

BAD CALLS: HOW CORPS' DISTRICTS ARE MAKING UP THEIR OWN RULES OF JURISDICTION UNDER THE CLEAN WATER ACT

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Four years after a sharply divided Supreme Court handed down its decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*,¹ there is both good news and bad news for wetlands protection under the Clean Water Act (CWA).² The good news is that, contrary to the expectations in some quarters, there has been no massive rollback of CWA jurisdiction.³ The lower courts have, almost uniformly, rebuffed attempts to read the decision broadly and have, in some cases, actually extended CWA jurisdiction into places it had not been before.⁴ To date there have been some fifty-four decisions interpreting

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1. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) [hereinafter SWANCC].

2. Clean Water Act of 1972, 33 U.S.C. §§ 1251-1387 (2000).

3. Some have argued that SWANCC should be read to limit jurisdiction to traditionally navigable waters and adjoining wetlands. See Albrecht and Nickelsburg, *Could SWANCC Be Right? A New Look at the Legislative History of the Clean Water Act*, 32 *Env'tl. L. Rep.* 11402 (2002). Others have sharply challenged this narrow view, arguing that it would remove as much as 90% of the "waters of the U.S." from the Act. See Lance D. Wood, *Don't Be Misled: CWA Jurisdiction Extends to All Non-Navigable Tributaries of the Traditional Navigable Waters and to Their Adjacent Wetlands*, 34 *Env'tl. L. Rep.* 10187 (2004); see also, Jeremy A. Colby, *SWANCC: Full of Sound and Fury, Signifying Nothing...Much?*, 37 *J. MARSHALL L. REV.* 1017 (2004). With few exceptions, the caselaw to date supports a narrow reading of SWANCC. See *infra* note 4.

4. See *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003), *reh'g (en banc) denied* (August 11, 2003), *cert. denied* 124 S.Ct. 1874 (2004). This is the leading post-SWANCC case in which the court held that a wetland adjacent to a roadside ditch that was ultimately connected after a "winding, 32 mile journey" to Chesapeake Bay was jurisdictional. *Id.* 706-07. In a thorough, well-reasoned opinion, the *Deaton* panel considered not only questions of statutory and regulatory interpretation, but tackled head-on the constitutional issues that the SWANCC majority ducked. On the statutory and regulatory issues the *Deaton* panel said:

Although the Corps has not always chosen to regulate all tributaries, it has always used the word to mean the entire tributary system, that is, all of the streams whose water eventually flows into navigable waters...In short, the word "tributaries" in the regulation means what the Corps says it means.

Id. at 710. Regarding the constitutional issue, the *Deaton* panel upheld the regulation of the "entire tributary system" of a navigable water as a valid exercise of Congress' power to regulate the "channels of commerce" under the commerce clause:

Congress's power over the channels of interstate commerce, unlike its power to regulate activities with a substantial relation to interstate commerce, reaches beyond the regulation of activities that are purely economic in nature. The power to regulate channels of interstate commerce allows Congress to make laws that protect the flow of commerce.

Id. at 706. *Deaton* also addressed the "significant nexus" issue alluded to in SWANCC:

There is also a nexus between a navigable waterway and its non-navigable

SWANCC, the vast majority of which have upheld the assertion of jurisdiction over all manner of tributaries, whether natural or artificial, perennial or intermittent, by surface or underground connection, as well as their adjacent wetlands.⁵ In addition, the ill-advised “Advanced Notice of Proposed Rulemaking,”⁶ a de-regulatory trial balloon floated by the White House, fizzled in the face of overwhelming opposition from the states,⁷ the public,⁸ and a sizeable number of members of Congress.⁹

tributaries. The Corps argues, with supporting evidence, that discharges into non-navigable tributaries and adjacent wetlands have a substantial effect on water quality in navigable waters. The Deatons do not suggest that this effect is overstated. This nexus, in light of the “breadth of congressional concern for protection of water quality and aquatic ecosystems” [citing *Riverside Bayview v. United States*, 474 U.S.121, 133 (1985).] it is sufficient to allow the Corps to determine reasonably that its jurisdiction over the whole tributary system of any navigable waterway is warranted. The regulation, as the Corps reads it, reflects a reasonable interpretation of the Clean Water Act. The Act thus reaches to the roadside ditch and its adjacent wetlands.

Id. at 712.

5. See, e.g., Kusler, *Identifying Waters of the U. S. After SWANCC* (March 2005) (on file with author) (Draft Report prepared for the Association of State Wetland Managers. Final report will be available at www.aswm.org); Lawrence R. Liebesman & Stuart Turner, *Judicial, Administrative, and Congressional Responses to SWANCC*, SJ086 ALI-ABA 193 (2004); Margaret N. Strand, *Wetlands in 2004*, SJ059 ALI-ABA 489 (2004). The only “outlier” at this point is the Fifth Circuit, which in two odd decisions interpreting “navigable waters” under the Oil Pollution Act, interpreted SWANCC, in dicta, more broadly than the four other Circuits, including the 4th in *Deaton*. See *Rice v. Harkin*, 250 F.3d 264, 269 (5th Cir. 2001); *In re Needham*, 354 F.3d 340 (5th Cir. 2003). I agree with my friend Lance Wood that these decisions are “obiter dicta” in the purest form. See Wood, *supra* note 3. Apparently the Supreme Court does not see any serious conflict among the circuits, having denied all four petitions for certiorari that have been presented, much to the dismay of conservative legal scholars. See John C. Eastman, *A Fistful of Denials The Supreme Court Takes a Pass on Commerce Clause Challenges to Environmental Laws*, (2004) available at <http://www.cato.org/pubs/scr/docs/2004/fistfulofdenial.pdf>. The Court is currently considering a fifth petition in the case. See also *infra* note 27.

6. Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of “Waters of the United States,” 68 Fed. Reg. 1992 (Jan. 15, 2003).

7. See EPA Water Docket OW-2002-0050, available at <http://docket.epa.gov/edkpub/index.jsp>. Thirty nine states submitted comments critical of the proposal to significantly scale back CWA jurisdiction, pointing out the severe consequences it would have for state water quality and wetlands programs. Some states, such as Arizona, noted that 95% of their waterways are intermittent. See Earthjustice, *Comments of 39 States Opposing the Bush Administration Proposal*, at <http://www.earthjustice.org/backgrounder/display.html?ID=68>.

8. EPA received 133,000 comments on the ANPR. See Earthjustice, *supra* note 7. According to an analysis by the Clean Water Network, the comments strongly favored retaining CWA jurisdiction. See generally Clean Water Network, *Scope of the Clean Water Act*, (2004) at <http://www.cwn.org/cwn/issues/scope/index.cfm>.

9. In the fall of 2003, a bi-partisan group of 38 Senators signed letters urging President Bush to retain CWA jurisdiction and to revoke the January 15, 2003 Guidance. See Clean Water Network, *Senators Send Letters Urging the President to Rescind the Policy Gutting the Clean Water Act*, (2004) available at <http://www.cwn.org/cwn/issues/scope/DisplayContent.cfm?ContentID=250&ContentTypeID=1&PageFormat=DisplayContent>. On November 24, 2003, 218 members of the House signed a “Dear Colleague” letter to President Bush urging him “not to reduce the scope of waters protected under the

The bad news, however, is that what is being won in the courts is being lost in the field as Corps Districts, left to their own devices under a flawed Guidance Document,¹⁰ are making inconsistent and questionable jurisdictional calls.¹¹ This article will discuss two examples of bad calls under this Guidance, and then offer some observations on what kind of guidance might better serve the purposes of the CWA, wetlands conservation, and the public interest.

GALVESTON DISTRICT

The Galveston District has never been accused of overly aggressive use of Clean Water Act (CWA) Section 404¹² to protect wetlands from coastal development in Texas. According to information provided by the Galveston Bay Estuary Program, approximately 35,000 to 45,000 acres, nearly one-quarter, of estuarine wetlands in Galveston Bay have been destroyed.¹³ Subsidence and sea level rise are the primary causes of this loss, but commercial, industrial and residential developments authorized by the Galveston District is a significant factor. The rate of freshwater wetland loss is considerably higher than the national average. At current rates of development, most of the Bay's freshwater wetlands could be gone in 20 years.¹⁴

These coastal wetlands include freshwater wetlands, unvegetated intertidal flats as well as emergent salt, brackish, and intermediate marshes that are flooded periodically by water with salinity greater than 0.5 parts per thousand.¹⁵ Coastal wetlands, of course, play a vital role in the health and productivity of estuaries. An estimated 80% of commercial and

Clean Water Act." *Id.*

10. Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States," 68 Fed. Reg. 1995 (Jan. 15, 2003) (a joint EPA/Corps Memorandum on the Scope of CWA Jurisdiction After SWANCC).

11. See Earthjustice, National Wildlife Federation, Natural Resources Defense Council, & Sierra Club, *Reckless Abandon How the Bush Administration is Exposing America's Waters to Harm*, (2004) available at http://www.earthjustice.org/news/documents/8-04/CWA_Jurisdiction_8-12-04.pdf; GEN. ACCT. OFF., REP. NO. GAO-04-297, *Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Offices Practices in Determining Jurisdiction* (Feb. 2004).

12. Clean Water Act of 1972 § 404, 33 U.S.C. § 1344 (2000).

13. Galveston Bay Estuary Program, *Habitat Priority Problems*, available at <http://www.gbep.state.tx.us/priority-problems/habitat.asp>

14. See Josh Harkinson, *Draining the Swamp*, HOUSTON PRESS, Jan. 13, 2005, available at <http://www.houstonpress.com/issues/2005-01-13/news/feature.html>

15. U.S. Fish and Wildlife Service & Texas Parks and Wildlife, *Texas Coastal Wetlands: Status and Trends, Mid-1950s to Early 1990s*, (1997) available at <http://training.fws.gov/library/Wetlands/TexasWetlands.pdf>

recreational coastal fisheries in the United States rely on wetlands as spawning areas, nurseries, and food sources.¹⁶ Approximately 95% of marine species in Texas bays and the Gulf of Mexico depend on wetlands in some portion of their life cycle.¹⁷ Coastal wetlands also provide important habitats for a host of other birds, mammals, and aquatic plants.¹⁸ The marshes that fringe Texas estuaries also serve as filters that remove pollutants and absorb nutrients entering the estuary as runoff.¹⁹ The dense stem networks of estuarine plants form a natural storm barrier, trapping sediment and retarding the flow of floodwater, while their root mats limit shoreline erosion.²⁰

Within months of the *SWANCC* decision, the Galveston District reverted to a set of policies it had developed in the 1980's that would exclude wetlands connected to navigable waters by means of sheet flow and drainage ditches.²¹ One of the first projects to benefit from this regulatory about-face was a massive container and cruise ship terminal proposed by the Port of Houston Authority (PHA) for construction on approximately 1,043 acres in the vicinity of and adjacent to the Bayport Ship Channel.²² This development would include facilities for docking, loading and unloading container and cruise ships, container storage areas, an intermodal yard, warehousing facilities, and properties available for light-industrial development.²³ Before *SWANCC*, the Galveston District estimated that over 100 acres of jurisdictional wetlands would be lost to the \$1.2 billion project; after *SWANCC*, the estimate dropped to fewer than three acres.²⁴ Eventually, after an official delineation, the Galveston District calculated that approximately twenty acres of jurisdictional wetlands and 126 acres of what it called “non-jurisdictional wetlands” would be lost to the project.²⁵ Interestingly, the mitigation plan submitted by PHA called for “compensating” both jurisdictional and non-jurisdictional wetlands, using different ratios. The approved plan provides for approximately 1,130 acres

16. *Id.*

17. The Nature Conservancy of Texas, *West Galveston Bay Conservation Area Plan*, (2001) available at http://conserveonline.org/2003/10/h/en/CAP_West_Galveston_Bay.doc

18. *See id.*

19. *See id.*

20. *See id.*

21. Harkinson, *supra* note 14.

22. Galveston District, *Environmental Impact Statement for the Port of Houston Authority's Proposed Container/Cruise Terminal* (2004), available at <http://www.swg.usace.army.mil/reg/pha/default.asp>.

23. *Id.*

24. See Douglas Jehl, *Chief Protector of Wetlands Redefines Them and Retreats*, N.Y. TIMES, Feb. 11, 2003, at A1.

25. See Galveston Bay Estuary Program, *supra* note 13.

of compensatory mitigation, all of which is off-site, out-of-kind, and heavily reliant on preservation of existing wetland and upland areas in different watersheds.²⁶

Not surprisingly, there was a lawsuit. In *City of Shoreacres v. Watterworth*,²⁷ a coalition of conservation organizations and local communities sued the District Engineer under NEPA and the Clean Water Act. The main claim in the case was a challenge to the adequacy of the EIS on the grounds that it failed to adequately consider cumulative impacts and reasonable alternatives.²⁸ Plaintiffs also challenged the jurisdictional determination, contending that all 146 acres were jurisdictional wetlands, and that the resulting mitigation plan did not meet the requirements of the CWA 404 (b)(1) Guidelines.²⁹ The District Court, invoking the familiar rule of deference to agency expertise, upheld the Galveston District's jurisdictional determination (JD) and mitigation plan under the arbitrary and capricious standard of review under the APA.³⁰ In a footnote, Judge Gilmore also referenced the *SWANCC* decision, noting that the Fifth Circuit, unlike other Circuits that have ruled on the issue, has expressed a broader view of *SWANCC*: “[I]n the Fifth Circuit, controlling authority holds that the CWA does not cover waters that are isolated or separated from a navigable body of water, such as these.”³¹ Waters “such as these” is a reference to the Galveston District's description of the wetlands as “isolated, depressional wetlands, occurring both within upland/wetland

26. The Galveston District describes the plan as follows:

The Port of Houston Authority will provide approximately 1,130 acres of compensatory mitigation. The mitigation includes wetlands creation, wetlands enhancement, prairie enhancement, and uplands preservation at the 174-acre Memorial Tract adjacent to Armand Bayou, preservation of the 456-acre Banana Bend Tract on the San Jacinto River, and preservation of 500 acres of coastal prairie within the Cypress Creek watershed, San Jacinto River Basin, or within the San Jacinto-Brazos Coastal Basin.

Galveston District, *supra* note 22. The plan relies heavily on preservation of existing wetlands at other locations rather than replacement of lost functions and values of the estuarine wetlands in Galveston Bay. This is a sharp departure from the “sequencing” approach called for under the 1990 Memorandum of Agreement on the Determination of Mitigation Under the Clean Water Act of 1972 § 404(b)(1), 33 U.S.C. § 1344 (b)(1) (2000). Nevertheless, providing permanent protection for 1000 acres of wetlands and upland habitat in Harris County is nothing to sneeze at.

27. *City of Shoreacres v. Watterworth*, 332 F. Supp.2d 992 (S.D.Tex. 2004)

28. *Id.* at 1006-07.

29. *Id.* at 1017-18.

30. *Id.* at 1018-19 (“The jurisdictional determination under the CWA is a highly technical decision within the expertise of the Corps and it is entitled to substantial deference.”).

31. *Id.* at 1019 n. 5 (*citing* Rice v. Harkins, 250 F.3d 264, 268 (5th Cir. 2001); *In re Needham*, 354 F.3d 340, 345 (5th Cir. 2003)). See also Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of “Waters of the United States,” *supra* note 6.

mosaics and as individual isolated depressions.”³² By “isolated” the District meant that they were not connected to the Bay by a defined, natural channel.³³ They were, however, connected by overland sheet flow and many were within several hundred yards of the Bay.³⁴ In addition, they were of the same type and provided the same functions as the wetlands that were connected by a “discernible channel.” Ultimately this means there was in fact a “significant nexus” between the wetlands and the Bay.³⁵ In short, the Corps made a bad call and got away with it.

The plaintiffs, understandably disappointed at an outcome that probably would not have happened anywhere but in the Fifth Circuit, appealed.³⁶ That may have been a mistake. Although the District Court dutifully followed the law of the Fifth Circuit, it also took pains to explain that its decision to defer to the Corps determination was based in large part on the fact that the JD had no bearing on the real issue, which was whether the mitigation plan was adequate under the CWA 404 (b)(1) Guidelines: “The Corps claims that resolution of the dispute over the number of jurisdictional wetlands is not essential for the Court’s decision in this proceeding, even if, as Shoreacres contends, the site contains 146 acres of jurisdictional wetlands.”³⁷ Judge Gilmore noted that EPA, the U.S. Fish and Wildlife Service, and the Texas Parks and Wildlife Department had all signed off on the mitigation plan as providing “adequate compensation” for the entire 146 acres of wetlands impacted by the project (in fact the acreage ratio was almost 10:1). Given all that, said Judge Gilmore, “the Court cannot conclude that the Corps’ wetlands delineation of 19.7 acres was arbitrary or capricious.”³⁸

In light of these somewhat unique facts, appellants are taking a big gamble teeing up the jurisdictional issue in front of the Fifth Circuit. Already the vultures are circling. Amicus briefs are coming in from all over the country, including The Pacific Legal Foundation on behalf of John Rapanos, who has filed his third petition for certiorari challenging the imposition of a million dollar penalty for filling wetlands adjacent to a

32. Shoreacres, 332 F. Supp.2d at 1019 n. 5.

33. *Id.* at 1018.

34. See Galveston District, *Recognizing Wetlands*, (1998) at <http://www.swg.usace.army.mil/reg/wetland/recwet.pdf> (for photograph of wetlands on site).

35. See, e.g., North Carolina Shellfish Growers Association and North Carolina Coastal Federation v. Holly Ridge Associates, 278 F. Supp.2d 654, 672 (E.D.N.C. 2003) (Coastal wetlands are jurisdictional “whether the hydrological connection occurs in a channelized flow or a network of flat bottoms and braids, continuously or intermittently.”).

36. City of Shoreacres v. Watterworth, No. 04-20527 (5th Cir. 2005) (case is still being briefed; oral argument has not been scheduled).

37. Shoreacres, 332 F.Supp.2d at 1017.

38. *Id.* at 1019.

headwaters tributary on his Michigan property.³⁹ The previous Fifth Circuit decisions of *Rice v. Harkin*⁴⁰ and *In re Needham*⁴¹ have not been definitive. Indeed, neither involved an interpretation of CWA jurisdiction in the context of a CWA 404 permit; rather they each dealt with liability questions under the Oil Pollution Act.⁴² In *Rice*, the court held that the “discharges were all onto dry ground,” and there was “very little evidence” that the oil got into any surface water at all.⁴³ In *Needham*, the court actually reversed the lower court on the jurisdictional issue, finding that some of the bayous were in fact jurisdictional, and remanding the case for further factual development.⁴⁴ Thus the portions of these opinions dealing with *SWANCC* can be fairly characterized as dicta since geographic jurisdiction was not dispositive in either case.⁴⁵

This time things may be different. Now the Department of Justice, which has thus far been defending, very successfully, the government’s assertion of jurisdiction in post-*SWANCC* cases, is called upon to defend the Corps’ non-jurisdiction determination (NJD). This time the deference doctrine cuts the other way. This has a lot of people worried – including me – and hoping that the Fifth Circuit court finds it unnecessary to reach the jurisdictional issue. These are not the facts I would want to ride into the teeth of an unfriendly Fifth Circuit.

ALBUQUERQUE DISTRICT

The Western half of the United States tends to be drier than the East. This is “basin and range” country, where entire watersheds are often enclosed by geographic formations encompassing millions of acres and thousands of miles of rivers and streams, playa lakes, and ephemeral wetlands. The Albuquerque District calls these “isolated basins,” and has decided they fall outside the CWA.⁴⁶ According to information obtained by the National Wildlife Federation (FWF) under the Freedom of Information Act (FOIA), the Albuquerque District has taken the position that these areas do not contain “waters of the U.S.” because there is no

39. *U.S. v Rapanos*, 339 F.3d 447 (6th Cir. 2003), *cert. denied*, 124 S.Ct. 1875, *reh’g denied*, 124 S.Ct. 2407 (2004), *cert. pet. filed* Feb. 3, 2005.

40. *Rice v. Harkins*, 250 F.3d 264 (5th Cir. 2001).

41. *In re Needham*, 354 F.3d 340 (5th Cir. 2003).

42. Oil Pollution Act of 1990, 33 U.S.C. §§ 2701-2761 (2000).

43. *Rice*, 250 F.3d at 270-71.

44. *In re Needham*, 354 F.3d at 345-46.

45. *See* Wood, *supra* note 3.

46. *See* National Wildlife Federation, *Weakening the Clean Water Act: What It Means for New Mexico* (2004), available at <http://www.cwn.org/cwn/files/04%20TX%20factsheet.PDF>.

surface outlet to traditionally navigable waterways, though there may be a hydrological connection through groundwater.⁴⁷ The New Mexico Department of Game and Fish has determined that such basins comprise more than twenty percent of the state, including eighty-four miles of perennial streams and 3,900 miles of intermittent waters.⁴⁸ Governor Bill Richardson has protested this interpretation of the CWA. In a letter to the Albuquerque District, Governor Richardson stated, “Although closed basins are largely intrastate and non-navigable, they still have functions and values that provide a basis for protection under the federal Clean Water Act.”⁴⁹ The District has not changed its position.

If the Albuquerque District is right, then the CWA does not apply across a vast swath of the Western United States where similar closed basins predominate the landscape. Fortunately, the District’s categorical position is not supported by the caselaw either before or after *SWANCC*. There are several alternative lines of cases relevant to the question. One involves cases that have found a sufficient hydrological connection through “tributary groundwater.” Though the pre-*SWANCC* cases are split, the majority view is that groundwater can, under the right circumstances, provide the necessary link to navigable waters.⁵⁰ One case directly relevant to the New Mexico situation is *Quivera Mining Co. v. USEPA*,⁵¹ where the Tenth Circuit, which includes New Mexico, stated: “[T]he waters of the Arroyo del Puerto and the San Mateo Creek soak into the earth’s surface,

47. *Id.*

48. *Id.* (the affected basins include the Sacramento River, the Mimbres River the San Augustine Plains, Santa Clara Canyon, the Estancia Basin and the Jornada del Muerto Basin).

49. National Wildlife Federation & New Mexico Wildlife Federation, *Weakening the Clean Water Act What it Means for New Mexico*, (2004) available at <http://www.cwn.org/cwn/files/04%20NM%20fact%20sheet.pdf>

50. See e.g., *Washington Wilderness Coalition v. Hecla Mining Co.*, 870 F. Supp. 983, 990 (E.D. Wash. 1994); *McClellan Seepage Situation v. Weinberger*, 707 F. Supp. 1182, 1195-96 (E.D. Cal. 1988), *vacated on other grounds*, 47 F.3d 325 (9th Cir. 1995); *New York v. United States*, 620 F. Supp. 374, 381 (E.D.N.Y. 1985); *Sierra Club v. Colorado Refining Co.*, 838 F.Supp. 1428, 1434 (D.Colo. 1993) (“discharge of any pollutant into ‘navigable waters’ includes such discharge which reaches ‘navigable waters’ through groundwater”); *but see Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962 (7th Cir.1994); *Town of Norfolk v. U.S. Army Corps of Engineers*, 968 F.2d 1438, 1451 (1st Cir.1992); *Umatilla Waterquality Protective Assoc., Inc. v. Smith Frozen Foods, Inc.*, 962 F.Supp. 1312, 1318 (D.Or.1997); *Kelley v. United States*, 618 F.Supp. 1103, 1106 (W.D.Mich.1985). Plaintiffs have the burden of proving the groundwater connection. As the court in *Hecla Mining* stated:

Plaintiffs must still demonstrate that pollutants from a point source affect surface waters of the United States. It is not sufficient to allege groundwater pollution, and then to assert a general hydrological connection between all waters. Rather, pollutants must be traced from their source to surface waters, in order to come within the purview of the CWA.

Hecla Mining, 870 F. Supp. at 990.

51. *Quivera Mining Co. v. USEPA*, 765 F.2d 126 (10th Cir. 1985).

become part of the underground aquifers and after a lengthy period, perhaps centuries, the underground water moves toward eventual discharge at Horace Springs or the Rio San Jose.”⁵² In a subsequent decision, the New Mexico District Court applied *Quivira Mining* to establish CWA jurisdiction via groundwater in *Friends of Santa Fe County v. LAC Minerals, Inc.*⁵³

Several post-*SWANCC* cases have also found a groundwater connection sufficient to establish CWA jurisdiction. For example, in *Idaho Rural Council v Bosma*,⁵⁴ the court found that “the CWA extends federal jurisdiction over groundwater that is hydrologically connected to surface waters that are themselves waters of the United States.”⁵⁵ The court rationalized this result as follows: “Stated even more simply, whether pollution is introduced by a visible, above-ground conduit or enters the surface water through the aquifer matters little to the fish, waterfowl, and recreational users which are affected by the degradation of our nation's rivers and streams.”⁵⁶

Another line of cases that could come into play with closed basins are those involving intrastate lakes that are “navigable in fact” notwithstanding that they are not connected to any other navigable water. The leading case, *Utah v United States*,⁵⁷ involves the Great Salt Lake. The issue was whether Utah owned the bed of the Lake. The question turned on whether the Lake was navigable in fact before statehood. The Court held that it was navigable because it was used for a brief time in the 1880's to transport cattle by boat to and from islands in the Lake.⁵⁸ The fact that the activity was economically marginal and not interstate in nature was of no consequence. Writing for the majority, Justice Douglas said, “Moreover, the fact that the Great Salt Lake is not part of a navigable interstate or international commercial highway in no way interferes with the principle of public ownership of its bed.”⁵⁹

52. *Id.* at 129.

53. *Friends of Santa Fe County v. LAC Minerals, Inc.*, 892 F. Supp. 1333, 1357 (D.N.M.1995) (“the Tenth Circuit's expansive construction of the CWA's jurisdictional reach in *Quivira Mining* forecloses any argument that the CWA does not protect groundwater with some connection to surface waters.”).

54. *Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169 (D. Id. 2001).

55. *Id.* 1179-80.

56. *See also* Northern California River Watch v. City of Healdsburg, 2004 WL 2001502 (N.D. Cal. 2004) (noting that two water bodies separated by a berm “shared the same ecosystem” through groundwater); *San Francisco Baykeeper v. Cargill*, No. 96-2161 (N.D. Cal. April 30, 2003) (pond separated from slough by berm was jurisdictional due to groundwater connection).

57. *Utah v. United States*, 403 U.S. 9, 10 (1971).

58. *Id.* at 12.

59. *Id.* at 11.

More recently, in *Colvin v. United States*,⁶⁰ the District Court held that the Salton Sea – not really a “sea” but a large intrastate lake with no surface connection to any other water body – was navigable in fact due to its ecological and economic importance as a destination for interstate travelers (sound familiar?).⁶¹ Moreover, it was subject to tidal influence; hence it was jurisdictional under the CWA.⁶² The case involved a habeas corpus action to overturn a pre-SWANCC conviction for an illegal discharge based on the argument that the jurisdictional element of the government’s case was based on the “migratory bird rule” struck down in SWANCC. The court rejected that argument: “However, the SWANCC Court did not invalidate other Corps interpretations (i.e., non-Migratory Bird Rule interpretations) of navigable waters, including all traditional navigable waters, all interstate waters, all tributaries to navigable or interstate waters, all wetlands adjacent to any and all of such waters, and all waters that are subject to the ebb and flow of the tide.”⁶³ The court elaborated:

The trial record reflects that the Salton Sea is a popular destination for out-of-state and foreign tourists, who fish and recreate in and on its waters and shoreline. Some tourists visit the Salton Sea for medicinal purposes, believing its water is good for their skin. Other international and domestic visitors frequent the Salton Sea to water ski, fish, hunt ducks, and race boats and jet skis on the Sea. Many Canadian tourists frequent the Sea in the winter, while many others use it in the summer. The record further shows that the Sea ebbs and flows with the tide. Under most any meaning of the term, the Salton Sea is a body of “navigable water” and “water of the United States.”⁶⁴

In short, the Albuquerque District is not taking full advantage of the caselaw, and the Corps’ own regulations, that support a broad reading of traditionally navigable waters.⁶⁵ Nor is the District investigating alternative grounds for asserting jurisdiction over intrastate waters where a nexus to interstate commerce can be established by means other than navigation,

60. *Colvin v. United States*, 181 F. Supp. 2d 1050 (C.D. Cal. 2001).

61. *Id.* at 1055.

62. *Id.*

63. *Id.*

64. *Id.*

65. See *The Daniel Ball*, 77 U.S. 557 (1870); *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 430 (1874); *Economy Light v. United States*, 256 U.S. 113 (1921); *United States v. Appalachian Power, Inc.*, 311 U.S. 377 (1940); *Loving v. Alexander*, 745 F.2d 861 (4th Cir. 1984); see also Kusler, *supra* note 5. Corps regulations explicitly recognize this broad reach of navigable waters. Definition of Waters of the United States, 33 C.F.R. § 328.3 (a)(1) (“All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.”).

such as use by interstate travelers for recreation as in the *Colvin* case.⁶⁶ Finally, contrary to the position taken in the 2003 Guidance, *SWANCC* did not invalidate the entire migratory bird rule. Rather, it only ruled that the Corps cannot rely *solely* on the use of the site by migratory birds.⁶⁷ Other factors cited in the “MBR,” which is actually just language from the preamble to the 1986 regulations, include use of water to irrigate crops sold in interstate commerce and use of the waters by threatened and endangered species.⁶⁸ Though some argue that *SWANCC* casts serious doubt on the continued viability of these grounds, the fact is that no court has ruled on the question yet.⁶⁹

CONCLUDING THOUGHTS

It is time to call a halt to the fruitless search for some divine meaning in the opaque language of the *SWANCC* decision and its tortured, inconsistent logic. While the debate over implications of the holding still rages in the pages of academic and professional journals, the rest the world is moving on. There is now a vast body of post-*SWANCC* law, not to mention more than thirty years of pre-*SWANCC* caselaw, clearly supporting a broad reading of the term “navigable waters” in the Clean Water Act.

It is also time for new guidance and more clear direction on how jurisdictional determinations should be made. The 2003 guidance assumed that the *SWANCC* decision would be given broad effect by the lower courts. This has not come to pass, and it is time to develop guidance that reflects where the law actually is. This time the presumption ought to be, as the Fourth Circuit held in *Deaton*, that the jurisdiction of the Clean Water Act extends to the “entire tributary system” of navigable waters and their adjacent wetlands, all the way to the headwaters.⁷⁰ That jurisdiction includes intermittent tributaries, artificial tributaries, and even, in some cases, groundwater tributaries. It includes wetlands connected to navigable waters by sheet flow as well as through defined channels, and waters that

66. See also Definition of Waters of the United States, 33 C.F.R. § 328.3 (a)(3). Although the 2003 Guidance strongly discourages use of these alternative bases, no case has held them to be invalid after *SWANCC*.

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

68. See Definition of Waters of the United States, 51 Fed. Reg. 41217 (1986).

69. However, four Circuits have upheld the constitutionality of the Endangered Species Act’s prohibition on the “take” of intrastate species in the face of commerce clause attacks. See Eastman, *supra* note 5. Though one statute cannot expand the jurisdiction of another, these cases do suggest that protection of endangered species and their aquatic habitat could provide the “significant nexus” that *SWANCC* requires, particularly in light of the CWA’s objective of maintaining the “biological integrity” of the nation’s waters.

70. *Deaton*, 332 F.3d at 710.

are navigable in fact under state law. Courts have recognized all of these as bases for Clean Water Act jurisdiction. The Department of Justice has made all of these arguments in post-*SWANCC* litigation, and, in briefs the department recently filed in *American Petroleum Industry v. EPA*,⁷¹ is making them right now.

The principle that emerges from the caselaw is that jurisdiction follows the pollutant all the way to the pollutant's origin. If the pollutant can be traced from the point of discharge to a navigable water, no matter how far the pollutant travels, or how many ditches and creeks it must negotiate, or how long it takes to get there, then it is within the geographic jurisdiction of the Clean Water Act. Does this raise constitutional issues? Of course, but not insurmountable ones. If the Fourth Circuit in *Deaton* and *Newdunn* saw no problem with extending Congress' power to regulate the "channels of commerce" all the way to the headwaters, chances are a majority of the Supreme Court, with better facts and arguments than in the *SWANCC* case, could be persuaded to concur.

71. *American Petroleum Institute v. EPA*, Civil Action No. 02-2247 PLF (D.D.C. 2005).