No. 99-1178

In the Supreme Court of the United States

SOLID WASTE AGENCY OF NORTHERN COOK COUNTY,

Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The issue in this case is whether the Corps of Engineers runs afoul of the Commerce Clause and the Clean Water Act when it claims authority to prohibit a municipal corporation from filling isolated waters on its land—a necessary incident to creating a long-planned and urgently required public waste disposal project—solely because those waters "are used as habitat by migratory bird[s] which cross state lines" or are protected by migratory bird treaties. Pet. C.A. App. 78; see Pet. 6 n.3.[1] The Corps' head-in-the-sand approach to the serious federalism concerns raised by its intrusion into a $20 million municipal project that had obtained every necessary state and local approval, as well as its strained defense of its reading of the CWA, confirm the need for immediate review. Four *amicus* briefs urging this Court to grant certiorari—filed by the National Association of Home Builders, the American Farm Bureau Federation, Cargill, Inc., and the Pacific Legal Foundation—attest to the importance of the question presented.

1. *The decision below conflicts with the Fourth Circuit's ruling in Wilson.* The Corps ignores the array

[1] The Solicitor General (at 5) tries to hint with citationless *"inter alias"* that there might have been some basis other than the migratory bird rule for asserting federal jurisdiction over the depressions and trenches on SWANCC's land. He identifies none in his brief in opposition, the Corps identified none to the courts below, and the Corps articulated none in its Section 404 denials.

of individual opinions and legal scholarship explaining why the migratory bird rule violates the Commerce Clause and CWA. See Pet. 13-14 & n.5. It does admit (at 10) that "*Wilson* is in some tension with the court of appeals' ruling in this case." But that is an understatement. The Fourth Circuit would have decided this case differently. It held in *Wilson* that the "other waters" rule, 33 CFR § 328.3(a)(3), "is unauthorized by the [CWA] as limited by the Commerce Clause and therefore is invalid." 133 F.3d at 254. The bird rule purports to "clarif[y]" that invalidated regulation (see Pet. App. 40a) and falls with it. Even apart from *Wilson*, the Corps may not rely on the migratory bird rule in the Fourth Circuit. It was invalidated in *Tabb Lakes Ltd.* v. *United States*, 885 F.2d 866 (4th Cir. 1989) (per cur.), for APA violations that the Corps has never rectified. Pet. 4 & n.2.

The Fourth Circuit's critique of the "other waters" rule applies with equal force to the migratory bird rule. First, the court invalidated § 328.3(a)(3) because it "requires neither that the regulated activity have a substantial effect on interstate commerce, nor that the covered waters have any sort of nexus with navigable, or even interstate, waters." 133 F.3d at 257. The migratory bird rule likewise does not mention interstate commerce, requiring only that isolated waters "are or would be used as habitat by birds protected by Migratory Bird Treaties" or "which cross state lines." Pet. App. 40a. And the Corps made no finding that bird use of SWANCC's property implicated interstate commerce in any way, nor could it plausibly do so.

Second, "as a matter of statutory construction," the

Fourth Circuit held, "'waters of the United States' when used to define the phrase 'navigable waters' refers to waters which, if not navigable in fact, are at least interstate or closely related to navigable or interstate waters" (133 F.3d at 257)—something that the "other waters" and migratory bird rules fail to recognize. Unlike the Corps (at 12), we see no sign that this interpretation of the CWA "is merely *dictum*." To the contrary, the quoted language introduces this clear holding: "When viewed in light of its statutory authority, 33 C.F.R. § 328.3(a)(3), which defines 'waters of the United States' to include intrastate waters that need have nothing to do with navigable or interstate waters, expands the statutory phrase 'waters of the United States' beyond its definitional limit." As one commentator observed, "the *Solid Waste Agency* court reached the opposite conclusion regarding congressional intent from the *Wilson* court," and it was the "Fourth Circuit [that applied] the proper analysis." Challis, *Standing Alone in Murky Waters*, 34 WAKE FOREST L. REV. 1179, 1187 n.75, 1204 (1999).

2. *Other factors also make review timely.* The use of many millions of acres of land and tens of millions of isolated waters is directly and significantly affected by the bird rule. See NAHB Br. 4; AFBF Br. 7. Yet, as the Pacific Legal Foundation explains in its *amicus* submission (at 9-14), the rule has rarely been challenged in court because the Corps routinely denies landowners "final decisions" on their permit applications and thereby precludes litigation. The Corps' recent institution of new administrative exhaustion requirements makes it even less likely that a challenge like this will be

ripened in the future. See *id.* at 14; 33 CFR §§ 320.1(a)(2), 331.1-.12 (1999). This Court's opportunities to address the bird rule are rare; it should not pass this one up.

Moreover, the intolerable uncertainty that the bird rule creates for landowners is not solely a result of conflicting circuit precedent and different views of *Lopez*; it inheres in the itinerant nature of migratory birds. One year's habitat may be abandoned the next; the bird's arrival on particular land is unpredictable. Because of the bird rule, virtually every major land-use project is in jeopardy throughout its planning and construction. At any point, a migratory bird may arrive at a wet spot, creating Corps jurisdiction and triggering Section 404 permit requirements. A rule imposing such heavy burdens so unpredictably requires clear justification—not statutory and constitutional contortions like those on display in the Corps' brief.

3. *The CWA does not authorize the Corps to regulate SWANCC's property.* We have already refuted (at Pet. 16-22) the Corps' argument, repeated in its brief in opposition, that the CWA authorizes it to regulate waters that are not navigable, potentially navigable, or in any way connected or related to navigable waters. The language and legislative history of the CWA demonstrate that the Corps' interpretation is untenable. The Corps misreads *Riverside Bayview Homes* (see Pet. 17-18, 21), and it does not even deign to cite *Federal Power Commission* or discuss the Federal Power Act provisions interpreted in that case, though these are directly at odds with the Corps' position. See Pet. 19 & n.6.

Astonishingly, the Corps (at 15 n.9) dismisses as irrelevant *The Daniel Ball* and other cases discussed in our petition on the grounds that they "significantly predate the CWA" and "construed the term '*navigable* waters of the United States.'" We have shown, however (at Pet. 20-21), that Congress expressly referenced this Court's decisions interpreting the term "navigable waters of the United States" when it adopted the CWA, that those decisions were an important backdrop to the statute, and that they must inform its interpretation. By using the term "navigable waters" and defining them as "waters of the United States," Congress tapped into this Court's precedents. It rejected the narrowest interpretation of navigability, set forth in *The Daniel Ball*, in favor of the broader interpretation embraced by this Court in *United States* v. *Utah* and *Appalachian Electric*, which includes waters capable of being made navigable. Add together *Utah*, *Appalachian Electric*, and *Riverside Bayview Homes* and you have a statute that indeed reaches "*some* waters that would not be deemed 'navigable' under the classical understanding" (474 U.S. at 133)—but nothing like the wet trenches and depressions, totally devoid of any connection to navigable or interstate waters, that the bird rule subjects to federal control. See Pet. 16-21.[2]

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[2] Oddly, at the same time the Corps insists that navigability is irrelevant to its powers, it relies (at 15-16) on the statement in the Conference Report that "[t]he conferees fully intend that the term *'navigable waters'* be given the broadest possible constitutional interpretation." S. Conf. Rep. No. 92-1236, at 144. The

The Corps' contention (at 14-15) that its bird rule is authorized because the CWA regulates waters in part to protect wildlife proves far too much. If protection of wildlife were sufficient for CWA jurisdiction, no bird-bath or ornamental pond would be safe from federal regulation. Equally, no swimming pool would be beyond the Corps' authority, because another goal of the CWA is to protect waters for their recreational value. See 33 U.S.C. § 1251(a)(2). "[W]e must be guided to a degree by common sense" in interpreting a statute, and common sense dictates that the CWA's goals may properly be pursued only through regulation of waters with *some* real connection to the navigable waters of the United States. *FDA* v. *Brown & Williamson Tobacco Corp.*, Slip op. 10 (Mar. 21, 2000). "[A]n administrative agency's power to regulate * * * must always be grounded in a valid grant of authority from Congress." *Id.* at 39. A basis for the Corps' assertion of jurisdiction over tens of millions of puddles and ponds on private land cannot remotely be located in the CWA.

4. *The bird rule is not entitled to Chevron deference because it raises serious Commerce Clause concerns.* The Corps' citation (at 20) to *United States* v. *Darby*,

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Corps does not respond to our explanation that Congress thereby meant merely to choose the *Utah* and *Appalachian Electric* approach over that of *The Daniel Ball*. Nor does the Corps provide any reasoned way to get from the Conference Report statement about *navigable* waters to the Seventh Circuit's broad holding that the CWA "reaches as many *waters* as the Commerce Clause allows." Pet. App. 9a.

312 U.S. 100 (1941), does not support its claimed entitlement to *Chevron* deference. As this Court held in *Edward J. DeBartolo Corp.*, 485 U.S. at 574-577, an agency's statutory construction is entitled to *no* deference when it raises "serious constitutional concerns." See *Texas Office of Pub. Util. Counsel* v. *FCC*, 183 F.3d 393, 443 n.95 (5th Cir. 1999) ("a court will reject an agency interpretation of a statute that would ordinarily receive deference under *Chevron* step-two if it believes the agency's reading raises serious constitutional doubts"); *Chamber of Commerce* v. *FEC*, 69 F.3d 600, 605 (D.C. Cir. 1995) (in light of court's "oblig[ation] to construe the statute to avoid constitutional difficulties," agency was "not entitled to *Chevron* deference"). Nothing in *Darby* requires this Court, contrary to *DeBartolo*, to defer to the Corps' constitutionally dubious expansion of its own reach under the CWA. Even if Congress had authority under the commerce power to enact the migratory bird rule, after making appropriate legislative findings, a mere agency does not. See *Greene* v. *McElroy*, 360 U.S. 474, 507 (1959); *National Cable Television Ass'n* v. *United States*, 415 U.S. 336, 342 (1974).

The Corps pretends (at 17-18) that exercising jurisdiction over SWANCC's property based on the bird rule "fits comfortably" within federal commerce power because "[c]ommerce associated with migratory birds has a measurable impact on the national economy," and because the "aggregate effects" of filling "isolated waters that are actually used as habitat for migratory birds" have a "substantial impact" on this commerce. That argument is wrong.

The self-propelled flight of birds across state lines is not commercial in character. Like "any conduct in this interdependent world of ours," such flight may have "an ultimate commercial * * * consequence." *Lopez*, 514 U.S. at 580 (Kennedy and O'Connor, JJ., concurring). But any "commercial nexus" here is too strained to support the Corps' "intru[sion] upon an area of [such] traditional state concern" as land use planning and control. *Ibid.* "Absent a stronger connection or identification with commercial concerns that are central to the Commerce Clause, that interference contradicts the federal balance the Framers designed." *Id.* at 583. If the federal government can justify regulating every place and every thing used by migratory birds merely by pointing in a generalized way to expenditures by hunters and birdwatchers, then we have "obliterate[d] the distinction between what is national and what is local and create[d] a completely centralized government." *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937).

Beyond that, the Corps points to no statistics or other evidence, and has made no finding, that filling even *every single isolated water* would have a substantial effect on interstate birdwatching or hunting or on migratory bird populations. In looking at "aggregate effects" on interstate commerce, the Corps (at 18-19) aggregates the wrong thing: the filling of all types of waters used by migratory birds, instead of the filling of *isolated* waters so used. See Pet. 24 n.8.

Any impact that *isolated* waters have on interstate commerce, even in the national aggregate, is "relatively trivial" and cannot serve "as an excuse for

broad general regulation of state or private activities." *Maryland* v. *Wirtz*, 392 U.S. 183, 197 n.27 (1968). Filling wholly isolated waters is not an "activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." *Lopez*, 514 U.S. at 567; see also *id.* at 560 ("*Wickard* * * * involved economic activity in a way that [filling isolated depressions and trenches] does not").[3]

5. *The bird rule infringes traditional state and local powers.* Based on its own view of the "public interest" (33 CFR § 320.4(a)), the Corps has blocked a state- and locally-approved project designed to benefit 700,000 residents of SWANCC's 23 member municipalities. The Corps' glib response (at 20-21) to our complaint that this infringes on local land use authority displays its cavalier approach to the Constitution's federalism guarantees as it seeks to aggrandize its own powers.

"[T]he local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere." THE FEDERALIST NO. 39, at 245 (C. Rossiter ed. 1961)

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[3] The Corps' frequent references to migratory bird treaties are unavailing. Of course, the treaty power authorizes the United States to agree with other nations to afford protection to migratory birds. But the Corps does not identify any treaty that requires the federal government to prevent the filling of isolated waters. Nor does it contend that the United States would be unable to fulfil its treaty obligations while also respecting the limits of its commerce power.

(Madison), quoted in *Printz*, 521 U.S. at 920-921. Requiring SWANCC to apply for a Section 404 permit in this case was an "ac[t] of usurpation" of local powers, which "deserve[s] to be treated as such." THE FEDERALIST NO. 33, at 204 (A. Hamilton). Contrary to the Corps' suggestion (at 21), Congress has *never* designated *isolated* waters as a national resource requiring national management. Absent an explicit determination of that sort, the CWA may not be read to "alter sensitive federal-state relationships" with regard to matters so "traditionally subject to state regulation" (*Rewis*, 401 U.S. at 811-812) as "the authority of state and local governments to engage in land use planning." *Dolan*, 512 U.S. at 384.

CONCLUSION

As the Solicitor General observes (at 21-22), the statutory schemes at issue in *Jones*, *Brzonkala*, and *Morrison* "are sufficiently different from the CWA that the Court's decisions in those cases are unlikely to affect the proper disposition" here. SWANCC's petition should not be held but granted forthwith, for the reasons stated above and in the petition.

Respectfully submitted.

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