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SWANCC: FULL OF SOUND AND FURY, SIGNIFYING NOTHING . . . MUCH?[1]

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The Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*[2] ("*SWANCC*") caused great concern amongst environmentalists, regulators, and commentators concerning the continuing viability of the Clean Water Act[3] ("CWA"). Indeed, one commentator referred to *SWANCC* as "the most devastating judicial opinion affecting the environment ever."[4] These initial reactions to *SWANCC*, however, may have been excessive.[5]

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1. *Cf.* WILLIAM SHAKESPEARE, MACBETH act 5, sc. 5 ("Life's but a walking shadow, a poor player that struts and frets his hour upon the stage and then is heard no more: it is a tale told by an idiot, full of sound and fury, signifying nothing.")

2. 531 U.S. 159 (2001).

3. The CWA, 33 U.S.C. §§ 1251-1387 (2000), is also known as the Federal Water Pollution Control Act. Donna M. Downing et al., *Navigating Through Clean Water Jurisdiction: A Legal Review*, 23 WETLANDS 475, 478 (2003); Paul Boudreaux, *Federalism and the Contrivances of Public Law*, 77 ST. JOHN'S L. REV. 523, 538 n.81 (2003) (noting that the CWA "is a mixture of various acts, the most significant of which was the Federal Water Pollution Control Act").

4. William Funk, *The Court, the Clean Water Act, and the Constitution: SWANCC and Beyond*, 31 ENVTL. L. REP. 10741, 10741 (2001); *accord* C. Victor Pyle, III, Note, *Isolated Wetlands Jurisprudence Post-*SWANCC *and Resulting Federal and State Attempts to Fill the Void*, 11 SOUTHEASTERN ENVTL. L.J. 91, 91 (2002) (noting that *SWANCC* "sent shock waves through the federal and state agencies charged with protection of wetlands and other aquatic resources").

5. *See* David E. Kunz, *A River Runs Through It: An Analysis of the Implications of* Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers *on the Clean Water Act and Federal Environmental Law*, 9 ENVTL. LAW. 463, 465 (2003).

> [I]t is not clear that the initial concerns and alarms raised by some jurists and many legal and environmental commentators—that the protections of the CWA will be seriously eroded and that federal environmental law will be placed in jeopardy—have come to fruition.

Although federal courts are split over how broadly *SWANCC* ought to be construed, a majority of federal appellate courts interpret *SWANCC* narrowly and hold that CWA jurisdiction extends to navigable waters and their tributaries and wetlands adjacent thereto. In other words, most courts hold that CWA jurisdiction exists over all waters hydrologically connected to navigable waters. This narrow interpretation of *SWANCC* has been adopted by the Fourth, Sixth, Seventh and Ninth Circuit Courts of Appeal, whereas the Fifth Circuit Court of Appeals has adopted a broad interpretation of *SWANCC*.[6]

Despite the narrow interpretation adopted by a majority of courts that have addressed the issue, *SWANCC*'s elimination of

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Indeed, it is arguable that these initial concerns have largely proven to be false. The CWA and federal environmental law, while restricted somewhat by the narrow holding of SWANCC, continue to be viable and powerful forces and will likely remain so in the future.

Id.

6. *See infra* Part IV; *Difficulties In Regulation of Wetlands: Before the Subcomm. on Water Res. of the House Comm. on Transp. and Infrastructure*, 108th Cong., (2004) [hereinafter *Woodley/Grumbles Testimony*] (statement of John Paul Woodley, Jr., Assistant Sec'y. of the Dep't of the Army, and Benjamin H. Grumbles, Acting Assistant Adm'r for Water, Environmental Protection Agency), *available at* 2004 WL 2011362 (noting the split between the Fifth Circuit and the Fourth, Sixth, Seventh and Ninth Circuits). The Supreme Court, however, recently declined to address this circuit split. *See* United States v. Deaton, 332 F.3d 698 (4th Cir. 2003), *cert. denied*, 124 S. Ct. 1874 (2004); United States v. Rapanos, 339 F.3d 447 (6th Cir. 2003), *cert. denied*, 124 S. Ct. 1875, *reh'g denied* 124 S. Ct. 2407 (2004); Treacy v. Newdunn Assocs., 344 F.3d 407 (4th Cir. 2003), *cert. denied*, 124 S. Ct. 1874 (2004). *See also* United States v. Thorson, No. 03-C-0074-C, 2004 WL 737522, at *12 (W.D. Wis. Apr. 6, 2004)

Courts are split over the question whether the inevitable conclusion of *SWANCC* is that the [CWA's] coverage extends only to those wetlands immediately adjacent to navigable waters or whether a surface level hydrological connection may be sufficient. Recently, the United States Supreme Court has denied three petitions for certiorari addressing this issue.

Id.

Accordingly, one may argue that the Supreme Court's denial of certiorari in *Deaton*, *Rapanos*, and *Newdunn* implicitly endorsed the narrow interpretation of *SWANCC* adopted by the Fourth and Sixth Circuit Courts of Appeal. *Cf.* Elizabeth Shogren, *Clean Water Act Now Protects Some Canals and Ditches Too*, L.A. TIMES, Apr. 9, 2004, at A19 ("The Supreme Court, at least tacitly, upheld the appellate court rulings [in the Fourth and Sixth Circuits] by refusing to hear the developers' appeals."); National Wildlife Federation, *Supreme Court Decision Major Setback in Industry Push to Remove CWA Protections from Many Wetlands and Streams*, *at* http://www.nwf.org/news/story.cfm?pageId=BC11D1FD%2D65BF%2D09FE%2DBFF0BD41D9E6B91D (last visited Aug. 12, 2004) (quoting Jim Murphy, Clean Water Counsel for the National Wildlife Federation as stating that the Supreme Court's denial of certiorari in *Deaton*, *Rapanos* and *Newdunn* "signaled today that industry pressure to broadly interpret the extremely narrow *SWANCC* decision is not appropriate").

CWA jurisdiction over intrastate, non-navigable, isolated wetlands has nonetheless adversely affected wetland preservation. Indeed, a significant percentage of wetlands have lost CWA protection as a result of *SWANCC*.[7] Although *SWANCC*'s impact may not be as dire as commentators initially predicted, it nonetheless eliminated federal protection for up to twenty percent of America's most important wetlands. These wetlands provide many valuable functions including flood control, bio-diversity, and maintaining the integrity of America's aquatic resources. Accordingly, Congress should enact legislation that will restore the CWA to its pre-*SWANCC* status — and it should predicate such legislation upon congressional powers that are less controversial than its Commerce power over intrastate activities that substantially affect interstate or foreign commerce.

Part I of this Article discusses the CWA's regulatory framework. Part II discusses the Supreme Court's interpretation of the CWA in *SWANCC* and *United States v. Riverside Bayview Homes, Inc.*[8] Part III discusses the split of authority that developed concerning the scope of the CWA in the wake of *SWANCC*. Part IV discusses recent decisions that have healed the post-*SWANCC* split of authority, thereby making a narrow interpretation of *SWANCC* the majority view amongst federal courts. Part V concludes that *SWANCC*, as interpreted by a majority of federal courts that have addressed the issue, has not significantly altered the CWA. Part VI suggests that Congress should enact the Clean Water Authority Restoration Act of 2003 ("CWARA") or similar legislation restoring the CWA to its pre-*SWANCC* status. Part VI also discusses various bases of congressional authority upon which the CWARA may be based, including the Spending Clause. Part VII discusses regulatory responses to *SWANCC*, culminating in the decision by the Bush Administration to abandon plans for rule-making that would have scaled back the CWA. Finally, Part VIII of this Article concludes that *SWANCC* has eliminated federal protection over a significant percentage of the country's most valuable wetlands, but that *SWANCC* — as subsequently interpreted — has not eliminated

7. *SWANCC*'s effect will likely fluctuate from region to region. For example, it will have less impact in the northeast where "isolated" wetlands are estimated to comprise one percent of total wetlands in some areas, but it will have a serious impact in the southwest and on the west coast where many wetlands are "isolated." *See* Scott G. Leibowitz & Tracie-Lynn Nadeau, *Isolated Wetlands: State-of-the-Science and Future Directions*, 23 WETLANDS 663, 666-67 (2003); *see also* John D. Ostergren, Note, SWANCC *in Duck Country: Will Court-Ordered Devolution Fill the Prairie Potholes?*, 22 STAN. ENVTL. L.J. 381, 382 n.4 (2003) (discussing various regional losses and noting estimates that ninety-eight percent of the wetlands in the Prairie Pothole Region in Minnesota and the Dakotas are isolated).

8. 474 U.S. 121 (1985).

CWA jurisdiction to the extent originally feared.

I. THE CWA'S REGULATORY FRAMEWORK

The Army Corps of Engineers ("ACOE") and the Environmental Protection Agency ("EPA") co-administer the CWA.[9] Nonetheless, states and tribes may also "assume responsibility for issuance of CWA permits for discharges into waters and wetlands subject to the Act."[10] In enacting the CWA, Congress intended to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[11] Section 301(a) of the CWA prohibits "discharge of any pollutant by any person" except certain discharges enumerated in the CWA.[12] One such

9. Downing, *supra* note 3, at 478 (discussing the respective functions of the ACOE and the EPA in administering the CWA).

10. Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States," 68 Fed. Reg. 1991, 1992 (Jan. 15, 2003) (to be codified at 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300 & 401) [hereinafter ANPRM] (summarizing various CWA regulatory schemes). *See* Downing, *supra* note 3, at 479 (discussing the ways in which states and tribes may implement and enforce the CWA); 33 U.S.C. §§ 1342(b), 1344(g) (permitting qualified states to assume administration of the section 402 and 404 permit programs with review by the ACOE); 33 U.S.C. § 1341 (making a state water quality certification a prerequisite for a section 404 permit); 33 U.S.C. § 1251(b) (noting that Congress chose "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources . . .").

11. 33 U.S.C. § 1251(a); *Riverside*, 474 U.S. at 132 (holding that the CWA was intended to combat "realities of the problem of water pollution" and noting that it is difficult to determine the "point at which water ends and land begins"). The history of the CWA and its predecessors is beyond the scope of this Article, which focuses on the current status of the CWA in light of post-*SWANCC* developments. *See generally* Downing, *supra* note 3, at 476-84 (discussing the history of the CWA and its statutory predecessor — the Rivers and Harbors Act of 1899 (the "RHA")); Bradford C. Mank, *The Murky Future of the Clean Water Act After* SWANCC*: Using a Hydrological Connection Approach to Saving the Clean Water Act*, 30 ECOLOGY L.Q. 811, 823-36 (2003) (discussing the history of federal regulation of navigation and the CWA); Roderick E. Walston, *The Federal Commerce and Navigation Powers: Solid Waste Agency of Northern Cook County's Undecided Constitutional Issue*, 42 SANTA CLARA L. REV. 699, 719-42 (2002) (discussing the evolution of Congress's power to regulate navigation); Susan E. Brabenec, Comment, *Of Commerce, Congress, and Canada Geese: Section 404 of the Clean Water Act and the Impact of* Solid Waste Agency v. United States Army Corps of Engineers, *531 U.S. 159 (2001)*, 70 U. CIN. L. REV. 1105, 1109-10 (2002) (discussing the CWA and its statutory predecessors); *infra* note 23 (noting disagreement regarding the proper interpretation of the CWA's legislative history).

12. 33 U.S.C. § 1311(a). *See* ANPRM, 68 Fed. Reg. at 1993; United States v. Bay-Houston Towing Co., 197 F. Supp. 2d 788, 801-03 (E.D. Mich. 2002) (summarizing the section 402 and section 404 regulatory schemes).

exception, which is often implicated when wetlands[13] are at issue, requires parties developing wetlands to obtain a section 404 permit from the ACOE "for the discharge of dredged or fill material into the navigable waters at specified disposal sites."[14] In other words, section 404(a) of the CWA authorizes the ACOE to regulate the discharge of fill material into "navigable waters" — which are defined as "the waters of the United States, including the territorial seas."[15] Likewise, section 402 of the CWA authorizes the ACOE to "issue a permit for the discharge of any pollutant" from a point source into the "waters of the United

13. Although the CWA does not define "wetlands," the ACOE and the EPA have done so. *See* Ostergren, *supra* note 7, at 388 n.21 ("Somewhat remarkably, the CWA itself never mentions the word 'wetland.'") 33 C.F.R. § 328.3(b) (2002) (defining "wetlands" as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions"); 40 C.F.R. § 230.3(t) (2002) (verbatim EPA definition).

14. 33 U.S.C. § 1344(a). *See* 33 U.S.C. § 1341 (requiring section 404 permit applicants to obtain a section 401 water quality certification from the state to ensure that the proposed discharge would not violate state water quality standards); 40 C.F.R. § 232.2 (defining "dredged material" and "fill material"); 33 C.F.R. § 323.2(e)(1) (defining "fill material"). *See generally* Ostergren, *supra* note 7, at 388-89, 403-26 (discussing the circuitous path of the section 404 permitting process); Edward A. Fitzgerald, Solid Waste Agency of Northern Cook County. v. U.S. Army Corps of Engineers*: Isolated Waters, Migratory Birds, Statutory and Constitutional Interpretations*, 43 NAT. RESOURCES J. 11, 14 n.20 (2003) (same). *See also* N. Carolina Shellfish Growers Ass'n v. Holly Ridge Assocs., LLC, 278 F. Supp. 2d 654, 682-83 (E.D.N.C. 2003) [hereinafter *NCSGA*] (applying section 404); United States v. Hummel, No. 00-C-5184, 2003 WL 1845365, at *1-2 (N.D. Ill. Apr. 8, 2003) (same).

15. 33 U.S.C. § 1362(7). Congress intended for this definition to be broad. *Riverside*, 474 U.S. at 133. The EPA has the final administrative authority to determine the scope of "navigable waters." Downing, *supra* note 3, at 483. The term "navigable waters" has spawned a host of litigation attempting to delineate the contours of CWA jurisdiction. *See, e.g.*, Rapanos, 339 F.3d at 447. The Fourth Circuit Court of Appeals noted a distinction between "navigable waters" (i.e., jurisdictional waters) and "traditional navigable waters" (i.e., "waters that may be used for commercial navigation"). *See* United States v. Interstate Gen. Co., No. 01-4513, 2002 WL 1421411, at *1 n.1 (4th Cir. July 2, 2002); Lance D. Wood, *Don't Be Misled: CWA Jurisdiction Extends to All Non-Navigable Tributaries of the Traditional Navigable Waters and to Their Adjacent Wetlands (A Response to the Virginia Albrecht / Stephen Nickelsburg ELR Article, to the Fifth Circuit's Decision* In re Needham*, and to the Supreme Court's Dicta in* SWANCC*)*, 34 ENVTL. L. REP. 10187, 10191 (2004).

> After 1972, federal courts and legal commentators began to call "the navigable waters of the United States" [i.e., waters regulated under the RHA] the "*traditional* navigable waters of the United States" to clearly distinguish that term from the much more extensive geographic jurisdiction of the FWPCA of 1972, the first version of the CWA.

Id.

States."[16] Jurisdiction under both sections 402 and 404 is contingent upon the involvement of "waters of the United States."[17] The ACOE issued 33 C.F.R. § 328.3(a), which defines "waters of the United States" in relevant part as:

> (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
>
> (2) All interstate waters including interstate wetlands;
>
> (3) All other 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 including any such waters:
>
> (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
>
> (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
>
> (iii) Which are used or could be used for industrial purpose by industries in interstate commerce;
>
> (4) All impoundments of waters otherwise defined as waters of the United States under the definition;
>
> (5) Tributaries of waters identified in paragraphs (a)(1) through (4) of this section;
>
> (6) The territorial seas;
>
> (7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section.[18]

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16. National Pollutant Discharge Elimination System ("NPDES") 33 U.S.C. § 1342(a); *id.* at § 1362(12)(A) (defining "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source"); S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 124 S. Ct. 1537, 1543 (2004) (construing section 1362(14)'s definition of "point source" as "mak[ing] plain that a point source need not be the original source of the pollutant; it need only convey the pollutant to 'navigable waters'" declining to address whether all navigable waters "should be viewed unitarily for purposes of NPDES permitting requirements"); *NGSCA*, 278 F. Supp. 2d at 675-76, 682 (applying sections 402 and 404).

17. *NGSCA*, 278 F. Supp. 2d at 669.

18. 33 C.F.R. § 328.3(a). *See also* 40 C.F.R. § 230.3(s) (substantially verbatim EPA definition of "waters of the United States"); ANPRM, 68 Fed. Reg. at 1994 (noting that substantively similar counterpart definitions appear

As noted above, where CWA jurisdiction exists, developers are required to obtain permits in order to discharge fill into a wetland.[19]

In 1986, the ACOE promulgated the Migratory Bird Rule ("MBR"),[20] which "clarified" that 33 C.F.R. § 328.3(a) extended the

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in various sections of 40 C.F.R.); Ostergren, *supra* note 7, at 388-91 (discussing the history of the CWA's definition of "waters of the United States").

19. *See generally* 33 U.S.C. §§ 1342, 1344; *Hummel*, 2003 WL 1845365, at *2 (discussing individual and general permits); Ostergren, *supra* note 7, at 403-26 (same). *Id.* at 414 (noting that developers are required to obtain either an individual permit or a general permit, also known as a nationwide permit ("NWP")); 33 U.S.C. § 1344(e) (authorizing NWP permits); 67 Fed. Reg. 2020 (Jan. 15, 2002) (issuing current NWPs). An individual permit requires a "rigorous site-specific review, including public notice and comment." Ostergren, *supra* note 7, at 403. On the other hand, general permits are permitted for classes of activities deemed by the ACOE to have "'minimal effects' on aquatic ecosystems." *Id.* Moreover, general permits follow a "relatively abbreviated review . . . without formal public notice and comment." *Id.* *See id.* at 413-21 (noting that 41 NWP's are currently in force and discussing NWP 39, which governs the development of wetlands). In any event, before the ACOE issues either an individual or a general permit, it must first make four findings with respect to the proposed activity pursuant to the EPA's 404(b)(1) guidelines. *Id.* at 404-05. First, there must be no "'practicable' alternative to the proposed activity that would have less adverse impact in the aquatic ecosystem." *Id.* (citing 40 C.F.R. § 230.10(a)). Second, the "proposed activity will not cause or contribute to 'significant degradation' of the waters of the United States," including "'significant adverse effects' on human health, aquatic ecosystems, recreation, aesthetics, or economic values." *Id.* (citing 40 C.F.R. § 230.10(c)). Third, the developer must take all "appropriate and practicable" steps to "minimize potential adverse impacts of the discharge." *Id.* at 404 (citing 40 C.F.R. § 230.10(d)). Finally, the ACOE may not issue a section 404 permit unless it finds that the "proposed activity will not violate any other state or federal laws." *Id.* (citing 40 C.F.R. § 230.10(b)). Nonetheless, relatively few permit applications are denied by the ACOE. *See* General Accounting Office, *Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction*, at 8, *available at* http://www.gao.gov/new.items/d04297.pdf (Feb. 2004) [hereinafter GAO Report] (noting that in 2002, the ACOE denied 128 section 404 permit applications out of 85,445, excepting 4,143 applications that were withdrawn by the applicant); Fitzgerald, *supra* note 14, at 67 n.484 (noting that, between 1995 and 1999, the ACOE only denied 0.3% of the annual 74,500 permit applications). *See also* Ostergren, *supra* note 7, at 426 n.220 (noting that the ACOE makes 40,000 NWP determinations annually).

20. *SWANCC*, 531 U.S. at 164 (quoting 51 Fed. Reg. 41,217). The MBR was issued without a notice and comment period as required by the Administrative Procedure Act, 5 U.S.C. § 553. *Id.* at 164 n.1. The MBR states in relevant part that § 404(a) extends to intrastate waters:

> a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or
>
> b. Which are or would be used as habitat by other migratory birds which cross state lines; or
>
> c. Which are or would be used as habitat for endangered species; or
>
> d. Used to irrigate crops sold in interstate commerce.

ACOE's jurisdiction to intrastate waters that were used as a habitat by specified migratory birds.[21] The MBR has been a controversial clarification — some say extension — of the CWA.[22] As discussed in Section II below, *SWANCC* struck down part of the MBR.

II. *SWANCC* — CWA JURISDICTION DOES NOT EXTEND TO "ISOLATED" WATERS

SWANCC has been the subject of much scholarly attention.[23]

Id. at 164 (quoting 51 Fed. Reg. 41,217).
The MBR is "neither a rule nor entirely about migratory birds" because it merely "provided, in regulatory preamble language, examples of the types of links to interstate commerce that might be considered as a basis for CWA jurisdiction." Leibowitz & Nadeau, *supra* note 7, at 664. *See also* Downing, *supra* note 3, at 483 (discussing the MBR). *But see* Timothy S. Bishop et al., *One for the Birds: The Corps of Engineers' "Migratory Bird Rule"*, 30 ENVTL. L. REP. 10633, 10635 (2000) (criticizing the MBR).

21. United States v. Krilich, 303 F.3d 784, 786 n.3 (7th Cir. 2002).

22. The MBR has been struck down in the Fourth Circuit and has been partly struck down by the Supreme Court. *See* United States v. Wilson, 133 F.3d 251, 257 (4th Cir. 1997) (striking down the MBR and section 328.3(a)(3) because "waters of the United States" does not include intrastate waters the degradation of which *may* affect interstate commerce); *SWANCC*, 531 U.S. at 174 (holding that the MBR exceeds the regulatory authority granted by the CWA).

23. *See generally,* Robin Kundis Craig, *Beyond* SWANCC*: The New Federalism and Clean Water Jurisdiction*, 33 ENVTL. L. 113, 126-39 (2003); Kunz, *supra* note 5, at 463; Ostergren, *supra* note 7, at 391-401; Jon Kusler, Memorandum Concerning SWANCC Prepared for the Association of State Wetland Managers, *available at* http://www.aswm.org/fwp/swancc/aswm-int.pdf (last visited June 8, 2004) [hereinafter Kusler Memorandum]; Downing, *supra* note 3, at 486-88; Jason Turner, Note, SWANCC*: Effects on Federal Jurisdiction Under the Clean Water Act and the Expanded State Roles in Wetland Protection*, 56 BAYLOR L. REV. 281 (2004); James Duquet, Note, *Could Narrowing Federal Jurisdiction Under the Clean Water Act Actually Take Away States' Ability to Protect Their Own Waters? The Unintended Consequences of SWANCC*, 20 T.M. COOLEY L. REV. 361, 368-73 (2003); Michelle J. Taylor, Solid Waste Agency Northern Cook County v. Army Corps of Engineers*: the United States Supreme Court Invalidates the Migratory Bird Rule and Raises Questions About the Commerce Clause*, 79 U. DET. MERCY L. REV. 301 (2002); Brandon A. Van Balen, Note, *Clearing the Muddy Waters?: An Examination of* SWANCC *and the Implications for Wetlands Protection and the Administrative State*, 36 WAKE FOREST L. REV. 845, 845-56 (2001); William F. Northrip, Note, *Running Aground on the (Shoal) "Waters of the United States": The Supreme Court Invalidates the Migratory Bird Rule*, 66 MO. L. REV. 903 (2001); Tanya M. White & Patrick R. Douglas, Note, *Postponing the Inevitable: the Supreme Court Avoids Deciding Whether the Migratory Bird Rule Passes Commerce Clause Muster*, 9 MO. ENVTL. L. & POL'Y REV. 9, 14-18 (2001); Charles Tiefer, SWANCC*: Constitutional Swan Song for Environmental Laws or No More Than a Swipe at Their Sweep?*, 31 ENVTL. L. REP. 11493 (2001). Many commentators have debated whether *SWANCC* was correctly decided. *Compare* Virginia S. Albrecht & Stephen M. Nickelsburg, *Could* SWANCC *be Right? A New Look at the Legislative History*

Consequently, this Article will only provide a brief summary of *SWANCC* in order to avoid repeating what has been artfully written elsewhere. Before discussing *SWANCC*, however, it is important to review the Supreme Court's prior decision in *United States v. Riverside Bayview Homes, Inc.*, which construed the CWA's "waters of the United States" and unanimously held that the ACOE was reasonable in defining the term to include "all wetlands adjacent to other bodies of water over which the Corps has jurisdiction . . . ."[24]

In so holding, the Court deferred to the expertise of the ACOE and the EPA in interpreting the CWA based on the ACOE's "ecological judgment about the relationship between waters and their adjacent wetlands."[25] The *Riverside* Court also noted that the term "navigable" has "limited import" because Congress intended to "regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term."[26] In

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of the Clean Water Act, 32 ENVTL. L. REP. 11042, 11043 (2002) (concluding that *SWANCC* was correctly decided because, in enacting the CWA, Congress only intended to regulate waters that are navigable-in-fact and waters adjacent thereto) *with* Wood, *supra* note 15, at 10187–217 (debunking and criticizing the Albrecht/Nickelsburg Article as well as dicta in *SWANCC* and the Fifth Circuit Court of Appeals' decision in *Needham*) *and* Fitzgerald, *supra* note 14, at 19-37 (criticizing *SWANCC*'s interpretation of the CWA's legislative history and concluding that Congress intended to abandon a navigability requirement). This Article, however, focuses on post-*SWANCC* developments as well as how Congress ought to respond. Nonetheless, any reader interested in the CWA's legislative history is well-advised to read Wood's Article, which humorously and forcefully challenges the Albrecht/Nickelsburg Article.

24. 474 U.S. at 135. *See id.* at 131 n.8 (noting that the Court was not addressing wetlands that are not adjacent to jurisdictional waters). Consequently, *Riverside* held that the ACOE had jurisdiction over the eighty-acre wetland parcel at issue because it "actually abut[ted] [] a navigable waterway." *Id.* at 135. *SWANCC* noted that *Riverside* held that the ACOE had "§ 404(a) jurisdiction over wetlands that actually abutted on a navigable waterway." *SWANCC*, 531 U.S. at 167. The eighty-acre parcel of swampy marshland was "near the shores of Lake St. Clair." *Riverside*, 474 U.S. at 124. Accordingly, it appears as though the Supreme Court has adopted a broad view of which wetlands are "adjacent to" "waters of the United States" inasmuch as only part of the eighty-acre parcel abutted a jurisdictional water. *SWANCC*, 531 U.S. at 175-76 (Stevens, J., dissenting).

25. *Riverside*, 474 U.S. at 134.

26. *Accord SWANCC*, 531 U.S. at 167 (discussing *Riverside*). Indeed, the Court in *Riverside* recognized that Congress sought to overcome the limitations of earlier pollution control statutes such as the RHA by adopting "a broad, systemic view of the goal of maintaining and improving water quality." *Riverside*, 474 U.S. at 132. As noted in *Riverside*, legislative history from the Senate indicated that Congress recognized that "broad federal authority to control pollution" was necessary because "'[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source." *Id.* at 132-33 (quoting S. Rep. No. 92-414, at 77 (1972)); *see also* Cong. Rec. 33756-33757 (1972) (statement of Rep. Dingell).

other words, *Riverside* held that the ACOE had jurisdiction over wetlands adjacent to "waters of the United States" because of the ACOE's conclusion that such wetlands "*may* affect the water quality of adjacent lakes, rivers, and streams even when the waters of those bodies do not actually inundate the wetlands."[27] Indeed, the *Riverside* Court stated that:

> Of course, it may well be that not every adjacent wetland is of great importance to the environment of adjoining bodies of water. But the existence of such cases does not seriously undermine the Corps' decision to define all adjacent wetlands as "waters." If it is reasonable for the Corps to conclude that in the majority of cases, adjacent wetlands have significant effects on water quality and the aquatic system, its definition can stand. That the definition may include some wetlands that are not significantly intertwined with the ecosystem of adjacent waterways is of little moment, for where it appears that a wetland covered by the Corps' definition is in fact lacking in importance to the aquatic environment—or where its importance is outweighed by other values—the Corps may always allow development of the wetland for other uses simply by issuing a permit. See 33 CFR § 320.4(b)(4) (1985).[28]

Accordingly, *Riverside* held that the ACOE has jurisdiction over wetlands hydrologically connected to "waters of the United States" — and that it is the province of the ACOE to grant a section 404(a) permit where a proposed discharge would not adversely affect jurisdictional waters.[29]

Sixteen years after *Riverside*, the Supreme Court revisited the meaning of section 404(a) of the CWA in *SWANCC*. *SWANCC* involved a consortium of municipalities that planned to build a solid waste disposal site at "an abandoned sand and gravel pit" that had evolved into a forest, containing permanent and seasonal ponds that served as a habitat for various migratory birds.[30] The

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27. *Riverside*, 474 U.S. at 134 (emphasis added). *See id.* at 134-35 (discussing the functions served by wetlands, which form the basis of the ACOE's conclusion that "wetlands adjacent to lakes, rivers, streams, and other bodies of water may function as integral parts of the aquatic environment even when the moisture creating the wetlands does not find its source in the adjacent bodies of water"); *id.* at 139.

28. *Riverside*, 474 U.S. at 135 n.9 (emphasis added). *See* Int'l Paper Co v. Ouellette, 479 U.S. 481, 486 (1987) (citing *Riverside* and noting that the CWA "applies to virtually all surface water in the country").

29. The *Riverside* Court noted that congressional attempts to narrow the ACOE's definition of "navigable waters" failed and that the CWA consequently retained such term and that Congress acquiesced in the ACOE's definition of "navigable waters," which included adjacent wetlands. *Riverside*, 474 U.S. at 135-38; *SWANCC*, 531 U.S. at 167 (discussing *Riverside*).

30. *SWANCC*, 531 U.S. at 162-63. Consequently, *SWANCC* did not involve *wetland* regulation, as opposed to the regulation of open waters. *Id.* at 163, 187 n.13. Moreover, *SWANCC* involved the ACOE's jurisdiction based on the *affect* that waters *may have* on interstate commerce, as opposed to use of the

ACOE exercised jurisdiction over the site based on the MBR.[31] The ACOE reasoned that although the abandoned mining excavations were "not wetlands,"[32] they nonetheless constituted "waters of the United States" because they served as a habitat for various migratory birds.[33]

After its permit application was denied by the ACOE,[34] the Solid Waste Agency of Northern Cook County filed suit in the Northern District of Illinois challenging the ACOE's jurisdiction and the merits of the permit denial.[35] The district court granted the ACOE's motion for summary judgment on the jurisdictional issue.[36]

SWANCC appealed to the Seventh Circuit Court of Appeals, arguing that the ACOE exceeded its statutory authority "in interpreting the CWA to cover nonnavigable, isolated, intrastate waters based upon the presence of migratory birds" and that, "Congress lacked the power under the Commerce Clause to grant

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water as a *channel* of interstate commerce. *See, e.g.*, United States v. Lamplight Equestrian Ctr., No. 00C6486, 2002 WL 360652, at *6 (N.D. Ill. Mar. 8, 2002) (noting that, where bodies of water are being regulated as channels of interstate commerce, as opposed to waters that may affect interstate commerce, *SWANCC* is irrelevant because it "involved isolated waters lacking a physical/hydrological connection to other navigable waters"). Consequently, *SWANCC*'s discussion of *Riverside* is dicta and the "significant nexus" requirement is merely a description of the holding in *Riverside*, as opposed to a new standard to be applied. *But see* Greater Yellowstone Coalition v. Flowers, No. 03-8034, 2004 WL 377685, at *2 n.3 (10th Cir. Mar. 2, 2004) ("The Supreme Court established the extent of the Corps' jurisdiction over wetlands in [*SWANCC*]."); FD&P Enters. v. United States Army Corps of Eng'rs, 239 F. Supp. 2d 509, 516-17 (D.N.J. 2003) ("In light of [*SWANCC*], it is the view of this court that the 'hydrological connection' test is no longer the valid mode of analysis.").

31. *SWANCC*, 531 U.S. at 164. The ACOE initially "concluded that it had no jurisdiction over the site because it contained no 'wetlands' or areas which support 'vegetation typically adapted for life in saturated soil conditions.'" *Id.* at 164. The ACOE, however, reconsidered and exercised jurisdiction over the site after the Illinois Nature Preserves Commission informed the ACOE that migratory birds had been observed there. *Id.* Consequently, the ACOE exercised jurisdiction on the basis of the MBR. *Id.*

32. *See supra* note 30; *SWANCC*, 531 U.S. at 164-65.

33. *Id.*

34. SWANCC obtained all of the necessary state and municipal regulatory approvals, including a water quality certification from the Illinois Environmental Protection Agency. *Id.* at 165. Nonetheless, the ACOE denied SWANCC's permit application on the grounds that (1) it "had not established that its proposal was the 'least environmentally damaging, most practicable alternative' for disposal of non-hazardous solid waste"; (2) "SWANCC's failure to set aside sufficient funds to remediate leaks posed an 'unacceptable risk to the public's drinking water supply'"; and (3) "that the impact of the project upon area-sensitive species was 'unmitigatable since a landfill surface cannot be redeveloped into a forested habitat.'" *Id.* at 165.

35. *Id.* at 165.

36. *Id.*

such regulatory jurisdiction."[37] The court of appeals held that (1) Congress has the authority to regulate the subject ponds "based upon the cumulative impact doctrine"[38] and (2) that the CWA extends as far as the Commerce Clause permits and that the MBR was thus a reasonable interpretation of the CWA (inasmuch as the court also held that the MBR was constitutional).[39] The Supreme Court, however, reversed.[40]

A five-member majority of the Court held that the MBR "exceeds the authority granted to [the ACOE] under § 404(a) of the CWA."[41] The Court, however, declined to address the significant constitutional and federalism questions raised by [the ACOE's] interpretation of the CWA,[42] to wit, whether Congress may exercise the power to regulate isolated waters based on the presence of migratory birds consistent with the Commerce Clause.[43] In arriving at its decision, the Court reviewed its previous decision in *Riverside*.[44] The *SWANCC* Court noted that it "was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes*."[45] Although the Court in *Riverside* found that

37. *Id.* at 165-66.

38. *Id.* at 166 (citing *SWANCC*, 191 F.3d 845, 850 (7th Cir. 1999)) ("[T]he cumulative impact doctrine, under which 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."). The court of appeals held that, in the aggregate, the destruction of migratory bird habitats had a substantial effect on interstate commerce. *Id.* at 166 (citing *SWANCC*, 191 F.3d at 850).

39. *Id.* (citing *SWANCC*, 191 F.3d at 851-52).

40. *SWANNC*, 531 U.S. at 166.

41. *Id.* at 174.

42. *Id.*

43. *Id.* at 162.

44. *Id.* at 167.

45. *Id.* *SWANCC*, however, failed to acknowledge footnote 9 in *Riverside*, which expressly stated that the ACOE's jurisdiction included "some wetlands that are not significantly intertwined with the ecosystem of adjacent waterways." *See Riverside*, 474 U.S. at 135 n.9. Although one could argue that this omission amounted to an attempt by the *SWANCC* Court to narrow the interpretation of the CWA that had been adopted in *Riverside*, such an argument should fail. First, inasmuch as *SWANCC* concerned isolated ponds that were not adjacent to any "waters of the United States," any statement about "adjacent to" jurisdiction would be dicta, as opposed to footnote 9 of *Riverside*, which was necessary to the Court's holding with respect to the ACOE's jurisdiction over wetlands adjacent to "waters of the United States." *See SWANCC*, 531 U.S. at 167-68 (noting that *Riverside* did not address "discharges of fill material into wetlands that are not adjacent to bodies of open water . . ."). Second, it appears as though the *SWANCC* Court erroneously characterized *Riverside* where it stated that the *Riverside* Court "found that *Congress*'s *concern* for the protection of water quality and aquatic ecosystems indicated *its intent* to regulate wetlands 'inseparably bound up with the 'waters' of the United States.'" *SWANCC*, 531 U.S. at 167 (emphasis

Congress acquiesced to the ACOE's definition of "navigable waters" when it failed to supplant such definition in 1977, the *SWANCC* Court concluded that congressional inaction did not amount to acquiescence to the ACOE's regulations concerning "isolated" waters.[46]

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added). *Cf. Riverside*, 474 U.S. at 134.

> We cannot say that the *Corps' conclusion* that adjacent wetlands are inseparably bound up with the 'waters' of the United States—based as it is on the Corps' and EPA's technical expertise—is unreasonable. In view of the breadth of federal regulatory authority contemplated by the Act itself and the inherent difficulties of defining precise bounds to regulable waters, 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.

Id. (emphasis added). Consequently, *Riverside* is the most relevant authority with respect to the ACOE's jurisdiction under the CWA over wetlands adjacent to waters of the United States. *See* Thomas L. Casey, III, Note, *Reevaluating "Isolated Waters": Is Hydrologically Connected Groundwater "Navigable Water" Under the Clean Water Act?*, 54 ALA. L. REV. 159, 174 (2002) (noting that *SWANCC*'s "substantial nexus" test "is nothing more than a clarification of the standard first established in *Riverside* for determining the scope of 'waters of the United States' under the [CWA]").

46. *SWANCC*, 531 U.S. at 170-71. As noted below, the *SWANCC* dissenters took the majority to task for this ostensible inconsistency. *See id.* at 186-87 (Stevens, J., dissenting). A powerful dissenting opinion authored by Justice Stevens (joined by Justices Souter, Ginsburg, and Breyer) opined that the majority took "an unfortunate step that needlessly weakens our principal safeguard against toxic water." *Id.* at 175 (Stevens, J., dissenting). Justice Stevens first noted that the CWA, unlike its predecessors such as the RHA, was designed to combat pollution, not navigability obstructions. *Id.* at 174-82 (Stevens, J., dissenting). Consequently, the majority erred in finding that nothing in the CWA's legislative history "signifies that Congress intended to exert [nothing] more than its commerce power over navigation." *Id.* at 181. (Stevens, J., dissenting) (quoting *id.* at 168 n.3). Indeed, Justice Stevens found persuasive a Senate Conference report explaining that "navigable waters" was "to 'be given the broadest possible constitutional interpretation'" and that the majority dismissed "this clear assertion of legislative intent with the back of its hand." *Id.* (Stevens, J., dissenting) (quoting S. Conf. Rep. No. 92-1236, at 144 (1972)). Justice Stevens further ridiculed the majority opinion for unfaithfully departing from *Riverside*. *Id.* at 175-76 (Stevens, J., dissenting). First, *Riverside* involved "an 80-acre parcel of low-lying marshy land that was not itself navigable, directly adjacent to navigable water, or even hydrologically connected to navigable water, but which was part of a larger area, characterized by poor drainage, that ultimately abutted a navigable creek." *Id.* (Stevens, J., dissenting). Indeed, according to Justice Stevens, *Riverside* found that the ACOE had CWA jurisdiction based on an *ecological* connection rather than a hydrological one. *Id.* at 176 n.2 (Stevens, J., dissenting) (discussing *Riverside*, 474 U.S. at 134-35). Moreover, such an ecological connection existed for "many, and possibly most, 'isolated' waters." *Id.* (Stevens, J., dissenting). Accordingly, the dissenters would have held that the ecological connection between SWANCC's ponds and migratory birds was sufficient to confer CWA jurisdiction upon the ACOE. *Id.* (Stevens, J., dissenting). Second, the dissent found troubling the majority's refusal to

In sum, *SWANCC* eliminated "CWA jurisdiction over isolated, intrastate, non-navigable waters where the sole basis for asserting CWA jurisdiction is the actual or potential use of the waters as habitat for migratory birds. . . ."[47] Consequently, the continuing vitality of section 328.3(a)(3) as a basis of CWA jurisdiction is not clear.[48] Nonetheless, the ACOE's jurisdiction over wetlands "adjacent to waters of the United States" was unaffected by *SWANCC*, which involved neither wetlands nor adjacency

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acknowledge the fact that *Riverside* held that Congress acquiesced in the ACOE's assertion of jurisdiction in its 1975 regulations. *Id.* at 186-87 (Stevens, J., dissenting). Justice Stevens noted that *Riverside* did not address isolated wetlands. *Id.* at 187 n.13 (Stevens, J., dissenting). Consequently, the dissent found unpersuasive the majority's assertion that *SWANCC* was consistent with *Riverside*. *Id.* (Stevens, J., dissenting). Third, the majority refused to give deference under *Chevron* to the ACOE's interpretation of the CWA, whereas the Court did so in *Riverside*, which also involved the ACOE's interpretation of its jurisdiction under the CWA. *Id.* at 191 (Stevens, J., dissenting). In addition to the majority's infidelity to *Riverside*, the dissent criticized the majority's contention that the ACOE's assertion of jurisdiction encroached upon the states' traditional power over land use. *Id.* (Stevens, J., dissenting). According to Justice Stevens, the "CWA is not a land-use code; it is a paradigm of environmental regulation[, which] is an accepted exercise of federal power." *Id.* (Stevens, J., dissenting) (citing *Hodel v. Virginia Surface Mining & Reclamation Assoc., Inc.*, 452 U.S. 264, 282 (1981)). Indeed, the CWA respects federalism by permitting states to supplant federal control by their own regulatory programs pursuant to section 404(g). *Id.* at 192 (Stevens, J., dissenting). Finally, the dissent concluded that the ACOE's exercise of jurisdiction "over 'isolated' waters that serve as habitat for migratory birds falls well within the boundaries set by [the] Court's Commerce Clause jurisprudence." *Id.* (Stevens, J., dissenting). *Accord* White & Douglas, *supra* note 23, at 16-18 (discussing the dissenting opinion in *SWANCC*); Mank, *supra* note 11, at 854-58 (same).

47. ANPRM, 68 Fed. Reg. at 1994. *Accord* Memorandum by Gary S. Guzy, General Counsel of the EPA, and Robert M. Anderson, Chief Counsel of the ACOE, *available at* http://www.spk.usace.army.mil/pub/outgoing/co/reg/SWANCC.pdf [hereinafter 2001 Joint Memorandum] (Jan. 19, 2001).

48. 2001 Joint Memorandum, *supra* note 47, at 2. *See id.* (noting that *SWANCC* "held that the Corps' *application* of § 328.3(a)(3) was invalid" but that it "did not strike down § 328.3(a)(3) or any other component of the regulations defining 'waters of the United States'") (emphasis added); *id.* at 4 (noting that *SWANCC* "did not specifically address what other connections with interstate commerce might support assertion of CWA jurisdiction over 'nonnavigable, isolated, intrastate waters' under subsection (a)(3)"); *id.* (suggesting that CWA jurisdiction may exist over nonnavigable, isolated, intrastate waters that either "could affect 'waters of the United States'" or "could affect interstate or foreign commerce"); Downing, *supra* note 3, at 491 (noting that *SWANCC* "did not specifically address what alternative bases for jurisdiction of [non-navigable intrastate isolated] waters remained valid"); Ostergren, *supra* note 7, at 395 (noting that, after *SWANCC*, it is unclear what remains of the MBR or § 328.3(a)(3)). *But see* United States v. Reuth Dev. Co., 335 F.3d 598, 603-04 (stating in dicta that, under *SWANCC*'s reasoning, the CWA's "effect on interstate commerce" jurisdiction appears doomed because it suffers from the same infirmity as the MBR, no nexus to navigability).

jurisdiction.[49] Indeed, *SWANCC* did not involve "the well-established rule including tributaries in the definition of 'navigable waters.'"[50] Consequently, *SWANCC* did not alter the rule that tributaries are "navigable waters."[51]

SWANCC, however, has generated much litigation over the meaning of "isolated,"[52] "adjacent"[53] and "significant nexus."[54] As demonstrated below, the meaning ascribed to these terms has serious ramifications concerning CWA jurisdiction.[55] Moreover, *SWANCC* did not address whether an ecological connection to a

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49. *See* Memorandum by Robert E. Fabricant, General Counsel of the EPA, and Steven J. Morello, General Counsel, Department of the Army, 68 Fed. Reg. 1991, 1997 (Jan. 15, 2003) [hereinafter 2003 Joint Memorandum] (noting that *SWANCC* did not disturb *Riverside* and that "wetlands adjacent to traditional navigable waters clearly remain jurisdictional after *SWANCC*"); 2001 Joint Memorandum, *supra* note 47, at 2, 5-6 (noting that *SWANCC* "did not overrule" *Riverside*); *Reuth*, 335 F.3d at 604 (2003) (noting that the defendant "simply rais[ed] the question of what 'adjacency' means, which *SWANCC* did not address at all"). *See also Riverside*, 474 U.S. at 135 (finding reasonable the ACOE's conclusion that adjacent wetlands are inseparably bound up with the "waters of the United States").

50. Cal. Sportfishing Prot. Alliance v. Diablo Grande, Inc., 209 F. Supp. 2d 1059, 1075 (E.D. Cal. 2002) (citing Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526, 533-34 (9th Cir. 2001)).

51. *See id.* at 1076 (citing Rice v. Harken Exploration Co., 250 F.3d 264, 270-272 (5th Cir. 2001)). *See also infra* note 73 (discussing case law holding that the CWA extends to all tributaries of "navigable waters").

52. Casey, *supra* note 45, at 165 (noting that *SWANCC* left "unclear which waters are isolated and which are sufficiently 'adjacent to' navigable bodies of water or their tributaries"); Ralph W. Tiner, *Geographically Isolated Wetlands of the United States*, 23 WETLANDS 494, 494 (2003) [hereinafter Tiner, *Geographically Isolated Wetlands*] (noting that the "term 'isolated wetland' is a relative one that can be defined from geographic, hydrologic and ecological perspectives").

53. *See* 33 C.F.R. § 328.3(c) (defining "adjacent" as "bordering, contiguous, or neighboring," including wetlands separated from other waters by manmade or natural barriers); 40 C.F.R. § 230.3(b) (counterpart definition). *See also* 2003 Joint Memorandum, 68 Fed. Reg. at 1997 (noting that the ACOE and the EPA have defined "adjacent wetlands," but that the Supreme Court has neither defined the term nor "stated whether the basis for adjacency is geographic proximity or hydrology"); *Lamplight*, 2002 WL 360652, at *8 (holding that a wetland must border or touch a body of water in order to be "adjacent" thereto); *Thorson*, 2004 WL 737522 at *10-17 (discussing adjacency under *SWANCC*).

54. Leibowitz & Nadeau, *supra* note 7, at 664 (noting that neither the ACOE nor the EPA have defined "significant nexus").

55. *See* infra Parts III-IV (discussing post-*SWANCC* case law); Jeanne A. Calderon, *The SWANCC Decision and the Future of Federal, State, and Local Regulation of Wetlands*, 30 REAL EST. L.J. 303, 304 (2002) (noting that the number of wetlands affected by *SWANCC* "will depend upon the interpretation of such words as 'adjacent,' 'tributary,' and 'significant nexus'"); *Woodley/Grumbles Testimony*, *supra* note 6 (noting that existing regulations define neither "tributaries" nor "adjacency").

jurisdictional water is sufficient to confer CWA jurisdiction.[56]

Finally, "*SWANCC* represent[s] a major reinterpretation of the scope of the . . . CWA by re-emphasizing the importance of navigability in the definition of 'waters of the United States' protected by the [CWA]."[57] As discussed below, *SWANCC* and its impact on the CWA has been the subject of much litigation in the lower federal courts.

III. THE JUDICIARY'S RESPONSE TO SWANCC: A SPLIT OF AUTHORITY DEVELOPED CONCERNING THE SCOPE OF THE CWA

Varying interpretations of *SWANCC* resulted in a split of authority among lower federal courts as to how narrowly (or broadly) it was to be applied — with a corresponding impact on the scope of the CWA. One district court described the post-*SWANCC* landscape when it stated:

> In the wake of [*SWANCC*], courts have struggled with evaluating the jurisdictional reach of § 404(a) of the CWA. . . . Courts interpreting the scope of [*SWANCC*] have essentially split into two camps. Under one reading, the [*SWANCC*] case represents a significant shift in the Court's CWA jurisprudence, calling into question the continuing validity of CWA jurisdiction over waters which are not either actually navigable or directly adjacent to navigable waters. On the other hand, an alternative reading of [*SWANCC*] holds that the case only applied to "isolated waters," and thus would permit continued CWA jurisdiction over all waters which have at least a minimal hydrological connection to navigable waters.[58]

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56. As noted above, the *SWANCC* dissenters would have so found. *See* supra note 46; *infra* note 127. *See also* Leibowitz & Nadeau, *supra* note 7, at 668-69 (noting that isolated wetlands are ecologically connected to other aquatic systems). Indeed, the CWA was enacted to protect, inter alia, the "biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Accordingly, if the degradation of an intrastate water would adversely affect a jurisdictional water, then CWA jurisdiction should exist because Congress has the authority to regulate activities that affect the channels of interstate commerce. *See supra* note 30. *But see* Thomas M. Swett, Comment, *Isolated Waters and the Clean Water Act After* SWANCC*: What Does the Commerce Clause Have To Do With It?*, 34 MCGEORGE L. REV. 929, 941 (2003) (concluding that "attempting to establish [*SWANCC*'s significant] nexus ecologically or through attenuated ground water connections is most likely reaching beyond the jurisdiction granted by the CWA").

57. Downing, *supra* note 3, at 491 (noting that *SWANCC*'s reinterpretation is contrary to "the CWA's legislative history and twenty years of judicial interpretation that focused on hydrologic cycles and the potential for pollutants to move"). *But see* Am. Canoe Ass'n v. D.C. Water & Sewer Auth., 306 F. Supp. 2d 30, 39 (D.D.C. 2004) ("*Solid Waste* did not purport to reinterpret the general scope of the CWA.").

58. *FD&P*, 239 F. Supp. 2d at 513. *Accord Lamplight*, 2002 WL 360652 at

Although this Article focuses on how the *SWANCC* split largely (but not completely) disappeared in 2003, a brief overview of the pre-2003 post-*SWANCC* split is helpful. As noted above, two competing schools of thought exist. The broad interpretation adopted by the Fifth Circuit Court of Appeals is contrasted by the narrow interpretation adopted by the Fourth, Sixth, Seventh, and Ninth Circuit Courts of Appeals.[59]

The Fifth Circuit Court of Appeals construed *SWANCC* broadly in *Rice v. Harken Exploration Corp.*,[60] noting that, according to *SWANCC*'s reasoning, a body of water is subject to federal jurisdiction if it "is actually navigable or is adjacent to an open body of navigable water."[61] Although *Rice* construed the Oil Pollution Act ("OPA"),[62] the court held that the phrase "navigable

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*5 ("Courts interpreting *SWANCC* have reached varying results, the primary rift being whether the [MBR] was the decision's only casualty, or whether the holding limited the Corps' jurisdiction even further."); *Thorson*, 2004 WL 737522, at *12-13 (citing cases that are split over the scope of *SWANCC*); *NCSGA*, 278 F. Supp. 2d at 673-74 (same); Carabell v. United States Army Corps of Eng'rs, 257 F. Supp. 2d 917, 930-31 (E.D. Mich. 2003) (same).

59. *Compare Rice*, 250 F.3d at 268-69 (adopting a broad interpretation of *SWANCC*), *and* United States v. Needham (*In re* Needham), 354 F.3d 340, 345-47 (5th Cir. 2003) (following *Rice*) *with Headwaters*, 243 F.2d at 533-34 (adopting a narrow interpretation of *SWANCC* in the Ninth Circuit), *and Deaton*, 332 F.3d at 698 (following *Headwaters* in the Fourth Circuit), *and Rapanos*, 339 F.3d at 447 (adopting *Headwaters* in the Sixth Circuit), *and Reuth*, 335 F.3d at 598 (construing *SWANCC* narrowly in the Seventh Circuit), *and* United States v. Krilich, 303 F.3d 784, 791 (7th Cir. 2002) ("[*SWANCC*'s] limited holding does not represent a significant change in the law such that it would be equitable to modify or vacate the Consent Decree.") The Second Circuit has not yet addressed the effect, if any, that *SWANCC* has had on the scope of the CWA. *See* Altman v. Town of Amherst, No. 01-7468, 2002 WL 31132139, at *5 (2d Cir. Sept. 26, 2002) (remanding case for determination of, inter alia, "whether the freshwater wetlands within New York were 'waters of the United States' within the meaning of the CWA, *see* [*SWANCC*]").

60. 250 F.3d at 268-69.

61. *Rice*, 250 F.3d at 269. *But see* Downing, *supra* note 3, at 490 (describing this language from *Rice* as dicta that "incorrectly paraphrased a passage from *SWANCC* . . . that referred to wetlands adjacent to any open water body covered by the CWA, whether navigable or not"); *Interstate Gen. Co.*, 2002 WL 1421411, at *3 (rejecting defendant's argument that "*SWANCC* limited the Corps' jurisdiction to (1) traditional navigable waters and (2) wetlands immediately adjacent to traditional navigable waters"); Michael P. Healy, *Law, Policy, and the Clean Water Act: The Courts, the Bush Administration, and the Statute's Uncertain Reach*, 55 ALA. L. REV. 695 (2004) (characterizing *Rice*'s analysis as confusing and incoherent). *Cf. Thorson*, 2004 WL 737522, at *14 ("The [*Rice*] court appears to have assumed that immediacy was implied in the word 'adjacent' and that navigability was implied in the phrase 'open waters.'"); *infra* note 183 (noting that the majority of courts have rejected the Fifth Circuit's "direct abutment" requirement).

62. 33 U.S.C. § 2701(a).

waters" has the same meaning in the OPA as it does in the CWA.[63]

Rice involved a non-navigable creek that was a tributary of a navigable body of water.[64] Nonetheless, despite the seemingly broad holding in *Riverside*, *Rice* held that *SWANCC* "limited the scope of the CWA" to waters that are actually navigable or adjacent to such waters.[65] Finding that the CWA's definition of "navigable waters" does not include groundwater,[66] *Rice* held that groundwater pollution was not covered by the OPA.[67] Additionally,

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63. *Rice*, 250 F.3d at 267 (examining the legislative history of the OPA and noting that "Congress generally intended the term 'navigable waters' to have the same meaning in both the OPA and the CWA"). The Rice court found that the definition of "navigable waters" was the same for both the OPA and the CWA. Id. *See also* United States v. Jones, 267 F. Supp. 2d 1349, 1357 (M.D. Ga. 2003) (citing *Rice* and finding the definitions to be "identical"). There is, however, a slight difference. *Compare* 33 U.S.C. § 2701(21) (defining "navigable waters" as "waters of the United States, including the territorial *sea*") (emphasis added), *with* 33 U.S.C. § 1362(7) (defining "navigable waters" as "waters of the United States, including the territorial *seas*") (emphasis added). It is doubtful that this slight variation has any substantive import, however. Indeed, *Rice* noted that the legislative history of the OPA indicates that the phrase is to be accorded the same meaning in the OPA that it is given in the CWA. *Rice*, 250 F.3d at 267. *But see* Wood, *supra* note 15, at 10188 (characterizing *Rice*'s statements with respect to the CWA as dicta).

64. *Rice*, 250 F.3d at 265 (noting that Big Creek is a small seasonal creek that runs to the Canadian River.). *See id.* at 268 n.4 (noting that wetlands were not at issue in the case).

65. *Id.* at 268-69. *See* 2003 Joint Memorandum, 68 Fed. Reg. at 1997 ("The analysis in [*Rice*] implies that the Fifth Circuit might limit CWA jurisdiction to only those tributaries that are traditionally navigable or immediately adjacent to a navigable water.").

66. *Rice*, 250 F.3d at 269.

67. *Id.* at 271 n.8 (discussing *Village of Oconomowoc Lake v. Dayton-Hudson Corp.*, 24 F.3d 962, 965 (7th Cir. 1994), which held that CWA jurisdiction does not extend to groundwater "simply because those waters may be hydrologically connected to protected surface waters"). *But see* Idaho Rural Council v. Bosma, 143 F. Supp. 2d 1169, 1179-80 (D. Idaho 2001) (noting that federal courts are split on the issue of whether groundwater hydrologically connected to jurisdictional waters are "waters of the United States"). The better interpretation of "waters of the United States," however, includes groundwater because, inasmuch as the CWA is designed to eliminate the pollution of navigable waters, groundwater hydrologically connected to a navigable water is a source of pollution that may reach a navigable water that is no less dangerous than pollution coming from a surface connection. *See id.* at 1180 (holding that "the CWA extends federal jurisdiction over groundwater that is hydrologically connected to surface waters that are themselves waters of the United States" because "Congress's decision not to comprehensively regulate groundwater as part of the CWA does not require the conclusion that Congress intended to exempt ground water from all regulation—particularly under circumstances where the introduction of pollutants into the groundwater adversely affects the adjoining surface waters"); Susan Griffithe, Note, *Isolating the Problem by Finding the Connection: The Proper Approach to Regulating Groundwater Under the Clean Water Act: Idaho Rural Council v. Bosma, 143 F. Supp. 2d 1169 (D. Idaho 2001)*, 27 S. ILL. U. L.J. 437, 454-56 (2003) (concluding that *Bosma* adopted the correct approach concerning CWA

despite evidence that the defendant's oil-drilling activities contaminated navigable waters, *Rice* held that the OPA was not applicable because the polluted surface waters were "seasonal streams" that the court found to be neither navigable nor adjacent to navigable waters.[68] Most important for purposes of this Article, however, was *Rice*'s broad interpretation of *SWANCC*, which was adopted by several district courts — thereby causing a split of authority over the CWA's scope after *SWANCC*.[69]

In contrast to *Rice* and its progeny is the Ninth Circuit Court

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jurisdiction over groundwater); Casey, *supra* note 45, at 174 (concluding that groundwater that is hydrologically connected to jurisdictional waters constitutes "navigable waters" under the CWA). Although groundwater connections may be more susceptible to certain types of pollution than others, such as oil pollution as opposed to dredged spoils or sediment, *see Cal. Sportfishing Prot. Alliance*, 209 F. Supp. 2d at 1076, the ACOE (through administration of the section 404(a) permit process) is in the best position to ascertain which discharges into groundwater hydrologically connected to a navigable water are not likely to pollute a navigable water. *See* Town of Norfolk v. United States Army Corps of Eng'rs, 968 F.2d 1438, 1451 (1st Cir. 1992) (concluding that the EPA and the ACOE was in the best position to make an "ecological judgment about the relationship between surface waters and groundwaters" connected to surface waters). *Cf. Riverside*, 474 U.S. at 135 n.9 (1985) (noting that the ACOE was permitted to exercise jurisdiction over wetlands that were "not significantly intertwined with the ecosystem of adjacent waterways" because discharges into such wetlands could be authorized by a permit). Indeed, the ACOE's scientific expertise places it in a better position than a federal court to make determinations as to the detrimental effect that a groundwater discharge would have on a navigable water.

68. *Rice*, 250 F.3d at 270-71. The court thus found the evidence insufficient to support a finding that the surface waters at issue were "sufficiently linked to an open body of navigable water as to qualify for protection under the OPA." *Id.* at 271.

69. *See* United States v. Rapanos, 190 F. Supp. 2d 1011, 1014-17 (E.D. Mich. 2002) (holding that, under *SWANCC*, the CWA does not cover wetlands adjacent to non-navigable waters), *rev'd*, 339 F.3d 447 (6th Cir. 2003), *cert. denied*, 124 S. Ct. 1875 (2004); United States v. RGM Corp., 222 F. Supp. 2d 780, 786-88 (E.D. Va. 2002) (holding that, under *SWANCC*, the CWA does not cover wetlands adjacent to ditches and streams that only occasionally flow into navigable waters); United States v. Newdunn Assocs., 195 F. Supp. 2d 751, 765 (E.D. Va. 2002) (holding that the ACOE failed to show a "sufficient connection" to navigable waters where the water at issue traveled via several manmade ditches), *rev'd sub nom.* Treacy v. Newdunn Assocs., LLP, 344 F.3d 407 (4th Cir. 2003), *cert. denied sub nom.* Newdunn Assocs., LLP v. United States Corps. of Eng'rs, 124 S.Ct. 1874 (2004). *See also In re Needham*, 279 B.R. 515, 518 (Bankr. W.D. La. 2001) (following *SWANCC* and *Rice* and holding that the OPA did not cover an oil spill into a body of water that was not itself "actually navigable," even though the oil may eventually reach the Gulf of Mexico), *aff'd sub nom.* United States v. Needham, Nos. 01-1987, 01-1898, 2002 WL 1162790, at *1 (W.D. La. Jan. 22, 2002), *rev'd*, 354 F.3d 340, 345-47 (5th Cir. 2003) (following *Rice* but finding that the bankruptcy court's factual findings were clearly erroneous). As noted below, however, *Rapanos*, *Newdunn* and *RGM* are no longer good law. *See infra* Part IV.

of Appeals' decision in *Headwaters, Inc. v. Talent Irrigation District*,[70] which construed *SWANCC* narrowly and concluded that the CWA was not altered by *SWANCC*. *Headwaters* held that the CWA covered non-navigable irrigation canals that served as tributaries of navigable waters.[71] In reaching its decision, the court of appeals held that non-navigable tributaries of navigable waters are "waters of the United States" because of the hydrological connection and consequent potential for pollution to reach navigable waters.[72] Consequently, *Headwaters* held that *SWANCC* only applied to isolated bodies of water with no hydrological connection to navigable waters.[73]

Many courts have adopted *Headwaters*'s rationale and conclusion.[74] For example, the district court in *United States v.*

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70. 243 F.3d 526 (9th Cir. 2001).

71. *Id.* at 528, 533-34. In *Headwaters*, the defendant failed to get a NPDES permit with respect to its use of a herbicide in its irrigation canals. *Id.* at 528-30. Notably, the court found the irrigation canals to be tributaries even though they were part of a "closed system" and that discharges into navigable waters were accidental and infrequent. *Id.* at 533-34 (noting that the irrigation canals leaked into navigable waters in 1983 and 1996). *See* United States v. Phillips, 356 F.3d 1086, 1094 (9th Cir. 2004) (affirming CWA conviction because the creek at issue was a tributary of a navigable water).

72. *Headwaters*, 243 F.3d at 533 (citing, inter alia, United States v. Eidson, 108 F.3d 1336, 1341-42 (11th Cir. 1997) and United States v. TGR Corp., 171 F.3d 762, 764 (2d Cir. 1999)). *Eidson* held that manmade ditches and canals that flowed intermittently into a navigable creek were "waters of the United States." *Eidson*, 108 F.3d at 1342. *TGR* held that a non-navigable brook was a "water of the United States" because it was a tributary of a navigable creek. *TGR*, 171 F.3d at 765.

73. *Headwaters*, 243 F.3d at 533. *See also FD&P*, 239 F. Supp. 2d at 515 (noting that *Headwaters* "concluded that [*SWANCC*] applied only to isolated waters with no hydrological connection to navigable waters").

74. *See infra* Part IV; Cmty. Ass'n for Restoration of the Env't. v. Henry Bosma Dairy, 305 F.3d 943, 954-55 (9th Cir. 2002) (applying *Headwaters*); *Lamplight*, 2002 WL 360652 at *5 (noting that courts other than *Rice* have concluded that "*SWANCC* struck the [MBR], pushing 'isolated waters' that may *affect* interstate commerce out of the Corps' jurisdiction, without altering the Corps' reach where its jurisdiction is based on a water's use or potential use as a channel of interstate commerce"); *Cal. Sportfishing Prot. Alliance*, 209 F. Supp. 2d at 1075-76 (following *Headwaters*); Colvin v. United States, 181 F. Supp. 2d 1050, 1055-56 (C.D. Cal. 2001) (following *Headwaters* and holding that a lake was a "navigable water" because it is used by foreign and interstate tourists); United States v. Buday, 138 F. Supp. 2d 1282, 1288-92 (D. Mont. 2001) (holding that CWA jurisdiction applies to tributaries of navigable waters). *See also Bosma*, 143 F. Supp. 2d at 1180 (holding "that the CWA extends federal jurisdiction over groundwater that is hydrologically connected to surface waters that are themselves waters of the United States"); Aiello v. Town of Brookhaven, 136 F. Supp. 2d 81, 119 (E.D.N.Y. 2001) (holding that "non-navigable tributaries of navigable waters [are] waters of the United States under the CWA") (quoting *TGR*, 171 F.3d at 764-65). In 2004, courts continue to interpret *SWANCC* narrowly, thus following appellate decisions such as *Headwaters*, *Deaton*, and *Rapanos*. *See, e.g., Thorson*, 2004 WL 737522 at *13-14 (following *Deaton* and *Rapanos*). Indeed, one district court

Lamplight Equestrian Center, Inc. followed *Headwaters* and its progeny in holding that CWA jurisdiction extends over wetlands with a hydrological connection, albeit intermittent or periodically broken, with a navigable water because *SWANCC* did not alter the ACOE's jurisdiction over waters as *channels* of interstate commerce as opposed to waters that may affect interstate commerce such as the isolated ponds in *SWANCC*.[75] Moreover, several circuit courts of appeals have held that *SWANCC* did not alter the CWA such that pre-*SWANCC* consent decrees that were not based on the MBR should be set aside.[76] *Headwaters* became the majority view in 2003.

IV. *HEADWATERS*'S NARROW CONSTRUCTION OF *SWANCC* BECAME THE MAJORITY VIEW IN 2003

As noted above, federal courts were sharply divided over the appropriate scope of the CWA in the wake of *SWANCC* — with *Rice* and *Headwaters* serving as the lead cases for alternate interpretations of *SWANCC*. This split of authority largely, although not entirely, disappeared in 2003. In addition to a majority of district courts that have addressed the issue, the

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extended *Headwaters* by holding that *SWANCC* "does not impose a hydrological connection requirement for adjacent wetlands and waters." N. Cal. River Watch v. City of Healdsburg, No. C01-04686WHA, 2004 WL 201502, at *9-10 (N.D. Cal. Jan. 23, 2004) (holding that wetlands were adjacent to navigable waters that were between fifty and "a few hundred feet" away).

75. *Lamplight, 2002* WL 360652, at *5-7. Indeed, "*SWANCC* did not limit Corps jurisdiction under the [CWA] to navigable waters and wetlands adjacent to navigable waters." *Id.* at *8. Consequently, *Lamplight* held that a hydrological connection sufficient to establish CWA jurisdiction exists even though it may be intermittent or "linked through other connections two or three times removed from the navigable water." *Id.* at *7-8.

76. *See Reuth*, 335 F.3d at 604-05 (holding that *SWANCC* did not affect the validity of the consent decree entered into by defendant because it was based on adjacency jurisdiction under 40 C.F.R. § 230.3(s)(7)); *Krilich*, 303 F.3d at 791 ("[*SWANCC*'s] limited holding does not represent a significant change in the law such that it would be equitable to modify or vacate the Consent Decree."); United States v. Interstate Gen. Co., 152 F. Supp. 2d 843, 847 (D. Md. 2001) ("The *SWANCC* case is a narrow holding in that only 33 CFR § 328.3(a)(3), as applied to the Corps' creation of the [MBR], is invalid pursuant to a lack of congressional intent."), *aff'd*, 2002 WL 1421411, at *2-3 (4th Cir. July 2, 2002) (refusing to invalidate defendants' CWA convictions, which resulted from the filling of wetlands adjacent to intermittent culverts and creeks that flow into two non-navigable creeks that eventually reach navigable waters six miles away, on the basis of *SWANCC*); *Interstate Gen. Co.*, 2002 WL 14214111, at *2-3 (holding that *SWANCC* did not affect "a fundamental or significant change in the law governing in this case" because the consent decree was not based on the MBR, which had been invalidated by *Wilson*, 133 F.3d 251, before *SWANCC* was decided). *See also Colvin*, 181 F. Supp. 2d at 1056 (denying motion to set aside CWA conviction in light of *SWANCC*).

Fourth and Sixth Circuit Courts of Appeals, and ostensibly the Seventh Circuit Court of Appeals, have also adopted *Headwaters*'s view that *SWANCC* was a narrow decision that did not alter the ACOE's jurisdiction over waters as channels of interstate commerce such that any hydrological connection to a navigable water suffices to establish CWA jurisdiction.[77]

In *FD&P Enterprises, Inc. v. United States Army Corps of Engineers*,[78] a district court in New Jersey followed *Rice* and broadly construed *SWANCC*. *FD&P* involved wetlands adjacent to a creek that was a tributary of a navigable water.[79] The issue was whether the CWA conferred "jurisdiction over wetlands abutting a non-navigable tributary, which feeds into a navigable body of water."[80] Although this issue had been answered in the affirmative by the Third Circuit Court of Appeals before *SWANCC*, *FD&P* held that *SWANCC* "limited the scope of the CWA."[81] Specifically, the court held that the "significant nexus" required by *SWANCC* "must constitute more than a mere 'hydrological connection.'"[82]

Applying this heightened standard, the court nonetheless found that summary judgment was inappropriate because there was a genuine issue of material fact whether there would be a substantial nexus between the wetlands at issue and the Hackensack River.[83] *FD&P*, however, erred in broadly construing

77. Mank, *supra* note 11, at 820 ("[A] majority of courts have read *SWANCC* narrowly to mean that although the [CWA] does not reach isolated, non-navigable waters with no connection to navigable waters, it does reach inland waters or wetlands that have a hydrological or ecological connection to navigable waters."); Craig, *supra* note 23, at 132 ("The emerging majority rule among the federal courts and EPA ALJs is that any surface water connection to waters that are navigable in the traditional sense—however intermittent, convoluted, or human-made the connection might be—is sufficient to confer CWA jurisdiction over a water body.").

78. 239 F. Supp. 2d 509 (D.N.J. 2003). *FD&P* was decided on January 15, 2003.

79. *Id.* at 517 (finding that the wetlands at issue drained into Penhorn Creek, which was a tributary of the Hackensack River, establishing a hydrological connection one mile away from the wetlands).

80. *Id.* at 511.

81. *Id.* at 512-13 (discussing United States v. Pozsgai, 999 F.2d 719 (3d Cir. 1993)). *Pozsgai* held that, under *Riverside*, the CWA covered wetlands adjacent to a non-navigable stream that flowed into a navigable waterway. *Pozsgai*, 999 F.2d at 730-33.

82. *FD&P*, 239 F. Supp. 2d at 516-17 ("In light of [*SWANCC*], it is the view of this court that the 'hydrological connection' test is no longer the valid mode of analysis."). Notably, the court appears to have been somewhat reluctant to follow what it construed to be the holding in *SWANCC*. *Id.* at 515-16 ("[A] reading of [*SWANCC*] which would confine CWA jurisdiction solely to navigable waters and those waters one step removed from navigable waters could ultimately serve to undermine the basic purposes of the CWA . . . [n]evertheless, we are obligated to read the CWA in light of [*SWANCC*].").

83. *Id.* at 517. Nonetheless, the court rejected FD&P's argument that "the

SWANCC. Indeed, the court noted that it was constrained by *SWANCC* under the doctrine of stare decisis.[84] *SWANCC*, however, was inapplicable because, unlike *FD&P*, it was not a channels of interstate commerce case.[85] *FD&P* thus construed *Rice* and *SWANCC* too broadly.[86] In any event, as discussed below, *FD&P* represents a minority view regarding the CWA in a post-*SWANCC* world.

In *Carabell v. United States Army Corps of Engineers*, a district court in Michigan followed *Headwaters* because it found more persuasive "the reasoning of the courts which have concluded that the Court's ruling in *SWANCC* was narrow, and did not substantially narrow the jurisdiction of the [ACOE] under the CWA."[87] *Carabell* reviewed an administrative appeal from a decision by the ACOE to deny a section 404 permit,[88] thus applying the highly deferential "arbitrary and capricious" standard of review.[89] The court upheld the ACOE's jurisdictional determination on the ground that the subject wetlands were adjacent to non-navigable bodies of water that drained into a navigable water, thus establishing a "significant nexus" under *SWANCC*.[90] The court also upheld the ACOE's permit denial because the Carabells failed to overcome the regulatory presumption that a practical alternative was available.[91] *Carabell* demonstrates that courts accord the ACOE wide discretion in making section 404(a) permit determinations.[92]

Corps' assertion of jurisdiction over the FD&P wetlands violates the Commerce Clause" because FD&P was building a commercial facility for interstate freight transportation. *Id.* at 518.

84. *Id.* at 516.

85. *See supra* note 30 (noting that *SWANCC*'s discussion of *Riverside* is dicta).

86. *Jones*, 267 F. Supp. 2d at 1359 n.7 (criticizing *FD&P* and noting that *Rice* did not limit OPA jurisdiction to waters that are actually navigable).

87. 257 F. Supp. 2d at 930-31 (refusing to follow *Rice*).

88. *Id.* at 924-25. The Carabells wanted to build a condominium complex on a nineteen acre parcel of land that contained twelve acres of wetlands. *Id.* at 919-20. A state agency granted the Carabells' permit request, but the EPA objected and exercised federal jurisdiction over the property. *Id.* at 920. The EPA authorized the ACOE to determine whether it should issue a section 404(a) permit, which it declined to issue on the grounds that (1) jurisdiction existed because the wetlands were adjacent to two ditches that drained into a navigable water (Lake St. Clair); (2) the project was against the public interest; and (3) the developers failed to rebut the presumption that less damaging practicable alternatives existed. *Id.* at 920-26. The Carabells' administrative appeal was also denied. *Id.* at 926.

89. *Id.* at 926-27.

90. *Id.* at 930-32.

91. *Id.* at 933-34 (applying 33 C.F.R. § 320.4 and 40 C.F.R. § 230.10(a)).

92. *See* Ostergren, *supra* note 7, at 405 (noting that the ACOE "exercises significant discretion" in making permit determinations).

In *United States v. Hummel*,[93] a district court in Illinois followed *Headwaters*. *Hummel* involved sewer installation in a wetland connected or adjacent to a creek that is a tributary of a navigable water.[94] The defendants were prosecuted for violating the CWA and they moved for summary judgment.[95] The court rejected the defendants' interpretation of *SWANCC*, that the CWA only covers wetlands that are directly adjacent to a navigable water.[96] Rather, the court followed the majority approach in *Headwaters,* which had been followed by the Seventh Circuit Court of Appeals.[97] *Hummel* held that the ACOE permissibly exercised jurisdiction over the subject wetlands because a hydrological connection existed — which constituted a "significant nexus" between the wetland and a navigable water.[98]

In *United States v. Jones*, a district court in Georgia construed *SWANCC* and *Rice* narrowly.[99] *Jones* held that the defendants violated both the OPA and the CWA by discharging oil into a storm drain that emptied into several ditches and a wetland adjacent to a river one to two miles away from the defendants' property.[100] In reaching this holding, the court made several findings. First, *Jones* applied the same analysis for the OPA and CWA claims.[101] Second, the court followed *Headwaters* in adopting a narrow construction of *SWANCC*.[102] The *Jones* court also found that courts that construed *Rice* (and hence *SWANCC*) broadly did so in error.[103] Rather, *Rice*'s "significant nexus" analysis suggested that the creek at issue would be navigable if there was evidence of a sufficient link.[104] Consequently, having concluded that *SWANCC*

93. 2003 WL 1845365 at *6-7.

94. *Id.* at *3. *See also id.* at *3-4 (noting that the subject wetlands were connected to Indian Creek, a tributary of the Des Plaines River).

95. *Id.* at *1.

96. *Id.* at *4-5 ("Contrary to Defendants' position, the Supreme Court's holding [in *SWANCC*] did not attempt to define precisely how connected a particular body of water must be to a navigable water to receive CWA protection.").

97. *Id.* at *5 (citing *Krilich*, 303 F.3d at 791).

98. *Id.* at *6-7 (noting that "[m]any courts, both before and after *SWANCC*," have held that a hydrological connection establishes CWA jurisdiction, even where the regulated water is two or three times removed from the navigable water).

99. 267 F. Supp. 2d at 1357-60.

100. *Id.* at 1353, 1357-60.

101. *Id.* at 1357 (following *Rice*).

102. *Id.* at 1360 ("The Court believes a complete reading of *SWANCC* reveals that the Supreme Court actually had no intention of defining 'navigable waters' as narrowly as courts have done in cases such as *Needham* and *FD&P Enterprises*.").

103. *Id.* at 1359-60 (discussing *FD&P*, 239 F. Supp. 2d at 516, and *In re Needham*, 279 B.R. at 518). *Jones* further noted that "[a]ny other interpretive language" in *SWANCC* beyond its MBR analysis was dicta. *Id.* at 1360.

104. *Id.* at 1359 n.7 ("If the Fifth Circuit [in *Rice*] is expressing, as other

"did not dramatically alter CWA case law," the *Jones* court applied the Eleventh Circuit's decision in *United States v. Eidson*, which held that CWA jurisdiction exists if water is hydrologically connected to a navigable water.[105]

In *North Carolina Shellfish Growers Ass'n v. Holly Ridge Associates, LLC* ("*NCSGA*"), a district court in North Carolina followed *Headwaters* and construed *SWANCC* narrowly.[106] *NCSGA* held that CWA jurisdiction extended to various waters on the defendant's property because they were hydrologically connected to navigable waters.[107] Specifically, the court held that an "absence of channelized flow between" a navigable water and a non-navigable water does not prevent the non-navigable water from being considered a tributary under the CWA.[108] Having found the waters at issue to be jurisdictional, the court applied both sections 402 and 404. The court found that the defendant violated section 402 by digging ditches without a NPDES permit.[109] The

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courts contend it is, that OPA applies only to 'actually navigable' waters, the court would not have focused on whether there was a *sufficient link* to an open body of navigable water in determining whether there was a navigable water.").

105. *Id.* at 1360; *supra* note 72.

106. 278 F. Supp. 2d 654, 674 (E.D.N.C. 2003) ("This Court agrees with the reasoning of those courts that have taken a narrower view of *SWANCC* [, which] involved isolated waters lacking any hydrological connection to traditional navigable waters."). Indeed, *NCSGA* noted that *SWANCC* reaffirmed *Riverside*. *Id.*

107. *Id.* at 669-75. The Court found that defendant's property fell within CWA jurisdiction because it (1) contained wetlands that drained into a navigable water (i.e., Stump Sound), *id.* at 670; (2) contained manmade ditches on the property that were connected to the jurisdictional wetlands, *id.* at 670, 672-73; (3) was connected to Stump Sound by a non-navigable tributary (i.e., Cypress Branch), *id.* at 671; (4) contained wetlands adjacent to non-navigable tributaries of navigable waters, *id.* at 672-74; and (5) contained an "on-site lake" that was an impoundment of jurisdictional waters and which drained into a navigable water, *id.* at 675. Notably, the court held that "evidence of a discharge is critical to a finding of liability, [but that] it is not relevant to the Court's determination of jurisdiction." *Id.*

108. *NCSGA* at 671. *See id.* (discussing *Headwaters* and *Eidson*, which have held that intermittent streams are covered by the CWA). *NCSGA* found this position to be consistent with *SWANCC* because any hydrological connection establishes the "significant nexus" required for CWA jurisdiction because there is potential for the pollution of navigable waters where the "hydrological connection occurs in a channelized flow or a network of flat bottoms and braids, continuously or intermittently." *Id.* at 671-72 (discussing *Deaton*, 332 F.3d at 698).

109. *Id.* at 675. In so finding, the court noted that redepositing sediment after digging a ditch constituted a "discharge" within the meaning of the CWA and that "pollutant" included items such as sediment and sand. *Id.* at 676. The court also applied 33 U.S.C. § 1342(p)(3)(A) and found that the defendants failed to obtain a permit to discharge stormwater "associated with an industrial activity" — which constitutes a "pollutant" under the CWA. *Id.* at 678-79 (discussing 40 C.F.R. § 122.26(b)(14)(x), which defines "industrial

defendant's ditch digging activities (without a section 404(a) permit) also violated section 404.[110]

In addition to a majority of district courts that have addressed the scope of *SWANCC* in 2003, recent decisions by the Fourth, Sixth, and Seventh Circuit Courts of Appeals have greatly healed the post-*SWANCC* split. A majority of circuits now construe *SWANCC* narrowly.

A. The Fourth Circuit Court of Appeals Construes SWANCC Narrowly

On June 12, 2003, the Fourth Circuit Court of Appeals adopted a narrow construction of *SWANCC* in *United States v. Deaton*.[111] The Deatons were convicted of violating the CWA by failing to get a permit before digging a ditch designed to drain wetlands on their property.[112] The wetlands at issue were adjacent to a ditch that was hydrologically connected to a navigable water, which was eight miles away from the Deatons' wetlands.[113] The district court granted the Deatons' summary judgment motion on the ground that their use of the sidecasting technique to dig the ditch did not constitute a "discharge" of pollutants within the meaning of the CWA.[114] The court of appeals, however, reversed, holding that the CWA's definition of "discharge" encompassed sidecasting.[115] The case was thus remanded back to the district

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activity" to include "clearing, grading and excavation, except operations that result in the disturbance of less than five acres of total land area").

110. *Id.* at 682-83. Although the court found that the defendant had violated section 404, it also found a genuine issue of material fact as to the applicability of an exemption. *Id.* at 683.

111. 332 F.3d at 698.

112. *Id.* at 702-03. The Deatons had a contractor dig an 1100-foot ditch across the property, piling the excavated dirt on either side of the ditch, a practice known as sidecasting. *Id.* at 703. *See* United States v. Deaton, 209 F.3d 331, 335-37 (4th Cir. 2000) (holding that sidecasting in a jurisdictional wetland is the discharge of a pollutant under the [CWA], even though there is "no net increase of materials present in the wetland"). Several other courts have held that sidecasting constitutes a "discharge" within the meaning of the CWA. *See* Borden Ranch P'shp v. United States Army Corps of Eng'rs, 261 F.3d 810, 815 (9th Cir. 2001) (holding that plowing or "deep ripping" wetlands constituted discharge of a pollutant within meaning of CWA), *aff'd*, 537 U.S. 99 (2002); *Hummel*, 2003 WL 1845365 at *8-9 (following *Deaton*, 209 F.3d at 335-36).

113. *Deaton*, 332 F.3d at 702-03. It was undisputed that the Deatons' wetlands were adjacent to a drainage ditch that "drains into a culvert under Morris Leonard Road [which goes under the road and] drains into another ditch, known as the John Adkins Prong of Perdue Creek [and that] Perdue Creek flows into Beaverdam Creek [which] is a direct tributary of the Wicomico River, which is navigable." *Id.* at 702.

114. *Id.* at 703.

115. *Id.* (discussing *Deaton*, 209 F.3d at 337).

court.[116]

Shortly after the case was remanded, *SWANCC* was decided. Consequently, the Deatons sought reconsideration of whether CWA jurisdiction extended to their wetlands.[117] The Deatons argued that, "under *SWANCC*, the [CWA] cannot be read to extend [ACOE] jurisdiction to their wetlands or the roadside ditch [adjacent thereto] and that if the [CWA] does extend that far, Congress exceeded its authority under the Commerce Clause."[118] The district court denied the motion, holding that, inter alia, CWA jurisdiction extended to the Deatons' wetlands because they were hydrologically connected to a navigable water.[119] The court of appeals affirmed the district court on appeal.

Deaton began its analysis by reviewing the CWA's statutory framework, which prohibits discharges into "navigable waters," defined as "waters of the United States."[120] The ACOE further defines "waters of the United States" as encompassing, inter alia, traditional navigable waters, tributaries of covered waters, and wetlands adjacent to covered waters.[121] *Deaton* held that the CWA, as interpreted by the ACOE's regulations, "fits comfortably within Congress's authority to regulate navigable waters."[122] In so holding, the court made several legal conclusions in undertaking "a somewhat complicated analysis."[123] First, the court found that the analysis in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[124] was applicable because the case did not present a serious constitutional question.[125] Inasmuch as *SWANCC* indicated that the CWA was based on Congress's power over navigable waters (i.e., as a channel of interstate commerce),

116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Deaton*, 332 F.3d at 704.
121. *Id.* (discussing 33 C.F.R. §§ 328.3(a)(1), (5), (7)). The court noted that "[s]everal courts have held that *SWANCC* limited [*Riverside*'s] holding to wetlands adjacent to traditional navigable waters." *Id.* (citing *Rice*, 250 F.3d at 268-69; *RGM*, 222 F. Supp. 2d at 780-86; *Newdunn*, 195 F. Supp. 2d at 763, 767-68; *Rapanos*, 190 F. Supp. 2d at 1015-16). Notably, however, the Deatons did not press for such an interpretation of *SWANCC*. *Id.* Rather, they argued that their wetlands were not adjacent to a covered water. *Id.*
122. *Id.* at 704-05.
123. *Id.* at 705.
124. 467 U.S. 837 (1984).
125. *Deaton*, 332 F.3d at 705 ("[W]hen we do not face the sort of serious constitutional questions that would lead us to assume Congress did not intend to authorize [the regulation's] issuance, we may decide the constitutional question and proceed to the *Chevron* analysis.") (internal quotations omitted) (second alteration in original); *id.* at 708 (concluding that the ACOE's "regulatory interpretation of the term 'waters of the United States' as encompassing nonnavigable tributaries of navigable waters does not invoke the outer limits of Congress's power or alter the federal-state framework").

Deaton held that "Congress's authority over the channels of commerce is thus broad enough to allow it to legislate, as it did in the Clean Water Act, to prevent the use of navigable waters for injurious purposes."[126] Consequently, the court held that Congress had the authority to regulate non-navigable waters that serve as a tributary of a navigable water, because the pollution of such tributaries has the potential to reach navigable waters.[127] In other words, *Deaton* found that the CWA extends to all waters and adjacent wetlands that are hydrologically connected to navigable waters.[128] Second, *Deaton* held that the ACOE may regulate "trivial" discharges such as "sidecasting" because Congress has the authority to decide whether the aggregate effect of such discharges justifies regulation of all such discharges.[129] Third, the CWA does not interfere with the balance of federalism because Congress's power to regulate navigable waters as channels of commerce is a power that "exists alongside the states' traditional police powers."[130]

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126. *Id.* at 705-08. Indeed, *Deaton* noted that

> Congress's power over channels of interstate commerce, unlike its power to regulate activities with a substantial relation to interstate commerce, reaches beyond the regulation of activities that are purely economic in nature [and that the] power to regulate channels of interstate commerce allows Congress to make laws that protect the flow of commerce.

Id. at 706 (citing Heart of Atlanta Motel, Inc. v United States, 379 U.S. 241 (1964)). Consequently, under this interpretation, *SWANCC* strengthened CWA jurisdiction by holding that it was based on Congress's power over navigability, which does not require a substantial relation to economic activity. *Id.* (discussing *Caminetti v. United States*, 242 U.S. 470, 491 (1917), which held that Congress had the power, when enacting the Mann Act, to prohibit the transportation of "any woman or girl" across state lines for immoral purposes, conduct that "was entirely noncommercial"). *See Thorson*, 2004 WL 737522 at *14 (noting that 33 C.F.R. § 328.3(7) subjects wetlands to the CWA "*because of* their connection with waters that are navigable in fact" and concluding that "the textual concerns guiding the Court's opinion in *SWANCC* are [thus] not implicated"); *id.* at *16 ("In arguing that congressional authority to regulate the channels of interstate commerce empowers Congress to regulate only those activities threatening the channel's suitability to transport goods, defendants advocate a construction that contravenes long-standing commerce clause precedent [as set forth in *Caminetti*].").

127. *Deaton*, 332 F.3d at 707 ("The power over navigable waters also carries with it the authority to regulate non-navigable waters when that regulation is necessary to achieve Congressional goals in protecting navigable waters. Any pollutant or fill material that degrades water quality in a tributary of navigable waters has the potential to move downstream and degrade the quality of the navigable waters themselves.") (citations omitted).

128. Consequently, *Deaton* implicitly overruled *RGM*, 222 F. Supp. 2d 780.

129. *Deaton*, 332 F.3d at 707 (discussing Wickard v. Filburn, 317 U.S. 111 (1943)).

130. *Id.* Indeed, "[a]lthough States have important interests in regulating . . . natural resources within their borders, this authority is shared with the Federal Government when the Federal Government exercises one of

After concluding that the analysis in *Chevron* was applicable, the *Deaton* court accorded deference to the ACOE's interpretation of its regulation as extending jurisdiction over the roadside ditch adjacent to the Deatons' wetlands as a "tributary" within the meaning of the CWA.[131] First, the *Deaton* court found that the CWA was ambiguous in its definition of "waters of the United States" as to whether such included distant, non-navigable tributaries of navigable waters.[132] Second, *Deaton* held that the ACOE's regulation[133] — extending jurisdiction to non-navigable tributaries of navigable waters — was ambiguous. Although the drainage ditch at issue was clearly a tributary of a navigable water, it was ambiguous whether section 328.3(a)(5) applied to tertiary tributaries as well as direct or primary tributaries.[134] Consequently, the court deferred to the ACOE's interpretation of section 328.3(a)(5).[135] Third, the court found that the ACOE's interpretation of "tributary" — which included every tributary in the system that eventually reaches a navigable water — was not "plainly erroneous."[136] Fourth, *Deaton* held that ACOE's interpretation of the CWA was reasonable because of the nexus between navigable waters and their non-navigable tributaries in terms of the potential for downstream pollution.[137] *Chevron* deference was thus accorded to the ACOE's interpretation of the CWA.[138]

On September 10, 2003, the Fourth Circuit Court of Appeals again construed *SWANCC* narrowly in *Treacy v. Newdunn Associates, LLP*, which was an ACOE enforcement action involving wetlands hydrologically connected to a navigable water by a series of connections including a man-made ditch crossing under a highway.[139] The *Treacy* court applied *Deaton* and held that CWA

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its enumerated powers. . . ." *Id.* (citing Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 204 (1999)) (alterations in original).

131. *Id.* at 708-09.

132. *Id.* at 709.

133. *Id. See* 33 C.F.R. §328.3(a)(5) (defining "waters of the United States" to include tributaries of navigable waters).

134. *Deaton*, 332 F.3d at 710-11

135. *Id.* at 710.

136. *Id.* at 710-11.

137. *Id.* at 711-12. To this end, *Deaton* held that the ACOE may change its interpretation (from its 1974 interpretation) as long as the new interpretation is reasonable. *Id.*

138. *Id.*

139. 344 F.3d at 407. *See id.* at 409-10 ("[T]he Newdunn Wetlands remain connected to the navigable waters of Stony Run by the intermittent flow of surface water through approximately 2.4 miles of natural streams and manmade ditches (paralleling and crossing under I-64)."). *Treacy* reversed the decision in *Newdunn*, 195 F. Supp. 2d at 765 (holding, inter alia, the ACOE failed to prove a "sufficient connection between the wetlands" and a navigable water). *Treacy*, 344 F.3d at 417.

jurisdiction existed over the Newdunn wetlands because a hydrological connection with navigable waters constituted a "sufficient nexus."[140] Significantly, the court found that "Newdunn's insistence that *SWANCC* limited the Corps' jurisdiction solely to those wetlands adjacent to navigable waters-in-fact is plainly incorrect."[141] *Treacy* also held that a subterranean manmade ditch constituted a "tributary" for CWA purposes.[142] Accordingly, the Fourth Circuit Court of Appeals construes *SWANCC* narrowly.[143]

B. The Sixth Circuit Court of Appeals Construes SWANCC Narrowly

On August 5, 2003, the Sixth Circuit Court of Appeals adopted a narrow construction of *SWANCC* in *United States v. Rapanos*.[144] Rapanos traversed a tortured path within the federal court system that eventually led to the reinstatement of his conviction for unlawfully filling wetlands in violation of the CWA.[145] After appealing his conviction, the Supreme Court

140. *Id.* at 416-17 ("In sum, the Corps' unremarkable interpretation of the term 'waters of the United States' as including wetlands adjacent to tributaries of navigable waters is permissible under the CWA because pollutants added to any of these tributaries will inevitably find their way to the very waters that Congress has sought to protect.").

141. *Id.* at 415 n.5. *SWANCC* merely held that the ACOE's attempt to exercise "jurisdiction over isolated ponds that had *no hydrologic connection whatsoever* to navigable waters could not stand." *Id.* at 415 (emphasis added). *Treacy* further noted that, "[a]s we held in [*Wilson*, 133 F.3d at 253-54], and as the Supreme Court affirmed in *SWANCC*, the Corps' jurisdiction does not extend to the limits of the Commerce Clause." *Id.* at 416.

142. *Id.* at 417 ("If this court were to conclude that the I-64 ditch is not a 'tributary' solely because it is manmade, the CWA's chief goal would be subverted. Whether man-made or natural, the tributary flows into traditional, navigable waters."). *See Cal. Sportfishing Prot. Alliance*, 209 F. Supp. 2d at 1075-76 (holding that an underground pipeline was sufficient hydrological connection within the meaning of the CWA).

143. Notably, however, *Deaton* made only passing reference to *Headwaters*, and did not cite it as authority for a narrow interpretation of *SWANCC*. *See Deaton*, 332 F.3d at 710-11. Moreover, *Treacy* followed *Deaton* and failed to cite *Headwaters*.

144. 339 F.3d at 447.

145. *Id.* at 448. The Michigan Department of Natural Resources ("MDNR") informed Rapanos that his land contained wetlands and that a permit would be required in order to start development. *Id.* at 449. Rapanos hired a consultant who found the property to contain between forty-nine and fifty-nine acres of wetlands. *Id.* Rapanos told the consultant to destroy any paper evidence concerning the wetlands and threatened to sue him if he did not comply. *Id.* Despite warnings from the EPA and the MDNR, Rapanos began filling the wetlands. *Id.* After a search warrant was obtained, twenty-nine acres of wetlands were found on Rapanos's land. *Id.* Rapanos was convicted for unlawfully filling in wetlands in violation of the CWA. *Id.* at 448-50. Rapanos subsequently appealed, was denied certiorari, appealed again, was

remanded the case to the district court in light of *SWANCC*.[146]

The district court set aside Rapanos's conviction and dismissed the case on the ground that *SWANCC* altered CWA jurisdiction such that federal jurisdiction did not extend to Rapanos's wetlands because they were "not directly adjacent to navigable waters" and because Rapanos's activities did not affect navigable waters that were twenty miles away.[147] The district court's decision in *Rapanos* was often cited for the proposition that a split of authority existed concerning whether *SWANCC* should be interpreted narrowly when making CWA jurisdictional determinations.[148] As noted, however, the district court's ruling was reversed by the Sixth Circuit Court of Appeals.

Although Rapanos's wetlands were "between eleven and twenty miles away from the nearest navigable[]" waterway,[149] they were adjacent to a drainage ditch that was hydrologically connected to a navigable-in-fact water.[150] Accordingly, the court of appeals held that jurisdiction existed because of the "ample nexus" between the wetlands and the "navigable waters."[151]

Several aspects of the court of appeals's rationale are noteworthy. First, *Rapanos* narrowly construed *SWANCC*, noting that it merely invalidated the MBR,[152] but that it did not restrict the CWA's "coverage to only wetlands directly abutting navigable water."[153] *Rapanos*, therefore, held that CWA jurisdiction extends to wetlands that are not directly adjacent to navigable waters.[154]

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granted certiorari, had his case remanded by the Supreme Court in light of *SWANCC*, and had his case dismissed by the district court on remand. *Id.* The court of appeals, however, reversed the district court and reinstated Rapanos's conviction. *Id.*

146. *Id.* at 448-50.

147. *Rapanos*, 190 F. Supp. 2d at 1015-16. The district court noted that the *SWANCC* dissent found the "wetlands in [*SWANCC*]"to be ecologically connected and that the majority referred to "the wetlands as isolated, indicating what is likely a significant shift in its CWA jurisprudence." *Id.* at 1014 n.3.

148. *See, e.g., Carabell*, 257 F. Supp. 2d at 929.

149. *Rapanos*, 339 F.3d at 449. The wetlands at issue were "connected to the Labozinski Drain (a one hundred year-old man-made drain) which flows into Hoppler Creek which, in turn, flows into the Kawkawlin River, which is navigable." *Id.*

150. *Id.* at 453.

151. *Id.*

152. *Id.* In so finding, the court rejected Rapanos's argument, which had been accepted by the district court, that *SWANCC* restricted CWA coverage "to only wetlands directly abutting navigable water." *Id.* Rather, *SWANCC* invalidated the MBR "because it found 'nothing approaching a clear statement from Congress that it intended [the Act] to reach an abandoned sand and gravel pit.'" *Id.* (quoting *SWANCC*, 531 U.S. at 174) (alteration in original).

153. *Id.*

154. *Rapanos*, 339 F.3d at 452-53.

Second, *Rapanos* adopted the reasoning of *Deaton*,[155] which, as noted above, held that a nexus between navigable waters and their non-navigable tributaries was sufficient to confer CWA jurisdiction.[156] Finally, the *Rapanos* court found that CWA jurisdiction existed where wetland contamination *could* result in contamination of navigable waters.[157] Consequently, under *Rapanos*, a hydrological connection between navigable waters and wetlands adjacent to non-navigable waters confers CWA jurisdiction — despite the fact that the hydrological connection was between eleven and twenty miles long and consisted of several links.[158]

On July 26, 2004, the Sixth Circuit Court of Appeals reaffirmed its narrow interpretation of *SWANCC* in *United States v. Rapanos* ("*Rapanos II*").[159] The court of appeals noted that "the majority of courts have interpreted *SWANCC* narrowly to hold that while the CWA does not reach isolated waters having no hydrological connection with navigable waters, it does reach inland waters."[160] Furthermore, as discussed below, the *Rapanos II* court rejected the Fifth Circuit Court of Appeals' holding in *Needham*.[161]

C. The Seventh Circuit Court of Appeals Construes SWANCC Narrowly

On July 10, 2003, the Seventh Circuit Court of Appeals decided *United States v. Reuth Development Co.*, which construed *SWANCC* narrowly.[162] Unlike *Deaton* or *Rapanos*, which were enforcement actions under the CWA, the issue in *Reuth* was whether a pre-*SWANCC* consent decree could be vacated in light of *SWANCC*.[163] The developer sought to vacate or modify the consent decree in light of *SWANCC* pursuant to Rule 60(b)(5) of the Federal Rules of Civil Procedure.[164] In affirming the district court's denial of the developer's motion, the *Reuth* court noted that

155. *Id.* at 453 (following *Deaton*, 332 F.3d at 708-09).

156. *Deaton*, 332 F.3d at 712.

157. *Rapanos*, 339 F.3d at 453 (holding that CWA jurisdiction existed because "[a]ny contamination of the Rapanos wetlands could affect the Drain, which, in turn could affect navigable-in-fact waters").

158. *Id.* at 449, 453.

159. 2004 WL 1646356, at *6-9 (6th Cir. Jul. 26, 2004) (affirming judgment of district court in government's civil action against Rapanos).

160. *Id.* at *6.

161. *Id.* at *6-8.

162. 335 F.3d at 604. *See Krilich*, 303 F.3d at 791 (construing *SWANCC* narrowly in an action to vacate a consent decree in the Seventh Circuit).

163. *Reuth*, 335 F.3d at 603. Also, unlike *Deaton* and *Rapanos*, which were enforcement actions by the ACOE, the consent decree in *Reuth* stemmed from an EPA enforcement action. *Id.* at 600-01. Consequently, 40 C.F.R. § 230.3(s) was construed by *Reuth*, rather than 33 C.F.R. § 328.3(a). *Id.* at 601.

164. *Id.* at 603.

the consent decree had been based on both "adjacent to"[165] jurisdiction and "effect on interstate commerce"[166] jurisdiction.[167] *Reuth* did not address the continued vitality of "effect on interstate commerce" jurisdiction[168] because it held that *SWANCC* "did not affect the law regarding [adjacency jurisdiction]."[169] Indeed, the *Reuth* court noted that *SWANCC* "did not address [adjacency] at all."[170] Consequently, under *Reuth*, it appears that the Seventh Circuit Court of Appeals has essentially adopted *Headwaters*'s narrow interpretation of *SWANCC*.[171]

D. The Fifth Circuit Court of Appeals Continues to Construe SWANCC Broadly

On December 16, 2003, the Fifth Circuit Court of Appeals decided *United States v. Needham*, which reaffirmed *Rice*'s narrow interpretation of *SWANCC*.[172] Like *Rice*, *Needham* involved the OPA, which "imposes strict liability upon parties that discharge oil into 'navigable waters,' a term defined in the statute to mean 'the waters of the United States . . . .'"[173] *Needham* noted that the OPA's definition of "navigable waters" is "co-extensive with the definition found in the [CWA]."[174] Although *Needham* sheds some light on the Fifth Circuit Court of Appeals's interpretation of the CWA's post-*SWANCC* scope, its statements with respect to the CWA, like similar pronouncements in *Rice*, are dicta.[175]

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165. *Id.* at 601. *See* 40 C.F.R. § 230.3(s)(7).

166. *Reuth*, 335 F.3d at 601. *See* 40 C.F.R. § 230.3(s)(3).

167. *Reuth*, 335 F.3d at 601.

168. *Id.* at 603-04 (stating in dicta that, under *SWANCC*'s reasoning, 40 C.F.R. § 230.3(s)(3)'s "effect on interstate commerce" jurisdiction appears doomed because it suffers from the same infirmity as the MBR, no nexus to navigability).

169. *Id.* at 604.

170. *Id.*

171. *Cf. id.* at 604 (discussing *Riverside* and *Deaton*). In any event, it appears that, under *Reuth* and *Krilich*, the Seventh Circuit Court of Appeals will eventually rule that the ACOE has jurisdiction over a body of water or wetland that has a hydrological connection to a navigable water. Indeed, a district court within the Seventh Circuit recently upheld CWA jurisdiction based upon a hydrological connection between a wetland adjacent to a non-navigable tributary of a navigable water based on its interpretation of, inter alia, *Reuth*, *Rapanos* and *Deaton*. *See Thorson*, 2004 WL 737522 at *13 ("Although the court's statements about adjacency in *Reuth* were dicta and therefore not binding, I agree that the reasoning in *Deaton* (and *Rapanos*) is persuasive and that *SWANCC* does not foreclose the hydrological connection standard for determining adjacency.").

172. 354 F.3d at 344-47.

173. *Id.* at 342, 344.

174. *Id.* at 344 (citing *Rice*, 250 F.3d at 267).

175. *See* Wood, *supra* note 15, at 10188 ("[O]ne can only conclude from the emphatic dicta in the *Needham* and *Rice* decisions that the Fifth Circuit is likely to adopt a narrow interpretation of CWA jurisdiction whenever a case

Needham Resources, Inc., a company owned by James and Janell Needham, was responsible for an oil spill.[176] The EPA and the U.S. Coast Guard ultimately cleaned up the spill and subsequently attempted to recover the response costs from the Needhams.[177] The day before the Coast Guard filed suit, the Needhams filed for bankruptcy protection.[178] While litigating the government's claims in the bankruptcy court, the parties stipulated that the oil, which was originally discharged into the drainage ditch at Thibodeaux Well, spilled into Bayou Cutoff, and then into Bayou Folse. Bayou Folse flows directly into the Company Canal, an industrial waterway that eventually flows into the Gulf of Mexico.[179]

The EPA filed a proof of claim, which the bankruptcy court denied on the ground that "neither the drainage ditch nor Bayou Cutoff are navigable waters as that term is defined in the OPA nor are they sufficiently adjacent to the navigable waters to support an extension of the OPA."[180] The bankruptcy court was affirmed on appeal by the district court.[181] The Fifth Circuit Court of Appeals, however, reversed and remanded the case to the bankruptcy court.[182]

The *Needham* court rejected the government's argument that the OPA covered "all waters, excluding groundwater, that have any hydrological connection with 'navigable water.'"[183] In doing so, the court noted that its decision was contrary to recent decisions by the Fourth and Sixth Circuit Courts of Appeals in *Deaton* and *Rapanos* respectively.[184] *Needham* stated that "[t]he CWA and the OPA are not so broad as to permit the federal government to impose regulations over 'tributaries' that are neither themselves

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eventually is decided by that court of appeals requiring an actual holding of law governing the subject."). *Cf. Woodley/Grumbles Testimony*, *supra* note 6 ("Two Fifth Circuit decisions, although not squarely in conflict with the other Circuits, reasoned in non-binding discussion that *SWANCC* narrowed jurisdiction over tributaries to include waters that are actually navigable or waters adjacent to an open body of navigable water.").

176. *Needham*, 354 F.3d at 343.

177. *Id.*

178. *Id.*

179. *Id.*

180. *In re Needham*, 279 B.R. at 519.

181. *Needham*, 2002 WL 1162790 at *1.

182. *Needham*, 354 F.3d at 347.

183. *Id.* at 345 (citing 40 C.F.R. § 300.5 (2003)).

184. *Id.* at 345. *See also* Mank, *supra* note 11, at 820 (discussing *Needham* and noting that it confirmed the Fifth Circuit's "narrow interpretation of the [CWA] in light of *SWANCC* and explicitly rejected the narrow interpretation *SWANCC* and broad interpretation of the [CWA] recently adopted by the Fourth and Sixth Circuits"); Wood, *supra* note 15, at 10189 (noting that *Needham* "boldly declares that the CWA's existing jurisdiction is limited to open bodies of actually navigable waters, plus any water body immediately adjacent, i.e., immediately proximate, to actually navigable open waters").

navigable nor truly adjacent to navigable waters."[185]

Although the court of appeals, like the bankruptcy court, followed *Rice*, it nonetheless found the bankruptcy court's factual findings to be clearly erroneous. Based on the parties' stipulated facts, the court of appeals found that it was clearly erroneous for the bankruptcy court to find (1) "that the oil spilled only into the drainage ditch adjacent to the Thibodeaux Well and Bayou Cutoff," and (2) "that the Gulf of Mexico was the only open body of navigable water in the vicinity of the spill."[186] The court of appeals noted that the Needhams "acknowledged that the residue from the spill was found 10 to 12 miles from the oil well, i.e., in Bayou Folse."[187] Accordingly, it found that "Bayou Folse is adjacent to an open body of navigable water, namely the Company Canal."[188] Having found that the OPA jurisdiction existed over the water polluted by the Needhams, i.e., Bayou Folse, the court of appeals remanded so that the bankruptcy court could consider the Needhams' other defenses.[189]

The Fifth Circuit's decision in *Needham* is somewhat contradictory. On the one hand, the court noted that "[u]nder *Rice*, the term 'adjacent' cannot include every possible source of water that eventually flows into a navigable-in-fact waterway. Rather, adjacency necessarily implicates a 'significant nexus' between the water in question and the navigable-in-fact waterway."[190] On the other hand, the court found that the pollution of Bayou Folse, which was between ten and twelve miles away from the oil spill, was sufficient to establish OPA jurisdiction because it was adjacent to a navigable water, i.e., the Company Canal. In other words, although *Needham stated* that jurisdiction under the CWA and OPA does not extend to "'tributaries' that are neither themselves navigable nor truly adjacent to navigable waters," it *held* that OPA jurisdiction existed where oil pollution traveled via several non-navigable tributaries, over a course of between ten and twelve miles, into a body of water that was adjacent to a navigable water.[191] To reconcile *Needham*'s

185. *Needham*, 354 F.3d at 345 (following *Rice*, 250 F.3d at 269). *Needham* construed *SWANCC* as extending CWA jurisdiction only to waters that are "actually navigable or adjacent to an open body of navigable water." *Id.* at 345-46. As noted below, however, *Rice*'s interpretation of *SWANCC* is erroneous because *SWANCC* referred to any waters adjacent to any jurisdictional waters, not just navigable ones. *See supra* note 61. *Needham* therefore merely further promulgated this error. *Cf. Rapanos II*, at *6-8 (rejecting *Needham*'s "direct abuttment" requirement).

186. *Needham*, 354 F.3d at 346 (citing *In re Needham*, 279 B.R. at 516-17).

187. *Id.* (citing *In re Needham*, 279 B.R. at 518).

188. *Id.*

189. *Id.* at 347.

190. *Id.* (citing *SWANCC*, 531 U.S. at 167).

191. *Compare id.* at 345, *with id.* at 346-47.

ostensible inconsistency, it appears that the Fifth Circuit Court of Appeals will find federal jurisdiction where pollution actually travels through a system of non-navigable tributaries, but that federal jurisdiction will not exist absent such a factual finding.[192]

V. THE JURY IS IN — *SWANCC* DID NOT SIGNIFICANTLY ALTER THE CWA

The majority of federal courts that have addressed the scope of *SWANCC* have construed it narrowly, finding that *SWANCC* did not alter the CWA beyond invalidating the MBR.[193] The majority view is consistent with the narrow interpretation of *SWANCC* adopted by the ACOE and the EPA under the Clinton and Bush Administrations.[194] Indeed, where a hydrological

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192. *Needham* thus appears to be consistent with *Rapanos* and *Deaton* to the extent that it would extend CWA jurisdiction to an oil spill in a non-navigable tributary that travels to a navigable water or water adjacent thereto.

193. *See supra* Parts III and IV; *supra* note 6 (suggesting that the Supreme Court has implicitly endorsed the narrow interpretation of *SWANCC* adopted by *Deaton*, *Rapanos*, and *Newdunn*); Kunz, *supra* note 5, at 463; 2003 Joint Memorandum, 68 Fed. Reg at 1996 ("[A] majority of cases hold that *SWANCC* applies only to waters that are isolated, intrastate and non-navigable . . . ."); Fitzgerald, *supra* note 14, at 70 (same); Wood, *supra* note 15, at 10189 (noting that "most federal courts have read the *SWANCC* decision narrowly [because its] *obiter dicta* seems ill-considered, unsupported by precedent or other legal authority, and generally unconvincing"); *id.* at 10215.

> [A]ll four of the courts of appeals that have directly addressed the question of post-*SWANCC* CWA jurisdiction have agreed, without the filing of a single dissenting opinion, that the *SWANCC* decision's holding was narrow, and that the entire tributary system of the § 10 navigable waters is still subject to the important protections of the CWA.

Id. Nonetheless, as noted above, *SWANCC* may call into question the viability of "effect on commerce" connections that are unrelated to navigability. *See supra* note 166.

194. On January 19, 2001, days after *SWANCC* was decided, the ACOE and the EPA issued a joint memorandum in the waning days of the Clinton Administration stating that "most CWA jurisdiction remains basically intact after the *SWANCC* decision." *See* 2001 Joint Memorandum, *supra* note 47, at 5; Downing, *supra* note 3, at 489 (discussing the 2001 Joint Memorandum). On January 15, 2003, the ACOE and the EPA under the Bush Administration issued guidance that superceded the 2001 Joint Memorandum. *See* 2003 Joint Memorandum, 68 Fed. Reg. at 1995. Nonetheless, the 2003 Joint Memorandum also adopted a narrow (albeit slightly broader) interpretation of *SWANCC*, noting that it eliminated "CWA jurisdiction over isolated waters that are intrastate and non-navigable, where the sole basis for asserting CWA jurisdiction is the actual or potential use of the waters as habitat for migratory birds. . . ." *Id.* at 1996. *See also infra* notes 264-268 (discussing the 2003 Joint Memorandum). Moreover, on December 16, 2003 the ACOE and the EPA announced that the Bush Administration was abandoning plans to issue a rule clarifying the scope of the CWA with respect to isolated waters. *Effort to Define U.S. Waters Dropped, EPA, Corps to Retain 2003 Guidance*, 72 U.S.L.W. 2361 (2003) [hereinafter BNA]; Eric Pianin, *EPA Scraps Changes to*

connection exists to a navigable water, most courts permit the ACOE to exercise "adjacency" jurisdiction under the CWA pursuant to 33 C.F.R. 328.3(a)(2) and (5).[195] These courts hold that *SWANCC*'s "significant nexus" is satisfied by a hydrological connection to a navigable water, even where the connection is several times removed from the navigable water and where the navigable water is miles away.[196] Indeed, *SWANCC* did not alter the ACOE's authority to regulate "waters of the United States" that serve as channels of interstate commerce, as opposed to ACOE regulation of waters based on their possible effect on interstate commerce.[197] Consequently, pre-*SWANCC* decisions regarding CWA jurisdiction based on a hydrological connection remain valid.[198]

Clean Water Act, WASH. POST, Dec. 17, 2003, at A20 (noting that the EPA stated that it reads *SWANCC* "narrowly").

195. *See supra* Parts III and IV; *see also* BNA, 72 U.S.L.W. at 2362 (noting that an EPA administrator stated that "[o]ur reading of the case law to date is that if there is a hydrological connection between wetlands resources and waters of the United States, that makes [the wetlands] jurisdictional"); Wood, *supra* note 15, at 10189 (contending that "the CWA's jurisdiction over non-navigable tributaries and their adjacent wetlands remains intact despite the Court's *SWANCC* decision and those who would exaggerate the implications of its *obiter dicta*"); *id.* at 10214-15 n.140 (setting forth the test for hydrological connectivity adopted by appellate courts that have addressed the scope of the CWA after *SWANCC*); 2003 Joint Memorandum, 68 Fed. Reg. at 1997 ("A number of court decisions have held that *SWANCC* does not change the principle that CWA jurisdiction extends to tributaries of navigable waters."); *id.* at 1998 (directing ACOE and EPA field staff to "continue to assert jurisdiction over traditional navigable waters (and adjacent wetlands) and, generally speaking, their tributary systems (and adjacent wetlands)").

196. *See supra* Parts III-IV; *Hummel*, 2003 WL 1845365 at *6-7; *Jones*, 267 F. Supp. 2d at 1357-60.

197. *See supra* note 75. Although *SWANCC* only invalidated the MBR, the continued viability of 33 C.F.R. § 328.3(a)(3) as a basis for CWA jurisdiction is questionable. *See* ANPRM, 68 Fed. Reg. at 1994; 2003 Joint Memorandum, 68 Fed. Reg. at 1996; *Buday*, 138 F. Supp. 2d at 1287 ("Even though [*SWANCC*] did *not* strike any part of 33 C.F.R. § 328.3(a)(3), the decision raises serious questions about the continued viability of that subsection."). *Cf. Reuth*, 335 F.3d at 603-04 (stating in dicta that, under *SWANCC*'s reasoning, 40 C.F.R. § 230.3(s)(3)'s "effect on interstate commerce" jurisdiction appears doomed because it suffers from the same infirmity as the MBR, no nexus to navigability).

198. *See TGR*, 171 F.3d at 765 (holding that CWA jurisdiction extends to tributaries of navigable waters); *Eidson*, 108 F.3d at 1341-42 (same); *Pozsgai*, 999 F.2d 719 (same); *FD&P*, 239 F. Supp. 2d at 516-17 (same). *See also Jones*, 267 F. Supp. 2d at 1360 (holding that *Eidson* was not affected by *SWANCC*); 2001 Joint Memorandum, *supra* note 47, at 6 (noting that, after *SWANCC*, *Riverside* continues to allow the EPA and the ACOE "to assert CWA jurisdiction over, *inter alia*, all of the traditional navigable waters, all interstate waters, and all tributaries to navigable or interstate waters, upstream to the highest reaches of the tributary systems, and over all wetlands adjacent to any and all of those waters").

In light of *Rapanos*, *Deaton*, *Newdunn*, and *Reuth*, the Fifth Circuit Court of Appeals's position, as reflected in *Rice* and *Needham*, represents the minority view.[199] Courts have largely refused to follow *Rice* because it involved discharges made on land (i.e., into groundwater), rendering its statement regarding the scope of *SWANCC* dicta.[200] Courts that have construed *Rice* (and hence *SWANCC*) broadly, such as *FD&P*,[201] have done so in error because *Rice* involved no hydrological connection to a navigable water.[202] Despite the number of cases interpreting *SWANCC*, no decision has "focused on the jurisdictional status of an isolated intrastate non-navigable water — the type of waters at issue in . . . *SWANCC*."[203] Consequently, it is unclear what circumstances, if any, would establish a significant nexus between isolated waters and navigable waters.[204] In sum, although most courts that have addressed *SWANCC* have construed it narrowly, the Fifth Circuit Court of Appeals ostensibly holds the contrary view and several questions stemming from *SWANCC* remain unanswered. Accordingly, *SWANCC* will continue to provide grist for litigation in lower federal courts.

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199. *See Rapanos II*, at *6-8 (noting the court's disagreement with *Needham* concerning CWA's "adjacency" requirement); *Thorson*, 2004 WL 737522 at *13-14 (following the majority trend as espoused in *Deaton* and *Rapanos* and declining to follow the Fifth Circuit Court of Appeals' decisions in *Rice* and *Needham*); *supra* note 6 (noting that the Supreme Court denied certiorari in *Deaton*, *Rapanos*, and *Newdunn*, decisions that reject *Rice* and which *Needham* declined to follow). Moreover, as noted above, *Needham* held that OPA jurisdiction existed where there was a hydrological connection between an oil spill and a navigable water that was ten to twelve miles and several non-navigable tributaries away. *See supra* notes 185-187.

200. *Hummel*, 2003 WL 1845365 at *6 (noting that *Rice*'s statements with respect to *SWANCC* were dicta because *Rice* involved groundwater discharges and that the *Rice* "court had no occasion to discuss the limits of the Corps' jurisdiction over waters with observable connections to navigable waters"); *Lamplight*, 2002 WL 360652 at *5 ("As Plaintiff points out, the Fifth Circuit's statement [in *Rice*] is probably only *dicta*: the landowners who sought recovery from an alleged upstream polluter in that case were unsuccessful because there was evidence only of oil discharge onto dry land rather than into any body of surface water."). *See* Wood, *supra* note 15, at 10188, 10190 (noting that "the Fifth Circuit's dicta in *Rice* and *Needham* . . . is supported by very little other than ipse dixit").

201. 239 F. Supp. 2d at 516.

202. *Jones*, 267 F. Supp. 2d at 1359 n.7 (discussing *Rice*, 250 F.3d at 271). Unlike *Rice*, *Needham* involved a hydrological connection between a polluted water and a navigable water. Nonetheless, as noted above, *Needham* held that federal regulatory jurisdiction existed, despite having rejected the federal government's ability to regulate all waters other than groundwater hydrologically connected to a navigable water. *See supra* note 196.

203. Downing, *supra* note 3, at 491.

204. *Id.*

VI. A LEGISLATIVE RESPONSE TO *SWANCC*?: CONGRESS SHOULD ENACT THE CLEAN WATER AUTHORITY RESTORATION ACT

Wetlands perform many valuable functions, including maintaining the integrity of America's drinking water, flood control, and biodiversity.[205] The nation lost a great number of wetlands before the CWA was enacted and continues to lose up to 300,000 acres of wetlands each year.[206] These losses "have significantly reduced important wildlife habitat, especially waterfowl breeding and migration habitat."[207] Likewise, isolated wetlands serve many important functions[208] and are especially important in arid regions of the country such as the southwest and the west coast.[209]

Although *SWANCC* has been construed narrowly by most courts addressing the issue, it has nonetheless adversely impacted wetlands regulation.[210] First, *SWANCC* has likely eliminated

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205. *See* Leibowitz & Nadeau, *supra* note 7, at 669-71 (discussing the functions of isolated wetlands including protecting the water quality of navigable waters and preserving habitats); Van Balen, *supra* note 23, at 846 (characterizing wetlands as "ecologically essential"); Oliver A. Houck & Michael Rolland, *Federalism in Wetlands Regulation: A Consideration of Delegation of Clean Water Act Section 404 and Related Programs to the States*, 54 MD. L. REV. 1242, 1245-53 (1995) (discussing wetland functions). For example, the "loss of fifty percent of America's remaining wetlands would result in increased sewage treatment plant expenditures of up to $75 billion for the removal of a single pollutant, nitrogen, alone." *Id.* at 1245. Moreover, wetlands' biomass generates "[m]ore than seventy percent of America's commercial seafood harvest, with an estimated annual value of $3.6 billion and total economic output of $31 billion . . . ." *Id.* at 1247. Indeed, the value of wetlands cannot be overstated.

206. Fitzgerald, *supra* note 14, at 55 n.369 (noting that "[o]ut of the 221 million acres of wetlands that once existed in the [continental] U.S.," only 103 million acres remain today and that eighty-seven percent of these losses occurred from the 1950s to the 1970s); 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, 22 nn.163-64 (1999) [hereinafter Adler, *Commerce Clause Jurisdiction*] (noting that estimates of annual wetland losses range between 117,000 and 300,000 acres).

207. Tiner, *Geographically Isolated Wetlands*, *supra* note 52, at 500.

208. Talene Nicole Megerian, *Federal Regulation of Isolated Wetlands: To Be or Not To Be*, 13 VILL. ENVTL. L.J. 157, 169-71 (2002) (discussing the importance of isolated wetlands).

209. Leibowitz & Nadeau, *supra* note 7, at 666-67; Tiner, *Geographically Isolated Wetlands*, *supra* note 52, at 496-97.

210. Ralph W. Tiner, *Estimated Extent of Geographically Isolated Wetlands in Selected Areas of the United States*, 23 WETLANDS 636, 650-51 (2003) [hereinafter Tiner, *Estimated Extent*] (noting that *SWANCC* has lessened protections afforded to isolated wetlands but that its impact will be mitigated if *SWANCC* is interpreted narrowly — i.e., as having only struck down the MBR); Fitzgerald, *supra* note 14, at 68. Consequently, *SWANCC* has been the

CWA jurisdiction over a substantial amount of wetlands that provide numerous ecological functions. Although no one knows what percentage of wetlands are "isolated,"[211] it is estimated that twenty percent of the wetlands in the continental United States are isolated and thus unprotected by the CWA after *SWANCC*.[212]

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subject of criticism. *See, e.g.*, *id.* at 11-12 (opining that *SWANCC* was "not a positive sign for the future of environmental law" and suggesting, inter alia, that the *SWANCC* Court "did not follow the text, intent, or purposes of the CWA, which clearly establishes broad federal jurisdiction").

211. Leibowitz & Nadeau, *supra* note 7, at 666 ("The number and area of isolated wetlands occurring nationally is not known."); *id.* at 675 ("Estimating the potential impact of *SWANCC* requires knowledge of how many isolated wetlands there are to begin with [which] . . . is not known."); *id.* at 676 (discussing the factors that need to be addressed in ascertaining the number of wetlands jeopardized by *SWANCC*, including state laws protecting isolated wetlands). This ignorance stems from the amorphous meaning of "isolated wetland." The scientific and regulatory communities lack a uniform definition of "isolated wetlands." *Id.* at 664-65 (noting that no regulatory definition has been promulgated by either the EPA or the ACOE and that scientists proffer several definitions). Although "isolated waters" has not been defined by either the EPA or the ACOE for jurisdictional purposes, the ACOE did define it for purposes of NWP 26 as "non-tidal waters of the United States that are (1) not part of a surface tributary system to interstate or navigable waters of the United States; and (2) not adjacent to such tributary waters." *Id.* at 665 (quoting 33 C.F.R. § 330.2(e)). NWP 26 expired in 2000. *Id.* The NWP 26 definition is essentially the hydrological connection definition adopted by the majority of post-*SWANCC* decisions. Although scientists proffer several definitions, they generally agree that "isolated wetlands" are not completely isolated from other aquatic systems. *Id.* at 668-69. Indeed, some wetland scientists state that "geographically isolated wetlands are best understood as occurring within an isolation-connectivity continuum that has both hydrologic [such as groundwater] and biotic expressions." *Id.* at 669. As noted above, the *SWANCC* dissenters construed *Riverside* as extending CWA jurisdiction to waters with an ecological or hydrological connection to jurisdictional waters — and that most isolated waters probably have such an ecological connection. *See supra* note 46.

212. Leibowitz & Nadeau, *supra* note 7, at 666 (noting that one commentator estimated "that no more than 20% of the wetland area in the contiguous U.S. is isolated"); Mank, *supra* note 11, at 816 (noting that the ANPRM "provoked concerns among environmentalists that approximately twenty percent of all wetlands, totaling about twenty million acres, will be classified as 'isolated,' and hence beyond federal jurisdiction"). *See* Fitzgerald, *supra* note 14, at 12 n.6, 69 (citing Kusler Memorandum, *supra* note 23, which estimated that forty to sixty percent of the nation's wetlands are jeopardized by *SWANCC*); Leibowitz & Nadeau, *supra* note 7, at 666-67 (noting that a geographic information system (GIS) study of seventy-two wetland sites indicated that isolated wetlands comprised twenty-six percent of the average site); *id.* at 676 (noting that the GIS study may underestimate how many wetlands are isolated inasmuch as it excluded non-adjacent wetlands that may nonetheless be jurisdictional where a hydrological connection exists). *But see* Tiner, *Estimated Extent*, *supra* note 210, at 636, 651 (noting that "estimates of isolated wetlands [in the GIS study] cannot be readily translated to wetlands that have lost Clean Water Act 'protection' [after *SWANCC*]"). As noted above, most circuits to have addressed the issue extend CWA jurisdiction over

In any event, several ACOE and EPA regulators have noted that:

> Even if construed narrowly, *SWANCC* can have an enormous effect on the ability of the CWA to protect the Nation's aquatic resources. If the decision results in the destruction of only one percent of wetlands that remain in the lower forty-eight states, that loss would be greater than all wetlands lost over the past decade.[213]

Moreover, "the magnitude of functional loss is not proportional to size" of an isolated wetland.[214] In other words, the loss of a relatively modest amount of isolated wetlands may result in a substantial loss of wetland function.

Second, ACOE Districts have made varying post-*SWANCC* jurisdictional determinations.[215] The resulting regulatory uncertainty may encourage zealous developers and would-be polluters to attempt to push the envelope in some ACOE districts.[216] Moreover, uniformity of regulatory application is desirable in and of itself. Indeed, interested entities must address a patchwork of regulatory interpretations,[217] thereby increasing costs and decreasing predictability. Therefore, although *SWANCC* did not significantly alter the CWA, it did jeopardize a significant number of wetlands.[218] Consequently, Congress should rectify

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non-adjacent wetlands that are hydrologically connected to a navigable water. Consequently, it appears that *SWANCC* has jeopardized twenty percent of the wetlands in the continental United States. Fitzgerald, *supra* note 14, at 69 (citing Kusler Memorandum, *supra* note 23). It follows that a higher relative percentage of wetlands are at risk in the states comprising the Fifth Circuit (Louisiana, Mississippi and Texas).

213. Downing, *supra* note 3, at 492.

214. *See* Scott G. Leibowitz, *Isolated Wetlands and their Functions: An Ecological Perspective*, 23 WETLANDS 517, 524 (2003).

215. GAO Report, *supra* note 19, at 2-3 (concluding that ACOE "districts differ in how they interpret and apply the federal regulations when determining what wetlands and other waters fall within the [CWA] jurisdiction of the federal government," including determinations regarding jurisdiction over (1) adjacent wetlands, (2) tributaries, and (3) ditches and manmade conveyances); Leibowitz & Nadeau, *supra* note 7, at 675; Kunz, *supra* note 5, at 488; Calderon, *supra* note 55, at 320-21.

216. National Wildlife Federation, *GAO Report Exposes Sweeping Lapses in Corps' CWA Enforcement* (Mar. 9, 2004), *available at* http://www.nwf.org/news/story.cfm?pageId=2FCDD1A0-65BF-09FE-BB82743180E77594 (Mar. 9, 2004) (noting that "many developers are no longer checking with the [ACOE] to see if a permit is even required"). *Cf.* Boudreaux, *supra* note 3, at 575.

217. GAO Report, *supra* note 19, at 14 (noting that building interests believe that *SWANCC* has created "uncertainty, resulting in unequal treatment and significant financial burden to the regulated community"); Tiner, *Estimated Extent*, *supra* note 210, at 636, 640, 650-51 (noting that *SWANCC* has resulted in "a lack of national [regulatory] consistency" that exacerbates pre-existing variation among ACOE districts).

218. ANPRM, 68 Fed. Reg. at 1994 ("Preliminary assessments of potential resource impacts vary widely depending on the scenarios considered.") (citing Ducks Unlimited, *The* SWANCC *Decision: Implications for Wetlands and Waterfowl at* http://www.ducks.org/conservation/404_report.asp (Sept. 2001);

SWANCC's potential harm by amending the CWA to expressly give the ACOE the authority to regulate "isolated" wetlands.[219]

In response to *SWANCC*, the Clean Water Authority Restoration Act of 2002 (the "CWARA of 2002") was introduced, but not enacted, by the 107th Congress.[220] This bill would have,

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Association of State Wetland Managers, SWANCC *Decision and the State Regulation of Wetlands at* http://www.aswm.org/fwp/swancc/aswm-int.pdf) (June 2001).

219. The states are also free to fill in any legislative gaps left by *SWANCC*. State legislative responses to *SWANCC* are beyond the scope of this Article and are discussed elsewhere. *See* Ostergren, *supra* note 7, at 434-42 (discussing Minnesota's legislative response to *SWANCC*); Pyle, *supra* note 4, at 91 (discussing various state responses to *SWANCC* as well as a Model Sate Wetland Protection Act proposed by the Association of State Wetland Managers); Kusler Memorandum, *supra* note 23 (discussing *SWANCC*'s impact on state regulation of wetlands and options available to the states); Craig, *supra* note 23, at 137 (listing fifteen states that have regulatory programs that address isolated wetlands and two additional states that enacted such programs in response to *SWANCC*); Fitzgerald, *supra* note 14, at 71 (same); Riverkeeper, New York State Wetlands Legislation Proposed, at http://www.riverkeeper.org/campaign.php/watershed/you_can_do/672 (last visited June 11, 2004) (discussing a bill in the New York legislature to enact the Clean Water Protection/Flood Prevention Act, which would regulate isolated wetlands in response to *SWANCC*). Nonetheless, state legislative responses may be inadequate because of interstate externalities, i.e., the burden of state regulation will only be felt locally whereas the benefit will be felt nationally. Houck & Rolland, *supra* note 205, at 1253 (noting that state and federal regulation is required to adequately protect wetlands because aggregate losses have interstate ramifications); Wood, *supra* note 15, at 10194 (noting that, before the CWA was enacted, "state and local governments had proven themselves both incapable of and unwilling to control water pollution" because of the "'transboundary' nature of water pollution" and a "race to the bottom" of state environmental de-regulation). *But see* Jonathan H. Adler, *The Duck Stops Here? The Environmental Challenge to Federalism*, 9 SUP. CT. ECON. REV. 205, 207-08 (2001) [hereinafter Adler, *The Duck Stops Here?*] (noting that interstate externalities may "justify federal environmental regulation," but concluding that "such externalities often are overstated, and the costs of addressing such externalities through federal regulation may well exceed the benefits of maintaining state primacy"). Moreover, budget-strapped states generally prefer to have their wetland resources protected by federal agencies. *See* GAO Report, *supra* note 19, at 14 (noting that forty-one of the forty-three states that submitted comments in response to the ANPRM "were concerned about any major reduction in [CWA] jurisdiction"); Rebecca R. Wodder, *Administration's Reversal on Excluding Wetlands, Streams from Clean Water Act Offers Chance to Reverse Decline in Water Quality*, U.S. NEWSWIRE, Dec. 17, 2003, *available at* 2003 WL 64751052 (noting that thirty-nine states opposed proposed rule-making that would decrease CWA jurisdiction). Consequently, federal protection of wetland resources is necessary to adequately protect wetland resources.

220. *See* Clean Water Authority Restoration Act of 2002, S. 2780, 107th Cong., 2d Sess. (2002); Clean Water Authority Restoration Act of 2002, H.R. 5194, 107th Cong., 2d Sess. (2002). *See also* Kunz, *supra* note 5, at 485-90 (discussing the Clean Water Authority Restoration Act of 2002); Duquet, *supra* note 23, at 376-77 (same); Fitzgerald, *supra* note 14, at 70 n.503 (same).

inter alia, deleted the term "navigable" from the CWA, thereby codifying the ACOE's regulations defining "waters of the United States."[221] Consequently, it would have restored CWA jurisdiction to its pre-*SWANCC* status.[222]

The 108th Congress reintroduced the CWARA of 2002 as the Clean Water Authority Restoration Act of 2003 (the "CWARA").[223] Like its predecessor, the CWARA would delete the term "navigable" from the CWA and codify the ACOE's regulations defining "waters of the United States."[224] The CWARA contains various congressional findings ostensibly responding to *SWANCC*.[225] For example, the CWARA states, inter alia, that pollution of intrastate waters may affect waters of the United States.[226] Consequently, the CWARA would be based in part upon Congress's commerce power over channels of commerce, a power that has repeatedly been affirmed by post-*SWANCC* case law.[227] It would also be predicated upon Congress's commerce power over

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Inasmuch as Senate Bill 2780 and House Bill 5194 are verbatim, they will be collectively referred to as the CWARA of 2002.

221. H.R. 5194, § 4; S. 2780, § 4; Kunz, *supra* note 5, at 486-87; Duquet, *supra* note 23, at 376-77. *See* Philip Lammens, Note, *Section 404(a) of the Clean Water Act: the Army Corps of Engineers' Jurisdiction over "All Other Waters"*, 54 FLA. L. REV. 147, 172-73 (2002) (proposing that the CWA should be amended by, inter alia, replacing "navigable waters" with "waters of the United States" and adopting the ACOE's and EPA's regulatory definitions).

222. Kunz, *supra* note 5, at 486-87.

223. *Compare* Clean Water Authority Restoration Act of 2003, S. 473, 108th Cong., 1st Sess. (2003), *and* Clean Water Authority Restoration Act of 2003, H.R. 962, 108th Cong., 1st Sess. (2003), *with* S. 2780, *and* H.R. 5194. Inasmuch as S. 473 and H.R. 962 are verbatim, they will be collectively referred to as the CWARA.

224. *See* S. 473, §§ 4-5; H.R. 962, §§ 4-5; *Federal Jurisdiction of Navigable Waters Under Clean Waters: Before the Subcomm. on Fisheries, Wildlife and Water of the Senate Comm. on Envrtl. & Public Works*, 108th Cong. (2003) (statement of Richard Hamann, Associate in Law, University of Florida), *available at* 2003 WL 56335161. *Cf.* Kunz, *supra* note 5, at 486-87 (discussing the corresponding sections of the CWARA of 2002).

225. Despite the substantive similarity between the CWARA and the CWARA of 2002, the congressional findings for these bills were different. *Compare* S. 473, § 3(1)-(17), *and* H.R. 962, § 3(1)-(17), *with* S. 2780, § 2(1)-(32), *and* H.R. 5194, § 2(1)-(32).

226. S. 473, § 3(4) ("Water is transported through interconnected hydrologic cycles, and the pollution, impairment, or destruction of any part of an aquatic system may affect the chemical, physical, and biological integrity of other parts of the aquatic system."); H.R. 962, § 3(4) (same); S. 473, § 3(5) ("Protection of intrastate waters, along with other waters of the United States, is necessary to restore and maintain the chemical, physical, and biological integrity of all waters in the United States."); H.R. 962, § 3(5) (same); S. 473, § 3(6) ("The regulation of discharges of pollutants into interstate and intrastate waters is an integral part of the comprehensive clean water regulatory program of the United States."); H.R. 962, § 3(6) (same).

227. *See supra* Parts III-IV.

activities that affect interstate or foreign commerce.[228] If enacted, the CWARA would "provide protection to the waters of the United States to the fullest extent of the legislative authority of Congress under the Constitution."[229] The CWARA would thus extend CWA jurisdiction over isolated intrastate waters based solely on the presence of migratory birds.[230] Accordingly, the CWARA would eventually force the Supreme Court to address whether the Commerce Clause gives Congress the authority to regulate intrastate wetlands, a question left unanswered by *SWANCC*.[231]

Enforcement of the CWARA based upon Congress's commerce power over *channels* of commerce would likely be upheld. To the extent, however, that the CWARA is based upon Congress's power to regulate intrastate activities that affect interstate or foreign commerce, it would be more controversial, potentially challenging the Rehnquist Court to continue a trend towards curtailing the reach of the Commerce Clause started by *United States v. Lopez*[232] and continuing in *United States v. Morrison*.[233] Although the

228. *See, e.g.*, S. 473, § 3(8)-(13); H.R. 962, § 3(8)-(13). *Cf.* Kunz, *supra* note 5, at 486-87.

229. S. 473, § 2(3); H.R. 962, § 2(3); *See* Philip Weinberg, *It's Time for Congress to Rearm the Army Corps of Engineers: A Response to the Solid Waste Agency Decision*, 20 VA. ENVTL. L.J. 531, 532-33 (2001) (suggesting that, in response to *SWANCC*, Congress should enact legislation clarifying and "restat[ing] its intention to assert broad federal jurisdiction under the [CWA]").

230. H.R. 962, § 3(12) ("Millions of people in the United States enjoy recreational activities that depend on intrastate waters, such as waterfowl hunting, bird watching, fishing, and photography and other graphic arts, and those activities and associated travel generate billions of dollars of income each year for the travel, tourism, recreation, and sporting sectors of the economy of the United States."); S. 473, § 3(12) (same). One commentator has suggested that the CWA should be amended to explicitly establish CWA jurisdiction over intrastate wetlands based on the presence of migratory birds. *See* Edward Alburo Morrissey, *The Jurisdiction of the Clean Water Act Over Isolated Wetlands: The Migratory Bird Rule*, 22 J. LEGIS. 137, 143 (1996).

231. *SWANCC*, 531 U.S. at 173-174; Ostergren, *supra* note 7, at 396 ("The central issue left unresolved by *SWANCC* is whether and to what extent the Corps may assert jurisdiction over isolated wetlands based on a connection to interstate commerce rather than navigation.").

232. United States v. Lopez, 514 U.S. 549, 561-62 (1995) (holding that the Gun-Free School Zones Act exceeded Congress's Commerce Clause power because possessing a gun near a school is not an economic activity that substantially affects interstate commerce); *id.* at 558 (holding that Congress could exercise its commerce power over (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce; and (3) activities that substantially affect interstate commerce).

233. United States v. Morrison, 529 U.S. 598, 613 (2000) (holding that the Violence Against Women Act's civil remedy provision exceeded Congress's Commerce Clause power because gender motivated violence is not economic activity that substantially affects interstate commerce). *See* Kunz, *supra* note 5, at 467-70 (discussing *SWANCC* in light of *Lopez* and *Morrison*); Fitzgerald, *supra* note 14, at 11-12 (noting that the Rehnquist Court is resurrecting

Supreme Court declined to address the Commerce Clause issue in *SWANCC*, commentators debate the future viability of federal environmental laws predicated upon this aspect of the Commerce Clause.[234] Nonetheless, the Commerce Clause remains, at present, a valid basis for extending CWA jurisdiction over "isolated" wetlands.[235] In addition to the Commerce Clause, the CWARA is

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federalism in its Commerce Clause cases); Adler, *supra* note 219, at 208 (opining that the Supreme Court will eventually "have to confront the constitutional issue that it avoided in *SWANCC*"); Walston, *supra* note 11, at 742 (noting that "Lopez, Morrison, and SWANCC may have a major impact on the constitutionality of Congress's environmental laws"); Adler, *supra* note 206 at 5 ("In the wake of the Lopez decision, commentators noted that federal wetlands regulation was one of the federal environmental programs most vulnerable to a Commerce Clause challenge.").

234. *Compare* Duquet, *supra* note 23, at 372 ("[F]ootnote three [in *SWANCC*] calls into question every agency regulation that does not have at least some connection with the regulation of navigation."), *and* Robert H. Bork & Daniel E. Troy, *Locating the Boundaries: the Scope of Congress's Power to Regulate Commerce*, 25 HARV. J.L. & PUB. POL'Y 849, 853-54 (2002) ("Environmental issues that are national but not commercial do not seem, as an original matter, appropriate for national resolution under the commerce power. This does not mean that courts or legislators should treat existing federal environmental legislation as unconstitutional. Rather, existing statutes should be interpreted against a background that respects federalism concerns to the extent possible."), *and* Jamie Y. Tanabe, Comment, *The Commerce Clause Pendulum: Will Federal Environmental Law Survive in the Post-*SWANCC *Epoch of "New Federalism"?*, 31 ENVTL. L. 1051, 1083 (2001) (opining that *SWANCC* imperiled the ACOE's "jurisdiction over adjacent wetlands"), *with* Robert A. Schapiro & William W. Buzbee, *Unidimensional Federalism: Power and Perspective in Commerce Clause Adjudication*, 88 CORNELL L. REV. 1199, 1227 (2003) ("The [*SWANCC*] Court's concern about constitutional boundaries is surprising, given the regulations' substantial commercial nexus . . . [with] a municipal landfill . . . [and] a multibillion dollar industry of hunting and bird watching."), *and* Kunz, *supra* note 5, at 493 (noting that the Supreme Court denied certiorari less than two months after *SWANCC* for a decision by the Fourth Circuit Court of Appeals rejecting a Commerce Clause challenge to the Endangered Species Act and opining that other federal environmental regulations would not necessarily fall prey to Commerce Clause challenges), *and* Peter Arey Gilbert, Note, *The Migratory Bird Rule After* Lopez*: Questioning the Value of State Sovereignty in the Context of Wetland Regulation*, 39 WM. & MARY L. REV. 1695, 1739 (1998) (concluding that "[t]he MBR represents a valid expression of congressional commerce power even after the *Lopez* decision"), *and* White & Douglas, *supra* note 23, at 18-21 (noting that "it remains uncertain whether the Supreme Court would sustain the [MBR] on Commerce Clause grounds" but arguing that the Court should do so for policy reasons and because it is consistent with *Lopez*).

235. Sam Saad, *Commerce Clause Jurisprudence: Has There Been a Change?*, 23 J. LAND RESOURCES & ENVTL. L. 143, 144-45 (2003) ("Morrison brings into question whether environmental regulations that rely on their aggregated consequences for substantial economic effect will survive the Supreme Court's new scrutiny of the Commerce Clause, however, following current federal jurisprudence, it is clear that the Commerce Clause will continue to provide federal authorities with the power to enact and enforce

based partly on the Treaty,[236] Necessary and Proper,[237] and Property[238] Clauses of the Constitution.[239] Moreover, additional congressional powers exist upon which the CWARA or similar legislation could be based.[240]

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environmental regulations."). *See also* Fitzgerald, *supra* note 14, at 51-68 (contending that the MBR is a valid exercise of Congress's Commerce Clause power). The uncertainty surrounding the scope of the Commerce Clause with respect to the CWA suggests that alternative bases of legislative authority should be used by Congress in enacting CWARA or similar legislation.

236. U.S. CONST. art. II, § 2, cl. 2. Although the Treaty Clause involves the power of the President to make treaties with the advice and consent of the Senate, the Necessary and Proper Clause of article 1, section 8 gives Congress the power to enact federal legislation that is necessary and proper for effectuating treaties entered into by the United Sates. *See, e.g.*, Missouri v. Holland, 252 U.S. 416, 432 (1925). *But see* Katrina L. Fischer, *Harnessing the Treaty Power in Support of Environmental Regulation of Activities that Don't "Substantially Affect Interstate Commerce": Recognizing the Realities of the New Federalism*, 22 VA. ENVTL. L.J. 167, 175 (2004) (suggesting that "an unbounded treaty power is irreconcilable with the Court's theory of federalism" and offering a treaty power framework "tailored to accommodate future application in the environmental realm"); Mark Strasser, *Domestic Relations,* Missouri v. Holland*, and the New Federalism*, 12 WM. & MARY BILL RTS. J. 179, 219 n.268 (2003) (opining that the Supreme Court would not likely permit Congress to use the treaty power to obviate its federalism decisions); Edward T. Swaine, *Does Federalism Constrain the Treaty Power*, 103 COLUM. L. REV. 403, 417 (2003) (noting that the "new federalism decisions also invite fresh scrutiny of the treaty power by encouraging its creative use to circumvent federalism restrictions"). Congress may use its other powers, such as the spending power, to enact legislation that it could not validly enact pursuant to the Commerce Clause; there is no reason to think that the treaty power is not among these "other" powers. *See* Fischer, *supra*, at 173 ("[C]ommentators on the SWANCC decision have suggested that the treaty power provides a ground independent of the Commerce Clause for upholding the constitutionality of the CWA's reach to include isolated, intrastate water bodies."); Swaine, *supra*, at 403 (noting that "the new federalism doctrines show a sensitivity toward preserving adequate means to pursue national and international ends like the treaty power"); *infra* note 239.

237. **U.S. CONST.** art. I, § 8, cl. 18.

238. *Id.* at art. IV, § 3, cl. 2.

239. S. 473, § 3(15) ("Protecting the quality of and regulating activities affecting the waters of the United States is a necessary and proper means of implementing treaties to which the United States is a party, including treaties protecting species of fish, birds, and wildlife."); H.R. 962, § 3(15) (same); S. 473, § 3(16) ("Protecting the quality of and regulating activities affecting the waters of the United States is a necessary and proper means of protecting Federal land, including hundreds of millions of acres of parkland, refuge land, and other land under Federal ownership and the wide array of waters [that land] encompasse[s]. . . ."); H.R. 962, § 3(16) (same); S. 473, § 3(17) ("Protecting the quality of and regulating activities affecting the waters of the United States is necessary to protect Federal land and waters from discharges of pollutants and other forms of degradation."); H.R. 962, § 3(17) (same).

240. *See, e.g.*, Eric R. Coulson, Note, *Bird Hotels: Are the Resting Spots of Migratory Birds Entitled to Federal Government Protection Through the Commerce Clause?* Solid Waste of Northern Cook County v. U.S. Army Corps

Congress could also extend CWA jurisdiction to "isolated" wetlands based on the Spending Clause of Article I, section 8.[241] It has been suggested that Congress could use its spending power to "extend federal environmental jurisdiction past the limits of the Commerce Clause if states cooperate" by accepting funds conditioned upon the states' agreement to protect isolated wetlands.[242] Indeed, Congress's spending power is not limited by its enumerated powers and Congress may attach conditions to the receipt of federal funds in order to advance objectives that it could not pursue directly.[243] Consequently, *Lopez* and its progeny would not threaten congressional regulation of intrastate wetlands exercised pursuant to the Spending Clause.[244] Although Congress's

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of Engineers, *531 U.S. 159 (2001)*, 26 S. ILL. U. L.J. 575, 593 (2002) (noting that *SWANCC* noted in its brief to the Supreme Court that "there are ample constitutional bases in the spending, treaty and property powers for a myriad of federal statutes protecting waters, wetlands, migratory birds . . .").

241. Several law review articles have been devoted to the subject of the spending power as an alternative basis for federal environmental regulations. *See* Denis Binder, *The Spending Clause as a Positive Source of Environmental Protection: A Primer*, 4 CHAP. L. REV. 147, 148-50 (2001) (suggesting the Spending Clause as an alternate basis of congressional authority in light of *Lopez* and *Morrison*); Michael J. Gerhardt, *Federal Environmental Regulation in a Post-*Lopez *World: Some Questions and Answers*, 30 ENVTL. L. REP. 10980, 10988-90 (2000) (noting that congressional regulation of wetlands could be based upon, inter alia, Congress's spending power); White & Douglas, *supra* note 23, at 21 (criticizing the Spending Clause as a basis of authority for intrastate wetland regulation and suggesting that courts may sustain such regulation under the Spending Clause if the MBR was held unconstitutional under the Commerce Clause). Inasmuch as the subject has been previously addressed, a comprehensive discussion of the spending power as a basis for federal environmental regulations such as the CWA is beyond the scope of this Article. *See generally* Binder, *supra*, at 159-61.

242. Binder, *supra* note 241, at 153-54, 159-61 (suggesting that the federal government could condition various grants related to public drinking water upon enforcement of the CWA or through the use of "wetlands preservation grants"). *See* S. 473, § 3(11) ("Millions of people in the United States depend on wetlands and other waters of the United States to filter water and recharge surface and subsurface drinking water supplies, protect human health, and create economic opportunity."). *Cf.* United States v. Dierckman, 201 F.3d 915, 922 (7th Cir. 2000) (holding that Congress's Swampbuster program regulating intrastate wetlands was a valid exercise of its spending power because it is an indirect regulation not limited by congressional powers enumerated in article I, section 8); Patrick R. Douglas, *Conservation or Coercion: Federal Regulation of Intrastate Wetlands Under the Swampbuster Provisions of the Food Security Act*, 8 MO. ENVTL. L. & POL'Y REV., 59, 59 (2001) (suggesting that *Dierckman* "greatly expanded the power of the federal government to regulate wholly intrastate wetlands").

243. South Dakota v. Dole, 483 U.S. 203, 207 (1987); Barnes v. Gorman, 536 U.S. 181, 189 (2002) (characterizing Congress's spending power as contractual in nature, permitting Congress to condition the receipt of federal funds upon the recipient's agreement to comply with federally imposed conditions).

244. Rebecca E. Zietlow, *Federalism's Paradox: The Spending Power and Waiver of Sovereign Immunity*, 37 WAKE FOREST L. REV. 141, 142-43 (2002)

spending power is not unlimited, its limits would not bar the conditioning of funds upon states' acceptance of federal jurisdiction over intrastate wetlands.[245] Nonetheless, Congress would risk invalidation if it used its spending power to coerce states to enact legislation protecting isolated wetlands.[246] As a result, constitutional exercise of the spending power would require Congress to either (1) direct its spending power at non-governmental persons or entities that receive federal funds (akin to Swampbuster) or (2) condition the receipt of federal funds by the states in a non-coercive manner (akin to *South Dakota v. Dole*). Of these two alternatives, attaching conditions on federal funding

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("The Court's broad reading of the Spending Power creates a paradox: Congress may use its spending power to accomplish precisely the same goals the Court found unconstitutionally intrusive on state sovereignty when attempted through other means."); John C. Eastman, *Restoring the "General" to the General Welfare Clause*, 4 CHAP. L. REV. 63, 64 (2001) (noting that "the Supreme Court has not given any signal to suggest that it would apply its federalism rulings in the Spending Clause context, and [*Dole*] strongly suggests that it would not").

245. *Dole* set forth several limits upon Congress's spending power. *Dole*, 483 U.S. at 207-08. First, the spending power must be exercised in pursuit of "the general welfare." *Id.* at 207 (noting that when "considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress"). Second, the spending power must be exercised unambiguously. *Id.* Third, the conditions imposed should be related to the particular federal interest or program. *Id.* at 207-08. Fourth, "other constitutional provisions may provide an independent bar to the conditional grant of federal funds." *Id.* at 208. *Dole* held that Congress could, pursuant to its spending power, condition the receipt of federal highway funds upon the states' adoption of a minimum drinking age of twenty-one. *Id.* at 209-11. The *Dole* Court also noted that "in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" *Id.* at 211. *Dole* held, however, that the condition was not coercive where it was attached to five percent of South Dakota's federal highway funds. *Id.* Consequently, Congress could amend the CWA to extend jurisdiction to intrastate wetlands as long as it followed *Dole*'s roadmap. Moreover, a greater percentage of funds may come with strings attached because courts rarely find a congressional spending condition to be coercive. *See* Zietlow, *supra* note 244, at 174 (noting that federal courts have upheld "virtually all conditional federal spending since the Court's ruling in Dole"); *id.* at 181 (noting that federal courts "have shown such resistance to applying the coercion restriction as to make it a virtually toothless restriction"); Erwin Chemerinsky, *Protecting the Spending Power*, 4 CHAP. L. REV. 89, 92 (2001) (noting that the Spending power is "virtually infinite").

246. *See* Binder, *supra* note 241, at 153 (noting that "while Congress can provide grants to states with rationally related conditions attached, it cannot directly mandate states exercise, in any way, their police powers"). *See also* Printz v. United States, 521 U.S. 898, 926 (1997) (reaffirming that Congress cannot "compel the States to enact or administer a federal regulatory program") (quoting *New York v. United States*, 505 U.S. 144, 188 (1992)); Binder, *supra* note 241, at 151-53 (discussing the fine line between conditioned grants and coercive measures).

to the states is the more likely method of regulating intrastate wetlands.[247] Despite the ostensibly long reach of its spending power, Congress has not often relied on it — probably because there was no need to do so until *Lopez* was decided in 1995.[248] In light of the uncertainty surrounding Congress's ability to use its commerce power to regulate intrastate wetlands, Congress should also rely on its spending power in enacting the CWARA or similar legislation.

Although the subject of much less scholarly attention, the Taxation Clause of Article I, section 8 could arguably support federal regulation of intrastate wetlands.[249] For example, Congress could tax developers utilizing NWP's.[250] The revenues generated from such a tax could then be used to fund state grants designed to protect isolated wetlands or create new wetlands, thereby requiring developers to bear the economic burden created by the loss of wetlands under the NWP program. An NWP tax should be imposed in addition to the ACOE's existing mitigation requirements. Conjoining mitigation requirements and a NWP tax would (1) decrease the loss of wetland functions associated with a mitigation-only approach[251] and (2) prevent developers from shifting the economic burden of their activities to the ACOE (and hence all federal taxpayers) in the form of monitoring the mitigation and NWP permit programs.

Regardless of the basis pursuant to which it is enacted, Congress should enact the CWARA or substantively similar legislation. Although post-*SWANCC* case law has softened the blow by interpreting *SWANCC* narrowly,[252] *SWANCC* nonetheless left unprotected millions of acres of wetlands.[253] Furthermore, the federal regulatory response to *SWANCC* has further decreased CWA protections.[254] Consequently, the CWARA is supported by

247. *Cf.* Zietlow, *supra* note 244, at 174.

248. *Cf.* Binder, *supra* note 241, at 159; Zietlow, *supra* note 244, at 148-50; Boudreaux, *supra* note 3, at 551.

249. Binder, *supra* note 241, at 149 n.18 (discussing Congress' use of the Taxation Clause as a basis of environmental regulations such as the Superfund).

250. *See supra* note 19 (discussing NWP's). *See also* Ostergren, *supra* note 7, at 413-14 (same).

251. *Cf.* Press Release, The National Academies, Reforms Needed in Wetlands Regulatory Program, *at* http://www4.nationalacademies.org/news.nsf/isbn/0309074320?OpenDocument (June 26, 2000)(questioning the efficacy of the ACOE's mitigation program).

252. *See supra* Parts III-IV.

253. Pianin, *supra* note 194; National Wildlife Federation, *Administration Reverses Course on Clean Water Rules: Put Brakes on Miguided Policy Proposal*, *at* http://www.nwf.org/enviroaction/index.cfm?issueid=30&articleid=262&CFID=2063582&CFTOKEN=e64bdb097cc19dd9-E0879C82-FE8A-8F45-7504533E7388824E (Feb. 2004) [hereinafter NWF Press Release].

254. *See infra* Part VII.

many states because the legislative gap left by *SWANCC* shifted the economic burden of protecting isolated wetlands onto the states.[255] Moreover, congressional clarification of the scope of the CWA would decrease the volume of CWA jurisdictional litigation and promote predictability amongst the regulated community.[256]

SWANCC and its progeny have also prompted a legislative proposal that would restrict CWA jurisdiction, thereby "nullify[ing] recent federal court rulings that support an expansive view of federal CWA jurisdiction."[257] Representative Richard Baker (R-LA) announced in March of 2004 that he planned to introduce the Comprehensive Wetlands Conservation and Management Act ("CWCMA"), which would, inter alia, redefine "'waters of the United States' as waters 'navigable in fact; adjacent to such navigable waters; or hydrologically connected to such navigable waters through a continuous, naturally occurring surface connection.'"[258] A spokesperson for Representative Baker indicated that the CWCMA "is designed to end confusion stemming from [*SWANCC*]."[259] As of August 12, 2004, the CWCMA had not been introduced. Consequently, it is impossible to examine the bill in any detail. Nonetheless, to the extent that the CWCMA would essentially adopt the position adopted by the Fifth Circuit Court of Appeals in *Rice* and *Needham*, its passage should be rejected for the same reasons that a majority of federal courts have rejected the Fifth Circuit's interpretation of *SWANCC*. Indeed, the narrow version of CWA jurisdiction apparently

255. *Cf.* Press Relase, Michigan Department of Environmental Quality, DEQ Expresses Support for Federal Wetland Protection through the Clean Water Authority Restoration Act of 2003, *at* http://www.michigan.gov/deq/0,1607,7-135-78077-00.html (Oct. 16, 2003); Wodder, *supra* note 219 (noting that thirty-nine states opposed proposed rule-making that would decrease CWA jurisdiction); Tiner, *Estimated Extent*, *supra* note 210, at 647-48 (noting that several states have produced estimates of the number of isolated wetlands left unprotected by *SWANCC*).

256. Margaret A. Johnston, Note, *Environmental Law—Clean Water Act—The Supreme Court Scales Back the Army Corps of Engineers' Jurisdiction Over "Navigable Waters" Under the Clear Water Act.* Solid Waste Agency v. United States Army Corps of Engineers, *531 U.S. 159 (2001)*, 24 U. ARK. LITTLE ROCK L. REV. 329, 356 (2002).

257. *See* Press Release, Federal Highway Administration, House Bill Cutting Clean Water Jurisdiction Would Nix Court Rulings, *at* http://nepa.fhwa.dot.gov/ReNEPA/ReNepa.nsf/0/b2d6a5b4a03e42b885256e52005996cc?OpenDocument (Mar. 5, 2004).

258. *Id.* The CWCMA would also (1) require the federal government to compensate landowners prohibited from developing property containing wetlands; (2) place the CWA section 404 permit program under the ACOE, thus eliminating a veto that the EPA currently maintains over ACOE permitting decisions; and (3) "establish a preference for private-sector mitigation banks as the primary method of wetlands mitigation." *Id.*

259. *Id.* In any event, Congress is not expected to address the controversial issue in an election year. *Id.*

envisioned by the CWCMA would undercut the essential purpose of the CWA: to prohibit the pollution of America's water resources, regardless of the manner in which the pollution travels (i.e., natural waterways versus manmade connections) or how often such pollutants travel (i.e., continuous waterways versus intermittent connections).[260]

VII. THE REGULATORY RESPONSE TO *SWANCC*: THE BUSH ADMINISTRATION ABANDONED PLANS FOR REGULATORY RULE-MAKING THAT WOULD HAVE LIMITED CWA PROTECTIONS

On January 15, 2003, the EPA and the ACOE issued an Advance Notice of Proposed Rulemaking ("ANPRM") on the CWA's regulatory definition of "waters of the United States."[261] The ANPRM sought comment on the scope of the CWA after *SWANCC* in order to develop regulations clarifying the CWA's regulatory scope.[262] In addition to noting that *SWANCC* eliminated jurisdiction over isolated, non-navigable, intrastate waters where the sole basis of jurisdiction was the presence of migratory birds, the ANPRM also questioned whether *SWANCC* further eliminated "the other factors in the [MBR] or the other rationales" listed in 33 C.F.R. 328.3(a)(3).[263] Consequently, the ANPRM sought public comment on two issues: (1) whether the non-migratory bird factors (e.g., use by foreign or interstate travelers, the presence of fish or shellfish that could be sold in interstate commerce) in 33 C.F.R. § 328.3(a)(3)(i)-(iii) remained a valid basis for CWA jurisdiction; and (2) whether the proposed regulations should define "isolated waters."[264]

As an addendum to the ANPRM, the EPA and the ACOE issued a joint memorandum providing additional guidance concerning implementation of the CWA in light of *SWANCC* [hereinafter 2003 Joint Memorandum].[265] The 2003 Joint

260. *Id.* Additionally, the House Water Resources and Environment Subcommittee conducted a hearing on March 30, 2004 concerning the "inconsistent determinations by [the ACOE and the EPA] of what is, and is not, subject to Federal jurisdiction under the [CWA]." U.S. House of Representatives, *The Subcommittee on Water Resources and Environment Hearing On Inconsistent Regulation of Wetlands and Other Waters, at* http://www.house.gov/transportation/water/03-30-04/03-30-4memo.html (last visited June 15, 2004). At the time this Article went to press, however, the subcommittee had not yet taken action.

261. *See* ANPRM, 68 Fed. Reg. at 1991. *See also* Kunz, *supra* note 5, at 491 (discussing the ANPRM).

262. ANPRM, 68 Fed. Reg. at 1991-93.

263. ANPRM, 68 Fed. Reg. at 1993; Ostergren, *supra* note 7, at 399-400 (noting that the ANPRM disavowed all jurisdiction under the MBR and questioned the continued vitality of § 328.3(a)(3)).

264. ANPRM, 68 Fed. Reg. at 1994.

265. ANPRM, 68 Fed. Reg. at 1995; *supra* note 193 (discussing the 2003 Joint Memorandum).

Memorandum provided "clarifying guidance" concerning *SWANCC*, thus superseding the 2001 Joint Memorandum issued by the Clinton Administration.[266] The 2003 Joint Memorandum construed *SWANCC* narrowly, noting that it eliminated "CWA jurisdiction over isolated waters that are intrastate and non-navigable, where the sole basis for asserting CWA jurisdiction is the actual or potential use of the waters as habitat for migratory birds. . . ."[267] The 2003 Joint Memorandum also questioned whether *SWANCC* effectively eliminated non-bird factors listed in the MBR, such as use of the waters as a habitat for endangered species or to irrigate crops sold in interstate commerce.[268] Accordingly, it noted that neither the ACOE nor the EPA would "assert CWA jurisdiction over isolated waters that are both intrastate and non-navigable, where the sole basis available for asserting CWA jurisdiction rests on any of the factors listed in the [MBR]."[269] Additionally, ACOE and EPA field staff were directed to "seek formal project-specific HQ approval prior to asserting jurisdiction over waters based on other factors listed in 33 CFR 328.3(a)(3)(i)-(iii)."[270]

On December 16, 2003, the ACOE and the EPA "announced that they would not issue a new rule [clarifying CWA] jurisdiction over isolated wetlands."[271] The decision to abandon the proposed rule-making was likely a result of the 133,000 (mostly negative) comments received by the ACOE in response to the ANPRM.[272]

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266. ANPRM, 68 Fed. Reg. at 1995.

267. *Id.* at 1996.

268. *Id.*

269. *Id.*

270. *Id.* at 1997-1998. *See also* Elizabeth Shogren, *EPA to Review Clean Water Act's Scope*, L.A. TIMES, Jan. 11, 2003, at A12, *available at* 2003 WL 2377326 (noting that CWA advocates feared that field staff would "choose not to require a permit for a body of water, rather than go to the trouble of appealing to Washington for a decision").

271. *See* Press Release, Environmental Protection Agency, EPA and Army Corps Issue Wetlands Decision, *at* http://yosemite.epa.gov/opa/admpress.nsf/b1ab9f485b098972852562e7004dc686/540f28acf38d7f9b85256dfe00714ab0?OpenDocument (Dec. 16, 2003) [hereinafter Joint Press Release]; BNA, 72 U.S.L.W. at 2361-62; Pianin, *supra* note 194 (noting that President Bush made the decision to abandon "plans for regulatory changes that would have sharply reduced the number of federally protected streams and wetlands"); NWF Press Release, *supra* note 253.

272. BNA, 72 U.S.L.W. at 2361; GAO Report, *supra* note 19, at 14 (noting that ninety-nine percent of the 133,000 comments received were opposed to new rulemaking). Those opposed to the proposed rule-making included 218 members of Congress, state regulators, environmentalists, and sportsmen. *Id.* *See also* BNA, 72 U.S.L.W. at 2361 ("[M]any of the comments came from state regulators concerned that a federal rulemaking could narrow the scope of federal jurisdiction, putting too many wetlands at risk. Several states commented that they did not have authority or financial resources to protect their wetlands that suddenly did not enjoy protection under Section 404 of the

Indeed, opponents of the proposed rulemaking contended that it would have jeopardized up to 20 million acres of wetlands.[273] Nonetheless, the EPA and the ACOE will continue to rely on the 2003 Joint Memorandum, which itself jeopardizes millions of acres of wetlands by imposing a procedural hurdle that will deter ACOE district staff from exercising jurisdiction in close cases.[274] Although encouraged by the Bush Administration's decision to abandon its proposed rulemaking, CWA advocates continue to press for the rescission of the policy guidance issued on January 15, 2003.[275] In any event, in October of 2003 the ACOE "agreed to an EPA request to collect data measuring the extent to which [*SWANCC* has] prompted [ACOE] district offices to avoid the regulation of

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federal Clean Water Act.") ; Pianin, *supra* note 194; Elizabeth Shogren, *Rule Drafted that Would Dilute the Clean Water Act*, L.A. TIMES, Nov. 6, 2003, at A12, *available at* 2003 WL 2446562 ("In comments on the [proposed rulemaking], states almost unanimously urged the federal government to retain a broad definition of waters of the United States.").

273. *Id.*; Pianin, *supra* note 194. The Bush Administration's decision to refrain from rulemaking may also have been prompted by the reaction to the draft rule, which was leaked in November of 2003 to the Los Angeles Times. *See* National Wildlife Federation, *Congress Rejects Bush Administration's Efforts to Remove Federal Protections from Nation's Wetlands and Streams, at* http://www.nwf.org/news/story.cfm?pageId=13C93164-65BF-1173-58078EE61E01C3B2 (Nov. 25, 2003) (noting that 218 members of Congress signed a letter opposing a draft rule by the Bush Administration that would have scaled back the CWA); National Wildlife Federation, *Draft Rule Threatens to Strip Clean Water Act Protections From Nation's Water Resources, available at* http://www.nwf.org/nwfwebadmin/binaryVault/CWA_Rulemaking_fact_sheet.pdf (last visited July 19, 2004)(outlining the changes that the draft rule would have effected, including the removal of CWA protection for (1) ephemeral and intermittent streams, (2) some wetlands adjacent to tributaries, and (3) manmade connections such as ditches and drainage pipes); Robert R.M. Verchick, *Toward Normative Rules for Agency Interpretation: Defining Jurisdiction Under the Clean Water Act*, 55 ALA. L. REV. 845, 869-71, 871 n. 158 (setting forth the draft rule) (2004). *See also* Shogren, *supra* note 272 (discussing a leaked copy of the Bush Administration's draft rule that would have, inter alia, removed protection for waters that lacked groundwater as a source and waters that flowed less than six months out of the year).

274. *See id.*; GAO Report, *supra* note 19, at 14 n.14 (noting that of the seven cases for which ACOE districts have sought headquarters' approval, six were found to be jurisdictional and one was found not jurisdictional); Mank, *supra* note 11, at 882 (noting that unidentified EPA officials "acknowledged off the record that requiring approval for field staff decisions will likely curtail the agencies' jurisdiction . . ."); Verchick, *supra* note 273, at 846-47, 870 (explaining that the guidance remains in effect, but will be reviewed); Pianin, *supra* note 194; Press Release, Sierra Club, Broad Backlash Prompts Bush Reversal on Misquided Water Rule: Administration Fails to Rescind Guidance Discouraging Enforcement of Clean Water Protections: Statement of Carl Pope, Executive Director, *at* http://www.sierraclub.org/pressroom/releases/pr2003-12-16.asp (Dec. 16, 2003); NWF Press Release, *supra* note 252.

275. NWF Press Release, *supra* note 253; Pianin, *supra* note 194, at A20.

wetlands and other waters."[276] Enactment of the CWARA, however, would obviate the problems associated with the 2003 Joint Memorandum - until the Commerce Clause showdown at the Supreme Court.[277]

VIII. CONCLUSION

The Supreme Court's decision in *SWANCC* has been the source of much litigation and scholarly attention. Most of the attention has focused on the extent of *SWANCC*'s impact on CWA jurisdiction. The majority of courts addressing the issue, including the Fourth, Sixth, Seventh, and Ninth Circuit Courts of Appeals have construed *SWANCC* narrowly, holding that CWA jurisdiction extends over all waters hydrologically connected to navigable waters and that *SWANCC*'s sole casualty was the part of the MBR related to migratory birds - and perhaps jurisdiction based upon effects on interstate commerce that are unrelated to navigation.[278] The Fifth Circuit Court of Appeals, on the other hand, construed *SWANCC* broadly in *Rice* and *Needham*, holding that federal regulatory jurisdiction under the OPA (and hence the CWA) only extends to waters that are either actually navigable or adjacent to a navigable body of water.[279]

Although commentators decried *SWANCC* as "the most devastating judicial opinion affecting the environment ever,"[280] the narrow construction of *SWANCC* adopted by a majority of federal courts addressing the issue indicates that *SWANCC* was not as damaging to the federal government's ability to regulate wetlands as was initially thought. Indeed, *SWANCC* did not alter federal regulatory jurisdiction over waters as *channels* of interstate commerce as opposed to waters that *may affect* interstate commerce.[281] Nonetheless, *SWANCC* did eliminate CWA

276. GAO Report, *supra* note 19, at 15. EPA oversight of ACOE jurisdictional determinations may help ensure that ACOE districts do not apply *SWANCC* too broadly.

277. To the extent, however, that the CWARA is not based on Congress's power to regulate activities that substantially affect interstate commerce, then the Supreme Court may not have to address the question left unanswered in *SWANCC*.

278. *Cf. supra* note 6 (noting that the Supreme Court denied petitions for certiorari that challenged decisions by the Fourth and Sixth Circuit Courts of Appeal).

279. Although *Rice* and *Needham* shed some light on how the Fifth Circuit Court of Appeals will construe *SWANCC* with respect to the scope of the CWA, these decisions are nonetheless dicta because they addressed the OPA. *See* Wood, *supra* note 15, at 10188.

280. *See* Funk, *supra* note 5, at 10741

281. *See, e.g., Lamplight*, 2002 WL 360652 at *6 (noting that, where bodies of water are being regulated as channels of interstate commerce, as opposed to waters that may affect interstate commerce, *SWANCC* is irrelevant because it "involved isolated waters lacking a physical/hydrological connection to other

jurisdiction over isolated, intrastate, non-navigable waters where the sole basis was the presence of migratory birds. This reduction of federal regulatory jurisdiction has adversely impacted wetlands preservation, especially in arid areas of the country such as California and the southwest, areas where isolated wetlands comprise a significant percentage of existing wetlands. Any additional loss of wetlands beyond the estimated annual loss of up to 300,000 acres further threatens a resource that helps maintain the integrity of America's water resources and provides functions such as biodiversity, flood control, as well as seafood and migratory waterfowl production. Consequently, Congress should enact the CWARA or substantively similar legislation restoring the CWA to its pre-*SWANCC* status by removing the term "navigable" from the CWA. Furthermore, Congress should consider basing the CWARA or similar legislation on, inter alia, Congress's spending power, which is not limited by the Supreme Court's recent federalist jurisprudence reigning in the Commerce Clause.

navigable waters").