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Supreme Court Guts Clean Water Act Protection of "Isolated" Wetlands Used by Migratory Birds

In the most controversial environmental law decision of its 2000 term, the Supreme Court ruled in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* ("SWANCC")\(^1\) that the Clean Water Act's (CWA) definition of "navigable waters" does not include intrastate waters used as habitat by migratory birds.

The CWA authorizes the Army Corps of Engineers (Corps) to issue permits allowing the discharge of dredged or fill material into "navigable waters," but defines "navigable waters" simply as "the waters of the United States, including the territorial seas."\(^2\) In July 1977, the Corps formally adopted a more expansive definition of "waters of the United States." The Corps definition included "isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters . . . the degradation or destruction of which could affect interstate commerce."\(^3\) Congress considered this expansive new interpretation during its 1977 amendments to the Act and specifically exempted some waters from the Corps' jurisdiction, but, after lengthy debate, rejected a proposal for a narrowed definition of "navigable waters."\(^4\) The Court also seemed to endorse this expanded jurisdiction in 1985, holding in *United States v. Riverside Bayview Homes, Inc.*\(^5\) ("Riverside Bayview") that the term "navigable" is of "limited import"\(^6\) and that Congress' rejection of a narrowed definition "is at least some evidence of the reasonableness of [the Corps'] construction."\(^7\) Finally, the Corps clarified its jurisdiction in 1986, stating that the CWA extends to intrastate waters that provide habitat for migratory birds that cross states lines.\(^8\)

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6. Id. at 133.
7. Id. at 137.
In accordance with this "Migratory Bird Rule," the Corps rejected a permit application, submitted by a consortium of suburban Chicago municipalities, to develop a solid waste landfill in a 533-acre former strip mine that had evolved into permanent and seasonal ponds used by migratory birds. The consortium then filed suit, arguing that the Migratory Bird Rule violated the Commerce Clause and the limit of the Corps' jurisdiction under the CWA. The Seventh Circuit Court of Appeals disagreed, finding that the $1.3 billion spent annually on migratory bird hunting was a "substantial impact on interstate commerce," that the CWA reaches as many waters as the Commerce Clause allows, and that the Corps' interpretation was thus a reasonable interpretation of the Act. 9

In a 5-4 decision split along familiar ideological lines, the Supreme Court reversed, holding that the Migratory Bird Rule exceeds the Corps' authority under the CWA. Writing for the majority, Chief Justice Rehnquist first limited the holding in Riverside Bayview, noting that the Court had expressed no opinion on the "question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water." 10 The majority then dismissed the Corps' 1977 interpretation of "waters of the United States," noting that it conflicted with the agency's original interpretation of the CWA. 11 The Court also refused to recognize Congress' apparent acquiescence to the Corps' expanded jurisdiction, noting that "flailed legislative proposals are 'a particularly dangerous ground on which to rest an interpretation of a statute.'" 12 The Court also declined to follow the Act's broad definition of "waters of the United States," holding that relying on the CWA's definition would incorrectly read "the term 'navigable waters' out of the statute." 13 Finally, the majority refused even to give

11. See id.
13. Id. at 682. The Court in fact held that the CWA's constitutional foundation lies not in Congress' Commerce Clause power, but in its authority over national waters. See id. at 683 ("The term 'navigable has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be made.").
deference to the agency, instead finding both that the CWA was clear and that the Corps' interpretation "would result in a significant impingement of the States' traditional and primary power over land and water use" without "a clear indication that Congress intended that result," making administrative deference inappropriate.\textsuperscript{15}

Justice Stevens' lengthy dissent effectively criticized the majority on nearly every substantive point. The dissenting opinion specifically castigated the majority for essentially writing "navigable" back into the CWA's definition of "waters of the United States," even though Congress had expressly deleted the word in 1972.\textsuperscript{16} Justice Stevens also attacked the majority's refusal to uphold Riverside Bayview's clear language that "Congress acquiesced in the [1975] administrative construction [of the Corps' jurisdiction],"\textsuperscript{17} without so much as a justification for departing from precedent.\textsuperscript{18} Finally, the dissent challenged the majority's denial of Chevron deference because of potential encroachment on traditional state land use power, noting that "[t]he CWA is not a land-use code; it is a paradigm of environmental regulation. Such regulation is an accepted exercise of federal power."\textsuperscript{19}

The impact of SWANCC on water quality and migratory birds may be tremendous. Outside observers have noted that if the environmental regulators of the Bush Administration interpret the rule broadly, twenty to twenty-five percent of the country's


\textsuperscript{15} SWANCC, 121 S. Ct. at 683.

\textsuperscript{16} See id. at 687-88 (Stevens, J., dissenting) ["The 1972 conferees arrived at the final formulation of the CWA] by specifically deleting the word 'navigable' from the definition that had originally appeared in the House version of the Act. . . . The majority accuses respondents of reading the term 'navigable' out of the statute. But that was accomplished by Congress when it deleted the word from the § 502(7) definition."].

\textsuperscript{17} Id. at 690-91 (Stevens, J., dissenting) ["The majority's refusal in today's decision to acknowledge the scope of our prior decision is troubling . . . . Having already conceded that Congress acquiesced in the Corps' regulatory definition of its jurisdiction, the Court is wrong to reverse course today."].

\textsuperscript{18} Justice Stevens also noted that the majority improperly relied on footnote 8 of Riverside Bayview (which reserved the question of whether the Corps' jurisdiction extends to isolated wetlands) since the present case concerns actual waters, which are much closer to the heart of intended CWA protection. See id. at 691 n.13 (Stevens, J., dissenting) ["Isolated wetlands . . . . are themselves only marginally 'waters,' [and thus] are the most marginal category of 'waters of the United States' potentially covered by the statute. It was the question of the extension of federal jurisdiction to that category of 'waters' that the Riverside Bayview Court reserved. That question is not presented in this case."].

\textsuperscript{19} Id. at 693 (Stevens, J., dissenting).
water will have lost federal protection. Although the Corps issued a legal opinion in the last days of the Clinton Administration stating that the case merely involves jurisdiction over isolated waters and wetlands based on migratory bird use (thus allowing federal regulation where jurisdiction can be established by other interstate commerce connections), it appears clear that, in the words of one commentator, "expansive jurisdiction for environmental regulation is not likely to pass this Court." As a result, environmental groups can merely hope that SWANCC was lost at oral argument, and does not signal a desire by the Court majority to couple "miserly" statutory interpretations with overzealous guardianship of state sovereignty to gut the hard-fought environmental protections embodied in the CWA and other statutes.

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23. In the early minutes of his oral presentation, Deputy Solicitor General Lawrence Wallace interrupted a question by Justice Scalia, only to have Chief Justice Rehnquist cut him off: "When a justice is asking you a question, I suggest you remain quiet until he finishes, if that isn't too much trouble." Several witnesses have reported that Wallace apologized several times, and staggered through the rest of his presentation. See Jonathan Ringel, High Court Disputes Federal Authority Over Ponds, RECORDER, Nov. 1, 2000, at 3; Dahlia Lithwack, Chicago's Big Bird Bath, http://slate.msn.com/court/entries/00-10-31_91626.asp.
24. See SWANCC, 121 S. Ct. at 693 (Stevens, J., dissenting).