

ENVIRONMENTAL LAW—CLEAN WATER ACT—THE “MIGRATORY BIRD RULE” EXCEEDS THE AUTHORITY GRANTED TO THE UNITED STATES ARMY CORPS OF ENGINEERS UNDER SECTION 404(a) OF THE CLEAN WATER ACT—*Solid Waste Agency of N. Cook County v. United States Army Corps of Engineers*, 121 S. Ct. 675 (2001).

A consortium comprised of twenty-three suburban Chicago municipalities, the Solid Waste Agency of Northern Cook County (SWANCC), sought to develop land formerly used in a sand and gravel mining operation as a disposal site for baled nonhazardous solid waste. *Solid Waste Agency of N. Cook County v. United States Army Corps of Engineers*, 121 S. Ct. 675 (2001). SWANCC filed for, and received, permits from both the State of Illinois and Cook County for the proposed disposal operation. SWANCC also contacted the U.S. Army Corps of Engineers (Corps) to determine whether the Clean Water Act (CWA) required SWANCC to secure a federal landfill permit because it was planned to fill-in ponds on the site. After first concluding that it had no jurisdiction because the site did not contain “wetlands,” the Corps reversed its decision and ultimately asserted jurisdiction under the “Migratory Bird Rule” after learning that the area was used as a habitat by several migratory bird species. Although SWANCC received approval from the appropriate state authorities and offered several proposals to mitigate the likely harm to various bird species, the Corps denied SWANCC a permit under section 404(a) of the CWA, citing probable environmental damage, risk to the area’s drinking water supply, and the likely negative impact on migratory bird species.

SWANCC sought relief in the U.S. District Court for the Northern District of Illinois. *Id.* at 679. Presented with a challenge to both the Corps’ jurisdiction over the proposed dump site and the merits of the Corps’ refusal to issue the section 404(a) permit, the District Court granted summary judgment to the Corps with regard to jurisdiction. *Id.* SWANCC thereafter withdrew its challenge to the merits of the Corps’ refusal to issue the permit. *Id.* Thereafter, SWANCC appealed to the Court of Appeals for the Seventh Circuit. *Id.* On appeal, SWANCC launched a two-pronged attack. *Id.* SWANCC first argued that, in promulgating the “Migratory Bird Rule,” the Corps had gone beyond its statutory authority by

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interpreting the scope of the CWA to include non-navigable, intrastate

bodies of water. *Id.* Alternatively, SWANCC argued that the Commerce Clause did not support Congress' grant of such jurisdiction to the Corps. *Id.*

Turning to the constitutional issue first, the court of appeals held that the regulation of such waters was within Congress' authority based on the cumulative impact doctrine. *Id.* The court of appeals explained that under the cumulative impact doctrine, "a single activity that itself has no discernible effect on interstate commerce may still be regulated if the aggregate effect of that class of activity has a substantial impact on interstate commerce." *Id.* (citation and internal quotes omitted). The court held that the aggregate effect of the potential damage to various migratory bird species on interstate commerce was substantial given the fact that a significant number of Americans spend billions of dollars and travel across state lines to observe and hunt such birds. *Id.* With respect to the "Migratory Bird Rule," the court of appeals stated that, in light of the court's expansive reading of the Commerce Clause, the Corps' "Migratory Bird Rule" constituted a reasonable interpretation of the CWA. *Id.* at 679-80.

Upon SWANCC's petition, the United States Supreme Court granted certiorari and reversed. *Id.* at 680. The Court held that in promulgating and applying the "Migratory Bird Rule," the Corps had exceeded the authority granted to it by section 404(a) of the CWA. *Id.*

Writing for the majority, Chief Justice Rehnquist began the Court's analysis by noting that in passing the CWA, Congress sought to protect the integrity of the country's waters while preserving the States' primary rights and responsibilities in eliminating pollution and planning for the development of both land and water resources. *Id.* The Court observed that section 404(a) of the CWA authorizes the Corps to regulate the disposal of waste into "navigable waters," defined by the statute as "the waters of the United States, including the territorial seas." *Id.* (quoting 33 U.S.C. § 1362(7)). The Court concluded that the Corps' interpretation of the CWA to include isolated waters that serve as a habitat for migratory birds is not supported by the language of the statute. *Id.*

The majority next distinguished this case from *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), in which the Court

held that the Corps had properly asserted 404(a) jurisdiction over an intrastate wetlands area. *Id.* In contrasting the two cases, the Court emphasized that the waters in *Riverside Bayview* abutted a navigable waterway, while the ponds in this case were not situated near any open water. *Id.*

Turning to the question of Congressional acquiescence with regard to the “Migratory Bird Rule,” the Chief Justice observed that the Corps’ original interpretation of the CWA contradicted its interpretation of the statute in this case. *Id.* The Corps’ original definition of “navigable waters,” the court observed, stated that the determining factor was the water’s ability to be used by the public for transportation or commerce. *Id.*

The Court also rejected the Corps’ argument that Congress ultimately approved of the Corps’ more expansive definition of the term “navigable,” as evidenced by both the failure to pass a bill that would have overturned the Corps regulations, and the passage of 404(g), which extends the Corps’ jurisdiction to waterways other than those considered traditional navigable waters. *Id.* at 681. The majority voiced its reluctance to interpret a present statute based on a failed legislative proposal. *Id.* (citations omitted). Finding that the Corps had produced “no persuasive evidence that the House bill was proposed in response to the Corps’ claim of jurisdiction over nonnavigable, isolated, intrastate, waters,” the Chief Justice concluded that the Corps fell short of carrying its burden of showing that the failure of the bill signaled Congress’ acceptance of the Corps’ regulations. *Id.* at 682.

Examining the text of section 404(g), the majority stated that the exact definition of the term “other . . . waters” was unclear. *Id.* The Court observed that “other . . . waters” could mean the types of isolated waters the Corps sought to regulate under the “Migratory Bird Rule,” or it could signify waterways adjacent to navigable bodies of water. *Id.* Given this ambiguity, the Court found that “§404(g)(1) does not conclusively determine the construction to be placed on the term ‘waters’ elsewhere in the Act” *Id.* (quoting *Riverside Bayview*, 474 U.S. at 138 n.11).

Further, the Chief Justice voiced the Court’s refusal to read the word “navigable” out of the statute by relying solely on the definitional phrase “waters of the United States.” *Id.* The majority acknowledged that in *Riverside Bayview* the Court indicated that the term “navigable” in the CWA was of “limited effect,” not

ineffective. *Id.* at 682-83. The Court asserted that the term remained important as a sign that, in passing the CWA, Congress had relied on its traditional authority to regulate navigable waters. *Id.* at 683.

The Chief Justice then proceeded to address the Corps' argument that Congress had never specifically answered the question of the scope of section 404(a), and thus the Court should give deference to the Corps' regulations. *Id.* The Court declined to defer to the Corps' rules because the Corps' interpretation of the CWA reached the furthestmost boundaries of Congress' power. *Id.* The majority explained that, in the absence of clear congressional intent, the Court would construe the Act to avoid Constitutional issues, especially when such construction implicated a change in the traditional federal-state balance. *Id.* The Court further noted that the "Migratory Bird Rule" presented such a quandary given that the power granted to Congress by the Commerce Clause is not unlimited, and there remained the question of whether migratory birds "substantially affect" interstate commerce. *Id.* The Court thus held that the Corps' application of the Migratory Bird Rule to SWANCC's disposal site exceeded the power granted to the Corps under the CWA. *Id.* at 684.

Writing for the dissent, Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, began by observing that Congress enacted the CWA with the lofty goal of terminating water pollution by 1985. *Id.* (Stevens, J., dissenting). Given that Congress' hope remains unfulfilled, the dissent lamented that the majority's decision would serve only to weaken the Nation's most important safeguard against polluted water. *Id.*

The dissent then traced the history of federal water regulation. *Id.* at 685 (Stevens, J., dissenting). Justice Stevens described the shift in legislative focus from protecting the navigability of waterways in the nineteenth century, to preventing environmental damage to the country's waters in the twentieth century. *Id.* at 685-86 (Stevens, J., dissenting). Noting that the CWA "was universally described by its supporters as the first truly comprehensive federal water pollution legislation," the dissent asserted that the passage of the Act in 1972 marked the climax in this movement toward environmental protection. *Id.* at 686 (Stevens, J., dissenting). The dissent contrasted section 404 of the CWA with section 13 of the Rivers and Harbors Appropriation Act of 1899, 30 Stat. 1152, as amended, 33 U.S.C. § 407 (RHA). *Id.* at 687 (Stevens, J., dissenting). The dissent stated that, although the two statutes were similar in some respects, the statutes differed markedly with respect to purpose, as evidenced by

surveys and studies for improvements in navigation facilities contained in the RHA, and by large appropriations for research on water pollution control in the CWA. *Id.* The dissent emphasized that in creating the CWA, Congress had carried over the traditional term “navigable waters,” as used in the RHA, but had deliberately expanded the definition of the term to include all “waters of the United States.” *Id.*

The dissent reminded the Court that the new definition “was intended to be given the broadest possible constitutional interpretation.” *Id.* (citation and internal quotes omitted). The dissent reasoned that, in recording its desire for broad interpretation, Congress could not have been referring to its authority over navigation, which had long been established as a core power under the Commerce Clause. *Id.* at 687-88 (Stevens, J., dissenting). Rather, the dissent noted, Congress referred to jurisdiction well beyond that traditional territory. *Id.* at 688 (Stevens, J., dissenting). The dissent

maintained that it was Congress, not the Corps, that had read the term “navigable” out of the CWA when it deleted the word from the statutory definition. *Id.*

Justice Stevens explained that it was this broadened definition of the Corps’ jurisdiction, which was clarified in interim regulations adopted in 1975 and in final regulations adopted in 1977, which sparked opposition from some Members of Congress. *Id.* at 688-89 (Stevens, J., dissenting). The dissent observed that a bill restricting the Corps’ section 404 authority to only those waters used for interstate or foreign commerce was passed by the House, but was ultimately rejected by the Senate in 1977. *Id.* at 690 (Stevens, J., dissenting). The dissent interpreted this failed legislation, as well as the informed debate surrounding the proposal, as a clear sign that Congress accepted the Corps’ expanded jurisdiction under the Act. *Id.* Moreover, the dissent declared that the Court’s finding of congressional acquiescence to the same regulations in *Riverside Bayview* foreclosed any contrary conclusion. *Id.*

Accusing the majority of selective reading, the dissent stated that in *Riverside Bayview* the Court held that the Corps regulations at issue were entitled to administrative deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Id.* at 693 (Stevens, J., dissenting). Justice Stevens urged that the majority’s concerns regarding federalism were misplaced because the CWA is not a land-use statute, but rather an environmental

regulation that explicitly encourages local control by allowing States to develop their own regulatory programs to take the place of federal control. *Id.*

Turning to the issue of whether Congress has the power under the Commerce Clause to regulate SWANCC's proposed disposal site, the dissent identified three categories of activities that Congress may regulate pursuant to its commerce power: "(1) channels of interstate commerce; (2) instrumentalities of interstate commerce, or persons and things in interstate commerce; and (3) activities that 'substantially affect' interstate commerce." *Id.* at 694 (citing *United States v. Lopez*, 514 U.S. 549, 558-59 (1995)) (Stevens, J., dissenting). The dissent indicated that the "Migratory Bird Rule" fell into the third category, which does not require that each instance of the activity substantially affect interstate commerce, merely that the activity taken as a whole have a substantial effect on interstate commerce. *Id.* (citing *Perez v. United States*, 402 U.S. 146 (1971)). Noting the intrinsic value of migratory birds, as well as the significant commercial value of both bird-watching and hunting, the dissent determined that the disposal of fill into the SWANCC site would substantially affect interstate commerce. *Id.* at 695 (Stevens, J., dissenting). Furthermore, the dissent characterized the preservation of migratory birds as a "textbook example of a national problem." *Id.* Justice Stevens stated that, like other environmental problems, the damage to the bird habitat would result in disproportionately local benefits, such as the new disposal site, while the costs (fewer birds) would be widely dispersed. *Id.* Finally, the dissent observed that the federal government's responsibility for protecting migratory birds is well established, and given the birds' transitory nature, national action stands as the only effective means of fulfilling that duty. *Id.* at 696 (Stevens, J. dissenting). Thus, the dissent concluded that the regulation of the "isolated" waters in this case was well within Congress' authority under the Commerce Clause. *Id.*

The majority's opinion is deceptively appealing in its simplicity. The dissent's more detailed and in-depth analysis, however, is more cogent. Congress clearly intended the Corps' jurisdiction to extend to waters not considered navigable in an effort to formulate a truly comprehensive environmental protection program. The Court's opinion may ignore Congress' intent, leaving wetlands across the country exposed to potentially irreversible environmental degradation. Moreover, although the majority declined to rest its opinion on the Commerce Clause issue, the

Court's dicta regarding Congress' commerce power is disconcerting. The Court's reading of Congress' authority under the Commerce Clause as more limited than traditionally defined may foreshadow a narrowing judicial scrutiny of legislation passed pursuant to the commerce power, including other environmental measures and civil rights legislation.

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