

Rapport Meyers Whitbeck Shaw & Rodenhausen LLP

A New Look at Navigable Waters: Federal and State Perspectives

by George A. Rodenhausen

Introduction

Two court decisions within the last several years, one federal and one state, have reshaped the basis for jurisdiction over interstate and intrastate waters. At the federal level, the SWANCC decision, discussed below, has upset the applecart for Army Corps of Engineers and EPA jurisdiction over non-navigable, intrastate, isolated wetlands and open waters. Many questions are left unanswered by the United States Supreme Court decision, widely seen as one of several decisions by the conservative majority of the Court to use the Commerce Clause as a limit on federal power and to establish a philosophy of federalism that returns more responsibility to the states.

In New York State, under an entirely different legal doctrine, the concept of navigability has been expanded, guaranteeing access to the public to waters running through privately held land. It could be argued that these different federal and state directions are consistent, as the Supreme Court appears to want to return to the states more responsibility for regulation of their land and water resources. In a series of decisions since 1995 the Court has interpreted the Commerce Clause to limit, rather than extend, the federal government's power. Whether the recent trend continues may depend on the balance between liberals and conservatives on the Court as new justices are appointed over the next four years and beyond.

The SWANCC Decision

One of the most significant Clean Water Act ("CWA") decisions of this year is likely to be the decision of the Supreme Court in *Solid Waste Agency of Northern Cook County v. United States Army Corp of Engineers*, 531 U.S. 159 (2001), decided January 9, 2001,

which significantly restricted the definition of navigable waters for purposes of Army Corps of Engineers (“ACOE”) jurisdiction. Although the case had specific reference to ACOE’s dredge and fill regulations, the decision could have consequences for other programs under the Clean Water Act. It also provides an insight into the federalism philosophy of the five-justice majority on the Court.

Factual Background

The case was brought by the Solid Waste Agency of Northern Cook County (“SWANCC”), a municipal corporation formed by 23 cities and villages in northern Cook County that had been trying for many years to find an acceptable site for a land-fill, in this case was referred to as a “balefill,” as it was intended for baled non-hazardous solid waste. The site ultimately selected was a former sand and gravel mine which had been abandoned in about 1960. After abandonment, trees and vegetation returned to the site and the excavation trenches evolved into a series of water filled depressions of varying sizes, ranging from under 1/10 of an acre to several acres, and from several inches in depth to several feet in depth.

SWANCC applied to Cook County and the State of Illinois for permits, and requested a ruling from ACOE as to whether a federal permit would be required for filling under Section 404(a) of the Clean Water Act, 33 U.S.C. § 1344(a). ACOE twice determined that the site did not contain the type of vegetation required to make it a wetland under federal law, and therefore that ACOE had no jurisdiction over the site. However, it was advised by the Illinois Nature Preserves Commission that migratory birds used the site, and upon investigation ACOE found that over one hundred species had been observed at the site.

ACOE Determination

ACOE then determined that although the abandoned mine did not qualify as a wetland it did qualify as waters of the United States under ACOE’s Migratory Bird Rule, thus giving ACOE jurisdiction. Accordingly SWANCC applied for a permit to fill 17.6 acres of water bodies on the property. By 1993 SWANCC had received all of the state and local permits it needed, including the Clean Water Act Section 404 water quality certification from the Illinois EPA. ACOE, however, determined that SWANCC had not successfully

demonstrated that the landfill and the various mitigation measures proposed satisfied federal requirements. Upon ACOE's refusal to issue a permit, SWANCC filed suit in federal court, challenging ACOE's denial and asserting ACOE had no jurisdiction over the site.

Lower Court Rulings

Based on the Migratory Bird Rule, the district court granted summary judgment to ACOE on the question of jurisdiction, and SWANCC appealed to the Court of Appeals for the Seventh Circuit. The Court of Appeals upheld ACOE's jurisdiction, holding that even though the waters involved were non-navigable, isolated, intrastate waters, Congress had the authority to regulate such waters under the Commerce Clause. The Commerce Clause provides: "The Congress shall have power ... to regulate commerce with foreign nations and among the several states." U.S. Constitution, Art. I, Sec. 8, Cl. 3.

The Court of Appeals reasoned that the cumulative impact on interstate commerce of the destruction of natural habitat for migratory birds was substantial, because of the number of people who were involved in hunting and observing migratory birds, many of whom crossed state lines and supported interstate commerce with their purchases. *Solid Waste Agency of Northern Cook County v. United States Army Corp of Engineers*, 191 F.3d 845 (7th Cir. 1999).

Supreme Court Decision

In a 5-4 decision, the Supreme Court reversed, holding that ACOE's regulations covering non-navigable, intrastate, isolated waters, as clarified and applied to the landfill pursuant to the Migratory Bird Rule, exceeded the authority granted to ACOE by the Clean Water Act. The majority opinion written by Chief Justice Rehnquist (joined by O'Connor, Scalia, Kennedy and Thomas) and the strongly worded dissent by Justice Stevens (joined by Souter, Ginsburg and Breyer) indicate a sharp split exists on the Court relating to federalism and the proper reach of the Commerce Clause.

The majority first noted that Section 404(a) of the Clean Water Act (33 U.S.C. § 1344[a]) authorizes ACOE to regulate the discharge of fill material into "navigable waters," defined in Section 502(7) as "the waters of the United States, including the territorial seas." 33 USC § 1362(7). As the dissent points out, the definition "requires neither actu-

al nor potential navigability.” Indeed, as the dissent notes, Congress specifically rejected the definition of navigable waters in the Rivers and Harbors Act and in drafting the Clean Water Act deleted the term “navigable” from “the waters of the United States.” Nowhere in the statute is there a reference to navigability-in-fact or guidance as to how to determine navigability, or indeed whether the term “navigable” is implicitly carried into the definitional phrase, “waters of the United States.” Providing guidance in these murky waters was left to ACOE as the administering agency.

The majority opinion noted with approval ACOE’s original interpretation. Regulations issued in 1974 two years after enactment of the Federal Water Pollution Control Act defined navigable water as “those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce.” 33 CFR § 209.120(d)(1). Further, “it is the water body’s capability of use by the public for purposes of transportation or commerce which is the determinative factor.” 33 CFR § 209.260(e)(1).

ACOE’s “Other Waters” Rule

ACOE did not stick with its original narrow interpretation, which was a carry-over from the Rivers and Harbors Act, a statute truly concerned with navigability of the nation’s rivers and harbors. In response to criticism that its interpretation did not do justice to the purposes of the Clean Water Act, in 1975 ACOE adopted interim regulations which became final in 1977. In the 1975 regulations jurisdiction was phased in from traditional navigable waters in phase one, to non-navigable tributaries, freshwater wetlands adjacent to navigable waters, and lakes in phase two, and to all other waters in phase three. 40 Fed. Reg. 31325-6 (1975). The final regulations go beyond navigable and adjacent waters, to include the following “other waters”:

All other waters, such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce. 33 C.F.R. § 328.3(a)(3). It was this section of the ACOE regulations that the Court found to be beyond the authority of the Clean Water Act.

Interestingly, in 1977, Congress did not expressly curtail ACOE’s regulations in enact-

ing the Clean Water Act amendments. Congress considered but did not pass a bill to limit its jurisdiction to navigable waters in the traditional sense. Congress' decision not to override the ACOE regulations was noted by the Court in 1985 in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). In that case the Court approved jurisdiction of ACOE over a wetland which was not navigable or directly adjacent to navigable waters, but was part of a large area of poor drainage that ultimately abutted a navigable creek, holding that Congress intended to regulate "at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *Id.*, at 133. The majority in *SWANCC* distinguished *Riverside Bayview* on the ground that the latter decision only addressed adjacent wetlands, not isolated wetlands or other isolated waters.

ACOE's Migratory Bird Rule

One year later, in 1986, ACOE issued the Migratory Bird Rule as an interpretation of the Clean Water Act and a clarification of the "other waters" rule quoted above, without, as the majority opinion noted, complying with the notice and comment procedures required by the Administrative Procedure Act. The Migratory Bird Rule extended Section 404 (a) jurisdiction to intrastate waters "which are or would be used as habitat for birds protected by Migratory Bird Treaties; or (b) which are or would be used as habitat by other migratory birds which cross state lines ..." 51 Fed. Reg. 41217 (1986). It was under this rule that ACOE asserted jurisdiction.

The majority's basis for striking down the Migratory Bird Rule and the "other waters" regulation (33 C.F.R. § 328.3[a][3]) was a somewhat strained, or, in the words of the dissent, "miserly," interpretation of the statute and the legislative history. That interpretation was driven by the majority's desire not to reach the constitutional questions of Commerce Clause and federalism. The clear suggestion, but not the holding, of the majority is that if the constitutional questions were raised by an interpretation of the Clean Water Act that it included all waters of the United States, then the act would have been ruled unconstitutional.

The specific result of the case is that the remaining sections of 33 C.F.R. § 328.3(a) appear to be the only valid bases for ACOE jurisdiction: all waters which are navigable in the traditional sense or may be made navigable; all tidal waters; all interstate waters and wetlands; all tributaries of the foregoing; and all wetlands adjacent to the foregoing.

Constitutional Issues

The constitutional implications of the majority opinion are most important for predicting the direction of the Court. The majority suggests that if Congress were to adopt the “other waters” rule or the Migratory Bird Rule as a basis for Section 404(a) jurisdiction, it would exceed its power under the Commerce Clause to regulate intrastate activities that substantially affect interstate commerce. The Court also suggests that were Congress to adopt the Migratory Bird Rule, it would “result in a significant impingement of the States’ traditional and primary power over land and water use.” On both counts, the five-justice majority suggest it would strike down such an amendment to the Clean Water Act as unconstitutional.

The dissent vigorously disagrees that difficult constitutional issues are raised, citing a line of Supreme Court decisions that approve of Congressional regulation of activities that “substantially affect” interstate commerce. The dissent claims the proper test is not whether the single activity of one fill permit affects interstate commerce, but whether the class of regulated activities would have such effect. What the majority has effectively done is take the Commerce Clause, which is a provision of the Constitution that empowers the federal government and has been used over the last half century to expand federal authority, and use it as a basis to limit the federal government’s authority. More such decisions should be expected.

With respect to federalism, the dissent quotes Justice Holmes for the principle that the protection of migratory birds is a “textbook example of a national problem,” appropriate for federal regulation, just as are activities that cause air or water pollution affecting more than one state. However, the majority quotes from the Clean Water Act to stress that land and water use have been traditionally within the province of state responsibility, and suggest that an attempt by the federal government to regulated intrastate waters would be invalid for that reason as well.

Implications of the Decision

The long-term significance of the decision is difficult to assess. Although widely understood as a decision affecting isolated wetlands, it is not a wetlands case. The case dealt with filling isolated open waters, not wetlands, although it may be assumed that the

majority would have applied the same rationale to isolated wetlands. On the other hand, wetlands may offer more benefits to interstate commerce than do open waters, and it is conceivable that EPA or ACOE could develop a theory of interstate commerce other than migratory birds for regulation of isolated wetlands that withstands a Commerce Clause attack. It would also be possible for Congress to amend the Clean Water Act to provide clarity in its definition of affected waters, as well as a justification under the Commerce Clause in the legislative history, justifying regulation of intrastate isolated waters and wetlands because of impact on interstate commerce. Should it do so the Court may still choose to strike down the provision as violating states' rights.

The NPDES program regulates the discharge of pollutants to "navigable waters." CWA § 502(12); 33 U.S.C. § 1362(12). As indicated above, the term "navigable waters" is defined as "the waters of the United States, including the territorial seas." CWA § 502(12); 33 U.S.C. § 1362(12). EPA has adopted definitions in its regulations identical to the ACOE definition. 40 C.F.R. § 230.3(s). The impact of the decision on EPA's definition has not yet been addressed. A joint memorandum issued by EPA and ACOE on January 19, 2001 (attached), frames the issues but answers none of the remaining questions.

If EPA's definition is also invalid, would discharges to intermittent streams no longer be subject to NPDES permits, or would such streams be considered tributaries to navigable waters and hence covered? Do we need to return to the old question of how much water is needed to create navigability or to create a tributary? What does "adjacent" mean, in view of the Court's narrow reading of *Riverside Bayview*? What will be the impact on the NPDES program? Future agency guidance and litigation will be needed to clarify questions left unanswered by the Court.

New York Navigable Waters

The New York SPDES and wetlands program does not suffer from the Commerce Clause problem that afflicts federal agencies. New York has regulated beyond the boundaries of navigable waters, defining the term "waters of the State" to include:

[L]akes, bays, sounds, ponds, impounding reservoirs, springs, wells, rivers, streams, creeks, estuaries, marshes, inlets, canals, the Atlantic Ocean within the territorial limits of the State of New York and all other bodies of surface or underground waters, natural or artificial, inland or coastal, fresh or salt, public or private (except those private waters

which do not combine or effect a junction with natural surface or underground waters), which are wholly or partially within or bordering the State or within its jurisdiction. Environmental Conservation Law § 17-0105(2). Adirondack League Club Case

Although litigation did not arise in the context of the “private waters” exemption under the Environmental Conservation Law, under the public trust doctrine the question arose as to the public could use a stream passing through private land which was not navigable under traditional commercial standards. In *Adirondack League Club, Inc. v. Sierra Club*, 92 N.Y. 2d 591 (1998), the Court of Appeals effectively expanded the definition of navigable waters to allow recreational use of the stream by the public where the bed and banks were in private hands.

The South Branch of the Moose River runs through property owned by the Adirondack League Club for a reach of 12 miles. The Adirondack League owned approximately 50,000 acres along the South Branch. The Club limited access to their land to members. The Club considered the stretch of the South Branch which runs through its property to be the Club’s exclusive property and prohibited access to members of the public. This case began in June 1991 when five individuals, some of whom were members of the Sierra Club, purposely canoed and kayaked down the river through the Adirondack League Club property. After the trip the Adirondack League Club sued the Sierra Club and the individuals for trespass. The State of New York and others intervened on the side of the defendants and along with the other defendants moved for summary judgment.

The question presented to the Court was whether the river was navigable-in-fact. Although the Court denied summary judgment, it did so only because there were some factual questions that deserved a hearing. However, the Court did develop new rules for determining navigability-in-fact which favored the defendants and suggested that the Adirondack League Club did not have an exclusive private right to use of the waterway.

Navigability-In-Fact

The resolution of navigability-in-fact turned on whether recreational use, as opposed to more traditional commercial use, should be considered in determining whether a river was navigable. In New York State any river which is navigable-in-fact is considered “a public highway” available to the public notwithstanding the fact that the land on either

side is in private hands. *Id.* at 601, citing *Morgan v. King*, 35 NY 454. In *Morgan v. King*, the Court of Appeals held that a river is navigable-in-fact if it is a river

[O]n which boats, lighters or rafts may be floated to market ... [and] capable, in its natural state and its ordinary volume of water, of transporting, in a condition fit for market, the products of the forest or mines, or other tillage of the soil upon its backs. It is not essential to the right, that the property to be transported should be carried in vessels, or in some other mode, whereby it can be guided by the agency of man, provided it can, ordinarily, be carried safely, without such guidance ... *Id.* at 458-459. The rule of public access to navigable waters was inherited from England. Those waters which were subject to the ebb and flow of the tide were owned by the public, from which waters they could take the fish. Those waters above the ebb and flow of the tide which were navigable-in-fact were available to the public for purposes of transportation, whether or not the banks and bed were privately owned.

In deciding *Adirondack League Club*, the Court of Appeals departed from the traditional rule that commercial transportation be the test of whether a river was navigable-in-fact. Drawing on a variety of case law, the Court ruled that it was transportation, not necessarily commercial transportation, that determined navigability. “Evidence of recreational use will support a finding that a river is susceptible to commercial use.” 92 N.Y.2d at 603. The Court protested that it was not broadening the test for navigability but merely recognizing that recreational use fit within the traditional test, holding only that “transport need not be limited to moving goods in commerce, but can include some recreational uses. Practical utility for travel or transport nevertheless remains the standard.” *Id.* at 604.

The facts which required the Court of Appeals to send the case back to the trial court included historical use of the river, whether it could be used for logging in its natural state, and with respect to recreational use whether unobstructed travel on the river could occur only periodically or seasonally. Importantly, the Court acknowledged that where necessary to circumvent occasional obstacles, the public’s right of access carries with it the right to use “when absolutely necessary” the bed and banks of the river to “portage around the obstacle.” *Id.* at 607. The fact that the five defendants were able to travel down the river was not considered by the Court to be conclusive evidence of its navigability during a sufficient portion of the year.

Conclusion

With respect to the federal navigable waters issue, the agencies are proceeding slowly. EPA and ACOE have indicated they are reading the Supreme Court decision narrowly. New York has not indicated that it intends to jump on the issue quickly and expand its regulation of isolated wetlands now exempt from ACOE jurisdiction. It is still not known whether EPA, ACOE or Congress will attempt to develop a Commerce Clause or other justification for regulation of isolated intrastate waters and wetlands that would satisfy the Supreme Court's conservative majority.

Rapport Meyers Whitbeck Shaw & Rodenhausen LLP