish between the Restoration Act's goal of redefining and expanding the definition of "waters of the United States," as opposed to merely regulating activities that affect such waters. The fact that the Restoration Act aims to do both (i.e., expand geographic and activity-based authority), when only the latter approach is uniquely relevant to protecting water quality, raises the question of whether the unspoken purpose of the Restoration Act is more about regulating land use by redefining land subject to federal control as opposed to regulating activities that cause water pollution.

Much of the current national focus is on the need to better control and regulate nonpoint sources of pollutants—those characterized as diffuse, unconfined, and non-discrete conveyances—which currently are not regulated under the Act's Section 402 permitting program.[22] It is practicable and far preferable to regulate more broadly the various sources of pollution without expanding the definition of waters of the United States, as states are in a much better position to control such sources of water pollution. And, in fact, EPA and states are doing just that by expanding the universe of sources subject to federal regulation.[23] For example, EPA and some states are now resorting to using authorities under the Act which heretofore have not been widely used, such as the residual designation authority under Section 402(p), which allows the EPA or states to require a federal permit for a stormwater discharge that "contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States." This represents but one of the many other tools and authorities under the Act to effectuate its goal of reducing pollution without the need to expand and redefine waters subject to federal regulation.

In sum, the CWA, although not perfect, is not broken and has worked fairly well in cleaning up and protecting the nation's waters. The solution to improving the nation's water quality is not through expanding the definition of waters of the United States, but encouraging greater cooperation and accountability between the states and the federal government. By federalizing all waters, the Restoration Act would, in the words of the Supreme Court, obliterate the distinction between what is national and what is local and create a completely centralized government. Such a result is unhealthy and destructive to our dual form of government.

Mr. Murphy: The Clean Water Act establishes a partnership between states and the federal government in administering and enforcing the Act. The Restoration Act will affirm the strong federal floor of protections that anchors this relationship. Without the certainty of a strong federal floor of protections, state programs, and protections are also at risk.

States play a strong role in administering and enforcing the CWA. Forty-six states administer a cornerstone program of the Act, the National Pollution Discharge Elimination System (NPDES) permitting system under Section 402 of the Act.[51] Two states, New Jersey and Michigan, administer the Section 404 dredge and fill program. Under Section 401 of the Act, all states have authority to certify that projects requiring federal licenses or permits and that discharge into jurisdictional waters meet water quality standards.[52] Additionally, pursuant to the Act, states receive various federal grants to help protect and clean-up waters.

Over the past thirty-six years, states have structured their water pollution regulatory laws and programs around the CWA, relying on the broad federal floor of protections to safeguard their waters. For instance, most states have no separate wetlands program, relying solely on the Section 404 program for protections. States have relied on their water quality certification authority under Section 401 of the Act to protect water quality from federally licensed projects—including those seeking Section 404 permits—that might pollute waters. Additionally, a handful of states have no more stringent than laws that prohibit them from regulating water more broadly than the federal government does. This list of states includes Arizona where water is precious, but approximately 96% of stream miles are intermittent or ephemeral and therefore at-risk of losing the Act's protections.[53]

As such, states have been fervent advocates of maintaining a strong federal floor of CWA protections. In 2003, over forty states objected to any administrative rollbacks of the Act's protections when the Bush Administration was considering re-writing the regulatory definition of "waters of the United States" in the wake of *SWANCC*. It was in part to these strong state objections that this potential regulatory rollback was derailed. Additionally, over thirty states urged the Supreme Court to uphold broad federal protections when it was considering *Rapanos*.

Other problems will fray the state-federal partnership if the current legal confusion is not speedily resolved. For instance, do Corps no-jurisdictional determinations under the Section 404 dredged and fill program mean that dischargers with state issued NPDES permits to those waters no longer need permits? Do water quality standards still apply to those waters? What about total maximum daily loads? In situations where EPA retains enforcement duties for NPDES violations, but where the state administers the program, can EPA enforce violations for waters protected under state law but no longer federally jurisdictional?

Furthermore, in states like Tennessee, where state protections are currently in place for waters now federally at-risk, intensive industry efforts are already underway to rollback these state laws.[54] It is only a matter of time before some of these efforts succeed and the "race to bottom" that prompted Congress to realize in 1972 that the states were not the proper guardians of trans-boundary resources like water begins anew.

The Restoration Act will resolve the current confusion and shore up the federal-state relationship that existed prior to 2001 and worked successfully for almost thirty years. Without passage of the Act, the complicated questions raised above will no doubt be worked out in a piecemeal fashion in the courts. The almost certain result of allowing that to occur will be conflicting decisions and continuing confusion, wasted time and money, and water protection programs that frustrate regulator and regulated alike without adequately protecting our waters.

Endnotes (Fewell)

1 33 U.S.C. § 1362(7).

2 *Id*. at § 1251(a).

3 Solid Waste Agency of Northern Cook County v. Army Corps of Engineers, 531 U.S. 159 (2001).

4 Rapanos v. United States, 547 U.S. 715 (2006).

5 H.R. 2421 (110th Congress, 1st Session), *available at* http://thomas.loc.gov/cgi-in/query/?c110:H.R.2421.

6 S. 787 (111th Congress, 1st Session), *available at* http://thomas.loc.gov/cgi-bin/query/z?c111:S.787.

7 33 U.S.C. § 1251(a)(1).

8 *Rapanos*, 126 S. Ct. at 2216 (plurality) and 2237 (concurrence). Both cite *Daniel Ball*, 77 U.S. 557 (1870).

9 U.S. Const., art. I, § 8.

10 The Federalist No. 45, 292-293 (1961).

11 514 U.S. 549 (1995).

12 JNLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937).

13 Wickard v. Filburn, 317 U.S. 111, 125 (1942)

14 33 U.S.C. § 1251(b).

15 33 U.S.C. § 1251(g).

16 *See* Environmental Council of the States, *The States Definitions of "Waters of the State"*, February 2009.

17 Ariz. Rev. Stat. § 49-201.

18 *See* National Wildlife Federation, *How the Supreme Court Has Broken the Clean Water Act and Why Congress Must Fix It*, April 14, 2009.

19 *See, e.g.,* Eric Schaeffer, *Half of U.S. Wetlands Now Vulnerable Under Unwise Decision by U.S. Supreme Court*, June 22, 2006.

20 *See* Jonathan Adler, *Once More, With Feeling: Reaffirming the Limits of Clean Water Act Jurisdiction*, *available at* http://it.vermontlaw.edu/VJEL/Rapanos/9-Adler.pdf.

21 *See* Association of State Wetland Managers, "The SWANCC Decision, State Regulation of Wetlands to Fill The Gap," March 2004, *available at* http://www.aswm.org/fwp/swancc/aswm-int.pdf.

22 *See* PBS, "Poisoned Waters," *available at* http://www.pbs.org/wgbh/pages/frontline/poisonedwaters. Under the Clean Water Act, nonpoint sources are regulated through the § 319 nonpoint source management program, which requires among other things the States to "identif[y] those navigable waters within the State which, without additional action to control nonpoint sources of pollution, cannot reasonably be expected to attain or maintain applicable water quality standards or the goals and requirements of [the Clean Water Act]." 33 U.S.C. § 1329(a). Nonpoint sources are subject to federally mandated State programs that must employ best management practices to reduce water pollution. *Id.* Under § 319, the federal government is required to provide financial support and technical assistance to the states.

23 *See* http://www.epa.gov/NE/charles/pdfs/RODfinalNov12.pdf.

Endnotes (Murphy)

1 33 U.S.C. §1362(7).

2 *Id*. at §1251(a).

3 Solid Waste Agency of Northern Cook County v. Army Corps of Eng'rs, 531 U.S. 159 (2001).

4 Rapanos v. United States, 547 U.S. 715 (2006).

5 S. 787 (111th Congress, 1st Session).

6 118 Cong. Rec. 33,756-57 (Oct. 4, 1972).

7 *Id*.

8 123 Cong. Rec. 26,718 (Aug. 4, 1977).

9 United States v. Riverside Bayview Homes, 474 U.S. 121, 133 (1985) (citing S. Conf. Rep. No. 92-1236, p. 144 (1972); 118 Cong. Rec. 33756-33757 (1972) (statement of Rep. Dingell)).

10 International Paper v. Ouelette, 479 U.S. 481, 492 (1987).

11 Natural Resources Defense Council v. Callaway, 392 F. Supp. 685, 686 (D.D.C. 1975).

12 United States v. Ashland Oil and Transp. Co., 504 F.2d 1317, 1323 (6th Cir. 1974).

13 *Id*. at 1323-24 (quoting House Consideration of the Report of the Conference Committee, 118 Cong. Rec. 33756-57 (1972) (comments of Representative Dingell), reprinted in 1 Legislative History, at 250).

14 *Id*. at 1325 (quoting 118 Cong. Rec. 33756-57).

15 *SWANCC*, 531 U.S. at 172 (citing United States v. Appalachian Elec. Power Co., 311 U.S. 377, 407-08 (1940)).

16 *Rapanos*, 547 U.S. at 734 (emphasis in original).

17 *Id*. at 779 (Kennedy, J., concurring).

18 *Cf.* United States v. Johnson, 467 F.3d 56, 60 (1st Cir. 2006), *reh'g and reh'g en banc denied* (Feb. 21, 2007), *cert. denied* 128 S. Ct. 375 (2007) (either Rapanos plurality test or Justice Kennedy concurring opinion can establish jurisdiction) to United States v. Robison et al., 505 F.3d 1208, 1221 (11th Cir. 2007), *cert. denied,* 129 S. Ct. 627 (2008) (only Justice Kennedy test can establish jurisdiction).

19 Memorandum from Majority Staff Committee on Oversight and Government Reform, and Majority Staff, Committee on Transportation and Infrastructure to Rep. Henry A. Waxman Chairman, House Committee on Oversight and Government Reform James L. Oberstar Chairman, House Committee on Transportation and Infrastructure (Dec. 16, 2008); Memorandum from Granta Y. Nakayama, Ass't Administrator, EPA to Benjamin Grumbles, Ass't Administrator for Water, EPA (Mar. 4, 2008).

20 *Id*.

21 Petition for Writ of Certiorari of United States, Petitioner, United States v. McWane, Inc., et al. (Aug. 2008) at 30.

22 Letter from Benjamin H. Grumbles, Ass't Administrator, EPA to Jeanne Christie, Executive Director, Association of State Wetland Managers (Jan. 9, 2006) (mistakenly date-stamped Jan. 9, 2005).

23 The Spending Power, U.S. Const., art. 1, § 8, cl. 1, which allows Congress to condition receipt of federal funds, may also provide a basis for protecting certain waters, but this article will not discuss this potential basis.

24 U.S. Const., art. I, §8, cl. 18

25 *Rapanos*, 547 U.S. at 782 (Kennedy, J., concurring).

26 U.S. Const., art. I, §8, cl. 3.

27 See Environmental Law Institute (ELI), Anchoring the Clean Water Act: Congress's Constitutional Sources of Power to Protect the Nation's Waters (July 2007).

28 Gonzales v. Raich, 545 U.S. 1, 17 (2005) (citations omitted).

29 *See* Sporhas v. Nebraska, ex rel. Douglas, 458 U.S. 941, 954 (1982) (relating to ground water).

30 *See Daniel Ball*, 77 U.S. 557, 563 (1870) (setting forth the test for navigable in fact); United States v. Appalachian Power, 311 U.S. 377, 426 (1940) (the channels power is not limited to navigability but can encompass as commercial regulation such as flood protection and watershed development); United States v. Deaton, 332 F.3d 698, 706-07 (4th Cir. 2003 (channels prong includes keeping navigable waters free of injurious uses such as pollution) (citations omitted); *Ashland Oil*, 504 F.2d at 1325-26 ("water pollution is … a direct threat to navigation—the first interstate commerce system in this country's history and still a very important one").

31 Rivers and Harbors Act of 1899 (codified as amended at 33 U.S.C. § 407).

32 Oklahoma ex rel. Phillips. V. Guy F. Atkinson Co., 313 U.S. 508, 525 (1941).

33 Wickard v. Filburn, 317 U.S. 111 (1942).

34 *Id*. at 125-28 (citations omitted).

35 *Raich*, 545 U.S. at 17 (quotations and citations omitted).

36 *Id*. at 24.

37 *Id*. at 22.

38 United States v. Gerke, 412 F.3d 804, 807 (7th Cir. 2005), *cert. granted, judgment vacated by,* 548 U.S. 901, *on remand to,* 464 F.3d 723, (7th Cir 2006), *reh'g and reh'g en banc denied* (2006), *cert. denied* 128 S. Ct. 45 (2007) (citations omitted).

39 Hodel v. Virginia Surface Mining and Reclamation Association, Inc., 452 U.S. 264, 276-78 (1981).

40 E.g., Alabama-Tombigbee Rivers Coalition v. Kempthorne, 477 F.3d 1250 (11th Cir. 2007); GDF Reality Investments v. Norton, 326 F.3d 622 (5th Cir. 2003); Rancho Viejo, LLC v. Norton, 323 F.3d 1062 (D.C. Cir. 2003); Gibbs v. Babbitt, 214 F.3d 483 (4th Cir. 2000).

41 Donald L. Hey, Ph.D. et al, Flood Damage in the Upper Mississippi River Basin: An Ecological Alternative (Aug. 6, 2004) at 2.

42 *See Rapanos*, 547 U.S. at 777 (Kennedy, J., concurring).

43 U.S. Geological Survey, Northern Prairie Wildlife Research Center, Prairie Basin Wetlands in the Dakotas: A Community Profile, at Preface, *available at* http://www.npwrc.usgs.gov/resource/wetlands/basinwet/preface.htm.

44 The treaty power is derived from art. 2, §2, cl. 2 of the Constitution which gives the President the power to make treaties with the advice and consent of the Senate, the Necessary and Proper Clause, and the Supremacy Clause of art. VI, §1, cl. 2.

45 Missouri v. Holland, 252 U.S. 416 (1920)

46 *Id*. at 432, 435.

47 *See* ELI, Anchoring the Clean Water Act, at 12 (detailing treaties protection migratory birds to which the United States is a party).

48 U.S. Const., art. IV, §3, cl. 2.

49 E.g., United States v. Cotton, 52 U.S. 229, 231-32 (1851).

50 E.g. Camfield v. United States, 167 U.S. 518, 525-26 (1897); United States v. Alford, 274 U.S. 264, 267 (1927) ("Congress may prohibit the doing of acts upon privately owned lands that imperil publicly owned forests") (citation omitted).

51 *See* http://cfpub.epa.gov/npdes/stateinfo.cfm (providing information regarding administration of NPDES program in all fifty states); 33 U.S.C. § 1342 (b).

52 33 U.S.C. §1341.

53 Letter from Stephen A. Owens, Director, AZ Dep't of Environmental Quality to Benjamin H. Grumbles, Ass't Administrator, Office of Water, U.S. Environmental Protection Agency (Dec. 5, 2007) at 2 (stating that 96 percent of AZ stream miles are non-perennial).

54 *See* TN House Bill HB1617 (2009 session) and Senate Bill SB633 (2009 session) (both seeking to remove state level protections for ephemeral streams or "wet weather conveyances").