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Don't Be Misled: CWA Jurisdiction Extends to All Non-Navigable Tributaries of the Traditional Navigable Waters and to Their Adjacent Wetlands (A Response to the Virginia Albrecht/Stephen Nickelsburg *ELR* Article, to the Fifth Circuit's Decision *In re Needham*, and to the Supreme Court's Dicta in *SWANCC*)

by Lance D. Wood

The September 2002 edition of the *Environmental Law Reporter's (ELR's) News & Analysis* published a truly remarkable Article: *Could* SWANCC *Be Right? A New Look at the Legislative History of the Clean Water Act*, by Virginia S. Albrecht and Stephen M. Nickelsburg.[1] A casual reader of the Article might not understand how revolutionary and far-reaching the conclusions and analysis of that Article are, regarding the geographic jurisdiction of the Clean Water Act (CWA).[2] In fact, the authors seem to go to some lengths to conceal the radical implications of their own conclusions while admitting that their Article does seek to overturn "long-entrenched assumptions" that the federal courts and agencies that implement the CWA have had for more than three decades regarding the extent of the CWA's geographic jurisdiction.[3]

Read carefully and with an understanding of the subject matter, the Albrecht/Nickelsburg Article asserts the following: based on Albrecht's and Nickelsburg's interpretation of the U.S. Supreme Court's decision in *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*,[4] plus those authors' highly innovative reading of the legislative history of the Federal Water Pollution Control Act (FWPCA) of 1972, i.e., the first effective federal CWA, the geographic jurisdiction of the CWA at present is actually only a tiny fraction (my estimate is less than 1%) of what the U.S. Environmental Protection Agency (EPA), the U.S. Army Corps of Engineers (the Corps), and other federal agencies, plus most of the federal courts, had previously believed. According to the Albrecht/Nickelsburg Article, the geographic jurisdiction of the CWA since 1972 has always been limited essentially to those major U.S. waterways that currently support (or historically supported) commercial navigation, plus some wetland areas that actually and directly adjoin open water areas of those "traditional navigable waters of the United States." Most significantly, the Albrecht/Nickelsburg Article asserts that none of the myriad non-navigable tributaries of the navigable waters have ever been subject to CWA jurisdiction. That disturbing conclusion follows naturally from the Albrecht/Nickelsburg assertion that the FWPCA of 1972 did not assert jurisdiction over any non-navigable tributaries, and that later amendments of the CWA, such as the FWPCA Amendments of 1977, did not clearly and explicitly assert jurisdiction over such tributaries. Consequently, the Albrecht/Nickelsburg Article effectively claimed that the CWA of today has no jurisdiction over any non-navigable tributaries (unless, that is, some unknown legal scholar in the future can find a clear and explicit statement in the FWPCA Amendments of 1977 that asserted CWA jurisdiction over such tributaries, a contingency that Albrecht and Nickelsburg apparently believe to be impossible).

If the Albrecht/Nickelsburg Article were correct, then the FWPCA of 1972 could never have addressed, and the CWA of today could not address, the problem of water pollution with any degree of effectiveness because (after that Article's revelations) any person or corporation wanting to dispose of toxic chemical wastes or any other pollutant could dump those pollutants into any non-navigable tributary stream that flows into the traditional navigable waters, or dump pollutants into wetlands adjacent to that tributary stream, free of any CWA prohibition or restriction, and immune from any possible CWA civil or criminal penalty. The fact that such potentially toxic pollutants dumped irresponsibly (but very economically) into non-navigable tributaries would soon wash downstream with the receiving waters, would be taken into the out-take pipes for our nation's public drinking water supplies, and would poison people, as well as fish, shellfish, and wildlife, is not discussed as a concern in the Albrecht/Nickelsburg Article. If one were to believe and take seriously the assertions of the Albrecht/Nickelsburg Article regarding past and present CWA jurisdiction, one would have to conclude that its authors

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1. Virginia S. Albrecht & Stephen M. Nickelsburg, *Could* SWANCC *Be Right? A New Look at the Legislative History of the Clean Water Act*, 32 ELR 11042 (Sept. 2002).
2. 33 U.S.C. §§1251-1387, ELR Stat. FWPCA §§101-607. For purposes of simplicity and convenience, this Article sometimes uses the familiar term "CWA" to refer to the Federal Water Pollution Control Act (FWPCA) of 1972, and its subsequent Amendments in 1977 and 1987. This Article uses the term FWPCA of 1972 when referring specifically to that enactment, Pub. L. No. 92-500, 866 Stat. 844 (Oct. 18, 1972).
3. *See* Albrecht & Nickelsburg, *supra* note 1, at 11043.
4. 531 U.S. 159, 31 ELR 20382 (2001).

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have discovered "the Holy Grail" of polluters: the proverbial "Dumpers Bill of Rights," rendering the CWA a toothless nullity.

Since the publication of the Albrecht/Nickelsburg Article in September 2002, I have waited patiently for *ELR* to publish a follow-up Article doing one of two things: first, some learned professor of law could publish a full refutation of the Albrecht/Nickelsburg Article, exposing its conclusions and analysis as erroneous, which they assuredly are. In the alternative, Albrecht and Nickelsburg could publish an admission that their Article was actually intended to be a lengthy, humorous hoax, comparable to similar literary hoaxes perpetrated by earlier writers such as Benjamin Franklin, H.L. Mencken, and Mark Twain. Of course, the humorous point of the original Albrecht/Nickelsburg Article would be that clever lawyers can "prove" virtually anything about a statute through a creative and highly selective use of legislative history materials.

Since September 2002, I have been disappointed to see that neither of those two types of follow-up Article has been published in *ELR*. That fact left open the possibility that some unwary reader of the Albrecht/Nickelsburg Article, e.g., a federal judge, a law clerk working for a federal court, a practicing lawyer, or a potential polluter, who is not familiar with this specialized area of the law could read and accept the Albrecht/Nickelsburg Article, in whole or in part, as a sound and reliable legal analysis of the past and current jurisdiction of the CWA.[5] That Article could even be regarded as "authority," and its conclusions could be adopted and followed by some federal court decision.

In fact, the Albrecht/Nickelsburg Article and its conclusions are all too likely to be embraced by certain legal practitioners, polluters, or even judges who consider themselves opponents of federal regulation or as advocates of the "private property rights" movement because the Article provides a colorable, superficially plausible legal basis for reaching a result that some very much desire, i.e., rolling back federal environmental regulation, and curtailing the jurisdiction of the CWA in particular. The fact that some federal judges were and are predisposed to reach that result is common knowledge and was reflected in *obiter dicta* in the U.S. Court of Appeals for the Fifth Circuit's decision, *Rice v. Harken Exploration Co.*,[6] and in several federal district court decisions cited with approval in the Albrecht/Nickelsburg Article.[7] As discussed hereinafter, even the Court's majority decision in *SWANCC* contains some ill-considered *obiter dicta* language that has been exploited by the Albrecht/Nickelsburg Article, the *Rice* Fifth Circuit panel, and others to support the allegation that the CWA currently has no jurisdiction over non-navigable tributaries.

On December 16, 2003, my fears appeared to be realized when a three-judge panel of the U.S. Court of Appeals for the Fifth Circuit handed down its decision *In re Needham*.[8] In that decision the Fifth Circuit restated as *obiter dicta* the assertions that CWA jurisdiction is limited essentially to navigable-in-fact waters, as the Fifth Circuit had earlier stated as dicta in *Rice*. According to the *Needham* decision's dicta:

> The CWA [is] not so broad as to permit the federal government to impose regulations over "tributaries" that are neither themselves navigable nor truly adjacent to navigable waters.[9] Consequently, in this circuit . . . a body of water is subject to regulation [under the CWA only] if the body of water is actually navigable or adjacent to an open body of navigable water.[10]

To be sure, the Fifth Circuit's pronouncements in *Needham* regarding the alleged lack of CWA jurisdiction over non-navigable tributaries are *obiter dicta*, as were similar Fifth Circuit assertions in *Rice*. Moreover, when one reads carefully the entirety of the Fifth Circuit's *Needham* decision, one notices many ambiguities and unanswered questions about precisely what that decision's dicta means. For example, it is unclear what water bodies the Fifth Circuit's *Needham* panel would consider to be "adjacent" to navigable-in-fact water bodies, etc. Nevertheless, one can only conclude from the emphatic dicta in the *Needham* and *Rice* decisions that the Fifth Circuit is likely to adopt a narrow interpretation of CWA jurisdiction whenever a case eventually is decided by that court of appeals requiring an actual holding of law governing the subject.

The fundamental CWA jurisdictional issues addressed in the Albrecht/Nickelsburg Article, in the *obiter dicta* of the Fifth Circuit's *Needham* and *Rice* decisions, and by dicta in the Court's *SWANCC* decision, are of great importance to the United States, its environment, and the health and welfare of its people. As discussed hereinafter, there now appears to be a likely future split among the federal circuits regarding what the remaining jurisdiction of the CWA is after *SWANCC*, so the Court will probably have to clarify the matter sooner or later. Because the assertions regarding CWA jurisdiction made by the Albrecht/Nickelsburg Article, the Fifth Circuit's *Needham* and *Rice* dicta, and the inac-

5. The authors of the Albrecht/Nickelsburg Article represented it to be an objective, reliable piece of legal scholarship. Nevertheless, as a reader considers whether Albrecht and Nickelsburg are really disinterested legal scholars regarding this subject, one should know that both Albrecht and Nickelsburg have been actively involved as advocates representing various development interests and in litigating cases that raise the same fundamental legal issues concerning CWA jurisdiction that their Article addresses. For example, the recent decisions of the U.S. Court of Appeals for the Fourth Circuit in *United States v. Deaton*, 332 F.3d 698, 33 ELR 20223 (4th Cir. 2003), and *United States v. Newdunn Associates*, 344 F.3d 407 (4th Cir. 2003), and the decision of the U.S. Court of Appeals for the Sixth Circuit in *United States v. Rapanos*, 339 F.3d 447, 33 ELR 20249 (6th Cir. 2003), cite Albrecht and Nickelsburg as attorneys on the brief for the defendants or as attorneys for amici curiae supporting the defendants. Similarly, Albrecht presented oral argument and otherwise advocated on behalf of the defendants in the Fifth Circuit case, *In re Needham*, No. 02-30217 (5th Cir. Dec. 16, 2003).

6. 250 F.3d 264, 31 ELR 20599 (5th Cir. 2001).

7. See the decisions cited in Albrecht & Nickelsburg, *supra* note 1, at 11042 n.10.

8. No. 02-30217 (5th Cir. Dec. 16, 2003).

9. *See Rice*, 250 F.3d at 269 n.8.

10. *In re Needham*, No. 02-30217. The Fifth Circuit's *obiter dicta* in *Needham* presents a noteworthy example of "judicial activism" since that dicta's assertions about how very narrow the jurisdiction of the CWA allegedly is were not part of any holding of law, and were quite unnecessary to the decision of the case. The strident nature of the *Needham* dicta is reflected in a gratuitous (and misleading) quotation from that dicta, which apparently was supposed to be characterizing the EPA and Corps regulations that were upheld by Fourth Circuit and Sixth Circuit's decisions that had been cited in the *Needham* dicta just preceding the following quotation: "In this circuit the United States may not simply impose regulations over *puddles, sewers* . . . and the like . . . ." *Id*. (emphasis added). As is explained in the last footnote of this Article, that quotation is not a fair or accurate characterization of EPA or Corps regulations or of the Fourth and Sixth Circuit decisions that have upheld those regulations.

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curate dicta from the *SWANCC* decision are wrong as a matter of law and potentially disastrous to the environment and public health of the United States, a thoughtful refutation of those assertions is needed.

This Article does not purport to be a comprehensive legal analysis of either the total geographic jurisdiction of the CWA or of the full legislative history of the CWA. Similarly, this Article does not attempt to address all of the fundamental constitutional law and administrative law issues raised by the Fifth Circuit's *Needham* dicta.[11] Nonetheless, as an attorney whose legal career has been devoted in large measure to dealing with the Rivers and Harbors Act of 1899 (R&H Act of 1899), the traditional navigable waters of the United States, and with "the waters of the United States" regulated under the CWA, I hope in this Article to expose many of the significant errors of the Albrecht/Nickelsburg piece and of the Fifth Circuit's and Court's dicta that constitute much of the alleged "legal authority" relied on in that Article. I hope that this Article will help make the case that the CWA has had jurisdiction over the full tributary system of the navigable waters from 1972 to the present, and that the CWA's jurisdiction over non-navigable tributaries and their adjacent wetlands remains intact despite the Court's *SWANCC* decision and those who would exaggerate the implications of its *obiter dicta*. As John Locke once observed, one can make a contribution to human knowledge if one merely helps to clear a future building site of clutter, even if one has neither the time nor the means to build a noble edifice on the site that one has helped to clear.

Despite its many errors and misrepresentations, the Albrecht/Nickelsburg Article is really quite important to the ongoing legal debate about the post-*SWANCC* jurisdiction of the CWA, for a very telling reason. As the Albrecht/Nickelsburg Article itself explains, no federal agency and very few federal courts or legal scholars thus far have been willing to implement or even take very seriously what Albrecht and Nickelsburg allege to be the far-reaching legal implications of the *SWANCC* decision's *obiter dicta* regarding CWA jurisdiction. One primary reason why all federal agencies and most federal courts have read the *SWANCC* decision narrowly is that its *obiter dicta* seems ill-considered, unsupported by precedent or other legal authority, and generally unconvincing. The Albrecht/Nickelsburg Article describes this problem more diplomatically as follows:

> There are several possible reasons for this resistance to *SWANCC*. . . . [T]he lower courts . . . 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.[12]

When one reads the discussions of post-*SWANCC* CWA jurisdiction presented in the Fifth Circuit's *Needham* and *Rice* decisions, and in the various federal district court decisions that the Albrecht/Nickelsburg Article cited with approval, one is even more struck by the paucity of thoughtful legal analysis or legal authority offered to support or justify the conclusions about CWA jurisdiction presented by those decisions. As a result, the reader of those decisions comes away with the disquieting impression that the judges writing those legal opinions well understood the result that was wanted, i.e., a radically truncated jurisdiction for the federal CWA, but were unable to find a convincing legal basis to support that result (other than ipse dixit, which is never very persuasive).

It seems likely that the Albrecht/Nickelsburg Article was written and published in *ELR* to provide an intellectually respectable foundation of legal authority and legal analysis to support and justify the dicta in *SWANCC*, *Rice*, and similar decisions, e.g., *Needham*, all of which would "roll back" the geographic jurisdiction of the federal CWA to the narrow limits of navigable-in-fact water bodies of the traditional navigable waters of the United States.[13] Obviously, Albrecht and Nickelsburg published their Article hoping that their legal analysis would be adopted and followed by federal court holdings in many future CWA cases. Nevertheless, when one examines the Albrecht/Nickelsburg Article carefully, one learns that that Article's legal analysis and conclusions are just as unpersuasive as the poorly justified dicta from the *SWANCC*, *Rice*, and *Needham* decisions that Albrecht and Nickelsburg wrote their Article to support and propagate.

At the outset, one should understand that there are some subtle differences between the ultimate conclusions of the Fifth Circuit's *Rice* and *Needham* dicta, the Court's dicta in *SWANCC*, and the conclusions of the Albrecht/Nickelsburg Article. The Fifth Circuit's dicta, as quoted above from the *Needham* decision, boldly declares that the CWA's existing jurisdiction is limited to open bodies of actually navigable waters, plus any water body immediately adjacent, i.e., immediately proximate, to actually navigable open waters. The Court's dicta in *SWANCC* was ambiguous, much less clear and definitive than the Fifth Circuit's, and thus has been open to widely varying interpretations. As a result, the federal district courts and circuit courts of appeals have interpreted the *SWANCC* precedent in totally inconsistent ways, as discussed hereinafter.

The Albrecht/Nickelsburg Article was cagey and somewhat disingenuous when presenting its ultimate conclusions concerning the CWA's existing jurisdiction. Albrecht and Nickelsburg clearly assert that the jurisdiction of the FWPCA of 1972 was limited to navigable-in-fact, open water areas of the traditional navigable waters, and that the 1972 Act excluded from its jurisdiction all non-navigable

11. The Fifth Circuit's dicta in *Needham* stated that the Fifth Circuit will give no deference to EPA and Corps regulations that for decades have asserted CWA jurisdiction over non-navigable tributaries. The apparent reason for that legal conclusion is that, allegedly, the U.S. Constitution gives the federal government no authority to regulate non-navigable tributaries of the traditional navigable waters of the United States (except, it seems, for a few non-navigable, tributary water bodies that are immediately proximate to those navigable waters, whatever that means). The judge who authored the *Needham* decision did not feel it necessary to cite any authority or reasoning to justify those controversial legal conclusions, other than that judge's interpretation of *SWANCC*. This Article addresses similar assertions of constitutional law in the discussion of the Corps of Engineers' final rule of April 3, 1974, *infra* notes 80-121 and accompanying text.

12. Albrecht & Nickelsburg, *supra* note 1, at 11043.

13. The Albrecht/Nickelsburg Article practically says as much: "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." *Id*. at 11043.

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tributaries and all adjacent wetlands. However, the Albrecht/Nickelsburg Article also concludes that the FWPCA Amendments of 1977 expanded the 1972 Act's jurisdiction to include wetlands actually adjoining open, navigable-in-fact waters. The Albrecht/Nickelsburg Article strongly implies, but never explicitly states, that the existing CWA has no jurisdiction over non-navigable tributaries and their adjacent wetlands, leaving open the unlikely but theoretical possibility that some unknown person in the future might identify either "clear text" or "evidence of clear congressional intent" from the FWPCA Amendments of 1977 to justify the inclusion of some unspecified class of non-navigable tributaries as part of the existing CWA's jurisdiction.[14]

My Article tries to take into account the subtle distinctions just noted between the conclusions of the Albrecht/Nickelsburg Article, versus the bolder conclusions of the Fifth Circuit's dicta in *Needham* and *Rice*, versus the Court's ambiguous dicta in *SWANCC*. Nevertheless, those subtle differences are generally not of great importance in understanding the fundamental legal questions under discussion herein. As a practical matter, it seems fair to state that the conclusions regarding the jurisdiction of the FWPCA of 1972 and of the existing CWA made by the Albrecht/Nickelsburg Article are essentially the same as the conclusions presented by the Fifth Circuit's dicta on that subject in *Rice* and *Needham*. Consequently, for the most part this Article addresses the assertions, legal analysis, and conclusions of the Albrecht/Nickelsburg Article, and does not always cite the Fifth Circuit's dicta in *Rice* and *Needham* as well. If this Article succeeds in refuting the fundamental assertions and conclusions of the Albrecht/Nickelsburg Article, it also will have effectively refuted the conclusions of the Fifth Circuit's dicta in *Rice* and *Needham*, since the Fifth Circuit's dicta is supported by very little other than ipse dixit.

This Article first explains the practical implications of the assertion of both the Albrecht/Nickelsburg Article and the Fifth Circuit's dicta that the geographic jurisdiction of the FWPCA of 1972 was limited, and that the jurisdiction of the existing CWA is limited, essentially to the open, navigable-in-fact portions of the traditional navigable waters of the United States. Those navigable-in-fact water bodies constitute a tiny fraction of the total tributary system that flows into those navigable waters. Second, this Article demonstrates how the Albrecht/Nickelsburg Article's assertion that the FWPCA of 1972 did not assert jurisdiction (and that Article's all-but-certain conclusion that the CWA still does not have jurisdiction) over non-navigable tributaries would render the CWA completely unable to deal with the problem of water pollution that the U.S. Congress sought to address through the FWPCA of 1972 (as well as through subsequent amendments of the FWPCA). Third, this Article analyzes one by one the primary grounds offered by the Albrecht/Nickelsburg Article to support its assertion that the FWPCA of 1972 did not assert jurisdiction over non-navigable tributaries. In the process, this Article demonstrates that the Albrecht/Nickelsburg Article's alleged "legislative history" of the FWPCA of 1972 offered to justify and support that Article's conclusions is a misrepresentation of the 1972 Act and of its legislative history. Fourth, this Article demonstrates that the Corps of Engineers' final rule of April 3, 1974, which was referenced in the Court's *SWANCC* dicta, and which the Albrecht/Nickelsburg Article relied on as crucial support for its conclusions, in fact provides no meaningful support for that Article's assertions about the jurisdiction of the FWPCA of 1972 or about the CWA's current jurisdiction.[15] Finally, this Article discusses briefly the FWPCA Amendments of 1977, which further refute the conclusions of Albrecht and Nickelsburg and of the Fifth Circuit's *Needham* dicta concerning the CWA's current jurisdiction.

The Albrecht/Nickelsburg Article's Claim That the FWPCA of 1972 Did Not Assert Jurisdiction Over the Non-Navigable Tributaries to the §10 Navigable Waters Is Radically at Odds With the Generally Accepted View of the 1972 Act's Jurisdiction, and Regarding the CWA's Current Jurisdiction

The Albrecht/Nickelsburg Article Asserted That Congress Limited the Geographic Jurisdiction of the FWPCA of 1972 to the Traditional Navigable Waters of the United States Regulated Under §10 of the Rivers and Harbors Act of 1899

Based on the authors' interpretation of the *SWANCC* decision and on their interpretation of the alleged legislative history of the FWPCA of 1972, the Albrecht/Nickelsburg Article asserted the following:

> Congress intended the coverage of the CWA to . . . include: waters that were or had been navigable in fact or which could reasonably be made so; waters landward of the harbor lines; and intrastate, navigable waters that are linked to intrastate [sic; in context, Albrecht and Nickelsburg must have meant "interstate"] commerce via overland connections. Any waters beyond these "navigable waters" were to remain "waters of the State."[16]

At several other places in their Article, Albrecht and Nickelsburg clearly reiterated the assertion that Congress limited the jurisdiction of the FWPCA of 1972 to the §10 traditional navigable waters, and excluded from FWPCA jurisdiction all non-navigable tributaries of the navigable waters.[17]

Even though the Albrecht/Nickelsburg Article emphatically claims that Congress limited the jurisdiction of the FWPCA of 1972 to the §10 navigable waters, that Article also concedes that CWA jurisdiction also now exists over wetlands that "immediately adjoin a navigable water and have a regular surface hydrological connection to that water."[18] That latter concession is not consistent with the alleged congressional intent regarding the jurisdiction of the FWPCA of 1972 quoted above, but is a necessary conces-

14. *See id*. at 11056.

15. U.S. Army Corps of Engineers, Permits for Activities in Navigable Waters or Ocean Waters, 39 Fed. Reg. 12115 (Apr. 3, 1974).

16. *See* Albrecht & Nickelsburg, *supra* note 1, at 11055.

17. *See id.* at 11054: "In other words, the Corps' original definition [of CWA jurisdiction in the Corps' 1974 final rule] captured the intent of the statute: to protect the navigable waters as traditionally defined." *See also id*. at 11055: "The Corps' 1974 regulation, which were limited to the traditional navigable waters, properly captured Congress' intent in regulating the 'navigable waters' in 1972."

18. *Id*. at 11058.

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sion, because it reflects the Albrecht/Nickelsburg Article's narrow interpretation of the Court's holding in *United States v. Riverside Bayview Homes, Inc.*[19] The Albrecht/Nickelsburg Article attempts to rationalize the inconsistency between the alleged intent of Congress regarding the jurisdiction of the FWPCA of 1972 versus the outcome of the *Riverside Bayview Homes* decision as follows. According to Albrecht and Nickelsburg, the Corps and EPA rulemakings of 1975, 1977, etc., that asserted jurisdiction over wetlands adjacent to §10 navigable waters were all illegal, i.e., not authorized by law, because those regulations were contrary to the intent of Congress clearly expressed in the FWPCA of 1972 to restrict CWA jurisdiction to navigable-in-fact §10 navigable waters. Nevertheless, those illegal agency rulemakings were partially ratified by Congress in the FWPCA Amendments of 1977 and, thus, were subsequently upheld in part by the Court's *Riverside Bayview Homes* decision, *but only regarding CWA jurisdiction over wetlands actually adjoining open water areas of navigable-in-fact §10 navigable waters*. Because allegedly the FWPCA of 1972 did not assert jurisdiction over non-navigable tributaries, and because the FWPCA Amendments of 1977 did not explicitly and clearly assert CWA jurisdiction over non-navigable tributaries, Albrecht and Nickelsburg assert that the CWA has never had jurisdiction (and almost certainly does not currently have jurisdiction) over any non-navigable tributary or over any wetlands adjacent to non-navigable tributaries. The Albrecht/Nickelsburg Article does leave open the theoretical possibility that in the future some unknown legal scholar might discover a hitherto unnoticed clear and explicit provision in the FWPCA Amendments of 1977 that would demonstrate that Congress actually did assert CWA jurisdiction over non-navigable tributaries in the FWPCA Amendments of 1977. However, the Albrecht/Nickelsburg Article strongly implies that such a discovery is so unlikely as to be virtually impossible. Thus, according to Albrecht and Nickelsburg, we can be all but certain that the CWA's existing jurisdiction does not extend to any non-navigable tributary or to any wetlands adjacent to any non-navigable tributary.[20] Of course, the Fifth Circuit's dicta in *Rice* and *Needham* is fully consistent with that conclusion.

For the benefit of readers who may not be familiar with this area of the law, a brief explanation of the Albrecht/Nickelsburg Article's assertions regarding CWA jurisdiction and some definition of terms may be necessary. Remarkably, the Albrecht/Nickelsburg Article alleged that the total geographic reach of the FWPCA of 1972, and of the current CWA, is limited to only a portion of the traditional "navigable waters of the United States" and to some of their adjacent wetlands. The expression "traditional navigable waters of the United States" is a legal term of art further defined below; that term is used synonymously with the expression, "the §10 navigable waters." In general terms, according to the Albrecht/Nickelsburg Article, the FWPCA of 1972 had, and the existing CWA almost certainly has, jurisdiction over only that portion of the traditional navigable waters of the United States that is "navigable-in-fact," i.e., currently capable of supporting commercial navigation, such as barge traffic, plus a few modest additions to those traditional navigable waters. The additions to navigable-in-fact waterways recognized in the Albrecht/Nickelsburg Article as also subject to *CWA* jurisdiction are: (1) waterways that historically carried commercial navigation but that no longer do so because those waterways are no longer navigable-in-fact; (2) a few large, navigable-in-fact, intrastate lakes such as the Great Salt Lake in Utah; and (3) wetlands immediately adjoining open water areas of the traditional navigable waters and having a regular surface connection to those navigable waters. *Excluded* from the Albrecht/Nickelsburg conception of the jurisdiction of both the FWPCA of 1972 and of the current CWA are the vast majority of rivers, creeks, streams, lakes, ponds, impoundments, sloughs, swamps, and so on that constitute the total tributary system that feeds into and supplies the fresh water in the limited "traditional navigable waters of the United States." The Albrecht/Nickelsburg Article clearly stated that the FWPCA of 1972, and almost certainly the existing CWA, have never had jurisdiction over non-navigable tributaries or their adjacent wetlands.[21]

The term "the navigable waters of the United States" is a legal term of art that has been defined over the years by numerous decisions of the Court and the federal circuit courts, as those courts have defined what water bodies are subject to certain federal statutory authorities, and also, of course, subject to federal authority under the U.S. Constitution. After 1972, federal courts and legal commentators began to call "the navigable waters of the United States" the "*traditional* navigable waters of the United States" to clearly distinguish that term from the much more extensive geographic jurisdiction of the FWPCA of 1972, the first version of the CWA. The FWPCA of 1972 also asserted jurisdiction over "navigable waters," but gave that term a new and much broader definition as "the waters of the United States, including the territorial seas."[22]

The federal courts have determined that the traditional navigable waters of the United States, speaking generally, constitute the geographic jurisdiction of two important federal regulatory statutes, §§9 and 10 of the R&H Act of 1899.[23] Section 9 of the R&H Act of 1899 requires federal approval of all dams, dikes, bridges, and causeways that would span a navigable waterway and potentially block navigation. Section 10 of the R&H Act of 1899 requires a permit from the Corps for any other type of structure or work in the navigable waters. Because the Corps' long-established regulatory program under §10 of the R&H Act of 1899 has been determined by many federal courts as extending throughout, but no further than, the traditional navigable waters of the United States, this Article will refer to that limited set of traditional navigable waters of the United States as "§10 navigable waters."

Generally speaking, the §10 navigable waters are subject to the federal navigation servitude, which ensures the right of the federal government to develop, alter, and protect all navigable waters of the United States to enhance navigation, without having to pay compensation under the Fifth Amendment to the Constitution.[24] As a general matter, the

19. 474 U.S. 121, 16 ELR 20086 (1985).

20. *See* Albrecht & Nickelsburg, *supra* note 1, generally, and specifically at 11054-56.

21. *See id*. at 11057: "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."

22. *See* 33 U.S.C. §502(7).

23. *Id*. §§401, 403.

24. *See, e.g.*, United States v. Rands, 389 U.S. 121 (1967); United States v. Cherokee Nation of Okla., 107 S. Ct. 1487 (1987).

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public also has a right to navigate freely on all §10 navigable waters.[25] The navigable waters of the United States include all areas (including wetlands) below the mean high tide line for tidal water bodies and below the ordinary high watermark for nontidal water bodies.[26] Based on this body of federal court decisions, for many years the Corps (the primary federal agency authorized by Congress to protect and develop the navigable waterways) has defined by regulation the extent of federal government jurisdiction over the traditional "navigable waters of the United States," i.e., the §10 navigable waters, as follows:

> General Definition. Navigable waters of the United States are those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. A determination of navigability, once made, applies laterally over the entire surface of the waterbody, and is not extinguished by later actions or events which impede or destroy navigable capacity.[27]

The Albrecht/Nickelsburg Article introduces some confusion regarding the geographic extent of the traditional navigable waters of the United States, i.e., the jurisdiction of §§9 and 10 of the R&H Act of 1899, and thus of the CWA as well, when that Article at least twice indicates that a water body is not subject to any of those federal statutes' jurisdiction merely because that water body is subject to the ebb and flow of the tide.[28] Apparently the Albrecht/Nickelsburg Article identifies as traditional navigable waters of the United States only those portions of tidal waters that are actually navigable-in-fact, and would exclude from R&H Act of 1899 jurisdiction all tidal water bodies and their adjacent tidal wetlands that are not actually navigable by commercial vessels but that nonetheless lie below the mean high tide line. Thus, the Albrecht/Nickelsburg Article apparently would exclude from the definition of the traditional waters of the United States, and perhaps from CWA jurisdiction as well, vast areas of tidal marshes, mud flats, shallow waters, etc., that lie below the mean high tide line but that are not navigable in fact, i.e., cannot actually support commercial navigation.[29] The Albrecht/Nickelsburg Article is wrong on that point, as demonstrated by court decisions such as *United States v. Stoeco Homes, Inc.*,[30] but that is a relatively minor error presented by the Albrecht/Nickelsburg Article. For purposes of this discussion, the important assertion of the Albrecht/Nickelsburg Article is that the FWPCA of 1972 never had, and thus that the current CWA almost certainly does not have, jurisdiction over any of the non-navigable tributaries of the §10 navigable waters, or over any wetlands adjacent to those non-navigable tributaries.

The Attempt of the Albrecht/Nickelsburg Article (and of the Fifth Circuit's Needham *Dicta) to Read Out of the Jurisdiction of the FWPCA of 1972, and of the Current CWA, All Non-Navigable Tributaries Would Effectively Nullify Those Important Federal Statutes*

As is generally understood, ever since enactment of the FWPCA of 1972, EPA, other federal agencies, and the vast majority of the federal courts have defined the geographic jurisdiction of that statute, and of the CWA as subsequently amended in 1977 and 1987, much more broadly than the limited geographic jurisdiction of the traditional navigable waters of the United States, i.e., the "§10 navigable waters." (Note: there was one short-lived exception to that generalization, the Corps of Engineers' final rule of April 3, 1974, which was overturned as contrary to law on March 27, 1975; that rule is discussed at length below.) From 1972 to the present, federal CWA jurisdiction has included not only the entirety of the §10 navigable waters of the United States, but also all interstate water bodies, intrastate, isolated but navigable water bodies (such as the Great Salt Lake), and, most importantly for this discussion, all non-navigable tributaries that flow into any of the water bodies listed above and all wetlands adjacent to any of those water bodies or tributaries.[31]

Of course, there is a remarkable contrast between the limited geographic reach of the FWPCA of 1972, and of the existing CWA, as construed by the Albrecht/Nickelsburg Article, compared with the vastly more extensive geographic reach of the CWA as construed to date by all federal agencies and the majority of the federal courts. If the Albrecht/Nickelsburg Article were correct in asserting that the FWPCA of 1972 had, and the current CWA almost certainly has, jurisdiction only over the §10 navigable waters, plus the few modest additions noted above, that highly restricted area would constitute only a tiny fraction of the total tributary system that constitutes all of the "waters of the United States" as that concept has been understood by EPA, other federal agencies, and the federal courts since 1972 (prior to the new revelations of the Albrecht/Nickelsburg Article, that is). The question of just how small that fraction would be cannot be answered with absolute precision and calls for some professional judgment. To arrive at a rough estimate, I consulted with several professional experts now working for the Corps whose job it is to implement both the CWA and the R&H Act of 1899, and with EPA experts who implement the CWA. Based on those consultations, my best estimate is

25. *But see* Kaiser Aetna v. United States, 444 U.S. 164, 10 ELR 20042 (1979).

26. *See generally* 33 C.F.R. pt. 329.

27. *Id.* §329.4. The Albrecht/Nickelsburg Article cites many of the important federal court decisions that have defined the "traditional navigable waters of the United States," so those citations will not be repeated here. *See* Albrecht & Nickelsburg, *supra* note 1, at 11043-44. Note that the general definition of the navigable waters of the United States from the Corps' regulations does not incorporate the "second test of *The Daniel Ball* case" as a prerequisite for a water body to qualify as a navigable water of the United States. That fine point is primarily relevant regarding the jurisdiction of §§9 and 10 of the Rivers and Harbors Act of 1899 over certain land-locked, intrastate, navigable-in-fact lakes such as the Great Salt Lake in Utah. That subject is discussed further below.

28. *See* the Albrecht & Nickelsburg summary of CWA jurisdiction, Albrecht & Nickelsburg, *supra* note 1, at 11055, and their definition of the "traditional navigable waters," *id.* at 11044. Both of those statements exclude "waters subject to the ebb and flow of the tide" as a separate, independent category of the traditional navigable waters. Nevertheless, in at least two other places in their Article, they seem to suggest that tidal waters might possibly be a separate category of the traditional navigable waters after all, and thus might be subject to jurisdiction under at least §10 of the Rivers and Harbors Act, even if not under the CWA. *See id.* at 11047, 11050.

29. Of course, the Albrecht/Nickelsburg Article presumably would recognize CWA jurisdiction over some tidal wetland areas if those wetlands actually abut open water areas of navigable-in-fact §10 navigable waters, since that is the Albrecht/Nickelsburg interpretation of the limited holding of the Court in *United States v. Riverside Bayview Homes*, 474 U.S. 121, 16 ELR 20086 (1985).

30. 498 F.2d 597, 4 ELR 20390 (3d Cir. 1974).

31. *See* 33 C.F.R. pt. 328 and specifically *id.* §328.3(a).

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that the total length of the rivers, streams, and other water bodies that would constitute the total geographic jurisdiction of the FWPCA of 1972, and of the existing CWA, under the Albrecht/Nickelsburg Article's assertions would amount to less than 1% of the area over which EPA and the Corps now assert CWA jurisdiction, i.e., in 2004.[32] Of course, prior to the substantial reduction of CWA jurisdiction caused by the Court's *SWANCC* decision in 2001, that small fraction would have been even smaller. This remarkable result is explained by the fact that the total length of the §10 navigable waters is quite small in comparison to the very large length of the huge number of non-navigable rivers, creeks, streams, impoundments, lakes, bayous, ponds, sloughs, swamps, marshes, etc., that constitute the total aquatic tributary system that feeds into the navigable waters and supplies them with fresh water. That contrast is one indication of the radical nature of the Albrecht/Nickelsburg Article's assertions that in itself should make any reader view that Article's assertions with some degree of skepticism.

A second reason why the Albrecht/Nickelsburg Article and the Fifth Circuit's *Needham* dicta cannot possibly be correct is based on the notion that if someone proposes a revolutionary new interpretation of an important federal statute's jurisdiction, which interpretation would render that statute *totally ineffective*, that new interpretation is probably wrong.

The Albrecht/Nickelsburg Article's (and Fifth Circuit's *Needham* Dicta's) Assertions Regarding the Jurisdiction of the FWPCA of 1972, and of the Existing CWA, Would Mean That No Provision of Either of Those Statutes Could Possibly Deal Effectively With Water Pollution

The Assertion of the Albrecht/Nickelsburg Article (and of the Fifth Circuit's Needham *Dicta) That the FWPCA of 1972 Had, and the Existing CWA Almost Certainly Has, No Jurisdiction Over Any of the Non-Navigable Tributaries That Flow Into the §10 Navigable Waters Would Eliminate the Jurisdiction of Every CWA Provision Over Those Tributaries, Not Just CWA §404*

The Albrecht/Nickelsburg Article misrepresents the potential significance of the extraordinarily restricted CWA jurisdiction that their Article asserts is legally mandated by their interpretation of the *SWANCC* decision and their interpretation of the CWA's legislative history. The Albrecht/Nickelsburg Article consistently addresses the jurisdiction of the CWA as a whole, but it nonetheless discusses the implications of its conclusions only for the Corps' regulation of wetlands and other waters of the United States under CWA §404. The Albrecht/Nickelsburg Article remains curiously silent about how its conclusions would affect the other provisions of the CWA or the many forms of water pollution that the CWA has addressed since 1972 and currently addresses.[33]

Because the Albrecht/Nickelsburg Article would appear at first glance to address only CWA §404 jurisdiction over wetlands, any reader of that Article could easily be misled regarding the significance of the Article's far-reaching assertions regarding the jurisdiction of the FWPCA of 1972 and of the existing CWA. It is true that vast amounts of ecologically valuable wetlands adjacent to the innumerable non-navigable tributaries to the traditional navigable waters (and adjacent to tidal waters that are not navigable in fact) would lie beyond CWA jurisdiction if the Albrecht/Nickelsburg Article's allegations were correct. It is also true that the unregulated and uncontrolled destruction of those wetlands would adversely affect water quality and flood control for the navigable and interstate water bodies lying downstream and would destroy valuable fish and wildlife habitat, etc. However, the most disturbing, but unstated, implications of the Albrecht/Nickelsburg Article do not relate to wetlands or CWA §404, but to all the numerous aspects of water pollution addressed by the many other provisions of the CWA.

Essential Background Information on the CWA

For the benefit of readers who may know very little about the CWA, it is important to understand that the CWA was enacted as the FWPCA of 1972 to provide a comprehensive, national, interstate solution for a perceived national crisis concerning water pollution. Some background information regarding the CWA is especially important so that a reader can "see through" the fallacious arguments presented in the Albrecht/Nickelsburg Article, suggesting that the United States has never really had, and has never really needed, an effective federal CWA, because, allegedly, state, local, and "voluntary" efforts will suffice to control water pollution, just as in the good old days before enactment of the FWPCA of 1972.[34]

Prior to 1972 the United States had relied on an ineffective assortment of state, local, and federal statutes, plus common-law "nuisance" remedies, to deal with the interstate problem of water pollution. As a result, by 1972 most of the nations's important waterways were either already polluted to a dangerous degree or were rapidly becoming so. For example, in 1972 Lake Erie presented a well-known example of an interstate water body that was so fouled by industrial and sewer discharges that it could no longer support a healthy population of fish or other aquatic life and was regarded as dangerous for human uses, such as swimming. The Cuyahoga River in Cleveland, Ohio, was so polluted by

32. To cite one example, the statistics for the Missouri River and its tributaries are as follows: according to experts in the Corps of Engineers Northwest Division, the total length of the traditional navigable waters of the United States, i.e., §10 navigable waterways, for the Missouri River and tributaries watershed is 3,151 miles. According to those same experts, a conservative estimate of the total length of the §10 waters plus all of the tributaries to those §10 waters would be greater than 559,669 miles. Thus, for the Missouri River and tributaries, the total length of the §10 waters would be less than 1% (.56297%) of the total length of the full tributary system of the Missouri River and tributaries.

33. To cite merely one example, the Albrecht/Nickelsburg Article states that even though the Article has revealed that many of the *wetlands* previously believed to be subject to regulation by the Corps under CWA §404 are now beyond CWA jurisdiction, those wetlands can still be protected, because: "The federal government has non-regulatory programs that create incentives to conserve or restore wetlands, and private groups commonly buy or preserve wetlands. Many states have their own wetland programs, and many who had left them dormant have expanded them after *SWANCC*." Albrecht & Nickelsburg, *supra* note 1, at 11058. In contrast, the Article is remarkably silent regarding the vast reaches of non-wetland water bodies that would be stripped of CWA protection by their assertions about CWA jurisdiction, and regarding potential pollution of those waters and of the navigable waters located downstream.

34. *See id.*

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petroleum and other chemical wastes that on at least one well-publicized occasion the river itself caught fire. The Potomac River in the vicinity of Washington, D.C., was commonly regarded as a smelly, open sewer in which few fish could survive and in which no sensible person would swim.

One reason why the state and local governments had proven themselves both incapable of and unwilling to control water pollution in the years before the FWPCA of 1972 was the "transboundary" nature of the water pollution problem, caused by the fact that multiple states and local governments shared the same river, lake, bay, etc. Thus, for example, no "downstream" state or community could benefit substantially from local efforts to control water pollution so long as upstream states and communities continued to send their uncontrolled, polluting wastes downstream. Instead, most states engaged in a "race to the bottom," refusing to spend local tax dollars on pollution abatement, or to jeopardize current or potential industrial development, by enacting effective state or local measures to control water pollution. State or local adoption of such expensive pollution control measures would cause polluting industries to move to lower cost states that did not regulate water pollution. Moreover, many of the "clean water" benefits that would be derived from state or local efforts to control water pollution would be enjoyed not by local residents who would bear the costs, but instead by the residents of other states or communities that shared the same water body, especially by those living "downstream." Meanwhile, any state with strong pollution control regulation would lose industry to competing states and still suffer from water pollution coming from other, e.g., "upstream," states.

Consequently, in 1972 Congress responded to the perceived national water pollution crisis by enacting the FWPCA of 1972, the first effective federal CWA. FWPCA §301 declared that "the discharge of any pollutant by any person shall be unlawful" unless such a discharge had been authorized under one of the various regulatory programs that the FWPCA created.[35] Among the regulatory programs created by the FWPCA of 1972 to control water pollution was CWA §402, through which EPA and the states that would later assume responsibility for administering that program would bring under control virtually every kind of polluting industrial and sewer discharge into any of "the waters of the United States."[36] The new FWPCA also included many other important provisions, addressing such issues as enforcement,[37] citizens lawsuits,[38] etc.

Of course, ever since the FWPCA's enactment, legal practitioners, federal agencies, and the federal courts have been dealing with difficult questions about what classes of aquatic areas are subject to the geographic jurisdiction of the federal CWA and what types of aquatic areas are beyond federal jurisdiction and reserved for regulation by the state governments. For purposes of this "nutshell" summary of the CWA, it may suffice to say that, after the Court's *SWANCC* decision but prior to the revolutionary revelations of the Albrecht/Nickelsburg Article, it was generally believed that the federal CWA had jurisdiction at a minimum over the full tributary system of the §10 navigable waters, so that the CWA could protect those waters from every kind of pollution. However, after the *SWANCC* decision, it has been widely believed that the CWA generally does not have jurisdiction over truly "isolated," intrastate, non-navigable water bodies, such as vernal pools or playa lakes that have no discernible "hydrologic connection" to the tributary system of the §10 navigable waters.

35. *See* 33 U.S.C. §1311.

36. *See id.* §1342.

37. *See id.* §1319.

38. *See id.* §1365.

Every Provision of the CWA Shares the Same Geographic Jurisdiction

Ever since enactment of the FWPCA of 1972, the jurisdictional scope of the entire CWA, and for every section thereof, has been defined by the same CWA term, "navigable waters," which is defined in the statute to mean "the waters of the United States, including the territorial seas."[39] Because every provision of the CWA since 1972 has always relied for its geographic jurisdiction on precisely the same statutory term, "the waters of the United States," the jurisdictional boundaries of the CWA are, and have always been, the same for every provision in the Act. Consequently, the assertion of the Albrecht/Nickelsburg Article that more than 99% of the total tributary system of the §10 navigable waters were not subject to the jurisdiction of the FWPCA of 1972, and almost certainly are not subject to the existing CWA, would effectively nullify all of the vital CWA provisions that have effectively protected our nation's waters from pollution since 1972.

As described below, the federal government has defined the term "the waters of the United States" in regulations, and the regulatory definitions for that term governing the various provisions and programs of the CWA are identical, as mandated by the common statutory definition of the same term.[40] Consequently, the Albrecht/Nickelsburg Article's assertion that the FWPCA of 1972's jurisdiction did not, and the existing CWA's jurisdiction almost certainly does not, include any of the non-navigable tributary streams that flow into traditional navigable waters would take away from all of those tributaries the protections of every CWA provision, including, for example, the all-important CWA §§301 and 309; the CWA §402 permit program, which covers all polluting discharges other than dredged or fill material; all CWA provisions relating to water quality standards, oil pollution prevention and cleanup, toxic effluent standards and prohibitions, e.g., CWA §307, etc.; as well as the permit program for discharges of dredged or fill material (CWA §404). As will be demonstrated below, such a result would have rendered any effort to control water pollution through the FWPCA of 1972, or under the existing CWA, impossible. It is hard to imagine that Congress intended such a nonsensical result from its landmark clean water legislation enacted as the FWPCA of 1972, and from the FWPCA as subsequently amended.

The Albrecht/Nickelsburg Article does not state or even suggest that the geographic reach of the various provisions of the CWA vary, or could vary, from one CWA section to another. But what other notion could possibly explain those authors' studied silence regarding the implications of their assertions regarding the jurisdiction of the FWPCA of 1972, and of the existing CWA, for all aspects of water pol-

39. *Id.* §1362(7).

40. *See, e.g.*, 33 C.F.R. §328.3(a).

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lution? In any event, there is no legitimate basis for asserting that the geographic jurisdiction of CWA §404 is different in any way from the jurisdictional reach of all other sections of the CWA under federal statutes and regulations as they exist now.

The executive branch agencies (through rulemakings) and the federal courts (through their decisions) have been construing the geographic jurisdiction of the CWA and the various sections thereof for more than 30 years. During all of that time there has been near unanimity that the entire CWA has one, unified geographic jurisdiction, based on one statutory definition of "the waters of the United States."[41] The Albrecht/Nickelsburg Article cited no federal court decision or other legal authority to the contrary.

Moreover, the well-known opinion of then-Attorney General Benjamin R. Civiletti, dated September 5, 1979, stated the following:

> The term "navigable waters" . . . is a linchpin of the Act . . . , critical not only to the coverage of [§]404, but also to the coverage of the other pollution control mechanisms established under the Act, including the [§]402 permit program for point source discharges, the regulation of discharges of oil and hazardous substances in [§]311 . . . and the regulation of discharges of vessel sewage in [§]312 . . . . Its definition is not specific to [§]404, but is included among the Act's general provisions. It is, therefore, logical to conclude that Congress intended that there be only a single judgment as to whether—and to what extent—any particular water body comes within the jurisdictional reach of the federal government's pollution control authority. We find no support either in the statute or its legislative history for a conclusion that a water body would have one set of boundaries for purposes of dredged or fill permits under [§]404 and a different set for purposes of the other pollution control measures in the Act. On this point I believe there can be no serious disagreement.[42]

It is significant that since enactment of the FWPCA of 1972, the federal courts have agreed with the Civiletti opinion's conclusion that the CWA has one, unitary geographic jurisdiction, identical in scope and extent for all CWA sections and programs; all federal agencies have accepted the conclusions of the Civiletti opinion since it was signed in 1979, and have reflected that fact in their regulations.[43] Consequently, when the Albrecht/Nickelsburg Article asserted that the FWPCA of 1972 excluded, and that the existing CWA almost certainly excludes, all non-navigable tributaries of the §10 navigable waters from their jurisdiction, that assertion would deprive all of those tributaries of the protection from pollution provided by every important section of the CWA, not merely CWA §404.

As explained above, my estimate is that the total length of the rivers, streams, and other water bodies that would constitute the geographic jurisdiction of the FWPCA of 1972, and of the existing CWA, under the Albrecht/Nickelsburg Article's assertions would amount to less than 1% of the water bodies over which EPA and the Corps now assert CWA jurisdiction. However, with regard to controlling water pollution, it hardly matters at all whether the Albrecht/Nickelsburg Article's assertions about CWA jurisdiction would strip 99%, 90%, 50%, or 30% of the total tributary system of the traditional navigable waters from the jurisdiction of the CWA because the resulting effect on water pollution in the United States, and the ability of government and citizens to control pollution, would be catastrophic in any event.

The CWA Would Be Completely Ineffectual if Non-Navigable Tributaries Were Not Covered Under Its Protection, as the Albrecht/Nickelsburg Article and the Fifth Circuit's Needham *Dicta Have Alleged*

It is significant that, ever since implementation of the FWPCA of 1972, and at present, a very large number of the CWA §402 permits for major industrial dischargers of water pollutants cover industrial discharges into non-navigable tributaries of the navigable waters.[44] If, as the Albrecht/Nickelsburg Article asserts, all of the non-navigable tributaries that flow into the §10 navigable waters were excluded from the jurisdiction of the FWPCA of 1972, and almost certainly from the jurisdiction of the existing CWA as well, then those industrial discharges would not need CWA §402 permits controlling their potentially harmful pollutants and requiring them to reduce and treat their wastes before discharging them into the tributary streams. If the FWPCA did not and does not have jurisdiction over non-navigable tributaries, then the numerous industrial facilities holding CWA §402 permits could dump their untreated chemical and industrial wastes into the tributary streams at will, just as they did before enactment of the FWPCA of 1972, regardless of the effects on people and the environment downstream.

In addition, any person, business, or industry that has chemical wastes or other pollutants to dispose of could (and presumably some of them would) send their tanker trucks loaded with those toxic chemicals to some tributary river or stream, anywhere upstream of the head of navigation,[45] i.e., the upstream end or limit of CWA jurisdiction, according to the Albrecht/Nickelsburg Article, where those untreated, and potentially highly toxic, chemical wastes could be dumped into the river and thereby disposed of cheaply, efficiently, and free of any CWA restrictions or penalties.

Moreover, any corporation with wastes to dispose of would have a very strong incentive to locate, or relocate, its factories (or at least all waste-disposal operations) upstream

41. 33 U.S.C. §1362(7).

42. 43 Op. Att'y Gen. No. 15, at 5 (Sept. 5, 1979).

43. During the first Reagan Administration, the U.S. Department of Justice (DOJ) conducted an informal review of the 1979 "Civiletti opinion," at the request of the U.S. Department of the Army (Army), to determine whether the opinion should be reconsidered. After conducting the review, the Reagan Administration's Assistant Attorney General, Office of Legal Counsel, Theodore Olson (now Solicitor General of the United States), determined that the Civiletti opinion was correct and that it would not be reconsidered or reversed by the DOJ. The author was personally involved in presenting to Olson the Army's request for a review of the Civiletti opinion, and the author was present to hear Olson's final response to the Army following the DOJ's review of that Attorney General's opinion.

44. That fact is clearly revealed by the record amassed by EPA and the Corps in response to the "Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of 'Waters of the United States,'" published in the *Federal Register*, 68 Fed. Reg. 1991 (Jan. 15, 2003). In fact, according to the National Hydrography Data Set of the U.S. Geological Survey, approximately 27% of the §402 permits for major industrial dischargers are for discharges into intermittent or ephemeral streams, the two smallest, most "upstream" categories of the innumerable non-navigable tributaries.

45. The "head of navigation" is a legal term of art referring to the place on a navigable river upstream of which commercial navigation is no longer feasible, usually because of rapids, waterfalls, shallow water, rocks, or other impediments to commercial navigation.

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of the head of navigation, where all that corporation's wastes could be dumped into the river, untreated, very inexpensively, and perfectly legally,[46] if the Albrecht/Nickelsburg Article's assertions about CWA jurisdiction were correct. For any industry or company that might not be inclined to behave so irresponsibly, competitive, cost-cutting pressures from competing firms would soon force them to follow the lead of the industry's most ruthless cost-cutters and to dump their wastes untreated into the tributary steams as well. Of course, within hours or days of the dumping, those chemical wastes would be carried downstream from the tributaries into the traditional navigable waters of the United States. The people of the United States take their drinking water from both navigable and non-navigable parts of the total tributary system, but in either case the chemical wastes that would be dumped into non-navigable tributaries free of CWA restrictions would become part of our drinking water supplies, as well as part of the flesh of the fish and shellfish that we eat, and part of our ecosystem in general. It is very curious that both the Albrecht/Nickelsburg Article and the Fifth Circuit's *Needham* opinion seem oblivious to the environmental and public health problems that they seem to legitimize, or arguably invite, by their assertion that the FWPCA of 1972 never did have, and the existing CWA almost certainly does not have, jurisdiction over the non-navigable tributaries of the §10 navigable waters.

If there is any person who believes that industries, corporations, and individuals with chemical wastes to dispose of will always (or even usually) be exemplary citizens on a purely voluntary basis and would not dump their untreated, toxic wastes into the nation's waters if they no longer have to be concerned about the CWA's restrictions and penalties, that person need merely review the history of water pollution in America before the FWPCA of 1972 became law. In fact, the enforcement history of the CWA has demonstrated every year since 1972 that quite a few polluters will try to get away with illegal dumping and discharging of pollutants of all types despite the stringent civil and criminal penalties that the CWA has imposed since 1972 on those dumpers who are apprehended. If the Albrecht/Nickelsburg and *Needham* dicta assertions restricting CWA jurisdiction to the §10 navigable waters were to prevail, then the number of polluters dumping their wastes into our waterways would surely increase, since they could dump into any non-navigable tributary free of any CWA restriction or penalty.

To cite merely one of numerous possible examples from the recent past, consider *United States v. Eidson*.[47] In that CWA enforcement case, the federal government used the CWA to impose severe penalties for water pollution on Eidson, whose business was to clean out underground gasoline tanks for service stations. Eidson quite naturally determined that the cheapest and most convenient way to empty his large tanker truck full of poisonous petroleum wastes and solvents was to dump those untreated wastes, secretly and late at night, into small, non-navigable tributaries that eventually flowed into Tampa Bay, Florida, where those toxic wastes caused a substantial fish kill. Although Eidson was apprehended and punished under the CWA, if the federal courts were to adopt the Albrecht/Nickelsburg Article's reading of CWA jurisdiction, then all of our nation's waters could be fouled by many thousands of polluters like Eidson, all doing what the unregulated, competitive system would impose as the least-cost, perfectly legal method for every business and industry to dispose of its wastes.[48]

The Conclusions of the Albrecht/Nickelsburg Article and of the Fifth Circuit's Needham *Dicta Defy Common Sense: Why Would Congress Enact a "Federal Water Pollution Control Act" Statute in 1972 With Such a Limited Geographic Jurisdiction That It Could Not Begin to Address the Serious Water Pollution Problems That the Act Purported to Address?*

It seems highly unlikely that Congress enacted the FWPCA of 1972 merely to create a nullity, an elaborate statutory fraud that could not possibly deal with the serious problem of water pollution that Congress purported to address. It seems equally unlikely that Congress kept in place that same statutory fraud of a CWA having only a tiny fraction of the geographic jurisdiction necessary to deal with the problem of water pollution when Congress revisited the question of the CWA's geographic jurisdiction in the FWPCA Amendments of 1977. Nevertheless, because the Albrecht/Nickelsburg Article asserts that the FWPCA of 1972 definitely excluded from its jurisdiction all non-navigable tributaries, and because that Article also asserts that the CWA of today almost certainly still has no jurisdiction over non-navigable tributaries, that Article did offer us all some palliative consolations. For example, Albrecht and Nickelsburg suggest that governments and private groups can offer incentives to reward people and corporations when they voluntarily choose not to discharge pollutants, even though they would have every legal right under the CWA to discharge pollutants into non-navigable tributaries free of any regulation or penalty.[49] By offering us this palliative, Albrecht and Nickelsburg implicitly admit that their assertions about the CWA's truncated jurisdiction would render that statute no longer capable of dealing effectively with water pollution. It

46. At least discharges of pollutants into non-navigable tributaries would be fully legal under federal law if the assertions of the Albrecht/Nickelsburg Article were correct. Of course, in theory such discharges could still be illegal under state or local law, but most states now rely on the FWPCA and on state programs assumed under that statute, so if federal CWA jurisdiction is lost, state jurisdiction would be lost as well. Many states have weak, nonexistent, or minimally enforced state and local laws governing water pollution, so the loss of CWA jurisdiction would render effective control of water pollution practically impossible, at least for many years.

47. 108 F.3d 1336, 27 ELR 20853 (11th Cir. 1997).

48. In fact, if potential polluters or their legal advisors were to read and agree with the conclusions of the Albrecht/Nickelsburg Article (or the dicta in the Fifth Circuit's *Needham* decision), then those polluters could start to dump their pollutants into any non-navigable tributary at once. Those polluters could rely on the notion that, if they were ever apprehended and prosecuted, the federal courts would later agree with the Albrecht/Nickelsburg Article and the *Needham* dicta, and conclude that their dumping had not violated the CWA, since the CWA allegedly does not protect non-navigable tributaries.

49. *See* Albrecht & Nickelsburg, *supra* note 1, at 11058. Under the Albrecht/Nickelsburg Article's view of CWA jurisdiction and the proposed use of voluntary incentives to discourage the discharge of pollutants, any potential polluter like Eidson with a tanker truck full of toxic chemical wastes could hold hostage an entire watershed, as well as all persons living downstream, by saying: "If you will pay me $5 million, I will refrain from dumping my toxic chemicals into this river just upstream of the head of navigation. Otherwise, get ready to ingest these chemicals in your tap water tomorrow or next week." While such payments to polluters could be described as a "voluntary incentive" not to pollute, the entire transaction could also be described as extortion.

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seems highly unlikely, however, that voluntary incentives not to pollute would prove very effective, and they could prove to be extraordinarily expensive.

Of course, the fact that the Albrecht/Nickelsburg Article and the Fifth Circuit's *Needham* dicta reached and presented conclusions regarding the past and current jurisdiction of the CWA that, if taken seriously and adopted by the federal courts and acted on by potential polluters, could lead to a major disaster for public health and environmental quality, does not necessarily demonstrate that the analysis and conclusions of the Albrecht/Nickelsburg Article and the *Needham* dicta are wrong as a matter of law. In fact, Albrecht and Nickelsburg seemed to anticipate this possible criticism of the environmental consequences of their position and responded to it in advance by suggesting that the remedial purposes of the CWA were all very fine in theory, but those purposes simply could not be achieved by a statute that, according to their analysis, has such a limited jurisdiction.[50] We will now examine their legal analysis.

The Albrecht/Nickelsburg Article Arrived at an Incorrect Interpretation of the Jurisdiction of the FWPCA of 1972 Because That Article Relies on Several Fallacies

The Albrecht/Nickelsburg Article's Conclusions Are Based on an Erroneous Analysis of the Legislative History of the FWPCA of 1972

The first and primary justification that the Albrecht/Nickelsburg Article offered to support its extraordinary conclusions about the CWA's geographic jurisdiction is based on a highly innovative use of what Albrecht and Nickelsburg purport to be a vital part of the legislative history of the FWPCA of 1972. The Albrecht/Nickelsburg Article's use of "legislative history" materials demonstrates why one must always be very careful, and somewhat skeptical, in accepting legal conclusions that an advocate alleges to be supported by legislative history, since legislative history analysis is inherently selective and can be easily manipulated. However, the Albrecht/Nickelsburg Article is especially remarkable because its fundamental legal conclusions regarding the FWPCA of 1972 are based on congressional hearings and reports that hitherto were not regarded as being part of the legislative history of the FWPCA of 1972 at all, and for a very good reason: the hearings and reports presented as "legislative history" of the FWPCA of 1972 by Albrecht and Nickelsburg really had nothing whatever to do with that statute.[51]

Boiled down to its essence, the Albrecht/Nickelsburg Article asserted that when Congress enacted the FWPCA of 1972, it was trying primarily to overturn a few administrative restrictions that the Corps had previously imposed on the geographic jurisdictional reach of §10 of the Rivers and Harbors Act of 1899, and, thus, Congress limited the jurisdiction of the FWPCA of 1972 to only §10 navigable waters. To say the least, that is a misrepresentation of the legislative history of the FWPCA of 1972.

According to the Albrecht/Nickelsburg Article, Congress did not intend to extend the geographic jurisdiction of the FWPCA of 1972 beyond the §10 navigable waters because Congress was simply trying to correct administrative mistakes that the Corps of Engineers had made in earlier decades by construing the geographic jurisdiction of the R&H Act of 1899 §10 program more narrowly than the §10 statute would have allowed. Thus, according to the Albrecht/Nickelsburg Article, in 1972 Congress intended to ensure that the new FWPCA statute would assert jurisdiction *only* over all categories of §10 navigable waters, including: "[W]aters landward of the harbor lines [i.e., lines that the Corps had established for U.S. harbors under §11 of the R&H Act of 1899[52]], 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 . . . ."[53]

To support that novel claim, Albrecht and Nickelsburg resorted to a clever "sleight of hand" trick and employed one of the oldest fallacies known to logic, which is often referred to as the "*post hoc, ergo propter hoc*" fallacy ("after the fact, therefore, because of the fact"). Here is a summary of the so-called legislative history of the FWPCA of 1972 as presented by and relied on by the Albrecht/Nickelsburg Article. During the early 1970s, a key congressional committee, named "the [U.S.] House [of Representatives] Committee on Government Regulations"[54] led Congress in pressing the Corps to change Corps regulations and practices implementing its regulatory authority under §10 of the R&H Act of 1899, so that §10 would regulate all of the traditional navigable waters that could be legally subject to §10 authority. The concern of the aforementioned House Committee, which concern allegedly was shared by certain unnamed "[k]ey members of the Congress,"[55] is magically transformed during the course of the Albrecht/Nickelsburg Article's discussion into the "Congress' concern,"[56] which in turn is alleged to explain what Congress as a whole did as "Congress was finalizing the FWPCA Amendments of 1972."[57] As part of their Article's discussion, Albrecht and Nickelsburg cited two House of Representative Reports[58] and concluded that the particular concerns of that one House Committee regarding the jurisdiction of the Corps' R&H Act of 1899 §10 regulatory program fully explain and reflect the concerns and intentions of the entire Congress regarding the geographic jurisdiction of the FWPCA of 1972.[59]

Here are the actual facts that the Albrecht/Nickelsburg Article referred to, but entirely misrepresented, when that Article incorrectly claimed that those facts were essential to

50. *Id*.

51. It is significant that the Congressional Research Service (CRS), at the request of Congress, amassed an official legislative history of the FWPCA of 1972, published as CRS, LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972 (1973). None of the various hearings and reports of the House Committee on Government Operations relied on to justify the conclusions of the Albrecht/Nickelsburg Article appear in that official legislative history (so far as I can determine), because those reports and hearings were unrelated to and irrelevant to the actual legislative history of the FWPCA of 1972.

52. 33 U.S.C. §404.

53. Albrecht & Nickelsburg, *supra* note 1, at 11047.

54. *See id.* at 11045.

55. *See id*.

56. *See id*. at 11046.

57. *Id*.

58. *See id.* at 11045-46 nn.36-42.

59. *See id.* at 11045-49.

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the legislative history of the FWPCA of 1972. So far as I can determine, there has never been any such committee as the "House Committee on Government Regulations." However, it is true that in the few years preceding 1972, the House of Representatives Committee on *Government Operations* did hold hearings and issue reports urging the Corps of Engineers to change Corps regulations and practices to broaden the geographic jurisdiction of the §10 permit program under the R&H Act of 1899. The House of Representatives hearings and reports referenced in the Albrecht/Nickelsburg Article all relate to those hearings and reports of the House Committee on Government Operations, and particularly of the Conservation and Natural Resources Subcommittee of the Committee on Government Operations.

It is also true that in the late 1960s and early 1970s, the Corps did change its regulations, administrative guidance, and administrative practices in a step-by-step, piecemeal manner to expand the Corps' implementation of the full statutory jurisdiction of the §10 program. The final codification of those changes appeared in the *Federal Register* on September 9, 1972, more than a month before the FWPCA of 1972 was enacted into law on October 18, 1972.[60] However, the assertion of the Albrecht/Nickelsburg Article that the geographic jurisdiction of the FWPCA of 1972 was intended and designed by Congress merely as a statutory codification of the modest expansions of the geographic jurisdiction of the §10 program that the Corps had already adopted by rulemaking in September 1972 is much more fanciful than their mythical "House Committee on Government Regulations" and constitutes a clever and entirely misleading application of the "*post hoc, ergo propter hoc*" fallacy.

The House of Representatives Committee on Government Operations was (and is) an *oversight* committee with no responsibility for formulating, drafting, or enacting legislation. So far as I can determine, the House Committee on Government Operations had no involvement whatever in developing or drafting the FWPCA of 1972. Those responsibilities in the House of Representatives belonged to the House Public Works and Environment Committee. In other words, the "legislative history" regarding the geographic jurisdiction of the FWPCA of 1972 concocted in the Albrecht/Nickelsburg Article from the unrelated activities of the House Committee on Government Operations concerning the jurisdiction of §10 of the R&H Act of 1899 refers to a "legislative sideshow" that had nothing to do with the framing and enactment of the FWPCA of 1972.

Far from being a significant concern of the Congress as a whole, the congressional project to encourage the Corps of Engineers to utilize to the fullest its authority under §10 of the Rivers and Harbors Act of 1899 was essentially the project of one activist chairman of a congressional oversight subcommittee. That activist was Rep. Henry S. Reuss (D-Wis.), the Chairman of the Conservation and Natural Resources Subcommittee of the House Committee on Government Operations. The Albrecht/Nickelsburg Article managed a remarkable sleight of hand trick when it magically transformed the concerns of that one activist House of Representatives subcommittee chairman into the paramount concerns of the Congress as a whole, in order to magically transform the legislative history of the FWPCA of 1972 into something new and unrecognizable. Of course, the finale of the trick was an amazing "disappearing act" that allegedly took away from the FWPCA of 1972 more than 99% of its actual geographic jurisdiction.

It is probably true that Congress did intend the geographic jurisdiction of the new FWPCA of 1972 to include the full extent of the broadest possible interpretation of §10 jurisdiction, since that would constitute only the small but important core of the total tributary system that drains into §10 navigable waters. However, the most reasonable reading of the legislative history of the FWPCA of 1972 demonstrates that Congress intended the new statute's jurisdiction to extend much farther than §10's jurisdiction, including all tributaries to the §10 waters, as is explained below.

If in 1972 Congress as a Whole Wanted to Broaden the Geographic Jurisdiction of §10 of the R&H Act of 1899, Congress Surely Would Have Amended That Statute; It Has Never Done So

If the Albrecht/Nickelsburg Article were correct in its assertion that a paramount concern of the entire Congress in 1972 was to ensure that the full statutory jurisdiction of §10 of the R&H Act of 1899 would be exercised over all navigable-in-fact waters, then in all likelihood at some point Congress at least would have amended §10 itself to achieve that result. Nevertheless, despite the hearings and pronouncements of the Conservation and Natural Resources Subcommittee of the House of Representatives Committee on Government Operations on that subject, Congress as a whole never did enact any legislation to expand the geographic jurisdiction of §10, relying instead on administrative actions by the Corps to accomplish that goal. Some of those Corps administrative changes and Corps assertions of §10 jurisdiction over certain water bodies based on those administrative changes were later overturned by the federal courts precisely because the §10 statute had not been amended by Congress. These facts provide further evidence that the House Committee on Government Operations' hearings and reports on §10 jurisdiction were a "legislative side show" not embraced by Congress as a whole, contrary to the assertions of the Albrecht/Nickelsburg Article.

Both before and after Congress enacted the FWPCA of 1972, §10 has been an important regulatory authority for protecting navigable waters, so it was entirely reasonable for the House Committee on Government Operations to urge the Corps to implement that authority to the fullest. Section 10 was originally intended to protect navigation and the navigable capacity of the navigable waters, but from 1968 on the Corps, by regulation and practice, used §10 to protect the total public interest in the navigable waters, including all aspects of environmental quality. While §10's basic geographic jurisdiction has always been limited to traditional navigable waters, its "activity jurisdiction" has always been very broad: §10 requires a federal permit for almost any structure or human activity that would affect the course, condition, or capacity of any of the traditional navigable waters. Section 10 does not regulate or control water pollution per se, but expansion of §10's limited geographic jurisdiction would have been a great advance for many other aspects of environmental protection, and for protection of the public interest in general, just as the Conservation and

60. *See* U.S. Army Corps of Engineers, Definition of Navigable Waters of the United States, 37 Fed. Reg. 18279 (Sept. 9, 1972).

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Natural Resources Subcommittee of the House Committee on Government Operations told the Corps, as referenced in the Albrecht/Nickelsburg Article.[61]

It would have been relatively easy for Congress to amend §10 to ensure the result that the Albrecht/Nickelsburg Article insists was the major goal of the entire Congress in 1972, yet Congress never did that. Moreover, the failure of Congress to amend §10 to achieve the goals ascribed to Congress as a whole by the Albrecht/Nickelsburg Article resulted in the frustration of some of those very goals. For example, at the urging of the House Committee on Government Operations, as referenced in the Albrecht/Nickelsburg Article, the Corps did assert §10 jurisdiction over a number of landlocked lakes, including the Great Salt Lake in Utah, Lake Minnetonka in Minnesota, and Devils Lake in North Dakota. However, because Congress never enacted any legislation broadening §10's geographic jurisdiction (despite the Albrecht/Nickelsburg Article's assertion that such was the entire Congress' primary goal), three separate federal courts of appeals later held that the Corps' assertion of §10 jurisdiction over those landlocked lakes was not authorized by the R&H Act of 1899.[62] The Corps has no §10 jurisdiction over those landlocked lakes to this day.

These facts indicate that the Albrecht/Nickelsburg Article entirely misrepresented the degree that Congress as a whole was focused on expanding the geographic jurisdiction of the §10 regulatory program in 1972, even though the House Committee on Government Operations did urge the Corps to do that through administrative actions. Instead, in 1972 Congress as a whole was focusing on new, unprecedented, landmark federal legislation to address comprehensively the serious national problem of water pollution. That legislation, the FWPCA of 1972, had very little, if anything, to do with the geographic jurisdiction of §10 of the R&H Act of 1899, a provision of law that had hardly anything to do with water pollution.

Congress Enacted the FWPCA of 1972 to Address the Jurisdictional Inadequacies of the Water Quality Act of 1965, Not any Inadequacies of §10 of the R&H Act of 1899, and Congress Included Non-Navigable Tributaries in the Jurisdiction of the FWPCA of 1972

Contrary to the assertions of the Albrecht/Nickelsburg Article, the limited geographic jurisdiction of §10 of the R&H Act of 1899 was not the primary basis used by Congress to establish the scope of the CWA's jurisdiction, as enacted in the FWPCA of 1972. Instead, the legislative history of the FWPCA demonstrates that Congress focused on the inadequacies of the Water Quality Act of 1965 as the starting point for crafting the expanded jurisdiction of the FWPCA of 1972. That same legislative history demonstrates that Congress intended the FWPCA of 1972 to cover all tributaries of the navigable waters.

In its discussion of the legislative history of the FWPCA of 1972, the Albrecht/Nickelsburg Article stated that "[t]he deletion of 'tributaries' from the [U.S.] Senate Bill and the adoption of language very close to the [House of Representatives] 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."[63] The Albrecht/Nickelsburg Article goes on to conclude:

> 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." [C]ommittee 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.[64]

The Albrecht/Nickelsburg Article also pointed to how the Senate bill that resulted in the FWPCA of 1972 defined "navigable" and stated:

> The Senate [b]ill 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."
>
> 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."[65]

The fact that the FWPCA of 1972 created and relied on that new term of art, "the waters of the United States," is highly significant. If the Albrecht/Nickelsburg Article were correct in its assertion that Congress intended to limit the geographic jurisdiction of the FWPCA of 1972 to only the §10 navigable waters, then in all probability Congress would have used only the term "the navigable waters" and presumably would have defined that term as meaning the traditional navigable waters of the United States. The fact that the FWPCA of 1972 provided a new definition for "navigable waters," i.e., "the waters of the United States," strongly suggests that the CWA was intended to have a jurisdiction substantially greater than the limited §10 navigable waters; this fact was confirmed by the CWA's legislative history from 1972, as well as the legislative history of the FWPCA Amendments of 1977.

Important evidence contradicting the conclusions of the Albrecht/Nickelsburg Article can be found buried in a footnote of that same Article, which quotes the entire portion of the Senate Report's explanation of what the jurisdiction of the FWPCA of 1972 was intended to be; it reads as follows:

> The control strategy of the Act extends to navigable waters. The definition of this term means the navigable wa-

61. In theory, §10 could have been used indirectly to address a small part of the problem of water pollution, given the fact that a §10 permit application for any structure or work in navigable waters that could result in the discharge of a pollutant (either through the construction of the structure or work, or through the operation of the structure) supposedly could require the processing of a state water quality certification under CWA §401, 33 U.S.C. §1341. Unfortunately, for many years after 1972, Corps Regulatory Branch officials refused to recognize that any activity requiring only a §10 permit could ever trigger the need for a state CWA §401 water quality certification, so as a practical matter §10 could not be used effectively to address water pollution even indirectly during the 1970s and 1980s.

62. *See* Hardy Salt Co. v. Southern Pac. Transp. Co., 501 F.2d 1156 (10th Cir. 1974); Minnehaha Creek Watershed Dist. v. Hoffmann, 597 F.2d 617, 9 ELR 20334 (8th Cir. 1979); and National Wildlife Fed'n v. Alexander, 613 F.2d 1054, 10 ELR 20060 (D.C. Cir. 1979).

63. Albrecht & Nickelsburg, *supra* note 1, at 11047.

64. *Id.* at 11048 (emphasis in original).

65. *Id.* at 11047.

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> ters 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*.[66]

This quotation from the Senate Report reveals three important points. First, the report explicitly states that the FWPCA of 1972 would include in its geographic jurisdiction the tributaries of §10 navigable waters, contrary to the assertions of the Albrecht/Nickelsburg Article. Second, when promulgating the definition of "navigable waters" in the 1972 FWPCA, Congress had the inadequacies of the implementation of the Water Quality Act of 1965 in mind, not the House Committee on Government Operations' unrelated project to make the Corps assert the full jurisdictional scope of §10 of the Rivers and Harbors Act of 1899. Third, to remedy those inadequacies in federal jurisdiction, Congress intended that the jurisdiction of the FWPCA of 1972 should encompass the entire tributary system flowing into the navigable waters so that water pollutants could be controlled at their source, as the Senate Report explicitly stated. Congress did not intend to limit the jurisdiction of the FWPCA of 1972 to the "traditional" definition of "navigable waters" that limited (and still does limit) the geographic jurisdiction of §10 of the Rivers and Harbors Act of 1899.

Turning from the FWPCA of 1972's Senate Report to the FWPCA of 1972's legislative history from the House of Representatives, those same basic points are confirmed. The House Public Works and Environment Committee's report on the FWPCA of 1972 stated: "The water pollution control program *as we know it today* was put into present shape by enactment of the Water Quality Act of 1965 and the Clean Waters Restoration Act of 1966."[67] One might have expected that either the House or the Senate Report on the FWPCA of 1972 would have specifically and explicitly referenced and adopted the limited geographic jurisdiction of §10 of the Rivers and Harbors Act of 1899 if Congress had actually intended to limit the jurisdictional reach of the FWPCA of 1972 to those §10 navigable waters, as the Albrecht/Nickelsburg Article asserted.

Significantly, the Senate Report language focused on the full "hydrologic cycles" of water systems and on the FWPCA of 1972's goal of controlling the "sources" of pollutants; those were concepts not contemplated when Congress defined "the navigable waters of the United States" under §10 of the Rivers and Harbors Act of 1899.[68] Those essential goals of the FWPCA of 1972 could only be achieved if that new statute had jurisdiction over all of the tributaries of the traditional navigable waters, as well as over the navigable waters themselves.

66. S. Rep. No. 92-414, at 77 (1972), *reprinted in* 1 CRS, Legislative History of the Water Pollution Control Act Amendments of 1972, at 1495 (1973) (emphasis added) [hereinafter Legislative History]; *see also* Albrecht & Nickelsburg, *supra* note 1, at 11047 n.49.

67. H. Rep. No. 92-911, at 68 (1972), *reprinted in* 1 Legislative History, *supra* note 66, at 755.

68. S. Rep. No. 92-414, at 77 (1972), *reprinted in* 1 Legislative History, *supra* note 66, at 1495.

69. Section 13 states the following, in pertinent part:

> It shall not be lawful to throw, discharge, or deposit . . . any refuse matter of any kind or description whatever . . . 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 . . . 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, either by ordinary or high tides, or by storms or floods, or otherwise . . . .

33 U.S.C. §407 (emphasis added).

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Congress Did Not Base the Jurisdiction of the FWPCA of 1972 on §10 of the Rivers and Harbors Act of 1899 Because §10 Was Not Intended to Address Water Pollution

Congress did not use the limited geographic jurisdiction of §10 of the Rivers and Harbors Act of 1899 as the model for establishing the jurisdiction of the FWPCA of 1972 because §10 was not a statute intended to control water pollution or capable of doing so. Section 10 was intended to protect navigation and the navigable capacity of the traditional navigable waters of the United States from unauthorized structures and work in the navigable waters. The one section of the Rivers and Harbors Act of 1899 that was intended to address water pollution was §13, which by its explicit terms did include in that section's geographic jurisdiction the non-navigable tributaries of the §10 navigable waters, as well as the §10 navigable waters themselves.[69] In 1972 Congress was well aware of that important distinction between §10's geographic jurisdiction and §13's jurisdiction. This important point is not discussed by the Albrecht/Nickelsburg Article.

The Albrecht/Nickelsburg Article attempted to establish the notion that in the FWPCA of 1972, and again in the FWPCA Amendments of 1977, Congress enacted landmark CWA legislation purporting to deal effectively with the very important national problem of water pollution of "the waters of the United States" while nonetheless excluding from the CWA's jurisdiction all non-navigable tributaries of the §10 navigable waters. In order to accept such a notion, one would have to conclude the following: in 1899 Congress had at least a rudimentary understanding of the nature of water pollution, i.e., that pollutants flow downstream from tributaries into the larger, navigable water bodies. That understanding led Congress to explicitly include the non-navigable tributaries of §10 navigable waters as an integral part of the geographic jurisdiction of the only section of the Rivers and Harbors Act of 1899 that did explicitly address water pollution, i.e., §13. Nevertheless, many decades later, in 1972, when Congress crafted and enacted federal legislation to deal comprehensively with the problem of water pollution, it had somehow forgotten that most rudimentary fact about water pollution, i.e., that pollution flows downstream from non-navigable tributaries into navigable water bodies. Thus, according to the Albrecht/Nickelsburg Article, Congress established a statutory structure for the FWPCA of 1972 that excluded from its jurisdiction all non-navigable tributaries of the §10 navigable waters. The only way that the Albrecht/Nickelsburg Article could be correct in its conclusions would be if Congress was perpetrating an unprecedented fraud on the nation in 1972 when it purported to be enacting comprehensive and effective federal legislation to deal with water pollution and stated in the first words of the FWPCA of 1972 that "the objective of this Act is to restore and maintain the chemical, physical, and biological integrity of the Nations's waters."[70] Of course, there is an alternative explanation: Albrecht and Nickelsburg could be profoundly wrong in their assertion that the FWPCA of 1972 had no jurisdiction over non-navigable tributaries to the navigable waters.

Non-Navigable Tributaries to the Navigable Waters Are Referred to in a Number of Places in the Legislative History of the FWPCA of 1972 as Part of the Intended Jurisdictional Scope of the New Legislation

The Albrecht/Nickelsburg Article does admit that Congress intended to expand the definition of "navigable waters" in the FWPCA of 1972. However Albrecht and Nickelsburg based their conclusions on hearings and reports of the House Committee on Government Operations that are not really part of the legislative history of the FWPCA of 1972, and which have never been regarded as part of the legislative history of the FWPCA of 1972 before the Albrecht/Nickelsburg Article resurrected them. Nevertheless, Albrecht and Nickelsburg rely on those extraneous, unrelated activities of the House Committee on Government Operations to justify their allegation that Congress intended to expand the jurisdiction of the FWPCA to an extraordinarily limited degree, to include *only* "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.'"[71] This narrow interpretation is contradicted by yet another part of the actual legislative history of the FWPCA of 1972 that the Albrecht/Nickelsburg Article itself cited as significant in footnote 57 of their Article. That was an important floor statement from Rep. John D. Dingell (D-Mich.), which states:

> The 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 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 . . . ." 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.*"
>
> 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.[72]

While this Article will not attempt to present a comprehensive analysis of the legislative history of the FWPCA of 1972, even a careful reading of those few portions of actual legislative history of the 1972 Act that the Albrecht/Nickelsburg Article itself quoted in footnotes indi-

70. *Id*. §1251(a).

71. Albrecht & Nickelsburg, *supra* note 1, at 11055.

72. 1 Legislative History, *supra* note 66, at 250-51 (emphasis added). *See also* Albrecht & Nickelsburg, *supra* note 1, at 11048 n.57.

73. *See* 474 U.S. at 121.

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cates that Congress intended to include non-navigable tributaries to navigable waters in the FWPCA's definition of "the waters of the United States."

The legislative history and analysis cited above demonstrates that the Albrecht/Nickelsburg Article's "evidence," analysis, and conclusions about the geographic jurisdiction of the FWPCA of 1972 are fallacious and misleading. While it is true that Congress did not provide an absolutely clear and explicit statement of what the geographic jurisdiction of the FWPCA of 1972 was intended to be, there is far more evidence and logic supporting the inclusion of non-navigable tributaries in the 1972 Act's jurisdiction than supporting the exclusion of those tributaries, as alleged in the Albrecht/Nickelsburg Article. However, to whatever extent there were ambiguities regarding how far Congress intended the jurisdiction of the FWPCA of 1972 to extend, EPA and the Corps of Engineers were clearly acting within their authorities in the several agency rulemakings based on the FWPCA of 1972 that interpreted the 1972 Act's jurisdiction as including all non-navigable tributaries.

Even if the Plain Words and Legislative History of the FWPCA of 1972 Were Somewhat Ambiguous Regarding the Extent of That Act's Jurisdiction, EPA and the Corps Acted Within Their Authorities When Their Administrative Procedure Act (APA) Rulemakings Interpreted and Implemented the FWPCA of 1972 to Assert Jurisdiction Over Non-Navigable Tributaries

Undoubtedly it can be argued that both the statutory words and legislative history of the FWPCA of 1972 contain some ambiguities regarding what Congress intended "the waters of the United States" to encompass. To whatever extent such ambiguities existed, they demonstrate that the essentially identical definitions of that term adopted by both EPA and the Corps to implement the FWPCA of 1972, after extensive APA rulemakings and based on considerable agency experience, was within those agencies' authority and, thus, was and is properly given deference by the federal courts. As will be described in more detail hereinafter, both EPA and the Corps adopted regulations interpreting and implementing the geographic jurisdiction of the FWPCA of 1972 as including non-navigable tributaries. Among those regulations implementing the FWPCA of 1972 were the Corps of Engineers' regulations of 1975 and 1977, both of which explicitly asserted jurisdiction over all non-navigable tributaries to navigable waters, as well as over all wetlands adjacent to both navigable and non-navigable waters. Those were substantively the regulations reviewed and upheld by the Court in *Riverside Bayview Homes.*[73] The Court described those regulations as follows: "[I]n 1975 the Corps issued interim final regulations redefining 'the waters of the United States' to include not only actually navigable waters but also tributaries of such waters . . . . 40 Fed. Reg. 31320 (1975)."[74] Even though the precise issues being litigated in the *Riverside Bayview Homes* case led the Court in that decision to focus on, and to uphold CWA jurisdiction over, wetlands "adjacent" to other waters of the United States, the legal principles that controlled the *Riverside* decision demonstrate clearly why EPA and the Corps acted within their authority when they both adopted regulations construing the FWPCA of 1972's jurisdiction as including all non-navigable tributaries.

The Court's unanimous decision in *Riverside Bayview Homes* summarized the difficult problem of defining the limits of CWA jurisdiction as follows:

> Faced with such a problem of defining the bounds of its [CWA] regulatory authority, an agency may appropriately look to the legislative history and underlying policies of its statutory grants of authority. Neither of these sources provides unambiguous guidance for the Corps in this case, but together they do support the reasonableness of the Corps' approach of defining adjacent wetlands as "waters" within the meaning of §404(a).[75]

In *Riverside Bayview Homes*, the Court reviewed in some detail the legislative history and underlying policies of the FWPCA of 1972 and considered the Corps' determination by APA rulemaking that adjacent wetlands are an important part of the total aquatic system and play an important role in protecting the water quality of the other "waters of the United States." The Court properly described the Corps' regulations as having construed the term "the waters of the United States" in the FWPCA of 1972 as follows: "The regulation extends the Corps' authority under [§]404 to all wetlands adjacent to navigable or interstate waters *and their tributaries*."[76] The Court went on to hold in *Riverside Bayview Homes*: "We are thus persuaded that the language, policies, and history of the Clean Water Act compel a finding that the Corps has acted reasonably in interpreting the Act to require permits for the discharge of fill material into wetlands adjacent to the 'waters of the United States.'"[77]

The Court's unanimous decision in *Riverside Bayview Homes* is still the law of the land, notwithstanding the unconvincing efforts of some to limit that decision to its facts after the *SWANCC* decision. It would be completely illogical to conclude that Congress and the responsible federal agencies were authorized by the FWPCA of 1972 to extend by APA rulemaking that statute's jurisdiction to wetlands adjacent to other waters of the United States in order to implement the FWPCA of 1972's goals of protecting water quality (as the *Riverside Bayview Homes* decision held), but that neither Congress nor the agencies could or did extend the FWPCA of 1972's jurisdiction to the non-navigable tributaries, which have far greater importance to the quality of the navigable waters than adjacent wetlands do. The essence of the *Riverside Bayview Homes* decision is that the underlying purpose of the CWA is to protect water quality, not navigation, and thus that the FWPCA of 1972's geographic jurisdiction extended not only to navigable waters, but to other aquatic areas that protect the quality of navigable waters. Given the policies and legislative history of the FWPCA of 1972 cited and relied on by the Court in *River-*

74. *Id*. at 123.
75. *Id*. at 132.
76. *Id*. at 129.
77. *Id.* at 139.
78. As of the date this Article was written, at least one post-*SWANCC* U.S. court of appeals decision presents a particularly thoughtful, well-reasoned analysis of the "deference" issue regarding EPA and Corps regulatory definition of CWA jurisdiction, and upholds CWA jurisdiction over the full tributary system to navigable waters: United States v. Deaton, 332 F.3d 698, 33 ELR 20223 (4th Cir. 2003).
79. *See* Albrecht & Nickelsburg, *supra* note 1, at 11055-56.

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side Bayview Homes, it is clear that Congress intended the FWPCA of 1972 to regulate non-navigable tributaries. If the Corps' regulations defining wetlands adjacent to other waters of the United States as subject to the jurisdiction of the FWPCA of 1972 were reasonable and deserving of judicial deference, as the Court held in *Riverside Bayview Homes*, then *a fortiori* EPA's and the Corps' regulations defining non-navigable tributaries of the navigable waters as subject to the jurisdiction of the FWPCA of 1972 were and are equally reasonable and must be given deference by the federal courts and upheld.[78]

The Albrecht/Nickelsburg Article tried to obscure these fundamental points by claiming that the Court's *Riverside Bayview Homes* decision is no longer good legal authority after *SWANCC* and is now limited to its facts. Albrecht and Nickelsburg also claim that the EPA and Corps regulations were illegal to the extent that they construed the jurisdiction of the FWPCA of 1972 as including any aquatic area outside navigable-in-fact §10 navigable waters because, they insist, Congress limited the jurisdiction of the FWPCA of 1972 to the navigable-in-fact §10 waters. To reconcile that latter conclusion with even the most narrow reading of the *Riverside Bayview Homes* decision, Albrecht and Nickelsburg must resort to the illogical notion that Congress ratified EPA's and the Corps' assertion of CWA jurisdiction over adjacent wetlands by enacting the FWPCA Amendments of 1977, but that allegedly Congress never ratified the same EPA and Corps regulations' assertion of CWA jurisdiction over non-navigable tributaries. Only a true believer of the Albrecht/Nickelsburg persuasion could swallow such a conclusion, and then only with the help of much "faith-based" thinking.

As we have seen, the Albrecht/Nickelsburg Article's conclusions regarding the jurisdictional scope of the FWPCA of 1972 were wrong for the various reasons cited above.

Nevertheless, based on their erroneous interpretation of the legislative history of the FWPCA of 1972, Albrecht and Nickelsburg went on to insist that to this day no CWA jurisdiction exists over non-navigable tributaries, *unless* some unknown legal wonder-worker can locate some hitherto unidentified clear and explicit statutory confirmation of jurisdiction over non-navigable tributaries in the text (or possibly in the legislative history) of the FWPCA Amendments of 1977.[79] A fair reading of the Albrecht/Nickelsburg Article is that those authors do not believe that such a feat can be accomplished. However, because the essential foundation of their position relies on their mistaken and disproved assertions regarding the FWPCA of 1972, one need not take their challenge regarding the 1977 FWPCA Amendments very seriously. In addition, however, both the Albrecht/Nickelsburg Article and the most troubling *obiter dicta* from the *SWANCC* decision relied heavily on a strange legal artifact from the 1970s: the Corps of Engineers' final rule of April 3, 1974. We will now turn our attention to that subject.

The Corps of Engineers' Final Rule of April 3, 1974, Provides No Reliable Support for the Assertions of the Albrecht/Nickelsburg Article Regarding the Jurisdiction of the FWPCA of 1972

One of the most important, and most superficially plausible, arguments made in the Albrecht/Nickelsburg Article is based on the following notion: the Corps of Engineers' final rule of April 3, 1974, interpreted CWA jurisdiction to cover only the §10 navigable waters and to exclude from CWA jurisdiction all non-navigable tributaries to those §10 waters. In addition, *obiter dicta* in the Court's *SWANCC* decision seemed to endorse that early Corps interpretation of the proper scope of CWA jurisdiction as possibly reflecting the original intent of Congress in the FWPCA Amendments of 1972.[80] Thus, the Albrecht/Nickelsburg Article relies heavily on that Corps final rule of April 3, 1974, as evidence supporting their own assertion that the jurisdiction of the FWPCA of 1972 was limited to the §10 navigable waters. However, careful analysis demonstrates that the long-discredited Corps final rule of April 3, 1974, provides no real support for the Albrecht/Nickelsburg Article's conclusions about the intent of Congress regarding the jurisdiction of the FWPCA of 1972.

As quoted in full below, the Court's dicta in *SWANCC* noted that the Corps' final rule of April 3, 1974, tried to limit the jurisdiction of CWA §404 to the §10 navigable waters; then the Court's decision stated: "Respondents put forward no persuasive evidence that the Corps mistook Congress' intent in 1974."[81] Most of the remainder of this Article will attempt to provide the "persuasive evidence" that the Court's *SWANCC* dicta seemed to invite by claiming that no such evidence had yet been put forward. The following discussion will demonstrate that the Corps' final rule of April 3, 1974, was not a legitimate or successful attempt to discern and implement the intent of Congress regarding the geographic jurisdiction of the FWPCA of 1972, and that the Corps' 1974 final rule is totally useless for determining the CWA's current jurisdictional reach.

80. *See* 531 U.S. at 168:

> Indeed, the 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 "it is the water body's capability of use by the public for purposes of transportation or commerce which is the determinative factor." *Id.* §209.260(e)(1). Respondents put forward no persuasive evidence that the Corps mistook Congress' intent in 1974.

81. *Id.*

82. *See* Albrecht & Nickelsburg, *supra* note 1, at 11049-50.

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Even Taking the Corps' Final Rule of April 3, 1974, at Face Value, It Provides No Support for the Albrecht/Nickelsburg Assertions About the Jurisdiction of the FWPCA of 1972 as a Whole, and Is Irrelevant to the Jurisdiction of the Current CWA

The first important point to note regarding the Corps' final rule of April 3, 1974, is that it explicitly purported to address *only* the geographic jurisdiction of the *Corps'* regulatory authorities, such as §10 of the Rivers and Harbors Act of 1899 and, most importantly for our discussion, *§404* of the FWPCA of 1972. On its face, the Corps' 1974 final rule did *not* purport to address the geographic jurisdiction of any part of the FWPCA of 1972 other than §404, nor of the FWPCA of 1972 as a whole. Thus, the Corps' 1974 final rule was predicated on two important legal assumptions that we now know to have been false: (1) the assumption that §404 of the FWPCA of 1972 had a geographic jurisdiction different from (and smaller than) the jurisdiction of the rest of the FWPCA of 1972; and (2) the assumption that the Corps had the right to establish the geographic jurisdiction of §404 of the FWPCA of 1972 unilaterally, without the agreement of EPA.

Taking the Corps' final rule of April 3, 1974, at face value, it was an attempt to establish the geographic jurisdiction of §404 of the FWPCA of 1972 as identical to the geographic jurisdiction of §10 of the Rivers and Harbors Act of 1899, even though that would give FWPCA §404 a vastly more limited geographic reach than all the other sections and programs of the FWPCA. As I will explain hereinafter, the Corps had several policy, practical, and political reasons in 1974 to make the attempt to carve out a separate, limited jurisdiction for the FWPCA §404 program, whether or not that attempt could or would ultimately be upheld by the federal courts. One must remember that in 1974 the Corps, at least in theory, could act on the assumption that it had the legal right, as the federal agency primarily responsible for administering the new FWPCA §404 regulatory program, to establish by rulemaking the geographic jurisdiction for the §404 program, even if that jurisdiction would be substantially more restricted than the jurisdiction of the rest of the FWPCA of 1972, as established by EPA's rulemakings. The "Civiletti opinion," discussed above, in which Attorney General Civiletti refuted that notion and ruled that EPA—not the Corps—had legal authority to determine the extent of geographic jurisdiction for the entire CWA, including §404, was not issued until 1979.

It is quite understandable that the Corps' final rule of April 3, 1974, purported to address the geographic jurisdiction of FWPCA §404, and not the FWPCA of 1972 as a whole, because, as the Albrecht/Nickelsburg Article pointed out, at the time the Corps promulgated its final rule, it was aware that well before that date EPA had taken several separate administrative actions to define the extent of the FWPCA's geographic jurisdiction, including EPA's promulgation in the *Federal Register* of May 3, 1973, of a comprehensive final rule on the jurisdiction of the FWPCA of 1972.[82] The Corps' final rule of April 3, 1974, did not purport to challenge or disagree with the various earlier rules and other official pronouncements that EPA had promulgated asserting FWPCA of 1972 jurisdiction over all of the tributaries to the traditional navigable waters *for purposes of the FWPCA of 1972 as a whole, or for specific FWPCA provisions and programs other than the Corps' §404 program*.

With regard to the current debate about CWA jurisdiction after *SWANCC*, it is significant that the Corps' unilateral attempt in 1974 to establish a restricted, special geographic jurisdiction for the Corps' FWPCA §404 regulatory program was founded on two legal assumptions that are now known to have been wrong. First, we now know that, within the Executive Branch, it is EPA, not the Corps, that had and has the ultimate legal authority to establish by regulation the geographic jurisdiction for the entire CWA, including CWA §404.[83] In addition, after 1974 the law became established and clear that there is only one universal geographic jurisdiction for the entire CWA, and that the CWA §404 regulatory program must have the same geographic jurisdiction as all the other sections of the CWA (unless and until the law changes).[84] Consequently, the notion that the Corps' long-abandoned and long-discredited final rule of April 3, 1974, was somehow determinative regarding the jurisdiction for the entirety of the FWPCA of 1972, or regarding the entire CWA of today, is clearly wrong, if only because the Corps itself in 1974 directed that rule only at the §404 program, and not at any other program of the FWPCA of 1972 or at the FWPCA of 1972 as a whole. Moreover, the Corps never had legal authority to determine the jurisdiction of §404 of the FWPCA of 1972 without the agreement of EPA, and EPA never approved or agreed with the Corps' rule of April 3, 1974.

Given the fact that the Corps' final rule of April 3, 1974, has been superseded by several subsequent EPA and Corps of Engineers APA rulemakings that have long recognized the full scope of the CWA's geographic jurisdiction, the long-revoked Corps of Engineers final rule of 1974 would appear to be totally irrelevant to current debates regarding CWA jurisdiction. Nevertheless, the Albrecht/Nickelsburg Article flatly asserts, and the Court's dicta in *SWANCC* could be read to imply, that the Corps' final rule of April 3, 1974, somehow reflected the "true intent" of Congress regarding the proper jurisdiction of the FWPCA of 1972, or possibly even regarding the proper geographic jurisdiction of the current CWA. A more detailed examination of the Corps' final rule of April 3, 1974, is necessary to determine whether the Albrecht/Nickelsburg Article's assertions and the possible implications of the *SWANCC* dicta could possibly be true.

83. *See* 43 Op. Att'y Gen. No. 15, *supra* note 42. *See also* CWA §101(d): "Except as otherwise expressly provided in this Act, the Administrator of the Environmental Protection Agency (hereinafter in this Act called 'Administrator') shall administer this Act." 33 U.S.C. §1251(d).

84. *See* 43 Op. Att'y Gen. No. 15, *supra* note 42; *see also supra* note 41 and accompanying text.

85. *See supra* note 67.

86. Memorandum from William R. Orlandi, Acting General Counsel, U.S. Army Corps of Engineers, to Director of Civil Works, U.S. Army Corps of Engineers, on Problem Areas Resolved in Corps Regulatory Programs Following Passage of Recent Legislation (Dec. 13, 1972) (on file with author).

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The Corps' Final Rule of April 3, 1974, Was Not a Legitimate and Serious Attempt to Divine and Implement the Intent of Congress Regarding the Jurisdiction of the FWPCA of 1972

The historic record demonstrates that the Corps' final rule of April 3, 1974, was not a legitimate, thoughtful effort to discern and implement "the true intent of Congress" regarding the geographic jurisdiction of the FWPCA of 1972 as a whole, or even of FWPCA §404. Instead, the rule was the Corps' "long shot" effort to construe the FWPCA §404 program's geographic jurisdiction extremely narrowly, while recognizing that the 1974 rule would probably not be upheld by the federal courts. The Corps understandably determined that it had nothing to lose by promulgation of the final rule of April 3, 1974, since that rule might possibly be upheld by the Courts, and because even if the final rule were eventually overturned, the rule and the subsequent litigation would "buy time"so that the Corps and Congress could solve the Corps' acute practical and political problems dealing with the immense workload of the FWPCA §404 program. The Corps' 1974 final rule was also intended to "shift the responsibility and the blame" from the Corps to the federal courts for an eventual extension of Corps FWPCA §404 jurisdiction from the limited §10 navigable waters to "all waters of the United States," including all non-navigable tributaries and their adjacent wetlands.

The history of the Corps' final rule of April 3, 1974, is remarkable and well worth telling, especially given the fact that the rule was "resurrected" from historic obscurity by the Court's reference to it in *obiter dicta* in the *SWANCC* decision.[85] As noted above and further explained hereinafter, the Corps had several important reasons for promulgating the 1974 final rule, separate and apart from any notion that the rule was reflecting or implementing "the true intent of Congress" regarding the geographic jurisdiction of the FWPCA of 1972 as a whole.

Corps Acting General Counsel Orlandi's Legal Memorandum of December 13, 1972, Documents the Fact That the Corps Understood and Accepted the Reality That the Recently Enacted FWPCA of 1972 Asserted Jurisdiction Over Non-Navigable Tributaries to the §10 Navigable Waters

The historic record demonstrates that, after the FWPCA of 1972 had become law, the Corps fully understood that "the waters of the United States" that the new FWPCA of 1972 covered was much greater in geographic scope than "the traditional navigable waters of the United States" that the Corps had been regulating under §10 of the Rivers and Harbors Act of 1899. For example, on December 13, 1972, less than two months after the FWPCA of 1972 had become law, the Acting General Counsel of the Corps of Engineers, William R. Orlandi, signed an official legal memorandum addressed to the Corps' Director of Civil Works, i.e., the U.S. Army Major General in charge of all Corps Civil Works activities, with the following subject line: "Problem Areas to be Resolved in Corps Regulatory Programs Following Passage of Recent Legislation."[86] The first line of that memo stated: "This Memorandum is designated to highlight those problem areas . . . which have been raised by the Federal Water Pollution Control Act (Pub. L. No. 92-500) . . . ."

The first page of Orlandi's legal memorandum demonstrates that the Corps understood very well that non-navigable tributaries to the §10 navigable waters were part of the jurisdiction of the new FWPCA of 1972. That is hardly surprising, given the fact that the Corps itself had been statutorily responsible for regulating water pollution in those same non-navigable tributaries since 1899 under §13 of the Rivers and Harbors Act of 1899, commonly referred to as "The Refuse Act."[87] In fact, the Corps had been implementing a permit program under §13 of the 1899 Act for polluting point source discharges of pollutants into those same non-navigable tributaries of the §10 navigable waters (as well as in the §10 navigable waters themselves) from 1970 until late 1972. It was the transfer from the Corps to EPA of that §13 permit program in the non-navigable tributaries to §10 navigable waters, mandated by §402 of the new FWPCA of 1972, that led Acting General Counsel Orlandi to write the following:

> Since (Refuse Act) permits for discharges into *non-navigable tributaries* have been transferred to EPA, what course of action should the Corps take to control and remedy shoaling conditions in *navigable waters* which may occur as a result of discharges into *nonnavigable tributaries*? This will require coordination with EPA with resultant agreements being reduced to a memorandum of understanding between both agencies.[88]

Having recognized that the new FWPCA of 1972 as a general matter would regulate non-navigable tributaries to the traditional navigable waters, later in the same memorandum Acting General Counsel Orlandi raised the very delicate question of when and how the Corps would have to expand the geographic jurisdiction of its own regulatory program from the limited jurisdiction of §10 of the Rivers and Harbors Act of 1899, to regulate additional, non-navigable waters under the new §404 of the FWPCA of 1972:

> Should the Corps continue to use the definition of "navigable waters" as prescribed in ER 1165-2-302 (33 CFR 209.260) to define the scope of its regulatory jurisdiction, or expand its jurisdiction to include "*all* waters of the United States" which is the definition of "navigable waters" used in the [CWA]? It is possible that we would be confined to our current definition of "navigable waters" in the administration of our [§]10 permit program, but would have to expand our normal jurisdiction to include additional waters in the administration of the new [§]404 permit program.[89]

Note that the Corps' Acting General Counsel explicitly interpreted the FWPCA of 1972's jurisdictional mandate of "the waters of the United States" to mean "*all* waters of the United States" as the Corps' likely future expanded jurisdiction under §404 of the FWPCA of 1972.

A reader of the two quotations provided above from Acting General Counsel Orlandi's memorandum might wonder why Orlandi was clear and forthright when describing the plain fact that the FWPCA of 1972 as a whole (and

87. 33 U.S.C. §407.

88. Memorandum from Corps Acting General Counsel Orlandi, *supra* note 86, ¶ 2a(2) (emphasis added).

89. *Id.* ¶ 2(c)(5) (emphasis added).

90. *Id.* ¶ 4 (emphasis added).

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FWPCA §402 in particular) regulated non-navigable tributaries to navigable waters, but he became more circumspect when gently suggesting that the Corps would also have to regulate not merely §10 navigable waters, but "all waters of the United States" under its new §404 permit authority. The explanation for that subtle change in tone relates to the Corps' vitally important policy, practical, and political concerns about its new §404 authority, and also provides the real story behind the Corps' final rule of April 3, 1974. The last sentence of the Orlandi legal memorandum of December 13, 1972, provides a fitting introduction to that history:

> In view of the fact that many of the problem areas raised by [the FWPCA of 1972] involve an *intermixture of legal and policy decisions*, it is suggested that representatives from your Directorate meet with members of my staff to resolve these matters. The principal contact in this office for these meetings will be Mr. Jacobus Lankhorst.[90]

Most of the remainder of this Article will explain the Corps' "policy decisions" of the early 1970s that motivated the Corps, in its final rule of April 3, 1974, temporarily to disavow the full scope of the FWPCA of 1972's geographic jurisdiction. The reader should also understand from Orlandi's "point of contact" sentence quoted above that the actual author of the legal memorandum of December 13, 1972, was the Corps' senior attorney responsible for Civil Works matters, Jacobus J. Lankhorst, who later was the primary author of the parts of the Corps' final rule of April 3, 1974, that are relevant to this discussion.

The Corps' Final Rule of April 3, 1974, Was Motivated in Large Measure by the Corps' Practical, Policy, and Political Needs, Rather Than by the Corps' View of Congress' Intent in the FWPCA of 1972

As is explained in Appendix 2 of this Article, the Corps' final rule of April 3, 1974, was motivated by a number of interrelated considerations. First, the primary author of the 1974 rule, Corps Assistant General Counsel Lankhorst, believed that a legally defensible case could be made that the Corps had statutory authority to establish by rulemaking a special, highly restricted geographic jurisdiction for the FWPCA §404 program, less extensive than the jurisdiction of the FWPCA of 1972 as a whole. Corps leaders understood that the 1974 rule would probably not be upheld by the federal courts, but they also knew that it might possibly withstand judicial review and that the Corps had nothing to lose by making the attempt. Even if the 1974 final rule were to be overturned as contrary to the mandates of the FWPCA of 1972, it would nevertheless serve to "buy time" so that the Corps and Congress could find solutions to a number of potentially overwhelming practical and political problems that the Corps had to deal with in the 1972 to 1974 period. Those problems were caused by the fact that §404 of the FWPCA of 1972 imposed vastly greater regulatory responsibilities on the Corps than the Corps' actual or potential regulatory resources could possibly deal with in 1974 without both legislative relief from Congress and the creation and use of new regulatory mechanisms that did not exist in 1974.

As it happens, I know a good deal about the policy, political, and practical considerations that constituted the full explanation of the Corps' final rule of April 3, 1974, from my familiarity with the history of the Corps' regulatory program, the historic record of that period, and from personal discussions that I have had with the authors, reviewers, and defenders of that 1974 final rule during my early years in the Corps' Office of the Chief Counsel in the 1970s and more recently.[91] A number of documents in the Corps' archives, and many documents from the full legislative history of the FWPCA Amendments of 1977, corroborate and confirm the following explanation of the Corps' final rule of April 3, 1974. In addition, Appendix 2 of this Article presents additional, detailed corroboration of the explanation of the Corps' final rule of April 3, 1974, presented herein.

The enactment of the FWPCA of 1972 presented the Corps with significant benefits, but also with major challenges and problems. Even prior to enactment of the FWPCA of 1972, the Corps had to administer large-scale, important, and expanding regulatory responsibilities with very limited resources, including a small regulatory program work force. In 1972 the Corps had barely enough regulatory program staff to administer its existing permit responsibilities under §§9 and 10 of the Rivers and Harbors Act of 1899, which covered only the §10 navigable waters. One reason why the Corps' regulatory program was already overstressed and underresourced in 1972 was that between 1968 and 1972, the Corps had voluntarily undertaken sub-

91. The portions of the Corps' final rule of April 3, 1974, and its preamble, that related to the jurisdiction of FWPCA §404 were written by Lankhorst, who in 1974 was the Corps' Assistant General Counsel for Civil Works; his assistant in this task was William Hedeman, Esq. Lankhorst later became the Corps' Deputy General Counsel and served for many months as the Corps' Acting Chief Counsel after the retirement of General Counsel Manning Seltzer. Hedeman also had a distinguished career with the Corps, serving for years as the Corps' Assistant General Counsel, Environmental Law and Regulatory Programs. Unfortunately, both of those primary authors of the final rule of April 3, 1974, are now deceased. Fortunately, however, still alive and practicing law is another of the Corps' senior attorneys from the 1974 era who was involved in and has personal recollection of the final rule of April 3, 1974. That is Fred Disheroon, who is now a Senior Litigator at the DOJ. Disheroon worked in the Corps of Engineers Office of the General Counsel (now called the Office of the Chief Counsel) from August of 1970 until August of 1975. In 1974 Disheroon served as the Corps' Assistant General Counsel for Litigation, Enforcement, and Adversarial Proceedings, and in that capacity was personally involved in and knowledgeable about the Corps' final rule of April 3, 1974. Consequently, I asked Disheroon to read this Article's explanation of the circumstances that produced the Corps' final rule of April 3, 1974, and to verify that this explanation is consistent with his own personal knowledge of the matter. Disheroon has done that, and has provided me with the letter of attestation to that effect quoted in Appendix 2 of this Article.

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

93. 33 U.S.C. §404.

94. *See* U.S. Army Corps of Engineers, Administrative Procedure-Harbor Lines, 35 Fed. Reg. 8280 (May 27, 1970) *(amending* 33 C.F.R. §209.150).

95. As noted above, FWPCA §402 transferred from the Corps to EPA the Corps' permit program for discharges of refuse and other pollutants into navigable waters and their non-navigable tributaries that the Corps had been administering since President Richard M. Nixon and Congress set up and funded that permit program in 1970, using the permit authority of §13 of the Rivers and Harbors Act. When that permit program was transferred from the Corps to EPA, all of the Corps' "spaces" for personnel to administer that "Refuse Act" permit program were also transferred to EPA, along with all §13 permit files and applications.

96. 33 U.S.C. §1413.

97. During the 1970s "regulators" were sometimes referred to disparagingly in the Corps as "permit clerks," reflecting the fact that they were not "real engineers."

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stantial new regulatory responsibilities under the Rivers and Harbors Act of 1899 by means of new rules and new administrative guidance. For example, in 1968 the Corps had abandoned its former practice of evaluating applications for permits under §§9 and 10 of the Rivers and Harbors Act of 1899 only in terms of the proposed activity's potential effects on navigation, and had substituted the much more demanding and expansive "public interest review," which required Corps district engineers to consider potential effects of proposed activities needing permits on all aspects of the public interest, including wetlands and other environmental quality factors.[92] In addition, the Corps had implemented a series of extensions of the geographic jurisdiction of the regulatory program under §§9 and 10 of the Rivers and Harbors Act of 1899, as discussed earlier in this Article. Similarly, as of May 27, 1970, the Corps had begun to require standard, individual §10 permits for proposed activities shoreward of existing harbor lines that had been established over the years under the authority of §11 of the Rivers and Harbors Act of 1899,[93] which previously had required no further Corps authorization.[94] Consequently, even without any new legislation, in 1972 the Corps' regulatory program had barely sufficient resources to implement its expanded, fully implemented regulatory authorities under §§9 and 10 of the Rivers and Harbors Act of 1899.[95]

Even though the Corps' small regulatory work force was already heavily burdened in 1972, in that year the Corps suddenly found itself responsible for potentially huge new regulatory responsibilities, not only under the new FWPCA §404, but also under §103 of the Ocean Dumping Act of 1972,[96] and under several demanding new environmental laws that greatly increased the administrative workload involved in processing every Corps permit. Those new environmental laws included the Coastal Zone Management Act, the new requirements of the National Environmental Policy Act (NEPA), and other requirements imposed by statutes and regulations. For several years after 1972, the Corps did not have a large enough regulatory staff to administer effectively even a small fraction of its greatly expanded new regulatory responsibilities. In addition, the Corps had neither the ability nor the inclination to rapidly expand its regulatory staff to deal with its burgeoning new regulatory duties.

The difficulties that the Corps encountered after 1972 in obtaining appropriations and authorized spaces so that it could hire new regulatory staffers, and the time it would take to hire and train many new regulatory civil servants, can be readily understood. However, another important problem was the fact that the Corps' leadership during the 1970s was reluctant to expand the Corps' regulatory roles or personnel to the extent that full implementation of the new FWPCA of 1972 §404 program demanded. The Corps' senior leadership wanted the Corps to remain to the maximum extent possible an engineering agency, staffed with engineers who solved important U.S. military and civil engineering problems, not a regulatory agency staffed with lawyers and regulators.[97] In addition, Corps senior leaders were reluctant to increase regulatory staff to implement the new §404 program because they had grave reservations regarding the "political survivability" of the new program and regarding how the new §404 program would affect the Corps' all-important relationships with key congressional interests whose good will was vital to the Corps.

During the period of 1972 through 1974 the Corps had no way to know with certainty just how the new §404 regulatory program would eventually evolve or what Corps resources it would eventually require, but Corps leaders and senior attorneys soon realized that §404 had the potential to create serious problems for the Corps, as well as important benefits. In 1972 the Corps had been willing and eager to accept the new FWPCA §404 permit authority in the traditional navigable waters for one obvious reason: if the Corps had not taken on the legal responsibility to authorize discharges of dredged material and fill material under §404 of the new FWPCA of 1972, then EPA under FWPCA §402 (and the states that eventually would assume legal responsibility for the §402 program) would have gained authority to regulate and control all of those discharges of dredged or fill material, as the Senate bill originally would have required. In fact, one of the primary reasons why §404 was added to the new FWPCA of 1972 late in the legislative process was precisely because the House of Representatives insisted that the Corps, rather than EPA or the states, would authorize and permit all activities involving the discharge of dredged or fill material. Given the fact that virtually every Corps Civil Works water resource development project has always involved discharges of dredged material or fill material (often both) as that project is constructed, operated, and maintained, the Senate bill's proposal to have discharges of both dredged material and fill material regulated under §402 would have allowed EPA and the states to gain effective control over all Corps Civil Works water projects and activities, a situation that the Corps (and the House of Representatives) regarded as unacceptable. Consequently, since practically all of the Corps' water resource development projects were located in the §10 navigable waters, the Corps was eager to have responsibility for permit issuance under §404 for all discharges of dredged or fill material in those §10 navigable waters. The Corps' new CWA §404 authority in the §10 navigable waters allowed the Corps to give itself FWPCA authorizations for all of its own Civil Works projects and activities and to grant §404 permits for similar discharges required by the activities of port authorities, dredgers, and similar development interests well known to the Corps. In addition, FWPCA §404 allowed the Corps to authorize many military projects involving discharges of dredged or fill material in the §10 navigable waters. As for non-Corps projects involving discharges of dredged material or fill material into the §10 navigable waters, the Corps had to issue §9 or §10 permits under the Rivers and Harbors Act of 1899 for those projects in any event, independently of the FWPCA of 1972, so the new §404 permit responsibilities in the §10 navigable waters would impose relatively light new regulatory burdens on the Corps. For all of these reasons, in 1972 the Corps regarded its new FWPCA §404 permit authority in the §10 navigable waters as a net benefit to the Corps and not as an unwanted burden or problem.

In contrast, the new FWPCA of 1972 §404 permit responsibilities in the non-navigable tributaries and other non-navigable waters, e.g., wetlands, provided the Corps with no discernible benefits for its traditional water resource development activities or for its traditional role as an engineering and construction agency, but seemed to present the potential for practically unlimited and overwhelming regulatory responsibilities and problems. If, as seemed quite probable, the new FWPCA of 1972 would eventually have geographic

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jurisdiction over virtually every water body and aquatic area, e.g., wetlands, mud flats, etc., in the United States, and if the §404 program would require a Corps §404 permit for any and every activity involving the discharge of either dredged or fill material into any of those waters, then the Corps could easily find itself legally responsible for somehow permitting under §404 many hundreds of thousands of different projects and activities *every year*. From 1972 through 1974, the Corps' leadership came to realize that the new §404 permit responsibility over "all the waters of the United States" could overwhelm the Corps with regulatory duties that the Corps had neither the staff nor the legal means to perform effectively, but which could get the Corps into serious political, practical, and legal difficulties.

Moreover, the Corps soon came to realize that its potentially huge §404 regulatory responsibilities in the non-navigable waters would be a thankless task, entailing high political costs with few if any political rewards. No matter how many new regulatory resources the Corps might eventually be able to obtain to operate the §404 program in non-navigable waters, the Corps could never expect to please the environmentalists and their friends in Congress, who would always demand a higher level of environmental protection from the §404 program than the Corps could ever provide, either through denial of permits or through imposition of permit conditions. On the other hand, the inevitable, growing backlog of delayed and unprocessed §404 permit applications, and the very nature of the §404 regulatory program itself, as designed and controlled by EPA through its mandatory §404(b)(1) guidelines, would inevitably alienate and anger state and local governments, other federal agencies needing Corps §404 permits, development-oriented interests in general, and the Corps' traditional congressional supporters, all of which for many decades had been the Corps' natural collaborators and political constituency. While it is true that some members of Congress during the early 1970s were "pro-environment" supporters of the new FWPCA §404 regulatory program, those "green" congressional interests decidedly were not well represented on either the House of Representatives or Senate Appropriations Committee subcommittees that funded and oversaw all of the Corps of Engineers' Civil Works activities. To summarize, in the early 1970s, the new FWPCA §404 program with regard to *non-navigable waters* seemed to present the Corps with almost unlimited problems and with hardly any countervailing benefits.

If one wants to read a full account of the problems that the Corps faced during the early 1970s as it tried to cope with the burgeoning, practically overwhelming, regulatory responsibilities that the new FWPCA of 1972 §404 program seemed to impose, one need merely read through the full legislative history that culminated in the FWPCA Amendments of 1977. The Corps' problems in dealing with the §404 program were so serious and controversial during the early and mid-1970s that much of the debate in Congress leading up to the FWPCA Amendments of 1977 relate to the §404 program and to two competing, alternative approaches for new legislation that would solve its legal and political difficulties. As is well documented in the legislative history of the 1977 FWPCA Amendments, Congress in 1977 had to choose between two very different sets of proposals: (1) a proposed major "rollback" of the geographic jurisdiction of FWPCA §404 from "all waters of the United States" to only the §10 navigable waters (plus their adjacent wetlands); or (2) retention of the total FWPCA of 1972's geographic jurisdiction, but adoption by statute of an array of new legal mechanisms that would allow the Corps to deal efficiently and effectively with the huge permit load that the §404 program created after the federal courts and the Corps' regulations extended that program to "all waters of the United States" after 1975. Of course, in the FWPCA Amendments of 1977, Congress adopted the latter approach and rejected any "rollback" of FWPCA of 1972 jurisdiction, as discussed by the Court in the *Riverside Bayview Homes* decision.

In the FWPCA Amendments of 1977, Congress added subsections (e) through (t) to FWPCA §404. Many of those new subsections were specifically designed by Congress to solve the serious problems that the Corps had faced in administering the §404 regulatory program in the non-navigable tributaries and their adjacent wetlands during the early 1970s.

For example, the new CWA §404(f) granted statutory exemptions for many hundreds of thousands of small, environmentally insignificant discharges of dredged or fill material caused every year by farming, forestry, ranching, maintenance, construction, and similar activities. Before the §404(f) exemptions became law, each one of those small projects or minor discharges of dredged or fill material theoretically needed an individual §404 permit, complete with "notice and opportunity for public hearings" (as required by FWPCA §404(a)) a NEPA document, a case-specific §404(b)(1) evaluation document, etc. After enactment of the FWPCA Amendments of 1977, all of those small projects or discharges had a statutory exemption from all §404 permitting requirements.

Similarly, the FWPCA Amendments of 1977's new §404(e) for the first time explicitly authorized the Corps to promulgate general permits under §404 on a nationwide, regional, or statewide basis. The Corps soon used that new CWA §404 general permit authority to authorize on average approximately 90,000 small-scale, minimal-impact projects every year. Before §404(e) was enacted in 1977, in theory each one of those small projects required an individual §404 permit, and every one of those individual permits in theory required a public notice, a NEPA document, a §404(b)(1) analysis, etc.

In addition, the 1977 Amendments' new §§404(g) through 404(*l*) for the first time authorized the states to assume §404 permitting and enforcement responsibilities over all waters of the United States other than the traditional navigable waters and wetlands adjacent thereto, including the non-navigable tributaries to the §10 navigable waters. Although to date only Michigan and New Jersey have actually assumed permitting authority under CWA §§404(g) through (*l*), in 1977 Congress expected state assumption to relieve much of the Corps' heavy permit burdens in the non-navigable tributaries of the §10 navigable waters.

Primarily because of the changes to §404 added by the Congress in the FWPCA Amendments of 1977, the Corps was able to reduce the number of individual, standard §404 permit applications that it was legally responsible for processing every year from the theoretical (but entirely imprac-

98. U.S. Army Corps of Engineers, Permits for Activities in Navigable Waters or Ocean Waters, 38 Fed. Reg. 12217 (May 10, 1973).

99. *Id*. at 12218 (emphasis added).

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tical) level of many hundreds of thousands per year to the vastly reduced level of 8,000 to 12,000 standard, individual permit applications yearly. While that was (and still is) a very large annual workload of individual permits, it was (and still is) manageable, so long as Corps general permits continue to authorize tens of thousands of relatively small projects with minor environmental effects yearly. However, the important point to remember here is that before enactment of the FWPCA Amendments of 1977, the Corps was legally required to accept and process many hundreds of thousands of individual §404 permit applications every year. Obviously, at the time that the Corps promulgated its controversial final rule on April 3, 1974, the Corps was unprepared to deal with such an overwhelming permit load; thus, the Corps' 1974 final rule was in large measure a mechanism to address that very serious difficulty.

Greatly assisted by the amendments to FWPCA §404 that Congress enacted in 1977, the Corps slowly but surely gained control over the massive workload that §404 imposed and eventually learned to implement the §404 regulatory program in "all waters of the United States" effectively, efficiently, and in a manner that balanced the needs for environmental protection against the reasonable expectations of property owners and the regulated public. However, this relatively happy ending to the CWA §404 saga after 1977 could not have been predicted or even imagined by Corps officials during the period from 1972 through 1974. During that period the Corps' leadership could see only the real and imminent likelihood that implementing the new §404 program in "all waters of the United States" would overwhelm the Corps with practical and political problems for which there were no solutions either immediately available or foreseeable. These facts provide the essential background explaining the Corps' final rule of April 3, 1974, which was an unusual, but highly useful, means to address the Corps' very serious practical and political difficulties described above.

The Corps' final rule of April 3, 1974, was preceded by a proposed or "tentative" rule dated May 10, 1973, which had not given any indication that the subsequent, final rule would purport to disavow any of the geographic jurisdiction of §404 of the FWPCA of 1972. The proposed rule of May 10, 1973, which provided "interim guidance" to all Corps field offices, said only the following about FWPCA §404 jurisdiction:

> Section 404 of the Federal Water Pollution Control Act (Public Law 92-500, 86 Stat. 816) authorizes the Secretary of the Army, acting through the Chief of Engineers, to issue permits, after notice and opportunity for public hearings, for the discharge of dredged or fill material into the navigable waters . . . .[98]
>
> Definitions . . . . (1) The term "navigable waters of the United States" mean those waters of the United States which are presently, or have been in the past, or may be in the future susceptible for use for purpose of interstate or foreign commerce. See 33 CFR 209-260 (ER 1165-2-302) . . . for more complete definition of this term. (2) *The term "navigable waters" as used in the Federal Water Pollution Control Act (Public Law 92-500, 86 Stat. 816) means the waters of the United States, including the territorial seas*.[99]

It is at least clear from the quotations just provided from the proposed, interim rule of May 10, 1973, that the Corps recognized that the statutory definition that established the geographic jurisdiction for FWPCA §404 was different from the definition of the traditional navigable waters that the Corps had long regulated under §10. Nevertheless, in the Corps' final rule of April 3, 1974, the Corps for the first and only time attempted to define the geographic jurisdiction of its FWPCA §404 program as being limited to the traditional navigable waters regulated under §10.

The Corps' Final Rule of April 3, 1974, Served Multiple Purposes; Among the Most Important Were: (1) to "Buy Time" so That the Corps Could Adapt to and Acquire Regulatory Resources for Its Burgeoning FWPCA §404 Regulatory Responsibilities; and (2) to "Shift the Blame" for Permit Delays and Backlogs to the Federal Courts Once the 1974 Rule Was Overturned as Contrary to the FWPCA of 1972

The historic record contains a number of indications that the Corps' final rule of April 3, 1974, disavowing most of the geographic jurisdiction required by the FWPCA of 1972, was not based on any special knowledge or insights regarding the "true intent" of Congress regarding the jurisdiction of the FWPCA of 1972. In fact, there is considerable evidence that Corps decisionmakers knew that the 1974 final rule was "a stretch," with very weak legal foundations. Moreover, the Corps knew that its 1974 rule would be challenged in the federal courts by environmentalist plaintiffs, and that eventually the federal courts would probably overturn those aspects of the final rule that tried to limit the geographic jurisdiction of §404 to the §10 navigable waters.[100] Nevertheless, the Corps had strong and important reasons for doing what it did in 1974.

First, the Corps' senior attorney, Lankhorst, believed and persuaded the Corps' leadership that a minimally defensible legal case could be made that the Corps had statutory authority to establish a special, more limited geographic jurisdiction for the §404 program; more limited, that is, than EPA had already established for the rest of the FWPCA of 1972. Second, Lankhorst pointed out that even if the Corps' final rule were eventually to be overturned by the courts, at the least the final rule would have provided a colorable legal basis allowing the Corps to implement its new §404 permit responsibilities only in the §10 navigable waters for so long as it would take the environmentalists to bring a lawsuit and for the federal courts to overturn the 1974 final rule, a process that could easily take years. In this way the Corps' 1974 final rule would "buy time" while the Corps and its allies in the regulated public (especially industry groups) sought

100. Corps leaders knew that environmentalists would certainly challenge the legality of the final rule of April 3, 1974, because that rule had declined to assert CWA jurisdiction over non-navigable tributaries to the §10 navigable waters, and over most wetlands adjacent to both navigable and non-navigable waters. One of the greatest environmental problems presented by the Corps' attempt in 1974 to exclude non-navigable tributaries from the jurisdiction of the §404 program was that the rule would have removed the protections of CWA §404 regulation from all wetlands adjacent to all non-navigable tributaries, thereby providing no federal protection for the water quality and flood control benefits that those wetlands provide for downstream waters. The Corps' 1974 final rule did not even assert CWA §404 jurisdiction over most wetlands adjacent to the §10 navigable waters. It is true that some wetlands adjacent to §10 navigable waters were already regulated under §10 of the Rivers and Harbors Act, i.e., wetlands lying below the mean high tide line in tidal §10 waters, and wetlands lying below the ordinary high watermark for nontidal §10 waters.

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congressional relief, or while the Corps found practical administrative ways to handle the overwhelming new regulatory responsibilities that §404 would create if and when extended to all non-navigable tributaries and to all adjacent wetlands. Third, the Corps' 1974 final rule and the inevitable litigation that would soon challenge it would establish clearly on the record that the Corps was willing to expand the §404 regulatory program beyond the §10 navigable waters only if and when the federal courts ordered the Corps to do so. This would allow the Corps to deflect "blame" for the resulting regulatory backlogs and burdens away from the Corps and onto the federal courts. Fourth, the Corps could gamble on the remote possibility that the federal courts might conceivably defer to the Corps' final rule and uphold it as a legally permissible way for the Corps to implement FWPCA §404 only in the §10 navigable waters, even if the rest of the FWPCA of 1972 did have a much greater geographic scope, as implemented by EPA and the states. Viewed from the Corps' perspective in 1974, the final rule of April 3, 1974, was a "no lose" proposition, even if it did not reflect "the true intent of Congress" regarding the full geographic scope of the FWPCA of 1972, and even if the prospects for having that rule upheld by the federal courts seemed highly improbable.

Taking the Corps' final rule of April 3, 1974, at face value, it is remarkable that, read carefully, the only explanation that the Corps provided in the *Federal Register* to justify the final rule's highly controversial assertion that FWPCA §404's jurisdiction was identical to §10's limited jurisdiction, was completely incredible, and not nearly as persuasive as the Corps presumably could have made it. In fact, no competent lawyer who was familiar with federal law regarding navigable and non-navigable waters in 1974 could possibly have believed or taken seriously the only justification that the Corps provided in the *Federal Register* of April 3, 1974, for that rule's attempt to disown most of the geographic jurisdiction of the FWPCA of 1972 for purposes of the §404 program. The following implausible preamble statements are especially noteworthy, given that in 1974 the Corps knew that its final rule was radically at odds with the earlier EPA determinations and regulations regarding FWPCA jurisdiction, and that the Corps knew that its repudiation of the full jurisdictional scope of the FWPCA of 1972 would be immediately challenged in the federal courts:

> Several comments and questions were received concerning the different definitions which were assigned to the terms "navigable waters of the United States" and "navigable waters." In this regard, it is noted that the Corps regulatory authority under the River and Harbors Act of 1899 (33 U.S.C. 401 et seq.) speaks in terms of "navigable waters of the United States." This term has received the benefit of over 100 years of judicial definition and interpretation *which has largely been based on the constitutional extent to which the authority of the United States can extend over the nation's waterways*. . . . 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 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.[101]

As the emphasized portions from the preamble state, the only justification that the Corps saw fit to provide for its assertion on April 3, 1974, that the geographic jurisdiction of the FWPCA §404 was limited to the §10 navigable waters was the notion that the *Constitution did not allow* the federal government to regulate any area outside the narrow limits of the §10 navigable waters of the United States. Thus the Corps' 1974 preamble essentially states that if the Corps were to attempt to regulate any activity beyond the narrow limits of the §10 navigable waters, that would be not only beyond the Corps' statutory authority, but unconstitutional. If that were true, then it would be equally true that if Congress by legislation were to assert federal regulatory powers outside the §10 navigable waters, or if any agency of the executive branch were to exercise federal regulatory powers outside the limits of the §10 navigable waters, that would be equally unconstitutional. If constitutional law assertions as retrograde and restrictive as those made in the Corps' 1974 preamble had been made early in the 1800s, some competent lawyers of the "states' rights persuasion" at that time might have agreed with it. But nothing is more certain than that the Corps' attorneys in 1974 who wrote the preamble language quoted above could not possibly have believed such a proposition, or even have expected it to be taken seriously by any federal court.[102] The obvious reason is that by 1974 numerous decisions of the Court and of the federal

101. 39 Fed. Reg. at 12115 (emphasis added).

102. The preamble to the Corps' final rule of April 3, 1974, was written by Lankhorst, with the assistance of Hedeman. (*See* Appendix 2.)

103. 174 U.S. 690 (1899).

104. 363 U.S. 229 (1960).

105. *See* 33 U.S.C. §407.

106. *See* 16 U.S.C. §817.

107. *See, e.g.*, Georgia Power Co. v. Federal Power Comm'n, 152 F.2d 908 (5th Cir. 1946); Union Elec. Co. v. Federal Power Comm'n, 326 F.2d 535 (8th Cir. 1964), *rev'd on other grounds*, 381 U.S. 90 (1965); Nantahala Power Co. v. Federal Power Comm'n, 384 F.2d 200 (4th Cir. 1967), *cert. denied*, 390 U.S. 945 (1968); United States v. Appalachian Elec. Power Co., 107 F.2d 769 (4th Cir. 1939), *rev'd on other grounds*, 311 U.S. 377 (1940); *see also* 36 Op. Att'y Gen. 355 (1930).

108. See the discussion in Appendix 2.

109. It is also noteworthy that a number of more superficially persuasive arguments were available to the Corps in 1974 that the Corps could have put into its preamble to try to justify a separate, more restricted geographic jurisdiction for the FWPCA §404 program than the full FWPCA jurisdiction that EPA had previously asserted administratively for the rest of the FWPCA of 1972. For example, unlike many liquid or highly soluble pollutants that obviously would flow downstream from tributaries to pollute the navigable waters, most fill material discharged into non-navigable tributaries consists primarily of solids, most of which would remain in place at the point of discharge, thus arguably presenting less danger of toxic pollutants flowing downstream than liquid pollutants would present. Of course, much dredged material consists of liquids, slurry, and mixture of solids and water, much of which can wash downstream with the current.

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courts of appeals, many well-known federal statutes enacted by Congress, and numerous executive branch regulations published in the *Code of Federal Regulations*, some of them written and enforced by the Corps itself, had established beyond any question that the Constitution did allow the federal government to regulate all manner of non-navigable tributary streams and waterways, as well as land areas, actions, activities, etc., lying beyond the narrow limits of the §10 navigable waters of the United States.

For example, the Corps' lawyers who wrote the preamble language quoted above were quite familiar with the Court decision in *United States v. Rio Grande Irrigation Co.*,[103] in which the Court upheld the authority of Congress to assert regulatory control over non-navigable tributaries to the traditional navigable waters. Corps lawyers were also familiar with the Court's decision in *United States v. Grand River Dam Authority*,[104] in which the Court upheld the authority of Congress to control and alter non-navigable tributaries to navigable waters, and in which the Court even applied the "no compensation rule" of the federal navigation servitude to Corps of Engineers actions that degraded such non-navigable tributaries in the course of building a Corps Civil Works navigation project. Such Court decisions provided the very foundation of many Corps Civil Works activities and were very familiar to all of the Corps' senior attorneys, especially those attorneys who wrote the preamble to the Corps' 1974 final rule.

In addition, as discussed earlier, the same Corps attorneys who wrote the preamble to the Corps' final rule of April 3, 1974, had been actively involved in implementing a large-scale regulatory program over polluting discharges in non-navigable tributaries to navigable waters pursuant to the Refuse Act, §13 of the Rivers and Harbors Act of 1899, an important Corps statutory authority that had explicitly asserted federal regulatory jurisdiction over non-navigable tributaries since 1899. Those same Corps attorneys also knew of and enforced the provision of the Refuse Act that asserted federal regulatory authority over "the *bank* of any navigable water" and over "*the bank of any tributary of any navigable water.*"[105] If it would have been unconstitutional for the federal government to assert regulatory authority outside the limits of §10 navigable waters pursuant to the FWPCA of 1972, as stated in the Corps' final rule preamble of April 3, 1974, then *a fortiori* it would have been unconstitutional for the Corps to exercise federal regulatory authority over the *banks* of navigable waters and over the *banks of non-navigable tributaries* under the Refuse Act; yet the Corps had been exercising such authority ever since 1899 without a qualm.

The Corps also knew of and helped to implement the federal government's explicit statutory assertion of regulatory authority over non-navigable tributaries to the navigable waters that was made by §23(b) of the Federal Power Act of 1920.[106] Corps attorneys also well understood that the Federal Power Act's assertion of federal regulatory jurisdiction over non-navigable tributaries had been upheld as constitutional by the federal courts.[107]

In summary, the one and only justification that the Corps provided in its preamble of April 3, 1974, to explain its disavowal of most of the geographic jurisdiction of FWPCA §404 was actually constitutional law nonsense that the highly competent and knowledgeable Corps attorneys who wrote that preamble in 1974 could not possibly have believed or taken seriously.[108] These facts suggest that the Corps' final rule of April 3, 1974, was not really a legitimate, serious rule that the Corps expected the federal courts to uphold.[109]

Just as the Corps expected,[110] the final rule of April 3, 1974, was soon challenged in the federal courts by environmental groups. And, just as the Corps must have anticipated, on March 27, 1975, the U.S. District Court for the District of Columbia held in *Natural Resources Defense Council, Inc. v. Callaway*[111] that the Corps had "acted unlawfully and in derogation of their responsibilities under [§]404 of the Water Act by the adoption of (the final rule of) April 3, 1974 . . . ."[112] The district court then ordered the Corps to:

> 1. Revoke and rescind so much of 39 *Federal Register* 12115, et seq., (April 3, 1974) as limits the permit jurisdiction of the Corps of Engineers by definition or otherwise to other than "the waters of the United States."
> 2. Publish within fifteen (15) days of the date of this order proposed regulations clearly recognizing the full regulatory mandate of the Water Act . . . .[113]

Presumably, the order was not accompanied by a detailed opinion precisely because the court considered its result to be entirely obvious.

If the Corps and the Army had actually believed the assertions made in the preamble to the Corps' final rule of April 3, 1974, i.e., that it would be not only unauthorized by statute, but unconstitutional, for the Corps to implement FWPCA §404 beyond the limits of the §10 navigable waters, then surely, after the Corps had received the order that it rescind its final rule of April 4, 1974, and replace it with a new rulemaking extending the geographic jurisdiction of the FWPCA §404 program to all "waters of the United States," the Corps and the Army would have had an absolute obligation to urge the U.S. Department of Justice (DOJ) to appeal the district court's decision to the court of appeals, and to the Court, if necessary. Such an appeal would have been essential to vindicate the Corps, the Army, the law, and the Constitution. Significantly, the Army made the decision

Moreover, contaminants and toxic pollutants found in either dredged or fill material can enter the water column at the time of discharge, or later can leach into the waters of tributary streams, and then move downstream to pollute the navigable waters. One purpose of the §404 permit program is to ensure that both dredged material and fill material discharged into any waters of the United States will not contain toxic pollutants in potentially harmful amounts. Nevertheless, in 1974 the Corps could have tried to make the case that §404 pollutants were different from §402 pollutants, thus allegedly justifying a reduced geographic jurisdiction for FWPCA §404. The omission of any such superficially persuasive arguments in the preamble of the 1974 final rule is further evidence that in 1974 the Corps was going through a somewhat disingenuous, but (from the Corps' perspective) politically and practically necessary exercise when it promulgated the final rule of April 3, 1974, purporting to disavow most of its FWPCA §404 geographic jurisdiction.

110. *See* Appendix 2.

111. 392 F. Supp. 685, 5 ELR 20285 (D.D.C. 1975).

112. *Id.* at 686.

113. *Id.*

114. 504 F.2d 1317, 4 ELR 20784 (6th Cir. 1974).

115. 373 F. Supp. 665, 4 ELR 20710 (M.D. Fla. 1974).

116. 403 F. Supp. 1292, 5 ELR 20039 (N.D. Cal. 1974).

117. U.S. Army Corps of Engineers, Permits for Activities in Navigable Waters or Ocean Waters, 40 Fed. Reg. 19766 (May 6, 1975).

118. *Id.*

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about appealing the *Callaway* decision and did *not* request that the DOJ appeal the district court's decision, even to the court of appeals level, much less to the Court. Instead, the Army accepted the decision as legally correct and instructed the Corps to set about the work of implementing it. That fact provides further evidence that the Corps' final rule of April 3, 1974, was little more than a "straw man" that the Corps in large measure expected the federal courts to overturn. The historic record cited below provides significant evidence regarding why the Corps had promulgated the final rule of April 3, 1974, in the first place, even though the Corps expected that the federal courts would probably overturn it, and also regarding the benefits that the Corps derived from the final rule even though the courts did strike it down.

The most obvious explanation for the Corps' April 2, 1974, attempt to disavow the broad, extended geographic jurisdiction of the FWPCA of 1972 §404 program is apparent from the Corps' lengthy explanation of its conduct in the preamble to its proposed rule of May 6, 1975, in which the Corps began to implement the district court's order of March 27, 1975. In that preamble the Corps did not really offer any justification or defense for the position that it had taken in its final rule of April 4, 1974, but the Corps did explain at length that it was now extending FWPCA §404 jurisdiction far beyond the navigable waters *because the federal courts had forced it to do so*. The Corps' preamble of May 6, 1975, discussed at length the order of the district court in the *Callaway* case, and also cited the decisions of the Fifth Circuit in *United States v. Ashland Oil & Transportation Co.*,[114] and the U.S. district court decisions in *United States v. Holland*[115] and *Leslie Salt Co. v. Froehlke*[116] as further evidence that the federal courts, not the Corps, were requiring this great expansion of jurisdiction under the FWPCA of 1972.[117] The Corps emphasized its inability to resist further by stating in the preamble: "Since the Department of the Army's present definition of this term ('the waters of the United States') has been judicially overruled, a broader definition of this term to include waters beyond those which fall within the traditional definition of 'navigable waters of the United States' is required."[118] Given the fact that the Corps and the Army had not insisted on an appeal of the *Callaway* decision to even the court of appeals level, the Corps' preamble of May 6, 1975, provides confirmatory evidence supporting the following explanation for the Corps' final rule of April 3, 1974: the Corps was not willing to accept the political costs, criticisms, and difficulties inherent in extending its FWPCA §404 jurisdiction without the "cover" of being able to blame it all on the federal courts. Because the Corps and the Army recognized that the district court's decision in *Callaway* was correct as a matter of law and would necessarily be upheld if it were to be appealed, the Corps and the Army accepted the district court's decision as sufficient "cover" to allow the Corps to do what it knew it had to do. Of course, the Corps could have chosen in its preamble to blame its difficult situation on Congress' enactment of the FWPCA of 1972 rather than on the federal courts that enforced the mandates of that statute. However, such a complaint could have been construed as a criticism of Congress itself, and the Corps would not criticize publicly the source of all of its funding, authorities, and very existence. Thus, the federal courts were the "scapegoat of choice."

In addition to providing the Corps with necessary "political cover," the Corps' final rule of April 4, 1974, successfully served its other primary purpose in that it bought the Corps three years and three months of respite before the Corps finally asserted jurisdiction over all of the waters of the United States covered by the FWPCA of 1972. Following the issuance of the final rule of April 3, 1974, there was almost one full year of delay before that rule was overturned judicially on March 27, 1975, and more than a year before the Corps even began to expand the full FWPCA of 1972 jurisdiction by means of the Corps' proposed rule of May 6, 1975.

The slow, deliberate "phase-in" period adopted by the Corps to implement the FWPCA of 1972's full geographic jurisdiction provided substantially more time for the Corps and the regulated public to prepare for and implement the expansion of FWPCA's geographic jurisdiction. The Corps announced the "phase-in" plan in its interim final regulations published on July 25, 1975.[119] As amended later on December 21, 1976, the Corps expanded its FWPCA §404 jurisdiction in three phases.[120] As of July 25, 1975, the Corps asserted FWPCA jurisdiction only over the §10 navigable waters and their adjacent wetlands. The Corps did not expand §404 jurisdiction to lakes and to the primary tributaries of the §10 navigable waters and their adjacent wetlands until July 1, 1976. The Corps did not expand §404 jurisdiction to all other tributaries of the §10 navigable waters and to other water bodies until July 1, 1977. Consequently, the Corps' final rule of April 3, 1974, its review by the federal courts, and the aftermath of that litigation actually bought the Corps three years and three months of valuable time before the Corps implemented the FWPCA of 1972's full geographic jurisdiction in July of 1977.[121] The Corps used that period of respite to consider and plan how it would deal with and implement an expansion of FWPCA of 1972 §404 jurisdiction beyond the §10 navigable waters. Most importantly, the Corps' plans and efforts, implemented quietly and effectively between 1975 and 1977, were instrumental in convincing Congress to provide extensive statutory relief to the Corps through the FWPCA Amendments of 1977, as described above. The details of that story are not really relevant to this Article, but many of those details can be found in the full legislative history of the FWPCA Amendments of 1977.

In summary, the Corps' final rule of April 3, 1974, decidedly was *not* an earnest, legitimate attempt by the Corps to discern and implement the "true intent" of Congress regarding the geographic jurisdiction of the FWPCA of 1972, as was asserted by the Albrecht/Nickelsburg Article, and as one might infer from the Court's dicta in *SWANCC*. The

119. *See* U.S. Army Corps of Engineers, Permits for Activities in Navigable Waters or Ocean Waters, 40 Fed. Reg. 31322 (July 25, 1975).

120. *See* U.S. Army Corps of Engineers, 41 Fed. Reg. 55524 (Dec. 21, 1976).

121. The difficulties presented by the Corps' multi-year "phase-in" of CWA jurisdiction, and the costs to aquatic resources caused by the time delay in asserting CWA jurisdiction, are reflected in the circumstances described in *United States v. Byrd*, 609 F.2d 1204, 9 ELR 20757 (7th Cir. 1979).

122. *See* 474 U.S. at 134 (concluding that "a definition of 'waters of the United States' encompassing all wetlands adjacent to other bodies of water over which the Corps has jurisdiction is a permissible interpretation of the Act").

123. 33 U.S.C. §1251(a).

124. *See* Albrecht & Nickelsburg, *supra* note 1, at 11056.

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practical and political considerations that in large measure motivated the Corps to promulgate its final rule of April 3, 1974, tend to refute, rather than support, the assertions about the jurisdiction of both the FWPCA of 1972 and of the current CWA that the Albrecht/Nickelsburg Article made based on that Corps 1974 final rule.

Both the Text and the Legislative History of the FWPCA Amendments of 1977 Confirm the Fact That EPA and the Corps, by APA Rulemakings Between 1972 and 1977, Properly Construed the Jurisdiction of the FWPCA of 1972 to Include Non-Navigable Tributaries

Because the Albrecht/Nickelsburg Article erroneously concluded that the FWPCA of 1972 did not assert jurisdiction over any aquatic area outside the §10 navigable waters, that Article also suggests that EPA and Corps regulations promulgated between 1972 and 1977 were all contrary to law and unauthorized (except, of course, for the Corps' final rule of April 3, 1974), because those regulations asserted jurisdiction over non-navigable tributaries under the authority of the FWPCA of 1972. In fact, the Court unanimously upheld most, if not all, of the substance of those EPA and Corps regulations as reasonable and legally authorized in *Riverside Bayview Homes.* In that decision, the Court unanimously upheld as reasonable and consistent with the FWPCA of 1972 the legal, scientific, and practical foundations of EPA and Corps regulations, finding reasonable those regulations that asserted FWPCA jurisdiction over "adjacent wetlands" outside the §10 navigable waters because "adjacent wetlands are inseparably bound up with the 'waters' of the United States."[122] Without such regulation, it would be impossible for the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[123] If EPA and Corps of Engineers APA rulemakings, and the unanimous Court in the *Riverside Bayview Homes* decision, concluded that wetlands adjacent to other waters of the United States are subject to CWA jurisdiction because they are "inseparably bound up with" those waters, then *a fortiori* those same regulations' assertion of CWA jurisdiction over all of the tributaries to those waters are subject to CWA jurisdiction for the same reason.

Of course, Albrecht and Nickelsburg would limit the *Riverside Bayview Homes* decision to its facts and ignore all of its reasoning. Thus, it is hardly surprising that the Albrecht/Nickelsburg Article also gave a cramped interpretation of the FWPCA Amendments of 1977. The Albrecht/Nickelsburg Article (supported by the Fifth Circuit's *Needham* and *Rice* dicta) would deny that CWA jurisdiction exists even today over any aquatic area outside the §10 navigable waters, including over any non-navigable tributary,

125. 392 F. Supp. at 685.

126. *See* 474 U.S. at 135-39.

127. *See* CWA §404(g), 33 U.S.C. §1344(g). Subsection 404(g) authorized states to assume §404 permitting responsibilities for only one small subcategory of the §10 waters, i.e., those nontidal water bodies that are not presently navigable-in-fact or susceptible to being made navigable with reasonable improvements, but that were historically navigable.

128. If the Albrecht/Nickelsburg assertions were correct, then a state could assume CWA §404 responsibilities only for "historic use only" nontidal streams. However, if one were to agree with other assertions of Albrecht/Nickelsburg and similar assertions of the Fifth Circuit's dicta in *Rice* and *Needham*, there would be hardly any "historic use only" nontidal streams remaining under CWA jurisdiction, and possibly none at all, thereby turning CWA subsections (g) through (*l*) into a complete nullity.

129. 531 U.S. at 171.

130. Appendix 1 offers some relevant quotations from these recent appellate decisions.

131. 332 F.3d 698, 33 ELR 20223 (4th Cir. 2003).

132. 344 F.3d 407 (4th Cir. 2003).

133. 339 F.3d 447, 33 ELR 20249 (6th Cir. 2003).

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unless some unknown legal authority can document the existence of such "federal jurisdiction . . . by the statute's clear text or by evidence of clear congressional intent."[124]

The Albrecht/Nickelsburg Article strongly implies that no one has ever discovered any "clear text" in the CWA statute or any other "evidence of clear congressional intent" that would convince those authors that the CWA has jurisdiction over non-navigable tributaries or their adjacent wetlands. One can safely infer from their Article that Albrecht and Nickelsburg believe that no such evidence can be found in either the text or the legislative history of the FWPCA Amendments of 1977; they surely point to none. Because this Article has refuted the essential premises of the Albrecht/Nickelsburg piece, all of which were based on their erroneous assertions about the FWPCA of 1972, this Article will not attempt to present a comprehensive review of the FWPCA Amendments of 1977. Nonetheless, even a cursory consideration of the FWPCA Amendments of 1977 indicates that, once again, Albrecht and Nickelsburg "got it wrong."

To whatever extent the terms and legislative history of the FWPCA Amendments of 1972 were ambiguous regarding the extent of the CWA's geographic jurisdiction, those doubts were in large measure removed when significant amendments to the FWPCA of 1972 were proposed, debated, and enacted in 1977. The Court's decision in *Riverside Bayview Homes* cites and relies on the legislative history of the FWPCA Amendments of 1977 as confirming the reasonableness and legality of EPA and Corps regulations that had construed the jurisdiction of the FWPCA of 1972 as extending far beyond the §10 navigable waters. In contrast, the Albrecht/Nickelsburg Article asserts that the 1977 Amendments may have changed the jurisdiction of the FWPCA of 1972, but expanded it only to cover some wetlands actually adjoining open water areas of the §10 navigable waters. In fact, the FWPCA Amendments of 1977 and their legislative history demonstrate that Congress understood, acquiesced in, and confirmed most, if not all, of EPA and Corps regulations that had asserted FWPCA of 1972 jurisdiction far beyond the traditional navigable waters, including all non-navigable tributaries and their adjacent wetlands.

In 1977 Congress revisited the entire question of FWPCA geographic jurisdiction, largely because the vast expansion of jurisdiction undertaken by the Corps under the authority of the FWPCA of 1972 to comply with the U.S. district court's decision in *Callaway*[125] had caused much political controversy. After a long and spirited debate, Congress rejected legislative efforts to roll back FWPCA jurisdiction to the traditional navigable waters and their adjacent wetlands and instead enacted the FWPCA Amendments of 1977, commonly known as the CWA. Both the text and the legislative history of the 1977 Amendments demonstrate that in 1977 Congress accepted and confirmed EPA and Corps regulations that had implemented the full extent of CWA geographic jurisdiction mandated by the *Callaway* decision. That 1977 legislative history is cited and relied on by the Court in the *Riverside Bayview Homes* decision[126] but is given short shrift in the Albrecht/Nickelsburg Article.

The text of the 1977 Amendments to CWA §404 does provide some evidence that the Albrecht/Nickelsburg suggestion that non-navigable tributaries are not (and never were) subject to FWPCA jurisdiction is wrong. While Congress refused in 1977 to enact proposed CWA amendments that would have rolled back FWPCA jurisdiction to the traditional navigable waters and their adjacent wetlands, Congress did for the first time in 1977 authorize the states to assume part of the controversial §404 regulatory program when Congress added subsections (g) through (*l*) to §404. The legislative history of those new subsections indicates that Congress expected interested states to assume §404 permitting responsibilities for the large number of non-navigable water bodies, such as non-navigable tributaries, that Congress had been debating in terms of the rejected legislative proposals for reducing FWPCA of 1972 jurisdiction. However, Congress explicitly refused to authorize states to assume §404 responsibilities for almost all of the §10 navigable waters or for wetlands adjacent to those §10 navigable waters.[127] If the Albrecht/Nickelsburg Article were correct

134. 243 F.3d 526, 31 ELR 20535 (9th Cir. 2001).

135. 305 F.3d 943, 33 ELR 20048 (9th Cir. 2002).

136. 303 F.3d 784, 33 ELR 20035 (7th Cir. 2002).

137. *See* Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States," 68 Fed. Reg. 1991 (Jan. 15, 2003).

138. In mid-December 2003, EPA and the Army announced that they had no current plans to undertake such a rulemaking. Nevertheless, the agencies obviously have full legal authority to revive plans for a rulemaking on CWA jurisdiction at any time.

139. 33 U.S.C. §1251(a).

140. Of course, that conclusion introduces legal, scientific, practical, and policy questions regarding what constitutes the "total tributary system" of the navigable waters that the CWA should have jurisdiction over if that Act is to protect "the waters of the United States" from all kinds of potentially harmful polluting discharges. Undoubtedly there are difficult and unanswered questions regarding what are the upper limits of the tributary system regulated by the CWA. To date neither the federal courts nor agencies responsible for implementing the CWA have provided answers for all of those questions, and this author will not attempt to do so in this Article.

Nevertheless, the analysis presented in this Article leads to at least one basic legal principle for determining what constitutes the "core" or minimal tributary system subject to CWA jurisdiction, as follows: the CWA at the least should have jurisdiction over every aquatic area, e.g., stream, watercourse, wetland, etc., if a pollutant, e.g., oil wastes, toxic chemical wastes, discharged into that aquatic area could be reasonably expected to migrate, e.g., flow, percolate, etc., from or through that aquatic area into §10 navigable waters under reasonably predictable hydrologic conditions, i.e., rainfall, runoff, predictable flooding events, etc. Any type of watercourse that connects with and could transport pollutants into the navigable waters would qualify as subject to CWA jurisdiction under this legal test, whether that watercourse is a man-made ditch or a natural stream, and regardless of whether the watercourse flows through culverts or other pipes for part of its length. Any wetland area that is adjacent to, i.e., bordering, contiguous to, or neighboring, such a watercourse, and any wetland that is otherwise hydrologically connected to such a watercourse, also would be subject to CWA jurisdiction under this test. (See the full definition of "adjacent" at 33 C.F.R. §328.3(c).) If all hydrologically connected wetland areas were not subject to CWA jurisdiction, then pollutants discharged into such wetlands would migrate into the navigable waters, and the unregulated destruction of such wetlands would eliminate their functions of filtering out pollutants, storing floodwaters, etc.

In some (though not all) circumstances the basic test for CWA jurisdiction described above can be established by a simple "dye test," whereby a dye is discharged into the aquatic area in question to observe whether that dye will migrate into the tributary system of the §10 navigable waters within some reasonable period of time. Of course, a dye test would not be an adequate or determinative test at all times or in all circumstances. For example, many watercourses in arid regions of the southwestern United States are dry during most of the year and are dry all year long during periods of extreme drought, but become torrential streams after rainfall events. Dye (or toxic chemical wastes) discharged into such dry watercourses might re-

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in its assertion that CWA jurisdiction covers very few (if any) water bodies that are not §10 navigable waters, then there would be hardly any waters subject to CWA jurisdiction that the states could assume CWA §404 permitting responsibility for, and CWA §404(g) through (*l*) would be almost a meaningless nullity.[128]

Predictably, the Albrecht/Nickelsburg Article treats the Court's *SWANCC* decision as if every word therein were holy writ. So it is curious that those authors do not mention the one explicit reference that the *SWANCC* decision makes to non-navigable tributaries. While discussing the significance of §404(g)'s expression "other . . . waters," the *SWANCC* majority opinion states that "it is also plausible, as petitioner contends, that Congress simply wanted to include [within CWA jurisdictional waters that states could assume §404 permitting responsibility for] all waters adjacent to 'navigable waters,' such as non-navigable tributaries and streams."[129] Thus Albrecht and Nickelsburg's favorite and ultimate legal authority, the *SWANCC* decision, itself provides some *obiter dicta* tending to refute those authors' suggestion that the CWA has no jurisdiction over non-navigable tributaries and their adjacent wetlands.

Conclusion

Since the time that I began researching and writing this Article several months ago, the U.S. Court of Appeals for the Fourth Circuit and the U.S. Court of Appeals for the Sixth Circuit, have handed down decisions regarding the post-*SWANCC* geographic jurisdiction of the CWA.[130] In *United States v. Deaton*,[131] *United States v. Newdunn Associates*,[132] and *United States v. Rapanos*,[133] the courts rejected the assertions and "evidence" that the Albrecht/Nickelsburg Article presented for the use of the federal courts, urging the courts to roll back CWA jurisdiction to the §10 navigable waters, or at least to restrict CWA jurisdiction to very narrow limits. Those three courts of appeals decisions are in full agreement with the decisions of the U.S. Court of Appeals for the Ninth Circuit in *Headwaters, Inc. v. Talent Irrigation District*[134] and *Community Ass'n for the Restoration of the Environment v. Henry Bosma Dairy*,[135] and with a similar decision of the U.S. Court of Appeals for the Seventh Circuit in *United States v. Krilich*.[136] As of the time this Article was completed in December 2003, all four of the courts of appeals that have directly addressed the question of post-*SWANCC* CWA jurisdiction have agreed, without the filing of a single dissenting opinion, that the *SWANCC* decision's holding was narrow, and that the entire tributary system of the §10 navigable waters is still subject to the important protections of the CWA.

Nevertheless, the *obiter dicta* from the Fifth Circuit's decisions in *Rice* and *Needham*, and the similar holdings of several U.S. district court decisions noted above, demonstrate that the post-*SWANCC* jurisdiction of the CWA is far from being a settled matter. Over the next several years many different federal courts presumably will rule on this important issue, and eventually the Court will probably have to address the matter. In addition, throughout 2003 EPA and the Army have been amassing and analyzing a public record from an "Advanced Notice of Proposed Rulemaking on the CWA Regulatory Definition of 'Waters of the United States.'"[137] Such a rulemaking, should it ever occur, would be intended to clarify the limits of post-*SWANCC* CWA jurisdiction.[138]

I hope that this Article has at least demonstrated that the radical analysis and conclusions presented by the Albrecht/Nickelsburg Article are fallacious and unworthy of acceptance by any federal court or knowledgeable legal practitioner. Contrary to the assertions of the Albrecht/Nickelsburg Article, the legislative history of the FWPCA of 1972, and both the text and the legislative history of the FWPCA Amendments of 1977, indicate that Congress intended that the CWA's geographic jurisdiction should encompass the tributaries to the §10 navigable waters. The CWA could not possibly fulfill its purposes and goals unless all of those tributaries are part of the CWA's jurisdiction because pollution discharged into the tributaries will inevitably flow downstream to pollute the larger §10 navigable waters. The alleged "legislative history" of the FWPCA of 1972 presented and relied on in the Albrecht/Nickelsburg Article was misleading to a marked degree. In fact, the Albrecht/Nickelsburg Article really provided no reliable support for that Article's extreme assertion that the CWA does not have and never has had jurisdiction over more than 99% of the full tributary system of §10 navigable waters. The most superficially credible argument presented by the Albrecht/Nickelsburg Article is based on the Corps' final rule of April 4, 1974. Yet when the Corps' 1974 final rule is analyzed carefully in light of the full historic record regarding how the Corps struggled with its new CWA §404 responsibilities during the 1972 through 1977 period, that 1974 final rule provides no substantial support for the Albrecht/Nickelsburg Article's conclusions.

The legal and policy debate regarding what is left of the

main at the discharge site for weeks or months, but would be carried downstream after the next heavy rain. The federal courts have determined that such dry watercourses are waters of the United States if they serve as tributaries to navigable waters after rainfall events. *See, e.g.*, United States v. Texas Pipe Line Co., 611 F.2d 345, 10 ELR 20184 (10th Cir. 1979); Quivera Mining v. EPA, 765 F.2d 126, 130, 15 ELR 20530 (10th Cir. 1985); United States v. Phelps Dodge, 391 F. Supp. 1181, 1187, 5 ELR 20308 (D. Ariz. 1975).

There may be other appropriate bases and legal tests for asserting CWA jurisdiction over various types of aquatic areas, but I believe the legal principle summarized above is the essential principle that has been adopted thus far by the Fourth, Sixth, Seventh, and Ninth Circuits in the decisions cited a number of times in this Article. Appendix 1 offers some relevant quotations from recent court of appeals decisions.

It should be noted that, notwithstanding some inaccurate dicta to the contrary in the Fifth Circuit's *Needham* decision, so far as I know no federal agency or court has ever asserted CWA jurisdiction over any "mud puddle" or "sewer." By definition no mud puddle would have sufficient permanence in the landscape to qualify as a wetland or other water body. Moreover, every isolated "mud puddle" would be outside CWA jurisdiction under the *SWANCC* decision's holding in any event. I know of no federal agency or court that has ever asserted CWA jurisdiction over a sanitary sewer. One case that could possibly be read to assert CWA jurisdiction over part of a storm sewer system might be *United States v. Eidson*, 108 F.3d 1336, 27 ELR 20853 (11th Cir. 1997), but even that is uncertain.

1. United States v. Deaton, 332 F.3d 698, 33 ELR 20223 (4th Cir. 2003).
2. *Id*. at 707.
3. *Id.* at 712.
4. 339 F.3d 447, 33 ELR 20249 (6th Cir. Aug. 5, 2003).
5. *Id*. at 453.
6. 344 F.3d 407, 2003 WL 22093616 (4th Cir. 2003).
7. *Id*. at *8.

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CWA's geographic jurisdiction after the Court's *SWANCC* decision is of first-class importance. The health and well-being of our nations's waters, environment, and people depend on the outcome of that debate. If that debate is to produce reasonable and responsible decisions from the federal courts, future federal agency rulemakings, and (potentially) future congressional enactments, legal practitioners contributing to that debate should try to rise above result-oriented advocacy that misrepresents either the legislative history or the current jurisdiction of the CWA.

As they deal with questions relating to the CWA's jurisdiction, the federal courts and agencies should be guided by an objective view of the CWA, its actual legislative history, and the Act's fundamental purposes of protecting the nation's waters from pollution. Those vitally important purposes were expressed in the CWA's stated objective: "[T]o restore and maintain the chemical, physical, and biological integrity of the nation's waters."[139] The federal courts and administrative agencies can best implement the intent of Congress expressed in the CWA by recognizing the fact that the CWA has, and has had since its enactment in 1972, jurisdiction over the total tributary system of §10 navigable waters.[140]

APPENDIX 1: Important Legal Principles Regarding CWA Jurisdiction Adopted in Recent U.S. Circuit Court of Appeals Decisions

The following two quotations are from *United States v. Deaton*[1]:

> The power over navigable waters also carries with it the authority to regulate nonnavigable waters when that regulation is necessary to achieve Congressional goals in protecting navigable waters. Any pollutant or fill material that degrades water quality in a tributary of navigable waters has the potential to move downstream and degrade the quality of the navigable waters themselves. . . .[2]
>
> . . .
>
> In *Riverside Bayview* the Supreme Court concluded that the Corps regulation extending jurisdiction to adjacent wetlands was a reasonable interpretation in part because of what *SWANCC* described as "the significant nexus between the wetlands and 'navigable waters.'" There is also a nexus between a navigable waterway and its nonnavigable tributaries. The Corps argues, with supporting evidence, that discharges into nonnavigable tributaries and adjacent wetlands have a substantial effect on water quality in navigable waters. The Deatons do not suggest that this effect is overstated. This nexus, in light of the "breadth of congressional concern for protection of water quality in aquatic ecosystems," is sufficient to allow the Corps to determine reasonably that its jurisdiction over the whole tributary system of any navigable waterway is warranted. The regulation, as the Corps reads it, reflects a reasonable interpretation of the Clean Water Act. The Act thus reaches to the roadside ditch and its adjacent wetlands.[3]

The following quotation is from *United States v. Rapanos*[4]:

> The evidence presented in this case suffices to show that the wetlands on Rapanos's land are adjacent to the Labozinski Drain, especially in view of the hydrological connection between the two. It follows under the analysis in *Deaton*, with which we agree, that the Rapanos wetlands are covered by the Clean Water Act. Any contamination of the Rapanos wetlands could affect the Drain, which, in turn could affect navigable-in-fact waters. Therefore, the protection of the wetlands on Rapanos' land is a fair extension of the Clean Water Act. Solid Waste requires a "significant nexus between the wetlands and 'navigable waters'" for there to be jurisdiction under the Clean Water Act. Because the wetlands are adjacent to the Drain and there exists a hydrological connection among the wetlands, the Drain, and the Kawkawlin River, we find an ample nexus to establish jurisdiction.[5]

The third and final quotation is from *United States v. Newdunn Associates*[6]:

> If this court were to conclude that the I-64 ditch is not a "tributary" solely because it is man-made, the CWA's chief goal would be subverted. Whether man-made or natural, the tributary flows into traditional, navigable waters. Accordingly, the Corps may permissibly define that tributary as part of the "waters of the United States."[7]

APPENDIX 2: Letter From Fred Disheroon, Esq., Concerning the Circumstances Surrounding the Corps of Engineers' Final Rule of April 3, 1974

Alexandria, Virginia
November 12, 2003

Lance D. Wood
Assistant Chief Counsel
Environmental Law and Regulatory Programs
U.S. Army Corps of Engineers
Washington, D.C. 20314

Dear Mr. Wood:

Thank you for the opportunity to read your draft article regarding the Corps of Engineers' actions in the 1970's implementing the Federal Water Pollution Control Act (FWPCA) of 1972, including the explanation of the Corps' final rule of April 3, 1974. I was personally involved in those matters, and I do have a clear recollection of them. In 1974 I served as the Corps of Engineers' Assistant General Counsel for Litigation, Enforcement, and Adversarial Proceedings, and I reviewed the Corps 1974 final rule in that capacity. In addition, I served as the Corps staff litigation counsel in the *NRDC v. Callaway* case, which challenged that 1974 rule. I believe your explanation of that general subject, including your explanation of the Corps' final rule of April 3, 1974, to be accurate and consistent with my personal recollections.

In 1974 Corps decisionmakers, and the senior Corps attorneys, did understand that the geographic jurisdiction of the FWPCA of 1972 as a whole extended much further than the Section 10 navigable waters, including non-navigable tributaries to the navigable waters. That understanding is reflected in the legal memo from Acting Corps General Counsel [William R.] Orlandi quoted in your article.

Nevertheless, some Corps officials, including the primary drafter of the final rule of April 3, 1974, Jacobus Lankhorst, believed that a legally defensible case could be made that the Corps and the Department of the Army could establish through rulemaking a separate, more limited geographic jurisdiction for the new Section 404 program estab-

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lished by the 1972 FWPCA. I was among the Corps personnel who advised Corps decisionmakers in 1974 that the final rule of April 3, 1974, would likely be challenged in the Federal Courts and would in all probability be overturned by the Courts as contrary to the mandates of the FWPCA regarding that statute's geographic jurisdiction. I did not believe that the Federal Courts would uphold the Corps's attempt to carve out a special, restricted geographic scope for the Section 404 program, in part because the EPA had not agreed to the Corps' 1974 rulemaking, and more generally because that rulemaking was contrary to the broad mandate of the FWPCA of 1972. In my opinion, Corps decisionmakers understood the legal risks inherent in the 1974 final rule, and the probability that the 1974 rule would not survive judicial review.

Nevertheless, the Corps had very little, if anything, to lose by promulgating the final rule of April 3, 1974, and potentially a great deal to gain. It was possible, though unlikely, that the Federal Courts could defer to the Corps's final rule and uphold it. Whether or not the 1974 final rule would prevail in the courts, it would still provide the Corps with important practical and political benefits, as your article accurately explained. I share your view that the Corps did not have adequate resources in 1974 to implement its new Section 404 regulatory program in all of the non-navigable waters that the FWPCA covered. The Corps' final rule of April 3, 1974, at the least would serve to "buy time" while the Corps decided how it could manage a program with a greatly expanded geographic jurisdiction under Section 404.

The Corps' leaders in 1974 understood that environmental plaintiffs would certainly challenge the Corps' final rule in the Federal Courts, because that 1974 final rule refused to assert CWA Section 404 jurisdiction over any aquatic areas beyond the Section 10 navigable waters. If, as most of the Corps' decisionmakers realistically expected in 1974, the Federal Courts did overturn the Corps' final rule of April 3, 1974, at least the regulated public and their congressional representatives would place the responsibility for that result on the Federal Courts, rather than the Corps, and leave no doubt that the resulting large expansion of regulatory jurisdiction, and the likely regulatory delays and inconveniences that followed for projects needing Section 404 permits from the Corps' under-resourced regulatory staff, was clearly required by federal law.

I am glad that your article will set the record straight on these subjects, since it is clear that some persons have very mistaken notions about the Corps' final rule of April 3, 1974, the Corps' regulatory program in the 1970's, and regarding the jurisdiction of the FWPCA in general.

Sincerely,

(Signature)
Fred R. Disheroon, Esq.