Federal Regulation of Isolated Wetlands

by

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FEDERAL REGULATION OF ISOLATED WETLANDS

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The Clean Water Act authorizes regulation of "waters of the United States." But, it is not clear whether isolated wetlands, which are neither navigable nor adjacent to navigable waters, are subject to regulation under the Act. While the U.S. Supreme Court has not decided the issue, and there has been some conflict in the federal circuit courts, the author argues that Congress intended isolated wetlands to be regulated under the Act and that the Commerce Clause of the Constitution gives power to that intent.

I. INTRODUCTION

Historically, wetlands were referred to as "swamps."[1] They were seen as insect-ridden wastelands prime for dredging, filling

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1. Wetlands vary widely, and modern classification systems discourage the use of such generic labels to identify the entire class. "Swamps," "bogs," and "marshes" are not merely synonyms for wetlands. Instead, each describes a particular type of wetland. "Swamps," for instance, are wetlands that are dominated by trees or shrubs. *See* GORDON MEEKS, JR. & L. CHERYL RUNYON, NATIONAL CONFERENCE OF STATE LEGISLATURES, WETLANDS PROTECTION AND THE STATES 5 (Karen Hansen ed., 1990).

or draining.[2] Not surprisingly, more than half of the wetlands that existed in the contiguous forty-eight states when America was born have been destroyed.[3]

Gradually, wetlands began to be appreciated for the benefits that they provide.[4] Often referred to as "nature's kidneys,"[5] wetlands improve water quality by removing excess nutrients,[6] sedi-

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2. MEEKS & RUNYON, *supra* note 1, at 1. *See also* GENERAL ACCOUNTING OFFICE, WETLANDS OVERVIEW 9 (1991) [hereinafter GAO]; WILLIAM A. NIERING, WETLANDS 18 (1985); U.S. FISH AND WILDLIFE SERVICE, WETLANDS OF THE UNITED STATES: CURRENT STATUS AND RECENT TRENDS 1 (1984). [hereinafter FWS]. Throughout history, government policies frequently encouraged the destruction of wetlands. For instance, in 1764, the Virginia Assembly chartered the Dismal Swamp Company to drain 40,000 acres of the Great Dismal Swamp to harvest the timber in the swamp. NIERING, *supra*, at 30-31. Similarly, in the Swamp Lands Acts of 1849, 1850, and 1860, Congress granted 65 million acres of wetlands to 15 western states for "swamp reclamation." WILLIAM L. WANT, LAW OF WETLANDS REGULATION § 2.02[1] (1989).

3. A 1990 study by the Fish and Wildlife Service estimates that 53% of the 221 million acres of wetlands that existed in the lower 48 states in 1780 were destroyed by the 1980s. GAO, *supra* note 2, at 11 (citing THOMAS E. DAHL, U.S. FISH AND WILDLIFE SERVICE, WETLANDS LOSSES IN THE UNITED STATES: 1780's to 1980's 1 (1990)). During that period, 19 states lost more than half of their wetlands, and 6 states lost more than 85% of their wetlands. *Id.* at 11, 91. Between 1950 and 1970 alone, an average of 458,000 acres of wetlands were lost per year. FWS, *supra* note 2, at vii. Agricultural development accounted for 87% of the losses during that period, with urban development accounting for 8%, and other development accounting for 5%. *Id.*

4. *See* MEEKS & RUNYON, *supra* note 1, at 1. Wetlands are one of America's most productive sources of food protein. ELINOR L. HORWITZ, COUNCIL ON ENVIRONMENTAL QUALITY, OUR NATION'S WETLANDS 21 (1978). *See also* JOHN GOLDMAN-CARTER, NATIONAL WILDLIFE FEDERATION, A CITIZEN'S GUIDE TO PROTECTING WETLANDS 27-31 (1989); FWS, *supra* note 2, at 19.

Studies have also indicated that some wetlands contribute to groundwater recharge, the replenishment of underground aquifers. FWS, *supra* note 2, at 23; NIERING, *supra* note 2, at 31. Furthermore, wetlands play a vital role in maintaining biospheric stability. For instance, wetland plants are important in producing oxygen from carbon dioxide and some studies indicate that the methane generated by wetlands plays a role in protecting the ozone layer. NIERING, *supra* note 2, at 34.

5. MEEKS & RUNYON, *supra* note 1, at 1.

6. The increased use of nitrogen-rich agricultural fertilizers leads to increased levels of nutrients in hydrologic systems. NIERING, *supra* note 2, at 33. Wetlands prevent nutrient overloading (eutrophication) by removing nutrients, especially nitrogen and phosphorous, from water before it leaves the wetland ecosystem. *Id.* *See also* FWS, *supra* note 2, at 18.

Tinicum Marsh, a 512 acre freshwater tidal marsh located just south of Philadelphia, illustrates the natural ability of a wetland to filter nutrients from the

ments,[7] and pollutants[8] from water. They prevent flooding[9] and soil erosion,[10] and provide critical habitat for countless species of migratory waterfowl and endangered species.[11] They also produce tremendous quantities of natural products.[12] In addition to those tangible and intangible economic benefits, wetlands provide immeasurable recreational, educational, and aesthetic benefits.[13]

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surrounding water. While three sewage treatment plants discharge treated sewage into the marsh, the marsh removes 4.9 tons of phosphorous, 4.3 tons of ammonia, and 138 pounds of nitrates from the water each day. FWS, *supra* note 2, at 18.

7. By removing sediments from water, wetlands reduce the turbidity of the water which leaves the wetland ecosystem, and reduce the siltation of water bodies which are located downstream from the wetland. *Id.* Since sediments transport various pollutants and nutrients, wetlands also filter pollutants and nutrients out of water when they remove sediments. *Id.*

8. *Id. See also* NIERING, *supra* note 2, at 33. Recognizing the ability of wetlands to remove pollutants from water, scientists are studying the use of natural wetlands, and even the construction of artificial wetlands, for waste treatment. *Id.* at 33-34.

9. Most wetlands temporarily store flood waters, and thereby slow the velocity of the water and lower flood crests. FWS, *supra* note 2, at 21. *See also* NIERING, *supra* note 2, at 31. By slowing the velocity of flood waters, wetlands also reduce the erosive potential of the waters. FWS, *supra* note 2, at 21. Since almost half the damage caused by floods is damage to agriculture, in the form of crop land erosion, wetlands play a vital role in protecting agricultural land from flood waters. *Id.* A scientific study conducted in Wisconsin determined that flooding may be reduced by almost 80% in watersheds with wetlands compared to similar watersheds without wetlands. *Id.* at 22.

10. FWS, *supra* note 2, at 23.

11. Scientists estimate that 150 North American bird species depend on wetlands for survival. NIERING, *supra* note 2, at 32. These ecosystems provide essential breeding grounds, feeding grounds, and wintering areas for the birds. FWS, *supra* note 2, at 14. Wetlands also provide critical habitat for one-third of the nation's endangered species. *Id.* at 17. *See also* COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY: 22ND ANNUAL REPORT 195 (1992).

12. FWS, *supra* note 2, at 23. *See also* MEEKS & RUNYON, *supra* note 1, at 7. Over 82 million acres of wetlands are commercially forested in the 49 continental states of the United States. FWS, *supra* note 2, at 23. Some of the products harvested in wetlands include timber, cranberries, blueberries, wild rice, fish and shellfish, water hyacinths, and peat. *Id. See also* MEEKS & RUNYON, *supra* note 1, at 8. Almost two-thirds of the fish and shellfish that are harvested commercially depend on wetlands for spawning or for use as nurseries. *Id.* at 7. *See also* FWS, *supra* note 2, at 13. While the intrinsic value of wetlands can be maintained with proper management of the harvesting of many natural products, the harvesting of some products can be devastating to the ecosystem. The harvesting of peat, for instance, is essentially a mining operation and permanently destroys the wetland ecosystem. MEEKS & RUNYON, *supra* note 1, at 8.

13. Wetlands often provide havens for hunters, fishers, hikers, swimmers,

Recognizing the inherent value of wetlands, Congress and states enacted legislation to protect wetlands[14] and to eliminate incentives for destroying them.[15] The federal government and the

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boaters, bird watchers, and nature photographers, among others. FWS, *supra* note 2, at 24.

14. One of the oldest federal wetlands protection statutes is the Migratory Bird Hunting Stamp Act, 16 U.S.C. § 718 (1988). Enacted in 1934, the legislation requires hunters of migratory waterfowl to purchase and display licenses, known as "duck stamps." 16 U.S.C. § 718a. The proceeds from the sale of duck stamps are deposited in a Migratory Bird Conservation Fund, which is used to purchase wetlands and surrounding areas for use as refuges or as waterfowl protection areas. 16 U.S.C. § 718d. Through 1989, the government spent $49 million to obtain easements to protect 1.2 million acres of wetlands, and spent an additional $102 million to obtain title to 564,000 acres of wetlands. GAO, *supra* note 2, at 23.

Another federal statute, the Water Bank Act, authorizes the Secretary of Agriculture to purchase 10 year easements on wetlands and adjacent areas "to preserve, restore, and improve the wetlands of the [n]ation." 16 U.S.C. §§ 1301-1311 (1988). In exchange for an annual payment, owners of wetlands agree not to drain, fill or otherwise destroy their wetlands, and to implement conservation plans and practices to protect the wetland habitat. *Id.* § 1303. As of July 1, 1991, the federal government was spending eight million dollars per year to protect 543,208 acres of wetlands under the Act. GAO, *supra* note 2, at 23.

The most comprehensive federal wetlands protection program, however, is the regulatory program established by section 404 of the Clean Water Act. 33 U.S.C. § 1344 (1988). The section 404 regulatory program is jointly administered by the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers. *Id.* The Clean Water Act prohibits the discharge of dredged or fill materials into wetlands or other waters without a permit under the section 404 program. *Id.* Persons who violate the Act are subject to criminal prosecution, 33 U.S.C. § 1319c, and face civil penalties of up to $25,000 per day of violation. *See id.* § 1319d. The government can also order them to restore the wetlands to the condition that they were in prior to the illegal filling activity. *See id.* § 1319a.

Several states have enacted legislation to provide additional protection to wetlands beyond the protection afforded by federal law. *See* WANT, *supra* note 2, § 13.02. *See also* MEEKS & RUNYON, *supra* note 1, at 10-14.

15. Prior to 1985, federal farm policies implicitly encouraged farmers to dredge or fill wetlands and convert them to agricultural land in order to obtain federal credit and commodity supports. GAO, *supra* note 2, at 21. However, in 1985, Congress removed some of those incentives when it enacted the Food Security Act of 1985. Pub. L. No. 99-198, 99 Stat. 1354 (codified in scattered sections of 7 and 16 U.S.C.) [hereinafter 1985 Farm Bill].

The "swampbuster" provisions of the 1985 Farm Bill deny price supports, loans, insurance, and other payments and benefits to farmers for any year that the farmers plant crops on wetlands that were converted to agricultural use after the enactment of the law. 16 U.S.C.A. § 3821 (West Supp. 1992).

The swampbuster provisions were strengthened by the Food, Agriculture, Conservation and Trade Act of 1990, Pub. L. No. 101-624, 104 Stat. 3359 (codified in scattered sections of 7 and 16 U.S.C.). Under the Act, farmers who drain,

states began to pursue unified programs to preserve wetland ecosystems.[16] As a result of these efforts, the rate of wetland loss in the United States has declined.[17]

Recently, however, the tide of wetland protection has begun to recede. In order to appease developers, farmers, and property rights advocates, the federal government proposed narrowing the definition of wetlands that are subject to federal regulation.[18] The

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dredge, fill or otherwise convert any wetland after November 28, 1990, "for the purpose, or to have the effect, of making the production of an agricultural commodity *possible*" shall be ineligible for various price supports, loans, insurance, payments and benefits for the year in which the wetlands are converted and for *every year* thereafter. 16 U.S.C.A. § 3821b (West Supp. 1992) (emphasis added). As of August 1991, over $3.7 million worth of benefits were withheld from farmers due to violations of the swampbuster provisions of the 1985 Farm Bill. GAO, *supra* note 2, at 21.

16. Prior to 1989, the U.S. Army Corps of Engineers, the EPA, the Fish and Wildlife Service, and the U.S. Department of Agriculture's Soil Conservation Service each employed its own standards and procedures for identifying wetlands. U.S. ARMY CORPS OF ENGINEERS ET AL., FEDERAL MANUAL FOR IDENTIFYING AND DELINEATING JURISDICTIONAL WETLANDS 1 (1989). In 1989, the four agencies jointly adopted a manual which set forth uniform standards and procedures for identifying wetlands. *Id.* at 2.

The federal government reached out to states and to a broad coalition of industry and environmental groups to establish a common agenda for wetlands protection. In 1987, EPA convened a National Wetlands Policy Forum, consisting of state governors and agency directors, local government officials, chief executive officers of environmental and business organizations, farmers, ranchers, and academics. GAO, *supra* note 2, at 15. *See also* MEEKS & RUNYON, *supra* note 1, at 9-10. The forum prepared an action agenda, which formed the basis for EPA's current wetlands protection agenda. U.S. EPA, WETLANDS ACTION PLAN (1989).

17. The Fish and Wildlife Service estimates that the annual rate of wetlands loss has declined to 290,000 acres. GAO, *supra* note 2, at 11.

18. Federal Manual for Identifying and Delineating Jurisdictional Wetlands, 56 Fed. Reg. 40,446 (1991). The government's proposal would narrow the definition of wetlands by changing the standards and methods that the government uses to identify wetlands. On August 14, 1991, EPA, the Corps, the Fish and Wildlife Service, and the Soil Conservation Service proposed revisions to the wetlands delineation manual that the four agencies jointly adopted in 1989. *Id.* The proposed revisions were prompted by protests from farmers and developers that the 1989 manual greatly increased the acreage of wetlands subject to regulation. *EPA Rejects OMB Proposal That Would Slow Issuance of Wetlands Manual*, INSIDE E.P.A. WEEKLY REPORT, Aug. 2, 1991, at 1-2.

The 1991 revisions have, however, been broadly criticized as confusing and scientifically flawed. *EPA, Interagency Experts All Find Wetlands Manual Confusing, UnScientific*, INSIDE E.P.A. WEEKLY REPORT, Nov. 29, 1991, at 3. *See also State Officials to Draft Wetlands Manual, Charging Federal Effort Flawed*, IN-

government may also sanction the conversion of thousands of acres of wetlands to farmland.[19] At the same time, representatives

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SIDE E.P.A. WEEKLY REPORT, Mar. 6, 1992, at 18-19. Over 70,000 public comments were submitted on the revisions, and they have not yet been finalized. *White House Wetlands Meeting Offers No Resolution over Disputed Manual*, INSIDE E.P.A. WEEKLY REPORT, Apr. 17, 1992, at 1-2.

Congress created further confusion regarding which manual should be used to identify wetlands when it enacted legislation which prohibits the Corps from using any of its appropriations for the 1992 fiscal year for delineating wetlands under the 1989 manual. *See* Energy and Water Development Appropriations Act of 1992, Pub. L. No. 102-104, 105 Stat. 510, 518 (1991). The legislation also provides that, for pending enforcement actions and permit applications in which wetlands were delineated using the 1989 manual, landowners or permit applicants can elect a new delineation under the Corps of Engineers' 1987 manual. *Id.*

Subsequent to the issuance of the proposed revisions to the 1989 manual and challenges to the scientific validity of the revisions, legislation was introduced to require the National Academy of Sciences to conduct a study of the scientific basis of wetlands delineation. *See* H.R. 3578, 102d Cong., 1st Sess. (1991). The White House has opposed such a study. *'Top Bush Aides' Opposition Dims Prospects for Study on Wetlands Manual*, INSIDE E.P.A. WEEKLY REPORT, Feb. 28, 1992, at 3-4. The dispute regarding which manual should be used to identify wetlands remains unresolved.

19. The EPA and the Corps have proposed regulations that will remove wetlands which qualify as "prior converted cropland" from federal jurisdiction under the Clean Water Act. Proposed Rule for the Clean Water Act Regulatory Programs of the Army Corps of Engineers and the EPA, 57 Fed. Reg. 26,894 (1992). A wetland qualifies as "prior converted cropland" if, prior to December 23, 1985, the wetland was drained or altered to remove water and cropped to the extent that it was inundated with water for no more than 14 consecutive days during the growing season. *Id.* at 26,897.

The proposed regulation codifies a policy which the Corps adopted in 1990 to establish greater consistency between the regulation of wetlands by the Corps and the United States Department of Agriculture (USDA) under the swampbuster provisions of the 1985 Farm Bill. *Id.* Recently, however, the USDA has indicated that it intends to expand its definition of "prior converted cropland" to include wetlands which have been farmed for six of the last ten years and meet the requirements for "prior converted cropland," regardless of whether the wetlands were converted prior to December 23, 1985. *USDA Drafts Plan Weakening Farmed Wetland Regs, Prompting EPA Protest*, INSIDE E.P.A. WEEKLY REPORT, May 22, 1992, at 1, 6.

Although the regulation which was recently proposed by EPA and the Corps incorporates the existing USDA definition of "prior converted cropland" by reference, the proposal stresses that if the USDA definition is amended, EPA and the Corps will review the amended definition and determine, at that time, whether to incorporate the amended definition by reference. 57 Fed. Reg. at 26,897. Therefore, the USDA's adoption of an amended definition of "prior converted cropland" might further decrease the acreage of wetlands subject to regulation under the Clean Water Act.

in Congress have introduced legislation to fundamentally restructure the existing federal program for the regulation of wetlands under the Clean Water Act.[20] Each of these initiatives strives to decrease the universe of wetlands that are subject to federal regulation.

Disputes regarding the extent of the federal government's jurisdiction to regulate wetlands have not, however, been limited to the executive and legislative branches of the federal government. The judiciary has frequently been called upon to determine which wetlands, if any, are subject to federal regulation under the Clean Water Act. In 1985, in *United States v. Riverside-Bayview Homes*,[21] the U.S. Supreme Court determined that the Clean Water Act authorizes federal regulation of wetlands that are *ad-*

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20. 33 U.S.C. §§ 1251-1386 (1988). The Clean Water Act requires permits for discharges of dredged or fill material into waters of the United States, which EPA and the Corps have interpreted to include wetlands. *Id.* §§ 1311, 1344. Under the Act, the permit program is administered by the Corps or by the states. *Id.* § 1344. The EPA, however, plays an important role in the permitting process. Permit decisions must be made in accordance with guidelines established by EPA and the Corps, and EPA can "veto" permits where it determines that the discharge authorized by the permit will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas, wildlife, or recreational areas. *See id.* § 1344b-c. The Fish and Wildlife Service also provides comments on proposed permits under the Act. *See id.* § 1344m.

Under the Comprehensive Wetlands Conservation and Management Act of 1991, a recent legislative proposal, EPA's role in the Clean Water Act permitting process would be eliminated. H.R. 1330, 102d Cong., 1st Sess. (1991). The proposed legislation would also increase the amount and type of wetlands that are exempt from the permit requirements of the Clean Water Act. *Id.* § 3f. Further, the legislation would classify wetlands by size and value, and impose varied regulatory requirements on them depending on their classification. *Id.* § 3c. If a wetland receives the highest classification provided for by the legislation, the United States would be forced to compensate the owner of the wetland for any diminution in the value of the land caused by the classification. *Id.* § 3d. Environmentalists have strongly criticized the proposed legislation. *Industry, Environmentalists Face Possible House Battle over Wetlands Bill*, INSIDE E.P.A. WEEKLY REPORT, July 10, 1992, at 1,6. The 102d Congress recessed without enacting H.R. 1330.

The Wetlands Reform Act of 1992 was also introduced during the 102d Congress. H.R. 4255, 102d Cong., 2d Sess. (1992). In contrast to House Bill 1330, the Wetlands Reform Act maintains and strengthens EPA's role in the wetlands permitting process. *Id.* §§ 105, 107, 201. It also increases the activities in wetlands which are subject to the permit requirements of the Clean Water Act, and requires the National Academy of Science to conduct a study of wetlands delineation. *Id.* §§ 201-202. The 102d Congress recessed without enacting H.R. 4255.

21. 474 U.S. 121 (1985).

jacent to other waters of the United States.[22] However, the Court expressly refused to decide whether the Act also authorizes regulation of *nonadjacent,* or isolated, wetlands.[23]

A few years after the Supreme Court's decision, the U.S. Court of Appeals for the Ninth Circuit addressed the question that the Supreme Court avoided. In *Leslie Salt Co. v. United States,*[24] the Ninth Circuit held that the Clean Water Act authorizes federal regulation of isolated wetlands.[25] The Ninth Circuit also held that such regulation is not precluded by the Commerce Clause of the Constitution.[26] Recently, however, in *Hoffman Homes v. EPA,*[27] a Seventh Circuit panel reached the opposite conclusion, and held that the Clean Water Act does *not* authorize federal regulation of isolated wetlands.[28] The court also held that regulation of certain intrastate, isolated wetlands is not authorized by the Commerce Clause.[29] However, five months after it issued the *Hoffman Homes* opinion, the Seventh Circuit vacated the opinion.[30] While the court did not explain its rationale for vacating the decision, the court's action has temporarily forestalled further deterioration of federal wetlands protection under the Clean Water Act.

This Article reviews the federal regulation of "adjacent" and "isolated" wetlands under the Clean Water Act. Section II reviews the statutory and regulatory basis for regulation of wetlands under the Clean Water Act, and the case law which has interpreted the scope of federal regulation under the Act. The remainder of the Article explores the federal government's au-

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22. *Id.* at 139.

23. The Court noted, "We are not called upon to address the question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to open bodies of water . . . and we do not express any opinion on that question." *Id.* at 131 n.8.

24. 896 F.2d 354 (9th Cir. 1990).

25. *Id.* at 360.

26. *Id.*

27. 961 F.2d 1310 (7th Cir.), *reh'g granted and opinion vacated,* 35 Env't Rep. Cas. (BNA) 1328 (7th Cir. Sept. 4, 1992).

28. *Id.* at 1316.

29. *Id.* at 1320-1321.

30. *EPA Victorious as Court Rejects Ruling Questioning Agency Wetlands Authority,* INSIDE E.P.A. WEEKLY REPORT, Sept. 11, 1992, at 13. The court granted EPA's petition for rehearing, and referred the case to a senior court attorney for settlement negotiations. *Id.* If negotiations fail, the court will rehear the case. *Id.*

thority to regulate isolated wetlands. Section III examines judicial interpretations of the legislative history of the Clean Water Act and concludes that Congress intended to regulate isolated wetlands, Section IV discusses the effect of wetlands on interstate Commerce and concludes that the Commerce Clause would give power to the Congressional intent to regulate wetlands under the Clean Water Act.

II. JURISDICTION TO REGULATE WETLANDS UNDER THE CLEAN WATER ACT

The controversy surrounding which wetlands, if any, are subject to federal regulation under the Clean Water Act derives from the ambiguity of the Act, which does not explicitly refer to wetlands. Instead, the Act prohibits the discharge of dredged or fill material[31] into "navigable waters" without a permit.[32] The dispute between landowners, environmentalists and government regulators has, therefore, centered on whether wetlands are navigable waters.

While wetlands are often not navigable per se, the term navigable waters in the Clean Water Act is not limited to waters that are truly navigable. Instead, the Act defines navigable waters as all "waters of the United States."[33] By adopting such a broad definition, Congress intended to exert the federal government's Clean Water Act jurisdiction over the broadest spectrum of waters authorized by the Commerce Clause of the Constitution.[34]

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31. "Dredged material" is defined as "material that is excavated or dredged from waters of the United States." Permits for Discharges of Dredged or Fill Material into Waters of the United States, 33 C.F.R. § 323.2c (1991). The "discharge of dredged material" means "any addition of dredged material into the waters of the United States." *Id.* § 323.2d. "Fill material" is defined as "any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody." *Id.* § 323.2e. The "discharge of fill material" means "the addition of fill material into waters of the United States." *Id.* § 323.2f.

32. 33 U.S.C. §§ 1311a, 1344a.

33. *Id.* § 1362(7).

34. *See* H.R. REP. No. 911, 92d Cong., 2d Sess. 131, *reprinted in* 1972 U.S.C.C.A.N. 3668; S. CONF. REP. No. 1236, 92d Cong., 2d Sess. 144, *reprinted in* 1972 U.S.C.C.A.N. 3668, 3822. Historically, the term "navigable waters" derives from the Rivers and Harbors Appropriation Act of 1899. 33 U.S.C. §§ 401-467n (1988). Section 10 of the Act authorizes the Army Corps of Engineers to regulate the alteration or modification of "navigable waters." *Id.* § 403. The term "naviga-

Since the Act does not explicitly refer to wetlands as "waters," the regulations which interpret the Act determine the scope of federal jurisdiction over wetlands.

A. Regulatory Interpretation of Jurisdiction

Federal regulation of wetlands under the Clean Water Act has evolved gradually since Congress established the permit program for discharges into navigable waters in section 404 of the Act.[35] Initially, the U.S. Army Corps of Engineers, which administers the section 404 permit program[36] promulgated regulations which interpreted navigable waters narrowly.[37] The regulations only required permits for discharges of dredged or fill material into waters which were truly navigable, and the regulations were silent regarding the Corps' jurisdiction over wetlands.[38]

However, the Corps' narrow regulatory interpretation of navigable waters conflicted with the broad definition established in the Act.[39] As a result, several federal courts struck down the regu-

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ble waters" is interpreted narrowly under the Rivers and Harbors Act to include only those waters which (i) are navigable in fact, *see* The Daniel Ball, 77 U.S. 557, 563 (1870); Miami Valley Conservancy Dist. v. Alexander, 692 F.2d 447, 449 (6th Cir. 1982), *cert. denied* 462 U.S. 1123; (ii) were historically navigable, *see* Economy Light and Power v. United States, 256 U.S. 113 (1921); State Water Control Board v. Hoffman, 574 F.2d 191, 193 (9th Cir. 1978); or (iii) are already suitable for navigation but require "artificial aids" to make the water suitable for commercial navigation, *see* United States v. Appalachian Electric Power Co., 311 U.S. 377, 407 (1940).

When Congress defined "navigable waters" in the Clean Water Act to include all "waters of the United States," Congress clearly expressed its intention to reject the narrow interpretation of the term established by the Rivers and Harbors Act in favor of a broad interpretation which is not necessarily tied to navigability per se.

35. 33 U.S.C. § 1344.

36. *Id.* Pursuant to the Act, though, states may assume responsibility for administering portions of the permit program in lieu of the Corps of Engineers. *Id.* § 1344h.

37. Permits for Activities in Navigable Waters or Ocean Waters, 39 Fed. Reg. 12,115 (1974).

38. The regulations defined "navigable waters" to mean "those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce . . . ." *Id.* at 12,119.

39. The regulatory definition adopted by the Corps also conflicted with EPA's interpretation of the term "navigable waters" under the Act. The EPA adminis-

lations.[40] In one case, the U.S. District Court for the District of Columbia ordered the Corps to revise its regulations.[41]

Shortly thereafter, the Corps adopted revised interim final regulations which defined navigable waters as all "waters of the United States," the term used in the Clean Water Act.[42] The regulations specifically identified coastal wetlands and freshwater wetlands as navigable waters, provided that the wetlands were "contiguous or adjacent to other navigable waters."[43] The regulations also authorized the Corps to determine, on a case-by-case basis, whether "perched wetlands" which were *not* contiguous or adjacent to other navigable waters were navigable waters.[44]

The Corps revised its regulations again in 1977, and adopted a new definition of "waters of the United States" subject to regulation under the Clean Water Act.[45] In those regulations, the

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ters the permit program that regulates discharges of pollutants, other than dredged or fill material, into navigable waters under the Act. *See* 33 U.S.C. § 1342 (1988). The Agency adopted a broad interpretation of navigable waters, consistent with the Act. *See* U.S. EPA, Meaning of the Term "Navigable Waters" (Feb. 6, 1973), *in* 1 COLLECTION OF LEGAL OPINIONS 295-96 (Dec. 1970 - Dec. 1973).

40. *See, e.g.*, United States v. Holland, 373 F. Supp. 665 (M.D. Fla. 1974).

41. Natural Resources Defense Council v. Callaway, 392 F. Supp. 685 (D.D.C. 1975). The Court ordered the Corps to "[r]evoke and rescind so much of . . . [its regulations] as limits the permit jurisdiction . . . to other than 'the waters of the United States' " and to "[p]ublish within (30) days . . . final regulations clearly recognizing the full regulatory mandate of the [Clean] Water Act." *Id.* at 686.

42. Permits For Activities in Navigable Waters or Ocean Waters, 40 Fed. Reg. 31,320, 31,324 (1975).

43. *Id.* "Coastal wetlands" were defined as "those areas periodically inundated by saline or brackish waters and that are normally characterized by the prevalence of salt or brackish water vegetation capable of growth and reproduction." *Id.* "Freshwater wetlands" were defined as "those areas that are periodically inundated and that are normally characterized by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction." *Id.* at 31,324-25. The regulations were implemented in three phases between 1975 and 1977. *Id.* at 31,326.

44. *Id.* at 31,325.

45. Regulatory Programs of the Corps of Engineers, 42 Fed. Reg. 37,122 (1977). Since the term "navigable waters" is used differently in the Clean Water Act and the Rivers and Harbors Act, the Corps of Engineers regulations were, and are, somewhat confusing. The 1977 regulations defined "navigable waters" narrowly to describe the waters subject to regulation under the Rivers and Harbors Act. The regulatory definition of "navigable waters" did not, however, apply to the Clean Water Act. Instead, the Corps adopted a definition of "waters of the United States" to describe the waters that are subject to jurisdiction as "navigable waters" under the Clean Water Act. *Id.* at 37,144 n.1. The current regulations also

Corps asserted jurisdiction over several categories of wetlands based on their ties to interstate commerce.[46] In particular, the 1977 regulations defined wetlands adjacent to other waters of the United States to be "waters of the United States" subject to regulation under the Clean Water Act.[47] The regulations also defined *isolated* wetlands to be "waters of the United States" if the degradation of the wetlands could affect interstate commerce.[48]

The Corps' regulations were amended in 1982[49] and 1986,[50] but neither amendment fundamentally changed the categories of wetlands that are subject to Clean Water Act jurisdiction. As noted above, not *all* wetlands are subject to Clean Water Act jurisdiction under the Corps' regulations. Instead, the regulations incorporate limits established by the Commerce Clause. In general, the Corps' regulations require permits for discharges of dredged or fill material into three categories of wetlands: interstate wetlands,[51] wetlands that are adjacent to other waters of the United States (adjacent wetlands),[52] and isolated wetlands, if "the use, degradation or destruction of the isolated wetlands could affect interstate or foreign commerce."[53]

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include a definition of "navigable waters" subject to Rivers and Harbors Act jurisdiction, and a definition of "waters of the United States" subject to Clean Water Act jurisdiction. *See* Definitions of Navigable Waters of the United States, 33 C.F.R. §§ 328-329 (1991).

46. 42 Fed. Reg. at 37,127. The Corps of Engineers noted in the preamble to the regulations that water moves in hydrologic cycles, and that the pollution of wetlands affects the water quality of other waters within the aquatic system. *Id.* at 37,128. The Corps relied on its authority under the Commerce Clause to regulate activities that contribute to water pollution as the basis for extending Clean Water Act jurisdiction over discharges of pollutants into certain wetlands. *Id.* at 37,127.

47. The regulations defined "waters of the United States" to include "[c]oastal and inland waters, lakes, rivers and streams that are navigable waters of the United States, including adjacent wetlands, . . . [t]ributaries to navigable waters of the United States, including adjacent wetlands, . . . [and] [i]nterstate waters and their tributaries, including adjacent wetlands . . . ." *Id.* at 37,144.

48. *Id.*

49. Interim Final Rule for Regulatory Programs of the Corps of Engineers, 47 Fed. Reg. 31,794 (1982) (codified at 33 C.F.R. §§ 320-30).

50. Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206 (1986) (codified at 33 C.F.R. §§ 320-330).

51. 33 C.F.R. § 328.3a(2) (1991).

52. *Id.* § 328.3a(7).

53. *Id.* § 328.3a(3). While the 1977 regulations used the term "isolated wetlands," the current regulations refer to "[a]ll other waters such as intrastate lakes,

In the 1986 revision to the regulations, the Corps explicitly identified several ways in which the use, degradation or destruction of intrastate, isolated wetlands could affect interstate or foreign commerce.[54] The Corps also adopted several criteria used by EPA to determine whether intrastate, isolated wetlands have sufficient ties to interstate commerce to justify federal regulation.[55] The EPA, which jointly administers the federal wetlands regulatory program, has also adopted regulations that identify which waters are subject to the Clean Water Act.[56] The EPA regulations are nearly identical to the Corps of Engineer regulations.

B. Case Law Regarding Jurisdiction

Ever since Congress defined navigable waters in the Clean Water Act as all "waters of the United States," federal courts have been called upon to interpret the extent of the federal government's jurisdiction under the Act. One of the first cases that addressed the issue was *United States v. Phelps Dodge Corp.*,[57] a criminal enforcement action brought by EPA under the Clean Water Act. The defendant in *Phelps Dodge* argued that the Clean Water Act definition of "waters of the United States" is unconstitutionally vague, because it does not specifically identify *which* waters are subject to jurisdiction under the Act.[58] The court dis-

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rivers, . . . wetlands, . . . or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce . . . ." *Id.*

54. In its regulations, the Corps of Engineers asserts jurisdiction over intrastate, isolated waters, including wetlands: "(i) Which are or could be used by interstate or foreign travelers for recreation or other purposes; or (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or (iii) Which are used or could be used for industrial purposes by industries in interstate commerce." *Id.*

55. 51 Fed. Reg. at 41,217. The Corps noted that EPA interprets "waters of the United States" to include waters:

a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or

b. Which are or would be used as habitat by other migratory birds which cross state lines; or

c. Which are or could be used as habitat for endangered species; or

d. Used to irrigate crops sold in interstate commerce.

Id.

56. Program Definitions: Exempt Activities Not Requiring 404 Permits, 40 C.F.R. § 232 (1991).

57. 391 F. Supp. 1181 (D. Ariz. 1975).

58. *Id.* at 1182.

agreed, and held that the Clean Water Act clearly identifies the waters that are subject to the Act's jurisdiction.[59] The scope of the Act's coverage, the court held, extends to "*any waterway*, including normally dry arroyos, where any water which might flow therein could reasonably end up in any body of water, to which or in which there is some public interest, including underground waters."[60] While *Phelps Dodge* did not address the issue of whether the Clean Water Act authorizes wetlands regulation, several other courts grappled with the issue in the early 1970s and 1980s. In general, those courts concluded that regulation of wetlands that are *adjacent* to other waters of the United States is authorized by the Clean Water Act.[61]

The Supreme Court entered the fray in 1985, when it affirmed the reasoning employed by many of those courts and held that the federal government can require persons to obtain a Clean Water Act permit before discharging dredged or fill materials into wetlands that are *adjacent* to other waters of the United States.[62] In *United States v. Riverside-Bayview Homes*,[63] the U.S. Army Corps of Engineers brought an enforcement action to enjoin a real estate developer from filling wetlands on the developer's property without a Clean Water Act section 404 permit.[64] The Corps alleged that the wetlands were "adjacent" to other waters of the United States and, therefore, were subject to Clean Water Act ju-

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59. *Id.* at 1187.

60. *Id.* Few courts have defined the Act's coverage as broadly as *Phelps Dodge*. In fact, the U.S. District Court for the Western District of Michigan specifically rejected the suggestion that Clean Water Act jurisdiction extends to groundwater. *See* Kelley v. United States, 618 F. Supp. 1103, 1106-07 (W.D. Mich. 1985).

61. *See, e.g.*, Florida Wildlife Fed'n v. Goldschmidt, 506 F. Supp. 350, 364 (S.D. Fla. 1981) (wetlands are "waters of the United States" subject to Clean Water Act jurisdiction); United States v. Weisman, 489 F. Supp. 1331, 1337-39 (M.D. Fla. 1980) (adjacent wetlands are "waters of the United States"); Conservation Council of N.C. v. Costanzo, 398 F. Supp. 653, 674 (E.D.N.C.) (wetlands that are periodically inundated by tidal waters are "waters of the United States"), *aff'd*, 528 F.2d 250 (4th Cir. 1975); United States v. Holland, 373 F. Supp. 665, 674-76 (M.D. Fla. 1974) (mangrove wetlands that are periodically inundated by tidal waters are "waters of the United States"). *But see* United States v. Riverside-Bayview Homes, 729 F.2d 391, 401 (6th Cir. 1984), *rev'd*, 474 U.S. 121 (1985).

62. United States v. Riverside-Bayview Homes, 474 U.S. 121 (1985).

63. *Id.*

64. *Id.* at 124.

risdiction under the Corps' regulations.[65] While the district court granted the Corps' request for an injunction, the Sixth Circuit reversed the district court's ruling.[66] The appellate court held that since the wetlands at issue were not flooded by *surface water* from the adjacent body of water, they were not adjacent wetlands under the Corps' regulations, and were not subject to the permit requirements of the Clean Water Act.[67]

The Supreme Court rejected the Sixth Circuit's narrow interpretation of the Corps' regulations and held that the wetlands at issue were adjacent wetlands.[68] The Court then focused on whether the Corps is authorized to regulate adjacent wetlands under the Clean Water Act.[69] Since the Corps is charged with administering the wetlands permitting program of the Clean Water Act,[70] the Supreme Court accorded a high degree of deference to the Corps' interpretation of the Act, and limited its inquiry to whether it was reasonable, in light of the language, policies and

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65. *Id.*

66. *Id.* at 125.

67. United States v. Riverside-Bayview Homes, 474 U.S. 121, 125 (1985). The Sixth Circuit ignored the Corps' interpretation of its own regulations and held that the wetlands at issue in the case were not adjacent wetlands because they were inundated by groundwater, rather than by surface water from the adjacent navigable waters. *Id.* The Sixth Circuit adopted a narrow construction of the Corps' regulations because the court felt that a broader reading of the regulation might result in the taking of private property without just compensation. *Id.*

68. *Id.* at 131. The Court dismissed the Sixth Circuit's takings concerns as spurious. *Id.* at 129. Specifically, the Court held that

> the possibility that the application of a regulatory program may in some instances result in the taking of individual pieces of property is no justification for the use of narrowing constructions to curtail the program if compensation will in any event be available in those cases where a taking has occurred. . . . Because the Tucker Act . . . is available to provide compensation for any taking that may occur . . . the Court of Appeals' fears that application of the Corps' permit program might result in a taking did not justify the court in adopting a more limited view of the Corps' authority than the terms of the relevant regulation might otherwise support.

Id. at 128-129. Having disposed of the constitutional question, the Court held that the Corps' regulations clearly define wetlands to be adjacent wetlands if they are sufficiently saturated by either surface water or ground water. *Id.* at 130 n.7. The court then deferred to the Corps' finding that the wetlands at issue met the regulatory criteria for adjacent wetlands.

69. *Id.* at 131.

70. *See* 33 U.S.C. §§ 1319, 1344 (1988). The Act also authorizes EPA to administer and enforce many provisions of the Act regarding wetlands. *See, e.g., id.*

legislative history of the Act, for the Corps to exercise jurisdiction over adjacent wetlands.[71]

The Court initially determined that the language of the Act is ambiguous,[72] so it examined the policies and goals of the Act to determine whether the Corps acted reasonably in regulating "adjacent" wetlands.[73] Section 101 of the Act defines the central purpose of the Act to be "to restore and maintain the chemical, physical and biological integrity of the Nation's waters."[74] Based on the policy enunciated in section 101, and on passages in the legislative history of the Act, the Court concluded that Congress chose to define "navigable waters" broadly in the Act to regulate waters that would not be deemed "navigable" under a classical understanding of the term.[75]

The Court then reviewed the Corps' regulation of adjacent wetlands to determine whether it was reasonable for the Corps to conclude that the broad jurisdiction of the Act encompasses those wetlands. In the preamble to the 1977 regulations, the Corps stressed that it is necessary to regulate adjacent wetlands under section 404 of the Act because "water moves in hydrologic cycles, and the pollution of [adjacent wetlands] . . . will affect the water

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71. *Riverside-Bayview Homes*, 474 U.S. at 131. An agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress. *See* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-845 (1984).

72. The Court explained,

> On a purely linguistic level, it may appear unreasonable to classify 'lands,' wet or otherwise, as 'waters'. Such a simplistic response, however, does justice neither to the problem faced by the Corps in defining the scope of its authority under § 404(a) nor to the realities of the problem of water pollution that the Clean Water Act was intended to combat. In determining the limits of its power to regulate discharges under the Act, the Corps must necessarily choose some point at which water ends and land begins. . . . Where on this continuum to find the limits of "waters" is far from obvious.

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

73. *Id.*

74. 33 U.S.C. § 1251.

75. *Riverside-Bayview Homes*, 474 U.S. at 132-33. The Court focused on passages in the legislative history which stressed that the Act incorporates "a broad, systemic view of the goal of maintaining and improving water quality" and that broad federal authority is necessary to control water pollution because "water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source." *Id.*

quality of the other waters within that aquatic system."[76] The Corps' regulations echoed concerns raised by EPA several years earlier.[77] In light of the technical determination of the Corps and the EPA that adjacent wetlands are inseparably linked to other waters of the United States, and in light of the broad federal regulatory authority contemplated by the Clean Water Act, the Court held that it was reasonable for the Corps to assert jurisdiction over adjacent wetlands under the Act.[78]

The Court rejected the Sixth Circuit's holding that limited the Corps' Clean Water Act jurisdiction over adjacent wetlands to those wetlands that are actually flooded by the surface water of adjacent waters.[79] Instead, the Court held that the Clean Water Act authorizes the Corps to regulate wetlands adjacent to other bodies of water even if the wetlands are not flooded or inundated by the adjacent waters.[80] As the Court observed, the Corps regulates adjacent wetlands because they may "(i) filter and purify water which drains into adjacent waters; (ii) slow the flow of surface runoff into lakes, rivers and streams, preventing flooding and erosion; and (iii) serve significant natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing and resting sites for aquatic . . . species."[81] The Court held that it was reasonable for the Corps to conclude that adjacent wetlands perform those functions, and reasonable, therefore, for the Corps to regulate *all* adjacent wetlands under section 404 of the Act.[82]

The Court based its holding in *Riverside-Bayview Homes* on

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76. *Id.* at 134 (citing Regulatory Programs of the Corps of Engineers, 42 Fed. Reg. 37,122, 37,128 (1977)).

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

78. *Id.* at 134-35.

79. *Id.*

80. *Id.*

81. *Id.* (citing 33 C.F.R. § 320.4b(2) (1991)).

82. United States v. Bayview-Riverside Homes, 474 U.S. 121, 135 (1985). While the Court acknowledged that some adjacent wetlands may not perform the functions described in the Corps' regulations, the Court explained that the existence of such wetlands does not undermine the Corps' decision to define *all* adjacent wetlands as "waters" subject to jurisdiction under section 404 of the Clean Water Act. *Id.* at 135 n.9. Instead, the Court opined, when a wetland does not perform the functions which the Corps attributes to adjacent wetlands, or when the value of the wetland is outweighed by other values, the Corps can allow development of the wetland simply by issuing a permit. *Id.*

the language of the Act and the legislative history of the 1972 amendments to the Act, which defined "navigable waters." However, the Court bolstered its holding with references to the legislative history of subsequent amendments to the Act.[83] Specifically, the Court noted that, during the legislative debates on the 1977 amendments to the Act, several measures were introduced to limit the Corps' jurisdiction over "navigable waters."[84] Each of those measures was defeated.[85] The Court reasoned that since the scope of the Corps' jurisdiction over adjacent wetlands was brought to Congress' attention in 1977, and since Congress rejected measures to limit that jurisdiction, Congress implicitly approved of the Corps' jurisdiction.[86]

The Court further noted that each of the measures that were proposed in the 1977 debates would have limited the Corps' Clean Water Act jurisdiction to waters that are navigable in fact and their adjacent wetlands.[87] The Court suggested that the proposed amendments provided additional support for the conclusion that Congress acquiesced in the Corps' interpretation of "navigable waters" to include adjacent wetlands.[88]

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83. *Id.* at 137-138.

84. *Id.* at 136.

85. The final legislation "retained the comprehensive jurisdiction over the Nation's waters." *Id.* at 137, (citing 123 CONG. REC. 39,209 (1977), statement of Sen. Baker). *See also* 123 CONG. REC. 39,210 (1977) (statement of Sen. Wallop); 123 CONG. REC. at 39,196 (statement of Sen. Rudolph); 123 CONG. REC. at 38,950 (statement of Rep. Murphy); 123 CONG. REC. at 38,994 (statement of Rep. Ambro).

86. *Riverside-Bayview Homes*, 474 U.S. at 137.

87. United States v. Riverside-Bayview Homes, 474 U.S. 121, 137 (1985).

88. *Id.* at 138. While the Court found support for its conclusion that Congress intended to regulate adjacent wetlands under the Clean Water Act in the legislative history surrounding amendments that the Congress rejected in 1977, the Court also found support for its holding in two amendments that Congress actually adopted in 1977.

First, when Congress amended section 404 of the Act to allow states to assume permitting authority from the Corps for certain discharges of fill material, Congress provided that states would not be permitted to supersede the Corps' jurisdiction to regulate discharges into actually navigable waters and waters subject to the ebb and flow of the tide, including wetlands adjacent thereto. *See* 33 U.S.C. § 1344g(1) (1988). For purposes of section 404g(1), at least, the Court reasoned, Congress clearly defined "waters" to include adjacent wetlands. *Riverside-Bayview Homes*, 474 U.S. at 138.

The Court also reasoned that Congress indicated that wetlands are a concern of the Clean Water Act when it included, in the 1977 amendments, an appropriation of six million dollars for completion of a national wetlands inventory to assist

The Supreme Court's decision in *Riverside-Bayview Homes* did not, however, completely outline the extent of the Corps' jurisdiction to regulate wetlands under the Clean Water Act. The Court was reluctant to hold that *all* wetlands are "navigable waters" subject to regulation under the Act.[89] Instead, the Court addressed the limited question before it, and determined that it was reasonable for the Corps to assert jurisdiction over adjacent wetlands under the Clean Water Act.[90] The Court refused to consider whether the Corps could also regulate wetlands that are not adjacent to bodies of open water (isolated wetlands) under the Act.[91]

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states in the development and operation of programs under the Act. *Id.* (citing 33 U.S.C. § 1288i(2) (1988)).

89. As the Court stated, "it is one thing to recognize that Congress intended to allow regulation of waters that might not satisfy traditional tests of navigability; it is another to assert that Congress intended to abandon the traditional notions of 'waters' and include in that term 'wetlands' as well." *Riverside-Bayview Homes*, 474 U.S. at 133. Neither EPA nor the Corps, however, asserts Clean Water Act jurisdiction over *all* wetlands. *See supra* notes 45-56 and accompanying text.

90. *Riverside-Bayview Homes*, 474 U.S. at 134.

91. *Id.* at 131 n.8. The Court noted,

> We are not called upon to address the question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to open bodies of water, *see* 33 C.F.R. § 323.2a(2) and (3) (1985), and we do not express any opinion on that question.

Id. The Court did not define "open bodies of water" in its opinion. However, it is apparent from the Court's reference to 33 C.F.R. § 323.2a(2) and (3) that the question which the Court refused to address is whether the Clean Water Act authorizes regulation of interstate nonadjacent wetlands, and intrastate, isolated wetlands.

However, the Court's footnote has apparently caused some confusion. For instance, the Court of Appeals for the Sixth Circuit recently misinterpreted the footnote in *United States v. Larkins*, 852 F.2d 189 (6th Cir. 1988). In *Larkins*, the Sixth Circuit reviewed the order of a district court which enjoined several defendants from filling wetlands that were adjacent to a tributary of a navigable water. While the Court of Appeals upheld the injunction, it noted that "[b]ecause the defendants did not argue that the Clean Water Act does not permit the [Corps] to exercise its regulatory jurisdiction over wetlands adjacent only to tributaries of navigable waters, this Court does not decide that issue." *Id.* at 190 n.3. Further, in a concurring opinion, Circuit Judge Merritt argued that had the defendants not declined to challenge the Corps' jurisdiction, the case before it would present the issue reserved by the Supreme Court in *Riverside-Bayview Homes*. *Id.* at 193.

To the extent that the majority and concurring opinions imply that the Supreme Court did not resolve the issue of whether the Clean Water Act authorizes the regulation of wetlands adjacent to tributaries of navigable waters, they are in error. In *Riverside-Bayview Homes*, the Supreme Court concluded that it was reasonable for the Corps to regulate, as "waters of the United States," all wetlands

Several years later, in *Leslie Salt Co. v. United States*,[92] the Ninth Circuit addressed that important question and held that the Corps can regulate discharges into isolated wetlands under the Clean Water Act.[93] The court also held that the Commerce Clause of the Constitution authorizes such regulation.[94] The dispute in *Leslie Salt* arose when the Corps ordered Leslie Salt Company to obtain a permit prior to draining and filling certain wetlands that the Corps claimed were subject to Clean Water Act jurisdiction.[95] The property over which the Corps asserted jurisdiction included wetlands that formed in calcium chloride pits and crystallizers that were used by Leslie Salt's predecessor to manufacture salt.[96] While the wetlands that formed in the pits and crystallizers were not adjacent to other "waters of the United States," migratory birds and the salt marsh harvest mouse, an en-

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adjacent to *other bodies of water over which the Corps has jurisdiction. Riverside-Bayview Homes*, 474 U.S. at 135. When the Supreme Court noted that it would not address the issue of whether the Clean Water Act authorizes the regulation of certain non-adjacent wetlands, the Court specifically identified the classes of waters to which it was referring—33 C.F.R. § 323.2a(2) and (3). The wetlands at issue in *Larkins* would have been covered by 33 C.F.R. § 323.2a(7) under the regulations that existed when the Supreme Court issued its decision, and fall squarely within the category of wetlands which the Supreme Court held were subject to Clean Water Act jurisdiction.

92. 896 F.2d 354 (9th Cir. 1990).

93. *Id.* at 360. One other federal court addressed the question after the Supreme Court's decision and before the Ninth Circuit's decision. In *National Wildlife Federation v. Laubscher*, 662 F. Supp. 548, 549 (S.D. Texas 1988), the court declared that the isolated wetlands at issue in the case were within federal jurisdiction under the Clean Water Act because they were visited by migratory birds. Since neither party disputed the jurisdictional issue, however, the court did not elaborate on the justification for regulating such wetlands under the Act or the Commerce Clause.

94. *Leslie Salt*, 896 F.2d at 360.

95. *Id.* at 355.

96. *Id.* The Ninth Circuit held that the fact that the wetlands in the crystallizers and pits were artificially created did not remove them from the Corps' jurisdiction. *Leslie Salt*, 896 F.2d at 360. Courts have uniformly held that the Corps can regulate artificially created waters if the waters otherwise come within the Corps' jurisdiction under the Clean Water Act or the Rivers and Harbors Act. *See* United States v. Tull, 769 F.2d 182 (4th Cir. 1985), *rev'd on other grounds*, 481 U.S. 412, 414 (1987); Stoeco Dev. Ltd. v. U.S. Army Corps of Eng'rs, 701 F. Supp. 1075, 1078, *appeal dismissed*, 879 F.2d 860 (3d Cir. 1989); United States v. Akers, 651 F. Supp. 320 (E.D. Cal. 1987); Track 12 v. U.S. Army Corps of Eng'rs, 618 F. Supp. 448 (D. Minn. 1985).

dangered species, used the wetlands as habitat.[97] The Corps asserted jurisdiction over the wetlands that formed in the pits and crystallizers, pursuant to its regulations, as isolated wetlands "the use, degradation or destruction of which could affect interstate or foreign commerce."[98] Under the Corps' regulations, isolated wetlands are deemed to have sufficient ties to interstate commerce to justify regulation if the wetlands are or would be used as habitat by endangered species, migratory birds which cross state lines, or birds protected by migratory bird treaties.[99]

The Ninth Circuit was faced with the question whether the Corps is authorized to regulate "isolated wetlands" under the Clean Water Act. Further, the case squarely presented the question of whether the use of wetlands by endangered species or migratory birds is, of itself, a sufficient tie to interstate commerce to justify regulation of isolated wetlands under the Commerce Clause. The court answered both questions in the affirmative, and 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."[100] Thus, the Ninth Circuit approved the regulation of isolated wetlands under the Clean Water Act, as long as the wetlands *potentially* provide habitat for migratory birds or endangered species.

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97. Leslie Salt Co. v. United States, 896 F.2d 354, 356 (9th Cir. 1990).

98. *Id.* at 359 (citing 33 C.F.R. § 328.3a(3) (1991)).

99. *Id.* at 360. The criteria which the Corps use to determine whether waters have sufficient ties to interstate commerce to justify regulation under the commerce clause were originally adopted by EPA, and incorporated by the Corps in 1986. *See supra* note 56 and accompanying text.

In Tabb Lakes Ltd. v. United States, 30 ENV'T REP. CAS. (BNA) 1510, 1511 (4th Cir. 1989), the court held that the Corps cannot assert Clean Water Act jurisdiction over wetlands based solely on the use of the wetlands by migratory birds because the Corps did not adopt its criteria in accordance with the notice and comment procedures of the Administrative Procedures Act. In response to the decision, the Corps and EPA issued a joint memorandum stating that the government believes that *Tabb Lakes* was incorrectly decided, that the government would undertake a rulemaking process to satisfy the *Tabb Lakes* ruling, and that the ruling would not be followed by the government in any circuit other than the Fourth Circuit. WANT, *supra* note 2, § 4.05[5].

100. *Leslie Salt*, 896 F.2d at 360. However, since the district court did not determine whether the wetlands in question had sufficient ties to interstate commerce under the regulatory criteria adopted by the Corps, the Ninth Circuit remanded that issue to the district court. *Id.*

Recently, however, the federal government's jurisdiction over isolated wetlands was temporarily called into question when a Seventh Circuit panel reached the opposite conclusion that the Ninth Circuit reached in *Leslie Salt*. In a ruling that extended far beyond the narrow question presented to the court, the Seventh Circuit held, in *Hoffman Homes v. EPA*,[101] that the federal government lacks jurisdiction to regulate *any* isolated wetlands under the Clean Water Act.[102] The court also held that the Corps lacks authority to regulate intrastate, isolated wetlands under the Commerce Clause if the only tie which the wetlands have to interstate commerce is the use of the wetlands as habitat for migratory birds.[103]

The dispute in *Hoffman Homes* centered on a 0.8 acre isolated wetland, referred to as Area A, situated in the midst of a housing subdivision built by Hoffman Homes.[104] When EPA discovered that Hoffman filled the wetlands without a permit, the agency ordered Hoffman to cease its filling activities and to restore the wetland.[105] Hoffman refused, and EPA filed an administrative complaint to enforce its order and to assess penalties.[106] In the administrative proceedings, EPA's Chief Judicial Officer (CJO) held that the agency is authorized to regulate discharges of fill material into isolated wetlands under the Clean Water Act as long as the agency can show that migratory birds could potentially use the wetlands as habitat.[107] Since EPA established that Area A could potentially be used by migratory birds, the CJO upheld the agency's order, and fined Hoffman $50,000 for filling Area A.[108] Hoffman appealed the CJO's decision to the Seventh

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101. 961 F.2d 1310 (7th Cir.), *reh'g granted and opinion vacated*, 35 ENV'T REP. CAS. (BNA) 1328 (7th Cir. Sept. 4, 1992).

102. *Id.* at 1316.

103. *Id.* at 1321.

104. *Id.* at 1311.

105. *Id.* at 1312.

106. Hoffman Homes v. EPA, 961 F.2d 1310, 1312 (7th Cir.), *reh'g granted and opinion vacated*, 35 ENV'T REP. CAS. (BNA) 1328 (7th Cir. Sept. 4, 1992).

107. *Id.* The CJO held that "EPA has statutory authority to regulate discharges of fill materials into intrastate wetlands that have a minimal, potential effect on interstate commerce . . . [and] EPA established this minimal potential effect on interstate commerce by showing that migratory birds could potentially use Area A." *Id.*

108. *Id.*

Circuit.[109]

The Seventh Circuit initially examined the statutory question raised by the appeal. Although the court could have focused on whether EPA was authorized to regulate Area A under the Clean Water Act, it chose instead to focus on EPA's regulation of isolated wetlands, in general, under the Act. As EPA jointly administers the Clean Water Act wetlands program with the Corps,[110] the court acknowledged that EPA's interpretation of the Act is entitled to a high degree of deference.[111] Accordingly, the court phrased the issue before it as "whether it is reasonable—in light of the language, policies, and legislative history of the Clean Water Act—for the EPA to exercise jurisdiction over intrastate, isolated wetlands."[112]

The court found the legislative history of the Clean Water Act devoid of any references to wetlands as navigable waters or "waters of the United States" subject to jurisdiction under the Act.[113] The court acknowledged that the terms navigable waters and waters of the United States have been interpreted broadly to include all waters and adjacent wetlands within constitutional reach under the Commerce Clause,[114] but the court stressed that "[n]o circuit [court] . . . has concluded that section 404 jurisdiction extends to wetlands which are *not* adjacent to 'waters of the United States.' "[115]

The court distinguished the regulation of adjacent wetlands under the Clean Water Act, which the Supreme Court approved

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109. *Id.*

110. *See supra* note 70.

111. Hoffman Homes v. EPA, 961 F.2d 1310, 1313 (7th Cir.), *reh'g granted and opinion vacated*, 35 ENV'T REP. CAS. (BNA) 1328 (7th Cir. Sept. 4, 1992). The court held that "EPA's regulatory construction of the Clean Water Act 'is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress.' " *Id.* (quoting United States v. Riverside-Bayview Homes, 474 U.S. 121, 131 (1985)).

112. *Id.*

113. *Id.* at 1313-14. Since Congress added the definition of "navigable waters" as "waters of the United States" to the Clean Water Act in 1972, the court limited its review of legislative history to the 1972 amendments.

114. *Id.* at 1314 (citing United States v. Tull, 769 F.2d 182, 184 (4th Cir. 1985), *rev'd on other grounds*, 481 U.S. 412 (1987); United States v. City of Fort Pierre, 747 F.2d 464, 465 (8th Cir. 1984); United States v. Lambert, 695 F.2d 536, 538 (11th Cir. 1983); United States v. Byrd, 609 F.2d 1204, 1209 (7th Cir. 1979)).

115. *Id.*

in *Riverside-Bayview Homes,* from the regulation of isolated wetlands. In *Riverside-Bayview Homes*, the court argued, the Supreme Court upheld the regulation of adjacent wetlands under the Clean Water Act because adjacent wetlands are "an integral part of the aquatic environment," and protection of adjacent wetlands furthers the objective of the Act to restore and maintain the chemical, physical, and biological integrity of the nation's waters.[116] Adjacent wetlands, the court reasoned, prevent flooding and erosion, filter and purify water draining into adjacent bodies of water, and play a key role in protecting and enhancing water quality.[117]

In contrast, the court argued, *isolated* wetlands "have no hydrologic connection to any body of water . . . [and] have no relationship or interdependence with any body of water."[118] Thus, the court concluded, "[p]rotection of isolated wetlands . . . would not further the objective of the Clean Water Act to restore and maintain the chemical, physical and biological integrity of the nation's waters."[119]

The court also concluded that the legislative history of the Clean Water Act, which the Supreme Court relied upon in *Riverside-Bayview Homes* to support the regulation of adjacent wetlands, did not provide *any* support for the regulation of isolated wetlands under the Clean Water Act.[120] The court held, therefore, that it was unreasonable for EPA to regulate isolated wetlands under the Clean Water Act.[121] While the court rejected EPA's

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116. Hoffman Homes v. EPA, 961 F.2d 1310, 1314 (7th Cir.), *reh'g granted and opinion vacated*, 35 ENV'T REP. CAS. (BNA) 1328 (7th Cir. Sept. 4, 1992).

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 1315-16. In contrast to the Supreme Court, the *Hoffman Homes* court was reluctant to attribute any significance to Congress' failure to amend the definition of "navigable waters" in 1977. *Id.* at 1315. The court held that "[t]he views of the 95th Congress regarding the extent of the section 404 permit authority established by the 92d Congress in 1972 are, at best, very questionable evidence of the intent of Congress in 1972." *Id.* at 1315 (citing Pension Benefit Guaranty Corp. v. LTV Corp., 496 U.S. 633 (1990)). However, even if the 1977 amendments shed some light on whether Congress intended to regulate adjacent wetlands as navigable waters under the Act, the *Hoffman Homes* court found that the amendments did not address *isolated* wetlands. *Id.* at 1316.

121. Hoffman Homes v. EPA, 961 F.2d 1310, 1316 (7th Cir.), *reh'g granted and opinion vacated*, 35 ENV'T REP. CAS. (BNA) 1328 (7th Cir. Sept. 4, 1992).

regulation of isolated wetlands as unreasonable, the court did not cite any studies or other authority for the scientific conclusions regarding the values and functions of isolated wetlands that formed the basis of the court's opinion.

The latter part of the court's opinion addressed the Commerce Clause issue raised by the appeal. In contrast to its broad treatment of the statutory issue, the court limited its review on the constitutional issue to the narrow question of whether EPA was authorized to regulate Area A, an intrastate isolated wetland, under the Commerce Clause.[122] Recounting long-standing Supreme Court precedent, the *Hoffman Homes* court noted that the Commerce Clause has been broadly interpreted to authorize regulation of intrastate activities " 'which have a substantial effect on the commerce or the exercise of the Congressional power over it.' "[123] Courts must defer to congressional findings that activities affect interstate commerce and " 'may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for [Congress'] finding that the regulated [activities affect] interstate commerce . . . .' "[124] Nevertheless, the *Hoffman Homes* court argued, "Congress' findings . . . should not merely be rubber-stamped by the courts."[125]

The *Hoffman Homes* court acknowledged that, in cases relied upon by EPA, the Supreme Court and lower federal courts consistently upheld, against Commerce Clause challenges, congressional regulation of intrastate activities to prevent air or water pollution, or other environmental hazards.[126] However, in each of the cases relied upon by EPA, the intrastate activities were demonstrated to have interstate effects.[127] Thus, the court reasoned, those cases merely authorize regulation of pollution that

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122. *Id.* at 1317.

123. *Id.* (quoting United States v. Darby, 312 U.S. 100, 118 (1941)).

124. *Id.* (quoting Hodel v. Indiana, 452 U.S. 314, 323-24 (1981)).

125. *Id.* at 1318.

126. Hoffman Homes v. EPA, 961 F.2d 1310, 1318 (7th Cir.), *reh'g granted and opinion vacated*, 35 ENV'T REP. CAS. (BNA) 1328 (7th Cir. Sept. 4, 1992). *See, e.g.*, Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. 264 (1981) (regulation of surface mining upheld); Utah v. Marsh, 740 F.2d 799 (10th Cir. 1984) (regulation of isolated intrastate lake upheld); United States v. Byrd, 609 F.2d 1204 (7th Cir. 1979) (regulation of adjacent wetlands upheld); United States v. Ashland Oil and Transp. Co., 504 F.2d 1317 (6th Cir. 1974) (regulation of pollution in nonnavigable tributary of a navigable stream upheld).

127. *Hoffman Homes*, 961 F.2d at 1318-19.

affects interstate commerce.[128] The court determined that EPA's regulation of Area A was distinguishable from the pollution prevention regulation upheld in other cases because EPA did not demonstrate that filling Area A affects interstate commerce.[129]

The *Hoffman Homes* court acknowledged that, in previous decisions regarding regulation of intrastate waters, courts held that the Commerce Clause authorizes regulation of tributaries of navigable waters, intrastate waters which are used to irrigate crops or to support a fishery, intrastate waters which are visited by interstate travelers, and adjacent wetlands.[130] However, the court found that there was *no* evidence that filling Area A would affect navigation or pollute another open body of water used for irrigation, fishing or recreational activities.[131] Further, the court found that there was *no* evidence that interstate travelers visited Area A.[132] In short, the court found that EPA's regulation of Area A did not affect interstate commerce in any of the ways that had been upheld previously as sufficient justifications for regulation of intrastate waters under the Commerce Clause.

Instead, EPA claimed that regulation of Area A was authorized by the Commerce Clause *solely* because migratory birds could potentially use the area as habitat.[133] The *Hoffman Homes* court summarily rejected EPA's argument as "far-fetched."[134] The Court scorned the suggestion that the presence of wildlife, actual or potential, is enough to invoke the Commerce Clause.[135] Instead, the court argued, "[t]he Commerce Clause . . . requires

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128. *Id.* at 1319.

129. *Id.* The court pointed out that "the EPA has not even attempted to construct a theory of how filling Area A affects interstate commerce." *Id.*

130. 961 F.2d at 1319.

131. Hoffman Homes v. EPA, 961 F.2d 1310, 1319-20 (7th Cir.), *reh'g granted and opinion vacated*, 35 ENV'T REP. CAS. (BNA) 1328 (7th Cir. Sept. 4, 1992).

132. *Id.* at 1320.

133. *Id.* The court found that there was no evidence that migratory birds ever actually used Area A as habitat. *Id.*

134. *Id.* The court argued that because

> [t]he birds obviously do not engage in commerce until they are watched, photographed, shot at or otherwise impacted by people who . . . engage in interstate commerce, migratory birds do not ignite the Commerce Clause. The idea that the potential presence of migratory birds itself affects commerce is even more far-fetched.

Id.

135. *Id.*

some connection to human commercial activity."[136] Since the court determined that EPA did not present any evidence that regulation of Area A had a connection to human economic activity, the court held that it was unreasonable for EPA to regulate Area A under the Commerce Clause.[137]

If adopted by other courts, the Seventh Circuit's decision in *Hoffman Homes* could have severely reduced the federal government's authority to protect wetlands and aquatic ecosystems.[138] However, five months after it issued the opinion in *Hoffman Homes*, the Seventh Circuit vacated the opinion.[139] While the court did not explain its rationale for vacating the opinion, the following sections of this Article describe the fundamental flaws in the opinion which the court vacated. As the remainder of this Article illustrates, both the Clean Water Act and the Commerce Clause authorize the federal government to regulate the class of isolated wetlands over which the government has asserted jurisdiction.

III. CLEAN WATER ACT JURISDICTION OVER ISOLATED WETLANDS

In *Hoffman Homes*, the Seventh Circuit struck down EPA's regulation of discharges of dredged or fill material into isolated wetlands under the Clean Water Act as unreasonable.[140] In its zeal to reach that result, the court addressed a question far

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136. Hoffman Homes v. EPA, 961 F.2d 1310, 1321-22 (7th Cir.), *reh'g granted and opinion vacated*, 35 ENV'T REP. CAS. (BNA) 1328 (7th Cir. Sept. 4, 1992).

137. *Id.* at 1321.

138. The decision could have had a broad impact because millions of acres of wetlands fall into the category of "isolated wetlands" established by the court. Scientists estimate that there are 5.6 million acres of prairie pothole "isolated" wetlands in North and South Dakota, and Minnesota alone, accounting for more than five percent of the total acreage of wetlands in the contiguous 48 states. COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL TRENDS 102 (1989) [hereinafter CEQ]. Similarly, there are almost 20,000 playa lakes, another type of isolated wetland, ranging from 1 to 500 acres, in the Texas panhandle. Marvin J. Dvoracek, Modification of the Playa Lakes in the Texas Panhandle, Address Before the Playa Lakes Symposium (Dec. 4-5 1979), *in* PLAYA LAKES SYMPOSIUM PROCEEDINGS, Feb. 1981, at 64-65 (Biological Services Program Doc. FWS/OBS-81/07). While the decision did not foreclose state regulation of isolated wetlands under state laws, state wetland protection laws vary widely. Fragmented state regulation is no substitute for uniform, comprehensive federal regulation.

139. *See supra* note 30.

140. 961 F.2d at 1316.

broader than the one presented by the parties, and it failed to accord any deference to the scientific expertise of the federal agencies that regulate wetlands. Furthermore, the court based its holding on scientifically insupportable premises. The opinion, which the court later vacated, sharply diverged from the mode of analysis employed by the Supreme Court in *Riverside-Bayview Homes*.

At the administrative level, EPA determined that Area A was an intrastate, nonadjacent wetland and was, therefore, subject to regulation under the agency's Clean Water Act regulations.[141] Neither party challenged the validity of the regulation that defines such isolated wetlands to be subject to jurisdiction under the Clean Water Act. The question before the court should have been limited to whether EPA acted reasonably in determining that Area A met the requirements for Clean Water Act jurisdiction under EPA's regulations. Instead, the *Hoffman Homes* court focused on whether it was reasonable for EPA to assert jurisdiction over *any* isolated wetlands under its regulations.[142]

After the court expanded the question to be decided on appeal, it ignored the applicable standard for reviewing that question. The Seventh Circuit paid lip service to the standard enunciated by the Supreme Court in *Chevron, USA v. Natural Resources Defense Council*[143] and *United States v. Riverside-Bayview Homes*.[144] While postulating that "EPA's regulatory construction of the Clean Water Act 'is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress,' "[145] the court failed to accord any deference to EPA's regulatory determination that certain isolated wetlands are navigable waters subject to jurisdiction under the Clean Water Act.[146]

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141. Hoffman Homes v. EPA, 961 F.2d 1310, 1312 (7th Cir.), *reh'g granted and opinion vacated*, 35 ENV'T REP. CAS. (BNA) 1328 (7th Cir. Sept. 4, 1992). *See* 40 C.F.R. § 230.3(s)(3) (defining "waters of the United States" as all waters "the use, degradation, or destruction of which could affect interstate . . . commerce").

142. *Hoffman Homes*, 961 F.2d at 1313.

143. 467 U.S. 837, 842-45 (1984).

144. 474 U.S. 121, 131 (1985).

145. *Hoffman Homes*, 961 F.2d at 1313 (quoting *Riverside-Bayview Homes*, 474 U.S. at 131).

146. The Supreme Court described the deference that federal appellate courts owe to EPA's technical interpretations of the Clean Water Act this past term in *Arkansas v. Oklahoma*, 112 S. Ct. 1046 (1992). In that case the Supreme Court overturned a Tenth Circuit opinion because the appellate court "exceeded

Under the Supreme Court's decisions in *Chevron* and *Riverside-Bayview Homes*, federal courts owe deference to the determination of EPA and the Corps that the Clean Water Act authorizes regulation of isolated wetlands. Instead, the court improperly usurped the agency's policy-making function.[147] Both EPA and the Corps promulgated regulations that interpret the Clean Water Act to authorize regulation of isolated wetlands if "the use, degradation, or destruction of those wetlands could affect interstate or foreign commerce."[148] Rather than relying on the scientific expertise of those agencies regarding wetlands, or on the expertise of the agencies in interpreting the Clean Water Act, the Seventh Circuit, without factual support, developed its own scientific theories regarding isolated wetlands and its own interpretation of Clean Water Act jurisdiction.[149]

While the *Hoffman Homes* court's decision was flawed because the court improperly substituted its judgment for EPA's, the decision was further undermined by the fact that the court based its decision on insupportable and invalid scientific theories. The court relied upon its judicially-created science to distinguish the regulation of isolated wetlands from the regulation of adja-

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the legitimate scope of judicial review of an agency adjudication." *Id.* at 1058. The Court chided the appellate court for failing to give due regard to EPA's interpretation of its own regulations and voicing the court's own interpretation of the governing law. *Id.* at 1060. In sum, the Supreme Court argued, "the Court of Appeals made a policy choice that it was not authorized to make . . . [and i]t is not our role, or that of the Court of Appeals, to decide which policy choice is the better one, for it is clear that Congress has entrusted such decisions to the Environmental Protection Agency." *Id.* at 1061. *See* William J. Holmes, *The Impact of* Arkansas v. Oklahoma *on the NPDES process under the Clean Water Act*, 23 ENVTL. L. 273 (1993).

147. The *Hoffman Homes* panel disclosed its political agenda at the conclusion of the opinion. In the final paragraphs, the panel argued, in essence, that if the government wants to protect wetlands as habitat for wildlife, it can do so by purchasing the wetlands, instead of by limiting private development. Hoffman Homes v. EPA, 961 F.2d 1310, 1322-23 (7th Cir.), *reh'g granted and opinion vacated*, 35 ENV'T REP. CAS. (BNA) 1328 (7th Cir. Sept. 4, 1992). The court reasoned that "after the Supreme Court decides *Lucas v. South Carolina Coastal Council* . . . the federal government, or more accurately, taxpayers, might be forced to bear the cost of our national conservation efforts, rather than imposing such costs on fortuitously chosen landowners like Hoffman Homes, Inc." *Id.* at 1323.

148. *See* 33 C.F.R. § 328.3a(3) (1991); 40 C.F.R. § 230.3s(3) (1991).

149. The court cited no authority for its determinations that isolated wetlands are not connected to any other body of water, or that isolated wetlands do not prevent flooding or protect water quality.

cent wetlands which the Supreme Court upheld in *Riverside-Bayview Homes*. If the court had relied upon genuine science, it would have discovered that isolated wetlands have many of the same values and perform many of the same functions as adjacent wetlands.

For instance, the *Hoffman Homes* court held that EPA's regulation of isolated wetlands is unreasonable because such wetlands do not provide the flood control or water quality protection benefits provided by adjacent wetlands.[150] However, numerous scientific studies have documented the important role that many types of isolated wetlands play in preventing flooding by collecting and storing runoff from adjacent land.[151] A North Dakota study concluded that prairie potholes, one type of isolated wetland, store seventy-two percent of the total stormwater runoff.[152] Similarly, it is well documented that many types of isolated wetlands play a vital role in protecting water quality by filtering sediments and pollutants out of water and by preventing nutrient overloading.[153] Contrary to the *Hoffman Homes* court's findings, many isolated wetlands do provide important flood control prevention and water quality benefits. The *Hoffman Homes* court also determined that isolated wetlands have no hydrologic connection to other bodies of water and are not part of aquatic ecosystems.[154] Once again, the court missed the mark. Numerous studies confirm that many "isolated" wetlands have strong

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150. *Hoffman Homes*, 961 F.2d at 1314.

151. *See, e.g.*, L.J. BRUN ET AL., *Stream Flow Changes in the Southern Red River Valley*, 38 NORTH DAKOTA FARM RES. 1-14 (1981) (finding that increased and destructive flooding in the Southern Red River Valley of North Dakota could be attributed largely to the drainage of prairie pothole wetlands); KENNETH L. CAMPBELL & HOWARD P. JOHNSON, *Hydrologic Simulation of Wetlands with Artificial Drainage*, 11 WATER RESOURCES RESEARCH 120-26 (1975) (finding that drainage of isolated depressions in Iowa resulted in greatly increased peak discharges).

152. HAROLD A. KANTRUD ET AL., FISH AND WILDLIFE SERVICE BIOLOGICAL REPORT 85(7.28), PRAIRIE BASIN WETLANDS OF THE DAKOTAS: COMMUNITY PROFILE 65 (1989) [hereinafter PRAIRIE PROFILE].

153. *See, e.g.*, PRAIRIE PROFILE, *supra* note 152, at 66 (finding that prairie potholes remove more than 70% of nitrogen compounds from agricultural runoff); J.R. JONES ET AL., *Factors Affecting Nutrient Loads in Some Iowa Streams*, 10 WATER RESEARCH 117 (1976). These findings have led the Fish and Wildlife Service to conclude that prairie wetlands are "important in preservation of local water quality." PRAIRIE PROFILE, *supra* note 152, at 66.

154. Hoffman Homes v. EPA, 961 F.2d 1310, 1314 (7th Cir.), *reh'g granted and opinion vacated*, 35 ENV'T REP. CAS. (BNA) 1328 (7th Cir. Sept. 4, 1992).

groundwater connections to other wetlands, lakes and streams.[155]

The court also ignored the fact that many isolated wetlands provide numerous other benefits similar to those provided by wetlands adjacent to navigable waters. For instance, prairie pothole wetlands play a vital role in groundwater recharge.[156] Many isolated wetlands provide potential drinking water supplies.[157] Furthermore, while the *Hoffman Homes* court found that Area A did not provide habitat for migratory waterfowl, isolated wetlands, in general, provide essential habitat for migratory waterfowl and a wide variety of amphibian and aquatic life.[158] For example, prairie pothole wetlands provide breeding ground for over fifty percent of all of the ducks in North America.[159]

If the *Hoffman Homes* court had reviewed the scientific evidence behind the federal government's decision to regulate certain isolated wetlands under the Clean Water Act rather than reaching its own scientific conclusions, the court would have discovered that isolated wetlands perform many of the functions attributed to adjacent wetlands by the Supreme Court in *Riverside-Bayview Homes*. For the same reasons that the Supreme Court upheld regulation of adjacent wetlands under the Clean Water Act, courts should uphold federal regulation of isolated wetlands under the Act.

In light of the numerous benefits provided by isolated wetlands and their interconnection to larger aquatic systems, it is reasonable for EPA and the Corps to determine that regulation of discharges into isolated wetlands is necessary to "restore and maintain the chemical, physical and biological integrity of the

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155. *See, e.g.*, THOMAS. C. WINTER, U.S. GEOLOGICAL SURVEY, PROFESSIONAL PAPER 1001, NUMERICAL SIMULATION ANALYSIS OF THE INTERACTION OF LAKES AND GROUNDWATER (1976); M.T. BROWN & M.F. SULLIVAN, *The Value of Wetlands in Low Relief Landscapes*, *in* THE ECOLOGY AND MANAGEMENT OF WETLANDS 133-45 (Donal D. Hook ed., 1988).

156. *See, e.g.*, BROWN & SULLIVAN, *supra* note 155; DANIEL E. HUBBARD, U.S. FISH AND WILDLIFE SERVICE, GLACIATED PRAIRIE WETLAND FUNCTIONS AND VALUES: A SYNTHESIS OF THE LITERATURE 13 (1988).

157. *See, e.g.* HUBBARD, *supra* note 156.

158. HUBBARD, *supra* note 156, at 30; PRAIRIE PROFILE, *supra* note 152, at 36-39, 46; CEQ, *supra* note 138, at 102; WILLIAM E. DUELLMAN & LINDA TRUEB, BIOLOGY OF AMPHIBIANS (1988).

159. PRAIRIE PROFILE, *supra* note 152, at 46.

Nation's waters."[160] It was unreasonable, on the other hand, for the *Hoffman Homes* court to repudiate that finding and invalidate the federal regulation of isolated wetlands.

The legislative history of the 1977 amendments to the Clean Water Act provides additional support for federal regulation of isolated wetlands under the Act. Contrary to the *Hoffman Homes* court's assertion, several passages in the legislative history of the amendments indicate that Congress was aware, in 1977, that the federal government was asserting jurisdiction over isolated wetlands as navigable waters under the Act.[161] Since the federal government's jurisdiction over isolated wetlands was brought to Congress' attention in 1977, and Congress did not limit that jurisdiction, it can be argued, consistent with the Supreme Court's ruling in *Riverside-Bayview Homes*, that Congress approved of the federal government's regulation of isolated wetlands.[162]

Riverside-Bayview Homes provides the model for review of federal regulation of isolated wetlands under the Clean Water Act. While the *Hoffman Homes* court feigned reliance on *River-*

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160. The fact that certain isolated wetlands do not provide the benefits which isolated wetlands, in general, provide, does not undermine the federal government's decision to regulate isolated wetlands as a class. The EPA and the Corps do not regulate all isolated wetlands. Pursuant to their regulations, they only assert jurisdiction over isolated wetlands, the use, degradation or destruction of which could affect interstate or foreign commerce. *See supra* note 148. If a particular isolated wetland provides few, if any, of the benefits which have led the EPA and the Corps to regulate isolated wetlands, the wetland will probably not meet the regulatory requirements for jurisdiction because the use, degradation, or destruction of the wetland will not affect interstate or foreign commerce. Even if the wetland meets the regulatory requirements for jurisdiction, though, the Corps "may always allow development of the wetland . . . simply by issuing a permit." *See* United States v. Riverside-Bayview Homes, 474 U.S. 121, 135 n.9 (1985).

161. Statements of legislators in favor of a broad interpretation of jurisdiction under the Act and opposed to such an interpretation indicate that Congress was well aware that the Corps was interpreting the Act to authorize regulation of isolated wetlands. For instance, in describing the Corps' regulations, Representative Abdnor noted that "the Corps must regulate all waters - from the smallest to the largest, including isolated wetlands." 123 CONG. REC. 34,852 (1977). Similarly, Senator Bentsen challenged certain amendments to the Act because, under the amendments, "[t]he program would still cover waters of the United States, including small streams, ponds, isolated marshes, and intermittently flowing gullies." 123 CONG. REC. at 26,711.

162. *See Riverside-Bayview Homes*, 474 U.S. at 137.

side-Bayview Homes, it ignored the fundamental analysis that the Supreme Court applied in that case and, therefore, reached a fundamentally flawed conclusion. Perhaps in recognition of those flaws, the Seventh Circuit vacated its opinion in *Hoffman Homes*.

Based on the language, policies, and legislative history of the Clean Water Act, the federal government is authorized to assert Clean Water Act jurisdiction over discharges into the class of isolated wetlands covered by the regulations of EPA and the Corps.

IV. AUTHORITY TO REGULATE ISOLATED WETLANDS UNDER THE COMMERCE CLAUSE

While the *Hoffman Homes* court broadly struck down the regulation of *any* isolated wetlands under the Clean Water Act as unreasonable, it pursued a narrower approach toward the constitutional question. Instead of deciding that regulation of *any* isolated wetlands is impermissible under the Commerce Clause, the court held that EPA's regulation of intrastate, isolated wetlands is not authorized by the Commerce Clause when the only tie that the wetlands have to interstate commerce is that they are, or could potentially be, used as habitat by migratory birds.[163] The decision did not, therefore, limit federal regulation of intrastate, isolated wetlands under the Commerce Clause when the wetlands have other ties to interstate commerce.

Intrastate, isolated wetlands perform many valuable functions which would justify regulation under the Commerce Clause. For instance, many isolated wetlands play crucial roles in preventing flooding of downstream navigable waters.[164] The Supreme Court has long upheld the regulation of intrastate activities to prevent flooding under the Commerce Clause,[165] for, as the Court has noted, "[f]loods pay no respect to state lines."[166] In *Oklahoma* ex rel. *Phillips v. Atkinson Co.*,[167] for example, the Supreme Court held that Congress can, consistent with the Commerce Clause, authorize the Corps to construct a dam on a non-

163. Hoffman Homes v. EPA, 961 F.2d 1310, 1321 (7th Cir.), *reh'g granted and opinion vacated*, 35 ENV'T REP. CAS. (BNA) 1328 (7th Cir. Sept. 4, 1992).

164. *See supra* notes 150-52 and accompanying text.

165. *See, e.g.*, Oklahoma *ex rel.* Phillips v. Atkinson Co., 313 U.S. 508 (1941); United States v. Appalachian Power Co., 311 U.S. 377 (1940).

166. *Phillips*, 313 U.S. at 521.

167. *Id.* at 508.

navigable portion of a river as part of a comprehensive flood control program.[168] The Court stressed the importance of regulating entire watersheds to control flooding.[169] Similarly, regulation of discharges into isolated wetlands is a necessary component of flood management within a watershed and is authorized by the Commerce Clause.

Federal courts have repeatedly upheld regulation of intrastate activities to prevent pollution. Intrastate, isolated wetlands play an important role in protecting the water quality of interstate and intrastate waters. Pollution of intrastate waters often has effects on interstate commerce which justify regulation under the Commerce Clause. The Sixth Circuit described many of those effects in *United States v. Ashland Oil and Transportation Co.*,[170] when it upheld the Corps' regulation of discharges of dredged or fill material into nonnavigable tributaries of navigable waters under the Clean Water Act.[171] While the *Ashland* court acknowledged that the Corps could, constitutionally, regulate such discharges to protect navigation,[172] the court held that the Corps' regulation was also authorized by the Commerce Clause as a means of preventing water pollution, which has numerous effects on interstate commerce.[173] Specifically, the court held that regulation of water pollution is constitutional because water pollution is a threat to the water supply of the nation, it endangers agriculture by rendering water unfit for irrigation, and it can end the public use and enjoyment of waters for fishing, boating, and swimming.[174]

Several other courts have upheld, as constitutional, the regulation of intrastate activities to protect the water quality of intrastate waters that are used for irrigation, used to support fisheries, or used for recreational purposes by interstate travelers.[175] In *Utah v. Byrd*, the Seventh Circuit upheld the Corps' regulation of

168. *Id.* at 525-28.
169. *Id.* at 525.
170. 504 F.2d 1317 (6th Cir. 1974).
171. *Id.* at 1326-29.
172. *Id.* at 1325-29.
173. *Id.* at 1325-26.
174. *Id.*
175. *See, e.g.*, Utah v. Marsh, 740 F.2d 799, 804 (10th Cir. 1984); United States v. Earth Sciences, Inc., 599 F.2d 368, 375 (10th Cir. 1979); United States v. Byrd, 609 F.2d 1204, 1209-11 (7th Cir. 1979).

discharges of dredged or fill material into wetlands that are adjacent to an intrastate lake because the lake was used for recreational purposes by interstate travelers.[176] In *Utah v. Marsh*, the Tenth Circuit upheld the regulation of Utah Lake, an intrastate water, because water from the lake was used to irrigate crops sold in interstate commerce, the lake supported a fishery which marketed fish out of state, and the lake was used by interstate travelers for recreation.[177] The *Hoffman Homes* court acknowledged the precedent set by *Ashland, Byrd,* and *Marsh*.[178] However, the court held that EPA did not present any evidence that regulation of Area A was necessary to prevent pollution to other bodies of water used for irrigation, fishing, or recreational purposes.[179]

Although EPA did not meet the evidentiary burden imposed by the Seventh Circuit in *Hoffman Homes* with respect to Area A, regulation of isolated wetlands is often necessary to prevent interstate water pollution. Isolated wetlands generally filter sediments, pollutants and excess nutrients from waters which may eventually flow into other bodies of water which are navigable, used for irrigation of crops that are sold in interstate commerce, used for recreation by interstate travelers, or used to support fisheries that raise fish sold in interstate commerce.[180] Regulation of isolated wetlands may often be authorized under the Commerce Clause, therefore, to protect the water quality of other bodies of water which have the requisite ties to interstate commerce. The *Hoffman Homes* decision did not foreclose regulation of isolated wetlands when it could be shown that regulation is necessary to prevent floods, to protect navigation, or to prevent interstate water pollution. However, the panel's decision clearly prohibited regulation of isolated wetlands based solely on the use of the wetlands as habitat for migratory waterfowl.[181] Contrary to the panel's de-

176. 609 F.2d 1204, 1210 (7th Cir. 1979).

177. 740 F.2d 799, 803-05 (10th Cir. 1984).

178. Hoffman Homes v. EPA, 961 F.2d 1310, 1318-20 (7th Cir.), *reh'g granted and opinion vacated*, 35 ENV'T REP. CAS. (BNA) 1328 (7th Cir. Sept. 4, 1992).

179. *Id.* at 1320. The EPA did not present such evidence because it believed that the potential use of the wetlands as habitat for migratory birds was a sufficient tie to interstate commerce to justify regulation under the commerce clause.

180. *See supra* note 153 and accompanying text.

181. *Hoffman Homes*, 961 F.2d at 1320-21. Although the only evidence that EPA offered in support of regulating the isolated wetlands at issue in the case was that the wetland could *potentially* be used by migratory birds, the court's decision seemed to foreclose regulation of isolated wetlands based on actual use by migra-

cision, though, federal regulation of isolated wetlands which can or may provide habitat for migratory birds *is* authorized by the Commerce Clause. The *Hoffman Homes* court reached its erroneous conclusion because it ignored the principles established by the Supreme Court for review of congressional regulation of intrastate activities under the Commerce Clause, and because it ignored the impact that destruction of isolated wetlands has on interstate commerce in migratory birds.

Hodel v. Indiana[182] illustrates the deference that courts owe to Congress' determination that federal regulation is authorized by the Commerce Clause. In *Hodel*, the petitioners argued that the Commerce Clause did not authorize Congress to enact six provisions of the Surface Mining Conservation and Reclamation Act of 1977[183] which were designed to protect prime farmland.[184]

In the decision below, the district court noted that surface coal mining affected only 0.006 percent of the total prime farmland acreage in the nation.[185] The district court concluded, therefore, that surface coal mining on prime farmland had an "infinitesimal effect or trivial impact on interstate commerce," and that the Commerce Clause did not authorize regulation to protect prime farmland from the effects of surface coal mining.[186] The Supreme Court reversed and upheld the prime farmland provisions of the Act.[187] The Court stressed that legislation enacted under the Commerce Clause is entitled to deference, and may be invalidated "only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate

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tory birds, as well, if interstate travelers did not visit the wetland to shoot, photograph, or watch the birds. *Id.*

As a practical matter, the *Hoffman Homes* decision would have significantly limited the federal government's jurisdiction over isolated wetlands because it places a difficult evidentiary burden on the government. It is much easier for the government to prove that a particular wetland is, or may be, used as habitat by migratory waterfowl, than it is to prove that a proposed discharge into the wetland will affect flooding, or the navigability or water quality of downstream navigable waters.

182. 452 U.S. 314 (1981).

183. Pub. L. No. 95-87, 91 Stat. 445 (1977) (codified in scattered sections of 30 U.S.C.).

184. *Hodel*, 452 U.S. at 317-21.

185. *Id.* at 322.

186. *Id.* at 322-23.

187. Hodel v. Indiana, 452 U.S. 314, 325-26 (1981).

commerce."[188] The Court noted that the rational basis inquiry does not focus on the *volume* of commerce affected by a regulated activity, but rather on "whether Congress could rationally conclude that the regulated activity affects interstate commerce."[189] Although the Supreme Court acknowledged that only a small percentage of prime farmland was affected by surface mining, it held that it was reasonable for Congress to conclude that surface mining on prime farmland affects interstate commerce in agricultural products.[190] The decision emphasizes the deference that courts must pay to congressional regulation of activities under the Commerce Clause.

The *Hoffman Homes* court purported to apply the deferential standard enunciated in *Hodel* to its review of EPA's regulation of Area A under the Clean Water Act.[191] However, the court failed to accord appropriate deference in its analysis, and ignored the impact that destruction of isolated wetlands has on interstate commerce in migratory birds. While the discharge of dredged or fill material into a single intrastate, isolated wetland may not seem to affect interstate commerce, the Supreme Court has consistently upheld the regulation of intrastate activities when the "cumulative effect" of the class of activities on interstate commerce is substantial.[192] The approach which the Court follows is illustrated by *Wickard v. Filburn.*[193]

Wickard v. Filburn involved a farmer's challenge to the wheat marketing quotas established pursuant to the Agricultural Adjustment Act of 1938.[194] The farmer challenged the quotas only insofar as they limited his production of wheat which was not intended for commerce but was intended wholly for consumption on his farm.[195] The appellee argued that producing wheat for his

188. *Id.* at 323-24.

189. *Id.* at 324.

190. *Id.* at 325.

191. Hoffman Homes v. EPA, 961 F.2d 1310, 1317-18 (7th Cir.), *reh'g granted and opinion vacated*, 35 ENV'T REP. CAS. (BNA) 1328 (7th Cir. Sept. 4, 1992).

192. *See, e.g.*, Hodel v. Indiana, 452 U.S. 314, 324-25 (1981); Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. 264, 277 (1981); Perez v. United States, 402 U.S. 146, 154-56 (1971); Katzenbach v. McClung, 379 U.S. 294, 303-04 (1964).

193. 317 U.S. 111 (1942).

194. Agricultural Adjustment Act, Pub. L. No. 75-430, 52 Stat. 31 (1938) (codified in scattered sections of 16 U.S.C.).

195. *Wickard*, 317 U.S. at 118.

own consumption did not affect interstate commerce.[196] The Supreme Court concluded, however, that the interstate commerce in wheat *is* affected when a farmer grows wheat for home consumption.[197] When a farmer grows wheat for home consumption, the Court reasoned, he reduces the amount of wheat which he will grow and sell, and reduces the amount of wheat which he will need to purchase for his own consumption.[198] Although the appellee in *Wickard* did not intend to market the wheat that he grew for home consumption, the Court held that Congress could, nevertheless, impose quotas on that production under the Commerce Clause.[199] Even though the farmer's activity was a "local" intrastate activity, the Court reasoned, the Commerce Clause authorizes regulation of local activities if they exert a "substantial economic effect" on interstate commerce.[200] The Court conceded that the appellee's activity (growing wheat for home consumption) could, itself, have a trivial effect on interstate commerce.[201] However, if other farmers engaged in the same activity, the cumulative effect of their actions on interstate commerce would be far from trivial.[202]

In the same manner, the cumulative effect of dredging and filling intrastate, isolated wetlands which provide habitat to migratory birds on interstate commerce in migratory birds is substantial. Just as the Supreme Court upheld the regulation of intrastate farmland in *Wickard* to protect interstate commerce in farm products, courts should uphold the regulation of isolated wetlands to protect interstate commerce in migratory birds. Migratory birds are an important item of interstate and foreign commerce. Hunters and enthusiasts cross state lines to shoot, observe, and photograph them, and the birds themselves are often sold across state lines.[203] The Fish and Wildlife Service estimates that commerce relating to migratory waterfowl alone exceeds billions

196. *Id.* at 119.

197. *Id.* at 127-29.

198. Wickard v. Filburn, 317 U.S. 111, 127 (1942).

199. *Id.* at 128-29.

200. *Id.* at 125.

201. *Id.* at 127-28.

202. *Id.*

203. The *Hoffman Homes* court acknowledged that migratory birds attract such interstate travelers. 961 F.2d 1310, 1320 (7th Cir.), *reh'g granted and opinion vacated*, 35 ENV'T REP. CAS. (BNA) 1328 (7th Cir. Sept. 4, 1992).

of dollars per year in North America.[204] The Supreme Court has described the protection of migratory birds as "a national interest of very nearly the first magnitude."[205]

The *Hoffman Homes* court held that the mere presence of wildlife is not enough to invoke the Commerce Clause power.[206] The court argued that migratory birds do not engage in commerce, and that until the birds are watched, photographed, shot at, or otherwise impacted by people who engage in interstate commerce, the birds do not ignite the Commerce Clause.[207] While the court was partially correct, it missed the point. Migratory birds are an *item* of commerce. Items of commerce do not *engage* in commerce. However, *because* there is an interstate commerce in migratory birds, Congress is authorized under the Commerce Clause to regulate activities that affect that commerce.

Discharges of dredged or fill material into isolated wetlands, which are or may be used by migratory birds, affect the interstate commerce in migratory birds. The loss and degradation of habitat for migratory birds is a major cause of the declining populations of waterfowl.[208] Although the loss of individual isolated wetlands may not have a direct impact on the ability of waterfowl to thrive, the cumulative effect of the loss of numerous wetland habitats is devastating.[209] As the habitat for migratory birds decreases, greater numbers of birds are forced to share less space, and "wetland ghettos" are created, where diseases spread rapidly.[210] As populations of migratory birds decline, the opportunities for hunting, photographing, and observing migratory birds decline. The loss of habitat, therefore, clearly affects the interstate commerce of migratory birds.[211]

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204. U.S. FISH AND WILDLIFE SERVICE, NORTH AMERICAN WATERFOWL MANAGEMENT PLAN 1989, U.S.-CAN. 1 (1989). [hereinafter WATERFOWL PLAN].

205. North Dakota v. United States, 460 U.S. 300, 309 (1983).

206. *Hoffman Homes*, 961 F.2d at 1320.

207. *Id.*

208. WATERFOWL PLAN, *supra* note 204, at 9-11.

209. *Id.*

210. *Id.*

211. Several other federal courts have upheld regulation to protect wildlife habitat under the Commerce Clause as a means of preserving interstate commerce in wildlife. In *Palila v. Hawaii Dep't of Land & Natural Resources*, 471 F. Supp. 985, 995 (D. Haw. 1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981), the court held that the Commerce Clause authorizes protection of the habitat of the Palila, an endangered bird, under the Endangered Species Act. The court stated that "a national

In the Clean Water Act, Congress determined that wildlife habitat should be protected from water pollution. The Act establishes a national goal of improving water quality to protect and propagate fish, shellfish and wildlife.[212] Furthermore, in determining whether to issue permits for discharges into wetlands, the Corps must consider the effect that the discharge will have on

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program to protect and improve the national habitats of endangered species preserves the possibilities of interstate commerce in these species . . . ." *Id.* The *Hoffman Homes* court distinguished the *Palila* decision, arguing that there was no evidence that EPA's regulation of the isolated wetlands at issue in the case affected interstate commerce. Hoffman Homes v. EPA, 961 F.2d 1310, 1321 (7th Cir.), *reh'g granted and opinion vacated*, 35 ENV'T REP. CAS. (BNA) 1328 (7th Cir. Sept. 4, 1992). However, as noted above, the destruction of isolated wetlands which may or do provide habitat for migratory birds cumulatively affects interstate commerce in migratory birds by reducing the number of such birds.

In *Utah v. Marsh*, 740 F.2d 799, 803-04 (10th Cir. 1984), the Tenth Circuit upheld the Corps' regulation of discharges into an isolated lake which provided habitat for migratory birds. The *Hoffman Homes* court distinguished *Marsh* by arguing that the lake in *Marsh* was on the flyway for migratory waterfowl protected under international treaties, while there was no evidence that any birds actually used the wetlands at issue in the instant case. *Hoffman Homes*, 961 F.2d at 1320. As isolated wetlands which are being used as habitat by migratory birds are destroyed, though, the birds must rely, for their survival, on other wetlands that are not currently being used as habitat. Thus, it is necessary to protect the existing *and* potential habitat of migratory birds in order to preserve the interstate commerce in migratory birds.

Admittedly, it is more difficult to demonstrate the necessary ties to interstate commerce to justify regulation when a wetland has not actually been used by migratory birds. However, EPA has not maintained that all isolated wetlands provide potential habitat for migratory birds. Indeed, in the administrative decision which was challenged in *Hoffman Homes*, EPA's CJO held that in order to assert jurisdiction over an isolated wetland which is not *actually* used as habitat, EPA must show that the wetland:

> provide[s] a suitable habitat for migratory birds, whether because of its vegetation, the amount of its surface covered by vegetation, the frequency and duration of its inundation, its location on migratory bird flyways, its proximity to or similarity to a wetland for which migratory bird use has been established, or some other quality.

In re The Hoffman Group, U.S. EPA Dkt. No. CWA-88-AO-24, at 27 (1989).

Finally, in *Leslie Salt Co. v. United States*, 896 F.2d 354, 360 (9th Cir. 1990), the Ninth Circuit upheld the Corps' authority under the Commerce Clause to regulate isolated wetlands as migratory bird habitat. In the court's words, "[t]he commerce clause power . . . is broad enough to extend the Corps' jurisdiction to local waters which may provide habitat to migratory birds and endangered species." *Id.* In a footnote, the *Hoffman Homes* court dismissed the Ninth Circuit's ruling as dicta. *Hoffman Homes*, 961 F.2d at 1321 n.8.

212. 33 U.S.C. § 1251 (1988).

wildlife.[213] The EPA can veto the issuance of wetlands permits that have an unacceptable adverse impact on wildlife.[214]

Congress directed EPA and the Corps to limit discharges of dredged or fill material into wetlands when the discharges may harm wildlife habitat. The EPA and the Corps implemented that mandate by regulating discharges of dredged or fill material into wetlands which are or may be used by migratory birds. It was clearly reasonable for the federal government to determine that discharges of dredged or fill material into isolated wetlands which provide or may provide habitat for migratory birds affect interstate commerce in migratory birds. Under the deferential standard of review described in *Hodel*, therefore, the regulation of such isolated wetlands is authorized by the Commerce Clause.

V. Conclusion

Over the past two decades, the federal government has successfully implemented programs to slow the destruction of the nation's wetlands. Recently, though, opponents of the federal wetlands protection program have begun fighting to limit the effectiveness of the program by limiting its scope. The battle to limit federal regulatory jurisdiction over wetlands is being fought in all three branches of government.

The Seventh Circuit's decision in *Hoffman Homes* was precipitated by that battle. In its zeal to narrow the federal government's Clean Water Act jurisdiction over wetlands, the Seventh Circuit ignored scientific reality, the expertise of the agencies regulating wetlands, and vital Supreme Court precedent.

The *Hoffman Homes* court cast aside the Supreme Court's directive to give a high degree of deference to agency expertise, ignored the environmental benefits provided by isolated wetlands, and ignored the analysis employed by the Supreme Court in *Riverside-Bayview Homes*, when the court held that the Clean Water Act does not authorize regulation of *any* isolated wetlands. Simi-

213. 33 U.S.C. § 1344b requires the Corps to apply guidelines developed by EPA and the Corps to determine whether to issue a wetlands permit. The guidelines are based on criteria comparable to the criteria in 33 U.S.C. § 1343c. 33 U.S.C. § 1343c(1)(A) requires EPA, in promulgating such criteria, to consider the effect of disposal of pollutants on wildlife.

214. 33 U.S.C. § 1344(c) (1988).

larly, the court ignored the Supreme Court's teachings in *Hodel v. Indiana* and *Wickard v. Filburn*, when it held that the use of isolated wetlands as habitat for migratory birds is an insufficient tie to interstate commerce to justify regulation under the Commerce Clause.

While the Seventh Circuit vacated its decision in *Hoffman Homes*, the dispute regarding the federal government's jurisdiction to regulate isolated wetlands remains unresolved. Although the Ninth Circuit upheld federal regulation of isolated wetlands under the Clean Water Act and the Commerce Clause in *Leslie Salt*, it is the only federal appellate court to do so, and it offered no support for its conclusion. Furthermore, when the Seventh Circuit vacated its decision in *Hoffman Homes*, it agreed to rehear the case if the parties were unable to resolve their differences through settlement negotiations. It is possible, therefore, that the Seventh Circuit may revisit the isolated wetlands dispute in the near future.

Although the Supreme Court was able to avoid the question in *Riverside-Bayview Homes*, federal courts must determine whether federal regulation of isolated wetlands is authorized by the Clean Water Act and the Commerce Clause. The Supreme Court provided the guideposts for the analysis in *Riverside-Bayview Homes*, *Hodel v. Indiana*, and *Wickard v. Filburn*. It is clear from that precedent that the federal government may regulate the class of isolated wetlands over which it has asserted jurisdiction under the Clean Water Act and the Commerce Clause.