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Killing the Birds In One Fell Swoop: Solid Waste Agency of Northern Cook County vs. United States Army Corps of Engineers

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KILLING THE BIRDS IN ONE FELL SWOOP: *SOLID WASTE AGENCY OF NORTHERN COOK COUNTY v. UNITED STATES ARMY CORPS OF ENGINEERS*

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I. INTRODUCTION

In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*[1] ("*SWANCC*"), the Supreme Court held that an isolated, intrastate wetland did not come under Corps jurisdiction, for purposes of the Clean Water Act ("CWA"), only because it served as a seasonal habitat for migratory birds.[2] In deciding that the exercise of such Corps jurisdiction would be a federal usurpation of powers reserved to the states, the Court applied the bright-line rules of the Commerce Clause[3] extension formulated in *United States v. Lopez*[4] to the complex and intertwined areas of the hydrologic and biological cycles.[5] The application of this bright-line rule, which was written to deal strictly with economic activity[6] without taking into account the complexities of these natural phenomena, led to a skewed and contradictory holding. Although the majority of isolated intrastate non-navigable waters, no longer under Corps Section 404 permit jurisdiction, will continue to be regulated under

1. Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs, 531 U.S. 159 (2001).

2. Federal Water Pollution Control Act, 33 U.S.C. § 1344 (2000).

3. U.S. CONST. art. I, § 8, cl. 3 (granting Congress power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

4. United States v. Lopez, 514 U.S. 549 (1995).

5. *Solid Waste Agency of N. Cook County*, 531 U.S. at 588.

6. *Lopez*, 514 U.S. at 556.

other federal and state programs,[7] the *SWANCC* decision represents a step backwards in the effort to control pollution. It incorrectly invalidates environmentally protective and regulatory regimes based on the notion that the destruction of such isolated wetlands would have a major negative impact on the entire nation's hydrological and biological cycles.

SWANCC came before the Supreme Court on appeal from the Seventh Circuit on October 31, 2000, and was decided on January 9, 2001.[8] The Corps argued that the CWA is constitutionally valid legislation properly empowering the Corps, through the Migratory Bird Rule,[9] to regulate the use of isolated intrastate waters that function as the habitat of migratory birds.[10] The Solid Waste Agency of Northern Cook County ("the Agency"), argued that to allow federal regulation of isolated, non-navigable, purely intrastate waters that are not used in interstate commerce would be to allow federal power to override state power in completely local affairs.[11]

The Agency was formed in 1986 as a municipal corporation made up of 23 municipalities in Northern Cook County. Its goal was to locate and develop a site for non-hazardous waste disposal.[12] The Agency identified and subsequently purchased a 533-acre site, located in both Cook and Kane counties, in Illinois.[13] The site was an abandoned strip mine, which had given way to an early stage forest with a scattering of permanent and seasonal ponds of various areas and depths which had evolved from excavation trenches.[14] Vegetation included nearly 170 plant species, and many small animals made the area their permanent home.[15] Most importantly, more than

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7. Clean Water Act Regulatory Definition of "Waters of the United States," 68 Fed. Reg. 1991, 1994 (proposed Jan. 15, 2003).

8. *Solid Waste Agency of N. Cook County*, 531 U.S. at 159.

9. Migratory Bird Rule, 51 Fed. Reg. 41,217 (Nov. 13, 1986).

10. Brief for the Federal Respondent at 11-13, Solid Waste Agency of N. Cook County, 531 U.S. 159 (2001) (No. 99-1178).

11. Brief for the Federal Petitioner at 44, Solid Waste Agency of N. Cook County, 531 U.S. 159 (2001) (No. 99-1178).

12. *Solid Waste Agency of N. Cook County*, 531 U.S. at 162-63.

13. *Id.* at 163.

14. *Id.*

15. Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs, 191 F.3d 845 (7th Cir. 1999), at 848, *vacated by* 531 U.S. 159 (2001).

100 species of migratory birds, many of which were endangered water-dependant migratory birds, had been observed at the site breeding, resting, and feeding.[16] Notably, the site was the seasonal home of the second-largest breeding colony of great-blue herons in northeastern Illinois.[17]

In order to use all 533 acres of the site for balefill,[18] the Agency needed to fill in about 17.6 acres of the small lakes and ponds within the forest.[19] Consequently, the Agency was required to file for county and state permits. The Agency also contacted the Corps to determine whether a federal landfill permit under Section 404(a) of the CWA was needed.[20] The Corps originally concluded that both the 276-acre and 414-acre parcels submitted by the Agency for decision did not qualify as "wetlands" under Section 404, and therefore were outside Corps jurisdiction.[21] However, the Corps reversed its decision as to the larger parcel, claiming jurisdiction, after the Illinois Nature Preserves Commission reported that many migratory birds, including some water-dependant species, had been observed there.[22] The Corps notified the Agency by letter on November 16, 1987, that the parcel would be subject to the requirements of section 404 of the CWA because the acres "are or could be used as habitat by migratory birds which cross state lines."[23]

Pursuant to this determination, the Agency submitted permit applications to the Corps, all of which were refused, because of the area's

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16. *Id.*

17. *Id.*

18. A "balefill" is defined in the case as "a landfill where the waste is baled before it is dumped." *Id.*

19. *Id.*

20. Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs, 531 U.S. 159, 163 (2001).

21. *Id.* at 164.

22. *Id.*

23. *Id.* at 165. The definition of "waters of the United States" had been assumed to include all waters, regardless of their relation to interstate commerce, which fell under the Migratory Bird Rule. This rule allowed the Corps to claim jurisdiction to regulate isolated intrastate waters in two cases: if the water is or would be the habitat of birds protected by Migratory Bird Treaties, or if the water is or would be used as habitat by migratory birds crossing state lines. *See* 33 C.F.R. § 328.3(a)(3) (2001).

designation as a migratory bird habitat.[24] After the second denial, the Agency sued the Corps, arguing that the Migratory Bird Rule was an incorrect basis for application rejection, and challenged the rejection on the merits.[25] The District Court for the Northern District of Illinois entered summary judgment in favor of the Corps on the jurisdiction issue, and the Agency appealed to the Seventh Circuit.[26] In the appeal, the Agency again attacked both the Corps use of the Migratory Bird Rule and its assertion that the presence of migratory birds alone was sufficient basis for asserting Corps jurisdiction under the CWA over isolated, non-navigable, intrastate waters.[27] The Agency also advanced the argument that regardless of whether the wetlands were bird habitats Congress lacked the power to extend the Commerce Clause to the extent necessary to grant the Corps jurisdiction over them.[28] Finally, the Agency argued that the Migratory Bird Rule was invalid because it had not been enacted in accordance with the Administrative Procedure Act.[29]

The Seventh Circuit Decision

The Seventh Circuit Court of Appeals first noted that, prior to *Lopez*, courts had consistently held that Congress had the power to regulate waterways based solely on the presence of migratory birds.[30] The court then analyzed the Migratory Bird Rule in light of the *Lopez* interpretation of the Commerce Clause, and decided the Rule would be constitutionally invalid unless it regulated an activity that "substantially affects interstate commerce."[31] The court looked

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24. *Solid Waste Agency of N. Cook County*, 531 U.S. at 165.
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs, 191 F.3d 845 (7th Cir. 1999), at 848, *vacated by* 531 U.S. 159 (2001).
30. *Id.* (citing *Reuth v. EPA*, 13 F.3d 227 (7th Cir. 1993); Leslie Salt Co. v. United States, 896 F.2d 354 (9th Cir. 1990)).
31. *Id.* In *Lopez*, the Supreme Court reaffirmed the principle that a federal statute whose power stemmed from the Commerce Clause must either be related to the regulation of channels of interstate commerce; regulation or protection of the instrumentalities of inter-

to the cumulative impact doctrine of *Wickard v. Filburn*, which states that even "a single activity that itself has no discernable effect on interstate commerce may still be regulated if the aggregate effect of that class of activity has a substantial impact on interstate commerce."[32] In assessing the cumulative impact of migratory birds on interstate commerce the court cited data from the United States Fish & Wildlife Service's 1996 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation.[33] The survey showed that, during the 1996 calendar year, approximately 3.1 million Americans spent $1.3 billion to hunt migratory birds, with approximately 11 percent of those hunters crossing state lines.[34] The survey also found that 17.7 million people undertook interstate travel to observe migratory birds.[35] The court found this to be compelling evidence that the destruction of habitat, and its attendant decrease in the numbers of migratory birds, would "substantially affect" interstate commerce.[36]

The court conceded that this argument may not be viable for every isolated body of water; but found that in the aggregate the effect on interstate commerce of wetland destruction and attendant migratory bird population loss was clear and may be sufficient to allow federal regulation under Commerce Clause powers.[37] The court also noted the existence of many international treaties and conventions for migratory bird protection as an indication that the problem could not be handled at the local or state level.[38]

Second, the court noted that because Congress has the power to regulate such waters, it is reasonable for the Corps to interpret the

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state commerce, or regulation of activities that "substantially affect" interstate commerce. United States v. Lopez, 514 U.S. 549, 558 (1995). To be valid, the Migratory Bird Rule, like the *Lopez* gun-control statute, must be an exercise of this third type of regulatory power.

32. Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs, 191 F.3d 845 (7th Cir. 1999), at 850, *vacated by* 531 U.S. 159 (2001) (citing Wickard v. Filburn, 317 U.S. 111, 127-128 (1942)).

33. *Solid Waste Agency of N. Cook County*, 191 F.3d at 850.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

CWA as delegating that power to them.[39] Finding the Agency's interpretation of the CWA to be reasonable and that the Act was designed to reach as many waters as constitutionally possible,[40] the court deferred to the Corps' interpretation.[41]

Lastly, the court found the Migratory Bird Rule to be merely an interpretive rule, and therefore exempt from the notice and comment requirements of the Administrative Procedure Act.[42] Although the Agency argued that the Rule is a new substantive rule, the court found it to be merely a clarification of the scope of federal jurisdiction included in the phrase "waters of the United States" in the CWA.[43] The court noted that the preamble of the Rule includes examples of waters covered and not covered under "waters of the United States," which is generally indicative of an interpretive rule.[44]

The Supreme Court Decision

The Agency again argued before the Supreme Court that the Corps lacked the right, under the CWA and the Commerce Clause of the United States Constitution, to assert jurisdiction over isolated intrastate waters solely based on their status as habitats for migratory birds.[45] The Agency argued: first, that the CWA did not give the Corps such authority;[46] and second, that even if the CWA on its face granted this authority, such a delegation of power by Congress was unconstitutional.[47]

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39. *Id.* at 851.

40. *Id.* See Reuth v. EPA, 13 F.3d 227, 231 (7th Cir. 1993).

41. *Solid Waste Agency of N. Cook County*, 191 F.3d at 851 (citing Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) (holding that the court shall interpret a statute as per the plain meaning of the text, but if the statute is ambiguous or silent on the issue, defer to reasonable agency interpretation of the agency charged by such statute)).

42. *Id.* at 852.

43. *Id.*

44. *Id.*

45. Brief for the Federal Petitioner at I, Solid Waste Agency of N. Cook County, 531 U.S. 159 (2001) (No. 99-1178).

46. *Id.* at 13.

47. *Id.* at 36.

In defense of its right to assert jurisdiction over isolated intrastate waters using the Migratory Bird Rule, the Corps made two arguments.[48] The first argument was that *Chevron* deference[49] should be given to the Corp's interpretation of the scope of the CWA.[50] The second argument was that the Migratory Bird Rule, per *Lopez*, was a constitutionally valid use of federal power to regulate an activity that "substantially impacts" interstate commerce.[51]

The Supreme Court reversed the Seventh Circuit. In a decision written by Chief Justice Rehnquist the Court held that the Corps had exceeded its authority in asserting jurisdiction over the Agency's site. The Court reasoned that while the CWA broadly asserts federal jurisdiction over "waters of the United States,"[52] this jurisdiction is elsewhere restricted to "navigable waters."[53] The Corps' interpretation of the Migratory Bird Rule as covering the Agency site therefore exceeded its authority because the Agency wetlands could not reasonably be defined as "navigable."[54] Although the Corps argued that activities associated with the migratory birds using the Agency site had substantial economic impact on interstate commerce, the Court found that impact not to be substantial enough to warrant reading the term "navigable" out of Section 404(a).[55] Thus, the Court found that the CWA could not be extended to cover isolated intrastate waters and wetlands solely because of the presence, or possible presence, of migratory birds.[56]

The Court concluded that the word "navigable" grants Corps jurisdiction only over waters navigable-in-fact and their adjacent waters and wetlands where discharge or fill in these waters or wetlands af-

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48. Brief for the Federal Respondent at I, Solid Waste Agency of N. Cook County, 531 U.S. 159 (2001) (No. 99-1178).

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

50. Brief for the Federal Respondent at I, Solid Waste Agency of N. Cook County, 531 U.S. 159 (2001) (No. 99-1178).

51. *Id.*

52. 33 U.S.C. § 1362(7) (1994).

53. 33 U.S.C. § 1344(a) (1994).

54. Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs, 531 U.S. 159, 174 (2001).

55. *Id.* at 173.

56. *Id.* at 174.

fects the waters navigable-in-fact.[57] The Court's interpretation is based upon its view of the CWA as a regulation to ensure the navigability of lanes of interstate commerce and not as a broader protective statute.[58] The Court opined that if Congress had meant the CWA to cover isolated intrastate waters and wetlands, it would have chosen other language when drafting the Act.[59]

The Court did not defer to the Corps' interpretation of the CWA. Although when following *Chevron,* courts normally defer to agency interpretations of statutes affecting their operations, the Court here found such deference would be inappropriate under the circumstances. The Court reasoned that when an agency's interpretation invokes the outer edge of congressional power, and especially when such an interpretation leads to an encroachment of federal power over authority traditionally reserved for states, *Chevron* deference is inappropriate unless there is clear indication that Congress intended such a result.[60]

Justice Stevens, joined in dissent by Justices Souter, Ginsburg, and Breyer, argued that the majority based its decision on two incorrect assumptions.[61] First, the majority assumed that when Congress passed the CWA in 1972, it intended to exert federal Commerce Clause power over only "navigable" waters.[62] Although early federal water regulations related only to the preservation of the navigability of those waters navigable-in-fact, the focus had shifted to the prevention of environmental degradation by the time the CWA promulgated.[63] Therefore, although Congress carried over the old term "navigable water," it broadened the definition of that term to "waters of the United States" in an effort to protect more of the aquatic ecosystem.[64] Although the majority felt that extending Corps regulation to isolated intrastate waters would be reading the term "navigable" out of the statute, Congress effectively took such action when it deleted the term from the definition in Section

57. *Id.* at 170.
58. *Id.*
59. *Id.* at 171.
60. *Id.* at 172-73.
61. *Id.* at 177 (Stevens, J., dissenting).
62. *Id.* at 175.
63. *Id.* at 177.
64. *Id.*

502(7).[65] The dissent thus argued that the term "navigable waters" is shorthand for "waters over which federal authority may properly be asserted."[66]

The majority's second error, according to the dissent, was its assumption that Congress meant to limit regulatory power of the Corps under the CWA to waters navigable-in-fact along with their immediately adjacent waters and wetlands. The dissent pointed to the failure of bills in Congress that tried to limit the Corps' authority to "waters which are presently used or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce."[67] Additionally, the dissent pointed to the 1977 congressional amendments to the CWA, which specifically list isolated waters that do not fall under federal regulation, as proof that Congress understood isolated waters *not* listed to fall under Corps control.[68]

Deference, the dissent asserted, should have been granted to the Corps' interpretation of "navigable waters" and the Migratory Bird Rule. In *United States v. Riverside Bayview Homes, Inc.*,[69] the Court had earlier held that the Corps' interpretation of its jurisdiction was entitled to *Chevron* deference.[70] The dissent also asserted that there was no problem of federalism which would negate deference, as the majority held, since Section 404(g) specifically promotes state control over waters otherwise regulated by the Corps under the CWA.[71]

The majority did not reach the question of whether the Migratory Bird Rule would be constitutional if explicitly promulgated by Congress.[72] In the dissent, Justice Stevens argued that the "substantial

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65. *Id.* at 181; *see also* S. REP. NO. 92-1236, at 144 (1972), *reprinted* in 1 Leg. Hist. 327 (stating that the definition of "navigable waters" as "waters of the United States" in section 502(7) is to "be given the broadest possible constitutional interpretation").

66. *Solid Waste Agency of N. Cook County*, 531 U.S. at 182 (Stevens, J., dissenting).

67. *Id.* at 185. (citing 123 CONG. REC. 10420, 10434 (1997)).

68. *Id.* at 188.

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

70. *Id.* at 191.

71. *Solid Waste Agency of N. Cook County,* 531 U.S. at 192 (Stevens, J., dissenting).

72. *Id.*

impact" of migratory birds on interstate commerce makes the regulation of habitat destruction, which would affect migratory bird numbers, a proper power of Congress under the Commerce Clause.[73] The dissent also argued that the power to regulate interstate commerce necessarily includes the power to regulate resources, which generate such commerce.[74] Additionally, the Migratory Bird Rule, unlike the regulations at issue in *Lopez* and *Morrison*, regulates a "national" rather than a "local" concern, and thus correctly falls under the umbrella of federal powers.[75] The dissent distinguished the Migratory Bird Rule from the regulations in *Lopez* and *Morrison* by arguing that the connection between the filling of isolated waters used as habitat by migratory birds and the decline of interstate commerce associated with migratory birds was not attenuated, but was instead direct and substantial.[76]

II. BACKGROUND

The Constitution vests in Congress the power to regulate interstate commerce.[77] Although such power was narrowly construed at first, it was gradually broadened[78] to become virtually limitless as U.S.

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73. *Id.* at 193. *See* Wickard v. Filburn, 317 U.S. 111, 129 (1942) (finding that the federal government can invoke the Commerce Clause to regulate individual actions when the sum of such actions, taken as a class, exert a substantial impact on interstate commerce).

74. *Solid Waste Agency of N. Cook County*, 531 U.S. at 193 (Stevens, J., dissenting).

75. *Id.* at 195. This is because, like with other environmental regulations, the benefit of habitat destruction is local while the costs are national. In this case, the locality gets a new landfill but the country and even neighboring nations lose much of the migratory bird population. In such cases, described by economists as involving "externalities," federal regulation is proper.

76. *Id.* at 196.

77. *Id.* at 174-74.

78. *Shreveport Rate Cases*, 234 U.S. 342 (1914) (incidental intrastate commerce regulation authorized under Commerce Clause when necessary for full regulation of intertwined interstate commerce): *see also*, *The Daniel Ball*, 77 U.S. 557 (1870) (Commerce Clause vests the federal government with the power to regulate intrastate com-

Courts upheld congressional regulation with only the most attenuated effect on interstate commerce.[79] Federal Commerce Clause power reached its zenith in *Wickard v. Filburn*, which upheld congressional power to regulate purely intrastate activity that merely affected interstate commerce.[80] Beginning in 1995 in *United States v. Lopez*,[81] and later in *United States v. Morrison*[82] and *Jones v. United States*,[83] the Supreme Court took a closer look at the limits of federal power to regulate intrastate activities under the Commerce Clause. In those decisions, the Court limited that power to the regulation of "channels of interstate commerce," activities that "substantially affect" interstate commerce, and instrumentalities of interstate commerce.[84]

The Clean Water Act evolved from the Rivers and Harbors Appropriations Act of 1899[85] and prior versions of the Federal Water Pollution Control Act first enacted in 1948.[86] When the Rivers and Harbors Appropriations Act ("RHA") was enacted, there was no concept of environmentalism or environmental protection. The Act was simply a means to regulate and maintain the physical navigabil-

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merce on a navigable waterway of the U.S. when a portion of the items being transported are to be further transported interstate).

79. Jonathan H. Adler, *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisdiction and the Limits of Federal Wetland Regulation*, 29 ENVTL. L. 1, 7 (Spring 1999).

80. Wickard v. Filburn, 317 U.S. 111, 129-29 (1942) (finding that the federal government may regulate growing wheat in amounts above federal quota, even if solely for personal use, due to the "aggregate affect" on interstate commerce if all farmers did the same).

81. United States v. Lopez, 514 U.S. 556 (1995).

82. United States v. Morrison, 529 U.S. 598 (2000).

83. Jones v. United States, 529 U.S. 848 (2000).

84. *Lopez*, 514 U.S. at 558-59 (reaffirming the "cumulative effects doctrine", allowing regulation of trivial events when the effects of such events, taken as a class, would have a substantial effect on interstate commerce).

85. Rivers and Harbors Appropriations Act of 1899, 30 Stat. 1152, 33 U.S.C.A. §§ 403, 407, 411 (1972).

86. Federal Water Pollution Control Act of June 30, 1948, Pub. L. No. 80-845, ch. 750, 62 Stat. 1155.

ity of U.S. waterways.[87] As such, it regulated only the discharge or deposit of refuse that would impede or obstruct navigation into any "navigable waters of the United States," as well as discharge into tributaries from which it may flow and block navigable waters.[88] On the other hand, the Federal Water Pollution Control Act was enacted during the "environmental decade," by which time the importance of controlling water pollution, both physical and chemical, had been generally accepted.[89] Through multiple revisions of the Act,[90] greater import was placed on regulating all dredging and filling.[91] In 1972, the Federal Water Pollution Control Act was significantly revised to become the CWA.[92] However, the original language of "navigable waters"[93] was kept to describe the reach of the federal discharge and fill permit program under Section 404(a) of the new Act. In contrast to the old RHA, the CWA had as its stated objective the "restoration and maintenance of the chemical, physical and biological integrity[94] of the Nation's waters."[95]

Although it kept the language of its predecessor statute, the CWA was enacted at a time when nature and the environment were gaining importance in the national consciousness.[96] In the 1972 amendments

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87. Rivers and Harbors Appropriations Act of 1899, 30 Stat. 1152, 33 U.S.C.A. §§ 403, 407, 411 (1972).

88. *Id.*

89. Water Pollution Control Act Amendments of 1956, Pub.L. No. 84-660, ch.518, 70 Stat. 498.

90. Federal Water Pollution Control Act Amendments of 1961, Pub.L. No. 87-88, 75 Stat. 204; Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903; Clean Water Restoration Act of 1970, Pub. L. No. 91-24, 84 Stat. 91.

91. S. REP. NO. 92-414, at 75 (1971).

92. H.R. REP. NO. 92-911 (1972).

93. Rivers and Harbors Appropriations Act of 1899, 30 Stat. 1152, 33 U.S.C.A. §§ 403, 407, 411 (1972).

94. "Integrity" is defined as the "condition in which the natural structure and function of ecosystems is maintained." H.R. REP. NO. 92-911 (1972).

95. *Id.*

96. A year before the major 1972 Federal Clean Water Act amendment, the Senate recognized that "Water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source." S. REP. NO. 92-414 (1971).

to the CWA, Congress made clear that it wished to maintain the "integrity" of the Nation's ecosystems.[97] Additionally, it found that "any change induced by man which overtaxes the ability of nature to restore conditions to 'natural' or 'original' is an unacceptable perturbation."[98] This was the beginning of regulations whose objective was the preservation of the "ecosystem," that of the oceans, the various navigable waters, and their adjacent wetlands.[99] However, the retention of the RHA language created problems for the Corps in implementing their regulatory power, due to confusion as to the scope of that power.[100] In 1975, the Corps was sued for using too narrow a definition of "navigable waters," and the District Court for the District of Columbia ordered the Corps to revise its regulatory interpretation of the phrase.[101] The Corps then published four alternative jurisdictional plans and as of July 1975, new regulations were put in place.[102] The language of Section 404 was changed to "navigable waters and adjacent wetlands."[103] Later amendments changed the Corps' definition of "navigable waters and adjacent wetlands" to

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97. *See id.* at 75.

98. *Id.* at 77.

99. H.R. REP. No. 95-139, at 56 (1977). In which, President Jimmy Carter lauds efforts to protect coastal and inland wetlands due to their biological richness and importance for many species of bird and fish, as well as their import in the hydrologic cycle. *Id.*

100. *Id.* at 21.

101. Nat'l Res. Def. Council, Inc. v. Callaway, 392 F. Supp. 685, 687 (D.D.C. 1975).

102. H.R. REP. No. 95-139 (1977).

103. *Id.* at 20. "Navigable waters" are defined as those which "are presently used or are susceptible to use in their present condition or with reasonable improvement to transport interstate or foreign commerce." This definition "omits the historical test of navigability" found in the RHA, thereby allowing jurisdiction over waters that had been, but were not presently being, used as commercial shipping routes. As of July 1977, "adjacent wetlands" were defined to be "primary tributaries of navigable waters of the United States, natural lakes greater than five acres in surface area and ... other waters generally up to the headwaters, where streams flow less than five cubic feet per second." *Id.*

"waters of the United States."[104] In 1977, the Corps defined "waters of the United States" to include "waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation, or destruction of which could affect interstate or foreign commerce."[105]

The Corps interpretation of Section 404 of the CWA became broadest with the Migratory Bird Rule.[106] This Rule extended permit requirements to include those waters which "are or would be used as habitat by birds protected by Migratory Bird Treaties"[107] or which "are or would be used as habitat by other migratory birds which cross state lines."[108] Although seemingly a sweeping extension of its jurisdiction, the Corps was quick to point out that this interpretation was just a clarification of the scope of Section 404, not a broadening.[109] The Corps contended that the Senate in 1972 had all but written the "navigable" requirement out of the definition of waters under Section 404 when it announced that "navigable waters" should be given "the broadest possible constitutional interpretation."[110] Therefore, the Corps was to regulate all "waters of the United States"[111] whose use, degradation, or destruction would affect interstate or international commerce.[112] Based on this broadened-to-the-full-constitutional-extent view of waters covered, the Corps un-

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104. Federal Water Pollution Control Act § 404(a), 33 U.S.C. § 1344 (1994).

105. *Id.*

106. 51 Fed. Reg. 41,217 (Nov. 13, 1986).

107. The Supreme Court found the federal government had power to enforce regulations within the several states as an Article 1, Section 8 Constitutional "necessary and proper" means to execute the international treaty-making power of the federal government. *See* Missouri v. Holland, 252 U.S. 416, 432 (1920).

108. 51 Fed. Reg. 41,217 (Nov. 13, 1986).

109. *Id.*

110. United States v. Byrd, 609 F.2d 1204, 1209 (7th Cir. 1979) (citing S.REP. No. 92-1236, at 144 (1972)).

111. Including lakes, streams, mudflats, wetlands, and sloughs. RODGERS & WILLIAM, ENVTL. L., AIR & WATER, 196, § 4.12 (1986).

112. Nat'l Res. Def. Council, Inc. v. Callaway, 392 F.Supp. 685, 687 (D.D.C. 1975).

derstood its spelling out of the terms of the Migratory Bird Rule to be only a clarification. Statistics from the U.S. Census Bureau show that millions of Americans annually spend more than a billion dollars to hunt, trap, and observe migratory birds,[113] and that these activities frequently involve interstate travel.[114] The destruction of migratory bird habitat and the ensuing decrease in bird populations "substantially affect" interstate commerce, placing the regulation of any and all isolated intrastate waters, as "waters of the United States" under Section 404 squarely within federal Commerce Clause powers.[115]

Pre-SWANCC *Rulings*

Different Circuits, ruling both before and after the *Lopez* decision, addressed the regulation of isolated wetlands and the ability of the Migratory Bird Rule to withstand Commerce Clause challenges, reaching different conclusions.

The Seventh Circuit, in *Hoffman Homes v. United States Environmental Protection Agency* ("*Hoffman Homes II*"),[116] vacated its earlier decision[117] and found that the Corps could not claim jurisdiction

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113. Hoffman Homes, Inc. v. EPA, 999 F.2d 256, 261 (7th Cir. 1993).

114. 3.1 million Americans spent $1.3 billion to hunt migratory birds in 1996, 11 percent crossed state lines to do so. 17.7 million people observed birds in states outside their state of residence, 14.3 million took such trips specifically for this purpose. FISH & WILDLIFE SERV., U.S. DEP'T OF THE INTERIOR & BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1996 NAT'L SURVEY OF FISHING, HUNTING, & WILDLIFE-ASSOCIATED RECREATION 25 (Nov. 1997).

115. The Migratory Bird Rule as a regulation of "activities that substantially affect interstate commerce", falls within the federal powers granted in the Commerce Clause. *See* United States v. Lopez, 514 U.S. 556, 558-59 (1995).

116. Hoffman Homes v. United States Envtl. Prot. Agency, 961 F.2d 1310, 1311 (7th Cir. 1997).

117. Hoffman Homes v. United States Envtl. Prot. Agency, 999 F.2d 256 (7th Cir. 1993).

over isolated intrastate waters.[118] In *Hoffman Homes I*, the court had held that due to congressional desire to give the term "navigable waters" the "broadest possible constitutional interpretation," the Corps could assert jurisdiction based on the Migratory Bird Rule.[119] However, if Corps jurisdiction was based on the Migratory Bird Rule alone, and the Rule was based on Commerce Clause powers, the Corps would have to prove that the activity it sought to regulate would have an impact on interstate commerce.[120] Therefore, the Corps could not claim jurisdiction over isolated waters solely because of the presence of migratory birds, without some showing that interstate commerce would be affected.[121]

In contrast, the Ninth Circuit has upheld Corps jurisdiction over seasonal, isolated wetlands under the Migratory Bird Rule and the Commerce Clause.[122] *Leslie Salt Co. v. United States* concerned ponds, originally created by the company for salt production, which provided temporary habitat for migrating birds.[123] The Ninth Circuit overturned the district court's holding which found that the artificial genesis of the ponds and the fact that they were dry much of the year left them outside the scope of "other waters" as defined by 33 C.F.R. § 328.3(a)(3).[124] Instead, the court found that "the 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."[125]

The court found that the Migratory Bird Rule was merely an interpretation by the Corps of the statutory term "waters of the United States," and that the interpretation should be given deference.[126] Under a deferential analysis, the court found it reasonable for the

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118. *Hoffman Homes*, 961 F.2d at 1311.

119. *Id.* at 1317 (citing *Byrd*, 609 F.2d 1204, 1209 (7th Cir. 1979) (citing S.R. No. 92-1236, at 144 (1972)).

120. *Id.* at 1319.

121. *Id.* at 1320.

122. Leslie Salt Co. v. United States, 896 F.2d 354 (9th Cir. 1990), *rev'd*, 700 F.Supp. 476 (N.D. Cal. 1989), *cert. denied*, 498 U.S. 1126 (1991), *aff'd*, 55 F.3d 1388 (9th Cir.), *cert. denied sub nom.* Cargill, Inc v. United States, 516 U.S. 955 (1995).

123. *Leslie Salt*, 55 F.3d at 1391.

124. *Id.*

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

126. *Leslie Salt*, 55 F.3d at 1393-94.

Corps to interpret the Act to include isolated intrastate waters providing habitat for migratory birds, under the "cumulative effects" doctrine of the Commerce Clause.[127] In *Cargill, Inc. v. United States*,[128] the Supreme Court denied certiorari to the *Leslie Salt* petitioners. In his dissent, Justice Thomas argued that the regulation of wholly intrastate, isolated, non-navigable waters, serving as a stop for migratory birds without attracting people to watch or photograph them, extends the Commerce Clause further than the regulation of weapons in school districts, which had been held unconstitutional in *Lopez*.[129]

In 1997, the Fourth Circuit held that the Corps' inclusion of waters "whose degradation 'could affect' interstate commerce"[130] under the definition of "waters of the United States" over which they had jurisdiction was invalid because it was unauthorized by the CWA as limited by the Commerce Clause.[131] They held that since "waters of the United States" was a definition of the statutory term "navigable waters," it would refer to either navigable-in-fact waters, interstate waters, or waters closely related to navigable or interstate waters.[132] The Fourth Circuit found that although the Supreme Court had found the definition of "waters of the United States" to be valid, it had explicitly limited its holding to wetlands actually adjacent to navigable waterways.[133] The Fourth Circuit therefore held that the Corps had exceeded its authority under the CWA by including isolated waters under its jurisdiction.[134]

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127. *Id.*

128. *See* Hoffman Homes v. United States Envtl. Prot. Agency, 999 F.2d 256 (7th Cir. 1993).

129. Cargill, Inc. v. United States, 516 U.S. 955, 967-68 (1995) (dissenting opinion of Justice Thomas based upon the Court's decision to deny certiorari from the Ninth Circuit's opinion in *Leslie Salt Co. v. United States*, 55 F.3d 1388).

130. 33 C.F.R. § 328.3(a)(3) (1993).

131. United States v. Wilson, 133 F.3d 251, 253-54 (4th Cir. 1997).

132. *Id.* at 257.

133. *Id.* (citing United States v. Riverside Bayview Homes Inc., 474 U.S. 121 (1985), which held that "[b]ecause respondent's property is part of a wetland that actually abuts on a navigable waterway, respondent was required to have a permit in this case.").

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

In yet another important pre-*SWANCC* case, the District Court for the Northern District of Illinois held for the EPA, thereby upholding Corps' jurisdiction, both in denying a motion for summary judgment[135] and in its eventual verdict in *United States v. Hallmark.*[136] Hallmark Construction had bought land from Swift Research Farms to develop a housing subdivision.[137] The land included a five-acre area which naturally retained water and was classified as a "seasonally flooded farmed wetland" by a civil engineering firm retained by Hallmark.[138] The court held that the *Lopez* decision did not prohibit the Corps from exercising jurisdiction over wetlands based solely on the presence of migratory birds.[139] Nevertheless, the court concluded that the Corps lacked jurisdiction because the government had never proven that the area was actually *used* by migratory birds.

Prior to *Lopez*, the Supreme Court had held in *Riverside Bayview Homes* that the Corps' authority under Section 404 extended to all wetlands adjacent to navigable or interstate waters and their tributaries.[140] The Court accepted that this "adjacency" could be created through an inundation or saturation of the areas through either surface or underground connection.[141] In holding that low-lying, marshy land connected to navigable waters only through groundwater inundation was still "adjacent" for Section 404 purposes[142] the Court reversed the Sixth Circuit holding that a surface hydrologic connection was needed.[143] The Court also held that the CWA was specifically intended to combat the degradation of the aquatic ecosystem.[144] Congress, the Court found, had intended the term "navigable" to be of limited import in order to allow the broadest reach of

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135. United States v. Hallmark, 14 F. Supp. 2d 1069, 1077 (N.D. Ill. 1998) (denying defendants motion for summary judgment).

136. United States v. Hallmark, 30 F. Supp. 2d 1033 (N.D. Ill. 1998).

137. *Hallmark*, 14 F. Supp. 2d at 1071.

138. *Id.*

139. *Hallmark*, 30 F. Supp. 2d at 1042.

140. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 124 (1985).

141. *Id.* at 460.

142. *Id.* at 461.

143. *United States v. Riverside Bayview Homes,* 729 F.2d 391, 392 (6th Cir. 1984).

144. *Riverside Bayview Homes*, 474 U.S. at 132.

federal regulation, and had rejected in the 1977 CWA amendments the narrower definition of "navigable waters" adopted by the Corps in 1975.[145] The Court further found that even the narrower definition would include waters navigable-in-fact and their adjacent wetlands.[146] Thus, the Corps definition of "navigable waters" and "adjacent" were proper in light of the Corps' Congressional grant of power.[147]

Post-SWANCC *Cases*

Post-*SWANCC*, disputes regarding Corps jurisdiction over isolated waters have led to a range of holdings. Decisions have ranged from the restriction of Corps' jurisdiction to waters that are navigable-in-fact and their immediate tributaries and wetlands, to decisions that have upheld Corps regulation in all cases except those where the sole basis for Corps' jurisdiction over isolated, intrastate, non-navigable waters was the Migratory Bird Rule. The only possible guarantee of a future court ruling on Corp's jurisdiction is to bind the parties to an agreement designating a prior decision by a court as controlling, as was done in *United States v. Krilich*.[148]

Some courts have applied the *SWANCC* reasoning broadly, invalidating CWA-based Corps jurisdiction over all waters except those navigable-in-fact or their immediate tributaries and wetlands. The leading case is *Rice v. Harken*,[149] from the Fifth Circuit. Called to

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145. *Id.* at 464.

146. *Id.*

147. *Id.* at 465.

148. United States v. Krilich, 303 F.3d 784 (7th Cir. 2002). A consent decree was signed in 1992 by Krilich and the EPA which bound parties to follow the *Hoffman Homes I* decision (notwithstanding that it had already been vacated) in determining the jurisdictional reach of the Clean Water Act over the property in question. The District Court found the consent decree to be binding, and Krilich therefore in violation of the decree for filling waters which, under *Hoffman Homes I*, would need a section 404(a) fill permit, notwithstanding the fact that the *SWANCC* Supreme Court decision would make the waters owned by Krilich beyond the reach of the Corps).

149. Rice v. Harken, 250 F.3d 264 (5th Cir. 2001) (rehearing denied).

interpret the scope of "navigable waters" under the Oilfield Pollution Act ("OPA"), the court found it to be the same as that of "navigable waters" in the CWA.[150] Relying on the *SWANCC* decision, the Fifth Circuit then concluded that a body of water is only subject to regulation under these acts if it is navigable-in-fact or adjacent to an open body of navigable water.[151]

A few district courts, reading *SWANCC* broadly, as exemplified by the *Harken* court, sought to limit CWA jurisdiction. In *United States v. Rapanos*,[152] the government presented evidence of a direct surface hydrologic connection with navigable waters through a collection of ditches, drains, and creeks that finally emptied into a navigable river and bay.[153] The District Court for the Eastern District of Michigan agreed that the goal of the CWA is to curtail water pollution, and therefore some waters not navigable-in-fact must fall under CWA jurisdiction.[154] However, the court found that because the wetlands in this case were twenty linear miles from navigable waters, they were not "adjacent" and therefore fell outside the jurisdictional reach of the CWA.[155]

In *Needham v. United States*,[156] a case concerning OPA jurisdiction, the District Court for the Western District of Louisiana relied on *Harken* in deciding that the scope of OPA "navigable waters" was the same as under the CWA.[157] Consequently, the court found that a non-navigable drainage ditch was not under federal jurisdic-

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150. *Id.* at 267.

151. *Id.* at 269.

152. United States v. Rapanos, 190 F. Supp. 2d 1011 (E.D. Michigan 2002) (government appeal pending).

153. *Id.* at 1014-15.

154. *Id.* at 1016 (citing *Riverside Bayview Homes*, 474 U.S. 121, 134 (1985), where wetlands adjacent and directly emptying into a navigable waterway were included in CWA jurisdiction because water flows in hydrologic cycles, and in order to accomplish the goal of the CWA to curtail water pollution, federal CWA jurisdiction includes any adjacent wetlands in reasonable proximity of navigable waters).

155. *Rapanos,* 190 F.Supp. at 1015.

156. Needham v. United States, 2002 WL 1162790 (W.D. La. 2002) (government appeal pending).

157. *Id.* at *1.

tion due to lack of sufficient adjacency to navigable waters.[158] Similarly, in *United States v. Newdunn Associates*,[159] the District Court for the Eastern District of Virginia held that wetlands connected to navigable water through miles of direct surface hydrologic connection were not "adjacent" and should therefore be classified as "phase three" isolated, non-adjacent waters.[160] This category had been removed from CWA jurisdiction by the *SWANCC* decision.[161] The same court, in *United States v. RGM Corp.*,[162] limited the Corps to the originally legislated scope of jurisdiction under the CWA, waters navigable-in-fact and their non-navigable tributaries only to the end of a continuous high-water mark,[163] and refused to give *Chevron* deference to any unlegislated Corps determination seeking to broaden jurisdiction.[164] Therefore, the court found wetlands not actually contiguous with navigable waters to be non-adjacent, and to fall outside the scope of CWA jurisdiction.[165]

Some courts read *SWANCC* very narrowly, holding that it invalidates only the Migratory Bird Rule, and using it to deny Corps Section 404 jurisdiction only in cases where the sole basis for jurisdiction was the use, or possible use, of the isolated water or wetland by migratory birds as a habitat. In *United States v. Interstate General Co.*,[166] the Maryland District Court limited the application of *SWANCC* to the Supreme Court's *o* specific holding that "the 'Mi-

158. *Id.*

159. United States v. Newdunn Associates, 195 F. Supp. 2d 751 (E.D. Va. 2002) (government appeal pending).

160. *Id.* at 764.

161. *Id.*

162. United States v. RGM Corp., 222 F. Supp. 2d 780 (E.D. VA. 2002) (government appeal pending).

163. *Id.* at 787. The 1975 regulations define "navigable waters" to include, among others, "(e) All tributaries of navigable waters of the United States up to their headwaters and landward to their ordinary high water mark." § 33 C.F.R. 209.120(2)(i)(e). This refers to the high water mark caused by the upstream tidal flow of water from navigable waters into its tributaries. *Id.*

164. *RGM Corp.*, 222 F. Supp. 2d at 787.

165. *Id.* at 788-89.

166. United States v. Interstate Gen. Co., 152 F. Supp. 2d 843 (D. Md. 2001), *aff'd* 39 Fed. Appx. 870, 2002 WL 1421411 (4th Cir. 2002).

gratory Bird Rule' is not fairly supported by the CWA."[167] Moreover, since the Corps in *Interstate General* asserted jurisdiction over some wetlands due to their adjacency to the headwaters of two non-navigable creeks, which drain into a navigable river, the court held the *SWANCC* decision to be inapplicable to the case.[168] Similarly, in *United States v. Rueth Development Co.*,[169] the Northern District of Indiana held that the *SWANCC* decision did not apply to the wetlands at issue since the basis for asserting jurisdiction over the wetlands was "adjacency" to navigable waters rather than a sole reliance on the Migratory Bird Rule.[170]

Other courts have found the Corps retains jurisdiction under the CWA, even after *SWANCC*, on waters not directly adjacent to navigable waters, so long as there is a connection, even an attenuated one. The Ninth Circuit held, in *Community Association for Restoration of the Environment v. Henry Bosma Dairy*, that *SWANCC* does not change the principles of the CWA, and that regardless of *SWANCC*, the fact that the water drained through connecting waterways into a navigable river was enough to make it a "tributary" and allow Corps jurisdiction.[171] In *United States v. Lamplight Equestrian Center*,[172] the District Court for the Northern District of Illinois held that regardless of *SWANCC*, the CWA reaches tributaries even when there is no unbroken surface hydrologic connection and even when the distance from the tributary to the navigable water is significant.[173] The court found that even in such a situation, the quality of the tributary is still vital to the quality of the navigable water.[174]

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167. *Id.* at 847 (citing Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs, 531 U.S. 159 (2001)).

168. *Id.*

169. United States v. Rueth Development Co., 2001 WL 17580078 (N.D. Ind. 2001).

170. United States v. Interstate Gen. Co., 152 F. Supp. 2d 843, 877 (D. Md. 2001), *aff'd* 39 Fed. Appx. 870, 2002 WL 1421411 (4th Cir. 2002).

171. Cmty. Ass'n for Restoration of the Envt. v. Henry Bosma Dairy, 305 F.3d 953, 954 (9th Cir. 2002).

172. United States v. Lamplight Equestrian Ctr., 2002 WL 360652 (N.D. Ill. 2002).

173. *Id.* at *8.

174. *Id.*

In *Aiello v. Town of Brookhaven*,[175] the District Court for the Eastern District of New York found that the Corps' definition of "navigable waters" still extended to all intrastate waters whose degradation or destruction would affect interstate or foreign commerce.[176] Therefore, the court found the pond and creek in question, although questionably navigable in the classical RHA sense, comprised at least a non-navigable tributary of a navigable water, and thus fell under CWA jurisdiction.[177]

Some courts have upheld CWA jurisdiction over waters not directly adjacent to navigable waters, post-*SWANCC*, but put some outer limits on the reach of the CWA over such non-continuous non-navigable waters. In *United States v. Buday*,[178] the District Court of Montana recognized that the Migratory Bird Rule was too tenuous a basis for federal jurisdiction and that jurisdiction does not exist over activities that merely "could" affect interstate commerce. However, the Court found that Congress had intended to protect waters to the fullest extent of its Commerce Clause power.[179] The Court therefore held that there is no limitation on federal jurisdiction over open waters that flow into interstate or navigable-in-fact waters because of the direct impact of their degradation on interstate commerce.[180] In *Headwaters v. Talent Irrigation District*,[181] the Ninth Circuit found all waters contributing their flow to a larger body of water are tributaries covered by CWA jurisdiction.[182] The court held that although the canals in question flow only intermittently, they are not "isolated" and therefore are not outside CWA jurisdiction per *SWANCC*, since they still exchange water with and impact the health of naviga-

175. Aiello v. Town of Brookhaven, 136 F. Supp. 2d 81 (E.D.N.Y. 2001).

176. *Id.* at 120 (finding that the court retains pre-*SWANCC* limits on Corps power as defined through pre-*SWANCC* cases and agency definitions).

177. *Id.*

178. United States v. Buday, 138 F.Supp.2d 1282 (D. Mont. 2001).

179. *Id.* at 1294-95.

180. *Id.*

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

182. *Id.* at 533.

ble waters.[183] The District Court for the District of Idaho, in *Idaho Rural Council v. Bosma*,[184] found that CWA jurisdiction includes all waters that are tributaries of navigable water, and even extends to those waters where a direct groundwater hydrologic connection to navigable water can (or cannot?) be proven.[185]

III. REGULATORY EFFECTS OF *SWANCC*

In the aftermath of the SWANCC decision, the Corps has issued an Advance Notice of Proposed Rulemaking to determine the regulatory definition of "waters of the United States" and the scope of waters subject to the CWA.[186] The Corps takes a narrow reading of the *SWANCC* decision, holding that it only eliminates Corps jurisdiction over isolated intrastate waters when the sole basis for jurisdiction under the CWA predicates upon the Migratory Bird Rule.[187] Since various courts have had very different understandings of the impact of the *SWANCC* decision, the Corps is now in the process of promulgating a new agency interpretation of "navigable waters" and "waters of the United States" to provide guidance to courts in determining future cases.[188] While the outer limit of CWA jurisdiction is in question, there is no dispute that traditional navigable waters and directly adjacent wetlands as well as waters subject to tidal flux and directly adjacent wetlands continue to be properly regulated under the CWA.[189]

Due to overlap among the many federal and state programs aimed at protecting the environment and rehabilitating damaged areas,[190]

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183. *Id.* The destruction of the tributary does not need to immediately impact navigable waters but so long as the impact will eventually be felt by navigable waters, the *SWANCC* decision is inapplicable in as much as it only applies to isolated intrastate waters. *Id.*

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

185. *Id.* at 1180.

186. 68 Fed. Reg. 1991.

187. *Id.* at 1993.

188. *Id.* at 1995.

189. *Id.* at 1996.

190. Ducks Unlimited Inc., *The SWANCC Decision: Implications for Wetlands and Waterfowl*, *at* http://www.ducks.org/conser-

many wetlands will remain protected, even if Corps jurisdiction under the CWA is finally determined to include only traditional navigable waters and their immediately adjacent wetlands.[191] However, due to the *SWANCC* invalidation of the Migratory Bird Rule as a basis for jurisdiction under the CWA, some of the most important wetlands for migratory birds will be removed from all governmental control.[192] As a result of the vacuum created by the demise of the Migratory Bird Rule, without further action by state or federal legislatures, these waters will likely disappear; leaving in the vacuum's wake devastating consequences for both migratory bird populations and the interstate commerce generated by people who travel to hunt or to photograph them.

The Hydrologic Cycle

The nature of water is impermanence and transience.[193] Water moves in a continuous cycle, falling as rain or snow, which then

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vation/404-report.asp (Sept. 2002) (on file with the Fordham Environmental Law Journal) (determining the impact of the *SWANCC* decision in light of the federal Swampbusters program, which serves as an economic disincentive to convert wetlands on agricultural land into farmland, along with state regulatory programs regulating activities that impact wetlands based on different jurisdictional limitations the Corps may eventually settle on, from no waters other than navigable and immediately adjacent, to a 100-mile "adjacency" buffer zone).

191. *Id.* at 43. Much of the isolated wetlands in the Mississippi alluvial valley, where the *SWANCC* property was located, would be covered by Swampbusters and state regulations even were the Clean Water Act jurisdiction to be severely limited. *Id.*

192. *Id.* at 47, 51. The Prairie Pothole Region, Rainwater Basin of Nebraska and Southern Great Plains Region, which are important for migrating, wintering, and breeding waterfowl, will lose CWA protection after *SWANCC* since most of the wetlands are isolated intrastate waters with jurisdiction based solely on the Migratory Bird Rule. This effect would be heightened if the Swampbuster program is weakened or repealed. *Id.*

193. PIELOU, E.C., FRESH WATER, 1 (University of Chicago Press, 1998).

evaporates back into the atmosphere or drains into the sea through surface or groundwater connections.[194] There is no such thing as non-circulating water; given enough time even water trapped in a glacier will once again circulate.[195] Humans, animals, and many plants can process only fresh water, which is water that is collected as groundwater ponds, lakes, or streams. Evapotranspiration or evaporation of water directly from land areas, results in almost nine percent of land precipitation, with the remaining ninety-one percent of land precipitation coming from evaporated seawater.[196] Although a lot of precipitation falling on land runs directly into lakes or streams, or soaks into the ground and is incorporated into the groundwater, an appreciable amount of water is held in wetlands or areas where the soil is periodically or continuously saturated.[197]

Wetlands have a number of concrete values: hydrologic, water quality improvement, ecological, and recreational.[198] The hydrologic values of wetlands include groundwater recharge, maintenance of regional precipitation patterns, and erosion control during storms. Unlike dry earth, where rainfall quickly runs off into streams and rivers without ever having time to fully saturate the soil, wetlands hold water and allow the soil to become saturated, which in turn recharges groundwater levels.[199] The evaporation of water sitting exposed in wetlands maintains regional precipitation patterns by keep-

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194. *Id.*

195. *Id.* at 2-3.

196. MOORE, JAMES W., BALANCING THE NEEDS OF WATER USE, 2 (Springer-Verlag, 1989).

197. *Id.* at 60.

198. *Id.* at 61. *See also* Federal Water Pollution Control Act Amendment of 1977, No. 95-139, at 52 (Hon. Robert W. Edgar, Hon. Gary A. Myers—"Filling wetlands and diverting streams without careful consideration of the ecological balance which could be upset is not only environmentally unsound, but economically unwise."). *See also* Federal Water Pollution Control Act Amendment of 1977, No. 95-139 at 56 (Jimmy Carter, Walter Mondale—"This Nation's wetlands are a most valuable resource.").

199. WETLAND MANAGEMENT, ENVT. AND NATURAL RES. POL'Y DIV. OF THE CONG. RESEARCH SERV. OF THE LIBRARY OF CONG., COMM. ON ENVT. & PUB. WORKS, U.S. SENATE, NO.97-11, at 49 (July 1982).

ing the moisture level of the atmosphere high.[200] Wetlands control storm erosion by limiting the number and severity of flash floods by serving as flood plains.[201] Water flow through wetlands is slow, allowing time for sedimentation and filtration, and the decomposition of particulate and chemical pollutants.[202]

Open waters in the agricultural areas of the United States, such as wetlands and small, isolated waters help regulate both rainfall and temperature which are vital for successful agriculture. Much atmospheric water, and therefore precipitation, comes from local open water. In agricultural areas, this is usually characterized as originating from small isolated ponds and wetlands.[203] The less open water there is in the agricultural center of the United States, the less precipitation will fall and the more water that must be imported. Open water also functions as a "heat sink," absorbing energy in the form of heat when the ambient temperature is hotter than that of the water; conversely releasing heat energy when the ambient temperature is lower than that of the water.[204] This results in a more constant temperature in the areas surrounding open bodies of water.[205] Without the temperature-dampening and precipitation-aiding effects of open bodies of water in the agricultural center of the United States, agriculture could become significantly more difficult and more costly as farmers find themselves suddenly working against nature.

Wetlands host a wide range of plants which thrive in saturated soils and provide a habitat for many animals, including those who use one wetland and those who visit various wetlands as resting and

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200. *Id.* at 48.

201. *Id.* at 49.

202. *Id.* *See also* ELIZABETH ROBERT BERNER, GLOBAL ENVIRONMENT: WATER, AIR AND GEOCHEMICAL CYCLES, 236 (Prentice Hall, 1996) (describing physical, chemical and biological processes in standing water and their affect on water composition).

203. JAMES W. MOORE, BALANCING THE NEEDS OF WATER USE, 2 (Springer-Verlag, 1989).

204. *Arctic Climatology and Meteorology*, *at* http://nsidc.org/arcticmet/glossary/heat_sink.html (Mar. 2003) (on file with Fordham Environmental Law Journal).

205. George Burba et al., Surface Energy Fluxes of an Open Water Area in a Mid-Latitude Prairie Wetland, University of Nebraska-Lincoln, *at* http://snrs1.unl.edu/GeorgeB/PresOW.abstract.html (1999) (on file with the Fordham Environmental Law Journal) .

feeding sites while migrating.[206] Migratory birds rely on wetlands while on their journeys, and the destruction of wetlands therefore leads to a corresponding decline in bird populations.[207] Regardless of size, wetlands are water systems and are part of the greater hydrologic cycle; alterations affecting the movement or quality of water in the wetlands greatly affect water movement and quality in other areas.[208] Additionally, the fact that a wetland may dry out seasonally does not necessarily lessen its import in the hydrologic cycle. One may infer that seasonal wetlands play a greater role in migratory bird migration or plant habitat than permanent wetlands.[209]

The area in dispute in *SWANCC* lies within the greater Mississippi basin. It has recently been recognized as the site of a complex, completely interconnected and immensely important hydrologic cycle vital to the United States environment, crop health in United States farming regions, commercial shipping in the Midwest, and ground water recharging.[210] As the interconnection of the hydrologic cycle became better understood, Congress gave the Corps the duty to balance the needs of economic development with those of environmental protection.[211] Courts in turn deferred to the Corps' interpretation of the statutes impacting its new role as protector of environ-

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206. *Id.* at 46-47.

207. *Id.* at 47.

208. *Id.* at 36.

209. *Id.* at 46-47.

210. *GCIP: Global Energy and Water Cycle Experiment (GEWEX) Continental-Scale International Project, A Review of Progress and Opportunities*, National Research Council, 1998. The project was set up to better understand the complex hydrologic cycle in the Mississippi basin and to determine the impact conversion of wetland to farmland has on the system as a hydrologic whole. The study is still ongoing, the 1998 report sets up study parameters and controls.

211. DAVID SALVESEN, WETLANDS: MITIGATING AND REGULATING DEVELOPMENT IMPACTS, 21 (The Urban Land Institute, 1990). The 1972 Clean Water Act changed Corps permitting process from a straight "navigability" test to a complicated cost-benefit analysis of the greater impact of wetland loss on the hydrology and biological diversity of the area. *See also* Federal Water Pollution Control Act Amendment of 1977, No. 95-139, at 60. Hon. Jennings Randolf—"necessity for broad jurisdiction to protect our interrelated and interdependent water resource."

mental integrity, including its interpretation of the term "navigable waters."[212] Although the Supreme Court refused to resolve the issue of completely isolated, non-navigable intrastate wetlands, the Court recognized the integrated nature of the hydrologic cycle and deferred to the Corps' understanding of what waters needed to be regulated in order to achieve the goals of the CWA.[213] Additionally, the Court found that "the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as 'waters' under the Act."[214]

Cumulative Impact

In light of the complexity of the hydrologic cycle, it is important for the courts to defer to the Corps' interpretation of the statute with which it is charged to enforce. The Corps is best able to determine how to accomplish the goals of the CWA as promulgated by Congress. However, in *SWANCC*, the Supreme Court arbitrarily imposed the artificial national-versus-local differentiation of *Lopez* and *Morrison* onto the complex, interconnected web of the hydrologic cycle. Unlike the clear "local" state police power over criminal matters, the interconnectedness of the hydrologic cycle means that even a seemingly "local" isolated intrastate water has significant, non-attenuated "national" impact on North American migratory bird populations as well as national precipitation and groundwater levels. In *Lopez*, Chief Justice Rehnquist limited Congress' Commerce Clause power when it "neither regulates a commercial activity nor contains a requirement that the [activity] be connected in any way to interstate commerce."[215] The question of whether an activity impacts interstate commerce is one of degree, to be answered by a

212. SALVESEN, *supra* note 212, at 461.

213. *Id.* at 463. "The regulation of activities that cause water pollution cannot rely on...artificial lines...but must focus on all waters that together form the entire aquatic system. Water moves in hydrologic cycles and the pollution of the is part of the aquatic system, regardless of whether it is above or below an ordinary high water mark, or mean high tide line, will affect the water quality of the other waters within that aquatic system." *Id.*

214. *Id.*

215. United States v. Lopez, 514 U.S. 549, 551 (1995).

thorough factual inquiry.[216] While the possession of guns in school zones could not be proven to substantially impact interstate commerce in *Lopez*, the same is not true of the Migratory Bird Rule. Migratory birds generate an immense amount of interstate commerce from those who follow them across state lines for purposes of photography and for hunting.[217]

Many wetlands used as habitat by migratory birds will be vulnerable to destruction and agricultural conversion with the Supreme Court's elimination of the Migratory Bird Rule as grounds for Corps jurisdiction under the CWA. Migratory bird populations will decline because of scarcity of food, water, and nesting sites in the few remaining protected wetlands. A decrease in bird populations will cause a corresponding decline in interstate commerce. Instead of being able to hunt birds at isolated locales, hunters will be forced to concentrate in a few areas, where the reports of multiple guns will lower the chances of any one hunter to complete his objective. In the same vein, birdwatchers will no longer have the opportunity to view migratory birds in pristine wetlands and will have to jostle with hunters for the chance to see anything. Many will stop traveling because the loss of wetlands will no longer make the trip worthwhile.

The Corps was given the power under the CWA to maintain the environmental health of "navigable waters," defined as "waters of the United States." In determining the true scope of its jurisdiction, the Corps had to look to the Congressional intent behind the CWA. Promulgated in "the environmental decade," the CWA was Congress' attempt to protect waters not just from navigation obstructions, but from environmental poisoning. The nature of the hydrologic cycle dictates that the poisoning of waters in a small isolated upstream pond may lead to widespread poisoning of downstream, navigable waters. In fact, the interconnectedness of the hydrologic cycle is so complete that even an isolated site with no surface connection and no direct link to groundwater may nevertheless negatively affect a larger and more critical body of water.

The biologic cycle relies on and bolsters the hydrologic cycle. The availability of fresh, unpolluted water and surrounding grasses limits the growth potential of species living in an area. When the biologi-

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216. *Id.* at 562-63.

217. United States v. Byrd, 609 F.2d 1204,1209 (7th Cir. 1979) (citing S. REP. No. 92-1236, at 144 (1972)).

cal population exceeds the carrying load[218] of a wetland, the population cannot increase and may, in fact, decrease due to crowding. The plight of migratory birds is exacerbated because they rely on many wetland habitats scattered across the country. Wetland destruction leading to a lower carrying load for just one of the wetlands on a migratory route will limit the entire population of migratory birds.

In *Leslie Salt Co.*, the Ninth Circuit found that a wetland caused by the temporary, seasonal pooling of water in an isolated and abandoned intrastate salt pit without any surrounding hydrophilic wetland vegetation,[219] fell within the "water of the United States" over which the Corps had regulatory jurisdiction. The Court based its decision on the refuge, which the area provided for migratory birds.[220] The importance of the wetland within the hydrologic "water of the United States" is even more pronounced in *SWANCC*, and the loss of Corps regulatory jurisdiction will lead to even worse consequences than did the loss of jurisdiction over the waters scattered among the housing tracts in *Wilson*.[221] Here, the waters are part of a naturalized biological system, evolving from a barren strip mine to a highly vegetated system with many seasonal ponds.[222] Not just a stop for migratory birds, the area serves as a breeding ground for herons, highlighting the relative permanence of the waters at the site.[223]

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218. The carrying load of an area is the maximum number of biological units that area can sustain.

219. WETLAND MANAGEMENT, *supra* note 200 at 49. The report defines wetlands as transitional systems between terrestrial and aquatic systems where the water table is close to, or at, the surface. Wetlands must be inundated by surface or ground water frequently enough to support a prevalence of hydrophytes, plants that thrive in water-logged soil and semi-aquatic habitats, or aquatic life requiring water-saturated soil for growth and reproduction. *Id.*

220. *Id.*

221. *See* United States v. Wilson, 133 F.3d 251, 253-54 (4th Cir. 1997).

222. Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs, 191 F.3d 845, 848 (7th Cir. 1999), at 848, *vacated by* 531 U.S. 159 (2001).

223. *U.S. Geological Survey*, at http://www.mbr-pwrc.usgs.gov/id/framlst/Lifehistory/lh1940.html (last viewed Mar. 1, 2004). Herons breed in wetlands and open-water areas, egg incubation takes 28 days and it is 56-60 days until the fledglings are ready to fly. The

Such long-standing waters occur during the spring season, the growing season for hydrophytes, which should further qualify the area as a wetland under the government definition.

Migratory birds "remember" where favorable resting sites are, and "plan" their route so as to minimize their flight. They visit the sites for vital rest and feeding before continuing on their arduous journey.[224] The loss of viable places for rest is one of the greatest contributors to migration mortality, which can affect up to half of the migrating population.[225] Proper sites in the United States portion of the migratory corridor are limited to narrow areas between agricultural plots and, unless in bad health or facing bad weather, birds are selective about their resting locations, choosing to stop in areas with many insects and plants as well as accessible water.[226] Both migratory birds and commercial housing contractors have a vested interest in many of these sites. Without the Corps regulation of such areas, they will be commercially exploited. This exploitation renders greater peril than the mere loss of a favorable site for rest. Now, with the area under development, the birds must either continue flying far distances with low fat reserves or they can stop and die as victims of malnutrition or predation.

When the number of stopover sites is reduced, the migratory population must crowd into the remaining, possibly inferior, stopover sites. These remaining sites cannot support all of the displaced birds. Each site has a carrying load, a limit on the amount of birds which it can support.[227] When that load is exceeded, all of the birds at the site will suffer. An unfavorable proportion will contribute to the demise of the birds, as there will be more birds than resources available at the site. Although the birds stay at any one site for only

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water at the *SWANCC* site must remain for at least 74 days, over 2 months, from the time the first egg is laid until the brood is ready to take their first flight. *Id.*

224. *Smithsonian National Zoological Park*, at http://natzoo.si.edu/ConservationAndScience/MigratoryBirds/Fact_Sheet/ (last viewed Mar. 1, 2004). Most neotropical birds, those that breed in North America and winter in Latin America, have a one-way migration of over one thousand miles. *Id.*

225. *Id.*

226. *Id.*

227. *U.S. Fish and Wildlife Service*, at http://training.fws.gov/history/priorities/priomig.html (last viewed Mar. 1, 2004).

a few days, the bulk of migration happens within a relatively short period of time, leading to conspicuous congregation of masses of birds at stopover sites.[228] This leads to many deaths, as birds are too weak to fly much farther, yet cannot get enough food at any stopover site to stave off death by starvation. Hence, one sure result of the *SWANCC* decision, the decrease in of the carrying load of any one part of the migratory corridor, will affect the entire migratory bird population by limiting the numbers of birds who can successfully navigate to the smallest carrying load of any one portion of the migratory corridor.[229] Furthermore, some wild migratory birds may turn to landing in poultry farms seeking to obtain high-protein feed. This interaction can lead to the transmission of disease from the wild birds to the farmed fowl, with possibly disastrous consequences for humans.[230] The current Dutch avian flu has led to culls[231] of thousands of farm fowl and to at least one human death.[232]

In *SWANCC,* as in *Lopez*, the Supreme Court found that the regulation under consideration was too attenuated from any interstate commerce to vest Congress with the sought after regulatory power under the Commerce Clause. However, the artificial lines dividing state and national interests developed in *Lopez* fail when applied to the fluid, interconnected web of the hydrologic and biologic cycles. Wetland destruction on a local level directly affects interstate commerce due to nationwide migratory bird population decline. The efforts of the Supreme Court to remain true to *Lopez* reasoning has brought forth a decidedly un-*Lopez*-like result. Where the national impact on interstate commerce is forced to take a an inferior position to local control over land and water use, neither the interests of the locality nor the nation are served.

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228. *Smithsonian National Zoological Park*, at http://natzoo.si.edu/ConservationAndScience/MigratoryBirds/Fact_Sheet/ (last viewed Mar. 1, 2004).

229. *U.S. Fish and Wildlife Service*, at http://training.fws.gov/history/priorities/priomig.html (last viewed Mar. 1, 2004).

230. Alison Abbott, *Chicken Flu Races through Dutch Poultry Farms*, 422 NATURE 247 (2003).

231. *Id.* Culls are when humans kill off whole populations of possibly infected animals in an effort to prevent transmission of the disease to other areas, farm animals, or humans. *Id.*

232. Alison Abbott, *Human Fatality Adds Fresh Impetus to Fight Against Bird Flu*, 423 NATURE 5 (2003).