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THE SUPREME COURT RULES AGAINST CORPS OF ENGINEERS JURISDICTION OVER "ISOLATED WETLANDS": THE SWANCC DECISION

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Abstract. On January 9, 2001, the Supreme Court handed down the latest in its series of recent decisions relating to the balance between federal and state power in our dual system of government. In Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers, the Court ruled that the long controversial "migratory bird rule," used by the Corps of Engineers to interpret its authority over "isolated wetlands," exceeded the agency's authority under the Clean Water Act.

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On January 9, 2001, the Supreme Court handed down the latest in its series of recent decisions relating to the balance between federal and state power in our dual system of government. In *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*, the Court ruled that the long controversial "migratory bird rule," used by the Corps of Engineers to interpret its authority over "isolated wetlands," exceeded the agency's authority under the Clean Water Act (CWA).

Background of the case. SWANCC, a consortium of Chicago cities and villages, sought to develop a landfill for baled nonhazardous solid waste on a 533- acre parcel in Illinois. The parcel had been used for sand and gravel mining until about 1960. Since then, the excavation trenches had evolved into ponds up to several acres in size.

SWANCC obtained the needed local and state permits, but the Corps denied a federal wetlands permit, required under CWA section 404(a)[1] for wetlands within that provision's reach. At issue here is the Corps' assertion that 404(a) covered the SWANCC site, notwithstanding that the ponds on the site were only "isolated wetlands"– those not abutting navigable waters of the United States or their tributaries. Long ago, the Supreme Court upheld the Corps' authority under section 404 to regulate wetlands actually abutting a navigable waterway.[2] The Corps in *SWANCC* was asserting jurisdiction over wetlands *not* so abutting, as Corps regulations have provided for since 1977.

The Corps' jurisdiction claim involved three steps. First, section 404 applies by its terms to "navigable waters," defined expansively by the CWA to mean "the waters of the United States."[3] Second, the Corps' regulation interpreting "waters of the United States" includes "waters such as intrastate lakes, ... wetlands, ... wet meadows, ... or natural ponds, the use, degradation, or destruction of which could affect interstate commerce." Third, the Corps' migratory bird rule, a 1986 attempt to clarify the intrastate waters

[1] 33 U.S.C. § 1344(a).

[2] United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985).

[3] CWA § 502(7); 33 U.S.C. § 1362(7).

covered by the regulation, says that such waters include those "which are or would be used as habitat by ... migratory birds that cross state lines ...." Migratory birds had been observed on several occasions using the ponds on the SWANCC site.

The U.S. Court of Appeals for the Seventh Circuit found that Congress has the authority under the Commerce Clause of the Constitution to regulate isolated wetlands, and that Congress, in enacting section 404, intended to reach such wetlands. The Supreme Court reversed.

The Supreme Court decision. As with many other Supreme Court decisions involving the line between federal and state power, the *SWANCC* ruling saw the Court divide along 5-4 lines. The five-justice majority opinion concluded that the migratory bird rule is not supported by the CWA. It was unnecessary, therefore, for it to reach the second issue: whether, had the migratory rule been authorized under the CWA, it exceeded Congress' power under the Commerce Clause.

The majority opinion held that Congress, in enacting 1977 amendments to the CWA, had not implicitly approved the Corps' broad definition of "navigable water" adopted that year (in regulations quoted above) under the original 1972-enacted CWA. For example, Congress' failure to pass a bill in 1977 containing a narrow definition of navigable waters had not been shown by the Corps, said the majority, to constitute congressional approval of the Corps' broad definition. The majority then declined to afford the Corps the customary deference granted agency interpretations of ambiguous statutes. For one thing, it said, section 404 is not ambiguous at all. And even if it were, deference is not appropriate where an agency interpretation of a statute "invokes the outer limits of Congress' power" – a reference to the Court's milestone decisions in recent years involving the reach of the Commerce Clause. This concern is particularly strong, it said, where the agency interpretation permits encroachment on a traditional state power – here, that over land and water use.

Implications of the decision. The *SWANCC* decision continues the efforts of the five justices generally regarded as conservative to limit federal regulatory power. In 1985 and 2000, these same five justices found that Congress had exceeded Commerce Clause limits in enacting legislation dealing with possession of guns in school zones and violence against women. While *SWANCC* did not reach the constitutional question, its analysis of the CWA has, as noted, an explicit undercurrent of constitutional and federalism concerns. The next event to watch will be the Court's decision whether to grant the petition for certiorari in a Commerce Clause challenge to the Endangered Species Act.[4]

SWANCC's implications for the scope of the federal wetlands permitting program are not fully clear. The holding in *SWANCC* is limited to invalidating the migratory bird rule, and thus appears to be narrower than the rationale supporting it. As a result, the degree of program contraction may depend on which of these the government decides to apply. In either event, continuing program coverage is certain for the majority of wetland acreage – that which is adjacent to navigable waters or their tributaries – and possible as well for wetlands adjacent to some large intrastate waterbodies.

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[4] Gibbs v. Babbitt, 214 F.3d 483 (4th Cir. 2000), *petition for cert. filed*, 69 U.S.L.W. 3383 (Nov. 22, 2000) (No. 00-844).