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## PROTECTING SOUTH CAROLINA'S ISOLATED WETLANDS IN THE WAKE OF *SOLID* *WASTE AGENCY*

### I. INTRODUCTION

South Carolina's wetlands have historically held an esteemed place in the state's conscience. During the Revolutionary War, they contributed to Francis Marion's<sup>1</sup> military success, and today, they serve as the critical breeding grounds for the birds we hunt, the fish we catch, and the seafood we eat.<sup>2</sup> Recently, scientists have recognized that wetlands are important natural resources.<sup>3</sup> Wetlands are critical to both South Carolina's ecosystem and to its economy.<sup>4</sup>

In early 2001, a man from Orangeburg, South Carolina placed old junk cars in isolated wetlands on his property.<sup>5</sup> If he had filled this land in the year 2000, he would have violated the federal Clean Water Act,<sup>6</sup> but after the United States Supreme Court rendered its decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (SWANCC)*<sup>7</sup> on January 9, 2001, he was free to destroy the wetlands. The *SWANCC* case was a watershed environmental law decision that openly permitted isolated wetlands to be destroyed.<sup>8</sup>

Before *SWANCC*, almost sixty percent of the nation's wetlands were regulated by the United States Army Corps of Engineers;<sup>9</sup> however, *SWANCC* has now removed these wetlands from federal jurisdiction.<sup>10</sup> Before *SWANCC*, there were few wetlands violations and few challenges either to the Army Corps of Engineers'

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1. Francis Marion, a South Carolinian and Revolutionary War leader, engaged in guerilla warfare to ambush small British detachments and to disrupt British lines of communication. WALTER EDGAR, *SOUTH CAROLINA: A HISTORY* 235 (1998). Marion earned the nickname "Swamp Fox" for his ability to strike quickly and then to disappear into the Pee Dee region's wetlands. *Id.* A British officer reportedly said, "Come let us go back and we will find the gamecock [Thomas Sumter]. But as for this damned fox [Marion], the devil himself could not catch him!" *Id.*

2. Bill Sipple, *Wetland Functions and Values*, available at <http://www.epa.gov/watertrain/wetlands/text.htm> (last visited Apr. 2, 2002) [hereinafter *Wetland Functions and Values*].

3. *Id.*

4. *Id.*

5. Telephone Interview with Chris Brooks, Deputy Comm'r, Office of Ocean and Coastal Res. Mgmt., S.C. Dep't of Health and Envtl. Control (Sept. 12, 2001).

6. The Federal Water Pollution Control Act (Clean Water Act) prohibits "the discharge of any pollutant by any person," including the filling of wetlands. 33 U.S.C. § 1311(a) (1994).

7. 531 U.S. 159 (2001).

8. *Id.* at 174.

9. Emergency Regulation on Wetlands, 25 S.C. Reg. 27 (Dep't of Health & Envtl. Control, Feb. 15, 2001).

10. *Solid Waste Agency*, 531 U.S. at 174.

or to the state's jurisdiction over isolated wetlands.<sup>11</sup> However, all regulations that governed isolated wetlands are now "tenuous,"<sup>12</sup> and 517 acres of wetlands in South Carolina's eight coastal counties are in jeopardy as courts decide critical jurisdictional questions.<sup>13</sup> To fill this judicially created void, states must either pass regulations or simply allow wetlands to be destroyed.<sup>14</sup>

This Note will examine *SWANCC*'s effects on South Carolina's wetlands and will analyze what action is needed to fill the regulatory void *SWANCC* produced. Part II will briefly discuss the value of isolated wetlands, the history of federal and state wetlands protection, and the impact *SWANCC* has had on current wetlands protections. Part III will explore South Carolina's best solution—a comprehensive state wetlands statute that will effectively prevent widespread wetlands destruction.

## II. BACKGROUND

### A. Value of Isolated Wetlands

South Carolina's isolated wetlands cover 4.6 million acres, which constitute approximately one-fourth of the state's surface area.<sup>15</sup> South Carolina has a large variety of isolated wetlands, but especially notable are the Carolina Bays, a wetland unique to this area.<sup>16</sup> The Bays range in size from .2 to 78.2 hectares.<sup>17</sup> Forty-six percent of the Carolina Bays are smaller than 1.2 hectares and eighty-seven percent of the Bays are smaller than four hectares.<sup>18</sup>

All isolated wetlands, including the Carolina Bays, are important South Carolina natural resources.<sup>19</sup> Wetlands create biodiverse ecological habitats.<sup>20</sup> Some

11. Telephone Interview with Chris Brooks, Deputy Comm'r, Office of Ocean and Coastal Res. Mgmt., S.C. Dep't of Health and Env'tl. Control (Sept. 12, 2001).

12. *See id.*

13. Telephone Interview with Rob Mikel, Office of Ocean and Coastal Res. Mgmt., S.C. Dep't of Health and Env'tl. Control (Sept. 12, 2001).

14. Jon Kusler, *The SWANCC Decision and the States—Fill in the Gaps or Declare Open Season?*, NAT'L WETLANDS NEWSL., Mar.-Apr. 2001, at 9, 9.

15. ROBERT L. WALDREP, JR., SOUTH CAROLINA SENATE AGRIC. & NAT. RES. COMM., OPTIONS FOR WETLANDS CONSERVATION IN SOUTH CAROLINA 5 (Aug. 2001).

16. Carolina Bays are shallow, often elliptical isolated wetlands found predominantly in the Carolinas and Georgia. UNIVERSITY OF GEORGIA: SAVANNAH RIVER ECOLOGY LABORATORY, CAROLINA BAYS FACT SHEET, at <http://www.uga.edu/srel/bays.html> (last visited Apr. 2, 2002). The Bays are fed by rain and shallow groundwater as well as by host plants and animals ranging from zooplankton to snakes, alligators, migratory waterfowl, and deer. *Id.* While Carolina Bays are approximately 30,000 to 100,000 years old, their origins remain a mystery. *Id.* Various theories abound, such as that the Bays were former UFO landing sites or that they were caused by meteors. *Id.*

17. Raymond D. Semlitsch, *Size Does Matter: The Value of Small Isolated Wetlands*, NAT'L WETLANDS NEWSL., Jan.-Feb. 2000, at 5, 6. A hectare is a metric measure of surface area equivalent to 2.471 acres. *See* THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 656 (unabridged ed. 1973).

18. Semlitsch, *supra* note 17, at 6.

19. *See generally Wetland Functions and Values*, *supra* note 2 (discussing wetlands' value for food, water, flood control, timber, tourism, and hunting).

20. *Id.*

species live in isolated wetlands, while others depend on wetlands for food or nesting.<sup>21</sup> This biodiversity is created partially by the wetlands' large volume of food, which attracts a wide variety of species.<sup>22</sup> Dead plant material deteriorates in the water, feeding small insects and fish.<sup>23</sup> These small insects and fish in turn feed "larger predatory fish, reptiles, amphibians, birds, and mammals."<sup>24</sup> Diversity also flourishes in isolated wetlands because the water levels remain constant and are unrelated to those of neighboring rivers and streams.<sup>25</sup> This independence allows the isolated wetlands to harbor life that cannot survive in the nearby waters.<sup>26</sup> Additionally, wetlands thaw and warm more quickly than do larger bodies of water, allowing waterfowl an early spring place to feed and to develop fat reserves needed for nesting.<sup>27</sup>

Isolated wetlands' teeming biodiversity is maintained by the "source-sink dynamic."<sup>28</sup> This dynamic, which is "crucial to the regional survival of species," allows a wetland to be both a "sink," a place where species die out from the local area, and a "source," a location with a surplus population that repopulates the sink sites.<sup>29</sup> The source-sink dynamic is critical to the survival of small wetland-dependent species, such as amphibians and reptiles.<sup>30</sup> These frogs, salamanders, snakes, and turtles comprise a majority of the total living mass of vertebrates, and they play an important role in the food chain by eating insects and plants and by serving as the food of larger fish and waterfowl.<sup>31</sup>

During a sixteen-year study of Rainbow Bay in South Carolina, Raymond D. Semlitsch, a professor of ecology at the University of Missouri in Columbia, documented twenty-seven species of frogs, toads, and salamanders and called the bay "one of the highest species diversities known for amphibians in this region."<sup>32</sup> As small, isolated wetlands are destroyed, these species must travel greater distances between wetlands to breed and recolonize.<sup>33</sup> In addition to these amphibians, many endangered and threatened species live in isolated wetlands.<sup>34</sup> The United States Fish and Wildlife Service estimates that the survival of over

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21. *Id.*

22. U.S. ENVTL. PROTECTION AGENCY, WETLANDS AND NATURE, at <http://www.epa.gov/owow/wetlands/vital/nature.html> (last visited Apr. 2, 2002).

23. *Id.*

24. *Id.*

25. Brief of Amici Curiae Dr. Gene Likens et al. at 16, Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs, 531 U.S. 159 (2001) (No. 99-1178) [hereinafter Likens' Brief].

26. *Id.*

27. *Id.*

28. Semlitsch, *supra* note 17, at 5.

29. *Id.*

30. *Id.*

31. Likens' Brief, *supra* note 25, at 19-20.

32. Semlitsch, *supra* note 17, at 6.

33. *Id.*

34. WILLIAM L. WANT, LAW OF WETLANDS REGULATION § 2.3, at 2-3 (12th ed. 2001).

forty-three percent of the plant and animal species on the federal endangered and threatened species list depends on wetlands.<sup>35</sup>

Isolated wetlands also perform an important flood control function by both restricting storm water during wet seasons and by feeding storm water into streams and rivers during dry seasons.<sup>36</sup> This cycle, called "base flow," keeps streams from evaporating in drier months.<sup>37</sup> Furthermore, wetlands store water physically through groundwater and biologically through vegetation transpiration.<sup>38</sup> This flood control function prevents urban runoff and damage to human structures and agriculture.<sup>39</sup>

Further, isolated wetlands act as a natural water purifier by capturing nutrients and by suspending sediments and pollutants,<sup>40</sup> such as organic matter,<sup>41</sup> mercury, lead, and polychlorinated biphenyls.<sup>42</sup> In one Georgia study, water polluted by human and animal waste emerged clean after "passing through" almost three miles of swamp.<sup>43</sup> Some areas capitalize on wetlands' power to purify water by using them as waste treatment facilities.<sup>44</sup> Isolated wetlands' filters also prevent polluted water from flowing into streams, rivers, lakes, and oceans.<sup>45</sup> In addition, this natural filter process can save millions of dollars on waste water treatment.<sup>46</sup> One 1990 study illustrated that the Congaree Bottomland Hardwood Swamp, located outside of Columbia, South Carolina, annually removes the same amount of pollutants as a multi-million dollar waste water treatment facility.<sup>47</sup>

Isolated wetlands also have tourism value because they support boating, hunting, fishing, and bird watching.<sup>48</sup> In the United States, more than half of all adults who hunt, fish, birdwatch, or photograph wildlife annually spend \$59.5 billion dollars.<sup>49</sup> Isolated wetlands also serve as invaluable educational and research tools because they allow scientists to study biology, ecology, fish and wildlife management, and environmental protection.<sup>50</sup> These wetlands also stimulate South Carolina's economy by supporting natural products such as fish, rice, and timber, the latter of which is South Carolina's top cash crop.<sup>51</sup> Furthermore, "[t]wo-thirds of the commercially important fish and shellfish harvested along the Atlantic and

35. *Wetland Functions and Values*, *supra* note 2.

36. Likens' Brief, *supra* note 25, at 13-14.

37. *Id.*

38. *Wetland Functions and Values*, *supra* note 2.

39. *Id.*

40. WANT, *supra* note 34, § 2.3, at 2-4.

41. *Wetland Functions and Values*, *supra* note 2.

42. Likens' Brief, *supra* note 25, at 13.

43. WANT, *supra* note 34, § 2.3, at 2-4.

44. *Id.*

45. Likens' Brief, *supra* note 25, at 2.

46. *Wetland Functions and Values*, *supra* note 2.

47. *Id.*

48. South Carolina Carolina Bays Protection Act, S. Res. 550, 114th Gen. Assem., Reg. Sess. (S.C. 2001).

49. *Wetland Functions and Values*, *supra* note 2.

50. *Id.*

51. S. Res. 550, 114th Gen. Assem., Reg. Sess. (S.C. 2001).

Gulf coasts depend on coastal estuaries and their wetlands for food sources, spawning grounds, or nurseries for their young.”<sup>52</sup> Because isolated wetlands are critical to South Carolina’s ecology, economy, and public health, state law must fill the new judicially created void to protect this important natural resource.

### B. History of Wetlands Regulation

In the 1800s, the United States’ standing policy provided for the filling of swamps and wetlands to stimulate progress and commerce.<sup>53</sup> The Rivers and Harbors Act of 1899 (RHA)<sup>54</sup> delegated to the U.S. Army Corps of Engineers the responsibility of “regulating discharges into certain waters in order to protect their use as highways for the transportation of interstate and foreign commerce; the scope of the Corps’ jurisdiction under the RHA accordingly extended only to waters that were ‘navigable.’”<sup>55</sup> In the 1960s, the Corps expanded its authority under the RHA by issuing its first regulations to protect wetlands.<sup>56</sup> In the 1966 case *United States v. Standard Oil Co.*, the United States Supreme Court broadly interpreted the term “refuse” to include aviation gasoline, a pollutant.<sup>57</sup> The Court deemed pollutants and refuse equally detrimental to commerce.<sup>58</sup> However, the *Standard Oil* Court sought only to preserve navigability, not the cleanliness of the waterway.<sup>59</sup> In the 1970s, both the RHA and the Clean Water Act (CWA) extended national goals beyond commerce to protecting the nation’s waterways from pollution.<sup>60</sup> The *Standard Oil* case and Congress’s adoption of the CWA marked a “shift in the focus of federal water regulation from protecting navigability toward environmental protection.”<sup>61</sup> Section 404 of the CWA delegates authority to the Corps of Engineers to oversee permits “for the discharge of dredged or fill material into the navigable waters at specified disposal sites.”<sup>62</sup> While the CWA retains the RHA term “navigable waters,” the CWA focuses primarily on pollution control and on ecosystem protection.<sup>63</sup>

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52. WANT, *supra* note 34, § 2.3, at 2-3.

53. *Id.* § 2.6, at 2-7.

54. 33 U.S.C. §§ 401-418 (1994).

55. *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng’rs*, 531 U.S. 159, 175 (2001) (Stevens, J., dissenting).

56. WANT, *supra* note 34, § 2.6, at 2-7.

57. *United States v. Standard Oil Co.*, 384 U.S. 224, 230 (1966).

58. *Id.*

59. Sam Kalen, *Commerce to Conservation: The Call for a National Water Policy and the Evolution of Federal Jurisdiction Over Wetlands*, 69 N.D. L. REV. 873, 882 (1993).

60. *Id.* at 878-79.

61. *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng’rs*, 531 U.S. 157, 179 (2001) (Stevens, J., dissenting).

62. 33 U.S.C. § 1344(a) (1994).

63. Robert G. Dreher, *Unsettling the Balance of Federalism: The SWANCC Decision*, NAT’L WETLANDS NEWSL., Mar.-Apr. 2001, at 1, 13.

The CWA defines navigable waters as “the waters of the United States, including the territorial seas.”<sup>64</sup> Further, the Corps defines “waters of the United States” as “waters such as intrastate lakes, rivers, streams, (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce.”<sup>65</sup> Additionally, the Corps clarified its jurisdiction with the Migratory Bird Rule;<sup>66</sup> this rule extended jurisdiction to interstate 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. [Which are or would be] used to irrigate crops sold in interstate commerce.<sup>67</sup>

The Migratory Bird Rule provided the critical interstate commerce connection, thereby allowing the regulation of isolated wetlands to survive strict scrutiny under the Commerce Clause and to fall within federal jurisdiction.<sup>68</sup>

The U.S. Supreme Court had its first chance to interpret § 404 of the Clean Water Act in *United States v. Riverside Bayview Homes*.<sup>69</sup> Riverside Bayview Homes owned eighty acres of Michigan marshland, which stood adjacent to Black Creek, a navigable waterway.<sup>70</sup> In order to develop the land, Riverside filled the wetlands.<sup>71</sup> The Court held that waters adjacent to “navigable waters” also fell under the Corps’ federal jurisdiction.<sup>72</sup> The Supreme Court, advocating a broad definition of “adjacent,” found that a wetland could be adjacent because it “filter[ed] and purif[ied] water draining into adjacent bodies of water and [slowed] the flow of surface runoff into lakes, rivers, and streams and thus prevent[ed] flooding and erosion.”<sup>73</sup> Waters that “serve[d] significant natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing and resting sites for aquatic . . . species” were, in the Court’s view, also

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64. 33 U.S.C. § 1362(7) (1994).

65. 33 C.F.R. § 328.3(a)(3) (2001).

66. 51 Fed. Reg. 41217 (Nov. 13, 1986).

67. *Id.*

68. WANT, *supra* note 34, § 4.25, at 4-20.

69. 474 U.S. 121 (1985); WANT, *supra* note 34, § 2.9, at 2-12.

70. *Riverside Bayview Homes*, 474 U.S. at 124, 131.

71. *Id.* at 124.

72. *Id.* at 131.

73. *Id.* at 134 (citation omitted).

adjacent.<sup>74</sup> Adjacent wetlands provide the same benefits as isolated wetlands, but the Court chose only to extend the CWA to adjacent wetlands.<sup>75</sup>

The *Riverside Bayview* Court left several important questions unanswered. First, the opinion broadly interpreted the CWA terms “adjacent”<sup>76</sup> and “navigable.”<sup>77</sup> The Court stated that Congress intended to “regulate at least some waters that would not be deemed ‘navigable’ under the classical understanding of that term.”<sup>78</sup> Additionally, the Court left open the larger issue concerning “the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water.”<sup>79</sup> This issue resurfaced sixteen years later in *SWANCC*.

### C. *The SWANCC Case*

In *SWANCC*, a consortium of suburban municipalities in Illinois (SWANCC) purchased an abandoned gravel pit mining operation that had given way to a “successional stage forest” containing permanent and seasonal ponds ranging in size from under one-tenth of an acre to several acres.<sup>80</sup> After the purchase, SWANCC contacted the U.S. Corps of Engineers to determine if it needed to obtain a CWA § 404(a) permit to fill the ponds.<sup>81</sup> Initially, the Corps determined that the area was not a wetland and that SWANCC thus did not need a permit.<sup>82</sup> However, once the Corps discovered that 121 bird species used the site, it exercised the Migratory Bird Rule<sup>83</sup> to take jurisdiction over the abandoned mining pit.<sup>84</sup> Specifically, the Corps desired jurisdiction over the pit because it provided a habitat for migratory birds, including the great blue heron rookery.<sup>85</sup> Upon taking jurisdiction, the Corps denied SWANCC a § 404 permit because SWANCC “had not established that its proposal was the ‘least environmentally damaging, most practicable alternative’ for disposal of nonhazardous solid waste.”<sup>86</sup> The Corps further justified its denial by claiming

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74. *Id.* at 134-35 (quoting 33 C.F.R. § 320.4(b)(2)(i) (1985)).

75. Stephen M. Johnson, *Federal Regulation of Isolated Wetlands After SWANCC*, 31 ENVTL. L. RPTR. 10669, 10671 (2001).

76. “After Hurricane Floyd in 1999, nearly the entire coastal plain of North Carolina was ‘adjacent’ water.” Derb S. Carter Jr., *Supreme Court Decision Defies Common Sense and Intent of Congress*, NAT’L WETLANDS NEWSL., Mar.-Apr. 2001, at 7, 15.

77. *Riverside Bayview Homes*, 474 U.S. at 133.

78. *Id.*

79. *Id.* at 131 n.8.

80. *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng’rs*, 531 U.S. 159, 163 (2001).

81. *Id.*

82. *Id.* at 164.

83. See 51 Fed. Reg. 41217 (Nov. 13, 1986).

84. *Solid Waste Agency*, 531 U.S. at 164.

85. *Id.* at 164-65.

86. *Id.* at 165.



that possible leaks threatened the water supply and that the project's deleterious environmental impact was "unmitigable."<sup>87</sup>

SWANCC filed suit, challenging the Corps' jurisdiction over the site.<sup>88</sup> The district court granted summary judgment to the Corps on the jurisdictional issue.<sup>89</sup> On appeal, SWANCC attacked the Corps' federal jurisdiction pursuant to the Migratory Bird Rule on the grounds that such jurisdiction exceeded the Corps' statutory authority under § 404 and violated the Commerce Clause<sup>90</sup> of the U.S. Constitution.<sup>91</sup> The Seventh Circuit Court of Appeals held that the Corps' jurisdiction over the gravel pit fell within the Commerce Clause power and that federal jurisdiction was proper due to the "cumulative impact doctrine, under which a single activity that itself has no discernible effect on interstate commerce may still be regulated if the aggregate effect of that class of activity has a substantial impact on interstate commerce."<sup>92</sup> The court reasoned that destroying many migratory bird habitats would, in the aggregate, affect the interstate activities of hunting and birdwatching.<sup>93</sup>

The United States Supreme Court granted certiorari and held in a 5-4 decision that the Migratory Bird Rule invalidly extended the Corps' jurisdiction under the CWA.<sup>94</sup> The Court refused to allow the Migratory Bird Rule to extend § 404 jurisdiction to isolated wetlands.<sup>95</sup> In the Court's opinion, "[p]ermitting [the Corps] to claim federal jurisdiction over ponds and mudflats falling within the 'Migratory Bird Rule' would result in a significant impingement of the States' traditional and primary power over land and water use."<sup>96</sup> However, by terminating the Corps' jurisdiction over isolated wetlands, the Court left many of the nation's most sensitive and valuable aquatic resources unprotected and open to development.<sup>97</sup> The *SWANCC* decision will not only restrict the Corps' permit jurisdiction, but it will also reduce the scope of other federal and state regulatory schemes.<sup>98</sup> For example, since the Corps' jurisdiction was weakened, "numerous other environmental laws that piggyback on the Corps['] authority—like the National Environmental Policy Act, the National Historic Preservation Act, significant

87. *Id.*

88. *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 998 F. Supp. 946 (N.D. Ill. 1998), *aff'd*, 191 F.3d 845, 853 (7th Cir. 1999).

89. *Solid Waste Agency*, 998 F. Supp. at 957.

90. U.S. CONST. art. I, § 8, cl. 3.

91. *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 191 F.3d 845, 851-52 (7th Cir. 1999), *rev'd*, 531 U.S. 159, 174 (2001).

92. *Solid Waste Agency*, 191 F.3d at 850.

93. *Id.*

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

95. *Id.* at 173-74.

96. *Id.* at 174.

97. *See Dreher, supra* note 63, at 1.

98. *See WANT, supra* note 34, § 2.9, at 2-20.

portions of the Endangered Species Act and water quality certification by the States—also no longer apply [to isolated wetlands].”<sup>99</sup>

The dissent in *SWANCC* described the majority’s decision as “one that invalidate[d] the 1986 migratory bird regulation as well as the Corps’ assertion of jurisdiction over all waters except for actually navigable waters, their tributaries,<sup>100</sup> and wetlands adjacent to each.”<sup>101</sup> If courts strictly interpret *SWANCC* by restricting federal jurisdiction to navigable waters and to their adjacent wetlands, then as little as 20% of the nation’s wetlands will be afforded federal protection.<sup>102</sup> If courts were to more loosely interpret the term adjacent to include rivers’ 100-year floodplains, 30-40% of wetlands would be protected.<sup>103</sup> If such jurisdiction were held to include navigable waters, adjacent wetlands, tributaries, and wetlands adjacent to those tributaries, 40-60% of wetlands would fall under federal protection.<sup>104</sup> Notably, if *SWANCC* serves to destroy *one* percent of the nation’s wetlands, this “small” loss may exceed the total wetlands destruction for the past ten years.<sup>105</sup> Thus, *SWANCC* may eradicate decades of wetlands conservation. In 2000, the U.S. Fish and Wildlife Service issued a report concerning the nation’s wetlands, stating that approximately 58,500 acres were lost each year between 1986 and 1997, an 80% reduction from the previous decade’s destruction.<sup>106</sup>

#### *D. The United States Army Corps of Engineers’ and Environmental Protection Agency’s Interpretation of SWANCC*

The credence that federal regulatory agencies give to the *SWANCC* case will determine the decision’s practical impact. Initially, these agencies have cautiously accepted a diminution of their authority. In a January 19, 2001 memo, the agencies stated, “In light of the Court’s ‘conclusion that the “Migratory Bird Rule” is not fairly supported by the CWA,’ field staff should no longer rely on the use of waters or wetlands as habitat by migratory birds as the sole basis for the assertion of regulatory jurisdiction under the CWA.”<sup>107</sup> The Corps asserted that it maintained jurisdiction over navigable waters, interstate waters, tributaries, and wetlands

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99. *Id.*

100. The decision does not specifically discuss tributaries, but mentions wetlands with a “nexus” to navigable water. *Solid Waste Agency*, 531 U.S. at 167.

101. *Id.* at 176-77 (Stevens, J., dissenting).

102. Kusler, *supra* note 14, at 9.

103. *Id.*

104. *Id.*

105. *Id.* at 10.

106. THOMAS E. DAHL, U.S. DEP’T OF THE INTERIOR, FISH AND WILDLIFE SERV., STATUS AND TRENDS OF WETLANDS IN THE CONTERMINOUS UNITED STATES 1986 TO 1997 9 (2000).

107. Memorandum from Gary S. Guzy, General Counsel, EPA, and Robert M. Anderson, Chief Counsel, U.S. Army Corps of Engineers 4 (Jan. 19, 2001), *available at* <http://www.epa.gov/owow/wetlands/swancc-ogc.pdf> (last visited Apr. 2, 2002).

adjacent to navigable and interstate waters.<sup>108</sup> The Corps relinquished jurisdiction over isolated wetlands; intrastate lakes, rivers, streams; and water affecting interstate commerce solely due to its use as a migratory bird habitat.<sup>109</sup> However, the Corps may exert jurisdiction over an isolated wetland if the wetland has a “significant nexus”<sup>110</sup> with “waters of the United States” or if the wetland’s “use, degradation, or destruction could affect interstate or foreign commerce.”<sup>111</sup> Courts should determine on a case-by-case basis if a significant nexus exists with waters of the United States. In a memorandum from the general counsels of both the EPA and the Army Corps of Engineers, the agencies emphasize *SWANCC*’s limited nature and stress that the case should be interpreted consistently with other U.S. Supreme Court and lower court decisions that “broadly uphold [Clean Water Act] jurisdictional authority.”<sup>112</sup> The Court of Appeals for the Ninth Circuit appears to have adopted a limited interpretation of *SWANCC*.<sup>113</sup> Further EPA guidance may clarify some of the ambiguities concerning federal jurisdiction created by the *SWANCC* case.

### *E. Why Congress Cannot Fill the Regulatory Gap*

Congress could properly regulate all national wetlands by clarifying the Clean Water Act. Specifically, Congress could define terms such as “navigable” and “adjacent” so that courts would not improperly extend the Corps’ authority.<sup>114</sup> Unfortunately, Congress is deadlocked not only on environmental issues but also on wetlands conservation issues.<sup>115</sup> Also, some believe that Congress never intended § 404 to protect isolated wetlands.<sup>116</sup> In fact, “[u]ntil recently, and perhaps still, implementation of the [§] 404 program has been sporadic, often driven by judicial decree and conflict between the agencies rather than by active and thoughtful consideration.”<sup>117</sup> The CWA was plagued by problems establishing jurisdiction, uncertainty regarding the permitting power’s scope, rivalry between the EPA and

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108. *Id.* at 4-5 (The Corps described adjacent wetlands as “bordering, contiguous, or neighboring . . . [w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes, and the like.”). *Id.* at 5 n.4 (quoting 33 C.F.R. § 328.3(c) (2001)).

109. *Id.* at 5-6.

110. Courts have not interpreted the term “significant nexus” since the *SWANCC* decision. Under this decision, it seems plausible that if cattle drink and graze from an isolated wetland and then enter the interstate beef market, that wetland could be considered a “water of the United States.” See David M. Ivester, *The Supreme Court Draws a Line*, NAT’L WETLANDS NEWSL., Mar.-Apr. 2001, at 5.

111. See Memorandum from Guzy & Anderson, *supra* note 107, at 6-7.

112. *Id.* at 7.

113. See *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 534 (9th Cir. 2001) (holding that partially isolated tributaries that connect with navigable water are under the Corps’ jurisdiction).

114. See 33 U.S.C. § 1362 (1994).

115. See Carter, *supra* note 76, at 16.

116. See, e.g., Kalen, *supra* note 59, at 909 (arguing that § 404 is not a comprehensive wetlands program, but is just one of many uncertain nonintegrated statutes.).

117. *Id.* at 914.

the Corps, and by the fact that the CWA is only a piece in the “patchwork of various regulatory and market incentive programs.”<sup>118</sup>

Another problem hindering federal regulation of isolated wetlands is that the Supreme Court’s recent Commerce Clause jurisprudence may not allow Congress to regulate wetlands with attenuated connections to interstate commerce.<sup>119</sup> The *SWANCC* Court stated that Congress did not *intend* to regulate isolated waters, not that Congress could or could not regulate such waters.<sup>120</sup> Because the Supreme Court did not reach the Commerce Clause issue in *SWANCC*, instead deciding the case on the jurisdictional question, doubts remain as to the Commerce Clause’s power to sustain environmental legislation.<sup>121</sup> The majority did warn that in asserting jurisdiction over isolated wetlands, the Army Corps of Engineers “invoke[d] the outer limits of Congress’ power.”<sup>122</sup> It also stated that the regulation of isolated wetlands raised “significant constitutional questions,”<sup>123</sup> implying that water regulation under the CWA should receive close scrutiny under the Commerce Clause as a “local” activity.<sup>124</sup> If so construed, this declaration practically forbids federal legislation because previously the Court has said that the Commerce Clause does not authorize the regulation of any activity that could “‘effectually obliterate the distinction between what is national and what is local.’”<sup>125</sup>

#### *F. South Carolina’s Low Level of Wetlands Protection*

*SWANCC* “places the burden of developing and implementing programs to protect isolated waters and their ecological and hydrological values squarely on the states, and it deprives those waters of virtually all protection in the meantime.”<sup>126</sup> *SWANCC* poses an undue regulatory burden on South Carolina, which is ill-prepared to shoulder the load.<sup>127</sup> Existing state programs are ineffective because the programs either stem from federal jurisdiction, offer only pollution protection, are

118. *Id.* at 905-14.

119. In *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), the Court held that Congress can regulate only the “use of the channels of interstate commerce,” “instrumentalities of interstate commerce,” or activities that have a “substantial relation to interstate commerce.” *Lopez*, 514 U.S. at 558-59; *Morrison*, 529 U.S. at 609; see also J. Blanding Holman, IV, *After United States v. Lopez: Can the Clean Water Act and the Endangered Species Act Survive Commerce Clause Attack?*, 15 VA. ENVTL. L.J. 139, 141 (1995) (“[T]he CWA migratory bird rule may not withstand a post-*Lopez* attack, given its attenuated relation to interstate commerce, its intrusion into areas traditionally of local concern, and its blurring of the distinction between local and national concerns.”).

120. See *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng’rs*, 531 U.S. 159, 174 (2001); Carter, *supra* note 76, at 8.

121. *Solid Waste Agency*, 531 U.S. at 172; Carter, *supra* note 76, at 8.

122. *Solid Waste Agency*, 531 U.S. at 172.

123. *Id.* at 174.

124. Johnson, *supra* note 75, at 10673.

125. *United States v. Morrison*, 529 U.S. 598, 608 (2000) (quoting *United States v. Lopez*, 514 U.S. 549, 556-57 (1995)).

126. Dreher, *supra* note 63, at 14.

127. See *infra* notes 128-58 and accompanying text.

voluntary, or only statutorily protect coastal wetlands. Existing state measures merely indirectly protect isolated wetlands.

South Carolina's most comprehensive wetlands statute is the Coastal Tidelands and Wetlands Act.<sup>128</sup> This Act requires the Office of Ocean and Coastal Resources Management (OCRM) to develop a Coastal Zone Management Plan and to review all permits for land alteration in the coastal zone.<sup>129</sup> The two critical criteria for determining whether to issue a permit are: (1) a balancing of the economic benefit against the preservation benefit, and (2) a determination of the extent to which "all feasible safeguards are taken to avoid adverse environmental impact."<sup>130</sup> OCRM's strict regulations deny permits unless the applicant has a navigation, mining, or drainage purpose, or unless there exists an overriding public interest to issue the permit.<sup>131</sup> While the Coastal Tidelands and Wetlands Act appears comprehensive, it regulates wetlands only in South Carolina's eight coastal counties where "critical areas" (defined as coastal waters, tidelands, and dunes) are found.<sup>132</sup> Isolated wetlands, including the Carolina Bays, fall outside the tenuous protection of this Act.<sup>133</sup> Moreover, individuals have already begun to challenge OCRM's authority to regulate isolated wetlands in light of the *SWANCC* decision.<sup>134</sup>

The Pollution Control Act<sup>135</sup> also indirectly protects South Carolina's isolated wetlands. This Act gives the Department of Health and Environmental Control (DHEC) the power to issue permits to prevent pollution and to maintain water quality standards.<sup>136</sup> By exerting jurisdiction over isolated wetlands as "waters of the state," the Pollution Control Act indirectly protects these wetlands.<sup>137</sup> However, in reality this Act provides little protection for isolated wetlands because its broad definition of "waters" does not directly mention such wetlands, implying that they are not covered by the Act.<sup>138</sup>

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128. S.C. CODE ANN. § 48-39-10 to -360 (West Supp. 2000).

129. WALDREP, *supra* note 15, at 18.

130. WANT, *supra* note 34, § 13.30, at 13-153.

131. *Id.*

132. *Id.* (citing § 48-39-130(c)).

133. See *supra* notes 16-18 and accompanying text.

134. Telephone Interview with Chris Brooks, Deputy Comm'r, Office of Ocean and Coastal Res. Mgmt., S.C. Dep't of Health and Envtl. Control (Sept. 12, 2001).

135. S.C. CODE ANN. § 48-1-10 to -350 (Law. Co-op. 1987 & West Supp. 2000).

136. *Id.* § 48-1-20.

137. WALDREP, *supra* note 15, at 18.

138. § 48-1-10(2) defines "waters:"

"Waters" means lakes, bays, sounds, ponds, impounding reservoirs, springs, wells, rivers, streams, creeks, estuaries, marshes, inlets, canals, the Atlantic Ocean within the territorial limits of the State and all other bodies of surface or underground water, natural or artificial, public or private, inland or coastal, fresh or salt, which are wholly or partially within or bordering the State or within its jurisdiction . . . .

Various state and federal landowner voluntary incentive programs also protect South Carolina's isolated wetlands.<sup>139</sup> Economics drive voluntary programs because a landowner often makes more money from the land by preserving it with a conservation easement than he would by developing it.<sup>140</sup> One successful voluntary program is the Wetlands Reserve Program,<sup>141</sup> which has created approximately 100 conservation easements in South Carolina.<sup>142</sup> The South Carolina Conservation Incentives Act<sup>143</sup> creates dollar-for-dollar state income tax credits in addition to federal tax credits for lands placed in approved conservation easements.<sup>144</sup> However, these benefits may be insufficient to prevent landowners from destroying wetlands.

The South Carolina Heritage Trust also indirectly regulates isolated wetlands.<sup>145</sup> The Trust preserves culturally and historically significant areas, including Bennett's Bay, a 680-acre isolated Carolina Bay—the largest surveyed in Clarendon County.<sup>146</sup> Unfortunately, the Trust only protects historic areas, and not all isolated wetlands are classified as historic.<sup>147</sup>

Finally, Section 401 of the Clean Water Act requires federal permit applicants to additionally apply to states for water quality certification.<sup>148</sup> A state may "veto" an approved federal permit and may "condition" the permit on the applicant's meeting certain water quality standards.<sup>149</sup> Section 401 thus allows states to regulate wetlands without establishing independent agencies and regulatory programs.<sup>150</sup> However, these programs depend on federal jurisdiction, so as the Corps' authority weakens, so too does the States' "veto" power.<sup>151</sup> Because a federal permit is no longer needed to fill isolated wetlands, developers can currently bypass state water quality standards.<sup>152</sup> Therefore, no entity, federal or state, currently adequately protects our state's isolated wetlands.

South Carolina quickly recognized this potentially harmful gap in wetlands regulation. Nearly one month after the *SWANCC* decision, DHEC adopted emergency rules to protect isolated wetlands because "[t]he state [was] . . . in

139. Voluntary conservation easements are advantageous relative to direct environmental regulation because protection easements can be site-specific rather than categorical. Federico Cheever, *Public Good and Private Magic in the Law of Land Trusts and Conservation Easements: A Happy Present and a Troubled Future*, 73 DENV. U.L. REV. 1077, 1085-1086 (1996). Because every wetland is different, voluntary easements can better protect "particular wetlands with particular boundaries in particular places." *Id.* at 1086.

140. *Id.* Of course, landowners may also preserve their land for purely altruistic purposes.

141. 16 U.S.C. § 3837 (2000).

142. WALDREP, *supra* note 15, at 9.

143. S.C. CODE ANN. § 12-6-3515 (2001) (LEXIS through 2000 legislation).

144. *Id.* § 12-6-3515(A).

145. S.C. CODE ANN. §§ 51-17-10 to -150 (West Supp. 2001).

146. WALDREP, *supra* note 15, at 12-13.

147. *Id.* at 12.

148. 33 U.S.C. § 1341 (1994).

149. Kusler, *supra* note 14, at 11.

150. *Id.*

151. *Id.*

152. *Id.*

danger of uncontrolled loss of isolated wetlands resulting from the SWANCC decision.”<sup>153</sup> The emergency rules reasserted state jurisdiction over isolated wetlands.<sup>154</sup> Under the rules, one cannot conduct an activity for which a DHEC permit is required when that activity, including dumping or filling, will alter isolated or other wetlands.<sup>155</sup> DHEC certification ensures that the activity will not violate water quality standards and, when necessary, that the activity is consistent with the Coastal Zone Management Plan.<sup>156</sup> Unfortunately, these emergency rules provided only a temporary solution. The South Carolina Code provides that if emergency regulations are filed while the General Assembly is in session, the regulations may not be refiled and are effective for only ninety days.<sup>157</sup> If the regulations are filed and expire when the Assembly is not in session, they may be refiled for another ninety days.<sup>158</sup> Since the General Assembly was in session on February 15, the emergency rules expired on May 15, 2001, leaving South Carolina’s isolated wetlands unprotected.

### III. SOLUTION

#### A. *Comprehensive Wetlands Statute Creating a State Permitting Scheme and the Role of Mitigation*

Because *SWANCC* eliminated federal regulation of isolated wetlands and because existing federal and state laws and programs are inadequate to protect our natural resources, a comprehensive state law is needed to clarify legislative intent, to outline a detailed regulatory scheme, and to consolidate regulatory directives. A truly comprehensive bill should include “goals, legislative findings of fact, wetland definition[s], wetland delineation criteria, mapping, permitting requirements and criteria, restoration provisions, mitigation bank provisions, [and] tax incentives.”<sup>159</sup>

South Carolina Senate Bill 550, which proposes the South Carolina Carolina Bays Protection Act,<sup>160</sup> accomplishes many of the goals mentioned above. First, the bill acknowledges that isolated wetlands are an “invaluable and vulnerable natural resource”<sup>161</sup> and that they are “being adversely affected, and will continue to be adversely affected, by escalating alteration of and construction within [the wetlands] areas, occasioned by increased population growth and resultant development.”<sup>162</sup> This description provides legislative intent, which is lacking in

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153. Emergency Regulation on Wetlands, 25 S.C. Reg. 27 (Feb. 15, 2001).

154. *Id.*

155. *Id.* at 27-28.

156. *Id.*

157. S.C. CODE ANN. § 1-23-130(c) (West Supp. 2000).

158. *Id.*

159. Jon Kusler, *The SWANCC Decision and State Regulation of Wetlands*, available at <http://www.aswm.org/swancc/aswm-int.pdf> (last visited Apr. 2, 2002).

160. S. Res. 550, 114th Gen. Assem., Reg. Sess. (S.C. 2001).

161. *Id.* § 48-1-510(3).

162. *Id.* § 48-1-510(6).

current South Carolina law. The bill also establishes an “interim goal of no overall net loss”<sup>163</sup> and a “long-term goal of increasing the quantity and quality of the state’s noncontiguous wetland resource base”<sup>164</sup> while simultaneously promoting lasting stewardship.<sup>165</sup>

An effective wetlands protection bill will also have accurate definitions and may choose to mirror federal definitions to promote consistency with the Corps’ remaining permitting jurisdiction over navigable waters and adjacent wetlands. For example, Bill 550 retains the definition of wetlands from the Code of Federal Regulations.<sup>166</sup>

One sponsor of the Carolina Bays Protection Act stated that “there is a great need for a conduit licensing agency to implement and oversee programs.”<sup>167</sup> The bill authorizes DHEC to promulgate regulations and to issue permits to restrain potentially harmful activities.<sup>168</sup> While the bill gives proper deference to DHEC, the General Assembly should further outline what applicants must disclose in their applications. This approach would clarify the legislature’s intention to enact a strict regulatory program. South Carolina should follow Florida’s lead and adopt a strict test that requires applicants to provide “reasonable assurance that state water quality standards applicable to waters as defined [in the statute] will not be violated and reasonable assurance that such activity in, on, or over surface waters or wetlands . . . is not contrary to the public interest.”<sup>169</sup> In determining whether a project is commensurate with the public interest, DHEC should balance the following factors:

1. Whether the activity will adversely affect the public health, safety, or welfare or the property of others;
2. Whether the activity will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats;
3. Whether the activity will adversely affect navigation or the flow of water or cause harmful erosion or shoaling;

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163. *Id.* § 48-1-530(B)(1).

164. *Id.*

165. Interview with Senator Robert L. Waldrep, Jr., Chairman, South Carolina Senate Agric. and Natural Res. Comm., and Patty Pierce, Senate Agric. and Natural Res. Comm., in Columbia, S.C. (Sept. 4, 2001).

166. The Code of Federal Regulations and the Senate Bill define wetlands as “areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.” 33 C.F.R. § 328.3(b) (2001); S. 550, 114th Gen. Assem., Reg. Sess. (S.C. 2001).

167. Interview with Senator Robert L. Waldrep, Jr., Chairman, South Carolina Senate Agric. and Natural Res. Comm., and Patty Pierce, Senate Agric. and Natural Res. Comm., in Columbia, S.C. (Sept. 4, 2001).

168. S. 550, 114th Gen. Assem., Reg. Sess., §§ 48-1-560 to -590 (S.C. 2001).

169. FLA. STAT. ANN. § 373.414(1) (West Supp. 2001).



4. Whether the activity will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity;
5. Whether the activity will be of a temporary or permanent nature;
6. Whether the activity will adversely affect or will enhance significant historical and archaeological resources . . . ; and
7. The current condition and relative value of functions being performed by areas affected by the proposed activity.<sup>170</sup>

Finally, the permit application should discuss possible mitigation proposals, including any alternatives to the proposed regulated activity.<sup>171</sup>

Mitigation is the “replacement of ecological resources lost as a result of development, and [the] lessening [of] adverse environmental impacts of development.”<sup>172</sup> Wetlands mitigation takes a twofold approach by utilizing both on-site mitigation (or the enhancement of degraded areas) and “mitigation banking,” where small threatened wetlands are destroyed to preserve larger restored wetlands in a different location.<sup>173</sup> Today, large commercial and public wetlands banks sell “credits” to developers needing compensatory mitigation.<sup>174</sup> Mitigation banking was originally touted as an economical way to balance development and conservation.<sup>175</sup> Further, mitigation banking allows continued development while simultaneously saving endangered wetlands.<sup>176</sup> The proposed South Carolina Bays Protection Act states that “[DHEC] is authorized to require mitigation for impacts to wetlands.”<sup>177</sup> However, the bill fails to delineate when mitigation is appropriate for permitting purposes. To correct this shortcoming, the bill should mandate that DHEC favor on-site to off-site mitigation and in-kind to out-of-kind mitigation.<sup>178</sup> These general preferences and policies should guide the applicant and DHEC by ensuring that the mitigation will “offset the adverse effects caused by the regulated activity.”<sup>179</sup>

170. *Id.*

171. *Id.* The stricter the test, perhaps the more opposition it will raise. However, a strict test is necessary for our state’s environmental and economic well-being and should be enacted regardless of the inevitable opposition that will result.

172. WANT, *supra* note 34, § 6.36, at 6-33.

173. J.B. Ruhl & R. Juge Gregg, *Integration Ecosystem Services Into Environmental Law: A Case Study of Wetlands Mitigation Banking*, 20 STAN. ENVTL. L.J. 365, 371 (2001).

174. *Id.* at 372.

175. *Id.* at 371.

176. *Id.*

177. S. Res. 550, 114th Gen. Assem., Reg. Sess. § 48-1-560 (S.C. 2001).

178. Regulators should favor on-site mitigation because replacing wetlands in another location—off-site mitigation through mitigation banking—often fails to promote the intended ecological function. *See* Ruhl & Gregg, *supra* note 173, at 369-70. Likewise, regulators should favor in-kind mitigation because a Carolina Bay in Aiken, for example, is not equivalent to or interchangeable with a swamp in Oconee County. *See id.*

179. FLA. STAT. ANN. § 373.414(1)(b) (West Supp. 2001).

For wetlands mitigation decisions, South Carolina should follow Florida's lead and outline a "uniform wetland mitigation assessment method."<sup>180</sup> In evaluating mitigation, DHEC should "determine the value of functions provided by wetlands and other surface waters considering the current conditions of these areas, utilization by fish and wildlife, location, uniqueness, and hydrologic connection."<sup>181</sup> DHEC should also consider "the expected time-lag associated with offsetting impacts and the degree of risk associated with the proposed mitigation."<sup>182</sup> This method would ensure that DHEC would consider the functions and values of wetlands when permitting wetlands mitigation.

As a part of this method, the bill should strictly outline when mitigation is impermissible. A Wisconsin wetlands statute states that "the department may consider a [proposed] mitigation project as part of an application . . . [if] the applicant demonstrates that all appropriate and practicable measures will be taken to avoid and minimize adverse impacts on the wetland."<sup>183</sup> The department "may not consider a mitigation project in reviewing an application . . . for an activity that adversely affects a wetland in an area of special natural resource interest or for an activity that adversely affects an area of special natural resource interest."<sup>184</sup> Wisconsin defines an area of "special natural resource interest" as "an area that possesses significant ecological, cultural, aesthetic, educational, recreational or scientific values."<sup>185</sup>

*B. A Comprehensive Permitting Scheme With Mitigation Is Both a Sound Doctrine and a Good Policy*

A central state regulatory agency permitting scheme will ensure a degree of legal uniformity and certainty. With isolated wetlands now falling under state jurisdiction, anyone desiring to implement a certain regulated activity in an isolated wetland will know whether a permit is needed, what must be included in an application, and whether there is a mitigation requirement for damage to the wetlands. South Carolina has already implemented eleven mitigation banks throughout the state.<sup>186</sup> This mitigation banking succeeds because it strikes a compromise between those who want to save all small isolated wetlands and those who wish to fill them. Mitigation allows developers to proceed with a necessary

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180. Ruhl & Gregg, *supra* note 173, at 385.

181. FLA. STAT. ANN. § 373.414(18) (West Supp. 2001).

182. *Id.*

183. WIS. STAT. ANN. § 281.37(2)(a)-(b) (West Supp. 2001).

184. *Id.* § 281.37(2)(c).

185. *Id.* § 281.37(1)(a).

186. WALDREP, *supra* note 15, at 19. A partial list of South Carolina's mitigation banks includes: 1. Vandross Bay, a private bank in Georgetown County; 2. Faulkenberry, a state bank in Clarendon County used by the South Carolina Department of Transportation (SCDOT); 3. Sandy Island, a SCDOT state bank in Georgetown County; and 4. Friend's Neck, a private Kershaw County bank. See UNITED STATES ARMY CORPS OF ENGINEERS, CHARLESTON DISTRICT MITIGATION INFORMATION, at <http://www.sac.usace.army.mil/permits/mitigate.html> (last visited Apr. 2, 2002).

project by filling small wetlands while simultaneously contributing to the restoration of an adjacent or larger wetlands system.<sup>187</sup> While economically efficient, mitigation banking still should only be used as a last resort.

Though developers may favor eliminating all isolated wetlands, permitting and mitigation can benefit developers by affording them a level of certainty in what is currently an unclear playing field. In fact, forcing development *around* wetlands could benefit business by preserving an attractive area for the development.<sup>188</sup> Structures surrounding wetlands can be sold at higher prices because the aesthetically pleasing wetlands serve as a buffer zone.<sup>189</sup>

Environmental groups also favor a comprehensive wetlands bill. While an off-site mitigation policy favors preserving larger wetlands systems as smaller wetlands are filled, this mitigation policy must conscientiously preserve some small systems, and it must not lose sight of the "source-sink" dynamic or the fact that larger systems serve different functions and values than do smaller systems.<sup>190</sup> Often, smaller systems provide more valuable ecological functions than do larger systems fostered by mitigation banking, and ten smaller systems cannot be replaced by the off-site creation of one large system.<sup>191</sup> Thus, off-site mitigation should be a last resort. Regulators can implement a program that both protects isolated wetlands and adheres to the short-term goal of no net loss and the long-term goal of "increasing the quantity and quality of the state's noncontiguous wetland resource base."<sup>192</sup>

Thus, a comprehensive wetlands bill could simultaneously please environmentalists and landowners. Landowners should appreciate that a single South Carolina agency controls their land, thus protecting them from costly litigation by delineating clear requirements for receiving a permit to fill or alter the land.<sup>193</sup> Coordinating definitions and permitting schemes with federal authorities should ease complex and time-consuming administrative work. Additionally, a policy encouraging the maintenance of wetlands would likely enhance hunting, fishing, and flood and erosion control.<sup>194</sup> Moreover, voluntary programs such as conservation easements could offer tax credits for undevelopable land.<sup>195</sup> Therefore, the presence of wetlands on one's property would not be tantamount to a total economic loss.<sup>196</sup>

187. See *supra* notes 172-76 and accompanying text.

188. Interview with Senator Robert L. Waldrep, Jr., Chairman, South Carolina Senate Agric. and Natural Res. Comm., and Patty Pierce, Senate Agric. and Natural Res. Comm., in Columbia, S.C. (Sept. 4, 2001).

189. WALDREP, *supra* note 15, at 7.

190. See *supra* notes 28-30, 178 and accompanying text.

191. See Ruhl & Gregg, *supra* note 173, at 382, 385.

192. S. Res. 550, 114th Gen. Assem., Reg. Sess., § 48-1-530(B)(1) (S.C. 2001).

193. See *supra* notes 167-68 and accompanying text.

194. See *supra* Part II.A.

195. See *supra* notes 139-44 and accompanying text.

196. Importantly, the state would also benefit from a comprehensive program because courts are less likely to find a regulatory taking in cases where "all economically beneficial uses" of the land are not lost due to the regulation. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019

*C. Problems Standing in the Way of a Comprehensive Wetlands Act*

Many obstacles block the implementation of a comprehensive wetlands conservation statute. The Senate Agriculture and Natural Resources Committee did not overlook the problems in funding a new program when it proposed the Carolina Bays Protection Act.<sup>197</sup> However, DHEC has stated that it can offset much of the work generated by the proposed act by hiring two new employees to handle the additional workload of “review[ing] applications, evaluat[ing] projects for adverse impacts, ensur[ing] mitigation, issu[ing] permits, [and] investigat[ing] complaints.”<sup>198</sup> The State Budget Office has predicted that the first-year costs of the program will be approximately “\$101,156, of which \$94,156 is recurring.”<sup>199</sup> Unfortunately, additional revenues from permits and fees are only expected to be about \$20,000 per year.<sup>200</sup> Moreover, in adopting this program, South Carolina will lose revenues from foregone development opportunities.<sup>201</sup>

Just as there are many proponents of a comprehensive wetlands bill, many fiercely oppose such legislation. Real estate developers want to open up land for development because unrestricted and undivided tracts of land are more profitable.<sup>202</sup> Landowners focused on property rights also oppose state wetlands regulation; some refer to Senate Bill 550 as a “racial bill” designed to take land from poor minorities.<sup>203</sup>

An examination of the origins of Senate Bill 550 illustrates the competing interests and the need for reconciling these interests. Senate Bill 550 is actually a hybrid of two other Senate bills—Senate Bill 223 and Senate Bill 287.<sup>204</sup> Senate Bill 223 gave carte blanche to DHEC, while Senate Bill 287 promoted environmental causes and gave DHEC no discretion.<sup>205</sup> Ultimately, senate staff drafted Senate Bill 550 by combining and amending Senate Bills 223 and 287 with input from environmental groups, environmental attorneys, DHEC, real estate developers, and other lobbyists.<sup>206</sup>

Another criticism of comprehensive legislation is that DHEC cannot handle the entire wetlands regulatory burden. Without a doubt, balancing all the potential

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(1992).

197. S. 550, OFFICE OF STATE BUDGET, STATEMENT OF ESTIMATED FISCAL IMPACT (2001).

198. *Id.*

199. *Id.*

200. *Id.*

201. See Brief of Amici Curiae Environmental Defense et al. at 16, *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001) (No. 99-1178) (“The money to be made on coastal, lakeside, riverside, and wetlands development is all but irresistible. State and local governments stand to gain considerable employment and tax revenue as well.”).

202. Interview with Senator Robert L. Waldrep, Jr., Chairman, South Carolina Senate Agric. and Natural Res. Comm., and Patty Pierce, Senate Agric. and Natural Res. Comm., in Columbia, S.C. (Sept. 4, 2001).

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

impacts on wetlands and evaluating projects concerning wetlands is a daunting task, difficult for any one regulatory agency to perform.<sup>207</sup> However, South Carolina *must* rely on a single agency to protect its isolated wetlands. Local control over permitting decisions is necessary because local regulators are more apt to account for local concerns as they issue permits within the general directives of the bill.

Lastly, whenever an area of traditional federal concern suddenly falls into the hands of state regulators, the state makes itself vulnerable to takings suits.<sup>208</sup> Another bill currently before the South Carolina Senate expands the concept of a regulatory taking.<sup>209</sup> Under this bill, the state is liable if it imposes an “unnecessary hardship”<sup>210</sup> on the landowner, which is a looser standard than was articulated in *Lucas*.<sup>211</sup>

#### IV. CONCLUSION

South Carolina’s General Assembly should enact a comprehensive wetlands statute with a detailed permitting scheme which considers specific criteria, states general goals, and utilizes mitigation as a tool to implement those goals. With *SWANCC*, the U.S. Supreme Court has handed down a decision that could

roll back the scope of federal water pollution control to the pre-Act 1960s, invalidating much of the current federal regulation of water pollution, including point source industrial discharges, into lakes and ponds, wetlands, and intermittent streams. Millions of acres of “isolated” surface waters and wetlands throughout the Nation would be removed from federal protection . . . .<sup>212</sup>

Because of *SWANCC*, South Carolina stands at a critical juncture where it must decide either to protect natural areas of great ecological, economic, and aesthetic value or to relinquish and squander its natural heritage. Time is of the essence, and South Carolina must act swiftly to protect its valuable isolated wetlands.

*Ross B. Plyler*

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207. Brief of Amici Curiae Environmental Defense et al. at 16, *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng’rs*, 531 U.S. 159 (2001) (No. 99-1178).

208. Kusler, *supra* note 14, at 12.

209. S. Res. 528, 114th Gen. Assem., Reg. Sess. (S.C. 2001).

210. *Id.*

211. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992).

212. Brief of Amici Curiae Environmental Defense et al. at 1-2, *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng’rs*, 531 U.S. 159 (2001) (No. 99-1178).