

All wet

Supreme Court sends migratory-bird rule south.

By Edmund L. Regalia and
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California property owners have been faced with the regulation of isolated wetlands and seasonal ponds located on their property under the federal Clean Water Act since the Army Corps of Engineers' promulgation of its regulations in 1977 defining waters of the United States to include isolated, intrastate waters.

The existence of wetlands located on a piece of property has required landowners, including developers, farmers and ranchers, to seek a permit under Section 404 of the Clean Water Act prior to conducting any activity on their property that may adversely affect these seasonal waters.

Until the recent U.S. Supreme Court decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, the extent of the Corps' jurisdictional reach under the act had progressively increased since its inception in 1972.

Congress enacted the Clean Water Act in 1972 "to restore and maintain the chemical, physical and biological integrity of the nation's waters." The Corps, along with the Environmental Protection Agency, enforce the act by promulgating regulations, which include the authorization to issue permits under Section 404 allowing discharges of dredged or fill material into "navigable waters." The Clean Water Act defines "navigable waters" as "the waters of the United States."

In the original declaration made in support of the goal of restoring and maintaining the nation's waters, Congress set forth a policy of comprehensive programs for water-pollution control, financial assistance for treatment works and waste-treatment management and research.

In addition, Congress stated a national goal of prohibiting the discharge of toxic pollutants into the waters of the United States, eliminating the discharge of pollutants into navigable waters by 1985 and providing for protection and propagation of fish and recreation by 1983.

These goals have proven too optimistic, but the Environmental Protection Agency and the Corps have aggressively pursued alleged violators. The Clean Water Act, and particularly "waters of the United States," has been interpreted liberally and expansively. Both the EPA and the Corps have published regulations that define "waters of the United States" to include not only the expected navigable waters, but also isolated, intrastate waters and wetlands.

In *United States v. Riverside Bayview Homes Inc.*, the Supreme Court held that the Corps had jurisdiction over wetlands adjacent to a navigable waterway. The nexus between the wetlands

and the navigable waters was the basis for the court's opinion. The court in *Riverside Bayview Homes* did not express an opinion on the Corps' authority to regulate isolated waters or wetlands not adjacent to waters of the United States.

In 1986, the Corps attempted to "clarify" its jurisdiction over wetlands as waters of the United States by setting forth the "migratory bird rule," extending the Corps' jurisdiction to isolated intrastate waters that:

■ Are or would be used as habitat by birds protected by Migratory Bird Treaties.

523-acre property to use as a landfill. The site had been mined for sand and gravel for about 30 years, after which trenches became ponds that were used by migratory birds. The Corps claimed jurisdiction over the proposed solid-waste disposal site and its "scattering" of permanent and seasonal ponds, varying in size from under one-tenth of an acre to several acres, and varying in depth from several inches to several feet.

After the Corps refused to issue a Section 404 permit, the consortium sued, claiming that the

Corps did not have jurisdiction over these isolated waters. The Northern District of Illinois granted the Corps' summary judgment motion on the jurisdictional issue. The 7th U.S. Circuit Court of Appeals held that Congress has the authority to regulate isolated waters under the "cumulative impact doctrine" and that the migratory-bird rule was a reasonable interpretation of the act.

The U.S. Supreme Court disagreed. In an opinion delivered by Chief Justice William H. Rehnquist and joined by Justices Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy and Clarence Thomas, the majority found that the migratory-bird rule is not fairly supported by the provisions of the act. The majority opinion found "nothing approaching a clear statement from Congress that it intended Section 404(a) to reach an abandoned sand and gravel pit."

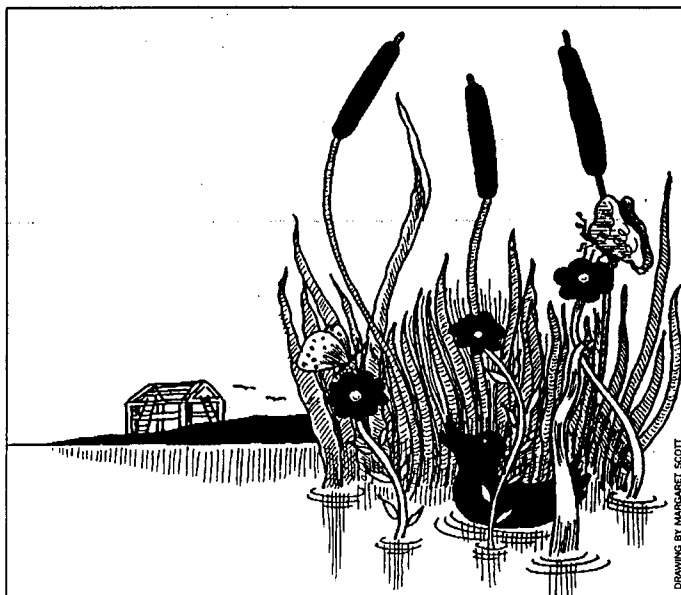
The opinion also focused on the separation between federal

and state authority. Justice Rehnquist's opinion stated that the tension between state and federal jurisdiction is "heightened when the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power" and that permitting the Corps' jurisdiction over the isolated ponds under the migratory-bird rule "would result in a significant impingement of the states' traditional and primary power over land and water use."

While the court's decision does not specifically strike down the regulation setting forth the migratory-bird rule, the opinion makes clear that the rule cannot be utilized as a sole basis for asserted federal jurisdiction over isolated intrastate waters that are not adjacent to waters of the United States.

The decision allows California property owners to breathe easier if their properties contain isolated wetlands or ponds. While it is possible that the state could fill the gap by seeking to impose state regulation over such isolated waters, this is not likely to occur in the immediate future.

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■ Are or would be used as habitat by other migratory birds that cross state lines.

■ Are or would be used as habitat for endangered species.

■ Are used to irrigate crops sold in interstate commerce.

Landowners, including farmers, ranchers and developers, have argued that the migratory-bird rule, which purports to give the Corps jurisdiction over isolated wetlands (those not adjacent to or connected to any navigable waters), exceeds the limits of Congress' Commerce Clause power and Congress' intent under the Clean Water Act, as well as the limits provided by the U.S. Supreme Court in *Riverside Bayview Homes*.

The U.S. Supreme Court has now agreed with the argument that the migratory-bird rule exceeds Congress' intent under the Clean Water Act. On Jan. 9, in a 5-4 decision, the court decided *Solid Waste Agency*, holding unequivocally that Congress never intended the Clean Water Act to cover non-navigable, isolated, intrastate waters based upon the presence of migratory birds.

The case involved a consortium of 23 Cook County, Ill., municipalities that joined to buy a