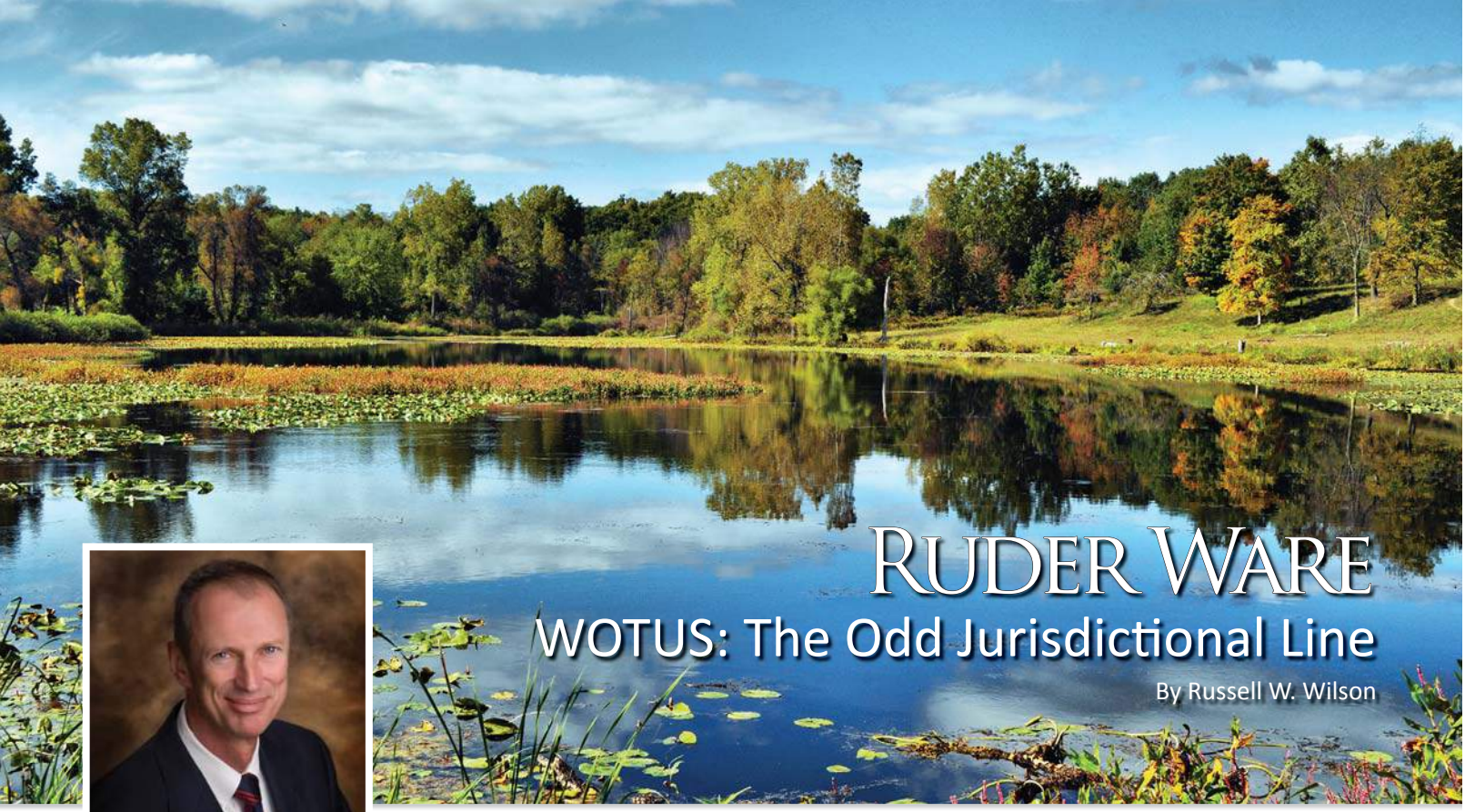

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WOTUS: The Odd Jurisdictional Line

By Russell W. Wilson

This article reviews the second of three important U.S. Supreme Court cases that examine the jurisdictional reach of the *Clean Water Act* ("CWA") by interpreting the definition of the "waters of the United States."

The first case was *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) ("*Riverside Bayview*"), where the Court held that non-navigable wetlands adjacent to traditionally navigable water were included within the definition of the "waters of the United States."

As a result, the U.S. Army Corps of Engineers ("Corps") was within its jurisdiction in pursuing enforcement against a developer who began construction activity in a wetland adjacent to traditional navigable water. The next case, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"), reached the opposite conclusion with respect to intrastate, isolated ponds and mud flats not adjacent to traditional navigable water.

Unlike the unanimity in *Riverside Bayview*, the decision in *SWANCC* rested upon a majority of five. Justice Rehnquist wrote the majority decision; he was joined by Justices O'Connor, Scalia, Kennedy and Thomas. Justice Stevens, who was joined by Justices Souter, Ginsburg and Breyer, wrote the dissenting opinion.

The physical area was a 533-acre parcel in Kane and Cook counties in Illinois previously used for mining sand and gravel that had been abandoned since 1960. During the period of abandonment,

a successional stage forest had emerged and remnant excavation trenches had evolved into permanent and seasonal ponds of varying area and depth.

The Solid Waste Agency of Northern Cook County applied for local land use approvals, which were granted. The agency also applied pursuant to section 404 of the CWA to the Corps for a permit to dredge or fill wetlands. The Corps asserted jurisdiction pursuant to the "Migratory Bird Rule" portion of its definition of the "waters of the United States." The Corps denied the permit, and SWANCC sued to challenge the agency's jurisdiction.

The federal district court and the Seventh Circuit Court of Appeals ruled that jurisdiction reached intrastate, isolated ponds not adjacent to wetlands. The 5-4 decision of the U.S. Supreme Court ruled that the isolated ponds and mud flats were outside the jurisdiction of the Clean Water Act.

Congressional intent is derived from the plain language of the statute. In this instance, the CWA defines "navigable waters" as the "waters of the United States, including the territorial seas." Congress did not, however, define the term "waters of the United States."

Upon congressional authorization, agencies promulgate regulations through the rulemaking process so as to implement the laws that Congress enacts. In order for regulations to be enforceable, they must comport with congressional intent.

In this instance, the Corps promulgated regulations initially in 1974 and later in 1977 (33 C.F.R. § 328.3(a)(3)), the latter of which includes as a definition of "waters of the United States": "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…"

In 1986, the Corps added a provision to clarify jurisdiction as to intrastate waters:

"a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or

"b. Which are or would be used as habitat by other migratory birds which cross state lines; or

"c. Which are or would be used as habitat for endangered species; or

"d. Used to irrigate crops sold in interstate commerce."

The Corps relied upon subsection "b" – habitat for other migratory birds that cross state lines – to deny the Cook County Agency's application to fill or dredge the ponds and mud flats.

The majority opinion and the dissent demonstrate sharply divergent views as to what Congress intended as to the meaning of the "waters of the United States" and hence, the jurisdiction of the CWA.

The Majority Opinion

In the majority's view, the case raised two questions. First, can the CWA be interpreted to extend to intrastate, isolated ponds and mud flats that provide habitat for migratory birds based upon administrative definitions promulgated by the Corps in 1977 and 1986?

The majority held that the Corps' definition exceeded congressional intent under the CWA's enactment in 1972 and its amendments in 1977.

Second, if the statute can be interpreted in accordance with the Corps' interpretation (specifically its Migratory Bird Rule promulgated in 1986), could that interpretation be supported constitutionally under the power to regulate interstate commerce?

The legislative and administrative history is intricate. Congress passed the Federal Water Pollution Control Act Amendments of 1972. The 1972 amendments gave the basic structure to what is known as the CWA. Congress again passed amendments to the CWA in 1977.

The statute defines the term "navigable waters" as the "waters of the United States." The statute, however, does not further define the "waters of the United States." The Corps then developed the meaning

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of the "waters of the United States" through the rulemaking process.

The Corps' initial definition was narrow. In 1974, the Corps defined "navigable waters" under section 404 to mean "those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce."

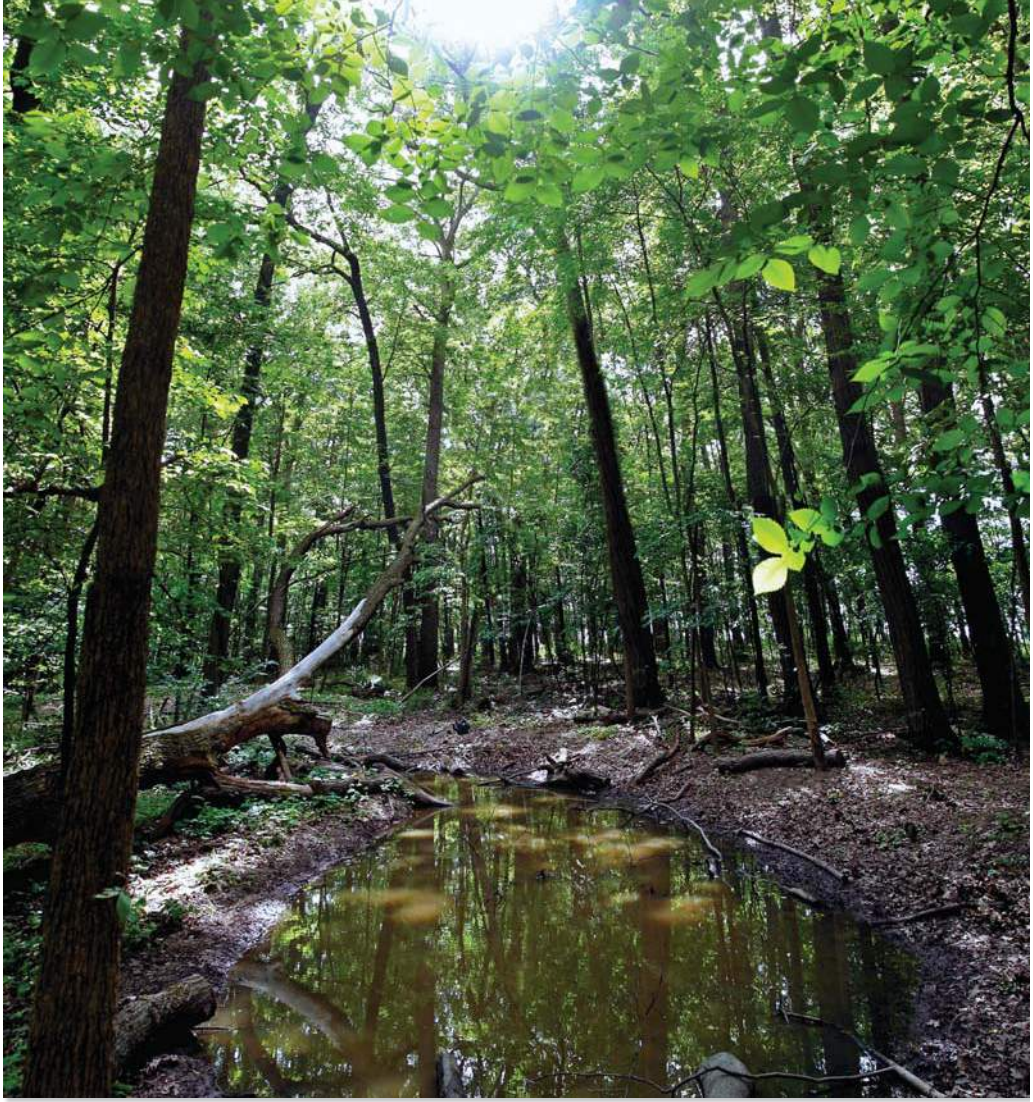
The majority opinion in *SWANCC* points out that the Corps had emphasized transportation or commerce as the determinative factor.

The U.S. Environmental Protection Agency ("EPA"), which generally administers the CWA, opposed what it viewed as the Corps› inappropriately narrow view of its jurisdiction under Section 404. As a result, the Corps expanded the definition of the "waters of the United States" in 1977.

At this time the expanded definition included "isolated wetlands and lakes, intermittent streams, prairie potholes, and other 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."

Thereafter, Congress passed its 1977 amendments to the CWA. The majority opinion holds that in doing so Congress did not plainly indicate its intent to endorse the expanded definition of the "waters of the United States" that the Corps had promulgated earlier that same year.

The Corps' unsuccessful argument was twofold. First, it argued that Congress implicitly approved the Corps' 1977 definition because Congress failed to pass a House Bill that would have expressly restricted the definition. (As will be seen in the dissenting opinion, below, the failed House Bill would have defined the term "navigable waters" as the "navigable waters of the United States.")



The majority opinion states, however, that it is only with "extreme care" that it recognizes "…congressional acquiescence to administrative interpretations of a statute…"

The majority points out that "[t]he relationship between the actions and inactions of the 95th Congress and the intent of the 92nd Congress in passing § 404(a) is also considerably attenuated." The Court points out the action or inaction of a subsequent Congress is less informative of the intent of an earlier Congress.

Accordingly, the majority opinion finds the failure of the House Bill to shed little light on Congress' intent in defining "navigable waters" in 1972.

The Court found the Corps' second argument to be "equally unenlightening." The second argument relates to what Congress did enact in 1977. At that time Congress passed section 404(g)(1), which authorizes states to apply to the EPA for permission to administer their own permit programs with certain restrictions:

"to administer its own individual and general permit program for the discharge of dredged or fill material into the navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce…, including wetlands adjacent thereto) within its jurisdiction…"

The Corps argued that the "other than those waters" language in

section 404 indicated a congressional recognition of a broad definition of navigable waters that includes non-navigable, isolated, intrastate waters.

The majority, however, describes "other than those waters" as too vague a basis on which to discern what Congress intended when it defined "navigable waters" in the 1972 CWA.

The majority opinion states that in *Riverside Bayview* "we recognized that Congress intended the phrase 'navigable waters' to include 'at least some waters that would not be deemed 'navigable' under the classical meaning of that term…But § 404(g) gives no intimation of what those other waters might be.

It simply refers to them as 'other waters.'" The majority opinion states that the "other than those waters" language does "not conclusively determine the construction to be placed on the use of the term 'waters' elsewhere in the Act (particularly in § 502(7), which contains the relevant definition of 'navigable waters')…"

The majority opinion concludes that it will not take "the next ineluctable step after *Riverside Bayview Homes*." In the view of the majority, doing so would read the term "navigable waters" out of the statute.

Noting that the term "navigable waters" was interpreted in *Riverside Bayview* as having "limited import," the opinion counters that "…it is one thing to give a word limited effect and quite another to give it no effect whatever."

The majority opinion finds that Congress in 1972 clearly had in mind "traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made."

However, even if congressional intent were ambiguous, the majority opinion would not defer to the Corps' interpretation.

In 1986, the Corps' promulgated its Migratory Bird Rule. The majority opinion states that protecting birds whose migratory routes cross state lines would "push the limit of congressional authority" under the power to regulate interstate commerce.

The majority opinion gave short shrift to the finding of the Seventh Circuit Court of Appeals, which had found in the case that"…millions of people spend over a billion dollars annually on recreational pursuits relating to migratory birds."

Finding no clear congressional statement of intent to regulate "an abandoned sand and gravel pit such as we have here" under the Commerce Clause, the majority opinion would refuse to give any deference to the Corps' 1977 expanded definition even if the Court felt that the term "navigable waters" is ambiguous (which the Court holds is not the case).

That being the case, the majority found it unnecessary to rule on the second issue—could the Corps' Migratory Bird Rule pass constitutional muster under the Commerce Clause.

The Dissenting Opinion

The dissent asserts that the majority opinion draws the Corps' jurisdictional boundary on an "odd line." In a play on words, the dissent characterizes the CWA as "watershed" legislation triggered by the 1969 Cuyahoga River fire.

The dissent traces the ancestry of the Rivers and Harbors Appropriation Act of 1899, its various amendments and the enactment of the Federal Water Pollution Control Act of 1948, including its various amendments that led to the CWA. The dissent observes that the various Rivers and Harbors Acts regulated discharges (not including sewage) into certain waterways as "highways for the transportation of interstate and foreign commerce."

In contrast to the narrow commercial scope of the various Rivers and Harbors Acts, the CWA "proclaimed the ambitious goal of ending water pollution by 1985." The dissent notes that during the middle of the 20th Century, "the goals of federal water regulation began to shift away from an exclusive focus on protecting navigability and toward a concern for preventing environmental degradation."

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The dissent describes the "major purpose" of the CWA as establishing a comprehensive long-range policy for the elimination of water pollution.

"Because of the statute's ambitious and comprehensive goals, it was, of course, necessary to expand its jurisdictional scope. Thus, although Congress opted to carry over the traditional jurisdictional term "navigable waters" from the [various Rivers and Harbors Acts] and prior versions of the [Federal Water Pollution Control Act], it broadened the *definition* of that term to encompass all "waters of the United States"…

Indeed, the 1972 conferees arrived at the final formulation by specifically deleting the word "navigable" from the definition that had originally appeared in the House version of the Act. The majority today undoes that deletion." (Emphasis in the original.)

According to the dissent, Congress knowingly endorsed the Corps' position by its refusal in 1977 to narrow the jurisdictional scope of the CWA as enacted in 1972. The dissent explains that in 1975 the Corps adopted the interim regulations that the Court later approved in *Riverside Bayview*.

In 1977, the Corps adopted the final version of the regulations. Opposition developed in Congress; a House bill was proposed that would have narrowed the jurisdiction of the CWA by inserting the modifier "navigable" so as to read "navigable waters of the United States" (as opposed to the then existing definition – "waters of the United States.")

The Senate, however, objected to the insertion of "navigable." The Conference Committee agreed with the Senate's approach and deleted the adjective "navigable."

According to the dissent, the deletion of the adjective "navigable" in 1977 was not an unnoticed omission. Rather, the dissent points to the intentional deletion as having been the subject of "extensive debate" in both the House and the Senate over wetlands preservation. The House version, had it been enacted, would have "excluded vast stretches of crucial wetlands from the Corps' jurisdiction, with detrimental effects on wetlands ecosystems, water quality, and the aquatic environment, generally."

The dissent notes that the Conference Committee adopted the Senate's approach and abandoned the effort to narrow the definition of "waters." The dissent states that the "net result of that extensive debate was a congressional endorsement of the position that the Corps maintains today."

According to the dissent, Congress was "fully aware of the Corps' understanding of the scope of its jurisdiction under the 1972 Act."

The dissent goes on to say that "[t]he majority's reading drains all meaning from the conference amendment." In the dissent's view, "once Congress had crossed the legal watershed that separates navigable streams of commerce from marshes and inland lakes, there is no principled reason for limiting the statute's protection to those waters or wetlands that happen to lie near a navigable stream."

According to the dissent, the Corps' definition "requires neither actual nor potential navigability." Accordingly, the dissent finds no jurisdictional difference between the wetland parcel adjacent to Black Creek in *Riverside Bayview* and the isolated, intrastate ponds and mud flats in *SWANCC*.

Moreover, the dissent would affirm the validity of the Migratory Bird Rule as constitutional under the Commerce Clause as a class of activity that, in the aggregate, substantially affects interstate commerce. Placing fill material into wetlands, the dissent observes, "is almost always undertaken for economic reasons."

The "overwhelming majority" of acreage for which the Corps issues section 404 permits to dredge or place fill materials into wetlands is for "commercial, industrial, or other economic use." The dissent reasons, accordingly, that the CWA does not regulate land use; it regulates the dredging of wetlands and the discharge of fill into wetlands.

"Moreover, no one disputes that the discharge of fill into 'isolated' waters that serve as migratory bird habitat will, in the aggregate, adversely affect migratory bird populations."

The dissent quotes Justice Holmes in *Missouri v. Holland*, 252 U.S. 416 (1920), who had observed that "the protection of migratory birds is a textbook example of a *national* problem." (Emphasis in the original.)

The dissent notes that while the benefits of a landfill would be disproportionately local to the northern Illinois area, the costs (*e.g.*, fewer aquatic migratory birds) "would be widely dispersed and often borne by citizens living in other States. Citing *Missouri v. Holland* again, the federal interest in protecting migratory birds is "the first magnitude." "Because of their transitory nature, they 'can be protected only by national action.'"

This article is a part of a series exploring the "waters of the United States."