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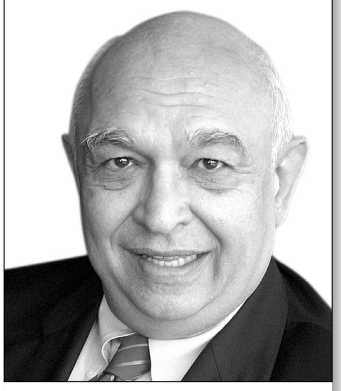
Protecting Wetlands

State May Take Role Once Played By Corps of Engineers

ZONING AND LAND USE PLANNING



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FOR many years, the primary government agency charged with the protection of wetlands[1] in New York and across the country was the U.S. Army Corps of Engineers. This regulatory power was based on the Constitution's Commerce Clause, the Corps' authority over navigable waters and to some extent on the Clean Water Act and its far-reaching regulations.[2] In 2001, however, the U.S. Supreme Court's decision in *Solid Waste Agency of Northern Cook Co. v. U.S. Army Corps of Engineers*[3] limited the scope of the Corps' power over some wetlands and left regulation to local authorities. In this case, the Court, in its continuing efforts to limit the reach of federal jurisdiction over local matters,[4] blocked the Corps from relying on the so-called "Migratory Bird Rule," which it had created by regulation, to assert jurisdiction over some purely intrastate and isolated wetlands. This rule extended Corps' authority to isolated ponds on the basis that migratory birds used the ponds during migration. This Supreme Court ruling left millions of acres of wetlands across the country, including in New York, subject to a regulatory "gap," i.e., no governmental agency was overseeing or regulating this property. Indeed, estimates from the Environmental Protection Agency and the Corps showed that at least 20 percent and possibly as much as 50 percent of existing wetlands — with estimates even higher in New York — were left unprotected following the Supreme Court's decision.[5]

Democratic New York State Assemblyman Thomas P. DiNapoli and Republican State Senator Carl L. Marcellino, both from Long Island, reacted swiftly and introduced legislation in an effort to remedy this perceived problem. Both Assembly Bill A7905-A, which passed the Assembly in April, and its companion bill in the Senate, S4480-A, which has been reported to the Senate Rules Committee, would fill the void created by the Supreme Court decision by bringing additional wetlands within the purview of the New York State Department of Environmental Conservation. If it is enacted, the legislators' reaction to the Supreme Court's decision will become a textbook example of the "new federalism," providing certainty to property owners, local governments and environmentalists as well as resulting in state control over what is, undoubtedly, a matter of local concern.[6]

High Court Case

The Supreme Court case arose when the Solid Waste Agency of Northern Cook County, a consortium of 23 suburban Chicago cities and villages, decided to purchase some abandoned property located in two Illinois counties to use as a disposal site for baled nonhazardous solid waste. Because its plans called for the filling of some of the permanent and seasonal ponds on the property, the agency contacted the Corps to determine if a federal landfill permit was required under §404(a) of the Clean Water Act,[7] which grants the Corps authority to issue permits "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." In 1986, relying on the term "navigable waters," which is defined under the Clean Water Act as "the waters of the United States, including the territorial seas," the Corps issued its Migratory Bird Rule extending §404(a) to intrastate waters that, among other things, "are or would be used as habitat by other migratory birds which cross state lines."[8]

After the Corps discovered that a number of migratory bird species had been observed at the Cook County site, it asserted jurisdiction over the property. Although the solid waste agency received a special use planned development permit from the Cook County Board of Appeals, a landfill development permit from the Illinois Environmental Protection Agency, and approval from the Illinois Department of Conservation, and although the agency made several proposals to mitigate the likely displacement of the migratory birds and to preserve a great blue heron rookery located on the site, the Corps still refused to issue it a §404(a) permit. The Corps found that the agency had not established that its proposal was the "least environmentally damaging, most practicable alternative" for disposal of nonhazardous solid waste; that its failure to set aside sufficient funds to remediate leaks posed an "unacceptable risk to the public's drinking water supply;" and that the impact

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of the project upon area-sensitive species was "unmitigatable since a landfill surface cannot be redeveloped into a forested habitat."[9]

Agency's Suit

The Solid Waste Agency of Northern Cook County filed suit in a federal district court in Illinois challenging the Corps' jurisdiction over the site. It contended that the Corps had exceeded its statutory authority in interpreting the Clean Water Act to include nonnavigable, isolated, intrastate waters based only upon the presence of migratory birds. The district court rejected the agency's jurisdictional claim, and the U.S. Court of Appeals for the Seventh Circuit affirmed. In its decision, the circuit court ruled that Congress had the authority to regulate the Cook County wetlands based on "the cumulative impact doctrine, under which 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." It added that the aggregate effect of the "destruction of the natural habitat of migratory birds" on interstate commerce was substantial because each year millions of Americans cross state lines and spend more than $1 billion to hunt and observe migratory birds. The Seventh Circuit then held that the Corps' Migratory Bird Rule was a reasonable interpretation of the Clean Water Act. The Supreme Court granted certiorari.

In a 5-4 decision, a divided Court held that the Migratory Bird Rule was not fairly supported by the Clean Water Act because the Corps' jurisdiction under the statute did not extend to ponds that were not adjacent to open water. The majority, in an opinion by Chief Justice William Rehnquist, was unwilling to hold "that isolated ponds, some only seasonal, wholly located within two Illinois counties, fall under §404(a)'s definition of 'navigable waters' because they serve as habitat for migratory birds."

The majority reasoned that permitting the Corps to claim federal jurisdiction over ponds and mud flats falling within the Migratory Bird Rule "would result in a significant impingement of the States' traditional and primary power over land and water use." Finding no indication that Congress had intended to readjust the federal-state balance in this manner, the majority held that the Migratory Bird Rule exceeded the authority granted to the Corps under §404(a), and it reversed the Seventh Circuit's judgment.

Decision's Impact

The majority's decision had both a significant jurisprudential impact and a practical impact. For one thing, the majority rejected a federal regulator's interpretation of a statute that Congress apparently had intended to be "comprehensive" and to establish "a comprehensive long-range policy for the elimination of water pollution."[10] In fact, the Court's decision can be interpreted as effectively reversing its 1985 decision in *United States v. Riverside Bayview Homes, Inc.*,[11] upholding broad §404(a) jurisdiction of the Corps over wetlands.

The Court's opinion, removing isolated purely intrastate wetlands from the jurisdiction of the Corps, also had a practical effect in New York: Because current law permits the Department of Environmental Conservation to regulate only wetlands of 12.4 acres or more which are on the state's wetland maps, or wetlands of unusual local significance. Other wetlands are subject to neither federal nor state government oversight.

If enacted into law, the bills introduced by legislators DiNapoli and Marcellino will close this gap. The bills would:

- Amend Section 24-0107 of the Environmental Conservation Law to provide the Department of Environmental Conservation with regulatory authority over freshwater wetlands that are one acre or more in size and other wetlands of significant local importance.
- Amend Section 24-0701 of the Environmental Conservation Law to specify the permitting requirements for freshwater wetlands, including the requirement for a wetlands permit for the subdivision of land.
- Amend Section 24-0703 of the law to specify the requirements for the department to respond to requests for determination of wetland status.
- Make it clear that the department need not map wetlands under 12.4 acres in size.

Certainly, wetlands are important environmental assets. They improve drinking water quality by providing a buffer area to intercept polluted runoff before it contaminates lakes, rivers, streams and coastal waters. Moreover, wetlands act as natural water filters, absorbing pollutants, pesticides, nitrogen, phosphorus and other contaminants before they infiltrate drinking water. They also absorb flood waters and serve as buffers during storms, saving billions of dollars in property damage annually.

It is by no means clear, however, that isolated wetlands located completely in one state should be subject to federal regulation. The wetlands in the *Northern Cook County* case were entirely self-contained and were not connected with open navigable waters. Such ponds and mud flats do not have a substantial impact on navigable waters or on interstate commerce and are best left to state or municipal regulation. The Supreme Court's decision in the *Cook County* case confirms that federal regulation is inappropriate. The Court's opinion, however, does not necessarily mean that these wetlands will be free of all government oversight. If the legislation introduced by Messrs. DiNapoli and Marcellino becomes law, wetlands appropriately will be subject to local control by local regulators, rather than by federal agents.

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1. Wetlands are lands "that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas." 33 CFR §328.3(b).

2. See 33 U.S.C. §1251 et seq.

3. 531 U.S. 159 (2001).

4. See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995).

5. See New York State Senate Introducer's Memorandum in Support of S4480-A (Marcellino), at http://www.geocities.com/ntgreencitizen/amherst5.html.

6. See *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994) ("[R]egulation of land use [is] a function traditionally performed by local governments").

7. See 33 U.S.C. §1344(a).

8. 51 Fed. Reg. 41217.

9. 531 U.S. at 165.

10. S. Rep. No. 92-414, p. 95 (1971), reprinted in 2 Legislative History of the Water Pollution Control Act Amendments of 1972 (Committee Print compiled for the Senate Committee on Public Works by the Library of Congress), Ser. No. 93-1, p. 1511 (1971). See, also, *Milwaukee v. Illinois*, 451 U.S. 304, 318 (1981) (Rehnquist, J.) ("[n]o Congressman's remarks on the legislation were complete without reference to [its] 'comprehensive' nature").

11. 474 U.S. 121 (1985).