Redefining Jurisdictional Limits in the Clean Water Act: "Tributary" Acquires New Meaning with Help from *Chevron* and *Seminole Rock* Deference [*United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003)]

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There is no limiting principle to a theory that bases federal [Clean Water Act] authority on the notion that water molecules might migrate downhill and eventually flow into rivers, streams, and oceans.[1]

I. INTRODUCTION

When the Cuyahoga River in Ohio spontaneously caught fire in 1969, the federal government realized something was terribly wrong with America's rivers.[2] The idea that water could ignite defied chemistry, but the heavily-polluted waters of the Cuyahoga erupted in flames when an unknown source sparked industrial waste floating on the water's surface.[3]

Unfortunately, by 1969 Congress had backed itself into a corner with respect to federal water pollution control; with the exception of the Rivers and Harbors Act of 1899 (RHA), Congress had granted primary authority to the states to address water pollution.[4] Delega-

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1. *Agency Implementation of the* SWANCC *Decision: Hearing Before the House Comm. on Gov't Reform*, 107th Cong. 117 (2002) (statement of Raymond Stevens Smethurst, Jr., Adkins, Potts and Smethurst, L.L.P.). Mr. Smethurst represented the Deatons in this case. *See* United States v. Deaton, 332 F.3d 698, 700 (4th Cir. 2003).

2. *See* Jonathan H. Adler, *Fables of the Cuyahoga: Reconstructing a History of Environmental Protection*, 14 FORDHAM ENVTL. L.J. 89, 94 (2002) ("The June 22, 1969 fire on the Cuyahoga is the 'seminal' event in the history of water pollution control in America, helping to spur the growth of the environmental movement and the passage of national environmental legislation.").

3. *See id.*; DAVID D. VAN TASSEL, THE ENCYCLOPEDIA OF CLEVELAND HISTORY 324 (1987).

4. ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE AND POLICY 577-78 (4th ed. 2003). For more than 100 years, Congress has attempted to keep rivers clean. *See id.* Beginning with the Rivers and Harbors Act of 1899, Congress banned discharges of refuse into navigable waters without a permit. 33 U.S.C. § 407 (2000). As post-World War II industrial activity (and water pollution) increased, the Water Quality Act of 1948 provided federal grants for state-level water pollution programs. *See generally* Water Quality Act, Pub. L. No. 80-845, 62 Stat. 1155 (1948). The Federal Water Pollution Control Act of 1956 provided federal aid for municipal sewage treatment facilities and authorized the federal government to control interstate pollution through abatement conferences. *See* Federal Water Pollution Control Act, Pub. L. No. 84-660, 70 Stat. 498 (1956). The Water Quality Act of 1965 required states to set water quality standards within federal guidelines. *See* Water Quality Act of 1965, Pub. L.

tion of enforcement to the states had resulted in a "race to the bottom," in which states competitively relaxed water pollution standards to attract mobile industries.[5] Moreover, Congress had failed to enforce the RHA's federal permit program, the only method of direct federal enforcement.[6] As a result, Congress could not extinguish the Cuyahoga's flames or stop the pollutants that fueled the fire.

In 1970, Congress dusted off the RHA and began enforcing the federal permit program.[7] However, the RHA limited Congress' power over navigable waters.[8] In 1972, Congress passed sweeping amendments to the Federal Water Pollution Control Act to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[9] After further amendments in 1975, the Federal Water Pollution Control Act became known as the Clean Water Act (CWA).[10] Like the RHA, the CWA required a permit before discharging pollutants into regulated waters.[11] However, the CWA expanded federal jurisdiction beyond navigable waters to include "waters of the United States."[12]

Congress charged the Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) with administering the CWA.[13] The Corps administered the permit program for discharges of "dredged or fill material" into regulated waters.[14] In the 1970s and 80s, the Corps expanded its interpretation of "waters of the United States" to assert jurisdiction over waters previously exempted from CWA jurisdiction, including upland tributaries and ditches.[15] As a result, CWA jurisdiction has crept steadily upstream to cover creeks and streams miles away from navigable waters.[16] In *United States v.*

No. 89-234, 79 Stat. 903 (1965). However, only half of the states enacted standards, and the federal government had little enforcement power. *See* PERCIVAL ET AL., *supra*.

5. *See* Scott R. Saleska & Kirsten H. Engel, *"Facts are Stubborn Things": An Empirical Reality Check in the Theoretical Debate over the Race-to-the-Bottom in State Environmental Standard-Setting*, 8 CORNELL J.L. & PUB. POL'Y 55 (1998).

> A central rationale for placing primary responsibility for environmental protection with federal authorities—as opposed to state or local authorities—is the long-standing belief that, in the absence of federal regulation, state governments will engage in a welfare-reducing "race to the bottom" in environmental standard-setting for the purpose of attracting and retaining mobile industries.

Id.

6. *See* PERCIVAL ET AL., *supra* note 4, at 578-79.
7. *See id.* at 578.
8. *See* 33 U.S.C. § 407 (2000).
9. *Id.* § 1251(a).
10. *Id.* §§ 1251-1387.
11. *See id.* §§ 1341-1346.
12. *Id.* § 1362(7); *see also* City of Milwaukee v. Illinois & Michigan, 451 U.S. 304, 319 n.10 (1981).
13. § 1344(a), (b).
14. Clean Water Act § 404, 33 U.S.C. § 1344(a).
15. *See* 33 C.F.R. § 328.3 (1999); *infra* notes 80-85 and accompanying text.
16. *See generally* United States v. Rapanos, 339 F.3d 447 (6th Cir. 2003) (declaring Clean Water Act (CWA) jurisdiction over roadside ditch more than eleven miles upstream from navigable river); United States v. Rueth Dev. Co., 335 F.3d 598, 603 (7th Cir. 2003); Headwaters, Inc.

Deaton,[17] the Fourth Circuit Court of Appeals held that a roadside ditch, eight miles upstream from navigable waters, was the type of "tributary" that falls within CWA jurisdiction.[18] This decision extended CWA authority to include the entire tributary system, no matter how distant or minute. At the same time, it contravened Congress' two-fold intent to base CWA jurisdiction in terms of navigable water quality and to preserve the federal-state balance of power over land and water use.

II. Case Description

In 1988, James and Rebecca Deaton purchased a twelve-acre plot of land on the Delmarva Peninsula in Maryland.[19] Like most of the property on the Peninsula, the Deatons' property had a low spot that gathered rainwater.[20] Water from the rest of the property drained into a roadside ditch,[21] which emptied into Perdue Creek, a nonnavigable tributary of the navigable Wicomico River.[22]

The Deatons purchased the property to develop a five-home residential area.[23] The development plans included sanitary drain fields for sewage disposal, but the property's high water table prevented them from qualifying for an installation permit.[24] To lower the water

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v. Talent Irrigation Dist., 243 F.3d 526, 533 (9th Cir. 2001) (holding that irrigation canals, because they exchanged water with streams and a lake, were waters of the United States); Carabell v. Army Corps of Eng'rs, 257 F. Supp. 2d 917, 930 (E.D. Mich. 2003) (extending CWA jurisdiction to wetlands having no surface water connection to waters of the United States).

17. 332 F.3d 698 (4th Cir. 2003).

18. *Id.* at 712.

19. United States v. Deaton, 209 F.3d 331, 333 (4th Cir. 2000). The Delmarva Peninsula separates the Atlantic Ocean from Chesapeake Bay. *See Deaton*, 332 F.3d at 702.

20. *Agency Implementation of the* SWANCC *Decision: Hearing Before the House Comm. on Gov't Reform*, *supra* note 1, at 106 ("Like most of the peninsula, this area is low and flat and laced with bays, rivers and streams, most of which are tidal. In many areas, shallow groundwater rises and falls in predictable seasonal patterns, rising in the late winter and then falling off in the late spring.").

21. *Deaton*, 332 F.3d at 702. The parties disagreed as to how much water flowed through the ditch. *See Agency Implementation of the* SWANCC *Decision: Hearing Before the House Comm. on Gov't Reform*, *supra* note 1, at 107 ("The [ditch] is shallow, narrow, and only occasionally contains water . . . [d]uring the warm weather months, there is normally no water flowing in the roadside ditch . . . except following a heavy rainfall."); Brief of Appellants at 6, *Deaton* (No. 02-1442). *But see* Brief for the United States at 6, *Deaton* (No. 02-1442) ("Even during the driest time of the year, the [ditch] . . . has a bottom width of 3.5 feet and a water depth of 4-7 inches within a defined bed and bank.").

22. *Deaton*, 332 F.3d at 702. The court explained the connection between the roadside ditch and the navigable Wicomico River:

> At the northwest edge of the Deatons' property, the roadside ditch drains into a culvert under Morris Leonard Road. On the other side of the road, the culvert drains into another ditch, known as the John Adkins Prong of Perdue Creek. Perdue Creek flows into Beaverdam Creek, a natural watercourse with several dams and ponds. Beaverdam Creek is a direct tributary of the Wicomico River, which is navigable. Beaverdam Creek empties into the Wicomico River about eight miles from the Deatons' property.

Id.

23. Brief of Appellants at 5, *Deaton* (No. 02-1442) ("The Deatons . . . planned to build five homes on [the property].").

24. *Id.*

table, the Deatons planned to dig a ditch from the low area of the property out to the roadside ditch, where excess water could drain away.[25] Upon inspection, a local Soil Conservation Service (SCS) representative informed the Deatons that the low-lying area might be non-tidal wetlands and advised them to contact the Corps for a permit.[26] Despite this advice, the Deatons began digging out to the roadside ditch, placing the excavated dirt next to either side of the drainage ditch in a practice known as "sidecasting."[27]

The Corps ordered the Deatons to stop digging and apply for a permit.[28] The Corps claimed that the low spot on the property was a non-tidal wetland.[29] In addition, the Corps claimed that the roadside ditch, which connected to the Wicomico River, was the type of tributary covered by the CWA.[30] Because CWA jurisdiction includes wetlands adjacent to "tributaries" of navigable waters,[31] the Corps claimed jurisdiction over the Deatons' property.[32] To prove that water from the Deatons' property flowed toward the Wicomico, the Corps injected dye onto the property and detected it downstream.[33]

The Deatons stopped digging and filed a joint federal-state permit application, but the Corps returned it as incomplete.[34] The Deatons did not resubmit the application,[35] and after four years of unsuccessful negotiations, the Corps filed suit in the United States District Court for the District of Maryland.[36] The Corps sought monetary damages and injunctive relief from the Deatons' excavation.[37]

The district court ordered summary judgment in favor of the Corps[38] but later granted a motion to reconsider in light of *United States v. Wilson*.[39] In *Wilson*, the United States Court of Appeals for the Fourth Circuit split on the issue of whether sidecast material was a "pollutant" under the CWA.[40] Predicting that the Fourth Circuit

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25. *Id.*
26. United States v. Deaton, 209 F.3d 331, 333 (4th Cir. 2000). This information came from the *second* SCS inspector. *Id.* The Deatons agreed to purchase the property after the *first* SCS inspector suggested digging a ditch across the property to alleviate drainage problems. *Id.*
27. *See id.*
28. *Id.*
29. *Id.*
30. Brief for the United States at 11-12, *Deaton* (No. 02-1442).
31. *See* 33 C.F.R. § 328.3(a)(5) (2003).
32. Brief for the United States at 11-12, *Deaton* (No. 02-1442).
33. *Id.* at 7. However, the dye trail disappeared before reaching the Wicomico River. *See* Brief of Appellants at 8, *Deaton* (No. 02-1442) (noting that the dye reached Beaverdam Creek).
34. *Deaton*, 209 F.3d at 333.
35. *Id.*
36. *Id.*
37. *Id.* at 334.
38. *Id.* ("The district court granted partial summary judgment to the [Corps], holding that any wetlands on the property were subject to the [CWA] and that sidecasting excavated material into those wetlands was the discharge of a pollutant under the Act.").
39. 133 F.3d 251 (4th Cir. 1997); *see also Deaton*, 209 F.3d at 334.
40. *See Wilson*, 133 F.3d at 252. In addition to the majority opinion, concurring and dissenting opinions were filed. *Id.*; *see also Deaton*, 209 F.3d at 334 (summarizing *Wilson*). "Pollutant"

would later hold that the material was not a pollutant, the district court reversed its previous decision and granted summary judgment in favor of the Deatons.[41] On appeal, the Fourth Circuit held that sidecast material was indeed a pollutant under the CWA and remanded the case to district court for further proceedings.[42]

One year later, the United States Supreme Court decided *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* (*SWANCC*).[43] *SWANCC* invalidated the Migratory Bird Rule,[44] a Corps regulation that extended CWA jurisdiction to distant, isolated waters used by birds protected under the Migratory Bird Treaties.[45] In light of *SWANCC*, the Deatons filed a second motion for reconsideration.[46] Once again, the district court denied the motion and entered a remediation order to restore the property to its original condition.[47] For the second time, the Deatons appealed to the United States Court of Appeals for the Fourth Circuit.[48] In *United States v. Deaton*, the Fourth Circuit affirmed the claim of authority over the Deatons' property by extending CWA jurisdiction to the roadside ditch.[49]

III. BACKGROUND

A. *The Basis for Federal Authority over Navigable and Nonnavigable Waters*

The Commerce Clause grants congressional authority over the "channels" of interstate commerce,[50] which includes preserving navigability of rivers and streams.[51] However, before distinct areas of authority, such as channels, existed within the Commerce Clause, the United States Supreme Court recognized Congress' power to regulate

is defined under the CWA at 33 U.S.C. § 1362(6) (2000). The definition is quoted *infra* text accompanying note 63.

41. *See Deaton*, 209 F.3d at 334.

42. *Id.* at 337.

43. 531 U.S. 159 (2001) [hereinafter *SWANCC*].

44. *See* 33 C.F.R. § 328.3(b) (1999).

45. *See SWANCC*, 531 U.S. at 174.

46. United States v. Deaton, 332 F.3d 698, 701 (4th Cir. 2003) (noting the district court held that *SWANCC* did not preclude CWA jurisdiction over the Deatons' property).

47. *Id.*

48. *See generally id.*

49. *Id.* at 702.

50. U.S. CONST. art. I, § 8, cl. 3. The Commerce Clause grants congressional authority over three distinct areas of interstate commerce: channels, instrumentalities, and activities having a substantial relation to interstate commerce. United States v. Lopez, 514 U.S. 549, 558-59 (1995); Heart of Atlanta Motel v. United States, 379 U.S. 241, 256 (1964); United States v. Darby, 312 U.S. 100, 114 (1941); Nat'l Labor Relations Bd. v. Jones & Laughlin Steel Co., 301 U.S. 1, 37 (1937).

51. *See* Gibbs v. Babbitt, 214 F.3d 483, 490-91 (4th Cir. 2000) ("The term 'channels of interstate commerce' refers to, inter alia, 'navigable rivers, lakes, and canals in the United States; the interstate railroad track system; the interstate highway system; . . . interstate telephone and telegraph lines; air traffic routes; [and] television and radio broadcast frequencies.'").

both navigable and nonnavigable waters.[52] For instance, *United States v. Rio Grande Dam & Irrigation Co.*[53] involved an attempt to dam a nonnavigable section of the Rio Grande River for irrigation and municipal use.[54] The Court held that the "superior power of the federal government to secure the uninterrupted navigability of all navigable streams within the limits of the United States" limited states' authority to modify common-law riparian rights.[55] The Court did not cite the Commerce Clause as Congress' "superior power."[56]

The Court eventually departed from general references to superior powers and began citing the Commerce Clause as specific authority.[57] For example, in *Oklahoma ex rel. Phillips v. Guy F. Atchison Co.*,[58] the Court held that the Commerce Clause allowed Congress to require the damming of nonnavigable tributaries to prevent flooding of the Mississippi River.[59] Consistent use of the Commerce Clause as the basis for congressional authority over navigability resulted in a distinct power over "channels" of interstate commerce.[60]

Following the Court's precedent, Congress exercised its Commerce Clause authority when it enacted the CWA.[61] Moving beyond the RHA's limited goal of preserving navigability, Congress intended to protect water quality as well.[62] Congress enacted the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" by prohibiting the "discharge of any pollutant into navigable waters"[63] without a permit.[64] Intending to exercise the full extent of its Commerce Clause powers,[65] Congress expanded "navigable waters" to include "'waters of the United States', including the territorial seas."[66] Expanding the scope of regulated waters in this

52. *See generally* Oklahoma *ex rel.* Phillips v. Guy F. Atchison Co., 313 U.S. 508, 525 (1941); United States v. Rio Grand Dam & Irrigation Co., 174 U.S. 690 (1899). The Court did not recognize distinct powers under the Commerce Clause until 1995. *See supra* note 50.

53. 174 U.S. 690 (1899).

54. *Id.* at 701.

55. *Id.* at 703.

56. *Id.*

57. *See* United States v. Commodore Park, Inc., 324 U.S. 386, 392 (1945); *Phillips*, 313 U.S. at 525.

58. 313 U.S. 508 (1941).

59. *Id.* at 525.

60. *See* United States v. Lopez, 514 U.S. 549, 558-59 (1995); *supra* notes 50-51 and accompanying text.

61. S. REP. NO. 1236, at 144 (1972).

62. *See* 33 U.S.C. §§ 407, 1251(a) (2000).

63. *Id.* § 1251(a). The CWA defines "pollutant" as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal, and agricultural waste discharged into water." *Id.* § 1362(6).

64. *Id.* § 1344(a).

65. S. CONF. REP. NO. 92-1236, at 144 (1972), *reprinted in* 1978 U.S.C.C.A.N. 3668, 3882 (intending that "the term 'navigable waters' be given the broadest possible constitutional interpretation").

66. 33 U.S.C. § 1362(7).

manner allowed Congress to regulate both navigable and nonnavigable water quality.[67]

Before the CWA, navigable waters, such as the Mississippi River, were waters large enough to support commerce.[68] In the CWA, Congress departed from this traditional meaning and defined navigable waters as "waters of the United States."[69] As a result, waters that could not support commerce could still be considered navigable so long as they were "waters of the United States."[70] For example, in defining "waters of the United States," the Corps included nonnavigable tributaries, which could not support commerce.[71] However, defining tributary and other newly regulated waters for purposes of CWA jurisdiction could present challenges. In a non-legal context, tributary means "a river or stream flowing into a larger river or stream."[72] For CWA jurisdiction, however, tributary means the upstream limit of federal authority.[73] As a result, the legal and non-legal definitions are not necessarily the same.[74]

B. *The Corps' Role in the CWA*

The Corps plays a critical role in enforcing the CWA.[75] The Corps administers the permit program for discharges of dredge and fill materials into regulated waters.[76] In addition, it interprets CWA provisions and promulgates regulations.[77]

In 1975, the Corps issued its interim final regulations for the CWA.[78] The Corps initially interpreted "navigable waters of the United States" as "waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use or for purposes of interstate commerce or foreign commerce."[79] The Corps' initial regu-

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67. *See* 33 C.F.R. § 328.3(a) (2003).

68. *See* Garrett Power, *The Fox in the Chicken Coop: The Regulatory Program of the U.S. Army Corps of Engineers*, 63 VA. L. REV. 503, 513 (1977) (noting that waters were traditionally deemed "navigable" if they were "suitable for moving goods to or from markets").

69. 33 U.S.C. § 1362(7).

70. *See, e.g.*, 33 C.F.R. § 323.3(a)(3) (including as waters of the United States "mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds").

71. *See id.* § 323.2(a).

72. WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 1232 (1988).

73. *See* 33 C.F.R. § 323.2(a). "Tributaries" under the CWA are the upstream limit of federal jurisdiction because Corps regulations enumerate many types of waters and then extend jurisdiction to tributaries of those waters. *Id.*

74. Each definition may encompass different sets of waters because the legal definition is not bound by the limits of the non-legal definition.

75. *See infra* notes 76-77 and accompanying text.

76. 33 U.S.C. § 1344(a) (2000).

77. *Id.* § 1344(b).

78. *See* 33 C.F.R. § 209 (1975).

79. 33 C.F.R. §§ 209.120, 209.260 (1974) (elaborating on the definition of "navigable waters of the United States"). Until 1977, Congress used "navigable" in conjunction with "waters of the United States." *See infra* note 83 and accompanying text.

lation framed CWA jurisdiction in terms of navigation.[80] The regulation limited CWA jurisdiction over nonnavigable tributaries to the "headwaters" or "ordinary high water mark" of the stream.[81] Waters upstream from this mark remained under state control.[82]

When Congress amended the CWA in 1977, it stated that "navigable waters" included "all of the waters of the United States."[83] In response, the Corps amended its regulations to include tributaries as "waters of the United States,"[84] but again limited its jurisdiction by exempting "manmade non-tidal drainage and irrigation ditches excavated on dry land."[85] In its 1985 amendments, the Corps deleted all such exemptions.[86] The Corps currently defines "waters of the United States" as

1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
2) All interstate waters including interstate wetlands;
3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
   i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
   ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
   iii) Which are used or could be used for industrial purpose by industries in interstate commerce;
4) All impoundments of waters otherwise defined as waters of the United States under the definition;

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80. 33 C.F.R. § 209.260(d)(1). Some in the United States Supreme Court would disagree. *See SWANCC*, 531 U.S. 159, 181 (2001) (Stevens, J., dissenting) ("Indeed, the goals of the [CWA] have nothing to do with *navigation* at all.").

81. Permits for Activities in Navigable Waters or Ocean Waters, 40 Fed. Reg. 31,320, 31,321 (July 25, 1975).

> With respect to the inland areas of the country, Corps jurisdiction under Section 404 of the [CWA] would extend to all rivers, lakes, and streams that are navigable waters of the United States, to all tributaries (primary, secondary, tertiary, etc.) of navigable waters of the United States, and to all interstate waters. . . . Corps jurisdiction over these water bodies would extend landward to their ordinary high water mark and up to their headwaters.

Id. For additional information see 33 C.F.R. section 209.120(h)(ii)(a) (1976), defining "ordinary high water mark" as "that point on the shore that is inundated 25% of the time" and section 209.120(h)(ii)(d), defining "headwaters" as "the point on the stream above which the flow is normally less than 5 cubic feet per second."

82. *See* Reply Brief of Appellants at 14, United States v. Deaton, 332 F.3d 698 (4th Cir. 2003) (No. 02-1442) (citing *Development of New Regulations by the Corps of Engineers: Hearing Before the Subcomm. on Water Resources, Comm. on Public Works & Transp.*, 94th Cong. 15 (1975) ("We put the dividing line at 5 second-feet of normal flow. Now, if it is smaller than that, the whole creek is outside the permit.")).

83. H.R. REP. No. 95-139, at 2 (1977).

84. *See* 33 C.F.R. § 323.2(a) (1977).

85. *Id.* § 323.2(a)(3).

86. *Id.* § 323.2(a)(3) (1986).

5) Tributaries of waters identified in paragraphs (a)(1)-(4) of this section;
6) The territorial seas;
7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(6) of this section.[87]

C. *Reviewing Agency Interpretations of Statutes and Regulations*

Congress frequently delegates authority to administrative agencies to interpret and administer statutes, which includes promulgating regulations and defining terms.[88] As the agency performs its duties, two issues can arise: ambiguity in the statute and ambiguity in the agency's own regulation.[89] When an agency's interpretation of a statute or its own regulation is challenged, courts must decide what the statute or regulation means and then determine whether the agency's interpretation is reasonable.[90]

When an agency's interpretation of a *statute* is challenged, courts apply the test established by the United States Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[91] Under *Chevron*, courts first address whether Congress has directly spoken to the issue.[92] If congressional intent for the statute is clear, courts will give effect to that intent and will not defer to the agency's interpretation.[93] However, if the statute is silent or ambiguous, courts will defer to the agency's interpretation if it is based on a permissible construction of the statute.[94] Courts commonly refer to this method of analysis as *Chevron* deference.[95]

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87. *Id.* § 328.3(a) (2003).

88. DANIEL A. FARBER ET AL., CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY 958 (2nd ed. 1998).

> Congress often is called upon to solve problems for which there is no clear solution, or for which the details cannot be surmised. Delegation to a group of expert administrators allows Congress to address the problem, but with allowance for the details of the solution to be worked out by people who know what they are doing and who can respond to new information about the problem.

Id.; *see also* Morton v. Ruiz, 415 U.S. 199, 231 (1974) ("The power of an administrative agency to administer a constitutionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.").

89. Ambiguity in statutes and regulations is so commonplace that the United States Supreme Court has established tests to determine whether an agency's interpretation of a statute or regulation is reasonable. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945).

90. *See Chevron*, 467 U.S. at 842-43; *Seminole Rock*, 325 U.S. at 414.

91. 467 U.S. 837 (1984).

92. *Id.* at 842 ("First, always, is the question whether Congress has directly spoken to the precise question at issue.").

93. *Id.* at 842-43 ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

94. *Id.* at 843.

95. *Id.*

In *Chevron*, the Court addressed whether the EPA correctly interpreted the term "stationary source" for air pollution permits in the 1977 amendments to the Clean Air Act (CAA).[96] Congress had provided no definition of stationary source in the amendments,[97] and the legislative history revealed conflicting interests: economic growth and preserving the environment.[98] The EPA had interpreted stationary source to include large facilities with more than one pollution source.[99] Under the EPA's "bubble concept," a single facility with multiple air pollution sources would require only one permit.[100] The Court held that Congress' intent was unclear[101] and ruled that the EPA's interpretation was a permissible construction of the CAA.[102]

When an agency's interpretation of its own *regulation* is challenged, courts apply the test established by the United States Supreme Court in *Bowles v. Seminole Rock & Sand Co.*[103] In *Seminole Rock*, the Court addressed the meaning of a maximum price regulation under the Emergency Price Control Act of 1942.[104] The Office of Price Regulation had defined "highest price charged during March, 1942" to mean "[t]he highest price which the seller charged to a purchaser of the same class for delivery of the article or material during March, 1942."[105] However, the regulation did not reveal whether the material must be delivered in March or whether both the charge *and* delivery must occur in March.[106] The agency had interpreted its regulation to only require delivery.[107] In affirming the agency's interpretation, the Court held that an agency's interpretation of an ambiguous regulation should be upheld unless it is "plainly erroneous or inconsistent with the regulation."[108]

In summary, when faced with ambiguous statutes, courts may use *Chevron* analysis to determine what the statute means and decide whether the agency's interpretation is correct. Similarly, when faced with ambiguous regulations, courts may use the *Seminole Rock* analy-

96. *Id.* at 840. Congress required "permits for the construction and operation of new or modified major stationary sources." 42 U.S.C. § 7502(c)(5) (2000).

97. *See Chevron*, 467 U.S. at 851 (noting that the 1977 amendments did not "contain a specific definition of the term 'stationary source'").

98. *See id.*

99. *See id.* at 855-56. The EPA had defined "stationary source" as "any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the Act." 40 C.F.R. § 51.18(j)(1)(i) (1983).

100. *Chevron*, 467 U.S. at 840 (noting the "EPA's decision to allow [s]tates to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single 'bubble'").

101. *Id.* at 862.

102. *Id.* at 866.

103. 325 U.S. 410 (1945).

104. *Id.* at 413.

105. *Id.* at 414.

106. *Id.* at 415.

107. *Id.*

108. *Id.* at 414, 416.

sis to determine what the regulation means and decide whether the agency's interpretation should be followed.

D. *The Scope of Federal Authority over Nonnavigable Waters*

Congress redefined the scope of federal authority over nonnavigable waters when it shifted focus from preserving navigability under the RHA to regulating water quality under the CWA.[109] The United States Supreme Court has ruled twice on the CWA, and both decisions involved the Act's jurisdictional scope.[110]

In *United States v. Riverside Bayview Homes, Inc.*,[111] the Court unanimously held that CWA jurisdiction extended to non-tidal wetlands adjacent to navigable waters.[112] The wetlands at issue were adjacent to a navigable tributary of Lake St. Clair in Michigan.[113] After concluding that wetlands existed on the property, the Court addressed the reasonableness of regulating wetlands adjacent to navigable waters.[114]

The Court noted that the text of the CWA provided little guidance as to where land ended and water began, so it turned to the Act's legislative history and underlying policy.[115] The Court found that by defining navigable waters as "waters of the United States," Congress intended the CWA to have broad coverage.[116] As such, "navigable" was of "limited import."[117] The Court found that regulating adjacent wetlands was reasonable because Congress intended broad coverage and because wetlands can affect the quality of adjacent navigable waters.[118] However, the Court limited its holding to wetlands adjacent to navigable waters and declined to address the scope of federal authority over wetlands "not adjacent to bodies of open water."[119]

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109. *See* 33 U.S.C. § 1251(a) (2000). The scope of federal authority changed from "navigable waters" to "waters of the United States" in the CWA. *See id.* § 1362(7).

110. *See generally SWANCC*, 531 U.S. 159 (2001) (holding that CWA jurisdiction did not extend to isolated ponds used by migratory birds); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) (holding that CWA jurisdiction extended to wetlands adjacent to open waters).

111. 474 U.S. 121 (1985).

112. *Id.* at 139.

113. *Id.* at 131.

114. *Id.* (limiting review to "whether [the regulation] is reasonable, in light of the language, policies, and legislative history of the Act").

115. *See id.* at 131, 132 ("Faced with such a problem of defining the bounds of its regulatory authority, an agency may appropriately look to the legislative history and underlying policies of its statutory grants of authority.").

116. *Id.* at 133.

117. *Id.*

118. *See id.*

119. *Id.* at 131 n.8 ("We are not called upon to address the question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water . . . and we do not express any opinion on that question.").

In contrast to *Riverside Bayview*, the Court struck down the Corps' assertion of CWA jurisdiction over isolated, intrastate waters in *SWANCC* by a five-to-four vote.[120] The waters in *SWANCC* had accumulated at an abandoned sand and gravel pit isolated from navigable waters.[121] Permanent and seasonal ponds had developed, and more than one hundred species of migratory birds inhabited the site.[122]

In its first act of limiting CWA jurisdiction, the *SWANCC* Court reasoned that Congress intended to preserve states' rights and responsibilities regarding water control.[123] In addition, the Corps' current regulations were inconsistent with its original regulations, which based jurisdiction on the commerce power over navigation.[124] Although Congress had not opposed the Corps' subsequent amendments,[125] the Court held that congressional acquiescence is a weak basis for administrative authority.[126]

The Court also clarified its statement from *Riverside Bayview* that "navigable waters" was of limited import.[127] It explained that "navigable" indicated Congress' desire to base CWA jurisdiction on the commerce power over "the use of channels of interstate commerce."[128] Extending jurisdiction to the isolated waters in *SWANCC* would require the use of the Commerce Clause authority over "activities that 'substantially affect interstate commerce,'"[129] and doing so would raise a significant constitutional question.[130] In addition, extending jurisdiction to the isolated ponds would significantly limit states' power over water use.[131] Because adopting the Corps' interpretation of the CWA would raise both constitutional and balance of power issues, the Court refused to give *Chevron* deference and invali-

120. *SWANCC*, 531 U.S. 159, 174 (2001).

121. *Id.* at 163.

122. *Id.* at 163-64.

123. *See id.* at 166-67 (citing 33 U.S.C. § 1251(b) (1999)).

124. *See id.* at 168.

125. *See id.* at 164 (noting the Corps' 1986 amendments, which established the Migratory Bird Rule).

126. *Id.* at 169-70 (citing Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 187 (1994)).

127. *See id.* at 172.

128. *Id.* ("The term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonable be so made.").

129. *Id.* at 173. The Corps argued that the "substantially affects interstate commerce" prong of the Commerce Clause should allow jurisdiction over the ponds because hunters and birdwatchers spent millions of dollars each year in interstate commerce hunting and viewing the birds. *Id.*

130. *See id.*

131. *See id.* at 174 ("Permitting respondents to claim federal jurisdiction over ponds and mudflats falling within the 'Migratory Bird Rule' would result in a significant impingement of the States' traditional and primary power over land and water use.").

dated the Migratory Bird Rule[132] as exceeding the Corps' authority.[133] The dissent interpreted the Court as limiting CWA jurisdiction to "navigable waters, their tributaries, and wetlands adjacent to each."[134]

In summary, the United States Supreme Court has established the scope of CWA jurisdiction. The CWA extends to non-tidal wetlands adjacent to navigable waters but does not extend to isolated, intrastate waters.[135]

IV. Analysis

In *United States v. Deaton*, the United States Court of Appeals for the Fourth Circuit analyzed whether a roadside ditch, adjacent to non-tidal wetlands and eight miles upstream from navigable waters, was a "tributary" of "waters of the United States" and therefore subject to CWA jurisdiction.[136]

A. *Parties' Arguments*

1. The United States/Army Corps of Engineers

The Corps first argued that CWA jurisdiction existed because the wetlands were adjacent to "waters of the United States."[137] The Corps contended that jurisdiction should extend to the roadside ditch because Congress intended to broaden the scope of federal authority when it defined navigable waters as "waters of the United States."[138] Additionally, the Corps argued that its construction of "waters of the United States" to include nonnavigable tributaries should be given *Chevron* deference because the Corps was acting pursuant to Congressional authority,[139] and the regulations were reasonable and consistent with Congress' intent.[140] Moreover, the Corps asserted that the wetlands were adjacent to "waters of the United States" because surface water flowed from the wetlands into the roadside ditch.[141]

The Corps also claimed that exercising CWA jurisdiction over the wetlands would not violate the Commerce Clause because Congress' power over the channels of interstate commerce allowed regulation of

132. *See* 33 C.F.R. § 328.3(a) (1999).
133. *SWANCC*, 531 U.S. at 174.
134. *See id.* at 176-77 (Stevens, J., dissenting).
135. *Id.* at 174; United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 139 (1985).
136. *See* United States v. Deaton, 332 F.3d 698, 704 (4th Cir. 2003) ("Our analysis, then, will focus on whether the Corps has jurisdiction over the roadside ditch.").
137. *See* Brief for the United States at 23-28, *Deaton* (No. 02-1442).
138. *See id.* at 23 (citing 33 U.S.C. § 1362(7) (2000)).
139. Congress delegated authority to the EPA and the Corps to define terms such as "waters of the United States." *See* 33 U.S.C. § 1344(b) (2000).
140. *See* Brief for the United States at 26, *Deaton* (No. 02-1442) (citing *Riverside Bayview*, 474 U.S. at 130).
141. *Id.* at 35.

pollutant discharges into nonnavigable tributaries.[142] Additionally, the Corps argued that extending jurisdiction also satisfied the "substantially affects interstate commerce" test because pollutant discharges in nonnavigable tributaries can have a substantial aggregate impact on navigable-water quality.[143]

Finally, the Corps contended that extending jurisdiction did not impinge on the federal-state balance of power because intrastate pollution can affect navigable waters,[144] and navigable water quality is a federal concern.[145] The Corps argued that Congress did not invade states' rights when it exercised an enumerated power such as the Commerce Clause in a manner that displaced state authority.[146]

2. The Deatons

The Deatons first argued that CWA jurisdiction should not apply because the roadside ditch was neither a navigable water nor "waters of the United States."[147] They claimed that *SWANCC* limited Corps jurisdiction to the traditional meaning of navigable waters, and the nearest navigable water was the Wicomico River eight miles downstream.[148] The Deatons also argued that the roadside ditch was not "waters of the United States" because Congress did not intend to regulate upland ditches.[149] Moreover, the Deatons stated that the CWA did not define "adjacent," and the ordinary meaning of the term would not include a distance of eight miles.[150] As such, the wetlands were not adjacent to navigable waters as required by *Riverside Bayview*.[151]

The Deatons next argued that extending jurisdiction to the roadside ditch would violate the Commerce Clause.[152] They claimed that regulation under the "channels of interstate commerce" should fail because the wetlands were miles away from navigable waters and had no impact on navigation.[153] In addition, the Deatons asserted that the substantially affects interstate commerce test did not support CWA jurisdiction because filling wetlands was a local endeavor and had no

142. *Id.* at 38-47.
143. *Id.* at 41-45.
144. *See id.* at 47 (citing Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 282 (1981)).
145. *See id.* (citing Kaiser Aetna v. United States, 444 U.S. 164, 173-74 (1979)).
146. *See id.* (citing *Hodel*, 452 U.S. at 291).
147. Brief of Appellants at 28, 30, *Deaton* (No. 02-1442).
148. *Id.* at 13.
149. *Id.* at 30.
150. *Id.* at 18 (citing 33 U.S.C. § 1344(g)(1)). Corps regulations define "adjacent" as "bordering, contiguous, or neighboring." 33 C.F.R. § 328.3(c) (1999).
151. *See* Brief of Appellants at 14, *Deaton* (No. 02-1442).
152. *Id.* at 39.
153. *Id.* at 41.

effect on interstate commerce.[154] In the alternative, the Deatons argued that *SWANCC* removed the "substantially affects interstate commerce" prong as a basis for CWA jurisdiction.[155]

The Deatons also claimed that extending jurisdiction would impinge on the federal-state balance of power over waters because Congress intended to maintain that balance in the CWA.[156] The Deatons reasoned that including the roadside ditch as "waters of the United States" would result in no "waters of the States."[157]

B. *The Court's Opinion*

In a unanimous opinion by Judge M. Blane Michael, the Fourth Circuit Court of Appeals ruled that CWA jurisdiction extended to the roadside ditch, making the ditch a "tributary" under the CWA.[158] In rendering its judgment, the court addressed both the constitutional and statutory issues of extending CWA jurisdiction to the ditch.[159] The court stated that if extending jurisdiction would raise a serious constitutional problem, the court would interpret the CWA to avoid the problem.[160] However, if regulating the ditch would not raise such a problem, the court could proceed to the statutory analysis.[161]

As to the constitutional issue, the court addressed whether Congress had authority under the Commerce Clause to regulate the roadside ditch.[162] The court noted that the channels of interstate commerce prong of the Commerce Clause allowed Congress to regulate the flow of nonnavigable tributaries when necessary to protect navigation.[163] In addition, the court stated that Congress should also be free to regulate discharges into nonnavigable tributaries because of the possible effect on navigable water quality.[164] Because Congress

154. *Id.* at 42.
155. *Id.* at 37.
156. *See* 33 U.S.C. § 1251(b) (2000).
157. *See* Brief of Appellants at 31, *Deaton* (No. 02-1442) (noting that "Congress carefully distinguishes between federal 'waters of the United States' and local 'waters of the States'").
158. *Deaton*, 332 F.3d at 712.
159. *Id.* at 705, 708.
160. *Id.* at 705 (quoting *SWANCC*, 531 U.S. 159, 173 (2001) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, [courts] will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.") (internal citation omitted)).
161. *See id.*
162. *Id.*
163. *Id.* at 707 ("The power over navigable waters also carries with it the authority to regulate nonnavigable waters when that regulation is necessary to achieve [c]ongressional goals in protecting navigable waters."). Authority for this proposition comes from *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 525-26 (1941), holding that Congress can dam upstream tributaries to control flooding of navigable waters, and *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 709 (1899), holding that Congress can prohibit the damming of nonnavigable tributaries when doing so would impair navigability of downstream waters.
164. *See Deaton*, 332 F.3d at 707 ("Any pollutant or fill material that degrades water quality in a tributary of navigable waters has the potential to move downstream and degrade the quality of the navigable waters themselves.").

had provided an "intelligible principle" as a guide, the court noted that Congress could delegate this authority to the Corps.[165] The court found that the regulations were constitutional because the Corps used this delegated power to regulate nonnavigable tributaries.[166]

Continuing its constitutional analysis, the court analyzed whether the regulation presented a serious constitutional question.[167] The court held that the CWA did not invade rights reserved to the states because Congress exercised an enumerated power, the Commerce Clause, when it enacted the statute.[168] Thus, the court determined that regulating nonnavigable tributaries did not "'significantly change the federal-state balance.'"[169] As a result, regulating the roadside ditch did not present a significant constitutional question.[170]

Having hurdled the constitutional barriers, the court next addressed whether the CWA included the roadside ditch as "waters of the United States."[171] To determine whether this phrase included the ditch, the court turned to *Chevron* analysis for guidance.[172]

Under the first step of *Chevron*, the court analyzed whether Congress had delegated authority to the Corps to regulate nonnavigable tributaries.[173] The court first held that "waters of the United States" was "sufficiently ambiguous to constitute an implied delegation of authority to the Corps."[174] Congress had intended to depart from the traditional definition of navigable waters when it enacted the CWA,[175] but the court could not determine if Congress intended the CWA to include nonnavigable tributaries.[176]

Because the court found that "tributary" was ambiguous, it suspended the second step of *Chevron* analysis and turned to *Seminole Rock* analysis for guidance.[177] Under *Seminole Rock*, an agency's in-

165. *See id.*

166. *Id.* at 708 ("The federal assertion of jurisdiction over nonnavigable tributaries of navigable waters is constitutional.").

167. *See id.* at 705.

168. *Id.* at 706, 707 (citing *SWANCC*, 531 U.S. 159, 172 (2001)). When Congress uses an enumerated power to regulate natural resources, states must share authority with the federal governments. *See id.* at 707-08 (quoting Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 204 (1999) ("Although States have important interests in regulating . . . natural resources within their borders, this authority is shared with the Federal Government when the Federal Government exercises one of its enumerated powers . . . .")).

169. *Id.* at 708 (quoting United States v. Bass, 404 U.S. 336, 349 (1971)).

170. *See id.* ("The agency's interpretation of the statute therefore does not present a serious constitutional question that would cause us to assume that Congress did not intend to authorize the regulation.").

171. *See id.*

172. *See id.*

173. *See id.*

174. *Id.* at 709-10 ("This . . . permits the Corps to determine which waters are to be covered within the range suggested by *SWANCC*.").

175. *See id.* at 709 (citing United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 133 (1985)).

176. *See id.*

177. *See id.* (citing Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 413-14 (1945)).

terpretation of its own ambiguous regulation should control unless it is "'plainly erroneous or inconsistent with the regulation.'"[178]

First, the court analyzed what tributary meant.[179] Because the Corps did not define tributary in its regulations, the court turned to two dictionaries.[180] The court found that both definitions of tributary included the roadside ditch, but neither definition revealed how far upstream coverage of tributaries should extend.[181] Because the plain language of the regulation was ambiguous, the court turned to the Corps' interpretation.[182] The Corps claimed that even if previous regulations had placed physical limits on CWA jurisdiction, it had always interpreted tributary to include the entire tributary system.[183] The court stated that since the Corps' usage was not plainly erroneous or inconsistent with the regulation, the Corps' interpretation of tributary was entitled to *Seminole Rock* deference.[184]

With a practical definition of tributary in hand, the court returned to *Chevron* analysis to determine whether the Corps' regulation was based on a "permissible construction" of the statute.[185] It held that the Corps' 1974 regulations,[186] which the *SWANCC* Court recognized as a correct interpretation of the CWA, were not the only permissible interpretation of the statute.[187] Moreover, the fact that the 1974 regulations contradicted current regulations did not necessarily mean the current regulations were invalid.[188] Because a nexus existed between navigable waters and nonnavigable tributaries, the court held that the Corps' regulations were a reasonable interpretation of "waters of the United States" and were entitled to *Chevron* deference.[189] As a re-

178. *Id.* (quoting *Seminole Rock*, 325 U.S. at 413-14).

179. *See id.* at 710.

180. *Id.* The first dictionary defined tributary as (1) "providing with or serving as a channel for supplies or additional matter" or (2) "one that is tributary to another: as . . . a stream." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2441 (1993). The second dictionary defined tributary as "[a] river or stream flowing into a larger river or stream." WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 1232 (1988).

181. *Deaton*, 332 F.3d at 710 ("The dictionaries thus agree that the roadside ditch is a tributary, but they do not settle the question of whether it is a tributary of a navigable water . . . which is what the regulation covers.").

182. *See id.* (citing Brief for the United States at 37, *Deaton* (02-1442)).

183. *Id.* ("Although the Corps has not always chosen to regulate all tributaries, it has always used the word to mean the entire tributary system, that is, all of the streams whose water eventually flows into navigable waters.").

184. *Id.* at 711.

185. *See id.* (citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 843 (1984)).

186. 33 C.F.R. § 209.120 (1974).

187. *Deaton*, 332 F.3d at 711 (holding that the Corps' initial regulations captured Congress' general intent, but Congress delegated authority to the Corps to decide the extent of tributary coverage).

188. *See id.* (citing Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 742 (1996) (holding that an agency is allowed to change its mind, so long as its new interpretation is reasonable)).

189. *Id.* at 712 ("This nexus, in light of the 'breadth of congressional concern for protection of water quality and aquatic ecosystems,' . . . is sufficient to allow the Corps to determine reasonably that its jurisdiction over the whole tributary system of any navigable waterway is warranted.").

sult, CWA jurisdiction extended to the roadside ditch, giving the Corps authority over the Deatons' wetlands.[190]

C. *Commentary*

In *United States v. Deaton*, the court incorrectly held that a roadside ditch, eight miles upstream from the navigable Wicomico River, is the type of tributary that falls within the scope of CWA jurisdiction. In its *Chevron* analysis, the court should have given greater weight to congressional intent to preserve the federal-state balance of authority over land and water use.[191] Additionally, when the court applied *Seminole Rock* analysis to determine the tributary regulation's limit, the court should have considered the Corps' practical application of the tributary regulation, not just its theoretical definition of the entire tributary system.[192] By giving both *Chevron* and *Seminole Rock* deference to the Corps' regulations, the CWA now has virtually unlimited jurisdiction over upstream water flow, no matter how distant or minute.[193] Until Congress states otherwise, the Corps' tributary regulation should base CWA jurisdiction on navigable water quality and preserve the federal-state balance of power over land and water use.

1. The Court Misapplied *Chevron* Deference

The Fourth Circuit incorrectly gave *Chevron* deference to the Corps. Under *Chevron*, courts first determine whether Congress has spoken on an issue.[194] If Congress has been silent, courts address whether the agency's interpretation is a permissible construction of the statute.[195] In *Deaton*, the court failed to recognize that Congress has expressed its intent as to CWA jurisdiction. In limiting CWA jurisdiction to "waters of the United States," Congress intended to frame CWA jurisdiction in terms of navigable water quality and also to preserve the federal-state balance of power over land and water use.[196] The Corps' interpretation of CWA jurisdiction to include the "entire tributary system" is an impermissible construction because it violates Congress' two-fold intent.

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190. *Id.*
191. *See* 33 U.S.C. § 1251(b) (2000).
192. *See* 33 C.F.R. § 209.260 (1974); *id.* § 323.2(a)(3) (1978).
193. In *Deaton*, the court held that the tributary provision extended to the "entire tributary system." 332 F.3d at 712. The entire tributary system would include any ditch or stream connected to a navigable water, regardless of distance or water flow because the water from the ditch or stream could theoretically end up in the navigable water.
194. Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842 (1984); *supra* note 98 and accompanying text.
195. *Chevron*, 467 U.S. at 843; *supra* note 99 and accompanying text.
196. *See* 33 U.S.C. § 1251(a)-(b).

Although Congress did not provide precise limits for "waters of the United States,"[197] it did supply a broad framework within which agencies could act. The preamble to the CWA states, "It is the national goal that the discharge of pollutants into the navigable waters be eliminated."[198] Congress defined "navigable waters" as "waters of the United States."[199] In *SWANCC*, the Court found that Congress intended only to use its commerce power over navigation when it defined "waters of the United States" as the jurisdictional limit of the CWA.[200] As a result, CWA jurisdiction exists in terms of *navigable* water quality, so CWA jurisdiction should not extend to upstream waters that do not affect navigable water quality.

Congress also intended to maintain the balance between federal and state authority over water control when it enacted the CWA.[201] The preamble to the CWA states, "It is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use . . . of land and water resources."[202] Congress provided further evidence of its intent to respect state authority when it defined CWA jurisdiction as "waters of the *United States*."[203] By implication, Congress intended for federal authority to end where "waters of the *States*" begin.[204]

Even if Congress had not expressed its intent as to the precise scope of waters of the United States, the Corps' interpretation is an impermissible construction of the statute because it contravenes Congress' general intent.[205] Though the Corps' original regulations reflected Congress' two-fold intent to base CWA jurisdiction on navigable water quality and to preserve the federal-state balance of power over land and water use,[206] subsequent amendments do not reflect congressional intent.[207]

In *SWANCC*, the Court noted that the Corps' original regulations reflected congressional intent.[208] The original regulations limited CWA jurisdiction to the "headwaters" or "ordinary high water mark"

197. Congress did not define the term in the CWA.
198. 33 U.S.C. § 1251(a)(1).
199. *Id.* § 1362(7).
200. *SWANCC*, 531 U.S. 159, 172 (2001).
201. *See* 33 U.S.C. § 1251(b).
202. *Id.*
203. *Id.* § 1362(7).
204. The term "waters of the States" does not exist in the CWA; the Deatons adopted it on appeal. *See* Brief of Appellants at 31, United States v. Deaton, 332 F.3d 698 (4th Cir. 2003) (No. 02-1442).
205. *See infra* note 208 and accompanying text.
206. *See generally* 33 C.F.R. § 209.260(d) (1974).
207. *Id.* § 323.2(a)(3) (1986).
208. *SWANCC*, 531 U.S. 159, 168 (2001) (holding that the Corps' original regulations were consistent with Congress' intent to exercise nothing more than its commerce power over navigation).

of a tributary.[209] Waters upstream from those respective marks remained under state control.[210] Much has changed since 1975, and the Corps' tributary regulation is no exception. In 1977, the Corps expanded the regulation's scope by exempting non-tidal drainage and irrigation ditches from the permit program.[211] In 1985, the Corps expanded the regulation yet again by removing all exemptions, leaving tributary undefined.[212] The Corps then reviewed permit applications on a case-by-case basis,[213] leaving courts to interpret the meaning of tributary from numerous prior usages.[214]

In *Deaton*, the Corps won the ultimate battle for expansion of CWA jurisdiction by persuading the Fourth Circuit to accept its theoretical definition of tributary to include the entire tributary system.[215] As a result, CWA jurisdiction over nonnavigable tributaries is virtually unlimited. When compared to Congress' unwavering two-fold intent, giving unlimited federal jurisdiction over remote upstream waters is an impermissible construction of the statute and is not entitled to *Chevron* deference.

2. The Court Misapplied *Seminole Rock* Deference

The court should have withheld *Seminole Rock* deference for the Corps' interpretation of tributary, which included the entire tributary system. Under the *Seminole Rock* analysis, courts defer to an agency's interpretation of its own ambiguous regulation so long as the interpretation is not plainly erroneous or inconsistent with the regulation.[216] In *Deaton*, the court analyzed the tributary regulation, which provides that tributaries are "waters of the United States."[217] In light of the Corps' history of placing physical limits on the meaning of tributary, removing all limits and regulating the *entire* tributary system is both plainly erroneous and inconsistent with the regulation, and therefore is not entitled to *Seminole Rock* deference.

Calling a stream or ditch a tributary in an everyday, non-legal context is much different from calling the same stream or ditch a trib-

209. *See supra* note 81 and accompanying text.

210. *Development of New Regulations by the Corps of Engineers, Hearing Before the Subcomm. on Water Resources, Comm. on Public Works & Transp.* 94th Cong. 15 (1975). The Army's Assistant Secretary confirmed this intent during congressional hearings. *Id.* ("We put the dividing line at five second-feet of normal flow. Now, if it is smaller than that, the whole creek is outside the permit.").

211. *See supra* note 85 and accompanying text.

212. *See supra* note 86 and accompanying text.

213. *See* 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986).

214. With tributary left undefined in the Corps' regulations, the court must turn somewhere when parties dispute the meaning of the word. Even if the court analyzed the Corps' historical application of the tributary regulation, the court would see that the term has had three different meanings. *See supra* notes 78-87 and accompanying text.

215. United States v. Deaton, 332 F.3d 698, 712 (4th Cir. 2003).

216. Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945).

217. *See Deaton*, 332 F.3d at 704; 33 C.F.R. § 323.2(a) (1999).

utary for purposes of CWA jurisdiction.[218] In a non-legal context, tributary means "a river or stream flowing into a larger river or stream."[219] For purposes of CWA jurisdiction, tributary is a term of art that defines the upstream limit of federal authority over rivers and streams.[220] Thus, tributary can have completely different meanings depending on the context in which it is used. In a non-legal context, one could call the roadside ditch in *Deaton* a tributary because the ditch flows downstream into other waters connected to the navigable Wicomico River.[221] However, merely because the roadside ditch is a tributary in a non-legal context does *not* necessarily mean it is a tributary under the CWA. To determine whether the roadside ditch is a tributary for purposes of CWA jurisdiction, one must look to the definition ascribed by the Corps.[222]

The Corps had previously defined "tributary" in the negative: instead of explaining what a tributary was, it explained what a tributary was not.[223] The Corps began by limiting upstream tributaries at the "headwaters" or "ordinary high water mark."[224] The Corps later amended its criteria by exempting non-tidal drainage and irrigation ditches.[225] These waters may have been tributaries in everyday usage, but they were not tributaries under the CWA. The problem with defining terms in the negative is that if all limitations are removed, the term has no meaning. The Corps removed all exemptions in the 1985 amendments, leaving tributary undefined.[226]

In *Deaton*, the court attempted to construct a definition of tributary by first turning to dictionaries, which provided a non-legal definition.[227] However, the dictionaries did not reveal the upstream limit for CWA jurisdiction, so the court next turned to the Corps' interpretation.[228] The court found that the Corps had always interpreted tributary to include the entire tributary system.[229] The court held that this interpretation was not plainly erroneous or inconsistent with the regulation or the dictionary definitions and deferred to the Corps' interpretation.[230]

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218. *See infra* notes 219-222 and accompanying text.
219. WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 1232 (1988).
220. *See* 33 C.F.R. §§ 323.2(a), 328.3(a)(5) (2003).
221. *See Deaton*, 332 F.3d at 702.
222. The Corps has responsibility for defining terms for the dredge-and-fill permit program. *See* 33 U.S.C. § 1344(b) (2000).
223. *See supra* notes 81-85 and accompanying text.
224. 33 C.F.R. § 209.260(j)(1) (1974); Permits for Activities in Navigable Waters or Ocean Waters, 40 Fed. Reg. 31,320, 31,321 (July 25, 1975).
225. 33 C.F.R. § 323.2(a)(3) (1978).
226. *Id.* § 323.2(a)(5) (1986).
227. *See* United States v. Deaton, 332 F.3d 698, 710 (4th Cir. 2003).
228. *Id.*
229. *Id.* at 711.
230. *Id.*

Instead of turning to desk dictionaries and the Corps' theoretical definitions, the court should have first looked to a highly relevant source used in other areas of law: past usage of the term.[231] Until 1985, the Corps had placed express limits on CWA jurisdiction over nonnavigable tributaries.[232] Even after removing all formal exemptions in 1985, the Corps informally exempted upland ditches by reviewing permit applications on a case-by-case basis.[233] By looking at how the Corps had regulated tributaries in the past, the court could have determined what tributary should mean now. Had the court given weight to the Corps historical exemptions, both formal and informal, the court likely would have determined that including the entire tributary system contradicted decades of the Corps' policies and actions. Consequently, the Corps' interpretation is both inconsistent and plainly erroneous with the regulation and is not entitled to *Seminole Rock* deference.[234]

3. Redefining the Scope of CWA Jurisdiction over Nonnavigable Tributaries

To properly define tributary under the CWA, it is important to first examine how other courts have ruled on facts similar to *Deaton*. It is also important to respect Congress' two-fold intent and to define tributary in a manner that provides predictability and guidance for courts. Finally, it is useful to ask if unlimited federal jurisdiction over nonnavigable tributaries is improper.

Courts other than the Fourth Circuit Court of Appeals have addressed situations similar to *Deaton*, and the resulting opinions have created a wide split of authority.[235] The division among the courts arises from competing interpretations of two United States Supreme Court cases: *Riverside Bayview* and *SWANCC*.[236] *Riverside Bayview* extended CWA jurisdiction to wetlands adjacent to navigable waters.[237] In contrast, *SWANCC* denied CWA jurisdiction over intra-

231. For example, past usage is commonly used to resolve contract disputes in which the parties disagree about the meaning of a term in a contract. *See* U.C.C. § 2-208 (2001); RESTATEMENT (SECOND) OF CONTRACTS §§ 219-223 (1981).

232. *See supra* notes 81-85 and accompanying text (discussing the Corps' amendments to the tributaries regulation).

233. *See* 51 Fed. Reg. 41,217 (1986) (stating that non-tidal drainage and irrigation ditches excavated on dry land are generally not considered waters of the United States, but reserving the right to determine on a case-by-case basis).

234. *See supra* note 108 and accompanying text (discussing *Seminole Rock* deference).

235. *See infra* notes 241-242 and accompanying text.

236. *See SWANCC*, 531 U.S. 159, 174 (2001) (rejecting CWA jurisdiction for isolated, intrastate waters having no connection to any waters subject to CWA jurisdiction); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 139 (1985) (extending CWA jurisdiction to nontidal wetlands adjacent to navigable waters).

237. *Riverside Bayview*, 474 U.S. at 139.

state waters isolated from other waters.[238] Before *SWANCC*, the Court had never denied an assertion of CWA jurisdiction.

Riverside Bayview and *SWANCC* seemed to have established the opposite ends of a jurisdictional continuum. According to *Riverside Bayview*, the CWA *did* extend to wetlands adjacent to *navigable* waters; however, according to *SWANCC*, the CWA did *not* extend to totally isolated, intrastate waters.[239] These decisions failed to address wetlands that fall somewhere in the middle, such as wetlands adjacent to nonnavigable tributaries. Such wetlands are similar to the wetlands in *Riverside Bayview*, being adjacent to waters of the United States, but are also similar to the isolated waters in *SWANCC* in that they are often miles away from navigable waters. However, wetlands adjacent to nonnavigable tributaries do not fit precisely into either category. Where on the jurisdictional continuum such wetlands belong depends on how courts have interpreted *SWANCC* and *Riverside Bayview*.

In *SWANCC*, the Court stated that "to rule for respondents here, we would have to hold that the jurisdiction of the Corps extends to ponds that are *not adjacent to open water*. But we conclude that the text of the statute will not allow this."[240] Courts denying CWA jurisdiction for wetlands adjacent to nonnavigable tributaries concluded that this statement had established *Riverside Bayview* as the limit for CWA jurisdiction over wetlands.[241] In other words, if the wetlands were not adjacent to *navigable* (open) waters, some courts would deny CWA jurisdiction.

Other courts held that *SWANCC* had only invalidated the Migratory Bird Rule and had not established *Riverside Bayview* as the jurisdictional limit for wetlands.[242] These courts found that the ponds in

238. *SWANCC*, 531 U.S. at 174.

239. *Id.*; *Riverside Bayview*, 474 U.S. at 139. *Riverside Bayview* specifically left this issue unanswered. *See* 474 U.S. at 131 n.8.

240. *SWANCC*, 531 U.S. at 168 (emphasis added).

241. *See* Rice v. Harken Exploration Co., 250 F.3d 264, 269 (5th Cir. 2001) ("Under [*SWANCC*], it appears that a body of water is subject to regulation under the CWA if the body of water is actually navigable or is adjacent to an open body of navigable water."); United States v. RGM Corp., 222 F. Supp. 2d 780, 787 (E.D. Va. 2002) (finding no CWA jurisdiction over wetlands adjacent to a roadside ditch that flowed into a series of nonnavigable tributaries similar to *Deaton*); United States v. Newdunn, 195 F. Supp. 2d 751, 767 (E.D. Va. 2002) (finding no CWA jurisdiction over wetlands that "only by multiple drainage ditches, a culvert under a highway, and miles of nonnavigable waters, are . . . even remotely connected to navigable waters"). The latter two cases, if appealed, would go to the Fourth Circuit, which decided *United States v. Deaton*. Presumably, these cases would be reversed on appeal.

242. United States v. Rapanos, 339 F.3d 447, 453 (6th Cir. 2003) ("Although the [*SWANCC*] opinion limited the application of the [CWA], the court did not . . . [restrict] the Act's coverage to only wetlands directly abutting navigable water. Instead, the [*SWANCC*] Court, in a narrow holding, invalidated the Migratory Bird Rule as exceeding the authority granted to the [Corps] by the [CWA]."); United States v. Rueth Dev. Co., 335 F.3d 598, 603 (7th Cir. 2003) ("*SWANCC* did nothing more than invalidate the Migratory Bird Rule . . . ."); Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526, 533 (9th Cir. 2001); Carabell v. Army Corps of Eng'rs, 257 F. Supp. 2d 917, 930 (E.D. Mich. 2003). *Carabell* also provides a comprehensive list of cases on both sides of the issue, including pre-*SWANCC* decisions. *Id.* at 928.

SWANCC were isolated from all navigable waters; thus, *SWANCC* would deny jurisdiction if the wetlands were *not adjacent* to any other waters.[243] So long as the wetlands were adjacent to "waters of the United States," whether navigable or nonnavigable, CWA jurisdiction should apply.[244]

Courts extending CWA jurisdiction to wetlands adjacent to nonnavigable tributaries have also held that *SWANCC* should not apply because CWA jurisdiction for wetlands adjacent to nonnavigable waters exists in the tributaries regulation.[245] *SWANCC* did not involve the "tributaries" regulation; rather, *SWANCC* had invalidated the Migratory Bird Rule, which existed in the "other waters" regulations.[246] Accordingly, invalidating the other waters regulation should not automatically invalidate the unrelated tributaries regulation.[247] By this reasoning, even if the Court decided *SWANCC* correctly, the decision would only apply to the Migratory Bird Rule and should not control in other cases.

The courts' rationale in extending CWA jurisdiction to wetlands adjacent to nonnavigable waters seems logical. First, though the Court declined to address CWA jurisdiction for wetlands not adjacent to navigable waters in *Riverside Bayview*, such a refusal does not mean that the Court thought CWA jurisdiction should *only* extend to wetlands adjacent to *navigable* waters.[248] As frequently happens, the Court limited its decision to the facts of the case.[249]

Additionally, denying CWA jurisdiction over wetlands adjacent to nonnavigable tributaries seems incorrect because Congress did not intend such a result. Denying jurisdiction over nonnavigable tributaries would require overruling more than a century of United States

243. The waters in *SWANCC* were isolated from other waters. *See* 531 U.S. at 163; *Rueth Dev. Co.*, 335 F.3d at 602-03 ("[*SWANCC*] concluded that nothing in the text of the statute indicated any [c]ongressional intent to extend the jurisdiction of the Corps to 'ponds that are *not* adjacent to open water.'").

244. *See Rapanos*, 339 F.3d at 453 (finding ample nexus between wetlands adjacent to a storm drain that flowed into a nonnavigable tributary and navigable waters more than ten miles downstream); *Carabell*, 257 F. Supp. 2d at 931-32 (holding that "wetlands adjacent to neighboring tributaries of navigable waters" have a significant nexus to waters of the United States).

245. 33 C.F.R. § 328.3(a)(5) (2003).

246. *See SWANCC*, 531 U.S. at 174 ("We hold that [the 'other waters' provision], as clarified and applied . . . pursuant to the [Migratory Bird Rule], exceeds the authority granted to the [Corps] under § 404(a) of the CWA.").

247. *Rueth Dev. Co.*, 335 F.3d at 604 ("For it is clear that *SWANCC* did not affect the law regarding the government's alternative asserted basis for jurisdiction adjacency under [the 'adjacent wetlands' provision].").

248. When the Court declined to discuss wetlands adjacent to nonnavigable waters, it made no statement indicating that CWA jurisdiction would not exist for these waters. *See* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 131 n.8 (1985).

249. *Riverside Bayview*, 474 U.S. at 121, 131 ("[O]ur review is limited to the question whether it is reasonable . . . for the Corps to exercise jurisdiction over wetlands adjacent to but not regularly flooded by rivers, streams and other hydrographic features."). In a footnote, the Court stated, "We are not called upon to address the question of whether the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water . . . and we do not express any opinion on that." *Id.* at 131 n.8.

Supreme Court precedent.[250] As early as 1899, Congress and the Court realized that the flow of nonnavigable waters can affect the navigability of downstream rivers.[251] Consequently, the quality of nonnavigable waters can in turn affect the quality of navigable waters.[252] Thus, extending jurisdiction to wetlands adjacent to "waters of the United States" seems rational.

Courts err not by extending CWA jurisdiction to certain nonnavigable tributaries that are waters of the United States, but rather by holding that isolated and remote tributaries are the type of tributaries covered by CWA jurisdiction. In *Deaton*, the court commingled the legal and non-legal usages of tributary. Had the Corps retained formal exemptions in the regulation, the court could have created a jurisdictional limit and would not have had to construct a definition and commingle legal and non-legal usages in the process. Nevertheless, leaving tributary undefined benefited the Corps in *Deaton* because it can now regulate the entire tributary system in the Fourth Circuit, regardless of how far removed the tributary may be from "waters of the United States."[253]

Limitless federal authority over tributaries, such as extending CWA jurisdiction to the entire tributary system, not only contravenes congressional intent to base CWA jurisdiction in terms of navigable water quality, but also upsets the federal-state balance of power over land and water use. Therefore, a narrower, practical limit for CWA jurisdiction should be drawn, respecting Congress' two-fold intent. Where the line should be drawn remains unresolved.

Until 1977, Corps regulations exempted tributaries that had less than five cubic-feet per second of water flow.[254] Similarly, until 1985 the Corps exempted from the permit program non-tidal drainage ditches and ditches excavated on dry land.[255] These regulations drew a line in the water and granted state jurisdiction to upstream waters.[256] Even after the Corps removed every exemption, it continued to effectively exempt non-tidal drainage ditches by reviewing permit applications on a case-by-case basis.[257] Now, however, the Corps considers the entire tributary system under federal control.[258]

250. This line of cases began with *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690 (1899), and has never stopped.

251. *See id.* at 702.

252. Just as reduced flow of nonnavigable water could affect navigability of downstream waters, any pollutant existing in the nonnavigable waters that flow downstream to contribute to navigability could also introduce such pollutants into the navigable waters.

253. *See* United States v. Deaton, 332 F.3d 698, 712 (4th Cir. 2003).

254. 33 C.F.R. § 209.120(h)(ii)(a), (d) (1976).

255. *Id.* § 323.2(a)(3) (1978).

256. *See supra* note 82 and accompanying text.

257. *See supra* note 213 and accompanying text.

258. *See supra* note 183 and accompanying text.

In *SWANCC*, the Court provided a basis for redrawing the CWA's jurisdictional line. First, the Court noted that the Corps' original regulations had correctly interpreted congressional intent.[259] More importantly, the Court held that Congress only intended to exert its commerce power over navigation when enacting the CWA.[260] The Court also refused to apply the "substantially affects interstate commerce" test of the Commerce Clause as a basis for CWA jurisdiction.[261] By implication, the substantially affects prong did not apply.[262]

Congressional intent to only use the "channels" power of the Commerce Clause helps define the outer limits of federal authority over nonnavigable tributaries. For more than a century, Congress has regulated nonnavigable tributaries that could influence navigability.[263] In 1972, Congress expanded its regulatory scope in the CWA to also regulate water quality.[264] However, the scope of CWA jurisdiction is still limited to whether the discharge of pollutants could affect navigable water quality.[265] In determining the upstream limit of CWA jurisdiction for nonnavigable tributaries, the Corps should consider whether a discharge of pollutants from any given point could have a measurable impact on downstream navigable water quality. This would reconcile Congress' intent to extend CWA jurisdiction to its furthest extent while preserving the federal-state balance of power over land and water use.[266]

Although this jurisdictional line could effectively execute congressional intent, application of such a rule could be difficult. Studies show that the degree to which pollutants discharged in upstream, nonnavigable waters can affect navigable water quality depends on numerous factors.[267] Variables include the type of pollutant discharged, the velocity of the downstream water flow, and the time of year the discharge occurs.[268] Accounting for numerous factors may require a case-by-case analysis for each permit application and could result in unreasonable amounts of work for respective agencies. However, the

259. *SWANCC*, 531 U.S. 151, 168 (2001).
260. *Id.* at 172.
261. *Id.* at 173.
262. *See id.* at 168 n.3.
263. *See supra* notes 52-56 and accompanying text.
264. *See supra* notes 61-64 and accompanying text.
265. *See SWANCC*, 531 U.S. at 172 (denying the substantial effects test as a basis for CWA jurisdiction).
266. Similar to the Corps' pre-1985 regulations, defining the upstream limit of CWA jurisdiction in terms of potential impact on navigable water quality would leave to state jurisdiction waters that would not influence navigable water quality. *See supra* note 82 and accompanying text.
267. ARTURO A. KELLER, PEER REVIEW OF THE WATERSHED ANALYSIS RISK MANAGEMENT FRAMEWORK (WARMF) 17-18 (2000).
268. *Id.*

Watershed Analysis Risk Management Framework (WARMF)[269] could provide a systematic method of accounting for numerous factors when assessing permit applications.[270] WARMF, a computer-based modeling system, weighs factors such as water flow and type of pollutant to estimate whether the pollutants could affect navigable water quality.[271]

Setting an effective limit for CWA jurisdiction could be difficult and may require more agency effort than is currently necessary. As a result, some may argue that the Corps' permit program would be simpler and more cost-effective if CWA jurisdiction extended to the entire tributary system. In addition, some may argue that the court in *Deaton* was correct because usurping state jurisdiction over distant streams and ditches advances the CWA's primary goal of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters."[272] After all, failed state-level enforcement of federal water pollution statutes was a primary reason why Congress reclaimed federal enforcement authority in the CWA.[273] If Congress exerted jurisdiction over *all* upstream tributaries, including roadside ditches, it could prevent another "race to the bottom" scenario in which states competitively relax water-pollution control standards to attract mobile industries.[274]

Federal regulation of all waters in the United States could have distinct advantages: it could level the regulatory playing field, provide uniform standards among the states, and conceivably result in cleaner waters nationwide.[275] However, Congress did not have sole federal authority in mind when it enacted the CWA. On the contrary, it intended to not only base CWA jurisdiction on navigable water quality, but also to preserve the federal-state balance of power over land and water use.[276] Congress chose to "recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources."[277] Even if Congress had not stated in the CWA that it intended to preserve the federal-state balance of power over land and water use, the United States Supreme Court has stated that "'regulation of land use [is] a function

269. *See generally id.*

270. *Id.* at 10.

271. *Id.*

272. 33 U.S.C. § 1251(a)-(b) (2000).

273. *See supra* notes 4-6 and accompanying text.

274. Saleska & Engel, *supra* note 5, at 55.

275. States could not relax standards to attract industries if they had no control over water quality. By removing all state authority, Congress could enforce the CWA for all waters in the United States.

276. 33 U.S.C. § 1251 (2000).

277. *Id.* § 1251(b).

traditionally performed by local governments.'"[278] Absent express congressional intent, the Corps should continue to respect these historical boundaries.

The mere prospect of increasingly effective water pollution regulations does not justify erasing state authority over remote, intrastate waters. The agency's duty to fulfill congressional intent outweighs the possibility of improved regulations that could not exist without violating congressional intent. Even if misguided, the executive branch must execute, and the judicial branch must enforce, congressional intent that does not violate the Constitution.

V. CONCLUSION

In *United States v. Deaton*, the Fourth Circuit Court of Appeals incorrectly held that a roadside ditch, eight miles upstream from navigable waters, was the type of tributary that falls within the scope of CWA jurisdiction. This decision improperly extended CWA jurisdiction to virtually all upstream water flow, no matter how distant or minute. In giving *Chevron* deference to the Corps' interpretation of "waters of the United States," the court overlooked Congress' two-fold intent to base CWA jurisdiction in terms of navigable water quality and to preserve the federal-state balance of power over land and water use. In addition, instead of giving *Seminole Rock* deference to the Corps' interpretation of "tributary," which included the "entire tributary system," the court should have looked to the Corps' historical application of the regulation. Giving weight to the Corps' past actions would have made *Seminole Rock* deference inappropriate.

The Fourth Circuit's decision in *Deaton* may advance the CWA goal of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters"[279] by removing authority from states, which historically have relaxed water pollution regulations to attract mobile industries. However, the court's ruling declares that Congress' two-fold intent, which has not changed in more than thirty years, takes second stage to a "clean water at all costs" mentality. Instead of regulating the entire tributary system, the Corps should ask whether a discharge of pollutants from a particular location would have a measurable impact on navigable water quality.

The effort to clean up America's waters began when the Cuyahoga River spontaneously caught fire in 1969. Due to the CWA's advances in water-pollution control policy, the mighty Cuyahoga will likely never erupt in flames again. Although upsetting

278. *SWANCC*, 531 U.S. 159, 174 (2001) (quoting Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 44 (1994)).

279. 33 U.S.C. § 1251(a) (2000).

the federal-state balance of power over land and water use may ultimately be necessary to achieve the Clean Water Act's goal of clean water nationwide, a statement of this magnitude can only come from Congress.