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## DEFINING THE LIMITS OF WETLAND REGULATION UNDER THE CWA AND THE COMMERCE CLAUSE

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*United States v. Wilson*<sup>1</sup>

by Stephen S. Davis

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### I. INTRODUCTION

Ever since the Supreme Court declared in 1985 that federal agencies could regulate wetlands adjacent to navigable waterways under the Clean Water Act ("CWA"), federal courts have seemed puzzled as to how far to extend wetland regulation. The Court's decision in *U.S. v. Lopez* renewed concerns about the limits of permissible wetland regulation under the Commerce Clause, since not all wetlands are or lie adjacent to navigable waterways. In *U.S. v. Wilson*, the Fourth Circuit has now held that wetlands not adjacent to interstate waters may not be regulated under the CWA. This decision directly contradicts pre-*Lopez* rulings and receives criticism because of *Lopez*'s unpopularity among courts. *U.S. v. Wilson* therefore would have represented an opportunity for the Supreme

Court to clarify its Commerce Clause jurisprudence and resolve the issue of wetland regulation under the CWA. Unfortunately, the United States chose not to appeal the Fourth Circuit's decision.

### II. FACTS AND HOLDING

In 1996, a jury convicted James J. Wilson along with two firms he controlled, Interstate General ("Interstate") and St. Charles Associates, of four felony counts of knowingly discharging fill material and excavated dirt into wetlands without a permit.<sup>2</sup> Wilson has been a land developer for over 30 years and was declared responsible for both firms' activities from which this dispute arose.<sup>3</sup> The development at issue was located in the planned community of St. Charles, Maryland.<sup>4</sup> St. Charles is situated in Charles County between the Chesapeake Bay and the Potomac

### Limits of Wetland Regulation

River and consists of about 4,000 developed acres with a population of 33,000 people at present.<sup>5</sup> When completed, the development will cover more than 9,000 acres and have 80,000 residents.<sup>6</sup> The city was created pursuant to the New Communities Act of 1968 as a collaboration between Interstate and the U.S. Department of Housing and Urban Development ("HUD").<sup>7</sup> The agreement between Interstate and HUD reserved portions of St. Charles for parks, schools, and recreational areas, and also set aside 75 acres of wetlands near the Zekiah Swamp.<sup>8</sup> As required, Interstate and HUD prepared an Environmental Impact Statement for St. Charles, but the statement did not mention any specific plan for development of Wilson's land within the wetland area. This statement also did not constitute a permit under the CWA for development of the wetland in question.<sup>9</sup>

Evidence introduced at trial indicated that Wilson violated federal regulations by draining four parcels of land classified as wetlands.<sup>10</sup> Wilson drained the area by both digging drainage ditches to allow for run-off and building up the

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<sup>1</sup>133 F.3d 251 (4th Cir. 1997).

<sup>2</sup>James Wilson was CEO and Chairman of the Board of Interstate General Co., L.P., a publicly traded land development company with 340 employees, 2,000 shareholders, and assets of over \$100 million. Interstate General was the general partner of St. Charles Associates, L.P., the firm which owned the land being developed within St. Charles, Maryland. *Wilson*, 133 F.3d at 254.

<sup>3</sup>*Id.*

<sup>4</sup>*Id.*

<sup>5</sup>*Id.*

<sup>6</sup>*Id.*

<sup>7</sup>*Id.*

<sup>8</sup>*Id.*

<sup>9</sup>*Id.*

<sup>10</sup>*Id.* at 254-55.

land by depositing truck loads of fill material over it.<sup>11</sup> The dirt removed in the digging process was deposited next to the ditches, in a process termed "sidecasting."<sup>12</sup> The Army Corps of Engineers ("Corps"), the agency with regulatory authority over wetlands under the CWA, charged the defendants with violating rules prohibiting wetland pollution without a permit.<sup>13</sup>

One issue at trial was whether the parcels should be classified as wetlands. The government introduced "substantial" evidence that the area was in fact a wetland.<sup>14</sup> According to the National Wetlands Inventory Map and other topographical maps, the area was a wetland. In addition, testimony and photographs proved the presence of standing water and vegetation typical of wetland areas, and infrared aerial photographs showed a pattern of water currents under the

vegetation.<sup>15</sup> The Corps also demonstrated that water from the land flowed in a drainage pattern through intermittent streams and creeks to the Potomac River, emptying into the Chesapeake Bay.<sup>16</sup> Finally, the government introduced evidence supporting its claim that Wilson acted knowingly, the mens rea required for conviction under the relevant regulations.<sup>17</sup>

Wilson introduced evidence questioning the government's assertion that the parcels in question were in fact wetlands under the CWA. This evidence included inconsistent actions of the Corps concerning the land and an intra-agency memorandum questioning the classification of the area as wetlands under the Act.<sup>18</sup> After deliberating for 15 hours, the jury returned a verdict for the government.<sup>19</sup>

In appealing his conviction, Wilson argued that the regulation he

allegedly violated was ultra vires, in that it extended the application of the CWA's definition of waters under the Corps' jurisdiction to the parcels of land in controversy. Specifically, Wilson claimed that defining "waters of the United States" as any waters whose "degradation 'could affect' interstate commerce" improperly reached the parcels because it violated the Commerce Clause.<sup>20</sup> He asserted that allowing the jury to justify regulation of interstate commerce by basing it on activities that "could affect" interstate commerce afforded the government practically limitless authority and offended the U. S. Supreme Court's recent Commerce Clause jurisprudence.<sup>21</sup> The Fourth Circuit Court of Appeals set aside the conviction and ordered a new trial, holding that the underlying regulation exceeded Congress' delegation of authority under the CWA in that

<sup>11</sup>*Id.* at 254.

<sup>12</sup>*Id.*

<sup>13</sup>*Id.* at 255. See 33 U.S.C. §§ 1311(a) and 1319(c)(2)(A). The Corps and the EPA share responsibility for administering and enforcing the CWA. The EPA has authority to seek penalties for discharge of pollutants into waters of the United States without a permit in violation of 33 U.S.C. § 1311. The EPA can issue an order requiring compliance with the Act, bring a civil action for injunctive relief and penalties, or seek administrative relief. The Corps has authority to issue permits to discharge dredged or fill materials into water covered by the Act. The Corps follows the guidelines established by the EPA in issuing permits. The Corps also has authority to enforce violations of these permits, and the EPA has a veto power over the issuance of permits when it determines, after consulting with the Corps, that the dredging or fill materials "will have an unacceptable adverse effect on municipal water supplies, shellfish beds . . . wildlife, or recreational areas." 33 U.S.C. § 1344(c). See *Hoffman Homes*, 961 F.2d at note 2, *infra* note 54.

<sup>14</sup>*Wilson*, 133 F.3d at 254.

<sup>15</sup>*Id.* at 254.

<sup>16</sup>*Id.* at 254-55.

<sup>17</sup>*Id.* at 255. The evidence demonstrated that Wilson made extra efforts in constantly draining and re-draining the land, shoring up the land through the addition of hundreds of truckloads of filler, and fighting off reappearing wetland vegetation. In addition, a private consulting firm advised Wilson to apply for a permit from the Corps before beginning development. The zoning commission in Charles County also contacted Wilson regarding its concerns that he was developing in a wetland area. Finally, even after Wilson complied with a Corps order to cease development on the land in question, Wilson continued to develop other parcels without notifying the Corps or seeking a permit for them. *Id.*

<sup>18</sup>*Id.*

<sup>19</sup>*Id.*

<sup>20</sup>*Id.* at 256.

it encompassed areas not under the jurisdiction of Congress pursuant to its commerce power.<sup>22</sup>

### III. LEGAL BACKGROUND

Congress enacted the CWA pursuant to its authority under the Commerce Clause, but the ambiguity of the Act's terms has caused constitutional confusion.<sup>23</sup> The Act prohibits discharges of dredge or fill material without a permit into "navigable waters."<sup>24</sup> The Act defines "navigable waters" as "waters of the United States," an undefined, troubling jurisdictional

phrase which does not clearly encompass wetlands.<sup>25</sup> At first, the Corps, which administers section 404 of the Act – the section requiring permits for discharging dredged and fill materials into navigable waters – interpreted the term narrowly and promulgated rules accordingly, only prohibiting discharges without a permit into bodies of water that were truly navigable and excluding wetlands from regulation.<sup>26</sup> However, courts struck down these regulations because they conflicted with the overall purpose of the Act.<sup>27</sup>

Subsequently, the Corps promulgated new rules defining "waters of the United States."<sup>28</sup> The regulation included wetlands among those waters regulated.<sup>29</sup> The rules prohibited permitless discharges into wetlands adjacent to waters of the United States and, on a case-by-case basis, non-adjacent wetlands whose "degradation" could affect interstate commerce.<sup>30</sup> The authority of Congress to regulate navigable waters under the Commerce Clause has long been upheld by the Supreme Court.<sup>31</sup> The present controversy arose because

<sup>21</sup>*Id.* at 256.

<sup>22</sup>*Id.* at 258. This Note deals exclusively with the Court of Appeals holding regarding the Commerce Clause and the regulation of wetlands under the CWA. Not discussed are the felony violation issues of the Court's decision, such as the mens rea requirement of the CWA regulations and the associated jury instruction issue. For treatment of felony violations of CWA provisions, see the following: Richard J. Lazarus, *Mens Rea in Environmental Criminal Law: Reading Supreme Court Tea Leaves*, 7 FORDHAM ENVTL. L.J. 861 (1996); Patrick W. Ward, Comment, *The Criminal Provisions of the CWA as Interpreted by the Judiciary and the Resulting Response from the Legislature*, 5 DICK. J. ENVTL. L. & POL'Y 399 (1996); and Christine L. Wettach, *Mens Rea and the "Heightened Criminal Liability" Imposed on Violators of the CWA*, 15 STAN. ENVTL. L.J. 377 (1996).

<sup>23</sup>See U.S. Const. art. I, § 8, cl. 3.

<sup>24</sup>33 U.S.C. § 1311(a).

<sup>25</sup>See 33 U.S.C. §§ 1311(a), 1362(12)(A) and 33 C.F.R. § 328.3(a)(3) (1993). For a more complete description of the regulatory development of wetlands under the CWA, see George K. Chamberlin, Annot., *What are "Navigable Waters" Subject to the Provisions of the Federal Water Pollution Control Act, as Amended*, 52 A.L.R.FED. 788 (1981); Elaine Bueschen, Comment, *Do Isolated Wetlands Substantially Affect Interstate Commerce?*, 46 AM. U. L. REV. 931, 935 (1997); J. Blanding Holman, *After United States v. Lopez: Can the CWA and the Endangered Species Act Survive Commerce Clause Attack?*, 15 VA. ENVTL. L.J. 139, 165 (1995); Stephen M. Johnson, *Federal Regulation of Isolated Wetlands*, 23 ENVTL. L. 1, 9 (1993); and John A. Leman, *The Birds: Regulation of Isolated Wetlands and the Limits of the Commerce Clause*, 28 U.C. DAVIS L. REV. 1237, 1244 (1995).

<sup>26</sup>Johnson, *supra* note 25, at 10.

<sup>27</sup>*Id.* at 360 (citing *U.S. v. Holland*, 373 F.Supp. 665 (M.D. Fla. 1974), and *Natural Resources Defense Council v. Callaway*, 392 F.Supp. 685 (D.D.C. 1975)).

<sup>28</sup>*Id.* at 11-12. See also 42 Fed. Reg. 37, 122 (1977).

<sup>29</sup>Johnson, *supra* note 25, at 11-12.

<sup>30</sup>*Id.* The regulation at issue in *Wilson* defines "waters of the United States" to include: "All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mud flats, sand flats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate commerce." 33 C.F.R. § 328.3(a)(3) (1993). See *Wilson*, 133 F.3d at 256-57.

<sup>31</sup>See *U.S. v. Rands*, 389 U.S. 121, 122-23 (1967) (quoting *Gilman v. Philadelphia*, 70 U.S. 713, 724-25 (1865)). In *Gilman*, the Court stated that "[t]he Commerce Clause confers a unique position upon the Government in connection with navigable waters. 'The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States . . .'" See *Wilson*, 133 F.3d at 256.

of the regulation's expansion of the reach of the Act from navigable waters to all waters of the United States, including those waters whose "degradation 'could affect' interstate commerce."<sup>32</sup>

In 1985, the Supreme Court dealt with the authority of Congress to regulate navigable waters under the CWA in *U.S. v. Riverside Bayview Homes, Inc.*<sup>33</sup> In that case, the Court upheld the Corps' definition of "waters of the United States," which included wetlands adjacent to navigable waters.<sup>34</sup> The Corps filed suit to halt a housing development because the developer did not have the requisite permits to dredge and fill the land.<sup>35</sup> The Court limited its discussion to adjacent wetlands because the wetland at issue bordered the Black Creek, a navigable waterway, and the wetland had ground-water connections with other bodies of water.<sup>36</sup> The Court stated that in using the term "navigable" in the CWA, Congress "evidently intended to repudiate limits" previ-

ously applied to pollution control statutes in order to regulate "at least some waters that would not be deemed 'navigable' under the classical understanding of that term."<sup>37</sup> Thus, the Court concluded, it was reasonable for the Corps of Engineers to construe the term "waters of the United States" as encompassing wetlands that are adjacent to what are commonly considered navigable waters.<sup>38</sup>

Since the subject in controversy in *Riverside Bayview Homes* was an adjacent wetland, the Supreme Court left open the issue of whether CWA regulations govern non-adjacent wetlands.<sup>39</sup> A few years after the *Riverside Bayview Homes* decision, the issue of isolated wetlands emerged in two cases before the federal courts of appeals. The first case, *Leslie Salt Co. v. U.S.*, was heard by the Ninth Circuit; the other, *Hoffman Homes, Inc. v. Administrator, U.S. Environmental Protection Agency*, arose in the Seventh Circuit.<sup>40</sup>

In *Leslie Salt*, the Court of Appeals for the Ninth Circuit held that a wetland lying a quarter-mile from the Newark Slough, a tidal arm of the San Francisco Bay, could be regulated under the CWA.<sup>41</sup> The land at issue fell under the Act even though its characteristics as a wetland arose through artificial means.<sup>42</sup> In the early part of the century, Leslie Salt Company's predecessor in interest excavated pits for depositing calcium chloride and other pits for crystalizing salt.<sup>43</sup> Salt production later ceased in the late 1950s, but the pits remained.<sup>44</sup> These pits filled with rainwater during the rainy season, but wetland-type vegetation did not grow for years because of the land's high salt content.<sup>45</sup> The government later constructed a sewer line and public roads in and around the property that created culverts connecting the land to the Newark Slough.<sup>46</sup> The area also became reachable to ocean tidal backflow when the state highway agency destroyed a tidegate on neighboring

<sup>32</sup>*Wilson*, 133 F.3d at 256.

<sup>33</sup>474 U.S. 121, 133 (1985).

<sup>34</sup>*Riverside Bayview Homes*, 474 U.S. at 133.

<sup>35</sup>*Id.*

<sup>36</sup>*Id.* at 131.

<sup>37</sup>*Id.* at 132-33.

<sup>38</sup>*Id.* at 133.

<sup>39</sup>*Id.* at 131, n.8. The Court expressed, "We are not called upon to address the question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water . . . and we do not express any opinion on that question." *Id.* See also Johnson, *supra* note 25 at 19.

<sup>40</sup>See *Leslie Salt*, *infra* note 41. and *Hoffman Homes*, *infra* note 55.

<sup>41</sup>*Leslie Salt Co. v. U.S.*, 896 F.2d 354, 355 (9th Cir. 1990).

<sup>42</sup>*Id.* at 355.

<sup>43</sup>*Id.*

<sup>44</sup>*Id.*

<sup>45</sup>*Id.*

<sup>46</sup>*Id.* at 356.

## Limits of Wetland Regulation

land.<sup>47</sup> When Leslie began efforts to drain the land in the mid-1980s, the Corps issued a cease and desist order under § 404 of the CWA.<sup>48</sup>

The court explained that government jurisdiction would include the wetland at issue if it fell within the scope of Congress' authority to regulate interstate commerce.<sup>49</sup> The court rejected Leslie's argument that government intrusion should not create government jurisdiction under the CWA, stating:

[t]he fact that third parties, including the government, are responsible for flooding Leslie's land is irrelevant. The Corps' jurisdiction does not depend on how the property at issue became a water of the United

States. Congress intended to regulate local aquatic ecosystems regardless of their origin.<sup>50</sup>

Because the government acts changed the nature of the wetland from isolated to adjacent, the court permitted regulation, provided that there was a sufficient connection between the land and interstate commerce.<sup>51</sup> The court directed that jurisdiction would be proper under the Commerce Clause if the land provided a habitat for either migratory birds or an endangered species, as the Environmental Protection Agency ("EPA") regulations instructed.<sup>52</sup> It gave no reasoning for this finding.<sup>53</sup> In so ruling, the Court demonstrated that it would go to great lengths to defer to the Corps' interpretation of the CWA, both on

adjacency and interstate commerce issues, for even an isolated wetland with no natural, hydrological connection to a navigable water fell under the Act's jurisdiction.<sup>54</sup>

The Seventh Circuit's holding in *Hoffman Homes* can be distinguished from the Ninth Circuit's decision in *Leslie Salt*. The *Hoffman Homes* court held that the EPA lacked jurisdiction under the CWA to regulate an isolated wetland.<sup>55</sup> This case involved an one-eighth acre piece of land with a bowl-shaped depression that often collected rainwater.<sup>56</sup> In 1986, a Corps employee happened to drive by the site and notice that it was being developed.<sup>57</sup> Upon investigation, the EPA and the Corps determined that the area was an intra-state wetland, and that dredging and

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<sup>47</sup>*Id.*

<sup>48</sup>*Id.*

<sup>49</sup>*Id.* at 357.

<sup>50</sup>*Id.* at 358.

<sup>51</sup>*Id.* at 357-58. The district court held that the government intrusions could not create government jurisdiction. To allow this would be to allow the Corps to "expand its own jurisdiction by creating some wetland conditions where none existed before." *Id.* at 357.

<sup>52</sup>*Id.* at 360. The Corps introduced evidence that the land was a habitat for migratory birds who used the pits when they were flooded during the winter and spring. The Corps also showed that the salt marsh harvest mouse, an endangered species, inhabited the area.

<sup>53</sup>*Id.* The Court did cite cases to back up its decision, *e.g.*, *Utah v. Marsh*, 740 F.2d 799, 804 (10th Cir. 1984); *Palila v. Hawaii Dep't of Land and Natural Resources*, 639 F.2d 495 (9th Cir. 1981); and *Hughes v. Oklahoma*, 441 U.S. 322, 329-36 (1979).

<sup>54</sup>*Id.* After asserting that the wetland could be classified as adjacent to navigable waters and, therefore, that the issue was not a bar to the Corps' jurisdiction, the Court explained that it was still necessary to determine whether the crystallizers and pits have sufficient connections to interstate commerce to be regulated. *Id.* The Court remanded this issue to the district court. *Id.* It instructed that jurisdiction may extend if the district court finds that the area was a habitat for migratory birds or endangered species, as the EPA regulations provide. *Id.* On remand, the district court found this to be the case and extended jurisdiction. *Id.* On appeal, the Ninth Circuit affirmed, holding that the Court of Appeals' previous decision was not clearly erroneous, and thus, did not warrant reconsideration. *See generally* *Leslie Salt Co. v. U.S.*, 55 F.3d 1388 (9th Cir. 1995).

<sup>55</sup>*Hoffman Homes, Inc. v. Administrator, U.S. Env'tl. Protection Agency*, 999 F.2d 256 (7th Cir. 1993).

<sup>56</sup>*Id.* at 258.

<sup>57</sup>*Id.* at 257.

filling the area without a permit was a violation of the CWA.<sup>58</sup> It was not disputed that the area had no surface or groundwater connection to any other body of water, was not used for any interstate commerce function, such as fishing or industrial use, nor was it visited by interstate travelers for recreational or other purposes.<sup>59</sup> The EPA argued that the area fell under CWA jurisdiction solely because migratory birds could potentially use the area for feeding, nesting or resting before moving on to other states.<sup>60</sup> There was no evidence, however, that any migratory birds actually used the site.<sup>61</sup>

The Corps, under the direction of the EPA, denied Hoffman

a retroactive permit for filling and dredging the land and filed an administrative complaint against the company when it refused to restore the land to its original condition.<sup>62</sup> An EPA administrative law judge ("ALJ") concluded that the area was, in fact, a wetland within the meaning of the CWA and its regulations, but that the EPA did not have authority to regulate it, since the area had no effect on interstate commerce.<sup>63</sup> The EPA's Chief Judicial Officer ("CJO") reversed the ALJ's decision, finding that the EPA had authority under the Act to regulate intrastate wetlands that had a "minimal, potential effect" on interstate commerce.<sup>64</sup> Hoffman then appealed to the Seventh Circuit

Court of Appeals, which found in its favor on the merits.<sup>65</sup> Later, however, the court granted the EPA's motion for rehearing and vacated its decision.<sup>66</sup> Upon rehearing, the court once again overruled the CJO's decision, but only discussed the Commerce Clause issue in dicta.<sup>67</sup>

In its final 1993 decision, the Seventh Circuit Court of Appeals held that the potential presence of migratory birds was indeed enough to tie an isolated wetland to interstate commerce so that it could be regulated.<sup>68</sup> However, since the EPA had furnished an unsubstantial amount of evidence to establish that the area was a po-

<sup>58</sup>*Id.* at 258.

<sup>59</sup>*Id.*

<sup>60</sup>*Id.* at 259.

<sup>61</sup>*Id.*

<sup>62</sup>*Id.* at 258.

<sup>63</sup>*Id.*

<sup>64</sup>*Id.* at 258-59.

<sup>65</sup>*See Hoffman Homes, Inc. v. Administrator, U.S. Env'tl. Protection Agency*, 961 F.2d 1310 (7th Cir. 1992). In this opinion, the court held that the EPA could not regulate an intrastate wetland that did not affect interstate commerce. According to the EPA, even isolated wetlands fall under its regulatory jurisdiction if "the use, degradation, or destruction" of the wetland "could affect interstate commerce." *Id.* at 1313 (quoting 40 C.F.R. § 230.3(a)(3)). The court examined the language of the statute, its legislative history, and its stated policy objectives in deciding whether to uphold the EPA's interpretation of it under the *Chevron* doctrine. *Id.* It found the language of the statute ambiguous with respect to wetlands in general, that the 1972 and 1977 legislative history failed to support regulation of isolated wetlands, and that the Act's stated policy objectives did not evidence an intent to regulate isolated wetlands. *Id.* at 1316. The *Hoffman Homes* court also interpreted *Riverside Bayview Homes* as denying regulation of isolated wetlands. *Id.* at 1314 (quoting *Riverside Bayview Homes*, 474 U.S. at 131, n.8). The court also discussed wetland regulation under the Commerce Clause. *Id.* at 1317. It asserted that an isolated wetland, by definition, has no effect on interstate waters and that the EPA had produced no evidence showing that the wetland affected interstate commerce. *Id.* at 1319-20. The EPA claimed that the potential use of the wetland by waterfowl in the midst of interstate flight was sufficient to grant it jurisdiction. *Id.* at 1320. The court rejected this argument, replying that migratory birds, until they are "watched, photographed, shot at or otherwise impacted" by people engaging in interstate commerce, do not "ignite the Commerce Clause." *Id.* The court ruled that the "potential presence" of migratory birds does not sufficiently support Commerce Clause regulation. *Id.*

<sup>66</sup>*See Hoffman Homes, Inc. v. Administrator, U.S. Env'tl. Protection Agency*, 975 F.2d 1554 (7th Cir. 1992).

<sup>67</sup>*See Hoffman Homes, Inc. v. Administrator, U.S. Env'tl. Protection Agency*, 999 F.2d 256 (7th Cir. 1993).

<sup>68</sup>*Hoffman Homes*, 999 F.2d at 261-62.

tential habitat for migratory birds, it reversed the CJO's decision.<sup>69</sup> According to the regulation, the EPA had regulatory jurisdiction over waters "which are or could be taken," or "are used or could be used" for industrial purposes.<sup>70</sup> The court interpreted the word "could" in the regulation as the CJO had done, that EPA jurisdiction extends to waters whose nexus to interstate commerce is only potential rather than actual and "minimal rather than substantial."<sup>71</sup> In dicta, the court maintained that migratory birds affect interstate commerce.<sup>72</sup> Thus, the court explained that the potential presence of migratory birds was a sufficient connection to interstate commerce to grant the EPA jurisdiction based on a reasonable interpretation of the regulation.<sup>73</sup> But the lack of substantial evidence on the migratory bird issue precluded the court from ruling on an inter-

state commerce basis.

Ten years after *Riverside Bayview Homes*,<sup>74</sup> the Supreme Court put limits on Congress' authority under the Commerce Clause in *U.S. v. Lopez*.<sup>75</sup> The Court in *Lopez* struck down the Gun-Free School Zones Act of 1990, a criminal statute Congress enacted pursuant to its authority under the Commerce Clause.<sup>76</sup> Because the intrastate activity at issue in *Lopez* did not "substantially affect" interstate commerce, even in the aggregate if repeated elsewhere, the Supreme Court ruled that the law was unconstitutional.<sup>77</sup> In the instant case, the Fourth Circuit cited *Lopez* for the proposition that Congress may regulate matters substantially affecting interstate commerce.<sup>78</sup> Thus, the *Wilson* court asserts that although the full reach of Congress' power under the Commerce Clause remains unclear, courts should ac-

cept the regulation of non-navigable waters to the extent that they substantially affect the use, potential use or instrumentalities of interstate commerce.<sup>79</sup>

Scholars have been busy theorizing what effect *Lopez* will have on wetland regulation under the CWA.<sup>80</sup> At least one scholar believes that the decisions of the Ninth and Seventh Circuits may be on shaky ground after *Lopez*.<sup>81</sup> Because of *Lopez*, the Supreme Court may now view the connection between isolated wetlands and interstate commerce as so "tenuous" as to say that such regulation "seriously erode[s] the distinction between local and national concerns."<sup>82</sup> In particular, the migratory bird rule "does not guarantee" that filling isolated wetlands substantially affects interstate commerce.<sup>83</sup> the migratory bird rule as insufficient to confer regulatory authority under

<sup>69</sup>*Id.* at 262.

<sup>70</sup>*Id.* at 261.

<sup>71</sup>*Id.*

<sup>72</sup>*Id.* The court cited *U.S. v. Byrd*, 609 F.2d 1204 (7th Cir. 1979), holding that Congress may regulate activities that "affect" interstate commerce, and the Migratory Bird Treaty Act and the Migratory Bird Conservation Act, passed by Congress in 1918 and 1929 respectively, showing congressional regulation of and interest in protecting migratory birds.

<sup>73</sup>*Id.*

<sup>74</sup>474 U.S. 121 (1985).

<sup>75</sup>514 U.S. 549 (1995).

<sup>76</sup>*Lopez*, 514 U.S. at 558-59.

<sup>77</sup>*Id.* at 567.

<sup>78</sup>*Wilson*, 133 F.3d at 255-56.

<sup>79</sup>*Id.* In 1997 the Supreme Court issued its decision in *Printz v. U.S.*, 117 S.Ct. 2365. Although that case dealt with regulation of interstate commerce, it primarily concerned such regulation in conjunction with state sovereignty issues. It, therefore, does not significantly add to a discussion of federal regulation of wetlands when no state executive authority is involved.

<sup>80</sup>See *supra* note 25.

<sup>81</sup>Holman, *supra* note 25, at 168.

<sup>82</sup>*Id.* at 195.

<sup>83</sup>*Id.*



There are two concerns that the Supreme Court would view the Commerce Clause.<sup>84</sup> First, Congress has not made explicit findings that the filling of isolated wetlands substantially affects interstate commerce.<sup>85</sup> Were Congress to do so, the Supreme Court would likely defer to the legislature's reasoning, even under *Lopez*. In *Lopez*, the Court found no economic activity inherent in carrying a handgun in a city school. On the contrary, congressional regulation of the nation's waters as well as agency regulation of wetlands have become historic practices and gained approval by the Supreme Court.<sup>86</sup> Secondly, migratory birds are a "weak weapon" for the EPA to use because their flyways cover most of the United States, and the birds tend to alight almost anywhere.<sup>87</sup> Thus, the court may view the migratory bird rule as a limitless, and therefore unusable, approach. However, the effect *Lopez*

will have is uncertain for a number of reasons. Although *Lopez* puts questions on the constitutionality of isolated wetlands regulation, the federal judiciary's treatment of *Lopez* since it was announced raises questions of whether the Supreme Court would remain completely faithful to its 1995 decision.<sup>88</sup>

#### IV. INSTANT DECISION

The *Wilson* court first considered the issue of whether the regulation exceeded Congress' delegation of authority in extending the definition of "waters of the United States" to include "those waters whose degradation 'could affect' interstate commerce."<sup>89</sup> While the defendants in *Wilson* ("Defendants") did not challenge the Act's constitutionality under the Commerce Clause, they did challenge the jury instructions and regulations as both exceeding Congress' delegation of authority to the Corps of Engineers under the Act and Con-

gress' power under the Commerce Clause.<sup>90</sup> The court held that the regulation was ultra vires, but chose not to reach the issue of the limits of congressional power under the Commerce Clause.<sup>91</sup> It stated that resolving the regulation issue was dispositive to the issue of the Commerce Clause and that it need not undertake to answer the "difficult questions" regarding the limits of congressional authority under the Commerce Clause.<sup>92</sup>

At trial, the instructions allowed the jury to convict if it found that Defendants' activities affected interstate commerce. If those activities affected interstate commerce, they could be reached by the regulations under the Act. For instance, if the jury could find that "fish or shellfish are or could be taken" from the waters and sold in interstate commerce, then the government had established a sufficient connection with interstate commerce to apply the regulation.<sup>93</sup>

<sup>84</sup>*Id.* at 197.

<sup>85</sup>*Id.*

<sup>86</sup>See generally *Riverside Bayview Homes*, 474 U.S. 121.

<sup>87</sup>Holman, *supra* note 25, at 197.

<sup>88</sup>Judge Luttig's concurrence in *Wilson* emphasizes that the 4th Circuit has dismissed *Lopez*. See *Wilson*, 133 F.3d at 266, and also *infra* note 109.

<sup>89</sup>*Wilson*, 133 F.3d at 255.

<sup>90</sup>*Id.* at 257.

<sup>91</sup>*Id.* at 256-57.

<sup>92</sup>*Id.*

<sup>93</sup>*Id.* at 256. The instructions regarding the regulation read: "The government must prove that these waters have some potential connection with interstate commerce. If you find, ladies and gentlemen, beyond a reasonable doubt that these waters were or could be used by visitors from other states for recreational or other purposes, or that fish or shellfish are or could be taken from these waters and sold in interstate or foreign commerce, or that these waters were used or could have been used for industrial purposes by industries in interstate commerce, or that these waters were subject to the ebb and flow of the tide or that the use, degradation or construction [sic] [destruction?] of such waters could affect interstate commerce, then I instruct you as a matter of law that the government has established such connection with interstate commerce and that these waters, including wetlands, are waters of [the] United States." *Id.*

The Court of Appeals found this set of instructions flawed. It found that interpreting “waters of the United States” as waters whose use potentially affected interstate commerce was contrary to the Supreme Court’s jurisprudence on the CWA.<sup>94</sup> The Act prohibits the discharge, without a permit, of pollutants into “navigable waters.”<sup>95</sup> The Act then defines “navigable waters” as “waters of the United States.”<sup>96</sup> The court noted that the Supreme Court ruled that by defining “navigable waters” as “‘waters of the United States,’ Congress intended ‘to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed ‘navigable’ under the classical understanding of that term.’”<sup>97</sup> Thus, it was not disputed that the regulation may extend to some waters that are not in fact “navigable.” In addition, *Lopez* en-

sured that Congress could regulate discharges of pollutants that “substantially affect interstate commerce.”<sup>98</sup> However, the court found that the regulation surpassed even this broad interpretation.<sup>99</sup>

Hesitating to embark on a discussion of congressional authority under the Commerce Clause, the court noted that the Supreme Court has changed its view regarding some issues of federalism.<sup>100</sup> Because the object of the controversy was an administrative regulation and not a statute, the court stated that it could avoid the constitutionally troubling Commerce Clause issue, that would have been presented had the facts surrounded a statute.<sup>101</sup> The court explained that because a similarly-worded statute would certainly appear to contradict recent Supreme Court rulings, a situation involving such a statute would be much harder to deal with.<sup>102</sup>

The court struck the rule as exceeding the scope of Congress’ delegation.<sup>103</sup> It explained that a constitutionally troubling regulation did not impose as formidable an obstacle for it to dispose of as such a statute would have, although it did not elaborate as to why. In striking the rule, the court asserted that “absent a clear indication to the contrary, we should not lightly presume that merely by defining ‘navigable waters’ as ‘the waters of the United States’ . . . Congress authorized the Army Corps of Engineers to assert its jurisdiction in such a sweeping and constitutionally troubling manner.”<sup>104</sup> Not only did the regulation’s definition surpass what could be interpreted as “navigable waters,” it even reached beyond what could be regarded as “closely related to navigable or interstate waters.”<sup>105</sup> The court held that by defining “navigable waters” so

<sup>94</sup>*Id.* at 258.

<sup>95</sup>*Id.* at 257.

<sup>96</sup>*Id.*

<sup>97</sup>*Id.* at 256 (quoting *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985)).

<sup>98</sup>*Id.* (quoting *U.S. v. Lopez*, 514 U.S. 549, 558-59 (1995)).

<sup>99</sup>*Id.* at 258.

<sup>100</sup>*Id.* at 256 (citing *Printz v. U.S.*, 117 S.Ct. 2365 (1997); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996); *U.S. v. Lopez*, 514 U.S. 549 (1995); and *New York v. U.S.*, 505 U.S. 144 (1992)).

<sup>101</sup>*Id.* at 257.

<sup>102</sup>*Id.*

<sup>103</sup>*Id.*

<sup>104</sup>*Id.*

<sup>105</sup>*Id.*

broadly, the regulation went too far. It ruled that the Corps of Engineers exceeded its authority under the CWA in promulgating 33 C.F.R. §328.3(a)(3) and thus, the rule was invalid.<sup>106</sup>

## V. COMMENT

At some point, the Supreme Court should consider the issue presented in *Wilson*. Assessing jurisdiction under the CWA and its regulations is a fact-intensive determination. The facts of *Wilson* were distinct from those of prior cases and amplify the problems they raised. In light of the Supreme Court's developing Commerce Clause jurisprudence and federal case law concerning the regulation of wetlands under the CWA, the

*Wilson* court's ruling makes sense but further muddied the water. It effectively applies the spirit of *Lopez* to the CWA, but altered the Supreme Court's ruling on wetlands in *Riverside Bayview Homes*. In sum, the Fourth Circuit's ruling in *Wilson* raised questions that stand in need of resolution by the Supreme Court.

*Wilson* seemed to stray from the Supreme Court's CWA jurisprudence in *Riverside Bayview Homes*. In that case, the Supreme Court pronounced that wetlands may be regulated if adjacent to a navigable body of water.<sup>107</sup> The Court evaluated adjacency according to the broad meaning of "navigable waters" that Congress intended the Act to have.<sup>108</sup>

It reasoned that wetlands connected to navigable waters on the basis of hydrological cycles and the flow of water through ecosystems are sufficient to fall under the purview of the Act.<sup>109</sup> As in *Riverside Bayview Homes*, the wetlands in *Wilson* flowed through hydrological cycles to navigable waterways.<sup>110</sup> Thus, the facts of *Wilson* seemed strikingly similar to *Riverside Bayview Homes*, although some inconsistencies appeared.<sup>111</sup> The court did not adequately explain how the facts of *Wilson* were distinguishable from those of *Riverside Bayview Homes*.

The facts of *Wilson* were clearly distinguishable from *Leslie Salt* and *Hoffman Homes*. In *Leslie Salt*, the wetland was iso-

<sup>106</sup>*Id.* Each judge on the panel filed an opinion. Judge Niemeyer wrote the opinion of the court, while Judge Luttig concurred in the judgment and filed a separate opinion. Judge Payne, a district court judge sitting by designation, concurred in part of the Court's opinion and in the judgment, but also filed a separate opinion. Judge Niemeyer's opinion is divided into seven parts as outlined below:

- I. Facts and evidence presented
- II. Jurisdiction of the regulation – "navigable waters"
- III. Jury instructions regarding wetlands and interstate waters
- IV. Sidecasting issue
- V. Mens rea jury instruction
- VI. Admissibility of expert testimony
- VII. Conclusion

A majority of the panel adopted parts II, V, and VI as well as the ultimate judgment. Judge Luttig only concurred in the ultimate judgment and only for the reasons stated in Part V. Although he believed that Judge Niemeyer's analysis in Part II was "convincing," he nevertheless declined to adopt it. *Wilson*, 133 F.3d at 266. He felt that it directly conflicted with the Fourth Circuit's holding in *Brzonkala v. Virginia Polytechnic & State University*, 132 F.3d 949 (4th Cir. 1997). *Id.* In his brief statement, Judge Luttig asserted that the Circuit has dismissed *Lopez* as an "aberration" and limited it to its specific facts. *Id.* In *Brzonkala*, the Court held that the Violence Against Women Act did not exceed congressional authority under the Commerce Clause. *See generally Brzonkala*, 132 F.3d 949. Judge Luttig was on the *Brzonkala* panel and dissented in its judgment. *Wilson*, 133 F.3d at 266. Since *Wilson* was handed down, the Circuit has granted a motion for rehearing in *Brzonkala*.

Judge Payne adopted Parts II, V, and VI of Judge Niemeyer's opinion and voiced his own views on coverage of both adjacent wetlands and sidecasting under the Act. *Id.* at 266-75.

<sup>107</sup>*Riverside Bayview Homes*, 474 U.S. at 131.

<sup>108</sup>*Id.* at 132-35.

<sup>109</sup>*Id.* at 134.

<sup>110</sup>*See Wilson*, 133 F.3d at 254-55.

<sup>111</sup>*Id.* at 254. The facts of *Wilson* are not entirely clear. For instance, the wetlands at issue were not part of the Zekiah Swamp, although they were nearby. *Id.* Also, although the case mentions a drainage pattern through intermittent streams

lated until altered by artificial means.<sup>112</sup> In *Hoffman Homes*, the wetland at issue was completely isolated, separate from any other water source or body.<sup>113</sup> The wetland at issue in *Wilson* was clearly different in that it was not isolated in the same sense as the areas in both *Leslie Salt* and *Hoffman Homes*. Thus, it seems that the *Wilson* court changed the recipe – it took facts similar to *Riverside Bayview Homes* and applied *Lopez*-like reasoning. *Leslie Salt* and *Hoffman Homes* held that the mere presence of migratory waterfowl justified regulation under the Commerce Clause.<sup>114</sup> *Lopez* seemed to conflict with these cases.<sup>115</sup> Under *Lopez*, the appropriate question for a court to ask in considering the constitutionality of CWA regulations was whether they substantially affected interstate commerce.<sup>116</sup> This was what the Fourth Circuit did in *Wilson*.<sup>117</sup> It logically applied the reasoning of *Lopez* to wetland regulation under the CWA. In doing so, however, it created friction with the Seventh and Ninth Circuits as well as Supreme Court precedent on wetlands, and thus it presented an issue that the Supreme

Court should resolve.

The *Wilson* court's decision also created some additional confusion. The court commented that Congress' far-reaching power to regulate waters that are, in fact, not navigable "could be drawn into question by the [Supreme] Court's recent federalism jurisprudence."<sup>118</sup> But then the Court collected itself and dismissed the point it just made, saying, "we need not resolve these difficult questions about the extent and limits of congressional power to regulate non-navigable waters to resolve the issue before us."<sup>119</sup> One might ask then, why did the court bring it up to begin with? Such a remark only serves to encourage skepticism on the constitutionality of the Act's provision and how it should be interpreted by courts regarding all wetlands under the Commerce Clause. But perhaps this is precisely what the court had in mind.

Were the Supreme Court to apply a *Lopez* analysis to regulation of isolated wetlands under the CWA, it is likely that such a regulation would not be sustained.<sup>120</sup> According to one scholar, the Supreme Court would begin by inquir-

ing as to whether the relevant portions of the CWA regulate an activity that substantially affects interstate commerce.<sup>121</sup> It would likely conclude that while the Act as a whole does bear some relation to commerce or an economic enterprise, "it must be admitted that the Act does not concern itself solely with the 'regulation of economic activity.'"<sup>122</sup> For example, the Court would likely view regulation of isolated wetlands as having no connection with interstate commerce, because they are totally intrastate and bear no impact on navigable waterways used as channels of commerce. The migratory bird rule could establish an economic connection between isolated wetlands and interstate commerce, but a *Lopez*-governed court would likely analogize the happenstance landing of birds that fly over state lines to the potential travel of guns over state lines to rule that such a connection is insufficient to establish Commerce Clause jurisdiction. Whether the Supreme Court would remain true to *Lopez* in considering the constitutionality of regulating isolated wetlands under the CWA is another question.

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and creeks, it fails to mention if these were navigable. *Id.* Thus, it is unknown just how isolated the wetlands were from a navigable waterway.

<sup>112</sup>*Leslie Salt*, 896 F.2d at 356.

<sup>113</sup>*Hoffman Homes*, 961 F.2d at 1311, 1314.

<sup>114</sup>See *Leslie Salt*, 896 F.2d at 360.

<sup>115</sup>See generally *Lopez*, 514 U.S. 549.

<sup>116</sup>See *Wilson*, 133 F.3d at 256.

<sup>117</sup>*Id.* at 256-57.

<sup>118</sup>*Id.* at 256.

<sup>119</sup>*Id.*

<sup>120</sup>Holman, *supra* note 25, at 198.

<sup>121</sup>*Id.* at 197.

<sup>122</sup>*Id.* at 198.

The *Wilson* court's decision is unclear in another aspect. In reasoning that the regulation defining "waters of the United States" is invalid, the court stated that it had no reason to believe Congress would authorize such a constitutionally troubling interpretation as the agency had given.<sup>123</sup> The court stated:

[w]ere this regulation a statute, duly enacted by Congress, it would present serious constitutional difficulties, because, at first blush, it would appear to exceed congressional authority under the Commerce Clause. This regulation is not, however, a statute.<sup>124</sup>

It is a well-established statutory canon of construction that a court should, if possible, interpret a statute so as not to violate the Constitution. Apparently, the *Wilson* court said that it had no such duty regarding administrative rules. Such a pronouncement seemed to conflict, however, with the *Chevron* doctrine, that when Congress has not spoken to the matter, an agency's construction of its authorizing statute should enjoy great deference.<sup>125</sup> The court could have decided, under *Chevron*, that the regulation was an unreasonable construction of the CWA, in that it was unreasonable to say that the EPA may regulate all wetlands, even seasonal pools of water, under the term "navigable waters."

Instead, it struck the regulation in a way that appeared to conflict with *Chevron*. The court would have done better to either elaborate and explain its point or omit it altogether.

## VI. CONCLUSION

The Fourth Circuit has now ruled to prohibit regulation of intrastate, non-adjacent wetlands under the CWA. In so doing, it applied the Supreme Court's revised jurisprudence limiting congressional authority under the Commerce Clause. This decision was novel because it broke from prior Supreme Court precedent as well as recent federal court rulings regarding wetland regulation. It underscored the inherent conflict between the reasoning of *Riverside Bayview Homes* and the philosophy of *Lopez Lopez*. This controversy is ripe for review and should be resolved by the Supreme Court in order to establish a coherent national policy.

When given a chance to address the issue in *Wilson*, the Supreme Court should stay true to its decision in *Lopez*. It should rule that intrastate, isolated wetlands, because they do not substantially affect interstate commerce, fall outside federal regulation under the Commerce Clause. Such a ruling would go far to clear up the Court's occluded CWA and Commerce Clause jurisprudence. If the Court is truly committed to strengthening federalism and reigning in Congress' Commerce Clause authority, it must

reaffirm *Lopez* in the wetlands context.

<sup>123</sup>*Wilson*, 133 F.3d at 257.

<sup>124</sup>*Id.*

<sup>125</sup>For an authoritative explanation of the *Chevron* doctrine, see 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE §§ 3.1-3.6 (3d ed. 1994).