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Navigating *SWANCC*: An Examination of the U.S. Army Corps of Engineers' Authority Under the Clean Water Act

by Daniel Simmons

I. Introduction

For the last 25 years, the U.S. Army Corps of Engineers (the Corps), the U.S. Environmental Protection Agency (EPA), and courts have argued that the Clean Water Act (CWA)[1] gave the Corps and EPA the authority to regulate waters in the United States to the full extent of the U.S. Congress' authority under the Commerce Clause. This assumption was rejected in 2001 when the U.S. Supreme Court handed down its decision in *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*.[2] The Court held that the presence of migratory birds did not provide the Corps regulatory authority over isolated ponds. In rejecting the Corps' broad assertion of regulatory authority, the Court limited the Corps' regulatory scope to conform with the limits in the CWA.

This Article asks: in light of *SWANCC*, what are the statutory limitations on the Corps' authority to regulate wetlands property under the CWA? The Article reviews the history of Congress' regulation of navigable waters, the history of the Corps' regulation of "navigable waters," the *SWANCC* decision, CWA's legislative history, and counterarguments to the holding in *SWANCC*. The Article concludes that the CWA provides authority for the Corps to regulate navigable waters as they have been traditionally defined and the power to regulate wetlands adjacent to navigable waters. The CWA does not provide authority of the Corps to regulate beyond those statutorily defined boundaries.

II. History of the Regulation of Navigable Waters

To understand the impact of the *SWANCC* decision, it is necessary to understand the history of federal regulation of navigable waters. This is especially true, since in *SWANCC*, the Corps' definition of navigable had evolved to the point where the Corps was regulating isolated wetlands as navigable waters.[3]

A. Congressional Regulation of Navigable Waters

Congress' authority to regulate navigable waters is derived from the Commerce Clause.[4] In fact, one of the seminal Commerce Clause cases, *Gibbons v. Ogden*,[5] involved the regulation of navigable waters. In *Gibbons*, the Court held that the Commerce Clause gave the federal government, and not a state, the authority to regulate maritime commerce between states.[6] As the Court explained in *Gibbons*:

> America understands, and has uniformly understood, the word "commerce," to comprehend navigation. It was so understood, and must have been so understood, when the constitution was framed. The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government. . . .[7]

A more difficult question than whether the Commerce Clause gives Congress the authority to regulate interstate commerce over navigable waters, and the central question in *SWANCC*, is what is the scope of the term "navigable waters?" In 1870, in the admiralty case *The Daniel Ball*,[8] the Court enunciated the traditional definition "navigable waters." It explained:

> [R]ivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.[9]

Thirty years later, Congress passed the most significant exercise of its authority to regulate navigable waters with the Rivers and Harbors Act (RHA) of 1899.[10] In §13 of the RHA, Congress charged the Corps with the responsibility to regulate the discharge of "refuse" into any "navigable waters" without a permit.[11] During the 1960s and early 1970s, with the increasing concern about pollution, Congress, commentators, and courts[12] started to view §13 as a tool to help reduce pollution in the nation's waters.[13] As a result, Congress passed the 1972 Amendments to the Federal Wa-

Daniel Simmons is the Emmett McCoy Research Fellow at the Mercatus Center. He graduated from George Mason University School of Law in May 2003. He would like to thank Karol Boudreaux, Susan Dudley, Wendy Gramm, Paul Kamenar, Randy Simmons, and the Pacific Legal Foundation. The original version of this Article was the second runner up in the Fourth Annual Student Writing Competition sponsored by Pacific Legal Foundation's Program for Judicial Awareness. For more information, visit Pacific Legal Foundation's website at http://www.pacificlegal.org.

1. 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607.
2. 531 U.S. 159, 31 ELR 20382 (2001).
3. *See id.* at 162.
4. U.S. CONST. art. I, §8, cl. 3.
5. 22 U.S. (9 Wheat.) 1 (1824).
6. *Id.* at 189-90.
7. *Id.*
8. 77 U.S. (10 Wall.) 557, 563 (1870).
9. *Id.* at 563.
10. *See* Act of March 3, 1899, ch. 425, §§9-10, 30 Stat. 1151.
11. 33 U.S.C. §407.
12. *See, e.g.*, United States v. Republic Steel Corp., 362 U.S. 482, 490-92 (1960) (noting that "refuse" in RHA §13 was a broad enough term to include industrial waste).
13. Virginia S. Albrecht & Stephen M. Nickelsburg, *Could* SWANCC *Be Right? A New Look at the Legislative History of the Clean Water Act*, 32 ELR 11042 (Sept. 2002) [hereinafter *Could* SWANCC *Be Right?*].

ter Pollution Control Act.[14] These Amendments are now called the CWA.[15] Congress explained that it passed the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[16]

In order to implement these goals, Congress wrote part of the CWA to be similar to RHA §13. In a similar fashion to RHA §13, the CWA prohibits the "discharge of any pollutant by any person" into "navigable waters" without a permit.[17] In the CWA, Congress defines "navigable waters" as "waters of the United States, including the territorial seas."[18]

B. The Corps' Regulations on Navigable Waters

In response to the enactment of the CWA, in 1974 the Corps promulgated a rule to define "navigable waters" and "waters of the United States."[19] The 1974 rule defined "waters of the United States" as "those 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."[20] The Corps further explained that the determinative factor for defining navigable waters "is the water body's capability of use by the public for purposes of transportation or commerce."[21] In essence, the Corps' 1974 regulatory definition of "navigable waters" was essentially the traditional definition of navigable waters.

Less than one year after promulgating their definition of navigable waters, the Corps faced a lawsuit that changed their regulations. In *Natural Resources Defense Council, Inc. v. Callaway*,[22] the Natural Resources Defense Council, Inc. (NRDC) argued that the Corps' definition of "navigable waters" was impermissibly narrow and should be set aside. The court agreed, declaring that the phrase

> "the waters of the United States, including the territorial seas," asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution. Accordingly, as used in the Water Act, the term is not limited to the traditional tests of navigability.[23]

As a result of the *Callaway* lawsuit, the Corps promulgated a new rule in 1977, extending the Corps' regulatory authority under the CWA to the maximum extent available under the Commerce Clause.[24] The 1977 rule defined "waters of the United States" to include the traditional definition of navigable waters and "isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce."[25] Over the next 20 years, the Corps refined its definition of navigable waters.[26] Today the definition reads:

> (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
> (2) All interstate waters including interstate wetlands;
> (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
>
> (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
> (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
> (iii) Which are used or could be used for industrial purpose by industries in interstate commerce;
>
> (4) All impoundments of waters otherwise defined as waters of the United States under the definition;
> (5) Tributaries of waters identified in paragraphs (a)(1) through (4) of this section;
> (6) The territorial seas;
> (7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section.[27]

C. The Migratory Bird Rule

The Corps' regulation that was directly at issue in *SWANCC* was the "migratory bird rule."[28] In 1986, the Corp published an interpretation of its authority under the CWA that extended the Corps' regulatory authority to 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.[29]

While the Corps may have been ostensibly relying on the CWA's regulation of navigable waters for the regulatory authority to promulgate the migratory bird rule, the real basis of the migratory bird rule exists only in the Commerce Clause. The rule fails to mention water (other than to irrigate crops) and relies only on the regulation of migratory birds, habitat for endangered species, and crops—all things regulated under Congress' Commerce Clause power.

14. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 47 (1972).
15. U.S. EPA, *Clean Water Act*, *at* http://www.epa.gov/region5/water/cwa.htm (last visited Mar. 30, 2004).
16. 33 U.S.C. §1251(a).
17. *Id.* §§1311, 1362(12).
18. *Id.* §1362(7).
19. 33 C.F.R. §209.120 (1974).
20. *Id*. §209.120(d)(1) (internal reference omitted).
21. *Id*. §209.260(e)(1).
22. 392 F. Supp. 685, 5 ELR 20285 (D.D.C. 1975).
23. *Id.* at 686.
24. 33 C.F.R. §323.2 (1978).
25. *Id*. §323.2(a)(5).
26. *See* Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41206, 41250-51 (Nov. 13, 1986); Clean Water Act Regulatory Programs, 58 Fed. Reg. 45036 (Aug. 25, 1993).
27. 33 C.F.R. §328.3(a) (2002).
28. The "Migratory Bird Rule" is not a rule; rather, it is an interpretation. As the Court explained in *SWANCC*, the Corps "issued the 'Migratory Bird Rule' without following the notice and comment procedures outlined in the Administrative Procedures Act." *SWANCC*, 531 U.S. at 164.
29. Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. at 41217.

III. The *SWANCC* Decision

A. The Background of the SWANCC *Case*

In the mid-1980s the Solid Waste Agency of Northern Cook County (SWANCC), a coalition of 23 cities and villages in suburban Chicago, were searching for a waste disposal site[30] and ultimately purchased a 533-acre former sand and gravel pit.[31] Mining evacuations on the property had left behind many permanent and seasonal ponds.[32] In order to comply with the environmental regulations, SWANCC filed for various permits with both Cook County and the state of Illinois. In 1986 and 1987, SWANCC asked the Corps if the site was subject to §404 of the CWA.[33] On both occasions, the Corps issued a letter stating that because there were no wetlands on the property, the Corps could not regulate the land.[34]

However, after the Illinois Nature Preserves Commission informed the Corps that migratory birds had been observed at the site, the Corps reconsidered and asserted jurisdiction under the migratory bird rule.[35] SWANCC made several proposals to mitigate the displacement of any birds and received all of the necessary state and local approvals.[36] Despite SWANCC's efforts, the Corps denied SWANCC a permit under §404, arguing: (1) SWANCC's proposal was not the "least environmentally damaging, most practicable alternative" for disposing of nonhazardous waste; (2) SWANCC had not set aside sufficient funds to remediate risks to the public drinking water supply; and (3) the impact of the project on "area sensitive species was 'unmitigatable since a landfill surface cannot be redeveloped into a forested habitat.'"[37]

Frustrated by the Corps' regulations, SWANCC filed suit in federal district court arguing that the Corps' assertion of regulatory authority to their land exceeded the Corps' statutory authority and that Congress' Commerce Clause authority did not extend to isolated wetlands.[38] Both the district court and the U.S. Court of Appeals for the Seventh Circuit held that the Corps had the regulatory authority to regulate isolated wetlands and that the regulation of an isolated wetland was permissible under the Commerce Clause.[39] SWANCC appealed to the Court.

B. The Court's Decision

The Court reversed the lower court decisions, finding that the "'Migratory Bird Rule' is not fairly supported by the CWA."[40] By finding that the Corps' regulation exceeded its authority under the CWA, the Court avoided the constitutional question of whether this regulation was permissible under the Commerce Clause.[41]

SWANCC is a statutory interpretation case. At issue is whether §404(a)'s regulation of "navigable waters," which the CWA defines as "waters of the United States" provides sufficient regulatory authority to allow (or even require) the Corps to regulate isolated wetlands.

Because the CWA provides scant guidance to determine the scope of "navigable waters,"[42] the Court looked to its past precedents as guideposts. In *United States v. Riverside Bayview Homes, Inc.*,[43] the Court considered the scope of "navigable waters." At issue in *Riverside* was whether the Corps could assert regulatory authority over "80 acres of low-lying, marshy land near the shores of Lake St. Clair in Macomb County, Michigan."[44] These marshy lands are "adjacent to a body of navigable water."[45] In holding that the Corps had the requisite statutory authority to regulate wetlands adjacent to navigable waters, the Court found that Congress had "exercise[d] its powers under the Commerce Clause to regulate at least some waters that would not be deemed navigable under the classical understanding of that term."[46] In *Riverside*, the Court also found "that the term 'navigable' as used in the [CWA] is of limited import."[47] The Court went on to explain that "it is reasonable for the Corps to interpret the term 'waters' to encompass wetlands adjacent to waters as more conventionally defined."[48]

In *SWANCC*, the Corps seized onto language from *Riverside* that the term "navigable" is of "limited import" and argued that navigable waters under the CWA should include isolated, intrastate waters.[49] At oral argument before the Court, counsel for the government argued that "the use of the word navigable in the statute . . . does not have any independent significance."[50]

The Court read *Riverside* differently and explained that *Riverside* did not give the Corps carte blanche to regulate all waters, no matter their connection with navigable waters. The Court argued that while Congress evidenced some intent to "regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term,"[51] Congress did not write "navigable" out of the statute.[52] The Court explained that "[t]he 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."[53] Instead of expansively interpreting "navigable waters" and "waters of the United States" to mean any water permissibly regulated

30. *SWANCC*, 531 U.S. at 162-63.
31. *Id*. at 163.
32. *Id.*
33. Solid Waste Agency of N. Cook County v. Corps of Eng'rs, 998 F. Supp. 946, 948 (N.D. Ill. 1998), *aff'd*, 191 F.3d 845, 30 ELR 20161 (7th Cir. 1999).
34. *SWANCC*, 531 U.S. at 163.
35. *Id.*
36. *Id.* at 165.
37. *Id.*
38. *Id.* at 166.
39. Solid Waste Agency of N. Cook County v. Corps of Eng'rs, 998 F. Supp. 946, 956 (N.D. Ill. 1998), *aff'd*, 191 F.3d 845, 853, 30 ELR 20161 (7th Cir. 1999).
40. *SWANCC*, 531 U.S. at 166.
41. *Id.* at 162.
42. As noted above, the only definition the CWA provides for "navigable waters" is that they are "waters of the United States." 33 U.S.C. §1362(7).
43. 474 U.S. 121, 16 ELR 20086 (1985).
44. *Id.* at 124.
45. *Id.* at 131.
46. *Id.* at 133.
47. *Id.*
48. *Id.*
49. *See SWANCC*, 531 U.S. at 171-72.
50. *Id.* at 172.
51. *Id.*
52. *See id.*
53. *Id.*

under Congress' Commerce Clause powers, the Court found "nothing approaching a clear statement from Congress that it intended §404(a) to reach an abandoned sand and gravel pit" as was at issue in the case.[54] Instead, the Court found "§404(a) to be clear"[55] and that §404(a)'s regulation of navigable waters did not extend to an isolated wetland.[56]

C. Constitutional and Federalism Considerations

The Court found the Corps' argument in *SWANCC* troubling because such expansive regulation raises "significant constitutional questions."[57] As a result, the Court reminded the Corps that "Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority."[58] The Court gave two reasons for this concern—federalism and Congress' limitations under the Commerce Clause.[59] The Court recognizes the Founders placed federalism in the U.S. Constitution to protect the people. As James Madison explained in *The Federalist*, federalism provides a "double security" from usurpations of individual liberties by federal and state governments.[60]

Because the purpose of this federal-state balance is to protect the people, Congress must clearly convey its purpose to do so or otherwise "it will not be deemed to have significantly changed the federal-state balance."[61] Not only does the CWA not have a clear statement affecting the federal-state balance, in the CWA "Congress chose to 'recognize, preserve, and protect the primary responsibilities and right of the States . . . to plan the development and use . . . of land and water resources. . . .'"[62]

Even if there were no federalism concerns with the Corps' interpretation of the CWA, there is a further question of whether the Corps can exercise jurisdiction over isolated wetlands consistent with the Commerce Clause. In recent Commerce Clause cases, the Court has made it clear that the exercise of federal authority over essentially state and local activities has constitutional limits.[63] The Court in *SWANCC* reminded the Corps that the federal government is a limited government of enumerated powers. As such, Congress must clearly indicate that it intends an agency to "invoke the outer limits of Congress' power."[64]

D. Past Agency Interpretation

The Court also found support from the Corps itself in limiting the scope of "navigable waters." As noted above, in 1974, two years after the passage of the CWA, the Corps promulgated its first regulation to define §404(a)'s "navigable waters."[65] In that regulation, the Corps defined its regulatory authority to encompass "those waters of the United States that 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."[66] The Corps' 1974 definition emphasized that "[i]t is the water body's capability of use by the public for purposes of transportation or commerce which is the determinative factor."[67] While the Corps changed its definition in response to losing the *Callaway* case,[68] the Court ignored that opinion and instead reasoned that the Corps "put forward no persuasive evidence that the Corps mistook Congress' intent in 1974."[69]

E. Legislative History

The Corps and the dissenting Justices argued that the majority should have relied on the CWA's legislative history to give the term "navigable waters" the "broadest possible constitutional interpretation."[70] The dissent points to U.S. Senate and U.S. House of Representatives Committee Reports for the statement that "[t]he 'major purpose' of the CWA was 'to establish a *comprehensive* long[-]range policy for the elimination of water pollution'"[71] and the claim that the CWA was "the most comprehensive and far-reaching water pollution bill we have ever drafted."[72] The dissent argues that when the CWA defined "navigable waters" as "waters of the United States, including the territorial seas," it broadened the definition of "navigable waters."[73] The dissent's final piece of evidence that Congress intended a very broad reading of "waters of the United States" was the Conference Report, stated that the definition was to "be given the broadest possible constitutional interpretation."[74]

The majority summarily dispenses with this argument with a footnote. The footnote reads:

> Respondents refer us to portions of the legislative history that they believe indicate Congress' intent to expand the definition of "navigable waters." Although the Conference Report includes the statement that the conferees "intend that the term 'navigable waters' be given the

54. *Id.* at 174.
55. *Id.* at 172.
56. *Id*. at 162, 174.
57. *Id.* at 173.
58. *Id.* at 172-73.
59. *Id.* at 173.
60. *See* THE FEDERALIST No. 51 (James Madison). Usurpations of individual liberties continue to occur today. For example, EPA raided a business with 21 armed EPA agents and criminally charged the business owner with violating the CWA. The Washington Legal Foundation (WLF) represented the business owner. Through the WLF's investigation, it was discovered that EPA altered log books to make it appear that there were water quality violations and EPA suppressed other evidence. The court subsequently dismissed the charges and ruled that the prosecution and EPA's "SWAT Team" tactics were "vexatious" and constituted harassment. Riverdale Mills Corp. v. United States, Civ. No. 0040137 (D. Mass. Aug. 8, 2000); United States v. Knott & Riverdale Mills Corp., Crim. No. 98-40022-NMG (July 27, 2000).
61. *SWANCC*, 531 U.S. at 173.
62. *Id*. at 174 (quoting 33 U.S.C. §1251(b)).
63. *See* United States v. Morrison, 120 S. Ct. 1740 (2000) ("even under [this Court's] modern, expansive interpretation of the Commerce Clause, Congress' regulatory authority is not without effective bounds"); United States v. Lopez, 514 U.S. 549 (1995).
64. *SWANCC*, 531 U.S. at 172.
65. 33 C.F.R. §209.120(d)(1) (1974).
66. *Id.*
67. *Id.* §209.260(e)(1); *see also SWANCC*, 531 U.S. at 168.
68. *See supra* note 22 and accompanying text.
69. *SWANCC*, 531 U.S. at 168.
70. *Id.* at 181, (Stevens, J., dissenting) (quoting S. CONF. REP. No. 92-1236, at 144 (1972)).
71. *SWANCC*, 531 U.S. at 179 (Stevens, J., dissenting) (emphasis in original).
72. *Id.*
73. *Id.* at 177-82.
74. *Id.* at 181.

> broadest possible constitutional interpretation," . . . neither this, nor anything else in the legislative history to which respondents point, signifies that Congress intended to exert anything more than its commerce power over navigation. Indeed, respondents admit that the legislative history is somewhat ambiguous.[75]

The legislative history is ambiguous enough that it can be read to support SWANCC's position and the majority's reading of the statute. To understand what Congress meant by giving "waters of the United States" the "broadest possible constitutional interpretation," the statement needs to be put in context. The House and Senate versions of the CWA defined "navigable waters" differently. The House defined it as "navigable waters of the United States, including the territorial seas."[76] The Senate defined it as "navigable waters of the United States, portions thereof, and the tributaries thereof, including the territorial seas and the Great Lakes."[77] The Conference Committee resolved the differences by eliminating "navigable" from the House and Senate bills, and "tributaries" from the Senate bill.[78] Therefore, the Conference Committee's compromise definition of "navigable waters" became "the waters of the United States, including the territorial seas."[79] The final definition defined "navigable waters" as "the waters of the United States, including the territorial seas." The Conference Report explained that "[t]he conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes."[80]

Despite assertions that Congress intended "waters of the United States" to regulate water to the fullest extent of the Commerce Clause,[81] put in context, it is not clear exactly what the Conference Report meant by arguing that "waters of the United States" should be given the "broadest possible constitutional interpretation." The dissent claims that Congress intended "waters of the United States" as "shorthand for 'waters over which federal authority may property be asserted,'"[82] especially since the Conference Committee eliminated the word "navigable" from the term "navigable waters of the United States." It is also possible that Congress intended "waters of the United States" to be read expansively because the Conference Committee eliminated "tributaries" from the definition of "waters of the United States" in the Senate bill.

But this view is challenged by examining statements made by the House bill's proponents. On the House Floor, Rep. John D. Dingell (D-Mich.), one of the floor managers, argued that

> [t]he new and broader definition is in line with more recent judicial opinions which have substantially expanded that limited view of navigability—derived from the *Daniel Ball* case (77 U.S. 557, 563)—to include waterways which would be "susceptible of being used . . . with reasonable improvement," as well as those waterways which include sections presently obstructed by falls, rapids, sand bars, currents, floating debris, et cetera[.][83]

Representative Dingell's statement implies that giving the phrase "waters of the United States" the "broadest possible constitutional interpretation" would only extend the Corps' regulatory authority to regulate navigable waters incrementally beyond the traditional definition of navigation in *The Daniel Ball* case to include waterways that were "'susceptible of being used . . . with reasonable improvements.'"[84] Representative Dingell's statement notes that the Court had already expanded the definition of "navigable waters" to include waterways that "were susceptible of being used . . . with reasonable improvements" in *United States v. Utah*[85] and *United States v. Appalachian Power Co.*,[86] among other decisions.[87] Despite assertions that the legislative history is clear concerning the regulatory scope that Congress intended, when seen in context, the legislative history is "somewhat ambiguous," as the Corps admitted in its briefs to the Court in *SWANCC*.[88]

Arguments that rely on legislative history and not the statutory text also seem ignorant of the business of politics. The business of politics and legislation is about swaying public opinion and selling ideas. Many comments made by politicians are designed to sway public opinion, not necessarily to describe the whole truth of what a bill actually does. Therefore, many statements are nothing more than political advertising.

We all know that advertising of any sort often involves puffery and stretching the truth. For example, beer commercials imply that if the guy merely drank the right beer he would be attractive, funny, and always get the girl. We all know that this is stretching the truth a bit (to say the least). Just as we are wary of claims made by commercial advertisers, we ought to be wary of claims made by politicians as political advertisers. Statements made by politicians on the floor of the House or Senate or statements written by staff in Committee Reports are political advertising and should be treated with a healthy dose of skepticism.

Despite the need to have healthy doses of skepticism, the dissenters in *SWANCC* pointed out that a congressman said that the CWA is "the most comprehensive and far-reaching water pollution bill we have ever drafted"[89] and that the

75. *Id.* at 168 n.3 (internal citations omitted).
76. H.R. 11896, 92d Cong., §502(8) (1972), *as cited in Could* SWANCC *Be Right?*, *supra* note 13, at 11047.
77. S. 2770, 92 Cong., §502(h) (1971), *as cited in Could* SWANCC *Be Right?*, *supra* note 13, at 11047.
78. *Could* SWANCC *Be Right?*, *supra* note 13, at 11047.
79. 33 U.S.C. §1362(7).
80. H. Rep. No. 92-1236, at 144, *as cited in Could* SWANCC *Be Right?*, *supra* note 13, at 11047.
81. *See, e.g.*, *SWANCC*, 531 U.S. at 180-82 (Stevens, J., dissenting).
82. *Id.* at 182.
83. 1 Congressional Research Service, Legislative History of the Water Pollution Control Act Amendments of 1972, at 1069 (1973).
84. H. Rep. No. 92-1323, at 29–30, *quoted in Could* SWANCC *Be Right?*, *supra* note 13, at 11045).
85. 283 U.S. 64 (1931).
86. 331 U.S. 377, 407-10, 416 (1940).
87. The complete list of cases Representative Dingell cites is as follows: *Utah*, 283 U.S. at 64; *Appalachian Power Co.*, 331 U.S. at 407-10, 416; Wisconsin Pub. Serv. Corp. v. Federal Power Comm'n, 147 F.2d 743 (7th Cir.); *cert. denied*, 325 U.S. 880 (1945); Wisconsin v. Federal Power Comm'n, 214 F.2d 334 (7th Cir.), *cert. denied*, 348 U.S. 883 (1954); Namekagon Hydro Co. v. Federal Power Comm'n, 216 F.2d 509 (7th Cir. 1954); Puente de Reynosa, S.A. v. City of McAllen, 357 F.2d 43, 50-51 (5th Cir. 1966); Rochester Gas & Elec. Corp. v. Federal Power Comm'n, 344 F.2d 594 (2d Cir. 1965); The Montello, 87 U.S. (20 Wall.) 430, 441-42 (1874); Economy Light & Power Co. v. United States, 256 U.S. 113 (1921).
88. *See SWANCC*, 531 U.S. at 169 n.4.
89. *Id.* at 178 (Stevens, J., dissenting).

Conference Committee said that "waters of the United States" should "be given the broadest possible constitutional interpretation." Therefore, the dissenters claim, "the term 'navigable waters' operates in the statute as a shorthand for 'waters over which federal authority may properly be asserted.'"[90]

Drawing conclusive inferences from statements by members of Congress is difficult. As noted above, when the statements are put in context, it is not obvious that Congress intended to regulate beyond navigable waters. Second, the statements may not be entirely truthful, but rather political advertising. Third, and most troubling, if Congress intended "navigable waters" and "waters of the United States" to be interpreted as "waters over which federal authority may properly be asserted," then why didn't Congress explicitly do so? Congress could easily have created a definition that would unambiguously extend the Corps' regulatory authority to the limits of Congress' Commerce Clause authority. Instead of using this expansive approach, however, Congress chose to limit the Corps' regulatory authority to only "waters of the United States." If Congress chooses to extend the Corps' regulatory authority, it is always free to do so. Furthermore, because the Corps' expansive interpretation of its authority under the CWA would raise "significant constitutional questions,"[91] the Court will only allow the Corps to assert such authority if there is a clear statement that the broad regulatory authority was what Congress intended.[92]

The Court's rejection of legislative history in this case should remind us that the statutory text guides the Court, not the legislative history (even if the legislative history were clear). As Justice Antonin Scalia has previously written, "[w]e are here to apply the statute, not legislative history,"[93] indeed the Court's "job begins with the test that Congress has passed and the [p]resident has signed."[94]

F. Environmental Concerns

Although the dissent's main arguments were based on their reading of legislative history, they were mostly concerned that limiting the Corps' regulatory scope would lessen environmental protections. The dissent wrote that "the Court takes an unfortunate step that needlessly weakens our principle safeguard against toxic water."[95] Others have agreed with the dissent and charged that defining "navigable waters" to only include navigable waters and wetlands adjacent to navigable waters would result in a wetland environmental apocalypse. In comments to EPA on the scope of the CWA, for example, one person wrote that "[l]eaving isolated sections of land unprotected is tantamount to signing the death warrant of all the wildlife that uses it."[96] The dubious assumption underlying the dissent's argument and the sentiments of some of the supporters of the CWA is that if the CWA doesn't reach all waters, then these waters will not be protected.

There are many different ways to protect wetlands besides relying on the CWA. These other ways include other federal, state, and local programs as well as private conservation efforts. As the Corps and EPA noted in a *Federal Register* notice, federal programs (besides the CWA) that protect wetlands include:

> Food Security Act's Swampbuster requirements[,] . . . Wetlands Reserve Program (administered by the U.S. Department of Agriculture), grant making programs such as Partners in Wildlife (administered by the Fish and Wildlife Service), the Coastal Wetlands Restoration Program (administered by the National Marine Fisheries Service), the State Grant, Five Star Restoration, and National Estuary Programs (administered by EPA), and the Migratory Bird Conservation Commission (composed of the Secretaries of Interior and Agriculture, the Administrator of EPA and Members of Congress).[97]

Besides these federal statutes, the states provide a great deal of protection for wetlands. After all, the individual states have the "primary responsibilities and rights . . . to prevent, reduce, and eliminate pollution."[98] As EPA and the Corps have noted in the *Federal Register*:

> Prior to *SWANCC*, [15] States had programs that addressed isolated wetlands. Since *SWANCC*, additional States have considered, and two have adopted, legislation to protect isolated waters. The Federal agencies have a number of initiatives to assist States in these efforts to protect wetlands. For example, EPA's Wetland Program Development Grants are available to assist States, Tribes, and local governments for building their wetland program capacities. In addition, the U.S. Department of Justice and other Federal agencies co-sponsored a national wetlands conference with the National Governors Association Center for Best Practices, National Conference of State Legislatures, the Association of State Wetlands Managers, and the National Association of Attorneys General. This conference and the dialogue that has ensued will promote close collaboration between Federal agencies and States in developing, implementing, and enforcing wetlands protection programs. EPA also is providing funding to the National Governors Association Center for Best Practices to assist States in developing appropriate policies and actions to protect intrastate isolated waters.[99]

Some have argued that federal programs are needed because states will engage in an environmentally destructive "race-to-the-bottom" whereby states will compete for development by sacrificing their environmental amenities.[100]

90. *Id.* at 182.

91. *Id.* at 173.

92. *See id.* at 174.

93. Chisom v. Roemer, 501 U.S. 380, 406 (1991) (Scalia, J., dissenting).

94. *Id.* at 405 (Scalia, J., dissenting).

95. *SWANCC*, 531 U.S. at 175 (Stevens, J., dissenting).

96. Jan Roberts, *Comment to EPA on the Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States,"* EPA Docket OW-2002-0050, Jan. 13, 2003.

97. Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States," 68 Fed. Reg. 1991, 1995 (Jan. 15, 2003).

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

99. 68 Fed. Reg. at 1995.

100. *See, e.g.*, Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 Yale L.J. 1196, 1211-12 (1977); Richard B. Stewart, *The Development of Administrative and Quasi-Constitutional Law in Judicial Review of Environmental Decisionmaking: Lessons From the Clean Air Act*, 62 Iowa L. Rev. 713, 747 (1977); Craig N. Oren, *Prevention of Significant Deterioration: Control-Compelling Versus Site-Shifting*, 74 Iowa L. Rev. 1, 29 (1988); Scott R. Saleska & Kirsten H. Engel, "*Facts Are Stubborn Things": An Empirical Reality Check in the Theoretical Debate Over the Race-to-the-Bottom in State Environmental Standard-Setting*, 8 Cornell J.L. & Pub. Pol'y 55 (1998).

Intuitively, race-to-the-bottom has a certain appeal, but there are many reasons why race-to-the-bottom only occurs in theory.[101] For example, when states compete for business, environmental regulations are only one aspect over which they compete.[102] While states want to lure businesses, businesses need employees, and environmental amenities are one factor that lures people to one state over another. This desire for environmental amenities creates pressure for more environmental protections.[103]

If race-to-the-bottom were a good predictor of state's regulatory decisions, one would expect that states would lag the government in the protection of environmental amenities. This is not the case, especially with respect to state regulation of wetlands. According to environmental policy expert Jonathan Adler:

> Not only did states not wait for the federal government to begin regulating wetlands, but the order in which state began to act is the precise opposite of what the race-to-the-bottom theory would predict. Fifteen states have more than [10%] of their land area in wetlands, according to the National Wetland Inventory. All of these states but Alaska enacted their first wetland protection statutes prior to 1975, when a federal court declared that the CWA applied to wetlands. Moreover, most of these states have some protections for inland wetlands, in addition to coastal wetlands. . . . This is the exact opposite of what the race-to-the-bottom theory would predict.[104]

Even if race-to-the-bottom were a problem, there are other ways that people are working to protect wetlands besides state governments. Because many of the benefits of wetland protection are local, local governments and voluntary associations are working in all areas of the country to protect wetlands. These actions are part of the American tradition of uniting together to achieve commonly held goals. As Alexis de Tocqueville explained in *Democracy in America*: "Americans of all ages, all conditions, and all dispositions constantly form associations."[105] This was as true when *Democracy in America* was first published in 1835, as it is today. The power to accomplish goals through associations is great. As de Tocqueville argued: "[W]hat political power could ever carry on the vast multitude of lesser undertakings which the American citizens perform every day, with the assistance of the principle of association."[106]

Because wetlands are important, many people are forming organizations to privately protect wetlands and other lands with environmental amenities. Today there are over 1,200 land trusts that work to protect lands and wetlands.[107] Land trusts protect land through the donation or purchase of land in fee simple, or through the donation or purchase of conservation easements.[108] According to the Land Trust Alliance, land trusts have protected more than 6.2 million acres.[109]

But land trusts are not the only way private organizations work to protect wetlands; other conservation organizations also work to protect these important areas. Ducks Unlimited, for example, calls itself "the world's largest and most effective wetland conservation organization"[110] and as evidence of their efforts they have persevered over 10 million acres of wildlife habitat.[111] The National Audubon Society has been working for the last 100 years to protect wetlands for bird habitat.[112] EPA's *Clean Water Action Plan* contains a case study of California grape growers who voluntarily created a no-crop buffer zone along streams based on an economic model developed by a local agency.[113] Numerous other landowners have created or preserved wetlands to attract wildlife.[114]

With so many ways to protect wetlands, there is ample reason to believe that wetlands will continue to receive protection, even if EPA and the Corps change their regulation to properly respect the regulatory scope of the CWA. In fact, some research suggests wetlands may be *better* protected through public and private incentive-based programs for wetland restoration.[115] The voluntary, incentive-based programs of the U.S. Department of the Interior's Fish and Wildlife Service (the Partners for Wildlife Program and the North American Waterfowl Management Plan) and the U.S. Department of Agriculture's Wetland Reserve Program, along with state, local, and private efforts, such as those of

101. *See, e.g.*, Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553 (2001); Jonathan H. Adler, *Let 50 Flowers Bloom: Transforming the States Into Laboratories of Environmental Policy*, 31 ELR 11284 (Nov. 2001); Jonathan H. Adler, *The Duck Stops Here? The Environmental Challenge to Federalism*, 9 SUP. CT. ECON. REV. 205, 223–31 (2001) [hereinafter *The Duck Stops Here?*]; Richard L. Revesz, *The Race-to-the-Bottom and Federal Environmental Regulations: A Response to Critics*, 82 MINN. L. REV. 535 (1997); Richard L. Revesz, *Federalism and Environmental Regulation: A Normative Critique*, *in* THE NEW FEDERALISM: CAN THE STATES BE TRUSTED? 97–127 (John Ferejohn & Barry R. Weingast eds., 1997) [hereinafter *A Normative Critique*]; Richard L. Revesz, *Federalism and Environmental Regulation: Lessons From the European Union and the International Community*, 83 VA. L. REV. 1331 (1997); Wallace E. Oates, *On Environmental Federalism*, 83 VA. L. REV. 1321 (1997).

102. *See A Normative Critique*, *supra* note 101, at 105. States also compete on taxes, infrastructure, the skill of local workers, local workplace regulations, etc.

103. Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 706 (1995).

104. *See The Duck Stops Here?*, *supra* note 101, at 228-29.

105. 2 ALEXIS DE TOQUEVILLE, DEMOCRACY IN AMERICA §2, ch. 5 (1835), *available at* http://xroads.Virginia.edu/~hyper/detoc/ch2_05.htm (last visited Mar. 30, 2004).

106. *Id.*

107. Land Trust Alliance, *About Land Trusts*, *at* http://www.lta.org/aboutlt/index.html (last visited Apr. 4, 2003).

108. *Id.*

109. *Id.*

110. John A. Tomke, *Message From John A. Tomke, President of Ducks Unlimited*, *at* http://www.ducks.org (last visited Apr. 4, 2003).

111. *Id.*

112. National Audubon Society, *Over a Century of Conservation: An Audubon Timeline*, *at* http://www.audubon.org/nas/timeline.html (last visited Mar. 30, 2004).

113. U.S. EPA & U.S. DEPARTMENT OF AGRICULTURE (USDA), CLEAN WATER ACTION PLAN: RESTORING AND PROTECTING AMERICA'S WATERS 53 (1998) (EPA 840-R-98-001), *available at* http://www.cleanwater.gov/action/cwap.pdf (last visited Apr. 4, 2003).

114. *See, e.g.*, Robert J. Smith, *Viansa Winery Wetlands*, *at* http://www.cei.org/gencon/025,01363.cfm (last visited Apr. 15, 2003) (examining Viansa Winery and their efforts to create a private wetland); Robert J. Smith, *Cypress Bay Plantation, Cummings, South Carolina*, *at* http://www.privateconservation.org/pubs/studies/cypress_bay.pdf (Dec. 2000) (last visited Apr. 14, 2003) (telling the story of Skeet Burris and his private conservation efforts, including wetlands creation, on his plantation in South Carolina).

115. *See, e.g.*, Jonathan Tolman, *Swamped: How America Achieved "No Net Loss"* (Apr. 1997), *at* http://www.cei.org/pdf/2302.pdf (last visited Mar. 30, 2004); COURTNEY LAFOUNTAIN, SAVING WETLANDS WITHOUT SOAKING LANDOWNERS (Center for the Study of American Business Policy Brief No. 164, 1996).

Ducks Unlimited and other conservation groups, have been largely responsible for stemming the loss of wetlands since the mid-1980s.[116] EPA's *Clean Water Action Plan* recognizes the role these incentive-based programs have played, and will continue to play, in wetland conservation and restoration.[117] One analyst who examined federally reported data concluded that while the United States has achieved the stated goal of "no net loss" of wetlands, this would have been the case even without the §404 program. "In fact, if the funds used to run the [Corps'] regulatory program were diverted to voluntary incentive programs, the rate of gain would likely be even greater."[118]

While some people were concerned that the Court's narrow reading of "navigable waters" in *SWANCC* would reduce the amount of environmental protection, there is little reason to believe that this is true. *SWANCC* will indeed reduce the Corps' regulatory authority under the CWA, but as noted above, the CWA is not the only or most effective way to protect wetlands.

IV. The Corps' Statutory Limitations on the Regulation of Wetlands Under the CWA

This Article began by asking the question, "in light of *SWANCC*, what are the statutory limitations on the Corps' authority to regulate wetlands under the CWA?" In *SWANCC*, the Court held that the CWA does not give the Corps the authority to regulate isolated wetlands.[119] While some, including the dissent, believe that the scope of the term "navigable waters" should be broadly defined because Congress defined "navigable waters" as "waters of the United States," the Court disagreed. The regulatory scope of "navigable waters" is limited to "waters that were or had been navigable in fact or which could reasonably be so made."[120] Along with "navigable waters," in the traditional sense of the term, the Corps' regulatory authority also extends to wetlands adjacent to navigable waters, as the Court held in *Riverside*.[121] The Corps' regulatory authority extends to wetlands adjacent to navigable waters because, as the Court stated in *Riverside*, it was Congress' intent "to regulate wetlands inseparably bound up with the 'waters' of the United States."[122] Under *SWANCC*, therefore, the Corps' regulatory authority under the CWA extends to waters that are or have been navigable in fact or which could reasonably be so made, and wetlands adjacent to those navigable waters. The Corps' original interpretation of "navigable waters" supports this view, the legislative history does not disprove it, and there is little reason to believe that the nation's waters will become toxic because the Court limited the Corps' jurisdiction to what was written in the statute.

A. SWANCC*'s Implications on Current Regulations*

Under *SWANCC*, the Corps' wetlands regulations under the CWA are overbroad. As a result, the Corps and EPA have considered amending these regulations. On January 15, 2003, the Corps and EPA published an advanced notice of proposed rulemaking in the *Federal Register* to solicit "comment[s] on issues associated with the scope of waters that are subject to the [CWA], in light" of *SWANCC*.[123] On December 16, 2003, however, EPA and the Corps announced that they would not promulgate a new rule.[124]

The current regulations derive their authority from the wrong source. This conclusion is best illustrated by comparing the current regulations to the Corps' 1974 regulations on the same subject. The 1974 regulations defined "navigable waters" as "those 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."[125] As the Court noted in *SWANCC*, in 1974 the Corps emphasized that "[i]t is the water body's capability of use by the public for purposes of transportation or commerce which is the determinative factor."[126] These regulations correctly defined the regulatory scope of "navigable waters" because they focus on the actual statutory language. The 1974 regulations did not attempt to extend the regulatory scope of "navigable waters" to the full extent of Congress' Commerce Clause authority; rather, actual or future "navigability" was the guide to decide what is "navigable."

In contradistinction, the current regulations assume that Congress defined "navigable waters" to include all waters over which Congress could assert regulatory authority. Thus, the current regulations cover:

> (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
>
> (2) All interstate waters including interstate wetlands;
>
> (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce . . . ;

116. *See* Tolman, *supra* note 115.

117. U.S. EPA & USDA, *supra* note 113.

118. Tolman, *supra* note 115, at 14.

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

120. *Id.* at 172.

121. *Id*. at 167.

122. *Id.* at 168 (internal quotations omitted).

123. Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States," 68 Fed. Reg. 1991 (Jan. 15, 2003).

124. Marty Coyne, *EPA Drops Plan to Issue New Rule, Opening Door to More Litigation*, GREENWIRE, Dec. 17, 2003. EPA Administrator Mike Leavitt and Assistant Administrator for Water G. Tracy Mehan said that EPA would not promulgate a more restrictive rule because of negative public comments on the proposed rule, and also because federal judges have interpreted *SWANCC* rather narrowly, upholding federal jurisdiction over isolated wetlands in many cases. Ironically, the same day as Leavitt and Mehan made their announcement, the Fifth Circuit ruled in *United States v. Needham*, No. 02-30217, 2003 U.S. App. LEXIS 25318, 34 ELR 20009 (5th Cir. Dec. 16, 2003), that courts have construed *SWANCC* too narrowly. The Fifth Circuit reasoned:

> In our view, this definition is unsustainable under *SWANCC*. The CWA and the OPA are not so broad as to permit the federal government to impose regulations over "tributaries" that are neither themselves navigable nor truly adjacent to navigable waters. Consequently, in this circuit the United States may not simply impose regulations over puddles, sewers, roadside ditches[,] and the like; under *SWANCC* "a body of water is subject to regulation . . . if the body of water is actually navigable or adjacent to an open body of navigable water."

Id. at **9-10 (internal citations omitted).

125. 33 C.F.R. §209.120(d)(1) (1975).

126. *SWANCC*, 531 U.S. at 168 (quoting 33 C.F.R. §209.260(e)(1)).

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a)(1) through (4) of this section.[127]

These regulations are overbroad because they do not derive their authority from the CWA's reference to "navigable waters" and the susceptibility of the waters to navigation, but rather these regulations focus on the water's susceptibility to commerce. Regulatory authority under the CWA extends to navigable waters and wetlands adjacent to them, not to any waters Congress could possibility regulate under the Commerce Clause.

Using this analysis, the authority under the CWA does not reach "all interstate waters including interstate wetlands" as the current regulations cover.[128] If an interstate water or wetland is navigable, or is adjacent to navigable waters, then the water body is jurisdictional under the CWA. However, merely because Congress could hypothetically authorize the regulation of interstate water and wetlands does not mean that Congress actually did so under the CWA. The CWA was not written expansively enough to provide for the regulation of interstate waters and wetlands that are not navigable or adjacent to navigable waters.

Also, the CWA does not regulate "[a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce . . . ."[129] The CWA could provide the regulatory authority for this regulation if, and only if, they are navigable or adjacent to navigable waters. In essence, the current regulations read the word "navigable" out of the statute.

The CWA also does not regulate "[t]ributaries of waters identified in paragraphs (a)(1) through (4) of this section,"[130] as the Corp claims in its regulations, unless these tributaries are navigable or adjacent to navigable waters. Nothing in the definition of "navigable waters" extends "navigable waters" to include non-navigable tributaries. If these tributaries are or have been navigable in fact or could reasonably be so made, the CWA provides the statutory authority to regulate them. Otherwise, *SWANCC* forecloses the Corps' authority to regulate tributaries of navigable waters.

B. Recent SWANCC-*Related Court Cases*

Despite the Court's clear instructions in *SWANCC*, not all lower courts have uniformly followed it. In *Headwaters, Inc. v. Talent Irrigation District*,[131] the U.S. Court of Appeals for the Ninth Circuit found that man-made ditches and canals were "waters of the United States."[132] To reach this finding, the Ninth Circuit cited pre-*SWANCC* cases for the definition of "waters of the United States." The court argued that their decision was "not affected by" *SWANCC* because the canals at issue in *Headwaters* were not "'isolated waters' such as those that the Court concluded were outside the jurisdiction of the [CWA]."[133] Instead, the Ninth Circuit found that the canals were "tributaries to other 'waters of the United States.'"[134]

The Ninth Circuit's decision in *Headwaters* misapplies the reasoning of *SWANCC*. The Court disallowed the Corps' regulation of isolated wetlands not solely because of the wetland's isolation, but rather because of the wetland's lack of navigability and lack of adjacency to navigable waters. As the Court explained in *SWANCC*, navigable waters refer to "waters that were or had been navigable in fact or which could reasonably be so made."[135] In *Headwaters*, the Ninth Circuit should have analyzed the irrigation canals' susceptibility to navigation, not their isolation.

In *United States v. Lamplight Equestrian Center, Inc.*,[136] a district court misapplied *SWANCC*. In *Lamplight*, the court ruled that the Corps had regulatory authority over wetlands that were connected to navigable waters only through a drainage ditch that ends before a tributary of Brewster Creek, a creek that drains into the navigable Fox River.[137] The district court argued that "[m]uch of the *SWANCC* opinion has no direct relevance here because that case involved isolated waters lacking a physical/hydrological connection to other navigable waters."[138]

SWANCC's holding, however, was based on water's navigability and adjacency to navigable waters. The *SWANCC* decision was not based on a "physical/hydrological connection" to water. Despite the *Lamplight* district court's arguments, the Corps may only regulate wetlands that have a "physical/hydrological connection" to navigable waters if the wetlands are adjacent to navigable waters.

While some courts have misapplied *SWANCC* by using arguments similar to the Ninth Circuit's in *Headwaters*,[139] others courts have applied *SWANCC*'s teachings correctly. One such example is *Rice v. Harken Exploration Co.*[140] In *Rice*, the U.S. Court of Appeals for the Fifth Circuit held that the CWA did not extend regulatory authority to groundwater or a non-navigable creek, but instead to "water [that] is actually navigable or is adjacent to an open body of navigable water."[141]

The Fifth Circuit also applied *SWANCC* correctly in *United States v. Needham*.[142] At issue in *Needham* was whether oil discharged from a facility contaminated water regulated by the United States under the Oil Pollution Act (OPA).[143] The OPA forbids the discharge of oil into "navigable waters," which is defined as "waters of the United

127. 33 C.F.R. §328.3(a) (2003).

128. *Id*. §328.3(a)(2).

129. *Id*. §328.3(a)(3).

130. *Id*. §328.3(a)(5).

131. 243 F.3d 526, 31 ELR 20535 (9th Cir. 2001).

132. *Id.* at 533.

133. *Id.*

134. *Id.*

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

136. No. 00 C 6486, 2002 WL 360652, 32 ELR 20526 (N.D. Ill. Mar. 8, 2002).

137. *Id.* at *2.

138. *Id.* at *6.

139. *See, e.g.*, Colvin v. United States, 181 F. Supp. 2d 1050 (C.D. Cal. 2001) (arguing that *SWANCC* merely overruled the migratory bird rule); United States v. Buday, 138 F. Supp. 2d 1282 (D. Mont. 2001) (arguing that *SWANCC* dealt with navigability and left intact the Corps' ability to regulate waters that affect interstate commerce).

140. 250 F.3d 264, 31 ELR 20599 (5th Cir. 2001).

141. *Id.* at 269.

142. No. 02-30217, 2003 U.S. App. LEXIS 25318, 34 ELR 20009 (5th Cir. Dec. 16, 2003).

143. 33 U.S.C. §§2701-2720.

States, including the territorial seas."[144] As is obvious from the language of the OPA, the regulatory scope of the OPA regarding "navigable waters" "is co-extensive with the definition found in the [CWA]."[145]

In *Needham*, the United States tried to argue that the term "navigable waters" includes "all waters, excluding groundwater, that have any hydrological connection with 'navigable water.'"[146] The Fifth Circuit found that this definition of "navigable waters" was overly broad:

> In our view, this definition is unsustainable under *SWANCC*. The CWA and the OPA are not so broad as to permit the federal government to impose regulations over "tributaries" that are neither themselves navigable nor truly adjacent to navigable waters. Consequently, in this circuit the United States may not simply impose regulations over puddles, sewers, roadside ditches[,] and the like; under *SWANCC* "a body of water is subject to regulation . . . if the body of water is actually navigable or adjacent to an open body of navigable water."[147]

Thus, although some courts have misapplied *SWANCC*, the Fifth Circuit has applied it correctly by limiting the regulatory scope of "navigable waters" to waters that are "actually navigable or adjacent to an open body of navigable water."[148]

V. Conclusion

In light of *SWANCC*, the Corps' and EPA's statutory authority to regulate the use of wetlands under the CWA only extends to the regulation of navigable waters and wetlands adjacent to navigable waters. This interpretation of the CWA most accurately reflects the clear statutory language and the legislative history of the Act.

144. *Id*. §2701(21).

145. *Needham*, 2003 U.S. App. LEXIS 25318, at *6.

146. *Id.* at *9.

147. *Id.* at **9-10 (internal citations omitted).

148. *Id.* at *10.