Congress should not expand federal regulation under the guise of "restoring" environmental protections.

The Clean Water Land Grab

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In 1989, developer John Rapanos deposited dirt onto a portion of his property near Midland, MI. This was illegal, according to the U.S. Army Corp of Engineers, as Rapanos' property contained federally designated wetlands, subject to regulation as "waters of the United States" under the Clean Water Act (CWA), and Rapanos lacked a federal permit. The U.S. Supreme Court was not convinced. Upon hearing Rapanos's appeal, over 15 years after his alleged offense, the Court questioned whether the wetlands were indeed subject to federal regulatory jurisdiction.

Why the uncertainty? The CWA prohibits the unpermitted discharge of fill material into "navigable waters." But the wetlands at issue were over 10 miles away from the nearest navigable waterway and lacked any direct hydrological connection. One of the wetlands in question was connected to a man-made drainage ditch, which drained into a creek, which in turn flowed into the Kawkawlin River, which emptied into Saginaw Bay and Lake Huron. While the latter are unquestionably waters subject to CWA jurisdiction, a divided court held the Corps had to prove the law's expansive scope was capacious enough to encompass the wetlands in question. Specifically, the Court held the Corps needed to demonstrate Rapanos' property possessed a "significant nexus" to navigable waters before it could be regulated as "waters of the United States." Waters and wetlands lacking any discernible hydrological connection to navigable waters are simply beyond the scope of federal regulation.

Rapanos v. United States was not the first time the Supreme Court challenged a broad assertion of federal regulatory authority under the CWA. In a 2001 case, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (SWANCC), the Court rejected the Army Corps' claim that it could regulate an isolated intrastate lake in Illinois merely because it was used by migratory birds. Isolated intrastate waters lacking any

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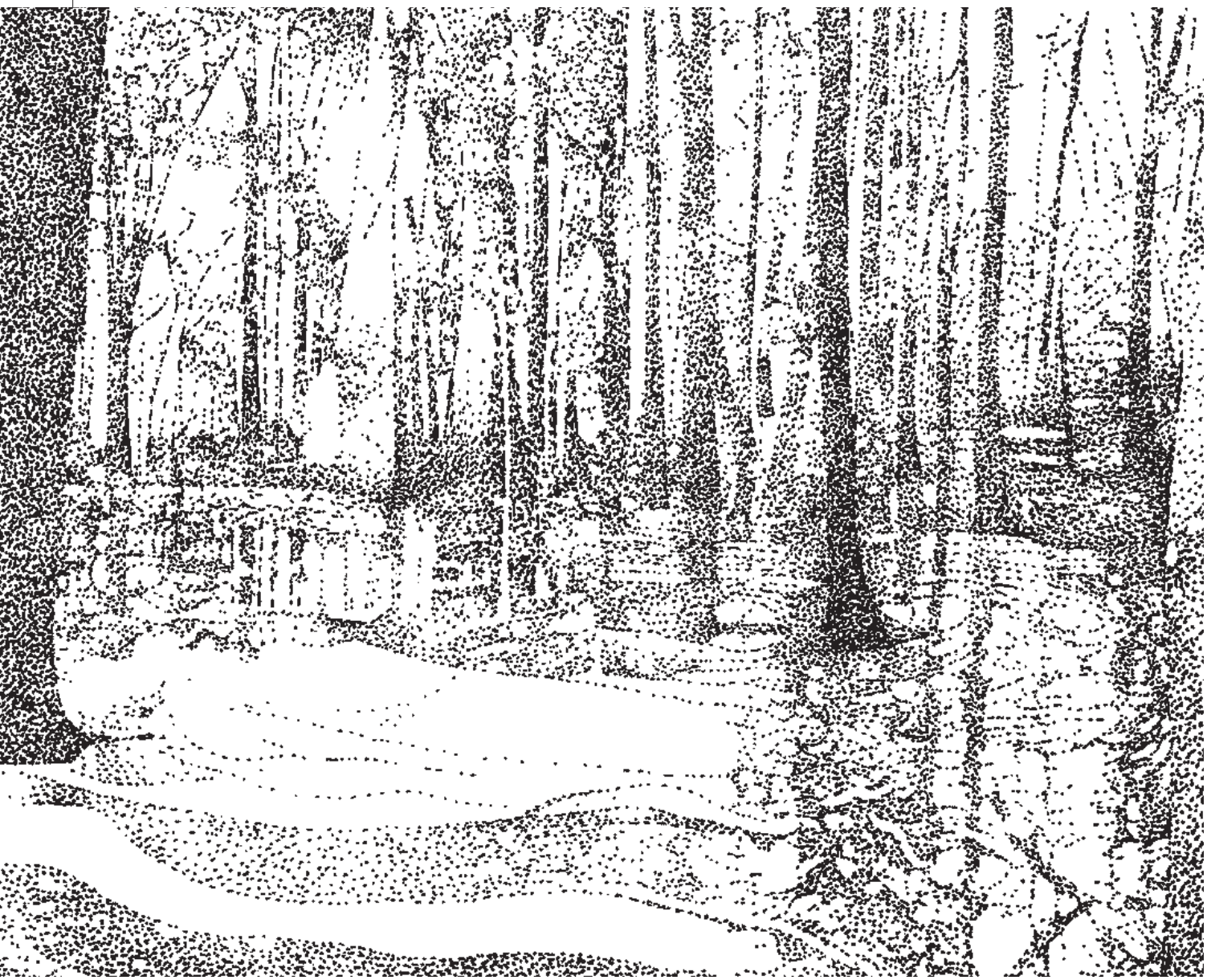
meaningful connection to navigable waterways, the Court held, did not constitute "waters of the United States" subject to CWA regulation. While not every water or wetland subject to federal regulation had to be navigable itself, the Court refused to read the word "navigable" out of the act or countenance federal regulatory control over waters or wetlands lacking any connection to navigable waterways.

Environmentalist groups, among others, labeled *Rapanos* and *SWANCC* environmental disasters. Now, some members of Congress are seeking to overturn both decisions by amending the CWA. Their proposed legislation, the Clean Water Restoration Act (CWRA), purports to extend federal regulatory jurisdiction as far as it may go under the Constitution. Though promoted as a modest measure to "restore" pre-*Rapanos* regulatory authority, this legislation would dramatically expand the federal government's regulatory reach over waters, marginally wet lands, and much else. Billed as a measure to clarify the scope of federal jurisdiction, the legislation would in fact exacerbate existing regulatory uncertainty. Sold as a necessary environmental measure, it would do little to improve environmental protection. Like so much other environmental legislation, the CWRA is far more expansive and less desirable than it might at first appear.

DEFINING WATERS UNDER THE CWA

The Clean Water Act (formally, the Federal Water Pollution Control Act) was enacted in 1972 "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." It prohibits the "discharge of any pollutant" — defined to include dredged material, rock, sand, and solid or industrial waste — into "navigable waters" without a federal permit. Navigable waters, in turn, are defined simply as "waters of the United States."

This definition has left the scope of federal regulatory authority somewhat unclear. At the time of the CWA's passage, the Army Corps maintained wetlands were not included within the definition of "navigable waters." The Environmental Protection Agency and environmentalist groups disagreed, and the latter soon prevailed in federal court. The Army Corps and EPA responded with a more expansive interpreta-



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tion of their regulatory jurisdiction, but the fight over what constitutes a "navigable water" subject to federal control was far from over.

The federal regulations promulgated by the Army Corps of Engineers defined "waters of the United States" to include all waters used for interstate commerce, all interstate waters and wetlands, all tributaries or impoundments of such waters, and, most significantly,

> all other waters such as intrastate lakes, rivers, streams (including intermittent streams, mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds) the use, degradation, or destruction of which could affect interstate or foreign commerce including any such waters: (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or (iii) Which are used or could be used for industrial purpose by industries in interstate commerce.

This definition explicitly included "wetlands adjacent to waters (other than waters that are themselves wetlands)."

Litigation over the scope of federal jurisdiction followed. In 1985, the Supreme Court upheld the regulation of "wetlands adjacent to navigable bodies of water and their tributaries." The Court accepted the Army Corps' conclusion that "adjacent wetlands are inseparably bound up with the 'waters' of the United States." Yet the Court did not give the Corps a blank check, as it explicitly refused to decide whether the Corps' authority extended to cover "wetlands not necessarily adjacent to other waters."

One year later, the Corps published an official interpretation of its regulatory authority, commonly referred to as the "migratory bird rule." This interpretation claimed that the Corps' regulatory authority extended to intrastate waters that "are or could be used" as habitat for migratory birds or endangered species. With this interpretation, the Corps effectively asserted its regulatory authority over all territory meeting the definition of waters or wetlands throughout the United States — and more litigation followed. Over the next two decades, federal courts heard numerous challenges to the scope of federal regulatory authority under the CWA over private land, eventually culminating in the *SWANCC* and *Rapanos* decisions.

THE CWRA

Members of Congress in both the House and Senate introduced the Clean Water Restoration Act to overturn *SWANCC* and *Rapanos* and "restore" prior regulatory protections for waters and wetlands. While the two chambers have considered slightly different versions of the legislation, each bill's central features, and failings, are the same.

The CWRA has three stated purposes:

- To reaffirm Congress's original intent with regard to federal regulatory jurisdiction.
- To clarify the scope of federal regulatory jurisdiction over "waters of the United States."
- To enhance the environmental protection of such waters.

Yet the CWRA achieves none of those purposes. It does not conform to the original meaning of the 1972 act, and will do little to advance the act's original goals. To the contrary, the CWRA will exacerbate existing uncertainty about the scope of federal regulatory authority and, if anything, impede efforts by federal agencies to set meaningful regulatory priorities that could enhance federal environmental protection efforts. In short, the CWRA will not accomplish what its sponsors and supporters say they intend.

The central feature of the CWRA is to expand the definition of waters subject to federal regulation under the CWA. It does this by eliminating any reference to navigability and providing that all of the CWA's provisions apply simply to "waters of the United States." It further defines "waters of the United States" to include all inter- and intrastate waters and impoundments thereof throughout the nation. Specifically, the new definition of "waters of the United States" asserts that:

> all waters subject to the ebb and flow of the tide, the territorial seas, and all interstate and intrastate waters and their tributaries, including lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, natural ponds, and all impoundments of the foregoing, to the fullest extent these waters or activities affecting these waters, are subject to the legislative power of Congress under the Constitution.

Even with various exceptions inserted into each version of the bill, this definition is significantly more expansive than that adopted by Congress in 1972. The legislation, if passed, will ensure years of litigation over the scope of federal regulatory authority, and yet it is unlikely to enhance environmental protection.

EXPANSION, NOT RESTORATION

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

There is no indication that the 1972 Congress sought to impose federal regulatory authority over the tens of millions

of acres of private land that exhibit wetland characteristics or are occasionally inundated. As noted above, when the act was adopted, the U.S. Army Corps of Engineers explicitly rejected an expansive interpretation of the act's jurisdiction. Nor is there anything in the act suggesting that Congress sought to impose regulatory controls on those wetlands and purely intrastate waters that lack any meaningful connection to navigable waters of the United States. Yet the CWRA would do just that, as if the word "navigable" had never been in the original statute.

As written, the CWRA would extend federal regulatory jurisdiction to all "intrastate waters" and "all impoundments" of such waters, no matter the size. As a consequence, it potentially extends jurisdiction to many waters and places that have never been subject to federal regulatory authority, including many ditches, irrigation and drainage systems, stock ponds, depressions, constructed water features, and, under a version of the bill considered by the House of Representatives in 2008, groundwater. (A finding in the Senate bill disclaims any assertion of regulatory jurisdiction over groundwater.)

Whatever the merits of such a broad assertion of federal regulatory authority, it cannot be defended on the grounds that it "restores" the original intent of the CWA. Indeed, Congress has never passed legislation that would explicitly authorize such far-reaching regulatory authority over local waters and private lands as would the CWRA.

REGULATORY UNCERTAINTY

Regulators and regulated alike lament the lack of clarity about the scope of federal regulatory jurisdiction. There has certainly been confusion and inconsistency in federal jurisdictional determinations since *SWANCC* and *Rapanos*. Lower courts have adopted varying interpretations of the decision and its implications for federal jurisdiction. Yet this legal confusion did not begin with those decisions, and will not end with enactment of the CWRA. As noted above, there has been litigation, uncertainty, inconsistency, and confusion over the scope of federal regulatory jurisdiction — and in particular over the scope of "waters of the United States" covered by the act — since the enactment of the CWA in 1972.

Not only was a federal court called upon to resolve disputes over whether wetlands were included in the act's definition of "navigable waters" in 1975, but courts have wrestled with expansive regulatory interpretations ever since. Controversy and confusion over what constitutes a jurisdictional water reigned throughout the late 1980s and early 1990s because of varying wetland-delineation manuals and agency definitions. While both the Corps and EPA purported to apply a consistently broad understanding of federal jurisdiction, jurisdictional determinations were inconsistent and repeatedly subject to court challenge.

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

When the Clean Water Act was first adopted in 1972, the U.S. Army Corps of Engineers explicitly rejected an expansive interpretation of the act's jurisdiction.

Against this backdrop, the Supreme Court's *SWANCC* decision should have been no surprise. In *SWANCC* the Court adopted a narrow construction of the CWA so as to avoid potential constitutional problems, such as those that would attend an assertion of federal regulatory authority based on nothing more than the presence of migratory birds. Despite the Court's decision, the Army Corps and EPA refused to revise their regulations or recognize that the decision had any meaningful effect on their jurisdiction. Nonetheless, agency delineations remained inconsistent. Despite claims that the limits of the Army Corps' jurisdiction were relatively clear, the U.S. Government Accountability Office found both inter- and intra-office variation in jurisdictional determinations by the Army Corps.

Rapanos was not a revolutionary decision, but a logical sequel to *SWANCC*. In *Rapanos* the Supreme Court reaffirmed the existence of both statutory and constitutional limits on the scope of federal regulatory jurisdiction over private lands and waters. The Court rejected the Army Corps and EPA's expansive interpretation of their own authority, and reaffirmed that federal regulatory authority only extends to those wetlands that have a "significant nexus" to navigable waters of the United States.

As in the *SWANCC* decision, a majority of the Court adopted a narrow construction of the meaning of "waters of the

United States" so as to ensure that the CWA did not exceed the scope of federal authority under the Commerce Clause. As Justice Kennedy explained, "In *SWANCC*, by interpreting the Act to require a significant nexus with navigable waters, the Court avoided applications — those involving waters without a significant nexus — that appeared likely, as a category, to raise constitutional difficulties and federalism concerns." Justice Kennedy's *Rapanos* opinion embraced this same approach, explaining that this aspect of the *SWANCC* precedent limited the scope of federal jurisdiction sufficiently to prevent any jurisdictional problems. Wrote Kennedy, "as exemplified by *SWANCC*, the significant-nexus test itself prevents problematic applications of the statute."

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

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

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

If regulatory certainty is the goal, new legislation is unnecessary. Indeed, it is counterproductive. The surest way to bring greater certainty to the scope of federal regulation under the CWA is for the Army Corps and EPA to undertake a notice-and-comment rulemaking to more clearly define when, and under what conditions, waters and wetlands constitute a part of the "waters of the United States." Under *SWANCC* and *Rapanos*, the Army Corps and EPA retain ample authority to identify those ecological factors and characteristics that are indicative of a "significant nexus" to navigable waters, so as to facilitate more consistent and predictable jurisdictional determinations by regional offices, courts, and private landowners. Indeed, three of the opinions in *Rapanos* — those by Justice Kennedy, Justice Breyer, and Chief Justice Roberts — expressly encourage the Army Corps and EPA to do just that.

New legislation is not a solution to regulatory uncertainty, but a costly and potentially disruptive detour.

If the CWRA is enacted, this step is not avoided. Upon the act's adoption, the Army Corps and EPA will still have to engage in a notice-and-comment rulemaking to clarify the scope of "waters of the United States" if there is to be any regulatory certainty. New legislation is not a solution to regulatory uncertainty, but a costly and potentially disruptive detour.

IMPROVING ENVIRONMENTAL PROTECTION

Protection of the nation's waters and wetlands does not require additional legislation, nor does it require the adoption of a more expansive assertion of regulatory jurisdiction. If Congress seeks to improve federal environmental protections of waters of the United States, it should not seek the indiscriminate expansion of federal regulatory authority. Adopting a new, expanded definition of "waters of the United States" that exceeds the scope of the CWA as interpreted in *Rapanos* and *SWANCC* is not a particularly effective way of reducing water pollution or conserving the nation's wetlands. Rather, Congress should encourage the Army Corps and EPA to focus their regulatory efforts so as to maximize their effectiveness.

Federal regulatory resources are necessarily limited. For this reason, those resources are best utilized if they are targeted at those areas where there is an identifiable federal interest, or the federal government is in particularly good position to advance conservation goals. For example, there is an undeniable federal interest in regulating the filling or dredging of

wetlands where such activities would cause or contribute to interstate pollution problems or compromise water quality in interstate waterways. Where the effects of wetland modification are more localized, the federal interest is less clear. Not coincidentally, in the latter case, the basis for federal jurisdiction is also more attenuated.

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

A more expansive definition of "waters of the United States" is not necessary to control water pollution either. While there is a single definition of "waters" for all purposes of the CWA, the definition does not have the same effect on direct water pollution control efforts as it does on wetland development. The CWA prohibits any unpermitted discharge of a pollutant into "waters of the United States." This includes indirect discharges. Therefore, removing an intermittent stream from federal jurisdiction under the CWA does not mean that discharges into that stream that reached navigable waters are unregulated. To the contrary, such discharges are still governed by the act.

One should also not lose sight of the fact that federal regulation is not the only means for advancing wetland conservation. Indeed, the experience of federal conservation programs that rely upon incentives and cooperation with private landowners compares quite favorably with the conflicts and inconsistencies of federal wetland regulations. Federal support for the protection of waterfowl habitat dates back some 70 years to the sale of "duck stamps" to hunters that created a dedicated source of revenue for conservation of an estimated 4.5 million acres. Other programs under which the federal government enters into private agreements with landowners to restore wetlands on their property, while subsidizing the cost of restoration and the purchase of a permanent or multiyear easement to ensure that the wetland is protected, are particularly cost-effective when compared to mandated mitigation under the CWA. Adopted pursuant to the federal spending power rather than the Commerce Power, such programs are also not confined by the constitutional limits on federal regulatory authority, nor do they generate the litigation and conflict of federal controls on private land-use decisions. The effectiveness of such programs is undermined, however, by the existence of ethanol subsidies and other programs that increase commodity prices and thus increase the cost of setting aside prospective cropland for conservation purposes.

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

CONCLUSION

Enhancing protection of waters and wetlands is a worthy policy goal. Further expansion of regulatory authority is not necessary to achieve that goal, and could even be counterproductive. Regulated entities and the conservation community both stand to benefit from greater clarity about the scope of federal jurisdiction. Yet the CWRA will not provide such certainty. To the contrary, enactment of the CWRA would ensure years of litigation and regulatory conflict, neither of which will enhance federal conservation efforts. R

Readings

- "An Opening for Meaningful Reform?" by David L. Sunding. *Regulation*, Vol. 26, No. 2 (2003).
- "Reckoning with *Rapanos*: Revisiting 'Waters of the United States' and the Limits of Federal Wetland Regulation," by Jonathan H. Adler. *Missouri Environmental Law and Policy Review*, Vol. 14 (2006).
- "Swamp Rules: The End of Federal Wetlands Regulation?" by Jonathan H. Adler. *Regulation*, Vol. 22, No. 2 (1999).
- "The Ducks Stop Here? The Environmental Challenge to Federalism," by Jonathan H. Adler. *Supreme Court Economic Review*, Vol. 9 (2001).
- "The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process," by David Sunding and David Zilberman. *Natural Resources Journal*, Vol. 42 (2002).
- The Supreme Court and the Clean Water Act: Five Essays on *Rapanos*," edited by L. Kinvin Wroth. *Vermont Environmental Law Journal*, 2007.