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U.S. Supreme Court Curtails the Federal Regulation of "Isolated" Waters and Wetlands Under the Clean Water Act

by Mark A. Chertok and Kate Sinding

The United States Supreme Court recently struck a major blow to the federal government's ability to regulate activities affecting so-called "isolated" waters, including wetlands. *Solid Waste Agency of Northern Cook County [SWANCC] v. United States Army Corps of Engineers*, ___ U.S. ___, 51 Env't Rep. Cas. (BNA) 1833, 2001 U.S. LEXIS 640 (2001). A 5-4 majority of the Court held that the U.S. Army Corps of Engineers lacks jurisdiction under the Clean Water Act ("CWA") to regulate non-navigable, wholly intrastate bodies of water solely on the basis of the presence of migratory birds. In so doing, the Court not only struck down the Corps' longstanding "Migratory Bird Rule," but drew into question the federal government's authority to exercise jurisdiction over any body of water or wetland not adjacent to a traditionally navigable water body.

The Court issued its ruling without reaching the broad constitutional question: does Congress have the authority under the Commerce Clause of the United States Constitution to regulate wholly intrastate isolated bodies of water? Instead, the Court limited its decision to the narrower issue of the Corps' interpretation of its own authority to regulate such waters under the CWA. While the decision makes clear that the Corps may continue to regulate non-navigable water bodies and wetlands adjacent to navigable waters, the decision leaves open the question of whether the Corps may continue to exercise jurisdiction over wetlands that are adjacent to bodies of water that are not traditionally navigable.

The CWA'S Jurisdictional Scope

The case arose when SWANCC, a consortium of 23 suburban Chicago municipalities, joined to purchase a former mining site for development as a nonhazardous landfill. Subsequent to its previous abandonment for mining purposes, the property had evolved "into a scattering of permanent and seasonal ponds of varying size ... and depth." After receiving local and state approvals, SWANCC contacted the Corps for a determination of whether a federal permit was required.

Section 404(a) of the CWA authorizes the Corps to issue permits "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a). Although the term "navigable waters" was traditionally interpreted to include only those waters affected by tidal flow, or which have been used, or are susceptible to use, for interstate or foreign commerce, the term has taken on a broader meaning under the CWA. The Act defines the term "navigable waters" to include "waters of the United States..." 33 U.S.C. § 1362(7), which the Corps' regulations define to include not only traditional "navigable waters," but also tributaries thereto, interstate waters and wetlands, intrastate waters (including intermittent streams, mudflats, ponds, and isolated wetlands) where a discharge could affect interstate or foreign commerce, tributaries of these intrastate waters, and wetlands adjacent to any of these waters. 33 C.F.R. § 328.3(a)(3).

In 1986, the Corps issued the "Migratory Bird Rule" to "clarify" the reach of its jurisdiction under the CWA, which stated that Section 404 also extends to wholly intrastate waters which "are or would be used" by migratory birds protected by international treaties or "which cross state lines." 51 Fed. Reg. 41217 (1986). The U.S. Environmental Protection Agency ("EPA"), which shares limited regulatory authority under Section 404, subsequently adopted a similar rule in the preamble to its regulations. 53 Fed. Reg. 20765 (1988).

The Corps found that SWANCC's site, while not wetlands, contained "waters of the United States" subject to its jurisdiction in part on the basis of the presence of migratory birds. The Corps denied SWANCC a Section 404 permit, citing several environmental concerns.

SWANCC filed suit, challenging Corps jurisdiction over the site. The District Court granted summary judgment to the Corps, finding that the Corps' exercise of jurisdiction under the Migratory Bird Rule was permissible. SWANCC then appealed to the Court of Appeals for the Seventh Circuit, which upheld the lower court's decision. 191 F.3d 845 (7th Cir. 1999). The Seventh Circuit noted that under the "cumulative impact doctrine," which was established by the Supreme Court in *Wickard v. Filburn*, 317 U.S. 111 (1942), "a single activity that itself has no discernible effect on interstate commerce may still be regulated if the aggregate effect of that class of activity has a substantial impact on interstate commerce." 191 F.3d at 850. The court concluded that "the destruction of the natural habitat of migratory birds in the aggregate 'substantially affects' interstate commerce," and thus forms a sufficient basis upon which the Corps could exercise jurisdiction over non-navigable, isolated, intrastate wetlands. *Id.*

The Supreme Court's Ruling

On January 9, 2001, a 5-4 majority reversed. Declining to address the constitutional issue, the Court instead focused on the question of whether the Corps' interpretation of its own statutory authority under the CWA was permissible. The Court first found that its earlier decision in *U. S. v. Riverside Bayview Homes*, 474 U.S. 121 (1985), which upheld Corps jurisdiction over wetlands located adjacent to a traditionally navigable waterway, did not support jurisdiction over isolated, wholly intrastate waterbodies. In *Riverside Bayview*, the Court had stated that the term "navigable" in the CWA is of "limited import" and that Congress evidenced its intent to "regulate at least some waters that would not be deemed 'navigable' under [that term's] classical understanding." *Id.* at 133. In *SWANCC*, however, the Court held that its earlier ruling was based largely on "Congress' unequivocal acquiescence to, and approval of," the Corps' regulations covering wetlands adjacent to navigable waters." The Court continued, "[i]n order to rule for respondents here, we would have to hold that the jurisdiction of the Corps extends to ponds that are *not* adjacent to open water. But we conclude that the text of the statute will not allow

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this." The Court also rejected the Corps' argument that Congress had clearly "acquiesced to" its broader interpretation of its jurisdiction under Section 404 in the Migratory Bird Rule by failing to pass legislation overturning that interpretation.

Second, the Court found that, even if the question of whether Congress intended Section 404 to extend to non-navigable, isolated, intrastate waters was unclear — which it did not believe it was — the Corps' interpretation of its own jurisdiction was not entitled to deference. In what may prove to be a portent of the Court's view of the scope of congressional authority to regulate isolated waters and wetlands pursuant to the Commerce Clause, the Court declined to accord deference to the Corps' interpretation because it found that the Migratory Bird Rule raised "serious constitutional problems." It both "invokes the outer limits of Congress' power" under the Commerce Clause, and "would result in a significant impingement on the States' traditional and primary power over land and water use." Opting to interpret the statute so as to avoid these "constitutional and federalism questions," the Court struck down the Corps' exercise of jurisdiction over the SWANCC site under the Migratory Bird Rule.

Uncertainties Remain Concerning the Scope of the SWANCC Holding

While clearly setting down the law with respect to isolated, non-navigable, wholly intrastate wetlands, the Court's ruling in *SWANCC* leaves open the question whether the Corps may continue to exercise jurisdiction over wetlands that are adjacent to other bodies of water that are not traditionally navigable. For example, would a wetland that is adjacent to a non-navigable, as opposed to a navigable, tributary be subject to Corps regulation if that tributary eventually leads to a navigable river?

The dissenting justices, led by Justice Stevens, would apparently argue that the answer to this question is yes. In discussing *Riverside Bayview*, Justice Stevens wrote: "[t]he Court has previously held that the Corps' broadened jurisdiction under the [Clean Water Act] properly included 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." Whether a majority of the Supreme Court agrees with this reading of the Court's holding in *Riverside Bayview* remains to be seen. For their part, as discussed below, the Corps and EPA have made clear that they believe wetlands that are adjacent to non-navigable tributaries to navigable water bodies remain subject to federal jurisdiction following *SWANCC*.

The Regulatory Agencies' Reaction to SWANCC

The regulatory agencies have, not surprisingly, adopted a narrow view of the Supreme Court's holding in *SWANCC*. In a memorandum issued jointly to field personnel by the General Counsel of EPA and the Chief Counsel of the Corps, the agencies expressed their view that "the Court's holding was strictly limited to waters that are 'nonnavigable, isolated, [and] instrastate [sic].' With respect to any waters that fall outside of that category, field staff should continue to exercise CWA jurisdiction to the full extent of their authority under the statute and regulations and consistent with court opinions."

The agencies further pointed out that the Court had not in *SWANCC* overruled "the holding or rationale" of *Riverside Bayview*. Thus, they maintained that "traditionally navigable waters, interstate waters, their tributaries, and wetlands adjacent to each" remain subject to federal regulation. This list impliedly, if not expressly, indicates the agencies' belief that wetlands adjacent to non-navigable tributaries that ultimately lead to a navigable water body are subject to federal regulation.

The agencies went on to specifically enumerate those bodies of water that they consider to remain subject to regulation following *SWANCC*. First, citing both portions of the *SWANCC* opinion as well as previous wetlands cases, they contended that all but one of the subsections of the regulatory definition of "waters of the United States" set forth at 33 C.F.R. § 328.3(a) remain unaffected by the Court's ruling. Included are: (1) "[a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce...."; (2) "[a]ll interstate waters including interstate wetlands"; (3) [a]ll impoundments of waters otherwise defined as waters of the United States under the definition [except subsection (a)(3) waters, discussed below]"; (4) [t]ributaries to waters identified [above]"; (5) "[t]he territorial seas"; and (6) "[w]etlands adjacent to waters (other than waters which are themselves wetlands) identified [above]." The agencies pointed out, moreover, that the Supreme Court did not in *SWANCC* disturb the broad regulatory definition of "adjacent" it had earlier approved in *Riverside Bayview*, which includes "[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes, and the like...." 33 C.F.R. § 328.3(d).

The one subsection of the regulatory definition drawn into question by the *SWANCC* ruling in the agencies view is 33 C.F.R. § 328(a)(3), which applies to:

"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...."

As to such waters, the agencies provided the following guidance to their field personnel. Waters that fall under the subsection (a)(3) definition solely because of their use as habitat for migratory birds should no longer be considered "waters of the United States." However, other "connections with interstate commerce might support the assertion of CWA jurisdiction over 'nonnavigable, isolated, intrastate waters.'" Two examples of situations in which jurisdiction might be asserted over wholly intrastate, non-navigable waters were provided: (1) where the "use, degradation, or destruction" of such waters could affect other "waters of the United States"; or (2) where the "use, degradation, or destruction" of such waters could affect interstate or foreign commerce.

Finally, the agencies cautioned that the *SWANCC* holding should be read in light of

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The Westchester Municipal Planning Federation, in conjunction with the Edwin G. Michaelian Municipal Law Resource Center of Pace University, will present the 2001 Land Use Training Institute on the evenings of March 8, 13, 15 and 22, 2001 at 6:30 p.m. at the Lubin Graduate Center of Pace University, 1 Martine Avenue, White Plains, New York. These 3-hour programs will feature topics of interest to planning, zoning and design review board members and attorneys including SEQRA, historic preservation and design review, variances and evaluating site and subdivision plans.

Of particular interest to attorneys, is the March 22nd session which will consist of a comprehensive update of significant cases affecting the planning and zoning process. This session, also cosponsored by the Westchester County Bar Association, Municipal Law Section, will provide participants with three (3) MCLE credits for their attendance.

The registration fee is $15 per night and $50.00 for all four nights for Westchester Municipal Planning Federation members and $70.00 for non-members. Separate registration, in addition to registration with the Planning Federation, is required with the Westchester County Bar Association for the March 22nd MCLE accredited program. The Bar Association registration fee is $30.00 for members and $60.00 for non-members for the March 22nd program..

For more information, contact Kay Eisenman, WMPF Executive Director at (914) 995-4424. For information and registration for MCLE credits contact Delores Eisenberg at the Westchester County Bar Association (914) 761-3707 ext. 13.

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MLRC Director ..... *Lester D. Steinman*
Municipal Law Section Chair ..... *Edward J. O'Connor*
Co-Editors ..... *Lester D. Steinman*
Ralph Bandel
MLRC *914-422-4276*
Pace University
One Martine Avenue
White Plains, New York 10606
www.pace.edu/dyson/mlrc

Legal Requirements for Engineering Services

by Thomas W. King, Jr. and Cheryl L. Cundall

Municipal attorneys are often responsible for negotiating and drafting agreements for engineering services being procured by a municipality. As a result, many municipal attorneys are required to become familiar with the legal requirements governing individual engineers and the legal requirements governing business entities that provide engineering services. Effective January 1, 2000, it became easier for the attorney to verify that the appropriate authorizations are in place, as New York now requires each business entity that provides engineering services to obtain a Certificate of Authorization. In addition, the State Education Department has implemented on-line verification of professional engineers' licenses and disciplinary records, and on-line verification of Certificates of Authorization.

Under New York law, municipal officials have a specific obligation to utilize professional engineers (P.E.s) for public works projects:

"No county, city, town or village or other political subdivision of this state shall engage in the construction or maintenance of any public work involving engineering or land surveying for which plans, specifications and estimates have not been made by, and the construction and maintenance supervised by, a professional engineer or land surveyor; provided that this section shall not apply to the construction, improvement or maintenance of county roads or town highways, nor to any other public works wherein the contemplated expenditure for the completed project does not exceed five thousand dollars." New York State Education Law §7209(3).

As is the case in most states, New York regulates the profession of engineering, recognizing that such regulation is necessary for the protection of the public health and safety. Projects located in New York are subject to New York law, whether or not the engineer is located within the state. Engineering services can only be performed by a person licensed or otherwise authorized to practice in New York, and only by a business entity which is authorized to practice. "Unauthorized practice of engineering" is a serious offense in New York, a class E felony. "Aiding and abetting" unlicensed practice is similarly a serious offense, one which public officials need to guard against, particularly officials employed by municipalities and public agencies.

Professional Governance

New York is unique in placing its system of professional governance under the Board of Regents, a lay body which heads the State Education Department. The Department administers the licensure of thirty-eight professions, in accordance with the State Education Law. Boards, made up of licensed professionals and public members, advise the Regents and the Department on all aspects of professional education, licensing, practice, and conduct. For the engineering profession, the Board is the State Board for Engineering and Land Surveying (SBELS).

Professional Engineering Licensure Requirements

To obtain a Professional Engineering (P.E.) license in New York State, an engineer must meet education/experience and examination requirements. Typically these include a bachelor's degree from an engineering program accredited by the national Accreditation Board for Engineering and Technology, four years of engineering experience satisfactory to the SBELS, and passing two eight hour examinations, the "Fundamentals of Engineering" (FE) and the "Principles and Practice of Engineering" (P&P). The FE tests basic engineering mathematics and sciences and is usually taken in the senior year of college. The P&P, on the other hand, is a more in-depth test of problem-solving skills and technical expertise.

In addition to the engineering disciplines of Chemical, Civil, Electrical, and Mechanical, New York also offers the P & P examinations in thirteen other engineering disciplines: Agricultural, Environmental, Fire Protection, Metallurgical, Structural I, Structural II, Mining/ Mineral, Nuclear, Petroleum, Control Systems, Manufacturing, Ship Design, and Industrial. Most of the exams are in an objectively -scored format consisting of multiple-choice questions.

While the exams are discipline-specific, the license issued by New York is not. However, the statute and the Regents Rules for professional conduct require that the licensee practice only in the area of his or her competence.

Permissible Forms of Engineering Practice

Section 7202 of the New York State Education Law provides that, "Only a person licensed or otherwise authorized under this article shall practice engineering or use the title 'professional engineer'...." A "person licensed" is an individual who has qualified by education, experience and examination and has been issued a New York State Professional Engineering license by the State Education Department. Persons "otherwise authorized" may include an individual person licensed in another state who has applied for and received a limited permit to practice for a specific time period or with respect to a specific project. Limited permits to practice are not available to business entities of any kind.

In New York, professional engineering services may be provided by a professional service corporation (PSC) authorized under Article 15 or 15-A of the New York State Business Corporation Law. PSCs authorized under Article 15 (domestic) are special corporations where each of the shareholders, officers and directors must be licensed by New York State in the area of the service(s) being provided. For PSCs authorized under Article 15-A (foreign PSCs) only the individual actually providing the professional service must be licensed in New York although all of the officers, directors and shareholders must be licensed in some jurisdiction. Professional limited liability companies and foreign professional limited liability companies may also provide professional engineering services and require that all members be licensed in New York State. Finally, such services may also be provided by partnerships, limited liability partnerships and foreign limited liability partnerships and require that all partners be licensed in New York State.

Corporate Practice of Engineering Limited to "Grandfathered" Corporations

With the exception of one special class of corporations, business corporations may ***not*** provide engineering services. The exception is for one special class of corporations, often referred to as the "grandfathered" corporations, which may legally provide professional engineering services in New York State. These are general business corporations that on April 15, 1935, and continuously thereafter, were lawfully engaged in the practice of professional engineering in New York State and whose chief executive officer is a licensed professional engineer under the laws of the State of New York. These corporations may be bought and sold and may or may not retain a corporate address in New York. However, as long as they retain their corporate identity and stay in compliance with New York laws, they may continue to provide professional engineering services in New York.

No other entity or individual except those described previously, including a general business corporation that may be authorized under the laws of another state to practice there (but a foreign professional service corporation is exempt from this general prohibition as previously described), may practice professional engineering in New York State. It is also important to note that a person who is licensed (or otherwise authorized) to practice in New York State and is an officer or employee of a general business corporation operating in New York State or in a state other than New York *can not* provide professional engineering services in New York *as an officer or employee of that firm but can only do so as an individual.* In other words, a contract with a New York client must be between the individual licensee and the client and not the corporate employer (that is, the corporation) and the client. Lastly, an entity not authorized to provide professional engineering services, such as a general contractor, can **not** subcontract with, or employ, a licensed professional engineer in order to provide engineering services to a third party client.

Prohibition on Fee-Splitting

Another important aspect of New York State's regulation of professionals deals with fee splitting and profit sharing. Licensed professionals or professional firms cannot share, except with other members of their professional firm, the fees earned for providing professional services. Based upon Section 6509(9) of the Education Law, Regents Rule 29.1(b)(4) prohibits professionals or professional firms from sharing the fees earned for providing professional services.

Unauthorized Practice

New York law is clear in regard to unauthorized practice. Section 6512.1 of the Education Law makes it a class E felony for

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anyone not authorized to practice who practices or offers to practice or holds himself or herself out as being able to practice professional engineering. Section 6509 defines professional misconduct as, among other things, permitting, aiding or abetting an unlicensed person to perform activities requiring a license; and, section 6512.2 makes it a class E felony for *anyone*, including a public official, to knowingly aid or abet three or more unlicensed persons practice a profession requiring a license.

In the municipal arena, unauthorized practice can arise from many circumstances. Unauthorized engineering can occur when engineering services are being offered by unlicensed individuals, including contractors, professors, or a company's outsourced or retired engineers.

In other situations, the individual may be licensed, but the organization may not be legally authorized to provide engineering services. For example, even if a New York-licensed P.E. is on staff, engineering services cannot be legally provided by out-of-state corporations, unless such companies have obtained the necessary legal authorization to provide engineering services in New York State. Similarly, even if a New York-licensed P.E. is employed by a New York corporation (such as a laboratory, contractor, planning firm, or consulting firm), only legally authorized PSCs or "grandfathered" corporations may legally provide engineering services.

Verification of Licensure

An individual engineer's license can be verified by consulting the website maintained by the State Education Department, at *www.op.nysed.gov/opsearches.htm*. Users of this website can verify the licensure status of any licensed professional, including engineers. The website also contains information on disciplinary action taken against licensed professionals. Alternatively, such information can be obtained by contacting the State Education Department by telephone, at (518) 474-3817.

Certificates of Authorization

One may also verify whether a business entity is authorized to provide professional engineering services by requesting the entity provide a copy of its Certificate of Authorization, or by consulting the website maintained by the State Education Department, at www.op.nysed.gov/opsearches.htm. On the website, "A/E" firms (architectural/engineering) are listed separately, under "design corporations." Solo practitioners are not required to obtain a Certificate of Authorization.

Effective January 1, 2000, all firms that provide engineering services are required to obtain a Certificate of Authorization from the State Education Department. As of December 2000, the Office of the Professions, State Education Department, had received over 1,400 applications for a Certificate of Authorization to provide engineering services in New York State, and had issued approximately 900 certificates.

The Office reported that approximately 500 applications have been received from companies that have no business entity currently registered and authorized to provide professional engineering services in New York. These companies are being advised that they are not authorized to practice in New York and that if they are practicing, they are doing so illegally, and committing a class E felony, a crime. Most of these applications are from businesses located outside of the State. An additional 100 applications have been received from businesses that are registered to practice in New York but are not otherwise in compliance with the law for various reasons. These businesses will be advised to come into compliance or risk being prosecuted for professional misconduct.

Practice Tips

When procuring engineering services, the following steps should be taken to protect the municipality from inadvertently being victimized by a party or entity engaging in the unauthorized practice of engineering:

When drafting Requests for Proposal (RFPs), the municipal attorney should require that each business entity submitting a proposal for engineering services must provide a copy of its Certificates of Authorization as part of the proposal or bid. This requirement should extend to any subcontractors providing engineering services. Solo practitioners are not required to obtain Certificates of Authorization, but the status of their license and registration should be verified.

If the Certificates of Authorization were not obtained or verified during the RFP process, the agreement should be drafted to require that entities providing engineering services must provide their Certificates prior to beginning work.

The municipal attorney should make sure that the contract is executed with the entity named on the Certificate of Authorization, and not with a corporate affiliate of that business entity. In an effort to minimize liability, many engineering firms have established a number of affiliated companies, only some of which are authorized to provide engineering services. A contract with a corporate affiliate may not provide sufficient protection to the municipality.

Thomas W. King, Jr., P.E., recently retired as the Executive Secretary of the New York State Board for Engineering and Land Surveying (SBELS).

Edwin G. Michaelian
Municipal Law Resource Center
Pace University
One Martine Avenue
White Plains, N.Y. 10606

Cheryl Cundall, P.E., Esq., is environmental counsel at Pratt & Whitney, a division of United Technologies Corporation in Hartford, CT.

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Wetlands

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previous decisions of the Supreme Court and lower courts, particularly including *Riverside Bayview*, "which precedents broadly uphold CWA jurisdictional authority." The memorandum concludes by stating:

"In sum, the holding, the facts, and the reasoning *of United States v. Riverside Bayview Homes* continue to provide authority for the EPA and the Corps to assert CWA jurisdiction over, *inter alia*, all of the traditional navigable waters, all interstate waters, and all tributaries to navigable or interstate waters, upstream to the highest reaches of the tributary systems, and over all wetlands adjacent to any and all of those waters."

Conclusion

A critical open question following *SWANCC* is whether the agencies' broad reading of those waters and wetlands that remain subject to federal regulation will be sustained in anticipated future challenges. The courts will undoubtedly face the issue whether the Corps may indeed continue to assert CWA jurisdiction over *all* tributaries to navigable waters and the wetlands adjacent to them, regardless of whether those tributaries are themselves navigable. In addition, as suggested by Justice Stevens' dissent, the courts will likely face the issue whether the Corps may continue to assert jurisdiction over wetlands that have a connection to another water body within its jurisdiction, where a surface water connection between the two is lacking.

Mark A. Chertok is a partner, and Kate Sinding is an associate, at Sive, Paget & Riesel, P.C. in New York City.