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To the Ends of the Earth: Where Does Navigable Water Begin Under *SWANCC*?

by Jim Wedeking

I. Introduction and Overview

Traveling by water can conjure images of everything from goliath cruise ships to Huckleberry Finn's homemade raft.[1] For some federal courts, however, navigable water need not accommodate even a toy sailboat. The Clean Water Act (CWA),[2] although primarily concerned with protecting the nation's seas and rivers from pollution, also provides for federal jurisdiction over wetlands, a catchall term for bogs, swamps, and even large puddles that only exist during spring rains or flood seasons.[3] The key to federal involvement is the term "navigable waters,"[4] which authorizes the federal government to prevent the filling of wetlands with dirt[5] under the U.S. Commerce Clause.[6] To facilitate this transfer, the U.S. Congress, the U.S. Army Corps of Engineers (the Corps), and courts have stretched, strained, and tortured common definitions and ideas about water and land, especially the term "navigable," to preserve broad federal jurisdiction. The Corps and U.S. Environmental Protection Agency (EPA) have exercised jurisdiction over wetlands that could never support any watercraft used in interstate commerce and the courts have been willing to bend. But only so far.

In January 2001, the U.S. Supreme Court stated that it could bend no further. The Court's decision in *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*[7] invalidated the migratory bird rule,[8] promulgated by the Corps as the basis for jurisdiction over intrastate wetlands that were isolated from any navigable body of water. The wetlands at issue in *SWANCC* were a series of ditches and trenches from an abandoned gravel mining operation that filled with water over the years, but were not part of any stream or river.[9] Although the Court admitted that "navigable water" should be construed broadly, it simply was not a reasonable interpretation of the statute for the Corps to completely eliminate the term from the CWA. Thus, the migratory bird rule was not faithful to the language of the statute or the intentions of Congress. The Corps would have to find another way to regulate these isolated, intrastate wetlands.

The holding in *SWANCC* was not greeted kindly by some in Congress, academia, or environmental advocacy groups.[10] That EPA has since failed to restate the basis for federal jurisdiction over isolated, intrastate wetlands without the migratory bird rule has also elicited criticism.[11]

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1. *See* Mark Twain, The Adventures of Huckleberry Finn (Penguin U.S.A. 2003) (1884).
2. 33 U.S.C. §§1251-1387, ELR Stat. FWPCA §§101-607; *see also id*. §1251(a)(1) ("it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985").
3. 33 C.F.R. §328.3 (the U.S. Army Corps of Engineers (the Corps) has defined "waters of the United States" as including "intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds."
4. "Navigable waters" are defined as "the waters of the United States." 33 U.S.C. §1362(7). These are, in turn, defined to include wetlands; *supra* note 3.
5. The Corps is authorized to issue or deny a permit for the discharge of pollutants, including dirt, into "navigable waters" through 33 U.S.C. §1344(a); *see* 33 U.S.C. §1362(6) (including "dredged spoil" rock, sand, and dirt as pollutants); *see also* United States v. Deaton, 209 F.3d 331, 336, 30 ELR 20508 (4th Cir. 2000) ("Congress determined that plain dirt, once excavated from waters of the United States, could not be redeposited into those waters without causing harm to the environment").
6. *See* U.S. Const. art. I, §1, cl. 8.
7. 531 U.S. 159, 31 ELR 20382 (2001).
8. *See* 51 Fed. Reg. 41217 (Nov. 13, 1986).
9. *See SWANCC*, 531 U.S. at 163 (The description of "ditches" and "trenches" may not accurately characterize the size of these water bodies, which varied "from under one-tenth of an acre to several acres" and "from several inches to several feet" deep.).
10. *See* Press Release, Sierra Club (Jan. 10, 2001) (characterizing the ruling as furthering "the relentless efforts of special interests to capitalize on loopholes in the [CWA] and erode essential safeguards aimed at protecting our critical wetlands"); Press Release, Natural Resources Defense Council, Inc. (Jan. 9, 2001):

    > Those who want to pave over the last remaining vestiges of undeveloped wetlands will consider this decision—which will destroy the second largest Great Blue Heron breeding colony in northeastern Illinois—to be a great victory. . . . By ignoring their own precedent, the five [J]ustices revealed their activist agenda to weaken our most important environmental laws.

    William Funk, *The Court, the Clean Water Act, and the Constitution:* SWANCC *and Beyond*, 31 ELR 10741 (July 2001) (*SWANCC* is "the most devastating judicial opinion affecting the environment ever"). *See also* statements of members of Congress *infra* note 59.
11. *See Issues Raised by the Court's* SWANCC *Decision: Hearings Before the Subcomm. on Fisheries, Wildlife, and Water of the Senate Comm. on Environment and Public Works*, 108th Cong. (2003) (statement of Sen. Inhofe, Chairman, Senate Comm. on Environment and Public Works):

    > The fact that two and [one-]half years after the [Court] decision, the agencies have not proposed any changes to their regulations is disturbing on two counts. First, that the American public has been subjected to an arbitrary and inconsistent regulatory policy. And second, it casts doubt on the ability of the Corps and EPA to prioritize their scarce resources in order to maximize protection of the environment.

    See (statement of Sen. Feingold) (criticizing post-*SWANCC* guidance from EPA as uncertain and the command that all field offices seek staff legal opinions before asserting jurisdiction over isolated, intrastate wetlands). EPA issued an advance notice of proposed rulemaking seeking public comment on how to re-define its jurisdiction over waters of the United States. 68 Fed. Reg. 1991 (Jan. 15, 2003). EPA later suspended the possibility of re-defining jurisdiction. Press Release, EPA and Corps, EPA and Army Corps Issue Wetlands Decision (Dec. 16, 2003), *available at* www.epa.gov/newsroom/2003_dec.htm#1.

Some have suggested that federal jurisdiction over these wetlands may be found through a hydrological connection to navigable waterways (hydrological connection theory). Courts have not waited for any official declaration from the *Federal Register* or Congress before running with the hydrological connection theory of jurisdiction. Many federal district courts viewed *SWANCC* as putting isolated, intrastate wetlands off-limits from federal regulation[12] only to be snapped back by the U.S. circuit courts of appeal,[13] claiming that an ambiguous and often disputed hydrological connection to navigable water is enough to sustain EPA and Corps jurisdiction. Although the U.S. Court of Appeals for the Fifth Circuit[14] has agreed that *SWANCC* put many of these disputed wetlands beyond federal reach, the hydrological connection theory has gained prominence and will have its mettle tested by the Court.[15] Two years after *SWANCC*, it has yet to be determined whether its constriction of federal jurisdiction was a minor defeat for EPA and the Corps or part of something larger.[16]

In *SWANCC*, the Court expressly reserved opinion on whether the regulation of isolated, intrastate wetlands violates the Commerce Clause.[17] It will not stay silent for long. The circuit courts of appeal are split on the issues of: (1) whether the hydrological connection theory can justify assertion of jurisdiction over these wetlands; and (2) whether it violates the Commerce Clause. This Article will serve as a preview of the issues that will ultimately be presented to the Court. First, this Article will review the *SWANCC* decision for clues on the validity of the hydrological connection theory, outline a definition of the term through the circuit courts of appeal decisions applying it, analyze how attorneys and courts handle a case basing jurisdiction on the hydrological connection theory, and finally, discuss whether the hydrological connection theory could survive a Commerce Clause challenge, either as defined by the circuit courts of appeal or through an amendment to the CWA.[18]

II. The *SWANCC* Decision

Twenty-three villages and cities in the Chicago area banded together as the Solid Waste Agency of Northern Cook County (SWANCC) in order to find a disposal site for baled nonhazardous solid waste.[19] SWANCC decided upon a 533-acre site that was used as a sand and gravel pit mining operation from the 1930s to the 1960s.[20] Abandoned for over 30 years, the site had been overrun by vegetation. Nearly 298 acres were deemed to be "an early successional stage forest."[21] A series of trenches and pits created over 200 permanent and seasonal ponds, attracting 170 different plant and animal species.[22] Before the disposal site could open, "approximately 17.6 acres of ponds and small lakes located on the parcel had to be filled in."[23] The Corps asserted jurisdiction[24] over the wetlands[25] and refused to grant a permit solely on the basis of the migratory bird rule.[26]

A. The CWA and the Migratory Bird Rule

The CWA, passed in 1972,[27] aims to "[r]estor[e] and maintain[ ] the chemical, physical[,] and biological integrity of the [n]ation's waters."[28] Among its provisions are those that require the Corps to issue permits "for the discharge of dredged or fill material into the navigable waters."[29] The term "navigable waters" is the key to federal jurisdiction over waters and wetlands susceptible to federal regulation from those regulated by the states. Navigable waters are circularly defined under the CWA as "the waters of the United States, including the territorial seas."[30] Without any demar-

12. *See*, *e.g.*, United States v. Rapanos, 190 F. Supp. 2d 1011, 1014 n.3 (E.D. Mich. 2002) (believing that the Court's reasoning in *SWANCC* was "likely a significant shift in its CWA jurisprudence").
13. *See* Treacy v. Newdunn Associates Ltd. Liab. Partnership, 344 F.3d 407, 33 ELR 20268 (4th Cir. 2003); *accord* United States v. Rapanos, 339 F.3d 447, 33 ELR 20249 (6th Cir. 2003); United States v. Rueth Dev. Co., 335 F.3d 598, 33 ELR 20238 (7th Cir. 2003); United States v. Deaton, 332 F.3d 698, 33 ELR 20223 (4th Cir. 2003).
14. In re Needham, 354 F.3d 340 (5th Cir. 2003). *See* Rice v. Harken Exploration Co., 250 F.3d 264, 31 ELR 20599, *petition for reh'g en banc denied*, 263 F.3d 167 (5th Cir. 2001).
15. At the date of this writing, the losing parties in *Rapanos*, *Deaton*, *Treacy*, and *Rueth* have either filed or intend on filing petitions for certiorari to the Court. *See* 72 U.S.L.W. 3451 (Dec. 22, 2003) (petition for certiorari filed for *Rapanos*); 72 U.S.L.W. 3310 (Oct. 27, 2003) (petition for certiorari filed for *Treacy*); *Slew of High Court Petitions May Spark Additional SWANCC Review*, *at* www.InsideEPA.com (last visited Nov. 7, 2003). The U.S. Solicitor General has urged the Court to decline certiorari. *DOJ Urges High Court to Decline Review of Suits on Water Act's Scope*, *at* www.InsideEPA.com (last visited Feb. 6, 2004). Certiorari has already been denied in *Rueth*. Rueth Dev. Co. v. United States, 123 S. Ct. 835 (2003).
16. Some have speculated that *SWANCC* was part of a larger movement by the current Court to revive Commerce Clause restrictions on congressional actions that have largely been ignored since the New Deal. *See generally* Keith E. Whittington, *Taking What They Give Us: Explaining the Court's Federalism Offensive*, 51 Duke L.J. 477 (2001); United States v. Morrison, 529 U.S. 598 (2000) (invalidating the Violence Against Women Act for lack of an impact on interstate commerce); United States v. Lopez, 514 U.S. 549 (1995) (invalidating the Gun-Free School Zone Act since gun violence is a local issue with no import on interstate commerce).
17. *See SWANCC*, 531 U.S. at 174 ("We thus read the statute as written to avoid the significant constitutional and federalism questions raised by respondents' interpretation, and therefore reject the request for administrative deference.").
18. In February 2003, Sen. Russell Feingold (D-Wis.) introduced S. 473, 108th Cong., the Clean Water Authority Restoration Act of 2003. This bill would strike the term "navigable waters" from the CWA and replace it with "waters of the United States." The purpose was to reverse *SWANCC*, which Senator Feingold proclaimed, "removed much of the CWA protection for between 30[%] to 60[%] of the [n]ation's wetlands." 149 Cong. Rec. S2928 (daily ed. Feb. 27, 2003) (statement of Senator Feingold).
19. *See SWANCC*, 531 U.S. at 162-63.
20. *See id*. at 163.
21. Solid Waste Agency of N. Cook County v. Corps of Eng'rs, 191 F.3d 845, 848, 30 ELR 20161 (7th Cir. 1999).
22. *See id*.
23. *Id*. at 847.
24. *See id*. at 848-49 (SWANCC contacted the Corps, which inspected the site and originally concluded that the parcel did not contain protected wetlands. Afterwards, the Illinois Nature Preserves Commission notified the Corps that a number of migratory birds inhabited the site, causing the Corps to reverse its position and invoke the migratory bird rule).
25. *See* 33 C.F.R. §328.3(b) (Wetlands are defined as a habitat supporting "vegetation typically adapted for life in saturated soil conditions.").
26. *See SWANCC*, 191 F.3d at 849.
27. *See* CWA Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 817 (1972).
28. 33 U.S.C. §1251(a).
29. *Id*. §1344(a). These permits are referred to as §404(a) permits.
30. *Id*. §1362(7). This "definition" could not possibly be more broad and ambiguous; yet it was not an oversight or poor drafting. Congress likely wished to extend its authority over as much of the nation's wa-

cation between "waters of the United States" and waters of the states, the executive agencies were left to articulate the boundaries of federal regulation. They were ambitious. The Corps' definition of "waters of the United States" includes "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 . . . ."[31] To further extend its grasp, the Corps promulgated a supplemental statement defining its jurisdiction in 1986 to include interstate 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.[32]

This is the migratory bird rule.

After determining that 121 bird species were found at the SWANCC disposal site, the Corps held that although the mining and gravel pits were not wetlands they were "waters of the United States" based on their "natural character" and their use as "habitat by migratory bird[s] which cross state lines."[33] Despite receiving local and state approval (including approval by the Illinois EPA), and offering a variety of proposals to offset the potential damage of using the site as a landfill, the Corps denied SWANCC a §404(a) permit to fill the 17.6 acres.[34] The Corps declared: (1) SWANCC's proposals failed to be the "least environmentally damaging, most practicable alternative" for a landfill; (2) SWANCC failed to reserve enough funds for potential leaks into the groundwater (thus posing a hazard to the drinking water supply); and (3) the potential harm caused by a landfill would be irreversible "since a landfill surface cannot be redeveloped."[35]

B. The U.S. District Court for the Northern District of Illinois, the U.S. Court of Appeals for the Seventh Circuit, and the Court

Contending that the Corps lacked jurisdiction over these intrastate, isolated waters, SWANCC fared no better with the lower courts[36] than with the Corps in challenging the permit denial on both the merits and jurisdictional grounds.[37] The district court upheld the Corps' decision and the Seventh Circuit affirmed congressional regulation of intrastate, isolated wetlands under the Commerce Clause[38] before holding that the Corps' interpretation of "waters of the United States" was reasonable.[39] The Court reversed on this latter issue by using a combination of statutory analysis and federalism.

In doing so, the Court needed to mend some damage it had wrought on the dictionary in 1985—it needed to distinguish its holding in *United States v. Riverside Bayview Homes, Inc.*[40] There, the Court demeaned the modifier "navigable" as being of "limited import" and could not undermine congressional intent to "regulate at least some waters that would not be termed 'navigable' under the classical understanding of that term."[41] The *SWANCC* Court noted that the disputed wetland in *Riverside Bayview* was directly adjacent to an indisputably navigable body of water. The *Riverside Bayview* wetland was deemed to have some "significant nexus" to navigable water, allowing for federal regulation.[42] With this significant nexus test, the *SWANCC* Court held that the word "navigable" can bend, but this crucial jurisdictional modifier cannot break.[43] At most, the Court stated, it would allow the regulation of non-navigable wetlands when there is a "significant nexus between wetlands and 'navigable waters,'" best displayed when the wetland is adjacent to an open, navigable water body.[44]

The migratory bird rule impermissibly made navigable bodies of water, the CWA's jurisdictional link to the Commerce Clause, irrelevant. "As counsel for respondents conceded at oral argument, such a ruling [in favor of the Corps] would assume that 'the use of the word navigable in the statute . . . does not have any independent significance.'"[45] The Court also distinguished its own narrowing of the word "navigable" in *Riverside Bayview*:

> [I]t is one thing to give a word limited effect and quite another to give it no effect whatever. The term "navigable" has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.[46]

ters as possible with only the Commerce Clause as a limit; *see* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 132-34, 16 ELR 20086 (1985).

31. 33 C.F.R. §328.3(a)(3).
32. 51 Fed. Reg. at 41217.
33. *SWANCC*, 531 U.S. at 164-65.
34. *See id*. at 165. Of the 533-acre site, 410 acres were proposed for use as the landfill. The Corps' refusal extended to 17.6 acres of nonwetlands (as defined by the Corps) that needed to be filled with sand and dirt, approximately 4.3% of proposed project area.
35. *Id*.
36. SWANCC sought review pursuant to the Administrative Procedure Act (APA), 5 U.S.C. §701-706, *available in* ELR Stat. Admin. Proc.
37. After the Northern District of Illinois granted summary judgment to the Corps on the jurisdictional issue, SWANCC dismissed the remainder of its suit dealing with the merits of the decision. *SWANCC*, 531 U.S. at 165.
38. *See* Solid Waste Agency of N. Cook County v. Corps of Eng'rs, 191 F.3d 845, 850, 30 ELR 20161 (7th Cir. 1999).
39. *Id*. at 851-52.
40. 474 U.S. 121, 16 ELR 20086 (1985).
41. *Id*. at 133. In the Court's defense, mangling the American lexicon in the name of the environment is a long-standing tradition in our legal system. *See* Thomas L. Casey, *Reevaluating "Isolated Waters": Is Hydrologically Connected Groundwater "Navigable Water" Under the Clean Water Act*?, 54 Ala. L. Rev. 159 (2002) (explaining that the re-definition of words is common given the complexities of environmental policy).
42. *See SWANCC*, 531 U.S. at 167. *Riverside Bayview* reserved opinion on the ultimate issue in *SWANCC*: "[T]he authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water. . . ." *Id*. (quoting *Riverside Bayview*, 474 U.S. at 131-32).
43. Well, what does "navigable" mean? The *SWANCC* Court endorsed the Corps' original 1974 definition of "navigable waters": "[T]hose waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce." *Id*. at 168 (quoting 33 C.F.R. §209.120(d)(1) (1974)).
44. *See id*. at 167.
45. *Id*. at 172 (citation omitted).
46. *Id*.

In emphasizing "navigability" as a signal of congressional intention, the Court presumed that Congress wanted to respect the maxim that "[r]egulation of land use [is] a function traditionally performed by local governments."[47] Even if a presumption that Congress wanted to restrict its own power is naïve, the Court noted that making navigability the dividing line is the only interpretation that avoids a constitutional question.[48] Thus, disregard for navigability sank the migratory bird rule. The significant nexus test became the Corps' only remaining authority to regulate isolated, intrastate wetlands.

C. The Dissent

Predictions of *SWANCC* being another Rehnquist Court showdown over Commerce Clause restrictions are bolstered by the Justices in dissent. Justice John Paul Stevens' opinion was joined by the usual Justices favoring expanded congressional power: Justices David H. Souter, Ruth Bader Ginsburg, and Stephen G. Breyer. Beginning with an invocation of the fiery Cuyahoga River,[49] Justice Stevens dove right into *Riverside Bayview*, denying that there was any reason to preclude a further extension of regulation beyond adjacent, navigable waters.[50] Relying on a collection of law review articles, Justice Stevens submitted that although Congress and the Corps began with the intention of improving navigability for commercial purposes the courts began to read the language as allowing for pollution control "even when such discharges did nothing to impede navigability."[51] In asserting that navigability of commercial waterways and environmental concerns are mutually exclusive, Justice Stevens noted the lack of a citation to commerce in the legislative history or "policy and goals" of the CWA.[52] Although Justice Stevens could not escape the fact that the CWA is limited to "navigable waters," he believed that a conference committee amendment in the definition of "navigable waters" allowed for regulation beyond "navigable waters" and the strictures of the Commerce Clause.[53] According to Justice Stevens, the conference report's intention that federal jurisdiction "be given the broadest possible constitutional interpretation"[54] supports an inference that Congress intended to ignore the Commerce Clause: "The statement, [the majority] claims, 'signifies that Congress intended to exert [nothing] more than its commerce power over navigation . . . drains all meaning from the conference amendment.'"[55] While stating that Congress can ignore the U.S. Constitution at its leisure, Justice Stevens simultaneously asserted that power over "'significant natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing and resting sites' for various species of aquatic wildlife" is a commercial one.[56]

In essence, Justice Stevens was concerned far more with what Congress wanted to regulate as opposed to what Congress was permitted to regulate or claimed to regulate.[57] Without this free-roaming ability to control "significant natural biological functions," he construed the majority's holding as drawing a superficial line: "The Court draws a new jurisdictional line, one that invalidates . . . the Corps' assertion of jurisdiction over all waters except for actually navigable waters, their tributaries[,] and wetlands adjacent to each."[58] Justice Stevens did not explain how this "new jurisdictional line" was different than the significant nexus test laid down in *Riverside Bayview*, an opinion that he joined.

D. The Fallout of SWANCC

In keeping with Justice Stevens' dissent, however, it is clear that some in Congress do want expansive federal jurisdiction over all wetlands in all parts of the country and urge that if *SWANCC* cannot be legislatively overruled then it should be read as narrowly as possible.[59] In the aftermath of the decision, EPA was widely criticized for its more cautionary approach to refining the scope of its jurisdiction to accom-

47. Hess v. Port Authority Trans-Hudson Corp., 513 U.S. 30, 44 (1994).

48. *See SWANCC*, 531 U.S. at 174.

49. *See* Jonathan H. Adler, *Fables of the Cuyahoga: Reconstructing a History of Environmental Protection*, 14 Fordham Envtl. L.J. 89 (2002) for an interesting review of the Cuyahoga River's role in sparking federal environmental legislation and possible misperceptions about state pollution controls at the time.

50. *See SWANCC*, 531 U.S. at 175-76. Justice Stevens' second footnote muddied the coherence of his dissenting opinion by simultaneously denying and asserting that a hydrological connection was found in *Riverside Bayview* and that an "ecological connection" was present in both the *Riverside Bayview* wetlands and "many, and possibly most, 'isolated' waters" (citing Brief for Dr. Gene Likens et al. as amici curiae, at 2000 WL 1369410, providing a laundry list of ecological functions that wetlands may serve in their surrounding environment). No definition for either an ecological connection or hydrological connection was provided. Justice Stevens may or may not find them synonymous. Their relation to the Commerce Clause was also a mystery.

51. *Id*. at 178. Justice Stevens relied on Garrett Power, *The Fox in the Chicken Coop: The Regulatory Program of the U.S. Army Corps of Engineers*, 63 Va. L. Rev. 503 (1977) and Sam Kalen, *Commerce to Conservation: The Call for a National Water Policy and the Evolution of Federal Jurisdiction Over Wetlands*, 69 N.D. L. Rev. 873 (1993) in claiming that the 1970s were an era when concerns for transportation and the environment diverged. This is undercut by Justice Stevens' own mention of the Cuyahoga River fire. *See* Adler, *supra* note 49 at 101-06 (recounting the damage to shipping and transportation caused by river fires and other pollution problems). Characterizing the pollution control values of that era as either concern for transportation and commerce *or* concern for the environment is not consistent with history.

52. *See SWANCC*, 531 U.S. at 179-80.

53. *See id*. at 180-81. Justice Stevens cites the deletion of the word "navigable" from the definition of "navigable waters" in H.R. 11896, 92d Cong., §502(8) (1971) (which defined them as "the waters of the United States, including the territorial seas," 33 U.S.C. §1362(7)) as conclusive proof that Congress was shaking off the jurisdictional straightjacket of navigability. Of course, the obvious redundancy of defining "navigable waters" as "navigable waters of the United States" seems like a more probable reason for the change. *See also SWANCC*, 531 U.S. at 182 (Stevens, J., dissenting), claiming that Congress "deleted" navigability from the CWA even though the term "navigable waters" remains.

54. *SWANCC*, 531 U.S. at 180-81 (citing S. Conf. Rep. No. 92-1236, at 144 (1972)).

55. *SWANCC*, 531 U.S. at 181 (citing *id.* at 168 n.3) (second alteration in original).

56. *See id*. at 181 (citing *Riverside Bayview*, 474 U.S. at 134-35).

57. *See SWANCC*, 531 U.S. at 184-91. The remainder of Justice Stevens' dissenting opinion is dedicated to trying to prove that congressional debates in 1977, on whether to limit the jurisdictional expanse of the CWA to less than "navigable waters," somehow provided congressional approval of the migratory bird act, which was promulgated in 1986.

58. *Id*. at 176.

59. *See Hearings on the Status of Federal Jurisdiction Over "Navigable Waters" Under the CWA Before the Subcomm. on Fisheries, Wildlife, and Water of the Senate Comm. on Environment and Public Works*, 108th Cong. (2003) (statements of Sens. Lieberman, Graham, and Feingold).

modate the ruling[60] and for seeking public comment on revisions to federal jurisdiction that may be more extensive than required by *SWANCC*.[61]

If Congress wanted to regulate wetlands for the pure protection of ecosystems, it must tie this desire into the Commerce Clause. But how? Claiming that "natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing and resting sites for various species of aquatic wildlife"[62] has an independent relation to commerce would require a hearty imagination. Thus, proponents of expansive jurisdiction for the sake of the environment will have to disguise their concerns through a hydrological connection to navigable waters used in commerce. This, of course, leaves the two primary questions: (1) what is a hydrological connection; and (2) will this connection be within the boundaries of the Commerce Clause and federalism?

III. A Hydrological Connection to Navigable Waters

The use of the word "navigable" in regulating water pollution allows a presumption of conservative congressional intentions considering its origin: the Rivers and Harbors Appropriation Act of 1899.[63] Given the pre-New Deal time frame, Congress was more prescient of leaving land use regulation to the states while pursuing its traditional interests in using water as a conduit for trade.[64] Since the passage of the CWA, the emphasis of water regulation shifted from interstate shipping to environmental protection, which requires control over land use, but the word "navigable" has remained.[65] Given this restriction, EPA and the Corps must find some way to tie a regulated wetland to navigable waters.

Starting with the reasonable premise that direct tributaries and adjacent wetlands will affect a navigable water body, the federal government has claimed jurisdiction through the hydrological connection theory in an attempt to pack its desire to regulate into the existing statutory framework. This appears to create some relationship, or possibly restatement, of *Riverside Bayview*'s significant nexus test. But what is it exactly? Given EPA's failure to formally redefine its jurisdiction over wetlands after *SWANCC*, courts have claimed jurisdiction through the hydrological connection theory to allow regulation but without giving a clear definition or articulating a stopping point. Examining the collection of cases, the best definition has claimed jurisdiction through the hydrological connection theory seems to be a possible, even if improbable and solely theoretical, ability of the isolated, intrastate wetland to carry pollution into or detrimentally affect navigable waters.

Aside from a clear definition, two other questions on how the hydrological connection theory would work in real-life litigation are unclear. First, is proof of a hydrological connection to each specific wetland required or will the courts simply assume its existence? Second, if proof is required, by what standard will the government be burdened to establish this hydrological connection? Since a hydrological connection is essentially a causation element, i.e., the defendants' activities on their wetlands cause harm to navigable water through a hydrological connection, one would think that it must be proven by a preponderance of the evidence in accordance with tort law (or beyond a reasonable doubt in criminal cases).[66] Additionally, an individual link to navigable water for each wetland should be required to establish federal jurisdiction over what would otherwise be an isolated, intrastate wetland. This has not been the case. Courts rarely require much individualized proof of a hydrological connection, allowing any theoretical connection between the litigated wetland and the nearest body of navigable water, no matter how attenuated.[67] Others simply ignore substantial evidence showing that a disputed wetland is isolated by asserting an extremely deferential standard in favor of the government.[68] Like many of the rivers and streams involved in these cases, the current use and standards of the hydrological connection theory is long and convoluted.

60. *See* Memorandum from Gary Gauzy and Robert Anderson, to assistant and regional administrators and directors (Jan. 19, 2001) (recommending that regional staff refuse to assert jurisdiction over any non-navigable, isolated, and intrastate wetland based solely on the migratory bird rule and to consult EPA attorneys before acting).

61. *See* 68 Fed. Reg. at 1991 ("The goal of [EPA and the Corps] is to develop proposed regulations that will . . . clarify[ ] what waters are subject to CWA jurisdiction and affording full protection to these waters through an appropriate focus of [f]ederal and [s]tate resources consistent with the CWA."). Critics have claimed that the Bush Administration has used *SWANCC* as an excuse to surrender jurisdiction over a substantial amount of wetlands to state control. *See supra* note 59 (statement of Sen. Lieberman): "And not surprisingly, the Bush Administration is considering using the decision as a rationale to push through a much more radical anti-environment agenda than the court decision required."

62. *SWANCC*, 531 U.S. at 181 (Stevens, J., dissenting) (citation omitted).

63. 30 Stat. 115255 Cong. ch. 525 (1899) (also known as the Refuse Act). *See SWANCC*, 531 U.S. at 177. Section 13 delegates protection of waterways used in foreign or interstate commerce to the Corps. 33 U.S.C. §407. *See supra* note 59 (statement of Sen. Graham):

> I would suggest the reason the CWA was limited to "navigable waters" is the function of earlier statutes, and the early [Court] rulings on the limitation of the commerce clause of the Constitution. . . . The principal goal of [the Rivers and Harbors Act] was [to] ensure that commerce was not hindered by floating debris.

64. Taming the waters of the United States for use in commerce was one of this country's earliest priorities. *See* Letter from President Thomas Jefferson, to Meriwether Lewis:

> The object of your mission is to explore the Missouri River, and such principal streams of it, as, by its course and communication with the waters of the Pacific Ocean, whether the Columbia, Oregon, Colorado, or any other river, may offer the most direct and practible water-communication across the continent, for the purposes of commerce.

(Misspellings in original), *available at* http://www.lewisandclark200.gov/edu/tjletter.cfm (last visited Dec. 17, 2003).

65. The likely reason that the term "navigable" was retained was to ensure that Congress was treading on explored ground while tweaking its meaning to create broad jurisdiction. *See* 118 Cong. Rec. H33757 (1972) (statement of Rep. Dingell):

> The authority of Congress over navigable waters is based on the Constitution's grant to Congress of "Power. . . . To regulate commerce with Foreign Nations and among the several States. . . ." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). Although most interstate commerce 150 years ago was accomplished on waterways, there is no requirement in the Constitution that the waterway must cross a State boundary in order to be within the interstate commerce power of the Federal Government.

66. *See* 33 U.S.C. §1319(c) (The CWA allows for criminal prosecution of those who either knowingly or negligently fill a wetland in violation of a permit or without a permit.).

67. *See infra* Part C.

68. *See id.*

A. What Is a Hydrological Connection in Theory and in Practice?

The term hydrological connection is somewhat self-evident, describing a relationship between two or more bodies of water, but is hardly precise. Its Supreme Court counterpart, the significant nexus, is similarly self-defining and vague, referring to some type of substantial relationship. In a legal sense, however, generalized terms need more articulation, especially when enforcing civil and criminal provisions through litigation. In practice, how does a landowner, the Corps, or a trial judge know when a hydrological connection exists or not?

Taking the reverse tack, the U.S. Fish and Wildlife Service (FWS) has attempted to define the antonym of a hydrologically connected wetland—one which is isolated. Although its definition of an isolated wetland is helpful, it is still troubling for an attorney seeking concrete standards. "The term 'isolated' is a relative term. There is no single, ecologically or scientifically accepted definition of isolated wetland because this issue is more a matter of perspective than scientific fact."[69] For purposes of a working definition, the FWS considered isolated wetlands to be "wetlands with no apparent surface water connection to perennial rivers and streams, estuaries[,] or the ocean. These geographically isolated wetlands were surrounded by dry land. Streamside wetlands where the stream disappeared underground or entered an isolated (no outflow) lake or pond . . . were also classified as isolated."[70] With these parameters in mind, the FWS determined that many of the wetlands in the country were isolated.[71]

The FWS' work expands the narrow space between *SWANCC* and *Riverside Bayview* and arms litigators with specific tasks for their expert witnesses. For the litigator, they must first determine if the wetland is geographically adjacent to any navigable body of water or tributary of a navigable body of water. Second, determine if there is any unseen relationship between the wetland in question and a navigable body of water such as through groundwater or underground streams. These two factual issues will breathe life into judicial catchphrases such as a "significant nexus" or "inseparably bound."[72] They also explain the difference between the holdings of *SWANCC*, where the disputed wetlands were isolated from any navigable body of water, and *Riverside Bayview*, involving a wetland with a significant nexus to an adjacent, navigable body of water.[73] In practice, however, the difference between a significant nexus and a hydrological connection are still unclear. Obviously, where a significant nexus exists, then a hydrological connection exists. Courts, however, have made it abundantly clear that a hydrological connection can be far less than a significant nexus between two water bodies, effectively ignoring the FWS' definition of an isolated wetland.

B. How the Courts Have Handled Proof of a Hydrological Connection

1. Science Versus the Law

As the FWS found, hydrological connections are not within the realm of a layman's understanding. "Geographic isolation is the easiest to determine since it describes the position of a wetland on the landscape, with an isolated wetland being completely surrounded by upland (no outlet). The other definitions of an isolated wetland require more detailed examinations of hydrologic interactions (surface and subsurface) and ecological relationships."[74] Given the scientific nature of defining a hydrological connection, and the lack of guidance from Congress, the issue seems tailor-made for *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[75] deference. However, this creates a collision between the agency's scientific expertise and the law. Under *Chevron* deference, a federal agency's designation of a wetland as non-isolated and hydrologically connected will not be disturbed unless unreasonable.[76] On the other hand, civil actions require proof of all elements to be established by a preponderance of the evidence and criminal charges require that all elements of the charge be proven beyond a reasonable doubt[77]—including any jurisdictional elements.[78]

In dealing with challenges under *SWANCC*, however, courts have viewed federal jurisdiction in the wrong light. When defendants claim that their parcel of land is beyond the reach of the Corps' authority, the courts' analysis has

69. Ralph W. Tiner et al., U.S. FWS, Geographically Isolated Wetlands: A Preliminary Assessment of Their Characteristics and Status in Selected Areas of the United States 7 (2002).

70. *Id*. at 148 (internal quotation marks omitted).

71. *See id*. at 149:

> Only 19 of the 72 sites (or 26%) had less than 10[%] of their wetland acreage isolated. From a numeric standpoint . . . all study areas except Green River (Utah) had more than 20[%] of their wetlands designated as isolated. Over 50 sites had more than 40[%] of their wetlands isolated. For most areas, isolated wetlands tended to be smaller than the non-isolated wetlands; hence they represented a higher proportion of the total number of wetlands than they did in regard to the total wetland acreage.

72. This is an earlier articulation of *SWANCC*'s significant nexus test found in *Riverside Bayview* where the Court defers to "the Corps' conclusion that adjacent wetlands are inseparably bound up with the 'waters' of the United States." *See Riverside Bayview*, 474 U.S. at 134.

73. The facts of *Riverside Bayview* remain disputed among members of the Court. *Compare SWANCC*, 531 U.S. at 167 ("It was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes*") (majority opinion) *with SWANCC*, 531 U.S. at 175-76 (*Riverside Bayview* involved "an 80-acre parcel of low-lying marshy land that was not itself navigable, directly adjacent to navigable water, or even hydrologically connected to navigable water") (Stevens, J., dissenting). Justice Stevens' claim that *Riverside Bayview* upheld regulation without adjacency or a hydrological connection is troubling considering that he was a member of the unanimous court holding that the respondent's wetland was flooded by groundwater from the adjacent and navigable Black Creek. "Together, these findings establish that respondent's property is a wetland adjacent to a navigable waterway." *Riverside Bayview*, 474 U.S. at 130-31.

74. *See* Tiner et al., *supra* note 69, at 134.

75. 467 U.S. 837, 842-43, 14 ELR 20507 (1984) (creating two-step standard for statutory interpretation: (1) is the statute ambiguous; (2) if so, expert agency's interpretation receives deference so long as it is "based on a permissible construction of the statute").

76. *Id*.

77. *See* Apprendi v. New Jersey, 530 U.S. 466, 477 (2000) ("the Sixth Amendment indisputably entitle[s] a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.'") (quoting United States v. Gaudin, 515 U.S. 506, 510 (1995)).

78. *See*, *e.g.*, United States v. Castro, 89 F.3d 1443 (11th Cir. 1996) (Conviction for bribery under 18 U.S.C. §666 requires the government "to show that [defendants] intended to enter into a direct exchange with an agent of the [State] organization receiving federal funds" in excess of $10,000 to establish federal jurisdiction.).

been simply whether the agency's interpretation of the CWA and its own regulations[79] are reasonable. In other words, courts only ask whether the Corps has authority to categorically regulate types of wetlands, not the wetland in question. Although this is appropriate when a party challenges the promulgation of permitting regulations under the Administrative Procedure Act (APA),[80] it is only one of three questions to ask during enforcement proceedings.

2. Categorical Versus Individual Jurisdiction

In a civil suit or criminal prosecution, the courts must determine whether the Corps has proven: (1) a connection between the defendant's wetland to a regulated body of water sufficient enough to establish regulatory jurisdiction; and (2) whether some pollutant reached that regulated body of water by a preponderance of the evidence or beyond a reasonable doubt, respectively,[81] in addition to categorical jurisdiction.[82] For many cases, whether the individual wetland falls within the Corps' jurisdiction is the vital element of the suit or charge that must be affirmatively proven by the government, and yet this burden is often shifted to the defendants, who must show that the Corps' decision is arbitrary or capricious.[83] By comparison, an enforcement action under the CWA for an unpermitted discharge from a point source would examine: (1) whether EPA has the power to categorically regulate discharges into waters of the United States[84]; (2) whether the defendant is a regulated entity requiring a permit (or one that has a permit); and (3) whether an illegal discharge was actually made. Because of the fixation on scientific deference and categorical jurisdiction, these latter two questions are simply omitted in the wetlands context.

C. Post-SWANCC *Cases Using the Hydrological Connection Theory*

In the wake of *SWANCC*, the courts needed to reexamine the bases of jurisdiction for both ongoing litigation and recently signed consent decrees between the Corps and land developers.[85] Without the migratory bird rule, the Corps was forced to resort to the hydrological connection theory in ongoing litigation over isolated, intrastate wetlands. In some cases, the connection can be clearly established and proven. In others, courts have waived away any requirement of proof of fact in order to allow expansive regulation.

The case of *Headwaters, Inc. v. Talent Irrigation District*[86] is a simple and clean example of when the hydrological connection theory works. Although not involving wetlands, the U.S. Court of Appeals for the Ninth Circuit's analysis of whether canals were "waters of the United States" shows a stark contrast to the logic displayed in subsequent cases. There, citizen groups sued the Talent Irrigation District for dispersing a pesticide, Magnacide H, into irrigation canals.[87] The pesticide bled into Bear Creek, killing 92,000 steelhead.[88] In affirming the district court's holding that the canals could be regulated under the CWA, the Ninth Circuit's analysis was noncontroversial and logical, stating that "the irrigation canals exchange water with a number of natural streams and at least one lake, which no one disputes are 'waters of the United States.'"[89] In addressing *SWANCC*, the court noted the obvious hydrological connection between the canals and the navigable waters they feed. "[T]he canals receive water from natural streams and lakes, and divert water to streams and creeks, they are connected as tributaries to other 'waters of the United States.'"[90] The court rejected Talent Irrigation District's assertion that waste gates isolated the canal from the streams, noting that the undisputed, pesticide-induced fish kill was obvious proof of the hydrological connection.[91]

One could not ask for a clearer demonstration of a hydrological connection between waters. It was undisputed that there was an exchange of water between the defendants' body of water and a navigable body of water,[92] and the fish

79. Agency interpretations are actually split into two parts: (1) interpretation of the statute; and (2) interpretation of its own regulations. An agency's interpretation of a statute is governed by *Chevron*. An agency's interpretation of its own regulations is governed by Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 413-14 (1945), where the courts will defer to the agency unless their interpretation "is plainly erroneous or inconsistent with the regulation." This is an even easier burden for agencies to bear than *Chevron*. If the agency's own regulation is unambiguous, and there is no real need for any interpretation, then the court will ignore any interpretation provided by the agency and the plain language will control. *See* Christensen v. Harris County, 529 U.S. 576 (2000). *See* United States v. Deaton, 332 F.3d 698, 710-11 (4th Cir. 2003) (the Corps' definition of a "tributary" under 33 C.F.R. §328.3 easily passed muster).

80. 5 U.S.C. §553.

81. The Court has held that, in a criminal case, the Fifth and Sixth Amendments "give[ ] a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged." *Gaudin*, 515 U.S. at 522-23. This applies to the jurisdictional elements of a crime as well. United States v. Vasquez, 267 F.3d 79 (2d Cir. 2001). The same holds true for civil cases. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 561, 22 ELR 20913 (1992) (proof of federal jurisdiction are "not mere pleading requirements but rather an indispensable part of the plaintiff's case"); APWU v. Potter, 243 F.3d 619, 623, 33 ELR 20271 (2d Cir. 2003) (subject matter "jurisdiction must be show affirmatively") (quoting Shipping Fin. Servs. Corp. v. Drakos, 140 F.3d 129, 131 (2d Cir. 1998)).

82. Proof of whether the individual discharge at issue actually affected interstate commerce is a constitutional question discussed *infra* Part IV.C.

83. *See* Treacy v. Newdunn Associates Ltd. Liab. Partnership, 344 F.3d 407, 33 ELR 20268 (4th Cir. 2003) (finding the Corps' interpretation of "adjacent" reasonable when applied to wetlands 2.4 miles from a river and separated by a highway); *Deaton*, 332 F.3d at 704-05 (using *Chevron* to uphold the Corps' claim that a roadside ditch was a tributary of navigable waters and "fits comfortably within Congress' authority to regulate navigable waters" without consideration of factual evidence to the contrary).

84. *See* 33 U.S.C. §1342.

85. *See, e.g., United States v. Rueth Dev. Co.*, 335 F.3d 598, 33 ELR 20238 (7th Cir. 2003); United States v. Interstate Gen. Co., 39 Fed. Appx. 870, 32 ELR 20781 (4th Cir. 2002). Those courts held that, when attempting to reopen a consent decree under FED. R. CIV. P. 60(b)(5), the moving party has a heightened burden to show a change in the governing law under Agostini v. Felton, 521 U.S. 203 (1997). The Corps' claims of jurisdiction through a hydrological connection were allowed to stand without proof because, in signing the consent decrees, the defendants waived the right to litigate the factual issues underpinning the agreements. *Rueth*, 335 F.3d at 604.

86. 243 F.3d 526, 31 ELR 20535 (9th Cir. 2001).

87. *See id*. at 528-29.

88. *See id*. at 528.

89. *Id*. at 533.

90. *Id*.

91. *See id*.

92. This also stays faithful to *Riverside Bayview*, where the Court found that the defendant's wetland was actually fed by groundwater from a navigable river. In fact, the district court found that "the area . . . extended beyond the boundary of respondent's property to Black Creek," allowing for the reasonable characterization that the wetland and the navigable river it abutted were one and the same body of water. *See* 474 U.S. at 130-31.

kill demonstrated the result of an actual discharge of a pollutant into navigable water. The canals served as tributaries to navigable bodies of water, and the treatment of the canals were proven to affect those navigable bodies.[93] Later cases seeking to distinguish themselves from the reasoning of *SWANCC* have not displayed a similar respect for the proof of all elements establishing federal jurisdiction or fidelity to logic.

The U.S. Court of Appeals for the Fourth Circuit in the subsequent circuit court opinion, *United States v. Deaton*,[94] deviated from the step-by-step analysis in *Headwaters* and allowed a finding of liability against the defendants based on two mistakes. First, it allowed proof of the jurisdictional element, based not by a preponderance of evidence but because "the Corps [is] to decide how far coverage must extend in order to protect the navigable waters."[95] Second, in deciding what types of waters the Corps *may* regulate,[96] the court did not consider whether the Corps had proven jurisdiction over this particular wetland. Although the court noted that the "Corps argues, with supporting evidence, that discharges into non-navigable tributaries and adjacent wetlands have a substantial effect on water quality in navigable waters,"[97] no analysis of evidence connecting the defendant's wetland and any specific non-navigable tributary was ever made.[98] Relying on *SWANCC*'s language that a "significant nexus between the wetlands and 'navigable waters'"[99] is required to establish federal jurisdiction, the significant nexus at issue in this case was simply presumed to exist in *Deaton*.[100] In practice, the Fourth Circuit and others accepting the hydrological connection theory have confused categorical jurisdiction with individual jurisdiction, thus treating the trial of a defendant as an administrative challenge to regulations under the APA.

In *Deaton*, the presumed hydrological connection between the defendants' wetland and a navigable body consisted of the following:

> The parcel slopes gently downhill toward a county road . . . . A drainage ditch runs alongside the road between the pavement and the Deatons' property. The Deatons call the ditch the "Morris Leonard Road ditch," while the Corps calls it the "John Adkins Prong of Perdue Creek." . . . The parties agree that surface water from the Deatons' property drains into the roadside ditch. They disagree about how much water flows through the ditch, and how consistent the flow is, but they agree on the ditch's course. Water from the roadside ditch takes a winding, [32]-mile path to the Chesapeake Bay. . . . [T]he roadside ditch drains into a culvert under Morris Leonard Road. On the other side of the road, the culvert drains into another ditch, known as the John Adkins Prong of Perdue Creek. Purdue Creek flows into Beaverdam Creek, a natural watercourse with several dams and ponds. Beaverdam Creek is a direct tributary of the Wicomico River, which is navigable. Beaverdam Creek empties into the Wicomico River about eight miles from the Deatons' property.[101]

For the Deatons, the question of whether water from their property actually traveled through this course, or was diverted, pooled, or evaporated along the way, and whether dirt actually reached the Wicomico River is never asked or even alleged.[102] The only question, the incorrect question, asked by the Fourth Circuit, was whether the Corps could interpret *a* roadside ditch (as opposed to *the* roadside ditch described above) under *Bowles v. Seminole Rock & Sand Co.*[103] deference as a tributary of navigable water[104] and then regulate the Deatons' adjacent wetland.[105] This mistake of swapping categorical jurisdiction and individual jurisdiction dispenses with all individualized questions of fact in order to reach a desired outcome.

In *United States v. Newdunn Associates*,[106] the Corps also asserted regulatory authority based on a hydrological connection between the defendants' wetlands and navigable waters.[107] The findings of fact by the trial court illustrated the difference between the Corps' claims of hydrological connections facilitating federal jurisdiction and their ability to prove it.

> Rain[-]generated surface water runoff occasionally exits the Property through a spur ditch. . . . There is no evidence of the frequency or volume of the surface water runoff. At prior hearings, the Corps had claimed a hydrological connection between the Property and Jones Run, as well as a hydrological connection between the Property and a branch of Stony Run located to the east of highway I-64. However, these alternative connections were not proven at any pretrial hearings and no evidence of either alternate connection was presented at trial. . . . Although reference was also made in pretrial hearings to damage to plant and animal life which occupied the wetlands on the Property, no evidence on this issue was presented at trial by the Corps.[108]

Despite the lack of evidence, the Corps insisted that a hydrological connection existed between the defendants' wetlands and the Stony Run ditch. The trial court found that any water leaving the defendants' wetlands for Stony Run would have to travel the following path: (1) 40 feet through an adjacent wetland owned by the Virginia Department of Transportation; (2) reach a drainage ditch next to highway

93. While *Headwaters* provides a nice step-by-step example of how the hydrological connection theory could be used in litigation, it does nothing to define itself separately from the significant nexus test of *Riverside Bayview*. The canal at issue was adjacent to navigable waters, establishing a significant nexus. For purposes of *Headwaters*, the hydrological connection theory and significant nexus test were one in the same.

94. 332 F.3d 698, 33 ELR 20223 (4th Cir. 2003).

95. *Id*. at 711.

96. *See id*. at 705-12.

97. *Id*. at 712.

98. The Corps' failed dye test, showing that dirt-laden water traveled "only two miles from the Deatons' property, but still six miles short of the Wicomico River" was never mentioned by the Fourth Circuit. Deaton Petition for *cert. filed*, 72 U.S.L.W. 3356 (U.S. Nov. 10, 2003) (No. 03-701) [hereinafter Deaton Petition].

99. *Id*. (quoting *SWANCC*, 531 U.S. at 167).

100. *See Deaton*, 332 F.3d at 712 ("The Corps argues, with supporting evidence, that discharges into non-navigable tributaries and adjacent wetlands have a substantial effect on water quality in navigable waters . . . [33 C.F.R. §328(a)(5)], as the Corps reads it, reflects a reasonable interpretation of the CWA. The Act thus reaches to the roadside ditch and its adjacent wetlands.").

101. *Id*. at 702.

102. *See supra* note 97, explaining that the Corps inadvertently proved that no hydrological connection existed.

103. 325 U.S. 410 (1945).

104. *See* 33 C.F.R. §328.3(a)(5).

105. *See Deaton*, 332 F.3d at 710-12.

106. 195 F. Supp. 2d 751, 32 ELR 20573 (E.D. Va. 2002).

107. *See id.* at 756.

108. *Id*. at 757.

Interstate (I) 64, which "is ephemeral, or dry most of the year"; (3) travel 400 feet to a culvert running under I-64; (4) travel another 100 feet through the culvert to another dry drainage ditch on the other side of I-64; (5) go approximately one and one-third miles down the I-64 ditch to the western arm of Stony Run, which is not navigable; and (6) approximately 1,000 feet downstream, where the western arm of Stony Run intersects with the central arm of Stony Run, which only becomes navigable one mile further downstream.[109]

Additionally, the trial court found that, because of the elevation and lack of adjacency to any body of water, the defendants' wetlands failed to "filter pollutants" or serve any symbiotic function with navigable waters.[110] Finally, and most importantly, there was "no evidence of any pollution, other than silt . . . exiting from the property. There is no evidence that the silt exiting the property as a result of Newdunn's activities on the property actually reaches any natural watercourse or causes harm to the Chesapeake Bay or any of its 'natural' tributaries."[111] Without this proof of a connection, the Corps' argument that "each segment of this path qualified as 'waters of the United States'" failed.[112]

Also troubling to the trial court was the Corps' effort at redefining the term "tributary to navigable waters": "The Corps argues that a culvert or storm drainage pipe connection from wetlands to a tributary to navigable waters is a sufficient surface water or hydrological connection. In fact, it argues that a culvert or storm drainage pipe meets its newest definition of a tributary."[113] The trial court feared that if the Corps were able to prove a hydrological connection in some later case, then the 1986 regulations "substantially increased the reach of its regulatory powers" beyond Congress' grant of authority.[114] It noted that amendments to its own regulations[115] specifically excluded nontidal drainage and irrigation ditches from the Corps' reach, while reserving the Corps' right to regulate them on a "case-by-case basis."[116] "In other words, the 1986 regulations expanded the Corps' power to the point where it could give itself jurisdiction even over the waters that the regulations defined as generally not qualifying under the expansively-defined term 'water of the United States.'"[117] Without any description of how the Corps would evaluate individual decisions to assert jurisdiction over wetlands that were already defined as being off-limits to regulation, i.e., no guidance on how the "case-by-case" determination would be made, the trial court noted that the Corps' regulations were impermissibly vague and beyond the powers ascribed to it by the CWA.[118]

Again, none of the factual or legal deficiencies of the Corps' case troubled the Fourth Circuit.[119] Despite relying heavily on *Riverside Bayview*'s authority to "regulate wetlands '*inseparably* bound up with the waters of the United States,'"[120] and recognizing that "the Corps' attempted exercise of jurisdiction over isolated ponds that had no hydrologic connection whatsoever to navigable waters could not stand,"[121] it reversed the trial court's holding. The view that *Riverside Bayview* and *SWANCC* limited the Corps' jurisdiction to wetlands adjacent to navigable waters was deemed "plainly incorrect."[122] Instead, the Fourth Circuit determined that only the Corps could decide "the scientifically nebulous point at which water ends and land begins."[123] Of course, the trial court's holding was not so narrow. The trial court specifically found an absence of any hydrological connection between the defendants' wetlands and the navigable portion of Stony Run, primarily because the Corps offered no evidence of it.

Without finding any defects in the trial court's finding of facts, the Fourth Circuit dispensed with all factual issues required to resolve the case by labeling all the ditches, trenches, and culverts involved as "tributaries of waters of the United States."[124] Apparently, the court was not bothered by the undisputed fact that these "tributaries" were dry irrigation ditches nor was it concerned with the lack of any evidence that water from the defendants' wetlands ever flowed to navigable waters. Instead, it castigated the trial court for making the "irrelevant distinction" between "a manmade rather than a natural watercourse."[125] The Fourth Circuit deferred completely to the Corps' assertion that "[t]he discharge of a pollutant into a waterway generally has the same effect downstream whether the waterway is natural or manmade."[126] Ignoring the factual record, the court held that, because the Corps "extensively documented the connection between the Newdunn Property's wetlands and the navigable waters," it was relieved of its duty in a civil enforcement action to prove the existence of any actual "discharge of a pollutant" or any actual "effect downstream."[127]

109. *See id*. at 758.

110. *See id*. Perhaps this was an attempt to quiet Justice Stevens' concerns in his *SWANCC* dissent that Congress could no longer regulate wetlands with "significant natural biological functions" in the aftermath of the decision. *SWANCC*, 531 U.S. at 181.

111. *See Newdunn*, 195 F. Supp. 2d at 758.

112. *See id*. at 765.

113. *Id*.

114. *See id*. at 765-66.

115. *See* 51 Fed. Reg. at 41217. The Corps amended the regulations defining the scope of its authority in 1986. The trial court in *Newdunn* referred to these revisions as "the 1986 regulations."

116. *Id*. at 766 (quoting 51 Fed. Reg. at 41217).

117. *Id*.

118. *See id*. at 766-67.

119. *See* Treacy v. Newdunn Associates Ltd. Liab. Partnership, 344 F.3d 407, 33 ELR 20268 (4th Cir. 2003).

120. *Id*. at 415 (quoting *Riverside Bayview*, 474 U.S. at 167) (emphasis added).

121. *Id*. at 415.

122. *Id*. at 415 n.5.

123. *Id*. (citation and internal quotation marks omitted).

124. *Id*. at 416-17. In both *Deaton* and *Treacy*, the Fourth Circuit and the Corps were required to hold any conduit where water might flow as "tributaries" to avoid labeling the disputed wetlands as "adjacent" to a navigable body of water several miles away, in contradiction of the definition provided by the Corps in 33 C.F.R. §328.3(a)(7). These culverts, ditches, or drains are converted to tributaries because they are physically adjacent to the wetlands, allowing regulation of a wetland adjacent to a tributary to a tributary to a tributary of navigable water.

125. *Id*. at 417.

126. *Id*. (quoting Brief for the United States at 48-49). Again, relying on categorical relationships "generally" as opposed to the waters involved in this case.

127. *Id*. at 417. Also, the court held that "it is undisputed that water flows intermittently from wetlands on the Newdunn Property through a series of natural and manmade waterways . . . eventually finding its way 2.4 miles later to traditional navigable waters." *Id*. Newdunn Associates did not dispute this factual issue on appeal because the Corps provided *no evidence* that any water traveled from the Newdunn property to the navigable portion of Stony Run. United States v. Newdunn Associates, 195 F. Supp. 2d 751, 758, 32 ELR

Essentially, the Fourth Circuit allowed a legal finding of a sufficient nexus between wetlands and a navigable water wherever the Corps could imagine that one exists.

Under the pseudo-reasoning of these opinions, it would be hard to imagine any body of water that escapes federal control by being isolated from navigable waters.[128] Even more important than the result, is the method used to arrive at this conclusion. Basic elements of civil and criminal jurisprudence are jettisoned for fear that "the CWA's chief goal would be subverted."[129] Courts need to return to the fundamental premise that every element of a crime or cause of action, including the hydrological connection that grounds federal jurisdiction, be proven by the government.

IV. The Commerce Clause

Should the hydrological connection theory become popular with the circuit courts of appeal,[130] the Corps must still defend against a Commerce Clause challenge. As stated earlier, the key word to wetland regulations is "navigable." Why did Congress use this particular modifier? What purpose does navigability have in protecting waters from pollution? Congress, in assessing their constitutional powers to regulate, relied on the word because it has a proven link to the Commerce Clause. "The power of regulating commerce extends to the regulation of *navigation* . . . [b]ut it does not extend to a commerce which is completely internal."[131] These were the words of Chief Justice John Marshall in *Gibbons v. Ogden*,[132] one of the first Court cases interpreting the reach of congressional power under the Commerce Clause. It was the commercial tie to navigability that defined "waters of the United States."

> It is not unreasonable to say, that what are called the waters of New-York, are, to purposes of navigation and commercial regulation, the waters of the United States. . . . It is a common principle, that arms of the sea, including navigable rivers, belong to the sovereign, *so far as navigation is concerned*. Their *use* is navigation. The United States possess the general power over navigation, and, of course, ought to control, in general, the use of navigable waters . . . *for purposes of trade and navigation*.[133]

Congress understood that they could regulate navigable waters and their tributaries[134] when used for commercial trade. As congressional prerogatives shifted from commerce to the environment, the requirement of "navigability" continued despite the fact that Congress was trying to solve noneconomic problems with powers to regulate commerce. As a result, the current dispute over wetlands is the metaphorical equivalent of stubbornly hammering a square peg into a round hole while maintaining that the two were meant to fit together all along. It is time for the Court to properly define the extent of wetland regulation within the Commerce Clause and end the rhetorical gymnastics that have learned judges telling us that puddles in our backyards are now tributaries of federal waters many miles away. Delineating a clear line between economic regulation and environmental regulation allows state agencies to pick up when federal agencies can go no further.

A. From the Seas to Roadside Ditches—Funneling the Commerce Clause Inward

As Chief Justice Marshall noted, Congress has power over the seas and the navigable rivers for purposes of regulating commerce.[135] Since commerce traditionally relied on how far a boat carrying goods could travel, the line was drawn at what is navigable.[136] Of course, navigability acts as a definitional example. Congress may regulate water use for other economic reasons.[137] That congressional power extends beyond navigable waters is not controversial. In order to regulate waters primarily within the Commerce Clause, power is given over tributaries that impact navigable waters.[138] The *Headwaters* case is a good example of how discharges into a feeder canal can economically impact water clearly within congressional purview.[139] Discharging pesticides that are proven to reach a navigable water and proven to kill commercially valuable fish as a result is inapposite to *Deaton*, which lacked any economic impact, and interpreted an elaborate series of dry dirt and concrete ditches to be tributaries of navigable waters, no different than those in *Gibbons*.

20573 (E.D. Va. 2003). The Fourth Circuit mentions "photographic evidence of silt-laden water flowing from the subject property into Stoney [sic] Run." Treacy v. Newdunn Associates Ltd. Liab. Partnership, 344 F.3d 407, 417, 33 ELR 20268 (4th Cir. 2003), but these photographs were never mentioned in the trial court's findings of fact.

128. The general counsels of EPA and the Corps suggested the Great Salt Lake as an example of an isolated water that is "not part of the tributary system of traditional navigable waters or interstate waters," but also noted that it is navigable-in-fact and "has substantial connections with interstate commerce." *See supra* note 60, at 5 n.6.

129. *Treacy*, 344 F.3d at 417.

130. This assumes, of course, that no other circuit courts of appeal or the Court will strike the theory for being beyond the words of the CWA, their own regulations and the legislative intent, as occurred with the migratory bird rule. Both *Deaton* and *Treacy* show that the Corps may have significant problems defending their interpretations of "tributary" and "adjacent" in addition with squaring the results of their decisions with *Riverside Bayview*'s significant nexus test.

131. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 3 (1824) (emphasis added).

132. 22 U.S. (9 Wheat.) 1 (1824).

133. *Id*. at 21-22 (emphasis added).

134. As Justice Marshall made clear, the authority to regulate water has a derivative component that diminishes as it becomes more attenuated. Because of the use in commerce, the sovereign has authority over the seas. Thus, he affirmed that these commercial ties require authority over "arms of the seas, including navigable rivers," *id*. at 22, although, many navigable rivers such as the Mississippi River are used for interstate commerce themselves, independent of the seas. Without controversy, the Corps has maintained authority over primary tributaries to the navigable rivers, which are arms of the sea. As we plow further inland, to wetlands which may or may not discharge water to dry drainage ditches deemed to be tributaries to tributaries to tributaries of navigable rivers, which are arms of the sea, one discovers how far afield modern arguments over jurisdiction have strayed from the original interpretation in *Gibbons*.

135. *See id*.

136. *The Daniel Ball*, 77 U.S. 557, 563 (1870) (defining navigable waters as those "used, or susceptible of being used in their ordinary condition, as highways for commerce").

137. *See* United States v. Appalachian Elec. Power Co., 311 U.S. 377, 426, 2 ELR 20702 (1940) ("In truth the authority of the United States is the regulation of commerce on its waters. Navigability . . . is but a part of this whole."); *see also* Oklahoma v. Guy F. Atkinson Co., 313 U.S. 508 (1941) (upholding creation of dam and reservoir to prevent property damage due to catastrophic floods).

138. *See* 33 C.F.R. §328.1.

139. *See* United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 709 (1899) (allowing regulation of tributaries that "substantially interfere[ ] with the navigational capacity").

A Commerce Clause analysis requires consideration of the type of purported impacted the Deatons' activities had on commerce, and the proof required under the standard. The Court in *United States v. Lopez*[140] outlined three areas where Congress may regulate commerce (the *Lopez* criteria): (1) uses of the channels of interstate commerce, e.g., roads, railways, and rivers; (2) instrumentalities of interstate commerce, including persons and goods; and (3) any activity having a "substantial effect" on interstate commerce. Category (2), instrumentalities of interstate commerce, is not useful for this Article due to the imagination required to interpret dirt flowing through water as a good bought and sold in interstate commerce. The remaining two categories were at issue in *Deaton* and its sister cases.

B. The Fourth Circuit's Channels of Commerce Detour

The Fourth Circuit in *Deaton* held that "unlike its power to regulate activities with a substantial relation to interstate commerce" Congress may "prevent the use of navigable waters for injurious purposes."[141] One error in the Fourth Circuit's analysis lies in this "injurious purposes" statement. Congress may prevent the use of the roads or rivers for activities that harm people or the economy, but the "injurious purposes" line of cases under the first *Lopez* criteria does not protect the avenues of commerce themselves. For example, in *United States v. Darby*[142] the Court held that a ban on interstate transport of goods manufactured in violation of working standards were "injurious to the public health, morals[,] or welfare." The Fourth Circuit asserted the novel proposition that Congress can prevent the use of the roads or rivers in a way that harms the roads or rivers themselves, not the "public health, morals[,] or welfare."[143]

The Fourth Circuit's misstatement applying the "injurious use" doctrine to the channels of commerce is not vital to the discussion (although continuing to assert it clouds the conversation). Congress is not impotent in preventing impediments to the channels of commerce. The error in the "injurious use" argument is that, if an action is harming the channels of interstate commerce, then it is affecting commerce. There has been no argument that water flows carrying dirt into navigable water affect the public health, morals, or welfare.[144] If, however, the soil clogs a tributary causing lower water levels or creating a sandbar impeding navigation, then harm to the channels of interstate commerce is a harm to interstate commerce. Injury to the channels of commerce is not a separate and distinct argument from *Lopez*'s "affecting commerce" criteria. As the Court held long ago, states and private actors are

> limited by the superior power of the general government to secure the uninterrupted navigability of all navigable streams within the limits of the United States. In other words, the jurisdiction of the general government over interstate commerce and its natural highways vests in that government the right to take all needed measures to preserve the navigability of the navigable water courses of the country . . . .[145]

Correcting the Fourth Circuit's error still leaves the question of whether isolated, intrastate wetlands, similar to the Deatons' wetland, affect commerce and allow federal regulation.

C. Affecting Commerce

Challenging laws as outside the Commerce Clause is a long-shot proposition. "We need not repeat [a] detailed review of the Commerce Clause's history here; it suffices to say that, in the years since *NLRB v. Jones & Loughlin Steel Corp.* . . . Congress has had considerably greater latitude in regulating conduct and transactions under the Commerce Clause than our previous case law permitted."[146] Of course, every case examining a broad view of the Commerce Clause has referenced limitations,[147] but the lack of clear doctrinal limits, as opposed to a case-by-case evaluation, makes it difficult to know when Congress has exceeded its authority. The "affecting commerce" test (*Lopez* criteria) is derived from *Wickard v. Filburn*,[148] regarded by some as the outer limit of the Court's expansive view of the Commerce

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140. 514 U.S. 549, 558-59 (1995).

141. *Deaton*, 332 F.3d at 706-07.

142. 312 U.S. 100 (1941). *See also* Caminitti v. United States, 242 U.S. 470, 492 (1917) ("under the [C]ommerce [C]lause of the Constitution . . . the authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained"); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 259 (1964) (Congress can use channels of interstate commerce in "legislating against moral wrongs").

143. The Deatons claim that the Fourth Circuit compounded its error by "importing the 'aggregate effect' principle into its channels of commerce analysis," to find a "substantial effect on interstate commerce." Deaton Petition at 19. The Deatons' claim that the aggregate effect principle which allows regulation of commercial activities having a substantial effect on interstate commerce, as established by Wickard v. Filburn, 317 U.S. 111 (1942), cannot be applied to "noneconomic activities in a channel analysis." *Id*. This argument is persuasive in light of United States v. Morrison, 529 U.S. 598, 611 n.4 (2000) (Noting "*Lopez*'s conclusion that, in every case where we have sustained federal regulation under the aggregation principle in *Wickard* . . . the regulated activity was of an apparent commercial nature.").

144. The regulation of dirt is to prevent erosion or blocking of the rivers, not harm to public health. *See*, *e.g.*, 117 CONG. REC. 38853 (1971) (statement of Rep. Ellender):

> the Secretary of the Army [is] to issue permits for the disposal of dredged materials. This is, essential since the Secretary of the Army is responsible for maintaining and improving the navigable waters of the United States. . . . There is no competent evidence to show that there is any increase in pollution or permanent effect on the marine environment in and adjacent to open water disposal areas resulting from typical dredged materials.

Any discharge of a more traditional pollutant, such as hydrochloric acid, would affect the public welfare.

145. United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 703 (1899); *see also* Oklahoma v. Guy F. Atkinson Co., 313 U.S. 508, 523 (1941) ("Congress may exercise its control over the non-navigable stretches of a river in order to preserve or promote commerce on the navigable portions").

146. *Morrison*, 529 U.S. at 607-08.

147. *See Lopez*, 514 U.S. at 564 (rejecting limitless Commerce Clause powers allowing Congress to "regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example"); National Labor Relations Bd. v. Jones & Laughlin, 301 U.S. 1, 37 (1937) (federal power "may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them . . . would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. The question is necessarily one of degree"); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 194-95 (1824) (broadly outlining limits as "commerce, which is completely international . . . and which does not extend to or affect other States").

148. *See* 317 U.S. 111, 128-29 (1942).

Clause.[149] The "affecting commerce" test allows federal regulation over local activity "if it exerts a substantial economic effect on interstate commerce . . . ."[150] Understanding that one person's actions alone can substantially affect interstate commerce, *Wickard* also created the aggregation principal, where the defendant's "contribution taken together with that of many others similarly situated, is far from trivial."[151] Although *Wickard*'s substantial effects/aggregation principle has been subjected to criticism,[152] it has not been abandoned by the Court. Since the Court will "invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds,"[153] lawyers do not challenge exercises of the Commerce Clause lightly.

There has been some attempt to reign in the Commerce Clause power within the past decade. Both *Lopez* and *United States v. Morrison*[154] have made evaluation of Commerce Clause powers clearer and the Court will hopefully follow them for the sake of consistency. *Morrison* tracked *Lopez* in outlining three prongs in the analysis: (1) whether the regulated activity is economic or noneconomic in nature[155]; (2) a jurisdictional element limiting the law to activities with "an explicit connection with or effect on interstate commerce"[156]; and (3) congressional findings on the regulated activity's effects on interstate commerce.[157] When these elements are applied to *Deaton*, the Commerce Clause challenge will succeed. Also bolstering the Deatons' chances is an issue that rarely surfaces in Commerce Clause challenges: proof that the regulated activity actually occurred.

The first element involves a hard decision as to what §404(a) permits actually regulate. The discharge of dirt into water is not itself an economic activity, although it can be done in conjunction with farming or real estate development. The Deatons emphatically deny that digging a ditch in a wetland is an economic activity and state that the Fourth Circuit treated this activity as a noneconomic one by erroneously applying its "injurious use" analysis.[158] The Court is not likely to be bound by the Fourth Circuit's implication that it is a noneconomic activity,[159] and may decide that real estate development is the real activity being regulated, either for the sake of argument or in order to avoid needless erosion of noncontroversial regulation of wetlands. Depending upon the prevailing characterization, filling in a wetland may be an economic activity.

The second element, some limitation between activities falling within state jurisdiction and those with "an explicit connection with or effect on interstate commerce"[160] highlights the difference between the hydrological connection theory and the significant nexus test. As defined in *Riverside Bayview*, the significant nexus test requires that wetlands be "inseparably bound up with the 'waters of the United States.'"[161] In *Riverside Bayview*, this was best defined by adjacency. The significant nexus test would include some of the wetlands listed under the Corps' definition of "waters of the United States"[162] while ruling out the more suspect classes that "*could* affect interstate or foreign commerce" given enough speculation or theory.[163] So the government must explain what the hydrological connection theory is if it is somehow different, and presumably broader, than the significant nexus test.

As applied by the Fourth Circuit in *Deaton*, the hydrological connection theory has little to do with the hydrological connection between water bodies explained by the FWS.[164] The Fourth Circuit's hydrological connection theory could best be described, by reference to 33 C.F.R. §328.3(3), as the "could be" theory.[165] In practice, as seen in *Deaton* and its sister cases, the limits of navigable waters are not defined at all. This runs counter to the second element of the *Lopez/Morrison* factors because it fails to delineate where land use (and state authority) ends and when navigable water (and federal authority) begins. In fact, the only real difference between the significant nexus test and the hydrological connection theory is that no significant nexus or actual hydrological connection is necessary to establish federal jurisdiction. Thus, the hydrological connection theory is defined as any theoretical and attenuated connection from

149. *See*, *e.g.*, Kathleen M. Sullivan & Gerald Gunther, Constitutional Law 142 (14th ed. 2001) (stating that *Wickard* represents "the outer limits of the 'affecting commerce' rational").

150. *Wickard*, 317 U.S. at 125.

151. *Id*. at 127-28.

152.

> [T]he very notion of a "substantial effects" test under the Commerce Clause is inconsistent with the original understanding of Congress' powers and with this Court's early Commerce Clause cases. By continuing to apply this rootless and malleable standard, however circumscribed, the Court has encouraged the Federal Government to persist in its view that the Commerce Clause has virtually no limits.

United States v. Morrison, 529 U.S. 598, 627 (2000) (Thomas, J., concurring). Both the substantial effects test and the aggregation principal are products of the "Living Constitution" theory—born of the necessities of the New Deal era instead of the words of the Constitution or the era preceding *Wickard*. It served as a stand-in for the direct/indirect effect on commerce test outlined in A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935), which was also a rudderless test of contemporary necessity.

153. *Morrison*, 529 U.S. at 607.

154. 529 U.S. 598 (2000).

155. *See id*. at 610-11.

156. *Id*. at 611-12.

157. *See id*. at 612.

158. *See* Deaton Petition at 19.

159. According to the Deaton Petition at 18, the "injurious use" line of reasoning was raised sua sponte. If the issue was never briefed, a final determination of whether digging a ditch or the development of land in general is an economic one, is even more likely to be reviewed de novo by the Court.

160. *Morrison*, 529 U.S. at 611-12 (quoting *Lopez*, 514 U.S. at 562).

161. *See* 33 C.F.R. §328.3(7) ("Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (1)-(6).").

162. *See id*. §328.3(3) (including all intrastate bodies of water that

> the use, degradation or destruction of which could affect interstate or foreign commerce . . . are or could be used by interstate or foreign travelers for recreational or other purposes . . . [f]rom which fish or shellfish are or could be taken and sold in interstate or foreign commerce [or] are used or could be used for industrial purpose by industries in interstate commerce. . . .

See infra note 164.

163. *See* Tiner et al., *supra* note 69, at 16 (defining an isolated wetland as one that is geographically isolated, i.e., not adjacent, from any navigable body of water).

164. The "could be" theory outlined in 33 C.F.R. §328.3(a)(3) was struck down in United States v. Wilson, 133 F.3d 251, 253-54, 28 ELR 20299 (4th Cir. 1997). The Fourth Circuit's holdings and analyses in *Treacy* and *Deaton* have effectively reversed *Wilson* without explicitly stating so.

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

point A to a navigable water regardless of actual exchanges of water or actual detriment to those navigable waters. Further complicating the analysis is the scientific nature of proving when a wetland has become "inseparably bound up with the 'waters of the United States.'" Although federal agencies are given due deference under *Chevron*, this extends only to interpretations of statutes, not to issues of fact.[166] This is a rare twist in Commerce Clause cases because few, if any, involve disputed issues of fact.[167] *Riverside Bayview* did find the facts important in defining the extent of federal jurisdiction. Only after an analysis of the specific, individual wetland at issue, did it announce the significant nexus test.[168] Individual facts are important to this Commerce Clause challenge and will need to be scrutinized in every wetland case with jurisdictional uncertainty. This is something the Fourth Circuit looked past.[169] Simply put, the limits and standards of the hydrological connection theory are nonexistent. None of the circuit courts of appeal have bothered to set a boundary and one would be hard pressed to do so without upsetting at least some of the cases utilizing the theory. Under the significant nexus test, with a heavy emphasis on adjacency, the limits of federal regulation lie in what the Corps can actually prove. Only the significant nexus test requires a consistent, explicit connection with navigable waters in accordance with the *Lopez/Morrison* requirement of "an explicit connection with or effect on interstate commerce."[170]

The third element, congressional findings of an effect on interstate commerce, again puts the significant nexus test ahead of the hydrological connection theory. The significant nexus test was formulated after a review of the CWA's legislative history.[171] The hydrological connection theory has not even been formally promulgated by the Corps,[172] much less received formal approval by Congress. A bill to significantly expand wetland jurisdiction by dropping the "navigable" modifier has not progressed in Congress, and senators can be found on both sides of the issue.[173] Like the hydrological connection theory itself, claims of an impact on interstate commerce by isolated, intrastate wetlands are speculative and untested.

Even if Congress were to formally declare a need to regulate isolated, intrastate wetlands due to their impact on interstate commerce, conclusory findings and the magic incantation of interstate commerce are not enough under *Lopez/Morrison* review. Both cases involved these declarations from Congress and both declarations were found lacking in substance.[174] Congressional findings in the wetland context could amply support categorical regulation,[175] but they should not override the lack of a connection to navigable waters, and thus a connection to interstate commerce, in individual cases. Congress cannot simply declare that a discharge into navigable waters occurred when it did not.

Even if filling a wetland was deemed an economic activity, the hydrological connection theory lacks federalism boundaries, lacks congressional sanction and requires courts to ignore issues of fact in order to "pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."[176] The factual burdens allotted to the government under the significant nexus test are incredibly lenient and allow for a clear showing of when the Commerce Clause applies. The government need not show an effect on interstate commerce, only that water carrying dirt actually reached a navigable water. In *Deaton*, the government failed.[177] The hydrological connection test fails a Commerce Clause challenge.

V. Conclusion

The constitutional swashbuckling over federal regulation of wetlands dances around the real issue—will regulation of wetlands disappear without federal command-and-control regulations? As Sen. Russell Feingold (D-Wis.) testified, the federal government must regulate all wetlands, everywhere, regardless of any connection to commerce to "protect our waters, rather than lose them."[178] But lose them to whom? Senator Feingold himself boasted that shortly after *SWANCC*, "Wisconsin became the first state to pass legislation to assume regulatory jurisdiction over wetlands left unprotected by the [Court's] decision . . . . Our state's legislation has become the model for several others."[179] What likely bothers proponents of the hydrological connection theory is not a lack of regulation, but that states will not regulate the way the proponents want.

This is a debate inappropriately held in a constitutional forum. Proponents of centralized wetlands regulation seek a decisive outcome: preserving wetlands from development. But the Constitution is a method, a way of making policy decisions with no concern about specific outcomes. Although

166. *Supra* note 75.

167. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (plaintiff seeking declaratory judgment stipulated that it served interstate travelers and sought summary judgment on the pleadings); Wickard v. Filburn, 317 U.S. 111 (1942) (no dispute over whether the defendant actually did grow the wheat governed by the challenged regulations); United States v. Darby, 312 U.S. 100 (1941) (no dispute that defendant's products did or were intended to leave the state).

168. *See Riverside Bayview*, 474 U.S. at 130-31. Technically, it was the *SWANCC* decision that labeled the analysis in *Riverside Bayview* a significant nexus test.

169. *See Deaton*, 332 F.3d at 707 ("has the potential to move downstream . . ."); *see also* Deaton Petition at 16 ("In no case has this Court *presumed* an impact on navigable waters as justification under the Commerce Clause to regulate activities on non-navigable waters.").

170. *Lopez*, 514 U.S. at 562.

171. *See Riverside Bayview*, 474 U.S. at 132-39 (analysis of CWA legislative history showed "at least some evidence" of concurrence with Corps regulation beyond traditional navigable waters).

172. The issuance and subsequent withdrawal of the Advance Notice of Proposed Rulemaking shows significant indecision by the Corps and EPA on where to end federal jurisdiction of wetlands. 68 Fed. Reg. at 1991.

173. *See* S. 473, 108th Cong., a bill introduced by Senator Feingold, *supra* note 18, to eliminate the word "navigable" from the CWA in order to expand jurisdiction did not even receive a hearing from the Senate Committee on the Environment and Public Works.

174. *See Morrison*, 529 U.S. at 614 ("the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation"); *Lopez*, 514 U.S. at 557 n.2 ("simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so").

175. *See Riverside Bayview*, 474 U.S. at 135 n.9.

176. *Lopez*, 514 U.S. at 567.

177. *See supra* note 94, discussing the Corps' failed dye test.

178. *Oversight Hearings on the Regulatory and Legal Status of Federal Jurisdiction of Navigable Waters Under the CWA Before the Subcomm. on Fisheries, Wildlife, and Water of the Senate Comm. on Environment and Public Works*, 108th Cong. (2003) (statement of Sen. Feingold).

179. *Id*.

Congress can stop wetland development where there is a significant nexus to navigable waters, the Constitution simply lacks a provision empowering federal regulation of isolated, intrastate waters with no actual connection to commerce. Without this connection to interstate commerce, federalism allows each state to make the decision that best suits them without impacting their neighbors. The balancing of economic development and conservation is best made by smaller units of government. The smaller the unit of government, the more responsive and accountable it is to the wishes of the affected populace, whether they want a total ban on wetland development or not. Where federal command-and-control regulations are imposed on one community, such as the Deatons' Wicomico County in Maryland, by legislators from all 50 states and interest groups with a national constituency, the regulated community is forced to bear the costs of wetland preservation, potentially against its own interests.

The hydrological connection theory is not the first general federal police power that needed to be masked as economic regulation. Nor will it be the first of its kind to be struck down when challenged. Although it is true that environmental issues were not concerns of the Framers of the Constitution, without a constitutional amendment, Congress is simply stuck with less than full reach over all environmental problems. It does not mean doom. It only means that those seeking environmental protection for wetlands must look to their own state capitals instead of Washington, D.C. This is hardly a heavy sacrifice in exchange for fidelity to the Constitution.