Leslie Salt Co. v. United States: Keep the Birds out of Your Birdbath: It May Be Considered the Jurisdiction of the Army Corps of Engineers as a Water of the United States

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LESLEY SALT CO. V. UNITED STATES: KEEP THE BIRDS
OUT OF YOUR BIRDBATH: IT MAY BE CONSIDERED THE
JURISDICTION OF THE ARMY CORPS OF ENGINEERS AS
A "WATER OF THE UNITED STATES"

I. INTRODUCTION

In Leslie Salt Co. v. United States (Leslie II), the United States Court of Appeals for the Ninth Circuit held that the Army Corps of Engineer's (Corps) jurisdiction under the Clean Water Act (CWA) extended to both property made aquatic in part by government action and to man-made temporary water formations whose connection with interstate commerce is based on their potential as habitats for migratory birds and endangered species.

At issue was the scope of Corps jurisdiction over two distinct parcels of privately owned intrastate property: (1) land that exhibited wetland characteristics caused in part by government actions which allowed water from neighboring properties to flow through the land; and (2) artificially created ponds and pits that temporarily held rainwater for a portion of the year, but were not hydrologically connected to any other body of water. Both issues involved Corps regulations interpreting the scope of Corps jurisdiction conferred by Congress under the CWA.

1. 896 F.2d 354 (9th Cir. 1990), cert. denied, ___ U.S. ___, 111 S. Ct. 1089 (1991). Throughout this Note the Ninth Circuit decision will be referred to as "Leslie II." The district court's "Leslie I" decision, Leslie Salt Co. v. United States, 700 F. Supp. 476 (N.D. Cal. 1988), rev'd, 896 F.2d 354 (9th Cir. 1990), was reversed by the appellate court in Leslie II.

2. For a discussion of the Corps' role under the Clean Water Act, see infra notes 32-52 and accompanying text.


5. Throughout this Note cases and analysis will be distinguished by waters that are hydrologically or non-hydrologically connected. Hydrology is "[t]he scientific study of the properties, distribution, and effects of water on the earth's surface, in the soil and underlying rocks, and in the atmosphere." The AMERICAN HERITAGE DICTIONARY 630 (2d College ed. 1982). The term "hydrologically connected," as used in this Note, will refer to the circulation of water from one location to another by means other than rainfall.


7. The congressional power to regulate pollution in bodies of water is based on its power under the commerce clause of the Constitution. See infra
The appellate court determined that how a body of water was formed is irrelevant to the issue of Corps jurisdiction. Perhaps more notably, the court decided that Congress meant to extend the Corps’ jurisdiction under the CWA to the full extent of congressional commerce clause power, and that Corps jurisdiction includes artificially created intrastate bodies of water with no hydrological connection to any other body of water. Because the Ninth Circuit affirmed the Corps’ broad interpretation of its jurisdiction under the CWA, practically any body of water in the United States could now arguably be considered under the jurisdiction of the Corps and require a permit before it is filled.

The Leslie II decision is significant because it is a clear victory for environmental groups interested in protecting wetlands and notes 16-23 and accompanying text. Congress intended the CWA to “restore and maintain the chemical, physical, and biological integrity of the nation’s waters.” CWA § 101(a), 33 U.S.C. § 1251(a). In section 404 of the CWA, Congress gave the Corps the power to regulate the discharge of fill material into navigable waters. For a discussion of the Corps’ definition of fill material, see infra notes 33-34 and accompanying text. Under section 502(7) of the CWA, 33 U.S.C. § 1362(7), Congress defined “navigable waters” to mean the “waters of the United States” but did not define the term “waters of the United States.” See CWA § 101-607, 33 U.S.C. §§ 1251-1387. The Corps has defined the term “waters of the United States” broadly as applied to its jurisdictional limits under the CWA. See Definition of Waters of the United States, 33 C.F.R. § 328.3 (1990). For text and discussion of the Corps’s definition of “waters of the United States,” see infra notes 48-52 and accompanying text.

8. Leslie II, 896 F.2d at 358.
9. Id. at 360. For a definition of “hydrologically connected” and its significance in this Note, see supra note 5.
10. The Corps has interpreted its jurisdiction to include waters whose destruction would affect interstate commerce. Definition of Waters of the United States, 33 C.F.R. § 328.3(a)(1) (1990). These waters include those used by interstate recreational travelers, waters providing fish sold in interstate commerce, or waters providing present or former use for industrial purposes by industries in interstate commerce. Definition of Waters of the United States, 33 C.F.R. § 328.3(a)(3) (1990). The Corps would also include waters whose sole connection to interstate commerce is their use by migratory birds as a habitat. Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41,217 (1986). For a discussion of regulations promulgated by the Corps defining its jurisdiction, see infra notes 48-52 and accompanying text.
11. The district court in Leslie I, 700 F. Supp. 476, had concluded that (1) land does not become a “water of the United States just because water collects, ponds, and stands on the land for a few days after a rain” and (2) land does not become “a water of the United States simply because water drains off of the land and ultimately ... flows into waters of the United States.” Id. at 483-84. The district court contended that if the previous criteria were used as the test then any land subject to enough rainfall to collect standing water or any land located at a higher elevation than a “water of the United States,” where water eventually drained off into the lower “water” would itself become “waters of the United States.” Id. at 484 (emphasis added). By reversing the district court, the Ninth Circuit has, if the district court contention is correct, made any body of water a potential “water of the United States” subject to Corps jurisdiction.
other bodies of water that support ecological life. The ruling is a defeat for land development groups who may now face potentially insurmountable obstacles in developing certain lands for residential or commercial use. Before the ruling, land developers felt that Corps jurisdiction was too broad. After Leslie II, the uncertainty of permit requirements and the consistency (or arbitrariness) of Corps enforcement will have an increasing impact on both the property uses and business practices of developers, land owners, and farmers.

12. An attorney for the Save San Francisco Bay Association, which had appealed the district court ruling along with the Corps, said “this is a 100 percent victory for us and is really important to protect California’s wetlands.” The San Francisco Chronicle, Feb. 7, 1990, § A, at 2. In contrast, a Leslie Salt Co. attorney stated “from our perspective, it was not a good decision.”

13. The tension between environmentalists and developers is illustrated by the conflict between preserving lands for the protection of endangered species and migratory birds, and the jobs and revenue produced by commercial development. For example, Hayward, California was the site of a proposed 687 acre industrial park and race track, near the land in controversy in Leslie II. The development would have provided up to 16,000 jobs and raised $16 million in revenue at the expense of land that was home to rare species and migratory birds. Hayward Mayor, Alex Giuliani, a supporter of the development, said “do we want to feed birds or feed people?” United Press International wire release, March 18, 1987 (NEXIS, Omni Library).

14. In 1985 the Supreme Court in United States v. Riverside Bayview Homes, 474 U.S. 121 (1985), interpreted Corps jurisdiction to include waters adjacent to “waters of the United States” but, unlike the Leslie II court, did not reach the question of waters not adjacent to waters of the United States. Id. at 461 n.8, (emphasis added). Even so, “[t]he U.S. Chamber of Commerce had called the government’s expansive interpretation of the Clean Water Act ‘a classic example of federal regulatory overreaching,’ saying many development plans were being ruined by the Corps’ assertion of authority even when they posed no threat to water quality.” Los Angeles Times, Dec. 5, 1985, § 1, at 14, col. 1. An attorney who supported the developers commented, “[t]he permit process is a very costly, time-consuming and aggravating process.”

15. The Corps has broad powers to regulate land development and farming in a manner that may not have been contemplated by Congress. For example, the Corps defines wetlands, in part, as “areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support . . . vegetation typically adapted for life in saturated soil conditions.” Definition of Waters of the United States, 33 C.F.R. § 328.3(a)(7)(b) (1990). But the Corps has considered land inundated or saturated for as little as one week per year to be wetlands subject to its jurisdiction. Nat’l L.J., Nov. 13, 1989, at 19. Other examples of wetlands under the regulations include “a North Dakota cornfield where pools of water collect for a week each year during normal spring runoff; a muddy patch between railroad tracks in the center of an Idaho town; irrigation ditches dug by farmers in the West—some of which have been in use since 1900.” N.Y. Times, April 3, 1991, § A, at 21, col 1 (Is California 40 Percent Wetlands?). The Corps has used its jurisdiction over bodies of water it considers wetlands to “stop the construction of refineries, interstate power lines, highways and shopping centers . . . unlike many other environmental laws that require a facility or project to attain a certain level of pollution control, wetlands regula-
This Note first considers the development of the Corps' jurisdiction over "waters of the United States" from the Corps' original conception of its authority under the CWA, through court decisions interpreting its jurisdiction prior to the Leslie II case. This Note will then examine the decision in Leslie II, and analyze its reasoning and impact.

II. THE HISTORICAL DEVELOPMENT OF THE TERM "WATERS OF THE UNITED STATES"

A. Congressional Power Under the Commerce Clause to Regulate Waters

The Constitution of the United States grants Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." This grant of power, known as the "commerce clause," is the basis for congressional jurisdiction over all waters of the United States deemed to have a connection with interstate commerce. Interstate commerce has been interpreted broadly; the Congress may even regulate activities that are considered purely local. If Congress has a reasonable basis for concluding that interstate commerce is affected, the courts will treat its definition with deference.

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17. A statute based on congressional power under the commerce clause will be upheld if (1) the general activity sought to be upheld is reasonably related to, or has an effect on, interstate commerce and (2) the specific activity in controversy was intended to be reached by Congress through the statute. Perez v. United States, 402 U.S. 146 (1971); Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); United States v. Darby, 312 U.S. 100 (1941).
18. "Thus the power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce." Heart of Atlanta Motel, 379 U.S. at 258; see United States v. Wrightwood Dairy Co., 315 U.S. 110, 119 (1942) (commerce power of Congress is plenary and extends to intrastate local activities affecting interstate commerce). "[E]ven if ... activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'" Wickard v. Filburn, 317 U.S. 111, 125 (1942). As long as a class of acts might reasonably have a significant aggregate economic effect nationally, it is irrelevant if an individual's act in that class is trivial. See Fry v. United States, 421 U.S. 542, 547 (1975); Katzenbach, 379 U.S. at 300-01; Wickard, 317 U.S. at 127-28. See also L. Tribe, AMERICAN CONSTITUTIONAL LAW 236-37 (1978).
Water pollution is regarded as seriously affecting interstate commerce, and thus, Congress has the power under the commerce clause to regulate activities that cause such pollution. Courts have broadly defined the prerequisite interstate commerce activities affected by water pollution, recognizing that water pollution impacts interstate commerce by endangering agriculture, ending public enjoyment of rivers and lakes and threatening navigation. Congress may constitutionally regulate bodies of water which are non-navigable and by themselves do not affect interstate commerce other than recreationally or agriculturally. Moreover, challenges to government jurisdiction over intrastate animals or bodies of water, based on a claim that Congress lacks power under the commerce clause, have generally failed.

Spectrum of economic activities ‘affect’ interstate commerce and thus are susceptible of congressional regulation under the commerce clause irrespective of whether navigation, or, indeed, water is involved); see also United States v. Darby, 312 U.S. 100 (1941); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). For a further list of authorities supporting this deferential treatment of congressional power when exercised under the commerce clause, see supra note 18.

20. United States v. Holland, 373 F. Supp. 665 (M.D. Fla. 1974) (dumping of pollutants into canals flowing into arm of Tampa Bay was type of activity Congress intended to regulate under CWA). The Holland court was one of the first to take judicial notice of the effects of water pollution outside of navigable waters. “Congress and the courts have become aware of the lethal effect pollution has on all organisms. Weakening any of the life support systems bodes disaster for the rest of the interrelated life forms. To recognize this and yet hold that pollution does not affect interstate commerce . . . would be contrary to reason.” Id. at 673.

21. United States v. Ashland Oil & Transp. Co., 504 F.2d 1317 (6th Cir. 1974) (dumping of pollutants into canals flowing into arm of Tampa Bay was type of activity Congress intended to regulate under CWA). The court noted the effect water pollution has on interstate commerce; polluted water is unfit for agricultural irrigation, and polluted rivers and lakes are unfit for swimming, boating and fishing. The court also took judicial notice that two rivers in the Fourth Circuit were so polluted with flammable materials that they had repeatedly caught fire. Id. at 1325-26.

22. Utah v. Marsh, 740 F.2d 799, 802-04 (10th Cir. 1984). In Marsh, the State of Utah, through its Division of Parks and Recreation, contended that the Corps had no jurisdiction over a lake with no navigable tributary or outlet beyond the state border. Id. at 801. The State argued these characteristics caused the lake to be beyond the constitutional reach of the regulatory authority of Congress. Id. The State did not controvert evidence presented by the Corps that the lake affected interstate commerce because it was used by interstate travelers and that water from it was used to grow crops sold in interstate commerce. Id. The State considered this evidence irrelevant to the constitutional question. Id. The Marsh court held that discharge of fill material into the lake could affect interstate commerce as defined by the Corps and thus the court supported the Corps’ claim of jurisdiction. Id. at 803.

23. See Marsh, 740 F.2d at 803; United States v. Byrd, 609 F.2d 1204, 1209-11 (7th Cir. 1979) (Congress may constitutionally extend its regulatory control of navigable waters under commerce clause to wetlands which adjoin or are contiguous to intrastate lakes used by interstate travelers for water related recreational purposes); Palila v. Hawaii Dep’t of Land & Natural Resources, 471 F.
B. Congressional Enactment of the Clean Water Act

The CWA was enacted following a congressional finding that national efforts to control water pollution were inadequate. The CWA was enacted in order "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." The word "integrity" refers to a condition in which the natural functions of ecosystems are maintained.

In order to achieve its far-reaching goal of restoring and maintaining the nation's waters, Congress decreed in the CWA that "the discharge of any pollutant [into navigable waters] by any person shall be unlawful." Persons can escape liability only by complying with certain other sections of the CWA. Pollution is defined by the Act as "the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." Congress broadly defined pollutants to include wastes, heat, and discarded sand.

Supp. 985, 991-95 (D. Haw. 1979), aff'd, 639 F.2d 495 (9th Cir. 1981) (Congress may enforce Endangered Species Act on behalf of entirely intrastate animal because of possibilities of interstate commerce in species and interstate movement of persons who come to observe the species); see also Hughes v. Oklahoma, 441 U.S. 322 (1979) (state statute prohibiting out-of-state shipment of certain intrastate fish must yield to federal commerce power).


25. CWA § 101(a); 33 U.S.C. § 1251(a).

26. S. REP. No. 92-911, 92d Cong., 2d Sess. 76-77, reprinted in LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, 753, 763-64 (1972); See Minnehaha Creek, 597 F.2d at 625. The House Committee on Public Works also stated that "[a]ny change induced by man which overtaxes the ability of nature to restore conditions to 'natural' or 'original' is an unacceptable perpetuation." Id.

27. For a discussion of the term "navigable waters," see infra notes 37-43 and accompanying text.

28. CWA § 301(a); 33 U.S.C. § 1311(a).

29. United States v. Velsicol Chemical Corp., 438 F. Supp. 945, 947-48 (W.D. Tenn. 1976) (section 301(a) of CWA; 33 U.S.C. § 1311(a), imposes absolute prohibition on discharge from point source of pollutants into any water of United States by any person unless such discharge is in compliance with certain CWA sections including §§ 301, 302, 306, 307, 318, 402, and 404). The court considered a city sewer system as discharging a pollutant into a navigable water as defined by CWA section 502(7), 33 U.S.C. § 1362(7), but did not base its definition on the section of the CWA that the city had failed to comply with. Id. at 948. It might be assumed, therefore, that the definition of a "water of the United States" under section 502(7) is not dependent on which provision of the CWA is being enforced. For a further discussion of Velsicol, see infra notes 74-75 and accompanying text.


C. Inaugural Corps Jurisdiction Under the Clean Water Act of “Waters of the United States”

Congress provided the United States Army Corps of Engineers with a role in administering the CWA. Section 404 of the CWA requires that those wishing to put dredged or fill material into the “navigable waters” must obtain permits from the Corps. The permit program’s purpose is to prevent “(1) the destruction and degradation of aquatic resources that results from replacing water with dredged material or fill material; and (2) the contamination of water resources with dredged or fill material that contains toxic substances.” The criteria for denying a permit include those where “the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas, . . . wildlife, or recreational areas.”

The CWA defines “navigable waters” to mean “the waters of


33. The Corps accused Leslie Salt Co. of discharging fill into “waters of the United States” in violation of the CWA. Leslie II, 896 F.2d at 356.

The Corps’ original definition of dredged material stated that “[d]redged material means material that is excavated or dredged from navigable waters . . . [but] does not include material resulting from normal farming, silviculture, and ranching activities.” 33 C.F.R. § 209.120(d)(4) (1976). The Corps later updated this definition, stating that dredged material is “material excavated or dredged from waters of the United States.” Permits for Discharges of Dredged or Fill Material into Waters of the United States, 33 C.F.R. § 323.2 (1987).

The Corps’ original definition of fill material stated the following:

Fill material . . . means any pollutant used to create fill in the traditional sense of replacing an aquatic area with dry land or of changing the bottom elevation of a water body . . . [but] does not include . . . [m]aterial resulting from normal farming . . . [or] [m]aterial placed for the purpose of maintenance or emergency repair of existing fills such as dikes, dams, levees, . . . causeways, and bridge abutments or approaches.

33 C.F.R. § 209.120(d)(6) (1976).

For a discussion of the meaning of “fill material” under the CWA, see Minnehaha Creek Watershed Dist. v. Hoffman, 597 F.2d 617, 624-27 (8th Cir. 1979).

34. 33 U.S.C. § 1344(a). “The Secretary [of the Army, acting through the Corps of Engineers] may issue permits, after notice and opportunity for public hearings, for the discharge of dredged or fill material into the navigable waters at specified disposal sites.” Id.


36. CWA § 404(c), 33 U.S.C. § 1344(c).
the United States." But Congress never defined the term "waters of the United States" as it applies to the limits of the Corps' jurisdictional authority, and reliance on the definition of "navigable waters" is unhelpful because it fails to provide any definition for the term "waters of the United States." The term "navigable waters" was used by Congress as a jurisdictional term limiting the scope of Corps regulation beginning with the Rivers and Harbors Appropriation Act of 1899. Relying on the definition in that Act, the Corps defined "navigable waters" as applying only to waters used for the transport of interstate commerce or foreign commerce.

Despite Congress defining Corps jurisdiction as limited to "navigable waters," it is clear from the legislative history that Congress intended the CWA to cover waters beyond the Corps' established test of navigability. In its report on the original

37. Id. § 502(7), 33 U.S.C. § 1362(7). "The term 'navigable waters' means the waters of the United States, including the territorial seas." Id.
38. See CWA §§ 101-607, 33 U.S.C. §§ 1251-1387
39. It is possible that Congress used the term "navigable" to invoke the notion of "navigational servitude" and thereby avoid compensating property owners who are adversely affected by the CWA. The Supreme Court has stated that "[w]hen the 'taking' question has involved the exercise of the public right of navigation over interstate waters that constitute highways for commerce, however, this Court has held in many cases that compensation may not be required as a result of the federal navigational servitude." Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979) (citing United States v. Chandler-Dunbar Co., 229 U.S. 53 (1913)).
40. 33 U.S.C. § 401 (1982). Under section 10 of the Rivers and Harbors Act, 33 U.S.C. § 403, it was illegal to fill, excavate, alter, or modify the course or condition of waters within the boundaries of a navigable waterway without authorization from the Corps. Rivers and Harbors Act § 10, 35 U.S.C. § 403. Under section 13, one was prohibited from the deposit of refuse in or on the bank of a navigable waterway without a Corps permit. Id. § 13, 33 U.S.C. § 407.
41. The Corps still defines "navigable waters" as "those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce." Definition of Navigable Waters of the United States, 33 C.F.R. § 329.4 (1990). However, the Corp stated, in the purpose section of the regulation, that this definition does not apply to authorities [regulations promulgated] under the CWA. Id. § 329.1.
42. The joint House and Senate Committee Committee stated that: "[t]he conference fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." S. Rep.
Senate bill, the Senate Public Works Committee considered the hydrological movement of water to be a key reason for broadening the jurisdiction of waters covered by the CWA: "[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source. Therefore, reference to the control requirements [of the CWA] must be made to the navigable waters, portions thereof, and their tributaries." 43

One of the first cases that expanded Corps jurisdiction over "waters of the United States" beyond its established "navigable waters" definition was United States v. Holland.44 The Holland court held that Congress did not intend Corps jurisdiction under the CWA to be limited to the historical meaning of "navigable waters," as the concept of "navigable" in 1899 was based on Commerce power over transport commerce.45 The Holland court defined water pollution, in addition to transport, as an activity affecting interstate commerce for purposes of the commerce clause, and thus, the Corps was not confined to its traditional definition of "navigable water."46 In the years following the enactment of the CWA, there has been general agreement by the judiciary that Congress gave the Corps broad powers to regulate waters not considered navigable.47

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43. S. REP. No. 92-414, 77, 92d Cong., 1st Sess. (1971), U.S. CODE CONG. & ADMIN. NEWS 1972, 3668, 3742-43. Representative Dingell, in commenting on the Committee's term "navigable waters," emphasized the overall hydrological nature of the waters to be protected, as opposed to mere navigability:

Third, the conference bill defines the term "navigable waters" broadly for water quality purposes. It means all "the waters of the United States" in a geographical sense. It does not mean "navigable waters of the United States" in the technical sense as we sometimes see in some laws . . . . Thus, the new definition clearly encompasses all water bodies, including main streams and their tributaries, for water quality purposes. No longer are the old narrow definitions of navigability, as determined by the Corps of Engineers, going to govern matters covered by this bill.


44. 373 F. Supp. 665 (M.D. Fla. 1974).

45. Id. at 669.

46. Id. at 671. For a discussion of the broad interpretation of congressional power under the commerce clause, see supra notes 16-19 and accompanying text.

47. Even before the Supreme Court addressed the issue of Corps jurisdiction under the CWA in United States v. Riverside Bayview Homes, 474 U.S. 121 (1985), at least one commentator noted agreement throughout the federal courts that Corps jurisdiction was not limited to traditional navigable waters. Note, Significant Development: The Clean Water Act — More Section 404: The Supreme Court Gets its Feet Wet. 65 B.U.L. REV. 995, 1006-07 n.92 (1985). The commenta-
D. Corps Regulations Defining “Waters of the United States”

Pursuant to its mandate under the CWA, the Corps has promulgated regulations which define the term “waters of the United States” by dividing the “waters” into three categories. The first category is the Corps’ traditional area of navigable and interstate waters. The second category is wetlands adjacent to navigable waters.

The definition of Waters of the United States is found in 33 C.F.R. § 328 (1990). The Corps states the purpose of the regulation section is to define “the term ‘waters of the United States’ as it applies to the jurisdictional limits of the authority of the Corps of Engineers under the Clean Water Act.” Id. § 328.1.

The Corps regulations include the following definitions:

(a) 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;

(b) All interstate waters including interstate wetlands;

(c) 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;

(d) 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;

(e) 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.

The definition in section 328.3(a)(1) is similar to the Corps' general definition of navigable waters found in section 329.4. For a discussion of the Corps' traditional meaning of this term, see supra note 37-43. "Waters" also include all tributaries. Id. § 328.3(a)(5).
waters. A third category is all “other waters” which could affect interstate or foreign commerce. These “other waters” include intrastate lakes, rivers, streams, and other structures that hold water.

E. Classification of “Waters” Based on Their Hydrological Connection with Other Waters

For purposes of defining its jurisdiction, the Corps has categorized “waters of the United States” based on the Corps’ traditional “navigable” definition, the interstate location of the waters, and the physical structure of the water body.

For purposes of this Note, cases challenging the Corps’ interpretation of “waters,” and thus the Corps’ jurisdiction over the “water,” can also be classified by two distinct physical characteristics of the water itself: those cases where “waters” are hydrologically connected to other waters, and those where “waters” are non-hydrologically connected.

50. *Id.* § 328.3(a)(7). “The term ‘wetlands’ means 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.” *Id.* § 328.3(b). Wetlands generally include swamps, marshes, bogs and similar areas. *Id.*

Adjacent wetlands are those waters bordering, contiguous or neighboring but otherwise separated from other “waters of the United States” by natural or man-made barriers. *Id.* § 328.3(c).

51. *Id.* § 328.3(a)(3). The Corps lists examples of waters which by their use, degradation or destruction could affect interstate or foreign commerce as including 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 purpose by industries in interstate commerce;

*Id.*

For the complete list of examples of waters, see *infra* note 159.

52. Definition of Waters of the United States, 33 C.F.R. § 328.3(a)(3) (1990). All other waters include “intrasate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds. . . .” *Id.*

53. For a discussion of the Corps’ categorization of “waters of the United States,” see *supra* notes 48-52 and accompanying text.

54. For a discussion of cases challenging Corps jurisdiction over each category of “water,” see *infra* notes 55-112 and accompanying text. For the definition of “hydrologically connected,” see *supra* note 5 and accompanying text.
I. Challenges to Corps Jurisdiction over Waters Hydrologically Connected with Other Waters

Challenges to Corps jurisdiction over hydrologically connected waters not falling squarely into Corps regulatory descriptions have failed because the intent of Congress is clear: water pollution that moves in hydrologic cycles must be controlled at the source.\(^{55}\)

a. Wetlands

Wetlands may not be directly hydrologically connected to other bodies of water, and are, therefore, harder to define,\(^{56}\) but their very nature and ecological function supports the contention that wetland pollution or destruction affects adjacent waters and thus merits protection.\(^{57}\) Because Congress has expressed special

55. For a discussion of cases challenging Corps jurisdiction over hydrologically connected waters, see infra notes 56-92 and accompanying text. For a discussion of congressional intent on this subject, see supra note 43 and accompanying text.

56. One commentator surveyed the changing definitions of wetlands and stated: "like the land and waters it defines, the Corps' definition of the term 'wetlands' has not been immutable. The definitions which have been used by the Corps in its various past regulations have differed significantly ... ." Schlauch & Strickland, Changing Land to Water— The Alchemy of the Federal Wetlands Regulatory Scheme, 27A ROCKY MTN. MIN. INST. 635, 715 (1981).

For the latest Corps regulations defining wetlands, see supra note 50 and accompanying text. Compare the current definition with an earlier regulation defining wetlands as follows: an area "inundated or saturated by water at a frequency and duration sufficient to support aquatic vegetation. This inundation or saturation may be caused by either surface water, ground water, or a combination of both." 42 Fed. Reg. 37,112, 37,128 (1977).

Another commentator takes a more cynical view of the Corps' evolving regulations:

Building dams had gone out of style, the Corps needed a new bailiwick and environmental activism was it. Consequently, the Corps, which had designated wetlands on the basis of the land's functions, changed the formula to include such factors as plant types and chemical properties and moisture of the soil.


57. The court in National Wildlife Fed'n v. Hanson, 623 F. Supp. 1539 (E.D.N.C. 1985), aff'd in part, vacated in part, 859 F.2d 313 (4th Cir. 1988), summed up the importance of wetlands in relation to its surrounding ecology: [W]etlands and bays, estuaries and deltas are the Nation's most biologically active areas. They represent a principal source of food supply. They are the spawning grounds for much of the fish and shellfish which populate the oceans, and they are passages for numerous upland game fish. They also provide nesting areas for a myriad of species of birds and wildlife. The unregulated destruction of these areas is a matter which needs to be corrected and which implementation of section 404 has attempted to achieve.

Id. at 1543-44 (quoting 1977 U.S. CODE CONG. & ADMIN. NEWS 4326, 4336).

The importance of wetlands to adjacent waters is made clear simply by the
interest in the fate of wetlands, the Corps has been given broad authority to determine what is a wetland. Courts have generally given deference to the Corps' wetlands definitions.

The Supreme Court in *United States v. Riverside Bayview Homes* evaluated the scope of Corps jurisdiction under both the CWA and the Corps' corresponding regulations. In 1976, Riverside began construction of a housing development on marshy, lake shore lands. The Corps asserted jurisdiction over the property as an adjacent wetland. The Sixth Circuit denied the Corps jurisdiction. The Supreme Court reversed, holding that "the language, policies, and history of the Clean Water Act com-

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58. Avoyelles Sportsmen's League v. Marsh, 715 F.2d 897, 915 (5th Cir. 1983) ("[i]n fact, Congress repeatedly recognized the importance of protecting wetlands if the nation was to realize the statutory goal of restoring the chemical and biological integrity of the nation's waters."). For a further statement of congressional concern for the fate of wetlands, see supra note 57.

59. The Corps has the primary responsibility for determining whether particular tracts are wetlands. CWA §§ 404(a)-(c), 33 U.S.C. § 1344(a)-(c). The Corps may enlist the aid of the EPA in "special cases." Jurisdiction of Dredge and Fill Program; Memorandum of Understanding, 45 Fed. Reg. 45,018 (1980). See also Hanson, 623 F. Supp. at 1545 (in wetlands determination, Corps must evaluate vegetation, hydrology, and soils).

60. See Avoyelles, 715 F.2d at 906 ("[t]he determination [of wetland condition] . . . which requires an analysis of the types of vegetation, soil and water conditions . . . is the kind of scientific decision normally accorded significant deference by the courts").

61. 474 U.S. 121 (1985). Interestingly, Justice White, who delivered the opinion for a unanimous Court in *Riverside*, was the only Justice willing to grant the petition of Leslie Salt Co. for writ of *certiorari* to review the decision in *Leslie II*. Leslie Salt Co. v. United States, ___ U.S. __, 111 S.Ct. 1089, 1090 (1991).

62. *Riverside*, 474 U.S. at 123. The *Riverside* court stated the issue as follows: This case presents the question whether the Clean Water Act (CWA), 33 U.S.C. § 1251 et seq., together with certain regulations promulgated under its authority by the Army Corps of Engineers, authorizes the Corps to require landowners to obtain permits from the Corps before discharging fill material into wetlands adjacent to navigable bodies of water and their tributaries.

*Id.*

63. *Id.* at 124.

64. *Id.* at 124-25. When Riverside persisted in discharging fill materials without a permit, the Corps sued to enjoin Riverside from filling the property without Corps' permission with the district court holding the wetlands subject to Corps jurisdiction. *Id.*

65. *Id.* at 125. The Sixth Circuit held that Corps regulations excluded from the category of adjacent wetlands, and hence from "waters of the United..."
pel a finding that the Corps has acted reasonably in interpreting the Act to require permits for the discharge of fill material into wetlands adjacent to the 'waters of the United States.' "

The Supreme Court in *Riverside* found that the issue of the Corps' asserted jurisdiction over wetlands was specifically called to Congress' attention during a 1977 debate over proposed changes to the CWA. 67 Congress had rejected measures designed to limit Corps jurisdiction, and the Supreme Court found this to be evidence of the reasonableness of the Corps' interpretation of the CWA. 68

In reaching its conclusion, the Supreme Court considered important the hydrological connection between the wetlands and adjacent water. 69 The Supreme Court deemed the Corps' regulations reasonable even though the wetlands were not directly hydrologically linked because the wetlands affect the water quality of adjacent waters in other hydrologically beneficial ways. 70 It is important to note that the Court did not specifically address the issue of Corps jurisdiction over non-adjacent waters and thus did not decide Corps jurisdiction over waters with no hydrological connection with other waters. 71

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66. *Riverside*, 474 U.S. at 139. The Supreme Court reviewed and approved the reasonableness of the Corps' interpretation of "waters of the United States" as used in the CWA. *Id.* Citing legislative history, the Supreme Court inferred that Congress intended to exercise broad jurisdiction in its attempt "to restore and maintain the chemical, physical, and biological integrity" of the nation's waters. *Id.* at 132-33. The Supreme Court concluded that Congress meant to exercise its commerce power to regulate some waters not traditionally considered navigable. *Id.* at 133.

67. *Id.* at 135-37.

68. *Id.* The Supreme Court held that "a refusal by Congress to overrule an agency's construction of legislation is at least some evidence of the reasonableness of that construction, particularly where the administrative construction has been brought to Congress's attention through legislation specifically designed to supplant it." *Id.* at 137.

69. *Id.* at 132-35. The Supreme Court noted that a congressional report discussed water moving in hydrological cycles as an essential reason for controlling water pollution at its source. *Id.* at 132-33. The Court also noted Corps regulations explaining the need for expanded jurisdiction based on waters within the aquatic system which move in hydrological cycles. *Id.* at 134.

70. *Riverside*, 474 U.S. at 134-35. The Supreme Court noted that wetlands, even though not flooded by adjacent waters, still may tend to drain into those waters. *Id.* The wetlands may (1) filter and purify the water as it drains, (2) slow the flow of runoff into lakes, rivers, and streams and prevent flooding and erosion, and (3) serve significant natural biological functions including providing habitat for aquatic species. *Id.*

71. *Id.* at 131 n.8. The Supreme Court stated "[w]e are not called upon to address the question of the authority of the Corps to regulate discharges of fill
b. Artificially Created Waters

Corps jurisdiction is not barred because a hydrologically connected water was artificially created. In *Holland*, the court held that Congress intended the Corps to have broad jurisdiction under the CWA.\(^{72}\) The court stated that jurisdiction should extend to waters conveying pollutants into other bodies of water, such as canals, whether they were man-made or not.\(^{73}\) In *United States v. Velsicol Chemical Corp.*,\(^{74}\) the court held that water in a city sewer system, into which pollutants were being discharged, was a "water of the United States" under the CWA because the sewer emptied into the Mississippi River.\(^{75}\)

Similarly, the fact that wetlands were artificially created is not a bar to Corps jurisdiction.\(^{76}\) In *Leslie Salt Co. v. Froehlke*,\(^{77}\) the Ninth Circuit held that waters which were formerly subjected to tidal inundation from other waters were still under Corps CWA jurisdiction even when currently separated from those waters by material into wetlands that are not adjacent to bodies of open water . . . and we do not express any opinion on that question." *Id.* For a reaction to *Riverside* by developers, see *supra* note 14.


73. *Id.* at 673-74. The *Holland* court held that man-made, non-navigable mosquito canals which empty into a bayou arm of the Tampa Bay in Florida are "waters of the United States." *Id.* See also *United States v. DeFelice*, 641 F.2d 1169, 1172-75 (5th Cir. 1981) (illegal and unauthorized acts of third parties can create Rivers and Harbors Act jurisdiction when artificially created canal became connected to tidal waterway), *cert. denied*, 454 U.S. 940 (1981).


75. *Id.* at 946-47. The suit was filed by the United States against an alleged discharger of pollutants into the Mississippi River via the City of Memphis Wastewater Collection System. The *Velsicol* court found the sewer to be a "water of the United States" as defined in CWA section 502(7), 33 U.S.C. § 1362(7) (1987). For the text of section 502(7), see *supra* note 37 and accompanying text.

76. *See United States v. Akers*, 651 F. Supp. 320, 323 (E.D. Cal. 1987) (prior Supreme Court observation that congressional concern with "entire hydrologic cycle" leads to broad definition of wetlands supporting Corps claim of jurisdiction over man-made wetlands); *Track 12 Inc. v. District Engineer, U.S. Army Corps of Engineers*, 618 F. Supp. 448, 450 (D. Minn. 1985) (argument that Corps lacks jurisdiction because tract is not natural wetland is contrary to legislative and judicial authority); *United States v. Ciampitti*, 583 F. Supp. 483, 494 (D.N.J. 1984) (fact that part of area may have become wetlands because of man-made connection between site and tidal waterways not dispositive because Corps jurisdiction determined by whether site is presently wetland, not how it became wetland), *aff’d*, 772 F.2d 893 (3d Cir. 1985), *cert. denied*, 475 U.S. 1014 (1986); *United States v. Bradshaw*, 541 F. Supp. 880, 883 (D. Md. 1981) (historical condition of land irrelevant where area was wetland at time Corps asserted jurisdiction).

77. 578 F.2d 742 (9th Cir. 1978).
man-made dikes.\textsuperscript{78}

c. Government Created Waters

The fact that the government itself has helped create the body of water does not bar Corps jurisdiction. A narrow exception to this general rule\textsuperscript{79} was established, however, in \textit{United States v. City of Fort Pierre}.\textsuperscript{80} In \textit{Fort Pierre}, the Corps asserted jurisdiction over a dry slough that had begun to exhibit wetland characteristics as a direct result of the Corps’ ordinary river maintenance (dredging activities) on a nearby river.\textsuperscript{81} The \textit{Fort Pierre} court held that the Corps could not claim jurisdiction in this narrow instance because of the “peculiar facts and unique circumstances” of the Corps activity.\textsuperscript{82}

In \textit{United States v. Southern Inv. Co.},\textsuperscript{83} the Corps had built a dam which may have caused a portion of defendant’s land to acquire wetland characteristics.\textsuperscript{84} In contrast to \textit{Fort Pierre}, the \textit{Southern Inv.} court held that even if the Corps indisputably caused the wetland conditions, the Corps maintained jurisdiction because building a dam is not ordinary river maintenance. Therefore, the narrow \textit{Fort Pierre} exception did not apply.\textsuperscript{85}

d. Temporary or Seasonal Waters

Just as the artificial nature or construction of a water body is irrelevant to Corps jurisdiction, the same is true for temporary or

\textsuperscript{78} Id. at 756. The property in question was not the subject of Leslie’s current suit.

\textsuperscript{79} For a discussion of the general rule that government created waters are still be subject to Corps jurisdiction, see infra notes 83-85 and accompanying text.

\textsuperscript{80} 747 F.2d 464 (8th Cir. 1984).

\textsuperscript{81} Id. at 467. The \textit{Fort Pierre} court found the water in the area to be polluted, stagnant, devoid of wildlife, and not conducive to significant use by the public. \textit{Id.}

\textsuperscript{82} Id. at 466-67. The \textit{Fort Pierre} court denied Corps jurisdiction when “the Corps, as an unintended by-product of ordinary river maintenance, inadvertently creates a wetland-type ecological system on private property where no such system previously existed.” \textit{Id.} at 476. The Court neither decided whether Congress could not assert jurisdiction over the slough if it chose to, nor did it challenge Corps jurisdiction over any other artificially created wetlands. \textit{Id.}

\textsuperscript{83} 876 F.2d 606 (8th Cir. 1989).

\textsuperscript{84} Id. at 609.

\textsuperscript{85} Id. at 612. \textit{See also} Swanson v. United States, 789 F.2d 1368 (9th Cir. 1986) (Corps construction of dam which raised water level to cover private land created waters under Corps jurisdiction); United States v. Tull, 769 F.2d 182, 184 (4th Cir. 1985) (federal construction of mosquito-control drainage ditch created waters under Rivers and Harbors Act jurisdiction), rev’d on other grounds, 481 U.S. 412, 414 n. 1 (1987).
seasonal water body formations. The court in United States v. Phelps Dodge Corp. reviewed the legislative history of the CWA and concluded that "waters of the United States" include normally dry arroyos which have a hydrological connection with other waters.

Quivira Mining Co. v. EPA decided the question of jurisdiction over a normally dry arroyo and creek being used for waste discharge. The Quivira court concluded that, under the CWA, Congress intended to regulate discharges into all bodies of water effecting interstate commerce. The court emphasized in two separate portions of its opinion the fact that, although surface flow occurred only occasionally, there were other hydrological connections between the arroyo, creek and other bodies of water.

2. Challenges to Corps Jurisdiction over Waters not Hydrologically Connected with Other Waters

a. Recreation and Industry as the Basis for a Water's Interstate Commerce Connection

Waters that are not hydrologically connected with other "waters of the United States" must have an independent connection

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87. An arroyo is a "deep gully cut by an intermittent stream; dry gulch." The American Heritage Dictionary 129 (2d College ed. 1982).
88. Phelps Dodge, 391 F. Supp. at 1184-87. The court held the following: [T]he legal definition of . . . "waters of the United States" within the scope of the [CWA] includes any waterway within the United States also including normally dry arroyos through which water may flow, where such water will ultimately end up in public waters such as a river or stream, tributary to a river or stream, lake, reservoir, bay, gulf, sea or ocean either within or adjacent to the United States. Id. at 1187.
89. 765 F.2d 126 (10th Cir. 1985), cert. denied, 474 U.S. 1055 (1986).
90. Id. at 127, 129. The plaintiff discharged waste into the waters from its uranium mining mills. Id. at 127.
91. Id. at 129-30.
92. Id. at 130. The Quivira court noted that although the arroyo and creek were not navigable, during heavy rainfall a surface connection was established with other navigable waters. The court emphasized that the waters of the arroyo and creek soak into the earth and become part of underground aquifers, and this underground water eventually discharges in another spring or creek. Id. at 129.

The Quivira court further stated that its findings were compelled by the evidence that during heavy rainfall there was a surface connection between the arroyo and creek and other navigable-in-fact streams. Id. at 130. The court further added that the water flow continued regularly though underground aquifers fed by the surface flow in the arroyo and creek, and this flow eventually made its way into navigable-in-fact streams. Id.
to interstate commerce for Corps jurisdiction to be upheld. The court in United States v. Byrd decided the issue of Corps jurisdiction over an inland intrastate lake and its adjacent wetland. The Byrd court concluded that Congress could extend Corps jurisdiction under the CWA, based on commerce clause power, where the interstate commerce connection is based on recreational use of the lake by out-of-state visitors.

The Tenth Circuit in Utah v. Marsh decided the issue of Corps jurisdiction over a lake with no navigable tributary or outlet outside the state of Utah. The court upheld Corps jurisdiction based on the lake’s interstate commerce connection because the lake was used to irrigate crops sold in interstate commerce, supported a fishery whose products were sold out-of-state, and provided interstate travelers with recreational opportunities.

The court in Fort Pierre, denied Corps jurisdiction over a slough exhibiting some wetland characteristics but otherwise having no hydrological connection to any other bodies of water. The court based its decision in part on the fact that the slough was “devoid of wildlife, supports no fish or fowl, and is not conducive to recreation or other significant use by the public.”

93. This is in contrast to waters with hydrological connections; congressional intent in the CWA to protect from pollution all traditional waters of the United States that are joined in the hydrological cycle by other waters clearly establishes an interstate commerce connection. See supra notes 56-92 and accompanying text.

The question of the extent of the hydrological connection was found to be determinative in Kelley v. United States, 618 F. Supp. 1103 (W.D Mich. 1985). In Kelley, the court held that Congress did not intend CWA jurisdiction to apply over groundwater contamination. Id. at 1107. The Kelley decision was handed down prior to the Supreme Court’s ruling in Riverside, which reversed a CWA jurisdictional scope question in the Kelley circuit. As such, Kelley may not be good law today.

94. 609 F.2d 1204 (7th Cir. 1979).
95. Id. at 1210. The recreational use must be for water related recreational purposes such as fishing or swimming. Id.
96. 740 F.2d 799 (10th Cir. 1984).
97. Id. at 800. The court found that half the water in the lake was lost through evaporation, and the rest was delivered via a river and irrigation canal to industry. Id. at 800-01. The effect pollution had on the river or canal was not considered and was not the basis of the court’s opinion.
98. Id. at 803. The recreational opportunities included fishing, hunting, boating, water skiing, picnicking, camping, observation, photography, and appreciation of bird and animal life. Id.
99. Fort Pierre, 747 F.2d 464. For a discussion of other aspects of the Fort Pierre case, see supra notes 80-82 and accompanying text.
100. Id. at 467.
b. A Water's Interstate Commerce Connection Based Solely on the Presence of Migratory Birds

The question of the Corps' CWA jurisdiction over non-hydrologically connected waters, where the jurisdiction is based solely on the presence of migratory birds, has not been specifically answered by the courts. In *National Wildlife Fed'n v. Laubscher*, the court identified the issue as whether the Corps had jurisdiction, under the CWA, over an intrastate pond visited by migratory birds. However, the court then described the pond as a wetland and concluded that it was within the jurisdiction of the Corps because "a wetland visited by migratory birds is a wetland within the jurisdiction of [the Corps]." The court in *Tabb Lakes Ltd. v. United States* also avoided deciding the question of Corps jurisdiction over bodies of water when jurisdiction is based solely on the presence of migratory birds. In *Tabb*, the Corps claimed jurisdiction based on the presence of migratory birds and supported its authority with a memorandum from a deputy director of the Corps. The memorandum stated that "[w]aters which are used or could be used as habitat by other migratory birds which cross state lines" is a basis for Corps jurisdiction under the CWA. The *Tabb* court determined the Corps did not have jurisdiction on the narrow grounds that the memorandum did not meet federal administrative agency notice and comment requirements. The court, however, did express its opinion on the subject stating that it had "grave doubts that a property now so used, or seen as an expectant

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102. *Id.* at 549. The EPA was also a federal defendant in the case with similar jurisdictional rights as the Corps under the CWA. *Id.*
103. *Id.* at n.1. "[The pond] is a thirty acre wetland located in Willacy County, Texas." *Id.*
104. *Id.* at 549. It is not certain whether the visits of migratory birds was the sole reason for jurisdiction because wetlands have other characteristics that support its designation as a "water of the United States." For a discussion of Corps wetland jurisdiction, see *supra* notes 56-71 and accompanying text.
106. *Id.* at 729.
107. *Id.* at 728.
108. *Id.*
109. *Tabb*, 715 F. Supp. at 729. The APA's [Administrative and Procedures Act § 4, 5 U.S.C. § 553 (1988)] "notice and comment provisions seek to insure [sic] public participation and fairness to affected parties where agencies hold governmental authority." *Id.* at 728. The *Tabb* court stated that it must set aside the Corps' actions because the Corps' memorandum was not exempted from the APA's notice and comment requirements. *Id.* at 729.
habitat for some migratory birds, can be declared to be such a nexus to interstate commerce as to warrant Army Corps of Engineers jurisdiction."110

After Tabb the Corps formally published a clarification of "waters of the United States" to include waters used by migratory birds.111 The Corps also broadly defined its jurisdiction to include, on a case-by-case basis, many artificially created bodies of water that have no hydrological connection to other bodies of water.112

110. Id.

111. The issue in Tabb, compliance with the APA's notice and comment requirements, was resolved when the Corps published the following clarification of its definition of "waters of the United States":

[W]aters of the United States . . . also include the following 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.

Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41,217 (1986). The regulations also included waters used to irrigate crops sold in interstate commerce. Id.

112. Id. The Corps stated its authority as follows:

For clarification it should be noted that we generally do not consider the following waters to be "Waters of the United States." However, the Corps reserves the right on a case-by-case basis to determine that a particular waterbody within these categories of waters is a water of the United States. EPA also has the right to determine on a case-by-case basis if any of these waters are "waters of the United States."

(a) Non-tidal drainage and irrigation ditches excavated on dry land.

(b) Artificially irrigated areas which would revert to upland if the irrigation ceased.

(c) Artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.

(d) Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating and/or diking dry land to retain water for primarily aesthetic reasons.

(e) Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States (see 33 C.F.R. 328.3(a)).

Id.
III. THE LESLIE SALT CO. V. UNITED STATES CASE

A. The Factual Background and Procedural History

Leslie II involved Corps' claims of jurisdiction over two distinct portions of land based on two different legal theories. The first parcel of land was claimed as an adjacent wetland even though government actions helped make it aquatic. The other parcel of land was claimed as an "other water" defined in the Corps' regulations.

The dispute revolved around a 153 acre tract of undeveloped land owned by the Leslie Salt Co. and located south of San Francisco in the city of Newark, Alameda County, California. The property lies east of the San Francisco National Wildlife Refuge and is approximately one quarter mile from the Newark Slough, a tidal water of the San Francisco Bay. There are neither tributary streams or rivers on, or adjacent to, the property, nor has the property ever been inundated by tides. A road divides the property into two parcels: one of 143 acres (parcel 143) and one of 10 acres (parcel 10).

114. Id. at 356-57. For purposes of describing the characteristics of the land in controversy, both the appellate court and district court descriptions are cited. The descriptions of the land complement each other. The appellate court did not find the district court's finding of fact pertaining to the land to be in error. For a discussion of the description of the land and procedural history of the case in controversy, see notes 113-39 and accompanying text.
115. Id. at 356.
116. Id. at 357.
117. Leslie II, 896 F.2d at 355. The land is also referred to as the Newark Coyote Property. Id.
118. Id.
120. Id. The district court refers to the parcels of land by the terms "parcel 143" and "parcel 10." Id. Because the issues in the case are very sensitive to the exact nature and location of the land, and because the features and boundaries have changed over the years, the district court provided the following detailed description:

[The property] is surrounded on all sides by roads and highways. The one hundred forty-three acre parcel ("parcel 143") is bounded on the north by State Highway 84, on the west by Thornton Avenue, on the south by relocated Jarvis Avenue, and on the east by Jarvis Avenue, with residential subdivisions of the City of Newark lying east across Jarvis Avenue. The ten acre parcel ("parcel 10") is located across relocated Jarvis Avenue to the south of parcel 143 and is bounded by Thornton and Jarvis Avenues.

Across Thornton Avenue to the west of the property is the San Francisco National Wildlife Refuge, situated on land which was previously taken from Leslie by condemnation action of United States. The nearest navigable water is Newark Slough, which is approximately one
The property, originally pastureland, was acquired by Leslie's predecessors in interest in the late 1800's and used for the production of salt. As part of the production process, they excavated pits (pits) on the eastern one-third of parcel 143 for depositing calcium chloride, and created crystallizer ponds (crystallizers) on the western two-thirds. Salt production on the property stopped, for the most part, in 1959.

Although salt production had ceased, the pits and crystallizers remained and each year they temporarily filled with water. The Leslie II court found that although the "ponding" was limited, "standing water did form on the property and remain long enough for fish and plant life to live in the ponds." More importantly for the Corps' claim, the Leslie II court found that when the crystallizers and pits were flooded during the winter and

quarter mile from the southernmost tip of the property, and that point is approximately two miles from San Francisco Bay.

Id.

121. Leslie I, 700 F. Supp. at 479-80. To further the manufacture of salt, Leslie's predecessor constructed a railroad spur, a salt refining plant, and related buildings. Leslie II, 896 F.2d at 355.

122. Leslie II, 896 F.2d at 355. The court describes the crystallizers as "large, shallow, water-tight basins." Id. The salt crystallizers "held salt brine during the final stage of the solar salt production process." Leslie I, 700 F. Supp. at 480. The district court further expounded on how the crystallizers were constructed and how they were used as follows:

The crystallizers were constructed on dry land, by excavating large shallow basins, and leveling and compacting the soil on the bottom to create a level and watertight surface. The excavated soil was used to build earthen levees around the crystallizers to form watertight earthen containers. During the years of their use by Leslie, saturated salt brine (which had been produced by Leslie's evaporation ponds located closer to San Francisco Bay) was pumped through the Coyote Hills and into the crystallizers. The salt then precipitated and settled onto the bottom of the crystallizers. The remaining liquid was drawn off, and the salt was harvested by large mechanical harvesters that ran across the floor of the crystallizers. The salt was then moved by railcars to a refining plant located on the property. After each harvest of the salt, the crystallizers were drained, releveled, and recompacted.

Id.

123. Leslie II, 896 F.2d at 355. The district court noted that the production of salt had become uneconomical, although there was some limited production in 1962 and 1968. Leslie I, 700 F. Supp. at 480.

124. Leslie II, 896 F.2d at 355. The appellate court explained that the San Francisco Bay Area has a Mediterranean climate where rain is not consistent throughout the year but occurs primarily in the winter and spring months. Id. at 355 n.1.

125. Id. at 355-56. The formation of plant life in the crystallizers was helped by Leslie plowing the property in 1983 to combat a dust problem. Previously, plant life had been nonexistent due to the high salinity and compaction of the soil. Id.
spring, migratory birds used them as a habitat.126

The Leslie II court found the property was “substantially af-

Tected by construction of a sewer line and public roads on and

around the property.”127 This construction created, besides
ditches and road beds, “culverts which hydrologically connected
the property to the Newark Slough.”128 The Leslie II court noted
that Caltrans, the state highway authority, had in part caused the
tidal backflow to reach the property by building the culverts,
breaching a levy on the wildlife refuge adjacent to the property
and by destroying a tidegate which had previously prevented the
tidal backflow from reaching Leslie’s property.129 The Leslie II
court maintained that the effect of this human activity was “to fos-
ter natural, ecological developments” which included the creation
of some wetland features on the southern fringes of the property
and use of the property by an endangered species.130

In late 1985, Leslie started to dig a feeder ditch and siltation
pond on parcel 143 in order to drain the land.131 The Corps is-
sued a cease and desist order pursuant to its authority under sec-
tion 404 of the CWA,132 “claiming that Leslie was discharging a
pollutant, [fill], into waters of the United States in violation of
section 301 of the CWA.”133 The Corps issued a second cease
and desist order in early 1987 to stop Leslie from blocking a cul-

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126. Id. at 356.
127. Id.
128. Leslie II, 896 F.2d at 356. The district court found that the culverts
drained the property of water and subjected it to some backflow. Leslie I, 700
F. Supp. at 479. The district court then described the location of the culverts in
relation to the property:

One is located at the southernmost tip of parcel 10, and runs under
Thornton Avenue to Newark Slough. The second is located near the
intersection of Jarvis and Thornton, and runs under Thornton Avenue
onto the wildlife refuge. The third is located approximately halfway up
Thornton Avenue, and also runs under Thornton Avenue and onto the
wildlife refuge.

Id.

129. Leslie II, 896 F.2d at 356, 358.
130. Id. at 356. The appellate court found that tidewater on the edges of
Leslie’s property caused the wetland features. Id. The endangered species was
the salt marsh harvest mouse. Id.
131. Id.
132. 33 U.S.C. § 1344. For a discussion of section 404 of the CWA, see
supra note 33-34 and accompanying text.
133. Leslie II, 896 F.2d at 356. “The Corps also claimed that Leslie’s activi-
ties were obstructing the navigable waters of the United States in violation of
section 10 of the Rivers and Harbors Appropriations Act.” Id. For a discussion
of the Rivers and Harbors Act, see supra note 40 and accompanying text. For the
definition of “fill,” see supra note 33.
vert which connects the property to the Newark Slough.  

In issuing the cease and desist order, the Corps claimed jurisdiction over the majority of the Leslie Salt property. Leslie challenged the Corps' claim of jurisdiction and filed suit. The Corps countersued to establish its jurisdiction over the property and claimed that Leslie had violated the CWA and the Rivers and Harbors Act "in connection with its activities on or connected with the property." The district court found in favor of Leslie, holding that the property was not subject to the Corps' jurisdiction. The Corps then appealed the decision to the Ninth Circuit.  

The Leslie II court began its analysis by framing the issue as one of jurisdiction over the two parcels of land: (1) whether most of parcel 10 and the southern tip of parcel 143 are adjacent wetlands and part of the Corps' CWA jurisdiction, in spite of the fact that government actions made them aquatic; and (2) whether the former crystallizers and calcium chloride pits are "other waters," as defined by the Corps' regulations, and subject to its jurisdiction under the CWA?

The Leslie II court considered separately the standard of review for the district court's findings and the Corps' regulations. It declared that the district court's findings of fact were subject to the "clearly erroneous" standard of review. The court was similarly deferential when considering the Corps' interpretation of the CWA, deferring to the agency's analysis if it was "reasonable and not in conflict with the expressed intent of Congress." But the appellate court regarded issues of law, involving consideration of legal concepts rather than essentially factual inquiries,

134. Id.
135. Id.
137. Id.
138. Id. at 490.
139. Leslie II, 896 F.2d 354. Save San Francisco Bay Association and the National Audubon Society also joined the appeal, intervening on behalf of the Corps. Id. at 356.
140. Id. at 356-57.
141. Id. at 357.
142. Id.
143. Leslie II, 896 F.2d at 357 (citing United States v. Riverside Bayview Homes, 474 U.S. 121, 151 (1985) and Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 844-45 (1984)). "The agency's interpretation of its own regulations is entitled to greater deference, amounting to a plain error standard." Id.
B. Corps Jurisdiction over the Southern Portions of Leslie’s Property as “Wetlands”

The Court of Appeals first considered the issue of the Corps’ jurisdictional claim over the southern portions of property as “wetlands.” The appellate court examined the three reasons provided by the district court for denying the Corps’ jurisdiction and found them each to be erroneous.

1. Wetlands Created by the Government Theory

The appellate court first examined the district court’s denial of jurisdiction based on the fact that the wetland conditions were caused by the government. The appellate court noted that “Congress intended to create a very broad grant of jurisdiction in the Clean Water Act, extending to any aquatic features within the reach of the commerce clause power.”

The district court in Leslie Salt II had found an exception to this congressional mandate when the changes to the property were caused by the government, reasoning that the Corps should not be allowed “to expand its own jurisdiction by creating some wetland conditions where none existed before.” The district court had relied on Fort Pierre; however, the appellate court distinguished Leslie Salt I & II from Fort Pierre on the facts. The appellate court found, unlike Fort Pierre, that “the Corps was not directly and solely responsible for flooding Leslie’s land;” the

144. Id.
145. Id.
146. Id. at 357-59. The district court had denied the Corps jurisdiction over the parcel because: “(1) the wetland conditions were caused by the government; (2) the conditions were not normal, as required by 33 C.F.R. § 328.3(b) and; (3) the property was not adjacent to waters of the United States, as required by 33 C.F.R. § 328.3(a)(7).” Id. at 357.
147. Leslie II, 896 F.2d at 357 (citing Leslie Salt Co. v. Froehlke, 578 F.2d 742, 755 (9th Cir. 1978) (citing California v. EPA, 511 F.2d 963, 964 n. 1 (9th Cir. 1975), rev’d on other grounds, 426 U.S. 200, (1976))). For a discussion of congressional intent in enacting the CWA, see supra note 43 and accompanying text. For a discussion of congressional power under the commerce clause, see supra notes 16-23 and accompanying text.
148. Id.
149. Id. at 358. For a discussion of Fort Pierre, see supra notes 80-85 and accompanying text.
150. Id. at 358. The appellate court noted that other parties were responsible for allowing water to flow onto Leslie’s property: “[1] Caltrans constructed the culverts which allowed water to flow onto Leslie’s property; [2] Caltrans and the Fish and Wildlife Service breached the levee on the wildlife refuge adjacent
Corps, therefore, was not attempting to expand its own jurisdiction. 151

The appellate court added that even if third parties, including the government, were responsible for flooding Leslie's land, the Corps' jurisdiction did not depend on how the property became a water of the United States because "Congress intended to regulate local aquatic ecosystems regardless of their origin." 152

2. Man-Made Wetlands Theory

The district court also reasoned that because the wetlands were man-made, they were not "normal" as required by the Corps' regulations. 153 The Court of Appeals, in rejecting this

to Leslie's property which allowed water to flow up the culverts; [3] Caltrans and the Fish and Wildlife Service failed to place effective floodgates on the culverts; and [4] Leslie itself maintained floodgates which unknown third parties propped open." 151 Leslie II, 896 F.2d at 358. The appellate court also stated that the finding by the district court that "the Corps flooded the wildlife refuge and thereby brought tidewater further inland" directly contradicted the record. Id. at 358 n.7.

152. Id. at 358. The appellate court deemed that how the land became a "water of the United States" was "irrelevant." Id. The court cited the following cases as authority for this proposition:

Swanson v. United States, 789 F.2d 1368 (9th Cir. 1986) (Corps construction of a dam creates waters under Corps jurisdiction); United States v. Tull, 769 F.2d 182, 184 (4th Cir. 1985) (federal construction of mosquito-control ditch creates waters under Rivers and Harbors Act jurisdiction), rev'd on other grounds, 481 U.S. 412, 414 n. 1, 107 S.Ct. 1831, 1834 n. 1, 95 L.Ed.2d 365, 371 (1987); United States v. DeFelice, 641 F.2d at 1175 (illegal and unauthorized acts of third parties can create Rivers and Harbors Act jurisdiction), cert. denied, 454 U.S. 940, 102 S.Ct. 474, 70 L.Ed.2d 247 (1981); Track 12 Inc. v. District Engineer, U.S. Army Corps of Engineers, 618 F. Supp. 448, 449 (D. Minn. 1985) (state and locality construction of highway and sewage system creates Corps jurisdiction). 153. Leslie II, 896 F.2d at 358. The appellate court was referring to regulations under 33 C.F.R. § 328.3(b). For the text of 33 C.F.R. § 328.3(b) (1987), see supra note 50. The appellate court noted that the district court had "found the requisite wetland conditions." 154 Leslie II, 896 F.2d at 358. The district court held, however, that "circumstances in those areas are not 'normal,' because the ability to support [wetland] vegetation was caused primarily by the government's flooding of the wildlife refuge across [the road]." Id.

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reasoning, stated that "normal" excluded only those areas which are not aquatic but still experience an "abnormal presence of aquatic vegetation." Because the district court found the southern portions were in fact aquatic areas, the issue of whether the wetlands were artificially or naturally created was irrelevant.

3. Wetlands not Adjacent to Waters Theory

Finally, the appellate court rejected the district court's holding that the wetland portion of the property was not adjacent to waters of the United States, as required by the Corps' regulations. The appellate court found that the culverts on the property, by which water flowed directly to the Newark Slough and then on to the San Francisco Bay, were waters of the United States, and therefore, the property was adjacent to those waters.

C. Corps Jurisdiction over the Crystallizers and Pits as "Other Waters"

After deciding in favor of the Corps on the wetland issue, which concerned the southern portion of Leslie's property, the appellate court considered the Corps' claim of jurisdiction over the property containing the crystallizers and pits. The Corps based its jurisdictional claim on its definition of the crystallizers and pits as "other waters," as defined in the Corps' regulations. The district court held that the crystallizers and pits

154. Leslie II, 896 F.2d at 358 (quoting 42 Fed. Reg. 37,128 (1977)).
155. Id.
156. Id. at 358-59. For a discussion of 33 C.F.R. § 328.8(a)(7) and the definition of "adjacent wetlands," see supra note 50 and accompanying text.
157. Leslie II, 896 F.2d at 358-59. The district court disregarded the culverts because they were artificially created by Caltrans and the Fish and Wildlife Service. Id. For a description of the culverts in relation to Leslie's property, see supra notes 127-30 and accompanying text.
158. Id. at 359-60.
159. Id. at 359. Corps regulations define "waters of the United States" to include the following:

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
were not described by the Corps' regulations and based its holding on two separate grounds: (1) the crystallizers and pits are artificial structures, and the regulations list only natural formations ("artificial vs. natural formation"); and (2) the ponding was too temporary to qualify as "other waters." 160

1. The Artificial vs. Natural Formation Theory

The appellate court rejected the district court's "artificial vs. natural formation" distinction by concluding that the district court incorrectly construed the regulations to exclude artificially created waters. 161 The appellate court recognized that the Corps had claimed jurisdiction over artificial waters in both its regulations and in its subsequent interpretation of the pertinent regulations. 162 The appellate court maintained that the Corps' interpretation of its own regulations proved that the Corps intended to exempt from its jurisdiction "only those artificially created waters which are currently being used for commercial

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce.


160. Leslie II, 896 F.2d at 360.

161. Id. at 359-60. The appellate court noted that the district court was correct in finding that all waters listed as "other waters" in section 328.3(a)(3) were naturally created, but the district court erred when it concluded that the artificially created crystallizers and calcium chloride pits could not be covered by the section. Id. For the text of section 328.3(a)(3), see supra note 159 and accompanying text.

162. Leslie II, 896 F.2d at 359-60. The Corps defines "lake," a feature listed in section 328.3(a)(3), to include artificial waters under 33 C.F.R. § 323.2(b) ("'lake' includes 'a standing body of open water created by artificially blocking or restricting the flow of a river, stream or tidal area.'"). Id.

The Corps' interpretation of section 328.5 regulations support the Corps' assertion of jurisdiction over a broad range of waters, including artificially created waters:

[W]e generally do not consider the following waters to be "waters of the United States." However, the Corps reserves the right on a case-by-case basis to determine that a particular waterbody within these categories of waters is a water of the United States.

(c) Artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.

(e) Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definitions of waters of the United States (see 33 C.F.R. 328.3(a)).

Id. (emphasis in original).
purposes, and that even those waters are subject to such jurisdiction on a ‘case-by-case’ basis of review.” The appellate court concluded that because the crystallizers and calcium chloride pits were not being used for commercial purposes anymore, they were not exempted from Corps jurisdiction under the regulations.

2. The Temporary Water Formation Theory

The appellate court next considered the issue of the temporary nature of the water formation in the crystallizers and pits. Due to the climate in the San Francisco Bay Area, the crystallizers and pits fill with water only during the winter rainy season. The district court had held that the crystallizers and calcium chloride pits were not “other waters” within the Corps’ regulations because the structures “are in fact dry most of the year.” The appellate court rejected this reasoning on two grounds: (1) Corps regulations specifically list two seasonal water features as “other waters”; and (2) prior case law finding Corps jurisdiction over temporary water bodies.

3. The Connection of the Crystallizers and Pits to Interstate Commerce

The appellate court next addressed the question of whether the formations had sufficient connections to interstate commerce.
to come under the Corps' jurisdiction as "other waters." The appellate court found that the Corps had published criteria for determining when waters had sufficient ties to interstate commerce. The use of water by migratory birds was included in these determining criteria. The appellate court accepted the Corps' interpretation of its jurisdiction under the CWA and remanded to the district court for a determination of whether the property had the requisite connections to interstate commerce based on two appellate court findings: (1) "migratory birds (including many protected by Migratory Bird Treaties) and one endangered species may have used the property as habitat"; and (2) "[t]he commerce clause power, and thus the [CWA], is broad enough to extend the Corps' jurisdiction to local waters which may provide habitat to migratory birds and endangered species."

D. The Concurring and Dissenting Opinion of Judge Rymer

The majority opinion in Leslie II was accompanied by an opinion written by Judge Rymer concurring in part and dissenting in part. Judge Rymer concurred in the majority's holding on the

170. Leslie II, 896 F.2d at 360. Under 33 C.F.R. § 328.3(a)(3), the crystallizers and pits must still qualify as those whose "use, degradation or destruction . . . could affect interstate or foreign commerce." For the text of section 328.3(a)(3), see supra note 159.

171. Leslie II, 896 F.2d at 360. The Corps adopted EPA's (Environmental Protection Agency) criteria for determining when waters have sufficient ties to interstate commerce. Id. For a description of these criteria, see infra note 172 and accompanying text.

172. Id. Final rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206 states in pertinent part:

... [W]aters of the United States at 33 CFR 328.3(a)(3) also include the following 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. . . .


173. Leslie II, 896 F.2d at 360. The Ninth Circuit cites Utah v. Marsh, 740 F.2d 799, 804 (10th Cir. 1984); Palila v. Hawaii Dep't of Land and Natural Resources, 471 F. Supp. 985, 991-95 (D. Haw. 1979), aff'd, 639 F.2d 495 (9th Cir. 1981) and cites generally Hughes v. Oklahoma, 441 U.S. 322, 329-36 (1979), for the proposition that the commerce clause power and CWA are broad enough to extend the Corps' jurisdiction to local waters which may provide habitat to migratory birds and endangered species. Id.

174. Leslie II, 896 F.2d at 361. The majority opinion was written by Circuit Judge Farris, and joined by Circuit Judge Pregerson. Circuit Judge Rymer concurred in part and dissented in part. Id. at 355, 361.

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wetland property stating "the southern portions of Leslie's property meet the [CWA] requirements for Corps' jurisdiction." Judge Rymer disagreed, however, with the majority's treatment of the crystallizers and pits, concluding that the district court had correctly determined that the crystallizers and pits were not "other waters" within the meaning of Corps regulations.

Judge Rymer asserted that the majority was correct in its conclusion that "the seasonal nature of the ponding is no obstacle to Corps jurisdiction." Judge Rymer, however, distinguished the instant case from the cases cited by the majority as authority for that proposition because, in the instant case, there was no hydrological connection between any other body of water and the crystallizers and pits.

Judge Rymer concluded that it was unnecessary to decide whether the CWA extended Corps jurisdiction to waters that are not "adjacent to bodies of open water," noting that the Supreme Court had specifically declined to rule on this issue in Riverside. Judge Rymer recognized that Congress has the power under the commerce clause to regulate wildlife and endangered species but disagreed that this regulatory power was at issue in this case.

175. Id. at 361. The southern portions of Leslie's property were held to be under Corps jurisdiction because they exhibited wetland characteristics under 33 C.F.R. § 328.3(b). For a discussion of the Court's analysis of the southern portions, see supra notes 145-57 and accompanying text.

176. Leslie II, 896 F.2d at 361 (Rymer, J., dissenting) (referring to 33 C.F.R. § 328.3(a)(3)).

177. Id.

178. Id. (emphasis added). The fact that the cycle of ponding created no hydrological connection with any other water distinguishes the instant case from Quivira Mining Co. v. EPA, 765 F.2d 126 (10th Cir. 1985) and United States v. Phelps Dodge Corp., 391 F. Supp. 1181 (D. Ariz. 1975). Id. For a discussion of Quivira Mining and Phelps Dodge, see supra notes 86-92 and accompanying text. For a discussion of the Leslie II court's majority treatment of Quivira Mining and Phelps Dodge, see supra note 169 and accompanying text. The dissent noted that nothing in the record showed that water flowed directly or indirectly from the crystallizers or pits into any other body of water. Leslie II, 896 F.2d at 361 (Rymer, J., dissenting).

179. Leslie II, 896 F.2d at 361. For the Supreme Court's statement in Riverside declining to address the issue of bodies of water not adjacent to open bodies of water, see supra note 71 and accompanying text. For a discussion of Riverside, see supra notes 61-71 and accompanying text.

180. Leslie II, 896 F.2d at 361 n. 1 (Rymer, J., dissenting) (citing Palila v. Hawaii Dep't of Land and Natural Resources, 471 F. Supp. 985 (D. Haw. 1979), and Hughes v. Oklahoma, 441 U.S. 322 (1976)). For a discussion of the reasoning behind the majority's reliance on these two cases, see supra note 173 and accompanying text. For a discussion of congressional power over migratory birds and endangered species, see supra note 23 and accompanying text.
Judge Rymer reframed the issue as being whether Congress intended to extend the Corps' jurisdiction under the CWA to the full extent of the Congress' commerce clause power. According to Judge Rymer, there was no evidence that the Corps' regulations, allowing jurisdiction based on migratory and endangered species habitats alone, were a reasonable interpretation of the CWA. Judge Rymer distinguished the Supreme Court's finding in Riverside of "at least some evidence of the reasonableness" in the Corps' regulations because Congress had been aware of the regulations at issue in Riverside and specifically rejected efforts to change them. In the instant case, Congress had not consented to the Corps' jurisdiction based on migratory birds and endangered species because it had not considered new CWA legislation since the Corps published the new regulations.

IV. ANALYSIS

A. Corps Jurisdiction over the Wetland Portion of the Property

The Ninth Circuit was correct in its conclusion that the

181. *Id.* The dissent doubted whether it is reasonable for Corps jurisdiction to rest on the fact that migratory birds and endangered species may have used the waters as a habitat. Where the majority had cited Utah v. Marsh, 740 F.2d 799 (10th Cir. 1984), as authority for this proposition, the dissent distinguished Marsh from the instant case because in Marsh "the lake was used for several purposes that established a connection to interstate commerce." *Leslie II*, 896 F.2d at 361 n. 1 (Rymer, J., dissenting). The dissent noted "[i]t is unclear whether the Marsh court would have found a substantial enough effect [sic] on interstate commerce, and thus Corps' jurisdiction [under the CWA], had the only connection to interstate commerce been that 'the lake was on flyway of several species of migratory waterfowl..." *Id.* (citing Marsh, 740 F.2d at 803).


183. *Id.* The dissent notes that in Riverside:

[T]he Supreme Court held that since the Corps asserted jurisdiction over adjacent wetlands was brought to the attention of Congress 'through legislation specifically designed to supplant it...,' and Congress rejected efforts designed to curb that jurisdiction, that was 'at least some evidence of the reasonableness of the [Corps'] construction.'

*Id.* (citation omitted)

184. *Id.* Judge Rymer reasoned that since the Corps issued new regulations on November 13, 1986 in order to clarify CWA regulations regarding the section 404 permit program, these regulations were not considered during congressional debates on the Clean Water Act of 1977, and therefore, Congress had not conceded their reasonableness. *Id.* at 362. The dissent noted that new regulations (1) "placed the definition of 'waters of the United States' into a new Part 328 of Title 33 of the Code of Federal Regulations" and (2) "stated that 'waters of the United States' also include areas which are 'or would be' used as a habitat for migratory birds or endangered species. 33 C.F.R. § 328.3(a)(3)." *Leslie II*, 896 F.2d at 362.
southern portions of Leslie's property were wetlands under the jurisdiction of the Corps. The issue had been settled in many previous cases\textsuperscript{185} and was only before the appellate court because the district court did not properly distinguish the instant facts from those of \textit{Fort Pierre}.\textsuperscript{186} The Ninth Circuit distinguished \textit{Leslie II} from \textit{Fort Pierre} because in the instant case the Corps was not solely and directly responsible for creating the wetland conditions on Leslie's property.\textsuperscript{187} There are, however, stronger grounds for distinction. In \textit{Fort Pierre}, the area claimed by the Corps had only slight wetland characteristics and was otherwise devoid of life.\textsuperscript{188} In contrast, the Leslie property showed stronger wetland characteristics of the kind that Congress intended to protect.

Congress was concerned with waters that flow in hydrological cycles and considered wetlands an important part of that cycle. The Ninth Circuit found that the culverts which connect Leslie's wetland property to an arm of the San Francisco Bay provided grounds for jurisdiction.\textsuperscript{189} This is a prime illustration of complying with the congressional mandate requiring protection of hydrologically connected waters by preventing pollution at the source; in the instant case by preventing the destruction of the culvert's adjacent wetlands.\textsuperscript{190} The appellate court was correct when it reasoned that how a wetland was created, even if it was created by the government, is irrelevant to the determination of Corps jurisdiction.\textsuperscript{191}

\textbf{B. Corps Jurisdiction over the Crystallizers and Pits}

The Ninth Circuit's determination that the Corps has jurisdiction over the crystallizers and pits is, however, an unprecedented expansion of the Corps' jurisdiction. The appellate

\begin{itemize}
  \item \textsuperscript{185} For a discussion of cases finding Corps jurisdiction over wetlands and other hydrologically created waters, see \textit{supra} notes 55-78 and accompanying text.
  \item \textsuperscript{186} For a discussion of \textit{Fort Pierre}, see \textit{supra} notes 80-82 and accompanying text.
  \item \textsuperscript{187} \textit{Leslie II}, 896 F.2d at 357-58. For a discussion of the appellate court's treatment of \textit{Fort Pierre}, see \textit{supra} notes 149-51 and accompanying text.
  \item \textsuperscript{188} \textit{Fort Pierre}, 747 F.2d at 466. The only thing living in the polluted water were cattails and other wetland type vegetation that thrived in stagnant and often polluted waters. \textit{Id.}
  \item \textsuperscript{189} \textit{Leslie II}, 896 F.2d at 358-59.
  \item \textsuperscript{190} For a discussion of why wetlands are ecologically important to adjacent waters, see \textit{supra} note 57.
  \item \textsuperscript{191} The authorities cited by the appellate court support that proposition and are consistent with case law on the subject. For a list of these authorities, see \textit{supra} note 152.
\end{itemize}
court's analysis is based on an overly broad reading of Congress' intent with respect to regulating "waters of the United States" as it applies to the Corps under the CWA. The appellate court found the crystallizers to be non-hydrologically connected when describing them as "large, shallow, watertight basins."\footnote{192} Nothing in the record showed that water flowed directly or indirectly from the crystallizers or pits into any other body of water.\footnote{193} Yet the appellate court supports its finding of jurisdiction with cases that refer to hydrologically connected waters that are significantly physically different from the non-hydrologically connected crystallizers and pits.\footnote{194}

The Ninth Circuit offers two different interpretations of what Congress intended to regulate under the CWA. When discussing the effect of government caused inundation, the court first states that Congress intended to extend CWA jurisdiction to "any aquatic features within the reach of the commerce clause power."\footnote{195} Three paragraphs later the court says "Congress intended to regulate local aquatic ecosystems regardless of their origin."\footnote{196} The two interpretations vary significantly in meaning, and will be considered separately below.

The phrase "any aquatic feature" means anything taking place in or on water.\footnote{197} The appellate court cites Leslie Salt Co. v. Froehlke for this interpretation of the CWA's scope.\footnote{198} However, Froehlke was written at a time when courts were giving broader meaning to the CWA in order to escape the constraints of the traditional meaning of the phrase "navigable waters."\footnote{199} The Froehlke court did not apply the traditional "navigable water" test when it held that pond water collected by pumping from a neigh-

\footnote{192. Leslie II, 896 F.2d at 355. For a detailed description of the crystallizers, see supra note 122.}
\footnote{193. Id. at 361 (Rymer, J., dissenting).}
\footnote{194. For a listing of the cases cited by the Ninth Circuit to support its finding of jurisdiction over the crystallizers and pits, see supra notes 164 & 169 and accompanying text.}
\footnote{195. Leslie II, 896 F.2d at 357.}
\footnote{196. Id. at 358.}
\footnote{197. The American Heritage Dictionary 123 (2d College ed. 1982). "Aquatic" is defined as (1) off or in the water, (2) living or growing in or on the water, or (3) taking place in or on the water. Id.}
\footnote{198. Leslie II, 896 F.2d at 357 (citing Leslie Salt Co. v. Froehlke, 578 F.2d 742, 755 (9th Cir. 1978)). For a discussion of the proposition held by Froehlke, see supra note 47 and accompanying text. For a discussion of the court's reliance on Froehlke, see supra note 147 and accompanying text.}
\footnote{199. For a discussion of the Corps' traditional meaning of the term "navigable waters," see supra notes 37-41 and accompanying text.}
boring bay at the rate of eight to nine billion gallons was subject to Corps jurisdiction under the CWA, even though the ponds were not subject to tidal action because of man-made dikes.\textsuperscript{200} The Froehlke court specifically “express[ed] no opinion on the outer limits to which the Corps’ jurisdiction under the FWPCA [CWA] might extend.”\textsuperscript{201} Froehlke is consistent with the position that hydrologically connected waters, even though separated by man-made dikes, are subject to Corps jurisdiction. To read Froehlke as expanding Corps jurisdiction to any aquatic feature within the commerce clause is an unwarranted interpretation of the case and congressional intent.\textsuperscript{202}

The second view of the Ninth Circuit, that Congress intended to regulate local aquatic “ecosystems,” has greater validity because this is closer to congressional intent under the CWA.\textsuperscript{203} An “ecosystem” considers the ecology of an area as a whole.\textsuperscript{204} The cases cited by the appellate court for this “ecosystem” interpretation of Corps jurisdiction under the CWA: (1) relate to hydrologically connected waters; and (2) disregard the origin of the water body.\textsuperscript{205}

When analyzing the situation involving the crystallizers and pits, however, the Ninth Circuit applied the first, and arguably too expansive, test applicable to hydrologically connected waters.

\textsuperscript{200.} Froehlke, 578 F.2d at 755.
\textsuperscript{201.} Id. at 756.
\textsuperscript{202.} For the holding in Froehlke, see supra note 47. For a discussion of the appellate court’s reliance on Froehlke, see supra note 147 and accompanying text. For a discussion of congressional intent in enacting the CWA, see supra note 43 and accompanying text.
\textsuperscript{203.} For reference to the Court of Appeals’ consideration of the ecosystem definition, see supra note 196 and accompanying text. For a discussion of congressional intent in enacting the CWA, see supra note 43 and accompanying text.
\textsuperscript{204.} \textsc{The American Heritage Dictionary} 1437 (2d College ed. 1982). “An ecological community together with its physical environment, considered as a unit.” Id.
\textsuperscript{205.} See Swanson v. United States, 789 F.2d 1368, 1370 (9th Cir. 1986) (traditional navigable lake before and after Corps’ construction of dam creates waters under Corps jurisdiction); United States v. Tull, 769 F.2d 182, 188 (4th Cir. 1985) (federal construction of mosquito-control ditch creates waters subject to ebb and flow of tide), \textit{rev’d on other grounds}, 481 U.S. 412, 414 n. 1 (1987); United States v. DeFelice, 641 F.2d 1169, 1174 (5th Cir. 1981) (tidal canal connected with interstate waterway), \textit{cert. denied}, 454 U.S. 940 (1981); Track 12, Inc. v. District Engineer, U.S. Army Corps of Engineers, 618 F. Supp. 448, 449 (D. Minn. 1985) (state and locality construction of highway and sewage system created wetland under Corps jurisdiction). For the proposition the Leslie II court cites for each case, see supra note 152 and accompanying text.
The appellate court focused its analysis on whether the crystallizers and pits are described by the Corps’ regulations as waterbodies over which it asserts jurisdiction.206 The court applied the “artificial v. natural formations” test and reasoned that the Corps’ own interpretation of its regulations also included artificial waters with no hydrological connection.207 However, the cases cited by the appellate court to support the proposition that Corps jurisdiction includes artificial waters are cases where the “waters” are hydrologically connected to other waters or wetlands.208

The appellate court also determined that the temporariness of the water formation in the crystallizers and pits was not a bar to Corps jurisdiction, but again supported this proposition with cases dealing exclusively with hydrologically connected waters.209

The appellate court stated it would defer to the Corps’ interpretation of the CWA when it was “reasonable and not in conflict with the expressed intent of Congress” and further when the interpretation did not amount to “a plain error.”210 The court then delineated the two different interpretations of congressional intent: (1) “any aquatic features within the reach of the commerce

206. Leslie II, 896 F.2d at 359-60.
207. Id. The appellate court cited the Corps’ interpretation of its regulations which declared, on a case-by-case basis, that artificially created waters including lakes, ponds and waterfilled depressions used to collect water or excavate materials were “waters of the United States.” Id. (citing Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41,217 (1986). These waters cited by the court have no hydrological connection to other waters.


For a list of cases cited by the Ninth Circuit to support its proposition, see supra note 164.

209. Leslie II, 896 F.2d at 360 (citing Quivira Mining Co. v. EPA, 765 F.2d 126, 129 (10th Cir. 1985) (lake and arroyo connected to other waters by surface flooding and groundwater) and United States v. Phelps Dodge, 391 F. Supp. 1181, 1187 (D. Ariz. 1975) (water flowing through normally dry arroyo ends up in public waters)). For a discussion of Quivira Mining and Phelps Dodge, see supra notes 86-92 and accompanying text. For a discussion of the majority’s treatment of Quivira Mining and Phelps Dodge, see supra note 169 and accompanying text. For a discussion of the dissent’s treatment of Quivira Mining and Phelps Dodge, see supra note 178 and accompanying text.

210. Leslie II, 896 F.2d at 357. For a further statement of the court’s standard of review, see supra notes 141-43 and accompanying text.
clause power”; and (2) “local aquatic ecosystems regardless of their origin.” 211 Nowhere in its analysis of the crystallizers and pits does the Ninth Circuit actually make a finding that the Corps’ regulations are reasonable interpretations of either characterization of congressional intent. Thus, the analysis of the Corps’ regulations under this declared reasonableness standard was never applied. The appellate court instead focused on distinctions of artificiality and temporariness that apply to cases involving only hydrologically connected waters.

A jurisdictional test based on aquatic ecosystems is the correct test of congressional intent in regulating waters under the CWA. If the Ninth Circuit had discussed this test, which it itself had raised, the court would have found little evidence of congressional intent to regulate a body of water under the CWA that was not hydrologically connected to other waters. 212 Unlike Riverside, where the Corps’ regulations at issue had been debated in Congress and not revoked, the Corps regulations at issue in Leslie I & II have not been formally debated in Congress. 213 The dissent in Leslie II raises this issue and is correct in finding no evidence of reasonableness. The Supreme Court in Riverside explicitly stated that it did not reach the issue of Corps jurisdiction over waters not “adjacent to bodies of open water,” 214 a conclusion the Ninth Circuit affirmatively reaches. The district court had stated that “land does not become a water of the United States just because water collects, ponds, and stands on land for a few days after a rain.” 215 It is doubtful that this type of water

211. Leslie II, 896 F.2d at 357-58. For a statement of the two descriptions, see supra notes 195-96 and accompanying text.

212. In Riverside, the Supreme Court linked aquatic ecosystems and hydrologic cycles when it stated “[p]rotection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for ‘[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.’” Riverside, 474 U.S. at 132-33. For a discussion of the Supreme Court’s analysis of waters based on hydrological connection, see supra notes 69-71 and accompanying text.

213. Leslie II, 896 F.2d at 362 n. 1 (Rymer, J., dissenting). For a discussion of congressional consent to the Corps’ regulations, see supra note 184 and accompanying text.

214. For a discussion of the Supreme Court’s declining to answer this issue, see supra note 71 and accompanying text.

215. Leslie I, 700 F. Supp. at 483. The district court noted that any land subjected to enough rain will collect water which eventually runs off or percolates into the ground. Id. The appellate court dissent by J. Rymer opined that the fact that no hydrological connection exists between the crystallizers and pits and other bodies of water distinguishes the instant case from other cases where temporary bodies of water were held to be under Corps jurisdiction. Leslie II, 896 F.2d at 361 (Rymer, J., dissenting).
body was what Congress had intended to be regulated by the Corps under the CWA.\textsuperscript{216} Waters that are not hydrologically connected do not present as compelling an issue for environmental protection as hydrologically connected waters because their pollution, destruction or modification does not effect other waters. The Corps' jurisdiction over these waters rests not on the ill effects of one body contaminating another, but solely on the detrimental effect pollution, destruction or modification will have on the individual body of water's function in interstate commerce. The Ninth Circuit found that waters which \textit{may} provide habitat to migratory birds and endangered species justify Corps jurisdiction.\textsuperscript{217} However, the court cites cases that uphold general congressional commerce power over endangered species\textsuperscript{218} and specific Corps power over waters with several interstate commerce connections.\textsuperscript{219} This author must agree with the statement of the \textit{Tabb} court when it expressed "grave doubts that a property now so used, or seen as an expectant habitat for some migratory birds, can be declared to be such a nexus to interstate commerce as to warrant Army Corps of Engineers jurisdiction".\textsuperscript{220}

V. CONCLUSION

As a result of the court's decision in \textit{Leslie II}, environmentalists have a strong position with regards to opposing development on any land that holds water, even temporarily. This water does not have to be hydrologically connected with any other water and

\textsuperscript{216} The \textit{Leslie II} court stated that under 51 Fed. Reg. 41,206, 41,217 the Corps intended to exempt from its jurisdiction only those artificial waters being used for commercial purposes, and that the crystallizers and pits had not been used for decades. \textit{Leslie II}, 896 F.2d at 360. But is that a reasonable test? Why should Leslie be able to fill the pits if it was for the commercial purpose of producing salt, but not for the commercial purpose of housing or commercial development? If the distinction is the ongoing nature of the commercial enterprise, then how long a lapse is required in the enterprise before the Corps may obtain jurisdiction?

\textsuperscript{217} \textit{Leslie II}, 896 F.2d at 360.

\textsuperscript{218} \textit{Id.} (citing Palila v. Hawaii Dep't of Land and Natural Resources, 471 F. Supp. 985, 991-95 (D. Haw. 1979)).

\textsuperscript{219} \textit{Id.} (citing Utah v. Marsh, 740 F.2d 799, 804 (10th Cir. 1984)). The appellate court in \textit{Marsh} upheld Corps jurisdiction based on the lake's interstate commerce connection because the lake was used to irrigate crops sold in interstate commerce, support a fishery whose products were sold out-of-state, and provide interstate travelers with recreational opportunities. \textit{Marsh}, 740 F.2d at 803-05. For a discussion of \textit{Marsh}, see \textit{supra} notes 96-98 and accompanying text.

\textsuperscript{220} \textit{Tabb}, 715 F. Supp. at 729. For a discussion of \textit{Tabb}, see \textit{supra} notes 105-10 and accompanying text.
could, at the extreme, be found to include almost any puddle on any land in the United States.

Developers, property owners, and farmers will face uncertainty about the extent of Corps regulations over their property if the property contains any natural or man-made water formations. Routine maintenance and development of their land may be subject to costly and prohibitive Corps permit procedures.

The Army Corps has broad powers of regulation that may be wielded unevenly. The Corps, an administrative agency with considerable decision making discretion, has the power to decide what constitutes the appropriate use of vast portions of land in the United States. As this power is exercised, and its effects on development are felt, Congress may decide that it did not grant its total power to regulate "waters of the United States" under the commerce clause to the Army Corps of Engineers and may legislate strict limitations and criteria pertaining to waters subject to Corps regulation.

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