

Migratory Birds and the Administrative State

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INTRODUCTION

Solid Waste Agency of Northern Cook County v United States Army Corps of Engineers,¹ a case in which Judge Diane Wood wrote the opinion for a unanimous Seventh Circuit panel, addressed important questions about both the Commerce Clause and the Clean Water Act² (CWA). The Supreme Court reversed the Seventh Circuit's decision by a vote of five to four.³ To read the Supreme Court's majority opinion side by side with Judge Wood's is to see a contrast that does not, to put it mildly, make the Supreme Court look good. Judge Wood's opinion is lucid, careful, and measured; it deals with the complexities of environmental protection in a realistic way. The majority opinion of the Supreme Court is loosely reasoned and almost transparently result oriented. As it turned out, the Supreme Court's decision in *SWANCC* (as it is abbreviated) was a first step in rolling back the federal government's power to implement the CWA.⁴ And the contrast between what Judge Wood did and what the Court did is a warning about the future not just of environmental protection but of the administrative state.

I. *SWANCC* IN THE SEVENTH CIRCUIT

SWANCC concerned the "Migratory Bird Rule,"⁵ which was promulgated by the US Army Corps of Engineers pursuant to its

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¹ 191 F3d 845 (7th Cir 1999).

² Federal Water Pollution Act Amendments of 1972, Pub L No 92-500, 86 Stat 816 (1972), codified at 33 USC § 1251 et seq.

³ *Solid Waste Agency of Northern Cook County v United States Army Corps of Engineers*, 531 US 159, 174 (2001) (*SWANCC*).

⁴ The next step was taken in *Rapanos v United States*, 547 US 715 (2006). See text accompanying notes 55–58.

⁵ *SWANCC*, 531 US at 164, quoting 51 Fed Reg 41205, 41217 (1986).

authority under the CWA.⁶ The litigation over the Rule originated in the “efforts of a consortium of Illinois municipalities to find a place to dump their trash.”⁷ The municipalities bought a parcel of land that had, decades before, been a strip mining site. “[A] labyrinth of trenches and other depressions remained behind” and “the land evolved into an attractive woodland” with “over 200 permanent and seasonal ponds.”⁸ Those ponds, which “range[d] from less than one-tenth of an acre to several acres in size, and from several inches to several feet in depth,”⁹ were the habitat for over 100 species of birds. Judge Wood described the aviary:

These include many endangered, water-dependent, and migratory birds. Among the species that have been seen nesting, feeding, or breeding at the site are mallard ducks, wood ducks, Canada geese, sandpipers, kingfishers, water thrushes, swamp swallows, redwinged blackbirds, tree swallows, and several varieties of herons. Most notably, the site is a seasonal home to the second-largest breeding colony of great blue herons in northeastern Illinois, with approximately 192 nests in 1993.¹⁰

The municipalities, in order to dispose of their garbage, would have had to fill in over seventeen acres of this “semi-aquatic property” in the woodland.¹¹

The question in the case was whether the CWA required the municipalities to get a permit from the Corps before they did so. The CWA forbids “the discharge of any pollutant by any person” with various exceptions.¹² The “discharge of a pollutant” includes “any addition of any pollutant to navigable waters from any point source,”¹³ and “pollutant” includes the kinds of things the municipalities presumably wanted to use to fill the ponds: “dredged spoil,” “rock,” and “sand.”¹⁴ One of the exceptions to the prohibition is for discharges allowed by a permit,¹⁵ and Section 404(a) of

⁶ *SWANCC*, 191 F3d at 847.

⁷ *Id.*

⁸ *Id.* at 848.

⁹ *Id.*

¹⁰ *SWANCC*, 191 F3d at 848.

¹¹ *Id.*

¹² 33 USC § 1311(a).

¹³ 33 USC § 1362(12)(A).

¹⁴ 33 USC § 1362(6).

¹⁵ 33 USC § 1311(a) (referring to, among other provisions, 33 USC § 1344).

the CWA authorized the Corps to issue a permit “for the discharge of dredged or fill material into the navigable waters.”¹⁶

The case turned on the definition of “navigable waters.” The various ponds on the site that the municipalities wanted to fill were not navigable in the ordinary sense of the word. But the CWA’s definition of “navigable waters” does not refer to navigation: it defines “navigable waters” as “the waters of the United States, including the territorial seas.”¹⁷ The Environmental Protection Agency and the Corps, by regulation, defined the “waters of the United States” to include a wide range of intrastate waters “the use, degradation or destruction of which could affect interstate or foreign commerce.”¹⁸ And the Corps issued a statement—the Migratory Bird Rule—that Section 404(a) applied to intrastate waters that “are or would be used as habitat by birds protected by Migratory Bird Treaties” or that “are or would be used as habitat by other migratory birds which cross state lines.”¹⁹

The Corps denied the municipalities’ applications for a permit, finding that the ponds they wanted to fill were, in fact, used as habitat by migratory birds.²⁰ The municipalities then sued, challenging the Migratory Bird Rule on three grounds: (1) that Congress lacked the power under the Commerce Clause to reach the intrastate waters to which the Rule applied; (2) that the CWA did not authorize the Rule; and (3) that the Corps should have followed the notice-and-comment procedures of the Administrative Procedure Act²¹ (APA) when it issued the Rule.²²

Judge Wood’s opinion for the Seventh Circuit rejected all three claims. As far as the Commerce Clause was concerned, Judge Wood said, there was no serious question that “the destruction of migratory bird habitat and the attendant decrease in the populations of these birds ‘substantially affects’ interstate commerce.”²³ Millions of people observe or hunt migratory birds, traveling interstate and spending billions of dollars to do so; there are “numerous international treaties and conventions designed to

¹⁶ 33 USC § 1344(a).

¹⁷ 33 USC § 1362(7).

¹⁸ 33 CFR § 328.3(a)(3). The definition included “intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds.” 33 CFR § 328.3(a)(3).

¹⁹ *SWANCC*, 531 US at 164, quoting 51 Fed Reg at 41217 (cited in note 5).

²⁰ *SWANCC*, 191 F3d at 849.

²¹ See 5 USC § 553.

²² *SWANCC*, 191 F3d at 849.

²³ *Id.* at 850.

protect migratory birds”;²⁴ and Supreme Court cases had “recognize[ed] the ‘national interest of very nearly the first magnitude’ in protecting such birds.”²⁵ While the municipalities’ proposed action might not, by itself, substantially affect interstate commerce, the Supreme Court had made it clear that the question was not about that single action but about the aggregate effect of the destruction of migratory birds’ habitats: “The effect may not be observable as each isolated pond used by the birds for feeding, nesting, and breeding is filled, but the aggregate effect is clear, and that is all the Commerce Clause requires.”²⁶ Judge Wood anticipated the objection that “the Corps will be trying to regulate the filling of every puddle that forms after a rainstorm, at least if a bird is seen splashing in it”; the Corps, she explained, could not apply the Rule unless it determined that a particular body of water was a habitat—a place where birds “naturally live[] or grow[]”—and the Corps had made such a determination about the bodies of water that the municipalities wanted to fill.²⁷

Judge Wood then concluded that the Migratory Bird Rule was consistent with the CWA. She noted that the agency’s interpretation of the CWA was entitled to deference under *Chevron U.S.A. Inc v Natural Resources Defense Council, Inc*,²⁸ as long as the statute was ambiguous, which the definition of “navigable waters” plainly was.²⁹ Previous Seventh Circuit decisions had established that the Act reached as far as the Commerce Clause allowed.³⁰ Because Congress has the power under the Commerce Clause to prevent the destruction of migratory birds’ habitat, it was, Judge Wood said, “certainly reasonable” for the Corps to interpret the CWA to permit it to adopt the Rule.³¹

II. SWANCC IN THE SUPREME COURT

The Supreme Court reversed the Seventh Circuit’s decision.³² The Court’s opinion focused on the word “navigable.”³³ This was

²⁴ Id at 851.

²⁵ Id, quoting *North Dakota v United States*, 460 US 300, 309 (1983).

²⁶ *SWANCC*, 191 F3d at 850.

²⁷ See id, quoting *Webster’s Third New International Dictionary* 1017 (Merriam 1993).

²⁸ 467 US 837 (1984).

²⁹ *SWANCC*, 191 F3d at 851.

³⁰ Id.

³¹ Id. Judge Wood’s opinion also concluded that the Corps did not have to use the APA’s notice-and-comment procedures before issuing the Rule. See id at 852–53.

³² *SWANCC*, 531 US at 162.

³³ See id at 171–72.

an odd word for the Court to emphasize, for several reasons. For one thing, as Justice John Paul Stevens pointed out in dissent, the CWA's definition—"the waters of the United States, including the territorial seas"—"requires neither actual nor potential navigability."³⁴ For another, in a previous decision, *United States v Riverside Bayview Homes, Inc.*,³⁵ the Court had explicitly said that the use of the word "navigable" in the CWA was of "limited import" and that Congress intended the CWA to "regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term."³⁶ And *Riverside Bayview* had upheld a regulation of non-navigable wetlands.³⁷ But the Court in *SWANCC* declared that "it is one thing to give a word limited effect and quite another to give it no effect whatever,"³⁸ and that *Riverside Bayview* was distinguishable because it involved a wetland that was adjacent to navigable waters.³⁹ As for *Chevron*, the Court, in addition to asserting (implausibly) that the statute was clear,⁴⁰ said that the agency was not entitled to deference because its interpretation of the statute "invoke[d] the outer limits of Congress' power" and there was no "clear indication that Congress intended that result."⁴¹ The Court added that the concern with avoiding a constitutional issue "is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power."⁴²

The three notions toward which the Supreme Court's opinion gestured—navigability, constitutional avoidance, and federalism—are all highly manipulable, at least (or perhaps especially) in the context of the CWA. And even taken together, they did not justify the conclusion that the Court reached.

Navigability—as Justice Stevens explained in his dissent—was the principal concern of the first generation of federal laws dealing with water pollution, but the CWA, enacted in 1972, sharply changed the focus of the antipollution regime.⁴³ When Congress first regulated water pollution, the problem it identified

³⁴ Id at 175 (Stevens dissenting).

³⁵ 474 US 121 (1985).

³⁶ Id at 133.

³⁷ Id at 139.

³⁸ *SWANCC*, 531 US at 172.

³⁹ Id at 167.

⁴⁰ Id at 172.

⁴¹ Id.

⁴² *SWANCC*, 531 US at 173.

⁴³ See id at 177–80 (Stevens dissenting).

was that pollution would physically obstruct interstate waterways.⁴⁴ The CWA, by contrast, was directed not at physical obstructions of navigation but at preventing environmental degradation.⁴⁵ That was why the statutory definition omitted a reference to navigability.⁴⁶ And the purpose of preventing environmental degradation included, as the Court itself had recognized in *Riverside Bayview*, “the protection of ‘significant natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing and resting sites’ for various species of aquatic wildlife.”⁴⁷ In its decision in *SWANCC*, the Supreme Court insisted that navigability still had something to do with the limits on the government’s power, but it never explained why navigability mattered, or in what way it mattered, or what principle distinguished wetlands adjacent to navigable waters (which, under *Riverside Bayview*, the CWA did reach) from the ponds used by the migratory birds in *SWANCC*.

In order to explain why the Migratory Bird Rule should not receive at least *Chevron* deference, the Court in *SWANCC* also invoked the canon that statutes should be interpreted in a way that avoids serious constitutional questions.⁴⁸ Notoriously, this canon can enable a court to muddy the reason for its decision and escape responsibility.⁴⁹ The court can avoid having to explain either why a statute cannot be construed in a certain way, or why, if it were, the statute would be unconstitutional. Instead, a court can say that the statute *might* not permit a certain result, and if it permitted that result it *might* be unconstitutional. On that basis, a court can reach a conclusion that could not be justified by a straightforward interpretation of the statute and the Constitution.

That is what the Supreme Court did when it reversed Judge Wood’s decision in *SWANCC*. As Judge Wood explained, and as previous Seventh Circuit cases had held, the CWA could easily be construed to reach the limits of Congress’s Commerce Clause

⁴⁴ *Id.* at 177.

⁴⁵ *Id.* at 179.

⁴⁶ See *SWANCC*, 531 US at 179–82 (Stevens dissenting); 33 USC § 1362(7) (“The term ‘navigable waters’ means the waters of the United States, including the territorial seas.”).

⁴⁷ *SWANCC*, 531 US at 181 (Stevens dissenting) (quotation marks omitted), quoting *Riverside Bayview*, 474 US at 134–35.

⁴⁸ *SWANCC*, 531 US at 172–73.

⁴⁹ See, for example, Frederick Schauer, *Ashwander Revisited*, 1995 S Ct Rev 71, 89–90.

powers.⁵⁰ The conference committee report—the most reliable form of legislative history—said as much.⁵¹ At the very least, that was a plausible view for an agency to take, and under *Chevron* the agency's view was entitled to deference. As Judge Wood's opinion pointed out, the protection of migratory birds is comfortably within the interstate commerce power. In reversing the Seventh Circuit's decision, the Supreme Court never actually said that the CWA, taken at face value, could not be interpreted to protect the habitat of migratory birds. It also never said that it would be unconstitutional for Congress to enact a statute protecting their habitat. It just said that both were close questions, so the constitutional avoidance canon justified ruling against the agency's decision.⁵² In that way, the Court was able to invalidate the Migratory Bird Rule without actually confronting the arguments in Judge Wood's opinion.⁵³

Evidently the Court was looking for a way to strike down the Rule. Judge Wood's opinion anticipated a reason why: maybe the Court was concerned that “the Corps will be trying to regulate the filling of every puddle that forms after a rainstorm, at least if a bird is seen splashing in it.”⁵⁴ The Court's later decision in *Rapanos v United States*,⁵⁵ which further limited the scope of the CWA, confirmed Judge Wood's intuition. The plurality opinion in that case detailed examples of what it called the “Corps' sweeping assertions of jurisdiction over ephemeral channels and drains.”⁵⁶ The plurality also described the burdens that the permit

⁵⁰ *SWANCC*, 191 F3d at 851, citing *Rueth v United States Environmental Protection Agency*, 13 F3d 227, 231 (7th Cir 1993), *United States v Huebner*, 752 F2d 1235, 1239 (7th Cir 1985), and *United States v Byrd*, 609 F2d 1204, 1209 (7th Cir 1979).

⁵¹ See *Federal Water Pollution Control Act Amendments of 1972*, S Rep No 92-1236, 92d Cong, 2d Sess 144 (1972), reprinted in 1972 USCCAN 3776, 3822 (“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.”).

⁵² *SWANCC*, 531 US at 174.

⁵³ The Court's invocation of federalism was also a makeweight. The Court asserted that “[p]ermitting [the Corps] to claim federal jurisdiction over ponds and mudflats falling within the ‘Migratory Bird Rule’ would result in a significant impingement of the States’ traditional and primary power over land and water use” and noted that the CWA had stated, among its purposes, maintaining the role of states in land use decisions. *Id* at 174. But any federal prohibition on water pollution—or, for that matter, any number of other federal regulatory programs—could be characterized as affecting state governments’ power in a similar way.

⁵⁴ *SWANCC*, 191 F3d at 850.

⁵⁵ 547 US 715 (2006).

⁵⁶ *Id* at 726 (Scalia) (plurality).

requirement placed on a developer who filled in a wetland in order to build a shopping center.⁵⁷ And it raised the specter of the Corps “exercis[ing] the discretion of an enlightened despot” while regulating “an endless network of visible channels [that] furrows the entire surface” of the land area of the United States.⁵⁸ In *SWANCC*, and then again in *Rapanos*, the Court apparently thought it had to come up with an interpretation of the CWA that would avert what it considered to be that nightmare scenario.

III. *SWANCC*, THE COURTS, AND THE ADMINISTRATIVE STATE

The Supreme Court’s decisions implicitly reflect—and Judge Wood’s opinion abjures—a certain conception of the role of the courts. The Supreme Court’s view seems to be that overweening, “despotic” bureaucrats are the problem, and courts are the solution.

No one doubts that courts can impose some limits on the power exercised by the Corps under Section 404(a). A specific decision to deny a permit can be challenged in court on the ground that it was not reasonable; the municipalities in *SWANCC* initially raised, and then abandoned, such a challenge.⁵⁹ Also, under *Chevron*, an agency’s assertion of power has to rest on a reasonable interpretation of the governing statute.⁶⁰ Beyond that, though, the question is not whether the agency’s power should be limited; it is whether the source of those limits should be the agency’s judgment or the courts’. The Supreme Court’s decision in *SWANCC* reflected a kind of inchoate intuition, on the part of a majority of the Court, that the agency had gone too far, and that the CWA somehow had to be interpreted to limit it. There is no apparent reason for that intuition to prevail over the judgment of the agency to which Congress has entrusted the enforcement of the statute.

In fact, as *SWANCC* illustrates, there are often good reasons not to trust the courts’ judgment. A party challenging an agency’s action can focus attention on the particular hardship imposed on it. That party wants to dispose of its garbage, or build on a wetland, and the permit requirement may substantially increase its costs. By comparison, the harm that the permit requirement prevents—filling in a ditch or a swamp—can be trivialized. It is easy

⁵⁷ Id at 720–21; id at 763–64 (Kennedy concurring).

⁵⁸ Id at 721, 722 (Scalia) (plurality).

⁵⁹ See *SWANCC*, 191 F3d at 849.

⁶⁰ *Chevron*, 467 US at 844.

to portray the permit requirement as an example of senseless bureaucratic overreach, as the Court did in *Rapanos* in particular.⁶¹

But this is a cognitive bias, a point brought out by Judge Wood's emphasis on the aggregate effects of pollution. It is an artifact of resolving individual claims case by case, focusing on the facts brought forward by the particular litigant seeking relief—which is what courts characteristically do when they review agencies' actions. This kind of distortion may be particularly severe in the case of environmental regulation. The costs to the party challenging the regulation are often very salient; the competing costs to the environment may accrete over time in remote places and are much harder to visualize. The agency, which can take a broader view of the potential harms and adopt general rules, is less prone to those biases. This is a reason for courts to distrust their own intuitions about whether the agency has gone too far and to stick instead to established principles of deference to agencies.

There is an ideological element, too. The intuition that an agency has gone too far, when it is not supported by well-grounded statutory arguments—as it was not in the Supreme Court's decision in *SWANCC*—is bound to reflect the judges' own views about regulatory policy. The Supreme Court's well-known opinion in *Vermont Yankee Nuclear Power Corp v Natural Resources Defense Council*⁶² made just this point in a different context: in that case, the Court excoriated the DC Circuit for supplementing the procedural requirements of the APA in a way that, the Court strongly suggested, reflected the DC Circuit's opposition to nuclear power.⁶³ A parallel problem can afflict the Supreme Court itself: interpolating substantive requirements into the CWA because of hostility to (what the justices perceive as) excessive environmental regulation. There is a lot of reason to think that that is what happened in *SWANCC*.

Of course, agencies can have their own ideological dispositions. Even apart from ideology, they can be afflicted by tunnel vision, or captured by interest groups, or subject to other pathologies. But there are established administrative law principles, such as “arbitrary and capricious” review under the APA, to deal

⁶¹ See *Rapanos*, 547 US at 719–21 (Scalia) (plurality).

⁶² 435 US 519 (1978).

⁶³ See *id.* at 558 (“The fundamental policy questions appropriately resolved in Congress and in the state legislatures are *not* subject to reexamination in the federal courts under the guise of judicial review of agency action.”) (emphasis in original).

with those problems. And, to make a familiar point, agencies are politically accountable to a much greater degree than courts are.

CONCLUSION

Since *SWANCC*, the Supreme Court's hostility to the administrative state has become a persistent feature of its decisions.⁶⁴ Supreme Court opinions that read like Judge Wood's opinion in *SWANCC*—taking a broad view of both Congress's power and the reach of a regulatory statute and deferring to an agency's view under *Chevron*—are not very common these days. This may be a particularly severe problem in the future, for reasons again suggested by *SWANCC*.

In the polarized political climate that prevails now, it is difficult for Congress to enact major regulatory statutes or to adopt substantial revisions of existing regulatory regimes.⁶⁵ As a result, administrative agencies often have to operate under decades-old statutes while addressing problems that were unforeseen when those statutes were enacted.⁶⁶ The use of the Clean Air Act⁶⁷ to regulate greenhouse gas emissions is a prominent example.⁶⁸ This situation is bound to strain the principles that govern judicial review of agency action. Courts will apply statutory criteria that were drafted without any awareness of the kinds of problems that the agencies are now addressing. If courts insist that agencies' actions are invalid unless they were clearly contemplated by Congress (or nearly so), the result will be regulatory paralysis. But excessive deference to agency freelancing is also not a good outcome. The courts' responsibility will be to construct principles that deal with this predicament in a realistic, nondogmatic way, and certainly not to give in to ideologically driven preconceptions about bureaucratic menace.

⁶⁴ See generally, for example, Gillian E. Metzger, *The Supreme Court, 2016 Term – Foreword: 1930s Redux: The Administrative State Under Siege*, 131 Harv L Rev 1 (2017).

⁶⁵ See, for example, Sarah Binder, *The Dysfunctional Congress*, 18 Ann Rev Polit Sci 85, 91–98 (2015) (arguing that Congress cannot solve problems even when the president and Congress are in agreement).

⁶⁶ See generally Jody Freeman and David B. Spence, *Old Statutes, New Problems*, 163 U Pa L Rev 1 (2014).

⁶⁷ To Improve, Strengthen, and Accelerate Programs for the Prevention and Abatement of Air Pollution, Pub L No 88-206, 77 Stat 392 (1963), codified as amended at 42 USC § 7401 et seq.

⁶⁸ See, for example, *Massachusetts v Environmental Protection Agency*, 549 US 497, 533–35 (2007).

A milder version of this problem—a gap between the particular matters that Congress focused on when it adopted a regulatory regime and the issues that the agency confronts—often exists when courts review agency action; *SWANCC* is an example. There is no reason to think that Congress specifically considered the kinds of issues raised by the ponds, mudflats, and rivulets in *SWANCC*. But those issues were broadly within the range of problems that the CWA was enacted to address. The Congress that enacted the CWA was, of course, aware that water pollution endangered the habitat of migratory birds, and the explicitly stated purpose of the CWA was to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”⁶⁹ That is why Judge Wood’s reasoning—the CWA extended Congress’s power to its constitutional limits; the protection of migratory birds’ habitat was well within those limits; and, if there were any doubt, the agency’s determination should get deference under *Chevron*—was correct. And that is why the Supreme Court’s decision to reverse the Seventh Circuit in *SWANCC*, and to continue on the same course in *Rapanos*, is one among many troubling indications about the future of the administrative state.

⁶⁹ 33 USC § 1251(a).