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Judicial, Administrative, and Congressional Responses to *SWANCC*

by Lawrence R. Liebesman

In the wake of the U.S. Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (*SWANCC*),[1] courts have scrambled to reevaluate the scope and reach of the government's regulatory authority over "navigable waters" pursuant to the Clean Water Act (CWA).[2] A growing majority of courts, especially the U.S. Court of Appeals for the Fourth Circuit, the U.S. Court of Appeals for the Sixth Circuit, the U.S. Court of Appeals for the Seventh Circuit, and the U.S. Court of Appeals for the Ninth Circuit, have read the decision narrowly, interpreting it as merely invalidating a controversial 1986 regulation allowing the U.S. Army Corps of Engineers (the Corps) to assert jurisdiction over isolated wetlands based on their use by migratory birds (the migratory bird rule).[3] These courts hold that *SWANCC*'s reasoning for invalidating the migratory bird rule as an invalid jurisdictional basis centered on the use of isolated waters by migratory birds. Therefore, they read the "significant nexus" language in *SWANCC* to mean any nexus to "waters of the United States"[4] even if such nexus is based on an indirect hydrologic connection or some other U.S. Commerce Clause connection other than use by migratory birds.[5]

A significant minority of courts, including the U.S. Court of Appeals for the Fifth Circuit, have instead read *SWANCC* broadly as restricting the authority of the Corps and the U.S. Environmental Protection Agency (EPA) over waters and wetlands that are a significant distance from traditionally navigable waters.[6] These courts read *SWANCC* as "reining in" the historical expansion of federal jurisdiction since 1972 with the Corps' revisions of its regulations in 1975, 1977, and 1986. They hold that the Corps has expanded its jurisdiction to waters and wetlands a distance from traditionally navigable waters, misconstruing the congressional intent underlying the CWA. These courts generally conclude that while not all regulated waters must be navigable-in-fact, the government must show that a "significant nexus" exists between the waters sought to be regulated and a navigable waterway and that tenuous and indirect linkage is not sufficient to confer CWA jurisdiction.[7]

While the courts have been grappling with *SWANCC*, the Bush Administration and the U.S. Congress have also "jumped into the fray." In January 2003, the Corps and EPA released a long-awaited guidance memorandum and an advance notice of proposed rulemaking (ANPRM). Congress has also recently begun considering legislation that would "fill the gap" created by the *SWANCC* decision.[8]

Decisions Narrowly Interpreting *SWANCC*

Courts reading *SWANCC* as a narrow invalidation of the migratory bird rule have largely found that the "significant nexus" test employed by the *SWANCC* Court can be satisfied by indirect and sometimes tenuous connection between with a traditionally navigable water. The first significant post-*SWANCC* court of appeals' decision came from the Ninth Circuit in *Headwaters, Inc. v. Talent Irrigation District*.[9] That case involved a CWA citizens' suit challenging an irrigation district's use of aquatic herbicide in a system of irrigation canals that entered nearby Bear Creek through a malfunctioning waste gate, killing nearly 100,000 steelhead. This was the second fish kill the defendant was responsible for; an earlier release in 1983 had similar effects. The court did not evaluate the defendant's claims that he had rectified the leakage problem—instead, the court evaluated and concluded that the Corps' reach extends to the canals themselves, regardless of the measures taken to insulate the system from Bear Creek. The court also addressed the issue of national pollutant discharge elimination system (NPDES) permit coverage for pesticide application.[10]

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1. 531 U.S. 159, 31 ELR 20382 (2001).
2. 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607.
3. 51 Fed. Reg. 41208, 41217 (Nov. 13, 1986).
4. *See* 33 U.S.C. §1362(7), ELR STAT. FWPCA §502(7) (statutory definition of "navigable waters").
5. *See* 33 C.F.R. §328.3(a)(3) (the Corps' regulatory definition of "navigable waters" depends on a "substantial effect" Commerce Clause rationale for conferring jurisdiction under the CWA).
6. That is, "navigable-in-fact," as developed by the *Daniel Ball* line of cases: Daniel Ball, 77 U.S. (10 Wall.) 557 (1871), Economy Light & Power Co. v. United States, 256 U.S. 113 (1921); United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940).
7. Even decisions that do not explicitly endorse either reading clearly acknowledge that the regulatory landscape has changed. In Borden Ranch Partnership v. Corps of Eng'rs, 261 F.3d 810, 32 ELR 20011 (9th Cir. 2001), *aff'd by an equally divided Court*, 123 S. Ct. 599 (2002), the defendant vineyard owner's property contained a hydrological system of intermittent pools and other wetland features. Defendant and the Corps agreed that the intermittent pools were outside of the reach of the CWA due to the *SWANCC* holding. The court endorsed this agreement by dismissing the charges relating to these isolated pools.
8. *See* 68 Fed. Reg. 1991 (Jan. 15, 2003).
9. 243 F.3d 526, 31 ELR 20535 (9th Cir. 2001).
10. The court held that as an initial matter, the lack of notice of a CWA permit requirement does not exonerate the defendant, despite the fact that the label clearly stated that a Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) permit was required. The residue left behind by the chemical was categorized as a chemical waste product, and thus qualified as a "pollutant" under the CWA.

The court concluded that its assertion of jurisdiction over the water was "not affected" by the ruling in *SWANCC*. It acknowledged *SWANCC*'s ruling that the Corps' authority under the CWA does not derive from Congress' broad commerce power, but rather from the traditional authority exercised by Congress over navigable waters. Therefore, the court focused on the actual hydrological connection noting that the waters at issue were not the same type of "isolated waters" at issue in *SWANCC*.

The significance of this decision is that the court found that even a tenuous hydrological connection was sufficient. The irrigation system was not proven to be completely isolated from the surrounding areas, and the two releases, 13 years apart, were enough for the court in this case: "Even tributaries that flow intermittently are 'waters of the United States.'"[11] Thus, the court concluded that *SWANCC* left the central goal of the CWA intact: "The [CWA] is concerned with the pollution of tributaries as well as with the pollution of navigable streams, and it is incontestable that substantial pollution of one not only may but very probably will affect the other."[12]

Another Ninth Circuit case coming a year later, *Community Ass'n for Restoration of the Environment v. Henry Bosma Dairy*,[13] dealt with a suit by environmental groups alleging owner and operator of two dairies discharged waste from dairy operations into Joint Drain 26.6 (J.D. 26.6) that flowed into an irrigation canal, and emptied into the Yakima River during irrigation season in violation of the CWA.

The court relied strictly on its earlier decision in *Headwaters*, which held that irrigation canals are tributaries because they are "stream[s] which contribute [their] flow to a larger stream or other body of water."[14] Furthermore, in *Headwaters* the court found that "[e]ven tributaries that flow intermittently are 'waters of the United States.'"[15] Thus, the circuit court held that the district court did not err in finding J.D. 26.6 jurisdictional under the CWA because it drained through the irrigation canal into the Yakima River.[16]

In the same year (2002), two more circuits handed down decisions. In *United States v. Interstate General Co.*,[17] the Fourth Circuit dealt with an unusual case in which the government pursued and obtained a criminal conviction for illegal dumping in wetlands covered by the CWA. A conviction obtained in the district court was reversed in *United States v. Wilson*,[18] and a settlement was reached upon remand of the case for a new trial, resulting in the dismissal of the criminal charges. In the wake of the *SWANCC* decision, the former defendant filed for a writ of *coram nobis*, in an attempt to overturn the original determination by the government that his actions were within the reach of the CWA.

The circuit court affirmed the district court's decision rendering *SWANCC* only a narrow rejection of the migratory bird rule, rather than a curtailment of the government's CWA authority as a whole.[19] The district court relied upon language in *SWANCC* which specifically stated that the Court was not ruling upon the exact definition of navigable waters under §404(g) of the CWA. The district court acknowledged that there is a difference of opinion regarding the scope of *SWANCC*, but elected to strongly characterize *SWANCC* as a "narrow holding dealing with the Migratory Bird Rule and 33 C.F.R. [§]328.3(a)(3)."[20]

In *United States v. Krilich*,[21] the Seventh Circuit affirmed the district court's ruling that a 1992 consent decree ending an EPA prosecution for violations of the CWA was not an ultra vires action given the *SWANCC* decision. The district court found the defendants' theory to be flawed on a number of important regards. In its brief discussion of *SWANCC*, the district court did recognize that the Court had rolled back the reach of the CWA from the isolated waters described in 33 C.F.R §328.3(a)(3) and the migratory bird rule. In a footnote, the district court opined that if it was called upon to decide the applicability of the CWA over the disputed terrain, it would look to the rulings that interpreted *SWANCC* narrowly: "Cases subsequent to *SWANCC* have not limited the definition of waters of the United States to those immediately adjacent to navigable (in the traditional sense) waters."[22]

The Fourth Circuit added to the line of cases adopting a narrow reading of *SWANCC* in *United States v. Deaton*[23] by interpreting *SWANCC* to allow jurisdiction over non-navigable waters "with some connection to navigable ones." *Deaton* contains the most extensive analysis of the issue to date by a federal court of appeals. At issue was whether the CWA permitted federal jurisdiction over a roadside ditch, dug by defendant property owner, whose waters eventually connected with the navigable Wicomico River, eight miles away, after traversing through at least five culverts, three ponds, and five dams. The court was particularly concerned with the scope of the CWA phrase "waters of the United States."[24] The Corps' regulations interpret "waters of the United States" to include even the most remote tributaries of traditional navigable waters.[25] The Deatons challenged that interpretation on the ground that *SWANCC* invalidated federal jurisdiction over all waters that are not in fact navigable.

The district court adopted possibly the narrowest reading of *SWANCC* to date, holding that it "invalidate[d] only the migratory bird rule (which was derived from §328(a)(3)), rather than [invalidating] §328.3(a)(3) itself."[26] In a unanimous decision, the Fourth Circuit upheld the ruling, on both statutory and constitutional grounds. The *Deaton* court's analysis centered on two key issues: (1) the Corps' regulation of tributaries; and (2) whether finding the ditch as jurisdictional exceeded Congress' power under the Commerce Clause. As to the first issue, the court held that because the

11. *Id*. at 534, 31 ELR at 20537.
12. *Id*.
13. 305 F.3d 943, 33 ELR 20048 (9th Cir. 2002).
14. *Id*. at 954, 33 ELR at 20048 (quoting *Headwaters*, 243 F.3d at 533, 31 ELR at 20537).
15. *Id*. (quoting *Headwaters*, 243 F.3d at 534, 31 ELR at 20537).
16. *Id*.
17. 39 Fed. Appx. 870, 32 ELR 20781 (4th Cir. 2002).
18. 133 F.3d 251, 28 ELR 20299 (4th Cir. 1997).
19. 39 Fed. Appx. at 874, 32 ELR 20782.
20. United States v. Interstate Gen. Co., 152 F. Supp. 2d 843, 849, 31 ELR 20750, 20752 (D. Md. 2001).
21. 303 F.3d 784, 33 ELR 20035 (7th Cir. 2002).
22. United States v. Krilich, 152 F. Supp. 2d 983, 992 n.13, 31 ELR 20787, 20789 n.13 (N.D. Ill. 2001).
23. No. MJG-95-2140, 2003 WL 21357305, 33 ELR 20223 (4th Cir. 2003).
24. 42 U.S.C. §1362(7), ELR Stat. FWPCA §502(7).
25. 33 C.F.R. §328.3(a)(5).
26. *Deaton*, slip op. at 11, 33 ELR at 20223.

CWA term "waters of the United States" is ambiguous, deference to the Corps' regulatory interpretation was warranted. By adopting the Corps' interpretation, the court allowed CWA jurisdiction over any branch of a tributary system that eventually flows into a navigable body of water. In so holding, the court cited *United States v. Riverside Bayview Homes*[27] language in that the phrase "waters of the United States" indicates an intent to "regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term."[28] The court looked at the dictionary definition of "tributary," finding "alternative dictionary definitions" that "agree that the roadside ditch is a tributary, but do not settle the question of whether it is a tributary of a navigable water (here the Wicomico River) which is what the regulation covers." The court then applied traditional administrative deference principles in upholding the Corps' interpretation as "reasonable," stating that the word "tributaries" in the Corps regulation "means what the Corps says it means."[29] As to the second issue, the Court relied on congressional power over the "channels" of interstate commerce that "reaches beyond the regulation of activities that are purely economic in nature."[30] The court also noted that "there is no reason to believe Congress has less power over navigable waters than over other interstate channels such as highways. . . ."[31] Significantly, the court rejected Deaton's argument that the discharge was simply "too trivial to affect water quality in navigable waters," by relying on the fact that Congress may "decide that the aggregate effect of all of the individual instances of a discharge, like the discharge by the Deaton's, justifies regulating each of them."[32] However, the only evidence of such congressional support cited by the court is the general intent of Congress in passing the CWA "to restore and maintain the chemical, physical, and biological integrity of the nation's waters."[33] From there, the court simply noted that the Corps' use of "delegated authority is well within Congress' traditional power over navigable waters."[34]

A petition for rehearing has been filed in *Deaton* which largely argues that the court, by deferring to the Corps, ignored the obligation imposed by *SWANCC* to require evidence establishing a significant hydrologic nexus to a navigable water. Deaton argues that "the mere connection does not prove that water from the roadside ditch ever reached navigable waters."[35]

Very recently, the Fourth Circuit followed *Deaton* to the letter in reversing a decision by Judge H.C. Morgan Jr. of the U.S. Court for the Eastern District of Virginia in *Treacy v. Newdunn Associates*.[36] The district court held that under *SWANCC*, CWA jurisdiction could not be asserted over wetlands only remotely connected to Stony Run which flows into Warwick River which intersects with the James River, a tributary of Hampton Roads Harbor which flows into the Chesapeake Bay. The Newdunn wetlands were connected to Stony Run by the intermittent flow of surface water through approximately 2.4 miles of natural streams and man-made ditches crossing under Interstate 64 (I-64) in the Hampton Roads area. In reversing the district court, the Fourth Circuit found strong factual parallels with *Deaton* holding that "[t]his circuit has recently concluded that the Corps intends to assert jurisdiction over any branch of a tributary system that eventually flows into a navigable water."[37] The court also rejected the argument that the I-64 ditch was man-made and, therefore, could not provide a basis for "tributary" jurisdiction under the CWA, noting that "the United States has extensively documented the connection between the Newdunn's property wetlands and the navigable water both before and after construction of I-64."[38] The court then stated that

> [i]f this court were to conclude that the I-64 ditch is not a "tributary" solely because it is man-made, the CWA's chief goal would be subverted. Whether man-made or natural, the tributary flows into traditional, navigable water. Accordingly, the Corps may permissibly define that tributary as part of the "waters of the United States."[39]

Finally, the court reversed the district court's holding that the commonwealth of Virginia's jurisdiction under the Virginia Wetlands Resources Act of 2000[40] was coextensive with the CWA. The court held that "in light of the Virginia act's clear statutory language, it is apparent that Virginia now regulates activities in wetlands beyond its federal mandate."[41]

The Sixth Circuit also recently adopted *Deaton*'s narrow interpretation of *SWANCC* in upholding federal jurisdiction over wetlands that are not themselves adjacent to navigable waters in *United States v. Rapanos*.[42] In that case, the defendant landowner owned a tract of land 20 miles from both the Saginaw Bay and the navigable Kawkawlin River. Approximately one-third of the land consisted of wetlands. In preparation for sale of the property, defendant filled in the wetlands with sand without obtaining a permit, despite warnings from EPA. The government prosecuted him for violation of the CWA, and obtained a conviction in a federal district court. The appeal made it to the Court, which vacated the conviction, and remanded to the district court for reconsideration consistent with *SWANCC*.

The government's evidence showed that the wetlands were connected by a "surface hydrological connection"—an open drain sluice connected to a creek connected to the Kawkawlin—to navigable waters. The government contended that this connection was sufficient to grant it authority, even after *SWANCC*. The district court disagreed, ruling that, under *SWANCC*, a hydrological connection was not enough. The court observed in a footnote that even the most isolated wetlands are hydrologically and ecologically connected to navigable waters, if one cared to draw the connection over sufficient distance. Rejecting such expansive

27. 474 U.S. 121, 16 ELR 20086 (1985).
28. *Id*. at 133, 16 ELR at 20089.
29. *Deaton*, slip op. at 15, 33 ELR at 20223.
30. *Id*.
31. *Id*. at 9, 33 ELR at 20223.
32. *Id*. at 10, 33 ELR at 20223.
33. 33 U.S.C. §1251(a), ELR STAT. FWPCA §101(a).
34. *Deaton*, slip op. at 10, 33 ELR at 20223.
35. Petition of Appellants for Rehearing, at 5, 33 ELR at 20223.
36. No. 02-1480 (E.D. Va. Sept. 10, 2003).
37. *Treacy*, slip op. at 15.
38. *Id*. at 16.
39. *Id*.
40. Codified at VA. CODE ANN. §§62.1-44.3, -44.15:5, -44.19 (Michie 2001).
41. *Treacy*, slip op. at 12.
42. 2003 WL 21789241 (6th Cir. 2003).

jurisdiction, the district court held that "[e]ven if there is a hydrological connection, Defendant's wetlands may be considered 'isolated'" for purposes of the CWA, and ruled that, in any event, the government made no showing that the filling of the wetlands on defendant's property had impacted the nearest navigable water 20 miles away.

The Sixth Circuit reversed, and found CWA jurisdiction as consistent with the Court's holding in *Riverside Bayview*. The *Rapanos* court contrasted *SWANCC*—as standing for a limit to CWA jurisdiction short of the migratory bird rule—with *Riverside Bayview*—as standing for CWA jurisdiction over wetlands that are adjacent to navigable waters. The court held that this case was, like *Deaton*, closer to *Riverside Bayview* than to *SWANCC*,[43] based on *Deaton*'s reasoning that in light of congressional concern for water quality and aquatic ecosystems, a nexus between navigable waterways and their non-navigable tributaries is enough to grant CWA jurisdiction over the whole tributary system of any navigable waterway.[44] The court paved its path for finding such expansive jurisdiction by reasoning that *SWANCC* was a "narrow holding, invalidating [only] the Migratory Bird Rule."[45]

Adding to the list of circuit courts of appeal narrowly interpreting *SWANCC*, the Seventh Circuit held in *United States v. Rueth Development Co*.[46] that *SWANCC* did not affect the Corps' "well-established" adjacency jurisdiction.[47] The district court had found Corps jurisdiction over the disputed wetlands based upon a tenuous connection to navigable waters through two ditches and a non-navigable tributary. The district court later returned to this decision and vacated the portion of its opinion dealing with adjacency and *SWANCC*, finding that the defendant had signed an enforceable consent decree with the Corps prior to the ruling in *SWANCC*. The court noted that the defendant could have chosen to contest the Corps' basis for the consent decree, like the plaintiffs in *SWANCC* itself. It did not do so, hence the Corps was free to enforce the consent decree like any other contract.

On the basis of the consent decree, the Seventh Circuit upheld the district court's ruling. In dicta, the court noted that adjacency is likely present under *Riverside Bayview* and *Deaton*. The *Rueth* court reasoned that if surface runoff that winds through tributaries into navigable waters establishes adjacency in those cases, then adjacency jurisdiction is likely present under the facts of the case as well. The court interpreted *SWANCC* as having no bearing on adjacency jurisdiction, the government's asserted basis for the consent decree. Thus, the court found no reason to invalidate the decree in light of *SWANCC*.[48]

The district courts narrowly interpreting *SWANCC* range geographically from the East Coast, to the Midwest, to California. In *California Sportfishing Protection Alliance v. Diablo Grande*,[49] the court ruled that Salado Creek, the primary avenue of drainage for two golf courses and an access road, was a navigable water of the United States. Stormwater from the golf courses and from the access road, as well as water introduced by defendant's road-washing truck, entered Salado Creek via numerous down drains and pipes. The creek traveled a long way from the property, crossing over a state highway on a weir, then into an underground pipeline which "eventually" connects to the navigable San Joaquin River. A factual dispute existed over whether Salado Creek was intermittent or continuous in flow.

While the court agreed that seeping groundwater does not implicate "navigable water," it observed that passage through a pipeline running underground does not render a flow to be "groundwater." The court noted that flow through a pipe does not filter out sedimentary pollution, as does groundwater seepage. Generally, the court adopted the test set forth in *Headwaters*, and ruled that *SWANCC* did not preclude jurisdiction over seasonal or intermittent waters, or waters that flow unimpeded through underground pipes. "[A]s long as the tributary would flow into the navigable body under certain conditions, it is capable of spreading environmental damage and is thus a 'water of the United States' under the Act."[50]

Using the same reasoning, the U.S. District Court for the Eastern District of North Carolina in *North Carolina Shellfish Growers Ass'n v. Holly Ridge Associates, Ltd. Liability Corp.*[51] very recently held that CWA jurisdiction covers wetlands adjacent to navigable-in-fact waters, and all tributaries of covered waters, as "waters of the United States." Under *Riverside Bayview*, wetlands that are immediately adjacent to navigable waters have long been considered within CWA jurisdiction,[52] so the court's finding of jurisdiction is unremarkable in that respect. What is more noteworthy is the court's finding of CWA jurisdiction over wetlands that connect to a non-navigable channel (Cypress Branch) that is interrupted by another wetland flat for over a mile, before yet another channel connects to a navigable waterway (Batts Mill Creek). The court held that "[a]n absence of a channelized flow between the two bodies of water does not necessarily prevent Cypress Branch from being considered a tributary of Batts Mill Creek."[53] Jurisdiction was found because pollutants could potentially flow from the wetland in question, through Cypress Branch, into Batts Mill Creek. The court considered its finding to be perfectly consistent with *SWANCC*, since the hydrological connection through which pollutants can flow into navigable waters provides the "significant nexus" required for CWA jurisdiction under *SWANCC*.[54] Thus, *Holly Ridge* adds to the growing trend of cases narrowly interpreting the force of *SWANCC* to limit jurisdiction.

Another district court within the Seventh Circuit recently handed down a narrow interpretation of *SWANCC*. In *United States v. Hummel*,[55] the U.S. District Court for the Northern District of Illinois held that Hummel violated the CWA when he installed sewer lines in a wetland connected to Indian Creek, a tributary of the Des Plaines River, a navi-

43. *Id*. at *4.

44. *Id*. at *5.

45. *Id*.

46. 335 F.3d 598, 33 ELR 20238 (7th Cir. 2003).

47. *Id*. at 604, 33 ELR at 20238 (citing *Riverside Bayview*).

48. *Id*.

49. 209 F. Supp. 2d 1059 (E.D. Cal. 2002) (appeal pending before the Ninth Circuit).

50. *Id*. at 1075 (quoting *Headwaters*, 243 F.3d at 534, 31 ELR at 20537).

51. No. 7:01-CV-36-BO(3) (E.D.N.C. July 25, 2003).

52. *See Rueth*, 335 F.3d at 604, 33 ELR at 20238.

53. *Holly Ridge*, slip op. at 21.

54. *Id*. at 22.

55. No. 00 C 5184, 2003 WL 1845365 (N.D. Ill. Apr. 8, 2003).

gable-in-fact water.[56] The court found this hydrologic connection sufficient to confer CWA jurisdiction, rejecting defendant's argument that *SWANCC* required that the wetland be either navigable or at least be "directly adjacent" to the navigable water.[57] To support this holding the court cited *Krilich* and almost all of the subsequent district court cases that found this type of hydrologic connection legally sufficient. The court rejected Hummel's reliance on the Fifth Circuit's *Harken* decision,[58] characterizing that decision's discussion of *SWANCC* as "primarily dicta" because it saw the *Harken* court primarily deciding whether CWA jurisdiction extended to groundwater.[59]

An earlier Northern District of Illinois district court case, *United States v. Lamplight Equestrian Center, Inc.*,[60] involved road construction on the property of an equestrian center that filled in a portion of a wetland, which eventually led to an enforcement action. The wetlands in question had been intermittent at various times in the past, but had remained constant for the previous five years, according to testimony. The wetlands maintained a tenuous connection to the larger waterways, through a drainage ditch, over 50 feet of open ground and into an extended "swale," which ended at a tributary of Brewster Creek, which drains in turn into the navigable-in-fact Fox River, and then on into "additional interstate waterways."

The court performed an extensive survey of the cases following *SWANCC* and arrived at the conclusion that the migratory bird rule was the only "casualty" of that decision. The court noted that *SWANCC* had left the previous holding in *Riverside Bayview* largely intact, including the importance of a "significant nexus," if any, between the waters the government seeks to regulate, and a body of water that is navigable-in-fact.

Rejecting per se categories, the court ruled that "intermittent flow . . . can be sufficient to establish the Corps' jurisdiction,"[61] and that "[a tributary] may be linked through other connections two or three times removed from the navigable water and still be subject to the Corps' jurisdiction."[62] The court cited *Headwaters*, which used this test to rule that a man-made irrigation ditch is a "water of the United States." Permanent or intermittent, mere drainage or permanent watercourse, distant or directly adjacent, the court refused to acknowledge that the *SWANCC* decision erected any categorical bar to CWA authority, short of placing truly isolated waters out of reach. "Even where the distance from the tributary to the navigable water is significant, the quality of the tributary is still vital to the quality of the navigable waters."[63]

In *Colvin v. United States*,[64] the defendant in a criminal CWA case was found guilty of discharging industrial waste onto wetlands and directly into an adjacent lake. The defendant cited *SWANCC* in his motion to vacate the verdict. The court noted that the Ninth Circuit has taken *SWANCC* to merely overrule the migratory bird rule (citing *Headwaters*), and left all previous regulations intact. The court shied away from ruling definitively, as evidence existed that the defendant had dumped waste on the shoreline of the lake, and that the tides washed the deposited waste into the lake. The lake was a popular tourist spot, with many types of waterborne traffic, and it ebbs and flows with the tide. The court found the lake to be navigable-in-fact, and it was therefore not necessary to evaluate the authority of the government to regulate the adjacent wetlands. No possible reading of *SWANCC*, reasoned the court, prevented regulation of waters shown to be navigable-in-fact.

In *United States v. Buday*,[65] Buday, the owner of land adjacent to Fred Burr Creek, was depositing fill from his land into the wetlands adjacent to the creek, a tributary of Flint Creek, which is a tributary of the navigable-in-fact Clark Fork River, which comes down from Canada to meet it. The Clark Fork River does not become "navigable-in fact" until it wends 122 miles downstream from Buday's property. The court largely concerned itself with the extent of the "legal" definition of "navigable waters." According to the *Buday* court, *SWANCC* was not relevant to the evaluation of Corps jurisdiction over nonisolated waters, representing merely the Court's "fire and ire" over the migratory bird rule.[66]

The fact that pollution deposited in Fred Burr Creek could wend its way, via several tributaries, to an indisputably navigable waterway such as the Columbia River, in the court's opinion meant that the case was outside the ambit of the *SWANCC* decision. Moreover, in such a situation, pollution could foreseeably affect navigable water, so the Corps could reasonably assert jurisdiction: "Any polluting activity is subject to federal jurisdiction if it impinges on any stream that flows primarily over the surface of the land and empties into a water that is at some point navigable-in-fact."[67]

Decisions Broadly Interpreting *SWANCC*

The only court of appeals' case to date broadly interpreting *SWANCC* is the Fifth Circuit's 2001 ruling in *Rice v. Harken Exploration Co*.[68] There, the owner of the surface rights to a tract of land utilized for oil exploration and drilling filed suit under the Oil Protection Act (OPA)[69] against the drilling company for the accumulated damage to the soil and groundwater resulting from many small-scale discharges of oil and other pollutants onto the soil. Big Creek, a small seasonal creek on the property, carried these pollutants:

> Big Creek runs across the ranch to the Canadian River, which is the southern boundary of Big Creek Ranch. The Canadian River is down gradient from Harken's oil and gas flow lines, tank batteries, and other production equipment. The Canadian River flows into the Arkansas River, which flows into the Mississippi River, which empties into the Gulf of Mexico.[70]

Harken did not dispute that the Canadian River is legally a

56. *Id*. at *4.
57. *Id*.
58. Rice v. Harken Exploration Co., 250 F.3d 264, 31 ELR 20599 (5th Cir. 2001).
59. *Hummel*, 2003 WL 1845365, at *6.
60. No. 00 C 6486, 2002 WL 360652, 32 ELR 20526 (N.D. Ill. Mar. 8, 2002) (appeal pending before Seventh Circuit).
61. *Id*. at *7, 32 ELR at 20528.
62. *Id*. at *8, 32 ELR at 20528.
63. *Id*.
64. 181 F. Supp. 2d 1050 (C.D. Cal. 2001).
65. 138 F. Supp. 2d 1282 (D. Mont. 2001).
66. *Id*. at 1286.
67. *Id*. at 1289.
68. 250 F.3d 264, 31 ELR 20599 (5th Cir. 2001).
69. 33 U.S.C. §§2701-2761, ELR STAT. OPA §§1001-7001.
70. 250 F.3d at 265, 31 ELR at 20599.

"navigable water." However, the court could not divine from the record the exact nature of Big Creek. It was variously reported to be "seasonal," "intermittent," and occasionally underground (discharges occurred on land "that only infrequently carried running water").[71] The plaintiffs argued, and the court agreed, that Congress intended for "navigable waters" to have the same meaning under the OPA as under the CWA but that in light of *SWANCC*, "a body of water is protected under the Act only if it is actually navigable or is adjacent to an open body of navigable water."[72] Furthermore, the court held that, consistent with *SWANCC*, the CWA was not intended to extend agency regulatory power to the fullest extent of the Commerce Clause.[73]

Continuing its OPA analysis in the context of the CWA definition, the court concluded that neither the groundwater nor the non-navigable creek at issue were protected by the CWA (and, therefore, fell outside the OPA as well). The court also declined to extend the coverage of the CWA to a discharge on dry land that seeps into groundwater, which in turn seeps into a navigable water.

Several district courts interpreting *SWANCC* broadly have wrestled with the scope and meaning of *SWANCC*'s "significant nexus" language and the various related concepts such as the meaning of "tributary" and "adjacency."

As noted above, the Fourth Circuit recently reversed the ruling of Judge Morgan in *Newdunn*. A second ruling by Judge Morgan reached a similar result. In *United States v. RGM Corp.*,[74] he ruled that the Corps did not have CWA jurisdiction under its 1986 regulations because these regulations exceeded its authority under the CWA.[75] The Corps alleged that it had jurisdiction over the wetlands on the RGM property because surface water drains from the property from the south via a drainage ditch, which empties into an ephemeral stream, which flows to the Northwest River; and from the north via a system of man-made ditches, which empty into Cooper's ditch, which then flows into the Intracoastal Waterway. The river and the waterway are jurisdictional.

The court found that since the 1986 regulations did not apply, jurisdiction had to rest on the 1975 regulations requiring an ordinary high watermark (OHWM). The court interpreted the 1975 regulations as requiring that the OHWM result from the upstream or landward flow from the navigable water.[76] Furthermore, it held that in order for nontidal wetlands adjacent to drainage ditches and ephemeral streams to be jurisdictional, the ditches and streams must have a continuous OHWM.[77] *RGM* is also on appeal and the court will very likely be influenced by the prior rulings in *Deaton* and *Newdunn*.

In *United States v. Needham*,[78] a bankruptcy court in Louisiana reviewed the impact of an oil spill on estate land, and the responsibility of debtors to pay for cleanup under the OPA. Overflow oil from a containment basin was pumped into a drainage ditch connected to a system of non-navigable bayous and canals which terminated 60 miles away in the Gulf of Mexico. Following *Harken* almost to the letter, the court found that *SWANCC* was a broad ruling, allowing regulation "if and only if the body of water is actually navigable or is adjacent to an open body of navigable water."[79] Groundwater and "intermittent or seasonal creeks" do not meet this requirement, found the court. The court took the requirement seriously, to the point of watching a video of a small motorboat unsuccessfully attempting to navigate the bayous that led away from the site. The court's literal reading of the "navigability" requirement contrasts starkly with the "migratory molecule" theory embodied in the superceded *Rueth* opinion.[80]

Finally, of the opinions reading *SWANCC* broadly, *FD & P Enterprises, Inc. v. U.S. Army Corps of Engineers*[81] not only states that *SWANCC* created a new paradigm in CWA jurisdictional analysis but went a step further clarifying the meaning of "substantial nexus." FD &P, a freight transportation company, wished to develop 53.5 acres of wetlands on its property. The wetlands abut Penhorn Creek, a non-navigable tributary which feeds into the Hackensack River, a navigable body of water. After almost seven years of unsuccessful negotiations with the Corps, FD & P filed a motion for summary judgment challenging the Corps' jurisdiction.

The FD&P court interpreted *SWANCC* very broadly. It held that *SWANCC* represents a clear statement from the Court that CWA jurisdictional analysis has shifted from a "hydrological connection" test to a "significant nexus" test, implying that the former was the status quo and that the latter represents the new, narrower CWA jurisdictional test. According to the district court, this must mean that CWA jurisdiction requires that there be a "substantial nexus—*beyond* a mere hydrological connection."[82]

Assessment of the Case Law

The split in interpretation among the courts wrestling with the *SWANCC* decision is deep and was instantaneous. In the two years since the high court ruled, two diametrically opposed, fully articulated interpretations have emerged among the lower federal courts. However, the recent trend is toward a narrow reading of the decision. A growing majority of courts have read *SWANCC* narrowly and preserved the Corps' jurisdiction over all but the most isolated waters.[83]

71. *Id*. at 270, 31 ELR at 20601.

72. *Id.*

73. *Id*. at 269-70, 31 ELR at 20601.

74. 222 F. Supp. 2d 780, 32 ELR 20817 (E.D. Va. 2002).

75. *Id*. at 786, 32 ELR at 20818.

76. *Id*. at 787, 32 ELR at 20819.

77. *Id*. at 788, 32 ELR at 20819.

78. 279 B.R. 515 (Bankr. W.D. La. 2001), *aff'd*, Nos. Civ. A. 01-1897, Civ. A. 01-1898, 2002 WL 1162790 (W.D. La. Jan. 22, 2002) (appeal pending before Fifth Circuit).

79. *Id*. at 518.

80. The U.S. District Court for the Western District of Louisiana upheld the decision with minimal comment. *See id*. at 515. *See also* United States v. Bay-Houston Towing Co., Inc., 197 F. Supp. 2d 788, 805 (E.D. Mich. 2002) (noting in dicta that in the wake of *SWANCC*, "adjacency" is a requirement for jurisdiction).

81. 239 F. Supp. 2d 509, 33 ELR 20140 (D.N.J. 2003).

82. *Id*. at 516, 33 ELR at 20140 (emphasis added).

83. In addition to those noted above, several courts have cited *SWANCC* briefly, and characterized it narrowly. *See* San Francisco Baykeeper v. Cargill Salt Div., 263 F.3d 963, 964 (9th Cir. 2001) (remanding the case to consider jurisdiction; characterized *SWANCC* as merely invalidating the migratory bird rule); Idaho Rural Council v. Bosma, 143 F. Supp. 2d 1169, 1178 (D. Idaho 2001) ("While [*SWANCC*] articulated [the Court's] unwillingness to read the term 'navigable' entirely out of the CWA, it also made clear that waters of the United States include at least some waters that are not navigable in the clas-

This is especially true at the court of appeals' level, where courts in the Fourth, Sixth, Seventh, and Ninth Circuits have all interpreted the decision narrowly, leaving only the Fifth Circuit's broad reading.

Generally, decisions utilizing a narrow construction of *SWANCC* are characterized by the following themes:

> (1) The primary impact of *SWANCC* was to declare the migratory bird rule void. It did not otherwise significantly affect the Corps' jurisdiction, which the Corps may continue to assert under 33 C.F.R §328.3(a) over tributaries and their adjacent wetlands.
>
> (2) The Corps may still exert jurisdiction over wetlands or waters, separated a distance from traditionally navigable waters, provided there is a "hydrological connection" or "significant nexus" (although the meaning of this terms differs from those courts reading *SWANCC* broadly) between the waters sought to be regulated and waters that are navigable-in-fact, even if the water travels many miles in between. Under the "migratory molecule" theory, espoused in *Rueth*, *Deaton*, and *Newdunn*, even an extremely slight co-mingling of water may be enough.
>
> (3) The tendency to defer to the Corps' definition of "tributary" jurisdiction, most recently articulated by the Fourth Circuit in *Deaton* and *Newdunn*. That is, these courts seem unwilling to "second-guess" the Corps' interpretation that even a roadside ditch with only a tenuous link to a navigable water is jurisdictional, even in the absence of evidence that water from the ditch actually reaches the navigable water.
>
> (4) Other Commerce Clause theories (besides the use of the waters by migratory birds), such as the *Holly Ridge* court's liberal interpretation of what constitutes a "significant nexus" under *SWANCC*, and the "channels of commerce" theory espoused in *Deaton*, may justify CWA jurisdiction.

Decisions reading *SWANCC* broadly also share common themes:

> (1) As the CWA was based on Congress' traditional power over navigable waters, CWA jurisdiction does not extend to waters or wetlands with no discernable hydrologic connection to navigable waters. By so ruling, these courts not only eliminated the migratory bird rule, but also placed into question the Corps' assertion of broad Commerce Clause jurisdiction over aquatic areas that are not clearly adjacent to navigable waters.
>
> (2) To assert jurisdiction under the CWA, the Corps must show an actual effect upon a navigable-in-fact waterway. It is not enough to show merely that it is possible that discharges into an isolated aquatic area may eventually find their way to navigable water.
>
> (3) An indirect and tenuous connection through ditches, swales, and gutters to a navigable water is generally not sufficient to create "tributary" jurisdiction under the CWA.
>
> (4) The proper forum for expansion of the CWA jurisdiction is in Congress. The Corps' expansion of jurisdiction since 1975 has exceeded congressional direction.

Whether the Court will ultimately decide to address *SWANCC*'s application to tributaries and their adjacent wetlands remains an open question. While the weight of court of appeals' decisions clearly favor a narrow reading of *SWANCC*, the existence of the Fifth Circuit's *Harken* ruling does create a conflict in circuits over what constitutes a "significant nexus" to a navigable water. Of course, it remains to be seen how the Fifth Circuit will address the applicability of *Harken* in the currently pending *Needham* case. However, given the state of confusion over *SWANCC*'s applicability, and the split in circuits, the odds are in favor of the Court again addressing these issues in the future.

Administration and Congressional Responses to *SWANCC*

The judiciary has not been the only branch of government confronting *SWANCC* and its progeny. Congress and the regulated community have also put great pressure on the Corps and EPA to address *SWANCC*'s applicability as well. Following hearings in the House Government Operations Committee, the Corps and EPA on January 15, 2003, issued a joint guidance memorandum and an ANPRM in an attempt to provide a clearer interpretation of *SWANCC*'s meaning.[84] The environmental community, however, has consistently asserted that rulemaking is not necessary.

Joint Guidance Memorandum

The joint guidance memorandum reaffirms the agencies' prior narrow interpretation of *SWANCC* by stating that the decision only expressly eliminated the "migratory bird rule" as a basis of CWA jurisdiction over isolated waters and wetlands. "The EPA and the Corps are now precluded from asserting CWA jurisdiction in such situations including waters such as isolated non-navigable, intrastate vernal pools, playa lakes, and pocosins."[85] However, the guidance also states that *SWANCC* "also calls into question whether CWA jurisdiction over isolated waters could also be predicated on the other factors" such as "use of water as habitat for birds protected by Migratory Bird treaties, use of water as habitat by Federally protected endangered or threatened species, or use of the water to irrigate crops sold in interstate commerce."[86] In the case of those isolated waters, the guidance instructs the Corps' field staff to seek "formal project-specific Headquarters approval prior to asserting juris-

sical sense, such as non-navigable tributaries and streams."); Brace v. United States, 51 Fed. Cl. 649, 652, 32 ELR 20499, 20500 (Fed. Cl. 2002) (citing narrow interpretations, court declined to grant defendant summary judgment because insufficient facts to determine if there is a "substantial nexus" between the lands sought to be regulated and "navigable waters"); Aiello v. Town of Brookhaven, 136 F. Supp. 2d 81, 119 (E.D.N.Y. 2001) (citing *SWANCC* as invalidating Migratory Bird Rule); Laguna Gatuna, Inc. v. United States, 50 Fed. Cl. 336, 343 (Fed. Cl. 2001) (noting that *SWANCC* only directly affected the authority of the Corps, not that of EPA, and on 33 C.F.R. §328.3(a)(3), not 40 C.F.R. §122.2 or any other regulation).

84. 68 Fed. Reg. 1991 (Jan. 15, 2003).

85. *Id*. at 1996.

86. *Id*.

diction over such waters, including permitting and enforcement actions."[87]

However, the guidance does not further clarify the situations in which jurisdiction may be based on an asserted tributary connection to traditionally navigable waters—by far the most common method the agencies utilize to assert jurisdiction. Instead, the guidance cites the cases that have interpreted *SWANCC* differently with respect to jurisdiction over these waters and their adjacent wetlands. The agencies note that the majority of courts "did not change the principle that CWA jurisdiction extends to tributaries of navigable waters." The guidance also cites those cases that have interpreted *SWANCC* as covering even tributaries that flow intermittently or that are connected by man-made ditches and canals, such as *Headwaters*, or where water must travel a substantial distance and through man-made structures before reaching navigable water, such as *Buday*.

The guidance, however, does note the cases that take a narrow view of jurisdiction by excluding CWA jurisdiction over tributaries that are not contiguous or adjacent to navigable waters. These include *Harken* and *Newdunn*. Thus, the guidance simply advises the Corps' field staff to "make jurisdictional and permitting decisions on a case-by-case basis, considering this guidance, applicable regulations, and any additional relevant court decisions."[88] This means that, for the most part, the regulated community and the public must carefully monitor case law developments in particular jurisdictions, pending rulemaking by the agencies and/or a possible future Court decision.[89]

The ANPRM

The ANPRM cites the great uncertainty engendered by *SWANCC* and the fact that the jurisdictional issues cover more than just the CWA §404 program, extending also to the §303 water quality standards program, the §311 oil spill program and the OPA, the §401 state water quality certification and the §402 NPDES program. The ANPRM notes that one of its purposes is to "solicit additional information, data, or studies addressing the extent of resource impacts to isolate intrastate, non-navigable waters." The ANPRM solicited comments for a 90-day period, and sought input on the following issues[90]:

> (1) Whether, and if so, under what circumstances other factors listed in the rule at 33 C.F.R. §328.3(a)(3)(i)-(iii) (use of water by interstate or foreign travelers, the presence of fish or shellfish that could be sold in interstate commerce and the use of waters for industrial purposes by industries in intrastate commerce) or any other factors provide a basis of jurisdiction over isolated, intrastate non-navigable waters; and
>
> (2) Whether the regulations should define "isolated waters" and, if so, what factors should be considered in determining whether a water is or is not isolated for jurisdictional purposes.

The ANPRM resulted in extensive comments for many affected interests. Over 133,000 comments were received. Groups issuing comments including 4 Indian tribes, 42 states, local governments, academic, research, and scientific organizations, industry, nonprofits, and the general public.[91] Much of the commentary provided information and data regarding the ecological value of various aquatic resources, including isolated wetlands and intermittent streams. At the other end of the spectrum, many comments rejected the idea that impact on aquatic resources is relevant to determining CWA jurisdiction.

The agencies are still early in the process of analyzing the comments received. It is presently unclear when the Corps and EPA will publish a proposed regulation for public comment.

Congressional Consideration

On February 27, 2003, the U.S. Senate entered the *SWANCC* debate with Sen. Russ Feingold's (D-Wis.) introduction of S. 473, which he characterizes as a reaffirmation of the CWA.[92] His bill adopts a statutory definition of "waters of the United States" to include all waters, navigable or otherwise. It also eliminates the term "navigable" from the Act to clarify that Congress' true intent was to guard against pollution rather than to sustain the navigability of waterways.

Section 4 of the bill defines "waters of the United States" as:

> [A]ll waters subject to the ebb and flow of the tide, the territorial seas, and all interstate and intrastate waters and their tributaries, including lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, natural ponds, and all impoundments of the foregoing, to the fullest extent that these waters, or activities affecting these waters, are subject to the legislative power of Congress under the U.S. Constitution.[93]

On June 10, 2003, the Senate Environment and Public Works Committee held a hearing on S. 473. Sen. James

87. *Id*. at 1998.

88. *Id.*

89. One recent example of ad hoc Corps district guidance on defining "adjacency" was issued by the Corps' Jacksonville District. The district's July 11, 2003 guidance *Approval on Identifying Adjacent Wetlands and Isolated Waters* states that

> as a rule of thumb, if a wetland is within 200 feet of open waters (defined in this context and used in this document as any flowing or standing surface water, even though the water may not be present for the entire year) of another water of the [United States] (wetlands cannot be adjacent to other wetlands, such as wetlands that are contiguous to open waters that are tributary) then the wetland area is considered adjacent to that open water of the [United States].

90. *Id*. at 1994.

91. Statement of G. Tracy Mehan, Assistant Administrator for Water, U.S. EPA and George S. Dunlap, Deputy Assistant Secretary for Policy and Legislation, Department of the Army, Before the Subcommittee on Fisheries, Wildlife, and Water of the Senate Environment and Public Works Committee 7 (June 10, 2003).

92. The bill was cosponsored by Sens. Barbara Boxer (D-Cal.), James Jeffords (I-Vt.), and Joseph Lieberman (D-Ct.) and states as its purpose:

> (1) To reaffirm the original intent of Congress in enacting the Federal Water Pollution Control Act Amendments of 1972 (96 Stat. 816) to restore and maintain the chemical, physical, and biological integrity of the waters of the United States.
>
> (2) To clearly define the waters of the United States that are subject to the Federal Water Pollution Control Act.
>
> (3) To provide protection to the waters of the United States to the fullest extent of the legislative authority of Congress under the Constitution.

93. S. 473, 107th Cong. (2003).

Inhofe (D-Idaho), the committee chairman, noted the confusion engendered by the *SWANCC* decision.[94] The committee heard from numerous witnesses, including EPA and U.S. Army officials. At that hearing, critics claimed that the legislation may rest on shaky constitutional ground. Because the CWA was passed pursuant to Congress' authority to regulate interstate commerce, presumably any amendments must also comport with the restrictions placed on Congress in this area. Section 3 of the bill lists 17 "findings" in support of Commerce Clause authority to create federal jurisdiction over literally any body of water in the country. However, Sen. Lisa Murkowski (R-Ark.) spoke against the constitutionality of the proposed bill, and for a strict limitation on federal jurisdiction to only waters that are in fact navigable.[95] Sen. Bob Graham (D-Fla.), on the other hand, argued that under a theory of "aggregation" even isolated waters can be federally regulated, since if enough are destroyed, interstate commerce will be damaged by the resulting devastation of migratory birds.[96] Thus, the controversy over S. 473 reflects the larger debate over the meaning of *SWANCC* in the courts and the agencies.

94. The guidance issued by the agencies, like the Clinton Administration guidance, see Memorandum from Gary S. Guzy, General Counsel, U.S. EPA, and Robert M. Andersen, Chief Counsel, U.S. Army Corps of Engineers, Regarding Supreme Court Ruling Concerning CWA Jurisdiction Over Isolated Waters 1 (Jan. 2001), did very little to clear up the quagmire of nebulous regulations. By providing no detailed or definitive criteria for field staff, the Corps and EPA have simply perpetuated the already intolerable level of confusion in the §404 program. *See* Statement of Sen. James Inhofe (June 10, 2003).

95. Statement of Sen. Lisa A. Murkowski Before the Subcommittee on Fish, Wildlife, and Water, Committee on Environment and Public Works (June 10, 2003).

96. Statement of Sen. Bob Graham Before the Subcommittee on Fisheries, Wildlife, and Water (June 10, 2003).

Conclusion

The *SWANCC* decision has engendered as much debate and discussion as any major environmental decision in recent memory. The Court has literally opened a "pandora's box" of issues of great constitutional and statutory dimension highlighting the tension between the traditional role of state and local government over land and water resources and the growth of federal regulation under the CWA since its enactment in 1972. This tension necessarily invokes the Commerce Clause as a basis for a broad federal role. The breadth and scope of court decisions since *SWANCC* mirrors this broad tension. How this debate will ultimately be resolved remains to be seen but the Court may again have the "final word."