

***EPA and COE Issue Guidance
on Isolated Wetlands Authority
and Request Comments***

The United States Environmental Protection Agency (EPA) and the United States Army Corps of Engineers (COE) have issued an Advanced Notice of Proposed Rulemaking (ANPRM) for regulations to define the scope of wetlands that are subject to jurisdiction under the Clean Water Act (CWA) in light of the decision of the United States Supreme Court in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, (the SWANCC decision) [see “Supreme Court Says States Must Regulate Filling of Isolated Ponds,” *Michigan Environmental Compliance Update*, March 2001]. The ANPRM seeks early comment on issues associated with the scope of wetlands subject to CWA jurisdiction, but does not include any specific proposed rules. Concurrently with the ANPRM, EPA and COE issued guidance for regulators to follow in making CWA wetland jurisdiction decisions until regulations clarifying this issue are promulgated.

The SWANCC Decision

In the SWANCC decision, the Supreme Court held that CWA jurisdiction does not include isolated, intrastate, non-navigable waters that may serve as habitat for migratory birds. The majority opinion in the SWANCC decision, written by Chief Justice Rehnquist, held that Congress had not clearly indicated that it intended federal authority to extend to isolated ponds that had no connection to navigable waters. Justice Rehnquist relied heavily on the fact that Congress had used the term “navigable waters,” and reasoned that the word “navigable” was not simply surplus language. The Court also placed significant weight on the fact that the COE’s 1974 regulations, adopted only two years after the CWA had been enacted, defined “waters of the United States” to include only waterways which were either actually or potentially navigable.

The Court did not decide that Congress had no constitutional authority to authorize federal regulation of isolated wetlands; it simply said that the CWA, as now written, does not do so.

EPA and COE Guidance

In their guidance, EPA and COE noted that several federal court decisions have addressed the effect of the SWANCC decision on federal CWA jurisdiction, and that the caselaw on this issue is still developing. EPA and COE stated that their guidance is intended to add greater clarity concerning federal CWA jurisdiction after the SWANCC decision by identifying specific categories of waters, explaining which categories of waters are jurisdictional or non-jurisdictional, and pointing out where more refined factual and legal analysis will be required to make a jurisdictional determination.

Isolated, Intrastate Waters that are Non-Navigable

EPA and COE affirmed that the SWANCC decision squarely eliminates CWA jurisdiction over isolated waters that do not cross state lines and are not navigable where the sole basis for asserting CWA jurisdiction is the actual or potential use of the waters as habitat for migratory birds. EPA and COE also acknowledged that the SWANCC decision called into question whether CWA jurisdiction over such waters could be predicated on other factors that had previously been applied by EPA and COE, such as the use of the water as habitat for birds protected by migratory bird treaties, use of the water as habitat for federally protected species, use of the water to irrigate crops sold in interstate commerce, recreational use of the water by interstate or foreign travelers, the presence of fish or shellfish that could be harvested and sold in interstate commerce, and use of the water for industrial purposes.

In view of the SWANCC decision, neither EPA nor COE will assert jurisdiction over isolated waters that are both intrastate and non-navigable where the sole basis for asserting CWA jurisdiction is the use of the water as habitat for birds protected by migratory bird treaties, use of the water as habitat for federally protected species, or use of the water to irrigate crops sold in interstate commerce. In addition, EPA and COE field staff are instructed to seek formal project-specific approval from EPA and/or COE headquarters prior to asserting jurisdiction over isolated, intrastate, non-navigable waters based on recreational use of the water by interstate or foreign travelers, the presence of fish or shellfish that could be harvested and sold in interstate commerce, or use of the water for industrial purposes.

Traditional Navigable Waters

The EPA and COE guidance states that traditional navigable waters, which include waters that are subject to the ebb and flow of tides and waters that are currently used, have been used in the past, or may be susceptible for use to transport interstate or foreign commerce, remain subject to jurisdiction under the CWA. Therefore, isolated, intrastate waters that are capable of supporting navigation by watercraft are included within the jurisdiction of the CWA.

Adjacent Wetlands

The EPA and COE guidance states that the SWANCC decision does not change the principle established in previous Supreme Court decisions that wetlands adjacent to traditional navigable waters are within the jurisdiction of the CWA. EPA and COE currently define “adjacent” 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 EPA and COE guidance notes that the United States Supreme

Court has not provided its own definition of “adjacent” in this context and has not ruled on the validity of the EPA and COE definition.

Tributaries

The EPA and COE guidance notes that several court decisions have held that the SWANCC decision does not change the principle that CWA jurisdiction includes tributaries to navigable waters and, by extension, to wetlands that are adjacent to tributaries. The EPA and COE guidance also notes, however, that several court decisions have relied on the SWANCC decision to hold that CWA jurisdiction includes only navigable waters and adjacent wetlands and does not include non-navigable tributaries or wetlands adjacent to non-navigable tributaries. Moreover, the EPA and COE guidance notes that, even among courts that have ruled that CWA jurisdiction includes tributaries, different courts have reached differing conclusions depending on whether the tributaries flow through ditches, culverts, pipes, storm sewers or similar man-made conveyances and depending upon whether the tributaries flow consistently or intermittently.

The EPA and COE guidance does not offer any analysis of these differing court decisions, but does conclude that field staff should, “generally speaking,” assert federal jurisdiction over tributaries to navigable waters and wetlands adjacent to tributaries.

Conclusion

EPA and COE extended the period for the public to submit comments on regulations to clarify the scope of waters that are subject to jurisdiction under the CWA until April 16, 2003. Until new rules defining waters subject to CWA jurisdiction are promulgated, EPA and COE have issued guidance stating that federal jurisdiction should not be asserted over isolated waters that are both intrastate and non-navigable where the sole basis for asserting CWA jurisdiction is the use of the water as habitat for birds protected by migratory bird treaties, use of the water as

habitat for federally protected species, or use of the water to irrigate crops sold in interstate commerce. In addition, EPA and COE field staff are instructed to seek formal project-specific approval from EPA and/or COE headquarters prior to asserting jurisdiction over isolated, intrastate, non-navigable waters based on recreational use of the water by interstate or foreign travelers, the presence of fish or shellfish that could be harvested and sold in interstate commerce, or use of the water for industrial purposes.

The EPA and COE guidance instructs field staff to continue to assert jurisdiction over traditional navigable waters, wetlands adjacent to navigable waters and, “generally speaking,” their tributary systems and wetlands adjacent to tributaries. 68 Fed. Reg. 1991 (January 15, 2003).

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