Land & Water Law Review

Volume 30 | Issue 1 Article 6

1995

Section 404 of the Clean Water Act: The Case for Expansion of Federal Jurisdiction over Isolated Wetlands

Dennis J. Priolo

University of Wyoming
College of Law

LAND AND WATER
LAW REVIEW

VOLUME XXX 1995 NUMBER 1

Section 404 of the Clean Water Act: The Case for Expansion of Federal Jurisdiction Over Isolated Wetlands*

*Dennis J. Priolo***

* The U.S. Army Corps of Engineers' staff adopted Mr. Priolo's paper, in substantially the same form as presented here, as their working position for negotiations with the U.S. Environmental Protection Agency over new federal wetlands regulations. Letter from Lance D. Wood, Assistant Chief Counsel, Environmental Law and Regulatory Programs, *Department of the Army, Office of the Chief of Engineers*, to Col. John Reese, District Engineer, *U.S. Army Engineer District, Sacramento* (Aug. 4, 1994) (on file with the *Land & Water Law Review*).

** Legal Intern, U.S. Army Corps of Engineers. B.A. 1991, University of California, Davis, J.D., December, 1994, McGeorge School of Law, University of Pacific.

I. INTRODUCTION

Wetlands were once viewed as worthless swamps which served as obstacles to land development. Landowners drained and filled wetlands, often due to Congressional encouragement and without considering the adverse environmental effects of their actions.[1] The U.S. Supreme Court characterized wetlands as "the cause of malarial and malignant fevers" and stated that "the police power is never more legitimately exercised than in removing such nuisances."[2] As a result of these activities, more than 50% of the wetlands in the conterminous United States have been destroyed.[3] Today, wetlands are disappearing at a rate of nearly 300,000 acres annually.[4]

The focus of this article is federal regulation of isolated wetlands. Wetlands are areas "inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions."[5] Wetlands include swamps, marshes, bogs and similar areas.[6] Isolated wetlands are wetlands that are not physically adjacent to traditionally navigable waters, interstate waters, or their tributaries. The U.S. Army Corps of Engineers (Corps) and U.S. Environmental Protection Agency (EPA) regulate isolated wetlands under the authority of Section 404 of the Clean Water Act (CWA).[7] However, the EPA maintains the ultimate responsibility for determining the scope of federal jurisdiction over isolated wetlands.[8]

---

1. In the Swamp Lands Acts of 1849, 1850, and 1860, Congress granted 65 million acres of wetlands to 15 western states for "swamp reclamation." WILLIAM L. WANT, LAW OF WETLANDS REGULATION, § 2.02[1] n.29 (1989). In addition, the Virginia Assembly chartered the Dismal Swamp Company to drain 40,000 acres of wetlands for timber harvest. William A. Niering, THE AUDUBON SOCIETY NATURE GUIDES, WETLANDS 30-31 (1989).

2. Levoy v. United States, 177 U.S. 621, 636 (1900).

3. "Over a period of 200 years, the lower 48 states lost an estimated 53 percent of their original wetlands . . . [o]n average, this means that the lower 48 states have lost over 60 acres of wetlands for every hour between the 1780's and the 1980's . . . California has lost the largest percentage of original wetlands within the state (91%). Florida has lost the most acreage (9.3 million acres.)" T.E. DAHL, U.S. DEPT. OF THE INTERIOR, FISH AND WILDLIFE SERVICE, WETLANDS LOSSES IN THE UNITED STATES 1780'S TO 1980'S 1 (1990).

4. T.E. DAHL AND C.E. JOHNSON, U.S. DEPT. OF THE INTERIOR, FISH AND WILDLIFE SERVICE, STATUS AND TRENDS OF WETLANDS IN THE CONTERMINOUS UNITED STATES, MID 1970'S TO MID-1980'S 1 (1991). Between the 1950's and the 1970's, the average annual net loss in the contiguous United States was 458,000 acres of wetlands. W.E. FRAYER AND J.M. HEFNER, U.S. FISH AND WILDLIFE SERVICE, SOUTHEAST REGION, FLORIDA WETLANDS, STATUS AND TRENDS, 1970'S TO 1980'S 5 (1991).

5. 33 C.F.R. § 328.3(b)(1993) and 40 C.F.R. § 230.3(t) (1993).

6. *Id.*

7. 3 U.S.C. §§ 1251-1387 (1987).

8. *See* 43 Op. Att'y Gen. 15 (1979) (Opinion of Attorney General Benjamin Civiletti,

Congress enacted the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[9] Consequently, federal courts have held that the Clean Water Act serves two public interests - (a) cleaning up the nation's waters and (b) preserving the surrounding ecological environment.[10] The CWA prohibits the discharge of dredged or fill material into "navigable waters" without a Corps permit. The CWA defines "navigable waters" as all "waters of the United States," but does not specifically mention wetlands. The Corps' regulations, however, assert jurisdiction over isolated wetlands, the "use, degradation or destruction of which could affect interstate or foreign commerce."[11] Thus, the Corps asserts jurisdiction over an isolated wetland only if has a site-specific impact on interstate commerce.[12] The Ninth and Seventh Circuit Courts of Appeal have upheld the Corps' regulations regarding isolated wetlands.[13]

Many isolated wetlands lack the requisite connection to interstate commerce and are not subject to federal jurisdiction. For example, the Corps refused to assert jurisdiction over wetlands in Southern California at Madrona Marsh and in South Carolina at Hilton Head Island because these wetlands did not have the requisite connection to inter-

---

holding that "Congress intended to confer upon the Administrator of the Environmental Protection Agency the final administrative authority to make those determinations."). *Id.* Federal courts have upheld the validity of the Attorney General's opinion. Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 903 n.12 (5th Cir. 1983); In Matter of Alameda County Assessor's Parcels, 672 F. Supp. 1278, 1285 (N.D. Cal. 1987).

9. 33 U.S.C. § 1251(a) (1987).

10. United States v. Malibu Beach, Inc., 711 F. Supp. 1301, 1313 (D.N.J. 1989); United States v. Ciampitti, 583 F. Supp. 483, 499 (D.N.J. 1984).

11. The Corps' regulations are codified at 33 C.F.R. § 328.3(a) (1993) which state the following in relevant part:

> (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
>
> (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
>
> (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
>
> (iii) Which are used or could be used for industrial purposes by industries in interstate commerce.

The EPA regulations contain identical language. *See* 40 C.F.R. § 230.3(g)(3) (1993).

12. The Corps also regulates "adjacent wetlands" which are wetlands that are "[b]ordering, contiguous, or neighboring" a waterbody currently or formerly used in interstate commerce. 33 C.F.R. § 328.3(a),(c) (1993). Unlike isolated wetlands, the Corps asserts jurisdiction over all "adjacent wetlands" regardless of whether they have a site-specific impact on interstate commerce. *Id.*

13. Leslie Salt Co. v. United States, 896 F.2d 354 (9th Cir. 1990), and Hoffman Homes v. Administrator, United States Environmental Protection Agency, 999 F.2d 256 (7th Cir. 1993).

state commerce.[14] Thus, landowners often argue that their isolated wetlands lack site-specific impacts on interstate commerce and, consequently, are not subject to federal jurisdiction.[15]

The "cumulative effect" doctrine[16] will enable the Corps to expand its regulatory jurisdiction to any isolated wetland, regardless of whether it has a site-specific effect on interstate commerce. In short, this doctrine provides that a federal agency may regulate a purely intrastate activity if that activity is a member of a class of activities which substantially affects interstate commerce. Under this doctrine, the Corps could regulate the discharge of fill material into an isolated wetland which has no impact on interstate commerce, a purely interstate activity, because as a class of activities, the discharge of fill into isolated wetlands substantially impacts interstate commerce by destroying potential bird habitat and flood control mechanisms. Thus, the cumulative effect doctrine will increase the amount of wetlands subject to the Corps jurisdiction and eliminate a private landowner's ability to challenge the Corps' jurisdiction on the basis that the landowner's isolated wetlands do not have site-specific impacts on interstate commerce.

Isolated wetlands provide society with numerous environmental benefits. Isolated wetlands provide essential habitat for migratory waterfowl and one-third of the Nation's endangered species.[17] By collecting and storing water runoff from adjacent lands, isolated wetlands provide flood control.[18] Isolated wetlands also prevent water pollution, by filtering sediments and pollutants out of water, preventing nutrient overload, and recharging groundwater.[19]

---

14. Jerry Jackson, *Wetlands and the Commerce Clause: The Constitutionality of Current Wetland Regulation under Section 404 of the Clean Water Act*, 7 VA. J. OF NAT. RESOURCES L. 307, 320 (1988).

15. *See* United States v. Pozsgai, 999 F.2d 719, 732 (3d Cir. 1993); and Hoffman Homes v. Administrator, United States Environmental Protection Agency, 999 F.2d 256, 260 (7th Cir. 1993).

16. *See infra* notes 53-55 and accompanying text.

17. COUNCIL ON ENVIRONMENTAL QUALITY. ANN. REP. 22, at 195 (1992).

18. For example, prairie potholes may store flood waters and thus prevent surface water runoff from entering lakes, rivers, or streams. *See* Harold A. Kantrud, FISH AND WILDLIFE SERVICE BIOLOGICAL REPORT 85 (7.28), *Prairie Basin Wetlands of the Dakotas: Community Profile 65* (1989); and D.E. Hubbard & R.L. Linder, *Spring Runoff Retention in Prairie Pothole Wetlands*, 41 SOIL & WATER CONS. 2:122-125 (1986). "One study of the Devil's Lake basin in North Dakota found that prairie pothole wetlands store 40% of the runoff from a 100-year flood event—a large flood that has a 1 percent probability of occurring in any give year." Constance Hunt, Senior Program Officer, U.S. Land and Wildlife Program, World Wildlife Fund (editorial), *U.S. Policies Need a Flood of Reform*, CHICAGO TRIB., June 3, 1994, at 27N.

19. "In the prairie pothole region of the Midwest, wetlands are more important than uplands in groundwater recharge." Niering, *supra* note 1, at 31. M.T. Brown & M.F. Sullivan, *The Value of Wetlands in Low Relief Landscapes, in* THE ECOLOGY AND MANAGEMENT OF WETLANDS 133-45 (Donald D. Hook ed., 1988).

Private landowners argue that federal jurisdiction over isolated wetlands, intrudes on the landowners' "bundle of private property rights" and may result in a diminution in property value, as well as an infringement on the landowner's investment-backed expectations.[20] A federal judge recently intimated that the taxpayers should bear the costs of wetland preservation "rather than imposing such costs on fortuitously chosen landowners."[21]

The author of this paper will examine two tenets of the Corps' jurisdiction over private landowners' isolated wetlands: (1) legal authority for federal jurisdiction over isolated wetlands, and (2) Corps' reliance on the "cumulative effect" doctrine to expand its regulatory jurisdiction to any isolated wetland.

II. LEGAL PRECEDENT FOR JURISDICTION OVER ISOLATED WETLANDS

A. Guidelines From The U.S. Supreme Court

The specific issue of whether the Corps has CWA jurisdiction over isolated wetlands has yet to reach the U.S. Supreme Court. In *United States v. Riverside-Bayview Homes*,[22] the Supreme Court upheld the Corps' authority to regulate adjacent wetlands, under Section 404 of the CWA, but expressly declined to decide whether the CWA gave the Corps authority to regulate isolated wetlands.[23]

In *Riverside-Bayview*, the Supreme Court held that the CWA applied to adjacent wetlands because Congress intended to have a "broad systemic view of the goal of maintaining and improving water quality" and broad federal authority is necessary to control water pollution.[24] The court found evidence of Congressional intent for expansive federal authority in the

---

20. A takings analysis is beyond the scope of this paper. However, the reader should note that a takings claim is not ripe for judicial review until the plaintiff exhausts administrative remedies and obtains a final determination as to the type of development permitted on his land. For analysis of takings principles concerning regulation under the Section 404 of the CWA, see Formanek v. United States, 26 Cl. Ct. 332 (1992); Loveladies Harbor, Inc. v. United States, 21 Cl. Ct. 153 (1990); Florida Rock Industries, Inc. v. United States, 791 F.2d 893 (Fed. Cir. 1986); 1902 Atlantic Ltd. v. Hudson, 574 F. Supp. 1383 (E.D. Va. 1983); Deltona Corp. v. United States, 657 F.2d 1184 (Ct. Cl. 1981); Dolan v. City of Tigard, 114 S. Ct. 2309 (1994); Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992); First Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); Kaiser Aetna v. United States, 444 U.S. 164 (1979); Penn Central Transportation Co. v. New York, 438 U.S. 104 (1978). For an in-depth analysis of the foregoing cases, see Jan Goldman-Carter, *Protecting Wetlands and Reasonable Investment Backed Expectations in the Wake of Lucas v. South Carolina Coastal Council*, 28 LAND & WATER L. REV. 425 (1993).

21. Hoffman Homes, Inc. v. Administrator, United States Environmental Protection Agency, 961 F.2d 1310, 1323 (7th Cir. 1992) (Manion, J., concurring).

22. 474 U.S. 121 (1985).

23. *Id.* at 131n. 8.

24. *Id.* at 133.

CWA's legislative history. First, the court held that Congress, in enacting the 1972 CWA Amendments, rejected the narrow interpretation of "navigable waters"[25] found in the 1899 Rivers and Harbors Act.[26] Under the Rivers and Harbors Act, the courts interpreted the term "navigable waters" to only apply to waters that are (1) navigable in fact,[27] or (2) historically navigable,[28] or (3) suitable for navigation with the use of artificial aids or reasonable improvements.[29] The court found Congress intended the term "navigable waters" to be construed broadly beyond waters that are traditionally navigable under the 1899 Rivers & Harbors Act.

The *Riverside-Bayview* court also focused on the legislative history of the 1977 CWA Amendments. While debating the 1977 Amendments, Congress considered several bills to limit the Corps' jurisdiction to waters which were "navigable per se." Since Congress rejected each of these bills, the court found that Congress intended the CWA to apply to other waters such as adjacent wetlands.

The court also held that the regulation of adjacent wetlands was necessary to further the purpose of the CWA, which is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[30] The court focused on the Corps' 1977 regulations which stated "water moves in hydrologic cycles, and the pollution of [adjacent wetlands] . . . will affect the water quality of other waters within that aquatic system."[31] The court also deferred to the Corps' finding that adjacent wetlands (1) "serve significant natural biological functions including food chain production, general habitat, and nesting, spawning, rearing and resting sites for . . . aquatic species"[32] and (2) "slow the flow of surface runoff into lakes, thus preventing flooding."[33]

B. The Interstate Commerce Clause: The Legal Basis For Federal Jurisdiction Over Isolated Wetlands

In *Leslie Salt Co. v. United States*,[34] the Ninth Circuit Court of Appeals upheld the Corps' authority to regulate isolated wetlands which

25. *Riverside-Bayview Homes*, 474 U.S. at 133 (citing S. Rep. No. 1236, 92d Cong., 2d Sess. 144 (1972), *reprinted* in 1972 U.S.C.C.A.N. 3776, 3826).
26. 33 U.S.C. §§ 401-467 (1899).
27. The Daniel Ball, 77 U.S. 557, 563 (1870).
28. State Water Control Board v. Hoffman, 574 F.2d 191 (4th Cir. 1978).
29. United States v. Appalachian Electric Power, 311 U.S. 377, 407 (1940).
30. *Riverside-Bayview Homes*, 474 U.S. at 132 (quoting 33 U.S.C. § 1251(a) (1987)).
31. *Id.* at 134 (quoting 42 Fed. Reg. 37,128 (1977)).
32. *Id.* at 134-35 (quoting 33 C.F.R. § 320.4(B)(2)(i)).
33. *Id.* at 134 (citing 33 C.F.R. § 320.4(b)(2)(iv) and (v)).
34. 896 F.2d 354 (9th Cir. 1990).

exhibit a site-specific impact on interstate commerce. The court held that "[t]he commerce clause power, and thus the Clean Water Act, is broad enough to extend the Corps' jurisdiction to local waters which may provide habitat to migratory birds and endangered species."[35]

Until recently, there was some question as to whether the Seventh Circuit would uphold the Corps' authority to regulate isolated wetlands. In *Hoffman Homes, Inc. v. Administrator, U.S. Environmental Protection Agency (Hoffman I)*,[36] the Seventh Circuit Court of Appeals ruled that the Corps did not have the authority to regulate isolated wetlands. This case involved an isolated wetland known as "Area A," which was less than one acre. When the EPA discovered that Hoffman filled Area A without a 404 permit, the EPA ordered Hoffman to cease filling Area A, restore it to its original condition, and pay a $50,000 penalty.

Hoffman sued the EPA, arguing that the EPA did not have regulatory jurisdiction over Area A. The *Hoffman I* court held that the CWA did not apply to isolated wetlands because Congress did not intend the term "navigable waters" to include isolated wetlands. The *Hoffman I* court vacated its decision within five months.

In *Hoffman Homes, Inc. v. U.S. Environmental Protection Agency*[37] (*Hoffman II*), the Seventh Circuit Court of Appeals switched its position and held that the Corps may regulate isolated wetlands which exhibit a site-specific connection to interstate commerce. This connection "may be potential rather than actual, minimal rather than substantial."[38] Moreover, the court conceded that migratory birds' use of isolated wetlands may provide a sufficient connection to interstate commerce.

Though the *Hoffman II* court upheld the migratory bird test, the court held that Area A was not subject to 404 jurisdiction because there was not "substantial evidence"[39] that the wetland was potential habitat for migratory birds. Though the EPA presented expert testimony as to why Area A was a potential habitat for migratory birds, the court concluded that the wetland was not potential habitat for the following reasons: (1) the only source of moisture for the wetland was

35. *Id.* at 360.

36. 961 F.2d 1310 (7th Cir. 1992).

37. 999 F.2d 256 (7th Cir. 1993).

38. *Id.* at 261.

39. Substantial evidence does not mean a large or considerable amount of evidence, but rather "such relevant evidence as a reasonable mind might accept as adequate to support a conclusions." Pierce v. Underwood, 487 U.S. 552, 565 (1988) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)).

rainfall, (2) the wetland was only wet part of the year, and (3) the wetland was approximately one acre in size.[40]

In a concurring opinion, Judge Manion argued that the CWA does not authorize federal regulation of isolated wetlands. He reasoned that since isolated wetlands, by their definition, have no effect on "waters of the United States," regulation of isolated wetlands did not further the purposes of the CWA.[41] Arguing that the Commerce Clause did not empower Congress to regulate isolated wetlands such as Area A, Judge Manion stated the following:

> To hold otherwise would be, in effect, to hold that Congress' power under the Commerce Clause is virtually limitless. The commerce power as construed by the courts is indeed expansive, but not so expansive as to authorize regulation of puddles merely because a bird traveling interstate might decide to stop for a drink.[42]

For the reasons discussed in Section III-C of this article, Judge Manion's conclusions were factually and legally incorrect.

The Seventh Circuit Court of Appeals has recently revisited the issue of federal jurisdiction over isolated wetlands. In *Village of Oconomowoc Lake v. Dayton Hudson Corp.*,[43] the court upheld the *Hoffman II* decision and specifically reiterated that the EPA did not exceed its power when promulgating its isolated wetlands regulations. In *Rueth v. United States Environmental Protection Agency*,[44] the court held that "[d]ecisions such as *Hoffman Homes II*, give full effect to Congress's intent to make the Clean Water Act as far-reaching as the Commerce Clause permits."[45] However, the court also stated "[i]t is not inconceivable that the EPA or the Corps of Engineers might completely overextend their authority. In such a case, we . . . will not hesitate to intervene in pre-enforcement activity."[46] This statement appears to be a warning that unless there is "substantial evidence" an isolated wetland is a potential habitat for migratory birds, an isolated wetland is not subject to 404 jurisdiction.

---

40. Hoffman Homes, Inc. v. Administrator, United States Environmental Protection Agency, 999 F.2d 256, 262 (7th Cir. 1993).

41. *Id.* at 263.

42. *Id.* at 263.

43. 24 F.3d 962 (7th Cir. 1994).

44. 13 F.3d 227 (7th Cir. 1993).

45. *Id.* at 231.

46. *Id.*

C. When Does A Wetland Have A Sufficient Connection To Interstate Commerce?

The Corps asserts jurisdiction over isolated wetlands that are used or can potentially be used by migratory birds which (1) cross state lines or (2) are protected by migratory bird treaties.[47] Many commentators believed this migratory bird rule was applicable to practically any isolated wetland and "essentially eliminate[d] the interstate commerce criterion as a restriction to regulating wetlands."[48] The Ninth Circuit courts have held the migratory bird rule constitutes a sufficient connection to interstate commerce to warrant federal jurisdiction under the CWA.[49]

Other federal courts have placed limits on the migratory bird rule. In *Tabb Lakes, Ltd. v. United States*,[50] the Fourth Circuit Court of Appeals struck down the migratory bird rule because the Corps had not adopted the rule pursuant to the formal rulemaking requirements of the Administrative Procedures Act. The court found that the rule constituted a change in the substantive standard for finding an interstate commerce connection. Thus, the Corps could not legally apply the rule without first providing the public with notice and an opportunity to comment. Intimating that it would not uphold even a valid adoption of the migratory bird rule, the court held:

> [T]his court has grave doubts that the property now so used, or seen as an expectant habitat for some migratory birds, can be declared to be such a nexus to interstate commerce as to warrant Army Corps of Engineers jurisdiction . . . .[51]

The *Hoffman II* court limited the migratory bird rule to situations where the agency could provide "substantial evidence" that the isolated wetland was a suitable or potential habitat for migratory birds. The court was unclear as to what type of evidence would meet this standard. The court implied that actual use by the migratory birds may be necessary.[52] However, the court

---

47. 51 Fed. Reg. 41,206, 41,217 (1987).

48. *See, e.g.*, WILLIAM WANT, LAW OF WETLANDS REGULATION, § 4.05[3], at 4-17 (1989).

49. Leslie Salt Co. v. United States, 896 F.2d 354 (9th Cir. 1990); *see also* Golden Gate Audubon Society, Inc. v. United States Army Corps of Engineers, 796 F. Supp. 1306 (N.D. Cal. 1992).

50. 715 F. Supp. 726 (E.D. Va. 1988), *aff'd* (unpublished opinion), 885 F.2d 866 (4th Cir. 1989).

51. *Id.* at 729. Due to the Tabb Lakes case, the Corps no longer employs the migratory bird rule in Maryland, West Virginia, Virginia, North Carolina, and South Carolina. *See* Memorandum, U.S. Environmental Protection Agency and U.S. Dept. of the Army, *Clean Water Act Section 404 Jurisdiction over Isolated Waters in Light of Tabb Lakes v. United States*, at 3-4 (Jan. 1990) (on file with author).

52. Hoffman Homes, Inc. v. Administrator, United Environmental Protection Agency, 999 F.2d 256, 262 (7th Cir. 1993). "The migratory birds are better judges of what is suitable for their welfare than are we . . . Having avoided Area A the migratory birds have thus spoken and submitted their own evidence. We see no need to argue with them." *Id.*

also looked to whether the isolated wetland contained "any characteristic[s] that would render it any more attractive to birds than any other land that at one time or another contains water."[53] Thus, the Seventh Circuit Court of Appeals requires more than a general statement by an agency expert that an isolated wetland is a suitable habitat to migratory birds.

The Corps may also regulate isolated wetlands which exhibit other effects on interstate commerce. Endangered species' use of isolated wetlands constitutes a sufficient connection to interstate commerce.[54] Isolated wetlands often prevent flooding, which constitutes a sufficient connection to interstate commerce.[55] Isolated wetlands may also protect interstate waters from pollution, which establishes a sufficient connection to interstate commerce.[56] Moreover, use by interstate travellers for recreational purposes constitutes a sufficient connection to interstate commerce to warrant federal jurisdiction.[57] Though most isolated wetlands exhibit one of the foregoing connections to interstate commerce, there are many isolated wetlands which are not subject to federal regulation due to a lack of a site-specific effect on interstate commerce.

III. EXPANSION OF CWA JURISDICTION TO ALL ISOLATED WETLANDS UNDER THE "CUMULATIVE EFFECT" DOCTRINE

The U.S. Supreme Court has consistently held that under the Commerce Clause power, Congress may regulate a purely intrastate activity as long as the activity is part of a class of activities that has a substantial economic effect on interstate commerce. This doctrine, known as the "cumulative effect" doctrine, may be an adequate legal basis for the Corps to expand its jurisdiction over all isolated wetlands. However, it would eliminate the ability of a private landowner to contest CWA jurisdiction based on a lack of a site-specific impact on interstate commerce.

A. History Of The "Cumulative Effect" Doctrine

The U.S. Supreme Court first addressed "cumulative effect" doctrine in *Wickard v. Filburn*.[58] The *Wickard* case involved the Agriculture

53. *Id.* at 261.

54. Palila v. Hawaii Dept. of Land & Natural Resources, 471 F.Supp 985 (D. Haw. 1979). The court held a "national program to protect . . . natural habitats of endangered species preserves possibilities of interstate commerce in these species . . . ." *Id.* at 995.

55. Oklahoma v. Atkinson Co., 313 U.S. 508, 525 (1941).

56. United States v. Ashland Oil & Transportation Co., 504 F.2d. 1317, 1328 (6th Cir. 1974).

57. United States v. Earth Sciences, Inc., 599 F.2d. 368, 375 (10th Cir. 1979).

58. 317 U.S. 111, 127 (1942).

Adjustment Act which allowed the Secretary of Agriculture to set quotas for wheat production on every farm in the country. The quotas did not only apply to wheat that was sold in interstate commerce, but also to wheat grown for home consumption, a purely intrastate activity. The Supreme Court held that federal production quotas could constitutionally be applied to a farmer who grew wheat purely for his own consumption. The court emphasized that in the aggregate, home consumption of wheat affected the demand for wheat grown for sale and therefore affected interstate commerce.

In *Perez v. United States*,[59] the U.S. Supreme Court held that Congress could constitutionally regulate a purely intrastate loansharking activity under the cumulative effect doctrine and stated "where the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class."[60] Therefore, Congress may regulate a purely intrastate activity, as long as that activity is a member of a class of activities which substantially affects interstate commerce.

B. United States v. Pozsgai: The "Cumulative Effect" Doctrine As A Legal Basis For The Corps' Regulation of Adjacent Wetlands

Recently, the Third Circuit Court of Appeals applied the "cumulative effect" doctrine as the constitutional basis for the Corps' adjacent wetland regulations, which assert jurisdiction over all adjacent wetlands without requiring a site-specific impact on interstate commerce.[61] The *Pozsgai* case involved a land developer, Pozsgai, who purchased a fourteen-acre site which contained "adjacent wetlands."[62] The Corps found that fill had been dumped into these wetlands, informed Pozsgai that he needed a Section 404 permit, and sent Pozsgai a "Cease & Desist Order" (C&D). Subsequently, the Corps found more fill had been placed into the wetlands and issued Pozsgai a second C&D. After the Corps discovered even more fill in the wetlands, the EPA installed a video camera in a neighbor's house. The camera recorded more filling activities on the site.

---

59. 402 U.S. 146, 154 (1971).

60. *Id.* at 156 (emphasis added). *See also* Texas v. United States, 730 F.2d 339, 349 (5th Cir. 1984); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964).

61. United States v. Pozsgai, 999 F.2d 719 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 1052 (1994).

62. *Id.* at 729. Prior to the purchase, Pozsgai hired three engineering firms to assess the property for construction of a building, which would require filling significant amount of wetlands. Each of the three firms informed Pozsgai that the entire site was "wetlands," which could not be developed without a Corps permit. *Id.* at 722.

A District Court subsequently issued a Temporary Restraining Order, forbidding Pozsgai from placing any additional fill into the wetlands. Two days later, the video camera recorded 25 truckloads of dirt dumped on the site, and John Pozsgai operating a bulldozer leveling the fill. The District Court then held Pozsgai in contempt of court.[63]

Pozsgai initially attacked the Corps' adjacent wetland regulations, as applied to him, asserting that the regulation violated the Commerce Clause because the regulation did not require proof that his filling activities had a site-specific effect on interstate commerce. The court held that when a person challenges Congress' exercise of its Commerce Clause power, the court must review Congress' power under a deferential standard and uphold the application of the law if (A) there is a "rational basis" for the congressional determination that the regulated activity affects interstate commerce, and (B) the means chosen to regulate the activity are reasonable.[64]

In arguing the Constitution required an individualized effect on interstate commerce, Pozsgai relied on cases construing other federal statutes, such as the Sherman Act, Hobbs Act, Federal Arson Statute, and two Federal Labor statutes which required an individualized effect on interstate commerce for federal jurisdiction. Based on the foregoing statutes, Pozsgai argued that the CWA required a showing of an individualized effect on interstate commerce as a prerequisite to federal jurisdiction. The court distinguished the CWA, under which the court found Congress chose to handle the interstate commerce nexus differently. Under the CWA, Congress delegated the Corps statutory authority to establish the 404 permit program. Moreover, the court held that the Corps had rationally determined that adjacent wetlands, as a class, affect interstate commerce. Applying the "cumulative effect" doctrine, the court noted:

> In contending their discharge activities did not have substantial effects on interstate commerce, the Pozsgais ignore the well-settled principle that '[w]here the class of activities is regulated and that class is within the reach of federal [commerce] power,

63. *Id.* at 723. The Government also brought criminal proceedings against Pozsgai which resulted in a jury conviction of 40 counts of unpermitted discharge. Pozsgai was sentenced to 3 years in jail, placed him on 5 years probation, and fined him $200,000. *See* United States v. Pozsgai, 897 F.2d 524 (3d. Cir), *cert. denied*, 498 U.S. 812 (1990).

64. *Id.* at 733; *See* Hodel v. Virginia Surface Mining & Reclamation Ass'n., 452 U.S. 264 (1981). The foregoing test also applies if a party challenges a regulation promulgated by an agency acting under its statutorily delegated authority. *See* United States. v. Byrd, 609 F.2d 1204, 1209 (7th Cir. 1979).

> the courts have no power to excise, as trivial, individual instances of the class.'[65]

Thus, the court held that the Corps could assert jurisdiction over adjacent wetlands without requiring a site-specific impact on interstate commerce because the filling of adjacent wetlands, as a class of activities had a substantial impact on interstate commerce.

Pozsgai also argued that in determining the scope of the cumulative effect of filling wetlands on interstate commerce, the class of wetlands must be defined on a local or regional level. Pozsgai argued that filling activities in wetlands cannot be aggregated on a national level because his filling activities cannot be added to filling activities in other parts of the country which involved other aquatic systems. Citing the *Wickard* case the court rejected this argument and stated the following:

> [I]t would be illogical to impose such a requirement on the Corps of Engineers in the course of making national water pollution policy. The regulation reflects the Corps' expert determination that, in the aggregate, discharge into wetlands above the headwaters which are adjacent to tributaries of waters used or useable in interstate commerce, increases water pollution. It matters not whether the increase is substantial in a particular region, or just in the nation as a whole.[66]

C. *Extension of the "Cumulative Effect" Doctrine To Isolated Wetlands*

In *Pozsgai v. United States*,[67] the court held that an adjacent wetland need not have a site-specific impact on interstate commerce in order to be subject to CWA jurisdiction. Applying the "cumulative effect" doctrine, the court based its holding on the fact that discharges into adjacent wetlands, as a class of activities, significantly affect interstate commerce. Similarly, discharges into isolated wetlands, as a class of activities, substantially affect interstate commerce. Thus, the Corps may use the "cumulative effect" doctrine to expand its jurisdiction to any isolated wetland, regardless of whether there is a site-specific impact on interstate commerce.

---

65. *Id.* at 734. Other federal courts have applied the cumulative effect doctrine to Corps regulation under the CWA. *See* United States v. Ashland Oil & Transportation Co., 504 F.2d 1317, 1329 (6th Cir. 1974); *see also* United States v. Byrd, 609 F.2d 1204, 1209 (7th Cir. 1979).

66. *Id.* at 734.

67. 999 F.2d 719 (3d Cir. 1993).

The key legal issue is whether the filling of isolated wetlands, as a class of activities, substantially affects interstate commerce. The answer is arguably yes. Isolated wetlands provide critical habitat for migratory birds,[68] which are an important part of interstate commerce. In *Hoffman II*, the Seventh Circuit Court of Appeals acknowledged this impact on interstate commerce by stating the following:

> Throughout North America, million of people annually spend more than a billion dollars on hunting, trapping, and observing migratory birds. Yet the cumulative loss of wetlands has reduced populations of many bird species[69] and consequently the ability of people to hunt, trap and observe those birds.[70]

Considering the fact that over 420,000 hunters may cross state lines[71] to hunt migratory waterfowl, it is evident that hunters create substantial revenues in the form of lodging, travel and equipment sales. The foregoing evidence demonstrates that the destruction of isolated wetlands, as a class of activities, has a substantial economic effect on interstate commerce.

If the Corps expanded its jurisdiction to all isolated wetlands, a reviewing court would have to determine if the Corps properly construed the scope of its CWA jurisdiction. A court must defer to an agency's construction of a statute it is charged with enforcing, if the agency's interpretation is "reasonable and not in conflict with the expressed intent of Congress."[72] The court must also determine "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[73] There is ample evidence that Congress intended the Corps to exert the maximum jurisdiction over isolated wetlands.

---

68. Over half of the newborn duck population is born in the prairie pothole region, consisting of isolated wetlands, of the Northern Great Plains. *See* Jerry Jackson, *Wetlands and the Commerce Clause: The Constitutionality of Current Wetland Regulation under Section 404 of the Clean Water Act*, 7 VA. J. NAT. RESOURCES L. 307 (Spring 1988).

69. "Destruction of wetlands and other habitats is the single most important factor affecting duck abundance." U.S. FISH AND WILDLIFE SERVICE, A NATIONAL WATERFOWL MANAGEMENT PLAN FOR THE UNITED STATES 5 (1982).

70. Hoffman Homes, Inc. v. Administrator, United States Environmental Protection Agency (Hoffman II, 999 F.2d 256, 261 (1993).

71. U.S. DEPT. OF INTERIOR, FISH AND WILDLIFE SERVICE AND U.S. DEPT. OF COMMERCE, BUREAU OF THE CENSUS, 1980 NATIONAL SURVEY OF FISHING, HUNTING, AND WILDLIFE-ASSOCIATED RECREATION 27 (1982).

72. Chevron U.S.A. v. Natural Resources Defenses Council, Inc., 467 U.S. 837, 842-45 (1984).

73. *Id.* at 842-843.

Congress intended the CWA to apply to isolated wetlands. The 1972 Senate Conference Report states "[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."[74]

On July 25, 1975, the Corps published regulations which expanded the definition of "navigable waters" under Section 404 of the CWA. The 1975 regulations installed discretionary authority in the Corps' District engineers over "other waters" such as perched wetlands.[75] Thus, under the 1975 regulations, the District Engineer had authority to regulate isolated wetlands on a case-by-case approach. The Corps' 1977 regulations explicitly asserted jurisdiction over isolated wetlands.[76] Though Congress was aware of the foregoing regulations,[77] Congress chose not to strike the Corps regulations' when reauthorizing the CWA in 1977. This action constituted tacit Congressional approval of the Corps' jurisdiction over isolated wetlands.[78]

In the 1977 CWA reauthorization, Congress clearly chose to assert CWA jurisdiction over isolated wetlands. The House of Representatives approved an amendment to the CWA which would have excluded isolated wetlands from 404 jurisdiction by limiting jurisdiction to only traditionally navigable waters and their adjacent wetlands.[79] This was because House members realized that the Corps was asserting jurisdiction over isolated wetlands. However, the Senate rejected this amendment. Consequently, Congress clearly intended 404 jurisdiction to extend beyond only adjacent wetlands and to isolated wetlands.

Moreover, in the debate over the 1977 CWA Amendments, Representative James Abdnor stated, "the Corps must regulate all waters—from the smallest to the largest, including isolated wetlands."[80] Senator Lloyd

---

74. S. Rep. No 1236, 92d Cong, 2d Sess. 144 (1972), *reprinted* in U.S.C.C.A.N. 1972, 3822.

75. 40 Fed.Reg. 31,325 (1975).

76. On July 19, 1977, the Corps published regulations which explicitly asserted jurisdiction over isolated wetlands. 42 Fed. Reg. 37,144 (1977). These regulations were codified at 33 CFR § 328.3(a) (1993) and read in relevant part:

> (a) The term "waters of the United States" means: . . . (5) All other waters of the United States . . . such as isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce.

77. 123 CONG. REC. 26,710-26,711 (1977).

78. In United States v. Riverside-Bayview Homes, the U.S. Supreme Court focused on the fact that Congressional acquiescence in the Corps' regulations, asserting jurisdiction over adjacent wetlands, constituted tacit approval of the Corps' jurisdiction over adjacent wetlands. 474 U.S. 121, 138 (1985).

79. H.R. 3199, 95th Cong., 1st Sess., § 16 (1977), *reprinted* in 1977 U.S.C.C.A.N. 4472.

80. 123 CONG. REC. 34,852 (1977).

Bentsen stated "the program would still cover all waters of the U.S., including . . . isolated marshes."[81]

Federal courts have consistently held that Congress intended to extend the CWA's jurisdiction to the constitutional limit under the Commerce Clause. In *Leslie Salt Co. v. United States,* the court held " . . . Congress intended to create a very broad grant of jurisdiction in the Clean Water Act, extending to any aquatic features within the reach of the commerce clause power."[82] In *Utah v. Marsh,* the court stated "it is generally agreed that Congress, by adopting this definition, intended to assert federal jurisdiction over the nation's waters to the maximum extent permissible under the Constitution, unlimited by traditional concepts of navigability."[83] In *Avoyelles Sportsmen's League, Inc. v. Marsh,* the court held "Congress had lofty goals in enacting the CWA . . . that the term "navigable waters' be given the broadest constitutional interpretation."[84] Since Congress wanted the CWA to apply to isolated wetlands and intended to extend the CWA's jurisdiction to the Constitutional limit, it is evident Congress wanted to regulate isolated wetlands to the fullest extent permissible under the Commerce Clause. The "cumulative effect" doctrine is a viable legal basis for effectuating Congress' intent.

Regulation of all isolated wetlands also furthers the purposes of the CWA. In *Riverside-Bayview Homes*, the U.S. Supreme Court upheld the Corps' adjacent wetland regulations because they furthered the purposes of the CWA. Specifically, the court held that adjacent wetlands (1) served significant natural biological functions by providing "general habitat . . . nesting, spawning, rearing and resting sites for aquatic . . . species" and (2) slowed the flow of surface runoff into lakes, thus preventing flooding.[85] Similarly, isolated wetlands also serve significant biological functions by providing general habitat for aquatic species such as migratory birds. Isolated wetlands may also improve water quality by controlling flooding of other waters and recharging groundwater supplies. Thus, the regulation of all isolated wetlands furthers the purposes of the CWA.

---

81. 123 CONG. REC. 26,711 (1977).

82. 896 F.2d 354 (9th Cir. 1990), *cert. denied,* 111 S.Ct. 1089 (1991), *on remand,* 820 F. Supp. 478 (N.D. Cal.1992).

83. 740 F.2d 799, 802 (10th Cir. 1984).

84. 715 F.2d 897, 914-15 (5th Cir. 1983). *See also* Leslie Salt Co. v. Froehlke, 578 F.2d 742, 754-55 (9th Cir. 1978) ("[t]he term 'navigable waters' . . . is to be given the broadest possible constitutional interpretation under the Commerce Clause"); *see also* Appeal of Ciampitti, 772 F.2d 893 (3d Cir. 1985), *cert. denied,* 475 U.S. 1014 (1986), *and later proceeding,* 669 F. Supp. 684 (D.N.J. 1987); State of Minnesota v. Hoffman, 543 F.2d 1198, 1200 (8th Cir. 1976); United States v. Ashland Oil and Transportation Co., 504 F.2d 1317, 1324 (6th Cir. 1974).

85. 474 U.S. 121, 134-35 (1985).

D. Why The Corps May Adopt The "Cumulative Effect" Doctrine As A Legal Basis To Regulate Isolated Wetlands

An environmental advocacy group may sue the Corps to force them to assert jurisdiction over all isolated wetlands. The environmental group could argue that the Corps is construing the CWA too narrowly, by only regulating isolated wetlands that exhibit a site-specific impact on interstate commerce. In *National Wildlife Federation v. Laubscher*,[86] the National Wildlife Federation brought such a lawsuit, arguing the Corps was legally obligated to regulate all isolated wetlands under the "cumulative effect" doctrine.[87] The *Laubscher* court never decided this issue because it found that the plaintiffs lacked standing to sue.[88]

If such a suit were successful, a federal court may order the Corps to revise its regulations to assert jurisdiction over all isolated wetlands. In past cases where the Corps has interpreted their jurisdiction too narrowly under the CWA, the courts have ordered the Corps to revise its regulations appropriately. The Corps' 1975 regulations only required permits for discharges of dredged or fill materials into waters that were "navigable per se." In *Natural Resources Defense Council, Inc. v. Callaway*, an environmental group brought a lawsuit alleging that the Corps' 1975 regulations violated the CWA.[89] The court found the Corps' narrow interpretation of navigable waters conflicted with Congressional intent, in enacting the 1972 CWA Amendments, to assert jurisdiction over the nation's waters "to the maximum extent permissible under the Commerce Clause . . . ." Consequently, the court ordered the Corps to revoke and rescind its regulations and to "publish within (30) days . . . final regulations clearly recognizing the full regulatory mandate of the [Clean] Water Act."[90] The court further found:

> Defendants Howard H. Callaway, Secretary of the Army, and Lt. Gen. William C. Gribble, Chief, Army Corps of Engineers, are without authority to amend or change the statutory definition of navigable waters . . . [and] acted unlawfully and in derogation of their responsibilities under Section 404 of the Water Act . . . [91]

---

86. 662 F. Supp 548 (S.D. Tex. 1987).

87. *See* National Wildlife Federation v. Laubscher, [1987] Envtl. L. Rep. Pend. Lit. (Envtl. L. Inst.) 65,890 (S.D. Tex. Jan. 15, 1987).

88. National Wildlife Federation v. Laubscher, 662 F. Supp. 548 (S.D. Tex. 1987).

89. 392 F. Supp 685 (D.D.C. 1975).

90. *Id.* at 686.

91. *Id.*

Based on the *Callaway* case, a court could order the Corps to revise its regulations to define the term "navigable waters" to include all isolated wetlands. Such action would be consistent with Congressional intent to assert jurisdiction over isolated wetlands to the maximum extent possible under the Commerce Clause.

IV. CONCLUSION

After the *Hoffman II* case, it appears the federal courts will uphold the Corps' current regulations, which assert jurisdiction over isolated wetlands exhibiting a site-specific impact on interstate commerce. With the exception of the Fourth Circuit, migratory birds' potential use of an isolated wetland will constitute a site-specific impact on interstate commerce. In the Seventh Circuit, the migratory bird rule is only applicable if the Corps can show "substantial evidence" that an isolated wetland may be used by migratory birds. Thus, under the current Corps regulations, property owners may always argue their isolated wetlands are not subject to federal jurisdiction due to a lack of site-specific impacts on interstate commerce.

The Corps may constitutionally expand its regulatory jurisdiction to all isolated wetlands under the "cumulative effect" doctrine. The filling of isolated wetlands, as a class of activities, substantially impacts interstate commerce by destroying migratory bird habitat and flood control mechanisms. Moreover, there is sufficient evidence that Congress intended the Corps to regulate isolated wetlands to the maximum extent permissible under the Commerce Clause. From a policy perspective, this would eliminate the ability of a private landowner to contest federal jurisdiction because the landowner's isolated wetlands do not exhibit site-specific impacts on interstate commerce and bring all isolated wetlands under the ambit of federal jurisdiction.