The Supreme Court's *SWANCC* Decision

BACKGROUND

The main federal regulatory program protecting wetlands in the United States is section 404 of the Clean Water Act (CWA), implemented by the U.S. Army Corps of Engineers (the Corps). Under section 404 anyone wanting to discharge fill material into "waters of the United States" must obtain a permit from the Corps. Litigation on the extent of the Corps' authority under section 404 and the meaning of certain terms (e.g., "waters of the United States," "navigable waters") has produced a large body of case law that interprets the CWA.

The Solid Waste Agency of Northern Cook County (SWANCC) wanted to develop a non-hazardous solid waste disposal facility on a site that contained isolated ponds and wetlands. The Corps denied SWANCC a section 404 permit to fill those wetlands because they were used by migratory birds. Lower courts found in favor of the Corps, and SWANCC appealed to the Supreme Court.

On January 9, 2001, the U.S. Supreme Court issued a decision in the case [*Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers* (the SWANCC decision), 531 U.S. 159 (2001)]. The Court determined that the Corps' authority under the CWA did not extend to isolated wetlands if they are not "adjacent" to navigable waters. It held that the Corps exceeded its statutory authority by asserting CWA jurisdiction over the ponds that SWANCC wanted to fill based solely on the use of those "non-navigable, isolated, intrastate" waters by migratory birds.

STATUTES

Sections 9 and 10 of the Rivers and Harbors Act, as amended. 33 U.S.C. 401 and 403.

Section 404 of the Clean Water Act (CWA). Public Law 92-500, as amended. 33 U.S.C. 1344.

REGULATIONS

33 *CFR* part 323: Permits for discharges of dredged or fill material into waters of the United States

33 *CFR* part 328: Definition of waters of the United States

33 *CFR* part 329: Definition of navigable waters of the United States

40 *CFR* part 232: 404 Program Definitions; Exempt activities not requiring 404 permits

REFERENCES

Guzy, Gary S. and Robert M. Anderson. 2001. Joint EPA/Corps Memorandum. Supreme Court Ruling Concerning CWA Jurisdiction over Isolated Waters. January 19.

Parenteau, Pat. 2001. Position Paper on Clean Water Act Jurisdiction Determinations Pursuant to the Supreme Court's January 9, 2001, Decision, *Solid Waste [Agency] 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.

Solid Waste Agency of Northern Cook County v. *United States Army Corps of Engineers*. 531 U.S. 159 (2001)

Tiner, Ralph W., Herbert C. Bergquist, Gabriel P. DeAlessio, and Matthew J. Starr. 2002. *Geographically Isolated Wetlands: A Preliminary Assessment of their Characteristics and Status in Selected Areas of the United States*. U.S. Department of the Interior, Fish and Wildlife Service, Northeast Region, Hadley, MA.

United States v. *Riverside Bayview Homes, Inc*. 474 U.S. 121 (1985)

FEDERAL REGULATION OF WETLANDS

The Rivers and Harbors Act

The Rivers and Harbors Act requires the Corps to maintain and protect navigable waters and to further interstate commerce. The 1890 version of the law gave the Corps the job of overseeing all construction in waterways that were used for transportation and commerce and, thus, were navigable. In 1899 Congress revised the Act to give the Corps the additional authority to also protect commerce in navigable streams and waterways.

Clean Water Act

The purpose of the Federal Water Pollution Control Act, commonly known as the CWA, is to protect the quality of the nation's waters for aesthetic, health, recreational, and environmental uses. The law is jointly enforced by the Environmental Protection Agency (EPA) and the Corps.

In writing the CWA Congress retained the term "navigable waters" from the Rivers and Harbors Act (e.g., Section 404 requires a permit for the discharge of dredged or fill material into such waters) and defined that term as "waters of the United States." Thus, the extent of regulation under the CWA is related to the definitions of "navigable waters" (33 *CFR* 329) and "waters of the United States" (33 *CFR* part 328).

In 1977 the Corps adopted a regulation containing a broad definition of "waters of the United States." That definition [33 *CFR* 328.3(a)] stated in subpart (3) that the following areas were "waters of the United States":

> . . . waters such as *intrastate* lakes, rivers, streams (including intermittent streams), mudflats, sandflats, *wetlands*, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation, or destruction of which could affect interstate or foreign commerce . . .

Since 1977, there have been many court cases questioning national wetlands policy and the limits of the Corps' jurisdiction under section 404. In 1985 the Supreme Court in *U.S.* v. *Riverside Bayview Homes* ruled that wetlands *adjacent* to waters of the United States were within the Corps' jurisdiction. But, it also noted that it was not deciding at that time whether the Corps had jurisdiction over *isolated* wetlands.

Adjacent is defined in 33 *CFR* 328.3(c) as

> ... bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes, and the like are "adjacent wetlands."

The Corps and EPA in 1986 and 1988, respectively, attempted to clarify the connection between isolated, intrastate wetlands (e.g., prairie potholes) and interstate commerce. An explanation in the preambles to their final regulations stated that hunting and viewing migratory birds were interstate economic activities. Thus, "waters that are or may be used as habitat by migratory birds are an example of waters whose use, degradation or destruction could affect interstate or foreign commerce." This statement became known as the "Migratory Bird Rule."

THE SWANCC DECISION

SWANCC

SWANCC was formed by a group of Illinois municipalities that wanted to jointly dispose of non-hazardous, solid waste. SWANCC planned to develop a waste-disposal facility on 410 acres of a 533-acre site it had purchased. That site, an abandoned sand and gravel pit, contained isolated, permanent and seasonal ponds that were used by over 100 species of birds, many of them migratory and dependent on aquatic habitats. The proposed project would have filled in 17.6 acres of ponds.

The Corps initially concluded that the property did not contain wetlands and, therefore, that it did not have jurisdiction over the project and a section 404 permit would not be needed. After learning that the ponds on the property were used by migratory birds, the Corps determined that such use brought the property within its jurisdiction. At that point the Corps denied SWANCC a section 404 permit to fill the isolated wetlands[1] because they provided habitat for migratory birds. When lower courts found in favor of the Corps, SWANCC appealed to the Supreme Court.

[1] "Wetlands with no apparent surface water connection to perennial rivers and streams, estuaries, or the ocean" (i.e., wetlands with no surface water outlet) are considered to be geographically isolated (Tiner et al. 2002). A recent U.S. Fish and Wildlife Service report (Tiner et al. 2002) provides a basic ecological and geographic introduction to the isolated wetland resources of the United States.

The Supreme Court's Decision

The Supreme Court ruled that the Corps did not have authority under section 404 over the isolated wetlands in question. The ruling restricted the Corps' jurisdiction over isolated, non-navigable, intrastate waters that traditionally have been included in the definition of "waters of the United States" under 33 *CFR* 328.3(a)(3). The Court did not strike down any of the regulations implementing section 404 or alter the definition of "waters of the United States." But it did strike down the Migratory Bird Rule that asserted jurisdiction over wetlands on the basis that they are or may be used as habitat by migratory birds. The Supreme Court concluded that regulation of isolated wetlands by the Corps could only be done if the wetlands had some connection to interstate commerce other than their use by migratory birds.

DEVELOPMENTS SINCE THE DECISION

EPA/Corps Joint Memo

On January 19, 2001, the counsels for EPA and the Corps issued a joint legal memorandum presenting their analysis of the SWANCC decision. In describing how the regulatory definition of "waters of the United States" was affected by the decision, they stated, "most CWA jurisdiction remains basically intact after the SWANCC decision."

The memo highlighted the fact that even though the SWANCC decision specifically involved only section 404 of the CWA, the "decision affects the scope of regulatory jurisdiction under other provisions of the CWA as well" (e.g., section 402 National Pollutant Discharge Elimination System program, section 311 oil spill program). Thus, their discussion applied to any CWA program that is based on the definition of "waters of the United States."

Their interpretation of the Court's finding was that it was strictly limited to waters that are "non-navigable, isolated, and intrastate." They stated that agency field staff should not rely on the use of waters or wetlands as habitat by migratory birds as the sole basis for asserting regulatory jurisdiction under the CWA. However, they also stated that the Court still recognized the CWA's assertion of jurisdiction over traditional navigable waters and their tributaries and the wetlands adjacent to them. Thus, for waters that are outside the category of "non-navigable, isolated, and intrastate," they said that field staff should continue to exercise CWA jurisdiction as they had before the SWANCC decision.

The memo noted that the "Court's opinion expressly reserved the question of what 'other waters' were intended to be addressed by CWA § 404(g)(1)... Factors not addressed in SWANCC may have a bearing on whether subsection (a)(3) may still be relied on as the basis for asserting CWA jurisdiction over certain 'other waters.'" The memo noted several questions that remain about the Corps' 404 jurisdictional authority including:

- Are there connections with interstate commerce that would make non-navigable, isolated, and intrastate waters fall under the CWA jurisdiction, other than use by migratory birds?
- With respect to waters that are navigable, even though they are isolated and intrastate (e.g., the Great Salt Lake), might CWA jurisdiction be possible if their use, degradation, or destruction could affect interstate or foreign commerce?

The memo recommended that agency legal counsel should be consulted when specific cases dealing with such issues arise.

The memo ended with a discussion of how to interpret the SWANCC decision in light of other Supreme Court and lower court precedents. It concluded, based on those considerations, that "... EPA and the Corps [can still] assert CWA jurisdiction over, *inter alia*, all of the traditional navigable waters, all interstate waters, and all tributaries to navigable or interstate waters, upstream to the highest reaches of the tributary systems, and over all wetlands adjacent to any and all of those waters."

Planned Joint Rulemaking

According to the Fall 2002 Unified Agenda of Federal Regulatory and Deregulatory Actions (67 *FR* 74216, December 9, 2002), EPA and the Corps are planning a joint rulemaking to amend the regulatory definition of "waters of the United States." The proposal would clarify the jurisdictional status under the CWA of isolated intrastate waters and wetlands based on the SWANCC opinion. According to EPA and the Corps:,

> Revision of the regulatory language is necessary to address the Court's decision, improve regulatory clarity, and provide more specificity regarding CWA jurisdiction. The rulemaking would clarify CWA jurisdiction for entities (e.g., industrial, commercial, governmental) that discharge pollutants, including dredged or fill material, to isolated intrastate surface waters or wetlands.

EPA and the Corps plan to issue a Notice of Proposed Rulemaking in the *Federal Register* in June 2003, with final action projected for February 2004.

Other Related Actions

In decisions since the Supreme Court's SWANCC decision, courts have continued to broadly define "waters of the United States." For example, 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. *Buday* [138 F. Supp. 2d 1282 (D. Mont. 2002)] the court held that the United States had jurisdiction to regulate a discharge to a tributary of a navigable water. (See Parenteau 2001 for references to additional cases.)

In addition, according to a report in the July 2001 issue of the National Wetlands Newsletter, the Corps has issued an internal memorandum, dated May 11, 2001, stating its interim policy that Corps' districts are to continue basing determinations on the local practices that were in effect prior to the SWANCC decision.

IMPLICATIONS FOR DOE FACILITIES

The implications of the SWANCC ruling for Federal agencies such as DOE are still unclear. Of major relevance will be how the ruling is interpreted and implemented by the Corps and EPA (e.g., how will they redefined the terms "adjacent," "tributary," and "navigable waters"). Subsequently, EPA and Corps guidance will likely be further interpreted by the courts.

New regulations to interpret the Court's ruling will not be finalized until at least early in calendar year 2004. Until then, if a DOE site has what appear to be isolated, non-navigable wetlands, DOE personnel should consult with DOE's General Counsel for guidance to ensure consistency throughout the DOE complex. If the wetlands have fallen under the Corps' 404 jurisdiction in the past *only* because they were used by migratory birds, then the site will likely not need a 404 permit. However, if the wetlands have other connections to navigable waters that make them waters of the United States, then a 404 permit may be needed for certain activities.

Wetlands that are "adjacent" to waters of the United States are not affected by the SWANCC decision. Thus, any such wetlands on a DOE site are still under the Corps' jurisdictional authority.

Waste treatment ponds or lagoons that were designed to meet CWA requirements are not waters of the United States (i.e., they are not within the Corps' jurisdiction) (40 *CFR* 122.2). However, EPA may take the position that some cooling ponds are waters of the United States. According to EPA's interpretation of the definition of "waters of the United States" at 40 *CFR* 122.2, a decision as to whether a "particular cooling pond is or is not 'waters of the United States' is to be made ... on a case-by-case basis, informed by the principles enunciated in [the SWANCC decision]." (See 67 *FR* 17129, April 9, 2002.)

Because more 404 permit applications will now be based on case-by-case evaluations than in the past, the length of time required to obtain such a permit may be longer than before. DOE planners should consider that factor when developing project schedules. Also, even if proposed DOE actions no longer require section 404 permits, they will still be subject to other requirements including the National Environmental Policy Act and DOE's regulations implementing it (10 *CFR* 1021); Executive Orders (EOs) dealing with wetlands, floodplain management, and protection of migratory birds; DOE's regulations implementing the wetlands and floodplains management EOs (10 *CFR* 1022); and CWA section 401 permits.

In conclusion, the SWANCC decision has eliminated the Migratory Bird rule by which the Corps asserted control over some isolated wetlands (i.e., waters that could affect interstate commerce solely by virtue of their use as habitat by migratory birds are no longer considered "waters of the Untied States"). As the foregoing indicates, the law applicable to water and wetlands is, from time to time, subject to change and reinterpretation by the courts. Accordingly, it would be wise to consult with appropriate regional or headquarters counsel as these issues arise to ascertain the state of the law.

Questions of policy or questions requiring policy decisions will not be addressed in EH-412 Information Briefs unless that policy has already been established through appropriate documentation. Please refer any questions concerning the subject material covered in this Information Brief to Lois Thompson, Office of Environmental Policy and Guidance, EH-412, (202) 586-9581; fax: (202) 586-3915; e-mail: Lois.Thompson@hq.doe.gov.