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## NOTES

# FOR THE BIRDS: THE STATUTORY LIMITS OF THE ARMY CORPS OF ENGINEERS' AUTHORITY OVER INTRASTATE WATERS AFTER SWANCC

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### I. INTRODUCTION

Every year the Army Corps of Engineers receives over 74,500 applications<sup>1</sup> for permits under section 404(a) of the Clean Water Act (“CWA”), the provision regulating the discharge of fill or dredged material into the nation’s waters.<sup>2</sup> Consequently, when the Supreme Court granted certiorari for *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (“SWANCC”)<sup>3</sup>—a case potentially affecting the status of millions of acres of American wetlands—property owners, developers, and environmentalists alike were wise to stand up and take notice.

The *SWANCC* case involved a Chicago-area consortium of municipalities that sued the U.S. Army Corps of Engineers (“Corps”) for denying them a permit to develop a landfill on an abandoned mining site

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1. See JEFFREY A. ZINN & CLAUDIA COPELAND, CONG. RESEARCH SERV., WETLAND ISSUES 4–5 (2002), available at <http://www.ncseonline.org/NLE/CRSreports/03Jan/IB97014.pdf>.

2. 33 U.S.C. § 1344(a) (2001).

3. *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng’rs* (“SWANCC”), 531 U.S. 159 (2001).

because the Corps had determined the land in question was inhabited by migratory birds.<sup>4</sup> The central issue presented in *SWANCC* was whether this “Migratory Bird Rule”—a regulation promulgated in 1986 giving the Corps authority over wetlands populated by migrating birds<sup>5</sup>—was a proper exercise of jurisdiction under the CWA.<sup>6</sup> The municipalities argued that the rule exceeded the Corps’ authority because the CWA was meant to only regulate waters that are navigable or that adjoin navigable waterways.<sup>7</sup> On the other hand, the Corps argued that its jurisdiction is not limited by traditional notions of navigability; rather it has authority over the nation’s waters to the fullest extent of the Commerce Clause.<sup>8</sup>

In the end, the Court sided with the municipalities and held that, as applied to the petitioner’s site, the presence of migratory birds alone is insufficient grounds on which to base federal jurisdiction under the CWA.<sup>9</sup> Beyond the central holding, however, observers from all sides were left bewildered.<sup>10</sup> No one was sure how the ruling affected other isolated, nonnavigable, intrastate waters.<sup>11</sup> Specifically, since the Supreme Court dealt only with the Migratory Bird Rule, many wondered whether the Corps could continue to assert CWA jurisdiction over isolated waters based on some connection with interstate commerce other than migratory birds.<sup>12</sup> Indeed, Corps regulations have claimed jurisdiction over “all surface water

4. See *id.* at 159–60.

5. Regulatory Programs of the Corps of Engineers; Final Rule, 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986).

6. See *SWANCC*, 531 U.S. at 159–60.

7. See Brief for Petitioners at 5, *SWANCC* (No. 99-1178) [hereinafter Petitioners’ Brief].

8. See Brief for Respondents at 11–12, *SWANCC* (No. 99-1178) [hereinafter Respondents’ Brief].

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

10. According to commentator Michael J. Gerhardt:

[B]oth sides greeted the outcome with uncertainty. Since the majority avoided deciding any constitutional issue, overturned no cases, announced (at least explicitly) no new rules or standards, and arguably left some room open for federal protection of migratory birds, the opponents of the Rule could not be sure of the extent of their victory, while the proponents of the Rule were unsure of the magnitude of their loss.

Michael J. Gerhardt, *The Curious Flight of the Migratory Bird Rule*, 31 ENVTL. L. REP. 11,079, 11,079 (2001). See also DUCKS UNLIMITED, *THE SWANCC DECISION: IMPLICATIONS FOR WETLANDS AND WATERFOWL 2* (2001), available at [http://www.ducks.org/conservation/404\\_report\\_1.pdf](http://www.ducks.org/conservation/404_report_1.pdf). (“There continues to be some debate over what the [SWANCC] [C]ourt actually decided.”).

11. In fact, much confusion exists even several years after the case was decided. See Douglas Jehl, *Chief Protector of Wetlands Redefines Them and Retreats*, N.Y. TIMES, Feb. 11, 2003, at A1 (observing that the Corps has been trying to resolve *SWANCC*’s unanswered question of which wetlands are still eligible for federal protection).

12. Apparently the Corps itself does not have the answer to this question and in early 2003 sought public comment on this very issue. See Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of “Waters of the United States,” 68 Fed. Reg. 1991, 1991 (Jan. 15, 2003), available at <http://www.epa.gov/owow/wetlands/ANPRM-FR.pdf>.

bodies the degradation of which can be expected to affect interstate commerce.”<sup>13</sup> Under the regulations, these effects on commerce include, inter alia, the use of water by foreign and interstate travelers for recreation, the presence of fish or shellfish that could be harvested for sale in interstate commerce, and the use of water by industries in interstate commerce.<sup>14</sup> Because the Supreme Court expressed no opinion on these other bases of jurisdiction, much speculation exists as to their legitimacy under the reasoning of *SWANCC*.

This Note will evaluate the extent of the Corps’ jurisdiction over intrastate waters after the *SWANCC* decision and in particular will critique the claim that the Corps has residual authority over isolated waters derived from connections to interstate commerce similar to the grounds listed above. Part II will examine section 404 of the CWA and the myriad of historical attempts by the Environmental Protection Agency (“EPA”) and the Corps to draw their jurisdictional lines. This Part will show, as the majority opinion in *SWANCC* noted, that the legislative history of the terms “navigable waters” and “waters of the United States” is as muddy as the waters they have tried to define.<sup>15</sup> Part III will take a closer look at the Court’s reasoning in *SWANCC* and its implicit holding that any jurisdiction under the CWA must stem from Congress’s power over navigation, rather than the water’s effect on interstate commerce. Part IV applies this holding to the Corps’ regulations over intrastate waters used by travelers, fish and shellfish harvesters, and interstate industries and argues that these bases are equally illegitimate and no more likely to pass Supreme Court muster than the Migratory Bird Rule. Finally, this Note will respond to the arguments made by both courts and commentators for a narrow reading of *SWANCC* and explain why these arguments are contrary to the reasoning in *SWANCC*, as well as the federalism principles underlying congressional power over navigation.

## II. LEGISLATIVE HISTORY

The *SWANCC* case, at its heart, was a case about defining the

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13. Respondents’ Brief, *supra* note 8, at 11.

14. See 33 C.F.R. § 328.3(a)(3)(i)–(iii) (2003) (defining the term “waters of the United States” as it applies to the Corps under the CWA). See also 40 C.F.R. § 230.3(s)(3)(i)–(iii) (2003) (codifying the EPA’s definition of “waters of the United States”).

15. See *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng’rs* (“*SWANCC*”), 531 U.S. 159, 168 n.3 (2001) (“[T]he legislative history is somewhat ambiguous.”).

statutory coverage of the term “navigable waters” under the CWA.<sup>16</sup> Consequently, any analysis of *SWANCC* must necessarily begin with an examination of the history of that term. Under § 1344(a) of the CWA, the Corps has the authority to issue permits “for the discharge of dredged or fill material into the navigable waters at specified disposal sites.”<sup>17</sup> The CWA defines “navigable waters” rather opaquely as “the waters of the United States, including the territorial seas.”<sup>18</sup> The Corps has issued regulations defining the term “waters of the United States” to include “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.*”<sup>19</sup>

Based on these definitions, the Corps argued in *SWANCC* that its jurisdiction under the CWA extended to the broadest reach of the Commerce Clause.<sup>20</sup> The Court, however, rejected this argument, finding that the word “navigable” in “navigable waters” is a word of exclusion, limiting jurisdiction to those waters over which Congress has “traditional jurisdiction” under its more limited navigation power.<sup>21</sup> This Part will analyze these two divergent theories of jurisdiction, the general commerce power and the more limited federal power over navigation, and will illustrate that the Corps and the *SWANCC* majority were both partially correct in their claims. For purposes of discussion, and to better illustrate the evolution of these two theories, this Part will divide the background into roughly four historical periods: first, original conceptions of the navigation power during the nineteenth and early twentieth centuries; second, the passage of the CWA during the environmental decade of the 1970s; third, initial interpretations of the CWA and its amendments of 1977; and finally, the necessary precursors to *SWANCC* during the 1980s, including the court’s ruling in *United States v. Riverside Bayview Homes* in 1985<sup>22</sup> and the promulgation of the Migratory Bird Rule in 1986.<sup>23</sup>

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16. See William Funk, *The Court, the Clean Water Act, and the Constitution: SWANCC and Beyond*, 31 ENVTL. L. REP. 10,741, 10,742 (2001) (“The Court indicated that the real question at issue in the case was the import of the words ‘navigable waters’ . . .”).

17. 33 U.S.C. § 1344(a) (2001).

18. 33 U.S.C. § 1362(7) (2001).

19. 33 C.F.R. § 328.3(a)(3) (emphasis added).

20. See Respondents’ Brief, *supra* note 8, at 14.

21. See *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng’rs* (“*SWANCC*”), 531 U.S. 159, 172 (2001).

22. See *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 138–39 (1985) (holding wetlands adjacent to navigable waters may be regulated under the CWA).

A. ROLLIN' DOWN THE RIVER: CONCEPTIONS OF NAVIGATION FROM THE  
EARLY REPUBLIC TO THE 1960S

Legal scholarship has long held that although both the power to regulate interstate commerce and the federal power to protect navigation derive from the Constitution, the scope of the two powers are vastly different and involve two separate judicial assessments.<sup>24</sup> Indeed, even Chief Justice Rehnquist, the author for the *SWANCC* majority, recognized in *Kaiser Aetna v. United States* that the two powers were not co-terminous.<sup>25</sup> The reach of these two powers is best understood in light of the three categories laid out in *United States v. Lopez*.<sup>26</sup> Whereas the general Commerce Clause power authorizes Congress to regulate the channels of interstate commerce, the instrumentalities moving in interstate commerce, and those economic activities having a substantial effect on interstate commerce,<sup>27</sup> the federal power to protect navigation comprises only the first category, which allows the national government a servitude or easement in waters otherwise belonging to the individual states.<sup>28</sup> The doctrinal distinction is more than academic; rather it reflects underlying principles of federalism. Unlike the general commerce power, which is intentionally broad to serve the needs of the national economy, the federal power over navigation is restricted to preserve states' autonomy over their own land and water resources.<sup>29</sup> As such, the federal navigation power requires that Congress carefully differentiate between waters of the United States and waters of the states and allows regulation over the former only.<sup>30</sup>

Although federal navigation power is but a subset of the broader

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23. Regulatory Programs of the Corps of Engineers; Final Rule, 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986).

24. See, e.g., Roderick E. Walston, *The Federal Commerce and Navigation Powers: Solid Waste Agency of Northern Cook County's Undecided Constitutional Issue*, 42 SANTA CLARA L. REV. 699, 699-700 (2002).

25. *Kaiser Aetna v. United States*, 444 U.S. 164, 174 (1979) ("[C]ongressional authority over the waters of this Nation does not depend on a stream's 'navigability.'").

26. *United States v. Lopez*, 514 U.S. 549, 558-59 (1995).

27. See *id.*

28. See, e.g., *Kaiser Aetna*, 444 U.S. at 178 (discussing the scope of the government's servitude over navigable waters); *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 63 (1913) (same).

29. See, e.g., *California v. United States*, 438 U.S. 645, 662 (1978) (explaining *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690 (1899)) ("[E]xcept where the reserved rights or navigation servitude of the United States are invoked, the State has total authority over its internal waters.").

30. See Walston, *supra* note 24, at 722-23. Cf. *United States v. Morrison*, 529 U.S. 598, 599 (2000) ("The Constitution requires a distinction between what is truly national and what is truly local.").

commerce power, it suffers the historical quirk of having evolved first. The most likely explanation for this anomaly, as some scholars argue, is the fact that the Supreme Court did not develop interstate Commerce Clause jurisprudence until well into the 1930s when it was forced to evaluate the constitutionality of New Deal legislation.<sup>31</sup> In contrast, courts formulated the federal navigation power relatively early in the nation's history when travel by rivers, streams, and open sea were the principal means of transport.<sup>32</sup>

Indeed, from Lewis and Clark's celebrated trek along the Columbia River to the nineteenth century steamboat races down the Mississippi made legendary by the writings of Mark Twain, American waterways have long been an essential national resource. Yet, despite the primacy of waterways during the early part of the nation's history, the term "navigable waters" is not found in the Constitution.<sup>33</sup> Instead, federal power over navigation derives from the Commerce Clause, which empowers Congress to "regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes."<sup>34</sup> In *Gibbons v. Ogden*, the Supreme Court first recognized the interconnectedness of navigation and interstate commerce:

Commerce, undoubtedly, is traffic, but it is something more: it is intercourse . . . . The mind can scarcely conceive a system for regulating commerce between nations, which shall exclude all laws concerning navigation . . . . America understands, and has uniformly understood, the word "commerce" to comprehend navigation . . . . The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government . . . .<sup>35</sup>

Hence, the Commerce Clause, as interpreted by the Supreme Court, gives Congress plenary authority over navigable waters.<sup>36</sup> Put another way,

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31. See Walston, *supra* note 24, at 700, 710–14. Cases in which the Court addressed the constitutionality of New Deal legislation include, for example, *Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. Darby*, 312 U.S. 100 (1941); and *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

32. See, e.g., Walston, *supra* note 24, at 700.

33. See Virginia S. Albrecht & Stephen M. Nickelsburg, *Could SWANCC Be Right? A New Look at the Legislative History of the Clean Water Act*, 32 ENVTL. L. REP. 11,042, 11,043 (2002).

34. U.S. CONST. art. I, § 8, cl. 3. See also Walston, *supra* note 24, at 700.

35. *Gibbons v. Ogden*, 22 U.S. 1, 189–90 (1824).

36. See, e.g., *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 63 (1913) (holding navigable waters are the "public property of the nation, and subject to all the requisite legislation by Congress"); *Gilman v. Philadelphia*, 70 U.S. 713, 724–25 (1865) ("Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose . . . ."); Albrecht & Nickelsburg, *supra* note 33, at 11,043 ("Federal authority over navigable waters is . . . based on the Commerce Clause.").

the federal power over navigation inheres in the Commerce Clause and is but one part of the more general power to protect interstate commerce, analogous to a small branch on a large tree.<sup>37</sup> However, the *Gibbons* court expressed no opinion regarding the extent of federal jurisdiction, and Chief Justice Marshall offered no guidance as to what the power over navigation exactly entailed.

Almost five decades later, the Supreme Court was presented with its first opportunity to define the term “navigable waters” in *The Daniel Ball*, an 1870 case arising out of admiralty law.<sup>38</sup> The case concerned a congressional act that required vessels transporting merchandise or passengers over “navigable waters of the United States” to be licensed and inspected.<sup>39</sup> Like the *SWANCC* case, the central dispute in *The Daniel Ball* was over the appropriate test of navigability when defining jurisdictional waters within the meaning of the act.<sup>40</sup> The Court first surveyed the English common law tradition of navigability, which required that the waters be linked geographically with the ebb and flow of the tide, but ultimately rejected this test and noted that unlike English waters, which are almost exclusively linked to tidal waters, American waters are not similarly situated.<sup>41</sup> The Court observed that across the vast American continent there are rivers “navigable for many hundreds of miles above as they are below the limits of tide water, and some of them are navigable for great distances by large vessels, which are not even affected by the tide at any point during their entire length.”<sup>42</sup> Thus, the English notion of navigability, developed for a predominantly maritime nation, was not well suited for internal American waterways.<sup>43</sup> Consequently, the Court rejected the English topographical linkage test in favor of a test of “navigable capacity.”<sup>44</sup>

Under the “navigable capacity” theory, waters could not be “brought

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37. See *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 426 (1940) (“[T]he authority of the United States is the regulation of commerce on its waters. Navigability . . . is but a part of this whole.”).

38. *The Daniel Ball*, 77 U.S. 557, 560 (1870).

39. *Id.* at 558.

40. As the Appellant succinctly stated the issue, “What, then is meant by the term ‘navigable waters of the United States.’” *Id.* at 560.

41. *Id.* at 563.

42. *Id.*

43. See *Kaiser Aetna v. United States*, 444 U.S. 164, 182–83 (1979) (Blackmun, J., dissenting) (“[I]t is not surprising that the Court, contemplating the substantial interstate fresh-water commerce on our lakes and rivers, found a test developed in England, an island nation with no analogue to our rivers and lakes, unacceptable as a test for the extent of federal power over these inland waterways.”).

44. *The Daniel Ball*, 77 U.S. at 563.

within the sphere of the sovereignty of the United States”<sup>45</sup> unless they formed a highway for commerce “which Congress can regulate.”<sup>46</sup> According to the Court, this judicial determination required a two-part showing that (1) the water in its ordinary condition be capable of being used by vessels to transport interstate commerce, and (2) the water by itself or connecting with others must form a “continued highway” over which commerce could be carried on with other states or foreign countries.<sup>47</sup> The clear import of this test was to place the function of interstate waters (their navigational and commercial capacity) above their form.<sup>48</sup> In doing so, it harkened back to Marshall’s *Gibbons* opinion recognizing the intrinsic commercial nature of navigation. In other words, to employ more familiar *Lopez* language, what made the waters navigable, and therefore subject to federal jurisdiction, was their use by vessels as a “channel” of interstate commerce.<sup>49</sup>

In 1899, Congress exercised its authority over these channels by passing the Rivers and Harbors Act (“RHA”)<sup>50</sup> with the express policy goal of keeping waterways open and unobstructed for commerce. It did so through three main provisions. First, section 9 of the Act required congressional approval before bridges, dams, or their like could be built over rivers and “other water.”<sup>51</sup> Additionally, section 10 of the Act prohibited filling channels of “any navigable water,” without prior approval from the Chief of Engineers and the Secretary of the Army.<sup>52</sup> Finally, section 13 of the RHA, also known as the Refuse Act,<sup>53</sup> prohibited the discharge of waste material into any navigable water without a permit from the Secretary of the Army and approval of the Chief of Engineers.<sup>54</sup>

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45. *Id.* at 561.

46. *Id.*

47. *Id.* at 563.

48. This functional approach was also articulated in *Gilman v. Philadelphia*: “‘Commerce among the States’ does not stop at a State line. Coming from abroad it penetrates wherever it can find navigable waters reaching from without into the interior, and may follow them up as far as navigation is practicable.” *Gilman v. Philadelphia*, 70 U.S. 713, 725 (1866). *See also* *Gibson v. United States*, 166 U.S. 269, 271–72 (1897) (“All navigable waters are under the control of the United States for the purpose of regulating and improving navigation . . . it is always subject to the servitude in respect of navigation created in favor of the Federal government by the Constitution.”).

49. *See* *United States v. Lopez*, 514 U.S. 549, 558–59.

50. 33 U.S.C. §§ 403–407 (2001).

51. *See* Sam Kalen, *Commerce to Conservation: The Call for a National Water Policy and the Evolution of Federal Jurisdiction Over Wetlands*, 69 N.D. L. REV. 873, 880 (1993) (citing 33 U.S.C. § 401 (1988)).

52. *See id.* at 880 (citing 33 U.S.C. § 403 (1988)).

53. *See id.* at 880 n.37.

54. *See id.* at 880 (citing 33 U.S.C. § 407 (1988)).

The RHA impacts the story of *SWANCC* in several key ways. First, like the CWA, the RHA drew its jurisdictional line at “any navigable water,” thereby employing the same statutory language interpreted in *The Daniel Ball* to mean waters forming a highway usable by vessels for commercial purposes.<sup>55</sup> Second, section 10 of the RHA uses the terms “navigable waters” and “waters of the United States” interchangeably,<sup>56</sup> which closely parallels the CWA as it defines “navigable waters” simply as “the waters of the United States.”<sup>57</sup> Also, similar to the CWA are the RHA’s permitting provisions for discharging refuse. Like section 404(a) of the CWA, which required the Solid Waste Agency of Northern Cook County to obtain a permit to discharge dredge or fill material in the nation’s waters, the RHA likewise mandated a permit to release refuse into a navigable waterway.<sup>58</sup> Finally, the RHA was also enforced by the Chief of Engineers and Secretary of the Army, the predecessor of the Army Corps of Engineers.<sup>59</sup> Seen in this light, the RHA regulatory scheme is the direct antecedent of the CWA program scrutinized in *SWANCC*; thus, an understanding of the RHA tends to shed light on the type of authority the Corps inherited.

Since 1899, two major twentieth century developments have broadened the scope of federal power over navigation beyond that initially conceived in *The Daniel Ball* and the RHA. The first development involved the Federal Water Power Act, which was passed in 1920 to facilitate the development of hydroelectric power by establishing a regulatory commission to license dams and other power generators.<sup>60</sup> This Act departed from *The Daniel Ball* framework by defining “navigable waters” as waters “over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States.”<sup>61</sup> Hence, for purposes of the Act, jurisdiction extended to the fullest breadth of the Commerce Clause powers, rather than being limited by navigation

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55. *Cf.* 1902 Atlantic Ltd. v. Hudson, 574 F. Supp. 1381, 1393–95 (E.D.Va. 1983) (explaining that jurisdiction under the RHA extends to waters considered traditionally navigable or usable to transact interstate or foreign commerce).

56. *See* Albrecht & Nickelsburg, *supra* note 33, at 11,044.

57. 33 U.S.C. § 1362(7) (2001).

58. *See* 33 U.S.C. §§ 401–407 (2001).

59. *See* Kalen, *supra* note 51, at 880.

60. *See* Federal Water Power Act, Pub. L. No. 66-280, 41 Stat. 1063 (1920). The Act was amended under Pub. L. No. 74-333, 49 Stat. 838 (1935) and renamed the Federal Power Act. *See* United States v. Appalachian Elec. Power Co., 311 U.S. 377, 398 n.2 (1940).

61. Walston, *supra* note 24, at 726 (citing 16 U.S.C. § 796(8) (1994)).

and federalism principles.<sup>62</sup> As a result, many power generators filed suit, arguing that Congress had overstepped its authority by regulating waters only tangentially related to navigation.<sup>63</sup> Interestingly, the Court upheld the Act against these challenges, even while acknowledging its purpose bore little relationship to navigation.<sup>64</sup> However the Court seemed not to acknowledge that Congress was asserting its general commerce power. Instead, the Court upheld this Act as a valid exercise of the navigation power by stretching the navigability test laid out in *The Daniel Ball*. For example, in *United States v. Appalachian Electric Power Co.*, the Court expanded the definition of “navigable waters” from *The Daniel Ball* to include waters currently non-navigable, but that could be made so through reasonable improvements.<sup>65</sup> The apparent reason for its more lenient interpretation was the Court’s pragmatic desire not to hinder Congress’s authority simply because a waterway required reasonable improvements to make it a highway of commerce.<sup>66</sup> In a subsequent case—*Economy Light & Power Co. v. United States*—involving another electric generator, the Court held that “navigable waters” included those waters that had been once navigable in the past, but had become obstructed or otherwise fallen into disuse.<sup>67</sup> Taken together, *The Daniel Ball*, *Appalachian Power*, and *Economy Light* form the current interpretation of the federal power over “navigable waters.” It is this triad of “navigable in fact,” “susceptible to navigation,” and “past use” that the SWANCC court referred to as comprising “traditional navigable waters.”<sup>68</sup>

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62. See *id.* (arguing that under the Power Act “navigable waters” are defined as co-extensive with Congress’s Commerce Clause power). Indeed, the Supreme Court held that the Power Act was based in Congress’s commerce power, rather than its more limited power over navigation. See *Fed. Power Comm’n v. Union Elec. Co.*, 381 U.S. 90, 96 (1965) (“Congress drew upon its full authority under the Commerce Clause, including, but not limited to its power over water commerce.”).

63. Roderick Walston argues that while the act was passed partially for navigation purposes, it was also passed for the broader purpose of power generation. See Walston, *supra* note 24, at 726.

64. See *id.* at 727.

65. *Appalachian Electric*, 311 U.S. at 407 (“A waterway, otherwise suitable for navigation, is not barred from that classification merely because artificial aids must make the highway suitable for use before commercial navigation may be undertaken.”).

66. See *id.* at 408 (“The power of Congress over commerce is not to be hampered because of the necessity for reasonable improvements to make an interstate waterway available for traffic.”). See also *id.* at 409 (“It cannot properly be said that the federal power over navigation is enlarged by the improvements to the waterways. It is merely that improvements make applicable to certain waterways the existing power over commerce.”).

67. See *Econ. Light & Power Co. v. United States*, 256 U.S. 113, 123 (1921).

68. *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng’rs* (“SWANCC”), 531 U.S. 159, 172 (2001) (stating that Congress’s authority for enacting the CWA was “its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made”). See also Albrecht & Nickelsburg, *supra* note 33, at 11,044 (claiming that subsequent judicial interpretations have expanded the definition of navigable waters to include “waters that are now, that

The second major broadening of the federal navigation power involves the evolution of the RHA in the years leading up to 1972. As the *SWANCC* dissent observed, the focus of the RHA shifted during the 1960s from regulating water obstructions to controlling pollution and preventing environmental degradation.<sup>69</sup> Although the RHA retained its jurisdictional line as “navigable waters,” environmental activists sought to apply the permitting provisions to industrial discharges even when the discharges did not obstruct navigability.<sup>70</sup> These citizen suits were largely successful—in 1960 the Supreme Court held that releases of industrial waste into a waterway could constitute an “obstruction” within the meaning of the RHA and hence required a permit from the Corps.<sup>71</sup> The activists were dealt another victory in 1966 when the Court held that pollutants such as gasoline spills fall under the RHA’s ban on depositing “any refuse matter of any kind or description” in navigable water.<sup>72</sup> In fact, prosecuting polluters under the RHA proved so successful that by the late 1960s, industries and developers lobbied the executive branch for protection.<sup>73</sup> However, before it could adopt a workable compromise between business and environmental groups, Congress acted to pass the CWA.<sup>74</sup>

#### B. SILENT SPRINGS, LAKES, AND TRIBUTARIES: CWA AND POLLUTION-CONTROL MEASURES

Congress passed the CWA in 1972 with the stated purpose of “restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the nation’s waters.”<sup>75</sup> Enacted during the great flurry of activism known collectively as the “environmental decade,” the CWA was meant to complement the suite<sup>76</sup> of environmental regulation by

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have been used in the past or that are susceptible to use in the future with reasonable improvements by vessels in interstate or foreign commerce”).

69. See *SWANCC*, 531 U.S. at 178 (Stevens, J., dissenting). See also Kalen, *supra* note 51, at 880–81.

70. See *SWANCC*, 531 U.S. at 178 (Stevens, J., dissenting).

71. See *United States v. Republic Steel Corp.*, 362 U.S. 482, 485, 489 (1960).

72. See *United States v. Standard Oil Co.*, 384 U.S. 224, 229–30 (1966) (“There is nothing more deserving of the label ‘refuse’ than oil spilled into a river.”).

73. ROBERT V. PERCIVAL, ALAN S. MILLER, CHRISTOPHER H. SCHROEDER & JAMES P. LEAPE, *ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY* 634 (3d ed. 2000).

74. For a full account of the events leading up to the passage of the Clean Water Act, see Kalen, *supra* note 51, at 883–87.

75. 33 U.S.C. § 1251(a) (2001). The act was originally passed as the Federal Water Pollution Control Act Amendments and renamed the Clean Water Act when amended in 1977. See PERCIVAL ET AL., *supra* note 73, at 635.

76. Other legislation comprising the modern federal regulatory infrastructure include the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”), 7 U.S.C. § 136 (1994), passed in 1972; Toxic

“prohibit[ing] all unpermitted discharges of pollutants into surface waters . . . implementing technology-based effluent limits on dischargers, and . . . establishing a national permit system to be implemented by [the] EPA.”<sup>77</sup> The Act was also unique in that it established a separate permit program, section 404, designed especially for wetlands.<sup>78</sup>

The legislative history of the CWA indicates that Congress struggled with the issue of defining the geographic scope of federal jurisdiction. Both the House and Senate versions used the term “navigable waters” to describe the area over which the Corps had authority to regulate, but each bill defined the phrase differently.<sup>79</sup> The House version defined “navigable waters” as ‘navigable waters of the United States, including territorial seas.’<sup>80</sup> Conversely, the Senate version defined “navigable waters” as ‘the navigable waters of the United States, portions thereof, and the tributaries thereof, including the territorial seas and the Great Lakes.’<sup>81</sup> Both versions, therefore, defined “navigable waters” with an express reference to navigability.<sup>82</sup>

It could be argued that by using the phrase “navigable waters,” a term whose only prior statutory use was in section 10 of the RHA, Congress intended to invoke the same jurisdiction it had historically asserted over national waters, namely its power only over waters navigable in fact.<sup>83</sup>

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Substances Control Act (“TSCA”), 15 U.S.C. §§ 2601–2629 (1994), passed in 1976; Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531–1544 (1994), passed in 1973; Marine Protection, Research, and Sanctuaries Act (“Ocean Dumping Act”), 33 U.S.C. §§ 1401–1445 (1994), passed in 1972; Safe Drinking Water Act (“SDWA”), 42 U.S.C. § 300(f)–(g) (1994), passed in 1974; National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321–4370(a) (1994), passed in 1970; The Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. §§ 6901–6987 (1994), passed in 1976; and The Clean Air Act, 42 U.S.C. §§ 7401–7642 (1994), passed in 1970.

77. PERCIVAL ET AL., *supra* note 73, at 108.

78. Prior to the CWA, wetlands were generally not protected under federal law. Indeed, in the nineteenth century, Congress passed the Swamp Acts of 1849, 1850, and 1860 to drain and fill wetland areas, which were viewed as public nuisances and hurdles to development. *See* Kalen, *supra* note 51, at 877. The Swamp Acts gave fifteen western states approximately sixty-five million acres of marshes, mudflats, and other “wastelands” for reclamation. *See* WILLIAM L. WANT, LAW OF WETLANDS REGULATION § 2:6 n.1 (2002). In passing section 404(a) of the CWA, Congress hoped to reverse the tide of wetland loss. Specifically, section 402 of the CWA aimed to regulate the discharge of “fill material” into wetlands, which it defined as “material used for the primary purpose of replacing an aquatic area with dry land.” 33 C.F.R. § 323.2(k) (1985). This provision, which regulates the dumping of such material, is much more expansive than section 10 of the RHA, which only regulated the dredging or removal of such material from the Nation’s waters. *See* Nat’l Mining Ass’n v. U.S. Army Corps of Eng’rs, 145 F.3d 1399, 1401 (D.C. Cir. 1998).

79. *See* Albrecht & Nickelburg, *supra* note 33, at 11,047.

80. *Id.* at 11,047 (quoting H.R. 11896, 92d Cong. § 502(8) (1972)).

81. *Id.* at 11,047 (quoting S. 2770, 92d Cong. § 502(h) (1971)).

82. *See* Funk, *supra* note 16, at 10,748.

83. *See* Albrecht & Nickelsburg, *supra* note 33, at 11,047.

However, this explanation is unsatisfying for at least two reasons. First, prior to the passage of the CWA, Congress had expressed a desire to broaden the scope of its regulation beyond that available under the RHA. Indeed, the House Committee on Government Relations held hearings in 1972 in which several lawmakers chastised the Corps for failing to bring its regulations in line with more recent judicial opinions such as the *Appalachian Power* and *Economy Light* cases.<sup>84</sup> The problem, according to the legislators, was that the Corps had taken a cramped view of its jurisdiction by limiting its authority to waters presently navigable instead of incorporating the more expansive view of “navigable waters” as those also navigable in the past or susceptible to navigation.<sup>85</sup> Still more revealing, the Committee also insisted the Corps bring intrastate navigable lakes under its definition, an idea theretofore seen as outside the scope of federal navigation power.<sup>86</sup> These hearings, which helped precipitate the enactment of the CWA, indicate that Congress desired to expand jurisdiction beyond the historical limits of the RHA. At the very least, the hearings intimate congressional desire to codify the expansive view of federal navigation power under the triad of *The Daniel Ball*, *Appalachian Power*, and *Economy Light* cases. Seen in this context, Congress sought to incorporate *Appalachian Power* and *Economy Light* into its jurisdictional repertoire, even if it chose to use the old RHA phraseology, “navigable waters.”<sup>87</sup>

Second, both the Senate and House Committees on Public Works expressed concerns about overlimiting the scope of “navigable waters” when they reported their respective bills out of committee.<sup>88</sup> For example, as the House report explained:

One term the Committee was reluctant to define was the term “navigable waters.” The reluctance was based on the fear that any interpretation would be read narrowly. However, this is not the Committee’s intent. The Committee fully intends that the term “navigable waters” be given the broadest possible constitutional interpretation unencumbered by agency determinations [that] have been made or may be made for

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84. *See id.* at 11,045.

85. *See id.*

86. *See id.* at 11,045–46 (noting that the general counsel of the EPA believed these waters to be outside the scope of federal jurisdiction).

87. *See* J. Michael Bayes, *New Limits on the Army Corps of Engineers’ Jurisdiction: The Court Throws the Migratory Bird Rule Overboard*, 7 ENVTL. LAW. 691, 698 n.25 (2001) (observing that most case law preceding *SWANCC* held that Congress’s definition of “navigable waters” in the CWA as “waters of the United States” was broader than its definition of “navigable waters” in the RHA).

88. *See* Funk, *supra* note 16, at 10,748.

administrative purposes.<sup>89</sup>

Moreover, the Senate report also expressed an earnest desire for broad jurisdiction, noting that “[w]ater moves in hydrological cycles,” and ecological needs required “discharge of pollutants [to] be controlled at the source.”<sup>90</sup> Thus, legislative intent, as reflected in the House and Senate Reports, also supports the claim that Congress believed it was empowering the Corps with more authority under the CWA with the phrase “navigable waters” than under the old RHA.

In the final conference bill, the word “navigable” was removed from the definition of “navigable waters,” such that “navigable waters” was now defined simply as “the waters of the United States.” One might argue, as the Corps did in *SWANCC*, that by eliminating the reference to navigability, Congress was intending to go not just beyond its historic navigation jurisdiction in the RHA, but also to reach the furthest limits under the general commerce power. Proponents of this theory attempt to substantiate this claim by noting that, as the Conference Report explained, “[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.”<sup>91</sup>

Yet this argument goes too far and tends to overstate Congress’s intent. Rather than showing that the conference version eliminated *any* reference to navigability, the fact that the CWA defines “navigable waters” as “the waters of the United States” proves nothing more than that Congress used the same statutory approach as it did with the RHA.<sup>92</sup> This means that Congress probably intended “navigable waters” and “waters of the United States” to be placeholders for the federal navigation power, consistent with the former statutory construction of that term. Moreover, reference to the Conference Report’s language about giving “waters of the United States” the “broadest possible constitutional interpretation” is equally unavailing, as the careful reader will recall the same language was used in the earlier House report to explain “navigable waters of the United States.” Consequently, while the foregoing evidence indicates Congress intended a broad reading of “navigable waters,” it goes too far to say that Congress intended anything beyond a broad interpretation of its traditional

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89. *Id.* at 10,748 (quoting H.R. REP. NO. 92-911, at 131 (1971)).

90. *Id.* (quoting S. REP. NO. 92-414, at 77 (1971)).

91. *Id.* (quoting S. REP. NO. 92-1236, at 144 (1971)).

92. Recall that the RHA used “waters of the United States” interchangeably with “navigable waters.” See *supra* note 56 and accompanying text.

power over navigation.<sup>93</sup>

Indeed, floor debate on the CWA further evinces the notion that Congress meant its federal navigation power rather than its more general Commerce Clause power. As debate in the Senate clarified:

Based on the history of the consideration of this legislation, it is obvious that its provisions and the extent of its application should be construed broadly. It is intended that the term 'navigable waters' include all water bodies, such as lakes, streams, and rivers, regarded as public navigable waters in law which are navigable in fact. It is further intended that such waters shall be considered to be navigable in fact when they form, in their ordinary condition by themselves or by uniting with other waters or other systems of transportation, such as highways or railroads, a continuing highway over which commerce is or may be carried on with other States or with foreign countries in the customary means of trade and travel in which commerce is conducted today.<sup>94</sup>

The House floor manager for the CWA bill, Representative John D. Dingell (D-Mich.) similarly explained:

[T]he conference bill defines the term 'navigable waters' broadly for water quality purposes. It means all 'the waters of the United States' in a geographical sense. It does not mean 'navigable waters of the United States' in the technical sense as we sometimes see in some laws.

The new and broader definition is in line with more recent judicial opinions which have substantially expanded . . . 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, etc.<sup>95</sup>

Hence, it is relatively clear that when defining the term "navigable waters" in the CWA, Congress did not intend to exercise its general Commerce Clause powers, as the Corps argued in *SWANCC*. Rather, it appears that the Court was correct when it held that "navigable waters" simply means the more limited federal power over navigation, under *The*

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93. See Albrecht & Nickelsburg, *supra* note 33, at 11,048–49; Funk, *supra* note 16, at 10,749.

94. See Funk, *supra* note 16, at 10,748 (quoting Senate Consideration of the Report of the Conference Committee, Oct. 4, 1972, reprinted in A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 178 (1973)).

95. *Id.* at 10,749 (quoting House Consideration of the Report of the Conference Committee, Oct. 4, 1972, reprinted in A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 250–51 (1973)).

*Daniel Ball, Appalachian Power, and Economy Light* triad of cases.<sup>96</sup>

C. THE 1977 AMENDMENTS: CWA JURISDICTION REACHES ITS HIGH WATER MARK

One year after the CWA was passed, the EPA issued its first regulations interpreting “waters of the United States” to include:

- (1) All navigable waters of the United States;
- (2) Tributaries of navigable waters of the United States;
- (3) Interstate waters;
- (4) Intrastate lakes, rivers, and streams which are utilized by interstate travelers for recreation or other purposes;
- (5) Intrastate lakes, rivers, and streams from which fish or shellfish are taken and sold in interstate commerce; and
- (6) Intrastate lakes, rivers, and streams which are utilized for industrial purposes by industries in interstate commerce.<sup>97</sup>

However, unlike the EPA, which apparently labored under the impression that the 1972 Act eliminated all reference to navigability,<sup>98</sup> the Corps responded with a much narrower interpretation. Mindful of the prior 1970 congressional hearings, in which legislators had admonished the Corps to update their definitions in light of the *Appalachian Power* and *Economy Light* decisions,<sup>99</sup> the Corps defined “navigable waters” as “those waters which are presently, or have been in the past, or may be in the future susceptible for use of purposes of interstate or foreign commerce.”<sup>100</sup> Thus, the EPA’s definition, (which included the use of water by travelers, fish harvesters, and interstate industries) was grounded in Congress’s general Commerce Clause power, specifically the power over activities substantially affecting commerce, whereas the Corps’ definition was based

96. See *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng’rs* (“*SWANCC*”), 531 U.S. 159, 168 n.3 (2001) (“[N]either 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.”); *id.* at 172 (“The term ‘navigable’ has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.”).

97. 38 Fed. Reg. 13,528, 13,529 (May 22, 1973). One might observe that categories 4–6 are nearly identical to current regulations under 33 C.F.R. § 328.3(a)(3)(i)–(iii) (2003) (the Corps’ regulations) and 40 C.F.R. § 230.3(s)(3)(i)–(iii) (2003) (the EPA’s regulations).

98. See Albrecht & Nickelsburg, *supra* note 33, at 11,049 (noting that in 1973, the EPA’s general counsel issued an opinion stating that the deletion of the word “navigable” from the definition of “navigable waters” eliminated any navigability requirement for jurisdiction).

99. See *supra* notes 84–87 and accompanying text.

100. Navigable and Ocean Waters, 37 Fed. Reg. 18,290 (Sept. 9, 1972).

in the more limited federal navigation power.

These divergent interpretations by the Corps and the EPA sparked considerable controversy from the outset. In 1975, environmental groups challenged the Corps' definition as being illegally narrow in *National Resources Defense Council, Inc. v. Callaway*.<sup>101</sup> The district court ruled that the phrase "navigable waters" when defined as "waters of the United States" is not limited to traditional tests of navigability and that Congress intended jurisdiction to reach the "maximum extent permissible under the Commerce Clause of the Constitution."<sup>102</sup> The court ordered the Corps to revise and publish new regulations within fifteen days.<sup>103</sup>

Pursuant to the order, the Corps promulgated new regulations.<sup>104</sup> Indeed, over the next two years, the Corps issued several sets of interim regulations. By 1977, however, Congress's amendments and reauthorization of the entire Act superceded the Corps' revisions.<sup>105</sup>

In the House, proponents of the 1977 amendments attempted to reign in the *Callaway* decision by circumscribing jurisdiction under section 404 of the CWA to navigable waters and adjacent wetlands.<sup>106</sup> By "navigable waters," the House meant those navigable in fact or reasonably susceptible to being navigable in interstate or foreign commerce.<sup>107</sup> "Adjacent wetlands" meant those contiguous to navigable waters, characterized by periodic inundation and specific vegetation.<sup>108</sup> As the House committee report further explained, "Section 404 requires a permit . . . for the discharge of dredged or fill material into any water or wetland of the United States . . . section 16 amends section 404 by limiting the requirement for a permit to navigable waters and adjacent wetlands."<sup>109</sup> Hence, as some scholars observe, in 1977, the House believed the Corps was exercising authority beyond traditional navigable waters as defined in the 1972 Act, and this legislative activity was aimed at overturning *Callaway* and restoring the original intent of Congress.<sup>110</sup>

Conversely, the Senate bill would have retained the broad definition

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101. *Natural Res. Def. Council, Inc. v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975).

102. *Id.* at 686.

103. *Id.*

104. *See Kalen, supra* note 51, at 893.

105. For a more complete history regarding these interim regulations, see *id.* at 892–97.

106. *See id.* at 898–99.

107. *See id.* at 899.

108. *See id.*

109. *See Albrecht & Nickelsburg, supra* note 16, at 10,752.

110. *See id.*

interpreted in *Callaway*.<sup>111</sup> Senator Lloyd Bentsen (D-Tex.) offered an amendment similar to the House proposal to limit the scope of federal jurisdiction to navigable waters and adjacent wetlands.<sup>112</sup> Arguments were made on both sides, but the amendment was narrowly defeated in a vote that has been called “nothing less than a Senate referendum on the then-current interpretation of the 1972 Act reflected in the *Callaway* case.”<sup>113</sup>

The House and Senate versions were sent to conference, and ultimately Congress adopted the Senate version, which left the definition of “navigable waters” unchanged. Therefore, the legislative record indicates that during the 1977 reauthorization debate, Congress arguably knew that the *Callaway* case and other administrative decisions had eviscerated any limitations regarding navigability, yet Congress acquiesced to this expanded definition by failing to pass an amendment to reign in the jurisdiction.<sup>114</sup> While this account certainly seems plausible, especially based on the documentary history, the *SWANCC* Court refused to draw such an inference regarding congressional acquiescence to sweeping jurisdiction based on the general commerce power.<sup>115</sup>

#### D. OPENING THE FLOODGATES: *RIVERSIDE BAYVIEW HOMES* AND THE MIGRATORY BIRD RULE

That the *SWANCC* majority was so dismissive of the 1977 reauthorization amendments as proof of congressional acceptance of broad CWA jurisdiction should be particularly surprising given that the same legislative history was so heavily relied on in its 1985 decision in *United States v. Riverside Bayview Homes*.<sup>116</sup> This case arose out of a suit filed by the Corps against a development company who had placed fill material into some of its eighty acres of low-lying, marshy land in order to prepare the area for construction of a housing development.<sup>117</sup> The Corps sought to enjoin the activity, believing it was a violation of CWA regulations, which prohibited the filling of adjacent wetlands without a permit.<sup>118</sup> After the

111. See Kalen, *supra* note 51, at 900.

112. See Albrecht & Nickelsburg, *supra* note 16, at 10,753.

113. *Id.*

114. *Id.* at 10,753–54.

115. See *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs* (“*SWANCC*”), 531 U.S. 159, 171 (2001).

116. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 135–39 (1985).

117. See *id.* at 124.

118. See *id.* at 124, 129. Corps regulations further defined wetlands as ‘inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal

Sixth Circuit held the regulations did not apply to the developer's property, the Supreme Court granted certiorari to determine whether the Corps could regulate adjacent wetlands under section 404 of the CWA.<sup>119</sup>

The Court unanimously upheld the Corps' regulations as a reasonable exercise of federal jurisdiction under the CWA.<sup>120</sup> Although the court expressly deferred on whether the Corps could regulate nonadjacent, isolated intrastate wetlands (the issue later presented in *SWANCC*),<sup>121</sup> the Court held that the comprehensive purpose of the CWA, as well as judicial deference to reasonable agency interpretations under the *Chevron* doctrine, compelled such a result.<sup>122</sup> However, what seemed to animate the Court even more than policy and judicial deference was the legislative history of the CWA, especially the 1977 reauthorization debate discussed above. Four full pages of the opinion discussed the 1977 congressional deliberation.<sup>123</sup> The Court delineated that because adjacent wetlands were specifically debated in the legislative history,<sup>124</sup> Congress intended them to be included in the CWA's purview. Describing the 1977 debate, the Court appeared persuaded that by rejecting the House bill as well as the Bentsen amendment in the Senate,<sup>125</sup> Congress acquiesced to expansive federal wetlands jurisdiction. As the opinion states,

Although we are chary of attributing significance to Congress' failure to act, a refusal by Congress to overrule an agency's construction of legislation is at least some evidence of the reasonableness of that construction, particularly where the administrative construction has been brought to Congress' attention through legislation specifically designed to supplant it.<sup>126</sup>

In other words, the Court believed that Congress was fully aware that jurisdiction under the CWA had been greatly expanded past the traditional federal navigation power and by failing to adopt a more stringent definition in the 1977 amendments, Congress in effect gave its blessing to such

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circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.' *Id.* at 129 (quoting 33 C.F.R. § 323.2(c) (1985)) (emphasis removed).

119. *Id.* at 125–26.

120. *Id.* at 139.

121. *Id.* at 131–32 n.8.

122. *See id.* at 131–33.

123. *See id.* at 136–39.

124. The Court observes that Congress added section 404(g) of the CWA, which specifically provided for federal protection of navigable waters “including wetlands adjacent thereto.” *See id.* at 138. Moreover, the Court found that by authorizing appropriations for a “National Wetlands Inventory,” Congress expressed a policy of including wetlands for protection under the CWA. *See id.* at 139.

125. *See supra* notes 106–112 and accompanying text.

126. *Riverside Bayview Homes*, 474 U.S. at 137.

expansion.

Flying on the wings of its victory in *Riverside Bayview*, the Corps amended its regulations the following year by passing what has been termed the “Migratory Bird Rule.”<sup>127</sup> The rule was promulgated as preamble language to clarify the reach of its jurisdiction under 33 C.F.R. § 328.3(a)(3), the provision defining “waters of the United States” to include intrastate waters, “the use, degradation or destruction of which could affect interstate or foreign commerce.”<sup>128</sup> The Corps had already listed three examples of uses that would qualify for federal jurisdiction, namely if the water was used for recreational purposes by interstate or foreign travelers, if the water was inhabited by fish or shellfish that could be harvested for sale in interstate commerce, or if the water was used for industrial purposes by businesses in interstate commerce.<sup>129</sup> The aim of the 1986 addition was to insert another category to the list: those intrastate waters used by migratory birds. The full promulgation read:

EPA has clarified that waters of the United States at 40 C.F.R. § 328.3(a)(3) also include the following 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.<sup>130</sup>

Since the Corps intended the Migratory Bird Rule as an appendage to the list of uses of water that could affect interstate commerce, the underlying theory of jurisdiction was the general Commerce Clause power, rather than the federal navigation power.<sup>131</sup> Under this interpretation of the

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127. Federal Regulatory Programs of the Corps of Engineers; Final Rule, 51 Fed. Reg. 41,216, 41,217 (Nov. 13, 1986). To this day the Corps dispute the nomenclature, arguing that “the examples were neither a rule nor entirely about birds.” Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of “Waters of the United States,” 68 Fed. Reg. 1991, 1994 (Jan. 15, 2003).

128. 33 C.F.R. § 328.3(a)(3) (2003).

129. See 33 C.F.R. § 328(a)(3)(i)–(iii) (2003).

130. Regulatory Programs of the Corps of Engineers; Final Rule, 51 Fed. Reg. at 41,217.

131. Indeed, this was the entire theory of the government’s case in *SWANCC*. See *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng’rs (“SWANCC”)*, 531 U.S. 159, 173 (2001) (“Respondents argue that the ‘Migratory Bird Rule’ falls within Congress’s power to regulate intrastate activities that ‘substantially affect’ interstate commerce.”); Respondents’ Brief, *supra* note 8, at 37 (“[T]he destruction of migratory bird habitat can be expected to have a substantial aggregate effect on interstate commerce.”).

CWA, the Corps attempted to punt the old *Daniel Ball–Appalachian Power–Economy Light* framework, and consequently any water was potentially susceptible to federal regulation as long as the activities conducted in it (by birds or by humans) substantially affected interstate commerce.

The Corps' novel approach of using migratory bird habitats to gain authority over otherwise nonjurisdictional intrastate waters did not escape the scrutiny of lower courts in the years leading up to the Supreme Court's decision in *SWANCC*. The Fourth Circuit first expressed its skepticism of the Migratory Bird Rule in 1997 in its opinion in *United States v. Wilson*.<sup>132</sup> In this case, the court held that the Corps exceeded its statutory authority under the CWA by regulating non-navigable, intrastate waters solely on the grounds that "the use, degradation, or destruction of such waters *could* affect interstate commerce."<sup>133</sup> The court objected that the regulation required neither an actual and substantial effect on commerce, nor a connection to navigable or interstate waters.<sup>134</sup> As a result, the court invalidated 33 C.F.R. § 328.3(a)(3) in its entirety,<sup>135</sup> meaning that the Corps could no longer assert jurisdiction on waters solely because of their use by travelers, fish, interstate industries, and migratory birds.

The Migratory Bird Rule received warmer receptions in other circuits. For example, the Ninth Circuit twice upheld the Migratory Bird Rule in the *Leslie Salt* cases.<sup>136</sup> Like *SWANCC*, which involved the denial of a dredge and fill permit to a developer whose land was inhabited by migratory birds, the *Leslie Salt* Company similarly challenged the Corps' assertion of jurisdiction over its property.<sup>137</sup> A series of litigation ensued, with the court ultimately siding with the Corps.<sup>138</sup> Likewise, approximately six years before hearing *SWANCC*, the Seventh Circuit upheld the application of the Migratory Bird Rule to isolated, intrastate wetlands as long as the presence of birds was supported by "substantial evidence."<sup>139</sup> Thus, the split between circuits, combined with the Supreme Court's recent federalism decision in *Lopez* made the *SWANCC* case ripe for review.

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132. *United States v. Wilson*, 133 F.3d 251, 257 (4th Cir. 1997).

133. *See id.* at 257 (emphasis in original).

134. *Id.*

135. *Id.* at 257.

136. *See Leslie Salt Co. v. United States*, 55 F.3d 1388, 1392 (9th Cir. 1995). *See also* Bayes, *supra* note 87, at 704–05.

137. *See* Bayes, *supra* note 87, at 704–05.

138. *See Leslie Salt*, 55 F.3d at 1396.

139. *See Hoffman Homes, Inc. v. Adm'r*, 999 F.2d 256, 260 (7th Cir. 1993).

### III. THE SWANCC CASE

The Solid Waste Agency of Northern Cook County (“SWANCC”) formed as a consortium of twenty-three Chicago-area municipalities for the purpose of acquiring a disposal site for baled, nonhazardous waste.<sup>140</sup> The group purchased a 533 acre parcel spanning Cook and Kane Counties, which was once the site of a sand and gravel mining operation.<sup>141</sup> Abandoned since approximately 1960, the area had become a successional stage forest, and the mining depressions that remained had filled with seasonal rainwater, creating ponds of various sizes throughout the property.<sup>142</sup>

The dispute arose when the consortium, armed with its requisite state and county permits in hand, was denied a section 404 fill permit by the Corps.<sup>143</sup> Ironically, the Corps initially believed it had no jurisdiction over the site because the property did not contain “wetlands.”<sup>144</sup> However, the Corps reclassified the site after observing 121 bird species on the land and subsequently denied SWANCC’s request for a permit, even though SWANCC had submitted mitigation proposals to preserve some of the birds.<sup>145</sup> After the Seventh Circuit upheld the Corps’ administrative determination, SWANCC appealed to the Supreme Court, which granted certiorari.<sup>146</sup>

#### A. MAJORITY OPINION

The consortium advanced two main arguments for its cause: First, it argued that the application of the Migratory Bird Rule to its isolated, nonnavigable, intrastate property exceeded the statutory authority of the CWA, and second, Congress lacked authority under the Commerce Clause to grant such jurisdiction.<sup>147</sup> Chief Justice Rehnquist, writing for the majority, held that the Migratory Bird Rule did exceed the scope of section 404 of the CWA, and therefore declined to reach the constitutional claim.<sup>148</sup>

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140. Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng’rs (“SWANCC”), 531 U.S. 159, 162–63 (2001).

141. *Id.* at 163.

142. *Id.*

143. *Id.* at 163–64.

144. *Id.*

145. *Id.* at 164–65.

146. *Id.* at 166.

147. *Id.* at 165–66.

148. *Id.* at 162.

In reaching this holding, Rehnquist first attempted to distinguish *SWANCC* from the Court's earlier decision in *Riverside Bayview Homes*. While acknowledging that the earlier decision upheld the application of section 404 of the CWA to adjacent wetlands, Rehnquist noted that it was the "significant nexus" between the adjacent wetlands and navigable waters that "informed [the Court's] reading of the CWA in *Riverside Bayview Homes*."<sup>149</sup> Rehnquist then pointed to a slippery slope, saying that in order for the Corps to prevail, the Court would have to hold that jurisdiction extends to nonadjacent, isolated ponds, a step he was not willing to take.<sup>150</sup>

Rehnquist was also forced to distinguish from *Riverside Bayview Homes*' holding that the word "navigable" was of limited import.<sup>151</sup> Instead of striking down this former interpretation, Rehnquist chose to moderate it, opining that there is a large difference between giving a word "limited effect" and giving it "no effect whatever."<sup>152</sup> He then reiterated that "navigable" at least acted as a modifier by limiting the CWA's jurisdiction to "traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made."<sup>153</sup> Thus, with this last sentence, Rehnquist reinstated the *Daniel Ball—Appalachian Power—Economy Light* framework and, by implication, struck down *Callaway*.<sup>154</sup> According to the *SWANCC* majority, the CWA's authority sounds in the federal "power over navigation,"<sup>155</sup> not in the general commerce power to regulate intrastate activities that substantially affect interstate commerce. Consistent with his advocacy for the federal navigation power, Rehnquist also pointed to federalist principles of protecting "the States' traditional and primary power over land and water use."<sup>156</sup>

Once the Court held that jurisdiction under the CWA is to be predicated on the limited federal power over navigation rather than the general commerce powers, its ruling that the Migratory Bird Rule was not fairly supported by the CWA followed by necessity.<sup>157</sup> After all, the

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149. *Id.* at 167.

150. *Id.* at 168.

151. *Id.* at 172 (quoting *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985)).

152. *Id.*

153. *See id.*

154. *See id.* at 168 (ruling that the Corps' original regulations of 1974 did not mistake congressional intent and implying that the *Callaway* Court erred in finding that CWA jurisdiction extended to the furthest reach of Commerce Clause powers).

155. *See id.* at 168 n.3.

156. *See id.* at 174.

157. *See id.* at 167 ("We conclude that the 'Migratory Bird Rule' is not fairly supported by the CWA.").

Migratory Bird Rule, and in fact all the other categories under 33 C.F.R. § 328.3(a)(3), were anchored in the idea of ‘affect[ing] interstate or foreign commerce.’<sup>158</sup> Instead, what matters under the federal navigation power “is the water body’s capability of use by the public for purposes of transportation or commerce.”<sup>159</sup>

Yet, the majority had one last question to answer. Why did the Court buy the congressional acquiescence argument in *Riverside Bayview Homes*, but not in *SWANCC*? As discussed above in Part II, credible evidence from the legislative history of the 1977 CWA amendments indicates that Congress understood *Callaway* to have broadened the scope of jurisdiction beyond the traditional navigation power.<sup>160</sup> In *Riverside Bayview Homes*, the Court appeared persuaded by this evidence of legislative acquiescence, but the *SWANCC* court was not so convinced.<sup>161</sup> What explains this disparity? One main difference between the two is that while the *Riverside Bayview Homes* Court was able to point to specific provisions of the 1977 debate that mentioned adjacent wetlands, the *SWANCC* Court was obviously unable to find similar language mentioning the Migratory Bird Rule since the rule was not passed until 1986.<sup>162</sup> Of course, the difference could also be explained by the *SWANCC* Court’s level of comfort between the two categories; while the Court expressed confidence that adjacent wetlands are fairly well tethered to navigable waterways, migratory bird habitats could exist anywhere, which led the Court to demand a clear statement from Congress that it intended such a questionably constitutional result.<sup>163</sup>

## B. DISSENT

Justice Stevens disagreed with the majority on almost every major point, from the significance of the 1977 amendments to the precedential value of *Riverside Bayview Homes*. Stevens began his assessment of the

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158. See *id.* at 163 (quoting 33 C.F.R. § 328.3(a)(3) (2001)).

159. See *id.* at 168 (quoting the Corps’ original 1974 regulations).

160. See *supra* notes 106–113 and accompanying text.

161. Compare *supra* notes 123–125 and accompanying text, with *SWANCC*, 531 U.S. at 171 (“[R]espondents point us to no persuasive evidence that the House bill was proposed in response to the Corps’ claim of jurisdiction over nonnavigable, isolated, intrastate waters or that its failure indicated congressional acquiescence to such jurisdiction.”).

162. See *SWANCC*, 531 U.S. at 170.

163. See *id.* at 172. Of course, the difference could also be explained by the growing textualist movement, led by Scalia, to eliminate any use of the legislative history when analyzing statutes. See generally Charles Tiefer, *SWANCC: Constitutional Swan Song for Environmental Laws or No More Than a Swipe at Their Sweep?* 31 ENVTL. L. REP. 11,493 (2001) (observing the politics of the *SWANCC* Court).

Migratory Bird Rule by referring to the legislative history of the CWA.<sup>164</sup> He pointed to the comprehensive scope and the remedial nature of the CWA, noting that the Act was designed to protect water quality for “esthetic, health, recreational, and environmental uses,” and argued that the jurisdiction should be similarly broad.<sup>165</sup> Stevens emphasized that the CWA does not list the promotion of water transportation or keeping waterways free of obstructions as its objectives, unlike the nineteenth century RHA.<sup>166</sup> Rather, the CWA is focused solely on ‘preventing, reducing, or eliminating the pollution of navigable waters.’<sup>167</sup>

The dissent also disagreed with what it believed was a disingenuous reading of the 1977 amendments.<sup>168</sup> According to the dissent, the 1977 reauthorization debate clearly shows Congress acquiesced to broad jurisdiction by failing to pass legislation that would have overturned *Callaway*. Stevens contended *Riverside Bayview Homes* allowed for legislative history to be evidence of such acquiescence, and that there was no principled reason for the majority to backpedal on its former findings.<sup>169</sup>

Finally, Stevens expressed his opinion on the constitutional claim, which the majority had refused to consider. According to his interpretation, the Migratory Bird Rule was a valid exercise of Congress’s power to regulate activities having a substantial affect on interstate commerce.<sup>170</sup> Stevens argued that whether one aggregates the effects of discharging fill materials into wetlands, or aggregates the effects of such activity on migratory bird populations, either way the activity undertaken by SWANCC substantially affected commerce, thereby subjecting it to federal jurisdiction.<sup>171</sup> Stevens also countered the majority’s invocation of federalist principles and state controlled land use, suggesting that migratory birds have previously been held by the Court to be a matter of national concern, especially given that competition between the states would leave bird habitats undersupplied.<sup>172</sup> Because the migratory birds are by

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

165. See *id.*

166. See *id.* at 180.

167. *Id.* (quoting 33 U.S.C. § 1252). See also *id.* at 181 (“Indeed, the goals of the 1972 statute have nothing to do with *navigation* at all.”).

168. See *id.* (“The Court dismisses this clear assertion of legislative intent with the back of its hand.”).

169. See *id.* at 186.

170. See *id.* at 193.

171. See *id.* at 193–94.

172. See *id.* at 195 (arguing that protection of migratory birds has previously been held by the Court to be a “textbook example of a *national* problem”); *id.* at 195–96 (advancing the race-to-the-

definition transitory, Stevens felt that only a coordinated, national policy would adequately protect them.<sup>173</sup>

#### IV. ANALYSIS

The majority opinion in *SWANCC* correctly held that the presence of migratory birds on the consortium's isolated, nonnavigable, intrastate property was insufficient grounds on which to assert federal jurisdiction under section 404 of the CWA. Although the dissent was right in claiming that the CWA is a fundamentally broader statute than the RHA, the plain language of the CWA extends only to "navigable waters," a phrase that has been interpreted since *The Daniel Ball* as shorthand for the federal power to protect navigation.<sup>174</sup> While some would contend that the term "navigable waters" was plucked from the air, and can therefore be interpreted in any way Congress desires,<sup>175</sup> it would certainly be a cosmic coincidence for Congress to use a phrase steeped in over one hundred years of admiralty convention, as well as embodying specific judicial connotations, if it did not intend to continue using those same interpretations. Indeed, if Congress intended to break from the RHA's tradition and propose a different jurisdictional line as some suggest, why did it not also employ a new term devoid of any historical vestiges? Instead, the simplest explanation for the retention of the phrase "navigable waters," defined as "waters of the United States," is that Congress intended to go forward with the framework it had established in the RHA, as clarified in cases such as *Appalachian Power* and *Economy Light*.

Critics of *SWANCC* contend that because the CWA was enacted for the broad and comprehensive purpose of protecting waterways, its jurisdiction should reach the full extent of Congress's Commerce Clause powers so as to give effect to those congressional objectives. But this argument proves too much. When determining the outer limits of congressional authority, it is not enough to assume that whatever furthers the underlying purposes of the act is the law.<sup>176</sup> Every statute must find a balance between achieving a desired result and staying within the

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bottom economic theory as a reason why states are incapable of adequately supplying migratory bird habitats).

173. *Id.* at 196.

174. *Contra id.* at 182 (Stevens, J., dissenting).

175. *See* Funk, *supra* note 16, at 10,746 ("In short, if Congress wishes to define the statutory term 'brown' to mean 'red' for purposes of a particular statute, it is free to do so.")

176. *See* Funk, *supra* note 33, at 11,058.

constitutional bounds dictated by the federalist system of government.<sup>177</sup> Although no one denies the sweeping purposes of the CWA, those goals must be pursued within the statutory framework adopted by Congress, and the framework chosen was the federal navigation power.<sup>178</sup>

Given the wide ranging pollution-control policies underlying the CWA, it is curious that Congress decided to borrow heavily from the regulatory framework of the RHA,<sup>179</sup> especially considering there was a much better alternative available: the Federal Power Act of 1920 (“Federal Power Act”). As discussed earlier in Part II, the Federal Power Act explicitly defined its jurisdiction to the fullest extent of the Commerce Clause, and placed no limits on navigability.<sup>180</sup> Like the CWA, the Federal Power Act was also adopted for comprehensive remedial purposes.<sup>181</sup> By modeling after the Federal Power Act, rather than the RHA, the CWA could have drawn into its control any waters “over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States.”<sup>182</sup> This would have unequivocally placed section 404 of the CWA’s jurisdiction squarely within Congress’s general Commerce Clause powers, thereby countenancing the Migratory Bird Rule if it could be shown that the aggregated effects substantially impacted commerce. If this had been the case, the *SWANCC* Court would have faced a much more difficult decision and would have had to confront the constitutional issue, which it chose not to decide.

Yet, *SWANCC* cautions against inferring too much from counterfactuals.<sup>183</sup> Instead, as *SWANCC* noted, it is sufficient to assume

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177. *See id.*

178. *See supra* notes 55–57 and accompanying text.

179. For a list of similarities between the two Acts, see *supra* notes 55–59 and accompanying text.

180. *See supra* notes 61–62 and accompanying text. *Compare* Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng’rs (“*SWANCC*”), 531 U.S. 159, 182 (2001) (Stevens, J., dissenting) (“The majority accuses respondents of reading the term ‘navigable’ out of the statute. But that was accomplished by Congress when it deleted the word from the § 502(7) definition.”), *with* Fed. Power Comm’n v. Union Elec. Co., 381 U.S. 90, 107 (1965) (“[W]e find it of compelling significance that the Congress adopted comprehensive language and refrained from writing any limitation or reference to navigation into § 23(b).”).

181. *Compare* *SWANCC*, 531 U.S. at 179 (Stevens, J., dissenting) (“This Court was therefore undoubtedly correct when it described [the CWA] as establishing a ‘comprehensive program for controlling and abating water pollution.’”) (quoting *Train v. City of New York*, 420 U.S. 35, 37 (1975)), *with* *Union Elec.*, 381 U.S. at 99 (“[T]he 1920 Federal Water Power Act ‘was . . . a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation.’”) (quoting *First Iowa Hydro-Elec. Coop. v. Fed. Power Comm’n*, 328 U.S. 152, 180 (1958)).

182. *See supra* notes 61–62 and accompanying text.

183. *See* *SWANCC*, 531 U.S. at 169–70.

that Congress intended its traditional power over navigable waters, the Corps did not mistake congressional intent in promulgating its first regulations, and the *Callaway* court simply erred in holding that the Corps regulations were impermissibly narrow. Whatever one's personal opinion about the validity of the holding, the *SWANCC* decision remains the law, with no sign of changing in the near future.<sup>184</sup> The task at hand, then, becomes evaluating the impact of the *SWANCC* decision on the remaining categories of the Corps' jurisdiction.<sup>185</sup>

Because the Court held the CWA sounds in the federal power over navigation rather than the general commerce power to regulate activities that substantially affect commerce, the Court effectively invalidated the entirety of 33 C.F.R. § 328.3(a)(3), the regulation concerning intrastate waters "the use, degradation or destruction of which could affect interstate or foreign commerce."<sup>186</sup> This means that all the so-called uses under 33 C.F.R. § 328.3(a)(3), including use by travelers, the presence of fish that could be taken for sale, and the use by industries in interstate commerce are no longer acceptable methods of establishing jurisdiction for section 404 of the CWA's permitting provisions. Along with the Migratory Bird Rule, these categories were proffered as a non-exclusive list of illustrations which could attach federal jurisdiction to intrastate waters. As the *SWANCC* decision makes clear, however, the necessary condition for jurisdiction to attach is the navigability (either current, past, or susceptibility thereto) of the waterway,<sup>187</sup> or its adjacency to a navigable waterway.<sup>188</sup>

After the *SWANCC* decision was handed down, the government attempted to limit the holding by characterizing it as only invalidating jurisdiction over isolated, intrastate, nonnavigable waters "where the sole basis for asserting [the] CWA[']s jurisdiction is the actual or potential use of the waters as habitat for migratory birds that cross State lines in their migrations."<sup>189</sup> Perhaps this reflected a desire to hold onto the remaining

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184. Indeed, *SWANCC* appears to join *Lopez* as part of a larger agenda to reestablish limits on the Commerce Clause power. See *SWANCC*, 531 U.S. at 173 ("Twice in the past six years we have reaffirmed the proposition that the grant of authority to Congress under the Commerce Clause, though broad, is not unlimited.").

185. See, e.g., Advanced Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States," 68 Fed. Reg. 1991, 1993 (Jan. 15, 2003) ("It is appropriate to review the regulations to ensure that they are consistent with the *SWANCC* decision.").

186. 33 C.F.R. § 328.3(a)(3) (2003).

187. See *SWANCC*, 531 U.S. at 172.

188. See *United States v. Riverside Bayview Homes*, 474 U.S. 121, 129–31 (1985).

189. Advanced Notice of Proposed Rulemaking on the Clean Water Acts Regulatory Definition of "Waters of the United States," 68 Fed. Reg. at 1994.

categories of jurisdiction based under 33 C.F.R. § 328.3(a)(3). However, there is no principled reason why the examples listed in 33 C.F.R. § 328.3(a)(3) are any different than the Migratory Bird Rule. Indeed, one could argue that of all the categories, migratory birds were the least objectionable group. After all, the Migratory Bird Rule was also based on obligations to protect the birds under at least four international treaties.<sup>190</sup> As a result, if international obligations under treaties are insufficient grounds on which to assert the CWA's authority, then there is no reason why the use of water by travelers, harvestable fish, or interstate industries would provide any unique claim for jurisdiction.

## V. CONCLUSION

This Note has attempted to distinguish between the federal power over navigation and the general commerce power, as well as trace the historical applications of both. The animating difference between the two powers involves essential questions of federalism and the role of states in controlling their own land and water resources. In *SWANCC*, the Court was forced to decide whether authority to regulate wetlands under the CWA was based in Congress's general commerce powers, as the Corps urged, or in the more limited federal power over navigation, as the *SWANCC* consortium believed. Ultimately, the Court held that the Migratory Bird Rule was a regulation that could not fly and ruled that the necessary condition to establish jurisdiction is the waterway's navigable capacity or its adjacency to navigable waterways.

Section 404 of the CWA continues to be the subject of fierce debate in both public and private circles. Although the full impact of the *SWANCC* decision is yet to be determined, one thing is for sure: for the remaining 105.5 million acres of American wetlands,<sup>191</sup> *SWANCC* will not be the last word.

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190. These treaties include: Convention Concerning the Conservation of Migratory Birds and Their Environment, Nov. 19, 1976, U.S.-U. S. S. R., 29 U.S.T. 4647; Convention for the Protection of Migratory Birds and Birds in Danger of Extinction, and Their Environment, Mar. 4, 1972, U.S.-Japan, 25 U.S.T. 3329; Convention for the Protection of Migratory Birds and Game Mammals, Feb. 7, 1936, U.S.-Mex., 50 Stat. 1311; Convention for the Protection of Migratory Birds, Aug. 16, 1916, U.S.-Gr. Brit., 39 Stat. 1702.

191. WANT, *supra* note 78, § 2:4.

