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Could *SWANCC* Be Right? A New Look at the Legislative History of the Clean Water Act

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For over two decades courts and agencies have assumed that the Clean Water Act (CWA) grants the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) jurisdiction over the nation's waters to the full extent of the U.S. Congress' authority under the U.S. Constitution's Commerce Clause. This belief led the Corps and EPA to assert CWA jurisdiction over virtually all waters in the nation, including navigable waters; non-navigable tributaries; adjacent wetlands; and non-navigable, isolated, intrastate waters and wetlands.

In early 2001, however, the U.S. Supreme Court rejected the Corps' assertion of authority over a non-navigable, isolated, intrastate water in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*.¹ The Corps had claimed jurisdiction under its "migratory bird rule," which asserted jurisdiction over waters that, among other things, "are or would be used as habitat by . . . migratory birds which cross state lines."² Pointing to statements in the Act's legislative history that the term "navigable waters" was to be given "the broadest possible constitutional interpretation, unencumbered by agency determinations which have been made or may be made for administrative purposes," the Corps defended the migratory bird rule as an exercise of federal power over things having a "substantial effect" on commerce—the broadest basis of federal power under the Commerce Clause.³ Rejecting this argument, the Supreme Court held that Congress did not intend to exercise its power over things "affecting commerce" in passing the CWA.⁴ Instead, according to the Court, Congress intended to exercise only its authority over navigation.⁵

This holding works a major change in the landscape of water and wetland regulation. Although *SWANCC* specifically involved only the migratory bird rule, its reasoning applies to any CWA regulation founded on an "affecting commerce" theory of the commerce power, and should apply to much more than that.⁶ Rather than rubber-stamp federal jurisdiction under the almost-everything-goes "affecting commerce" theory, courts and agencies must now ask whether federal jurisdiction over a particular geographic feature was in fact intended by Congress. Jurisdiction over the traditional navigable waters has certainly been authorized, as *SWANCC* recognized, by the plain language of the CWA. To regulate beyond the navigable waters, however, courts and agencies must now look for a clear statement of congressional intent—like, for instance, the clear congressional intent to regulate wetlands actually abutting navigable waters that was recognized in *United States v. Riverside Bayview Homes*.⁷

The lower courts' and agencies' response to *SWANCC* has been mixed. One court of appeals has articulated a broad vision of the import of *SWANCC* for federal jurisdiction. In *Rice v. Harken Exploration Co.*,⁸ the U.S. Court of Appeals for the Fifth Circuit stated that "[u]nder *Solid Waste Agency*, it appears that a body of water is subject to regulation under the [CWA] if the body of water is actually navigable or is adjacent to an open body of navigable water."⁹ The court held that several intermittent streams are not "navigable waters" and that connections through groundwater cannot establish jurisdiction under the Act. Several district courts have followed suit.¹⁰

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1. 531 U.S. 159, 31 ELR 20382 (2001).

2. Although commonly referred to as a "rule," the migratory bird rule was announced in a legal memorandum prepared by EPA's general counsel in 1985. It was later referenced in the *Federal Register*, see 51 Fed. Reg. 41208, 41217 (Nov. 13, 1986), but it was never promulgated through notice-and-comment rulemaking.

3. The commerce power is extremely broad, at least in modern interpretation. It includes three separate categories of regulatory authority: the authority to regulate the instrumentalities of interstate commerce, the authority to regulate channels of interstate commerce, and the authority to regulate other activities and things that alone or in the aggregate have a substantial effect on interstate commerce. See *United States v. Lopez*, 514 U.S. 549, 558-59 (1995).

4. See *SWANCC*, 531 U.S. at 172-74, 31 ELR at 20384-85.

5. See, e.g., *id.* at 168 n.3, 31 ELR at 20383 n.3.

6. Examples of cases based on the theory that the CWA is as broad as Congress' power to regulate things "affecting commerce" include *United States v. TGR Corp.*, 171 F.3d 762, 764-65, 29 ELR 21059, 21060 (2d Cir. 1999), *United States v. Eidson*, 108 F.3d 1336, 1341-42, 27 ELR 20853, 20854-55 (11th Cir. 1997), *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1394-95, 25 ELR 21046, 21049-50 (9th Cir. 1995), *Quivira Mining Co. v. EPA*, 765 F.2d 126, 129-30, 15 ELR 20530, 20531-32 (10th Cir. 1985), *United States v. Texas Pipe Line Co.*, 611 F.2d 345, 347, 10 ELR 20184, 20184 (10th Cir. 1979), *United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1325, 4 ELR 20784, 20788-89 (6th Cir. 1974), and *United States v. Phelps Dodge Corp.*, 391 F. Supp. 1181, 1185-86, 5 ELR 20308, 20310-11 (D. Ariz. 1975).

7. 474 U.S. 121, 16 ELR 20086 (1985). On June 10, 2002, the U.S. Supreme Court issued a writ of certiorari to the U.S. Court of Appeals for the Ninth Circuit in *Borden Ranch Partnership v. Corps of Eng'rs*, No. 01-1243 (9th Cir. June 10, 2002), which presents questions regarding the activities the Corps is authorized to regulate under the CWA.

8. 250 F.3d 264, 31 ELR 20599 (5th Cir. 2001).

9. *Id.* at 269, 31 ELR at 20600.

10. See *United States v. Rapanos*, 190 F. Supp. 2d 1011 (E.D. Mich. 2002) (rejecting jurisdiction over wetlands and stating that *SWANCC* "establish[es] a mode of analysis for this Court"); *United States v. Needham*, Nos. 01-1897, 01-1898 (W.D. La. Jan. 22, 2002)

Other courts, however, have attempted to limit *SWANCC* to its facts, stating that the Supreme Court's holding extends only to the migratory bird rule or to non-navigable, isolated, intrastate waters.¹¹ The agencies have likewise sought to limit *SWANCC*'s effect on the scope of their jurisdiction. A joint EPA/Corps memorandum issued immediately after *SWANCC* sought to limit the decision to waters for which jurisdiction was based "solely on the presence of migratory birds."¹²

There are several possible reasons for this resistance to *SWANCC*. Agencies are seldom willing to cede jurisdiction once exercised. And the lower courts, although they have no institutional investment in broad agency jurisdiction, nonetheless face long-entrenched assumptions that the CWA extends to the broadest possible constitutional bounds. Moreover, although the *SWANCC* opinion itself is clear, it is written in Chief Justice William H. Rehnquist's signature spare style, expending only a few paragraphs in rejecting the broad theory of CWA jurisdiction and offering no detailed discussion of why the conventional wisdom has been wrong.

The thesis of this Article is that the resistance to *SWANCC* is unfounded, and that the history of the Federal Water Pollution Control Act (FWPCA) Amendments of 1972 shows that the Court's interpretation of Congress' original intent is correct. The second and third parts of the Article examine the history of federal jurisdiction over "navigable waters" under the CWA and other, older statutes. Given the Act's remedial purpose, could Congress really have meant (as the Supreme Court appears to have said) to premise the geographic scope of the Act on traditional concepts of "navigability"? What did Congress mean when it stated that the term "navigable waters" should be given "the broadest possible constitutional interpretation," and what were the "agency determinations" that Congress had sought to overrule? This examination shows that before 1972 the Corps had taken a cramped view of "navigable waters" that was far narrower than the case law would have allowed, that Congress intended to expand federal jurisdiction beyond those previous administrative determinations to reach the broadest possible constitutional interpretation of the term "navigable waters," and that Congress' reliance on its power over navigation is fully consistent with the remedial purposes of the Act. Extending federal jurisdiction to *all* navigable waters and imposing a new permit requirement for discharges into those waters was at the time a significant expansion of federal authority that would dramatically improve the chemical and biological integrity of the nation's waters.

The fourth part of the Article sets forth the facts, holding, and reasoning of *SWANCC*. The next part examines the im-

plications of *SWANCC* for federal CWA jurisdiction, with specific focus on the Corps' §404 program. The final part examines the arguments that are being made for a narrow reading of *SWANCC* and explains why they cannot be squared with the opinion.

History of Federal Authority Over the Navigable Waters: The Traditional Definition of the Navigable Waters and the Rivers and Harbors Act of 1899

The Traditional Definition of the Navigable Waters of the United States

The Constitution does not mention "navigable waters." Federal regulatory authority over the navigable waters is instead based on the Commerce Clause, which gives Congress the power to "regulate Commerce with foreign Nations, and among the several States."¹³ Chief Justice John Marshall first wrote in *Gibbons v. Ogden*¹⁴ that Congress' power to regulate navigation is inherent in its power to regulate interstate and foreign commerce:

Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations, which shall exclude all laws concerning navigation . . . All America understands, and has uniformly understood, the word "commerce," to comprehend navigation. . . . The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it.¹⁵

Gibbons involved Congress' power to regulate maritime commerce by licensing vessels operating in the coastal trade. In *Gilman v. Philadelphia*,¹⁶ the Supreme Court made clear that Congress' power to regulate interstate commerce also includes the power to control "all the navigable waters of the United States which are accessible from a State other than those in which they lie," and that this power includes the power to keep those waters free of obstructions.¹⁷ Congress exercised this authority in the late 19th century by passing the Rivers and Harbors Act, which authorized the predecessor of the Corps to protect navigation by regulating construction, dredge, and fill activities in the navigable waters of the United States.¹⁸

At the time of the passage of the Rivers and Harbors Act, the "navigable waters of the United States" had a specific meaning, based in admiralty law. This definition was articulated in *The Daniel Ball*¹⁹:

Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for com-

(affirming bankruptcy court's decision that drainage ditch and bayou are outside federal jurisdiction); *United States v. Newdunn Assocs.*, 195 F. Supp. 2d 751, 32 ELR 20573 (E.D. Va. 2002) (rejecting jurisdiction over wetlands adjacent to drainage ditches).

11. See, e.g., *Headwaters v. Talent Irrigation Dist.*, 243 F.3d 526, 533, 31 ELR 20535, 20537 (9th Cir. 2001); *United States v. Interstate Gen. Co.*, 152 F. Supp. 2d 843, 846-47, 31 ELR 20750, 20751 (D. Md. 2001); *United States v. Krilich*, 152 F. Supp. 2d 983, 991 n.13, 31 ELR 20787, 20789 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).

12. Memorandum from Gary S. Guzy and Robert M. Anderson, Supreme Court Ruling Concerning CWA Jurisdiction Over Isolated Waters (undated; released Jan. 19, 2001) [hereinafter Guzy-Anderson Memorandum].

13. U.S. CONST. art. I, cl. 8.

14. 22 U.S. (9 Wheat.) 1 (1824).

15. *Id.* at 189-90.

16. 70 U.S. (3 Wall.) 713 (1865).

17. *Id.* at 724-25.

18. 33 U.S.C. §§401-413.

19. 77 U.S. (10 Wall.) 557 (1871).

merce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the Acts of Congress, in contradistinction from the navigable waters of the States, when they form 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.²⁰

The *Daniel Ball*'s definition established a two-part test for navigability, requiring: (1) that the water in its ordinary condition presently be capable of being used by vessels to transport interstate commerce; and (2) that the water form a continuous highway with other waters over which commerce could be transported to other states.²¹ Several subsequent judicial interpretations ultimately expanded the definition of the navigable waters of the United States, at least for Commerce Clause purposes,²² to include waters that are now, that have been in the past,²³ or that are susceptible to use with reasonable improvements²⁴ by vessels in interstate or foreign commerce. This Article will refer to these waters—the “navigable waters of the United States” as defined in *The Daniel Ball* and as expanded in later cases such as *Economy Light & Power Co. v. United States*²⁵ and *United States v. Appalachian Electric Power Co.*²⁶—as the “traditional navigable waters.”

The Rivers and Harbors Act of 1899

The Scope of the Rivers and Harbors Act

Before 1972, the most significant statutory exercise of Congress' commerce power over navigation was the Rivers and Harbors Act of 1899. The language of the Rivers and Harbors Act, judicial interpretation of that language, and Congress' perceptions in the early 1970s of the shortcomings of that Act are critical to an understanding of Congress' intent in passing the CWA in 1972.

20. *Id.* at 563.

21. *See, e.g.,* *Minnehaha Creek Watershed Dist. v. Hoffman*, 597 F.2d 617, 621-22, 9 ELR 20334, 20335-36 (8th Cir. 1979).

22. Cases and commentators have stressed that the definitions of the “navigable waters” for admiralty purposes and for the purpose of determining the ownership of submerged lands—another area in which the concept of “navigability” is important—are distinct from the definition of “navigable waters” for Commerce Clause purposes. *See, e.g.,* *Kaiser Aetna v. United States*, 444 U.S. 164, 10 ELR 20042 (1979); THOMAS J. SCHOENBAUM, 1 *ADMIRALTY & MARITIME LAW* §3-3, at 66-67 (2d ed. 1994) (“The admiralty concept of navigable waters is related to but in certain respects differs from . . . constitutional, statutory, and property law concepts.”); Francis W. Laurent, *Judicial Criteria of Navigability in Federal Cases*, 1953 WIS. L. REV. 8, 9 & n.4 (same). Nonetheless, there is a good deal of overlap in the cases. Courts have relied on *The Daniel Ball*'s definition for all three purposes, and have at times cited indiscriminately from one or the other line of cases without making the distinction clear. *See* Glenn J. MacGrady, *The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, and Some Doctrines That Don't Hold Water*, 3 FLA. ST. U. L. REV. 511, 587 & n.401 (1975).

23. *See* *Economy Light & Power Co. v. United States*, 256 U.S. 113, 123 (1921) (“past use”).

24. *See* *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407-09 (1940) (“susceptible with reasonable improvement”).

25. 256 U.S. 113 (1921).

26. 311 U.S. 377 (1940).

Two sections of the Rivers and Harbors Act have been influential in the Corps' regulation of navigable waters. First, under §10 of the Act, “[t]he creation of any obstruction . . . to the navigable capacity of any of the waters of the United States” without the consent of Congress is forbidden, and a Corps permit is required to build “structures . . . in any water of the United States, outside harbor lines,” or “to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of [waters] within the limits of any breakwater or of the channel of any navigable water of the United States.”²⁷ Second, §13, also known as the Refuse Act, makes it unlawful to throw, discharge, or deposit refuse matter into any navigable water of the United States or tributary thereof without a Corps permit.²⁸ Section 10 uses the terms “navigable waters of the United States” and “waters of the United States” interchangeably, and those terms have been interpreted to extend only to the traditional navigable waters.²⁹

In addition, the Corps' jurisdiction under §§10 and 13 includes certain activities affecting the navigable capacity of the navigable waters. First, because activities occurring outside the navigable waters might “obstruct[] the navigable capacity” or “alter or modify the course, condition, or capacity” of the navigable waters, the Corps has at times regulated such activities under §10.³⁰ These activities have included dams erected in upstream, non-navigable portions of

27. 33 U.S.C. §403. Section 10 states more completely:

[T]he creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside harbor lines . . . ; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

Id.

28. *See* 33 U.S.C. §407. The Refuse Act states more completely:

It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, 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; and it shall not be lawful to deposit, or cause, suffer, or procure to be deposited material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water . . . whereby navigation shall or may be impeded or obstructed

Id.

29. *See, e.g.,* *United States v. Stoeco Homes, Inc.*, 498 F.2d 597, 608-11, 4 ELR 20390, 20393-94 (3d Cir. 1974).

30. *See* 33 C.F.R. §322.3 (stating that §10 permits are required for “structures and/or work in or affecting navigable waters of the United States”).

waters that affect water levels and flows in downstream navigable waters.³¹

Second, §13 bars the discharge of “any refuse matter of any kind or description . . . 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.”³² It also bars the “deposit” of “material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water . . . whereby navigation shall or may be impeded or obstructed.”³³ This provision, therefore, by its terms bars the discharge of material to non-navigable tributaries and to the banks of the navigable waters, if material placed in those waters or on those banks is washed into the navigable waters and (for material placed on the banks) if it obstructs navigation.

The Rivers and Harbors Act as a Water Pollution Control Statute and Congressional Frustration With the Corps’ Limited Interpretation of “Navigable Waters”

In the 1960s and early 1970s, legislators, agencies, and commentators began to look to the Rivers and Harbors Act as a tool for controlling pollution in the nation’s waters.³⁴ Because the Corps’ traditional focus under the Act had been on navigation, not on pollution control, proponents of this goal met with early frustration. Congressional hearings from the early 1970s demonstrate several areas of contention.

One initial question was whether the Corps had the authority to expand its review of projects beyond their effects on navigation to include their effects on the broader environment. In the late 1960s the Corps broadened its permitting process to include a “public interest review” of the environmental impacts of permitted projects. This expanded review was ultimately upheld in the courts, and is not the subject of this Article.³⁵

Another significant issue (and the focus of this Article) was the scope of the Corps’ geographic jurisdiction. Key members of Congress felt that the Corps was not reaching as far as it could, or should. Three main points were in dispute. First, until 1970, the Corps had declined to require permits for the installation of structures, dredging, or filling shoreward of the harbor lines, even though such areas could be regulated under *The Daniel Ball*’s limited definition of

“navigable waters.”³⁶ This allowed individuals to fill tidal areas below the mean high waterline and out to the harborlines without federal review. In March 1970, the House Committee on Government Regulations criticized this limitation as being inconsistent with the Rivers and Harbors Act, and in May 1970, the Corps published a rule to regulate this practice.³⁷

Second, some members of Congress believed that the Corps had unduly limited its regulation to waters that are presently navigable—the old *Daniel Ball* definition. These legislators were concerned that the Corps had “narrowly defined the waters to which these statutory provisions apply, and thus severely limited the scope of the law.”³⁸ In hearings in 1972, Congress criticized the Corps’ failure to regulate waters that should have been regulable under judicial decisions such as *Economy Light & Power Co.* and *Appalachian Power Co.*:

The corps’ regulations currently define navigable waters as those “which are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition,” for conducting trade or travel “in the customary modes of trade and travel on water.” 33 C.F.R. 209.260(a). That language is based on similar language used over 100 years ago in the Supreme Court’s opinion in *The Daniel Ball*

However, more recent judicial opinions have substantially expanded that limited view of navigability to include waterways which could be “susceptible of being used . . . with reasonable improvements,” as well as those waterways which include sections presently obstructed by falls, rapids, sand bars, currents, floating debris, etc. *United States v. Utah*, 283 U.S. 64 (1931); *United States v. Appalachian Power Co.*, 331 U.S. 377, 407-410, 416 (1940); *Wisconsin Public Service Corp. v. Federal Power Commission*, 147 F.2d 743 (CA7, 1945), cert. denied, 325 U.S. 880; *Wisconsin v. Federal Power Commission*, 214 F.2d 334 (CA7, 1954), cert. denied, 348 U.S. 883 (1954); *Namekagon Hydro Co. v. Federal Power Commission*, 216 F.2d 509 (CA7, 1954); *Puente de Reynosa, S.A. v. City of McAllen*, 357 F.2d 43, 50-51 (CA5, 1966); *Rochester Gas and Electric Corp. v. Federal Power Commission*, 344 F.2d 594 (CA2, 1965); *The Montello*, 87 U.S. (20 Wall.) 430, 441-42 (1874); *Economy Light & Power Co. v. United States*, 256 U.S. 113 (1921).³⁹

Finally, the committee pushed the Corps to assert jurisdiction over wholly intrastate, navigable lakes. The question whether the traditional navigable waters included only those waters that formed a continued interstate highway for waterborne commerce, as *The Daniel Ball* and *Gilman* seemed to imply, or whether intrastate navigable waters could be linked to interstate commerce through overland connections such as highways and railroads, was a significant constitutional issue at that time. For example, the gen-

31. See *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 708 (1899) (“[A]nything, wherever done or however done, within the limits of the jurisdiction of the United States, which tends to destroy the navigable capacity of one of the navigable waters of the United States, is within the terms of the prohibition” of the Rivers and Harbors Act.).

32. 33 U.S.C. §407.

33. *Id.*

34. See, e.g., H.R. REP. NO. 92-1333 (1972); H.R. REP. NO. 92-1323 (1972); H.R. REP. NO. 91-917 (1970); *United States v. Republic Steel Corp.*, 362 U.S. 482 (1960) (discharge of industrial solids is the creation of an obstruction within the meaning of §10 of the Act); *United States v. Standard Oil Co.*, 384 U.S. 224 (1966) (discharge of aviation fuel is discharge of “refuse” under the Refuse Act); Robert L. Potter, *Discharging New Wine Into Old Wineskins: The Metamorphosis of the Rivers & Harbors Act of 1899*, 33 PITT. L. REV. 483, 487-89 (1972).

35. See, e.g., *Zabel v. Tabb*, 430 F.2d 199, 1 ELR 20023 (5th Cir. 1970).

36. See H.R. REP. NO. 91-917, at 6-10 (criticizing this limitation). On the West Coast, moreover, the Corps had defined its jurisdiction to extend to the mean high tideline, and Congress pushed the Corps to assert jurisdiction farther, to the mean higher high tideline. *Id.* at 27.

37. See 35 Fed. Reg. 8280 (May 27, 1970) (amending 33 C.F.R. §209.150).

38. H.R. REP. NO. 92-1323, at 27; see also *id.* at 5 (“The [C]orps has thus far taken too narrow a view of its jurisdiction and responsibilities over navigable waterways, but the [C]orps plans to publish broadened regulations on navigability in the near future.”).

39. *Id.* at 29-30.

eral counsel of EPA issued an opinion in 1971 stating that overland connections were insufficient to establish federal jurisdiction over intrastate lakes for the purpose of the FWPCA.⁴⁰ The House Committee, however, urged the Corps to adopt an interpretation of traditional navigable waters that included intrastate navigable lakes:

Another instance of the [C]orps' limited view of its responsibilities has been its opinion that it cannot exercise jurisdiction over waters which, although clearly navigable, do not "form 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 waters." (33 C.F.R. 209.260(a).) For example, the Acting Chief of Engineers informed the subcommittee, by letter of February 20, 1970, that Lake Chelan—a body of water 55 miles long and almost 2 miles wide in the State of Washington, and clearly navigable—"is not considered by the Corps of Engineers to be a navigable waterway of the United States," because "navigation on Lake Chelan cannot form a part of either the interstate or international system."

This limited view reflected the 1879 dictum in *The Daniel Ball*, *supra*, that to constitute navigable waters of the United States they must "form, by themselves, or by uniting with other waters, a continuous highway over which . . . commerce is conducted by water."

The U.S. Constitution contains no mention of navigable waters. The authority of Congress over navigable waters is based on the Constitution's grant to Congress of "[p]ower . . . To regulate commerce with Foreign Nations and among the several States . . ." (Art. I, sec. 8, clause 3.) *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). Although most interstate commerce 150 years ago was accomplished on waterways, there is no requirement in the Constitution that the waterway must cross a State boundary in order to be within the interstate commerce power of the Federal Government. Rather, it is enough that the waterway serves as a link in the chain of commerce among the States as it flows in the various channels of transportation (highways, railroads, air traffic, radio and postal communication, waterways, etc.). The "gist of the Federal test" is the waterways' use "as a highway," not whether it is "part of a navigable interstate or international commercial highway." *Utah v. United States*, 403 U.S. 9, 11 (1971) . . .⁴¹

The committee concluded its hearings by urging the Corps to assert a more expansive definition of the "navigable waters of the United States," including

all waterways . . . which are now, or were, or may in the future be, capable of being used for purposes of interstate or foreign commerce, irrespective of whether the waterway itself crosses a State line, irrespective of whether, when, how, or by what mode, such use actually occurs, and irrespective of the quantity or kind of items of commerce such use affects. Furthermore, if any substantial part of a waterway was, is, or may be capable of carrying materials or persons traveling in interstate commerce, the whole of that waterway should be viewed and administered by the [C]orps as being within its jurisdiction over navigable waters of the United States.⁴²

In short, this definition would have required the Corps to regulate all of the "traditional navigable waters" (as defined in *The Daniel Ball*, *Economy Light & Power Co.*, and *Appalachian Power Co.*) and to assert jurisdiction over intrastate lakes on the basis of overland links between those lakes and traditional navigable waters.

On September 9, 1972, the Corps responded to Congress' concerns by expanding its definition of navigable waters of the United States to include all of the "traditional navigable waters."⁴³ At about the same time that the Corps was promulgating this regulation, Congress was finalizing the FWPCA Amendments of 1972.

The FWPCA

The 1972 FWPCA Amendments

The 1972 Amendments dramatically changed the approach of the FWPCA, now known as the CWA. Before 1972, the FWPCA had addressed water pollution by funding state and municipal water treatment systems and by requiring the establishment of state water quality standards.⁴⁴ This approach had been largely ineffective in controlling individual discharges of pollution. The 1972 Amendments addressed this problem by instituting a system requiring individual permits for discharges to navigable waters—which was a dramatic expansion of the federal role. The CWA now prohibits "the discharge of any pollutant by any person," except in accordance with a permit issued pursuant to the Act.⁴⁵ The "discharge of a pollutant" means "any addition of any pollutant to navigable waters from any point source."⁴⁶ The "navigable waters" are in turn defined as "the waters of the United States, including the territorial seas."⁴⁷ The Act does not further define the "waters of the United States."

The immediate question posed by this statutory structure is the meaning of the term "waters of the United States"—which is the term the courts and agencies have cited in support of a broad interpretation of federal jurisdiction. The only previous statutory use of the term appears to

43. See 37 Fed. Reg. 18279 (Sept. 9, 1972); see also Charles D. Ablard & Brian Boru O'Neill, *Wetland Protection & Section 404 of the Federal Water Pollution Control Act Amendments of 1972: A Corps of Engineers Renaissance*, 1 VT. L. REV. 51, 62 (1976) noting

four recent jurisdictional expansions by the Corps: the inclusion of historical navigable waters of the United States; the inclusion of waters susceptible to navigation after improvement; the inclusion of coastal waters subject to the ebb and flow of the tide; and 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.

Id. at 62. See also Garrett Power, *The Fox in the Chicken Coop: The Regulatory Program of the U.S. Army Corps of Engineers*, 63 VA. L. REV. 503, 514-15 (1977) (describing changes in the Corps' jurisdictional regulations). Two courts later held, however, that overland links could not establish an interstate connection for the purposes of the Rivers and Harbors Act. See *Hardy Salt Co. v. Southern Pac. Transp. Co.*, 501 F.2d 1156, 1168 (10th Cir. 1974); *Minnehaha Creek Watershed Dist. v. Hoffman*, 597 F.2d 617, 623-24, 9 ELR 20334, 20336 (8th Cir. 1979).

44. See ROBERT V. PERCIVAL ET AL., *ENVIRONMENTAL REGULATION: LAW, SCIENCE & POLICY* 881 (2d ed. 1996). The origin of the FWPCA can be traced to the Water Quality Act of 1948. See *Water Quality Act*, ch. 758, 62 Stat. 1155 (1948).

45. 33 U.S.C. §1311, ELR STAT. FWPCA §301.

46. *Id.* §1362(12), ELR STAT. FWPCA §502(12).

47. *Id.* §1362(7), ELR STAT. FWPCA §502(7).

40. See EPA General Counsel Opinion (Dec. 9, 1971).

41. H.R. REP. NO. 92-1323, at 30.

42. *Id.* at 31-32.

have been in §10 of the Rivers and Harbors Act, which used it interchangeably with the term “navigable waters of the United States.” It is therefore possible that Congress intended to use the term as it had in the Rivers and Harbors Act—to invoke the generally accepted basis for federal jurisdiction over the national waters, and to distinguish the waters of the United States from the waters of the states.

The legislative history of the term “waters of the United States” is not clear. As first proposed, neither the House nor the Senate versions of the CWA included the term “waters of the United States.” Instead, each included the term “navigable waters,” and each defined that term differently. The House Bill defined “navigable waters” as “the navigable waters of the United States, including the territorial seas.”⁴⁸ The Senate Bill defined “navigable waters” as “the navigable waters of the United States, portions thereof, and the tributaries thereof, including the territorial seas and the Great Lakes.”⁴⁹

The final compromise eliminated “tributaries” from the Senate bill and “navigable” from the House bill, defining the “navigable waters” as simply “the waters of the United States.” In explanation, the Conference Report adopted a portion of the language of the preceding House Report: “The 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.”⁵⁰ This is the language that has traditionally been relied upon to support broad interpretations of federal jurisdiction. Despite its apparent breadth, however, when placed in context this passage is, as the government conceded in *SWANCC*, “somewhat ambiguous.”⁵¹

48. H.R. 11896, 92d Cong. §502(8) (1972), reprinted in 1 CONGRESSIONAL RESEARCH SERVICE, LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 1069 (1973) [hereinafter LEGISLATIVE HISTORY]. According to the accompanying House Report:

One term that the Committee was reluctant to define was the term “navigable waters.” The reluctance was based on the fear that any interpretation would be read narrowly. However, this is not the Committee’s intent. The Committee fully intends 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.

H.R. REP. NO. 92-911, at 131 (1972), reprinted in 1 LEGISLATIVE HISTORY 818.

49. S. 2770, 92d Cong. §502(h) (1971), reprinted in 2 LEGISLATIVE HISTORY 1698. The accompanying Senate Report explained that

[t]he control strategy of the Act extends to navigable waters. The definition of this term means the navigable waters of the United States, portions thereof, tributaries thereof, and includes the territorial seas and the Great Lakes. Through a narrow interpretation of the definition of interstate waters the implementation [of the] 1965 Act was severely limited. Water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source. Therefore, reference to the control requirements must be made to the navigable waters, portions thereof, and their tributaries.

S. REP. NO. 92-414, at 77 (1971), reprinted in 2 LEGISLATIVE HISTORY 1495.

50. S. REP. NO. 92-1236, at 144 (1972), reprinted in 1 LEGISLATIVE HISTORY 327. Compare H.R. REP. NO. 92-911, *supra* note 48.

51. *SWANCC*, 531 U.S. at 168 n.8, 31 ELR at 20385 n.8. By contrast, the Supreme Court found the statute itself to be “clear.” *See id.* at 172, 31 ELR at 20386 (“We find §404(a) to be clear . . .”).

On one hand, the statement that the term “navigable waters” should be “given the broadest possible constitutional interpretation . . . unencumbered by agency determinations” could be interpreted—and until *SWANCC* had been widely interpreted—to mean that Congress intended to assert jurisdiction to the broadest extent of its constitutional commerce power, including over activities and/or waters that have a substantial effect on interstate commerce.⁵² The Supreme Court has divided Congress’ commerce power into three broad categories: the power to regulate the “channels of interstate commerce,” to regulate the “instrumentalities of commerce,” and to regulate “those activities having a substantial relation to interstate commerce . . . , *i.e.*, those activities that substantially affect interstate commerce.”⁵³ The broadest of these categories is Congress’ power over things substantially affecting interstate commerce.⁵⁴

On the other hand, the conferees’ language could be interpreted, as the Supreme Court in *SWANCC* read it, to mean simply that Congress intended to override previous, unduly narrow agency interpretations to assert its broadest constitutional authority over *the traditional navigable waters*. This would include the fullest definition of the navigable waters as developed in *The Daniel Ball* and its progeny, such as waters landward of the harborlines, waters susceptible for use in navigation with reasonable improvements, waters subject to the ebb and flow of the tide, and the then-highly controversial jurisdiction over intrastate lakes that Congress had been urging at the time the Act was passed. As noted above, a major issue in several committee hearings in the early 1970s had been the Corps’ failure to use the Rivers and Harbors Act to reach all of the traditional navigable waters and large intrastate lakes.⁵⁵ If, as seems likely, the interpretations at issue in those committee hearings were the limited “agency determinations” to which the Conference Report referred, then this is the better reading of the conferees’ language.⁵⁶

Indeed, although the agencies have generally argued that the deletion of “navigable” from the definition of “navigable waters” indicates that Congress intended to broaden the definition of “navigable waters,” the contrary could also be true. The deletion of “tributaries” from the Senate Bill and the adoption of language very close to the House Bill could indicate that Congress intended the “navigable waters” to conform to their contemporary understanding, without the artificial limits that had been the subject of discussion between Congress and the Corps.

The statements of the floor managers do not absolutely resolve this question—they are merely the statements of single legislators—but they do provide some context. One widely quoted statement is that of Rep. John D. Dingell (D-Mich.), the House floor manager for the bill. Representative Dingell declared that the bill “defines the term ‘navi-

52. *See, e.g.*, *United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1325, 4 ELR 20784, 20788-89 (6th Cir. 1974).

53. *United States v. Lopez*, 514 U.S. 549, 558-59 (1995).

54. *See id.* at 556-57.

55. *See supra* notes 35-44 and accompanying text.

56. The broad statement of intent in the Conference Committee was drawn verbatim from the House Committee report. Because the House definition of navigable waters included only “the navigable waters of the United States,” it may be that the House, too, had in mind the “broadest constitutional interpretation” of federal power over the traditional navigable waters, which the House Committee on Government Operations had been urging the Corps to adopt.

nable waters' broadly for water quality purposes," meaning "all 'the waters of the United States' in a geographical sense," and not "'navigable waters of the United States' in the technical sense as we sometimes see in some laws."⁵⁷ Although years of administrative gloss have made this statement seem quite broad to the present-day reader, at the time it was uttered it may have simply indicated an intent to override the Corps' specific, narrower practices that were at issue in the early 1970s. Indeed, Representative Dingell stated explicitly, "[n]o longer are the old narrow definitions of navigability, as determined by the [C]orps of Engineers, going to govern matters covered by this bill," and proceeded to quote verbatim two long paragraphs from the 1972 Committee on Government Operations Report that had urged the Corps to assert its jurisdiction over the full, traditional "nav-

igable waters" under the Rivers and Harbors Act and over intrastate navigable lakes.⁵⁸ Representative Dingell did not contend that the CWA was a radical break from contemporary understanding. To the contrary, he emphasized that "[t]he new and broader definition is in line with more recent judicial opinions."⁵⁹ Other widely quoted, superficially broad statements can be similarly understood when placed in context.⁶⁰

In sum, the legislative history of the 1972 Amendments suggests that Congress did, indeed, intend to broaden significantly the reach of federal regulatory authority over the nation's waters. But the debate was framed in terms of the traditional navigable waters—specifically, how far federal power could reach if the term *navigable waters* was given its "broadest possible constitutional interpretation." Thus, in referring to the "agency determinations" that had "encumbered" federal jurisdiction, the committee reports and floor statements were referring to the interpretations that had been at issue in the immediately preceding period under the Rivers and Harbors Act. Rather than sweep away all distinction between the waters of the United States and the waters of the states (as the modern agencies would do), when read in context this legislative history indicates that Congress intended a far narrower—but at the time expansive, hard-fought, and constitutionally controversial—purpose: to force the Corps to assert its jurisdiction to the fullest constitutional definition of the navigable waters, and to assert ju-

57. 1 LEGISLATIVE HISTORY 250-51. Representative Dingell's full statement provides:

[T]he conference bill defines the term "navigable waters" broadly for water quality purposes. It means all "the waters of the United States" in a geographical sense. It does not mean "navigable waters of the United States" in the technical sense as we sometimes see in some laws.

The new and broader definition is in line with more recent judicial opinions which have substantially expanded that limited view of navigability—derived from the Daniel Ball case (77 U.S. 557, 563)—to include waterways which would be "susceptible of being used . . . with reasonable improvement," as well as those waterways which include sections presently obstructed by falls, rapids, sand bars, currents, floating debris, et cetera.[.] *United States v. Utah*, 283 U.S. 64 (1931); *United States v. App[alachian] Power Co.*, 331 U.S. 377, 407-410, 416 (1940); *Wisconsin Public Service Corp. v. Federal Power Commission*, 147 F.2d 743 (CA7, 1945), cert. denied, 325 U.S. 880; *Wisconsin v. Federal Power Commission*, 214 F.2d 334 (CA7, 1954), cert. denied, 348 U.S. 883 (1954); *Namekagon Hydro Co. v. Federal Power Commission*, 216 F.2d 509 (CA7, 1954); *Puente de Reynosa, S.A. v. City of McAllen*, 357 F.2d 43, 50-51 (CA5, 1966); *Rochester Gas and Electric Corp. v. Federal Power Commission*, 344 F.2d 594 (CA2, 1965); *The Montello*, 37 U.S. (20 Wall.) 430, 441-42 (1874); *Economy Light & Power Co. v. United States*, 256 U.S. 113 (1921).

The Constitution contains no mention of navigable waters. The authority of Congress over navigable waters is based on the Constitution's grant to Congress of "Power . . . to regulate commerce with Foreign Nations and among the several States . . ." (art. I, sec. 8, clause 3). *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). Although most interstate commerce 150 years ago was accomplished on waterways, there is no requirement in the Constitution that the waterway must cross a State boundary in order to be within the interstate commerce power of the Federal Government. Rather, it is enough that the waterway serves as a link in the chain of commerce among the States as it flows in the various channels of transportation—highways, railroads, air traffic, radio and postal communication, waterways, et cetera. The "gist of the Federal test" is the waterway's use "as a highway," not whether it is "part of navigable interstate or international commercial highway." *Utah v. United States*, 403 U.S. 9, 11 (1971); *U.S. v. Underwood*, 4 ERC 1305, 1309 (D.C., Md., Fla., Tampa Div., June 8, 1972).

Thus, this new definition clearly encompasses all water bodies, including main streams and their tributaries, for water quality purposes. No longer are the old, narrow definitions of navigability, as determined by the corps of Engineers, going to govern matters covered by this bill. Indeed, the conference report states on page 144:

"The 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."

Id.

58. The second and third paragraphs of Representative Dingell's statement come almost verbatim from the House Committee on Government Operations' 1972 Report, see *supra* notes 40 and 42-43, which had urged the Corps to assert broader jurisdiction over the traditional navigable waters. See H.R. REP. NO. 92-1323, at 29-30 (1972). As noted above, in these sections the committee urged the Corps to assert jurisdiction over waters "susceptible of being used . . . with reasonable improvement" for navigation, and waters that formed links in the chain of commerce through their connection with highways or railroads. *Id.* at 29-30.

59. 1 LEGISLATIVE HISTORY 250-51.

60. Like Representative Dingell's, Sen. Edmund S. Muskie's (D-Me.) widely quoted summary includes a discussion of the traditional definition of navigable waters as well as a discussion of waters that form a link in the chain of commerce through overland connections:

One matter of importance throughout the legislation is the meaning of the term "navigable waters of the United States."

The conference agreement does not define the term. The conferees fully intend that the term "navigable waters" be given the broadest possible interpretation unencumbered by agency determinations which have been made or may be made for administrative purpose.

Based on the history of consideration of this legislation, it is obvious that its provisions and the extent of application should be construed broadly. It is intended that the term "navigable waters" include all water bodies, such as lakes, streams, and rivers, regarded as public navigable waters in law which are navigable in fact. It is further intended that such waters shall be considered to be navigable in fact when they form, in their ordinary condition by themselves or by uniting with other waters or other systems of transportation, such as highways or railroads, a continuing highway over which commerce is or may be carried on with other States or with foreign countries in the customary means of trade and travel in which commerce is conducted to day. In such case the commerce on such waters would have a substantial economic effect on interstate commerce.

1 LEGISLATIVE HISTORY 178. The third paragraph of this passage does not come from the Conference Report at all; it comes from Senator Muskie's floor statements in support of the 1970 Act. See 116 CONG. REC. 8985 (1970); see also H.R. REP. NO. 92-1323, 31 (quoting the same language).

jurisdiction over intrastate navigable waters having an overland, i.e., rail or highway, connection to interstate commerce. When read in context, this history therefore supports the Supreme Court's conclusion in *SWANCC* that Congress intended in 1972 to exercise its commerce power over navigation, and not its power over all things affecting interstate commerce.

The Definition of Navigability Under the 1972 Amendments

Two Conflicting Views of CWA Jurisdiction

In light of this historical context, it is not surprising that the broad, modern interpretation of federal CWA jurisdiction was not universally apparent immediately after the Amendments were adopted in 1972. In fact, EPA and the Corps initially developed sharply differing interpretations of the scope of the "navigable waters" and "waters of the United States." The Corps, viewing the 1972 Amendments through the prism of its contemporaneous experience before the House Committee, adopted a definition that incorporated the concerns Congress had articulated in the years preceding the passage of the 1972 Amendments. EPA, on the other hand, adopted a new and different approach.

According to EPA, the term "navigable waters," when defined as "waters of the United States," included any waters in or on which activity might affect interstate commerce. This was a significant change from the pre-1972 FWPCA, which EPA had interpreted narrowly.⁶¹ In 1973, EPA's general counsel explained the reasoning behind this broad theory of jurisdiction:

We have investigated the origin and history of the term "navigable waters of the United States," in order to determine the significance of the deletion of the word "navigable." That phrase, as it was construed in early Supreme Court decisions, depended upon the application of two tests. First, the waters in question were required to be navigable in fact, which meant that they must be capable of being used by vessels in carrying goods in commerce. Second, the phrase "of the United States" meant that the waters had to be capable of being used in interstate commerce. Accordingly, the deletion of the word "navigable" 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.⁶²

There are several problems with this analysis. Even taking EPA on its own terms, if the phrase "of the United States" means "that the waters had to be capable of being used in interstate commerce," then deleting the term "navigable" should result in federal jurisdiction over waters "capable of being used in interstate commerce." But EPA converts "waters . . . capable of being used in interstate commerce" to all *pollution* of waters capable of *affecting* interstate commerce. This is a non sequitur. Moreover, it converts criteria of navigability into a rationale for broad federal authority under an "affecting commerce" theory.

The same problem is evidenced in EPA's description of the meaning of the first part of the definition: the term "navigable."

According to EPA, "navigable" means "capable of being used by vessels in carrying goods in commerce," a phrase denoting both the concept of navigability and the concept of use in commerce. The only meaning added by the second part of the definition ("of the United States") is therefore the concept that the commerce be "interstate." The deletion of the word "navigable" simply leaves the idea that the waters had to be "interstate." It does not allow EPA to claim jurisdiction over waters on the ground that the pollution of those waters could affect interstate commerce.

EPA contended that its analysis came from the "origin and history" of the term "navigable waters of the United States." But an examination of the origin of the term further demonstrates that EPA's conclusion is ahistorical as well as illogical. The classic exposition of that term is that of the Supreme Court's opinion in *The Daniel Ball*. That case identifies "navigable in fact" as signifying that waters are "used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." Thus, the term "navigable" includes both the concept that the waters be used by vessels and the concept that the waters be used in commerce. The phrase "of the United States . . . in contradistinction from the navigable waters of the States" means that the waters "form 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."⁶³ The phrase "waters of the United States, . . . in contradistinction from the navigable waters of the States" therefore distinguishes interstate from intrastate waters.

Nonetheless, EPA adopted this reasoning, and ensuing EPA regulations for the federal national pollutant discharge elimination system program defined the navigable waters to include:

- (1) All navigable waters of the United States;
- (2) Tributaries of navigable waters of the United States;
- (3) Interstate waters;
- (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.⁶⁴

63. *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1871).

64. 40 C.F.R. §125.1(o) (1974); see also 38 Fed. Reg. 13528, 13529 (May 3, 1973). EPA actually took several months to arrive at this definition. The six categories of waters were first proposed in a memorandum by Associate General Counsel Alan Eckert, issued on November 14, 1972. EPA's initial regulation for state programs, announced in December 1972, did not articulate these categories. It simply incorporated by reference the statutory definition of "navigable waters." See 37 Fed. Reg. 28390, 28392 (Dec. 22, 1972) (promulgating 40 C.F.R. §124.1(n)). In January 1973, EPA's proposed regulation for the federal national pollutant discharge elimination system program likewise simply recited the statutory definition: "the waters of the United States, including the territorial seas." 38 Fed. Reg. 1362, 1363 (Jan. 24, 1973). In February the above cited General Counsel's Opinion publicly stated that the "waters of the United States" included "at least" the six categories of waters, but substi-

61. EPA General Counsel Opinion (Dec. 9, 1971) (declaring that "navigable waters of the United States" require an interstate *water* connection).

62. EPA General Counsel Opinion (Feb. 6, 1973).

The Corps, on the other hand, rejected EPA's broad interpretation. Instead, the Corps viewed the CWA as requiring it to assert jurisdiction over all the traditional navigable waters, including those traditional navigable waters that it had previously declined to regulate. As noted above, this interpretation makes sense in light of the historical context. Congress had repeatedly urged the Corps to discard earlier, limited interpretations of its jurisdiction and to expand its interpretation of its authority to include the full extent of the "traditional navigable waters."⁶⁵ Accordingly, the Corps responded in its 1972 regulatory definition of the "navigable waters of the United States" and again in its 1974 definition of the "waters of the United States" by asserting jurisdiction over the full scope of the "traditional navigable waters."

In the preamble to the 1974 rule setting forth the Corps' first CWA §404 permitting program, the Corps explained, stating:

Section 404 of the FWPCA uses the term "navigable waters" which is later defined in the Act as "the waters of the United States." The Conference Report, in discussing this term, advises that this term is to be given the "broadest possible Constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." We feel that the guidance in interpreting the meaning of this term which has been offered by this Conference Report—to give it the broadest possible Constitutional interpretation—is the same as the basic premise from which the aforementioned judicial precedents [interpreting the "navigable waters of the United States"] have evolved. The extent of Federal regulatory jurisdiction must be limited to that which is Constitutionally permissible, and in this regard, we feel that we must adopt an administrative definition of this term which is soundly based on this premise and the judicial precedents which have reinforced it. Accordingly, we feel that in the administration of this regulatory program both terms should be treated synonymously.⁶⁶

The Corps therefore defined "navigable waters" to include "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"⁶⁷ The Corps further explained which criteria would qualify a water body as "navigable," including "past, present, or potential presence of interstate or foreign commerce" and "physical capabilities for use by commerce."⁶⁸ In short, the Corps, as it had done in 1972, asserted jurisdiction over all the traditional navigable waters.

The *Callaway* Case

The Natural Resources Defense Council (NRDC) challenged the Corps' definition, and in 1975 the U.S. District

Court for the District of Columbia held that the definition was illegally narrow.⁶⁹ In an order without an opinion, the court declared in *Natural Resources Defense Council v. Callaway*⁷⁰ that Congress had "asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the constitution."⁷¹ "Accordingly," the court declared, "as used in the Water Act, the term ["navigable waters"] is not limited to the traditional tests of navigability."⁷² The court ordered the Corps to develop regulations "clearly recognizing the regulatory mandate of the Water Act."⁷³

The Corps' Response

After the *Callaway* decision, the Corps proposed regulations in early 1975 to attempt to establish the new bounds of its jurisdiction.⁷⁴ Upon receiving public comments, the Corps promulgated interim final regulations later that year.⁷⁵ These regulations regulated most linear water bodies below the headwaters.⁷⁶ These regulations also established

69. *Natural Resources Defense Council v. Callaway*, 392 F. Supp. 685, 5 ELR 20285 (D.D.C. 1975).

70. 392 F. Supp. 685, 5 ELR 20285 (D.D.C. 1975).

71. *Id.* at 686, 5 ELR at 20285.

72. *Id.*

73. *Id.*

74. See 40 Fed. Reg. 19766 (May 5, 1975).

75. See *id.* 31320 (July 25, 1975).

76. The Corps' 1975 regulations defined "navigable waters" to include coastal waters and wetlands; navigable rivers, lakes, and streams; artificial channels and canals connected to navigable waters; wetlands adjacent to navigable waters; and

(c) Rivers, lakes, streams, and artificial water bodies that are navigable waters of the United States up to their headwaters and landward to their ordinary high water mark;

. . . .

(e) All tributaries of navigable waters of the United States up to their headwaters and landward to their ordinary high water mark;

(f) Interstate waters landward to their ordinary high water mark and up to their headwaters;

(g) 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.

Id. at 31323-24. In 1975, the Assistant Secretary of the Army for Civil Works, Victor Veysey, testified before Congress that the Corps' expanded permit procedure "will not apply to: (A) Headwaters of streams—above the point of regular flow less than 5 second feet, (B) small lakes and ponds, [and] (C) coastal or inland wetlands above the navigation servitude not frequently inundated." *Development of New Regulations by the Corps of Engineers, Implementing Section 404 of the Federal Water Pollution Control Act Concerning Permits for Disposal of Dredge or Fill Material Before the House Subcomm. on Water Resources of the Comm. on Public Works and Transportation*, 94th Cong. 6 (1975); see also *id.* at 13. Assistant Secretary Veysey reported that the headwaters would mark "the termination of any permit requirement," *id.* at 13, observing that "these

tuted "interstate" for "intrastate" in the definitions of the final three. See EPA General Counsel Opinion (Feb. 6, 1973). Not until May 1973 did EPA finally promulgate the complete definition cited above, with the explanation that "[t]he definition of 'navigable waters' has been clarified by incorporating additional language." 38 Fed. Reg. at 13528-29.

65. See *supra* notes 35-44 and accompanying text.

66. 39 Fed. Reg. 12115 (Apr. 3, 1974).

67. 33 C.F.R. §209.120(d)(1).

68. *Id.* §209.260(d).

a phase-in period, under which the Corps would gradually assert jurisdiction over waters upstream of the traditional navigable waters.⁷⁷

In 1977, the Corps issued its final rule, which modified the Corps' approach.⁷⁸ The Corps' final regulations 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 (manmade 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 waters of the United States, the degradation or destruction of which could affect interstate commerce.⁷⁹

The 1977 final regulations exempted areas above the headwaters from the §404 permit requirement, establishing by rule that discharges into "non-tidal rivers, streams and their impoundments including adjacent wetlands that are located above the headwaters" were "hereby permitted."⁸⁰ In practical effect, the 1975 and 1977 regulations were quite similar: the Corps would require permits for dredge or fill activities in the traditional navigable waters, and in non-navigable tributaries, but not above the headwaters.

The CWA Amendments of 1977

At roughly the same time that the Corps was amending its regulations, Congress again amended the FWPCA. A major

decisions would be better made within States—certainly on the smaller bodies of water and the upper branches of rivers—than to bring them to the Federal Government." *Id.* at 8. The Secretary testified that these waters lie well within the state's traditional authority over land and waters. As the Secretary opined, a headwaters cutoff would avoid subjecting individual farmers to the §404(a) permit requirement. *See id.* at 13 ("And I would suspect that most of your farmers would not be operating within areas that would have more than 5 second-foot flow.")

77. The Corps announced that:

Department of the Army permits will be required for the discharge of dredged material or of fill material into navigable waters in accordance with the following phased schedule:

(a) *Phase I:* After the effective date of this regulation, discharges of dredged material or of fill material into coastal waters and coastal wetlands contiguous or adjacent thereto or into inland navigable waters of the United States and freshwater wetlands contiguous or adjacent thereto are subject to the procedures of this regulation.

(b) *Phase II:* After July 1, 1976, discharges of dredged material or of fill material into primary tributaries, freshwater wetlands contiguous or adjacent to primary tributaries, and lakes are subject to the procedures of this regulation.

(c) *Phase III:* After July 1, 1977, discharges of dredged material or fill material into any navigable water are subject to the procedures of this regulation.

40 Fed. Reg. at 31326.

78. *See* 42 Fed. Reg. 37122 (July 19, 1977).

79. *Id.* at 37144.

80. *Id.* at 37146 (quoting 33 C.F.R. §323.4-2).

topic of the congressional debates over these amendments was the scope of the Corps' jurisdiction after *Callaway*. A bill was proposed in the House that would have defined "navigable waters" for the purposes of §404 as "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," and that would have expressly authorized the regulation of adjacent wetlands.⁸¹ A similar definition was proposed in the Senate, but was defeated in a close vote.⁸² The different bills were sent to the Conference Committee, and in the end Congress left the definition as it was.

Congress ultimately passed revisions to §404 that made it clear that adjacent wetlands were to be included within the Corps' jurisdiction over navigable waters.⁸³ These provisions also included exemptions to §404 designed to avoid regulating certain, mostly agricultural activities, a grant of authority to the Corps to issue general permits, and a grant of authority to the states to petition to administer

[their] own individual and general permit program for the discharge of dredged or fill material into the navigable 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) within [their] jurisdiction.⁸⁴

The Supreme Court addressed the implications of these provisions in *SWANCC*.⁸⁵

Further Expansion of the Definition of "Waters of the United States," and the Supreme Court's Decision in United States v. Riverside Bayview Homes

Expansion of the Definition of "Waters of the United States"

Since the 1977 Amendments, EPA's notion of what constitutes "effects" on interstate commerce has steadily expanded, and EPA's and the Corps' regulations have followed suit. Currently, the Corps and EPA define "waters of the United States" as follows:

(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

81. H.R. 3199, 95th Cong. §16 (1977), reprinted in 4 LEGISLATIVE HISTORY 1183.

82. *See* 123 CONG. REC. 26710, 26728 (1977).

83. *See* 33 U.S.C. §§1288(i)(2), 1344(g), ELR STAT. FWPCA §§208(i)(2), 404(g).

84. *Id.* §1344(e)-(g), ELR STAT. FWPCA §404(e)-(g).

85. The Court held that neither the failure of the proposals to overrule *Callaway* nor the addition of the agricultural and other exemptions indicated Congress' acquiescence in the full scope of the Corps' 1977 regulations. *See SWANCC*, 531 U.S. at 169-71 & n.7, 31 ELR at 20383-84 & n.7.

- (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;
- (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.⁸⁶

Riverside Bayview Homes

In 1985, the Supreme Court upheld the Corps' jurisdiction over wetlands adjacent to navigable waters in *Riverside Bayview Homes*.⁸⁷ The Court held that wetlands adjacent to navigable waters were "waters of the United States" within the meaning of the CWA.

The respondent in *Riverside Bayview Homes* owned "80 acres of low-lying, marshy land near the shores of Lake St. Clair in Macomb County, Michigan."⁸⁸ Those waters were "adjacent to a body of navigable water, since the area characterized by saturated soil conditions and wetland vegetation extended beyond the boundary of respondent's property to Black Creek, a navigable waterway."⁸⁹ As the government described them in its briefing before the Court, "there is direct, unimpeded access from the mid-east boundary of Riverside's property to additional marshes and the open waters of Black Creek, a navigable water of the United States. . . . Indeed, it would not be an exaggeration to state that one could, after wading through a cattail marsh, swim directly from Riverside's property into the Great Lakes."⁹⁰ The Supreme Court held that the CWA could reasonably be interpreted to include such "adjacent wetlands" in the "waters of the United States," since Congress "intended . . . to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and 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."⁹¹

The Court therefore approved the Corps' regulation of wetlands adjacent to navigable waters as a reasonable construction of the CWA. The Court pointed to three congressional actions in support of the reasonableness of the Corps' construction. First, the Court noted that Congress had considered limiting the reach of §404 after the *Callaway* decision, and had declined to do so. Second, the Court noted that even those who would have limited the Corps' jurisdiction would have authorized the Corps to regulate wetlands im-

mediately adjacent to otherwise navigable waters. Third, the Court pointed to other sections of the Act that appeared to contemplate the regulation of wetlands.⁹² Although the Court reserved the question whether the CWA authorized the Corps to "regulate discharges of fill material into wetlands that are not adjacent to open waters,"⁹³ the regulation of wetlands directly abutting open, navigable waters was found to be consistent with the Act.

The Migratory Bird Rule

In 1986, the Corps included in the preamble to one of its regulations a statement that the "waters of the United States . . . also include the following waters," those:

- a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or
- b. Which are or would be used as habitat by other migratory birds which cross state lines; or
- c. Which are or would be used as habitat for endangered species; or
- d. Used to irrigate crops sold in interstate commerce.⁹⁴

This became known as the migratory bird rule, and was soon the subject of significant litigation. One court held that the migratory bird rule was illegally promulgated without notice and comment,⁹⁵ but the Corps continued to apply the rule outside that federal circuit. Several courts held that it was consistent with the CWA on the ground that Congress intended the CWA to be extended to the fullest extent of its commerce authority, including its authority over activities having a substantial effect on interstate commerce.⁹⁶ Another court held the rule invalid, then vacated its opinion and issued a second opinion rejecting the government's jurisdictional claims on different grounds.⁹⁷

The SWANCC Decision

Facts and Holding of SWANCC

In *SWANCC*, the Supreme Court took up the validity of the Corps' claim of jurisdiction over several small ponds in northern Illinois. The petitioner in *SWANCC* was a municipal corporation formed by 23 suburban Chicago cities and villages to manage their municipal waste. As part of their comprehensive solid waste management plan, these municipalities had purchased a site for the purpose of developing a new landfill (or balefill). The site had once housed a sand

86. 33 C.F.R. §328.3 (Corps regulations); see also 40 C.F.R. §122.2 (EPA regulations).

87. *Riverside Bayview Homes*, 474 U.S. at 121, 16 ELR at 20086.

88. *Id.* at 124, 16 ELR at 20087.

89. *Id.* at 131, 16 ELR at 20088.

90. See Edgar B. Washburn, *Current Status of the 404 Regulatory Programs*, ALI WETLANDS L. & REG. (May/June 2001) (quoting Reply Brief for the United States at 2 (*Riverside Bayview Homes*)). At oral argument, the government again asserted that "this is in fact an adjacent wetland, adjacent—by adjacent, I mean it is immediately next to, abuts, adjoins, borders, whatever other adjective you might want to use, navigable waters of the United States." *Id.* (quoting Official Tr. at 5-6 (*Riverside Bayview Homes*)).

91. 474 U.S. at 133, 16 ELR at 20089.

92. See *id.* at 135-39, 16 ELR at 20088-89.

93. *Id.* at 131 n.8, 16 ELR at 20088 n.8.

94. 51 Fed. Reg. at 41217.

95. See *Tabb Lakes, Ltd. v. United States*, 715 F. Supp. 726, 729, 19 ELR 20672, 20673 (E.D. Va. 1988), *aff'd*, 885 F.2d 866, 20 ELR 20008 (4th Cir. 1989).

96. See *Solid Waste Agency of N. Cook County v. Corps of Eng'rs*, 191 F.3d 845, 850, 30 ELR 20161, 20162-63 (7th Cir. 1999); *Leslie Salt Co. v. United States*, 55 F.3d 1388, 25 ELR 21046 (9th Cir. 1995); *Leslie Salt Co. v. United States*, 896 F.2d 354, 360, 20 ELR 20477, 20480-81 (9th Cir. 1990).

97. See *Hoffman Homes, Inc. v. EPA*, 975 F.2d 1554, 22 ELR 21547 (7th Cir. 1992) (holding the migratory bird rule to be invalid) (vacated); *Hoffman Homes, Inc. v. EPA*, 999 F.2d 256, 23 ELR 21139 (7th Cir. 1993) (rejecting jurisdiction as unsupported by substantial evidence).

and gravel strip mine, and the trenches and other depressions left by the mining had formed permanent and seasonal ponds ranging from less than one-tenth of an acre to several acres in size and from several inches to several feet in depth. These “isolated ponds” were used by a variety of migratory birds.

After several years of review, the state of Illinois approved the project, attaching conditions intended to mitigate its adverse environmental impacts. But the Corps, claiming jurisdiction over the site pursuant to its migratory bird rule, denied the project a §404 permit. The municipalities sued.

The municipalities made two arguments. First, they claimed that the CWA extended only to “navigable waters” as traditionally understood. The migratory bird rule, which was justified by Congress’ broader authority to regulate things having a substantial effect on interstate commerce, was not authorized under this traditional understanding of navigable waters.⁹⁸ Second, the municipalities argued that the Corps’ claim of jurisdiction exceeded even Congress’ broadest constitutional authority.⁹⁹ The Supreme Court decided only the first of these issues, and concluded that the Corps had extended federal jurisdiction beyond the scope of the CWA.

The Court’s Reasoning

Holding that Congress did not authorize the Corps to regulate to the full extent of the commerce power, the Supreme Court invalidated the migratory bird rule in its entirety. According to the Court, “33 C.F.R. §328.3(a)(3), as clarified and applied to petitioner’s baffle site pursuant to the ‘Migratory Bird Rule,’ exceeds the authority granted to [the Corps] under §404(a) of the CWA.”¹⁰⁰ The “navigable waters” regulated by the CWA do not stretch so far.

The Supreme Court reached its conclusion after evaluating the plain meaning of the statute, its legislative history, and the contemporaneous interpretations of the Corps, as well as the Court’s own precedent. The Court found the migratory bird rule to exceed the Corps’ jurisdiction under the plain language of the CWA. Moreover, the Court observed that a broader interpretation, without a clear statement from Congress that a broad interpretation was intended, would violate the Court’s duty to avoid statutory interpretations that expand federal power at the expense of the traditional authority of the states.¹⁰¹

The Rule and the Regulation Violate the Statutory Text, as Supported by the Legislative History and Context

The first basis for the Court’s conclusion was the plain meaning of the statute: the CWA grants jurisdiction only over “navigable waters.” The Corps had argued that the omission of the term “navigable” from the statute’s definition of “navigable waters,” i.e., the “waters of the United States,” signified a broader reach, but the Court did not agree. According to the Court, “[t]he term ‘navigable’ has at least the import of showing us what Congress had in mind as

its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.”¹⁰² Because the migratory bird rule and the regulation that it “clarified” were justifiable only by reference to Congress’ broader power to regulate activities substantially affecting interstate commerce—not by Congress’ “commerce power over navigation”¹⁰³—they exceeded the scope of the CWA. As the Court observed, “this is a far cry, indeed, from the ‘navigable waters’ and ‘waters of the United States’ to which the statute by its terms extends.”¹⁰⁴

An analysis of the legislative history yielded the same conclusion. The Corps had argued that the statute’s drafters intended to expand agencies’ authority to the fullest extent of Congress’ power over things “affecting commerce”—and based its argument largely on the 1972 Conference Report’s statement 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.”¹⁰⁵ The Supreme Court specifically rejected that argument. According to the Court, “neither this, nor anything else in the legislative history to which respondents point, signifies that Congress intended to exert anything more than its commerce power over navigation.”¹⁰⁶ Although the Court did not rebut the government’s position with an affirmative case of its own, the discussion of the legislative history in the second and third parts of this Article indicates that the Court was correct.

The Supreme Court also relied on the Corps’ own early interpretation of the statute. The Corps’ original regulations had defined the “navigable waters” according to their traditional understanding: “[T]hose 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.”¹⁰⁷ Moreover, in determining whether a water was jurisdictional, it was “the water body’s capability of use by the public for purposes of transportation or commerce which [was] the determinative factor.”¹⁰⁸ The Supreme Court concluded that these regulations captured the true meaning of the CWA, quoting verbatim the Corps’ first definition of “navigable waters,” which *Callaway* had rejected in 1975:

[T]he Corps’ *original* interpretation of the CWA, promulgated two years after its enactment, is inconsistent with that which it espouses here. 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 C.F.R. §209.120(d)(1). The Corps emphasized that “[i]t is the water body’s capability of use by the public for purposes

98. See *SWANCC*, Brief for the Petitioner at 13-32.

99. See *id.* at 36-50.

100. *Solid Waste Agency of N. Cook County v. Corps of Eng’rs*, 531 U.S. 159, 174, 31 ELR 20382, 20385 (2001) (citations omitted).

101. See *id.* at 172-75, 31 ELR at 20384-85.

102. *Id.* at 172, 31 ELR at 20384.

103. *Id.* at 168 n.3, 31 ELR at 20383 n.3

104. *Id.* at 173, 31 ELR at 20384.

105. *Id.* at 168 n.3, 31 ELR at 20383 n.3.

106. *Id.*

107. *Id.* at 168, 31 ELR at 20383 (quoting 33 C.F.R. §209.120(d)(1) (1974)).

108. *Id.* (quoting 33 C.F.R. §209.260(e)(1) (1974)).

of transportation or commerce which is the determinative factor.” §209.260(e)(1).¹⁰⁹

The government, said the Court, “put forward no persuasive evidence that the Corps mistook Congress’ intent in 1974.”¹¹⁰ In other words, the Corps’ original definition correctly captured the intent of the statute: to protect the navigable waters as traditionally understood.

The Supreme Court then rejected the argument that Congress in 1977 acquiesced in the Corp’s jurisdictional expansion. Because Congress had amended the CWA at around the same time that the Corps had issued new regulations in conformance with *Callaway*, and because Congress rejected House and Senate proposals to overrule *Callaway*, the Corps argued that Congress had “recognized and accepted a broad definition of ‘navigable waters’ that includes non-navigable, isolated, intrastate waters.”¹¹¹ The Court rejected the premise that Congress had endorsed or acquiesced in the Corps’ 1977 regulations. Calling congressional acquiescence “a particularly dangerous ground on which to rest an interpretation of a prior statute,” the Court “conclude[d] that respondents have failed to make the necessary showing that the failure of the 1977 House bill demonstrates Congress’ acquiescence to the Corps’ regulations or the ‘Migratory Bird Rule.’”¹¹²

The Court Limited Its Opinion in *Riverside Bayview Homes* to Wetlands Abutting Open, Navigable Waters

The Supreme Court also rejected the argument that jurisdiction over the wetlands in *SWANCC* was authorized by its opinion in *Riverside Bayview Homes*. In so doing, the Court severely limited the reasoning of *Riverside Bayview Homes* and reinstated the traditional navigable waters as the touchstone for federal jurisdiction under the Act.

Two aspects of the opinion in *SWANCC* limit the reasoning of *Riverside Bayview Homes*. First, the Supreme Court held in *SWANCC* that the term “navigable” continues to define the scope of the CWA, despite language in *Riverside Bayview Homes* stating that “the term navigable as used in the Act is of limited import.”¹¹³ In fact, the Court concluded that the statutory term “navigable” implied that Congress intended to assert its jurisdiction over the traditional navigable waters:

We said in *Riverside Bayview Homes* that the word “navigable” in the statute was of “limited effect” and went on to hold that §404(a) extended to non-navigable wetlands adjacent to open waters. But 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 [CWA]: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.¹¹⁴

The “plain text” of the statute, according to the Court, was “clear.”¹¹⁵ Moreover, the Court emphasized that its holding

in *Riverside Bayview Homes* “was based in large measure upon Congress’ unequivocal acquiescence to, and approval of, the Corps’ regulations interpreting the CWA to cover wetlands adjacent to navigable waters.”¹¹⁶

The second aspect of *SWANCC* restricting the reasoning of *Riverside Bayview Homes* severely limited the scope of the congressional acquiescence that the Court was willing to recognize. In *SWANCC*, the Corps argued that Congress had acquiesced to all of the Corps’ 1977 regulations, which had extended the Corps’ jurisdiction to virtually all waters and wetlands in response to the *Callaway* decision.¹¹⁷ The Supreme Court in *SWANCC* rejected that argument, holding that the congressional acquiescence accepted in *Riverside Bayview Homes* did not extend so far. Instead, the Court held, the congressional debates over the 1977 Amendments “centered largely on the issue of wetlands preservation.”¹¹⁸ Because the government could point to “no persuasive evidence” that Congress intended to endorse the Corps’ other broad claims of jurisdiction in 1977, the Court rejected the claim that the 1977 Amendments approved the Corps’ full post-*Callaway* assertion of jurisdiction.¹¹⁹

SWANCC therefore refocuses CWA jurisdiction on the text of the Act and the clear intent of Congress. *SWANCC* emphasizes that the Court’s acceptance of the acquiescence argument in *Riverside Bayview Homes* had been premised on Congress’ clear intent to regulate wetlands that “actually abut” navigable waters such as those at issue in that case. After *SWANCC*, *Riverside Bayview Homes* cannot stand for the proposition that federal agencies have jurisdiction over any area that the agencies believe is “inseparably bound up” with the navigable waters. Jurisdiction can now be asserted over other areas outside the traditional navigable waters only if similar clear congressional intent can be found.

“Significant Constitutional and Federalism Questions” Required the Rejection of the Corps’ Interpretation of Its Jurisdiction

The Supreme Court was also especially concerned that the Corps’ primary argument in support of the migratory bird rule—that the rule “falls within Congress’ power to regulate intrastate activities that ‘substantially affect’ interstate commerce”—raised “significant constitutional questions.”¹²⁰ “Where an administrative interpretation of a statute invokes the outer limit of Congress’ power,” the Court reminded, “we expect a clear indication that Congress intended that result.”¹²¹ This is especially true if “the administrative interpretation alters the federal framework by permitting federal encroachment on a traditional state power.”¹²²

The CWA contains no such clear statement. To the contrary, “Congress chose to ‘recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water re-

116. *Id.* at 167, 31 ELR at 20383.

117. *See id.* at 168-69, 31 ELR at 20383-84.

118. *Id.* at 170, 31 ELR at 20384 (quoting *Riverside Bayview Homes*, 474 U.S. at 136, 16 ELR at 20090).

119. *See id.* at 171, 31 ELR at 20384.

120. *Id.* at 173, 31 ELR at 20384.

121. *Id.* at 172-73, 31 ELR at 20384.

122. *Id.* at 173, 31 ELR at 20384.

109. *Id.* at 168, 31 ELR at 20383 (emphasis in original).

110. *Id.*

111. *Id.* at 169, 31 ELR at 20384.

112. *Id.* at 169-70, 31 ELR at 20384.

113. *Riverside Bayview Homes*, 474 U.S. at 133, 16 ELR at 20089.

114. 531 U.S. at 172, 31 ELR at 20384.

115. *See id.* at 170, 172, 31 ELR at 20384.

sources.”¹²³ Here, “[r]ather than expressing a desire to re-adjust the federal-state balance,” Congress had explicitly preserved the preexisting authorities of the states.¹²⁴ The application of the migratory bird rule, however, “would result in a significant impingement of the States’ traditional and primary power over land and water use.”¹²⁵ “[T]o avoid the significant constitutional and federalism questions raised by respondents’ interpretation,” the Court declined to adopt the Corps’ proffered justification for its rule and regulation.¹²⁶

Implications of *SWANCC*

It is obvious after *SWANCC* that the migratory bird rule is no longer valid. But the reasoning of *SWANCC* has much broader implications. Two principles stand out. First, the Corps’ 1974 regulations, which were limited to the traditional navigable waters, properly captured Congress’ intent in regulating the “navigable waters” in 1972. Second, any expansion of that original geographic scope—for instance, to wetlands adjacent to the navigable waters—must be proven with reference to a clear congressional statement.

The Corps’ 1974 Definition Properly Captured the Geographic Reach of the 1972 FWPCA Amendments

After *SWANCC*, the starting point for the analysis of federal jurisdiction is the traditional navigable waters, as defined in *The Daniel Ball*, *Economy Light & Power Co.*, and *Appalachian Power Co.*¹²⁷ The Supreme Court’s opinion states more than once that Congress’ use of the term “navigable waters” signifies that Congress intended to exercise its traditional authority over navigable waters, and not its broader power over all things that substantially affect commerce.¹²⁸ In so stating, the Court expressly endorsed the Corps’ 1974 interpretation of the statute (which had expanded the Corps’ jurisdiction to the full scope of the traditional navigable waters, as members of Congress had been urging), and expressly rejected the broader view the Corps adopted in 1977 (which expanded the Corps’ jurisdiction much farther to match that asserted by EPA).

The Court’s view of Congress’ intent, while contrary to conventional wisdom 25 years after *Callaway*, is consistent with the historical context and legislative history of the FWPCA Amendments of 1972. To the extent the legislative history of the FWPCA Amendments assert an intention that “the term ‘navigable waters’ be given the broadest possible constitutional interpretation unencumbered by agency de-

terminations which have been made or may be made for administrative purposes,”¹²⁹ that intention should be read in the context of the specific “agency determinations” that were at issue in 1972, and the specific constitutional questions that were the subject of debate at that time.

As discussed above, Congress had expressed frustration in the early 1970s with the Corps’ narrow interpretations of its jurisdiction over the “navigable waters of the United States” under the Rivers and Harbors Act. Specifically, Congress had urged the Corps repeatedly to assert jurisdiction consistent with several judicial decisions that had expanded the meaning of the term “navigable waters” and to expand its interpretation of the meaning of “navigable waters” to include wholly, intrastate, navigable waters that were connected to other intrastate navigable waters through overland links. In light of this background, it appears that Congress intended the coverage of the CWA to define “navigable waters” to overcome the Corps’ prior limiting constructions. This expanded meaning would include: waters that were or had been navigable in fact or which could reasonably be so made; waters landward of the harbor lines; and intrastate, navigable waters that are linked to intrastate commerce via overland connections. Any waters beyond these “navigable waters” were to remain “waters of the State.”

A Clear Congressional Statement Must Be Shown to Regulate Waters Beyond the Traditional Navigable Waters

The second principle of the *SWANCC* opinion is that the regulation of areas outside the traditional navigable waters—such as the regulation of wetlands adjacent to navigable waters approved in *Riverside Bayview Homes*—must be justified with a clear showing of congressional intent. No longer can federal CWA jurisdiction be justified by showing that an activity “substantially affects commerce.” The Court held that although the Conference Report included the statement that the conferees “intend that the term ‘navigable waters’ be given the broadest possible Constitutional interpretation . . . neither this, nor anything else in the legislative history . . . , signifies that Congress intended to exert anything more than its commerce power over navigation.”¹³⁰ Accordingly, previous judicial decisions that were based upon an “affecting commerce” rationale are now of dubious value.¹³¹

Furthermore, *SWANCC* makes clear that in view of Congress’ commitment in the CWA to preserve and protect the primary responsibility of the state to control the use of land and water resources, and in view of general principles of statutory construction in the area of federal/state relations, the CWA should not be read to expand jurisdiction into the traditional sphere of the states absent a clear statement to that effect. In *Riverside Bayview Homes*, for instance, the Supreme Court acknowledged that Congress had clearly intended to include “adjacent wetlands” within the “waters of the United States.” *SWANCC* explained this holding as being based largely upon Congress’ “unequivocal acquiescence” to the regulation of wetlands adjacent to navigable waters. The CWA therefore does not grant the agencies

123. *Id.* at 174, 31 ELR at 20385 (quoting 33 U.S.C. §1251(b), ELR STAT. FWPCA §101).

124. *Id.*

125. *Id.*, 31 ELR at 20384.

126. *Id.*, 31 ELR at 20385.

127. See *supra* section entitled *The Traditional Definition of Navigable Waters of the United States*.

128. See 531 U.S. at 168 & n.3, 31 ELR at 20383 & n.3 (finding no evidence “that Congress intended to exert anything more than its commerce power over navigation”); *id.* at 172, 31 ELR at 20384 (“The term navigable has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.”); *id.* at 173-74, 31 ELR at 20384 (refusing to inquire whether federal jurisdiction was “within Congress’ power to regulate intrastate activities that ‘substantially affect’ interstate commerce,” and electing instead to “read the statute as written”).

129. S. Rep. No. 92-1236, at 144 (1972), reprinted in 1 LEGISLATIVE HISTORY at 327.

130. 531 U.S. at 168 n.3, 31 ELR at 20383 n.3.

131. See *supra* note 6 and cases cited.

broad authority to regulate any waters they believe have a nexus with the traditional navigable waters. Instead, federal jurisdiction must be established by an affirmative grant from Congress, as shown by the statute's clear text or by evidence of clear congressional intent.

The Arguments for a Narrower Reading of *SWANCC*, and Why They Are Wrong

Agencies and commentators disappointed with *SWANCC* have been working to limit its holding. Their arguments can be grouped into five broad categories: arguments limiting *SWANCC* to its facts; arguments substituting new jurisdictional tests, especially a "significant nexus" test; arguments expanding *Riverside Bayview Homes*; arguments resuscitating the "affecting commerce" test; and arguments based on the general remedial purposes of the CWA.

Limiting *SWANCC* to Its Facts

The first category of argument attempts to limit *SWANCC*'s holding to the facts of the case. Some argue that *SWANCC* applies only to non-navigable, isolated, intrastate waters. Some argue even more narrowly that *SWANCC* applies only to non-navigable, isolated, intrastate waters for which jurisdiction is based solely on the presence of migratory birds.¹³² These arguments ignore the Supreme Court's rationale, which was necessary to its holding. And "[w]hen an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound."¹³³ The rationale of *SWANCC* has implications far broader than isolated waters.

SWANCC "establish[es]" a new "mode of analysis" for the consideration of jurisdictional questions.¹³⁴ The Supreme Court could not have reached its ultimate decision in *SWANCC* without first: (1) rejecting the proposition that Congress intended to reach all activities "affecting interstate commerce" when it passed the CWA; (2) concluding that Congress intended instead in 1972 to exercise its power over navigation; and (3) concluding, based on overwhelming evidence of congressional intent, that Congress in 1977 had acquiesced in the Corps' regulation of wetlands that actually abut navigable waters but had not acquiesced to the rest of the 1977 regulations which had formed the basis for the Corps' purported jurisdiction over the waters at issue in *SWANCC*. These decisions necessarily implicate not only the Corps' assertion of jurisdiction over isolated waters, but also its assertion of jurisdiction over any water that is not navigable within the traditional meaning of the term. Jurisdiction over all sorts of non-navigable waters has until now been justified solely under the assumption that Congress intended to exercise its full powers under the Commerce Clause. Jurisdiction over those waters must now be justified, if at all, by reference to the actual intent of Congress in 1972 and 1977.

132. Shortly after *SWANCC* was announced, the General Counsel of EPA and the Chief Counsel of the Corps issued a memorandum opining that even the Corps' "other waters" (or "isolated waters") regulation, §328.3(a)(3), retained some vitality. See Guzy-Anderson Memorandum, *supra* note 12.

133. *Seminole Tribe v. Florida*, 517 U.S. 44, 67 (1996).

134. *United States v. Rapanos*, 190 F. Supp. 2d 1011, 1015 (E.D. Mich. 2002).

One court of appeals has recognized that the import of *SWANCC* extends to more than isolated waters. In *Rice*, the Fifth Circuit stated that "[u]nder *Solid Waste Agency*, it appears that a body of water is subject to regulation under the [CWA] if the body of water is actually navigable or is adjacent to an open body of navigable water."¹³⁵ The court in *Rice* held that several intermittent streams were not "navigable waters" under the Act and that connections through groundwater could not establish CWA jurisdiction after *SWANCC*. Three district courts have held that a bayou and ditch¹³⁶ and wetlands hydrologically connected to navigable waters¹³⁷ are outside federal jurisdiction.

Other courts have limited *SWANCC* to either the migratory bird rule or to non-navigable, isolated waters.¹³⁸ None of these cases has offered a careful analysis of the rationale of *SWANCC*, however. Instead, these cases have relied on broad, pre-*SWANCC* precedent that was based on the "affecting commerce" theory of CWA jurisdiction and that rejected "navigability" as a limit on jurisdiction under the Act.¹³⁹ Courts eventually will have to reconcile these prior holdings with the rationale in *SWANCC*—and, as the Fifth Circuit has recognized, it is the recent Supreme Court precedent that will govern. If the Corps cannot point to either (1) traditional navigability, or (2) affirmative congressional authorization of jurisdiction, it should not have jurisdiction over the property at issue.

Substituting New Jurisdictional Tests

The second category of post-*SWANCC* argument for broad federal jurisdiction seeks to substitute new jurisdictional tests. Several tests have been floated in court filings and in commentary: for example, that the Corps has jurisdiction over any wetland or water with a "significant nexus" to navigable waters¹⁴⁰; that the Corps has jurisdiction over any wetland or water that is "inseparably bound up with" navigable waters¹⁴¹; that the Corps has jurisdiction over any wetland or water with a "hydrological connection" to a navigable water¹⁴²; that the Corps has jurisdiction over any wetland or water that is part of the "tributary system" to a navigable water¹⁴³; and that the Corps has jurisdiction over areas

135. *Rice*, 250 F.3d at 269, 31 ELR at 20600.

136. See *United States v. Needham*, Nos. 01-1897, 1898 (W.D. La. Jan. 22, 2002).

137. See *Rapanos*, 190 F. Supp. 2d at 1011; *United States v. Newdunn Associates*, 195 F. Supp. 2d 751, 32 ELR 20573 (E.D. Va. 2002).

138. See, e.g., *Headwaters v. Talent Irrigation Dist.*, 243 F.3d 526, 533, 31 ELR 20535, 20537 (9th Cir. 2001); *Deaton v. United States*, No. MJG-95-2140 (D. Md. Jan. 29, 2002); *United States v. Interstate Gen. Co.*, 152 F. Supp. 2d 843, 31 ELR 20750 (D. Md. 2001); *United States v. Krilich*, 152 F. Supp. 2d 983, 991 n.13, 31 ELR 20787, 20789 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).

139. See *supra* note 6 and cases cited.

140. See Guzy-Anderson Memorandum, *supra* note 12, ¶ 5(b)(1).

141. See Brief for the United States, at 31, *United States v. Interstate Gen. Co.*, No. 01-4513 (4th Cir. 2001).

142. See Brief for the United States, at 6, *FD&P Enterprises, Inc. v. Corps of Eng'rs*, No. 99-3500 (D.N.J. 2001).

143. See Brief for the United States, at 50, *Interstate Gen. Co.* (No. 01-4513); Supplemental Brief for the United States as *Amicus Curiae*, at 12-13, Support of Panel Rehearing in *Rice v. Harken Exploration Co.* (5th Cir. 2001); Guzy-Anderson Memorandum, *supra* note 12, ¶ 6(d).

on the basis of physical conditions that ceased to exist long before the passage of the 1972 Amendments.¹⁴⁴ These new “tests,” untethered to any showing of congressional intent and devoid of substantive meaning (what is a “significant nexus” after all?), would vest vast discretion in the regulatory agencies to claim jurisdiction on an arbitrary, case-by-case basis. Indeed, jurisdiction under each of these tests has been suggested to extend to any water or wetland from which a drop of water can flow downstream and end up in a navigable water.¹⁴⁵ The migratory water molecule has been substituted for the migratory bird.

None of these tests is drawn from the text or history of the CWA. For example, nowhere does the text of the Act include the phrase “significant nexus” or “inseparably bound up with” the navigable waters. Nor does the legislative history include either of those phrases. Instead, those phrases are drawn out of context from a section of the Supreme Court’s opinion in *SWANCC* that explained that Congress affirmatively authorized the Corps to assert jurisdiction over certain wetlands, and that stressed that those wetlands (in contrast to the waters at issue in *SWANCC*) had an especially close relationship with navigable waters.¹⁴⁶ In articulating these words of description and limitation, however, the Court did not purport to announce a new test for jurisdiction. Indeed, the Court made clear that the text of the statute and congressional intent were the sole basis for agency jurisdiction. This is not surprising, for the Corps and EPA, like any agency, may act only upon the affirmative authorization of Congress.

Moreover, the import of these alternative tests implicates the very concerns that animated the Court in *SWANCC*. For if, as the government has contended, any water or wetland having a potential downstream hydrological connection with a navigable water has a “significant nexus” to that water and is jurisdictional, any connection between an upland site and a navigable water, no matter how remote, infrequent, or brief, would be sufficient for federal jurisdiction.¹⁴⁷ If the mere fact that a drainage pattern can be traced, over great distances, from a higher elevation parcel to a lower elevation navigable water could establish jurisdiction, federal CWA authority would extend to the smallest of

ditches, swales, and rivulets, regardless of their relation to actual navigability and regardless of whether Congress actually intended to grant jurisdiction over those remote areas.

This result cannot be squared with the reasoning of *SWANCC*—which, far from affirming broad assertions of agency jurisdiction, rejects the jurisdictional rationale advanced by the agencies since 1975. If, as the Supreme Court stated in *SWANCC*, Congress in 1972 intended to regulate only the navigable waters, then the original CWA did not include non-navigable tributaries. And no case has yet examined the text or legislative history of the 1977 Amendments to determine whether Congress acquiesced in the Corps’ post-*Callaway* jurisdiction over non-navigable tributaries—or, if Congress did, how far upstream it intended to authorize the agencies to go.¹⁴⁸ Careful analysis would certainly show that Congress never acquiesced in federal jurisdiction over the upper reaches of tributaries—even the Assistant Secretary of the Army in 1975 disavowed any intent to regulate non-navigable streams above their headwaters,¹⁴⁹ and the legislative history contains no clear statement of congressional intent to the contrary. These waters lie well within the states’ traditional authority over land and water resources, and far beyond any possibility of navigation. Rather than constructing new, even broader jurisdictional tests, the agencies should be examining the intent of Congress to determine how far the nation’s legislature intended them to extend the federal regulatory authority.

Expanding Riverside Bayview Homes

The third category of argument seeks a broad interpretation of the Court’s prior decision in *Riverside Bayview Homes*, at the expense of the Court’s later decision in *SWANCC*. Some have argued that *Riverside Bayview Homes* approved the Corps’ very expansive regulatory definitions, including the Corps’ definition of “adjacent” and the Corps’ assertion of jurisdiction over a variety of marginal waters under the rubric of “tributaries.”¹⁵⁰ This is not the case. As the *Riverside Bayview Homes* Court stated and the *SWANCC* Court emphasized, the wetland at issue in *Riverside Bayview Homes* “actually abut[ted] on a navigable waterway,” a factual setting that did not require the Court to decide whether the

144. See Joint Case Management Conference Statement in *San Francisco Baykeeper v. Cargill, Inc.*, No. C-96-2161, No. C-98-4388 (N.D. Cal. 2001).

145. See *United States v. Rueth Dev. Co.*, 2001 U.S. Dist. LEXIS 22944 (N.D. Ind. Sept. 25, 2001), *vacated in part*, 2002 U.S. Dist. LEXIS 3483 (Feb. 21, 2002).

146. See *SWANCC*, 531 U.S. at 167-68, 31 ELR at 20383 (internal citations omitted):

[O]ur holding [in *Riverside Bayview Homes*] was based in large measure upon Congress’ unequivocal acquiescence in, and approval of, the Corps’ regulations interpreting the CWA to cover wetlands adjacent to navigable waters. We found that Congress’ concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands “inseparably bound up with the waters of the United States.”

It was the significant nexus between the wetlands and “navigable waters” that informed our reading of the CWA in *Riverside Bayview Homes*. . . . In order to rule for respondents here, we would have to hold that the jurisdiction of the Corps extends to ponds that are not adjacent to open water. But we conclude that the text of the statute will not allow this.

Id. at 167-68, 31 ELR at 20383.

147. See Brief for the United States in *United States v. Deaton*, No. MJG-95-2140 (D. Md. Jan. 29, 2002).

148. The word “tributary” is not used in the CWA, and neither EPA nor the Corps has ever published a definition of the term. The 1972 and 1977 Congresses would likely be greatly surprised by the agencies’ current attempts to use the concept of “tributaries” to assert federal jurisdiction over intermittent streams, drainage ditches, and ephemeral waters, which have only occasional (if any) connection to the navigable waters.

149. See *supra* note 77.

150. See Guzy-Anderson Memorandum, *supra* note 12, n.4; Brief for the United States, at 34-35, *United States v. Interstate Gen. Co.*, No. 01-4513 (4th Cir. 2001). This argument is based upon the Court’s statement of the question presented in *Riverside Bayview Homes*: “[W]hether the Clean Water Act . . . together with certain regulations promulgated under its authority by the Army Corps of Engineers, authorizes the Corps to require landowners to obtain permits from the Corps before discharging fill material into wetlands adjacent to navigable waters and their tributaries.” *Riverside Bayview Homes*, 474 U.S. at 123, 16 ELR at 20086. Because the Court in *Riverside Bayview Homes* did not address the validity of the Corps’ jurisdiction over the water to which the wetland at issue was “adjacent,” much less how far up a non-navigable tributary federal jurisdiction might theoretically extend, this argument grossly overstates the “holding” of *Riverside Bayview Homes*.

Corps' regulations and definitions were otherwise valid.¹⁵¹ Nothing in *Riverside Bayview Homes* purports to consider or approve federal jurisdiction over a wetland that does not immediately adjoin a navigable water and have a regular surface hydrological connection to that water. There is no basis in that case to support jurisdiction, as the Corps has suggested, over wetlands that do not "actually abut" navigable waters, over uplands wetlands that drain via overland surface runoff to navigable waters at lower elevations, or over wetlands connected only through groundwater.

Resuscitating the "Affecting Commerce" Test

A fourth argument that continues to arise in commentary and in briefs is that the Corps has the authority to regulate certain marginal waters or wetlands based on the "substantial effects" that activities in those waters might have on interstate commerce.¹⁵² This argument is squarely foreclosed by the analysis in *SWANCC*.¹⁵³ Employing a substantial effects test to reach waters lying beyond navigable waters is entirely inconsistent with Congress' intent to exercise its traditional "commerce power over navigation."¹⁵⁴ Moreover, such an argument raises the same constitutional questions the Court found problematic in *SWANCC*. These constitutional questions are not limited to hydrologically isolated wetlands. They arise by virtue of the substantial effects test itself—which is the most far-reaching basis of congressional authority under the Commerce Clause.¹⁵⁵

These constitutional concerns are especially acute where the Corps attempts to assert jurisdiction over areas within "the States' traditional and primary power over land and water use," as were the isolated waters in *SWANCC* and as are many of the marginal waters and wetlands the Corps continues to attempt to regulate. Regulating drainage ditches, ephemeral waters, and wetlands that are not immediately adjacent to navigable waters will extend the federal government into the "primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources" every bit as much as does the regulation of the waters at issue in *SWANCC*.¹⁵⁶ It is for this reason that the Supreme Court elected in *SWANCC* to "read the statute as written," i.e., to extend to "navigable waters." After *SWANCC*, there should never be an occasion for the Corps or EPA to invoke the irrelevant federal power over activities having "substantial effects" on commerce.

Invoking the Environmental Purposes of the CWA

The final argument for a narrow reading of *SWANCC* is founded on a basic purpose of the CWA: "[T]o restore and maintain the chemical, physical, and biological integrity of

the Nation's waters."¹⁵⁷ If there is no federal jurisdiction over a particular parcel, the argument goes, this remedial congressional purpose will be thwarted.

This argument proves too much. No one disputes the environmentally remedial purpose of the CWA—indeed, the Court in *SWANCC* nowhere questioned the biological purposes of the migratory bird rule.

But no legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.¹⁵⁸

If the only question to be asked were whether the regulation of a class of waters or wetlands would benefit the physical and biological integrity of the nation's waters, there would be no limit to federal jurisdiction. The decision in *SWANCC* makes clear, however, that Congress intended to effectuate that purpose in a specifically defined area of federal geographic jurisdiction. Regardless of the statute's environmental purpose, one must examine the text and intent of the statute to determine its scope.

The absence of federal geographic jurisdiction does not mean that important waters and wetlands will go unprotected. The federal government has nonregulatory programs that create incentives to conserve or restore wetlands,¹⁵⁹ and private groups commonly buy or preserve wetlands.¹⁶⁰ Many states have their own wetlands programs, and many who had left them dormant have expanded them after *SWANCC*.¹⁶¹ A system of limited but effective federal jurisdiction coupled with such revitalized state efforts is the very system of federalism the CWA strove to attain, and is entirely consistent with the original purposes of the Act and with the Supreme Court's analysis in *SWANCC*.

Conclusion

The *SWANCC* decision repudiates two decades of conventional wisdom regarding federal jurisdiction under the CWA. Although the opinion may have come as a surprise after decades of assuming the Act extends to the maximum bounds of the Commerce Clause, re-reading the history of the Act in its historical context suggests that the Supreme Court was correct. Jurisdictional regulations that were promulgated on the premise that the Corps' jurisdiction was unbounded should now be reconsidered under a more restrained understanding of agency authority. The Corps and EPA, after all, may only act upon the authorization of Congress. Before the agencies stretch their jurisdiction outside the navigable waters into the traditional range of local land use planners, they must inquire whether Congress intended them to do so.

151. See 474 U.S. at 135, 16 ELR at 20089; see also *SWANCC*, 531 U.S. at 167, 31 ELR at 20383.

152. See, e.g., Guzy-Anderson Memorandum, *supra* note 12, ¶ 5; Brief for the United States in *FD&P Enterprises v. Corps of Eng'rs*, No. 99-3500 (D.N.J.).

153. See *SWANCC*, 531 U.S. at 173-74, 31 ELR at 20384 (declining to consider whether the migratory bird rule was supported by the "substantial effects" test because of the "significant constitutional questions" involved in "evaluat[ing] the precise object or activity that, in the aggregate, substantially affects interstate commerce").

154. See *id.* at 163 n.8, 31 ELR at 20385 n.8.

155. See *United States v. Lopez*, 514 U.S. 549, 558-59 (1995).

156. *SWANCC*, 531 U.S. at 174, 31 ELR at 20385 (quoting 33 U.S.C. §1251(b), ELR STAT. FWPCA §101(b)).

157. 33 U.S.C. §1251(a), ELR STAT. FWPCA §101(a).

158. *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (emphasis added).

159. The Wetlands Reserve program provides federal wetlands protection funding for the purchase of temporary or permanent easements. See 16 U.S.C. §3837-3837f. The Swampbuster program conditions U.S. Department of Agriculture farm benefits on agricultural wetland protection. See 16 U.S.C. §3821(a).

160. The Nature Conservancy may be the most familiar of these groups. See <http://www.nature.org> (organization website cataloguing wetland protection efforts).

161. See, e.g., *Isolated Wetlands Remain Protected Under State Rules*, *Commission Says*, Daily Env't Rep. (BNA), Mar. 10, 2001, at A-4.