

DID YOU KNOW...

SUPREME COURT LIMITS FEDERAL JURISDICTION OVER INTRASTATE WATERS; EPA AND THE ARMY CORPS ISSUE NEW WETLANDS RULE

Supreme Court Decision

On January 9, 2001, the United States Supreme Court ruled by a 5-4 majority to limit federal authority to regulate intrastate waters. This decision, *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 2001 WL 15333 (2001), appears to represent one of the most significant retrenchments of federal jurisdiction under the Clean Water Act ("CWA") in years, and calls into question federal authority to regulate certain intrastate waters that are not adjacent or connected to "navigable waters." The Court held that the CWA does not grant the federal government authority over wholly intrastate water bodies, at least where the only basis for federal jurisdiction is the presence of migratory birds in the area. Although individual states may regulate such intrastate waters under their own regulatory schemes, it is possible that this decision could eliminate some federal involvement with purely intrastate waters – a change that may eliminate the types of significant obstacles faced by developers in this case. While the Supreme Court only invalidated one of the several bases for the federal government's assertion of jurisdiction over intrastate waters, its decision does seem likely to foreclose federal regulation of small, ephemeral, isolated wetlands.

This case stems from the attempt by the Solid Waste Agency of Northern Cook County ("SWANCC") to develop a nonhazardous waste disposal site for municipal trash (i.e., a landfill). SWANCC is a consortium of 23 suburban Chicago communities, which purchased a 533 acre parcel of property that had been used extensively as a sand and gravel pit mine from the 1930's to the 1950's, when it was abandoned. The former excavation trenches eventually developed into a number of permanent and seasonal ponds, ranging from less than an acre to several acres. By 1993, SWANCC had obtained all necessary state and local permits for the landfill,

but was unable to obtain a CWA Section 404 dredge and fill permit from the United States Army Corps of Engineers (the "Corps"). Reversing its initial determination that the Site did not contain waters falling within the its jurisdiction, the Corps later determined that the Site was subject to federal jurisdiction after learning that it was used by over 100 different species of migratory birds, some of which require aquatic habitats for survival. The Corps claimed jurisdiction based upon its 1986 "Migratory Bird Rule."

At issue before the Supreme Court was whether the Migratory Bird Rule allowed the Corps to assert jurisdiction over "wholly" intrastate waters which are not adjacent or connected to "waters of the United States." Section 404 of the CWA confers federal jurisdiction over "navigable waters," which are defined as "the waters of the United States." The Corps' regulations define "waters of the United States" to include "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 and foreign commerce . . ." The Migratory Bird Rule provided that purely intrastate waters used by migratory birds or endangered species were federally protected because destruction of those intrastate waters, and the resultant harm to migratory birds and endangered species, would affect interstate or foreign commerce.

The United States Court of Appeals for the Seventh Circuit agreed with the Corps that the Migratory Bird Rule was a valid basis for federal jurisdiction over intrastate waters. The Supreme Court disagreed, however, and invalidated the Corps' use of the Migratory Bird Rule to extend federal jurisdiction under the CWA. In its view, "the 'Migratory Bird Rule' is not fairly supported by the

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CWA,” and cannot serve as the “interstate commerce” nexus between intrastate waters and “waters of the United States.” In the Court’s view, upholding federal jurisdiction based upon the Migratory Bird Rule, without clear Congressional intent that such jurisdiction exists, “would result in a significant impingement of the States’ traditional and primary power over land and water use.”

This decision is certain to be controversial. Within hours of its publication, Carol Browner announced that she was “very disappointed today by the Supreme Court’s split decision. It weakens America’s ability to protect its wetlands, which are among the country’s most valuable natural resources Although today’s ruling will make it even more difficult to effectively protect against the loss of wetlands, we hope that aggressive efforts will continue to be made under existing laws to prevent future losses of this vital resource. This decision further underscores the need for Congressional action to strengthen the laws that protect wetlands.”

Although the full ramifications of the Court’s ruling may not be known for some time, some things seem clear. Absent Congressional action, the Corps will no longer be able to rely upon the Migratory Bird Rule as its jurisdictional basis for regulating wholly intrastate water bodies. Nevertheless, land development interests should expect a concerted federal effort to continue extending federal jurisdiction over wholly intrastate waters based upon other “interstate commerce” factors such as recreational uses, harvesting of fish, and potential for use by industries in interstate commerce.

Despite the importance of the Supreme Court’s decision, it is unclear at this point just how significantly the decision will change federal regulatory requirements pertaining to wholly intrastate waters. As noted above, the Corps will likely try to retain its jurisdiction over these waters through a jurisdictional “hook” other than the presence of migratory birds. In the near term, developers should certainly continue to seek Corps input before commencing any developments or activities that might affect intrastate waters. This is particularly important, as we would expect federal authorities to vigorously enforce federal laws protecting wetlands and other water bodies ostensibly subject to federal jurisdiction wherever these laws apply. It is also possible that in light of the Supreme Court’s decision, states may seek to bolster their own regulation of intrastate waters. It will be

important to monitor state developments in this area to learn of any increased state regulation of those intrastate waters formerly regulated by the Corps under the Migratory Bird Rule.

New Wetlands Rule

On January 9, 2001, the same day the Supreme Court dealt a blow to federal CWA jurisdiction, the EPA and Corps announced a new rule which revises the Corps’ definition of the term “discharge of dredged material.” This rule represents EPA’s and the Corps’ attempt to limit the effect of a 1998 federal court decision which found that the federal government lacked authority under the CWA to regulate those activities which result only in the “incidental fallback” of material that is excavated from wetlands or other jurisdictional waters. The 1998 decision in the “Tulloch” case was viewed by EPA and the Corps as providing land developers with an opportunity to eliminate problematical wetlands through careful ditch-digging or pond construction that resulted in nothing more than “incidental fallback” of excavated material. Under the new definition, the “Corps and EPA regard the use of mechanized earth-moving equipment to conduct landclearing, ditching, channelization, in-stream mining, or other earth-moving activity in waters of the U.S. as resulting in a discharge of dredged material, unless project-specific evidence shows that the activity results in only ‘incidental fallback.’” Through this new definition, EPA and the Corps have effectively shifted the burden to the “earth-moving” party to demonstrate that the activity will result only in “incidental fallback.” Industry challenges to this new regulatory definition seem likely.

If you have any questions about this development, please feel free to contact:

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