

# **ENVIRONMENTAL LAW, WETLANDS REGULATION, AND REFORM OF THE ENDANGERED SPECIES ACT**

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A CONFERENCE PRESENTED BY THE FEDERALIST SOCIETY AND ITS  
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## **PANEL I: PROPOSED REFORM OF THE ENDANGERED SPECIES ACT**

*Both Houses of Congress are considering the first major overhaul of the Endangered Species Act in over thirty years. The House passed the Endangered Species Recovery Act of 2005 last September. Related legislation has been introduced in the U.S. Senate. Has the ESA properly balanced costs and benefits in the protection of endangered species? Has it been effective in identifying and protecting endangered species, or has it been over inclusive? Has ESA litigation had unintended consequences? What are the costs of ESA to private property ownership? How will the proposed ESA reform measures change the legal landscape?*

### **MODERATOR:**

Hon. Lynn Scarlett, Deputy Secretary, U.S. Department of the Interior

### **PANELISTS:**

Honorable Richard Pombo, U.S. House of Representatives  
Mr. Michael Bean, Environmental Defense Fund  
Mr. John Kostyack, National Wildlife Federation  
Mr. Lawrence Liebesman, Holland & Knight  
Mr. Steven Quarles, Crowell & Moring

HON. LYNN SCARLETT  
DEPUTY SECRETARY  
U.S. DEPARTMENT OF THE INTERIOR

I am Lynn Scarlett with Department of the Interior, and I'm going to serve as the moderator for this Endangered Species Act panel. I want to get right into things with Congressman Pombo, and I do want to let everyone know that the Congressman is going to have to leave after his remarks. I know he would've loved to be here for all of the dialogue and debate, but he has many other duties.

Many of you, of course, are familiar with Congressman Pombo and his work and leadership. He's in his, I believe, seventh term in the U.S. House of Representatives. He represents California's 11th Congressional District and that is, for those of you who know California, the San Joaquin, Alameda, Contra Costa, and Santa Clara County areas; lots of endangered species and lots of challenges there, so he has paid a lot of attention to this topic. He is Chairman of the House Resources Committee, so at Department of the Interior, we are often partners and in many discussions in dialogue with Congressman Pombo.

So without any ado, I want to introduce the Congressman. He, of course, has taken a significant leadership role in discussions about the future of the Endangered Species Act, and indeed, had a bill in the House that has moved forward, and I'm sure he'll be talking to us about that.

HON. RICHARD POMBO  
U.S. HOUSE OF REPRESENTATIVES

Well, thank you very much, Lynn. It's nice to have an opportunity to be here today and talk a little bit about what we have done in the House in regards to the Endangered Species Act, and the effort that we have made. But I think that, to begin with, we need to have a little bit of a background on the process that we've gone through over the last several years on the Endangered Species Act. When I was elected, almost fourteen years ago now, I introduced a bill to rewrite the Endangered Species Act. And over the last several years I think I've had an opportunity to learn a lot about what has worked and what has not worked in terms of the implementation of the Act.

If you go back to the original purpose of the Act, I don't think anybody could really argue that we don't need an Endangered Species Act.

It has become a value, a moral value, that we as a society have supported over the last thirty-plus years. Mainly because people—you know, we had a situation that had developed because of a lack of planning, a lack of attention to certain species, and we were in the midst of some of our grand species possibly becoming extinct, things like the bald eagle and the gray wolf. Things that people identified with were on the verge of becoming extinct, so Congress responded to that during the '50s and '60s, and then into the '70s, with a number of different laws to try to save endangered species.

Ultimately, with the passage of the Endangered Species Act, the decision was made that as a federal government, we would act to try to stop species from becoming extinct. That became a goal of the Department of the Interior and Fish and Wildlife Service, to stop species from becoming extinct, and recover their populations to a healthy limit. Over the years, we've seen the law be interpreted in different ways and implemented in different ways, and it has caused a number of conflicts with private property owners and with the desires of people. And that conflict has manifested itself mainly throughout the western part of the United States, but increasingly in other parts of the country.

The original bill I introduced when I came in the Congress dealt a lot with the private property rights side and changing the implementation of the law so we could reduce the number of conflicts that we had with private property owners. But it became very apparent that that was not going to be enough. And getting into subsequent bills and learning more about the way the law was being implemented, I came to realize that not only did we have conflicts with private property owners as a result of the way the law was be implemented, but we weren't doing a very good old job of recovering species either.

Last year or two years ago now, we actually sat down and went through all of Fish and Wildlife's documentation on the recovery of species and the health of the species. It was kind of surprising to us, and I think the most people. What we found was that the vast majority of species that are on the list are either still declining or Fish and Wildlife really didn't have any idea what their numbers were. The result is that, we aren't doing a very good job of recovering species. Out of the nearly 1,300 species that have been listed on the endangered species list, less than ten have been removed because of recovery. And I would argue that of those ten, many of those probably had data error when they were originally listed, and it was a mistake on their original listing. They may not have been an endangered species—they were off on their numbers, on the

reproduction rates, or other important things that are considered as part of the determination in a listing.

So, we began to look at the law to figure out what we had to do to put the focus back on recovery, to try to get away from all of the conflicts that had resulted from the implementation of the law, and reduce those conflicts and at the same time, put the focus on recovery. What we came up with was, after several months of negotiating the bill and trying to move forward on fixing what had become obvious problems and things that people from all sides of the debate were talking about, we came to the conclusion that one of the major problems we had was with the current critical habitat process. It dealt more with land use and controlling land than it did with what was necessary to recover the species.

So, we came to the conclusion that we would take away the current process of protecting habitat under critical habitat and go with something that we referred to as recovery habitat, and change the focus of the law so that we would go from a species being listed as endangered and then having a statutory deadline on the adoption of critical habitat, to instead putting the focus on—you list the species as endangered, you figure out how you're going to recover it, and then you protect the habitat that is necessary to fulfill that recovery plan. Almost everybody in the House that worked on this bill agreed with that approach, and even in the substitute bill that was put forward, they took a very similar approach to what we did in the bill that ultimately passed the House.

So, putting the focus back on recovery, putting the focus on protecting land that is necessary to fulfill that recovery plan, became the real linchpin of how we would move forward with changing the Endangered Species Act, changing the way that it is being implemented today.

We also did a couple of other things in the bill. One of those was that under current implementation of the law, we have an odd process where someone can come in that's trying to have a development or trying to do something with their property, and never get an answer back from Fish and Wildlife Service as to whether or not the activity that they're proposing is legal under the Act and if they can move forward. Sometimes guys spend years trying to move forward and to get an answer to figure out how they can move forward. And we came to a solution through which, after they have entered into the process and they're trying to move forward, they can send a letter to the Secretary of Interior saying this is the activity I want to conduct on my property, and giving the Secretary a deadline to give them an answer—tell them yes or no. We don't tell them

that you have to tell them yes, but you do have to give them a definitive answer as to whether or not they can move forward from that point.

And also, we did something in the bill in terms of protecting private property. And this has obviously become one of the most controversial parts of what we did in the House. Under current law, the federal government has the ability to step in, declare critical habitat, and in effect take control of activity that happens on that property based on it being critical habitat or habitat for an endangered species. That has resulted in the loss of value, the loss of use, the inability of someone to be able to use their land in accordance with local law.

If you look at the way that that has operated over the years, it has probably been one of the most controversial parts, and one of the parts of the law that has caused the greatest amount of conflict with private property owners. Whether or not it has an impact on them, many property owners have a fear that if they are part of critical habitat or they do have endangered species on their property, they will lose the ability to use their land. And as a result of that, many property owners manage their land in a way to not attract wildlife because they don't want to have to fear that someone will come in and tell them what they can do with their property. So, it has worked contrary to the goal of recovering species.

Something like ninety percent of the species that are listed, at least part of their habitat is a private property. Private properties owners have to be part of the solution, they have to be part of how we're going to recover a species, because they represent so much of the habitat that species need to recover. If you have an adversarial relationship between the Fish and Wildlife Service and the property owners, they will never work in a cooperative manner to help recover species, and they won't do things that are necessary to improve habitat and create habitat on their property in order to recover species.

So, we had to figure out a way—if we were going to make this law work, we had to figure out a way—to protect those private property owners so that, if they did have habitat or they created habitat on their property, there would not be an economic disincentive to have that habitat on their property. The solution that we came up with was, first, a series of grants and incentives that would go to private property owners, that would say if you create a habitat, or if you have habitat and you improve that on your property, we will participate with you and give them an economic incentive in order to improve that habitat, and therefore improve the chances of species recovery.

Ultimately, we have a provision in there that if the Secretary comes and says you can't use part of your property—we need that in order to recover this endangered species, and you can't use part of your property—we've taken away the value or the use of that particular piece of property, and at that point, the property owner can then qualified to be compensated for the loss of that private property.

Now, a lot of people have said that that's wrong to compensate private property owners, if you take part of the value and the use of their private property. We've been going through this debate for a number of years, and even back into the '70s they were debating the same issue. But I've always believed that this bill reflects that if we, as a society, decide that recovering endangered species is a priority and something that we want to do as a society, as a government, we as a society should pay for that priority.

If we pass a law in Congress that says we need to build an interstate highway system, and we go across somebody's property in order put a highway in, we pay them for it. Even if putting a highway across their property increases the value of their property, we still pay them for what we took from them. But if we declare that property necessary to recover an endangered species and take away the value of that property, we don't. And I think that is wrong. I think that if we are going to use someone's private property to recover species, then we should pay that individual for what we have taken from them. There's no reason for a single individual or a small group of property owners to have to bear the entire financial burden of what we as a society decided was important, was a priority to us. So we included that in there, as a means of giving private property owners the protections that they need in order to protect them from losing their property, but also to remove the financial disincentive to participate in the recovery of species.

And I don't believe that the Endangered Species Act will ever work in terms of recovering species unless you have the cooperative agreement, a cooperative relationship, between private property owners and those whose charge is to carry out the Endangered Species Act. I believe that's the only way we'll ever have a successful law that we can look back on.

The law right now has not been full of successes. It's not been full of a number of species that we can point to and say that because of the Act, we were able to recover this, and if it were not for this, these species would become extinct. I know people will tell you that that's the case, but the numbers don't bear that out. We put together the full report on all of

the species that are listed on the Act, and the numbers just don't bear that out. The law has not worked in its current implementation.

Again, I will tell you we have to have some kind of an Endangered Species Act. I don't believe that we can just get rid of the Endangered Species Act and say that it's going to go away. We have to have a law. But if we're going to, it should be a law that's going to work. I believe that that's extremely important.

We were able to put together a bill that not only passed the Resources Committee with a majority of the Democrats voting for it—it was a strong bipartisan vote coming out of the Committee—but it was also strong bipartisan vote on the House floor, and it moved with a large majority of the House of Representatives. It's in the Senate now. Senator Chafee is the Subcommittee Chairman on the Senate side; Senator Inhofe is the full Committee Chairman. They are working on the process right now. I believe that they will have a bill that they will put together in the next couple of months that will be able to pass the Senate, and we will have an opportunity to sit down and work out whatever differences there are between what ultimately the Senate does versus what the House has already done. I believe that the more the people begin to pay attention to the law and what some of the shortcomings have been, the better chance we have of getting a law that will actually work and be something that can be implemented and begin to put its focus back on recovering species.

I believe that's extremely important. It's one of the major issues that the Resources Committee and Congress will take up this year. But it's also extremely controversial. Any time you talk about going in and modernizing or updating any of our existing environmental laws, it draws a lot of emotion, it draws a lot of controversy. And sometimes people yell and shout and scream about it, and really not concentrate too much on the facts. But you know, when it comes right down to it, I think we are moving in the right direction and will ultimately have a bill that will do a better job than the current law.

Thank you for giving me the opportunity to come in and spend some time with you. Unfortunately, I'm not going to be able to stay for the rest of the panel discussion, but knowing all of these folks up here very well, I'm sure that they will give you a lively discussion.

Thank you very much.

## DEPUTY SECRETARY SCARLETT

Thank you very much, Congressman. We're going to have what I hope to be a great roundtable discussion preceded by some presentations by our four panelists. Before I turn to introducing them I want to build upon some of the things that Congressman Pombo said and just set the stage for us here.

The Act, as we all know, was passed over thirty years ago. It has had its three decade anniversary. There are currently some 1,268 species listed under the Act as threatened or endangered, at least as of the end of last year. Now, as Congressman Pombo noted, the Act has long been a lightning rod for debate. Current debates are no exception to several decades of discussion. The history is one marked by litigation. Indeed, for critical habitat designations, litigation entirely dominates at the Department of the Interior with the Fish and Wildlife Service decisionmaking.

The implementation of the Act, as Congressman Pombo alluded, arouses debates over science. It ignites the passions, sometimes, of property owners. It generates concerns over how the current Act affects landowner incentives. Yet at the same time, as Congressman Pombo noted, the Act is also a symbol, for many, of our commitment as a nation to ensuring the rich diversity of plants and wildlife, the values to which Congressman Pombo alluded. For some, the Act offers a backdrop of security, security that species protection will in fact hold a place in Agency actions and decisions.

And, of course, amid this debate, some point to the work that is getting done in the context of all of this controversy, both through regulatory and non-regulatory tools within the Act. The Fish and Wildlife Service, for example, has enrolled some 3.6 million acres under the safe harbor agreements, a recent tool under the Act, with landowners to protect a variety of species. I could go on with some of these accomplishments.

Now, we have a roundtable of panelists here to explore the Act, its implementation, and to focus on the question of whether and how updating the Act might affect its effectiveness. We'll explore questions that include: the role of the states in protecting species and enhancing their well-being; the relevance of critical habitat; the scope and definition of protections, such as prohibitions against take of species; issues pertaining to the listing process and uses of science; the meaning of critical terms within the Act such as jeopardy and adverse modification—all matters of which have been the subject of litigation, court decisions, and Agency actions. And then, of course, the final question is whether, given all of

that, there is a case for updating the Act, reforming the Act, or otherwise altering its implementation, and in what ways.

We're going to start with Michael Bean. Michael, someone I have known for a long time, is a guru of the Endangered Species Act, some might say. He is with Environmental Defense. He leads their legislative policymaking and litigation activities that pertain to wildlife, and especially and particularly the Endangered Species Act and issues related to it. He serves as the consultant to national and international wildlife conservation organizations. He's the author of many, many articles, many of them focused on the Endangered Species Act. As early as two decades ago, he wrote a book entitled *The Evolution of National Wildlife Law*, something, of course, that has many chapters since that time to be written. He directed the Wildlife Program for the Environmental Law Institute, prior to eventually coming to Environmental Defense. He is a very creative thinker, I might add; a graduate of Yale, he was editor of the *Yale Law Journal* during his tenure at Yale.

MICHAEL BEAN  
ENVIRONMENTAL DEFENSE FUND

Thank you very much, Lynn. Good morning, everyone. Today in the *Federal Register*, the Fish and Wildlife Service announced the reopening of the public comment period on a proposal to remove the bald eagle from the Endangered Species List. That proposal was originally made on July 6, 1999, and on that day some six and a half years ago, there were fewer than 6,000 pairs of bald eagles in the lower forty-eight states. And the Dow Jones industrial average on that day closed at 11,120.

Today, bald eagle numbers have increased by roughly fifty percent since that date, while the Dow Jones average is roughly fifty points lower than it was on that date. If it reflected changes in eagle abundance rather than stock prices since 1999, the Dow Jones Index would have climbed to nearly 17,000 today, rather than remaining flat at 11,000.

It's not just bald eagles that have outperformed the market, however. If the Dow Jones index measured changes in whooping crane abundance since 1999, it would be in excess of 13,000 today. If it measured changes in the abundance of the Kirtland's Warbler, an endangered songbird of Michigan's Upper Peninsula, it would be nearly 19,000. And if it measured changes in the number of Kemp's Ridley Sea Turtles nesting along the Texas coast, it would stand at around 30,000. So, I'm

tempted to ask, is James Glassman in the room? I could go on for the remainder of this talk and use my allotted time with examples like this, but I won't because you get the point.

Yesterday, in a guest opinion column that appeared in the *Sacramento Bee*, Representative Pombo said again, as he has said many times before, that the ESA has had "a stunning record of failure." Those were his words in print yesterday. He calls the Endangered Species Act a failure because only a few species have yet recovered and been taken off the Endangered list. Apparently, then, the bald eagle is a failure—and the whooping crane, and the Kirtland's Warbler, and the California Condor, and the Kemp's Ridley sea turtle, and the wolves and grizzly bears in Yellowstone. All of them are apparently failures, in Mr. Pombo's calculation, because none of them has yet recovered and been taken off the Endangered Species List. But if those were stocks rather than species, I don't think I'd be complaining about their performance.

Mr. Pombo's mischaracterization of the Endangered Species Act is not new. But what is new is his mischaracterization of his own bill, for yesterday in that same *Sacramento Bee* guest editorial, Mr. Pombo said the following about the compensation provisions of his bill, the provisions he discussed here this morning: "The amount is based only on the value of the land's current use, rather than any future increased value. In other words, if the land in question is farmland, the payment is based on its value as farmland." That statement, I will submit, is patently, flatly, and undeniably false.

Contrary to his statement, his bill creates a mechanism whereby property owners can submit a "proposed use" of their property for review by the Fish and Wildlife Service. The property owner's submission must include "a demonstration that the property owner has the means to undertake the proposed use." If the Fish and Wildlife Service determines that the proposed use would not comply with the prohibition against taking an endangered species, the property owner may agree to forgo the proposed use whereupon he is entitled to be paid the fair market value of that forgone proposed use. The bill even includes a statement that "fair market value shall take into account the likelihood that the foregone use would be approved under state and local law."

The Bill's express reference to a proposed use that the owner must demonstrate that he has the means to undertake and to a fair market value that takes into account the likelihood of securing state and local approval clearly does not limit compensation to current land use. Indeed, the plain language of the Pombo Bill is utterly irreconcilable with the

characterization of it that appeared in print yesterday under his name. So I ask, how is it possible to have an intelligent debate about the merits of legislation in the face of such clear misrepresentation?

What is sad, in my opinion, about this state of affairs is that the administration of the Endangered Species Act is in need of intelligent reform. Intelligent reform would begin by recognizing that there is a need both for improving the effectiveness of the Act in conserving imperiled species and making it less onerous for those whom it affects. In particular, reform needs to remove the impediments to beneficial actions by private landowners and others. To the extent that progress toward conservation goals can be achieved through incentive-based strategies, there is that much less need to rely upon regulatory strategies to achieve those goals.

A lot of these reforms, I believe, can be accomplished within the existing framework of the current Endangered Species Act, and we've already seen evidence of that in recent years. When comparing the "then" of a decade or so ago to the "now" of today, for example, I might have added that then, the idea of a safe harbor was a place where you might moor a boat. But today, as Lynn has pointed out, it's a mechanism whereby literally hundreds of landowners who own literally millions of acres of land are managing that land in ways to improve its value for endangered species, in effect laying out the welcome mat on their land for endangered species. It's just one of many administratively-created innovations that can make the Endangered Species Act better for species and better for property owners. And that, in my opinion, is where the attention of serious reformers ought to be focused.

The House bill, ironically, has probably reduced the prospects for legislative reform, rather than enhanced them. It is an extreme measure, and one that even its chief sponsor won't honestly acknowledge. Thank you.

DEPUTY SECRETARY SCARLETT

Thank you very much, Michael. We turn now to Steven Quarles, whom I believe I first met at the airport. Steve is, like Michael, well known over many years for his work on the Endangered Species Act. He is Chair of the Natural Resources and Environmental Law group with the law firm of Crowell & Moring here in Washington. His practice is wide-ranging, but includes wildlife and endangered species issues, federal lands issues, water issues, and related environmental matters. His practice includes litigation, administrative practice, and a legislative practice.

He represents clients in federal courts, in all the Federal Circuits and the Supreme Court—again, often on environmental matters, including the Endangered Species Act. His administrative practice, likewise, includes work on habitat conservation plans, environmental impact statements, and other environmental matters. His legislative practice, too, has a similar focus. He has held positions in government, including at Department of the Interior and also with the U.S. Senate. And, like Michael, he is a prolific writer. Many of those writings are law articles pertaining to the Endangered Species Act. With that, Steve.

STEVEN QUARLES  
CROWELL & MORING

Thank you. Before I launch into my short segment, I need to say something about Michael. His record, unlike mine, can't possibly be summarized, although Lynn made a very good effort at it. She mentioned, for example, the Safe Harbor program, and that many hundreds of thousands of acres have been protected under it. Michael is well known as the father of that program. A skill of Michael's that is not often recognized was put on a good display today. Michael is a superb analogist, one example being his analogy of species restoration to stock prices.

My favorite Michael Bean analogy of many years ago was when he talked about how underfunded is the Endangered Species program—one place where conservatives and liberals agree. I remember that he once said that the entire budget of the Fish and Wildlife Service for endangered species was less than the citizens of Washington, D.C. spend each year on pizza. I thought that was a classic analogy.

In eight minutes, which is what we're all allotted for our remarks—since most of us are also lawyers, that probably means ten—there's not enough time to talk substantive issues in depth, or at least not enough time for me to talk about them coherently. I hope we will discuss those issues in a serious way in the question-and-answer period. So, instead, I'm going to try to place the Pombo Bill in some kind of context or perspective and identify what I think is the most significant largely unreported contribution of the Pombo Bill and tantalize you with perhaps a hint of what I believe to be the explosive unaddressed issues in that bill.

Putting the House action on September 29 last year—the passage of H.R. 3824—into perspective, I want to emphasize how important an accomplishment that was, and also emphasize that unreported story

which is how much consensus, or at least emerging consensus, there may be. There is consensus, I believe, on the importance of ESA and its purpose. I believe there also is consensus not that the ESA is a failed law, but that it is a flawed law with identifiable problems. I think there's also a consensus, although both Michael and John will quickly add that the devil resides in the details, on solutions to a surprising number of those flaws and problems.

More than a decade and a half has passed since comprehensive amendments to the ESA were enacted in 1988. In fact, more than a decade and a half has passed since comprehensive amendments to ESA have passed on the floor of either chamber of the Congress. The last try for a comprehensive bill was S. 1180 in 1997, the so-called Kempthorne-Chafee-Baucus-Reid Bill. That bill had everything going for it. It was sponsored by the Chairman and the ranking Minority Member of the Senate committee of jurisdiction and subcommittee of jurisdiction; enjoyed support of the Senate leadership; was strongly advocated by the Clinton Administration; and even had modest praise from a number of moderate environmentalists. Yet, it went nowhere. Environmentalists basically kept it from the floor of the Senate. And, when a rump conference was created to see if there could be agreement on an identified bill that could be brought to both the floor of the Senate and the floor of the House, western property rights advocates killed the effort in the House.

To the contrary, H.R. 3824, the first to pass on the floor in either chamber in a decade and a half, enjoyed none of these favorable conditions. H.R. 3824 did have bipartisan support, but to a distinctly lesser degree than did S. 1180. If the Bush Administration did not manifest total indifference toward H.R. 3824, it certainly did not lend the vigorous, vocal, and highly visible support that the Clinton Administration did to S. 1180. In contrast to the Senate when S. 1180 was in play, the House leadership was in disarray. The vote on H.R. 3824 occurred the day after Mr. Delay resigned as Majority Leader. You should have seen the amount of whipping that was going on in the Democratic cloak room. And, a rare occurrence: Nancy Pelosi, who knows absolutely nothing about the Endangered Species Act, was sent to the floor to speak on it. This gives you the feeling that the Democrats were as much or more concerned about providing the Republicans with their first defeat on the House floor after Mr. Delay's resignation than almost anything else. And, of course, unlike S. 1180, H.R. 3824 also had the active and very stiff opposition of a united environmental community.

I think Chairman Pombo should be congratulated—no matter how you feel about the H.R. 3824—by the way he went about building that bill from the bottom up, with long discussions between his staff and the ranking minority member's staff on where they could find consensus, and drafting provisions that tried to bring landowners into a constructive relationship with the ESA—not actively opposing it, but actively assisting in the recovery of species.

Now some spoilsports or cynics may say, how can you maintain that H.R. 3824 enjoyed significant bipartisan support when the alternative bill, sponsored by very prominent Democrats in George Miller and John Dingell and some moderate Republicans, most notably Sherry Boehlert and Mr. Gilchrest, lost by only ten votes on the House floor. And by the cruel mathematics of the legislative process, that's only five representatives, although it's ten votes.

The easy answer is that many more Democrats voted for H.R. 3824 than Republicans voted for the Miller-Boehlert substitute. But the better answer is to give the Miller-Boehlert substitute effort all the credit it deserves and acknowledge that it is the key to the unreported story. Sponsors of the Miller-Boehlert substitute asserted over and over on the House floor that their bill contained eighty to ninety percent of the language of H.R. 3824. Now that message was a bit hyperbolic, but it wasn't that far from the truth. It does demonstrate how much of a consensus or emerging consensus, fragile as it is, does exist. Now, it's not my intention to gloss over how widely divergent or significant are the remaining differences. But I do think the story of the House action on H.R. 3824 and the Miller-Boehlert substitute is that there is a nascent consensus building.

Certainly the big reforms in H.R. 3824 are well-known: strengthening recovery planning, establishing new landowner incentive programs, adding more carrots to the sticks, eliminating the God Squad, consolidation of implementation in a single agency, elimination of critical habitat in favor of recovery habitat, compensating loss of land use due to ESA implementation. Now a number of those ideas have been trumpeted by environmentalists, such as improving recovery planning, developing more attractive landowner incentive packages, and even dropping critical habitat, and no environmentalist that I'm aware of has ever been in support of the God squad. But of course, again, as Michael and John will tell you, the devil is in the details, and certainly they do not support, I am positive, most of the provisions with those purposes in H.R. 3824.

The biggest accomplishment of H.R. 3824 in my mind is its attempt to reduce the transaction costs of many of the ESA processes. I'll

give you just one example. The greatest accomplishment of the last administration was Secretary Babbitt's vivifying the Habitat Conservation Plan/incidental take permit process, which has now protected millions of acres of habitat. But that program is now dying a slow death, and some of the most prominent companies that have strong environmental ethics and have been most active in preparing Habitat Conservation Plans, have announced that they are going to disengage from the process because the transaction costs are too high. And of course, when the transaction costs are too high for the regulated, they're also too high for the regulators—the woefully underfunded agencies, the Fish and Wildlife Service and NOAA Fisheries. Those costs reduce the federal dollars available to be spent on the ground in protecting species and habitat. Many of H.R. 3824's provisions, whether they got it right or wrong, were intended to try to streamline many of the decision-making processes so as to reduce those transaction costs and allow the scarce dollars and funds to be converted to on-the-ground activities to conserve species.

Now my time is almost up, but one thing I must tell you is that I don't want you to think that the regulated community believes H.R. 3824 is any kind of home run that clears ESA base paths of all remaining issues. I believe that, even if any legislation passed, the ESA will remain the most controversial environmental law. I'd be happy to tell you why but I've already published an article with the reasons why ESA occupies the top rung on the ladder of controversy in ELI's *Environmental Law Report*. But I would also be happy to tell you why I think we've only begun to see the most critical issues, and what those issues might be.

Amazingly, thirty years later, I believe that over the next two or three years the greatest amount of ESA litigation is going to go to the basic definitions section of the Act, which is normally where litigation on any law begins. And, the most prominent litigation will be over the definitions of "species," the definition of "endangered species" and "threatened species" and their "significant portion of the range" language, and the definition of "critical habitat," (if, as I suspect, critical habitat's deletion is not supported by the Senate). During the question-and-answer period, I'd be happy to discuss these forthcoming issues. Thank you.

DEPUTY SECRETARY SCARLETT

Thank you, Steve. Now to carry on this dialogue, we have next John Kostyack, who is Senior Counsel and Director of Wildlife Conservation Campaigns in the National Wildlife Federation's Washington office.

He, too, like the other panelists, is an expert on the Endangered Species Act. He is responsible for overseeing the National Wildlife Federation's advocacy on endangered species before the Congress, before federal agencies, and also before the courts. He oversees the National Wildlife Federation's work on invasive species and state wildlife action plans. John serves as counsel for the National Wildlife Federation as well as other conservation groups in a variety of legal aid initiatives, including, most recently, cases to protect the ivory-billed woodpecker in Arkansas, the Florida panther in the Everglades, and to restore the gray wolf in the northeastern United States. John, too, writes often and lectures on meeting the challenges of conserving U.S. wildlife. He has authored with Professor Reid Ewing of the University of Maryland the first national study that tries to quantify the impact of sprawl on the nation's biological diversity.

JOHN KOSTYACK  
NATIONAL WILDLIFE FEDERATION

Thanks a lot, Lynn. It was a pleasure to follow Steve and Michael, since we have been trapped in a room together now for the past four or five months. As so we know each other's lines and we can finish each other's sentences. I'll try to do a little bit of that today.

I'd like to start out by talking a little bit about the trends that are facing wildlife in this country and abroad because I think it's a key premise to any discussion of updating the Endangered Species Act to understand the threats that are facing wildlife and habitats. I would argue that those threats are greater today than ever before in human history. Lynn already mentioned the work I've done on sprawl. We can talk about sprawl. We can talk about invasive species.

But let me elaborate a minute on what I see as the biggest threat, and what scientists are now saying is the biggest threat, to biodiversity, and that is global climate change. In the past century, we've already seen a 1°F increase in the Earth's temperatures, and scientists are projecting in the coming century a 2- to 10° increase in the Earth's temperatures. A recent study by the Wildlife Society shows how plants and animals have already begun to shift, in both elevations and in latitudes, the locations of their habitats to adapt to this change in surface temperatures. And the real question that will face all of us who've been working for decades on conservation is: are all the good works that we have accomplished and achieved in the past several decades going to be lost as a result of global climate change?

Now why does this relate to the Endangered Species Act? Well, when the law was enacted in 1973, it probably was the most visionary wildlife law ever enacted. For decades after that people were saying that, and I think today even you can say that. But in 1973, Congress was not talking about global climate change. In fact, they weren't talking about invasive species and they weren't talking much about land use patterns in terms of sprawl, where we've essentially consumed, per capita, a greater number of acres every single decade than in the previous decade. So, we have new challenges to face. Wildlife habitat is still disappearing at an unprecedented rate, and we're facing trends that suggest that it could be disappearing even more quickly than in the past in the next few decades.

The Endangered Species Act is our nation's most comprehensive tool to address this problem. We have challenges that are new, such as thinking about buffers and wildlife corridors to address global warming, making sure those corridors are oriented in a north-south direction to address this movement of plants and animals. These are the kinds of challenges that I hope to work with. As long as I'm here in DC, I'll be working on modernizing the Endangered Species Act and basically facing some of the most fundamental challenges facing humanity, not just plants and animals.

Now, we heard this morning from Mr. Pombo. And he is so far the one person who has gotten a bill completed on the House and Senate floor since 1988. It is unfortunate that this is the leader, I have to say, because his leadership is essentially ignoring the fundamental challenges and essentially suggesting that it's time for a retreat from this nation's commitment to conserving wildlife.

Now, he did say that his bill is more oriented toward recovery, and I'd like to spend a moment in following up on Michael Bean's argument on why that is essentially a cynical argument. In fact, this bill that he got passed through the House floor was introduced two weeks before its approval by the House of Representatives, so we had very little time to debate the fundamental question: is the Endangered Species Act a success or failure? Michael gave some pretty good anecdotes to suggest why it's really one of the most powerful laws and has been very successful in bringing Endangered Species Act.

But I'd like to refer to the U.S. Fish and Wildlife Service reports that were the foundation of the study that Mr. Pombo says is the basis for his efforts. It's a biannual study that comes out from the U.S. Fish and Wildlife Service, called "Threatened and Endangered Species Recovery Report." If you look at the numbers put forward by these official

statistics that Mr. Pombo relies upon, it not only shows that over ninety-nine percent of the species ever protected remain with us today, it also directly counters his argument that the law is not recovering species. The longer species are protected by the Endangered Species Act, the more likely species are to be stabilized and recovering. That's the fundamental fact you can draw from those reports. For species that have been protected for five years or more, the majority are stable or improving.

So, where does this argument really come from that the ESA is a failure? I would argue that it's not based on any meaningful analysis. What it's based upon is public relations. Back in the 1990s when Mr. Pombo led the charge to weaken the Endangered Species Act, it was based upon the argument that the Act was interfering with business and private property rights. That argument proved to be a failure. The American people didn't buy it. After a relentless PR campaign advancing that message for five to ten years, the most recent polling shows that the law is as popular as ever. Eighty-six percent of the people of this country continue to favor a strong Endangered Species Act. So, Mr. Pombo has obviously adopted a new message to try to achieve its objectives, but the underlying goals have not changed. He says the bill is for recovery, and yet you can walk through each of the key provisions and figure out how the bill pushes us in the opposite direction, away from achieving species recovery.

Now, we talked a little bit about what might happen in the Senate. What I've been hearing from Senate staff, and this isn't just sort of the liberals to moderates, we're hearing this from now from conservatives as well, that the word "Pombo" unfortunately has become a poison pill. There's how a new verb that's been adopted in the lexicon called the "Pomboization" of the Endangered Species Act, a fear that if the Senate moved forward with even a responsible bill that would have to be met in the conference committee with the Pombo Bill, and the law would end up being weakened. This has taken all the wind out of any efforts to achieve a sort of responsible compromise in the Senate.

Mr. Pombo's recent initiative in December to essentially allow a fire sale of millions of the acres of public land across the West under the guise of the 1872 mining law further exacerbated this problem. We had all of our members, including hunters and anglers that are conservative Republicans, fired up, going to their members, and saying this is an outrage. Our fundamental commitments to protecting wildlife habitats in this country will essentially disappear as the result of this kind of provision. So, this is the context in which we're operating. I'm actually not hopeful at all in terms of our ability to achieve a solution in the Senate in the context we're dealing with here.

On the other hand, I do agree with the fundamental point that Steve made, which is that there are plenty of opportunities for achieving consensus. There is sort of a middle ground out there that has been identified on a lot of key policy issues in the Endangered Species Act, and a compromise is waiting to be struck. Let me walk through some of what I see as the fundamental policy issues that are facing us. I realize my time is short, so it's going to be a little bit of an oversimplification.

Private landowner incentive—this is probably one where there is the greatest degree of consensus and the greatest amount of hope. There are enormous opportunities for getting landowners to do positive things on their land. Already there are some existing programs, such as the Safe Harbor, that are making that happen. To give these programs real juice, we have to get the Tax Code and other key incentives programs more oriented toward providing private landowners with the incentives to conserve habitats. There's a long list of suggested ways to do that that have broad support from the conservation community and the regulated side.

Now, in the Pombo Bill, and to a lesser extent the Crapo Bill—let me talk a little bit about the Crapo Bill. This is the only pending Endangered Species Act bill in the Senate right now, S. 2110. There are references to private landowner incentives. But a fundamental distinction between paying landowners to do things above and beyond what's required by the law and paying for landowners to take compliance measures under the law, is missing from both of these bills. And so, essentially, both create a perverse incentive.

If you're a developer that's trying to decide whether to construct a development that steers around endangered species habitat, under essentially the fundamental dynamic we have now, you have a great incentive to make essentially a conservation-oriented development, to work your way around the habitats and not destroy them. That incentive disappears under the Pombo Bill because if you target the endangered species habitat on your property, then you are entitled to an automatic paycheck from the federal taxpayers for any lost profits that might have been suffered as a result of any endangered species restrictions.

And so this consensus that awaits on private property conservation needs to deal with this fundamental difference that Mr. Pombo and Mr. Crapo's bills highlights, which is that you'll never get any consensus on the notion of undermining the regulatory program, paying for compliance measures, but there's enormous opportunity for consensus about management and restoration activities above and beyond the law, getting the federal government to shift a lot of its current spending and tax programs to help those programs along.

Real briefly on critical habitats, we've mentioned a few times, you know, there are two fundamental safety net provisions of the Act dealing with federal agency actions. One is the jeopardy protection, and the other is the critical habitat protection. Then there's another key regulatory provision, known as the take prohibition for non-federal activities. Of those three, critical habitat is the only one that explicitly protects habitat. For the other two key provisions, we've had a lot of differences in implementation around the country, but oftentimes it fundamentally comes down to a debate about whether or not the species is present there. That is not a sufficient amount of habitat to save the endangered species. You have to deal with the broader habitat needs of the species. Critical habitat gets at that fundamental challenge. There's broad support for addressing recovery needs of species.

We have a consensus that we want to maintain the goal of recovery; we don't want to keep species at the brink of extinction. Then the real question is how do you go about it? Well, this notion of recovery habitat is out there. Everybody seems to agree that it would be worthwhile to at least have some kind of consensus on mapping habitats needed for recovery. Then the big challenge is what do you do about it? There are a range of possible solutions to it, but this notion that there is a consensus to get rid of critical habitat masks the fact that critical habitat does address a very legitimate problem. And, you know, the discussions need to continue. Mr. Pombo is completely wrong in suggesting that he moved forward with an idea that had broad support because he completely gutted the critical habitat provision. He essentially has no responsibility whatsoever for protecting these habitats under his bill.

The jeopardy provision has its own set of challenges because of the fact that oftentimes the dynamic under the Act is piecemeal loss without a look at the big picture of the challenges facing species. We have the gradual chipping away that leads species closer and closer to extinction. That is a problem that we're going to need to deal with in any update in the Endangered Species Act to essentially find a way to make sure that this provision of the Act ensures no net loss of the habitat needed for recovery, using mitigation and other strategies.

Mr. Pombo's bill, again, takes us in the wrong direction. He essentially says the opposite of what needs to happen. In his provisions dealing with the analysis of the baseline condition of the species, he essentially says you may only look at the project in isolation. You may not, you are forbidden—the Agency is forbidden—from looking at the big picture of surrounding actions and projects that are threatening the species. So there's another issue we're going to have to solve.

Real quickly on state roles and on science, these are, I would say, the last two issues that are commonly debated. State roles is an area, I think, where there's an enormous amount of consensus that we would like to increase the role of states in endangered species conservation. Most of the state wildlife agencies are severely underfunded. That's one of the first challenges we'd would have to deal with, and local governments as well because they're the ones involved in making so many of the zoning and other key decisions affecting endangered species.

However, oftentimes the notion of expanding the role of states is used as a Trojan horse for essentially weakening the Act, and that's something we cannot support. In the Pombo Bill, as well as in the Crapo Bill, there are massive authorizations for incidental taking of endangered species, if you can get your activity somehow covered by state conservation agreement—no requirements whatsoever that you minimize or mitigate the harmful effects of your activity, which is currently the way the law operates. So we can find a way to expand the role of states, but we can't use it as a way for weakening habitat protections.

Finally, on science, obviously the Endangered Species Act is a success because of the fact that it does have a strong scientific foundation. Numerous leading scientists and scientific societies have made this point over and over again, that the scientific foundation of the Endangered Species Act is a strong one; it's a key to the operation of the law. So the basic standard we have today, which is to use the best available science, is a good one. It means we can adapt to the latest information to deal with things on a case-specific basis using the experts on that species.

The Pombo Bill essentially says let's come up with a new definition of best available science, but let's leave that to the Secretary of the Interior. We, the Congress, won't even make clear what we want to change about the existing standard. We'll just turn it over to a political official to come up with regulations narrowing and defining what science may be used in protecting endangered species. This takes us in exactly the wrong direction. The times we have had problems with science in the Endangered Species Act is when it's become politicized. We've seen surveys conducted by the Union of Concerned Scientists saying there's an increased problem of political officials reaching down and telling biologists to change their decisions based on nonscientific reasons as a way of removing protections for endangered species. That kind of problem would be exacerbated by the Pombo Bill, which essentially allows the politicians to say what the best science is and not scientists.

Let me wrap up by saying we've had a lot of people around from around the country speaking up recently in support of a strong Endangered

Species Act, sensing the threat that the Pombo Bill poses. Leading scientists from around the country, hunters and anglers, faith groups, businesses, they're all writing to Congress right now saying this is a serious concern, and it goes to the notion that this is a bedrock conservation law that people around the country care passionately about. I don't feel badly at all about the passion that Mr. Pombo was alluding to. That is the key to having saved this law from numerous threats over the years; that's actually a good thing.

But what's missing so far, right now, is leadership. We're going to need members of the Congress to step forward and be honest in confronting the challenges facing species and habitats across this country, and once we have that, I actually think there is the making for a lot of consensus and resolution of the reauthorization debate. Let me close there. Thanks.

#### DEPUTY SECRETARY SCARLETT

Thank you, John. As moderator, I'm trying to be just that: very neutral in this dialog. But as we've had three speakers all celebrate landowner incentives, I must add a plug for the Department of the Interior and the fact that over the last four years we've increased funding for landowner incentives in our landowner incentive programs by fifty-three percent. So I will just put a plug in for that.

Our next speaker is Larry Liebesman, who has thirty years of experience as an environmental lawyer and litigator. Like his colleagues here, his practice emphasizes endangered species; also wetlands, water pollution, environmental impact assessments, and coastal protection issues. He is a nationally recognized expert in wetlands and endangered species. Like the others on this panel, he is the author of a number of works on wetlands as well as on endangered species, including the co-authoring of an endangered species desk book for the Environmental Law Institute. He authored Supreme Court amicus briefs in *Babbitt v. Sweet Home*, a very familiar Endangered Species Act case, as well as a number of other similar kinds of cases. Mr. Liebesman spent two years at the U.S. Environmental Protection Agency and eleven years as Senior Trial Attorney at the U.S. Department of Justice, so he brings both private sector and public sector experience. He had a one-year detail to the President's Council on Environmental Quality during the Carter Administration. Mr. Liebesman is a graduate of Rutgers University, and he received his law degree from George Washington University right here in town. With that, Larry.

LAWRENCE LIEBESMAN  
HOLLAND & KNIGHT

Thank you, Lynn. It's a pleasure to be here today. I want to give you a little different perspective than John just did regarding ESA reform. As an attorney representing public and private sector clients dealing with ESA, I've seen all aspects and many sides of the debate. I've come to the conclusion that tinkering around the edges legislatively is not going to work to come up with a meaningful solution to the conundrum that we're dealing with under the Act. In my view, we must not lose the momentum that came out of H.R. 3824, and this is a golden opportunity to seize the moment to try to solve these many problems.

What I'd like to do today is to try to identify what I consider to be the three main sort of failed themes of the existing Endangered Species Act and comment a little bit on the legislative approaches that are now swirling around Congress, and give you my sort of view of the future as to where we're going. I would lump the major problems with ESA, as it is now constituted, into three major categories: (1) flawed science; (2) unrealistic deadlines and priorities; and finally (3) inadequate—I don't say failed, but inadequate—incentives for recovery, especially dealing with private property owners. And then I'm going to get into some of the reform proposals.

We've heard a lot of debate on the flawed science aspect of things. The environmental community says science is good and the ESA is fundamentally a science-based bill. I would submit that there are major problems in how scientific decisions are made under the ESA. . . .

Case in point, we were involved in challenging the listing of a number of species of fairy shrimp. They're little crustaceans that live in the Central Valley south of California, up and down the spine of California. And while the listing of those species was upheld, I would submit that the science was indeed very flawed, and it did not go through the kind of rigorous peer review that is necessary to ensure sound scientific decisions. When you're going to make a judgment that a particular species is in danger of extinction throughout its range, you fundamentally have to have good scientific data, analysis, and have it peer-reviewed in the sunshine, in the public view, to make sound decisions. Now we've heard a lot of the debates saying well, if you go to peer review, if you see the Pombo view and approach of regs and going out there in this process, you'll never make a decision; it's a recipe for extinction. Frankly, I would submit it's not a recipe for extinction, it's a

recipe for good sound decision-making. And that's what the government should really be doing.

The second major area is unrealistic deadlines and priorities. We've heard a lot of talk about how the courts are running the Endangered Species Act. I would submit that judicial policing is but a symptom of a deeper problem, namely that Congress has created a framework here, a patchwork of disconnected requirements, deadlines, and priorities. They've basically made it impossible for the Department of Interior and NOAA Fisheries to ever meet.

Now, when you look at critical habitat which has got so much attention in the courts over the last couple of years, I think that's sort of a prime example. We were involved in the critical habitat challenge for the wintering population of the piping plover in Cape Hatteras, and also around the country. I think that's a case in point where that critical habitat designation that really covered over 1,500 miles of the American coastline—we were involved in the Cape Hatteras aspect of that in the litigation—was rushed. It was based upon a decision that did not have good adequate data. It essentially resulted in a redline of a lot of properties because of the potential that these coastal areas would be habitat in the future for wintering populations coming out of the Great Lakes and the Great Plains. Judge Lamberth here agreed with us in coming out with the very strongly-worded opinion and pointing out the various laws in that process. This is simply one example of the extensive amount of litigation that's going on in critical habitat. And I would agree with Lynn that, you know, you're seeing so many of the important resources within the Department being devoted to dealing with this litigation, but it's a symptom of a law that needs to be dealt with.

When you're representing private clients or public-sector clients that are affected by critical habitat like we do, sometimes you have no choice but to sue when you're looking at the effect of critical habitat, which I would submit does not really promote recovery but has a disincentive of redlining private property and dissuading folks from taking proactive measures, property owners, to promote recovery, to enhance recovery, to do what's right, then I think you got to change the law. It's not working. There's a disconnect between critical habitat and recovery that the Pombo Bill is indeed going to address.

That leads me to the third major flaw: inadequate incentives. I certainly commend the Department of Interior for working very strongly in enhancing and expanding the various landowner incentives that are out there: the cooperative agreements, the safe harbor programs, candidate

conservation agreements. They're all great. You want to sort of encourage the biodiversity ethic on the part of the landowners in encouraging them to do the right thing. But that's not enough.

We live in a market-based economy, and unfortunately without having economic incentives and without facing disincentives, and getting away from disincentives and a positive incentive-based approach, property owners are not going to cooperate. Fundamentally, we are facing unreality if we think that property owners in this country, that this market-based economy is going to deal with these issues unless you create positive economic-based incentives. Unfortunately, the way I see the Act right now, it does not promote those results. When you're dealing with so many species that are on private lands, whether you're dealing with pygmy owls in Arizona—look at the pervasive litigation that's gone around that issue—so many private lands and landowners have to deal with that, and in many ways they're trying to find ways not to have species on their property or to cover up the existence of those species because they know that it is a disincentive. It's going to make it very difficult to make sound land-use decisions. It's not going to promote stewardship that is really necessary under these circumstances.

We've seen, in terms of these disincentives when you're dealing with the Section 7 consultation process, it's very interesting; that's sort of, in many ways, the heart and soul of the way the agencies interact when you have the federal handle. And many times we see in the inter-agency squabbles in terms of Section 7 consultations, whether actions are actually going to result in a take of the species. A lot of folks want to find a federal handle because they think that's a better way of approaching things, through Section 7 rather than through the habitat conservation process. So that's a whole issue that is sort of the topic of, you might say, another discussion. It's a crazy quilt of how you solve the consultation issues and how you promote these kinds of incentives.

It's interesting—you know, I heard Mike talk about the recovery of the Kemp's Ridley turtle and how that's doing better. I don't know whether Mike is aware of it, but a lot of that was done through the positive work of landowners. We represented a company in Padre Island, Texas, that had won the right to explore for oil and gas. There was a whole issue dealing with habitat for the Kemp's Ridley turtle down in Padre Island, Texas, a prime area for habitat for that endangered species. Through a cooperative arrangement with the Department of Interior and the Park Service, we were able, through our client, to allow for reasonable exploration and a stewardship program. And the result of that,

several years ago was the best season for Kemp's Ridley production it had in years, and no evidence of any kind of impact from oil and gas operations in taking these species. Our clients went out and really worked very hard in the stewardship, recovering eggs and promoting and working with understaffed Park Service officials in promoting recovery, in which there was this quid pro quo of working out the need for oil and gas exploration, the right to do that, and the ability to promote the recovery of that particular species. So, indeed, these opportunities do exist.

Now commenting on where things are going legislatively, I submit that the Pombo Bill is an excellent start. It tackles these issues head on. This is not an issue of sort of going at things at the edges. It's really getting to the guts of what these problems are that I've tried to articulate today. I think it's critical—a critical element is promoting cooperation with states and tribes. Unfortunately, unlike a lot of environmental lawyers, and I've seen this over thirty years as an environmental attorney, the ESA does not really promote the cooperative federalism that is at the heart of the Clean Water Act and the Clean Air Act. It is command-and-control. It is a federally run program. When you deal with a lot of state agencies, there are very well-meaning and well-qualified biologists and state wildlife agencies, a lot of databases, a lot of focus on biodiversity. We have to promote those kinds of partnerships. We have to find a way to recognize that states play an active role and they should be an interactive partner with the federal agencies in promoting recovery. The law hasn't worked that way. The Pombo Bill will achieve that, if it's done the right way.

I think the whole issue regarding sunshine, that's another problem I see the ESA today. Many decisions are made behind closed doors. Representing clients, it's almost impossible to be able to comment on a draft biological opinion. Things are done between the Action agency and the Fish and Wildlife Service. The bill will allow for all public comment from all sides, giving folks a chance to deal with those kinds of issues. You have to deal with ESA in a public arena. You have to get it out there. There must be a database. You should be able to log in to that database to find that information. That's the only way that the Act is really going to achieve its lofty goals. Otherwise, it's going to be based upon suspicion, innuendo, and fear. And fear is not way to promote biodiversity and recovery. I think the Pombo Bill will help achieve that.

Now I want to comment here—I know my time is sort of running out here, and I'll be happy to answer questions later—on landowner compensation issues. You know, in many ways they reflect sort of the

good and bad. I think the fundamental idea about property owners in this country being compensated for promoting a public use is sound. It's absolutely essential. We have to find a way to recognize that property rights must be protected. Now whether the Pombo Bill achieves it the right way is a big question, quite frankly. I think the idea of the foregone use, the idea of getting your determination from the Interior, may have some problems in terms of whether it's going to create misinformation—you know, folks who may identify species on their property to get the highest and best use, if it's not the right way. On the other hand, I think it does recognize that there must be a balance between public and private uses, and the government should pay and compensate in some way to recognize uses that are foregone to protect species.

I might say that I think the Crapo-Lincoln Bill has some very interesting approaches that may turn out eventually to be the best solution, particularly regarding tax credits and conservation banking. How many of you are familiar with the wetlands mitigation banking and that whole approach? Well, conservation banking is sort of the analogue under the ESA. What it does is create a market for preserving and protecting habitat. It's working in the wetlands context. You see markets emerging in Florida, folks buying up wetlands that are degraded or areas that are in need of restoration. There's a whole infrastructure that's been created over the last ten years to promote conservation, wetlands mitigation banking.

Why can't that be done in the ESA context? When you're going out in parts of the country where there are multi-species, where habitat loss is a significant issue, why can't you promote and encourage folks to create habitat, and then sell credits, create that incentive, that market-based approach, to achieve the ends of the Act? Create those kinds of incentives. We can look back years in the future, hopefully, and say we did it right; we created these kinds of markets. And I think the Crapo-Lincoln Bill will help achieve that. And that's got to be tied to tax credits, you know, the idea that if you're going to go ahead and encourage conservation banking, you must give a tax break to folks that take that approach. So I find a lot of those concepts to be very interesting and they may provide an avenue to try to deal with these very, very difficult issues.

Now, the future—I'm going to wrap up by saying that we can take the easy path, the Band-Aid solution, one which nibbles at the edges, that deals with a couple of these policy issues and says, well, the Act is working; you know, species are not going extinct. That's sort of the argument that we've heard; you know, it's not a failure because species are not going extinct. Or we could recognize the most important issue,

and that is when the Act was created, it's conservation—it was getting species to a point that there were sufficient protections there without the ESA necessarily in place. It's bringing species to that point of recovery. And it seems to be the only way you do that is to take the road less traveled and tackle these issues head-on. In my opinion, that is the only road that will save the Act from its own extinction. Thank you.

DEPUTY SECRETARY SCARLETT

Thanks, Larry. What I want to do is throw a couple of questions to our panelists first, and then invite you all to participate. What I would strive for here is a little bit of a dialogue, rather than simply Q&A back and forth.

As I listened to the previous four discussants, and certainly their views reflect a larger audience that has discussed this issue over many years, one of the key areas of tension or disagreements among those who discuss the Act is in this realm of incentives and the place of private landowners with respect to species conservation and protection. On the one hand, we have concerns that the incentives within the Act are perhaps inadequate. On the other hand, we have others pointing to things like safe harbor in suggesting that there are elements within the Act that do give elbow room for landowners to, in essence, become the citizen stewards that many of us aspire towards.

So, I'd like to get a little bit more fleshing out of the perspectives of the panelists on whether the Act, which has a combination of, on the one hand, regulatory provisions, and on the other hand, also has some elbow room for what we at Interior call cooperative conservation and landowner incentives, whether the Act strikes that right balance. If not, in what ways might that balance better be struck?

Let me turn first to one of the individuals here, John, who was supportive of the Act, fairly strongly, and who seemed to suggest that perhaps that balance is appropriately struck. I'd like to get your views, but then turn to our panelists to reflect as well.

MR. KOSTYACK

Well, just to clarify, I actually think the one area where there is the greatest amount of consensus about the need to update the Act is on private landowner incentives. The reason is because the law was passed

in 1973 as a fundamentally regulatory law, and did not have many of the carrots that most people recognize are going to be necessary to get people doing positive things on the land.

Virtually no one from the conservation community that I know of argues that the regulatory tools of the Act should be used to force people to improve the condition of the land for species. The regulatory provisions are essentially a safety net to help ensure that landowners don't send species to extinction. But we have a fundamental challenge of getting numbers up and getting habitats restored and managed, especially with, as I indicated before, new challenges such as climate change and invasive species. So, National Wildlife Federation's fundamental position is that there is a host of things we can do under the Farm Bill, under the Tax Code, tweaking the candidate conservation and HCP programs under the ESA, to get landowners doing more positive things.

But let me make absolutely clear, the success stories we have had in cooperative conservation over the years, and there have been many, have been largely due to the fact that there is this fundamental safety net, regulatory structure there, bringing people to the table and getting them engaged in the conversation. If we took away those safety net provisions, as the Pombo Bill largely does, then the developer with the bulldozer poised in front of pygmy owl habitat has absolutely no reason to approach anyone and engage in the discussion. And so, what I'm always interested to hear for the people who say, you know, they want to take a Pombo approach, is all these wonderful programs you agree are great, safe harbor, candidate conservation, etc., how can they conceivably work without maintaining the safety net provisions of the Act, the regulatory provisions.

#### DEPUTY SECRETARY SCARLETT

What I'd like is some other perspectives on that. Of course, playing devil's advocate here, what some folks from the alternative position might say, is that the backdrop provisions—that is, the safety net, as you referred to them—themselves perhaps stand in the way of inspiring landowners by, in effect, scaring them off. So I guess I'd like some other comments and perspectives on that.

MR. BEAN

Yes, actually, I think you're right about that, Lynn. The challenge I see is to know where and when to use incentives, and where and when to use regulatory means. On the working landscape, by which I primarily mean farms, ranches and forest lands, I think there is enormous potential to use incentives to induce landowners, if you will, to go about their farming, their ranching, their silviculture, in ways that are most compatible or more compatible with conservation needs. There, it seems to me, the role of the Endangered Species Act and of the Interior Department is to reduce the impediments to that sort of good stewardship by those landowners.

I think in the rapidly urbanizing context, whether it's southern California or anywhere else where habitat is basically facing a future of either remaining habitat or becoming concrete, it is much less clear that there's anything useful to be done through incentives. That, it seems to me, is where the regulatory emphasis has to be placed, if only because there does not appear to be a workable incentive mechanism to respond to the market pressures of development in those contexts. So, I think recognizing those two different situations, removing impediments to stewardship in the first situation and maintaining an effective regulatory program in the second, is key to making this more successful.

DEPUTY SECRETARY SCARLETT

Larry, you spoke rather eloquently about concerns with respect to the disincentives. Do you want to chime in, and then we'll turn to Steve.

MR. LIEBESMAN

Right. I think we're dealing with a question of degree. I don't think these issues are black and white. They're not good or bad, and I think that's one of the problems in the Washington debate. It's sort of the zero-sum game, who is going to win and who's not. I think what I've observed is that the regulatory aspects of the ESA are going to be there anyway, and I don't think the Pombo Bill is going to eliminate that. You're still going to have Section 7 consultation. You're still going to have action agencies. And you know, to get an Army Corps permit, you're going to have to deal in consultation with the Fish and Wildlife Service.

The question is, can you go through the extra step? I mean, I wouldn't draw the line between Eastern and Western or urban and non-urban. I think if we draw that line and say that we can't promote, through the combination of regulatory and other non-regulatory mechanism, better stewardship—I think that's the real path to go. I think that when you're looking at a lot of urbanized areas, you find multi-species habitat areas, whether you're in southern Florida where you have multi-species around the Everglades or southern California. They're rapidly urbanized, and I think you're going to have to encourage folks to come into the process and create these incentives. If you're saying, well, if you're going to go through some kind of Section 7 consultation to get an Army Corps permit, you know, can you also couple that with mitigation that's associated with that, where somebody, for example, goes in and works at mitigation measures and has incentives to go beyond what they need to do to get a permit to create habitat and sell credits. I mean, there are ways to do that. I think a lot of the landowners, if you educate them the right way, are willing to latch onto those approaches.

Unfortunately, there's the fear right now of, you know, I have a species on my property and I need to get a permit, and there are not enough ways to mesh the two together effectively. And that's my perspective. I think the Pombo Bill goes a long way towards trying to achieve that better balance so that we deal with these issues in the right way.

DEPUTY SECRETARY SCARLETT

Steve, you wanted to chime in.

MR. QUARLES

Yes, two things. First I'd like to say that I do disagree with John that somehow the Pombo Bill has removed most of the sticks. I would remind the audience that the most fundamental stick, the prohibition on "take," is unchanged. The jeopardy requirement is unchanged for federal agency actions. Recovery planning is actually strengthened.

Both the Pombo Bill in the Miller-Boehlert Bill removed critical habitat, and there was a general bipartisan consensus in committee that the jeopardy standard, which is one of the two-part standards for federal agency actions, along with adverse modification of critical habitat, had

to be strengthened if you removed critical habitat. Unfortunately, after that mark-up was over and the reported bill contained the agreed-upon new definition of jeopardy, the always fragile bipartisan agreement on the new definition began to disintegrate. The ultimate bill that went to the House floor did not have the jeopardy definition language in it. And the Miller-Boehlert Bill did not have that language in it; it had new, stronger language yet that had never been discussed when the bipartisan consensus was built before and during the H.R. 3824 markup. But other than the critical habitat issue, I would argue that there has been no significant diminution in the so-called sticks.

Second, I would like to mention a couple things about the incentives. First of all, to say that we must realize that we're trying to establish incentives, and Environmental Defense has been a leader for years in seeking for greater incentives for private land owners, at the very worst time legislatively in an era of tight budget constraints. There are some regulatory things we can do. You've heard many of them, like Safe Harbor Agreements, Candidate Conservation Agreements, etc.,—new programs that can be squeezed within the four corners of the existing ESA. I also believe that there are some regulatory incentives that can be accomplished by removing process roadblocks and costly aspects of the process. But, I still think, ultimately, if we're going to have major incentives, they're going to have to be legislated.

It's interesting that Larry focused on taxes. There's actually a very practical reason, not only because of the budgetary problem but also for another geopolitical reason. If you recall, I said the most important bill before the Pombo Bill in the last decade and a half was the Kempthorne-Chafee-Baucus-Reid Bill in the Senate Environment and Public Works Committees. Three of four of those Senators—Kempthorne, Baucus, and Reid—were from states that had major ESA problems. One of the hurdles for getting any ESA bill through the Senate now is, if you look at the makeup of the Environment and Public Works Committee, there are very few members on that committee that have had any experience in their home states with an endangered species issues. Where are the ESA-affected and ESA knowledgeable senators? They're in the Finance Committee. And, it's interesting that the Crapo-Lincoln Bill was written so as to be referred to the Finance Committee. I do think that there is a real opportunity, not only because of budget constraints but because of the makeup in the Senate today, to fashion some significant incentives through tax credits or other tax mechanisms out of the Finance Committee.

MR. KOSTYACK

Lynn, if I could just reply to the point that supposedly the three safety net provisions of the Act that have not been affected by the Pombo Bill; if I could just explain the point that I made. First of all, just to go back over, there are three main regulatory protections of the Act, the take prohibition applying to both federal and non-federal, and the general jeopardy and the critical habitat, adverse modification language.

On take, that provision of the Act has been rendered largely unenforceable as a result of the compensation provision. In other words, the wildlife agency has a gun put to its head anytime it tries to enforce the take prohibition to come up with millions of dollars to pay for any lost profits. And because the agencies don't have that money in their budgets, Section 9 then essentially becomes unenforceable.

On the critical habitat, Steve apparently agrees that it was essentially eliminated by the Pombo Bill. I guess the only point of disagreement is whether the Miller-Boehlert alternative eliminates it. And I would argue that it does not. It comes up with a new mechanism of protecting recovery habitat. The Pombo Bill essentially eliminates any protection whatsoever of that kind of habitat. And finally on jeopardy, it doesn't expressly delete the jeopardy protection, but by using this provision that essentially forbids a cumulative effects analysis, it severely weakens the jeopardy provision.

So, the fundamental safety net provisions of the Act that have made the Act effective over the past three decades are either eliminated or severely weakened.

DEPUTY SECRETARY SCARLETT

I want to turn to two other questions I want to lob out, and then we'll have a little bit of time for your questions as well. There has been a lot of discussion, and you've alluded to this in the discussion on the incentives/disincentives issue, but there's been a lot of discussion about recovery and that the official Act focused on protecting species that were on the brink, if you will, of perishing, and therefore the focus was on bringing them back over that brink so that they no longer need the immediate protections of the Act, with much less attention on the longer-term aspirational recovery. Do we have flourishing species out there?

I'd like your observations of whether you think the Act and/or any of the legislative proposals out there really tackle that issue adequately. That is, do we have adequate mechanisms already on the recovery side and/or in any of the legislation? And perhaps you might even tie that back to the incentive question as well. Michael, do want to take an initial stab at that?

MR. BEAN

Yes. Well, the goal of the Act, the meaning of recovery, is to get a species in a position where it is no longer in need of the special protection that the Endangered Species Act provides. So I think, as a practical term, the question that the Fish and Wildlife Service has to ask itself and is now asking itself with respect to the eagle, for example, is if we remove the protection of the Endangered Species Act, is this species likely to be able to persist on its own with the other measures that are in place? In the case of that species, there are other federal laws and many state laws that protect it. That's fundamentally all the Act has as its goal, to get a species in a position where the special measures of that law are no longer necessary. It's not to turn back the clock to some pre-Columbian stage or to target any other particular point in time as the desired optimum for a species, but is instead more practically based on getting the species to the point where it's no longer at risk of extinction, if we remove these particular protections.

That has been a difficult goal to achieve, largely because most of the species that the Act has protected have not been protected until they were very close to that brink you described. I think, if one asks a group of scientists, what's the single greatest need for the Endangered Species Act, they will, almost to a person, tell you to start conservation attention sooner than we've been starting it, not wait until the eleventh hour when species are at the brink to begin to provide conservation efforts for them.

DEPUTY SECRETARY SCARLETT

Do I have any other observations?

MR. LIEBESMAN

I think, quite frankly, that recovery has been a failure in the existing Act because of the way the Act has been set up. I think that because of the timetable that is built-in and the fact that while recovery plans are out there, many times they're not given the kind of effect that they should. They haven't brought together the consensus of the stakeholders. And a lot of these recovery plans, I understand, are very much out of date. You know, you've got a lot of information that has accumulated over the years that has not been updated. I was thinking of the Delmarva Fox, which is a case we're involved in which the recovery plan is at least ten or eleven years out of date. But there aren't the incentives to basically bring on stakeholders to the table to make recovery plans sort of the paradigm of where you want to go.

Now what I think the Pombo Bill does, to its credit, is to make recovery and developing these recovery teams the central focus. That's the vehicle by which you're going to achieve that. And while we see criticism of that—well, it's going to eliminate critical habitat—if the idea of critical habitat is to be one of the key vehicles to achieve recovery, then elimination of it shouldn't bother people if the recovery program is done the right way.

I think the Pombo Bill, with the idea of creating stakeholders and doing it in the public sunshine and creating these kinds of time periods to develop these recovery plans and making it the paradigm of the Act, is going to achieve that. It still has these special areas which I guess are equivalent to critical habitat, but they will still be there, and yet it will be meshed to the larger question of how you get species off the list. That's really essential, and that has got to be tied with the kind of incentives that I think are built in to bring stakeholders to the table, so that everybody that has an interest can sit around the table, get best science there, figure out whether they've got a plan that's ten years out of date. What do we know more about the species now? What do we know more about the loss of habitat in the last ten or fifteen years? How can we achieve the end of getting that species off the list? So, I quite frankly think that that has got to be the central goal and, you know, we should stand behind that. And that's a major benefit of the Pombo Bill.

MR. QUARLES

I'd also like to speak to the recovery matter just for a second, which is to say that I do agree that we ought to address species at risk earlier. For all of us up here, there is a major issue, which is, as many of you know, that the states assert basic authority over wildlife within their jurisdictions. Now, the Supreme Court has eroded that State authority to a major extent, but there will always be political conflict if we try to move up the survival chain, if you will, and try to address species earlier, unless we engage the states. One of the really underutilized portions of the ESA that, to the credit of this Administration, they're looking very hard at, is the Section 6 federal-state cooperative agreement provisions. These provisions could allow the states to take a lead role in trying to protect species that are at risk but not yet at the threatened or endangered stage.

The only other thing I would say is that recovery plans are not just out of date, they are woefully, even ludicrously, inadequate. I'm dealing with several where the scientists put together a self-serving wish list of research for which they expected to receive funding and never included anything having to do with goals for conservation or recovery. And, if there's one thing that every single bill—the Kempthorne bill, the Miller-Boehlert substitute, and the Pombo bill—has in common—it is that they're all in fundamental agreement, almost to the letter, on how to improve recovery planning so that we at least know when a species is at the point that it no longer needs the protections of the ESA.

DEPUTY SECRETARY SCARLETT

Steve, that response is a perfect segue to the third issue I want to raise. All of you in one way or another have alluded to the relationship of states to species protection. I'd like all of you to discuss that issue, whether the current Act, again, adequately engages the states and whether any of the legislative proposals move in a direction that might be preferable. Let me turn to John first, and then we'll see what other people have to say.

MR. KOSTYACK

I think the Act could certainly be updated to reflect a larger state role. In my conversation with many state agency folks, as well as with the folks here in town representing the states, there isn't a strong desire

to take over the permitting programs. You guys get stuck with it, and you're not going to be able to hand it off that easily.

It seems to me the fundamental question is can we get the states more involved in species recovery. I would agree with all the comments of the previous panelists. There's a lot more we could do on recovery. You know, the Fish and Wildlife Service is not going to have its budget expanded to any significant extent, as far as I can predict, in the next few years. The real question is who are going to be the leaders on all these species recovery projects. Well, one of the great possibilities is the state wildlife agencies. Particularly as the state wildlife action plans are now in effect, these agencies potentially have new funding sources and new momentum to actually begin staffing up on the non-game program. Historically, most of the state wildlife agencies have been largely funded by fishing and hunting license fees, and as a result their staff is oriented toward those programs. There is a strong desire among all those agencies to diversify.

And so, we're at this historic opportunity right now where, if everyone can rally around and get some funding into the hands of these agencies, I think it's almost sort of a test phase. Get some funding, see what the states can do, and you know, create some sort of pilots and some models out there. And then maybe Congress can get a better idea on exactly how to legislate the updated Section 6.

DEPUTY SECRETARY SCARLETT

Michael, do you have a thought on that?

MR. BEAN

Yes. I do think the states could play a more significant role and they do need to be brought in as partners. I would note that when the Act was passed, Congress intended and provided that the states would receive federal financial assistance for developing parallel programs. By and large from the very beginning, that money was not forthcoming so those programs never got established to the degree that they should have. But I think that's a possible thing to do.

I would make one further point, and here I would want to refer to the yardstick that Mr. Pombo has used to measure the effectiveness of the Endangered Species Act. Most states have state endangered species

laws. Most of the state programs protect not only the species that the federal law protects but also other species that are only protected by the state law. By Mr. Pombo's measure, how many species have recovered, you would have to find that most of the states have been failures, more so than the federal law, because in most states not a single species that is not federally protected has been recovered. I think that's an inappropriate yardstick, but I think it's important to point it out since Mr. Pombo repeatedly uses that as a measure of the federal law.

DEPUTY SECRETARY SCARLETT

We have very little time, so let me invite all of you—any questions here?

AUDIENCE PARTICIPANT

Yes, two brief questions. The first is, I wonder in terms of worrying about global warming, whether the last Ice Age caused plants and animals to adapt and change their range rather rapidly. For example, those so-called ancient forests couldn't possibly have been in Oregon and Washington 13,000 or 14,000 years ago. In fact, I don't think they were there 5,000 or 6,000 years ago.

The second is to Lynn Scarlett. I'm very disappointed that President Bush, who ran on supporting property rights, and Secretary Norton, who at one time was a property rights advocate, have only supported the passage of the Pombo Bill for those elements that improve the bureaucratic process and make life easier for the Department of the Interior, and have said nothing about what seems to me to be the thing in the Bill that will do the most to improve the protection of endangered wildlife, namely protecting the rights of American citizens.

DEPUTY SECRETARY SCARLETT

Let me turn to the panelists first on the climate change observation, which seemed like an observation rather than a question. But, nonetheless, is there any reflection? And then, I will respond to the question about the Administration position. Are there any reflections on the comments about climate change? I guess your point is that nature is dynamic.

MR. KOSTYACK

Yeah, certainly we had mass extinctions in the past when there were major climatic shifts. The real question is whether the current mass extinction is natural phenomenon. And I think the vast, vast majority of climate scientists say this major climate shift is not natural; that it's human-caused. And the other fundamental thing that distinguishes this era from the previous ones is that we have fragmented the landscape already with human development. And therefore, its resilience to change has actually already been greatly reduced. And so, in devising the updated Endangered Species Act, we're going to have to address those kinds of issues about how to address habitat fragmentation.

MR. LIEBESMAN

When you're dealing with the whole issue of climate change, it's so incredibly complex and it's so difficult to get a handle on what's the baseline? I mean, look, to what degree has a particular species status been affected by climate change and natural evolution versus man-induced activities? That sort of creates a conundrum, which I'm not sure you're ever going to be able to respond or answer effectively. I mean, I think we've got to continue the research on climate change, but we've sort of got to look, if we're going to assess a species status, is what are the conditions right now, and what were the conditions when it went on the list. And that's sort of like your baseline. And then you go from there and you look at, you know, whether the habitat has been so destroyed that it's likely to lead to the extinction of that species once you take action. But I think to use climate change as the paradigm for this issue, I think is going to be difficult.

DEPUTY SECRETARY SCARLETT

And now I'll give my brief response. I was hoping as moderator, I wouldn't have to give my views at all and avoid that. But Secretary Norton remains a strong supporter of property rights, indeed, she views property rights as one of the central tenets of a society that is able to prosper and enable people to pursue their dreams and, in fact, has raised over the years concerns about some of the disincentive elements in the

Endangered Species Act as it relates to property owners and implications that some of the regulatory provisions have on their ability to utilize their property.

We've done many, many things short of legislation, because, of course, we are not in control of legislation, to try to strengthen what we call cooperative conservation, that is partnerships, voluntary partnerships, with landowners, in order to achieve conservation goals, be they species protection or otherwise. And that, in fact, is why you're seeing—because one tool we have for that is budget—that is why you've seen our cooperative conservation grants go up fifty-three percent since 2001.

On the other hand, we have not focused on land acquisition. In 1999, the land acquisition budget of Department of the Interior was about \$1 billion. This year, I believe for 2007, the proposal is about \$66 million, and that includes things like the Flight 93 Memorial. So, clearly, I think, that expresses that we want to work in partnership with landowners. We have worked very well and closely with Congressman Pombo. We applaud his efforts on the Endangered Species Act, strongly applaud them, and we are in constant dialogue with him.

The respect for property rights and their importance, though, nonetheless begs the question of whether we have the details, as we have had alluded here, perfectly right in that particular instance. And so, in the Administration's testimony on the Bill we did indicate a strong desire to work with the congressman going forward in the future and look at whether those provisions have it exactly right. We are concerned from a budgetary standpoint as to whether the Bill has it just right or whether it would have significant financial consequences for the taxpayer that need to be looked at further.

So, we very much applaud Congressman Pombo's efforts. We are in lockstep with him on the importance of property rights. And the question is, as the congressional debate and discussion over the Endangered Species Act proceeds, how do we strike the right chord as it relates to those incentives and property rights protections?

But please, direct your comments and questions to others because I am intended to be the moderator here.

#### AUDIENCE PARTICIPANT

I just wanted to reflect in my question that it seems a little bit disingenuous to look at this law as an enormous national commitment in light of the fact that the economic effects on private landowners have

been so geographically and demographically disparate, that it's all fine and good to speak of budget constraints or of the implicit idea, as John did, that a compensation provision would gut the take provision because, God forbid, we'd actually have to pay for it. But I don't think that—you know, that's kind of a process or budgetary argument. It's not a principled argument about whether or not this is a national commitment we're willing to pay for, or somehow we wish to squeeze this under the rubric of health and safety regulations. When you talk about paying people to obey the law, I think that's the most disingenuous thing I've ever heard. I think you guys need to get off of that rhetoric, or perhaps you have a better articulation of it. And that's really my question.

DEPUTY SECRETARY SCARLETT

Any observations on that remark? Steve, I'm going to call on you.

MR. QUARLES

No, I have none. I take the Fifth.

DEPUTY SECRETARY SCARLETT

Any other thoughts? Larry.

MR. LIEBESMAN

Well, you know, I think the fundamental basis of our Constitution is our property rights, and I think that's got to be a big consideration. I think this is a difficult issue because I hear what you're saying regarding the public fiscal and budget issues. And you know, I think one of the things that's got to be looked at very closely in this Bill is what the impact is going to be. On the other hand, if you brush property rights aside and say we're not going to think of some kind of financial incentive, some kind of mechanism, then we're going against one of the fundamental precepts of our constitutional system. That's really my last word.

MR. QUARLES

Actually, I will say something, if I could, which does not go to whether Chairman Pombo got it right, whether the Administration is getting it right, or anything similar. Rather, I think that there is a very interesting point here about the disparities in geography as to the effect of the Endangered Species Act.

I think you saw this phenomenon on the House floor in the tremendous frustration among representations of rural communities in witnessing how outraged so many of the urban community representatives were over the Supreme Court *Kelo* decision, even though it provided complete compensation for the taking of the property. Yet, when farmers and woodlot owners and others feel as though their ability to use their land has been terribly compromised by the ESA (I leave it to the courts to decide whether it's a regulatory program or regulatory taking), I think you see that extreme frustration. It is an issue that we need to address. And, to its credit, Environmental Defense, in its landowner incentive program, is attempting to address it. But it's something we need to address more broadly whether or not we end up with a compensation package specifically attached legislatively to the ESA.

MR. BEAN

I would just say that we've been quite careful I think, sensitive to the need to work with landowners and help landowners overcome regulatory barriers and overcome financial obstacles to being good stewards on their land. We've worked, for example, with landowners in the East and West. We've worked in New York, North Carolina, South Carolina, Texas, Utah, California and elsewhere putting together safe harbor agreements, putting together conservation banks for endangered species, which Larry talked about earlier, with the goal of making endangered species an asset, rather than a liability for landowners, or at least removing endangered species as a liability. I think there's a great deal of room for further development in that direction.

I would not go so far as to say that we should abandon regulatory controls altogether. I think there is a need for a base of regulatory controls, for some of the reasons I described. But in particular for the working landscape landowners where the fears Steve described are commonplace, and also commonly exaggerated in my view, nevertheless

we have to deal with those fears, and one way to do that is with the sort of assistance that we're trying to provide to landowners, both financially and technically in overcoming some of the regulatory barriers that lead to good stewardship.

DEPUTY SECRETARY SCARLETT

I might just conclude on that point by saying, of course, I think many of you are familiar with the two programs we did create: a landowner incentive program and a private stewardship grant program. Those really deal with, however, the aspirational rather than the regulatory. But on the regulatory front, a strong motivation behind our looking at the ability to work with states, for example, on cooperative agreements and candidate cooperation agreements, is precisely because our ability to do so can enable us to move forward without having to then list a species, which in turn then triggers the regulatory provisions that you are describing and are concerned about. And so, to the degree that we have been successful, for example, in the state of Idaho with slick spot peppergrass, as one example, in getting some partnership to conservation agreements put forward, that enabled us to not have to list that species, and therefore avoid the whole circumstance that you described in the first place. So we're looking creatively at the suite of things that we can do to better utilize partnerships, voluntary action, and the momentum that landowners have, in fact, on their own to work with us.

We'll have to wrap up with John's comment because I think time is up.

MR. KOSTYACK

Well, I don't think I would have time to respond all the points this gentleman made, but I do think that there's a myth out there that I would like to respond to, which is that the Endangered Species Act is being imposed upon this narrow subset of people by this sort of urban class that doesn't have to address any of the costs of implementing the Act. And that's not been my experience.

In fact, large a percentage of the work that I've done on endangered species conservation is in urbanized areas. Up and down the West Coast, from Seattle to Portland, the San Francisco Bay area through a whole area of southern California, Las Vegas, Austin, the list goes on.

And it's in eastern cities as well, many southern Florida cities, and all across the United States; we have urbanized areas where people have basically rolled up their sleeves and found out a way to make the Endangered Species Act work. And it does require some give-and-take. Nobody can have everything they want. So the real question is whether we want to continue that give and take approach, where there are a lot of reasonable people sitting to the table coming up with solutions, or we have sort of winner-takes-all approach that I think the Pombo Bill represents.

DEPUTY SECRETARY SCARLETT

Thank you all. I'm sorry, that we're over time. Well, do all of you want to take one more question?

AUDIENCE PARTICIPANT

Yes, I just have a comment for John and Mike. John asks how can we (inaudible) the ESA conservation programs (inaudible) without the big regulatory stick. And I think the answer to that is (inaudible) we follow the precepts of probably the most successful habitat conservation plan in the country, which is the Department of Agriculture's Conservation Reserve Program, which is a huge success because people all over the country can join it, precisely because the landowner has the federal agent at his door with a check in his hand rather than a gun in his hand, and they're happy to save the habitat for common species, like field sparrows and meadow larks, and non-native species like ring-necked pheasants. In 1995, Congressman Schopf had asked, well, why can't we take the same approach with the Endangered Species Act? If we can pay landowners and save the habitat for common species, why can't we pay them to save the habitat for endangered species, which is far more important? If you're a tree farmer in South Carolina, you don't care who buys your trees, whether it's International Paper or the feds. And so, you work out a program where you pay the landowners not to harvest their trees for fifteen years; the government gets fifteen years worth of woodpeckers, and at the fifteen years when you sell your trees, they're bigger and better and worth more.

One quick comment for Michael Bean—I thought it was a very clever analogy when you talk about the ESA being a success story

because the bald eagle populations have gone from 6,000 and 9,000 in the last seven years, while the Dow Jones has stayed at 11, 000, and hasn't moved. And yet, as I'm sure you know, the Endangered Species Act essentially had nothing to do whatsoever with recovery of bald eagles. That was solely the responsibility of Ruckelshaus and the EPA banning DDT before the ESA was passed, and it stopped the eggshell thinning syndrome and that was driving those for the birds to extinction. So that had nothing to do with the essay. And then secondly, the recovery in various states, where the states' departments of fish and game went out and got DDT-free eggs and young birds and transferred them from other parts of the country into states like New York State. Almost all of those officials will say that the major problem they have is the ESA, and they accomplished that in spite of the ESA, not because of the ESA, because the feds wouldn't let them move these birds around in order to recover species.

DEPUTY SECRETARY SCARLETT

Thank you, RJ. Let us conclude. We've gone a little bit over time. Thank you very much for your attention. Let's give a hand to our four panelists, who really did a great job.

**PANEL II: WETLANDS REGULATION: WHAT ARE THE LIMITATIONS OF THE COMMERCE CLAUSE?**

*In the form of two related cases, the extent of the federal government's jurisdiction over isolated wetlands is currently before the United States Supreme Court. In 2001, the Supreme Court sought to limit the reach of federal Clean Water Act jurisdiction over isolated wetlands in Solid Waste Agency v. United States Army Corps of Engineers ("SWANCC"). In that case the Court found that migratory waterfowl use of a wetland was an inadequate reason for finding federal jurisdiction under the Clean Water Act. Despite SWANCC, the Corps continues to assert jurisdiction over isolated wetlands. That, some argue, contravenes the SWANCC decision. The federal circuits have split on this question, and the Supreme Court has granted cert in two cases that deal with the reach of the federal government's regulation of isolated wetlands. In both cases, the landowners argue the federal government lacks jurisdiction under the Clean Water Act and, moreover, that the Commerce Clause does not permit such federal regulation of wetlands that are not adjacent to navigable waters.*

MODERATOR:

Mr. Jeffrey Clark, Kirkland & Ellis

PANELISTS:

Ms. Virginia Albrecht, Hunton & Williams

Professor Robert Percival, University of Maryland School of Law

Mr. Richard Schwartz, Crowell & Moring

Mr. Timothy Searchinger, Environmental Defense Fund

MR. JEFFREY CLARK

KIRKLAND & ELLIS

Welcome to the Federalist Society's panel today, entitled "Wetlands Regulation: What Are the Limits of the Commerce Clause." We're going to discuss two very important Commerce Clause and Clean Water Act cases in this term of the Supreme Court, *Rapanos v. United States* and *Carabell v. Army Corps of Engineers*.

I'm Jeff Clark, currently a partner at Kirkland and Ellis and an adjunct professor at George Mason Law School. From August 2001 to until 2005, I was at the Justice Department in the Environment Division and actually worked on these two cases. Therefore, moderating this panel and attending the oral argument coming up next week are really going to be the closest that I get to influencing these cases any further. But maybe that makes me a good moderator because I am wholly sidelined.

But much to my chagrin about that sidelining aside, let me talk about the panelists today who are decidedly not sidelined in the important dispute over these two Supreme Court cases.

First, we have Virginia Albrecht, who is a partner at the law firm of Hunton and Williams and a longtime practitioner in the area of wetlands law. Indeed, she was counsel in the landmark D.C. Circuit case that invalidated the Tulloch Rule, which had provided that incidental fallback that accompanies dredging is a discharge of dredge or fill material under the Clean Water Act, or the CWA for short, as I'm sure you'll be hearing a lot about today. Ms. Albrecht received her J.D. from Vanderbilt Law School and is an adjunct professor at the University of Miami School of Law and Co-Chair of the annual ALI-ABA National Wetlands Conference. Ms. Albrecht filed an amicus brief in *Rapanos* and *Carabell* on behalf of the Foundation for Environmental and National Progress, the National Association of Realtors, and the Chamber of Commerce, among others.

Next up will be Timothy Searchinger, who received his J.D. from Yale and was senior editor of the *Yale Law Journal*. After law school, he clerked for Judge Edward Becker on the United States Court of Appeals for the Third Circuit, sitting in my hometown, actually, of Philadelphia. Since 1989, Mr. Searchinger has been a senior attorney with Environmental Defense, and at one time worked as Deputy Counsel to then Governor Robert Casey. He's authored numerous articles on wetlands protection, and in 1992 received a National Wetlands Protection Award from the Environmental Protection Agency and from the Environmental Law Institute for his role in maintaining a broad definition of wetlands. Finally, Mr. Searchinger has worked with a number of states to establish buffer zones and to protect wetlands. He's also worked on an amicus brief in the *Rapanos* and *Carabell* cases.

Third up will be Richard Schwartz, who is a partner at Crowell & Moring. He holds his J.D. from the University of Michigan. He's practiced and specialized in environmental law for more than 33 years, representing a variety of industries in working with EPA and other agencies to develop creative solutions to complex problems, or where that failed,

to bring or defend litigation. For instance, Richard's experiences go back to the foundational days of the Act. In 1974, he represented the steel industry in EPA's first toxic pollutant hearings under the Clean Water Act, and his record reflects a continuous span of accomplishments since then. In 2004, Mr. Schwartz was named in Chambers USA's *Client Guide* as one of America's leading water quality litigators. Mr. Schwartz filed an amicus brief on *Rapanos* and *Carabell* on behalf of CropLife America and several trade associations representing agricultural interests.

Finally, battling cleanup, will be Professor Robert Percival. Robert Percival is the Robert F. Stanton Professor of law at the University of Maryland School of Law, and the Director of its Environmental Law program. Professor Percival obtained his J.D. from Stanford and clerked for Justice Byron White on the United States Supreme Court. He has also worked in the Executive Branch of the Department of Education and served as a senior attorney for the Environmental Defense fund. Perhaps most notably, Professor Percival is the lead author of the most widely used casebook in environmental law. Thus, we have one of the field's most distinguished academics with us today. He's also served on the Board of Directors of the Environmental Law Institute.

So, those are our distinguished panel members. I think we'll have an excellent discussion today. But having introduced the panel, let me turn to the task of trying to set up the background in the constitutional law and the background in the Clean Water Act area of regulating wetlands before I turn it over to Virginia for the opening panelist's presentation.

First, given the mention of the Commerce Clause in the title of this panel, it really makes sense to begin there. Congress possesses an enumerated power to regulate commerce among the states. It does not possess a general police power; in other words, a power essentially to regulate any subject under the sun.

As a consequence of the New Deal era of constitutional jurisprudence, the Commerce Clause was generally thought for a long time to be a dead letter, functionally conveying to Congress the equivalent of a generalized police power based on judicial precedent. Virtually all law schools at the time taught the subject in that way. That ended in 1995 with the reintegration of the Commerce Clause in the *Lopez* case.

In *Lopez*, the United States Supreme Court, five to four, invalidated the Gun-Free School Zones Act in an opinion by the late Chief Justice William Rehnquist. Rehnquist rejected several arguments that were offered to defend that criminal statute on the ground that they would convert the Commerce Clause into a general police power of the

sort that would entirely negate the concept of enumerated powers. The fact that the criminal law was historically the primary purview of the states was a factor in the decision, as was, I believe, the traditional role that states had played over education.

*Lopez* was followed by the *Morrison* case, in which the Supreme Court invalidated portions of the Violence Against Women Act, or VAWA, in a case involving what the majority deemed to be a rape crime traditionally regulated by the states. Signaling the case's importance, again, Chief Justice Rehnquist wrote the decision, which represented an expansion of *Lopez* because it refused to defer to the extensive findings that Congress had made about the impact of violence against women on interstate commerce. The Court also rejected the argument that Congress possessed the power to pass the VAWA statute based on Section 5 of the Fourteenth Amendment. The Chief Justice also emphasized, as he had in *Lopez*, that if Congress is to act constitutionally under the Commerce Clause based on regulating mere effects on interstate commerce, those effects must be substantial.

Finally, in the past term of the Supreme Court, the government's losing streak in Commerce Clause cases was broken. In the *Reich* case, the Controlled Substances Act was upheld by the Supreme Court—the CSA—as it was being used to prohibit and criminalize the manufacture, distribution, and use of medical marijuana, so-called medical marijuana; marijuana for medical purposes. Justice Scalia joined that majority, however, and his rationale that *Reich* was perhaps, in his mind, an easy case, is not too easily dismissed. He essentially reasoned that the Commerce Clause gave Congress the power to define as contraband a good that was trading in interstate commerce, and that the Necessary and Proper Clause gave Congress all necessary means to make that ban on contraband effective, thereby embracing intrastate possession and use of that contraband item. Otherwise, essentially, a black market could occur, and that black market could undermine the regulatory scheme and the ability that Congress had to regulate and to determine that a particular substance or item in commerce was contraband.

Chief Justice Rehnquist, however, and Justices O'Connor and Thomas vehemently dissented. They would have applied *Lopez*- and *Morrison*-like reasoning to CSA. Now how does all of that constitutional law apply to wetlands? The Clean Water Act's reach is to "navigable waters," which are defined in the Statute as the waters of the United States. In accord with their *Chevron* powers, the two relevant agencies—the Environmental Protection Agency ("EPA"), and the Army Corps

of Engineers—have broadly defined wetlands to include: tributaries to navigable waters; many waters that are not navigable in fact; wetlands, in particular wetlands adjacent to navigable waters or their tributaries; and even other categories of water that may have an impact on interstate commerce.

Litigation has been common in the area. And indeed, litigation here in the District Court in Washington in the *Callaway* case initially spurred the Corps to expand the categories of wetlands that are jurisdictional under the Clean Water Act. A legislative proposal in connection with the 1970s Clean Water Act amendments that was designed to narrow the jurisdictional scope of agency jurisdiction over wetlands failed to pass Congress.

Ultimately, the Supreme Court, however, took note of these issues in a case that it decided in 1985 called *United States v. Riverside Bayview Homes*. *Riverside Bayview* unanimously reversed a Sixth Circuit decision that applied the principle of constitutional avoidance based on avoiding takings of private property in violation of the Fifth Amendment to give a narrower construction to the statute and the Corps' regulations than the Corps had itself advocated. The Supreme Court, on the facts of the case, approved of regulating adjacent wetlands and approved the Corps' regulation of adjacency to uphold an assertion of jurisdiction by the Corps over wetlands that abutted, in fact, a navigable creek and that were very near to Lake St. Clair in Michigan.

After *Lopez*, however, the Supreme Court reviewed another wetlands case, *Solid Waste Agency of Northern Cook County*, or SWANCC for short. In SWANCC, Chief Justice Rehnquist arguably wrote *Lopez* 2.5. The majority did not strike down the CWA's regulation of wetlands as unconstitutional. Rather, it applied the constitutional avoidance principle, this time on the basis of the Commerce Clause in *Lopez*, to narrow the construction of navigable waters. The Court emphasized that land use regulation, which wetland regulations implicate, trenched upon the traditional powers of the states, and thus the term "navigable" had to be given some non-trivial meaning to avoid what otherwise would be serious Commerce Clause questions. On the facts, the Supreme Court struck down an interpretation of regulations the Corps had issued, commonly referred to as the Migratory Bird Rule, which allowed wetlands to be regulated that were not adjacent to navigable waters or tributaries thereof, but rather allowed the regulations of wetlands based on their use by migratory birds.

When the Bush Administration took over in 2001, it was widely anticipated that they would use SWANCC and its Chevron powers to define wetlands in a more limited way. Indeed, at the start of 2003 the

Administration launched an Advanced Notice of Proposed Rulemaking that seemed designed to do precisely that. Before the year was out, however, the Bush Administration decided, after once extending the comment period, to withdraw the rulemaking effort. Governor Leavitt, then Administrator of the EPA, told *USA Today* that the President had personally made that decision. It is clear that between January and December 2003, the opposition from environmental groups to the proposed Advance Notice of Proposed Rulemaking was loud and strong.

In the lower courts, meanwhile, the government had racked up a string of what advocates of an expansive wetlands policy would call victories, a series of narrow readings of what *SWANCC* meant. Essentially, *SWANCC* was confined by most courts of appeals to its facts. Even the conservative Fourth Circuit read and applied *SWANCC* in that way. The Fifth Circuit, however, the circuit that had actually launched the Commerce Clause reintegration because it had the *Lopez* case originally, arguably broke ranks or at least came close to making clear that its attention eventually would be to break ranks with its sister circuits.

In the two cases before us, the Supreme Court is now taking review of both of them from the Sixth Circuit. The narrow reading of *SWANCC* was applied. One of the cases, *Rapanos*, is a civil companion to a criminal case for unlawfully filling wetlands without governmental permission. Given that the circuit split was not entirely clear, it was somewhat surprising that the Court took these cases. Fans of *SWANCC* have taken that as an encouraging sign.

Also, these cases will be an important early bellwether for the jurisprudential philosophies, as applied, for the two newest members of the Supreme Court: Chief Justice John Roberts, and Associate Justice Samuel Alito. I won't describe the facts of the cases to you; I'll let the panelists help with that. But I will set out for you, before I turn things over to Virginia, the questions that are presented.

First, *Rapanos*. Number one: Does the Clean Water Act's prohibition on unpermitted discharges to navigable waters extend to non-navigable wetlands that do not even abut a navigable water? Number two: Does extension of the Clean Water Act jurisdiction to every intrastate wetland with any sort of hydrological connection to navigable waters, no matter how tenuous or remote the connection, exceed Congress's constitutional powers to regulate commerce among the states?

And then, *Carabell*. Number one: Does the Clean Water Act extend to wetlands that are hydrologically isolated from any of the navigable waters of the United States? This part of involves a factual question

that's unique to *Carabell* that I'm sure some of the panelists today will discuss. Question number two: Do the limits on Congress's authority to regulate activities that substantially affect interstate commerce preclude an interpretation of the Clean Water Act that would extend federal authority to wetlands that are hydrologically isolated from any of the navigable waters of the United States?

Those are the questions. That's the constitutional and statutory backdrop. Without further ado, I'm going to turn things over to Virginia.

VIRGINIA ALBRECHT  
HUNTON & WILLIAMS

Thanks, Jeff. And thanks for asking me to come over here. It's fun to be with this good panel and talk about this really important topic. I represented the regulated community for many, many years on these issues, and I'm not sure what it means that they took these cases, but we'll see.

What I was going to do was sort of lay out the framework of the statute and not talk too much about the law. I think the rest of the group will be talking about the law, but I'll talk a little bit.

Just so you understand the factual issues here, *Rapanos*, one case, is a case that is a series of wetlands that are said to be adjacent to a series of water bodies that the government describes as tributaries. Most of those, or a lot of those water bodies, are ditches. Anyway, they are ditches. And you go through a series of ditches and channels and culverts and streams, etc. until you get to navigable water twenty miles away.

So the issue is, is there jurisdiction over these wetlands because they are adjacent, and what are they adjacent to? Are they adjacent to these ditches? And would the adjacency to these ditches make them waters of the United States? Or are they adjacent to navigable waters? Twenty miles away, probably not. So the key question is what's the jurisdictional status of these wetlands, and that is tied to what's the jurisdictional status of these ditches to which they are claimed to be adjacent.

*Carabell* is also about a wetland, and there's a ditch here, and there's a dispute about the facts. But between the wetlands in the ditch, there is a burm. And the *Carabell* people are saying essentially, at law, we are just *SWANCC* all over again; we are completely isolated, although very close to this ditch. We are not actually—we're not touching the ditch. There's no relationship. We are therefore an isolated water, and so we're out. So those are the factual settings that are at issue here.

Now, I thought what I'd do is actually sort of go back because I know some of you are really familiar with the Clean Water Act, and some of you probably don't deal with it much at all. And to sort of take you back and look at 1972, the Clean Water Act, what Congress was really thinking about at the time. Well, at the time, as we recall, or some of us old enough to recall, people, factories, and municipal sewage treatment plants, were essentially setting up shop next to rivers. They had outfall pipes, and you would do your industrial process and then you would put your waste water or your raw sewage through a pipe, and it would go through the pipe into the river, and the river would conveniently carry it away. And it didn't bother you, but it certainly bothered everybody who was downstream. And there have been many efforts over the years to deal with this issue, all of which had not proven effective. So, we had a lot of problems.

So Congress began to say, okay, what are we going to do about addressing this sort of unregulated discharge of pollutants into our navigable waters? And that is what began the inquiry. As Congress was wrestling with this, they said to themselves, oh my gosh, there is one thing that ends up in the navigable waters which we actually like, which is that the Corps of Engineers, through the Civil Works program, is empowered to go out, do dredging, to maintain the navigable waterways. And when they dredge up this dredge material, they usually put it somewhere, and they often put it somewhere else in the navigable waters. That would also be regarded as a discharge of a pollutant under our new statute. But of course we want the Corps of Engineers to continue to maintain the navigable waterways. So what are we going to do about it?

Long story short—Congress set up two regulatory programs. One regulatory program, which is really the big part of the Clean Water Act and we always refer to as the wet part of the Water Act, is the program that you're really familiar with, the NPDES Section 402 program, which essentially says, if you discharge a pollutants, the soluble wastes and everything, through a point source, you must get a permit from either EPA or, in delegated states, from a state. And that's your traditional toxic bad pollutant.

But then, they set up a separate program under Section 404 administered by the Corps, which is to regulate the discharge of dredged or fill material. That program was a program which is before—although it's all part of the Clean Water Act and that's an important aspect of it, that's the program that's in front of the Court today. That program, the 404 program, has over the years kind of morphed into a construction

regulation program. If you're building a road, if you're building a house, if you're putting in foundations, you need to discharge fill material, you need to discharge dredged and fill material, you have to go and get a permit from the Corps of Engineers.

These two programs are really different because when you've got the fill material, essentially—you've got fill material, and the fill material, by definition, stays put. In the NPDES 402 program, you've got a program where the material that you're putting into the water is expected to migrate downstream. So, these programs actually have different kind of effects. But both of them have in common under Section 301 that Section 301 of the Clean Water Act says that you may not discharge a pollutant into the navigable waters from a point source without a permit. So these are the permitting programs.

The question in front of the Court on Tuesday is going to be, are these wetlands navigable waters within the meaning of the Clean Water Act. People arguing for a broad construction of the term, what are the United States' navigable waters, are essentially looking and saying, you know what, we need to have a broad construction because, and I quote from the legislative history, "Water moves in hydrological cycles, and therefore it is essential to regulate the discharge of pollutants that the source." And they will say, therefore, what that means is that we need to move upstream and call the far upstream remote areas waters of the United States in order to prevent this downstream pollution. Now, that issue about the fear of downstream pollution is a real issue when you're dealing with the 402 program, but in the 404 context it's not really much of an issue. But they are all part of the Clean Water Act, so they need to be addressed.

There are four problems with this argument I just want to get into quickly. First of all, as Jeff mentioned, the statute says "navigable waters." There's no textual basis, there's nothing in the statute that says we want to regulate based on effects or anything else. The statute says we are going to regulate discharges into navigable waters. It uses those terms "navigable waters."

The Supreme Court in *SWANCC* said that "navigable" has a meaning; it needs to be given meaning. And the argument that the government is now making in support of its broad view of waters of the United States is that we can regulate anything that has any kind of hydrological connection. So if there's a hydrological connection from here down to there, then we can regulate up here. That's all. But there's nothing in the statute that says that. The statute says "navigable

waters.” If you think about a hydrological connection theory, it’s pretty much a seamless, endless kind of a theory. We all know from our seventh-grade science textbooks that all water moves in a hydrological cycle. We know about the cloud; it rains, percolates down, evaporates back up, and so it’s all related. It’s all connected.

Secondly, the idea that these ditches and these other kinds of flowing water bodies are tributaries is a new idea. The government has, or the regs have claimed, jurisdiction over tributaries but don’t talk about what tributaries are. In fact, the government—the Corps and the EPA’s policy over the years, until *SWANCC*, had been that ditches in particular were not considered to be jurisdictional at all. They were not considered to be waters of the United States. But now, really in an effort to sort of outflank *SWANCC*, the government has come up with essentially a litigating position that says if there is a connection, then we can take jurisdiction, and we can take jurisdiction out there.

This is a situation in which this kind of interpretation is entitled to no deference, so that is a third point.

And then, finally, I’ll make the point that calling these upstream areas waters of the United States in order to prevent this downstream migration, or this fear of downstream migration, is really unnecessary for several reasons, one of which is that EPA for many years has claimed the authority to regulate indirect discharges. In other words, if you are out here and you’re discharging into a publicly owned treatment work, a publicly owned sewage treatment plant, and the sewage treatment plant has its own outfall pipe and it has its own Clean Water Act permit, EPA claims the authority to control the kind of effluent that is discharged through this sewage treatment plant, in other words, so that they can regulate indirect discharges. They can regulate the source of these indirect discharges without calling the source of the indirect discharges itself a water of the United States. So if, in a particular instance, there is a concern, which would be rare in the instance of construction, there is a concern that a pollutant discharged up here would actually reach navigable waters. EPA has the authority to regulate that activity, and it can regulate the activity without calling that source a water of the United States.

This distinction between regulating activity and calling the area a water of the United States is really important because when something becomes a water of the United States, the federal government then essentially has plenary power over everything that happens in that area. For example, water quality standards are set. Designated uses are set,

total maximum daily loads, all sorts of things. Not to mention, permitting is required every time you do anything in something that is a water of the United States, whereas if you regulate the activity, you can reach the activity and prevent the pollution, but you're not federalizing the place. So, that's just food for thought, and I'm sure Tim will have a few comments.

TIMOTHY SEARCHINGER  
ENVIRONMENTAL DEFENSE FUND

Thank you very much for having me. I apologize that you're having an Environmental Defense day. Michael Bean was here before, and we claim Bob Percival, even though he's tried to escape us many years ago, so apologies but blame your organizers.

One of the important parts about what Virginia was trying to establish is her view that there really are two different regulatory programs. There's the Section 404 wetland permitting, which she called a construction program, and the Section 402 program for factory-type discharges. One of the challenges here with that argument is that Section 404 doesn't actually prohibit anything on its own. Neither does Section 402. The prohibition of the Clean Water Act is the prohibition in Section 301 that says there can be no discharge unless it is authorized by one of the other sections of the Act; no discharge in the navigable water.

So, the question in this case is not simply whether the waters at issue are going to be permitted for purposes of discharges of dredged or fill material, but whether the waters at issue are also required to have a permit for a sewage treatment plant, a factory discharge, or whatever. And Mr. Rapanos's theory in this case is not that the wetlands aren't regulated *per se*, but that tributaries aren't regulated. His argument is that the only things regulated under the Clean Water Act are what are called traditional navigable waters and immediately adjacent wetlands. Now, traditional navigable waters are probably on the order of about one percent of the rivers in the United States.

To give you an idea, even if you have a navigable river, like the Potomac River, the upstream parts of that are not considered navigable waters. Neither are any of the tributaries that flow into the river, including the Anacostia River, for example. Since 1972, when the Clean Water Act was passed, sewage treatment plants and factories that discharge into any of these tributaries have always been required to have a permit. That is the overwhelming majority of factory and sewage treatment plant

permits in the United States. What this case actually presents is not simply a question of whether wetlands need to have permits but whether factories and sewage treatment plants need to have permits to discharge into any so-called non-traditionally navigable water.

Now these tributaries are not simply high up in the landscape. If you go down to the Chesapeake Bay, you will find little streams discharging directly into the Chesapeake Bay. In fact, you will sometimes have some kind of little stream, and then another stream, and then another stream coming in, but they can be very close to the Chesapeake Bay, or they can be far away up in Pennsylvania running up into eventually bigger rivers. But any discharge of pollutants into those streams is likely to reach the Chesapeake Bay.

The argument now for the first time is that for essentially thirty-four years, the Clean Water Act has been misinterpreted in virtually all of its applications in the regulation of sewage treatment plants and factory discharges in the tributaries. So this is not really a case about wetlands at all. Wetlands are one of the issues in the case, but the real issue in the *Rapanos* case is whether ninety-nine percent of the rivers and streams in the United States are protected under the Clean Water Act, regulated for those kinds of discharges.

One of the problems with a contrary ruling, apart from the fact that large numbers of factories and sewage treatment plants and all that discharge into these tributaries, is that if you don't discharge into a tributary like that, it's very easy to escape the reach of the Clean Water Act by simply moving your discharge outfall. So you could discharge directly in the Potomac River, or you could move the outfall and discharge under the Anacostia River, or into Rock Creek, or whatever. And so, it would be very easy, if you only regulated the actual big navigable waters, to escape regulation by simply moving the discharge outfall.

The reason the definition is the same for both acts, for both 402 and 404, is that the prohibition is not in 404 itself. The prohibition is in 301, and it says any discharge into a water of the U.S., a navigable water, needs to have a permit unless otherwise authorized. That's what is at issue in this case. If this is not a water of the U.S. subject to 301, you don't need a permit either for discharges into wetlands or any dredge or fill material into any wetland. But you also don't need a permit for any discharge of sewage treatment or anything else into any other tributary water of the U.S. So that is to understand the kind of larger context of the *Rapanos* case and why, in fact, those who are trying to challenge that have tried very hard to make this look as though it's simply a case about

wetlands and simply a case of kind of creeping land use regulation. Whatever you think of the policies or those views, that's not what really is at stake at this case.

Going back, then, to the question of whether it's appropriate to regulate these water bodies, and even if your view is that the only kind of legitimate purpose is to regulate the water quality of the Chesapeake Bay, let's say, or the Potomac River, the obvious reason you have to regulate discharges into these upstream areas is that in fact pollutants flow downstream. Now image that's drawn, that suggests, well, come on, when you're really a long way away, and you're really discharging into a very small stream, can that really be the case that that has an impact on these big navigable waters downstream? And so the challenge here is basically based on a picture. The picture is, you go up the river, and you get to a smaller river, and you get to a smaller river, and you get to a smaller river. And are you really claiming that what goes into those smaller rivers is as big a impact all the way downstream?

There are two problems with this. The first is, as I said, you have little streams right next to big navigable rivers, too, so they're not necessarily thousands or hundreds of miles away. They could be right next to the Chesapeake Bay. But the larger problem is it actually is the case scientifically—we know for a fact—that in many cases, the most significant sources of pollutants are precisely the pollutants that go into these streams.

Now how do we know that? Well, for example, in the Chesapeake Bay—we're all presumably from this area. You're familiar with the water quality of the Chesapeake Bay. The biggest problem is nitrogen. Nitrogen causes algal blooms, causes these areas of low dissolved oxygen. That's the big thing in the Chesapeake Bay. Well, there have been elaborate modeling studies to try to figure out where does the nitrogen come from, and the vast majority comes into these small streams. That's where comes from, coming off the landscape, right into these small streams. Now Virginia's suggested, well, maybe that's true of kind of factory-type discharges, but not wetlands. But that's also not true. The reason we protect wetlands from a water quality standpoint is because what wetlands do, as well as small streams, is filter the pollutants that might otherwise make it all way downstream.

Now the Gulf of Mexico, just to give you an example, has the same kinds of problems as the Chesapeake Bay. There are elaborate modeling studies, and we know that the primary sources of pollutants in the Gulf of Mexico—again, this is nitrogen—come from very small streams high up in Illinois, Iowa, high up in the Corn Belt. And a large part of the

cause of the problem, according to scientists, is loss of wetlands because under natural conditions, pollutants coming off the landscape would go through wetlands, and from wetlands into small streams and the filtration process occurs in wetlands and small streams.

I can give you a very simple way of understanding that, which is that the filtration that occurs comes from the contact between pollutants in water and sediment and soil. So when you're going through a wetland, there's a good chance that that shallow water is going to come into contact with the sediment and soil. It's the bacteria in sediment and soil that strips out the nitrogen. The same is true of a small stream. By the time you get to the Mississippi River, if you're a little milliliter of water in the Mississippi River, there's a good chance you're going all the way down to the Gulf. You no longer come into contact with sediment and soil, and so the filtration process no longer occurs.

Virginia has suggested that somehow or other, even if those discharges weren't regulated, the EPA could somehow control them indirectly. I don't know what she's referring to. It is the case, of course, that if you were to say that a stream is itself a source of pollutants, and not a water of the U.S., you could regulate at the point where the stream discharges into the larger river. But what you would then be saying is that the landowner who controls that point of access is responsible for all the pollutants higher upstream. And that's not fair, it's not reasonable, and there's no way of doing it.

The Federalist Society obviously tends to have concerns largely with the scope of federal power. One of the flip sides for business interests is that obviously if the federal government can regulate something, it also can preempt the states from regulating that something. Now under the Clean Water Act, the Supreme Court held many years ago that efforts to use state common law to regulate pollutant discharges were preempted by the federal Clean Water Act because the Clean Water Act occupied the field.

Now, this is a case called the *Willett* case, and what happened was there were some interests in Vermont that tried to sue a paper plant in New York under Vermont common law, on the grounds that they were causing pollution in Vermont waters—Vermont portions of Lake Champlain. What that obviously would have done was allow Vermont courts to dictate and essentially override the rulings of permit authorities in New York State on what the permit limit should be for those paper plants. The Supreme Court held that, in fact, the Clean Water Act was so all-encompassing and regulated all discharges in all water bodies throughout the

United States, that under preemption doctrine it should be viewed as preempting state common law.

And of course, the risk, if you're going to try to cut back too much authority from the federal government, is that what you end up with is a system where only the states can regulate, and you can end up with a system where the states are trying to interfere with each other's regulations, or there's a completely inconsistent permitting scheme. And so the oddity is that many of the same lawyers who are often challenging these kinds of federal regulatory authorities, at other times working for the same clients, are claiming that those federal regulations preempt state law because of all the obvious potential interference with commerce if you had fifty different regulatory schemes.

So if I can, I'll just mention two other little quick things and one big thing. One of the suggestions was, well, these are ditches and ditches can't really be rivers and streams. Unfortunately, we live a highly manipulated aquatic system, where large numbers of rivers and streams have been excavated and channelized in order to carry flows more rapidly. Virginia is absolutely correct that there are some ditches constructed originally in upland areas. For instance, if you have a ditch as part of carrying your storm water from a parking lot, that's not a water of the U.S. because that's part of the parking lot. But there are other cases where you had, originally, waters of the U.S. that were simply made to carry water more rapidly. And it would seem to make very little sense to say that, if what we care about is the hydrological connections, the fact that you've channelized the stream so that it carries water more rapidly downstream would somehow therefore no longer make it a water of the U.S., or you would no longer be concerned with discharges into that.

The last thing, if I could say—well, I'll go through one other little issue. Dealing with these challenges and this fundamental problem—with the fact that the Clean Water Act obviously has been regulating sewage treatment plant discharges into the vast majority of rivers, virtually all rivers, since 1972—the homebuilders have come up with an argument that says we should have a case-by-case approach so that before you regulate discharges into a river, you want to see whether or not that particular discharge would have a significant nexus to a downstream water body. And I think Virginia suggested the same thing. There are practical problems with this, which is how the heck do you

know if this discharge is going to have an impact all the way downstream, if the would-be permittee doesn't even have to provide you any information about what the discharge would be.

But the legal problem is that the Clean Water Act says a discharge of any pollutant into a water of the U.S. should be regulated. It does not say the water of the U.S. depends on the nature and amount of the pollutant we're going to discharge. It creates a permit scheme to say we're going to start by casting a net where we're going to look at the discharge of pollutants to see what effect it might have downstream. And there's no hint of a suggestion in the Clean Water Act that the definition of the water of the U.S. should vary depending on how much of a pollutant or the nature of the pollutant you're likely to discharge.

I'll just say one thing about the constitutional issue. As I said, the essence of the constitutional claim is a picture. The picture is that as we are going upstream, we are getting farther and farther removed from the federal government's legitimate role. We kind of finally get way up there, and you've just got to be kidding. I've told you why I think the science does not support that. But let me go back to the broader issue, which is why should the federal government have the authority to regulate these kinds of resources?

When you go back to 1972, what the federal government saw was a waste of a very valuable natural resource. What was that natural resource? It was water. Now, if there were tremendous waste of oil resources in the U.S., people were somehow or other contaminating oil resources, destroying the future economic ability to fully exploit oil resources because states were not doing a decent job of regulating and protecting oil resources, and the federal government said we're going to need to protect—we're going to need to establish a uniform regulatory scheme that still will have the states doing the vast majority of the work, but we're going to set a kind of minimum floor of what they have to do to protect those oil resources—I don't think anybody would doubt their constitutional authority to do that.

Well, water is a similarly very valuable economic resource. As of 1972, the states were doing a very poor job of protecting that resource for a wide variety of uses, and that's what the federal government did. And it doesn't strike me, notwithstanding this picture—in fact, this picture seems to me to have nothing to do with really what the federal government's power should be. If in fact there's a legitimate basis for determining that state regulation is not preventing waste of a very valuable economic resource, it seems to me we want the federal government to be

able to establish that minimum regulatory scheme to assure that that waste does not occur.

That is particularly true in a context where you have a large number of economic enterprises that want preemption of things like state common law in order to establish a consistent regulatory scheme.

Thank you very much.

RICHARD SCHWARTZ  
CROWELL & MORING

I'm going to talk primarily about the other side of this. Virginia has talked about wetlands; I'm going to talk to you about discharges of effluent into the waters of the United States. Now there are really three points I want to make. And first is, they really are inseparable. As Tim mentioned, what this starts out in is what the Clean Water Act did in the 1972 amendments, that was a really huge change in law, and the really big thing it did was say that there's no right to pollute.

The Section 301 prohibition says that, "except as in compliance with this Statute, there will be no discharge of pollutants into waters of the United States." And there were two exceptions, or a few exceptions, but the exceptions were if you had a permit. And there were two kinds of permits; one was for dredged and fill material, which is involved in *Rapanos* and *Carabelle*, and the other was for anything else which is a pollutant. The term "pollutant" is very broadly defined: rock, sand, any kind of waste of any sort, garbage, all that stuff, is a pollutant. So when we talk about the definition of "waters of the U.S.," the basic prohibition applies to the discharge of any pollutant, and the discharge of any pollutant is defined as a discharge of any pollutant to navigable waters.

So for both programs, when you're talking about navigable waters you're talking about this big prohibition. And the division has been, you know, what kind of permit do you need to go beyond that prohibition. And that is why we talk about the decision the Supreme Court is going to make as being so broadly applicable, because in fact that doesn't just apply to wetlands. It really does apply to any kind of discharge of any kind of pollutant into the navigable waters, depending on how you define them.

Now I want to talk about the issue of tributaries, which Tim has talked about in some detail. And to give you an idea about the scope of how far the regulation can go, you have to know certain ground rules. First of all, as the law has developed through agency laws, court decisions,

etc., the tributaries themselves don't have to be navigable in order to count as waters of the United States. It doesn't matter how far away they are from a navigable water. It doesn't matter that they're man-made. And, it doesn't matter that they are dry.

In fact, I suspect that what you would find if you counted up the miles of tributaries throughout the United States, you would find out that a huge percentage, probably a majority, are dry most of the time. That's because, as we say, those of us who live east of the Mississippi are forest dwellers. Those who of us who are west of the Mississippi are desert dwellers. Most of what they call arroyos, dry washes, all sorts of drainage areas that drain storm water are tributaries, and they've been held to be tributaries by the courts. And they're treated that way by the Corps of Engineers and by the EPA, and are universally regulated that way.

In fact, it's real surprise, if you're like me, I grew up east of the Mississippi. I live here. And then you go out West and you find what they call waters of the United States, and you're astonished because these are areas of land that are a little bit lower than the rest of the land that never have any water, except in the rare occasions that they have a big, big storm. And then they're filled with water for a short time, and then they are dry again for most of the year. And all those things, those tributaries, are treated as waters of the United States, and they're regulated under the Clean Water Act.

Now what I'd like to do to give you an idea what this means is to bring it close to home. The Potomac River is a navigable water. Rock Creek is a tributary of the Potomac River. When there are urban discharges, they go through storm sewers. And if you go along Rock Creek, you'll see little culverts or pipes where water is flowing. Where that water is coming from is storm sewers, and where the storm sewers are coming from are streets. And from the streets sometimes up curbs, and sometimes they have ditches alongside the streets. And all those things are leading to Rock Creek, so those are tributaries of Rock Creek. And if you go back far enough, they lead you to Heska Street, which is where I live in Chevy Chase, Maryland. If you go to the bottom of Heska Street from the storm drain and you go up, you get to my driveway.

When it rains real hard, water flows down my driveway, and it goes in to Heska Street, and it goes down the storm drain. And from the storm drain, it goes down to Rock Creek. And from Rock Creek, it goes to the Potomac River. Now if it rains real hard, it goes from my backyard. The water piles up, it flows down my driveway, goes down at Heska Street, etc. And all those things are, using the definition, if you play out the

rules, the tributaries, they're tributaries. They're waters of the United States and they go into my backyard. And the worst thing is, in my backyard I have a birdbath.

Until *SWANCC*, my birdbath, when it rained hard and overflowed and went into my backyard and down the driveway down the street, you know, it was visited by birds from Northern Virginia, from Toronto. And it could have been categorized as a navigable water. It's a tributary of the waters of the United States, and has a clear commerce connection. And so that's what can happen when you carry this too far.

And the other thing that happens is, you know, sometimes in the mornings I take out the garbage. And sometimes, you know, the garbage can get pretty filled and I'm walking up the driveway, and I spill some garbage. And that's a violation of the Clean Water Act because my driveway leads to the street, which leads to the sewer, which leads to Rock Creek. My driveway is a tributary, and a tributary is a water of the United States. Now because I'm a good citizen, after I drop the garbage, I pick it up again I put it back in the garbage can and the garbage collectors pick it up, and everything's fine. My garbage never actually gets to the Potomac River. But that doesn't matter, and it doesn't matter that my driveway is dry at the time I dropped the garbage because, to the Potomac River, it was a tributary, and the courts have held that there's no obligation to prove that my garbage ever actually got to the Potomac River. It fell into a tributary, which is a water of the United States, and, therefore, I violated the Clean Water Act.

Now that, I concede or most people concede, is further than regulation ought to go under the Clean Water Act. The question is, what can you do about it? Now generally what the industry side says—and you'll see this in the briefs in *Rapanos*—is some kind of evidence that my garbage actually got to the Potomac River before I can be charged with a \$25,000 fine. And the government and people who favor more regulation don't like that because it can be hard to prove.

So the question is what you do about this. I can give you an example where this is handled in a way I think it makes sense, and that involves groundwater. It is undisputed, I believe, and I think all the cases have held, that a discharge of groundwater is not itself a discharge to waters of the United States, and that comes from the legislative history of the Clean Water Act. That's very clear, and all the courts have held that. But the problem is, well, what if you discharge to groundwater but it's right next to a river. And so it seeps into the ground—it's a variation on the problem that Tim raised as, well, I'll just move my pipe

back and so, I avoid the statute. And so, there's been a lot of litigation about suppose somebody discharges something into the ground, it goes in the groundwater, and then it seeps into a river. Is that exempt from Clean Water Act jurisdiction?

The Courts have come out different ways. The broadest was in a case called *Quevera Mining Company*. It was the Tenth Circuit in Colorado, where they took the broadest possible view. And there, there was a discharge by a mining company into a dry area of New Mexico and the court said, yeah, but it seeps into the ground and somewhere under that ground there's groundwater, and sometimes after—this is a direct quote; I'm not making this up—“after centuries, it could enter a river.” And that was good enough for the Tenth Circuit. They said, well, this is a discharge to waters of the United States through groundwater, and so we're going to regulate that.

Now what has evolved, fortunately, is different from that. But the court seemed to be requiring in the case of a discharge into the ground, which on its face is not regulated by the Clean Water Act, is that the plaintiff, whether it be the government or a citizens group, has to trace actual pollution from the point source discharge into the ground and show that it actually does get into the river. This is an obligation that has not been imposed under other (inaudible), and under discharges to dry tributaries, but it's one that I think could be managed because requiring an actual effect on navigable waters does create burden of proof issues, but it's the kind of burden of proof issue that the courts could handle and they've handled it in many other circumstances. They create presumptions and they do all sorts of things.

In the end, perhaps, the burden of proving that I picked up my garbage should be on me. But there are ways that you can introduce a rule of reason and protect me and my birdbath from violating the Clean Water Act. Thank you.

PROFESSOR ROBERT PERCIVAL  
UNIVERSITY OF MARYLAND SCHOOL OF LAW

I really appreciated Jeff's introduction to sort of set the stage and outline some of the constitutional issues, particularly because I teach constitutional law and environmental law and some of my constitutional law students are here today. So I hope they're listening carefully.

One major issue in constitutional law these days, of course, is federalism, and federalism issues are very important. I've continually, though, been kind of struck by how federalism can often be used as kind of a cover, and that the same people who care passionately about states' rights will suddenly turn around when a state's doing something that their client doesn't like and advocate federal preemption, whether it's with respect to tort law or marriage law or medical marijuana or assisted suicide, and that some of the true major federalism concerns, such as the fact that since I'm a D.C. resident, I have no voting representation in Congress, are rarely addressed even by groups like the Federalist Society.

What I want to talk about today is, first, why this case arose, why the Court took it, and then to make a prediction that I think will probably disappoint a lot of you in the audience as to how these cases are going to come out. The case arose because anyone who can open a major loophole that relaxes long-standing regulations can make a lot of money. So there's always going to be an economic incentive for clever lawyers to try to figure out ways to have the courts engage in judicial activism and cut back on long-standing doctrines of environmental law. And as a result of the *Lopez* decision in 1995, there was a field day on lawyers trying to come up with new theories as to how to apply that to roll back the environmental laws.

But what we have here is a federal statute that hasn't been amended in decades. The law is still the same, despite the fact that when the Republicans took over Congress in 1994 they tried to gut the Clean Water Act, and there was such a tremendous reaction from the public that they abandoned that effort. The regulations at issue in this case have not changed in decades either, and as Jeff indicated, the Bush Administration after the *SWANCC* decision did in fact propose to change the regulations. But what happened was it wasn't just the environmental groups that were upset, as Virginia indicated. It was a lot of Republican sportspersons who went directly to the White House and insisted on meeting with President Bush, who personally made the decision that it would be very bad for sportsmen, if we cut back on Clean Water Act jurisdiction. So what we have here in this case is basically a naked invitation to judicial activism. We can't change the law in Congress, even though Congress is not particularly sympathetic to environmental concerns today. We're not going to change the regulations administratively. So, try to get judges to adopt new interpretations of the law that will open new loopholes.

When the *SWANCC* decision came down in 2001, four years ago, there was a Federalist Society program that I attended in this very room, and there was a lot of uncertainty. What does it mean? It was quite clear at the time that a field day of wetlands development without permits was going on throughout the United States because many people assumed that this had greatly cut back on the jurisdiction of the Clean Water Act. Well, what's happened since then? Almost every lower court that looked at the issue said that the *SWANCC* decision only applied in the rare case where the sole basis for federal jurisdiction was the potential presence of migratory birds.

The Bush Administration, after originally proposing to change the regulations on what constituted the waters of the United States, abandoned that effort when it realized how horrendous the consequences could be. And subsequently we had the Supreme Court's decision last term in *Gonzalez v. Reich* where, by a six to three vote, the Court very carefully cabined *Lopez* and *Morrison*, and indicated that when a comprehensive federal program is at issue that clearly has constitutional applications, that even purely intrastate non-economic activities, such as growing marijuana in your old backyard for your own consumption, can be regulated under the Commerce Clause. We would think that these issues were settled but for one thing, and that is that the Court took these cases.

I think everyone was surprised that the Court took these cases. So why did it do so? Did that indicate that, in fact, the Court wants to reopen another major loophole in the Clean Water Act? I don't think so, and I think the answer really lies in the current personnel changes at the Court. As you may recall, what was one of the major issues that came up in the confirmation hearings for Chief Justice John Roberts? The hapless toad. We heard an awful lot about the hapless toad, which was one of Roberts' opinions dissenting from a denial of a re-hearing *en banc* in a case involving the question of whether or not the Endangered Species Act was constitutional under the Commerce Clause.

Roberts initially got kind of a bum rap from environmentalists who suggested that his dissent indicated that he was hostile toward the environmental laws when Commerce Clause limitations were imposed. But actually, if you went back and read his opinion, all he was advocating was that the D.C. Circuit should reconsider a decision that said that it was constitutional to regulate a commercial enterprise that might affect endangered species because that was inconsistent with another court who had said it shouldn't make any difference whether the enterprise is commercial or not, and he thought it would be useful to get the rationale consistent.

In the confirmation hearings for Supreme Court Justice Samuel Alito, who will be sitting on the Bench for the first time to hear oral argument on Tuesday when these cases are argued, there was a lot of discussion about federalism issues. And I think it was kind of striking. In his testimony he made it quite clear that environmental laws are here to stay. He doesn't see any serious threat to their constitutionality. So I don't think that this is going to be a major issue. Why did they take the cases then? Well, I suspect that, given all the attention that was brought to these issues, they would like to clarify that the one Fifth Circuit opinion that tends to deviate from the consistent pattern of interpretation of the Clean Water Act, in fact, got it wrong. And that's why I would predict that, in fact, the Court will rule in favor of the government in both of these cases.

Now, the strategy here is one of using vague constitutional questions as kind of the gorilla in the closet, the notion that there's a canon of statutory interpretation that says if you can decide a case and resolve it on statutory grounds, you should do so in preference for (gap in transcript). . . . wrong with that canon of statutory interpretation, but in fact has been distorted a bit recently to argue that if there's any constitutional question, you should seize whatever statutory grounds, no matter how meritless they are, to decide a case in order to avoid the constitutional question. That is not the traditional doctrine of statutory interpretation.

That was tried in *Riverside Bayview*, as Jeff indicated, where the plaintiff in that case said if you don't let us develop our wetland, it will be a regulatory taking and that will raise grave constitutional issues. And Justice White, my old boss who wrote the majority opinion in that case, said that's ridiculous. If in fact it's a taking, the government has to pay for it. That issue can be raised in a later case, but that's no reason for us to distort how the Clean Water Act is interpreted. The government's interpretation that adjacent wetlands, even if not directly connected to navigable waters, can be regulated under the Clean Water Act is the proper one. And that's what the Court did.

Most recently, I was struck, when Attorney General Gonzalez was testifying before Congress on the Warrantless Surveillance Program, that he actually made the argument that the program was legal despite the fact that it seems to directly contradict the provisions of the Foreign Intelligence Surveillance Act because of the authorization of use of military force in light of the 9/11 attacks, and that this doctrine of constitutional interpretation, that there would be grave constitutional questions if the program was not legal, requires the courts to hold that the authorization of military force, even though it says nothing about surveillance,

trumps the clear legislative language of the Foreign Intelligence Surveillance Act.

Now, at its most extreme, the argument that the petitioners are making in these cases is that no matter how serious a threat to the environment the filling of a wetland would be, the federal government and the states who implement the Clean Water Act, as Michigan did in these cases, will have absolutely no authority, both from a statutory standpoint or even from a constitutional standpoint, if you accept their constitutional argument, and it cannot be regulated at all, regardless of the environmental effects. In these cases, you had a clear finding by the Army Corps of Engineers that there would be serious long-term damage to water quality if Mr. Rapanos was able to fill his wetlands. And Mr. Rapanos's wetlands involve over hundreds of acres of wetlands that were going to be filled.

So, Rich's example of the street and his backyard—I'm glad to see that he appreciates that even very minor things we do, like how we dispose of our garbage can have environmental effects. But there's absolutely no prospect that the Clean Water Act provisions would be applied to him and he would be required to have a permit. In fact, even if he had a wetland in his backyard that he was proposing to fill, he wouldn't need to apply for a permit under Section 404 unless he's wealthier than Dan Snyder and has so many acres of property in his backyard that it would not already be exempt from the provisions of Section 404.

Why do I think the government will win both of these cases? Well first of all, I think where you draw the line is a big issue in these cases, and I think the government has a much clearer line to draw. It says if something's an adjacent wetland to a tributary of a navigable water, it's covered. That's much more appealing than trying to make the courts to do a case-by-case inquiry into potential effects on interstate commerce.

Secondly, much like the situation in *Lopez*, the Clean Water Act has clear jurisdictional provisions that tie it to effects on interstate commerce.

Thirdly, it's part of a comprehensive program to protect interstate commerce from the damaging effects of pollution. And in light of the rationale of Justice Scalia in *Gonzalez v. Reich*, the medical marijuana case, clearly there would be no constitutional problem with that. It's rational for the government to conclude that the activity regulated has a substantial effect on interstate commerce. And the federalism issue is really bogus in this case because almost all of the states are supporting the Bush Administration's position in this case, that there should be federal jurisdiction.

Finally, Mr. Rapanos is not exactly the most sympathetic plaintiff in the world, since he directly defied court orders and, as a result, was criminally convicted for violating the Clean Water Act. A decision in his favor would certainly open up a field day for challenges to the environmental laws. And I suspect that in light of the discussion at the confirmation hearings for both Chief Justice Roberts and Justice Alito, that's the last thing that they would want to open their service on the Supreme Court by doing. Thank you.

MR. CLARK

Thanks to all our panelists. Before I open it up to all of you for questions, I want to exercise the moderator's prerogative and put one question really to each side of the debate.

My question for Virginia and Rich's side of the debate is what about Professor Percival's point, essentially, that Congress hasn't revisited this problem seemingly to fix it? What about the fact that the presidential administrations haven't used their power to issue new regulations or new regulatory interpretations to give what Rich would call a "rule of reason" to the Act? Why should the courts ride to the rescue and provide the solution to that problem when the political branches have not acted?

And then, the question for Professor Percival and Tim is a question really about, why isn't it possible to break the connection at some level between Sections 402 and 404? Because the constitutional question is really one about the effects that the programs have on the ground. And if the one program doesn't create the same constitutional questions as the other program, because the wetlands program appears to have much greater entrenchment effect upon local land use regulation, which has historically been the purview of the states, why can't that constitutional avoidance principle rationally be used to distinguish essentially between 404 and 402 effects?

First, I'll ask Virginia and Rich to respond to the first to question, and then Professor and Tim to the second question.

MR. SCHWARTZ

Yes, I think the one answer is simply the way the courts work. It's not limited to the Clean Water Act. If you look at any of the environmental statutes, it's extremely difficult, frankly, to amend them, even if a lot

of people think they should be amended. And probably, the prime example is the Clean Air Act, where they were fighting—eastern and western coal interests were fighting—over how you regulate the sulfur content in coal. And I think it was something like fifteen years; somebody else may know the numbers, but it was over a decade. It was going up and down. They couldn't amend it because they couldn't agree because there were interests fighting on both sides.

And so, to interpret the fact that Congress has not amended a law like the Clean Water Act, which is very controversial, to interpret it as saying, well, that means they think it's okay, or that means they think anything, I think probably is misguided. And that's true with the Clean Water Act as well. Congressional inaction is a very poor basis for interpretation of what Congress meant. In fact, what Congress is to do with something that's controversial is let the courts work it out. And frankly, that's what they're, in preference, doing here. But Virginia may have other observations.

MS. ALBRECHT

Actually, yes. I was kind of struck by Bob's point that the Clean Water Act hasn't changed. It hasn't. It was passed in 1972 and the jurisdiction—the words of the statute are the same today as they were in 1972, so it's thirty-four years. But if you go on any piece of ground in the United States, the administration of the statute has changed dramatically.

Actually I've got one client who really makes this illustration very aptly. This is a large landowner in Southern California. Thirty years ago, they would get a 404 permit or a 402 permit for these major creeks that ran through their property. Today, they are getting permits and required to get permits for the smallest erosional feature on the side of a hill. And getting these permits is no small potatoes. It's not like getting a driver's license.

There was a study that was done a couple years ago by two professors from the University of California at Berkeley, economists who looked at permitting processes and found that it takes 788 days for the average permit process, to get through the permit process. That's the average. That's more than two years. And so this is a major kind of thing. And I think what's happening here is we're not asking for judicial activism. We're basically saying to the judiciary, take a look at the statute; is the way it's being administered consistent with the words of the statute and what Congress intended?

The other point I would make is that it has morphed as we've gone along. And the prime example of that is the treatment—actually

Rich's example of these artificial pitches and things like that. At the time that Congress last looked at this statute at all, 1977, ditches were not regulated; ditches were explicitly excluded from regulation. And in fact, under the 1975 regulations, which were in effect up until just days before Congress changed the statute in 1977, the interpretation of the administration was that jurisdiction ended at the headwaters. The headwaters—not to get too technical, but Rapanos's ditches, and everybody else's, would be out, and certainly your curbs.

The last point I would make is the San Diego County water permit actually treats in words, and says, curbs and gutters are waters of the United States because they are tributaries. So it's not an exaggeration. So the question is what of the role of the courts in a situation like that.

MR. SEARCHINGER

It's certainly true that more things are being regulated under the same legislation, but that's in large part due to the fact that we now realize that things subject to Clean Water Act jurisdiction that we weren't so worried about before have a real impact on environmental quality.

The last time the Act was amended was in 1977, and it was right after the most recent change in the regulations at issue in these cases. And I think the governor has a very strong argument that the legislative debate and the language in the statutory amendment certainly reflects that Congress wanted to strengthen the Act in 1977, and that's why it adopted legislation and language, minor amendments, that tend to indicate approval for the expansion of the jurisdiction of the Act in those cases.

PROFESSOR PERCIVAL

Let me address two things. I don't think the actual legal jurisdiction has changed at all since 1977. What happened was in 1977, Congress debated exactly these issues, which was the existing regulation of the definition of waters of the U.S. And it's not simply that they declined to take action. What it did do was enact a whole series of changes precisely to prevent anyone from claiming this kind of example of overreach that Rich gave. So, for example, give the Corps of Engineers the authority to grant something called general permits. Upwards of ninety percent of all permits are handled automatically as general permits. It also gave the states the authority to have the program delegated.

It also, by the way, said the only thing you can't delegate is the regulation of wetlands adjacent to traditional navigable waters. So, it said, we're going to delegate the wetland permit program to the states, except for wetlands adjacent to traditional navigable waters. And now Rapanos is claiming that all the Act does is regulate wetlands adjacent to traditional navigable waters, which would mean that that provision of the ability to delegate would have no meaning whatsoever.

Now, let me address the question of 404 and 402. There's a limit to what a court can do in completely rewriting an act under any constitutional avoidance principle. And as I said, the section that is at issue, the section that applies to any kind of permit, is any discharge of any pollutant into a water of the U.S. is prohibited without a permit. So the question is what does that mean. Now in order to avoid the kind of constitutional question that you hypothesized, they would have to rewrite that statute to say any discharge except for a dredge of fill material into the navigable waters would be prohibited unless it has a 402 permit, and any discharge into a traditional navigable water or adjacent wetland that is a dredge or fill discharge is prohibited, except for 404. So they would have to do this dramatic rewrite.

It's not simply that the same term is used—the common principle of statutory interpretation is that if Congress uses the same term throughout an act, it means the same thing—but that it's the same provision. It is precisely the same provision. The prohibition is any discharge into a water of the U.S. is prohibited. If it is not prohibited for purposes of 404, it isn't prohibited for purposes of 402. So I actually applaud Rich's acknowledgment of that fact.

And the last thing I'll say, if I can, is Rich raises a good point about the fact that there are examples of things that would be absurd to regulate in the way he claims. I don't know about—if Virginia is correct about the permit, it's the wrong permit. But what we do—the example he gave is actually a good aside of the rationality of the Clean Water Act is applied. We do not regulate—we do not say waters of the U.S. include sewers. We do not say the waters of the U.S. include parking lots or driveways, whatever. What we do say, though, is that at that point, that is no longer water of the U.S.

But Washington, D.C.'s storm water system is a source of pollutants and needs a permit for its discharges into what you would agree look like streams. Now, those streams include not merely the Potomac River. They also include Rock Creek. They also include the tributaries to Rock Creek, if you walk through them, but not Rich's driveway or the

sewer system. Why? What we do is we regulate the collective of that, in that. But we do that even though some of the outfalls are directly into the Potomac River and some of them are into Rock Creek. So, obviously there is going to be a line at which you have to draw a line; what is a water, what isn't a water?

But the last thing I'll say—sorry for taking too much time, if I am—but the mere fact that something doesn't flow all year-round would be a terrible line. The Río Grande River has a stretch right in the middle of it that almost never flows. The reason rivers and streams out in the West tend to be ephemeral is because they are in a desert environment. But when it rains, a lot of water flows. In fact, some of the biggest flooding problems in the country are in the west in these washes, in these streams that are in fact not flowing ninety percent of the year. And when you have a massive flood caused by one of these streams, you would be pretty odd not to call it a water of the United States.

So, it's easy if you don't kind of know all the facts about this stuff, but obviously it's correct. There's going to be some point at which you say a stream is not a stream. And you have to draw the line, and the agencies has to come up with reasonable technical bases for coming up of those lines.

MR. CLARK

All right. Well, thanks. And there's one issue that probably not a lot of folks are going to ask about, but Dean, I have dibs on it for a future conference to explain how one reconciles views of the Commerce Clause and preemption. It's a good topic to keep in mind for the future.

But we want to hear from you. Who has a question?

AUDIENCE PARTICIPANT

Jeff, in your opening remarks, you mentioned the medical marijuana decision and that sort of being a reversal of *Lopez*. Do you have any thoughts or comments on assisted suicide, assisted death decision?

MR. CLARK

Well, here's what I'll try to say, not to be too intrusive as the moderator. I don't think that the *Reich* case represents a reversal of *Lopez* or

*Morrison*. I think it represents a different situation, which is one reason why I tried to highlight Justice Scalia's agreement there with the majority. So, I urge you to sort of focus on the facts of the nature of the regulatory scheme as being different than what's at issue, arguably, in this sort of situation but certainly in *Lopez* and *Morrison*.

In terms of the assisted suicide case, one of the dissents, especially Justice Thomas's dissent, focuses on the sort of questions that you're posing. But the most part, the majority decision and the sort of main dissent focus on administrative law issues. I think the assisted suicide case is a very important *Chevron* case and stands for a lot of important principles there are about how to interpret regulations, especially how much deference agencies get when they interpret their own regulations.

But any questions for our panelists?

#### AUDIENCE PARTICIPANT

Yes. I have a question, I guess to Tim. I guess you're quite right in the sense that 301 is the operative provision, which says that you can't discharge a pollutant into a navigable waterway. But it seems to me that what's still at issue is whether a wetland is a navigable waterway for this reason. It may be right that the streams you keep saying are connected all the way up, and putting something in the stream up there at the beginning would eventually going to the navigable waterway. Assuming that's true, that's not the case here, where you're talking about putting a pollutant into a wetland, not even where it will go down the driveway, out and into the Rock Creek, and then to the Potomac River, but, as you stated, that it's the wetland itself that prevents pollutants and discharges from other people, like, say, grease from the roadway that the owner did not discharge, from somehow being filtered out and going into the waterway.

So if, in fact, we're looking at the statute and going after the discharge from a point source into a navigable waterway, how would that—wouldn't you have to come back to, well, was this a wetland, the navigable waterway, because as Justice White in *Riverside Bayview Homes* talked about, well, where does the water end and dry land begin? There was this middle area where, if you put pollutants onto a wetland adjacent, that pollutant may wash into the water, not that it serves as a trap for somebody else's discharge that may go in.

MR. SEARCHINGER

Well, I think you raised both a policy and a legal issue. The reason the focus in *Rapanos* has been on whether the tributary is regulated is because there's a tremendous amount of language in *Riverside Bayview Homes*, and even in *SWANCC*, that if the tributary is otherwise a water of the U.S., Congress made clear in 1977 amendments that wetlands adjacent to the tributary should be regulated. So, *Rapanos* has not argued, for example, that the tributary is regulated but the wetland is not. He's argued that the whole kit and caboodle is out.

Now the policy issue you raise is kind of a fairness issue of, you know, is it fair to require that people protect their wetlands because, you know, they're really serving as kind of filtration for other would-be polluters. That's true, but it's not just that. Basically, why is it that the Chesapeake Bay is a system that naturally would have very little nitrogen? Well it's not only that we didn't pour as much nitrogen onto agricultural fields, or we didn't have as much nitrogen coming from streets, and things like that. It's because prior to our manipulations of it, there was this massive wetland system, and almost every tributary was surrounded by wetlands. There was a fair amount of nitrogen that still kind of ran off the landscape. But that nitrogen never reached the Chesapeake Bay because it got filtered out. This was even before humans came out and added more nitrogen. That nitrogen got filtered out along the way.

And so, one reason we protect the wetlands is because if we don't, we're essentially changing the chemistry of the aquatic system to take care of itself. Yes, obviously the fact that we have more pollutants going in is a problem. But even if we didn't have more pollutants going in, if we just took the wetlands out, that would also cause those things to be polluted. So that may kind of answer the policy-type issue.

But you know, I think you're right that what's motivating this case, you know, why there are organizations that really want to challenge the wetland protection is not because they really think the sewage treatment plants or factories that discharge of the tributary shouldn't be regulated. I mean, I haven't seen a single—that's ever been a case. It's been around for thirty-four years. No one is going around saying, boy, that sewage treatment plant really shouldn't be regulated because it discharges into the Anacostia River and on to the Potomac River. What's motivating it is concern about wetlands and private property and all those kinds of things, and the policy issues surrounding that.

But this isn't a case that deals with private property issues. Those are important policy issues and maybe legal issues under the Takings Clause. I don't think that they are legitimate questions under the Clean Water Act.

AUDIENCE PARTICIPANT

Robert, your boss actually—you suggested, the same as your boss that—I think his words ought to be wary of imputing meaning from Congress's failure to pass a statute and the *Riverside Bayview Homes* decision. Then he went on to, nonetheless, give that some serious weight in that consideration. And I think obviously as we come back to this, I don't quibble with the notion that we understand differently the nitrogen cycle, or the sense that it's not potentially only human contribution.

But I would argue that the same basic—that I would offer you the same challenge, which is it not the responsibility of those who realize this to pass a statute based on that new information, rather than to simply take a statute that was not passed in contemplation, in serious contemplation, of those downline ramifications. And in that context, I would offer a kind of judicial compromise to let you pound about. Suppose the Court were to say, as I think Virginia suggested, not that discharges into tributaries cannot be reached because they are tantamount to discharges into navigable waters, but that's different from suggesting that the tributary becomes a regulated water. Now you worry about this because if it's not a regulated water, a navigable water, then the adjacent wetland is out. You've gone right at the issue.

But if the scary issue here is that we're going to lose control over anything put into a tributary, if we don't maintain them as waters, I think that's wrong. I think the Court could say, look, if a discharge into a tributary is tantamount to a discharge into a regulated water, it comes in, much as the upstream discharger into the sewer system, that's tantamount to a discharge at the end of the pipe without calling the entire internal portion of the sewer system a water of the United States. So what's wrong with that?

PROFESSOR PERCIVAL

Let me address it first as kind of a policy issue and say, how would you apply that. You would agree, I'm sure, that the impact of

discharges downstream is going to be in part cumulative. You know, you can have a major impact not because your arsenic alone is going to destroy the Chesapeake Bay, but because of your arsenic in combination with other people's arsenic, even more so with nitrogen or whatever else.

So what you would—it's not in just an individual discharge. What you're really suggesting is the case-by-case approach. Under the case-by-case approach, what you'd have to do is say is this discharge, in combination with all the other discharges that we're reasonably likely to see, likely to have an impact on the downstream navigable, in fact, water body. What that would mean is whether or not that discharge is regulated, which under the Statute means whether or not that's a water of the U.S., the water of the U.S. would sometimes be a water of the U.S. and sometimes not be water of the U.S. It would take this complete cumulative watershed analysis of all the potential sources of pollutants.

Now you could have a statute that says that. You could have a statute that says we will only regulate discharges into tributaries to the extent necessary to protect downstream navigable waters. You could have a statute that says that. There was a statute that said that. It was called the Refuse Act. It existed prior to the Clean Water Act, and Congress superseded of the Refuse Act in passing the Clean Water Act because it didn't consider the refuse act to be adequate.

So you know, that's a policy thing you could pursue, but it's not, in my view, consistent with the language of the Act, not only because we know that Congress was not satisfied with the Refuse Act, but because there's not a hint in the act that whether or not something is considered to be a water of the U.S. depends on the nature and volume of the discharge individually, let alone on the cumulative impact of all the discharges.

MR. CLARK

Do we have any closing remarks from our panelists before we wrap up our session today?

MS. ALBRECHT

I did want to make one point, which is actually the reference to the Refuse Act as a good example, and I think that builds on Brian's point, which is the Refuse Act actually—it wasn't that Congress was

disappointed with it; it was that it didn't have a statutory foundation to create a regulatory program. And they used the Refuse Act as a model for Section 402. When you look at the legislative history, the legislative history of the Clean Water Act says that we're moving the Refuse Act into Section 402. That is what it is. And the Refuse Act actually made that distinction between regulating and calling things navigable waters, and regulating activities that took place outside of the navigable waters on a case-by-case basis, and said essentially you can have activities that occur in tributaries and regulate those polluting activities, regulate the activities, but you don't call the tributaries navigable waters. And that was the distinction they made. And they recognized that when you call something a "navigable water," you are federalizing that place. The Refuse Act and the Clean Water Act, I would submit, have a way to reach polluting activities that occur upstream without federalizing the place. That's our challenge.

MR. SCHWARTZ

If I could just add, the consequence of federalizing the place is that activities that clearly do not affect navigable waters nonetheless are be regulated under the Clean Water Act. One example that we deal with is farmers' fields that have low areas that are—you could call them a lot of things, but they can be called wetlands. And if they use animal manure to fertilize those fields, and they grow crops on those fields, they would require a Clean Water Act permit even though none of the nutrients, none of the fertilizers, being applied to the fields will ever get to a water of the United States.

Similarly, there are activities that are short in time, temporal activities—short-term construction projects or sometimes even short-term discharges—where pollutants are discharged and they hit either wetlands or they hit tributaries which are dry. The pollutants may soak into the ground or blow away, but they're short in time. And you can demonstrate that there is absolutely no impact on a navigable water. Well, since the theoretical basis for extending jurisdiction upstream is impact on the navigable water, it is not unreasonable to say that those activities should not be regulated. And that's the line that we're trying to draw.

And the issue is, I think we all agree that the issue is, well, how far do you go upstream? What circumstances you choose to make the distinction between what will be regulated under the Clean Water Act

versus activities that can be regulated under other statutes and are regulated under statutes. The example I gave to you about farmers fertilizing their fields refers to activity that's regulated under every state in the union under state farm statutes. Similarly, construction activities are regulated under state construction actions, often overlapping with Clean Water Act requirements, and often requiring builders to get multiple permits. They need a state permit to build a home, and they also need a Clean Water Act permit. And frequently those permits have very similar requirements. They get tripped up sometimes because there are small differences, and they think they've got one and then they don't have the other one, and so they find themselves in violation.

But essentially, what we're talking about is how far—under what circumstances do you use a statute that everyone agrees was intended to protect navigable waters, and when do you apply that to activities that you know, in fact, do not affect navigable waters.

MR. SEARCHINGER

Of course, normal farming operations are exempt from the Section 404 program. And the argument that the government makes in this case is, yes, there may be cases where jurisdictional wetlands are—in some unusual circumstance, their development's not going to affect navigable waters, and in those cases we'll grant a permit. We give 80,000 permits a year.

PROFESSOR PERCIVAL

Yes, I'm sorry, I have to say this last little thing.

MR. CLARK

We have a lively panel.

PROFESSOR PERCIVAL

Congress could have written a statute that says discharges will be regulated to the extent they have a discernible identifiable impact on traditional navigable waters, but that's not how it wrote it. It says

discharges and any water of the U.S. So it's either a water of the U.S. or it's not. If it is a water of the U.S., the Clean Water Act makes it very clear that you protect the water quality of that itself, and not just the navigable water downstream. So it could have done it, but it didn't.

And here's the interesting thing. For thirty-four years, every sewage treatment plant, every factory that's gotten a permit, that permit has had limits designed not simply to protect big, big water bodies downstream but the tributaries into which they're actually discharged. Nobody that I know of has ever really challenged that. And this case is essentially putting that issue, even though what really is bothering the people who want to bring this case or who are sympathetic to it is something very different, which is, I just don't trust regulation of wetlands and that kind of thing.

But at issue in this case now is this amazing question of whether or not the vast majority of permits ever written under the Clean Water Act in all fifty states were necessary.

MR. CLARK

Well, on behalf of the Federalist Society, I want to thank all of you attending, and we look forward to seeing you at our next event.