

Supreme Court Says That States, Not Federal Government, Must Take Responsibility To Regulate Filling Of Isolated Ponds

The United State Supreme Court recently held that the 1972 Clean Water Act (CWA) does not authorize the Army Corps of Engineers (COE) to regulate the dredging and filling of non-navigable, intrastate ponds that provide habitat to federally-protected migratory birds. The decision is important because it demonstrates the court's reluctance to interpret environmental statutes broadly, especially when it believes that a broad reading of the statute will unduly interfere with the traditional rights of state and local governments.

The case involved the efforts of twenty-three Chicago-area municipalities to turn a five-hundred acre former sand and gravel mine outside Chicago into a municipal landfill. The property included about seventeen acres of small ponds that were not connected to any body of water outside the property. After the mining ceased, blue herons and other migratory birds protected by federal law nested on the property. The local governments acquired the property and invested approximately \$30 million in their successful efforts to obtain approvals for the project by Cook County, the Illinois Environmental Protection Agency, and the Illinois Department of Conservation. However, the project ground to a halt when the COE refused to issue a permit under § 404 of the CWA to fill the ponds because filling them would adversely affect federally protected migratory birds.

The COE's refusal to grant the permit revitalized a controversy about the scope of federal authority under the CWA. Section 404 of CWA authorizes the COE to regulate the dredging and filling of "navigable waters," a term which Congress broadly defined as "waters of the United States." What did Congress mean by the word "navigable"? Did it intend to limit federal authority to waters that were actually usable for navigation? At first, the COE acted cautiously, and asserted authority only over waters that were navigable. In 1975, environmental groups sued the COE, and the United States District Court for the District of Columbia ordered the COE to amend its regulations to assert authority to the maximum extent permitted by the Commerce Clause of the United States Constitution. In 1977 the COE adopted new regulations asserting authority over isolated ponds and wetlands. The 1977 regulations defined "waters of the United States" to include, among other things, intrastate lakes, rivers and streams, and ponds, the use or destruction of which "could affect interstate commerce." In 1986, the Corps "clarified" in a regulatory

preamble that waters of the United States include waters “which are or would be used as habitat by birds protected by Migratory Bird Treaties; or which are or would be used as habitat by other migratory birds which cross state lines” 51 Fed. Reg. 41217. This “clarification” became known as the “Migratory Bird Rule.”

Some environmental lawyers were surprised when the Supreme Court agreed to consider the appeal by the twenty-three Chicago-area municipalities. Some expected that the COE might lose, because the Court had recently issued two decisions, which, for the first time in many decades, invalidated two federal statutes because they exceeded Congress’s constitutional authority to regulate interstate commerce.

The majority decision, written by Chief Justice Rehnquist, held that Congress had not clearly indicated that it intended federal authority to extend to isolated ponds that had no connection to navigable waters, and, therefore, struck down the COE’s regulation on the grounds that it exceeded the authority granted by Congress. Justice Rehnquist relied heavily on the fact that Congress had used the term “navigable waters,” and reasoned that Congress must have meant something by the word “navigable.” The Court also placed significant weight on the fact that the COE’s 1974 regulations, adopted only two years after the CWA had been enacted, defined “waters of the United States” to include only waterways which were either actually or potentially navigable. Somewhat surprisingly, the Court dismissed the fact that the Conference Report for the 1972 CWA included a statement that the House and Senate conferees “intend that the term ‘navigable waters’ be given the broadest constitutional interpretation,” apparently because nothing in the Conference Report specifically referred to migratory birds or to isolated wetlands and ponds. The Court was also unpersuaded by the COE’s argument that Congress had accepted the COE’s broad interpretation by defeating legislative proposals that would have overturned it. Finally, the Court refused to give the COE’s current regulatory definition the benefit of the doubt, which it normally does for regulations adopted by an administrative agency that has authority to administer a statute. The Court refused to give the deference it normally does to administrative interpretations because it considered the COE’s interpretation to “invoke the outer limits of Congress’ power” under the Commerce Clause of the Constitution.

The Court did not decide that Congress had no constitutional authority to authorize federal regulation of isolated wetlands; it simply said that the CWA, as now written, does not do so.

Although the Court limited its decision to a matter of statutory interpretation, but it is very clear that it was heavily influenced by the Court's belief that the Commerce Clause does not authorize Congress to interfere with the powers of state and local governments to regulate matters that are not of federal concern. Justice Rehnquist explained in his majority opinion that it is appropriate to construe a statute narrowly if a broad interpretation would present serious questions about the constitutionality of the statute. He argued that allowing the COE to claim jurisdiction over isolated, non-navigable ponds based only on the Migratory Bird Rule "would result in a significant impingement of the States' traditional and plenary power over land and water use," and noted that Congress included language in the CWA that recognized "the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources" The fact that the Court did not issue a definitive ruling on the constitutional question leaves open the possibility that Congress could amend the CWA to include isolated, non-navigable ponds. However, there is no indication that the new Congress is interested in doing so. If it did, there is a good chance that the Court would hold such a statute to exceed Congress' authority under the Commerce Clause.

The state of Michigan has administered its own wetlands protection program for many years. Some of Michigan's wetland protection statutes, including the Goemaere-Anderson Wetland Protection Act, the Inland Lakes and Streams Act, and the Michigan Environmental Protection Act, were enacted long before the federal "Migratory Bird Rule" that enabled the COE to regulate isolated ponds and wetlands. In 1984 the United States Environmental Protection Agency and the COE authorized Michigan to regulate the dredging and filling of non-navigable ponds and wetlands in Michigan in place of the federal program. However, EPA and the COE reserved the right to review, and approve or disapprove, each permit issued by the state. The Court's decision means that such federal oversight of state-issued permits for isolated waters and wetlands will no longer take place. This may enable Michigan to process permit applications for such projects more quickly.

Solid Waste Agency of Northern Cook County v. United States COE Corps of Engineers, 531 U.S. (Jan. 9, 2001).

Christopher J. Dunsky