The Supreme Court Draws a Line

The ruling in the SWANCC *case is tied to the 1985 decision in* United States v. Riverside Bayview Homes Inc. *An attorney with the firm that argued the formative case for Riverside discusses the parallels and differences between the cases and why* SWANCC *sets regulation back on a more reasonable course.*

by David M. Ivester

In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers,*[1] the U.S. Supreme Court ruled that the U.S. Army Corps of Engineers exceeded its authority under the Clean Water Act when it regulated discharges of fill material into "isolated" waters used as habitat by migratory birds. This decision reverses roughly two decades of agency claims of jurisdiction over such waters.

Under the Clean Water Act, the Corps and the U.S. Environmental Protection Agency regulate "discharges" of "pollutants" into "navigable waters," which the act defines as "waters of the United States." In the mid-1970s, the agencies administratively defined that term to include not only waters that are or could be used for navigation, tidal waters, interstate waters, tributaries of jurisdictional waters, and wetlands adjacent to jurisdictional waters, but also "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 commerce...."[2] In 1986, the Corps noted in the preamble to its regulations that EPA had "clarified" that these "other waters" include waters that are or would be used as habitat by migratory birds or endangered species, or waters used to irrigate crops sold in interstate commerce.[3] This agency clarification has become known as the "Migratory Bird Rule," and it is this rule that the Supreme Court concluded "is not fairly supported by the Clean Water Act."[4]

Of the many questions prompted by this decision, two merit quick attention. First, after *SWANCC*, may the Corps and EPA continue to assert Clean Water Act jurisdiction over isolated waters based on some connection with interstate commerce other than migratory birds? In a January 19, 2001, memorandum, the counsel of both agencies suggest that their agencies could do just that. Second, with respect to the now critical task of determining which waters are "isolated," what guidance can be gleaned from the Supreme Court's first Clean Water Act decision, *United States v. Riverside Bayview Homes, Inc.*,[5] which upheld the Corps' Clean Water Act jurisdiction over wetlands "adjacent" to navigable waters? In his dissenting opinion in *SWANCC*, Justice Stevens argues that *Riverside Bayview Homes* sanctioned the Corps' exercise of adjacent-wetland jurisdiction over an area that was somewhat removed from the nearest navigable water.

With respect to the first question, the Corps and EPA counsel issued a memorandum advising agency personnel that because *SWANCC* was limited to waters that are "nonnavigable, isolated, and intrastate," the regulatory definition of "waters of the United States" is "unaffected," except for the "other waters" provision (quoted above).[6] Regarding the effect of *SWANCC* on that provision, they stated that waters covered by the "other waters" provision "that could affect interstate commerce solely by virtue of their use as habitat by migratory birds" can no longer be regulated. They added, though, that the Court did not specifically address what other connections with interstate commerce might support the assertion of jurisdiction over "nonnavigable, isolated, intrastate waters" and asked agency staff to consult legal counsel as specific cases arise.[7]

One can only wonder whether the agencies would contemplate that, for instance, if cattle drink from an isolated pond or graze on an isolated wetland and thereafter go to their reward in interstate commerce, the pond or wetland may assume the status of "waters of the United States."

It remains to be seen whether the agencies will long persist in this initial, narrow reading of *SWANCC*, the plausibility of which may fairly be doubted. After all, one is hard put to read the Court's opinion as limited just to isolated waters used by migratory birds. The Migratory Bird Rule itself, expressly invalidated by the Court, encompassed more than that, including waters used as habitat for endangered species or used to irrigate crops sold in interstate commerce.

More to the point, the Court explained what Congress had in

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mind when it enacted the Clean Water Act, and it was not the interstate commerce theories the agencies seem yet willing to entertain. Noting that the Corps, in urging the inclusion of isolated waters within the meaning of "navigable waters," assumed that "the use of the word navigable in the statute...does not have any independent significance." The Court acknowledged that in *Riverside Bayview Homes* it said that the word "navigable" was of "limited effect." "But it is one thing," observed the Court, "to give a word limited effect and quite another to give it no effect whatever." The Court concluded: "The term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the [Clean Water Act]: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be made so."[8] To much the same effect, the Court also stated that the Clean Water Act did not extend the Corps' jurisdiction to ponds not adjacent to open water.[9]

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The dissent, too, understood the Court's ruling to preclude jurisdiction predicated on interstate-commerce theories unrelated to navigation. Justice Stevens wrote that the Court "draws a new jurisdictional line, one that invalidates the 1986 migratory bird regulation as well as the Corps' assertion of jurisdiction over all waters except for actually navigable waters, their tributaries, and wetlands adjacent to each."[10] All nine justices thus understood the Court to limit the Corps' jurisdiction to those waters and wetlands that are part of, or adjacent to, navigable waters—and thereby preclude jurisdictional claims over isolated waters (which, by definition, are neither part of, nor adjacent to, navigable waters).

The second question concerns identifying which waters are "isolated" and which are part of, or "adjacent" to, navigable waters. Agencies, landowners, and courts will, no doubt, explore the various factors going into this question for some time. A logical starting place, though, is *Riverside Bayview Homes*, because the wetland at issue in that case offers an authoritative example of what it means to be "adjacent."

What were the pertinent characteristics of that wetland? The *Riverside Bayview Homes* Court described it as "part of a wetland that actually abuts on a navigable waterway."[11] Justice Stevens, however, painted a different picture in his dissent in *SWANCC*, characterizing the Riverside property as "an 80-acre parcel of low-lying marshy land that was not itself navigable, directly adjacent to navigable water, or even hydrologically connected to navigable water, but which was part of a larger area, characterized by poor drainage, that ultimately abutted a navigable creek."[12] He elaborated that the district court found no direct hydrological connection between the parcel and any nearby navigable waters. The parcel's wetland characteristics, he observed, were due, not to a surface or groundwater connection to any actually navigable water, but to poor drainage resulting from the soil underlying the property. "Nevertheless," he added, "this court found occasional surface runoff from the property into nearby waters to constitute a meaningful connection."[13]

The importance of these varying characterizations of the Riverside wetland is that one supports the view that an "adjacent" wetland is one directly alongside a navigable water and the other supports the view that an "adjacent" wetland may be somewhat removed from the nearest navigable water.

Which characterization is correct? The answer is revealed in the rather unusual manner in which the *Riverside Bayview Homes* Court was presented with the facts of the case. In the usual circumstance, the Court reviews legal issues predicated on a clear set of facts found by lower courts. And *Riverside Bayview Homes* appeared to fit this familiar pattern as well, with both parties presenting arguments predicated on the district court's characterization of the wetland—until the United States filed its reply brief. In that brief, the government announced that trial exhibits—including a map of the parcel in question—which had previously been misplaced and thus had not been seen by either the Court of Appeals or the Solicitor General, had been located. Based on these exhibits, the government disputed Riverside's description of the wetland at issue (which was based largely on the same district court findings Justice Stevens noted in his dissent in *SWANCC*) and maintained: "...There is direct, unimpeded access from the mid-east boundary of Riverside's property to additional marshes and the open waters of Black Creek, a navigable water of the United States....One could, after wading through a cattail marsh, swim directly from Riverside's property to the Great Lakes."[14]

At oral argument, the Supreme Court observed that, by claiming in its reply brief that the wetland had a direct surface connection with a navigable water, the government seemed to change its whole theory of the case; the government agreed.[15] The government asserted that much of what the district court found was irrelevant and erroneous, and urged the Court to base its decision on the plain

continued on page 17

SUPREME COURT DRAWS A LINE, continued from page 6

facts revealed by the trial exhibits. When asked whether there must be a connection between the wetland and navigable waters, the government conceded that there should be a connection for a wetland to be treated as adjacent, but differed with the appeals court's characterization of the connection in this instance.[16] As the government put it, the appeals court opinion was "permeated with concern that the government is regulating low lying back yards," but the trial exhibits showed that the parcel is "not a low lying back yard. This is in fact an adjacent wetland, adjacent—by adjacent, I mean it is immediately next to, abuts, adjoins, borders, whatever other adjective you might want to use, navigable waters of the United States."[17] When asked about the district court finding that there was no hydrologic connection between the Riverside property and a navigable water, the government pronounced it "dead wrong [and] irrelevant" and explained that "there is a hydrologic connection through a visible surface connection, whereas all the evidence [the district court] took pertained to subsurface ground water flow...."[18]

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The Supreme Court accepted the government's characterization, observing that Riverside's "property is part of a wetland that actually abuts on a navigable waterway."[19] Without reference to the district court's finding that there was no hydrologic connection between the property and navigable water, the Court instead noted that the district court found that the wetland on the Riverside property was adjacent to navigable water because "the area characterized by saturated soil conditions and wetland vegetation extended beyond the boundary of [Riverside's] property to Black Creek, a navigable waterway."[20] On this basis, the Court upheld the Corps' regulation of the wetland, cautioning that "we are not called upon to address the question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water...and we do not express any opinion on that question."[21] That question is the one the Court has now resolved 15 years later in the recent *SWANCC* decision.

As the Supreme Court predicated its decision in *Riverside Bayview Homes* on this view of the Riverside wetland, it is that view—and not the one offered by Justice Stevens harking back to seemingly contrary findings by the district court—that should inform future inquiry into the meaning of the term "adjacent wetland." The *Riverside Bayview Homes* Court accepted the government's characterization of the wetland and ruled that because it "actually abuts on a navigable waterway," it is properly considered an "adjacent wetland" within the Corps' jurisdiction. In basing its decision on that understanding of the facts, rather than on the district court's contrary findings, the Court offered no opinion on whether, as the district court found, a wetland some distance from, and without a hydrologic connection to, navigable waters may properly be considered "adjacent." The Court certainly did not, as Justice Stevens supposed in his *SWANCC* dissent, declare that such a wetland qualifies as "adjacent." It would be ironic, to say the least, for the government to urge one view of the Riverside wetland (as abutting a navigable water) to win the case and later to adopt a different view of the same wetland (as largely disconnected from any navigable water) to stretch the meaning of that case. ■

References

1 148 L.Ed. 2d 576 (2001) (*SWANCC*).
2 33 C.F.R. §328.3(a)(3).
3 51 Fed. Reg. 41206, 41217 (1986).
4 *SWANCC* at 584.
5 474 U.S. 121 (1985).
6 33 C.F.R. §328.3(a)(3).
7 G. Guzy, General Counsel, U.S. Environmental Protection Agency, and R. Andersen, Chief Counsel, U.S. Army Corps of Engineers, Memorandum re Supreme Court Ruling Concerning Clean Water Act Jurisdiction Over Isolated Waters 4 (January 19, 2001), emphasis in original.
8 *Id.* at 588; see also *id.* at 585 n. 3.
9 *Id.* at 585.
10 *Id.* at 590–591 (Stevens, J., dissenting).
11 *Riverside Bayview Homes,* 474 U.S. at 431.
12 *SWANCC* at 590 (Stevens, J., dissenting).
13 *Id.* at 590, n.2.
14 Reply Brief for the United States at 2, *Riverside Bayview Homes.*
15 Official Transcript at 5-6, *Riverside Bayview Homes.*
16 *Id.* at 14-15.
17 *Id.* at 16.
18 *Id.* at 27.
19 *Riverside Bayview Homes* at 431.
20 *Id.* at 429.
21 *Id.* at 429, n.8.