

Navigating in Isolated Waters: Section 404 of the Clean Water Act Revisited

[Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159 (2001)]

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I. INTRODUCTION

The United States Supreme Court recently rocked the foundations of one of the Clean Water Act's ("CWA") core provisions.¹ In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* ("SWANCC"),² the Court struggled to determine whether section 404 of the CWA gave the United States Army Corps of Engineers ("Corps") authority over dredge and fill activities in isolated, intrastate waters.³ Contrary to over twenty-five years of judicial decisions and administrative regulations, the Court found that the scope of section 404 stopped short of the full reach of the Commerce Clause.⁴ Instead, the majority concluded that section 404 extended only to Congress' traditional commerce power over navigation.⁵ Accordingly, the Corps' jurisdiction under section 404 did not reach isolated, intrastate waters that were neither navigable-in-fact, nor otherwise connected to traditionally navigable bodies of water.

Not surprisingly, there has been a great hue and cry from various environmental advocates challenging the legitimacy of the Court's decision.⁶ By contrast, virtually no one in the legal community has expressed the opinion that maybe, just maybe, the Court got this one right. The cause of this lack of visible support can be found in the Court's methodology, which has likely done more to fuel criticism of the decision than to dispel it. In particular, the Court's desire to base its holding on the text of the statute seems to have enticed the major-

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1. Clean Water Act, 33 U.S.C. §§ 1251-1387 (2001).

2. 531 U.S. 159 (2001).

3. See SWANCC, 531 U.S. at 162.

4. See *id.* at 174.

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

6. See, e.g., Robin Kundis Craig, *Navigating Federalism: The Missing Statutory Analysis in Solid Waste Agency*, 31 ENVTL. L. REV. 10508 (2001); Christy H. Dral & Jerry J. Phillips, *Commerce by Another Name: Lopez, Morrison, SWANCC, and Gibbs*, 31 ENVTL. L. REV. 10413 (2001); William Funk, *The Court, the Clean Water Act, and the Constitution: SWANCC and Beyond*, 31 ENVTL. L. REV. 10741 (2001).

ity to read clarity into otherwise ambiguous statutory language. Ironically, the legislative history the Court sought to avoid provides the richest support for its holding.

II. CASE DESCRIPTION

The Solid Waste Agency of Northern Cook County (“SWANCC”), a consortium of suburban Chicago municipalities, planned to construct a solid waste disposal site on land containing the remains of an abandoned sand and gravel pit.⁷ The site had been abandoned since about 1960.⁸ The sand and gravel excavation trenches subsequently filled with water and formed ponds, which became the habitat for several species of migratory birds.⁹ SWANCC obtained various permits from Cook County and the State of Illinois authorizing SWANCC to proceed with its waste disposal site project.¹⁰ Since the project required filling the ponds, SWANCC contacted the Corps to determine if a fill permit was required pursuant to section 404(a) of the CWA.¹¹

Section 404(a) gives the Corps permit authority over “the discharge of dredged or fill material into the navigable waters.”¹² The CWA defines navigable waters as “the waters of the United States, including the territorial seas.”¹³ By regulation, the Corps has further defined “waters of the United States” to include “waters such as intra-state lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce.”¹⁴ Finally, the Corps provided even more clarification of how it perceived its jurisdiction under section 404(a) of the CWA in what has come to be known as the “Migratory Bird Rule.”¹⁵ This rule states that the Corps has jurisdiction over all waters “[w]hich are or would be used as habitat by . . . migratory birds which cross state lines.”¹⁶

7. *See* SWANCC, 531 U.S. at 162-63.

8. *See id.* at 163.

9. *See id.* at 163-64.

10. *See id.* at 165. These included permits from the Illinois Environmental Protection Agency and the Illinois Department of Conservation. *Id.*

11. *See id.* at 163.

12. Clean Water Act § 404(a), 33 U.S.C. § 1344(a) (2001).

13. Clean Water Act § 502(7), 33 U.S.C. § 1362(7) (2001).

14. 33 C.F.R. § 328.3(a)(3) (2001).

15. SWANCC, 531 U.S. at 164.

16. Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986). The full text of the Migratory Bird Rule provided for Corps jurisdiction over all waters:

a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or
b. Which are or would be used as habitat by other migratory birds which cross state lines; or

The Corps initially decided that it lacked jurisdiction in the case, but later reversed itself and asserted jurisdiction under the Migratory Bird Rule.¹⁷ Despite the fact that SWANCC obtained all the required permits from state agencies, the Corps refused to grant SWANCC's fill permit.¹⁸

Consequently, SWANCC filed suit challenging the Corps' assertion of jurisdiction over the site, as well as the merits of the permit denial.¹⁹ The District Court granted summary judgment to the Corps on the jurisdictional issue.²⁰ SWANCC dropped its challenge to the permit decision and appealed.²¹ Subsequently, the Court of Appeals affirmed the lower court ruling, holding that the CWA reached all waters allowed by the Commerce Clause and that the Migratory Bird Rule was a reasonable interpretation of the CWA.²²

III. BACKGROUND

A. Historical Water Pollution Legislation

The CWA has its roots in the Rivers and Harbors Appropriation Act of 1899.²³ The most environmentally significant provision of this act was probably section 13, frequently referred to as the "Refuse Act."²⁴ The original intent of the Refuse Act was to preserve and protect navigation by prohibiting the discharge or release of any item into the navigable waters that might impair navigability.²⁵

The Refuse Act underwent a judicial expansion in the middle of the twentieth century.²⁶ This expansion included prohibitions against water pollution without regard to such pollution's effect on navigation.²⁷ Accompanying this judicial activity was an increased Congressional interest in curbing water pollution. Beginning with the Federal

c. Which are or would be used as habitat for endangered species; or
d. Used to irrigate crops sold in interstate commerce.

Id.

17. See *SWANCC*, 531 U.S. at 164. The Corps originally concluded that it lacked jurisdiction because the water did not qualify as wetlands. *Id.* The Corps reversed its position and asserted jurisdiction after being informed that the ponds and surrounding land were used as habitat for several species of migratory birds. *Id.*

18. See *id.* at 165.

19. See *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 998 F. Supp. 946, 948 (N.D. Ill. 1998).

20. See *id.* at 957.

21. See *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 191 F.3d 845, 847 (7th Cir. 1999).

22. See *id.* at 851-52.

23. See 2 WILLIAM H. RODGERS, JR., *ENVIRONMENTAL LAW* § 4.1, at 9-10 (1986); see also *Rivers and Harbors Appropriation Act of 1899*, § 13, 30 Stat. 1152 (1899) (codified at 33 U.S.C. § 407 (2001)).

24. See RODGERS, *supra* note 23, § 4.11, at 162-63.

25. See *Rivers and Harbors Appropriation Act of 1899*, § 13, 30 Stat. 1152 (1899) (codified at 33 U.S.C. § 407 (2001)).

26. See RODGERS, *supra* note 23, § 4.11, at 167-70.

27. See *United States v. Standard Oil*, 384 U.S. 224, 226 (1966); see also RODGERS, *supra* note 23, § 4.11, at 167-70.

Water Pollution Control Act (“FWPCA”) of 1948,²⁸ Congress enacted legislation that called upon the states to take a role in reducing water pollution.²⁹ Although Congress amended the FWPCA five times between 1948 and 1972,³⁰ none of these amendments substantially shifted the balance between state and federal authority.³¹

B. *The Federal Water Pollution Control Act of 1972*

In 1972, Congress enacted amendments to the FWPCA, commonly known as the CWA.³² These amendments did in fact shift the authority to establish and enforce water quality laws from the states to the federal government.³³ Section 404(a) of the CWA granted dredge and fill permit authority to the Corps.³⁴

The CWA began as two separate bills, Senate Bill 2770 and House Bill 11896.³⁵ The committee report on House Bill 11896 provided:

One term that the Committee was reluctant to define was the term “navigable waters.” The reluctance was based on the fear that any interpretation would be read narrowly. However, this is not the Committee’s intent. The Committee fully intends that the term “navigable waters” be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes.³⁶

Similarly, the conference committee report said, “[t]he conferees fully intend that the term ‘navigable waters’ be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes.”³⁷

The meaning of “navigable waters” was not seriously discussed in the initial House and Senate debates on the bills. When taking up the conference bill, however, some key proponents of the bill explained in detail the meaning of “navigable waters.” These profound statements showed exactly how far Congress meant to go as it pushed what it

28. Pub. L. No. 80-845, 62 Stat. 1155 (1948).

29. See RODGERS, *supra* note 23, § 4.1, at 10.

30. See *id.*

31. See *id.* § 4.2, at 21.

32. Pub. L. No. 92-500, 86 Stat. 816 (1972).

33. See RODGERS, *supra* note 23, § 4.2, at 21 (quoting H. LIEBER & B. ROSINOFF, FEDERALISM AND CLEAN WATERS: THE 1972 WATER POLLUTION CONTROL ACT, preface (1975)) (“[I]t is reported empirically that the 1972 Amendments represent ‘a classic case of federal takeover stemming from Congress’ dissatisfaction with cleanup efforts by the states.’”).

34. See 33 U.S.C. § 1344(a) (2001).

35. In fact, multiple bills were introduced in both houses of Congress, but S. 2770 and H.R. 11896 were the only ones to emerge from committee. See S. REP. NO. 92-414, at 111-20 (1971); H.R. REP. NO. 92-911, at 69 (1972).

36. H.R. REP. NO. 92-911, at 131 (1972).

37. H.R. CONF. REP. NO. 92-1465, at 144 (1972).

perceived as the constitutional envelope. Senator Edmund Muskie (D-ME), sponsor and floor manager of Senate Bill 2770, said:

The Conferees fully intend that the term “navigable waters” be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes It is intended that the term “navigable waters” include all water bodies, such as lakes, streams, and rivers, regarded as public navigable waters in law which are navigable in fact. It is further intended that such waters shall be considered to be navigable in fact when they form, in their ordinary condition by themselves or by uniting with other waters or other systems of transportation, such as highways or railroads, *a continuing highway over which commerce is or may be carried on with other States*³⁸

The significance to Senator Muskie’s statement is that, in the same breath, he equated “broadest possible constitutional interpretation” with the water’s use as part of “a continuing highway over which commerce is or may be carried on”³⁹ Likewise, Representative John Dingell (D-MI) stated:

[T]he conference bill defines the term “navigable waters” broadly for water quality purposes. It means all “the waters of the United States” in a geographical sense. It does not mean “navigable waters of the United States” in the technical sense as we sometimes see in some laws [I]t is enough that the waterway serves as a link in the chain of commerce among the States as it flows in the various channels of transportation — highways, railroads, air traffic, radio and postal communication, waterways, et cetera. The “gist of the Federal test” is the waterway’s use “as a highway,” not whether it is “part of a navigable interstate or international commercial highway.” . . . The conferees fully intend that the term navigable waters be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes.⁴⁰

Like Senator Muskie, Representative Dingell explained that when Congress said it was reaching the limits of the Constitution, it was only reaching to bodies of water that formed part of a commercial highway.⁴¹ Both the Dingell and Muskie statements went completely un-rebutted in the Congressional Record⁴² and the conference bill was

38. 118 CONG. REC. 33,699 (1972) (emphasis added).

39. *Id.*

40. 118 CONG. REC. 33,756-57 (1972) (emphasis added) (quoting *Utah v. United States*, 403 U.S. 9, 11 (1971); *United States v. Underwood*, 4 ERC 1305, 1309 (D.C., Md., Fla., Tampa Div., June 8, 1972)).

41. Representative Dingell was not alone in his recognition of Senator Muskie’s “highway” explanation. See *supra* text accompanying note 38. In 1974, the Corps promulgated regulations explaining that “it is the water body’s capability of use by the public for purposes of transportation or commerce which is the determinative factor” in whether the water body is considered “navigable waters” under section 404 of the CWA. 33 C.F.R. § 209.260(e)(1) (1974).

42. The conspicuous absence of any debate over the breadth of meaning implied in “navigable waters” would certainly suggest that there was not a great deal of contention between members as to what was meant when Congress said it was reaching the limits of the Constitution.

passed overwhelmingly by a vote of 74-0 in the Senate⁴³ and 366-11 in the House.⁴⁴

In addition to the Muskie and Dingell statements, the legislative history of section 404 sheds considerable light on what Congress intended in 1972. Section 404 was not part of the original Senate bill.⁴⁵ Senator Ellender (D-LA) originally offered section 404 as an amendment to Senate Bill 2770.⁴⁶ Senator Ellender proposed section 404 for the exclusive purpose of preventing the CWA from impeding or delaying dredging operations that were critical to ensuring safe navigation into America's ports and harbors.⁴⁷ The amendment was intended to ensure that the Corps continued as the sole federal permit-issuing authority for dredge and fill operations, instead of requiring both a dredging permit from the Corps as well as a discharge permit from the United States Environmental Protection Agency ("EPA").⁴⁸ Senator Muskie vigorously opposed the Ellender amendment.⁴⁹ Muskie's opposition resulted in a compromise amendment⁵⁰ that retained much of the EPA's discretion in issuing permits for the discharge of dredged spoil.⁵¹

Approximately two weeks after the failure of Senator Ellender's amendment to Senate Bill 2770, House Bill 11896 was introduced.⁵² House Bill 11896 contained its own section 404, written in language almost identical to the Ellender amendment.⁵³ When reporting House Bill 11896, the House Public Works Committee stated "[t]he Committee expects that until such time as economic and feasible alternative methods for disposal of dredge material are available, *no arbitrary of [sic] unreasonable restrictions shall be imposed on dredging activities essential for the maintenance of interstate and foreign commerce . . .*"⁵⁴

When the conference committee took up the competing versions of the CWA, section 404 was retained.⁵⁵ The conference committee

43. 118 CONG. REC. 33,718 (1972).

44. *Id.* at 33,767.

45. *See* S. 2770, 92d Cong. (1971).

46. *See* 117 CONG. REC. 38,853 (1971).

47. *See id.* at 38,853-54 (statement of Senator Ellender)("The strict adherence to the published standards would result in 90 percent of the ports and harbors of the United States being closed . . .").

48. *See id.* at 38,854 (statement of Senator Ellender).

49. *See id.* at 38,854-55 (statements of Senator Muskie).

50. *See id.* at 38,856-57.

51. *See* S. 2770, 92d Cong. § 402(m) (1971).

52. *See* H.R. 11896, 92d Cong. (1971)(as introduced on November 19, 1971).

53. *See id.* § 404.

54. H.R. REP. NO. 92-911, at 130 (1972) (emphasis added).

55. *See* H.R. CONF. REP. NO. 92-1465, at 141-42 (1972). The conference committee did, however, remove some of the autonomy granted to the Secretary of the Army under H.R. 11896 by giving the Administrator of the EPA the authority to prevent disposal of dredged spoils at sites where the Administrator determines such disposal may have adverse environmental effects. *See id.*

echoed much of the House's sentiment toward protecting navigation and preventing "unreasonable restrictions . . . on dredging activities essential for the maintenance of interstate and foreign commerce."⁵⁶ Thus, the legislative history of the Federal Water Pollution Control Act of 1972 indicates very strongly that, notwithstanding Congress' general intentions regarding the definition of "navigable waters," section 404 of the CWA was written exclusively to govern dredge and fill operations related to navigation.

C. *The Corps' Response*

At first, the Corps was reluctant to expand its jurisdiction under section 404.⁵⁷ Instead, the Corps preferred to adhere to more traditional notions of navigable waters.⁵⁸ However, in 1975, pursuant to a suit brought by the Natural Resources Defense Council and the National Wildlife Federation, a federal judge ordered the Corps to expand its jurisdiction under section 404 of the CWA to the limits of the Commerce Clause.⁵⁹

In response to the court order, the Corps issued interim regulations that expanded its jurisdiction in three phases: Phase I, effective immediately, primarily included traditional navigable waters; Phase II, effective July 1, 1976, added primary tributaries and freshwater lakes; and Phase III, effective July 1, 1977, added all remaining navigable waters (presumably as defined by the limits of the Commerce Clause).⁶⁰ In 1977, the Corps issued the final version of these regulations, which contained the expansive definition of "navigable waters" addressed in *SWANCC*.⁶¹

D. *The Clean Water Act Amendments of 1977*

By 1977, Congress faced a public outcry against the Corps' overreaching regulations.⁶² Farmers and ranchers feared that many of their routine activities would now fall under the Corps' section 404 regulatory authority.⁶³ Accordingly, they called on Congress to remedy the matter.⁶⁴

56. *Id.* at 142.

57. *See* RODGERS, *supra* note 23, § 4.12 at 196.

58. *See id.*

59. *See* Natural Res. Def. Council v. Callaway, 392 F. Supp. 685, 686 (D.D.C. 1975).

60. *See* 40 Fed. Reg. 31325-26 (July 25, 1975).

61. *See* 33 C.F.R. § 328.3(a)(3) (2001); *see supra* text accompanying note 14.

62. *See, e.g.*, 123 CONG. REC. 26,711 (1977) (remarks of Senator Bentsen).

63. *See id.*

64. *See id.*

The House responded with House Bill 3199,⁶⁵ which specifically defined “navigable waters” for purposes of section 404 as

all waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark⁶⁶

This definition continued to acknowledge the role of the waterway as a “highway” in the transportation of goods in interstate commerce.⁶⁷ This bill also expressly extended the Corps’ jurisdiction to wetlands adjacent to navigable waters.⁶⁸ House Bill 3199 passed the House by a vote of 361-43, but met Senate opposition concerning the definition of “navigable waters.”⁶⁹

As in 1972, Senator Muskie acted as floor manager for the Senate counterpart to House Bill 3199, Senate Bill 1952.⁷⁰ He also sponsored Senate Bill 1952 and chaired the subcommittee from which it emerged.⁷¹ Senator Muskie’s bill did not include the restrictive definition of “navigable waters” found in House Bill 3199, but instead exempted specific activities from the Corps’ jurisdiction.⁷²

Although this approach might seem to indicate that the Senate was more comfortable with the Corps’ assertion of jurisdiction, Senator Muskie condemned the Corps’ actions numerous times.⁷³ In one

65. H.R. 3199 was virtually identical to H.R. 9560, which was passed by the House in 1976 by a vote of 339-5. 123 CONG. REC. 10,393 (1977). However, the House and Senate failed to reach a compromise and H.R. 9560 died when the congressional session ended. *Id.*

66. H.R. 3199, 95th Cong. § 216(b) (1977) (as incorporated in H.R. 11). Critics of this definition claimed that it narrowed “navigable waters” even beyond its traditional definition. *See* H.R. REP. NO. 95-139, at 55 (1977). Under the traditional definition (applicable to the Refuse Act), navigable waters also included any bodies of water that had been used for interstate commerce in the past. *See id.* at 23-24. This definition has even been interpreted to include waters used, for example, by eighteenth century fur traders, regardless of whether the waters are presently used for interstate commerce. *See id.* The definition put forth in H.R. 3199 excludes historical use as a basis for identifying navigable waters. *See id.* at 23.

67. *See supra* text accompanying notes 38 and 40 (statements of Senator Muskie and Representative Dingell).

68. *See* H.R. 3199, 95th Cong. § 216(a) (1977) (as incorporated in H.R. 11).

69. *See* 123 CONG. REC. 10,434 (1977). During the House debate, an amendment was offered by Representatives Cleveland and Harsha that would have replaced the proposed definition of “navigable waters” and related provisions with specific exemptions for farming, ranching and silviculture in language almost identical to that passed in the corresponding Senate bill, S. 1952. *See id.* at 10,428-29; *see infra* text accompanying note 72. The House rejected the Cleveland-Harsha amendment. *See* 123 CONG. REC. 10,432 (1977).

70. *See* 123 CONG. REC. 26,690 (1977).

71. *See* S. REP. NO. 95-370, at 1 (1977).

72. *See* S. 1952, 95th Cong. § 49(b) (1977). Although S. 1952 did not originally contain the restrictive definition of “navigable waters” used in H.R. 3199, Senator Bentsen (D-TX) proposed an amendment to S. 1952 that would have replaced the exemptions with the definition used in H.R. 3199. *See* 123 CONG. REC. 26,709 (1977). The amendment was defeated 51-45. *Id.* at 26,738 (1977).

73. “I think it ought to be clear that no Member of the Senate, as far as I know, defends section 404. The Senator [Bentsen] knows that I vigorously opposed the interpretation of section 404 which the Corps of Engineers undertook to implement” 123 CONG. REC. 26,711 (1977). “[W]e are trying to eliminate the impact and the implications of section 404, which has generated

of his strongest attacks, he stated “[t]here is not a Senator on the floor, including the Senator who is speaking, who supports section 404 as it has been interpreted and implemented by the Corps of Engineers.”⁷⁴

Not only did Senator Muskie express disapproval of the Corps’ activities, but he went on to make some explicit statements about the intended scope of the Corps’ jurisdiction under both the 1972 Act and the 1977 Amendments.⁷⁵ Moreover, he accused the Corps of distorting congressional intent through its (then) current assessment of jurisdiction, saying:

Now, what the committee bill does is very simple. *It undertakes to continue the corps’ traditional jurisdiction exercised since the Refuse Act of 1899 and before.* It was under that jurisdiction that the corps for all these decades has policed and monitored and approved dredging in the waterways of our country and disposing of the dredged spoil wherever it chose without any consideration for the environmental values concerned or the damage that was done because of that insensitivity. *For the purpose of disciplining the corps in that respect, section 404 was enacted into law in 1972. The corps proceeded to take that section and, by its interpretation, expand it far beyond any intent of the Congress so that it found itself threatening regulation in areas of the country which the corps had never imagined it had any jurisdiction over.*⁷⁶

Thus, in one broad statement, Senator Muskie expressed his understanding that the bill *he sponsored* would continue the Corps’ jurisdiction under the Refuse Act, and that the Corps’ assertion of jurisdiction beyond those bounds was a distortion of congressional intent. Ultimately, it was the Senate’s version of section 404 that survived the House-Senate conference largely intact and was passed into law as the Clean Water Act of 1977.⁷⁷

much emotion all across the Nation. No one on this floor is defending section 404” *Id.* at 26,720.

74. 123 CONG. REC. 26,728 (1977).

75. *See infra* note 76 and accompanying text.

76. 123 CONG. REC. 26,728 (1977) (emphasis added); *see also id.* at 26,720-21 (“[T]here is a legitimate national role, roughly spelled out by the 1899 Refuse Act, which has been the basis of the Corps of Engineers’ jurisdiction over dredge and fill operations for the last 80 years Within that broad jurisdiction, the committee bill would continue the jurisdiction of the Corps of Engineers, which it has always had. It was the purpose of section 404 to discipline the Corps of Engineers’ discharge of its responsibilities under the 1899 act by requiring it to take into account the toxic nature of the materials which it was shifting from the bottoms of our waterways into wetlands and other vulnerable areas. That was the purpose of section 404, and it is a legitimate purpose and it is a purpose which I hope will continue to be served by the decisions which the Senate makes on this question today.”).

77. *See* Clean Water Act of 1977 § 67 (codified at 33 U.S.C. § 1344 (2001)). The Corps did not promulgate its Migratory Bird Rule until 1986. *See* 51 Fed. Reg. 41206, 41217 (Nov. 13, 1986). The Migratory Bird Rule formed the basis for the Corps’ jurisdiction in SWANCC. *See supra* note 16 and accompanying text.

E. Case Precedent

The United States Supreme Court had taken up the issue of the Corps' jurisdiction under section 404(a) of the CWA only once before. In *United States v. Riverside Bayview Homes, Inc.*,⁷⁸ the Court upheld the Corps' jurisdiction over wetlands that were located adjacent to a navigable waterway.⁷⁹ The Court reasoned, without regard to the intent of Congress in 1972, that Congress specifically acquiesced in 1977 to the Corps' assertion of jurisdiction over adjacent wetlands.⁸⁰ The Court found two bases for its conclusion in the legislative history of the 1977 Amendments: (1) Congress specifically focused on wetlands in the debates and committee reports, and (2) Congress rejected the House bill that would have provided a narrow definition of "navigable waters."⁸¹

Although *Riverside Bayview Homes* was the only case in which the United States Supreme Court had considered the meaning of "navigable waters" under section 404 of the CWA, lower federal courts had ruled on the matter extensively. Almost categorically, the lower courts concluded that section 404 reached the limits of the Commerce Clause and that the Migratory Bird Rule properly interpreted the Corps' jurisdiction under the CWA.⁸² By the time *SWANCC* reached the Supreme Court, the abundance of federal case law weighed almost unanimously in favor of the Corps.

IV. ANALYSIS

In *SWANCC*, the Court faced two issues: first, whether Congress granted the broad jurisdiction that the Corps asserted in this case; and, if so, whether such authority is permitted under the Commerce Clause.⁸³

78. 474 U.S. 121 (1985).

79. See *Riverside Bayview Homes*, 474 U.S. at 139.

80. See *id.* at 136.

81. See *id.* at 137-38.

82. See, e.g., *United States v. Tilton*, 705 F.2d 429, 431 (11th Cir. 1983) ("Congress intended 'waters of the United States' to include the maximum permissible under the Constitution."); *Deltona Corp. v. United States*, 657 F.2d 1184, 1186 (Ct. Cl. 1981) ("It is now well settled that Congress . . . 'asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause . . .'" (citations omitted); *United States v. Byrd*, 609 F.2d 1204, 1209 (7th Cir. 1979) (concluding that Congress intended "navigable waters" to include all waters that could be reached under the Commerce Clause); *Leslie Salt Co. v. Froehlke*, 578 F.2d 742, 755 (9th Cir. 1978) ("[T]he term 'navigable waters' . . . is to be given the broadest possible constitutional interpretation under the Commerce Clause."). See also *RODGERS*, *supra* note 23, § 4.12, at 196.

83. See *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159, 162 (2001).

A. Parties' Arguments

SWANCC argued that the Corps went far beyond the jurisdictional limits Congress established in the 1972 Act.⁸⁴ Furthermore, SWANCC contended that the 1977 amendments to the CWA did not amount to congressional acquiescence to the Corps' regulations.⁸⁵ Alternatively, SWANCC claimed that even if the CWA did support jurisdiction over the SWANCC site, such jurisdiction exceeded congressional authority under the Commerce Clause.⁸⁶ Finally, SWANCC argued that the Corps' regulations were not entitled to deference, as described in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* ("Chevron deference"),⁸⁷ because the Corps' regulations were not supported by the legislative history of the CWA.⁸⁸

The Corps countered that the 1972 Act constituted a complete dissolution of the former meanings of "navigable waters."⁸⁹ Moreover, the agency contended that the 1977 amendments to the CWA constituted congressional acquiescence to the Corps' regulations regarding its jurisdiction.⁹⁰ Finally, the Corps maintained that it was entitled to *Chevron* deference because "[t]he term 'waters of the United States' is neither an established term of art . . . nor one with an obvious 'plain meaning.' The choice among reasonable alternative constructions is therefore the province of EPA and the Corps"⁹¹

B. Majority Opinion

Considering these arguments, the Court approached the statutory interpretation problem largely by focusing on the plain text of section 404(a) and the definition of "navigable waters" in section 502(7).⁹² A surprisingly small part of the opinion was actually aimed at evaluating

84. See Brief for Petitioner at 21-23, *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001) (No. 99-1178).

85. See *id.* at 23-26.

86. See *id.* at 36-48.

87. 467 U.S. 837 (1984). This so-called "*Chevron* deference" holds that a court will not overrule an administrative regulation if it is a reasonable interpretation of an otherwise ambiguous statute, so long as the interpretation is not inconsistent with the statutory language and the related legislative history. See *id.* at 845. "If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *Id.* (quoting *United States v. Shimer*, 367 U.S. 374, 383 (1961)).

88. See Brief for Petitioner at 32, *SWANCC* (No. 99-1178). SWANCC also argued that, since the CWA imposes criminal liability, the statute should be strictly construed against the government. *Id.* at 31. The Court declined to take up that issue, having decided the case on different grounds. See *SWANCC*, 531 U.S. at 174 n.8.

89. See Brief for Respondents at 18-20, *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001) (No. 99-1178).

90. See *id.* at 27-28.

91. *Id.* at 28-29.

92. See *SWANCC*, 531 U.S. at 167.

the definition of “navigable waters.”⁹³ In fact, the legislative history of the 1972 Act received nothing more than a passing mention in a single footnote.⁹⁴ The majority reasoned that, although the word “navigable” in section 404(a) was of “limited import,”⁹⁵ it would be non-sensical to render the term “navigable” devoid of any independent meaning.⁹⁶

Thus, the Court proceeded from the premise that Congress’ use of the term “navigable” limited the Corps’ jurisdiction to Congress’ traditional commerce power over navigation.⁹⁷ The majority described this jurisdiction as extending to “waters that were or had been navigable in fact or which could reasonably be so made.”⁹⁸ With that notion in mind, the Court spent the balance of its opinion rebutting the Corps’ claims of congressional acquiescence and *Chevron* deference.

The Court took up the question of congressional acquiescence with a predisposed reluctance toward recognizing congressional inaction.⁹⁹ The Court stated as much when it said “failed legislative proposals are ‘a particularly dangerous ground on which to rest an interpretation of a prior statute.’”¹⁰⁰ Accordingly, the Court rejected the suggestion that, by failing to enact House Bill 3199 in 1977 (as originally passed by the House), Congress acquiesced to the jurisdiction suggested under the Migratory Bird Rule.¹⁰¹ In support of its conclusion, the majority postulated that “[a] bill can be proposed for any number of reasons, and it can be rejected for just as many others.”¹⁰² Its decision on acquiescence notwithstanding, the Court further intimated that Congress could not possibly have acquiesced to the Migratory Bird Rule in 1977, since that rule was not promulgated until 1986.¹⁰³

Finally, the Court considered the Corps’ request for *Chevron* deference in its interpretation of section 404(a). The Court rejected that

93. *See id.*

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

95. *Id.* at 167 (quoting *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985)).

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

97. *See id.*

98. *Id.* (citations omitted).

99. *See id.* at 169-70.

100. *Id.* at 170 (citations omitted).

101. *See id.* The Court attempted to reconcile this conclusion with its former holding that Congress had acquiesced to the Corps’ jurisdiction over adjacent wetlands. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 136 (1985). The Court noted that the 1977 debates over bills proposed to limit the definition of “navigable waters centered largely on the issue of wetlands preservation.” *SWANCC*, 531 U.S. at 170 (quoting *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 136 (1985)). Since Congress had not taken up debate regarding jurisdiction over “nonnavigable, isolated, intrastate waters,” congressional inaction was ineffective to legitimize the Corps’ jurisdiction over such water bodies. *Id.* at 170-71.

102. *SWANCC*, 531 U.S. at 170.

103. *See id.*

request out of hand based on its finding that the meaning of section 404(a) was clear.¹⁰⁴ Additionally, the majority noted that the Corps' interpretation pressed the limits of Congress' constitutional authority and encroached upon "a traditional state power" (land use planning).¹⁰⁵ Accordingly, the Corps was not entitled to *Chevron* deference, even if section 404(a) was unclear.¹⁰⁶

Although the opinion questioned the Corps' jurisdiction over isolated waters in general, the holding was very narrow.¹⁰⁷ The Court's limited ruling found that the use of the Migratory Bird Rule to reach the SWANCC landfill site "exceed[ed] that authority granted to [the Corps] under section 404(a) of the CWA."¹⁰⁸

C. Dissenting Opinion

Justice Stevens wrote a forceful dissent in which he disagreed with the majority on every substantive point raised in the case.¹⁰⁹ First, he stated that section 404 was "principally intended as a pollution control measure," as opposed to being concerned with "the maintenance of navigability."¹¹⁰ As such, he reasoned, section 404 should not be constrained to circumstances related to navigation.¹¹¹ Moreover, the dissent also discounted the use of the term "navigable" as being merely nostalgic, stating "Congress' choice to employ the term 'navigable waters' in the 1972 Clean Water Act simply continued nearly a century of usage."¹¹² Accordingly, Justice Stevens concluded

104. See *id.* at 172; see also *infra* text accompanying note 157; see also *infra* note 158 and accompanying text.

105. See *SWANCC*, 531 U.S. at 172-73 ("Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result. . . . This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power.") (citations omitted).

106. See *id.*

107. "In order to rule for respondents here, we would have to hold that the jurisdiction of the Corps extends to ponds that are *not* adjacent to open water. But we conclude that the text of the statute will not allow this." *Id.* at 168. "[R]espondents point us to no persuasive evidence that the House bill was proposed in response to the Corps' claim of jurisdiction over nonnavigable, isolated, intrastate waters . . ." *Id.* at 171.

108. *Id.* at 174.

109. See generally *id.* at 174-97 (Stevens, J., dissenting).

110. *Id.* at 179.

111. See generally *id.* at 179-81. Quite to the contrary, the legislative history indicates that section 404 was originally enacted for the exclusive purpose of balancing the needs of navigation (by way of required dredging) with the general pollution control concerns of the CWA. See 117 CONG. REC. 38,853-54 (1971) (statements of Senator Ellender). Section 404 was enacted as an expedient measure, a calculated reduction in the water pollution controls provided by the Act in general, and was specifically aimed at ensuring America's commercial ports and harbors would be able to remain safe for navigation despite the restrictions otherwise imposed by the CWA. See *id.* See also *supra* text accompanying notes 47-48.

112. *SWANCC*, 531 U.S. at 182 (Stevens, J., dissenting). This conclusion ignores statements by leading proponents of the CWA, Senator Muskie and Representative Dingell, indicating that the term "navigable" related to the waterway's actual or potential use as a highway or similar link in the chain of transportation of interstate or foreign commerce. See *supra* text accompanying notes 38 and 40. As such, the term "navigable" is not used merely to carry on a favored

that the CWA of 1972 expressed Congress' intent to completely abandon the traditional view of "navigable waters" as a jurisdictional limit.¹¹³ Instead, Congress delegated its full Commerce Clause authority to the Corps for the purposes of administering section 404 of the CWA.¹¹⁴

Next, the dissent concluded that in 1977 Congress acquiesced to the Corps' expanded interpretation of its jurisdiction.¹¹⁵ Justice Stevens determined that the unsuccessful attempt to rein in the Corps' jurisdiction with House Bill 3199 (as originally passed by the House), combined with the extensive debate over that subject in the 95th Congress, was sufficient to legitimize the Corps' position.¹¹⁶ Justice Stevens stated that "[t]he net result of that extensive debate was a congressional endorsement of the position that the Corps maintains today."¹¹⁷ He supported this conclusion with *United States v. Riverside Bayview Homes, Inc.*¹¹⁸ The dissent interpreted *Riverside Bayview Homes* as holding that in 1977 Congress acquiesced to the *entire jurisdiction* claimed by the Corps, not merely to jurisdiction over wetlands adjacent to navigable waters.¹¹⁹

Finally, the dissent argued that the Corps was entitled to *Chevron* deference because the Corps' interpretation of section 404(a) was reasonable, and because it did not "'encroach' upon 'traditional state power' over land use."¹²⁰ Justice Stevens reasoned that, although the Corps' decision in this case operated as an override to the land use decisions made by the State of Illinois, it was not of itself land use planning because the Corps was not telling the State how the land could be used, only how it could not be used.¹²¹

Although the majority never reached the constitutional question of whether Congress had the power to grant such broad authority to the Corps, the dissent did address that issue. Justice Stevens concluded that the billions of dollars spent each year to hunt and observe migratory birds constituted a sufficient connection to interstate commerce to make the assertion of jurisdiction constitutional.¹²²

tradition, but to indicate the actual or potential navigability-in-fact that will qualify a waterway as a potential "highway" over which interstate commercial transportation may be conducted.

113. See *SWANCC*, 531 U.S. at 180-82 (Stevens, J., dissenting).

114. See *id.*

115. See *id.* at 185-91.

116. See *id.* at 185-86.

117. *Id.* at 186.

118. 474 U.S. 121 (1985).

119. *SWANCC*, 531 U.S. at 186 (Stevens, J., dissenting).

120. *Id.* at 191 (quoting *id.* at 173 (majority opinion)).

121. See *id.* at 191. This mincing of words seems rather ironic when the practical effect of the Corps' decision appears to be the affirmative land use decision that the *SWANCC* site will be used for ponds that support migratory birds.

122. See *id.* at 195. Interestingly enough, there is nothing in Justice Stevens' constitutional argument that limits it to water. As a result, the dissent's conclusion would provide a constitutional basis for the assertion of federal authority over land use decisions for any land that formed

D. Commentary

A majority of the *SWANCC* Court found that the meaning of section 404(a) of the CWA was clear.¹²³ The Court's conclusion is correct. However, the provision's clarity arises not from the plain text of the statute, but from its legislative history. By refusing to include the abundant legislative history that supports its conclusion, the Court seemed to approach the case with a rather cavalier tone, which undercut the strength of its decision.¹²⁴

Certainly legislative history must be used with great caution, because congressional debates are frequently replete with opposing views on contested issues. Selective quoting can thus provide an abundance of evidence to support one's position, while omitting an equal abundance of support for the opposing view. Nonetheless, Chief Justice Rehnquist reminds us "[o]ur task in this case, like any other case involving the construction of a statute, is to give effect to the intent of Congress. To divine that intent, we traditionally look first to the words of the statute and, if they are unclear, then to the statute's legislative history."¹²⁵

In this case, the statutory language defines "navigable waters" as "waters of the United States" ¹²⁶ The Court determined that the word "navigable" sufficiently limited the scope of "waters of the United States" such that the plain language of the statute was clear.¹²⁷ On the contrary, Congress was defining "navigable waters," and was presumably free to define "navigable waters" as it pleased. As the dissent aptly pointed out, using the word being defined ("navigable waters") to limit the scope of the definition ("waters of the United States") presents questionable grounds on which to conclude that an otherwise ambiguous statute is clear.¹²⁸

part of a "habitat" for migratory birds, including farmers' fields, local parks and even the backyards of private individuals.

123. *See id.* at 172.

124. Some commentators suggest that, in close decisions, a Justice who is willing to consider legislative history might avoid doing so in order to maintain the support of Justices Scalia and Thomas for the majority opinion. *See, e.g.,* Philip P. Frickey, *Revisiting the Revival of Theory in Statutory Interpretation: A Lecture in Honor of Irving Younger*, 84 *MINN. L. REV.* 199, 205 (1999) (citing Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 *WASH. U. L.Q.* 351, 355-57 (1994)). If the majority opinion uses legislative history to support its conclusion, Scalia (and probably Thomas) is likely to write a concurring opinion in which he refuses to join those parts of the majority opinion that rely on legislative history. *See id.*

125. *United Steelworkers of America v. Weber*, 443 U.S. 193, 253-54 (1979) (Rehnquist, J., dissenting).

126. 33 U.S.C. § 1362(7) (2001).

127. *See SWANCC*, 531 U.S. at 172 (citations omitted). The unstated result of this conclusion would seem to be that it was unnecessary to consult legislative history.

128. *See id.* at 182 (Stevens, J., dissenting) ("[I]t is the *definition* that is the proper focus of our attention.").

Given the questionable clarity of the statutory definition, the Court should have considered the legislative history.¹²⁹ Although committee reports are generally considered the most authoritative sources of legislative history,¹³⁰ explanatory statements by the sponsor of legislation “are an authoritative guide to the statute’s construction.”¹³¹ Based on this principle, the statements of Senator Muskie (as sponsor and floor manager of the enacted language) become authoritative in interpreting the statute. Accordingly, “navigable waters” (in the 1972 Act) can mean nothing more than waters that are navigable-in-fact, plus those water bodies that form part of “a continuing highway over which commerce is or may be carried on with other States”¹³²

Although legislative history provides some of the strongest support for the Court’s conclusion, common sense also suggests that the 92nd Congress did not intend a complete break from all the traditional notions of “navigable waters.” If Congress wanted to exercise jurisdiction over every drop of water that it could reach in the geographic United States, why would it have continued to use the word “navigable,” with its near-century of common understanding based on legislative and judicial precedent?¹³³ Moreover, why would Congress try to execute such an “about-face” from decades of precedential baggage by using such a vague term as “the waters of the United States”?¹³⁴

The answer seems simple: the premise is incorrect. Congress never intended to divest the term navigable of all its traditional meaning. The legislative history of the FWPCA of 1972 shows that Congress simply intended to broaden the definition of “navigable waters” to encompass waterways that had the potential to become part of the system of “highways” over which interstate or foreign commerce is conducted.¹³⁵ The statements made about “broadest possible constitutional interpretation”¹³⁶ simply indicate that, in 1972, Congress felt

129. See *United Steelworkers of America*, 443 U.S. at 253-54 (Rehnquist, J., dissenting); see also *supra* text accompanying note 125.

130. See WILLIAM N. ESKRIDGE, JR. ET AL., *LEGISLATION AND STATUTORY INTERPRETATION* 307 (2000).

131. *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526-27 (1982). See also *United Steelworkers of America*, 443 U.S. at 239-40 (Rehnquist, J., dissenting) (quoting explanatory statements by senators whom Justice Rehnquist referred to as “floor captains” of the bill in question.); ESKRIDGE, *supra* note 130, at 303.

132. See *supra* text accompanying note 38. Representative Dingell conveyed Senator Muskie’s explanation to the House when he said the scope of “navigable waters” was limited by the “highway test.” See *supra* text accompanying note 40. Thus, both the House and the Senate were informed of Senator Muskie’s restrictive interpretation of “navigable waters” prior to voting on the final enactment.

133. 33 U.S.C. § 1362(7) (2001).

134. *Id.*

135. See *supra* text accompanying notes 38 and 40.

136. See *supra* text accompanying notes 36, 38 and 40.

the “highway test” *was* as far as it could go under the Commerce Clause.¹³⁷ Thus, we must avoid the temptation to quote the general limits (“broadest possible constitutional interpretation”) while ignoring the specific limits (“highway test”) presented in the debates.

The stated goal of Congress in enacting the CWA was “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”¹³⁸ With that purpose in mind, the logic of Congress in trying to reach waterways that were “potentially navigable” makes sense. It seems irrational to prohibit pollution of a navigable river, while permitting pollution of non-navigable creeks, streams and other tributaries that feed into the river. Pollution injected into these tributaries will inevitably reach the river, frustrating Congress’ purpose for enacting the CWA. The lack of any discernable hydrologic connection between small, isolated, intrastate waters and more traditionally navigable waterways casts considerable doubt on congressional intent to regulate isolated waters, like the SWANCC ponds, with the 1972 Act.

Turning next to the 1977 Amendments, the dissent urged that by failing to legislate changes to the Corps’ definition of navigable waters, Congress acquiesced to the Corps’ position.¹³⁹ This conclusion raises two separate issues: (1) constitutional concerns about the legitimacy of acquiescence as a substitute for affirmative legislative action; and (2) factual concerns about whether these particular circumstances show congressional approval of Corps activities.

The Constitution provides specific requirements for giving legislation the effect of law: bicameral approval (approval by both houses of Congress) and presentment to the Executive.¹⁴⁰ The legislative history of the 1972 Act strongly suggests that Congress did not grant the broad jurisdiction exercised by the Corps following *Natural Resources Defense Council v. Calloway*.¹⁴¹ Thus, Congress could not have met the constitutional requirements of bicameralism unless it expanded the Corps’ jurisdiction in 1977 with an affirmative legislative act. In other words, for Congress to move the jurisdictional line it drew in 1972, the Constitution requires that a bill, with language to that effect, be approved by both houses of Congress.¹⁴² Quite to the contrary, any changes to the definition of “navigable waters” (and thus, the

137. See *supra* text accompanying note 40.

138. 33 U.S.C. § 1251(a) (2001).

139. See *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng’rs*, 531 U.S. 159, 185-91 (Stevens, J., dissenting); see also *supra* text accompanying notes 115-17.

140. See U.S. CONST. art. I, § 7, cl. 2.

141. See *supra* text accompanying notes 38 and 40.

142. See U.S. CONST. art. I, § 7, cl. 2.

Corps' jurisdiction under section 404) were categorically rejected by the Senate in 1977 and did not become part of the CWA of 1977.¹⁴³

In order for the theory of congressional acquiescence to at least pay "lip service" to the constitutional requirements of bicameralism, one must presume the following: if the situation were reversed (that is, Congress felt that "navigable waters" had previously been defined too narrowly), then Congress would have been able to pass a bill expanding that definition to cover the broad jurisdiction asserted by the Corps. The legislative history of the 1977 Amendments casts serious doubt on that presumption.

First of all, the House passed House Bill 3199 by a vote of 361-43.¹⁴⁴ This version of the bill specifically focused on narrowing the definition of "navigable waters" in section 404.¹⁴⁵ This overwhelming approval of a bill narrowing the scope of "navigable waters" should certainly raise the question of whether a bill specifically expanding the definition of "navigable waters" could ever have passed the House.

Furthermore, Senator Bentsen's amendment to incorporate the House definition of "navigable waters" into the Senate bill was fairly narrowly defeated by a vote of 51-45.¹⁴⁶ This shows how closely divided the Senate was on the issue. As a result, it seems extremely doubtful that a bill to expand a narrower definition of "navigable waters" would have been passed, especially in the House. Quite possibly, Congress was sufficiently divided on the subject that neither a bill to expand a narrow definition nor a bill to restrict a broad definition (as was House Bill 3199 in its original form) could have been passed, and the best anyone could hope for was to leave the matter unaddressed. Under such circumstances, crediting congressional inaction as an affirmation of the Corps' position would seem to violate the constitutional prerequisites of bicameralism.

Constitutional arguments notwithstanding, the congressional debates surrounding the 1977 Amendments raise significant factual questions about whether Congress was really endorsing the jurisdictional statements made by the Corps. House Bill 3199, as originally and overwhelmingly passed by the House, rebuked the Corps by defining "navigable waters" in terms of the water's use or potential use

143. See, e.g., S. REP. NO. 95-370, at 75 (1977) ("The committee amendment does not redefine navigable waters."). The paragraphs surrounding that statement actually indicate that the Senate is not completely at odds with the Corps' position; however, from a constitutional perspective it matters little if Congress provides tacit approval to the Corps' activities when they qualify such approval with the caveat that Congress is unwilling to affirmatively move the jurisdictional line it drew in 1972 by redefining "navigable waters." The net result is that the jurisdiction granted in 1972 remains unchanged.

144. See 123 CONG. REC. 10,434 (1977).

145. See *supra* note 66 and accompanying text.

146. See 123 CONG. REC. 26,738 (1977).

to transport interstate or foreign commerce.¹⁴⁷ Conversely, Senate Bill 1952 and related reports suggests less hostility toward the Corps in the Senate; however, the debates over the Bentsen amendment¹⁴⁸ and the numerous statements by the bill's sponsor, Senator Muskie,¹⁴⁹ show that even the strongest proponents of the Senate bill expressed great disdain for the Corps' interpretation of its jurisdiction.

In particular, when Senator Muskie stated that section 404 did nothing more than "continue the corps' traditional jurisdiction exercised since the Refuse Act of 1899 and before," he was assuring his colleagues that the 1977 Amendments were not an endorsement of the Corps' actions.¹⁵⁰ Again, as sponsor and floor manager of the relevant enacted language, Senator Muskie's remarks are "an authoritative guide to the statute's construction."¹⁵¹

Thus, it seems unsound to conclude (as the dissent did) that the 1977 Amendments amounted to congressional acquiescence to the very regulations that the 95th Congress so strongly condemned. Furthermore, Senator Muskie's statements strongly suggest that the jurisdictional line established by the 1972 Act remained unmoved by the 1977 Amendments.¹⁵² Such a position can also be reconciled with *United States v. Riverside Bayview Homes, Inc.*¹⁵³

In *Riverside Bayview Homes*, the Court concluded that Congress had acquiesced to the Corps' jurisdiction over wetlands adjacent to navigable waters.¹⁵⁴ Although this decision seems to indicate that congressional inaction is an acceptable substitute for affirmative legislation, there is evidence in the text of the 1977 amendments to show that Congress acted affirmatively to include adjacent wetlands within

147. See H.R. 3199, 95th Cong. § 216 (1977) (as incorporated in H.R. 11).

148. See *supra* note 73.

149. See *supra* note 76 and accompanying text; see *supra* text accompanying note 74.

150. See *supra* note 76 and accompanying text.

151. *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526-27 (1982).

152. One principal source of confusion with regard to what Congress was trying to do in 1977 arises because some members of Congress tried to reconcile the Corps' position with the 1972 Act. See, e.g., H.R. REP. NO. 95-139, at 53-54 (1977) (statement of Representatives Edgar and Myers) ("Some opponents of the section 404 program maintain that the court's decision [in *Natural Resources Defense Council v. Calloway*] was too broad and violated the intent of Congress. This is simply not true, and the act and legislative history of the act support our contention. The court case merely affirmed the letter of the law and the intent of Congress."). *Contra* H.R. REP. NO. 95-139, at 21 (1977) (stating that the Corps' original interpretation of the 1972 Act to provide the same jurisdiction granted under the Refuse Act of 1899 was consistent with congressional intent); 123 CONG. REC. 26,711 (1977) (remarks of Senator Bentsen) (stating that the jurisdiction asserted by the Corps "runs counter to the original intent of the legislation as passed by Congress"); *id.* at 26,728 (remarks of Senator Muskie) ("The corps proceeded to take that section [404] and, by its interpretation, expand it far beyond any intent of the Congress . . ."). Interestingly, neither Representative Edgar nor Representative Myers was a member of Congress when the 1972 Act was passed, so they were not speaking from first-hand experience. Conversely, both Senators Bentsen and Muskie were members of Congress when the 1972 Act was passed and can attribute their statements to first-hand knowledge of what was intended in 1972.

153. 474 U.S. 121 (1985).

154. See *id.* at 136.

the Corps' jurisdiction.¹⁵⁵ Even House Bill 3199 (as originally passed by the House), went to great pains to state that wetlands adjacent to navigable waters *were* within the scope of section 404.¹⁵⁶ Moreover, the debates surrounding the 1977 Amendments were replete with statements advocating the protection of wetlands. Thus, there is ample evidence that Congress acted affirmatively to bring "adjacent wetlands" within the jurisdiction of section 404. This was not accomplished by congressional inaction, but by affirmative legislative acts passed by both houses of Congress and signed into law by the President.

Finally, the Court considered whether the Corps' jurisdictional regulations were entitled to *Chevron* deference. The concept of *Chevron* deference is based on the prerequisites that (1) the statute is sufficiently vague on its face regarding the particular issue before the court;¹⁵⁷ and (2) neither the statute nor its legislative history indicates congressional opposition to the position being taken by the administrative agency.¹⁵⁸ Contrary to the majority opinion, the text of section 404(a) and the accompanying definition of "navigable waters" in section 502(7) *does* convey ambiguity on the intended scope of the Corps' jurisdiction. What exactly is meant by "the waters of the United States"?¹⁵⁹

Fortunately, the legislative history of the 1972 Act provides substantial authority to show that when Congress said "navigable waters" was intended to be given the "broadest possible constitutional interpretation,"¹⁶⁰ it meant that "navigable waters" were all waters that were or could be used as a link in the highway over which interstate or foreign commerce is conducted.¹⁶¹ Since Congress has clarified the more general expression of "broadest possible constitutional interpretation" with the more specific limitations of the water's use or potential use as a highway, the legislative history of the 1972 Act is at odds with the Corps' assertion of jurisdiction over isolated, non-navigable waters.¹⁶² Because the Corps fails to satisfy the second prerequisite

155. See Clean Water Act of 1977 § 67(b) (codified at 33 U.S.C. § 1344 (2001)) (adding subsection (g)(1) to § 404 of the 1972 Act).

156. See H.R. 3199, 95th Cong. § 216(a)-(b) (1977) (as incorporated in H.R. 11).

157. See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

158. See *id.* at 845 (quoting *United States v. Shimer*, 367 U.S. 374, 383 (1961)). Justice Stevens states that "[i]f a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Id.* at 843 n.9. Providing contemporaneous evidence of what he considered "traditional tools of statutory construction," Justice Stevens made extensive use of legislative history to support the holding in *Chevron*. See generally *id.* at 851-53.

159. Clean Water Act § 502(7), 33 U.S.C. § 1362(7) (2001).

160. H.R. CONF. REP. NO. 92-1465, at 144 (1972).

161. See *supra* text accompanying notes 38 and 40 (statements of Senator Muskie and Representative Dingell).

162. See *supra* text accompanying notes 36, 38 and 40.

for *Chevron* deference, such deference may not be extended based on the 1972 Act.¹⁶³

Furthermore, the legislative history of the 1977 Amendments shows overwhelming disapproval of the jurisdictional position taken by the Corps.¹⁶⁴ Even the strongest proponents of the Senate bill stated that the Corps' actions were a distortion of congressional intent.¹⁶⁵ Thus, the 1977 Amendments also fail to satisfy the second prong of the *Chevron* deference test.¹⁶⁶ Accordingly, the Corps was not entitled to *Chevron* deference to legitimize its authority over the isolated SWANCC ponds.

V. CONCLUSION

The United States Supreme Court correctly concluded that SWANCC's isolated ponds were beyond the Corps' jurisdiction under section 404 of the CWA. However, the Court's failure to include the richest sources of support for the holding undermines the credibility of its opinion and positions this case for overruling as an aberration. Confusion and resistance to the ruling have already surfaced.

Despite the Court's strong hints that isolated, intrastate waters are beyond the reach of section 404, federal courts have already begun to interpret the holding very narrowly.¹⁶⁷ Their initial conclusion is that SWANCC does nothing more than invalidate the Migratory Bird Rule.¹⁶⁸ Conversely, the Corps appears to have read the case more broadly. In its initial response to SWANCC, the Corps deleted isolated, intrastate water bodies from its definition of wetlands.¹⁶⁹ Additionally, legal counsel for the Corps and the EPA have interpreted SWANCC to apply not only to section 404 of the CWA, but also to the jurisdiction granted under section 402 (National Pollutant Discharge

163. See *supra* note 158 and accompanying text.

164. See H.R. 3199, 95th Cong. § 216(b) (1977) (as incorporated in H.R. 11); see *supra* notes 69,73,76 and accompanying text; see *supra* text accompanying notes 74-75.

165. See, e.g., S. REP. NO. 95-370, at 1 (1977). See *supra* note 76 and accompanying text.

166. See *supra* note 158 and accompanying text.

167. See, e.g., *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, No. 98-2277, 2001 U.S. App. LEXIS 6271 at *2-*3 (7th Cir. Mar. 29, 2001) (remanding to the trial court with instructions to determine if any grounds exist, other than the Migratory Bird Rule, that would allow the Corps to assert jurisdiction over the isolated SWANCC ponds); *United States v. Interstate Gen. Co.*, Civil No. AW-96-1112, 2001 U.S. Dist. LEXIS 8107, at *7-*10 (D. Md. June 12, 2001) (stating that SWANCC only invalidates the Migratory Bird Rule and does not define navigable waters for purposes of section 404 of the CWA). *But see Rice v. Harken Exploration Co.*, 250 F.3d 264, 267-69 (5th Cir. 2001) (applying SWANCC's holding on the definition of "navigable waters" to the Oil Pollution Act of 1990, 33 U.S.C. §§ 2701-2720 (2001)).

168. See *supra* note 167.

169. See John H. Stam, *Court Decision on Isolated Wetlands Prompts Army Corps to Revise Definition*, 32 ENV'T. REP. 448, 448 (2001). Cf. Susan Bruninga, *Panelists Say High Court Decision Will Prompt States to Ensure Protections*, 32 ENV'T. REP. 353, 353-54 (2001) (stating that, based on Wisconsin's perception of the gaps left by SWANCC, Wisconsin has already passed legislation to provide state regulation of dredge and fill activities in wetlands).

Elimination System program) and section 311 (oil spill program) of the CWA.¹⁷⁰

This confusion could have been avoided. Had the majority emphasized the strong legislative history that supported its holding, the lower courts would have been put on notice that the “highway test” defined the waters Congress intended to reach. As it stands, the lower courts have little more than an invalidated Migratory Bird Rule, and no persuasive evidence to show that *SWANCC* should be read more broadly.

Similarly, environmentalists who feel jilted by *SWANCC* cannot rationalize the result by studying Senator Muskie’s statements, because those statements were not included in the opinion.¹⁷¹ Instead, these individuals search in vain for justice in what appears to them to be an ideologically motivated decision.

In sum, *SWANCC* provides the right answer for the wrong reason. It is not every day that an opportunity arises to correct landmark judicial mistakes. When a mistake has become as entrenched as *Natural Resources Defense Council v. Callaway*,¹⁷² the Court is obligated to do more than bludgeon ambiguous text into clarity in order to support a sweeping reversal. In *SWANCC*, the Court should have supported its decision with relevant legislative history.

170. See Memorandum from Gary S. Guzy, General Counsel, United States Environmental Protection Agency, and Robert M. Andersen, Chief Counsel, United States Army Corps of Engineers, to various personnel named on an EPA and Corps distribution list (Jan. 19, 2001) (on file with author).

171. See *supra* note 76 and accompanying text; see *supra* text accompanying notes 38 and 74; see *supra* note 73.

172. 392 F. Supp. 685 (D.D.C. 1975).