

## LEGISLATIVE REFORM

# THE JURISDICTION OF THE CLEAN WATER ACT OVER ISOLATED WETLANDS: THE MIGRATORY BIRD RULE

### I. INTRODUCTION

In 1977, Congress amended the existing Federal Water Pollution Control Act and adopted the Clean Water Act ("the CWA"). Absent exceptions detailed therein, the CWA prohibits "the discharge of any pollutant by any person."<sup>1</sup> The CWA defines "the discharge of a pollutant" as "any addition of any pollutant to [waters of the United States] . . . ."<sup>2</sup> However, the CWA provides no further explanation of the term "waters of the United States."

The Army Corps of Engineers ("Corps") and the Environmental Protection Agency ("EPA"), pursuant to their shared authority under the CWA, promulgated regulations defining "waters of the United States" as, *inter alia*, "[a]ll other waters such as intrastate lakes, rivers, . . . wetlands, . . . the use, degradation or destruction of which could affect interstate or foreign commerce . . . ."<sup>3</sup> In 1986, the Corps stated in its preamble to the Federal Regulations that the "waters of the United States" also include waters "which are or would be used as habitat by birds protected by Migratory Bird Treaties or [waters] which are or would be used as habitat by other migratory birds which cross state lines . . ." ("the Migratory Bird Rule").<sup>4</sup>

The federal circuits have not uniformly recognized the Migratory Bird Rule. In *Leslie Salt Co. v. United States*,<sup>5</sup> the Ninth Circuit ruled that the presence of migratory birds at certain seasonally inundated, intrastate ponds during the winter months established the Corps' jurisdiction to regulate any dredging or filling of those ponds pursuant to the CWA. Similarly, in *Hoffman Homes Inc. v. Administrator, United States Environmental Protection Agency ("Hoffman Homes IV")*,<sup>6</sup> the Seventh Circuit held that the actual or potential presence of migratory birds sufficiently established jurisdiction under the CWA.<sup>7</sup> The Tenth Circuit also found that the presence of migratory

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1. 33 U.S.C. § 1311(a) (1988).

2. 33 U.S.C. § 1362(7), (12)(A) (1988 & Supp. V 1993).

3. 33 C.F.R. § 328.3(a)(3) (1994); 40 C.F.R. § 230.3(s)(3) (1994).

4. 51 Fed. Reg. 41,206, 41,217 (1986). The preamble further interpreted "waters of the United States" to extend to "[waters] which are or would be used as habitat for endangered species or used to irrigate crops sold in interstate commerce." *Id.*

5. *Leslie Salt Co. v. United States*, 896 F.2d 354 (9th Cir. 1990), *aff'd*, 55 F.3d 1388 (9th Cir. 1995) [hereinafter *Leslie Salt II*].

6. *Hoffman Homes Inc. v. Administrator, United States Env'tl. Protection Agency*, 999 F.2d 256 (7th Cir. 1993), *rev'g* 961 F.2d 1310 (7th Cir. 1992) [hereinafter *Hoffman Homes IV*].

7. *See also* *Rueth v. United States Env'tl. Protection Agency* 13 F.3d 227 (7th Cir. 1993) (wetland affects interstate commerce and subsequently falls within the jurisdiction of the CWA if the wetland is used by migratory birds).

waterfowl in an intrastate lake contributed to the Corps' proper exercise of jurisdiction under the CWA prior to the Corps' 1986 regulations.<sup>8</sup>

However, in *Tabb Lakes Ltd. v. United States* ("Tabb Lakes II"),<sup>9</sup> the Fourth Circuit rejected the Migratory Bird Rule because the preamble in the 1986 regulations did not comply with the notice and comment procedure as required for substantive rules pursuant to § 552 of the Administrative Procedure Act.<sup>10</sup>

Because the circuits have not uniformly upheld the Migratory Bird Rule, the government cannot pursue an effective policy to protect isolated wetlands under the CWA. Indeed, those isolated wetlands which may happen to fall within the jurisdiction of a circuit hostile to the Migratory Bird Rule do not fall within the purview of the CWA. The inconsistent protection of isolated wetlands particularly affects migratory birds because these species rely upon the presence of suitable habitats along their migratory routes or flyways.<sup>11</sup> Unfortunately, the Corps cannot assert jurisdiction and protect those isolated wetlands along the routes or flyways of migratory birds based upon the potential or actual presence of migratory waterfowl if the wetlands lie within a jurisdiction hostile to the Migratory Bird Rule. Hence, the government's attempt "to provide . . . for the protection and propagation of . . . wildlife"<sup>12</sup> remains inhibited by the federal circuits' inconsistent approval of the Migratory Bird Rule.

The courts' inconsistent evaluation of the Migratory Bird Rule also poses a real concern for private landowners and real estate developers. Current landowners and developers find that the government's right to assert jurisdiction over isolated wetlands under the CWA depends largely upon the circuit where the property is located. Moreover, isolated wetlands property in those jurisdictions that have not ruled upon the validity of the Migratory Bird Rule cannot be accurately valued because the property's use may or may not be limited by the CWA. This uncertain limitation on the property's use may generate a substantial cost to a seller or purchaser of isolated wetlands property. If, for example, the optimal use of a property is worth X, the limitation on a property's use may decrease the value of the property to Y, where X is greater than Y. In a seller's market, a purchaser may assume the risk that an acquired wetlands property may be subject to the CWA and purchase that property for X. If the property subsequently falls within the jurisdiction of the CWA, the property's value is reduced to Y and the purchaser must incur the difference between X and Y. The converse scenario in a buyer's market would find that the seller incurs the cost of a property's uncertain standing under the CWA where the seller conveys a property for Y although that property may be worth X. In either case, the uncertain validity of the Migratory Bird Rule as a means to establish the CWA's jurisdiction over isolated wetlands causes an inefficient land transaction.

Currently, the Supreme Court has expressly declined to rule upon the jurisdiction

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8. See *Utah v. Marsh, Secretary of the Army*, 740 F.2d 799 (10th Cir. 1984) (the Corps was empowered to regulate the State's discharge of dredged or fill material into Utah Lake because the lake was used 1) for public recreation; 2) for commercial fishing and crop irrigation (for interstate commerce); and 3) as a flyway for migratory waterfowl protected under international treaties).

9. *Tabb Lakes, Ltd. v. United States*, No. 89-2905 (4th Cir. Sept. 19, 1989) (Westlaw, CTA database) (unpublished disposition), *aff g.*, 715 F. Supp. 726 (E.D. Va. 1988) [hereinafter *Tabb Lakes II*].

10. 5 U.S.C. § 552 (1988).

11. See *infra*, note 50.

12. 33 U.S.C. § 1251(a)(2) (1988).

of the CWA over isolated wetlands.<sup>13</sup> In order to provide further guidance to the judiciary, the EPA and the Corps, Congress should codify the Migratory Bird Rule and the jurisdictional reach of the CWA as consistent with and only limited by the extent of the Commerce Clause of the United States in furtherance of the purpose of the CWA.<sup>14</sup>

## II. JUDICIAL REVIEW OF THE MIGRATORY BIRD RULE

### A. The Migratory Bird Rule Upheld

In *Leslie Salt II*,<sup>15</sup> the Ninth Circuit recognized that the Migratory Bird Rule sufficiently established a nexus to interstate commerce as a basis for jurisdiction under the CWA. In 1919, Leslie Salt's predecessor in interest constructed calcium chloride pits and large shallow basins for manufacturing and crystallizing salt. After salt production effectively halted in 1959, the calcium chloride pits and crystallizers remained. In 1985, Leslie Salt began to dig a feeder ditch and siltation pond in order to drain the pits. The Corps issued a cease and desist order pursuant to § 44 of the CWA.<sup>16</sup>

The *Leslie Salt II* court reversed the district court's ruling and concluded that the calcium chloride pits and the crystallizers qualified as "waters of the United States." Furthermore, the court found that "the commerce clause power, and thus the Clean Water Act, is broad enough to extend the Corps' jurisdiction to local water which may provide habitat for migratory birds."<sup>17</sup>

On appeal from remand, the Ninth Circuit reaffirmed the Migratory Bird Rule.<sup>18</sup> The court found that the Migratory Bird Rule qualified as an interpretative rule stating, "[b]y holding [that] migratory birds could form a sufficient connection to interstate commerce to support jurisdiction, the [previous hearing by this court of this matter] implicitly rejected all arguments that the rule is invalid for procedural reasons under the Administrative Procedure Act as well."<sup>19</sup> Thus, the court concluded that the Migratory Bird Rule did not violate the Administrative Procedure Act ("the APA") because the rule was "merely an interpretation of the [CWA] as opposed to a substantive

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13. In *United States v. Riverside Bayview Homes Inc.*, 474 U.S. 121 (1985), the Supreme Court unanimously ruled that wetlands adjacent to a lake fell within the definition of "waters of the United States" because, *inter alia*, the "adjacent wetlands may 'serve significant natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing and resting sites for aquatic . . . species'" *Id.* at 134 (citing 33 C.F.R. § 320.4(b)(2)(i) (1984)). It should be noted that isolated wetlands also serve identical biological functions as these properties provide general habitat to migratory birds and other semi-aquatic or aquatic species. *See generally* United States Dep't of the Interior Fish and Wildlife Serv., 1994 Update to the N. American Waterfowl Management Plan (1994).

14. In pertinent part, the Commerce Clause reads: "Congress shall have the Power To lay and collect Taxes, Duties . . . and provide for the common Defence and general Welfare of the United States . . . To regulate Commerce with foreign Nations, and among the several States . . ." U.S. CONST. art. I, sec. 8, cl. 3.

15. *Leslie Salt II*, *supra* note 5.

16. *Id.* at 355-56.

17. *Leslie Salt II*, *supra* note 5, at 360.

18. *Leslie Salt Co. v. United States*, 55 F.3d 1388 (9th Cir. 1995) [hereinafter *Leslie Salt IV*].

19. *Id.* at 1393. The relevant portions of the Administrative Procedure Act provide that "General notice of proposed rule making shall be published in the Federal Register . . . and after notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making . . . but this subsection does not apply to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice . . ." 5 U.S.C. § 553(b)(A), (c) (1988).

addition to its reach<sup>20</sup> and therefore not subject to the APA's notice and comment requirement.

The *Leslie Salt IV* court also approved the Corps' construction of the CWA when the court rejected any conclusion that the Migratory Bird Rule is an unreasonable interpretation of the CWA.<sup>21</sup> The court judged the reasonableness of the Corps' interpretation "in light of the [CWA's] language, policies and legislative history."<sup>22</sup> The presence of express language in the CWA which provided for the protection of wildlife<sup>23</sup> and Congress' intent to extend [the CWA's] jurisdiction over waters of the United States to the maximum extent possible under the Commerce Clause<sup>24</sup> support the Migratory Bird Rule as a reasonable interpretation of the CWA.

Finally, the *Leslie Salt IV* court repudiated the claim that the Migratory Bird Rule exceeds Congress' power under the Commerce Clause. The court found that "[t]he Supreme Court has suggested that Congress' commerce clause powers extend to the regulation of migratory birds."<sup>25</sup> The court also noted that migratory birds affect commerce because millions of people spend an aggregate of a billion dollars a year on recreational activities such as hunting, observing and trapping of migratory birds.<sup>26</sup> Thus, the Migratory Bird Rule does not violate the broad sweep of the Commerce Clause.<sup>27</sup>

The Seventh Circuit also adopted the Migratory Bird Rule in *Hoffman Homes IV*.<sup>28</sup> In this case, the EPA asserted that Hoffman Homes had violated the CWA when the company filled a one-acre, bowl-shaped depression which frequently "ponded" during wet weather.<sup>29</sup> Upon rehearing, the court reversed its previous decision and concluded that "it is reasonable to interpret the regulation [which includes isolated wetlands within the meaning of waters of the United States] as allowing migratory birds to be that connection between a wetland and interstate commerce."<sup>30</sup> The court added, "[t]hroughout North America, millions of people annually spend more than a

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20. *Leslie Salt IV*, *supra* note 18, at 1394.

21. The *Leslie Salt IV* court asserted that "An agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress" *Id.* (citing *United States v. Riverside Bayview Homes Inc.*, 474 U.S. 121, 131 (1985)).

22. *Id.*

23. The CWA states that one of the Act's goals and policies is to "provide . . . for the protection and propagation of fish, shellfish and wildlife" 33 U.S.C. § 1251(a)(2) (1988). Additionally, the CWA enumerated guidelines for the EPA to determine the degradation of water, including, "the effect of disposal of pollutants on . . . fish, shellfish, wildlife . . ." 33 U.S.C. § 1343(c)(1)(A) (1994). see also *Leslie Salt IV*, *supra* note 18, at 1394.

24. S. REP. NO. 1236, 92nd Cong., 2d Sess. 144 (1972); see also *Leslie Salt IV*, *supra* note 18, at 1395.

25. *Id.* at 1396 (citing *Hughes v. Oklahoma*, 441 U.S. 322, 329-36 (1979) (state regulation of interstate wildlife falls within the ambit of the dormant Commerce Clause)).

26. *Id.* at 1395-96 (citing *Hoffman Homes, Inc. v. Administrator, United States Environmental Protection Agency*, 999 F.2d 256, 261 (7th Cir. 1993)).

27. *Id.* at 1396. The *Leslie Salt IV* decision that the Migratory Bird Rule does not exceed Congress' power under the Commerce Clause affirms the decision in *Leslie Salt II* that "[t]he commerce clause power, and thus the [CWA], is broad enough to extend the Corp's jurisdiction to local waters which may provide habitat for migratory birds . . ." *Leslie Salt II*, *supra* note 5, at 359.

28. *Hoffman Homes IV*, *supra* note 6.

29. *Id.* at 258.

30. *Id.* at 261. The court did conclude, however, that the bowl-shaped depression did not fall within the purview of the CWA because the proceedings below did not provide substantial evidence to support any actual or potential presence of migratory birds. *Id.*

billion dollars on hunting, trapping and observing migratory birds.<sup>31</sup> Thus, the actual or potential use of an isolated wetland by migratory birds establishes the jurisdiction of the CWA under the Commerce Clause.

### B. Migratory Bird Rule Subject to Notice and Comment

In *Tabb Lakes II*,<sup>32</sup> the Fourth Circuit affirmed a district court's summary judgment and rejected the Migratory Bird Rule. *Tabb Lakes* submitted a permit application to the Corps to fill portions of its property. While a decision was pending, *Tabb Lakes* withdrew its application and sought declaratory relief to counter the Corps' assertion of jurisdiction over the "waters" at *Tabb Lakes*' property. The Fourth Circuit endorsed the district court's summary judgment in favor of *Tabb Lakes* and concluded that the Migratory Bird Rule qualified as a substantive rule under the APA.<sup>33</sup> Because the Migratory Bird Rule has not been subject to notice and comment as required by the APA, the district court struck down the rule.<sup>34</sup> The district court defined substantive rules as "ones which grant rights, impose obligations, or produce other significant effects on public interests, or which effect a change in public existing law or policy."<sup>35</sup> The district court subsequently qualified the Migratory Bird Rule as substantive because "[b]eyond any doubt, the [Migratory Bird Rule] produced a 'significant effect on public interests' in a 38-acre tract at *Tabb Lakes*."<sup>36</sup>

The dissent in *Tabb Lakes II* discussed the defective analyses of both the district court and the Fourth Circuit and reasoned that "[t]he touchstone of a substantive rule is its creation of new legal obligations."<sup>37</sup> As such, the Migratory Bird Rule cannot impose new legal obligations because, in interpreting the CWA, Congress intended "that the term 'navigable waters' [or waters of the United States] be given the broadest possible interpretation . . . ."<sup>38</sup> Thus, the Migratory Bird Rule cannot logically impose new statutory obligations under the Commerce Clause.

### III. AMBIT OF THE INTERSTATE COMMERCE CLAUSE

Assuming the jurisdiction of the CWA is limited only by the reach of the Commerce Clause, it must still be established that the regulation of isolated wetlands pursuant to the CWA would not exceed Congress' Commerce Clause powers. In a recent Supreme Court decision, *United States v. Lopez* ("*Lopez*"), the Court defined the reach of the Commerce Clause when it struck down the Gun-Free School Zones Act because the Act exceeded the authority of Congress to regulate commerce derived from the Commerce Clause.<sup>39</sup> The Gun-Free School Zones Act forbids "any individual know-

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31. *Id.*

32. *Tabb Lakes II*, *supra* note 9.

33. *Id.*

34. *Id.* at 727-28.

35. *Id.* at 728.

36. *Id.*

37. *Tabb Lakes II*, *supra* note 9 (dissent). See also *Leslie Salt IV*, *supra* note 18 ("A substantive rule is one that imposes "general, extra-statutory obligations . . ." (quoting *Alcaraz v. Block*, 746 F.2d 593, 613 (9th Cir. 1984))).

38. S. REP. NO. 1236, 92nd Cong., 2d Sess. 144 (1972). See also *Leslie Salt IV*, *supra* note 18, at 1394-95 (" . . . legislative history from 1972 asserts Congress's intent to extend Act jurisdiction over waters of the United States to the maximum extent possible under the Commerce Clause." (citing S. REP. NO. 1236, 92nd Cong., 2d Sess. 144 (1972))); *Tabb Lakes II*, *supra* note 9 (dissent) (same).

39. *United States v. Lopez*, 115 S. Ct. 1624 (1995).

ingly to possess a firearm at a place that [he] knows . . . is a school zone."<sup>40</sup> The *Lopez* Court overturned a twelfth grade student's conviction under the Act as a result of the student's possession of a concealed handgun at his high school.<sup>41</sup> The Court further ruled that the possession of a handgun in a school zone did not fall within the ambit of the Commerce Clause because this activity did not substantially affect interstate commerce. In its decision, the Court stated that, *inter alia*, those "regulations by which Congress has sought to protect an instrumentality . . . or a thing of interstate commerce" or "[the] regulation of an activity that substantially affects interstate commerce" adequately supports Congress' power under the Commerce Clause.

The Migratory Bird Rule protects isolated wetlands as an integral component of the preservation of the migratory waterfowl population. The billions of dollars spent hunting, trapping, observing and photographing waterbirds evidences their identity as an item or thing of commerce.<sup>42</sup> Thus, the protection of isolated wetlands under the CWA falls within the purview of Congress to regulate an item of commerce under the Commerce Clause.

The *Lopez* Court also provided further guidance to help identify those activities which do not substantially affect interstate commerce. The Court concluded that Gun-Free School Zones Act did not substantially affect interstate commerce because 1) the Act "[was] not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated,"<sup>43</sup> and 2) the Act "contained no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affect[ed] interstate commerce."<sup>44</sup>

The protection of isolated wetlands under the CWA is a necessary component to the CWA's objective to "maintain the chemical, physical, and biological integrity of the Nation's waters . . . [and] provide . . . for the protection and propagation of fish, shellfish, and wildlife . . ." <sup>45</sup> Hence, the CWA seeks to protect waterfowl, as wildlife, by maintaining the integrity of the waters used by the birds. Because all migratory waterfowl use wetlands and their associated habitats,<sup>46</sup> the protection of these areas must continue in order to support the regulatory scheme or objective of the CWA.

Unlike the Gun-Free School Zones Act, the CWA provides a case-by-case inquiry to determine if a particular isolated wetland substantially affects waterfowl as an item of interstate commerce. The permit system operated by the Corps individually evaluates a prospective site where a party seeks to dredge or fill to determine its impact on wildlife. Under the Migratory Bird Rule, the Corps would assess a site's actual or potential use as a habitat for migratory waterfowl. Thus, the CWA provides an "express jurisdictional element which might limit its reach to a discrete set of [isolated wetlands] that additionally have an explicit connection with or effect on interstate

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40. 18 U.S.C.A. § 922(q)(1)(A) (1988).

41. *Lopez*, 115 S. Ct. at 1626.

42. See Stephen M. Johnson, *Federal Regulation of Isolated Wetlands*, 23 *Envtl. L.* 1, 38 (1993) ("Migratory birds are an item of commerce . . . because there is an interstate commerce in migratory birds, Congress is authorized under the Commerce Clause to regulate activities that affect that commerce.").

43. *Lopez*, 115 S. Ct. at 1631.

44. *Id.*

45. 33 U.S.C. § 1251(a) (1988).

46. See *infra* note 51 and accompanying text.

commerce."<sup>47</sup>

The *Lopez* decision provides a useful analysis to determine when a congressional act violates the Commerce Clause. The Court states that an activity must substantially affect interstate commerce to fall within the purview of the Commerce Clause.<sup>48</sup> The Migratory Bird Rule regulates an activity which substantially affects interstate commerce because 1) the Rule qualifies as an essential part of a larger regulatory scheme to protect wildlife and 2) the CWA provides for a case-by-case jurisdictional inquiry through the Corps' permit application process.

#### IV. AMENDING THE CLEAN WATER ACT

In order to provide further guidance to the Corps, the EPA and the judiciary, Congress should add the following to section 1362 of the CWA:

(21) The term "waters of the United States" includes all other waters such as intrastate lakes, rivers, streams, mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes or natural ponds, the use or degradation of which could affect interstate or foreign commerce including waters:

- (i) which are or would be used as habitat by birds protected by Migratory Bird Treaties; or
- (ii) which are or would be used as habitat by other migratory birds which cross state lines; or
- (iii) which are or would be used as habitat for endangered species.

In addition, Congress should clarify its intent under the CWA and add the following to section 1251:

- (g) It is the policy and intent of Congress that this chapter be given the broadest possible jurisdiction in the interest of interstate commerce.

The Migratory Bird Rule recognizes the importance of waterfowl within our economic and ecological community. More than 30 million North Americans spend several billions of dollars annually to observe, photograph, hunt and otherwise appreciate waterfowl.<sup>49</sup> The preservation of the wetlands is of paramount importance to waterfowl because these birds depend on wetland and associated upland habitats for their survival.<sup>50</sup> The jurisdiction of the CWA over isolated wetlands provides the government with the opportunity to maintain and improve the welfare of waterfowl as an integral component of our economic community. Similarly, the codification of the Migratory Bird Rule would also benefit a large number of species other than waterfowl. This is due to the fact that wetlands are among the world's most biologically diverse and productive environments.<sup>51</sup> Thus, a broader interpretation of the jurisdiction of the CWA permits the EPA and the Corps to pursue the national goal set forth in the CWA to "provide for the protection and propagation of . . . wildlife."<sup>52</sup>

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47. *Lopez*, 115 S. Ct. at 1631.

48. *Id.* at 1630.

49. U.S. DEP'T OF THE INTERIOR FISH AND WILDLIFE SERV., 1994 UPDATE TO THE N. AMERICAN WATERFOWL MANAGEMENT PLAN 4 (1994). Because waterfowl remain so dependent upon wetlands for their survival, these birds represent one of the best documented sources of long-term data associated with wetlands. *Id.* at 10. Thus, the Migratory Bird Rule is derived from the most quantitative measure of wetland productivity. *Id.*

50. *Id.* at 4.

51. *Id.*

52. 33 U.S.C. § 1251(a)(2) (1988 & Supp. V 1993).

Approximately 56% of the wetlands habitat in the United States has already been destroyed.<sup>53</sup> The Fish and Wildlife Service estimates that the United States will lose an additional 4,250,000 acres of wetlands by the year 2000.<sup>54</sup> Sustained wetlands losses at rates comparable to 1960-1980 period will prevent recovery of the population of waterfowl.<sup>55</sup> It is imperative that the government continue to implement a comprehensive, uniform conservation plan to limit the decline of the nation's natural resources.<sup>56</sup>

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53. See U.S. DEP'T OF THE INTERIOR FISH AND WILDLIFE SERV., *WETLANDS: MEETING THE PRESIDENT'S CHALLENGE* (1990).

54. *Id.*

55. U.S. DEP'T OF THE INTERIOR FISH AND WILDLIFE SERV., *1994 UPDATE TO THE N. AMERICAN WATERFOWL MANAGEMENT PLAN* (1994).

56. However, the current House of Representatives has approved the Gilchrest Amendment (to the pending 1995 Clean Water Act Amendments) which prohibits the classification of a property as a wetland based solely on the fact that migratory birds use or might use the property. 141 CONG. REC. H4988 (daily ed. May 16, 1995).

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