

**THE SWANCC DECISION**  
**AND**  
**STATE REGULATION OF WETLANDS**

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*This memorandum was prepared to help states understand and respond to the SWANCC decision. It is being posted to our web page—[www.aswm.org](http://www.aswm.org). It may be distributed or quoted with credit. A draft of the memorandum was distributed to thirty states. The comments and suggestions of state staff and others pertaining to the draft which were submitted to us are much appreciated. We welcome any further comments, corrections, improved estimates of “isolated” wetland acreage, or copies of proposed or adopted state or local statutes, rules, or regulations to address isolated wetlands. We are presently working on a model state wetland statute for states considering new legislation and welcome help. Thanks!*

**INTRODUCTION**

On January 9, 2001 the U.S. Supreme Court issued a decision, Solid Waste Agency of Northern Cook County (SWANCC) v. United States Army Corps of Engineers (Slip Opinion, No. 99-1178, October Term, 2000) ; herein referred to as *SWANCC v. USACOE*) that limits the scope of the United States Army Corps of Engineers (Corps) Clean Water Act regulatory permitting program (Section 404) as applied to isolated waters. By narrowing the water and wetland areas subject to federal regulation, the decision also narrows the areas and activities subject to Clean Water Act Section 401 programs which requires State approval for federally permitted activities. It partially narrows the areas and activities subject to State CZM consistency review. It partially limits the areas and activities addressed by State 404 “assumption” programs and by State Programmatic Permits.

It potentially removes much of the Clean Water Act protection for 30% to 60% of the Nation’s wetlands. A preliminary estimate from Wisconsin suggests that approximately 79% will be removed in that state. Nebraska estimates more than 40%. Indiana estimates 31% of acreage and 74% of total number of wetlands. Delaware estimates 33% or more of the freshwater wetlands, depending whether connections through drainage ditches qualify wetlands as tributary or adjacent. However, the amount removed will depend upon the definitions used by the Corps and EPA and ultimately supported by the courts for, “adjacent”, “tributary”, and “significant nexus”. See discussion below.

The decision affirms the “primary responsibilities and rights of the States” over land and waters. But, by narrowing the federal Section 404 program, the decision also shifts more of the economic burden for regulating wetlands to states and local governments.

Will existing state and local wetland regulations fill the gap in federal regulations? What options exist for filling the gap? What could Congress and the federal agencies do to help the states and local governments to fill this gap? What does this decision mean to the states?

The following discussion first describes the SWANCC decision and its implications for federal Clean Water Act regulation of wetlands. Next it considers the ability of existing state and local regulations to regulate waters that may no longer fall under federal Clean Water Act jurisdiction. It concludes with a discussion of options for filling the gap and the possible implications of the decision to the states.

## **THE DECISION**

### **Facts**

In the case, Chief Justice Rehnquist, writing for the majority of a narrowly divided Court (a 5-4 decision), held that the Corps' denial of a Section 404 permit to the Solid Waste Agency of Northern Cook County to fill several permanent and seasonal ponds that served as a heron rookery was invalid because the Corps lacked jurisdiction over these ponds under Section 404(a) of the Water Pollution Control Amendments of 1972 and the Clean Water Act of 1977. These ponds were located on a 533-acre parcel purchased by a consortium of 23 suburban cities and villages as a disposal site for nonhazardous solid waste. The site was an abandoned sand and gravel pit operation that had reverted to a successional forest. Remnant excavation ditches had evolved into a scattering of permanent and seasonal ponds varying in size from under one tenth of an acre to several acres and from several inches to several feet deep.

SWANCC had sought and received a number of state and local permits. These included a special use planned development permit from the Cook County Board of Appeals and from the Illinois Department of Conservation. SWANCC also secured water quality certification from the Illinois Environmental Protection Agency.

SWANCC also sought a Section 404 permit from the Corps, who initially concluded that it had no jurisdiction over the site because it contained no "wetlands", or areas which support "vegetation typically adapted for life in saturated conditions." (Slip Opinion) However, the Illinois Nature Preserves Commission informed the Corp that a number of migratory bird species had been seen at the site. The Corps ultimately found that approximately 121 bird species had been observed at the site, including "several known to depend upon aquatic requirements for a significant portion of their life requirements." (Slip Opinion) The Corps reconsidered its initial conclusion and in 1987 formally determined that the area, while not wetlands, qualified as "waters of the United States" pursuant to the Migratory Bird Rule (see below). The Corps refused to issue a Section 404 permit because it concluded that SWANCC had not established that its proposal was the "least environmentally damaging, most practical alternative"; that SWANCC's failure to set aside sufficient funds to remediate leaks posed "an unacceptable risk to the public's drinking water supply"; and that project impact upon "area-sensitive species was unmitigatable since a landfill surface cannot be redeveloped into a forested habitat." (Slip Opinion)

SWANCC filed suit against the Corps in federal District Court claiming that the Corps did not have jurisdiction. The District Court ruled for the Corps on this issue. SWANCC then appealed the jurisdictional determination to the U.S. Court of Appeals for the Seventh Circuit which also ruled in favor of the Corps. SWANCC next appealed to the U.S. Supreme Court which accepted the case and overturned the District Court and Court of Appeals and ruled in favor of the consortium.

Specifically, the Supreme Court (Court) held that the Corps' "Migratory Bird Rule" which the Corps had adopted in 1986, exceeded the authority granted to the Corps by Congress in Section 404(a) and that Corps jurisdiction over these ponds was lacking. The "Migratory Bird Rule" was an administrative interpretation stating that the presence of migratory bird aquatic habitat was sufficient to make such aquatic habitat jurisdictional under 33 CFR 328(a)(3), which provides for Clean Water Act jurisdiction over "other waters" based upon Commerce Clause. The Court held that Congress did not intend Section 404(a) to regulate such isolated waters based solely upon the use of such waters by migratory birds.

The Corps had issued regulations in 1977 defining the term "waters of the United States" to include:

"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..." 33 CFR 328.3(a)(3) (1999).

In an attempt to clarify its jurisdiction, the Corps adopted what had been dubbed the Migratory Bird Rule. This Rule provided, in part, that Section 404(a) jurisdiction extended to intrastate waters:

- "a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or
- b. Which are or would be used as habitat by other migratory birds which cross state lines...51 Fed. Reg. 41217.

### **The Majority Opinion**

SWANCC urged the Court to hold that Congress did not intend Section 404(a) to apply to the isolated waters like those in this case based on their use by migratory birds. Justice Rehnquist, writing for a 5-4 majority, agreed. The Court struck down the application of the "Migratory Bird Rule" to assert Clean Water Act jurisdiction over isolated, nonnavigable, intrastate waters that are not tributary or (in the case of wetlands) adjacent to navigable waters or tributaries.

SWANCC also urged the Court to hold that Congress lacked the power to regulate isolated waters under the Commerce Clause of the U.S. Constitution but the Court refused to do so although the Court did indicate a strong concern with this issue.

In reaching its decision, the Court stated that a “clear indication” of Congressional intent would have been needed for the Corps to regulate isolated waters. The Court suggested that such a clear indication of intent was needed “where an administrative interpretation of a statute invokes the outer limits of Congress’ power.” The Court also observed that the “concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power.” (Slip Opinion). Finding that there was not a clear indication of Congressional intent, the Court declined to interpret the statute as allowing jurisdiction to be asserted over isolated waters based solely on the basis of their use as migratory bird habitat.

The Court rejected arguments that the Corps had sufficiently broad discretion to issue the Migratory Bird Rule based upon the broad definition of “waters of the United States” contained in the 1972 Water Pollution Control Amendments and comments by members of the Senator and House in the Congressional Record indicating that these Amendments should have the broadest possible interpretation in order to implement a comprehensive water pollution control scheme for the Nation. The Court rejected arguments that Congress endorsed the Corps’ interpretation of the 1972 Amendments to apply Section 404 to isolated wetlands and waters by defeating a proposed House Bill in 1977 which would have restricted the scope of the Corps’ authority. The Court rejected arguments that 1977 Clean Water Act amendments exempting some activities and isolated waters and wetlands from regulation and providing a mechanism to delegate to the states power to regulate waters and wetlands other than traditionally navigable waters indicated Congressional intent to regulate such isolated waters and wetlands. In reaching its decision, the Court also observed that “permitting respondents to claim federal jurisdiction over ponds and mudflats falling within the ‘Migratory Bird Rule’ would result in significant infringement of the States’ traditional and primary power over land and water use.”

### **Waters Regulated by Section 404**

Although the Court held that the Migratory Bird Rule was invalid, it failed to make clear what waters and wetlands are regulated by Section 404(a). It did provide, in discussing various legal points in the case, some helpful but not entirely consistent hints.

The Court several times quoted from its earlier decision, *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985) in which the Court held that the Corps had sufficient power under Section 404(a) to regulate wetlands adjacent to navigable waters. The Court, in citing *Riverside Bayview Homes*, observed that in this case “we recognized that Congress intended the phrase ‘navigable waters’ to include ‘at least some waters that would not be deemed “navigable” under the classical understanding of that term.” Referring to *Riverside Bayview Homes*, the Court “found that Congress’s concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands ‘inseparately bound up with the “waters of the United States.’” The Court also observed that “It was the significant nexus between the wetlands and ‘navigable waters’ that informed our reading of the CWA (Clean Water Act) in *Riverside Bayview Homes*.” In addition, the Court observed: “We said in *Riverside Bayview Homes* that the word ‘navigable’ in the statute was of ‘limited effect’ and went on to hold that Section 404(a) extended to nonnavigable wetlands adjacent to open waters. But it is one thing to give a word limited effect and quite another to give it no effect whatever.”

How, then, might the Corps and EPA revise their regulations in light of this decision to give the term “navigable” in Section 404(a) “limited effect” but more than “no effect”? Unfortunately, the Court provides contradictory additional suggestions as to how this could be accomplished. At one point in the case the Court suggests a very narrow definition of included waters might be appropriate by stating that “(r)espondents put forward no persuasive evidence that the Corps mistook Congress’ intent in 1974” when it adopted initial regulations (which were later revised) limiting the Corps’ Section 404 jurisdiction to traditionally navigable waters. However, such reading would give the term “navigable” controlling effect rather than “limited effect”. And, the Court endorsed at least regulation of wetlands adjacent to traditionally navigable waters although its endorsement is somewhat roundabout. For example, the Court states that “(i)n order to rule for the respondents here, we would have to hold that the jurisdiction of the Corps extends to ponds that are not adjacent to open water. But, we conclude that the text of the statute will not allow this.”

The majority decision also does not explicitly affirm the Corps’ regulation of tributaries and wetlands adjacent to tributaries in addition to traditionally navigable waters and their adjacent wetlands. However, if the decision is read to not only limit the Corps’ jurisdiction for isolated wetlands but also tributaries and adjacent wetlands, Congress would then have adopted meaningless legislation when it adopted 404(g) in 1977. Section 404(g) authorizes EPA to approve state programs for “discharge of dredged or fill material into the navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce..., including wetlands adjacent thereto”. If Corps’ jurisdiction were limited only to traditionally navigable waters and their adjacent wetlands, the statute would have nothing to delegate to the states.

What does this all mean?

In his dissent, Justice Stevens characterizes the decision as “one that invalidates the 1986 migratory bird regulation as well as the Corps’ assertion of jurisdiction over all waters except for actually navigable waters, their tributaries, and wetlands adjacent to each.” Although this is a possible (and fair) overall reading of the decision, the majority decision provides no explicit inclusion of tributaries (as Stevens suggests). On the other hand, the majority decision that quotes the *Riverside Bayview Homes* language above could also be interpreted to include additional wetlands “inseparably bound up with the ‘waters of the United States’” and wetlands with a “significant nexus between the wetlands and ‘navigable waters’”. This opens the door for inclusion of at least some wetlands and waters that are not adjacent, tributary, or adjacent to tributaries but have a significant nexus to navigable waters for water quality, flood storage and conveyance, navigation or other purposes.

On January 19, 2001, the General Counsel of EPA and the Chief Counsel of the Corps issued a memorandum providing the agencies’ legal interpretation of Clean Water Act jurisdiction in light of SWAANC (available at <http://www.epa.gov/owow/wetlands/>). This memorandum was broadly disseminated to the public and Corps and EPA field staff. EPA and the Corps will need to provide additional guidance on the meaning of key terms in the SWAANC opinion such as “significant nexus”, “adjacent”, and “tributary”. These interpretations will likely be tested in the courts over the upcoming months and years.

## The Dissenting Opinion

Justice Stevens in a well-reasoned and detailed dissenting opinion flatly contradicts the majority opinion on most major points. He was joined in this dissent by Justices Souter, Ginsburg, and Breyer.

Justice Stevens points out at the beginning of the dissent that the Water Pollution Control Amendments of 1972 and subsequent Clean Water Act Amendments are “watershed” legislation rather than simply an extension of earlier federal regulation of navigable waters that concerned navigability. He supports this position by extensively examining the legislative history as well as the goals and previous legal interpretations of the Act.

Citing a great deal of legislative history, Justice Stevens argues that the “text” of the 1972 Water Pollution Control Amendments “affords no support for the Court’s [present] holding, and amendments Congress adopted in 1977 do support the Corps’ present interpretation of its mission as extending to so called ‘isolated’ waters.” He argues that “(i)ndeed simple common sense cuts against the particular definition of the Corps’ jurisdiction favored by the majority.” He further argues that “(n)othing in the text, the stated purposes, or the legislative history of the CWA supports the conclusion that in 1972 Congress contemplated—much less commanded—the odd jurisdictional line that the Court has drawn today.” (Slip Opinion)

Justice Stevens also examines with care the legislative history and content of the 1977 Clean Water Act. In arguing that Congress intended to endorse the Corps’ regulation of isolated waters in adopting the 1977 Act, he quotes from the joint Senate and House Conference Report pertaining to Section 404(g)(1) which was added in 1977. This Section authorizes state “assumption” of Corps permitting authority for some waters. The Conference Report states that Congress intended state “assumption” for phase 2 and phase 3 waters (isolated waters). He argues that “it is the majority’s [of the Court] reading, not the agency’s, that does violence to the scheme Congress chose to put in place.”

He also argues that the present decision is partially inconsistent with *Riverside Bayview Homes* in terms of Congressional intent, yet that the majority of the Court refuses to acknowledge these inconsistencies in citing the decision. He notes that the Supreme Court in *Riverside Bayview Homes* unanimously endorsed the Corps’ jurisdiction as applied to an 80-acre parcel of low-lying marshy land, part of a larger area that ultimately abutted a navigable creek. He observed (footnote 2) that “this Court found occasional surface runoff from the property into nearby waters to constitute a meaningful connection.”

He also argues on the more fundamental question of the scope of Commerce Clause (which the majority did not directly consider) that “(t)he Corps’ exercise of its Section 404 permitting powers over ‘isolated’ waters that serve as habitat for migratory birds falls well within the boundaries sets by this Court’s Commerce Clause jurisprudence.” He observes that “no one disputes that the discharge of fill into ‘isolated’ waters that serve as migratory bird habitat will, in the aggregate, adversely affect migratory bird populations.” He argues that “(i)n addition to the intrinsic value of migratory birds..., it is undisputed

that literally millions of people regularly participate in birdwatching and hunting and that those activities generate a host of commercial activities of great value.” He concludes:

The power to regulate commerce among the several States necessarily and properly includes the power to preserve the natural resources that generate such commerce....Migratory birds, and the waters on which they rely, are such resources. Moreover, the protection of migratory birds is a well-established federal responsibility. As Justice Holmes noted in *Missouri v. Holland*, the federal interest in protecting these birds is of ‘the first magnitude.’...Because of their transitory nature, they ‘can be protected only by national action.’ Ibid.”

## **CHANGES IN THE WETLANDS SUBJECT TO REGULATION**

Prior to SWANCC, virtually all wetlands throughout the Nation were (at least theoretically) subject to regulation under Section 404. Some were also regulated by state and local governments as will be discussed below. The impact of SWANCC on wetland areas subject to Section 404 and state Section 401 regulations will depend, in part, upon the Corps’ and EPA’s interpretation of the SWANCC decision and subsequent court decisions. As discussed above, the agencies have issued a legal memorandum interpreting Clean Water Act jurisdiction in light of SWANCC.

### **Changes in Federally Regulated Wetlands**

If only traditionally navigable waters and their adjacent wetlands were regulated under Section 404 (a very restrictive reading of *SWANCC v. USACOE*), perhaps as little as 20% of the Nation’s wetlands would be subject to federal regulation. Under this scenario, wetlands regulated under the Clean Water Act would primarily include river fringing wetlands for larger rivers and streams, lake fringing wetlands for larger lakes, and coastal and estuarine fringing wetlands. It is to be noted that the Section 404 regulations are reduced in scope by *SWANCC v. USACOE* on both private and public lands including the one-third of the Nation’s lands in federal ownership. Federal agency decisions on these lands affecting isolated wetlands will no longer be subject to Section 404 permitting although they will be subject to NEPA requirements and the Wetland and Floodplain Executive Orders and the recently published Migratory Birds Executive Order.

Major wetland types not regulated under this scenario would include prairie potholes, wet meadows, river fringing wetlands along small, nonnavigable rivers and streams, lake fringing wetlands for smaller nonnavigable lakes, many forested wetlands, playads, vernal pools, seeps and springs, flats, bogs and large amounts of tundra in Alaska. However, the amount actually excluded would depend upon the interpretation of “adjacency”. If an inclusive definition of adjacency is applied (e.g., the 100 year floodplain), many floodplain wetlands like those along the Mississippi may be regulated and the total Section 404 regulated wetlands could range from 30% to 40% of the Nation’s wetlands.

If the Corps and EPA were to regulate not only navigable waters and their adjacent wetlands but also tributaries and wetlands adjacent to tributaries (the interpretation suggested by Justice Stevens and the most reasonable interpretation of the decision), the total Section 404 regulated wetlands will likely increase to 40%-60% or more. But, this will also depend, in part, how the key terms “tributary” and “adjacency” are defined by

the Corps and EPA and subsequently interpreted by the courts. For example, if “tributary” were narrowly construed to only include only perennial streams, much less riverine and headwater wetland would be included. On the other hand, if “tributary” were broadly construed to include infrequent surface water connections including not only streams but water flowing along the surface during flood events, a great deal of riverine, depression, slope and other wetland types could be included as “waters of the U.S.” and the total be 60% or more. The definition of “adjacency” will also be very important as suggested above.

Major wetland types along tributaries include most fringe wetlands along smaller rivers and streams, some prairie potholes and other depressions that periodically overflow, some vernal pools, some seeps and springs, some forested wetlands and flats, some tundra, and some bogs. There would continue to be many unregulated prairie potholes, playas, vernal pools, slope and seep wetlands, nonnavigable lake fringing wetlands, forested wetlands, wet meadows, bogs, and tundra unless extremely broad definitions of “adjacency” and “tributary” were applied.

However, some additional wetlands with a “significant nexus” to navigable waters wetlands might be regulated even if they are not tributary or adjacent. For example, some prairie potholes might be included that periodically store and discharge flood waters to tributaries even if they are not in themselves tributary or adjacent. But, documentation of such nexus would likely need to be made on a case-by-case basis.

Which scenario for “waters of the U.S.” will unfold remains to be seen. It will depend upon Corps and EPA interpretations and the willingness of courts to accept those interpretations. As a result, accurate estimates of the impact of SWANCC on wetland resources are not possible. However, SWANCC’s impacts are likely to be environmentally significant. Tentative state estimates which have been provided to the Association of State Wetland Managers suggest 30% to 79% of total wetland acreage may be affected. See discussion above. This is considerably higher than the 15% to 20% figure often suggested for isolated wetland acreage in the past years. Even if SWANCC results in only a one percent loss of America’s wetlands, the decision would cause more wetlands to be destroyed than were lost in the past decade.

### **Do Existing State and Local Regulations Fill the Gaps?**

State and local wetland regulations will partially fill the gap in federal wetland regulation for isolated wetlands in fourteen states. Little protection will be provided in the rest.

State and local wetland regulatory programs throughout the Nation focus primarily upon navigable waters (using state tests for navigability), tributaries, and adjacent wetlands. See generally, Kusler, Jon et. al. 1995. State Wetland Regulation: Status of Programs and Emerging Trends, Association of State Wetland Managers, Berne, N.Y. 12023; Kusler, Jon and Richard Hamann. 1985. Wetland Protection: Strengthening the Role of the States. Proceedings of a National Symposium. Univ. of Florida College of Law, Gainesville. Association of State Wetland Managers, Berne, N.Y. 12023; Want, William. 1989 and 2000 revised edition. The Law of Wetland Regulation. Clark Boardman, New York, New York. World Wildlife Fund. 1992. Statewide Wetlands Strategies, A Guide to Protecting and Managing the Resource. Island Press, Washington, D.C. These programs



will continue to regulate many of same activities regulated by the Section 404 program for these waters and wetlands as described more specifically below. Some will continue to regulate a broader range of activities and will regulate more stringently than the Section 404 program for these wetlands and waters.

**State regulatory programs for isolated freshwater wetlands.** State and cooperative state/local regulatory programs for isolated waters and freshwater wetlands are limited in thirty-five states due to lack of basic enabling statutes or lack of funding and staff for existing regulatory efforts. Fifteen states provide considerable protection for isolated freshwater wetlands including Maine, Connecticut, New Hampshire, Rhode Island, Massachusetts, Vermont, New York, New Jersey, Maryland, Virginia, Florida, Minnesota, Michigan, Pennsylvania, and Oregon. Most of these programs are, with the exception of New Jersey, New Hampshire, Pennsylvania, and Rhode Island, cooperative state/local regulatory efforts where much of the actual regulation is achieved in cooperation with local governments. Some of the programs are very comprehensive and regulate virtually all wetlands such as New Hampshire, New Jersey, Maine and Pennsylvania. However, regulations are limited in many of the fourteen states by wetland size (e.g., 12.4 acres in New York, 5 acres in Michigan for some wetlands), mapping requirements, and exemptions for agriculture and other activities. State regulations do not generally apply to federal lands (one third of the Nation's land). The *SWANCC v. USACOE* decision will also substantially cut back State protection of such wetlands pursuant to Section 401 programs as discussed below.

A number of additional states such as California and Washington regulate discharges into wetlands pursuant to comprehensive pollution control statutes. However, these states have not established independently staffed and funded wetland regulatory efforts. To date, these states have relied primarily upon Section 401 water quality certification for Section 404 permits to gain a measure of state control.

The thirty five states without staffed and funded wetland protection programs provide little independent protection for isolated wetlands although some limited protection may be provided through critical area statutes and local land planning and management programs. A small number of local governments in these states have also adopted wetland protection regulations.

Little or no state protection is provided in the states with some of the largest isolated wetland acreages such as Alaska, Louisiana, Texas, North Dakota, South Dakota, South Carolina, North Carolina, Georgia, Nebraska, Kansas, and Mississippi.

**State programs for freshwater wetlands adjacent to tributaries.** Twenty-five states provide a least partial regulation for freshwater wetlands adjacent to tributaries. These include the 15 states listed above which regulate isolated wetlands. They also include other states which provide some measure of protection for wetlands adjacent to tributaries through shoreland or shoreline zoning (Wisconsin, Washington State), state land use controls (Hawaii), drainage laws (North Dakota) and a number of states which regulate wetlands under pollution control statutes (e.g., California, Nebraska, Indiana, Nebraska, South Carolina, Ohio). The latter vary greatly in scope. Most of these regulatory efforts lack comprehensiveness because they apply only to wetlands within "shoreline" or "shoreland" or other designated areas. Many of these wetland regulatory programs also

limit regulation based on size (e.g. 12.4 acres in New York) as noted above. Most of these programs are, in fact, cooperative state/local programs (e.g., New York, Massachusetts, Maine, Connecticut, Florida, Oregon). Many but not all local governments in these states have adopted wetland protection overlay zones, conservancy zoning, or other regulations for at least a portion of the wetlands adjacent to tributaries.

The remaining twenty-five states provide little or no protection for freshwater wetlands adjacent to tributaries other than through critical area statutes and local land planning and management programs mentioned above. Some local governments have adopted regulations for wetlands adjacent to tributaries.

**State regulatory programs for freshwater wetlands adjacent to traditionally navigable waters (federal test) and state navigable waters.** The twenty-five states which provide some measure of regulatory protection for wetlands adjacent to tributaries also provide even greater protection for wetlands adjacent to navigable waters (applying state tests of navigability). State and local protection is, in many instances, more comprehensive and stringent for wetlands adjacent to navigable waters than for wetlands adjacent to tributaries because navigable waters (and to a lesser extent adjacent wetlands) are, in many states, partially owned by the public or subject to state “public trust.” Many local governments have also adopted wetland protection regulations for freshwater wetlands adjacent to navigable waters. Other states (in addition to the twenty one) provide some protection for wetlands adjacent to navigable waters through floodplain regulations, river and stream protection, dam safety, critical area, water quality, state public trust, and other regulatory programs. However these programs are usually limited in objectives and geographical scope.

**State programs for coastal and estuarine wetlands.** All coastal states including the Great Lake states provide some sort of state or state/local protection for coastal and estuarine wetlands through coastal wetland regulation statutes and programs (e.g., Massachusetts, Georgia), shoreline or shoreland zoning statutes and programs (e.g., Wisconsin, Minnesota, Washington), coastal zone management statutes and programs (e.g., California, North Carolina), or public water statutes and programs (e.g., Texas). These programs will also continue to apply to many of the same waters as the Section 404 program--traditionally navigable coastal and estuarine waters and adjacent wetlands. Often these state programs regulate or partially regulate some activities (e.g., drainage) not regulated or only partially regulated by the federal program. In some instances, coastal zone programs regulate some freshwater and isolated wetlands within a broadly defined coastal zone in addition to coastal and estuarine wetlands inundated by the tides. The scope of coverage of these programs varies greatly from broad coastal zone programs including not only estuarine and coastal wetlands but some isolated wetlands (e.g., Wisconsin, North Carolina) to more restrictive programs applying only to public waters such as the Texas statute.

## **IMPACT OF SWANCC V. USACOE ON STATE SECTION 401 PROGRAMS, STATE ASSUMPTION, STATE CZM CONSISTENCY REVIEW, AND STATE PROGRAMMATIC PERMITS**

The scope of State Section 401 programs depends upon the scope of federal regulatory permitting authority. State Section 401 oversight for activities in isolated wetlands and other waters will be substantially reduced as the Section 404 jurisdiction is reduced.

The impact upon wetland protection will be particularly great in the thirty-six states lacking comprehensive freshwater wetland regulatory programs. In these states, state wetland regulatory protection has been primarily achieved through Section 401 water quality certification procedures. Pursuant to Section 401 of the Water Pollution Control Amendments of 1972, applicants for a federal permit must also receive state water quality certification. The states have “veto” power on the federal permit and quite often condition certification. These conditions become part of a permit. State Section 401 water quality certification programs have also been important in states with explicit tidal and freshwater wetland regulatory statutes in filling the gaps in these programs.

State water quality certification for federal permits has allowed many states to exercise a significant measure of regulatory control over wetlands without the expense of establishing independent state permitting, monitoring, and enforcement programs. This has been particularly important in states with limited wetlands and limited budgets. With the Corps’ Section 404(a) jurisdiction reduced, states will need to adopt their own independent programs if they wish to maintain a pre-SWANCC level of wetland protection.

*SWANCC v. USACOE* will also somewhat affect state “assumption” under Section 404(g) as indicated above. States will have much less to “assume” from the federal government. Under Section 404(g) states can “assume” Section 404(a) permitting power for waters other than traditionally navigable waters and adjacent wetlands. Prior to *SWANCC v. USACOE* the states could assume permitting for tributary waters and their adjacent wetlands and isolated waters and their adjacent wetlands. With the Section 404 jurisdiction no longer applicable to isolated waters and their adjacent wetlands, the only remaining “assumable” waters may be the tributary waters and wetlands adjacent to tributaries. This will reduce the incentive for state assumption by other states. In addition, existing assumption agreements may need to be partially rewritten although these changes will not be great. Only two states—Michigan and New Jersey—have assumed the Section 404 program and both states have adopted comprehensive state wetland programs.

*SWANCC v. USACOE* will also affect state/Corps programmatic permitting agreements. Agreements may need to be partially rewritten because the Corps will no longer oversee state regulation of isolated waters and wetlands. However, changes will not be great in most states.

Finally, the scope of state Coastal Zone Management consistency review will be somewhat reduced in coastal states because activities in some isolated wetlands will no longer be subject to Section 404 permitting.

## FUTURE OPTIONS

There are a number of actions that could be undertaken at the national, state, and local level in response to the Supreme Court decision. A short list of options is provided below.

--**EPA and the Corps adoption of revised regulations.** EPA and the Corps will first need to adopt revised definitions of waters of the U.S. Revised definitions should be consistent so that interpretations of “regulated waters” do not vary greatly for one Corps district to another. Substantially different interpretations will not only be unfair to landowners but create administrative nightmares for States with two, three, or more Districts. In redrafting guidance, EPA and the Corps will need to approach the concepts of “tributary” and “adjacency” with care to insure that wetlands with a substantial relationship or nexus (water quality, flood storage, flood conveyance, ground water recharge, etc.) to navigable waters and their tributaries continue to be regulated by the Section 404 program as well as navigable waters tributaries, adjacent wetlands, and interstate waters and wetlands.

--**Leadership from the Bush Administration.** The White House could help fill the gap in federal regulations and support state and local regulations in several ways. It could require that the individual Corps districts and EPA provide coordinated responses and guidance concerning the scope Clean Water Act jurisdiction. This is much needed. It could require that federal agencies carefully comply with the Wetlands Executive Order for activities on federal lands including alternatives analysis and mitigation requirements. The Order might also be amended to more specifically address protection of isolated wetlands of federal lands. The White House could support increased funding for state programs and incentive programs for landowners, also much needed. It could work with Congressional committees to develop remedial legislation of the sort suggested below.

--**Congressional adoption of an amendment to Section 404.** Congress could amend Section 404 to make clear that Section 404 (and the Clean Water Act more generally) applies to isolated wetlands and waters. Whether this would be considered Constitutional by the Supreme Court remains to be seen although it seems likely such an amendment could be upheld if criteria were included for regulated wetlands that clearly established links (“significant nexus”) between isolated wetlands and waters and traditionally navigable waters and their tributaries (particularly hydrologic and water quality links) and if the roles of the states and local governments states were more clearly and specifically spelled out with a more explicit sharing of powers. Such an amendment might also invoke treaty powers (i.e. protection as necessary to implement migratory bird treaties to which the U.S. is a party) as well as the Commerce Clause to provide a Constitutional basis for regulation.

Federal agencies with wetland maps and data bases such as the Fish and Wildlife Service, Natural Resources Conservation Service, National Oceanic and Atmospheric Administration, and Environmental Protection Agency could aid Congress in more accurately evaluating the impact of SWANNC and alternative amendment strategies by determining the acreage, numbers, and types of “isolated” wetlands which are encompassed by different interpretations for key terms such as tributary and adjacent. This could be done by applying alternative definitions (scenarios) for the terms

“adjacent” and “tributary” in carrying out wetland map and digital data analyses. For example, alternative acreage and number figures could be developed with “tributary” defined to include permanent streams or, alternatively, perennial and permanent streams. “Adjacency” might be alternatively defined to include wetlands within 1,000 meters, wetlands within 3,000 meters, wetlands within 10,000 meters, wetlands within the 100 year floodplain, or all wetlands as long as they are continuous from a navigable water body or tributary.

With alternative estimates concerning wetland acreages, numbers and types in hand, federal and state agencies could then project impacts upon functions and values. They could also better evaluate the need for and implications of possible statutory amendments.

--**Congressional adoption of broader wetlands legislation.** Congress could adopt more sweeping wetland and broader water and wetland regulatory provisions to replace Section 404. The U.S. Supreme Court might be particularly sympathetic to a comprehensive wetland statute tied into broader water quality protection and more explicitly involving states and local governments in a power-sharing arrangement. These provisions could not only address isolated wetlands but clarify federal/state/local roles including state assumption and programmatic permits for all wetlands. Background surveys concerning the impact of SWANNC on wetland resources of the sort suggested above could aid these efforts as well.

--**Congressional continuation and enhancement of landowner incentive programs.** Congress could continue and enhance the Wetland Reserve Program and other private landowner incentive programs to encourage protection of isolated wetlands through acquisition and easements rather than regulations. States and local governments could also more specifically target threatened isolated wetlands for acquisition or easements.

--**Congressional increase in funding of the state wetland grant program.** Congress could increase the present \$15-17 million per year EPA state wetland grant program to help states establish and implement wetland programs for isolated wetlands. Some increase in funds is essential if states are to take over some of the Corp’s wetland permitting, monitoring, and enforcement roles.

--**Congressional and federal agency increase in federal technical assistance.** Congress could fund and federal agencies could update and expand wetland mapping, technical assistance, and funding to states and local governments to help them establish and implement wetland regulatory programs for isolated and other wetlands.

--**State amendment of water quality statutes and regulations to include wetlands.** State legislatures could adopt wetland “water quality” statutory amendments to state pollution control statutes and regulations. Such statutory or regulation amendment changes might include a redefinition of water to specifically include “wetlands” and a redefinition of “pollutants” to include discharges of fill material. Such a statute and the administrative regulations and the programs established pursuant to them might not provide comprehensive protection for all wetlands but it could provide some protection and would more closely integrate wetlands, water quality, and watershed management.

Such an approach may be particularly attractive for states with limited wetland acreages and budgets.

A number of states such as California and Washington with broad existing water quality statutes and regulations could move quickly to establish independent wetland permitting programs as part of water quality programs without the need for new legislation or regulations. However, to do so, they will need to find the funds and staffing to issue, monitor, and enforce wetland permits. And, this will not be easy.

--**State amendment of floodplain, critical area, sensitive area, river protection, public water, watershed management and other programs to include wetlands.** State legislatures could add protection of wetland functions and values into the goals and permitting criteria for floodplain regulation, critical area, sensitive area, watershed management, and other resource management statutes. Adding these goals could, to some extent, help protect isolated wetlands through existing programs without substantial new budgets. But, protection for isolated wetlands would also often be “spotty” due to the piecemeal coverage of these programs and lack of wetland expert staffs and budgets.

--**State adoption of more comprehensive wetland statutes.** States could adopt more extensive “wetland regulatory” statutes similar to statutes adopted in Minnesota, New York, Massachusetts, New Hampshire, Maine, or other states. Such statutes could include goals, legislative findings of fact, wetland definition, wetland delineation criteria, mapping, permitting requirements and criteria, restoration provisions, mitigation bank provisions, tax incentives, and other types of provisions. Adoption of a comprehensive statute may be particularly appropriate in a state with large acreages of wetlands.

--**Local government adoption of wetland plans and regulations, tax incentives, other incentives.** Local governments could help fill the gaps by adopting comprehensive land and water use plans with wetland protection components, special wetland ordinances, floodplain ordinances with wetland provisions, wetland overlay zones as part of zoning regulations, or other regulations and measures to apply to isolated and other wetlands. They could provide tax incentives to landowners and help acquire wetlands for open space. States, federal agencies, and not for profits including local land trusts could assist local governments by providing model ordinances, wetland maps, wetland training, and funding.

## WHAT THE DECISION MEANS TO THE STATES

The *SWANCC v. USACOE* decision will be welcomed by some in the states and opposed by others.

The Supreme Court in *SWANCC v. USACOE* strongly endorsed state authority over lands and waters. This will be welcomed by advocates of states’ rights. Ironically, however, by cutting back on Section 404 permitting authority, *SWANCC* reduces the breadth of State authority under Section 401 which many states have relied upon as the basis for state regulation of wetlands. By narrowing Section 404 jurisdiction, the Court restricted federal Clean Water Act regulatory control over state lands and state projects in waters and wetlands (e.g. highways) and this will also be welcomed by some. The narrowing of Clean Water Act authority will be applauded by many property rights advocates and

landowners wishing to drain or fill isolated wetlands and waters. Finally, although only time will tell, *SWANCC v. USACOE* may, because of its precedent value pertaining to the scope of the Commerce Clause, narrow the scope of other federal natural resource regulatory initiatives for air and water and this too will be welcomed by some.

The SWANCC decision will have negative impacts. Considerable confusion and misunderstanding will likely result from the decision in the federal/state wetland and water relationships that have slowly developed over a twenty-nine year period. This confusion will continue until new regulations are promulgated and tested in court and a revised set of relationships are forged.

A great deal of isolated waters and wetlands may now be unregulated and this will likely result, in the long run, in destruction of many wetlands and waters with attendant loss of water quality protection, flood control, and habitat and other functions. This could have broad impact on homeowners, communities, duck hunters, fisherman, bird watchers and many other groups of citizens who depend upon the habitat, fisheries, water pollution control, flood attenuation and other functions of isolated wetlands.

States and communities will, of course, have the opportunity to fill the gaps and regulate isolated wetlands. Bills have already been drafted in Nebraska and Wisconsin. Legislative proposals are likely in other states. Efforts are underway in several states such as Ohio and South Carolina to adopt emergency rules to regulate isolated wetlands as part of pollution control efforts.

In most states, filling the gap will require new statutes and regulations, new staffing, training and added budgets. Many states will, therefore, be reluctant to assume this role even if there is political support. In addition states and local governments will also be more vulnerable to takings claims and judgments since they, rather than the Corps, become the primary permitting authority.

The impacts will not, of course, stop with the states and local governments. The decision leaves many unanswered legal questions with regard to what waters and wetlands are validly regulated under the Clean Water Act. This will create confusion and uncertainty for some developers and landowners although it will also be viewed as providing “regulatory relief” by others. There will also likely be uncertainty concerning the status of many wetland permits and corresponding compensation measures which have already been permitted for isolated wetlands over the last twenty five years and permit applications now before the Corps including required restoration and creation “mitigation” measures.

If states and local government adopt regulations to fill the gaps, these regulations will vary from community to community and state to state. This will create more complexity and uncertainty for developers. Engineering consulting firms will find that they need less staff with a reduction in overall workload for preparing permits, carrying out, delineations, and designing and constructing mitigation projects. Many of the 200 mitigation banks being created throughout the Nation with investment of hundreds of millions of dollars in private and public funds will likely find that they now have fewer customers and some designed to compensate for isolated wetland losses may be put out of business.

The full implications of *SWANCC v. USACOE* will not be apparent for some time. Much of the impact will depend upon how the Section 404 program is administered in light of the decision and whether states and local governments fill the gaps. At a minimum, the decision creates serious new vulnerabilities in water and wetland resource protection and requires adjustments in federal, state, and local roles in the planning and regulation of waters and wetlands. Some rethinking of roles will be needed not only for isolated wetlands and waters but broader watershed management, floodplain management, water supply, stormwater management, and point and nonpoint source pollution control efforts which depend, to a greater or less extent for their accomplishment, upon the protection and restoration of isolated wetlands and waters.