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## Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001)

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# **COURT REPORTS**

## **FEDERAL COURTS**

### **UNITED STATES SUPREME COURT**

**Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001)** (holding the Army Corp of Engineers' ("Corps") regulation defining "navigable waters" to include intrastate waters, as clarified and applied to the petitioners' landfill site, pursuant to the Migratory Bird Rule, exceeded the authority granted to the Corps under section 404(a) of the Clean Water Act).

The Solid Waste Agency of Northern Cook County ("SWANCC"), a consortium of twenty-three suburban Chicago municipalities, selected for their baled nonhazardous waste disposal an abandoned sand and gravel pit mining site. The site included excavation trenches that had evolved into scattered permanent and seasonal ponds. Since the project would involve filling these ponds, SWANCC contacted the United States Corps of Engineers ("Corps") to determine if section 404(a) of the Clean Water Act ("CWA") required it to obtain a federal landfill permit.

Section 404(a) authorizes the Corps to regulate the discharge of fill into "navigable waters," which the statute defines as "the waters of the United States, including the territorial seas." The Corps promulgated 33 C.F.R. section 328.3(a)(3) ("the regulation"), which defined "navigable waters" to include intrastate waters, the use or destruction of which could affect interstate or foreign commerce. Applying the regulation, the Corps initially concluded that it had no jurisdiction over the site.

However, after the Illinois Nature Preserves Commission informed the Corps of reported observations of migratory bird species at the site, the Corps reconsidered and ultimately asserted jurisdiction over the balefill site under the Migratory Bird Rule. In relevant part, the Migratory Bird Rule states that section 404(a) extends to intrastate waters "which are or could be used by migratory birds that cross state lines." In November 1987, the Corps formally determined that the seasonally ponded, abandoned gravel mining depressions located on the SWANCC project site, while not wetlands, did qualify as "waters of the United States" under the CWA because: (1) the proposed area was an abandoned mining site; (2) the water areas and spoil piles had developed a natural character; and (3) migratory birds which cross

state lines used the water areas as habitat.

Although SWANCC secured the required water quality certification from the Illinois Environmental Protection Agency, the Corps refused to issue a section 404(a) permit. The Corps denied the permit on three grounds. First, the Corps found SWANCC had failed to establish that its proposal was the least environmentally damaging, most practicable alternative for disposal of nonhazardous waste. Second, SWANCC's failure to set aside sufficient funds to remediate leaks posed an unacceptable threat to the public's drinking water supply. Finally, the Corps found that the impact of the project upon area-sensitive species was unmitigatable since a landfill surface could not be redeveloped into a forested habitat.

SWANCC filed suit under the Administrative Procedure Act in the Northern District of Illinois challenging both the Corps' jurisdiction over the site and the merits of its denial of the section 404(a) permit. The district court granted summary judgment to the federal respondents on the jurisdictional issue, and SWANCC abandoned its challenge to the Corps' permit decision. On appeal to the Seventh Circuit, SWANCC renewed its attack on the Corps' use of the Migratory Bird Rule to assert jurisdiction over the site. The appellate court held that under the "cumulative impact doctrine," Congress had the authority to regulate such waters. The court reasoned that the cumulative effect on interstate commerce of the destruction of migratory bird habitat was substantial because millions of Americans annually spend over a billion dollars to hunt and observe migratory birds. Furthermore, the appellate court held the CWA reached as many waters as the Commerce Clause allows, and thus, the Migratory Bird Rule was a reasonable interpretation of the CWA. SWANCC appealed to the United States Supreme Court. The Court granted certiorari and reversed.

The Supreme Court found the Corps had interpreted section 404(a) to cover the abandoned gravel pit at issue because migratory birds use it as habitat. The Court concluded the CWA does not fairly support the Migratory Bird Rule in this case. The Court explained that it previously held in *United States v. Riverside Bayview Homes, Inc.* that the Corps had section 404(a) jurisdiction over wetlands that actually abutted a navigable waterway. Unlike the wetlands in *Riverside*, the Court found the ponds on the SWANCC site were not adjacent to an open waterway. Thus, the Court found *Riverside* inapplicable.

Next, the Court turned to the text and legislative history of the CWA. The Court found the Corps' original interpretation of the CWA inconsistent with its current one. Specifically, the Court noted that the Corps' 1974 regulations defined section 404(a)'s "navigable waters" to mean those waters of the United States, which are subject to the ebb and flow of the tide, and have been, presently are, or may in the future be susceptible to use for interstate or foreign commerce. However, the Corps argued that three years later, Congress approved an expanded definition of "navigable waters." The Corps asserted that, in July 1977, it adopted a regulation that defined waters of the United States to

include isolated, intrastate, nonnavigable waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce. The Corps contended that Congress's failure to pass a proposed house bill overturning the Corps' 1977 legislation, which extended its jurisdiction in CWA section 404(g) to waters "other than traditional navigable waters," indicated congressional acquiescence to the Corps' interpretation of the CWA.

The Court found this argument unpersuasive. The Court reasoned that Congress could propose a bill for any number of reasons, and similarly, Congress could reject the same on just as many grounds. Furthermore, the Court found the relationship between the actions or inactions of the 1977 Congress and the intent of the 1974 Congress in passing section 404(a) too attenuated. Accordingly, the Court concluded the Corps failed to make the necessary showing that the failure of the 1977 house bill demonstrated Congress's acquiescence to the Corps' 1977 regulation or the Migratory Bird Rule.

The Court also found section 404(g) unenlightening. After reviewing section 404(g)'s language, the Court stated the text gave no indication of what the "other than traditional waters" might be. Thus, the Court concluded that section 404(g) failed to conclusively determine the construction a court should place on the term "waters" defined elsewhere in the CWA.

Finally, the Corps contended the Court should give deference to the Migratory Bird Rule, since Congress did not address the precise scope of section 404(a) with regard to nonnavigable, isolated, intrastate waters. The Court explained that where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court would construe the statute to avoid such problems, unless such construction is plainly contrary to the intent of Congress. The Court reasoned that allowing the Corps to extend federal jurisdiction over ponds falling within the Migratory Bird Rule would seriously impinge the states' traditional and primary power over land and water use. Finding no express congressional intent for section 404(a) to reach abandoned sand and gravel pits, the Court declined to extend administrative deference.

The Court reversed and held the CWA did not permit the Corps to extend its section 404(a) jurisdiction over "navigable waters" to isolated ponds, some only seasonal, wholly located within two Illinois counties, because they serve as habitat for migratory birds.

Four justices dissented from the majority opinion. The dissenting opinion stated that power to regulate commerce among the several states includes the power to preserve natural resources that generate such commerce. The dissent found migratory birds, and the waters on which they rely, were such resources. Furthermore, the dissent explained that the protection of migratory birds was a well-established federal responsibility. Therefore, the dissent found no merit in SWANCC's constitutional argument and would have affirmed the

judgment of the court of appeals.

*Kris A. Zumalt*

## UNITED STATES CIRCUIT COURTS

### FIRST CIRCUIT

**Baker v. Coxe, 230 F.3d 470 (1st Cir. 2000)** (holding substantive due process and equal protection rights were not violated when neither a legitimate government purpose in delaying the issuance of a land use permit existed, nor an exercise of free speech violation existed, when the delay was not the result of retaliation).

In May 1991, Plaintiffs, John and Susan Baker ("Bakers"), applied for a permit to build a pier on land they owned and operated as a tree farm on Clark's Island in Plymouth Harbor, Massachusetts. The pier would enable equipment unloading in furtherance of the tree farm operation. Clark's Island served as a major nesting area, or heronry, for several varieties of sea birds. The Army Corps of Engineers was in the process of preparing to issue the permit when Jay Copeland, an environmental researcher for Natural Heritage, objected.

Natural Heritage felt the proximity of the nesting area to the Bakers' tree farm would disrupt the heronry, thus causing the birds to abandon their nests. After the issuance of a notice-and-comment period, Natural Heritage contacted an ornithologist, Dr. Katharine Parsons, who was familiar with the island. Parsons informed Copeland of her concerns about the land use and of her suspicions that the land was merely a "tax dodge." Parsons also told Copeland of Mr. Baker's opposition to 1989 legislation that, if enacted, would have classified Clark's Island as an Area of Critical Environmental Concern ("ACEC"), subjecting it to use restrictions. Copeland and others' subsequent visit to the island revealed the heronry was essentially destroyed.

After contact with other agencies and some investigation into the Bakers' operation, Natural Heritage filed a formal opposition to the permit application, asserting the pier construction would significantly contribute to the destruction of a major natural resource. Further, Natural Heritage successfully collected ten citizens' signatures to initiate environmental review under the Massachusetts Environmental Policy Act. After Natural Heritage filed the required forms, the Massachusetts Executive Office of Environmental Affairs ("EOEA") issued a decision requiring the Bakers to file an Environmental Impact Report ("EIR"). After litigation concerning the scope of the EIR, the Army Corps of Engineers issued the permit to the Bakers in 1997, and the Bakers built the pier.