

Position Paper on Clean Water Act Jurisdiction Determinations Pursuant to the Supreme Court's January 9, 2001 Decision, Solid Waste of Northern Cook County v. United States Army Corps of Engineers (SWANCC)

Presented to Administrator Whitman, United States Environmental Protection Agency by the Association of State Wetland Managers and the Association of State Floodplain Managers, December 2001

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The section 404 regulatory program has been in turmoil ever since the Supreme Court's SWANCC decision on January 9, 2001. The Association of State Wetlands Managers (ASWM) and Association of State Floodplain Managers have watched the situation grow increasingly more confusing and chaotic with each passing day. Our members report widely varying interpretations by field offices of the Corps and EPA regarding the jurisdictional scope of the 404 program in the wake of the Court's invalidation of the "Migratory Bird Rule" as the sole basis for federal regulation of non-navigable, isolated, and intrastate wetlands ("isolated wetlands") under the Clean Water Act. For example, Corps Districts in the semi-arid western states are taking the position that perennial streams are not jurisdictional if there is no "discernible high water mark" downstream in parts of the watershed with low annual precipitation rates (e.g. Kiawah Creek and Bijou Creek, Colorado and Great Divide Closed Basin, Wyoming). The South Pacific Division has issued guidance stating that jurisdiction over desert washes depends on the frequency of storm events.¹ In Wisconsin the Corps is refusing to regulate intrastate closed basin lakes of substantial size. Other Districts are not asserting jurisdiction over man-made ditches and canals that have replaced natural conveyances over time and were formerly regulated. In the absence of clear guidance, jurisdictional calls have become largely ad hoc and unpredictable. There does not appear to be consistency in what type of information and criteria are used for making jurisdictional calls for isolated waters. Some Corps Districts are making jurisdictional determinations in the office using aerial photography and maps, whereas other Districts are doing field investigations.

There is also confusion regarding the status of 404 permits issued pre-SWANCC for activities in isolated wetlands. Some Corps Districts are taking the position that such permits are no longer valid and enforceable, which is simply not the law.

According to the interpretation of the Corps Alaska District approximately one-third to one-half of the new general permit applications are no longer jurisdictional wetlands. This has serious and confusing ramifications for coastal management and wetland management plans adopted by the state and local governments.

This is an untenable situation for everyone concerned-- state and local governments, the regulated community, the conservation community, and most of all for the wetland resource itself. As confirmed in the recent report to Congress on the "Status and Trends of the Nation's

¹ U.S.C.O.E., South Pacific Division, Final Summary Report: Guidelines For Jurisdictional Determinations For Waters of the United States in The Arid Southwest, 7 (June, 2001).

Wetlands,” the 404 program and other protection and restoration efforts have been instrumental in reducing wetland losses by 80% over the past decade. Just as the long-sought goal of “no net loss” of wetlands seemed to be within reach, the confusion surrounding SWANCC threatens to derail the program.

Further, the lack of action by the federal agencies to clarify the situation negatively impacts the ability of the states and local governments to explore and implement strategies to address the gap in federal protection. State and local governments and, in particular, state legislatures and local elected officials need to know the extent of the impact to waters in their state or locality to determine what state or local actions are appropriate. This information is also needed to generate appropriate public support and ensure ongoing concerns over duplication of effort between state and federal government are addressed. Estimates completed of the range of possible changes in jurisdiction identify 20 to 60% of the waters in the United State may be impacted. However the range of potential impact from state to state is much greater from little or no impact to greater than 70% of the waters within the state. States where the average rate of evaporation exceeds precipitation are where the largest impacts are likely to occur. In addition, in states with large wetland acreages, even a relatively small change in jurisdiction can affect millions of acres of isolated waters. Therefore, to prevent degradation and destruction of isolated waters as well as broader environmental problems, we are urging EPA to assert its authority for implementing the Clean Water Act and provide guidance.

As the agency with the primary authority and responsibility for implementing the CWA, it falls to EPA to clarify the jurisdictional issues and get the 404 program back on track. Obviously, the interpretation of the SWANCC decision has implications for all of the CWA programs, including the NPDES permit program (§ 402), the water quality standards and continuing planning process (§ 303), the TMDL program (§ 303 (d)), the water quality certification provision (§ 401), the oil spill liability provision (§ 311), and others. It is therefore incumbent upon EPA to take action to prevent further erosion of federal jurisdiction. Although coordination with the Corps is necessary regarding the administration of the 404 program, and agreement on jurisdictional issues is desirable, the final authority on what constitutes “waters of the United States” under the CWA clearly rests with EPA as forth in the 1979 Opinion of the Attorney General (the Civilletti Opinion), and in the 1983 Memorandum of Agreement with the Department of Army regarding determination of waters of the United States.

We were encouraged when EPA and the Corps issued the January 19, 2001, Memorandum Re: “Supreme Court Ruling Concerning CWA Jurisdiction Over Isolated Waters” (“SWANCC Memo”), which correctly characterized the decision as “narrowly limited to Clean Water Act regulation of ‘non-navigable, isolated, intrastate’ waters based solely on the use of such waters by migratory birds.”² The SWANCC Memo further noted that the decision must be

² The precise question the Court certified in SWANCC was: “Whether the Corps may assert jurisdiction over isolated, intrastate waters solely because those waters do or potentially could serve as habitat for migratory birds.” The Court’s answer was equally precise: “We hold that 33 CFR § 328.3 (a) (3), as clarified and applied to petitioner’s balefill site pursuant to the ‘Migratory Bird Rule’ [citation omitted] exceeds the scope of the authority granted to respondents under § 404 of the CWA.” Though the SWANCC Memo notes that the rationale is

interpreted in light of other Supreme Court precedents “which broadly uphold CWA jurisdictional authority.”³ Unfortunately, however, the SWANCC Memo introduced an element of uncertainty by also stating that the “the Supreme Court decision does provide an important new limitation on how and in what circumstances the EPA and the Corps assert regulatory authority under the CWA.” It is not clear what “important new limitation” is contemplated beyond the invalidation of the migratory bird rule, but the ambiguity is spawning freelance interpretations that are undermining the integrity of the 404 program.

The Association of State Wetland Managers (ASWM) and the Association of State Floodplain Managers (ASFPM) urge EPA to develop specific guidance to insure that the narrow legal interpretation embodied in the SWANCC Memo does not get lost as it filters down to the field offices of the Corps and EPA. Specifically, we recommend that the guidance address the following major points:

1. Clarify that SWANCC did not invalidate any of the regulatory provisions defining “waters of the United States.” All that it invalidated was the “Migratory Bird Rule,” which was in fact not a rule but a policy and guidance document. Furthermore, SWANCC did not outlaw consideration of the use of wetlands by migratory birds, endangered species and other wildlife factors to be considered in making jurisdictional determinations; it merely ruled that such considerations could not serve as the sole basis for asserting jurisdiction. Clarification is needed on this point because some Corps personnel are citing SWANCC as a justification for declaring as non-jurisdictional intrastate waters that were formerly regulated.
2. Make it clear that SWANCC does not invalidate previously issued permits, and their terms and conditions should continue to be enforced, including mitigation requirements.
3. Adopt the Riverside Bayview “significant nexus” test for determining jurisdiction over wetlands, and establish a presumption that all wetlands within or abutting the 100 year floodplain are to be considered “adjacent.” The guidance should require an assessment of the hydrological and ecological functions that particular wetlands perform within a watershed context. These include: flood control, erosion control, water quality maintenance, groundwater recharge, and conservation of biological diversity. Wetland scientists have never recognized the artificial regulatory distinction between “adjacent”

in some respects broader than the holding, the preferential effect of the decision is limited to the result, not the rationale. It may take years of litigation to sort out the conflicting interpretations of what the Court meant by some of the statements in the opinion, but EPA must act now and adopt an interpretation consistent with its previous positions and faithful to the goals of the CWA.

³ Significantly, the SWANCC Court reaffirmed the landmark 1985 decision in Riverside Bayview that CWA jurisdiction extends beyond traditionally navigable waters to include non-navigable waters and wetlands where there is a “significant nexus” between the wetlands and navigable waters. Further, the SWANCC Court acknowledged Congress’ intent to regulate wetlands that are “inseparably bound up with waters of the United States.”

and “isolated” wetlands, and there is now an opportunity to clarify that it is the function, not the label, that matters. For example, proper application of the significant nexus test would maintain 404 protection for important “isolated wetlands” such as the “prairie potholes,” which not only serve as habitat for migratory birds but which provide crucial water storage capacity and erosion control that helps reduce flood peaks and sedimentation, and the resulting damage to downstream resources and water quality.⁴ Similarly, forested wetlands in the Chesapeake Bay watershed have been shown to be remarkably effective at removing nitrogen and phosphorous, thereby acting as buffers to nutrient inputs to streams.⁵ Excess nutrients are the principal cause of water quality impairment in the United States. Recent studies confirm the important role that headwater streams play in controlling nutrient export to rivers, lakes and estuaries.⁶

4. Clarify that the definition of “tributaries” includes groundwater tributaries and man-made structures, as well as all surface tributaries whether mapped or unmapped. The courts have adopted a common sense approach to this issue which holds that, for purposes of determining CWA jurisdiction, what matters is whether the discharge has the potential to adversely affect the “chemical, physical or biological integrity” of water. Courts have not required physical proximity to “open water” as a necessary predicate for federal regulation.
5. Clarify and expand the “significant impact on interstate commerce” test for jurisdictional determinations. Specifically, the guidance should emphasize that, under applicable Supreme Court decisions, it is the “aggregate effect” of the regulated activities on interstate commerce that must be evaluated, not simply the effect of regulating a particular wetland fill.⁷ As the SWANCC Court acknowledged, “most discharges of dredge or fill material” involve the kind of economic activity that falls squarely within the Commerce Clause. The error the Court pointed to in SWANCC was the exclusive reliance on regulation for the benefit of migratory birds, an objective that the Court felt went beyond the intent of Congress in enacting the CWA. However, there are many other reasons to protect wetlands that are more directly related to the water quality goals that are clearly within the intent of Congress as interpreted by the Court in SWANCC and Riverside Bayview, and also within the scope of Congress’ power under the Commerce

⁴ See A. P. Ludden, D. L. Frank & D. H. Johnson, “Water Storage Capacity of Natural Wetlands Depressions in the Devil’s Lake Basin of North Dakota,” 38 J. Soil & Water Cons. 45-48 (1983).

⁵ P. J. Phillips, J. M. Denver, R. J. Shedlock, and P. A. Hamilton, Effect of Forested Wetlands on Nitrate Concentrations in Ground Water and Surface Water on the Delmarva Peninsula, 13 Wetlands 75-83 (1993).

⁶ B. J. Peterson, et al, Control of Nitrogen Export From Watersheds By Headwater Streams, Science 292:86-90 (2001).

⁷ See Lopez v United States, 514 U. S. 549 (1995); United States v Morrison, 120 S. Ct. 1740 (2000).

Clause.⁸ Moreover, there is a growing body of information on the economic value of the many “ecosystem services” wetlands provide, which, in the aggregate, can have a substantial effect on interstate commerce.⁹

Finally, EPA and the Corps should jointly institute a program to clarify the extent of jurisdictional wetlands on a state-by-state or regional basis, to take account of the geographic and climatic differences that exist throughout the country. The State of Delaware has begun such an effort in conjunction with the Corps and EPA Region 3 with the goal of identifying all regulated wetlands as soon as practicable.

The approach suggested here is consistent with the way that EPA has interpreted the scope of CWA jurisdiction over the past three decades, and is strongly supported by the considerable body of law that has developed over that period of time. SWANCC did not erase this body of law. Indeed, in the decisions that have come down since the SWANCC decision, the courts continue to give a very broad reading to the term “waters of the United States.” For example, in Headwaters v Talent Irrigation District, 243 F. 3d 526, 533 (9th Cir. 2001), the Ninth Circuit held that an irrigation ditch was a water of the United States because it was connected to an intermittent tributary of a navigable water. In Idaho Rural Council v Bosma, 143 F. Supp. 2d 1169, 1179 (D. Id. 2001), the court held that springs connected to non-navigable streams and groundwater connected to surface water were both “waters of the United States.” In United States v Interstate General, 152 F. Supp. 2d 843,847 (D. Md. 2001), the court rejected a post-SWANCC challenge to a conviction for unpermitted discharges to wetlands adjacent to intermittent streams and artificial canals stating: “The SWANCC case is a narrow holding that only 33 CFR § 328.3 (a) (3), as applied by the Corps creation of the ‘Migratory Bird Rule’ is invalid pursuant to lack of congressional intent.”¹⁰

In closing we urge EPA to show the leadership it has shown in the past on these difficult jurisdictional issues. The fallout from SWANCC has destabilized the 404 program and is

⁸ For example, in Hodel v Virginia Surface Mining & Recl. Assn., 452 U.S. 264, 282 (1981), the Court broadly upheld the power of Congress to regulate activities that cause air and water pollution with effects in more than one state.

⁹ See G.C. Dailey, et al, *Ecosystem Services: Benefits Supplied To Human Societies By Natural Ecosystems, Issues In Ecology*, (Ecological Society of America, 1999). To cite two examples, the City of New York has embarked on a \$250 million program to acquire and protect up to 350,000 acres of wetlands and riparian lands in the Catskills in order to protect the City’s water supplies instead of constructing filtration plants, estimated to cost between \$6 and \$8 billion. The City of Boston is acquiring 5000 acres of wetlands in the Charles River Watershed to avoid construction of a \$100 million dam for flood control.

¹⁰ See also, United States v Buday, 138 F. Supp. 2d 1282 (D. Mont. 2001)(US had jurisdiction to regulate discharge to tributary of navigable water); United States v Krillich, 152 F. Supp. 2d 983 N.D. Ill 2001 (“isolated waters” are those without “any connection to any body of water.”); Aiello v Town of Brookhaven, 136 F. Supp. 81,119 (discharge to pond and creek that flows into lake connected to navigable water is subject to 404 regulation).

threatening to do even more damage to nation's water quality goals. EPA has the authority to turn this situation around and the Association of State Wetland Managers and the Association of State Floodplain Managers stand ready to assist in any way we can.