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# Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs, 191 F.3d 845 (7th Cir. 1999), petition for cert. filed, Jan. 14, 2000

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necessity of a permit and suggested doing the work upland away from the swale, to which Kelly replied, in effect, "Don't worry, be happy." The Corps again visited the property and observed the work Prisk was doing. After an administrative hearing, the EPA assessed administrative penalties against Prisk and Kelly in the amount of $3,000 and $4,000, respectively. The district court upheld the penalties. Both men appealed to this court, which affirmed the district court's decision.

Kelly and Prisk argued on appeal that they did not violate the CWA because they did not do so knowingly. The court disagreed for three reasons. First, their brief never developed this argument, thus the court deemed it waived. Second, the court held civil liability under the CWA, unlike criminal liability under the CWA, was strict. Last, even if the statute required knowledge, the incident in 1990 put Kelly and Prisk on notice that filling a wetland violated the CWA.

Kelly and Prisk also suggested that their actions caused no environmental harm, even though there was some contradictory evidence. The court stated that the CWA did not forbid the filling of wetlands, rather, it forbade the filling of wetlands without a permit. The court found that had Kelly applied for a permit, he might have received one (less than one percent of such applications were denied in 1994). Nevertheless, Kelly did not do so.

Contrary to their arguments, the court found that Kelly and Prisk's fines were not too high or retaliatory in proportion to the amount of damage caused. The intent of civil penalties under the CWA were to punish and deter. While the EPA could have sought civil penalties up to $25,000 per day, it chose instead to assess administrative penalties with a maximum of $10,000 each. In response to Kelly and Prisk's final argument that the $7,000 in total fines violated the "excessive fines" clause of the Eighth Amendment, the court said that when Congress had determined the appropriate punishment, a fine well within the statutory limits could not be grossly disproportionate to the gravity of the offense.

While Kelly and Prisk could have made other, more persuasive arguments, the court said, theirs was essentially nothing more than a diatribe against federal power under the CWA.

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**Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs, 191 F.3d 845 (7th Cir. 1999), *petition for cert. filed*, Jan. 14, 2000** (holding that because certain intrastate waters provided habitat to migratory birds, and the potential aggregate result of the destruction of this habitat and subsequent decrease in population of migratory birds substantially affected interstate commerce, the United States Army Corps of Engineers justifiably exercised jurisdiction over the waters at issue based on the migratory bird rule).

The Solid Waste Agency of Northern Cook County ("SWANCC"), a

consortium of twenty-three municipalities formed for the purpose of locating and developing a disposal site for nonhazardous waste, instituted this action to challenge the United States Army Corps of Engineers' ("Corps") exercise of jurisdiction based on the migratory bird rule over its proposed "balefill" site. SWANCC proposed to build a balefill (a landfill where disposed waste is baled before it is dumped) on approximately 410 acres of land, over half of which consisted of an early successional stage forest and more than 200 permanent and seasonal ponds. Upon the initial finding by the Corps that the aquatic areas on the site could potentially serve as habitat for migratory birds crossing state lines, the Corps exercised its jurisdiction under the Clean Water Act ("CWA"), and ultimately found that the aquatic areas serve as habitat to several species of migratory birds. Specifically, the proposed balefill required the filling of almost eighteen acres of known migratory bird habitat, and, relying on the migratory bird rule, the Corps denied SWANCC's section 404 permit application.

The migratory bird rule resulted from the Corps' longstanding interpretation of the phrase "waters of the United States" in the CWA's implementing regulations. This interpretation included intrastate waters which were, or could potentially be used as, habitat for species protected by Migratory Bird Treaties or which were, or could potentially be, habitat areas for unprotected species of migratory birds which cross state lines. Although SWANCC did not challenge the Corps' finding of migratory bird habitat on the proposed site, SWANCC challenged the migratory bird rule as a basis for the Corps' exercise of jurisdiction. In particular, SWANCC argued that: (1) Congress did not have the authority under the Commerce Clause to grant the Corps jurisdiction over isolated, intrastate waters merely because of the presence of migratory birds; (2) the Corps exceeded its statutory authority in interpreting that the CWA conferred jurisdiction based solely on the presence of migratory birds in intrastate water; and (3) the Corps did not promulgate the migratory bird rule in accordance with the procedural requirements of the Administrative Procedure Act ("APA"). The court rejected each of these challenges and upheld the Corps' exercise of jurisdiction over aquatic areas that were found to serve as habitat to migratory bird species, but did not address whether the Corps could properly exercise jurisdiction over areas that were only potential habitats.

The court dispelled the constitutional challenge to the migratory bird rule by invoking the cumulative impact doctrine. Under the cumulative impact doctrine, a single activity that by itself had no recognizable effect on interstate commerce might still be regulated if the aggregate effect of all similarly-typed activities had a substantial impact on interstate commerce. Citing various statistics exemplifying the effect of the presence of migratory birds on interstate commerce, the court found that the destruction of this habitat and the accompanying decrease in population substantially affected interstate commerce. This aggregate effect justified regulation under the Commerce Clause.

With regard to SWANCC's challenge that the Corps exceeded its statutory authority in interpreting the CWA to confer jurisdiction over intrastate waters based on the presence of migratory birds alone, the court

first noted that to assert jurisdiction under the rule, the Corps had to first make a factual determination that a body of water provided a habitat for migratory birds. That is, the Corps had to establish that the water was not merely a place a bird might occupy momentarily, but rather that the water was the place where the species naturally lived. Additionally, recognizing the existence of several international treaties and conventions designed to protect migratory birds, the court found that the constitution's Supremacy Clause clearly gave precedence to federal law in the regulation of migratory bird species. The court reasoned that because it was within Congress's Commerce Clause power to permit regulation of waters based on the presence of migratory birds, the Corps could reasonably do the same.

Finally, by noting the distinction between the APA's procedural provisions pertaining to interpretative rules and policies as opposed to the notice and comment requirements applicable to legislative rules, the court classified the migratory bird rule as an agency interpretation and not a substantive rule. The notice and comment provisions of the APA were therefore inapplicable. Thus, the court concluded that the Corps reasonably and justifiably exercised jurisdiction over the isolated intrastate bodies of water based solely on the presence of migratory birds utilizing the water as habitat.

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**Wisconsin v. Federal Energy Regulatory Comm'n, 192 F.3d 642 (7th Cir. 1999)** (holding that Wisconsin did not have standing under the Federal Power Act to challenge the Federal Energy Regulatory Commission's granting of six licenses for hydroelectric power projects proposed on the Flambeau River).

Section 4(e) of the Federal Power Act ("FPA") authorized the Federal Energy Regulatory Commission ("FERC") to license hydroelectric power projects on waterways subject to federal Commerce Clause regulation. In exercising this authority, the FPA required FERC to consider whether a proposed project was in the public interest. FERC must take into consideration, among other factors, the adaptability of a project to a comprehensive plan for the "improvement and utilization of water-power development, for the adequate protection, mitigation, and enhancement of fish and wildlife." This determination mandates FERC to give equal consideration to the fish and wildlife protection and enhancement aspects of a project as it does to a project's water-power development potential.

At issue in this case was FERC's 1998 issuance of licenses for six hydropower projects on the Flambeau River, a tributary of the Chippewa River, in Wisconsin. In accordance with applicable regulations, through the course of the licensing process, the applicants for the proposed projects consulted with the appropriate state regulatory agencies. Additionally, the applicants conducted a year-long fish entrainment study in five of the six