THE ODD COUPLE: THE HIGH COURT'S EXPANSION OF ENVIRONMENTAL STANDING IN WATERS BUT CONTRACTION OF REGULATORY JURISDICTION OVER THEM

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I. INTRODUCTION

There is a principle in aiki–jujitsu known as expansion and contraction.[1] If a clutching enemy is too strong, you can move away at an angle and stretch or expand him like a rubber band, then, while he is momentarily caught off balance and weak, you can move back again to contract him and let him flop, like letting go of and shooting a rubber band.[2] The United States Supreme Court seemed to follow this principle in two recent environmental/administrative law cases. In one, the Court opened the door to plaintiffs who could sue over environmental matters,[3] but in the other, the court shut the door on a host of plaintiffs as to what environmental matters they could pursue. As expected, the Court has left lawyers with a bit of a mystery as to where its expansions and contractions will go. This article is about those two cases.

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1. Seminar by Shihan Dennis G. Palumbo on "hakkoryu," on March 10, 2000.
2. *Id*.
3. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167 (2000).

II. EXPANSION—OVERVIEW OF STANDING ISSUE

Based upon a narrow reading of the standing requirements in the United States Constitution, the United States Supreme Court on January 12, 2000, handed down a decision in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*[4] that perhaps reverses a ten–year judicial trend of curtailing citizen public interest suits against companies.[5]

Constitutional standing is the one tool courts utilize to assure that they are not overstepping the judicial bounds of separation of powers and to assure that they are deciding cases rather than governing society.[6] Standing, in broad terms, means A cannot normally sue B for an injury B inflicts on C. Rather, B needs to injure A for A to sue B. The difficulty in environmental cases is that A's injury is usually more aesthetic or intuitive than physical or economic and is more difficult for a court to measure.

Standing requires plaintiffs to present proof of their status, if challenged,[7] to include "injury in fact"—real, concrete and particularized, and actual or imminent, and not just speculative or hypothetical; a "causal connection" between the plaintiff's harm and "fair traceability" to defendant's actions, rather than to actions of independent non–parties; and "redressibility"—the injury must likely be redressed by a favorable court decision.[8] When an organizational plaintiff is involved, the organization must additionally show that its members would have standing to sue individually

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4. 528 U.S. 167 (2000). Note: The analysis addresses only statutory citizen suits based upon violations of environmental laws and not toxic tort suits which require a plaintiff to show damages. Standing's "injury in fact" involves a lesser showing than actual damages in the tort sense. Most of Part II of this article was originally published as, Stanley A. Millan, *Laidlaw and the Coming of the "Anti–Company"*, *in* 6 LA. ENVTL. LAW. 2 (Spring 2000).

5. *See Lujan v. Nat'l Wildlife Federation*, 497 U.S. 871, 898 (1990), for the beginning of this trend. *See also* Stanley A. Millan, Lujan v. NWF*: One Step Backward for Standing*, 21 BNA ENVTL. REP. 1057 (1990).

6. For a discussion on other tools involving the quintuple helix of finality, exhaustion of administrative remedies, ripeness, primary jurisdiction, and mootness, see 2 KENNETH DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE §§ 14–15 (3d ed. 1994). Mootness is also discussed in *Laidlaw*, 528 U.S. at 189.

7. Stanley A. Millan, *Louisiana Public and Private Natural Resources*, *in* LOUISIANA ENVIRONMENTAL HANDBOOK 26–1, 9–10 (Roger Stetter ed. 2000) [hereinafter *Louisiana Resources*]. Other prudential limitations exist to standing, like whether the injury is in the "zone of interest," or covered, by the statute alleged to be violated. *Id*. at 26–10.

8. *Id.* at 26–10.

(as seen above), that it is seeking to protect interests that are germane to its purpose, and neither the claim asserted (e.g., property damages per se) nor the relief requested requires the organization's members to participate in the lawsuit (e.g., as a party, as opposed to a witness).[9]

A. Facts

In *Laidlaw*, the defendant, Laidlaw, operated a hazardous waste incineration facility in South Carolina.[10] Laidlaw had a National Pollutant Discharge Elimination System (NPDES) water discharge permit authorizing discharge of waste water into a river.[11] The permit's discharge limits included mercury.[12] Laidlaw violated the mercury limits on 489 occasions between 1987 and 1995.[13] As a result, Friends of the Earth filed a citizens suit against Laidlaw in 1992.[14] Before the lawsuit was filed, Laidlaw allegedly struck a "sweetheart" deal with the South Carolina Department of Health and Environmental Control.[15] In a "speedy" lawsuit filed for the discharge violations, Laidlaw settled the case for $100,000 in penalties with the state.[16] A few days after this "settlement," Friends of the Earth filed its citizens suit against Laidlaw under the Clean Water Act.[17] That Act allows citizens to enforce the law against violators under certain conditions.[18]

After the complaint was filed but before the district court rendered judgment, Laidlaw violated the mercury discharge limits in its permit thirteen additional times.[19] The last recorded mercury discharge violation occurred in 1995, years after the complaint was filed, but two years before the district court's judgment

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9. *Millan Louisiana Resources*, *supra* note 7, at 26–10. *See also* Meredith v. Ieyoub, 700 So. 2d 478 (La. 1997), for this test.
10. *Laidlaw*, 528 U.S. at 175.
11. *Id*. at 176.
12. *Id*.
13. *Laidlaw*, 528 U.S. at 176.
14. *Id*.
15. *Id*. at 175–77.
16. *Id*. at 177.
17. *Id*.
18. *See* Stanley A. Millan, *Environmental Law: Fifth Circuit Decisions on Water, Waste, and States' Rights*, 44 LOY. L. REV. 415, 426–428 (1998) [hereinafter *Millan Envtl. Law*].
19. *Laidlaw*, 528 U.S. at 179.

was rendered.[20] Additionally, in late 1998, Laidlaw allegedly closed its incineration facility permanently, dismantled it and put it up for sale.[21] Allegedly all discharges from the facility permanently ceased before the United States Supreme Court granted certiorari in the case in 1999.[22]

The Court's majority opinion, authored by Justice Ginsburg addressed the issues of mootness and standing.[23] The standing issue before the Court was whether the plaintiffs' satisfied Article III's standing requirements of showing that they have suffered an "injury in fact."[24] Plaintiffs abandoned their claim for injunctive relief before the district court, where they also sought over $400,000 in penalties for Laidlaw's unauthorized discharges.[25]

Laidlaw contended that plaintiffs lacked "injury in fact" because they could not show proof of harm to the environment from Laidlaw's mercury discharges.[26] Significantly, the Court explained that it was *not injury* to the environment, but *injury to the plaintiff* that satisfies Article III's standing requirements.[27] The Court noted that to insist upon the former "is to raise standing hurdle higher than the necessary showing for success on the merits."[28] Interestingly, the Court examined a number of affidavits submitted by plaintiffs to demonstrate their "injury in fact" in the case.[29] All the affiants averred that they would use the affected area of the river "but for" the pollution.[30] The Court stated that the affiants are persons for whom the challenged activity of Laidlaw would lessen the aesthetic and recreational value of the area.[31]

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20. *Laidlaw*, 528 U.S. at 179.
21. *Id*.
22. *Id*.
23. *Id*. at 180.
24. *Laidlaw*, 528 U.S. at 180.
25. *Id.*
26. *Id*. at 181.
27. *Id.* (emphasis added).
28. *Laidlaw*, 528 U.S. at 181.
29. *Id*. at 181–83.
30. *Id.*
31. *Id*. at 183 (citing Sierra Club v. Morton, 405 U.S. 727, 735 (1973)).

B. Averments of "Injury in Fact"

The affidavits in *Laidlaw* included the following examples:[32]

> Curtis, who lived a half a mile from the facility, stated that the river looked and smelled polluted, and stated that he would recreate three to fifteen miles downstream of the facility but for his *concerns* about pollution;[33]
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> Patterson attested that she lived two miles from the facility, that she had picnicked, walked, bird–watched and waded in the river, because of its natural beauty, but that she no longer engaged in these activities "because she was *concerned* about harmful effects from discharged pollutants;"[34]
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> Patterson also testified that she and her husband would like to buy a home near the river, but did not do so because of Laidlaw's discharges;
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> Pruitt averred that she lived a quarter of a mile from the facility, would like to fish, hike and picnic along the river, "but refrained from those activities because of the mercury discharges;"
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> Moore testified she lived twenty miles from the facility, would use the river south of the facility and land surrounding it for recreational purposes were she not *concerned* that the water contained harmful pollutants;[35]
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> Lee testified that her home, which was "near Laidlaw's facility, had a lower value than similar homes located further from the facility, and that she *believed* the pollutant discharges accounted for some of the [price] discrepancy;"[36]

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32. *Laidlaw*, 528 U.S. at 181–82.
33. *Id*.
34. *Id*. at 182 (emphasis added).
35. *Id*.
36. *Id*. at 182–83 (emphasis added).

> Sharp averred that he had canoed forty miles downstream of the facility and would like to canoe in the river "closer to Laidlaw's discharge point, but did not do so because he was *concerned* that the water contained harmful pollutants."[37]

C. "Injury in Fact" and "Redressibility" Rulings

The Court reaffirmed its decision in *Lujan v. National Wildlife Federation*,[38] which held that a plaintiff could not survive a summary judgment motion merely by offering averments which state only that one of the organization's members used "*unspecified* portions of an *immense* tract of territory, on some portions of which [regulated] mining activity has occurred or probably will occur by virtue of the government action."[39] In contrast, the Court said the affiants in the instant case demonstrated a member's reasonable concern about the effects of discharges *directly* on their "recreational, aesthetic, and economic interests."[40] The Court noted that these concerns are "dispositively more" than the "*general* averments" and "*conclusory* allegations" that the Court already found insufficient in *Lujan v. Defenders of Wildlife*.[41]

The dissenters felt that the majority's holding reduced standing to subjective apprehensions.[42] The majority responded by explaining that it was undisputed that Laidlaw's unlawful conduct of discharging pollutants in excess of permit limits was occurring at the time the complaint was filed.[43] The Court saw nothing improbable about the proposition "that the company's *continuous* and *pervasive* illegal discharges of pollutants into a river" affected

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37. *Laidlaw*, 528 U.S. at 183 (emphasis added).
38. 497 U.S. 871 (1990).
39. *Id.* at 889 (emphasis added).
40. *Laidlaw*, 528 U.S. at 184.
41. *Id.* (emphasis added).
42. *Id.* at 198–203 (Scalia, J., dissenting). The Court previously rejected the argument that certain environmental statutes cover fear. *See* Metro. Edison Co. v. People Against Nuclear Energy, 460 U.S. 766 (1983).
43. *Laidlaw*, 528 U.S. at 184.

nearby recreational use of the waterway and subjected residents to other "economic and aesthetic harms."[44]

Although the Court did not discuss the second prong of standing, "causation," it did discuss the third prong of standing, "redressibility."[45] The dissenters asserted that by abandoning injunctive relief, plaintiffs could not "bootstrap" themselves on standing based upon imposition of civil penalties because the illegal conduct had ceased.[46] However, the majority felt that even though the civil penalties would be payable to the government, the penalties will have some deterrent effect on future Laidlaw violations.[47] The Court explained that a sanction (like penalties) that effectively abates the plaintiff's concerned injury, prevents its recurrence and provides a form of redress.[48] The Court acknowledged that at some point the deterrent effect of civil penalties may become too insubstantial and remote to support a citizens suit.[49] However, the Court did not address or define the outer limits of remoteness. The Court noted simply that "the civil penalties sought by [Friends of the Earth] carried with them a deterrent effect that made it *likely*, "as opposed to *merely speculative*, that the penalties would redress [their] . . . injuries by abating current violations and preventing future ones."[50] The Court distinguished the recently decided *Steel Company* case, which held that citizens lack standing to seek civil penalties for violations that have abated by the time of the suit.[51] In the instant case, the penalties were for violations that were ongoing at the time of the complaint and that could have continued into the future if undeterred.[52]

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44. *Laidlaw*, 528 U.S. at 184 (emphasis added). Even Justice Scalia, dissenting in *Lujan*, also previously held that plaintiffs living "next door" to a polluting facility are likely to have standing. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 573 n.7 (1992).
45. *Laidlaw*, 528 U.S. at 185.
46. *Id*. at 202.
47. *Id*. at 186.
48. *Id*. at 187.
49. *Id.*
50. *Laidlaw*, 528 U.S. at 187 (emphasis added).
51. *Id*. *See also* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 106–07 (1998). Citizen suits, as opposed to direct government enforcement against polluters, generally cannot be asserted for wholly past violations. Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 59 (1987).
52. *Laidlaw*, 528 U.S. at 188.

D. Mootness and Separation of Powers

The Court also found that it should not dismiss the citizen's suit as moot because the defendants did not bear the *heavy burden* of showing that it was "*absolutely clear* that the allegedly wrongful behavior could not reasonably be to recur by Laidlaw."[53] The Court noted that if the prospect of a defendant resuming lawful conduct existed, the Court would not view the prospect as too speculative to overcome a mootness defense.[54] The Court remanded the case for a determination of disputed factual issues, because the facility was allegedly closed and the unlawful discharges had allegedly ceased.[55]

In concurrence, Justice Kennedy expressed concern about whether the citizens were unconstitutionally fulfilling law enforcement responsibilities that Article II of the Constitution committed to the Executive.[56] Justices Scalia and Thomas dissented,[57] and although they generally concurred in the mootness finding, they felt that the facts alleged in the affidavits were too speculative and conclusory to support standing.[58] They noted that to find an "injury in fact," there must be harm to the environment which injures the plaintiff.[59] They felt that the Court treated the "injury in fact" requirement as a "sham"[60] and questioned the "redressibility" holding, noting that the penalties were too speculative and generalized.[61] The dissent also emphasized the Article III implications of the Supreme Court's decision and cautioned that this "new standing law" carries "grave implications for democratic governance."[62]

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53. *Laidlaw*, 528 U.S. at 189 (emphasis added).
54. *Id*. at 189–90.
55. *Id*. at 194–95. Recent cases have split over whether the sale of a polluting facility will moot a citizen enforcement suit. *See, e.g.*, *In re* Southdown, Inc., 2001 WL 471912, at *6 (S.D. Ohio 2001).
56. *Id*. at 197.
57. *Id.* at 198.
58. *Laidlaw*, 528 U.S. at 198–201.
59. *Id.* at 199–200.
60. *Id*. at 201.
61. *Id*. at 202–03.
62. *Id.* at 202.

E. The Missing Prong—"Causation"

The Court did not expressly deal with or analyze the "causation" (or harm "fairly traceable" to defendant's action) requirement of standing. Earlier, appellate courts have considered harm to the environment in the context of the "causation" element of standing.[63] For instance, in *Friends of the Earth, Inc. v. Crown Central Petroleum Corp.*,[64] the court noted that waterways covered by federal protection may be so large that the complainant should rightfully demonstrate a more specific geographic area or other nexus to satisfy the causation element of standing.[65] In that case, plaintiffs only used a portion of a lake some eighteen miles downstream from a refinery allegedly polluting the waterways.[66] The court felt that the waterway in that case was too large to infer causation solely from the use of another portion of the waterway.[67] The court found that plaintiffs' assumption that, because water flows downstream, any upstream pollutants from a refinery would have a noticeable effect eighteen miles downstream, was not sufficient.[68] Therefore, the plaintiffs in that case lacked standing because they did not show any evidence linking the pollution to harm on their lake usage.[69] Did *Laidlaw* affect this case law?

In *Laidlaw*, the Court held that one cannot link harm to the environment with harm to the plaintiffs to defeat standing because such a link confuses standing with the merits of the case.[70] However, the Supreme Court's holding on this point was solely in the context of "injury in fact," not "causation."[71] Thus, in "causa-

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63. *See* Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., 73 F.3d 546, 556 (5th Cir. 1996); Pub. Interest Research Group, Inc. v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 72 (3d Cir. 1990).

64. 95 F.3d 358 (5th Cir. 1996).

65. *Id*. at 361–62.

66. *Id*. at 362.

67. *Id*.

68. *Id*. *See also* Atlantic States Legal Found. v. Babbitt, 140 F. Supp. 185, 191 (N.D. N.Y. 2001).

69. *Crown Central*, 95 F.3d at 362.

70. *Laidlaw*, 528 U.S. at 181.

71. *See id.* at 185. The defendant apparently did not raise the "causation" element below. *See id.* at 176. See generally Brief for Respondent, *Friends of the Earth, Inc. v. Laidlaw Environmental Services*, 528 U.S. 167 (2000) (No. 98–822), where the Brief Amicus Curiae of the Washington Legal Foundation did raise "causation." In the "injury in fact" context, the Court noted that Laidlaw's continuous and pervasive illegal discharges *caused* the nearby residents to curtail their recreational use of the waterway. *Laidlaw*, 528 U.S. at 183–84.

tion" the focus shifts from plaintiff's harm to defendant's conduct. Furthermore, the facts of *Laidlaw* involved plaintiffs who *lived near and used* the water downstream of the facility. That was not as immense, perhaps, as that at issue in the *Crown Central* case. Thus, it still seems that cases like *Crown Central* should have merit on "causation" when the plaintiffs are alleging harm in the context of a geographically or temporally immense environmental problem (not, arguably, involved in *Laidlaw*).

Moreover, in those pollution cases wherein the plaintiff is isolated or distant, this causation problem may also occur in the case of plaintiffs who allege injury because of an agency's failure to consider cumulative impacts on the environment. The agency should consider the permit with other past, present, and reasonably foreseeable future actions or permits, including conduct of independent third parties not before the court, and those who may not be controlled by the defendant in the case.[72] This issue could occur in the context of lawsuits involving federal or state "wetland" permits,[73] impact to public land,[74] the National Environmental Policy Act,[75] the Louisiana "IT" doctrine,[76] etc. *If* the geographic area or temporal span affected by the plaintiff's millennium argument is great, even though plaintiff may have the requisite "injury in fact," plaintiffs may not be able to meet the "causation" requirement of standing of some counts. It is, thus, important for plaintiffs to remain focused on their "injury in fact" from the defendant and not on some other or future actors.

Although state law is not directly affected by the Article III holdings, many states have standing requirements mirrored after federal decisions.[77] The Supreme Court's expansion of "injury in

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72. *See* Sierra Club v. Glickman, 156 F.3d 606, 614–15 (5th Cir. 1998). Independent third party involvement can also relate to "redressibility." *Id*. at 616.

73. Bayou Liberty Assoc. v. United States Army Corps of Eng'rs, 217 F.3d 393, 395 (5th Cir. 2000).

74. *See generally* Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871 (1990).

75. 42 U.S.C. § 4321 (1994).

76. Save Ourselves, Inc. v. Louisiana Envtl. Control Comm'n, 452 So. 2d 1152 (La. 1984).

77. *See* Calcasieu League for Envtl. Action NOW v. Thompson, 661 So. 2d 143, 147–48 (La. App. 1st Cir. 1995). *See also* Anthony Pastor, Meredith v. Ieyoub*: The Louisiana Supreme Court Limits the Power of the Attorney General by Applying the Separation of Powers Doctrine*, 72 TUL. L. REV. 2239 (1998) (for a discussion of broader "taxpayer standing" in Louisiana).

fact" of standing to near speculation that a plaintiff will not use the resource allegedly damaged by pollution because they are *concerned*, could well expand in all courts the class of plaintiffs that can successfully *remain* in court in environmental cases.

Thus, we may have a new wave of citizens' suits empowered by the *Laidlaw* decision. In this age of relaxed environmental enforcement by the agencies, the citizens' responsibility may have been reborn. This may spell the coming of a new era of the "anti–company" syndrome where government does not always support industry,[78] where government may "overkill" when it does enforce the law, and where a reinvigorated citizenry will enforce the law when the government will not. Whether it is only the Executive who may take care that laws be enforced remains to be tested.

F. Implications

The progeny of *Laidlaw* is manifold and still expanding. Shortly after the *Laidlaw* decision, the Supreme Court decided *Vermont Agency of Natural Resources v. Stevens*,[79] in which the Court upheld standing of a *qui tam* relator under the False Claims Act ("FCA") who was suing for fraudulent injury on behalf of the government.[80] Justice Scalia, citing *Laidlaw*, as well as the other standing cases, including *Lujan v. Defenders of Wildlife*,[81] questioned the standing of the *qui tam* relator with respect to a portion of his recovery, and the bounty he would receive if he was successful, (as similar to one who has placed a wager upon an outcome).[82] However, the Court did not find this to be a "speculative" injury at all, because the FCA could be regarded as effecting a partial assignment of the government's damages claim to the relator.[83] Thus, the relator's damages were not akin to a by–product of a suit, which alone could not give rise to Article III standing. This is an expansion of "injury in fact," and, essentially, defers to a congressional statutory mandate of injury.

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78. *See generally* Brief for Petitioner, Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167 (2000) (No. 98–822).
79. 120 S. Ct 1858 (2000).
80. *Id*. at 1866–67.
81. 504 U.S. 555, 560 (1992).
82. *Stevens*, 120 S. Ct. at 1862–63.
83. *Id*. at 1863.

Similarly, the Ninth Circuit in *Ecological Rights Foundation v. Pacific Lumber Co.*,[84] held that a Clean Water Act citizen had standing to sue for pollution by a lumber company, even though that member of the plaintiff's environmental organization did *not* live *near* the facility.[85] The court, citing *Laidlaw*, stated that daily geographic proximity, for instance, may make actual past recreational use less important in substantiating "injury in fact," because a person who lives near a facility is likely to notice and care about the physical beauty of the area.[86] The court further stated that a person who *uses* an area for recreational purposes does not have to show that he or she lives particularly nearby, to establish an "injury in fact" to the *possible* or *feared* environmental degradation.[87] Repeated recreational use accompanied by a credible allegation of desired future use can be sufficient, even if infrequent, to demonstrate that environmental degradation of the area is injurious to that person.[88] The court further held that plaintiffs need *not* have *regular* continuous contact with the resource they wish to protect to have standing.[89]

Likewise, in *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*,[90] the Fourth Circuit analyzed the "fairly traceable" requirement of standing after the *Laidlaw* decision.[91] The *Gaston Copper* court was liberal in interpreting the "fairly traceable" standard as not being equivalent to the requirement of a tort causation.[92] The plaintiffs in the case established that Gaston Copper was discharging heavy metals in the lake and that there was presence of heavy metals in the lake of the type discharged by Gaston Copper. Further, tests showed Gaston Copper was discharging pollutants at a level that caused environmental degradation.[93] Plaintiffs further presented evidence that Gaston Copper's

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84. 230 F.3d 1141 (9th Cir. 2000).
85. *Id*. at 1149–50.
86. *Id*. at 1150.
87. *Id*.
88. *Id*. at 1149. In this case, plaintiff's members attested to longstanding recreational and aesthetic use of the creek that was being polluted at the specific place at issue in the case. *Id*. at 1144. The plaintiff's members either refrained from fishing in the creek because of concerns about pollution, or expressed a desire to continue to enjoy the beauty of the area. *Id.*
89. *Pacific Lumber*, 230 F.3d at 1150 n.10.
90. 204 F.3d 149 (4th Cir. 2000).
91. *Id*. at 154.
92. *Id*. at 161.
93. *Gaston Copper*, 204 F.3d at 161.

discharges would travel 16.5 miles downstream to pass in the area of concern to plaintiffs, Shealy's Lake.[94] Gaston Copper could point to no other source of pollution. The court explained that it would not transform the "fairly traceable" requirement into a kind of scientific inquiry.[95] The court noted that the absence of laboratory analysis of the chemical content, salinity, or ecosystem of Shealy's Lake is of no moment because the law does not require that type of evidence for standing.[96] The court did say that it would draw a distinction between the plaintiff who lives within the "discharge zone" of the polluter and one who is so far downstream that his injuries cannot be "fairly traced" to the defendant.[97] The court indicated that eighteen miles could be too far away, and two miles could be sufficiently close.[98]

However, other standing cases since *Laidlaw* have not been as gentle on "injury in fact." In *Central and Southwest Services v. United States*,[99] the Fifth Circuit found that plaintiffs could not show that they were likely to suffer any direct or concrete injury as a result of an EPA rule dealing with the use and disposal of PCBs.[100] The court found that the plaintiffs' subjective fears and *speculative* string of events could not possibly serve as a basis for standing.[101] Additionally, in *American Petroleum Institution v. United States*,[102] another circuit court rejected plaintiffs' standing, noting that while *Laidlaw* may not require very much to constitute a concrete and particularized harm, more than a *vague* statement is required.[103] In *American Petroleum*, the plaintiffs

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94. *Id*.
95. *Id.* at 162.
96. *Id*.
97. *Gaston Copper*, 204 F.3d at 162.
98. *See id.* (citing Friends of the Earth, Inc. v. Crown Cent. Petroleum Corp., 95 F.3d 358, 361–62 (5th Cir. 1996) and Friends of the Earth, Inc. v. Chevron Chem. Co., 900 F. Supp. 67, 75 (E.D. Tex. 1995)).
99. 220 F.3d 683 (5th Cir. 2000).
100. *Id*. at 701.
101. *Id*. Plaintiff's expert, Dr. Carman, testified that PCB bulk product waste disposed of in his town's landfill may leach from the landfill and somehow enter the town's water supply. *Id*. at 700. However, he presented no facts to support this concern. *Id*. He produced no facts establishing the relative location of the landfill and the aquifer. *Id.* at 701. The court felt that it was purely conjectural that PCBs could leach from the landfill and contaminate his town's water supply. *Id*. A subjective concern, the court said, could not serve as a basis for the plaintiff's standing. *Id.*
102. 216 F.3d 50 (D.C. Cir. 2000).
103. *American Petroleum*, 216 F.3d at 67.

established that an EPA order regulating several materials generated in petroleum refining and petrochemical industries, would allow quenching of coke in waste of a toxic nature and would increase the dust and levels of toxic contaminants in the environment.[104] Plaintiffs also established that they lived near refineries or coke storage sites.[105] However, the court held the generalized testimony—that insertion of hazardous waste in the coking process is potentially unhealthy and environmentally unsound, and that coke product emissions from such a process are likewise unhealthy and unsound—does not provide the link between the process and what is substantially likely to occur at the facilities in question.[106]

Finally, in *City of Philadelphia v. Baretta U.S.A. Corp.*,[107] the court also stressed the "fair traceability" prong of standing.[108] The suit was not an environmental suit, but was, rather, a suit by the City against gun manufacturers, alleging that the gun industry's method of distributing guns was negligent and a public nuisance.[109] Yet, the court analogized it to environmental cases. This case is discussed because it does probe the "fair traceability" aspect of *Laidlaw*, which was not emphasized in that Court decision. *Laidlaw*, however, did imply that plaintiffs need only show that the pollution "causes" their concern. Nevertheless, the court in *Baretta* found that the plaintiffs failed to establish standing because they could not meet the "fair traceability" element.[110] The court stated that plaintiffs need not show causation to a scientific certainty or to tort law causation standards.[111] The court rejected the plaintiffs' attempt to analogize to the distance of plaintiffs from facilities in water cases, that were, nevertheless, causing pollution.[112]

The court stated that once in a water course, toxins move downstream by force of nature.[113] The court further noted that

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104. *Id.* at 66.
105. *Id.* at 65.
106. *Id.* at 67–68.
107. 126 F. Supp. 2d 882 (E.D. Pa. 2000).
108. *Id.* at 896.
109. *Id.* at 888.
110. *Id.* at 897.
111. *Id.* at 896.
112. *City of Philadelphia*, 126 F. Supp. at 896.
113. *City of Philadelphia*, 126 F. Supp. at 897.

the human role ends with the act of pollution.[114] By contrast, gun manufacturers' products lawfully enter the stream of commerce.[115] Only illegal conduct or harm to plaintiffs because of *intervening actions* by independent individuals, including the federally licensed dealer who must sell the gun, the store buyer who must resell it, and the criminal who must use it, which could cause the plaintiff injury.[116] The court felt none of these events are natural consequences of the gun manufacturers' distribution scheme. The court explained:

> It is also disturbing that the organizational plaintiffs argue that they may sue for the costs of educational sessions and other programs which they run to counteract gun violence. By this logic, any social action organization may confer standing upon itself by voluntarily spending money on the social problem of its choice. Analogously, the environmentalist group in *Lujan* would have standing to protest the endangerment of wildlife in Sri Lanka simply by running programs to preserve flora and fauna. This will be a novel and vast expansion of associational liability for which plaintiffs have advanced no precedential support. It also contradicts the prudential concern behind the standing doctrine that courts not become vehicles for the advancement of ideological and academic agendas.[117]

Thus, the progeny of *Laidlaw* has been kind to some plaintiffs, but most courts still insist upon a full analysis of the three prongs of standing, including causation. Although plaintiffs' standing on injury–in–fact may be somewhat relaxed, more is required than just generalized assertions. However, scientific proof

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114. *Id*.
115. *Id*.
116. *Id*.
117. *Id*. Other courts have analyzed the causation element of standing after the *Laidlaw* decision. *See generally* Tozzi v. United States Dep't of Health & Human Servs., 2000 U.S. Dist. LEXIS 15990, at *9 (D.D.C. 2000); Friends of the Earth v. Gaston Copper Recycling, 9 F. Supp. 2d 589, 594 (D.S.C. 1998). *See also* Natural Res. Def. Council v. S.W. Marine, Inc., 236 F.3d 985, 994–95 (9th Cir. 2000) (finding curtailment of bay use due to pollution concerns "fairly traceable" to shipyard conduct); Chlorine Chemistry Council v. EPA, 206 F.3d 1286, 1286 (D.C. Cir. 2000) (finding a substantial probability that EPA rule will cause petitioners higher cleanup liability); Cantrell v. City of Long Beach, 241 F.3d 674, 680 (9th Cir. 2001) (finding causation relaxed after a finding of injury in fact is met).

of harm is not required. Perhaps with the new relaxed *Laidlaw* standard, a court may answer the question of whether there is standing for a legal complaint against global warming.[118] Yet, the Supreme Court recently in the *qui tam* case reserved the Article II issue about citizen enforcement, noted in *Laidlaw*'s dissent and concurring opinions.[119]

III. CONTRACTION: LOSS OF REGULATORY JURISDICTION OVER ISOLATED "WETLANDS"

A. History

The other Supreme Court case, *Solid Waste Agency v. United States Army Corps of Engineers*,[120] ("*SWANCC*") may have reversed a trend of decades of Corps of Engineers and United States EPA extensions of regulatory jurisdiction over non–navigable waters.[121] Although that case involved a challenge to a permit by the applicant, what waters are subject to the Clean Water Act is also a vital issue for enforcement, including citizen enforcement.[122] It is critical to examine what waters and wetlands are of the type that a plaintiff may assert federal regulatory jurisdiction under statutes and regulations, particularly the Clean Water Act, enabled by the Commerce Clause. A brief review of relevant Commerce Clause case law leading up to this junction is appropriate.

The federal government's regulatory jurisdiction over navigable waters is based upon Article 1, Section 8, Clause 3 of the

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118. David R. Hodas, *Standing and Climate Change: Can Anyone Complain About the Weather?*, 15 J. LAND USE & ENVTL. LAW 451 (2000). A NEPA cause of action would likely have to be fashioned against some government inaction. *Id*. at 487. However, this multi–causal and multi–effect phenomenon—involving a myriad of greenhouse gases from numerous sources and effects ranging from rising waters to climate change—would liken a plaintiff to a blindfolded person pinning the tail on the donkey. And, although *Federal Election Commission v. Adkins*, 524 U.S. 11 (1998), opened standing to generalized but concrete grievances with respect to information needed to exercise the right to vote, the geographic scope of this climate problem is enormous.

119. *Laidlaw*, 528 U.S. at 209.

120. 121 S. Ct. 675 (2001).

121. The Corps regulates the development of wetlands and "waters" under 33 U.S.C. § 1344(a) (1994). *Id*. at 680. However, the "end of the pipe" waste water discharge permit program and the oil spill provisions of the Act are also affected by the Court's ruling. *See* 33 U.S.C. §§ 1321, 1342 (1994).

122. *SWANCC*, 121 S. Ct. at 692.

United States Constitution (the Commerce Clause).[123] Neither the earlier Rivers and Harbors Act of 1899,[124] nor the Clean Water Restoration Act,[125] necessarily regulate "wetlands." Rather, those statutes primarily regulate "navigable waters." Through rule–making, the federal regulatory agencies extended and interpreted navigable waters to mean some, but apparently not all, wetlands.[126]

Historically, millions of acres of wetlands which bounded the nation were either considered hindrances or disease–laden areas.[127] "However, over time, wetlands have been recognized as performing many valuable functions, including water quality improvements, groundwater recharging, natural flood control, and habitats for fish and wildlife. Wetlands are also important to commercial fisheries and for recreational use. Yet more than half of the nation's wetlands have been lost in the past 200 years, and the loss rate continues annually in the thousands of acres due to both human and natural forces."[128] For instance, since the late 1700's, Louisiana has lost approximately forty–six percent of its wetlands, leaving about 6,505,988 acres of inland wetlands which play critical roles in Louisiana habitat.[129]

It has been only during the last twenty–five years that wetlands have been regulated extensively by the government.[130] Since approximately seventy–five percent of the nation's wetlands are privately owned, there are competing demands for their use.[131] Environmentalists and some agencies favor retention of wetlands in their natural state so wetlands can serve the functions described above. However, private interests seek to develop their wetlands for profitable uses, including farming, oil and gas explo-

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

124. 33 U.S.C. § 403 (1899) (codified as 22 U.S.C. §275(a) (1994) and 33 U.S.C. §§ 610, 633 (1994)).

125. 33 U.S.C. § 1344(a) (1948).

126. *See* Stanley A. Millan, *The Fifth Circuit's Wetland Determination and Superfund Liability Requirements*, 40 LOY. L. REV. 581, 593 (1994) [hereinafter *Millan Wetland*]. The brief history of the wetlands herein is extracted from this article.

127. *Id*. at 590–92.

128. *Id*. *See also Millan Envtl. Law*, *supra* note 18, at 458.

129. *Louisiana Statewide Wetlands Conservation and Management Strategy*, *in* LOUISIANA DEPARTMENT OF NATURAL RESOURCES 4 (June 1999).

130. *Millan Envtl. Law*, *supra* note 18, at 458.

131. *Id*.

ration, golf courses, real estate development, and so forth. Hence, recognition of wetlands' natural values, and competing private and ecological demands for wetland development and preservation, have provided the impetus for wetlands regulation in our society.

One purpose of the federal Clean Water Act[132] was to broaden the definition of traditionally "navigable waters" in order to control pollution at its source.[133] "Congressional debates regarding the Clean Water Act noted that past, narrow interpretations of 'navigable waters' severely limited federal regulation over waters."[134]

Water moves in hydrological cycles (up and down [and in and out], but not uphill) and it is essential that discharge of pollutants be controlled at the source. Hence, the Clean Water Act expanded the notion of "navigable" waters from its relationship to tidewaters and transportation. This expansion allowed the federal government to go beyond the traditional benchmarks of bays and rivers in regulating waters.[135] How far this expansion could go was only recently checked by the *SWANCC* decision.

> Prior to the Clean Water Act, there were two primary types of water subject to federal control for regulatory jurisdiction purposes—tidewaters and rivers used to transport interstate commerce. Thus, waters which are or may be used to transport foreign or interstate commerce and waters which are or may be subject to the ebb and flow of tides were navigable waters of the United States and subject to federal control. The first category is considered navigable if the water, either by itself or in conjunction with other waterways, forms a highway for transporting commerce across state lines. The second category is considered navigable by law.
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> The ordinary high water mark ("OHWM") sets the lateral limit of navigable waters in non–tidal riverain

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132. 33 U.S.C. §§ 1251–1376 (1994).
133. *See* Stanley A. Millan, *Regulation of Batture Pollution and Ecology*, 33 LOY. L. REV. 921, 935 (1988).
134. *Millan Wetland*, *supra* note 126, at 591.
135. *Id*.

> and lacustrine (lake) situations. The OHWM is determined by physical markings on the shore established by river flow, such as the destruction of terrestrial vegetation, the presence of litter and debris, a clear natural bank line, shelving, and changes in soil. The OHWM is not normally a mathematical determination. . . . The mean high water line ("MHWL") sets the lateral limits of navigable waters subject to the ebb and flow of tide. This is normally an average mathematical determination of the daily high tide over a period of many years.
>
> These lateral limits set by the OHWM and MHWL were the traditional limits of federal control over tidal and non–tidal waters until the Clean Water Act. Those limits told regulators where water's dominion ended and when land's dominion began. The Clean Water Act went above and beyond the OHWM and MHWL. Hence, the waters subject to jurisdiction under the Clean Water Act include [some] waters, which go beyond traditionally navigable waters and the OHWM and MHWL.[136]

Some early cases decided what type of waters were regulated "navigable waters" under the Clean Water Act. In *United States v. Ashland Oil & Transportation Co.*,[137] the Sixth Circuit held that a tributary of a navigable water was subject to the oil spill provisions of the Clean Water Act.[138] In *United States v. Byrd*,[139] the Seventh Circuit held that a wetland adjacent to an inland lake was subject to the Clean Water Act.[140] These two cases were approved by the Supreme Court in *Hodel v. Virginia Surface Mining*

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136. *Millan Wetland*, *supra* note 126, at 591.

137. 504 F.2d 1317 (6th Cir. 1974).

138. *Id.* at 1324–26. Oil was discharged into Little Cypress Creek, which is a tributary to Cypress Creek, which is a tributary to Pond River, which in turn is a tributary to Green River. *Id*. at 1320. The court stated that uncontrolled *pollution* of the nation's *waterways* was a threat to health and welfare of the country as well as a threat to interstate commerce. *Id*. at 1324–25.

139. 609 F.2d 1204 (7th Cir. 1979).

140. *Id.* at 1209–10. The court indicated that the Commerce Clause covers wetlands adjacent or contiguous to intrastate lakes that are used by interstate travelers for water–related recreational purposes. *Id*. at 1210. The court found that the destruction of all or most of the wetlands would significantly impair the attraction the lake held for interstate travelers by degrading water quality of the lake, thereby indirectly affecting the flow of interstate commerce. *Byrd*, 609 F.2d at 1211.

and Reclamation Ass'n.[141] However, as *Riverside Bayview Homes*, below, later clarified, federal regulatory jurisdiction does not necessarily include any and all wetlands, including isolated ones.

In *United States v. Riverside Bayview Homes, Inc.*,[142] the Supreme Court stated that:

> On a purely linguistic level, it may appear unreasonable to classify "lands," wet or otherwise, as "waters. . . ." [I]t is one thing to recognize that Congress intended to allow regulation of waters that might not satisfy traditional tests of navigability; it is another to assert that Congress intended to abandon traditional notions of "waters" and include in that term "wetlands" as well. Nonetheless, the evident breadth of congressional concern for protection of water quality and aquatic ecosystems suggests that it is reasonable for the Corps to interpret the term "waters" to encompass wetlands *adjacent* to waters as more conventionally defined.[143]

The wetlands that were regulated in *Riverside Bayview* were eighty acres of low–lying marshy land *near* the shores of Lake St. Clair in Michigan.[144] The Court found this marshland to be regulated wetlands because it *abutted* a navigable lake, even though it was not frequently flooded at certain land elevations by the adjacent navigable waters.[145] The Court, however, stated the following: "We are not called upon to address the question of the authority of the Corps to regulate discharges of fill material into wetlands that are *not* adjacent to bodies of open water. . . and we do not express any opinion on that question."[146]

Following *Riverside Bayview*, the Seventh Circuit in *Hoffman Homes, Inc. v. Administrator, U.S.E.P.A.*,[147] addressed the issue of adjacent versus isolated wetlands. The case involved whether an isolated wetland is subject to the jurisdiction of the Clean Water

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141. 452 U.S. 264, 282 n.21 (1981), *vacated by* Virginia Citizens for Better Reclamation, Inc. v. Virginia Surface Mining Reclamation Ass'n, 453 U.S. 901 (1981).
142. 474 U.S. 121, 132 (1985).
143. *Id.* at 131–32 (emphasis added).
144. *Id.* at 124.
145. *See id.* at 134–35.
146. *Id.* at 131 n.8 (emphasis added).
147. 999 F.2d 256 (7th Cir. 1993).

Act as an area the degradation or destruction of which could affect interstate commerce.[148] Although the court found it reasonable to interpret the regulations as allowing migratory birds to be the connection between a wetland and interstate commerce, the court found no evidence that any migratory birds actually used the wetland area in question.[149] This wetland area was not connected to any body of water, unlike a nearby wetland area that was adjacent to a creek along the western edge of the tract.[150] Therefore, the court held that a non–adjacent wetland requires a specific showing of the connection with interstate commerce.[151]

Against this backdrop, a new development occurred in the scope of the Commerce Clause with the United States Supreme Court's decision in *United States v. Lopez*.[152] In *Lopez*, the Court held that the federal statute prohibiting possession of a firearm in a school zone exceeded the authority of Congress to regulate commerce under the Constitution's Commerce Clause, despite the government's argument that guns chilled children's learning in school and this chilling would cumulatively and adversely affect the national economy.[153] The Court stated that the Commerce Clause is subject to outer limits.[154] Following precedent, the Court further stated that:

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148. *Id*. at 260.

149. *Id*. at 261. Known as area A in the case, the court found that area A did not border a stream, did not adjoin a large wetland, that its only source of moisture was rainfall during the wet part of the year and that the area covered small acreage. *Id*. at 262. The biologist also admitted that the area A would have a low waterfowl value because of the lack of open water. *Id*. The biologist did not observe any large waterfowl at the site. *Hoffman Homes*, 999 F.2d at 262. Another ecologist testified that area A would only have moderate suitability as a resting place for migratory birds. *Id*.

150. *Id*. at 261.

151. The so–called "migratory bird" rule used in the *Hoffman Homes* decision was criticized in *Cargill, Inc. v. United States*, 516 U.S. 955, 958 (1995), in Justice Thomas's dissent. *See Cargill*, 516 U.S. at 957–59. In addition, the court in *Tabb Lakes Ltd. v. United States*, 715 F. Supp. 726 (E.D. Va. 1988), held that since the "migratory bird rule" was not promulgated as a legislative rule under the Administrative Procedure Act, the court would set aside the agency action based on that "rule." *Id*. at 728.

152. 514 U.S. 549 (1995). *See also* United States v. Morrison, 529 U.S. 598, 567–68 (2000) (declining to uphold the Violence Against Women Act under the Commerce Clause, because the activity lacked an economic basis even if the impact of the violence would have an adverse cumulative impact on the economy.)

153. *Lopez*, 514 U.S. at 552.

154. *Id*. at 557.

> [T]he scope of the interstate commerce power "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect or remote that to embrace them, in view of our complex society, would eventually obliterate the distinction between what is national and what is local and create a completely centralized government."[155]

Although Congress may regulate channels of interstate commerce, like navigable waterways, and instrumentalities, persons, and things in interstate commerce, (like tourist hotels), it appeared before *SWANCC* that the catch–all Commerce Clause authority always included the power to regulate those intrastate activities that have a *substantial* relation to interstate commerce.[156] The Court confirmed that "the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce."[157] In finding the Act in question unconstitutional, the Court in its "substantial affect" analysis included the fact that the activity (possession of a firearm in a school zone) did not involve economic activity at all.[158] Through case–by–case inquiry, the Court also found no jurisdictional element in the Act in question.[159] The Court specifically rejected the government's argument that there was a cumulative effect between possession of a firearm in a school zone and the national economy.[160] The Court stated that:

> Similarly, under the Government's "national productivity" reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the theories that the Government presents . . . it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we

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155. *Id*. (quoting NLRB v. Jones & Laughlin Steel, 301 U.S. 1, 37 (1937)).
156. *Lopez*, 514 U.S. at 557–58.
157. *Id*. at 559.
158. *Id*. at 560–62.
159. *Id*.
160. *Id*. at 563–64

> were to accept the Government's arguments, we are hard–pressed to posit any activity by an individual that Congress is without power to regulate.[161]

Following *Lopez*, the Fourth Circuit, in *United States v. Wilson*,[162] held that there was no Commerce Clause authorization for a Clean Water Act wetland regulation that "could affect" interstate commerce.[163] The court stated:

> Congress can clearly regulate discharges of pollutants that substantially affect interstate commerce. . . . Presumably, Congress may also regulate the discharge of pollutants into non–navigable waters to the extent necessary to protect the use or potential use of *navigable* waters as channels or instrumentalities of interstate commerce, although the extent of that power is not entirely clear. Finally, it is arguable that Congress has the power to regulate the discharge of pollutants into any waters that themselves flow across state lines, or connect to waters that do so, regardless of whether such waters are navigable in fact, merely because of the interstate nature of such waters, although the existence of such a far reaching power could be drawn into question by the Court's recent federalism jurisprudence. . . . This regulation purports to extend the coverage of the Clean Water Act to a variety of waters that are intrastate, non–navigable, or both, solely on the basis that the use, degradation, or destruction of such waters *could* affect interstate commerce. The regulation requires neither that the regulated activity have a *substantial* effect on interstate commerce, nor that the covered waters have any sort of nexus with navigable, or even interstate, waters . . . .[164]

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161. *Lopez*, 514 U.S. at 564.
162. 133 F.3d 251 (4th Cir. 1997).
163. *See id.* at 256–57.
164. *Wilson*, 133 F.3d at 256–57. The wetlands in the cited case were more than ten miles from Chesapeake Bay, more than six miles from the Potomac River and hundreds of yards from the nearest creeks. *Id*. at 257.

The Fifth Circuit has had reason to analyze *Lopez* in a matter dealing with unlawful possession of machine guns.[165] The Fifth Circuit originally concluded that the ban on possession of machine guns was an attempt to control the interstate market for machine guns.[166] On rehearing, an equally divided Fifth Circuit confirmed the panel decision *en banc*.[167] Judge Parker wrote the most liberal of concurring opinions, nevertheless concluding that *Lopez* established an outer limit for congressional authority. A concurring opinion by Judge Higginbotham, joined by Judges Politz, Davis, and Wiener, explained that under *Lopez*, the court would not set aside congressional acts if "the Congress could have found that the relevant intrastate activity has a substantial effect on interstate commerce."[168] Judge Higginbotham further noted that "if *Lopez* means anything, it is that Congress' power under the Commerce Clause must have some limits."[169]

The opinion of Judge Jones, joined by Judges Garwood, Jolly, Smith, Duhé, Barksdale, Garza, and DeMoss, who would have reversed the conviction, focused on the purely intrastate nature of the machine gun possession in the case, finding no substantial effect for connection to interstate commerce thereby.[170] Judge Jones held that *Lopez* required three steps to determine if an activity met the substantial effects test. The first question was whether the local activity sought to be regulated is commercial in nature, or whether its regulation is necessary to effectuate federal regulations of a larger commercial activity.[171] The second element is whether the statute itself contains the jurisdictional nexus to interstate commerce.[172] The final element is whether there are limits in the statute that mark a boundary of some sort between matters of truly national concern and those subject to state regulation.[173] In this particular case, Judge Jones found that mere possession of a machine gun was not an economic transaction, nor

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165. United States v. Kirk, 70 F.3d 791, 795 (5th Cir. 1995).
166. *Id*. at 796.
167. *See* United States v Kirk, 105 F.3d 997, 998 (5th Cir. 1997) (per curium). Because the panel was equally divided, the lower court decision was affirmed.
168. *Id*. at 999.
169. *Id.*
170. *Id.* at 1005–06.
171. *Id.* at 1008.
172. *Kirk*, 105 F.3d at 1009.
173. *See id.* at 1006.

an essential link in the chain of federal regulations of firearm dealings.[174] Additionally, no congressional findings were made in the case about possession and commerce. The Clean Water Act contains no congressional findings linking isolated waters or wetlands to interstate commerce. But along comes the next Supreme Court case which addresses the issue.

The Supreme Court in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*,[175] reversed over twenty–five years of regulatory and judicial developments under the Clean Water Act, by restricting the scope of waters which regulatory agencies may cover under that Act. The Solid Waste Agency of Northern Cook County ("SWANCC") is a consortium of twenty–three suburban Chicago cities and villages that united to develop a disposal site for solid waste.[176] Cook County purchased a 533 acre tract which had been the site of sand and gravel pit mining from the 1930's until 1960.[177] The old mining site succeeded to a forest and its trenches evolved into scattered ponds.[178] It was a wetland complex. Some ponds were permanent and some were seasonal, and they varied in size from one–tenth of an acre to several acres and from several inches deep to several feet deep.[179]

B. Factual History

SWANCC obtained state and local permits for the operation of the landfill project but twice failed in obtaining a Corps of Engineers Section 404 permit under the Clean Water Act.[180] Section 404(a) regulates the discharge of dredged or fill material into navigable waters. The Act defines *navigable waters* as including *waters* of the United States.[181] Waters of the United States include many waters, including traditionally navigable waters and adjacent wetlands, as well as "waters such as intrastate lakes, rivers, streams . . . mudflats, sandflats, wetlands, sloughs, prairie

174. *See id.* at 1016.
175. 121 S. Ct. 675 (2001).
176. *Id*. at 678.
177. *Id*.
178. *Id*.
179. *Id*.
180. *SWANCC*, 121 S. Ct. at 678.
181. 33 U.S.C. § 1362(7) (1994).

potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which *could* affect interstate or foreign commerce."[182] The Corps clarified its jurisdiction with its "migratory bird rule" which extended Corps regulatory jurisdiction to intrastate waters, as follows:

a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or

b. Which are or would be used as habitat by other migratory birds which cross state lines; or

c. Which are or would be used as habitat for endangered species.[183]

This "migratory bird rule" is important because the Corps did not regulate the pond area to be filled as a wetland. Rather, because the Corps found that approximately 121 bird species had been observed on the site, including migratory birds, the Corps regulated the pond site under the "migratory bird rule."[184] The Corps ultimately denied the permit because SWANCC did not establish that the site was the least environmentally damaging alternative, and that the impact of the project upon sensitive species was not mitigatable because the landfill could not be redeveloped into a forested habitat.[185] SWANCC filed suit under the Administrative Procedure Act[186] challenging the Corps' denial of the permit.[187] SWANCC lost the case at the trial level, and on appeal focused solely on the improper use of the "migratory bird rule" by the Corps to assert jurisdiction over the site.[188]

The appellate court found that Congress has the authority to regulate the ponds at issue, because of the cumulative impact doctrine of the Commerce Clause under which a single activity that itself has no discernable effect on interstate commerce may still be regulated if the aggregate effect of that class of activity has a sub-

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182. 33 C.F.R. § 328.3(a)(3) (2000) (emphasis added).
183. Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41217 (Nov. 13, 1986).
184. *SWANCC*, 121 S. Ct. at 678.
185. *Id*. at 679.
186. 5 U.S.C. §§ 701–707 (1994).
187. *SWANCC*, 121 S. Ct. at 679.
188. *SWANCC*, 121 S. Ct. at 679.

stantial impact on interstate commerce.[189] The appellate court found that the aggregate effect of the destruction of the natural habitat of migratory birds on interstate commerce is substantial because each year millions of Americans cross state lines and spend over a billion dollars to hunt and observe migratory birds.[190] The court of appeals further found that the "migratory bird rule" was a reasonable interpretation of the Act by the Corps of Engineers.[191]

C. Majority

The United States Supreme Court reversed and found that the "migratory bird rule" is not fairly supported by the Clean Water Act.[192] The Court noted that in its prior decision in *United States v. Riverside Bayview Homes, Inc.*,[193] the Court held that the Corps, pursuant to Section 404, had jurisdiction over wetlands that "actually abutted" on a navigable waterway.[194] The Court also noted, in *Riverside Bayview*, that the term "navigable" in the Clean Water Act is of limited importance because Congress evidenced its intent to regulate at least some waters that would not be deemed navigable under the classic meaning of that term.[195] However, the Court in *SWANCC* held that the context of its holding in *Riverside Bayview* was based on the Congress's unequivocal acquiescence to Corps regulations covering wetlands *adjacent* to navigable waters under the Clean Water Act.[196] The Court found that Congress's concern for the protection of water quality in aquatic ecosystems indicated its intent to regulate wetlands that were inseparably bound with the waters of the United States.[197]

The Court noted that the significant nexus between wetlands and navigable waters led the Court in *Riverside Bayview* to withhold any opinion on the question of the Corps' authority to regu-

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189. Solid Waste Agency v. United States Army Corps of Eng'rs, 191 F.3d 845, 850 (7th Cir. 1999).
190. *Id*.
191. *Id*. at 852.
192. *SWANCC*, 121 S. Ct. at 680.
193. 474 U.S. 121 (1985).
194. *SWANCC*, 121 S. Ct. at 680.
195. *Id.*
196. *SWANCC*, 121 S. Ct. at 680.
197. *Id.*

late wetlands that were not "adjacent" to bodies of open water.[198] The Court explained that the Corps' assertion of jurisdiction in Northern Cook County would require the Court to extend Corps jurisdiction to ponds (waters) that were *not* adjacent to open water.[199] The Court felt that the text of the Clean Water Act would not allow that stretch.

The Court noted that the government put forth no persuasive evidence that the Corps mistook Congress's intent in 1974,[200] when the Corps defined navigable waters to mean those waters of the United States which are subject to the ebb and flow of tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce.[201] The 1974 emphasis was the water body's capability of use by the public for purposes of transportation or commerce.

The Court rejected subsequent action by the Corps as expanding Clean Water Act jurisdiction over navigable waters.[202] For instance, the Corps in 1977 expanded its jurisdiction "to include 'isolated wetlands and lakes, intermittent streams, prairie potholes and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation and destruction of which could affect interstate commerce.'"[203] In 1977, Congress failed to restrict the Corps' jurisdiction.[204] The Court explained that it only recognized congressional acquiescence in administrative interpretations of a statute in some situations, with extreme care.[205] The Court did not feel that Congress' inaction in 1977 acquiesced in the Corps "Migratory Bird Rule."[206]

Further, the Court rejected the contention that Section 404(g) expanded the Corps jurisdiction by implication. Section 404(g) authorizes a transfer of the 404 program to states, but only

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198. *Id*.
199. *Id*.
200. *See id.*
201. *SWANCC*, 121 S. Ct. at 680.
202. *See id.* at 681.
203. *Id*.
204. *Id.*
205. *SWANCC*, 121 S. Ct. at 681.
206. *Id*. at 682.

over certain limited "other waters."[207] Although the Court in *SWANCC* did not interpret Section 404(g), the court noted that it was unclear what Section 404(g) meant by "other waters," but the Court held that Congress could simply have wanted to include waters adjacent to navigable waters in a broad sense, such as non–navigable tributaries and streams.[208] The Court expressed no opinion on Section 404(g).

The Court disagreed that Congress's separation of the phrase "waters of the United States" from a reading of the term "navigable waters," read the concept of navigability out of the statute.[209] The Court did reiterate its holding in *Riverside Bayview* that the word "navigable" in the statute was to be given limited effect, as the term clearly covered non–navigable wetlands adjacent to open waters, but the Court maintained it was quite another thing to give *no* effect to the word "navigable" whatsoever.[210] The Court felt "navigable" meant traditional jurisdiction over waters that were, or had been, navigable or could reasonably be made so.[211]

The Court further rejected the government's contention under the *Chevron* doctrine,[212] that the Court should give deference to the Corps' interpretation of Section 404 to include non–navigable, isolated, intrastate waters.[213] The Court stated, rejecting the *Chevron* doctrine's applicabilities, "[w]here an administrative interpretation of a statute that invokes the outer limits of Congress' power, we expected a clear indication that Congress intended that result,"[214] and such intent was not clear at all in the Clean Water Act. In the instant case, the Court felt that deferring to the agency's interpretation would further alter the federal–state framework by permitting federal encroachment upon traditional state powers over land use and water use.[215] Citing recent

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207. Section 1344(g)(1) covers a transfer of navigable waters other than those waters which are presently used or are susceptible to use for transporting commerce in the adjacent wetlands. 33 U.S.C. § 1344(g)(1) (1994).
208. *SWANCC*, 121 S. Ct. at 682.
209. *Id*. at 682.
210. *Id*. at 682–83.
211. *Id*. at 683.
212. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).
213. *See SWANCC*, 121 S. Ct. at 683.
214. *SWANCC*, 121 S. Ct. at 683.
215. *Id*.

cases in which the Court limited the Commerce Clause,[216] the Court did not rule on whether, in the aggregate, filling isolated waters would have a substantial impact on interstate commerce. The Court simply read the statute in a way to avoid significant constitutional and federalism questions raised by the government. The Court held that the Corps' regulations, covering isolated waters pursuant to the "migratory bird rule," exceeded the Corps' jurisdiction under section 404 of the Act.[217]

D. Dissent

The dissent stressed that the Clean Water Act was a watershed statute, and that its encompassment of "waters of the United States" neither requires actual nor potential navigability to warrant jurisdiction.[218] The dissent felt that the prior decision in *Riverside Bayview* made this clear, as a low–lying marshy land that was not itself navigable, not directly adjacent to a navigable water, or even hydrologically connected to a navigable water was regulated, because it was part of a larger area, characterized by poor drainage, that ultimately abutted a navigable water.[219] The occasional surface run–off from the property into nearby waters was sufficient to make the meaningful connection to the creek. The dissent further felt that the amendments Congress adopted in 1977 support the Corps' present interpretation of its mission as extending to so–called "isolated" waters.[220] The dissent stated that the shift in focus of the Clean Water Act was away from protecting navigability and toward environmental protection.[221] The dissent quoted from the conference report on the Clean Water Act, explaining that "waters of the United States" was to be given the broadest possible constitutional interpretation.[222] The dissent

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216. *See, e.g.*, United States v. Morrison, 529 U.S. 598 (2000) (holding the Violence Against Women Act unconstitutional because there was no economic activity involved, even though arguably there could be a national impact realized by violence committed on women); United States v. Lopez, 514 U.S. 549 (1995) (striking down a statute which made it illegal to possess a gun near a school zone because there was no economic activity involved even though again, there could be a national impact from children's limited ability to learn and ultimate failure to excel in the work place and business due to violence in their schools).

217. *SWANCC*, 121 S. Ct. at 684.

218. *Id*. at 685 (Stevens, J., dissenting).

219. *Id*.

220. *SWANCC*, 121 S. Ct. at 685.

221. *Id*. at 686.

222. *Id.* at 687.

viewed "waters of the United States" to include not only navigable waters and their tributaries, but also non–navigable interstate waters whose use or misuse could affect interstate commerce.[223]

The dissent further felt that the issue reserved in *Riverside Bayview* was not over isolated open waters, such as the ponds in the instant case, but rather isolated wetlands.[224] The dissent noted that isolated wetlands were the most marginal "waters" to be covered under the Act, but that the ponds in question were not in that category.[225]

The dissent also referred to the exemptions in Section 404(f) of the Clean Water Act to indicate that Congress intended to cover isolated waters.[226] The dissent felt that isolated waters not covered by the narrow exceptions of the Act would fall within the statute's limits of "waters of the United States." For instance, the Act excluded from Corps jurisdiction discharges of fill material for the purpose of construction and maintenance of farm or stock ponds, irrigation ditches, or maintenance of drainage ditches.[227]

The dissent also argued that Section 404(g), which grants the EPA the authority to transfer non–navigable waters to states, further indicated that the term "waters of the United States" does cover waters *other* than those that are presently used, or susceptible for use for transporting commerce, as well as their adjacent wetlands.[228] The dissent felt the *Chevron* doctrine should be used to defer to the agency's construction of the term "waters of the United States" under the Act.[229] The dissent further rejected the idea that the Clean Water Act would be used as a land use code if isolated waters were covered. According to the dissent, it is not a land use code, but rather the Act is a paradigm of environmental regulation.[230] Thus, the dissent stated that the "migratory bird

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223. *SWANCC*, 120 S. Ct. at 687 (Stevens, J., dissenting).
224. *Id*. at 691 n.13.
225. *Id*. at 691 (Stevens, J., dissenting).
226. *Id*. at 691–92.
227. *Id.* at 691.
228. *SWANCC*, 121 S. Ct. at 691–92.
229. *See SWANCC*, 121 S. Ct. at 693.
230. *Id*. at 693 (Stevens, J., dissenting).

rule" did not blur the "distinction between what is truly national and what is truly local."[231]

Finally, and most significantly, the dissent analyzed the three categories of Commerce Clause power in *United States v. Lopez*.[232] The three categories that Congress may regulate are: channels of interstate commerce, like waterways; instrumentalities of interstate commerce or persons or things of interstate commerce, like tourist hotels; and activities that "substantially affect" interstate commerce.[233]

The dissent stressed that the "migratory bird rule" should be properly analyzed in the third category, because the class of activities, e.g., filling isolated waters, taken in the aggregate, has a substantial effect on interstate commerce, such as loss of habitat from migratory waterfowl.[234] The dissent felt, unlike the *Morrison* and *Lopez* cases, that the landfill operation in question would be clearly economic in nature.[235] Discharge of fill into isolated waters would adversely affect migratory bird populations. Since millions of people regularly participate in birdwatching and hunting, these activities would generate a host of commercial activities and be lost by the gradual dissipation of habitat for migratory waterfowl, such as the ponds in the instant case.[236]

E. Implications

1. General

The case does invite Congress to amend the Clean Water Act to state clearly that waters of the United States are intended to be regulated to the maximum extent permissible under the Com-

231. *Id*. at 695 (quoting United States v. Morrison, 529 U.S. 598, 612 (2000)).
232. 514 U.S. 549, 558–59 (1995).
233. *Id*.
234. *SWANCC*, 121 S. Ct. at 695 (Stevens, J., dissenting).
235. *Id*.
236. *Id*.

merce Clause.[237] Such an amendment would open the door to the third category of Commerce Clause regulation, and allow a court and the Corps to consider the cumulative effects, including loss of habitat, as a result of the aggregate filling of isolated waters. In these more conservative times, it is doubtful that Congress can take up that challenge.

The majority's restriction of the third test of interstate commerce—the substantial effects test—to only clear statements of Congress's reach—at least where land use control is implicated, is most troubling in the environmental area. Most environmental regulations, including air, water, and endangered species, impact land use control, by dictating how and if private land can be used in certain ways, such as industrially or for farming or timber harvesting. In the author's experience, seldom is Congress's reach crystal clear in environmental statutes.[238]

What does the case mean? First of all, although the Court discusses wetlands in its opinion, the actual facts of the case do not involve a wetland, but rather, a water, such as a pond which are similar to isolated prairie pot holes in the West. This may be a distinction without a difference, as both ponds and wetlands are but examples of the "waters of the United States" covered by the Clean Water Act. Of greater import is the meaning the Court intends to give to the word "adjacent," in this context wetlands fringing on rivers, streams, lakes, and estuaries. These waters are likely still covered by the Act, but inland waters like prairie potholes, wet meadows, playa lakes, vernal pools, flats, bogs, tundra, and wetlands fringing small, non–navigable waters (including ditches) may be the States' domain.[239]

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237. *SWANCC*, 121 S. Ct. at 696. The dissent suggested that Congress intended that "navigable waters" means "waters over which federal authority may properly be asserted." *Id*. at 688. See 16 U.S.C. § 817 (Supp. IV 1998), for an example of a statute that does *expressly* cover projects "across, along, over, or in any stream, . . . over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States. . . ."

238. *See* John H. Starn & Peyton M. Sturges, *Legal Issues: Air, Water, Takings, Overfiling Cases Expected to be Focus of Litigation in 2001*, 32 BNA ENV'T REP. S–31 (2001).

239. *See* Susan Bruninga, *State Regulatory Burden May Increase after Recent U.S. Supreme Court Decision*, 32 BNA ENV'T REP. 306–07 (Feb. 16, 2001); Susan Bruninga, *Panelists Say High Court Decision will Prompt State to Ensure Protection*, 32 BNA ENV'T REP. 353–54 (Feb. 23, 2001).

Ponds and wetlands, adjacent to navigable waters and non–navigable streams, are still regulated. But what does the Court's terminology of "actually abutting . . . open waters," mean? It seems that direct flow into an open body of navigable water is what the Court intends here. Would separation of the non–navigable water from other open bodies of water by dikes, other lands, highways, or development be enough to sever and isolate such a water from its "nexus" with open bodies of water? The Corps defines "adjacent" broadly to include natural and man–made separations such as dikes, berms, and so forth.[240] No mention is made as to what distance is involved, but rather a case–by–case administrative determination is called for. In Louisiana, regulatory jurisdictional problems may persist over borrow pits, levied areas, and bottoms located some distance from drainage ditches.

The Court in *SWANCC* held that the Corps does not have jurisdiction over a "water" that is not "adjacent" to open water.[241] In referring to its 1985 *Riverside Bayview* case, the Court applied adjacency to mean a wetland that *actually abutted* a navigable waterway.[242] In that case, a marshy area was contiguous with land that ultimately drained directly into a navigable waterway.[243] Unfortunately, the Court in *SWANCC* did not clarify what it meant by the word "adjacent."[244] The Court in *Riverside Bayview* suggested, in dicta, that "adjacent" wetlands meant only those "periodically inundated by contiguous navigable waters."[245] This description is not very specific.

But even the dissent recognized that the Court superficially followed—but *limited—Riverside Bayview*.[246] The dissent explained that *SWANCC* invalidated the migratory bird rule as well as Corps jurisdiction, "over all waters except for actually naviga-

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240. *See also* 33 C.F.R. § 328.3(c) (2000).
241. *SWANCC*, 121 S. Ct. at 680.
242. *Id*.
243. *Id*.
244. *See Louisiana Statewide Wetlands Conservation and Management Strategy*, *in* LOUISIANA DEP'T OF NATURAL RESOURCES 4–5 (June 1999) [hereinafter *Louisiana Wetlands Strategy*], which maps out inland and coastal wetlands in Louisiana. The inland, non–tidal wetlands, not "adjacent" to rivers, could be a benchmark for isolated wetlands. *See Louisiana Wetlands Strategy*, *supra*, at 5–8.
245. 474 U.S. 121, 136 (1985).
246. *SWANCC*, 121 S. Ct. at 690 (Stevens, J., dissenting).

ble waters, their tributaries, and wetlands adjacent to each."[247] The dissent noted that the majority *refused* to acknowledge the "scope" of *Riverside Bayview*, and its lack of deference to the Corps interpretation was "unfaithful" to that case.[248] So, *SWANCC* probably leads more than follows *Riverside Bayview*. Where does that leave us?

2. Agency Views

First, following *SWANCC*, the administration could view the case as allowing the use of the broad definition of "adjacent" to mean bordering, and including natural or man–made separations by dikes, berms, and so forth, in an attempt to preserve Corps of Engineers' wetland jurisdiction.[249] This would, in effect, dilute *SWANCC*, because, depending on how far the agencies interpret the word "adjacent," every wetland can be adjacent to some imagined, nearby navigable waterway.

Second, the administration could view the case to restrict adjacency to actually abutting, meaning touching, which could reduce the Corps of Engineers' jurisdiction over wetlands by some percentage. The percentage of loss is unknown but estimated to be at least twenty percent to as high as eighty percent.[250] The wetlands in the United States have not been authoritatively mapped to this writer's knowledge.

Third, the administration could include non–navigable tributaries as "open waters" in an attempt to preserve Corps of Engineers' jurisdiction. This is consistent with Justice Stevens's dissent in *SWANCC* and dicta in the Court's opinion.[251] However, there remains some uncertainty over what feeder water bodies that empty into larger bodies of water will qualify.

Fourth, the administration could also attempt to include many other waters, such as ditches, as "open waters" in an at-

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247. *Id*. at 685.
248. *Id*. at 690.
249. 33 C.F.R. § 328.3(c) (2000).
250. Juan Otero, *Supreme Court Reinforces Local Authority for Land Use*, 24 NATION'S CITIES WEEKLY 1 (Jan. 15, 2001); Susan Bruninga, *State Regulatory Burden May Increase After Recent U.S. Supreme Court Decision*, 32 BNA ENV'T REP. 306 (Feb. 16, 2001).
251. *SWANCC*, 121 S. Ct. at 682, 685.

tempt to nullify the *SWANCC* court's ruling. For instance, representatives of the New Orleans District Corps of Engineers feel there is no such thing as an "isolated wetland" in most of the State of Louisiana.[252]

The United States EPA and Corps of Engineers seem to have picked the first option as of this writing. On January 19, 2001, the agencies released a joint Corps/EPA legal interpretation of the ruling.[253] The agencies view the new ruling as "significant."[254] The agencies opined that field staff should no longer rely on the use of waters or wetlands as habitat by migratory birds as a sole basis for assertion of regulatory jurisdiction under the CWA.[255] The agencies further opined that the Court's holding in *SWANCC* was limited to non–navigable, isolated, and intrastate waters, and not to any other waters,[256] and that the Court did not overrule the holding in *Riverside Bayview*, which upheld agency jurisdiction over traditionally navigable waters, interstate waters, their tributaries, and wetlands adjacent to each. In a footnote, the agencies stated that the following waters were unaffected by *SWANCC*:

> 1. All waters which are currently used or, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of tide; 2. All interstate waters

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252. Interview with New Orleans District Corps representatives in 2000. It is noted that non–tidal drainage ditches excavated on dry land are not normally considered "navigable waters." *See* Rules and Regulations Department of Defense, 51 Fed. Reg. 41206, 41256–57 (Nov. 13, 1986). The Corps would have to reclassify ditches from vague "other waters," affected by the *SWANCC* decision, to functional "tributaries," arguably not affected by *SWANCC*. But this change in their prior practice, policy, or interpretation may require notice and comment rulemaking to effectuate because, after *SWANCC*, the reclassification arguably expands regulatory jurisdiction significantly. *See* Shell Offsore Inc. v. Babbit, 238 F.3d 622, 629 (5th Cir. 2001). However, see *Headwaters, Inc. v. Talent Irrigation District*, 243 F.3d 526, 533–34 (9th Cir. 2001), and pre–*SWANCC* cases cited therein, which stated that irrigation and drainage canals and ditches with intermittent flows can be man–made tributaries subject to the NPDES program under the Clean Water Act. But see *Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001), which held under *SWANCC* that even intermittent creeks and streams are not sufficiently connected to open waters to be regulated under the Oil Pollution Act, which defines "navigable waters" generally the same as does the Clean Water Act.

253. Memorandum from Gary S. Guzy, United States EPA and Robert M. Andersen, Army Corps of Engineers (Jan. 19, 2001).

254. *Id*. at 1.

255. *Id*. at 3.

256. Memorandum from Gary S. Guzy, *supra* note 253, at 4.

> including interstate wetlands; 3. All impoundments of water, *otherwise* [i.e., apparently not including "isolated" waters] defined as waters of the United States . . . ; 4. Tributaries [to those waters] . . . ; 5. The territorial seas; 6. Wetlands adjacent to [the above waters].[257]

The agencies opined that the *Riverside Bayview* decision, but not *SWANCC*, approved the Corps definition of "adjacent" as bordering, contiguous, and neighboring.[258] The agencies recognize that the *SWANCC* decision affects "all other waters such as intrastate lakes, rivers, streams, [intermittent streams], mudflats, sandflaps, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation, or destruction of which could affect interstate or foreign commerce . . . ."[259] The agencies felt, however, that the *SWANCC* opinion did not specifically address what "other connections" with interstate commerce might support an assertion of CWA jurisdiction over non–navigable, isolated, intrastate waters.[260] Therefore, the agencies opined that deregulatory jurisdiction over "other waters" should be considered on a "case–by–case" basis in consultation with agency legal counsel.[261] The agencies further opined that at least some *impoundments* (e.g., diking) of isolated, non–navigable, intrastate waters and tributaries thereto, and their adjacent wetlands must continue to be analyzed on a "case–by–case" basis.[262]

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257. *Id*. at 4–5.
258. *Id.* at 5 n.4.
259. *Id*. at 5.
260. *Id*. The Court considered whether a groundwater connection between the ponds and the Fox River was enough, and did not so rule. Transcript of Oral Argument at 37, 42–43 (Oct. 31, 2000), Solid Waste Agency v. United States Army Corps of Eng'rs, 121 S. Ct. 675 (2001) (No. 99–1178). See also *Rice v. Harken Exploration Co.*, 250 F.3d 264, 269 (5th Cir. 2001), which held that the CWA does not protect groundwater. Additionally, the author obtained under FOIA on February 6, 2001, copies of the 1990 and 1993 Corps of Engineers, Chicago District's public notices on the pertinent SWANCC permit applications. A figure shows that the project area is less than one mile from the Fox River, a little more than a half a mile from Poplar Creek, and near many roads that undoubtedly have lateral drainage swales, through which storm water flows. *See* Appendix A. Was the site really that isolated? Or, is the Court's decision more far–reaching than the agencies admit?
261. Memorandum from Gary S. Guzy, *supra* note 253, at 6.
262. *Id*.

The agencies express hope that a "nexus" exists between interstate commerce and some of these isolated waters[263] and are perhaps ignoring the Court's rejection of the third prong of the Commerce Clause. Nevertheless, besides these attempts to restrict *SWANCC*, the agencies admit that "the Supreme Court's decision in *SWANCC* does provide an important new limitation on how and in what circumstances the EPA and the Corps can assert regulatory authority under the CWA."[264] However, the opinion, in addition to downplaying *SWANCC*, tries to bring *Riverside Bayview* to the forefront in support of continued Corps jurisdiction over many waters.[265]

The agencies stated that *Riverside Bayview* upheld the legality of the basic provisions of the CWA jurisdiction to all wetlands adjacent to navigable interstate waters and their tributaries.[266] The agencies admitted that *Riverside Bayview* left open the question of CWA jurisdiction over "wetlands that are not adjacent to bodies of open water."[267] The agencies re–emphasized *Riverside Bayview*'s explanation that the broad objective of the Clean Water Act is to maintain and improve water quality, which included the condition in which the natural structure and function of an ecosystem is maintained.[268] The agencies further emphasized that protection of an aquatic ecosystem demands broad federal authority to control pollution because water moves in hydrologic cycles, and it is essential that the discharge of pollutants be controlled at the source.[269] Furthermore, the agencies reiterated *Riverside Bayview* dicta in finding reasonable the Corps' preamble to its 1977 regulations expanding jurisdiction including over adjacent wetlands, in which the Court quoted from the Corps that adjacent wetlands under the Clean Water Act must include any adjacent wetlands on the "border" of or in "reasonable proximity" to the

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263. *Id.* The agency position here can only be understood if the Court merely rejected habitat as a basis for Congress's Commerce Clause assertion under the third test of interstate commerce. The Court's opinion appears broader in its decision. Thus, the role of recreational travel, commercial fishing and industrial use of an isolated water may be debated. Conservatively, it would seem that only actual navigability would be acceptable to the Court to meet the first test of the Commerce Clause.

264. Memorandum from Gary S. Guzy, *supra* note 253, at 6–7.

265. *Id.* at 7–8.

266. *Id.* at 7.

267. *Id.* at 7 n.7.

268. *Id.* at 7–8.

269. Memorandum from Gary S. Guzy, *supra* note 253, at 8.

other waters of the United States.[270] In conclusion, the agencies stated that *Riverside Bayview* provides a basis for EPA and Corps CWA jurisdiction over "all of the traditional navigable waters, all interstate waters, and all tributaries to navigable or interstate waters, upstream to the highest reaches of the tributary system, and over all wetlands adjacent to any and all of those waters."[271]

The agencies' guidance to the field appears flawed in that it de–emphasizes the new decision, *SWANCC*, and over–emphasizes the 1985 decision in *Riverside Bayview*. *Riverside Bayview* did speak about the regulation of adjacent wetlands, but in the limited context of a marsh that was *abutting* a navigable waterway. It did give broad brush approval to the Corps concepts, including adjacency as meaning bordering on reasonable proximity, but did not specifically endorse the Corps regulatory definition of "adjacent" to include waters that were further separated from navigable waters by man–made or natural structures, like dikes. In light of the Court's apparent rejection of the third test of interstate commerce under the Clean Water Act, the agencies' guidance that the Corps should use an arguably standardless, "case–by–case" approach in asserting jurisdiction over what waters and wetlands are or are not adjacent or isolated, opens the doors to inconsistent decisions. The agencies may have unwittingly created a new dimension of "nonacquiescence" in ignoring, through interpretation, a High Court decision contrary to their own policies.[272]

3. Private Options

Options to private interests after the *SWANCC* case could include the following. First, if development is held up at a site that seems to be affected by the *SWANCC* decision, the developer could

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270. *Id*.

271. *Id*.

272. *See generally* Samuel Estreicher & Richard L. Revesz, *Nonaquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679 (1989); Erin M. Masson, *Social Security Administration Nonacquiescence on the Standard for Evaluating Pain*, 36 WM. & MARY L. REV. 1819 (1995). It is debatable whether judicial deference to agency interpretations is due under such circumstances. The agencies are not only interpreting a statute they administer, which would normally be due deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), but are interpreting and largely nullifying a Court decision. Interpretations of judicial precedent are normally reserved for courts under Article III of the United States Constitution.

pursue a temporary taking claim against the government for inverse condemnation.[273] A temporary taking is a denial of all use of an owner's property temporarily, between the time of regulation and the time the regulation is invalidated.[274] The problem with this is that there is some vagueness in the *SWANCC* decision as to what waters are no longer to be regulated by the Corps. Absent definitive rulemaking by the agencies, one would have to win on a two–fold test, filed contemporaneously in two separate courts.[275] First, before seeking damages timely before the Federal Court of Claims, one must prove in the United States District Court that his land is no longer subject to Corps regulatory jurisdiction under *SWANCC*.

Another option would be to seek a declaratory judgment in federal court stating that one's land is not subject to regulatory jurisdiction of the Corps, if the land is geographically situated to take advantage of the *SWANCC* decision. The problem with this approach is that some courts may view the case as not being ripe absent an exhaustion of the permit process. That is, the permit may be issued and the harm minimized to a developer.[276] Additionally, some courts may hold that there is no pre–enforcement review under the Clean Water Act, and that a developer must await an enforcement action before he can pursue legal remedies.[277] But certainly the government would not wish to test its vague standards in a criminal context.

For jurisdictional determinations made after March 28, 2000, permit applicants must pursue an administrative appeal over any jurisdictional determination, including whether their land is adja-

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273. *See* First English Evangelical Lutheran Church v. Los Angeles County, 482 U.S. 304, 318 (1987).

274. Tahoe–Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 216 F.3d 764, 778 (9th Cir. 2000).

275. Creppel v. United States, 41 F.3d 627, 633 (Fed. Cir. 1994). *See also* 28 U.S.C. §§ 1346, 1491 (1994). There is a six–year statute of limitations before the Federal Court of Claims on taking claims. 28 U.S.C. § 2501 (1994).

276. *See* S. Pines Assocs. v. United States, 912 F.2d 713, 714–15 (4th Cir. 1990); Commissioners of Pub. Works v. United States, No. 93–2061, 1994 U.S. App. LEXIS 20162, *4–*5 (4th Cir. Aug. 3, 1994).

277. Rueth v. United States EPA, 13 F.3d 227, 229–30 (7th Cir. 1993); Fiscella & Fiscella v. United States, 717 F. Supp. 1143, 1146–47 (E.D. Va. 1989).

cent to a water of the United States or not.[278] Therefore, it seems that the Corps was visionary when it drafted its regulations, to require that the administrative appeal approach be exhausted before any court review of Corps jurisdiction could be attempted. It is doubtful that the hearing officer at the Corps, who must be a regulatory specialist but not a lawyer, would be well–versed in the law to make decisions affecting the statutory and constitutional implications of an "adjacency" determination. Exhaustion of administrative remedies is also a flexible doctrine,[279] but certainly it is a government defense that could be expected, and it must not be taken lightly. Therefore, an administrative appeal based on *SWANCC* would have to be undertaken. This appeal process would be frustrating to applicants who receive their permits, because they usually cannot proceed with the work until the appeal is resolved, many months later.

An anomaly would occur if the permit is issued, no administrative appeal is taken, and a public interest group sues the Corps over its permit decision. The permittee as a defendant or defendant–intervenor may wish to defend on the grounds that the Corps lacks the regulatory jurisdiction. It would seem that the exhaustion doctrine would not be strictly applicable there.

Third, landowners could pursue a constitutional tort claim against government officials for taking their property without due process or just compensation.[280] This claim is difficult to make because constitutional torts are only allowed for *clearly* established rights, and there have been but few inverse condemnation cases even recognizing compensation for a Section 404 permit denial as a regulatory taking.[281] However, if the Corps lacks ade-

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278. Rules and Regulations Department of Defense, 65 Fed. Reg. 16486, 16486; 33 C.F.R. § 331 (2000). See also 33 C.F.R. § 331.3(a)(3) for the qualifications of the hearing officer and 33 C.F.R. § 331.2 for adjacency determinations. Jurisdictional determinations made prior to March 28, 2000 apparently may still be subject to the administrative appeals process if the actual permit is issued or conditioned afterward.

279. *See* S. Ohio Coal Co. v. Office of Surface Mining, Reclamation, and Enforcement, Dep't of the Interior, 20 F.3d 1418, 1423 (6th Cir. 1994).

280. *See* Butz v. Economou, 438 U.S. 478, 479 (1978).

281. *See* United States v. Lanier, 520 U.S. 259, 270 (1997). *See also* Palm Beach Isles Assocs. v. United States, 208 F.3d 1374, 1384–86 (Fed. Cir. 2000), *aff'd*, 231 F.3d 1354 (Fed. Cir. 2000); Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1179–82 (Fed. Cir. 1994); Florida Rock Indus., Inc. v. United States, 18 F.3d 1560, 1562 (Fed. Cir. 1994). Takings issues often include whether the investment predated the regulations at issue and are any remaining uses of the property affected after permit denial. *Florida Rock*, 18 F.3d at 1564.

quate standards for determining a) when one piece of "wet" property is "adjacent" to navigable waters, b) what "adjacent" means, and c) to what type of waters the wetlands must be adjacent, a due process violation could be alleged.[282] This may be more fruitful, unless the Corps somehow determines adjacency using adequate standards for what is adjacent, much more so than the scant "case–by–case" definition in its regulations at this time.[283] Adjacency must be clearer than a vote on a chad.

And, finally, what of the myriad of Corps permits denied, conditioned, or issued after delays, over "isolated" wetlands in the past? Does *SWANCC* have retroactive implications?[284] It certainly voids some Corps regulatory authority back to the 1970's. Do these owners/permittees have damages or taking claims? When did they become aware of their rights? Are they prescribed?[285] Did they unwittingly agree to overly broad Corps jurisdiction and "knowingly" waive rights? Litigation can be anticipated over many of these issues.

IV. CONCLUSION

Although the Court's sharp swing in *Laidlaw* is viewed as an environmental victory, its returning blade has lowered on that victory like in a tale from Poe. The *SWANCC* decision, restricting agency discretion under *Chevron* and skewing Congress's manifestation of broad interstate commerce coverage, will take years to unravel. And, finally, who may "take care" of enforcing federal law—citizens or government? The environmental practitioner will face a jubilee of injury, causation, deterrence, separation of

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The Supreme Court in *Palazzolo v. Rhode Island*, 121 S. Ct. 2448 (2001), recently rejected the proposition that regulations must pre–date a landowner's acquisition of property, in a total taking claim, if the landowner can show that the plan of development only involved regulated properties on which an agency denied a permit for development.

282. *See generally* Bush v. Gore, 121 S. Ct. 525 (2000); Everett v. City of Tallahassee, 840 F. Supp. 1528 (N.D. Fla. 1992) (applying a vague policy on an ad hoc basis can deny one due process). *Id*.

283. *See* 33 C.F.R. § 328.3(c) (2000).

284. *See* Am. Trucking Ass'n, Inc. v. Smith, 496 U.S. 167, 196–202 (1990). The courts use a balancing test to determine whether decisions should apply retroactively to events or conduct occurring prior to the court decision date. *See id.* at 185–86.

285. *See* 28 U.S.C. §§ 2401, 2501 (1994). Federal courts also borrow state statutes of limitations in constitutional torts. Laspopoulos v. FBI, 884 F. Supp. 214, 216 (E.D. La. 1995).

powers, waters, adjacency, interstate commerce, states' rights, and administrative interpretation issues in meeting these challenges.

Appendix A