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The Constitutionality and Economic Impacts of Federal Jurisdiction of Wetlands: The Clean Water Restoration Act of 2009

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NOTE

THE CONSTITUTIONALITY AND ECONOMIC IMPACTS OF FEDERAL JURISDICTION OF WETLANDS: THE CLEAN WATER RESTORATION ACT OF 2009

R. Benjamin Lingle[*] [**]

I. INTRODUCTION

Imagine there is a river, and a half mile to the river's east is a twenty-acre wetland. To the east of the wetland is a neighborhood. The river's eastern bank is seven feet above the mean water line, and the western bank is ten feet above the mean water line. If the river floods to eight feet above the mean water line, it will spill over the eastern bank. The water will flow unfettered for half a mile. However, upon reaching the wetland, much of the flooding water could be absorbed. One acre of

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wetland flooded to one foot can hold up to 330,000 gallons of water.[1] Therefore, the twenty acres in our hypothetical could absorb up to 6,600,000 gallons of water. This could stop the flooding water, or at least hinder its progress. However, if the wetland were filled in and replaced with a shopping center, this flood control function would be unavailable. The impervious cover of the shopping buildings and accompanying parking lots would prevent the surface absorption of any water, possibly exacerbating flood damage farther down the water's path.[2] Therefore, the wetland's mitigating effect on flood damage would be trumped by the shopping center's exacerbating effect. If the wetland were not under Clean Water Act[3] (CWA) jurisdiction, the shopping center developer could proceed without Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) oversight, possibly imposing flood damage externalities on the adjacent neighborhood.

If a CWA § 404 permit were required,[4] the Corps could assure that the developer avoids, minimizes, and mitigates any harm posed to the wetland and, consequently, to the town.[5] However, requiring the would-be-developer to acquire CWA permits would impose a significant financial burden.[6] Recent Supreme Court jurisprudence shows a reluctance to impose such permits unless the CWA's statutory language makes abundantly clear that doing so comports with its framers' intent.[7] Discontented with these judicial decisions, House and Senate Democrats have drafted legislation reasserting federal control over waters cut out by the Court, and arguably beyond.[8] The Clean Water

1. JON KUSLER & TERESA OPHEIM, OUR NATIONAL WETLAND HERITAGE: A PROTECTION GUIDE 5 (2d ed. 1996).

2. For information on impervious cover, the "land cover that water cannot penetrate," see Craig Anthony Arnold, *Clean-Water Land Use: Connecting Scale and Function*, 23 PACE ENVTL. L. REV. 291, 294–301 (2006).

3. *See* 33 U.S.C. §§ 1251–1387 (2006).

4. *Id.* § 1344 (requiring Corps' authorization to add dredged or fill material into jurisdictional waters).

5. *The Clean Water Restoration Act of 2007: Hearing Before the H. Comm. on Transportation and Infrastructure*, 110th Cong. 471 (2008) [hereinafter *CWRA of 2007 House Hearings*] (statement of The Hon. John Paul Woodley, Jr., Assistant Secretary of the Army).

6. *See* David Sunding & David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 NAT. RESOURCES J. 59, 74–75 (2002).

7. *See* Rapanos v. United States, 547 U.S. 715, 738 (2006) (plurality opinion) ("We ordinarily expect a 'clear and manifest' statement from Congress to authorize an unprecedented intrusion into traditional state authority."); Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 172 (2001) [hereinafter *SWANCC*] ("Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result.").

8. *See* The Clean Water Restoration Act, S. 787, 111th Cong. (2009) [hereinafter CWRA].

Restoration Act of 2009 (CWRA), which cleared the Senate Environmental and Public Works Committee in June of 2009,[9] is the latest of these proposals.[10] Under the current form of the CWRA, it is uncertain how many additional landowners, if any, would be pulled into Corps and EPA permitting authority.[11] This uncertainty is cause for concern.

Congress passed the Clean Water Act to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[12] The Act exerted federal control over the nation's "navigable waters,"[13] defined ambiguously as "the waters of the United States, including the territorial seas."[14] Congress granted the EPA ultimate discretion to interpret which waters were jurisdictional.[15] Between 1985 and 2006, a triad of Supreme Court decisions weighed in on the interpretations, with

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> [T]his Act will treat, as "waters of the United States", those features that were treated as such pursuant to the regulations of the Environmental Protection Agency and the Corps of Engineers in existence before the dates of [the *Rapanos* and *SWANCC* decisions], including—(A) all waters which are subject to the ebb and flow of the tide; (B) all interstate waters, including interstate wetlands; (C) 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; (D) all impoundments of waters of the United States; (E) tributaries of the aforementioned waters; (F) the territorial seas; and (G) wetlands adjacent to the aforementioned waters[.]

Id. § 3(8).

9. Press Release, U.S. Senate Comm. on Env't. & Pub. Works, EPW Comm. Approves Clean Water Restoration Act (June 19, 2009), *available at* http://epw.senate.gov/public/index.cfm?FuseAction=PressRoom.PressReleases&ContentRecord_id=F95AB046-802A-23AD-46DC-40C4F53FB380.

10. Earlier proposals, all similar in intended effect, are the Clean Water Restoration Act of 2007, S. 1870, 110th Cong. (2007), the Clean Water Restoration Act of 2007, H.R. 2421, 110th Cong. (2007), the Clean Water Authority Restoration Act of 2005, S. 912, 109th Cong. (2005), the Clean Water Authority Restoration Act of 2003, S. 473, 108th Cong. (2003), and the Clean Water Authority Restoration Act of 2002, S. 2780, 107th Cong. (2002).

11. *See* Congressional Budget Office, Cost Estimate: S. 787, Clean Water Restoration Act, at 2 (2009) [hereinafter CWRA CBO Cost Estimate].

12. 33 U.S.C. § 1251(a) (2006).

13. *Id.* § 1344(a).

14. *Id.* § 1362(7).

15. Donna M. Downing et al., *Navigating Through Clean Water Act Jurisdiction: A Legal Review*, 23 WETLANDS 475, 483 (2003).

> In 1979, the Secretary of the Army requested the Attorney General of the United States to clarify whether the Corps or EPA had the ultimate administrative authority to determine the reach of the term "navigable waters" for purposes of CWA section 404. In his opinion letter, Attorney General [Benjamin] Civiletti determined that "'navigable waters' can have only one interpretation under the Act," and EPA is charged with administering the entire Clean Water Act.

Id.

the latter two decisions significantly narrowing which waters should be included.[16] Depending on whether a reader looks to the plurality opinion or to the concurrence, the Supreme Court's latest word on the issue, *Rapanos v. United States*,[17] limits federal jurisdiction to either 1) "relatively permanent, standing or continuously flowing bodies of water"[18] and "wetlands with a continuous surface connection" to those waters[19] or 2) those waters possessing a "significant nexus" to navigable waters.[20]

The main thrust of the CWRA is to remove the word "navigable" from the definition of waters reached by the CWA.[21] Neither the 2009 version of the CWRA nor its House and Senate predecessors have been warmly received by the regulated community.[22] Whereas environmental groups have extolled the Act's benefits and largely ignored the potential costs,[23] private property advocates have focused solely on the burdens the Act will impose while ignoring the potential benefits.[24] Opponents argue that the Act extends beyond Congress' commerce powers.[25] They argue that the Act pushes jurisdiction beyond areas of national concern

16. *See* Rapanos v. United States, 547 U.S. 715, 739 (2006) (plurality opinion); *SWANCC*, 531 U.S. 159, 170–74 (2001); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 131–39 (1985).

17. 547 U.S. 715.

18. *Id.* at 739 (plurality opinion).

19. *Id.* at 742.

20. *Id.* at 759 (Kennedy, J., concurring).

21. CWRA, *supra* note 8, § 5(1).

22. *See generally, e.g.*, *The Future of Specialty Crops for Small Family Farmers: Hearing Before the Subcomm. on Rural Development, Entrepreneurship and Trade of the H. Comm. on Small Business*, 111th Cong. (2009) (testimony of Bill Holbrook, Owner, Cold Mountain Farms); *Meeting the Needs of Small Businesses and Family Farmers in Regulating Our Nation's Waters: Hearing Before the H. Comm. on Small Business*, 111th Cong. (2009) (testimony of James K. Chilton, Jr., on behalf of Arizona Cattle Growers Association, Public Lands Council, and National Cattlemen's Beef Association); *Meeting the Needs of Small Businesses and Family Farmers in Regulating Our Nation's Waters: Hearing Before the H.Comm. on Small Business*, 111th Cong. (2009) (testimony of Bob Gray, Executive Director, Northeast Dairy Farm Cooperatives); *Meeting the Needs of Small Businesses and Family Farmers in Regulating our Nation's Waters: Hearing Before the H. Comm. on Small Business*, 111th Cong. (2009) (statement of Trey Pebley, Vice President, McAllen Construction, Inc.); *Meeting the Needs of Small Businesses and Family Farmers in Regulating Our Nation's Waters: Hearing Before the H. Comm. on Small Business*, 111th Cong. (2009) (written testimony of Lyle Schellenberg, President, Armadillo Underground, Inc. and National Utility Contractors Association); *CWRA of 2007 House Hearings*, *supra* note 5 (statement of The Hon. John Paul Woodley, Jr., Assistant Secretary of the Army).

23. *See, e.g.*, Sierra Club, *Restoring the Clean Water Act*, http://illinois.sierraclub.org/legislation/2009/docs/federal/CWRAFactSheet7.09.pdf (last visited May 15, 2010).

24. *See supra* note 22.

25. *See* Is the Clean Water Restoration Act Constitutional?, http://rapanos.typepad.com/my_weblog/2009/06/plf-calls-clean-water-restoration-act-clearly-un con stitutional.html (June 1, 2009).

and "eliminate[s] the current separation between the state and federal government, bringing the federal government into local land use decisions."[26] This arguably leaves property owners subject to a more distant and less responsive authority than that found in state governments. Additionally, opponents argue the financial burdens imposed by extending federal jurisdiction will unduly restrict property owners' rights to utilize their land.[27]

This Note addresses the concerns with the Clean Water Restoration Act. Following the Introduction, Part II briefly outlines what constitutes a wetland and why protection is important. Part III summarizes the history of the CWA's § 404 permitting scheme and reviews the three pivotal Supreme Court decisions. Following the review is a description of the resulting CWRA legislation. Part IV addresses the constitutionality of the CWRA, in particular whether it exceeds Congress' power under the Commerce Clause[28] and whether it improperly impinges on state sovereignty. A look at modern Commerce Clause jurisprudence demonstrates that Congress is indeed empowered to pass the CWRA.[29] Many CWRA waters are "things in interstate commerce," and all included waters "substantially affect interstate commerce."[30] Further, regardless of arguments that the waters' effects on interstate commerce may be too attenuated to fall within Congress' commerce powers, the regulated activities themselves affect interstate commerce. The language of the CWRA is structured to extend jurisdiction both to waters affecting commerce and to waters where "activities affecting these waters[] are subject to the legislative power of Congress under the Constitution."[31]

Should the Supreme Court have the opportunity to review the CWRA, the Act should not be invalidated. Passage of the CWRA would be constitutional. However, substantial public policy arguments cut against the Act in its present form. The Act's implementation would affect interstate commerce, and the effect could be detrimental both to local governments and to the private sector. Economic implications are unknown but may well be substantial.[32] Other than retaining the exemptions to § 404 included in the CWA,[33] the CWRA does not

26. *The Clean Water Restoration Act of 2007: Hearing Before the S. Environment and Public Works Comm.*, 110th Cong. 6 (2008) (statement of David Brand, County Sanitary Engineer, Madison County, Ohio).

27. *See Clean Water Restoration Act of 2007: Hearing on S. 1870 Before the S. Comm. on Environment and Public Works*, 110th Cong. 9 (2008) (testimony of Randall Smith, on behalf of the National Cattlemen's Beef Association).

28. U.S. CONST. art. I, § 8, cl. 3.

29. *See generally* Rapanos v. United States, 547 U.S. 715 (2006); *SWANCC*, 531 U.S. 159 (2001); Rancho Viejo, LLC v. Norton, 323 F.3d 1062 (D.C. Cir. 2003); Nat'l Ass'n of Home Builders v. Babbitt, 130 F.3d 1041 (D.C. Cir. 1997).

30. *See* United States v. Lopez, 514 U.S. 549, 558–59 (1995).

31. CWRA, *supra* note 8, § 4(25).

32. CWRA CBO Cost Estimate, *supra* note 11, at 2.

33. CWRA, *supra* note 8, § 3(13)(A) ("[N]othing in this Act modifies or otherwise affects

address potential economic harm caused by increased permitting jurisdiction. Land developers, farmers, and ranchers have all attested that they will be harmed by the CWRA,[34] yet have provided no data to support this claim. Part V of this Note addresses the uncertainty of the CWRA's economic impacts. Until more substantiated economic data is developed and considered, passage of the CWRA is unwise. The Act clarifies the constitutional scope of federal jurisdiction but has an imprudent "wait and see" approach to economic costs.

This Note concludes that more research must be done before CWRA passage would be appropriate. Supporters are not considering economic costs, and opponents are not considering environmental costs.[35] Bringing federal jurisdiction back to pre-2001 levels would have predictable economic impacts; the impacts would be comparable to those actually demonstrated prior to the Supreme Court's 2001 curtailment of jurisdiction.[36] However, the CWRA arguably expands jurisdiction beyond pre-2001 levels. A responsible Congress would attempt to better ascertain additional costs before taking this step.

II. WETLANDS

Wetlands are "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."[37] The Corps evaluates the presence of three factors when judging whether an area constitutes a wetland: hydrophytic plants, hydric soil, and wetland hydrology.[38] As detailed in Justice Anthony Kennedy's *Rapanos* concurrence, the Corps looks to:

> (1) [The] prevalence of plant species typically adapted to saturated soil conditions . . . ; (2) hydric soil, meaning soil that is saturated, flooded, or ponded for sufficient time during the growing season to become anaerobic . . . ; and (3) wetland hydrology, a term generally requiring continuous inundation or saturation to the surface during at

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[CWA and prior CWA amendments] that exempted certain activities, such as farming, silviculture, and ranching activities, as well as agricultural stormwater discharges and return flows from oil, gas, and mining operations and irrigated agriculture, from particular permitting requirements.").

34. *See* sources cited *supra* notes 22 and 27.

35. *See* sources cited *supra* notes 22–23 and 25–27.

36. *See* Sunding & Zilberman, *supra* note 6, at 74–75.

37. 33 C.F.R. § 328.3(b) (2005), *quoted in* Rapanos v. United States, 547 U.S. 715, 761 (Kennedy, J., concurring).

38. *Rapanos*, 547 U.S. at 761 (citing U.S. ARMY CORPS OF ENG'RS, WETLANDS RESEARCH PROGRAM TECHNICAL REPORT Y-87-1 (online edition) 12–34 (1987), http://el.erdc.usace.army.mil/elpubs/pdf/wlman87.pdf (last visited May 15, 2010)).

least five percent of the growing season in most years.[39]

There are four general categories of wetlands found in the United States: marshes, swamps, bogs, and fens.[40] Marshes are tidal (coastal) or nontidal (inland) wetlands containing herbaceous vegetation dependent on saturated soil conditions.[41] Examples include freshwater marshes, wet meadows, wet prairies, prairie potholes, playas, and vernal pools.[42] Whereas marshes are dominated by herbaceous vegetation, swamps are characterized by trees and shrubs.[43] Swamps, which occur both in freshwater and saltwater conditions, are further characterized as forested swamps, shrub swamps, and mangrove swamps.[44] Bogs are "characterized by spongy peat deposits, a growth of evergreen trees and shrubs, and a floor covered by a thick carpet of sphagnum moss."[45] Examples include northern bogs and pocosins.[46] Fens are also characterized by peat deposits, but they differ from bogs in that they are richer in nutrients and less acidic.[47]

Wetlands serve valuable ecological functions and are integral to a healthy ecosystem.[48] They prevent damage to neighboring lands by providing conveyance and storage of flood waters.[49] Coastal wetlands are barriers to waves,[50] serving as "'horizontal levees' that . . . absorb storm surges."[51] Both inland and along the coast, wetlands serve to prevent erosion and help with sediment control.[52] Another benefit is pollution control: "Wetlands act as settling ponds and remove excess nutrients and other pollutants by filtering and causing chemical breakdown of pollutants."[53] Wetlands also serve as habitats for fish and

39. *Id.* Anaerobic soil is the cause of the repugnant smell often associated with wetlands. Bacteria which thrive in the oxygen-free soil emanate the rotten-egg odor of hydrogen-sulfide. *See* THEDA BRADDOCK, WETLANDS: AN INTRODUCTION TO ECOLOGY, THE LAW, AND PERMITTING 5 (2d ed. 2007).

40. U.S. ENVTL. PROT. AGENCY, TYPES OF WETLANDS (2001) http://www.epa.gov/owow/wetlands/pdf/types.pdf 1–2 (last visited May 7, 2010).

41. *Id.* at 1.

42. *Id.*

43. *Id.*

44. *Id.* at 2.

45. *Id.*.

46. *Id.*

47. U.S. Envtl. Prot. Agency, Wetlands: Fens, http://www.epa.gov/owow/wetlands/types/fen.html (last visited May 7, 2010).

48. KUSLER & OPHEIM, *supra* note 1, at 5–10.

49. *Id.* at 5. As noted in the Introduction, one acre of wetland flooded to one foot can hold up to 330,000 gallons of water—water that would flood neighboring parcels if the wetland were not present. *Id.*

50. *Id.*

51. Sandra Zellmer, *A Tale of Two Imperiled Rivers: Reflections from a Post-Katrina World*, 59 FLA. L. REV. 599, 610 (2007) (citing Oliver Houck, *Can We Save New Orleans?*, 19 TUL. ENVTL. L.J. 1, 35 (2006)).

52. KUSLER & OPHEIM, *supra* note 1, at 5.

53. *Id.* at 7.

wildlife, provide water based recreation, and contribute to surface water supply and aquifer recharge.[54]

When the first European settlers began to emigrate to what is now the United States, they came to a land containing approximately 393 million acres of wetlands.[55] From the colonial days through the mid-20th Century, wetlands were considered foul, malarial areas that prevented land from being properly utilized for crop cultivation or development.[56] Prompted by governmental acquiescence and even actual encouragement of wetland destruction,[57] by 1954, half of the United States' wetlands had been destroyed by drainage, fill, and construction.[58] In the decades leading up to the CWA's 1972 passage, the rate of wetland destruction in the United States was approximately 460,000 acres per year.[59] Following the passage of the CWA and later aided by the "no net loss" policy promulgated during the first President Bush's administration,[60] a reverse in the trend has led to a net increase of 32,000 acres of wetlands from 1988 to 2004.[61] However, this trend is jeopardized by the Supreme Court's recent § 404 jurisprudence.

III. THE CLEAN WATER ACT, THE SUPREME COURT, AND THE CLEAN WATER RESTORATION ACT OF 2009: A BRIEF HISTORY

A. *The Clean Water Act and § 404 Permitting*

To "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," the 92nd Congress passed the Federal Water Pollution Control Act Amendments of 1972, popularly known as the Clean Water Act.[62] The CWA regulates the addition of pollutants to jurisdictional waters.[63] Section 404 concerns the permitting requirements for adding dredged or fill material into such waters[64] and is applicable to wetlands because fill material is considered a pollutant pursuant to § 502.[65] In continuance of its role in dredge and fill

54. *Id.* at 6–7.

55. BRADDOCK, *supra* note 39, at 6. Of these 393 acres, approximately 220 million were in the lower, coterminous forty-eight states. *Id*.

56. *Id.*

57. In the mid-19th Century, Congress passed the Swamp Lands Act, ch. 84, 9 Stat. 519 (1850) (codified at 43 U.S.C. §§ 981–94 (2006)), granting to states the right to "reclaim" wetlands to reduce flooding destruction and mosquito havens. BRADDOCK, *supra* note 39, at 6.

58. KUSLER & OPHEIM, *supra* note 1, at 3.

59. *CWRA of 2007 House Hearings*, *supra* note 5, at 471.

60. *Id.* at 470.

61. *Id.* at 471.

62. 33 U.S.C. §§ 1251–1387 (2006).

63. *Id.* § 1362(6) ("The term 'pollutant' means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.").

64. *Id.* § 1344.

65. *Id.* § 1362(6).

permitting under a CWA precursor, the Rivers and Harbors Appropriation Act of 1899,[66] the Army Corps of Engineers exercises CWA authority to issue § 404 permits.[67] The EPA, however, reserves an oversight and advisory function and may overrule a Corps decision granting a permit.[68] During the early years of the CWA, the Corps and the EPA disagreed regarding the scope of § 404 jurisdiction.[69] Whereas the Corps maintained jurisdiction should be limited to discharges intended either to change an aquatic area into a non-aquatic area or to raise the elevation of an aquatic bed, the EPA held that all solid waste discharges should be included, regardless of the intent or effect of the discharge.[70] In 1986, the two agencies entered into an agreement on the matter, in which a discharge of fill material would be considered jurisdictional if:

> (a) The discharge has as its primary purpose or has as one principle purpose of multi-purposes to replace a portion of the waters of the United States with dry land or to raise the bottom elevation[,]
> (b) The discharge results from activities such as road construction or other activities where the material to be discharged is generally identified with construction-type activities[,]
> (c) A principal effect of the discharge is physical loss or physical modification of waters of the United States, including smothering of aquatic life or habitat[, or]
> (d) The discharge is heterogeneous in nature and of the type normally associated with sanitary landfill discharges.[71]

The Corps' early understanding of the CWA confined its authority to the waters covered by the Rivers and Harbors Appropriation Act of 1899: "[N]avigable waters, including waters subject to the ebb and flow of the tides, waters which are or have been used to transport interstate commerce, tidal flats under navigable waters, and the natural meandering of rivers."[72] However, as a result of a citizen suit in *Natural Resources Defense Council, Inc. v. Callaway*,[73] the Corps expanded its

66. 33 U.S.C. §§ 401–18 (2006). For information on the Rivers and Harbors Appropriation Act of 1899, see Zellmer, *supra* note 51, at 612.

67. BRADDOCK, *supra* note 39, at 44.

68. *Id.* at 44 n.10 (citing Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning Determination of the Geographic Jurisdiction of the Section 404 Program and the Application of Exceptions Under Section 404(f) of the Clean Water Act (Jan. 19, 1989)).

69. *Id.* at 45.

70. *Id.*

71. Memorandum of Agreement on Solid Waste, 51 Fed. Reg. 8871 (Mar. 14, 1986).

72. BRADDOCK, *supra* note 39, at 44 n.12.

73. 392 F. Supp. 685 (D.D.C. 1975).

interpretation of jurisdictional waters to include wetlands.[74] Consequently, regulations promulgated after *Callaway* explicitly reference wetlands.[75] This jurisdictional expansion withstood Supreme Court review in one decision,[76] only to be dramatically curtailed in later decisions.[77]

B. *The Supreme Court and § 404 Permitting*

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

In *United States v. Riverside Bayview Homes, Inc.*,[78] the Supreme Court addressed whether the CWA "authorizes the Corps to require . . . permits . . . before discharging fill material into wetlands adjacent to navigable bodies of water and their tributaries."[79] The Court noted that the Corps' interpretation of CWA jurisdiction should be afforded deference so long as it was not unreasonable and did not contravene congressional intent.[80] The Court also acknowledged that "[i]n determining the limits of its power to regulate [wetland] discharges under the Act, the Corps must necessarily choose some point at which water ends and land begins."[81] Looking to the CWA's legislative history and its underlying ecological policies, the Court found the Corps' asserted jurisdiction over wetlands adjacent to navigable waters not unreasonable, and therefore legitimate.[82] Further, adjacent wetlands were covered by the CWA even when the wetlands were not flooded by or permeated by the adjacent waters.[83] Wetlands adjacent to navigable waters "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."[84] The Court noted that though the CWA did not explicitly mention wetlands, "a refusal by Congress to overrule an agency's construction of legislation is at least some evidence of the reasonableness of that construction, particularly [as here,] where the administrative construction has been brought to Congress' attention."[85]

74. BRADDOCK, *supra* note 39, at 44 n.12.

75. *See, e.g.*, 33 C.F.R. § 328.3(a)(2) (2009).

76. *See* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 139 (1985).

77. *See* Rapanos v. United States, 547 U.S. 715, 742 (2006) (plurality opinion); *SWANCC*, 531 U.S. 159, 174 (2001).

78. 474 U.S. 121 (1985).

79. *Id.* at 123.

80. *Id.* at 131.

81. *Id.* at 132.

82. *Id.* at 132–35.

83. *Id*. at 134–35.

84. *Id.* at 135.

85. *Id.* at 137.

2. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*

In 2001, the Supreme Court revisited the scope of § 404 jurisdiction in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (*SWANCC*).[86] In *SWANCC*, the Corps tried to exert jurisdiction over an abandoned sand and gravel pit containing isolated, non-navigable, intrastate, "permanent and seasonal ponds."[87] The Corps premised its jurisdiction on the fact that several species of migratory birds frequented the isolated waters.[88] Pursuant to the Corps' Migratory Bird Rule, this served as the requisite link to interstate commerce, thus validating CWA jurisdiction.[89] Not persuaded, the Court struck down the Migratory Bird Rule as not within the scope of CWA authority.[90] After *SWANCC*, the Corps could still exert jurisdiction over navigable waters, tributaries to navigable waters, wetlands adjacent to navigable waters, and wetlands adjacent to the tributaries of navigable waters.[91] However, the Corps lost the authority to regulate isolated, non-navigable, intrastate waters.

3. *Rapanos v. United States*

The Supreme Court's most recent word on the scope of the Corps' § 404 permitting authority came in 2006 with *Rapanos v. United States*.[92] The Court in *Rapanos* could not garner the requisite five votes for a majority opinion but rather produced a four-member plurality penned by Justice Antonin Scalia[93] and a concurrence penned by Justice Kennedy.[94] The opinions proved complex and confusing, and produced uncertainty on what the post-*Rapanos* standard for § 404 jurisdiction precisely is.[95] Justice Scalia's plurality opinion cabined jurisdiction to "relatively permanent, standing or continuously flowing bodies of water"[96] and "wetlands with a continuous surface connection" to those waters.[97] Justice Kennedy's concurrence, on the other hand, found all waters possessing a "significant nexus" to navigable waters to be

86. 531 U.S. 159 (2001).

87. *Id.* at 162–63.

88. *Id.* at 164–65.

89. *Id.* at 173. The Corps also justified the Migratory Bird Rule because it protected the "habitat [of] birds protected by Migratory Bird Treaties." *Id*. at 164.

90. *Id.* at 174.

91. For a summary of Corps jurisdiction following *SWANCC*, see BRADDOCK, *supra* note 39, at 39–40.

92. 547 U.S. 715 (2006).

93. *Id.* at 719–57 (plurality opinion).

94. *Id.* at 759–87 (Kennedy, J., concurring).

95. For information on case law following the *Rapanos* decision, see U.S. Envtl. Prot. Agency, Post-Rapanos Caselaw, http://www.epa.gov/owow/wetlands/pdf/Post-RapanosCaselaw 6407.pdf (last visited May 16, 2010).

96. *Rapanos*, 547 U.S. at 739 (plurality opinion).

97. *Id.* at 742.

jurisdictional waters.[98] He understood this nexus to be determinable only on a case-by-case basis.[99] Writing for the dissent, Justice John Paul Stevens noted that since the four dissenting Justices would uphold jurisdiction in all waters included in either Justice Scalia's or Justice Kennedy's test, satisfaction of either test should validate jurisdiction.[100] Interpreting this decision has proven less than workable, leading to disparate standards and frustration among the courts, the Corps, and the regulated community.[101]

C. *The Clean Water Restoration Act of 2009*

The Clean Water Restoration Act of 2009 amends the CWA "by striking 'navigable waters of the United States' each place it appears and inserting 'waters of the United States.'"[102] Importantly, the CWRA expressly exerts federal jurisdiction over all intrastate waters, language not found in the 1972 CWA.[103] Under the CWRA, jurisdictional waters would include

> [A]ll waters subject to the ebb and flow of the tide, the territorial seas, and all interstate and intrastate waters and their tributaries, including lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, natural ponds, and all impoundments of the foregoing, to the fullest extent that these waters, or activities affecting these waters, are subject to the legislative power of Congress under the Constitution.[104]

Whereas the original CWA ambiguously asserted jurisdiction over "navigable waters," defined only as "the waters of the United States, including the territorial seas,"[105] the CWRA language is explicit and closely follows the pre-*Rapanos* Army Corps of Engineers delineation of covered waters found in 33 C.F.R. § 383.3.[106]

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98. *Id.* at 779–80 (Kennedy, J., concurring).
99. *Id.* at 782.
100. *Id.* at 810 (Stevens, J., dissenting).
101. *See* U.S. Envtl. Prot. Agency, *supra* note 95.
102. CWRA, *supra* note 8, § 5(1).
103. *Id.* § 4(25).
104. *Id*.
105. 33 U.S.C. § 1362(7) (2006).
106. 33 C.F.R. § 328.3(a)(1-7) (2009).

> For the purpose of this regulation these terms are defined as follows: (a) The term waters of the United States means (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

Section 3 of the CWRA states that jurisdiction will be returned to those waters covered before the *Rapanos* and *SWANCC* opinions.[107] However, the language of the Act would arguably permit jurisdiction to extend beyond those earlier levels. Additionally, the CWRA retains the numerous exemptions included in the original CWA.[108] These include, among others, exemptions for most "normal farming, silviculture, and ranching activities, such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices."[109] The uncertainty in how far beyond pre-*Rapanos* levels CWRA jurisdiction would extend has been one of the main concerns regarding the Act's passage.[110]

IV. THE COMMERCE CLAUSE AND § 404 PERMITTING

A. *The Commerce Clause*

Pursuant to its commerce power,[111] Congress may enact laws regulating 1) "the use of the channels of interstate commerce"; 2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce"; and 3) "those activities that substantially affect interstate commerce."[112] Many of the waters covered by the CWRA constitute "channels of interstate commerce" or "things in interstate commerce."[113] Federal control of these waters, all under federal jurisdiction at least since 1972, is constitutional. The possible Commerce Clause complications stem from CWRA authority over waters not previously enumerated by Congress, such as "intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa

> 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.

Id.

107. CWRA, *supra* note 8, § 3(8).

108. *Id.* § 6.

109. *Id.* § 6(3).

110. *See supra* notes 22, 25–27 and accompanying text.

111. U.S. CONST. art. 1, § 8, cl. 3 (providing that "The Congress shall have power . . . [t]o regulate Commerce . . . among the several States").

112. United States v. Lopez, 514 U.S. 549, 558–59 (1995).

113. *See id.* at 558.

lakes, [] natural ponds[,] . . . [and their] tributaries."[114] To survive judicial scrutiny, a government defendant would need to demonstrate that these intrastate waters "substantially affect interstate commerce."[115] The following paragraphs will demonstrate that most, if not all, of these waters satisfy this criterion and are thus within Congress' commerce power.

The Supreme Court has not specifically ruled on potential Commerce Clause restraints to federal regulation of wetlands. In all three of the Court's § 404 opinions, the decision turned on the Corps' statutory interpretation, not the statute's constitutionality.[116] For example, in *SWANCC*, the petitioners asked the Court whether § 404 extended to an intrastate sand and gravel pit with "a scattering of permanent and seasonal ponds," and if so, "whether Congress could exercise such authority consistent with the Commerce Clause."[117] The Court found § 404 did not extend to such waters, and thereby avoided the constitutional issue.[118]

Again in 2006, rather than making a judgment on Congress' commerce powers, the Court invalidated a § 404 implementation scheme on statutory interpretation grounds.[119] Justice Kennedy signaled, however, that the Commerce Clause is a potential factor in wetlands regulation controversies.[120] Justice Kennedy found that the CWA granted federal jurisdiction over wetlands adjacent to navigable-in-fact waters and to wetlands having a "significant nexus" to nonnavigable tributaries.[121] He stated that "[*t*]*his* interpretation of the Act does not raise federalism or Commerce Clause concerns sufficient to support a presumption against its adoption."[122] He added that in "*most* cases regulation of wetlands that are adjacent to tributaries and possess a significant nexus with navigable waters will raise no serious constitutional or federalism difficulty."[123] Justice Kennedy stated that his "significant nexus" test should preclude unconstitutional extensions of the CWA.[124] This indicates that, regardless of whether Congress amends the CWA with the CWRA, waters failing to have a "significant nexus" to navigable waters or nonnavigable tributaries to navigable

114. CWRA, *supra* note 8, § 3(8)(C), (E).

115. *Lopez*, 514 U.S. at 558–59.

116. *See* Rapanos v. United States, 547 U.S. 715, 738–39 (2006) (plurality opinion); *SWANCC*, 531 U.S. 159, 173 (2001); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 131 (1985).

117. *SWANCC*, 531 U.S. at 162–63.

118. *Id.* at 162.

119. *Rapanos*, 547 U.S. at 738–39 (plurality opinion).

120. *Id.* at 777, 782–83 (Kennedy, J., concurring).

121. *Id.* at 782. Navigable-in-fact waters are those waters that are actually navigable. This phrase distinguishes these waters from the broad array of waters considered "navigable waters" per the CWA, many of which are not actually navigable.

122. *Id.* (emphasis added).

123. *Id.* (emphasis added).

124. *Id.* at 783.

waters will likely raise Commerce Clause issues for Justice Kennedy. Given that Justice Kennedy often serves as a swing vote, this could prove determinative should the CWRA be contested under the current or a similar makeup of the Court.

Justice Kennedy's presentiment is unfortunate. Though advocating a case-by-case analysis of whether a wetland's adjacency to nonnavigable tributaries establishes a "significant nexus,"[125] Justice Kennedy stated "mere hydrologic connection should not suffice in all cases."[126] He further noted that "the connection may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood."[127]

However, waters that lack a "significant nexus" to navigable-in-fact waters yet have hydrologic connections to navigable waters may cumulatively affect interstate commerce. Justice Kennedy himself stated, "'[W]hen a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.'"[128] Justice Kennedy drew this from *Gonzalez v. Raich*,[129] a 2005 Supreme Court decision reaffirming the *Wickard v. Filburn*[130] principal that proper Commerce Clause jurisprudence looks to the impacts of activities in the aggregate.[131] Accordingly, CWRA waters' aggregate effect on interstate commerce may open the door for Congress' commerce power, despite the lack of a "significant nexus" in specific instances. As Professor William Buzbee

125. *Id.* at 782.

126. *Id.* at 784. Hydrologic connectivity refers to the movement of water from one location to another within the same hydrologic cycle. Catherine Pringle, *What is Hydrologic Connectivity and Why Is It Ecologically Important?* http://cpringle.myweb.uga.edu/hydroconn.html (last visited July 11, 2010). If such movement is possible between two bodies of water, the two bodies would be hydrologically connected.

127. *Id.* at 784–85.

128. *Id.* at 783 (quoting Gonzales v. Raich, 545 U.S. 1, 17 (2005)).

129. 545 U.S. 1.

130. 317 U.S. 111 (1942).

131. *See Raich*, 545 U.S. at 17. In United States v. Morrison, 529 U.S. 598 (2000), the Supreme Court stated, "While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *Id*. at 613. The commerce impacting functions of wetlands arguably give wetlands an economic nature. *See infra* text accompanying notes 143–51. Should wetlands be considered not "economic in nature," however, *Morrison* might cut against aggregating wetlands' effects on interstate commerce. *See Morrison*, 529 U.S. at 613. But the fact that the Court chose not to "adopt a categorical rule" suggests aggregation has not been definitively foreclosed. *See id*. Further, in a four-Justice dissent to *Morrison*, Justice Souter noted that "*Wickard* applied an aggregate effects test to ostensibly domestic, noncommercial farming," and that an "attempt to distinguish between primary activities affecting commerce in terms of the relatively commercial or noncommercial character of the primary conduct proscribed comes with the pedigree of near tragedy . . . ." *Id*. at 641 (Souter, J., dissenting). The issue, therefore, is not settled. A slight shift in the Court's make-up could push the dissenting position into the majority, thus making an aggregation of wetlands' effects on interstate commerce more clearly appropriate.

attested during congressional hearings on the 2007 CWRA, due to the "aggregate importance of often small types of waters and possibly individually small environmental harms that in aggregate can be substantial, the [CWRA] is on sound footing."[132]

Wetlands play an essential role in watershed hydrology, which in the aggregate affects interstate commerce. These waters reduce sediment and toxic pollutant buildup in adjacent waters, serve as habitat for aquatic animals, reduce downstream flooding,[133] and contribute to nutrient recycling.[134] None of the commerce-impacting functions of wetlands discriminate between waters with a "mere hydrologic connection"[135] to navigable waters and waters with a "significant nexus" to such waters. Though the effect on interstate commerce may be de minimis compared to the impact from wetlands adjacent to navigable-in-fact waters or those bearing a "significant nexus" to nonnavigable tributaries, the effect is still present, and in the aggregate, may "substantially affect interstate commerce."[136]

As discussed above, effects on commerce are not found exclusively in waters with hydrologic connections to navigable waters; wholly "intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, [] natural ponds[,] . . . [and their] tributaries"[137] also "substantially affect interstate commerce."[138] Like the CWA before it, the CWRA would "establish[] a uniform baseline for the protection of the nation's waters, . . . ensur[ing] that all states and communities start from a level playing field with respect to water quality standards."[139] Further, the CWRA, like its predecessor the CWA, would

> attempt[] to avoid the potential for states with differing water quality standards to be at competitive disadvantages for encouraging economic growth, but rather [would] facilitate[] states interested in establishing stricter water quality standards to do so, without the fear that they will be placed at a competitive disadvantage to neighboring states.[140]

This "[f]ederal floor"[141] would prevent a race to the bottom in wetlands regulation and allow those states whose industries are affected by

132. *CWRA of 2007 House Hearings*, *supra* note 5, at 225 (testimony of William W. Buzbee, Professor of Law, Emory University School of Law).

133. *Rapanos*, 547 U.S. at 788 (Stevens, J., dissenting).

134. *Id.* at 790.

135. *Id.* at 784 (Kennedy, J., concurring).

136. *See* United States v. Lopez, 514 U.S. 549, 559 (1995).

137. CWRA, *supra* note 8, § 3(8)(C), (E).

138. *See Lopez*, 514 U.S. at 559.

139. *CWRA of 2007 House Hearings*, *supra* note 5, at viii.

140. *Id.*

141. *Id.* at vii.

wetlands regulations to engage in interstate commerce from an initially "level playing field."[142]

Anticipating contentions from the detractors of federal regulation of wetlands, the CWRA drafters included numerous connections to interstate commerce.[143] For example, the CWRA references the effects on interstate commerce caused by pollution.[144] Wetlands are a valuable source of water filtration and purification.[145] This pollution mitigation is thwarted when wetlands are drained or filled. Without § 404 permitting for CWRA waters, the draining or filling of wholly intrastate wetlands likely occurs without consideration of such factors. This affects interstate commerce. The CWRA also notes the exacerbation of flood damage caused by the draining or filling of wetlands, and the consequent effects on interstate commerce.[146] Concerning downstream flooding, Justice Stevens noted in his *Rapanos* dissent that, "'There is no constitutional reason why Congress cannot, under the commerce power, treat the watersheds as a key to flood control on navigable streams and their tributaries.'"[147] Further, wetlands and streams play a part in filtering drinking water supplies.[148] With ever increasing demand for this commodity,[149] the effects on interstate commerce will become increasingly pronounced. In addition to these pervasive effects on interstate commerce, the CWRA notes the importance of wetlands and other intrastate waters with respect to "waterfowl hunting, bird watching, fishing, and photography"[150] and the correlated impacts on "the travel, tourism, recreation, and sporting sectors of the economy of

142. *Id.* at viii; *see also* Rancho Viejo, LLC v. Norton, 323 F.3d 1062, 1069 n.7 (D.C. Cir. 2003) (holding that "[a]pplication of the [Endangered Species Act] to habitat degradation has a further impact on interstate commerce by removing the incentives for states 'to adopt lower standards of endangered species protection in order to attract development,' thereby preventing a destructive 'race to the bottom'"). In addition, see Hodel v. Va. Surface Mining and Reclamation Ass'n, 452 U.S. 264, 282 (1981), which justified federal surface mining and reclamation standards by noting that "[t]he prevention of . . . destructive interstate competition is a traditional role for congressional action under the Commerce Clause." Though *Hodel* was treated unfavorably by the *Lopez* Court, 514 U.S. at 557–59, the federal floor to prevent destructive interstate competition rationale was not overruled. This rationale, then, could be used to demonstrate a rational basis for Congress using its commerce power to enact the CWRA.

143. CWRA, *supra* note 8, § 3(19)–(25).

144. *Id.* § 3(19).

145. 33 C.F.R. § 320.4(b)(2) (2009).

146. CWRA, *supra* note 8, § 3(21)(B).

147. Rapanos v. United States, 547 U.S. 715, 803–04 (2006) (Stevens, J., dissenting) (quoting Oklahoma *ex rel.* Phillips v. Guy F. Atkinson Co., 313 U.S. 508, 525 (1941)).

148. CWRA, *supra* note 8, § 3(22)–(23).

149. As population growth, pollution, and increased consumption will likely create greater demand for water, "One of the defining issues of the twenty-first century will be the allocation of fresh water supplies." Christine A. Klein, Mary Jane Angelo & Richard Hamann, *Modernizing Water Law: The Example of Florida*, 61 FLA. L. REV. 403, 404 (2009).

150. CWRA, *supra* note 8, § 3(24)(A).

the United States."[151] The fact that there are non-economic reasons for Congress to expand its CWA jurisdiction is not fatal to the CWRA.[152] Inclusive in "the national objective of restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters"[153] are commerce-affecting factors, and these factors put the CWRA within Congress' commerce powers.

To contravene arguments that the aforementioned effects on interstate commerce are too attenuated or insubstantial, paragraph twenty-five of the CWRA illustrates an undeniable effect on interstate commerce.[154] It states, "[A]ctivities that result in the discharge of pollutants into waters of the United States are commercial or economic in nature, and, in the aggregate, have a substantial effect on interstate commerce."[155] The CWRA is an amendment to a water quality statute, but the § 404 permitting over those waters is a regulatory section of the statute[156] and thus inextricably linked to commerce. A fair reading of the CWRA demonstrates Congress' unambiguous intent to regulate both commerce-impacting waters and waters affected by "activities that result in the discharge of pollutants" into waters.[157] Both the waters and the activities affecting those waters have a substantial effect on interstate commerce and therefore are within Congress' commerce powers.

The CWRA amended CWA may be compared to the Endangered Species Act (ESA) and its § 9 "take" permits.[158] Each Act taken as a whole regulates a natural resource, while the provisions on permitting requirements (§ 404 and § 9, respectively) regulate what is typically commercial activity.[159] In *Rancho Viejo, LLC v. Norton*,[160] the petitioner real estate development company contended that application of the ESA contravened the Commerce Clause.[161] In finding to the contrary, the D.C. Circuit noted that "the rationale upon which [to] rely focuses on the activity that the federal government seeks to regulate,"[162] as opposed to the object of the regulation. The court explained that

> [the] regulated activity is Rancho Viejo's planned commercial development, not the arroyo toad that it

151. *Id.* § 3(24)(B).

152. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 257 (1964) ("Congress was not restricted by the fact that the particular obstruction to interstate commerce with which it was dealing was also deemed a moral and social wrong.").

153. CWRA, *supra* note 8, § 3(3).

154. *Id.* § 3(25).

155. *Id.*

156. *See* 33 U.S.C. § 1344 (2006).

157. CWRA, *supra* note 8, § 3(25).

158. *See* 16 U.S.C. § 1538 (2006).

159. 33 U.S.C. § 1344 (2006); 16 U.S.C. § 1538 (2006).

160. 323 F.3d 1062 (D.C. Cir. 2003).

161. *Id*. at 1064.

162. *Id*. at 1069.

> threatens. The ESA does not purport to tell toads what they may or may not do. Rather, section 9 limits the taking of listed species, and its prohibitions and corresponding penalties apply to the persons who do the taking, not to the species that are taken.[163]

A similar rationale in a CWRA amended § 404 context would focus on the effects on interstate commerce of the "activities that result in the discharge of pollutants into waters of the United States"[164] rather than solely the effects caused by the waters themselves.

It should be noted that in *SWANCC*, the Supreme Court seemed uncomfortable basing CWA jurisdiction on the commerce impacts of the regulated activity rather than solely on the commerce impacts of the waters.[165] Concerning the Corps basis of jurisdiction on the commercial impacts associated with viewing migratory birds, Chief Justice William Rehnquist stated:

> These arguments raise significant constitutional questions. For example, we would have to evaluate the precise object or activity that, in the aggregate, substantially affects interstate commerce. This is not clear, for although the Corps has claimed jurisdiction over petitioner's land because it contains water areas used as habitat by migratory birds, respondents now, *post litem motam*, focus upon the fact that the regulated activity is petitioner's municipal landfill, which is "plainly of a commercial nature." But this is a far cry, indeed, from the "navigable waters" and "waters of the United States" to which the statute by its terms extends.[166]

This dictum was supported by Justice Kennedy, the crucial vote should the current Court address Commerce Clause implications of the CWRA.[167] However, the Court has not always focused its Commerce Clause analysis solely on the thing to be protected.[168] During congressional hearings on the 2007 CWRA, Professor Buzbee pointed out that "in the Supreme Court's major Commerce Clause decisions in

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163. *Id*. at 1072. It is interesting to note that in 2003 while sitting on the D.C. Circuit Court of Appeals, Chief Justice John Roberts dissented in an order denying the *Rancho Viejo* petitioner a rehearing en banc. Rancho Viejo, LLC v. Norton, 334 F.3d 1158, 1160 (D.C. Cir. 2003). Roberts noted that *Rancho Viejo* seemed inconsistent with *Lopez*. *Id*. However, in any future Supreme Court decision on the Commerce Clause and environmental regulation, Chief Justice Roberts is not likely to be the pivotal vote.

164. CWRA, *supra* note 8, § 3(25).

165. *SWANCC*, 531 U.S. 159, 173 (2001).

166. *Id*.

167. Chief Justice Rehnquist's *SWANCC* opinion garnered the support of Justices Kennedy, Scalia, Sandra Day O'Connor, and Clarence Thomas. *Id*. at 161.

168. *See infra* notes 169–71 and accompanying text.

recent years, it has focused at times on the thing to be protected, while at other times focused on the nature of the activity that would, if not regulated, cause harm."[169] Buzbee noted that while the Court in *Lopez* focused on the commercial impacts of the thing to be protected (gun possession),[170] "[i]n the later *United States v. Morrison* case, 529 U.S. 598 (2000), the Court focused on the lack of a commercial aspect to violence against women."[171]

Perhaps in light of the disputes this distinction has caused, the CWRA drafters made sure that the Act would explicitly establish jurisdiction both over waters that have commercial impacts and waters affected by commercial activities.[172] The Act states that the covered "'waters of the United States' means all waters subject to the ebb and flow of the tide, the territorial seas, and all interstate and intrastate waters . . . to the fullest extent that these waters, *or activities affecting these waters*, are subject to the legislative power of Congress under the Constitution."[173] Therefore, if an activity impacting interstate commerce affects CWRA waters, CWRA jurisdiction kicks in.[174] No contention of an agency construing statutory directive *post litem motam* could be made. Additionally, the Act states that included in "'waters of the United States' [are] those features that were treated as such pursuant to the regulations of the Environmental Protection Agency and the Corps of Engineers in existence before the dates of [*SWANCC* and *Rapanos*]."[175] This, of course, includes waters "the use, degradation, or destruction of which could affect interstate . . . commerce . . . ."[176] Therefore, whether the focus of Commerce Clause inquiry is on the particular waters added to federal protection under the CWRA or on the regulated activities that potentially degrade those waters, substantial effects on interstate commerce are present. As noted in *Morrison*, "in every case where we have sustained federal regulation under [*Wickard*'s

169. *CWRA of 2007 House Hearings*, *supra* note 5, at 225 (testimony of William W. Buzbee, Professor of Law, Emory University School of Law).

170. United States v. Lopez, 514 U.S. 549, 560 (1995).

171. *CWRA of 2007 House Hearings*, *supra* note 5, at 225 (testimony of William W. Buzbee, Professor of Law, Emory University School of Law).

172. CWRA, *supra* note 8, § 4(25).

173. *Id.* (emphasis added).

174. In addition to this explicit indication of the extent of CWRA jurisdiction, the entire Act is peppered with references to the "activities affecting these waters." *Id.*; *see also id.* § 3(25) ("[A]ctivities that result in the discharge of pollutants into waters of the United States are commercial or economic in nature, and, in the aggregate, have a substantial effect on interstate commerce."); *id.* § 3(28) ("[R]egulating activities affecting the waters of the United States is a necessary and proper means of implementing treaties . . . ."); *id.* § 3(32) ("[R]egulating 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 . . . ."); *id.* § 3(33) ("[R]egulating 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.").

175. *Id.* § 3(8).

176. *See* 33 C.F.R. § 328.3(a)(3) (2009).

aggregation principle], the regulated *activity* was of an apparent commercial character."[177] This lends support to the view that the "activities that result in the discharge of pollutants into waters"[178] could legitimately be the focus of Commerce Clause analysis. If the focus should be solely the waters, however, the aforementioned connections to interstate commerce substantiate the rational basis for an exercise of Congress' commerce powers.[179]

An honest Court would give the CWRA the "'presumption of constitutionality'" owed congressional legislation.[180] The Act is crafted to "reach[] both activities that are economic or commercial causing harms to specified sorts of waters, and also protect[] waters that are themselves of economic or commercial significance individually or in the aggregate."[181] Indeed, "[t]hese are sound, core sorts of justifications for federal constitutional power."[182] Though the CWRA may extend to the limits of Congress' commerce powers, Congress has every right to craft such legislation. They have done so with the CWRA, issuing both a "'clear and manifest' statement"[183] of federal jurisdiction, and referencing the commerce-impacting factors that legitimize it.[184]

B. *State Sovereignty and the Clean Water Restoration Act of 2009*

Despite the substantial effects that wetlands and wetlands regulation have on interstate commerce, critics will undoubtedly argue that the CWRA would "result in a significant impingement of the States'

177. United States v. Morrison, 529 U.S. 598, 611 n.4 (2000) (emphasis added and internal citation omitted).

178. CWRA, *supra* note 8, § 3(25).

179. *See* Katzenbach v. McClung, 379 U.S. 294, 303–04 (1964) ("[W]here we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end."). Further, in evaluating the effects on interstate commerce, a broad interpretation of economic activity should be used. *See* Gibbs v. Babbitt, 214 F.3d 483, 491 (4th Cir. 2000). In *Gibbs*, the court noted that:

> Although the connection to economic or commercial activity plays a central role in whether a regulation will be upheld under the Commerce Clause, economic activity must be understood in broad terms. Indeed, a cramped view of commerce would cripple a foremost federal power and in so doing would eviscerate national authority.

Id.

180. *See* Rancho Viejo, LLC v. Norton, 323 F.3d 1062, 1069 (D.C. Cir. 2003) (quoting *Morrison*, 529 U.S. at 607).

181. *CWRA of 2007 House Hearings*, *supra* note 5, at 224 (testimony of William W. Buzbee, Professor of Law, Emory University School of Law).

182. *Id.*

183. *See* Rapanos v. United States, 547 U.S. 715, 738 (2006) (plurality opinion) (quoting BFP v. Resolution Trust Corp., 511 U.S. 531, 544 (1994)).

184. CWRA, *supra* note 8, § 3(19)–(25).

traditional and primary power over land and water use."[185] In striking down the wetland permitting scheme applied to the *Rapanos* petitioners, Justice Scalia noted that "[r]egulation of land use, as through the issuance of the development permits sought by petitioners . . . , is a quintessential state and local power."[186] The fact that thirty-three states and the District of Columbia favored the Corps' interpretation of federal jurisdiction did not influence Justice Scalia.[187] Rather, he stated that it "makes no difference . . . that some States wish to unburden themselves" of their "responsibilities and rights" concerning wetlands regulation.[188]

Justice Scalia's opinion, however, does not consider the effects that one state's waters will have on another state's waters. These effects are more pronounced for, though not limited to, waters within the same hydrologic cycle as waters in a bordering state. As noted in Part IV.A., all of these waters are not included in Justice Kennedy's "significant nexus" test.[189] Without federal water standards, states may exercise their own power over land and water use yet are powerless to prevent water degradation caused by bordering states with laxer standards. One might point out that this argument could be used concerning any land and water regulation. States are at least indirectly affected by many regulations of neighboring states. However, water is different from other traditionally state-regulated issues because water is in constant motion. Land, for the most part, is not. Recognition of hydrologic cycles played a part in the drafting of both the CWA and the CWRA[190] and it plays a part in understanding the drawback of relying on a "patchwork of state water pollution control efforts."[191]

Recognizing the interconnectedness of waters, along with the consequent effects on interstate commerce, helps undermine the argument that the CWRA would "result in a significant impingement"[192] of what should appropriately be state sovereignty. Less persuasive, however, is the justification that without federal regulation the states' hands are tied. During hearings for the 2007 CWRA, the House of Representatives Subcommittee on Water Resources and Environment Majority Staff listed six concerns caused by the *SWANCC* and *Rapanos* decisions.[193] The fourth concern raised this argument.[194]

185. *See SWANCC*, 531 U.S. 159, 174 (2001). However, "[t]he purported federal deference to state water law is not nearly as strong as one might think. The Supreme Court has not hesitated to find state law preempted when it interferes with federal navigational powers, flood control, hydropower, or vessel safety." Zellmer, *supra* note 51, at 617.

186. *Rapanos*, 547 U.S. at 738 (plurality opinion) (citing Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 44 (1994); FERC v. Mississippi, 456 U.S. 742, 767–68 n.30 (1982)).

187. *Id.* at 737 n.8.

188. *Id.* (Internal quote marks and external citation omitted).

189. *Supra* notes 126–27 and accompanying text.

190. *CWRA of 2007 House Hearings*, *supra* note 5, at vii.

191. *Id.*

192. *SWANCC*, 531 U.S. 159, 174 (2001).

193. *CWRA of 2007 House Hearings*, *supra* note 5, at x. The six concerns raised were:

The Subcommittee noted that without federal jurisdiction and "in the absence of affirmative State legislative or administrative action to cover these waters," the waters would not be covered.[195] Though true, this is not sound justification for federal jurisdiction. If the states want waters regulated that are not covered by federal regulations, the states can implement legislative or administrative action to regulate those waters. This might be costly and burdensome, but it is not impossible. However, the Subcommittee continued by stating that

> [a]ccording to the Corps, "approximately [twenty-five] States have some limitations on their ability to establish environmental requirements that are more stringent than those called for under federal law. This ranges from notification requirements when programs proposed are more stringent, to strict prohibitions against state programs that are more stringent than the [Clean Water Act]." These so-called "no more stringent" rules limit the ability of certain states to assume responsibility for the protection of waterbodies and wetlands that were once covered under the Clean Water Act, and turn "federal floors into regulatory ceilings" for the protection of water quality.[196]

However, the prohibition created by "no more stringent" rules is, at least in part, illusory. A state wishing to implement regulations covering waters not covered by the CWA would need to enact a bill with the support of, in most circumstances, 51% of its legislators. An extra hurdle would exist for a state with a "no more stringent" rule. In those cases, the legislature would need to either repeal or make an exception to the rule. Such action would likely require 51% of the legislators.

> (1) Inconsistent Judicial Tests for Determining Jurisdiction; (2) Uncertainty and Delay in State and Local Construction Projects; (3) Impact on the Control of Point Sources of Pollution; (4) Obstacles for States to Address the *SWANCC*/*Rapanos* Coverage Gap; (5) Potential for States to Lose State Clean Water Act Funding; and (6) Implications of *SWANCC*/*Rapanos* on other Environmental Authorities.

Id.

194. *Id.*

195. *Id.* at xiv.

196. *Id.* at xiv (quoting U.S. ARMY CORPS OF ENG'RS, QUESTIONS AND ANSWERS FOR *RAPANOS* AND *CARABELL* DECISION 20 (2007), http://www.usace.army.mil/CECW/Documents/cecwo/reg/cwa_guide/rapanos_qa_06-05-07.pdf (last visited May 17, 2010); Andrew Hecht, Note, *Obstacles to the Devolution of Environmental Protection: States' Self-Imposed Limitations on Rulemaking*, 15 DUKE ENVTL. L. & POL'Y F. 105, 113 (2004)). The source relied upon by the Subcommittee actually denotes twenty-seven states with "no more stringent" rules. Hecht, *supra*, at 116. Seventeen of the twenty-seven states have generally applicable "no more stringent" rules that apply to all water quality statutes. *Id*. Ten of the states have rules that apply to only certain areas of water quality regulation. *Id*.

Therefore, if a state has the political will to expand its regulatory scheme, it should have the political will to first disable a "no more stringent" rule. Of the twenty-seven states with "no more stringent" rules governing water quality, two such rules are executive orders, one is a binding policy statement, and the rest are statutes.[197] None are mandated by state constitutional provisions. Accordingly, whereas political or budgetary factors may prevent a state from regulating waters not covered by federal regulations, no state is actually barred from increasing the scope of regulation. The Subcommittee's reference to "no more stringent" rules in the congressional hearings for the 2007 CWRA could lead one to draw inaccurate conclusions.[198] A more persuasive and honest argument focuses on the effects of a state's degraded waters on neighboring states, as discussed above.

V. THE UNCERTAIN ECONOMIC IMPACTS OF THE CLEAN WATER RESTORATION ACT OF 2009

Though the CWRA is a constitutional exercise of Congress' commerce powers, in its present form, it lacks the clarity a prudent Congress would require. Insufficient time and resources have been spent on researching the economic impacts the Act would have on local governments and the private sector. The hundreds of pages of testimony reveal concern but do little to fill the gaps.[199] Without numbers demonstrating what the costs will be, members of the regulated community are understandably worried.[200]

As of the time of this Note's publication, studies have not predicted how many additional applicants will come under Corps and EPA permitting jurisdiction should the scope of CWA waters be expanded. A 2002 article from the *Natural Resources Journal* provided statistics on how much the permitting process costs individual applicants.[201] Both the *Rapanos* Court in 2006 and testimony during CWRA hearings in 2009 relied on this article for data on economic impacts,[202] suggesting it is one of the few authoritative texts on the subject. However, the article provided no insight on how many additional applicants would be added

197. Hecht, *supra* note 196, at 116. Wisconsin's rule is a binding policy statement. Maryland and Pennsylvania have executive orders. Alabama, Alaska, Arizona, Arkansas, Colorado, Florida, Idaho, Iowa, Kentucky, Maine, Mississippi, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Tennessee, Utah, Virginia, West Virginia, and Wyoming have statutes. *Id*. at 116 nn.42, 45–46.

198. *See CWRA of 2007 House Hearings*, *supra* note 5, at xiii–xv.

199. *See* sources cited *supra* notes 22 and 26–27.

200. *Id.*

201. Sunding & Zilberman, *supra* note 6, at 74–75.

202. *See* Rapanos v. United States, 547 U.S. 715, 721 (2006) (plurality opinion) ("The average applicant for an individual permit spends 788 days and $271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and $28,915—not counting costs of mitigation or design changes."); *Meeting the Needs of Small Businesses and Family Farmers in Regulating Our Nation's Waters, H. Comm. on Small Business*, 111th Cong. 6 (2009) (statement of Trey Pebley, Vice President, McAllen Construction, Inc.).

under different statutory regimes—crucial information for honest debate on wetlands jurisdiction.

Concerning the pending legislation on the CWRA, a 2009 Congressional Budget Office (CBO) Cost Estimate noted that

> cost[s] . . . would be the additional costs of obtaining permits (or designing projects to avoid having to obtain a permit), net of any savings that would result from a modified permitting process. Information about the additional bodies of water that would be covered by the bill is scarce, and the number of activities that would require a permit is uncertain. Therefore, CBO has no basis for estimating . . . the cost of the [CWRA].[203]

The CBO Cost Estimate also stated that decreased litigation would save the federal government an "insignificant" sum and that government permit receipts would likely increase by less than $100,000 per year.[204] In discussing the number of likely applicants, the report noted that the number of Corps-issued standard permits decreased 30% in the years following *SWANCC* and *Rapanos*.[205] However, "information from the Corps indicates that the decline is mainly attributable to weakening economic conditions."[206] The two-page report offered little additional information and no concrete numbers on the probable economic impact that passage of the CWRA would have on the regulated community.[207] The CBO staff contact for impacts on the private sector confirmed this scarcity of data.[208]

Since 1999, the CBO has prepared reports on at least eighteen other bills amending or otherwise relating to the CWA.[209] Of those eighteen,

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203. CWRA CBO Cost Estimate, *supra* note 11, at 2.

204. *Id.* at 1–2.

205. *Id.* at 2.

206. *Id.*

207. *Id.* at 1–2.

208. Telephone Interview with Amy Petz, Analyst, Congressional Budget Office (Sept. 21, 2009).

209. Congressional Budget Office, Cost Estimate: S. 2080, Sewage Overflow Community Right-to-Know Act, at 1 (2008); Congressional Budget Office, Cost Estimate: H.R. 2452, A Bill to Amend the Federal Water Pollution Control Act to Ensure That Sewage Treatment Plants Monitor for and Report Discharges of Sewage, and for Other Purposes, at 1 (2008); Congressional Budget Office, Cost Estimate: S. 3630, A Bill to Amend the Federal Water Pollution Control Act to Reauthorize a Program Relating to the Lake Pontchartrain Basin, and for Other Purposes, at 1 (2006); Congressional Budget Office, Cost Estimate: H.R. 3963, A Bill to Amend the Federal Water Pollution Control Act to Extend the Authorization of Appropriations for Long Island Sound, at 1 (2005); Congressional Budget Office, Cost Estimate: H.R. 1721, A Bill to Amend the Federal Water Pollution Control Act to Reauthorize Programs to Improve the Quality of Coastal Recreation Waters, and for Other Purposes, at 1 (2005); Congressional Budget Office, Cost Estimate: S. 158, Long Island Sound Stewardship Act of 2005, at 1 (2005); Congressional Budget Office, Cost Estimate: H.R. 1359, A Bill to Amend the Federal Water Pollution Control Act to Extend the Pilot Program for Alternative

none is as ambiguous about costs as the CWRA Cost Estimate.[210] Addressing the CWRA, the CBO noted that there is "no basis for estimating whether the cost [of passage of the CWRA] would exceed the annual thresholds established in [the Unfunded Mandates Reform Act] for intergovernmental or private-sector mandates."[211] Of the other eighteen cost estimates, all eighteen had estimates for the economic impacts on the federal government and the private sector.[212] Only two of the eighteen did not have estimates for the costs to be imposed on intergovernmental agencies.[213] However, both of these did have an estimate of the number of intergovernmental entities to be impacted,[214] information missing from the CBO Cost Estimate for the CWRA.[215] This evidences that proposing an amendment to the CWA with such scant information on costs is an aberration from congressional norms on modern CWA amendments.[216]

Water Source Projects, at 1 (2005); Congressional Budget Office, Cost Estimate: H.R. 624, A Bill to Amend the Federal Water Pollution Control Act to Authorize Appropriations for Sewer Overflow Control Grants, at 1 (2005); Congressional Budget Office, Cost Estimate: H.R. 4731, A Bill to Amend the Federal Water Pollution Control Act to Reauthorize the National Estuary Program, at 1 (2004); Congressional Budget Office, Cost Estimate: H.R. 4688, A Bill to Amend the Federal Water Pollution Control Act to Reauthorize the Chesapeake Bay Program, at 1 (2004); Congressional Budget Office, Cost Estimate: H.R. 4470, A Bill to Amend the Federal Water Pollution Control Act to Extend the Authorization of Appropriations for the Lake Pontchartrain Basin Restoration Program from Fiscal Year 2005 to 2010, at 1 (2004); Congressional Budget Office, Cost Estimate: H.R. 784, A Bill to Amend the Federal Water Pollution Control Act to Authorize Appropriations for Sewer Overflow Control Grants, at 1 (2004); Congressional Budget Office, Cost Estimate: S. 1961, Water Investment Act of 2002, at 1 (2002); Congressional Budget Office, Cost Estimate: S. 522, Beaches Environmental Assessment and Coastal Health Act of 2000, at 1 (2000); Congressional Budget Office, Cost Estimate: H.R. 1237, A Bill to Amend the Federal Water Pollution Control Act to Permit Grants for the National Estuary Program to be Used for the Development and Implementation of a Comprehensive Conservation and Management Plan, to Reauthorize Appropriations to Carry out the Program, and for Other Purposes, at 1 (2000); Congressional Budget Office, Cost Estimate: H.R. 2328, A Bill to Amend the Federal Water Pollution Control Act to Reauthorize the Clean Lakes Program, at 1 (2000); Congressional Budget Office, Cost Estimate: A Bill to Amend the Federal Water Pollution Control Act to Provide that Certain Environmental Reports Shall Continue to be Required to be Submitted, at 1 (1999) (no Senate number provided); Congressional Budget Office, Cost Estimate: H.R. 999, Beaches Environmental Assessment, Cleanup, and Health Act of 1999, at 1 (1999).

210. *Compare* sources cited *supra* note 209, *with* CWRA CBO Cost Estimate, *supra* note 11.

211. CWRA CBO Cost Estimate, *supra* note 11, at 2. For 2009, these thresholds are $69 million and $139 million, respectively. *Id.*

212. *See supra* note 209.

213. Congressional Budget Office, Cost Estimate: S. 2080, Sewage Overflow Community Right-to-Know Act, at 2 (2008); Congressional Budget Office, Cost Estimate: H.R. 2452, A Bill to Amend the Federal Water Pollution Control Act to Ensure That Sewage Treatment Plants Monitor for and Report Discharges of Sewage, and for Other Purposes, at 2 (2008).

214. *See* sources cited *supra* note 213.

215. *See* CWRA CBO Cost Estimate, *supra* note 11.

216. *See supra* note 209. The eighteen CBO reports listed in footnote 209 were for far

Congressional passage of the CWRA without ascertaining a more exact cost estimate, or at least *some* cost estimate, would be irresponsible. In his *Rapanos* dissent, Justice Stevens seemed untroubled by the plight of the regulated community.[217] He commented that, "The fact that large investments are required to finance large developments merely means that those who are most adversely affected by the Corps' permitting decisions are persons who have the ability to communicate effectively with their representatives."[218] Those individuals are communicating with their representatives, and the opinions thus far have been negative.[219] However, it is difficult to say with certainty that the financiers of large developments are truly the people who would be most adversely affected. Home developers required to acquire § 404 permits are presumably passing costs on to consumers.[220] In addition to the actual costs of permitting, developers incur various costs from delay.[221] Developers waiting for permits must carry capital, which increases interest expenses for monies borrowed.[222] The developers must also bear labor expenses for additional time, further adding to total costs.[223] Some of these costs are likely included in the costs finally paid by the consumers. Considering these factors, Justice Stevens' opinion that those bearing the costs have adequate representation might not be entirely accurate.[224] This, coupled with the uncertainty of what the overall costs would be, makes passage of the CWRA unwise.

VI. CONCLUSION

Should Congress enact the CWRA and remove the word "navigable" from the definition of waters reached by the CWA,[225] it would be acting

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simpler (and less ambitious) congressional proposals with more easily ascertainable cost estimates. The last CWA amendment to approach the scale of the CWRA was the Water Quality Act of 1987, Pub. L. No. 100-4 (codified in scattered sections of 33 U.S.C.). However, the CBO began producing cost estimates for impacts on the private sector only after passage of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1501–71 (2006). *See* Congressional Budget Office, *CBO's Role in the Budget Process*, http://www.cbo.gov/aboutcbo/budgetprocess.shtml (last visited May 18, 2010). Consequently, there are no CBO cost estimates for major amendments to the CWA to compare with the CWRA Cost Estimate.

217. *See* Rapanos v. United States, 547 U.S. 715, 799 (2006) (Stevens, J., dissenting).

218. *Id.*

219. *See* sources cited *supra* notes 22 and 26–27.

220. *See* Sunding & Zilberman, *supra* note 6, at 81 ("A National Association of Home Builders survey reveals that all aspects of the Section 404 permitting process taken together add $400 to the price of an average new home. Viewed another way, the survey concludes that costs imposed by Section 404 requirements are 0.16 percent of total homebuilding costs and 0.4 percent of total development costs.").

221. *Id*. at 81–82.

222. *Id*. at 82.

223. *Id*.

224. *See* Rapanos v. United States, 547 U.S. 715, 799 (2006) (Stevens, J., dissenting).

225. *See* CWRA, *supra* note 8, § 4(1).

within the commerce powers granted in Article I, § 8, of the Constitution.[226] Many CWRA waters are "channels of interstate commerce" or "things in interstate commerce."[227] Other CWRA waters, in particular the "intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, [] natural ponds[,] . . . [and] tributaries"[228] not covered by the 1972 CWA, "substantially affect interstate commerce."[229] The CWRA exerts federal jurisdiction beyond waters with direct effects on commerce and includes even those waters where "activities affecting [the] waters[] are subject to the legislative power of Congress."[230] Though this admittedly "invokes the outer limits of Congress' power," it is within that limit, and the Act is a "clear indication that Congress intended that result."[231]

Despite the Act's sound constitutional footing, however, Congress' failure to discern the probable economic impacts suggests that more work should be done before enacting the CWRA or similar legislation. Further, it is uncertain where costs will rest, whether developers will absorb the costs or merely be a conduit to pass costs on to less well represented and less financially insulated citizens.[232] To obtain the 92nd Congress' goal to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters,"[233] some sort of legislative amendment to § 404 jurisdiction is likely appropriate. It would be irresponsible, however, for Congress to pass the Act in its present form. To expect citizens to support legislation with unknown repercussive costs is an unrealistic and imprudent endeavor.

226. U.S. CONST. art. 1, § 8, cl. 3.
227. *See* United States v. Lopez, 514 U.S. 549, 558–59 (1995).
228. *See* CWRA, *supra* note 8, § 3(8)(C), (E).
229. *See Lopez*, 514 U.S. at 559; *supra* Part IV.A.
230. *See* CWRA, *supra* note 8, § 4(25).
231. *SWANCC*, 531 U.S. 159, 172 (2001).
232. *See supra* Part V.
233. 33 U.S.C. § 1251(a) (2006).