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# Toward Normative Rules for Agency Interpretation: Defining Jurisdiction under the Clean Water Act

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## TOWARD NORMATIVE RULES FOR AGENCY INTERPRETATION: DEFINING JURISDICTION UNDER THE CLEAN WATER ACT\*

*Robert R.M. Verchick\*\**

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*The tide is high, but I'm holdin' on.*<sup>1</sup>

#### INTRODUCTION

From environmentalists to duck hunters, wetlands advocates dodged a bullet last year when the Bush Administration dropped plans to narrow its jurisdiction over streams and wetlands.<sup>2</sup> The decision marked a key chapter in a story, which, by lawyers' standards, continues to be packed with drama. It began in 2001, when the Supreme Court in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* ("SWANCC"),<sup>3</sup> invalidated part of the Migratory Bird Rule, a regulation that for many years had supported federal protection over some intrastate wetlands.<sup>4</sup>

The Court's broad rejection of this narrow rule sent federal jurisdiction under the Clean Water Act (the "Act")<sup>5</sup> into a tailspin. Beyond the marshy waters of herons and geese, the decision opened jurisdictional debates about tributaries, culverts, and intermittent streams in the Southwest. Beyond jurisdictional authority under the Act's wetlands program, the decision appeared to narrow jurisdictional authority under the Act's National Pollution Discharge Elimination System ("NPDES") program,<sup>6</sup> the Oil Pollution Act,<sup>7</sup> and other water-related programs. In addition, the majority's discussion of the Interstate Commerce Clause raised questions about federal power under several other environmental laws.<sup>8</sup> All this led Professor William Funk to opine that *SWANCC* "may be the most devastating judicial opinion affecting the environment ever."<sup>9</sup>

Since that decision, several federal courts have re-examined Clean Water Act jurisdiction, including appellate courts in the Fourth, Fifth, Sixth, Seventh, and Ninth Circuits.<sup>10</sup> As this Article goes to press, four petitions for certiorari—each denied—have come before the Supreme Court.<sup>11</sup> The Bush Administration has responded, too. Last year it issued guidance to the

1. BLONDIE, *The Tide Is High, on* AUTOAMERICAN (Chrysalis Records 1980).

2. See Felicity Barringer, *In Reversal, E.P.A. Won't Narrow Wetlands Protection*, N.Y. TIMES, Dec. 17, 2003, at A35.

3. 531 U.S. 159 (2001).

4. *Id.* Under this rule, issued in 1986, the Army Corps asserted jurisdiction over intrastate waters,  
a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or  
b. Which are or would be used as habitat by other migratory birds which cross state lines; or  
c. Which are or would be used as habitat for endangered species; or  
d. Used to irrigate crops sold in interstate commerce.

Migratory Bird Rule, 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986). Narrowly construed, the *SWANCC* decision might be said to have invalidated only subsection (b) of the rule.

5. Clean Water Act, 33 U.S.C. §§ 1251-1387 (2000).

6. *Id.* § 1342.

7. Oil Pollution Act, 33 U.S.C. §§ 2701-61 (2000).

8. *SWANCC*, 531 U.S. at 165-66.

9. William Funk, *The Court, the Clean Water Act, and the Constitution: SWANCC and Beyond*, 31 *Envtl. L. Rep.* 10,741, 10,741 (2001).

10. See *infra* note 119.

11. See *infra* note 119.

Army Corps's field offices that essentially weakened federal control over wetlands.<sup>12</sup> As mentioned above, the Administration also announced a plan to revise jurisdictional rules, which, according to one draft proposal, would have opened tens of millions of acres to development.<sup>13</sup> But after sharp criticism from state governments, hunting and fishing groups, and conservationists, the Administration deftly pirouetted and decided not to change the regulations after all.<sup>14</sup>

Academics and lawyers are now swimming in law review articles attempting to decipher of SWANCC.<sup>15</sup> Virtually all of this scholarship approaches Clean Water Act jurisdiction as a *judge* would interpret it. That is not surprising, since administrative law scholarship has focused mainly on the judiciary.<sup>16</sup>

This Article charts a different course. My purpose is to examine the proper role of federal agencies—in this case, the Environmental Protection Agency (“EPA”) and the Army Corps of Engineers—in interpreting their authority under the Act and under the Constitution. I want to examine the agencies’ guidance, the draft rule, and the decision to abandon that rule to see if the Administration reached the right decisions for what we might agree to be the right reasons.

The proper role of agencies in statutory interpretation is a surprisingly under-examined field of law.<sup>17</sup> Only a handful of law review articles address the issue in any substantial way.<sup>18</sup> To my knowledge, no law review article

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12. See Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of “Waters of the United States,” 68 Fed. Reg. 1991 (Jan. 15, 2003) (to be codified at 33 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, and 401) [hereinafter ANPRM].

13. See *id.* at app. § A (joint memorandum between the EPA and the Army Corps providing guidance on federal jurisdiction) [hereinafter Guidance]; Elizabeth Shogren, *Rule Drafted that Would Dilute the Clean Water Act*, L.A. TIMES, Nov. 6, 2003, at A12. For an excerpt of the draft rule, see *infra* note 158.

14. Barringer, *supra* note 2, at A35.

15. See, e.g., Robert W. Adler, *The Supreme Court and Ecosystems: Environmental Science in Environmental Law*, 27 VT. L. REV. 249 (2003); Virginia S. Albrecht & Stephen M. Nickelsburg, *Could SWANCC Be Right? A New Look at the Legislative History of the Clean Water Act*, 32 ENVTL. L. REP. 11,042 (2002); Edward A. Fitzgerald, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers: Isolated Waters, Migratory Birds, Statutory and Constitutional Interpretation*, 43 NAT. RESOURCES J. 11 (2003); Funk, *supra* note 9; Michael J. Gerhardt, *On Revolution and Wetland Regulations*, 90 GEO. L.J. 2143 (2002); John D. Ostergren, *SWANCC in Duck Country: Will Court-Ordered Devolution Fill the Prairie Potholes?*, 22 STAN. ENVTL. L.J. 381 (2003). I am afraid I have contributed to the flood. See Robert R.M. Verchick, *Steinbeck's Holism: Science, Literature, and Environmental Law*, 22 STAN. ENVTL. L.J. 3, 48-52 (2003) (comparing method of judicial interpretation in SWANCC to that in *United States v. Riverside*).

16. Elena Kagan writes:

For too long, administrative law scholars focused on judicial review and other aspects of legal doctrine as if they were the principal determinants of both administrative process and administrative substance. They are not, and the most welcome change in administrative law scholarship over the past decade or so has been its insistence on this point.

Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2383 (2001) (citing with approval recent works by Jerry Mashaw, Thomas McGarity, and Cass Sunstein, among others).

17. J.R. DeShazo & Jody Freeman, *Public Agencies As Lobbyists* 5-6 (unpublished manuscript, on file with the author).

18. See, e.g., Jerry L. Mashaw, *Agency Statutory Interpretation*, ISSUES IN LEGAL SCHOLARSHIP, DYNAMIC STATUTORY INTERPRETATION, art. 9 (2002), available at

has significantly addressed agency statutory interpretation in an exclusively environmental context. Yet the topic is extremely important as both a general matter and an environmental one. Absent judicial intervention, “the law” is what agencies say it is. While it is true that courts do examine and occasionally overturn agency interpretations of a statute, agencies generally prevail. When courts do intervene, it is usually after years of agency practice under rules of the agency’s own design. In the case of Clean Water Act jurisdiction, the Army Corps’s Migratory Bird Rule thrived for nearly fifteen years before *SWANCC* clipped its wings.

In addition, the study of agency interpretation is important because the standards by which we evaluate judicial interpretations are not completely transferable to agencies. Indeed, one of my central claims will be that when interpreting statutes, agencies should employ standards that are different from those employed by courts.<sup>19</sup> Court decisions evaluating agency interpretation, while significant, are also of limited value to the rulemaking agency. A judge’s review of agency interpretation concerns what readings are permitted; the study of agency interpretation concerns what readings, among those permitted, are desirable.

Part I of this Article proposes a set of normative guidelines for agencies to follow when interpreting statutes. The guidelines are drawn from structural considerations embedded in the Constitution and prudential considerations aimed at effective governance, particularly in the environmental setting. Parts II and III apply these interpretive guidelines to the Bush Administration’s efforts to define federal jurisdiction under the Act after *SWANCC*. Part II sets the judicial stage, introducing *SWANCC* and lower courts’ understanding of that case. Part III studies the Administration’s decisions concerning agency guidance and informal rulemaking in light of *SWANCC* and the proposed interpretive guidelines. In this Part, I conclude that the EPA and the Army Corps have produced mixed results. From the proposed normative perspective, their handling of the rulemaking process resulted in a correct outcome, but for incorrect reasons. The agencies’ guidance, which remains in effect, produces an incorrect outcome, based on incorrect reasoning. That guidance, if not modified, will seriously threaten wetlands protection.

Before continuing, some preliminary points are in order. First, proposing interpretive guidelines for environmental agencies is an ambitious task, and I do not pretend to have completed the project here. My analysis is merely an effort to open debate. Like Jerry Mashaw and Peter Strauss, who have tentatively explored agency interpretation in general terms,<sup>20</sup> I hope to convince more scholars to study this topic and improve upon the ideas that

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<http://www.bepress.com/cgi/viewcontent.cgi?article=1028&context=ils>; Peter L. Strauss, *Symposium on Statutory Interpretation: When the Judge Is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI.-KENT L. REV. 321 (1990).

19. See *infra* Part III.

20. See Mashaw, *supra* note 18; Strauss, *supra* note 18.

have come before. Second, my model is not intended to predict what, in fact, the EPA or Army Corps will do next. The project is normative and evaluative, not explanatory. But it is not “pie in the sky.” The proposed guidelines are intended to be practical to apply and helpful to effective governance. Third, the interpretive analysis applied here to federal jurisdiction can be applied to many other environmental topics by many other users. Interpretive questions arise in scores of environmental issues confronted by federal agencies, from EPA’s delayed guidance on Title VI<sup>21</sup> to the Bush Administration’s proposed cap-and-trade program for mercury utility emissions<sup>22</sup> to preemption questions surrounding California’s proposed greenhouse-gas legislation.<sup>23</sup> Finally, the ideas offered here are intended, of course, to help agencies in reading statutes, but they are also intended to help scholars who evaluate agency actions, as well as lawyers and members of the lay public who work to influence agency behavior.<sup>24</sup>

### I. GUIDELINES FOR AGENCY INTERPRETATION

I ground my guidelines for agency interpretation in a combination of structural and prudential arguments. The structural arguments involve the very complicated issues of constitutional delegation, executive oversight, and institutional expertise. The prudential arguments involve the practical concerns of making government work well. These categories inevitably overlap.<sup>25</sup> Both, however, are related to two questions that all agencies confront: “Who’s the boss?” and “What’s my line?” The first is a question that asks how agencies should manage their competing loyalties to the three branches of government. The second is a question that asks how agencies should define their institutional missions. I take each question in turn.

#### A. *Who’s the Boss?*

The job of agencies is to help the President fulfill his or her constitutional duty to “take Care that the Laws be faithfully executed.”<sup>26</sup> Good

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21. See Eileen Gauna, *EPA at Thirty: Fairness in Environmental Protection*, 31 *Envtl. L. Rep.* 10,528 (2001) (reviewing EPA’s draft guidance on investigating Title VI discrimination claims). Although EPA issued its draft Title VI guidance in 2000, it has not yet (as of December 2003) issued a final version.

22. The Bush Administration’s proposed trading program for mercury emissions would require a new interpretation of the Clean Air Act’s provisions on hazardous air pollutants. See Jennifer 8. Lee, *New Policy on Mercury Pollution Was Rejected by Clinton E.P.A.*, *N.Y. TIMES*, Dec. 16, 2003, at A31.

23. See Ann E. Carlson, *Federalism, Preemption, and Greenhouse Gas Emissions*, 37 *U.C. DAVIS L. REV.* 281, 292-98 (2003) (noting that California’s proposed greenhouse gas restrictions would require the EPA to grant the state a waiver under the Clean Air Act, a move that would depend on a particular reading of a Clean Air Act provision).

24. For a practical essay on how lawyers, law students, and the lay public can use the public comment process to influence administrative policy, see Victor Flatt et al., *Let the People Speak: Notice and Comment Rulemaking (Lessons from the Controversial New Source Review Proposal of the Clean Air Act)*, 34 *Envtl. L. Rep.* 10,115 (2004).

25. See Mashaw, *supra* note 18, at 15.

26. U.S. CONST. art. II, § 3.

agencies are, therefore, “faithful agencies.”<sup>27</sup> But to what and to whom are they faithful? To “the Laws,” and by extension, “the People,” is the answer. But that is an easy dodge. To be faithful to the laws and the people, an agency must define its more complicated loyalties to the three branches of government, each of which influences and partially controls administrative behavior. In this Part, I argue that agencies owe their broadest and strongest loyalties to Congress, leaving a set of narrower, but very important, loyalties to the President and the courts.

### 1. *The Congress*

There is little doubt that agencies owe significant “faithfulness” to Congress. Agencies are creatures of Congress. Congress breathes them into being and endows them with purpose and authority. This delegation of power and the constitutional requirement that such delegation contain both a mandate and guiding, “intelligible principles”<sup>28</sup> implies a primary allegiance to Congress.<sup>29</sup> Because statutory enactments also require action (or inaction) on the part of the President, this allegiance to Congress implies a corresponding faithfulness to the overseeing President. But this detail does not change the normative picture. Agencies are keepers of the statutory flame. It is their job to keep Congress’s words and intent alive, to transform the legislative will into reality, even after public attention is drawn to other causes and the personnel in Congress has changed.

In this way, the structural relationship between Congress and executive agencies resembles a trustor-trustee relationship. The legislating Congress is the trustor. It leaves its assets (public, legal, and financial resources) in the care of an agency, the trustee, to be developed and used according to a set of instructions designed to preserve the trustor’s intent. Like a trustee, the agency will necessarily act within some range of interpretive latitude. In many cases, Congress itself may grant to an agency (explicitly or implicitly)<sup>30</sup> the power to fill in statutory gaps—“to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law, even one about which ‘Congress did not actually have an intent’ as to a particular result.”<sup>31</sup> Still, the intent of the legislature controls: Congress is the “dead hand.”

An agency’s responsibility toward Congress is suggested in other ways. The longstanding judicial practice of showing deference to at least some

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27. The term belongs to Jerry Mashaw. Mashaw, *supra* note 18, at 5.

28. *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 487 (2001).

29. Mashaw, *supra* note 18, at 3; *see also* JERRY L. MASHAW ET AL., *ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM* 56-84 (4th ed. 1998).

30. *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001) (interpretive grant may be implicit); *Chevron v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984) (same). Identifying implicit grants of gap-filling authority may be more art than science. David Barron and Elena Kagan characterize the quest as “chimerical.” David J. Barron & Elena Kagan, *Chevron’s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 203.

31. *Mead Corp.*, 533 U.S. at 229 (quoting *Chevron*, 467 U.S. at 845).

statutory interpretations of agencies implies a corresponding obligation for agencies to try their best to get their interpretations right.<sup>32</sup> Congress's authority to employ oversight committees to review and in some cases influence statutory enforcement by the agencies similarly signals a structural basis for statutory faithfulness.

Also relevant, I believe, are the clarity and effectiveness with which Congress is able to influence agency behavior. Clarity is important because agencies should not be expected to adhere closely to congressional will if that will is difficult to understand. Effectiveness is important, because if Congress lacks the ability to effectively limit agency action, it is even more important, from a normative standpoint, that agencies develop self-regulating standards to guard Congress's statutory flame. Thus, positive marks on the clarity scale strengthen the normative argument for increased deference from agencies. Positive marks on the effectiveness scale, on the other hand, slightly weaken the normative argument for increased deference from agencies.

Congress has two primary ways to control agency behavior: statutory directive (which, for my purposes, includes legislative riders) and committee oversight. The first tool presents relatively clear and comprehensive means of instructing agencies. Many environmental statutes, for instance, limit agency discretion through statutory language that forecloses or presumes against certain interpretations. The Clean Air Act's apparent "cost-blind" analysis in establishing national ambient air quality standards is one example of this technique.<sup>33</sup> The so-called "hammer" provisions contained in the amendments to the Resource Conservation and Recovery Act, which demand specific standards and timetables for agency implementation of landfill regulations, is another.<sup>34</sup> Congress also uses legislation to cut or enhance agency budgets.

But, as in writing a trust instrument, there are practical limits to how specific the drafter can be if she wishes to remain flexible in the face of unexpected events. To complicate matters, many details omitted in environmental statutes involve exactly the kinds of issues that Congress, for either political or technological reasons, is unable to resolve.

Beyond the written word, the act of legislation itself provides further clarity and comprehensiveness in the form of legislative history. But statutory intent lacks the coercive power of statutory language because courts are less likely to limit agency behavior for reasons of statutory intent than they are for reasons of statutory text. In this Article, I take no position on the use

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32. See *id.* at 229 (describing the various forms of deference historically shown to agency interpretations).

33. *Whitman*, 531 U.S. at 464-71 (holding that agency determinations of national ambient air quality standards may not be influenced by considerations of cost).

34. Resource Conservation and Recovery Act, 42 U.S.C. § 6924(c)(2) (2000). See also Solid Waste Disposal Act, 42 U.S.C. § 6901 (2000).



of legislative intent by courts. But I will argue that *agencies* should use such information aggressively.

Congress's second coercive tool, congressional oversight, is more of a mixed bag. The structure of Congress and its oversight committees suggest strong impediments to a clear and effective system of supervision. As Elena Kagan explains, "Because Congress rarely is held accountable for agency decisions, its interest in overseeing much administrative action is uncertain; and because Congress's most potent tools of oversight require collective action (and presidential agreement), its capacity to control agency discretion is restricted."<sup>35</sup> In addition, congressional oversight committees may be open to capture by individual legislators who are more sympathetic to the regulated community than is Congress as a whole.<sup>36</sup> In apparent contrast to this view, some empirical and anecdotal surveys suggest that congressional oversight has increased substantially since the 1970s.<sup>37</sup> Even so, such action may be motivated more by "captured" oversight commissions than statutory faithfulness, a point that suggests committees are interested more in under-enforcement than enforcement. In addition, as Kagan points out, congressional oversight committees lack the enforcement powers most likely to change agency behavior.<sup>38</sup> Thus, I make the case for strong deference to Congress, as a normative matter. Agencies' powers and mandate are conferred by Congress and required by the Constitution to be intelligible. Such delegated powers often include (explicitly or implicitly) the power to fill in statutory gaps, a job that suggests strong loyalty to congressional purpose. In addition, Congress's purpose is often fairly clear, particularly when legislative history is examined. Finally, a lack of effective oversight suggests that if agencies do not, themselves, give congressional will the highest of priorities, that will might be abandoned.

Pursuing the will of Congress requires agencies to examine legislative history carefully, applying its meaning as best they can. A strong reliance on legislative history is controversial in today's judiciary; but it should not be within agencies. Courts' skepticism toward legislative history is commonly based either on the belief that such history is inconclusive or that the judicial enforcement of even conclusive history amounts to legislating from the bench.

These concerns are less compelling where agencies are concerned. To take the latter point first, agencies—unlike courts—are charged with filling in the statutory blanks. For better or worse, writing law (within certain parameters) is what agencies are supposed to do. This charge presumes an

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35. Kagan, *supra* note 16, at 2347.

36. *See id.* at 2259-60; DeShazo & Freeman, *supra* note 17, at 1492 (describing this view as "plausible").

37. *See, e.g.*, JOEL D. ABERBACH, KEEPING A WATCHFUL EYE 14, 34-37 (1990) (cited in Kagan, *supra* note 16, at 2257 n.28); Alexis Simendinger, *The Paper Wars*, 30 NAT'L J. 1732, 1735-36 (1998) (cited in Kagan, *supra* note 16, at 2257 n.29).

38. *See* Kagan, *supra* note 16, at 2259. Even with stronger enforcement powers, there is reason to doubt an oversight committee's commitment to enforcement.

understanding of purpose and authorial intent. In addition, the agency has the best chance of getting the intent right. It may be unrealistic to expect a federal court, which interprets the provisions of several different statutes a month, to develop nuanced expertise in the history of each environmental act. As Judge Frank Easterbrook has written, "Judges are overburdened generalists, not philosophers or social scientists. Methods of interpretation that would be good for experts are not suitable for generalists."<sup>39</sup> But agencies are made up of specialists, not generalists. They have a direct relationship with Congress and a long-term connection to the statutes. Many career staffers have studied and interpreted the same statutes for decades, amassing an unsurpassed wealth of practical and historical information. Indeed, the very *practice* of agency interpretation against the backdrop of congressional activity over time eventually takes on a form of legislative meaning. To ask that administrators ignore or minimize this accumulated knowledge would be equivalent to, as Professor Peter Strauss has suggested, "locking the agency out of its library."<sup>40</sup>

In addition, legislative history provides grounding for an agency that may be pressured by the White House to read the statute in a way less favorable to Congress's goals.<sup>41</sup> As Congress's "keeper of the flame," agencies should prefer congressional intent over executive jawboning. In contrast, courts have no need to fend off the sometimes counter-regulatory pressures of the executive.<sup>42</sup>

Finally, there is a more complicated argument favoring legislative intent, which involves congressional oversight. Some commentators suggest that the more agencies minimize or ignore legislative history, the more Congress would be spurred to increase its regulatory oversight.<sup>43</sup> This would have the effect of strengthening the power of the *present* overseeing Congress at the expense of the *past* enacting Congress. This power shift is more than a shift from a past legislature to a current one; it is a shift from Congress—as a whole—to a smaller congressional oversight committee.

One might think that such oversight committees would be more sympathetic to an agency's statutory mission, but often the reverse is true. Professors J.R. DeShazo and Jody Freeman, for instance, have shown that oversight committees are likely to be populated by legislators who have special sympathies for industries that are subject to agency control.<sup>44</sup> Thus, oversight committees may prove *less* supportive of statutory mandates than the overall Congress (present or past).<sup>45</sup> In addition, increased congressional

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39. Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 69 (1994).

40. Strauss, *supra* note 18, at 335-40; *see also* Mashaw, *supra* note 18, at 7 ("For a faithful agen[cy] . . . to in some sense ignore its institutional memory, would be to divest itself of critical resources in carrying out congressional designs.").

41. Mashaw, *supra* note 18, at 8; *see* Strauss, *supra* note 18, at 336.

42. Strauss, *supra* note 18, at 346.

43. *See id.* at 336.

44. DeShazo & Freeman, *supra* note 17.

45. *Id.*

oversight heightens “separation of powers” concerns, creating the prospect of what Professor Strauss has called a “counter-executive” within the legislative branch.<sup>46</sup>

One might respond to the pro-history argument by saying that legislative history is too uncertain and pliable to be heavily relied upon, even by agencies. But the fact is that locking the agency out of the library will simply lead to further reliance on other sources of influence, whether that be the President, congressional oversight groups, or the courts. There is nothing wrong with these sources, but they are not inherently more reliable than congressional history. At any rate, if agencies do misread legislative history, their decisions are more easily subject to correction (than those of courts) by the coercive powers of the executive or congressional oversight committees.

Based on the reasoning above, I suggest the first guideline for statutory interpretation by agencies: *When interpreting a statute, agencies should rely heavily on a statute’s language, structure, and legislative history.*

## 2. *The President*

“We live today,” as Elena Kagan writes, “in an era of presidential administration.”<sup>47</sup> From Ronald Reagan to George W. Bush, we have gotten used to presidents calling the administrative shots. For environmental scholars, the progression is familiar territory. In the first months of his presidency, President Reagan signaled his intention to consolidate administrative power within the White House.<sup>48</sup> He selected administrative officials on the basis of loyalty and ideological commitment.<sup>49</sup> He issued an executive order empowering the Office of Management and Budget (“OMB”), an entity within his purview, to review all major regulations of executive branch agencies.<sup>50</sup> Through these actions, Reagan was able to set a uniform course for executive agencies in the service of mainly anti-regulatory goals.<sup>51</sup> President George H.W. Bush used essentially the same tools for essentially the same ends.<sup>52</sup>

President Clinton took the newly-centralized powers of the OMB and made them his own. He softened the agency’s aggressive methods and invoked the review mechanism to advance, rather than inhibit, the regulatory mission.<sup>53</sup> He issued stacks of executive orders (handy since they required no approval from a skeptical Congress), including one requiring all agencies to identify and address environmental justice concerns.<sup>54</sup> Clinton also used

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46. Strauss, *supra* note 18, at 339-40.

47. Kagan, *supra* note 16, at 2246.

48. *Id.* at 2277-78.

49. *Id.*

50. *Id.*

51. *Id.* at 2277-80.

52. *See id.* at 2281.

53. *See id.* at 2282-83.

54. Exec. Order No. 12,898, 3 C.F.R. § 859 (1995), *reprinted in* 42 U.S.C. § 4321 (2000); *see generally* Denis Binder et al., *A Survey of Federal Agency Response to President Clinton’s Executive*

executive directives to spur administrative action and personalized his relationship with agencies by publicly promising to have popular rules implemented, then taking the credit when they were.<sup>55</sup>

President George W. Bush makes similar use of such control strategies, although mainly for anti-regulatory ends. Upon taking office, Bush instructed all agencies to review all regulations enacted at the end of the Clinton Administration that had not yet taken effect.<sup>56</sup> Like Reagan, Bush continues to experiment with OMB review, expanding its scope, increasing its power, and multiplying its staff.<sup>57</sup> Like Clinton, Bush takes personal ownership of at least some regulatory decisions, such as his early directive on stem-cell research or, more recently, the EPA's "Clear Skies Initiative."<sup>58</sup>

This impulse toward administrative control should not be surprising. "Any president," write Richard Pildes and Cass Sunstein,

is likely to seek assurance that an unwieldy federal bureaucracy conforms its actions to his or her basic principles. Any president is likely to be concerned about excessive public and private costs. And any president is likely to want to be able to coordinate agency activity so as to ensure consistency and coherence . . . .<sup>59</sup>

But what, in normative terms, is the justification for this impulse? If we can locate the justification for consolidated executive control of agencies, we might then propose a justification for agency deference toward the executive in cases of statutory interpretation.

The most conventional case for consolidated presidential authority, called the "unitary" view, follows an originalist track. In its strongest form, the unitary view holds that the President has plenary power over administrative functions, including adjudication and rulemaking.<sup>60</sup> Administration officials who do not toe the President's line are subject either to reversal or dismissal.<sup>61</sup> This theory is commonly anchored in two provisions of Article II: the Vesting Clause which states that "[t]he executive Power shall be vested in [the] President,"<sup>62</sup> and the Take Care Clause, which enjoins the

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*Order No. 12898 on Environmental Justice*, 31 *Env'tl. L. Rep.* 11,133 (2001).

55. Kagan, *supra* note 16, at 2285-86.

56. *Id.* at 2319.

57. FRANK ACKERMAN & LISA HEINZERLING, *PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING* 42, 110-11, 168-69, 195, 207-08 (2003) (noting OMB's expanded scope and increased power); John D. Graham, *Presidential Oversight of the Regulatory State: Can It Work?* (speech delivered Oct. 4, 2002), *available at* [http://www.whitehouse.gov/omb/inforg/ghraham\\_cmu\\_100402.html](http://www.whitehouse.gov/omb/inforg/ghraham_cmu_100402.html) (noting expansion of OMB staff).

58. See *Clear Skies*, at [www.epa.gov/clearskies](http://www.epa.gov/clearskies) (last modified Sept. 8, 2003).

59. Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 *U. CHI. L. REV.* 1, 16 (1995).

60. Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 *COLUM. L. REV.* 1, 9-10 (1994).

61. *Id.* at 8.

62. U.S. CONST. art. II, § 1; Lessig & Sunstein, *supra* note 60, at 9-10.

President to “take Care that the Laws be faithfully executed.”<sup>63</sup> As unitarians see it, the Vesting Clause should be understood to vest *all* executive power (for none is excluded) into *one* chief executive, that is, “the President.”<sup>64</sup> The Take Care Clause should be understood to confer to the President not only the duty to execute the laws, but also the *means* necessary to do it.<sup>65</sup> For unitarians, the “means” is plenary administrative control.<sup>66</sup>

While advocates of the unitary model, to my knowledge, have not directly addressed standards of agency interpretation, their analysis would not be hard to imagine. The model suggests that agencies owe substantial deference to the President in all cases. The reason is structural. Executive agencies,<sup>67</sup> while creatures of the Congress, perform (among other things) traditionally executive functions. Because the Vesting Clause pours all executive powers into the vessel of the presidency and because the President alone is responsible for their proper execution, the agencies must show loyalty. Admittedly, the argument is circular: the President’s control over agencies implies their normative obedience. But if one believes that the President is the sole source of executive power and enforcement, anything less than normative obedience makes little sense.

I reject the unitarian view of Article II and, consequently, its justification for presidential control and agency loyalty. My reasons, which are beyond the scope of this Article, draw from the work of Lawrence Lessig and Cass Sunstein.<sup>68</sup> Examining the historical record, they argue that the Framers intended to balance aspects of executive control between the President and the Congress.<sup>69</sup> In this view, Congress possessed power to regulate administrative activities within the executive branch itself.<sup>70</sup> Having the duty to faithfully execute the laws did *not* imply the power to decide exactly how it should be done.<sup>71</sup> In most cases, that power resided in Congress.<sup>72</sup>

But rejecting unitarianism need not leave the President in the cold. A more pragmatic case for presidential power—associated with Elena Kagan and, to a lesser extent, Lessig and Sunstein—is gaining momentum. The newer view holds that despite Congress’s authority to regulate administrative activities—and despite its occasional use of congressional vetoes and independent agencies—the President’s discretionary power supply remains significantly intact.<sup>73</sup> This is a good thing, not because the Framers intended all administrative power to vest in a single office, but because centralizing

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63. U.S. CONST. art. II, § 3, Lessig & Sunstein, *supra* note 60, at 9-10.

64. Lessig & Sunstein, *supra* note 60, at 8-10 (describing the originalist unitary view).

65. *Id.*

66. *Id.*

67. The strong version of unitarianism does not acknowledge the constitutionality of “non-executive,” independent agencies. See Lessig & Sunstein, *supra* note 60, at 8 n.21.

68. See generally *id.*

69. *Id.* at 68-69.

70. *Id.*

71. *Id.*

72. *Id.*

73. Kagan, *supra* note 16, at 2319-31; see Lessig & Sunstein, *supra* note 60, at 85-119.

such power in the President advances the normative values of transparency, accountability, and effectiveness.<sup>74</sup> For these reasons, the argument goes, constitutional and statutory law should be read to promote the President's control over agency action, rather than limit it.<sup>75</sup>

Let us take these normative values in turn. Transparent governance is an obvious aspiration for a democratic republic. Presidential leadership in administrative matters creates the potential for clearer chains of command and a more organized system of decisionmaking across agency borders. Ideally, firm leadership "enabl[es] the public to comprehend more accurately the sources and nature of bureaucratic power."<sup>76</sup>

Presidential control also leads to better political accountability. Within the intricate lacework of regulatory law, the average citizen has no idea which official deserves the praise or blame for any given initiative. The problem is amplified in the environmental arena where cooperation between federal, state, and local agencies is routine. Presidential leadership can establish a political link between the voter and the bureaucracy, perhaps increasing the prospect for greater government responsiveness.<sup>77</sup>

Finally, as the earlier quotation from Pildes and Sunstein suggests, presidential leadership brings the promise of uniformity, consistency, and rationality to the administrative state.<sup>78</sup> Pro-regulatory presidents such as Clinton have even shown the potential to inject energy and dynamism into the administrative mission.<sup>79</sup>

Yet it would be a mistake to conclude that this argument, which seeks to justify the President's coercive authority over agencies, brings with it a justification for broad, uncoerced deference toward the President on the part of agencies. This is because, unlike the originalist, unitary view, which would posit administrative obedience as a matter of the Framers' intent, Elena Kagan's more pragmatic view grounds presidential administration in the promise of process-based outcomes—transparency, accountability, and effectiveness. While courts (as Kagan argues) should be willing to give the President some benefit of the doubt when defining his or her power under congressional delegation, it is not clear from this view that agencies owe the same deference to the President on their own.

One reason involves the concepts of clarity and control, first introduced in the discussion of congressional administrative power. Since the Reagan era, presidential control of agencies has shown terrific success in terms of clarity of direction and strength of control. Clear presidential directions (e.g., Reagan: "favor cost-benefit analysis"; Clinton: "address environmental racism") cut in favor of agency obedience. But the President's strong

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74. Kagan, *supra* note 16, at 2331-40; see Lessig & Sunstein, *supra* note 60, at 85-119.

75. See Kagan, *supra* note 16, at 2363-64.

76. *Id.* at 2331-32.

77. *Id.* at 2332.

78. See Pildes & Sunstein, *supra* note 59, at 16.

79. See Kagan, *supra* note 16, at 2252, 2281-82.

coercive power (e.g., power of appointment, presidential directives, OMB's "return letters")<sup>80</sup> suggests a much milder need for agencies' voluntary deference.

A second reason to doubt a rule of voluntary deference is that, in the real world, presidential administration can lead to the very *opposite* of transparency and accountability. Elena Kagan acknowledges the possibility that a President might use his or her power to inappropriately cloud issues and avoid accountability,<sup>81</sup> but she grossly underestimates the danger.

Environmentalists' central claim against the Bush Administration involves this very charge. To raise just a few examples, commentators have frequently criticized the OMB's use of accounting techniques such as the "discounting" of human lives or the calculation of "quality-adjusted life years," because of their potential to mask within the language of social science value judgments more appropriately made under the public eye.<sup>82</sup>

Congress's General Accounting Office recently issued a comprehensive report of OMB activity which leveled much broader charges of non-transparency.<sup>83</sup> The report notes that OMB's reviewing body, the Office of Information and Regulatory Affairs ("OIRA"), has changed its rulemaking role from one of a "counselor" to rulemaking agencies to that of a "gatekeeper."<sup>84</sup> More significantly, the report states that OIRA often recommends changes in agency rules *before* the rules are ever made public and that often no records are kept of such changes either within OMB or the other agencies.<sup>85</sup> Among the rules surveyed in the previous year, the report states that EPA's rules "were [those] most often significantly changed."<sup>86</sup>

Such problems, of course, diminish accountability. But environmentalists point to other threats to accountability as well. In their view, George W. Bush is not a conservative copy of Bill Clinton—a President who publicly wraps himself in the regulatory achievements of executive agencies in order to win popularity. They would say he uses his public role more cynically by pushing for anti-environmental rules in private and then publicly mischaracterizing those rules as pro-environmental to gain public praise.

Some recent examples appear to support this view. The Forest Service's so-called "Healthy Forests Initiative," which exempts from environmental review the harvesting of up to seventy acres of healthy trees on federal land,

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80. A return letter is a letter issued by the OMB's Office of Information and Regulatory Affairs that returns a proposed rule to the drafting agency and recommends that its rulemaking would "benefit from further consideration." U.S. OFFICE OF MGMT. & BUDGET, OIRA RETURN LETTERS, *available at* [http://www.whitehouse.gov/omb/inforeg/return\\_letter.html](http://www.whitehouse.gov/omb/inforeg/return_letter.html) (last visited on Feb. 15, 2004). Grounds for a return letter might include an agency's misapplication of regulatory standards, a rule's inconsistency with existing law, or a rule's inconsistency with the president's "policies and priorities." *Id.*

81. *See* Kagan, *supra* note 16, at 2332-33.

82. *See* ACKERMAN & HEINZERLING, *supra* note 57, at 98-102, 186-94.

83. *See* U.S. GEN. ACCT. OFFICE, PUBLIC NO. GAO-03-929, RULEMAKING: OMB'S ROLE IN REVIEWS OF AGENCIES' DRAFT RULES AND THE TRANSPARENCY OF THOSE REVIEWS, Sept. 2003, *available at* <http://www.gao.gov/cgi-bin/getrpt?GAO-03-929>.

84. *Id.* at 2 (internal quotations omitted).

85. *Id.*

86. *Id.*

appears on its face to significantly advance the interests of the logging industry in return for relatively small environmental benefit.<sup>87</sup> Yet President Bush has repeatedly characterized the initiative as primarily directed at preventing forest fires and promoting “healthy forests.”<sup>88</sup> On the subject of wetlands, President Bush, like his father before him, consistently affirms in public the nation’s “goal of halting overall wetlands loss.”<sup>89</sup> Yet at least some reason exists to doubt that this public goal enjoys the same support within the Army Corps of Engineers.

Regardless of whether President Bush’s public comments on environmental initiatives amount to “bait and switch” politics, the possibility of such abuse clearly exists. Kagan may be correct that even against this possibility, it is better for the President to have broad coercive control over executive agencies than not.<sup>90</sup> But agencies need not, and should not, *voluntarily* follow presidential preferences that appear (to the agency) to be inconsistent with legislative intent or against the core values of transparency and accountability.

Before moving on, I should address one concern that may weigh on readers’ minds. The concern is that, given the President’s strong grip on agency behavior, it is unrealistic to expect an agency to stand up to presidential policy, however it is expressed. If the President instructs that the sky is “red,” what chance is there that an agency will mount an argument for “blue”? To complicate things, the preference for “red sky” is likely shared by political appointees within the agency itself, a further reason to doubt administrative independence. As an example, some observers contend the White House has reduced the EPA’s level of environmental enforcement by moving many key discretionary decisions from senior career staff members to the agency’s more ideologically-reliable political appointees.<sup>91</sup>

In its most forceful version, this concern is actually an argument against any normative standards for agency interpretation: if agencies always do what the President wants, why bother to prescribe interpretive standards? My answer to this view is that even in the era of “presidential administration,” the White House cannot realistically pre-determine the acts and ideologies of all agencies; it has neither the focus, the resources, nor the time.<sup>92</sup>

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87. Victoria Sutton, *Environmental Law Symposium: The First Year of the Bush Administration: The George W. Bush Administration and the Environment*, 25 W. NEW ENG. L. REV. 221, 234 (2003).

88. See, e.g., REMARKS BY PRESIDENT GEORGE W. BUSH AT SIGNING OF H.R. 1904, THE HEALTHY FORESTS RESTORATION ACT OF 2003, Dec. 3, 2003, available at <http://www.usda.gov/news/releases/2003/12/hfiremarks.htm>.

89. See, e.g., PROCLAMATION BY THE PRESIDENT OF THE UNITED STATES OF AMERICA [George W. Bush], YEAR OF CLEAN WATER 2002-03, Oct. 18, 2002, available at <http://www.amsa-cleanwater.org/pubs/cleanwater/oct02/yocw02-03.pdf>.

90. See Kagan, *supra* note 16, at 2333.

91. Rena Steinzor, *Testimony before the Subcommittee on Fisheries, Wildlife, and Water of the U.S. Senate Regarding Implementation of the Clean Water Act* (Center for Progressive Regulation, Rockville, Md.) Sept. 16, 2003, available at [http://www.progressiveregulation.org/articles/EPA\\_Enforcement\\_Testimony\\_091603.pdf](http://www.progressiveregulation.org/articles/EPA_Enforcement_Testimony_091603.pdf) (describing the research findings of Joel Mintz).

92. Sometimes, in the interest of political expediency or ideological diversity, a President will



And while the White House can revise agency decisions (as through the review process at OMB) or coerce agency compliance, these acts are likely to be reported publicly, subjecting the issue to public debate. This, in itself, would advance the values of governmental accountability and transparency.<sup>93</sup>

Based on the reasoning above, I then suggest a second guideline for statutory interpretation by agencies: *When interpreting a statute, agencies should attempt to integrate presidential policy preferences, but ultimately must decide for themselves the meaning of the law.*

### 3. *The Courts*

One can imagine the judiciary's pull on administrative bodies as involving two forces, a strong and a weak force. The strong force begins with the "law of the case." When a court finds an agency interpretation invalid as applied, as it did in *SWANCC*,<sup>94</sup> there is no more discussing the matter. The agency must rescind its interpretation in the circumstances of that case. Most legal scholars would probably say that agency interpretation is also limited by previous Supreme Court rulings, although there exists creative legal arguments to the contrary.<sup>95</sup> Thus, on-point Supreme Court precedent might also be considered part of the judiciary's strong coercive force.

All other judicial influence represents the weak force, by which I mean an influence that, while perhaps relevant, is not binding on the agency as a matter of law. Federal district or appellate court rulings are examples of such influence. As a practical matter, an agency will often defer to the ruling in future activities in the court's geographic region. When, for instance, the Eleventh Circuit Court of Appeals recently struck down as unconstitutional administrative compliance orders under the Clean Air Act,<sup>96</sup> the EPA discontinued its practice of issuing such orders in the Eleventh Circuit, but continued the practice everywhere else.<sup>97</sup> Legally, it may not have had to do even this.<sup>98</sup>

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appoint an administrative head whose political views seem to deviate from the White House norm. For example, President Bush appointed Secretary of State Colin Powell and former EPA Administrator Christi Whitman, both of whom are viewed as personally more moderate on some issues than is the President.

93. See Kagan, *supra* note 16, at 2333 (arguing that a "more nakedly assertive (and legally aggressive) [model of presidential control over agencies] is the more desirable" for purposes of promoting democratic values).

94. *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001).

95. See Mashaw, *supra* note 18, at 10 n.37.

96. See *Tenn. Valley Auth. v. Whitman*, 336 F.3d 1236, 1260 (11th Cir. 2003).

97. Interview with David Cozad, Environmental Protection Agency, Region VII, Kansas City, Missouri (Nov. 10, 2003).

98. Jerry Mashaw writes:

While federal courts "declare what the law is," they do so only in concrete cases. These interpretations become "the law of the case." They are binding on the litigants in that case and on inferior courts subject to the reviewing jurisdiction of the court rendering the interpretive opinion.

Certain judicially-recognized norms, if compelling enough, can also influence agencies in a non-binding way. Consider *Bob Jones v. United States*,<sup>99</sup> in which the Internal Revenue Service interpreted a provision of the tax law so as to advance a constitutional commitment to non-discrimination.<sup>100</sup> Other candidates for compelling norms might include a commitment to civil liberties or the separation of powers.

To what degree should interpreting agencies allow themselves to be influenced by these judicial forces? Where the mandatory, strong forces are at play, the answer is “completely.” To ignore the law of the case is illegal; to ignore on-point Supreme Court precedent is self-destructive. The question is less clear where weak forces are concerned. When interpreting law for a national program, agencies should, in general, favor their own views of the law over that of a single district or appellate court. This is because Congress likely placed a premium on national uniformity and would not want an agency to voluntarily choose non-uniform rules. Where a federal court has exclusive jurisdiction over interpretation of a particular statute, the concern for non-uniformity disappears, as does an agency’s justification for discounting it.

The use of judicial norms requires a more nuanced approach. It would be hard to argue that agencies should not incorporate widely-shared democratic norms when interpreting statutes. Such norms lie at the heart of good governance. But at the same time, agencies should not avoid bumping up against constitutional questions or testing the limits of a legal doctrine. To err always on the side of caution would have the ironic effect of depriving courts of their ability to resolve the important legal questions of the day. Jerry Mashaw put it this way: “Constitutionally timid administration both compromises faithful agency and potentially usurps the role of the judiciary in harmonizing congressional power and constitutional command.”<sup>101</sup> The solution implies a middle road in which agencies defer to widely-shared norms, but feel free to question less established or less clearly-defined principles. Most often, the distinction will come down to the surrounding facts—an answer, perhaps, not completely satisfying. To offer more guid-

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But agencies are not inferior courts. They are a part of the executive branch. Hence, a court ruling is binding on the agency in the litigated case, but as a technical legal matter, not otherwise.

Mashaw, *supra* note 18, at 10.

An agency’s refusal to extend nationally the ruling of a single federal circuit may also be defended as good policy. Where the agency disagrees with the ruling, such refusal prevents a single circuit from making “national” law against the wisdom of the agency. Were agencies to allow federal circuit courts this power, the already-existing practice of forum shopping among federal circuits would significantly increase. Also, the U.S. Supreme Court might feel greater pressure to review federal appellate decisions on questions of first impression, before allowing other circuits to weigh in on the same issue in the future. Such pressure might expand the Supreme Court’s case load and cut off the opportunity for several federal circuits to examine and crystallize the issues before a possible Supreme Court resolution.

99. 461 U.S. 574 (1983).

100. Mashaw, *supra* note 18, at 6 (offering this example).

101. *Id.* at 5; see also Larry D. Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 4, 148-51 (2001).

ance, I will approach this question again in Part II, where wetlands protection confronts the normative value of federalism.<sup>102</sup>

A theme that should be apparent from this discussion is the difference between the interpretive charge of courts and of agencies. Whereas courts try to interpret law so as to remain consistent with rulings in other jurisdictions, I argue that agencies should focus instead on consistency within their national programs. Whereas courts seek to avoid constitutional questions for prudential reasons, I argue that agencies should be less concerned with avoidance. One way of understanding this difference involves the notions of clarity and control, which have been discussed earlier.

While the strong, mandatory forces of judicial decree are relatively clear to the agencies involved, the weak forces are not. This is particularly true where judicial norms and principles are concerned. Agencies are not as equipped as courts to flesh out the details of general principles or to define their boundaries. Even if agencies were so equipped, that would not be their job. This brings us to the notion of control. Agency interpretation is ultimately subject to judicial control (although that control depends on a plaintiff with standing to present the issue). Because of this control, the risk of interpretive error by agencies is lessened.

From this reasoning comes a third guideline for statutory interpretation by agencies: *When interpreting a statute, agencies should avoid direct conflict with controlling precedent and be sensitive to widely-shared norms of democratic society; but agencies need not avoid raising valid constitutional questions or testing the limits of legal doctrines.*

### B. *What's My Line?*

In addition to being faithful to the three branches of government, agencies must also be faithful to themselves. That is, they should seek to develop those areas of expertise or ability that make them valuable to the administrative process. To some degree the areas to be developed will depend on the agency involved. For agencies like the EPA and the Army Corps, which have significant responsibilities related to environmental protection, some top considerations are briefly discussed below.

#### 1. *Special Knowledge and Expertise*

For agencies responsible for the integrity of millions of acres of wetlands and their related ecosystems, dependence on the best scientific information is essential. The scientific expertise within the EPA and the Army Corps justifies, in part, Congress's decision to delegate administrative powers to those agencies. The courts have also acknowledged the specialized expertise of many agencies and have cited such expertise as a basis for de-

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102. See *infra* Part II.

ferring to administrative judgments when cases are close.<sup>103</sup> Courts have further emphasized the importance of administrative expertise by requiring agencies to approach important questions by considering all relevant information, practicable alternatives, and diverse perspectives.<sup>104</sup> For the same reasons that courts sometimes defer to agencies with more expertise, agencies themselves should also defer to more expert sibling agencies where authority is shared.

Scientific analysis, by itself, can seldom direct an agency to a given policy choice.<sup>105</sup> For this reason, public values, as expressed in public comments, lobbying, and activism, must also be considered. The President's policies, which represent another source of public values, should also carry significant weight. But public sentiments should not be allowed to replace scientifically-based answers to essentially objective questions.<sup>106</sup> This is an important point in an era in which science is experiencing declining prestige with the general public<sup>107</sup> and where the current administration is often accused of choosing policies against the weight of scientific evidence.<sup>108</sup>

## 2. *Robust Action*

Agencies are delegated authority with the understanding that they will use it. Administrators should, therefore, favor regulatory action that seeks in broad and robust ways the fulfillment of congressional will. Sure, there is a theoretical chance of going too far; but the institutional forces favoring inaction—inadequate resources, interest group opposition, lack of political focus—provide an enormous safety brake. Environmental law is filled with

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103. *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 152-53 (1991) (finding that an interpretation by the Department of Labor was deserving of greater deference than that of the Occupational Safety & Health Review Commission because the Department had greater expertise and because Congress showed a preference toward the Department's control); *Prof'l Operator Soc'y v. U.S. Nuclear Regulatory Comm'n*, 939 F.2d 1047, 1051 (D.C. Cir. 1991) (finding that an agency's interpretation was not deserving of deference because the issue was "outside the agency's particular expertise").

104. *See, e.g., Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983); *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1217 (5th Cir. 1991); *see also* Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1410-11 (1992).

105. Robert R.M. Verchick, *Feathers or Gold? A Civic Economics for Environmental Law*, 25 HARV. ENVTL. L. REV. 95, 131 (2001).

106. I concede that the distinction between objective questions, answerable by science, and subjective questions, answerable by public sentiment, is partly in the eye of the beholder. But most people can probably agree on some range of questions (e.g., How many acres of wetlands were lost last year? Are humans partially responsible for global warming?) that are best considered scientific in nature.

107. *See* William J. Broad & James Glanz, *Does Science Matter?*, N.Y. TIMES, Nov. 11, 2003, at D1 (noting the public's increased skepticism of science and citing Harris poll finding that the percentage of Americans who saw scientists as having "very great prestige" has declined from 66% to 57% in the last quarter century).

108. *See, e.g., U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON GOVERNMENT REFORM, MINORITY STAFF SPECIAL INVESTIGATION DIVISION, POLITICS AND SCIENCE IN THE BUSH ADMINISTRATION* (Aug. 2003, updated Nov. 13, 2003), *available at* <http://www.house.gov/reform/min/politicsandscience/report.htm> (reporting what it describes as "numerous instances where the [second Bush] Administration has manipulated the scientific process and distorted or suppressed scientific findings," going beyond "the typical shifts in policy that occur with a change in the political party occupying the White House").

many more stories of recalcitrant administrators than runaway agencies. A preference toward action also protects agency expertise by occupying the field and establishing regulatory “rights” against other agencies or branches with less expertise.

Of course, a bias toward regulatory action is hardly popular today. Many believe that regulation hobbles economic efficiency. But economic efficiency is not the primary mandate of federal environmental laws: many statutes explicitly place the goals of health or the environment above cost.<sup>109</sup> Moreover, scholars have rebutted critics’ claims that regulation—particularly environmental regulation—has resulted in excessive costs, finding that most such claims are based on suspect calculations and assumptions.<sup>110</sup>

### 3. Agency Effectiveness

As a final consideration, agencies should, of course, strive to make their actions effective. As government’s chosen implementers, agencies must be practical. The ethic of practicality encourages compromise with other agencies or with competing branches of government. It also entails realistic forecasts about how administrative resources can be used and to what effect. Practicality requires the ability to evaluate and order priorities. It should be clear that the values of expertise, robust action, and effectiveness will sometimes (even often) conflict. But attention to these values is still useful. First, sometimes these values will not conflict but converge. In this case, the standards show clarity and should inspire strong confidence. Second, these values prove useful in *excluding* other values that otherwise might be considered but should not be.

Based on the reasoning above, I suggest a final guideline for statutory interpretation by agencies: *When interpreting a statute, agencies should rely heavily on their specialized expertise, favor robust action, and proceed in a manner best calculated to be effective.*

## II. APPLYING THE GUIDELINES TO CLEAN WATER ACT JURISDICTION: SWANCC AND AGENCY REACTION

Parts II and III show how the above guidelines might be applied to evaluate recent agency actions involving federal jurisdiction under the Act. Part II begins the analysis by introducing the Supreme Court’s decision in *SWANCC* and describing the jurisdictional tidal shift that sent the EPA and the Army Corps into administrative action.

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109. See MARK SAGOFF, *THE ECONOMY OF THE EARTH: PHILOSOPHY, LAW, AND THE ENVIRONMENT* 65-68 (1988); Verchick, *supra* note 105, at 133-48.

110. See, e.g., ACKERMAN & HEINZERLING, *supra* note 57; SIDNEY A. SHAPIRO & ROBERT L. GLICKSMAN, *RISK REGULATION AT RISK: RESTORING A PRAGMATIC APPROACH* 73-91 (2003); Richard W. Parker, *Grading the Government*, 70 U. CHI. L. REV. 1345 (2004).

A. *The SWANCC Decision*

*SWANCC* tested the Army Corps's authority to regulate dumping in intrastate waters—specifically, a state proposal to fill “isolated” freshwater ponds in an abandoned gravel pit.<sup>111</sup> According to the Act, the Army Corps may regulate discharges into “navigable waters,”<sup>112</sup> which the Act defines simply as “waters of the United States.”<sup>113</sup> The Army Corps had asserted jurisdiction under a part of the Corps's “Migratory Bird Rule,” which based regulatory authority on the actual or potential use of waters as habitat for migratory birds that cross state lines in their migrations.<sup>114</sup> In a 5-4 decision, the Court held that the Corps's assertion of jurisdiction under the Migratory Bird Rule exceeded its authority under the Act.<sup>115</sup>

The Court's reasoning was mainly text-based. The Court found that even though the term “navigable waters” had been defined as “waters of the United States,” the concept of navigability must still have significance in delineating jurisdiction.<sup>116</sup> The nature of that significance was never fully explained, although the Court had years earlier held, in *United States v. Riverside*,<sup>117</sup> that waters “adjacent” to, but not flooded by, navigable waters fell within the Corps's authority.<sup>118</sup> In distinguishing *Riverside* its current case, the *SWANCC* majority described “adjacent” waters in various ways, including “wetlands that actually abutted on a navigable waterway,” “wetlands ‘inseparably bound up with the ‘waters’ of the United States,’” and wetlands that had a “significant nexus” with navigable waters.<sup>119</sup> But however one defined the critical link to navigable waters, the Court was sure it was absent from those Illinois gravel pits.<sup>120</sup>

The Army Corps argued that both the objective of the Act and its legislative history implied a broader reading. It noted the statute's expansive purpose of “restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters”<sup>121</sup> and recounted legislative pro-

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111. *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 162-67 (2001).

112. Clean Water Act, 33 U.S.C. § 1344(a) (2000).

113. *Id.* § 1362(7) (2000).

114. Migratory Bird Rule, 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986). Alternative rationales for jurisdiction under the Migratory Bird Rule, which were not asserted by the Corps in *SWANCC* included intrastate waters that are or could “be used as habitat by birds protected by Migratory Bird Treaties,” habitat for federally protected endangered or threatened species, or water “[u]sed to irrigate crops sold in interstate commerce.” *Id.* While it is possible to argue that these parts of the Migratory Bird Rule survived *SWANCC*'s invalidation of Corps jurisdiction, the EPA and the Corps appear to have conceded this argument. A redlined version of the ANPRM, available to the public, shows that an early draft specifically invited public comment on whether these provisions survived *SWANCC*. That invitation was later omitted. *See supra* note 12.

115. *SWANCC*, 531 U.S. at 161, 174.

116. *Id.* at 167-74.

117. 474 U.S. 121, 139 (1985).

118. *Id.* at 129-31.

119. *SWANCC*, 531 U.S. at 167 (quoting *Riverside*, 747 U.S. at 134).

120. *Id.* at 139.

121. *Id.* at 166 (quoting Clean Water Act, 33 U.S.C. § 1251(a) (2000)).

ceedings from the 1970s, which it believed supported an expansive delegation and showed Congress's intentional acquiescence in the Corps's regulations.<sup>122</sup> But the Court found the arguments unconvincing as applied to the ponds at issue.<sup>123</sup>

To the Corps's argument for deference under *Chevron v. Natural Resources Defense Council*,<sup>124</sup> the Court replied that its own reading of the statute was clear and unambiguous.<sup>125</sup> Then the Court added a second rationale. Even if the language were not clear, the Court found, it would still not accord *Chevron* deference.<sup>126</sup> "Where an administrative interpretation of a statute invokes the outer limits of Congress' power," the Court wrote, "we expect a clear indication that Congress intended that result."<sup>127</sup> This view flowed from the Court's "prudential desire not to needlessly reach constitutional issues" and its "heightened" concern "where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power."<sup>128</sup> The looming "constitutional issues," purposely avoided by the Court, concerned whether Congress's Commerce Clause power even allowed it to restrict activity on intrastate waters.

## B. Getting in Sync with SWANCC

### 1. The Lower Courts

Several federal courts have now examined the impact of *SWANCC* on Clean Water Act jurisdiction.<sup>129</sup> Most of these cases limit *SWANCC*'s effect to waters that are isolated, intrastate, and non-navigable, although a few do not. These developments are important: the *SWANCC* decision logically extends to jurisdictional issues beyond the section 404 wetlands program,

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122. *Id.* at 132-33.

123. *Id.* at 171-72.

124. 467 U.S. 837 (1984).

125. *SWANCC*, 531 U.S. at 172.

126. *Id.*

127. *Id.*

128. *Id.* at 172-73.

129. See *United States v. Phillips*, No. 02-30035, 02-30046, 2004 WL 193258 (9th Cir. Jan. 30, 2004); *In re Needham*, 354 F.3d 340 (5th Cir. 2003); *Treacy v. Newdunn Assocs., L.L.P.*, 344 F.3d 407 (4th Cir. 2003), *cert. denied*, 72 U.S.L.W. 3310 (U.S. Apr. 5, 2004) (No. 03-637); *United States v. Rapanos*, 339 F.3d 447 (6th Cir. 2003); *United States v. Rueth Dev. Co.*, 335 F.3d 598 (7th Cir. 2003), *cert. denied*, 124 S. Ct. 835 (2003); *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003), *cert. denied*, 72 U.S.L.W. 3356 (U.S. Apr. 5, 2004) (No. 03-701); *Cnty. Ass'n for Restoration of the Env't v. Henry Bosma Dairy*, 305 F.3d 943 (9th Cir. 2002); *United States v. Krilich*, 303 F.3d 784 (7th Cir. 2002), *cert. denied*, 123 S. Ct. 1782 (2003); *United States v. Interstate Gen. Co., L.P.*, No. 01-4513, 2002 WL 1421411 (4th Cir. 2002); *Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001); *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526 (9th Cir. 2001); *N.C. Shellfish Growers Ass'n v. Holly Ridge Assocs.*, 278 F. Supp. 2d 654 (E.D.N.C. 2003); *United States v. Jones*, 267 F. Supp. 2d 1349 (M.D. Ga. 2003); *United States v. Hummel*, No. 00-C-5184, 2003 WL 1845365 (N.D. Ill. Apr. 8, 2003); *Carabell v. U.S. Army Corps of Eng'rs*, 257 F. Supp. 2d 917 (E.D. Mich. 2003); *FD&P Enters., Inc. v. U.S. Army Corps of Eng'rs*, 239 F. Supp. 2d 509 (D.N.J. 2003); *United States v. R.G.M Corp.*, 222 F. Supp. 2d 780 (E.D. Va. 2002); *United States v. Lamplight Equestrian Ctr., Inc.*, No. 00-C-6486, 2002 WL 360652 (N.D. Ill. 2002).

including the section 402 NPDES program, the section 311 oil spill program, water quality standards under section 303, and water quality certification under section 401, all of which rely on administrative jurisdiction over “waters of the United States.”

Without going into unnecessary detail, the effects of *SWANCC* fall into three categories defined by the types of waters at issue: those involving isolated waters, traditional navigable waters, and adjacent wetlands.

*a. Isolated Waters*

*SWANCC* rules out any Army Corps jurisdiction over isolated waters that are intrastate and non-navigable, *if* jurisdiction is based solely on the Migratory Bird Rule.<sup>130</sup> While the Court did not define “isolated,” the facts suggest the Court was referring to “geographically isolated,” or “hydrologically isolated,” waters, as opposed to “ecologically isolated” waters, which are virtually non-existent.<sup>131</sup> Most courts have held that *SWANCC* scuttles jurisdiction only where surface connections to navigable waters are tenuous or absent, in other words, where the waters are hydrologically isolated.<sup>132</sup> Some courts, however, have interpreted *SWANCC*’s reasoning to apply to waters other than isolated waters.<sup>133</sup>

Also still open for debate is whether the Army Corps may assert jurisdiction over isolated waters for reasons other than those based on the Migratory Bird Rule. In addition to the Migratory Bird Rule, section 328.3(a)(3)(i)-(iii) of the Army Corps’s regulations asserts authority over isolated, non-navigable, intrastate waters characterized by interstate or foreign tourism, the presence of fish or shellfish that could be sold in interstate commerce, or by industrial use by industries in interstate commerce.<sup>134</sup> These justifications were not at issue in *SWANCC*. At least one appellate circuit, in a pre-*SWANCC* case, has rejected all three provisions as sources for jurisdiction over isolated waters.<sup>135</sup>

*b. Traditional Navigable Waters*

Traditional navigable waters are defined as waters subject to the ebb and flow of the tide, or waters that are, have been, or could be used as a channel for interstate or foreign commerce.<sup>136</sup> *SWANCC* does not appear to limit jurisdiction over traditionally navigable waters in any way. At least

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130. An argument exists that some rationales of the Migratory Bird Rule not at issue in *SWANCC* may still survive, but the point is minor. *See supra* note 4.

131. *SWANCC*, 531 U.S. at 163-65.

132. *See, e.g., Treacy*, 344 F.3d at 407; *Rapanos*, 339 F.3d at 447; *Rueth Dev. Co.*, 335 F.3d at 598; *Deaton*, 332 F.3d at 698; *Headwaters*, 243 F.3d at 526.

133. *See, e.g., Rice*, 250 F.3d at 264.

134. Definition of Waters of the United States, 33 C.F.R. § 328.3(a)(3)(i)-(iii) (2003).

135. *See United States v. Wilson*, 133 F.3d 251, 257 (4th Cir. 1997).

136. 33 C.F.R. § 328.3(a)(1).



one post-SWANCC decision has upheld federal jurisdiction even where the navigable water body is geographically isolated and completely within a state's boundaries.<sup>137</sup>

c. *Waters Adjacent to Navigable Waters*

Waters that are "adjacent" are, by definition, not "isolated." A finding of adjacency thus virtually assures a finding of federal jurisdiction. The concept of "adjacency" breaks into two questions: (1) What makes a water body adjacent? and (2) What must that water body be adjacent to? As seen earlier, the Supreme Court's discussion of "inseparably bound" waters or waters with a "significant nexus" to navigable waters is of limited help. The Supreme Court has not even made clear whether the basis for adjacency involves geography, hydrology, ecology, or all three. The wetlands in *Riverside* over which jurisdiction was found, physically "abutted" a navigable water body and was not flooded by it, but may have been close enough to the navigable body to indirectly affect its water quality and biology.<sup>138</sup>

Assuming a water body is adjacent, the liveliest issue in the federal courts is what that water body must be adjacent to. *Riverside* establishes that direct adjacency to navigable water confers jurisdiction.<sup>139</sup> Most post-SWANCC decisions have also found jurisdiction where wetlands are adjacent to non-navigable tributaries feeding into navigable waters.<sup>140</sup> Some courts have found jurisdiction over wetlands adjacent to other tributaries that feed into tributaries that feed into navigable waters,<sup>141</sup> or over wetlands adjacent to ditches or pipes that feed into such tributaries.<sup>142</sup> One principle that might explain these holdings is that jurisdiction should extend to any wetlands that might affect, through intermingling surface waters, the physical integrity of navigable waters.

The details surrounding adjacency are extremely important. A report made on behalf of the Association of Wetland Managers estimated that, depending on how broadly or narrowly adjacency is interpreted, the percentage of the nation's wetlands under Clean Water Act jurisdiction after SWANCC could be as high as sixty percent or as low as twenty percent.<sup>143</sup>

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137. See *Colvin v. United States*, 181 F. Supp. 2d 1050 (C.D. Cal. 2001). Utah's Great Salt Lake and Oregon's Crater Lake are well-known examples of such waters.

138. *Riverside*, 474 U.S. at 133.

139. *Id.* at 129-131.

140. See *United States v. Phillips*, No. 02-30035, 02-30046, 2004 WL 193258 (9th Cir. Jan. 30, 2004); *United States v. Lamplight Equestrian Ctr., Inc.*, No. 00C6486, 2002 WL 360652, at \*8 (N.D. Ill. Mar. 8, 2002). *But see* *Rice v. Harken Exploration Co.*, 250 F.3d 264, 269 (5th Cir. 2001).

141. See, e.g., *Carabell v. U.S. Army Corps Eng'rs*, 257 F. Supp. 2d 917, 927-30 (E.D. Mich. 2003).

142. See, e.g., *United States v. Deaton*, 332 F.3d 698, 702-12 (4th Cir. 2003).

143. Pat Parenteau, Position Paper on Clean Water Act Jurisdiction Determinations Pursuant to the Supreme Court's January 9, 2001 Decision, *Solid Waste of Northern Cook County v. United States Army Corps of Engineers (SWANCC)*, to Administrator Whitman 2 (Dec. 2001), available at <http://www.aswm.org/fwp/swancc/position.pdf>.

Such loss of protection would not only threaten the wetlands at issue, but also the larger water bodies to which they are hydrologically connected.

## 2. *The EPA and the Army Corps of Engineers*

Following the *SWANCC* decision, the EPA and Army Corps began tinkering with the plumbing of federal jurisdiction. The agencies offered two exercises in interpretation, which will soon become the subjects of our assessment.<sup>144</sup> The first involved a proposal to revise the Army Corps's jurisdictional rules. In January 2003, the EPA and the Army Corps issued an advance notice of proposed rulemaking ("ANPRM"), which sought public comment "on issues related to the jurisdictional status of isolated waters under the [Clean Water Act]."<sup>145</sup> Specifically, the notice sought comments on whether or how jurisdiction over isolated waters based on section 328.3(a)(3)(i)-(iii) should be preserved and whether or how the term "isolated waters" should be defined in new revised regulation.<sup>146</sup> When the public comment period closed on April 16, 2003, the EPA had received 133,000 comments.<sup>147</sup>

On November 6, 2003, the *Los Angeles Times* reported that it had received a draft of a proposed rule, prepared by the Army Corps and the Justice Department, that would "significantly narrow the scope of the Act, stripping many wetlands and streams of federal pollution controls and making them available to being filled for commercial development."<sup>148</sup> On December 12, 2003, President Bush met with leaders of several hunting and fishing organizations, who favor wetlands conservation.<sup>149</sup> Four days later, the EPA and the Army Corps affirmed the Bush Administration's commitment to "'no net loss' of wetlands" and announced that they had decided "not [to] issue a new rule on federal regulatory jurisdiction over isolated wetlands."<sup>150</sup> The draft rule that had been leaked to the *Los Angeles Times* was dead.

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144. A note on each agency's authority: Historically, the Army Corps has promulgated the main jurisdictional rules under the wetlands program. See WILLIAM H. RODGERS, ENVIRONMENTAL LAW § 4.6 (2d ed. 1994). But an Attorney General's opinion from the Carter Administration found that the EPA had ultimate authority on jurisdictional issues. 43 Op. Att'y Gen. 197,202 (1979). The EPA and the Army Corps appear to have been working under a Memorandum of Agreement by which the EPA delegated some authority over jurisdictional issues to the Corps, although this agreement has since expired without being renewed. See Parenteau, *supra* note 143.

145. ANPRM, *supra* note 12, at 1994.

146. *Id.*

147. See Elizabeth Shogren, *Administration Backs Off Clean Water Act*, L.A. TIMES, Dec. 17, 2003, at A22 [hereinafter Shogren, *Administration Backs Off*].

148. Elizabeth Shogren, *Rule Drafted that Would Dilute the Clean Water Act; If Implemented, Streams and Wetlands Would be Open to Development. California and Other Parts of the West Would Bear the Brunt*, L.A. TIMES, Nov. 6, 2003, at A12.

149. See Barringer, *supra* note 2, at A24; Shogren, *Administration Backs Off*, *supra* note 147; Ducks Unlimited, Press Release, DU President Discusses Wetlands Conservation with President Bush (Dec. 12, 2003), available at <http://www.mnducks.org/NewsReleaseWhitehouse2-16-03.pdf> [hereinafter Ducks Unlimited Press Release].

150. U.S. Env'tl. Prot. Agency, Press Release, EPA and Army Corps Issue Wetlands Decision (Dec.

The second exercise involved an administrative guidance document. On the same day that the EPA and the Army Corps issued their ANPRM, the agencies published a memorandum of agreement clarifying federal jurisdiction after *SWANCC*.<sup>151</sup> This guidance document held that “neither agency will assert [Clean Water Act] jurisdiction over isolated waters that are both intrastate and non-navigable, where the sole basis available for asserting [Clean Water Act] jurisdiction rests on any of the factors listed in the ‘Migratory Bird Rule.’”<sup>152</sup> In addition, the guidance document instructed Army Corps field staff to “seek formal project-specific [EPA] Headquarters approval” before asserting jurisdiction over waters that are both isolated and intrastate, where the basis of jurisdiction rests on section 328.3(a)(3)(i)-(iii).<sup>153</sup> This document was not rescinded by the agencies’ decision to abandon a revised jurisdictional rule. As this Article goes to press, the guidance remains in effect, although the EPA has suggested it will later be reviewed.<sup>154</sup>

### III. APPLYING THE GUIDELINES TO CLEAN WATER ACT JURISDICTION: EVALUATING AGENCY REACTION

These two exercises in agency interpretation—one resulting in a decision not to revise the jurisdictional rule, the other to issue and maintain a jurisdictional guidance document—can be evaluated according to the normative guidelines proposed in Part I. This evaluation will show more than the standard outcome-based approach that one sees on television or in newspapers, offering instead a more subtle analysis that considers the agencies’ proper structural and prudential roles in policymaking. Applying my proposed guidelines, I find that on the subject of the abandoned regulation, the agencies ultimately reached an appropriate outcome, but for inappropriate reasons. On the subject of the guidance document, the agencies are maintaining an inappropriate policy for inappropriate reasons.

#### A. *Doing the Right Thing for the Wrong Reasons*

For clarity, we should consider the agencies’ rulemaking activities in two stages: the stage involving the ANPRM and the Draft Rule, and the stage involving the Bush Administration’s apparent reversal of these actions in December 2003. The Administration’s decision to abandon stage one in

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16, 2003), available at <http://yosemite.epa.gov/opa/admpress.nsf/0/540f28acf38d7f9b85256dfe00714ab0?OpenDocument> [hereinafter EPA Press Release].

151. Guidance, *supra* note 13, at 1995.

152. *Id.* at 1996.

153. *Id.*

154. Barringer, *supra* note 2, at A24 (quoting EPA Administrator Michael Leavitt as saying, “We will likely be reviewing the guidance we have provided the regions in light of this decision [to retain current jurisdictional rules.]”).

favor of the already existing rules represents a desirable outcome according to my proposed guidelines, but the motivations behind this decision—as best one can understand them—appear to have little to do with the values behind the guidelines.

1. *The ANPRM and the Draft Rule*

According to the ANPRM, the EPA and the Army Corps decided to review their jurisdictional rules in order to “ensure that [the rules were] consistent with the *SWANCC* decision.”<sup>155</sup> The ANPRM also expressed interest in the potential resource implications of narrower federal jurisdiction.<sup>156</sup> Both are concerns we would expect from an ideal agency, but the *real* agencies—the EPA and the Army Corps—quickly run off course, particularly in balancing their loyalties to the courts, the Congress, and the President.

a. *The Courts*

One would expect the ideal agency to avoid direct conflict with controlling precedent and to be sensitive to widely-shared norms of democratic society. But one would not expect it to avoid testing the boundaries of legal doctrines if such testing would promote other administrative loyalties. With *SWANCC*, this certainly means abiding by the judicial “strong forces”—the law of the case and holdings in all similar and controlling cases. The exact holding, as we have seen, is somewhat uncertain. At the very least, *SWANCC* invalidated jurisdiction of geographically isolated, intrastate waters where jurisdiction is based on the part of the Migratory Bird Rule that was at issue in the case. The decision very probably struck down the entire Migratory Bird Rule.<sup>157</sup> The ideal agency would recognize this by issuing guidance forbidding the Army Corps from using the Migratory Bird Rule and, perhaps, revising its jurisdictional regulations to change or rescind that rule.

But based on judicial loyalty alone, it is difficult to imagine the ideal agency developing the Army Corps’s Draft Rule. That rule abandoned jurisdiction over *all* geographically isolated wetlands by insisting that all federal non-navigable waters be connected by tributary or “continuous flow” of surface water to a navigable body.<sup>158</sup> This interpretation not only eliminated

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155. ANPRM, *supra* note 12, at 1993.

156. *Id.* at 1994.

157. Parenteau, *supra* note 143.

158. The Draft Rule defines jurisdictional waters, in relevant part, as follows:  
Section 328.3—Definitions.

For the purpose of this regulation these terms are defined as follows:

- a. The term “waters of the United States” means
  1. the territorial seas;
  2. traditional navigable waters;
  3. tributaries to traditional navigable waters;
  4. wetlands adjacent to the waters listed in (1)-(3). . . .

the Migratory Bird Rule, but all other rules conferring jurisdiction over geographically isolated wetlands, including jurisdiction over geographically isolated intrastate wetlands on the basis of the presence of interstate tourism, interstate commerce in shellfish, or industrial use in interstate commerce.<sup>159</sup>

Yet these rules arguably survived *SWANCC*. The Court's refusal to defer to agency interpretation, recall, was based on its finding that the commercial link with migratory birds was too near the Constitution's "outer bounds" to stand on its own.<sup>160</sup> It is possible to argue that commercial links based on tourism, shellfish trade, or industrial activity, are closer to the Constitution's "inner bounds," and thus deserving of *Chevron* deference.<sup>161</sup> Had this provision of the Draft Rule gone into effect, the judiciary would have had to wait years, perhaps, before a legal challenge reintroduced the issue before a federal court for clarification. Even if a future court were persuaded that *SWANCC* invalidated only the Migratory Bird Rule, the doctrine of *Chevron* deference might still lead it to uphold a broader invalidation under the Draft Rule—effectively allowing the agencies to "lock in" a questionable interpretation by issuing it early.

But the Army Corps's much larger surrender concerned jurisdiction over adjacent wetlands. In order to be considered "adjacent" under the Draft Rule, wetlands must "provide regular and continuous flow of surface waters to" either "territorial seas," "traditional navigable waters," or to tributaries leading into those bodies.<sup>162</sup> This provision not only did not follow from *SWANCC*, but was nearly irrelevant to it, since *SWANCC* did not involve adjacent wetlands. What's more, the Supreme Court decision that *did* in-

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- c. The term "adjacent" means hydrologically contiguous such that adjacent wetlands provide regular and continuous flow of surface waters to waters listed in paragraph a(1)-(3). Surface flows to traditional navigable waters may be include flows conveyed through tributary connections. The continuous flow of surface water which connects wetlands to traditionally navigable waters must be constant except for seasonal dry periods that occur during years with normal precipitation patterns. . . .
  - g. The term "tributaries" means waters that are part of a system of surface waters and that contribute regular and recurrent flow to traditional navigable waters of the United States. Perennial streams and intermittent streams that contribute flow to traditional navigable waters are tributaries. Flows to traditional navigable waters must be conveyed through a continuous system of tributaries and/or tributary connections. Tributaries do not include flows of waters from sheetflows, or discrete flows that do not have groundwater as a source, such as ephemeral washes or streams.

Definition of Waters of the United States, 33 C.F.R. § 328.3(a) and (c) (2003) (strikeout in original) (unpublished document with handwritten marks, on file with the author) [hereinafter Draft Rule]. I thank Elizabeth Shogren, environmental correspondent for the *Los Angeles Times*, for providing me with a copy of this document. See e-mail from Elizabeth Shogren, Reporter, *Los Angeles Times*, to Robert Verchick, Jan. 14, 2004 (on file with the author); Shogren, *supra* note 148.

159. See 33 C.F.R. § 328.3(a)(3)(i)-(iii) (2003) (conferring jurisdiction in these cases).

160. *SWANCC*, 531 U.S. at 172-74. A competing reading of the decision would hold that the refusal to defer to the agency was simply an alternative reasoning, not necessary to the holding of the case.

161. See Funk, *supra* note 9, at 10,770 (arguing that "the chain of causation [under the Commerce Clause] would appear to be shorter and less attenuated" under rules based on tourism, shellfish trade, or industrial activity, than under the Migratory Bird Rule).

162. Draft Rule, *supra* note 158, at § 328.3(a) and (c).

volve adjacent wetlands, *Riverside*, clearly held that federal jurisdiction extends beyond the wetlands described in the Draft Rule (that is, those that “provide regular and continuous flow of surface waters” to larger bodies).<sup>163</sup> In *Riverside*, the Court unanimously upheld federal jurisdiction over wetlands that had little, if any, surface connection to navigable waters.<sup>164</sup> *SWANCC* explicitly affirmed this holding.<sup>165</sup> Most lower courts reviewing jurisdiction over adjacent wetlands after *SWANCC* have similarly found jurisdiction over wetlands connected by less than what the Draft Rule describes as “regular and continuous surface flow” to constitute a navigable water.<sup>166</sup>

If *SWANCC* and *Riverside* do not require the Draft Rule’s narrower reading, one might wonder if the “widely-shared norms of democratic society” require such a result. In this case, one might argue that the norm of federalism requires the agencies to further restrict their authority so as to honor state authority over wetlands. But this argument has serious flaws. To begin with, the Supreme Court has made clear that it does not believe jurisdiction in circumstances such as those in *Riverside* violates federalism principles.<sup>167</sup> While an agency is free to some degree to “overprotect” a constitutional principle, it should not where other loyalties cut strongly in the other direction. In addition, the suggestion that a tight-leashed Army Corps “honors” state authority borders on political fantasy. The truth is that states *want* the federal government to protect intrastate waters (which, in turn, protect interstate waters) so that local resources will not be siphoned off to feed parallel state-based wetlands programs. For this reason, the Army Corps’s position in *SWANCC* was supported by eight states acting as amici curiae in the case.<sup>168</sup> After the Administration’s Draft Rule to narrow jurisdiction was made public, it reportedly drew criticism from nearly forty states.<sup>169</sup>

*b. The Congress*

We would expect the ideal agency to be chiefly concerned with implementing the Act according to the language and intent of Congress. The ideal agency would start with the Act’s stated objective, “to restore and maintain

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163. *Riverside*, 474 U.S. at 138-39.

164. According to the Sixth Circuit Court of Appeals, the trial court in *Riverside* had found that “there have been long periods of time when none of the property [at issue] was inundated by water from contiguous or adjacent navigable waters. Indeed, this has been true most of the time.” 729 F.2d 391, 395 (6th Cir. 1984) (quoting trial court findings). The United States does not appear to have ever alleged that the wetlands at issue were connected in any regular way by surface waters to navigable waters.

165. *SWANCC*, 531 U.S. at 170-72.

166. ANPRM, *supra* note 12, at 1997.

167. See Funk, *supra* note 9, at 10,747.

168. See generally *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng’rs*, Brief of the States of California, Iowa, Maine, New Jersey, Oklahoma, Oregon, Vermont, and Washington, as Amici Curiae in support of Respondents, No. 99-1178, 2000 WL 1369438 (Sept. 20, 2000).

169. *Rescuing Wetlands*, N.Y. TIMES, Dec. 18, 2003, at A30.

the chemical, physical, and biological integrity of the Nation's waters,"<sup>170</sup> interpreting this charge against the backdrop of legislative history.

As many scholars have pointed out, the original legislative history of the Act appears to favor broad jurisdictional powers—very likely to the full extent permitted by the Commerce Clause.<sup>171</sup> The ideal agency would also look at the history of administrative enforcement in interpreting its charge. In this case, it would note that the Army Corps had asserted authority over non-navigable waters since 1975 and that Congress had debated the desirability of such jurisdiction in both houses before the 1977 amendments and had ultimately rejected a proposal to narrow the Corps's asserted jurisdiction.<sup>172</sup>

While courts are reluctant to read too much into congressional acquiescence to agency interpretation,<sup>173</sup> agencies should not share this reluctance because often agencies are in a better position to evaluate the significance of such acquiescence. Unlike courts, which only occasionally parachute into congressional debates to settle disputes, agencies like the EPA or the Army Corps follow such debates carefully over time, reacting and interacting with lawmakers. If, through their continual interactions with Congress, such agencies come to believe that congressional action or inaction is relevant to the meaning of a relevant statute, the agency has not only the power but the obligation to incorporate that knowledge into its assessments.

The ideal agency would also duly consider its scientific expertise, its charge to act, and its desire to be effective. Current scientific knowledge appears to weigh in favor of expansive jurisdiction over wetlands, given their broad and important ecological functions, as well as their increasing scarcity. As explained in a recent scientific assessment released by the United States Fish and Wildlife Service, even geographically isolated wetlands have significant interactions with their surrounding environments.<sup>174</sup> Many geographically isolated wetlands are connected hydrologically through surface waters or groundwater.<sup>175</sup> Others are connected "ecologically," in the sense that they facilitate seed dispersal, animal migration, or animal reproduction.<sup>176</sup> Indeed, many geographically isolated wetlands are associated with the same "functions and benefits" as other kinds of wetlands.<sup>177</sup> Like all wetlands, geographically isolated wetlands are "vital natural resources, important for maintaining the Nation's biodiversity and for providing a host of other functions."<sup>178</sup>

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170. Clean Water Act, 33 U.S.C. § 1251(a) (2000).

171. See, e.g., Funk, *supra* note 9, at 10,754-55.

172. *Riverside*, 474 U.S. at 135-37.

173. SWANCC, 531 U.S. 159, 172-74 (2001); *Riverside*, 474 U.S. at 137.

174. Ralph W. Tiner et al., United States Fish and Wildlife Service, *Geographically Isolated Wetlands: A Preliminary Assessment of their Characteristics and Status in Selected Areas of the United States*, June 2002, available at [http://wetlands.fws.gov/Pubs\\_Reports/isolated/report.htm](http://wetlands.fws.gov/Pubs_Reports/isolated/report.htm).

175. *Id.*

176. *Id.*

177. *Id.* at section 4.

178. *Id.*

The ideal agency's charge to act would also favor broad jurisdiction, as greater jurisdiction creates a more comprehensive and robust program. This charge, however, is tempered by an agency's desire to be effective. If an agency has inadequate resources, a greater jurisdictional mandate could weaken its program by spreading the agency too thin. Similarly, broad jurisdiction could engender strong political resistance, running the risk that current lawmakers might attempt to curtail agency power in response. While both fears are reasonable in the abstract, neither appears very strong in this case. After all, the Army Corps has exercised broad authority over wetlands for thirty years without any serious administrative or political repercussions.

Still, the ANPRM might be justified as a precaution against other lawsuits or as a showing of good faith to the pro-development lobbies. Either justification might be acceptable as a means of preserving an agency's political effectiveness.

But the Draft Rule went too far. By scrapping federal protection of all geographically isolated wetlands *and* all intermittent streams, it threatened to gut much of the protection Congress originally hoped to establish. As written, the Draft Rule could have denied federal protection to as many as twenty million acres of the nation's wetlands—roughly twenty percent of all wetlands in existence outside of Alaska.<sup>179</sup> The exclusion of intermittent streams would have proved similarly devastating, particularly in the Southwest, where eighty to ninety percent of all streams would likely have lost protected status.<sup>180</sup>

In sum, the Draft Rule called into question the Army Corps's faithfulness to statutory purpose. Agency officials also appear to have downplayed the importance of science and ecological expertise. The Draft Rule's distinction between perennial and intermittent waters, for instance, could not have been justified on the basis of ecological function or scientific evidence. This should not have taken a public comment period under the ANPRM to understand. But if agency officials were not closely following the cues of the courts or the Congress, whose cues *were* they following? The answer is below.

### c. *The President*

The ideal agency also owes loyalty to the President, but not to the degree owed to the legislating Congress, and not at its expense. As agency outsiders, it may be difficult for us to judge an agency's loyalty to the President by its administrative actions; it is not always obvious to outsiders exactly what the President wants. In public, President Bush has said many times that he wants to halt "overall wetlands loss."<sup>181</sup> If this represents his

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179. Shogren, *supra* note 13.

180. *Id.*

181. See *supra* note 89 and accompanying text.



entire directive, the Army Corps's Draft Rule threatened to subvert that goal.

But it is also possible that the President was sending mixed messages, preaching out loud "no-net-loss of wetlands," while instructing, *sotto voce*, "keep land developers happy."<sup>182</sup> This strategy would fit with President Bush's apparent pattern of environmental switchbacks mentioned earlier.<sup>183</sup> It might also explain small modifications that the White House OMB made to the ANPRM before it was issued, which elevated the role of the Army Corps and slightly broadened the goals of the revised rulemaking.<sup>184</sup>

We should expect the ideal agency to consider whatever regulatory agenda the President proposes, in private or in public. And certainly, this agency must follow any legally binding requirements, such as executive orders. But the decision to act on a non-binding instruction, whether it be to save all wetlands or to *fill* them, should, as a normative matter, be left to the discretion of the agency to be weighed against its much heavier responsibility as the trustee of Congress. In the case of wetlands jurisdiction, the intent of Congress and the dictates of science present a very strong case *against* loosening wetlands jurisdiction beyond what the judiciary absolutely requires.

This conclusion rests on the reasons suggested in Part I. Because Congress vests agencies with their administrative powers, agencies should exercise that power according to the explicit and implicit expectations of Congress. Because the President's significant coercive powers over agencies (power of appointment, executive directives, interagency controls) outshine Congress's coercive powers (for instance, committee oversight), voluntary allegiance should be given to Congress first.

This argument is especially compelling in cases where the President may be hiding his true administrative goals from the public. In such cases, faithfulness to Congress (rather than to the President) advances the core values of accountability, transparency, and uniformity. Accountability is a benefit because the President is discouraged from needling agencies to act in ways he or she would not publicly condone. Transparency is a benefit because the President would be forced to rely on the executives' stronger coercive powers to control agency behavior, which would be more obvious to watchdog groups and to the media. Finally, uniformity is a benefit because the President would be discouraged from "playing both sides of the issue" in favor of taking a consistent stand in public and in private.

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182. Ducks Unlimited Press Release, *supra* note 149. This charge has been leveled by traditional environmental organizations as well as recent Democratic presidential candidates. See, e.g., Robert Perks & Gregory Wetstone, *The New Rules, Year-end Report 2002, The Bush Administration's Assault on the Environment* (Nat. Resources Def. Council, New York, N.Y.) Jan. 2003, at 29, at <http://www.nrdc.org/legislation/rollbacks/rr2002.pdf>; John Kerry's *Comprehensive Vision for a Cleaner Environment, a Stronger Economy, Healthier Communities*, Oct. 2003, at [http://www.johnkerry.com/pdf/long\\_enviro.pdf](http://www.johnkerry.com/pdf/long_enviro.pdf).

183. See *supra* notes 87-89 and accompanying text.

184. See Redline/Strikeout of Final Rule Prepared for Purposes of E.O. 12866 § 6(A)(E)(II), (III).

Under the interpretive guidelines offered here, we would thus expect the Army Corps and the EPA to rely more upon the language and history of the Act than on the instructions (expressed or implied) from the White House. Specifically, this would mean proposing a jurisdictional rule that would, in contrast to the Army Corps's Draft Rule, maintain authority over as many geographically isolated wetlands as *SWANCC* would allow, and over wetlands that are hydrologically connected to navigable waters, if even by intermittent streams. To the extent that the President's views on federal jurisdiction clearly deviate from those of Congress, the Army Corps and the EPA should hold to Congress's view as strongly as possible, limited only by the practical concern for remaining as politically effective as possible under the circumstances.

## 2. *Abandoning Revisions to Jurisdictional Rules*

As it turns out, there was no need for a showdown between the President and the agencies (and it seems unlikely that one would have occurred anyway). As a Christmas surprise, both the President and the agencies announced that they favored stronger protections for wetlands than had previously been imagined. President Bush's views were made public on December 12, 2002, days after a high-profile meeting he had attended with the President of Ducks Unlimited and leaders of other pro-conservation hunting and fishing groups.<sup>185</sup> According to a press release issued by Ducks Unlimited, President Bush affirmed at the meeting his own enthusiasm for hunting and fishing, and "pointedly and repeatedly stated his support for wetlands protection, underscoring his commitment to his policy of no-net-loss of wetlands."<sup>186</sup>

Four days later, the EPA and the Army Corps announced its decision to seek no further review of jurisdictional rules.<sup>187</sup> In what the *New York Times* described as a "hastily called news conference," EPA Administrator Michael Leavitt stressed that the decision was founded on "a commitment from the Bush administration to achieve the goal of no net loss of wetlands."<sup>188</sup> In a press release issued the same day, Leavitt observed that wetland protection was "vital for water quality, the health of our streams and wildlife habitat."<sup>189</sup> The agencies also found their decision fully consistent with *SWANCC*: one EPA official told the press, "We are reading [the *SWANCC* decision] narrowly . . . and right now we see no compelling reason to go forward with [the proposed] rule."<sup>190</sup> At the EPA press conference, Leavitt

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185. See Ducks Unlimited Press Release, *supra* note 149.

186. *Id.*

187. EPA Press Release, *supra* note 150.

188. Barringer, *supra* note 2 (internal quotation marks omitted); see also EPA Press Release, *supra* note 150 (reiterating the no-net-loss policy).

189. EPA Press Release, *supra* note 150 (internal quotation marks omitted).

190. Eric Pianin, *EPA Scraps Changes to Clean Water Act*, WASH. POST, Dec. 17, 2003, at A20 (quoting G. Tracy Mehan, III) (internal quotation marks omitted); see also EPA Press Release, *supra*

also suggested that the legality of earlier plans to narrow jurisdiction had been called into question by post-SWANCC decisions still favoring broad jurisdiction.<sup>191</sup>

Because the regulatory review process and the Draft Rule reflected inadequate concern for congressional intent and scientific findings, the Bush Administration's rejection of these actions deserves high praise. Agency officials also sounded the right notes. Observe Leavitt's concern for water quality and wildlife habitat—a nod to congressional purpose as well as scientific fact—and his loyalty to the stated executive policy of no-net-loss.<sup>192</sup> The agencies also emphasized judicial limits, carefully placing their new policy within the parameters of existing law.

But this resolution appears too pat. Nearly all of these justifications existed *before* the ANPRM was issued and *before* the extraordinarily narrow Draft Rule was leaked. It is true that the analysis of lower federal courts continued to unfold during this period. But the Draft Rule was not only inconsistent with many lower court rulings, but probably with the *Riverside* decision of 1986. Surely this point was known to the agencies before last year. It is also arguable that the strong degree of public support for wetlands was not known until after the ANPRM spotlighted the issue. In addition to lobbying from hunting and fishing groups, the government received 133,000 public comments on the jurisdictional issue, most opposing any revision.<sup>193</sup> But while public views are vital to the rulemaking process, they do not supplant it. Had the public overwhelmingly *avored* narrower Clean Water Act jurisdiction, that fact would hardly have erased congressional intent and the scientific findings.

We will probably never know exactly what motivated the President and the agencies to drop rulemaking plans, but circumstances strongly suggest the move was fueled less by agency faithfulness, and more by interest group politics. Indeed, some political commentators found the Administration's abandonment of the Draft Rule “directly traceable to Mr. Bush's calculation that the proposal was politically unsustainable.”<sup>194</sup> On the normative scorecard, the agencies receive a “plus” for outcome, but a “minus” for rationale.

### B. *Doing the Wrong Thing for the Wrong Reason*

The agencies' guidance drops general jurisdiction over geographically isolated wetlands—including those arguably unaffected by SWANCC<sup>195</sup>—in favor of case-by-case evaluations of such wetlands by the EPA's headquarters. Unless the headquarters finds jurisdiction in *every* case it reviews, the

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note 150 (stating that “the Agencies reaffirmed federal jurisdiction over the majority of wetlands [is] not impacted by the [SWANCC] decision”)

191. Barringer, *supra* note 2.

192. See EPA Press Release, *supra* note 150.

193. Shogren, *Administration Backs Off*, *supra* note 147.

194. *Rescuing Wetlands*, *supra* note 169.

195. See *infra* note 197 and accompanying text.

new guidance will almost certainly result in net wetlands loss. Neither the outcome nor the reasoning of this document comports with the proposed interpretive guidelines.

The guidance does not follow easily from case law because, depending on how one reads *SWANCC*, it delivers either too little or too much. For instance, one might read *SWANCC* to say that all geographically isolated wetlands lie outside of federal jurisdiction regardless of whether the justification for authority is based on the Migratory Bird Rule or on any other rationale. This reading would accept as dispositive the Court's finding that the Act, on its face, requires a tight relationship to navigable waters, and would treat as unnecessary dictum the Court's later discussion of the Commerce Clause and its reasons for not deferring to agency interpretation. Under this reading, it would not matter if the government based its authority on migratory birds or on foreign tourism, for neither one would meet the textual requirement of having a close relationship with navigability. This reading would invalidate the Migratory Bird Rule and all justifications under section 328.3(a)(3)(i)-(iii) in every case. The agencies' guidance would be inadequate under this reading, since the guidance allows EPA headquarters to accept jurisdiction under this section in at least some cases.

The alternative reading of *SWANCC*, which I believe is more persuasive, is that the Court's discussion of the "outer limits" of the Commerce Clause is essential to the Court's invalidation of the asserted jurisdiction. The Court's detailed analysis on this issue certainly highlights an importance that goes beyond dictum. Further, many lower courts now analyze Commerce Clause considerations in applying *SWANCC*, suggesting that they, too, understand this to be part of the *SWANCC* calculus.<sup>196</sup> But this reading does not, in itself, suggest there is anything wrong with jurisdictional justifications under section 328.3(a)(3)(i)-(iii). As argued earlier, these justifications are less likely to skirt the "outer boundaries" than is the Migratory Bird Rule. The guidance document's solution is to send these decisions to the agency headquarters for resolution. But surveying the Constitution's "outer boundaries" is hardly the job of an environmental agency working on a case-by-case basis. Not only is agency expertise less suited to deciding constitutional issues, it is less likely to provide uniformity over time since the agency is not bound to consider the same factors in every case and is not bound to follow its own precedent in future cases.

The guidance also defeats the concerns of Congress and our hope for an accountable executive. Because the guidance would almost certainly result in a net loss of wetlands, Congress's stated concern for the integrity of American waters is needlessly jeopardized. The guidance also throws into question the true policy of the President. If the President is truly committed to no net loss of wetlands, the guidance is subverting his goal. A skeptic

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196. See, e.g., *In re Needham*, 354 F.3d 340 (5th Cir. 2003); *Treacy v. Newdunn Assoc.*, 344 F.3d 407 (4th Cir. 2003); *United States v. Rueth Dev. Co.*, 335 F.3d 598 (7th Cir. 2003).

might charge that the President's commitment to wetlands is mainly for show—all hat and no cattle. This scenario is, by far, the more troublesome, for it suggests that the executive may be using its pro-wetlands position on jurisdictional rules to mask an essentially anti-wetlands position embedded in agency guidance documents. Unlike an administrative proposal to narrow jurisdictional rules, case-by-case jurisdictional rulings are much less subject to public scrutiny. Further, a private litigant would find it almost impossible to defeat an agency decision to allow wetland destruction under these circumstances since, as informal adjudications based on agency guidance, such a decision would enjoy a heavy presumption of validity. Thus, the administration's guidance undercuts the values of transparency, accountability, and consistency that justify strong executive powers.<sup>197</sup>

Finally, the guidance hinders the agencies' commitment to action, robustness, and effectiveness. Rather than empowering the Army Corps field offices to protect the waters described in section 328.3(a)(3)(i)-(iii), the guidance requires the Army Corps to kick such matter upstairs for further review; this is delay, not robust action. The headquarter's new case load would also threaten agency efficiency.

The agency guidance does not threaten wetlands protection as much as the Army Corps's Draft Rule did. Unlike the Draft Rule, the guidance would not erase jurisdiction over adjacent waters connected by intermittent streams.<sup>198</sup> But the guidance threatens the protection of many wetlands and, therefore, “the chemical, physical, and biological integrity of the Nation's waters.”<sup>199</sup> This threat comes at the expense of proper faithfulness to Congress, as balanced against the interests of the President and the courts. The guidance also damages agency reputation by thrusting the Army Corps field offices into a weaker, inactive role and hobbling enforcement decisions.

The supposed justification for this arrangement—consistency with SWANCC—does not wash. Read narrowly (as the EPA now purports to be doing),<sup>200</sup> SWANCC has no direct effect on section 328.3(a)(3)(i)-(iii), leaving the agencies free—and, normatively speaking, *obligated*—to pursue other structural and prudential concerns. The agencies, therefore, should review the guidance promptly and remove the provisions involving section 328.3(a)(3)(i)-(iii).

#### CONCLUSION

How should agencies interpret jurisdiction under the Act? My answer is “faithfully.” That is, out of a faithful concern for the many structural and prudential obligations with which agencies are charged. This Article has

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197. See Kagan, *supra* note 16, at 2331-40.

198. Section 328.3(a)(3)(i)-(iii) is used mainly to confer jurisdiction over geographically isolated, non-adjacent waters. See *supra* note 134 and accompanying text.

199. Clean Water Act, 33 U.S.C. § 1251 (2000).

200. See Pianin, *supra* note 190.

proposed a normative model that offers specific guidelines in addressing such interpretive concerns. Under the model, agencies should act in ways that respect policies from all three governmental branches but that primarily favors congressional intent, as expressed by a statute's language, structure, and legislative history. Agencies, particularly those charged with environmental enforcement, also owe substantial deference to the teachings of their scientific and other professional expertise, with the understanding that public debate is essential where non-scientific values are at stake. Finally, agencies owe a strong obligation to prefer active, robust, and effective enforcement strategies.

A look at the Bush Administration's handling of Clean Water Act jurisdiction after *SWANNC* shows the need for stronger and more principled agency interpretation in real life. The Administration's decision to drop its plans to unduly restrict its jurisdiction over intrastate streams and wetlands was welcomed by conservationists and should also be welcomed by advocates of faithful agencies. But the circumstances surrounding this decision suggest that it sprang from special interest lobbying, rather than concerns for constitutional balance and agency effectiveness. That is, the Administration did the right thing, but for the wrong reasons.

The Administration's decision to issue and maintain a guidance document that effectively narrows federal jurisdiction beyond what *SWANCC* probably requires proves inconsistent with my proposed model. By opening acres of wetlands to development against the language and intent of the Act, the Administration is needlessly endangering the integrity of American waters for reasons that cannot be grounded in constitutional or prudential values. For these reasons, the Bush Administration should revisit the guidance and rescind the provisions that reach beyond the *SWANCC* holding.

Evaluating administrative actions is always a tricky business, given the interplay of law and politics. Also, events move swiftly. It is possible that agency policy concerning jurisdictional rules or guidance will have changed by the time some readers find this Article. It is also possible that the Supreme Court will further illuminate *SWANCC* in the future. I offer my normative model of agency interpretation as a way of tracking and evaluating the changes that will inevitably occur in this area of environmental law and in other areas of law.

For those who believe that agencies are too influenced by special interests to be properly house-broken, this project may seem quixotic. But the need for agency-based interpretive standards is very real. In many, if not most situations, agencies retain meaningful freedom in crafting their decisions. Where this is the case, normative standards should point the way. Scholars, lawyers, and other concerned members of the public also need such standards to help them more fully evaluate and advocate administrative change. When the public begins to expect more from agencies in normative terms, those agencies will feel pressure to deliver. Political tides will always threaten the more principled high ground, but that should not discourage us from holding on.