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Environmental Law—Clean Water Act—The Supreme Court Scales Back the Army Corps of Engineers' Jurisdiction over "Navigable Waters" under the Clean Water Act. Solid Waste Agency v. United states Army Corps of Engineers, 531 U.S. 159 (2001).

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ENVIRONMENTAL LAW—CLEAN WATER ACT—THE SUPREME COURT SCALES BACK THE ARMY CORPS OF ENGINEERS' JURISDICTION OVER "NAVIGABLE WATERS" UNDER THE CLEAN WATER ACT. *Solid Waste Agency v. United States Army Corps of Engineers*, 531 U.S. 159 (2001).

I. INTRODUCTION

In 1900 the United States Supreme Court stated, in reference to wetlands, that "the police power is never more legitimately exercised than in removing such nuisances."[1] Since 1900, an appreciation for the importance of wetlands[2] and the protection of our environment has replaced this view, and as the national attitude has changed, so have the laws that control activities that impact the environment. One of the most important and sweeping environmental laws passed by Congress was the Clean Water Act (CWA) of 1972,[3] which had several ambitious goals, including the restoration of the integrity of the nation's waters, protection of the animal and plant life in the waters, and, by 1985, elimination of pollutant discharge.[4]

In accordance with these policies, the United States Army Corps of Engineers ("the Corps") has, since the 1970s, administered a permit program commonly known as the section 404(a) program. This program regulates the dredging or discharge of fill materials into "navigable waters."[5] Determining the type of waters to which the Corps's authority should extend has made the section 404(a) permit program one of the most controversial programs of the CWA. Since the early 1800s, deciding just how broadly to interpret the term "navigable waters" has been a bone of contention between supporters of a strong federal government and proponents of states' rights, between entrepreneurs and environmentalists, and now, again, in an important holding by the United States Supreme Court, between two branches of our federal government; which two branches depends on how the case is

1. Leovy v. United States, 177 U.S. 621, 636 (1900).

2. See the Environmental Protection Agency (EPA) Wetlands website and the Sierra Club website for a general discussion of the role of wetlands in the environment and the importance of preserving them. Environmental Protection Agency, Office of Water, *Wetlands*, *at* http://www.epa.gov/owow/wetlands/ (revised Oct. 18, 2001); Sierra Club, *Clean Water and Wetlands*, *at* http://www.sierraclub.com/wetlands/ (last visited Nov. 8, 2001).

3. Federal Water Pollution Control Act and Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified as amended at 33 U.S.C. §§ 1251-1377 (1994 & Supp. V 1999)). This Act is more commonly known as the CWA. *Id.*

4. 33 U.S.C. § 1251(a) (1994).

5. *See id.* § 1344. See *infra* note 26 for the CWA's definition of "navigable waters."

read: the Court and the administration, as represented by the Corps, or the Court and Congress.

This note examines the United States Supreme Court's controversial decision in *Solid Waste Agency v. United States Army Corps of Engineers*[6] (*Solid Waste*), in which the Court struck down the "Migratory Bird Rule"[7] as an unauthorized extension of the authority given to the Corps in the CWA. First, the note discusses the regulatory struggles that began in the mid-1980s when a group of Illinois municipalities sought to site a garbage dump on an abandoned gravel mine, and ended in the Corps's decision that gave rise to *Solid Waste*. The note next focuses on the historical development of federal authority over navigation and water pollution, including the evolution of the definition of "navigable waters," the history and development of the CWA, and the history of the Corps's interpretation of the CWA. With this groundwork laid, the note shifts to a discussion of recent decisions by the Court that interpret the CWA and the Federal Commerce Clause power on which congressional authority over navigation is based. Next, the note examines the Court's reasoning in the *Solid Waste* opinion, including its decision to refrain from extending its recent limitations on the Commerce Clause. This section highlights the 5-4 conservative-liberal split in the Court, currently familiar to legal scholars, which gave rise to a deep contrast between the majority and minority opinions. In conclusion, this note considers the impact that the *Solid Waste* decision will have on environmental regulation, the potential for further limitations on the Corps's authority over "navigable waters," and the possibility that even if Congress restores the Corps's authority over isolated wetlands, the Supreme Court may decide to invalidate Congress's actions on the grounds that they are limited by the Commerce Clause.

II. FACTS

In the mid-1980s the Chicago metropolitan area faced what was reported as a major garbage disposal crisis.[8] The Northwest Municipal

6. 531 U.S. 159 (2001).

7. Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41,216-17 (Nov. 13, 1986); *see infra* note 99 and accompanying text. For a detailed discussion of this rule see *infra* Part III.A.3.

8. *See, e.g.*, William Presecky, *Governments Dig for Garbage Ideas*, CHI. TRIB., Mar. 5, 1986, at D1, *available at* 1986 WL 2651168. The Chicago metropolitan area generated more than 6.25 million tons of garbage annually. *Id.* The life expectancy of eight of the twenty-three landfills in the area was estimated at two years or less. *Id.* Only six

Conference (NMC), a group of twenty-seven north and northwest Cook County suburbs, banded together to search for cost-effective solutions to their waste management problems.[9] In December 1985 the NMC announced plans to build a balefill—which is a repository for garbage previously compacted into blocks or bales—on an abandoned gravel mine near the Cook County border.[10]

Over one-third of the 533-acre site had been strip-mined for gravel and sand from the 1930s to the 1950s.[11] Abandoned by 1960, the site had gradually evolved into an "early successional stage forest," and the ridges and trenches left by the mining had formed several acres of permanent and seasonal ponds.[12] The NMC proposed to use 410 acres of the site for the balefill[13] and to fill in 17.6 acres of the permanent and seasonal ponds as part of the balefill's construction.[14] One hundred and forty-two acres of the 410-acre parcel were designated to be used for actual garbage disposal, with several acres of trees acting as a buffer zone to the surrounding area.[15]

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landfills were expected to last over ten years. *Id.*

9. *Id.* The number of municipalities in the group has dropped from twenty-seven to twenty-three. *See Solid Waste*, 531 U.S. at 162-63.

10. Gary Wisby, *Suburb Landfill Site Chosen: 29 Towns Select Former Strip Mine Near Elgin*, CHI. SUN-TIMES, Dec. 20, 1985, at 28, *available at* 1985 WL 3607433. A balefill only accepts baled garbage, thereby saving space, eliminating loose garbage, and minimizing odor and rodents. *Id.*

11. Petitioner's Brief at 4, Solid Waste Agency v. United States Army Corps of Eng'rs, 531 U.S. 159 (2001) (No. 99-1178).

12. *Solid Waste*, 531 U.S. at 163; Petitioner's Brief at 4, *Solid Waste* (No. 99-1178). An "early successional stage forest" develops after an "opening occurs in a forest, whether from fire, wind or human activity." Jonathan S. Linowes, *Moulton Hill Is a Thriving Young Forest Teeming with Wildlife*, *at* http://www.linowes.com/forest/nature.htm (last visited July 7, 2001). Characteristics of an early successional stage forest include "low vegetation, dense cover and food for wildlife." *Id.* The term "succession" simply indicates the natural patterns of change in an ecosystem over time. *Plant Succession: How a Field Becomes a Forest*, *at* http://www.env.duke.edu/forest/sucession.htm (last updated Apr. 5, 2000). The ponds on the site range from under one-tenth of an acre to several acres in size and from several inches to several feet in depth. *Solid Waste*, 531 U.S. at 163.

13. Petitioner's Brief at 4, *Solid Waste* (No. 99-1178).

14. Wayne Baker, *Balefill Opponents Flood Army Corps*, CHI. TRIB., May 17, 1993, at D3, *available at* 1993 WL 11071357. In its first permit application to the Army Corps of Engineers, NMC indicated that it planned to fill in thirty-one acres of wetlands, but scaled that back to 17.6 acres in its second application in response to the Corps's criticisms of the plan. *See id.*

15. Solid Waste Agency of Northern Cook County, *Northwest Cook County Balefill*, *at* http://www.swancc.org/balefill.htm (last visited June 16, 2001).

Under a 1981 Illinois law,[16] the NMC had to receive local government approval for the siting of the landfill and state government approval for its design before construction could begin.[17] In 1987, NMC applied to the Cook County Zoning Board of Appeals (CCZB) for a special use planned unit development permit for the balefill.[18] After fifty-eight hours of hearings, the CCZB unanimously recommended approval of the balefill site to the Cook County Board of Commissioners (CCBC), which approved the plan with a seventy-five percent majority in November 1987.[19]

CCBC conditioned its approval on the subsequent approval of the Illinois Environmental Protection Agency (IEPA),[20] and in November 1988, the NMC, now incorporated and renamed the Solid Waste Agency of Northern Cook County (SWANCC), submitted a 1,600 page application to the IEPA.[21] The IEPA rejected the first application, and SWANCC resubmitted with several design changes.[22] The IEPA approved the second plan in November 1989 with fifty-one conditions relating to the construction, operation, and monitoring of the balefill.[23] The final hurdle that SWANCC had to cross in order to begin construction was approval by the Corps to fill the ponds on the site.[24] In April

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16. 415 ILL. COMP. STAT. ANN. 15/2 (West 1997).

17. *Id.*; *see* Petitioner's Brief at 5-6, *Solid Waste* (No. 99-1178).

18. Petitioner's Brief at 5, *Solid Waste* (No. 99-1178). Initially, the NMC sought to have the site annexed by the nearby village of Bartlett. T.J. Rolando Jr., *The Case Against Bartlett Balefill*, CHI. TRIB., Dec. 27, 1986, at C8, *available at* 1986 WL 2735403. After facing strong opposition to the project from neighboring suburbs and being rejected by the Bartlett Zoning Board, the NMC turned to the CCZB with its balefill proposal. *See id.*

19. Steve Johnson, *Cook County Gives Green Light to Controversial Landfill*, CHI. TRIB., Nov. 17, 1987, at C1, *available at* 1987 WL 2996703. "Members of the Cook County Zoning Board of Appeals . . . praised the design as being among the safest they'd ever seen" while opponents of the project claimed it endangered the Newark Valley aquifer from which many surrounding towns drew their water. *Id.*

20. *Id.*

21. *See* Stevenson Swanson, *Balefill Plan to Guarantee Land Values*, CHI. TRIB., Nov. 23, 1988, at C1, *available at* 1988 WL 3531545. The plan was the first landfill plan in Illinois to propose setting up funds to guarantee property values and water quality. *Id.*

22. Petitioner's Brief at 6, *Solid Waste* (No. 99-1178). Design changes included a more comprehensive monitoring system for ground water, the redesign of a system to collect liquid waste, and a more substantial clay liner to protect the aquifer beneath the site from decomposing waste. Mike Nichols, *Foes of Balefill Fight New Plan: Waste Agency Revises Its Proposal*, CHI. TRIB., Sept. 19, 1989, at C4, *available at* 1989 WL 4625351.

23. Petitioner's Brief at 6, *Solid Waste* (No. 99-1178).

24. Stevenson Swanson, *State OKs New Suburb Landfill: Opponents Call Action 'Unconscionable,' Vow Lawsuit*, CHI. TRIB., Nov. 17, 1989, at M7, *available at* 1989 WL 4641960.

1986 and March 1987, the Corps, at SWANCC's request for a ruling, disclaimed jurisdiction over the proposed balefill site, finding that there was no need for a section 404(a) permit[25] to discharge fill material into navigable waters because navigable waters were not present.[26] However, in July 1987, the Illinois Nature Preserves Commission told the Corps that migratory birds had been seen on the balefill site.[27] Pursuant to the Migratory Bird Rule,[28] in November 1987, the Corps asserted jurisdiction over the balefill because: (1) the site was abandoned; (2) it developed a natural character; and (3) the waters on the site were or could be used by migratory birds that cross state lines.[29]

In February 1990, SWANCC submitted its first section 404(a) permit application to the Corps.[30] The Corps denied SWANCC's application on the grounds that the balefill would damage the site's wetlands and that SWANCC had not proven that the site was the "least damaging practicable alternative site."[31] SWANCC attempted to

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25. Section 404(a) of the CWA gives the Corps the authority over the discharge of fill material. 33 U.S.C. § 1344(a) (1994). Section 404(a) states that the Corps of Engineers "may issue permits . . . for the discharge of dredged or fill material into the navigable waters." *Id.*

26. Petitioner's Brief at 8, *Solid Waste* (No. 99-1178); *see* Solid Waste Agency v. United States Army Corps of Eng'rs, 531 U.S. 159, 164 (2001). The Corps based its initial conclusion that it did not have jurisdiction on the fact that no wetlands or areas supporting plant life typically found in saturated soil conditions were present on the site. *Solid Waste*, 531 U.S. at 164. The Clean Water Act defines "navigable waters" as "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7) (1994). The Corps's regulatory definition of "waters of the United States" includes "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." 33 C.F.R. § 328.3(a)(3) (2001).

27. Respondent's Brief at 7-8, Solid Waste Agency v. United States Army Corps of Eng'rs, 531 U.S. 159 (2001) (No. 99-1178); *see also Solid Waste*, 531 U.S. at 164. Subsequent observations revealed 121 different species of birds on the balefill site, including migratory birds such as "mallard ducks, wood ducks, Canada geese, sandpipers, kingfishers, water thrushes, swamp [sparrows], red-winged blackbirds, tree swallows, and several varieties of herons." Respondent's Brief at 7, *Solid Waste* (No. 99-1178). Also observed at the site was the second-largest colony of great blue herons in northeastern Illinois, and the Veery and Cooper's Hawk, both of which are on the threatened or endangered list of the Illinois Endangered Species Protection Board. *Id.*

28. Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41,216-17 (Nov. 13, 1986). The Migratory Bird Rule asserted the Corps's jurisdiction over intrastate waters used by migratory birds and endangered species. *Id.*; *see infra* note 99 and accompanying text; *infra* Part III.A.3 (discussing rule in detail).

29. *Solid Waste*, 531 U.S. at 164-65.

30. Petitioner's Brief at 9, *Solid Waste* (No. 99-1178).

31. *Id.* The United States Fish and Wildlife Service and EPA both recommended that the Corps reject the permit application because of the balefill's effect on the habitat

address the Corps's criticisms when it resubmitted a significantly revised section 404(a) permit application to the Corps.[32] However, in July 1994 the Corps again rejected SWANCC's application, finding the balefill was against the public interest on three grounds: (1) the "unmitigable" impact of site development on migratory birds and other wildlife; (2) SWANCC had not sufficiently demonstrated that it had examined all of the less environmentally damaging available alternatives to the landfill; and (3) the project created an unacceptable risk of groundwater contamination.[33]

SWANCC responded to this second denial from the Corps by filing a lawsuit in federal district court asking the court to overturn the Corps's permit denial.[34] The first theory that SWANCC put forward to support its position was that the Corps's decision to deny the request

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and wildlife of the site. Stevenson Swanson, *U.S. Agency Says Balefill Would Damage Wildlife*, CHI. TRIB., Apr. 16, 1990, at M3, *available at* 1990 WL 2914829; Stevenson Swanson & Mike Comerford, *EPA Sides with Foes of Balefill*, CHI. TRIB., May 1, 1990, at C1, *available at* 1990 WL 2918160. However, in a report to Congress, totally inconsistent with its subsequent ruling on SWANCC's section 404(a) permit, the Corps found that there was little risk of contamination to the Newark Valley Aquifer from the balefill. *See* Gilbert Jimenez, *Bartlett Waste Site No Risk, Army Says*, CHI. SUN-TIMES, May 12, 1990, at 41, *available at* 1990 WL 4399468. The Corps even found that "SWANCC's project 'is not contrary to the public interest because [its communities] need a solid waste disposal facility' and 'the project's reasonably foreseeable benefits outweigh its foreseeable detriments.'" Petitioner's Brief at 9, *Solid Waste* (No. 99-1178).

32. *See* Petitioner's Brief at 10, *Solid Waste* (No. 99-1178). Revision of the application included measures such as the reduction of the number of acres to be "filled" from thirty-one to 17.6 acres; a proposal to mitigate the loss of the wetlands by the creation of 17.6 acres of replacement waters on the site; relocation of a great blue heron rookery on the site; spreading construction over a fifteen year period to minimize disturbance to the site's wildlife; and the purchase and dedication of 258 acres of land next to the property as a forest preserve. *Id.* at 5.

33. *Solid Waste*, 531 U.S. at 165; Petitioner's Brief at 10, *Solid Waste* (No. 99-1178). The Corps conducted this special groundwater study because of an amendment to the 1988 Army Corps of Engineers appropriation bill that required the Corps to conduct a study of the impact of the balefill on the Newark Valley Aquifer before issuing a section 404(a) permit. Water Resources Development Act of 1988, Pub. L. No. 100-676, § 47(b), 102 Stat. 4012 (1988); *see also* discussion of report findings, *supra* note 31. The United States Fish and Wildlife Service later reversed its position on the project and found that the SWANCC's mitigation efforts overcame the project's detriments and recommended permit approval. Martha Russis, *2nd Round of Balefill Battle Set*, CHI. TRIB., Sept. 28, 1993, at NW1, *available at* 1993 WL 11108000. The EPA, on the other hand, reiterated its disapproval of the project to the Corps. Sue Ellen Christian, *U.S. EPA Against Plan for Balefill*, CHI. TRIB., Aug. 10, 1993, at D1, *available at* 1993 WL 11092630.

34. Solid Waste Agency v. United States Army Corps of Eng'rs, 998 F. Supp. 946, 948 (N.D. Ill. 1998), *aff'd*, 191 F.3d 845 (7th Cir. 1999), *rev'd*, 531 U.S. 159 (2001). The district court had jurisdiction over the matter pursuant to the Administrative Procedure Act. *See* 5 U.S.C. §§ 701–706 (2000). *Id.*

was arbitrary and capricious.[35] SWANCC's second theory was that the Corps did not have jurisdiction over the waters on the site because the Migratory Bird Rule is an unconstitutional extension of the Commerce Clause[36] power, a faulty interpretation of the CWA, and was adopted by the Corps without the proper notice and comment periods mandated under the Administrative Procedure Act (APA).[37] The district court granted summary judgment to the Corps on the issue of jurisdiction and held that the Migratory Bird Rule was a constitutional extension of the Corps's jurisdiction under the Commerce Clause; that the rule was a permissible construction of the CWA; and that the notice and comment requirements of the APA did not apply to the rule.[38] Afterwards, SWANCC voluntarily dismissed its other claims to pursue an appeal solely on the issue of jurisdiction.[39]

The United States Court of Appeals for the Seventh Circuit affirmed the district court's ruling.[40] SWANCC appealed again, and the United States Supreme Court granted certiorari to decide the matter.[41] In *Solid Waste Agency v. United States Army Corps of Engineers*,[42] the Court reversed the Seventh Circuit decision and held that the Corps, under its regulation defining "waters of the United States,"[43] as it was clarified by the Migratory Bird Rule and as applied to the SWANCC balefill, exceeded the authority granted to it by Congress under section 404(a) of the CWA.[44]

35. *Solid Waste*, 998 F. Supp. at 949. As the court noted in *Solid Waste*, "a final agency decision is entitled to a 'presumption of regularity.'" *Id.* at 952. A court must uphold an agency decision unless the decision contains clear errors in judgment or it was not based on a consideration of the relevant factors. *Id.* at 952-53. Any reasonable decision by an agency will be affirmed. *See id.* at 953.

36. *See infra* notes 45-48 and accompanying text.

37. *See* 5 U.S.C. § 553 (2000).

38. *Solid Waste*, 998 F. Supp. at 957.

39. Solid Waste Agency v. United States Army Corps of Eng'rs, 191 F.3d 845, 846 (7th Cir. 1999), *aff'g* 998 F. Supp. 946 (N.D. Ill. 1998), *rev'd*, 531 U.S. 159 (2001).

40. *Id.* at 847.

41. Solid Waste Agency v. United States Army Corps of Eng'rs, 529 U.S. 1129 (2000).

42. 531 U.S. 159 (2001).

43. 33 C.F.R. § 328.3(a)(3) (2001).

44. *Solid Waste*, 531 U.S. at 171-72.

III. BACKGROUND

A. Historical Overview of Federal Power over Navigation and Water Pollution

Congressional authority over navigation and water pollution is based on the Commerce Clause of the United States Constitution, which gives Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[45] The Supreme Court found that constitutional authority over commerce includes navigation, and therefore, the Constitution implicitly grants Congress the power to regulate navigation.[46] The Court firmly established this proposition early in the nineteenth century when it upheld the supremacy of a federal coasting trade statute over a New York law that restricted steamboat access to New York ports.[47] Subsequent case law supported the notion that federal power over navigation reigned supreme over state law.[48] In the 1972 CWA and its 1977 amendments, Congress affirmed the federal supremacy over navigation and "navigable waters" for a new purpose: controlling pollution.[49] The Corps further extended federal authority when it promulgated the Migratory Bird Rule in 1986.[50] Federal power over navigation before 1972 will be discussed first, followed by a discussion of the 1972 CWA and its 1977 amendments, and closing with a discussion of the 1986 Migratory Bird Rule.

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45. U.S. CONST. art. I, § 8, cl. 3.

46. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 193 (1824). The Court also found that commerce "among the states" does not end at each state's boundary. *Id.* at 194. The Court held that, as a result, Congress had the power to regulate internal navigation in the states so long as it concerned commerce "among the states." *Id.* at 197.

47. *See id.* at 1.

48. Gilman v. Philadelphia, 70 U.S. (3 Wall.) 713 (1865) (holding that power to regulate navigation extends to all navigable waters in a state reachable from another state).

49. *See Solid Waste*, 531 U.S. at 174-175 (Stevens, J., dissenting); *see also infra* Part III.A.2.

50. *See* discussion of Migratory Bird Rule *infra* Part III.A.3; *see also infra* text accompanying note 99.

1. *Assertion of Federal Power over Navigation and Pollution Before 1972*

In the 1870 decision *The Daniel Ball*,[51] the United States Supreme Court fashioned a definition of navigable waters on which the modern understanding of the term was built.[52] The Court defined navigable waters as waters, navigable in fact, which could be used as highways for commerce.[53] Navigable waters of the United States were distinguished from navigable waters of the states, over which the United States had no jurisdiction, because those of the United States form, by themselves or by uniting with other waters, a highway over which commerce with other states or foreign countries can be accomplished.[54] Applying the definition, the Court held that a vessel, which operated solely within the boundaries of the state of Michigan, was subject to federal licensing provisions for steamships.[55] The Court decided this because while the ship only operated in the state, it carried goods that had been or would be transported between states and because it operated on a navigable water of the United States by which the ship could have transported the goods to another state.[56]

Over time the Court expanded this definition to apply to all but the most insignificant bodies of water.[57] In *The Montello*,[58] navigable waters were stretched to include not only waters in actual commercial use, but also waters that could potentially be used in commerce.[59] The

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51. 77 U.S. (10 Wall.) 557 (1870).

52. *See id.*

53. *Id.* at 563. The Court defined navigable waters as:

> [those waters] which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

Id.

54. *Id.* The Court distinguished the navigable waters of the United States from those of the states in the following statement:

> And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.

Id.

55. *See id.* at 566.

56. *Id.* at 565.

57. United States v. Holland, 373 F. Supp. 665, 670 (M.D. Fla. 1974).

58. 87 U.S. (20 Wall.) 430 (1874).

59. *Id.* at 441-42. In this case, the Court found that, even though the river in

1921 decision in *Economy Light & Power Co. v. United States*[60] further defined navigable waters to include bodies of water used in the past for commerce even though the present status of the water precluded a commercial use.[61] Subsequent growth of the definition established that if reasonable improvements could make it navigable, a waterway was considered navigable-in-fact.[62]

In contrast to its expansion of the definition of navigable waterways, in *Willamette Iron Bridge Co. v. Hatch*,[63] the Supreme Court recognized the limits of United States common law and held that there was no federal common law that banned obstructions of navigable rivers.[64] This prompted Congress to enact the 1890 precursor of what would become the Rivers and Harbors Appropriation Act of 1899 (RHA).[65] The RHA asserted the federal power over obstructions that affect the navigability of waters.[66] In section 13 of the RHA (commonly

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question had to be improved to accommodate "modern" commercial vessels (i.e., sail and steam boats), it had been used in its natural state by other types of vessels. *Id.* The level of difficulty these "other" vessels encountered in navigating the river was not relevant as to whether it was navigable—the fact that the vessels actually used the river was the only fact relevant in determining navigability. *Id.*

60. 256 U.S. 113 (1921).

61. *Id.* The river in *Economy Light & Power Co.* was used in the fur trade until about 1825, after which changes in drainage in the area and the construction of several dams on the river had rendered the river unnavigable in practice. *Id.* at 118. However, the Court found that even with the changes the river retained its original status as a navigable river. *Id.* at 123.

62. United States v. Appalachian Elec. Power Co., 311 U.S. 377, 407-08 (1940). The Court's test to determine if improvements were reasonable balanced cost against need "at a time when the improvement would be useful." *Id.* For instance, the Court noted that the millions of dollars that would be required to make the Rio Grande navigable in fact made such improvements impracticable, and therefore the river could not be considered navigable. *Id.* at 407 n.26.

63. 125 U.S. 1 (1888).

64. *Id.* at 8. In this case appellees sued to keep a bridge from being constructed on the Willamette River by the Willamette Iron Bridge Company. *Id.* at 2-3. They contended that a federal law, which declared that all navigable waters of Oregon should be available for interstate commerce, precluded the state from authorizing obstructions to be built in navigable waters, and, therefore, the state law authorizing construction of the bridge over the Willamette River was in violation of the federal act. *Id.* at 7-8. The Court agreed with appellants, however, and found that the federal law in question only asserted congressional authority to prohibit laws by the State of Oregon that would hamper freedom of commerce between the several states. *Id.* at 12.

65. United States v. Republic Steel Corp., 362 U.S. 482, 485-86 (1960); *see* Rivers and Harbors Appropriation Act of 1899, ch. 425, § 13, 30 Stat. 1152 (codified as amended at 33 U.S.C. § 407 (1994)).

66. 33 U.S.C. § 407; Sam Kalen, *Commerce to Conservation: The Call for a National Water Policy and the Evolution of Federal Jurisdiction over Wetlands*, 69 N.D. L. REV. 873, 879 (1993).

known as the Refuse Act), Congress made it illegal to dump refuse into navigable waters and their tributaries and gave the Corps the authority to regulate discharges into navigable waters.[67] The Refuse Act, on its face, gives the Corps substantial power over navigable waters, but until the 1960s, that power was only exercised in reviews of the impact of discharges into navigable waters on navigation.[68]

In the 1960s, in two decisions,[69] the Supreme Court signaled the beginning of the process of transforming the Refuse Act from a navigation regulation statute into a pollution regulation statute.[70] Both cases utilized an expanded definition of refuse to create a pollution-fighting tool out of the Refuse Act.[71] In 1969 the polluted Cuyahoga River in Cleveland, Ohio, caught fire, and national attention focused on pollution and on finding solutions to regain clean air and water in the United States.[72] By 1970 the Corps was committed to an environmental permit program governing discharges into navigable waters.[73]

In the face of the Corps's permit program commitment, the Nixon administration issued an executive order in 1970[74] to implement a Refuse Act Permit Program in accordance with section 13 of the

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67. 33 U.S.C. § 407. The statute reads:

> It shall not be lawful to throw, discharge, or deposit . . . any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; and it shall not be lawful to deposit . . . material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water . . . whereby navigation shall or may be impeded or obstructed . . . [a]nd provided further, That the Secretary of the Army, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, may permit the deposit of any material above mentioned in navigable waters.

Id.

68. Michael C. Blumm & D. Bernard Zaleha, *Federal Wetlands Protection Under the Clean Water Act: Regulatory Ambivalence, Intergovernmental Tension, and a Call for Reform*, 60 U. COLO. L. REV. 695, 701 (1989).

69. United States v. Standard Oil Co., 384 U.S. 224 (1966) (holding commercially valuable substances such as oil could be considered refuse); United States v. Republic Steel Corp., 362 U.S. 482 (1960) (holding industrial solid waste is refuse).

70. Kalen, *supra* note 66, at 880-81.

71. *Standard Oil*, 384 U.S. at 228-30; *Republic Steel*, 362 U.S. at 489-92.

72. Solid Waste Agency v. United States Army Corps of Eng'rs, 531 U.S. 159, 174-75 (2001) (Stevens, J., dissenting).

73. Kalen, *supra* note 66, at 883.

74. Exec. Order No. 11574, 35 Fed. Reg. 19,627 (Dec. 23, 1970).

RHA.[75] Within a year, a federal district court ended the newborn program when it found that the Refuse Act did not provide for the issuance of permits for discharges into non-navigable waters, and determined that the permit program was therefore invalid.[76] A new solution was called for, and in 1972 the CWA was born.[77]

2. *The Clean Water Act of 1972 and Its 1977 Amendments*

The 1972 CWA represents a defining moment in environmental legislation in the United States.[78] The CWA was a comprehensive water pollution regulation measure that had as a goal the total elimination of the discharge of pollutants into water by 1985.[79] Another stated goal was to achieve, by 1983, water quality sufficient to protect and nurture fish, shellfish, and wildlife and to provide the opportunity for water recreation.[80] Also included in the Act's policy statement was the congressional intent "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use . . . of land and water resources."[81]

For the purpose of the CWA, "navigable waters" are defined as "waters of the United States, including the territorial seas."[82] The legislative history indicates that the omission of the word "navigable"

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75. *See Solid Waste*, 531 U.S. at 178 n.4 (Stevens, J., dissenting); *see also supra* note 67.

76. Kalur v. Resor, 335 F. Supp. 1, 10-11 (D.D.C. 1971).

77. *See Solid Waste*, 531 U.S. at 174-75 (Stevens, J., dissenting); *see also* Federal Water Pollution Control Act and Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified as amended at 33 U.S.C. §§ 1251-1377 (1994 & Supp. V 1999)). The CWA has its roots in the mid-twentieth century in Congress's first attempt to regulate water pollution—the Federal Water Pollution Control Act of 1948—which reflected a growing awareness in the United States about the problem of water pollution. Kalen, *supra* note 66, at 877-79 & n.29. The statute was enacted as an "exercise of jurisdiction over the waterways of the Nation and in consequence of the benefits resulting to the public health and welfare by the abatement of stream pollution." Federal Water Pollution Control Act, ch. 756, 62 Stat. 1151 (1948). This early version of the Act defined "interstate waters" as "all rivers, lakes, and other waters that flow across, or form a part of, State boundaries." *Id.* Subsequent amendments to the Act followed the lead of the RHA and established the Federal Water Pollution Control Act jurisdiction over "navigable waters." *Solid Waste*, 531 U.S. at 178 n.5 (Stevens, J., dissenting).

78. *See Solid Waste*, 531 U.S. at 175 (Stevens, J., dissenting).

79. *Id.*; *see* 33 U.S.C. § 1251(a)(1).

80. 33 U.S.C. § 1251(a)(2).

81. *Id.* § 1251(b).

82. *Id.* § 1362(7).

from the definition was deliberate and that Congress intended "that the term 'navigable waters' be given the broadest possible constitutional interpretation."[83] In matters of refuse discharge, the CWA retained the old RHA provision that made the discharge of refuse illegal, but the Act also created a new permit program—commonly referred to as the section 404(a) permit program—administered by the Corps for the discharge of dredge and fill material into navigable waters.[84]

After passage of the CWA, the Corps initially interpreted navigable waters in a manner consistent with the treatment of the term under the RHA.[85] The Corps issued regulations that defined "navigable waters of the United States" as "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 . . . use[d] for purposes of interstate or foreign commerce."[86] Further, in determining whether a body of water is used for interstate commerce, "it is the water body's capability of use by the public for purposes of transportation or commerce which is the determinative factor, and not the time, extent or manner of that use."[87]

The EPA disagreed with this geographically-based interpretation as too narrow to achieve the intended purpose of the CWA,[88] and so did the courts.[89] As a result, in 1975, the Corps promulgated interim regulations that defined "waters of the United States" to include navigable waters and their tributaries and "nonnavigable intrastate waters whose use or misuse could affect interstate commerce."[90] With

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83. S. CONF. REP. NO. 92-1236, at 144 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3822.

84. 33 U.S.C. § 407 (1994); *id.* § 1344(a) (1994); *see supra* notes 25, 64-66 and accompanying text.

85. *See* 33 C.F.R. § 209.120(d)(1) (1974); *id.* § 209.260(e)(1).

86. *Id.* § 209.120(d)(1). Section 209.120 refers the reader to section 209.260 for a more complete definition of the term. *Id.*

87. *Id.* § 209.260(e)(1).

88. *See Solid Waste*, 531 U.S. at 183 n.10 (Stevens, J., dissenting). See Walter G. Wright, Jr. & Albert J. Thomas III, *The Federal/Arkansas Water Pollution Control Programs: Past, Present, and Future*, 23 U. ARK. LITTLE ROCK L. REV. 541, 600-01 (2001), for a discussion of EPA's definition of "navigable waters."

89. *See* Natural Res. Def. Council, Inc. v. Callaway, 392 F. Supp. 685 (D.D.C. 1975). The court held that by defining "navigable waters" as it did, the CWA "asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution" and that, therefore, "the term is not limited to the traditional tests of navigability." *Id.* at 686. The court also found that the Corps acted unlawfully and contrary to its duties under the CWA by adopting the definition of navigability found in 33 C.F.R. §§ 209.210(d)(1) and 209.260. *Id.*

90. *Solid Waste*, 531 U.S. at 184 (Stevens, J., dissenting). The interim regulations phased in the Corps's control over "waters of the United States" over three years: phase one addressed navigable waters covered by the 1974 regulation and the RHA; phase two included "nonnavigable tributaries, freshwater wetlands adjacent to primary

some changes, these regulations were made final in 1977 just before the consideration and passage of several amendments to the CWA.[91]

The 1977 amendments to the CWA made significant changes to the section 404(a) permit program but did not change the definition of "navigable waters."[92] Many legislators expressed concern about the broad powers given to the Corps to regulate isolated wetlands and intrastate waters under the CWA's definition of navigable waters and under the section 404(a) program.[93] The House of Representatives version of the bill redefined navigable waters and would have severely limited the Corps's section 404(a) permit power.[94] The Senate approached the issue from a different direction, and, while it did not redefine navigable waters, it did approve certain exemptions to section 404(a) jurisdiction and approved a program to allow states to take control of the dredge and fill permitting process.[95] In the final Conference Committee version of the bill, Congress declined to change the CWA definition of navigable waters but did adopt the proposed Senate exemptions and a program to allow states to take over the dredge and

navigable waters, and lakes"; and phase three included all other waters covered under the statute such as "intermittent rivers, streams, tributaries, and perched wetlands that are not contiguous or adjacent to navigable waters." *Id.* Also included in phase three were any waters that the Corps determined needed to be regulated to ensure water quality. *Id.*

91. *See id.* at 186-87; 33 C.F.R. § 328.3 (a)(3) (2001); *see also supra* note 26.

92. Kalen, *supra* note 66, at 897-98; *see supra* note 26.

93. *See* 123 CONG. REC. S26710-29 (daily ed. Aug. 4, 1977); 123 CONG. REC. H10424-32 (daily ed. Apr. 5, 1977).

94. *See* H.R. CONF. REP. NO. 95-830, at 59 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4424, 4433. That bill, H.R. 3199, defined navigable waters as "those waters which, are presently used or are susceptible to use in their present condition or with reasonable improvement to transport interstate or foreign commerce." *Id.*

95. S. REP. NO. 95-370, at 75-78 (1977) *reprinted in* 1977 U.S.C.C.A.N. 4326, 4400-03. Exemptions approved included exceptions for seeding, cultivating, and harvesting; upland construction of soil and water conservation measures; the construction or maintenance of farm or stock ponds, the construction and maintenance of agricultural irrigation ditches; the maintenance of drainage ditches; and the construction of farm and forest roads. *Id.*

fill permit process for "Phase Two" and "Phase Three" waters.[96] After the 1977 CWA amendments, courts consistently ratified the Corps's jurisdiction over isolated wetlands and intrastate bodies of water.[97] In 1986 the Corps gave the courts additional fodder by adding a new "clarification" to its definition of navigable waters by promulgating the Migratory Bird Rule.[98] The Migratory Bird Rule extended section 404(a) jurisdiction to intrastate waters:

(1) Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or
(2) Which are or would be used as habitat by other migratory birds which cross state lines; or
(3) Which are or would be used as habitat for endangered species; or
(4) Used to irrigate crops sold in interstate commerce.[99]

3. *The Migratory Bird Rule*

The Corps established the Migratory Bird Rule as a clarification of its definition of the navigable waters over which it had jurisdiction

96. H.R. CONF. REP. NO. 95-830, at 60-63 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4424, 4437; *see supra* note 90 (defining "phase two" and "phase three" waters). The new provisions of the dredge and fill permit program were codified under section 1344 of the United States Code. 33 U.S.C. § 1344(f)–(g) (1994 & Supp. V 1999). The codification of the provision by which a state could take control of portions of the dredge and fill permit program gave the states potential power over navigable waters "other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce, . . . including all waters which are subject to the ebb and flow of the tide . . . including wetlands adjacent thereto." *Id.* § 1344(g)(1).

97. *See, e.g.*, Quivira Mining Co. v. United States EPA, 765 F.2d 126 (10th Cir. 1985) (holding "arroyos" or gullies to be within the meaning of waters of the United States); Utah v. Marsh, 740 F.2d 799 (10th Cir. 1984) (holding an intrastate lake subject to Corps's jurisdiction because it was used for interstate commerce); Wyoming v. Hoffman, 437 F. Supp. 114 (D. Wyo. 1977) (affirming that Corps's jurisdiction extends beyond traditional tests of navigability); *cf.* United States v. City of Fort Pierre, South Dakota, 747 F.2d 464 (8th Cir. 1984) (denying jurisdiction to the Corps over wetland created as by-product of ordinary river maintenance).

98. Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986).

99. *Id.* The rule had previously been adopted and codified as a formal regulation for EPA use only. *See id.*; 40 C.F.R. § 328.3(a)(3) (2001). The Corps opted, however, not to formally adopt the rule as a regulation, but rather to treat it as a memorandum for clarification of its codified definition of navigable waters. *See* Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. at 41,217.

under the CWA.[100] It first appeared as a Corps rule in the preamble to the recodification of its definition of navigable waters.[101] The rule asserted the Corps's jurisdiction over intrastate waters used, or which could be used, by migratory birds and endangered species.[102] The idea behind the rule was that objects of commercial activity, which in the aggregate would affect interstate commerce, were sufficient to invoke the Corps's jurisdiction under the CWA.[103]

Environmentalists have supported the rule as much needed protection for shrinking United States wetlands.[104] Until *Solid Waste*, the courts also have approved the Corps's interpretation of the CWA as encompassing the Migratory Bird Rule.[105] Generally they have based their decisions on a finding that Congress intended the Corps to have jurisdiction over isolated wetlands under the CWA and that this jurisdiction is valid under federal commerce power.[106] In *Leslie Salt Co. v. United States*,[107] the United States Court of Appeals for the Ninth Circuit held that "[t]he commerce clause power, and thus the Clean Water Act, is broad enough to extend the Corps' jurisdiction to local waters which may provide habitat to migratory birds and endangered

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100. Solid Waste Agency v. United States Army Corps of Eng'rs, 531 U.S. 159, 164 (2001); *see supra* note 26; *see also supra* note 99 and accompanying text.

101. Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. at 41, 217.

102. *Solid Waste*, 531 U.S. at 164.

103. *See generally* Dennis J. Priolo, *Section 404 of the Clean Water Act: The Case for Expansion of Federal Jurisdiction over Isolated Wetlands*, 30 LAND & WATER L. REV. 91 (1995).

104. Elizabeth Ann Glass Geltman, *Regulation of Non-Adjacent Wetlands Under Section 404 of The Clean Water Act*, 23 NEW ENG. L. REV. 615, 620 (1988-89); *see also* Edward Alburo Morrissey, *The Jurisdiction of the Clean Water Act over Isolated Wetlands: The Migratory Bird Rule*, 22 J. LEGIS. 137 (1996).

105. *E.g.*, Hoffman Homes, Inc. v. United States EPA, 999 F.2d 256 (7th Cir. 1993) (holding that presence of migratory birds meets interstate commerce requirement); Leslie Salt Co. v. United States, 896 F.2d 354 (9th Cir. 1990) (holding Corps's jurisdiction over salt pits based on Migratory Bird Rule valid); United States v. Hallmark Constr. Co., 14 F. Supp. 2d. 1069 (N.D. Ill. 1998) (holding Migratory Bird Rule valid under Commerce Clause and the CWA). *Contra* United States v. Wilson, 133 F.3d 251 (4th Cir. 1997) (holding Corps's regulation defining "waters of the United States" invalid). Legal scholars have also closely scrutinized the rule and the expansion of regulatory power over isolated wetlands. *See* Morrissey, *supra* note 104, at 137-38; Priolo, *supra* note 103, at 96-98; Stephen Jay Stokes, Note, *The Limit of Government's Regulatory Authority over Non-Adjacent Wetlands:* Hoffman Homes, Inc. v. EPA, 15 ENERGY L.J. 137 (1994).

106. *See Hoffman Homes*, 999 F.2d 256; *Leslie Salt*, 896 F.2d 354; *Hallmark Constr.*, 14 F. Supp. 2d. 1069.

107. 896 F.2d 354 (9th Cir. 1990).

species."[108] Similarly, in *Hoffman Homes, Inc. v. EPA*,[109] the court held that a potential or minimal connection to interstate commerce, like the possible presence of migratory birds, is sufficient to establish the Corps's jurisdiction over a property.[110] Recently, however, a dissenting voice was heard from the United States Court of Appeals for the Fourth Circuit in *United States v. Wilson*,[111] which found that the Migratory Bird Rule might exceed the limits of Federal Commerce Clause power and that the rule did exceed the authority Congress granted the Corps under the CWA.[112]

B. Recent Developments Indicating the Limitation of the Corps's Power over Navigation Through Interpretation of the CWA and Limitation of Federal Commerce Clause Power

Since 1985, the United States Supreme Court has made some significant decisions that are relevant to any discussion of *Solid Waste.* First, *United States v. Riverside Bayview Homes, Inc.*,[113] an important Court decision interpreting the Corps's authority under the CWA, will be briefly examined. A review of two important cases limiting Congress's authority under the Commerce Clause will follow: *United States v. Lopez*[114] and *United States v. Morrison.*[115]

1. United States v. Riverside Bayview Homes, Inc.

The Supreme Court sent a message to supporters and opponents of federal regulation of wetlands in *United States v. Riverside Bayview Homes, Inc.*[116] At issue in *Riverside Bayview* was whether or not the Corps had correctly interpreted its statutory authority when it defined navigable waters and waters of the United States to include wetlands

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108. *Id.* at 360. At issue in this case was the Corps's jurisdiction over seasonally filled abandoned salt pits adjacent to the San Francisco National Wildlife Refuse and within a quarter of a mile of Newark Slough, a tidal arm of the San Francisco Bay. *Id.* at 355-56.

109. 999 F.2d 256 (7th Cir. 1993).

110. *Id.* at 261.

111. 133 F.3d 251 (4th Cir. 1997).

112. *Id.* at 257. The Fourth Circuit questioned the constitutionality of the Migratory Bird Rule in light of the 1995 *Lopez* decision discussed *infra* Part III.B.2. *Id.* at 255-56.

113. 474 U.S. 121 (1985).

114. 514 U.S. 549 (1995).

115. 529 U.S. 598 (2000).

116. 474 U.S. 121 (1985).

adjacent to navigable bodies of water.[117] The Court concluded that the Corps had reasonably interpreted its jurisdiction under the CWA.[118]

The Court made its holding in light of a review of the legislative history of the CWA.[119] Notably, the Court found that Congress acquiesced to the Corps's regulations because of a failed attempt by members of Congress to alter the definition of "navigable waters" and because of the passage of amendments to the CWA that seem to reflect congressional understanding of the Corps's interpretation of the Act.[120]

The Court also held that Congress clearly intended that the word "navigable" be of limited import and that federal control extended to at least some waters not traditionally considered navigable.[121] The question remaining after the Supreme Court holding was one the Court had specifically declined to address in *Riverside Bayview*: whether or not the Corps had authority to regulate the discharge of fill material into wetlands not adjacent to bodies of open water.[122]

2. *Recent Limitations on Federal Commerce Clause Power*

In *United States v. Lopez*,[123] the Supreme Court signaled a willingness to set limits on Federal Commerce Clause power, ending a decades-long trend of the expansion of that power.[124] The broad commerce power long upheld by the Court under the "substantial effects" doctrine was based on a showing that if an activity affects commerce even indirectly Congress could invoke federal commerce

117. *See id.* at 123.

118. *Id.* at 139.

119. *Id.* at 131-39.

120. *Id.* at 135-39. The 1977 amendments to the CWA were considered a "a major piece of legislation aimed at achieving 'interim improvements within the existing framework' of the Clean Water Act." *Id.* at 135 (quoting H.R. REP. NO. 95-139 (1977)). Amendments actually approved by Congress that the *Riverside Bayview* Court found supported the Corps's interpretation of the CWA included changes to the section 404 permit program to allow the states to regulate some discharges of fill material and an appropriation for a "National Wetlands Inventory to assist the States 'in the development and operation of programs under [the CWA].'" *Id.* at 138-39 (quoting 33 U.S.C. § 1288(i)(2) (1994)).

121. *Id.* at 133. The Court found that the Corps could reasonably interpret the term "waters" to include wetlands adjacent to traditionally navigable waters based on Congress's deep concern for protecting water quality and aquatic ecosystems. *Id.*

122. *Riverside Bayview*, 474 U.S. at 131 n.8.

123. 514 U.S. 549 (1995).

124. Lori J. Warner, *The Potential Impact of* United States v. Lopez *on Environmental Regulation*, 7 DUKE ENVTL. L. & POL'Y F. 321, 321-22 (1997). In *Lopez*, the Court struck down a federal law that established gun-free zones in schools and provided criminal penalties for violation of the law. *Lopez*, 514 U.S. at 551-52.

power because the activity could touch interstate commerce.[125] In *Lopez*, the Court stated that a law would only be upheld when the activity that it regulates is economic in nature and substantially affects interstate commerce.[126] An apparently significant component of the Court's reasoning was the lack of legislative findings to support the government's contention that the regulated activity affected commerce.[127]

In *United States v. Morrison*,[128] however, the Court made it clear that legislative findings were not the key component required to uphold legislation under the Commerce Clause.[129] In that case, the Court struck down the section of the Violence Against Women Act that provided a federal civil remedy to victims of gender-motivated violence.[130] The important elements of the Court's decision were (1) that legislation of a purely intrastate activity will only be upheld if the activity is economic in nature;[131] (2) that the link between the activity legislated and its effect on interstate commerce must be sufficiently direct because otherwise almost any purely intrastate activity could be regulated as interstate commerce under "but-for" reasoning;[132] and, (3) that a jurisdictional requirement must be present to provide that the statute does not control unless an instrumentality of interstate commerce has been used (i.e., shipping or transportation across state lines).[133]

Legal scholars quickly recognized the possible impact that Commerce Clause limits could have on Corps's authority over wetlands.[134] The uncertainty of how the Court might rule on this issue

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125. Priolo, *supra* note 103, at 100-01; Warner, *supra* note 124, at 321-22.

126. *Lopez*, 514 U.S. at 560. Congress based its authority to pass this law on the impact on interstate commerce of guns in schools. *See id.* at 562-64.

127. *See id.* at 562-63.

128. 529 U.S. 598 (2000).

129. *Id.* at 614; *see also* Jennifer L. Wethington, Note, *Violence Against Women Act's Civil Rights Remedy Exceeds Congress's Power to Regulate Interstate Commerce*, 23 U. ARK. LITTLE ROCK L. REV. 485 (2001) (discussing *United States v. Morrison* and recent Commerce Clause jurisprudence).

130. *Morrison*, 529 U.S. at 601-07.

131. *Id.* at 610-11.

132. *Id.* at 614-16.

133. *Id.* at 613.

134. Warner, *supra* note 124, at 340-64; *see* Morrissey, *supra* note 104, at 141-43. Recognizing the potential impact of a Supreme Court decision on the environment, six Illinois environmental groups sent a letter to all the parties involved in *Solid Waste* in an attempt to reach a last minute settlement of the issue and to forestall any necessity for the Supreme Court to rule. William Grady, *Groups Seek Settlement of Balefill Suit: Environmentalists Fear Effect on Laws*, CHI. TRIB., Sept. 22, 2000, at D1, *available at* 2000 WL 3711752.

drew significant attention from environmentalists and many other groups when the Supreme Court granted certiorari to the *Solid Waste* case.[135] Potentially at issue were not just the future of wetlands regulation and the CWA, but also states rights, civil rights, and maybe even the future of congressional and administrative regulatory authority under the Commerce Clause.[136]

IV. REASONING

In *Solid Waste Agency v. United States Army Corps of Engineers*,[137] the United States Supreme Court reversed the United States Court of

135. At least four briefs of amici curiae from twenty-nine interested parties were submitted in support of the Corps, including parties such as the Anti-Defamation League, National Gay and Lesbian Task Force, NOW Legal Defense and Education Fund, Human Rights Campaign, National Coalition Against Domestic Violence, National Urban League, The Association of State Wetland Managers, Environmental Defense, Natural Resources Defense Council, National Wildlife Federation, World Wildlife Fund, Defenders of Wildlife, and the States of California, Iowa, Maine, New Jersey, Oklahoma, Oregon, Vermont, and Washington. Briefs of Amici Curiae, *Solid Waste*, 531 U.S. 159 (No. 99-1178). At least eighteen briefs of amici curiae were filed by forty-four parties in support of the Solid Waste Agency of Northern Cook County, including briefs from the Defenders of Property Rights, American Road and Transportation Builders Association, Metropolitan Denver Water Authority, National Association of Home Builders, American Forest & Paper Association, American Iron and Steel Institute, United States Conference of Mayors, National League of Cities, Council of State Governments, National Association of Counties, Chamber of Commerce of the United States, State of Alabama, American Farm Bureau Federation, National Cattlemen's Beef Association, and National Stone Association. Briefs of Amici Curiae, *Solid Waste* (No. 99-1178).

136. *See* Briefs of Amici Curiae, *Solid Waste* (No. 99-1178). For both states' rights and civil rights groups, a decision that upheld the Corps's jurisdiction would confirm the extension of federal Commerce Clause power over issues considered by some parties to be purely within the authority of the states. *See, e.g.*, Brief of Amici Curiae Chamber of Commerce of the United States, *Solid Waste* (No. 99-1178); Brief of Amici Curiae of Anti-Defamation League et al., *Solid Waste* (No. 99-1178). Such a decision would also signal continued deference to the Corps's jurisdiction over certain intrastate waters and to existing civil rights jurisprudence, much of which is also based on the Commerce Clause. *See, e.g.*, Brief of Amici Curiae of Anti-Defamation League et al., *Solid Waste* (No. 99-1178); Brief of Amici Curiae of Environmental Defense et al., *Solid Waste* (No. 99-1178). If based on an improper construction of the CWA, a decision for SWANCC would curtail federal jurisdiction over many intrastate waters but would not impact civil rights. *See, e.g.*, Brief of Amici Curiae of Anti-Defamation League et al., *Solid Waste* (No. 99-1178); Brief of Amici Curiae of Environmental Defense et al., *Solid Waste* (No. 99-1178). If based on an improper extension of congressional power under the Commerce Clause, a decision for SWANCC would continue the recent Supreme Court trend of limiting federal Commerce Clause power and endanger the authority of the federal government over civil rights and many other areas. *See, e.g.*, Brief of Amici Curiae of Anti-Defamation League et al., *Solid Waste* (No. 99-1178).

137. 531 U.S. 159 (2001).

Appeals for the Seventh Circuit and held that Congress did not intend for the jurisdiction of the Corps under section 404(a) of the CWA to extend to isolated bodies of water such as those defined under 33 C.F.R. § 328.3(a)(3) and as clarified by the Migratory Bird Rule.[138] The majority opinion began by analyzing the CWA to determine if it could be construed to support the Migratory Bird Rule.[139] The Court then briefly considered the constitutionality of the Migratory Bird Rule under the Commerce Clause, but did not reach its decision based on this issue.[140]

A. Majority Opinion

The Court first noted that the stated purpose of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[141] The court pointed out that the statute specifically preserves the states' rights to administer plans to combat pollution and to control the use of their own land and water resources.[142] However, as the Court stated, the statute also gives the Corps the authority to regulate the discharge of fill material into "navigable waters" under the section 404(a) permit program.[143] Further, the Court stated that Congress defined navigable waters as "the waters of the United States, including the territorial seas."[144]

The Court had previously considered the issue of the Corps's jurisdiction under section 404(a) in *United States v. Riverside Bayview Homes, Inc.*[145] In *Solid Waste*, the Court reasoned that *Riverside Bayview* was distinguishable from *Solid Waste* because the *Riverside Bayview* holding was based upon Congress's tacit approval of Corps's jurisdiction over *adjacent* wetlands.[146] The Court stated that "[i]t was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes*,"[147] and

138. *Id.* at 174. Chief Justice Rehnquist wrote the 5-4 majority opinion, in which Justices O'Connor, Scalia, Kennedy, and Thomas joined. *See id.* at 162. Justice Stevens entered a dissenting opinion, in which Justices Souter, Ginsburg, and Breyer joined. *See id.* at 174.

139. *Id.* at 166-68.

140. *Id.* at 172-74.

141. *Id.* at 166 (citing 33 U.S.C. § 1251(a) (1994)).

142. *Id.* at 166-67; *see supra* Part III.A.2 (outlining congressional policy).

143. *Solid Waste*, 531 U.S. at 167; 33 U.S.C. § 1344(a) (1994).

144. *Solid Waste*, 531 at 167; 33 U.S.C. § 1362(7) (1994).

145. 474 U.S. 121 (1985); *see* discussion of *Riverside Bayview supra* Part III.B.1.

146. *Solid Waste*, 531 U.S. at 167-68; *Riverside Bayview*, 474 U.S. at 135-39.

147. *Solid Waste*, 531 U.S. at 167.

pointed out that it had explicitly declined to decide if Corps's jurisdiction extended to wetlands not adjacent to navigable waters.[148]

Next, the Court examined the evolution of the Corps's interpretation of the CWA and Congress's response to it.[149] The Court pointed out that, in the original 1974 interpretation of the CWA,[150] the Corps did not include isolated bodies of water in its definition of "navigable waters."[151] The Court concluded that this original interpretation was permissible because there was no conclusive evidence that the Corps had misconstrued the CWA in 1974.[152] Further, the Court said that even legislative history which indicated that the term "navigable waters" should "be given the broadest possible constitutional interpretation" did nothing more than point to Congress's intention to exert its commerce power over navigation.[153]

The argument that Congress ratified the Corps's 1977 interpretation of navigable waters was also considered and discounted by the Court. The Corps's regulations on which the Migratory Bird Rule is based were finalized just before Congress passed several amendments to the CWA in 1977.[154] The Court said that Congress's failure to pass a House bill that would have limited the definition of "navigable waters" to the waters covered in the Corps's 1974 original interpretation of the CWA did not give rise to the conclusive interpretation that Congress intended to support the Corps's 1977 definition of "navigable waters."[155] Additionally the Court stated that the connection between the legislative history of the 1972 CWA and that of the 1977 amendments to the CWA was too distant to allow a true interpretation of the statute in the face of a plain reading of section 404(a).[156] The Court explained that, in spite of its finding in *Riverside Bayview* that the 1977 debates on the House bill limiting the definition of "navigable waters" focused on the issue of wetlands preservation, the debates proved nothing beyond Congress's desire to continue the Corps's authority over adjacent wetlands.[157]

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148. *Id.*; *Riverside Bayview*, 474 U.S. at 131-32 n.8.

149. *Solid Waste*, 531 U.S. at 168-71.

150. 33 C.F.R. § 209.120(d)(1) (1974); *see supra* Part III.A.2.

151. *Solid Waste*, 531 U.S. at 168.

152. *Id.*

153. *Id.* at 168 n.3; *see* S. CONF. REP. NO. 92-1236 at 144 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3822.

154. *See Solid Waste*, 531 U.S. at 168-69; *see also* 33 C.F.R. § 328.3(a)(3) (2001) (formerly codified at 33 C.F.R. § 323.2(a)(5) (1978)); *see supra* note 26.

155. *See Solid Waste*, 531 U.S. at 169-70.

156. *Id.* at 170.

157. *Id.* at 170-71.

The Court also rejected the argument that adoption of section 404(g)(1) in the 1977 CWA amendments indicated that Congress accepted the Corps's expanded definition of "navigable waters."[158] Section 404(g)(1) authorized a program by which states could administer the permit program for the discharge of dredge and fill material for navigable waters subject to federal control under section 404(a) *other* than those used in interstate or foreign commerce, those subject to the tide and adjacent wetlands.[159] The possible implication of the Act is that those "other waters" would include isolated bodies of water and that Congress intended the Corps to have authority over them until a state successfully applied to take control.[160] The Court rejected this implication, stating that section 404(g) does not elaborate on what "other waters" are, and, though "other waters" could include those waters covered by the 1977 Corps regulations, they could simply include all waters or wetlands adjacent to "navigable waters."[161] The 1977 amendments to the CWA also included exemptions from section 404(a) for certain types of discharges.[162] The Corps had referred to the exemptions, which applied to discharges that are a part of activities such as the construction of drainage ditches, as support for its proposition that Congress recognized the Corps's expanded jurisdiction.[163] The Court rejected this argument on the grounds that the decision to exempt certain activities from the section 404(a) permit program had no bearing on the definition of navigable waters.[164]

According to the Court, Congress's use of the phrase "waters of the United States" to define "navigable waters" did not constitute a basis for finding that the term "navigable" no longer had any significance.[165] The Court explained that, although the term was of limited importance, it demonstrated that Congress still had in mind its traditional authority over waters that were navigable in fact or could be reasonably made so when it enacted the CWA.[166] On this basis, the Court then declined to hold that isolated bodies of water were included

158. *Id.* at 171-72; *see supra* note 96 and accompanying text.
159. 33 U.S.C. § 1344(g)(1) (1994).
160. *See Solid Waste*, 531 U.S. at 169.
161. *Id.* at 171.
162. *Id.* at 171 n.7; *see* 33 U.S.C. § 1344(f); *see supra* note 95 and accompanying text.
163. *See Solid Waste*, 531 U.S. at 171 n.7; *see also* 33 U.S.C. § 1344(f).
164. *Solid Waste*, 531 U.S. at 171 n.7.
165. *Id.* at 172.
166. *Id.*

in the Corps's section 404(a) jurisdiction just because they served as a habitat for migratory birds.[167]

Even though the Court began its opinion by declining to address the constitutional impact of the Migratory Bird Rule,[168] while discussing the issue of extending *Chevron*[169] deference to the rule, the Court did briefly consider the constitutional issue.[170] The Court noted that two of its recent decisions limited Congress's broad Commerce Clause authority:[171] *United States v. Morrison*[172] and *United States v. Lopez*.[173] The Court acknowledged the argument that the Migratory Bird Rule comes under Congress's power "to regulate intrastate activities that 'substantially affect' interstate commerce" and that over a billion dollars each year is spent on activities which concern migratory birds,[174] but pointed out that these assertions raised significant constitutional questions and that to answer them it would have to evaluate "the precise object or activity that, in the aggregate, substantially affects interstate commerce."[175] The Court also found that the rule could affect the state-federal balance of power by encroaching on traditionally local land use decisions.[176] The Court did not address these constitutional issues further because the Court could resolve this case by applying general principles of statutory construction to the CWA.[177] Thus, in *Solid Waste*, the United States Supreme Court held that, as applied to the balefill site, the Migratory Bird Rule clarification of the Corps's definition of "navigable waters" exceeded the authority granted to the Corps under section 404(a) and reversed the Seventh Circuit.[178]

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167. *Id.* at 171-72.

168. *Id.* at 162.

169. Chevron, U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984). *Chevron* deference is outside the scope of this note, but the Court did consider and discard the idea of applying this tenet of statutory construction to the Migratory Bird Rule. *Solid Waste*, 531 U.S. at 173-74. The *Chevron* rule states that when Congress has not directly addressed the question at issue, the Court, after reviewing an administrative interpretation of Congressional intent to determine if it is a permissible construction of the statute, will give deference to that interpretation instead of imposing its own construction. *Chevron*, 467 U.S. at 842-43.

170. *Solid Waste*, 531 U.S. at 173-74.

171. *Id.* at 173.

172. 529 U.S. 598 (2000); *see* discussion *supra* Part III.B.2.

173. 514 U.S. 549 (1995); *see* discussion *supra* Part III.B.2.

174. *Solid Waste*, 531 U.S. at 173.

175. *Id.*

176. *See id.* at 173-74.

177. *Id.*

178. *Id.* at 174.

B. Minority Opinion

In his dissent, Justice Stevens indicated that he would have upheld the Migratory Bird Rule as a valid interpretation of the CWA and as a valid exercise of Congress's Commerce Clause authority.[179] Justice Stevens began his dissent with a brief overview of the origins of the CWA, the events that led up to its adoption, subsequent case law interpreting the statute, and a statement that outlined his view of the majority opinion.[180] Justice Stevens next outlined the history of federal water regulation leading up to the passage of the CWA in 1972,[181] highlighting the gradual shift in water regulation's focus from concerns over navigability to concerns over pollution.[182] This modern focus on pollution, Justice Stevens determined, mandated the expansion through the CWA of a previously insufficient jurisdictional reach over navigable waters.[183] Justice Stevens asserted that congressional commerce power over navigation had been established by the Court years earlier.[184] Given that fact and the fact that the CWA had nothing to do with navigation, Justice Stevens questioned why Congress would intentionally seek to give the CWA the broadest power constitutionally possible if it did not intend the jurisdiction to be broader than that of previous water regulation acts.[185] Justice Stevens also found that Congress had intended to change the meaning of the term "navigable waters" when it intentionally dropped the word navigable from the CWA definition of "navigable waters."[186] He noted that based on the history of water regulation, "navigable waters" had become a term of art that was short for "waters over which federal authority may properly be asserted."[187]

In the second part of the dissent, Justice Stevens focused on the history of the Corps's jurisdiction and the CWA since 1972, relying heavily on the Court's findings in *Riverside Bayview*.[188] He noted that the

179. *Id.* at 174-97 (Stevens, J., dissenting). Justices Souter, Ginsburg, and Breyer joined in the dissent. *Id.* at 175 (Stevens, J., dissenting).

180. *Solid Waste*, 531 U.S. at 174-77 (Stevens, J., dissenting).

181. *Id.* at 177-78 (Stevens, J., dissenting).

182. *Id.* at 178-79 (Stevens, J., dissenting).

183. *Id.* (Stevens, J., dissenting).

184. *Id.* at 181 (Stevens, J., dissenting). *See* The Daniel Ball, 77 U.S. (10 Wall.) 557 (1870); Gilman v. Philadelphia, 70 U.S. (3 Wall.) 713 (1865); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

185. *Solid Waste*, 531 U.S. at 181-82 (Stevens, J., dissenting).

186. *Id.* (Stevens, J., dissenting); *see* 33 U.S.C. § 1362(7) (1994).

187. *Solid Waste*, 531 U.S. at 182 (Stevens, J., dissenting).

188. *Id.* at 183-91 (Stevens, J., dissenting).

1974 Corps regulations garnered significant criticism from the courts and from the EPA because of their narrow interpretation of the Corps's jurisdiction under the CWA,[189] and that, as a result, the Corps changed the regulations to allow for broader jurisdiction.[190] Justice Stevens also found that, even if Congress did not expand the Corps's authority in 1972, it ratified the expansion in 1977 by its failure to pass a House bill that would have limited the Corps's authority and by the passage of additional amendments which indicated that Congress understood and approved of the Corps's expanded jurisdiction—a finding he said the Court had already made in *Riverside Bayview*.[191]

After determining that the Corps was construing the CWA correctly,[192] Justice Stevens addressed the Commerce Clause issue that the majority opinion did not reach.[193] He distinguished discharging fill from the criminal activities regulated in *United States v. Lopez*[194] (possession of guns in schools) and *United States v. Morrison*[195] (gender-based crimes) because discharging fill is almost always an economic activity.[196] Justice Stevens noted that no one disputed that migratory birds would be adversely affected by the discharge of fill into isolated waters in the aggregate, and that millions of people impacted the economy by participating in economic activities involving migratory birds.[197] Finally, Justice Stevens observed that the Migratory Bird Rule distinguishes between a truly national and a truly local problem.[198] He also noted that a jurisdictional element necessary for the proper

189. *Id.* at 183-84 (Stevens, J., dissenting).

190. *Id.* at 184-85 (Stevens, J., dissenting).

191. *Id.* at 184-85, 187-90 (Stevens, J., dissenting).

192. *Id.* at 191 (Stevens, J., dissenting). Justice Stevens criticized the majority's refusal to extend *Chevron* deference to the Corps's regulations, noting that the Court had extended that deference to the same regulations in *Riverside Bayview*. *Id.* at 191-92 (Stevens, J., dissenting).

193. *Solid Waste*, 531 U.S. at 192-97 (Stevens, J., dissenting).

194. 514 U.S. 549 (1995).

195. 529 U.S. 598 (2000).

196. *Solid Waste*, 531 U.S. at 193-94 (Stevens, J., dissenting).

197. *Id.* at 194-95 (Stevens, J., dissenting). United States Congress Office of Technology Assessment statistics from 1980 indicated that "5.3 million Americans hunted migratory birds, spending $638 million . . . [m]ore than 100 million Americans spent almost $14.8 billion . . . to watch and photograph fish and wildlife . . . [and according to the United States Department of Interior, United States Fish and Wildlife Service and United States Department of Commerce, Bureau of Census, 1996 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation] [o]f 17.7 million birdwatchers, 14.3 million took trips in order to observe, feed, or photograph waterfowl, and 9.5 million took trips specifically to view other water-associated birds, such as herons." *Id.* at 195 n.17 (Stevens, J., dissenting).

198. *Id.* at 195-96 (Stevens, J., dissenting).

assertion of Congress's commerce power was present in the reference of Corps's jurisdiction to waters used by migratory birds.[199] According to Justice Stevens, migratory birds and the waters they use are resources that generate commerce and therefore can be regulated under Congress's Commerce Clause authority.[200] Justice Stevens concluded by asserting that if Congress can regulate activities causing water and air pollution under its commerce powers, then it should be able "to control individual actions that in the aggregate, would have the same effect."[201]

V. SIGNIFICANCE

By invalidating the Migratory Bird Rule as an unauthorized extension of the Corps's powers under the CWA, the Supreme Court made an important shift in the balance of regulatory power between the federal and state governments with respect to environmental issues. As a result, thirty to sixty percent of our nation's wetlands are now at risk of potentially unsupervised development according to some estimates.[202] At least one state is working to fill the gaps created by *Solid Waste*,[203] but many states have little or no wetlands protection legislation in place.[204] While ultimately the states might be better environmental regulators than the federal government, at this juncture, most states are ill-equipped to implement and oversee sophisticated environmental regulations.

This result seems so clearly contrary to what Congress intended when it passed the CWA[205] that it gives strong support to the dissent's argument that the majority had misread the plain language of the statute. The dissent's opinion is further bolstered by the extent of *Solid Waste*'s potential impact on the Corps's jurisdiction over isolated

199. *Id.* at 196 (Stevens, J., dissenting).

200. *Id.* (Stevens, J., dissenting).

201. *Id.* (Stevens, J., dissenting).

202. *E.g.*, Jon Kusler, Association of State Wetland Managers, Inc., The SWANCC Decision and State Regulation of Wetlands 1 (2001) (memorandum), *available at* http://www.aswm.org/swancc/aswm-int.pdf (last visited Nov. 12, 2001).

203. *See* WIS. STAT. ANN. §§ 281.22, 281.36 (West Supp. 2001). The State of Wisconsin recently passed an "isolated wetlands" law aimed at preserving the status quo before the *Solid Waste* opinion. *Id.*

204. *See* Robert Meltz & Claudia Copeland, Congressional Research Service Report for Congress, The Supreme Court Addresses Corps of Engineers Jurisdiction Over "Isolated Waters": The SWANCC Decision (Feb. 16, 2001), *available at* http://www.cnie.org/nle/rsk-56.html.

205. See *supra* Part III.A.2 for a discussion of the policy goals of the CWA.

wetlands—a jurisdiction that Congress has thoroughly debated and failed to take action on since the 1970s.[206] The majority's assertion that this opinion does not contradict its findings in *Riverside Bayview* highlights the misinterpretation by the Court.

The Court's holding invalidated only the Migratory Bird Rule as it applied to SWANCC's balefill site and not the broader Corps's definition of "waters of the United States," but in dicta the Court seemed to indicate that in every situation the rule and the definition were both unauthorized.[207] Thus, the Court's limited holding on the Migratory Bird Rule's validity may have far-reaching impacts. One federal district court has already affirmatively stated that *Solid Waste* does invalidate the entire definition promulgated by the Corps.[208] In that case, the district court went so far as to say that the Supreme Court had relied on the Corps's 1974 definition of "waters of the United States."[209] However, it is not clear that the Court relied on the 1974 definition, especially when the Court took special pains to reaffirm its *Riverside Bayview* holding that adjacent wetlands were covered under Corps's jurisdiction.[210] Unmistakably, the issue is far from settled and will likely be argued in the courts for years to come, creating even greater uncertainty in the already uncertain area of environmental regulation.

The Corps's narrow interpretation of the *Solid Waste* decision, outlined in a memorandum from the legal counsel of both the Corps and the EPA, which reminded Corps's field offices "that most CWA jurisdiction remains basically intact after the [*Solid Waste*] decision," will undoubtedly fuel the controversy over the "waters of the United States" definition.[211] The memorandum emphasized that the Corps still has jurisdiction over isolated wetlands and instructed administrators to contact agency legal counsel about connections with interstate commerce, other than migratory birds, that might support the assertion of Corps's jurisdiction.[212] The *Solid Waste* opinion indicates, though it

206. *Solid Waste*, 531 U.S. at 183-92.

207. *Id.* at 170-71.

208. United States v. Interstate Gen. Co., 152 F. Supp. 843, 847 (D. Md. 2001) (mem.).

209. *Id.* at 846.

210. *Solid Waste*, 531 U.S. at 167-68.

211. Memorandum from Gary S. Guzy, General Counsel, United States EPA & Robert M. Andersen, Chief Counsel, United States Army Corps of Engineers (January 19, 2001), *available at* http://www.epa.gov/owow/wetlands/swancc-ogc.html (last visited Nov. 12, 2001).

212. *Id.*

does not explicitly hold, that no interstate commerce connection will uphold jurisdiction over isolated wetlands under the Court's reading of the CWA.[213] The court challenges that are sure to follow will decide the issue.

Also still up in the air after the decision is whether or not Corps's jurisdiction over isolated wetlands based on a Commerce Clause connection such as migratory birds would be valid if Congress amended the CWA to provide for such jurisdiction. The Court suggested that the Commerce Clause issue would raise significant constitutional and federalism questions. Nevertheless, the Court dodged both issues in this case, though it did hint that the Migratory Bird Rule might not survive a constitutional challenge when it stated that the rule significantly impinges on "the States' traditional and primary power over land and water use."[214] If Congress did amend the CWA to expand the Corps's jurisdiction, the Court would likely have to face the issue head-on. The Court's recent trend of limiting the Commerce Clause power suggests that the Court might use another CWA Commerce Clause challenge to further rein in the federal commerce power.[215] To do that, however, would be a serious step that might impact other decisions by the Court that are based on expanded federal commerce power. For instance, much of the landmark civil rights jurisprudence of the twentieth century is just one of the potentially affected areas.

The Court recently declined to consider such a step in *Gibbs v. Babbit*.[216] In that case, plaintiffs directly challenged the Federal Endangered Species Act—which prohibited the taking of red wolves—based on Congress's Commerce Clause authority.[217] The district court and the Fourth Circuit both declined to invalidate the Act and held that taking a red wolf was legitimately prohibited under the Commerce Clause.[218] The Supreme Court denied plaintiffs' request for certiorari.[219]

Ultimately, the Court's decision in *Solid Waste* has done little to mitigate the controversy surrounding federal environmental regulation under the CWA; the decision leaves the future of federal environmental legislation as a whole and wetlands protection in particular hanging in

213. *Solid Waste*, 531 U.S. at 168 n.3, 170-71.
214. *See id.* at 174.
215. *See* Meltz & Copeland, *supra* note 204, at 14-18.
216. 214 F.3d 483 (4th Cir. 2000), *cert. denied sub nom.* Gibbs v. Norton, 531 U.S. 1145 (2001).
217. *Id.*
218. *Id.*
219. Gibbs v. Norton, 121 S. Ct. 1081 (2001), *denying cert. to* 214 F.3d 483 (4th Cir. 2000).

the balance. No ideal solution presents itself. For environmentalists, the ideal solution to the problem is for Congress to pass legislation that would confirm a broad-based jurisdiction over "waters of the United States" by the Corps.[220] Even though such legislation might ultimately face a Commerce Clause challenge, it would at least maintain the status quo and allow lawmakers time to consider all of their options.

Another solution might appeal to those who want to protect the environment but feel that the federal government's power has encroached too far. For instance, Congress could enact legislation that would *require* the states to conduct some type of permitting program for the dredge and fill of isolated wetlands and to provide federal funds to support those programs.[221] If neither of these things happens, to protect wetlands the states will need to find alternate ways to bridge the gaps in environmental regulation left as a result of *Solid Waste.*

As the above discussion demonstrates, the legacy that *Solid Waste* leaves is the uncertainty that now surrounds the Corps's authority over isolated wetlands and environmental regulations in general. This note does not even touch on the other EPA and Corps programs that are impacted by the *Solid Waste* ruling.[222] These important issues need to be addressed so that the vacuum in regulatory control left by the Court's decision is filled or not filled in a way that truly reflects the will of the majority of the American people rather than the interests of any one minority group.

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220. *See* Meltz & Copeland, *supra* note 204.

221. *Id.*

222. *Id.*

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