

Solid Waste Energy Of Northern Cook County v. United States Army Corps Of Engineers

01.10.2001

On January 9, 2001, in a 5-4 decision, the U.S. Supreme Court struck down the "Migratory Bird Rule," which was the basis of jurisdictional authority for the U.S. Army Corps of Engineers ("Corps") over a non-navigable, isolated, intrastate water of the U.S. The case has been closely watched for its potential to have a major effect on the Corps Section 404 permitting program.

The Migratory Bird Rule stems from a 1986 interpretation by the Corps of its regulatory definition for "navigable waters," the statutory limit to the Corps' jurisdiction under the Clean Water Act ("CWA"). The Corps' regulations define navigable waters for purposes of the CWA to include isolated water bodies "the use, degradation or destruction of which could affect interstate or foreign commerce . . ." 33 CFR § 328.3(a)(3)(1999). The 1986 interpretation specified that if the waters "are or would be used as habitat by other migratory birds which cross state lines . . .," then these waters could affect interstate or foreign commerce and are jurisdictional. 51 Fed. Reg. 41217.

The property at issue in the decision was a 553-acre abandoned sand and gravel mine, which contained water-filled excavation trenches that were used by approximately 121 bird species. The area did not qualify as "wetlands." The Corps found the site jurisdictional based on its use by migratory birds. The Court of Appeals for the Seventh Circuit upheld the Corps' jurisdiction over the site. The petitioners, a consortium of 23 suburban Chicago cities and villages who intended to fill the site as a sanitary landfill, appealed to the Supreme Court.

Petitioners claimed that: (1) the Migratory Bird Rule exceeded the Corps' authority under the CWA and (2) the exercise of such jurisdiction was inconsistent with the Commerce Clause, U.S. Constitution, Art. 1 § 8, cl. 3. The Supreme Court reversed the Court of Appeals decision by supporting petitioner's first assertion and declined to make a judicial determination on the validity of the second assertion.

The Supreme Court held that 33 CFR § 328.3(a)(3), as clarified and applied to petitioners' site pursuant to the Migratory Bird Rule, exceeds the authority granted to the Corps under Section 404(a) of the CWA. The Court ruled that the CWA does not apply to a battle between the Federal Government and Chicago suburban towns that want to put a landfill atop an abandoned water-filled gravel pit.

The Court also signaled its concern over the conflict between federal jurisdiction under Section 404 and state and local land use law. It noted that allowing the Corps "to claim federal jurisdiction over ponds and mudflats that fall within the 'Migratory Bird Rule' would result in a significant impingement of the States' traditional and primary authority over land and water use." *SWANCC v U.S. Army Corps of Engineers*, 531 U.S., 13 (January 9, 2001).

While the Court's ruling is a significant loss for the Corps and the Environmental Protection Agency ("EPA"), the Court's decision does not displace the other key provisions of the Corps' jurisdiction. Although the Court left open the possibility that it would review other challenges to Corps' jurisdiction, the Court did not disturb the Corps' jurisdiction over tributaries to navigable waters (33 CFR § 328.3(a)(4)), impoundments of waters of the U.S. (33 CFR § 328.3(a)(5)), tributaries to navigable and interstate waters (33 CFR § 328.3(a)(5)), or wetlands adjacent to waters (other than waters that are themselves wetlands) (33 CFR § 328.3(a)(7)).

Specifically, the Court did not overturn its prior decision in *U.S. v Riverside Bayview Homes*, 474 U.S. 121 (1985), which affirmed the Corps' jurisdiction over wetlands adjacent to open water bodies. The Court distinguished between wetlands, which actually abut a navigable waterway, and an isolated, abandoned sand and gravel pit. The Court clarified that although the *Riverside Bayview Homes* decision established that the navigable requirement was of "limited import," the requirement must have some meaning, particularly when applied to water bodies that are decidedly not wetlands. The Court also distinguished wetlands versus other water bodies based on "Congress' unequivocal acquiescence to, and approval of, the Corps' regulations interpreting the CWA to cover wetlands adjacent to navigable waters." *SWANCC*, 531 U.S., 6. Consequently, the decision does not serve to eliminate any prior jurisdiction the Corps held over adjacent wetlands.

However, the decision could have a significant effect on the Corps' jurisdiction over isolated waters of the U.S., including vernal pools, prairie potholes and other wetlands waters that have been traditionally covered under 33 CFR § 328.3(a)(3). By ruling that the Congress did not intend to regulate isolated nonwetlands waters, the Court leaves open the issue of whether the Congress intended to allow the Corps to regulate other types of isolated waters such as vernal pools and wetlands and if it did, whether such regulation is authorized under the Commerce Clause. The Court invalidated the Migratory Bird Rule, but it did not invalidate the underlying regulation. 33 CFR § 328.3(a)(3). Nonetheless, the decision calls into question the validity of 33 CFR § 328.3(a)(3) in its entirety and its viability for future use.

In summary, the Court's decision draws a clear line excluding isolated non-wetland waters from the Corps' jurisdiction. It calls into question the Corps jurisdiction over other isolated waters. It is foreseeable that the case will spawn litigation over other areas, such as ephemeral streams, in which the Corps' jurisdiction is marginal. Until those cases work their way through the court system, the Corps' jurisdiction over many areas in California remains untouched and will continue as in the past.

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This article was originally published as a Land Use and Natural Resources Update (January 2001), a Sheppard, Mullin, Richter & Hampton LLP publication.

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