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Isolated Waters and Wetlands are Beyond the Scope of Regulation Under the Clean Water Act

In a stunning 5-4 split decision decided January 9, 2001, the United States Supreme Court held invalid a long-standing federal regulation that asserted jurisdiction under the Clean Water Act and required Section 404 (dredge and fill) permits for non-navigable, isolated, intrastate "waters," including ponds, wetlands and mudflats. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, et al.*, 2000 WL 15333 ("SWANCC") (decision available at <http://www.supremecourtus.gov/opinions/00pdf/99-1178.pdf>).

The ruling has far reaching implications not only for those who wish to develop property involving such isolated waters. It also impacts those who have already done so by accepting, as part of a Section 404 permit, onerous conditions limiting the use of their properties, or otherwise requiring them to obtain and maintain "mitigation" property devoted to a conservation use. We discuss these implications after summarizing the Court's ruling.

The Decision

Section 404(a) of the Clean Water Act requires a permit to discharge dredge or fill material into "navigable waters," which is defined in the Act as "the waters of the United States, including the territorial seas." It has long been assumed that Congress intended the Clean Water Act to create jurisdiction to the full extent permitted by the United States Constitution. In prior rulings by the Court, for example, the term "navigable" was given "limited import" and the Court found that Congress evidenced an intent to regulate waters that would not be deemed "navigable" under the classical, traditional understanding. Accordingly, in *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), the Court found that wetlands adjacent to traditional navigable waters, or adjacent to tributaries to such navigable waters, were squarely within the purview of the Clean Water Act.

Similarly, the U.S. Army Corps of Engineers promulgated regulations defining "navigable waters" to include all intrastate waters, lakes, streams, intermittent streams, mudflats, wetlands, and natural ponds "the use, degradation or destruction of which

could affect interstate or foreign commerce." Interpreting this regulation in guidance now known as the "Migratory Bird Rule," the Army Corps asserted jurisdiction over every isolated water body which is, or could be, used as habitat by migratory birds. (The U.S. EPA has a similar definition governing point source discharges that require an NPDES permit under Section 402 of the Clean Water Act.) Because many land parcels include some isolated wetlands or mudflats which provide, or could provide, habitat for migratory birds, the consequence of the Migratory Bird Rule was to frequently require a Section 404 permit as a precondition to development. To obtain a permit, the wetlands needed to be preserved or, if filled, the wetland destruction mitigated, either on-site, or by the creation or preservation of off-site wetland property. This broad assertion of jurisdiction has slowed if not halted many proposed developments, and added significant (some say unneeded) expense to the development process.

To most practitioners and legal scholars, the issue to be resolved in *SWANCC* was whether the regulations of the Army Corps, asserting jurisdiction over isolated waters which provide or might provide habitat to migratory birds, exceeded the scope of the Commerce Clause of the United States Constitution. The Court in *SWANCC* avoided the constitutional issue, however, and instead concluded that the language of the Clean Water Act does not authorize the extension of jurisdiction to ponds and waters that are not adjacent to traditional navigable waters, or tributaries to waters traditionally thought of as navigable.

The Army Corps argued that its interpretation of the breadth of the term "navigable water" is entitled to deference under the standard set by the Court in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under *Chevron*, a reviewing court must accept the reasonable interpretation of an ambiguous statutory term by the agency empowered to implement the statute, even if the reviewing court might prefer an alternate interpretation. The Court in *SWANCC* determined that *Chevron* deference is inappropriate where "an

administrative interpretation of a statute invokes the outer limits of Congress' power," unless Congress has provided a "clear indication" that it intended such result. Instead, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will [reject the request for administrative deference and instead] construe the statute to avoid such problems unless the construction is plainly contrary to the intent of Congress." The Court therefore held that the regulatory definition seeking to regulate isolated waters as applied to the involved property exceeded the authority granted to the Army Corps under Section 404(a) of the Act.

Implications

The *SWANCC* decision has two immediate implications. First, while the *SWANCC* decision was limited to the facts of this particular case, the scope of the jurisdiction of the Army Corps under the Clean Water Act (in the absence of Congressional amendment) appears to be limited to waters, including wetlands, that are adjacent to traditional navigable waters, or adjacent to tributaries to waters traditionally thought of as navigable. Second, Congress will now need to decide whether to amend the Clean Water Act so as to allow it to reach as broadly as permitted by the United States Constitution. However, were it to do so, the discussion of the Court, represented by the five Justices in the majority, suggest, while not deciding, that the assertion of federal jurisdiction over isolated waters solely on the basis of use of such waters by migratory birds may exceed Congress' grant of authority under the Commerce Clause, and therefore be unconstitutional.

The *SWANCC* decision will be hailed by developers as a major victory, and should streamline future property development. However, what about all the development that occurred under Section 404 permits issued without statutory authority? Many of these properties were developed under permit conditions requiring an owner or developer to create on-site "mitigation" wetlands, and further requiring deed restrictions on the future use and maintenance of the "mitigation property." In light of *SWANCC*, these restrictions would appear to have been imposed without legal authority. This means that (subject to other local or federal requirements) the property owner should be able to use the mitigation property without restriction, including now filling the created or enhanced wetland. To do so, the deed restrictions need to be lifted by obtaining the consent of the Army Corps, or by having a court declare the deed restrictions invalid. If the restrictions cannot be lifted, the illegal imposition may constitute a governmental "taking," thereby entitling the property owner to compensation. Also, affected permittees, whether they provided on-site mitigation or secured off-site mitigation, incurred expense to comply with the unlawful regulatory requirements and may have a monetary claim against the Government, notwithstanding its sovereign immunity.

In conclusion, any person or entity that had to obtain a Section 404 permit to develop property containing "isolated" waters and wetlands, should evaluate available options. The attorneys in our Environmental, Safety and Health Group can assist you in evaluating these options. For further analysis of this decision, contact Andy Perellis, Jeffrey Srulovitz, or any member of the ES&H Group.

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