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The Murky Future of the Clean Water Act after SWANCC: Using a Hydrological Connection Approach to Saving the Clean Water Act

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In 2001, the Supreme Court decided Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (SWANCC). In this five-to-four decision, the Court held that the U.S. Army Corps of Engineers (Corps) lacked the authority under the Federal Water Pollution Control Act (FWPCA) to regulate "isolated" intrastate wetlands and waters that serve as habitat for migratory birds. The Court found the FWPCA's jurisdiction is limited to navigable waters and non-navigable waters that have a "significant nexus" to navigable waters, such as wetlands adjacent to navigable waters. However, the Court did not clearly define which adjacent wetlands and tributaries are within the scope of the FWPCA, generating considerable uncertainty about the FWPCA's jurisdiction. Some courts and commentators read SWANCC broadly to limit the FWPCA's application to only navigable waters and non-navigable wetlands and tributaries that immediately abut navigable waters. Other courts read SWANCC narrowly to mean that the FWPCA does not reach isolated, non-navigable waters that have no connection to navigable waters, but that its jurisdiction does reach inland waters or wetlands that have any hydrological or ecological connection to navigable waters. This Article proposes an intermediate position that requires that non-navigable waters contribute more than a mere hydrological connection or drop of water to navigable water to come within the FWPCA's jurisdiction, but also rejects the view that adjacent wetlands and tributaries must directly abut navigable waters to constitute "waters of the United States." The Article concludes that courts should interpret the Act to include any non-navigable waters,

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wetlands, or tributaries that possess a significant hydrological nexus with navigable waters.

INTRODUCTION

In 2001, the Supreme Court murkied the already clouded understanding of the 1972 Federal Water Pollution Control Act (FWCPA or "the Act")[1] with its five-to-four decision in *Solid Waste Agency of Northern Cook County (SWANCC) v. United States Army Corps of Engineers*[2]. The Court held that the U.S. Army Corps of Engineers (Corps) lacked authority under the FWPCA to regulate wetlands and waters that serve as habitat for migratory birds when those waters are both isolated and intrastate.[3] According to the *SWANCC* Court, Congress intended that the FWPCA's jurisdiction be limited to navigable waters and non-navigable waters that have a "significant nexus" to navigable waters, such as wetlands adjacent to navigable waters.[4] The Court emphasized that, despite precedent diminishing the importance of navigability,

1. *See generally* Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2003) (commonly known as the "Clean Water Act").

2. Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'gs, 531 U.S. 159 (2001) [hereinafter *SWANCC*]. Chief Justice Rehnquist wrote the majority opinion, joined by Justices O'Connor, Scalia, Kennedy and Thomas. *Id.* at 161. Justices Stevens, Souter, Ginsburg, and Breyer dissented. *Id.*

3. *See SWANCC*, *supra* note 2, at 171–74 (invalidating Final Rule for Regulatory Programs for the Corps of Engineers, 51 Fed. Reg. 41206, 41217 (Nov. 13, 1986)); William Funk, *The Court, the Clean Water Act, and the Constitution:* SWANCC *and Beyond*, 31 ENVTL. L. REP. 10741 (2001); Stephen M. Johnson, *Federal Regulation of Isolated Wetlands After* SWANCC, 31 ENVTL. L. REP. 10669 (2001).

4. *SWANCC*, *supra* note 2, at 167–68 (explaining the Court's prior decision in *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985), by observing that a "significant nexus" existed between adjacent wetlands and navigable waters).

> it is one thing to give a word limited effect and quite another to give it no effect whatever. The term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the [FWPCA]: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.[5]

Although *SWANCC* specifically addressed the ability of the Corps to regulate isolated, intrastate wetlands, the decision has broad implications for governmental regulation of water pollution. Because the U.S. Environmental Protection Agency (EPA) shares overlapping responsibilities with the Corps over wetlands regulation and has exclusive jurisdiction over other areas of the FWPCA,[6] the *SWANCC* decision may also affect the EPA's approach to wetlands regulation and specifically its authority to issue permits for isolated waters.[7] However, the Court did not clearly define which adjacent wetlands and tributaries are within the scope of the FWPCA, thereby generating considerable uncertainty about the FWPCA's jurisdiction.

On January 19, 2001, the last full day of the Clinton administration, the EPA and the Corps [hereinafter "the agencies"] issued a joint memorandum written by Gary S. Guzy, General Counsel of the EPA, and Robert M. Andersen, Chief Counsel of the Corps, adopting the narrow interpretation that *SWANCC* invalidates the agencies' authority only over waters in which their jurisdiction was based solely on the presence of migratory birds.[8] In light of *SWANCC's* broader dicta

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5. *SWANCC*, *supra* note 2, at 172 (citing United States v. Appalachian Elec. Power Co., 311 U.S. 377, 407–08 (1940)).

6. In its Advance Notice of Proposed Rule Making (ANPRM), the EPA and the Corps summarized their jurisdiction under the FWPCA as follows:

> The [FWPCA] generally prohibits the discharge of pollutants into 'waters of the U.S.' without a permit issued by EPA or a State or Tribe approved by EPA under § 402 of the Act, or, in the case of dredged or fill material, by the Corps or an approved State or Tribe under § 404 of the Act.

Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of Waters of the United States, 68 Fed. Reg. 1991, 1991–92 (Jan. 15, 2003) [hereinafter ANPRM]. The EPA has authority to veto section 404 permits issued by the Corps, or an approved State or Tribe. In a footnote, the *SWANCC* Court stated: "The EPA is the agency that generally administers the [FWPCA], except as otherwise provided. 33 U.S.C. § 1251(d); *see also* 43 Op. Atty. Gen. 197 (1979) ('Congress intended to confer upon the administrator of the [EPA] the final administrative authority' to determine the reach of the term 'navigable waters')." *SWANCC*, *supra* note 2, at 184 n.10.

7. *See* Susan Bruninga, *EPA, Army Corps Say Definition of 'Waters' May Affect Other Clean Water Act Programs*, 34 BNA ENV'T REP. 139 (2003); *infra* notes 301, 305 and accompanying text.

8. Memorandum from Gary S. Guzy and Robert M. Andersen, Supreme Court Ruling Concerning CWA Jurisdiction over Isolated Waters 2–3 (Jan. 19, 2001), *available at* http://www.epa.gov/owow/wetlands/swanccnav.html (online Edocket for the ANPRM, document no. OW-2002-0050-0003); Virginia S. Albrecht & Stephen M. Nickelsburg, *Could* SWANCC *Be Right? A New Look at the Legislative History of the Clean Water Act*, 32 ENVTL. L. REP. 11042,

concerning the primacy of navigation in determining the Act's jurisdiction, advocates of property rights and many Republican members of Congress have lobbied the agencies to revise the Guzy-Anderson joint guidance on wetlands and issue a rule limiting the FWPCA's jurisdiction to navigable waters, wetlands adjacent to navigable waters, and tributaries to navigable waters.[9] Conversely, several leading environmental groups and the Associations of State Wetland and Floodplain Managers have argued that the agencies should not address issues raised by *SWANCC*'s dicta in a broad rule making, but should instead issue a narrow guidance addressing which wetlands are affected by the Court's rejection of the Migratory Bird "Rule."[10]

11042–43 (2002) (discussing joint EPA and Corps memorandum on FWPCA jurisdiction); Jeanne A. Calderon, *The* SWANCC *Decision and the Future of Federal, State and Local Regulation of Wetlands*, 30 REAL EST. L.J. 303, 304, 315 (2002) (same).

9. *See, e.g., Federal Authority to Require Wetlands Dumping Permits: Hearing on Agency Implementation of* Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers *Before the Subcomm. on Energy Policy, Natural Res. & Regulatory Affairs, House Comm. on Gov't Reform,* 107th Cong., 2d Sess. (2002) (statement of Doug Ose, Chairman, Subcomm. on Energy Policy, Natural Res. & Regulatory Affairs, House Comm. on Gov't Reform), *available at* 2002 WL 100237579 (arguing *SWANCC's* rationale requires EPA and Corps to issue rule limiting Clean Water Act jurisdiction to navigable waters, and immediately abutting wetlands and tributaries); *id., at* 2002 WL 100237583 (statement of M. Reed Hopper, Principal Attorney, Pacific Legal Foundation); *id., at* 2002 WL 100237584 (statement of Nancie G. Marzulla, President, Defenders of Property Rights); *id., at* 2002 WL 100237585 (statement of Raymond Stevens Smethurst, Jr., Partner, Adkins, Potts and Smethurst).

10. *See, e.g., Hearing on Clean Water Act Before Senate Comm. on Environment & Public Works*, 107th Cong., 2d Sess. (2002) (statement of Robert F. Kennedy, Jr., Senior Counsel, Natural Resources Defense Council), *available at* 2002 WL 100237903 [hereinafter Kennedy Testimony]; *Federal Authority to Require Wetlands Dumping Permits: Hearing on Agency Implementation of* Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers *Before the Subcomm. on Energy Policy, Natural Res. & Regulatory Affairs, House Comm. on Gov't Reform,* 107th Cong., 2d Sess. (2002) (statement of Gary S. Guzy, Partner, Foley Hoag, LLP), *available at* 2002 WL 100237586 [hereinafter Guzy Testimony]; *Federal Authority to Require Wetlands Dumping Permits: Hearing on Agency Implementation of* Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers *Before the Subcomm. on Energy Policy, Natural Res. & Regulatory Affairs, House Comm. on Gov't Reform,* 107th Cong., 2d Sess. (2002) (statement of Patrick Parenteau, Professor of Law, Vermont Law School), *available at* 2002 WL 100237587 [hereinafter Parenteau Testimony]; Joe Truini, *Supreme Court's ruling muddies water regulations*, WASTE NEWS, Sept. 30, 2002, at 1 (reporting criticisms of Joan Mulhern, legislative counsel for Earthjustice, of EPA's planned rule making on FWPCA jurisdiction); Editorial, *The Clean Water Act at 30*, N.Y. TIMES, Oct 22, 2002, at A30 (arguing Bush administration should not narrow jurisdiction of FWPCA); Letter from Jeanne Christie, Executive Director, Association of State Wetland Managers and Larry Larson, Executive Director, Association of State Floodplain Managers to Christine Todd Whitman, Administrator, United States Environmental Protection Agency, et al. (Dated Oct. 4, 2002) ("We urge the [Bush] administration not to proceed with rulemaking in an attempt to limit the scope of the [FWPCA].") (on file with author); Letter from Clean Water Action; Defenders of Wildlife; Earthjustice; Friends of the Earth; National Wildlife Federation; Natural Resources Defense Council and Sierra Club to Dominic Izzo, Principal Deputy Assistant Secretary of the Army for Civil Works, United States Army Corps of Engineers and Christine Todd Whitman, Administrator, United States Environmental Protection Agency, et. al., (dated Oct. 4, 2002) ("We respectfully urge the [Bush] administration to issue policy guidance consistent with the

Environmentalists argue that the Act's legislative history, the agencies' regulations, and prior judicial decisions clearly establish that the term "waters of the United States" that describes jurisdiction in the Act should be given the broadest possible interpretation permissible pursuant to Congress' authority under the Constitution's Commerce Clause.[11]

On January 10, 2003, the EPA and the Corps issued a joint press release in which they announced their intention to publish an Advance Notice of Proposed Rule Making (ANPRM) to solicit public comment to clarify the extent of the Act's jurisdiction in light of *SWANCC*.[12] The agencies also issued a joint memorandum, or guidance, on how field staff should address jurisdictional issues until the agencies issue a final rule on the subject.[13] On January 15, 2003, the agencies published the ANPRM in the Federal Register and gave the public forty-five days to comment on the impact of *SWANCC* on the agencies' jurisdiction.[14] The agencies also published in the Federal Register the joint memorandum as Appendix A to the ANPRM.[15] After receiving over thirty thousand comments,[16] the agencies subsequently extended the comment period to April 16, 2003.[17]

The ANPRM and January 2003 guidance have provoked concerns among environmentalists that approximately twenty percent of all wetlands, totaling about twenty million acres, will be classified as "isolated," and hence beyond federal jurisdiction.[18] The guidance has not made developers happy either; they seek clear rules defining which wetlands are subject to regulation.[19] In response to the concerns of environmentalists, Benjamin Grumbles, the EPA deputy assistant administrator for water, responded that the Bush administration is

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legal position of the Department of Justice and not to proceed with rulemaking in an attempt to limit the scope of the [FWPCA].") (on file with author).

11. *See* Bruninga, *supra* note 7, at 139; Guzy Testimony, *supra* note 10 (arguing *SWANCC* was narrow decision leaving broad jurisdiction under FWPCA); Kennedy Testimony, *supra* note 10 (same); Parenteau Testimony, *supra* note 10 (same).

12. ANPRM, *supra* note 6.

13. *See* Press Release, EPA and Army Corps of Engineers, Administration to Reaffirm Commitment to No Net Loss of Wetlands and Address Approach for Protecting Isolated Waters in Light of Supreme Court Ruling on Jurisdictional Issues (Jan. 10, 2003), *available at* http://www.epa.gov/owow/wetlands/Press-Logo.pdf; Bruninga; *supra* note 7, at 139; Susan Bruninga, *Jurisdiction Over Isolated Waters Clarified in Guidance Issued by EPA, Army Corps*, 34 BNA ENV'T REP. 140 (2003).

14. ANPRM, *supra* note 6.

15. *Id.* at 1995–98; *infra* notes 487, 493–96 and accompanying text.

16. Ray A. Smith, *New Guidelines Stir Debate on Wetlands*, WALL ST. J., Feb. 26, 2003, at B8.

17. Extension of Comment Period, 68 Fed. Reg. 9613 (Feb. 28, 2003).

18. *See, e.g.*, Matt Arado, *How Bartlett's Balefill Case Sparked National Wetlands Debate*, CHI. DAILY HERALD, Mar. 17, 2003, at 1; Smith, *supra* note 16 (quoting Jeffrey R. Porter, manager of environmental law section of Mintz Levin Cohn Ferris Glovsky & Popeo, stating that, "Both sides are unhappy with the government['s guidelines.]").

19. Smith, *supra* note 16.

committed to no net loss of wetlands,[20] and that the agencies plan to retain jurisdiction over most wetlands and may not even issue new regulations.[21]

Several Democratic politicians, as well as some Republicans, have argued against weakening the Act, and some commentators suggested that the Bush administration would delay issuing a final rule until after the 2004 elections.[22] For example, in March 2003, the EPA spokesman, John Millett, stated that the agencies might not issue new rules for two to five years because of the difficulty in addressing the "gray area" of which wetlands are isolated and thus ineligible for federal protection.[23] In congressional testimony, Major General Robert H. Griffin, director of civil works for the Corps, indicated that the substantial policy issues required in re-defining the Corps' jurisdiction demand "a substantial work effort that is expected to carry into 2004."[24] On June 10, 2003, despite pressure from conservative Republican senators requesting faster action by the agencies in issuing a rule on the definition of wetlands jurisdiction, G. Tracy Mehan, the EPA assistant administrator for water, indicated that the Agency would not issue a rule until it had studied all comments on the ANPRM—5,000 individualized comments and 128,000 form comments; on December 16, 2003, the EPA and Corps announced that the Bush Administration would not issue new regulations substantially restricting the agencies' jurisdiction over wetlands, although they also announced that their controversial January 2003 joint guidance would remain in effect until such time as the agencies may later issue new guidelines refining the Act's jurisdiction.[25]

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20. *Id.* (paraphrasing Grumbles).

21. *See* Press Release, EPA and Army Corps of Engineers, *supra* note 13; *EPA Claims Isolated Waters Plans Affirm Strong Agency Oversight*, INSIDE EPA, January 22, 2003.

22. *See Environmentalists Seek '04 Democratic Focus on Bush Water Rule*, INSIDE EPA, March 19, 2003; infra note 25 and accompanying text.

23. Arado, *supra* note 18.

24. *See Hearing on Fiscal 2004 Appropriations Before the Subcomm. on Energy and Water Development, Comm on Senate Appropriations*, 108th Cong., 1st Sess. (2003) (testimony of Major General Robert H. Griffin, Director of Civil Works for the Army Corps of Engineers).

25. *Federal Jurisdiction of Navigable Waters Under Clean Waters: Hearing Before Senate Comm. on Environment and Public Works* 108th Cong., 1st Sess. (2003) (statement of G. Tracy Mehan, Assistant Administrator of Water, EPA), *available at* 2003 WL 56335158; Susan Bruninga, *Ecology, Hydrology Should Determine Federal Role, EPA Official Says*, 34 BNA ENV'T REP. 1341 (2003) (reporting G. Tracy Mehan, EPA Assistant Administrator of Water, testified before Senate Subcommittee that EPA and Corps would review over 128,000 comments before revising agency rules on wetlands jurisdiction despite Republican Senator James Inhofe's request for swifter action). On November 25, 2003, in response to a leaked draft document indicating that the EPA and Corps planned to issue a draft rule narrowing jurisdiction over non-navigable wetlands and waters, 218 members of the House of Representatives, including 26 Republicans, sent a letter to the Bush administration urging it not to issue any rule narrowing the jurisdiction of the Clean Water Act. Elizabeth Shogren, *Changes in Water Policy Opposed*, L.A. TIMES, Nov. 26, 2003, at 12. James Connaughton, chairman of the Council on Environmental Quality, responded that the Bush Administration was still reviewing comments

As the agencies have begun to develop rules, the importance of the *SWANCC* Court's broader dicta concerning the primacy of navigation in determining the Act's jurisdiction has generated vigorous debate. Until recently, the EPA and the Corps broadly construed the scope of federal jurisdiction under the Act[26] to reach the limits of Congress' constitutional authority under the Commerce Clause.[27] In 1985, the Supreme Court in *United States v. Riverside Bayview Homes, Inc.*[28] concluded that the Act applied to non-navigable wetlands adjacent to navigable waters, stating that the term "navigable" is of "limited import" and that Congress sought "to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term."[29] In light of *Riverside Bayview's* broad dicta, but not its actual holding, the Corps in 1986 issued a migratory bird regulation that justified jurisdiction over non-navigable, isolated, intrastate waters and wetlands that "are or would be used as habitat by . . . migratory birds which cross state lines" on the grounds that these birds substantially affect interstate commerce.[30] It was this rule that the Court overruled in *SWANCC* when the Corps based their assertion of jurisdiction upon it.

Since 1977, the EPA and the Corps' regulations have broadly defined the term "waters of the United States" to include "intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate

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on the ANPRM and had not decided whether to issue a rule regarding federal jurisdiction under the Clean Water Act. *Id.* On December 16, 2003, just before this article was published, the EPA announced it would not issue a rule restricting its jurisdiction over wetlands because most states were opposed to narrowing federal jurisdiction and the majority of lower court decisions had broadly interpreted the Act's jurisdiction. EPA, Press Release, *EPA and Corps Issue Wetlands Decision*, EPA 03-R-291 (Dec. 16, 2003), *available at* 2003 WL 22955590; Elizabeth Shogren, *Administration Backs Off Clean Water Act*, L.A. TIMES, Dec. 17, 2003, at 22. Predictably, environmentalists were pleased with the Bush Administration's decision not to issue new regulations, although disappointed that the January 2003 guidelines will remain in effect, and developers were disappointed that there will be no new rule. *Id.*

26. *See Federal Authority to Require Wetlands Dumping Permits: Hearing on Agency Implementation of* Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers *Before the Subcomm. on Energy Policy, Natural Res. & Regulatory Affairs, House Comm. on Gov't Reform*, 107th Cong., 2d Sess. (2002) (statement of Dominic Izzo, Principal Deputy Assistant Secretary of the Army, Civil Works Dep't of the Army and Robert E. Fabricant, General Counsel, EPA), *available at* 2002 WL 100237580; Truini, *supra* note 10, at 1 (reporting EPA's plans to update its regulations on FWPCA jurisdiction).

27. *See infra* notes 135, 141–46, 186–92 and accompanying text.

28. *See* 474 U.S. 121 (1985).

29. *Id.* at 133.

30. *See* Final Rule for Regulatory Programs of the Corps of Engineers. 51 Fed. Reg. 41206, 41217 (Nov.13, 1986) (interpreting 33 C.F.R. § 328.3); *infra* notes 186–92.

or foreign commerce . . . ."[31] Before 2001, many lower court decisions agreed that the Act's jurisdiction reached the limits of Congress' authority to regulate interstate commerce.[32] Additionally, there is strong scientific support behind the agencies' efforts to regulate isolated, intrastate wetlands. In 1995, in a major report prepared for the Corps, the National Academy of Sciences concluded that the "scientific basis for policies that attribute less importance to headwater areas and isolated wetlands than to other wetlands is weak."[33]

In the 2001 *SWANCC* decision,[34] the Supreme Court revitalized the importance of navigability in determining the Act's jurisdiction and raised questions about many decisions that extended the Act to non-navigable waters.[35] *SWANCC* only specifically addressed the Migratory Bird "Rule," thus the impact of *SWANCC* on the Act's jurisdiction in other areas is unclear. Since the Court decided *SWANCC*, lower federal courts have disagreed whether the decision is limited to its core holding that the Migratory Bird "Rule" is invalid or whether the decision reflects a broader principle that the Act is limited to regulation of navigable waters and waters that have a close nexus to navigable waters.[36] A minority of courts and some commentators read the *SWANCC* decision broadly to limit the Act to only navigable waters and non-navigable wetlands and tributaries that immediately abut or have a very close nexus to navigable waters.[37] In *Rice v. Harken Exploration Co.*,[38] the United States Court of Appeals for the Fifth Circuit stated that "[u]nder

31. *See* 33 C.F.R. § 328.3(a)(3) (2003) (Corps regulation); 40 C.F.R. § 230.3(s)(3) (2003) (EPA regulation); Funk, *supra* note 3, at 10,741.

32. *See, e.g.*, United States v. TGR Corp., 171 F.3d 762, 764–65 (2d Cir. 1999); United States v. Eidson, 108 F.3d 1336, 1341–42 (11th Cir. 1997); Leslie Salt Co. v. United States, 55 F.3d 1388, 1394–95 (9th Cir. 1995); Quivira Mining Co. v. EPA, 765 F.2d 126, 129–30 (10th Cir. 1985); Robin Kundis Craig, *Navigating Federalism: The Missing Statutory Analysis in* Solid Waste Agency, 31 ENVTL. L. REP. 10508 & n.4, 10513–14 & n.80 (2001) (citing numerous pre-*Lopez* cases holding FWPCA's jurisdiction reaches limits of congressional commerce power).

33. NATIONAL RESEARCH COUNCIL, WETLANDS: CHARACTERISTICS AND BOUNDARIES 156 (1995); *see also Changes to the Water Pollution Control Act: Hearing Before Senate Comm. on Environment and Public Works* 105th Cong., 1st Sess. (1997) (statement of Michael L. Davis, Deputy Assistant Secretary of the Army) (discussing conclusion of National Academy of Sciences that isolated and headwaters wetlands deserve protection); Jodi Finder & Steven M. Reiness, Note, *General Permits Under Wetlands Law: The Rise and Fall of Nationwide Permit 26*, 3 ENVTL. LAW. 891, 896–97 (1997) (same).

34. *SWANCC*, *supra* note 2.

35. *See infra* notes 222–29, 246 and accompanying text.

36. *See* Albrecht & Nickelsburg, *supra* note 8, at 11042–43 (discussing cases interpreting *SWANCC's* impact on FWPCA jurisdiction); Calderon, *supra* note 8, at 316–19 (2002) (same); Lawrence R. Liebesman & Stuart Turner, *Summary Of Federal Court Decisions Interpreting The Supreme Court's 2001 Decision Of* Solid Waste Agency Of Northern Cook County v. Corps, SG096 ALI-ABA 207, 209–15 (May 29–31, 2002) (same).

37. *See* Albrecht & Nickelsburg, *supra* note 8, at 11055–56; Liebesman & Turner, *supra* note 36, at 209–12; *supra* note 9 and *infra* notes 38–40, 312–59, 532 and accompanying text.

38. 250 F.3d 264 (5th Cir. 2001).

[*SWANCC*], it appears that a body of water is subject to regulation under the [Act] if the body of water is actually navigable or is adjacent to an open body of navigable water"; on December 16, 2003, just before this article was published, the Fifth Circuit in its decision *In re Needham* confirmed its narrow interpretation of the Act in light of *SWANCC* and explicitly rejected the narrow interpretation of *SWANCC* and broad interpretation of the Act recently adopted by the Fourth and Sixth Circuits.[39] Several district court decisions had come to the same conclusion as the Fifth Circuit, but some of these decisions were recently reversed by the Fourth and Sixth Circuits.[40] This narrow position is at odds with the Act's broad ecological goals, is inconsistent with a careful reading of *Riverside Bayview*, and is not required by *SWANCC*.[41]

Conversely, a majority of courts have read *SWANCC* narrowly to mean that although the Act does not reach isolated, non-navigable waters with no connection to navigable waters, it does reach inland waters or wetlands that have a hydrological or ecological connection to navigable waters.[42] In *Headwaters v. Talent Irrigation District*,[43] the United States Court of Appeals for the Ninth Circuit read *SWANCC* narrowly by broadly defining navigable waters to include irrigation canals that were designed to be isolated from navigable water but which, in fact,

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39. *Id.* at 269; *accord* In re Needham, 2003 WL 22953383 (5th Cir. Dec. 16, 2003) (No.02-30217) (confirming its narrow interpretation of the Act's jurisdiction in light of *SWANCC* and explicitly rejecting the broad view of Act's jurisdiction and narrow interpretation of *SWANCC* in United States v. Deaton, 332 F.3d 698 (4th Cir. 2003), *petition for cert. filed*, 72 U.S.L.W. 3356 (U.S. Nov. 10, 2003) (No. 03-701) and United States v. Rapanos, 339 F.3d 447 (6th Cir. 2003), *petition for cert. filed*, (U.S. Dec. 22, 2003) (No. 03-929)); see *also* Liebesman & Turner, *supra* note 36, at 209–10.

40. *See* FD & P Enters. v. United States Army Corps. of Eng'rs, 239 F. Supp. 2d 509, 516 (D.N.J. 2003) (concluding *SWANCC*'s "significant nexus" test requires "more than a mere 'hydrological connection'"); United States v. RGM Corp., 222 F. Supp. 2d 780, 786–88 (E.D.Va. 2002) (holding that Act's jurisdiction does not reach wetlands adjacent to and flowing into man-made ditches and streams that only occasionally flow into navigable waters) (government appeal pending); United States v. Rapanos, 190 F. Supp. 2d 1011, 1015 (E.D. Mich. 2002) (holding wetlands not adjacent to navigable waters are outside scope of FWPCA and stating that Supreme Court's *SWANCC* decision "establish[es] a mode of analysis for this Court"), *rev'd*, 339 F.3d 447 (6th Cir. 2003), *petition for cert. filed*, (U.S. Dec. 22, 2003) (No. 03-929); United States v. Newdunn Assocs., 195 F. Supp. 2d 751, 767–68 (E.D. Va. 2002) (holding Army Corps of Engineers did not prove sufficient connection between wetlands on owner's property and navigable waters and therefore did have jurisdiction over wetlands adjacent to multiple drainage ditches), *rev'd,* Treacy v. Newdunn Associates, 344 F.3d 407(4th Cir. 2003), *petition for cert. filed*, 72 U.S.L.W. 3310 (U.S. Oct. 27, 2003) (No. 03-637); Liebesman & Turner, *supra* note 36, at 210–12.

41. *See infra* notes 353–61 and accompanying text.

42. *See, e.g.*, Headwaters v. Talent Irrigation Dist., 243 F.3d 526, 533 (9th Cir. 2001); United States v. Interstate Gen. Co., 152 F. Supp. 2d 843, 846–47 (D. Md. 2001); United States v. Krilich, 152 F. Supp. 2d 983, 992 n.13 (N.D. Ill. 2001); Idaho Rural Council v. Bosma, 143 F. Supp. 2d 1169, 1178 (D. Idaho 2001); United States v. Buday, 138 F. Supp. 2d 1282, 1289 (D. Mont. 2001); Liebesman, *supra* note 36, at 212–15.

43. 243 F.3d 526.

sometimes became intermittent tributaries to a navigable waterway when a waste gate malfunctioned.[44] Similarly, several district court decisions found that the Act applies to ditches or wetlands that indirectly or intermittently flow into navigable waters without a direct or contiguous connection to those waters.[45] While a majority of courts have followed *Headwaters'* broad interpretation of *SWANCC's* significant nexus test and the Ninth Circuit's narrow reading of the impact of *SWANCC*,[46] none of these courts provided a clear definition of the "significant nexus" or "hydrological connection" test. Some of these cases suggest or state that a hydrological connection brings non-navigable waters within the Act's jurisdiction when a mere drop of water reaches navigable waters.[47] Such a loose approach to defining a hydrological connection ignores *SWANCC's* requirement of a significant nexus.[48]

The "significant nexus" or "hydrological connection" approach announced by the *SWANCC* Court raises many questions that the lower courts have not been able to address satisfactorily. This Article proposes an intermediate position that requires more than a token hydrological connection to invoke the Act's jurisdiction,[49] but also rejects the view that adjacent wetlands and tributaries must directly abut navigable waters to constitute "waters of the United States."[50] The Article concludes that courts should interpret the Act to include non-navigable waters, wetlands, or tributaries that possess a significant hydrological connection or nexus with navigable waters. Courts should find a "significant nexus" where non-navigable waters have a clearly perceptible impact on navigable waters or where there is a reasonable possibility that there could be such impacts in the future.[51] If non-navigable waters have an ecological connection to navigable waters by serving as habitat for migratory birds or other species, but no significant hydrological connection exists, then the non-navigable waters would be regrettably beyond the scope of the Act. However, if some hydrological connection between non-navigable waters and navigable waters exists, then the

44. *Id.* at 533; Liebesman & Turner, *supra* note 36, at 212–13; Hans Hull, In Brief, *Ninth Circuit Court of Appeals Maintains Broad Clean Water Act Jurisdiction*, 29 ECOLOGY L.Q. 436 (2002).

45. *See, e.g.*, United States v. Lamplight Equestrian Center, 2002 WL 360652, at *7, 54 ERC 1217, 32 Envtl. L. Rep. 20,526 (N.D. Ill. 2002); United States v. Rueth, 189 F. Supp. 2d 874, 877 (N.D. Ind. 2001), *order vacating order in part* (2002), *aff'd*, 335 F.3d 598 (7th Cir. 2003), *cert. denied*, 72 U.S.L.W. 3282, (U.S. Dec. 1, 2003) (No. 03-548); United States v. Interstate Gen. Co., 152 F. Supp. 2d 843, 846–47 (D. Md. 2001); *Krilich*, 152 F. Supp. 2d at 991 n.13; *Bosma*, 143 F. Supp. 2d at 1178; *Buday*, 138 F. Supp. 2d at 1289; Liebesman & Turner, *supra* note 36, at 213–15.

46. *See infra* notes 365–448 and accompanying text.

47. *See Rueth*, 189 F. Supp. 2d at 877–78; *infra* notes 516–21 and accompanying text.

48. *See infra* notes 515–22 and accompanying text.

49. *See infra* notes 52, 176–85, 353–57, 384, 520–22, 531–42 and accompanying text.

50. *See id; infra* notes 544–49, 553–58 and accompanying text.

51. *Id.*

presence of ecological connections should serve as a tiebreaker in close cases.

In determining jurisdiction, the agencies should consider the distance between non-navigable "adjacent wetlands" and navigable waters because the term "adjacent" implies that the wetlands are in reasonable proximity to navigable waters or a non-navigable tributary to navigable waters.[52] On the other hand, the agencies and the courts should define a "tributary" of navigable waters to include intermittent streams, man-made ditches, and underground waters that have a significant hydrological connection to navigable waters regardless of distance.[53] Even after *SWANCC*, the Act's jurisdiction should usually include wetlands that are adjacent to a non-navigable tributary that is hydrologically connected to navigable waters because such wetlands are likely to affect the water quality of the tributary and, in turn, the water quality of the navigable waters.[54] A more difficult question is whether Congress intended the Act to include groundwater that directly flows into surface waters. This Article favors including groundwater that has a significant and direct nexus with surface waters. That issue is not as easily resolved by applying a significant nexus standard, however, because the Act's legislative history is ambiguous about whether Congress intended the Act to include groundwater. A reasonable interpretation of *SWANCC's* "significant nexus" language to include all non-navigable waters with significant hydrological connections to navigable waters could achieve many of the Act's ecological goals, but still respect *SWANCC's* emphasis on navigability. The agencies should adopt a reasonable definition of *SWANCC's* significant nexus test to include all non-navigable wetlands and tributaries that contribute a significant amount of water to navigable waters and err on the side of inclusion if non-navigable waters have a significant ecological effect on navigable waters.

52. Regulatory Programs of the Corps of Engineers, 42 Fed. Reg. 37122, 37128–29 (1977) (stating that adjacent wetlands "directly connect," "form the border," "or are in reasonable proximity to other waters."); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 133-34 (1985) (approving Corps' regulations including reasonable proximity test); Scott Bergstrom, Comment, *Overflowing Jurisdictional Banks: The Extension of Regulatory Authority Over "Navigable Waters" Under Section 404 of the Clean Water Act*, 41 U. KAN. L. REV. 835, 846, 846 n.80 (1993).

53. *See infra* notes 535-38 and accompanying text.

54. United States v. Deaton, 332 F.3d 698, 702 (4th Cir. 2003), *petition for cert. filed*, 72 U.S.L.W. 3356 (U.S. Nov. 10, 2003) (No. 03-701) (holding Corps has jurisdiction over wetlands adjacent to non-navigable drainage ditch, which is eventual tributary to navigable waters); *see infra* notes 185, 353–57 and accompanying text.

I. FEDERAL REGULATION OF NAVIGATION

A. The Federal Navigation Power and State Sovereignty

States have traditionally exercised sovereignty over navigable waters within their borders. The authority stems from the English common law's recognition that the King possessed sovereign authority over all navigable waters, including those in the American colonies.[55] After the American Revolution, the original thirteen states inherited the King's sovereign authority over their navigable waters.[56] Under the Constitution's equal footing doctrine, new states are admitted to statehood with the same sovereign authority as existing states. New states, therefore, have sovereign authority over their navigable waters, which include waters navigable-in-fact at the time of statehood and those subject to the ebb and flow of the tide.[57] Additionally, courts have recognized that states possess a public trust over navigable waters, their beds and their banks, which limits the rights of private landowners to take actions inconsistent with the state's interest in navigation.[58]

Even where a state has title to navigable waters within its borders, under the Constitution's federalist structure, the federal navigation power

55. *See* Shively v. Bowlby, 152 U.S. 1, 57 (1894) ("At common law, the title and dominion in lands flowed by the tide were in the King for the benefit of the nation."); Craig, *supra* note 32, at 10520; Roderick E. Walston, *The Federal Commerce and Navigation Powers:* Solid Waste Agency of Northern Cook County's *Undecided Constitutional Issue*, 42 SANTA CLARA L. REV. 699, 721 (2002).

56. *See Shively*, 152 U.S. at 57 ("Upon the American Revolution, [the right to regulate navigable waters], charged with a like trust, were vested in the original States within their respective borders, subject to the rights surrendered by the Constitution of the United States."); Martin v. Waddell, 41 U.S. 367, 410 (1842) ("[W]hen the revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered to the general government."); Craig, *supra* note 32, at 10520; Walston, *supra* note 55, at 721.

57. *See* Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 478–81 (1988) (the state has the right to waters that ebb and flow with tide); California v. United States, 438 U.S. 645, 654–55 (1978); United States v. Appalachian Elec. Power Co., 311 U.S. 377, 407–09 (1940) (holding state can have right to waters not navigable-in-fact at time of statehood); Kansas v. Colorado, 206 U.S. 46, 94 (1907); United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 704–06 (1899); *Shively*, 152 U.S. at 26–27, 49–50, 57 (stating "[t]he new States admitted into the Union since the adoption of the Constitution have the same rights as the original States in the tide waters, and in the lands under them, within their respective jurisdictions."); *see also* Pollard's Lessee v. Hagan, 44 U.S. 212, 223–24, 229 (1845); Barney v. Keokuk, 94 U.S. 324, 338 (1877); Hardin v. Jordan, 140 U.S. 371, 381–82 (1891); Craig, *supra* note 32, at 10520; Walston, *supra* note 55, at 721.

58. *See, e.g.*, *Phillips Petroleum Co.*, 484 U.S. at 471–85 (holding quiet title to submerged lands rested in the state of Mississippi rather than in private landowners); Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 452 (1892) (stating navigable waters, their beds and banks are "held in trust for the people . . . that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction of interference of private parties."); Craig, *supra* note 32, at 10520.

limits the traditional sovereign powers of states over their waters.[59] The Constitution does not directly mention federal regulation of navigation, but Congress' authority over navigation has long been presumed based on its authority under the Commerce Clause of the Constitution to "regulate Commerce with foreign Nations, and among the several states."[60] In 1824, Chief Justice Marshall wrote a masterful opinion in *Gibbons v. Ogden*[61] concluding that Congress had authority under the Commerce Clause to license steamboat operations in New York waters because Congress had the power to regulate both interstate commerce and intrastate activities affecting interstate commerce.[62] Marshall found Congress' authority to regulate navigation clearly implied in the Commerce Clause. Broadly defining "commerce" as "the commercial intercourse between nations, and parts of nations, in all its branches,"[63] Marshall reasoned that "[t]he mind can scarcely conceive a system for regulating commerce between nations, which shall exclude all laws concerning navigation."[64] The Chief Justice divined the minds of "all America" as understanding "'commerce' to comprehend navigation."[65]

The Supreme Court has recognized that Congress may implement its commerce power over navigation by regulating navigable waters that serve as channels of interstate and foreign commerce.[66] This authority

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59. *See, e.g.*, Kaiser Aetna v. United States, 444 U.S. 164, 172 (1979); Utah v. United States, 403 U.S. 9, 10 (1971); *Appalachian Elec. Power Co.*, 311 U.S. at 404–05; United States v. Texas, 339 U.S. 707, 717 (1950); United States v. Oregon, 295 U.S. 1, 14 (1935); Lewis Blue Point Oyster Co. v. Briggs, 229 U.S. 82, 87–88 (1913); Craig, *supra* note 32, at 10520; Walston, *supra* note 55, at 720.

60. U.S. CONST. art. I, § 8, cl. 3; *see* Albrecht & Nickelsburg, *supra* note 8, at 1104344; Craig, *supra* note 32, at 10521; Walston, *supra* note 55, at 719.

61. 22 U.S. (9 Wheat.) 1 (1824).

62. *Id.* at 186–98. Craig, *supra* note 32, at 10521; Bradford Mank, *Protecting Intrastate Threatened Species: Does the Endangered Species Act Encroach on Traditional State Authority and Exceed the Outer Limits of the Commerce Clause?*, 36 GA. L. REV. 723, 735–36 (2002); Louis J. Virelli III & David S. Leibowitz, *"Federalism Whether They Want It or Not":The New Commerce Clause Doctrine and the Future of Federal Civil Rights Legislation After* United States v. Morrison, 3 U. PA. J. CONST. L. 926, 927–29 (2001) (arguing Chief Justice Marshall's opinion in *Gibbons* adopted broad interpretation of commerce power); Sophie Akins, Note, *Congress' Property Clause Power to Prohibit Taking Endangered Species*, 28 HASTINGS CONST. L.Q. 167, 169–70 (2000) (stating that Chief Justice Marshall's *Gibbons* opinion implied commerce power reaches intrastate activities affecting interstate commerce).

63. *Gibbons*, 22 U.S. (9 Wheat.) at 189–90.

64. *Id.* at 190.

65. *Id.*

66. Kaiser Aetna v. United States, 444 U.S. 164, 172 (1979); United States v. Grand River Dam Auth., 363 U.S. 229, 231–32 (1960); United States v. Twin City Power Co., 350 U.S. 222, 224–25 (1955); Oklahoma *ex rel.* Phillips v. Guy F. Atkinson Co., 313 U.S. 508, 523 (1941); United States v. Appalachian Elec. Power Co., 311 U.S. 377, 404 (1940); Lewis Blue Point Oyster Co. v. Briggs, 229 U.S. 82, 87–88 (1913); United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 63 (1913); United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 706–08 (1899); *Gibbons*, 22 U.S. (9 Wheat.) 1, 89–90; Craig, *supra* note 32, at 10520; Walston, *supra* note 55, at 719.

includes a navigation "servitude" or "easement" in navigable waters that is superior to the rights of states and private individuals.[67] Under the common law, the navigation servitude limited the rights of individuals to compensation for what would otherwise be a taking of property under the Fifth Amendment.[68] If the federal navigation power does not apply, states possess sovereign rights to their navigable internal waters.[69] For example, when it sold or gave federal public land to miners or settlers during the nineteenth century,[70] Congress recognized that internal, non-navigable waters on such land were subject to state law and control.[71] Thus, while states retain authority over purely intrastate navigable waters that do not service interstate commerce, the federal government controls navigable interstate waters.

B. An Expanding Scope: Nineteenth Century Interpretation of Navigable Waters

Before 1936, the Supreme Court read the Commerce Clause narrowly to include only the actual interstate transportation of commercial goods and excluded intrastate manufacturing activities, even if a product later entered interstate commerce, on the grounds that the intrastate manufacturing only indirectly affected interstate commerce.[72]

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67. *See Kaiser Aetna*, 444 U.S. at 178 ("servitude"); United States v. Gerlach Live Stock Co., 339 U.S. 725, 736 (1950) ("easement"); *Lewis Blue Point Oyster Co.*, 229 U.S. at 87–88; *Chandler-Dunbar Water Power Co.*, 229 U.S. at 63 ("servitude"); Craig, *supra* note 32, at 10520; Walston, *supra* note 55, at 719.

68. *Chandler-Dunbar Water Power Co.*, 229 U.S. at 60; *see also Kaiser Aetna*, 444 U.S. at 175 (explaining history of navigation servitude); Craig, *supra* note 32, at 10520; Walston, *supra* note 55, at 719. The Supreme Court has more recently recognized some property rights for substantial takings that deprive an owner of the right to exclude. *See Kaiser Aetna*, 444 U.S. at 170–80; Craig, *supra* note 32, at 10520.

69. *See, e.g.*, Oregon *ex rel.* State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 372–74 (1977); United States v. Texas, 339 U.S. 707, 717 (1950); United States v. Oregon, 295 U.S. 1, 14 (1935); Shively v. Bowlby, 152 U.S. 1, 26–27, 49–50 (1894); Hardin v. Jordan, 140 U.S. 371, 381–82 (1891); Barney v. Keokuk, 94 U.S. 324, 338 (1877); Pollard's Lessee v. Hagan, 44 U.S. 212, 223, 229 (1845); Martin v. Waddell, 41 U.S. 367, 410 (1842); Craig, *supra* note 32, at 10520; Walston, *supra* note 55, at 721.

70. *See* Mining Acts of 1866 and 1870, 14 Stat. 251 (1866), as amended, 16 Stat. 217 (1871), 43 U.S.C. § 661; Desert Land Act of 1877, ch. 107, 43 U.S.C. § 321 (2003) (providing for disposition of public domain lands to miners, homesteaders and others); Walston, *supra* note 55, at 721 n.107.

71. *See* California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 158 (1935) (stating several mining and public domain statutes together "effected a severance of all waters upon the public domain, not theretofore appropriated, from the land itself."); Walston, *supra* note 55, at 721 & n.107; Accordingly, states enjoy "plenary control" of their non-navigable waters. *California Oregon Power Co.*, 295 U.S. at 163–64; *See* Walston, *supra* note 55, at 721 n.107.

72. Hammer v. Dagenhart, 247 U.S. 251 (1918) (holding Commerce Clause did not authorize child labor laws because intrastate manufacturing is not interstate commerce even though products later entered interstate commerce), *overruled by* United States v. Darby, 312 U.S. 100, 116 (1941); United States v. E.C. Knight Co., 156 U.S. 1 (1895) (holding sugar

Thus, courts focused on whether an activity was interstate or intrastate rather than on the activity's ultimate impact on interstate commerce.[73]

Second, during the nineteenth century, the Court limited federal authority over navigable waters to waters that were "navigable in fact."[74] In *The Propeller Genesee Chief v. Fitzhugh*, the Supreme Court in 1851 held that the admiralty and maritime jurisdiction of the United States extended beyond waters subject to the ebb and flow of the tide, which was the English standard for defining its admiralty and maritime jurisdiction, to actually navigable lakes and rivers used in interstate commerce.[75] In 1871, the Court in *The Daniel Ball* defined navigable waters of the United States as those "form[ed] in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water."[76]

The Court slowly began to expand the scope of federal jurisdiction through a series of decisions beginning in the late nineteenth century. Initially, the Court recognized the federal government's right to regulate non-navigable waters that affected navigable waters. Congress took the next step by enacting legislation authorizing the federal government to remove obstructions from navigable waters. In 1888 however, the Supreme Court concluded that the common law did not give the federal government the power to remove obstructions in navigable waters.[77] In response, Congress in 1890 enacted the River and Harbor Act (1890 Act), which empowered the Secretary of War to prohibit construction, including dredging and filling, that obstructed navigable waters.[78] In 1899, the Supreme Court, applying the 1890 Act, held the United States could enjoin the construction of a dam in a non-navigable section of the upper Rio Grande River to prevent obstruction of the navigable portions of the

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manufacturers were outside Sherman Act because sugar manufacturing was intrastate activity even if sugar later entered interstate commerce); Mank, *supra* note 62, at 736; Philip Weinberg, *It's Time For Congress to Rearm the Army Corps of Engineers: A Response to the Solid Waste Agency Decision*, 20 VA. ENVTL. L.J. 531, 533 (2001).

73. *See generally Hammer*, 247 U.S. at 271–72; Mank, *supra* note 62, at 736.

74. The Daniel Ball, 77 U.S. (10 Wall.) 557 (1871); Albrecht & Nickelsburg, *supra* note 8, at 11043–44; Joseph J. Kalo, *"Now Open for Development?": The Present State of Regulation of Activities in North Carolina Wetlands*, 79 N.C. L. REV. 1667, 1687–88 (2001).

75. *See* 53 U.S. (12 How.) 443, 453–58 (1851).

76. *The Daniel Ball*, 77 U.S. (10 Wall.) at 563; Albrecht & Nickelsburg, *supra* note 8, at 11043–44; Craig, *supra* note 32, at 10520–21; Kalo, *supra* note 74, at 1687, 1689–90.

77. *See* Williamette Iron Bridge Co. v. Hatch, 125 U.S. 1, 8 (1888); Bergstrom, *supra* note 52, at 836.

78. Pub. L. No. 51-907, 26 Stat. 454 (1890), § 10 "prohibiting the creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters, in respect to which the United States has jurisdiction."

River.[79] The Court recognized that activities in non-navigable waters were within the scope of the statute and congressional power because non-navigable waters affected navigable waters.[80]

Responding to ambiguities in the 1890 Act, Congress enacted the broader River and Harbor Act in 1899 (1899 Act) to protect navigable waters from obstructions by requiring congressional consent or a permit from the Corps for any construction in such waters.[81] Congress used broader language in the 1899 Rivers and Harbors Act, using the more general term "waters of the United States" in addition to "navigable waters of the United States." Section 10 of the 1899 Act forbids "[t]he creation of any obstruction . . . to the navigable capacity of any of the waters of the United States."[82] Section 10 refers to the terms "navigable waters of the United States" and "waters of the United States," but courts have construed both terms in the 1899 Act to apply only to navigable waters.[83] Under the 1899 Act, the term "navigable waters" is limited to "those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce."[84]

Finally, Congress expanded its area of authority over navigation to include discharges of refuse into and nearby navigable waters. Section 13 of the 1899 Act, commonly referred to as the Refuse Act, makes

> [i]t unlawful to throw, discharge, or deposit . . . any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water.[85]

The Refuse Act specifically prohibits adding refuse to non-navigable tributaries that flow into navigable rivers.[86] The statute also prohibits the deposit of such material on the banks of both non-navigable tributaries

79. *See generally* United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 696–702, 707–10 (1899) (construing River and Harbors Act of 1890, 26 Stat. 454 (1890), to prohibit obstructions in non-navigable waters that interfere with navigable waters); Kalo, *supra* note 74, at 1691.

80. *See Rio Grande*, 174 U.S. at 709–10.

81. River and Harbor Act of 1899, ch. 425, 30 Stat. 1121, 1151, 33 U.S.C. § 401 (2003); Albrecht & Nickelsburg, *supra* note 8, at 11044–45; Craig, *supra* note 32, at 10520; Walston, *supra* note 55, at 723–24; Bergstrom, *supra* note 52, at 836.

82. 33 U.S.C. § 403 (2003); *see* Albrecht & Nickelsburg, *supra* note 8, at 11044; Walston, *supra* note 55, at 723–24.

83. *See* 33 U.S.C. § 403; United States v. Stoeco Homes, Inc., 498 F.2d 597, 608–11 (3d Cir. 1974); Albrecht & Nickelsburg, *supra* note 8, at 11044.

84. 33 C.F.R. § 329.4; *see* Craig, *supra* note 32, at 10520.

85. 33 U.S.C. § 407; Albrecht & Nickelsburg, *supra* note 8, at 11044.

86. 33 U.S.C. § 407; Albrecht & Nickelsburg, *supra* note 8, at 11044–45.

and navigable rivers if such material washes into a navigable water and causes the obstruction of navigation.[87]

C. *The Twentieth Century Brings a Broader View of the Federal Navigation Power*

During most of the twentieth century, courts broadened their interpretation of Congress' authority over interstate commerce, which in turn led courts to expand the federal navigation power as well.[88] First, the courts generally expanded the scope of the Commerce Clause. Beginning in 1937, in the seminal case of *NLRB v. Jones Laughlin Steel Corp.*,[89] the Supreme Court held that intrastate activities that "have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions" are within the scope of the Commerce Clause.[90] After 1937, the Court applied a rational basis review to congressional legislation enacted pursuant to the Commerce Clause and did not generally distinguish between activities that directly or indirectly affected interstate commerce.[91] From 1937 to 1995, the Supreme Court deferentially reviewed most regulatory laws enacted pursuant to the Commerce Clause.[92] In FWPCA cases, the Court began to focus on whether an

87. 33 U.S.C. § 407; Albrecht & Nickelsburg, *supra* note 8, at 11044–45.

88. *See generally* NLRB v. Jones Laughlin Steel Corp., 301 U.S. 1 (1937); Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. 264 (1981); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940); United States v. Republic Steel Corp., 362 U.S. 482 (1960); Federal Power Commission v. Union Electric Company, 381 U.S. 90 (1965); United States v. Standard Oil Co., 384 U.S. 224 (1966).

89. 301 U.S. 1, 36-39 (1937).

90. *Compare id.* at 36–39 (holding statute prohibiting unfair labor practices is within commerce power), *with* Carter v. Carter Coal Co., 298 U.S. 238, 310–11 (1936) (rejecting similar labor laws in the Bituminous Coal Conservation Act as exceeding commerce power); Mank, *supra* note 62, at 736 (citing *NLRB v. Jones & Laughlin*, 301 U.S. 1); Omar N. White, *The Endangered Species Act's Precarious Perch: A Constitutional Analysis Under the Commerce Clause and the Treaty Power*, 27 ECOLOGY L.Q. 215, 235 (2000); Weinberg, *supra* note 72, at 533 & n.13, 538.

91. *See* United States v. Lopez, 514 U.S. 549, 606 (1995) (Souter, J., dissenting); Christy H. Dral & Jerry J. Phillips, *Commerce by Another Name:* Lopez, Morrison, SWANCC, *and* Gibbs, 31 ENVTL. L. REP. (NEWS & ANALYSIS) 10413, 10413 (April 2001); Mank, *supra* note 62, at 736–37.

92. *See, e.g.*, *Virginia Surface Mining*, 452 U.S. at 281–82 (approving under commerce power federal regulation of intrastate mining activities under the Surface Mining Control and Reclamation Act of 1977 to prevent ruinous competition among states that would likely lead to inadequate environmental standards); *Heart of Atlanta Motel*, 379 U.S. at 246 (upholding use of commerce power to enact civil rights legislation prohibiting racial discrimination in public accommodations); Eric Brignac, Recent Development, *The Commerce Clause Justification of Federal Endangered Species Protection: Gibbs v. Babbitt*, 79 N.C. L. REV. 873, 874 (2001); Dral & Phillips, *supra* note 91, at 10413; Mank, *supra* note 62, at 737; Weinberg, *supra* note 72, at 534, 539.

activity was within Congress' authority to regulate activities that "substantially affect" interstate commerce.[93]

Second, the Court expanded the definition of "navigable waters" to include a wider range of purposes than just navigation. For example, the Court held in the 1940 decision *United States v. Appalachian Electric Power Co.* that Congress had authority under the Commerce Clause to promote the development of electric power under the Federal Power Act even if those purposes did not serve navigation needs.[94] The Court found that navigability was but one part of the whole of commerce.[95] Other commercial needs such as "[f]lood protection, watershed development, [and] recovery of the cost of improvements through utilization of power [were] likewise parts of commerce control" as the "by-products" of the general use of the rivers for commerce.[96] Finally, even if there were no authority under the Commerce Clause, the Court stated that Congress had broad "plenary power"--complete authority-- over navigable waters under its inherent powers as a sovereign to regulate navigation. This power authorized Congress to prohibit obstructions in those waters unless its actions violated the takings clause of the Fifth Amendment.[97]

Third, the Court expanded the scope of the FWCPA to cover not only existing navigable waters but also *potentially* navigable waters. In *Appalachian Power*, the Court broadened the definition of "navigable waters" to include those "susceptible [to navigation] with reasonable improvement."[98] In the 1960 decision *United States v. Republic Steel Corp.*,[99] the Court held that the 1899 Refuse Act gives the Corps jurisdiction to regulate obstructions that hinder potential navigation, not just currently navigable waters.[100] During the early 1970s, several congressional hearings and committee meetings criticized the Corps' narrow interpretation of navigation under the 1899 Refuse Act, and urged the Corps to include any waters that could be made navigable through reasonable improvements.[101]

Fourth, decisions subsequent to *Appalachian Power* gradually enlarged the range of circumstances in which the federal government has

93. *See* Walston, *supra* note 55, at 700, 729–32 (arguing that the Supreme Court after 1937 took a broader view of the Commerce Clause to authorize federal regulation of activities related to navigable waters rather than just regulation of navigable waters themselves).

94. *See Appalachian Elec. Power Co.*, 311 U.S. at 426–27; Walston, *supra* note 55, at 727.

95. *Appalachian Elec. Power Co.*, 311 U.S. at 426.

96. *Id.*

97. *Id.* at 427.

98. *Id.* at 406; *see* Albrecht & Nickelsburg, *supra* note 8, at 11045; Walston, *supra* note 55, at 727.

99. 362 U.S. 482 (1960).

100. *Id.* at 485–86; Walston, *supra* note 55, at 724.

101. Albrecht & Nickelsburg, *supra* note 8, at 11045–46. The Corps was also encouraged to regulate wholly intrastate, navigable lakes. *Id.*

authority over non-navigable tributaries of navigable waters.[102] In the 1965 decision *Federal Power Commission v. Union Electric Co.*,[103] the Court ruled that the Federal Power Commission's authority over power-generation facilities extended to non-navigable waters as well, concluding that the Commerce Clause extends to non-navigable waters.[104] While it did not construe the jurisdiction of the 1899 Act, the *Federal Power Commission* Court's broad interpretation of the commerce power over non-navigable waters was another step in the direction of giving the federal government authority over these waters. Beginning in the 1960s, courts began to read the Refuse Act more broadly to prohibit industrial discharges not only where they actually obstructed a river, but also where they simply polluted rivers. Rather than limiting "refuse" to just garbage that obstructed navigation, the Court included industrial solids and even liquids as barriers to navigation.[105] By the early 1970s, Congress began to consider formally expanding the Refuse Act or enacting new legislation to address the public's growing concern with water pollution.[106] In response to the growing scope of the 1899 Refuse Act, the Corps published regulations in 1972 that expanded the definition of navigation under the Act.[107] Congress shortly thereafter enacted broader changes through new water pollution legislation.

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102. *See, e.g.*, United States v. Grand River Dam Auth., 363 U.S. 229, 232 (1960); Oklahoma *ex rel.* Phillips v. Guy F. Atkinson Co., 313 U.S. 508, 523 (1941); Walston, *supra* note 55, at 720.

103. 381 U.S. 90 (1965).

104. *Id.* at 99–110; Funk, *supra* note 3, at 10,765. The non-navigable stream at issue was the tributary and headwaters of a navigable stream. *Federal Power Comm'n*, 381 U.S. at 93–94. While it might have emphasized that the non-navigable water was connected to navigable waters, the Court determined that Congress has the authority under the Commerce Clause to regulate the interstate transmission of electricity regardless of whether the waters are navigable. *Id.* at 99–110.

105. *See* United States v. Standard Oil Co., 384 U.S. 224, 230 (1966) (holding accidental release of commercial aviation fuel is prohibited discharge of "refuse" in violation of the Refuse Act because it pollutes and harms river); United States v. Republic Steel Corp., 362 U.S. 482, 489–91 (1960) (holding discharge of industrial solids, fine metal particles, constitutes obstruction within the meaning of Section 10 of the Act both because particles obstruct navigation and harm the river); Robert L. Potter, *Discharging New Wine Into Old Wineskins: The Metamorphosis of the Rivers and Harbors Act of 1899*, 33 U. PITT. L. REV. 483, 487–89 (1972).

106. *See, e.g.*, H.R. REP. NO. 92-1333 (1972); H.R. REP. NO. 92-1323 (1972); H.R. REP. NO. 91-917 (1970); Albrecht & Nickelsburg, *supra* note 8, at 11045. This discussion led to the passage of the Clean Water Act. *See infra* section II.

107. *See* Definition of Navigable Water of the United States, 37 Fed. Reg. 18289, 18289–92 (Sept. 9, 1972); Charles D. Ablard & Brian Boru O'Neill, *Wetland Protection and Section 404 of the Federal Water Pollution Control Act Amendments of 1972: A Corps of Engineers Renaissance*, 1 VT. L. REV. 51, 62 (1976) (describing four jurisdictional inclusions by the Corps: (1) historical navigable waters of the United States; (2) waters susceptible to navigation after improvement; (3) coastal waters subject to the ebb and flow of the tide; and (4) the expansion of the definition of the limit of the ebb and flow of the tide from the mean high-water mark to the mean higher high-water mark on the West Coast); Albrecht & Nickelsburg, *supra* note 8, at 11046 n.43 (same); Garrett Power, *The Fox in the Chicken Coop: The Regulatory Program of the U.S. Army*

II. THE CLEAN WATER ACT AND REGULATION OF NON-NAVIGABLE WATERS

A. *The 1972 Federal Water Pollution Control Act*

In the 1972 FWPCA, Congress went far beyond the 1899 Act and adopted a comprehensive approach to regulating pollution and improving the quality of the nation's waters.[108] The amended statute's goal is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" for current and future generations.[109] The Act prohibits "the discharge of any pollutant by any person" unless she has a permit issued by the EPA, Corps, or a state using federally-delegated permit-issuing authority.[110] The Act defines the "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source."[111] Section 404 of the Act requires all persons to obtain a permit from the Corps "for the discharge of dredged or fill material into the navigable waters at specified disposal sites."[112]

The Act defines the crucial term "navigable waters" as "the waters of the United States, including the territorial seas."[113] The Conference Report for the Act explained that "[t]he conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes."[114] Unfortunately, courts and commentators have disagreed about whether Congress in the 1972 Act intended the term "waters of the United States" to include only the actually or potentially navigable waters encompassed by Section 10 of the 1899 Rivers and Harbors Act, or to encompass any waters within the scope of Congress' authority over interstate commerce under the Commerce Clause.[115]

Some commentators argue that Congress intended the 1972 FWPCA to reach the limits of the Commerce Clause by covering a wide range of non-navigable waters not covered in the 1899 Act.[116] Though some

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Corps of Engineers, 63 VA. L. REV. 503, 514–15 (1977) (noting additions to the Corps' jurisdictional regulations).

108. *See* Weinberg, *supra* note 72, at 535.

109. 33 U.S.C. § 1251(a) (2003).

110. *Id.* § 1311(a).

111. *Id.* § 1362(12).

112. *Id.* § 1344(a).

113. *Id.* § 1362(7).

114. S. REP. NO. 92-1236, at 144 (1972), *reprinted in* 1 LEGISLATIVE HISTORY at 327; Albrecht & Nickelsburg, *supra* note 8, at 11047.

115. *Compare* Albrecht & Nickelsburg, *supra* note 8, at 11046–49 (arguing Congress in 1972 only sought to address any potentially navigable waters) *with* Weinberg, *supra* note 72, at 535 (arguing Congress sought to use its full authority under the commerce power to protect both navigable and non-navigable waters).

116. *See* Weinberg, *supra* note 72, at 535.

sections of the FWPCA refer to "navigable waters,"[117] that statute defines the term to include "the waters of the United States" without any further reference to navigability.[118] The House Bill for the 1972 FWPCA had defined "navigable waters" as the "navigable waters of the United States, including the territorial seas,"[119] but the final Conference Bill eliminated the word "navigable."[120] The EPA and the Corps have both argued that with this deletion Congress intended to expand the definition of navigable waters.[121] Other sections of the FWPCA apply to "intrastate waters"[122] and "any waters."[123] In the 1974 decision *United States v. Ashland Oil & Transportation Co.*,[124] the United States Court of Appeals for the Sixth Circuit interpreted the Conference Report's reference to the "the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes" to mean that Congress intended that the Act reach any activity that substantially affects commerce.[125] This interpretation reflected the broadest definition of congressional authority over interstate commerce under the Commerce Clause.[126] In the 1979 decision *Kaiser Aetna v. United States,*[127] Justice Rehnquist appeared to repudiate the Court's traditional emphasis on navigability of waters and focus squarely on Congress' authority to regulate interstate commerce under the Commerce Clause. He found that the "navigability of a waterway adds little if anything to the breadth of Congress' regulatory power over interstate commerce."[128] Rather, Justice Rehnquist focused on the effect waters have on interstate commerce. In particular, he found that economic activities that affect interstate commerce "are susceptible of congressional regulation under the Commerce Clause irrespective of whether navigation, or, indeed, water, is involved."[129] Consequently,

117. 33 U.S.C. § 1344; *see* Weinberg, *supra* note 72, at 535.

118. *See, e.g.*, 33 U.S.C. § 1312(a) (establishing water quality-related effluent limitations for "navigable waters"); *see id.* § 1362(7); Weinberg, *supra* note 72, at 535.

119. H.R. 11896, 92nd Cong. § 502(8) (1972), *reprinted in* 1 LEGISLATIVE HISTORY 1069; Albrecht & Nickelsburg, *supra* note 8, at 11047.

120. *See supra* notes 113–115 and accompanying text.

121. *See* Albrecht & Nickelsburg, *supra* note 8, at 11047.

122. 33 U.S.C. § 1313(a)(2) (stating EPA must approve state water quality standards for intrastate waters); *see* Weinberg, *supra* note 72, at 535.

123. 33 U.S.C. § 1317(a)(2) (stating that EPA effluent limitations for toxic pollutants "shall take into account the . . . presence of the affected organisms in any waters"); *see* Weinberg, *supra* note 72, at 535.

124. 504 F.2d 1317 (6th Cir. 1974).

125. *Id.* at 1325; *see* Albrecht & Nickelsburg, *supra* note 8, at 11047 & n.52.

126. *See id.* at 1325; Albrecht & Nickelsburg, *supra* note 8, at 11047.

127. 444 U.S. 164 (1979).

128. *Id.* at 173–74 (internal citations omitted); Craig, *supra* note 32, at 10521; Walston, *supra* note 55, at 731–32.

129. 444 U.S. at 173–74 (internal citations omitted); Craig, *supra* note 32, at 10521; Walston, *supra* note 55, at 731–32.

Justice Rehnquist's *Kaiser Aetna* opinion defined congressional authority under the FWPCA in terms of the Commerce Clause rather than navigability.

By contrast, some commentators argue that the conferees' language shows that they simply intended to require the broadest constitutional authority over traditional navigable waters.[130] In *SWANCC*, the government conceded that it was "somewhat ambiguous" whether the conferees' language sought to reach the broadest possible limits of navigability or the Commerce Clause.[131] In light of Congress' concern during the early 1970s that the Corps failed to read the 1899 Act to the fullest possible limits of navigability, some commentators contend that Congress more likely intended the 1972 Act only to reach navigability rather than Commerce Clause limits.[132]

B. The EPA and the Corps Initially Disagreed About the Act's Jurisdiction

Initially, the EPA and the Corps disagreed about the jurisdiction of the 1972 FWPCA. In 1973, the EPA's general counsel issued an opinion that the "the deletion of the word 'navigable' [in the 1972 FWPCA] eliminates the requirement of navigability. The only remaining requirement, then, is that pollution of waters covered by the bill must be capable of affecting interstate commerce."[133] By contrast, in 1971, the EPA's general counsel promulgated an opinion concluding that overland connections were insufficient to establish federal jurisdiction over navigable intrastate lakes for the purpose of the pre-1972 version of the FWPCA.[134] Accordingly, the EPA understood the 1972 Act as significantly expanding the Agency's jurisdiction over the nation's waters. In May 1973, the EPA promulgated regulations defining navigable waters requiring a permit to include:

(1) All navigable waters of the United States;

(2) Tributaries of navigable waters of the United States;

(3) Interstate waters;

130. *See* Albrecht & Nickelsburg, *supra* note 8, at 11047.

131. *See SWANCC*, *supra* note 2, at 168 n.3 (citing Brief for Federal Respondents at 24); Albrecht & Nickelsburg, *supra* note 8, at 11047.

132. *See* Albrecht & Nickelsburg, *supra* note 8, at 11047–49.

133. EPA General Counsel Opinion (Feb. 6, 1973); *see* Albrecht & Nickelsburg, *supra* note 8, at 11049.

134. *See* EPA General Counsel Opinion (Dec. 9, 1971) (stating that term "navigable waters of the United States" in then-existing FWPCA required an interstate water connection and that an overland connection to a wholly intrastate navigable lake was insufficient); Albrecht & Nickelsburg, *supra* note 8, at 11046 & n.40, 11049 & n.61.

(4) Intrastate lakes, rivers, and streams which are utilized by interstate travelers for recreational or other purposes;

(5) Intrastate lakes, rivers, and streams from which fish or shell fish are taken and sold in interstate commerce;

(6) Intrastate lakes, rivers, and streams which are utilized for industrial purposes by industries in interstate commerce.[135]

The Corps, on the other hand, defined its jurisdiction as simply the broadest possible definition of actually and potentially navigable waters.[136] In a 1974 rule addressing its jurisdiction under Section 404 of the Act, the Corps interpreted the 1972 FWPCA Conference Report's reference to "the broadest possible constitutional interpretation, unencumbered by agency determinations which have been made or may be made for administrative purposes" to relate to prior judicial precedents addressing the constitutional limits of actually or potentially navigable waters.[137] The Corps' regulations defined "navigable waters" as "those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce . . . ."[138]

C. *The Corps' 1975 Interim and 1977 Final Regulations Expand the FWPCA's Jurisdiction*

In the 1975 decision *Natural Resources Defense Council v. Callaway,*[139] the United States District Court for the District of Columbia held that the Corps' definition of "navigable waters" was unduly limited and violated the FWPCA.[140] The court concluded that Congress "asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution."[141] Thus, "the term [navigable waters] is not limited to the traditional tests of navigability."[142] In an order without an opinion, the court commanded the

135. National Pollutant Discharge Elimination System, 38 Fed. Reg. 13528, 13528–29 (May 3, 1973); Albrecht & Nickelsburg, *supra* note 8, at 11049–50 & n.64.

136. Albrecht & Nickelsburg, *supra* note 8, at 11050.

137. Permits for activities in Navigable Waters or Ocean Waters, 39 Fed. Reg. 12115 (Apr. 3, 1974) (stating "[T]o give [the Conference Report] the broadest possible Constitutional interpretation—is the same as the basic premise from which the aforementioned judicial precedents [defining the "navigable waters of the United States"] have evolved."); Albrecht & Nickelsburg, *supra* note 8, at 11050.

138. 33 C.F.R. § 209.120(d)(1) (1974); Albrecht & Nickelsburg, *supra* note 8, at 11050.

139. 392 F. Supp. 685 (D.D.C. 1975); Albrecht & Nickelsburg, *supra* note 8, at 11050.

140. *Callaway*, 392 F. Supp. at 686; *see also* Weinberg, *supra* note 72, at 535–36.

141. *Callaway*, 392 F. Supp. at 686.

142. *Id.*

Corps to issue regulations "clearly recognizing the full regulatory mandate of the Water Act."[143]

In response to the *Callaway* decision, the Corps issued interim regulations in 1975 that defined navigable waters to include intrastate lakes, rivers and streams that are used by interstate travelers or in interstate commerce.[144] The 1975 regulations established three phases for expanding the Corps' jurisdiction: phase one, which took effect immediately, included all navigable waters covered by the 1974 regulation and the 1899 Act; phase two, effective after July 1, 1976, expanded the Corps' jurisdiction to non-navigable tributaries, freshwater wetlands adjacent to primary navigable waters, and lakes; and phase three, effective after July 1, 1977, broadened the Corps' jurisdiction to all other waters covered under the statute, including "intermittent rivers, streams, tributaries, and perched wetlands that are not contiguous or adjacent to navigable waters" whenever the Corps determines the regulation is necessary for the protection of water quality.[145] In 1977, the Corps issued a final rule that included isolated wetlands and waters whose degradation or destruction could affect interstate commerce.[146]

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143. *Id.*

144. The regulations stated:

Intrastate lakes, rivers and streams landward to their ordinary high water mark and up to their headwaters that are utilized:

(1) By interstate travelers for water-related recreational purposes;

(2) For the removal of fish that are sold in interstate commerce;

(3) For industrial purposes by industries in interstate commerce;

(4) In the production of agricultural commodities sold or transported in interstate commerce; . . . and

(i) Those other waters which the District Engineer determines necessitate regulation for the protection of water quality.

Permits for activities in Navigable Waters or Ocean Waters, 40 Fed. Reg. 31,320, 31,324 (July 25, 1975); Albrecht & Nickelsburg, *supra* note 8, at 11050–51 & n.76; *see* Weinberg, *supra* note 72, at 536.

145. Permits for activities in Navigable Waters or Ocean Waters, 40 Fed. Reg. at 31325–26; *see SWANCC*, *supra* note 2, at 184 (Stevens, J., dissenting) (discussing 1975 Interim Corps' regulations).

146. The Corps defined the "waters of the United States" as:

(1) The territorial seas . . .;

(2) Coastal and inland waters, lakes, rivers, and streams that are navigable waters of the United States, including adjacent wetlands;

(3) Tributaries to navigable waters of the United States, including adjacent wetlands (man-made nontidal drainage and irrigation ditches excavated on dry land are not considered waters of the United States under this definition);

(4) Interstate waters and their tributaries including adjacent wetlands; and

(5) All other waters of the United States not identified in paragraphs (1)– (4) above, such as isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable

D. Congress' 1977 Amendments: Acquiescence to the Corps' Regulations?

In 1977, Congress amended the FWPCA, but failed to clarify the definition of navigable waters or the scope of the Act's jurisdiction. In light of the *Callaway* decision, the House considered, but did not enact, a bill that would have explicitly recognized the Corps' jurisdiction under Section 404 of the 1972 FWPCA over "all waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce."[147] The Senate narrowly defeated a similar bill.[148] The Conference Committee considered both bills, but in the end, Congress did not amend the definition of navigable waters.[149] Until the Supreme Court decided the issue in *SWANCC*,[150] commentators debated whether Congress' failure to amend the FWPCA should be interpreted as acquiescence to the Corps' 1977 regulations.[151] Since 1977, the EPA and the Corps have each claimed broad jurisdiction over interstate navigable waters, intrastate waters "that could affect interstate or foreign commerce," tributaries of interstate waters or intrastate waters affecting interstate or foreign commerce, and adjacent wetlands.[152]

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waters of the Untied States, the degradation or destruction of which could affect interstate commerce.

Regulatory Programs of the Corps of Engineers, 42 Fed. Reg. 37,122, 37,144 (July 19, 1977).

147. *See* H.R. 3199, 95th Cong. § 16 (1977), *reprinted in* 4 LEGISLATIVE HISTORY 1183; Albrecht & Nickelsburg, *supra* note 8, at 11051.

148. *See* 123 CONG. REC. 26710, 26728 (1977); Albrecht & Nickelsburg, *supra* note 8, at 11051.

149. *See* Albrecht & Nickelsburg, *supra* note 8, at 11051.

150. *See infra* notes 231–239 and accompanying text.

151. *See* Albrecht & Nickelsburg, *supra* note 8, at 11051 (discussing debate).

152. The 1977 regulations are quoted in *supra* note 146 and accompanying text. Current Corps and EPA regulations define "waters of the United States" as listed below:

> (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
>
> (2) All interstate waters including interstate wetlands;
>
> (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
>
> > (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
> >
> > (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
> >
> > (iii) Which are used or could be used for industrial purposes by industries in interstate commerce;
>
> (4) All impoundments of waters otherwise defined as waters of the United States;

III. EXPANSION OF THE ACT: ADJACENT WETLANDS AND MORE?

A. *Riverside Bayview: Providing Support for Broader Agency Jurisdiction*

In the 1985 decision *United States v. Riverside Bayview Homes, Inc.*,[153] the Supreme Court held that the Corps had jurisdiction over non-navigable wetlands that are adjacent to navigable waters because they are "waters of the United States" as defined by the Act.[154] The wetlands at issue were adjacent to and partly abutted Black Creek, a navigable water of the United States.[155]

While some commentators have read *Riverside Bayview* as a narrow decision approving jurisdiction only over adjacent wetlands that immediately abut navigable waters, the Court's reasoning supports a far broader hydrological connection, or even ecological connection, analysis emphasizing the biological, rather than the physical, relationship between non-navigable and navigable waters.[156] The Court observed that the 1972 Act "constituted a comprehensive legislative attempt 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'"[157] To achieve these goals, Congress emphasized the need to preserve and improve the ecological conditions surrounding these waters. The House Report on the 1972 Act stated that "the word 'integrity' . . . refers to a condition in which the natural structure and function of ecosystems [are] maintained."[158] In addressing non-navigable waters, the Court determined that Congress was especially concerned with waters such as adjacent wetlands that frequently have a substantial ecological impact on navigable waters.[159] Additionally, the Court found that the legislative history of the 1972 Act supported a broad view of the Act's jurisdiction to protect wetlands that have hydrological and ecological impacts on navigable waters. The Court observed, "Protection of aquatic

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(5) Tributaries of waters identified in paragraphs (a)(1) through (4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section. [exclusions omitted]

33 C.F.R. § 328.3 (2003) (Corps regulations); 40 C.F.R. § 122.2 (2003) (EPA regulations).

153. 474 U.S. 121 (1985); Funk, *supra* note 3, at 10,742–44.

154. *Riverside Bayview*, 474 U.S. at 133.

155. *Id.* at 124, 131.

156. *Id.* at 134.

157. *Id.* at 132 (quoting FWPCA § 101, 33 U.S.C. § 1251).

158. *Id.* at 132 (quoting H.R. Rep. No. 92-911, 92d Cong. p. 76 (1972)).

159. *See id.* at 129–35; Funk, *supra* note 3, at 10742–44 (discussing *Riverside Bayview*); Johnson, *supra* note 3, at 10672 (arguing that *Riverside Bayview* allowed regulation of many waters and wetlands that are not navigable in fact), 10674–75 (discussing nexus standard for relationship between adjacent wetlands and navigable waters).

ecosystems, Congress recognized, demanded broad federal authority to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.'"[160]

The *Riverside Bayview* Court concluded that the term "navigable" is of "limited import" and that Congress sought "to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term."[161] The Court reasoned that Congress had sought to regulate all waters that affect navigable waters. In light of legislative history emphasizing the need to protect non-navigable waters that ecologically and hydrologically affected navigable waters, the Court found that the EPA's and the Corps' regulation of "any adjacent wetlands that form the border of or are in reasonable proximity to other waters of the United States"[162] was appropriate. The Court stressed that the agencies' "technical expertise" and "ecological judgment" in determining the relationship "between waters and their adjacent wetlands provide[] an adequate basis for a legal judgment that adjacent wetlands" are covered by the Act.[163]

The Court concluded that the FWPCA applied to adjacent wetlands that were not inundated or frequently flooded by navigable waters if the adjacent wetlands had ecological and biological connections to navigable waters.[164] In a footnote, the Court stated that to achieve the goal of

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160. *Riverside Bayview*, 474 U.S. at 132–33 (quoting S.REP. NO. 92-414, 92d Cong., 77 (1972), reprinted in 1972 U.S.C.C.A.N. 3668, 3742).

161. *Id.* at 133.

162. *Id.* at 133–34 (quoting 42 Fed. Reg. 37,128 (1977)).

163. *Id.* at 134.

164. *Id.* at 134–35.

> This holds true even for wetlands that are not the result of flooding or permeation by water having its source in adjacent bodies of open water. The Corps has concluded that wetlands may affect the water quality of adjacent lakes, rivers, and streams even when the waters of those bodies do not actually inundate the wetlands. For example, wetlands that are not flooded by adjacent waters may still tend to drain into those waters. In such circumstances, the Corps has concluded that wetlands may serve to filter and purify water draining into adjacent bodies of water, *See* 33 CFR § 320.4(b)(2)(vii) (1985), and to slow the flow of surface runoff into lakes, rivers, and streams and thus prevent flooding and erosion. *See* § 320.4(b)(2)(iv),(v). In addition, adjacent wetlands may "serve significant natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing and resting sites for aquatic . . . species." *See* § 320.4(b)(2)(i). In short, the Corps has concluded that wetlands adjacent to lakes, rivers, streams, and other bodies of water may function as integral parts of the aquatic environment even when the moisture creating the wetlands does not find its source in the adjacent bodies of water. Again, we cannot say that the Corps' judgment on these matters is unreasonable, and we therefore conclude that a definition of 'waters of the United States' encompassing all wetlands adjacent to other bodies of water over which the Corps has jurisdiction is a permissible interpretation of the Act.

Riverside Bayview, 474 U.S. at 134–35.

preserving and improving adjacent wetlands that have significant ecological and hydrological impacts on navigable waters, it was appropriate for the Corps to regulate all adjacent wetlands, even though a minority might not have any impacts on navigable waters.[165]

Moreover, the Court concluded that the Corps had jurisdiction over adjacent wetlands because there was evidence that Congress, in enacting the 1977 Amendments to the Act, had acquiesced to the Corps' regulations applying the Act to adjacent wetlands.[166] The Court stated:

> Although we are chary of attributing significance to Congress' failure to act, a refusal by Congress to overrule an agency's construction of legislation is at least some evidence of the reasonableness of that construction, particularly where the administrative construction has been brought to Congress' attention through legislation specifically designed to supplant it.[167]

In particular, the Court found there was little question that Congress had acquiesced to the Corps' administrative regulations addressing adjacent wetlands. Yet, even had Congress restricted the definition of "waters of the United States" in 1977, it would have left in place a definition of "navigable waters" that included waters navigable in fact *and their adjacent wetlands*.[168] Thus, the Court found that whether or not Congress acquiesced to the Corps' regulations, the Act covered adjacent wetlands.

The Court found that Section 404(g)(1), which was added to the FWPCA in the 1977 Amendments, recognized the Corps' jurisdiction over adjacent wetlands. Section 404(g)(1) authorizes states to administer their own wetland permit programs regulating the discharge of dredged or fill material into waters. However, state regulation is limited to waters "other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce . . . including wetlands adjacent thereto."[169] The "other than those waters," including adjacent wetlands, must be regulated by the Corps. The *Riverside Bayview* Court expressly reserved the question of whether the Act applies to "wetlands that are not adjacent to open waters."[170]

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165. *Id.* at 135 n.9.

166. *See id.* at 136–39; Funk, *supra* note 3, at 10,742–44 (discussing *Riverside Bayview*); Craig, *supra* note 32, at 10512–13 (discussing *Riverside Bayview's* conclusion that Congress in 1977 amendments to Clean Water Act acquiesced to the Corps' regulations); Johnson, *supra* note 3, at 10672 (arguing that *Riverside Bayview* allowed regulation of many waters and wetlands that are not navigable in fact), 10674–75 (discussing nexus standard for relationship between adjacent wetlands and navigable waters).

167. *Riverside Bayview*, 474 U.S. at 137.

168. *Id.*

169. 33 U.S.C. § 1344(g)(1) (2003).

170. *Riverside Bayview*, 474 U.S. at 131 n.8.

In addition, the Court did not precisely define the meaning of "adjacent" in terms of distance from or impact on navigable waters. Arguably, the Court implicitly approved the Corps' 1985 definition of "adjacent", which remains the definition today: "The term adjacent means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'"[171] This definition does not provide any distance formula for determining which wetlands are adjacent, but requires an examination of the relationship between the wetlands and navigable waters. The imprecise and flexible nature of the Corps' current definition is consistent with similar terms the Corps has used in the past. For example, in 1977 the Corps' regulations used the term "in reasonable proximity" to define which wetlands were adjacent to other waters of the United States.[172] In 1981, the United States District Court for the Eastern District of Michigan followed the Corps' then-definition in concluding that wetlands that were within "reasonable proximity" of a navigable river, despite an intervening parcel, were "contiguous" adjacent wetlands because a direct hydrological connection through man-made irrigation ditches existed between the wetlands and the river.[173] This case foreshadowed current debates over the meaning of "adjacency."

The *Riverside Bayview* Court emphasized the importance of hydrological and biological connections between adjacent wetlands and navigable waters in determining that adjacent wetlands are within the scope of the Act.[174] The Court acknowledged that some adjacent wetlands might not have significant hydrological and biological connections with navigable waters, but concluded that the Corps' regulation was valid in part because such connections exist in the majority of cases.[175] While it did not address isolated and other non-navigable waters, the *Riverside Bayview* decision suggests that hydrological and biological connections between non-navigable waters and navigable waters should be important in determining whether other non-navigable waters are within the scope of the Act.

171. 33 C.F.R. § 323.2(d) (1985) (currently 33 C.F.R. § 328.3(c) (2003)); *see* Bergstrom, *supra* note 52, at 846.

172. Regulatory Programs of the Corps of Engineers, 42 Fed. Reg. 37,122, 37,129 (1977) (stating that adjacent wetlands "directly connect," "form the border," "or are in reasonable proximity to other waters."); Bergstrom, *supra* note 52, at 846 & n.80.

173. *See* United States v. Lee Wood Contracting, 529 F. Supp. 119, 120–24 (E.D.Mich. 1981); Bergstrom, *supra* note 52, at 847.

174. *Riverside Bayview*, 474 U.S. at 132–35; *supra* notes 162–65 and accompanying text.

175. *Riverside Bayview*, 474 U.S. at 135 n.9; *supra* notes 164–65 and accompanying text.

B. Subsequent Cases Interpret "Adjacency" Broadly

Subsequently, the Eleventh Circuit Court of Appeals has examined whether there is a hydrological connection between wetlands and navigable waters in determining whether wetlands are adjacent.[176] In *Conant v. United States*,[177] the United States Court of Appeals for the Eleventh Circuit affirmed a district court's finding that wetlands were adjacent even though they did not directly abut a navigable river because the wetlands served as filters for the river and thus had a hydrological connection.[178] In *United States v. Banks*,[179] the defendant contended that his lands, assuming that they contained wetlands at all, contained isolated wetlands rather than adjacent ones because they were all at least one-half mile away from any navigable channels and had no hydrological relationship with navigable waters.[180] The Eleventh Circuit found the district court's conclusion that the wetlands were adjacent not to be clearly erroneous in light of the lower court's finding that water from the wetlands reached the channels through both groundwater and surface water connections.[181] Also, the district court had "found ecological adjacency based on the water connections and the fact that the lots serve as habitat for birds, fish, turtles, snakes and other wildlife."[182] The Eleventh Circuit's use of hydrological and ecological connections to find that wetlands were adjacent to navigable waters, even though they did not immediately abut navigable waters, was consistent with the Supreme Court's reasoning in *Riverside Bayview*.

Similarly, in *United States v. Pozsgai*,[183] the United States District Court for the Eastern District of Pennsylvania concluded that a fourteen-acre parcel of land contained adjacent wetlands where a small stream on the land had a direct hydrological connection with navigable waters through "an unnamed tributary of the Pennsylvania Canal, which flowed into the Delaware River."[184] In a subsequent related decision involving the same wetlands, the Third Circuit concluded that these wetlands were within the Act's jurisdiction because the statute includes wetlands

176. *See* United States v. Banks, 115 F.3d 916, 920–21 (11th Cir. 1997); Conant v. United States, 786 F.2d 1008 (11th Cir. 1986) (per curiam).

177. *Id.*

178. *See id.* at 1009–10; Bergstrom, *supra* note 52, at 847–48 (arguing *Conant* opinion "implicitly relied on the 'neighboring' factor [in the Corps' regulations defining adjacent wetlands] since the court failed to note the existence of vegetation extending to the river").

179. *Banks*, 115 F.3d 916.

180. *Id.* at 920–21.

181. *Id.* at 921.

182. *Id.*

183. No. 88-6545, 1991 WL 111175 (E.D.Pa. 1991).

184. *See id.* at *1–3; Bergstrom, *supra* note 52, at 848.

adjacent to a non-navigable tributary that flows into navigable waters.[185] Thus, several lower courts broadly interpreted *Riverside Bayview* and the Corps' regulations concerning adjacent wetlands to conclude that wetlands were adjacent when a significant hydrological connection existed between them and a navigable river, even where the wetlands did not immediately abut those waters.

C. The 1986 Preamble: The Migratory Bird "Rule"

In 1986, the Corps interpreted its existing regulations defining the term "waters of the United States" to "include . . . waters . . . [w]hich are or would be used as habitat by birds protected by Migratory Bird Treaties; or [w]hich are or would be used as habitat by other migratory birds which cross state lines."[186] The Corps intended the preamble, which has been termed the Migratory Bird "Rule," to be consistent with and to clarify its existing regulations extending the Corps' jurisdiction to all intrastate waters that affect interstate commerce. Those waters include:

> All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
>
> (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
>
> (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
>
> (iii) Which are used or could be used for industrial purposes by industries in interstate commerce.[187]

The Migratory Bird "Rule" essentially applied to the phase three waters identified in the 1975 interim regulations because phase one and two

185. *See* United States v. Pozsgai, 999 F.2d 719, 727-32 (3d Cir.1993); *accord* United States v. Deaton, 332 F.3d 698, 708 (4th Cir. 2003) (holding Corps has jurisdiction over a wetlands adjacent to a non-navigable drainage ditch, which is eventually a tributary to navigable waters), *petition for cert. filed*, 72 U.S.L.W. 3356 (U.S. Nov. 10, 2003) (No. 03-701); *see also* United States v. TGR Corp., 171 F.3d 762, 764-65 (2d Cir.1999) (concluding United States has jurisdiction under Clean Water Act over non-navigable tributary that flows into navigable waters;); Quivira Mining Co. v. EPA, 765 F.2d 126, 130 (10th Cir. 1985) (same).

186. Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41,217 (Nov.13, 1986) (interpreting 33 C.F.R. § 328.3); *see* Albrecht & Nickelsburg, *supra* note 8, at 11042 n.2, 11052; Calderon, *supra* note 8, at 308. In 1988, the EPA included the same migratory bird "rule" in the preamble of one its regulations. *See* Clean Water Act Section 404 Program Definitions and Permit Exemptions; Section 404 State Program Regulations, 53 Fed. Reg. 20,765 (1988).

187. 33 C.F.R. § 328.3(a)(3)(i)-(iii) (2003).

waters were clearly covered by the Act after the Court's *Riverside Bayview* decision.[188]

Under the Migratory Bird "Rule," the Corps expanded its jurisdiction to isolated, intrastate waters or wetlands not adjacent to navigable waters based on their actual or potential use as habitat for migratory birds.[189] The Corps justified the "rule" based on its need to prevent the destruction of isolated, intrastate wetlands that served as the habitat for numerous migratory birds.[190] Because bird watching and bird hunting of migratory birds has significant economic value, the Corps reasoned that preserving isolated, intrastate waters would serve to protect interstate commerce in these birds.[191] Additionally, isolated intrastate wetlands and waters often offer important environmental benefits because they are home to many wetland species, including birds, and frequently provide a buffer against local flooding.[192]

Despite its name, the Corps established the Migratory Bird "Rule" without the notice-and-comment procedures required to promulgate agency rules.[193] The EPA's general counsel issued a legal memorandum in 1985 claiming that the EPA and the Corps had jurisdiction over isolated waters and wetlands used by migratory birds. The Corps mentioned the principle in the Federal Register without giving the public the opportunity to comment on it.[194] The United States Court of Appeals for the Fourth Circuit declared the Migratory Bird "Rule" invalid because the Corps issued it without public notice-and-comment, but the Corps continued to apply the "Rule" in other circuits.[195]

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188. *See SWANCC*, *supra* note 2, at 184 n.12 (Stevens, J., dissenting) (discussing 1986 Corps' preamble establishing migratory bird "rule"); *see also* Permits for Activities in Navigable Waters or Ocean Waters, 40 Fed. Reg. 31320, 31326 (1975) (establishing three phase approach to Corps' jurisdiction under FWPCA); *supra* notes 145–46 and *infra* note 288 and accompanying text.

189. Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41206, 41217 (Nov. 13, 1986); Funk, *supra* note 3, at 10,741; Maya R. Moiseyev, Solid Waste Agency of Northern Cook County v. United States Army Corp of Engineers: *The Clean Water Act Bypasses a Commerce Clause Challenge, But Can the Endangered Species Act?*, 7 HASTINGS W. NW. J. ENVTL. L. & POL'Y 191, 193–94 (2001).

190. Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41,217; Funk, *supra* note 3, at 10,743; Moiseyev, *supra* note 189, at 193–94.

191. Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41206, 41217; Funk, *supra* note 3, at 10,743; Moiseyev, *supra* note 189, at 193–94.

192. *See* Johnson, *supra* note 3, at 10670–71 (discussing benefits of isolated wetlands and impact of *SWANCC*).

193. *See SWANCC*, *supra* note 2, at 164 n.1; Albrecht & Nickelsburg, *supra* note 8, at 11042 n.2, 11052.

194. Albrecht & Nickelsburg, *supra* note 8, at 11042 n.2, 11052.

195. *See* Tabb Lakes, Ltd. v. United States, 715 F. Supp. 726, 729 (E.D. Va. 1988) (holding Migratory Bird "Rule" was invalid because it was not promulgated with public notice-and-comment), *aff'd*, 885 F.2d 866 (4th Cir. 1989); Albrecht & Nickelsburg, *supra* note 8, at 11052 & n.95.

IV. SWANCC

A. Lopez *and* Morrison *Reinterpret the Commerce Clause*

From 1937 until 1995, courts had consistently applied a broad interpretation of congressional power under the Commerce Clause, in the presence of a rational argument that a federally regulated activity "substantially affected" interstate commerce.[196] In the 1995 opinion *United States v. Lopez*,[197] however, the Supreme Court significantly narrowed congressional authority under the Commerce Clause by rejecting the Gun-Free School Zones Act of 1990,[198] which made possession of a gun within a school zone a federal offense. The Court reasoned that prosecuting intrastate criminal behavior was traditionally a state regulatory function outside the scope of the Commerce Clause.[199] Summarizing prior Commerce Clause decisions,[200] the *Lopez* Court observed that Congress could regulate three broad types of economic activity: (1) "the use of the channels of interstate commerce;" (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities;" and (3) "those activities having a substantial relation to interstate commerce . . . i.e., those activities that substantially affect interstate commerce."[201] The *Lopez* Court stressed that Congress' authority under the Commerce Clause is generally limited to regulation of economic behavior, stating "[w]here economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained."[202] In contrast, the Court was concerned that broadly reading the Commerce Clause to include a wide range of non-economic activities

196. *See, e.g.*, Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. 264, 281–82 (1981) (holding the Surface Mining Control and Reclamation Act of 1977 regulation of surface mines that primarily affected intrastate environmental quality was valid under the Commerce Clause to prevent ruinous competition among states that would likely lead to inadequate environmental standards); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 262 (1964) (holding civil rights statute prohibiting racial discrimination in public accommodations substantially affected interstate commerce and was thus within congressional power under Commerce Clause); Wickard v. Filburn, 317 U.S. 111 (1942) (upholding statute regulating intrastate production of wheat because home consumption nevertheless affected interstate trade in product); Brignac, *supra* note 92 at 874; Dral & Phillips, *supra* note 91, at 10413; Mank, *supra* note 62, at 737.

197. 514 U.S. 549 (1995). Chief Justice Rehnquist wrote the majority opinion, joined by Justices O'Connor, Scalia, Kennedy and Thomas. *Id.* at 550. The same five justices were in the majority in the *Morrison* and *SWANCC*, which are discussed below. *See supra* note 2 and *infra* notes 205, 217, 273 and accompanying text. Justices Stevens, Souter, Ginsburg, and Breyer dissented in *Lopez*, *Morrison* and *SWANCC*.

198. 18 U.S.C. § 922(q) (2003).

199. *See Lopez*, 514 U.S. at 561; Mank, *supra* note 62, at 723 n.2, 738–40.

200. *See* Perez v. United States, 402 U.S. 146 (1971).

201. *Lopez*, 514 U.S. at 558–59 (citations omitted); Mank, *supra* note 62, at 738.

202. *Lopez*, 514 U.S. at 560; Mank, *supra* note 62, at 738–39.

that have traditionally been regulated by states would undermine the federal system of dual national and state sovereignty.[203]

Similarly, in the 2000 decision *United States v. Morrison*,[204] the Court held that a federal statute criminalizing intrastate, gender-based, violent behavior exceeded Congress' authority under the Commerce Clause by impinging on traditional state authority over criminal matters.[205] The Violence Against Women Act (VAWA) created a "right to be free from crimes of violence motivated by gender" and provided a civil damages remedy for victims of gender-based violence.[206] The *Morrison* Court held that, despite congressional findings about the effects of gender-based violence on the national economy, the VAWA was beyond the scope of the Commerce Clause because gender-based violence is primarily non-economic and only indirectly affects interstate commerce.[207] Based on federalist concerns, the Court refused to consider congressional findings relating to the aggregate economic effects of non-economic violent crime on interstate commerce. The Court was concerned that Congress could abuse the aggregation of non-economic activities under the Commerce Clause to enact legislation that would "completely obliterate the Constitution's distinction between national and local authority."[208]

After the *Lopez* and *Morrison* decisions, the authority of the Corps to enforce the Migratory Bird "Rule" came into question. Before *Lopez*, most lower courts found the Corps' Migratory Bird "Rule" to be valid because the courts assumed that Congress intended in the 1972 Act to exercise its full authority under the Commerce Clause.[209] In 1995, after deciding *Lopez*, the Supreme Court denied certiorari to review a pre-*Lopez* Ninth Circuit case that approved the Migratory Bird "Rule" under a broad interpretation of the commerce power.[210] However, Justice Thomas dissented from the denial of certiorari, questioning whether the

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203. *See Lopez*, 514 U.S. at 557–59, 576–83 (Kennedy, J., concurring); Mank, *supra* note 62, at 739–41.

204. 529 U.S. 598 (2000).

205. Chief Justice Rehnquist wrote the majority opinion, joined by Justices O'Connor, Scalia, Kennedy and Thomas. *Id.* at 600; Mank, *supra* note 62, at 742–44. Justices Stevens, Souter, Ginsburg, and Breyer again dissented in *Morrison*. 529 U.S. at 628–36 (Souter, J., dissenting).

206. 42 U.S.C. § 13981 (1994); Mank, *supra* note 62, at 742.

207. *Morrison*, 529 U.S. at 613–19; Mank, *supra* note 62, at 742–44. The Court also held that Congress lacked authority under Section 5 of the Fourteenth Amendment to enact Section 13981, but that issue is beyond the scope of this Article. *Morrison*, 529 U.S. at 619–27.

208. *Morrison*, 529 U.S. at 615–17; Mank, *supra* note 62, at 743.

209. *See, e.g.*, Leslie Salt Co. v. United States, 55 F.3d 1388, 1392-96 (9th Cir. 1995), *cert. denied sub. nom.* Cargill, Inc. v. United States, 516 U.S. 955 (1995); Albrecht & Nickelsburg, *supra* note 8, at 11052; Craig, *supra* note 32, at 10514-15

210. *See Leslie Salt*, 55 F.3d at 1392-96; Craig, *supra* note 32, at 10515; Tanya M. White & Patrick R. Douglas, Case Note, *Postponing the Inevitable: The Supreme Court Avoids Deciding Whether the Migratory Bird Rule Passes Commerce Clause Muster*, 9 MO. ENVTL. L. & POL'Y REV. 9, 13 (2001).

Corps was regulating wetlands without proof that use by migratory birds substantially affected interstate commerce.[211] In the 1997 decision *United States v. Wilson*,[212] the Fourth Circuit appeared to follow Justice Thomas' criticisms. The court held that, in light of *Lopez*, both the Migratory Bird "Rule" and all of subsection (a)(3) of the Corps' definition of "waters of the United States" unconstitutionally exceeded the scope of the commerce power because the regulation "requires neither that the regulated activity have a *substantial* effect on interstate commerce, nor that the covered waters have any sort of nexus with navigable, or even interstate, waters."[213] While suggesting that the Migratory Bird "Rule" probably exceeded the scope of Congress' authority under the Commerce Clause, the Fourth Circuit did not prohibit the Corps from regulating isolated waters that actually had an impact on interstate or foreign commerce, and the Corps continued to regulate isolated waters with such impacts in the Fourth Circuit.[214] In dicta, the Fourth Circuit offered some thoughts on the outer limit of congressional authority to regulate intrastate waters, arguing that it may even extend to "discharge of pollutants into any waters that [] flow across state lines, or connect to waters that do so, regardless of whether such waters are navigable in fact."[215] Subsequently, in the appellate decision for *SWANCC*, the United States Court of Appeals for the Seventh Circuit upheld the Migratory Bird "Rule," but then the Supreme Court reversed.[216]

B. SWANCC: The Majority Opinion

In the *SWANCC* opinion, Chief Justice Rehnquist held that the Migratory Bird "Rule" was invalid because the Corps exceeded its statutory authority under the Act.[217] The Court concluded that the term

211. *See Cargill, Inc.*, 516 U.S. at 959 (Thomas, J., dissenting); Craig, *supra* note 32, at 10515; White & Douglas, *supra* note 210, at 13.

212. 133 F.3d 251 (4th Cir. 1997).

213. *Id.* at 257; Craig, *supra* note 32, at 10515; White & Douglas, *supra* note 210, at 14.

214. *See* U.S. ENVIRONMENTAL PROTECTION AGENCY (EPA) & U.S. ARMY CORPS OF ENG'RS (CORPS), GUIDANCE FOR CORPS AND EPA FIELD OFFICES REGARDING CLEAN WATER ACT SECTION 404 JURISDICTION OVER ISOLATED WATERS IN LIGHT OF UNITED STATES V. WILSON, §§ 1, 4. (stating the EPA and the Corps in the Fourth Circuit will regulate only isolated waters that have actual connections to interstate or foreign commerce) (1998, withdrawn January 19, 2001), *available at* www.epa.gov/earth1r6/6en/w/wilguid.pdf (1998 *Wilson* guidance); EPA & ARMY CORPS OF ENGINEERS, GUIDANCE FOR CORPS AND EPA FIELD OFFICES REGARDING CLEAN WATER ACT SECTION 404 JURISDICTION OVER ISOLATED WATERS IN LIGHT OF UNITED STATES V. JAMES J. WILSON (Jan. 19, 2001), *available at* www.aswm.org/fwp/swancc/wdrawal.htm (2001 notice of withdrawal); Johnson, *supra* note 3, at 10699 n.4, 10676; White & Douglas, *supra* note 210, at 14.

215. *See* United States v. Wilson, 133 F.3d 251, 256 (1997); Craig, *supra* note 32, at 10515.

216. *See* Solid Waste Agency of N. Cook County v. Corps of Eng'rs, 191 F.3d 845, 852–53 (7th Cir. 1999), *rev'd*, 531 U.S. 159 (2001); Craig, *supra* note 32, at 10515–16.

217. *SWANCC*, *supra* note 2, at 172–74.

"navigable waters" does not include "isolated" wetlands or waters.[218] The Court read the Corps' authority under the Act narrowly to preserve states' primary role in regulating non-navigable waters. The Court interpreted the Conference Committee's language extending the Act's jurisdiction to require the broadest possible constitutional authority over traditional navigable waters and not the broadest jurisdiction under the Commerce Clause.[219] The Court did not decide whether Congress would have authority under the Commerce Clause to regulate isolated wetlands.[220] Nor did the Court provide a clear definition of which non-navigable waters the FWPCA's jurisdiction covers.[221]

The *SWANCC* Court rejected the government's assertion that *Riverside Bayview's* limitation of traditional navigation principles supported the Corps' broad reading of the term "navigable waters" to include isolated, intrastate waters.[222] In *Riverside Bayview,* the Supreme Court stated that the term "navigable" is of "limited import" and that Congress sought to "regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term."[223] The government contended that the term "some waters" could include isolated waters, but the *SWANCC* Court observed that it was "also plausible . . . that Congress simply wanted to include all waters adjacent to 'navigable waters,' such as non-navigable tributaries and streams."[224] The *SWANCC* Court maintained that both Congress and the Court's precedent had always made navigability an essential basis for the Act's jurisdiction. Putting a limit on the *Riverside Bayview* decision, the Court found that

> it is one thing to give a word limited effect and quite another to give it no effect whatever. The term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the [FWPCA]: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.[225]

The Court clearly implied that Section 404 of the FWPCA, requiring a permit prior to discharging, primarily relies on navigability as the test for jurisdiction.[226]

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218. *Id.* at 170–74; *see* 33 U.S.C. § 1344(a) (2003); Moiseyev, *supra* note 189, at 194.

219. *See SWANCC, supra* note 2 at 168 n.3; Albrecht & Nickelsburg, *supra* note 8, at 11042, 11053.

220. *See infra* notes 240–50, 268–71 and accompanying text.

221. *See infra* notes 265–67 and accompanying text.

222. *SWANCC, supra* note 2, at 167–68.

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

224. *See SWANCC, supra* note 2, at 171.

225. *Id.* at 172 (citing United States v. Appalachian Elec. Power Co., 311 U.S. 377, 407–408 (1940)).

226. *See Id.* at 173.

The *SWANCC* Court thus interpreted *Riverside Bayview* as a narrow exception to the FWPCA's primary reliance on navigability as the test for federal jurisdiction over interstate waters.[227] According to the *SWANCC* Court, *Riverside Bayview* accepted federal regulation over adjacent wetlands because of the wetlands' close relationship, or "significant nexus," to navigable waters.[228] The *SWANCC* Court expressly found that "the text of the [FWPCA] does not allow" the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water.[229] While *SWANCC's* narrow interpretation of *Riverside Bayview* is questionable, Chief Justice Rehnquist's concern with navigability in *SWANCC* is clearly at odds with his view twenty-two years earlier in *Kaiser Aetna* that navigability was far less important than regulation of commerce in defining the limits of congressional authority.[230]

In light of its traditional reluctance to interpret congressional inaction as evidence of acquiescence to existing regulations, the Court rejected the government's argument that Congress' failure to amend the definition of "navigable waters" in the 1977 Amendments demonstrated legislative acquiescence to the Corps' 1977 regulations.[231] By contrast, in *Riverside Bayview*, the Court concluded that Congress acquiesced to the Corps' regulation of adjacent wetlands in 1977 when a House Bill that would have narrowed the Act's jurisdiction over waters was rejected in the Senate and not adopted by the Conference Committee.[232] The government in *SWANCC* made the same argument, noting Congress' failure to legislatively overturn the 1975 decision by the United States District Court for the District of Columbia in *Natural Resources Defense Council v. Callaway,*[233] which concluded that the Corps must issue new regulations expanding its Section 404 jurisdiction over non-navigable waters.[234] Observing that "[f]ailed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute," the Court determined that "[h]ere, respondents have failed to make the necessary showing that Congress' failure to pass legislation demonstrates acquiescence to the 1977 regulations or the 1986 Migratory Bird Rule."[235]

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227. *Id.* at 167–73.

228. *Id.* at 167.

229. *Id.* at 167–68.

230. 444 U.S. 164, 173–74 (1979); *see supra* notes 127–29 and accompanying text.

231. *See SWANCC*, *supra* note 2, at 169–71, & n.7; Albrecht & Nickelsburg, *supra* note 8, at 11051 n.85, 11054.

232. *See* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 136–39 (1985); *supra* notes 148–50 and accompanying text.

233. 392 F. Supp. 685 (D.D.C. 1975); Albrecht & Nickelsburg, *supra* note 8, at 11054.

234. *Callaway*, 392 F. Supp. at 686.

235. *See SWANCC*, *supra* note 2, at 169–70.

The Court rejected the government's argument because Section 404(g)(1) of the 1977 regulations does not define the term "other waters."[236] The government argued that evidence indicated that in 1977, Congress sought to regulate non-navigable, isolated waters by adding Section 404(g)(1) to the FWPCA.[237] While the government contended that "other waters" refers to isolated waters, the Court concluded that it was equally plausible that "Congress simply wanted to include all waters adjacent to 'navigable waters,' such as non-navigable tributaries and streams."[238] Accordingly, the Supreme Court concluded that Section 404(g)(1) did not provide a clear answer regarding the meaning of the term "navigable waters" in the general definition section of the Act, Section 502(7).[239]

Although it did not ultimately decide whether Congress has authority under the Commerce Clause to regulate isolated waters, the Court questioned the government's argument that the regulation was within the scope of the congressional commerce power.[240] Citing *Lopez* and *Morrison*, the *SWANCC* Court observed that Congress' authority under the Commerce Clause, "though broad, is not unlimited."[241] The Corps argued that the Migratory Bird "Rule" fell within congressional power under the Commerce Clause to regulate activities that "substantially affect" interstate commerce because the birds generate over a billion dollars per year in recreational activities. However, the Court found that the Corps had not clearly specified the "precise object or activity that, in the aggregate, substantially affects interstate commerce."[242] Despite prior decisions stating that protection of migratory birds was a "national interest of very nearly the first magnitude,"[243] the Court found unclear whether regulation of isolated waters and wetlands "in the aggregate" affected interstate commerce.[244] The Corps initially argued that it had authority to regulate the petitioner's land because it

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236. *See id.* at 171; Craig, *supra* note 32, at 10518.

237. Section 404(g)(1) limits state regulation to waters:

> other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto.

33 U.S.C. § 1344(g)(1) (2003); *see SWANCC*, *supra* note 2, at 169 (discussing 33 U.S.C. § 1344(g)(1)); Craig, *supra* note 32, at 10518.

238. *See SWANCC*, *supra* note 2, at 171; Craig, *supra* note 32, at 10518.

239. *See SWANCC*, *supra* note 2, at 171.

240. *Id.* at 173–74

241. *Id.* at 173.

242. *Id.*

243. *Id.* (citing Missouri v. Holland, 252 U.S. 416, 435 (1920)).

244. *Id.*; Moiseyev, *supra* note 189, at 195.

"contain[ed] water areas used as habitat by migratory birds," but then the Corps shifted its argument to emphasize the economic and commercial value of petitioner's municipal landfill.[245] The Court questioned the Corps' attempt to use the full scope of the Commerce Clause as the basis for the FWPCA's jurisdiction because "this is a far cry, indeed, from the 'navigable waters' and 'waters of the United States' to which the statute by its terms extends."[246]

Underlying the Court's questions about whether the Commerce Clause justified federal regulation of isolated waters was a federalism concern for protecting "States' traditional and primary power over land and water use."[247] The Court emphasized that in Section 1251(b) of the FWPCA

> Congress chose to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter."[248]

To protect the primary role of the states, especially in regulating non-navigable waters, the Court read the Corps' jurisdiction narrowly to primarily encompass navigable waters as well as adjacent wetlands and tributaries having a close relationship to them. While the Court did not directly rely on *Lopez* and *Morrison* in addressing the issue of preserving traditional state police powers, the *SWANCC* decision reflects similar federalism concerns in limiting federal regulation over a traditional area of state control-isolated waters.[249] Because there was no clear statement in the Act indicating that Congress wished to give the federal government authority over isolated wetlands, the Court refused to interpret the Act broadly to include "federal jurisdiction over ponds and mudflats falling within the 'Migratory Bird Rule' [that] would result in a significant impingement of the States' traditional and primary power over land and water use."[250]

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245. *SWANCC*, *supra* note 2, at 173.

246. *Id.*; Albrecht & Nickelsburg, *supra* note 8, at 11053.

247. *See SWANCC*, *supra* note 2, at 172–74 (citing United States v. Bass, 404 U.S. 336, 349 (1971)) ("[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance"); Dral & Phillips, *supra* note 91, at 10421; Johnson, *supra* note 3, at 10673.

248. *SWANCC*, *supra* note 2, at 166–67 (quoting 33 U.S.C. § 1251(b)); *see* Craig, *supra* note 32, at 10517–19.

249. *See* Mank, *supra* note 62, at 748–49; *infra* notes 257–59 and accompanying text.

250. *SWANCC*, *supra* note 2, at 174 (citing Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 44 (1994) ("[R]egulation of land use [is] a function traditionally performed by local governments")).

In *SWANCC,* the Court ignored evidence that Congress intended the Act to include shared state and federal authority over many non-navigable waters, with the states taking the primary role as long as they sought to fulfill the Act's ecological goals.[251] While Section 1251(b) provides that states will take the primary role in reducing pollution and issuing permits, the 1972 Act also gave the federal government a greater role in providing technical and financial assistance to states so they could achieve the Act's ultimate goal of eliminating all water pollution by 1985.[252] Furthermore, the Act's legislative history anticipates a federal-state balance of responsibility for implementing the permit system. The Act implies that the federal government will only defer to states that establish effective permit programs that are "superior" to the federal program.[253]

> The [new] permit system establishes a direct link between the Federal government and each industrial source of discharge into the navigable waters.... The legislation will restore Federal-State balance to the permit system. Talents and capacities of those States whose own programs are superior are to be called upon to administer the permit system within their boundaries. The Administrator is to suspend his activity, insofar as the permit system is concerned, in these States.[254]

The *SWANCC* Court also rejected the government's argument that the Corps' interpretation was entitled to deference under the *Chevron* doctrine, which states that courts should usually defer to an agency's reasonable interpretation of an ambiguous statute for which Congress has delegated authority to the agency. Because the Court concluded that "[w]e find § 404(a) to be clear" and, "even were we to agree with respondents [that the statute is ambiguous], we would not extend *Chevron* deference here."[255] Additionally, The Court applies an exception to the doctrine when an agency's interpretation raises serious constitutional questions; in such circumstances, the Court places the burden of proof on an agency to demonstrate that Congress intended a statute to reach the broadest limits of congressional authority under the Constitution.[256] Thus, the burden of proof was on the Corps to

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251. *See* Craig, *supra* note 32, at 10508–10, 10518–20.

252. *See* 33 U.S.C. § 1251(b) (2003) (giving states primary role in reducing pollution, managing construction grants and implementing permit programs with federal government providing technical and financial assistance); Craig, *supra* note 32, at 10508–10, 10518–20.

253. *See* Craig, *supra* note 32, at 10508–10, 10518–20; *supra* note 252 and *infra* note 254 and accompanying text.

254. S. REP. NO. 92-414 (1971), reprinted in 1972 U.S.C.C.A.N. 3668, 3675; *see also* E.I. DuPont de Nemours & Co. v. Train, 528 F.2d 1136, 1137–38 (4th Cir. 1975), *aff'd*, 430 U.S. 112 (1977) (discussing the 1972 Act and greater federal role in Act); Craig, *supra* note 32, at 10519.

255. *SWANCC*, *supra* note 2, at 174.

256. *See SWANCC*, *supra* note 2, at 172–74; Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) (holding that courts should defer to an agency's interpretation of a statute for which Congress has delegated authority if the statute is ambiguous

demonstrate that Congress intended the FWPCA to reach the broadest limits of congressional authority under the Constitution and the Court concluded that the Corps failed to carry that burden. The Court thus refused to defer under the *Chevron* doctrine to the Corps' interpretation of the statute.[257] To preserve traditional state regulation of isolated waters and wetlands, the Court returned to its traditional emphasis on navigability in determining federal jurisdiction over waters. Thus, the Court "read the statute as written to avoid the significant constitutional and federalism questions raised by respondents' interpretation, and therefore reject the request for administrative deference."[258] The Court stated:

> Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result. This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority. This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power. Thus, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." [259]

Furthermore, the Court concluded that the Migratory Bird "Rule" was not entitled to deference because it contradicted the Corps' original 1974 interpretation of the FWPCA that defined the Act's jurisdiction as waters that are presently used, have been used, or could be used by the public for transportation or interstate commerce.[260] The Court observed

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and the agency's interpretation is permissible, or, in other words, reasonable); *see infra* notes 263, 476 and accompanying text. To avoid constitutional questions, however, the Court applies an exception to the *Chevron* doctrine. *See* Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 574–75 (1988); Bradford C. Mank, *Textualism's Selective Canons of Statutory Construction*, 86 KY. L.J. 527, 571–75 (1997–98); Thomas W. Merrill & Kristin E. Hickman, Chevron's *Domain*, 89 GEO. L.J. 833, 914–15 (2001) (arguing exception to *Chevron* should apply only if statute actually violates Constitution); *infra* note 259 and accompanying text. Some commentators have argued that the Court did not apply the *DeBartolo* exception to *Chevron* consistently in a controversial abortion case, Rust v. Sullivan, 500 U.S. 173, 186–87 (1991) (holding agency's interpretation of statute entitled to deference despite serious constitutional questions); Mank, *supra* note 62, at 573–75 (discussing inconsistency between *DeBartolo* and *Rust*).

257. *SWANCC*, *supra* note 2, at 172–74 (citing *Edward J. DeBartolo Corp.*, 485 U.S. at 575); Moiseyev, *supra* note 189, at 195.

258. *SWANCC*, *supra* note 2, at 174.

259. *Id.* at 172–73 (internal citations omitted).

260. The *SWANCC* Court summarized the Corps 1974 regulations:

that "the Corps' *original* interpretation of the [FWPCA], promulgated two years after its enactment, is inconsistent with that which it espouses here."[261] The Court concluded that the government "put forward no persuasive evidence that the Corps mistook Congress' intent in 1974."[262] The *SWANCC* Court's refusal to consider the Corps' evolving interpretation of the FWPCA's jurisdiction is inconsistent with other decisions by the Court recognizing that an agency may change its interpretation of an ambiguous statute for which Congress has delegated rule making authority to the agency.[263] Additionally, the Court ignored the fact that the EPA, which has final authority over Section 404 and the entire FWPCA, has consistently interpreted the statute to reach Congress' authority under the Commerce Clause since 1973.[264]

The actual impact of the *SWANCC* opinion remains uncertain because the line between isolated, purely intrastate wetlands and wetlands adjacent to navigable waters covered by the [FWPCA] is often unclear and depends in part on how the Corps and the EPA define the term "wetlands" and "navigable waters."[265] The Court did not clarify whether it intended to create a new test for establishing which non-navigable waters are sufficiently related to navigable waters so that the Act covers them. Instead, the Court distinguished *SWANCC* from *Riverside Bayview* by explaining *Riverside Bayview* as a case involving a "significant nexus"[266] between the adjacent wetlands and navigable

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> Its 1974 regulations defined § 404(a)'s 'navigable waters' to mean 'those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce.' 33 CFR § 209.120(d)(1). The Corps emphasized that '[i]t is the water body's capability of use by the public for purposes of transportation or commerce which is the determinative factor.' § 209.260(e)(1).

SWANCC, *supra* note 2, at 168; Albrecht & Nickelsburg, *supra* note 8, at 11053–54.

261. *SWANCC*, *supra* note 2, at 168.

262. *Id.*; Albrecht & Nickelsburg, *supra* note 8, at 11053–54.

263. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–45, 864–65 (1984) (concluding EPA could change its interpretation of the term "stationary source" in the Clean Air Act).

264. *See supra* note 135 and accompanying text.

265. *See* Robin Kundis Craig, *Lower Courts Untangle the Finer Points of* SWANCC *Decision*, 24 NAT'L WETLANDS NEWSL.7, 7–8 (Sept.–Oct. 2002) (stating "the *SWANCC* Court left the exact parameters of the Corps' jurisdiction over wetlands that fall between these two poles [those adjacent to open water and isolated wetlands regulated solely because of migratory birds] unclear, particularly regarding what qualifies as 'adjacency' or a 'significant nexus'"); Funk, *supra* note 3, at 10743–45, 10771–72 (arguing future of wetlands regulation is uncertain because the definition of adjacent wetland is not clear); Johnson, *supra* note 3, at 10676–77 (same); *see* Tobias Halvarson, Note, Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers: *The Failure of "Navigability" as a Proxy in Demarcating Federal Jurisdiction For Environmental Protection*, 29 ECOLOGY L.Q. 181, 193 (2002) ("*SWANCC*'s implications are uncertain, thanks primarily to the large zone of ambiguity left by the Court.").

266. *SWANCC*, *supra* note 2, at 167–68.

waters.[267] Furthermore, the Court did not identify the constitutional limits of congressional authority over isolated, non-navigable intrastate wetlands that affect interstate commerce.[268] Unlike the Fourth Circuit's decision in *Wilson*,[269] the *SWANCC* decision did not directly address whether Congress had authority under the Commerce Clause to regulate isolated wetlands, although the Court suggested that the answer might be no.[270] Thus, the Court did not determine whether Congress would have the authority under the Commerce Clause to enact the Migratory Bird "Rule" as a statute. Justice Stevens argued in his dissent that tourism and hunting activities connected to migratory birds have a substantial effect on interstate commerce.[271] The majority opinion in *SWANCC*, however, suggested that a majority of the Court did not find this argument persuasive.

C. *SWANCC: Justice Stevens' Dissent*

In his dissenting opinion, Justice Stevens, who was joined by Justices Souter, Ginsburg and Breyer, made a strong case that Congress intended the FWPCA to reach the limits of congressional authority under the Commerce Clause and that the Corps had the authority under the statute to issue the Migratory Bird "Rule." He argued that the majority's narrow interpretation of the Act's jurisdiction was based "on two equally untenable premises: (1) that when Congress passed the 1972 [FWPCA], it did not intend 'to exert anything more than its commerce power over navigation,' and (2) that in 1972 Congress drew the boundary defining the Corps' jurisdiction at the odd line on which the Court today settles."[272] Justice Stevens argued that the Corps' interpretation of the term "waters of the United States" to include isolated, non-navigable intrastate wetlands was consistent with Congress' intent in the 1972 Act, or at the least, that Congress acquiesced in the 1977 FWPCA amendments to the Corps' broader 1977 regulations.[273]

Justice Stevens suggested that the Court should interpret the 1972 Act's jurisdiction in light of its ambitious goals and missions. The goal of the 1899 Act was to protect waters from obstructions to navigation. Thus, the corresponding jurisdiction was limited to navigable waters. By

267. *See supra* notes 225–29 and accompanying text.

268. *See* Weinberg, *supra* note 72, at 533 (stating *SWANCC* avoided constitutional issue of whether Congress has authority to protected isolated wetlands under the Commerce Clause).

269. *See supra* notes 212-15 and accompanying text.

270. *See supra* notes 240-50 and accompanying text.

271. *See generally* Weinberg, *supra* note 72, at 533–47 (arguing Congress has authority to protected isolated wetlands under the Commerce Clause); *infra* notes 288–95 and accompanying text.

272. *SWANCC*, *supra* note 2, at 177.

273. *Id.* at 175–85 (Stevens, J., dissenting).

contrast, in the 1972 Act, Congress expanded the goal to achieving zero water pollution by 1985[274] and "broadened the Corps' mission to include the purpose of protecting the quality of our Nation's waters for esthetic, health, recreational, and environmental uses."[275] Justice Stevens presented evidence that the 1972 Act represented a significant "shift in the focus of federal water regulation from protecting navigability toward environmental protection . . . ."[276] He argued that Congress intended the 1972 Act to be a "comprehensive" statute going far beyond the 1899 Act's restrictive emphasis on navigation to the far broader goal of improving water quality.[277] To fulfill these goals, Congress had intentionally expanded the 1972 Act's jurisdiction beyond navigable-in-fact waters to include "all of 'the waters of the United States, including the territorial seas'"[278] and requiring "neither actual nor potential navigability."[279] In arguing that Congress intended the 1972 Act's jurisdiction to extend beyond navigable waters, he stated that "although Congress opted to carry over the traditional jurisdictional term 'navigable waters' from the [1899 Act] and prior versions of the FWPCA, it broadened the *definition* of that term to encompass all 'waters of the United States.'"[280] Justice Stevens noted that "the 1972 conferees arrived at the final formulation by specifically deleting the word 'navigable' from the definition that had originally appeared in the House version of the Act. The majority today undoes that deletion."[281] He maintained that the 1972 Act's jurisdiction included isolated wetlands because the Act's text and legislative history, especially the conference report's reference to "the broadest possible constitutional interpretation, unencumbered by agency determinations," demonstrated that Congress intended the 1972 Act to be a "comprehensive" statute that would reach more broadly than the 1899 Act.[282] He criticized the majority's attempt to use the Corps' initially restrictive interpretation of the Act's jurisdiction because the EPA had immediately attacked that interpretation as flawed, and contended that the Court should have deferred to the Corps' recognition that its 1974 regulations unnecessarily limited the statute's jurisdiction.[283]

Justice Stevens argued that Congress had acquiesced in 1977 to the Corps' 1977 regulations permitting jurisdiction over isolated, non-navigable waters by refusing to adopt amendments that would have

274. *Id.* at 175 (citing 33 U.S.C. § 1251a).
275. *Id.*
276. *Id.* at 179.
277. *Id.* at 179–82.
278. *Id.* at 175 (quoting 33 U.S.C. § 1362(7)).
279. *Id.* at 175.
280. *Id.* at 180.
281. *Id.* at 180–81.
282. *Id.* at 181 (Stevens, J., dissenting).
283. *Id.* at 183–84 & n.8.

rejected the Corps' 1977 regulations interpreting the Act's jurisdiction as reaching the limits of the Commerce Clause.[284] Justice Stevens suggested that the majority's claim that Congress acquiesced to the Corps' regulation of adjacent wetlands but not other waters was a misreading of *Riverside Bayview's* rationale,[285] because the evidence of congressional acquiescence to the Corps' regulations was similar for adjacent wetlands and isolated, intrastate waters affecting interstate commerce. Additionally, the legislative history indicated that Congress was aware of and approved of the Corps' regulation of phase three waters, which include the isolated wetlands at issue in *SWANCC*.[286] Given the statutory ambiguity, Justice Stevens contended that the majority should have deferred to the Corps' reasonable interpretation of the term "navigable waters" in the FWPCA to include isolated intrastate wetlands.[287]

Justice Stevens also noted that "[t]he Corps' exercise of its [Section] 404 permitting power over 'isolated' waters that serve as habitat for migratory birds falls well within the boundaries set by this Court's Commerce Clause jurisprudence."[288] He argued that while the Court in *Lopez* and *Morrison* refused to allow federal regulation of criminal behavior traditionally regulated by the states, the regulation of isolated wetlands is proper under the Commerce Clause because "the discharge of fill material into the Nation's waters is almost always undertaken for economic reasons."[289] Justice Stevens asserted that the destruction of isolated wetlands substantially affects interstate commerce because it significantly harms the migratory bird population in the aggregate and

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284. *Id.* at 185–90.

285. *Id.* at 186–91.

286. Justice Stevens stated:

> The Conference Report discussing the 1977 amendments, for example, states that § 404(g) "establish[es] a process to allow the Governor of any State to administer an individual and general permit program for the discharge of dredged or fill material into *phase 2 and 3 waters* after the approval of a program by the Administrator." H.R. CONF. REP. NO. 95-830, p. 101 (1977), U.S. Code Cong. & Admin. News 1977 pp. 4326, 4476, reprinted in 3 Legislative History of the Clean Water Act of 1977 (Committee Print compiled for the Committee on Environment and Public Works by the Library of Congress), Ser. No. 95-14, p. 285 (emphasis added) (hereinafter Leg. Hist. of CWA). Similarly, a Senate Report discussing the 1977 amendments explains that, under § 404(g), "the [C]orps will *continue* to administer the section 404 permit program in all navigable waters for a discharge of dredge or fill material until the approval of a State program *for phase 2 and 3 waters.*" S. REP. NO. 95-370, p. 75 (1977), U.S. Code Cong. & Admin. News 1977 pp. 4326, 4400, reprinted in 4 Leg. Hist. of CWA 708 (emphases added).

SWANCC, *supra* note 2, at 189 (Stevens, J., dissenting).

287. *Id.* at 191–92; Moiseyev, *supra* note 189, at 195–96.

288. *SWANCC*, *supra* note 2, at 192.

289. *Id.* at 192–96 (Stevens, J., dissenting); Moiseyev, *supra* note 189, at 196.

reduces tourism.[290] He argued that federal regulation of isolated wetlands was appropriate because "the causal connection between the filling of wetlands and the decline of commercial activities associated with migratory birds is not 'attenuated,'[291] [but] is direct and concrete."[292] In addition, the Migratory Bird "Rule" did not "blur the 'distinction between what is truly national and what is truly local'" because, as Justice Holmes recognized in *Missouri v. Holland*,[293] protecting migratory birds is a national problem requiring federal regulation.[294] Justice Stevens maintained that regulation of intrastate isolated wetlands to protect interstate migratory birds substantially affects interstate commerce and is consistent with the modern judicial understanding of the Commerce Clause.[295]

Moreover, Justice Stevens suggested that the majority's opinion was inconsistent with the underlying rationale of *Riverside Bayview*.[296] The wetland that the *Riverside Bayview* Court had characterized as "adjacent," and thus within the scope of the Act, was an isolated wetland similar to the wetlands at issue in *SWANCC*. He pointed out that the wetland in *Riverside Bayview* "was not itself navigable, directly adjacent to navigable water, or even hydrologically connected to navigable water, but [] was part of a larger area, characterized by poor drainage, that ultimately abutted a navigable creek."[297] Justice Stevens found no compelling reason to distinguish between "isolated" wetlands and

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290. *SWANCC*, *supra* note 2, at 192–96 (Stevens, J., dissenting); Moiseyev, *supra* note 189, at 196.

291. *SWANCC*, *supra* note 2, at 192–96 (Stevens, J., dissenting) (quoting United States v. Morrison, 529 U.S. 598, 612 (2000)).

292. *SWANCC*, *supra* note 2, at 192–96 (Stevens, J., dissenting) (citing Gibbs v. Babbitt, 214 F.3d 483, 492–93 (4th Cir. 2000)); Moiseyev, *supra* note 189, at 196.

293. 252 U.S. 416, 435 (1920).

294. *SWANCC*, *supra* note 2, at 195–96 (Stevens, J., dissenting) (quoting *Morrison*, 529 U.S., at 617– 18); Weinberg, *supra* note 72, at 534, 543 (discussing *Missouri v. Holland* and Justice Stevens' dissent in *SWANCC*).

295. *SWANCC*, *supra* note 2, at 192–96 (Stevens, J., dissenting); Weinberg, *supra* note 72, at 536–43 (discussing Justice Stevens' dissent in *SWANCC* and arguing Commerce Clause gives Congress authority to regulate isolated wetlands).

296. *SWANCC*, *supra* note 2, at 176, 186–87, 191.

297. *Id.* at 175–76. In a footnote, Justice Stevens further explained why there was no hydrological connection, stating:

> The district court in *Riverside Bayview* found that there was no direct "hydrological" connection between the parcel at issue and any nearby navigable waters. App. to Pet. for Cert. in *Riverside Bayview* [at] 25a. The wetlands characteristics of the parcel were due, not to a surface or groundwater connection to any actually navigable water, but to "poor drainage" resulting from "the Lamson soil that underlay the property." Brief for Respondent in *Riverside Bayview* [at] 7. Nevertheless, this Court found occasional surface runoff from the property into nearby waters to constitute a meaningful connection. *Riverside Bayview*, 474 U.S. at 134; Brief for United States in *Riverside Bayview* 8, n. 7.

SWANCC, *supra* note 2, at 176 n.2.

"adjacent" wetlands because "once Congress crossed the legal watershed that separates navigable streams of commerce from marshes and inland lakes, there is no principled reason for limiting the statute's protection to those waters or wetlands that happen to lie near a navigable stream."[298] He observed that the *Riverside Bayview* Court emphasized "the *ecological* connection between the wetlands and the nearby waters" and contended that "[b]oth [hydrological and ecological] types of connections are also present in many, and possibly most, 'isolated' waters."[299] Relying on *Riverside Bayview*, Justice Stevens suggested that Congress intended to use its Commerce Clause authority to reach many non-navigable waters, including isolated wetlands, that have significant ecological or hydrological connections to the nation's waters.[300] Accordingly, Justice Stevens made a powerful case that the majority had ignored Congress' intent and at least the spirit of the *Riverside Bayview* decision by striking down the Corps' Migratory Bird "Rule."

Justice Stevens' dissent suggested that the majority opinion had rejected FWPCA jurisdiction over all isolated waters and not merely those covered by the Migratory Bird "Rule."[301] He found that with the new jurisdictional line drawn by the Court, the Corps only maintained jurisdiction over "actually navigable waters, their tributaries, and wetlands adjacent to each."[302] While Justice Stevens' dissent may expose some of the unwritten assumptions of the majority, his characterization of the majority opinion is clearly not binding on either the Court or the lower courts. Furthermore, Justice Stevens' characterization of the scope of the majority opinion does not define which tributaries are within the Act and which wetlands are considered adjacent to navigable waters. Unfortunately, Justice Stevens' dissent did not address the crucial issue of the majority's use of the "significant nexus" standard.[303]

D. The EPA's and the Corps' 2001 Joint Memorandum on SWANCC

On January 19, 2001, the EPA and the Corps released a joint memorandum on the *SWANCC* decision that narrowly construed the decision's impact on their jurisdiction. According to the joint memorandum, the Court's holding invalidated the agencies' jurisdiction over "'non-navigable, isolated, instrastate' [sic] waters based solely on the

298. *Id.* at 176.

299. *Id.* at 176 n.2 (emphasis in original) (citing United States v. *Riverside Bayview* Homes, Inc., 474 U.S. 121, 134–135 (1985)).

300. *Id.*

301. *Id.* at 176–77.

302. *Id.*

303. *See* Calderon, *supra* note 8, at 313–14 (discussing significant nexus test).

use of such waters by migratory birds."[304] The 2001 joint memorandum conceded that the *SWANCC* decision applied not only to Section 404, but also to "other provisions of the [FWPCA] as well."[305] The 2001 joint memorandum took an expansive view, however, of what waters may still be covered by the Act after *SWANCC*. The memorandum emphasized that *SWANCC* did not overrule the holding or rationale of *Riverside Bayview*, which the memorandum contended had "upheld the regulation of traditionally navigable waters, interstate waters, their tributaries and wetlands adjacent to each."[306] Further, even "waters that are isolated, intrastate, and nonnavigable," may still be within the Act's jurisdiction "if their use, degradation, or destruction could affect other 'waters of the United States,' thus establishing a significant nexus between the water in question and other 'waters of the United States.'"[307] The joint memorandum's use of the "significant nexus" standard is obviously a reference to its use in *SWANCC*.[308] By focusing only on the *SWANCC* holding, the 2001 joint memorandum underplayed *SWANCC's* significance in re-emphasizing navigability as the primary criterion in defining the Act's jurisdiction. While its language is not clear, the 2001 joint memorandum arguably suggested that ecological impacts from isolated waters on navigable waters satisfy the standard, even in the absence of a hydrological connection. Justice Stevens supported this view in his dissent, but the majority clearly rejected it. To the extent the 2001 joint memorandum suggested that truly isolated waters are still within the jurisdiction of the federal government without any significant hydrological connection to navigable waters, the memorandum's reasoning is suspect. Nevertheless, the 2001 joint memorandum's narrow reading of *SWANCC* was understandable in light of the agencies' mission in achieving the Act's broad ecological goals.

The 2001 joint memorandum directed that "[w]ith respect to any waters that fall outside of that category [i.e., nonnavigable, isolated, intrastate waters], field staff should continue to exercise [FWPCA] jurisdiction to the full extent of their authority under the statute and regulations and consistent with court opinions."[309] The memorandum advised staff to analyze on a case-by-case basis whether impoundments

304. Joint Memorandum, *supra* note 8, at 2; *see* Albrecht & Nickelsburg, *supra* note 8, at 11042 & n.12.

305. *See* Joint Memorandum, *supra* note 8, at 1–2. In a footnote, the joint memorandum states that *SWANCC* only applies to the Act and does not affect jurisdiction under other federal statutes addressing "aquatic features" or affect state or tribal jurisdiction over "aquatic features." *Id.* at 2 n.1.

306. *Id.* at 3 (citing *Riverside Bayview*, 474 U.S. at 123, 129, 139); *see also id.* at 5–7 (discussing *Riverside Bayview*).

307. *Id.* at 5.

308. *See supra* notes 225–29 and accompanying text.

309. Joint Memorandum, *supra* note 8, at 3.

of, tributaries of, or wetlands adjacent to subsection (a)(3) waters solely affect commerce as migratory bird habitat, or whether those waters have a significant nexus to navigable waters or whether the use, degradation or destruction of those waters affects interstate or foreign commerce.[310]

The impact of the agencies' narrow interpretation of the *SWANCC* decision was short lived. As discussed in Part V, the Bush administration's own joint memorandum supercedes the 2001 memorandum and the administration may make even more extensive changes if it issues new rules concerning the Act's jurisdiction.[311]

V. THE SPLIT IN THE COURTS SINCE SWANCC

A. Cases Reading the Act Narrowly and SWANCC Broadly

1. Rice*: Subsurface Groundwater Does Not Constitute "Navigable Waters"*

In *Rice v. Harken Exploration Co.*,[312] the Fifth Circuit held that neither the Oil Pollution Act (OPA)[313] nor the FWPCA[314] apply to contaminated groundwater without proof of a hydrological connection to a navigable water.[315] The plaintiffs were the trustees of a trust that owned the surface rights to a ranch that the defendant, Harken Exploration Company (Harken), leased for oil exploration and drilling.[316] While drilling for oil on dry land, Harken allegedly contaminated with oil the ranch's soil, groundwater, and Big Creek, a small seasonal creek.[317] The oil in the groundwater and in Big Creek allegedly reached the Canadian River, a navigable water.[318]

While finding that the plaintiffs presented significant evidence that the defendant's oil discharges on the surface of the ranch land had

310. *Id.* at 5.

311. *See supra* notes 13–25 and *infra* notes 477–503 and accompanying text.

312. 250 F.3d 264 (5th Cir. 2001).

313. *See generally* 33 U.S.C. §§ 2701–2761 (2003); Kevin Batik, Note, *OPA's Reach: The Geographic Scope Of "Navigable Waters" Under The Oil Pollution Act Of 1990*, 21 REV. LITIG. 419, 421–23 (2002) (discussing Oil Pollution Act Of 1990).

314. *See Rice*, 250 F.3d at 269–70; Batik, *supra* note 313, at 432–33, 439–41 (discussing *Rice*); *see generally*, Philip M. Quatrochi, Comment, *Groundwater Jurisdiction Under the Clean Water Act: The Tributary Groundwater Dilemma*, 23 B.C. ENVTL. AFF. L. REV. 603 (1996) (discussing conflicting cases regarding whether groundwater is within jurisdiction of FWPCA and arguing that tributary groundwater is within Act's scope); *infra* notes 461–76 and accompanying text.

315. Because the definition of "navigable waters" is the same under the Act and OPA, the *Rice* Court applied *SWANCC's* definition of that term to the OPA as well. *See Rice*, 250 F.3d at 267–69.

316. *Id.* at 265.

317. *Id.*

318. *See id.* at 265–66.

contaminated the groundwater under the Big Creek Ranch, the Fifth Circuit concluded that the plaintiffs failed to prove that the oil contaminated waters were protected under the OPA or FWPCA.[319] In a prior decision, the Fifth Circuit clearly held that the FWPCA's jurisdiction does not reach groundwater because the statute applies only to surface waters.[320] Because the term "waters of the United States" is no broader under the OPA than the Act, the court concluded that subsurface waters are likewise outside the scope of the OPA.[321] Furthermore, the plaintiffs failed to prove that there was a "hydrological connection between the groundwater and the Canadian River," other than a general assertion in the report by the plaintiffs' expert that the Canadian River is down gradient from the Big Creek Ranch.[322] In addition, the plaintiffs did not address flow rates into the river, or estimate how much of the oil contamination in the groundwater would reach the Canadian River.[323] The Fifth Circuit broadly interpreted *SWANCC* and narrowly construed the FWPCA to conclude "that a body of water is subject to regulation under the [FWPCA] if the body of water is actually navigable or is adjacent to an open body of navigable water."[324] The plaintiffs failed to establish that Harken's activities caused the type of direct discharges into navigable waters that fall within the jurisdiction of the OPA or the Act because the trustees did not provide evidence of a "close, direct and proximate link between Harken's discharges of oil" and any resulting harm to navigable waters.[325]

Given the absence of a clear hydrological connection from the groundwater contamination to the Big Creek and then to the Canadian River, the court likely reached the correct result.[326] Additionally, Congress probably did not intend the Act or the OPA to reach

319. *See id.* at 272.

320. *Id.* at 269 (discussing Exxon Corp. v. Train, 554 F.2d 1310, 1322 (5th Cir. 1977) (holding legislative history of FWPCA clearly demonstrated Congress did not intend the Act to reach subsurface waters)). The United States Court of Appeals for the Seventh Circuit has also held that groundwater is beyond the scope of the FWPCA. *See* Vill. of Oconomowoc Lake v. Dayton Hudson Corp., 24 F.3d 962, 965–66 (7th Cir. 1994); *see also* Weinberg, *supra* note 72, at 544 (agreeing with *Rice* decision that groundwater is beyond jurisdiction of FWPCA and OPA). For conflicting views in other circuits, *see infra* notes 461, 465, 471 and accompanying text.

321. *Rice*, 250 F.3d at 269. Because it concluded that neither the FWPCA nor the OPA's jurisdiction includes groundwater, the Fifth Circuit arguably should not even have addressed the facts of the case. Perhaps because of the conflicting views in other circuits and the possibility that the Supreme Court might disagree on the issue of groundwater jurisdiction, the Fifth Circuit did address the facts of the case. *See supra* note 320 and *infra* notes 461, 465, 471 (discussing conflict law regarding whether groundwater is within jurisdiction of FWPCA).

322. *See Rice*, 250 F.3d at 272; Calderon, *supra* note 8, at 318–19.

323. *See Rice*, 250 F.3d at 272.

324. *Id.* at 269 (citing *SWANCC*).

325. *Id.* at 272.

326. *Id.* at 270–72.

groundwater contamination that does not clearly impact surface waters.[327] The *Rice* decision's broad reading of *SWANCC* and narrow reading of the Act can be limited to the facts in *Rice*; the hydrologic connection between the defendant's activities and the nation's surface waters was uncertain.[328]

2. *Judge Morgan Rejects the Corps 1986 Regulation in* Newdunn Associates *and* RGM

In *United States v. Newdunn Associates*,[329] Judge Morgan of the United States District Court for the Eastern District of Virginia held that the Corps did not have jurisdiction under the Act when the hydrologic connection to navigable waters consisted of man-made ditches and culverts and miles of non-navigable waters. The defendant owned a forty-three acre parcel of land in Newport News, Virginia.[330] The Corps sought to enjoin the property owner from excavating or filling any wetlands on its property in alleged violation of the Corps' wetlands regulations under the Act.[331] The Corps claimed a hydrological connection existed between the wetlands and navigable waters through a series of multiple drainage ditches, a culvert under a highway, and miles of non-navigable waters.[332] After initially granting the Corps' request for a temporary restraining order and then a preliminary injunction,[333] the court concluded that the Corps did not have jurisdiction under the Act to regulate the property and entered judgment for the defendants.[334] The Fourth Circuit recently reversed the district court's decision.[335]

The *Newdunn* court rejected using man-made structures to establish hydrological connections under the Act.[336] The court maintained that no evidence supported granting the Corps' jurisdiction over drainage pipes or culverts among navigable waters.[337] The district court also found that

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327. *See supra* note 320 and *infra* notes 461, 465, 471 and accompanying text.

328. *See* Calderon, *supra* note 8, at 319.

329. 195 F. Supp. 2d 751 (E.D. Va. 2002), *rev'd*, Treacy v. Newdunn Assocs., 344 F.3d 407 (4th Cir. 2003), *petition for cert. filed*, 72 U.S.L.W. 3310 (U.S. Oct. 27, 2003) (No. 03-637).

330. *Id.* at 753.

331. *Id.* at 753.

332. Surface water leaving the property traveled for miles—via (1) a spur ditch; (2) the eastern, man-made I-64 drainage ditch; (3) a culvert under I-64; (4) the western, man-made I-64 drainage ditch (portions of which were indisputably constructed through "dry lands"); and (5) non-navigable parts of Stoney Run—before finding navigable waters. *Id.* at 765.

333. *Id.* at 753.

334. *Id.* at 770–71.

335. *See infra* notes 362-64 and accompanying text.

336. "The Corps relied at trial exclusively on this 'surface water connection' or 'hydrological connection' for jurisdiction, although neither of those terms are included in even the 1986 regulations." *Newdunn*, 195 F. Supp. 2d at 765; Liebesman & Turner, *supra* note 36, at 211 (discussing *Newdunn* Court's rejection of hydrological connection argument).

337. *See Newdunn*, 195 F. Supp. 2d at 765; Liebesman & Turner, *supra* note 36, at 211.

defining a culvert or storm drain as a tributary was arbitrary, because man-made construction or obstructions often block culverts or storm drains, rendering the Corps' jurisdiction dependent on third party actions.[338]

Even if the Corps proved that the wetlands were within the jurisdiction of the 1986 regulations, the court concluded that the Corps did not have the authority to issue those regulations in the first place because the Corps' interpretation of the Act exceeded the scope of jurisdiction Congress intended when it passed the Act in 1972.[339] While the 1986 regulations generally exclude non-tidal drainage and irrigation ditches excavated on dry land from the definition of tributaries, the regulations give the Corps the discretion to determine on a case-by-case basis whether such ditches or culverts constitute tributaries to waters of the United States.[340] According to the court, Congress intended the 1972 Act to address only navigable waters. The Corps' 1986 regulations defined "waters of the United States" far more broadly than navigable waters and thus "usurped Congress' authority to determine the Corps' jurisdiction."[341]

Subsequently, in *United States v. RGM*,[342] Judge Morgan held that the Corps did not have jurisdiction over a 658-acre tract of land and wetlands in Chesapeake, Virginia, where the only connections between the wetlands on the property and navigable waters were man-made drainage ditches and ephemeral streams.[343] According to the Corps' regulations, "[t]he term adjacent means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'"[344] However, the court concluded that the possibility that water from the wetlands might sometimes enter navigable waters through drainage ditches and ephemeral streams was insufficient to create jurisdiction under either the Corps' current regulations, or under the Corps' pre-1986 regulations because the connection was too tenuous to constitute a significant nexus under the *SWANCC* decision.[345]

The *RGM* court determined that the Corps' current regulations governing its jurisdiction over non-navigable, non-tidal waters were

338. *See Newdunn*, 195 F. Supp. 2d at 765; Liebesman & Turner, *supra* note 36, at 211.

339. *See Newdunn*, 195 F. Supp. 2d at 765–67.

340. Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41206, 41217 (Nov. 13, 1986).

341. *Id.*

342. 222 F. Supp. 2d 780 (E.D. Va. 2002).

343. *Id.* at 787–89.

344. 33 C.F.R. § 323.2(d) (1985) (currently 33 C.F.R. § 328.3(c) (2003)); *see* Bergstrom, *supra* note 52, at 846.

345. *RGM*, 222 F. Supp. 2d at 787–89.

invalid.[346] In determining jurisdiction over waters with intermittent flows, the Corps regulations provide that, in the absence of adjacent wetlands, the lateral limits of non-tidal waters extend to the OHWM.[347] The ordinary high water mark was originally based on the flow of *navigable* waters. In 1975 however, the Corps eliminated this requirement.[348] Specifically, the Corps extended its jurisdiction to all non-navigable waters that might tangentially or occasionally affect navigable waters.[349] Citing *SWANCC*, the district court found "that the Corps' reinterpretation of the jurisdictional significance of an OHWM is not entitled to *Chevron* deference, and is an invalid extension of [the] Corps' jurisdiction."[350] The district court also found that the waters at issue did not extend to the OHWM because the wetlands did not continuously provide water to the navigable waters. The court also rejected the Corps' expert testimony claiming that water flowed uphill from the wetlands to create a high water mark from the property to navigable waters.[351] The United States is appealing the case to the Fourth Circuit and is likely to prevail in light of the Fourth Circuit's decisions in *Deaton* and *Newdunn*.[352]

The *Newdunn* and *RGM* decisions were incorrectly decided. First, the court was wrong in both cases to exclude man-made tributaries from the Act's jurisdiction. The Corps' regulations properly recognize that man-made changes can change the scope of its jurisdiction, but appropriately require such changes to be "permanent," which likely means something that will last for a number of years.[353] In contrast to Judge Morgan's decisions, the Eleventh Circuit in *United States v. Eidson*[354] correctly held that Congress intended the Act to include man-made tributaries and not just natural ones.[355] Similarly, in the June 2002

346. *See id.* at 787.

347. *See id.* at 786–88; 33 C.F.R. § 328.4(c)(1) (2003); *see also* ANPRM, *supra* note 6, at 1997 (summarizing *RGM*).

348. *See id.*

349. *See RGM*, 222 F. Supp. 2d at 787.

350. *See id.* at 787–89; *see also* ANPRM, *supra* note 6, at 1997 (summarizing *RGM*).

351. *See RGM*, 222 F. Supp. 2d at 787–89 (questioning validity of 1986 Corps regulations and concluding that wetlands at issue could not meet definition of even 1986 regulations); *see also* ANPRM, *supra* note 6, at 1997.

352. *See* EPA, Office of Water, Wetlands home page, Post-SWANCC Caselaw on "Waters of the United States," located at http:// www.epa.gov/owow/wetlands/Caselaw12303.pdf (listing cases on appeal) (updated January 21, 2003); ANPRM, *supra* note 6, at 1997; *infra* notes 360-64 and accompanying text.

353. *See* 33 C.F.R. § 328.5 (2003) ("Man-made changes may affect the limits of waters of the United States; however, permanent changes should not be presumed until the particular circumstances have been examined and verified by the district engineer.").

354. 108 F.3d 1336 (11th Cir. 1997).

355. *Id.* at 1342.

decision *In the Matter of Ray and Jeanette Veldhuis*,[356] an EPA administrative law judge concluded that a connection or nexus between wetlands and navigable waters "is not precluded by the distances or number of tributary connections involved, the intermittency of the connection, or the fact that some tributaries may have been of human construction."[357] Second, the district court in *RGM* incorrectly required the presence of a continuous OHWM and rejected the Corps' regulations allowing just an intermittent flow.[358] As discussed below, the Ninth Circuit in *Headwaters v. Talent Irrigation District* appropriately concluded that intermittent flows from non-navigable tributaries could have significant impacts on navigable waters.[359] As a matter of law, the district court in *RGM* inappropriately excluded human-made hydrological connections and intermittent connections without considering whether, in some circumstances, they could have significant impacts on navigable waters.

One commentator predicted that the Fourth Circuit would likely reverse the *Newdunn* and *RGM* decisions.[360] Using reasoning clearly inconsistent with the *Newdunn* and *RGM* decisions, the Fourth Circuit held in the June 2003 decision *United States v. Deaton* that the Corps has tributary jurisdiction over a roadside drainage ditch from which water must pass through several other non-navigable watercourses before reaching a navigable river.[361] On September 10, 2003, just before this Article was published, the Fourth Circuit did in fact reverse the district court's *Newdunn* decision.[362] Following its reasoning in *Deaton*, the Fourth Circuit rejected the district court's conclusion that the Corps may not assert tributary jurisdiction over man-made ditches. Further, the court determined that the I-64 ditch that connected the Newdunn Property's wetlands with navigable waters was a tributary within the Corps' jurisdiction, holding that the distinction between man-made and natural watercourses is "irrelevant" given that both types can serve as a

356. E.P.A. Docket No. CWA-9-99-0008, 72 (EPA June 10, 2002), 2002 WL 1493840 (hereinafter *Veldhuis*), *available at* http://www.epa.gov/oalj/orders/veldhuis.pdf, *aff'd*, 2003 WL 23019918 (EPA EAB, Oct.21, 2003) (CWA Appeal No. 02-08).

357. *Id.* at 87; *see also* In re Wolco, Respondent, 2002 EPA ALJ LEXIS 54 (EPA Sept. 4, 2002) (finding FWPCA jurisdiction where water on respondent's property reached Mississippi River after traveling across drainage ditch, gravel, pond, stream, tributary of creek, and creek); Craig, *supra* note 265, at 8, 13 n.9 (discussing *Veldhuis* and *Wolco*).

358. *See* U.S. v. RGM Corp., 222 F. Supp. 2d 780, 787–89 (E.D.Va. 2002); *see also* ANPRM, *supra* note 6, at 1997.

359. *See infra* notes 394 and accompanying text.

360. Craig, *supra* note 265, at 12.

361. United States v. Deaton, 332 F.3d 698 (4th Cir. 2003), *petition for cert. filed*, 72 U.S.L.W. 3356 (U.S. Nov. 10, 2003) (No. 03-701).

362. Treacy v. Newdunn Assocs., 344 F.3d 407 (4th Cir. 2003), *petition for cert. filed*, 72 U.S.L.W. 3310 (U.S. Oct. 27, 2003) (No. 03-637).

hydrological connection.[363] Rejecting Newdunn's contention that *SWANCC* limits the Corps' jurisdiction to wetlands adjacent to navigable waters, the Fourth Circuit held that "there exists a sufficient nexus between the Newdunn Wetlands and navigable waters" for the Corps to assert jurisdiction.[364]

B. Cases Reading the Act Broadly and SWANCC Narrowly

1. Headwaters*: Intermittent Tributaries to Navigable Waters Are Not Isolated Waters*

In *Headwaters, Inc. v. Talent Irrigation District*,[365] the United States Court of Appeals for the Ninth Circuit held that irrigation canals were "waters of the United States" because they were intermittent tributaries to navigable waters.[366] The defendant, Talent Irrigation District (TID), operated a system of irrigation canals that provided water to its members from May to October, and used an aquatic herbicide, Magnacide H, to control the growth of aquatic weeds in the canals.[367] The Headwaters organization and another environmental group whose members used the streams near the irrigation canals filed a citizens' suit under the Act claiming that TID had violated the FWPCA by discharging aquatic herbicides into irrigation canals without the National Pollutant Discharge Elimination System (NPDES) permit required under the Act.[368] The plaintiffs alleged that the herbicide periodically flowed from the canals into the navigable Bear Creek through a malfunctioning waste gate,[369] and had in fact killed more than 92,000 steelhead in Bear Creek.[370]

The Ninth Circuit determined that *SWANCC's* holding that the FWPCA jurisdiction does not include isolated waters did not apply to the canals because intermittent tributaries of navigable waters are not isolated waters.[371] The *Headwaters* court read the Supreme Court's decision to exclude intrastate "'isolated waters'" that have "no connection to any navigable waters" from the Act's jurisdiction over "waters of the United States."[372] But in this case, the court found that the

363. Id. at 416-17.
364. Id. at 415 n.5, 416–18.
365. 243 F.3d 526 (9th Cir. 2001).
366. *See id.* at 533–34; Calderon, *supra* note 8, at 316; Hull, *supra* note 44.
367. *Headwaters*, 243 F.3d 526, 528.
368. *Id.* at 528–29.
369. *Id.*
370. *Id.* at 528.
371. *Id.* at 533.
372. *See id.*; Hull, *supra* note 44, at 436 ("The Ninth Circuit decided *Headwaters* correctly by maintaining the historically broad jurisdiction of the [FWPCA] and limiting the reach of *SWANCC* to truly isolated intrastate waters.").

canals were not "isolated waters." Rather, they served as tributaries to "waters of the United States," because, even though the canals were separated from natural streams by a system of closed waste gates, periodic leaks caused the canals to exchange water with several natural streams and at least one lake, which were clearly "waters of the United States."[373] While TID claimed that the canals were a "closed system," the court concluded that leaks from the canals into the local creeks had killed fish in 1983 and 1996 and that there was no guarantee there would be no future leaks despite the defendants' new "protocol" to prevent such leaks.[374] While the canals only intermittently contributed water to these navigable waters, the court concluded that such intermittent tributaries were "waters of the United States" subject to the Act's permit requirements.[375] Relying on lower court decisions decided before *SWANCC*, the Ninth Circuit held that the defendant was required to obtain an NPDES permit to apply an aquatic herbicide to non-navigable irrigation canals that intermittently flowed into "waters of the United States" even if there was no proof that the herbicide actually polluted navigable waters.[376] The Ninth Circuit's decision in *Headwaters* suggests that even infrequent hydrological connections between non-navigable and navigable waters can, if ecologically significant, render a body of water an intermittent tributary that constitutes "waters of the United States."[377]

Headwaters does not address *SWANCC's* apparent requirement that non-navigable waters share a "significant nexus" with navigable waters in order to fall within the scope of the FWCPA.[378] To the extent the Ninth Circuit suggested that *any* hydrological connection between non-navigable waters and navigable waters establishes federal jurisdiction, *Headwaters* is inconsistent with *SWANCC*. However, evidence of a significant connection between the irrigation canals and navigable waters justifies the Ninth Circuit's conclusion that the canals were within the FWPCA. Since prior releases of herbicide from the canals had harmed

373. *Headwaters*, 243 F.3d at 533.

374. *Id.* at 533–34.

375. *Id.* at 534. To address continuing controversy arising from *Headwaters*, the EPA recently issued guidance that National Pollutant Discharge Elimination (NPDES) Permits under Section 402 of the FWPCA are generally *not* required for applications of pesticides regulated under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), but that states or tribes may regulates such discharges if they affect water quality. *See* G. Tracy Mehan, EPA Assistant Administrator for Water & Stephen L. Johnson, EPA Assistant Administrator for Prevention, Pesticides and Toxic Substances, Interim Statement & Guidance on Application of Pesticides of the Waters of the United States in Compliance with FIFRA (July 11, 2003), reprinted 68 Fed. Reg. 48,385 (Aug 13, 2003).

376. *Headwaters*, 243 F.3d at 534.

377. *See* Liebesman & Turner, *supra* note 36, at 213.

378. *See SWANCC*, *supra* note 2, at 167; *supra* notes 225–29 and *infra* notes 505–22, 549, 554–57 and accompanying text.

fish in navigable waters, the court was correct to place the burden of proof on TID to establish that leaks could not occur in the future. TID failed to meet this burden.[379]

If an intermittent tributary is capable of seriously affecting navigable waters, the FWPCA's fundamental goal of preventing pollution to navigable waters argues for treating such a tributary as "waters of the United States."[380] The Ninth Circuit correctly stated that "[t]he [FWPCA] is concerned with the pollution of tributaries as well as with the pollution of navigable streams, and 'it is incontestable that substantial pollution of one not only may but very probably will affect the other.'"[381] Previous decisions had correctly held that normally dry creeks and arroyos that connect to streams during intense rainfall are "waters of the United States" because they can substantially affect navigable waters, even if they only do so infrequently.[382] The *Headwaters* court correctly concluded that the canals were within the FWPCA because the herbicide's potential harm to fish established a significant connection to navigable waters. But the court would have done better by framing its holding as consistent with the SWANCC significant nexus test, thus emphasizing that insignificant connections between navigable and non-navigable waters will not establish jurisdiction under the FWPCA.

2. Lamplight Equestrian Center *Allows Jurisdiction Whenever a "Significant Nexus" Between Intrastate Waters and Navigable Waters Exists*

Several district court decisions have reached a conclusion similar to the Ninth Circuit's ruling in *Headwaters*, suggesting that any hydrological connection between non-navigable and navigable waters is sufficient to establish jurisdiction under the FWPCA consistent with *SWANCC*. In *United States v. Lamplight Equestrian Center*,[383] the United States District Court for the Northern District of Illinois agreed with the hydrological connection and nexus approach used in *Headwaters* - tributaries are not isolated if they exchange waters with natural streams that are navigable or connected to navigable waters.[384] The case involved a fifty-two-acre tract of land, which included approximately eight acres of wetlands.[385] The landowner placed sand and clay fill for a road in some of the

379. *See* Liebesman & Turner, *supra* note 36, at 213.

380. *Headwaters*, 243 F.3d at 534; *see* Liebesman & Turner, *supra* note 36, at 213.

381. *Headwaters*, 243 F.3d at 534 (quoting United States v. Ashland Oil and Transp. Co., 504 F.2d 1317, 1329 (6th Cir. 1974)); *see* Liebesman & Turner, *supra* note 36, at 213.

382. *See, e.g.*, Quivira Mining Co. v. EPA, 765 F.2d 126, 130 (10th Cir. 1985); United States v. Phelps Dodge Corp., 391 F. Supp. 1181, 1187 (D. Ariz. 1975).

383. 2002 WL 360652, 54 ERC 1217, 32 Envtl. L. Rep. 20,526 (N.D. Ill. 2002).

384. *Id.* at *5.

385. *Id.* at *1.

wetlands without obtaining a permit from the Corps.[386] The Corps argued that the wetlands were within its jurisdiction and subject to permit requirements because they drained into Brewster Creek, which in turn is connected to the navigable Fox River.[387] The landowner claimed that the wetlands were isolated and outside its jurisdiction in light of *SWANCC*.[388]

The *Lamplight* court examined several district court decisions that had followed the Ninth Circuit approach and found that "[a]t least six lower courts, including two in th[e Seventh] Circuit, have followed *Headwaters*' lead in declining to read *SWANCC* as a broad reduction of the Corps' authority to regulate waters under the Act."[389] The *Lamplight* court agreed with *Headwaters* and the subsequent district court cases that *SWANCC* set aside the Migratory Bird "Rule," but did not effect so substantial a change in the Corps' jurisdiction. The court distinguished *SWANCC* on its facts, finding that the waters in *SWANCC* were "lacking a physical/hydrological connection to other navigable waters."[390] The "critical issue" for the *Lamplight* court was whether there was a "significant nexus" between the Property's wetlands and the Fox River.[391]

The *Lamplight* court concluded that the hydrological connection between the wetlands at issue and a tributary to a navigable water was enough to place the wetlands within the scope of the Act, even though the connection was intermittent and the tributary itself was not navigable.[392] The defendant had conceded that a hydrologic connection existed after rain events and during certain (presumably wet) seasons.[393] Following *Headwaters*, the district court concluded that "[w]ater need not flow in an unbroken line at all times to constitute a sufficient connection to a navigable water or its tributaries; as recognized by other courts, intermittent flow of the type *Lamplight* has acknowledged can be sufficient to establish the Corps' jurisdiction."[394] Additionally, the court found that a connection between the wetlands and the tributary of Brewster Creek established "adjacency." The court held that "by virtue of the path of water, whether it be a delta, a meandering swale, or a drainage connection the wetlands come into actual contact with the tributary of the creek."[395]

386. *Id.*
387. *Id.* at *1–2.
388. *Id.* at *1.
389. *Id.*
390. *Id.* at *6.
391. *Id.*
392. *Id.* at *7.
393. *Id.*
394. *Id.*
395. *Id.* at *8.

Furthermore, the *Lamplight* court concluded that it did not matter whether the creek was navigable, as long as the creek was connected to navigable waters. The district court explained that:

> a tributary need not have a direct connection to the navigable water, but may be linked through other connections two or three times removed from the navigable water and still be subject to the Corps' jurisdiction .... Even where the distance from the tributary to the navigable water is significant, the quality of the tributary is still vital to the quality of the navigable waters.[396]

While acknowledging that the Fifth Circuit in *Rice,* at least in dicta, had taken a broader view of *SWANCC*, the *Lamplight* court implied that the facts in *Rice* were quite different and distinguishable from its case "because there was evidence only of oil discharge onto dry land rather than into any body of surface water."[397] To the extent that *Rice* was relevant, it represented a minority interpretation among lower federal courts. The *Lamplight* court observed

> that the remainder of courts considering the issue have reached the opposite conclusion: that *SWANCC* struck the Migratory Bird Rule, pushing "isolated waters' that may *affect* interstate commerce out of the Corps' jurisdiction, without altering the Corps" reach where its jurisdiction is based on a water's use or potential use as a channel of interstate commerce.[398]

While the district court in *Lamplight* correctly ruled a tributary need not have a direct connection to navigable waters, it failed to provide a clear test for how significant an indirect connection must be in order to trigger FWPCA jurisdiction.[399] The district court correctly stated that a significant nexus was required under *SWANCC*, but again it failed to quantify the connection between the wetlands and the navigable waters, or discuss how the non-navigable waters at issue might significantly impact navigable waters. The *Lamplight* court should have addressed not just whether there was a connection between the wetlands and the navigable waters, but whether the connection was significant.

3. Buday *and* Rapanos *Allow Jurisdiction in Cases Involving Pollution into Tributaries or Wetlands that Reach Navigable Waters*

In *United States v. Buday,*[400] the United States District Court for the District of Montana held that the Corps had jurisdiction to regulate the discharge of pollutants into tributaries of navigable waters and wetlands

396. *Id.*
397. *Id.* at *5.
398. *Id.*
399. *Id.* at *6–7.
400. 138 F. Supp. 2d 1282 (D. Mont. 2001).

adjacent to such tributaries as "waters of the United States," even though the creek and surrounding wetlands were not navigable and did not connect with navigable waters for at least 235 miles. In *Buday*, the defendant pled guilty to knowingly discharging pollutants, including dredge and fill material, into navigable waters in violation of the FWPCA.[401] The defendant entered his guilty plea just hours before the Supreme Court decided *SWANCC*.[402] In ruling on the defendant's motion to withdraw his guilty plea, the district court concluded that the Supreme Court's decision in *SWANCC* did not affect cases involving pollution into tributaries or wetlands that eventually reached navigable waters. The *SWANCC* Court had rejected the Migratory Bird "Rule" because it focused on the possible *effects* non-navigable waters could have on interstate commerce, which are open-ended and often unrelated to navigation. This is in contrast to the traditional focus on whether waters served as navigable *channels* for commerce. The court found that the Migratory Bird "Rule" was "based on a different inflection of the theory of Congress' powers over the waters of the United States."[403]

In denying the defendant's motion to withdraw his guilty plea, the court concluded that the creek was a tributary to navigable waters and therefore the wetlands next to the creek were "waters of the United States."[404] The court emphasized that the defendant knew that he needed a permit from the Corps to do excavation work in a wetlands area and had agreed that the creek was a "navigable water" within the meaning of the FWPCA.[405] The district court reached the right result. If the guilty plea had been entered after *SWANCC*, however, the district court would have had to consider whether the wetlands and Fred Burr Creek had a "significant nexus" with a navigable water that was over two hundred miles away.

Likewise, the Sixth Circuit in *United States v. Rapanos* recently reinstated the conviction of a landowner who illegally discharged material into a wetland based on the potential pollution of a navigable-in-fact waterway.[406] The court determined that direct adjacency between the wetland and navigable water was not required because contamination of Rapanos' wetland could affect the navigable waterway through a hydrological connection between the two water bodies.[407]

401. *Id.* at 1284.
402. *Id.*
403. *Id.* at 1287.
404. *Id.* at 1291–95.
405. *Id.* at 1284.
406. United States v. Rapanos, 339 F.3d 447 (6th Cir. 2003), *petition for cert. filed*, (U.S. Dec. 22, 2003) (No. 03-929).
407. *Id.*

The procedural posture of the case is intricate. The defendant in *Rapanos* owned 175 acres of land, about one-third of which were wetlands, located about twenty miles from a bay and navigable section of a river.[408] Seeking to improve the property for sale, the defendant used sand to fill in the wetlands, without obtaining a permit from the Corps.[409] The government prosecuted him for violating the FWPCA.[410] In 1995, a jury convicted the defendant of two counts of knowingly discharging pollutants into waters of the United States without a permit, in violation of Section 301(a) of the Act.[411] The district court sentenced the defendant to three years' probation and a fine of $185,000.[412] The defendant appealed his conviction and the government cross-appealed his sentence.[413] The Sixth Circuit agreed with the government that the district court improperly sentenced the defendant and remanded the case for re-sentencing, and simultaneously summarily dismissed the defendant's appeal.[414] After the Sixth Circuit decided the case, the Supreme Court issued its *SWANCC* decision. The Supreme Court granted the defendant's petition for a writ of certiorari, vacated the court of appeals' order, and remanded the case for reconsideration in light of *SWANCC.*[415] The Sixth Circuit remanded the case to the district court.[416] The district court interpreted the *SWANCC* decision to require that wetlands be *directly* adjacent to navigable waters in order to fall under the FWPCA, and therefore reversed Rapanos' conviction. In a recent decision, the Sixth Circuit reinstated Rapanos' conviction.

Even after *SWANCC,* the government argued that the wetlands were "waters of the United States" because they constituted a "tributary."[417] The government argued that the wetlands were connected to navigable waters by a "surface hydrological connection," made up of an open drain sluice, or ditch, connected to a creek that in turn was connected to the navigable Kawkawlin River.[418] The government argued that the wetland's hydrological connection to the Kawkawlin River placed the wetlands within the jurisdiction of the Act.[419]

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408. United States v. Rapanos, 190 F. Supp. 2d 1011, 1012 (E.D. Mich. 2002), *rev'd*, 339 F.3d 447 (6th Cir. 2003), *petition for cert. filed*, (U.S. Dec. 22, 2003) (No. 03-929).
409. *Id.*
410. *Id.*
411. *Id.*
412. *Id.* at 1013.
413. *Id.*
414. *See* United States v. Rapanos, 235 F.3d 256, 261 (6th Cir. 2000).
415. *Rapanos,* 190 F. Supp. 2d at 1013.
416. *See* United States v. Rapanos, 16 Fed. Appx. 345 (6th Cir. 2001).
417. *Rapanos,* 190 F. Supp. 2d at 1013–14.
418. *Id.* at 1014–15.
419. *Id.*

The Sixth Circuit rejected the district court's finding that *SWANCC* requires direct adjacency.[420] The lower court commented in a footnote that frequently "even the most 'isolated' wetlands are in fact both hydrologically connected, as well as ecologically connected, to navigable waters," but that *SWANCC* still treated them as "isolated" and outside the scope of the Act if the connection was indirect or remote.[421] The Sixth Circuit, however, took a much more narrow view of *SWANCC*. While the Sixth Circuit agreed that the *SWANCC* opinion "limits the application of the Clean Water Act," it found that *SWANCC* "did not go as far as Rapanos argues."[422] Rather it characterized the *SWANCC* decision as primarily invalidating the Migratory Bird "Rule."[423]

The Sixth Circuit in *Rapanos* also found the rationale of *Riverside Bayview* and *Deaton* more compelling and factually similar to *Rapanos* than *SWANCC* was.[424] Drawing on the *Riverside Bayview* Court's view that the Act regulates some non-navigable waters to prevent the pollution of navigable waters, the district court acknowledged that a hydrological connection was sometimes enough to show the potential of non-navigable water to pollute navigable waters.[425] The district court, nevertheless, distinguished *Riverside Bayview* by observing that the wetlands in *Riverside Bayview* were directly adjacent to navigable waters, while the wetlands in *Rapanos* were not adjacent to navigable waters.[426] The Sixth Circuit, however, rejected the requirement of direct adjacency, finding that so long as a hydrological connection existed and pollution could potentially travel from the wetland to the navigable water, the adjacency requirement is met.

While the district court made much of the United States' inability to provide evidence that the defendant's activities in *Rapanos* had a direct impact on navigable waters,[427] the Sixth Circuit was not so hamstrung. In *United States v. Ashland Oil and Transp. Co.*,[428] the Sixth Circuit concluded that the defendant violated the FWPCA by releasing 3,200 gallons of oil into a non-navigable tributary located one hundred feet from a creek that flowed into a navigable river where the oil created a visible sheen in the creek.[429] By contrast, there was no similar evidence in *Rapanos*. The district court found that "the plain text of the statute

420. United States v. Rapanos, 339 F.3d 447, 452–53 (6th Cir. 2003), *petition for cert. filed*, (U.S. Dec. 22, 2003) (No. 03-929).

421. *See Rapanos*, 190 F. Supp. 2d at 1014 n.3; Liebesman & Turner, *supra* note 36, at 212.

422. *Rapanos*, 339 F.3d at 452–53.

423. *See id.* at 452–53.

424. *Id.*

425. *See Rapanos*, 190 F. Supp. 2d at 1016; Liebesman & Turner, *supra* note 36, at 211–12.

426. *Rapanos*, 190 F. Supp. 2d at 1016.

427. *Id.*

428. 504 F.2d 1317 (6th Cir. 1974).

429. *See id.* at 1319–25.

mandates that navigable waters must be impacted by [d]efendant's activities."[430] The court found "as a matter of law, that the government is unable to prove that [d]efendant, whose land contained wetlands that are located roughly twenty miles from the nearest body of navigable water, affected any navigable waters."[431]

As the Sixth Circuit found, the district court was wrong as a matter of law to require evidence of actual impacts on navigable waters in addition to a hydrological connection. If a clear hydrological connection exists, the government should not have to prove an impact on navigable waters. The 1972 Act sought to eliminate the requirement in earlier versions of the Federal Water Pollution Act that the government prove that a water discharge caused harm.[432] Furthermore, as Part VI will demonstrate, *Riverside Bayview* did not require adjacent wetlands to actually abut navigable waters; wetlands are considered "adjacent" if they have hydrological connections to the navigable waters and are in reasonable proximity to those navigable waters.[433]

While the district court was wrong to demand direct evidence of harm to navigable waters, the court had some legitimate concerns about whether the hydrological connection between the wetlands and navigable waters constituted a "significant nexus," given the twenty-mile distance between the wetlands and the navigable waters. As discussed in Part VI, while adjacent wetlands need not abut navigable waters, the Corps regulations appropriately require that wetlands "neighbor" navigable waters.[434]

Several courts concluded that the FWPCA's jurisdiction includes wetlands that are adjacent to non-navigable tributaries and the government might have been able to establish jurisdiction on this basis.[435] The district court acknowledged that the government might have tried to prove that the wetlands were adjacent to non-navigable tributaries that flowed into navigable waters. However, the district court claimed that the jury instructions during the trial, which occurred before the *SWANCC* decision, did not clearly distinguish jurisdiction based on such an adjacency from jurisdiction over totally isolated wetlands.[436] The district court stated: "Thus, while the jury could have found that the wetlands on

430. *Rapanos*, 190 F. Supp. 2d at 1017.

431. *Id.*

432. *See* Weyerhaeuser Co. v. Costle, 590 F.2d 1011 (D.C. Cir. 1978) (rejecting paper mills' argument that EPA should consider receiving water quality in setting effluent standards because 1972 Act was based on new approach, rejecting earlier versions of Federal Water Pollution Control Act that required government to prove discharger harmed water quality).

433. *See supra* notes 162–165, 174, 296–300 and *infra* notes 531-35, 550 and accompanying text.

434. *See supra* notes 171–72 and *infra* notes 533–36 and accompanying text.

435. *See supra* notes 183–85 and accompanying text.

436. *See Rapanos*, 190 F. Supp. 2d at 1014.

[d]efendant's property were adjacent to a tributary, such a finding was not necessary; indeed, it is possible under these instructions that the jury found the wetlands at issue to be completely 'isolated' from any navigable waters, yet still impacted interstate commerce."[437] Because the case was tried in 1995 before *SWANCC* limited the FWPCA's jurisdiction, it is not surprising that the jury instructions, which the government and defendant agreed to, did not exclude jurisdiction over isolated waters.[438] In future cases, if wetlands are a significant distance from navigable waters, courts should examine whether the wetlands are nevertheless adjacent to a non-navigable tributary that flows into navigable waters.

4. Brace *Identifies the Key Issue Under SWANCC as Whether a Nexus Exists Between Wetlands and an Interstate Channel*

In *Brace v. United States*,[439] the United States Court of Federal Claims addressed a property owner's claim that the government effectively took his property without just compensation when the Corps ordered him to stop maintenance and operation of a drainage system on his property and to restore part of the property to wetland status.[440] The court denied the government's summary judgment motion on the takings claim because triable issues existed as to whether the property and an interstate water shared a significant nexus.[441] Citing the Ninth Circuit's decision in *Headwaters,* the *Brace* court correctly noted that the key factual question under *SWANCC* is whether a nexus between wetlands and an interstate channel exist.[442] In the absence of a nexus, the Corps lacks jurisdiction over the wetlands.[443] The *Brace* court correctly recognized that the nexus issue was central to determining the Corps' jurisdiction under the FWPCA.

5. California Sportfishing *and* Bosma*: Underground Pipes and Groundwater*

In *Rice*, the Fifth Circuit concluded that the defendant's disposal of oil on dry land, which then contaminated groundwater and possibly reached navigable waters, was outside the Act because the FWPCA's jurisdiction did not reach groundwater.[444] However, two district court decisions have found that subsurface waters are within the jurisdiction of

437. *Id.*
438. *Id.* at 1014 & n. 4.
439. 51 Fed. Cl. 649 (2002).
440. *Id.* at 650; *see also* Brace v. United States, 48 Fed. Cl. 272 (2000).
441. *Brace*, 51 Fed. Cl. at 653.
442. *Id.* at 652–53.
443. *Id.* at 653.
444. *See supra* notes 312–27 and accompanying text.

the Act if evidence indicates that they are contaminating navigable waters.[445] And unlike *Rice*, in which there was mere speculation that the oil on the ranch actually reached navigable waters,[446] the evidence of contamination in *California Sportfishing* was far stronger.

In *California Sportfishing Protection Alliance v. Diablo Grande, Inc.*,[447] the United States District Court for the Eastern District of California followed the Ninth Circuit's *Headwaters* ruling that non-navigable tributaries are waters of the United States.[448] In *California Sportfishing,* the defendant argued that Salado Creek, a non-navigable tributary to a navigable water, could not be a "navigable water" because it flowed through an underground pipeline on its way to the San Joaquin River.[449] The defendant contended that the case was factually closer to *Rice* than to *Headwaters*.[450]

The *California Sportfishing* court distinguished *Rice* on two grounds. First, in *Rice* "there was no evidence of any discharge into any surface water; the allegation was that oil seeped into the ground, mixed with groundwater, and then made its way into several bodies of surface water."[451] By contrast, in *California Sportfishing* elevated turbidity levels indicated direct discharge into surface waters. Second, unlike in *Rice,* the connection to the navigable water was uncomplicated and direct, and no groundwater was involved.[452] The court did not have to decide whether groundwater was within the confines of the Act, because "[t]he fact that the waters of Salado Creek flow underground, partially through a pipe, does not make them 'groundwater' outside the jurisdiction of the Act."[453]

Unlike *Rice*, where there was no clear evidence of a hydrological connection between the groundwater and the river,[454] here, there was no dispute that, at times, water in Salado Creek flows into the San Joaquin River. Thus, the *California Sportfishing* decision convincingly distinguished the *Rice* decision. Courts should find a significant nexus where non-navigable waters have a clearly perceptible impact on navigable waters or where non-navigable waters could have a measurable impact on navigable waters in the future.[455]

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445. *See infra* notes 446–74 and accompanying text

446. *See supra* notes 322–26 and accompanying text.

447. 209 F. Supp. 2d 1059 (E.D. Cal. 2002).

448. *Id.* at 1075.

449. *Id.*

450. *Id.* at 1075–76.

451. *Id.* at 1076 (citing Rice v. Harken Exploration Co., 250 F.3d 264, 270 (2001).

452. *Id.* at 1076.

453. *Id.* at 1076 (footnote omitted).

454. *See Rice,* 250 F.3d at 272.

455. *See supra* notes 359–61, 389-96, 425 and *infra* notes 521-23 536–42, 549, 554–58 and accompanying text.

Even if the tributary in *California Sportfishing* had been characterized as groundwater, the tributary may still have been a navigable water under the FWPCA.[456] The United States District Court for the District of Idaho in *Idaho Rural Council v. Bosma* held that the FWPCA's legislative history only requires exclusion of isolated groundwater that has no hydrological connection to surface waters.[457] In *Bosma*, the plaintiffs, Idaho Rural Council, a non-profit representing various family farmers, brought a citizens' suit under the Act alleging that the defendant Bosma had dumped waste from its dairy farm into holding ponds and irrigation canals that seeped into groundwater and surface waters.[458] The Idaho district court concluded that the defendants had violated the Act by dumping pollutants into two springs, Butler and Walker Springs that were "sufficiently connected through surface water to Clover Creek as to fall within the definition of waters of the United States."[459]

The district court next addressed "[t]he more difficult issue" of whether the defendant's "alleged discharge of pollutants into groundwater that was hydrologically connected to the springs violated the [FWPCA]."[460] If groundwater is not hydrologically connected to surface water, courts "generally agree that waters of the United States do not include isolated, non-tributary groundwater, and that discharges of pollutants into such groundwater are not subject to [FWPCA] regulation."[461] On the other hand, "[t]he courts are split, . . . on the issue of whether the discharge of pollutants into groundwater which find their way into and affect the waters of the United States are subject to [FWPCA] regulation."[462] Neither the Supreme Court nor the Ninth Circuit, the circuit in which the Idaho district court is located, had addressed the issue directly.[463] The *Bosma* court found that since the goal of the FWPCA was to protect surface waters, it didn't matter whether the pollutant entered such waters directly or through groundwater.[464]

Conversely, many other courts read the Act's legislative history to exclude groundwater.[465] These courts point out that the statute expressly

456. *See infra* notes 457–74 and accompanying text.

457. 143 F. Supp. 2d 1169, 1179 (D. Idaho 2001).

458. *Id.* at 1173–74.

459. *Id.* at 1178–79.

460. *Id.* at 1179.

461. *Id.*; *see generally* Quatrochi, *supra* note 314, at 643 (stating "[a]lthough it may be arguable that nontributary groundwater is covered by the [FWPCA], the Tenth Circuit only includes tributary groundwater [which is defined as water that reaches surface waters]").

462. *Bosma*, 143 F. Supp. 2d at 1179.

463. *Id.*.

464. *Id.* at 1179–80.

465. *Id.* at 1180 (citing Vill. of Oconomowoc Lake v. Dayton Hudson Corp., 24 F.3d 962 (7th Cir. 1994)); Town of Norfolk v. Corps of Eng'rs, 968 F.2d 1438, 1451 (1st Cir.1992); Umatilla Waterquality Protective Assoc., Inc. v. Smith Frozen Foods, Inc., 962 F. Supp. 1312, 1318 (D. Or.

included groundwater in certain provisions of the Act, indicating that Congress distinguished groundwater from navigable waters.[466] Additionally, Congress was reluctant to regulate groundwater because states defined the term differently, rendering national legislation difficult.[467] Furthermore, the EPA has not sought to regulate groundwater consistently.[468] In *Village of Oconomowoc Lake v. Dayton Hudson Corp.*,[469] the Seventh Circuit argued that the Act should not include groundwater because all groundwater eventually reaches surface water, and the legislature never intended the Act to reach every drop of water at every point of the hydrologic cycle.[470]

While acknowledging that there were arguments against regulating groundwater under the Act, the *Bosma* court read the Act's legislative history to "extend[] federal jurisdiction over groundwater that is hydrologically connected to surface waters that are themselves waters of the United States."[471] The court therefore denied the defendant's motion for summary judgment that argued that groundwater is simply beyond the Act's jurisdiction.[472] However, the court held that the plaintiff has the burden of demonstrating that polluted groundwater actually reaches navigable waters.[473] The court found that in meeting that burden, it would be insufficient "to assert a general hydrological connection between all waters."[474] The court required plaintiffs to trace pollutants from their source to the surface waters in question.[475]

As the *Bosma* court recognized, whether Congress intended to include groundwater within the FWPCA's jurisdiction is ambiguous.[476] Under the *Chevron* doctrine, courts defer to an agency's expertise in

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1997); Kelley v. U.S., 618 F. Supp. 1103, 1106 (W.D. Mich. 1985)); *see* Quatrochi, *supra* note 314, at 626–32 (discussing Seventh Circuit's view that groundwater is not within FWPCA's jurisdiction).

466. *Bosma*, 143 F. Supp. 2d at 1180 (citing *Umatilla*, 962 F. Supp. at 1318).

467. *Id.* at 1180 (citing *Umatilla*, 962 F. Supp. at 1318); *see* S. REP. NO. 92-414 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3739; *Vill. of Oconomowoc Lake*, 24 F.3d at 965; Quatrochi, *supra* note 314, at 615–16, 632.

468. *Bosma*, 143 F. Supp. 2d at 1180 (citing *Umatilla*, 962 F. Supp. at 1318); *see Vill. of Oconomowoc Lake*, 24 F.3d at 965–66 (observing that EPA has never directly regulated groundwater and that any indirect regulation is not a basis for finding jurisdiction under the Act); *see also* Quatrochi, *supra* note 314, at 631.

469. *Vill. of Oconomowoc Lake*, 24 F.3d at 962.

470. *Id.* at 964–65; Quatrochi, *supra* note 314, at 631.

471. *Bosma*, 143 F. Supp. 2d at 1180.

472. *Id.* at 1180–81.

473. *Id.*

474. *Id.* (citing Washington Wilderness Coalition v. Hecla Mining Co., 870 F. Supp. 983, 990 (E.D. Wash. 1994)).

475. *Id.* at 1180–81.

476. *See* Thomas L. Casey, III, Comment, *Reevaluating "Isolated Waters": Is Hydrologically Connected Groundwater "Navigable Water" Under the Clean Water Act?*, 54 ALA. L. REV. 159, 160–74 (2002) (arguing statute and legislative history of Clean Water Act are ambiguous regarding whether statute includes groundwater hydrologically connected to surface waters).

addressing ambiguous statutory issues.[477] If the Corps or the EPA issues a revised guidance or rule that addresses groundwater, courts should defer to the agencies' interpretation of whether groundwater is within the scope of the Act.

VI. FEDERAL GUIDANCE IN THE WAKE OF SWANCC

A. *Advance Notice of Proposed Rule Making*

In anticipation of issuing a revised guideline or rule to address their jurisdiction over "waters of the United States" under the Act, the EPA and the Corps published an Advance Notice of Proposed Rule Making (ANPRM), which requested public comment on the impact of *SWANCC* on the Act's jurisdiction. The agencies specifically solicited comment from the public on the following two issues:

> (1) Whether, and, if so, under what circumstances, the factors listed in 33 CFR 328.3(a)(3)(i)-(iii) (i.e., use of the water by interstate or foreign travelers for recreational or other purposes, the presence of fish or shellfish that could be taken and sold in interstate commerce, the use of the water for industrial purposes by industries in interstate commerce) or any other factors provide a basis for determining [FWPCA] jurisdiction over isolated, intrastate, non-navigable waters?
>
> (2) Whether the regulations should define "isolated waters," and if so, what factors should be considered in determining whether a water is or is not isolated for jurisdictional purposes?[478]

The agencies requested that commenters "provide, as appropriate, any information (e.g., scientific and technical studies and data, analysis of environmental impacts, effects on interstate commerce, other impacts, etc.) supporting your views, and specific recommendations on how to implement such views."[479] The agencies also invited commenters to submit their "views as to whether any other revisions are needed to the existing regulations on which waters are jurisdictional under the [FWPCA]."[480]

Consistent with the January 19, 2001 joint memorandum, the ANPRM persuasively contended that the *SWANCC* decision has implications beyond the Section 404 wetlands program and "may also affect the scope of regulatory jurisdiction under other provisions of the [FWPCA], including programs under sections 303, 311, 401, and 402," that use the phrase "waters of the United States."[481] The ANPRM

477. *See supra* notes 256, 263 and accompanying text.
478. ANPRM, *supra* note 6, at 1994.
479. *Id.*
480. *Id.*
481. *Id.* at 1993. The ANPRM summarizes these sections as follows:

observed that "[t]he *SWANCC* decision also highlights the role of States in protecting waters not addressed by Federal law. Prior to *SWANCC*, fifteen States had programs that addressed isolated wetlands."[482] The agencies also noted that several federal programs existed to assist these state efforts.[483] To assess both current state and federal programs, the agencies solicited comments addressing "the availability and effectiveness of other Federal or State programs for the protection of aquatic resources, and on the functions and values of wetlands and other waters that may be affected by the issues discussed in this ANPRM."[484] The notice originally gave the public forty-five days to respond,[485] but the agencies subsequently extended the deadline to April 16, 2003.[486]

B. Joint Memorandum

In its summary, the ANPRM directs "the regulated community" to "seek assistance from the Corps and EPA, in accordance with the joint memorandum attached as Appendix A" while the rule making on *SWANCC* is pending.[487] It is somewhat unusual for an agency to publish such a guidance document in the Federal Register because courts treat

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> • Section 303 water quality standards program. Under this program, States and authorized Indian Tribes establish water quality standards for navigable waters to "protect the public health or welfare" and "enhance the quality of water", "taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agriculture, industrial, and other purposes, and also taking into consideration their use and value for navigation."
>
> • Section 311 spill program and the Oil Pollution Act (OPA). Section 311 of the [FWPCA] addresses pollution from both oil and hazardous substance releases. Together with the Oil Pollution Act, it provides EPA and the U.S. Coast Guard with the authority to establish a program for preventing, preparing for, and responding to spills that occur in navigable waters of the United States.
>
> • Section 401 State water-quality certification program. Section 401 provides that no Federal permit or license for activities that might result in a discharge to navigable waters may be issued unless a section 401 water-quality certification is obtained from or waived by States or authorized Tribes.
>
> • Section 402 National Pollutant Discharge Elimination System (NPDES) permitting program. This program establishes a permitting system to regulate point source discharges of pollutants (other than dredged or fill material) into waters of the United States.

Id.

482. *Id.* at 1995.

483. *Id.*

484. *Id.* at 1994.

485. *Id.* at 1991.

486. Advanced Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of Waters of the United States, 68 Fed. Reg. 9613 (Feb. 28, 2003); *see also* EPA, *Clean Water Act Definition of "Waters of the United States," at* http://www.epa.gov/owow/wetlands/swanccnav.html#extension (last updated May 8, 2003).

487. *See* ANPRM, *supra* note 6.

such documents as only tentative guidance to agency staff rather than legally binding on the public,[488] but the quotation in the preceding sentence suggests that the agencies intended the joint memorandum to provide guidance as well to the regulated community until the agencies issue a more definitive rule or decision on the Act's jurisdiction. The agencies' decision to publish the joint memorandum was a good policy decision because guidance documents are frequently effectively binding on the public and therefore agencies should give the public notice of their existence.[489] The joint memorandum, however, does not have legally binding effect. At the end of the ANPRM as published in the Federal Register, there is the statement that "[t]he following guidance document will not appear in the Code of Federal Regulations."[490]

In the January 2003 joint memorandum signed by Robert Fabricant, the EPA's General Counsel, and Steven Morello, General Counsel, Department of the Army, the agencies issued "clarifying guidance" regarding *SWANCC*.[491] The memorandum reviews and summarizes all the significant lower court cases decided in 2001 and 2002 interpreting the Act's jurisdiction in light of *SWANCC*.[492] It discusses the often-conflicting views of the lower courts about jurisdiction over adjacent wetlands and tributaries of various types. While primarily raising questions about the Act's jurisdiction, the 2003 joint memorandum unsurprisingly prohibits field staff from asserting FWPCA jurisdiction over non-navigable intrastate waters where the sole basis for jurisdiction are the factors listed in the Migratory Bird "Rule."[493] *SWANCC* clearly requires this prohibition.[494] More importantly, the guidance requires field staff to obtain "formal project-specific approval" from agency headquarters before asserting jurisdiction over isolated non-navigable intrastate waters based on interstate commerce links other than migratory birds, even

488. *See generally* Am. Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1046 (D.C. Cir. 1987) (discussing difference between binding rules and non-binding guidance and interpretive statements); Batterton v. Marshall, 648 F.2d 694, 702 (D.C. Cir. 1980) (same).

489. *See generally* Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?* 41 DUKE L.J. 1311, 1328–32, 1359–62 (1992) (arguing policy statements should provide only tentative guidance to agency but are often misused to bind agency staff); Robert A. Anthony & David A. Codevilla, *Pro-Ossification: A Harder Look at Agency Policy Statements*, 31 WAKE FOREST L. REV. 667, 676–79 (1996) (arguing that policy statements, while issued tentatively, often acquire binding status); Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 383–84 (1985) (same).

490. *Id.* at 1995.

491. ANPRM, *supra* note 6, at 1995. The joint memorandum is included as Appendix A to the ANPRM in the Federal Register, *available at* http:// www.epa.gov/owow/wetlands/swanccnav.html.

492. *Id.* at 1995–97.

493. *Id.* at 1997.

494. *SWANCC*, *supra* note 2, at 172–74 (2001); *supra* note 217 and accompanying text.

though current regulations allow such jurisdiction.[495] Because the agencies published the 2003 joint memorandum, the January 2001 joint memorandum is no longer on the agencies' web sites. The EPA's web site specifically observes that it does not contain superceded guidance.[496]

C. Analysis of ANPRM and Joint Memorandum

By themselves, the ANPRM and 2003 guidance do not significantly change the substance of the agencies' approach to delineating the Act's jurisdiction, but they add procedural barriers by requiring agency headquarters to review field staff decisions.[497] Implying that the agencies have not significantly changed their approach to the Act's jurisdiction, Benjamin Grumbles, the EPA deputy assistant administrator for water, told reporters that the new guidance is "very similar" to the 2001 Guzy-Anderson memorandum, although it discusses subsequent judicial decisions.[498] Indeed, some developers and property rights advocates have complained that the ANPRM and 2003 guidance do not sufficiently clarify or restrict the jurisdiction of the agencies over waters.[499]

Environmentalists are concerned that the 2003 guidance and ANPRM will eventually lead to sharp reductions in the agencies' jurisdiction over isolated wetlands and waters.[500] Some EPA officials have acknowledged off the record that requiring approval for field staff decisions will likely curtail the agencies' jurisdiction and give greater control to state, local and tribal officials.[501] Significantly, Grumbles told

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495. ANPRM, *supra* note 6, at 1997–98; 33 C.F.R. § 328.3(a)(3)(i)–(iii) (2003); Bruninga, *supra* note 13, at 140.

496. EPA, *Clean Water Act Definition of "Waters of the United States," at* http://www.epa.gov/owow/wetlands/swanccnav.html#extension (last updated May 8, 2003).

497. See *infra* notes 500–501 and accompanying text.

498. Bruninga, *supra* note 13, at 140 (quoting Benjamin Grumbles, EPA deputy assistant administrator for water).

499. *See* Bruninga, *supra* note 7, at 139 (reporting developers seek consistent definition of Clean Water Act's jurisdiction because they contend various agency officials have applied inconsistent approach when issuing); Bruninga, *supra* note 12, at 140 (reporting National Association of Home Builder's view that the 2003 guidance does not clarify jurisdiction and allows agencies to assert jurisdiction over waters that *SWANCC* does not permit them to regulate); Allison Freeman & Damon Franz, *White House Seeks to Redefine Federal Wetlands Jurisdiction*, 10 LAND LETTER No. 9, Jan. 16, 2003 (quoting Duane Desiderio, vice president for legal affairs at the National Association of Home Builders, "This is only going to perpetuate the confusing disarray in the field."); Elizabeth Shogren, *EPA to Review Clean Water Act's Scope*, L.A. TIMES, Jan. 11, 2003, at A12, (stating "Developers and environmentalists expressed disappointment that the administration's announcement failed to clarify what waters now are covered by federal law"); *EPA Claims Isolated Waters Plans Affirm Strong Agency Oversight*, *supra* note 21 (reporting unnamed source with the National Association of Home Builders criticized the 2003 guidance and ANPRM for failing to clarify law).

500. See *infra* note 503 and accompanying text.

501. Michael Kilian & Julie Deardorff, *EPA Softens Protection of Wetlands*, CHI. TRIB., Jan. 11, 2003, at 1.

reporters at a January 10, 2003 briefing that the Corps districts only need to seek headquarters' approval if the districts want to regulate wetlands.[502] Environmentalists are concerned that the Bush administration, in keeping with its broader efforts to weaken environmental protections, will adopt a new rule significantly reducing the agencies' jurisdiction. In response to these criticisms, Grumbles claimed that the agencies might retain jurisdiction over wetlands and may not even issue new regulations; on December 16, 2003, the EPA and the Corps announced that the agencies would not issue new regulations significantly restricting their jurisdiction over wetlands, although they will keep the January 2003 joint guidance in effect until they issue revised guidance refining the Act's jurisdiction.[503] Grumbles has also downplayed the authority of the agencies by contending that the agencies are simply responding to policies outlined in recent judicial decisions.[504]

VII. USING SWANCC'S SIGNIFICANT NEXUS TEST TO DEFINE ADJACENT WETLANDS AND TRIBUTARIES UNDER THE FWPCA

The implications of *SWANCC* are far more important than its actual holding, which only expressly rejected the Migratory Bird "Rule" as a basis for regulating isolated wetlands.[505] While acknowledging that the Act covers some non-navigable waters, the *SWANCC* majority emphasized that navigability remains an important criterion for determining whether water is within the Act's jurisdiction.[506] In *SWANCC*, the Court justified its ruling in *Riverside Bayview* by explaining that there "was [a] significant nexus between the wetlands and 'navigable waters.'"[507] The *SWANCC* Court's emphasis on the "significant nexus" between the adjacent wetlands and navigable waters suggests that the Court will use that standard in future cases.

The "significant nexus" standard is consistent with judicial precedent, the Act's legislative history, and both the Corps' and the EPA's regulations asserting jurisdiction over all non-navigable waters that impact navigable water. Although neither the Act nor its legislative history explicitly refer to a "significant nexus" standard or to a hydrological connection approach,[508]a long history of judicial decisions beginning with *Rio Grande* in 1899 indicates that federal jurisdiction

502. *EPA Claims Isolated Waters Plans Affirm Strong Agency Oversight*, *supra* note 21.

503. *See* Bruninga, *supra* note 12, at 140; *EPA Claims Isolated Waters Plans Affirm Strong Agency Oversight*, *supra* note 20; supra note 25 and accompanying text.

504. *See* Bruninga, *supra* note 13, at 140.

505. *See supra* notes 3, 8, 217, 304 and accompanying text.

506. *See supra* notes 4–5, 222–29, 246 and accompanying text.

507. *SWANCC*, *supra* note 2, at 167.

508. *See* Albrecht & Nickelsburg, *supra* note 8, at 11056–57.

includes non-navigable waters that significantly affect navigable waters.[509] The 1972 Act's legislative history supports this view.[510]

Despite its focus on the "significant nexus" standard, the *SWANCC* decision does not explain how to apply the standard.[511] How close must the hydrological connection be between a non-navigable water and a navigable one before the former is within the Act's jurisdiction? Several lower court decisions, including the Ninth Circuit in *Headwaters*, have suggested or implied that any hydrological connection between non-navigable waters and navigable waters is sufficient.[512] Conversely, the Fifth Circuit in *Rice* and even more clearly in its most recent *In re Needham* decision has demanded a much stronger hydrological connection, perhaps limited to only non-navigable waters directly adjacent to navigable waters.[513] This Article adopts a middle interpretation requiring that non-navigable waters have a measurable or perceptible and potentially significant hydrological impact on navigable waters.[514]

The view that *any* hydrological connection between non-navigable waters and navigable waters is enough to bring non-navigable waters within the scope of the Act ignores the "significant" component of *SWANCC's* "significant nexus" test. In *United States v. Rueth*,[515] the United States District Court for the Northern District of Indiana adopted the broadest possible reading of the "significant nexus" test by concluding that a single molecule of water flowing from non-navigable waters to navigable waters was enough to establish a hydrological connection, and thus gave the federal government jurisdiction over the non-navigable waters.[516] The court contended that an isolated wetland is one in which not a drop of water reaches navigable waters, and distinguished its case from *SWANCC*. In *SWANCC*, "a molecule of water residing in [the] pits or ponds could not mix with molecules from other bodies of water."[517] Thus, there was no connection. In contrast, in the wetlands at issue in the *Rueth* case, "water molecules currently present in the wetlands will inevitably flow towards and mix with water from

509. *See supra* notes 79–80, 94–104, 106 and accompanying text.

510. *See supra* notes 108–14, 116–29 and accompanying text.

511. *See* Calderon, *supra* note 8, at 313–14.

512. *See* ANPRM, *supra* note 6, at 1997; *see also* Albrecht & Nickelsburg, *supra* note 8, at 11056–57; *supra* notes 378, 383-99 and *infra* notes 515-18 and accompanying text.

513. *See* ANPRM, *supra* note 6, at 1997; *see also* Albrecht & Nickelsburg, *supra* note 8, at 11056; *supra* notes 9, 37-40, 324–25, 345, 349–51 and accompanying text.

514. *See supra* notes 49–54 and *infra* notes 515–23, 531–49, 553–58 and accompanying text.

515. 189 F. Supp. 2d 874, 877 (N.D. Ind. 2001), *order vacating order in part* (2002), *aff'd* 335 F.3d 598 (7th Cir. 2003)

516. *Id.* at 877, 885–86.

517. *Id.* at 877.

connecting bodies," including navigable waters.[518] The court found "[t]he relationship between the wetlands and the navigable waterway [was] direct" because there was a significant nexus between the navigable waters and the adjacent wetland at issue.[519] The defendant appealed the decision to the Seventh Circuit, which recently affirmed the district court's decision.[520]

The *Rueth* court's test fails to give sufficient weight to the word "significant" in the significant nexus test. A mere molecule or drop of water is not significant. On the other hand, the recently reversed *Rapanos* district court decision's requirement that the government prove that a property owner's activities in wetlands actually harms navigable waters demanded too much and the Sixth Circuit appropriately rejected the district court's approach.[521] The Corps or the EPA should only have to prove that a non-navigable water may reasonably have significant impacts on navigable waters because proving actual significant impacts is often difficult. The "significant nexus" test does not provide a precise answer to how closely related non-navigable waters must be to navigable ones to fall within the Act's jurisdiction, but the standard does suggest that the Corps, EPA and courts must examine the hydrological connections between them to determine if significant hydrological impacts exist.

A fair reading of the "significant nexus" test is that the Act's jurisdiction does not reach isolated waters and wetlands that have no or only a remote hydrological connection to navigable waters. If there is a significant hydrological connection between non-navigable waters and navigable waters, the agencies need not prove as an additional factor whether the hydrological connection has significant ecological impacts because the Court in *Riverside Bayview* implied that potential ecological or biological impacts from a hydrological connection are enough to constitute a significant relationship or "nexus" to navigable waters.[522] If non-navigable waters have an ecological connection to navigable waters by serving as habitat for migratory birds or other species, but there is no significant hydrological connection, the *SWANCC* decision unfortunately strongly implies that the non-navigable waters are beyond the Act's jurisdiction.[523] However, if there is some hydrological connection between

518. *Id.*

519. *Id.* at 877–78.

520. *See id.* at 889.

521. *See* United States v. Rapanos, 190 F. Supp. 2d 1011, 1017 (2002), *rev'd*, 339 F.3d 447 (6th Cir. 2003), *petition for cert. filed*, (U.S. Dec. 22, 2003) (No. 03-929); *supra* notes 380–90 and accompanying text.

522. *See supra* notes 162–165, 171, 174–175, 296–299 and *infra* notes 532–38, 551 and accompanying text.

523. *SWANCC*, *supra* note 2, at 167–74; *supra* notes 222–29 and accompanying text.

non-navigable waters and navigable waters, then the existence of ecological connections should be a tie-breaker in close cases.

In *FD & P Enterprises v. U.S. Army Corps Engineers*,[524] the United States District Court for the District of New Jersey rejected both an overly narrow and an overly broad interpretation of the *SWANCC* Court's "significant nexus" standard.[525] The *FD & P Enterprises* court stated "a reading of [*SWANCC*] which would confine [FWPCA] jurisdiction solely to navigable waters and those waters one step removed from navigable waters could ultimately serve to undermine the basic purposes of the [FWPCA]."[526] Conversely, an overly broad interpretation of the Act allowing it to include any non-navigable water with the slightest hydrological connection was inconsistent with the "significant nexus" test. The court stated that because *SWANCC* "has substantially altered the meaning of 'navigable waters' in the [FWPCA], a 'significant nexus' must constitute more than a mere 'hydrological connection.'"[527] While the *FD & P Enterprises* court was sympathetic to the defendant landowners' assertion that wetlands on its property were too low to "provide any flood storage function" and therefore could not significantly affect the Hackensack River, the court denied the defendant's motion for summary judgment because "[t]he Corps has submitted sufficient evidence such that a reasonable jury could find that the filling of the wetlands will have a substantial injurious impact upon the chemical, physical, and/or biological integrity of the Hackensack River."[528]

In deciding the defendant's motion for summary judgment, the *FD & P Enterprises* court appropriately deferred to the Corps' assertion that "given the proximity of the wetlands on the FD & P Property to the Hackensack River, filling of the wetlands would have an injurious impact on the river by increasing the sediments and chemicals flowing into the river."[529] The Corps also contended "that because the FD & P Property is within the 100-year flood plain, the proposed fill will displace flood storage capacity, increasing the likelihood of rain- induced flooding."[530] While the district court implied that it was inclined to agree with the defendant's argument that the impact of filling the wetlands would not be substantial, the court found the Corps' claim appropriate for jury consideration.[531]

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524. 239 F. Supp. 2d 509 (D.N.J. 2003).

525. *Id.* at 513–16.

526. *Id.* at 515.

527. *Id.* at 516. *But see* United States v. Jones, 267 F. Supp. 2d 1349, 1360 (M.D. Ga. 2003) (disagreeing with *FD &P Enterprises'* substantial nexus test because *SWANCC* only rejected the Migratory Bird "Rule" and any other language in that case is "merely *dicta*.").

528. *FD & P Enterprises*, 239 F. Supp. 2d at 517.

529. *Id.*

530. *Id.*

531. *Id.*

The Corps, EPA and courts should focus on whether significant hydrological connections exist between non-navigable waters and navigable waters, rather than on the physical distance between them. Some commentators have suggested that wetlands must actually abut a navigable river to be considered adjacent,[532] but the "significant nexus" standard is consistent with precedent emphasizing the need to consider all clear hydrological connections between wetlands waters and navigable waters. Non-navigable waters that do not directly abut navigable waters often have significant hydrological impacts on navigable waters; *Riverside Bayview* and *SWANCC* appropriately regulate these waters under the Act.[533] While *SWANCC* excluded isolated waters that have no significant nexus with navigable waters, *SWANCC* did not impose a distance requirement.[534] In *Riverside Bayview*, the adjacent wetlands "actually abut[ted] on a navigable waterway," but the Court emphasized the hydrological and ecological relationship between the wetlands and navigable waters, instead of the distance between them.[535] Both federal agencies and courts should follow the lead of the *Riverside Bayview* Court by focusing on the hydrological connections between wetlands and navigable waters or on ecological functions, such as wetlands' role in filtering water or providing habitat for the species using the navigable waters, rather than their adjacency.

To give meaning to the *SWANCC* Court's significant nexus standard, it is useful to recognize that there are some differences between adjacent wetlands and tributaries in how they connect to navigable waters. The Corps' definition of adjacent wetlands does not use a distance formula, but instead requires wetlands to "neighbor" navigable waters or non-navigable tributaries[536] While the district court in *Rapanos* incorrectly required the wetlands to be directly adjacent to navigable waters, the twenty-mile distance in *Rapanos* was arguably too great for the wetlands in the case to be "adjacent" to navigable waters.[537] However, as the Sixth Circuit in its *Rapanos* decision appropriately recognized, the Act's jurisdiction should usually include wetlands that are "adjacent" to a non-navigable tributary that is hydrologically connected to navigable waters

532. *See* Albrecht & Nickelsburg, *supra* note 8, at 11057–58; Liebesman & Turner, *supra* note 36, at 209–12; *supra* notes 9, 37-40, 324-25, 349–51, 513, 521 and accompanying text.

533. Kalo, *supra* note 74, at 1690–91 (arguing that *Riverside Bayview* allowed regulation of many waters and wetlands that are not navigable in fact if there is a hydrological connection).

534. *See supra* notes 228–229, 265–268 and accompanying text.

535. *See* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 129–35 (1985); *supra* notes 162–165, 171, 174–175 433, 522 and *infra* notes 536–38, 551 and accompanying text.

536. *See supra* notes 171–75 and accompanying text; *see also supra* notes 176–185 and accompanying text.

537. *See supra* notes 408, 434 and accompanying text.

because such wetlands are likely to affect the water quality of the tributary, and, in turn, the water quality of the navigable waters.[538]

By contrast, for tributaries, the physical distance between non-navigable and navigable waters is not important. The key issue is whether a clear and significant hydrological connection exists between tributaries and navigable waters. In *Rice*, the Fifth Circuit probably correctly decided that the plaintiffs had failed to prove that the oil leaking into the groundwater reached navigable waters.[539] Yet a much longer distance should not preclude tributary status for non-navigable waters. As the Ninth Circuit suggested in *Headwaters*, an intermittent tributary can be within the scope of the Act if it has periodically contributed significant amounts of water and may do so in the future.[540] Whether the connection was man-made or natural should not matter.[541] In *Newdunn* and *RGM*, the district court wrongly ruled it inappropriate to consider artificial connections or pathways; the Fourth Circuit has reversed *Newdunn* and will likely reverse *RGM*. The court justified its decision based on their belief that man-made connections are more likely to be blocked or discontinued in the future. This assumption is false because both artificial and natural connections can become blocked over time, and thus, the artificial versus natural distinction is not helpful.[542]

The *SWANCC* decision does not directly address the long-standing issue of whether groundwater connected to surface waters falls within the Act's jurisdiction.[543] As the split among the lower courts demonstrates, there are strong arguments on both sides, based on how one reads the Act's legislative history.[544] While *SWANCC* does not address the issue of groundwater, its "significant nexus" test is compatible with decisions concluding that groundwater that has a direct connection to navigable surface waters falls under the Act's jurisdiction.[545] The "significant nexus" test could provide a limiting principle for when groundwater falls within the Act's jurisdiction by excluding trivial or "one drop" connections.

538. *See* United States v. Deaton, 332 F.3d 698 (4th Cir. 2003) (holding the Corps has jurisdiction over wetlands adjacent to non-navigable drainage ditch, which is eventual tributary to navigable waters), *petition for cert. filed*, 72 U.S.L.W. 3356 (U.S. Nov. 10, 2003) (No. 03-701); *see supra* notes 183–85, 406-07, 420-33 and accompanying text.

539. *See supra* notes 319–28 and accompanying text.

540. *See, e.g.*, Headwaters v. Talent Irrigation Dist., 243 F.3d 526, 533 (9th Cir. 2001); United States v. Interstate Gen. Co., 152 F. Supp. 2d 843, 846–47 (D. Md. 2001); United States v. Krilich, 152 F. Supp. 2d 983, 992 n.13 (N.D. Ill. 2001); Idaho Rural Council v. Bosma, 143 F. Supp. 2d 1169, 1178 (D. Idaho 2001); United States v. Buday, 138 F. Supp. 2d 1282, 1289 (D. Mont. 2001); Liebesman & Turner, *supra* note 36, at 212–13; *supra* notes 44–45, 365-83, 392-94 and accompanying text.

541. *See supra* notes 353–57, 361-64 and accompanying text.

542. *Id.*

543. *Id.*

544. *See supra* notes 461–70 and accompanying text.

545. *Id.*

While the *SWANCC* Court refused to defer to the agencies' Migratory Bird "Rule"[546] because the Court concluded that "rule" exceeded the agencies' statutory authority under the Act,[547] there is a much stronger argument for courts to defer to the agencies' expertise in addressing the ambiguous statutory issue of whether groundwater is within the scope of the Act.[548]

The significant nexus standard addresses the Act's ultimate goal of improving the nation's navigable waters by examining whether non-navigable waters have significant hydrological impacts on navigable waters. While arguably easier to apply, a test requiring non-navigable waters to abut navigable waters would exclude too many non-navigable waters that have significant impacts on navigable waters. On the other hand, a trivial "one drop" connection between non-navigable waters and navigable waters is not a significant nexus. To meet the significant nexus test, non-navigable waters must have a perceptible or measurable impact on navigable waters to be considered "waters of the United States." Despite Justice Stevens' strong arguments in his *SWANCC* dissent for an ecological test, the *SWANCC* majority does not bring isolated waters that support migratory birds or other wildlife, but lack a significant hydrological connection, under the FWPCA's jurisdiction. At most, ecological impacts could be a tie-breaker in cases where non-navigable waters have a small, but measurable, impact on navigable waters; such impacts arguably are significant.[549]

CONCLUSION

The *SWANCC* decision wrongly limited the FWPCA to only navigable waters and non-navigable waters closely related to navigable waters. Based on the 1972 Act's legislative history and the apparent acquiescence of the 1977 Congress to the Corps' newly expanded regulations, Justice Stevens' dissent persuasively argued that the Act reaches the limits of Congress' authority under the Commerce Clause.[550] Additionally, as the Supreme Court recognized in *Riverside Bayview*, the 1972 Act's legislative history supports a broad reading of the Act's jurisdiction to achieve the Act's ecological and hydrological goals.[551] The legislative history of the Act and its overall text suggest that Congress sought to balance state and federal roles, rather than to reserve exclusive

546. *See supra* notes 255–63 and accompanying text.

547. *Id.*

548. *See supra* notes 475–77 and accompanying text.

549. *See supra* notes 49–54, 174–75, 179–82, 377-82, 389-96, 425, 455, 521-23, 534-42 and infra notes 554-58 and accompanying text.

550. *See supra* notes 272–95 and accompanying text.

551. *See supra* notes 162–65, 171, 174–75, 296–99, 433, 522, 532–38 and accompanying text.

state control over isolated wetlands.[552] Finally, scientific evidence indicates that isolated wetlands and wetlands above headwaters are as important ecologically as adjacent wetlands.[553] Nevertheless, despite *SWANCC's* flawed reasoning, the agencies and lower courts must appropriately apply its "substantial nexus" standard.

Instead of revising the regulations defining "waters of the United States," the EPA and the Corps could simply issue guidance that more clearly explains how field staff should apply *SWANCC's* "significant nexus" test. The agencies should issue guidance that protects all non-navigable waters that have a significant hydrological connection or nexus to navigable waters, while excluding waters that have a trivial or "one drop" connection.[554] The *Rueth* court's ruling that a non-navigable water lies within the Act's jurisdiction if it contributes one drop to navigable waters is not a reasonable interpretation of the "significant nexus" test.[555] On the other hand, the recently reversed *Rapanos district* court decision's requirement that the government prove that a property owner's activities in wetlands actually harms navigable waters demanded too much and the Sixth Circuit appropriately rejected the district court's approach.[556] Accordingly, the Corps and the EPA should have to prove only that a non-navigable water may reasonably have significant impacts on navigable waters, because proving actual significant impacts is often difficult.[557] If non-navigable waters have an ecological connection to navigable waters by serving as habitat for migratory birds or other species, but no significant hydrological connection exists, then the non-navigable waters are regrettably beyond the scope of the Act. However, if there is some hydrological connection exists, then the existence of ecological connections should serve as a tie-breaker in close cases. Applying a reasonable interpretation of the "significant nexus" test to include all non-navigable waters that have a significant hydrological connection or nexus to navigable waters is consistent with *SWANCC*'s demand that the agencies must ultimately base the Act's jurisdiction on a relationship to navigability. While Justice Stevens' ecologically-based reading of the Act is preferable in many ways to the majority's significant nexus test, a liberal yet reasonable application of the significant nexus test would still protect many non-navigable waters and wetlands. If the

552. *See* Craig, *supra* note 32, at 10508–09, 10519, 10526–27; *supra* notes 251–55 and accompanying text.

553. *See supra* note 33 and accompanying text.

554. *See supra* notes 49–54, 514–23, 532–49 and accompanying text.

555. *See supra* notes 514–21 and accompanying text.

556. *See* United States v. Rapanos, 190 F. Supp. 2d 1011, 1017 (2002), *rev'd*, 339 F.3d 447 (6th Cir. 2003), *petition for cert. filed*, (U.S. Dec. 22, 2003) (No. 03-929); *supra* notes 37-40, 407-34, 537-38 and accompanying text.

557. *See supra* notes 424-33, 455, 522–23, 532-42, 554-56 and accompanying text.

EPA and the Corps adopt a guidance or rule that fails to include wetlands, tributaries, and other waters that have significant hydrological impacts on navigable waters, courts should reject that rule or guidance as inconsistent with the statute's clear purpose "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" for current and future generations.[558] Hopefully, the Bush Administration will maintain its recent decision on December 16, 2003 not to issue a rule restricting the Act's jurisdiction.[559]

558. 33 U.S.C. § 1251(b) (2003).

559 *See supra note 25 and accompanying text.*