Testimony

by

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on behalf of the

National Association of Wheat Growers
National Cattlemen's Beef Association

With regard to

Interpreting the effect of the U.S. Supreme Court's recent decision in the joint cases of Rapanos v. United States and Carabell v. U.S. Army Corps of Engineers on "The Waters of the United States"

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Subcommittee on Fisheries, Wildlife, and Water

The Honorable Lincoln Chafee, Chairman

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Introduction

My name is Keith Kisling and I come from Burlington, Oklahoma. I am here today testifying on behalf of the National Association of Wheat Growers (NAWG) and the National Cattlemen's Beef Association (NCBA). I raise 1,500 head of stocker cattle on wheat pasture and 900 – 1,000 cattle on a backgrounding lot. Additionally, I grow wheat on more than 3,000 acres. Currently, I am the Chairman of the Oklahoma Wheat Commission and am the past Chairman of the U.S. Wheat Associates, which is the marketing arm for wheat growers in our country. My family and I have been in the business of farming and ranching for more than 35 years, and I am a third generation producer.

Members of NAWG and NCBA are on the land everyday raising and growing food for our nation and the world. We produce the cheapest and most plentiful supply of food in the world. Our producers respect and love the land in a way occasional visitors to the land may have difficulty comprehending. We know that food production must be sustainable for it to be economic in the long run.

Approximately 70% of the land in the lower 48 States is owned privately. A substantial portion of this land is used for the production of food which is arguably the most important use for this land. The production of food in our country cannot be taken for granted. Farmers and ranchers in other countries are increasingly able to produce comparable food at lower cost to the American market. Additionally, society also looks to this private land and associated waters for many other services, including habitat for wildlife, clean water, and open space, most notably. American producers face an ever tightening web of regulations which economically marginalizes an increasing number of operations. While many, if not all, of the environmental and work-safety regulations are well-intended, it must also be recognized that limiting and ultimately choking the ability of farm and ranch operations to earn a living will come at a considerable cost to the nation.

The single biggest threat to wildlife values in the world is fragmentation of landscapes. Given the enormous pressures to subdivide and develop land in this country, farms and ranches are the most important buffers to slowing the tide of development. There is also a considerable human cost to disregarding the needs of farms and ranches. The families who settled our country and made a living from the land provided a critical service to our nation and deserve the respect and support of society. While times change and so must people, hopefully our ability and desire to support our history and cultural heritage does not. Respect for this history includes respect for buildings and artifacts. But it also includes respect for the people who made the buildings and artifacts. We are diminished as a people if we lose our connection with the past and the people who continue to bridge the past with the future.

The challenge for society in using private lands is to strike a sensible balance between the demands of food production and conservation of natural resources. Unfortunately, the United States through both Republican and Democratic administrations has completely

abdicated its responsibility to strike a balance between protecting wetlands and the respecting people who make their living on the land. Not only has no balance been struck, but in fact, regulation has been allowed to proceed unlawfully and directly at odds with teachings from the leading Supreme Court cases on the issue. This Congress and this Administration cannot allow this situation to continue. Fortunately, the Supreme Court provided a roadmap for resolving the situation in its recent decision in Rapanos v. United States, 126 S.Ct. 2208 (2006).

1. **Need Rulemaking**

Section 404 of the Clean Water Act (CWA) authorizes the Corps of Engineers to issue permits for the discharge of dredge and fill materials into navigable waters of the United States. In Solid Waste Agency of Northern Cook County v. Army Corps of Engineers, (SWANCC), 531 U.S. 159 (2001), the Supreme Court ruled the Corps could not require a permit to fill isolated wetlands because such wetlands are not waters of the United States and are not subject to the regulatory reach of the Clean Water Act. This limitation on the reach of the CWA has never been implemented by the Corps in a rulemaking. Instead, the Corps continues to assert jurisdiction over every conceivable presence of water on the land. In Rapanos, 126 S.Ct. 2208 (2006), the Court observed that even after SWANCC, the government continued to regulate "roadside ditches"; tributaries consisting of "an intermittent flow of surface water through approximately 2.4 miles of natural streams and manmade ditches"; "irrigation ditches and drains that intermittently connect to covered waters"; and, "washes and arroyos" in the middle of the desert. Rapanos, 126 S.Ct. at 2217-18.

The need for rulemaking was emphasized by Justices Kennedy, Breyer, and Chief Justice Roberts in Rapanos. As Chief Justice Roberts observed,

> Rather than refining its view of its authority in light of our decision in SWANCC, and providing guidance meriting deference under our generous standards, the Corps chose to adhere to its essentially boundless view of the scope of its power. The upshot today is another defeat for the agency.

Rapanos, 126 S.Ct. at 2236.

Nobody benefits from the government's failure to act in this arena. Without a rule, a federal assertion of jurisdiction over waters will always be subject to a legal challenge for failure to comply with the Administrative Procedures Act. Not only will the agency be defeated again without a rule but so will those members of the public who are concerned with protecting as much water resources as possible within the actual jurisdiction of the Corps.

Of course, agriculture producers are also big losers from government regulation without a rule. Because agriculture producers control so much private land in this country, much of the land has some kind of water on it either permanently or intermittently. Without clear

notice of the extent of the government's regulatory reach provided by a rule, producers will always be uncertain about the extent they can use their own land without running afoul of the proscriptions in the CWA.

Both the overzealous government regulation and the failure to provide adequate notice about the extent of authority to regulate result in serious infringement of the rights of producers to use their own property. Private property rights are perhaps the most important bulwark enshrined in our nation's laws and customs against abusive government conduct. People want to be left alone to use their property as they see fit. While we understand the government can and should regulate private conduct in certain carefully prescribed instances, we expect in this country that that regulation will be pursuant to law.

In the case of waters of the United States, the government has clearly been regulating the use of private property beyond the authority conferred by the CWA. In its decisions in SWANCC and Rapanos, the Supreme Court has worked to check this usurpation of congressional authority by the executive branch of government, albeit to no avail as of this time. Those interested in protecting civil liberties, and of course the producers themselves, are the big losers. The time for the government to issue a rule in conformance with the law is certainly upon us.

2. **Content of the Regulations**

The Supreme Court in Rapanos offered guidance on this question as well. As an initial matter, it may be worth dispelling confusion that apparently swirls around the wetlands community as to what was the rule issued by the Court in the case. If the interested community cannot come to agreement on this point, it is hard to imagine an agreement forming on what should be the content of the regulations.

When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds." Marks v. United States, 430 U.S. 188, 193 (1977) (emphasis added).

For Rapanos, the opinions that "concurred in the judgment" were Justice Scalia's four-justice plurality and Justice Kennedy's concurrence, not Justice Stevens and the dissent. Accordingly, the Administration should look to the common elements of the Scalia and Kennedy decisions to determine the new standard for CWA jurisdiction. There appears to be at least two elements Kennedy and the plurality agreed on:

1. Hydrologic Connection

Hydrologic connection in the sense of an interchange of waters between a wetland and a navigable in fact body of water is not enough by itself to show a "significant nexus" between the wetland and the water to support an assertion of jurisdiction by the Corps. 126 S.Ct. at 2251. Justice Kennedy emphasized the importance of frequency of flow,

volume of flow, and proximity to traditional navigable waters in determining whether a nonnavigable water has a "significant nexus" with traditional navigable waters. Justice Scalia's plurality opinion requires a continuous connection from nonnavigable water to navigable water. Thus, remote and insubstantial connections will not suffice under either test.

2. Identification of Jurisdictional Tributaries

Justice Kennedy criticized the Corps' existing standard for identifying tributaries as overbroad:

> [T]he Corps deems a water a tributary if it feeds into a traditional navigable water (or tributary thereof) and possesses an ordinary high water mark. . . . [Although] this standard presumably provides a rough measure of the volume and regularity of flow . . ., the breadth of this standard – which seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water carrying only minor water volumes towards it – precludes its adoption as the determinative measure of whether adjacent wetlands are likely to play an important role in the integrity of the aquatic system comprising navigable waters as traditionally understood.

126 S.Ct. at 2249. Justice Scalia was similarly skeptical of the Corps' and EPA's regulation of ditches, drains, gutters, and gullies.

These points of agreement do not so much identify an affirmative standard for regulation, as they identify limitations on Corps authority, as does the SWANCC Court's decision excluding isolated wetlands from the reach of regulation, that must be reflected in promulgated rules.

Much has been made of Justice Kennedy's proposed "significant nexus" test for determining whether a wetland is within the reach of government regulation under the Clean Water Act. Because of the variety of circumstances in which water exists on the land, it may very well be that jurisdictional determinations for wetlands will have to be done on a case- by-case basis to some extent. It is also true, however, that the Supreme Court has offered some bright lines in SWANCC and the common elements in Rapanos for excluding certain waters from the reach of the CWA.

Thank you for this opportunity to testify today. I will be pleased to take any questions you may have.