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**Solid Waste Agency of Northern Cook County  
v. U.S. Army Corps of Engineers: Isolated  
Waters, Migratory Birds, Statutory and  
Constitutional Interpretation**

by

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# *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers: Isolated Waters, Migratory Birds, Statutory and Constitutional Interpretation*

## ABSTRACT

*The U.S. Supreme Court, through its statutory and constitutional interpretations, has revived federalism to curtail federal authority. In the Solid Waste case, the Court, relying primarily on the text of the Clean Water Act, determined that the federal government lacked jurisdiction over isolated waters that serve as migratory bird habitat. The Court's decision was inconsistent with text, intent, and purposes of the statute. The Court reinforced its statutory interpretation by declaring that the migratory bird rule probably exceeded federal commerce clause authority. The Court's speculation was dubious under the framework of United States v. Lopez. The Court's conclusions are not a positive sign for the future of environmental law.*

## INTRODUCTION

One of the hallmarks of the Rehnquist Court is the resurrection of federalism to limit federal authority.<sup>1</sup> The Court is accomplishing this

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1. From 1937 through 1995, the Supreme Court deferred to congressional determinations that activities were sufficiently related to interstate commerce to justify federal regulation pursuant to the commerce clause. See *United States v. Lopez*, 514 U.S. 549, 554-56 (1995). The Court only asked whether the decision was rational and whether the means chosen were reasonably related to the ends sought. *Id.* at 557. In 1995, the Court changed the conceptual framework for assessing federal commerce clause authority. *Id.* See generally Peter M. Shane, *Federalism's "Old Deal": What's Right and Wrong with Conservative Judicial Activism*, 45 VILL. L. REV. 201 (2000); Philip P. Frickey, *The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and United States v. Lopez*, 46 CASE W. RES. L. REV. 695 (1996).

goal through statutory and constitutional interpretation.<sup>2</sup> The Court advanced its agenda in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*<sup>3</sup> by invalidating the Corps of Engineers' (Corps) "migratory bird rule,"<sup>4</sup> which asserted federal jurisdiction over the discharge of dredge and fill material into isolated waters and wetlands that serve as migratory bird habitat pursuant to section 404 of the Clean Water Act (CWA).<sup>5</sup> This article analyzes the Court's decision, which puts in jeopardy as much as 60 percent of the nation's wetlands<sup>6</sup> and threatens to harm migratory birds, and concludes that the decision was erroneous.

The SWANCC decision raised several issues. First, there is the problem of statutory interpretation, particularly the conflict between textualism and intentionalism. The Court, relying primarily on the text,<sup>7</sup> held that the migratory bird rule exceeded the scope of federal jurisdiction in the CWA.<sup>8</sup> The Court's conclusion did not follow the text, intent, or purposes of the CWA, which clearly establishes broad federal jurisdiction. Instead, the Court substituted its views for those of Congress. Second, there are questions about the role of administrative agencies regarding statutory interpretation. The Court, relying on the canons of statutory interpretation, refused to defer to the Corps' interpretation of the CWA because there was no clear statement regarding congressional intent and the migratory bird rule raised constitutional issues regarding federalism.<sup>9</sup> The Court's decision undermined the principle of judicial deference to agency statutory interpretation. The Court ignored strong executive precedent and invalidated a regulation that had been in place for 15 years, followed by three administrations, and upheld in most judicial decisions. Finally, there are concerns regarding the scope of federal commerce clause

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2. *Lopez*, 514 U.S. at 557. See also *United States v. Morrison*, 529 U.S. 598 (2000).

3. 121 S. Ct. 675 (2001).

4. Dept. of Defense, Corps of Engineers, Dept. of Army, Final Rule for Regulatory Programs of the Corps, Consolidation of Corps Permit Regulations, 51 Fed. Reg. 41,206; 41,217 (Nov. 13, 1986) (codified at 33 C.F.R. Parts 320, 321, 322, 324-30).

5. 33 U.S.C. § 1344 (2000). Isolated waters are waters that "lack a hydrologic connection to other waters that are part of or adjacent to interstate waters, a tributary system, or traditionally navigable waters." Bonnie Nevel, *Focus on SWANCC*, NAT'L WETLANDS NEWSL. (Envtl. Law Inst., Washington, D.C.), Mar.-Apr. 2001, at 2.

6. Jon Kusler, *The SWANCC Decision and State Regulation of Wetlands*, Memo prepared for the Association of State Wetland Managers, Inc., 1, 7-8 (2001), available at [www.aswm.org/propub/pubs/aswm-publist.htm](http://www.aswm.org/propub/pubs/aswm-publist.htm) (last updated Jan. 31, 2002); Jon Kusler, *The SWANCC Decision and the States—Fill in the Gaps or Declare Open Season?*, NAT'L WETLANDS NEWSL. (Envtl. Law Inst., Washington, D.C.), Mar.-Apr. 2001, at 9-12.

7. Michael P. Healy, *Textualism's Limits on the Administrative State: of Isolated Waters, Barking Dogs, and Chevron*, 31 ENVTL. L. REP. 10,928, 10,929-37 (2001).

8. SWANCC, 121 S. Ct. at 684.

9. SWANCC v. U.S. Army Corps of Eng'rs, 121 S. Ct. 675, 683-84 (2001).

authority. The Court reinforced its statutory interpretation by suggesting that the migratory bird rule probably exceeded federal commerce clause authority.<sup>10</sup> This conclusion was dubious in terms of the Court's decision in *United States v. Lopez*.<sup>11</sup>

The article examines the Court's statutory analysis in the context of the conceptual framework of *Chevron, U.S.A. v. Natural Resources Defense Council*.<sup>12</sup> It analyzes the migratory bird rule in terms of the Court's current commerce clause jurisprudence. Finally, it reviews the political responses to the Court's decision and speculates about the decision's future implications for environmental law.<sup>13</sup>

## I. FACTS

The Solid Waste Agency of Northern Cook County (SWANCC), an association of 23 suburban cities in Cook County Illinois, was formed in 1988 to pursue "a comprehensive action plan for regional solid waste disposal."<sup>14</sup> The SWANCC adopted a 20-year management plan for solid waste disposal<sup>15</sup> that called for the construction of a new landfill for the disposal of baled nonhazardous waste. The SWANCC purchased 533 acres of property, 300 acres of which had previously been used for gravel and sand strip mining; 410 acres would be utilized for the balefill site. There were over 200 seasonal and permanent ponds on the site ranging from one-tenth of an acre to several acres, with a depth varying from several inches to several feet. The initial plan called for filling in 31 acres of wetlands.<sup>16</sup>

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10. *Id.* at 683.

11. 514 U.S. 549 (1995) (the Gun-Free School Zones Act was declared unconstitutional for exceeding federal commerce clause authority).

12. 467 U.S. 837 (1984).

13. Judge Wald, a former member of the D.C. Circuit, stated, "The law of the environment, like the environment itself, is a seamless web: '[p]luck at any one point in the intricate fabric of our ecosystem and the web of relationships changes shape, disrupting the previous equilibrium.'" Patricia M. Wald, *The Role of the Judiciary in Environmental Protection*, 19 B.C. ENVTL. AFF. L. REV. 519, 535 (1992) (quoting THOMAS M. HOBAN & RICHARD O. BROOKS, *GREEN JUSTICE: THE ENVIRONMENT AND THE COURTS* 6 (1987)).

14. Brief for the Petitioner at 3, *SWANCC v. U.S. Army Corps of Eng'rs*, 121 S. Ct. 675 (2001) (No. 99-1178). The Illinois Solid Waste Planning and Recycling Act encourages such "intergovernmental cooperation agreements whereby various units of local government within a region determine the best methods and locations for disposal of solid waste." 415 ILL. COMP. STAT. ANN. 15/2 (1993).

15. Brief for the Petitioner at 3, *SWANCC v. U.S. Army Corps of Eng'rs*, 121 S. Ct. 675 (2001) (No. 99-1178). The plan stressed waste volume reduction, recycling, composting, and other ways to divert 40 to 45 percent of solid waste from disposal in compliance with the Solid Waste Planning and Recycling Act, 415 ILL. COMP. STAT. ANN. 15/2 (1993), and Illinois Environmental Protection Agency rules, 35 ILL. ADMIN. CODE § 870.102 (2002).

16. Brief for the Petitioner at 4-5, *SWANCC v. U.S. Army Corps of Eng'rs*, 121 S. Ct. 675 (2001) (No. 99-1178).

The SWANCC asked the Corps if a dredge and fill permit was necessary. Section 404 of the CWA requires a permit issued by the Corps for the discharge of dredge and fill material into navigable waters of the United States.<sup>17</sup> In 1986 and again in 1987, the Corps informed the SWANCC that a section 404 permit would not be necessary because the proposed site was not subject to their regulatory authority.<sup>18</sup>

In 1987, the Illinois Nature Preserves Commission informed the Corps that migratory birds were observed on the site. The Corps asserted jurisdiction over the site pursuant to the migratory bird rule<sup>19</sup> and informed the SWANCC that a section 404 permit would be necessary.<sup>20</sup> On the site there are 121 different species of birds that depend on water and migrate throughout the United States. Many of the species are protected by international treaties. The site contains the second largest breeding colony of blue herons in northeast Illinois. There were approximately 192 nests in 1993. The ponds are the breeding habitat for several species considered endangered or threatened by the Illinois Endangered Species Protection Board.<sup>21</sup>

In 1990, the SWANCC's request for a section 404 permit was denied. The Corps concluded that the project was in the public interest and the foreseeable benefits exceeded the costs, but the "site may not be

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17. 33 U.S.C. § 1344(a) (2000).

18. Brief for the Petitioner at 8-9, SWANCC v. U.S. Army Corps of Eng'rs, 121 S. Ct. 675 (2001) (No. 99-1178).

19. The Corps asserted jurisdiction "based on the following criteria: 1) the proposed site had been abandoned as a gravel mining operation; 2) the water areas and spoil piles had developed a natural character; and 3) the water areas are used as habitat by migratory bird[s] which cross state lines." SWANCC, 121 S. Ct. at 679.

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Obtaining a permit is a two stage process. First, pursuant to CWA Section 401 the Corps requires the applicant to provide a "State [certification] that the proposed discharge will comply with applicable provisions of State Law," including "water quality standards." ...The Illinois EPA issued water quality certifications to SWANCC in November 1989 and again in December 1992.

Second, the Corps makes "an environmental assessment, and a determination of the project's impact on the public interest," weighing in its "public interest" determination such factors as "economics, aesthetics, general environmental concerns,...fish and wildlife values,...land use,...and, in general, the needs and welfare of the people. Though the Corps purports to recognize that "primary responsibility for determining zoning and land use matters rests with state [and] local governments," it declines to "accept decisions by such governments" where "there are significant issues" it deems "of overriding national importance" given "the degree of impact in [the] individual case."

Brief for the Petitioner at 9, SWANCC v. U.S. Army Corps of Eng'rs, 121 S. Ct. 675 (2001) (No. 99-1178) (citations omitted).

21. Brief for the Federal Respondents at 7, SWANCC v. U.S. Army Corps of Eng'rs, 121 S. Ct. 675 (2001) (No. 99-1178).

the least damaging practicable alternative site" and the project "would contribute to significant degradation of the aquatic ecosystem."<sup>22</sup>

The SWANCC proposed a mitigation plan that would cost \$17 million. The plan called for the reduction in the area to be filled from 31 to 17.6 acres. A breeding area for the herons would be relocated on the property. If this proved unsuccessful, a breeding area would be provided at another site. The construction would begin in phases over 15 years. The forest and waters on the property would be enhanced. To improve forest habitat, 258 acres adjacent to the property would be acquired.<sup>23</sup> The project received the necessary state and local approval.<sup>24</sup>

In 1994, the Corps again rejected the SWANCC's request for a section 404 permit on grounds that the project was contrary to the public interest and federal regulations for the following reasons: (1) the break up of such "a large contiguous forest" would cause "unmitigable impacts to area sensitive birds"; (2) the SWANCC had not demonstrated that this was "the least environmentally damaging, most practical alternative"; and (3) the SWANCC had not proved that its members possessed the capacity to finance the "long-term maintenance responsibilities," which created an 'unacceptable' risk of groundwater contamination."<sup>25</sup>

The Corps found the site particularly important because the loss of similar wooded aquatic habitats in the region was responsible for the drop in bird population. The Corps' decision was supported by the U.S. Fish and Wildlife Service (FWS), which concluded that "[b]ecause of its value to migratory birds, we do not believe this site is an appropriate place to site a landfill."<sup>26</sup> The FWS determined that the blue herons would likely abandon the site. Existing sites had to be preserved because the habitat for forest birds in the Midwest was lacking. The FWS was aware of the solid waste disposal problem but felt that the preservation

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22. Brief for the Petitioner at 9, *SWANCC v. U.S. Army Corps of Eng'rs*, 121 S. Ct. 675 (2001) (No. 99-1178).

23. *Id.* at 5.

24. By 1993, SWANCC received a "special use planned development permit from the Cook County Board of Appeals, a landfill development permit from the Illinois Environmental Protection Agency, and approval from the Illinois Department of Conservation." *SWANCC*, 121 S. Ct. at 679. Several commentators noted that "[n]early every contested federal wetlands permit decision—and they are numerous—is one that, by federal regulation, already received all necessary state approvals." Oliver A. Houck & Michael Rolland, *Federalism in Wetlands Regulation: A Consideration of Delegation of Clean Water Act Section 404 and Related Programs to the States*, 54 MD. L. REV. 1242, 1253 (1995).

25. Brief for the Petitioner at 10, *SWANCC v. U.S. Army Corps of Eng'rs*, 121 S. Ct. 675 (2001) (No. 99-1178).

26. Brief for the Federal Respondents at 9, 2000 WL 1369439, *SWANCC v. U.S. Army Corps of Eng'rs*, 121 S. Ct. 675 (2001) (No. 99-1178).

of habitat was equally important.<sup>27</sup> The Environmental Protection Agency (EPA) concurred with the Corps' decision.<sup>28</sup>

The SWANCC brought suit, challenging the Corps' jurisdiction over the site. The federal district court upheld the Corps' decision and determined that the commerce clause authorized the Corps' regulation of isolated waters that could provide habitat for migratory birds.<sup>29</sup> The Corps' interpretation of the CWA was reasonable.<sup>30</sup> The migratory bird rule was an interpretative rule, so notice and comment<sup>31</sup> was not warranted.<sup>32</sup>

The Seventh Circuit concurred and held that the cumulative impact on tourism, hunting, and observation resulting from the destruction of migratory bird habitat would substantially affect interstate commerce.<sup>33</sup> The management of migratory birds, which are the subject of many international treaties, was not a local issue.<sup>34</sup> The Seventh Circuit agreed that the Corps' interpretation of the CWA was reasonable. There was no need to focus on potential impacts because filling in 17.6 acres of isolated waters would have an immediate impact on the birds.<sup>35</sup> The Seventh Circuit also agreed that the migratory bird rule was an interpretative rule that did not require notice and comment.<sup>36</sup>

The Supreme Court reversed and held that the Corps' jurisdiction under section 404 of the CWA was limited to waters navigable in fact.<sup>37</sup> The Court did not find any evidence in the legislative history to support an extension of the Corps' jurisdiction to isolated

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27. *Id.*

28. Congress passed the Water Resources Development Act of 1988, Pub. L. No. 100-676, 102 Stat. 4012 (codified at 33 U.S.C. §§ 2312 et seq. (2000)), which provided that prior to issuing a section 404 permit for the proposed SWANCC landfill, the Secretary of the Army was to consult with the EPA and consider the impacts on the Newark Aquifer and on drinking water supplies. The EPA initially determined that the project posed little risk. The EPA later amended its finding and held that "the project site is inherently unsuitable for a project of this type due to the hazard of possible groundwater contamination of the Newark Valley Aquifer." Brief for the Respondents Village of Bartlett and Citizens Against the Balefill at 8, *SWANCC v. U.S. Army Corps of Eng'rs*, 121 S. Ct. 675 (2001) (No. 99-1178).

29. *SWANCC v. U.S. Army Corps of Eng'rs*, 998 F. Supp. 946, 950-53 (N.D. Ill. 1998).

30. *Id.* at 954-955.

31. Administrative Procedures Act, 5 U.S.C. § 553 (1994).

32. *SWANCC*, 998 F. Supp. at 955-57.

33. *SWANCC v. U.S. Army Corps of Eng'rs*, 191 F.3d 845, 850 (7th Cir. 1999). The Seventh Circuit determined that *Lopez* recognized "the cumulative impact doctrine, under which a single activity that itself has no discernible effect on interstate commerce may still be regulated if the aggregate effect of that class of activity has a substantial impact on interstate commerce." *Id.* at 850.

34. *Id.* at 850-51.

35. *Id.* at 851-52.

36. *Id.* at 852-53.

37. *SWANCC v. U.S. Army Corps of Eng'rs*, 121 S. Ct. 675, 680-83 (2001).

waters.<sup>38</sup> The Court refused to defer to the Corps' interpretation of the statute, which was on the boundaries of constitutional authority. A clear statement in the text of the statute was necessary to support such jurisdiction.<sup>39</sup> The Court also noted that even if Congress had authorized the migratory bird rule, it would probably violate the commerce clause by intruding on traditional state authority.<sup>40</sup> The Court's decision was inconsistent with the text, intent, and purposes of the CWA, the Corps and EPA interpretations of the CWA, and the scope of federal commerce clause authority.

## II. STATUTORY INTERPRETATION: STEP ONE

The Court's decision in *SWANCC* involved questions of statutory interpretation, particularly the conflict between textualism and intentionalism.<sup>41</sup> When examining an agency's legal interpretation of a statute, the court utilizes the two-step conceptual framework provided in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council (NRDC)* (hereinafter *Chevron*).<sup>42</sup> The first step requires the court to determine "whether Congress has spoken to the precise question at issue."<sup>43</sup> The court examines the text, intent, and purposes of the statute.<sup>44</sup> This technique, which is known as originalism, recognizes the statute as the command of the sovereign that must be interpreted by other agencies of government.<sup>45</sup>

If Congress has not addressed the question, the court can "not simply impose its own construction on the statute."<sup>46</sup> The court moves to

38. *Id.*

39. *Id.* at 683-84.

40. *Id.*

41. See generally EDWARD A. FITZGERALD, *THE SEAWEED REBELLION: FEDERAL-STATE CONFLICTS OVER OFFSHORE ENERGY DEVELOPMENT* 5-26 (2001).

42. 467 U.S. 837 (1984).

43. *Id.* at 842-43. The courts employ *Chevron* in a strong and weak manner. A strong reading requires the court to defer to the agency's legal interpretation, unless Congress has specifically addressed the issue. A weak reading stresses the continued use of the traditional tools of statutory interpretation, which focus on the text, intent, and purpose of the statute. Kenneth W. Starr et al., *Judicial Review of Administrative Action in a Conservative Era*, 39 ADMIN. L. REV. 353, 367-71 (1987).

44. Justice Stevens, the author of the *Chevron* decision, later stated that the courts decide "pure question[s] of statutory construction" by "[e]mploying traditional tools of statutory construction." *INS v. Cardozo-Fonseca*, 480 U.S. 421, 446 (1987).

45. See Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 467 (1989); Martin H. Redish & Theodore T. Chung, *Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation*, 68 TUL. L. REV. 803, 804-05 (1994); William N. Eskridge, *The New Textualism*, 37 UCLA L. REV. 621, 626 (1990).

46. *Chevron*, 467 U.S. at 843.



the second step to decide "whether the agency's answer is based on a permissible construction of the statute."<sup>47</sup> The court does not have to conclude that the agency's interpretation is "the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding."<sup>48</sup> Instead, the court must defer to "a reasonable interpretation made by the administrator of an agency."<sup>49</sup>

The Court in *SWANCC* relied primarily on the statutory text to limit the Corps' jurisdiction under the CWA. Focusing on the text allowed the Court to ignore clear signals in legislative history and statutory purposes regarding the broad scope of federal jurisdiction.<sup>50</sup> The Court acted as an autonomous interpreter, solving the statutory puzzle through ingenuity, rather than a faithful agent of the legislature or administrative agency, discovering meaning through an archeological search.<sup>51</sup> This enabled the Court to establish its own policy preferences.<sup>52</sup>

### A. Text

The court begins by examining the text of the statute, which has been enacted into law through the constitutionally prescribed process.<sup>53</sup> The text, which is known to the litigants and the public, is the best evidence of legislative intent. Reliance on the text confines the court's inquiry, increases the probability of obtaining judicial agreement in a particular case, and provides certainty and predictability in the law.<sup>54</sup> Textualism examines definitions, grammatical construction, and canons of statutory interpretation. Textualism also reviews the structure of the statute to see how words are utilized in the statute and how the definition fits in with the statute as a whole.<sup>55</sup>

47. *Id.*

48. *Id.* at 843 n.11.

49. *Id.* at 844.

50. See Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 355-63 (1994).

51. *Id.* at 373-74.

52. See Abner J. Mikva & Eric Lane, *The Muzak of Justice Scalia's Revolutionary Call to Read Unclear Statutes Narrowly*, 53 SMU L. REV. 121, 123 (2000).

53. For a discussion of the rise of textualism, see Charles Tiefer, *The Reconceptualization of Legislative History in the Supreme Court*, 2000 WIS. L. REV. 205, 212-21.

54. T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 23-24 (1988); Karen M. Gebbia-Pinetti, *Statutory Interpretation, Democratic Legitimacy and Legal System Values*, 21 SETON HALL LEGIS. J. 233, 320 (1997).

55. William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 340-41 (1990); Eskridge, *supra* note 45, at 660-63; Richard C. Ausness, *Federal Preemption of State Products Liability Doctrines*, 44 S.C. L. REV. 187, 234-35 (1993).

Textualism poses several interpretative problems. First, the text alone is generally insufficient to determine statutory meaning because it is ambiguous, vague, or incomplete. Words do not have clear meaning outside the context in which they are used.<sup>56</sup> Second, textualism does not foster a sensible reading of the statute that is designed to carry out the legislative intent or purpose. Instead, the court undermines legislative bargains and fails to acknowledge signals sent by the Congress regarding interpretative problems.<sup>57</sup> Textualism makes the judge an "autonomous interpreter," rather than a faithful agent of the legislature.<sup>58</sup> Finally, textualism is based on the "benign fiction" that legislators know the canons of statutory construction, prior judicial precedents, and the existing statutory terrain and that rational legislators write clear text.<sup>59</sup>

The Court in *SWANCC* held the Corps' jurisdiction pursuant to the CWA is limited to waters navigable in fact or connected to navigable waters, such as adjacent wetlands. Isolated waters with no connection to navigable waters, except for their use as migratory bird habitat, are beyond the Corps' jurisdiction.<sup>60</sup>

The Court's holding, which relied primarily upon the text,<sup>61</sup> is too narrow. The CWA establishes federal jurisdiction over navigable waters, which are defined as "the waters of the United States."<sup>62</sup> The CWA recognizes that navigable waters are not limited to those utilized for interstate commerce.<sup>63</sup> Numerous courts have determined that navigability is not crucial to the scope of federal jurisdiction under the CWA.<sup>64</sup>

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56. Eskridge & Frickey, *supra* note 55, at 341-44.

57. McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 738 (1992); Patricia M. Wald, *The D.C. Circuit: Here and Now*, 55 GEO. WASH. L. REV. 718, 727-28 (1987); Eskridge, *supra* note 45, at 683.

58. Merrill, *supra* note 50, at 353.

59. See generally Eskridge, *supra* note 45, at 679-80; Redish & Chung, *supra* note 45, at 825-26; Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1311-15 (1990).

60. *SWANCC v. U.S. Army Corps of Eng'rs*, 121 S. Ct. 675, 680-81 (2001).

61. *Id.* at 680; see also Healy *supra* note 7, at 10,929-37.

62. 33 U.S.C. § 1362(7) (2000).

63. 33 U.S.C. § 1344(g) (2000).

64. *NRDC v. Callaway*, 392 F. Supp. 685 (D.C. 1975); *United States v. Holland*, 373 F. Supp. 665 (M.D. Fla. 1974); *United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317 (6th Cir. 1974); *P.F.Z. Props. Inc. v. Train*, 393 F. Supp. 1370 (D.D.C. 1975); *Leslie Salt Co. v. Froehлке*, 403 F. Supp. 1292 (N.D. Cal. 1974).

The Court in *Kaiser Aetna v. United States*, 444 U.S. 166 (1979), supported broad federal regulation over navigable waters pursuant to the Rivers and Harbors Act. The Court stated, "[r]eference to the navigability of a waterway adds little if anything to the breadth of Congress' regulatory power over interstate commerce." *Id.* at 173. Congressional authority over waters of the United States "does not depend on a stream's 'navigability.'" *Id.* at 174. Numerous "economic activities 'affect' interstate commerce and thus are susceptible of congressional regulation under the Commerce Clause irrespective of

For example, the Supreme Court in *United States v. Riverside Bayview Homes, Inc.*<sup>65</sup> upheld federal jurisdiction over wetlands adjacent to, but not hydrologically connected to, navigable waters pursuant to the CWA. The Court stated that "the term 'navigable' as used in the Act is of limited import."<sup>66</sup> Congress clearly "intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term."<sup>67</sup>

The Court's restrictive view in *SWANCC* is contrary to section 404(g) of the CWA, which specifically recognizes federal jurisdiction over navigable waters other than those waters suitable for commercial traffic.<sup>68</sup> The Court addressed this issue and concluded that "[t]he exact meaning of section 404(g) is not before us and we express no opinion on it."<sup>69</sup> The Court's conclusion is contrary to the expressed legislative intent on this question.<sup>70</sup>

## B. Intent

If the text does not answer the interpretative problem, the court must search through the "ashcans of the legislative process"<sup>71</sup> to discover legislative intent,<sup>72</sup> which is how the enacting legislature would have resolved the interpretative question.<sup>73</sup> Studying the legislative history

whether navigation, or, indeed, water, is involved." *Id.* Judicial decisions regarding federal authority over "waters used in interstate commerce are consequently best understood when viewed in terms of more traditional Commerce Clause analysis than by reference to whether the stream in fact is capable of supporting navigation or may be characterized as 'navigable water of the United States'" *Id.* at 174.

65. 474 U.S. 121 (1985).

66. *Id.* at 133.

67. *Id.*

68. Section 404(g) allows the states to assume authority over "the discharge of dredged or fill material into the navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto) within its jurisdiction." 33 U.S.C. 1344(g) (2000).

69. *SWANCC v. U.S. Army Corps of Eng'rs*, 121 S. Ct. 675, 682 (2001).

70. See *infra* text and notes 158-172.

71. CHARLES P. CURTIS, *IT'S YOUR LAW* 52 (1954).

72. For a discussion on the existence of legislative intent, see Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930); REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 68-69 (1975); Tiefer, *supra* note 53, at 207-08, 251-71; Eskridge, *supra* note 45, at 643-50.

73. Justice Frankfurter, dissenting, asserted,

places the court in the proper deferential framework regarding the legislature and establishes a criterion of reliability that helps the court to select and weigh elements of the language and the legislative context.<sup>74</sup>

There are some problems with legislative history. Judge Leventhal stated that using legislative history is like "looking over a crowd and picking your friends."<sup>75</sup> First, focusing on legislative intent draws attention away from the text, which has been enacted into law. Second, examining legislative history introduces uncertainty into the law because alleged contradictions provide the opportunity for judicial adventurism. Third, there is always the danger that the legislative history was manufactured to influence subsequent judicial decisions. Finally, legislative history is produced by the staff, not the congresspersons.<sup>76</sup>

Despite these problems, the benefits of legislative history far exceed any of the alleged costs. First, legislative history does not replace the text, but is utilized to explain the text. This avoids absurd results, illuminates drafting errors, and explains specialized meanings.<sup>77</sup> Second, the use of legislative history decreases judicial adventurism by focusing judicial attention on the legislative product and decreasing judicial autonomy. Legislative history provides guidance in the face of textual silence or ambiguity.<sup>78</sup> Third, the court must distinguish between manufactured and legitimate legislative history.<sup>79</sup> The utilization of the

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The notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification...A statute, like other living organisms, derives significance and sustenance from its environment, from which it cannot be severed without being mutilated. Especially is this true where the statute, like the one before us, is part of a legislative process having history and a purpose. The meaning of such a statute cannot be gained by confining inquiry within its four corners. Only the historic process of which such legislation is an incomplete fragment—that to which it gave rise as well as that which gave rise to it—can yield its true meaning.

United States v. Monia, 317 U.S. 424, 431-32 (1943).

74. See CURTIS, *supra* note 71, at 52; Redish & Chung, *supra* note 45, at 813-15; Aleinikoff, *supra* note 54, at 22-23; Eskridge, *supra* note 45, at 630.

75. Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) (quoting Judge Leventhal).

76. Mikva & Lane, *supra* note 52, at 130-31.

77. Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 848-52 (1992).

78. *Id.* at 856.

79. Legitimate legislative history is comprised of statements that are designed to explain the meaning of the statute and build support for its enactment. These statements "illuminate the consensus view of the legislature where that view is left in some doubt by the enacted language." Robert Weisberg, *The Calabresian Judicial Artist: Statutes and the New Legal Process*, 35 STAN. L. REV. 213, 246-47 (1983). Manufactured legislative history consists of statements that are not designed to generate support for the statute but appeal to

statutory text and purposes aids in this endeavor. There is also a hierarchy of legislative sources that is based on their comparative reliability.<sup>80</sup> Finally, Congress is a bureaucratic organization. Congresspersons rely on their staff regarding most aspects of legislative matters.<sup>81</sup>

The Court did not find much guidance in the legislative history of the CWA regarding the scope of federal jurisdiction.<sup>82</sup> The Court's appraisal of the legislative history was too brief and constrained.<sup>83</sup> The legislative history shows federal jurisdiction in the CWA was not limited to waters navigable in fact, which were already subject to federal jurisdiction under the Rivers and Harbors Act of 1899. The 1972 and 1977 amendments to the Federal Water Pollution Control Act (FWPCA) (now known as the CWA) also endorsed broad federal jurisdiction.

### 1. Rivers and Harbors Appropriation Act of 1899

Prior to the enactment of amendments to the FWPCA in 1972, the federal government already exercised jurisdiction over navigable waters pursuant to the River and Harbor Act of 1899 (RHA).<sup>84</sup> The RHA grants the Corps authority to regulate dredge and fill operations in navigable waters and prohibits discharges into navigable waters and their tributaries without a permit issued by the Corps.<sup>85</sup> The Supreme Court

particular constituencies and influence judicial interpretation of the statute. These statements do not reflect the consensus of the legislature. *Id.*

80. William Eskridge provides a list of legislative sources in the order of their reliability: (1) committee reports, (2) sponsor statements, (3) rejected proposals, (4) floor and hearing colloquy, (5) views of nonlegislator drafters, (6) legislative inaction, and (7) subsequent legislative history. Eskridge, *supra* note 45, at 637-640.

81. Breyer, *supra* note 77, at 863; Tiefer, *supra* note 53, at 223-26.

82. SWANCC v. U.S. Army Corps of Eng'rs, 121 S. Ct. 675, 680-82 (2001).

83. Professor Charles Tiefer noted that "[a]rtistry with legislative history is a talent of Chief Justice Rehnquist's which has been admired in the past, but which he has often suppressed to avoid eliciting separate opinions by Justice Scalia." Charles Tiefer, *SWANCC: Constitutional Swan Song for Environmental Laws or No More Than a Swipe at Their Sweep?*, 31 ELR 11,493, 11,496 (2001).

84. Mar. 3, 1899, ch. 425, 30 Stat. 1121, 1152 (codified as amended at 33 U.S.C. § 407 (2000)). The RHA was preceded by the Rivers and Harbor Act of 1890, which allowed the Corps to appraise and approve construction projects and dredge and fill operations on navigable waters. See FRANK P. GRAD, *TREATISE ON ENVIRONMENTAL LAW* 3-249, 3-249-3-255 (2002). See also W. Christian Hoyer, *Corps of Engineers Dredge and Fill Jurisdiction: Buttressing a Citadel Under Siege*, 26 U. FLA. L. REV. 19, 20-29 (1973).

85. Under the common law navigable waters were limited to those subject to the ebb and flow of the tides. *Id.* at 21 n.19, citing *Waring v. Clarke*, 46 U.S. (5 How.) 441 (1847); *The Orleans*, 36 U.S. (11 Pet.) 175 (1837); *The Thomas Jefferson*, 23 U.S. (10 Wheat.) 428 (1825). This definition was inapplicable to the United States, which contains many inland waters. Hoyer, *supra* note 84, at 21-22, n.20.

continually expanded the definition of navigable waters<sup>86</sup> and shaped the RHA into an instrument for pollution control.<sup>87</sup>

With the emergence of the environmental movement,<sup>88</sup> the Corps fashioned the RHA into a tool for environmental protection.<sup>89</sup> The Corps began to consider other values when issuing dredge and fill permits, specifically "the effect of the proposed work on navigation, fish and wildlife, conservation, pollution, aesthetics, ecology, and the general public interest."<sup>90</sup> This "public interest review" was inconsistent with the case law, which limited the Corps' evaluation to navigational impacts. The conflict was settled in *Zabel v. Tabb*,<sup>91</sup> which focused on the Corps' refusal to issue permits to fill in wetlands because of potential adverse environmental effects. The Fifth Circuit, reversing the district court, held that the Corps can reject a permit on environmental grounds, even though there is no impact on navigability. The court found that Congress

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86. In *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870), the Court adopted a "navigability-in-fact" test. Waters were considered navigable when they form "by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water." *Id.* at 563. The Court in *The Montello* considered waters to be navigable if they potentially could be put to public use. 87 U.S. (20 Wall.) 430, 441-42 (1874). In *Economy Light & Power Co. v. United States*, the Court established the "indelible navigability" rule, which held that once a waterway is navigable, it is always considered to be navigable despite any changes in its character. 256 U.S. 113, 123 (1921); see Hoyer, *supra* note 84, at 22. The Court in *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 408 (1940), concluded that navigable waters included those waters that could become navigable with reasonable improvements. Federal power was not limited by navigation but extended as far as necessary to meet the needs of commerce, which includes flood protection, watershed development, and hydroelectric power. *Id.* at 426. Furthermore, the boundary of navigable waters was the mean high water line. The courts began to move beyond this point and permit the regulation of activities above the mean high water line that impacted navigable waters. Hoyer, *supra* note 84, at 23-25.

87. In 1960, the Court in *United States v. Republic Steel Corp.* noted that the navigable capacity of a waterway refers to more than obstructions to "movements in commerce." 362 U.S. 482 (1960). The Court declared that the RHA must be interpreted "charitably" in light of the purpose to be served and not with "a narrow, cramped reading." *Id.* 491. In 1966, in *United States v. Standard Oil Co.*, 384 U.S. 224, 225 (1966), the Court noted that the RHA must be interpreted in light of "common sense, precedent, and [its] legislative history." See also GRAD, *supra* note 84, at 3-253. One commentator stated that "navigability is now no more than a base that federal courts feel obligated to touch when clearing the path for the progress of federal policies or programs." Hoyer, *supra* note 84, at 23, 25-29. See also Dick Ratliff, *Wetlands Protection Under the Corps of Engineers' New Dredge and Fill Jurisdiction*, 28 HASTINGS L.J. 223, 226-27 (1976).

88. James S. Bowman, *The Environmental Movement: An Assessment of Ecological Politics*, 5 ENVTL. AFF. 649 (1976).

89. Hoyer, *supra* note 84, at 25-29. See also Charles D. Ablard & Brian Boru O'Neill, *Wetland Protection and Section 404 of the Federal Water Pollution Control Act Amendments of 1972: A Corps of Engineers Renaissance*, 1 VT. L. REV. 51, 54-58 (1976).

90. Hoyer, *supra* note 84, at 26-27; 33 C.F.R. 320.4 (2002).

91. 296 F. Supp. 764 (M.D. Fla. 1969), *rev'd* 430 F.2d 199 (5th Cir. 1970).

can regulate matters that significantly affect interstate commerce, including adverse environmental impacts on fish and wildlife and water quality.<sup>92</sup> This authority was reinforced by the Fish and Wildlife Coordination Act<sup>93</sup> and the National Environmental Policy Act (NEPA).<sup>94</sup>

Congress was also concerned with the Corps' jurisdiction and responsibility to protect the environment under the RHA. In 1970, the House Government Operations Committee recommended that the Corps should consider the effects that the proposed work will have on the conservation of natural resources, fish and wildlife, air and water quality, esthetics, scenic view, historic sites, ecology, and other public interest aspects of the waterway, as well as navigation, when considering applications for landfills, dredging, and other public works in navigable waters.<sup>95</sup>

President Nixon responded by issuing Executive Order 11574, which established a permit system to regulate discharges into navigable waters, including their nonnavigable tributaries.<sup>96</sup> However, a federal district court in *Kalur v. Resor*<sup>97</sup> invalidated the program for regulating the discharges into nonnavigable tributaries of navigable streams. The court held that the RHA only allows discharges into navigable waters with a permit. This decision provided part of the impetus for the enactment of the 1972 amendments to the FWPCA because all discharging into nonnavigable streams was illegal.<sup>98</sup>

## 2. 1972 FWPCA Amendments

The FWPCA, which was enacted in 1948, was amended five times prior to the major amendments in 1972. Initially, the FWPCA focused mainly on state-developed ambient water quality standards that

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92. 430 F.2d at 204-05. See also *Section 404 Permit Program Survives Legal Challenges, Faces Congressional and Administrative Review*, 11 ENVTL. L. REP. 10,233, 10,234 (Dec. 1981).

93. 16 U.S.C. § 661 (2000). The Fish and Wildlife Coordination Act (FWCA) mandates that the Corps consult with the FWS regarding the impact of its actions on fish and wildlife. The FWCA enunciates a national policy of "recognizing the vital contribution of our wildlife resources to the Nation, the increasing public interest and significance thereof due to expansion of our national economy and other factors, and to provide that wildlife conservation shall receive equal consideration and be coordinated with other features of water-resource development programs." *Id.*

94. 42 U.S.C. § 4321 (2000); *Zabel*, 430 F.2d at 209.

95. See H.R. REP. NO. 91-917, at 1-6 (1970).

96. Executive Order No. 11574, Administration of Refuse Act Permit Program, 35 Fed. Reg. 19,627 (Dec. 23, 1970).

97. 335 F. Supp. 1 (D.D.C. 1971).

98. GRAD, *supra* note 84, at 3-354, 3-255; Michael C. Blumm & D. Bernard Zaleha, *Federal Wetlands Protection Under the Clean Water Act: Regulatory Ambivalence, Intergovernmental Tension, and a Call for Reform*, 60 U. COLO. L. REV. 695, 700-02 (1989).

were only applicable to interstate navigable waters.<sup>99</sup> There were many problems with the water quality approach, so Congress changed the thrust of the FWPCA in 1972. Water quality standards were supplemented by federal point-source effluents limitations.<sup>100</sup> The aspirational goals of the FWPCA were fishable and swimmable waters by 1983 and zero discharges by 1985.<sup>101</sup> The federal regulation of dredge and fill discharges was addressed in section 404, which granted broad federal jurisdiction.

The Senate Committee on Public Works reported a bill in 1971 that extended federal jurisdiction to "the navigable waters of the United States, portions thereof, and includes the territorial seas and the Great Lakes."<sup>102</sup> The Committee recognized that the narrow interpretation of interstate waters limited the implementation of the 1965 act. The Committee stressed that "water moves in hydrological cycles and...the discharge of pollutants [must] be controlled at the source."<sup>103</sup> The Senate bill did not contain a specific provision regarding dredge and fill activities.

The House Committee on Public Works reported a bill in 1972 but was reluctant to define the term navigable waters, fearing "that any interpretation would be read narrowly, [which] is not the Committee's intent."<sup>104</sup> The Committee emphasized that "the term navigable waters be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes."<sup>105</sup> The House bill contained section 404, which granted the Corps jurisdiction over the discharge of dredge and fill materials into navigable waters.<sup>106</sup>

The conference committee followed the House bill and granted the Corps jurisdiction to regulate the discharge of dredge and fill

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99. S. REP. NO. 92-414, at 2 (1971), cited in A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, 93d Cong., 1st Sess. 1420 (1973) [hereinafter LEGISLATIVE HISTORY 1972].

100. Robin Kundis Craig, *Navigating Federalism: The Missing Statutory Analysis in Solid Waste Agency*, 31 ENVTL. L. REP. 10,508, 10,509 (2001).

101. 33 U.S.C. § 1251 (2000).

102. William Eskridge points out that committee reports are the most authoritative source of legislative history because they reflect the understanding of those who were involved in the drafting and study of the proposals. The committee reports show areas of agreement. The conference committee report shows the areas of disagreement and their resolution. Eskridge, *supra* note 45, at 637. See also Tiefer, *supra* note 53, at 251-54.

103. Senate Committee on Public Works, Federal Water Pollution Control Act Amendments of 1971, 92d Cong., 1st Sess. 77 (1971), cited in LEGISLATIVE HISTORY 1972, *supra* note 99, at 1495.

104. House Committee on Public Works, Federal Pollution Control Act Amendments of 1972, 92d Cong., 2d Sess. 131 (1972), cited in LEGISLATIVE HISTORY 1972, *supra* note 99, at 764.

105. *Id.*

106. *Id.* at 168-69, cited in LEGISLATIVE HISTORY 1972, *supra* note 99, at 855-57.



material into navigable waters. The EPA was granted concurrent jurisdiction to develop disposal site guidelines and to veto permits that "will adversely affect municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreation areas."<sup>107</sup>

The conference committee defined navigable waters as "the waters of the United States, including the territorial seas,"<sup>108</sup> which was identical to the definition in the House bill except for the omission of the word "navigable."<sup>109</sup> This means that the deletion was intentional.<sup>110</sup> The conferees intended "that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes."<sup>111</sup> Since the agency determinations referred to by the committee related to "navigability," this demonstrated the conference committee's intent to drop "navigability" as the basis for federal jurisdiction.<sup>112</sup>

There were statements on the floor of the Senate and House regarding the conference report.<sup>113</sup> Senator Muskie, a sponsor of the bill and conferee, declared that the provisions should be "construed broadly." Nevertheless, he noted that navigable waters are "navigable in fact," which means they form "a continuing highway over which commerce is or may be carried on..."<sup>114</sup> Representative Dingell stated that the conference committee defined "the term navigable waters broadly for water quality purposes."<sup>115</sup> Navigable waters encompassed "all the waters of the U.S. in a geographic sense,"<sup>116</sup> not a technical sense. The waterway must only serve "as a link in the chain of commerce

107. Conference Committee, Federal Water Pollution Control Act Amendments of 1972, SEN. REP. NO. 92-1236, at 141-42 (1972), cited in LEGISLATIVE HISTORY 1972, *supra* note 99, at 324-26.

108. *Id.* at 143-44, cited in LEGISLATIVE HISTORY 1972, *supra* note 99, at 326-27.

109. Robert Zener, *The Federal Law of Water Pollution Control*, in FEDERAL ENVIRONMENTAL LAW 682, 689-90, n.53 (Erica L. Dolgin & Thomas G.P. Guilbert eds., 1974) (citing H.R. 11896, 92d Cong., 2d Sess., § 502(8) (1972)).

110. *Id.*

111. See LEGISLATIVE HISTORY 1972, *supra* note 99, at 327.

112. Zener, *supra* note 109, at 690.

113. William Eskridge points out that the statements of sponsors and floor managers are particularly important because they are "most likely to know what the proposed legislation is all about, and other Members can be expected to pay special heed to their characterizations of the legislation." Eskridge, *supra* note 45, at 638. The statements of other legislators on the floor, while less authoritative, show "the general assumptions made at the time a law was enacted." *Id.* at 639.

114. LEGISLATIVE HISTORY 1972, *supra* note 99, at 178.

115. *Id.* at 250.

116. *Id.*

among the States..."<sup>117</sup> Representative Dingell declared that "no longer are old, narrow definitions of navigability, as determined by the Corps of Engineers, going to govern matters covered by this bill."<sup>118</sup>

Senator Muskie's statement in 1972 was ambivalent. He assumed a broad definition of navigable waters but continued to stress a nexus to navigable water.<sup>119</sup> Nevertheless, the plain meaning of the statute and the conference committee report are more authoritative than the individual views of a particular congressperson.<sup>120</sup> Representative Dingell's statement more accurately reflected the scope of federal jurisdiction. Furthermore, later statements by both Senator Muskie<sup>121</sup> and Representative Dingell<sup>122</sup> propounded the broadest possible definition for navigable waters, clearing up any ambiguities.

The amendments to the FWPCA in 1972 were designed to restore the nation's water quality and prevent pollution. Congress recognized that pollution was a national problem that required a national solution. Congress was concerned with the loss of fisheries and recreational values, unfair interstate competition, interstate pollution, and the disruption of ecosystems.<sup>123</sup> Federal jurisdiction was expanded to "the waters of the U.S" and given "the broadest possible constitutional interpretation."<sup>124</sup> Federal jurisdiction was dependent on the commerce clause, not the water's navigability. At the time, the courts recognized virtually unlimited federal commerce clause authority.<sup>125</sup>

### 3. 1977 Clean Water Act (CWA)

Despite the broad jurisdiction granted in the 1972 amendments to the FWPCA, the Corps continued to restrict its authority to waters

117. *Id.*

118. *Id.*

119. Senator Muskie's statement was taken verbatim from the legislative history of the vessel sewage provision of the 1970 Amendments to the FWPCA, a provision that applied to the "navigable waters of the United States" in the traditional sense of the term. 116 Cong. Rec. 8985 (1970). See Zener, *supra* note 109, at 690 n.56.

120. Eskridge, *supra* note 45, at 637. See also Michael C. Blumm, *Wetlands Preservation, Fish and Wildlife Protection, and 404 Regulation: A Response*, 18 LAND & WATER L. REV. 469 (1983).

121. A LEGISLATIVE HISTORY OF THE CLEAN WATER ACT OF 1977, A CONTINUATION OF THE LEGISLATIVE HISTORY OF THE FEDERAL WATER POLLUTION CONTROL ACT, 95th Cong., 2d Sess., at 869 (1978) [hereinafter LEGISLATIVE HISTORY 1977].

122. During the floor debates on the Clean Water Act of 1977, Rep. Dingell declared that the 1977 amendments represented a retreat from the 1972 CWA. He was opposed to granting the states jurisdiction over phase II and III waters because the states were too willing to develop their wetlands. LEGISLATIVE HISTORY 1977, *supra* note 121, at 1390.

123. Zener, *supra* note 109, at 692.

124. *Id.* at 690, 692 n.63.

125. Zener, *supra* note 109, at 692-93; Charles W. Smith, *Highlights of the Federal Water Pollution Control Act of 1972*, 77 DICK. L. REV. 459, 466 (1973).

navigable in fact. This generated institutional conflict. Positive political theory posits that the governmental institutions act as rational actors and compete with each other to have their policy preferences prevail. The competing players constantly signal each other regarding their intent.<sup>126</sup>

There was conflict within the executive branch. The EPA asserted jurisdiction over wetlands and declared that the conference committee deleted navigation from the definition of navigable waters to free pollution control from narrow jurisdictional boundaries. All that was required was a connection to interstate commerce, not to navigation.<sup>127</sup>

Congress was critical of the Corps' narrow interpretation. The House Committee on Government Operations advocated broader jurisdiction.<sup>128</sup> The federal courts also adopted a more expansive view of the Corps jurisdiction.<sup>129</sup> Several decisions required dredge and fill permits for activities on nonadjacent wetlands that had a hydrological connection to navigable waters.<sup>130</sup> In 1975, a federal district court invalidated the Corps regulation<sup>131</sup> and held that Congress intended to assert federal jurisdiction over waters to the maximum extent possible under the Commerce Clause.<sup>132</sup>

The Corps responded by issuing interim regulations that asserted jurisdiction over different classes of water in a three-phase

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126. William N. Eskridge, Jr., *Post-Enactment Legislative Signals*, 57 LAW & CONTEMP. PROBS. 75 (1994); Daniel A. Farber & Philip P. Frickey, *Foreward: Positive Political Theory in the Nineties*, 80 GEO. L.J. 457, 462 (1992); Barry Friedman, *Legislative Findings and Judicial Signals: A Positive Political Reading of United States v. Lopez*, 46 CASE W. RES. L. REV. 757 (1996).

127. *Comprehensive Wetlands Protection: One Step Closer to Full Implementation of 404 of FWPCA*, 5 ENVTL. L. REP. 10,099, 10,100-01 (1975); H.R. REP. NO. 93-1396, at 24 (1974); Environmental Protection Agency, Part 230-Navigable Waters, Discharge of Dredged or Fill Material, 40 Fed. Reg. 41,292, 41,297-98 (Sept. 5, 1975).

128. H. REP. NO. 93-1396, at 14-27.

129. Representative Harsha, one of the 1972 conferees, declared that "[t]he courts did not adjudicate a new definition of navigable waters....The Court has upheld our position on that. It did not redefine navigable waters." See LEGISLATIVE HISTORY 1977, *supra* note 121, at 1390.

130. See *United States v. Holland*, 373 F. Supp. 665 (M.D. Fla. 1974) (permitting federal regulation of activities above the mean high water line that pollute the waters of the United States); *United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317 (6th Cir. 1974) (involving the discharges of oil into a tertiary tributary to navigable U.S. waters); *P.F.Z. Props. v. Train*, 393 F. Supp. 1370, 1381 (D.D.C. 1975) and *Leslie Salt v. Froehke*, 403 F. Supp. 1292, 1296-97 (N.D. Cal. 1974) (each involving discharges of dredge and fill material into navigable waters of the United States).

131. *NRDC v. Callaway*, 524 F.2d 79 (2nd Cir. 1975). Blumm & Zaleha, *supra* note 98, at 705-06. Ablard & O'Neill, *supra* note 89, at 61-64. Joanne M. Frasca, *Federal Control Over Wetlands: The Effectiveness of Corps Regulation Under Section 404 of FWPCA*, 51 NOTRE DAME LAW. 505 (1975).

132. *Callaway*, 524 F.2d at 686.

process.<sup>133</sup> In phase I, the Corps would regulate discharges into coastal waters and wetlands, navigable rivers, lakes, streams, and contiguous and adjacent wetlands. In phase II, discharges into tributaries of navigable waters and their contiguous wetlands would be controlled. In phase III, discharges into all U.S. waters, including isolated waters that substantially affect interstate commerce, would be regulated. No section 404 permit would be approved until the state provided a water quality certification pursuant to section 401.<sup>134</sup>

The Corps' interim regulations generated harsh criticism. Some argued that the expansion of jurisdiction would overburden the Corps and intrude on state and local land use authority.<sup>135</sup> An unsuccessful suit was brought, challenging the Corps' broadened jurisdiction.<sup>136</sup> Twenty senators wrote to President Ford, requesting a delay in the implementation of phases II and III.<sup>137</sup> In July 1976, President Ford granted the request and suspended implementation of phase II while Congress considered the issue.<sup>138</sup>

There was an unsuccessful attempt to amend the FWPCA and resolve the jurisdictional dispute in 1976.<sup>139</sup> The House passed amendments that limited the Corps' jurisdiction to "navigable waters and their adjacent wetlands."<sup>140</sup> The Senate did not follow the House approach.<sup>141</sup> The Senate restricted the Corps' exclusive jurisdiction to traditional navigable waters pursuant to the RHA but allowed the states to assume control over dredge and fill activities in nontraditional

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133. Corps of Engineers, Dept. of Army, Part 209—Administrative Procedure, Permits for Activities in Navigable Waters and Ocean Waters, 40 Fed. Reg. 31,320, 31,326 (July 25, 1975).

134. *Id.*; see also *Comment: Corps Issues Interim Rules for Discharges of Dredge and Fill Materials*, 5 ENVTL. L. REP. 10,143 (1975).

135. This fear was highly exaggerated. LEGISLATIVE HISTORY 1977, *supra* note 121, at 1386-89 (statement of Rep. Edgar); *Environmental Groups Call Corps Permits Statement Deliberately Misleading*, 6 ENVT. REP. (BNA) 145 (1975); Daniel E. Boxer, *Every Pond and Puddle—or, How Far Can the Army Corps Stretch the Intent of Congress*, 9 NAT. RES. LAW. 467 (1976).

136. *Wyoming v. Hoffman*, 437 F. Supp. 114 (D. Wyo. 1977).

137. *Senators Plan to Ask President to Halt Phase II Dredge Fill Rules*, 7 ENVT. REP. (BNA) 285 (1976).

138. *Ford Halts Corps Phase II Rules: Senate Public Works Sets Hearings*, 7 ENVT. REP. (BNA) 435-36. James R. Curtis, *Note, The Clean Water of 1977: Midcourse Corrections in the Section 404 Program*, 57 NEB. L. REV. 1092, 1105-06 (1978).

139. Lee Evan Caplin, *Is Congress Protecting Our Water? The Controversy Over Section 404, Federal Water Pollution Control Act Amendments of 1972*, 31 U. MIAMI L. REV. 445 (1977).

140. The historic test of navigability, that past use makes the waterway always navigable, was eliminated. Adjacent wetlands only included freshwater wetlands contiguous or adjacent to other navigable waters. Freshwater wetlands not contiguous or adjacent to other navigable waters were omitted. *Id.* at 460-66.

141. *Id.* at 479-89.

navigable waters (phase II and III waters) with EPA authorization.<sup>142</sup> Nevertheless, the conferees could not reach an agreement over the Corps' section 404 jurisdiction, so the amendments were not enacted.<sup>143</sup>

In 1977, Congress again considered amendments to the FWPCA. The House Public Works Committee reported a bill that was similar to the 1976 House measure.<sup>144</sup> Navigable waters were limited to waters navigable in fact up to the mean high water level and their adjacent wetlands. Historic navigable waters were excluded. The discharge of dredge and fill into nonnavigable waters and adjacent wetlands could be regulated by the Corps and states through voluntary agreements. The committee was critical of the court's expansion of navigable waters and the Corps' regulations.<sup>145</sup>

The House bill was criticized for placing 98 percent of the nation's stream miles and 80 percent of the nation's wetlands beyond federal jurisdiction. There was fear that loopholes would allow the dumping of toxic wastes into nonnavigable waters and adjacent wetlands. There were doubts that the states could implement dredge and fill programs. Problems with point source discharges and enforcement actions were envisioned. Both the Corps and the EPA opposed the House bill.<sup>146</sup>

The Senate Public Works Committee rejected the House approach.<sup>147</sup> The committee felt that the Corps' jurisdiction could not be limited to traditional navigable waters, so there would be no redefinition of navigable waters. The Senate bill "intends to ensure continued protection of all the Nation's waters, but allows States to assume the primary responsibility for protecting those lakes, rivers, streams, swamps, marshes, and other portions of the navigable waters outside the Corps program in the so-called phase I waters."<sup>148</sup> The Corps would continue to control the discharge of dredge and fill material into nontraditional navigable waters until state programs were approved.<sup>149</sup>

During the Senate debates, there was recognition of the importance of protecting wetlands,<sup>150</sup> as well as efforts to amend section

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142. *Id.*

143. *Id.* at 489-90.

144. H.R. REP. NO. 95-139 (1975), cited in LEGISLATIVE HISTORY 1977, *supra* note 121, at 1195.

145. LEGISLATIVE HISTORY 1977, *supra* note 121, at 1215-20.

146. *Comment: The Move to Amend § 404 of FWPCA: House Passes Bill Limiting Federal Authority Over Dredge and Fill Activities*, 7 ENVTL. L. REP. 10,082, 10,083 (1977).

147. S. REP. NO. 95-370 (1977), reprinted in LEGISLATIVE HISTORY 1977, *supra* note 121, at 633.

148. LEGISLATIVE HISTORY 1977, *supra* note 121, at 708.

149. *Id.*

150. Senator Stafford stated, "the section 404 process is an essential tool....Without it, critical aquatic areas...[that] are essential to the preservation of migratory and resident fish,

404. Senator Bentsen offered an amendment that would restrict the Corps' jurisdiction to the parameters of the House bill. Senator Bentsen argued that the delegation of the authority to the states did not reduce the scope of section 404. If a state did not assume responsibility, the Corps would continue to regulate the dredge and fill discharges into the waters of the United States.<sup>151</sup> The Bentsen amendment was criticized on the floor by Senators Baker<sup>152</sup> and Muskie,<sup>153</sup> both 1972 conferees on the FWPCA, and was defeated by a vote of 45 to 51. All of the 1972 conferees remaining in the Senate voted against the amendment: Senators Baker, Muskie, Randolph, Eagleton, and Bayh.<sup>154</sup>

The conference committee, which was comprised of seven 1972 conferees,<sup>155</sup> adopted the Senate version.<sup>156</sup> There was no change in the definition of navigable waters. States were permitted to assume jurisdiction over dredge and fill discharges in nontraditional navigable waters (phase II and III waters) after EPA approval of their programs.<sup>157</sup> The discharge of dredge and fill material from normal farming, silviculture, and ranching, as well as that from federal projects authorized by Congress,<sup>158</sup> was exempted from section 404

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bird and other animal populations, might otherwise be irrevocably destroyed." *Id.* at 881. Senator Randolph, a 1972 conferee, characterized the bill as "a realistic and workable way of protecting our Nation's waterways from contamination by the disposal of dredged and fill materials. The section of the CWA of 1977 is similar to that in last years bill." *Id.* at 897.

151. *Id.* at 901-10.

152. Senator Baker stated that "[a] fundamental element of the Water Act is broad jurisdiction over water for pollution control purposes....Comprehensive jurisdiction is necessary not to protect the natural environment but also to avoid creating unfair competition." *Id.* at 920-21.

153. Senator Muskie noted that "the systematic destruction of the Nation's wetlands is causing serious, permanent ecological damage. The wetlands...are the Nation's most biologically active areas...they also provide nesting areas for myriad of species of birds and wildlife." *Id.* at 869.

154. *Id.* at 947. Senators Boggs and Cooper were no longer in the Senate.

155. The 1977 conference committee consisted of seven members from the 1972 conference committee: Senators Baker, Muskie, and Randolph and Representatives Johnson, Roe, Harsha, and Clausen.

156. H.R. REP. NO. 95-830 (1977), reprinted in LEGISLATIVE HISTORY 1977, *supra* note 121, at 185.

157. 33 U.S.C. 1344(g) (2000); see also LEGISLATIVE HISTORY 1977, *supra* note 121, at 221-29, 284-89. For a debate on Section 404, see Lance D. Wood, *The Forum's Proposal to Delegate Section 404 to the States: A Bad Deal for Wetlands*, NAT'L WETLANDS NEWSL. (Envtl. Law Inst., Washington, D.C.), July-Aug. 1989, at 2; Thomas H. Kean, *A Reply to Mr. Wood*, NATIONAL WETLANDS NEWSL. (Envtl. Law Inst., Washington, D.C.), Nov.-Dec. 1989, at 3; Lance D. Wood, *Section 404 Delegation: A Rebuttal to Governor Kean*, NAT'L WETLANDS NEWSL. (Envtl. Law Inst., Washington, D.C.), Jan.-Feb. 1990, at 2; Thomas J. Dawson, *States Need Commitment, Leadership, and Backbone, Not Section 404*, NAT'L WETLANDS NEWSL. (Envtl. Law Inst., Washington, D.C.), Jan.-Feb. 1990, at 4.

158. 33 U.S.C. 1344(r) (2000).

requirements.<sup>159</sup> Funds were authorized for a national wetlands inventory.<sup>160</sup>

On December 15, 1977, Congress passed the bill, which is known as the Clean Water Act. President Carter signed the bill, stating, "the Nation's wetlands will continue to be protected under a framework which is workable and which shares responsibilities with the States."<sup>161</sup>

The Court in *SWANCC* adopted a very constrained view of the 1977 legislative history.<sup>162</sup> The Court declared that it is dangerous to base statutory interpretation on rejected congressional proposals because there are many reasons for their demise.<sup>163</sup> Instead, the Court determined that the federal government had not shown that failure to constrain the Corps' jurisdiction indicated congressional acceptance of the migratory bird rule. The debates in Congress only focused on the extent of the Corps' jurisdiction and were only concerned with wetland preservation. There was nothing to indicate that the Corps' jurisdiction extended beyond adjacent wetlands, as upheld in *Riverside Bayview Homes*.<sup>164</sup>

The Court's view on this matter was dubious. Rejected proposals are important because they show that Congress considered the issue and discarded the policy proposal.<sup>165</sup> Congress, in 1977, disdained the restriction of the Corps' jurisdiction upheld in *SWANCC*. The House bill and the Bentsen amendment, which were designed to limit the Corps' jurisdiction to traditional navigable waters, were rejected. Statements by several of the 1972 conferees indicated that such a restriction was not consistent with legislative intent in 1972. Furthermore, section 404(g) was enacted, which specifically recognized federal jurisdiction over waters "other than" traditional navigable waters.

The Court attached great significance to the 1977 amendments in *United States v. Riverside Bayview Homes, Inc.*<sup>166</sup> The Court found the Corps' regulatory definition reasonable in light of the language, policies, and legislative history of the CWA, which reflected clear congressional intent to extend federal jurisdiction beyond traditional navigable

159. 33 U.S.C. 1344(f) (2000).

160. 33 U.S.C. 1288(4) (B)(v) (2000).

161. LEGISLATIVE HISTORY 1977, *supra* note 121, at 185. Earlier President Carter issued Executive Order 11990, which instructed federal agencies "to minimize the destruction, loss or degradation of wetlands, and to preserve and enhance the nature and beneficial values of wetlands in carrying the agency's responsibilities..." Exec. Order No. 11990, 42 Fed. Reg. 26,961 (May 24, 1977).

162. *SWANCC v. U.S. Army Corps of Eng'rs*, 121 S. Ct. 675, 681-82 (2001).

163. *Id.*, citing *Central Bank of Denver, N.A. v. First Interstate Bank of Denver*, 511 U.S. 164 (1994).

164. *SWANCC*, 121 S. Ct. at 681-83, citing *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 136 (1985).

165. Eskridge, *supra* note 45, at 638-39.

166. *Riverside Bayview Homes*, 474 U.S. at 121.

waters.<sup>167</sup> Regarding the legislative history, the Court determined that the unsuccessful efforts to restrict the Corps regulatory definition during the enactment of the 1977 amendments were significant and demonstrated congressional approval of the Corps' action.<sup>168</sup>

The 1977 amendments were subsequent legislative history, which is generally considered less authoritative because it is not indicative of the intent and purpose of the original legislature. However, the Court at times relies on subsequent legislative history "when the precise intent of the enacting Congress is obscure."<sup>169</sup> The original intent of Congress in 1972 was clear and was simply reinforced by the 1977 amendments. Furthermore, many of the same congresspersons who were conferees in both the 1972 and 1977 FWPCA amendments stated that broad federal jurisdiction was assumed in the 1972 FWPCA amendments.

The Court in *SWANCC* also neglected the 1988 Water Resources Development Act,<sup>170</sup> which instructed the Corps to consult with the EPA and consider the impacts on Newark Valley Aquifer before issuing any section 404 permit at the *SWANCC* site in Bartlett, Illinois. The EPA initially found that there were no risks but later changed its position. This provision indicates congressional approval of the Corps' jurisdiction over the site.<sup>171</sup>

### C. Purposes

The court's statutory interpretation must also be guided by the legislative purpose, which is the ultimate motive of the legislature.<sup>172</sup> The legislative purpose is the best justification that can be attributed to the statute in terms of its relationship with the set of legal norms operating at the time of the court's decision. The legislative purpose, which is more abstract than intention, helps the court to determine the legislative intent, directs the court when the intent has not been manifested, and allows the court to keep the statute in harmony with contemporary values.<sup>173</sup>

167. *Id.* at 137-38.

168. *Id.* at 137, citing *Bob Jones University v. United States*, 461 U.S. 574, 599-601 (1983); *United States v. Rutherford*, 442 U.S. 544, 554 n.10 (1979).

169. Eskridge, *supra* note 45, at 635-36, 640.

170. Water Resources Development Act, Pub. L. No. 100-676, 102 Stat. 4012 (1988) (codified at 33 U.S.C. §§ 2312 et seq. (2000)).

171. Brief for the Respondents Village of Bartlett and Citizens Against the Balefill at 16 n.6, *SWANCC v. U.S. Army Corps of Eng'rs*, 121 S. Ct. 675 (2001) (No. 99-1178).

172. HENRY M. HART & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1374 (1994); DICKERSON, *supra* note 72, at 86-102.

173. HART & SACKS, *supra* note 172, at 1374-80; Vincent A. Wellman, *Dworkin and the Legal Process Tradition: The Legacy of Hart & Sacks*, 29 AZ. L. REV. 413, 463 (1987).



Critics argue that reliance on the legislative purposes is indeterminate for the following reasons: (1) since the legislative purposes are stated in general terms, the court is granted too much discretion; (2) a statute reflects many different purposes because it must be acceptable to a wide range of interests in order to be enacted; (3) focusing on the purposes ignores the statutory text; and (4) the optimistic assumptions regarding purposeful rational legislative processes are naïve.<sup>174</sup>

Hart and Sacks address this criticism and assert that the attribution of purpose does not grant the court unbridled discretion. The court is constrained by the words of the statute, which are enacted into law. The court must be careful not to give the words "a meaning that they will not bear."<sup>175</sup> Words are not empty vessels into which the court pours meaning but have a dual role "as guides in the attribution of general purpose and as factors limiting the particular meanings that can properly be attributed."<sup>176</sup> The words must not be given "a meaning which would violate any established policy of clear statement."<sup>177</sup> The court must "try to put itself in...the position of the legislature which enacted the measure" and assume that the "legislature was made up of reasonable persons pursuing reasonable purposes reasonably."<sup>178</sup> The court asks, "why would reasonable men, confronted with the law as it was, have enacted this new law to replace it."<sup>179</sup> The court looks for the "mischief" in the prior statute and "the true reason of the remedy" provided by the new statute.<sup>180</sup> The legislative history must be examined "for the light it throws on the general purpose."<sup>181</sup>

The Court in *SWANCC* never addressed, but undermined, the purposes of the CWA. The declared purpose of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."<sup>182</sup> The House Public Works Committee explained that integrity means "a condition in which the natural structure and function

174. Eskridge & Frickey, *Statutory Interpretation as Practical Reasoning*, *supra* note 55, at 334-38; William N. Eskridge & Philip P. Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691, 704-09 (1987).

175. HART & SACKS, *supra* note 172, at 1374-76.

176. *Id.* at 1375.

177. *Id.* at 1374.

178. *Id.* at 1378.

179. *Id.*

180. HART & SACKS, *supra* note 172, at 1378.

181. *Id.* at 1379-80. See also Breyer, *supra* note 77, at 853-56; Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest-Group Model*, 86 COLUM. L. REV. 223, 261-67 (1986). Farber and Frickey note that "Hart and Sacks are not so much Panglossian empiricists as savvy normativists—crafters of assumptions that provide useful judicial and administrative side-constraints upon the less attractive features of politics." Farber & Frickey, *supra* note 126, at 475.

182. 33 U.S.C. § 1251 (2000). See also Blumm, *supra* note 120, at 475-76.

of the ecosystems is maintained."<sup>183</sup> Natural means "that condition in existence before the activities of man invoked perturbations which prevented the system from returning to its original state of equilibrium."<sup>184</sup> Any manmade change to the system "which overtaxes the ability of nature to restore conditions to natural or original is an unacceptable perturbation."<sup>185</sup> Ecosystems are dynamic and undergo change overtime. Natural ecosystems are "capable of preserving themselves at levels believed to have existed before irreversible perturbations caused by man's activities."<sup>186</sup>

To accomplish these objectives, the CWA seeks to end discharges into U.S. waters by 1985 and achieve interim water quality that provides for "the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water" by 1983.<sup>187</sup> The CWA is concerned with pollution and ecological balance, not with navigation or the regulation of interstate transport.

If section 404 is limited to navigable waters, there will be gaps in the comprehensive statutory scheme. Section 404 protects against dredge spoils, which contain heavy toxic metals, and fill materials, that destroy the waters and wetlands. Many isolated waters and wetlands are hydrologically connected to navigable waters through groundwater and flooding, so adverse impacts cannot be constrained.<sup>188</sup> Furthermore, many isolated waters and wetlands, which are ecologically connected to navigable waters, will be left unprotected. The discharge of dredge and fill material into these waters will jeopardize fish and wildlife and upset aquatic ecosystems, which will have interstate impacts.<sup>189</sup> For example, the destruction of prairie potholes in the northern Great Plains or the playa lakes of the Great Basin will have adverse effects on the migratory shorebirds that are part of the ecological balance at other wetland sites on the east and west coasts.<sup>190</sup>

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183. See LEGISLATIVE HISTORY 1972, *supra* note 99, at 763.

184. *Id.*

185. *Id.* at 764.

186. *Id.*

187. *Id.*

188. Stephen M. Johnson, *Federal Regulation of Isolated Wetlands*, 23 ENVTL. L. 1, 30-31 (1993). Wetlands are dynamic water systems that are linked to other aquatic systems. Jon A. Kusler, et al., *Wetlands*, SCI. AM., Jan. 1994, at 68-70. Numerous water basins and water bodies overlap state boundaries and are affected by the destruction of wetlands in one state. Brief of the States of California et al. at 21-22, *SWANCC v. U.S. Army Corps of Eng'rs*, 121 S. Ct. 675 (2001) (No. 99-1178). See also *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 216 F.3d 764, 767-68 (9th Cir. 2000) (describing the effect of wetlands disturbance on the water quality of the lake).

189. LEGISLATIVE HISTORY 1977, *supra* note 121, at 1397-98.

190. Houck & Rolland, *supra* note 24, at 1247. *U.S. v. Riverside Bayview Homes Inc.*, NAT'L WETLANDS NEWSL. (Envtl. Law Inst., Washington, D.C.), Jan.-Feb. 1986, at 17. See also Laura

The protection of isolated waters and wetlands, which "represent an ecosystem of unique and major importance,"<sup>191</sup> realizes the environmental goals of the CWA. Isolated waters and wetlands serve as habitat for mammals, fish, and waterfowl.<sup>192</sup> They are the principal breeding grounds for migratory birds and serve as a habitat oasis in dry regions during migration. Isolated waters and wetlands help prevent erosion, slow runoff, and curtail flooding by holding water. Isolated waters and wetlands filter out pollutants and restore the quality of surface and ground water. Isolated waters and wetlands are a vital link in the aquatic food chain. The plant life provides food for marine and freshwater animals. Half of the fish and shellfish reside in wetlands during part of their life.<sup>193</sup> Recognizing these values, the federal government has adopted a longstanding policy of protecting and preserving wetlands.<sup>194</sup>

H. Kolsoff, *Comment, Tragedy of the Kesterson Reservoir: Death of a Wildlife Refuge Illustrates Failings of Water Law*, 15 ENVTL. L. REP. 10,386 (1985).

191. Environmental Protection Agency, Protection of Nation's Wetlands, 38 Fed. Reg. 10,699, 10,834 (May 2, 1973).

192. Small wetlands are important for "maintaining the biodiversity of a number of plant and animal species. Furthermore, healthy populations of many species depend on not just a single wetland but a landscape densely covered by a variety of wetlands." Raymond D. Semlitsch, *Size Does Matter: The Value of Small Isolated Wetlands*, NAT'L WETLANDS NEWSL. (Envtl. Law Inst., Washington, D.C.), Jan.-Feb. 2000, at 5.

193. Semlitsch, *supra* note 192, at 5; Environmental Protection Agency, Protection of Nation's Wetlands, 38 Fed. Reg. 10,834-35 (May 2, 1973); Eric W. Nagle, *Wetlands Protection or the Neglected Child of CWA: A Proposal for Shared Custody of Section 404*, 7 VA. J. NAT. RES. L. 381, 384-89 (1988); Bhavani Prasad V. Nerikar, *This Wetland Is Your Land, This Wetland Is My Land: Section 404 of the CWA and Its Implications on the Private Development of Wetlands*, 4 ADMIN. L.J. 197, 202-07 (1990).

194. In the Water Bank Act, Congress declared that it is in the public interest to preserve, restore, and improve wetlands of the Nations, and thereby to conserve surface waters, to preserve and improve habitat for migratory waterfowl and other wildlife resources...The Secretary of Agriculture...is authorized and directed to formulate and carry out a continuous program to prevent the serious loss of wetlands, and to preserve, restore and improve such lands...

Water Bank Act, 16 U.S.C. § 1301 (2000).

In the North American Wetlands Conservation Act, Congress stated, The purposes of this chapter are to encourage partnership among public agencies and other interests— 1) to protect, enhance, restore, and manage an appropriate distribution and diversity of wetland ecosystems and other habitats for migratory birds and other fish and wildlife in North America; 2) to maintain current or improved distributions of migratory bird populations; and 3) to sustain an abundance of waterfowl and other migratory birds consistent with the goals of the North American Waterfowl Management Plan and the international obligations contained in the migratory bird treaties and conventions and other agreements with Canada, Mexico, and other countries.

The Supreme Court in *United States v. Riverside Bayview Homes, Inc.*, focusing on the statutory purposes, noted that the CWA "constituted a comprehensive legislative attempt" to restore and maintain "the integrity of the Nation's waters."<sup>195</sup> The regulation of polluting activities "must focus on all waters that together form the entire aquatic system." Water moves in hydrologic cycles, so that pollution in any part of the system "will affect the water quality of the other waters within the aquatic system."<sup>196</sup> As a result, "Congress chose to define the waters covered by the Act broadly."<sup>197</sup> The Court concluded that "Congress evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its power under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of the term."<sup>198</sup> Furthermore, the Court specifically recognized the ecological benefits of protecting adjacent wetlands.<sup>199</sup> Isolated waters and wetlands provide the same benefits.<sup>200</sup>

### III. STATUTORY INTERPRETATION: STEP-TWO

*Chevron* holds that if Congress has not addressed the issue, the court can "not simply impose its own construction on the statute."<sup>201</sup> The court must move to the second step and determine "whether the agency's answer is based on a permissible construction of the statute."<sup>202</sup> The court does not have to conclude that the agency's construction is "the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question had arisen in a judicial proceeding."<sup>203</sup> Instead, the court must defer to "a reasonable interpretation made by the administrator of the agency."<sup>204</sup>

Judges are admonished not to read their policy preferences into the law because they lack expertise and are not accountable to the

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North American Wetlands Conservation Act, 16 U.S.C. § 4401 (2000). See also *infra* notes 471-483.

195. 474 U.S. 121, 132 (1985).

196. *Id.*

197. *Id.* at 133.

198. *Id.* at 132. The Court did, however, decide not "to address the question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water." *Id.* at 131 n.8.

199. *Id.* at 133-35.

200. *United States v. Riverside Bayview Homes*, 474 U.S. 121, 132-35 (1985).

201. *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984).

202. *Id.*

203. *Id.* at 843 n.11.

204. *Id.* at 844.

electorate. Congress delegated power to the agency, which can "properly rely upon the incumbent administration's views of wise policy to inform its judgments."<sup>205</sup> The President, who has the constitutional responsibility to faithfully execute the law,<sup>206</sup> makes policy choices that "resolve the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities."<sup>207</sup>

*Chevron* is applauded for decreasing judicial review.<sup>208</sup> Agencies will be "encouraged to take more responsibility for interpreting the statutes they implement."<sup>209</sup> Litigants will "make their best arguments, clearly and aggressively, before the agency rather than waiting for the main event in the courthouse."<sup>210</sup> Agencies will have more flexibility to change their statutory interpretation "in light of new scientific, industrial, or other developments or even because a recently elected administration has a new regulatory program."<sup>211</sup> The development of national policy will be facilitated by precluding different circuit courts from rendering different decisions on the same issues, preventing the "balkanization of federal law."<sup>212</sup>

*Chevron* has not been followed consistently by the courts.<sup>213</sup> To alleviate this problem, Professor Merrill suggests that the courts should treat executive decisions like judicial precedents and accord them discretionary deference. The courts should ask three questions: (1) Is there an executive precedent? (2) How strong is the executive precedent?

205. *Id.* at 865-66.

206. U.S. CONST. art. II, § 1, cl. 3.

207. *Chevron*, 467 U.S. at 865-66.

208. For criticism of *Chevron*, see Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 466-69, 488-99 (1987); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 478-88 (1989); Alfred Aman, *Administrative Law in a Global Era: Progress, Deregulatory Change, and the Rise of the Administrative Presidency*, 73 CORNELL L. REV. 1101, 1228-35 (1988).

209. Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. REG. 283, 311 (1986).

210. *Id.*

211. Clark Byse, *Judicial Review of Administrative Interpretation of Statutes: An Analysis of Chevron's Two Step*, 2 ADM. L.J. 255, 259 (1988).

212. Peter L. Strauss, *One Hundred and Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1122 (1987).

213. From 1984 through 1990, the Court only invoked *Chevron* in approximately one-third of the appropriate circumstances. Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 981 (1992); Merrill, *Textualism and the Future of the Chevron Doctrine*, *supra* note 50, at 355-63. Other courts have manifested the same ambivalence. *Id.* See also Richard C. Pierce, *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 DUKE L.J. 300, 312-13 n.82; Strauss, *supra* note 212, at 1118-19; Peter H. Schuck & E. Donald Elliot, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1118-19 (1990).

and (3) Does independent judicial review compel a different result?<sup>214</sup> The courts should uphold agency decisions with strong precedents that carry out congressional intent.<sup>215</sup>

The Court in *SWANCC* refused to defer to the Corps' statutory interpretation absent clear direction in the CWA because the Corps' interpretation "raised significant constitutional and federalism questions."<sup>216</sup> The Court's reliance on the canons of statutory interpretation, the clear statement rule, and avoidance of constitutional doubt was questionable.

Canons are flawed for several reasons. First, canons are not policy neutral.<sup>217</sup> They provide contradictory rules, which a judge can choose to support her view of the case. Karl Llewellyn noted that "there are two opposing canons on almost every point."<sup>218</sup> Second, canons pose problems as guides to meaning. Canons are presumptions about legislative intent. There is little evidence that legislators are aware of the canons of statutory interpretation. Canons shift the burden of proof and force the legislature to overcome the judicial presumption, rather than requiring the judge to search for meaning.<sup>219</sup> The best indications of legislative intent are not found in the canons but in the legislative history.<sup>220</sup>

The strong clear statement rule has many drawbacks.<sup>221</sup> First, it allows the court to ignore clear signals in the legislative history and statutory purposes and undermines legislative bargains.<sup>222</sup> Second, it enables the court to advance its ideological agenda without directly antagonizing Congress.<sup>223</sup> Third, it is based on an unrealistic view of the legislative process. Reaching agreement in Congress is difficult, so it is often necessary to fashion the statutory language in general terms and

214. Merrill, *Judicial Deference to Executive Precedent*, *supra* note 213, at 1003-12.

215. *Id.* See also David M. Forman, *Economic Development Versus Environmental Protection: Executive Oversight and the Judicial Review of Wetland Policy*, 15 HAWAII L. REV. 23, 31-36 (1993).

216. *SWANCC v. U.S. Army Corps of Eng'rs*, 121 S. Ct. 675, 683-84 (2001).

217. William N. Eskridge & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 595-96 (1992).

218. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401 (1950).

219. Mikva & Lane, *supra* note 52, at 129. Breyer, *supra* note 77, at 869-74.

220. The canon of statutory construction is "a rule used in construing legal instruments, especially contracts and statutes." BLACK'S LAW DICTIONARY 198 (7th ed. 1999). The legislative history is "the background and events leading to the enactment of a statute, including hearings, committee reports, and floor debates." *Id.* at 911.

221. Eskridge & Frickey, *supra* note 217, at 595-98.

222. *Id.*; Healy, *supra* note 7, at 10,940.

223. William N. Eskridge & Philip P. Frickey, *Forward: Law as Equilibrium*, 108 HARV. L. REV. 26, 85 (1994).

delegate implementing authority to the administrative agency.<sup>224</sup> Fourth, it constitutes the classic "bait-and-switch." Congress enacts statutes with presumptions about the interpretative regime. When the court changes the interpretative regime, it undermines legislative intent.<sup>225</sup> Fifth, it makes the delegation of authority to an administrative agency difficult and encumbers the agency's ability to act.<sup>226</sup> Finally, it frustrates *Chevron*, which presumes the supremacy of the administrative agency's statutory interpretation in the presence of congressional doubt.<sup>227</sup>

The avoidance of constitutional doubt canon poses constitutional difficulties.<sup>228</sup> The avoidance canon, which is based on legislative supremacy,<sup>229</sup> posits that when alternative interpretations of a statute are possible, the court must choose the one that precludes constitutional invalidity.<sup>230</sup> The canon, however, presents problems with the constitutional separation of powers. First, the canon does not foster legislative supremacy. Congress might want to push the constitutional parameters when enacting a statute and generate a constitutional determination.<sup>231</sup> By avoiding a constitutional determination, the court may interpret the statute in a manner that is inconsistent with the text, intent, and purposes of the statute.<sup>232</sup> The Court noted that the canon is not "a license for the judiciary to rewrite the language enacted by the

224. *Supreme Court—Leading Cases*, 115 HARV. L. REV. 528, 536-37 (2001).

225. Eskridge & Frickey, *supra* note 223, at 85; Healy, *supra* note 7, at 10,939 n.108.

226. Healy, *supra* note 7, at 10,940-41.

227. Judge Mikva observed "that when Congress has not given a clear command, we presume that it has accorded discretion to the agency to clarify any ambiguities in the statute it administers. In requiring the agency to justify its regulation by reference to such a clear command, the majority confounds its role. Ties are supposed to go to the dealer under *Chevron*." Sweethome Chapter of Communities for a Great Or. v. Babbitt, 17 F.3d 1463, 1475 (1995) (Mikva, J., dissenting).

228. William K. Kelley, *Avoiding Constitutional Questions as a Three Branch Problem*, 86 CORNELL L. REV. 831 (2001); Lisa A. Kloppenberg, *Avoiding Serious Constitutional Doubts: The Supreme Court's Construction of Statutes Raising Free Speech Concerns*, 30 U.C. DAVIS L. REV. 1 (1996); Lawrence C. Marshall, *Divesting the Courts: Breaking the Judicial Monopoly on Constitutional Interpretation*, 66 CHI.-KENT L. REV. 481 (1990).

229. The justifications for the canon are

- (1) the delicacy and (2) finality of judicial review of legislative acts; (3) the limitations on authority and jurisdiction of federal courts; (4) the "paramount importance of constitutional adjudication in our system"; (5) separation of powers concerns raised by ruling on the acts of coequal branches; and (6) the need to show respect for other branches.

Kloppenberg, *supra* note 228, at 13-14.

230. The Court noted that it has long been an axiom of statutory interpretation that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

231. Kelley, *supra* note 228, at 846-47.

232. *Id.*

legislature."<sup>233</sup> Second, the avoidance canon interferes with the Executive Branch's Article II responsibility to insure the faithful execution of the law. *Chevron* holds that Congress delegated authority to democratically accountable expert agencies to fill in the gaps of a statute. The avoidance canon undermines the agency's implementation of the statute. Without declaring the agency action unconstitutional, the court simply substitutes its view on policy for that of the agency.<sup>234</sup> Finally, the avoidance canon precludes judicial review, yet the court is still engaged in "'quasi-constitutional lawmaking' and developing 'phantom constitutional norms.'"<sup>235</sup> This muddles the constitutional dialogue with other political actors.<sup>236</sup>

The Court's invocation of the clear statement rule in *SWANCC* ignored important signals in the legislative history and statutory purposes, which clearly indicated broad federal jurisdiction. The Court's utilization of the canon of constitutional doubt interfered with the implementation of the CWA and undermined *Chevron*. The Court ignored strong executive precedent. The Corps' assertion of jurisdiction over waters having a substantial effect on interstate commerce, which was consistent with congressional intent, had been followed for 26 years. The migratory bird rule had been in effect for 15 years, adhered to by three administrations, and upheld by most courts. There was no reason to change the policy. Neither the Executive Branch nor Congress was seeking such change. The Court simply substituted its views on policy for those of the Corps.

### A. The History of the Migratory Bird Rule

After the enactment of the FWPCA amendments in 1972, the Corps continued to limit its jurisdiction to navigable waters up to the mean high waterline.<sup>237</sup> The federal courts, however, supported a broader

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233. *United States v. Albertini*, 472 U.S. 675, 680 (1985); *United States v. Monsanto*, 491 U.S. 600, 611 (1989).

234. Kelley, *supra* note 228, at 869-91.

235. Kloppenborg, *supra* note 228, at 16-17; Eskridge & Frickey, *supra* note 217, at 612-15.

236. Kloppenborg, *supra* note 228, at 17-24; Marshall, *supra* note 228, at 484-86.

237. Corps of Engineers, Dep't of Army, Part 209—Administrative Procedure, Definition of Navigable Waters of the United States, 37 Fed. Reg. 17,807, 18,289 (Sept. 9, 1972); Corps of Engineers, Dep't of Army, 33 CFR Part 209, Permits for Activities in Navigable Waters and Ocean Waters, 38 Fed. Reg. 11,959, at 12,217, 12,218 (May 10, 1973); Corps of Engineers, Dep't of Army, Permits for Activities in Navigable Waters and Ocean Waters, 39 Fed. Reg. 11,855, 12,115 (Apr. 3, 1974); Blumm, *supra* note 120, at 477-78; Nagle, *supra* note 193, at 245-46; Jerry Jackson, NAT'L WETLANDS NEWSL. (Env'tl. Law Inst., Washington, D.C.), Sept.-Oct. 1987, at 8; William P. Want, *Federal Wetlands Law: The Cases and the Problems*, 8 HARV. ENVTL. L. REV. 1, 10-11 (1984). This position was criticized by the EPA, the Department of Justice, and the House Government Operations Committee. *Comprehensive Wetlands Protec-*



view of the Corps' jurisdiction and upheld federal regulation of dredge and fill discharges into nonnavigable waters, if those waters were in any way connected to navigable waters. The courts were concerned about the movement of pollutants from nonnavigable to navigable waters and the maintenance of aquatic ecosystems.<sup>238</sup> The Natural Resources Defense Council and the National Wildlife Federation (NWF) brought suit in 1975, challenging the Corps' restrictive jurisdiction. The federal district court in *Natural Resources Defense Council v. Callaway*<sup>239</sup> invalidated the Corps' regulations and determined that the FWPCA authorized broader jurisdiction.<sup>240</sup>

The Corps responded to the NRDC decision by proposing four alternative regulations.<sup>241</sup> The broadest, Alternative I, followed the EPA regulations and asserted jurisdiction over all U.S. waters. The narrowest, Alternative IV, asserted jurisdiction over traditional navigable waters and was preferred by the Corps. The proposed regulations were accompanied by an inflammatory press release claiming that under Alternative I, ranchers who want to enlarge a stock pond and farmers who seek to deepen an irrigation ditch or plow a field might need a section 404 permit.<sup>242</sup>

The EPA criticized the news release for being deliberately misleading and accused the Corps of creating panic.<sup>243</sup> In response, the Corps developed interim final regulations that called for a three-phase compliance schedule for section 404.<sup>244</sup> There were numerous comments on the regulations.<sup>245</sup> The EPA<sup>246</sup> and the Department of Interior<sup>247</sup>

*tion: One Step Closer to Full Implementation of § 404 of the FWPCA*, 5 ENVTL. L. REP. 10,099, 10,100 (1975); H.R. REP. NO. 93-1396, at 24.

238. *United States v. Holland*, 373 F. Supp. 665 (D. Fla. 1974); *United States v. Ashland Oil & Transp.*, 364 F. Supp. 349 (W.D. Ky. 1973); *P.F.Z. Props. v. Train*, 393 F. Supp. 1370 (D.D.C. 1975); *Leslie Salt v. Froehlke*, 403 F. Supp. 1292 (N.D. Cal. 1974). *See also Comment, The 1972 Amendments to the FWPCA Extend Dredge and Fill Jurisdiction Above the Mean High Water Line*, 6 RUTGERS-CAM. L.J. 823 (1975).

239. 392 F. Supp. 685 (D.D.C. 1975).

240. *Id.* *See also Frasca*, *supra* note 131, at 505. *Ratliff*, *supra* note 87, at 232-35.

241. Corps of Engineers, Dep't of Army, *Permits for Activities in Navigable Waters and Ocean Waters*, 40 Fed. Reg. 18,977, 19,766 (May 6, 1975).

242. *Environmental Groups Call Corps Permits Statement Deliberately Misleading*, 6 ENVTL. REP. (BNA) 145, 146 (1975). *See also Comprehensive Wetlands Protection: One Step Closer to Full Implementation of § 404 of the FWPCA*, 5 ENVTL. L. REP. 10,099, 10,101-02 (1975).

243. *Comprehensive Wetlands Protection*, *supra* note 242, at 10,101-02.

244. Corps of Engineers, Dep't of Army, *Permits for Activities in Navigable Waters and Ocean Waters*, 40 Fed. Reg. 29,795, 31,320, 31,326 (July 25, 1975). *See also Caplin*, *supra* note 139, at 449-54.

245. *Development of New Regulations by the Corps of Engineers, Implementing Section 404 of the FWPCA Concerning Permits for the Disposal of Dredge or Fill Material, Hearing Before the House Subcomm. on Water Resources, House Committee on Public Works and Transportation*, 94th Cong. (1975).

246. *Id.* at 2-7 (statement of Victor V. Vesey, Asst. Sec. of the Army for Civil Works).

supported the regulations. Representative Dingell applauded broad federal jurisdiction over waters of the United States. He asserted that if federal jurisdiction were restricted only to navigable waters, the FWPCA would be superfluous because the RHA already dealt with navigable waters.<sup>248</sup> Representative Wright criticized the regulations for extending federal jurisdiction "to every pond and puddle in [the] U.S."<sup>249</sup>

The EPA issued interim final guidelines that supported the Corps' regulations.<sup>250</sup> The guidelines, which set out general considerations and objectives regarding the issuance of permits, encouraged the Corps to institute measures to protect the environment in the permit process.<sup>251</sup> The EPA defined navigable waters in the same manner as the Corps.

Opponents challenged the Corps' regulations in court but were unsuccessful.<sup>252</sup> In 1976, 20 senators asked President Ford to delay the implementation of phase II and III regulations while Congress considered amendments to the FWPCA.<sup>253</sup> President Ford granted the request.<sup>254</sup>

While Congress was considering amendments to the FWPCA in 1977,<sup>255</sup> the Corps enacted final regulations<sup>256</sup> that continued to recognize the Corps' jurisdiction over waters "such as isolated lakes and wetlands...and other waters...which could affect interstate commerce."<sup>257</sup>

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247. *Id.* at 37-39 (statement of Royston C. Hughes, Asst. Sec. of the Interior).

248. *Id.* at 85-86.

249. *Wright Seen Succeeding Jones in '77 as House Public Works Committee Head*, 6 ENV'T. REP. (BNA) 1757-58 (Feb. 13, 1976).

250. Corps of Engineers, Dep't of Army, Permits for Activities in Navigable Waters and Ocean Waters, 40 Fed. Reg. 40,139, 41,292, 41,297 (Sept. 5, 1975).

251. The guidelines recommended avoiding discharges that harm the aquatic food chain and destroy significant wetlands, preserving water quality, and protecting fish and shellfish. The guidelines established a presumption that a permit would not be issued unless the applicant demonstrated that the activity was water dependent or no other site or alternative was practicable. There were also technical procedures for assessing the chemical, physical, and biological effects of discharges. *Id.* See also Lawrence R. Liebesman, *The Role of EPA's Guidelines in the Clean Water Act § 404 Permit Program-Judicial Interpretation and Administrative Application*, 14 ENVTL. L. REP. 10,272, 10,273 (1984).

252. *Wyoming v. Hoffman*, 437 F. Supp. 114 (D. Wyo. 1977).

253. *Senators Plan to Ask President to Halt Phase II Dredge Fill Rules*, *supra* note 137, at 285.

254. *Id.* at 435-36.

255. In May 1977, there were two Executive Orders regarding wetlands. Executive Order 11990, Protection of Wetlands, mandated that federal agencies minimize the destruction of wetlands when carrying out their responsibilities. Executive Order 11988, Flood Plain Management, required federal agencies to avoid flood plain development when reasonable alternatives were available. See OFFICE OF TECHNOLOGY ASSESSMENT (OTA), WETLANDS: THEIR USE AND REGULATION 74 (1984).

256. Corps of Engineers, Dep't of Army, Regulatory Programs of Corps of Engineers, 42 Fed. Reg. 37,122 (July 19, 1977).

257. The regulations extend federal jurisdiction to "[a]ll other waters of the U.S. not identified in Categories 1-3, such as isolated lakes and wetlands, intermittent streams,

The discharge of dredge and fill material into isolated lakes and wetlands was permitted through a general permit. Only isolated lakes and nonadjacent wetlands greater than ten acres were subject to section 404 permit requirements.<sup>258</sup> In 1977, Congress rejected efforts to limit the Corps' jurisdiction to traditional navigable waters in the CWA.

Since the CWA did not change the jurisdictional provisions, there was a question whether the EPA or the Corps possessed primary authority regarding the geographical scope of federal jurisdiction.<sup>259</sup> The Secretary of the Army requested an opinion from the Attorney General. In 1979, the Attorney General determined that the EPA had primary authority regarding jurisdictional issues, including section 404.<sup>260</sup>

In 1980, the EPA published revised guidelines regarding the specifications for site disposal<sup>261</sup> that restated the presumption against wetland alterations for non-water-dependent uses and "expanded it to include 'special aquatic sites' such as important fish and wildlife habitats, marine sanctuaries, and refuges."<sup>262</sup> Discharges of dredge and fill material into aquatic ecosystems were prohibited unless the discharger could demonstrate that there would be no adverse environmental impacts. The "EPA [also] expressly declared that the guidelines were 'regulatory', not advisory," so were binding on the Corps.<sup>263</sup>

The Corps remained reluctant to assume jurisdiction over wetlands. This inaction was reinforced by the Reagan administration, which targeted section 404 for regulatory reform.<sup>264</sup> The Acting Secretary of the Army for Civil Works, Robert Dawson, was not an enthusiastic supporter of wetlands protection.<sup>265</sup> In 1982, the Corps promulgated

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prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the U.S., the degradation or destruction of which could affect interstate commerce." *Id.* at 37,127.

258. *Id.* at 37,146.

259. Blumm & Zaleha, *supra* note 98, at 709.

260. *Id.* (citing 43 Op. Atty. Gen. 15 (1979)). See also *Civiletti Rules EPA Has Final Say on What Constitutes "Navigable Waters"*, 10 ENV'T. REP. (BNA) 1278-79 (Oct. 5, 1979). This decision was later upheld in court. *Avoyelles Sportsmen's League v. Marsh*, 715 F.2d 897, 903 n.12 (5th Cir. 1983).

261. 33 U.S.C. § 1344 (2000). See also Liebesman, *supra* note 251, at 10,274.

262. Blumm & Zaleha, *supra* note 98, at 709. See also Environmental Protection Agency, 40 CFR-Part 320, Guidelines for Specification of Disposal Sites for Dredged or Fill Material, 45 Fed. Reg. 85,336-57 (1980).

263. Blumm & Zaleha, *supra* note 98, at 710.

264. *Id.* In August 1981, the President's Task Force on Regulatory Relief identified the 404 program for reform. Liebesman, *supra* note 251, at 10,274, citing President's Task Force on Regulatory Relief, *Administrative Reforms to the Regulatory Program Under Section 404 of the CWA and Section 10 of the Rivers and Harbors Act* (May 7, 1982).

265. Environmental groups opposed his confirmation as Assistant Secretary of the Army in 1985. After appraising his record as deputy assistant secretary, they concluded,

interim regulations that were designed to expedite the permit process and establish a broader nationwide permit system.<sup>266</sup> The regulations were challenged by 16 environmental groups led by the National Wildlife Federation.<sup>267</sup> The Corps also signed a memorandum of understanding with federal fishery agencies and the EPA that expedited the permit processing and limited the opportunities for administrative appeals.<sup>268</sup> In 1983, the Corps proposed far reaching regulations that would change the entire section 404 program.<sup>269</sup>

The Corps' 1983 proposal represented the culmination of its regulatory reforms for several reasons.<sup>270</sup> First, William Ruckleshaus, who became EPA Administrator in 1983, "identified section 404 as a high priority" and opposed any changes in the guidelines.<sup>271</sup> Second, the

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"The record of his performance over the past four and a half years demonstrates fundamental opposition to the goals of the Clean Water Act. His positions on wetland protection under Section 404 have been at odds with other key officials in this Administration charged with similar responsibilities. He has succeeded only in producing unprecedented levels of confrontation with the state and federal agencies which share a role in the Section 404 program." *Oversight Hearings on Section 404 of the Clean Water Act Before the Senate Comm. on Env't. and Pub. Works*, 99th Cong. 297, 319 (1985) (statement of Bass Anglers Sportsman Society, Env't Defense Fund, Nat'l Audubon Soc'y, and Nat'l Wildlife Fed'n). See also *United States v. Riverside Bayview Homes Inc.*, NAT'L WETLANDS NEWS (Env'tl. Law Inst., Washington, D.C.), Jan.-Feb. 1986, at 18.

266. Corps of Engineers, Dep't of Army, 33 CFR 320-330, Interim Final Rule for Regulatory Programs of the Corps of Engineers, 47 Fed. Reg. 31,794 (July 22, 1982).

267. The plaintiffs sought to invalidate six nationwide general permits and other 1982 regulatory changes. The plaintiffs were particularly concerned with nationwide permits for activities in isolated waters. They asserted that expanding nationwide permits that were limited to waters of less than 10 acres to include isolated waters and wetlands, regardless of size, removed many of the nation's most important wetlands from permit requirements. These include "700,000 to 900,000 acres of prairie potholes, 73,000 acres of wetlands in Pocono Mountains, 350,000 acres adjacent to Great Salt Lake in Utah, 30 percent of New England's freshwater wetlands, many thousands of acres of inland wetlands in Wisconsin, Minnesota, New York, New Jersey, and Florida and millions of acres of Alaska's tundra wetlands." *Environmental Organizations Sue to Undo Reagan Administration Changes in Section 404 Program*, NAT'L WETLANDS NEWSL. (Env'tl. Law Inst., Washington, D.C.), Jan.-Feb. 1983, at 4-6.

268. Blumm & Zaleha, *supra* note 98, at 711.

269. *Id.* (citing Corps of Engineers, Dep't of Army, 33 CFR Parts 320-323, 325, 327-28, 330, Proposal to Amend Permit Regulations for Controlling Certain Activities in Waters of the United States, 48 Fed. Reg. 21,466, 21,469 (May 12, 1983)). The changes omitted any reference to EPA "guidelines and reversing the presumption against wetland discharges by stating that 'a permit will be granted unless its issuance is found to be contrary to the public interest.'" Thus, the proposal reversed the burden of proof on the applicant. *Id.*; also cited in Liebesman, *supra* note 251, at 10,275. See also *Corps Proposes Additional Revisions to § 10/§ 404 Permit Regulations*, NAT'L WETLANDS NEWSL. (Env'tl. Law Inst., Washington, D.C.), May-June 1983, 3-4.

270. Blumm & Zaleha, *supra* note 98, at 711. See also Liebesman, *supra* note 251, at 10,274-75.

271. Blumm & Zaleha, *supra* note 98, at 711. See also Liebesman, *supra* note 251, at 10,275.

parties in *National Wildlife Federation v. Marsh*<sup>272</sup> reached a settlement that required the Corps to publish new regulations.<sup>273</sup> Third, the Corps agreed to revise the memorandum of understanding with federal fishery agencies and the EPA to provide greater flexibility and consultation.<sup>274</sup>

In 1985, the Court in *United States v. Riverside Bayview Homes Inc.*,<sup>275</sup> following *Chevron*, put to rest any doubts that section 404 was not designed to protect wetlands.<sup>276</sup> The Court upheld the thrust of lower court decisions,<sup>277</sup> which had recognized the Corps' jurisdiction over dry arroyos with only occasional surface flow,<sup>278</sup> an isolated lake,<sup>279</sup> an isolated wetland,<sup>280</sup> wetlands adjacent to a recreational lake used by interstate travelers,<sup>281</sup> private lands flooded by a federal dam,<sup>282</sup> artificial wetlands,<sup>283</sup> a mangrove forest,<sup>284</sup> and bottomland hardwoods.<sup>285</sup>

The Corps asserted jurisdiction over adjacent wetlands but required a case-by-case determination for isolated waters and wetlands regarding the substantial effects on interstate commerce.<sup>286</sup> The problem

272. 568 F. Supp. 985 (D.D.C. 1983).

273. Blumm & Zaleha, *supra* note 98, at 711. See also Liebesman, *supra* note 251, at 10,277. The settlement agreement accomplished the following: First, the Corps acknowledged that the EPA guidelines were mandatory. Second, the presumption against wetland discharges was maintained. Third, section 404 would be applied to agricultural clearing, drainage, and channeling of wetlands nationwide. Fourth, the ten-acre limit for isolated wetlands and headlands was restated in the nationwide permit. Fifth, "a pre-discharge notification [was required] for activities causing the 'loss or modification' of from one to ten acres" of wetlands. Sixth, the Corps must "seek the views of the EPA and fish and wildlife agencies concerning proposed discharges affecting one to ten acres of special aquatic sites." Blumm & Zaleha, *supra* note 98, at 711-12. See also *Court Approves Settlement Agreement in NWF v. Marsh*, NAT'L WETLANDS NEWSL. (Env'tl. Law Inst., Washington, D.C.), Mar.-Apr. 1984, at 4-6; *Corps Proposes Section 404 Regulations Implementing NWF v. Marsh Settlement*, NAT'L WETLANDS NEWSL. (Env'tl. Law Inst., Washington, D.C.), May-June 1984, at 2-3; *Court Rules Corps Did Not Breach NWF v. Marsh Settlement Agreement*, NAT'L WETLANDS NEWSL. (Env'tl. Law Inst., Washington, D.C.), Jan.-Feb. 1985, at 6-7.

274. Blumm & Zaleha, *supra* note 98, at 712.

275. 474 U.S. 121 (1985).

276. *U.S. v. Riverside Bayview Homes Inc.*, NAT'L WETLANDS NEWSL. (Env'tl. Law Inst., Washington, D.C.), Jan.-Feb. 1986, at 14-18.

277. Blumm & Zaleha, *supra* note 98, at 715-16.

278. See *Quivira Mining Co. v. Env'tl. Prot. Agency*, 765 F.2d 126, 129 (10th Cir. 1985).

279. See *Utah v. Marsh*, 740 F.2d 799 (10th Cir. 1984).

280. See *Nat'l Wildlife Fed'n v. Laubscher (Pond 12)*, 662 F. Supp. 548, 549 (S.D. Tex. 1987).

281. See *United States v. Byrd*, 609 F.2d 1204 (7th Cir. 1979). See also *Bailey v. United States*, 647 F. Supp. 44 (D. Idaho 1986).

282. See *Swanson v. United States*, 789 F.2d 1368, 1371 (9th Cir. 1986).

283. See *United States v. Ciampitti*, 583 F. Supp. 483, 492-94 (D.N.J. 1984).

284. See *United States v. Rivera Torres*, 656 F. Supp. 251 (D.P.R. 1987).

285. See *U.S. v. Larkins*, 852 F.2d 189 (6th Cir. 1988).

286. Jerry Jackson, *Wetlands and the Commerce Clause: The Constitutionality of Current Wetland Regulation Under Section 404 of the Clean Water Act*, 7 VA. J. NAT. RES. 307, 319, 329-34 (1988). See also Jerry Jackson, *The Constitutional Test for Wetlands Jurisdiction: Agencies in a*

with the reluctance of the Corps and the EPA to regulate isolated waters and wetlands became apparent in the Pond 12 litigation.<sup>287</sup> After observing a channelization operation occurring in Pond 12, a 30-acre pothole wetland in south Texas, the FWS wanted the Corps to assert jurisdiction. The Corps refused, alleging that its jurisdiction over isolated waters "is limited and not clearly defined."<sup>288</sup> The FWS then pointed out that 83 species of birds protected by the Migratory Bird Treaty Act (MBTA) visited the pond. After the Corps again declined to assert jurisdiction on the grounds that there was no substantial affect on interstate commerce, "Pond 12 was subsequently destroyed."<sup>289</sup> At the same time, other district offices of the Corps were asserting jurisdiction over isolated waters and wetlands used by migratory birds.<sup>290</sup>

The Pond 12 case demonstrated how the Corps and the EPA utilized the substantial effects test on a case-by-case basis to preclude federal jurisdiction. In 1986, the National Wildlife Federation (NWF) brought suit challenging the failure of the Corps and the EPA to assert jurisdiction over Pond 12, alleging that the failure was part of a larger policy regarding isolated waters. The NWF wanted the court to compel the Corps and EPA to assert jurisdiction over all wetlands that met the regulatory definition and declare all such wetlands to be within federal commerce clause authority.<sup>291</sup> In response, the Corps conceded that waters and wetlands "which are or could be used" by migratory birds fall within the ambit of section 404<sup>292</sup> "but maintained that it possessed discretion not to take enforcement action against the discharger."<sup>293</sup>

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Muddle, NAT'L WETLANDS NEWSL. (Env'tl. Law Inst., Washington, D.C.), Sept.-Oct. 1987, at 7-9.

287. Nat'l Wildlife Fed'n v. Laubscher (Pond 12), 662 F. Supp. 548 (S.D. Tex. 1987); Blumm & Zaleha, *supra* note 98, at 718-19; Jackson, *Wetlands and the Commerce Clause*, *supra* note 286, at 327-29.

288. *Environmentalists Sue the Corps and EPA over Isolated Wetlands Jurisdiction*, NAT'L WETLANDS NEWSL. (Env'tl. Law Inst., Washington, D.C.), Mar.-Apr. 1986, at 14.

289. The EPA concurred. Blumm & Zaleha, *supra* note 98, at 718; Jackson, *Wetlands and the Commerce Clause*, *supra* note 286, at 327-29.

290. Jackson, *Wetlands and the Commerce Clause*, *supra* note 286, 327-37. See also Utah v. Marsh, 740 F.2d 799 (10th Cir. 1984); Memoranda from Brigadier General Patrick J. Kelley (Nov. 8, 1985, Feb. 11, 1986) cited in *Tabb Lakes Ltd. v. United States*, 715 F. Supp. 726, 728-29 (E.D. Va. 1988).

291. *Environmentalists Sue the Corps and EPA Over Isolated Wetlands Jurisdiction*, NAT'L WETLANDS NEWSL. (Env'tl. Law Inst., Washington, D.C.), Mar.-Apr. 1986, at 13-14.

292. U.S. Army Corps Memorandum from Patrick J. Kelly, Deputy Director of Civil Works, to Southwestern Division Commander (Feb. 11, 1986), cited in Jackson, *Wetlands and the Commerce Clause*, *supra* note 286, at 335 n.173. See also Corps of Engineers, Dep't of Army, CFR 320-330, Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41,217 (1986).

293. Blumm & Zaleha, *supra* note 98, at 719; Jackson, *Wetlands and the Commerce Clause*, *supra* note 286, at 330.

The federal district court in *National Wildlife Federation (NWF) v. Laubscher*<sup>294</sup> held that the NWF lacked standing to secure national injunctive relief.<sup>295</sup> The court refused to order the restoration of wetlands or impose fines because neither the Corps nor the EPA had undertaken an enforcement action against dischargers. There would not be judicial review of agency inaction.<sup>296</sup> The litigation demonstrated that the Corps possessed discretion to deny jurisdiction over nonadjacent wetlands under section 404.<sup>297</sup>

There were numerous complaints about the Corps' ad hoc implementation of section 404. At Senate oversight hearings in 1985 and 1986,<sup>298</sup> the Corps' narrow interpretation of its section 404 jurisdiction was criticized.<sup>299</sup> Senators Mitchell<sup>300</sup> and Chaffee<sup>301</sup> urged the Corps to broaden its section 404 jurisdiction to protect wetlands. Both senators supported federal jurisdiction over isolated waters utilized by migratory birds and endangered species that had been announced in a 1985 EPA memo.<sup>302</sup>

While the Pond 12 litigation was underway, the Corps revised its regulations.<sup>303</sup> The preamble of the 1986 regulations contains the migratory bird rule, which defines "the waters of the U.S." in the following ways: waters used "as habitat by birds protected by Migratory Bird Treaties," by migratory birds traveling interstate, "as habitat for endangered species, or used to irrigate crops sold in interstate commerce."<sup>304</sup> The migratory bird rule, which was consistent with EPA regulations, was an interpretative rule explaining particular significant

294. 662 F. Supp. 548 (S.D. Tex. 1987).

295. *Id.* at 549; Elizabeth Ann Glass Geltman, *Regulation of Nonadjacent Wetlands Under Section 404 of Clean Water Act*, 23 NEW ENG. L. REV. 615, 636-37 (1988/1989).

296. *NWF*, 662 F. Supp. at 550 (citing *Heckler v. Chaney*, 470 U.S. 821 (1985)).

297. Blumm & Zaleha, *supra* note 98, at 719. The Corps must provide a written record to show it was a reasonable decision that is subject to judicial review. *See also NWF v. Hanson*, 623 F. Supp. 1539 (E.D.N.C. 1985).

298. *Oversight Hearings on Section 404 of the Clean Water Act, Hearings before the Subcommittee on Environmental Pollution, Senate Environment and Public Works Committee*, 99th Cong. (1985).

299. Senator Stafford stated that the "intent of Congress is that wetlands are important and are to be protected under section 404. For...the Army Corps of Engineers to hold otherwise frustrates the goals of the Act." *Id.* at 101-03.

300. *Id.* at 105, 113-14.

301. *Oversight Hearings on Section 404 of the Clean Water Act, Hearings Before the Subcommittee on Environmental Pollution, Senate Environment and Public Works Committee*, 99th Cong. 1-5 (1986).

302. Memorandum from Francis S. Blake, U.S. EPA Gen. Counsel, to Richard A. Sanderson, U.S. EPA Acting Ass't, Office of External Affairs (Sept. 12, 1985), *cited in* Blumm & Zaleha, *supra* note 98, at 715 n.127.

303. Corps of Engineers, Dep't of Army, CFR 320-330, Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206 (Nov. 13, 1986).

304. *Id.* at 41,217.

effects on interstate commerce supporting the Corps' jurisdiction. The CWA was amended in 1987,<sup>305</sup> but section 404 was not significantly altered.

The migratory bird rule was challenged in *Tabb Lakes, Ltd. v. United States*.<sup>306</sup> The federal district court held that the Corps did not properly promulgate the regulation, which was part of a November 8, 1985, memorandum from the Corps deputy director to the district offices. The migratory bird rule was substantive, not interpretative, and was invalid because its promulgation did not comply with notice and comment procedures of the Administrative Procedures Act (APA). The court raised questions about the constitutionality of the rule, stating it had "grave doubts that a property now so used, or seen as an expectant habitat for some migratory bird, can be declared to be such a nexus to interstate commerce as to warrant Corps jurisdiction, we do not here decide that issue."<sup>307</sup> The Fourth Circuit concurred.<sup>308</sup> The federal government did not appeal, so the holding was only followed in the Fourth Circuit.

Criticism of the section 404 program continued. The General Accounting Office (GAO) concluded that the Corps' implementation of section 404 "faile[d] to provide comprehensive wetland protection" for several reasons:<sup>309</sup> (1) "many activities that destroy wetlands" were not covered,<sup>310</sup> (2) "the Corps did not use the full range of the regulatory authority it has,"<sup>311</sup> (3) "the Corps frequently ignores the recommendations of fish and wildlife agencies,"<sup>312</sup> and (4) the program lacks any systematic monitoring and enforcement."<sup>313</sup> One commentator noted that "the section 404 program has no hope of achieving any significant impact on wetlands destruction as long as its administration is left to an agency [the Corps] that has demonstrated little enthusiasm for regulating activities in the wetlands defined by its own regulation."<sup>314</sup>

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305. The Water Quality Act, Pub. L. No. 100-4, 101 Stat. 7, 76 (1987) (codified at 33 U.S.C. §§ 1267 et seq. (2000)).

306. 715 F. Supp. 726 (E.D. Va. 1988).

307. *Id.* at 729.

308. *Tabb Lakes, Ltd. v. United States*, 885 F.2d 866 (4th Cir. 1989).

309. U.S. GENERAL ACCOUNTING OFFICE, WETLANDS: THE CORPS OF ENGINEERS' ADMINISTRATION OF THE SECTION 404 PROGRAM (1988), cited in Blumm & Zaleha, *supra* note 98, at 761.

310. Blumm & Zaleha, *supra* note 98, at 761.

311. *Id.* at 761.

312. *Id.* at 761-62.

313. *Id.* at 762.

314. Jackson recommended that "Congress should relieve a reluctant Corps of its regulatory duty over wetlands." Jackson, *The Constitutional Test for Wetlands Jurisdiction*, *supra* note 286, at 9.



The EPA and the Corps signed a memorandum in 1989 regarding section 404 jurisdiction, replacing the 1980 memo.<sup>315</sup> The Corps is granted jurisdictional authority but must "'fully implement' the EPA guidance concerning the scope of section 404 jurisdiction."<sup>316</sup> The EPA is permitted to "make jurisdiction determinations itself in any given case or class of cases."<sup>317</sup> The Corps must provide the EPA with a list of its jurisdictional decisions, so that they can be reviewed.<sup>318</sup>

The courts generally supported the migratory bird rule.<sup>319</sup> The Ninth Circuit in *Leslie Salt Co. v. United States*<sup>320</sup> upheld the Corps' authority to regulate the discharge of dredge and fill material into nonadjacent or isolated wetlands. The Corps ordered Leslie Salt to obtain a section 404 permit prior to draining and filling wetlands formed by previous salt making. The Corps asserted that filling in the wetlands, which are used by migratory birds as well as the salt marsh harvest mouse, an endangered species, would substantially affect interstate commerce.<sup>321</sup> The court did not make a factual determination of bird usage but remanded the question back to the district court.<sup>322</sup>

The Ninth Circuit later determined that the Corps' interpretation of the CWA was reasonable. The court concluded that "[t]here is no suggestion in the language of the Act that isolated waters used only by migratory birds fall within its ambit. Nevertheless, the Act's policy of protecting wildlife could plausibly be read to stretch this far."<sup>323</sup> Congress intended to extend federal jurisdiction "over the waters of the United States to the maximum extent possible under the Commerce Clause."<sup>324</sup> Furthermore, the court held that "the Corps rationale for regulating adjacent wetlands may have some application to isolated waters as well."<sup>325</sup>

In 1993, the Seventh Circuit sitting en banc reversed the decision of a three-judge panel in *Hoffman Homes, Inc. v. Administrator, U.S.*

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315. Memorandum of Agreement Between the Department of the Army and EPA Concerning the Determination of the Geographic Jurisdiction of the Section 404 Program and the Application of the Exemptions under Section 404(f) of the CWA (Jan. 19, 1989), cited in Blumm & Zaleha, *supra* note 98, at 719 n.151.

316. Blumm & Zaleha, *supra* note 98, at 719.

317. *Id.* at 719.

318. *Id.* at 720.

319. The notable exception was *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997).

320. 896 F.2d 354 (9th Cir. 1990).

321. The Ninth Circuit held that "[t]he commerce clause power, and thus the Clean Water Act, is broad enough to extend the Corps' jurisdiction to local waters which may provide habitat to migratory birds and endangered species." *Id.* at 360.

322. *Id.* at 360-61.

323. *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1394 (9th Cir. 1995).

324. *Id.* at 1395.

325. *Id.*

*Environmental Protection Agency*<sup>326</sup> and held that the EPA could regulate "waters whose connection to interstate commerce may be potential rather than actual, minimal rather than substantial."<sup>327</sup> The court determined that "it is reasonable to interpret the regulation as allowing migratory birds to be that connection between a wetland and interstate commerce."<sup>328</sup> Nevertheless, the court concluded that the suitability of the wetland as migratory bird habitat was not supported by substantial evidence.<sup>329</sup>

#### IV. THE COMMERCE CLAUSE

The scope of congressional commerce authority has varied throughout U.S. history.<sup>330</sup> The Rehnquist Court<sup>331</sup> has resurrected federalism to restrict federal commerce clause power.<sup>332</sup> The Court has abandoned the political safeguards of federalism<sup>333</sup> and is ostensibly protecting the states from encroaching federal authority.

The Court in *SWANCC* demanded a clear statement in the CWA to support the Corps' jurisdiction, which posed a constitutional problem with federalism.<sup>334</sup> The Court suggested that the migratory bird rule

326. 999 F.2d 256 (7th Cir. 1993). For further comment on this case see Johnson, *supra* note 188, at 27-33. Stephen Jay Stokes, *The Limit of Government's Regulatory Authority over Non-Adjacent Wetlands: Hoffman Homes, Inc. v. EPA*, 15 ENERGY L.J. 137, 148-49 (1994); Douglas W. Smith & William A. Butler, *Judicial Activism Threatens Wetlands*, NAT'L WETLANDS NEWSL. (Env'tl. Law Inst., Washington, D.C.), Sept.-Oct. 1992, at 6-7; Virginia S. Albrecht & David G. Isaacs, *The Unreasonable Bird Rule*, NAT'L WETLANDS NEWSL. (Env'tl. Law Inst., Washington, D.C.), Sept.-Oct. 1992, at 4-5.

327. *Hoffman*, 999 F.2d at 261.

328. *Id.*

329. *Id.* at 261-63.

330. Initially, the Supreme Court, led by Justice Marshall, established broad expansive federal commerce clause authority. *Gibbons v. Ogden*, 22 U.S. 1 (1824). From 1833 to 1937, the Court fostered dual federalism, which restricted federal commerce power and interfered with states' Tenth Amendment authority. *United States v. E.C. Knight*, 156 U.S. 1 (1895); *Hammer v. Dagenhart*, 247 U.S. 251 (1918); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936). Following President Roosevelt's unsuccessful attempt to pack the court in 1937, the Court retreated and accepted almost unlimited congressional commerce authority and promoted cooperative federalism. *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938); *United States v. Darby*, 312 U.S. 100 (1941); *Wickard v. Filburn*, 317 U.S. 111 (1942).

331. The "federalism five" are Justices Rehnquist, O'Connor, Scalia, Kennedy, and Thomas.

332. *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000); *Reno v. Condon*, 528 U.S. 141 (2000); *Jones v. United States*, 529 U.S. 848 (2000). See also Stephen R. McAllister & Robert L. Glicksman, *Federal Environmental Law in the "New" Federalism Era*, 30 ENVTL. L. REP. 11,122 (2000).

333. Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

334. *SWANCC v. U.S. Army Corps of Eng'rs*, 121 S. Ct. 675, 683-84 (2001).

probably exceeded federal commerce clause authority because it "would result in a significant impingement of the States' traditional and primary power over land and water use."<sup>335</sup> The Court's decision was dubious. The migratory bird rule did not pose any problems with federalism and was well within federal constitutional authority. The migratory bird rule should have been upheld as a legitimate exercise of federal commerce clause power under the framework of *United States v. Lopez*.<sup>336</sup>

The Court in *United States v. Lopez* held that federal commerce clause authority extends to (1) the "channels of interstate commerce"; (2) the "instrumentalities of interstate commerce, or persons or things in interstate commerce;" and (3) "activities having a substantial relation to interstate commerce."<sup>337</sup> The federal government can regulate intrastate "activities that arise out of or are connected with a commercial transaction, which when viewed in the aggregate, substantially affects interstate commerce."<sup>338</sup> Intrastate activities can also be regulated if they are "an essential part of a larger regulation of economic activity" that would "be undercut unless the intrastate activity was regulated."<sup>339</sup> Jurisdictional boundaries must be delineated between federal and state authority.<sup>340</sup> There must be a distinction between "what is truly national and what is truly local."<sup>341</sup> Federal regulation must not impinge on an "area of traditional state concern" to which "States lay claim by right of history and expertise."<sup>342</sup>

### A. Things in Interstate Commerce

*Lopez* permits the federal government to regulate "things in interstate commerce."<sup>343</sup> Migratory birds, which travel across state lines, are things in interstate commerce.<sup>344</sup> The Supreme Court supported federal jurisdiction over migratory birds in *Missouri v. Holland*,<sup>345</sup> which

335. *Id.* at 684.

336. 514 U.S. 549.

337. *Id.* at 558-59.

338. *United States v. Lopez*, 514 U.S. 549, 561 (1995).

339. *Id.*

340. *Id.* at 567.

341. *Id.* at 567-68.

342. *Id.* at 580, 583 (Kennedy, J., concurring).

343. *Id.* at 558.

344. In several earlier cases, the courts, relying on *Geer v. Connecticut*, 161 U.S. 519 (1896), held that the commerce clause could not support federal jurisdiction over migratory birds, which are the property of the state in which they are found. *United States v. Shauver*, 214 F.154 (E.D. Ark. 1914); *United States v. McCullach*, 221 F. 288 (D. Kan. 1915).

345. 252 U.S. 416 (1920).

upheld the Migratory Bird Treaty Act.<sup>346</sup> The Court noted that the protection of migratory birds has long been recognized as “a national interest of very nearly the first magnitude.”<sup>347</sup> Since “the subject matter is only transitorily within the state and has no permanent habitat therein,” the birds “can be protected only by national action.”<sup>348</sup> The Court was concerned that in the absence of the statute, there soon might not be any birds to protect. In *North Dakota v. United States*,<sup>349</sup> the Court noted that treaties obligate the United States to preserve and protect migratory birds and their habitat.<sup>350</sup>

The federal government can regulate things that cross state lines even though they are not commercial in nature.<sup>351</sup> In *Thornton v. United States*,<sup>352</sup> the Court declared that cattle wandering across state lines with no economic motivation constitute interstate commerce. The Court stated, “We do not think that such passage by ranging can be differentiated from interstate commerce. It is intercourse between states...”<sup>353</sup> The Seventh and Ninth Circuits determined that migratory birds, which pass between states, are objects of interstate commerce subject to federal jurisdiction. The Seventh Circuit in *Cochrane v. United States*<sup>354</sup> held that the federal government can act to protect national property such as migratory birds. The court declared that “Congress may lawfully legislate, under the Commerce Clause of the Constitution (article 1, Sec. 8, cl. 3), to protect the game, nongame, and insectivorous birds which migrate with the changing season.”<sup>355</sup> Migratory birds are no different than cows; “their passage from state to state could not be differentiated from interstate commerce.”<sup>356</sup> The Ninth Circuit in *Cerritos*

346. 16 U.S.C. § 703 (2000). See generally Betsy Vencil, *Comment: The Migratory Bird Treaty Act—Protecting Wildlife on Our National Refuges—California’s Kesterson Reservoir, a Case in Point*, 26 NAT. RESOURCES J. 609 (1986); David G. Lombardi, *The Migratory Bird Treaty Act: Steel Shot Versus Lead Shot for Hunting Migratory Waterfowl*, 22 AKRON L. REV. 343 (1989); Murray G. Sagveen, *Waterfowl Production Areas: A State Perspective*, 60 N.D. L. REV. 659 (1984).

347. *Holland*, 252 U.S. at 435.

348. *Id.*

349. 460 U.S. 300 (1983).

350. *Id.* at 309-10 n.12.

351. The transportation of persons across state lines is interstate commerce. *Edwards v. California*, 314 U.S. 160, 172 (1941); *Camps Newfound/Owatonna v. Harrison*, 520 U.S. 564, 584 (1997). It is not crucial that the transportation be commercial in nature. *Edwards*, 314 U.S. at 172 n.1; *United States v. Wright*, 128 F.3d 1274, 1275 (8th Cir. 1997); *United States v. Bailey*, 115 F.3d 1222, 1228 (5th Cir. 1997); *United States v. Black*, 125 F.3d 454, 460 (7th Cir. 1997).

352. 271 U.S. 414 (1926).

353. *Id.* at 425.

354. 92 F.2d 623 (1937).

355. *Id.* at 627.

356. *Id.* (citing *Thornton v. U.S.*, 271 U.S. 414, 425 (1925)).

*Gun Club v. Hall*<sup>357</sup> noted that the movement of migratory birds "across state lines made their interstate intercourse 'commerce'..."<sup>358</sup>

Federal regulation of migratory birds is necessary because of their transient nature and the ineffectiveness of individual state management.<sup>359</sup> Migratory birds do not acknowledge political boundaries and must be managed as integral components of the ecosystems to which they belong.<sup>360</sup>

The protection of migratory birds poses many of the same issues that were involved in the reintroduction and management of the red wolf.<sup>361</sup> The federal district court in *Gibbs v. Babbitt*<sup>362</sup> held that prohibiting the taking of a red wolf can be supported as the regulation of things in interstate commerce.<sup>363</sup> The red wolf is a migratory creature that originally inhabited the entire southeastern region of the United States. By the early twentieth century, the red wolf was restricted to only 14 states. Aggressive predator control from 1920 to 1950 extinguished the red wolf from its historic range.<sup>364</sup> The remaining red wolves were captured and placed in a captive breeding program.<sup>365</sup> If reintroduction is successful, the red wolves will again cross state boundaries and repopulate the entire southeastern region.

## B. Substantial Effects on Interstate Commerce

The Court in *SWANCC* held that filling in isolated waters, unconnected to navigable waters except through migratory bird use, probably did not substantially affect interstate commerce to justify federal regulation.<sup>366</sup> The regulation of such isolated waters intrudes on traditional state land use authority and violates the principle of

357. 96 F.2d 620 (1938).

358. *Id.* at 626.

359. The commerce clause allows the federal government "to legislate concerning transactions which, reaching across state boundaries, affect the people of more states than one; to govern affairs which the individual states, with their limited territorial jurisdictions, are not fully capable of governing." *United States v. S.E. Underwriters Assn.*, 322 U.S. 533, 552 (1944).

360. George Cameron Coggins & Sebastian T. Patti, *The Resurrection and Expansion of the Migratory Bird Treaty Act*, 50 U. COLO. L. REV. 165, 166-67 (1979).

361. See Edward A. Fitzgerald, *Seeing Red: Gibbs v. Babbitt*, 13 VILL. ENVTL. L.J. 1 (2002).

362. 31 F. Supp. 2d 531 (E.D.N.C. 1998), *aff'd* 214 F.3d 483 (4th Cir. 2000).

363. *Id.* at 535.

364. Endangered and Threatened Wildlife and Plants, Determination of Experimental Population Status for an Introduced Population of Red Wolves in North Carolina, 51 Fed. Reg. 41,790 (Nov. 19, 1986).

365. Last Chance for the American Wolf, 119 Cong. Rec. 8951-52 (Mar. 21, 1973) (statement of Rep. William Whitehurst of Va.).

366. *SWANCC v. U.S. Army Corps of Eng'rs*, 121 S. Ct. 675, 684 (2001).

federalism.<sup>367</sup> The Court's decision was erroneous under the *Lopez* framework. The filling in of isolated waters used as habitat by migratory birds is an economic activity that substantially affects interstate commerce, so the cumulative impacts of this activity must be considered.

### 1. *The Economic Nature of the Activity*

*Lopez* requires that the regulated activity be economic in nature or part of a larger economic regulatory program.<sup>368</sup> The regulated activity under section 404 is the filling in of isolated waters and wetlands and the harm to migratory bird habitat. The loss of wetlands, which are disappearing at rate of about 300,000 acres per year, is a national concern.<sup>369</sup> Wetlands are among the most biologically productive areas. They are two and one-half times more productive than the most fertile fields.<sup>370</sup> Isolated waters and wetlands are valuable ecosystems that perform important national functions, such as improving water quality,<sup>371</sup> controlling flooding and erosion,<sup>372</sup> providing habitat for migratory and endangered species,<sup>373</sup> and maintaining fish stock.<sup>374</sup>

367. *Id.*

368. *United States v. Lopez*, 514 U.S. 549, 559-63 (1995).

369. Wetlands represent "five percent of the land surface of the lower 48 states. Out of the 221 million acres of wetlands that once existed in the coterminous United States, the U.S. Fish and Wildlife Service (FWS) estimates that there are only 103.3 million acres remaining. Each year, development, drainage, and agriculture eliminate another 290,000 acres—an area less than half the size of Rhode Island. From the 1950s to the 1970s conversion of wetlands to farmland caused 87 percent of all wetland losses." U.S. Geological Survey, National Wetlands Inventory Products, USGS Fact Sheet 080-99 (Nov. 1999). *See also* OTA, *supra* note 255, at 3; Blumm, *supra* note 120, at 469-70.

370. Blumm, *supra* note 120, at 470.

371. Wetlands improve water quality by cycling nutrients, storing organic material, and filtering out harmful pollutants. OTA, *supra* note 255, at 43, 48-51. For example, the "loss of the 50% of America's remaining wetlands could cost \$75 billion" in sewage treatment for the removal of excess nitrogen. Houck & Rolland, *supra* note 24, at 1245. The diminishment of water quality in one state can affect other states. For example, pollution in six states has endangered the Chesapeake Bay. *Id.*

372. Wetlands detain water and curtail flow peaks downstream. OTA, *supra* note 255, at 43-46. Wetlands also reduce shoreline erosion and provide ground water recharge. *Id.* at 46-48. *See also* Houck & Rowland, *supra* note 24, at 1249-50.

373. Wetlands provide food, shelter, and resting and feeding places for migratory birds. OTA, *supra* note 255, at 52-54. U.S. FISH & WILDLIFE SERVICE, 1994 UPDATE TO THE NORTH AMERICAN WATERFOWL MANAGEMENT PLAN 20 (1994). The destruction of the habitat constitutes the destruction of the birds. Brief of the States of California et al. at 14-20, SWANCC v. U.S. Army Corps of Eng'rs, 121 S. Ct. 675 (2001) (No. 99-1178). Isolated wetlands provide unique habitat that is essential for migratory bird survival. *Id.* For example, the draining of prairie potholes in North Dakota has threatened a variety of waterfowl in Virginia, Maryland, and Delaware. "[I]n 1980 another 5.3 million Americans hunted migratory birds, spending \$638 million. Fifty-five million Americans spent almost \$10 billion in 1980 to watch and photograph wetland-dependent birds." Houck & Rowland, *supra* note 24, at 1248.

Plants and animals exist in interconnected ecosystems, which affect interstate commerce.<sup>375</sup> The loss of one species impacts the entire system.<sup>376</sup> Disruptions in the ecosystem cause environmental instabilities that diminish nature's ability to establish food chains, cycle nutrients, sustain the atmospheric quality, control the climate, regulate the fresh water supply, maintain the soil, dispose of wastes, pollinate crops, and control pests and disease.<sup>377</sup>

Robert Costanza estimated the value of the services derived from ecosystems to be in the range of 16 to 54 trillion dollars per year. With an estimated annual value of \$33 trillion per year, ecosystems provide services that cost almost twice the total gross national product of all the nations of the world combined.<sup>378</sup> Costanza notes,

Because ecosystem services are not fully "captured" in commercial markets or adequately quantified in terms comparable with economic services and manufactured capital, they are often given too little weight in policy decisions. This neglect may ultimately compromise the sustainability of humans in the biosphere. The economies of the Earth would grind to a halt without the services of ecological life-support systems, so in one sense their total value to the economy is infinite.<sup>379</sup>

Isolated waters and wetlands provide critical habitats that are important for the preservation of biodiversity,<sup>380</sup> which is the "total of

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374. "More than seventy percent of America's commercial seafood harvest, with an estimated annual value of \$3.6 billion and total economic output of \$31 billion, originates in coastal estuaries." Houck & Rowland, *supra* note 24, at 1247. See generally Environmental Protection Agency, Protection of Nation's Wetlands, Policy Statement, 38 Fed. Reg. 10,834 (May 2, 1973).

375. Robert Costanza et al., *The Value of World's Ecosystem Service and Natural Capital*, 387 NATURE 253 (1987).

376. Keith Saxe, *Regulated Taking of Threatened Species Under the Endangered Species Act*, 39 HASTINGS L.J. 399, 408 (1988); John Copeland Nagle, *Playing Noah*, 82 MINN. L. REV. 1171, 1210 (1998); George Cameron Coggins & Anne Fleishel Harris, *The Greening of American Law?: The Recent Evolution of Federal Law for Preserving Floral Diversity*, 27 NAT. RESOURCES J. 247, 252 (1987); George Cameron Coggins, *Federal Wildlife Law Achieves Adolescence: Developments in the 1970's*, 1978 DUKE L.J. 753, 814 (1978); Patrick Parenteau, *Rearranging the Deck Chairs: Endangered Species Act Reforms in an Era of Mass Extinction*, 22 WM. & MARY ENVTL. L. & POL'Y REV. 227, 236-44 (1998).

377. PAUL & ANNE EHRLICH, EXTINCTION: THE CAUSES AND CONSEQUENCES OF THE DISAPPEARANCE OF SPECIES 86-95 (1981).

378. Costanza et al., *supra* note 375, at 259.

379. *Id.* at 253.

380. Semlitsch, *supra* note 192, at 5.

genes, species and ecosystems, on the earth."<sup>381</sup> Biodiversity is a "living, exploitable, renewable resource" that has economic importance and "potential consumptive and transformative uses."<sup>382</sup> The preservation of genes is critical to the development of foods and medicines and the maintenance of ecosystems.<sup>383</sup>

The loss of isolated waters and wetlands is due to economic activity. Dredge and fill material is derived from agriculture, industry, public works, and other economic activities. The filled in wetlands serve an economic purpose,<sup>384</sup> in this case that of a landfill,<sup>385</sup> which clearly has interstate economic and environmental impacts.<sup>386</sup>

Congress was specifically concerned with biodiversity and ecosystem maintenance in the CWA.<sup>387</sup> The Supreme Court recognized

381. Mark A. Urbanski, *Chemical Prospecting, Biodiversity Conservation, and the Importance of International Protection of Intellectual Property Rights in Biological Materials*, 2 BUFF. J. INT'L L. 131, 134-35 (1995).

382. *Id.*

383. *Id.* at 135 n.9. See generally Fitzgerald, *supra* note 361, at 19-23.

384. SWANCC v. U.S. Army Corps of Eng'rs, 121 S. Ct. 675, 694-95 (2001) (Stevens, J., dissenting).

385. *Id.* at 683.

386. See also *Philadelphia v. New Jersey*, 437 U.S. 617 (1977); *Fort Gratiot Sanitary Landfill Inc. v. Michigan Dep't of Natural Res.*, 504 U.S. 353 (1992); *Chemical Waste Mgmt. Inc. v. Hunt*, 504 U.S. 334 (1992). See generally Edward A. Fitzgerald, *The Waste War: Fort Gratiot Sanitary Landfill v. Michigan Department of Natural Resources and Chemical Waste Management Inc. v. Hunt*, 13 STAN. ENVTL. L.J. 78, 91-96 (1994).

387. The purpose of the CWA is to maintain water quality for "the protection and propagation of fish, shellfish, and wildlife and provide for recreation in and on the water." 33 U.S.C. § 1251 (2000). The statements of two of the 1972 and 1977 Senate conferees illustrate congressional concern with wetlands protection. Senator Baker declared that the protection of water quality must encompass the protection of the interior wetlands and smaller streams....We should be mindful of the fact that when these [wetland] areas are polluted out of existence, we will have lost the very valuable free service of nature; and if toxic-laden dredge and fill material is discharged into wetlands, we risk poisoning the very foundation of our aquatic system.

123 Cong. Rec. 26,719 (1977).

Senator Muskie stated,

There is no question that the systematic destruction of the Nation's wetlands is causing serious, permanent ecological damage. The wetlands and bays, estuaries and deltas are the Nation's most biologically active areas. They represent a principal source of food supply. They are the spawning grounds for much of the fish and shellfish which populate the ocean, and they are passages for numerous upland game fish. They also provide nesting areas for a myriad of species of birds and wildlife.

The unregulated destruction of these areas is a matter which needs to be corrected and which the implementation of Section 404 has attempted to achieve.

123 Cong. Rec. 26,697 (1977).

See also 123 Cong. Rec. 38,994-96 (1977) (remarks of Reps. Ambro, Lehman, and Dingell);

123 Cong. Rec. 26,701-03, 26,713, 26,716-17 (1977) (remarks of Sens. Stafford, Hart, and



the connection between biodiversity, ecosystem maintenance, and interstate commerce in *United States v. Riverside Bayview Homes*.<sup>388</sup> The Eleventh Circuit in *United States v. Banks*<sup>389</sup> held that the Corps possessed jurisdiction over adjacent wetlands, which are hydrologically connected to groundwater or surface water during storms.<sup>390</sup> The court also found an ecological connection that is based on "the water connections and the fact that the lots serve as habitat for birds, fish, turtles, snakes, and other wildlife."<sup>391</sup>

Other courts have also recognized the nexus between ecological harm and interstate commerce.<sup>392</sup> The Fourth Circuit in *Gibbs v. Babbitt* determined that the regulation prohibiting the taking of the red wolf substantially affects interstate commerce by preserving biodiversity, which includes the protection of scarce natural resources.<sup>393</sup> The D.C. Circuit in *National Association of Home Builders v. Babbitt*<sup>394</sup> recognized the importance of the delhi fly, an endangered intrastate species, to interstate commerce. Judge Henderson noted that the protection of biodiversity, which is essential for future medical and commercial activities, substantially affects interstate commerce.<sup>395</sup> Furthermore, if one species is harmed, the ecosystem will be disrupted, causing interstate impacts.<sup>396</sup> The Fifth Circuit in *Zabel v. Tabb*, which upheld the Corps' refusal to issue dredge and fill permits for ecological reasons, determined that the destruction of fish and wildlife habitat has substantial, and in some

Chaffee); H.R. REP. NO. 95-139 (1977) (additional views of Reps. Edgar and Myer). See also *Oversight Hearings on Section 404 of the Clean Water Act before the Subcomm. on Envtl. Prot., Senate Comm. on Envtl. & Pub. Works*, 99th Cong. 244-45 (1985).

388. The Court held that "the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act." 474 U.S. 121, 134 (1985).

389. 115 F.3d 916 (1997).

390. *Id.* at 921. See also *U.S. v. Tilton*, 705 F.2d 429 (1983); Johnson, *supra* note 188, at 30-31.

391. *Banks*, 115 F.3d at 921.

392. *Hartsell v. United States*, 127 F.3d 343 (1997) (upholding congressional authority to regulate pollution discharge into nonnavigable waters); *United States v. Olin Corp.*, 107 F.3d 1506 (11th Cir. 1999) (supporting federal regulation of onsite waste disposal as part of Congress's scheme to protect interstate commerce from pollution and upholding constitutionality of Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)); *United States v. Bramble*, 103 F.3d 1475 (9th Cir. 1996) (rejecting challenge to constitutionality of the Bald Eagle Protection Act).

393. 214 F.3d 483 (4th Cir. 2000).

394. 130 F.3d 1041 (D.C. Cir. 1997). See generally, John C. Nagle, *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly*, 97 MICH. L. REV. 174 (1998); Fiona M. Powell, *Property Rights, Federalism, and the Endangered Species Act*, 29 REAL ESTATE L.J. 13 (2000).

395. *Gibb*, 130 F.3d. at 1052-54.

396. *Id.* at 1057-60.

areas, devastating effects on interstate commerce.<sup>397</sup> Dredge and fill permits "may tend to destroy ecological balance and thereby affect commercial sustainability."<sup>398</sup>

Only the Fourth Circuit, in *United States v. Wilson*,<sup>399</sup> determined that the Corps did not have jurisdiction over isolated waters and wetlands. The Fourth Circuit held that the Corps' regulation asserting jurisdiction over waters that are intrastate or nonnavigable because their use, degradation, or destruction could affect interstate commerce was beyond the scope of the commerce clause. The regulation failed to require any substantial effect on interstate commerce or a sufficient nexus with navigable or interstate waters. The majority stated that "waters of the United States" must refer "to waters that, if not navigable in fact, are at least interstate or closely related to navigable or interstate waters."<sup>400</sup> Two of the three judges on the panel, however, registered reservations. Judge Luttig concurred but disagreed with the majority's commerce clause analysis.<sup>401</sup> Judge Payne, dissenting in part, held that a hydrological connection to surface or ground water or a nexus to an aquatic ecosystem is all that is necessary to establish the Corps' jurisdiction.<sup>402</sup>

The district court in SWANCC refused to follow *Wilson*<sup>403</sup> and determined that federal jurisdiction pursuant to the CWA was coextensive with the commerce clause.<sup>404</sup> The Seventh Circuit in SWANCC also rejected *Wilson*<sup>405</sup> and found that there was no concern with potential effects on interstate commerce because "facts show that the filling of the 17.6 acres would have an immediate effect on migratory birds that actually use the area as habitat."<sup>406</sup>

The harm to migratory bird habitat also substantially affects interstate commerce. People travel to hunt, observe, and photograph migratory birds. In 1991, the FWS determined that 76 million Americans watched and photographed federal birds and wildlife and spent over

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397. 430 F.2d 199, 203-04 (5th Cir. 1970).

398. *Id.*

399. 133 F.3d 251 (4th Cir. 1997); see also generally Christopher N. Challis, *Standing Alone in Murky Waters: Evaluating the Fourth Circuit's Solitary Stance on Federal Wetlands Regulation*, 34 WAKE FOREST L. REV. 1179 (1999); J. Sloane Strickler, *Federal Wetlands Jurisdiction*, 5 ENVTL. L. 225 (1998).

400. *Wilson*, 133 F.3d at 257.

401. *Id.* at 266.

402. *Id.* at 266-69.

403. SWANCC v. U.S. Army Corps of Eng'rs, 998 F. Supp. 946, 951 (N.D. Ill. 1998).

404. *Id.* at 951-52.

405. SWANCC v. U.S. Army Corps of Eng'rs, 191 F.3d 845, 851-52 (7th Cir. 1999).

406. *Id.* at 852.

\$18.1 billion.<sup>407</sup> This generated \$3 billion in tax revenues and created 766,600 jobs.<sup>408</sup> In 1997, the FWS found that 3.1 million Americans spent \$1.3 billion to hunt migratory birds in 1996. Migratory bird hunters spent \$720 million on equipment and eleven percent of these hunters crossed state lines.<sup>409</sup> Another 62.9 million Americans spent \$29 billion observing wildlife, including birds.<sup>410</sup> Almost \$20 billion was spent on equipment for wildlife watching. Of the 17.7 million bird watchers, 14.3 million people took trips to observe waterfowl; 9.5 million took trips for shorebirds, such as herons. More than six million people crossed state lines to participate in bird watching.<sup>411</sup> In 1996, hunters of migratory birds in Illinois spent \$293 million and 1.2 million people in Illinois spent on average \$231 each observing, feeding, and photographing waterfowl.<sup>412</sup>

Migratory bird populations are decreasing because of the loss and destruction of their habitat.<sup>413</sup> The cumulative impact of the loss of wetlands is devastating. As the habitat decreases, greater numbers of birds are forced to share less space and "wetland ghettos" are created where disease spreads rapidly. As populations decline, the opportunities for hunting, observing, and photographing decrease, as do the revenues generated by these activities.<sup>414</sup> It is clear that the loss of habitat substantially affects interstate commerce.<sup>415</sup>

Several lower court decisions held that the economic impact of tourism, recreation, and hunting establishes a sufficient nexus with interstate commerce to justify the migratory bird rule. The Seventh Circuit in *United States v. Byrd*<sup>416</sup> held that the Corps can regulate the deposit of dredge and fill material into wetlands adjacent to an intrastate

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407. James D. Caudill, U.S. Fish & Wildlife Service, 1991 *Economic Impacts of Non-Consumptive Wildlife Related Recreation* (1997), cited in Nagle, *supra* note 376, at 1209.

408. *Id.*

409. U.S. Fish & Wildlife Service, United States Dep't of Interior, & Bureau of the Census, U.S. Dep't of Commerce, 1996 *National Survey of Fishing, Hunting, and Wildlife-Associated Recreation* 25, 60 (1997), cited in Brief for the Federal Respondents at 48-49, *SWANCC v. U.S. Army Corps of Eng'rs*, 121 S. Ct. 675 (2001) (No. 99-1178).

410. *Id.* at 91, cited in Brief for the Federal Respondents at 48-49, *SWANCC v. U.S. Army Corps of Eng'rs*, 121 S. Ct. 675 (2001) (No. 99-1178).

411. *Id.* at 45, 90, cited in Brief for the Federal Respondents at 48-49, *SWANCC v. U.S. Army Corps of Eng'rs*, 121 S. Ct. 675 (2001) (No. 99-1178). See also *SWANCC v. U.S. Army Corps of Eng'rs*, 191 F.3d 845, 850 (7th Cir. 1999).

412. SOUTHWICK ASSOCIATES, THE ECONOMIC BENEFITS OF WATCHABLE WILDLIFE RECREATION DURING 1996 IN ILLINOIS at 4, 8 (1998), cited in Brief of the States of California et al. at 22, *SWANCC v. U.S. Army Corps of Eng'rs*, 121 S. Ct. 675 (2001) (No. 99-1178).

413. U.S. FISH & WILDLIFE SERVICE, WATERFOWL FOR THE FUTURE; NORTH-AMERICAN WATERFOWL MANAGEMENT PLAN 8-9 (1989).

414. *Id.*

415. Johnson, *supra* note 188, at 39.

416. 609 F.2d 1204 (7th Cir. 1979).

lake utilized by interstate tourists. If the water quality is destroyed, tourism will end.<sup>417</sup> The Tenth Circuit in *Utah v. Marsh*<sup>418</sup> determined that the Corps can exercise jurisdiction over an intrastate lake used by interstate travelers. Interstate tourists come to the lake to see, photograph, and appreciate birds and animals. Migratory birds use the lake as habitat. Interstate tourists and migratory birds provide a sufficient connection with interstate commerce.<sup>419</sup>

The Ninth Circuit in *Leslie Salt Co. v. United States* held that "[t]he commerce clause power...is broad enough to extend the Corps' jurisdiction to local waters that may provide habitat to migratory birds and endangered species."<sup>420</sup> In *Hoffman Homes Inc. v. U.S. EPA*, the Seventh Circuit observed that tourist travel and spend money hunting, trapping, and observing migratory birds.<sup>421</sup> The loss of wetlands will result in a loss of opportunities, which provide a sufficient connection with interstate commerce.<sup>422</sup>

Other cases have held that tourism and scientific study establish a sufficient nexus with interstate commerce. In *Gibbs v. Babbitt*, the Fourth Circuit recognized a direct connection between the taking of a red wolf and interstate commerce.<sup>423</sup> Judge Luttig held that absent red wolves there will be no related interstate tourism or scientific study. There is no need to pile inference upon inference to support this conclusion.<sup>424</sup> A federal district court in *Palila v. Hawaii Department of Land and Natural Resources*<sup>425</sup> determined that the demise of the palila, an endangered species found only on Hawaii, would substantially affect interstate commerce by precluding the "interstate movement of persons, such as amateur students of nature or professional scientists who come to a state

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417. *Id.* at 1210.

418. 740 F.2d 799 (10th Cir. 1984).

419. *Id.* at 803-04.

420. 896 F.2d 354, 360 (9th Cir. 1990); *See also* *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1395-96 (9th Cir. 1995); John A. Leman, *The Birds: Regulation of Isolated Wetlands and the Limits of the Commerce Clause*, 28 U. CAL. DAVIS L. REV. 1237 (1995). Renee Stone, *Wetlands Protection and Development: The Advantages of Retaining Federal Control*, 10 STAN. ENVTL. L.J. 137 (1991).

421. 999 F.2d 256, 261 (7th Cir. 1993); Stokes, *supra* note 326; Dennis J. Priolo, *Section 404 of the Clean Water Act: The Case for Expansion of Federal Jurisdiction over Isolated Wetlands*, 30 LAND & WATER L. REV. 91, 96-101 (1995); Robert D. Icsman, *Comment: Hoffman Homes, Inc. v. Administrator, U.S. EPA: The Seventh Circuit Gets Boggled Down in Wetlands*, 54 OHIO ST. L.J. 809 (1993).

422. *Hoffman Homes*, 999 F.2d at 261; *see also* *United States v. Hallmark Const. Co.*, 14 F. Supp. 2d 1069 (N.D. Ill. 1998); *Rueth v. U.S. EPA*, 13 F.3d 227 (7th Cir. 1993); *Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962 (7th Cir. 1994); *SWANCC v. U.S. Army Corps of Eng'rs*, 998 F. Supp. 946, 951-52 (N.D. Ill. 1998).

423. 214 F.3d 483, 492-97 (4th Cir. 2000).

424. *Id.*

425. 471 F. Supp. 985 (D. Haw. 1979), *aff'd* 639 F.2d 495 (9th Cir. 1981).

to observe and study these species, which would otherwise be lost by state inaction."<sup>426</sup>

## 2. Precluding Interstate Market Advantage

The protection of isolated waters, wetlands, and migratory birds also substantially affects interstate commerce by preventing any state from establishing a competitive interstate market advantage.<sup>427</sup> If a state fails to protect isolated waters and wetlands, the economic interests in the state will have the advantage of lower production costs. If a state wants to attract and promote business, it will not preserve isolated waters and wetlands, precipitating a race to the bottom. Congress can act to prevent a state from attaining any interstate competitive market advantage.<sup>428</sup> Furthermore, the destruction of isolated waters and wetlands will have interstate consequences.<sup>429</sup>

Federal standards are necessary to preclude states being placed at a competitive disadvantage for having stronger environmental protection standards. The Supreme Court in *Hodel v. Virginia Surface Mining and Reclamation Association*<sup>430</sup> recognized that Congress can regulate intrastate activity that endangers interstate commerce. The Court upheld the Surface Mining and Reclamation Control Act (SMRCA), noting that "[the] inadequacies in existing state laws and the need for uniform minimum nationwide standards made federal regulations imperative."<sup>431</sup> National standards were necessary "to insure that competition in interstate commerce among sellers of coal produced in different States will not be used to undermine the ability of several states to improve and maintain adequate standards on coal mining operations within their borders."<sup>432</sup>

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426. *Palila*, 471 F. Supp. at 995.

427. Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite U.S. v. Lopez*, 94 MICH. L. REV. 554, 609-10 (1995). See also Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992).

428. The federal policy of wetlands preservation could be frustrated by inadequate state protection of isolated waters and wetlands. North American Wetlands Conservation Act, 16 U.S.C. §§ 4401-4414 (2000); Water Bank Act, 16 U.S.C. §§ 1301-1311 (2000). See also Exec. Order No. 11,990, 42 Fed. Reg. 26,961 (May 24, 1997).

429. Federal wetlands regulation protects against the effects of one state filling in waters and wetlands on other states water quality, flood control, and wildlife management. Citizens in one state have additional concerns about activities in another state because their federal taxes pay the bill when federal assistance is required for increased public health care costs, flood protection, emergency relief, and environmental cleanups when wetlands are not able to perform their functions. Brief of the States of California et al., at 21-22, *SWANCC v. U.S. Army Corps of Eng'rs*, 121 S. Ct. 675 (2001) (No. 99-1178).

430. 452 U.S. 264 (1981).

431. *Id.* at 280.

432. *Id.* at 281-82.

Other courts have employed this rationale. The D.C. Circuit in *National Association of Home Builders v. Babbitt* held that the Endangered Species Act (ESA) regulates economic activity that substantially affects interstate commerce.<sup>433</sup> The court determined that the ESA, like the SMRCA, regulates private intrastate commercial activities to prevent actions that will harm interstate commerce by destroying the environmental quality and the variety of species in other states.<sup>434</sup> Furthermore, the ESA, like the SMRCA, ensures that economic growth does not undermine conservation and species preservation, which are essential to interstate commerce.<sup>435</sup>

The Fourth Circuit in *Gibbs v. Babbitt* determined that the anti-taking regulation prevents a state from establishing any unfair competitive market advantage.<sup>436</sup> No state can lower its wildlife protection standards to benefit in-state economic interests. Federal regulation avoids the race to the bottom.<sup>437</sup>

### C. Jurisdictional Limits

*Lopez* requires that the federal statute contain jurisdictional limits to distinguish between federal and state authority.<sup>438</sup> One of the jurisdictional constraints regarding the discharge of dredge and fill material into isolated waters and wetlands was migratory bird habitat. Habitat is the area where the members of a species grow and live, not just visit.<sup>439</sup> The migratory bird rule required a case-by-case determination by the Corps regarding the suitability of the isolated waters as migratory bird habitat prior to issuing any permit, as was done in the SWANCC case.<sup>440</sup>

The jurisdictional parameters of the migratory bird rule were acknowledged by the Seventh Circuit in *Hoffman Homes v. EPA*.<sup>441</sup> The court held that the adverse impact on tourism resulting from the loss of migratory bird habitat constituted a sufficient connection to interstate commerce to justify federal jurisdiction.<sup>442</sup> However, the court

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433. 130 F.3d 1041, 1053 (D.C. Cir. 1997).

434. *Id.* at 1055-56.

435. *Id.* at 1054-57.

436. 214 F.3d 483, 501-503 (4th Cir. 2000).

437. *Id.*

438. *United States v. Lopez*, 514 U.S. 549, 561-62 (1995).

439. *McAllister & Glicksman*, *supra* note 332, at 11,128.

440. *SWANCC v. U.S. Army Corps of Eng'rs*, 191 F.3d 845, 848-49 (7th Cir. 1999). See also Edward A. Morrissey, *The Jurisdiction of the Clean Water Act over Isolated Wetlands: The Migratory Bird Rule*, 22 J. LEGIS. 137, 142-43 (1996).

441. 999 F.2d 256, 261 (7th Cir. 1993).

442. *Id.*

determined that there was not substantial evidence that the site served as migratory bird habitat.<sup>443</sup>

The Fourth Circuit made a similar finding regarding jurisdictional limitations in *Gibbs v. Babbitt*.<sup>444</sup> The court determined that the anti-taking regulation did not apply to all wildlife and plants but was restricted to endangered and threatened species.<sup>445</sup>

#### D. Traditional State Authority

*Lopez* is concerned that federal regulation does not intrude upon traditional state authority.<sup>446</sup> The regulation of migratory birds is not a traditional state function. The control over the discharge of dredge and fill material into isolated waters and wetlands is an environmental regulation that is designed to control the impacts of pollution, not a land use regulation regarding the use of the site.<sup>447</sup>

Migratory birds are not subject to state authority. Initially, migratory birds were considered to be wildlife under state jurisdiction, not subject to federal commerce clause authority.<sup>448</sup> The United States and Great Britain signed a treaty in 1916 to protect migratory birds in the United States and Canada, which was implemented by the Migratory Bird Treaty Act (MBTA) in 1918.<sup>449</sup> The Court upheld the MBTA in *Missouri v. Holland*<sup>450</sup> as being necessary and proper to implement the treaty. Federal treaty making authority was not limited by any "invisible radiation from the general terms of the Tenth Amendment."<sup>451</sup> Justice Holmes noted that the federal interest in protecting migratory birds is of "very nearly the first magnitude....[Because of their transitory nature,

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443. *Id.* at 261-63.

444. 214 F.3d 483, 504-05 (4th Cir. 2000).

445. *Id.*

446. *United States v. Lopez*, 514 U.S. 549, 567-68 (1995); *see also id.* at 568-583 (Kennedy, J., and O'Connor, J., concurring).

447. *SWANCC v. U.S. Army Corps of Eng'rs*, 121 S. Ct. 675, 693 (2001) (Stevens, J., dissenting).

448. *United States v. McCullagh*, 221 F. 288, 292 (D. Kan. 1915); *United States v. Shauver*, 214 F.154 (E.D. Ark. 1914).

449. 16 U.S.C. §§ 703-711 (2000). *See also* George Cameron Coggins & Sebastian T. Patti, *The Resurrection and Expansion of the Migratory Bird Treaty Act*, 50 U. COLO. L. REV. 165 (1979).

450. 252 U.S. 416 (1920).

451. *Id.* at 434. Missouri's invocation of *Geer v. Connecticut*, 161 U.S. 619 (1896), which upheld state control over wildlife, was also rejected. The Court stated that "the State may regulate the killing and sale of such birds, but it does not follow that its authority is exclusive of paramount powers. To put the claim of the State upon title is to lean upon a slender reed. Wild birds are not in the possession of anyone; and possession is the beginning of ownership." *Missouri*, 252 U.S. at 434-35.

they] can be protected only by national action."<sup>452</sup> The Court has subsequently declared that the MBTA can also be justified under federal commerce clause authority.<sup>453</sup>

The federal government is committed to the preservation and management of migratory birds and has established an extensive system of wildlife refuges, waterfowl management areas, and migratory bird sanctuaries that serve as migratory bird habitat.<sup>454</sup> The Migratory Bird Conservation Act was enacted in 1929, authorizing the Secretary of the Interior to acquire land "for...use...as inviolate sanctuaries for migratory birds."<sup>455</sup> In 1934, the Migratory Bird Hunting Stamp Act was passed to provide funding for land acquisitions under the Migratory Bird Conservation Act.<sup>456</sup> Congress amended the Stamp Act in 1958, increasing the price of duck stamps, to hasten the acquisition of land for migratory bird habitat.<sup>457</sup> When this proved insufficient, Congress provided additional revenues through the Wetlands Act of 1961.<sup>458</sup> The Land and Water Conservation Fund Act of 1965<sup>459</sup> authorizes funds for the purchase of natural areas, including wetlands. The Water Bank Act<sup>460</sup> was enacted in 1970 "to conserve water, preserve and improve the condition of migratory waterfowl habitat and other wildlife resources,...through long-term land use agreement with landowners and operators in important migratory waterfowl nesting and breeding areas."<sup>461</sup> In 1986, Congress passed the Emergency Wetlands Resource Act, which increased the price of duck stamps to accelerate the speed of wetland preservation.<sup>462</sup>

The North American Waterfowl Management Plan, signed in 1986, recognizes that restoring wetlands and associated ecosystems is necessary for the recovery and perpetuation of waterfowl populations.<sup>463</sup> The Plan committed the United States and Canada to cooperative efforts

452. *Id.* at 435.

453. *Andrus v. Allard*, 444 U.S. 51, 58 (1979). *See also* *United States v. Bramble*, 103 F.3d 1475, 1482 (9th Cir. 1996) (determining that eagle extinction would have a substantial impact on interstate commerce).

454. U.S. FISH & WILDLIFE SERVICE, THE NORTH AMERICAN WATERFOWL MANAGEMENT PLAN 12 (1989); *North Dakota v. United States*, 460 U.S. 300, 302-04 (1983). *See generally* OTA, WETLANDS, *supra* note 255, at 9, 69-80.

455. 16 U.S.C. § 715(e) (2000).

456. 16 U.S.C. § 718 (2000).

457. 16 U.S.C. § 718d(c) (2000).

458. 16 U.S.C. § 715k (2000).

459. 16 U.S.C. § 4601 (2000). *See also* OTA, WETLANDS, *supra* note 255, at 72-73.

460. 16 U.S.C. § 1301 (2000).

461. S. REP. NO. 96-449 (1979), *reprinted in* 1979 U.S.C.C.A.N. 2778, 2778-79. The Water Bank Act was amended in 1979 to adjust payment rates, expand the types of wetlands eligible for the program, and increase annual appropriations. *Id.*

462. Pub. L. No. 99-645, 100 Stat. 3582 (1986).

463. U.S. FISH & WILDLIFE SERVICE, *supra* note 454, at 13.



to stop the decline in waterfowl populations and their habitats. Mexico joined in 1988 and became a full partner in 1994. Since 1986, the participants "have invested over \$500 million for waterfowl and wetland conservation and over 2 million acres of habitat have been purchased, leased, restored, secured, or enhanced for wildlife."<sup>464</sup>

Congress amended the Fish and Wildlife Coordination Act in 1988 to "require the Secretary of Interior to identify conservation measures to assure that nongame migratory bird species do not reach the point at which measures of the Endangered Species Act of 1973 are necessary."<sup>465</sup> In 1989, the North American Wetlands Conservation Act<sup>466</sup> was enacted "to protect, enhance, restore, and manage an appropriate distribution and diversity of wetland ecosystems and other habitats for migratory birds and other fish and wildlife in North America."<sup>467</sup>

Wildlife protection is not an exclusive state function.<sup>468</sup> There are numerous federal statutes that protect wildlife, including the Lacey Act,<sup>469</sup> Bald Eagle Protection Act,<sup>470</sup> Fish and Wildlife Coordination Act,<sup>471</sup> Endangered Species Act,<sup>472</sup> and Wild Free-Range Horses and Burros

464. U.S. DEPT. OF INTERIOR, 1994 UPDATE TO THE NORTH AMERICAN WATERFOWL MANAGEMENT PLAN 2 (1994). See also Stephen Brown, *Building Partnerships for Wetlands: U.S. Shorebird Conservation Plan*, NAT'L WETLANDS NEWSL. (Envtl. Law Inst., Washington, D.C.), Jan.-Feb. 1999, at 3-4.

465. 16 U.S.C. § 4401(a)(10) (2000).

466. 16 U.S.C. § 4401 et seq.

467. 16 U.S.C. § 4401(b)(1).

468. See generally Fitzgerald, *supra* note 361, at 39-51. See also William S. Boyd, *Federal Protection of Endangered Wildlife Species*, 22 STAN. L. REV. 1289 (1970); Davina K. Kaile, *Note: Evolution of Wildlife Legislation in the U.S.: An Analysis of the Legal Efforts to Protect Endangered Species and Its Prospects for the Future*, 5 GEO. INT'L ENVTL. L. REV. 441 (1993); George Cameron Coggins & William H. Hensley, *Constitutional Limits on Federal Power to Protect and Manage Wildlife: Is the Endangered Species Act Endangered?* 61 IOWA L. REV. 1099 (1976); Byron Swift, *Endangered Species Act: Constitutional Tensions and Regulatory Discord*, 4 Colum. J. Env'tl. L. 97, 105-13 (1977); George Cameron Coggins, *Wildlife and the Constitution: The Walls Come Tumbling Down*, 55 WASH. L. REV. 295 (1980).

469. 16 U.S.C. § 701 (2000); Fitzgerald, *supra* note 361, at 42-43. See also Robert S. Anderson, *The Lacey Act: America's Premier Weapon in the Fight Against Unlawful Wildlife Trafficking*, 16 PUB. LAND L. REV. 27 (1995); Michael E. Field, *The Evolution of the Wildlife Taking Concept from Its Beginning to Its Culmination in the Endangered Species Act*, 21 HOUS. L. REV. 457, 468-69 (1984).

470. 16 U.S.C. § 668 (2000).

471. 16 U.S.C. § 661 (2000).

472. 16 U.S.C. § 1531 et seq. (2000).

Act.<sup>473</sup> These statutes have been upheld under the Commerce Clause,<sup>474</sup> the Property Clause,<sup>475</sup> and the Treaty Clause.<sup>476</sup>

Congress did not attempt to end state authority in the CWA, which reflects cooperative federalism.<sup>477</sup> The FWPCA initially focused on state implemented water quality standards.<sup>478</sup> After this method proved ineffective, the 1972 FWPCA amendments moved to federal point source control,<sup>479</sup> including the discharge of dredge and fill material. Congress amended section 404 in 1977. Many normal farming, silviculture, and ranching activities are exempted from section 404 requirements.<sup>480</sup> The federal government retains exclusive jurisdiction over the discharge of dredge and fill material into traditional navigable waters, but the states are encouraged to assume control over dredge and fill operations in non-traditional navigable waters.<sup>481</sup>

The regulation of dredge and fill discharges into isolated waters and wetlands is an environmental regulation under federal authority, not a land use control under state jurisdiction. The distinction between environmental regulation and land use control is subtle. An environmental regulation focuses on pollution control. Pollution is usually the result of cumulative decentralized decisions by numerous individuals who do not coordinate their activities; therefore, national standards are required. Land use controls regulate the location of human activity and the commitment of a site to a particular purpose. Land use decisions affect a small number of individuals who are related to the site and such decisions are generally under state and local control.<sup>482</sup> According to the Court, "Land use planning in essence chooses particular uses for the land; environmental regulation, at its core, does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits."<sup>483</sup>

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473. 16 U.S.C. § 1331 (2000).

474. *United States v. Bryant*, 716 F.2d 1091 (6th Cir. 1983); *United States v. Power*, 923 F.2d 131 (9th Cir. 1990) (upholding the Lacey Act); *Andrus v. Allard*, 444 U.S. 51 (1979); *United States v. Bramble*, 103 F.3d 1475 (9th Cir. 1996) (upholding the Bald Eagle Protection Act).

475. *Kleppe v. New Mexico*, 426 U.S. 529 (1976) (upholding the Wild Free Roaming Horses and Burros Act).

476. *Missouri v. Holland*, 252 U.S. 416 (1920). See generally Fitzgerald, *supra* note 361, at 39-52.

477. 33 U.S.C. § 1251(b) (2000).

478. For a history of federal water pollution control, see S. REP. NO. 92-414 (1972), reprinted in 1972 U.S.C.C.A.N. 3669, 3677.

479. *Id.* at 3675-77.

480. 33 U.S.C. § 1344(f) (2000).

481. 33 U.S.C. § 1344(g).

482. RICHARD B. STEWART & JAMES E. KRIER, ENVIRONMENTAL LAW AND POLICY: READINGS, MATERIALS, AND NOTES 23-28 (2d. ed. 1978).

483. *Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 587 (1987).

Section 404 is not a planning provision that dictates the particular use of the property but affects development of the property by eliminating or mitigating any adverse environmental impacts.<sup>484</sup> Section 404 is similar to other federal requirements that impact land use.<sup>485</sup> Under the purview of the Commerce Clause, the Court has upheld federal land use restrictions designed to prevent environmental harm.<sup>486</sup>

## V. POLITICAL REACTION

The Court's decision in *SWANCC* places national wetlands, which are rapidly disappearing,<sup>487</sup> at risk.<sup>488</sup> If federal jurisdiction pursuant to the CWA is limited to wetlands adjacent to navigable waters, only 20 percent of the national wetlands will be protected. The remaining 80 percent of the nation's wetlands, which include prairie potholes, wet meadows, forest wetlands along non-navigable rivers and

484. The Corps rarely denies a section 404 permit. Between 1995 and 1999, the Corps only denied 0.3 percent of the annual 74,500 permit requests. Zinn & Copeland, *Wetland Issues*, Congressional Research Service Issue Brief (May 1, 2000), cited in Brief of the States of California et al., at 29-30, *SWANCC v. U.S. Army Corps of Eng'rs*, 121 S. Ct. 675 (2001) (No. 99-1178).

485. See Clean Air Act, 42 U.S.C. §§ 7401 et seq. (2000), particularly 42 U.S.C. § 7410 (federal requirements for state implementation programs); Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 et seq. (2000), particularly 42 U.S.C. §§ 1288, 1313(e) (area-wide waste treatment plants); Coastal Zone Management Act, 16 U.S.C. § 1451 et seq. (2000). See also Ablard & O'Neill, *supra* note 89, at 109 n.222.

486. *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687 (1995). See also Peter A. Buchsbaum, *Federal Regulation of Land Use: Uncle Sam the Permit Man*, 25 URB. LAW. 589 (1993); Peter A. Buchsbaum & Thomas C. Shearer, *Report of the Subcommittee on Federal Regulation of Land Use*, 26 URB. LAW. 831 (1994); Peter A. Buchsbaum, James E. Brookshire, Roger Platt, *The Federal Government and Land Use: The Not So Quiet Evolution Continues*, 28 URB. LAW. 517 (1996); Peter A. Buchsbaum, *SWANCC: A Retreat from Federal Regulation of Land Use?* 33 URB. LAW. 753 (2001).

487. From the 1780s through the 1980s, the contiguous United States lost 54 percent of the estimated 221 million acres of wetlands. Between the 1950s and 1970s, the lower 48 states lost an estimated 458,000 acres of wetlands annually; and from the 1970s through the 1980s, the yearly loss was 290,000 acres. From 1985 through 1995, the United States experienced an annual loss of 117,000 acres of wetlands. U.S. FISH & WILDLIFE SERVICE, *STATUS AND TRENDS OF WETLANDS IN THE COTERMINOUS U.S.* 9 (2000). See Teresa Opheim, *Wetland Losses Continue but Have Slowed*, NAT'L WETLANDS NEWSL. (Envtl. Law Inst., Washington, D.C.), Nov.-Dec. 1997, at 1.

488. For a discussion on the scope of *SWANCC*, see Robert G. Dreher, *Unsettling the Balance of Federalism: The SWANCC Decision*, NAT'L WETLANDS NEWSL. (Envtl. Law Inst., Washington, D.C.), Mar.-Apr. 2001, at 1; David M. Ivester, *The Supreme Court Draws the Line*, NAT'L WETLANDS NEWSL. (Envtl. Law Inst., Washington, D.C.), Mar.-Apr. 2001, at 5; Derb S. Carter, Jr., *Supreme Court Decision Defies Common Sense and Intent of Congress*, NAT'L WETLANDS NEWSL. (Envtl. Law Inst., Washington, D.C.), Mar.-Apr. 2001, at 7; Jon Kusler, *supra* note 6, at 9. See also National Wildlife Federation, NRDC, *WETLANDS AT RISK: IMPERILED TREASURES available at* <http://www.nwf.org/wetlands/wetlandsatrisk.html> (last visited Mar. 17, 2003).

lakes, forested wetlands, playas, vernal pools, flats, bogs, and Alaskan tundra, will be exposed. If federal jurisdiction includes navigable waters, their tributaries, and adjacent wetlands, 40 to 60 percent of the nation's wetlands will be sheltered. If waters with a significant nexus to navigable waters are regulated, 80 percent of the wetlands will be secured.<sup>489</sup> The Court's decision also threatens migratory birds by decreasing their habitat.<sup>490</sup>

The Court's decision generated political responses. On January 10, 2001, President Clinton issued Executive Order 13186, outlining the responsibilities of federal agencies regarding the protection of migratory birds.<sup>491</sup> The order declared that "migratory birds are of great ecological and economic value" to the United States.<sup>492</sup> International agreements place affirmative duties on the United States. Any federal agency undertaking action that can harm migratory birds is instructed to develop and implement a memorandum of understanding with the FWS that will "promote the conservation of migratory bird populations."<sup>493</sup> An inter-agency Council for the Conservation of Migratory Birds is established to oversee the implementation of the order.<sup>494</sup> The Executive Order has not been revoked by President Bush.<sup>495</sup>

The EPA and the Corps adopted a narrow reading of the Court's decision, which only precludes the assertion of jurisdiction over waters used by migratory birds.<sup>496</sup> The EPA and Corps believe that the Court's holding in *United States v. Riverside Bayview Homes, Inc.* establishes the basis for federal jurisdiction. In addition, federal jurisdiction over other waters can occur if there is a "significant nexus" between these waters and waters of the United States or "their use, degradation, or destruction

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489. Jon Kusler, *The SWANCC Decision and State Regulation of Wetlands* 1, 7-8, prepared for the Association of State Wetlands Managers (2001), available at <http://www.aswm.org/rwp/swancc/aswm-int.pdf> (last visited Mar. 17, 2003); Kusler, *supra* note 6, at 9-12.

490. U.S. FISH & WILDLIFE SERVICE, *supra* note 454, at 8-9.

491. Responsibilities of Federal Agencies to Protect Migratory Birds, Exec. Order No. 13,186, 66 Fed. Reg. 3853 (Jan. 17, 2001). This builds on other orders that protect wetlands and floodplains.

492. *Id.*

493. *Id.*

494. *Id.*

495. Johnson, *supra* note 188, at 10,677. One commentator noted that "the Bush Administration's attitude toward environmental regulation might best be characterized as 'quietly hostile.'" Thomas O. McGarity, *Jogging Place: The Bush Administration's Freshman Year Environmental Record*, 32 ENVTL. L. REP. 10,709, 10,720 (2002).

496. Memorandum from Gary S. Guzy, General Counsel, EPA, and Robert M. Anderson, Chief Counsel, U.S. Army Corps of Engineers, Regarding Supreme Court Ruling Concerning Clean Water Act Jurisdiction over Isolated Waters (Jan. 2001) (on file with author).

could affect other waters of the U.S.<sup>497</sup> The EPA and the Corps are working on a new definition of wetlands.<sup>498</sup>

The courts have limited the SWANCC holding to a rejection of the migratory bird rule and continued to give a broad reading to the term "waters of the U.S."<sup>499</sup> For example, the courts have found an irrigation ditch connected to an intermittent tributary of a navigable water,<sup>500</sup> a spring connected to a non-navigable stream,<sup>501</sup> and ground water connected to surface water to be "waters of the U.S."<sup>502</sup>

Congress can act to include isolated waters within the definition of navigable,<sup>503</sup> to establish national wetlands legislation,<sup>504</sup> or to protect migratory bird habitat pursuant to the treaty or property clauses.<sup>505</sup> There

497. Stephen M. Johnson, *Federal Regulation of Isolated Wetlands After SWANCC*, 31 ENVTL. L. REP. 10,669, 10,674-77 (2001).

498. Clean Water Act—Definition of Waters of the United States, 66 Fed. Reg. 26,258 (May 14, 2001); Clean Water Act—Definition of Waters of the United States, 67 Fed. Reg. 33,864 (May 13, 2002); *Excerpt from "Supreme Court Ruling Concerning Clean Water Act Jurisdiction over Isolated Waters,"* NAT'L WETLANDS NEWSL. (Envtl. Law Inst., Washington, D.C.), Mar.-Apr. 2001, at 4. See generally Agency Implementation of the SWANCC Decision, *Hearings before the Subcommittee on Energy Policy, Natural Resources, and Regulatory Affairs, House Comm. on Gov. Reform* (Sept. 19, 2002), available at <http://www.reform.house.gov/reg/hearings/index.htm#September192002> (last visited Mar. 17, 2003).

499. See generally Patrick Parenteau, *Position Paper on the Clean Water Act Jurisdiction Determinations Pursuant to the Supreme Court's January 9, 2001 Decision, SWANCC v. Corps*, presented to Administrator Whitman, U.S. EPA, the Association of State Wetlands Managers, Inc. (Dec. 2001), available at <http://www.aswm.org/propub/pubs/aswm-publist.htm> (last visited March 17, 2003); Robin Kundis Craig, *Beyond SWANCC: The New Federalism and Clean Water Jurisdiction* (forthcoming in ENVTL. L.). See also Douglas T. Kendall, et al., *Conservative Judicial Activism and the Environment: An Assessment of the Threat*, 32 ENVTL. L. REP. 10,835, 10,838 n.37 (2002).

500. *Headwaters v. Talent Irrigation Dist.*, 243 F.3d 526, 533 (9th Cir. 2001).

501. *Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169, 1179 (D. Idaho 2001).

502. *United States v. Interstate General Co.*, 152 F. Supp.2d 843, 847 (D. Md. 2001). See also *United States v. Buday*, 138 F. Supp. 2d 1282 (D. Mont. 2001); *United States v. Krillich*, 152 F. Supp. 2d 983 (N.D. Ill. 2001); *Aiello v. Town of Brookhaven*, 136 F. Supp. 2d 81, 119 (E.D.N.Y. 2001); *California Sportfishing Prot. Alliance v. Diablo Grande, Inc.*, 209 F. Supp. 2d 1059 (E.D. Cal. 2002); *Colvin v. U.S.*, 181 F. Supp. 2d 1050 (C.D. Cal. 2001); *Borden Ranch Partner v. U.S. Army Corps of Eng'rs*, 261 F.3d 810 (9th Cir. 2001). However, there have been several decisions that have limited federal jurisdiction pursuant to SWANCC. See *Rice v. Harken Energy Expl. Co.*, 250 F.3d 264 (5th Cir. 2001); *U.S. v. Rapanos*, 190 F. Supp. 2d 1011 (E.D. Mich. 2002); *U.S. v. Bay-Houston Towing Co., Inc.*, 197 F. Supp. 2d 788 (E.D. Mich. 2002); *U.S. v. Newdunn Assocs.*, 195 F. Supp. 2d 751 (E.D. Va. 2002).

503. The Clean Water Authority Restoration Act of 2002 was introduced by Senator Feingold "to provide protection to waters of the United States to the fullest extent of the legislative authority of Congress under the Constitution..." S. 2780, 107th Cong. (2002). A companion bill was introduced in the House by Representative Oberstar that had 15 Democratic co-sponsors. H.R. 5194, 107th Cong. (2002).

504. Kusler, *supra* note 6, at 12. See also OTA, *WETLANDS*, *supra* note 255, at 14-21.

505. Fitzgerald, *supra* note 361, at 45-47; Johnson, *supra* note 497, at 10,679; Michael J. Gerhardt, *Federal Environmental Protection in a Post-Lopez World: Some Questions and Answers*, 30 ENVTL. L. REP. 10,980, 10,988-90 (2000).

is, however, little chance of a congressional reaction because the Republicans regained control of Congress in 2002.<sup>506</sup>

State and local regulation can partially fill in the gaps created by the Court in *SWANCC*.<sup>507</sup> Fifteen states provide protection for isolated waters and wetlands, including Connecticut, Florida, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Virginia. The remaining 35 states rely upon the federal program to protect their wetlands.<sup>508</sup> Section 401 of the CWA requires applicants for section 404 permits to receive state water quality certification, which grants the states a veto over the permit and the ability to attach conditions for permit approval to protect state wetlands.<sup>509</sup> Ironically, by decreasing federal authority, the Court also reduces state authority pursuant to section 401 and discourages states from assuming jurisdiction over section 404 permitting in nontraditional navigable waters.<sup>510</sup>

## CONCLUSION

The Court's decision in *SWANCC* represents conservative activism.<sup>511</sup> It is institutional activism because the Court elevated its views over the decisions of the democratically accountable legislative and executive branches.<sup>512</sup> The Court did not follow the text, intent, and purposes of the CWA, which indicated broad federal jurisdiction over "the waters of the U.S." The Court ignored strong executive precedent and overruled a long-standing Corps and EPA interpretation of the CWA. The Court reinforced its interpretation of the CWA by questioning the constitutionality of broad federal jurisdiction. It is also policy

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506. From 1993 through 2002, the Republicans' pro-environmental score ranged from nine percent to 19 percent in the Senate and from 16 percent to 32 percent in the House. The Democrats achieved higher pro-environmental scores, ranging from 75 percent to 84 percent in the Senate and from 68 percent to 81 percent in the House. See LEAGUE OF CONSERVATION VOTERS' NATIONAL ENVIRONMENTAL SCORECARDS, 1993-2002, available at <http://www.lcv.org/scorecard/scorecardList.cfm?c=25> (last visited May 8, 2003).

507. Kusler, *supra* note 6, at 9-12; Johnson, *supra* note 497, at 10,679-80; Frasca, *supra* note 131, at 519-20.

508. Kusler, *supra* note 6, at 10.

509. 33 U.S.C. § 1341 (2000).

510. *SWANCC v. U.S. Army Corps of Eng'rs*, 121 S. Ct. 675, 693 (2001) (Stevens, J., dissenting); Kusler, *supra* note 6, at 11.

511. See generally Kendall et al., *supra* note 499.

512. Institutional activism occurs when the judicial decision "tends to expand judicial power either absolutely or relative to other institutions of government, and, conversely, reflects institutional restraint when it tends to limit judicial power." Robert E. Levy & Robert L. Glicksman, *Judicial Activism and Restraint in the Supreme Court's Environmental Law Decisions*, 42 VAND. L. REV. 343, 348 (1989).

activism because the Court continued to advance its pro-development agenda and discount the protection of the environment.<sup>513</sup>

The Court did not follow the two-step *Chevron* framework in *SWANCC*. Step one requires the Court to determine if Congress addressed the interpretative issue. When examining congressional action, the traditional tools of statutory interpretation—text, intent, purposes—are employed. The Court in *SWANCC* relied principally on the text of the CWA, but its interpretation of the text was questionable. The Court made a cursory review of the legislative history and mistakenly concluded that Congress intended to limit the Corps' jurisdiction to traditional navigable waters. The Court completely ignored the legislative purposes and rendered a decision that frustrates the ecological goals of the CWA and undermines federal policy to preserve wetlands and protect migratory birds.

Step two in *Chevron* requires the court to defer to the agency's interpretation of the statute, if it is reasonable. The Court in *SWANCC* did not adopt the Corps' interpretation because there was no clear statement of congressional intent in the CWA to justify such broad federal jurisdiction into a traditional area of state authority.<sup>514</sup> Mandating a strong clear statement allowed the Court to ignore clear signals in the legislative history and statutory purposes.<sup>515</sup> The Court advanced its own views without directly provoking a hostile reaction from Congress.<sup>516</sup> The Court engaged in the classic "bait-and-switch."<sup>517</sup> Congress enacted the CWA with presumptions about how it would be interpreted and its constitutionality. The Court changed the interpretive framework and undermined the prior legislative assumptions.

The Court refused to defer to the Corps' interpretation because it threatened federalism<sup>518</sup> and raised constitutional doubt.<sup>519</sup> The Court's

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513. Policy activism occurs when the "court uses the judicial power to pursue its own choice of policy." *Id.* at 350, 421-24. Glicksman and Levy concluded, after studying the Court's decisions from 1976 through 1988, that "the Supreme Court has been making environmental policy—a pro-development policy contrary to the pro-environment policy chosen by Congress." *Id.* at 347. See generally MICHAEL S. GREVE, *THE DEMISE OF ENVIRONMENTALISM IN AMERICAN LAW* (1996).

514. Eskridge & Frickey, *supra* note 223, at 82, noted, "Like the Court's erratic textualist performance in statutory cases, its application of quasi-constitutional clear statement rules has been tactically clever in the short-term but institutionally risky in the longer-term. The Court's adventurism has been most apparent, and most normatively questionable, in the super-strong clear statement rules protecting states' rights at the expense of individual rights and national policies."

515. Eskridge & Frickey, *supra* note 217, at 595-98, 629-46. Healy, *supra* note 7, at 10,940.

516. Eskridge & Frickey, *supra* note 223, at 85.

517. *Id.*; Healy, *supra* note 7, at 10,939 n.108.

518. See generally Eskridge & Frickey, *supra* note 217, at 619-29.

519. The constitutional doubt canon requires that when "an otherwise acceptable construction of a statute would raise serious constitutional problems, the court will

invocation of these canons of statutory interpretation was questionable.<sup>520</sup> The migratory bird rule did not present a problem with federalism, nor was it beyond the scope of congressional commerce power. The avoidance of constitutional doubt canon poses separation of powers problems and encourages judicial activism. The Court's canonical jurisprudence in *SWANCC* undermined *Chevron*, which instructs the courts to defer to reasonable agency interpretation. Deference to the Corps' reasonable statutory interpretation would have precluded any constitutional doubt.<sup>521</sup>

The Court in *SWANCC* also ignored strong executive precedent regarding the Corps' jurisdiction and invalidated a regulation that had been in place in a general manner since 1975 and in a specific manner for 15 years. There was no demand for a change in the policy by Congress or the Executive Branch. The Court simply substituted its pro-development position for the environmental protection in the regulations.<sup>522</sup>

The Court in *SWANCC* also suggested that even if Congress had authorized the migratory bird rule, the rule probably would still be unconstitutional. The Court's conclusion was dubious under the *Lopez* framework. *Lopez* allows the regulation of activities that substantially affect interstate commerce individually or in aggregate. The destruction of isolated waters and wetlands is an economic activity that harms the ecosystem and biodiversity, which are important for interstate commerce. The destruction of habitat has adverse economic impacts on the hunting, studying, photographing, and observing of migratory birds. *Lopez* requires that the regulated activity have jurisdictional parameters. The migratory bird rule establishes such limits regarding isolated waters and wetlands. *Lopez* also precludes federal regulation into areas of traditional state authority. The states do not have authority over migratory birds, which are protected by international treaties and federal statutes. Section 404 acknowledges and encourages state authority. In addition, the regulation of the discharge of dredge and fill material is an environmental regulation, not a land use control.

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construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward D. Bartolo Corp. v. Fla. Gulf Coast Bldg. and Constr. Trades Council*, 485 U.S. 568, 575 (1988). This canon assumes that since the court is not politically accountable, it should defer to Congress, which is majoritarian, unless Congress made clear error. In addition, the separation of powers dictates that the court does not rule on constitutional issues not before it. The court should adopt an unproblematic interpretation. *Supreme Court—Leading Cases, supra* note 224, at 533-34.

520. For every canon, there is an opposing canon. There is no indication that Congress is aware of the canons. Canons are flawed presumptions about legislative intent and are contrary to legislative supremacy. *Mikva & Lane, supra* note 52, at 129-30; *Esckridge & Frickey, supra* note 217, at 595-98.

521. *Supreme Court—Leading Cases, supra* note 224, at 534-36.

522. *Levy & Glicksman, supra* note 512, at 346-47, 421-24.



The Court's decision in *SWANCC* puts at risk a great many isolated waters and wetlands that are rapidly disappearing. Isolated waters and wetlands are collective goods that perform important national functions, including migratory bird habitat. It is difficult to protect this public resource because market forces are not particularly sensitive to collective benefits.<sup>523</sup> Reducing the scope of federal protection of isolated waters and wetlands enhances the possibility of their destruction through economic development, replaying the "tragedy of the commons."<sup>524</sup> Furthermore, as William Saxbe, former Attorney General, noted,

if we fail save the wetlands, we will be losing more than an economic and aesthetic asset that can never be re-created. The loss may also signal an impending and crushing defeat in the larger effort to maintain an environment that civilized man can inhabit.<sup>525</sup>

The impact of the Court's statutory and constitutional interpretation on the future of environmental law is debatable.<sup>526</sup> The *SWANCC* decision can be viewed as a narrow issue of statutory interpretation revolving around an ambiguous statutory provision or as a threat to environmental statutes.<sup>527</sup> The latter position is more accurate. Federal environmental statutes assume broad federal authority.<sup>528</sup> The Court is invoking states' rights to constrain federal authority and national

523. Blumm, *supra* note 120, at 471-72.

524. Garrett Hardin, *Tragedy of the Commons*, 162 *SCI.* 1243 (1968).

525. Address by Attorney General Saxbe, Conference on the Protection of Gulf Coast Wetlands (July 18, 1974), cited in *Comprehensive Wetlands Protection: One Step Closer to Full Implementation of § 404 of the FWPCA*, 5 *ENVTL. L. REP.* 10,099, 10,104 (1975).

526. See generally Gerhardt, *supra* note 505; Timothy S. Bishop, Kyle F. Waldinger, & Elizabeth A. Clark, *One for the Birds: The Corps of Engineers' "Migratory Bird Rule,"* 30 *ENVTL. L. REP.* 10,633 (2000); Charles Tiefer, *After Morrison, Can Congress Preserve Environmental Laws from Commerce Clause Challenge?* 30 *ENVTL. L. REP.* 10,888 (2000); Philip Weinberg, *Does That Line in the Sand Include Wetlands? Congressional Power and Environmental Protection*, 30 *ENVTL. L. REP.* 10,894 (2000).

527. See generally William Funk, *The Court, the Clean Water Act, and the Constitution: SWANCC and Beyond*, 31 *ENVTL. L. REP.* 10,741 (2001); Michael J. Gerhardt, *The Curious Flight of the Migratory Bird Rule*, 31 *ENVTL. L. REP.* 11,079 (2001); Tiefer, *supra* note 83; Healy *supra* note 7; Kendall et al., *supra* note 499; Craig, *supra* note 100; McAllister & Glicksman, *supra* note 332; Arthur P. Mizzi, *Impact of Solid Waste Agency Decision on the 10th Circuit and Environmental Laws*, 30 *COLO. LAW.* 109, 111-12 (July 2001); Buchsbaum, *SWANCC: A Retreat from Federal Regulation of Land Use?*, *supra* note 486.

528. Other environmental statutes that could be threatened are CERCLA, 42 U.S.C. §§ 9601 et seq. (2000); the Surface Mining Control and Reclamation Act (SMCRA), 30 U.S.C. §§ 1201 et seq. (2000); and the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901 et seq. (2000). See Brief of the States of California et al. at 19, *SWANCC v. U.S. Army Corps of Eng'rs*, 121 S. Ct. 675 (2001) (No. 99-1178).

policies.<sup>529</sup> The Court's reliance on textualism, requirement of clear statements, invocation of statutory canons, and disregard for executive precedent makes it difficult for Congress to legislate and delegate administrative authority and for executive agencies to implement statutes. Under the guise of federalism the Court in *SWANCC* reversed the decisions of democratically accountable lawmakers and imposed its own ideological view.<sup>530</sup> This is not a positive sign for the future of environmental law.<sup>531</sup>

The Court is well aware of the existing political landscape.<sup>532</sup> Institutional self-interest generally dictates that the Court will not act to frustrate the policy goals of the Congress and the Executive Branch.<sup>533</sup> The Court began to limit federal authority over the states in the 1990s under the protection of Republican President George H.W. Bush.<sup>534</sup> The Court restricted federal authority over action that ostensibly fell within state jurisdiction in 1995 under the protection of a Republican Congress until 2001, then a Republican House and President. The Republican takeover of the Congress in the 2002 midterm elections will encourage the Court to establish greater limits on federal authority. Furthermore, if President Bush is afforded the opportunity to replace one of the moderate justices on the Court with a justice in the mold of Justice Scalia

529. Eskridge & Frickey, *supra* note 217, at 642-44.

530. Judge Wilkinson observed, the values of federalism must be tempered by the maxims of prudence and restraint....A wholesale invalidation of environmental, civil rights, and business regulation would signal a different and disturbing regime—one other than that which we now have. If modern activism accelerates to a gallop, then this era will go the way of its discredited forbearer.

*Brzonkala v. Va. Polytechnic Instit.*, 169 F.3d 820, 897-98 (4th Cir. 1999). See also J. Harvie Wilkinson III, *The Role of Reason in the Rule of Law*, 56 U. CHI. L. REV. 779, 801-09 (1989).

531. Several commentators observed that conservative judicial activism is not the traditional role of the courts and noted that

[f]ederal courts have been instrumental to the success of the environmental movement. They have traditionally sustained the policy choices made by the public and the Congress to protect the environment. They generally have respected the Constitution and long-standing precedent in upholding environmental protection against industry-launched attacks. They have ensured adequate access to the courts by citizens harmed by violations of environmental laws. As a result, our air, lakes, rivers, and other natural resources are far better off than they were in decades past. The antienvironmental judicial activism that has emerged in recent years threatens all we have gained.

Kendall et al., *supra* note 499, at 10,852.

532. See generally Eskridge, *supra* note 126; Farber & Frickey, *supra* note 126; Friedman, *supra* note 126; Tiefer, *supra* note 53, at 212-31.

533. William N. Eskridge & John Frejohn, *The Elastic Commerce Clause: A Political Theory of American Federalism*, 47 VAND. L. REV. 1355, 1359-60, 1362, 1367 (1994).

534. *Gregory v. Ashcroft*, 501 U.S. 452 (1991); *New York v. United States*, 505 U.S. 144 (1992).

or Justice Thomas, this will accelerate the Court's efforts to elevate states' rights and support economic development that poses risks to the environment.<sup>535</sup> As E.J. Dionne, a noted *Washington Post* reporter, observed, "The doctrine of states' rights, so often invoked as a principle, is almost always a pretext to deny the federal government authority to do things conservatives dislike. These include...increasing protection for the environment and regulating business."<sup>536</sup>

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535. Levy & Glicksman, *supra* note 512, at 347; Kendall et al., *supra* note 499, at 10,835-37, 10,852; Tiefer, *supra* note 526, at 10,891-93; Gerhardt, *supra* note 527, at 11,084-85.

536. E.J. Dionne, Jr., *When States' Rights Get in the Way*, WASH. POST, June 25, 2002, at A19.