

1 IN THE SUPREME COURT OF THE UNITED STATES
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3 SOLID WASTE AGENCY OF :
4 NORTHERN COOK COUNTY, :
5 Petitioners, :
6 v. : No. 99-1178
7 UNITED STATES ARMY :
8 CORPS OF ENGINEERS, :
9 Respondent. :
10 - - - - - x
11 Washington, D.C.
12 Tuesday, October 31, 2000
13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United
15 States at 10:00 a.m.
16 APPEARANCES:
17 TIMOTHY S. BISHOP, ESQ., Chicago, Illinois; on behalf
18 of the Petitioners.
19 LAWRENCE G. WALLACE, ESQ., Washington, D.C.; on
20 behalf of the Respondent.
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| 1 | C O N T E N T S | |
| 2 | ORAL ARGUMENT OF | PAGE |
| 3 | TIMOTHY S. BISHOP, ESQ. | |
| 4 | On behalf of the Petitioner | 3 |
| 5 | ORAL ARGUMENT OF | |
| 6 | LAWRENCE G. WALLACE, ESQ. | |
| 7 | On behalf of the Respondent | 23 |
| 8 | REBUTTAL ARGUMENT OF | |
| 9 | TIMOTHY S. BISHOP, ESQ. | |
| 10 | On behalf of the Petitioner | 42 |
| 11 | | |
| 12 | | |
| 13 | | |
| 14 | | |
| 15 | | |
| 16 | | |
| 17 | | |
| 18 | | |
| 19 | | |
| 20 | | |
| 21 | | |
| 22 | | |
| 23 | | |
| 24 | | |
| 25 | | |

1 P R O C E E D I N G S

2 (10:00 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now on number 99-1178, Solid Waste Agency of Northern Cook
5 County versus United States Army Corps of Engineers. Mr.
6 Bishop.

7 ORAL ARGUMENT OF TIMOTHY S. BISHOP

8 ON BEHALF OF PETITIONER

9 MR. BISHOP: Mr. Chief Justice, and may it
10 please the Court, by 1972 the terms navigable waters and
11 waters of the United States had a settled meaning after a
12 century during which congresses and this Court's
13 conception of what those terms meant had expanded
14 significantly from an initial strict view that the
15 navigable waters were those navigable, in fact, to a
16 recognition that they included in addition waters
17 navigable with improvements and tributaries of those
18 waters, to this Court's statement in the Union Electric
19 case in 1965 that the only things excluded were intrastate
20 non-navigable waters that did not flow into the navigable
21 waters.

22 By 1972, when the act was passed, the broadest
23 conception of the navigable waters of the United States
24 included all waters that form part of a single aquatic
25 system with navigable waters in the traditional sense,

1 that flow into and so can affect the quality of those
2 waters.

3 QUESTION: Mr. Bishop, the government says that
4 the -- while you may be correct about the perception of
5 what the navigable waters of the United States consist of,
6 that there was no practice of referring to that conception
7 as waters of the United States. Do you have instances --

8 MR. BISHOP: We do, Your Honor.

9 QUESTION: -- in the statutory text or in our
10 opinions where that precise phrase that's used in the
11 definition here, waters of the United States, is used?

12 MR. BISHOP: Well, the traditional phrase that
13 appears over and over again in the statutes and in the
14 Court's opinions is navigable waters of the United States,
15 but there are instances where those are broken up, and in
16 effect the terms are used interchangeably.

17 In Section 10 of the Rivers and Harbors Act of
18 1899, for example, the statute begins by talking about
19 protecting the navigable capacity of the waters of the
20 United States, and immediately switches to talk about
21 preventing obstructions to the navigable waters.

22 In a much more recent statute, 1990, the Aquatic
23 Nuisance Prevention Act, which I did not cite in my brief,
24 but which I have directed the Solicitor General to, it's
25 at 16 USC 4702. That is a statute in which the

1 jurisdictional term is waters of the United States.
2 What's the definition in the statute? Navigable waters.
3 The phrases have been used interchangeably in statutes and
4 in this Court's opinions, and in our reply brief in a
5 footnote towards the end we cited a number of opinions.

6 QUESTION: Have we ever used the term waters of
7 the states or has Congress ever used the term waters of
8 the states? It would seem there might be a dichotomy
9 there; I'm not sure that it necessarily follows.

10 MR. BISHOP: Yes, I think in that same footnote
11 we cite a number of cases where the waters of the United
12 States is used in contradistinction to the waters of the
13 states. One of the problems with the government's
14 interpretation is that there is no longer any such thing
15 as the waters of the states.

16 QUESTION: I can understand. I don't think -- I
17 can understand the position that says waters of the United
18 States means the navigable waters, but that's not your
19 position. You're saying it includes anything that flows
20 into navigable waters. I could understand the position
21 that says waters of the United States means whatever
22 Congress can legislate on under the commerce clause, but
23 that's not your position. That's their position. What I
24 don't understand is the position which, I take it is
25 yours, which says that all non-navigable waters which flow

1 into a navigable water is within the statute, and that
2 apparently according to the amici brief, is about 80
3 percent of every backyard pond.

4 But those which flow into waters under the
5 ground rather than over the ground which I guess are
6 excluded on your theory, just because they go under the
7 ground. That isn't the small ones; that includes Crater
8 Lake, the Great Salt Lake, huge bodies of water. It isn't
9 the big ones. It's some small ones, some big ones, 80
10 percent, the only difference being that they happen to
11 flow into the stream that's navigable under the ground
12 rather than over the ground.

13 So what conceivably could Congress have had in
14 mind on your interpretation?

15 MR. BISHOP: Just one question. We're not
16 taking a position on groundwaters. The circuits are in
17 conflict on that.

18 QUESTION: Maybe you're even saying that some of
19 the ones that go under the ground are within the statute,
20 but others aren't.

21 MR. BISHOP: Some courts have held that
22 groundwaters that are connected to the -- that is, flow
23 into the navigable waters of the United States, serve as a
24 source.

25 QUESTION: Or into the Fox River, isn't that

1 right?

2 MR. BISHOP: There is no evidence of that.

3 QUESTION: My question you see, is I can
4 understand their interpretation, I can understand a narrow
5 interpretation, but I don't understand what any human
6 being would want to accomplish by writing your
7 interpretation that would in fact exclude somewhere
8 between 5 and 20 percent of the bodies of water in
9 people's backyards.

10 MR. BISHOP: I think what the Congress had in
11 mind in borrowing the common law and prior statutory
12 meanings of these terms was that it did want to protect
13 water, but it was also very cognizant of states' rights
14 and retained rights under the 10th Amendment to regulate,
15 and wanted to maintain limits on the scope of the
16 jurisdiction.

17 QUESTION: Mr. Bishop, is your position on this
18 issue influenced in any respect by our decision in
19 Riverside versus Bayview Homes?

20 MR. BISHOP: Clearly I have to accommodate that
21 position, and that is one that Congress addressed
22 specifically as the Court noted in Riverside Bayview. It
23 pointed out that the adjacent wetland abutted and drained
24 into the navigable waters.

25 I think what Congress had in mind, when you read

1 the legislative history, in the context of the statutory
2 language and the history of these terms is not, as the
3 government says, the commerce -- the effects of commerce
4 jurisdiction, but the channels jurisdiction. It was
5 interested in expanding Federal jurisdiction over the
6 water as a protective matter as far as it thought it
7 could.

8 QUESTION: Mr. Bishop, if that's so, then how do
9 you explain Section 404(g) of the statute, which allows
10 the states' governments to submit to the EPA a description
11 of a program involving discharging into waters that are
12 other than navigable or adjacent to navigable waters? Why
13 would Congress give the governors permission to do that if
14 those were to be excluded?

15 MR. BISHOP: It's clear that what that refers to
16 is tributaries. The only thing excluded in the state
17 program are traditional navigable waters narrowly defined
18 as waters navigable in fact, navigable with improvement,
19 and wetlands adjacent thereto. That leaves a vast array
20 of navigable waters of the United States as set forth in
21 this Court's understanding. XXX the finally, secondary,
22 tertiary tributaries. As Justice Breyer pointed out, what
23 is excluded, we believe, are the small proportion of
24 waters that are totally isolated, that do not flow into
25 the tributaries.

1 QUESTION: 404(g) would not cover such --

2 MR. BISHOP: It would not cover isolated waters.
3 It clearly does allow states to regulate tributaries, that
4 is, traditional navigable waters of the United States,
5 under for example, the Rivers and Harbors Act or the 1948
6 version of the Clean Water Act.

7 QUESTION: And presumably, states can regulate,
8 under your theory, these isolated waters that don't flow
9 into navigable waters. It's within the states'
10 jurisdiction.

11 MR. BISHOP: That's right, Justice O'Connor, and
12 the State of Alabama in its amicus brief set out a long
13 appendix with state statutes. It's clear that virtually
14 all states, if not all states, regulate isolated waters
15 and protect them.

16 Here the State of Illinois and Cook County
17 carefully investigated our project over many public
18 hearings, over many months, and concluded the project
19 would not impact the waters involved here in any way.

20 QUESTION: What about lakes or ponds,
21 intrastate, that don't flow into navigable waters but
22 which can support rowboats or small sailboats or something
23 like that?

24 MR. BISHOP: This Court's definition in
25 Appalachian Electric of a navigable water included one

1 that could be used by small noncommercial vessels on the
2 theory that that indicated the potential of the water body
3 to be used for commerce, and we are not objecting here to
4 the Court's claim of jurisdiction over waters that are
5 navigable in fact, even by small vessels. We are
6 objecting solely to the taking of jurisdiction over
7 isolated water bodies that do not support commerce or
8 boating and that do not flow into and therefore affect the
9 quality of navigable waters over which the Corps has
10 always had jurisdiction.

11 QUESTION: I don't quite understand your
12 position as to why if it's a small lake entirely within
13 the boundaries of the state that you don't object to
14 Federal jurisdiction there. Even if it's navigable,
15 that's not interstate commerce, it's local commerce.

16 MR. BISHOP: Right, but we're not objecting -- I
17 mean, that is not our case, Justice Stevens, so I can't
18 claim to -- you know, I don't want to state a definitive
19 position on this. It's not unreasonable in our view for
20 the Corps to have regarded small lakes that support
21 intrastate commerce as part of the flow of commerce around
22 the nation.

23 QUESTION: Would this case be different if the
24 United States could prove that people used rowboats to go
25 fishing in the pond that we're talking about here? It's

1 several acres in size, I think, isn't it?

2 MR. BISHOP: These ponds are very tiny and
3 shallow. There is nothing in the record. It's private
4 land. They have never been used.

5 QUESTION: How big is the pond we're talking
6 about?

7 MR. BISHOP: Well, there are a number of ponds.
8 When I was out there originally, there was no water on the
9 land.

10 QUESTION: How big is the biggest one?

11 MR. BISHOP: I think in the record they say
12 several acres.

13 QUESTION: Several acres. So you could row back
14 and forth across that one. Two feet deep, I'm told.

15 MR. BISHOP: They're very shallow.

16 QUESTION: If you could, would that make a
17 difference to you? Say it was ten feet deep instead of
18 two feet deep, and people regularly went out in rowboats
19 in it?

20 MR. BISHOP: The position that the Corps has
21 taken, which we do not object to --

22 QUESTION: I'm asking your position.

23 MR. BISHOP: Yes, anything that supports -- our
24 position essentially is anything that supports, could
25 support commerce, and that would include the intrastate

1 portion --

2 QUESTION: I'm just asking specifically, if it
3 can support people going out in a rowboat and rowing back
4 and forth across the lake, that would be sufficient in
5 your view?

6 MR. BISHOP: I find that implausible, but that
7 is what the Court said in --

8 QUESTION: But I would like to get an answer to
9 my question, if you could please. What is your view on
10 that hypothetical?

11 MR. BISHOP: Yes, I think you have intrastate
12 waters if they are navigable, that is, if a boat can go on
13 them and move.

14 QUESTION: This would be a different case if the
15 government could prove that rowboats could go back and
16 forth across the water?

17 MR. BISHOP: Or if they could prove that -- yes,
18 that's right.

19 QUESTION: Well, I don't see why you keep
20 referring to, you know, supporting interstate commerce. I
21 thought the whole core of your case is that when you
22 referred to navigable waters, you're not talking about
23 interstate commerce, that there is one basis of
24 jurisdiction which is the commerce clause, and there is
25 another basis of jurisdiction which is navigable waters,

1 and if you interpret navigable waters to mean waters that
2 are navigable, whether they are navigable interstate or
3 not, it would necessarily include lakes big enough to
4 float a rowboat.

5 MR. BISHOP: That's right, Justice Scalia, but
6 --

7 QUESTION: Why do you keep referring to
8 interstate commerce?

9 MR. BISHOP: Because I believe there is a
10 connection.

11 QUESTION: That's part of the navigable waters
12 clause?

13 MR. BISHOP: No. I believe that when Congress
14 talks about navigable waters, particularly in the expanded
15 sense that grew up over the hundred years after the Daniel
16 Ball, they had in mind the channels power, and that that's
17 how it reaches tributaries and things that affect the
18 navigable waters. Clearly many of the waters that are
19 covered under the tributaries language of the statutes are
20 not navigable in fact and could not support even a small
21 rowboat.

22 QUESTION: But they affect navigable waters, and
23 so Congress' authority over the navigable waters, it gives
24 the Congress the authority to protect navigable waters.

25 MR. BISHOP: Absolutely right.

1 QUESTION: So what is the source of the
2 Congress' authority over navigable waters? Is it the
3 commerce clause?

4 MR. BISHOP: Yes, I believe it's the channels
5 power under the commerce clause, but it is not what the
6 government has taken here which is the effects of
7 commerce. Congress by 1972 knew very well how to invoke
8 the effects commerce power. It did so, for example, in
9 844(a) of the criminal code, which this Court considered
10 in Lopez, where it specifically invoked that power.

11 It did not do so in the Clean Water Act. It used
12 these traditional terms, navigable waters of the United
13 States, and under any plausible understanding of those
14 terms, historical or just common sense, and certainly
15 reading the legislative history, there is absolutely no
16 indication that Congress meant to reach isolated ponds
17 that can have no affect on the quality of navigable
18 waters.

19 QUESTION: Mr. Bishop, I don't mean to belabor
20 this but I'm looking at the text of 404(g), and it seems
21 that this provision addresses permits on the application
22 of the governor of any state to things that are not
23 navigable waters, not tributaries, not adjacent wetlands.
24 They seem, this section seems to fit the category that you
25 say is outside the statute. Perhaps you can look at the

1 text of 404(g) and show me where I am wrong.

2 MR. BISHOP: No, you are right, but the statute
3 does not define the limits of what is being allotted to
4 the states. The Corps -- Congress is only allotting to
5 the states that which is left over from the 404 permit
6 program once traditional navigable waters have been taken
7 out. It is our position that there is nothing else in the
8 statute that gives the Federal government power over
9 isolated waters with no impact on the navigable waters of
10 the United States, and therefore the only thing that
11 404(g)(1) reaches are the tributaries which are part of
12 the navigable waters but which are not part of the
13 traditional Corps meaning of navigable waters in the
14 Daniel Ball, Appalachian Electric sense. That seems like
15 -- I mean, the statute does not say isolated waters; there
16 is nothing in there that even hints that isolated waters
17 are part of what is left over.

18 QUESTION: Adjacent wetlands are not left over
19 because that's specifically mentioned --

20 MR. BISHOP: Wetlands adjacent to that are
21 navigable in fact or navigable with improvements, not
22 waters that are -- wetlands that are adjacent to
23 tributaries, which are left to the states. That leaves an
24 enormous amount of regulatory power to the states over
25 tributaries and their adjacent wetlands, but nothing in

1 there suggests in the least that isolated waters are
2 included in that package, and isolated waters are
3 traditionally regulated by the states anyway.

4 There are principles of statutory interpretation
5 here that even if there were any ambiguity in the
6 statutory language, which we don't believe there is, there
7 are principles of statutory interpretation which require,
8 we believe, our reading as opposed to the government's.
9 The first of those is the DeBartolo principle that a
10 statute or in this case a regulation, the bird rule should
11 not be read so as to create constitutional problems.
12 Whatever one's conclusion about the constitutionality of
13 the bird rule, it seems beyond question that it does raise
14 serious questions.

15 QUESTION: Well, are you asking us, counsel, to
16 just focus on the bird habitat final rule or to focus on
17 the regulation in 33 Code of Federal Regulations,
18 paragraph 3328.3, defining waters of the United States?

19 MR. BISHOP: I believe that that regulation,
20 Justice O'Connor, does not satisfy our view of the
21 statutory language and therefore should be set aside.

22 QUESTION: Is the one 3328.3, the one defining
23 waters of the United States?

24 MR. BISHOP: Right, the one defining waters of
25 the United States.

1 QUESTION: You want us to focus on that and in
2 your view it is too broad and covers things the statute
3 didn't authorize?

4 MR. BISHOP: That is true, it does not.

5 QUESTION: Isolated, intrastate pond?

6 MR. BISHOP: What it does is to extend the
7 government's jurisdiction to the limits of the effects
8 commerce power. We don't believe that that's what the
9 Clean Water Act says. Now, having said that I would like
10 to add, however, that the only --

11 QUESTION: So the bird habitat regulation
12 doesn't have anything to do with it, or it does?

13 MR. BISHOP: Well, the government has -- the
14 sole basis on which the government has claimed
15 jurisdiction in this case during the past -- since 1987
16 when all this started is the bird rule. They have never
17 mentioned another rule. In their brief --

18 QUESTION: I didn't quite understand. The sole
19 basis is what, Mr. Bishop?

20 MR. BISHOP: The sole basis is the migratory
21 bird rule. That is what they stated when they took
22 jurisdiction in the first place. It is the only basis of
23 jurisdiction that is stated in the 404 permit denials.
24 Having said that, we obviously don't want to go back down
25 and find ourselves caught on some other provision of the

1 other waters regulation. It seems to us that the other
2 waters regulation is wholly inconsistent insofar as it
3 reaches any water, any isolated water that has any
4 conceivable effect on interstate commerce.

5 That is incompatible with the plain language of
6 the statute and the legislative history, and so although
7 we -- the migratory bird rule is the only basis on which
8 jurisdiction has been asserted in their briefs to this
9 Court, the government does retreat from that and rely on
10 the activity itself, which I think is an intent to rely on
11 the other waters regulation. And so we would like the
12 Court to address that to save another \$30 million in
13 public money which is what we spent dealing with the Corps
14 for the last 13 years.

15 I was talking about the principles of statutory
16 regulation which we think support our interpretation. One
17 is the DeBartolo principle, but a second one and one the
18 Congress had very much in mind as Section 101(b) of the
19 statute makes clear is that it was concerned not to
20 trample state powers over land use and over the
21 environment, and there is no doubt that that trampling
22 occurred here. The Corps put together a 47,000-page
23 record over the course of seven years of permitting, and
24 in doing so overrode the considered determinations of the
25 State of Illinois and Cook County.

1 When it does a 404 determination, once it has
2 taken jurisdiction, it doesn't just keep its eyes on the
3 isolated waters. It roams far and wide, using a public
4 interest standard. The elements of that public interest
5 standard include, for example, whether the project meets
6 the needs and welfare, the general needs and welfare of
7 the people. It includes review of economics, aesthetics,
8 an array of other things. It is general land use
9 regulation at that point, and we believe that that is both
10 inconsistent to stretch the jurisdiction as the Corps has
11 through its rules, to stretch the jurisdiction to impinge
12 on state regulation in the face of a clear statement in
13 the preamble of the statute that Congress intended, had a
14 policy to preserve the primary jurisdiction of state and
15 local government over these matters, and that it is
16 inconsistent with the clear statement principle that this
17 Court has applied which requires that if Congress is going
18 to impinge on the reserved rights of the states that it
19 should say so clearly. Far from saying so clearly in this
20 case, it said that it wished to preserve to the extent
21 possible the rights of the states.

22 QUESTION: And where are the words that say
23 that?

24 MR. BISHOP: 101(b), Your Honor, section 101(b),
25 1251(b), which is probably quoted on the first page of our

1 blue brief.

2 QUESTION: First page of the blue brief?

3 MR. BISHOP: Yes, Your Honor. It is the policy
4 of Congress to recognize, preserve, and protect the
5 primary responsibilities and rights of states to prevent,
6 reduce, and eliminate pollution and to plan the
7 development and use of land and water resources.

8 QUESTION: Could Congress regulate these ponds
9 to prevent them from serving as nesting places, say for
10 mosquitos that carry West Nile disease from state to
11 state?

12 MR. BISHOP: I don't believe that the Federal
13 government may regulate these ponds under the interstate
14 --

15 QUESTION: So instead of -- if they discovered
16 that mosquitos are flying all over the place, infect
17 birds, and people are dying in different states because of
18 a pond that is not appropriately sprayed, Congress lacks
19 the power in your view to tell the states or to tell
20 individuals to spray their ponds or not to use certain
21 pesticides that are killing people in other states. Do
22 they have that power?

23 MR. BISHOP: Not under the commerce clause, ut
24 they clearly can use treaty power. You have to understand
25 that birds are --

1 QUESTION: No. I'm talking about under my
2 hypothetical; there is no treaty, as I know, on West Nile
3 mosquitos?

4 MR. BISHOP: West Nile disease is spread by
5 birds and kills birds, and under the migratory bird treaty
6 act Congress can clearly take birds by --

7 QUESTION: What I'm trying to ask with my
8 question, if you can just -- suppose that it's discovered
9 that birds are causing diseases or suppose that pesticides
10 are dangerous to people. Can Congress tell you that you
11 cannot use a certain pesticide in your backyard pond or
12 your backyard tree because the effect of that is to spread
13 disease from state to state? Do they have that power?

14 MR. BISHOP: Congress can certainly regulate
15 anything that is commercial, including --

16 QUESTION: So if the pesticide is shipped in
17 interstate commerce, they could regulate it on that basis?

18 MR. BISHOP: Exactly, Mr. Chief Justice.

19 QUESTION: Could it affect only people in
20 Indiana and not people in Illinois, so that Illinois
21 doesn't care about it? I mean, is this a real problem?
22 If it's a national problem, are these mosquitos just going
23 to bite Indianans and not people from Illinois, so that
24 Illinois would have as much interest in preventing that as
25 the Federal government? You would think they would have

1 more interest.

2 MR. BISHOP: Yes, Justice Scalia. There is no

3 --

4 QUESTION: My question is whether or not
5 Congress has the power to regulate local products in local
6 ponds on local trees that would spread diseases from one
7 state to another.

8 MR. BISHOP: And if you can find a commerce
9 connection, for example, because the product --

10 QUESTION: I said what the hypothetical is.

11 MR. BISHOP: If there is no commerce connection,
12 the answer is no. And the framers of the Constitution did
13 not intend that the Federal government have power over
14 every problem just because it was national in scope. It
15 intended that the states have reserve powers to deal with
16 problems as well, and --

17 QUESTION: But why isn't there going to be a
18 commerce connection? I mean apart from the Chief
19 Justice's suggestion, it seems to me that the hypothetical
20 that Justice Breyer throws out is a pretty good predicate
21 to substantial effects on commerce.

22 MR. BISHOP: Well, but I don't think that
23 substantial effects on an end user -- here the claim is
24 that the birds, because they fly interstate and at some
25 point may get shot by or watched by people who are

1 crossing state lines and spending money, that is a
2 sufficient interstate commerce connection. If that
3 connection --

4 QUESTION: I don't think that was the
5 hypothetical, was it?

6 MR. BISHOP: That doesn't seem very different to
7 me.

8 QUESTION: That wasn't the hypothetical.

9 MR. BISHOP: That doesn't seem very different to
10 me from the hypothetical. But some end user commerce
11 connection is not enough. If you get there then there are
12 no reserve powers left to the states, everything is within
13 the enumerated powers.

14 If I could, I would like to reserve the
15 remainder of my time.

16 QUESTION: Very well, Mr. Bishop. Mr. Wallace,
17 we will hear from you.

18 ORAL ARGUMENT OF LAWRENCE G. WALLACE

19 ON BEHALF OF THE RESPONDENT

20 MR. WALLACE: Thank you, Mr. Chief Justice, and
21 may it please the Court:

22 The Clean Water Act states its goals as to
23 restore and maintain the chemical, physical, and
24 biological integrity of the nation's waters and to attain
25 water quality which provides for the protection and

1 propagation of fish, shellfish, and wildlife. The
2 operative provisions at issue here prohibit discharges of
3 pollutants into certain waters -- we'll get into what
4 those are in just a moment -- without a permit. Those
5 provisions regulate human conduct, usually commercial in
6 nature, and certainly commercial in this instance, in
7 order to avert harm to natural resources, wildlife, or the
8 environment, and in common with similar antipollution
9 provisions in other Federal environmental statutes, these
10 prohibitions on conduct do not purport to assert any
11 special Federal domain over the place where the conduct
12 occurs.

13 QUESTION: I don't understand exactly what that
14 means, Mr. Wallace.

15 MR. WALLACE: Well, for example, in the act
16 commonly known as RCRA, another environmental statute, the
17 Resource Conservation and Recovery Act, a permit
18 situation, a permit system is set up for the treatment,
19 storage or disposal of hazardous waste, which occurs in
20 privately owned land ordinarily, without any reference to
21 waters whatsoever. The Endangered Species Act prohibits
22 harm to the protected species, whether that occurs on land
23 or water.

24 QUESTION: You're saying there are a lot of laws
25 like this one?

1 MR. WALLACE: Well, I am saying there are many
2 prohibitions on conduct that pollutes or endangers the
3 natural resources of this country or the wildlife of this
4 country that are enacted under the commerce power and that
5 are not commonly thought of or thought of in the law as
6 asserting a special Federal domain over the place where
7 the conduct occurs.

8 QUESTION: That's true, but unlike those other
9 statutes, this one is limited to the navigable waters of
10 the United States.

11 MR. WALLACE: As defined in the statute, that's
12 --

13 QUESTION: As defined in the statute.

14 MR. WALLACE: That's exactly what I'm going to
15 turn to now, but I have to speak first, as I tried to do,
16 to the argument that there would be a constitutional
17 problem if the conduct prohibited occurred in one place
18 rather than another. The conduct --

19 QUESTION: The assertion was that if there was
20 no commerce clause connection, it would be
21 unconstitutional, and that's what the discussion was
22 about, a sufficient commerce clause connection.

23 MR. WALLACE: I guess --

24 QUESTION: Mr. Wallace, when a justice is asking
25 you a question, I suggest you remain quiet until he

1 finishes, if that isn't too much trouble.

2 MR. WALLACE: Thank you. Sorry. I'm just
3 trying to help with the inquiry. I'm sorry. In any
4 event, let's turn now to the question of what waters the
5 statute addresses. The first thing to be said about this
6 question, before turning to the statute, is that this
7 Court has already spoken to this issue, not in detail, but
8 quite clearly in an opinion in which it was an important
9 part of the Court's reasoning, and I'm speaking of a
10 carefully crafted opinion of the Court in International
11 Paper Company against Ouellette which dealt with a very
12 difficult issue. This is in 479 U.S., which dealt with a
13 very difficult issue of implied preemption under the act
14 in light of the meaning of two savings clauses.

15 And an important part of the reasoning of the
16 Court in concluding the scope of preemption of
17 escape-based causes of action, it happened to be a
18 challenge to a discharge that caused harm in an adjoining
19 state, but an important part of the Court's reasoning was
20 consideration of the comprehensive scope of the Clean
21 Water Act. And the Court stated at page 486 of 479 U.S.
22 in describing the case first that the act applies to
23 virtually all surface water in the country, and it had a
24 footnote at that point citing its decision from the
25 previous term in Riverside Bayview Homes which had

1 described the Corps' regulations that extended to isolated
2 waters so-called. And then in the legal discussion in its
3 opinion several pages later at 479 U.S. page 493, the
4 Court reasoned, As we noted in Milwaukee 2, Congress
5 intended the 1972 act amendments to establish, quote, an
6 all encompassing program of water pollution regulation,
7 unquote. The act applies to all point sources and
8 virtually all bodies of water, and it sets forth the
9 procedures for obtaining a permit in great detail.

10 QUESTION: Mr. Wallace, if you would turn to the
11 language in Riverside Bayview that you cited in passing,
12 that does say that the word navigable in this statute has
13 a, quote, limited office. As I understand what you're
14 telling us now, which you put forward in your brief, it
15 has no office at all, that the statute would mean what you
16 say it means if the term navigable were not in there so
17 that you give no effect whatever to that term. Am I
18 correct in so understanding?

19 MR. WALLACE: Well, the term is defined in the
20 statute, so it has effect as a reference to the
21 definition, but it's a term of art in the statute, and
22 it's defined as waters --

23 QUESTION: What does it have to do? In other
24 words, would the statute do anything more or less in your
25 view if the word navigable were not there and there were

1 just the words waters of the United States? In other
2 words, does navigable have any function whatever, not has
3 it been defined away?

4 MR. WALLACE: I believe the answer is that the
5 use of the word navigable in the statute, as a reference
6 to the definition of what navigable means for purposes of
7 the statute, does not have any independent significance.

8 QUESTION: May I suggest why it could have some
9 independent significance? Now, Congress has many
10 authorities under the commerce clause. It seems to me
11 clear that this statute was appealing to one aspect of
12 Congress' commerce clause powers, that aspect which has to
13 do with the control of navigable waters. And to leap from
14 that and simply ignore the navigable waters appeal and
15 just say all Congress is doing is exerting its broad
16 commerce power in all its aspects simply -- just seems to
17 me to ignore a very precise appeal to one aspect of the
18 commerce clause power.

19 MR. WALLACE: The word navigable appears in the
20 statute in that spot but not elsewhere. The statute does
21 not deal with navigability problems. The statute deals
22 with a water pollution crisis that was --

23 QUESTION: I understand, but Congress was
24 limiting its control over that problem to navigable
25 waters, and even the definition which means waters of the

1 United States, that can be explained without making the
2 word navigable totally useless in the statute, by simply
3 saying that was meant to make it clear that when Congress
4 said navigable waters, it meant the broad definition of
5 navigability, which had been apparent in our cases, so
6 that it includes wetlands adjacent to navigable waters and
7 includes even tributaries that go into navigable waters.
8 But it seems to me to blink reality and to say that
9 Congress was relying upon a general commerce clause power,
10 which is what the government's position is.

11 MR. WALLACE: Well, this is the main law
12 governing conduct that pollutes surface waters in this
13 country, and it's comparable to the Safe Drinking Water
14 Act which protects aquifers and underground waters more
15 directly. But to answer your question more directly, as
16 we explained in discussing the '72 act and then the 1977
17 amendments, the act started off and was called the Federal
18 Water Pollution Control amendments of 1972, and it used
19 the definition navigable waters, which was left over from
20 prior legislation, including the Rivers and Harbors Act,
21 but in the course of the development of the '72 act,
22 dissatisfaction was expressed with the idea that the act
23 would apply too narrowly and the definition of navigable
24 waters was changed from navigable waters of the United
25 States to just the words waters of the United States, and

1 the committee report reporting it out at that time said it
2 was meant to exert the full constitutional authority of
3 the Congress under the commerce power.

4 QUESTION: What it didn't say, Mr. Wallace, is
5 what, for example, 16 USC Section 817 says, a different
6 statute. That imposes requirements on water projects on,
7 quote, navigable waters of the United States and other
8 waters, quote, over which Congress has jurisdiction under
9 its authority to regulate commerce.

10 Now, you're essentially saying that's what this
11 statute says. But if it says it, it says it in such a
12 roundabout way. I mean, this is a very easy way to say
13 it.

14 MR. WALLACE: Well, it --

15 QUESTION: Water projects are navigable waters
16 of the United States and other waters over which Congress
17 has jurisdiction under its authority to regulate commerce.

18 MR. WALLACE: It can be said quite plainly, I
19 mean, Congress could have spoken with greater clarity than
20 it did.

21 QUESTION: Well, isn't that a problem under any
22 clear statement analysis? I understand, I think I
23 understand your argument, and I can see that it is
24 possible to construe the language as broadly as you do,
25 but when literally any farm pond in the United States is

1 going to be subject to Corps jurisdiction on your analysis
2 and Congress has not spoken any more clearly than it has
3 here, isn't that a reason for construing the statute more
4 narrowly rather than as broadly as you are here?

5 MR. WALLACE: It arguably is a reason, although
6 the Court in Riverside Bayview --

7 QUESTION: A good reason.

8 MR. WALLACE: -- said the deference to the
9 Corps' interpretation was appropriate, because Congress
10 had not directly spoken to the issue.

11 QUESTION: We do here seem to have -- and maybe
12 we did there for that matter, but we seem at least to have
13 a conflict in principle because we have the deference
14 principle and then we have some clear statement notion
15 when the results get to the, sort of to the bizarre point.
16 So which principle do we choose?

17 MR. WALLACE: Well, I have to take issue with
18 whether the result here gets to a bizarre point that
19 implicates a clear statement rule, but I do think that
20 we're talking precisely on the issue on which Congress
21 focused in the 1977 amendments to the act.

22 QUESTION: Mr. Wallace, it's at least unclear
23 enough that the Corps of Engineers didn't come to this
24 interpretation until quite late on. They didn't interpret
25 it this way originally themselves, did they? That's how

1 at least unclear it is, not to say clear in the other
2 direction.

3 MR. WALLACE: They did not interpret it this way
4 originally but were reprimanded by several court decisions
5 for misinterpreting the act. EPA, which has the primary
6 authority to interpret the act, did interpret it this way
7 originally, and the Corps came around after conducting
8 another rulemaking proceeding as it was ordered to do by a
9 court that had said its view of the authority was too
10 narrow to accomplish the purposes of the act that Congress
11 had in mind, and the two agencies reached the same
12 conclusion by the time Congress was considering the 1977
13 amendments which focused very specifically on the question
14 of whether the jurisdiction over so-called isolated waters
15 had gone too far.

16 The House of Representatives --

17 QUESTION: Mr. Wallace, had the EPA taken this
18 position before 1977?

19 MR. WALLACE: Yes.

20 QUESTION: And so that position was in a
21 regulation at the time Congress acted in 1977?

22 MR. WALLACE: That is correct. And it was also
23 in the interim rule that the Corps had come to, and indeed
24 the Corps adopted its final rule during the course of
25 consideration after the House had passed its bill but

1 before the Senate had voted.

2 QUESTION: Mr. Wallace, this comes to us as a
3 sort of as-applied challenge, I guess, and in the context
4 of provisions imposing criminal penalties. Does that
5 influence our interpretation at all? Is there any rule of
6 lenity concerns or anything of the sort because we are
7 dealing with statutes imposing criminal penalty?

8 MR. WALLACE: Well, that was an issue that the
9 Court addressed in its opinion in Babbitt versus Sweet
10 Home in footnote 18 of that opinion, where in a civil
11 proceeding a similar concern was raised. And I think the
12 answer given in that footnote that in a civil context of
13 litigation where the agency interpretation has been made
14 clear, that there's no occasion to invoke the rule of
15 lenity.

16 QUESTION: So the statute can mean one thing if
17 it's prosecuted criminally, and something different if
18 it's prosecuted civilly? That's extraordinary.

19 MR. WALLACE: We don't take that position.

20 QUESTION: But that's what the footnote you
21 appeal to would seem to suggest.

22 MR. WALLACE: It's a footnote by this Court.

23 QUESTION: Well, even so.

24 MR. WALLACE: We do have mens rea questions that
25 we and the courts have been struggling with.

1 QUESTION: The point of the footnote, as I
2 remember it was, if the matter is cleared up in the civil
3 proceedings, then the rule of lenity doesn't apply
4 subsequently because there is no longer the ambiguity that
5 gives rise to the rule of lenity problem.

6 MR. WALLACE: Very well stated.

7 QUESTION: Which raises the different problem of
8 what the statute means depends upon whether the first case
9 prosecuted is a criminal or a civil case, is that the
10 government's position?

11 MR. WALLACE: Well, we're very cautious about
12 not bringing what we think would be an unfair criminal
13 prosecution. We're mostly -- we mostly try to confine
14 those initiatives to scofflaw situations where we think
15 that we could prevail and where that kind of sanction is
16 appropriate.

17 But to get back to the 1977 controversy, the
18 House did pass a bill, and a similar bill was sponsored by
19 Senator Bentsen in the Senate, but both bills made clear
20 that they were not repudiating the broader scope of
21 authority for EPA in regulating toxic discharges into all
22 waters of the United States as they had been interpreted
23 in the regulations, but only addressed the Corps'
24 permitting activities with respect to dredge and fill
25 activities.

1 The Congress indicated in detail that it was
2 very familiar with the agency interpretations by both
3 agencies, and even then the Senate refused to pass the
4 House version or the Bentsen amendment, and it decided
5 instead to retain the existing scope of the geographic
6 authority stated in the regulations that had been adopted,
7 but to counterbalance that with this new provision that
8 Justice Ginsburg has been averting to, 404(g), which
9 provided authority for the states to adopt their own
10 programs over what were called in the Corps' new
11 regulation and the Senate report, very specifically
12 referred to this as Phase II and Phase III of the
13 expansion of the Corps' permit program, and we have quoted
14 the Senate report that uses precisely those terms on page
15 25 of our brief.

16 The committee amendment does not redefine
17 navigable waters. Instead, the committee amendment
18 intends to assure continued protection of all the nation's
19 waters but allows states to assume the primary
20 responsibility for protecting the waters outside of the
21 so-called Phase I waters, which are the navigable waters
22 and those adjacent and then the wetlands adjacent thereto.
23 Under the committee amendment the Corps will continue to
24 administer the entire Section 404 program in all navigable
25 waters until the approval of a state program for Phase II

1 and Phase III waters, and the Phase III waters which the
2 Corps was planning to get to in a couple of years time are
3 the waters at issue here.

4 So the whole premise of the Senate bill, which
5 is what the conference committee adopted, was that the
6 extension of jurisdiction to these Phase III waters would
7 be retained, but the states would be given the option of
8 administering the program. Two states have chosen to do
9 that, New Jersey and Michigan. New Jersey was one of
10 eight states that have filed a brief in our support in
11 this case. Only one has filed a brief on the other side,
12 I hasten to point out. And the Senate also
13 counterbalanced the retention of the broad jurisdiction by
14 providing for certain exemptions, including an exemption
15 of certain agricultural activities because of precisely
16 the concern that Justice Souter suggested might raise a
17 question of bizarre authority and also have --

18 QUESTION: That is in the statute, Mr. Wallace?

19 MR. WALLACE: That is in the statute. That was
20 part of the 1977 amendments that certain exemptions were
21 added.

22 QUESTION: Could you give us -- is it in your
23 brief somewhere?

24 MR. WALLACE: Yes. Yes, it is.

25 QUESTION: Could you tell us where?

1 MR. WALLACE: It's Section 1344(f) of Title 33.

2 QUESTION: Thank you.

3 QUESTION: Mr. Wallace, how -- I'm trying to get
4 a quantitative idea from what one of the amici briefs
5 suggested. Your view is that all the water that affects
6 interstate commerce, maybe the word is substantially
7 affects or significantly affects, whatever the
8 constitutional test, but think of that set of water, all
9 the water that significantly affects interstate commerce
10 is included. I take it that they agree that all the water
11 that affects interstate commerce is included provided it
12 also is either navigable or if not navigable, it flows
13 into navigable water, and I thought they were talking
14 about flows on the surface.

15 There is an amicus brief that says well, there
16 is only about 20 percent left over. Is that right? Now,
17 I think maybe today -- I'm not sure. I think maybe they
18 said it also includes the water affecting interstate
19 commerce that isn't navigable but flows underground, in
20 which case I would think that takes care of everything
21 else. Maybe there is a tiny little bit that actually
22 doesn't flow underground, and I take think it this
23 particular place, the Army Corps of Engineers and the EPA
24 think it does flow into the Fox River underground, and
25 they think it doesn't flow into the Fox River underground,

1 so I'm not sure what we're supposed to do. I'm trying to
2 get an idea of what the -- what we're talking about.

3 MR. WALLACE: Well, one of the rules specified
4 by the Corps in its elaboration of its regulations as to
5 what waters can affect interstate commerce are those that
6 are used as habitat by migratory birds protected under
7 bird treaty acts or that migrate between the states, which
8 happened to be the basis on which jurisdiction was
9 asserted here, on the basis of the factual showing that
10 was made to the Corps by an Illinois state agency dealing
11 with birds.

12 And perhaps if we get away from this particular
13 cite for a moment, much of the battle would be about the
14 so-called prairie potholes in the Dakotas and adjoining
15 states where about 50 percent of the waterfowl in this
16 country breed. Under petitioner's position, as I
17 understand it, the commerce power would enable Congress to
18 protect the winter habitat of duck species and other
19 waterfowl in the Chesapeake Bay area with all of its tidal
20 waters and navigable rivers and et cetera, but not to
21 protect the summer breeding habitat of these same
22 waterfowl.

23 QUESTION: I don't think that's his position. I
24 think his position is not that the commerce power doesn't
25 allow you to protect them. It's that the navigable waters

1 aspect of the commerce power doesn't allow you to protect
2 them, and if Congress wants to come back and exert its
3 commerce power generally, it would be a different issue.

4 MR. WALLACE: That is a statutory argument, but
5 he also is making the argument that that interpretation is
6 one that should be adopted because otherwise there would
7 be constitutional doubt about the authority of Congress to
8 protect this bird habitat, and of course any scientist
9 would look at this question and say, well, it's futile,
10 it's ineffectual to be able to protect the habitat that
11 they use in one season but not to be able to protect the
12 habitat that they use in another season, the breeding
13 season.

14 QUESTION: Mr. Wallace, just to be clear on one
15 thing, it is the Corps' position, is it not, that the
16 Phase III water, their power to regulate the Phase III
17 water applies whether or not the isolated ponds have an
18 underground connection to navigable waters?

19 MR. WALLACE: That is correct, and the so-called
20 prairie potholes are perhaps the prime example of that.
21 The waters here, that's a more difficult inquiry.
22 Certainly they serve as storage for what would otherwise
23 be flood waters during periods of heavy rain that would
24 cause overflow. That was part of what the Corps had to
25 deal with in dealing with this application.

1 QUESTION: Do the states exercise any regulation
2 over the prairie potholes?

3 MR. WALLACE: They do. This whole area is one
4 of concurrent and overlapping authority between the states
5 and the Federal government, as the states that have filed
6 amicus in our support have pointed out.

7 QUESTION: Maybe the Federal government was
8 content to protect the navigable waters from pollution and
9 to leave the problem of the pollution of waters that don't
10 affect the navigable waters to the states. It's a
11 perfectly rational approach.

12 MR. WALLACE: Well, that is exactly contrary to
13 what the Senate committee said in adopting the 1977
14 amendments.

15 QUESTION: But I mean, this case, it seems to
16 me, does point up the problem that petitioner's counsel
17 raised quoting from page 1 of the blue brief, it is the
18 primary responsibility of the states to eliminate
19 pollution and to plan development and use of land. Here
20 you have a 47,000-page report, did I hear that correctly,
21 that the Corps of Engineers issued?

22 MR. WALLACE: This was a very --

23 QUESTION: It seems to me that this illustrates
24 that the way in which the Corps has promulgated its
25 regulation departs from the design of the statute.

1 MR. WALLACE: Well, the Corps grants all but
2 less than one percent of applications each year, and about
3 85 percent of the permits that it issues are issued under
4 general permit programs which are streamlined and do not
5 require individual inquiries into the categories that they
6 fall, if certain conditions are met in the application.

7 QUESTION: I don't see how that should affect
8 our determination.

9 MR. WALLACE: Well, what we had in this case was
10 what turned out to be a very complex inquiry, although
11 petitioner characterizes that it's trenching on local land
12 use planning functions, but local land use boards seldom
13 have to deal with a project of this magnitude, and its
14 potential and long-range effects on the people who will be
15 affected by it in their posterity, which is why the states
16 supporting us say that the special expertise of the Corps
17 and of the other agencies, state and Federal, that weighed
18 in in this process, and of course responses were received
19 from petitioner and its supporters, were so important,
20 because what was implicated here was not only dangers to
21 migratory birds but a question of possible contamination
22 of an aquifer used by thousands of people for their
23 drinking water.

24 QUESTION: Has Illinois showed no interest at
25 all or concern about this particular site? Is this a

1 situation where the state has just turned its back and
2 said, we don't care?

3 MR. WALLACE: The state agencies participated in
4 the Corps proceeding. It's true that they initially
5 licensed a plan to which many mitigation measures were
6 added by the state so that the plan would have been a much
7 better one if the Corps had approved it than what
8 petitioner started with.

9 QUESTION: Thank you, Mr. Wallace. Mr. Bishop,
10 you have four minutes remaining.

11 REBUTTAL ARGUMENT OF TIMOTHY S. BISHOP

12 ON BEHALF OF THE PETITIONER

13 MR. BISHOP: Justice O'Connor, the State of
14 Illinois rejected our first permit application, made us
15 reapply. We filed a 1700-page application, there were an
16 additional set of public hearings. They subjected the
17 project to 51 conditions before they would let us proceed.
18 Cook County engaged in the largest, longest permit
19 proceeding it had ever engaged in over this project.

20 Let me say that the act is not open ended. It's
21 not that any connection will do. The Corps -- and one of
22 the amicus briefs on the other side from the wetland
23 scientists claims that isolated ponds are in fact somehow
24 connected on the surface or through groundwater to the
25 navigable waters, but the fact is any change made in the

1 landscape will make some -- have some effect on the flow
2 of water. I just switched the gutter on my garage so that
3 it drains onto an impermeable surface where the water
4 evaporates rather than onto the garden where it goes down
5 into our water table and ends up in Lake Michigan.

6 The Corps cannot use this language which
7 requires some physical connection to the navigable waters
8 to extend its jurisdiction in the same way that it's now
9 extending it endlessly through the effects commerce strand
10 of the commerce power, so -- and as to groundwater, I did
11 not and certainly do not mean to suggest that the Corps
12 can regulate any water that flows into groundwater. The
13 law is clear in the 7th Circuit that the Corps does not
14 have jurisdiction over groundwater. Other courts, the 5th
15 Circuit, for example, has held that if the groundwater
16 recharges surface water, there's jurisdiction. That's
17 simply an issue that is not in this case, and I do not
18 concede that if there is any connection to the groundwater
19 here that that would be jurisdictional. And the record in
20 this case which is 47,000 pages long contains no basis of
21 jurisdiction, no sourceable authority at all other than
22 presence of migratory birds on these waters.

23 The parade of horrors that Mr. Wallace has
24 trotted out should also not be believed. The Clean Water
25 Act is not out there by itself protecting clean water, or

1 birds. The Migratory Bird Treaty Act which is authorized
2 under the treaty power gives Congress the authority to
3 protect birds and their habitats. The spending power has
4 been used to great effect in the prairie potholes region
5 whereas this Court considered in the South Dakota case,
6 the Federal government has either acquired outright or
7 bought easements over more than a million acres, and this
8 is 20 years ago, more than a million acres of prairie
9 potholes. So taking out this strand, the bird rule and
10 the other waters rule, this strand from the Corps'
11 jurisdiction will have and should have no impact on what
12 Congress can do under the other statutes.

13 If you address this case as a statutory rather
14 than a constitutional case, it would also want to address
15 the question whether Congress can come back with a
16 different plan to protect clean waters. What we don't
17 believe the government can plausibly assert is that the
18 terms navigable waters defined as waters of the United
19 States, given the history, given the legislative history,
20 given the historical usage of those terms, in this Court
21 and other statutes, extends to isolated ponds regulated by
22 the states.

23 And finally on the -- as to the rule of lenity,
24 I would recommend that the Court follow the --

25 QUESTION: Thank you, Mr. Bishop.

1 MR. BISHOP: Thank you, Chief Justice.

2 QUESTION: The case is submitted.

3 (Whereupon, at 11:00 a.m., the case in the
4 above-entitled matter was submitted.)

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