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Troubled Waters: Florida's Isolated Wetlands in the Aftermath of Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers

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v. U.S. Army Corps of Engineers***

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I. INTRODUCTION

The United States Supreme Court's controversial decision in *Solid Waste Agency of Northern Cook County* ("SWANCC") *v. United States Army Corps of Engineers*¹ has limited the ability of the Clean Water Act² to protect our nation's water supply.³ In *SWANCC*, a narrowly divided Supreme Court held that the United States Army Corps of Engineers ("Corps") lacked jurisdiction over intrastate isolated waters that were not navigable within the meaning of the Clean Water Act ("Act").⁴ Moreover, the Court's dicta asserts that Congressional authority to regulate nonnaviga-

1. 531 U.S. 159 (2001) [hereinafter *SWANCC*].

2. 33 U.S.C. §§ 1251–1387 (1994).

3. *SWANCC*, 531 U.S. at 175 (Stevens, J., dissenting); see Brief of Amici Curiae Environmental Defense et al. at 9, *SWANCC*, 531 U.S. 159 (2001) (No. 99-1178), 2000 WL 1369436 (claiming such a holding "would roll back the scope of federal water pollution control" to a pre-Clean Water Act level, removing "millions of acres of 'isolated' surface waters . . . from federal protection") [hereinafter ED Brief].

4. *SWANCC*, 531 U.S. at 174 (rendering 5-4 decision).

ble intrastate isolated waters poses “significant constitutional and federalism questions.”⁵ Taking a functional approach, the dissent delivers a strong, systematic attack on the Court’s reasoning and establishes that there “is no principled reason” to limit the Corps’ jurisdiction on the basis of navigability.⁶ Since Congress intended the Clean Water Act to afford “comprehensive long-range” protection for our nation’s waters,⁷ the dissent concludes that waters need not be actually or potentially navigable to fall within the scope of the Act.⁸

By limiting the scope of the federal regulatory permitting program under section 404 of the Clean Water Act,⁹ the Court has taken “an unfortunate step that needlessly weakens our principle safeguard against toxic water.”¹⁰ The ruling impacts federal protection for more than twenty percent of our nation’s remaining wetlands, including cypress domes in the Everglades.¹¹ In the absence of federal protection, the preservation of the vital functions provided by isolated wetlands is left to the states.¹² The majority of states, including some with significant wetland acreages currently provide little protection.¹³ The Court has created a gap in the protection of isolated wetlands,¹⁴ yet the broader ecosystem cannot be protected unless their important functions are preserved.¹⁵

5. *Id.*

6. *Id.* at 176 (Stevens, J., dissenting).

7. *Id.* at 179.

8. *Id.* at 175.

9. *SWANCC*, 531 U.S. at 167.

10. *Id.* at 175 (Stevens, J., dissenting); see William Funk, *The Court, the Clean Water Act and the Constitution: SWANCC and Beyond*, 31 ELR 10741, 10741 (2001) (taking the impact in light of the present political climate in which “legislative amendment is virtually impossible,” the author argues that the *SWANCC* decision may be the most devastating judicial opinion affecting the environment ever).

11. *Supreme Court Deals Devastating Blow to Wetlands*, INT’L WILDLIFE, May–June 2001, at 8–9. One percent of the total land in the contiguous forty-eight states received federal protection prior to *SWANCC*. Brief of Amici Curiae Gene Likens et al. at 24, *SWANCC*, 531 U.S. 159 (2001) (No. 99-1179), 2000 WL 1369410 [hereinafter Likens Brief]. Total wetlands are estimated to occupy ninety-five million acres, or four percent of the nation’s total land. *Id.*

12. Jon Kusler, *The SWANCC Decision and State Regulation of Wetlands* (Ass’n of State Wetland Managers, Berne, N.Y.), (May 31, 2001), at <http://www.aswm.org/swancc/index.htm> [hereinafter Kusler].

13. See *id.* at 9.

14. *Id.* at 15.

15. Likens Brief, *supra* note 11, at 9; see also Stephen M. Johnson, *Federal Regulation of Isolated Wetlands After SWANCC*, 31 ENVTL. L. REP. 10669 (June, 2001), WL 31 ELR 10669 (claiming the decision is especially disheartening since it was announced just

"Isolated" wetlands are only isolated in the sense that they lack a surface connection to downstream waters.¹⁶ They serve critical hydrologic and biological functions that have downstream effects, significantly impacting the broader environment.¹⁷ The basic hydrologic function of isolated wetlands is to store and filter water.¹⁸ Their preservation is vital to the functions of flood control, water quality filtration, and streambank erosion.¹⁹ When they are developed and drained, water quality is affected by the hastened release of long trapped pollutants that move downstream and ultimately cause harm to animals and humans.²⁰ The rapid influx of water can likewise result in flooding and erosion.²¹

The biological integrity of the nation's waters is also dependent upon the preservation of isolated wetlands.²² They provide distinct habitats and breeding grounds for waterfowl, migratory birds, and amphibians that are not served by other water bodies.²³ Destruction of isolated wetlands can result in severe consequences for biodiversity; if local species become endangered or extinct, the food chain is disturbed.²⁴

Florida is one of only fifteen states that presently afford considerable protection for isolated waters and wetlands.²⁵ Even so, the Court's decision adversely affects the state's environment, water supply, and economy.²⁶ This article discusses the Supreme Court decision's impact on Florida, exposing that the Court's holding undermines the ability of the Clean Water Act to protect our nation's waters. Part II introduces section 404 of the Clean Water Act and explores the case, the holding, and its potential impact. It demonstrates that the *SWANCC* decision has created a gap in the preservation of isolated wetlands, which if not bridged, has severe consequences for the nation's environment and water supply.²⁷ Part III evaluates Florida's

after a U.S. Fish and Wildlife Service report indicated that the annual rate of wetlands loss has been declining steadily).

16. There is no scientific or regulatory definition for "isolated" wetlands. Likens Brief, *supra* note 11, at 11.

17. *Id.* at 8.

18. *Id.* at 9.

19. *Id.* at 11.

20. *Id.* at 16.

21. Likens Brief, *supra* note 11, at 12.

22. *Id.* at 22.

23. *Id.* at 18.

24. *Id.* at 22-23.

25. Kusler, *supra* note 12, at 9.

26. See discussion *infra* Part III.C.-D.

27. Kusler, *supra* note 12, at 15.

isolated wetlands law, *SWANCC*'s practical implications for the state, and the state's options in the aftermath of the decision. Since Florida wetlands law is not uniform throughout the state, Florida's experience demonstrates the state's ability to bridge the *SWANCC* gap as well as the political and economic realities it confronts in doing so.²⁸ The fragmentation in Florida law also renders the state a microcosm of the nation as a whole. Florida's inability to completely bridge the *SWANCC* gap confirms the dissent's contention that comprehensive national regulation of intrastate isolated wetlands is essential to accomplishing the goals of the Clean Water Act.²⁹

II. UNDERMINING THE CLEAN WATER ACT: THE *SWANCC* DECISION

A. Watershed Legislation: *The Clean Water Act*

The Clean Water Act's mandate is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."³⁰ Designed to "establish a comprehensive, long range policy for the elimination of water pollution,"³¹ the Act fundamentally changed both the scope and purpose of federal regulation of the nation's waters.³² It extended the scope of federal jurisdiction to all of "the waters of the United States, including the territorial seas."³³ The Act also broadened the United States Army Corps of Engineers' mission to include protecting the nation's waters for "esthetic, health, recreational, and environmental uses."³⁴

To control water pollution, the Clean Water Act established nationwide standards and federal permitting and enforcement measures.³⁵ Section 404(a) of the Act affords the Secretary of the Army, acting through the United States Army Corps of Engineers, authority to regulate the discharge of dredge or fill material into "navigable waters."³⁶ Upon determining that a discharge "will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding

28. See discussion *infra* Part III.C.–D.

29. See discussion *infra* Part III.E.

30. 33 U.S.C. § 1251(a).

31. *SWANCC*, 531 U.S. 159, 179 (2001) (Stevens, J., dissenting).

32. *Id.* at 175.

33. 33 U.S.C. § 1362(7) (1994).

34. *SWANCC*, 531 U.S. at 175.

35. ED Brief, *supra* note 3, at 11.

36. 33 U.S.C. § 1344(a). "Dredging" is excavation in wetlands or other surface waters and "filling" is deposition of any material in wetlands or other surface waters. FLA. STAT. § 373.403 (13)–(14) (2001).

areas), wildlife, or recreational areas," the Act authorizes the Corps to refuse a permit.³⁷

The Act defines "navigable waters" as "waters of the United States."³⁸ Since 1977, the Corps has defined the term "waters of the United States" for purposes of section 404 jurisdiction to mean:

- (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)³⁹ identified in paragraphs (a)(1) through (6) of this section.

The Corps originally construed the scope of jurisdiction under section 404(a) to cover only waters that were navigable in fact, but largely in reaction to judicial interpretation and congressional reaction, the Corps asserted broader authority.⁴⁰

37. § 1344(c).

38. § 1362(7).

39. 33 C.F.R. § 328.3(a) (2000).

40. *SWANCC*, 531 U.S. at 183–84 (Stevens, J., dissenting) (indicating judicial decisions encouraging the Corps to assert broader authority included *Natural Resources Defense Council v. Callaway*, 392 F. Supp. 685, 686 (D.C. 1975) and *United States v. Holland*, 373 F. Supp. 665 (M.D. Fla. 1974)); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123 (1985) [hereinafter *Riverside Bayview*].

The Supreme Court first addressed the scope of section 404(a)'s jurisdiction in *United States v. Riverside Bayview Homes*⁴¹ where it upheld the Corps' authority over adjacent wetlands.⁴² Reviewing legislative history, the Court concluded that Congress intended the term "navigable waters" to be construed broadly in order to achieve the goals of the Clean Water Act.⁴³ Since "[w]ater moves in hydrologic cycles and the pollution . . . will affect the quality of other waters within that aquatic system," the Court reasoned that the regulation of adjacent wetlands was essential to maintaining the integrity of the nation's waters.⁴⁴ Thus, in construing the breadth of the Corps' authority under section 404(a), the Court afforded deference to the Corps' 1977 regulations and limited the importance of the term "navigable."⁴⁵

In 1986, the year following the *Riverside Bayview* decision, the Corps issued a regulation clarifying that section 404(a) authority 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.⁴⁶

This promulgation, known as the "Migratory Bird Rule," falls under subsection three of the Corps' definition of "waters of the United States" that ties jurisdiction of intrastate waters to interstate commerce.⁴⁷ The Migratory Bird Rule is at the core of SWANCC controversy.

41. 474 U.S. 121 (1985).

42. *Id.* at 139.

43. *Id.* at 133.

44. *Id.* at 134 (quoting 42 Fed. Reg. 37128 (1977)). The Court recognized that wetlands "serve to filter and purify water," "slow the flow of surface runoff . . . prevent[ing] flooding and erosion," and provide significant biological functions. *Id.*

45. *Riverside Bayview*, 474 U.S. at 134.

46. SWANCC, 531 U.S. 159, 164 (2001).

47. 33 C.F.R. § 328.3(a)(3) (2000).

B. *Narrowing the Scope: SWANCC*

The legal issue decided in *SWANCC* was whether the U.S. Army Corps of Engineers had authority under section 404(a) of the Clean Water Act of 1977 to regulate the discharge of nonhazardous fill material by a consortium of local municipalities into "isolated" waters in Illinois that were home to migratory birds.⁴⁸ The Solid Waste Agency of Northern Cook County ("Agency") sought to develop a 533-acre abandoned mining site that had evolved into a sprinkling of permanent and seasonal ponds for disposal of their baled nonhazardous solid waste.⁴⁹ After receiving the requisite county and state permits, the Agency contacted the Corps to determine whether a federal permit was required under section 404(a) of the Clean Water Act; the Agency plans involved filling roughly seventeen acres of the site that included seasonal ponds that had developed a natural character.⁵⁰

Though initially concluding it lacked authority, the Corps asserted jurisdiction under section 404(a)(3) of the Clean Water Act after the Illinois Nature Preserves Commission exposed the fact that a number of migratory bird species inhabited the site.⁵¹ Employing subpart (b) of the Migratory Bird Rule, the Corps found that the isolated ponds, though not wetlands, qualified as "waters of the United States."⁵² The Corps determined that the Agency's plan presented an "unacceptable risk to the public's drinking water supply" and that its impact on the area-sensitive species could not be mitigated.⁵³ Finding that the Agency's plan posed significant environmental risks, the Corps denied the permit.⁵⁴

The Agency filed suit in federal district court claiming that the Corps lacked jurisdiction under the Clean Water Act and challenging the merits of the denial.⁵⁵ The District Court granted summary judgment to the Corps on

48. *SWANCC*, 531 U.S. at 162.

49. *Id.* at 163.

50. *Id.* Excavation trenches, created by thirty years of gravel pit mining that continued until 1960, developed into ponds ranging in size from under one-tenth acre to several acres and in depth from several inches to several feet. *Id.*

51. *Id.* at 164. The ponds were home to a great blue heron rookery and approximately 121 bird species. *Id.* at 164–65. In addition to providing herons the second-largest breeding site in northeastern Illinois, the ponds were inhabited by several protected species of waterfowl. *Id.* at 194 n.16.

52. *SWANCC*, 531 U.S. at 164.

53. *Id.* at 165.

54. *Id.*

55. *Id.*

the jurisdictional issue.⁵⁶ Abandoning its challenge to the justification of the Corps' denial, the Agency appealed on statutory and constitutional grounds.⁵⁷ The Seventh Circuit Court of Appeals held that the Clean Water Act reaches as far as the Commerce Clause allows and given the aggregate effect of the destruction of natural habitat of migratory birds on interstate commerce, the Migratory Bird Rule was reasonable.⁵⁸ The Supreme Court granted certiorari and reversed.⁵⁹

Rather than deciding the constitutional issue, the Supreme Court based its holding on statutory grounds; the decision turns on the importance of the term "navigable waters" in section 404(a) of the Clean Water Act.⁶⁰ Since the Court held that the term "navigable" was of "limited import" in *United States v. Riverside Bayview Homes*, the Court distinguishes that case.⁶¹ In *Riverside Bayview*, the Court found "Congress' 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'" and held that the Act applied to adjacent wetlands, waters not navigable in the traditional sense.⁶² In *SWANCC*, the Court explains that "[i]t was the significant nexus between the wetlands and the 'navigable waters'" that brought the adjacent wetlands at issue in *Riverside Bayview* within the scope of the Clean Water Act and refuses to extend that jurisdiction to "ponds that are *not* adjacent to open water."⁶³ Reasoning "it is one thing to give a word limited effect and quite another to give it no effect whatever,"⁶⁴ the Court deems the term "navigable" important to the extent that it indicates Congressional authority for enacting the Clean Water Act.⁶⁵

Although the Court does not hold the Migratory Bird Rule unconstitutional, it asserts that Congressional authority to regulate non-navigable, intrastate waters poses "significant constitutional and federalism ques-

56. *Id.*

57. *SWANCC*, 531 U.S. at 165.

58. The Court of Appeals found the effect on interstate commerce substantial since interstate tourists spend over a billion dollars per year in migratory bird related pursuits. *Id.* See ED Brief, *supra* note 3, at 13 (noting migratory bird watching is a \$1.3 billion dollar per year industry and precipitates 14.3 million trips each year, many across state lines).

59. *SWANCC*, 531 U.S. at 166.

60. *Id.* at 172.

61. *Id.* at 167.

62. *Id.*

63. *Id.* at 167-68.

64. *SWANCC*, 531 U.S. at 172.

65. *Id.* The dissent reads the term "navigable water" to mean "those waters over which federal authority may be properly asserted." *Id.* at 162.

tions.”⁶⁶ The Court refuses to afford deference to the Corps’ regulation since it “invokes the outer limits of Congress’ power,”⁶⁷ particularly where traditional state powers over land and water use could be impinged.⁶⁸ Emphasizing recent Supreme Court holdings limiting Congressional power under the Commerce Clause,⁶⁹ the Court explains that to determine the requisite interstate connection “we would have to evaluate the precise object or activity that, in the aggregate, substantially affects interstate commerce.”⁷⁰ The Court then indicates it is not clearly convinced that migratory bird-related travel sufficiently satisfies the interstate connection.⁷¹

C. *Uncharted Waters: The Impact of the Decision*

It is clear that the Migratory Bird Rule can no longer provide the sole basis for jurisdiction over isolated waters under the Clean Water Act, but the impact of the decision potentially reaches much further.⁷² The Supreme Court did not clearly chart the waters that fall within the scope of section 404(a)(3) permitting authority.⁷³ In theory, virtually all wetlands were subject to federal regulation prior to *SWANCC*.⁷⁴ In the aftermath of

66. *SWANCC*, 531 U.S. at 174.

67. The Court refused to extend the same deference to the Corps’ regulations that it did in *Riverside Bayview* absent a clear indication from Congress that it intended to reach intrastate isolated water. *Id.* at 170. The dissent argues that the Court’s refusal to extend deference is inconsistent with the *Riverside Bayview* decision. *Id.* at 185 (Stevens, J., dissenting). The dissent explains that in *Riverside Bayview*, the Court interpreted the same section of the Clean Water Act and found that Congress was aware of the Corps’ 1977 regulations, Congress declined to narrow their scope in its 1977 Amendments, and thus implicitly acquiesced to the Corps’ interpretation. *Id.* at 184. The Court finds this indication of Congressional intent “unpersuasive.” *Id.* at 168.

68. *SWANCC*, 531 U.S. at 168. The dissent contests the Court’s federalism concerns, pointing to section 404(g) of the Act which allows state assumption of the federal permitting program, and stresses that the Act regulates the environment, not land use. *Id.* at 188.

69. *Id.* at 173 (citing *United States v. Morrison*, 529 U.S. 598 (2000) and *United States v. Lopez*, 514 U.S. 549 (1995) as indicative of the limits on Congressional power under the Commerce Clause).

70. *Id.*

71. The court of appeals held that a rational relationship exists between recreational pursuits relating to migratory birds and the Migratory Bird Rule and thus found authority under the Commerce Clause. *Id.* The dissent concurs with the lower court’s interpretation and finds the connection between “the filling of wetlands and the decline of commercial activities associated with migratory birds” direct and concrete. *Id.* at 195.

72. Johnson, *supra* note 15, at 10669.

73. Kusler, *supra* note 12, at 4.

74. *Id.* at 7 (noting that some are concurrently subject to state and local regulation).

SWANCC, it is unclear whether the courts will uphold the Act's jurisdiction over any intrastate isolated waters unless a clear and direct impact on interstate commerce can be shown.⁷⁵ Since the Court neglected to explain how the connection could be legally satisfied, the holding has caused uncertainty and confusion.⁷⁶

Following the decision, the General Counsel^o of the Environmental Protection Agency ("EPA") and the Chief Counsel of the Corps issued a joint memorandum providing their interpretation of the SWANCC decision.⁷⁷ The memorandum stated jurisdiction over "[a]ll other waters such as intrastate lakes, rivers, streams . . . wetlands . . . or natural ponds, the use, degradation, or destruction of which could affect interstate or foreign commerce" are "potentially affected by SWANCC."⁷⁸ The Corps and the EPA stressed that the Court's opinion did not specifically address what would constitute a sufficient connection with interstate commerce to support Clean Water Act jurisdiction over these waters and indicated that legal advice should be sought on a case by case basis.⁷⁹

It is difficult to gage the full impact of the decision since it is largely dependent upon administrative and judicial interpretation.⁸⁰ If the holding is interpreted narrowly to mean that the Court only invalidated the Migratory Bird Rule, not federal regulation of all intrastate isolated wetlands, the decision potentially removes federal protection under the Clean Water Act from thirty percent of the nation's wetlands.⁸¹ But, the dissenting opinion interpreted the Court's holding more broadly to mean that the Corps no longer has jurisdiction over any intrastate isolated waters unless they are or could be made navigable.⁸² If the Corps and courts interpret the holding broadly, the decision may remove federal protection for up to sixty percent

75. Funk, *supra* note 10, at 54.

76. Kusler, *supra* note 12, at 15.

77. Memorandum from Gary S. Guzy, General Counsel, U.S. Environmental Protection Agency & Robert M. Anderson, Chief Counsel, U.S. Army Corps of Engineers, to U.S. Army Corps of Engineers Administrators, Commanders, and Counsels, *Supreme Court Ruling Concerning CWA Jurisdiction over Isolated Waters*, 1 (Jan. 19, 2001) [hereinafter Memo].

78. *Id.* at 2-3

79. *Id.* at 3.

80. Kusler, *supra* note 12, at 7.

81. *Id.* at 1.

82. SWANCC, 531 U.S. at 176-77. (2001) (Stevens, J., dissenting) (claiming the "Court draws a new jurisdictional line . . . that invalidates the 1986 migratory bird regulation as well as the Corps' assertion over all waters except for actually navigable waters, their tributaries, and wetlands adjacent to each").

of the nation's wetlands.⁸³ Within these two interpretations, the extent of SWANCC's impact is also dependent upon how key terms including "adjacent" and "significant nexus" are defined.⁸⁴

Regardless of the interpretation, the environmental impacts will be significant.⁸⁵ The Association of State Wetland Managers estimates "[e]ven if SWANCC results in only a one percent loss of America's wetlands, the decision would cause more wetlands to be destroyed than were lost in the past decade."⁸⁶ In the absence of federal protection, regulation of isolated wetlands is devised to the states.⁸⁷ Only fifteen states currently have regulations that substantially close the gap.⁸⁸ The rest, including some with significant wetland acreages, provide little protection.⁸⁹ Many states have relied on the federal permitting program to protect their water quality.⁹⁰

The resulting lack of regulation will likely occasion the destruction of many wetlands and in turn adversely impact their water filtration, flood protection, erosion, and habitat functions.⁹¹ Regulations over isolated wetlands will differ among and within states as they attempt to bridge the SWANCC gap.⁹² At the very least, the decision creates "serious new vulnerabilities in water and wetland resource protection" that require federal, state, and local adaptation in the regulation of isolated wetlands if their critical functions are to be preserved.⁹³

83. Kusler, *supra* note 12, at 7.

84. If the terms "adjacent" and "significant nexus" to navigable waters are interpreted broadly, some isolated wetlands may be recategorized, mitigating the impact of the decision. *Id.* at 8.

85. *Id.*

86. *Id.* at 8.

87. *Id.*

88. Kusler, *supra* note 12, at 9 (including Florida, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Virginia).

89. *Id.* at 8–9 (identifying Alaska, Georgia, Kansas, Louisiana, Mississippi, North Carolina, Nebraska, South Carolina, South Dakota, and Texas as states with large isolated wetlands acreage and limited protection).

90. Funk, *supra* note 10, at 8.

91. Kusler, *supra* note 12, at 15.

92. *Id.*

93. *Id.* at 16.

III. FLORIDA IN THE AFTERMATH OF SWANCC

A. Shallow Waters: Florida Wetlands

Florida has a strong economic incentive to protect its wetlands; home to the Everglades National Park, Florida's economy is dependent upon the health and vitality of its natural system.⁹⁴ Florida's wetlands, though, provide more than aesthetic beauty attracting visitors from around the nation and world; they perform important hydrologic functions including water filtration and flood control.⁹⁵ They also serve to moderate temperatures and maintain precipitation.⁹⁶ Florida's wetlands provide distinct habitats for migratory birds, recreational hunting fowl, and for nearly half of the state's endangered species, and serve as spawning grounds for "two-thirds of the commercial fish and shellfish harvested along the Atlantic Coast and in the Gulf of Mexico"⁹⁷

The state is "on a collision course with itself, dependent both on its unique natural resources and the . . . growth that is strangling those resources."⁹⁸ Florida's wetlands are threatened by the consequences of population growth and development.⁹⁹ Not only have millions of acres of wetlands been destroyed, but the development of roads and canals has "isolated" many wetlands by cutting them off on the surface from broader ecosystems.¹⁰⁰ In the aftermath of SWANCC, these artificially isolated

94. See John J. Fumero, *Environmental Law: 1994 Survey of Florida Law—At a Crossroads in Natural Resource Protection and Management in Florida*, 19 NOVA L. REV. 77, 79 (1994).

95. *Id.* at 79–80.

96. They moderate temperatures because water warms and cools more slowly than land and maintain precipitation through envirotranspiration, a loss of water from soil by evaporation. *Id.* at 80.

97. *Id.* at 79–80 (citing RALPH W. TINER, JR., U.S. DEP'T OF THE INTERIOR FISH AND WILDLIFE SERV., *WETLANDS OF THE UNITED STATES: CURRENT STATUS AND RECENT TRENDS* 13 (1984)).

98. *Id.* at 78 (quoting Lieutenant Governor Buddy McKay, Remarks at the Inaugural Meeting of the Governor's Commission for a Sustainable South Florida (Apr. 27, 1994)).

99. See Fumero, *supra* note 94, at 79 (exposing that since Florida's population is expected to increase, effective natural resource protection and management is especially crucial).

100. Jan Hollingsworth, *Ruling Affects Florida Wetlands*, TAMPA TRIB., Jan. 10, 2001, 12001 WL 5490527 TAMPA TRIB 2.

wetlands, along with other isolated Florida waters, may lose their federal protection.¹⁰¹

B. Charting a Course: Florida Wetlands Law

Since the preservation of wetlands is crucial to Florida's economy and ecology, the state has enacted substantial legislation to ensure their protection.¹⁰² Florida's current wetlands law is rooted in the Florida Environmental Reorganization Act of 1993.¹⁰³ Prior to the Reorganization Act, Florida lacked a uniform system of regulation because the entities responsible for permitting adopted independent definitions of "wetlands."¹⁰⁴ Codified in 1994 in part IV of chapter 373 of the *Florida Statutes*, the Reorganization Act fundamentally changed Florida's wetlands law.¹⁰⁵ First, it streamlined the regulatory process by consolidating permitting "into a single regulatory approval referred to as an 'environmental resource permit' ("ERP")."¹⁰⁶ Second, it established a uniform system for defining and delineating Florida's wetlands that all agencies and water management districts, with the

101. *Court Opens Door to Isolated Wetlands Development in Panhandle*, AP NEWSWIRES, Feb. 5, 2001, 1 WL APWIRES 14:36:00 [hereinafter *Panhandle*]; see Jan Crawford Greenburg, *Top Court Puts Limit on Clean Water Act*, SUN SENT. (Ft. Lauderdale), Jan. 10, 2001, at 12A, (claiming lands in the Eastern portions of the Everglades may lose their federal protection).

102. Florida has regulated wetland development on a statewide basis since the early 1970's. FLA. DEP'T OF STATE, OVERVIEW OF FLORIDA'S ENVIRONMENTAL RESOURCE PERMIT PROGRAM (2001), at <http://www.myflorida.com/environment/learn/waterprograms/wetlands/erp/overview.html> [hereinafter OVERVIEW]. The Florida Water Resources Act of 1972 established a fundamental water policy for the state and authorized Florida's five water management districts to regulate alterations to the landscape that affected surface water flows. *Id.* The management and storage of surface waters permitting program applied to uplands, wetlands, and isolated wetlands. *Id.* The wetland resources permitting program, originally implemented in 1975 and incorporated into the Warren S. Henderson Wetlands Protection Act of 1984, provided the Department of Environmental Regulation (now the Department of Environmental Protection) the authority to regulate dredging and filling in all waters of the state that were connected to "named waters." *Id.* It did not regulate activities in isolated wetlands unless such isolated wetlands were to be connected either naturally or artificially to the "named waters." *Id.*

103. Fumero, *supra* note 94, at 98 (citing Ch. 93-213, 1993 Fla. Laws 2149 (codified at FLA. STAT. § 373 (1994))).

104. *Id.*

105. OVERVIEW, *supra* note 102.

106. Fumero, *supra* note 94, at 83.

exception of the Northwest Florida Water Management District and certain grandfathered activities, are now required to employ.¹⁰⁷

Throughout most of the state, Florida affords considerable protection to its isolated wetlands under section 373.414 of the *Florida Statutes*.¹⁰⁸ Section 373.414, incorporating rule 62.340.200 of the *Florida Administrative Code*, defines wetlands beginning with the same operational sentence as the Corps' definition:¹⁰⁹ "those areas that are inundated or saturated by surface water or ground water at a frequency and a duration sufficient to support, and under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soils."¹¹⁰ Florida's rule further defines wetlands:

Soils present in wetlands generally are classified as hydric or alluvial, or possess characteristics that are associated with reducing soil conditions. The prevalent vegetation in wetlands generally consists of facultative or obligate hydrophytic macrophytes that are typically adapted to areas having soil conditions described above. These species, due to morphological, physiological, or reproductive adaptations, have the ability to grow, reproduce or persist in aquatic environments or anaerobic soil conditions. Florida wetlands generally include swamps, marshes, bayheads, bogs, cypress domes and strands, sloughs, wet prairies, riverine swamps and marshes, hydric seepage slopes, tidal marshes, mangrove swamps, and other similar areas. Florida wetlands generally do not include longleaf or slash pine flatwoods with an understory dominated by straw palmetto.¹¹¹

The statutory definition employed under section 373.414 is thus unique to Florida's local characteristics and inclusive of isolated wetlands.¹¹²

Rule 62.340.300 of the *Florida Administrative Code* provides the methodology that must be used by all levels of government in the state to

107. FLA. STAT. §§ 373.4145, .414.

108. *Id.* § 373.414.

109. U.S. ARMY CORPS OF ENGINEERS, CORPS OF ENGINEERS WETLAND DELINEATION MANUAL 13 (1987), at [www.say.usace.army.mil/permit/87 manual.pdf](http://www.say.usace.army.mil/permit/87%20manual.pdf) [hereinafter MANUAL].

110. FLA. ADMIN. CODE ANN. r. 62.340.200(19) (2000) (codified at FLA. STAT. § 373.421 (2000)).

111. FLA. ADMIN. CODE ANN. r. 62.340.200(19) (codified at FLA. STAT. § 373.019(17) (2000)).

112. *Id.*

delineate the landward extent of an area that meets the statutory definition.¹¹³ It mandates that the regulating agency use “reasonable scientific judgment” to delineate the area first “visually by on site inspection, or aerial photo-interpretation in combination with ground truthing” in accordance with the statutory definition.¹¹⁴ If this is impossible, four other methods are presented that base delineation on factors including the type of plants present, the characteristics of the soil, and/or hydrologic indicators.¹¹⁵ Structurally, Florida’s methodology considerably differs from the federal methodology, particularly in terms of hydric soil indicators and plant classifications.¹¹⁶ Though the federal delineation methodology encompasses a broader area than Florida’s, there are other provisions within the state methodology to compensate and the scope is accordingly similar in practice.¹¹⁷

Once wetlands are defined and delineated under section 373.414, the Florida Department of Environmental Protection in cooperation with four of the five state water management districts is authorized to administer the ERP program.¹¹⁸ The ERP program provides a consistent permitting approach throughout most of the state, and allows a single application to be filed when requesting state and federal permits.¹¹⁹ ERPs are only granted when there are reasonable assurances that state water quality standards will not be violated and that the activity is not “contrary to the public interest.”¹²⁰

In determining whether an activity is contrary to the public interest, the statute directs the Department of Environmental Protection and the water management districts to consider the impact on public health, safety, or welfare, whether it will adversely affect the conservation of fish and wildlife, including threatened or endangered species and their habitats,

113. FLA. ADMIN. CODE ANN. r. 62.340.300 (codified at FLA. STAT. § 373.421(1) (2000)). Changes cannot be made to the wetlands delineation rule without legislative approval. FLA. STAT. § 373.421.

114. FLA. ADMIN. CODE ANN. r. 62.340.300(1).

115. FLA. ADMIN. CODE ANN. r. 62.340.300 (2)–(4).

116. Memorandum from the Wetlands Delineation Section, Florida Department of Environmental Protection, to the Florida Department of Environmental Protection, *Resolution of Differences Between the Florida and Federal Wetland Delineation Methodologies*, 1 (1997) [hereinafter *Resolution*].

117. *Id.* at 2.

118. OVERVIEW, *supra* note 102. Responsibilities are divided based on the type of activity being regulated. Fumero, *supra* note 94, at 93. The Department is responsible for permitting most industrial activities and the water management districts are responsible for most residential, agricultural, and commercial projects. *Id.* at 93–95.

119. FLA. STAT. § 373.4211(1) (2000).

120. § 373.414(1).

navigation, fishing, recreational values or marine productivity in the vicinity.¹²¹ The statute specifically requires the responsible entities to consider the “cumulative impacts upon surface waters and wetlands,” thereby allowing consideration of additional projects that may be reasonably anticipated to follow.¹²² Upon determining that an activity is contrary to the public interest, the Department or district must consider and assess mitigation measures based on the “quality of the wetland to be impacted and the type of mitigation proposed.”¹²³ If measures designed to restore, create, or enhance the wetlands are unable to compensate for the adverse affects, the permit will be denied.¹²⁴

Section 373.414 of the *Florida Statutes* allows the governing board of a water management district or the Department of Environmental Protection to establish by rule additional permitting criteria for isolated wetlands in two instances.¹²⁵ First, the size threshold to be considered for permitting may be limited “based on biological and hydrological evidence that shows the fish and wildlife values of such areas to be minimal.”¹²⁶ Second, criteria may be established for the “protection of threatened and endangered species in isolated wetlands regardless of size and land use.”¹²⁷

The ERP plan does not extend to certain activities grandfathered under section 373.414 of the *Florida Statutes*,¹²⁸ or to lands within the geographical jurisdiction of the Northwest Florida Water Management District.¹²⁹ Section 373.4145 exempts these lands from the ERP program and regulates them under separate, looser guidelines that do not protect isolated wetlands.¹³⁰ In these lands, the Florida Department of Environmental Protection is authorized under rule 62.312.010 of the *Florida Administrative Code* to issue permits for “dredging and filling conducted in, on, or over the surface waters of the state” as defined in rule 62.312.030 of the code.¹³¹ Rule 62.312.030 defines “surface waters of the state” as those “which connect

121. § 373.414(1)(a)(1)–(4).

122. § 373.414(8)(a).

123. § 373.414(6)(d)2.

124. § 373.414.

125. § 373.414(2).

126. § 373.414(2)(a).

127. § 373.414(2)(b).

128. § 373.414(11)–(16).

129. § 373.4145.

130. § 373.4145. The exemption results from financial constraints placed on the Northwest Florida Water Management District under the Florida Constitution. FLA. CONST. art VII, § 9(b). See discussion *infra* Part III.D.

131. *Id.* § 373.4145(1)(b).

directly or via an excavated water body or series of water bodies” to waters specifically named.¹³² Wetlands are thus only protected if they are connected to a “named” water.¹³³ “Isolated” wetlands are excluded because by definition they lack a surface water connection.

C. *The Ripples of SWANCC: The Impact on Florida*

Though Florida generally affords isolated wetlands substantial protection, the state will still feel the environmental and economic impact of the SWANCC decision. Florida law is fragmented; strong throughout most of the state, yet virtually nonexistent in the Panhandle.¹³⁴ Throughout most of Florida, the critical functions provided by isolated wetlands are well preserved under section 373.414 of the *Florida Statutes*.¹³⁵ Though the ERP program operates independently of the Corps and employs a different delineation methodology, it is very comparable in scope to the federal program.¹³⁶ The gap is not completely filled; the statute provides exemptions for grandfathered activities and allows the water management districts to determine the size of isolated wetlands that will not be subject to permitting.¹³⁷ But the SWANCC decision ought to have limited economic and environmental impact where the ERP program exists.

In contrast, the SWANCC decision will certainly impact the preservation of isolated wetlands in Northwestern Florida. Prior to SWANCC, the state relied on the Corps’ authority under section 404(a)(3) of the Clean Water Act to protect isolated wetlands located within the jurisdiction of the Northwest Florida Water Management District.¹³⁸ In the aftermath of SWANCC, thousands of acres of Florida wetlands have become open to development in the Panhandle.¹³⁹ The implications are already being felt as developers are discarding mitigation proposals and redrafting plans to include isolated wetlands.¹⁴⁰ In the long run, this will impair the vital water

132. The “named waters” include the Atlantic Ocean, the Gulf of Mexico, bays, and natural channels and tributaries thereto. FLA. ADMIN. CODE ANN. r. 62.312.030(2).

133. *Id.*

134. *Panhandle*, *supra* note 101, at 1.

135. FLA. STAT. § 373.414.

136. *Resolution*, *supra* note 116, at 2; *OVERVIEW*, *supra* note 102, at 4.

137. § 373.414(11)–(17); *see Fumero*, *supra* note 94, at 87 n.52 (providing a detailed explanation of exempted activities).

138. *Panhandle*, *supra* note 101, at 1.

139. *Id.*

140. *Id.*

quality protection, flood control, and habitat functions isolated wetlands provide.¹⁴¹

The Corps will retain jurisdiction over some of Florida's isolated wetlands on a case by case basis if a clear and direct connection to interstate commerce can be found; the Corps is currently exploring the connection of beavers trapped in isolated wetlands to beaver pelt trading across state lines.¹⁴² But uncertain whether the courts will uphold such interstate connections, the Corps is proceeding with caution.¹⁴³ The legal questions left unanswered in the *SWANCC* decision have resulted in confusion and uncertainty throughout the state.¹⁴⁴

Florida's experience confirms that the Court's decision has created a gap in the protection of isolated wetlands. The *SWANCC* decision not only adversely affects Florida's environment, but impacts the state's economy as well. In order to regulate isolated wetlands once under federal jurisdiction, the state must assume financial and administrative responsibility.¹⁴⁵ It could also open Florida to more court judgments since the state, rather than the Corps would be the primary permitting authority.¹⁴⁶ In the absence of state action, some of Florida's isolated waters may be completely unprotected following the decision.¹⁴⁷

D. Bridging the Gap: Florida's Options

Florida law illustrates that the state is capable of protecting its wetlands. Florida's experience in the aftermath of the Supreme Court's decision exposes the obstacles the state confronts in attempting to bridge the *SWANCC* gap. Although Florida has numerous options in the aftermath of the decision, the state is constrained by political and economic realities.

At one extreme, Florida can do nothing at the state level. This would leave the regulation of isolated wetlands to county and local entities. Officials in Escambia County are already exploring whether to tighten their

141. Kusler, *supra* note 12, at 15.

142. *Panhandle*, *supra* note 101, at 2.

143. *Id.*

144. In Florida, Army Corps engineers have assigned the term "SWANCCing it" to cases that are being re-evaluated as a result of the Court's decision. Telephone Interview with Bryce McCoy, West Palm Beach Office, U.S. Army Corps of Engineers (July 8, 2001). The Corps is proceeding with caution in Florida. *Id.* The *SWANCC* decision has complicated the Corps' mission; now additional research is needed to prove jurisdiction. *Id.*

145. See Kusler, *supra* note 12, at 15.

146. See *id.*

147. See *id.*

own regulations to exert some control over their formerly protected lands.¹⁴⁸ Northwest Florida's local governments might begin to bridge the SWANCC gap, but regulations will likely differ throughout the Panhandle.¹⁴⁹ This, in turn, will create complexity in the state's regulation of isolated wetlands and uncertainty for developers.¹⁵⁰

At the other extreme, Florida can enact substantial legislation to bridge the judicially created gap. In theory, this could be accomplished by the inclusion of the Northwest Florida Water Management District in the ERP program. In practice, the economic and political obstacles may be insurmountable. The Northwest Florida Water Management District was exempted from the ERP program for financial reasons and extending the ERP program to the Panhandle would cost an estimated three million dollars annually.¹⁵¹ The water management districts fund the ERP program through property taxes.¹⁵² Tax caps for the districts, though, are constitutionally mandated.¹⁵³ The four other districts can assess taxes at a rate of up to one dollar per \$1000 of taxable property value.¹⁵⁴ The Northwest Florida Water Management District is limited under the Florida Constitution to a property tax rate of five cents per \$1000 of taxable property.¹⁵⁵ Last year, the Florida Legislature refused to put a proposed amendment on the ballot that would have increased the Northwest Florida Water Management District's cap.¹⁵⁶ At least in the short term, extension of the ERP program is not a realistic option.

Florida can also chart middle ground and regulate development of isolated wetlands under the Northwest Florida Water Management District's jurisdiction, but to a lesser extent than the ERP program would. This might be possible by revising water policy, flood control, or land use statutes.¹⁵⁷ Even if the required expenditures are lower than would be needed to extend the ERP program to the Panhandle, Florida would still have to enact new

148. *Panhandle*, *supra* note 101, at 1.

149. *See* Kusler, *supra* note 12, at 15 (discussing the implications for states generally).

150. *Id.*

151. *Panhandle*, *supra* note 101, at 1. *See* discussion *infra* Part III.A.

152. *Id.* at 2.

153. FLA. CONST. art. VII, § 9(b).

154. *Id.*

155. *Id.*

156. *Panhandle*, *supra* note 101, at 2.

157. Jon Kusler, *Model State Wetland Statute to Close the Gap Created by SWANCC*, (Ass'n of State Wetland Managers, Berne, N.Y.), Feb. 22, 2001, at <http://www.aswm.org/index.htm>.

legislation and commit funds to administer the new policy.¹⁵⁸ Moreover, charting middle ground would not completely fill the *SWANCC* gap.

Florida can also pursue state assumption of the federal permitting program under the Clean Water Act.¹⁵⁹ Section 404(g) of the Act allows the governor of a state to apply for assumption of the permitting program for the discharge of dredged or fill materials into navigable waters, other than traditionally navigable waters and their adjacent wetlands.¹⁶⁰ Upon acceptance by the Environmental Protection Agency, the state plan replaces the Corp's permitting program, rather than supplementing it.¹⁶¹ State assumption would allow Florida to administer the federal permitting program over intrastate isolated wetlands that have a substantial connection to interstate commerce.¹⁶² The benefit is in the interpretation; the Corp's Wetland Delineation states "determination that a water body or wetland is subject to interstate commerce and is therefore a water of the United States shall be made independently of procedures described in this manual."¹⁶³ Florida could choose to interpret and administer the Court's decision narrowly.¹⁶⁴

Florida's prospects for assumption, however, are diminished by past experience. The state attempted to assume administration under section 404(g) in 1997, and the request was denied because Florida's delineation methodology differs from the Corps.¹⁶⁵ The designation of slash pine as an upland plant, rather than a facultative one, posed the most significant problem.¹⁶⁶ Recognizing that slash pine is in fact a facultative plant, Florida's methodology provides mechanisms to identify areas as wetlands even when dominated by slash pine, but the designation still precluded assumption.¹⁶⁷ Since Florida cannot change its methodology without legisla-

158. *Id.* at 2.

159. 33 U.S.C. § 1344(g)(1).

160. § 1344(g)(1). Only two states, Michigan and New Jersey, have assumed federal permitting under 404(g). Brief for the Federal Respondents at 19, *SWANCC*, 121 S. Ct. 675 (2001) (No. 99-1178), 2000 WL 1369439.

161. § 1344(g)(1).

162. *Id.*

163. *MANUAL*, *supra* note 109, at 13.

164. See Funk, *supra* note 10, at 50 (suggesting the interstate commerce link with fishing is less attenuated than with migratory birds); see discussion *infra* Part II.B.

165. Letter from the Florida Department of Environmental Protection to Carol Browner, Administrator, Environmental Protection Agency (Sept. 17, 1997) [hereinafter Letter].

166. *Id.*

167. *Id.*

tive approval¹⁶⁸ and the designation of slash pine as upland was due to timber industry lobbying, effectuating change will likely prove difficult.¹⁶⁹ There is also the risk that opening the methodology to legislative debate results in looser regulation, especially in light of the state's conservative government.¹⁷⁰

Finally, Florida may be able to partially bridge the gap by urging the Corps to chart new legal ground. The *SWANCC* decision fails to distinguish the reasons why intrastate isolated waters are in fact isolated.¹⁷¹ The Court finds that Congress never intended the Clean Water Act to reach isolated ponds in Illinois that were created as a result of mining, yet fails to consider that not all isolated waters were created where waters did not originally and naturally exist.¹⁷² Unlike the ponds in Illinois that eventually developed a natural character,¹⁷³ many of Florida's isolated wetlands were isolated by development, not created by it.¹⁷⁴ Florida could argue that this is a distinction with a significant difference; artificially isolated wetlands may have once been navigable in fact. The state could encourage the Corps to assert broader jurisdiction under section 404(a)(1). Charting new ground, though, takes time and its success is ultimately dependent upon administrative and judicial interpretation.

Economic and political realities make it difficult for Florida to completely bridge the isolated wetlands gap created by the *SWANCC* decision. Since Florida's current government is unlikely to extend itself to protect the environment, the gap is likely to remain unfilled in the short term.¹⁷⁵ In the interim, many of Florida's isolated wetlands have become open to development.¹⁷⁶ Only time will reveal the *SWANCC* decision's full impact on Florida's environment and water supply.

168. FLA. ADMIN. CODE ANN. r. 62.340.300 (2000).

169. Telephone Interview with John Toby, Wetlands Delineation Section, Florida Department of Environmental Protection (July 8, 2001).

170. *Id.*

171. *SWANCC*, 531 U.S. 159, 179 (2001).

172. *Id.* at 171.

173. *Id.* at 163.

174. *Panhandle*, *supra* note 101, at 2.

175. Telephone Interview with John Toby, Wetlands Delineation Section, Florida Department of Environmental Protection (July 8, 2001).

176. *See Panhandle*, *supra* note 101, at 1.

E. Making Waves: The Court's "Isolated" Decision

The fragmentation in Florida law renders *SWANCC*'s impact on the state a microcosm of the decision's impact on the nation as a whole. Florida's experience suggests that states will not completely bridge the *SWANCC* gap, leaving the vital functions of isolated wetlands unprotected. Since the Court's holding has created a gap that has severe consequences for the nation's water supply and environment, the decision is itself "isolated" from the goals of the Clean Water Act.¹⁷⁷

Florida law demonstrates that a state will only afford strong protection to the functions of its isolated wetlands where it is in the state's individual interest to do so.¹⁷⁸ Where Florida has a strong economic incentive to protect its isolated waters, the state has generally enacted strong and comprehensive legislation to protect its wetlands.¹⁷⁹ But in the Panhandle, where the Everglades are distant and the economic incentive is lacking, Florida neglects to protect its isolated wetlands from development on a statewide basis.

Florida's experience thereby exposes the need for comprehensive, federal regulation in order to effectuate the goals of the Clean Water Act. Florida has a particularly strong incentive to protect its isolated wetlands. But the state's interest may be as unique as the Everglades.¹⁸⁰ Absent such interest, most states are faced with the economic and political realities that Florida confronts in the Panhandle. If a state determines that the benefits of development outweigh the associated environmental costs, Florida's experience suggests that the functions of isolated wetlands are unlikely to receive strong protection under state law.

While the benefits of dredging and filling in isolated wetlands are local, the burdens do not respect state boundaries.¹⁸¹

The harm from wetland development is cumulative, not individual. . . . [A] state's perspective . . . might differ from that of other states, or the national interest Nearly every contested federal wetlands permit decision—and they are numerous—is one that, by federal regulation, already received all necessary state approvals. If

177. See Likens Brief, *supra* note 11, at 9–10.

178. See discussion *infra* Part III.A–C.

179. *Id.*

180. See Fumero, *supra* note 94, at 78 (noting the uniqueness of Florida's natural resources).

181. *SWANCC*, 531 U.S. at 195; ED Brief, *supra* note 3, at 15.

the interests of receiving states—of downstream and downflight Americans—are going to be represented, those interests must be protected by more than an agency of a state¹⁸²

Since water moves in hydrologic cycles, pollution must be controlled at the source.¹⁸³ Florida's experience implies that many states will lack the incentive to control water pollution at the source. Since the impacts of development on the hydrologic and biological functions of "isolated" wetlands reach beyond state lines, water quality, flooding, erosion, and habitats in other states may be adversely affected.¹⁸⁴ Water pollution is a national problem that has "substantial, cumulative impacts on interstate commerce . . . requir[ing] a uniform, nationwide solution."¹⁸⁵ Unless the critical functions of isolated wetlands are protected at the national level, the Clean Water Act's ability to protect the nation's waters is undermined.¹⁸⁶

Finally, the decision's impact on Florida illustrates that the Court's federalism concerns are unwarranted.¹⁸⁷ Though in theory the Court's decision supports state rights,¹⁸⁸ in practice it has complicated Florida's ability to protect its wetlands and water quality.¹⁸⁹ Florida has economically and environmentally benefited from the Corp's authority over its intrastate isolated wetlands.¹⁹⁰ In Northwest Florida, the state has relied on the Corps

182. ED Brief, *supra* note 3, at 19.

183. *Id.* at 15; Likens Brief, *supra* note 11, at 10.

184. ED Brief, *supra* note 3, at 15.

185. *Id.* at 12.

186. *SWANCC*, 531 U.S. 159, 175 (2001) (Stevens, J., dissenting); Brief of Amici Curiae Cal. et al. at 12, *SWANCC*, 121 S. Ct. 675 (2001) (No. 99-1178), 2000 WL 1369438 [hereinafter Cal. Brief].

187. The dissent counters the Court's federalism concerns by arguing that the Clean Water Act regulates the environment, not zoning and land use. *SWANCC*, 531 U.S. at 191. Environmental regulation "does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits." *Id.* (quoting Cal. Coastal Comm'n v. Granite Rock Co., 480 U.S. 572 (1987)). Furthermore, federal jurisdiction under the Clean Water Act is not limitless; exceptions are provided in the Act itself and states can assume administration of the federal program. ED Brief, *supra* note 3, at 27.

188. *SWANCC*, 531 U.S. at 174.

189. *Environmental Defense Criticizes Supreme Court Ruling*, NEWS RELEASE (Env'tl. Defense, Wash., D.C.), Jan. 9, 2001, at http://www.environmentaldefense.org/pubs/NewReleases/2001/Jan/c_courtuling.html.

190. The states of California, Iowa, Maine, New Jersey, Oklahoma, Oregon, Vermont, and Washington submitted a joint brief on behalf of the respondents arguing that states benefit from the national approach. Cal. Brief, *supra* note 186, at 12. These states do not believe that section 404 interferes with traditional state powers over zoning and land use. *Id.* at 14.

to protect the functions of its isolated wetlands that would otherwise be adversely impacted by dredging and filling. Now Florida must commit funds and enact legislation to fill the *SWANCC* gap or risk the environmental consequences. Since Florida law does substantially close the *SWANCC* gap, the economic and environmental consequences of the decision will be even more severe for the majority of states that currently have looser regulations.¹⁹¹ Florida's experience demonstrates that the Court's decision is "isolated" from the actual functioning of the Clean Water Act.¹⁹²

IV. CONCLUSION

Florida's experience in the aftermath of *SWANCC* echoes the dissent's pronouncement that the Court's reasoning "does violence to the scheme Congress chose to put in place."¹⁹³ Congress intended the Clean Water Act to "be given the broadest possible constitutional interpretation" in order to protect the nation's water quality and environment.¹⁹⁴ The *SWANCC* decision has created a gap in the protection of isolated wetlands that Florida's experience intimates many states will be unable to fill, leaving the water filtration, flood control, and habitat functions served by isolated wetlands unprotected. The fragmentation in Florida wetlands law exposes the need for uniform, federal regulation of the nation's waters if the goals of the Clean Water Act are to be accomplished.

In a well-reasoned dissent, Justice Stevens demonstrates that Congress intended to afford comprehensive, long-range protection for our nation's waters.¹⁹⁵ Thoroughly examining the Clean Water Act's mandate, legislative intent, and the Court's rationale in *Riverside Bayview*, the dissent concludes that waters need not be actually or potentially navigable to fall within the scope of the Act.¹⁹⁶ Florida's experience illuminates the practical wisdom of the dissent's reasoning.

191. *Id.* See discussion *supra* Part III.B.

192. See Cal. Brief, *supra* note 186, at 12.

193. *SWANCC*, 531 U.S. at 191.

194. *Id.* at 181 (citing S. Conf. Rep. No 92-1236, p. 144 (1972), reprinted in 1 Leg. Hist. 327).

195. Justice Stevens was joined by Justice Souter, Justice Ginsberg, and Justice Breyer in the dissent. *Id.* at 174.

196. The dissent makes three interrelated arguments: First, the Clean Water Act is designed to control water pollution, not navigability. *Id.* at 174-83. Second, isolated wetlands provide the same functions as adjacent wetlands and thus fall within the scope of the *Riverside Bayview* decision. *Id.* at 183-86. Third, there is a need for national regulation and

The Clean Water Act's stated purpose is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."¹⁹⁷ By definition, the Act extends its reach to all "waters of the United States."¹⁹⁸ Since the impact of water pollution does not depend upon whether the waters affected are navigable, the goals of the Act cannot be achieved if its scope is based solely on navigability.¹⁹⁹ "Navigable waters" in the statute must mean those "waters over which federal authority may properly be asserted" in order to achieve the Act's goals.²⁰⁰

By voicing its constitutional concerns and suggesting that the interstate connection in *SWANCC* is insufficient, the Court has unnecessarily created uncertainty in Florida and around the nation over the scope of federal permitting authority under section 404(a). There is independent authority under the Commerce Clause, apart from navigability, to regulate intrastate isolated waters that have a substantial effect on interstate commerce; the power to regulate commerce includes the power to protect the natural resources that generate the commerce.²⁰¹ It remains to be seen whether Congress or the states will be able to formulate an improved plan to protect the nation's waters.²⁰²

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authority under the Commerce Clause for such regulation independent of navigability. *SWANCC*, 121 S. Ct. at 186–88.

197. 33 U.S.C. § 1251(a).

198. § 1362(7).

199. *SWANCC*, 531 U.S. at 188.

200. *Id.* at 182, 189.

201. *Id.* at 196 (citing *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982) (holding water to be an "article of commerce")). The dissent argues that the Clean Water Act regulates dredging and filling, almost always an economic activity, and finds the "causal connection between the filling of wetlands and the decline of commercial activities associated with migratory birds" is direct enough to render the Migratory Bird Rule within the Court's Commerce Clause jurisprudence. *Id.*

202. In his final words at oral argument, the Agency's counsel suggested that if the court decides the case on statutory grounds, it ought to consider whether Congress could come back with another plan to protect the nation's waters. Petitioner's Rebuttal at Oral Argument at 23, *SWANCC*, 531 U.S. 159 (2001) (No. 99-1178), 2000 WL 169870.