

OVERVIEW

SUBSIST./

STATE

DEFENSE/

NAT. RES.

1/31/01

FEDERAL RELATIONS MATERIALS

*Maps from Alaska v. United States, Original No. 128

*Web site of Professor Gregory Maggs, with resumé
and docket

*Quarterly Report, natural resources cases

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DEPARTMENT OF THE INTERIOR
Harold L. Ickes, Secretary

GLACIER BAY NATIONAL MONUMENT ALASKA

NATIONAL PARK SERVICE
Arno B. Commanor, Director

Established Feb. 26, 1925, Proclamation 161733. Containing 1,641,800,000 Acres

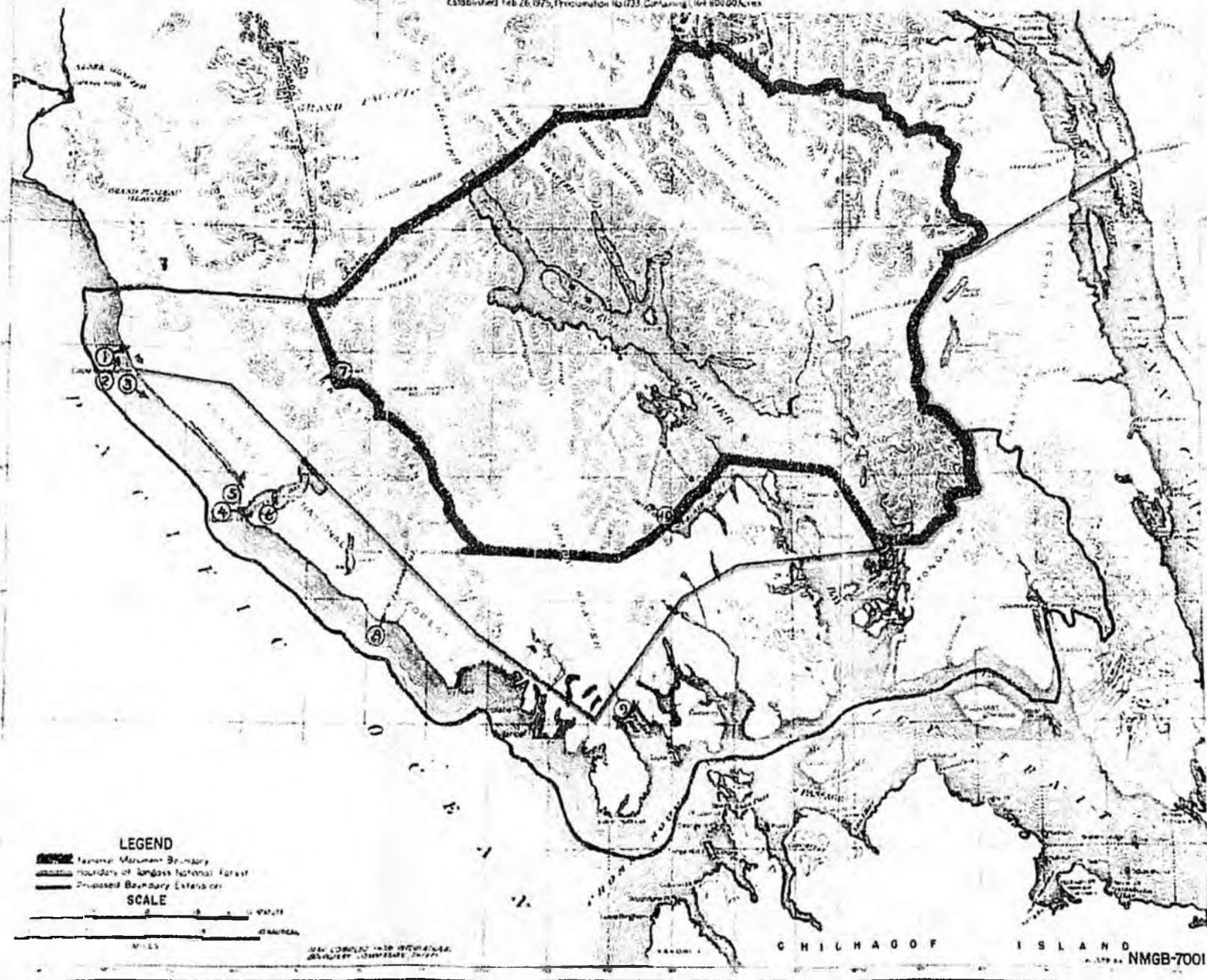


EXHIBIT 1

Historic Waters of Alexander Archipelago



Graphic depiction of closing lines drawn by the United States at the 1903 Boundary Tribunal to mark the seaward limits of the inland waters of the Archipelago. See *5 Proceedings of the Alaskan Boundary Tribunal*, S. Doc. No. 162, 58th Congress, 2d Session (1903-04), Pt. I, Argument of the United States, pp. 15-16; *id.* Vol. 4, Pt. I, Counter-case of the United States, pp. 31-32.



Territorial sea (3 nautical miles) and inland waters



"Pockets and enclaves" more than 3 nautical miles from the shoreline of the coast and of any islands comprising the Alexander Archipelago and behind the 1903 Alaska Boundary Tribunal closing lines.



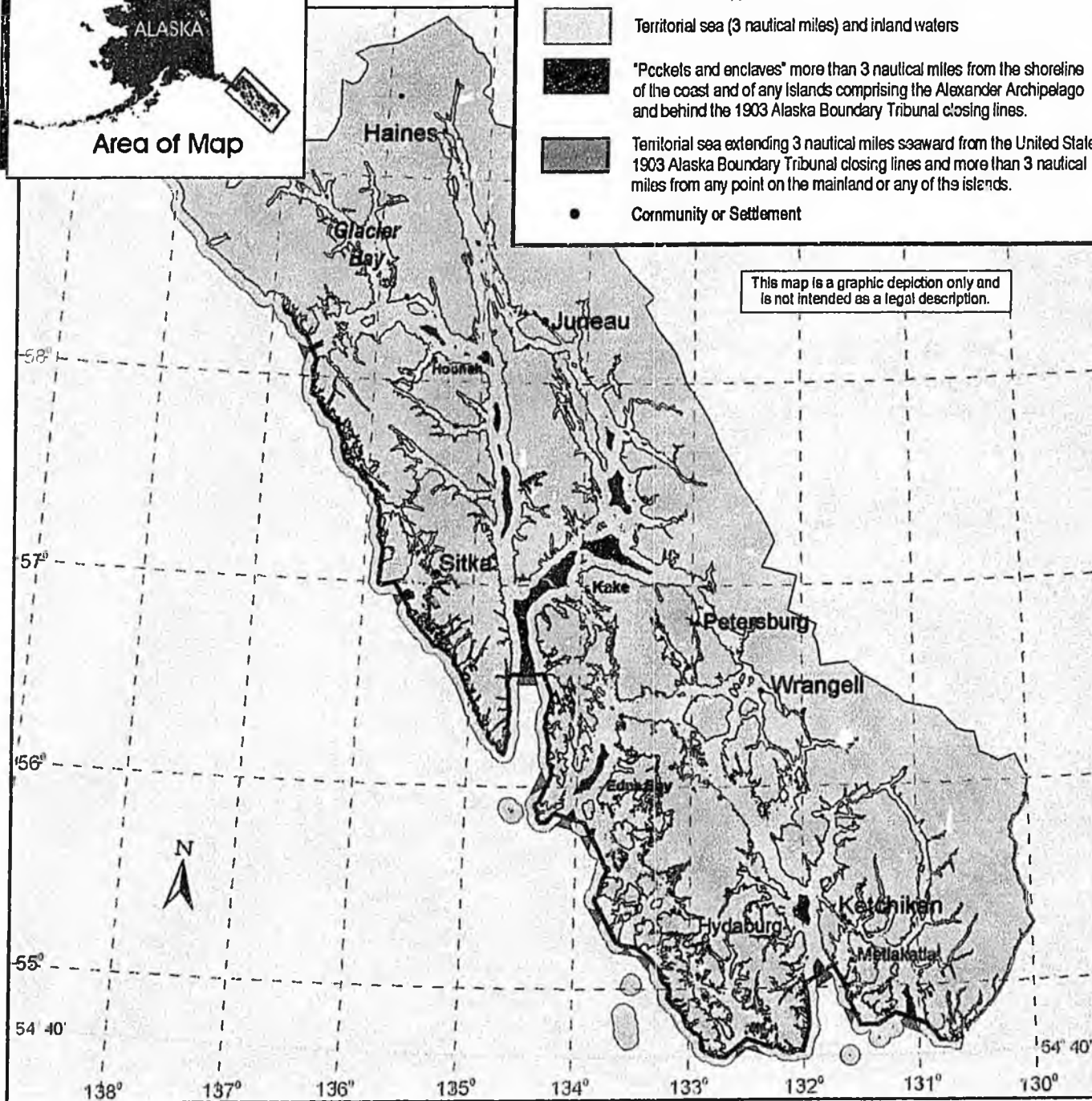
Territorial sea extending 3 nautical miles seaward from the United States' 1903 Alaska Boundary Tribunal closing lines and more than 3 nautical miles from any point on the mainland or any of the islands.



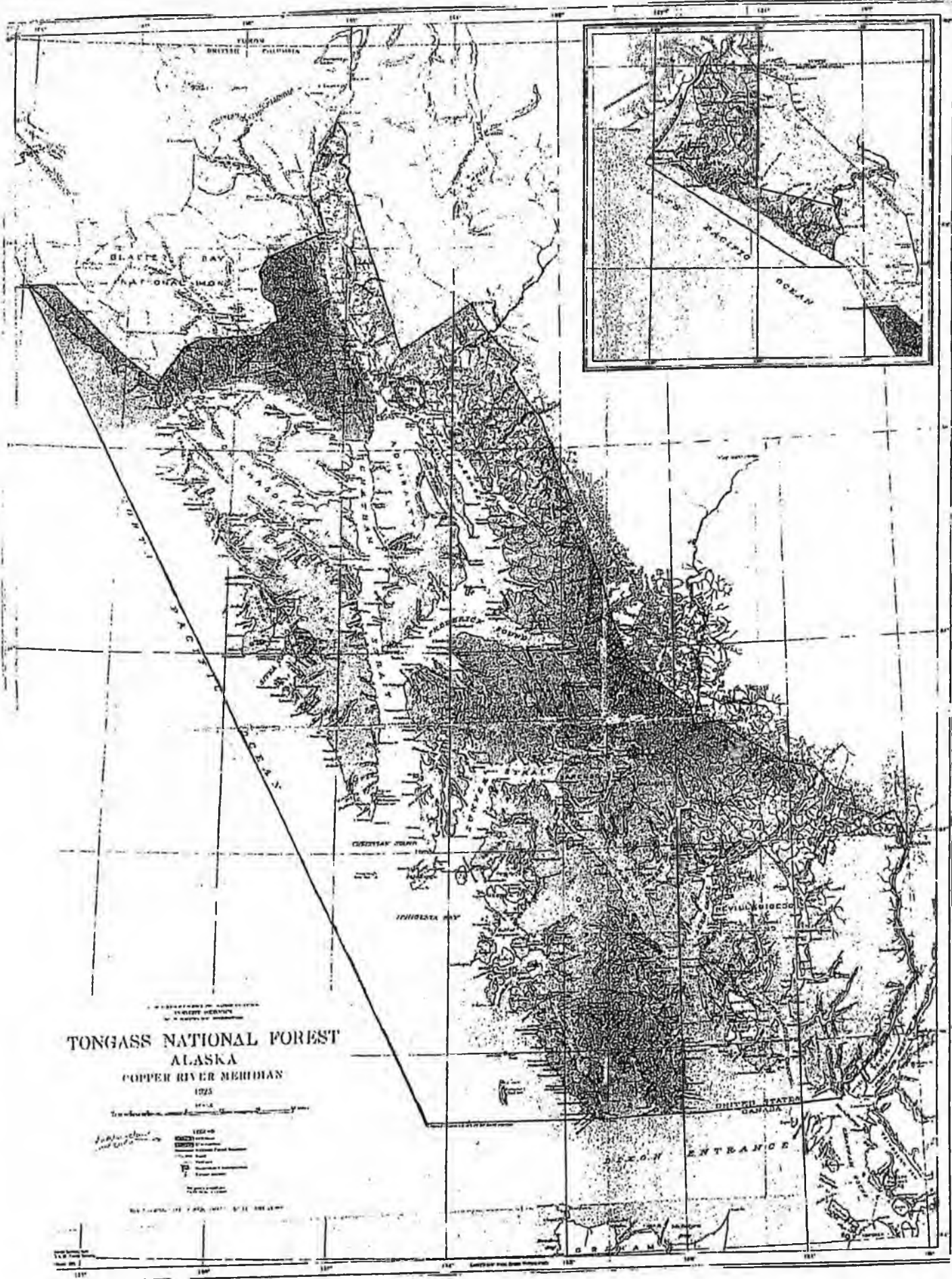
Community or Settlement



Area of Map



This map is a graphic depiction only and is not intended as a legal description.



**TONGASS NATIONAL FOREST
ALASKA**

COPPER RIVER MERIDIAN
1925

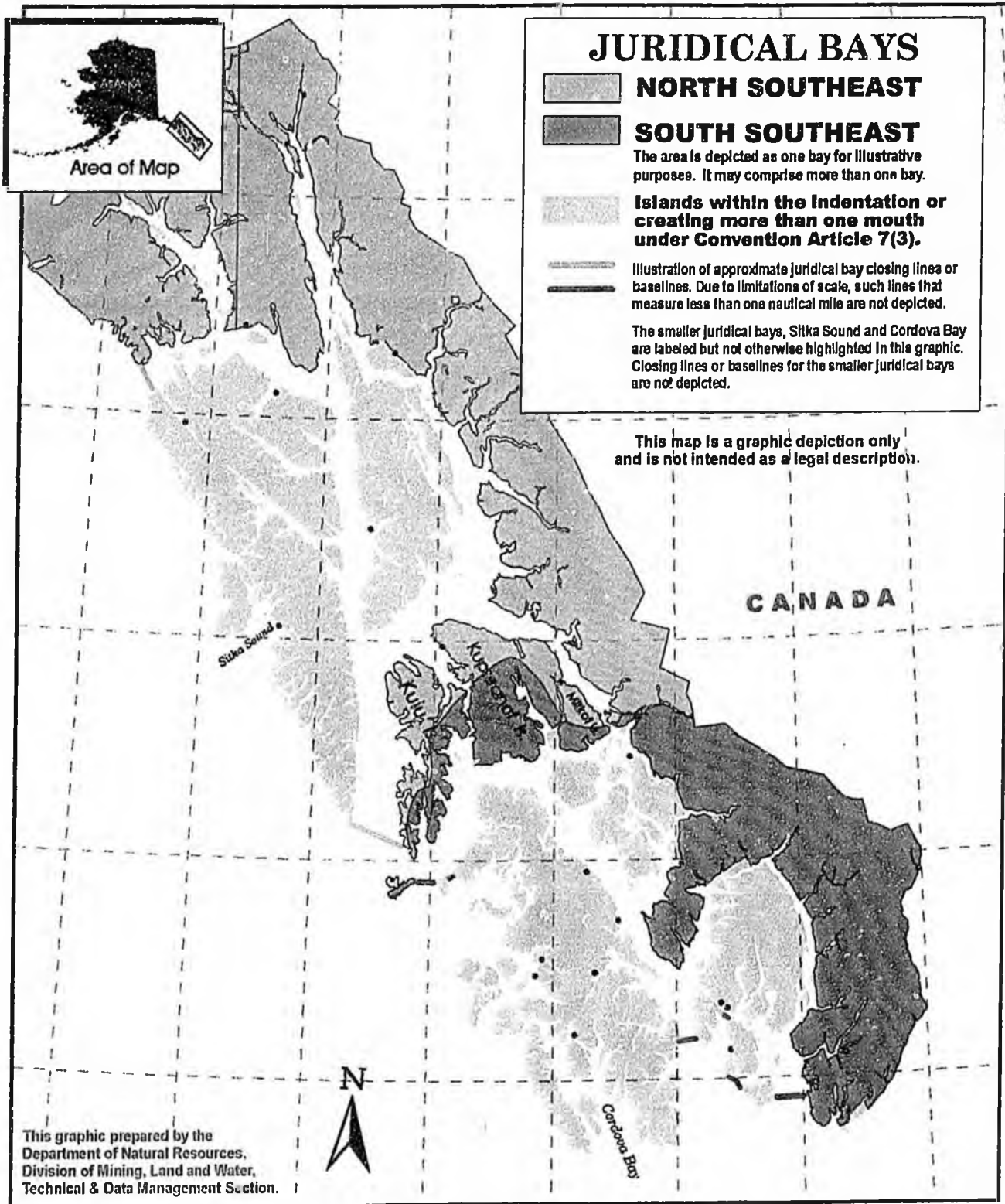
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Map of the Tongass National Forest, Alaska

Scale: 1:50,000

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Personal Information: [resume](#), [publications](#)

Courses: Constitutional Law I ([spring 2000 syllabus](#), [exams](#), [grading guides](#))

Contracts I ([fall 2000 syllabus](#), [exams](#), [grading guides](#))

Contracts II ([spring 2000 syllabus](#), [exams](#), [grading guides](#))

Commercial Paper ([fall 2000 syllabus](#), [exams](#), [grading guides](#), [review videos](#))

No. 128, Original, Alaska v. United States: [docket sheets](#)

Updated November 6, 2000

GREGORY E. MAGGS -- Resume

PRESENT EMPLOYMENT

The George Washington University Law School, Washington, D.C.

Professor of Law (2000-present); Associate Professor of Law (1993-2000)

Subjects taught: Commercial Paper--Payment System, Constitutional Law I,
Contracts I & II

Distinguished Faculty Service Award (1997, 1998)

Special Master, U.S. Supreme Court No. 128, Orig., Alaska v. United States

EDUCATION:

Harvard Law School, J.D., magna cum laude, 1988

Harvard Law Review (Articles Office Co-Chair)

Harvard College, A.B., summa cum laude, 1985

Phi Beta Kappa, John Harvard Scholar

Concentration: Linguistics and Applied Mathematics

PREVIOUS EMPLOYMENT:

Consultant to the Office of Independent Counsel, In re: Madison Guaranty
Savings & Loan Ass'n (Hon. Kenneth W. Starr) (1998-2000)

Assistant Professor of Law, University of Texas School of Law, Austin, Texas

Subjects taught: Bankruptcy, Insurance Law, Payment Systems

(Fall 1991, 1992-1993)

Law clerk to Hon. Clarence Thomas, U.S. Supreme Court, Washington, D.C.
(1991-1992)

Private practice and research with Hon. Robert H. Bork, Washington, D.C.
(1990-1991)

Law clerk to Hon. Anthony M. Kennedy, U.S. Supreme Court, Washington, D.C.
(1989-1990)

Law clerk to Hon. Joseph T. Sneed, U.S. Court of Appeals for the Ninth Circuit,
San Francisco, Calif. (1988-1989)

ADMITTED TO PRACTICE:

New York, District of Columbia, Massachusetts

MILITARY:

U.S. Army Reserve, Judge Advocate General's Corps (1990-present)

FOREIGN LANGUAGE STUDY:

German, Arabic, Spanish

DOCKET SHEETS -- NO. 128, ORIGINAL, ALASKA v. UNITED STATES

Below are two docket sheets for United States Supreme Court, No. 128, Original, State of Alaska, Plaintiff v. United States of America.

The first is a copy of the official docket sheet maintained by the U.S. Supreme Court's Office of the Clerk. The second is a docket sheet prepared by the Special Master for proceedings before him.

The Special Master will post selected documents, including the final (but unsigned) versions of all of his orders, in ".pdf" format. To view and print these documents, you will need Adobe® Acrobat® Reader, ™ which you may download for free at www.adobe.com.

Gregory E. Maggs, Special Master
George Washington University Law School
720 20th Street, N.W.
Washington, DC 20052
[Special Master's Home Page](#)

Last updated Dec. 20, 2000

**COPY OF OFFICIAL DOCKET SHEET MAINTAINED BY THE U.S. SUPREME COURT
FROM NOVEMBER 24, 1999 UNTIL OCTOBER 16, 2000.**

ENTRY	DATE	PROCEEDING AND ORDERS	PDF
1	Nov 24 1999	Motion for leave to file and bill of complaint filed.	
2	Jan 24 2000	Order extending time to file response to motion for leave to file a bill of complaint until February 28, 2000.	
3	Feb 25 2000	Order further extending time to file response to motion for leave to file a bill of complaint until March 29, 2000.	
4	Mar 29 2000	Order further extending time to file response	

		to motion for leave to file a bill of complaint until April 12, 2000.
5	Apr 12 2000	Brief for United States filed.
6	Apr 25 2000	DISTRIBUTED. May 11, 2000 (Page 16)
7	Apr 25 2000	Reply brief filed.
8	May 23 2000	REDISTRIBUTED. June 8, 2000 (Page 4)
9	Jun 9 2000	Motion for leave to file a bill of complaint is granted. The United States is allowed 60 days within which to file an answer.
10	Aug 9 2000	Order extending time to file answer to bill of complaint until August 25, 2000.
11	Aug 25 2000	Answer of United States to bill of complaint filed.
12	Sep 13 2000	DISTRIBUTED. October 6, 2000 (page 4)
13	Oct 10 2000	REDISTRIBUTED. October 13, 2000 (page 14)
14	Oct 16 2000	It is ordered that Gregory E. Maggs, Esquire, of Washington, D.C., is appointed Special Master in this case.
15	Oct 16 2000	IT IS ORDERED that Gregory E. Maggs, Esquire, of Washington, D.C., be appointed as Special Master in this case with authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem it necessary to call for. The Special Master is directed to submit such Reports as he may deem appropriate. The compensation of the Special Master, the allowances to him, the compensation paid to his legal, technical, stenographic, and clerical assistants, the cost of printing his Reports, and all other proper expenses, including travel expenses, shall be charged against and be borne by the parties in such proportion as the Court may hereafter direct.

DOCKET SHEET FOR PROCEEDINGS BEFORE THE SPECIAL MASTER
STARTING OCTOBER 25, 2000.

ENTRY	DATE	PROCEEDING AND ORDERS	PDF
1	Oct 25 2000	Case Management Order No. 1	cmo-1.pdf
2	Nov 6 2000	Case Management Order No. 2	cmo-2.pdf
3	Nov 10 2000	Case Management Order No. 3	cmo-3.pdf
4	Dec 14 2000	Alaska's Unopposed Motion for Leave to File an Amended Complaint, Amended Complaint, and Brief in Support of Motion filed.	
5	Dec 20 2000	Case Management Order No. 4	cmo-4.pdf



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Alaska Department of Law / Natural Resources

Updated December 15, 2000

Significant Natural Resources Cases

The following is a summary of many of the active subsistence, statehood defense, and other significant lawsuits being handled by the Natural Resources Section of the Alaska Department of Law.

FEDERAL COURT CASES

1. Katie John v. U.S.
2. Stevens Village v. McVee and Rosier
3. Native Village of Quinhagak v. United States
4. Peratrovich v. United States
5. Kluti Kaah v. Alaska
6. State v. Harrison
7. State of Alaska v. United States [Southeast Alaska marine waters]
8. Confederated Tribes & Bands of the Yakama Indian Nation, et. al v. Baldrige
9. U.S. v. Washington
10. Alaska v. United States and Bruce Babbitt
11. Hyak Mining Co. v. U.S. [RS 2477]
12. Harold Kalve v. Frank Rue

STATE COURT CASES

1. Kenaitze Indian Tribe v. State
2. Interior Airboat Ass'n v. State
3. Kachemak Bay Conservation Society, et al. v. State, DNR

4. Kashwitna Farms, Inc., Harry and Consuelo Wassink v. State
5. Koyukuk River Tribal Task Force v. Rue
6. Cigna Insurance Co. & Native Village of Mekoryuk, et al. v. Moses
7. Leuthe v. State of Alaska
8. Greenpeace, Inc. v. State
9. Greenpeace v. Alaska Dep't of Natural Resources
10. Greenpeace v. Alaska Dep't of Natural Resources
11. Cook Inlet Keepers v. State
12. Haida Corp. v. Patrick Galvin
13. Crivello v. State, CFEC
14. Kenai Peninsula Borough v. State, Dep't of Natural Resources
15. Alaska Trademark Shellfish, Zaugg, et al. v. ADF&G, et al.
16. Kenai Peninsula Borough v. State, DNR
17. The Association of Village Council Presidents, Inc., et al. v. State
18. Alaska Center for the Environment, et al. v. State of Alaska, DGC
19. Fallis, Walker v. ADF&G
20. AHTNA, Inc., et al. v. State
21. Kenneth H. Manning v. State
22. Alaska Wildlife Alliance, et al. v. Alaska Board of Game, et al.
23. Fish and Wildlife Enforcement Actions

ADMINISTRATIVE PROCEEDINGS

1. In Re: Native Allotment Application of Donna Huff
2. In re: Native Allotment Application of Alfred Bayou
3. FPA Enforcement Actions

FEDERAL COURT CASES

1. Katie John v. U.S. (Ninth Cir. No. 00-35121; our file no. 221-00-0474; state's attorney: Joanne Grace; plaintiffs' attorney: Heather Kendall of NARF; U.S.' attorneys: Dean Dunsmore and Elizabeth Ann Peterson). This is one of the jointly managed ANILCA subsistence cases. These cases had been stayed until October 1, 1999. The plaintiffs alleged that ANILCA requires the federal government to manage fisheries in navigable waters of

Alaska, and accordingly, that the Federal Subsistence Board should take over management of the Copper River and authorize a subsistence fishery at Bazulnetas.

Both the District Court and the Ninth Circuit Court of Appeals agreed in part and held that the term "public lands" includes navigable waters in which the United States has reserved water rights. (Under the reserved water rights doctrine, when the United States withdraws land and reserves it for a federal purpose -- for example, a national park or wildlife refuge -- it also reserves by implication water rights necessary to fulfill the purposes of the reservation). The court remanded the case to the Departments of Interior and Agriculture to identify those waters.

In January 1999, the Departments of Interior and Agriculture published final regulations to assume management of subsistence fisheries. The regulations cover subsistence activities on all waters within or adjacent to the exterior boundaries of 34 identified federal areas, including national parks, refuges, preserves, monuments, wild and scenic rivers, and national forests (excluding the marine waters of the Tongass and Chugach National Forests). They also extend the Federal Subsistence Board's management to some federal lands selected under the Alaska Native Claims Settlement Act or the Alaska Statehood Act until conveyed. In addition, the rules purport to confirm the Secretaries' authority to restrict or eliminate hunting, fishing, and trapping on state and private lands when these activities interfere with the subsistence priority on the public lands. The rules became final in October 1999, and the U.S. District Court entered final judgment in the case on January 7, 2000, affirming its earlier orders and dismissing any remaining claims without prejudice. The state filed an appeal to the Ninth Circuit Court of Appeals on January 26, 2000. The court agreed to hear the appeal en banc. Oral argument will be December 20, 2000.

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2. Stevens Village v. McVee and Rosier (United States District Court No. A92-567-CV (HRH) (Judge Holland); our file no. 221-93-0123; state's attorney: Joanne Grace; plaintiffs' attorney: Carol Daniel; U.S.' attorneys: Bruce Landon and Dean Dunsmore). This is one of the jointly managed ANILCA cases.

In 1992, plaintiffs filed suit against the Federal Subsistence Board (FSB) and ADF&G, alleging they are being denied their federal subsistence priority within Game Management Unit 25(D) West. Following denial of a TRO, the federal defendants moved for a voluntary remand to the FSB. On remand, the FSB changed its regulations to accommodate plaintiffs' requests for: an extension of the season; provisions allowing a permittee to designate another person to hunt on his or her behalf; and closing federal public lands in GMU 25D West to hunting by non-local residents. The parties filed cross-motions for summary judgment on the only remaining issue: whether the FSB has authority to regulate hunting on state-managed lands adjacent to federal lands in GMU 25D West to protect subsistence uses on "public lands" in GMU 25D West. Judge Holland has characterized this as the "where II" issue.

Judge Holland tentatively indicated in the stay order that the FSB lacks authority off "public lands" because the Secretaries of Interior and Agriculture did not grant such authority in the regulations establishing the FSB. Judge Holland expressed no opinion on the question of whether the Secretaries themselves have that authority, but indicated that he would entertain further briefing on the issue. Meanwhile, the Stevens Village plaintiffs and others submitted a rulemaking petition to the Secretaries of Agriculture and Interior, requesting that they extend the FSB's authority to state and private lands. The parties agreed to stay the case while the Secretaries considered the petition.

In January 1999, the Departments of Interior and Agriculture published final regulations that purport to confirm the Secretaries' authority to restrict or eliminate hunting, fishing, and trapping on

state and private lands when these activities interfere with the subsistence priority on the public lands. The regulations became effective on October 1, 1999. To date, the secretaries have not attempted to restrict or eliminate moose hunting on state or private lands in GMU 25D West.

On December 16, 1999, the parties stipulated to dismissal of the case without prejudice. An order approving the stipulation was entered on January 3, 2000. The parties are now litigating attorney fees and costs.

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3. Native Village of Quinhagak v. United States (United States District Court No. A93-023-CV (HRH) (Judge Holland); Ninth Cir. No. 93-35496; our file no. 221-93-0041; state's attorney: Joanne Grace; plaintiffs' attorneys: Carol Daniel, John Starkey (AVCP); U.S.' Attorney: Dean Dunsmore). This is one of the jointly managed ANILCA cases.

The plaintiffs (the villages of Quinhagak and Goodnews Bay, the AVCP, and individual Yup'ik Natives) seek declaratory and injunctive relief allowing the harvest of rainbow trout from the Kanektok and Goodnews Rivers for subsistence. The plaintiffs claim that navigable rivers are "public lands" for purposes of ANILCA, that the state has no subsistence jurisdiction over the waters of the Kanektok and Goodnews River systems, and that the federal government has the authority to regulate non-public lands and waters owned by the state when necessary to provide for subsistence uses. In September of 1994, the Ninth Circuit reversed Judge Holland's order denying the plaintiffs' motion for preliminary injunction. On remand, the court entered an order prohibiting the state and federal defendants from enforcing regulatory prohibitions on the subsistence harvest of rainbow trout while the case is pending. The plaintiffs were awarded

partial attorneys fees incurred in connection with the motion for preliminary injunction and appeal.

The regulations extending the federal subsistence program to certain navigable waters became final in October 1999. The federal district court entered final judgment in the case on January 10, 2000, affirming its earlier orders and dismissing the remaining claims without prejudice. The parties now are litigating the issue of attorneys fees.

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4. Peratrovich v. United States (United States District Court No. A92-734-CV (HRH) (Judge Holland); our file no. 221-93-0340; state's attorney: Joanne Grace; plaintiffs' attorneys: Thomas Luebben and Richard Young of Albuquerque, New Mexico; U.S. attorney: Dean Dunsmore). This is one of the jointly managed ANILCA cases. The case has been stayed while the United States Supreme Court hears Alaska v. United States, Orig. 128, which involves an issue similar to that raised in Peratrovich.

In an amended complaint filed on October 24, 1996, plaintiffs seek declaratory and injunctive relief requiring the Federal Subsistence Board (FSB) to issue a collective permit allowing the harvest of up to 366,000 pounds of herring roe on kelp (1000 pounds per individual for 366 applicants) from the marine waters of southeast Alaska as "customary trade." (The state "customary trade" regulation allows sale of up to 32 pounds of herring roe on kelp by an individual, and up to 158 pounds per household.) The FSB has taken the position that it lacks jurisdiction over the navigable waters where the harvest would occur.

Plaintiffs contend primarily that (1) the United States owns the submerged lands within the Tongass National Forest as a result of a prestatehood withdrawal, and (2) that the waters in question are "public lands" within the meaning of ANILCA, on a reserved

water rights theory.

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5. Kluti Kaah v. Alaska (United States District Court No. A90-004-CV (HRH) (Judge Holland); our file no. 221-90-0433; state's attorney: Joanne Grace; plaintiff's attorneys: Heather Kendall of the Native American Rights Fund (NARF) and Mike Walleri of Tanana Chiefs' Conference (TCC); U.S.' attorney: Dean Dunsmore). This is one of the jointly managed ANILCA cases.

Plaintiffs and intervenors initially challenged state and federal regulations governing subsistence hunting of caribou in the Copper River basin. Plaintiffs claimed, among other things, that the federal regulations impermissibly fail to cover caribou located on state lands. This case has been consolidated with Arctic Regional Council v. United States. Kluti-Kaah filed an amended complaint which does not include any claims against the state. The court granted an unopposed motion by the federal government to dismiss TCC's claims against it, and the court dismissed all of TCC's claims against the state following an unopposed motion by the state.

On December 16, 1999, the parties stipulated to dismissal of the case without prejudice. An order approving the stipulation was entered on January 3, 2000. That parties are now litigating attorney fees.

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6. State v. Harrison (United States District Court No. A94-464-CV

(HRH) (Judge Holland); our file no. 221-95-0270; state's attorneys: John Baker and Robert Nauheim; private defendants' attorney: none, two successive attorneys withdrew). This action involves the state's assertion of a right-of-way for the Chickaloon River Road across the Native allotment owned by members of the Harrison family, who claim that the allotment constitutes sovereign Indian country. The Harrisons have relied on Chickaloon's inclusion on the 1993 BIA list of tribes to claim immunity from Alaska law, including charges of obstructing lawful public use of the Chickaloon River Road. The United States moved to dismiss the state's original complaint, initially arguing that the Quiet Title Act, 28 U.S.C. § 2409a, forbids any judicial inquiry into the validity of the state's right-of-way to the extent that "trust or restricted Indian land" is implicated. We amended our complaint to seek a title adjudication under 25 U.S.C. § 357, the federal condemnation statute. The Harrisons cross-claimed, alleging that the United States breached its trust obligation to the Harrisons as Natives by not defending the Harrisons' alleged ownership of the road.

In February 1997, Judge Holland dismissed the Harrisons' cross-claims against the United States and in May 1998, the court dismissed the Harrisons' counterclaims against the state. In October 1998, Judge Holland issued an order granting the state partial summary judgment on the state's claim of title to the road. On July 23, 1999, Judge Holland granted the state's further motion for summary judgment, ruling that only a 1.75-acre portion of the road, which had been realigned, had been "taken." The court also ruled that the value of the taken portion did not exceed the state's \$3,000 offer of judgment. On August 24, 1999, the court entered final judgment in favor of the state. The Harrisons appealed to the Ninth Circuit Court of Appeals, submitting a form "brief." After delays caused by motion practice to determine the status of the United States (with the court ruling the U.S. is no longer a party to the case), the state's brief was filed on June 29, 2000. On September 6, 2000 the court issued an order allowing the parties 10 days to submit reasons why oral argument should be held, an indication that the court is inclined to decide the case on the briefs. Although the Harrisons

did respond to the order, the court has not ruled on the request.

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7. State of Alaska v. United States [Southeast Alaska marine waters] (United States Supreme Court, No. 128, Original; our file nos: 221-99-0502, 221-99-791; state's attorneys: Joanne Grace and Laura Bottger, with outside counsel John Roberts, Jonathan Franklin, and Tom Koester; United States' attorneys: Jeff Minear, Mike Reed, and Bruce Landon).

The state filed a complaint against the federal government, claiming title to the lands underlying marine waters in Southeast Alaska, together with a motion requesting leave of the United States Supreme Court to file its case as an original action, in November of 1999. The suit was prompted by the Park Service's closure of commercial fishing in Glacier Bay National Park but extends to other areas of Southeast as well.

The action is based on the Submerged Lands Act and the equal footing doctrine, which grant states entering the Union title to the submerged lands within their boundaries as well as the lands underlying inland waters, including any historic waters. The state's complaint asserts the state's claim to all lands underlying marine waters in Southeast Alaska in three counts encompassing the submerged lands in Glacier Bay National Park, the Tongass National Forest, and jurisdictional "doughnut holes" more than three miles from the mainland or any islands within Southeast Alaska's inside passage.

The state filed its case as an "original action" that originates in the U.S. Supreme Court, rather than working its way through the lower courts. While the Supreme Court has jurisdiction over cases between a state and the federal government, it can decline the state's request that it take the case. The Court has appointed George Washington University Law Professor Gregory Maggs to

act as special master.

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8. [Confederated Tribes & Bands of the Yakama Indian Nation, et. al v. Malcolm Baldrige](#) (U.S. District Court for the District of Washington; state's attorney: Mike Stanley). This case has been resolved by a long term agreement in the Pacific Salmon Treaty. However, the court retains jurisdiction over the controversy.

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9. [U.S. v. Washington](#) (U.S. District Court for the Western District of Washington. In [U.S. v. Washington](#), 384 F. Supp. 312 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (9th Cir. 1975), Judge Boldt held that certain northwest Indian Tribes have a treaty fishing right to harvest 50 percent of the harvestable fish passing through recognized tribal fishing grounds. Under the continuing jurisdiction of the federal court, the northwest tribes now seek a ruling that their treaty rights include salmon caught in southeast Alaska that would otherwise return to tribal fishing grounds. The parties have filed a stipulation to stay the case for 10 years as a result of the 1999 amendments to the Pacific Salmon Treaty recently agreed upon by the United States and Canada.

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10. [Alaska v. United States and Bruce Babbitt \[RS 2477\]](#) (U.S. District Court No. F97-0009-CV (Judge Singleton); our file no.

221-97-0574; state's attorneys: Rob Nauheim and Laura Bottger; U.S.' attorney: Bruce Landon). On March 26, 1997, the state filed a quiet title action in federal court seeking to adjudicate an R.S. 2477 route on the Harrison Creek-Portage Creek Trail. The state has obtained entry of default against the mining claimants with claims located on the trail. The remaining parties are engaged in settlement discussions and the case has been stayed. The state recently dismissed its claim against a remaining defendant, and the state and the United States have now settled the case, recognizing a 60 foot right-of-way in the state.

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11. Hyak Mining Co. v. U.S. [RS 2477] (U.S. District Ct. No. A96-0478-CV (HRH); our file no. 221-97-0707; state's attorney: Elizabeth Barry; plaintiff's attorney: Mary Nordale; U.S.' attorney: Bruce Landon). Hyak Mining Co. sued the United States to quiet title to the Jualin Mine Road in Berner's Bay in southeast Alaska. The state is not a party to the action but state participation will be required to enable the parties to settle the case. Settlement discussions are progressing and the state has given the required 180-day notice of intent to sue to allow intervention in the case. Details regarding the means and methods of survey remain to be resolved between the parties.

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12. Harold Kalve v. Frank Rue, Commissioner of Fish and Game, William Daley, U.S. Sect'y of Commerce, Steve Pennoyer (U.S. District Court, District of Alaska, No. A99-0004 (Judge Singleton) and State of Alaska v. Harold Kalve, Alaska Court of Appeals No. A-07394; our file nos. 221-99-0408, 221-00-0016,

and 221-99-0533; state's attorneys: Rob Nauheim and Lance Nelson; U.S.' attorneys: Lauren Smoker and Rick Monikowski; Kalve's attorney: Jim Brennan.) In 1998 Harold Kalve, an IFQ holder, was charged in state district court with fishing for sablefish in state waters (Resurrection Bay) after a state closure. Kalve asked the Seward District Court to continue or dismiss the criminal matter based on the suit he filed in U.S. District Court claiming that federal law and the federal Individual Fishing Quota (IFQ) program preempt the state from closing state waters when the federal waters are open. In June 1999, Magistrate Peck dismissed the state criminal case. He based his decision on the federal paramountcy doctrine – an issue that both parties agree does not apply here. The state appealed to the Alaska Court of Appeals to decide the merits of Kalve's preemption claim and whether to reinstate the criminal charge. On September 29, 2000, the Court of Appeals issued a decision reversing the District Court and reinstating the charges against Kalve. The court held that federal regulations did not preempt state regulations in state waters because federal regulations acknowledged the validity of state regulations. Kalve petitioned the Alaska Supreme Court for a hearing. The petition was recently denied.

In the federal court case, U.S. District Judge Singleton issued a favorable decision dismissing Kalve's case against ADF&G Commissioner Frank Rue on the basis that the 11th Amendment does not permit Kalve to sue the state in federal court. Judge Singleton stated that the 11th Amendment issue was a close one, and that his decision turned on an interpretation of Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261. In Coeur d'Alene the Supreme Court acknowledged the continuing validity of the Ex parte Young exception but found where a suit involves a particular interest affecting the state's sovereignty, the Ex parte Young exception does not apply and the suit is barred by the 11th Amendment. Judge Singleton held that Kalve's lawsuit "implicates the state's control of its fish and wildlife resources as well as similar sovereignty concerns" and that the Young exception should not apply. He further found that "Kalve's suit seeks to divest the state of all regulatory power over certain of the

State of Alaska's waters." Kalve amended his complaint to name the individual members of the Board of Fisheries, but after the adverse ruling in state court has agreed to stipulate to their dismissal.

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STATE COURT CASES

1. Kenaitze Indian Tribe v. State (Alaska Superior Court No. 3AN-91-4569 Civ. (Anchorage, Judge Hensley); our file no. 223-91-0528; attorney for state: Steve White; attorney for plaintiffs: Carol Daniel). The Kenaitze tribe filed suit to challenge the Cook Inlet subsistence fishing regulations, and amended their complaint to challenge the constitutionality of the 1992 subsistence law. Other Native groups from Ninilchik, Eklutna and Knik intervened.

Judge Fabe granted summary judgment invalidating the nonsubsistence area provision of the 1992 law on the grounds that it violates the equal access provisions of the state constitution. In 1995 the Alaska Supreme Court reversed, holding that the nonsubsistence area provision is valid. However, the court found unconstitutional another provision of the 1992 subsistence law that makes the proximity of an individual's domicile a factor at the Tier II level. Regulations have been adopted to reinstate the nonsubsistence areas.

The Kenaitze challenge to the findings of the Joint Boards that resulted in the establishment of the Anchorage/MatSu/ Kenai Peninsula nonsubsistence area remains to be decided. The parties moved the court to stay proceedings on that claim in order to allow the Alaska legislature and Congress to take actions which would moot the case. As the legislature did not take those actions the briefing schedule has been reactivated. The tribes filed a

motion for summary judgment, the state filed an opposition, and the plaintiff's reply is due December 18, 2000.

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2. Interior Airboat Ass'n v. State (Fairbanks Superior Court No. 4FA-96-1494 Civ. (Judge Beistline); our file no. 221-97-0004; state's attorney: Kevin Saxby; Interior Airboat attorney: Lynn Levengood). The Airboaters sought to invalidate a regulation which prohibits the use of airboats for moose hunting near Nenana and another which limits aircraft use for hunting along part of the Noatak River. After briefing and oral argument, the court entered summary judgment in the state's favor, upholding the regulations. The Airboaters appealed the decision to the Alaska Supreme Court, and briefing and argument have been completed. We await the opinion.

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3. Kachemak Bay Conservation Society, et al. v. State, DNR (Alaska Superior Court No. 3AN-96-7609 Civ. (Anchorage, Judge Murphy); our file no. 221-98-0109; Intervenor-Appellee Alaska Mental Health Trust's attorney: Henry Wilson; Appellee Department of Natural Resources' attorneys: Lawrence Ostrovsky and Jeffrey Landry; Intervenor-Appellees' (Marathon Oil Co. and Union Oil Co. of California, Forcenergy, Inc., CIRI, Anadarko Corp.) attorneys: Susan Reeves and Tom Amodio, Rubini and Reeves; Appellants' attorney: Patrick Lavin, Trustees for Alaska). Kachemak Bay Conservation Society, et. al., appealed the administrative decision of DNR's Division of Oil and Gas that Oil and Gas Lease Sale 85-A was in the best interests of the state. The Alaska Mental Health Trust intervened in the litigation

because the Trust owns several of the parcels that were leased in the sale, and the Alaska Mental Health Trust Land Office had determined that the lease sale was in the best interests of the Trust, as separate from the best interests of the state as a whole. In a decision dated August 11, 2000, the Alaska Supreme Court found that Kachemak Bay Conservation Society's challenge failed in all respects, and affirmed.

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4. Kashwitna Farms, Inc., Harry and Consuelo Wassink v. State, consolidated with Hawkins v. Wassink (Alaska Superior Court No. 3AN-88-56 Civ. (Anchorage, Judge Joannides); our file no. 221-88-0853; Kashwitna Farms/Wassink's attorney: Joe Josephson; state's attorneys: Kevin Saxby and Rob Nauheim). These consolidated cases arise out of the Pt. MacKenzie Agricultural Project. The Wassinks acquired a dairy parcel and borrowed money from the Alaska Agricultural Revolving Loan Fund to develop it. When they failed to meet contractual development requirements, DNR sued them to terminate the land sale contract (Hawkins). When they defaulted on repayment of their loans, as the state was preparing to take collection action against them, they sued the state under various lender liability theories including misrepresentation, breach of fiduciary duty, and breach of the duty of good faith and fair dealings (Kashwitna Farms). The state countersued to collect the defaulted debt. In the Hawkins contract termination action, the superior court has twice granted the state summary judgment and the Alaska Supreme Court has twice reversed it, indicating that the Wassinks are entitled to a trial on their defenses that the contract should not be terminated under waiver, estoppel and contract frustration theories. The court has dismissed nearly all of the claims against the state with the affirmative defenses in Hawkins and the breach of duty of good faith and fair dealings and related issues in Kashwitna Farms remaining to be resolved. Recent efforts to

settle have been unsuccessful. Trial should be scheduled within the next several months.

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5. Koyukuk River Tribal Task Force v. Rue (Alaska Superior Court No. 4FA-99-561 and 4FA-00-777 (Fairbanks, Judge Greene); our file nos. 221-99-0630 and 221-00-0677; Koyukuk Tribal Task Force's attorney: Michael Walleri; state's attorney: Kevin Saxby). The seven village councils of the Koyukuk drainage have sued to obtain injunctive relief, requiring the Board of Game to make further findings as to the harvestable surplus and amounts reasonably necessary to provide for subsistence uses of moose, to eliminate or restrict nonsubsistence uses of moose in the area, and to require the department to implement an emergency closure of nonsubsistence uses until the desired regulatory scheme is in place. The trial court granted the state summary judgment because the tribal task force failed to exhaust administrative remedies. Following the Spring Board of Game meeting, at which Koyukuk moose issues were decided, the Tribal Task Force has filed a new, nearly identical, complaint. Summary judgment briefing is now being done.

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6. Cigna Insurance Co. & Native Village of Mekoryuk, et al. v. Moses, (Alaska Supreme Court No. S-08908/08918; state's attorney: Judy Rabinowitz; appellants' attorneys: Mark Figura & Tom Batchelor; appellee's attorney: Erling Johansen). This case is before the Alaska Supreme Court on interlocutory petitions for review of a superior court decision that the Native Village of Mekoryuk is not validly recognized as a tribal government. The

superior court reversed and remanded the Alaska Workers Compensation Board's determination that it lacked subject matter jurisdiction over a widow's workers compensation claims against the Native Village of Mekoryuk and its commercial enterprise because of the tribe's sovereign immunity from suit which had not been waived. The state filed an amicus brief in support of the petitions for review urging that the court clarify the state law on the status of federally recognized tribes in Alaska. The petitions were granted and briefing was completed. However, the parties reached a settlement and the appeal was dismissed.

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7. [Leuthe v. State of Alaska](#) (Alaska Supreme Court No. S-09343; Alaska Superior Court No. 3HO-98-62 Civ. (Judge Brown); our file no. 221-99-0173; state's attorney: John Baker; plaintiff's attorney: C. Michael Hough). Plaintiff alleges he was wrongfully denied a Cook Inlet drift gill net entry permit for commercial fishing of salmon. Plaintiff argues that his application was three years late due to "misadvice" by a state employee and therefore his application should be accepted. The state's position is that he was given good advice, not "misadvice", namely that he doesn't have enough points to qualify for a permit. The permit was, therefore, rightfully denied. Leuthe filed an opening brief and the state filed its opposition. On August 20, 1999, the superior court issued a memorandum decision upholding the CFEC, without waiting for Leuthe to file his reply brief. Leuthe appealed to the Alaska Supreme Court, and briefing was completed on August 30, 2000. As Leuthe did not request oral argument, the case is awaiting decision.

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8. Greenpeace, Inc. v. State (Anchorage Superior Court. No. 3AN-99-3350 Civ. (Judge Reese); our file no. 223-99-0408; state's attorneys: Lisa Weissler, Larry Ostrovsky, Mike Barnhill; Greenpeace's attorney: Nancy Wainwright; Intervenor BP's attorney: Jeff Feldman). Greenpeace filed an administrative appeal of the state's coastal program consistency determination for BP Exploration's Northstar Project. BP was granted intervenor status in the litigation. Briefing is complete, and oral argument was held September 7, 2000. A decision is pending.

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9. Greenpeace v. Alaska Dep't of Natural Resources (Anchorage Superior Court No. 3AN-00-3648 Civ., our file no. 221-00-0613; state's attorney: Rob Nauheim; Greenpeace attorney Nancy Wainwright). Greenpeace has appealed the Department of Natural Resources' decision to lift an automatic stay of the department's decision to issue a temporary water use permit for water used on the Northstar oil development project. Briefing will begin in December 2000.

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10. Greenpeace v. Alaska Dep't of Natural Resources (Anchorage Superior Court No. 3AN-00-3415; our file no. 221-99-0860; state's attorney: Rob Nauheim and Larry Ostrovsky; Greenpeace's attorney Nancy Wainwright. In October and November, 2000, superior court judge, pro tem, Sigurd Murphy remanded two water permits to the Department of Natural Resources for additional review. The permits had been issued to BP (Alaska) Exploration (BPXA) for oil development at the Northstar field. Judge Murphy ruled that the department must provide Greenpeace an opportunity for an administrative appeal

of the department's decisions on several legal issues related to a certificate of appropriation for oil development at Northstar. Judge Murphy also ruled that the department's issuance of a temporary water use permit to BPXA was not permissible without conducting public notice of the decision to issue the permit or conducting a review of the application under AS 46.15.080. The matter is now before the agency.

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11. Cook Inlet Keepers v. State of Alaska Office of Management and Budget, Div. of Governmental Coordination (Superior Court. No. 3AN 99-3482 Civ. (Judge Card); our file no. 223-00-0140; state's attorney: Lisa Weissler; appellant's attorney: Trustees for Alaska). Cook Inlet Keepers appealed the state's final coastal program consistency determination concurring with Forcenergy's certification that installation of an exploration drilling platform in Cook Inlet is consistent with the coastal program. The superior court ruled in favor of the state. Trustees have appealed to the Alaska Supreme Court. Appellant's brief is due December 22, 2000.

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12. Haida Corp. v. Patrick Galvin, Director, Division of Governmental Coordination, Office of Management and Budget, Office of the Governor, State of Alaska (Superior Court. No. 3AN 99-3455 Civ. (Judge Souter); our file no. 223-00-0052; state's attorney: Lisa Weissler; appellant's attorney: Cynthia Pickering Christianson). Haida Corporation appealed the state's final consistency determination that imposed stipulations on Haida's proposed hydroelectric project in Southeast Alaska. Haida objects to two of the stipulations, one related to screen size and the other to instream flow requirements. Haida has requested a

stay of the appeal pending issuance of the FERC license. The FERC license issued October 24, 2000. Haide is requesting another stay pending issuance and agency administrative appeals of state permits.

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13. Crivello v. State, CFEC (Kenai Superior Court No. 3HO-99-159 Civ. (Judge Brown), our file no. 221-00-0144; state's attorney: John Baker; appellant's attorney: C. Michael Hough). In this Rule 601 Administrative Appeal, Crivello claims the CFEC erred in denying him a limited entry permit for the Bristol Bay drift gill net salmon fishery. The appellant alleges that the CFEC improperly measured his "income dependence" on the fishery, and denied him due process by ruling, on reconsideration, to grant a third hearing on his claims. On August 21, 2000, the Superior Court affirmed the Commission's decision in all respects. On September 18, Crivello appealed to the Alaska Supreme Court. The briefing schedule is pending.

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14. Kenai Peninsula Borough v. State, Dep't of Natural Resources (Superior Court No. 3KN-00-30 Civ. (Judge Neville); our file no. 221-00-0444; state's attorney: Rob Nauheim; borough attorney: Holly Montague). The Kenai Borough challenges the state's reporting of the Quartz Creek Trail to the state legislature as a qualifying RS 2477 route under AS 19.30.400(b). The parties are engaged in settlement discussions and have moved the court for a stay until December 2000.

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15. Alaska Trademark Shellfish, Zaugg, et al. v. ADF&G, Commissioner Rue, and various ADF&G employees (Alaska Superior Court No. 1KE-00-211 Civ. (Judge Thompson); our file no. 223-01-0122; state's attorneys: Shannon O'Fallon and Steve White; appellants' attorneys: Bruce Weyhrauch and Clifford Smith). ATS sued for injunctive relief and damages over the Department of Fish and Game's alleged refusal to issue a decision on pending aquatic farm operating permits to geoduck farmers. Given the complicated nature of the issues involved with permitting aquatic farms in areas where there were large quantities of wild geoduck clams, ADF&G wanted to promulgate regulations before acting on the permits. ATS and the state reached an agreement for a date certain for issuing a decision which halted the original action. The department developed principles for issuing permits and drafted permits for the applicants to sign, but the aquatic farmers were not willing to abide by the permit conditions, leaving the Commissioner no choice but to deny the applications. ATS and five other applicants appealed to the superior court and the cases were consolidated. The issues on appeal are (1) how the department interprets the statute regarding conflicting uses at a proposed farm site; and (2) whether the department is correct that the law does not allow a farmer to harvest and sell wild resources off a farm site prior to engaging in any farming activity. ATS has filed its brief and the state is awaiting the other appellants' brief, before filing its response brief. In meantime, the promulgation of regulations is proceeding.

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16. Kenai Peninsula Borough v. State, DNR (Alaska Superior Court No. 3KN-00-257 Civ. (Judge Neville, pro tem); our file no: 221-00-0645; state's attorney: John Baker; KPB's attorney:

Collette Thompson). The Kenai Peninsula Borough, at the direction of newly-elected Borough Mayor Dale Bagley, filed an administrative appeal of the final Kenai Area Plan. The plan was prepared by DNR through an exhaustive 10-year planning process in which KPB participated actively. KPB asserts among its numerous points on appeal: that classifications under the plan threaten vested Borough selection rights under Title 29; that the DNR did not allow KPB sufficient participation in the planning process; that DNR classified land arbitrarily and capriciously, without adequate factual support; and that DNR was under a duty to provide selections of similar value to those KPB was forced to relinquish as a result of the Mental Health Trust land litigation. On June 30, 2000 the parties reached a settlement and signed a stipulation for dismissal of the case with prejudice. In return for the dismissal of KPB's claims, the state will expedite processing of KPB's remaining selections and facilitate the reclassification of certain lands currently managed by DOT under Interagency Land Management Agreements. DNR will also allow KPB a "first right of refusal" to select lands, if any, that become available due to reclassification within 10 years from the date of settlement.

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17. The Association of Village Council Presidents, Inc., et al. v. State of Alaska, Division of Governmental Coordination (Bethel Superior Court No. 4BE-00-263 Civ. (Judge Curda); our file no. 223-01-0153; state's attorney: Lisa Weissler; appellant's attorney: Scott Jay Sidell). AVCP appealed the state's coastal program consistency determination for the U.S. Postal Service's proposal to deliver mail via Hovercraft in the Yukon-Kuskokwim. The record was due December 11, 2000.

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18. Alaska Center for the Environment, et al. v. State of Alaska,

Division of Governmental Coordination (Anchorage Superior Court No. 3AN-00-3737 Civ. (Judge Tan); our file no. 223-01-0146; state's attorneys: Lisa Weissler, representing DGC and Jim Cantor, representing DOT, AIA; appellant's attorney; Trustees for Alaska). ACE appealed the state's coastal program consistency determination for the Corps of Engineers' ten-year wetland fill permit to be issued to the Anchorage International Airport. The record is due December 25, 2000.

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19. Fallis, Walker v. ADF&G (1JU-00-551 Civ. (Judge Weeks); our file no. 223-00-0341; state's attorney: Shannon O'Fallon; plaintiffs' attorney: Robert Reges). Plaintiffs filed suit for injunctive relief and damages after ADF&G found the expansion of their trailer park project inconsistent with the ACMP. Plaintiffs needed a stream crossing permit to cross an anadromous stream, which is what triggered ACMP review. The catalogued stream is alleged to be an artificially dug drainage ditch that over time has attracted rearing juvenile coho salmon. Plaintiffs challenged ADF&G's authority to regulate an artificial stream, and on partial summary judgment, Judge Weeks agreed, though he found there were material facts as to whether this stream was artificial or natural. The Judge also found there were open questions regarding how the stream had been catalogued and how it was mapped. The outstanding claims are inverse condemnation, trespass, and interference with prospective business relations. The claimed damages are approximately \$850,000 in lost profits. The case is set for trial in September 2001, but the parties are working toward a mutually agreeable resolution of the case.

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20. AHTNA, Inc., et al. v. State, (Alaska Superior Court No. 3PA-00-916 Civ. (Judge Beverly Cutler) our file no. 221-01-0195,

state's attorneys, Kevin Saxby and Lance Nelson; AHTNA, et al., attorneys, Patrick Anderson and James Brennan). AHTNA, et al., are suing to invalidate regulations which authorize the hunting of the Copper River Bison Herd, under the theory that the regulations cause trespass on Native Corp. lands in the area. The court denied preliminary injunctive relief; and a motion to dismiss filed by the state is now pending.

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21. Kenneth H. Manning v. State (Alaska Superior Court No. 3AN-00-8814 Civ. (Judge Sen Tan); our file nos. 221-01-0056 and 221-01-0235; state's attorney, Kevin Saxby; Ken Manning, pro se). Suit challenging Tier II hunting permit application scoring process and seeking to halt Nelchina Caribou Herd hunt until re-scoring is complete. Arguments are that the scoring decisions unconstitutionally take place of residence into account. The superior court denied preliminary injunctive relief, and the plaintiff immediately appealed to the state supreme court. After the appeal was dismissed because no final judgment had yet been entered by the trial court, litigation has again focused at the superior court level. A trial setting conference was held on December 7.

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22. Alaska Wildlife Alliance, et al. v. Alaska Board of Game, et al. (Alaska Superior Court No. 3AN-00-12369 Civ.; (Judge Peter Michalski); state's attorneys: Kevin Saxby and Sabrina Fernandez; plaintiffs' attorney: Tom Meacham). Alaska Wildlife Alliance, et al. have sued seeking declaratory relief and orders requiring that the Board of Game be disbanded, that its powers be vested in the commissioner of the Department of Fish and Game, and that the Board then be reconstituted to include

nonconsumptive use advocates. They claim that the Board historically and currently represents only hunting, trapping and guiding interests and so does not represent the views of a majority of Alaskans, thus violating the Board's enabling act and several state constitutional provisions. The state's answer is due in approximately a month.

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23. Fish and Wildlife Enforcement Actions

Several attorneys in our section pursue various actions against those persons and companies that commit serious violations of the state's fish and game laws. These attorneys work closely with the Division of Fish and Wildlife Protection and the Department of Fish and Game. Some of their cases involve seizure of vessels and equipment and subsequent forfeiture actions. Other cases involve claims for damages for the value of illegally taken fish, or damages for injury or loss to the fishery resources of the state. In addition, as time allows, these attorneys provide briefing, consultation, and other back-up assistance to the District Attorney's Offices around the state in criminal cases involving violations of state fish and game laws. Monetary recoveries in these cases amount to several million dollars over the last few years, with part of that money going to the Fish and Game Fund and the remainder to the state's general fund.

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ADMINISTRATIVE PROCEEDINGS

1. In Re: Native Allotment Application of Donna Huff (BLM Serial

No. AA-8185 (Hearing Officer: Elizabeth Carew); state's attorney: Laura C. Bottger; applicant's attorney: Alaska Legal Services Corp.). On September 26-27, 1996, an Aguilar hearing was conducted in Anchorage before the BLM hearing officer to determine whether Donna Huff's use of a 110 acre parcel of land situated in Kachemak Bay State Park satisfied the requirements of the Native Allotment Act. The state selected the land claimed in the application on June 13, 1962. At the hearing, Donna Huff testified on her own behalf while the state presented six witnesses to contest Ms. Huff's claim of qualifying use and occupancy. Each of the state's witnesses had either fished off the shore of the claimed parcel or otherwise occupied adjacent homestead property at the critical time. Briefing has been completed.

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2. In re: Native Allotment Application of Alfred Bayou (BLM Serial No. A-023839 (Hearing Officer: Elizabeth Carew); state's attorney: John Baker; applicant's attorney: Bart Garber). The applicant claims a 160-acre Native allotment located on Kachemak Bay outside of Seldovia. The heirs of the applicant claim use and occupancy of this parcel dating from 1943. At a hearing held in Seldovia on September 17, 1996, the state put on evidence that the applicant only made sporadic, intermittent and non-exclusive use of the parcel, not satisfying the standards of the Native Allotment Act. Post-hearing briefs have been filed and the parties are awaiting a decision from the hearing officer.

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3. FPA Enforcement Actions

Kevin Saxby represents DNR in various administrative actions involving violations of Alaska's Forest Practices Act. The cases often involve assessing liability for illegal harvest within riparian buffer zones, illegal bridge or stream crossings, anadromous waterbody classifications, and similar issues.

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Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

SOLID WASTE AGENCY OF NORTHERN COOK
COUNTY *v.* UNITED STATES ARMY CORPS
OF ENGINEERS ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT

No. 99-1178. Argued October 31, 2000— Decided January 9, 2001

Petitioner, a consortium of suburban Chicago municipalities, selected as a solid waste disposal site an abandoned sand and gravel pit with excavation trenches that had evolved into permanent and seasonal ponds. Because the operation called for filling in some of the ponds, petitioner contacted federal respondents, including the Army Corps of Engineers (Corps), to determine if a landfill permit was required under §404(a) of the Clean Water Act (CWA), which authorizes the Corps to issue permits allowing the discharge of dredged or fill material into "navigable waters." The CWA defines "navigable waters" as "the waters of the United States," 33 U. S. C. §1362(7), and the Corps' regulations define such waters to include intrastate waters, "the use, degradation or destruction of which could affect interstate or foreign commerce," 33 CFR §328.3(a)(3). In 1986, the Corps attempted to clarify its jurisdiction, stating, in what has been dubbed the "Migratory Bird Rule," that §404(a) extends to intrastate waters that, *inter alia*, provide habitat for migratory birds. 51 Fed. Reg. 41217. Asserting jurisdiction over the instant site pursuant to that Rule, the Corps refused to issue a §404(a) permit. When petitioner challenged the Corps' jurisdiction and the merits of the permit denial, the District Court granted respondents summary judgment on the jurisdictional issue. The Seventh Circuit held that Congress has authority under the Commerce Clause to regulate intrastate waters and that the Migratory Bird Rule is a reasonable interpretation of the CWA.

Held: Title 33 CFR §328.3(a)(3), as clarified and applied to petitioner's site pursuant to the Migratory Bird Rule, exceeds the authority

Syllabus

administrative interpretation of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless the construction is plainly contrary to Congress's intent. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U. S. 568, 575. The grant of authority to Congress under the Commerce Clause, though broad, is not unlimited. See, e.g., *United States v. Morrison*, 529 U. S. 598. Respondents' arguments, e.g., that the Migratory Bird Rule falls within Congress's power to regulate intrastate activities that substantially affect interstate commerce, raise significant constitutional questions, yet there is nothing approaching a clear statement from Congress that it intended §404(a) to reach an abandoned sand and gravel pit such as the one at issue. Permitting respondents to claim federal jurisdiction over ponds and mudflats falling within the Migratory Bird Rule would also result in a significant impingement of the States' traditional and primary power over land and water use. The Court thus reads the statute as written to avoid such significant constitutional and federalism questions and rejects the request for administrative deference. Pp. 11–14.

191 F. 3d 845, reversed.

REHNQUIST, C. J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, and THOMAS, JJ., joined. STEVENS, J., filed a dissenting opinion, in which SOUTER, GINSBURG, and BREYER, JJ., joined.

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SUPREME COURT OF THE UNITED STATES

No. 99-1178

**SOLID WASTE AGENCY OF NORTHERN COOK
COUNTY, PETITIONER v. UNITED STATES
ARMY CORPS OF ENGINEERS, ET AL.**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT**

[January 9, 2001]

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Section 404(a) of the Clean Water Act (CWA or Act), 86 Stat. 884, as amended, 33 U. S. C. §1344(a), regulates the discharge of dredged or fill material into "navigable waters." The United States Army Corps of Engineers (Corps), has interpreted §404(a) to confer federal authority over an abandoned sand and gravel pit in northern Illinois which provides habitat for migratory birds. We are asked to decide whether the provisions of §404(a) may be fairly extended to these waters, and, if so, whether Congress could exercise such authority consistent with the Commerce Clause, U. S. Const., Art. I, §8, cl. 3. We answer the first question in the negative and therefore do not reach the second.

Petitioner, the Solid Waste Agency of Northern Cook County (SWANCC), is a consortium of 23 suburban Chicago cities and villages that united in an effort to locate and develop a disposal site for baled nonhazardous solid waste. The Chicago Gravel Company informed the municipalities of the availability of a 533-acre parcel, be-

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striding the Illinois counties Cook and Kane, which had been the site of a sand and gravel pit mining operation for three decades up until about 1960. Long since abandoned, the old mining site eventually gave way to a successional stage forest, with its remnant excavation trenches evolving into a scattering of permanent and seasonal ponds of varying size (from under one-tenth of an acre to several acres) and depth (from several inches to several feet).

The municipalities decided to purchase the site for disposal of their baled nonhazardous solid waste. By law, SWANCC was required to file for various permits from Cook County and the State of Illinois before it could begin operation of its balefill project. In addition, because the operation called for the filling of some of the permanent and seasonal ponds, SWANCC contacted federal respondents (hereinafter respondents), including the Corps, to determine if a federal landfill permit was required under §404(a) of the CWA, 33 U. S. C. §1344(a).

Section 404(a) grants the Corps authority to issue permits "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." *Ibid.* The term "navigable waters" is defined under the Act as "the waters of the United States, including the territorial seas." §1362(7). The Corps has issued regulations defining the term "waters of the United States" to include

"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 . . ." 33 CFR §328.3(a)(3) (1999).

In 1986, in an attempt to "clarify" the reach of its jurisdiction, the Corps stated that §404(a) extends to intrastate waters:

'a. Which are or would be used as habitat by birds

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protected by Migratory Bird Treaties; or
'b. Which are or would be used as habitat by other migratory birds which cross state lines; or
'c. Which are or would be used as habitat for endangered species; or
'd. Used to irrigate crops sold in interstate commerce." 51 Fed. Reg. 41217.

This last promulgation has been dubbed the "Migratory Bird Rule."¹

The Corps initially concluded that it had no jurisdiction over the site because it contained no "wetlands," or areas which support "vegetation typically adapted for life in saturated soil conditions," 33 CFR §328.3(b) (1999). However, after the Illinois Nature Preserves Commission informed the Corps that a number of migratory bird species had been observed at the site, the Corps reconsidered and ultimately asserted jurisdiction over the balefill site pursuant to subpart (b) of the "Migratory Bird Rule." The Corps found that approximately 121 bird species had been observed at the site, including several known to depend upon aquatic environments for a significant portion of their life requirements. Thus, on November 16, 1987, the Corps formally "determined that the seasonally ponded, abandoned gravel mining depressions located on the project site, while not wetlands, did qualify as waters of the United States' . . . based upon the following criteria: (1) the proposed site had been abandoned as a gravel mining operation; (2) the water areas and spoil piles had developed a natural character; and (3) the water areas are used as habitat by migratory bird [*sic*] which cross state lines." U. S. Army Corps of Engineers, Chicago District, Dept. of

¹The Corps issued the "Migratory Bird Rule" without following the notice and comment procedures outlined in the Administrative Procedure Act, 5 U. S. C. §553.

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Army Permit Evaluation and Decision Document, Lodging of Petitioner, Tab No. 1, p. 6.

During the application process, SWANCC made several proposals to mitigate the likely displacement of the migratory birds and to preserve a great blue heron rookery located on the site. Its balefill project ultimately received the necessary local and state approval. By 1993, SWANCC had received a special use planned development permit from the Cook County Board of Appeals, a landfill development permit from the Illinois Environmental Protection Agency, and approval from the Illinois Department of Conservation.

Despite SWANCC's securing the required water quality certification from the Illinois Environmental Protection Agency, the Corps refused to issue a §404(a) permit. The Corps found that SWANCC had not established that its proposal was the "least environmentally damaging, most practicable alternative" for disposal of nonhazardous solid waste; that SWANCC's failure to set aside sufficient funds to remediate leaks posed an "unacceptable risk to the public's drinking water supply"; and that the impact of the project upon area-sensitive species was "unmitigatable since a landfill surface cannot be redeveloped into a forested habitat." *Id.*, at 87.

Petitioner filed suit under the Administrative Procedure Act, 5 U. S. C. §701 *et seq.*, in the Northern District of Illinois challenging both the Corps' jurisdiction over the site and the merits of its denial of the §404(a) permit. The District Court granted summary judgment to respondents on the jurisdictional issue, and petitioner abandoned its challenge to the Corps' permit decision. On appeal to the Court of Appeals for the Seventh Circuit, petitioner renewed its attack on respondents' use of the "Migratory Bird Rule" to assert jurisdiction over the site. Petitioner argued that respondents had exceeded their statutory authority in interpreting the CWA to cover nonnavigable,

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isolated, intrastate waters based upon the presence of migratory birds and, in the alternative, that Congress lacked the power under the Commerce Clause to grant such regulatory jurisdiction.

The Court of Appeals began its analysis with the constitutional question, holding that Congress has the authority to regulate such waters based upon "the cumulative impact doctrine, under which a single activity that itself has no discernible effect on interstate commerce may still be regulated if the aggregate effect of that class of activity has a substantial impact on interstate commerce." 191 F. 3d 845, 850 (CA7 1999). The aggregate effect of the "destruction of the natural habitat of migratory birds" on interstate commerce, the court held, was substantial because each year millions of Americans cross state lines and spend over a billion dollars to hunt and observe migratory birds.² *Ibid.* The Court of Appeals then turned to the regulatory question. The court held that the CWA reaches as many waters as the Commerce Clause allows and, given its earlier Commerce Clause ruling, it therefore followed that respondents' "Migratory Bird Rule" was a reasonable interpretation of the Act. See *id.*, at 851-852.

We granted certiorari, 529 U. S. 1129 (2000), and now reverse.

Congress passed the CWA for the stated purpose of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters." 33 U. S. C. §1251(a). In so doing, Congress chose to "recognize, pr e-

²Relying upon its earlier decision in *Hoffman Homes, Inc. v. EPA*, 999 F. 2d 256 (CA7 1993), and a report from the United States Census Bureau, the Court of Appeals found that in 1996 approximately 3.1 million Americans spent \$1.3 billion to hunt migratory birds (with 11 percent crossing state lines to do so) as another 17.7 million Americans observed migratory birds (with 9.5 million traveling for the purpose of observing shorebirds). See 191 F. 3d, at 850.

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serve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter." §1251(h). Relevant here, §404(a) authorizes respondents to regulate the discharge of fill material into "navigable waters," 33 U. S. C. §1344(a), which the statute defines as "the waters of the United States, including the territorial seas," §1362(7). Respondents have interpreted these words to cover the abandoned gravel pit at issue because it is used as habitat for migratory birds. We conclude that the "Migratory Bird Rule" is not fairly supported by the CWA.

This is not the first time we have been called upon to evaluate the meaning of §404(a). In *United States v. Riverside Bayview Homes, Inc.*, 474 U. S. 121 (1985), we held that the Corps had §404(a) jurisdiction over wetlands that actually abutted on a navigable waterway. In so doing, we noted that the term "navigable" is of "limited import" and that Congress evidenced its intent to "regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *Id.*, at 133. But our holding was based in large measure upon Congress' unequivocal acquiescence to, and approval of, the Corps' regulations interpreting the CWA to cover wetlands adjacent to navigable waters. See *id.*, at 135-139. We found that Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands "inseparably bound up with the waters of the United States." *Id.*, at 134.

It was the significant nexus between the wetlands and "navigable waters" that informed our reading of the CWA in *Riverside Bayview Homes*. Indeed, we did not "express any opinion" on the "question of the authority of the Corps to regulate discharges of fill material into wetlands that

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are not adjacent to bodies of open water" *Id.*, at 131–132, n. 8. In order 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.

Indeed, the Corps' *original* interpretation of the CWA, promulgated two years after its enactment, is inconsistent with that which it espouses here. Its 1974 regulations defined §404(a) "navigable waters" to mean "those 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 for purposes of interstate or foreign commerce." 33 CFR §209.120(d)(1). The Corps emphasized that "[i]t is the water body's capability of use by the public for purposes of transportation or commerce which is the determinative factor." §209.260(e)(1). Respondents put forward no persuasive evidence that the Corps mistook Congress' intent in 1974.³

Respondents next contend that whatever its original aim in 1972, Congress charted a new course five years later when it approved the more expansive definition of "navigable waters" found in the Corps' 1977 regulations. In July 1977, the Corps formally adopted 33 CFR §323.2(a)(5) (1978), which defined "waters of the United States" to include "isolated wetlands and lakes, intermi-

³ Respondents refer us to portions of the legislative history that they believe indicate Congress' intent to expand the definition of "navigable waters." Although the Conference Report includes the statement that the conferees "intend that the term 'navigable waters' be given the broadest possible constitutional interpretation," S. Conf. Rep. No. 92–1236, p. 144 (1972), neither this, nor anything else in the legislative history to which respondents point, signifies that Congress intended to exert anything more than its commerce power over navigation. Indeed, respondents admit that the legislative history is somewhat ambiguous. See Brief for Federal Respondents 24.

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tent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce." Respondents argue that Congress was aware of this more expansive interpretation during its 1977 amendments to the CWA. Specifically, respondents point to a failed House bill, H. R. 3199, that would have defined "navigable waters" as "all waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce." 123 Cong. Rec. 10420, 10434 (1977).⁴ They also point to the passage in §404(g)(1) that authorizes a State to apply to the Environmental Protection Agency for permission "to administer its own individual and general permit program for the discharge of dredged or fill material into the navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce . . . including wetlands adjacent thereto) within its jurisdiction . . ." 33 U. S. C. §1344(g)(1). The failure to pass legislation that would have overturned the Corps' 1977 regulations and the extension of jurisdiction in §404(g) to waters "other than" traditional "navigable waters," respondents submit, indicate that Congress recognized and accepted a broad definition of "navigable waters" that includes nonnavigable, isolated, intrastate waters.

Although we have recognized congressional acquiescence to administrative interpretations of a statute in some situations, we have done so with extreme care.⁵

⁴While this bill passed in the House, a similarly worded amendment to a bill originating in the Senate, S. 1952, failed. See 123 Cong. Rec. 26710, 26728 (1977).

⁵In *Bob Jones Univ. v. United States*, 461 U. S. 574, 595, 600-601

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'[F]ailed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute.'" *Central Bank of Denver, N. A. v. First Interstate Bank of Denver, N. A.*, 511 U. S. 164, 187 (1994) (quoting *Pension Benefit Guaranty Corporation v. LTV Corp.*, 496 U. S. 633, 650 (1990)). A bill can be proposed for any number of reasons, and it can be rejected for just as many others. The relationship between the actions and inactions of the 95th Congress and the intent of the 92d Congress in passing §404(a) is also considerably attenuated. Because "subsequent history is less illuminating than the contemporaneous evidence," *Hagen v. Utah*, 510 U. S. 399, 420 (1994), respondents face a difficult task in overcoming the plain text and import of §404(a).

We conclude that respondents have failed to make the necessary showing that the failure of the 1977 House bill demonstrates Congress'acquiescence to the Corps'regulations or the "Migratory Bird Rule," which, of course, did not first appear until 1986. Although respondents cite some legislative history showing Congress'recognition of the Corps'assertion of jurisdiction over "isolated waters,"⁶

(1983), for example, we upheld an Internal Revenue Service (IRS) Revenue Ruling that revoked the tax-exempt status of private schools practicing racial discrimination because the IRS'interpretation of the relevant statutes was "correct"; because Congress had held "hearings on this precise issue," making it "hardly conceivable that Congress—and in this setting, any Member of Congress—was not abundantly aware of what was going on"; and because "no fewer than 13 bills introduced to overturn the IRS interpretation" had failed. Absent such overwhelming evidence of acquiescence, we are loath to replace the plain text and original understanding of a statute with an amended agency interpretation. See *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U. S. 102, 118, n. 13 (1980) ("[E]ven when it would otherwise be useful, subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment").

⁶ Respondents cite, for example, the Senate Report on S. 1952, which

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as we explained in *Riverside Bayview Homes*, “[i]n both Chambers, debate on the proposals to narrow the definition of navigable waters centered largely on the issue of wetlands preservation.” 474 U. S., at 136. Beyond Congress’ desire to regulate wetlands adjacent to ‘navigable waters,’ respondents point us to no persuasive evidence that the House bill was proposed in response to the Corps’ claim of jurisdiction over nonnavigable, isolated, intrastate waters or that its failure indicated congressional acquiescence to such jurisdiction.

Section 404(g) is equally unenlightening. In *Riverside Bayview Homes* we recognized that Congress intended the phrase ‘navigable waters’ to include ‘at least some waters that would not be deemed navigable’ under the classical understanding of that term.” *Id.*, at 133. But §404(g) gives no intimation of what those waters might be; it simply refers to them as ‘other . . . waters.’ Respondents conjecture that ‘other . . . waters’ must incorporate the Corps’ 1977 regulations, but it is also plausible, as petitioner contends, that Congress simply wanted to include all waters adjacent to ‘navigable waters,’ such as nonnavigable tributaries and streams. The exact meaning of §404(g) is not before us and we express no opinion on it, but for present purposes it is sufficient to say, as we did in *Riverside Bayview Homes*, that ‘§404(g)(1) does not conclusively determine the construction to be placed on the use of the term waters elsewhere in the Act (particularly in §502(7), which contains the relevant definition of navigable waters’ . . .” *Id.*, at 138, n. 11.⁷

referred to the Corps’ isolated waters” regulation. See S. Rep. No. 95-370, p. 75 (1977). However, the same report reiterated that “[t]he committee amendment does not redefine navigable waters.” *Ibid.*

⁷Respondents also make a passing reference to Congress’ decision in 1977 to exempt certain types of discharges from §404(a), including, for example, ‘discharge of dredged or fill material . . . for the purpose of

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We thus decline respondents' invitation to take what they see as the next ineluctable step after *Riverside Bayview Homes*: holding that isolated ponds, some only seasonal, wholly located within two Illinois counties, fall under §404(a)'s definition of "navigable waters" because they serve as habitat for migratory birds. As counsel for respondents conceded at oral argument, such a ruling would assume that "the use of the word navigable in the statute . . . does not have any independent significance." Tr. of Oral Arg. 28. We cannot agree that Congress's separate definitional use of the phrase "waters of the United States" constitutes a basis for reading the term "navigable waters" out of the statute. We said in *Riverside Bayview Homes* that the word "navigable" in the statute was of "limited effect" and went on to hold that §404(a) extended to nonnavigable wetlands adjacent to open waters. But it is one thing to give a word limited effect and quite another to give it no effect whatever. 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 reasonably be so made. See, e.g., *United States v. Appalachian Elec. Power Co.*, 311 U. S. 377, 407–408 (1940).

Respondents—relying upon all of the arguments addressed above—contend that, at the very least, it must be said that Congress did not address the precise question of §404(a)'s scope with regard to nonnavigable, isolated, intrastate waters, and that, therefore, we should give

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construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches." §67, 91 Stat. 1600, 33 U. S. C. §1344(f)(C). As §404(a) only regulates dredged or fill material that is discharged "into navigable waters," Congress's decision to exempt certain types of these discharges does not affect, much less address, the definition of "navigable waters."

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deference to the "Migratory Bird Rule." See, e.g., *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). We find §404(a) to be clear, but even were we to agree with respondents, we would not extend *Chevron* deference here.

Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result. See *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U. S. 568, 575 (1988). This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority. See *ibid.* This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power. See *United States v. Bass*, 404 U. S. 336, 349 (1971) ("[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance"). Thus, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *DeBartolo, supra*, at 575.

Twice in the past six years we have reaffirmed the proposition that the grant of authority to Congress under the Commerce Clause, though broad, is not unlimited. See *United States v. Morrison*, 529 U. S. 598 (2000); *United States v. Lopez*, 514 U. S. 549 (1995). Respondents argue that the "Migratory Bird Rule" falls within Congress' power to regulate intrastate activities that "substantially affect" interstate commerce. They note that the protection of migratory birds is a "national interest of very nearly the first magnitude," *Missouri v. Holland*, 252 U. S. 416, 435

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(1920), and that, as the Court of Appeals found, millions of people spend over a billion dollars annually on recreational pursuits relating to migratory birds. These arguments raise significant constitutional questions. For example, we would have to evaluate the precise object or activity that, in the aggregate, substantially affects interstate commerce. This is not clear, for although the Corps has claimed jurisdiction over petitioners' land because it contains water areas used as habitat by migratory birds, respondents now, *post litem motam*, focus upon the fact that the regulated activity is petitioners' municipal landfill, which is "plainly of a commercial nature." Brief for Federal Respondents 43. But this is a far cry, indeed, from the "navigable waters" and "waters of the United States" to which the statute by its terms extends.

These are significant constitutional questions raised by respondents' application of their regulations, and yet we find nothing approaching a clear statement from Congress that it intended §404(a) to reach an abandoned sand and gravel pit such as we have here. 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. See, *e.g.*, *Hess v. Port Authority Trans-Hudson Corporation*, 513 U. S. 30, 44 (1994) ("[R]egulation of land use [is] a function traditionally performed by local governments"). Rather than expressing a desire to readjust the federal-state balance in this manner, 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 . . ." 33 U. S. C. §1251(b). We thus read the statute as written to avoid the significant constitutional and federalism questions raised by respondents' interpret-

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tation, and therefore reject the request for administrative deference.⁸

We hold that 33 CFR §328.3(a)(3) (1999), as clarified and applied to petitioner's balefill site pursuant to the "Migratory Bird Rule," 51 Fed. Reg. 41217 (1986), exceeds the authority granted to respondents under §404(a) of the CWA. The judgment of the Court of Appeals for the Seventh Circuit is therefore

Reversed.

⁸Because violations of the CWA carry criminal penalties, see 33 U. S. C. §1319(c)(2), petitioner invokes the rule of lenity as another basis for rejecting the Corps' interpretation of the CWA. Brief for Petitioner 31-32. We need not address this alternative argument. See *United States v. Shabani*, 513 U. S. 10, 17 (1994).

STEVENS, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 99-1178

**SOLID WASTE AGENCY OF NORTHERN COOK
COUNTY, PETITIONER *v.* UNITED STATES
ARMY CORPS OF ENGINEERS ET AL.**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT**

[January 9, 2001]

JUSTICE STEVENS, with whom JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

In 1969, the Cuyahoga River in Cleveland, Ohio, coated with a slick of industrial waste, caught fire. Congress responded to that dramatic event, and to others like it, by enacting the Federal Water Pollution Control Act (FWPCA) Amendments of 1972, 86 Stat. 817, as amended 33 U. S. C. §1251 *et seq.*, commonly known as the Clean Water Act (Clean Water Act, CWA, or Act).¹ The Act proclaimed the ambitious goal of ending water pollution by 1985. §1251(a). The Court's past interpretations of the CWA have been fully consistent with that goal. Although Congress's vision of zero pollution remains unfulfilled, its pursuit has unquestionably retarded the destruction of the aquatic environment. Our Nation's waters no longer burn. Today, however, the Court takes an unfortunate step that needlessly weakens our principal safeguard against toxic water.

It is fair to characterize the Clean Water Act as "water-shed" legislation. The statute endorsed fundamental

¹See R. Adler, J. Landman, & D. Cameron, *The Clean Water Act: 20 Years Later* 5-10 (1993).

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changes in both the purpose and the scope of federal regulation of the Nation's waters. In §13 of the Rivers and Harbors Appropriation Act of 1899 (RHA), 30 Stat. 1152, as amended, 33 U. S. C. §407, Congress had assigned to the Army Corps of Engineers (Corps) the mission of regulating discharges into certain waters in order to protect their use as highways for the transportation of interstate and foreign commerce; the scope of the Corps' jurisdiction under the RHA accordingly extended only to waters that were "navigable." In the CWA, however, Congress broadened the Corps' mission to include the purpose of protecting the quality of our Nation's waters for esthetic, health, recreational, and environmental uses. The scope of its jurisdiction was therefore redefined to encompass all of "the waters of the United States, including the territorial seas." §1362(7). That definition requires neither actual nor potential navigability.

The Court has previously held that the Corps' broadened jurisdiction under the CWA properly included an 80-acre parcel of low-lying marshy land that was not itself navigable, directly adjacent to navigable water, or even hydrologically connected to navigable water, but which was part of a larger area, characterized by poor drainage, that ultimately abutted a navigable creek. *United States v. Riverside Bayview Homes, Inc.*, 474 U. S. 121 (1985).²

²See also App. to Pet. for Cert. 25a, and Brief for United States 8, n. 7, in *Riverside Bayview*, O. T. 1984, No. 84-701. The District Court in *Riverside Bayview* found that there was no direct "hydrological" connection between the parcel at issue and any nearby navigable waters. App. to Pet. for Cert. in *Riverside Bayview* 25a. The wetlands characteristics of the parcel were due, not to a surface or groundwater connection to any actually navigable water, but to "poor drainage" resulting from "the Lamson soil that underlay the property." Brief for Respondent in *Riverside Bayview* 7. Nevertheless, this Court found occasional surface runoff from the property into nearby waters to constitute a meaningful connection. *Riverside Bayview*, 474 U. S., at

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Our broad finding in *Riverside Bayview* that the 1977 Congress had acquiesced in the Corps' understanding of its jurisdiction applies equally to the 410-acre parcel at issue here. Moreover, once Congress crossed the legal watershed that separates navigable streams of commerce from marshes and inland lakes, there is no principled reason for limiting the statute's protection to those waters or wetlands that happen to lie near a navigable stream.

In its decision today, the Court draws a new jurisdictional line, one that invalidates the 1986 migratory bird regulation as well as the Corps' assertion of jurisdiction over all waters except for actually navigable waters, their tributaries, and wetlands adjacent to each. Its holding rests on two equally untenable premises: (1) that when Congress passed the 1972 CWA, it did not intend "to exert anything more than its commerce power over navigation," *ante*, at 7, n. 3; and (2) that in 1972 Congress drew the boundary defining the Corps' jurisdiction at the odd line on which the Court today settles.

As I shall explain, the text of the 1972 amendments affords no support for the Court's holding, and amendments Congress adopted in 1977 do support the Corps' present interpretation of its mission as extending to so-called "isolated" waters. Indeed, simple common sense cuts against the particular definition of the Corps' juri s-

134; Brief for United States in *Riverside Bayview* 8, n. 7. Of course, the *ecological* connection between the wetlands and the nearby waters also played a central role in this Court's decision. *Riverside Bayview*, 474 U. S., at 134-135. Both types of connection are also present in many, and possibly most, "isolated" waters. Brief for Dr. Gene Likens et al. as *Amici Curiae* 6-22. Indeed, although the majority and petitioner both refer to the waters on petitioner's site as "isolated," *ante*, at 11; Brief for Petitioner 11, their role as habitat for migratory birds, birds that serve important functions in the ecosystems of other waters throughout North America, suggests that—ecologically speaking—the waters at issue in this case are anything but isolated.

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diction favored by the majority.

I

The significance of the FWPCA Amendments of 1972 is illuminated by a reference to the history of federal water regulation, a history that the majority largely ignores. Federal regulation of the Nation's waters began in the 19th century with efforts targeted exclusively at 'promot[ing] water transportation and commerce.' Kalen, *Commerce to Conservation: The Call for a National Water Policy and the Evolution of Federal Jurisdiction Over Wetlands*, 69 N. D. L. Rev. 873, 877 (1993). This goal was pursued through the various Rivers and Harbors Acts, the most comprehensive of which was the RHA of 1899.³ Section 13 of the 1899 RHA, commonly known as the Refuse Act, prohibited the discharge of "refuse" into any "navigable water" or its tributaries, as well as the deposit of "refuse" on the bank of a navigable water "whereby navigation shall or may be impeded or obstructed" without first obtaining a permit from the Secretary of the Army. 30 Stat. 1152.

During the middle of the 20th century, the goals of federal water regulation began to shift away from an exclusive focus on protecting navigability and toward a concern for preventing environmental degradation. Kalen, 69 N. D. L. Rev., at 877-879, and n. 30. This awakening of interest in the use of federal power to protect the aquatic environment was helped along by efforts to reinterpret §13 of the RHA in order to apply its permit requirement to industrial discharges into navigable waters, even when such discharges did nothing to impede navigability. See,

— — — — —
³See also Rivers and Harbors Appropriations Act of 1806, 29 Stat. 234; River and Harbor Act of 1894, 28 Stat. 363; River and Harbor Appropriations Act of 1890, 26 Stat. 426; The River and Harbor Appropriations Act of 1886, 24 Stat. 329.

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e.g., *United States v. Republic Steel Corp.*, 362 U.S. 482, 490–491 (1960) (noting that the term “refuse” in §13 was broad enough to include industrial waste).⁴ Seeds of this nascent concern with pollution control can also be found in the FWPCA, which was first enacted in 1948 and then incrementally expanded in the following years.⁵

The shift in the focus of federal water regulation from protecting navigability toward environmental protection reached a dramatic climax in 1972, with the passage of the CWA. The Act, which was passed as an amendment to the existing FWPCA, was universally described by its supporters as the first truly comprehensive federal water pollution legislation. The “major purpose” of the CWA was “to establish a *comprehensive* long-range policy for the elimination of water pollution.” S. Rep. No. 92–414, p. 95

⁴In 1970, the House Committee on Government Operations followed the Court’s lead and advocated the use of §13 as a pollution control provision. H. R. Rep. No. 91–917, pp. 14–18 (1970). President Nixon responded by issuing Executive Order No. 11574, 35 Fed. Reg. 19627 (1970) (revoked by Exec. Order No. 12553, 51 Fed. Reg. 7237 (1986)), which created the Refuse Act Permit Program. Power, *The Fox in the Chicken Coop: The Regulatory Program of the U. S. Army Corps of Engineers*, 3 Va. L. Rev. 503, 512 (1977) (hereinafter Power). The program was ended soon after it started, however, when a District Court, reading the language of §13 literally, held the permit program invalid. *Ibid.*; see *Kalur v. Resor*, 335 F. Supp. 1, 9 (DC 1971).

⁵The FWPCA of 1948 applied only to “interstate waters.” §10(e), 62 Stat. 1161. Subsequently, it was harmonized with the Rivers and Harbors Act such that—like the earlier statute—the FWPCA defined its jurisdiction with reference to “navigable waters.” Pub. L. 89–753, §211, 80 Stat. 1252. None of these early versions of the FWPCA could fairly be described as establishing a comprehensive approach to the problem, but they did contain within themselves several of the elements that would later be employed in the CWA. *Milwaukee v. Illinois*, 451 U.S. 304, 318, n. 10 (1981) (REHNQUIST, J.) (Congress intended to do something “quite different” in the 1972 Act); 2 W. Rodgers, *Environmental Law: Air and Water* §4.1, pp. 10–11 (1986) (describing the early versions of the FWPCA).

(1971), reprinted in 2 Legislative History of the Water Pollution Control Act Amendments of 1972 (Committee Print compiled for the Senate Committee on Public Works by the Library of Congress), Ser. No. 93-1, p. 1511 (1971) (hereinafter Leg. Hist.) (emphasis added). And "[n]o Congressmans' remarks on the legislation were complete without reference to [its] comprehensive' nature" *Milwaukee v. Illinois*, 451 U.S. 304, 318 (1981) (REHNQUIST, J.). A House sponsor described the bill as "the most comprehensive and far-reaching water pollution bill we have ever drafted," 1 Leg. Hist. 369 (Rep. Mizell), and Senator Randolph, Chairman of the Committee on Public Works, stated: "It is perhaps the most comprehensive legislation that the Congress of the United States has ever developed in this particular field of the environment." 2 *id.*, at 1269. This Court was therefore undoubtedly correct when it described the 1972 amendments as establishing "a comprehensive program for controlling and abating water pollution." *Train v. City of New York*, 420 U.S. 35, 37 (1975).

Section 404 of the CWA resembles §13 of the RHA, but, unlike the earlier statute, the primary purpose of which is the maintenance of navigability, §404 was principally intended as a pollution control measure. A comparison of the contents of the RHA and the 1972 Act vividly illustrates the fundamental difference between the purposes of the two provisions. The earlier statute contains pages of detailed appropriations for improvements in specific navigation facilities, 30 Stat. 1121-1149, for studies concerning the feasibility of a canal across the Isthmus of Panama, *id.*, at 1150, and for surveys of the advisability of harbor improvements at numerous other locations, *id.*, at 1155-1161. Tellingly, §13, which broadly prohibits the discharge of refuse into navigable waters, contains an exception for refuse "flowing from streets and sewers . . . in a liquid state." *Id.*, at 1152.

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The 1972 Act, in contrast, appropriated large sums of money for research and related programs for water pollution control, 86 Stat. 816–833, and for the construction of water treatment works, *id.*, at 833–844. Strikingly absent from its declaration of “goals and policy” is *any* reference to avoiding or removing obstructions to navigation. Instead, the principal objective of the Act, as stated by Congress in §101, was “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U. S. C. §1251. Congress therefore directed federal agencies in §102 to “develop comprehensive programs for preventing, reducing, or eliminating the pollution of the navigable waters and ground waters and improving the sanitary condition of surface and underground waters.” 33 U. S. C. §1252. The CWA commands federal agencies to give “due regard,” not to the interest of unobstructed navigation, but rather to “improvements which are necessary to conserve such waters for the protection and propagation of fish and aquatic life and wildlife [and] recreational purposes.” *Ibid.*

Because of the statute’s ambitious and comprehensive goals, it was, of course, necessary to expand its jurisdictional scope. Thus, although Congress opted to carry over the traditional jurisdictional term “navigable waters” from the RHA and prior versions of the FWPCA, it broadened the *definition* of that term to encompass all “waters of the United States.” §1362(7).⁶ Indeed, the 1972 conferees arrived at the final formulation by specifically deleting the word “navigable” from the definition that had originally appeared in the House version of the Act.⁷ The majority

⁶The definition of “navigable water” in earlier versions of the FWPCA had made express reference to navigability. §211, 80 Stat. 1253.

⁷The version adopted by the House of Representatives defined “navigable waters” as “the navigable waters of the United States, including the territorial seas.” H. R. 11896, 92d Cong., 2d Sess., §502(8) (1971),

today undoes that deletion.

The Conference Report explained that the definition in §502(7) was intended to "be given the broadest possible constitutional interpretation." S. Conf. Rep. No. 92-1236, p. 144 (1972), reprinted in 1 Leg. Hist. 327. The Court dismisses this clear assertion of legislative intent with the back of its hand. *Ante*, at 7, n. 3. The statement, it claims, "signifies that Congress intended to exert [nothing] more than its commerce power over navigation." *Ibid*.

The majority's reading drains all meaning from the conference amendment. By 1972, Congress' Commerce Clause power over "navigation" had long since been established. *The Daniel Ball*, 10 Wall. 557 (1871); *Gilman v. Philadelphia*, 3 Wall. 713 (1866); *Gibbons v. Ogden*, 9 Wheat. 1 (1824). Why should Congress intend that its assertion of federal jurisdiction be given the "broadest possible constitutional interpretation" if it did not intend to reach beyond the very heartland of its commerce power? The activities regulated by the CWA have nothing to do with Congress' "commerce power over navigation." Indeed, the goals of the 1972 statute have nothing to do with navigation at all.

As we recognized in *Riverside Bayview*, the interests served by the statute embrace the protection of "significant natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing and resting sites" for various species of aquatic wildlife. 474 U. S., at 134-135. For wetlands and "isolated" inland lakes, that interest is equally powerful, regardless of the proximity of the swamp or the water to a navigable stream. Nothing in the text, the stated pur-

reprinted in 1 Leg. Hist. 1069. The CWA ultimately defined "navigable waters" simply as "the waters of the United States, including the territorial seas." 33 U. S. C. §1362(7).

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poses, or the legislative history of the CWA supports the conclusion that in 1972 Congress contemplated— much less commanded— the odd jurisdictional line that the Court has drawn today.

The majority accuses respondents of reading the term “navigable” out of the statute. *Ante*, at 11. But that was accomplished by Congress when it deleted the word from the §502(7) definition. After all, it is the *definition* that is the appropriate focus of our attention. *Babbitt v. Sweet Home Chapter, Communities for Great Ore.*, 515 U. S. 687, 697–698, n. 10 (1995) (refusing to be guided by the common-law definition of the term “take” when construing that term within the Endangered Species Act of 1973 and looking instead to the meaning of the terms contained in the definition of “take” supplied by the statute). Moreover, a proper understanding of the history of federal water pollution regulation makes clear that— even on respondents’ broad reading— the presence of the word “navigable” in the statute is not inexplicable. The term was initially used in the various Rivers and Harbors Acts because (1) at the time those statutes were first enacted, Congress’ power over the Nation’s waters was viewed as “extending only to ‘water bodies that were deemed navigable’ and therefore suitable for moving goods to or from markets,” Power 513; and (2) those statutes had the primary purpose of protecting navigation. Congress’ choice to employ the term “navigable waters” in the 1972 Clean Water Act simply continued nearly a century of usage. Viewed in light of the history of federal water regulation, the broad §502(7) definition, and Congress’ unambiguous instructions in the Conference Report, it is clear that the term “navigable waters” operates in the statute as a shorthand for “waters over which federal authority may properly be asserted.”

II

As the majority correctly notes, *ante*, at 7, when the

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Corps first promulgated regulations pursuant to §404 of the 1972 Act, it construed its authority as being essentially the same as it had been under the 1899 RHA.⁸ The reaction to those regulations in the federal courts,⁹ in the Environmental Protection Agency (EPA),¹⁰ and in Congress,¹¹ convinced the Corps that the statute required it

⁸The Corps later acknowledged that the 1974 regulations "limited the Section 404 permit program to the same waters that were being regulated under the River and Harbor Act of 1899." 42 Fed. Reg. 37123 (1977). Although refusing to defer to the Corps' *present* interpretation of the statute, *ante*, at 11-12, the majority strangely attributes some significance to the Corps' *initial* reluctance to read the 1972 Act as expanding its jurisdiction, *ante*, at 7 ("Respondents put forward no persuasive evidence that the Corps mistook Congress' intent in 1974"). But, stranger still, by construing the statute as extending to nonnavigable tributaries and adjacent wetlands, the majority reads the statute more broadly than the 1974 regulations that it seems willing to accept as a correct construction of the Corps' jurisdiction. As I make clear in the text, there is abundant evidence that the Corps was wrong in 1974 and that the Court is wrong today.

⁹See, e.g., *Natural Resources Defense Council v. Callaway*, 392 F. Supp. 685, 686 (DC 1975); *United States v. Holland*, 373 F. Supp. 665 (MD Fla. 1974).

¹⁰In a 1974 letter to the head of the Army Corps of Engineers, the EPA Administrator expressed his disagreement with the Corps' parsimonious view of its own jurisdiction under the CWA. Section 404 of the Federal Water Pollution Control Act Amendments of 1972: Hearings before the Senate Committee on Public Works, 94th Cong., 2d Sess., 349 (1976) (letter dated June 19, 1974, from Russell E. Train, Administrator of EPA, to Lt. Gen. W. C. Gribble, Jr., Chief of Corps of Engineers). The EPA is the agency that generally administers the CWA, except as otherwise provided. 33 U. S. C. §1251(d); see also 43 Op. Atty. Gen. 197 (1979) ("Congress intended to confer upon the administrator of the [EPA] the final administrative authority" to determine the reach of the term "navigable waters").

¹¹The House Committee on Government Operations noted the disagreement between the EPA and the Corps over the meaning of "navigable waters" and ultimately expressed its agreement with the EPA's broader reading of the statute. H. R. Rep. No. 93-1396, pp. 23-27 (1974).

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'to protect water quality to the full extent of the [C]ommerce [C]ause" and to extend federal regulation over discharges "to many areas that have never before been subject to Federal permits or to this form of water quality protection." 40 Fed. Reg. 31320 (1975).

In 1975, the Corps therefore adopted the interim regulations that we upheld in *Riverside Bayview*. As we noted in that case, the new regulations understood "the waters of the United States" to include, not only navigable waters and their tributaries, but also "nonnavigable intrastate waters whose use or misuse could affect interstate commerce." 474 U. S., at 123. The 1975 regulations provided that the new program would become effective in three phases: phase 1, which became effective immediately, encompassed the navigable waters covered by the 1974 regulation and the RHA; phase 2, effective after July 1, 1976, extended Corps jurisdiction to nonnavigable tributaries, freshwater wetlands adjacent to primary navigable waters, and lakes; and phase 3, effective after July 1, 1977, extended Corps jurisdiction to all other waters covered under the statute, including any waters not covered by phases 1 and 2 (such as "intermittent rivers, streams, tributaries, and perched wetlands that are not contiguous or adjacent to navigable waters") that "the District Engineer determines necessitate regulation for the protection of water quality." 40 Fed. Reg. 31325-31326 (1975). The final version of these regulations, adopted in 1977, made clear that the covered waters included "isolated lakes and wetlands, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce."¹²

¹²42 Fed. Reg. 37127 (1977), as amended. 33 CFR §328.3(a)(3) (1977).

The Corps' broadened reading of its jurisdiction provoked opposition among some Members of Congress. As a result, in 1977, Congress considered a proposal that would have limited the Corps' jurisdiction under §404 to waters that are used, or by reasonable improvement could be used, as a means to transport interstate or foreign commerce and their adjacent wetlands. H. R. 3199, 95th Cong., 1st Sess., §16(f) (1977). A bill embodying that proposal passed the House but was defeated in the Senate. The debates demonstrate that Congress was fully aware of the Corps' understanding of the scope of its jurisdiction under the 1972 Act. We summarized these debates in our opinion in *Riverside Bayview*:

'In both Chambers, debate on the proposals to narrow the definition of navigable waters centered largely on the issue of wetlands preservation. See [123 Cong. Rec.], at 10426-10432 (House debate); *id.*, at 26710-26729 (Senate debate). Proponents of a more limited §404 jurisdiction contended that the Corps' assertion of jurisdiction over wetlands and other nonnavigable waters had far exceeded what Congress had intended in enacting §404. Opponents of the proposed changes argued that a narrower definition of navigable waters for purposes of §404 would exclude vast stretches of crucial wetlands from the

The so-called "migratory bird" rule, upon which the Corps based its assertion of jurisdiction in this case, is merely a specific application of the more general jurisdictional definition first adopted in the 1975 and 1977 rules. The "rule," which operates as a rule of thumb for identifying the waters that fall within the Corps' jurisdiction over phase 3 waters, first appeared in the preamble to a 1986 repromulgation of the Corps' definition of "navigable waters." 51 Fed. Reg. 41217 (1986). As the Corps stated in the preamble, this repromulgation was not intended to alter its jurisdiction in any way. *Ibid.* Instead, the Corps indicated, the migratory bird rule was enacted simply to "clarif[y]" the scope of existing jurisdictional regulations. *Ibid.*

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Corps' jurisdiction, with detrimental effects on wetlands ecosystems, water quality, and the aquatic environment generally. The debate, particularly in the Senate, was lengthy. In the House, the debate ended with the adoption of a narrowed definition of 'waters' but in the Senate the limiting amendment was defeated and the old definition retained. The Conference Committee adopted the Senate's approach: efforts to narrow the definition of 'waters' were abandoned; the legislation as ultimately passed, in the words of Senator Baker, 'retain[ed] the comprehensive jurisdiction over the Nation's waters exercised in the 1972 Federal Water Pollution Control Act.'" 474 U. S., at 136-137.

The net result of that extensive debate was a congressional endorsement of the position that the Corps maintains today. We explained in *Riverside Bayview*:

"[T]he scope of the Corps' asserted jurisdiction over wetlands was specifically brought to Congress' attention, and Congress rejected measures designed to curb the Corps' jurisdiction in large part because of its concern that protection of wetlands would be unduly hampered by a narrowed definition of 'navigable waters.' Although we are chary of attributing significance to Congress' failure to act, a refusal by Congress to overrule an agency's construction of legislation is at least some evidence of the reasonableness of that construction, particularly where the administrative construction has been brought to Congress' attention through legislation specifically designed to supplant it." *Id.*, at 137.

Even if the majority were correct that Congress did not extend the Corps' jurisdiction in the 1972 CWA to reach beyond navigable waters and their nonnavigable tributaries, Congress' rejection of the House's efforts in 1977 to

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cut back on the Corps' 1975 assertion of jurisdiction clearly indicates congressional acquiescence in that assertion. Indeed, our broad determination in *Riverside Bayview* that the 1977 Congress acquiesced in the very regulations at issue in this case should foreclose petitioners' present urgings to the contrary. The majority's refusal in today's decision to acknowledge the scope of our prior decision is troubling. Compare *id.*, at 136 ('Congress acquiesced in the [1975] administrative construction [of the Corps' jurisdiction]'), with *ante*, at 9 ('We conclude that respondents have failed to make the necessary showing that the failure of the 1977 House bill demonstrates Congress' acquiescence to the Corps' regulations . . .').¹³ Having already concluded that Congress acquiesced in the Corps' regulatory definition of its jurisdiction,

¹³The majority appears to believe that its position is consistent with *Riverside Bayview* because of that case's reservation of the question whether the Corps' jurisdiction extends to "certain wetlands not necessarily adjacent to other waters," 474 U. S., at 124, n. 2. But it is clear from the context that the question reserved by *Riverside Bayview* did not concern "isolated" waters, such as those at issue in this case, but rather "isolated" wetlands. See *id.*, at 131-132, 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 . . .'). Unlike the open waters present on petitioners' site, wetlands are lands that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas." 33 CFR §328.3(b) (2000). If, as I believe, actually navigable waters lie at the very heart of Congress' commerce power and "isolated," nonnavigable waters lie closer to (but well within) the margin, "isolated wetlands," which are themselves only marginally "waters," are the most marginal category of "waters of the United States" potentially covered by the statute. It was the question of the extension of federal jurisdiction to that category of "waters" that the *Riverside Bayview* Court reserved. That question is not presented in this case.

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the Court is wrong to reverse course today. See *Dickerson v. United States*, 530 U. S. 428, 443 (2000) (REHNQUIST, C. J.) (“[T]he doctrine [of *stare decisis*] carries such persuasive force that we have always required a departure from precedent to be supported by some ‘special justification’”).

More important than the 1977 bill that did not become law are the provisions that actually were included in the 1977 revisions. Instead of agreeing with those who sought to withdraw the Corps’ jurisdiction over “isolated” waters, Congress opted to exempt several classes of such waters from federal control. §67, 91 Stat. 1601, 33 U. S. C. §1344(f). For example, the 1977 amendments expressly exclude from the Corps’ regulatory power the discharge of fill material “for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches,” and “for the purpose of construction of temporary sedimentation basins on a construction site which does not include placement of fill material into the navigable waters.” *Ibid.* The specific exemption of these waters from the Corps’ jurisdiction indicates that the 1977 Congress recognized that similarly “isolated” waters not covered by the exceptions would fall within the statute’s outer limits.

In addition to the enumerated exceptions, the 1977 amendments included a new section, §404(g), which authorized the States to administer their own permit programs over certain non-navigable waters. Section 404(g)(1) provides, in relevant part:

“The Governor of any State desiring to administer its own individual and general permit program for the discharge of dredged or fill material into the navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to

transport interstate or foreign commerce . . . , including wetlands adjacent thereto) within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact." 33 U. S. C. §1344(g)(1).

Section 404(g)(1)'s reference to navigable waters "other than those waters which are presently used, or are susceptible to use" for transporting commerce and their adjacent wetlands appears to suggest that Congress viewed (and accepted) the Act's regulations as covering more than navigable waters in the traditional sense. The majority correctly points out that §404(g)(1) is itself ambiguous because it does not indicate precisely how far Congress considered federal jurisdiction to extend. *Ante*, at 10. But the Court ignores the provision's legislative history, which makes clear that Congress understood §404(g)(1)— and therefore federal jurisdiction— to extend, not only to navigable waters and nonnavigable tributaries, but also to "isolated" waters, such as those at issue in this case.

The Conference Report discussing the 1977 amendments, for example, states that §404(g) "establish[es] a process to allow the Governor of any State to administer an individual and general permit program for the discharge of dredged or fill material into *phase 2 and 3 waters* after the approval of a program by the Administrator." H. R. Conf. Rep. No. 95-830, p. 101 (1977), reprinted in 3 Legislative History of the Clean Water Act of 1977 (Committee Print Compiled for the Committee on Environment and Public Works by the Library of Congress), Ser. No. 95-14, p. 285 (emphasis added) (hereinafter Leg. Hist. of CWA). Similarly, a Senate Report discussing the 1977 amendments explains that, under §404(g), "the [C]orps will *continue* to administer the section 404 permit program in all navigable waters for a discharge of dredge or fill material until the approval of a State program for

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phase 2 and 3 waters." S. Rep. No. 95-370, p. 75 (1977), reprinted in 4 Leg. Hist. of CWA 708 (emphases added).

Of course, as I have already discussed, "phase 1" waters are navigable waters and their contiguous wetlands, "phase 2" waters are the "primary tributaries" of navigable waters and their adjacent wetlands, and "phase 3" waters are all other waters covered by the statute, and can include such "isolated" waters as "intermittent rivers, streams, tributaries, and perched wetlands that are not contiguous or adjacent to navigable waters." The legislative history of the 1977 amendments therefore plainly establishes that, when it enacted §404(g), Congress believed—and desired—the Corps' jurisdiction to extend beyond just navigable waters, their tributaries, and the wetlands adjacent to each.

In dismissing the significance of §404(g)(1), the majority quotes out of context language in the very same 1977 Senate Report that I have quoted above. *Ante*, at 10, n. 6. It is true that the Report states that "[t]he committee amendment does not *redefine* navigable waters." S. Rep. No. 95-370, at 75, reprinted in 4 Leg. Hist. of CWA 708 (emphasis added). But the majority fails to point out that the quoted language appears in the course of an explanation of the Senate's refusal to go along with House efforts to *narrow the scope* of the Corps' CWA jurisdiction to traditionally navigable waters. Thus, the immediately preceding sentence warns that "[t]o limit the jurisdiction of the [FWPCA] with reference to discharges of the pollutants of dredged or fill material would cripple efforts to achieve the act's objectives." ¹⁴ *Ibid.* The Court would do

¹⁴In any event, to attach significance to the Report's statement that the committee amendments do not "redefine navigable waters," one must first accept the majority's erroneous interpretation of the 1972 Act. But the very Report upon which the majority relies states that "[t]he 1972 [FWPCA] exercised *comprehensive jurisdiction* over the

well to heed that warning.

The majority also places great weight, *ante*, at 10, on our statement in *Riverside Bayview* that §404(g) "does not *conclusively* determine the construction to be placed on the use of the term waters elsewhere in the Act," 474 U. S., at 138, n. 11 (emphasis added). This is simply more selective reading. In that case, we also went on to say with respect to the significance of §404(g) that "the various provisions of the Act should be read *in pari materia*." *Ibid.* Moreover, our ultimate conclusion in *Riverside Bayview* was that §404(g) "suggest[s] strongly that the term waters as used in the Act" supports the Corps' reading. *Ibid.*

III

Although it might have appeared problematic on a "linguistic" level for the Corps to classify "lands" as "waters" in *Riverside Bayview*, 474 U. S., at 131-132, we squarely held that the agency's construction of the statute that it was charged with enforcing was entitled to deference under *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). Today, however, the majority refuses to extend such deference to the same agency's construction of the same statute, see *ante*, at 11-13. This refusal is unfaithful to both *Riverside*

Nations' waters to control pollution to the *fullest constitutional extent*." S. Rep. No. 95-370, at 75, reprinted in 4 Leg. Hist. of CWA 708 (emphases added). Even if the Court's flawed reading of the earlier statute were correct, however, the language to which the Court points does not counsel against finding congressional acquiescence in the Corps' 1975 regulations. Quite the contrary. From the perspective of the 1977 Congress, those regulations constituted the status quo that the proposed amendments sought to alter. Considering the Report's favorable references to the Corps' "continu[ing]" jurisdiction over phase 2 and 3 waters, the language concerning the failure of the amendments to "redefine navigable waters" cuts strongly against the majority's position, which instead completely excises phase 3 waters from the scope of the Act. *Ibid.*

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Bayview and *Chevron*. For it is the majority's reading, not the agency's, that does violence to the scheme Congress chose to put into place.

Contrary to the Court's suggestion, the Corps' interpretation of the statute does not "encroach" upon "traditional state power" over land use. *Ante*, at 12. "Land use planning in essence chooses particular uses for the land; environmental regulation, at its core, does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits." *California Coastal Comm'n v. Granite Rock Co.*, 480 U. S. 572, 587 (1987). The CWA is not a land-use code; it is a paradigm of environmental regulation. Such regulation is an accepted exercise of federal power. *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264, 282 (1981).

It is particularly ironic for the Court to raise the specter of federalism while construing a statute that makes explicit efforts to foster local control over water regulation. Faced with calls to cut back on federal jurisdiction over water pollution, Congress rejected attempts to narrow the scope of that jurisdiction and, by incorporating §404(g), opted instead for a scheme that encouraged States to supplant federal control with their own regulatory programs. S. Rep. No. 95-370, at 75, reprinted in 4 Leg. Hist. of CWA 708 ("The committee amendment does not redefine navigable waters. Instead, the committee amendment intends to assure continued protection of *all the Nation's waters*, but allows States to assume the primary responsibility for protecting those lakes, rivers, streams, swamps, marshes, and other portions of the navigable waters outside the [C]orps program in the so-called phase I waters" (emphasis added)). Because Illinois could have taken advantage of the opportunities offered to it through §404(g), the federalism concerns to which the majority adverts are misplaced. The Corps' interpretation of the

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statute as extending beyond navigable waters, tributaries of navigable waters, and wetlands adjacent to each is manifestly reasonable and therefore entitled to deference.

IV

Because I am convinced that the Court's miserly construction of the statute is incorrect, I shall comment briefly on petitioner's argument that Congress is without power to prohibit it from filling any part of the 31 acres of ponds on its property in Cook County, Illinois. The Corps' exercise of its §404 permitting power over "isolated" waters that serve as habitat for migratory birds falls well within the boundaries set by this Court's Commerce Clause jurisprudence.

In *United States v. Lopez*, 514 U. S. 549, 558-559 (1995), this Court identified "three broad categories of activity that Congress may regulate under its commerce power": (1) channels of interstate commerce; (2) instrumentalities of interstate commerce, or persons and things in interstate commerce; and (3) activities that "substantially affect" interstate commerce. *Ibid.* The migratory bird rule at issue here is properly analyzed under the third category. In order to constitute a proper exercise of Congress's power over intrastate activities that "substantially affect" interstate commerce, it is not necessary that each individual instance of the activity substantially affect commerce; it is enough that, taken in the aggregate, the *class of activities* in question has such an effect. *Perez v. United States*, 402 U. S. 146 (1971) (noting that it is the "class" of regulated activities, not the individual instance, that is to be considered in the "affects" commerce analysis); see also *Hodel*, 452 U. S., at 277; *Wickard v. Filburn*, 317 U. S. 111, 127-128 (1942).

The activity being regulated in this case (and by the Corps' §404 regulations in general) is the discharge of fill material into water. The Corps did not assert jurisdiction

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over petitioner's land simply because the waters were "used as habitat by migratory birds." It asserted jurisdiction because petitioner planned to *discharge fill* into waters "used as habitat by migratory birds." Had petitioner intended to engage in some other activity besides discharging fill (*i.e.*, had there been no activity to regulate), or, conversely, had the waters not been habitat for migratory birds (*i.e.*, had there been no basis for federal jurisdiction), the Corps would never have become involved in petitioner's use of its land. There can be no doubt that, unlike the class of activities Congress was attempting to regulate in *United States v. Morrison*, 529 U. S. 598, 613 (2000) ("[g]ender-motivated crimes"), and *Lopez*, 514 U. S., at 561 (possession of guns near school property), the discharge of fill material into the Nation's waters is almost always undertaken for economic reasons. See V. Albrecht & B. Goode, *Wetland Regulation in the Real World*, Exh. 3 (Feb. 1994) (demonstrating that the overwhelming majority of acreage for which §404 permits are sought is intended for commercial, industrial, or other economic use).¹⁵

Moreover, no one disputes that the discharge of fill into "isolated" waters that serve as migratory bird habitat will, in the aggregate, adversely affect migratory bird populations. See, *e.g.*, 1 Secretary of the Interior, Report to Congress, *The Impact of Federal Programs on Wetlands: The Lower Mississippi Alluvial Plain and the Prairie Pothole Region 79-80* (Oct. 1988) (noting that "isolated,"

¹⁵The fact that petitioner can conceive of some people who may discharge fill for noneconomic reasons does not weaken the legitimacy of the Corps' jurisdictional claims. As we observed in *Perez v. United States*, 402 U. S. 146 (1971), "[w]here the *class of activities* is regulated and that *class* is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class." *Id.*, at 154 (internal quotation marks omitted).

phase 3 waters "are among [the] most important and also the most threatened ecosystems in the United States" because "[t]hey are prime nesting grounds for many species of North American waterfowl . . ." and provide "[u]p to 50 percent of the [U. S.] production of migratory waterfowl"). Nor does petitioner dispute that the particular waters it seeks to fill are home to many important species of migratory birds, including the second-largest breeding colony of Great Blue Herons in northeastern Illinois, App. to Pet. for Cert. 3a, and several species of waterfowl protected by international treaty and Illinois endangered species laws, Brief for Federal Respondents 7.¹⁶

In addition to the intrinsic value of migratory birds, see *Missouri v. Holland*, 252 U. S. 416, 435 (1920) (noting the importance of migratory birds as "protectors of our forests and our crops" and as "a food supply"), it is undisputed that literally millions of people regularly participate in birdwatching and hunting and that those activities generate a host of commercial activities of great value.¹⁷ The causal connection between the filling of wetlands and the

¹⁶Other bird species using petitioner's site as habitat include the "Great Egret, Green-backed Heron, Black-crowned Night Heron, Canada Goose, Wood Duck, Mallard, Greater Yellowlegs, Belted Kingfisher, Northern Waterthrush, Louisiana Waterthrush, Swamp Sparrow, and Red-winged Blackbird." Brief for Petitioner 4, n. 3.

¹⁷In 1984, the U. S. Congress Office of Technology Assessment found that, in 1980, 5.3 million Americans hunted migratory birds, spending \$638 million. U. S. Congress, Office of Technology Assessment, *Wetlands: Their Use and Regulation* 54 (OTA-O-206, Mar. 1984). More than 100 million Americans spent almost \$14.8 billion in 1980 to watch and photograph fish and wildlife. *Ibid.* Of 17.7 million birdwatchers, 14.3 million took trips in order to observe, feed, or photograph waterfowl, and 9.5 million took trips specifically to view other water-associated birds, such as herons like those residing at petitioner's site. U. S. Dept. of Interior, U. S. Fish and Wildlife Service and U. S. Dept. of Commerce, Bureau of Census, *1996 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation* 45, 90 (issued Nov. 1997).

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decline of commercial activities associated with migratory birds is not "attenuated," *Morrison*, 529 U. S., at 612; it is direct and concrete. Cf. *Gibbs v. Babbitt*, 214 F. 3d 483, 492–493 (CA4 2000) ("The relationship between red wolf takings and interstate commerce is quite direct— with no red wolves, there will be no red wolf related tourism . . .").

Finally, the migratory bird rule does not blur the "distinction between what is truly national and what is truly local." *Morrison*, 529 U. S., at 617–618. Justice Holmes cogently observed in *Missouri v. Holland* that the protection of migratory birds is a textbook example of a *national* problem. 252 U. S., at 435 ("It is not sufficient to rely upon the States [to protect migratory birds]. The reliance is vain . . ."). The destruction of aquatic migratory bird habitat, like so many other environmental problems, is an action in which the benefits (*e.g.*, a new landfill) are disproportionately local, while many of the costs (*e.g.*, fewer migratory birds) are widely dispersed and often borne by citizens living in other States. In such situations, described by economists as involving "externalities," federal regulation is both appropriate and necessary. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N. Y. U. L. Rev. 1210, 1222 (1992) ("The presence of interstate externalities is a powerful reason for intervention at the federal level"); cf. *Hodel*, 452 U. S., at 281–282 (deferring to Congress' finding that nationwide standards were "essential" in order to avoid "destructive interstate competition" that might undermine environmental standards). Identifying the Corps' jurisdiction by reference to waters that serve as habitat for birds that migrate over state lines also satisfies this Court's expressed desire for some "jurisdictional element" that limits federal activity to its proper scope. *Morrison*, 529 U. S., at 612.

The power to regulate commerce among the several

States necessarily and properly includes the power to preserve the natural resources that generate such commerce. Cf. *Sporhase v. Nebraska ex rel. Douglas*, 458 U. S. 941, 953 (1982) (holding water to be an 'article of commerce'). Migratory birds, and the waters on which they rely, are such resources. Moreover, the protection of migratory birds is a well-established federal responsibility. As Justice Holmes noted in *Missouri v. Holland*, the federal interest in protecting these birds is of 'the first magnitude.' 252 U. S., at 435. Because of their transitory nature, they 'can be protected only by national action.' *Ibid.*

Whether it is necessary or appropriate to refuse to allow petitioner to fill those ponds is a question on which we have no voice. Whether the Federal Government has the power to require such permission, however, is a question that is easily answered. If, as it does, the Commerce Clause empowers Congress to regulate particular 'activities causing air or water pollution, or other environmental hazards that may have effects in more than one State,' *Hodel*, 452 U. S., at 282, it also empowers Congress to control individual actions that, in the aggregate, would have the same effect. *Perez*, 402 U. S., at 154; *Wickard*, 317 U. S., at 127-128.¹⁸ There is no merit in petitioner's constitutional argument.

Because I would affirm the judgment of the Court of Appeals, I respectfully dissent.

¹⁸JUSTICE THOMAS is the only Member of the Court who has expressed disagreement with the 'aggregation principle.' *United States v. Lopez*, 514 U. S. 549, 600 (1995) (concurring opinion).