LAW, POLICY, AND THE CLEAN WATER ACT: THE COURTS, THE BUSH ADMINISTRATION, AND THE STATUTE'S UNCERTAIN REACH

Michael P. Healy[*]

INTRODUCTION

The development of the jurisdictional reach of the Clean Water Act ("CWA")[1] reflects a hybrid of the judicial determination of the clear legal requirements of the CWA and the exercise of discretionary agency policymaking in the form of legal requirements that are binding on both agency and regulated party.[2] This distinction in the content of administrative law was not altogether clear prior to the Supreme Court's 1984 decision in *Chevron U.S.A. v. Natural Resources Defense Council*.[3] Today, the distinction is fundamental to administrative law and important to assessing the evolution of the scope of CWA jurisdictional waters because the source of law is importantly different for these two types of administrative law. In theory, the source of the clear legal requirements is Congress, although the judiciary must determine any such requirements to be clear. The agency is

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* Dorothy Salmon Professor of Law, University of Kentucky College of Law. B.A., Williams College; J.D., University of Pennsylvania. Thanks to the College of Law Summer Research Grant Fund for support of the research for this Article. Any errors are my own.

1. Clean Water Act, Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified as amended at 33 U.S.C. §§ 1251-1387 (1977)).

2. Discretionary policymaking in the form of binding regulations or adjudications is to be distinguished from agency "general statements of policy" that are exempt from informal rulemaking requirements, 5 U.S.C. § 553(b)(3)(B), and that do not bind agency decisionmaking. *See* Syncor Int'l Corp. v. Shalala, 127 F.3d 90, 94-95 (D.C. Cir. 1997).

3. 467 U.S. 837 (1984). In *Chevron*, the Court established the following two-step analysis of the legality of an agency's legal interpretation:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question 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. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842-43. An agency engages in policymaking when the statute is ambiguous and the "agency's answer is based on a permissible construction of the statute." *Id.* at 843.

the source of discretionary policy in contexts in which the judiciary has decided that Congress has delegated regulatory authority to the agency.[4]

Distinguishing the role of law, in contrast to the role of policy, in the development of the jurisdictional scope of the CWA provides important insights into the roles that an administrative agency and the judiciary play in the implementation of environmental law. In particular, the implementation of the jurisdictional scope of the CWA illustrates two problematic aspects of administrative law. The *Chevron* judicial review regime has provided and continues to offer opportunities for judicial overreaching by spuriously finding clarity in a statute's legal requirements.[5] The course of the development of the law regarding the CWA's jurisdictional scope also has provided and continues to offer opportunities for administrative buck-passing by claiming that that which is discretionary policy is dictated by law. Properly identifying the situations in which Congress has delegated administrative policy-making power to an agency and those situations in which Congress has itself defined the clear content of the law has been and is likely to again be important in understanding and assessing the implementation of the CWA's jurisdictional scope.

The risks of both spurious judicial interpretation and administrative buck-passing increase when one party has achieved the "constitutional trifecta" of controlling the three branches of government.[6] By accomplishing this "rare" feat,[7] the Republicans are in a position where no branch is likely to check overreaching by the other branches when the overreaching furthers the policy objectives of the Republican Party. One such objective of the Republican Party is reduced regulatory controls for corporate actors.[8] That purpose would be served by a CWA with a narrowed regulatory scope as a consequence of tightened CWA jurisdiction.

The history of the treatment of the jurisdictional reach of the CWA falls roughly into three stages, the third of which has only just begun. The shift from one stage to the next has involved the development of agency policy as a consequence of judicial legal interpretations. The first part of this Article

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4. Whether Congress has delegated an agency the power to define law through an exercise of its discretion is a legal question that is more difficult to resolve after the decision in *United States v. Mead Corp.*, 533 U.S. 218 (2001). *Mead* makes the resolution of that issue turn in part on whether Congress has expressly or impliedly delegated discretionary authority to the agency. *See* Michael P. Healy, *Spurious Interpretation Redux:* Mead *and the Shrinking Domain of Statutory Ambiguity*, 54 ADMIN. L. REV. 673, 677-79 (2002). This subject is beyond the scope of this Article.

5. *See generally* Healy, *supra* note 4.

6. JACK M. BALKIN, LEGITIMACY AND THE 2000 ELECTION IN BUSH V. GORE: THE QUESTION OF LEGITIMACY 219 (Bruce Ackerman ed., 2002).

7. *See id.*

8. *The New Republicans*, N.Y. TIMES, Dec. 28, 2003, at 8. There, the *Times* stated in its editorial:

> The modern [Republican] party's key allegiance is to corporate America, and its tolerance for intrusive federal government ends when big business is involved. If there is a consistent center to the domestic philosophy of the current administration, it is the idea that business is best left alone. The White House and Congress have chipped away at environmental protections that interfere with business interests on everything from clean air to use of federal lands.

Id.

will summarize and assess the first two stages of the development of the scope of CWA jurisdictional waters. The second part of the Article considers the Supreme Court decision in *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*,[9] and the more recent judicial decisions that have applied *SWANCC* and sought to determine the extent to which the CWA must now be understood to have clearly defined the scope of jurisdictional waters. The third part of the Article will consider the recent developments on the administrative side following the decision in *SWANCC* and assess the extent to which there has been an obscuring of the scope of policymaking discretion delegated by Congress in the CWA.

I. A BRIEF REVIEW OF THE FIRST TWO STAGES OF DEVELOPMENT OF THE SCOPE OF CWA JURISDICTION

When the Corps of Engineers initially implemented the section 404 permit program established by the CWA, it utilized the definition of "navigable waters" that it had promulgated just prior to the enactment of the CWA.[10] That definition recognized no difference in the meaning of "navigable waters" and the meaning of "waters of the United States,"[11] the term used to define "navigable waters" in the CWA.[12] The Corps' regulations provided that:

> Navigable waters of the United States are those waters which are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce. A determination of navigability, once made, applies laterally over the entire surface of the water body, and is not extinguished by later actions or events which impede or destroy navigable capacity.[13]

The regulations did not assert jurisdiction over wetlands adjacent to "navigable waters." The regulations instead considered "[m]arshlands and similar areas" as navigable "only so far as the area is subject to inundation by the mean high waters."[14]

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9. 533 U.S. 159 (2001).

10. The Corps published its final regulations implementing the section 404 program on April 3, 1974. *See* 39 Fed. Reg. 12,115 (Apr. 3, 1974). In the preamble to the regulations, the Corps stated its view that the term "waters of the United States" in the CWA "should be treated synonymously" with the CWA term that it defines, "navigable waters." *Id.* The Corps had recently promulgated a revised regulatory definition of "navigable waters" in September, over one month prior to the enactment of the CWA. *See* 37 Fed. Reg. 18,289 (Sept. 9, 1972). The CWA was enacted on October 18, 1972. *See* 86 Stat. 816 (1972).

11. *See supra* note 10.

12. 33 U.S.C. § 1362(7) (1977).

13. 37 Fed. Reg. at 18,290 (for codification at 33 C.F.R. § 209.260(c)).

14. *Id.* at 18,291 (for codification at 33 C.F.R. § 209.260(k)(2)) (jurisdiction over navigable rivers and lakes "includes all the land and waters below the original high water mark"); *see also id.* (for codification at 33 C.F.R. § 209.260(j)(1)). Interestingly, during the period when the Corps was promulgating the regulations that initially defined the scope of CWA jurisdiction, the Environmental Protection

In presenting this regulatory definition, the Corps expressly declined to rely on its own exercise of any discretionary power delegated by Congress to shape the scope of the waters within the jurisdictional reach of the statute being implemented. The Corps instead stated that the "definition is dependent on doctrines established by Federal courts,"[15] and the regulation itself provided that "[p]recise definitions of 'navigable waters' or 'navigability' are ultimately dependent on judicial interpretation and cannot be made conclusively by administrative agencies."[16] Consistent with this view of its lack of lawmaking authority, the Corps promulgated the regulation as an interpretive rule without the benefit of public comment.[17]

The Corps' regulatory approach was immediately challenged as being too restrictive in its view of the CWA's jurisdictional reach. A federal district court concluded in *Natural Resources Defense Council, Inc. v. Callaway*[18] that the Corps' definition of waters subject to CWA permitting conflicted with the intent of Congress:

> Congress by defining the term "navigable waters" . . . to mean "the waters of the United States, including the territorial seas," asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution. Accordingly, as used in the [Clean] Water Act, the term is not limited to the traditional tests of navigability.[19]

The *Callaway* court's decision thus presented the position that, in enacting the CWA, Congress had fixed a legal scope for CWA jurisdiction that extended to the full reach of congressional Commerce Clause power. Thus, the court's opinion of the legally-mandated scope of jurisdiction was substituted for the Corps' previous narrower, but still legal, view of that scope.

A different district court, addressing the scope of the Corps' jurisdiction under section 404 in *United States v. Holland*,[20] also reached the conclusion that the Corps' definition was too narrow. That court's reasoning focused not on Congress's decision to exercise the full scope of its Commerce Clause powers, but rather its goal of ecosystem protection, which may not give rise to a clear limit on jurisdiction:

> The Court is of the opinion that the mean high water line is no limit to federal authority under the [CWA]. While the line remains a

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Agency ("EPA") issued a policy statement "establish[ing] appropriate safeguards for the preservation and protection of the wetland resources." 38 Fed. Reg. 10,834 (May 2, 1973). That policy statement described the important ecological role played by wetlands, although it did not address directly the issue of the jurisdictional reach of the CWA. *See id.* at 10,834-35.

15. 37 Fed. Reg. at 18,289.
16. *Id.* at 18,290.
17. *See id.*
18. 392 F. Supp. 685, 686 (D.D.C. 1975).
19. *Id.*
20. 373 F. Supp. 665 (D. Fla. 1974).

> valid demarcation for other purposes, it has no rational connection to the aquatic ecosystems which the [CWA] is intended to protect. Congress has wisely determined that federal authority over water pollution properly rests on the Commerce Clause and not on past interpretations of an act designed to protect navigation. And the Commerce Clause gives Congress ample authority to reach activities above the mean high water line that pollute the waters of the United States.[21]

As a result of a court order that followed from the *NRDC v. Callaway* litigation, the Corps of Engineers promulgated a proposed regulation.[22] The fact that the Corps decided to proceed by notice and comment rulemaking suggested that the agency itself was acting to define the applicable law in a legislative rule, rather than merely interpreting the meaning of the statutory text. Moreover, the agency declined to define the CWA's jurisdictional scope by explicit reference to Congress's exercise of the full extent of its Commerce Clause powers, as the *Callaway* court had in its decision. Rather, the Corps stated only that "a broader definition of ['waters of the United States'] to include waters beyond those which fall within the traditional definition of 'navigable waters of the United States' is required."[23]

The Corps presented two alternate definitions of "waters of the United States" in the proposed regulation. The Corps thereby implied strongly that the CWA permitted the agency to exercise its discretion in adopting one of the two definitional approaches. Those approaches varied in two important respects. First, they differed in the scope of the tributaries of navigable waters subject to CWA regulation: one alternative asserted jurisdiction over all tributaries,[24] while the other asserted jurisdiction over "primary tributaries" only.[25] Second, they differed with respect to the shoreward limit of jurisdiction over fresh surface waters: one alternative asserted jurisdiction as far as the "aquatic vegetation line,"[26] while the narrower alternative asserted jurisdiction only as far as the "ordinary high water mark."[27] The Corps stated its initial, tentative support for the narrower definition of its regulatory jurisdiction.[28]

Less than three months after presenting this proposed regulation, the Corps published an interim final regulation defining the scope of its jurisdiction under the CWA.[29] Interestingly, the Corps suggested that its view of the scope of CWA jurisdiction reflected a legal conclusion that the CWA

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21. *Id.* at 676.
22. *See* 40 Fed. Reg. 19,766 (May 6, 1975).
23. *Id.*
24. *See id.* at 19,770.
25. *See id.* at 19,772.
26. *See id.* at 19,770.
27. *See id.* at 19,772.
28. *See id.* at 19,767-68.
29. 40 Fed. Reg. 31,320 (July 25, 1975).

extended jurisdiction "to the full extent of the [C]ommerce [C]lause."[30] The Corps' new regulation reflected a jurisdictional scope that was far broader than the jurisdictional scope it had suggested in the regulation proposed in May. The agency's definition was broad with respect to the tributaries that were subject to regulation: jurisdiction "extend[ed] to all rivers, lakes, and streams that are navigable waters of the United States, to all tributaries (primary, secondary, tertiary, etc.) of navigable waters of the United States, and to all interstate waters."[31] Also, the Corps asserted jurisdiction over "all contiguous or adjacent wetlands" to those waters.[32] The Corps also permitted substantial scope to the temporal reach of the CWA, stating that "in the case of intermittent rivers, streams, tributaries, and perched wetlands[,] . . . a decision on jurisdiction shall be made by the District Engineer."[33] Finally, and consistent with the Corps' apparent view of the legal scope of the statute, the Corps provided that its jurisdiction "extend[ed] to those waters located entirely within one state that are utilized by interstate travelers for water-related recreational purposes, or to remove fish for sale in interstate commerce, or for industrial purposes or the production of agricultural commodities sold or transported in interstate commerce."[34]

The Supreme Court reviewed the Corps' assertion of jurisdiction over freshwater wetlands adjacent to navigable waters in *United States v. Riverside Bayview Homes, Inc.*[35] The Court reviewed the regulation just one year after establishing *Chevron*'s deferential regime for judicial review of an agency's application of an ambiguous statute. The Court held unanimously that, contrary to the apparent meaning of the statutory text, the Corps of Engineers had discretion to interpret the CWA to apply to wetlands adjacent to navigable waters.[36] The Court did not rely on the Corps' apparent view in the interim final regulations that the agency was merely implementing Congress's intent to regulate to the full extent of its Commerce Clause power.[37] Instead, the *Riverside Bayview Homes* Court framed its decision by reference to the principle of *Chevron* deference:

> An agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress. Accordingly, our review is limited to the question whether it is reasonable, in light of the language, policies, and legislative history of the Act for the Corps to exercise ju-

30. *Id.*
31. *Id.*
32. *Id.* at 31,321.
33. *Id.* at 31,325.
34. *Id.* at 31,320-21.
35. 474 U.S. 121 (1985).
36. *See id.* at 132 ("On a purely linguistic level, it may appear unreasonable to classify 'lands,' wet or otherwise, as 'waters.' Such a simplistic response, however, does justice neither to the problem faced by the Corps in defining the scope of its authority under § 404(a) nor to the realities of the problem of water pollution that the Clean Water Act was intended to combat.").
37. *See supra* note 30 and accompanying text.

> risdiction over wetlands adjacent to but not regularly flooded by rivers, streams, and other hydrographic features more conventionally identifiable as "waters."[38]

The Court was deferential toward the agency's exercise of its expertise in addressing a problem—water pollution—as to which Congress had intended a comprehensive regulatory approach:

> Faced with such a problem of defining the bounds of its regulatory authority, an agency may appropriately look to the legislative history and underlying policies of its statutory grants of authority. Neither of these sources provides unambiguous guidance for the Corps in this case, but together they do support the reasonableness of the Corps' approach of defining adjacent wetlands as "waters" within the meaning of § 404(a). Section 404 originated as part of the Federal Water Pollution Control Act Amendments of 1972, which constituted a comprehensive legislative attempt "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." This objective incorporated a broad, systemic view of the goal of maintaining and improving water quality: as the House Report on the legislation put it, "the word 'integrity' . . . refers to a condition in which the natural structure and function of ecosystems [are] maintained." Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for "[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source."[39]

The Court took the view that the CWA reflected a congressional concern with the protection of aquatic ecosystems, and it was therefore reasonable to protect wetlands because of the role that they play in maintaining water quality.[40] The Court understood Congress's broad definition of waters subject to regulation under the CWA as reflecting the breadth of its concern with water pollution control:

> In keeping with these views, Congress chose to define the waters covered by the Act broadly. Although the Act prohibits discharges into "navigable waters," . . . the Act's definition of "navigable waters" as "the waters of the United States" makes it clear that the term "navigable" as used in the Act is of limited import. In adopting this definition of "navigable waters," Congress evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under

38. 474 U.S. at 131 (citations and footnote omitted).
39. *Id.* at 132-33 (citations omitted).
40. *Id.* at 133.

> the Commerce Clause to regulate at least some waters that would not be deemed "navigable" under the classical understanding of that term.[41]

In addition to relying on the comprehensive scope of Congress's regulatory program, the Court also based its acceptance of the Corps' broad assertion of jurisdiction under the CWA on a Congress-centered analysis of the amendment of the CWA in 1977.[42] During its consideration of proposed amendments to the CWA, Congress considered whether the Corps' regulations had extended CWA jurisdiction too broadly.[43] Congress declined to rein in the scope of the CWA: "efforts to narrow the definition of 'waters' were abandoned; the legislation as ultimately passed, in the words of Senator Baker, 'retain[ed] the comprehensive jurisdiction over the Nation's waters exercised in the 1972 Federal Water Pollution Control Act.'"[44] The Court's conclusion was that "[i]n the end . . . Congress acquiesced in the administrative construction."[45] The Court thus took the view that the regulatory definition reflected a reasonable application of the Corps' regulatory discretion and that Congress thereafter ratified that broad meaning of the statute by its acquiescence.

This lengthy and stable second period continued until the Supreme Court was again confronted with the issue of the jurisdictional reach of the CWA, in the context of a challenge to the Corps' assertion of jurisdiction over wholly intrastate waters.

II. DEFINING THE LAW: THE *SWANCC* DECISION AND ITS PROGENY

In *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*,[46] the Supreme Court reviewed the Corps of Engineers' exercise of regulatory authority over "other waters."[47] In *SWANCC*, a

41. *Id.* (citations omitted).

42. *Id.* at 133-34. *See* Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (1977).

43. *See* 474 U.S. at 136 ("Proponents of a more limited § 404 jurisdiction contended that the Corps' assertion of jurisdiction over wetlands and other nonnavigable 'waters' had far exceeded what Congress had intended in enacting § 404.").

44. *Id.* at 137.

45. *Id.* at 135-36. *See also id.* at 137 ("[T]he scope of the Corps' asserted jurisdiction over wetlands was specifically brought to Congress' attention, and Congress rejected measures designed to curb the Corps' jurisdiction in large part because of its concern that protection of wetlands would be unduly hampered by a narrowed definition of 'navigable waters.' Although we are chary of attributing significance to Congress' failure to act, a refusal by Congress to overrule an agency's construction of legislation is at least some evidence of the reasonableness of that construction, particularly where the administrative construction has been brought to Congress' attention through legislation specifically designed to supplant it." (citation omitted)).

46. 531 U.S. 159 (2001).

47. *Id.* The Code of Federal Regulations defines "waters of the United States" to include:

> 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

group of localities had formed to develop a site for the disposal of municipal waste.[48] The group focused its development interest on:

> a 533-acre parcel . . . which had been the site of a sand and gravel pit mining operation for three decades up until about 1960. Long since abandoned, the old mining site eventually gave way to a successional stage forest, with its remnant excavation trenches evolving into a scattering of permanent and seasonal ponds of varying size (from under one-tenth of an acre to several acres) and depth (from several inches to several feet).[49]

Although the Corps initially concluded that a section 404 permit was not necessary for the project,[50] the Corps later determined that a permit was necessary because the aquatic areas that would be filled to permit the development were habitat for many species of migratory birds and were accordingly "other waters" as defined by regulations.[51] When the Corps later declined to issue a section 404 permit,[52] SWANCC brought an action in federal court, claiming that the Corps' permit decision was unlawful and that the Corps lacked jurisdiction to require a permit for the filling of the "other waters."[53]

SWANCC marks a significant change in the law determining the scope of CWA jurisdictional waters both by reference to the Court's view of the source of the law relating to jurisdiction and by reference to the waters actually subject to regulation. With regard to the source of law, the approach of the Corps following the decision in *Callaway* was to assert—it must be said with some ambiguity—the authority of the *agency* to define the scope of "waters of the United States."[54] When the Supreme Court reviewed the Corps' expanded assertion of regulatory authority over wetlands adjacent to navigable waters, it took a similar view of the law. The Court did *not* conclude that *Congress* clearly intended to regulate such "waters,"[55] but instead

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> taken and sold in interstate or foreign commerce; or (iii) Which are used or could be used for industrial purpose by industries in interstate commerce[.]

Definition of Waters of the United States, 33 C.F.R. § 328.3(a)(3) (2003).

48. *SWANCC*, 531 U.S. at 162-63.

49. *Id.* at 163.

50. *See id.* at 164. ("The Corps initially concluded that it had no jurisdiction over the site because it contained no 'wetlands,' or areas which support 'vegetation typically adapted for life in saturated soil conditions.'" (citation omitted)).

51. *See id.* ("After the Illinois Nature Preserves Commission informed the Corps that a number of migratory bird species had been observed at the site, the Corps reconsidered and ultimately asserted jurisdiction over the balefill site pursuant to subpart (b) of the 'Migratory Bird Rule.' The Corps found that approximately 121 bird species had been observed at the site, including several known to depend upon aquatic environments for a significant portion of their life requirements.").

52. *Id.* at 165.

53. *Id.*

54. The ambiguity arose because the agency included in its interim final regulations the position that Congress had acted to assert the full scope of its Commerce Clause powers in defining "waters of the United States." *See supra* note 30 and accompanying text.

55. *See supra* note 39 and accompanying text. The Court did, however, suggest that the agency

upheld the regulation on the theory that the Court should defer under *Chevron* to agency lawmaking that implemented an ambiguous statutory provision. The *SWANCC* Court, however, reached a different conclusion about the locus of lawmaking regarding "other waters." The Court held that the clear meaning of the statute compelled a jurisdictional limit narrower than that asserted by the agency.[56] Because the agency was asserting regulatory jurisdiction in a constitutionally questionable context, only a statute that clearly delegated the questionable regulatory jurisdiction could provide the agency with the authority to regulate wholly intrastate waters.[57] There was no deference to the agency's interpretation of an ambiguous statute.[58]

In addition to changing its view of the source of the law of jurisdictional waters, the Supreme Court in *SWANCC* changed the focus of the rationale for finding the existence of waters subject to CWA jurisdiction. The *Riverside Bayview Homes* court upheld the Corps' assertion of regulatory jurisdiction over adjacent wetlands on the theory that wetlands performed an ecological function that was important to the environmental quality of the adjacent waters.[59] The *SWANCC* Court, on the other hand, found the geographical locus of the waters to be critical, because Congress had retained a concern with navigability in the statute.[60] In the *SWANCC* Court's view, Congress's use of the term "navigable waters" in the CWA indicated that the statute applies only when the waters at issue are physically connected to waters that meet the traditional test of navigability.[61] Indeed, the Court sup-

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interpretation had been adopted by Congress in the 1977 amendments to the CWA. *See supra* notes 41-44 and accompanying text.

56. *See SWANCC*, 531 U.S. at 172 ("We find § 404(a) to be clear . . . ."); *id.* at 168 ("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."). *See also id.* at 170 ("Because subsequent history is less illuminating than the contemporaneous evidence, respondents face a difficult task in overcoming the plain text and import of § 404(a)." (internal quotations and citation omitted)).

57. *Id.* at 172-74. The Court stated:

> [S]ignificant constitutional questions [are] raised by respondents' application of their regulations, and yet we find nothing approaching a clear statement from Congress that it intended § 404(a) to reach an abandoned sand and gravel pit such as we have here. Permitting respondents to claim federal jurisdiction over ponds and mudflats falling within the "Migratory Bird Rule" would result in a significant impingement of the States' traditional and primary power over land and water use. Rather than expressing a desire to readjust the federal-state balance in this manner, Congress chose to "recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources . . . ." We thus read the statute as written to avoid the significant constitutional and federalism questions raised by respondents' interpretation, and therefore reject the request for administrative deference.

Id. (citations omitted).

58. *Id.* The Court's reliance on a clear statement rule in *SWANCC* is discussed in greater detail and criticized in Michael P. Healy, *Textualism's Limits on the Administrative State: Of Isolated Waters, Barking Dogs, and* Chevron, 31 ENVTL. L. REP. 10,928, 10,941 (2001).

59. 474 U.S. at 133-34.

60. 531 U.S. at 171-72.

61. The Court's view was that:

> We cannot agree that Congress' separate definitional use of the phrase "waters of the United States" constitutes a basis for reading the term "navigable waters" out of the statute. We said in *Riverside Bayview Homes* that the word "navigable" in the statute was of "limited import,"

ported its view that this was the meaning of the statute by relying on the Corps' initial 1974 regulations, which had given the statute this limited effect.[62]

Thus, the importance of *SWANCC* is that the Court identified in some respects where Congress has given clear content, if only through judicial application of a clear statement rule, to the scope of "waters of the United States." Moreover, the Court's analysis indicated that limits on the CWA's jurisdictional reach followed from the doctrine of navigability and arose when waters had an insufficient connection to waters meeting the test of navigability.

Courts and agencies then had to give any further effect to the Court's transitional decision. We will now consider how those institutional actors have come to understand *SWANCC*, with a particular focus on the administrative law concerns raised earlier in this Article—judicial overreaching and agency buck-passing.[63]

The first court of appeals decision applying *SWANCC* was *Headwaters, Inc. v. Talent Irrigation District*.[64] Although the waters at issue were artificially-fashioned irrigation canals, the parties agreed that the canals "exchange water with a number of natural streams and at least one lake, which no one disputes are 'waters of the United States.'"[65] This connection between the waters led the Ninth Circuit to conclude that "[a]s tributaries, the canals are 'waters of the United States,' and are subject to the CWA and its permit requirement."[66]

The court rejected the *SWANCC* analysis because, unlike the "isolated ponds" at issue in that case, there was a direct physical connection between the canals and navigable waters.[67] The court rejected the argument that the canals were isolated from jurisdictional waters "by a system of closed waste gates."[68] The court concluded that any isolation was temporary at best and, analogizing to CWA jurisdiction over intermittent tributaries, decided that the canals constitute "waters of the United States," because of the ecological threat posed by the discharge of pollutants into the canals.[69] In short, because of the connectedness of the waters at issue, *Headwaters* provided a straightforward basis for distinguishing *SWANCC*.

> . . . and went on to hold that § 404(a) extended to nonnavigable wetlands adjacent to open waters. But it is one thing to give a word limited effect and quite another to give it no effect whatever. The term "navigable" has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.

Id. at 172 (citations omitted).

62. *Id.* at 168. *See also supra* notes 10-17 and accompanying text.
63. *See supra* notes 5-8 and accompanying text.
64. 243 F.3d 526 (9th Cir. 2001).
65. *Id.* at 533.
66. *Id.* (citations omitted).
67. *Id.* at 533-34.
68. *Id.* at 533.
69. *Id.* at 533-34.

The next court of appeals decision, *Rice v. Harken Exploration Co.*,[70] read *SWANCC* as marking a much more significant change in the law defining CWA jurisdiction.[71] Although the case actually involved the Oil Pollution Act ("OPA"), the court considered the jurisdictional scope of that statute as identical to the CWA's scope.[72] The decision offers a confused analysis of the jurisdictional reach of the CWA. In restating the legal significance of the *SWANCC* decision, the court concluded that the Supreme Court had held that CWA jurisdiction extends as a matter of law only to "navigable waters" and their directly adjacent tributaries.[73] The court first suggested this holding when it stated that, "[u]nder *Solid Waste Agency*, it appears that a body of water is subject to regulation under the CWA if the body of water is actually navigable or is adjacent to an open body of navigable water."[74] The court then concluded that "a body of water is protected under the [Clean Water] Act only if it is actually navigable or is adjacent to an open body of navigable water."[75]

This decision of the *Rice* court has the effect of establishing as a legal matter the view of the scope of CWA jurisdiction that the Corps had sought to adopt administratively when it first proposed new regulations following the decision in *Callaway*.[76] Even in those proposed regulations, however, the Corps, unlike the *Rice* court, had not believed that the CWA itself limited jurisdiction to only primary tributaries of navigable waters, because the Corps had presented an alternative in the proposed regulation that would have asserted jurisdiction over remote tributaries.[77]

The decision in *Rice* is confusing because of the incoherent analysis the court employed to support its conclusion that the aquatic site at issue in the case was not a "water[] of the United States" under the CWA and therefore was also not reached by the OPA. That aquatic site, Big Creek, is described by the court as follows:

> Big Creek is a small seasonal creek on the Rices' property. Big Creek runs across the ranch to the Canadian River, which is the

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70. 250 F.3d 264 (5th Cir. 2001).

71. *See id.* at 268-69.

72. *See id.* at 267-68. See also *In re* Needham, No. 02-30217, 2003 U.S. App. LEXIS 25318, at *6-*7 (5th Cir. Dec. 16, 2003) (citing *Rice* for the proposition that the CWA and the OPA have the same jurisdictional reach).

73. *See Rice*, 250 F.3d at 269-70.

74. *Id.* at 269 (citation omitted).

75. *Id.* at 270. It must be stated that the court is simply unclear in its use of the modifier "open." Presumably an "open body of navigable water" means the same thing as an "actually navigable" water. It is unclear, moreover, why the court added the modifier "actually" to navigable. The legal standard for navigability is based not on navigability in fact, but on past navigability, present navigability, or future navigability through the use of reasonable improvements. *See, e.g.*, *In re Needham*, 2003 U.S. App. LEXIS 25318, at *7-*9; *supra* note 13 and accompanying text (Corps definition of navigable waters).

76. *See supra* note 28 and accompanying text.

77. *See supra* note 24 and accompanying text. Several months after publishing the proposed regulations, the Corps adopted that broad approach in its 1975 interim final regulations. *See supra* note 31 and accompanying text.

> southern boundary of Big Creek Ranch. The Canadian River is down gradient from Harken's oil and gas flow lines, tank batteries, and other production equipment. The Canadian River flows into the Arkansas River, which flows into the Mississippi River, which empties into the Gulf of Mexico. While the exact nature of Big Creek is unclear from the record, Harken does not dispute that the Canadian River is legally a "navigable water."[78]

Big Creek would thus appear to be a primary tributary of, and therefore adjacent to, an admittedly navigable water, the Canadian River. Given the *Rice* court's understanding of *SWANCC*, it would appear that CWA jurisdiction would extend to Big Creek. The problem, as described by the *Rice* court, was that the surface connection between Big Creek and the Canadian River was never proved.[79] Any groundwater connection between the creek and the river was viewed as inadequate by the court:

> The bodies of water the Rices seek to protect are consistently referred to in the record as intermittent streams which only infrequently contain running water. There is no detailed or comprehensive description of any of these seasonal creeks available in the record. There is also very little evidence of the nature of Big Creek itself. It is described several times in various depositions as a "seasonal creek" that often has no running water at all. And, apparently, some of the time that water does flow in it, all the water is underground. There is no detailed information about how often the creek runs, about how much water flows through it when it runs, or about whether the creek ever flows directly (above ground) into the Canadian River. In short, there is nothing in the record that could convince a reasonable trier of fact that either Big Creek or any of the unnamed other intermittent creeks on the ranch are sufficiently linked to an open body of navigable water as to qualify for protection under the OPA.[80]

Rice is, in sum, important because the court of appeals read *SWANCC* as imposing a legal limit on CWA jurisdiction that ended with the primary tributary of a surface water that is "navigable." That decision, of course, represents an extension of *SWANCC*, rather than a simple application of it because the waters at issue in *SWANCC* did not have even a remote surface connection to "navigable" waters.[81]

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78. *Rice*, 250 F.3d at 265.

79. *Id.* at 270-71.

80. *Id. See also id.* at 272 ("The ground water under Big Creek Ranch is, as a matter of law, not protected by the OPA. And, the Rices have failed to produce evidence of a close, direct and proximate link between Harken's discharges of oil and any resulting actual, identifiable oil contamination of a particular body of natural surface water that satisfies the jurisdictional requirements of the OPA.").

81. This narrow view of CWA jurisdiction in *Rice* was recently reaffirmed by the Fifth Circuit in *In*

The next court of appeals to consider the effect of *SWANCC* was the Fourth Circuit in *United States v. Deaton*.[82] The site at issue there was a wetland adjacent to a drainage ditch:

> A drainage ditch runs alongside the road between the pavement and the Deatons' property. The Deatons call the ditch the "Morris Leonard Road ditch," while the Corps calls it the "John Adkins Prong of Perdue Creek." We will call it the "roadside ditch." The parties agree that surface water from the Deatons' property drains into the roadside ditch. They disagree about how much water flows through the ditch, and how consistent the flow is, but they agree on the ditch's course. Water from the roadside ditch takes a winding, thirty-two-mile path to the Chesapeake Bay. At the northwest edge of the Deatons' property, the roadside ditch drains into a culvert under Morris Leonard Road. On the other side of the road, the culvert drains into another ditch, known as the John Adkins Prong of Perdue Creek. Perdue Creek flows into Beaverdam Creek, a natural watercourse with several dams and ponds. Beaverdam Creek is a direct tributary of the Wicomico River, which is navigable. Beaverdam Creek empties into the Wicomico River about eight miles from the Deatons' property. About twenty-five river miles further downstream, the Wicomico River flows into the Chesapeake Bay, a vast body of navigable water.[83]

The court's analysis of the jurisdictional issue was clear and complete. First, it structured the analysis by establishing, consistent with *Riverside Bayview Homes*, that the core legal issue was whether the roadside ditch was a jurisdictional water. If subject to CWA jurisdiction, then the wetlands adjacent to the ditch would be subject to CWA jurisdiction as well.[84]

The court then proceeded to its legal analysis, which broadly conformed to the two-step *Chevron* analysis. The first step—whether the statute has a clear meaning or evidences clear congressional intent—is most important and is the point at which judicial overreaching is most likely. The *SWANCC* Court rejected the Corps' assertion of jurisdiction over isolated "other waters" by applying a clear statement requirement at this step in the analysis.[85] The *Deaton* court accordingly asked the same question: did constitutional doubt about congressional power to regulate a remote tributary of a navigable water give rise to a requirement that Congress must have clearly delegated power to the Corps (and EPA) to regulate a remote tributary of "navi-

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re Needham, 2003 U.S. App. LEXIS 25318.

82. 332 F.3d 698 (4th Cir. 2003).

83. *Id.* at 702.

84. *See id.* at 704 ("It is undisputed that the Deatons' wetlands are adjacent to the roadside ditch. Thus, if the ditch is covered, so are the wetlands. Our analysis, then, will focus on whether the Corps has jurisdiction over the roadside ditch.").

85. *See supra* note 57 and accompanying text.

gable waters?"[86] The *Deaton* court concluded that congressional authority over remote tributaries "does not present a serious constitutional question that would cause us to assume that Congress did not intend to authorize the regulation. Indeed, as our discussion of Congress's Commerce Clause authority makes clear, the federal assertion of jurisdiction over nonnavigable tributaries of navigable waters is constitutional."[87] Because a clear delegation of regulatory power was not necessary for the exercise of agency authority over remote tributaries, the CWA's broad definition of "navigable waters," that is "waters of the United States," was viewed as ambiguous by the court, thereby giving rise to deference at the second step of the *Chevron* analysis.[88]

The consequence of this analysis was that, provided a minimum connection was present that removed constitutional doubt about Congress's power to regulate, the *Deaton* court viewed the *agency* as the source of law defining the degree of connection required for tributaries of navigable waters.[89] This view of the source of law sharply contrasts with the view of the *Rice* court, which had concluded that Congress had clearly intended that CWA jurisdiction extend only to primary tributaries.[90] Because the *Deaton* court believed that the agency was properly the source of law, the ultimate legal question was the scope of the definition of waters of the United States

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86. *Deaton*, 332 F.3d at 705 ("Our initial task is to determine whether the constitutional question—does the Commerce Clause give Congress authority over the roadside ditch—is serious enough to warrant rejection of the Corps's regulation.").

87. *Id.* at 708. *See id.* at 706-08 (analyzing the extent of Congress's Commerce Clause power over tributaries of navigable waters).

88. *Id.* at 709-10. The court stated:

> In the Clean Water Act Congress elected to redefine "navigable waters," moving away from the traditional definition. Its choice of the expansive phrase "waters of the United States" indicates an intent to "regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *SWANCC*, of course, emphasizes that the CWA is based on Congress's power over navigable waters, suggesting that covered non-navigable waters are those with some connection to navigable ones. But we cannot tell from the Act the extent to which nonnavigable tributaries are covered. The statutory term "waters of the United States" is sufficiently ambiguous to constitute an implied delegation of authority to the Corps; this authority permits the Corps to determine which waters are to be covered within the range suggested by *SWANCC*. *See Chevron*, 467 U.S. at 843 ("'The power of an administrative agency to administer a congressionally created . . . program necessarily requires . . . the making of rules to fill any gap left . . . by Congress.'") (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)).

Id. (citations omitted).

89. *See id.* at 71. The court stated:

> In the case before us, . . . our conclusion in step one of the *Chevron* inquiry—that the CWA is ambiguous when it comes to jurisdictional coverage—shows that Congress intended to delegate authority to the Corps to decide how far coverage must extend in order to protect the navigable waters. We defer to an agency's reasonable interpretation not because the agency is in a better position to know what Congress really wanted, but "because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows."

Id.

90. *See supra* note 73 and accompanying text.

in the Corps' regulations. On this question, the *Deaton* court also deferred to the Corps' interpretation of its own regulations.[91]

The Sixth Circuit recently assessed the effect of *SWANCC* when it decided *United States v. Rapanos*.[92] The site at issue there was similar to the site in *Deaton*:

> John Rapanos owns a one hundred and seventy-five-acre plot of land in Williams Township, Bay County, Michigan. This plot once contained forested wetlands and cleared meadow areas. During the course of this proceeding, the wetlands in question have been described as between eleven and twenty miles from the nearest navigable-in-fact water. The government argues that there is a significant and direct link between the wetlands on Rapanos's land and this navigable waterway, rendering the wetlands covered by the Clean Water Act. The wetlands are connected to the Labozinski Drain (a one hundred year-old man-made drain) which flows into Hoppler Creek which, in turn, flows into the Kawkawlin River, which is navigable. The Kawkawlin eventually flows into Saginaw Bay and Lake Huron.[93]

The district court, reading *SWANCC* even more broadly than *Rice*, had "set aside Rapanos's convictions and dismissed the case, finding that *Solid Waste* had changed the scope of federal jurisdiction under the Clean Water Act. The district court found that because the wetlands on Rapanos's property were not 'directly adjacent to navigable waters,' the government could not regulate them."[94]

The Sixth Circuit reversed the district court decision.[95] It found the reasoning of the *Deaton* court "persuasive"[96] and concluded that *SWANCC* was a "narrow holding," rejecting only the Corps' assertion of jurisdiction over isolated, other waters.[97] The *Rapanos* court concluded that the aquatic site at issue met the connectedness requirement established by *SWANCC*:

> The evidence presented in this case suffices to show that the wetlands on Rapanos's land are adjacent to the Labozinski Drain, especially in view of the hydrological connection between the two. It follows under the analysis in *Deaton*, with which we agree, that the Rapanos wetlands are covered by the Clean Water Act. Any con-

91. *Deaton*, 332 F.3d at 708. *See id.* at 712 ("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."). The Fourth Circuit recently reaffirmed the *Deaton* holding in *Treacy v. Newdunn Assocs.*, 344 F.3d 407, 417 (4th Cir. 2003).

92. 339 F.3d 447 (6th Cir. 2003).

93. *Id.* at 448-49.

94. *Id.* at 450.

95. *Id.* at 448.

96. *Id.* at 452.

97. *Id.* at 453.

> tamination of the Rapanos wetlands could affect the Drain, which, in turn could affect navigable-in-fact waters. Therefore, the protection of the wetlands on Rapanos's land is a fair extension of the Clean Water Act. *Solid Waste* requires a "significant nexus between the wetlands and 'navigable waters,'" . . . for there to be jurisdiction under the Clean Water Act. Because the wetlands are adjacent to the Drain and there exists a hydrological connection among the wetlands, the Drain, and the Kawkawlin River, we find an ample nexus to establish jurisdiction.[98]

The decisions of the courts of appeals thus indicate that the key fault line in defining CWA jurisdiction after *SWANCC* concerns whether the CWA clearly prescribes the degree of remoteness necessary for a tributary of a navigable water to qualify as a "water[] of the United States." This issue has been present since the Corps, following the *Callaway* decision, took the implicit position that the CWA is ambiguous regarding the tributaries of navigable waters that are "waters of the United States."[99] The Corps subsequently exercised the discretion that it claimed and asserted regulatory jurisdiction over all tributaries of navigable waters.[100] The Fifth Circuit, alone among the courts of appeals, takes the legal position that this jurisdictional reach "is unsustainable under *SWANCC*. The CWA . . . [is] not so broad as to permit the federal government to impose regulations over 'tributaries' that are neither themselves navigable nor truly adjacent to navigable waters."[101]

This litigation of CWA jurisdiction reflects, of course, only part of the development of the scope of CWA jurisdiction following the Court's decision in *SWANCC*. The other part is comprised by agency lawmaking, to which we now turn.

III. OBSCURING THE POLICY: THE 2003 ADVANCED NOTICE OF PROPOSED RULEMAKING AND POLICY MEMORANDUM

While the federal government litigated CWA cases arguing that *SWANCC* had only the narrow effect of foreclosing jurisdiction over isolated "other waters," the EPA and the Corps were reconsidering the effect of the decision. This reconsideration resulted in a 2003 Advance Notice of Proposed Rulemaking[102] and a 2003 Corps/EPA Joint Policy Memorandum.[103]

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98. *Id.* (citation omitted).
99. *See supra* notes 22-28 and accompanying text.
100. *See supra* note 31 and accompanying text.
101. *In re Needham*, 2003 U.S. App. LEXIS 25318, at *10-*11.
102. *See* Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States," 68 Fed. Reg. 1991 (proposed Jan. 15, 2003) [hereinafter ANPRM]. The agencies stated:

These agency pronouncements are notable because they laid a tentative basis for a significant reduction in the scope of CWA jurisdiction.[104] Most striking is the broad range of jurisdictional issues that the agencies stated would be reconsidered as a consequence of the legal determination in *SWANCC*.[105] The agencies unsurprisingly raised the issue that has been the focus of litigation in the courts of appeals: the scope of CWA jurisdiction over tributaries of "navigable waters."[106]

The agencies also raised three other jurisdictional issues for potential reconsideration in light of *SWANCC*. As the discussion that follows will show, none of the pre-*SWANCC* agency positions on these issues had been viewed by the courts of appeals as having been made questionable by the decision in *SWANCC*. First, the agencies raised the issue of jurisdiction over wetlands adjacent to "waters of the United States," stating that, "[s]ince *SWANCC*, some courts have expressed the view that *SWANCC* raised questions about adjacency jurisdiction, so that wetlands are jurisdictional only if they are adjacent to navigable waters. *See, e.g.*, *Rice v. Harken*, discussed *infra*."[107] This citation to *Rice* seems dubious. The focus of *Rice* was on CWA jurisdiction over surface waters themselves, rather than adjacent wetlands. The *Deaton* court, recognizing that *SWANCC* had not purported to overrule or limit the legal analysis of jurisdiction over adjacent wetlands presented in *Riverside Bayview Homes*, took the position that CWA jurisdiction (if claimed by an agency) extended to wetlands adjacent to surface waters that are themselves jurisdictional.[108] The Corps and EPA may have

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> This ANPRM will help ensure that the regulations are consistent with the CWA and the public understands what waters are subject to CWA jurisdiction. The goal of the agencies is to develop proposed regulations that will further the public interest by clarifying what waters are subject to CWA jurisdiction and affording full protection to these waters through an appropriate focus of Federal and State resources consistent with the CWA. It is appropriate to review the regulations to ensure that they are consistent with the *SWANCC* decision.

Id. at 1993.

103. *Id.* at 1995.

104. To be sure, the ANPRM's suggestion of amended CWA regulations was not entirely restrictive. The agencies did offer the possibility that isolated, "other waters" might have some other acceptable legal basis. *See id.* at 1993 ("*SWANCC* . . . calls into question whether CWA jurisdiction over isolated, intrastate, non-navigable waters could now be predicated on the other factors listed in the 'Migratory Bird Rule' or the other rationales of 33 CFR 328.3(a)(3)(i)-(iii)."). Indeed, to the extent other waters meet the legal test of navigability, the agencies have asserted that CWA jurisdiction attaches. *See id.* at 1996 (citation omitted) ("In accord with the analysis in *SWANCC*, waters that fall within the definition of traditional navigable waters remain jurisdictional under the CWA. Thus, isolated, intrastate waters that are capable of supporting navigation by watercraft remain subject to CWA jurisdiction after *SWANCC* if they are traditional navigable waters, i.e., if they meet any of the tests for being navigable-in-fact.").

105. *Id.* at 1996-97.

106. *See id.* at 1997 ("The analysis in [*Rice v.*] *Harken* implies that the Fifth Circuit might limit CWA jurisdiction to only those tributaries that are traditionally navigable or immediately adjacent to a navigable water."). *See also id.* at 1996 ("EPA and the Corps have interpreted their regulations to assert CWA jurisdiction over non-navigable tributaries of navigable waters and their adjacent wetlands. Courts have upheld the view that traditional navigable waters and, generally speaking, their tributary systems (and their adjacent wetlands) remain subject to CWA jurisdiction.").

107. *Id.*

108. *See supra* note 84 and accompanying text.

wished to abandon the assertion of jurisdiction over some or all adjacent wetlands. The agencies were, however, being, at best, disingenuous, not to mention arbitrary or capricious,[109] to claim that such a reduction in jurisdiction followed from the legal decision in *SWANCC*, rather than an assertion of the agencies' own lawmaking power.[110]

Second, the agencies questioned whether their assertion of jurisdiction over artificial, man-made waters had to be reassessed on the basis of *SWANCC*:

> Another question that has arisen is whether CWA jurisdiction is affected when a surface tributary to jurisdictional waters flows for some of its length through ditches, culverts, pipes, storm sewers, or similar manmade conveyances. A number of courts have held that waters with manmade features are jurisdictional . . . . However, some courts have taken a different view of the circumstances under which man-made conveyances satisfy the requirements for CWA jurisdiction.[111]

Once again, *SWANCC* would not appear to have any relevance to the issue of whether CWA jurisdiction extends to artificially-formed waters. To be sure, the waters in *SWANCC* were the result of mining and were artificial in that respect.[112] The Court's decision, however, turned not on artificiality, but on the lack of any connection between those waters and "navigable waters." CWA jurisdiction has long been held to apply to artificial waters.[113] That view is consistent with the ecological purpose of the CWA, which accepts the ecological role of waters based on their present connection to other waters and their role in the ecosystem, rather than on how the waters came to have a particular locus. Again, the agencies may wish to abandon the assertion of CWA jurisdiction over artificial waters, but they should accept the responsibility of being the source of the legal change, rather than passing the buck to the Court's interpretation of the CWA in *SWANCC*.

The third and final additional issue raised by the agencies is CWA jurisdiction over intermittent, or seasonal, waters. The agencies stated:

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109. *See* 5 U.S.C. § 706(2)(A) (2000).

110. *Cf.* SEC v. Chenery Corp., 318 U.S. 80, 90 (1943) (remandeding agency decision for reconsideration by the agency because the agency improperly applied law defined by judicial opinions).

111. ANPRM, 68 Fed. Reg. at 1997.

112. *See supra* note 49 and accompanying text.

113. *See, e.g.*, Swanson v. United States, 789 F.2d 1368, 1372 (9th Cir. 1986). *Cf.* Kaiser Aetna v. United States, 444 U.S. 164, 172-73 (1979) (holding that jurisdiction under the Rivers and Harbors Act extends to dredged pond). Indeed, the Fifth Circuit, which has taken the most expansive view of the legal effect of *SWANCC*, does not appear to have any doubts that CWA jurisdiction extends to artificially created waters. *See In re Needham*, 2003 U.S. App. LEXIS 25318, at *7 (finding that the Company Canal is a tributary of a navigable water and therefore subject to CWA jurisdiction, without raising any question of whether the water was manmade). Moreover, the waters found to be jurisdictional in *Headwaters*, *Deaton*, and *Rapanos* were artificial. *See supra* note 61 and accompanying text (*Headwaters*); *supra note* 76 and accompanying text (*Deaton*); *supra note* 85 and accompanying text (*Rapanos*). None of these courts viewed the issue of artificiality as relevant after *SWANCC*.

> A number of courts have held that waters connected to traditional navigable waters only intermittently or ephemerally are subject to CWA jurisdiction. The language and reasoning in the Ninth Circuit's decision in *Headwaters Inc. v. Talent Irrigation District* indicates that the intermittent flow of waters does not affect CWA jurisdiction . . . . Other cases, however, have suggested that *SWANCC* eliminated from CWA jurisdiction some waters that flow only intermittently.[114]

As in the case of artificial waters, the relevance of the holding in *SWANCC* to intermittent waters appears coincidental at best, because some of the ponded waters at issue there were seasonal.[115] The Court's decision followed, however, from the lack of a physical connection to other "navigable waters," rather than the nonpermanent duration of the waters. Once again, the agencies may wish to abandon their claim of regulatory jurisdiction over intermittent waters. Such a withdrawal of regulatory authority must be accomplished, however, by the agencies' exercise of their own lawmaking power, rather than an "against our will" claim[116] that the Court made us do it.

Having raised these issues at the beginning of 2003, the Corps and EPA apparently have concluded at the end of the calendar year that they will not limit CWA jurisdiction along the lines suggested by their joint memorandum, at least with regard to adjacent wetlands.[117] That decision no doubt reflects the correct and obvious judgment that *SWANCC* did not itself compel such legal changes. The agencies' decision also reflects an apparent political judgment that the public would in any event view the agencies as the real source of the legal change, for which the agencies did not wish to accept political accountability.

CONCLUSION

This Article has used the aftermath of the Supreme Court decision in *SWANCC* to illustrate the fundamental problem of accountability in administrative law. The decision, which has prompted a new stage in the law of CWA jurisdiction, has given rise to opportunities for judicial overreaching and administrative buck-passing. Notwithstanding the existence of the Republicans' constitutional trifecta, however, the judicial overreaching has so

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114. ANPRM, 68 Fed. Reg. at 1997 (citations omitted). *See also id.* ("A factor in determining jurisdiction over waters with intermittent flows is the presence or absence of an ordinary high water mark (OHWM). Corps regulations provide that, in the absence of adjacent wetlands, the lateral limits of nontidal waters extend to the OHWM. One court has interpreted this regulation to require the presence of a continuous OHWM." (citations omitted)).

115. *See supra* note 49 and accompanying text.

116. *See* WILLIAM S. GILBERT & ARTHUR SULLIVAN, THE PIRATES OF PENZANCE.

117. *See* Felicity Barringer, *In Reversal, E.P.A. Won't Narrow Wetlands Protection*, N.Y. TIMES, Dec. 17, 2003, at A35. *See also Two Good Decisions; Rescuing Wetlands*, N.Y. TIMES, Dec. 18, 2003, at A42.

far been limited to the Fifth Circuit, and public opposition appears to have ended for now the concern about administrative buck-passing.