Substantial Effect under *Lopez*: Using a Cumulative Impact Analysis for Environmental Regulations

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I. INTRODUCTION

The United States Congress has powers both express and implied. Through the years, Congress has expanded those powers beyond anything the framers of the Constitution could have imagined. However, in the

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recent case of *United States v. Lopez*,[1] the Supreme Court narrowed the reach of Congress's major mechanism for regulating in those areas not specifically granted under the Constitution: the Commerce Clause.[2] The *Lopez* decision forces Congress to find a substantial connection to interstate commerce in order for federal laws to stand under that provision of the Constitution,[3] thereby resulting in potential challenges to many federal laws. Among the laws promulgated under the Commerce Clause are many environmental statutes, including the Lacey Act,[4] Clean Water Act (CWA),[5] Marine Mammal Protection Act,[6] and Endangered Species Act (ESA).[7] This decision causes concern that these acts, or portions of these acts, may be overturned in future lawsuits. Indeed, several recent cases demonstrate not only this possibility, but also the confusion in the application of *Lopez* to provisions of the CWA and the ESA.[8] This Comment suggests that a cumulative impact analysis of the entirety of an environmental act should be the benchmark when determining its constitutionality under *Lopez*. This process would not only check the possibility of attack upon these laws, but would also alleviate confusion, while remaining within the confines of *Lopez*.

II. FEDERALISM AND ENVIRONMENTAL LAWS

Under the Constitution of the United States, Congress enjoys enumerated powers which are set forth in Article I, Section 8, including such functions as coining money and declaring war.[9] However, environmental protection is never mentioned in the Constitution and those powers not specifically granted to Congress are reserved for the states.[10] This construction would appear to mean that environmental laws are solely the province of the states; so where did national environmental laws come from?

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1. 514 U.S. 549 (1995).
2. U.S. CONST. art. I, § 8, cl. 3 (giving Congress power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").
3. *Lopez*, 514 U.S. at 559.
4. Ch. 553, 31 Stat. 187 (1900) (current version at 16 U.S.C. §§ 3371-3378 (1996) and 18 U.S.C. § 42 (1994)).
5. 33 U.S.C. §§ 1251-1387 (1994).
6. 16 U.S.C. §§ 1361-1421h (1994).
7. 16 U.S.C. §§ 1531-1544 (1994).
8. *See* United States v. Wilson, 133 F.3d 251 (4th Cir. 1997) (limiting scope of § 404 of CWA); National Ass'n of Home Builders v. Babbitt, 130 F.3d 1041 (D.C. Cir. 1997) (upholding application of ESA § 9 to a purely local species).
9. *See* U.S. CONST. art. I, § 8, cl. 5, 11.
10. *See* U.S. CONST. amend. X (stating "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people").

Until about 1899, there were no federal environmental laws.[11] The major force to protect the environment was the common law.[12] Growing problems, including "piles of garbage, contamination of drinking water sources, and sewage dumping,"[13] along with increased environmental awareness[14] motivated Congress to regulate in this area. Since Congress had no specific powers under the Constitution to regulate for environmental protection, it had to find an alternative way to do so. The federal government first entered the environmental arena through the treaty power contained in Article VI of the Constitution[15] and the property clause contained in Article IV.[16]

The Migratory Bird Treaty Act of 1918[17] gave force to a 1916 treaty with Great Britain created to protect dwindling migratory bird populations.[18] The treaty covered all migratory birds, including: geese, ducks, doves, pigeons, hawks, and songbirds (even though some were only arguably migratory), as well as their nests and eggs.[19] The birds were a large source of food for people, and also helped to protect vegetation by feeding on insects that were harmful to plants.[20] Although the birds were valuable, their populations were shrinking due to a lack of

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11. One of the first federal environmental regulations was the Rivers and Harbors Act of 1899, which prohibited discharge of refuse into navigable waters. Ch. 425, §§ 9-25, 30 Stat. 1151-55 (1899) (codified at 33 U.S.C. §§ 401-418 (1997)). However, the law was passed primarily to protect commerce, since too much refuse in the water could obstruct the flow of commerce in the waterway. *See id.* at ch. 425, § 13, 30 Stat. 1152 (1899) (33 U.S.C. § 407) (1997) (commonly referred to as the Refuse Act.). Two previous regulations affected the environment, but were made in order to promote use of the natural resources for development. *See* Homestead Act of 1862, ch. 75, 12 Stat. 392 (1862) (codified at 43 U.S.C. §§ 161-302 (1982)) and Mining Act of 1872, 17 Stat. 91 (1872) (codified as amended at 30 U.S.C. § 2154 (1997)).

12. *See, e.g.*, Susquehanna Fertilizer Co. v. Malone, 20 A. 900 (Md. 1890) (noxious vapors from a fertilizer plant were a private nuisance because they harmed the property and health of a neighboring family); Missouri v. Illinois, 200 U.S. 496 (1906) (Chicago's sewage discharge into a river which eventually flowed to St. Louis was not a public nuisance).

13. JACQUELINE VAUGHN SWITZER, ENVIRONMENTAL POLITICS: DOMESTIC AND GLOBAL DIMENSIONS 5 (1994).

14. For example, the Sierra Club was founded in 1892, the National Audubon Society in 1905, and the Wilderness Society in 1935. *Id.* at 7, 8.

15. U.S. CONST. art. VI, cl. 2 (providing for the supremacy of treaties over state law), U.S. CONST. art. I, § 8, cl. 2 (giving Congress the power to make all laws necessary to fulfill its constitutional powers).

16. U.S. CONST. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . .").

17. 16 U.S.C. §§ 703-711 (1994).

18. Convention for the Protection of Migratory Birds (Migratory Bird Treaty), Dec. 8, 1916, U.S.-U.K. (regulating the killing and sale of migratory birds in the U.S. and Canada).

19. *See id.*

20. *See* Missouri v. Holland, 252 U.S. 416, 431 (1920).

satisfactory conservation measures.[21] Since the birds flew over both the United States and Canada, they needed protection in both countries for any conservation measures to be effective.[22] In order to accomplish the conservation goals, the United States entered into the treaty with Great Britain.[23] As an enforcement mechanism for the treaty, the federal government promulgated regulations in July and October of 1918, limiting "killing, capturing, or selling of any of the migratory birds . . . except as permitted by regulations . . . ."[24] In *Missouri v. Holland*,[25] the state challenged the constitutionality of the act under the Tenth Amendment, saying it infringed upon the rights reserved to the states under that amendment.[26] In its decision, the Supreme Court upheld the power of the federal government to regulate migratory birds in this manner:

> It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, "a power which must belong to and somewhere reside in every civilized government" is not to be found.[27]

Congress was thus allowed to regulate in an area in which the Constitution had granted no specific power. In the process, the Supreme Court rejected the idea of state ownership of wildlife asserted by *Geer v. Connecticut*.[28] Although the Migratory Bird Treaty Act was upheld in the *Holland* case,[29] regulating through the treaty power contains a major restriction—it can only be used to pass regulations when they are necessary in order to enforce a treaty.[30]

The federal government found success in entering the wildlife regulation arena with one method, but other methods were needed. A second path Congress found was through the property clause in Article IV of the Constitution. Congress was specifically designated the power to make regulations concerning federal lands,[31] and used that power to

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21. *See id*.
22. *See id*.
23. *See id.*; *see also* Migratory Bird Treaty, *supra* note 18.
24. *Holland*, 252 U.S. at 431.
25. 252 U.S. 416 (1920).
26. *See id.*
27. *Id*. at 433 (quoting Andrews v. Andrews, 188 U.S. 14, 33 (1902)).
28. 161 U.S. 519, 530 (1895).
29. *Holland*, 252 U.S. at 435.
30. *See* U.S. CONST. art. I, § 8, cl. 18. The "necessary and proper" clause allows Congress to pass regulations to execute other powers of the federal government, but it only applies to powers enumerated in the Constitution, and therefore does not expand congressional power.
31. *See* U.S. CONST. art. IV, § 3, cl. 2.

regulate the wildlife on those lands.[32] The Supreme Court decided in favor of the government being able to use the property power to promulgate environmental regulations,[33] but the limits were still unclear. The most conclusive case concerning the use of the property power to regulate wildlife was *Kleppe v. New Mexico*.[34] In *Kleppe*, the Supreme Court upheld the constitutionality of the Wild Free-Roaming Horses and Burros Act,[35] which protected free horses and burros on federal land. New Mexico felt:

> that if [the Supreme Court] approve[d] the Wild Free-roaming Horses and Burros Act as a valid exercise of Congress' power under the Property Clause, then [the Court would] have sanctioned an impermissible intrusion on the sovereignty, legislative authority, and police power of the State and have wrongly infringed upon the State's traditional trustee powers over wild animals.[36]

Although the law was in conflict with state interests, the Supreme Court held that the federal government had the right to protect wildlife located upon federal lands.[37] The property clause gave the federal government another means to regulate the environment, but it only covered those things which affected federally owned lands.

In order to effect all types of necessary environmental legislation, the federal government turned to the Commerce Clause for authority. This clause gives Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[38] If Congress could fit environmental laws under the heading of interstate commerce, it would have a Constitutional basis for those laws. However, past rulings regarding the Commerce Clause have produced differing interpretations; therefore, results are uncertain.

III. COMMERCE CLAUSE AND *LOPEZ*

The Commerce Clause provides a means for Congress to regulate in many areas otherwise unreachable because of the Tenth Amendment. The Commerce Clause was drafted in order to promote economic growth and

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32. *See, e.g.*, Hunt v. United States, 278 U.S. 96 (1928); Kleppe v. New Mexico, 426 U.S. 529 (1976).

33. *See Hunt*, 278 U.S. at 96 (upholding the right of the federal government to remove deer from a national forest to prevent overgrazing in the forest).

34. 426 U.S. 529 (1976).

35. *Id.* at 535.

36. *Id.* at 541.

37. *Id.* at 543.

38. U.S. CONST. art. I, § 8, cl. 3.

to protect the unity of the nation.[39] States were passing tariffs against imports from other states, essentially treating those states as foreign nations.[40] "[T]o prevent the states from interfering with commercial intercourse," the Commerce Clause was added to the Constitution.[41] Its wording is vague, as are other Constitutional clauses, because otherwise the Constitution probably would not have been ratified.[42] This vagueness has allowed for Congress and the courts to supply their own interpretations to the meaning of the Commerce Clause, and for many years the scope of the commerce power increased unchecked.[43] The effect was to allow Congress to regulate in more and more areas that had traditionally belonged to the states.

Under historical Commerce Clause opinions, Congress merely needed to show that it had a rational basis by which to find an effect on interstate commerce in order to regulate via the Commerce Clause.[44] Congress essentially had free reign to regulate whatever it wanted, as most anything could be shown to have some impact on commerce: "[a]lmost anything—marriage, birth, death—may in some fashion affect commerce."[45] The *Lopez* decision finally curbed the ever increasing national commerce power, and placed some limits on what could be regulated using the Commerce Clause.

A. Facts of Lopez

In *Lopez*, the Supreme Court overturned sections of the Gun-Free School Zones Act of 1990, which made it a crime to knowingly possess a firearm within a certain distance from school grounds.[46] The Court examined the Act's relationship to interstate commerce, and found neither an economic aspect nor a substantial effect on interstate commerce.[47]

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39. *See* ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL 310-12 (1916), *reprinted in* WILLIAM B. LOCKHART ET AL., CONSTITUTIONAL LAW 67 (8th ed. 1996).

40. *See id.*

41. ALPHEUS THOMAS MASON & DONALD GRIER STEPHENSON, JR., AMERICAN CONSTITUTIONAL LAW 184 (10th ed. 1993).

42. *See* ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 2, 3 (Daniel J. Boorstin ed., Sanford Levinson rev., 2d ed. 1994).

43. *See, e.g.*, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196 (1824) (defining the commerce power as the power "to prescribe the rule by which commerce is to be governed"); Houston, East & West Texas Ry. v. United States, 234 U.S. 342 (1914) (allowing the federal government to regulate railroad fares within the state of Louisiana); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (holding that even intrastate activities may be reached if they have a close and substantial relation to interstate commerce).

44. *See* Heart of Atlanta Motel, Inc., v. United States, 379 U.S. 241, 258 (1964).

45. *Jones & Laughlin Steel*, 301 U.S. at 99 (McReynolds, J., dissenting).

46. United States v. Lopez, 514 U.S. 549, 567 (1995) (citing 18 U.S.C. § 922(q)(1)(A) (1994) (amended 1996)).

47. *Id.* at 567.

The Court categorized three ways for federal regulations to be constitutional under the Commerce Clause:

> First, Congress may regulate the use of the channels of interstate commerce. . . . Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. . . . Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, . . . i.e., those activities that substantially affect interstate commerce.[48]

Past decisions had not settled the issue of whether the regulated activity under the third category must "affect" or "substantially affect" interstate commerce.[49] The *Lopez* Court considered the holdings of past opinions and followed *Maryland v. Wirtz*[50] in concluding that a trivial impact on commerce was not enough to invoke the commerce power.[51] Instead the Court applied the more stringent substantial effect test.[52]

The Court then examined the connection between the regulated activity, possessing a firearm in a school zone, and interstate commerce, to determine whether a substantial relationship existed.[53] The Court saw no substantial connection "visible to the naked eye," and looked to the legislative history for evidence of a connection.[54] However, "the Government concede[d] that '[n]either the statute nor its legislative history contain[ed] express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone.'"[55] The government argued that having a gun on school grounds does, in fact, affect interstate commerce in a number of ways.[56] First, gun possession could result in violent crimes, which would affect interstate commerce by raising insurance outlays because of the substantial costs of violent crimes, and also by affecting people's decisions to travel to certain destinations based upon their perception of the amount of crime in the area.[57] Second, guns could "threaten[] the learning environment", and thereby affect education. Students coming from that impaired educational process would not contribute as much to society.[58] Consequently, the

48. *Id.* at 558-59 (citations omitted).
49. *Id.* at 559.
50. 392 U.S. 183, 196 n.27 (1966).
51. *Lopez*, 514 U.S. at 559.
52. *Id.*
53. *Id.*
54. *Id.* at 562-63.
55. *Id.* at 562.
56. *See id.* at 563-64.
57. *See id.*
58. *See id.* at 564.

nation's economy would suffer.[59] The Court rejected these theories, and explained that according to either of these rationales, there would be virtually no limit to Congress's Commerce Clause power.[60] The Court found that Lopez was a local student and not a part of interstate commerce. Furthermore, the Court found that the mere possession of a gun did not in itself have a substantial effect on interstate commerce.[61] Therefore, the Court found the connection to interstate commerce in this case to be insufficient under a substantial relationship test.[62]

The Court also considered the requirement that the regulation be commercial in nature.[63] The statute made possession of a gun in a school zone a federal offense. "Section 922(q) is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."[64] The Court found that possession of a gun in a school zone was not an economic activity in itself, and that the regulation had nothing to do with any commercial activity.[65] Therefore, the Gun-Free School Zones Act did not meet this requirement either.

The *Lopez* decision also added a jurisdictional element to the Commerce Clause framework.[66] *Lopez* required a component in a statute to limit its scope to those situations where there is an explicit connection to interstate commerce.[67] The Gun-Free School Zones Act "made it a federal offense 'for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone.'"[68] The Court found that the statute did not contain the requisite requirement and hence found the jurisdictional element lacking.[69]

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59. *See id.*
60. *Id.*
61. *Id.* at 567.
62. *Id.*
63. *Id.* at 562-63.
64. *Id.* at 561.
65. *Id.* at 567.
66. *Id.*
67. *Id.* at 561-62.
68. *Id.* at 551 (quoting the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q)(1)(A) (1994).
69. *Id.* at 561. The statute was amended in 1996 to include the above elements, and now reads: "It shall be unlawful for any individual knowingly to possess a firearm that has moved in or that otherwise affects interstate commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone." 18 U.S.C. § 922(q)(2)(A) (1988 & Supp. V) (amended 1996). The preliminary language also contains information as to why Congress believes there is a substantial relationship to interstate commerce such that it may promulgate the regulation under the Commerce Clause. 18 U.S.C. § 922(q)(1) (1988 & Supp. V) (amended 1996).

B. Effects on Environmental Laws

The *Lopez* decision could profoundly impact any federal statute based on the commerce clause power. The decision provides a means to challenge the constitutionality of those statutes. Environmental laws, many of which are based solely on the commerce power, may be particularly vulnerable. In the past, Congress simply had to show that it had a rational basis for finding a connection to interstate commerce in order to use the Commerce Clause to promulgate regulations;[70] thus, these laws were fairly safe from challenge. However, since *Lopez*, there has been some confusion in the applicability of the Commerce Clause to environmental laws. Two recent cases concerning the CWA and the ESA show the uncertainty of decisions under current jurisprudence, and challenge the authority of present and future attempts at environmental regulation.

IV. CONFUSION IN ENDANGERED SPECIES ACT APPLICATION

A. Background

The ESA was promulgated in 1973 with the intention of conserving endangered and threatened species and their ecosystems.[71] The basic process is fairly straightforward, although the exact details of each listing may be very intricate. The first step in the ESA is to list a species for protection.[72] The Secretary of the Interior may list a species as either threatened, receiving some protection, or endangered, receiving greater protection.[73] When a species is listed, the Secretary should designate habitat critical to the survival of that species.[74] In order to promote conservation of listed species, the Secretary also must develop a "recovery plan" which should eventually result in the species recovering to the point that it may be removed from the list.[75] Federal agencies are required to work with the Secretary to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical . . . ."[76]

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70. *See, e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (Congress only has to show a rational basis for its finding that the Civil Rights Acts of 1954 are connected to interstate commerce).

71. ESA § 2, 16 U.S.C. § 1531(b) (1994).

72. ESA § 4, 16 U.S.C. § 1533.

73. *See id.*

74. *See id.*

75. *See id.*

76. ESA § 7(a)(2), 16 U.S.C. § 1536(a)(2) (parentheticals omitted).

The ESA is a federal regulatory scheme, yet it can have profound effects on local and state actions. When a development project is proposed in an area inhabited by a listed species, the developers must first get a permit from the Fish and Wildlife Service (FWS).[77] The FWS may require mitigation measures it deems necessary to protect the survival and recovery of the species.[78] The developer must meet the requirements listed in Section 10(a)(2) of the ESA.[79] Thus, the federal government can influence the completion of a local project on federal land. Consequently, the question arises whether the federal government has the authority to regulate matters that appear to be purely local.

B. National Association of Home Builders v. Babbitt

1. Facts and History

National Association of Home Builders v. Babbitt arose out of a dispute concerning the protection afforded the Delhi Sands Flower-Loving Fly (the Fly) after it was listed as an endangered species.[80] San Bernadino County and land developers challenged the constitutionality of applying ESA Section 9 to the Fly, since it only lived in a small section of California, and had no substantial connection to interstate commerce.[81]

San Bernadino County had plans to build a hospital in an area designated as Fly habitat, but received a permit from the FWS conditioned on setting aside land to be used as Fly habitat.[82] The county later told the FWS that it also planned to redesign an intersection to allow easier access to the hospital by emergency vehicles.[83] Changing the intersection would result in a 70-80% decrease in the size of a corridor set aside for the Fly; thus, the FWS determined that the expansion would likely result in a "taking" of the Fly under ESA Section 9(a).[84] The National Association of Home Builders filed a complaint seeking an injunction against enforcement of that provision on the grounds that it was unconstitutional as applied to the Fly.[85] The plaintiffs claimed that the Constitution granted no federal management authority over wildlife or nonfederal lands, and therefore the FWS did not have power to require

77. *See* ESA § 10, 16 U.S.C. § 1539(a).
78. *See id.* § 10(a)(2), § 1539(a)(2).
79. *See id.* § 10(a)(2), § 1539(a)(2).
80. National Ass'n of Home Builders v. Babbitt, 130 F.3d 1041 (D.C. Cir. 1997).
81. *See id*. at 1043.
82. *See id*.
83. *See id*.
84. *See id.* "Take" is defined as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." ESA § 3(19), 16 U.S.C. § 1532(19).
85. *See Home Builders*, 130 F.3d at 1043.

setting aside land as habitat for the Fly.[86] The United States District Court for the District of Columbia found the application constitutional under the Commerce Clause, and granted summary judgment for the government.[87] The D.C. Circuit Court of Appeals affirmed the decision of the district court.[88]

2. Court of Appeals Discussion

The court of appeals, in an opinion written by Judge Wald, first discussed the *Lopez* decision, and determined that in order for Section 9(a) of the ESA to fall under the Commerce Clause, it must fit under either category one or category three of the rationales discussed in *Lopez*.[89] The majority opinion found that the application of Section 9 was constitutional as a regulation of the channels of interstate commerce for two reasons:

> First, the prohibition against takings of an endangered species is necessary to enable the government to control the transport of the endangered species in interstate commerce. Second, the prohibition on takings of endangered animals falls under Congress' authority "to keep the channels of interstate commerce free from immoral and injurious uses."[90]

First, the court determined that prohibiting takings of endangered species is warranted by the need to achieve the ESA prohibitions against transporting and selling endangered species.[91] Second, the court determined that moving an endangered animal between regions through interstate commerce would injure the region from which the animal was taken.[92] Another rationale was that the workers and supplies necessary for building the hospital travel through the channels of interstate commerce.[93] Either way, the court determined that the regulation would affect the channels of interstate commerce, and therefore met the constitutional requirement under *Lopez*. [94]

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86. *See id*. at 1045.
87. *See id*. at 1043.
88. *Id*.
89. *Id.* at 1046. Category one says that "Congress may regulate the use of the channels of interstate commerce." United States v. Lopez, 514 U.S. 549, 558 (1995). Category three states that "Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce." *Id*. at 558-59 (citations omitted).
90. *Home Builders*, 130 F.3d at 1046 (quotations omitted).
91. *Id*. at 1047.
92. *Id*. at 1048.
93. *See id*.
94. *Id.*

The majority also found that the activity substantially affected interstate commerce, thereby creating the required nexus under category three from *Lopez*.[95] The court first looked to the congressional history of the ESA, and then discussed two specific ways that Section 9 of the ESA could affect interstate commerce.[96]

In order to find a statute constitutional under the Commerce Clause using a category three rationale, courts must first determine that Congress possessed a rational basis for finding a substantial connection to interstate commerce.[97] In both the Senate and House reports, Congress suggested several ways that the ESA relates to interstate commerce.[98] The House report discussed the value of endangered species as potential sources of medicine or cures for disease, the loss of which could certainly impact interstate commerce: "[f]rom the most narrow possible point of view, it is in the best interests of mankind to minimize the losses of genetic variations. The reason is simple: they are potential resources."[99] The Senate report focused more directly on the actual resources for sale. When endangered species are recovered and their populations increase, they can once again be exploited for sale. "In such a case businessmen may profit from the trading and marketing of that species for an indefinite number of years, where otherwise it would have been completely eliminated from commercial channels in a very brief span of time."[100] This commercial increase could not occur without the intervention of the ESA protections. The Senate report also discussed the loss to the gene pool when a species becomes extinct, which reduces mankind's potential to use that genetic material for bettering domestic animals or improving resistance to disease.[101] The Congressional Record shows that both Houses found the connection to interstate commerce sufficient to promulgate the ESA. When a court is determining whether there is a substantial connection to interstate commerce, "[t]he court must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding."[102]

The court of appeals looked at several specific grounds upon which Congress could have rationally found the interstate commerce connection.

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95. *Id*. at 1049.
96. *Id.* at 1051.
97. *See id.*
98. *See id*. at 1050-51.
99. *See id.* at 1051 (quoting H.R. Rep. No. 93-412, at 4-5 (1973)).
100. *Id*. (quoting S. Rep. No. 91-526, at 3 (1969)).
101. *See id.*
102. *Id.* at 1052 (quoting Terry v. Reno, 101 F.3d 1412, 1416 (D.C. Cir. 1996)).

Biodiversity was considered first.[103] According to the government, biodiversity would be greatly reduced without the protections afforded endangered species under the ESA.[104] When biodiversity is reduced, "the current and future interstate commerce that relies on the availability of a diverse array of species" is harmed.[105] "Endangered [species] are valuable as sources of medicine and genes,"[106] as well as attractions for tourists and research for scientists.[107] Takings of endangered species, "if permitted, would have a substantial effect on interstate commerce by depriving commercial actors of access to an important natural resource—biodiversity."[108]

The court of appeals looked next at interstate competition as a basis under which Congress could have found a substantial effect on interstate commerce.[109] Congress is empowered under the Commerce Clause to "act to prevent destructive interstate competition."[110] Even though the activities carried out may not be commercial in nature,[111] and might be executed in a single state, they "may be regulated because they have destructive effects . . . that are likely to affect more than one State."[112] In order to increase development, states may use less stringent standards of protection for endangered species, thereby gaining an advantage over other states in a destructive manner.[113] This is the "Race to the Bottom" theory, whereby developers will be attracted to the states with the lowest environmental standards because it will be cheaper and easier for businesses to operate there. The states with lower standards would suffer increased environmental harm, while the states with higher standards would suffer economically. Thus, Congress is empowered to pass laws to prevent both types of harm.[114] Because Congress has the power to prevent destructive interstate commerce, "Congress has the power to prevent interstate competition that will result in the destruction of endangered species . . . ."[115]

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103. Biodiversity is "defined as the presence of a large number of species of animals and plants." *Id*. at 1052.
104. *See id*.
105. *Id.*
106. *Id.*
107. *See id.* n.11.
108. *Id*. at 1054.
109. *Id.*
110. *Id.*
111. *See id*. at 1049.
112. *See id.* at 1055.
113. *See id*. at 1048.
114. *See id.* at 1057.
115. *Id.*

The D.C. Circuit Court of Appeals found that Section 9 of the ESA satisfied both category one and category three Commerce Clause rationales under *Lopez*,[116] and therefore upheld the decision of the United States District Court for the District of Columbia, and granted summary judgment for the government.[117]

Judge Henderson wrote a concurring opinion which for different reasons found that Section 9 of the ESA is constitutional. She first discussed, and then disposed of, the category one explanation.[118] She stated that because the Flies do not move in interstate commerce, and are not connected to things that move in interstate commerce, the regulation does not relate to interstate commerce.[119]

Judge Henderson then turned to the category three possibilities.[120] She disagreed with the majority's argument that an impact on interstate commerce can be based on the potential future value of medicines and genetic information that may come from species not yet studied.[121] Because there is not a definite effect, but only a potential effect, Judge Henderson found that this future value did not constitute a substantial impact on interstate commerce.[122]

Judge Henderson put forth two rationales to support the constitutionality of ESA Section 9. She agreed that biodiversity is a grounds for finding a substantial impact on interstate commerce because all ecosystems are interconnected.[123] The extinction of one species affects the local ecosystem, which in turn affects the worldwide ecosystem.[124] Based on this relationship, "it is reasonable to conclude that the extinction of one species affects others and their ecosystems and that the protection of a purely intrastate species . . . will therefore substantially affect land and objects that are involved in interstate commerce."[125] This was enough for Judge Henderson to find a "rational basis" for determining that Section 9 of the ESA falls "within Commerce Clause authority."[126]

Judge Henderson's second justification for finding Section 9 constitutional was that the regulation of the Fly results in the regulation of commercial development, which certainly affects interstate commerce.[127]

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116. *Id.* at 1046.
117. *Id.* at 1057.
118. *Id.* at 1057-58.
119. *Id.* at 1058.
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.* at 1058-59.
125. *Id.* at 1059 (parenthetical omitted).
126. *Id.*
127. *Id.*

When Congress wrote the ESA, it considered regulating land and development as a means of protecting endangered species.[128] Protecting the Fly causes the hospital and the intersection both to be regulated, thereby affecting interstate commerce.[129] According to Judge Henderson, since this "asserts a substantial economic effect on interstate commerce[,]" it is within the sphere of regulation available to Congress under the Commerce Clause.[130]

Judge Sentelle dissented, finding no justification under the Commerce Clause for this application of ESA Section 9.[131] He found this situation less related to interstate commerce than the situation in *Lopez*, since at least that regulation covered an item which does travel in commerce.[132] Judge Sentelle discussed several steps articulated in *Lopez* to use when examining a regulation under a category three rationale, and then applied them to the arguments put forth by the majority and concurrence.[133] When considering whether a regulation substantially affects interstate commerce for *Lopez* purposes:

> we must examine whether:
> - the regulation controls a commercial activity, or an activity necessary to the regulation of some commercial activity;
> - the statute includes a jurisdictional nexus requirement to ensure that each regulated instance of the activity affects interstate commerce; and
> - the rationale offered to support the constitutionality of the statute has a logical stopping point so that the rationale is not so broad as to regulate on a similar basis all human endeavors, especially those traditionally regulated by the states.[134]

According to Judge Sentelle, the application of Section 9 fails in all three aspects.[135] First, as in *Lopez*, the regulated activity is not commercial in nature.[136] "Neither killing flies nor controlling weeds nor digging holes is either inherently or fundamentally commercial in any sense."[137] Second, also as in *Lopez*, there is no jurisdictional requirement in the governing sections of the ESA that there be a connection to interstate commerce.[138] Third, Judge Sentelle sees "no stopping point" in

128. *See id.*
129. *Id.*
130. *Id.* (quoting Wickard v. Filburn, 317 U.S. 111, 125 (1942)).
131. *Id.* at 1061 (Sentelle, J., dissenting).
132. *Id.* at 1063.
133. *Id.* at 1063-64.
134. *Id.* (parenthetical omitted).
135. *Id.* at 1064.
136. *Id.*
137. *Id.*
138. *See id.* at 1064-65 (citing United States v. Lopez, 514 U.S. 549, 561 (1995)).

any rationale offered by the majority or concurrence.[139] If one considers the majority's rationale that the potential effect on medical, scientific, or economic value is enough, then a court could find a potential value for almost any object, regardless of its local or non-commercial nature.[140] Judge Henderson's suggestion that the reduction of any one species will affect land or other objects in interstate commerce also has no stopping point according to the dissent.[141] Any law regulating a purely local item with some effect on another item in interstate commerce could then fall under the Commerce power.[142]

Judge Sentelle did not find any proposal presented by either the majority or the concurrence to be persuasive, and in his dissent rejected every argument. He found that the application of Section 9 of the ESA to the Fly was not authorized by the Commerce Clause.[143]

3. Analysis

Although *Home Builders* provides some support for the application of the ESA to a purely local species under the Commerce power, that support is not very strong. The fact that none of the judges could agree upon any rationale for Commerce Clause authority shows the confusion in this area of the law. Since *Lopez*, there has not been a definite opinion determining how cases like this should turn out. In order for developers, agencies, and courts to understand how environmental regulations should be applied, there needs to be a more concrete answer as to what falls under Commerce Clause authority.

V. CONTINUING CONFUSION IN WETLANDS LAW

A. Background

The CWA was created "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[144] Section 404 of the CWA deals specifically with dredge and fill permits for wetlands.[145] This provision requires a developer to seek a permit from the Army Corps of Engineers (Corps) before discharging dredge or fill materials into navigable waters.[146] Landowners often want to develop wetlands on their property in order to put the land to what they consider to be a more

139. *Id.* at 1065.
140. *See id.*
141. *See id.*
142. *See id.*
143. *Id.* at 1067.
144. CWA § 101(a), 33 U.S.C. § 1251(a) (1994).
145. *See* CWA § 404, 33 U.S.C. § 1344.
146. *See id.*

beneficial use. Section 404 requires the Corps to consider alternative, non-water based possibilities for development, and may require mitigation measures in order for a permit to be granted.[147] Although the CWA itself has no problem passing constitutional muster, Section 404 has been litigated many times regarding its application to certain types of water bodies. The most difficult question is how Section 404 may be applied to isolated wetlands, that is, wetlands that are not adjacent to other navigable waterways. The constitutional question remains the same, but the framework for consideration has changed somewhat since *Lopez*. Now it is more difficult to find the requisite connection to interstate commerce necessary for application of Section 404 to be upheld. A recent decision from the Fourth Circuit, *United States v. Wilson*, has struck down the application of Section 404 to isolated wetlands for lack of a substantial effect on interstate commerce.[148]

B. United States v. Wilson

1. Facts and History

Interstate General, of which James J. Wilson "was the chief executive officer and chairman of the board of directors," was preparing several pieces of property for development, some of which contained wetlands.[149] Under Section 404 of the CWA, the developers were required to obtain a permit from the Corps before beginning development of any parcels containing wetlands.[150] Although the developers knew of the presence of wetlands on the property, they did not obtain the requisite permits.[151] They drained and filled the parcels of land, and were then convicted in the United States District Court for the District of Maryland of "knowingly discharging fill material and excavated dirt into wetlands on four separate parcels without a permit, in violation of the Clean Water Act . . . ."[152] Interstate General appealed on several grounds.

Under the Corps' definitions, waters of the United States "include those waters whose degradation 'could affect' interstate commerce."[153] Interstate General challenged the use of this definition in the jury instructions on the grounds that it was not authorized under the

147. *See id.*
148. 133 F.3d 251 (4th Cir. 1997).
149. *Id.* at 254.
150. *See* CWA § 404, 33 U.S.C. § 1344 (1994).
151. *See Wilson*, 133 F.3d at 255.
152. *Id.* at 254.
153. *Id.* at 253-54 (quoting Definition of Waters of the United States, 33 C.F.R. § 328.3(a)(3) (1993)).

Commerce Clause.[154] It also challenged the jury instructions which extended the application of the CWA to isolated wetlands.[155] The Court of Appeals for the Fourth Circuit agreed that the definition was not authorized under the CWA, and was therefore invalid, but did not rule on its constitutionality.[156] The court also agreed that the extension of the CWA to isolated wetlands was not a valid interpretation of the CWA.[157]

2. Court of Appeals Discussion

The court first determined whether the definition as interpreted by the Corps was valid under its authority granted by Congress in the CWA.[158] The court found that there was no clear evidence that Congress intended the regulation to be interpreted so broadly.[159] The court also found that the statutory authority would require there to be some connection to navigable or interstate waters to remain within the definitional limits of the phrase "waters of the United States."[160] For these reasons, the court found that the definition in 33 C.F.R. Section 328.3(a)(3) exceeded the authority granted by Congress, and was therefore invalid.[161] Although the court did not go so far as to determine the constitutionality of the regulation, it stated in dicta that the regulation would seem to go beyond the Commerce Clause power granted to Congress.[162]

Next, the court of appeals turned to the question of whether the statute could apply to the particular wetlands in question. The parties offered contradictory evidence at trial as to the types of wetlands present on the property.[163] According to Interstate General, the jury instructions did not allow the jury to reach the factual question concerning the type of wetlands present on the property.[164] The instructions "extended the jurisdiction of the Clean Water Act . . . to any wetland 'even without a

154. *See id.* at 255.
155. *Id*. at 253.
156. *Id*. at 257.
157. *See id*. at 258. The appellants also challenged the ruling on several other grounds, but only those discussed above are relevant to this Comment. *See id*. at 253.
158. *Id.* at 257.
159. *Id.*
160. *Id.*
161. *Id*. (citing Definition of Waters of the United States, 33 C.F.R. § 328.3(a)(3) (1993)).
162. *Id.* "The regulation requires neither that the regulated activity have a *substantial* affect [sic] on interstate commerce, nor that the covered waters have any sort of nexus with navigable, or even interstate, waters. Were this regulation a statute, duly enacted by Congress, it would present serious constitutional difficulties, because . . . it would appear to exceed congressional authority under the Commerce Clause." *Id*. (emphasis in original).
163. *Id.*
164. *See id.*

direct or indirect surface connection' with interstate waters."[165] Interstate General argued that extending the jurisdiction of the CWA to include nonadjacent wetlands was impermissible under the Commerce Clause.[166] In a 1985 case, *United States v. Riverside Bayview Homes*,[167] the Supreme Court upheld the regulation defining "waters of the United States" to include wetlands, but in that case the wetland was adjacent to another navigable body of water.[168] In the *Wilson* case, the jury instructions extended jurisdiction of Section 404 to those wetlands not adjacent to any navigable water body, even though the question had not yet been decided.[169] The court of appeals found that it was an error to include isolated wetlands in the jury instructions because that extended the CWA beyond its statutory limits.[170] The court also stated in dicta that "constitutional difficulties" would arise if the CWA was extended to cover "*waters* that are connected closely to neither interstate nor navigable waters, and which do not otherwise substantially affect interstate commerce."[171] In other words, the CWA was promulgated under the Commerce Clause and can certainly apply to those waters that have a substantial effect on interstate commerce. However, extending the CWA to isolated wetlands, which do not necessarily have a substantial effect on interstate commerce, may stretch the application of the CWA beyond the allowable limits under the Commerce Clause power.

3. Analysis

Although the Fourth Circuit Court of Appeals did not technically decide the question of whether the wetlands definitions in 33 C.F.R. Section 328.3(a)(3) are constitutional under the Commerce Clause, the court did state in dicta that if the regulations were statutes, they would not be constitutional.[172] The court's decision restricts the application of the CWA to wetlands that are adjacent to other navigable water bodies or that have a substantial effect on interstate commerce.[173] Unless Congress amends the CWA to extend the definition of "waters of the United States" to nonadjacent wetlands and to include "potential" effects on interstate commerce for purposes of finding a substantial connection, the CWA may not be extended to isolated wetlands. Even if Congress were to amend

165. *Id.*
166. *See id.*
167. 474 U.S. 121 (1985).
168. *Id.* at 130-31.
169. *Wilson*, 133 F.3d at 257.
170. *Id.*
171. *Id.* at 258 (emphasis in original).
172. *Id.* at 257.
173. *Id.* at 257-58.

the definitions in the CWA, such amendments would likely fail a Commerce Clause challenge. The *Wilson* case did not answer the question of whether isolated wetlands can be covered by the CWA and pass constitutional muster under the Commerce Clause. This question must be answered to provide more certainty in the application and enforcement of the CWA and environmental regulations.

VI. SOLUTION: USE A CUMULATIVE IMPACT ANALYSIS FOR ENVIRONMENTAL REGULATIONS

The validity of environmental statutes under the Commerce Clause cannot be determined until the case-by-case analysis of each application of the law cease. In order to determine whether a statute passes constitutional muster, the act itself should be examined for interstate commerce connections. If an act, when taken as a complete regulatory scheme, is permissible under the Commerce Clause, then each application of that act should also be permissible. "Congress may find that a class of activities affects interstate commerce and thus regulate or prohibit all such activities without the necessity of demonstrating that the particular transaction in question has an impact which is more than local."[174] This analysis comports with several different areas of Commerce Clause jurisprudence.

Civil rights law is similar to environmental law in that it is not specifically contemplated by the Constitution. When Congress found the need to regulate in the civil rights arena, it did so through the Commerce Clause. For example, in *Heart of Atlanta Motel, Inc. v. United States*, the Supreme Court upheld the application of the Civil Rights Act of 1964 to a hotel which discriminated against African Americans.[175] In its decision, the Court stated that "[i]f it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze."[176] In other words, Congress may reach out to activities that appear to be local in character, so long as they have an effect on interstate commerce. The activity itself does not have to be interstate in nature. This application supports the idea that Congress may address environmental concerns even if the regulated activities appear to be local, as long as there is an effect on interstate commerce. Following this rationale, the Fly in *Home Builders* could be regulated, even though it is local in character, because it might have an effect on interstate commerce when scientists travel to

174. United States v. Helsey, 615 F.2d 784, 787 (9th Cir. 1979).

175. 379 U.S. 241, 243 (1964).

176. *Id.* at 258 (quoting United States v. Women's Sportswear Mfg. Ass'n, 336 U.S. 460, 464 (1949)).

study it with equipment they bought for that purpose. This may seem to be a minor effect, but it is a commercial effect of protecting the Fly.

In *Katzenbach v. McClung*, the Supreme Court once again upheld an application of the Civil Rights Act of 1964.[177] The Court held that when Congress wrote the Act, they considered the cumulative effect that incidents of discrimination had on commerce.[178] The particular "discrimination was but 'representative of many others throughout the country, the total incidence of which if left unchecked may well become far-reaching in its harm to commerce.'"[179] Even though the particular instance in question may not have had a large impact on commerce, when taken in the aggregate, the effect could be substantial. This is clear support for the idea that environmental laws should be regarded as a whole. Even if protecting one species might not have a great impact on commerce, protecting endangered species in the aggregate could have a very substantial effect on interstate commerce. The aggregate loss of resources from species extinction, whether used for medicinal purposes or commercial sale, would add up to a very large sum. The same may be said for protecting the Nation's waters: even though one wetland might not make a large difference to commerce by itself, wetlands in the aggregate play a substantial role in interstate commerce. Allowing development of one wetland might have a minor result, but filling large numbers of wetlands would change the pattern of water drainage and affect other lands. Wetlands as a whole play a huge role in flood protection. "For example, a study conducted in Wisconsin showed flood flows reduced up to 80% in basins with wetlands and lakes. Moreover, wetlands that are not adjacent to streams and rivers (non-riparian or 'isolated' wetlands) also hold rain and runoff water and contribute to flood control."[180] The aggregate impact of destroying wetlands can easily be seen in the estimated "$30.9 billion in repair costs related to damage from flooding" that wetlands save every year.[181] In addition to flood control, migratory bird populations might begin to decline as a result of lost habitat necessary for stopping grounds during migration. This would affect both hunters and birdwatchers, obvious elements of interstate commerce.

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177. 379 U.S. 294 (1964).

178. *Id.*

179. *Id.* at 301 (quoting Polish Nat'l Alliance of United States v. NLRB, 322 U.S. 643, 648 (1944)).

180. *Regulatory Reform Act of 1995: Hearings on S. 851 Before the Subcomm. on Clean Air, Wetlands, Private Property, and Nuclear Safety of the Senate Comm. on the Environment and Public Works*, 104th Cong. (1995) (statement of Jan Goldman-Carter, Counsel for the National Wildlife Federation).

181. *Id.*

Perhaps the best example of the cumulative effects doctrine can be seen in the case of *Wickard v. Filburn*.[182] This case involved a local farmer growing a small amount of wheat on his property.[183] He exceeded the amount of wheat allotted to him under the Agricultural Adjustment Act of 1938, and was fined.[184] He contended that because the activity was local and was not commerce, the federal government could not regulate it.[185] The Supreme Court determined that this wheat growing could be regulated because it had a substantial effect on interstate commerce when combined with all the other wheat growers in the nation.[186]

> [E]ven if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce and this irrespective of whether such effect is what might at some earlier time have been defined as "direct" or "indirect."[187]

Under *Wickard*, a regulated activity may be local, noncommercial, and have an indirect impact on interstate commerce and still be regulated by Congress under the Commerce Clause. The Court was not looking at the individual case in question, but at the cumulative impact of all regulated activities under the Act to determine that it was constitutional under the Commerce Clause. This rationale applies nicely to environmental laws. In *Home Builders*, the fact that the regulated Fly had little impact on commerce itself would not matter.[188] The *Wickard* Court would look at the impact of protecting all endangered species on interstate commerce to determine the constitutionality of the application of the ESA.

The *Lopez* Court even offered some support for environmental laws to be looked at in a cumulative manner. "[W]here a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence."[189] Environmental laws are general regulatory schemes that have a substantial impact on interstate commerce. The ESA affects fur sales, hunting, birdwatching, fishing, plant collecting, and countless other activities which have an impact on interstate commerce. Likewise, the CWA affects development, business practices, birdwatching, and also many other activities which have an effect on interstate commerce. The

182. 317 U.S. 111 (1942).
183. *See id*. at 114.
184. *See id*. at 113.
185. *See id*. at 119.
186. *Id.* at 128-29.
187. *Id*. at 125.
188. *See Home Builders*, 130 F.3d at 1041.
189. *Lopez*, 514 U.S. at 558 (emphasis omitted) (quoting Maryland v. Wirtz, 392 U.S. 183, 197 (1968)).

Clean Air Act (CAA), which regulates emissions of pollutants into the air, affects the very nature of how corporations do business.[190] In order to operate, a plant can not violate certain minimum air quality standards and must take all necessary compliance measures.[191] Also, the CAA protects the health of individuals breathing the air, and thereby affects the economy by reducing medical bills and time taken off from work due to illness. The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)[192] was recently validated in *United States v. Olin Corp*., where CERCLA's clean-up authority was used on land which belonged solely to a private landowner.[193] The court of appeals in *Olin* found that hazardous waste releases significantly affect interstate commerce, whether or not the releases cross state lines.[194] "Specifically, we conclude that although Congress did not include in CERCLA either legislative findings or a jurisdictional element, the statute remains valid as applied in this case because it regulates a class of activities that substantially affects interstate commerce."[195] *Olin* is another example where regulation as a whole has a substantial effect on interstate commerce, and is therefore valid under Commerce Clause power. Individual instances of regulation arising under these statutes should not determine whether there is a substantial effect on interstate commerce. Commerce Clause jurisprudence leads to the conclusion that the aggregate effect standard should apply for all environmental regulations.

VII. CONCLUSION

The ESA protects endangered and threatened species from extinction.[196] In order to effectively carry out this purpose, the ESA must apply to all species that are within its definitions. It does not matter whether any particular species moves across state lines or is viewed by naturalists from across the country. What does matter is that each species is part of a world ecosystem, and to let any one become extinct is to risk harming the entire ecosystem. The regulatory scheme would be at risk if each species must have a substantial effect on interstate commerce before it is afforded protection. This must be prevented by considering the ESA as a whole rather than on a case-by-case basis.

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190. *See* 42 U.S.C. §§ 7401-7671*q* (1994).
191. *See id.*
192. *See* 42 U.S.C. §§ 9601-9675 (1994).
193. 107 F.3d 1506 (11th Cir. 1997).
194. *Id.* at 1510.
195. *Id.*
196. *See* 16 U.S.C. §§ 1531-1544 (1994).

The CWA protects the Nation's waters.[197] All waterways are connected in one large system and in order to protect one they all must be protected.[198] Since the Act as a whole has the requisite substantial effect on interstate commerce, and since it is necessary to regulate all waters to achieve its regulatory purposes, the constitutionality should be considered with respect to the cumulative impact, rather than on a case-by-case inquiry. This would prevent the confusion now seen in wetlands law, while staying within the requirements of *Lopez*.

Of the several rationales upon which Congress can rely to promulgate environmental regulations, perhaps the most obvious is the Commerce Clause. Even though *Lopez* has caused concern over future rulings on the constitutionality of some environmental laws and application thereof, this concern should not be necessary. The test for constitutionality under the Commerce Clause is whether the regulated activity has a substantial impact on interstate commerce. This impact exists in environmental laws in the aggregate, which is how they should be viewed. Any confusion by the courts, agencies, and developers would be eliminated by using this standard. It would be consistent across the board, and it would let all parties know in advance what would be covered under these laws. This reasoning fits within the *Lopez* requirements as there certainly is a substantial connection to interstate commerce. It is also consistent with previous cases allowing for cumulative impact analysis.[199] Policy reasons abound for protecting the environment through national, rather than state, laws. The "Race to the Bottom" theory shows the harm that may result if environmental regulations promulgated by states are not consistent with each other. If environmental problems are not addressed by states, they might eventually become national in nature as the pollution spreads, or the rivers flood, or the streams dry up.

If the cumulative impact analysis espoused in this Comment is adopted across the board, confusion in application of environmental laws such as the CWA and ESA will be lessened considerably. This would reduce litigation, as both those being regulated, and those enforcing regulations, would know when the rules apply. It would also help to protect the environment by allowing quicker application of environmental regulations, absent court delays and associated costs, and perhaps even improve compliance. Theoretically, if people know that a statute applies to them, they will be more likely to follow it. The goals of different

197. CWA 101(a), 33 U.S.C. § 1251(a) (1994).
198. *See Riverside Bayview Homes*, 474 U.S. at 133-34.
199. *See Wickard*, 317 U.S. at 111.

environmental laws would be more quickly realized if the laws were applied across the board, rather than on a case-by-case basis. Even industry would benefit, as competition would be on a level playing field, and litigation costs would be reduced. The benefits to accepting this plan are legion, and the fact is that it would work—even after *Lopez*.