

U.S. Supreme Court Shoots Down Migratory Bird Rule

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In a 5-4 decision that definitely is not "for the birds," the United States Supreme Court invalidated the "Migratory Bird Rule" of the Corps of Engineers and seriously weakened one of the underpinnings of the federal pollution laws' reliance on the Commerce Clause of the Constitution. The Court's decision most immediately affects future development in areas containing isolated wetlands. More significantly, it suggests a continued willingness on the part of the Court to restrict the regulatory power of the federal government.

In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, a consortium of municipalities attempted to site a solid waste landfill on land containing abandoned mining pits that had filled with water and become home to 121 species of birds. Based on the presence of those birds, the Corps of Engineers, applying its Migratory Bird Rule, determined that the land contained "navigable waters" — jurisdictional wetlands under the federal Clean Water Act — and that the municipalities were required to obtain a Section 404 dredged or fill material permit.

The municipalities applied for the permit, but the Corps denied it, based primarily on the effects of the landfill on the birds. The municipalities unsuccessfully challenged the Corps' decision in district court and in the Seventh Circuit, before the Supreme Court decided to hear their case.

The Migratory Bird Rule declares that the presence of migratory birds is a sufficient connection to interstate commerce to justify Corps' jurisdiction. The municipalities argued that the Corps had exceeded its statutory authority in formulating the rule and that Congress lacked the power under the Commerce Clause to grant that authority.

In overturning the rule, the Court declined to determine whether Congress had exceeded its power under the Constitution, finding instead that the agency had exceeded its power under the statute — by adopting a rule that invoked the outer limits of Congress' power, without clear congressional support. The Court observed that the Corp's interpretation raised significant constitutional questions, and suggested that any future legislation by Congress would raise those same questions. The Court cited two recent decisions in which it had overturned federal legislation as unauthorized under the Commerce Clause — *U.S. v. Morrison*, dealing with the Violence Against Women Act and *U.S. v. Lopez*, dealing with the Gun-Free School Zones Act.

The Migratory Bird Rule did raise questions, both as to how it was formulated — as a clarification rather than as a rule — and as to how broadly it extended. On the other hand, the Court appears to have significantly retreated from prior decisions that found it was Congress' intent that the Clean Water Act's jurisdictional term "navigable waters" be given the broadest possible interpretation. The majority opinion suggests that the concept of navigability, which had been consistently found unnecessary to support jurisdiction, is again relevant. The dissent pointed out that the goal of the Clean Water Act was to protect our Nation's waters from pollution and that the concept of navigability was inconsistent with that objective.

The Court's decision will have a direct impact on permitting not only for dredged or fill material, but also for the discharge of pollutants generally. More significantly, the decision suggests a willingness on the part of the Court to revisit longstanding interpretations of the power of not only federal

environmental agencies, but of the federal government generally. The Court's decision does not address the powers of individual states, leaving it to them to determine whether to regulate more broadly. To the extent the Supreme Court retracts federal authority, there will be a void, and states now will have to determine whether to step in and fill it. With the removal of regulatory floors that the federal government has set, states will be forced to make tough decisions whether to regulate. In the environmental area, those decisions — balancing economic growth against environmental protection — are especially difficult to make because of the competition among states for business. The net result may be a decrease in uniformity of environmental regulation from state-to-state and encouragement to businesses to forum shop.