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**Anchoring the Clean Water Act:
Congress's Constitutional Sources of Power
To Protect the Nation's Waters**

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Anchoring the Clean Water Act: Congress's Constitutional Sources of Power to Protect the Nation's Waters

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I. Introduction

Two badly divided Supreme Court rulings on the scope of the Clean Water Act¹ have left lower courts, legal scholars, federal agencies, environmental activists, and developers to grapple with difficult practical questions: Are so-called “isolated” or remote wetlands still covered by the Act? What about headwater streams and similar tributaries, and other waters that are vitally important, but may be miles away from larger lakes, rivers, and estuaries, or run intermittently or seasonally? When do non-navigable—but ecologically critical—streams and wetlands fall under federal jurisdiction?

As a legal matter, determining which water bodies are protected by the Clean Water Act depends on two things: first, Congress's intent in passing the Act, as determined from the Act's language, structure, and legislative history; and second, the meaning and scope of the constitutional provisions that give Congress power to legislate to protect the nation's waters. The key Supreme Court decisions on Clean Water Act jurisdiction have been concerned with only the first of these two considerations: attempting to divine the intent of Congress when it passed the modern Clean Water Act in 1972 and amended it in 1977 and 1987.

But what if Congress were to resolve this question of “intent” once and for all by again amending the Clean Water Act, this time to make clear that Congress intends to protect the nation's waters to the fullest extent of its legislative power under the Constitution? Legislation that would accomplish such clarification has now been introduced in both chambers of the 110th Congress.² This Issue Brief identifies the constitutional powers Congress can rely on to protect waters nationwide, and discusses what the Supreme Court has said about these powers. The following analysis is intended to inform the debate on the fundamental—but often misunderstood—area of law where protection of the nation's waters meets the Constitution.

II. Overview of Congress's Constitutional Sources of Power To Protect the Nation's Waters

The Constitution makes no express grant of power to regulate the nation's waters. However, the Constitution *does* vest in Congress powers that for many years Congress has successfully used to address issues that are national in scope—including management of waterways, flood control, and water pollution. These powers, together with Congress's additional authority to employ all “necessary and proper” means of carrying them out, form the constitutional basis on which Congress has legislated, and can continue to legislate, a comprehensive program of protection for all the nation's waters, including its many streams and wetlands.

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¹ 33 USC §§ 1251-1387

² H.R. 2421 & S. 1870 (Clean Water Restoration Act of 2007).

Traditionally, Congress’s most important power for purposes of environmental protection has been the power to regulate interstate commerce, granted exclusively to Congress by the Commerce Clause of Article I, Section 8, of the Constitution. This broad power—which includes Congress’s authority to regulate activities, even purely intrastate activities, that substantially affect commerce—has a rich history that underlies most federal legislation and regulation. Accordingly, it is the primary focus of this Issue Brief.

Also relevant, however, and gaining renewed attention, are: the treaty power, which derives from the Senate’s power of advice and consent to the President in the making of international treaties (Article II, Section 2); Congress’s power to manage all federal property, articulated in the Property Clause (Article IV, Section 3); and Congress’s spending power, contained in the Spending Clause (Article I, Section 8). This Issue Brief addresses the treaty power for its general utility in implementing international agreements that provide a basis for protecting wetlands and other waters. The property power and spending power are equally important but more specialized, and detailed treatment of them is beyond our present scope.

In addition to these enumerated powers, the Constitution grants Congress the further power “[t]o make all Laws which shall be necessary and proper” for executing its enumerated powers and all other powers vested by the Constitution in the U.S. Government (Article I, Section 8). This Necessary and Proper Clause has always been crucial to Congress’s effectiveness. As early as 1819, Chief Justice John Marshall wrote for a unanimous Supreme Court: “[I]f the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”³

The nature and scope of Congressional powers have been the subject of Supreme Court decisions dating to the earliest days of the Republic. Although questions persist even today about the precise reach of these individual powers, case law establishes that Congress possesses very broad constitutional authority to regulate the nation’s waters, particularly if it does so through a comprehensive legislative scheme like the Clean Water Act.

III. The Commerce Clause — Cornerstone of Environmental Law

A. The Basics.

Article I, Section 8 of the Constitution grants Congress the power “[t]o regulate Commerce . . . among the several States.” Federal legislative authority over interstate commerce is plenary, which means it is “complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution.”⁴

The Commerce Clause has served as the basis for nearly every major environmental and public health law passed by Congress, including the Clean Water Act. Despite repeated legal challenges to the constitutionality of these laws—including laws that of necessity regulate local,

³ *M’Culloch v. Maryland*, 17 U.S. 316, 421 (1819).

⁴ *Gibbons v. Ogden*, 22 U.S. 1, 75 (1824) (Chief Justice Marshall).

intrastate activities—neither the Supreme Court nor federal appellate courts have ever struck down an environmental statute as exceeding Congress’s power under the Commerce Clause.⁵

Nor is environmental law unique in the field of Commerce Clause legislation and jurisprudence. Over the last century, Congress has successfully relied on its Commerce Clause authority to respond to a variety of societal ills, including racial discrimination in public accommodations and restaurants,⁶ loan-sharking (and a vast array of other fraudulent or criminal activities),⁷ employer wage-and-hour abuses,⁸ trade in unsafe food products,⁹ and unfair labor practices targeting unions.¹⁰

It may seem counter-intuitive that Congress would try to address social, environmental, or health problems such as water pollution or racial discrimination by invoking a general constitutional provision that deals with *commerce*. Yet the Supreme Court has made clear that Congress is free under the Commerce Clause to legislate not only against economic problems, but also against public health problems and moral and social problems, so long as those problems also are a burden on interstate commerce.¹¹ And the Necessary and Proper Clause gives Congress great flexibility to legislate the means needed to exercise its commerce power effectively.

The Supreme Court has recently reaffirmed that the Commerce Clause authorizes Congress to engage in three general categories of regulation. First, Congress can directly regulate the “channels” of interstate commerce (such as highways and rivers); second, Congress can regulate the “instrumentalities” of interstate commerce, and persons or things in interstate commerce; and third, Congress can regulate “activities that substantially affect interstate commerce.”¹² For purposes of clean water legislation, the “channels” prong and the “substantial effects” prong are particularly important.¹³

⁵ See, e.g., *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 264, 283 (1981) (upholding Surface Mining Control and Reclamation Act); *Alabama-Tombigbee Rivers Coalition v. Kempthorne*, 477 F.3d 1250, 1273 (11th Cir. 2007) (joining three other Circuits in upholding Endangered Species Act; *GDF Realty Investments v. Norton*, 326 F.3d 622 (5th Cir. 2003), *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003), *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000), and *National Association of Homebuilders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997)); *Nebraska v. EPA*, 331 F.3d 995, 998 (D.C. Cir. 2003) (upholding Safe Drinking Water Act); *United States v. Olin Corp.*, 107 F.3d 1506, 1510 (11th Cir. 1997) (upholding CERCLA “Superfund” hazardous waste law).

⁶ E.g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 254-58 (1964), and its companion case, *Katzenbach v. McClung*, 379 U.S. 294, 304-05 (1964) (upholding Title II of the Civil Rights Act of 1964).

⁷ E.g., *Perez v. United States*, 402 U.S. 146, 146-47 (1971) (upholding Consumer Credit Protection Act).

⁸ E.g., *United States v. Darby*, 312 U.S. 100, 122-23 (1941) (upholding Fair Labor Standards Act); *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 555-56 (1985) (rejecting state claim of Tenth Amendment immunity from Fair Labor Standards Act).

⁹ E.g., *United States v. Carolene Products Company*, 304 U.S. 144, 147-48 (1938) (upholding Filled Milk Act).

¹⁰ E.g., *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 49 (1937) (upholding National Labor Relations Act).

¹¹ See *Carolene Products Company*, 304 U.S. at 147; *Heart of Atlanta Motel*, 379 U.S. at 257.

¹² *Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005).

¹³ The second Commerce Clause prong, providing for regulation of “things in interstate commerce,” offers another viable—though largely unexplored—basis for legislating water protections. Not only are chemicals and other pollutants that move in interstate commerce clearly subject to federal regulation, the Supreme Court also has

B. The Clean Water Act—Regulating “Navigable Waters” Based on the Commerce Clause.

The Clean Water Act asserts federal jurisdiction over “navigable waters.”¹⁴ The Act then defines “navigable waters” as “waters of the United States, including the territorial seas.”¹⁵ The phrase “waters of the United States” is not further defined.

Despite the sometimes complex case law and scholarship interpreting these statutory terms, the history of Clean Water Act jurisdiction is easily understood with reference to two distinct eras: the long period following passage of the Act and pre-dating the Rehnquist Court’s decision in *Solid Waste Authority of Northern Cook County v. U.S. Army Corps of Engineers*,¹⁶ or “SWANCC” (1972-2001); and the current post-SWANCC era (2001-present).

1. The Pre-SWANCC Era (1972-2001)

The statutory term “navigable waters” appears nowhere in the Constitution. However, Congress has historically employed this term to invoke its Article I power to regulate commerce among the states, and has applied that power to navigable waters since the nineteenth century.¹⁷ There exists no doubt that during the twentieth century, Congress used this power to enact the successive Federal Water Pollution Control Acts, culminating in the 1972 version now commonly known as the Clean Water Act.

Nor was there any doubt that by 1972, Congress intended to regulate much more broadly than in any previous federal water legislation. The legislative history of the Act establishes that the “major” purpose of the new law was “to establish a comprehensive long-range policy for the elimination of water pollution.”¹⁸ For example, Senator Jennings Randolph of West Virginia said that “[i]t is perhaps the most comprehensive legislation that the Congress of the United States has ever developed in this particular field of the environment.”¹⁹

As soon as the law passed, the U.S. Environmental Protection Agency (EPA) articulated an appropriately comprehensive view of its regulatory authority.²⁰ When the U.S. Army Corps of Engineers failed to follow suit,²¹ defining “waters of the United States” to cover only traditional

squarely ruled that water itself is “an article of commerce.” *See Sporhase v. Nebraska, ex rel. Douglas*, 458 U.S. 941, 954 (1982) (in the groundwater context).

¹⁴ *E.g.*, 33 U.S.C. § 1251(a), CWA § 101(a) (goals and policies); 33 U.S.C. § 1313(c)(2)(A), CWA § 303(c)(2)(A) (requirement of water quality standards); 33 U.S.C. § 1344(a), CWA § 404(a) (issuance of permits for the discharge of dredged or fill material); and 33 U.S.C. § 1362(12), CWA § 502(12) (defining “discharge of a pollutant”).

¹⁵ 33 U.S.C. § 1362(7), CWA § 502(7).

¹⁶ 531 U.S. 159 (2001).

¹⁷ *See, generally, e.g.*, William W. Sapp, *et al.*, “From the Fields of Runnymede to the Waters of the United States: A Historical Review of the Clean Water Act and the Term ‘Navigable Waters,’” 36 *Environmental Law Reporter* 10190, 10191 (2006).

¹⁸ S. Rep. No. 92-414 at 95 (Oct. 28, 1971).

¹⁹ 117 Cong. Rec. 38,797 (Nov. 2, 1971).

²⁰ *E.g.*, 38 Fed. Reg. 13527, 13529 (May 22, 1973) (defining “navigable waters” for purposes of Section 402); 38 Fed. Reg. 10834 (May 2, 1973) (wetlands policy).

²¹ *E.g.*, 39 Fed. Reg. 12115 (April 3, 1974) (narrowly defining “navigable waters” for purposes of Section 404).

navigable waters, a federal court revoked the Corps' definition. That court wrote that by re-defining "navigable waters" as it had done in the 1972 Act, Congress had:

asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution. Accordingly, as used in the Water Act, the term is not limited to the traditional tests of navigability."²²

The Corps quickly enacted appropriate new regulations.²³ The two federal agencies' parallel regulatory definitions of "waters of the United States" have remained largely unchanged since the 1970s.²⁴

When the Clean Water Act was amended in 1977, Congress continued to view the law as sweeping. For example, Senator Howard Baker of Tennessee said that "[t]he once seemingly separate types of aquatic systems are, we now know, interrelated and interdependent. We cannot expect to preserve the remaining qualities of our water resources without providing appropriate protection for the *entire resource*."²⁵

Likewise, the Supreme Court during this era harbored no doubts about the scope of Clean Water Act jurisdiction. In one of its first cases interpreting the Act, the Court noted that Congress's intent "was clearly to establish an all-encompassing program of water pollution regulation."²⁶ And in the landmark 1985 *Riverside Bayview* decision, a unanimous Court upheld federal jurisdiction over "adjacent wetlands," finding that Congress, in re-defining the term "navigable waters" to mean "waters of the United States," had intended that the historical word "navigable" be "of limited import." The Court ruled that Congress meant to "repudiate limits that had been placed on federal regulation by earlier water pollution control statutes," and use its constitutional authority to regulate "at least some waters that would not be deemed 'navigable' under the classical understanding of that term."²⁷

Two years later, the Court would recognize that the Clean Water Act applies to "virtually all bodies of water"²⁸—a view by then long reflected in EPA and Corps regulations. (In practice, however, then as now, the Corps grants nearly all permit requests,²⁹ and the two agencies have

²² *Natural Resources Defense Council v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975).

²³ See 40 Fed. Reg. 31,319 (July 25, 1975 interim final rule); 42 Fed. Reg. 37,122 (July 19, 1977 final rule). See also, e.g., Sapp, *supra* note 17, at 10204-07 (discussing the Corps's responses to the 1972 Act and the *Callaway* ruling).

²⁴ See 33 C.F.R. § 328.3(a) (Corps definition for Section 404 program); 40 C.F.R. § 230.3(s) (EPA definition for Section 404 program); 40 C.F.R. § 122.2 (EPA definition for Section 402 program).

²⁵ 123 Cong. Rec. 26,718 (Aug. 4, 1977) (emphasis added).

²⁶ *Milwaukee v. Illinois*, 451 U.S. 304, 318 (1981).

²⁷ *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985).

²⁸ *International Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987).

²⁹ For example, the Corps received an average of 74,500 Section 404 permit requests each year from 1996 to 1999, and only three-tenths of one percent (0.3%) were denied. See *EPA's Clean Air Budget and the Corps of Engineers Wetlands Budget: Hearing Before the Subcomm. on Clean Air, Wetlands, Private Property, and Nuclear Safety of the Senate Comm. on Environment and Public Works*, 106th Cong., at 2 (2000) (testimony of Michael Davis, Deputy Assistant Secretary of the Army for Civil Works).

established permitting rules that impose only modest requirements, or none at all, on low-impact development in regulated waters.³⁰⁾

In sum, for nearly three full decades, the Clean Water Act was broadly understood to provide comprehensive federal protections for virtually all bodies of water throughout the United States—the navigable rivers and seas as well as the headwaters, intermittent and ephemeral streams, and intrastate wetlands and other waters that are critical to the health of the Nation’s interconnected aquatic ecosystems.

2. SWANCC and the Post-SWANCC Era (2001-present)

In 2001, the Supreme Court for the first time cast doubt on this long-held understanding about the comprehensive nature of Clean Water Act coverage. In a narrow 5-4 ruling in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, the Court now concluded that Congress had not intended the Act to reach “isolated ponds, some only seasonal” that were located wholly within one state, where the only asserted basis for federal jurisdiction was their use as habitat by migratory birds. While continuing to acknowledge *Riverside Bayview*’s treatment of the word “navigable” in the Act as being of “limited import,” then-Chief Justice William Rehnquist asserted in *SWANCC* that “[t]he term ‘navigable’ has at least the import of showing us what Congress had in mind as its authority for enacting the [Clean Water Act]: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.” In a sharp dissent, Justice John Paul Stevens argued that the majority opinion flatly ignored the Act’s language, legislative history, and a nearly thirty-year record of executive branch and judicial interpretation—including the Court’s own decision in *Riverside Bayview*.³¹

Although the Court decided *SWANCC* on statutory rather than constitutional grounds, it did rule with an eye on the Commerce Clause. Rehnquist wrote that absent a “clear statement” from Congress that it had intended to reach the “isolated” waters³² at issue, the *SWANCC* majority would interpret the Act so as “to avoid the significant constitutional and federalism questions” that might be raised by assuming Congress had in fact meant to regulate to the full extent of its commerce power.³³ Despite Rehnquist’s concerns, however, lower courts interpreting *SWANCC* in the years that followed declined to pick up the constitutional cudgel.

³⁰ Section 404 permits can be individual or general. See 33 U.S.C. § 1344(e), CWA § 404(e) (general permits on state, regional, or nationwide basis). Approvals made under a general permit represents nearly 9 out of 10 permitting decisions made by the Corps. See Corps Fiscal Year 2003 Regulatory Statistics, available online at <http://www.usace.army.mil/cw/cecwo/reg/2003webcharts.pdf>. The Corps recently reissued all of its existing Nationwide Permits (NWP) and also issued new ones. See *Reissuance of Nationwide Permits; Notice*, 72 Fed. Reg. 11092 (March 12, 2007).

³¹ 531 U.S. 159, 162, 171-72, 176-77 (2001).

³² The word “isolated” is placed in quotes throughout this Issue Brief because, although the term was used in *SWANCC* to denote waters or wetlands located far from and geographically separated from waters traditionally understood as navigable, it has no scientific or ecological meaning. Wetland ecologists do not concede that any wetland is properly understood as “isolated.”

³³ *SWANCC*, 531 U.S. at 173-74; cf. *United States v. Wilson*, 133 F.3d 251, 256 (4th Cir. 1997) (“However, we need not resolve these difficult questions about the extent and limits of congressional power to regulate nonnavigable waters to resolve the issue before us.”).

In 2006, in *Rapanos v. United States*, the new Roberts Court took its first look at the scope of the Clean Water Act—this time in the context of wetlands adjacent to non-navigable tributaries of navigable waters. The Court fractured over its interpretation of the Act, issuing five opinions, none commanding a majority, and coming up with two very different tests for federal jurisdiction.³⁴ Significantly, as in *SWANCC*, the Court again declined to rule on the extent of Congress’s constitutional authority to legislate under the Commerce Clause—despite invitations from several parties to do so. To date, the main impact of the *Rapanos* Court’s “clarification” of the statute has been to leave Clean Water Act jurisdiction in disarray, with the implementing agencies, legal scholars, and the regulated community struggling to sort it all out.³⁵

Notwithstanding the Supreme Court’s one-two punch to federal jurisdiction in *SWANCC* and *Rapanos*, any restriction that the justices imposed on the Clean Water Act is based on the Court’s present understanding of Congressional intent in 1972, when Congress used the terms “navigable waters” and “waters of the United States” to characterize federal jurisdiction under the Act. Neither *SWANCC* nor *Rapanos* reaches, much less decides, the underlying constitutional question: namely, *what is the scope of Congress’s constitutional authority to protect the Nation’s waters?* So regardless of prior disagreements about statutory interpretation or Congressional intent, Congress remains free to convey, through a “clear statement,” the scope it intends (and originally intended) for the Act.

C. Regulating the “Channels” of Commerce.

As noted above, an essential aspect of Congress’s Commerce Clause power is its authority to regulate the “channels” of interstate commerce. Although Congress has a long history, which the Supreme Court has consistently upheld, of exercising this power in aid of “navigation,”³⁶ the channels power is by no means limited to preserving navigability. Navigation is only one aspect of interstate commerce via the Nation’s waters; other important, traditional means of commercial regulation include flood protection and watershed development,³⁷ as well as the authority to keep the channels of commerce free from “injurious uses,” including pollution.³⁸ As applied to water pollution control, these various aspects of channels regulation are mutually reinforcing: “water pollution is . . . a direct threat to navigation—the first interstate commerce system in this country’s history and still a very important one.”³⁹

³⁴ 126 S. Ct. 2208 (2006).

³⁵ See, e.g., U.S. Army Corps of Engineers/Environmental Protection Agency Joint Guidance Document on *Rapanos* (June 5, 2007); James Murphy, “*Rapanos v. United States*: Wading Through Murky Waters,” Nat’l Wetlands Newsl., Sept-Oct 2006, at 1; Latham & Watkins LLP, Client Alert: “A Divided US Supreme Court Offers Disparate, Sweeping Opinions as to the Reach of the Federal Clean Water Act—*Rapanos* and *Carabell*,” available online at <http://www.lathamandwatkins.com/Resources.aspx?page=ArticleDetail&practice=217&publication=1586&searchtype=Articles>.

³⁶ E.g., *The Daniel Ball*, 77 U.S. 557, 563 (1870) (defining “navigable in fact”); *Economy Light Co. v. United States*, 256 U.S. 113 (1921) (holding that once found to be navigable, a waterway remains so); *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 407-09 (1940) (holding that determination of a waterway’s susceptibility to use in commerce includes considering the effects of reasonable improvements).

³⁷ *Appalachian Electric Power Co.*, 311 U.S. at 426.

³⁸ E.g., *United States v. Deaton*, 332 F.3d 698, 706-07 (4th Cir. 2003), citing *Caminetti v. United States*, 242 U.S. 470, 491 (1917).

³⁹ *United States v. Ashland Oil and Transportation Co.*, 504 F.2d 1317, 1325-26 (6th Cir. 1974).

Federal authority to regulate the channels of water-related commerce does not cease at the river's edge—nor has it ever done so. The 1899 Refuse Act, for example, made illegal the unauthorized discharge of materials into “any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water . . . or on the bank of any tributary.”⁴⁰ And the Supreme Court has emphasized that protecting a body of water necessarily requires safeguarding its non-navigable tributaries:

[T]he power of flood control extends to the tributaries of navigable streams. For just as control over the non-navigable parts of a river may be essential or desirable in the interests of the navigable portions, so may the key to flood control on a navigable stream be found in whole or in part in flood control on its tributaries.⁴¹

Not surprisingly, this language and reasoning are evident throughout the cases interpreting the Clean Water Act, from 1972 to the present.⁴²

In *Rapanos*, in his concurring opinion that most commentators agree is controlling, Justice Anthony Kennedy made clear that Congress's authority to regulate under the channels rationale remains far-reaching. Specifically, he argues that his interpretation of the Clean Water Act as requiring proof of a “significant nexus”—which assesses how a particular wetland or stream ultimately affects the quality of downstream navigable waters—raises no federalism or Commerce Clause issues.⁴³ Justice Kennedy's citations to earlier cases imply that his analysis relies primarily on the channels approach to the Commerce Clause, as augmented by the Necessary and Proper Clause.

But in addition to this clear authority to regulate streams and wetlands under a “channels” rationale, Congress also can protect the Nation's waters based on its well-settled authority to regulate activities that “substantially affect” interstate commerce. Critically, under this rationale for federal jurisdiction, Congress need not link protections back to navigable waters at all.

D. Regulating Activities that “Substantially Affect” Commerce.

Congress has the authority to regulate activities that “substantially affect” interstate commerce, either to supplement its authority over “channels,” discussed above, or as a wholly independent ground. Many federal economic, health, and labor laws are based on this power, even where the regulated behavior occurs within an individual state and has no link to the channels of commerce.

⁴⁰ Rivers and Harbors Act of 1899, ch. 425, §13, 30 Stat. 1121, 1152 (1899) (codified as amended at 33 U.S.C. § 407).

⁴¹ *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 525-26 (1941).

⁴² *E.g.*, *Ashland Oil*, 504 F.2d at 1327 (1974); *Rapanos*, 126 S.Ct. at 2249-50 (Kennedy, J., concurring in the judgment) (2006).

⁴³ Justice Kennedy's test does not even require a wetland to be physically, or “hydrologically,” connected to traditional navigable waters in order for it to come within Clean Water Act coverage. Due to wetlands' ability to filter pollutants, hold back flood waters, and store runoff, it may in fact be the *absence* of such a connection that shows their significance for the aquatic system. *See Rapanos*, 126 S.Ct. at 2249-50 (Kennedy, J., concurring in the judgment).

In the famous *Wickard v. Filburn* case, the Supreme Court upheld federal quotas on wheat production, even as applied to a farmer who grew wheat solely for personal consumption on his small farm. On behalf of a unanimous Court, Justice Robert Jackson wrote that “even if [Mr. Filburn’s] activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce.” Although Mr. Filburn’s harvest was “trivial by itself,” it and similar harvests had an impact on Congress’s larger national program: “Home-grown wheat in this sense competes with wheat in commerce.”⁴⁴

Most recently, the Court applied the same reasoning to uphold the federal ban on marijuana, despite California residents’ claim that they used marijuana only for medicinal purposes allowed under state law, that it was grown wholly within the state, and that it was neither bought nor sold. In *Gonzales v. Raich*, just as in *Wickard*, the Court ruled that the Commerce Clause clearly allows Congress to reach even this limited, intrastate use: “when ‘a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.’” In so holding, it showed great deference to Congress’s fact-finding and legislative judgment in enacting the Controlled Substances Act: “We need not determine whether [medical marijuana] activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a ‘rational basis’ exists for so concluding.”⁴⁵

Key to the Court’s decision in *Raich* was the fact that the Controlled Substances Act is “a lengthy and detailed statute creating a comprehensive framework” for regulation.⁴⁶ Unlike earlier Rehnquist Court cases that invalidated narrow federal attempts to regulate non-economic, largely criminal behavior,⁴⁷ the *Raich* Court found that the Act as a whole governs both legal and illegal drug manufacture, distribution, and use—activities that are “quintessentially economic.” Given this broad enactment, even Justice Antonin Scalia concurred in upholding Congress’s power to regulate intrastate activities with substantial effects on interstate commerce, though he grounded this power in the Necessary and Proper Clause rather than the Commerce Clause alone.⁴⁸

Like the statutes at issue in *Wickard* and *Raich*, the Clean Water Act and most other federal environmental laws establish comprehensive schemes to regulate instances of economic behavior that, either individually or in the aggregate, substantially affect interstate commerce. Discharges of pollutants or fill material into streams and wetlands occur almost *exclusively* as a result of industrial and commercial operations, such as manufacturing, construction, resource extraction, land development, agriculture, and waste disposal.

The Supreme Court has long acknowledged that Congress can use the “substantial effects” prong of its commerce power to protect the natural environment from these activities. In

⁴⁴ *Wickard v. Filburn*, 317 U.S. 111, 125, 127-28 (1942).

⁴⁵ See *Raich*, 545 U.S. at 17 (quoting *Maryland v. Wirtz*, 392 U.S. 183, 196, n. 27 (1968)), 22.

⁴⁶ *Raich*, 545 U.S. at 24.

⁴⁷ *United States v. Lopez*, 514 U.S. 549 (1995) (handgun possession near schools); *United States v. Morrison*, 529 U.S. 598 (2000) (violence against women).

⁴⁸ Indeed, following this theory to its logical conclusion, Scalia’s concurrence states that the Necessary and Proper power may extend *beyond* economic activity: “. . . Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce.” *Raich*, 545 U.S. at 3, 34.

Hodel v. Virginia Surface Mining and Reclamation Association, the Court applied the same “rational basis” test to uphold the federal statute that covers all surface coal-mining activities, including land-based operations at intrastate sites.⁴⁹ Likewise, the federal courts of appeals have unanimously upheld the Endangered Species Act, widely thought to be the most far-reaching federal environmental law, against various Commerce Clause challenges;⁵⁰ and sustained the Superfund statute’s detailed federal regulation of the impacts of individual, intrastate hazardous waste sites on land or water.⁵¹

In light of these strong environmental precedents, pollution or destruction of “isolated,” intrastate wetlands and other similar waters could be shown to affect interstate commerce and justify federal protection—based both on the typically commercial reasons for filling them and on their own inherent economic value.⁵² As discussed above, the *SWANCC* Court declined to reach this question, instead finding (despite extensive legislative history) that Congress had not made a clear statement of intent to reach these waters. Most lower courts grappling with *SWANCC* also have skirted the issue, and rested Clean Water Act jurisdiction on the statutory language or the “channels” prong of the Commerce Clause. But even such a distinguished conservative jurist as Judge Richard Posner has suggested that the “substantial effects” test provides an entirely separate constitutional basis for regulation of water, including non-navigable wetlands and streams:

In fact navigability is a red herring from the standpoint of constitutionality. The power of Congress to regulate pollution is not limited to polluted navigable waters; the pollution of groundwater, for example, is regulated by federal law . . . because of its effects on agriculture and other industries whose output is shipped across state lines, and such regulation has been held to be authorized by the commerce clause.⁵³

Congress could further reinforce this conclusion by making express factual findings of the importance of protecting even intrastate streams and wetlands for their substantial effects on interstate commerce. For example, the Supreme Court in *Hodel* quoted with approval Congress’s statutory finding that strip-mining substantially affects commerce by:

destroying or diminishing the utility of land for commercial, industrial, residential, recreational, agricultural, and forestry purposes, by causing erosion and landslides, by contributing to floods, by polluting the water, by destroying

⁴⁹ *Hodel*, 452 U.S. at 276-80 (Surface Mining Control and Reclamation Act).

⁵⁰ See cases cited in note 5, *supra*.

⁵¹ *E.g.*, *Freier v. Westinghouse Electric Corp.*, 303 F.3d 176 (2nd Cir. 2002); *United States v. Olin Corp.*, 107 F.3d 1506 (11th Cir. 1997).

⁵² A good example is provided by the “prairie pothole,” a form of shallow wetland that is often seasonal. The prairie pothole region is one of critical importance for economically valuable wildlife and water quality, covering nearly 350,000 square miles, including portions of Iowa, Minnesota, Montana, North Dakota, and South Dakota, plus parts of Canada. Gleason, R.A., *et al.*, *Potential of Restored Prairie Wetlands in the Glaciated North American Prairie to Sequester Atmospheric Carbon, Plains CO2 Reduction Partnership* (Aug. 2005) at 4. This region produces at least half of America’s waterfowl. U.S. Geological Survey, Northern Prairie Wildlife Research Center, *Prairie Basin Wetlands in the Dakotas: A Community Profile*, at 1.

⁵³ *United States v. Gerke Excavation, Inc.*, 412 F.3d 804, 807 (7th Cir. 2005) (citations omitted).

fish and wildlife habitats, by impairing natural beauty, by damaging the property of citizens, by creating hazards dangerous to life and property, by degrading the quality of life in local communities, and by counteracting governmental programs and efforts to conserve soil, water, and other natural resources.⁵⁴

Since uncertainty remains as to how future courts might focus their analysis in the clean water context,⁵⁵ any such findings would do well to elicit the “quintessentially economic” nature of the protected water resources, of the activities that benefit from them (*e.g.*, tourism, hunting), and of the activities that are threatening them (*e.g.*, industrial pollution, construction).

Along these lines, the current House and Senate versions of the proposed Clean Water Restoration Act of 2007 recite both the commercial value of the protected waters themselves when taken in the aggregate, and the commercial value of the human activities that depend on them.⁵⁶ Congress of course is not required to make such findings, nor do they foreclose judicial review.⁵⁷ But their presence, coupled with the “rational basis” standard of review, should once again lead courts to defer to Congress’s legislative judgment—especially in the context of a comprehensive environmental protection law.

In sum, Congress’s Commerce Clause power to regulate activities, including purely intrastate activities, that substantially affect interstate commerce continues to be a robust source of constitutional authority. Although it is hard to say how individual justices on the Supreme Court would view regulation of certain waters under this—or any—rationale, the fact remains that a principled reading of the relevant Commerce Clause cases—from *Wickard* through *Hodel* and *Raich*—suggests that a comprehensive legislative scheme to protect all of the Nation’s waters should be upheld as constitutional.

IV. Other Constitutional Bases for Environmental Protection

If Congress were to regulate the Nation’s waters to the fullest extent of its legislative powers under the Constitution, it would likely be invoking at least three other sources of constitutional power—none of which implicates, or is limited by, the Commerce Clause. These include the Treaty Power, the Property Clause, and the Spending Power, each of which is introduced below.

A. The Treaty Power—Implementing International Obligations through Domestic Law.

⁵⁴ *Hodel*, 452 U.S. at 277 (quoting the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201(c)).

⁵⁵ *Cf. SWANCC*, 531 U.S. at 173 (“For example, we would have to evaluate the precise object or activity that, in the aggregate, substantially affects interstate commerce. This is not clear . . .”).

⁵⁶ Clean Water Restoration Act of 2007 §§ 3(1)-(13); *see also* Brief of Environmental Law Institute as *Amicus Curiae* Supporting Respondents at 22-25, *Rapanos v. United States*, No. 04-1034 (U.S. Supreme Court).

⁵⁷ *Morrison*, 529 U.S. at 612.

In the event that any so-called “isolated” wetland or similar body of water were to be deemed by a court to lie beyond the reach of federal regulation under the Commerce Clause, Congress’s treaty power would provide an independent basis for regulation.⁵⁸

Article II, Section 2 of the Constitution establishes that the President of the United States “shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur.” This provision, taken together with the Necessary and Proper Clause power (discussed above) to implement federal authority, form what is known as the treaty power of Congress. And Article VI of the Constitution, the Supremacy Clause, provides that treaties, like the Constitution and federal laws, are the supreme law of the land.

The foreign affairs power of the United States government—including the power to make treaties—is not an “enumerated” power under the Constitution. Rather, it is inherent in the Nation’s sovereignty.⁵⁹ This power is vested exclusively in the federal government, and need not be exercised so as to conform to state laws or policies.⁶⁰ Nor are there limitations on either the purpose or subject matter of international agreements.⁶¹

Despite its breadth, the treaty power of course is not without limits. A treaty may not contravene an express constitutional prohibition, and legislation passed to implement a treaty must bear a “rational relationship” to a permissible constitutional end.⁶² Every treaty must be a bona fide international agreement—and not simply a “mock marriage” between nations contrived solely to address the subject matter of the agreement.⁶³ And the fact that a super-majority (two-thirds) of the Senate is required to approve a treaty reflects not only a legislative check on the executive branch, but also a structural “federalism” opportunity for the states to have their say—and, indeed, for even a minority of states to block passage of a treaty altogether.

In the seminal case of *Missouri v. Holland*, the state of Missouri argued that it owned all the wild birds within its borders, and that a federal game warden’s efforts to enforce a new migratory bird treaty and federal regulations to protect migratory birds violated state sovereignty under the Tenth Amendment. Justice Oliver Wendell Holmes authored a short, powerful opinion rejecting the state’s position and upholding the power of Congress to implement international treaties through domestic law, even where that law might not otherwise be authorized through Congress’s enumerated powers.

⁵⁸ Recall that while the Supreme Court’s 2001 *SWANCC* decision disapproved of federal regulation of waters based solely on their asserted use by migratory birds, that ruling depended on the Court’s *statutory* interpretation of the Clean Water Act, and its finding that Congress had not clearly stated its intent to regulate to the full limits of the commerce power. The treaty power was not at issue in *SWANCC* and was never considered by the Court.

⁵⁹ *United States v. Curtiss-Wright Export Corporation*, 299 U.S. 304, 315-18 (1936).

⁶⁰ *United States v. Belmont*, 301 U.S. 324, 330 (1937); *United States v. Pink*, 315 U.S. 203, 233-34 (1942). *See also* Louis Henkin, *Foreign Affairs and the United States Constitution* 191 (2d ed. 1996) (“Since the Treaty Power was delegated to the federal government, whatever is within its scope is not reserved to the states: the Tenth Amendment is not material.”).

⁶¹ *See, e.g.*, Restatement (Third) of Foreign Relations Law of the United States § 302, cmt. c (1987).

⁶² *Missouri v. Holland*, 252 U.S. 416, 432 (1920); *see United States v. Lue*, 134 F.3d 79, 84 (2nd Cir. 1998), *citing M’Culloch v. Maryland*, 17 U.S. 316 (1819).

⁶³ *See, e.g.*, Restatement (Third) of Foreign Relations Law of the United States § 302, Reporters’ Note 2 (1987); Henkin, *supra* note 60, at 185.

“If the treaty is valid,” Justice Holmes wrote, “there can be no dispute about the validity of the statute under Article I, Section 8, as a necessary and proper means to execute the powers of the Government.” Describing the protection of migratory birds as “a national interest of very nearly the first magnitude,” Justice Holmes found in favor of the federal government.⁶⁴ *Missouri v. Holland* remains good law, and the ruling supports the power of Congress to implement the existing international obligations of the United States to safeguard migratory birds and their ever-diminishing habitat, including wetlands and other aquatic habitat.

Specifically, the United States now is party to multiple treaties that protect migratory birds, including the following:⁶⁵

- Migratory Bird Treaties with Canada, Mexico, Japan, and the former Soviet Union⁶⁶ (implemented domestically by the Migratory Bird Treaty Act);⁶⁷
- The Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, or “Western Convention”⁶⁸ (implemented domestically by the Endangered Species Act);⁶⁹
- The Convention on International Trade in Endangered Species of Wild Fauna and Flora, or “CITES”⁷⁰ (implemented domestically by the Endangered Species Act);⁷¹ and
- The Ramsar Convention on wetlands (this convention is “self-executing”).⁷²

One example of the type of treaty provision that Congress might implement through the exercise of its treaty power appears in a 1996 protocol to the Migratory Bird Treaty between the

⁶⁴ *Missouri*, 252 U.S. at 416, 432, 435.

⁶⁵ This list is intended simply to illustrate the types of treaties that may provide a basis for stream and wetlands protection, and is by no means exhaustive. Other international conventions to which the United States is party may also provide strong, independent grounds for water protection—for example, treaties addressing oceans and fisheries.

⁶⁶ See the Convention between the United States and Great Britain for the Protection of Migratory Birds in the United States and Canada, Aug. 16, 1916, U.S.-U.K., 39 Stat. 1702; the Convention between the United States and Mexico for the Protection of Migratory Birds and Game Mammals, Feb. 7, 1936, U.S.-Mex., 50 Stat. 131; the Convention between the Government of the United States and the Government of Japan for the Protection of Migratory Birds in Danger of Extinction, and their Environment, Mar. 4, 1972, U.S.-Japan, 25 U.S.T. 3329; and the Convention between the United States of America and the Union of Soviet Socialist Republics Concerning the Conservation of Migratory Birds and their Environment, Mar. 4, 1972, U.S.-U.S.S.R., 29 U.S.T. 4647.

⁶⁷ 16 U.S.C. §§ 703-711.

⁶⁸ The Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, Oct. 12, 1940, 56 Stat. 1354, 161 U.N.T.S. 193.

⁶⁹ 16 U.S.C. §§ 1531, 1537a(e), ESA §§ 2, 8A(e).

⁷⁰ The Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243.

⁷¹ 16 U.S.C. §§ 1531, 1537a(a)-(d), ESA §§ 2, 8A(a)-(d).

⁷² The Convention on Wetlands of International Importance especially as Waterfowl Habitat, Feb. 2, 1971, T.I.A.S. No. 11084, 996 U.N.T.S. 245.

United States and Canada, establishing that each government “shall use its authority to take appropriate measures to preserve and enhance the environment of migratory birds.”⁷³

Thus, under its treaty power, Congress possesses the constitutional authority to protect even “isolated” wetlands and similar waters as habitat for migratory birds—wholly independent of the implications for interstate commerce.

B. The Property Clause—Regulating Federal Lands and Outside Conduct that Affects Those Lands.

When bodies of water are located on federal lands, Congress’s constitutional power to protect them is unequivocal. Article IV, Section 3 of the Constitution provides that “Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.” It is well settled that under the Property Clause, the federal Government “exercises the powers both of a proprietor and of a legislature.”⁷⁴ As proprietor, the federal Government has the right to protect its property, as do other landowners;⁷⁵ and as sovereign, it can regulate conduct affecting its property—preempting any state law to the contrary.⁷⁶

Nor is Congress’s Property Clause power limited by the physical boundaries of federal lands. Rather, the power extends to conduct on non-federal lands that affects federal lands and their resources.⁷⁷ Justice Holmes made the point this way: “Congress may prohibit the doing of acts upon privately owned lands that imperil publicly owned forests The danger depends on the nearness of the fire not upon the ownership of the land where it is built.”⁷⁸

Congress’s authority under the Property Clause to protect federal water resources as proprietor and sovereign would seem to include, at a minimum, the right to prohibit conduct carried out on nearby non-federal lands that could harm waters on public lands. Although there may be some point at which the relationship between federal lands and conduct on non-federal lands becomes too attenuated to support federal regulation under the Property Clause, it is clear from case law that Congress’s power in this regard is far-reaching. The Supreme Court has repeatedly referred to Congress’s power over public lands as “without limitation.”⁷⁹

C. The Spending Power—Spending for the General Welfare.

⁷³ See Protocol between the Government of the United States of America and the Government of Canada Amending the 1916 Convention between the United Kingdom and the United States of America for the Protection of Migratory Birds in Canada and the United States, art. IV, S. Treaty Doc. No. 104-28, 1995 WL 877199.

⁷⁴ *Kleppe v. New Mexico*, 426 U.S. 529, 540 (1976).

⁷⁵ E.g., *United States v. Cotton*, 52 U.S. 229, 231 (1851).

⁷⁶ E.g., *Hunt v. United States*, 278 U.S. 96, 100 (1928).

⁷⁷ E.g., *Camfield v. United States*, 167 U.S. 518, 525-26 (1897); *United States v. Alford*, 274 U.S. 264, 267 (1927); *Cappaert v. United States*, 426 U.S. 128, 138-41 (1976).

⁷⁸ *Alford*, 274 U.S. at 267.

⁷⁹ E.g., *United States v. Gratiot*, 39 U.S. 526, 534 (1840); *United States v. City & County of San Francisco*, 310 U.S. 16, 29 (1940).

Another tool available to Congress for protecting the Nation’s waters derives from the power of the purse. Article I, Section 8 of the Constitution empowers Congress to “lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.” From this provision arises the spending power: Congress’s authority to spend in pursuit of “the general welfare.” Former Chief Justice Rehnquist wrote that:

[i]ncident to this power, Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power “to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.”⁸⁰

There is nothing new about conditioning federal grant monies; one commentator has indicated that conditions on grants can be traced back to the 1870s.⁸¹

Congress is not limited in its exercise of the spending power by the scope of its other enumerated powers.⁸² “[O]bjectives not thought to be within Article I’s ‘enumerated legislative fields’ may nevertheless be attained through the use of the spending power and the conditional grant of federal funds.”⁸³ Thus, Congress can condition the receipt of federal funds on compliance with federal statutes and policies that Congress could not otherwise mandate.

The spending power does have limits. First, the text of the constitutional provision itself limits spending to pursuit of “the general welfare,” a point on which “the courts should defer substantially to the judgment of Congress.” Second, if Congress desires to condition the States’ receipt of federal funds, it ‘must do so unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.’” Third, conditions might be “illegitimate if they are unrelated ‘to the federal interest in particular national projects or programs.’” Fourth, Congress cannot induce states to engage in otherwise unconstitutional conduct. Ultimately, Congress can rely on financial inducements to encourage the states, but not compel, or “commandeer,” them to exercise their police power in a way that satisfies Congress’s objectives.⁸⁴

The “Swampbuster” provisions of the Food Security Act—which condition eligibility for federal farm subsidies on preserving wetlands—provide a salient example of how Congress can, and does, use its spending power to protect the Nation’s water resources.⁸⁵ It would also seem reasonable that Congress could expressly condition the grant of federal funds under various

⁸⁰ *South Dakota v. Dole*, 483 U.S. 203, 206-07 (1987) (citations omitted).

⁸¹ Prof. Denis Binder, “The Spending Clause as a Positive Source of Environmental Protection: A Primer,” 4 *Chapman L. Rev.* 147, 149 & n. 24 (2001).

⁸² *United States v. Butler*, 297 U.S. 1, 66 (1936).

⁸³ *South Dakota*, 483 U.S. at 207 (citations omitted).

⁸⁴ *South Dakota*, 483 U.S. at 207-08, 210, 211; *see also*, *New York v. United States*, 505 U.S. 144, 175 (1992).

⁸⁵ *See, e.g., United States v. Dierckman*, 201 F.3d 915, 922 (7th Cir. 2000) (upholding Swampbuster under the spending power).

existing water programs on states' agreement to protect certain categories of waters, such as so-called "isolated wetlands."⁸⁶

V. Conclusion

If, as many lawmakers have now proposed, Congress amends the Clean Water Act with the express intent of regulating the waters of the United States to the full extent of its power under the Constitution, the legislation would be based largely on the Commerce Clause and the treaty power, each as implemented on its own terms, and through the Necessary and Proper Clause. Other potential sources of constitutional authority, discussed less extensively here, are the Property Clause and the spending power.

Relevant history and precedent demonstrate that Congress's authority to assert federal jurisdiction through the exercise of the commerce power alone is far-reaching, particularly in light of Congress's ability to regulate even purely intrastate activities as part of a comprehensive legislative scheme. And should Congress assert jurisdiction over the Nation's waters based on *all* of its relevant powers, collectively, there is little doubt that Congress would again be calling on the Corps of Engineers and EPA to regulate pollution and protect habitat across the vast majority of aquatic ecosystems nationwide. As a practical matter, this outcome would have the effect of restoring federal protection to the same categories of waters that were commonly understood to be subject to federal jurisdiction during the three decades prior to the Supreme Court's *SWANCC* ruling. Such a result would be both consistent with the Clean Water Act's long, successful history and, as this Issue Brief demonstrates, defensible as a matter of constitutional law.

⁸⁶ See, e.g., Binder, *supra* note 81, at 161 (discussing the concept and relevant Clean Water Act grant programs and revolving funds).