



For Immediate Release

July 26, 2000

COURT URGED TO REJECT FEDERAL JURISDICTION OVER ISOLATED WETLANDS (*SWANCC v. U.S. Army Corps of Engineers*)

The Washington Legal Foundation (WLF) filed a brief yesterday with the U.S. Supreme Court on behalf of itself and the Allied Educational Foundation, urging it to reverse a lower court decision that upheld federal jurisdiction over isolated wetlands under the Commerce Clause of the Constitution simply because migratory birds were observed on the land.

In *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*, a local government agency in Illinois purchased a 533-acre parcel of land to be used as a landfill. Originally, the U.S. Army Corps of Engineers determined that the parcel, which contained a few ponds and puddles, did not constitute "waters of the United States" under the Clean Water Act. However, the Corps changed its position and asserted jurisdiction over the isolated wetland when it was discovered that some migratory birds were spotted on the property. The U.S. Court of Appeals for the Seventh Circuit upheld the Corps' jurisdiction under the Commerce Clause because "the destruction of migratory bird habitat 'substantially affects' interstate commerce."

In its brief, WLF argued that the Corps' so-called "migratory bird rule" exceeds the authority conferred on the federal government under the Commerce Clause. The actual or potential presence of migratory birds on private property does not involve commercial transactions or economic activity. Accordingly, under the Supreme Court's recent Commerce Clause jurisprudence in *United States v. Lopez* and *United States v. Morrison*, it is impermissible to aggregate the speculative effects on interstate commerce caused by the destruction of migratory bird habitat nationwide. WLF also argued that the mere presence of any wild animal on private property, whether endangered or not, does not give the federal government authority to regulate private property.

WLF's brief was drafted with the *pro bono* assistance of Mark A. Perry of the Washington, D.C. office of Gibson, Dunn & Crutcher LLP. The case will be argued this fall in the Supreme Court.

* * *

For further information, contact Paul Kamenar, WLF's Senior Executive Counsel, at 202-588-0302.