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After SWANCC, the Fourth and Fifth Circuits Dispute Federal Jurisdiction over Non-navigable Waterways •

*United States v. Deaton*¹ and *In re Needham*², decided within six months of each other in 2003, represent opposing positions in the vigorous debate over Congress's constitutional authority to regulate activity bearing only indirectly on interstate commerce. In these two decisions, the Fourth Circuit and the Fifth Circuit gave broad and narrow readings, respectively, of how closely related a non-navigable waterway must be to a navigable waterway in order to fall within federal jurisdiction under the Clean Water Act. The United States Supreme Court's 2001 decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs (SWANCC)*³ significantly narrowed the federal government's jurisdiction over non-navigable waterways without providing adequate guidelines for determining jurisdictional boundaries. The Fourth Circuit found in *Deaton* that a broad construal of federal jurisdiction over non-navigable waterways is both constitutional and appropriate under the Clean Water Act. The Fifth Circuit, however, held in *Needham* that such a broad reading is not supported by the Clean Water Act, and may surpass congressional authority under the Commerce Clause. The split in the circuits and the lack of adequate guidelines makes this issue ripe for reevaluation by the Court. Given the "breadth of congressional concern for protection of water quality and aquatic ecosystems"⁴ illustrated in the Clean Water Act, federal jurisdiction ought to extend as far as necessary to prevent contamination of navigable waterways. As such, the expansive reading of federal jurisdiction set forth in *Deaton* ought to hold.

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1. 332 F.3d 698 (4th Cir. 2003).

2. 354 F.3d 340 (5th Cir. 2003).

3. 531 U.S. 159 (2001).

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

SWANCC: LIMITED FEDERAL JURISDICTION OVER NON-NAVIGABLE WATERWAYS

In the 2001 *SWANCC* decision, the Supreme Court excluded an intrastate “abandoned . . . gravel pit . . . which [provided] habitat for migratory birds”⁵ from federal jurisdiction under the CWA, finding no “significant nexus”⁶ between the pit and any navigable waterway. The Court held that despite both the Army Corps of Engineer’s own expansive regulatory definition of regulable “waters of the United States,” and its 1986 Migratory Bird Rule extending jurisdiction over a broad spectrum of migratory bird habitat,⁷ these administrative rules raised significant constitutional questions because Congress did not clearly convey an intent to authorize such expansive jurisdiction.⁸ The Court held that under a strict interpretation of the CWA, the Corps’ statutory jurisdiction extended only to waters that “were or had been navigable in fact or which could reasonably be so made.”⁹

UNITED STATES V. DEATON:¹⁰ A BROAD READING OF THE CORPS’ JURISDICTION

In 1995, the United States government sued James and Rebecca Deaton for pollution resulting from unlawful excavation of a 1,100-foot ditch across non-tidal wetlands.¹¹ The government alleged that placement of excavated soil on these wetlands, although part of the Deatons’ private property, was a violation of section 404(a) of the Clean Water Act (CWA).¹² Section 404(a) requires a permit from the Army Corps of Engineers for any activity that pollutes navigable waters by discharging fill material into navigable waters, their tributaries, or wetlands adjacent to either.¹³ The Corps alleged jurisdiction over the Deatons’ wetlands because they were adjacent to a roadside drainage ditch, which in turn drained into a network of tributaries eventually reaching the Wicomico river in Wicomico County, Maryland.¹⁴ The district court found in favor of the Deatons. The Fourth Circuit reversed, and the district court subsequently denied the Deatons’ motion to reconsider the question in light of *SWANCC*. On appeal from the denial of the motion to reconsider, the Fourth Circuit upheld this decision, finding for the Corps.

In its later decision, the Fourth Circuit first determined that the Corps did not exceed its authority delegated by Congress, pursuant to the Commerce Clause, in treating the ditch as a non-navigable tributary of a

5. *SWANCC*, 531 U.S. at 162.

6. *Id.* at 167.

7. *Id.* at 164.

8. *Id.* at 174.

9. *Id.* at 172.

10. 332 F.3d 698 (4th Cir. 2003).

11. *Id.* at 703.

12. *Id.*; 33 U.S.C. § 1344(a) (2000).

13. 33 C.F.R. §§ 328.3(a)(1), (5), (7) (2004).

14. *Deaton*, 332 F.3d at 702.

navigable waterway.¹⁵ The Commerce Clause grants Congress broad power to “keep the channels of interstate commerce free from . . . injurious uses,” even if such uses are themselves non-commercial.¹⁶ Congress or its delegates—here, the Corps—may intervene when a use of non-navigable waters injures those navigable waters serving as channels for interstate commerce, including injury from pollution.¹⁷ Thus, finding that the CWA and the Corps’ regulation do not unconstitutionally stretch Congressional authority or “alter the federal-state framework,”¹⁸ the court rejected the Deatons’ constitutional claim.¹⁹

The court next addressed the Deatons’ assertion that even if no constitutional question existed, under *SWANCC* neither the CWA nor the Corps’ regulatory interpretation of the CWA ought to extend to the ditch.²⁰ According to the Deatons, under *SWANCC* the ditch was beyond the Corps’ jurisdiction and so any assertion of federal jurisdiction over the ditch or their wetlands was an unconstitutional extension of Congressional authority.²¹ The court found that the Corps’ jurisdiction over the ditch, and consequently over the wetlands, was proper under the CWA.²² The Deatons unsuccessfully argued that, because the water flowing through the ditch must pass through a network of other non-navigable waterways before it reaches the “navigable Wicomico River,” the ditch is not a tributary of a navigable waterway.²³ In rejecting this argument, the court deferred to the Corps’ regulatory interpretation construing the CWA’s already-expansive definition of “navigable waters”²⁴ to mean “the entire tributary system . . . whose waters eventually flow into navigable waters.”²⁵ The court rejected the Deatons’ argument that *SWANCC* would forbid such a broad regulatory interpretation after the Corps had promulgated a narrower definition of ‘navigable waters’ in the 1970’s.²⁶ Instead, the court saw a permissible, scientifically and politically informed evolution of the Corps’ interpretation of its own jurisdiction, and deferred to the Corps’ current interpretation since there was no apparent conflict between that interpretation and Congressional intent as expounded in the CWA.²⁷

15. *Id.* at 708.

16. *Caminetti v. United States*, 242 U.S. 470 (1917) (quoted in *Deaton*, 332 F.3d at 706).

17. *United States v. Deaton*, 332 F.3d 698, 707 (4th Cir. 2003).

18. *Id.*

19. *Id.* at 708.

20. *Id.*

21. *Deaton*, 332 F.3d at 703.

22. *Id.* at 708.

23. *Id.*

24. 33 U.S.C. §§ 1344(a), 1362(7).

25. *United States v. Deaton*, 332 F.3d 698, 710 (4th Cir. 2003).

26. *Id.* at 711.

27. *Id.*

The court found that there existed a “significant nexus” between the Deatons’ wetland and a navigable waterway via non-navigable tributaries, including the ditch.²⁸ The court affirmed the Corps’ argument, uncontested by the Deatons, that pollution affecting non-navigable tributaries may substantially affect navigable waterways.²⁹ Given the court’s finding that the Corps’ expansive jurisdiction was constitutional, both the ditch and the adjacent wetland were thus subject to regulation by the Corps under the CWA.³⁰ The Fourth Circuit ultimately affirmed the district court’s remediation order and denied the Deatons’ motion to reconsider the Corps’ jurisdiction over the ditch.³¹

IN RE NEEDHAM:³² A NARROW READING OF CORPS’ JURISDICTION

Six months after the Fourth Circuit’s decision in *Deaton*, the Fifth Circuit Court of Appeals issued a decision applying the Oil Pollution Act (OPA) to a non-navigable waterway adjacent to navigable waters. In *Needham*,³³ the court found that the OPA’s definition of navigable waters, which was identical to the definition promulgated in the CWA, reasonably may be read to include waters that are not “navigable-in-fact” but that are “adjacent to open water.”³⁴ Under this definition, the oil spill in question—discharge by a Needham employee into a drainage ditch that spread into a nearby bayou that connected, in turn, to a canal flowing into the Gulf of Mexico—came within federal jurisdiction pursuant to the OPA.³⁵

Although the court approved of federal jurisdiction over the drainage ditch, ultimately the *Needham* decision promulgated a narrow reading of *SWANCC*. Significantly, the court condemned the broad regulatory interpretation of ‘navigable waters’ as condoned in *Deaton*, holding that in accordance with *SWANCC* neither the CWA nor the OPA may authorize federal regulation of “‘tributaries’ that are neither themselves navigable nor truly adjacent to navigable waters.”³⁶ The *Needham* court found that such an overbroad interpretation of either the CWA or the OPA’s definition of ‘navigable waters’ might constitute an encroachment by Congress onto areas of state supremacy, thereby

28. *SWANCC*, 531 U.S. at 167 (quoted in *Deaton*, 332 F.3d at 712).

29. *Deaton*, 332 F.3d at 712.

30. *Id.* The court also rejected the Deatons’ claim that their property does not contain wetlands, since the Deatons did not dispute either the definition of ‘wetlands’ promulgated by the Corps or the Corps’ analysis of the Deatons’ property revealing it to fall within the parameters of that definition. *Id.* at 712-13.

31. *Id.*

32. 354 F.3d 340 (4th Cir. 2003).

33. *Id.*

34. *Id.* at 345.

35. *Id.* at 346-47.

36. *Id.* at 345.

violating the Commerce Clause.³⁷ Instead, this court affirmed the holding in *Rice v. Harken Exploration Co.*, that there must be a “close, direct, and proximate link between . . . [the] . . . discharges of oil and any resulting actual, identifiable oil contamination of natural surface water” in order to trigger federal jurisdiction under the OPA.³⁸

Nonetheless, the court found that even under this narrow interpretation, Needham’s oil spill sufficiently impacted navigable-in-fact waters or waters adjacent to an open body of navigable waters to constitute a violation of the OPA.³⁹ The court based its decision on undisputed testimony that the oil spill traveled from the drainage ditch into Bayou Folse, which is adjacent to an open and navigable canal, and is itself arguably navigable-in-fact.⁴⁰

In its analysis of the term “adjacent” found in the statute, the court again rejected the interpretation of “navigable waters” encompassing distant, non-navigable tributaries.⁴¹ The court found that according to both regulatory and dictionary definitions, “adjacency” connotes nearness or direct contact. Consequently, for the court to find remote and disconnected tributaries or wetlands to be adjacent to navigable bodies of water would “extend the OPA beyond the limits set forth in *SWANCC*.”⁴² Regardless, the court found that the oil spill at issue was subject to federal regulation under the Oil Pollution Act, and remanded the matter to the lower court.⁴³

SWANCC CREATED JUDICIAL UNCERTAINTY REGARDING NON-NAVIGABLE
WATERWAYS

Taken together, these decisions illustrate judicial uncertainty regarding the extent of Congressional authority over non-navigable waterways in the wake of *SWANCC*. Because “the Court [in *SWANCC*] did not clearly define which adjacent wetlands and tributaries are within the scope of the [CWA],”⁴⁴ lower courts have issued a range of inconsistent holdings regarding the Corps’ jurisdiction.⁴⁵ Here, the Fourth Circuit held that a broad spectrum of activity at considerable distances from navigable waters may still sufficiently impact those waters to invoke the CWA; however, in the Fifth Circuit, *Needham* cautions that such an

37. *Id.* at 346.

38. 250 F.3d 264, 272 (5th Cir. 2001) (quoted in *Needham*, 354 F.3d at 346).

39. *In re Needham*, 354 F.3d 340, 347 (4th Cir. 2003).

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. Bradford C. Mank, *The Murky Future of the Clean Water Act after SWANCC: Using a Hydrological Connection Approach to Saving the Clean Water Act*, 30 *ECOLOGY L.Q.* 811, 814 (2003).

45. *Id.* at 860-79.

interpretation pushes the limits of Congress's regulatory authority over activity that only indirectly affects interstate commerce.

This pervasive ambiguity suggests that the definition of 'navigable waters' and the constitutional scope of the CWA promulgated in *SWANCC* ought to be revisited by the Supreme Court. If, as Justice Stevens wrote in his dissent to *SWANCC*, the majority in that case incorrectly invalidated the Corps' broad administrative definition of waterways subject to regulation and disregarded Congressional support for that definition,⁴⁶ a farther-reaching definition may be appropriate. Either way, the inconsistency among the Circuits ought to impel the Court to issue uniform and comprehensive guidelines for lower courts to use in determining the extent of federal jurisdiction over intrastate waterways. Additionally, legislative treatment of this inconsistency may also be appropriate. Although the cases here come out differently on the question of jurisdiction, both decisions hold parties liable for their pollution-generating activities and thus promote and preserve clean water. Since this outcome both represents Congressional intention as enacted in the Clean Water Act, and serves to protect the delicate ecological balance of United States waterways, Corps jurisdiction over non-navigable waterways ought not to be restricted where such a restriction would reasonably allow the pollution of navigable waterways. As such, the broad construal of the Corps' jurisdiction set forth by the Fourth Circuit is the more appropriate, and ought to guide future holdings concerning this question.

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46. *SWANCC*, 531 U.S. at 177 (Stevens, J., dissenting).