REEVALUATING "ISOLATED WATERS": IS HYDROLOGICALLY CONNECTED GROUNDWATER "NAVIGABLE WATER" UNDER THE CLEAN WATER ACT?

I. INTRODUCTION

Interpreting the language of environmental statutes is notoriously difficult.[1] Words never seem to have their ordinary meaning in environmental legislation. For example, "disposal" may be a passive activity,[2] "navigable waters" may include wetlands,[3] and an endangered specie may be unlawfully "taken" if its habitat is modified.[4] This development is not the product of judicial activism, but instead seems to be the natural product of such complex, sometimes self-contradictory, policy-driven legislation.[5] Therefore, even new textualists[6] such as Justice Scalia, who normally avoid legislative history in interpreting statutory language, occasionally look to legislative history when interpreting environmental statutes.[7] But what are courts to do when the legislative history is unclear? In those situations, under *Chevron v. Natural Resource Defense Council*,[8] courts are directed to look to the agency empowered to enforce a particular statute for guidance and

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1. Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 GEO. L.J. 2407, 2407 (1995). In his article, Lazarus states that:

> Environmental law is riddled with paradox. Seemingly nonsensical twists of policy abound in the double helix of statutory enactments and corresponding regulatory schemes that makes up modern environmental law. Conflict and contradiction are the rule rather than the exception for those hardy enough to go beyond the symbolic rhetoric and promise of environmental policy in an effort to discover the actual terms of environmental law itself.

Id.

2. Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 846 (4th Cir. 1992) (holding that "disposal" includes passive migration under the Comprehensive Environmental Response Compensation and Liability Act).

3. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 139 (1985) (holding that "waters of the United States" may reasonably include wetlands adjacent to navigable waters under the Clean Water Act).

4. Babbit v. Sweet Home Chapter of Communities, 515 U.S. 687, 708 (1995) (holding that to "take," which includes "harming" an animal, may reasonably include "significant habitat modification or degradation that actually kills or injures wildlife" under the Endangered Species Act).

5. *See generally* Cass R. Sunstein, *Paradoxes of the Regulatory State*, 57 U. CHI. L. REV. 407 (1990) (discussing the self-contradictory nature of regulatory law).

6. *See generally* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990) (criticizing the use of legislative history).

7. *See Sweet Home*, 515 U.S. at 726-30 (Scalia, J., dissenting).

8. 467 U.S. 837 (1984).

defer to that agency's interpretation as long as it is "reasonable."[9] However, where the enforcing agency has said little or nothing about a specific statute before the courts, the courts are left to interpret the statute on their own.[10]

Since its enactment in 1972, courts have struggled with determining the proper interpretation of "navigable waters" under the Clean Water Act.[11] Under the Act, Congress established a mechanism for regulating all discharges of pollution from a point source into "navigable waters."[12] The Act defines "navigable waters" as "waters of the United States,"[13] and courts have uniformly agreed that this definition provides evidence of Congress's intent that the statute is to have a "broad" scope.[14] But just how broad? More specifically, should "waters of the United States" include groundwater that is hydrologically connected to navigable waters? While courts agree that non-navigable surface waters connected to navigable waters are "waters of the United States,"[15] they have disagreed about hydrologically connected groundwater.[16]

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9. *Chevron*, 467 U.S. at 842-43. Under *Chevron*:

> 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. *See also* United States v. Mead Corp., 533 U.S. 218 (2001) (applying the *Skidmore* factors to agency decisions that do not qualify for *Chevron* deference).

10. *Chevron*, 467 U.S. at 842-43.

11. *See, e.g.*, United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) (discussing whether "waters of the United States" includes wetlands adjacent to navigable waters); United States v. GAF Corp., 389 F. Supp. 1379 (S.D. Tex. 1975) (discussing whether "waters of the United States" includes isolated groundwater).

12. Federal Water Pollution Control Act § 402, 33 U.S.C. § 1342 (1972) (establishing the national pollutant discharge elimination system).

13. *Id*. § 502.

14. *E.g., Riverside Bayview*, 474 U.S. at 133.

15. *E.g.,* Tex. Mun. Power Agency v. Admin'r of EPA, 836 F.2d 1482, 1487 (5th Cir. 1988); United States v. Tex. Pipeline Co., 611 F.2d 345, 347 (10th Cir. 1979) (holding that pollution of a small, unnamed tributary of a navigable waterway came within the Act's jurisdiction); United States v. Ashland Oil & Transp. Co., 504 F.2d 1317, 1326 (6th Cir. 1974).

16. *Compare* Rice v. Harken Exploration Co., 250 F.3d 264, 272 (5th Cir. 2001) (holding that "waters of the United States" under the Clean Water Act does not include hydrologically connected groundwater), Vill. of Oconomowoc Lake v. Dayton Hudson Corp., 24 F.3d 962 (7th Cir. 1994), Patterson Farm, Inc. v. City of Britton, 22 F. Supp. 2d 1085 (D.S.D. 1998), Allegany Envtl. Action Coalition v. Westinghouse Elec. Corp., No. 96-2178, 1998 U.S. Dist. LEXIS 1838 (W.D. Pa. Jan. 30, 1998), United States v. Conagra, Inc., No. CV96-0134-S-LMB, 1997 U.S. Dist. LEXIS 21401 (D. Idaho Dec. 31, 1997), *and* Umatilla Waterquality Protective Ass'n v. Smith Frozen Foods, Inc., 962 F. Supp. 1312 (D. Or. 1997), *with* McClellan Ecological Seepage Situation v. Weinberger, 707 F. Supp. 1182, 1193-94 (E.D. Cal. 1988) (holding that "waters of the United States" under the Clean Water Act does include hydrologically connected groundwater), *rev'd on other grounds*, 504 U.S. 902 (1992), Idaho Rural Council v. Bosma, 143 F. Supp. 2d 1169 (D. Idaho 2001), Woodward v. Goodwin, No. C 99-1103 MJJ, 2000 U.S. Dist. LEXIS 7642 (N.D. Cal. May 12, 2000), Mut. Life Ins. Co. of New York v. Mobil Corp., No. 96-CU-1781, 1998 U.S. Dist. LEXIS 4513 (N.D.N.Y. Mar. 31, 1998), Williams Pipe Line Co. v. Bayer Corp., 964 F. Supp. 1300 (S.D. Iowa 1997), Friends of Santa Fe County v. LAC Minerals, Inc., 892 F. Supp. 1333 (D.N.M. 1995), Wash. Wilderness Coalition v. Hecla Mining Co., 870 F. Supp. 983

In this Comment, I suggest that the statute is ambiguous, the legislative history is likewise unclear, the EPA has not clarified the issue, and therefore, that interpretation of "waters of the United States" should be governed by the meaning given to the phrase by the United States Supreme Court. Relying on the language of the Supreme Court, in turn, leads to the conclusion that "waters of the United States" includes hydrologically connected groundwater. As simple as this proposition may seem, it has seldom been followed by courts addressing this issue. Courts refusing to interpret "navigable waters" to include hydrologically connected groundwater have focused too much attention on Congress's rejection of Representative Aspin's proposed amendment to the Act,[17] which would have extended the scope of the Act to include even isolated groundwater.[18] On the other hand, courts that have interpreted the scope of "navigable waters" to include hydrologically connected groundwater often have paid too much attention to the underlying purposes of the Act with little or no reference to the interpretation provided by the Supreme Court.[19]

II. THE UNITED STATES SUPREME COURT'S INTERPRETATION OF "WATERS OF THE UNITED STATES"

In *United States v. Riverside Bayview Homes*,[20] the United States Supreme Court supported a broad interpretation of the Clean Water Act's scope.[21] Section 404(a) of the Act prohibits the discharge of any dredge and fill material into "navigable waters" without a permit issued by the United States Corps of Engineers.[22] "Navigable waters," defined as "waters of the United States" under section 502,[23] was expanded by the Corps through interim final regulations to include not only waters that were navigable in fact but also tributaries of navigable waters, interstate waters and their tributaries, nonnavigable intrastate waters whose use or misuse could affect interstate commerce, and freshwater wetlands "adjacent to" any other covered waters.[24] "Wetlands" were in turn defined by the Corps as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support . . . a prevalence of vegetation typically adapted for life in saturated soil conditions."[25]

Riverside Bayview Homes owned eighty acres of marshy land near the shores of Lake St. Claire in Michigan.[26] After determining that the marsh-

(E.D. Wash. 1994), *and* Sierra Club v. Colo. Ref. Co., 838 F. Supp 1428 (D. Colo. 1993).

17. *See* 118 CONG. REC. 10,666 (1972).
18. *See, e.g.*, *Vill. of Oconomowoc*, 24 F.3d at 965.
19. *See, e.g.*, *Wash. Wilderness Coalition*, 870 F. Supp. at 989-90.
20. 474 U.S. 121 (1985).
21. *Riverside Bayview*, 474 U.S. at 133.
22. Federal Water Pollution Control Act § 404, 33 U.S.C. § 1344 (1972).
23. *Id*. § 502.
24. *Riverside Bayview*, 474 U.S. at 123-24 (citing 40 Fed. Reg. 31,320 (1975)).
25. 33 C.F.R. § 328.3 (1985).
26. *Riverside Bayview*, 474 U.S. at 124.

land was a "wetland," the Corps filed suit against Riverside to enjoin it from placing fill material on its property in preparation for construction of a housing development.[27] The district court agreed with the Corps that the land was a wetland and enjoined Riverside from filling it without a permit.[28] Riverside appealed the decision to the Sixth Circuit, which reversed, finding that the Corps' regulation excluded wetlands that were not subject to flooding by adjacent navigable waters at a frequency sufficient to support the growth of aquatic vegetation.[29] The court adopted this narrow interpretation largely to avoid what it saw as potential Fifth Amendment problems.[30]

On review, the Supreme Court quickly brushed aside the constitutional concerns of the lower court and instead reviewed whether the Corps' exercise of jurisdiction over wetlands adjacent to, but not regularly flooded by, other "waters of the United States" was reasonable in light of the policy goals and legislative history of the Clean Water Act.[31] The Court noted that the Act represented a comprehensive legislative attempt to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[32] To achieve this goal, the Court stated, Congress chose to define the waters covered by the Act broadly.[33] Specifically, the Court found that by defining "navigable waters" as "waters of the United States," Congress intended the word "navigable" to have "limited import."[34] By adopting this definition, the Court believed that Congress intended to negate limits that had been placed on federal regulation by prior pollution control laws and to exercise its jurisdiction over waters that might not normally be considered "navigable."[35] Considering these broad policy goals and what it believed to be the intentions of Congress, the Court found that it was entirely reasonable for the Corps to bring "adjacent wetlands" under the ambit of "waters of the United States."[36] After all, both the EPA and the Corps had determined that adjacent wetlands played a key role in maintaining water quality.[37]

The Court emphasized the Corps' determination that:

> The regulation of activities that cause water pollution cannot rely on . . . artificial lines . . . but must focus on all waters that together form the entire aquatic system. Water moves in hydrologic cycles, and the pollution of this part of the aquatic system . . . will

27. *Id*.
28. *Id*. at 125.
29. United States v. Riverside Bayview Homes, Inc., 729 F.2d 391, 397 (6th Cir. 1984).
30. *Riverside Bayview*, 729 F.2d at 398.
31. *Riverside Bayview*, 474 U.S. at 131.
32. *Id*. at 132 (quoting Federal Water Pollution Control Act § 101, 33 U.S.C. § 1251 (1972)).
33. *Id*. at 133.
34. *Id*.
35. *Id*.
36. *Riverside Bayview*, 474 U.S. at 133.
37. *Id*.

> affect the water quality of the other waters within that aquatic system.[38]

The Court went further and said that this reasoning did not apply only to wetlands that are the result of flooding or permeation by water originating from an adjacent body of open water, but also to water originating from the wetland.[39] The Court pointed out that the Corps had determined that wetlands might affect the water quality of adjacent bodies of water even when those bodies of water do not normally inundate the wetlands.[40] The wetlands may serve to filter water that eventually drains into an adjacent body of water. Additionally, even where there is little or no exchange of water between a wetland and an adjacent body of water, the wetlands may "serve significant natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing and resting sites for aquatic . . . species."[41] Considering the language the Court used in *Riverside*, it appears that the Court found the Corps' determination of its jurisdiction under the Clean Water Act not only to be "reasonable," but precisely what Congress had in mind.

In 2001, the Supreme Court revisited the meaning of "navigable waters" under the Clean Water Act in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*.[42] The petitioner, the Solid Waste Agency of Northern Cook County (SWANCC), a consortium of municipalities surrounding Chicago, chose as a solid waste disposal site an abandoned gravel pit that had developed into a number of permanent and seasonal ponds.[43] Because the operation required the filling of some of the ponds, SWANCC sought a dredge and fill permit from the Corps under section 404 of the Act.[44]

At the time of SWANCC's permit application, the Corps' regulatory definition of "waters of the United States" remained largely the same as it had been in 1975.[45] However, in 1986 the Corps had issued the "Migratory Bird Rule," which stated that the Corps' jurisdiction under section 404 extended to intrastate waters:

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

38. *Id*. at 133-34 (quoting 42 Fed. Reg. 37,128 (1977)).
39. *Id*. at 134.
40. *Id*.
41. *Riverside Bayview*, 474 U.S. at 134-35 (quoting 33 C.F.R. § 320.4(b)(2)(i) (1985)).
42. Solid Waste Agency v. United States Army Corps of Eng'rs, 531 U.S. 159 (2001).
43. *Solid Waste Agency*, 531 U.S. at 162-63.
44. *Id*. at 163.
45. *See* 33 C.F.R. § 328.3 (1999).

d. Used to irrigate crops sold in interstate commerce.[46]

Even under this expanded coverage, the Corps initially decided that its section 404 jurisdiction did not extend to the ponds in question.[47] However, after the Illinois Nature Preserves Commission informed the Corps that numerous migratory birds had been spotted at the site, the Corps chose to assert its jurisdiction over the site under subpart (b) of the Migratory Bird Rule.[48] The Corps then refused to grant SWANCC a permit.[49]

SWANCC challenged both the Corps' assertion of jurisdiction and the merits of its refusal to grant the permit.[50] The district court granted the Corps summary judgment on the jurisdictional issue, which SWANCC appealed.[51] The Seventh Circuit, in finding for the Corps, held that "the decision to regulate isolated waters based on their actual use as habitat by migratory birds is within Congress' power under the Commerce Clause, and that it was reasonable for the Corps to interpret the Act as authorizing this regulation," affirming the district court's decision.[52]

On review, the Supreme Court chose not to address the constitutionality of the Migratory Bird Rule.[53] Instead, the Court focused on whether the rule was fairly supported by the Clean Water Act, and found that it was not.[54] The Court began its analysis by stating that Congress passed the Act for the purpose of "restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters,"[55] while at the same time "recogniz[ing], preserv[ing], and protect[ing] the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use . . . of land and water resources."[56] Therefore, while Con-

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46. *Solid Waste Agency*, 531 U.S. at 164 (quoting 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986)).

47. *Id*.

48. *Id*. The Corps specifically found that 121 different species of birds had been observed at the site, many of which depended upon aquatic environments for a significant part of their lives. *Id*. The Corps formally determined that the site qualified as "waters of the United States" based on the fact that: "(1) the proposed site had been abandoned as a gravel mining operation; (2) the water areas and spoil piles had developed a natural character; and (3) the water areas are used as habitat by migratory bird [sic] which cross state lines." *Id*. at 164-65.

49. *Solid Waste Agency*, 531 U.S. at 165. The Corps' refusal to grant SWANCC a permit was based on the fact that: (1) SWANCC had not established that its plan was the "least environmentally damaging, most practicable alternative" for disposal of nonhazardous solid waste; (2) SWANCC failed to set aside sufficient funds to remediate leaks which might endanger the public drinking water supply; and (3) SWANCC failed to create an acceptable mitigation plan to reduce the project's impact upon area-sensitive species. *Id*.

50. *Id*.

51. Solid Waste Agency v. United States Army Corps of Eng'rs, 191 F.3d 845, 847 (7th Cir. 1999). SWANCC abandoned its challenge to the Corps' substantive decision to refuse it a permit. *Solid Waste Agency*, 191 F.3d at 847.

52. *Id*. at 853.

53. *Solid Waste Agency*, 531 U.S. at 174. The Court chose to read the statute as written "to avoid . . . significant constitutional and federalism questions," although there were "significant constitutional questions raised by respondents' application of their regulations." *Id*.

54. *Id*. at 167.

55. *Id*. at 166 (quoting Federal Water Pollution Control Act § 101(a), 33 U.S.C. § 1251(a) (1972)).

56. *Id*. at 166-67 (quoting Federal Water Pollution Control Act § 101(b), 33 U.S.C. § 1251(b) (1972)).

gress intended the Act to have a broad scope, certain responsibilities were to be left to the states.

Turning to their holding in *Riverside*, the Court stated that their decision upholding the Corps' jurisdictions over wetlands adjacent to navigable waterways was in large part due to "the significant nexus between the wetlands and 'navigable waters.'"[57] In the case before them, the Court believed that upholding the Corps' assertion of jurisdiction based on the Migratory Bird Rule would require the Court to "hold that the jurisdiction of the Corps extend[ed] to ponds that are *not* adjacent to open water," a conclusion inconsistent with the *Riverside* holding and Congress's intent.[58] While it was true that *Riverside*'s holding established that the phrase "navigable waters" was only to have "limited effect," the Court made it clear that "it is one thing to give a word limited effect and quite another to give it no effect whatever."[59] Consequently, the Court found that the Act did not give the Corps the power to assert jurisdiction over "isolated ponds . . . wholly located within two Illinois counties . . . because they serve as habitat for migratory birds."[60]

III. THE SPLIT BETWEEN THE COURTS OVER HYDROLOGICALLY CONNECTED GROUNDWATER

The *SWANCC* decision, while apparently reaffirming much of *Riverside*'s holding, appears to have limited the Clean Water Act's jurisdiction to: (1) actually navigable waters, (2) their tributaries, and (3) bodies of water or wetlands adjacent to each.[61] In doing so, it remains unclear which waters are isolated and which are sufficiently "adjacent to" navigable bodies of water or their tributaries to come within the scope of the Act's jurisdiction. In particular, there is a great deal of uncertainty over whether bodies of water or wetlands are isolated if it can be shown that they are hydrologically connected to a navigable body of water or to a tributary of a navigable body of water through a groundwater connection.[62] Furthermore, it remains unclear what effect, if any, the *SWANCC* holding has upon *Riverside*'s presumption that "adjacency" may be established, at least in part, on the existence of an "ecological" connection.[63]

57. *Solid Waste Agency*, 531 U.S. at 167.

58. *Id*. at 168.

59. *Id*. at 172.

60. *Id*. at 171-72.

61. *See id*. at 176-77 (Stevens, J., dissenting).

62. *Compare, e.g.*, Idaho Rural Council v. Bosma, 143 F. Supp. 2d 1169, 1180 (D. Idaho 2001) (holding that the Clean Water Act extends federal jurisdiction to groundwater that is hydrologically connected to surface waters that are themselves waters of the United States), *with* Rice v. Harken Exploration Co., 250 F.3d 264, 269-70 (5th Cir. 2001) (stating that Congress did not intend for groundwater, even when connected to a navigable body of water, to be covered by the Act).

63. While the ecological connection issue is important and has not been explored thoroughly elsewhere, this Comment focuses only on the hydrological connection issue.

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A. Isolated Groundwater

The debate over whether discharge of a pollutant into "navigable waters" includes discharges into groundwater under the Clean Water Act is not new.[64] In 1974 the United States sought a restraining order and injunctive relief against the GAF Corporation after GAF had begun drilling two deep wells that it planned to use for the disposal of organic chemical wastes by high pressure injection.[65] The government's position was that under the Act, GAF first had to seek approval from the EPA before discharging chemical wastes into deep wells if such discharges could potentially contaminate groundwater.[66] The district court stated that the "expression 'navigable waters' is defined in [section 502] to mean 'the waters of the United States, including the territorial seas.' This definition effectively excludes from consideration any concept of navigability, in law or in fact."[67] However, the court looked at the legislative history of the Act and determined that Congress did not intend "waters of the United States" to include groundwater.[68]

The court pointed out that the Senate Public Works Committee, referring to the bill that would become the Clean Water Act, stated that "[s]everal bills pending before the Committee provided authority to establish Federally approved standards for groundwaters which permeate rock, soil, and other subsurface formations. Because the jurisdiction regarding groundwaters is so complex and varied from State to State, the Committee did not adopt this recommendation."[69] Furthermore, the court noted that in 1972 Congress specifically rejected an amendment proposed by Representative Aspin that would have brought all groundwater within the enforcement purview of the Act.[70] The court believed the failure of the proposed amendment "strongly militates against a judgment that Congress intended a result that it expressly declined to enact."[71] The court further stated that it "has neither the authority nor the inclination to act where the Congress has conferred no jurisdiction."[72]

In *Exxon Corp. v. Train*,[73] a 1977 case, the Fifth Circuit addressed the applicability of the Clean Water Act's permitting program to discharges of pollutants through deep well injection, and came to the same conclusion as the court in *GAF*. The *Exxon* court, too, was convinced that the language of the Senate's report and Congress's rejection of the Aspin amendment militated against extending "waters of the United States" to include groundwa-

64. *See, e.g.*, United States v. GAF Corp., 389 F. Supp. 1379 (S.D. Tex. 1975).
65. *GAF*, 389 F. Supp. at 1380.
66. *Id*. at 1381-82.
67. *Id*. at 1383.
68. *Id*.
69. *Id*. (quoting S. REP. NO. 92-414, at 73 (1971)).
70. *GAF*, 389 F. Supp. at 1383-84 (citing 118 CONG. REC. 10,666-69 (1972)).
71. *Id*. at 1384 (quoting Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186 (1974)).
72. *Id*.
73. 554 F.2d 1310 (5th Cir. 1977).

ter.[74] The *Exxon* court went further and stated that an examination of the Act's structure also revealed Congress's intention not to extend the section 402 federal permitting program to discharges into groundwater.[75] Certain sections of the Clean Water Act specifically address groundwater.[76] For example, the court pointed out that section 104(a) of the Act states that:

> The Administrator shall establish national programs for the prevention, reduction, and elimination of pollution and as part of such programs shall—
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> . . . .
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> (5) in cooperation with the States, and their political subdivisions, and other Federal agencies establish, equip, and maintain a water quality surveillance system for the purpose of monitoring the quality of the navigable waters and ground waters and the contiguous zone and the oceans."[77]

Likewise, section 304(e) states that:

> The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall issue to appropriate Federal agencies, the States, [and] water pollution control agencies . . . (1) guidelines for identifying and evaluating the nature and extent of nonpoint sources of pollutants, and (2) processes, procedures, and methods to control pollution resulting from—
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> . . . .
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> (D) *the disposal of pollutants in wells or in subsurface excavations . . . .*"[78]

Because such language explicitly addressing groundwater was left out of the section 402 permitting system it "strongly suggest[ed] that Congress meant to stop short of establishing federal controls over groundwater pollution."[79] Curiously, however, the court made it clear that it was only addressing whether the EPA's jurisdiction over "waters of the Untied States" included *isolated* groundwater. "EPA has not argued that the wastes disposed of into wells here do, or might, 'migrate' from groundwaters back into surface waters that concededly are within its regulatory jurisdiction. We mean to express no opinion on what the result would be if that were the state of facts."[80]

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74. *Exxon*, 554 F.2d at 1325-31.
75. *Id*. at 1322.
76. *Id*.
77. *Id*. at 1323 (quoting Federal Water Pollution Control Act § 104(a), 33 U.S.C. § 1245(a)).
78. *Id*. at 1324 (quoting Federal Water Pollution Control Act § 304(e), 33 U.S.C. § 1314(a)) (alteration in original).
79. *Exxon*, 554 F.2d at 1324.
80. *Id*. at 1312 n.1 (citation omitted).

B. Hydrologically Connected Groundwater

In *Village of Oconomowoc Lake v. Dayton Hudson Corp.*,[81] the Seventh Circuit relied on the reasoning of *Exxon* to conclude that "waters of the United States" did not include groundwater, even if hydrologically connected to navigable waters or their tributaries.[82] In particular, the court placed great weight on the fact that the Senate Committee on Public Works specifically decided that the Clean Water Act's scope should not include groundwater.[83] However, the court noted that "[d]ecisions not to enact proposed legislation are not conclusive on the meaning of the text actually enacted. Laws sometimes surprise their authors. But we are confident that the statute Congress enacted excludes *some* waters, and ground waters are a logical candidate."[84] The court cited *Exxon* for support,[85] but it made no comment on the *Exxon* court's caveat that its reasoning was only intended to apply to isolated groundwater. The court failed to address *Riverside*, even though *Riverside* was handed down subsequently to the *GAF* and *Exxon* decisions and certainly had some bearing on the issue. Furthermore, the court addressed, but brushed aside, language in the Preamble to the NPDES Permit Application Regulations for Storm Water Discharges issued by the EPA that stated, "'[T]his rule-making only addresses discharges to waters of the United States, consequently discharges to ground waters are not covered by this rulemaking (unless there is a hydrological connection between the ground water and a nearby surface water body.')"[86] Courts since *Village of Oconomowoc Lake* that have concluded that "waters of the United States" does not include hydrologically connected groundwater have uniformly relied on the *Exxon* reasoning as applied by *Village of Oconomowoc Lake* yet have largely ignored *Riverside*.[87] Other courts, however, have looked to *Riverside* for guidance.

In 1986, a group of citizens living near McClellan Air Force Base brought suit against the Department of Defense claiming, among other things, that the base was violating the Clean Water Act by storing hazardous wastes in an unlined waste pit, potentially threatening groundwater con-

81. 24 F.3d 962 (7th Cir. 1994).

82. *Vill. of Oconomowoc*, 24 F.3d at 965.

83. *Id*.

84. *Id*.

85. *Id*.

86. *Id*. at 966 (quoting 55 Fed. Reg. 47990, 47997 (Nov. 16, 1990)). The court gave this language little weight because it was merely "[c]ollateral reference to a problem." *Vill. of Oconomowoc*, 24 F.3d at 966. Perhaps even stranger is the fact that the court made no reference to its earlier decision in *United States Steel Corp. v. Train*, 556 F.2d 822 (7th Cir. 1977), where it held that the EPA may regulate tributary groundwater, "at least when the regulation is undertaken in conjunction with limitations on the permittee's discharges into surface waters." *Id*. at 852.

87. *See* Rice v. Harken Exploration Co., 250 F.3d 264 (5th Cir. 2001); Patterson Farm, Inc. v. City of Britton, 22 F. Supp. 2d 1085 (D.S.D. 1998); Allegany Envtl. Action Coalition v. Westinghouse Elec. Corp., No. 96-2178, 1998 U.S. Dist. LEXIS 1838 (W.D. Pa. Jan. 30, 1998); United States v. Conagra, Inc., No. CV 96-0134-S-LMB, 1997 U.S. Dist. LEXIS 21401 (D. Idaho Dec. 31, 1997); Umatilla Waterquality Protective Ass'n v. Smith Frozen Foods, Inc., 962 F. Supp. 1312 (D. Or. 1997).

tamination.[88] The court began its analysis by determining whether "waters of the United States" included isolated groundwater.[89] The court noted that the structure of the Act, its legislative history, and the relevant case law[90] supported a finding that Congress did not intend for "waters of the United States" to include *isolated* groundwater.[91] The court then observed that neither *Exxon* nor *GAF* had addressed the issue of hydrologically connected groundwater,[92] and it therefore looked to *Riverside* for guidance.[93] The court, noting *Riverside*'s determination that the term "navigable" was to have "limited import," found that while "it is clear that Congress did not intend to require permits for discharges to isolated groundwater, it is also clear that Congress did mean to limit discharges of pollutants that could affect surface waters of the United States."[94] In the court's estimation, the Supreme Court's decision in *Riverside* that "waters of the United States" could reasonably be extended to adjacent wetlands was hinged on the Corps' determination that "adjacent wetlands 'may affect the water quality of adjacent lakes, rivers, and streams' by 'serv[ing] to filter and purify water draining into adjacent bodies of water . . . and . . . slow[ing] the flow of surface runoff into lakes, rivers, and streams'. . . ."[95] Therefore, by placing the emphasis on adjacent wetlands' hydrological effect on navigable bodies of water or their tributaries, *Riverside*'s holding logically led to a conclusion that "waters of the United States" included hydrologically connected groundwater.[96] Numerous courts have since followed *MESS*'s reasoning, yet they have often failed to address *Riverside*, relying instead on the general purposes of the Clean Water Act.[97]

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88. McClellan Ecological Seepage Situation v. Weinberger, 707 F. Supp. 1182, 1193 (E.D. Cal. 1988), *rev'd on other grounds*, 504 U.S. 902 (1992).

89. *McClellan Ecological*, 707 F. Supp. at 1193-94.

90. The *McClellan Ecological* (*MESS*) court relied heavily on the *Exxon* decision. *See id*. at 1195.

91. *Id*. at 1193-94.

92. *Id*. at 1195.

93. *Id*.

94. *McClellan Ecological,* 707 F. Supp. at 1196.

95. *Id*. at 1196.

96. *See id*. The court further stated that a mere assertion that groundwater might be hydrologically connected "is not enough to bring the alleged discharge[] within the parameters of the NPDES program. Rather, MESS must establish that the groundwater is naturally connected to surface waters that constitute 'navigable waters' under the Clean Water Act." *Id*. *Cf.* Charter Township of Van Buren v. Adamkus, No. 98-1463, 1999 U.S. App. LEXIS 21037, at *6 (6th Cir. Aug. 30, 1999) (holding that when a court is reviewing an agency's decision involving a technical record, such as a determination whether a hydrological connection exists, the court's review is unusually deferential, holding the Agency to "minimal standards of rationality").

97. *See, e.g.*, Idaho Rural Council v. Bosma, 143 F. Supp. 2d 1169, 1180 (D. Idaho 2001) (stating that "whether pollution is introduced by a visible, above-ground conduit or enters the surface water through the aquifer matters little to the fish, waterfowl, and recreational users which are affected by the degradation of our nation's rivers and streams"); Woodward v. Goodwin, No. C 99-1103 MJJ, 2000 U.S. Dist. LEXIS 7642 (N.D. Cal. May 12, 2000); Mut. Life Ins. Co. of New York v. Mobil Corp., No. 96-CV-1781, 1998 U.S. Dist. LEXIS 4513 (N.D.N.Y. Mar. 31, 1998); Williams Pipe Line Co. v. Bayer Corp., 964 F. Supp. 1300 (S.D. Iowa 1997); Friends of Santa Fe County v. LAC Minerals, Inc., 892 F. Supp. 1333, 1358 (D.N.M. 1995) (stating that "the Tenth Circuit's expansive construction of the CWA's jurisdictional reach . . . foreclose[s] any argument that the CWA does not protect groundwater with some connection to surface waters"); Wash. Wilderness Coalition v. Hecla Mining Co., 870 F. Supp. 983

IV. A FURTHER EXAMINATION OF THE RELEVANT LEGISLATIVE HISTORY

Contrary to the court's finding in *Village of Oconomowoc Lake*, an examination of the legislative history of the Clean Water Act does not unambiguously lead to a conclusion that Congress did not intend for "waters of the United States" to include hydrologically connected groundwater. The Senate Public Works Committee Report does state, "Several bills pending before the Committee provided authority to establish Federally approved standards for groundwaters which permeate rock, soil, and other subsurface formations. Because the jurisdiction regarding groundwaters is so complex and varied from State to State, the Committee did not adopt this recommendation."[98] However, by choosing not to extend federal authority to all groundwater, including isolated groundwater, it does not necessarily follow that Congress did not intend to regulate hydrologically connected groundwater.[99] The same report states that:

> The Committee recognizes the essential link between ground and surface waters and the artificial nature of any distinction. Thus the Committee bill requires in section 402 that each State include in its program for approval under section 402 affirmative controls over the injection or placement in wells or any pollutants that may affect ground water. This is designed to protect ground waters and eliminate the use of deep well disposal as an uncontrolled alternative to toxic and pollution control.
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> . . . .
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> . . . Deep-well disposal raises a possibility of irrevocable damage to public aquifers and slow dissemination of pollutants into potential water supplies.[100]

Though the report also notes that "rivers, streams and lakes themselves are largely supplied with water from the ground,"[101] it seems clear that the Senate Committee was primarily concerned with isolated groundwater, particularly the effects of deep well injection on groundwater, and had considered

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(E.D. Wash. 1994); Sierra Club v. Colo. Refining Co., 838 F. Supp. 1428 (D. Colo. 1993). In *Colorado Refining Co.*, the court cited for support *Quivira Mining Co. v. United States EPA*, 765 F.2d 126 (10th Cir. 1985), which held that the EPA had the authority under the Clean Water Act to issue NPDES permits regulating uranium mining discharges into frequently dry arroyos because "the waters of the [arroyos] soak into the earth's surface, become part of the underground aquifers, and after a lengthy period . . . the underground water moves toward eventual discharge at Horace Springs or the Rio San Jose." *Id*. at 130.

98. S. REP. NO. 92-414, at 73 (1971).

99. *See Idaho Rural Council*, 143 F. Supp. 2d at 1180 (stating that "the interpretive history of the CWA only supports the unremarkable proposition with which all courts agree–that the CWA does not regulate 'isolated/nontributary groundwater' which has no affect [sic] on surface water").

100. S. REP. NO. 92-414 at 73.

101. *Id*.

extending the scope of the Act to include even isolated groundwater as a result.

Likewise, the rejection of Representative Aspin's proposed amendment, which the court in *Village of Oconomowoc Lake* relied on as evidence of Congress's intent not to regulate any groundwater,[102] does not necessarily suggest that Congress did not intend for "waters of the United States" to include hydrologically connected groundwater. Aspin's proposed amendment would have brought all groundwater within the scope of the Act's enforcement section.[103] Like the Senate Public Works Committee, Aspin was concerned with the effects of deep well injection on *both* isolated groundwater and hydrologically connected groundwater.[104] Aspin stated that:

> Ground water appears in this bill in every section, in every title except title IV. It is under the title which provides EPA can study ground water. It is under the title dealing with definitions. But when it comes to enforcement, title IV, the section on permits and licenses, then ground water is suddenly missing. That is a glaring inconsistency which has no point. If we do not stop pollution of ground waters through seepage and other means, ground water gets into navigable waters, and to control only the navigable water and not the ground water makes no sense at all.[105]

Aspin further stated that his amendment:

> [E]liminate[s] the inconsistency between the way we treat oil companies in this bill and the way we treat other companies. Oil companies and other industries can pollute ground water, through the operation of what are called "waste injection wells."
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> . . . .
>
> . . . What this bill does is cover the waste injection wells of every industry except oil. . . . [T]his is an inconsistency which should not be allowed to stand.[106]

Though some of the debate over the Aspin amendment focused on the difficulty of regulating all of the nation's groundwater,[107] much of the de-

102. Vill. of Oconomowoc Lake v. Dayton Hudson Corp., 24 F.3d 962, 965 (7th Cir. 1994).
103. 92 CONG. REC. 10,666 (1972).
104. *See id*.
105. *Id*.
106. *Id*. Under section 304 of the Clean Water Act, the EPA is required to publish information on the effect of certain pollutants present in groundwater on human health and the environment. Federal Water Pollution Control Act § 304, 33 U.S.C. § 1314 (1972). Waste injection wells would also have to meet federal or federally-approved standards. *Id*. However, certain by-products of the oil production process were excluded from the definition of a "pollutant." *Id*. § 502.
107. Representative Clausen, opposing the bill, stated that "it was determined by the committee that there was not sufficient information on ground waters to justify the types of controls that are required for

bate centered on the concessions made for the oil industry. For instance, Representative Fascell, in support of the amendment stated:

> [I]t seems to me the issue is equal application of Federal standards. If we are going to make these standards apply to the steel companies and the chemical companies and the paper companies . . . it seems to me that we ought to make it apply equally to oil companies.[108]

Representative Kastenmeier, also in support of the amendment, stated, "There is no other industry in America that is more pampered and that benefits more from special-interest legislation than that of oil. . . . [T]he oil industry and its friends in the Congress now have the sheer nerve to seek an exemption from our antipollution laws."[109] Representative Roberts, opposing the amendment, stated that "[t]here is no industry in the world that is regulated as much as the drilling industry. . . . I agree with [Aspin]'s position . . . but we have more stringent regulation now on the oil industry than we could ever impose through this legislation."[110] Therefore, by looking at the record, it is reasonable to conclude that Congress's rejection of the Aspin amendment supports a conclusion that isolated groundwater was not intended to be included as "waters of the United States." However, this does not necessarily mean that Congress intended hydrologically connected groundwater to be excluded. The fact that Congress was at least as concerned about certain loopholes made for the oil industry tends to negate any intent that may be derived from their rejection of the Aspin amendment.

V. A LOOK AT WHAT'S LEFT—*RIVERSIDE*'S MANDATE IN LIGHT OF *SWANCC*

Under *Chevron v. Natural Resources Defense Council*,[111] because the language of the Clean Water Act is unclear, the legislative history of the Act is inconclusive, and the EPA has not clarified the issue, interpretation of "waters of the United States" should be governed by the meaning that the United States Supreme Court has attached to the phrase.[112] In fact, the *MESS* court did precisely that and came to the conclusion that "waters of the United States" included hydrologically connected groundwater.[113] In *River-*

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navigable waters." 92 CONG. REC. 10,667 (1972).

108. *Id*.

109. *Id*. at 10,669.

110. *Id*. at 10,668.

111. 467 U.S. 837 (1984).

112. *See Chevron*, 467 U.S. at 842-43 (stating that courts are left with the obligation of interpreting ambiguous statutory language on their own where the Agency empowered to enforce the statute has not clarified the issue). It naturally follows that where the United States Supreme Court has provided guidance concerning the proper interpretation of ambiguous statutory language, lower courts are obliged to follow it.

113. McClellan Ecological Seepage Situation v. Weinberger, 707 F. Supp. 1182, 1196 (E.D. Cal.

side, the Supreme Court made it clear that "navigable waters," defined as "waters of the United States," was to have "limited import" in order to effectuate Congress's intent of restoring the nation's waters.[114] The Court pointed out the importance of the Corps' finding that adjacent wetlands "*may* affect the water quality of adjacent lakes, rivers, and streams," whether water from an adjacent body of water flows into a wetland or vice-versa.[115] More specifically, the Court upheld the Corps' definition of a "wetland" which included lands that are "inundated . . . by surface *or ground water*."[116] Therefore, it seems apparent that "waters of the United States," as interpreted by the Supreme Court, includes any water that could reasonably be determined to have an effect on navigable waters. Groundwater that is hydrologically connected to navigable waters surely falls within this scope.

This conclusion is still viable after *SWANCC*. The Supreme Court's main concern in *SWANCC* was that "navigable waters" must be given *some* meaning.[117] The Court stated that this language is given content as long as it can be shown that there is a "significant nexus" between the subject of regulation and "navigable waters."[118] For instance, turning to their holding in *Riverside*, the Court reaffirmed its decision upholding the Corps' regulation over wetlands adjacent to navigable waters considering the fact that the water quality of wetlands was "inseparably bound up with the 'waters' of the United States."[119] In comparison, the Migratory Bird Rule at issue in *SWANCC* went too far.[120] To bring completely isolated ponds under the definition of "waters of the United States" because of the presence of migratory birds would have rendered the language meaningless.[121] Turning to the issue of hydrologically connected groundwater, it seems clear that a "substantial nexus" exists to bring such groundwater within the scope of the Clean Water Act's jurisdiction.

VI. CONCLUSION

While some have read the *SWANCC* decision as a significant restriction on the scope of the Clean Water Act,[122] in actuality, *SWANCC* reaffirmed much of what the Court earlier held in *Riverside*. The "substantial nexus"

1988), *rev'd on other grounds*, 504 U.S. 902 (1992).

114. *See* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 133 (1985).

115. *Riverside Bayview*, 474 U.S. at 134 (emphasis added).

116. *Id*. at 129.

117. Solid Waste Agency v. United States Army Corps of Eng'rs, 531 U.S. 159, 172 (2001).

118. *Solid Waste Agency*, 531 U.S. at 167.

119. *Id*. (quoting United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 134 (1985)).

120. *See id*. at 168.

121. *See id*. Perhaps if the Corps' regulations had more specifically focused on the ecological connection between isolated ponds and navigable waters, the Court would have decided this case differently.

122. *See, e.g.*, William Funk, *The Court, the Clean Water Act, and the Constitution:* SWANCC *and Beyond*, 31 ENVTL. L. REP. 10741 (2001) (referring to the *SWANCC* decision as "the most devastating judicial opinion affecting the environment ever").

test annunciated by the Court in *SWANCC* is nothing more than a clarification of the standard first established in *Riverside* for determining the scope of "waters of the United States" under the Act. As for the issue of whether the Act extends to groundwater hydrologically connected to navigable surface waters or their tributaries, the *SWANCC* decision, consequently, demands the same result that would have been achieved under *Riverside*. In either case, a "significant nexus" clearly exists between groundwater and navigable surface waters or their tributaries where it can be established that a hydrological connection exists between the two. Unfortunately, in the past many courts either paid too little attention to *Riverside*'s holding or too much attention to the rejection of the Aspin amendment. Hopefully, *SWANCC*'s clarification will lead to a more consistent application of the Clean Water Act.

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