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No Need For EPA To Act After Court Ruling

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The Corps of Engineers and EPA's proposal for a post-SWANCC rulemaking to redefine "Waters of the United States" is at best self-contradictory, at worst disingenuous. On the one hand, the agencies' Federal Register notice repeatedly acknowledges the limited holding of Chief Justice Rehnquist's SWANCC opinion: that it applies only to "isolated waters that are intrastate and non-navigable, where the sole basis for asserting CWA jurisdiction is the actual or potential use of the waters as habitat for migratory birds that cross state lines in their migrations."

On the other hand, the notice simply presumes that the Supreme Court also intended to strike down the remainder of the so-called "Migratory Bird Rule," which deals with such disparate matters as endangered species and irrigation; it calls into question other long-standing jurisdictional bases — such as tourism and recreation, fishing and shellfishing, and industrial discharges — that are grounded in sixty years of Commerce Clause jurisprudence; and it implies that the scope of the rulemaking may extend beyond Section 404 to include permitting under the act's National Pollutant Discharge Elimination System plus state water quality standards and certification and the Oil Pollution Act.

This broad reliance on SWANCC to reopen a smorgasbord of legal and policy issues ventures quite some distance beyond the "abandoned sand and gravel pit" that Rehnquist pointedly located at the center of that case. It also runs contrary to the majority of courts that have resolved similar questions in light of SWANCC, and to EPA's own consistent litigation posi-

tion in those cases and in cases still pending on appeal. By and large, these decisions have distinguished SWANCC on its exceptional facts, and collectively served to bolster the Supreme Court's earlier holding in *United States v. Riverside Bayview Homes* — which even the SWANCC majority grudgingly reaffirmed — that "the term 'navigable' as used in the act is of limited import."

SWANCC and its progeny have carefully confined themselves to such statutory analysis of "navigability" and "waters of the United States." But considering the clear, inclusive direction of most Clean Water Act case law both pre- and post-SWANCC, the proposed rulemaking is superfluous, even baffling, unless there is something more on the agencies' minds. As much as anything else, their open-ended notice seems designed to elicit opinions on the same constitutional questions that the SWANCC Court deliberately avoided.

This is, for example, the only plausible reason for inviting new comment on the decades-old jurisdictional factors found in EPA and Corps regulations, which include (but are not limited to) fishing, recreation, and industrial discharge. Congress's unmistakable intent to address these activities is found repeatedly in the core provisions of the act, and permeates its legislative history. Calling these factors into question cannot be justified by SWANCC's narrow inquiry into statutory language and Congressional intent, but rather is a pretext for reviving the Commerce Clause challenge that the SWANCC Court expressly declined to reach. Certain commenters have jumped at this invitation to reargue before the agencies what they could not obtain from the Court.

Despite these urgings and hints of predisposition, the agencies should resist the temptation to revise constitutional history by rulemaking. First, any language in the SWANCC opinion beyond its statutory holding is dictum, binding neither on the agencies nor on future litigants. Second, given the extraordinarily qualified nature of that holding as applied "to

petitioner's balefill site pursuant to the 'Migratory Bird Rule,'" the agencies should not be attempting to extrapolate even a statutory rule from it, much less a constitutional one. As the maxim goes, "hard cases make bad law," and any needed clarification of SWANCC can await the further emergence of a pattern from lower-court dispositions of specific issues on specific factual records — a process that is well underway. Third, given at least EPA's mission of environmental protection, and its steady litigation in support of expansive Clean Water Act and Commerce Clause jurisdiction, revision of these principles without a much more insistent judicial mandate would be a poor policy choice indeed.

More broadly, now is a particularly odd time for administrative agencies to be tinkering with constitutional subtexts. Following the initial shock of the Supreme Court's *Lopez* and *Morrison* decisions, lower courts have distinguished most federal regulatory schemes from the essentially criminal issues at stake in those two rulings, and SWANCC itself betrays the Court's own reluctance to extend them into the environmental sphere. The 1981 *Hodel* cases that upheld the Surface Mining Control and Reclamation Act are still good law; every circuit to consider constitutional challenges to the Endangered Species Act has affirmed Congress's broad authority to legislate; and most recently, a panel of the D.C. Circuit signaled its extreme skepticism toward a Commerce Clause and Tenth Amendment attack on the Safe Drinking Water Act.

The question we, and the agencies and courts, should be asking is not how the Clean Water Act is somehow different from these comparably structured, contemporary statutes, but how it is the same. Like those visionary laws, the Clean Water Act's explicit purpose — "to restore and maintain the chemical, physical, and biological integrity of the nation's waters" — embodies a far more comprehensive, modern mindset than whatever vestiges of "navigability" it may have inherited from the Rivers and Harbors Act of 1899. As Justice Stevens wrote

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in his SWANCC dissent, "It is a paradigm of environmental regulation." While the Rehnquist Court may well have its own back-to-the-future agenda, EPA has little reason to subvert the dominant paradigm for Section 404 or any other part of the Clean Water Act.

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1972 Law Did Not Restrict Federal Action

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"Waters of the United States." Those words define the scope of coverage of the federal Clean Water Act. They were carefully selected after serious debate among the members of the conference committee on the Federal Water Pollution Control Act in 1972.

Senator Edmund S. Muskie of Maine included in the record of debate on that Conference Report the following statement:

"One matter of importance throughout the legislation is the meaning of the term 'navigable waters of the United States.'

"The conference agreement does not define the term. The Conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes."

His statement was intended to make clear that Congress wanted the broadest possible definition of waters subject to the new Clean Water regulatory regime. Senator Muskie and his colleagues on the conference committee knew that water pollution did not relate in any way to traditional views of navigability. They also knew that under various laws and regulations

"navigable" meant different things to different agencies.

Senator Muskie was comfortable with the Senate version of the definition, which limited the law's application to "the waters of the United States and their tributaries, including the territorial seas." It was the Senate's intention that all waters that have the capacity to contribute pollution to other waters be encompassed by that definition.

The waters and wetlands encompassed by federal water pollution law was evolutionary. There were intense early debates on waters to which the federal interest should apply. Thus, the law prior to 1972 limited federal clean water authority to "interstate waters" without reference to navigability. But by 1972 there were two parallel and important issues which had evolved in the Congress and the Courts.

First, there was the issue of the dredging and filling of waters under the jurisdiction of the U.S. Army Corps of Engineers. Second was the judicial decision which enforced the prohibition on the discharge of pollutants pursuant to the Refuse Act of 1899.

These issues were crystallized in the debate on the 1972 act. Not only did Congress establish and codify the national policy with respect to the filling of wetlands under Section 404 (later expanded in 1977), but also the Congress declared all discharges of pollutants were subject to either federal or state-issued federal permits.

Discharge of a pollutant was defined as "(A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft."

The distinction between interstate and intrastate waters was eliminated. All "waters of the United States" were subsumed under the rubric of the Federal Water Pollution Control Act.

Congress also created a program to deal with urban and agricultural runoff. Section 208 of the 1972 law was intended to address those sources of

pollution which did not flow into the "waters of the United States" through pipes or other discrete conveyances and required the states to develop area-wide waste management plans to address these sources of pollution.

Congress retained a water quality standards provision but made water quality standards a measure of the performance of state and federal regulatory programs, not an enforcement mechanism. There was no distinction among the waters of the United States to be incorporated in the water quality standards or area-wide waste management process.

Thus, while many look at the definition of "waters of the United States" to discern which waters are included in the Federal Water Pollution Control Act, it is a more constructive exercise to determine which waters are not subject to federal jurisdiction.

To this end, the debate of the members of the Senate Committee and of the conference committee is informative. What about isolated wetlands and waters like prairie potholes? The issue was encapsulated in the Senate Committee discussion of Lake Tulare in California. It was alleged in that debate that Lake Tulare was an isolated water that drained into no other waterway. Presumably, it derived its water from springs and groundwater sources and runoff and was reduced by evaporation. But in no case did it drain outside of its own borders.

Senator Muskie and his colleagues accepted the idea that this particular, very limited type of water might not be "waters of the United States."

In this period, Congress was concerned about the quality of the nation's waters. The members recognized that pollution was caused by municipal waste discharges, industrial sources, agricultural runoff, and even rain storms. They recognized that the more impervious surfaces the more rapid runoff would occur, the more pollution would result.

The objective of the 1972 Clean Water Act was to restore and maintain the chemical, physical and biological integrity of the nation's waters by eliminating the discharge of pollutants. Thus, a fair reading of the law