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“NOW OPEN FOR DEVELOPMENT?”: THE PRESENT STATE OF REGULATION OF ACTIVITIES IN NORTH CAROLINA WETLANDS

JOSEPH J. KALO*

Regulation of activities altering or destroying isolated freshwater wetlands is a very controversial topic. Over the past fifteen years, challenges to both the federal Clean Water Act's section 404 wetlands regulations and state wetlands regulation programs have intensified. In recent years, although proponents of the programs have found a sympathetic ear in the administering agencies, the opponents of such programs are beginning to find a more receptive judicial audience. At the federal level, on one hand, the 2001 decision of the United States Supreme Court in Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (SWANCC) indicates that isolated freshwater wetlands and waters are not section 404 jurisdictional waters, leaving such areas beyond the reach of the current law. On the other hand, within days of the SWANCC decisions, the federal agencies issued a revised Tulloch rule designed to limit mechanized landclearing activities in freshwater wetlands, including isolated ones. At the state level, pending litigation in North Carolina challenges the validity of the state Environmental Management Commission's (EMC) wetlands rules. The uncertainty surrounding the breadth of the holding in SWANCC and pending state litigation raises serious questions about the continued protection of many ecologically significant, isolated North Carolina freshwater wetlands. In this article, Professor Kalo argues that the SWANCC decision does withdraw isolated freshwater wetlands from the protections of section 404 and undermines the objective of the revised Tulloch rule. However, Professor Kalo concludes that the Environmental Management Commission has the necessary statutory authority to support its

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wetlands rules and their application to ditching and draining activities affecting isolated freshwater wetlands within the state.

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INTRODUCTION

The principal mechanism of federal regulation of activities adversely affecting wetlands is section 404 of the Clean Water Act (CWA),¹ which requires a permit from the United States Army Corps of Engineers (Corps) for any discharges of dredge or fill material into “waters of the United States.”² Since 1977, freshwater wetlands—the use, degradation, or destruction of which could affect interstate or foreign commerce—have been included within the regulatory definition of “waters of the United States,”³ and the regulatory definition of what constitutes a discharge has been expanded.⁴ The regulations promulgated to implement section 404 during that time have created minimum, national, uniform standards for determining which activities in wetlands areas are consistent with the protection of the important ecological functions performed by wetlands.⁵ In North Carolina, since 1996, state water quality rules have supplemented the federal section 404 program, providing an additional layer of protection for the wetlands resources of the state.⁶ As a result, the annual loss of wetlands resources through draining, ditching, filling, and conversion to other uses has been greatly reduced.⁷ At the

1. 33 U.S.C. §§ 1344–1377 (1994). The Act originally was titled the Federal Water Pollution Control Act of 1972. Pub. L. No. 92-500, 86 Stat. 852 (1972). It was renamed the Clean Water Act in 1977. Pub. L. No. 95-217, 91 Stat. 1567 (1977).

2. 33 U.S.C. §§ 1301(a), 1344, 1362(6), (7), (12), (14), (16) (1994) (providing authority for the Corps to regulate, through its section 404 permit program, discharges of dredge and fill activities into waters of the United States).

3. See *infra* notes 52–56 and accompanying text.

4. See *infra* notes 118–37 and accompanying text.

5. 33 C.F.R. § 320.4(b)(2) (2000) (describing the functions performed by wetlands that are important to the public interest); 40 C.F.R. § 230.41 (2000) (noting the potential adverse effects of the discharge of dredge or fill material in wetlands areas).

6. See *infra* notes 159–67 and accompanying text.

7. Of the estimated original 221 million acres of wetlands in the continental United States, approximately 100.9 million acres remain. Between 1950 and 1970, the estimated annual loss was 458,000 acres per year. During the period from 1970 to 1980, after the passage of the CWA, the estimated annual loss declined to 290,000 acres per year. From 1985 to 1995, when isolated freshwater wetlands were brought within the section 404 program permit requirements, the annual losses were reduced to approximately 117,000 acres per year. THOMAS E. DAHL, STATUS AND TRENDS OF WETLANDS IN THE COTERMINOUS UNITED STATES, 1986 TO 1997, at 34 (2000), available at <http://wetlands.fws.gov/bha/SandT/SandTReport.html> (last visited Sept. 9, 2001) (on file with the North Carolina Law Review). Wetlands loss in North Carolina is difficult to assess due to the lack of reliable historical data. At the time of European settlement, North Carolina contained 7.8 million acres of wetlands. By the mid-1970s, an estimated 5.7 million acres remained, which is about seventeen percent of the state's land area. Gordon E. Cashin et al., *Wetland Alteration Trends on the North Carolina Coastal Plain*, 12 WETLANDS 63, 64 (1992). The general consensus is that there has been a decline in wetlands loss in the state. Telephone Interview with Derb Carter, Senior Attorney, Southern Environmental Law

present time, however, regulation of activities adversely affecting wetlands is in a state of considerable uncertainty in North Carolina and throughout the nation. This uncertainty is the result of three circumstances. The first is the recent United States Supreme Court decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (SWANCC)*;⁸ the second is the continuing challenges to federal regulations defining what activities in wetlands constitute regulated “discharges”;⁹ and the third is litigation in the North Carolina state courts attacking the assertion of state authority over the ditching and draining of wetlands.¹⁰

Part II of this Article discusses the federal section 404 regulatory program and the basis for the assertion of CWA jurisdiction over activities in isolated freshwater wetlands by the Corps and the Environmental Protection Agency (EPA), which jointly administer the section 404 program.¹¹ The meaning of the phrase “waters of the United States” and the term “discharge” are examined.¹² Central to the discussion of “waters of the United States” is the *SWANCC* decision, which is discussed in the first half of Part II.¹³ The message of *SWANCC* appears to be that isolated, non-navigable, wholly intrastate waters and wetlands¹⁴ are not “waters of the United

Center (May 30, 2001).

8. 531 U.S. 159 (2001); see also Derb Carter, *Supreme Court Decision Defies Common Sense and Intent of Congress*, NAT'L WETLANDS NEWSL. (Environmental Law Institute, Washington, D.C.), Mar.-Apr. 2001, at 7, 15-16 (“The *SWANCC* decision will undoubtedly spark widespread litigation to resolve whether a particular water or wetland is regulated under the Clean Water Act.”); David M. Ivester, *The Supreme Court Draws a Line*, NAT'L WETLANDS NEWSL. (Environmental Law Institute, Washington, D.C.), Mar.-Apr. 2001, at 5, 6 (observing that the issue of which waters are “isolated” will undoubtedly be the subject of future discussions between landowners and agencies and the focus of future litigation).

9. See *infra* text accompanying notes 118-42.

10. For a more detailed history of the promulgation of, and litigation surrounding, the state wetland rules, see *infra* text accompanying notes 164-216.

11. Because the Corps and the EPA both have regulatory roles under Section 404 of the CWA, the Corps jurisdictional regulations parallel the EPA regulations. For example, 40 C.F.R. § 230.3(s)(3) is the corresponding EPA regulation to 33 C.F.R. § 328.3(a)(3), the Corps regulation at issue in *SWANCC*. In this Article, the discussion of the effect of judicial decisions on Corps regulations is equally applicable to the parallel EPA regulations.

12. See *infra* text accompanying notes 44-149.

13. See *infra* text accompanying notes 64-117.

14. As used in this Article, “isolated” means open freshwaters or wetlands that lack a surface hydrological connection to other waters that are part of, or adjacent to, interstate waters or navigable-in-fact waters or a tributary system of either. “Non-navigable” means that the waters are not navigable-in-fact. “Wholly intrastate” means that all of the body or water or wetland lies within the boundaries of a single state.

States.”¹⁵ Such a narrow interpretation of “waters of the United States” jeopardizes the section 404 program and the gains in wetlands protection achieved over the past twenty-five years.¹⁶ Such an interpretation would leave outside the protection of the CWA many ecologically significant freshwater wetlands and small open water ponds. These freshwater wetlands and ponds are isolated, non-navigable, wholly intrastate wetlands and waters and would be beyond the regulatory authority granted to the Corps and the EPA by the CWA.

Section 404 regulatory authority hinges not only on whether the area is part of the “waters of the United States,” but also upon whether the particular activity is a “discharge.” If either of the two elements is absent, the activity is not subject to section 404 regulatory requirements. Wetlands losses resulting from large-scale mechanized landclearing, ditching, and draining activities aimed at converting wetlands to tree plantations,¹⁷ soybean farms,¹⁸ golf courses,¹⁹

15. See *infra* text accompanying notes 84–116.

16. The reasoning and result in *SWANCC* is already being attacked in the environmentalist community. See, e.g., Carter, *supra* note 8, at 7 (arguing that *SWANCC* reverses “nearly a quarter of a century of fairly settled law that Clean Water Act protection extends to . . . ‘isolated’ waters and wetlands”); Robin Kundis Craig, *Navigating Federalism: The Missing Statutory Analysis in Solid Waste Agency*, 31 ENVTL. L. REP. 10,508, 10,510 (2001) (noting that the Supreme Court in *SWANCC* contradicted congressional intent and ignored Congress’s “complex but rational scheme for dividing state and federal regulatory authority to protect the nation’s waters”); Robert G. Dreher, *Unsettling the Balance of Federalism: The SWANCC Decision*, NAT’L WETLANDS NEWSL. (Environmental Law Institute, Washington, D.C.), Mar.-Apr. 2001, at 1 (“*SWANCC* upset[s] almost 30 years of cooperative effort between federal and state governments to protect the nation’s aquatic resources . . . [and throws] open a large part of the nation’s most sensitive and valuable aquatic habitat to unfettered development.”); Patrick Parenteau, *Our Wetlands Dominoes*, NAT’L L.J., Feb. 26, 2001, at A18 (“[T]his result-oriented decision is simply the latest example of the conservative majority’s single-minded determination to ‘reign in’ the power of the federal government whenever the opportunity presents itself, regardless of precedent, principle or public policy.”); Herman Schwartz, *An Out-of-Control Court*, THE NATION, Mar. 26, 2001, at 6 (commenting that the “Supreme Court’s conservative bloc seems determined to continue using its one-vote majority to ram through an assault on Congressional power”).

17. Brian Feagans, *Restoration: Regulators Slowly Restoring Once Violated Wetlands*, MORNING STAR (Wilmington, N.C.), Aug. 28, 1999, at 1A.

18. See, e.g., *Avoyelles Sportsmen’s League, Inc. v. Marsh*, 715 F.2d 897, 929 (5th Cir. 1983) (applying section 404 of the CWA to large-scale landclearing operations). The *Avoyelles* litigation concerned a large-scale landclearing operation intended to convert a 20,000-acre tract of land into soybean production. Most of the acreage consisted of forested wetlands. *Avoyelles* held that such large-scale landclearing operations were subject to the regulatory requirements of section 404 of the CWA. In the 1960s and 1970s, prior to the *Avoyelles* decision, large areas of cypress swamp in Louisiana’s Atchafalaya Basin were cleared and converted into soybean production. Many of these soybean operations proved unprofitable, however, and the fields were later abandoned. The state

subdivisions,²⁰ or other uses have long been a concern of environmental groups and others.²¹ With modern technology, this can frequently be accomplished with only small amounts of the removed soil and vegetation falling back into the wetland area.²² These small amounts of soil falling back are referred to as "incidental fallback."²³

and federal governments are purchasing the abandoned fields and returning them to high-quality wetlands. See Bob Anderson, *Atchafalaya Wetlands Restoration Planned*, BATON ROUGE ADVOC., Feb. 16, 1995, at 1B.

19. See, e.g., United States Army Corps of Engineers, Review and Findings: Old Cutler Bay Permit 404(q) Elevation (Sept. 13, 1990) (on file with the North Carolina Law Review). This permit elevation decision concerned the application of the practical alternatives of the EPA section 404 guidelines. The 357-acre project, located next to Biscayne National Park, involved the construction of 428 upscale single-family dwellings and an eighteen-hole golf course designed by Jack Nicklaus. To build the golf course, the developer planned to fill fifty-nine acres of wetlands, including twelve acres of white mangrove swamp. The project eventually was allowed to proceed after the developer agreed not to fill eight acres of the mangrove swamp. See *Agencies Protest Plan to Fill Wetlands*, ST. PETERSBURG TIMES, June 5, 1990, at 4B; David Conyers, *Developer Agrees to Avoid Mangroves*, ST. PETERSBURG TIMES, Dec. 27, 1990, at 4B; *EPA Puts Hold on Wetlands Fill*, ST. PETERSBURG TIMES, Dec. 7, 1990, at 7B. See also Editorial, *Tale From the Swamp*, NEWS & OBSERVER (Raleigh, N.C.), Dec. 15, 2000, at A22 (describing pressure to drain eastern North Carolina wetlands for housing and golf course projects).

20. See, e.g., Scott Harper, *EPA Cites 10 Local Projects for Destroying Wetlands*, VIRGINIAN PILOT AND LEDGER-STAR (Norfolk, Va.), May 9, 2000, at A1 (reporting the draining of wetlands for subdivisions in Virginia); see also Editorial, *Tale From the Swamp*, *supra* note 19 (describing the threat to wetlands from new development). A controversial topic was Nationwide Permit 26, which authorized the filling of small amounts of wetlands. Nationwide Permit 26 was allowed to expire in June 2000. Its replacement, Nationwide Permit 39, is much more restrictive. The National Association of Home Builders vigorously opposed the change. See, e.g., Bill Sapp, *Nationwide Permit 26: Replaced or Eliminated?*, NAT'L WETLANDS NEWSL. (Environmental Law Institute, Washington, D.C.), Mar.-Apr. 2000, at 1, 13 (describing the environmental concerns raised by Nationwide Permit 26 and comparing it to the new Nationwide Permit 39, its more restrictive and complicated replacement).

21. Much of the litigation which resulted in the expansion of the section 404 program was initiated by environmental organizations and citizens groups. For example, the *Tulloch* rule was adopted in response to citizen-initiated litigation, see *Am. Mining Cong. v. United States Army Corps of Eng'rs*, 951 F. Supp. 267, 269 (D.D.C. 1997), and the *Avoyelles* litigation was initiated by environmental groups. See *Avoyelles*, 715 F.2d at 901, n.5. The original *Tulloch* rule stated that "[t]he term discharge of dredged material means . . . any addition, including any redeposit, of dredged material, including excavated material, into the waters of the United States, which is incidental to any activity, including mechanized landclearing." 33 C.F.R. § 323.2 (2000) (emphasis added). The practical effect of the *Tulloch* rule was to require a section 404 permit for any large-scale landclearing operation in wetlands or other waters of the United States, because it would be almost impossible to remove soil and vegetation from wetlands areas without some soil or vegetation falling off the removal equipment back into the wetland area. Such fallback would be regarded as a redeposit. *Am. Mining*, 951 F. Supp. at 270, n.3. The EPA promulgated a parallel rule, which was codified at 40 C.F.R. § 232.2(1)(iii) (2000).

22. *Am. Mining*, 951 F. Supp. at 269.

23. 33 C.F.R. § 232.2(d)(2)(II) (2000) defines incidental fallback as "the redeposit of small volumes of dredged material that is incidental to excavation activity in waters of the

Eight days after the *SWANCC* decision, the Corps and the EPA issued a new, final regulation modifying the definition of “discharge of dredged material.”²⁴ The new regulation attempts to continue to assert section 404 jurisdiction over large-scale mechanized landclearing activities while responding to the ruling in *National Mining Association v. United States Army Corps of Engineers*²⁵ that incidental fallback is not a “discharge” subject to section 404 regulation.²⁶ The new regulation states that the use of mechanized earth-moving equipment to conduct landclearing, ditching, or other mechanized excavation activities in waters of the United States is presumed to result in a prohibited discharge absent project-specific evidence showing that the activity results in only incidental fallback.²⁷ Not surprisingly, homebuilders, mining companies, and farmers immediately challenged the new regulation as inconsistent with the decision in *National Mining*.²⁸ The second half of Part II discusses the new regulation, its background, and its relationship to the *SWANCC* decision.²⁹

Achieving the goal of this new regulation may be frustrated by *SWANCC*. To the extent that isolated waters and wetlands are no longer part of the “waters of the United States,” the nature and extent of the activity is irrelevant. If such waters and wetlands are no longer section 404 jurisdictional wetlands, the Corps and the EPA have no regulatory authority over such activities.

Despite the prospect of losing federal regulatory protection, isolated, non-navigable, wholly intrastate waters and wetlands may still be protected by state law in North Carolina and some other states.³⁰ When *SWANCC* was decided, the North Carolina regulatory

United States when such material falls back to substantially the same place as the initial removal.”

24. Further Revisions to the Clean Water Act Regulatory Definition of “Discharge of Dredged Material,” 66 Fed. Reg. 4550, 4550 (Jan. 17, 2001) (to be codified at 33 C.F.R. pt. 323).

25. 145 F.3d 1399 (D.C. Cir. 1998).

26. *National Mining*, 145 F.3d at 1401.

27. Further Revisions to the Clean Water Act Regulatory Definition of “Discharge of Dredged Material,” 66 Fed. Reg. 4550, 4575 (Jan. 17, 2001) (to be codified at 33 C.F.R. pt. 323).

28. See *Am. Mining Cong. v. United States Army Corps of Eng’rs*, 120 F. Supp. 2d 23 (D.D.C. 2000).

29. See *infra* text accompanying notes 118–49.

30. In thirty-five states, wetlands regulatory programs are limited or non-existent. Jon Kunsler, *The SWANCC Decision and the States—Fill in the Gaps or Declare Open Season?*, NAT’L WETLANDS NEWSL. (Environmental Law Institute, Washington, D.C.), Mar.–Apr. 2001, at 9, 9–10. Many of the state programs are tied to the state water quality certification requirement of section 401 of the CWA. But section 401 certification is

scheme did not require state permits for activities that involve ditching and draining of wetlands; however, such activities had to meet state water quality standards³¹ established by the North Carolina Environmental Management Commission (EMC), the entity charged with that responsibility under state law.³² Following the *SWANCC* decision, the question arose as to whether EMC's water quality standards continued to apply to isolated, non-navigable, freshwater wetlands. In the EMC's rules, its definition of "wetlands" incorporated the federal definition of wetlands that was the subject of *SWANCC*.³³ If such wetlands may no longer be section 404 jurisdictional wetlands, then arguably such wetlands are no longer North Carolina jurisdictional wetlands, either.³⁴ In May 2001, the EMC responded that its interpretation of its rules was that they incorporate the federal definition of wetlands as understood at the time the rules were adopted in 1996.³⁵ At its July 2001 meeting, the EMC's water quality committee unanimously approved a new rule that would create a permit program for discharges into certain isolated waters and isolated wetlands.³⁶ The rule, however, will not be sent to the full EMC for consideration until its September meeting,

triggered by permit applications under section 404 of the CWA. If a section 404 permit is not required, a section 401 state certification is not required. Therefore, if a state limits the scope of its wetlands regulatory program to providing required section 401 certifications, and *SWANCC* removes isolated, non-navigable, wholly intrastate waters and wetlands from the section 404 regulatory program, the result is that there will be no regulation of such wetlands in that state. *Id.* For the discussion of the relationship between section 401 of the CWA and North Carolina's regulation of activities in wetlands, see *infra* notes 159–67 and accompanying text.

31. See *infra* text accompanying notes 166–67.

32. See N.C. GEN. STAT. §§ 143-212(2), 143-214.1(a), 143-215 (1999).

33. N.C. ADMIN. CODE tit. 15A, r. 2B.0202(71) (Jan. 2001).

34. On April 12, 2001, the EMC issued an interpretative ruling that water quality and wetlands standards apply to isolated wetlands that may be excluded from federal jurisdiction as a result of *SWANCC*. *North Carolina Environmental Management Commission*, Apr. 12, 2001 (minutes of meeting), at 8–11 (on file with the North Carolina Law Review) [hereinafter *EMC Meeting*]. However, that interpretation is being challenged. See *infra* notes 165–66 and accompanying text. See also James Eli Shiffer, *State Will Stick to Wetlands-Protection Policy*, NEWS & OBSERVER (Raleigh, N.C.), Apr. 13, 2001, at 3A (reporting North Carolina's policy of continuing to prevent draining of a broad range of wetlands despite the *SWANCC* decision).

35. *EMC Meeting*, *supra* note 34, at 8–11.

36. See Agenda for Water Quality Committee, July 11, 2001, available at <http://h20.enr.state.us/admin/emc/committees/wq/2001/index2001.htm> (on file with the North Carolina Law Review). The new rules would apply to filling in or draining isolated wetlands larger than one-third of an acre east of Interstate 95 (the coastal plain) and greater than one-tenth of an acre west of Interstate 95 (the Piedmont and Mountain regions). *Id.*

by which time the composition of the commission will have changed.³⁷ Therefore, the prospects for adoption of the rule are uncertain.

These state efforts to protect isolated wetlands, however, have not gone unchallenged. Just as federal authority over such areas has been challenged, so has the authority of the EMC. Home builders and some landowners claim that the EMC lacks the statutory authority to create and enforce water quality standards applicable to all isolated wetlands.³⁸ If this contention is correct, then ecologically significant wetlands are outside the protection of both state and federal regulatory schemes. Part III of this Article evaluates this contention and concludes that a reasonable interpretation of existing state law supports continued state regulatory authority over isolated, non-navigable, freshwater wetlands. Part III also examines the existing EMC wetlands rules, the proposed changes, and the issues surrounding each.

I. THE CONTENTIOUS SECTION 404 WETLANDS PROGRAM

Section 404 is, and has long been, a controversial piece of legislation.³⁹ The major controversies involve two issues. The first is

37. Brian Feagans, *Environmentalists Fail to Push Wetlands Rules Through*, MORNING-STAR (Wilmington, N.C.), July 12, 2001, at 1A.

38. *In re* Request for Declaratory Ruling by Environmental Management Commission, No. 99-11706 (Wake County Superior Court filed Nov. 3, 1999). The litigation filed by the North Carolina Home Builders and other organizations raises a number of substantive and procedural challenges to a set of EMC rules governing wetlands, which are referred to as the Wetland Rules. These rules define "wetlands," create a wetlands evaluation procedure, assign "existing uses" and water quality standards to wetlands, and set forth mandatory mitigation ratios for certain projects. See N.C. ADMIN. CODE tit. 15A, r. 2B.0202(64) (Jan. 2001); N.C. ADMIN. CODE tit. 15A, r. 2B.0103(c) (Jan. 2001); N.C. ADMIN. CODE tit. 15A, r. 2B.0201(f) (Jan. 2001); N.C. ADMIN. CODE tit. 15A, r. 2H.0506(b) (Jan. 2001). A number of the issues raised are beyond the scope of this article. This article addresses only the issue of whether the EMC has the statutory authority to issue rules for "wetlands" as defined in title 15A, rule 2B.0202(64) of the North Carolina Administrative Code. See *infra* text accompanying notes 165-241. With respect to that question, the petitioners assert:

The General Assembly has never granted to the EMC the authority to promulgate the Wetland Rules Since the sweeping definition adopted by EMC may include areas far from surface waters and may be saturated only seasonally the EMC seeks to regulate activities wholly unrelated to the preservation of water quality standards in surface waters.

Petitioner's Brief in Support of Petition for Judicial Review at 2-6, *In re* Request for Declaratory Ruling by the Environmental Management Commission, No. 99-11706 (Wake County Superior Court filed Aug. 3, 2000) (on file with the North Carolina Law Review).

39. Oliver A. Houck & Michael Rolland, *Federalism in Wetlands Regulation: A Consideration of Delegation of Clean Water Act Section 404 and Related Programs to the States*, 54 MD. L. REV. 1242, 1243 (1995) ("Wetlands regulation may be the most controversial issue in environmental law. It pits America's most biologically-productive

and most rapidly-diminishing ecosystems against rights of private ownership and property development.”).

Since the inception of the section 404 program, opponents and supporters of the program have waged a seemingly interminable war in Congress. *See, e.g.,* 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, 898 (1993) (describing attempts in 1977 to pass legislation limiting the Corps' CWA section 404 authority to traditional navigable waters and adjacent wetlands); Wetlands Stewardship Act of 1991, H.R. 2400, 101st Cong. (1991) (attempting to legislate a no-net-loss-of-wetlands policy). Battles also have ensued before the agencies. *See, e.g., Section 404 Program Critics Call for Reform*, LAND LETTER, Mar. 1, 1991, at 10 (reporting the 1989 activities of the Nationwide Public Projects Coalition, which was seeking changes to the manner in which waters projects and other public works are evaluated under section 404, and describing lobbying by a group of fifty-four firms seeking a less restrictive 404 program).

On one hand, environmentalists and other concerned groups have successfully challenged regulations perceived as too narrow in their scope, forcing the Corps and EPA to write more expansive ones. In the landmark case of *National Resources Defense Council v. Calloway*, 392 F. Supp. 685 (D.D.C. 1975), the court ordered the Corps to rewrite its narrow 1973 CWA section 404 regulations and include within “waters of the United States” non-navigable streams flowing into navigable waters, wetlands along navigable waters, wetlands at the headwaters of navigable waters, and isolated wetlands. *See, e.g.,* Kalen, *supra*, at 892-97 (describing the background of the challenge to the narrowly drawn 1975 Corps regulations and the subsequent promulgation of the 1977 regulations expanding the definition of “waters of the United States”).

On the other hand, opponents have attempted to chip away at the breadth of the section 404 program through litigation and sponsoring legislation and restrictive regulatory proposals. *See, e.g.,* H.R. 2400, *supra*. Among other changes, this bill would have classified wetlands as Type A, Type B, or Type C wetlands. No permit would be required for activities in Type C wetlands. *Id.* Passage of this act would have resulted in major changes to the section 404 program. While expressly expanding section 404's jurisdiction to include drainage, excavation, and removal of vegetation, the bill would have stripped EPA of any role in the section 404 program, eliminated EPA's veto power and the EPA's section 404(b)(1) guidelines, and it would have introduced a wetlands classification system under which some wetlands would be entitled to more protection than others. *See, e.g.,* Jan Goldman-Carter, *The Misguided Call For Reform*, NAT'L WETLANDS NEWSL. (Environmental Law Institute, Washington, D.C.), Jan-Feb. 1996, at 1, 7 (“[T]he calls for Section 404 ‘reform’ emanate mostly from developers and extractive industries Under the guise of reform, the developer, extractive industry, and agriculture groups are seeking exemptions from Section 404 regulation.”). The many fronts on which these battles have taken place include (1) the meaning of “waters of the United States,” (2) the criteria used to determine whether an area is a wetland and how the boundaries of a wetland are to be delineated, and (3) the determination of what the phrase “discharge of a pollutant” means when the subject activity is taking place in a jurisdictional wetland which, at the time the activity is taking place, is devoid of water. Congressional hearings have been held, public relations campaigns mounted, and lawsuits filed. And, of course, a broad interpretation of *SWANCC* would mean that the twenty-five-year-old *Calloway* decision, explained above, has been overruled in part.

Property owners have also attacked section 404 wetlands regulations as violating the Fifth Amendment of the United States Constitution. The claim is that the wetland regulations are unconstitutional takings of private property without just compensation. In most of the litigation, such claims have been unsuccessful. *See, e.g.,* Ciampitti v. United States, 22 Cl. Ct. 310, 311 (1990) (finding no taking); *Deltona Corp. v. United States*, 657 F.2d 1184, 1185 (Ct. Cl. 1981) (same); *Jentgen v. United States*, 657 F.2d 1210, 1211 (Ct.

what areas are “waters of the United States,” and the second is what activities are regulated “discharges.” Fueling these controversies is the belief of some that when making these determinations, the EPA and the Corps exceeded their legislative mandate. According to opponents of the current section 404 program, the purpose of the Clean Water Act is to improve and maintain water quality by restricting the discharge of pollutants into the waters of the United States.⁴⁰ But it is contended that, under the guise of protecting water quality, the section 404 program is being used to protect small, isolated, non-navigable, wholly intrastate bodies of freshwater and isolated, wholly intrastate freshwater wetlands, and the wildlife using these areas, under circumstances that have little to do with either interstate commerce or water quality.⁴¹ The opponents further argue that even if Congress intended to regulate activities in such areas, it lacks the power to do so under the Commerce Clause.⁴² Until recently, those in favor of an expansive section 404 program have generally prevailed.⁴³ With one sweep of its judicial hand, however, the United States Supreme Court in *SWANCC* may have totally upset

Cl. 1981) (same). *But see, e.g.*, *Bowles v. United States*, 31 Fed. Cl. 37, 40 (1994) (finding a taking); *Formanek v. United States*, 26 Cl. Ct. 332, 333 (1992) (same); *Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153, 153 (1990), *aff'd*, 28 F.3d 1171, 1183 (1994) (same).

40. *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 191 F.3d 845, 852 (7th Cir. 1999). In the Seventh Circuit, the *SWANCC* plaintiffs argued that the “migratory bird rule [was] unreasonable because it is designed to preserve wildlife rather than water quality,” an argument the court rejected. *Id.*

41. *Id.*

42. *United States v. Wilson*, 133 F.3d 251, 257 (4th Cir. 1997). In *Wilson*, the court thought that the Corps’ inclusion of purely intrastate waters, the use of which could affect interstate commerce, in the definition of “waters of the United States” presented “serious constitutional difficulties” because “it would appear to exceed congressional authority under the Commerce Clause.” *Id.* The Seventh Circuit’s first decision in *Hoffman Homes, Inc. v. Adm’r, United States Envtl. Prot. Agency*, 961 F.2d 1310, 1316 (7th Cir. 1992) stressed the water quality objectives of the CWA and found that section 404 jurisdiction did not extend to isolated wetlands. A petition for rehearing was filed and granted, and the court referred the matter to a senior staff attorney for settlement negotiations. *See Hoffman Homes, Inc. v. Adm’r, United States Envtl. Prot. Agency*, 999 F.2d 256, 259 (7th Cir. 1993). The parties were unable to reach a settlement, and the case was reargued before the same panel of judges. *Id.* at 259–60. This time the court upheld the Migratory Bird Rule but found there was no evidence that migratory birds actually used the site in question. *Id.* at 261–62.

43. The history of the CWA section 404 program from 1975 until 1997 was one of expanding the scope of its coverage. *See, e.g.*, Kalen, *supra* note 39, at 892–913 (describing the legislative, administrative, and litigational history of the CWA from 1975–1993). In the late 1990s a more conservative bench began striking down expansive section 404 regulations. *See, e.g.*, *Wilson*, 133 F.3d at 257 (holding 33 C.F.R. § 328.3(a)(3) invalid as beyond the authority granted to the Corps under the CWA); *Nat’l Mining Ass’n v. United States Army Corps of Eng’rs*, 145 F.3d 1399, 1410 (D.C. Cir. 1998) (ruling that the attempt to regulate incidental discharges exceeded the Corps’ authority under the CWA).

the section 404 landscape and rendered meaningless the twenty-five year battle to make section 404 a comprehensive wetlands protection program.

A. *What Are the "Waters of the United States"?*

1. Pre-SWANCC Developments

The CWA leaves considerable room for disagreement over its coverage. The basic prohibition of the Act is that, without a federal permit, "the discharge of any pollutant is illegal."⁴⁴ "Pollutants" are defined, in part, as "dredged spoil, solid waste . . . biological materials . . . rock, [and] sand."⁴⁵ A discharge of a pollutant is said to take place whenever there is "any addition of any pollutant to navigable waters from any point source."⁴⁶ If Congress had stopped at that point, there probably would be less debate over the coverage of the Act. Congress went on to say, however, that "navigable waters" means "the waters of the United States," but provided no further statutory guidance as to what water bodies and waterways were "waters of the United States." That task was left to the EPA and the Corps.

The regulations initially promulgated by the Corps exhibited a very conservative approach. The 1974 regulations limited the section 404 permit program to the same waters then regulated under the Rivers and Harbors Act of 1899,⁴⁷ that is, "waters that are subject to the ebb and flow of the tide shoreward to their mean high water mark . . . and/or waters that are presently used, were used in the past, or may be susceptible to use to transport interstate or foreign commerce."⁴⁸ In *National Resources Defense Council, Inc. v.*

44. 33 U.S.C. § 1301(a) (1994).

45. *Id.* § 1362(6).

46. *Id.* § 1362(12). A point source is defined in 33 U.S.C. § 1362(14) (1994) as "any discernible, confined and discrete conveyance, including, but not limited to, any pipe, ditch, channel . . . from which pollutants are or may be discharged." Courts have interpreted this definition very broadly. *See, e.g., United States v. Lambert*, 915 F. Supp. 797 (S.D.W.Va. 1996) (including bulldozers, backhoes, draglines, and other earthmoving equipment as CWA point sources).

47. 33 U.S.C. §§ 401, 403-04, 406-09, 411-16, 418 (1994); *see also infra* notes 93-116 and accompanying text (explaining the judicial interpretation of "navigable waters of the United States" as used in the Rivers and Harbors Act of 1899).

48. Regulatory Programs of the Corps of Engineers, 42 Fed. Reg. 37,122, 37,123 (July 19, 1977). This is still the definition of "navigable waters of the United States" for purposes of determining whether jurisdiction exists under the Rivers and Harbors Act of 1899. *See* 33 C.F.R. § 329.4 (2000). This regulation in fact overstates the Corps' jurisdiction under the Rivers and Harbors Act of 1899. In *Minnehaha Creek Watershed Dist. v. Hoffman*, 597 F.2d 617 (8th Cir. 1979), the court rejected the Corps' attempt to assert jurisdiction over a waterbody that formed a segment of a commercial highway

Callaway,⁴⁹ however, the National Wildlife Federation and other environmental groups successfully challenged these regulations. According to the court, by using the phrase “waters of the United States,” Congress intended to assert “federal jurisdiction over the nation’s waters to the maximum extent permissible under the Commerce Clause of the Constitution.”⁵⁰ The court ordered the promulgation of regulations fully embodying the mandate of section 404 of the CWA.⁵¹ But the court left to the Corps the responsibility of determining what was the “maximum extent permissible under the Commerce Clause.”

The amended regulations, published in 1977,⁵² included 33 C.F.R. § 328.3(a)(3), the intrastate waters regulation. This regulation stated that “waters of the United States” included “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.*”⁵³ Thus, as a general matter, the regulation requires a connection between a particular, wholly intrastate body of water and interstate or foreign commerce. However, under the “cumulative effects” doctrine,⁵⁴ the EPA and Corps also claimed section 404 jurisdiction existed even where such an individual connection was absent.⁵⁵ According to the agencies, if

consisting of water, rail, and road connections, because the waterbody itself did not form part of a *continuous highway* for the movement of goods or people *solely by water* in interstate or foreign commerce. *Id.* at 622; *see also* Hardy Salt Co. v. S. Pac. Transp. Co., 501 F.2d 1156, 1169 (10th Cir. 1974) (rejecting a claim of Corps jurisdiction over the Great Salt Lake because it did not form part of a “continued highway over which commerce is or may be carried on with other states or foreign countries, by water”). The Corps never amended its 1974 regulations, one assumes, because the 1977 section 404 regulations allowed the Corps to assert a broader jurisdiction and regulate, in most cases, the same activities as those regulated under the Rivers and Harbors Act of 1899.

49. 392 F. Supp. 685 (D.D.C. 1975).

50. *Id.* at 686.

51. *Id.*

52. Regulatory Programs of the Corps of Engineers, 42 Fed. Reg. 37,122 (July 19, 1977) (codified at 33 C.F.R. pt. 328).

53. 33 C.F.R. § 328.3(a)(3) (2000) (emphasis added).

54. *See, e.g.,* Wickard v. Filburn, 317 U.S. 111, 133 (1942) (holding that the commerce power extends to activities that, considered in the aggregate, assert a substantial effect on interstate commerce); *United States v. Pozsgai*, 999 F.2d 719, 733–34 (3d Cir. 1993) (upholding Corps jurisdiction over dumping in wetlands using the cumulative effects doctrine).

55. *See, e.g.,* Memorandum from United States Environmental Protection Agency and the United States Army Corps of Engineers, (May 29, 1998), at <http://www.epa.gov/owow/wetlands/wilson.htm> (interpreting the *Wilson* decision narrowly) (on file with the North Carolina Law Review) [hereinafter 1998 Guidance]. This guidance was withdrawn for

the use, degradation, or destruction of a class of waterbodies would in the aggregate have a substantial effect on interstate or foreign commerce, section 404 also applied.⁵⁶

2. The Migratory Bird Rule

The Corps' use of the so-called "Migratory Bird Rule" to establish the nexus between a particular isolated water or wetland and interstate commerce troubled opponents of section 404. The Corps' and the EPA's position was that, if wetlands or other waterbodies "are or would be used as habitat by . . . migratory birds which cross state lines,"⁵⁷ the necessary interstate commerce connection exists to make such areas jurisdictional "waters of the United States."⁵⁸ Because migratory birds utilize many isolated wetlands and other waters for habitat and a billion-dollar bird-hunting and bird-watching industry exists, the agencies argued that the presence of migratory birds or the existence of suitable migratory bird habitat was sufficient, in and of itself, to establish that the waterbody is or could be used by interstate or foreign travelers for recreation or other purposes.⁵⁹ Therefore, small, isolated, non-navigable, wholly intrastate bodies of water or wetlands areas were "waters of the United States" and within the geographic scope of section 404.⁶⁰

Not surprisingly, this broad assertion of regulatory authority by the EPA and the Corps did not sit well with many private property owners whose lands fell within such a broad definition of "waters of

reconsideration following the United States Supreme Court decision in *SWANCC*. Memorandum from United States Environmental Protection Agency and the United States Army Corps of Engineers, (Jan. 19, 2001), at <http://www.epa.gov/owow/wetlands/swancc-ogc.html> (providing guidance for Corps and EPA field offices regarding section 404 jurisdiction over isolated waters) (on file with the North Carolina Law Review) [hereinafter *2001 Guidance*].

56. *1998 Guidance*, *supra* note 55. But see Jonathan H. Adler, *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetlands Regulation*, 29 ENVTL. L. 1, 35 (1999) (arguing that "the 'class of activities' itself must be subject to federal jurisdiction to come under federal control The filling of intrastate, isolated wetlands does not meet this test, as this 'class of activities' is not inherently economic or commercial in nature").

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

58. *Id.*

59. See, e.g., *Hoffman Homes, Inc. v. Adm'r, United States Env'tl. Prot. Agency*, 999 F.2d 256, 260-61 (7th Cir. 1993) (holding the Migratory Bird Rule valid).

60. *Hoffman Homes*, 999 F.2d at 260-61; see also Stephen M. Johnson, *Federal Regulation Of Isolated Wetlands*, 23 ENVTL. L. 1, 13-27 (1993) (discussing the Migratory Bird Rule and pre-1993 case law).

the United States.” Lawsuits challenging the use of the Migratory Bird Rule were filed. Initially the results were mixed, with the Seventh⁶¹ and Ninth Circuits⁶² upholding the rule, but the Fourth Circuit finding it invalid on procedural grounds.⁶³

3. The SWANCC Litigation and Decision

In 1998, the Migratory Bird Rule was challenged again in the Seventh Circuit in the *SWANCC* litigation.⁶⁴ The plaintiff, a municipal corporation created by an intragovernmental agreement, sought to open a balefill operation to dispose of nonhazardous

61. In *Hoffman Homes*, the Seventh Circuit found it reasonable to conclude that the presence of migratory birds in small, man-made ponds established a sufficient connection to interstate commerce because “millions of people annually spend more than a billion dollars on hunting, trapping, and observing migratory birds.” *Hoffman Homes*, 999 F.2d at 261. The *Hoffman Homes* litigation involved the application of 40 C.F.R. § 230.3(s)(3) (2000), which is identical to the Corps regulation, 33 C.F.R. § 328.3(a)(3) (2000). Initially the Seventh Circuit held that 230.3(s)(3), “as it applies to isolated wetlands, is contrary to the [Clean Water] Act and therefore invalid.” *Hoffman Homes, Inc. v. Adm’r, United States Envtl. Prot. Agency*, 961 F.2d 1310, 1316 (7th Cir. 1992). The EPA then filed a petition for a rehearing, which was granted and the earlier opinion and order vacated. *Hoffman Homes, Inc. v. Adm’r, United States Envtl. Prot. Agency*, 975 F.2d 1554, 1554 (7th Cir. 1992). This time the Seventh Circuit upheld 40 C.F.R. § 230.3(s)(3) and held that it was “reasonable to interpret the regulation as allowing migratory birds to be that connection between a wetland and interstate commerce.” *Hoffman Homes*, 999 F.2d at 261. But the court found there was insufficient evidence to establish that the area in question was suitable for migratory bird habitat and again vacated the administrative penalty. *Id.* at 262. Thus, the Migratory Bird Rule was upheld, but its application to a particular waterbody required substantial evidence that the area was in fact suitable habitat for migratory birds. *Id.*

62. In *Leslie Salt Co. v. United States*, 896 F.2d 354, 360 (9th Cir. 1990), the Ninth Circuit held that the presence of migratory birds in temporary ponds containing wetland vegetation was a sufficient connection to interstate commerce to sustain Corps jurisdiction under section 404. In a subsequent appeal in the same litigation, *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1396 (9th Cir. 1995), the Ninth Circuit reaffirmed its earlier holding, but noted that “[t]he migratory bird rule certainly tests the limits of Congress’s commerce powers and, some would argue, the bounds of reason.”

63. In *Tabb Lakes, Ltd. v. United States*, 885 F.2d 866 (4th Cir. 1989) (1989 U.S. App. LEXIS 14057) (unpublished opinion), the Fourth Circuit Court of Appeals affirmed a lower court decision, *Tabb Lakes, Ltd. v. United States*, 715 F. Supp. 726, 729 (E.D. Va. 1988), holding the Migratory Bird Rule invalid on the ground that it was promulgated in violation of the federal Administrative Procedure Act. The basis for the decision was that the rule was promulgated without the required notice and comment required by the Act. *Id.* at 729. In *Leslie Salt Co. v. United States*, 55 F.3d 1388 (9th Cir. 1995), however, the court stated it is “plausible to find that the preamble is merely an interpretative rule, and thus not subject to the notice-and-comment requirements of the Administrative Procedure Act.” *Id.* at 1394; see also *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng’rs*, 998 F. Supp. 946, 956–57 (N.D. Ill. 1998) (concluding that “the preamble was not substantive rulemaking”).

64. *Solid Waste Agency*, 998 F. Supp. at 946.

waste.⁶⁵ The chosen site was an abandoned gravel pit, portions of which had evolved into a number of permanent and seasonal ponds.⁶⁶ The project required the filling of the ponds. The Corps originally decided that the ponds were not “waters of the United States,”⁶⁷ but later changed its opinion⁶⁸ after being informed that more than one hundred different species of birds, including migratory waterfowl, were observed at the site.⁶⁹ The Corps then denied the permit application for the operation, and the municipalities sued.⁷⁰ The district court granted summary judgment to the Corps and held that it did have jurisdiction.⁷¹

On appeal, the municipalities argued that: (1) Congress lacked the constitutional authority under the Commerce Clause to require permits for activities in isolated, non-navigable, wholly intrastate wetlands; (2) the Corps had exceeded its statutory authority under the CWA by using the Migratory Bird Rule; and (3) the rule was invalid because it was promulgated in violation of the Administrative Procedure Act.⁷² The Seventh Circuit Court of Appeals once again upheld the Migratory Bird Rule and affirmed the district court.⁷³ A petition for certiorari was granted by the United States Supreme Court.⁷⁴ The case was argued in November 2000 and on January 9, 2001, the United States Supreme Court, in a five-to-four decision, struck down the Migratory Bird Rule.⁷⁵

Although the majority believed that the assertion of federal jurisdiction over isolated, non-navigable, wholly intrastate bodies of water raised significant constitutional questions,⁷⁶ the Court declined to decide those issues.⁷⁷ The specific holding was narrow: The

65. *Id.* at 948.

66. *Id.*

67. *Id.*

68. *Id.* at 949.

69. *Id.* at 948–49.

70. *Id.* at 949.

71. *Id.* at 957.

72. *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 191 F.3d 845, 849 (7th Cir. 1999).

73. *Id.* at 853.

74. *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 529 U.S. 1129 (2000).

75. *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001).

76. *Id.* at 173–74.

77. *Id.* at 174. This surely is a disappointment to those who have argued that the Migratory Bird Rule is an unconstitutional violation of the Commerce Clause. *See, e.g.*, Adler, *supra* note 56, at 33–40, 66 (asserting that the United States Supreme Court decision in *Lopez* does not support the claim that the power to protect migratory birds

Migratory Bird Rule exceeded the authority granted by Congress in the CWA.⁷⁸ Consequently, the Corps lacked section 404 jurisdiction over the ponds. The majority opinion did not say that the intrastate waters regulation, 33 C.F.R. § 328.3(a)(3), was invalid. Nor did it say that the Corps would not have jurisdiction if the interstate commerce connection were predicated on some basis other than the presence of migratory birds. Thus, the narrowest reading of the decision might be that the presence of migratory birds *alone* does not make isolated waters and wetlands “waters of the United States.”⁷⁹

4. The Meaning and Aftermath of the SWANCC Decision

a. The Corps’ and EPA’s Reaction to SWANCC

The Corps and EPA may give SWANCC such a narrow reading. When the Fourth Circuit invalidated the Migratory Bird Rule, the agencies’ response was to issue a joint memorandum stating that, without relying upon the Migratory Bird Rule, the EPA and the Corps would continue to assert jurisdiction over isolated waters and wetlands in the Fourth Circuit if the interstate commerce nexus otherwise existed.⁸⁰ Whether the agencies will do the same with

does not extend to the habitats in which they live); Richard Lazarus, *Corps Slips On Lopez, FWS Wins*, ENVTL. F., Mar-Apr. 1998, at 8 (observing that the Corps’ wetlands regulations were constitutional prior to *Lopez*, but unconstitutional afterwards).

78. The exact language of the Court was: “33 C.F.R. sec. 328.3(a)(3) (1999), as . . . applied to petitioner’s balefill site pursuant to the ‘Migratory Bird Rule’ . . . exceeds the authority granted to . . . [the EPA and the Corps] under sec. 404(a) of the CWA.” SWANCC, 531 U.S. 159, 174 (2001).

79. See 2001 Guidance, *supra* note 55 (indicating that the agencies intend to give SWANCC a narrow reading); see also *infra* text accompanying note 81 (explaining this construction).

80. WILLIAM L. WANT, LAW OF WETLANDS REGULATION § 4.27 (2000). The decision in *Tabb Lakes, Ltd. v. United States*, 885 F.2d 866, (4th Cir. 1989) (1989 U.S. App. LEXIS 14057) (unpublished opinion) had little effect on the assertion of jurisdiction by the Corps over isolated wetlands and waterbodies in the Fourth Circuit. The continued assertion of such jurisdiction led to the litigation in *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997), in which the court held that 33 C.F.R. § 328.3(a)(3), the provision defining CWA jurisdiction over isolated waters, was not authorized by the CWA and was invalid. *Id.* at 253–54. Once again the Corps and EPA disagreed with the Fourth Circuit and issued a joint memorandum stating that the application of the *Wilson* decision would be limited to the Fourth Circuit. 1998 Guidance, *supra* note 55. Even within the Fourth Circuit, 404 jurisdiction would still be asserted over isolated waters where either (1) an actual link to interstate commerce could be shown, or (2) under the cumulative effects doctrine, the use, degradation, or destruction of the waters in question would have a substantial effect on interstate or foreign commerce. *Id.* The *Wilson* case might be viewed as the precursor to SWANCC. In *Wilson*, the court stated:

When viewed in light of its statutory authority, 33 C.F.R. § 328.3(a)(3) (1993), which defines “waters of the United States” to include intrastate waters that need

SWANCC is unclear. In the closing days of the Clinton Administration, the agencies did issue a joint memorandum suggesting they might take such a position. The memorandum stated:

a. Waters covered *solely* by [328.3](a)(3) that could affect interstate commerce by virtue of their use as habitat by migratory birds are no longer considered to be “waters of the United States.” The Court’s opinion did not specifically address what other connections with interstate commerce might support CWA jurisdiction over “navigable, isolated, intrastate waters” under subsection (a)(3). *Therefore, as specific cases arise, please consult agency legal counsel.*⁸¹

After the case was remanded to the Seventh Circuit, the Court of Appeals likewise took a very narrow view of the SWANCC holding. The court sent the case back to the district court directing it to

determine whether the only properly presented basis for the Corps’ requirement of a permit was the Migratory Bird Rule or if alternate grounds of jurisdiction not inconsistent with the Supreme Court’s opinion remain available . . . if [the District Court] . . . finds another proper basis for jurisdiction, then it shall conduct further proceedings.⁸²

If SWANCC is given a narrow reading by the Corps, the EPA, and lower courts, then it will have little impact on federal regulation of activities affecting isolated waters and wetlands. However, there is much language in the majority opinion to strongly suggest the sending

have nothing to do with navigable or interstate waters, expands the statutory phrase “waters of the United States” beyond its definitional limit. Accordingly, we believe that in promulgating [the regulation] . . . the Army Corps of Engineers exceeded its congressional authorization under the Clean Water Act, and that, for this reason, 33 C.F.R. § 328.3(a)(3) (1993) is invalid.

133 F.3d at 257.

81. 2001 Guidance, *supra* note 55 (emphasis added). The memorandum goes on to reaffirm the existence of CWA section 404 jurisdiction over the waters described in 33 C.F.R. § 328.3(a)(1), (2), (4), (6), and (7). *Id.* At the same time, the Agencies withdrew for reconsideration the joint guidance issued after the Fourth Circuit’s ruling in *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997). 2001 Guidance, *supra* note 55. In March 2001, it was reported that the Corps was revisiting the wetlands definition and would remove the category of isolated, wholly intrastate water bodies. John H. Stam, *Wetlands: Court Decision on Isolated Waters Prompts Army Corps to Revise Definition*, BNA DAILY ENVTL. REPORT 1, Mar. 5, 2001. As of July 2001, however, neither the Corps nor the EPA nor any other agency has made or issued any additional statements to this effect. Therefore, the only official guidance document on this topic is the January 19, 2001 document cited *supra*, which contains a narrow interpretation of the SWANCC decision.

82. *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng’rs*, No. 98-2277, 2001 WL 312372 (7th Cir. 2001) (unpublished opinion).

of a broader message.⁸³ And it is this broader message that jeopardizes the continued protection of isolated waters and wetlands from harmful activities.

b. The Broader Message of *SWANCC*

Relying on a 1972 congressional conference report, the proponents of a broad interpretation of the words “waters of the United States” have argued that the defining of “navigable” as “waters of the United States” establishes a congressional intent not to limit the jurisdictional scope of the CWA to navigable waters as traditionally understood.⁸⁴ Instead, Congress intended that the term “navigable waters,” as used in the CWA, be given the broadest possible constitutional interpretation, unencumbered by agency determinations that have been made or may be made for administrative purposes.⁸⁵ Thus, under this view, the jurisdictional scope of the CWA was co-extensive with the powers of Congress under the Commerce Clause.⁸⁶ This, however, is not the view of the *SWANCC* majority.

According to the majority, such a broad interpretation would be an unwarranted reading of the word “navigable” out of the statute. In their view, “[t]he term ‘navigable’ has at least the import of showing . . . 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.”⁸⁷ In its 1985 decision in *United States v. Riverside Bayview Homes*,⁸⁸ the Court stated that the term “navigable,” as used in the CWA, was of

83. For example, at one point the majority opinion states: “In order to rule for [the Corps], we would have to hold that the jurisdiction of the Corps extends to ponds that are *not* adjacent to open water. But we conclude that the text of the statute will not allow this.” *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng’rs*, 531 U.S. 159, 168 (2001); *see also* Dreher, *supra* note 16, at 8 (“Although the Court’s opinion does not preclude the possibility that a nexus sufficient to justify federal regulation could be demonstrated between an isolated water and traditionally navigable waters on grounds other than migratory bird use, it will be difficult for federal regulators to show such connections.”).

84. The traditional understanding of navigable waters is what the *SWANCC* majority refers to as the “classical understanding.” *SWANCC*, 531 U.S. 159, 171 (2001).

85. S. CONF. REP. NO. 92-1236, at 144 (1972).

86. *See, e.g., United States v. Lambert*, 695 F.2d 536, 538 (11th Cir. 1983) (holding that the CWA reaches to the full extent of the Commerce Clause); *United States v. Tull*, 769 F.2d 182, 184 (4th Cir. 1985) (citing with approval legislative history of congressional intent to regulate to the limits of the Commerce Clause).

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

88. 474 U.S. 121 (1985).

limited effect,⁸⁹ but the *SWANCC* majority makes it clear the term should not be read out of the statute. According to Chief Justice Rehnquist, "[I]t is one thing to give a word limited effect and quite another to give it no effect."⁹⁰ Thus, embedded within the phrase "waters of the United States" is the concept of "navigability." In virtually the same breath, the majority also said that "[in] *Riverside Bayview Homes* we recognized that Congress intended the phrase 'navigable waters' to include at least some waters that would not have been deemed *navigable* under the classical understanding of that term."⁹¹ The issue, then, is what is the meaning of the word "navigable" for purposes of federal CWA jurisdiction? As to this question, the *SWANCC* Court does not provide clear guidance.⁹²

89. *Id.* at 133; see also *SWANCC*, 531 U.S. at 172 (citing *Riverside Bayview Homes*, 474 U.S. 121 (1985)).

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

91. *Id.* at 171. In its unanimous 1985 opinion in *Riverside Bayview Homes*, the Court, citing the same conference report, states: "Congress evidently intended to repudiate limits that had been placed upon federal regulation by earlier water pollution control statutes and to exercise its power under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *Riverside Bayview Homes*, 474 U.S. at 133 (citing S. CONF. REP. NO. 92-1236, at 144 (1974)).

92. In his dissent, however, Justice Stevens reads the majority opinion as limiting "waters of the United States" to navigable-in-fact waters, their tributaries, and wetlands adjacent to each. *SWANCC*, 531 U.S. at 176-77 (Stevens, J., dissenting). This reading is consistent with language in the majority opinion.

In the majority opinion, the *SWANCC* Court states that *Riverside Bayview Homes* held that the Corps had section 404 jurisdiction over wetlands that actually abutted a navigable waterway, but expressed no opinion as to whether the Corps had such jurisdiction over wetlands that are not adjacent to bodies of open water. *SWANCC*, 531 U.S. at 167. The *SWANCC* Court also emphasized that the 1974 regulations, those the Corps was forced to rewrite as result of the district court decision in *Calloway*, did not attempt to assert jurisdiction over non-navigable waters. *Id.* at 168. The Court further remarks that it does not agree with the argument "that Congress's separate definitional use of the phrase 'waters of the United States' constitutes a basis for reading the term 'navigable' out of the statute." *Id.* at 172.

Justice Stevens's reading of the Court's opinion is anticipated by the earlier Fourth Circuit decision in *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997). In *Wilson*, defendants were convicted in federal district court of four felony violations of the CWA for knowingly discharging fill and excavated material into wetlands of the United States without a permit. *Wilson*, 133 F.3d at 251. The Court of Appeals, however, held that 33 C.F.R. § 328.3(a)(3) (1993), the regulation the government relied upon as the basis for assertion of section 404 jurisdiction over the area in question, was invalid. *Id.* The precise holding of the court is debatable due to both the lack of clarity of the principal opinion and the fact that each of the three judges filed separate opinions.

One reading of the majority opinion on the issue of the validity of 33 C.F.R. § 328.3(a)(3) is that the court only decided that the use of the words "could affect" in 33 C.F.R. § 328.3(a)(3) was not authorized by the CWA as limited by the Commerce Clause. Under that reading, the section 404 jurisdiction exists for waters that have a "substantial effect" on interstate commerce or a nexus with navigable or interstate waters.

The “classical understanding” to which the majority may be referring is the interpretation of “navigable” in the Rivers and Harbors Act of 1899.⁹³ Section ten of that act makes it unlawful to engage in a number of activities that adversely affect “navigable waters of the United States.”⁹⁴ In interpreting and applying section ten to fresh waters,⁹⁵ the courts have consistently defined “navigable waters of the United States” as navigable-in-fact waters that, in their ordinary condition by themselves, or by uniting with other waters, form *a continuous highway over which commerce is or may be carried on with other states or foreign countries in the customary modes in which commerce is conducted by water.*⁹⁶

Another reading of *Wilson*, consistent with Justice Stevens’ interpretation of the majority opinion in *SWANCC*, is that the Fourth Circuit held that the phrase “waters of the United States” refers to waters which, if not navigable-in-fact, are at least interstate or closely related to navigable or interstate waters. Under such a reading, wholly intrastate, isolated water bodies and wetlands would not qualify as “waters of the United States.” EPA and the Corps gave the *Wilson* opinion the less restrictive reading and continued to assert jurisdiction:

over any and all isolated water bodies, including isolated wetlands within the Fourth Circuit, based on the CWA statute itself, where (1) either agency can establish an actual link between that water body and interstate or foreign commerce, and (2) individually and/or in the aggregate, the use, degradation, or destruction of isolated waters with such a link would have a substantial effect on interstate or foreign commerce. Those actual connections with, and effects on interstate or foreign commerce may include all the types of actual effects on interstate or foreign commerce that the Corps and EPA have traditionally relied on; for example, use for recreation by interstate and foreign travelers; use by industries operating in interstate or foreign commerce; *use by migratory waterfowl, other game birds, or other migratory birds* that are sought by hunters, birdwatchers, or photographers, or are protected by international treaty, thereby affecting interstate commerce.

1998 Guidance, *supra* note 55 (emphasis added). Of course, the Supreme Court’s decision in *SWANCC* may negate this attempted end run around the *Wilson* decision.

93. 33 U.S.C. §§ 401, 403-04, 406-09, 411-16, 418 (1994).

94. 33 U.S.C. § 403 (1994). Poorly drafted, the section uses both the phrases “waters of the United States” and “navigable waters of the United States.”

95. In *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 458 (1851), the Court held that navigable waters of the United States include waters subject to the ebb and flow of the tide.

96. The meaning of the phrase “navigable waters of the United States” is determined in accordance with the basic test set forth in *The Daniel Ball* Legislative history of the Rivers and Harbors Act of 1899 indicates that it was understood by its drafters to be merely a restatement of existing law The extent of federal regulatory power under section 10 of the Act . . . is limited to “navigable . . . waters of the United States.” [sic] Since this is the precise phrase which was defined by the Supreme Court in *The Daniel Ball*, and which was used in that case and others to describe the reach of the federal commerce power over navigable waters . . . we must assume that Congress intended the phrase to have the meaning which it had acquired in contemporary judicial interpretation.

Minnehaha Creek Watershed Dist. v. Hoffman, 597 F.2d 617, 622 (8th Cir. 1979). In *The*

There are three critical aspects of this definition of "navigable waters." First, waters are "navigable" only if navigable-in-fact. Second, to be "navigable waters of the United States," the waters must be of a continuous *water* highway over which goods can be moved, solely by water, in interstate or foreign commerce. Third, this definition of navigable waters is not co-extensive with Congress's power to regulate activities occurring on or in water bodies located within the geographic boundaries of the United States.⁹⁷ For example, if a river or other water body is only a water link in a chain of activities moving goods by water and land in interstate or foreign commerce, then the water body is not part of the "navigable waters of the United States." Nonetheless, exercising its powers under the Commerce Clause, Congress has regulated those aspects of the movement of goods in interstate or foreign commerce taking place on such a water body.⁹⁸ "Navigable waters of the United States" is therefore a term of art, which does not include all waters within the

Daniel Ball, the United States Supreme Court stated:

[Waters are navigable] 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. And they constitute *navigable waters of the United States* within the meaning of acts of Congress . . . when they form in their ordinary condition by themselves, or by uniting with other waters, a *continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water*.

The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870) (emphasis added). Later this definition was expanded to include nontidal waters that were navigable in the past or could be made navigable through reasonable improvements. *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 409 (1940).

97. See, e.g., *Leslie Salt Co. v. Froehlke*, 578 F.2d 742, 753 (9th Cir. 1978) (holding that the Rivers and Harbors Act did not extend to the mean high water mark, but the Act did not represent a full exertion of Congress's authority under the Commerce Clause).

98. See, e.g., *Minnehaha Creek Watershed Dist.*, 597 F.2d at 623-25, 627-28 (denying jurisdiction to the federal government over a lake solely within the boundaries of the State of Minnesota under the Rivers and Harbors Appropriation Act, but granting jurisdiction to the federal government to such lake under the Federal Water Pollution Control Act). The court held that waters that do not form themselves, or in conjunction with other waters, a continued highway over which interstate commerce can be conducted are not "navigable waters of the United States." *Id.* It rejected the Corps contention that a waterbody that formed a segment of a commercial highway, which may consist of water, rail, or road connections, is a "navigable water of the United States," but stated that it was not implying that Congress could not extend federal jurisdiction over such bodies of water in the exercise of its Commerce Clause powers. *Id.* at 624. In fact, the court went on to hold that, although the Corps did not have jurisdiction under the Rivers and Harbors Act over activities in such bodies of water, it did have jurisdiction under section 404 of the Federal Water Pollution Control Act of 1972, the predecessor of the CWA. *Id.*

United States, nor all those affecting interstate commerce and thus subject to Congress's power under the Commerce Clause.

When the Court in *Riverside Bayview Homes* stated that Congress, by using the phrase "waters of the United States" in the CWA, intended to "repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate some waters that would not be deemed 'navigable' under the classical understanding of that term,"⁹⁹ the limits being repudiated were those imposed by the judicial interpretation of "navigable waters of the United States" as used in the Rivers and Harbors Act of 1899.¹⁰⁰

If that is so, and if "waters of the United States" was intended to include more than the traditional "navigable waters of the United States," the venerable 1870 case of *The Daniel Ball*¹⁰¹ may provide some additional guidance. In *The Daniel Ball*, the Court draws a distinction between "navigable waters of the United States" and "navigable waters of the States." "Navigable waters of the States,"

99. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985).

100. Section thirteen of the Rivers and Harbors Act of 1899, 33 U.S.C. § 407 (1994), known as the Refuse Act, perhaps is one example of the limits placed upon federal regulation by earlier water pollution control statutes. Section 13 makes it unlawful:

to . . . discharge . . . any refuse matter . . . into any navigable water of the United States, or into any tributary of any navigable water of the United States from which the same shall float or be washed into such navigable water; and it shall not be lawful to deposit . . . material of any kind in any place on the bank of any navigable water, or the bank of any tributary of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water.

Id. As with the other sections of the Rivers and Harbors Act of 1899, federal jurisdiction is limited to navigable waters of the United States and extends to tributaries of such navigable waters only when material placed in the tributaries or on the banks of the tributaries would pose a threat to the navigable waters of the United States. In a critique of the Seventh Circuit's *SWANCC* decision, one article observed:

Traditionally, "navigable waters" meant "waters navigable in fact." Over time, however, courts extended the concept to include waters capable of navigation through reasonable improvement. The legislative history of the CWA indicates [that Congress intended] to avoid the most "limited" or "technical" definition . . . in favor of a definition "in line with more recent judicial opinions" that "expanded that limited view of navigability . . . to include waterways which would be "susceptible of being used . . . with reasonable improvement, 'as well as those waterways which include sections obstructed by fall, rapids, sand bars, currents, floating debris, et cetera.'"

Mayer, Brown & Platt, *United States: One For The Birds: The Corps Of Engineers' "Migratory Bird Rule,"* MONDAQ BUS. BRIEFING, Nov. 24, 2000, available at 2000 WL 9240067. In addition to this broader view of navigability, it appears that Congress did not intend the concept in the CWA to be limited to the *The Daniel Ball* definition of "navigable waters of the United States." 118 CONG. REC. 33, 756 (1972).

101. 77 U.S. (10 Wall.) 557 (1870).

the Court ruled, are those that are navigable-in-fact, but need not form a continuous highway for the movement of goods in interstate or foreign commerce.¹⁰² Therefore, one reading of "waters of the United States," as used in the CWA, is that waters of the United States include all "navigable-in-fact" waters in the United States, a definition broader than the classical understanding, but one which still gives significance to the word "navigable."

This definition of "waters of the United States" can be reconciled with the earlier United States Supreme Court decision in *Riverside Bayview Homes*.¹⁰³ In that case, the Court, in a unanimous opinion, held that wetlands adjacent¹⁰⁴ to navigable waters were "waters of the United States."¹⁰⁵ The wetlands at issue in *Riverside Bayview Homes* were not themselves navigable-in-fact. They consisted of saturated soil and wetlands vegetation extending some distance to a nearby navigable river.¹⁰⁶ The question was whether it was reasonable for the Corps to include within "waters of the United States" adjacent wetlands hydrologically connected with navigable-in-fact waters but not flooded or permeated by navigable-in-fact waters. Because the goal of the CWA was protection and enhancement of the nation's waters, inclusion of such adjacent wetlands was deemed appropriate.¹⁰⁷ This is not dissimilar to the treatment of issues of navigability in other contexts. For example, in obstruction of navigation and public trust title cases, a navigable waterway is not just the navigable-in-fact channel or portions. Under the "full breadth rule," a waterbody is deemed navigable-in-law from the mean high water mark on one shore to the mean high water mark on the

102. *Id.* at 563.

103. 474 U.S. 121 (1985).

104. The Corps regulation states that: "The term 'adjacent' means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'" 33 C.F.R. § 328.3(c) (2000).

105. According to the Court, a "definition of 'waters of the United States' encompassing all wetlands adjacent to other bodies of water over which the Corps has jurisdiction is a permissible interpretation of the [CWA]." *Riverside Bayview Homes*, 474 U.S. at 135. Part of the reasoning of the Corps in its inclusion of adjacent wetlands in its definition of "waters of the United States" was that even "wetlands that are not flooded by adjacent waters may still tend to drain into those waters. In such circumstances, the Corps has concluded that wetlands may serve to filter and purify water draining into adjacent bodies of water . . . and to slow the flow of surface runoff." *Id.* at 134. Wetlands, whether adjacent to navigable-in-fact waters or to their tributaries, perform these functions and thus play an important role in achieving the goal of the CWA to protect the chemical, physical, and biological integrity of the nation's waters.

106. *Riverside Bayview Homes*, 474 U.S. at 130-31.

107. *Id.* at 133-35.

opposite shore.¹⁰⁸ What is part and parcel of the navigable waterbody depends on the reason for asking the question. If the issue is water quality, then it is not unreasonable to consider hydrologically connected adjacent wetlands part of the navigable waters.

Such an interpretation would also be consistent with older United States Supreme Court opinions addressing the reach of the more limited Rivers and Harbors Act of 1890,¹⁰⁹ the predecessor of the 1899 Act. The purpose of that Act, and the later 1899 Act, was to protect the navigable capacity of the “navigable waters of the United States.” Consistent with this congressional objective, the Court, in *United States v. Rio Grande Dam and Irrigation Company*,¹¹⁰ held that the United States could enjoin the construction of a dam on a non-navigable portion of the upper Rio Grande River in New Mexico.¹¹¹ Although the defendants argued that the federal legislation prohibiting obstruction of navigable waters of the United States only applied to the navigable waters themselves, the Court held that the Act prohibited any obstruction to the navigable capacity of the navigable waters of the United States “wherever done or however done.”¹¹² Similarly, the CWA should be read as reaching activities in adjacent hydrologically connected areas that reasonably could pollute navigable-in-fact waters. Under such an approach, activities in non-navigable tributaries and their adjacent wetlands would also be subject to section 404. In fact, the SWANCC majority intimates that “waters of the United States” includes non-navigable tributaries and streams.¹¹³

Isolated, navigable-in-fact, wholly intrastate waters, their non-navigable tributaries, and wetlands adjacent to either, would still be section 404 jurisdictional waters or wetlands under this reading of

108. See, e.g., 33 C.F.R. §§ 329.11(a), 329.12 (2000) (extending federal regulatory jurisdiction to the entire water surface and bed of a navigable waterbody, which includes all the land and water below the ordinary high water mark).

109. Pub. L. No. 51-907, 26 Stat. 453 (1890).

110. 174 U.S. 690 (1899).

111. *Id.* at 690, 696, 698.

112. *Id.* at 708–09.

113. This is done as part of the majority’s discussion of 404(g) which allows, upon meeting certain requirements, a state to administer the 404 permit program for “navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce . . . including wetlands adjacent thereto).” 33 U.S.C. § 1344(g)(1) (1994). Section 1344(g) shows that Congress did intend for the term “navigable waters,” as used in the CWA, to encompass more than waters that are navigable-in-fact and their adjacent wetlands. How much more is not clear. See *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng’rs*, 531 U.S. 159, 171 (2001).

SWANCC.¹¹⁴ What is left out of “waters of the United States” are only isolated, non-navigable-in-fact, wholly intrastate waters and wetlands.¹¹⁵ The justification for excluding such waters and wetlands would be that activities in such areas will not affect the chemical, physical, or biological integrity of navigable-in-fact waters, the protection of which, in the Court’s view, was the objective of the CWA.¹¹⁶ Unfortunately, this means that many ecologically important North Carolina wetlands will not be protected by section 404.¹¹⁷

114. For example, the Great Salt Lake is an isolated, wholly intrastate, navigable-in-fact waterbody and a navigable water of the state of Utah. See *United States v. Utah*, 403 U.S. 9, 9–11 (1971) (title to Great Salt Lake is in the State of Utah because the lake was navigable at the time of statehood). But the Great Salt Lake is not a “navigable water of the United States.” See *Hardy Salt Co. v. S. Pac. Transp. Co.*, 501 F.2d 1156, 1167–69 (10th Cir. 1974) (holding that navigable water of the United States requires a navigable interstate linkage by water). If navigability is the key to section 404 jurisdiction, then such jurisdiction extends to all navigable-in-fact streams, rivers, lakes, ponds, and other navigable-in-fact bodies of water.

115. There is some indication that, at least in some Corps districts, SWANCC is being given a narrow reading. Immediately after the SWANCC decision was issued, the interpretation of the decision by the U.S. Army Corps of Engineers’ Wilmington, North Carolina district was that the presence of migratory birds was insufficient to establish the requisite interstate commerce connection, but that other indicia such as the presence of deer tracks, or the tracks of other animals that were the object of hunting activities would suffice. Later the district was instructed that the mere presence of such tracks was not enough, but the national offices of the EPA and the Corps provided little additional guidance. As of the end of July, 2001, the Wilmington district continues to include isolated, non-navigable, freshwater wetlands within section 404 jurisdictional waters and wetlands if the district finds a sufficient interstate commerce connection. The connection now must be more substantial than the mere presence of animal tracks. However, if the district determines that hunting actually takes place in the area, then, in its opinion, a sufficient interstate commerce nexus may exist since hunting activities involve both in-state and out-of-state hunters. It is uncertain whether the presence of endangered species satisfies the nexus requirement. Interview with Wayne Wright, Division Chief, Regulatory Section, Wilmington District, United States Corps of Engineers, July 27, 2001 (on file with the author). No formal written policy on the matter exists because, in May 2001, all Corps districts were instructed not to develop new local practices but to await further guidance from the national headquarters. At the same time, however, the districts were told to continue to make wetlands determinations using past local practices. No further guidance was provided. Memorandum from United States Army Corps of Engineers, (addressing jurisdictional issues raised by the SWANCC decision) (May 11, 2001) (on file with the North Carolina Law Review). In addition, if requested, the Wilmington district continues to make wetlands determinations for the benefit of the North Carolina Division of Water Quality. Interview with Wayne Wright, *supra*.

116. *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng’rs*, 531 U.S. 159, 166–67 (2001).

117. The estimates of the impact of SWANCC cover a wide range because they depend on what reading is given to the opinion. One estimate is that thirty to sixty percent of the nation’s wetlands could be removed from section 404 jurisdiction by SWANCC. See Memorandum from Jon Kunsler to the Association of State Wetlands Managers (Feb. 8, 2001), at <http://www.aswm.org> (on file with the North Carolina Law Review).

B. What Activities in Wetlands Are Subject to Section 404?

1. What is a Regulated Discharge?: The *Tulloch* Rule

The state of wetlands regulation in North Carolina depends not only upon whether certain areas are section 404 jurisdictional wetlands, but also upon whether the activities within such areas are section 404 jurisdictional activities. Not all activities that might adversely affect wetlands are subject to section 404. Only those activities that involve a discharge of a pollutant are regulated by the CWA.¹¹⁸ The CWA defines “discharge” to mean “any addition of any pollutant to navigable waters from any point source.”¹¹⁹ Pollutant is defined as “dredged spoil . . . biological materials, rock, [and] sand.”¹²⁰ Only those activities that involve a discharge of those pollutants constituting dredged spoil or fill materials are regulated under section 404 of the CWA.¹²¹ As to those discharges, section 404 grants the Corps the authority to issue permits for the discharge of such pollutants into waters of the United States.¹²² Under its regulations, “dredged material” is defined as “material that is excavated or dredged from the waters of the United States.”¹²³ “Fill material” is broadly defined to include any material used “for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody.”¹²⁴ As a practical matter, the combined definitions include the addition of almost any material to wetlands areas or other waterbodies.

A major area of controversy has been the application of these regulations to mechanized landclearing activities taking place in freshwater wetlands.¹²⁵ To the extent that an area is a jurisdictional wetland and thus a “water of the United States,” its soil and vegetation are part of the “waters of the United States.”¹²⁶ Any

118. 33 U.S.C. § 1311(a) (1994).

119. *Id.* § 1362(12).

120. *Id.* § 1362(6).

121. *Id.* § 1311; *id.* § 1344.

122. *Id.* § 1311; *id.* § 1344.

123. 33 C.F.R. § 323.2(c) (2000).

124. *Id.* § 323.2(e).

125. The long history of litigation and rule making is described in *Nat'l Mining Assoc. v. United States Army Corps of Eng'rs*, 145 F.3d 1399, 1402 (D.C. Cir. 1998) and the preamble to the January 17, 2001, revisions of the definition of “discharge of dredged materials,” 66 Fed. Reg. 4550, 4550–51 (Jan. 17, 2001).

126. 33 C.F.R. § 323.2(c) (2000) (“[D]redged material means material that is excavated or dredged from waters of the United States.”); *see, e.g.,* *Avoyelles Sportsmen's League v. Alexander*, 473 F. Supp. 525, 532 (W.D. La. 1979) (holding that wetlands vegetation is part of the “waters of the United States”).

excavation of such soil and removal of such plants is viewed as a dredging activity.¹²⁷ Consequently, movement and redeposit of wetland soil and vegetation within the jurisdictional wetland is subject to regulation under section 404 as a discharge of dredged or fill material.

During mechanized excavation operations, material is rarely completely removed from the site of the activity. Some of the material may be redeposited at or near the site of the operations,¹²⁸ some material will fall off the equipment being used for removal,¹²⁹ and other material may be purposely redeposited at varying distances from the point of extraction.¹³⁰ In 1983, in *Avoyelles Sportsmen's League v. Marsh*,¹³¹ the Fifth Circuit Court of Appeals held that such redeposits could constitute discharges subject to regulation under the CWA.¹³² Under pressure from various environmental groups, the Corps adopted the position that most mechanized landclearing operations in wetlands were subject to section 404 jurisdiction.¹³³ The theory was that these activities involved some discharge of dredged or fill material. In its 1986 regulations, however, the Corps created an exception for "de minimus, incidental discharges,"¹³⁴ but this "de

127. 33 C.F.R. § 323.2(d)(1)(iii) (2000). Activities that involve only the cutting or removal of vegetation above the ground when the activity involves neither substantially disturbing the root system nor mechanized pushing, dragging, or similar activities are not included in the definition of "discharge of dredged material." 33 C.F.R. § 323.2(d)(3)(ii) (2000).

128. Sidecasting is an example. Sidecasting involves placing removed soil by the side of an excavated ditch.

129. This material is referred to as "incidental fallback." See *Nat'l Mining*, 145 F.3d at 1403-04 (describing such material as "incidental fallback" and holding that such material is not a regulated section 404 discharge).

130. In *Avoyelles Sportsmen's League*, 473 F. Supp. at 527-29, the defendants were clearing a 20,000-acre tract, much of which was forested wetlands. Trees and vegetation were cut at or just above ground level, and the felled trees were pushed into wind rows.

131. 715 F.2d 897, 923-24 (5th Cir. 1983). In *Avoyelles Sportsmen's League* the court said that the word "'addition' . . . may reasonably be understood to include 'redeposit.'" *Id.* at 925. However, because the court found there was a discharge of fill material, the court did not have to decide whether there was also a discharge of dredged material. *Id.* at 925.

132. *Id.* at 923-25.

133. U.S. Army Corps of Engineers, Regulatory Guidance Letter 90-5: *Landclearing Activities Subject to Section 404 Jurisdiction* (July 18, 1990). The Corps detailed the types of activities that, in its view, were regulatory discharges in its discussion of its proposed 1993 revision of the regulations. Further Revisions to the Clean Water Act Regulatory Definition of "Discharge of Dredged Material," 65 Fed. Reg. 50,108, 50,111-13 (Aug. 16, 2000).

134. Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41,232 (Nov. 13, 1986); see also Memorandum from the United States Army Corps of Engineers, (Mar. 29, 1985) (interpreting the *Avoyelles* decision) (on file with the North

minimus” exception was challenged in a lawsuit filed by a number of environmental groups.¹³⁵ The Corps and EPA settled the litigation by agreeing to promulgate stiffer rules for landclearing and excavation activities in wetlands.¹³⁶ The new regulations, issued in 1993, expanded the definition of “discharge” to include

*any addition, including any redeposit, of dredged material, including excavated material, into the waters of the United States which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation.*¹³⁷

This became known as the *Tulloch* rule.

2. National Mining and the *Tulloch* Rule

Industry groups immediately challenged the *Tulloch* rule on the ground that it exceeded the statutory authority of the Corps.¹³⁸ In *National Mining Ass’n v. United States Army Corps of Engineers*,¹³⁹ the plaintiffs argued that incidental fallback, which occurs when

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135. In *North Carolina Wildlife Federation v. Tulloch*, No. C-90-713-CIV-5-BO (E.D.N.C. 1992), a number of environmental groups sued the Corps because the Corps determined that a developer did not need to obtain a section 404 permit for activities associated with clearing and draining 700 acres of forested wetlands in eastern North Carolina. *Id.*; see also Clean Water Act Regulatory Programs, 58 Fed. Reg. 45,008, 45,008 (Aug. 25, 1993).

136. See Clean Water Act Regulatory Programs, 58 Fed. Reg. 45008 (Aug. 25, 1993) (describing the settlement agreement).

137. 33 C.F.R. § 323.2(d)(1)(iii) (1993) (emphasis added). At the same time, the “de minimus” exception was also rewritten to exclude, as a practical matter, mechanized landclearing and related activities:

(4) Section 404 authorization is not required for the following:

(i) Any incidental addition, including redeposit, of dredged material associated with any activity that does not have or would not have the effect of destroying or degrading an area of waters of the United States as defined in paragraphs (d)(5) and (d)(6) of this section; however, this exception does not apply to any person preparing to undertake mechanized landclearing, ditching, channelization and other excavation activity in a water of the United States, which would result in a redeposit of dredged material, unless the person demonstrates to the satisfaction of the Corps, or EPA as appropriate, prior to commencing the activity involving the discharge, that the activity would not have the effect of destroying or degrading any area of the waters of the United States, as defined in paragraphs (d)(5) and (d)(6) of this section. The person proposing to undertake mechanized landclearing, ditching, channelization or other excavation activity bears the burden of demonstrating that such activity would not destroy or degrade any area of waters of the United States.

33 C.F.R. § 323.2(d)(4)(i) (2000).

138. *Am. Mining Cong. v. United States Army Corps of Eng’rs*, 951 F. Supp. 267, 269 (D.C. Cir. 1997).

139. 145 F.3d 1399 (D.C. Cir. 1998).

material removed from the water is redeposited into virtually the same location from which it was initially removed, is not a "discharge" because it does not result in any *addition* of material to a wetland,¹⁴⁰ and only *additions* of regulated materials (pollutants) require a permit under section 404 of the CWA. An example of incidental fallback would be slurry or soil dropping from the bucket of a backhoe as it excavates a ditch or channel in a section 404 jurisdictional wetland.¹⁴¹ The Court of Appeals for the District of Columbia Circuit agreed, enjoining the Corps' enforcement of the rule, and once again the Corps began the process of promulgating amended regulations.¹⁴²

3. The New *Tulloch* Rule

The Corps gave the *National Mining* decision the narrowest possible reading. In the preamble to its May 1999 regulations, the Corps stated that *National Mining* did not alter the doctrine that some redeposits of dredged material constitute discharge and are thus subject to section 404 jurisdiction.¹⁴³ The new regulations simply replaced "any redeposit of dredged material" with "redeposit of dredged material other than incidental fallback."¹⁴⁴ Then, in a footnote, the Corps stated that "[i]ncidental fallback results in the return of dredged material to virtually the spot from which it came."¹⁴⁵ Subsequently in January 2001, the Corps amended its regulations to incorporate this definition with some minor modifications.¹⁴⁶ The amended regulations also presume that

140. *Id.* at 1403 (emphasis added).

141. *Id.*

142. *Id.* at 1404. The district court's nationwide injunction prohibiting the enforcement of the regulation was affirmed. *Id.* at 1401; *see also* Revisions to the Clean Water Act Regulatory Definition of "Discharge of Dredged Material," 64 Fed. Reg. 25,120, 25,121 (May 10, 1999).

143. Revisions to the Clean Water Act Regulatory Definition of "Discharge of Dredged Material," 64 Fed. Reg. 25,120, 25,121 (May 10, 1999).

144. *Id.* at 25,123.

145. *Id.* at 25,120.

146. The revised rule states:

The Corps and EPA regard the use of mechanized earth-moving equipment to conduct landclearing, ditching, channelization, in-stream mining or other earth-moving activity in waters of the United States as resulting in a discharge of dredged material unless *project specific evidence shows that the activity results in only incidental fallback*. This paragraph (i) does not and is not intended to shift any burden in any administrative or judicial proceeding under the CWA.

Incidental fallback is the redeposit of small volumes of dredged material that is incidental to excavation activity in waters of the United States when such material falls back to substantially the same place as the initial removal.

landclearing and excavation activities result in discharges “unless project-specific evidence shows that the activity results in only incidental fallback.”¹⁴⁷ As a practical matter, this means that most landclearing and excavation activities in section 404 jurisdictional wetlands are subject to section 404 jurisdictional requirements and that any such project will be closely scrutinized by the Corps.¹⁴⁸

The impact of this regulation may be considerably lessened by the *SWANCC* decision. If isolated, non-navigable, wholly intrastate waters and wetlands are indeed no longer section 404 jurisdictional waters and wetlands, the *Tulloch* rule does not apply to any activities taking place within such areas. That means, absent state regulation or some other applicable federal legislation, ecological important areas are now “open for development.” The next section of this Article examines whether North Carolina law provides protection for isolated, non-navigable, wholly intrastate waters and wetlands. This is an especially significant question for North Carolina because a significant percentage of the state’s wetlands are classified as such.¹⁴⁹

Examples of incidental fallback include soil that is distributed when dirt is shoveled and the back-spill that comes off a bucket when such small volume of soil or dirt falls into substantially the same place from which it was initially removed.

33 C.F.R. § 323.2(d)(2) (2000) (emphasis added). On February 17, 2001, the Bush Administration ordered the implementation of the regulations to be delayed pending further study, but later, on April 16, 2001, the Administration announced that it endorsed the new *Tulloch* rule. See Mike Allen, *EPA Will Toughen Rules On Wetlands; New Permits Opposed By Builders*, WASH. POST, Apr. 17, 2001, at A6.

147. 33 C.F.R. § 323.2 (c)(2)(i).

148. Another activity associated with excavation and dredging in wetlands, called sidecasting, has also prompted litigation pertaining to the Corps’ authority under the CWA. Sidecasting involves the redeposit of dredge material at a point in the wetland, but away from the original location. Further Revisions to the Clean Water Act Regulatory Definition of “Discharge of Dredged Material,” 66 Fed. Reg. 4550, 4553 (Jan. 17, 2001) (describing sidecasting and other similar activities that involve “discharges”). In *United States v. Deaton*, 209 F.3d 331 (4th Cir. 2000), the government sued the Deatons for violation of sections 301 and 404 of the CWA by sidecasting dredged material as they dug a drainage ditch through a wetland. The district court awarded summary judgment for the Deatons, but the Court of Appeals reversed, holding that sidecasting in a section 404 jurisdictional wetland is the discharge of a pollutant under the CWA. *Id.* at 337. If soil can be extracted completely without depositing any dredge material on the side of the ditch or elsewhere in the wetland, other than incidental fallback, the activity will not be subject to the CWA permitting requirements. *Nat’l Mining Ass’n v. United States Corps of Eng’rs*, 145 F.3d 1399, 1404 (D.C. Cir. 1998). The more probable situation, however, is that any excavation activity in wetlands will produce some discharge and will therefore fall under review for section 404. See *Am. Mining Cong. v. United States Army Corps of Eng’rs*, 120 F. Supp. 2d 23 (D.D.C. 2000) (denying motion challenging the Corps’ May 10, 1999 discharge regulation as being inconsistent with the opinion of the court in *National Mining*).

149. “[I]solated waters’ are generally construed to be waters that lack a hydrologic

II. NORTH CAROLINA LAW AND ACTIVITIES IN ISOLATED, NON-NAVIGABLE, FRESHWATER WETLANDS

The Corps' and EPA's authority over activities in wetlands is tied to the meaning of the term "navigable waters" and whether the activity is a "discharge of a pollutant." However, the authority of the EMC, the relevant state entity, is tied to the state statutory definition of "waters of the state" and whether an activity violates state water quality standards. The challenges to EMC's authority have centered around this question: Are all isolated, non-navigable, freshwater wetlands statutory "waters" of the state? No serious challenge has been made to EMC's authority over isolated, non-navigable, open bodies of water, and the discussion in this part of the Article will be limited to EMC's authority over isolated, non-navigable, freshwater wetlands. This part of the Article will discuss the history of state regulation of wetlands activities, the relationship between EMC's water quality rules and the CWA section 401 certification requirement, and the statutory basis for EMC's authority. It also provides an analysis of that authority.

A. *The History of State Regulation of Activities in Wetlands*

Prior to 1996, state regulation of activities in wetlands areas was very limited. Three state statutes required permits for certain activities, and then only in some wetlands areas. First, under the state "dredge and fill" statute,¹⁵⁰ a state permit is required for dredging and filling activities in estuarine waters, tidelands, marshlands, or state-

connection to other waters that are part of or adjacent to interstate waters, a tributary system, or traditionally navigable waters." Bonnie Nevel, *Focus on SWANCC*, NAT'L WETLANDS NEWSL. (Environmental Law Institute, Washington, D.C.), Mar.-Apr. 2001, at 2. The percentage of wetlands in North Carolina that are "isolated" is hard to determine with any accuracy. Some wetlands studies have concentrated on particular types of wetlands, such as pocosins and Carolina Bays, *see, e.g.*, Curtis J. Richardson, *Pocosins: An Ecological Perspective*, 11 WETLANDS 335, 339 (1991) (finding that pocosins comprise more than fifty percent of North Carolina's freshwater wetlands) or wetlands within the coastal plain, *see, e.g.*, Gordon E. Cashin et al., *supra* note 7, at 69 (stating that about eleven percent of the coastal plain wetlands surveyed were hydrologically isolated). One report stated that "the majority of North Carolina's wetlands . . . [are] palustrine wetlands (from the Latin word "*palus*," meaning 'marsh')." NORTH CAROLINA ENVIRONMENTAL DEFENSE FUND, CAROLINA WETLANDS: OUR VANISHING RESOURCE 13 (1989). Eleven percent of these palustrine wetlands are described as being hydrologically isolated. *See id.* at 14-15, 22-23; UNITED STATES GEOLOGICAL SURVEY, NATIONAL WETLANDS SUMMARY, NORTH CAROLINA WETLANDS RESOURCES 297-300. Depending on how SWANCC is interpreted, the North Carolina Department of Environment and Natural Resources estimates that between two percent and sixty-three percent of North Carolina's wetlands could be affected by the decision. Shiffer, *supra* note 34.

150. N.C. GEN. STAT. § 113-229 (1999).

owned freshwater lakes.¹⁵¹ Because “marshland” is defined by the North Carolina General Statutes as “salt marsh or other marsh subject to the regular or occasional flooding by tides,”¹⁵² activities in freshwater wetlands outside of state-owned lakes do not require a dredge and fill permit. The reach of the second statute¹⁵³ is even more limited, targeting only the “dredging, filling, removing or otherwise altering of ‘coastal wetlands.’”¹⁵⁴ “Coastal wetlands” are defined the same as “marshland” in the dredge and fill statute¹⁵⁵ and, thus, limited to salt marsh and other marsh subject to regular or occasional flooding by the tides. The final statute dealing with the grant or denial of Coastal Area Management Act permits¹⁵⁶ overlaps the other two statutes¹⁵⁷ and is generally limited to activities affecting coastal wetlands.¹⁵⁸

The main state regulatory instrument of wetlands protection is actually through section 401 of the CWA. This section requires that “[a]ny applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into . . . navigable waters . . . shall provide . . . a certification from the State . . . that any such discharge will comply with [state effluent limitations and water quality standards].”¹⁵⁹ If the state denies the certification, the denial acts as an absolute veto to the issuance of the required federal license or permit.

Prior to the 1990s, states rarely used the section 401 certification process as a means of protecting wetlands.¹⁶⁰ The EPA, however,

151. *Id.* § 113-229(a).

152. *Id.* § 113-229(n)(3).

153. Section 113-230(a) of the North Carolina General Statutes authorizes the Secretary of the Department of Environment, Health, and Natural Resources, with the approval of the Coastal Resources Commission, to issue orders “prohibiting dredging, filling, removing or otherwise altering coastal wetlands.” N.C. GEN. STAT. § 113-230(a) (1999).

154. *Id.*

155. *Id.* § 113-230(a) states that “[t]he term ‘coastal wetlands’ shall mean any marsh as defined in N.C. GEN. STAT. § 113-229(n)(3).”

156. The North Carolina Coastal Management Act (CAMA) establishes a comprehensive coastal management program for the North Carolina coastal zone. N.C. GEN. STAT. §§ 113A-100 to -134.3 (1999). CAMA permits are required for development activities within areas of the coastal zone identified as Areas of Environmental Concern. *See id.* § 113A-103(2)–(5); *id.* § 113A-113; *id.* § 113A-118(d)(1)–(2).

157. N.C. GEN. STAT. § 113-120 (a) (1) (1999); *id.* § 113-120(a)(2).

158. N.C. GEN. STAT. § 113A-120 (1999).

159. 33 U.S.C. § 1341(a) (1994).

160. By applying its “antidegradation policy” to wetlands in 1989, North Carolina took a limited step in this direction. The antidegradation policy to protect existing uses of surface waters was part of a regulation adopted by the EMC in 1973. N.C. ADMIN. CODE tit. 15A, r. 2B.0200 (June 2000). In 1989, this policy was extended to wetlands, but in a

took the position that section 401 applied to wetlands because wetlands were "waters of the United States."¹⁶¹ Beginning in 1990, in an effort to force states to take a more active role in protecting their wetlands, EPA mandated that states take steps to include wetlands within the scope of their required CWA water quality standards.¹⁶² By the end of the fiscal year 1993, states were to include wetlands in their definition of "state waters," establish beneficial uses for wetlands, adopt existing narrative and numeric criteria for wetlands, adopt narrative biological criteria for wetlands, and apply anti-degradation policies to wetlands.¹⁶³ In 1996, after a drawn-out, contentious process,¹⁶⁴ North Carolina finally responded to this

roundabout manner. The regulation allowed the Director of the Division of Water Quality (DWQ) to authorize activities that would remove existing uses of a freshwater wetland. In making that determination, the Director would be guided by the policies followed by the Corps in deciding whether to issue a CWA section 404 permit. N.C. ADMIN. CODE tit. 15A, r. 2B.0109 (June 2000).

161. EPA MEMORANDUM, NATIONAL GUIDANCE: WATER QUALITY STANDARDS FOR WETLANDS 7 (July 30, 1990).

162. *Id.*

163. *Id.* at 4.

164. The EMC began considering wetlands rules in 1992. The DWQ established a study group to review the proposed rules and make suggestions for revisions. The group presented revised rules to the EMC's Water Quality Committee in December 1993. The EMC's Water Quality Committee approved the request to present the rules to the EMC in 1994. Public hearings were held in 1995. Brief of Respondent at 9-10, *In re Request for a Declaratory Ruling by the Environmental Management Commission*, No. 99-11706 (Wake County Superior Court filed Sept. 1, 2000) (on file with the North Carolina Law Review). Farmers, state highway officials, timbering interests, mining companies and developers opposed the adoption of the rules. Stuart Leavenworth, *Public Hearings on Wetlands Preservation Begin Next Week*, NEWS & OBSERVER (Raleigh, N.C.), Jan. 6, 1995, at 1A. The opponents of wetlands regulation also attempted to abort the EMC rule-making process through a proposed bill, H.B. 886, that would eliminate state jurisdiction over all wetlands under an acre in size. Douglas N. Rader & Melinda E. Taylor, *Wetlands at the Crossroads*, NEWS & OBSERVER (Raleigh, N.C.), May 16, 1995, at 9A. The rules faced continued opposition from the North Carolina Citizens for Business and Industry, a powerful lobbying group, which claimed the rules would have "devastating effects on development all across North Carolina." Stuart Leavenworth, *Saving Urban Marshes*, NEWS & OBSERVER (Raleigh, N.C.), Dec. 14, 1995, at 3A. Developers and highway builders also worked to exclude the filling of small wetlands from any regulation by the EMC. Editorial, *Striking a Blow for Wetlands*, NEWS & OBSERVER (Raleigh, N.C.), Oct. 9, 1995, at 10A. On March 14, 1996, the EMC adopted the rules with an effective date of October 1, 1996. See Brief of Respondent, *supra*, at 11. The opponents of the rules then challenged the rules before the Administrative Rules Review Commission. After hearing from the opponents and supporter of the rules, and after a few minutes of discussion, the commission decided that the rules were ambiguous and did not conform to the General Assembly's intent. Stuart Leavenworth, *Panel Supports Industry on Wetlands*, NEWS & OBSERVER (Raleigh, N.C.), July 19, 1996, at 3A [hereinafter Leavenworth, *Panel Supports Industry*]. On September 12, 1996, the EMC voted to file the wetlands rules notwithstanding the commission's objection. Brief of Respondent, *supra*, at 11. Shortly thereafter, a declaratory judgment action was filed in the Wake County Superior Court

initiative by promulgating water quality standards for its wetlands and other wetlands rules.¹⁶⁵

B. EMC's Certification and Enforcement Authority

The North Carolina Division of Water Quality (DWQ), the state entity responsible for implementing EMC's rules, applies these water quality standards. The DWQ evaluates ditching and other activities that drain wetlands, granting or denying the section 401 certification required for section 404 permit applicants. Until the *SWANCC* decision put federal regulation of isolated wetlands in jeopardy, the state's view was that, unless the project requires a federal permit, neither the EMC nor the DWQ has authority to require prior approval of ditching and other activities that drain a wetland.¹⁶⁶ However, the EMC has authority to enforce its water quality standards against individuals and companies who violate them irrespective of whether a federal permit or section 401 certification is required.¹⁶⁷

(No. 96-13108) (filed Dec. 23, 1996) asserting that the EMC lacked the authority to adopt the rules. Brief of Respondent, *supra*, at 11. This action was dismissed in February 1998 because the petitioners had failed to exhaust their administrative remedies. *Id.* at 12. After filing a petition with the EMC for a declaratory ruling and the EMC affirming its authority to adopt the rules, the petitioners instituted the present action pending before the Wake County Superior Court. *Id.*

165. N.C. ADMIN. CODE tit. 15A, r. 2B.0231(a) (June 2000) ("The water quality standards for all wetlands are designed to protect, preserve, restore and enhance the quality and uses of wetlands and other waters of the state influenced by wetlands.").

166. See N.C. GEN. STAT. § 143-215.1(a) (1999) (stating the circumstances under which a permit is needed from the EMC, and that ditching and draining are not included); see also Letter from Jill Hickey & Kathryn Cooper, North Carolina Attorney General's Office, to Preston Howard & Steve Tedder, Division of Water Quality, (Dec. 16, 1997) (advisory letter on the authority of the EMC to regulate the ditching and draining of wetlands) ("[W]e find no authority for the EMC to require prior approval, i.e. permitting, of ditching or other activities which drain wetlands, unless the activity requires a federal permit for which EMC is empowered to issue a 401 certification.") (on file with the North Carolina Law Review) [hereinafter *Advisory Letter*]. A clarification of the state's position took place in July 2001. In an oral opinion provided at the July EMC water quality meeting, the state attorney general's office stated that the EMC had the authority to establish a permit system regulating discharges, defined in the proposed rule as the "deposition of dredged or fill material including[,] but not limited to[,] fill, earth, construction debris and soil." Proposed N.C. ADMIN. CODE tit. 15A, r. 2H.1301(a), Version 2.6, July 11, 2001. The representative of the attorney general's office stated that a written opinion would be provided to the EMC prior to its September 2001 meeting. The 1997 opinion letter only addressed the question of whether the EMC could require pre-activity approval for activities "other than filling, such as ditching or draining." *Advisory Letter, supra* (emphasis added).

167. N.C. GEN. STAT. § 143-215.6A (1999) (providing for civil penalties); *id.* § 143-215.6B (providing for criminal penalties); *id.* § 143-215.6C (providing for injunctive relief); see also *Advisory Letter, supra* note 166 (asserting that the state has authority to assess

The significance of this enforcement authority became apparent after the decision in *National Mining* invalidating the original *Tulloch* rule. In late 1998 and early 1999, immediately following that decision, acting on the assumption that ditching and draining of wetlands no longer required either a section 404 permit or a section 401 certification, some developers and other property owners in eastern North Carolina engaged in a frenzy of ditching and draining thousands of acres of wetlands.¹⁶⁸ To combat these destructive activities, the State announced it would seek injunctive relief and civil penalties against any person violating water quality standards in the process of ditching or draining of wetlands.¹⁶⁹ The exercise of this authority has not gone unchallenged.

civil penalties, seek injunctive relief, and prosecute violators of water quality standards).

168. *Nat'l Mining Ass'n v. United States Army Corps of Eng'rs*, 145 F.3d 1399 (D.C. Cir. 1998) was handed down in June 1998. In July 1998, the State of North Carolina stated its intent to seek injunctive relief and civil penalties against anyone violating state water quality standards or other rules passed under relevant statutes while engaged in excavation, ditching or draining activities in wetlands areas after October 1, 1998. Poyner & Spruill, L.L.P., *State Signals Intent to Prohibit Excavation Activities In Wetlands*, N.C. ENVTL. LAW LETTER, Sept. 1998, at 1. Subsequently, the implementation date was changed to March 1, 1999. Poyner & Spruill, L.L.P., *Ditching Adjacent To Wetlands May Now Be Illegal*, 9 N.C. ENVTL. LAW LETTER, Dec. 1998, at 1. The stated reason for the delay was that staff shortages prevented the DWQ from enforcing its rules prior to March 1, 1999. James Eli Shiffer, *Loophole Leads to Loss of Wetlands*, NEWS & OBSERVER (Raleigh, N.C.), Mar. 5, 1999, at 1A [hereinafter Shiffer, *Loophole*]. During the perceived "non-enforcement window" between the decision in *National Mining* and the stated implementation of state enforcement efforts in 1999, developers and others rushed to engage in excavation, landclearing, ditching, and draining activities in southeastern North Carolina wetlands areas without a full understanding of state policy. Poyner & Spruill, L.L.P., *Division Of Water Quality Revises Wetlands Drainage Policy*, N.C. ENVTL. LAW LETTER, Aug. 1999, at 1. During this window of time, an estimated 4,627 acres of wetlands were drained in eastern North Carolina. James Eli Shiffer, *Coalition Wants End to Ban on Draining Wetlands*, NEWS & OBSERVER (Raleigh, N.C.), Sept. 8, 1999, at 1A [hereinafter Shiffer, *Coalition*]. Initial estimates were much higher, ranging from 9,000 to 20,000 acres. See *id.*; 3 *Brunswick Developers to Pay \$213,000 to Fill Ditches*, NEWS & OBSERVER (Raleigh, N.C.), Dec. 29, 1999, at 3A [hereinafter *Brunswick Developers*]. The developers and others engaged in these activities subsequently discovered that their activities violated not only erosion and control rules, but also other state rules. See *Brunswick Developers*, *supra*; see also Shiffer, *Loophole*, *supra* (concerning violations of sedimentation rules and water quality rules). In their haste to drain and clear wetlands, they also violated still valid and enforceable federal section 404 regulations. *Regulators Going After Developers for Improper Wetlands Draining*, NEWS & OBSERVER (Raleigh, N.C.), Aug. 30, 1999, at 3A [hereinafter *Regulators Going After Developers*].

169. Much to their surprise, the developers found themselves the target of both Corps and state enforcement actions. Although ditching and draining of wetlands was technically permissible, the developers and property owners found that the methods they used violated both federal and state regulations. Federal violations resulted because the activities involved more than incidental discharges; state violations resulted from violations of state sedimentation regulations.

C. *Are Isolated, Freshwater Wetlands “Waters” of the State?*

1. Issues Raised as to the Extent of the EMC’s Authority

The extent of EMC’s authority to set and enforce water quality standards for freshwater wetlands has been the subject of considerable disagreement¹⁷⁰ and the target of litigation pending in state superior court.¹⁷¹ The dispute is not over whether the EMC has the statutory authority to apply its water quality standards to some freshwater wetlands,¹⁷² but whether it has the authority to apply its water quality standards to all areas that might be classified as freshwater wetlands. This dispute has two components.

First, under the EMC rules, wetlands are defined as areas that are inundated or saturated by an accumulation of surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.¹⁷³

170. See, e.g., Leavenworth, *Panel Supports Industry*, *supra* note 164 (reporting that representatives of industry groups claim that EMC lacks authority to regulate wetlands); James Eli Shiffer, *Panel Retains Ban on Draining Wetlands*, NEWS & OBSERVER (Raleigh, N.C.), Sept. 10, 1999, at 3A. (reporting arguments by representatives of industry groups before the EMC that the EMC lacks authority to regulate wetlands to the extent it does under existing regulations).

171. North Carolina Home Builders Ass’n v. Env’tl. Mgt. Comm’n, No. 99 CV 11706 (Wake County Superior Court filed Nov. 3, 1999).

172. The EMC clearly has statutory authority to apply its water quality rules to some freshwater wetlands. See *infra* notes 184–90 and accompanying text. Even those involved in the current challenges to the EMC rules concede that the EMC has authority over some wetlands areas. The coalition of developers, builders, farmers, miners, and others accept the authority of the EMC to regulate “swamps,” but assert that not every wetland is a swamp. Their position is that the EMC lacks the authority to regulate areas without some permanent open water. See Shiffer, *Coalition*, *supra* note 168.

173. N.C. ADMIN. CODE tit. 15A, r. 2B.0202 (June 2000). This definition is almost identical to the one used by the Corps and EPA except for the addition of the words “an accumulation of.” See 40 C.F.R. § 230.41(a)(1) (2000). The addition of those words is necessitated by the definition of “water” in § 143-212(6). A more scientific and technical definition of wetlands is:

an ecosystem that depends on constant or recurrent inundation or saturation at or near the surface of the substrate. The minimum essential characteristics of a wetland are recurrent, sustained inundation or saturation at or near the surface and the presence of physical, chemical, and biological features reflective of recurrent sustained inundation or saturation. Common diagnostic features of wetlands are hydric soils and hydrophytic vegetation. These features will be present except where specific physicochemical, biotic, or anthropogenic factors have removed them or prevented their development.

NAT’L RESEARCH COUNCIL, WETLANDS 3 (1995).

Under this definition and standard methodology for delineating wetlands areas, freshwater wetlands range from areas with standing water all year to those displaying no surface water, but with a water table within twelve inches of the surface and characterized by wetland vegetation, such as white cedar and sweet gum trees and high bush blueberry and similar plant life, and wetlands soils, such as peat.¹⁷⁴ Thus, EMC's authority depends on whether all isolated wetlands satisfying these criteria are waters of the State.

The second component of the dispute relates to the SWANCC decision. Following the narrative description of wetlands contained in the EMC rule above, the rule concludes by stating that "wetlands classified as waters of the state are restricted to the waters of the United States as defined by 33 C.F.R. 328.3."¹⁷⁵ The express incorporation of the Corps' interstate waters regulation as a limitation on the definition of state jurisdictional wetlands raises the question as to whether SWANCC affects not only the Corps' regulatory authority but also alters the EMC's regulatory authority.¹⁷⁶

2. The Source of EMC's Authority Over Isolated Wetlands

The source of EMC's authority is Article 21 of Chapter 143 of the North Carolina General Statutes.¹⁷⁷ Under this legislation, the EMC has authority "to develop and adopt... [water quality] standards applicable to... each of the *waters of the State*."¹⁷⁸ The statutory definition of "waters" is provided by section 143-212(6) of the North Carolina General Statutes. Although the term "wetlands" does not appear in the list of specific types of waters that are considered "waters of the state," this does not mean that "wetlands" are not "waters of the state." The absence of the term is a product of carrying over statutory language formulated in 1951 and evolution of the English language. A statutory definition of "waters" first appears

174. See, e.g., NAT'L RESEARCH COUNCIL, *supra* note 173, at 96 (noting that although the surface may be dry, an area is considered saturated to the surface if the critical water table depth is twelve inches).

175. N.C. ADMIN. CODE tit. 15A, r. 2B.0202(71) (June 2000).

176. The EMC does not believe that the SWANCC decision affects the application of its wetlands rules. On April 12, 2001, the EMC passed an interpretative ruling that the EMC rules include all wetlands defined as waters of the United States by federal regulations at the time the wetlands rules were adopted in 1996 and specifically include isolated wetlands. *EMC Meeting*, *supra* note 34, at 10-11.

177. N.C. GEN. STAT. §§ 143-211 to -215.74I (1999).

178. *Id.* § 143-214.1(a)(1). The authority to set water quality standards for waters of the state has resided in a state agency since at least 1951. See Act of Apr. 6, 1951, ch. 606, sec. 1, 1951 N.C. Sess. Laws 530 (codified as amended at N.C. GEN. STAT. §§ 143-211 to -215.7 (1999)).

in the North Carolina General Statutes in 1951, as part of “An Act to Rewrite Article 21 of Chapter 143 of the General Statutes Relating to Stream Sanitation.”¹⁷⁹ The definitional section in that earlier Act is identical to the current section 143-212(6).¹⁸⁰ As the General Assembly rewrote Chapter 143, changing the nature and name of the state entity responsible for maintaining the quality of North Carolina’s waters and expanding the entity’s authority,¹⁸¹ the 1951 definition was carried forward.¹⁸² When the 1951 definition of “waters” was written, the term “wetlands” was not a familiar one. That term did not come into common usage until the latter part of the twentieth century. In the nineteenth and early twentieth centuries, areas commonly referred to today as wetlands were called swamps, bogs, mire, and fen.¹⁸³ Therefore, the question is whether the statutory language from an earlier period in our state’s history is

179. Act of Apr. 6, 1951, ch. 606, 1951 N.C. Sess. Laws 530 (codified as amended at N.C. GEN. STAT. §§ 143-211 to -215.7 (1999)).

180. N.C. GEN. STAT. § 143-212(6) (1999).

181. The first major overhaul of the 1951 Act was the 1967 Act to Create a Board of Water and Air Resources and to Define Its Duties and Powers Relating to Water and Air Pollution and Control and Water Resource Management. Act of June 22, 1967, ch. 892, sec. 1, 1967 N.C. Sess. Laws 1144 (1967) (codified as amended at N.C. GEN. STAT. §§ 143-211 to -215.9 (1999)). The 1951 language was carried over in this legislation. In 1973, as part of a governmental reorganization, a new entity was created to replace the Board of Water Resources, established by the 1967 act. The new entity was the Environmental Management Commission. Act of May 22, 1973, ch. 686, sec. 1, 1973 N.C. Sess. Laws 1020 (codified as amended at N.C. GEN. STAT. § 58-77(9) (1999)). In subsequent sessions, the legislature made other technical modifications of the applicable statutes, but never to the definition of “waters.”

182. Thus, the definition of “waters” in 143-212(6) predates the CWA, which was passed in 1972, and general public awareness of the importance of wetlands systems. In fact, in the nineteenth and early twentieth century, North Carolina, as did many other states, promoted the drainage of swamps and wetlands for cultivation purposes. *See, e.g., State ex rel. Rhodes v. Simpson*, 325 N.C. 514, 519–20, 385 S.E.2d 329, 332–33 (1989) (holding that the filling of a marsh was not a nuisance at common law); *Beer v. Whiteville Lumber Co.*, 170 N.C. 337, 340, 86 S.E. 1024, 1025 (1915) (stating that “swamp lands may be defined as those too wet for cultivation and requiring drainage to fit them for that purpose”); 1909 N.C. Sess. Laws 442 (stating that “drainage of swamps and the drainage of the surface water from agricultural lands . . . shall be considered a public benefit”); *see also* N.C. GEN. STAT. §§ 156-1 to -36 (1999) (discussing obtaining a right of drainage across the land of an adjoining landowner). This legislation can be traced back to 1795. 1795 N.C. Sess. Laws, 3.7.

183. *See, e.g., NAT’L. RESEARCH COUNCIL, supra* note 173, at 43 (discussing the nineteenth-century federal Swamp and Overflowed Lands Acts). A WESTLAW search for the period prior to 1955 did not reveal one case in which the term was used. Prior to 1963, the term “wetlands” appeared only in one decided case, *Madeo v. McGuire*, 192 N.Y.S.2d 936 (1959). The case did not raise any environmental issues, but only the question of whether offshore islands and wetlands, which were not part of a school district, could be annexed into an existing school district. *Id.* at 939.

adequate to permit the EMC to issue water quality rules for areas which today are commonly called "wetlands."

3. The Statutory Meaning of "Waters"

The relevant portion of section 143-212(6) states that "waters" include "any . . . swamp . . . or other body or accumulation of water, whether surface or underground."¹⁸⁴ The term "swamp" is not defined in the statute, but it has a very specific meaning in North Carolina law. In 1891, in an act reaffirming that title to, and the authority to dispose of, state-owned swamp lands was vested in the State Board of Education,¹⁸⁵ the General Assembly declared that swamp lands and marsh meant "all those lands which have been or may now be known and called 'swamp' or 'marsh' lands, 'pocosin bay,' 'briary bay' and 'savanna.'"¹⁸⁶ Later, in 1915, in *Beer v. Whiteville Lumber Company*,¹⁸⁷ the North Carolina Supreme Court said that "[s]wamp lands may be defined as those too wet for cultivation and requiring drainage to fit them for that purpose."¹⁸⁸ These definitions of swamp are likely those that the General Assembly had in mind when, in 1951, it first enacted section 143-212(6) and included "swamp[s]" within the term "waters."¹⁸⁹ This conclusion is supported by later action of the General Assembly. In 1959, when it amended the state statutes governing disposal of state-owned lands, it incorporated the *Beer* definition into North Carolina General Statute section 146-64(8). In the latter statute, "'[s]wamplands' means lands too wet for cultivation except by drainage, and includes . . . [a]ll state lands which have been or are known as 'swamp' or 'marsh' lands, 'pocosin bay,' 'briary bay' or 'savanna.'"¹⁹⁰

184. N.C. GEN. STAT. § 143-212(6) (1999).

185. An act to define the words "swamp lands" as the same are employed in the statutes of this state in respect to the entry and grant of lands and the lands appropriated and belonging to the State Board of Education, 1891 N.C. Sess. Laws 302. This statute can be traced back to 1822. See 1822 N.C. Sess. Laws 30 (closing all state-owned swamp land and marshland to appropriation by private individuals under the general entry and grant statute).

186. *Id.*

187. 170 N.C. 337, 86 S.E. 1024 (1915).

188. *Id.* at 340, 86 S.E. at 1025.

189. Section 143-212(6) was first enacted in 1951 as part of An Act to Rewrite Article 21 of Chapter 43 of the General Statutes Relating to Stream Sanitation. Act of Apr. 6, 1951, ch. 606, sec. 1, 1951 N.C. Sess. Laws 530 (codified as amended at N.C. GEN. STAT. §§ 143-211 to -215.7 (1999)).

190. N.C. GEN. STAT. § 146-64(8) (1999). The history of this statute can be traced back to 1822, when the state closed all state-owned swampland and marshland to appropriation by private individuals under the general entry and grant statute. 1822 N.C. Sess. Laws 30.

Swamps, some of which are isolated and non-navigable, are a type of freshwater wetlands. So the EMC certainly has authority over at least some types of isolated freshwater wetlands. The difficult question is whether statutory “waters” include those areas in which wetlands vegetation grows due to saturated soil conditions, but in which there is little, if any, surface water. If such areas are to be included within “waters of the state,” it is because they are either “swamp[s]” or “accumulations of . . . water, surface or underground” within the meaning of the statute.¹⁹¹

Both the 1891 and the 1959 definitions show that the General Assembly intended to include such areas within the term “swamp” when it enacted section 143-212(6). The 1891 and 1959 definitions identify a number of specific types of areas as “swamp[s]” or “swamplands.” Included within the term “swamp” are “pocosins,” which is a term that is used “to describe a variety of bog and swamp ecosystems and not to delineate a single class of wetlands.”¹⁹² Surface water is not present in all pocosins. Some pocosins consist of only seasonally saturated soils and wetlands vegetation.¹⁹³ Similarly, the word “bay” refers to Carolina Bays, which are shallow, ovate-shaped depressions found on the coastal plain of North Carolina and other Southeastern states.¹⁹⁴ Some Carolina Bays may not display surface water, but may only be seasonally saturated by groundwater.¹⁹⁵ And the term “savanna” refers to pine savannas, which are seasonally saturated by a high groundwater table.¹⁹⁶ Therefore, in using the word “swamp” in 1951 and retaining it in later legislation, the

However, the definition of swamplands was not included until 1959. 1959 N.C. Sess. Laws 612 (codified as amended at N.C. GEN. STAT. §§ 146-1 to -84 (1999)). This would also strongly suggest that earlier in 1951, when the General Assembly used the term *swamp*, it had in mind the same *Beer* definition.

191. N.C. GEN. STAT. § 143-212(6) (1999).

192. Curtis J. Richardson & J. Whitfield, *Pocosins, Carolina Bays, and Mountain Bogs*, in BIODIVERSITY OF THE SOUTHEAST UNITED STATES: LOWLAND TERRESTRIAL COMMUNITIES 257, 260 (William Martin et al., eds., 1993). Carolina Bays and bay forests or bay swamps are similar to pocosins in that each contains similar trees, shrub vegetation, and fauna. Different geological conditions, however, created each of these ecosystems. Richardson, *supra* note 149, at 337. About seventy percent (700,000 acres) of the nation’s pocosins are located in the coastal plain of eastern North Carolina. UNITED STATES GEOLOGICAL SURVEY, *supra* note 149, at 298.

193. Richardson & Whitfield, *supra* note 192, at 268.

194. *Id.* at 261–63.

195. *Id.* at 261–63, 269. In fact, the term pocosin has been used synonymously with Carolina Bay.

196. NORTH CAROLINA ENVIRONMENTAL DEFENSE FUND, *supra* note 149, at 19; NATIONAL WETLANDS SUMMARY, *supra* note 149, at 299. Pine savannas support orchids and plants, such as Venus flytrap, pitcher plants, and sundew. *Id.* at 298–99.

General Assembly had in mind a number of wetlands areas that do not contain surface waters but are saturated seasonally by groundwater.¹⁹⁷

In addition, the use of the words "or other . . . accumulation of water, surface or underground" in section 143-212(6) of the North Carolina General Statutes can also be read as indicating the General Assembly intended to include within "waters" other areas characterized by saturated soils that may not be formally known as "pocosins," "bays," or "savanna." One such area would be "seepage bogs," the surface of which is kept marshy at least seasonally by groundwater.¹⁹⁸ On the other hand, it could be argued that the "accumulation of . . . [underground] water" language was directed at wells and underground aquifers.¹⁹⁹ Based on that interpretation, one might argue that the EMC lacks the specific authority required to promulgate rules covering isolated freshwater wetlands in which no surface water is present.²⁰⁰ But the stated legislative purpose of the 1951 Act was that:

the water resources of the State shall be prudently utilized in the best interest of the people The maintenance of the quality of the water resources requires the creation of an agency . . . to protect the water requirement for health, recreation, fishing, agriculture, industry, and animal life.²⁰¹

In conjunction with the catchall provision "accumulation of water, surface or underground," this statement can be read as reflecting a specific legislative purpose of protecting all water resources of the State, and not only those specifically listed by name. Indeed, the General Assembly could be credited with the foresight that other water resources of the state, the importance or even the existence of which may not have been apparent at that time, should be protected and were specifically intended to be gathered into any regulatory structure by the catchall language.²⁰² Today, we are aware of the

197. *Id.* at 298-99.

198. NORTH CAROLINA ENVIRONMENTAL DEFENSE FUND, *supra* note 149, at 22.

199. See *Jordan v. Foust Oil Co.*, 116 N.C. App. 155, 447 S.E.2d 491 (1994). The case involved the North Carolina Oil Pollution and Hazardous Substances Act, 1973 N.C. Sess. Laws 534 (codified as amended at N.C. GEN. STAT. § 143-215.83 (1999)), which also contains the accumulation language. *Id.* The court held that the plaintiffs' well constituted "waters of the State." *Id.* at 160, 447 S.E.2d at 494.

200. Under the North Carolina Administrative Procedure Act, an agency may not adopt a rule that "[i]mplements or interprets a law unless that law or another law specifically authorizes the agency to do so." N.C. GEN. STAT. § 150B-19(1) (1999).

201. Act of Apr. 6, 1951, ch. 606, sec. 1, 1951 N.C. Sess. Laws 530 (codified as amended at N.C. GEN. STAT. §§ 143-211 to -215.7 (1999)).

202. As the North Carolina Court of Appeals said in *Wagoner v. Hiatt*, 111 N.C. App.

importance of wetlands areas and realize that the presence or absence of water at the surface is not indicative of a wetlands area's ecological significance. Therefore, the "or other . . . accumulations of water, surface or underground" language should be read as specific authority and as broad enough to include many isolated, freshwater wetlands that do not qualify as swamps and in which surface water is not present.

Admittedly, one could argue that when the General Assembly has chosen to include wetlands within the ambit of legislation, it has done so using the term "wetlands." One example of many such intentional uses of the term "wetlands"²⁰³ is section 143-215.77(18) of the North Carolina General Statutes, the definition section of the Oil Pollution and Hazardous Substances Control Act.²⁰⁴ Among other things, this Act requires permits from the EMC for the discharge of any oil or hazardous substance "into the waters of . . . [the] State."²⁰⁵ The definition of "waters" for purposes of this Act is significant because, in 1989, the General Assembly amended the definitional section, specifically identifying "wetlands" along with "swamp[s]" as waters of the State. The definitional section also contains the catch-all phrase "or any other . . . accumulation of water, surface or underground." Based on this, one might argue that "wetlands" are distinct from "swamp[s] . . . [and] any other body or accumulations of water, surface or underground."²⁰⁶ However, assuming that in earlier statutes "waters" that we now refer to as "wetlands" were classified as "swamp[s]" or "other . . . accumulation of water," by 1989, the word "wetlands" was deeply imbedded in our national vocabulary and at the center of the ongoing dialogue about protecting ecologically important areas. The inclusion of the term in this later legislation could just as easily be read as a legislative intent to emphasize both the inclusion of "wetlands" in the waters of the state and as a statement of their ecological importance, and not as a statement that wetlands were something newly added to the list.²⁰⁷

448, 450, 432 S.E.2d 417, 418 (1993), "The best indica of the legislative purpose are the language of the [A]ct and what the [A]ct seeks to accomplish."

203. See, e.g., N.C. GEN. STAT. § 104E-26 (1999) (licensing low-level radioactive waste facilities); N.C. GEN. STAT. § 113-77.9 (1999) (concerning the acquisition of lands with funds from the National Heritage Trust Fund); N.C. GEN. STAT. § 113-230 (containing an order to control activities in coastal wetlands); N.C. GEN. STAT. §§ 143-214.8 to -214.14 (1999) (creating the Wetlands Restoration Program).

204. N.C. GEN. STAT. § 143-215.75 (1999).

205. *Id.* § 143-215.83(c).

206. *Id.* § 143-215.77(18).

207. A contrary interpretation would mean that every time the General Assembly

Four additional arguments can be made in support of "wetlands," as defined by the EMC, being considered "waters of the State." First, in 1996, the General Assembly failed to enact bills specifically aimed at removing wetlands from the EMC's jurisdiction.²⁰⁸ Although there are many reasons why the legislature may fail to pass legislation, arguably this is some evidence of the legislature's understanding that the EMC had authority over wetlands under the existing definition of "waters." Second, later in 1996, the North Carolina Rules Commission, an administrative body created by the legislature to review agency regulations,²⁰⁹ objected to the EMC's new wetlands regulations²¹⁰ and sent the regulations back to the EMC for reconsideration.²¹¹ The EMC reaffirmed its regulation.²¹² During the interim, the General Assembly, aware of this disagreement, passed legislation specifically authorizing the EMC to issue section 401 certifications,²¹³ but did nothing affecting the EMC's authority over wetlands. Third, the 1989 amendment of the North Carolina Oil Pollution and Hazardous Substance Control Act to specifically include wetlands is further evidence of legislative intent to protect such areas.²¹⁴ In light of this history and current concerns about the loss of wetlands, a conclusion that "waters" includes isolated "wetlands" would not be unwarranted. Finally, with the possible withdrawal of federal regulatory protection as a result of the SWANCC decision, the inability of the DWQ to apply the EMC water quality standards to ditching and draining of any isolated, non-navigable, wholly intrastate wetlands would leave ecologically

specifically included a matter in a subsequent similar statutory definition that was presumably covered by a catchall provision, the argument would be made that the now specifically identified matter was never within the catch-all provision in the first place.

208. In May 1996, House Bill 1251 was introduced. One section of the bill would have overridden the EMC wetlands rules. The bill was referred to the Committee on Appropriations and, in June 1996, consideration of the bill was postponed indefinitely. See Brief of Respondent, *supra* note 164, at 11 (describing the adoption of the EMC's wetland rules and the General Assembly's actions with respect to these rules).

209. N.C. GEN. STAT. § 150B-2(1d) (1999); *Id.* §§ 150B-21.8 to -21.16.

210. Leavenworth, *Panel Supports Industry*, *supra* note 164. The lobbyists and lawyers appearing before the Commission argued that the EMC lacked the authority over wetlands because wetlands were not statutory "waters of the State." The Commission did not pass on the validity of that argument. *Id.*

211. *Id.*

212. In September 1996, the EMC upheld its rules, and they became effective on October 1, 1996. Brief of Respondent, *supra* note 164, at 11.

213. Act of Aug. 3, 1996, ch.18, sec. 27.4, 1995 N.C. Sess. Laws 846 (codified as amended at N.C. GEN. STAT. §§ 143-215.10A, 143-215.10B(4), 90A-47.3(b), 106-805(5), 143-215.114(a)(g) (1999)).

214. N.C. GEN. STAT. § 143-215.77(18) (1999).

important areas²¹⁵ subject to destructive activities. Judging from what happened in 1998 and early 1999, such activities will take place very quickly.²¹⁶ That would be a tragedy for the state.

D. The Effect of the Incorporation of Federal Wetlands Regulations in EMC's Wetlands Rules

The EMC rule also states that “[w]etlands classified as waters of the state are restricted to the waters of the United States as defined by 33 CFR 328.3.”²¹⁷ Thus, the rule equates North Carolina jurisdictional wetlands with those areas that also satisfy federal jurisdictional wetlands requirements.²¹⁸ But assuming the EMC has statutory authority to apply its water quality standards to isolated freshwater wetlands, the question is whether the methodology used to identify and delineate areas as federal jurisdictional wetlands results in classifying areas as “waters of the United States” that are not swamps or accumulations of surface or underground water within the meaning of the state statute.

215. These areas include pocosins, Carolina Bays, pine savannas, mountain bogs, and other isolated waters and wetlands. See *supra* note 149 and accompanying text. For descriptions of the ecological importance of these areas, see UNITED STATES GEOLOGICAL SURVEY, *supra* note 149, at 297–99; Raymond D. Semlitsch, *Size Does Matter: The Value of Small Isolated Wetlands*, NAT’L WETLANDS NEWSL. (Environmental Law Institute, Washington, D.C.), Jan.–Feb. 2000, at 5.

216. In October 1998, following the federal court decision in *National Mining*, which invalidated the then-existing Corps regulation defining “discharge,” the State announced it would postpone a ban on wetlands draining until March 1, 1999. North Carolina developers and property owners rushed to ditch and drain wetlands, especially in eastern North Carolina. James Eli Shiffer, *State Takes Strict Action on Drained Wetlands*, NEWS & OBSERVER (Raleigh, N.C.), Apr. 9, 1999, at 3A [hereinafter Shiffer, *State Takes Strict Action*]. After taking aerial photographs, the state estimated that 5,627 acres of wetlands were destroyed. Shiffer, *Coalition*, *supra* note 168. Following this ditching and draining activity, the State took enforcement action against those individuals and companies that in their haste to ditch and drain, failed to comply with state sediment control regulations. Shiffer, *State Takes Strict Action*, *supra*.

217. N.C. ADMIN. CODE tit. 15A, r. 2B.0202(71) (June 2000) (emphasis added). The sentence in the regulation ends with “and 40 C.F.R. 230.3.” *Id.* 40 C.F.R. § 230.3 is the EPA regulation that corresponds to section 328.3 of the Corps regulations. The wording of 33 C.F.R. § 328.3(a)(3) (2000) and 40 C.F.R. § 230.3(s)(3) (2000) is identical. See 33 C.F.R. § 328.3(a)(3) (2000); 40 C.F.R. § 230.3(s)(3) (2000).

218. The EMC would qualify this statement. Its current view is that North Carolina jurisdictional wetlands are identical to those areas classified as federal jurisdictional wetlands as of the time in 1996 when the EMC wetlands rules were adopted. See *supra* notes 34, 176 (discussing the April 12, 2001, EMC interpretive ruling to this effect).

1. Delineation of Wetlands Using Federal Wetlands Delineation Criteria

Although the federal regulations and state rules identify wetlands as “waters,” neither the regulations nor the rules spell out in detail how wetlands areas are to be identified and delineated.²¹⁹ Because North Carolina’s role in wetlands regulation has been limited to certifying under section 401 of the CWA that a proposal by an applicant for a federal permit is consistent with state water quality standards, and federal permit applications for projects involving wetlands are evaluated by the Corps under section 404 of the CWA, the State has deferred to the Corps’ determination of whether an area is a federal and state jurisdictional wetland.²²⁰ Identification and delineation of specific wetlands areas is left to field personnel who are guided in that task by the 1987 Corps wetlands delineation manual. The manual states what specific hydrological features, wetland vegetation, and soil conditions must exist in an area in order to classify it as a wetland.²²¹ According to the manual, an area displays wetland hydrology if the water table is within twelve inches of the surface for five percent of the growing season,²²² which is approximately fourteen days in North Carolina.²²³ If such areas

219. 33 C.F.R. § 323.3(b) states:

[t]he term “wetlands” means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal conditions do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

33 C.F.R. § 323.3(b) (2000). The wording of the EMC regulation is virtually identical to 33 C.F.R. § 323.3(b). *See supra* note 165 and accompanying text. The EPA definition of wetlands is identical to that of the Corps. *See* 40 C.F.R. § 230.3(t) (2000). However, the EPA regulations also include a general description of wetland vegetation types. *See* 40 C.F.R. § 230.41(a)(3) (2000).

220. At the present time, the DWQ does not delineate wetlands for purposes of evaluating certifications.

221. *See* FEDERAL MANUAL FOR IDENTIFYING AND DELINEATING JURISDICTIONAL WETLANDS 9–10 (1987).

222. The manual states that “an area has wetland hydrology if it is inundated or saturated to the surface continuously for at least five percent of the growing season in most years (fifty percent probability of recurrence). These areas are wetlands if they also meet hydrophytic vegetation and hydric soil requirements.” *Id.* at 30. The saturation to the surface requirement is in fact satisfied if the soil saturation is within twelve inches of the surface. The manual states that “[f]or soil saturation to impact vegetation, it must occur with a major portion of the root zone (usually within 12 inches of the surface) of the prevalent vegetation.” *Id.* at 32.

223. The period of time is determined on a county-by-county basis, using soil tables for the particular county and may vary by one or two days in the different counties that comprise the eastern North Carolina coastal plain. Telephone Interview with staff member, United States Army Corps of Engineers, Wilmington District (Apr. 2, 2001). As

support a prevalence of vegetation typically adapted for life in saturated soil conditions, then the areas are wetlands.²²⁴

The question is whether all areas meeting the Corps' delineation requirement for wetlands are statutory "waters of the state." The argument could be made that the Corps definition is too broad and includes areas that are not "waters of the state." However, since the general descriptive criteria of wetlands in the EMC rule must be applied in some fashion to particular areas, each with its own distinctive characteristics, the area's hydrology, vegetation, and soil criteria must be established through measurements and the use of indicators.²²⁵ This requires scientific expertise. The EMC's acceptance of delineations of wetlands using the Corps delineation manual should be accorded some deference by the courts. Traditionally, the interpretation of a statute by an agency created to administer it is afforded some deference.²²⁶ This is especially true when the question is one requiring a certain degree of scientific expertise.²²⁷ Therefore, the EMC should be permitted to accept the Corps delineations of wetlands for purposes of determining whether an area is a "water of the state."

2. The Effect of SWANCC Upon The EMC's Wetlands Rules

Finally, because the EMC's rule defines "wetlands" as limited to "waters of the United States" as defined by 33 C.F.R. § 328.3(a)(3), the impact of SWANCC must be explored to determine the limits of

a general matter, the Corps' rule of thumb is that, in the absence of specific regional data to the contrary, the threshold for duration of saturation can be approximated as fourteen days during the growing season in most years. NAT'L RESEARCH COUNCIL, *supra* note 173, at 5.

224. *See supra* notes 173–74, 222–23.

225. NAT'L RESEARCH COUNCIL, *supra* note 173, at 63.

226. *See, e.g.*, N.C. Bankers Ass'n, Inc. v. N.C. Credit Union Comm'n, 302 N.C. 458, 466, 276 S.E.2d 404, 410 (1981) (noting that an agency's interpretation of a statute it was created to administer is entitled to some deference but is not binding).

227. N.C. GEN. STAT. § 150B-34(a) (Supp. 2000) (mandating that administrative law judges shall give "due regard to the demonstrated knowledge and expertise of the agency"); *see also, e.g.*, Charles E. Daye, *Powers of Administrative Law Judges, Agencies, and Courts: An Analytical Empirical Assessment*, 79 N.C. L. REV. 1571, 1593–94, 1600 (2001) (arguing that on issues an agency was created to resolve and was provided with resources to acquire a special competence, the court should accord some deference to agency decisions); *see also* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 134 (1985) ("In view of . . . the inherent difficulties of defining precise bounds to regulable waters, the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act.").

EMC's authority.²²⁸ In order for an intrastate wetland to be a "water of the United States," a nexus with interstate commerce is required.²²⁹ Therefore, jurisdictional wetlands of the state arguably are also only those that satisfy that interstate commerce connection. Not every area that meets the hydrological, soil, and vegetation criteria for a wetland is a "water of the United States" or a "water of the state." On one hand, the linkage to the federal requirements means that insignificant wetlands areas are not "waters of the State." On the other hand, the linkage presents the question of just how closely the state definition is tied to the evolving federal standards for what wetlands are "waters of the United States." If *SWANCC* means that isolated, non-navigable, wholly intrastate waters are not "waters of the United States," then arguably such areas are no longer wetlands for purposes of this rule. If so, such areas are not subject to EMC's wetlands water quality standards. The opposing view is that the EMC rule incorporates the definition of waters of the United States as of the time the rule was adopted, which predates the *SWANCC* decision.²³⁰ Under that view, *SWANCC* has no effect on the meaning of "waters of the United States" for purpose of determining what areas are "wetlands" subject to state water quality standards.²³¹ The former interpretation appears to be better grounded in the history of the rule, but the history of the rule²³² is not determinative.

228. The North Carolina Administrative Procedure Act contains a provision for incorporating material by reference in an administrative rule, but the statute does not provide an answer to the question of whether the change in interpretation of the federal regulation affects the interpretation of the state rule. The state statute provides that: "An agency may incorporate the following material by reference in a rule without repeating the text of the reference material . . . (2) All or part of a . . . regulation adopted by . . . the federal government." N.C. GEN. STAT. § 150B-21.6 (1999). The statute continues, "In incorporating by reference, the agency must designate in the rule whether or not the incorporation includes subsequent amendments and editions of the referenced material." *Id.* Despite the statute's directive, the EMC rule does not state whether the incorporation includes subsequent amendments of the federal rule. Arguably, without such a statement, the assumption is that the rule does not incorporate subsequent amendments. This seems to be agency practice: to make a designation only if it is intended that a rule incorporate subsequent amendments and editions of referenced material. But beyond that, the statute really does not address the issue presented. The statute addresses amendments of incorporated regulations but does not address the effect of changes in the interpretation of an incorporated regulation. Furthermore, the administrative record developed when the rule was adopted states that the rule incorporates the definition of wetlands as currently defined and the scope of the rule will not increase or decrease in the future.

229. 33 C.F.R. § 328.3(a)(3) (2000).

230. See *EMC Meeting*, *supra* note 34, at 10.

231. *Id.* at 8, 10.

232. See *infra* notes 232–35 and accompanying text.

The State's water quality rules were, as discussed above, a response to EPA's initiative requiring states to develop water quality standards for wetlands for purposes of issuing CWA section 401 certifications. When questions were raised as to EMC's authority to establish classifications and water quality standards for wetlands, the North Carolina Attorney General's office issued an advisory opinion confirming the EMC's authority and emphasizing that "[s]ection 401 of the federal Clean Water Act requires the State to certify that any federally permitted activity that impacts North Carolina waters, including wetlands, will not result in a violation of state water quality standards."²³³ The centrality of the section 401 certification process to the application of EMC water quality standards to wetlands areas is apparent and appears to be the underlying reason for limiting "wetlands" to those subject to federal regulatory permit requirements.²³⁴ If *SWANCC* means that isolated, non-navigable, wholly intrastate wetlands are not "waters of the United States," then, absent a discharge of ditched material or drainage water into some other "waters of the United States," neither a federal permit nor a section 401 certification is required for the ditching or draining of wetlands. Absent the need for a section 401 certification, there is no historical justification for the application of state water quality standards to wetlands that are no longer subject to CWA requirements. The EMC may amend its rules to specifically cover isolated wetlands. Unless the EMC adopts emergency rules,²³⁵ however, the process of adopting a new, expanded definition of wetlands will probably take a year.²³⁶

The State, of course, is entitled to make its own interpretation of the meaning of incorporating 33 C.F.R. § 328.3(a)(3). On April 12,

233. EMC Wetlands Rulemaking Authority, Advisory Opinion of Att'y Gen. (Mar. 21, 1995), at <http://www.jus.state.nc.us/lrframe.htm>.

234. The incorporation of the Corps' and EPA's regulations may be related to the fact that, under the CWA, the Corps may issue general permits to conduct activities in certain section 404 jurisdictional wetlands. In a highly controversial nationwide permit, Nationwide Permit 26, an individual permit from the Corps was not required for activities in isolated wetlands of less than ten acres. However, the state 401 certification was still required by the CWA. By incorporating the Corps' and EPA's definition of "waters of the United States" into the state definition of wetlands, the State continued to have a veto over activities that violated state water quality standards, even though the activities were permissible under section 404 by reason of the general nationwide permit. Nationwide Permit 26 expired on June 5, 2000. See Final Notice of Issuance and Modification of Nationwide Permits, 65 Fed. Reg. 12,818, 12,818 (Mar. 9, 2000).

235. See N.C. GEN. STAT. § 150B-21.1 (2000) (describing the procedure for adopting a temporary or emergency rule).

236. Poyner & Spruill, L.L.P., *The Wetlands Puzzle*, N.C. ENVTL. LAW LETTER, June 1999, at 1.

2001, the EMC unanimously reaffirmed its wetlands rules, stating that the rules applied to isolated waters and wetlands.²³⁷ An administrative agency's interpretation of its own rules is entitled to some deference,²³⁸ perhaps more so than an agency's interpretation of a statute.²³⁹ However, if *SWANCC* is given a broad reading, continuing to include isolated, non-navigable, wholly intrastate wetlands within the EMC's rules would mean they are grounded on a judicially discarded aspect of the CWA.

But those water quality standards are part of state law now, and, unless the State changes its position on the enforcement of those standards,²⁴⁰ developers and property owners should act with extreme caution. Assuming that the EMC does have statutory authority to regulate certain activities in isolated wetlands, but the Corps does not have authority to issue section 404 permits for such activities in these areas, any person seeking to engage in such activities will be in a regulatory "no man's land." If the Corps lacks section 404 jurisdiction, neither a 404 permit nor a section 401 certification is required. But that means that under existing EMC rules, no procedure exists for persons seeking to engage in the ditching or draining of isolated wetlands to get pre-approval of, or a permit authorizing, the activity as consistent with state water quality standards. The EMC's pre-approval role is limited to issuing section 401 certifications.²⁴¹ Individuals violating EMC's water quality

237. Shiffer, *supra* note 34.

238. See, e.g., *Britt v. N.C. Sheriff's Educ. and Training Standards Comm'n*, 348 N.C. 573, 576, 501 S.E.2d 75, 77 (1998) ("[I]nterpretation of regulation by an agency created to administer that regulation is traditionally accorded some deference by appellate courts.").

239. An agency's interpretation of a statute it administers is entitled to substantial deference. See, e.g., *Shealy v. Associated Transp., Inc.*, 252 N.C. 738, 742, 114 S.E.2d 702, 705 (1960) (holding agency interpretation to be "strongly persuasive"); *Petition of Vanderbilt University*, 252 N.C. 743, 747, 114 S.E.2d 655, 658 (1960) (stating that agency interpretations ordinarily will be considered "prima facie correct").

240. In a January 22, 2001, e-mail message to the DWQWETLANDS listserv, the North Carolina 401 Wetlands Unit stated:

The N.C. Division of Water Quality will seek an advisory opinion from the NC Attorney General's office with respect to the effect (if any) of . . . [the *SWANCC*] decision on NC's water quality and wetlands standards. Until that opinion is provided (and until the Corps of Engineers also sorts out the implications of this decision for the 404 Program), DWQ expects that permitting and protection will continue as normal. Posting of Cyndi Karoly, *cyndi.karoly@ncmail.net*, to *dwqwetlands@egroups.com* (Jan. 22, 2001) (on file with the North Carolina Law Review).

241. Additionally, in 1997 the North Carolina Attorney General's office stated that the EMC had "no authority . . . to require prior approval, i.e. permitting, of ditching or other activities which drain wetlands, unless the activity requires a federal permit for which the EMC is empowered to issue a 401 certification." *Advisory Letter*, *supra* note 166. But see

standards in the process of ditching or draining wetlands, however, are subject to civil and criminal penalties and injunctive relief.²⁴² Therefore, anyone engaging in such activities runs the risk of subsequent state action claiming violations of state water quality standards.

E. The Proposed EMC Permitting Program for Isolated Wetlands

In order to close any regulatory gap created by the SWANCC decision and to provide developers and other property owners with a procedure to obtain pre-approval of projects consistent with state wetlands standards, in July 2001 the Water Quality Committee of the EMC proposed the adoption of rules to establish a permit system for “discharges” into isolated waters not subject to regulation under the section 404 program.²⁴³ According to the proposed rule, “discharge” means “the deposition of dredged or fill material including[,] but not limited to[,] fill, earth, construction debris and soil.”²⁴⁴ The stated authority for such a permit system is the statutory requirement of an EMC permit for the discharge of “any waste” into waters of the State in violation of applicable state water quality standards.²⁴⁵ Waste is broadly defined in the statutes.²⁴⁶ A permit system based on this authority would circumvent an earlier state Attorney General letter stating that the EMC lacked authority to require pre-approval or permitting of ditching and draining activities in wetlands.²⁴⁷ The proposed permit system is not directed at “ditching,” but rather at

supra note 233 and accompanying text (discussing the position taken by the Attorney General’s office that the EMC has such authority to regulate certain discharges into isolated wetlands).

242. *See supra* note 167. EMC’s water quality standards protect existing uses of classified waters, including wetlands. *See* N.C. ADMIN. CODE tit. 15A, r. 2B.0201 (Jan. 2001). The standards for assuring the maintenance or enhancement of existing uses of wetlands are set forth in title 15A, rule 2B.0231 of the North Carolina Administrative Code.

243. Proposed N.C. ADMIN. CODE tit. 15A, r. 2H.1301(a) states that the provisions of the rule apply to “isolated wetlands and isolated classified water surface waters.” Isolated is defined as having “no visible surface water connection to downstream waters of the state.” N.C. ADMIN. CODE tit. 15A, r. 2H.1301(b). Activities that result in a regulated discharge may be authorized by the issuance of either an individual permit or Certificate of Coverage to operate under a general permit. N.C. ADMIN. CODE tit. 15A, r. 2H.1301(c). The standards applied in determining whether to authorize a regulated discharge are set forth in title 15A, rule 2H.1305 of the North Carolina Administrative Code.

244. Proposed N.C. ADMIN. CODE tit. 15A, r. 2H.1301(a), Version 26, July 11, 2001.

245. N.C. GEN. STAT. § 143-215.1(a)(6) (1999).

246. N.C. GEN. STAT. § 143-212(18)(c) (1999).

247. *Advisory Letter, supra* note 166.

"discharges" that violate applicable water quality standards. Discharges that are consistent with applicable water quality standards and meet conditions of the rules would be permitted.²⁴⁸

Whether these new rules will be adopted by the EMC remains to be seen. Action on the proposal was deferred until the September 2001 meeting. By that time, nine new members may be appointed to the seventeen-member commission.²⁴⁹ The identity and views of these future members are currently unknown.

Even if new rules are adopted, it also remains to be seen whether they will withstand the legal challenges that are sure to come. Assuming that an area qualifies as federal jurisdictional wetlands, the Corps has authority to regulate discharges of dredge material.²⁵⁰ Dredge material is defined by the Corps regulations as "material excavated from the waters of the United States."²⁵¹ Thus, in this somewhat roundabout way, if wetlands are "waters of the United States," then the wetlands vegetation and soil removed from them are "dredged material" and subject to section 404 permit requirements. But there is no direct statutory authority for the EMC to establish a permit system like the Corps' for the discharge of dredged material. The validity of the proposed rules depends, then, on whether the requirement for a permit to discharge *waste* into waters of the state encompasses discharges of dredged material in isolated wetlands. Arguably it does not.

The large-scale mechanized landclearing operations that are the target of the new *Tulloch* rule illustrate the potential defect in the legal foundation for the proposed rules. These wetlands clearing operations may take place at times when there is no water present in the wetlands area. In such circumstances, the only "waste" being discharged would be the wetlands soil and vegetation that would be falling back into a seasonally dry wetlands. "Waste" is defined in the relevant statute as "sewage," "industrial waste," and "other waste."²⁵² The first category, sewage, would not be applicable to such wetlands

248. N.C. ADMIN. CODE tit. 15A, r. 2H.1305(a), (c), & (d).

249. The membership of the thirteen-member commission is described in N.C. Gen. Stat. § 143B-283 (1999). Nine seats were open for appointments as of July 1, 2001. See Feagans, *supra* note 37.

250. 33 U.S.C. §§ 1301(a), 1344(a) (1994).

251. The CWA does not define the terms "dredge" or "fill" material. The term "pollutant" is defined in 33 U.S.C. § 1362(6) (1994) to include "dredged spoil, solid waste . . . biological materials . . . rock, sand." Dredge material, however, is defined in the Corps regulations as "material that is excavated or dredged from the waters of the United States." 33 C.F.R. § 323.2(c) (2000).

252. N.C. GEN. STAT. § 143-213(18) (1999).

discharges, but the other two categories might. "Industrial waste" includes "any solid . . . or other waste substance . . . resulting from . . . the development of any natural resource."²⁵³ This definition might encompass wetlands soil and vegetation falling back into a wetlands area. But this category seems directed at materials that are byproducts of some industrial operation or process and not incidental soil movements or almost simultaneous discharges of removed, but unaltered, soil and vegetable matter back into the same environment from which it was initially removed. The term "other waste" is defined to include "sediment, and all other substances." Sediment is generally defined as "matter that settles to the bottom of a liquid."²⁵⁴ Wetlands soil and vegetation falling back into the seasonally dry wetlands area during a mechanized landclearing operation does not satisfy this common understanding of the meaning of sediment. The North Carolina Sedimentation Pollution Control Act of 1973²⁵⁵ defines sediment as "solid particulate matter, both mineral and organic, that has been or is being transported by water, air, gravity, or ice from its site of origin."²⁵⁶ Wetlands soil and vegetation might satisfy this definition of sediment, depending on how broadly or narrowly "site of origin" is construed. But the words "particulate matter" in the definition convey the idea of minute separate particles, in a liquid medium, and not incidental fallback and other movement of wetlands vegetation and soil in seasonably dry wetlands.²⁵⁷

If that interpretation is correct, then such discharges must fall within the catchall phrase "all other substances." The North Carolina Attorney General's office gives a broad reading to both "other waste" and "all other substances." In its September 5, 2001 advisory opinion to the EMC, the Attorney General's office states that "waste" is defined by statute as "refuse, sediment, and other fill materials."²⁵⁸ Based on this interpretation, the opinion concludes that the EMC has authority to regulate discharges of fill materials in isolated wetlands.²⁵⁹ There are some difficulties with this interpretation, however. There is no specific authority, for example, for the EMC to

253. *Id.* § 143-213(18)(b).

254. WEBSTER'S THIRD INTERNATIONAL DICTIONARY 2054 (1993).

255. N.C. GEN. STAT. § 113A-50 to -66 (1999).

256. *Id.* § 113A-52(10).

257. WEBSTER'S, *supra* note 254, at 1647.

258. Authority of the Environmental Management Commission to Adopt Temporary and Permanent Rules Requiring Permits for Impacts to Isolated Wetlands and Surface Waters, Advisory Opinion of Att'y Gen. (Sept. 5, 2001) (on file with the North Carolina Law Review).

259. *Id.*

regulate the discharge of "fill material" into the waters of the state. The EMC was created to administer a "program of water . . . pollution control and water resource management."²⁶⁰ As part of the administration of such a program, an EMC permit is required for the discharges of "waste" in violation of state water quality standards.²⁶¹ The words "fill material" do not appear anywhere in the statutes authorizing EMC activity. The definitional statute provides that "[o]ther waste means sawdust, shavings, lime, refuse, offal, oil, tar, chemicals, dissolved and suspended solids, sediment, and other substances . . . which may be discharged into . . . water."²⁶² Thus, the assumption underlying the Attorney General's opinion is that the discharge of some of these specific substances into waters of the state could be part of a filling activity and, therefore, any "other substances" include any other material that might be used to fill a waterway or waterbody. Some support for such an interpretation can be found in the statute prohibiting obstructions of streams. That statute makes it a misdemeanor to "put any slabs, stumpage, sawdust, shavings, lime, refuse, or any other substance in any . . . stream [or] river."²⁶³ Soil, vegetation, rocks, and sand that create obstructions of such waters undoubtedly would be "other substances" within the meaning of this statute.

But the meaning of "other waste" and "other substances" should be read in light of the purpose of the particular statute of which they are a part. The purpose of the stream obstruction statute is to keep waterways open, whereas the purpose of the statute prohibiting discharge of waste is to prevent pollution and protect the quality of the waters of the state. In light of the specific substances classified as "other waste," the nature question is whether the General Assembly intended to include within the ambit of that phrase wetlands soil and vegetation incidentally falling back into a seasonally dry wetlands or being redeposited in such an area. Ultimately, the answer to that question would appear to hinge on whether seasonally dry, isolated wetlands are "waters of the state." If they are, then such substances, benign on their face, may be viewed as the type of byproducts that, when removed and reintroduced to the waters of the state, potentially degrade those waters.²⁶⁴

260. N.C. GEN. STAT. § 143-211(c) (1999).

261. *Id.* § 143-215.1(a)(6).

262. *Id.* § 143-212(18).

263. *Id.* § 77-14.

264. In *United States v. Deaton*, 209 F.3d 331 (4th Cir. 2000), the defendant engaged a contractor to dig a drainage ditch through a wetlands area. As the contractor dug, he piled

A final but not insignificant difficulty with the Attorney General's approach is that it may not go far enough. In the Corps regulations, fill material is defined as "any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody."²⁶⁵ In the large-scale *Tulloch* landclearing operations, the object of the project may be the conversion of wetlands into dry land, but the incidental discharge of wetlands soil and vegetation is not being done for the primary purpose of replacing the wetlands with dry land or changing the bottom elevation of the wetlands. The material being removed is dredged material—material excavated from the wetlands²⁶⁶—and not fill material. Therefore, even if the EMC has authority to require permits for the discharge of fill material, not all discharges of wetlands soil and vegetation constitute discharges of fill material.

F. Other Risks Associated with Ditching and Draining Wetlands

In addition to potential violations of existing water quality standards, attempts to ditch or drain isolated wetlands in North Carolina pose other legal risks. After the *National Mining* decision, and the rush to ditch and drain wetlands in Eastern North Carolina,²⁶⁷ developers and other property owners subsequently discovered their activities violated other federal and state regulations. Although ditching and draining that involved only incidental discharges were permissible after *National Mining*, the methods used by developers

the excavated dirt on either side of the ditch, a practice known as sidecasting. The defendant argued that the CWA did not prohibit this activity because it prohibited "addition of any pollutant," not simply the "addition of material." According to the defendant, "addition" meant the adding of something not previously present. The court, however, determined that sidecasting, without a section 404 permit, was a violation of the CWA. The court reasoned that "there could be an addition of a pollutant with an addition of material . . . at least when an activity transforms some material from a nonpollutant into a pollutant." *Id.* at 335. "Congress determined," the court continued, "that plain dirt, once excavated from waters of the United States, could not be redeposited into those waters without causing some harm to the environment." *Id.* at 336. Using somewhat similar reasoning, one might argue that the General Assembly made a similar determination when it required a permit for the discharge of any waste into the waters of the State. On the other hand, a major difference between the CWA and the North Carolina statutes is that the CWA specifically designates benign substances such as rock, sand, cellar dirt, and biological materials as pollutants. See 33 U.S.C. § 1362(6) (1994).

265. 33 C.F.R. § 323.2(e) (2000). Since the proposed new EMC rules respond to the possible loss of Corps section 404 jurisdiction over isolated wetlands and use the terms "dredge" and "fill material," the assumption is that the EMC intends those terms to have a meaning similar to that which appears in the Corps' regulations.

266. See 33 C.F.R. 323.2(c) (2000).

267. See *supra* note 168 and accompanying text.

and other property owners went beyond incidental discharges and constituted violations of valid section 404 dredge and fill regulations.²⁶⁸ In addition, even though the DWQ did not immediately step in and enforce its water quality regulations,²⁶⁹ developers and other property owners discovered that their activities violated the state Sedimentation Pollution Control Act.²⁷⁰ The end result was subsequent federal and state enforcement and the refilling of ditches, restoring of wetlands hydrology, and payment of substantial fines.²⁷¹

CONCLUSION

The recent developments in wetland litigation may refocus attention on the nature of the Clean Water Act and determine whether the Act will continue to be applied to protect and preserve the nation's wetlands resources. While a narrow interpretation of "incidental discharge" may limit dredge and fill activities in isolated freshwater wetlands, this may not matter as much after the *SWANCC* decision. To some degree, *SWANCC* affects the geographic scope of section 404. Although the impact of this change in federal law is uncertain because accurate estimates of the wetland resources affected are not possible,²⁷² the decision in *SWANCC* is potentially devastating to our nation's efforts to protect both water quality and migratory birds.

In the southeast, certain important and unique wetlands found along the Atlantic coastal plain, including Carolina Bays and pocosins, many of which are isolated, non-navigable, intrastate freshwater wetlands, may not qualify as "waters of the United States." These wetland areas provide habitat for waterfowl and

268. See, e.g., *Regulators Going After Developers*, *supra* note 168.

269. See *supra* notes 168-69 and accompanying text.

270. N.C. GEN. STAT. §§ 113A-50 to -67 (1999); see, e.g., Shiffer, *Loophole*, *supra* note 168; Shiffer, *State Takes Strict Action*, *supra* note 216. These enforcement actions were taken by the state Division of Land Resources. Any landclearing activity of more than one acre requires the approval of an erosion control plan and compliance with the plan. See N.C. GEN. STAT. § 113-57 (1999). Even if the clearing involves less than one acre, if sediment leaves the site, that is violation of the act and subjects the violator to enforcement action. Poyner & Spruill, L.L.P., *supra* note 236, at 1.

271. See *supra* note 169 and accompanying text.

272. With so much continuing uncertainty as to the meaning of "waters of the United States" and uncertainty as to which non-404 jurisdictional wetlands will still be subject to regulation under state laws and what limitations on activities in non-404 jurisdictional wetlands exist, the estimate of the range of wetlands affected by the *SWANCC* decision is broad. National estimates of the affected wetlands range from thirty to seventy-nine percent of the nation's wetlands acreage. Kunsler, *supra* note 30, at 9.

terrestrial animals. In addition, wetlands known as mountain bogs would likely be excluded from section 404 jurisdiction. These freshwater wetlands are located throughout the Appalachian Mountains and provide habitat for numerous animals, including several rare amphibian species.²⁷³

Although the State continues to regulate some activities that threaten these important natural resources, developers and other property owners continue to question whether that power exists under current North Carolina law. Whether the State may continue to apply its water quality standards to restrict the ditching and draining of wetlands depends on the interpretation of state statutes and ambiguous EMC regulations. Hopefully, public interest in protecting all water resources will be the guiding principle in that task. However, if it is determined that some isolated freshwater wetlands are not waters of the State of North Carolina, then it is imperative that the legislature and the EMC act to close this loophole. Otherwise history tells us that, lacking both federal and state protection, it is likely that the state, and the nation, will experience an onslaught of destructive development activities in such unprotected wetlands.²⁷⁴

273. In other areas of the country, perhaps the most significant wetlands that could be excluded from section 404 jurisdiction are prairie potholes in the Midwest. Prairie potholes are small, freshwater wetlands that were formed by glaciers. An estimated fifty to seventy-five percent of all waterfowl in North America depend on these wetlands for habitat.

274. This is evidenced by what happened in 1998 in North Carolina. *See supra* note 168 and accompanying text.

