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Jonathan H. Adler

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PRESENTS

ENFORCEMENT OF THE CLEAN WATER ACT

Panelists:

- **Prof. Jonathan H. Adler,** Case Western Reserve University School of Law
- **Mr. M. Reed Hopper,** Pacific Legal Foundation
- **Prof. Patrick A. Parenteau,** Vermont Law School
- **Prof. Robert V. Percival,** University of Maryland School of Law
- **Prof. Steven J. Eagle,** George Mason University School of Law – *Moderator*

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Dirksen Senate Office Building,
Washington, DC

FEDERALIST SOCIETY

PROFESSOR EAGLE: Good afternoon, ladies, and gentlemen. My name is Steven Eagle. I teach at George Mason University School of Law across the river in Arlington, Virginia, and I'd like to welcome each of you to our Federalist Society program on Enforcement of the Clean Water Act. This is one of a series of programs that the Federalist Society holds to educate the public, legislators, and staff about important issues of the day.

This program is being recorded and will be available on the Federalist society website. And many individuals have been downloading and listening to these programs, so I'm pleased that we have that extended audience as well as those who are here in person this afternoon.

Historically, Congress's power to regulate water has been premised on the Commerce Clause and the importance of waterways in interstate commerce. Thus, there's been little question that dredging and filling navigable water bodies and their tributaries are appropriate subjects for federal regulation. However, the difficulty in determining precisely where waters end and land begins led the United States Supreme Court in 1985, in *United States v. Riverside Bayview Homes*, to agree with the Army Corps of Engineers that it was in reasonable to

interpret the term "waters" to encompass wetlands adjacent to waters as more conventionally defined.

At the same time, environmentalists, heeding the environmental Pioneer of John Muir's famous dictum that when we try to pick out any thing by itself, we find it hitched everything else in the universe – based on this, they argued that comprehensive water quality regulation was required and argued for extensions of waters that could be regulated under the Clean Water Act.

After much litigation in the federal courts, in a 2006 plurality decision, in *Rapanos v. United States*, the Supreme Court limited the scope of the Clean Water Act's protection of navigable waters to include only those bodies of water that are permanent, standing, or continuously flowing, and thus did not apply to channels through which water flows only some of the time.

In the wake of the *Rapanos* decision, Representative James Oberstar of Minnesota has sponsored that Clean Water Restoration Act of 2007. That would permit the Environmental Protection Agency and the U.S. Army Corps of Engineers to enforce the Clean Water Act on wetlands, streams, and ponds that are not a part of the traditional navigable waterways and their tributaries.

We have with us today a distinguished panel that will discuss the constitutional and practical issues regarding comprehensive water regulation under the Oberstar proposal. In the order in which they will be speaking, our panelists are Robert Percival, who is the Robert F. Stanton professor of law and director of the Environmental Law program at the University of Maryland. He served a on the Board of Directors of the Environmental Law Institute and is the contributing editor of *For Environment and Natural Resources* for the *Federal Circuit Bar Journal*. He is the principal author of the widely used casebook, *Environmental Regulation: Law, Science, and Policy*, and has lectured extensively on environmental law topics in the United States and abroad.

Professor Percival received his BA from McAllister College and his M.A. and J.D. degrees from Stanford University. He clerked for Judge Shirley M. Hofstetter of the Ninth Circuit and for Supreme Court Justice Byron R. White. In addition to other achievements that I don't have time to mention now, he also coaches his law school's championship softball team.

John H. Adler, who will speak second, is professor of law and Director of the Center for Business Law and Regulation at Case Western Reserve University School of Law, where he teaches courses in environmental, regulatory, and constitutional law. Professor Adler is the author or editor of three books on environmental policy, and his articles have appeared in numerous scholarly and popular publications. He also appears on radio and TV and covers environmental and legal topics for *National Review Online*. He is also a regular contributor to the legal blog, *The Volokh Conspiracy*. In 2004, Professor Adler was awarded

the Federalist Society's annual Paul M. Bator Award, given to an academic under 40 for excellence in teaching scholarship and commitment to students.

Prior to joining the Case Western faculty, Professor Adler clerked for Judge David Sentelle in the DC Court of Appeals for the DC Circuit, and from 1991 to 2000, he worked at the Competitive Enterprise Institute here in Washington, where he directed the environmental studies program. Professor Adler holds a BA *magna cum laude* from Yale University and a JD *summa cum laude* from the George Mason University school of Law. One of an academic's greatest pleasures is to savor the accomplishments of a former student, so I'm especially pleased to welcome Jonathan here.

Patrick A. Parenteau is professor of law and director of the Environmental and Natural Resources Law Clinic at Vermont Law School, where he previously was director of the Environmental Law Center. He also teaches in the environmental studies program at Dartmouth College. Professor Parenteau's previous posts include Vice President for Conservation with the National Wildlife Federation, general counsel to the New England Regional Office of the EPA, commissioner of the Vermont Department of Environmental Conservation, and he has been of counsel with the Perkins Coie law firm in Portland, Oregon. He is the recipient of the National Wildlife Federation's Conservation Achievement Award for 2005 in recognition of his contributions to wildlife conservation and environmental education. Professor Parenteau holds a B.S. from Regis University, a JD from Creighton University, and an LL.M. in environmental law from George Washington University.

M. Reed Hopper oversees the Pacific Legal Foundation's endangered species and Clean Water Act litigation. Prior to joining the Pacific Legal Foundation in 1987, he served as both an environmental protection officer and hearing officer in the US Coast Guard, enforcing the Clean Water Act in the Gulf Coast. He has managed large environmental compliance programs and written numerous environmental standards. He has litigated precedent-setting environmental and land use cases, including the recent *Rapanos* case in the US Supreme Court of which I'm sure we'll hear more about this afternoon.

Each panelist is going to make a short presentation, followed by a limited opportunity for rebuttal and conversation among the panel. And then we come to one of the most important parts of the program, which is an opportunity for you to ask questions of our panel.

So we'll start, then, with Professor Percival.

PROFESSOR PERCIVAL: Thanks, Steve. It's a real pleasure to be here. The timing of this was perfect because it gave me an excuse to skip a faculty meeting this afternoon.

I actually live just a few blocks away from here, and every time I speak for the Federalist Society, I do have to note that as a resident of

the District of Columbia, I think the absolute number one most important Federalism issue is the fact that I don't have any voting representation in Congress. I've lived here for 28 years, and I would hope that the Federalist Society would focus a little more on that. It's nice to see some action finally in Congress on that.

It shouldn't be a partisan issue because, if you look at history, President Bush's grandfather, Prescott, a Republican senator from Connecticut, was a great champion of DC voting rights, and in fact, along with Republican President Eisenhower, helped to get the 23rd Amendment through Congress. So we at least have voting representation for president. It would be nice if the bill that currently has the brilliant political compromise with giving Utah the ecstasy gets voted on soon in the Senate. I always have to say that when speaking to the Federalist Society because it's near and dear to my heart.

We have a baseball team now, which is great. Now just give us voting rights.

The topic of today's discussion is also very important because we have a situation now that is really intolerable no matter what side of the political fence you sit on. Due to the Supreme Court's decision in the *Rapanos* case last year, the law is completely confused with respect to the scope of federal jurisdiction under the Clean Water Act. I testified before Congressman Oberstar's committee on July 17, and my remarks are sort of a condensed version of that. If you want to see that testimony in more detail, it's online at the Committee's website.

Basically, I'd like to make four points. First, Congress properly recognized in 1972 when it passed the original version of the Clean Water Act that a comprehensive approach would be necessary to protect the nation's waters. Thus, it intended to exercise the fullest extent of its constitutional powers when it adopted legislation requiring permits for all discharges of pollutants or dredged or filled material that would degrade the nation's waters.

Second, the courts properly recognized that Congress had acted wisely when it entrusted the U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency with responsibility for implementing this program. Thus, in its 1985 *Riverside Bayview* decision, the U.S. Supreme Court unanimously deferred to these agencies in upholding their broad application of the Act to wetlands contiguous to open waters.

Third, as the result of two sharply decided Supreme Court decisions, not just the *Rapanos* decision in 2006, but also the *SWANCC* decision in 2001, everyone agrees that confusion now reigns over the scope of federal jurisdiction to protect the nation's waters. This confusion benefits no one and can only be dispelled by the adoption of new legislation clarifying the scope of the Act.

Fourth and finally, Congress has ample constitutional authority to restore the Act to its initial premises. First, Congress intended to pro-

vide comprehensive protection to the nation's waters. The Clean Water Act was enacted in 1972 to create a comprehensive federal regulatory program to ensure that the chemical, physical, and biological integrity of the nation's waters would be protected. Congress realized it was doing something quite expansive when it adopted that Act because it thought it was necessary. And in fact, the Supreme Court recognized that early on in 1981 when, in the case of *Milwaukee v. Illinois*, the Supreme Court held that the Clean Water Act was so comprehensive that the federal common law of interstate nuisance had been preempted by this.

This is quoting Justice Rehnquist's majority opinion in a case. "In view of the breadth of federal regulatory authority contemplated by the Act itself and the inherent difficulties of defining precise bounds to regulable waters" – oh, excuse me. I'm quoting from *Riverside Bayview.*

Here's what Justice Rehnquist had to say in 1981. Justice Rehnquist said that "the problem of controlling water pollution is difficult and technical; doubtless the reason Congress vested authority to administer the Act and administrative agencies possessing the necessary expertise." He opined that courts were particularly unsorted to resolving, through sporadic and ad hoc application of federal common law, the disputes over the extent of federal regulation. Thus, even the justice most clearly associated with championing state sovereignty and constitutional limits on federal authority acknowledged the comprehensive scope of the Clean Water Act and the wisdom of deferring to expert judgments of the agencies charged with implementing it.

Then in 1985, we get the *Riverside Bayview* case where the Court was asked to decide whether the Act applied to a wetland that was not itself a navigable water in the sense of being navigable, in fact, but was adjacent to navigable waters. And there, the Court unanimously, in a decision by my old boss Justice White, said that we should defer to the Corp's judgment because of the breadth and comprehensiveness of the Clean Water Act. And that's when he wrote, "In view of the breadth of federal regulatory authority contemplated by the Act itself and the inherent difficulties of defining precise bounds to regulable read global waters, the Corp's ecological judgment about the relationship between waters and their adjacent wetlands provides inadequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act."

Now, that decision is still good law in the sense that the four justices in the plurality in *Rapanos* did not purport to overturn it. They did, however, try to confine it to its facts without challenging, though, the underlying reasoning of the Act, which I suggest supports a broader interpretation of the Act.

Now what's happened as a result of the *Rapanos* decision? Confusion reigns. That confusion was illustrated by Professor Eagle's introduction where, in giving the holding in *Rapanos*, he quoted Justice Sca-

lia's plurality opinion. However, the Court split 4-1-4 in *Rapanos.* The four dissenting justices, led by Justice Stevens, explicitly rejected the notion that the Act only applied to contiguous, standing, or flowing bodies of water. Justice Kennedy, who agreed with neither the four dissenters nor the four in the plurality, expressly rejected that. So we have five of the Justices of the Court rejecting Justice Scalia's radical new interpretation of the Clean Water Act.

Justice Kennedy, in his concurring opinion in the judgment, basically said that the Corps should, on a case-by-case basis, determine whether there's a significant nexus between the waters, the wetlands it seeks to regulate, and the navigable waters downstream. That approach was rejected by the other justices. And yet, it is in fact the law that has to be applied today because it's an approach that is closest to what would be determinative in another case they came up because the four justices in the dissent said they basically would defer to the Corps' judgment.

So the result is that you have a situation where the law of the land – and its law that no one knows exactly how to apply Justice Kennedy's significant nexus test because he just made it up himself – is that represents the views of a single justice that were rejected by all other eight members of the Supreme Court. And I submit that that is causing confusion that is simply intolerable because no one knows what the true scope of federal jurisdiction is. So it certainly would be appropriate in those circumstances for the Congress to step in and clarify the law.

It's also interesting to note that when the *SWANCC* decision came down initially in 2001, the EPA and the Corps had actually proposed adopting new regulations. But 41 of the 43 states who responded to the Agency's request for comments opposed any significant narrowing of the Corps' jurisdiction, as did roughly 99 percent of the 133,000 other comments that were submitted, which convinced the White House to withdraw that proposal and not to redefine the waters of the United States in response to the *SWANCC* decision.

I submit that this actually should not be a partisan issue because the Bush administration fully defended both the Corps and EPA in the *Rapanos* case, and they were joined by – most of the states who filed *amicus* briefs came in on their side, arguing in fact that as a matter of federalism it was important to have strong federal regulatory authority in order for them to be able to deal with the transboundary pollution that could otherwise be caused by wetlands being destroyed in upstream states.

Now, the only way to clarify this would be to adopt legislation. The Oberstar bill effectively would adopt what Justice Breyer suggested in his separate dissent in the *Rapanos* case, simply stating that it's the intent of Congress in the Clean Water Act to extend federal jurisdiction to its constitutional limit. That does not mean that there's no limit to

federal jurisdiction. It still would have to be demonstrated that the waters that were going to be regulated would have a significant impact on interstate commerce in order for them to be able to be regulated under the Commerce Clause or, in light of the Supreme Court's decision in the *Gonzalez v. Raich* case, it would have to be demonstrated that it's necessary to regulate those wetlands in order to avoid undermining a larger federal regulatory program.

I submit that there is no question that Congress has the constitutional authority to extend federal jurisdiction to the limit of its constitutional authority. That's essentially a tautology. That, I think, would be the easiest solution in these circumstances. Otherwise, you'd have a situation where, even if destruction of a wetland would have a significant effect on interstate commerce and cause substantial environmental damage, it would not be regulated under the Act.

So that's why I think the Congress is doing the right thing by considering this legislation, to clear up this confusion.

Thank you.

PROFESSOR EAGLE: Thank you, Professor.

Next, we have Professor John Adler.

PROFESSOR ADLER: Thank you, Steve. It's a pleasure to be here. Like Bob, I'm getting to miss a faculty meeting today as well. So just for all of you, if you're looking to invite law professors to events in the future, find out when their faculty meetings are, and you'll have a much easier time getting them to come.

I should also just say that when I was a DC resident and I used to see – they started coming out of the license plates that said "No Taxation without Representation," I was just hoping they were going to get rid of my taxes. But that didn't happen either.

Now Bob and I would certainly agree, and in fact I think probably all of us on the panel would agree, that certainty in the law is a very good thing and that we would like to see greater certainty in terms of what is covered under the Clean Water Act, what activities and what lands and what waters are subject to federal regulation and what ones are not. This is not only important for the regulated community that needs to know what things it needs to ask the federal government permission for, but it's also important for nonfederal actors that are involved in environmental protection. States need to know where federal authority ends and state authority begins. Nongovernmental conservation organizations need to know where to devote their resources so they can complement the efforts of the federal government in terms of protecting the environment.

But the problem is that the confusion in this area didn't begin with *Rapanos*, and enacting legislation such as the Oberstar legislation that's been proposed, won't do anything to end the confusion about the scope of federal regulation over waters and wetlands. Ever since the Clean Water Act was first adopted, there was some uncertainty and

confusion and debate over the precise scope of its authority. Initially, the Army Corps of Engineers did not think, for example, the navigable waters of the United States included wetlands, and that was not resolved until litigation in 1975 brought by the Natural Resources Defense Council that resolve that issue in favor of the Corps having more regulatory authority than it thought it had. And after being thrown into that briar patch, interestingly enough, the Corps of Engineers did not appeal the federal district court's judgment.

The migratory bird rule that was adopted in the 1980s certainly engendered some additional confusion and debate over the scope of the Clean Water Act. The various delineation manuals adopted by the various federal agencies that have some role in dealing with wetlands prompted quite a bit of confusion. Some folks will remember the infamous 1989 wetland delineation manual that greatly expanded those lands that were considered wetlands and therefore subject, through the dredge and fill permitting requirements under Section 404, and Supreme Court decisions prior to *Rapanos* certainly created confusion as well.

The *Lopez* decision in 1995, which I'm sure we'll talk about quite a bit, that struck down the Gun Free Zones Act for exceeding the scope of Congress's authority under the Commerce Clause, was recognized by many at the time as casting a shadow over the federal government's definition of waters and its assertion of authority under the Clean Water Act. In fact, one noted environmental scholar said that the Corps and EPA regulations were clearly out of bounds post-*Lopez*.

This same scholar said that he thought the agencies could rewrite the regulations to achieve much the same purpose but that, as written, insofar as they asserted authority over waters and wetlands, that would merely affect interstate commerce as opposed to significantly affect and could assert authority if that effect was even simply potential, as opposed to actual. That assertion of jurisdiction was broader than allowed for by the Court in *Lopez*. And that scholar was not some raving libertarian ideologue or opponent of federal government authority. It was our colleague Richard Lazarus, who works not far from here, writing in the *Environmental Forum*, the magazine of the Environmental Law Institute.

This *SWANCC* decision certainly increased some of the uncertainty when it took a step toward applying the Court's *Lopez* holding to the Clean Water Act, and then certainly *Rapanos* has added to the uncertainty still and the confusion still.

I would suggest that if we want an end to this confusion, we don't want this legislation. We don't want the guidance that the Bush administration recently promulgated either. The thing that would do the most to reduce confusion would be a notice and comment rulemaking that would actually clarify in the sort of detail that is required to pro-

vide actual guidance where federal authority ends and other authority begins.

I should just note among other things, one of the problems with the guidance is that it adopts this theory that either the Justice Department has adopted and that Justice Stevens suggested, that there might be waters out there that fail to satisfy Justice Kennedy's significant nexus test but somehow satisfied with Scalia plurality and the dissent and would therefore be subject of federal jurisdiction. I think that is one of several areas where the guidance goes astray. I think the waters that satisfied the Scalia plurality and the dissent but do not satisfy Kennedy is a null set. Justice Scalia, in a footnote, makes clear that the continuous surface water connection that he posits as the basis for jurisdiction is a necessary but not sufficient condition for federal authority, and yet that the additional connections that he would require would certainly satisfy Justice Kennedy as well. So the guidance is not going to end the confusion. And I think there are aspects of the guidance which suggest things about the opinion which I don't think are accurate.

Now what happens if we eliminate the word "navigable" from the Clean Water Act? Does that suddenly end the confusion? In one sense, we might say, well, you know, this means we get to regulate everything. Right? We get to regulate all water; all interstate waters, all intrastate waters, all impoundments thereof, so we're creating, regulating not just natural waters but those that are artificially created, salt ponds. If our colleague, Professor Connelly were here, she would yell at me if I suggested that this would give the federal government authority to regulate swimming blows and birdbaths.

I'm not suggesting the Corps would try and do so, but I think eliminating the word "navigable" certainly could lead one to that conclusion, just as the Corps of Engineers has stated in the *Federal Register* that if it wanted to, it could regulate somebody riding a bicycle across the wetlands because the bicycle would be lifting up and redepositing dirt as it went along, and that it could regulate walking on wetland if it shows chose to.

I think that that's not what the Corps would actually try to do, but I think the real reason why eliminating "navigable" does not create certainty or eliminate confusion is because all it does is it begs the question, what does the statute do by its own terms? It says, well, we're going to regulate waters to the fullest extent of Congress's constitutional power. Okay, but that's precisely the question that needs to be answered is, what is the scope of Congress's constitutional power? And one thing we know from *Lopez*, one thing we know from *SWANCC*, and one thing we still know from *Rapanos* is that Congress's power in this area is not unlimited.

We know that in the *SWANCC* decision, the majority explicitly reinterpreted the Clean Water Act narrowly and explicitly construed the

extent of jurisdiction narrowly in order to avoid what it said were very difficult and potentially problematic constitutional questions about the scope of federal authority, and it was going to adopt the traditional canon of construction to read a statute narrowly to avoid a constitutional question.

Now some folks have suggested, oh, but this canon disappears suddenly disappears in the *Rapanos* decision. And that is a misreading of the *Rapanos* decision. Certainly, the plurality decision notes that – but Justice is Kennedy himself in the *Rapanos* decision makes clear that one basis for his significant nexus test is that it avoids the constitutional problem. He says, "As exemplified by the *SWANCC*, the significant nexus test itself prevents problematic applications of the statute." Kennedy makes clear that adopting some broader test, such as that embraced by the minority or as called for in this proposed legislation, would involve problematic applications of the Clean Water Act and would call into question Congress's constitutional authority over certain waters.

Unless one believes that Kennedy had a change of heart on that view, a majority of the Supreme Court still believes that asserting regulatory authority over all waters inter- and intrastate, irrespective of their connection to navigable waterways, would raise serious constitutional questions.

Now as I mentioned, if one really wanted to eliminate uncertainty, what could one do? One thing one can do is have a new notice and comment rulemaking identifying categories of waters and wetlands and the characteristics that would be indicative of a significant nexus. And Justice Kennedy in his opinion gives lots of indications, and in fact in some respects provides a roadmap of the sorts of things that could be done in a rulemaking.

One of the things he suggests is permissible, and I think at least some of the justices that signed on to the Scalia plurality would accept as well, would be the Corps of Engineers and EPA identifying certain types of waters and certain types of wetlands that, because of certain types of characteristics, would be very likely to have a significant nexus to navigable waterways. Justice Kennedy, for example, in explaining the holding or justifying the holding of *Riverside Bayview Homes* explains that that's essentially what was done. The claim is not that every single wetland adjacent to a navigable waterway has to be proven to have a significant nexus with navigable waterways but that it would be reasonable for the Corps of Engineers to make that assumption and explain that sort of assumption. That is something the core and the EPA could do.

I want to spend a couple minutes on what I think they should do because, while I do think they should engage in notice and comment rulemaking, I don't think they should do so with the aim of seeking to reassert as broad regulatory authority as they sought to exercise in the

past. Rather, I think they should take a different course. I think those who are interested in improving the quality of water protection in this country, the aim should not be to have the federal government regulate as much as it can but rather to have the federal government focus on those things which only the federal government can do or which the federal government is in a particularly good position to do.

Whether we like it or not, the EPA and the Corps of Engineers have limited budgets. They are not suddenly going to get thousands of new staff when this or similar legislation is enacted to review permits and to evaluate activities, and they will have a choice of either, as one environmental commenter put it, issuing permits like a piñata or simply sitting on permits and not issuing anything at all.

Or they will just, as they often do, act arbitrarily. There was an empirical study several years ago looking at the Corps of Engineers' evaluation of individual permit applications, finding that despite what we would expect the Corps of Engineers, it gave no consideration, at least in the actual records of the permit applications and the review process, there was no evidence the Corps of Engineers gave any consideration to the actual ecological impacts of permit applications prior to asking for mitigation requirements. That certainly is not the sort of program that we should be defending. And expanding the Corps jurisdiction and expanding EPA's jurisdiction will encourage more of that sort of regulatory activity rather than the sort that we should want.

So what should we ask the Corps of Engineers and EPA to do when it comes to waters and wetlands? Well, we should be asking them, and if there is legislation, what legislation should be focused on, is ensuring that federal efforts are focused on those areas where there are clear federal interests. And certainly, that involves protecting interstate waterways. I would note that the Clean Water Act, as Bob noted, is so comprehensive as to preempt interstate water pollution or interstate common-law nuisance actions but not intrastate common-law nuisance actions. Similarly, the federal interest is stronger when we're talking about interstate pollution problems, when an upstream state is doing something that could damage a downstream state, but not nearly so strong when we're dealing with water uses and land uses, the effects of which are primarily felt locally or even regionally. It's one thing for the federal government to be focused on preventing the pollution and obstruction of interstate navigable waterways; it is another thing to be worried about the filling of every prairie pothole or the modification of arroyos and the like throughout the nation.

I think I should maybe just want to get into this in discussion. I think there is an argument to be made, as well, that federal authority under *Rapanos* or to enforce the NPDES program, for example, is broader, or as a practical matter is broader, than for Section 404 because there are activities that we could characterize as upstream that would result in the discharge of a pollutant because of their down-

stream effects but would not themselves be occurring in waters in the United States.

I think that the federal government should leave room for states and non-regulatory programs and nongovernmental conservation organizations. We often say, and it's certainly said again and again in this legislation, well, the reason we have everything the federal government does in this area is because states and everyone else failed, and it's not quite clear to me that that's the case. In the context of wetlands, state governments regulate it first, and today many state governments regulate better. Every state in the continental United States with more than ten percent of its land area classified as wetlands regulated before the *NRDC v. Callaway* opinion that applied to the Clean Water Act to wetlands.

The first state to do so was Massachusetts in 1963 in the case of Water Quality – and I'm going to be super quick because I'm getting the hook – the First National Water Quality Inventory looking at the decade prior to enactment of the Clean Water Act found significant improvement in many waterways. The Cuyahoga River fire of 1969, something that occurred close to where I live now, is often taken as a symbol of how bad things could get before the federal government intervened. What people forget is that river fires of that sort had once been common. In the late 19th century and early 20th century, they were common not just in Cleveland but in many major cities and industrial areas. That was an environmental problem that had been addressed, and things were often in a good direction.

If we're concerned about protecting waters and wetlands, there are a lot of other things that we should be going instead of expanding authority of the Clean Water Act. One, which I know won't be popular, we would, for example, get rid of ethanol subsidies that discourage participation in conservation programs, which in the case of prairie potholes has a very significant negative effect, and expanding the scope of the Clean Water Act, I would know, will have very little effect on protecting those wetlands.

And my time is up. Thank you.

PROFESSOR EAGLE: Thank you, John.

Okay, Professor Parenteau.

PROFESSOR PARENTEAU: Well, unlike my colleagues, I'm not happy to be in DC. It was 42 degrees at my house this morning. It was nice and cool, and I was looking forward to a crisp early autumn day in the Green Mountains of Vermont with my little cider press out front and my kids kicking a soccer ball around and the gentle twilight of a nice cool New England evening. Ah, alas.

We do have a little bit of Yankee wisdom I'll share with you from Vermont, and that is if it ain't broke, don't fix it. And so the question obviously is what's broke? And does the Oberstar bill fix it? And what's broke is that we no longer have anything resembling a workable,

understandable, predictable tool for determining the scope of federal, geographic jurisdiction under the Clean Water Act. And who broke it was the five-member majority of *SWANCC*. *SWANCC* is the source of the problem. *Rapanos* has compounded it, but *SWANCC* is the problem.

And the problem is that Justice Rehnquist and his colleagues in their infinite wisdom thought it was necessary to "give some effect" to the term 'navigable' in the designation of 'navigable waters', waters of the United States, under the Clean Water Act. You see, up until that point we were all quite happy – well, more or less – with a settled scope of federal jurisdiction. Did you know that? That we had a settled scope of federal jurisdiction prior to *SWANCC*? We did. Thirty years of it; over 30 years of it.

And maybe be a little different than some of my colleagues, I don't think there's really been any inconsistency whatsoever from EPA on the scope of the Clean Water Act right from day one. The very first General Counsel's opinion in 1973 on the scope of the Clean Water Act nailed it and said that we will exercise our jurisdiction to the fullest extent of Congress's constitutional authority under the Commerce Clause.

So there really hasn't been a whole lot of inconsistency, notwithstanding some of the justices' of the Supreme Court attempt to create such inconsistencies over the history of the Clean Water Act leading up to *SWANCC*. It was basically the entire tributary systems of navigable waters. That's what the regulations said after *NRDC v. Callaway*. That's what they've always said. That's what they say today.

The Courts have never struck down the regulations. It struck down a migratory bird rule which wasn't a rule at all; it was language in a preamble. *Rapanos* didn't strike down any regulations. They remanded the case for some more thinking and cogitating. So the regs that have been on the books since *NRDC v. Callaway* are still there. And the scope of federal jurisdiction articulated in those regulations is the same. It's always been the same, and it's been consistently upheld by the courts over 30 plus years repeatedly. In fact, it was upheld by the courts post-*SWANCC* by five circuit courts – we'll ignore the Fifth Circuit for now – and all district courts to have considered the question. Something like a total of 50 or 60 opinions of the lower courts since *SWANCC* have all upheld that jurisdictional scope of the Clean Water Act – even the Fourth Circuit. A very conservative panel, I might add, of the Fourth Circuit in *Deaton* saw no constitutional problems whatsoever with asserting jet federal jurisdiction over the entire tributary systems of the nation's navigable waters. So that's what's broke. That's what's broke, and the Supreme Court broke it, and there's only one place we can fix it, and that's here. And that's Oberstar for now, unless somebody's got a better idea. So not surprisingly, I think Oberstar's bill is a good idea. I think in fact it's the only idea.

Now let's be clear about what we're not debating here. We're really not debating whether the 404 dredge-fill permit program is an ideal wetlands protection statute because it is not. It isn't even a good regulatory statute because it doesn't regulate historically and even today the major source of wetlands loss, which is drainage; not the addition of dredged material. That's not even a complete regulatory program.

Aside from the fact that it probably doesn't make sense for the federal government to be regulating each and every wetland loss all over the country – there's a shock coming from me perhaps, but it doesn't make sense – but it is by default the only national wetland protection program we have. So those of us who've spent a lifetime trying to make it work and defending it are sort of stuck. I wish somebody would put forward a real national wetlands protection law, like Justice Scalia called for in *Rapanos.* I love it. And if it was all voluntary, and all money, and buy all hundred million acres of remaining wetlands, whoopie. But that's probably not going to happen, so we're left with 404.

And 404 has been the wage on this issue, notwithstanding that the jurisdictional predicate for the Clean Water Act covers everything. It covers the 402 program. It covers the hazardous and oil spill liability program – everything. TMDLs, water quality standards, 319 non-point source pollution grant programs, everything is predicated on the jurisdictional scope of the Clean Water Act. So it is incredibly important to the whole national approach to dealing with water quality problems.

But the 404 program has been a wedge, and as my colleague, Bob Percival has articulated here, there's basically three Supreme Court decisions. In *Riverside,* unanimously the Court got it right. I'd give them a B+ because they probably should have gone even further and completely resolved the question of Congress's constitutional authority and the scope of the jurisdiction over non-adjacent or isolated wetlands, of which there are none. Really, the better term for these wetlands that I've come up with is jurisdictionally challenged wetlands. That's really a more logical way of thinking about them because of course there is no such thing as an isolated wetland, and Stephen Eagle has made that point clear from John Muir's famous quote.

In *SWANCC,* they got it wrong. Five of them got it spectacularly wrong. And then in *Rapanos Carabel,* they didn't get it at all. So we can no longer look to the Supreme Court for any guidance on this question, and in the lower courts since *SWANCC* – and I believe Reed Hopper is going to address this, so I won't steal any of his time or thunder – once again, I'm seeing the same pattern. It's a little different and a little more disjointed than what we saw post-*SWANCC.* I'm seeing the same thing. I'm seeing the circuit courts insisting on not rolling back the jurisdiction of the Clean Water Act, as somewhat like to see it, and trying to invent various theories and formulae for how to find jurisdic-

tion over waters that might otherwise be questionable under at least the plurality ruling in *SWANCC.*

So I have four points too. One, Congress has to straighten this mess out. The buck has to stop here. Guidance that's been issued – nice try. Actually, I'm not as critical of it as some of my friends and colleagues in the community. I think given the mess that the agencies were given with *Rapanos*; they did the best they could, close enough for government work. But it isn't going to result much of anything. The field staffs that I've talked to, the EPA staff, the Corps staff, have no idea how to implement it in any logical fashion with the resources that they have. Guidance isn't going to fix it.

Rulemaking – I hear a lot of talk about rulemaking. Three or four of the justices in *Rapanos Carabel* said, oh, we need rules. Rules can't resolve statutory intent. It's not going to happen. First of all, the rules themselves aren't going to happen. This administration isn't going to promulgate a rule. I'll eat your car if they do.

Secondly, I don't know what the next administration's going to do, but it's going to take a hell of a long time before they do it. So waiting for Godot, waiting for a rule to fix it all, it's not going to happen. Courts – yeah, well, you know, the courts will muddle through, just like Roberts. Chief Justice Roberts in his very helpful way, his very leadership way, said muddle through. So that's what they'll do. And my prediction is they'll muddle through finding jurisdiction more often than not. Now, so how do you like that?

In the meantime, of course, wetlands will be lost by default. The Corps will look the other way, throw up its hands, don't know, developers will go ahead and hope they don't get caught. The more sophisticated developers with a lot of financial risk involved are going to be very leery and nervous about proceeding as if, yes, well, we're fine. We don't need a permit here. So it's not a good situation.

Point two; I did think Oberstar will fix the problem as much as it probably can be fixed. It does, in my view, simply codify the existing regulatory scope of the Clean Water Act, the one, as I said, has been upheld for three decades. I don't think it expands it. If it does, it's some creative argument in lawyering that would do it. It's not intended to expand it. I don't think it will expand it. I think it codifies the pre-*SWANCC* world, which as I say was a world that most people had figured out how to live with at least. I think it's certainly consistent with the post-*SWANCC* case law that I referred to – the Oberstar bill, I mean – and the jurisdiction in any existing regulations.

So I did think Oberstar is the only way to fix this Supreme Court problem. Whether the language of Oberstar does it, whether it goes far enough, whether it could be tweaked and improved, well, those are good questions. But as a starting point, certainly at the markup vehicle, good piece of legislation.

Point three; I don't see any constitutional problem. ELI just put out a nice quickie – not quickie, but succinct – study of all the constitutional bases, the Commerce Clause, Treaty Power, Property Clause, Necessary and Proper Clause. I commend it to your attention; I don't have time to talk about it. But it's a good piece of work, and I think it puts to rest any serious doubt about Congress's constitutional authority to protect the waters of the United States.

Point four, I think the broad federal jurisdiction that I'm talking about here is absolutely necessary to achieve the purpose of the Clean Water Act, which, after all, is not to preserve the navigable capacity of the nation's waters but to restore and maintain their chemical, physical, and biological integrity, and you're not going to do that with a statute based on a 1954 dictionary definition. I'm sorry, but it won't work. We have to think ecologically.

It's not necessary for the law to be in perfect sync with science, but the closer we can get law to scientific reality, at least approaching what science is telling us about the complexity of aquatic ecosystems, I think that's a good thing. That's better than a law that's diverging off into another direction which has nothing to do with our understanding of how ecological systems work, the interrelationship of streams and wetlands and rivers and lakes and estuaries. We can't intelligently manage our activities and ourselves unless we think that way, and the law should reflect that thinking – in other words, an ecosystem-based thinking.

A few quick factoids for you. This whole battle is about headwaters. This is about first and second order streams and their associated wetlands. That's what we're talking about. That's the battleground that we're talking about. That's where 70 percent of the flow of the navigable waters comes from. That's where about 60 or 70 percent of the public water supplies are found. That's where 45 percent of the point sources that are regulated currently under the Clean Water Act are found. Those are important resources. We've got to protect them.

Thank you.

PROFESSOR EAGLE: And last, Reed Hopper.

PROFESSOR HOPPER: It certainly became apparent during Professor Eagle's introductions that if I'm going to get equal billing with my colleagues, I need to increase my curriculum vitae.

There are, in addition to the difficulties the *Rapanos* decision created in not settling the question as to the full scope of the commerce power or the full scope of the Clean Water Act, I think there are some very specific areas of agreement with which at least five members in the majority would accept:

Number one, that there are indeed constitutional limits to the commerce power and that it cannot be relied upon to regulate all waters in the United States;

Number two, that a mere hydrological connection between a wetland and a navigable in-fact water is not sufficient, even under the Clean Water Act, to establish federal jurisdiction;

Number three, that insubstantial connections between wetlands and navigable in-fact waters are insufficient to establish jurisdiction under the Clean Water Act.

Justice Kennedy with a quite clear on this point him, and of course, the Scalia plurality was quite express about it. In addition, I would suggest that we have agreement among the four in the plurality and Justice Kennedy that the *SWANCC* decision did more than invalidate the migratory bird rule but rather prohibited federal jurisdiction over isolated ponds and wetlands. This should have put to rest the argument that *SWANCC* merely applied to the migratory bird rule and is limited to its facts. It's much broader than that.

I think the final point that there is some agreement on in the Supreme Court under the *Rapanos* decision is that *Riverside Bayview* is to be limited to its facts. Justice Kennedy suggested that the only factual situation addressed by the Court, was a wetland abutting a navigable in-fact water and that the Corps could not rely on that case to categorically regulate wetlands that abut or are adjacent to non-navigable waters. So I think that that's those are significant clarifications, and they would be advantageous were they to be followed by the Corps and the EPA and were they to be accepted by the courts below.

Well, where do we stand post-*Rapanos* with respect to the litigation? The big debate after *Rapanos* now is which is the controlling opinion? Is it the Kennedy significant nexus test, or is it the Scalia plurality which limits federal regulation to navigable-in-fact waters and those traditional bodies of waters like rivers, lakes, and streams that are relatively permanent and wetlands that abut and are indistinguishable from those covered waters?

Well, *Rapanos* Carabel are back in the district court on remand, and under the Sixth Circuit rubric the federal government will be able to establish jurisdiction under either the Scalia plurality approach or the Kennedy significant nexus test, either one. We've had a few circuit courts that have addressed *Rapanos,* and one is the Ninth Circuit in *City of Healdsburg,* in which case the Ninth Circuit determined that the controlling opinion is the Kennedy significant nexus opinion. The court applied the *Marks v. Hill* rule that says that the controlling opinion is that opinion that would be agreed to by those who concurred in the judgment and which is the most narrowly drawn. And without much more analysis than that, this Ninth Circuit decision came down on the side of the significant nexus test.

The Seventh Circuit, in *United States v. Gerke,* also concluded that the significant nexus test is controlling in *Rapanos* because, in its words, it was the least restrictive of federal authority. So, we have these two circuits that say that the only standard on which jurisdiction may be

based is the significant nexus test, as per Kennedy in the *Rapanos* decision.

But we now have a conflict between those circuits in the First Circuit in *United States v. Johnson.* In the *Johnson* case, the court said that the *Gerke* decision was wrong, that it makes just as much sense to declare that the controlling opinion is the one that's the most restrictive of federal authority, not the least restrictive. In any event, the court said it really can't tell which is controlling opinion, so either the Scalia plurality or the Kennedy significant nexus test could be applied. So we have a split between those of the Ninth and Seventh and the First. The Pacific Legal Foundation represents Gerke and Johnson, and we have filed petitions to the Supreme Court in those cases. They're now pending. We're asking the Court to resolve the conflict as to the controlling opinion in *Rapanos.* So again, we're back in the court, and it's anybody's bet as to whether or not we'll get any resolution.

Now another couple of cases to keep an eye on that are coming up in the circuits is *U.S. v. Lucas.* This is a criminal case that has been briefed and argued in the Fifth Circuit, and it raises the question as to what the jurisdiction of the Corps and specifically what is the controlling opinion under *Rapanos.* You may recall that it was the Fifth Circuit the ruled prior to *Rapanos* that the *SWANCC* decision was correct and that it limited federal authority under the Clean Water Act to actual navigable waters and wetlands abutting those waters.

Then, the Second Circuit is considering currently at a case called *Simsbury-Avon v. Metacon.* We're representing Metacon Gun Club in the case. In that case, the district court determined that the wetlands in that particular case were not jurisdictional under both the Kennedy significant nexus test and the Scalia plurality.

Well, what is been a federal response now we have this *Rapanos* decision? As has been mentioned, we have the EPA and the Corps guidance. In our view, this is just business as usual. What will not be regulating categorically will be regulated based on the significant nexus rubric. We think that will be a *pro forma* effort, even thought Justice Kennedy requires a site-specific analysis. It's not going to take much for hydrologists to determine that wetlands in the region have a significant impact. The Corps of Engineers is already on record, argued in the *Johnson* case and other cases, that all wetlands are significant by definition.

We think that this guidance really goes too far in that it authorizes the categorical regulation of wetlands that abut non-navigable waters. As was previously mentioned, under the plurality test it's not enough that the wetland abut a non-navigable water that may be a permanent feature. It must be indistinguishable such that you can't tell where the water ends and the land begins. You've got to have a connection like that. That was upheld *Riverside Bayview.*

Also, Justice Kennedy said that the agencies cannot regulate categorically wetlands adjacent to non-navigable waters without adopting new regulations. So these new guidelines are inconsistent with both the plurality and Justice Kennedy's opinions. They also, I think, don't constitute merely an interim situation. I think that the intent is that this guidance would take the place of any future regulations. I think that's a mistake. And expressly, the guidance does not come to grips with the *SWANCC* decision. Although the court was quite clear in *SWANCC*, and as I indicated earlier, all factions on the court interpreted *SWANCC* to prohibit regulation of isolated ponds and water bodies. The Corps still asserts regulation over those types of water features.

Well, what about the Oberstar bill? Contrary to my colleagues, I disagree that there has been 30 years of consistent regulatory interpretation as to federal jurisdiction. Quite the contrary. GAO was able to establish that that's the case in both *SWANCC* and in *Rapanos*. The majority and the plurality castigated the Agency for its ever-changing definition of regulations. In 1974, two years after the promulgation of the Federal Water Pollution Control Act, the Corps said that its jurisdiction under the Clean Water Act only extended to traditional navigable waters. In *SWANCC*, the Supreme Court said that was a correct interpretation. Also, the migratory Bird rule was not adopted until after *Riverside Bayview*. The Court did not assert jurisdiction over drainage ditches and the like until after *Riverside Bayview*. There has certainly not been a consistent interpretation.

Now, as to the notion that this bill merely codifies the current regulations, that is patently wrong. I'll give you an example. The current regulations exclude from federal jurisdiction wetlands adjacent to other wetlands. That does not appear anywhere in the Oberstar bill. I also disagree respectfully with Professor Percival, who said that this bill would not apply except in cases where it is established that there is an appropriate connection with interstate commerce. That's exactly why this bill is unconstitutional. It does not include any jurisdictional requirement. It categorically states that Congress has the authority to regulate all waters without limit. That's clearly unconstitutional.

As I said, one of the things that's clear from *Rapanos* and should've been clear from *SWANCC* was that there are limits to the commerce power. And again, Roberts castigated the Government for not having recognized that from its prior decision in *SWANCC*. I would just add that I think that what is really required here – we'll never reach a situation where there's clarity, but I think what's really required here to achieve some clarity and to protect wetlands, at the same time recognizing constitutional limits, is for the government, through regulation, to adopt the plurality approach in the *Rapanos* decision.

Thank you very much.

PROFESSOR EAGLE: Thank you, Mr. Hopper.

And now before we get the questions, I'd like to ask the panelists, starting with Professor Percival, whether they have any brief comments occasioned by the other presentations.

PROFESSOR PERCIVAL: Yes, just a couple of brief comments. I'm glad to see Jonathan make the point that the Corps has limited resources, and so they're not going to be regulating birdbaths. Usually when we have these debates, you hear all kinds of outrageous anecdotes, and we didn't do that today. I do have to disagree with Jonathan, though, that a rulemaking can fix this because what's unclear is how far the legal authority goes, so how can an agency define rules when it doesn't know exactly how far its legal authority goes?

With respect to Mr. Hopper's argument about the bill by Oberstar, that it's clearly unconstitutional, I just absolutely don't see how they can be because the bill says we're extending federal jurisdiction to the limits of our constitutional authority. This is what Justice Breyer said in his separate dissenting opinion. He said his view is that the authority of the Army Corps of Engineers under the Clean Water Act extends to the limits of congressional power to regulate interstate commerce.

All Congress needs to do is to confirm that that is what its intent is, and that will have the effect of verifying things. Jonathan says that won't clarify things, but what it will do is it'll make clear that in a case like *Rapanos*, those wetlands, wetlands that are adjacent to nonnavigable tributaries and navigable waters, are clearly covered and that the only dispute will be constitutional challenges. Is this so insignificant that Congress didn't have the constitutional authority because it has no impact on interstate commerce? That will be what the legal challenges will be limited to, instead of having all these debates about what did Congress intend.

Justice Scalia said, well, this decision might have environmental impacts; that's what our critics will say is that we're harming the environment. He said it's not my problem. It's Congress's fault because I'm interpreting what Congress did. Congress is the one they can set Justice Scalia straight by saying this was our intent, what Justice Breyer said it was, to extend federal jurisdiction to the limits of Congress's constitutional authority.

PROFESSOR EAGLE: Thank you, Bob.

John.

PROFESSOR ADLER: Just a couple of quick things. One come on that last point, I think in legislation the clearest way to avoid these sorts of problems would be to include a jurisdictional element in the system. This is something that's done traditionally in federal criminal law. The federal arson statute is a good example because the Supreme Court's actions parse the jurisdictional element there. It only applies to arsons that substantially affect interstate commerce. And the Supreme Court, in a unanimous opinion in 1999, I think, *U.S. v. Johns*, explained what that would be. This is something Congress does all the time. The fed-

eral partial-birth abortion ban includes a jurisdictional element. It only applies to procedures performed in or affecting interstate commerce. That would be a way to remove constitutional questions from this sort of legislation.

It would, though, require in prosecutions or in challenges to jurisdiction that the agency actually put forward evidence of a substantial effect on interstate commerce. And that may be a drag on agency resources or something that the agency doesn't want to do.

Really quickly, I disagree with Pat that – we do have national wetland protection programs. We don't have any national, other than 404, national wetland regulation program. But regulation is not the only way of protecting wetlands and other environmental resources. Throughout the 1990s, various non-regulatory incentive-based programs were restoring and creating in excess of 200,000 acres of wetlands per year. This is several times more than the gross acreage that was created or restored under Section 404 mitigation, and the failure rate for these programs is much lower because these programs were done by people that actually cared about the ecological function of the wetlands, rather than by developers that were happy to simply turn on a hose if it would get them a permit.

Science doesn't get us out of this. Ecological interconnection, yes. It's ubiquitous. It's everywhere. So what? So is economic interconnection; so is social interconnection. The complexity and interconnectedness of systems does not by itself justify centralized regulatory programs anymore than the interconnectedness of dynamic economic systems would justify simple economic planning.

PROFESSOR EAGLE: Thank you, John.

Pat.

PROFESSOR PARENTEAU: Well, I'd like Jonathan and Reed to draw the line on the map for me where is the limit of Congress's powers under the Commerce Clause. I wish we had a map of any watershed – pick up watershed, Chesapeake Bay. Where does it stop, Jonathan or Reed? Where does it stop? What's a principled way to draw that line on a map?

PROFESSOR EAGLE: Reed, any comments?

PROFESSOR HOPPER: Well, I would say with respect to the constitutionality of the proposed bill, it doesn't save a bill to say that we can regulate anything we want, to the limits of the Commerce Clause. That does not save the bill from going too far. It does not save it from constitutional attack.

This proposed bill simply says that we intend to regulate to the limits of the commerce power, but we don't believe there are any limits to the commerce power, and therefore we're going to regulate all waters. I think that that's clearly unacceptable to a majority of the members of the Supreme Court and clearly inconsistent with any reasonable interpretation of the commerce power.

The other thing I would just add to what Professor Adler said, I was interested to read not too long ago the April Report on the President's Wetland Program in which it was reported that through voluntary efforts between or among federal and state and private interests in the past two years, conservation of wetlands had occurred to the extent of 500 million acres, and an equal amount had been created compared to the 25,000 acres that had been saved or improved under the Clean Water Act.

The Clean Water Act is not the flagship for environmental protection or wetlands protection specifically. Other efforts have greater results. The debate here is really not about merely what can we do to determine the scope of the Commerce Clause or what can we do to protect wetlands to the maximum extent possible. We have to recognize that, notwithstanding our desire to improve the human condition, we must do so in a way that's constitutional and recognizes the rule of law. In this case, regulation of local wetlands should and do devolve upon the states and not just the federal government.

PROFESSOR EAGLE: Thank you, Reed.

Now it's time for questions. I have two requests of you. First, because we do not have a hand-held microphone, please make your question short and simple so that I can repeat it for the tape. And second, please end your question with a question mark.

Yes, sir.

AUDIENCE PARTICIPANT: Professor, I'd ask about the scope (inaudible). It appears that the scope of the bill invokes the Necessary and Proper Clause, the Treaty Powers, and I guess (inaudible) the panelists, is the implication of those constitutional authorities, wouldn't that be broader than the Commerce Clause?

PROFESSOR EAGLE: Okay, the question is that the invocation in the Oberstar bill of the Necessary and Proper Clause and the Treaty Clause, in addition to the Commerce Clause, affect the bill's constitutionality?

PROFESSOR PERCIVAL: I think so. I think the treaty Power is a plenary power. *Missouri v. Holland* is one of the hallmarks, of course, of constitutional jurisprudence on the scope of Congress's treaty power. I don't think that just simply waving the talisman of the Treaty Power does it.

I think what you have to do is connect the specific wetland resources that are most questionable under the Commerce Clause, which would be prairie potholes, playa lakes, Carolina bays and the like, as habitat for the birds that are protected by four international conventions, two protocols, both of the latest protocols aimed at habitat conservation with the, duh, you don't have ducks without wetlands. So in my view, although I think there's a strong Raich-based Commerce Clause rationale for protecting these so-called isolated wetlands, to me, I think a stronger constitutional basis for Congress's doing that with

regard to habitat that is necessary to fulfill the United States obligations under these four conventions, I think the Treaty Power is golden for that kind of rationale.

I'd like to see more of that kind of basis developed in the legislative record underlying whatever is done, Oberstar, whatever else.

PROFESSOR EAGLE: John.

PROFESSOR ADLER: Yes, a couple of things. The Necessary and Proper Clause is not a freestanding power. It merely makes explicit what was generally understood, which is if you're going to have the power to regulate commerce, there may be things that you need to do to effectuate that power.

And so for example, in this context, if the power to regulate commerce clearly includes power over navigability, which is something I think is incontestable, the Necessary and Proper Clause – Congress can do certain things that aren't actually in navigable waters to protect those navigable waters. I think that's the logic at the end of the day underlying a significant nexus test, is that the Necessary and Proper Clause allows you to work around this area, but it doesn't allow you to do something that's freestanding. I don't think invocation of the federal property power does all that much unless you're talking about federal lands, which there's already a plenty of authority.

I don't think the Treaty power does all that much. I think *Missouri v. Holland* is a very short, over-interpreting case. It dealt with a transboundary resource, and so I don't think it could be used as a freestanding plenary authority for these sorts of regulations. One very basic structural reason for that is that it would be bizarre to have a situation where the president and two-thirds of the Senate could, in cooperation with a foreign power, grant to Congress powers that were withheld to it under Article 1. I mean, structurally that just would not make sense. It only makes sense if we're talking about something like a transboundary resource. *Missouri v. Holland* that was migratory birds.

I would just note, though, with prairie potholes just as an example, what's the biggest threat to prairie potholes? Well, farming. I believe this bill preserves the agricultural exemption from the other exemptions that are built into Section 404. So if we're really concerned with prairie potholes, we shouldn't be worried about trying to reverse *Rapanos.* We should be worried about better encouraging farmers to plow over prairie potholes rather than protect them. And that has nothing to do with Section 404 of the Clean Water Act. That has to do with other things that are going on.

PROFESSOR PARENTEAU: As far as the Commerce Power goes, prior to *Gonzalez v. Raich,* I think there was a narrow set of activities where people were dirt-biking for fun, that had nothing to do with Congress that might endanger species, where you had some question could that be regulated. But *Gonzalez v. Raich,* by saying you can prohibit growing medical marijuana in your backyard because it's integral

to preserving the integrity of this larger federal regulatory program I think has now resolved that. So in my view, the Commerce Power would cover just about anything that's necessary for Congress to protect, to preserve the integrity of the nation's waters. But it can't hurt to also cite the Treaty Power.

PROFESSOR EAGLE: Thank you.

Reed, did you want to hop in here?

PROFESSOR HOPPER: Yes. Pat referenced the 1920 *Holland* case in which the Supreme Court indicated that the treaty could constitute an independent basis for regulation. However, the caveat is that the treaty be constitutional. One would infer from that that the treaty would be constitutional if it was within the enumerated powers granted to Congress but does not extend those powers.

What was the other issue?

PROFESSOR EAGLE: Necessary and Proper.

PROFESSOR HOPPER: Oh yes, with respect to the Necessary and Proper Clause, Justice Thomas, I think, stated in the *Raich* case that if the regulation exceeds the commerce power, then it's neither necessary nor proper for further regulation. So I don't think that Raich allows for free-wheeling regulation under the Congress power.

PROFESSOR EAGLE: Okay, next question. Yes.

AUDIENCE PARTICIPANT: Yes, thank you. Bruce Meyers with the Environmental Law Institute. And thanks to Professor Parenteau for the plug to our common law paper. Actually, I have a question for Mr. Hopper, and I mean this as fairly serious question. The latest version of the draft of Oberstar, that I see anyway, the definition of "waters of the United States" suggests that X, Y, and Z-A, B, C water types are waters that are included to the fullest extent of our power under the Constitution, our legislative power. And I guess I'm just wondering, I think one of the other panelists may have even characterized this as a tautology. How on its face could that be unconstitutional? What would make that language unconstitutional? I understand that there could be a dispute over what the line is and how you would draw it and (inaudible). But what about that bill would make the (inaudible) unconstitutional?

PROFESSOR EAGLE: Let me just repeat the question if I may. The question is given that the Oberstar bill does contain descriptions of types of water that would be included under the bill, what is it that makes it too general to be constitutional?

PROFESSOR HOPPER: Let me read the language from the proposed Act itself. I think I've got the latest version. "Waters of the United States" defined. The term "waters of the United States" means 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, mud flats, sand flats, wetlands, sluice, prairie potholes, wet meadows, playa lakes, natu-

ral ponds and all and impoundments of the foregoing to the fullest extent that these waters or activities affecting these waters are subject to the legislative power of the Congress."

That caveat, as I was saying, you know, "that are subject to the legislative power of Congress" does not save it because this language, by its terms, applies to all waters in the United States, and I think it's clear from both *SWANCC* and *Rapanos* that at least a majority of the Court would not accept that all waters are within even the furthest limit of the commerce power.

PROFESSOR PERCIVAL: But Reed, then, what's the significance of saying to the extent of powers under the Constitution? You're just reading that out of the bill and saying, therefore, it's unconstitutional.

PROFESSOR HOPPER: This language calls – this language is an abdication of Congress's role to determine the extent of its own Commerce Clause power. This calls for the courts to determine where the line is. That's one of the problems with it.

PROFESSOR PERCIVAL: But it's not saying we want to regulate it whether we can or not constitutionally. It says we want to regulate to the limit of our constitutional powers.

PROFESSOR HOPPER: What it's saying is we will regulate all waters until were told by the court that we can't.

PROFESSOR PARENTEAU: I think he's right actually. I think Reed's right on that. But it doesn't matter what Bob Percival and I think about the extent of the Commerce Clause. It matters what Anthony Kennedy thinks. And we're all trying to figure that out. I mean, he clearly – I agree with Jonathan on this. He clearly is troubled by the current regulations. And so, a law that simply codifies them is asking for trouble. I'll be honest about that.

Unless this Congress, if it enacts something, does more than simply invoke, you know, some kind of magical incantation that we're using all the authority we have, I don't know that it's going to survive. I don't know that it's going to survive. We need five votes. We don't need four; we need five. And those of us who care about this issue have got to figure out how we get Kennedy on this, and we don't have him yet. So I'll leave it there.

PROFESSOR PERCIVAL: But it clearly would blow away Scalia saying this is what Congress really meant, this really crabbed interpretation. So, you've completely reversed Scalia's opinion, and that has accomplished something really major. And so now, everything is now waged on what are the limits of the constitutional power, not on the limit of what Congress intended.

PROFESSOR ADLER: If I could just jump in.

PROFESSOR EAGLE: One or two sentences.

PROFESSOR ADLER: Two sentences. First sentence, if the goal is certainty, punting this to the courts and saying we can regulate it as much as we can regulate, certainly doesn't do that. So if this is a tauto-

logical version of the bill, your certainty argument for the bill goes away.

Second sentence – *Rapanos* was decided after *Gonzalez v. Raich*, and Justice Kennedy still makes reference to the constitutional concerns that motivated the Court's decision in *SWANCC* as the basis for significant nexus test, which suggests that Justice Kennedy believes that even after *Gonzalez v. Raich*, there is a limit to Congress's authority in this area, that regulating, for example, wetlands adjacent to non-navigable tributaries would implicate.

PROFESSOR EAGLE: Thank you.

AUDIENCE PARTICIPANT: I'd like to ask Professor Hopper what he thinks, whether the Oberstar bill will clarify or further develop the issue of actions by private conservationists, say, prairie potholes (inaudible) rancher or farmer who wants to create new wetlands and puts a permanent dam across a ditch (inaudible) creek to the stream and create a cattail marsh for ducks and waterfowl and so on, or if he wants to take an isolated prairie pothole and (inaudible). Do you think it'll be clearer or less clear (inaudible) prison for destroying wetland when he's actually created it?

PROFESSOR EAGLE: Let me just repeat the question. The question is will the Oberstar bill clarify the legality of the actions of private conservationists who, in the course of engaging in conservation, create new wetlands.

Reed.

PROFESSOR HOPPER: Well, I think it will clarify that activity in any water of the United States is subject to federal regulation unless it falls within one of the farm exemptions, which themselves are ambiguous, until the first court gets a hold of this and overlays its interpretation of the Act.

AUDIENCE PARTICIPANT: I'm curious about the panelists' thoughts on the impact of this legislation on cooperative federalism, given the corrective language so that all waters would not reach ground waters and also historic role in the cooperative (inaudible).

PROFESSOR EAGLE: Okay. The question is what does the panel think will be the impact of this very broad and comprehensive bill on cooperative federalism?

AUDIENCE PARTICIPANT: and also the possibility of preemption.

PROFESSOR EAGLE: And the possibility of preemption.

PROFESSOR PARENTEAU: I think the states are going to support it, the majority. The vast majority of the states are going to support it. How they're going to do that politically with, you know, the vagaries of the National Governors Association and other entities to deal with, I don't know. I think Bob already cited these statistics to you, but when the advance notice of proposed rulemaking, the trial balloon that was floated by the Bush administration following *SWANCC*, the, how far

should we roll back the jurisdiction of the Clean Water Act and PRM, resoundingly – I forget what it was – between 35 and 40 states came in and said don't you dare roll back the jurisdiction of the Clean Water Act. Maybe we didn't like it 30 years ago, but we'd rather have what we know, the devil we know, than one we don't. And our programs are predicated on the scope of the Clean Water Act as it's been interpreted and applied over those 30 years. Leave it alone. And of course, that's what the Bush administration ultimately decided to do.

When the *Rapanos* case came up, same thing. I forget how many *amicus* briefs there were from the states, but in excess, more than half of the states weighing in on the side of the federal government. Even in those cases, which, you know, admittedly were pushing the envelope pretty hard on federal jurisdiction.

So I don't – the concern that's being raised about federalism, I don't think it's real. I don't think the states want to see the federal government exiting from the field of Clean Water Act protection and regulation. I just don't believe it.

PROFESSOR ADLER: I think there's some serious questions there. I mean certainly the question of whether or not this would call for federal regulation of groundwater or authorize that is a big question. Whether or not the effect this would have on certain irrigation systems, certain water systems, is, I think, a real question. I know in the hearing was held on the bill, there was some discussion of that. I think it's something that really hasn't been looked at.

One quick point on federalism, federalism is not there to protect the states. Federalism is not about the states. Federalism is about the people. The point of federalism is not to say the federal government is to do whatever wants as long as the states say okay because there are lots of times when the states would be happy to have the federal government give them money and regulate in place of the states so the states don't have to be accountable for those decisions. I mean that as a federalism that some might argue, but that's not the federalism that our Constitution sets up.

And so, the fact that states are happy to get the benefits of these wetland regulatory programs and are really eager to get them as long as they don't have to bear the political and financial costs themselves, as states, of implementing them, tells us nothing about whether or not federalism principles are implicated by expanding federal authority in this way.

PROFESSOR EAGLE: Questions? Yes, sir.

AUDIENCE PARTICIPANT: Yes. I think one of the things that's disconcerting about the Oberstar bill, getting back to this, is the delegation of authority, essentially a legislative function, to the administrative agencies, and I'd like the speakers to comment on how (inaudible) or could Congress say, you know, we pretend to legislate here to the fullest extent of our authority, and we want people punished to the

fullest extent of the law, as long as it's not cruel and unusual. It seems to me it's like punting the issue out of the legislature into some other (inaudible).

PROFESSOR EAGLE: Okay. The question is whether the Oberstar bill, by purporting to regulate to the fullest extent of Congress's constitutional authority, implicitly delegates to regulatory agencies those specific determinations which Congress itself is constitutionally mandated to do under the non-delegation doctrine.

PROFESSOR PERCIVAL: I certainly don't view it that way. I view it as basically a narrow response that says we think the Court got it wrong in both *SWANCC* and *Rapanos*. We think the four justices in the dissent were correct in saying that we had indeed adopted a very comprehensive regulatory program. The Court itself has said several times that they're not really as capable as the expert administrative agencies. Certainly if the Agency goes hog wild, they can always have their rules struck down as arbitrary and capricious, and the Courts have been continually active in doing that.

But here, we've got a situation where, as a result of those decisions, there's mass confusion, and there's been a substantial cutback in federal regulatory authority. And by Congress weighing in and saying you've got it wrong in those cases, we'll go back to how the dissent read the law in both cases, I don't see as any major new delegation.

PANELIST: After *American Trucking*, I don't think there are as many legs left in non-delegation doctrine. I mean, the court says has to be an intelligible principle in the legislative delegation. And in that case, the intelligible principle was that EPA was directed to protect the public health. So that's an intelligible principle, then I think Oberstar safely passes that kind of test.

PROFESSOR HOPPER: I don't think this is a delegation to the agencies. It's quite clear that Congress is intending here to regulate all waters. This is a delegation to the judicial branch from the legislative branch, and I think that's an abdication.

PROFESSOR PARENTEAU: Whether or not it's an abdication, I again say I don't think it's a good thing to do. I think the Congress ought to develop a much better record for the, even the codification of the existing regulatory scope of the Clean Water Act. I think it would be a mistake if Congress doesn't take that seriously and develop the kind of record that would pass muster with Mr. Justice Kennedy.

PROFESSOR ADLER: Let me agree with Pat, which is something that happens so rarely, that Congress should take more responsibility in the nitty-gritty and the details. I didn't call for that because, you know, that's just something Congress doesn't do anymore. It's not routine – and I probably shouldn't say that in this building – but it's now routine for members of Congress to vote for legislation and say the courts will sort out if there are parts of this that are unconstitutional. When we saw folks from the right doing that with campaign

finance. We saw folks from the left doing that with the Detainee Treatment Act and the Military Commissions Act. I mean, that's a common thing to do today. I think it does undermine accountability. I think it does abdicate legislative responsibility. So, too, do members of Congress not making for themselves an independent judgment on the constitutionality of a legislative act itself a basis for whether or not they will vote against something.

But we're not operating in that environment. We're operating in an environment where what aspects of a water body make it connected or not connected to navigable waters is the sort of thing that an agency is going to determine or a court is going to determine. And given those choices, I would rather it be done by an agency through notice and comment rulemaking rather than in a context of litigation both because I think it's more responsive to public concerns but also the things that make litigation good for resolving a dispute between parties, in my view, make it bad for formulating nationally applicable public policy because the issues are framed by adversary parties.

PROFESSOR PARENTEAU: Let me ask my colleague here a question. Suppose President Clinton directs her EPA to develop a rule to resolve the conflict over the scope of the Clean Water Act, and her agency goes back in history to the origins of the EPA's position on this and reinvents all of the reasons why the scope of the Clean Water Act, which has historically been asserted, is the proper scope of jurisdiction. Are you willing to accede to that simply because it appears in a rule? I mean, if another administration resolves the statutory intent question in favor of a very broad scope, well beyond Scalia's test, would you say, okay, that's good?

PROFESSOR ADLER: Well, I think it can avoid the need for case-by-case determination of the scope of federal authority. I don't think it could allow the federal government to regulate beyond the constitutional scope of the Commerce Clause, but it certainly could help clarify what sorts of waters are bound up with navigable waters because you have a question – in that context you have a legal question about what is the scope, the constitutional scope of power, as well as a factual question about whether or not activity in a certain area has an effect on something with the federal interest of a significant magnitude that could justify federal regulation.

And I think certainly the factual part of that question is the sort of thing that an agency could do. And there are many types of regulation that I might not like as a policy matter that I think as a constitutional matter would satisfy that test.

I should also note that once you go back and look at a Scalia plurality very closely and look at the words that he uses – without saying it explicitly, Scalia makes clear that his opinion is a *Chevron* Step 2 opinion. It is not a "this is the only meaning of the Clean Water Act." It is instead "the Corps of Engineers adopted an impermissible construc-

tion of the Clean Water Act, so to resolve this case, we have to give a construction of it." But that construction could be trumped by a permissible construction issued by an agency as a result of notice and comment rulemaking. That's the holding of *Brand X.*

So I mean, it's fairly clear that a Clinton administration or an Obama administration or a Paul administration or whatever administration you folks want would be able to adopt a rule that is quite broad, and that certainly covers far more than a case-by-case application of *Rapanos* is likely to cover.

PROFESSOR EAGLE: Let me exercise the moderator's prerogative and ask a question of the panel. Water, its impoundment and flow, its chemical, physical, and biological properties, inevitably are affected by land uses. Could one, therefore, having enacted the Oberstar bill, have laid the foundation for federal agencies to, on a national basis, regulate land use throughout the United States?

PROFESSOR HOPPER: Well, I'll take a shot at that. First of all, it already does. Under the current regulations, the Corps of Engineers does not simply look at the effect on the water. It has a multitude of factors that it not only evaluates when it's looking at a 404 permit but imposes mitigation for, including aesthetics and energy and land use and recreation, anything you can think of. It's very broad. And of course, under the Oberstar bill, you have this language here that we intend to exercise to the fullest extent of these waters or activities affecting these waters, which means land use. So this bill would not only, I think, offer a plenary type – you know, convert the commerce power into general police power with respect to water but also with respect to land use.

PROFESSOR PARENTEAU: When Congress amended the Clean Water Act in 1987, it added one new goal: to try to protect against nonpoint source pollution. But it didn't really do much of anything to the Act to try to accomplish that goal. The Oberstar bill does nothing to change the definition of point source or discharge of dredged or fill materials. So the answer to your question is very simple. It's no.

PROFESSOR EAGLE: Yes.

AUDIENCE PARTICIPANT: One last question if I may. If you look at the findings of the Oberstar bill, it basically recites portions of (inaudible) the states' primary role in regulating water within its boundaries and also managing land use activities within its sovereign boundaries. In this case, the bill actually does not use the term "primary." I'm curious whether or not findings in a subsequent amendment to the Clean Water Act could in fact (inaudible).

PANELIST: Probably not. Findings don't count for a whole lot anyway, in my view. But, I mean, you know, the *Lopez, Morrison, Raich* line of cases has been inconsistent, at best, in terms of looking at findings and how salient are they and so forth.

But I think it's not true that merely because the Oberstar bill doesn't recite the primacy, that somehow that goes away. The case law actually has given some weight to that particular verbiage in the findings section of the law, particularly where it comes to things like enforcement issues and whether an interpretation of the Act would very directly contravene state sovereignty or autonomy. But those are so rare, the instances where that actually happens is so rare that I don't think it's terribly significant, at least in my experience.

PROFESSOR EAGLE: Other – yes ma'am.

AUDIENCE PARTICIPANT: (Inaudible) (Off-mic) gloss over what I see as a fairly significant expansion of federal jurisdiction in the Clean Water Act, and that is to include, to get at upland activity, and that is – I think the language, Mr. Hopper, you read, I think goes to conclude activities that may affect (inaudible). So you go from regulating discharges from a point source to a navigable water, waters of the US, to now this kind of (inaudible) language to include activities that may affect – I'm just recalling –

PROFESSOR EAGLE: The general thrust of the question is, is the Oberstar bill expanding the jurisdiction of the federal government over waters to an extent we haven't yet discussed?

PROFESSOR PERCIVAL: It doesn't change the trigger for the Section 404 permit process, which is discharge of dredge or fill material. So that would still have to take place for it to be covered in a 404 permit requirement.

PROFESSOR ADLER: I should say, though, there are lots of activities that would certainly not trigger 404 but that would constitute the discharge of a pollutant, which is essentially the addition of a pollutant, to what could be characterized as an impoundment of water. That is the real kind of loaded part of the definition is saying any impoundment of water because it says, you know, it lists all the different types of waters and says all impoundments of the foregoing.

Now Bob and I will agree, the Corps of Engineers isn't going to try and regulate birdbaths. But can we think of various activities that involve the impoundment of water to some degree that have significantly large ecological effects that might be worth the EPA's time but that are not currently regulated by federal law? Sure. We can think of all sorts of things. And where that water is modified or added to in some way so as there to could be a discharge, again I think so, but it doesn't necessarily have to be the physical addition of atoms of a substance. Right? Heat, for example, can be the trigger for regulation.

So I mean some of his ambiguity there, and aggressive administration, I think, could really run with that language. You know, how would a court respond to that? I don't know.

PROFESSOR HOPPER: I think Oberstar can be clearer, frankly, on the point about – what it's really getting at, I think, is that the focus of the regulatory program are economic activities, but it's only a subset

of those activities that's actually regulated, and those are the ones that have a discharge from a point source.

So your point is fair that it could be clearer, I think, in the text and perhaps the legislative history, to the extent that's relevant anymore, of the bill that what we're really – we're not talking about changing the scope of the regulatory program with respect to activities. What we're talking about is the aggregate effect of the activities we do regulate, which are discharges, do have a significant effect on interstate commerce. That seems to me with they're trying to get at.

PROFESSOR EAGLE: Is the overall thrust of Oberstar to eliminate the concept of non-jurisdictional waters?

PROFESSOR ADLER: That's the attempt. That's the goal.

PROFESSOR PARENTEAU: I put the question to those of you who have concerns about this aggrandizement of federal authority, where would you draw the line? It's a serious question. Take out a map of the Chesapeake Bay and show me where you're going to draw the line and tell me how you did it. You know, do you want to stop it at first-order tributaries? Okay, here's the man who's going to step up to the plate. First order tribs are out. What's – off mic – what's the biggest problem with the Chesapeake Bay? Nitrogen and phosphorus. Right? Where does the biggest removal come from? First and second order streams. You want to take them out? Fine. You'll never recover the Chesapeake Bay. End of story.

PROFESSOR EAGLE: Pat is suggesting that –

PANELIST: I'll ask the same question of you, and ask you where you think you that line should be drawn.

PROFESSOR PARENTEAU: I don't think it should be drawn. Okay? I don't think it can be drawn.

PROFESSOR EAGLE: Okay.

PROFESSOR PARENTEAU: And I don't think there's anything in the Constitution or the Forefathers' papers or the Convention or anything else that says it has to be drawn. I think this whole business of a limiting principle and end-point is fiction, pure and simple. If Congress can articulate a rational reason for extending its jurisdiction in order to restore the Chesapeake Bay all the way to where it begins, I think constitutionally it's entitled to do it.

PROFESSOR EAGLE: Question, yes.

AUDIENCE PARTICIPANT: What do you consider a border of the United States, or what do you consider as a water that is – basically what you're talking about is (inaudible) all the way to headwaters and so on and so forth that are examples of where regulation has gone beyond what one might normally consider as a "headwater" and gotten into things like upland issues and the like. And arguably, potentially (inaudible) individual property, down their driveway to the rain gutter. And is there a line to be drawn there?

PROFESSOR EAGLE: The question is does permissible regulation under the Oberstar bill stop at the headwaters of secondary streams, or does it go to include people's driveways and drainage ditches in front of their house?

PROFESSOR PARENTEAU: Did you want me to keep going, or do you want to get some other voices?

All right. How many of the natural streams are ditched in the United States? There are data on this, you know. Guess? How many? How many natural streams are now ditches? A third. What do you do with them? Are they out? They're still tributaries. They may be ditches, but they're tributaries, and the Corps has tried to wrestle with this problem of what do you do with ditches for a long time. There's no good answer to it. There's no good answer to it. If it's a purely upland ditch, it goes from Point A to Point B and it's not functioning as a tributary, is it a water of the United States? No, and the Corps says it's not. Is it potentially a point source? I don't know. Maybe. Justice Scalia seems to think it is.

But see, I don't think there's a constitutional answer to questions like yours. It's a good question. It's a very good question. But you know what? I don't see that you can draw some bright line and say all ditches are out or all ditches are in because some ditches are streams by another name, and they're still tributaries even though they stink and they suck. But they're still tributaries because that's all that's left in some tributary systems.

PROFESSOR EAGLE: Albert Einstein once said that the job of science is to define things as simply as possible but no simpler. Listening to this discussion makes me ask, is the sometimes reviled Kennedy approach, talking about sufficient nexus, as good as we can get?

PROFESSOR ADLER: Yes. The thing is that – two quick points on this. One is the fact that line-drawing is difficult doesn't mean that there aren't categories, and the fact that the Constitution enumerates certain powers presupposes that there are things beyond those powers. Now, do we always know the precise contours of those lines? Of course not. But we know the category of things Congress can't do is not a null set. And so, any approach that renders it a null set, we know can't be correct. We know what night is and we know what day is, but we have twilight. And when precisely does day turn into night. Well, you know, there may be some scientific definition about the precise level light. That's an arbitrary line because someone ne3eded to draw a line, and none of us sitting there watching the sun go down is going to say ah-hah, now it's night. Yes, the sun's below the horizon, but it's still pretty bright out. Is that day? Is that night?

Same sort of thing – line-drawing is difficult, but we still know there are these categories there, separate. The fact that, that when we apply regulatory apparatus to things like wetlands or waters, it gets difficult and it's hard to draw the lines. And one of the reasons it would be bet-

ter for agencies and Congress to take their constitutional obligations seriously is so that courts don't have to try and do it on the fly on a case-by-case contest.

Kennedy's significant nexus approach is as good as a court is going to be able to do because Kennedy knows that there are waters that are beyond the scope of Congress's power. There are waters that are within its power. There are places where they mix and they interact. And if he had an infinite amount of time and an infinite number of clerks with (inaudible) background, he might be able to figure out that line, but that line wouldn't reflect the judgment of a legislative body. So it wouldn't reflect the popular will in any way.

It would be much better if Congress and the agency, in trying to delineate jurisdiction, knew that there were certain answers – we can regulate everything which is not acceptable – and try to focus on, okay, what are those waters that are sufficiently close to commerce that when regulating commerce, we can regulate those as well, knowing that there are things that may be beyond that and that we may have to use other tools than regulation to deal with. You might have to use incentives. You might have to use cooperative federalism. You might have to rely on non-regulatory approaches. We do that in lots of other areas. The fact that there's a constitutional limit to using a specific tool to address a specific problem doesn't mean the problem isn't important. It doesn't mean that we're not serious about addressing it. We recognize that in the national security context. We recognize that in the context of criminal law enforcement. It's about time we recognize that in environmental law as well.

PROFESSOR PERCIVAL: This whole discussion amazes me that we should be focusing on precisely where do you draw the line in the most extreme case, when *Rapanos* was anything but that. It was absolutely clear that Rapanos's wetlands were covered under the existing definitions. He hired a consultant who told him that. He then told him bury all your papers; you're fired. He went ahead and defied the Corps and as a result was criminally convicted. His criminal conviction was affirmed. The Supreme Court refused to intervene to overturn his conviction. It was a massive project that was going to have very significant ecological connections. Justice Kennedy himself says the government will have no problem satisfying my significant nexus test in the case of *Rapanos.*

What Oberstar is trying to do is to overturn what really is an outrageous outcome in a case where we've suddenly taken a giant step back; in a case where it wasn't one of those cases involving "is this really an extreme interpretation of the Act." The question was whether a wetland adjacent to a non-navigable tributary of a navigable water very, very close to the wetland where the *Riverside Bayview* case led to a unanimous Supreme Court decision affirming federal jurisdiction, whether that was subject to federal regulatory authority. I think the

four dissenters got it exactly right, that the Kennedy test is going to cripple the Corps further by requiring all these case-by-case analyses.

Now Kennedy did say new regulations would help. Chief Justice Roberts said maybe we would defer to new regulations, although it's hard to understand how he could do that and also join Justice Scalia's opinion. But maybe they'll listen to Jonathan and his view that it's a *Chevron* Step 2, and maybe Scalia would change his opinion in response to regulations.

Nothing the Oberstar bill does would change the Corps' regulation. If they wanted to somehow greatly expand what they actually require a 404 permit to do, they would have to propose new regulations and get those adopted. All the Oberstar bill is trying to do is to reverse the *Rapanos* decision and the *SWANCC* decision and side with the dissenters in both cases. And that was absolutely clear from anyone who attended the July 17 hearing and all the discussion.

PROFESSOR EAGLE: Any other questions?

(No response.)

PROFESSOR EAGLE: Well, if not, thank you all very much for attending. I think the panel has done some excellent presentations, and I'd like to thank them.

(Applause.)

(Panel concluded.)

WATER MARKETING
CLE INTERNATIONAL

Denver, Colorado December 10, 2007

Taylor E. C. Hawes, Associate Counsel for the Colorado River Water Conservation District, provided the first presentation of the day. She framed the discussions to follow by introducing the subject of water marketing. She stated that practitioners use the term "water marketing" broadly to describe both arrangements in which private parties purchase water rights and sell them to third parties and arrangements in which private or public entities lease or contract water to third parties but retain ownership of the rights. The anti-speculation doctrine limits water marketing in Colorado to only allow appropriation if the water is put to a beneficial use. Under Colorado statutory law, no appropriation of water may occur when the basis of the proposed appropriation is a speculative sale or transfer of the water rights to persons who are not parties to the appropriation. Therefore, in Colorado, private parties may only purchase water to market to third parties if they have firm contractual commitments with third parties lined up for the use of water once a project is completed. Ms. Hawes, then discussed