

NOTE

THE LIMIT OF GOVERNMENT'S REGULATORY AUTHORITY OVER NON-ADJACENT WETLANDS: *HOFFMAN HOMES, INC. v. EPA*

I. INTRODUCTION

Wetlands are defined as “those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.”¹ Historically, wetlands have been viewed as wastelands, nuisances² and no more than breeding grounds for disease-carrying insects.³ As a result of this negative thinking, Congress made “wetland reclamation” a national policy in the mid-1800s.⁴ This pattern of thinking continued through the turn of the century, when the Supreme Court viewed wetlands as nuisances and stated that removing wetlands was a legitimate exercise of police power.⁵ Dredging, filling, and draining wetlands for developmental purposes was considered part of progress.⁶ Gradually, the federal government began to recognize wetlands for the important ecological functions they serve, including water purification, flood prevention, maintenance of ground-water supplies, and the provision of fish and wildlife habitat.⁷

However, many wetlands that are the object of federal concern have no hydrological connection to interstate surface waters⁸ or interstate ground water reservoirs,⁹ and are therefore isolated, or non-adjacent, wet-

1. 33 C.F.R. § 328.3(b) (1993). *See also* 40 C.F.R. § 230.3(t) (1993).

2. WILLIAM L. WANT, *LAW OF WETLANDS REGULATION* § 2.02[1] (1993).

3. Flint B. Ogle, Comment, *The Ongoing Struggle Between Private Property Rights and Wetlands Regulation: Recent Developments and Proposed Solutions*, 64 U. COLO. L. REV. 573 (1993).

4. WANT, *supra* note 2, § 2.02[1]. The Swamp Lands Acts of 1849, 1850, and 1860 gave nearly 65 million acres of wetlands to 15 western states for swamp reclamation. *Id.*

5. “If there is any fact which may be supposed to be known by everybody, and therefore by courts, it is that swamps and stagnant waters are the cause of malarial and malignant fevers, and that the police power is never more legitimately exercised than in removing such nuisances.” *Leovy v. United States*, 177 U.S. 621, 636 (1900).

6. Ogle, *supra* note 3, at 573.

7. WANT, *supra* note 2, § 2.01[3].

8. “Surface water” is defined by the EPA as “all water which is open to the atmosphere and subject to surface runoff.” 40 C.F.R. § 141.2 (1993). Examples of surface water include “lakes, ponds, reservoirs, artificial impoundments, streams, rivers, springs, seeps and wetlands.” *Id.* § 131.35.

9. “Ground water” is defined by the EPA as “water below the land surface in a zone of saturation.” 40 C.F.R. §§ 144.3, 146.3 (1993).

lands.¹⁰ Thus, it may seem unlikely to the ordinary landowner that the federal government can assert jurisdiction over these intrastate, isolated wetlands. However, the U.S. Supreme Court has held that the federal government may regulate practically anything that substantially "affects" interstate commerce.¹¹

Federal regulations may also affect private property owners if a wetland lies within the borders of their property. This would occur if the federal government required wetland preservation, limiting the landowner's use of the property and significantly destroying the value of that property. However, severe federal and state budgetary problems have made it difficult for the federal government to pay landowners for the loss of value to their land caused by a regulatory requirement to preserve wetlands.

As a consequence, private landowners are challenging the preservation requirement on two grounds: first, there is a lack of federal jurisdiction to regulate the wetland because there is no connection between the wetlands and a federal constitutional authority to regulate;¹² second, the preservation requirement constitutes a regulatory taking without just compensation.¹³ With respect to the jurisdictional issue, the U.S. Supreme Court has ruled that Congress has the power to regulate local activities that have a substantial and harmful effect on interstate commerce.¹⁴ However, many commentators argue that the Supreme Court should adopt a more restrictive reading of the Commerce Clause.¹⁵ With respect to the takings issue, many commentators argue that all regulation that unreasonably limits the value of private property should be declared unconstitutional unless the property owner is justly compensated as required by the Fifth Amendment.¹⁶ However, precedent states that the government may regulate to promote the public interest without compensating the private property owners for any limits on the value of the property imposed by the regulation.¹⁷ In short, these are the concerns that the private property owners,

10. "Adjacent" is defined in the Corps and EPA regulations as "bordering, contiguous, or neighboring." 33 C.F.R. § 328.3(c) (1993); 40 C.F.R. § 230.3(b) (1993). Therefore, non-adjacent, isolated wetlands can be viewed as those wetlands that are not bordering, contiguous, or neighboring (i.e., have no hydrological connection to) any waters of the United States.

11. *Wickard v. Fillburn*, 317 U.S. 111, 125 (1942) (An activity may be reached "if it exerts a substantial economic effect on interstate commerce.").

12. See *infra* notes 119-137 and accompanying text.

13. See *infra* notes 138-149 and accompanying text.

14. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964).

15. See, e.g., LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 5-7 at 313-14 (2d ed. 1988); Vincent A. Cirillo & Jay W. Eisenhofer, *Reflections on the Congressional Commerce Power*, 60 *TEMP. L.Q.* 901 (1987); Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 *VA. L. REV.* 1387 (1987).

16. U.S. CONST. amend. V. See, e.g., RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985); E. PAUL, *PROPERTY RIGHTS AND EMINENT DOMAIN* (1987); James S. Burling, *Property Rights, Endangered Species, Wetlands, and Other Critters—Is It Against Nature to Pay for a Taking?*, 28 *LAND & WATER L. REV.* 309 (1992); Richard A. Epstein, *Takings: Descent and Resurrection*, 1987 *SUP. CT. REV.* 1; Gideon Kanner, *Condemnation Blight: Just How Just Is Just Compensation?*, 48 *NOTRE DAME L. REV.* 765 (1973); Norman Karlin, *Back to the Future: From Nollan to Lochner*, 17 *SW. U. L. REV.* 627 (1988).

17. *Mugler v. Kansas*, 123 U.S. 623 (1887).

environmental regulators, and the judiciary must face when dealing with environmental preservation of wetlands.

This Note discusses the federal government's regulatory jurisdiction over an intrastate, non-adjacent wetland.¹⁸ Part II begins with a basic overview of the Clean Water Act, its regulatory interpretations, and relevant case law concerning the issue of the federal government's regulation of isolated wetlands. Part III states the pertinent facts and traces the prior history of *Hoffman Homes, Inc. v. EPA*,¹⁹ a recent Seventh Circuit decision regarding the EPA's regulatory jurisdiction over an isolated wetland. Part IV gives the holding of this case, and Part V analyzes the opinion, discusses implications for future cases and suggests how the court should have properly addressed these concerns. This Note (1) concludes that the EPA's attempt to assert jurisdiction over isolated wetlands under the Clean Water Act is contrary to Congressional intent and goes beyond the limits of the Commerce Clause and (2) suggests that a possible response is to strictly enforce the Fifth Amendment's Takings Clause.

II. BACKGROUND

A. *The Clean Water Act*

As a regulatory scheme to improve water quality, Congress enacted the Clean Water Act (CWA),²⁰ whose express purpose is to "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."²¹ The administrator of the Environmental Protection Agency (EPA) and the Secretary of the Army, acting through the Chief Engineer of the Army Corps of Engineers (Corps), have concurrent responsibility to administer and enforce the terms of the CWA.²²

Section 404 of the CWA is the primary source for federal regulation of wetlands.²³ This section seeks to control water pollution by prohibiting "dredge"²⁴ and "fill"²⁵ activities in navigable waters, defined in the CWA as "waters of the United States,"²⁶ unless authorized by a permit issued by

18. See *supra* note 10 and accompanying text.

19. 999 F.2d 256 (7th Cir. 1993).

20. 33 U.S.C. §§ 1251-1387 (1988). As a result of a heightened environmental awareness and an improved understanding of the advantageous functions that wetlands provide, Congress amended the Federal Water Pollution Control Act in 1972 and 1977. Federal Water Pollution Control Act, Pub. L. No. 92-500, 80 Stat. 816 (1972), amended by Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (1977). This Note will refer to the water pollution control statute as the "Clean Water Act," which is the more common name used for the 1977 Amendments to the Federal Water Pollution Control Act.

21. 33 U.S.C. § 1251(a) (1988).

22. *Id.* §§ 1342, 1344.

23. *Id.* § 1344. The CWA provides a measure of protection for wetlands that was previously unavailable. See *supra* notes 2-6 and accompanying text.

24. The term "dredged material" means "material that is excavated or dredged from waters of the United States." 33 C.F.R. § 323.2(c) (1993).

25. The term "fill material" means "any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody." 33 C.F.R. § 323.2(e) (1993).

26. 33 U.S.C. § 1362(7) (1988). Although the CWA was originally interpreted to cover only waters actually navigable, the Corps expanded this definition in 1975 to include certain nonnavigable

the Corps.²⁷ Because the word "wetlands" never appears in the language of the CWA itself, the regulations that interpret the CWA determine the Corps' jurisdictional reach over intrastate, isolated wetlands.²⁸ In their regulations, the EPA and the Corps assert jurisdiction over certain "other waters such as intrastate . . . wetlands," if the use or misuse of the wetlands "could affect interstate . . . commerce."²⁹ This expansive assertion of federal jurisdiction over intrastate wetlands has created major conflicts between environmental regulators and property owners.

B. *Prior Case Law*

While the CWA allows regulation of "waters of the United States,"³⁰ it is not evident whether the Corps can extend its authority to regulate intrastate, isolated wetlands. The Supreme Court has yet to decide this particular issue, although there has been some discussion of it in the federal courts of appeal.

One of the first Supreme Court cases to deal with the extent of the federal government's jurisdiction over wetlands under the CWA was *United States v. Riverside Bayview Homes*.³¹ The Court restricted its

waters. Permits for Activities in Navigable Waters, 40 Fed. Reg. 31,320 (1975). There is no further guidance in the language of the CWA as to what "navigable waters" or "waters of the United States" includes. However, "waters of the United States" has been defined in the Corps' regulations to include:

- (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- (2) All interstate waters including interstate wetlands;
- (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
 - (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
 - (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
 - (iii) Which are used or could be used for industrial purposes by industries in interstate commerce;
- (4) All impoundments of waters otherwise defined as waters of the United States under this definition;
- (5) Tributaries of waters identified in paragraphs (a)(1) through (4) of this section;
- (6) The territorial seas;
- (7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section. Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States.

33 C.F.R. § 328.3(a)(1)-(7) (1993). The EPA's definition of "waters of the United States" is identical. 40 C.F.R. § 230.3(s)(1)-(7) (1993).

27. 33 U.S.C. § 1344(a) (1988). The CWA requires that section 404 permit applications be evaluated by the Corps under regulations developed jointly by the Corps and EPA. *Id.* § 1344(b).

28. See *supra* notes 1, 10 and accompanying text.

29. 33 C.F.R. § 328.3(a)(3) (1993); 40 C.F.R. § 230.3(s)(3) (1993). See also *supra* note 26.

30. 33 C.F.R. § 328.3(a) (1993); 40 C.F.R. § 230.3(s) (1993).

31. 474 U.S. 121 (1985).

review to whether the Corps' exercise of jurisdiction over adjacent wetlands was "reasonable, in light of the language, policies, and legislative history of the CWA."³² The Court focused on the stated objective of the CWA "to restore and maintain the chemical, physical and biological integrity of the Nation's waters,"³³ which, according to the legislative history, included maintaining and improving water quality.³⁴ Within the legislative history, the Court found that the CWA was intended to protect "aquatic ecosystems," and that broad federal power is required to control water pollution because "water moves in hydrological cycles and it is essential that discharge of pollutants be controlled at the source."³⁵ The Court reasoned that, because adjacent wetlands help protect and enhance water quality, protection of those adjacent wetlands furthers the objective of the CWA.³⁶ Therefore, the Court held that it was reasonable for the Corps to extend its section 404 jurisdiction to adjacent wetlands.³⁷ Nevertheless, *Riverside Bayview Homes* did not resolve all of the questions concerning section 404's geographic jurisdiction.³⁸ The Court refused to consider the issue of whether there is federal jurisdiction over non-adjacent wetlands under the CWA.³⁹

This precise issue was addressed by a federal district court in *National Wildlife Federation v. Laubscher*.⁴⁰ The court declared that an isolated wetland visited by migratory birds was within federal jurisdiction under the CWA.⁴¹ However, because neither party challenged the jurisdictional issue, the court failed to explain why it believed isolated wetlands could be regulated under the CWA or the Commerce Clause.⁴²

In *United States v. Larkins*,⁴³ the concurring opinion briefly discussed the issue of isolated wetlands jurisdiction that *Riverside Bayview Homes* left open.⁴⁴ It first recognized that the CWA does not refer to "wetlands,"

32. *Id.* at 131. "An agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress." *Id.* (quoting *Chemical Mfr. Ass'n v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 125 (1985), and *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984)).

33. 33 U.S.C. § 1251 (1988).

34. 474 U.S. at 131.

35. *Id.* at 132-33 (quoting S. REP. NO. 414, 92d Cong., 1st Sess. 77 (1972)).

36. *Id.* at 134-35. "[W]etlands adjacent to lakes, rivers, streams, and other bodies of water" are "integral parts of the aquatic environment." *Id.* at 135.

37. *Id.* at 134-35.

38. 474 U.S. at 131.

39. *Id.* n.8. The Court stated that they were "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 they did not express any opinion on that question. *Id.*

40. 662 F. Supp. 548 (S.D. Tex. 1987).

41. *Id.* at 549.

42. *Id.* at 548. The question that "deals with agency jurisdiction has become a non-issue." *Id.* at 549.

43. 852 F.2d 189 (6th Cir. 1988).

44. See *supra* note 39 and accompanying text. This issue was mentioned in a footnote and further discussed in a concurring opinion. 852 F.2d at 190 n.3, 193-94. The Sixth Circuit stated: "Because the defendants did not argue that the CWA does not permit the Army Corps of Engineers to exercise its

nor does it use any language that specifically includes "wetlands."⁴⁵ The CWA expressly limits the Corps' jurisdiction to "navigable waters."⁴⁶ However, the opinion further stated that the Corps' definition of wetlands has evidently divorced its wetlands jurisdiction from any notion of "open waters" or navigable waters.⁴⁷ "[N]avigable waters" has apparently been read "to include any creek or stream or moist area."⁴⁸

The Corps' jurisdiction over isolated wetlands was judicially limited with a ruling by the Fourth Circuit in *Tabb Lake Ltd. v. United States*.⁴⁹ The court held that federal jurisdiction under the CWA cannot be asserted over wetlands based solely on the use of wetlands by migratory birds.⁵⁰ The court based its decision on the fact that the Corps adopted this potential habitat theory of territorial jurisdiction⁵¹ without notice and opportunity for comment, thus promulgating a rule in violation of the Administrative Procedures Act.⁵² The court determined that, in this case, the policy statement was invalid because it did not fall under a constitutional authority of Congress.⁵³

In *Leslie Salt Co. v. United States*,⁵⁴ the Ninth Circuit addressed the issue of the Corps' jurisdictional authority over intrastate waters under the CWA.⁵⁵ The case involved wetlands in pits and crystallizers that were intrastate and non-adjacent.⁵⁶ The evidence showed that the property was used by migratory birds and one endangered species.⁵⁷ The Ninth Circuit addressed, but did not decide, the question of whether the property has a sufficient connection to interstate commerce.⁵⁸ In dicta, the court stated that "[t]he commerce clause power, and thus the Clean Water Act, is broad enough to extend the Corps' jurisdiction to local waters which may provide

regulatory jurisdiction over wetlands adjacent only to tributaries of navigable waters, this court does not decide that issue." *Id.*

45. 852 F.2d at 193.

46. *Id.*

47. 852 F.2d at 193. The concurring opinion further stated that "a homeowner's low lying backyard . . . has apparently been converted into government property no longer subject to control or improvement by the owner without government permission." *Id.* at 193-94.

48. *Id.* at 193.

49. 20 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,008 (4th Cir. 1989).

50. *Id.*

51. *Id.* The Corps interprets its jurisdictional reach over isolated wetlands, under 33 C.F.R. § 328.3 (a)(3) (1993), to extend to any waters "which are or would be" used as habitat by migratory birds which cross state lines or as habitat for endangered species. Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41,217 (1986).

52. 20 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,008. See 5 U.S.C. § 533(b)(3)(A) (1988). However, the Corps continues to rely on this potential habitat theory in every legal jurisdiction except the Fourth Circuit. WANT, *supra* note 2, § 4.05[5].

53. 20 Env'tl. L. Rep. (Env'tl. L. Inst.) at 20,008-09. Because this policy statement was adopted without notice and comment (i.e., it is not a true regulation), the validity of the policy can be questioned each time it is at issue in a case. *Id.*

54. 896 F.2d 354 (9th Cir. 1990).

55. *Id.* at 360.

56. *Id.* at 356.

57. *Id.*

58. *Id.* at 360.

habitat to migratory birds and endangered species.”⁵⁹ However, the court did not provide any support or analysis for its conclusion.⁶⁰

As the above discussion indicates, the controversy over the extent of the federal government’s jurisdiction over isolated wetlands was anything but resolved. However, the Seventh Circuit recently faced this same issue again in *Hoffman Homes, Inc. v. EPA*,⁶¹ and held that the EPA’s conclusion that an isolated wetland was a suitable habitat for migratory birds, and, therefore, had an “effect on interstate commerce,” was not supported by substantial evidence.⁶²

III. STATEMENT OF THE CASE

A. Facts

Hoffman Homes, Inc. is a residential housing developer⁶³ that owned a 43-acre tract of land used as a residential development site.⁶⁴ In developing this property, Hoffman Homes filled and graded certain areas of the site, including a 0.8-acre bowl-shaped depression at the northeast border of the site, known as “Area A,” and a 13.3-acre adjacent wetland called “Area B,” located along the western and southern portions of the site and bordering the Schaumburg Branch of Poplar Creek.⁶⁵ In March 1986, an employee of the Corps happened to observe this action by Hoffman Homes while driving by the site.⁶⁶ After an investigation, the Corps found Area A to be an intrastate, isolated wetland and determined that by filling and grading it, Hoffman Homes had violated section 301 of the CWA.⁶⁷

Area A was lined with relatively impermeable clay in which rain water collected and would not drain out quickly.⁶⁸ The Corps and the EPA declared this small basin to be an isolated wetland because it had no hydrological connection to any other surface water or groundwater.⁶⁹ As a result, it could not have any flood control or sediment trapping purposes.⁷⁰

59. *Id.*

60. *Id.*

61. 999 F.2d 256 (7th Cir. 1993). On April 20, 1992, the Seventh Circuit initially decided this case in *Hoffman Homes, Inc. v. EPA*, 961 F.2d 1310 (7th Cir. 1992) (*Hoffman Homes I*). On September 4, 1992, the court granted the petition for rehearing, vacated its prior decision, and ordered settlement negotiations in *Hoffman Homes, Inc. v. EPA*, 975 F.2d 1554 (7th Cir. 1992) (*Hoffman Homes I*). On July 19, 1993, after negotiations failed, the Seventh Circuit again dealt with this same matter in *Hoffman Homes, Inc. v. EPA*, 999 F.2d 256 (7th Cir. 1993) (*Hoffman Homes II*).

62. 999 F.2d at 262.

63. *Id.* at 257.

64. *Id.* This tract of land was located in Cook County, Illinois, and was to be developed into a subdivision called “Victoria Crossings.” *In re The Hoffman Group, Inc.*, No. CWA-88-AO-24, 1989 WL 266364, at *1 (E.P.A. Sept. 14, 1989) (initial decision).

65. 999 F.2d at 258. However, Hoffman Homes did not appeal the assessment of penalties for filling 5.9 acres of Area B without a permit to the Seventh Circuit. *Id.* Therefore, the discussion in this Note is limited to those issues involving Area A.

66. *Id.* at 257.

67. *Id.* at 258. See 33 U.S.C. § 1311(a) (1988).

68. 999 F.2d at 258.

69. *Id.*

70. *Id.* at 259.

In addition, Area A was not used by any interstate travelers and was not used for any industrial or fishing purposes.⁷¹ There was no evidence demonstrating that migratory birds or other types of wildlife actually used Area A for any purpose.⁷²

The Corps then ordered Hoffman Homes to stop the filling of Area A and to apply for a permit.⁷³ Hoffman complied by applying for the permit and proposing both on-site and off-site mitigation.⁷⁴ However, the Corps refused to issue Hoffman a permit because the EPA objected to Hoffman's mitigation plan.⁷⁵ The EPA issued a compliance order in December 1987, stating that Hoffman Homes had illegally filled Areas A and B and directing Hoffman Homes to stop its filling activities and restore the wetlands to their original condition according to plans approved by the EPA.⁷⁶ The EPA then filed an administrative complaint against Hoffman Homes in January 1988 to enforce that order and assess penalties.⁷⁷

B. Hoffman Homes Case History

In 1989, an EPA administrative law judge (ALJ) found that Area A was an isolated wetland over which the Corps had no jurisdiction because the area had no effect on interstate commerce, with the exception of potential use by migratory birds.⁷⁸ The ALJ further held that the theoretical possibility of migratory bird use was not a sufficient tie to interstate commerce to bring Area A within the definition of "waters" as used in the CWA for section 404 jurisdiction purposes.⁷⁹

The EPA appealed, and the EPA Chief Judicial Officer (CJO) reversed the ALJ's decision,⁸⁰ holding that the EPA could assert jurisdiction over an isolated, intrastate, temporarily wet area like Area A, if it could show that filling of Area A would have some minimal, potential

71. *Id.* at 261-62. *See also supra* note 26.

72. 999 F.2d at 262.

73. *Id.* at 258. The Corps issued a cease and desist order, pursuant to 33 U.S.C. § 1344 (1988), to stop Hoffman Homes from filling Area A, and instructed Hoffman to apply for an after-the-fact permit. *Id.*

74. *In re* The Hoffman Group, Inc., No. CWA-88-AO-24, 1989 WL 266364, at *1.

75. *Id.* The Corps has the power to ensure compliance with these permit requirements. 33 U.S.C. § 1344(s) (1988). However, the EPA has a regulatory veto power over the issuance of permits. *Id.* § 1344(c).

76. 999 F.2d at 258.

77. *Id.* at 258. The EPA has authority to seek penalties for violations of the permit requirements pursuant to 33 U.S.C. § 1319 (1988).

78. *In re* The Hoffman Group, Inc., No. CWA-88-AO-24, 1989 WL 266364, at *17. The EPA argued two grounds for asserting jurisdiction over Area A. The EPA first argued that Area A was an adjacent wetland pursuant to 40 C.F.R. § 230.3(s)(7). Second, they argued that Area A could be used potentially by migratory birds. *Id.* at *16. However, the ALJ found that Area A had no connection to any waters of the United States (it was isolated) and that it did not have "any characteristic that would render it any more attractive to birds than any other land that at one time or another contains water." *Id.* at *16-17.

79. *Id.*

80. *In re* The Hoffman Group, CWA Appeal No. 89-2, 1990 WL 324101, at *1 (E.P.A. Nov. 16, 1990) (final decision).

effect on interstate commerce.⁸¹ The CJO believed the EPA satisfied this requirement by showing that Area A could potentially be a habitat for migratory birds.⁸²

Hoffman Homes then appealed the CJO's decision to the Seventh Circuit, and *Hoffman Homes, Inc. v. EPA (Hoffman Homes I)* resulted from the appeal.⁸³ The court could not find any language in the CWA⁸⁴ or its legislative history⁸⁵ that would indicate congressional intent to protect isolated wetlands.⁸⁶ The court found that because isolated wetlands do not help maintain "the chemical, physical, and biological integrity of the Nation's waters,"⁸⁷ they are not within the scope of the CWA.⁸⁸ The court also held that intrastate, isolated wetlands are not within the reach of the Commerce Clause⁸⁹ if their only connection to interstate commerce is as a habitat for migratory birds.⁹⁰ The court stated that some type of relationship to human commercial activity is required by the Commerce Clause.⁹¹ Therefore, the regulation asserting jurisdiction over intrastate, isolated wetlands, the destruction of which could affect interstate commerce, was found to be "contrary to the Act and therefore invalid."⁹²

However, the EPA petitioned the Seventh Circuit for rehearing, and the Seventh Circuit granted the EPA's petition for rehearing and vacated its opinion without explaining its rationale for doing so.⁹³ The court then referred the case to the Senior Staff Attorney for the United States Court of Appeals for the Seventh Circuit for the purpose of conducting settlement negotiations.⁹⁴ After those negotiations failed, the court decided to rehear the case.⁹⁵ Thus, the case would be "back in the hands of the original panel which heard the oral arguments on this case" nearly two years earlier.⁹⁶

81. *Id.* at *4, *8.

82. *Id.* at *8.

83. 961 F.2d 1310 (7th Cir. 1992).

84. The CWA only refers to "navigable waters" as "waters of the United States." 33 U.S.C. § 1362(7) (1988).

85. The Seventh Circuit looked to the legislative history of the 1972 Amendments.

86. *Hoffman Homes I*, 961 F.2d at 1313-14. The court found that legislative history of the 1972 Amendments made no reference to wetlands. *Id.* at 1313. In fact, the court found that the only types of "waters" referred to in the legislative history of the CWA are "lakes, streams, rivers, tributaries, and the territorial seas." *Id.* at 1314.

87. 33 U.S.C. § 1251(a) (1988).

88. 961 F.2d at 1316. The court asserted that "the stated policy of the Act . . . demonstrate[s] that Congress did not intend the Act to protect isolated wetlands." *Id.*

89. U.S. CONST. art. I, § 8, cl. 3.

90. 961 F.2d at 1321.

91. *Id.* at 1321-22. The court found that "[c]ommerce is a uniquely human activity." *Id.* at 1322.

92. *Id.* at 1316. The EPA's interpretation of section 404, in 40 C.F.R. § 230.3(s)(3), to include jurisdiction over isolated wetlands was held to be unreasonable. *Id.*

93. *Hoffman Homes I*, 975 F.2d 1554 (7th Cir. 1992).

94. *Id.* at 1554.

95. 999 F.2d at 259-260.

96. *Id.* at 260.

IV. THE *HOFFMAN HOMES II* DECISION

In *Hoffman Homes, Inc. v. EPA (Hoffman Homes II)*,⁹⁷ the Seventh Circuit once again considered whether the EPA has jurisdiction to regulate an intrastate, isolated wetland.⁹⁸ The court had to determine whether the EPA properly interpreted 40 C.F.R. section 230.3(s)(3) and whether there was substantial evidence to support the CJO's finding of a violation of the CWA.⁹⁹ The court found that the EPA would have authority to regulate such a wetland under the Commerce Clause if the wetland provides a potential habitat for migratory birds.¹⁰⁰ However, because there was insufficient evidence to show that the wetland in dispute was a suitable or potential habitat for migratory birds, the court held that the EPA has no power to regulate Area A.¹⁰¹

The concurring opinion in *Hoffman Homes II* agreed with the majority's conclusion, but for different reasons.¹⁰² It asserted that the CWA does not authorize the regulation of isolated wetlands because their protection does not further the purpose of the act.¹⁰³ It also asserted that the Commerce Clause does not give the EPA the power to regulate isolated wetlands because these wetlands have no effect on interstate commerce.¹⁰⁴

V. ANALYSIS

A. *The Decision*

The Corps and the EPA have promulgated regulations defining their jurisdictional reach over "waters of the United States" to include those isolated wetlands whose use or misuse "could" affect interstate commerce.¹⁰⁵ They have construed these regulations to cover those isolated wetlands that might serve as a habitat for migratory birds.¹⁰⁶ In a short opinion, the majority in *Hoffman Homes II*¹⁰⁷ gave great deference to the EPA's construction of 40 C.F.R. section 230.3(s)(3).¹⁰⁸ The court stated, in agreement with the CJO, that the word "could" in the regulation extends federal jurisdiction to waters whose nexus to interstate commerce may be "potential rather than actual, minimal rather than substantial."¹⁰⁹ The court also agreed with the CJO that the regulation can reasonably be construed to

97. 999 F.2d 256 (7th Cir. 1993).

98. *Id.*

99. *Id.* at 260.

100. *Id.* at 261.

101. *Id.* at 262.

102. *Id.* Circuit Judge Manion incorporated by reference the prior vacated opinion of *Hoffman Homes I*, 961 F.2d 1310, as part of his concurrence.

103. *Id.* at 263.

104. *Id.*

105. 33 C.F.R. § 328.3(a)(3) (1993); 40 C.F.R. § 230.3(s)(3) (1993).

106. Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41,217 (1986). See also *supra* note 42 and accompanying text.

107. 999 F.2d 256.

108. *Id.* at 260. "An agency's construction of its own regulation binds a court in all but extraordinary cases." *Homemakers N. Shore, Inc. v. Bowen*, 832 F.2d 408, 411 (7th Cir. 1987).

109. 999 F.2d at 261.

allow use by migratory birds to be the connection between the wetlands and interstate commerce.¹¹⁰

The court examined the record and determined that the CJO's finding that Area A was a "suitable or potential habitat for migratory birds" was not supported by "substantial evidence."¹¹¹ The court recognized that Area B was suitable for migratory bird use.¹¹² However, the finding of suitability of Area A for migratory bird habitat based on its similarity to Area B was mere speculation, because Area A was hydrologically different from Area B.¹¹³ The court also relied on the ALJ's finding that the evidence did not support the conclusion that Area A had any use or value to migratory birds.¹¹⁴ As a result of the hydrological characteristics of Area A and the ALJ's findings, the court found that, although potential migratory bird use can be the minimal connection between wetlands and interstate commerce, the EPA failed to show this potential use by "substantial evidence."¹¹⁵ Ultimately, the court held that Area A was not subject to regulation under the CWA.¹¹⁶

The majority opinion in *Hoffman Homes II*¹¹⁷ seemed merely to recite the facts, state the rules and give the conclusion with little guidance or analysis on how it applied the "minimal, potential effect" and the "substantial evidence" standards to the facts of the case.¹¹⁸ It would have been more helpful if the majority's opinion had given further direction and set forth more detailed guidelines on how courts in the future are to approach and analyze a case regarding the federal government's jurisdiction to regulate isolated wetlands. The reason for this may have been that, because the court was dealing with a small 0.8-acre wetland not even used by migratory birds, the court did not consider the case important enough to set down guidelines.

110. *Id.* (citing *Palila v. Hawaii Dep't of Land & Natural Resources*, 471 F. Supp. 985 (D. Haw. 1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981), and *United States v. Byrd*, 609 F.2d 1204 (7th Cir. 1979)).

111. 999 F.2d at 261-262. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* at 261 (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

112. 999 F.2d at 262.

113. *Id.* The court stated that no evidence was presented that showed migratory birds used Area A, and the birds have submitted their own evidence as to its suitability for their welfare by avoiding that area. *Id.*

114. *Id.* The court found that the ALJ "was in the unique position to view the evidence, to hear the testimony, and to judge the credibility of the witnesses." *Id.*

115. *Id.*

116. *Id.* "No justification whatsoever is seen from the evidence to interfere with private ownership based on what appears to be no more than a well intentioned effort in these particular factual circumstances to expand government control beyond reasonable or practical limits." *Id.*

117. 999 F.2d 256.

118. The Seventh Circuit decided this case on an "ad hoc" factual basis. The court's decision applied only to the case before it, and the court did not provide a standard that could be applied to subsequent cases.

B. The Intent of Congress under the CWA

To avoid this problem, the court in *Hoffman Homes II*¹¹⁹ could have used the Supreme Court's two-step application for analyzing agency interpretations as articulated in *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*¹²⁰ According to *Chevron*, a court must first determine whether Congress spoke to the question at issue.¹²¹ If it did and its intent was clear, that is the end of the matter.¹²² However, if Congress did not address the issue, the court should determine whether the agency's interpretation is reasonable or permissible.¹²³

In *Hoffman Homes II*, the Seventh Circuit did not apply the first part of the *Chevron* test, which is to determine if Congressional intent was to extend the Corps' regulatory jurisdiction under the CWA to isolated wetlands with no water quality control function based on use by migratory birds.¹²⁴ The court in *Hoffman Homes II* should have followed the Supreme Court's analysis of *Riverside Bayview Homes*, in which the Supreme Court applied the *Chevron* test in the context of wetlands jurisdiction under the CWA.¹²⁵ In *Riverside Bayview Homes*, the Supreme Court found that Congress invoked only those powers under the Commerce Clause that pertain to the protection of the quality of waters involved in interstate commerce.¹²⁶ The Court found that Congress meant to authorize section 404 jurisdiction over those waters affecting navigable waters.¹²⁷ Congress' goal under the CWA was to ensure water quality of the hydrological system as a whole.¹²⁸ The Court reasoned that, in order to ensure water quality of navigable waters, adjacent wetlands would have to be regulated because they affect the water quality of the aquatic ecosys-

119. 999 F.2d 256.

120. 467 U.S. 837, 842-43 (1984).

121. *Id.* "The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Id.* at 843 n.9.

122. *Id.* at 842-43. "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Id.* at 843 n.9.

123. *Id.* at 843.

124. In *Hoffman Homes II*, the Seventh Circuit, ignoring the first part of the *Chevron* test, simply stated that great deference must be given to an agency's interpretation of its own regulation. 999 F.2d at 260-61. See also *supra* notes 108-10 and accompanying text. However, if the EPA's regulation, 40 C.F.R. § 230.3(s)(3), is in conflict with the expressed intent of Congress under the CWA, then it is not necessary to determine if the CJO's "minimal, potential effect" test is a reasonable interpretation of the regulation. *Hoffman Homes I*, 961 F.2d at 1313.

125. 474 U.S. at 131. A discussion based on *Riverside Bayview Homes* is relevant to the Seventh Circuit's handling of *Hoffman Homes II* because *Riverside Bayview Homes* shows how to analyze the first part of the *Chevron* test. This discussion is basically the reasoning that the concurrence in *Hoffman Homes II* adopted. See *supra* notes 31-39 and accompanying text.

126. 474 U.S. at 133. The Supreme Court stated that 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." *Id.* The Supreme Court found that Congress invoked some, but not all, of its powers under the Commerce Clause. *Id.*

127. *Id.*

128. *Id.*

tem.¹²⁹ Thus, the Supreme Court held that extending the Corps' jurisdiction to adjacent wetlands was reasonable due to the "water quality" goal of the CWA and the relationship of navigable waters to their adjacent wetlands.¹³⁰

However, in *Hoffman Homes II*, the Corps failed to show that filling isolated wetlands like Area A would have any effect on water quality. By their very definition, isolated wetlands have no hydrological relationship with any other water. Hence, protection of isolated wetlands would not further the goal of the CWA and would not be within its scope. The Corps, however, insisted that isolated wetlands must be protected as potential habitat for migratory birds, without any connection to water pollution or water quality.¹³¹ But Congress' clear and express intent in the CWA was to give the Corps the power to control water pollution.¹³² There was no congressional intent in the CWA that migratory bird use could extend the Corp's authority to isolated wetlands.¹³³ Because the intent of Congress is clear, that is the end of the matter. The Seventh Circuit, in *Hoffman Homes II*, and the EPA should have given effect to the unambiguously expressed intent of Congress, which was to ensure water quality and control water pollution.¹³⁴ Accordingly, isolated wetlands, such as Area A, would not be under Corps jurisdiction because they have no hydrological connection to any navigable water and filling them would have no effect on water pollution.¹³⁵

C. *The Commerce Clause*

Even if Congress did intend to regulate isolated wetlands within its constitutional reach under the Commerce Clause, this would likely exceed the scope of its constitutional authority. Congress lacks the constitutional authority to regulate isolated wetlands that do not substantially affect interstate commerce.¹³⁶ Although the Commerce Clause gives Congress sub-

129. *Id.* at 134.

130. *Id.*

131. *Hoffman Homes II*, 999 F.2d at 261.

132. The "regulation of activities affecting wetlands is tied not so much to the logic on this matter as to the general statutory scheme of the Clean Water Act, which has as its chief purpose—regulating water pollution." WANT, *supra* note 2, § 4.06[1]. The CWA's expressed objective is to eliminate all pollutant discharges into our nation's navigable waters. 33 U.S.C. § 1251(a)(1) (1988).

133. "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." *Chevron*, 467 U.S. at 842-843.

134. *Id.*

135. This is the reasoning adopted by Judge Manion's concurrence in *Hoffman Homes II*. Some may argue that the vacated opinion, adopted by the concurrence, rejected the interpretations offered by the EPA and substituted its own view of the ecology and potential effect of isolated wetlands without any reference to scientific evidence or outside findings. However, the court accepted an amicus curiae brief written by eight wetlands scientists, which provided the court with the necessary scientific information.

136. *Maryland v. Wirtz*, 392 U.S. 183, 196 (1968) (The Commerce Clause does not extend to a relatively "trivial impact on commerce" when used as "an excuse for broad general regulation of state or private activities."). *See also* *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (holding that

stantial authority to regulate activities that directly or indirectly affect commerce, the power to regulate potential migratory bird habitats seems to be beyond the guidelines of *Wirtz* and *Jones & Laughlin*. To hold that the Commerce Clause gives Congress the power to regulate isolated wetlands would be to hold the Commerce Clause virtually unlimited.¹³⁷

D. *The Takings Clause*

A possible solution to the isolated wetlands jurisdictional issues is to strictly enforce the language in the Fifth Amendment of the United States Constitution.¹³⁸ The majority opinion in *Hoffman Homes I*, adopted by the concurrence in *Hoffman Homes II*, inferred that the Corps' reliance on the Commerce Clause to justify regulation of isolated wetlands may be due to "the Supreme Court's jurisprudence constricting application of the Takings Clause."¹³⁹ The court asserted that if the federal government wants to preserve wetlands as a habitat for migratory birds and other wildlife, it should do so by purchasing the wetlands instead of by restricting private property owners' rights.¹⁴⁰ As a result, "the federal government or, more accurately, taxpayers, might be forced to bear the cost of our national conservation efforts, rather than imposing such costs on fortuitously chosen landowners."¹⁴¹

A key question in takings disputes is the definition of "property" that is affected by the government action.¹⁴² Generally, a court will view prop-

a "substantial" impact on commerce must be shown); *United States v. Darby*, 312 U.S. 100, 119-120 (1941) (The Commerce Clause power has been broadly interpreted to extend to regulation of intrastate activities "which have a substantial effect on the commerce.").

137. *Hoffman Homes II*, 999 F.2d at 263 (Manion, J., concurring). "The commerce power as construed by the courts is indeed expansive, but not so expansive as to authorize regulation of puddles merely because a bird traveling interstate might decide to stop for a drink." *Id.*

138. The Takings Clause provides: "[No person shall] be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

139. 961 F.2d at 1323 (citing *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987); *Agin v. City of Tiburon*, 447 U.S. 255 (1980); *Penn Cent. Transp. Co. v. New York*, 438 U.S. 104 (1978)).

140. 961 F.2d at 1322-23. *See United States v. Larkins*, 852 F.2d 189, 194 (6th Cir. 1988) (Merritt, J., concurring) ("The framers of the Constitution were solicitous of the rights of landowners . . . not to have land appropriated by the government. They therefore adopted the provisions of the Fifth Amendment of the Constitution prohibiting the taking of private property for public use without just compensation.").

141. 961 F.2d at 1323. *See, e.g., L. Gordon Crovitz, Justices Have No Reason to Fear Private Property*, WALL ST. J., Nov. 27, 1991, at A11 ("The Takings Clause, if enforced, would stop endless debates about wetlands, timber inhabited by spotted owls, landmark designations and rent control. All these could be regulated—but only if taxpayers decide it's worth compensating the owner."); *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (A rationale for the Fifth Amendment is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice should be borne by the public as a whole.").

142. The Supreme Court recently recognized the uncertainty in the "deprivation of all economically viable use" rule due to the unclear definition of "property interest." *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992). The Court noted that this uncertainty has produced inconsistent decisions by the Court. *Id.* at 2894 n.7. However, the Court avoided answering this difficult question in this case. *Id.*

erty as a whole and will not separate property ownership for the sake of a takings claim.¹⁴³ For example, when a property owner owns 43 acres of land and one acre is a wetland on which development is prohibited, there will not likely be a taking because the regulation probably did not significantly interfere with investment-backed expectations.¹⁴⁴ However, if a property owner only owns one acre of land and it is all wetland, there will likely be a taking that must be compensated because there will be no “economically viable use” left in the property.¹⁴⁵

The weakness of this reasoning is obvious when compared to case law dealing with physical takings by the government. For example, if the taking were for a highway, instead of a wetland, compensation would be due regardless of the amount of land the landowner possesses.¹⁴⁶ It should not make a difference whether the “taking” is a physical invasion or whether it is a wetland regulation.¹⁴⁷ In either case, the use and enjoyment of the property can be destroyed and the property owner can be deprived of all beneficial uses with respect to that wetland property. Therefore, when faced with a wetlands takings analysis, courts should only apply the analysis to the property that is negatively affected by the denial of the section 404 permit.¹⁴⁸

A potential problem is that the federal government has attempted to use the “nuisance exception” as a defense to a takings claim, arguing that the filling of wetlands is a public nuisance in itself. However, the nuisance exception is not as broad as the federal government’s police power.¹⁴⁹ The

143. *Ciampitti v. United States*, 22 Cl. Ct. 310, 311 (1991). The plaintiff argued that the takings analysis should be restricted to the wetlands that were in dispute. However, the court held that diminution in value of the whole parcel of which the wetlands were a part must be determined. In order to determine economically viable uses of the property, the court views all the property of the property owner as a whole. *Id.* at 319. See also *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470 (1987).

144. James S. Burling, *Property Rights, Endangered Species, Wetlands, and Other Critters—Is It Against Nature to Pay for a Taking?*, 28 LAND & WATER L. REV. 309, 347 (1992). Investment-backed expectations include “reasonable” expectations or fair returns on investments. *Penn Cent. Trans. Co. v. City of New York*, 438 U.S. 104, 107 (1978) (*Penn Central*).

145. Burling, *supra* note 144, at 347. For definition of “economically viable use,” see *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1986), and *Penn Central*, 438 U.S. at 124.

146. Burling, *supra* note 144, at 348. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). A taking was found when a telephone cable was merely attached to a building. The court stated that when the character of governmental action is a permanent physical occupation of the property, a Fifth Amendment taking is found to the extent of that occupation, even if the action has only a minimal economic impact. *Id.* See also *Twain Harte Assocs., Ltd. v. County of Toulumne*, 265 Cal. Rptr. 737 (Cal. Ct. App. 1990) (the court stated that the “nature of a particular land use regulation has been recognized as potentially creating separate parcels for ‘taking’ purposes.”).

147. Burling, *supra* note 144, at 348.

148. This is exactly what the United States Claims Court determined in *Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153 (1990), and *Florida Rock Indus., Inc. v. United States*, 21 Cl. Ct. 161 (1990), by limiting its takings determination to the property that was affected by the legislation.

149. *Penn Central*, 438 U.S. at 145 (Rehnquist, J., dissenting). The “nuisance exception” is not coterminous with the police power. The key inquiry is “whether the forbidden use is dangerous to the safety, health, or welfare of others.” *Id.* See *Florida Rock Indus., Inc. v. United States*, 8 Cl. Ct. at 170 (if the nuisance exception were as broad as the police power, the Fifth Amendment would be rendered “out of existence.”).

nuisance exception does not seem to be applicable in section 404 wetlands takings cases. Regulation of wetlands under the CWA is not for the purpose of preventing activities harmful to the public; rather, it is for the purpose of benefitting the public. As one commentator recognized:

[T]he permit denial, absent any proof that the planned activity would constitute a nuisance, is not sufficient to trigger the nuisance defense. Only if there exists a harmful use of the property should the nuisance defense be raised. As a general rule, nuisance analysis should not be applied to Section 404 cases.¹⁵⁰

VI. CONCLUSION

Protecting wetlands has slowly evolved into an environmental priority for the federal government. However, in a time of heightened environmental concern, wetlands regulations usually conflict with private property owners' rights and deprive them of the use of their land. This has led to considerable controversy over the federal government's regulation of non-adjacent wetlands.

According to its language, history, and policy, the CWA does not authorize the exercise of section 404 jurisdiction over isolated wetlands, because the prevention of grading and filling these wetlands has no connection with the prevention of pollution of the Nation's waters. The regulatory power of the Commerce Clause would be rendered virtually limitless if it could be invoked by the use of "minimal, potential effect" language to regulate isolated wetlands, merely because they provide potential habitat for migratory birds. With no political or legal limits being imposed on the section 404 program, it could not be consistently, competently and impartially applied.

When private property rights clash with environmental regulations, possibly the only fair and equitable solution to the isolated wetlands issues will be to enforce the language in the Fifth Amendment's Takings Clause. If protection of wetlands is so important to the Nation as a whole, then society should bear the cost of protection by paying the landowner for the necessary property.

Stephen Jay Stokes

150. Timothy G. Warner, Note, *Recent Decisions by the United States Claims Court and the Need for Greater Supreme Court Direction in Wetlands Taking Cases*, 43 SYRACUSE L. REV. 901, 924-25 (1992).