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**THE SWANCC DECISION;**

**STATE REGULATION OF WETLANDS  
TO FILL THE GAP**

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**BACKGROUND**

The following memorandum was prepared in June of 2001 to help states and others understand and respond to the SWANCC decision. It was updated in late 2004. It may be distributed or quoted with credit. This is one of three publications posted to our web page and prepared by the author to help the states address the gap in regulations created by SWANCC. See, in addition to this memorandum, J. Kusler, [Addressing the Gaps Created by SWANCC: A Federal, State, Tribal, and Local Partnership for Wetland Regulation](#), ASWM, 2004 and J. Kusler et al., [Model State Wetland Statute to Close the Gap Created by SWANCC](#), ASWM 2001.

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.

Thanks!

**INTRODUCTION;  
CONTENTS OF MEMORANDUM**

On January 9, 2001 the U.S. Supreme Court issued a decision, *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* (531 U.S. 159, 2001) (herein referred to as *SWANCC*), that limits the scope of the United States Army Corps of Engineers (Corps) Clean Water Act (CWA) regulatory permitting program (Section 404) as applied to isolated waters of the U.S. By narrowing the water and wetland areas subject to federal regulation, the decision also narrows the areas and activities subject to CWA Section 401 programs which require 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.

The decision affirmed the “primary responsibilities and rights of the States” over land and waters. But, by narrowing the federal Section 404 program, the decision also limited existing state wetland programs built upon Section 404 permitting and shifted more of the economic burden for regulating wetlands to states and local governments.

Are the states filling the gap created by SWANCC? 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?

The following discussion first describes the SWANCC decision. It then describes administrative actions to interpret SWANCC by the Corps and the U.S. Environmental Protection Agency (EPA) in the three years since the decision. This is followed by a description of federal district court and appellate court decisions concerning the scope of Section 404 waters since SWANCC. It considers existing state regulations and regulations adopted by the states to fill the gap created by SWANCC. It concludes with a discussion of options for filling the gap.

## **THE SWANCC DECISION**

### **Facts of the Decision**

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 CWA 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.

The solid waste agency had applied for 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. The solid waste agency also secured water quality certification from the Illinois Environmental Protection Agency.

The solid waste agency 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 Corps 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)

The solid waste agency 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. The solid waste agency then appealed the jurisdictional determination to the U.S. Court of Appeals for the Seventh Circuit which also ruled in favor of the Corps. The solid waste agency 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 CWA jurisdiction over "other waters" based upon the 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**

The solid waste agency 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 CWA jurisdiction over isolated, nonnavigable, intrastate waters that are not tributary or (in the case of wetlands) adjacent to navigable waters or tributaries.

The solid waste agency 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 Senate 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 CWA 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.”

### **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 CWA 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 CWA.

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 CWA. In arguing that Congress intended to endorse the Corps’ regulation of isolated waters in adopting the 1977 CWA, 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 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 argued on the more fundamental question of the scope of the 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.*”

### **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 ‘in separately 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 although the decision has been broadly interpreted to do so. 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.” That is a fair reading of the whole decision. 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 through surface water or ground water to navigable waters for water quality, flood storage and conveyance, navigation or other purposes.

### **Why the Definitions of “Adjacent”, “Tributary”, and “Significant Nexus” Are Important**

As will be discussed shortly, courts are wrestling with the ambiguities contained in SWANCC and have, not surprisingly, come to different conclusions concerning the scope of waters regulated by the Corps after the decision. States, federal agencies, and not for profit organizations have attempted, with difficulty, to determine how much of a “gap” in regulations SWANCC created. Individual Corps Districts have interpreted key terms differently in making jurisdictional calls. These key terms include “adjacent”, “tributary”, and “significant nexus”. Some differences in the scope of Section 404 permitting requirements depending upon the definitions used for these terms can be illustrated:

#### **If SWANCC is interpreted by courts or EPA/Corps to allow the Corps to regulate only traditionally navigable and “adjacent” wetlands.**

If only traditionally navigable waters (not including nonnavigable tributaries) and their adjacent wetlands were regulated under Section 404 (a very broad reading of *SWANCC*), perhaps as little as 20% of the Nation’s wetlands would be subject to federal regulation. Under this scenario, wetlands regulated under the CWA 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* 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 National Environmental Policy Act (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, playas, vernal pools, seeps and springs, flats, bogs and large amounts of tundra in Alaska. However, the amount actually excluded would also 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 SWANNC is interpreted by the courts or EPA/Corps to allow the Corps to regulate traditionally navigable waters, “tributaries” and “adjacent” wetlands.**

If the Corps and EPA were to regulate not only navigable waters and their adjacent wetlands but also tributaries and wetlands adjacent to all tributaries (the interpretation suggested by Justice Stevens and the most reasonable interpretation of the decision), the total Section 404 regulated wetlands will likely be 40%-60% or more of all wetlands. But, this will also depend, in part, on 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 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, depressional, slope and other wetland types could be included as “waters of the U.S.” and the total might be 60% or more. The definition of “adjacency” is also 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.

**If SWANNC is interpreted by the courts or EPA/Corps to allow the Corps to regulate traditionally “navigable” waters, “tributaries”, “adjacent” wetlands and other wetlands with a “significant nexus”.**

All of the above wetlands would be regulated. However, some additional wetlands with a “significant nexus” to navigable waters wetlands would 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. Some ground-water fed but isolated wetlands might be included if they were shown to be part of a larger recharge area for navigable streams or their tributaries. But, documentation of such nexus would likely need to be made on a case-by-case basis. A broad interpretation of significant nexus could result in regulation of 80-90% of all wetlands.

Which scenario or combination of scenarios for “waters of the U.S.” will ultimately prevail remains to be seen. It will depend in the long run, upon Corps and EPA interpretations of key terms and the willingness of courts to accept those interpretations. Even if SWANCC results in only a one percent loss of federal jurisdiction over America’s wetlands, the decision could cause more wetlands to be destroyed than were lost in the past decade.

## **ADMINISTRATIVE ACTIONS; COURT DECISIONS SINCE SWANCC**

### **Guidance from the Corps and EPA**

On January 19, 2001, the General Counsel of EPA and the Chief Counsel of the Corps issued a joint memorandum interpreting Clean Water Act jurisdiction in light of SWANNC (available at <http://www.epa.gov/owow/wetlands/>). This memorandum was broadly disseminated to the public and Corps and EPA field staff. The memorandum narrowly interpreted SWANCC, but it failed to provide much guidance on the meaning of key terms in the SWANNC decision such as “significant nexus”, “adjacent”, and “tributary”.

## Corps District Office Interpretation of SWANCC

In the three years since SWANCC, Corps District offices have interpreted SWANCC quite differently. Some Districts, such as Maryland, have apparently taken a narrow view of SWANCC and have continued to require permits for wetlands with any direct hydrologic connection with waters. Others, like Galveston, have apparently taken a broader view and have not continued to require permits for wetlands like coastal “bays”, unless there is a substantial natural drainage channel between navigable waters and wetlands. No study has been done to document the full extent of these differences but they are apparently quite large.

### Advance Notice for Proposed Rulemaking on CWA Definition of Waters of the United States

In January of 2003 the Corps and EPA published in the Federal Register an Advance Notice for Proposed Rulemaking on CWA Definition of Waters of the United States. More than 130,000 comments were submitted to the Corps and EPA in response to this rule. Comments were overwhelmingly supportive of a narrow interpretation to SWANCC and continued broad federal Section 404 jurisdiction:

- Comments were submitted by forty three states. Of these, forty one were favorable. Only two argued against for broad interpretation of SWANCC--Alaska and Idaho
- States largely reported that a broad reading of SWANCC would substantially undermine their state Section 401 water quality certification and wetland protection efforts (see discussion below).
- States were also concerned with impact of a broad interpretation on tributaries to navigable waters. Many states estimated that omission of nonnavigable tributaries would reduce by more than one half regulated waters in the state. See discussion below.

As a result of rumors that the Corps and EPA were about to issue proposed rules broadly excluding some waters from Section 404 regulation, more than 200 members of Congress signed a letter requesting the Corps and EPA not to issue new rules in November 2003. The Administration of EPA announced on December 16, 2003 that new rules would be issued at this point in time.

### Court Decisions Interpreting SWANCC

Since January 2001, there have been at least thirty one decisions interpreting SWANCC. This included the Borden case which was appealed to and argued before the U.S. Supreme Court. It did not, however, result in a formal U.S. Supreme Court decision in this case which involved Corps jurisdiction over “deep ripping” practices in California because there was a tie vote in the Court.

In all but three of the decisions which are briefly described below the courts took a narrow view of SWANCC and have held that waters were jurisdictional in a particular setting. Many of these decisions applied a broad concept of regulated “tributary” to include nonnavigable as well as navigable waters, a broad concept of “adjacency”, and a broad concept of “substantial nexus”. The following list of decisions is based upon an independent Lexis/Nexis search by the author and lists of cases provided by EPA, the National Wildlife Federation, and the U.S. Department of Justice.

Decisions holding that particular wetlands and waters are subject to CWA jurisdiction include:

**United States v. Deaton**, 332 F.3d 698 (4th Cir., 2003), reh’g (en banc) denied (August, 2003), petition for cert. filed (Court or Appeals upheld the Corp’s jurisdiction over a wetland adjacent to a roadside ditch that connects through a culvert and an eight mile long series of nonnavigable ditches and creeks to the navigable Wicomico River and ultimately to the Chesapeake Bay 25 miles later. The Court deferred to the Corp’s interpretation of the Clean Water Act to include all nonnavigable tributaries.)

**United States v. Rapanos**, 339 F.3d 447 (6th Cir. Aug. 5, 2003), reh'g (en banc) denied (2003) (Court of Appeals reinstated a criminal conviction for filling wetlands which were adjacent and hydrologically connected to a 100 year old man made drain which flowed into a creek which flowed into a navigable in fact river.)

**United States v. Rueth Development Co.**, 335 F.3d 598 (7th Cir, 2003) (Court of Appeals affirmed a consent decree in a Section 404 civil enforcement case which the plaintiff sought to reopen based on SWANCC. The Court upheld CWA act jurisdiction based on adjacency.)

**United States v. Krilich**, 303 F.3d 784 (7th Cir., 2002), cert. denied, 123 S.Ct. 1782 (2003) (Court of Appeals held that SWANCC was not an adequate basis for reopening a 1992 consent decree in a CWA Section 404 enforcement action because SWANCC did not represent such a significant change in the law that refusal to reopen was an abuse of discretion.)

**United States v. Newdunn**, 344 F.3d 407 (4th Cir., 2003), petition for cert. filed (Court of Appeals held that wetlands that abutted and had a hydrologic connection to a drainage ditch which flows via a culvert to nonnavigable portions of a stream before flowing into traditional navigable water were jurisdictional under the CWA. The court also held that Virginia's regulation of waters was based upon independent state powers and were not simply tied to CWA jurisdiction.)

**United States v. Interstate General Co.**, No. 01-4513, 2002 WL 1421411 (4th Cir, 2002) (Court of Appeals rejected the argument in a civil enforcement action that SWANCC restricted CWA jurisdiction to navigable-in-fact waters and wetlands immediately adjacent thereto.)

**Community Ass'n for Restoration of the Env't v. Henry Bosma Dairy**, 305 F.3d 943 (9th Cir., 2002) (Court of Appeals held that a drain that carried flows from an animal feeding operation either directly or by connecting waterways into the Yakima River was jurisdictional under the Clean Water Act.)

**Headwaters, Inc. v. Talent Irrigation District**, 243 F.3d 526 (9th Cir., 2001) (Court of Appeals held that shallow irrigation canals tributary to other waters of the U.S. were jurisdictional.)

**Aiello v. Town of Brookhaven**, 136 F.Supp. 2d 81 (E.D.N.Y, 2001) (District court concluded that nonnavigable pond and creek that flowed into a lake which in turn flowed into a traditional navigable water were jurisdictional.)

**United States v. Buday**, 138 F.Supp. 2d 1282 (D. Mont, 2001) (District court held in a criminal enforcement action that that wetlands surrounding a small, intermittent, non-navigable tributary some 235 miles upstream from the navigable in fact Clark Fork River were jurisdictional under the CWA.)

**United States v. Bruce Dyer**, No. 00-11013 (D. Mass. March 12, 2003) (District court refused to reopen consent decree based upon SWANCC for filling of wetlands adjacent to the Taunton River because the wetlands were adjacent to a navigable waterway.)

**Idaho Rural Council v Bosma**, 143 F.Supp. 2d 1169 (D. Idaho, 2001) (District court held that discharges from a concentrated animal feeding operation were subject to CWA jurisdiction including a spring that ran into a pond that drained across a pasture into a canal that flowed into a creek that was either navigable in fact or flows into a navigable in fact river. The court also concluded that discharges into groundwater that leads to surface water may require a Section 402 permit.)

**Colvin v United States**, 181 F.Supp. 2d 1050 (C.D., Cal., 2001) (District court held that the Salton Sea, a large, isolated, navigable in fact lake was a water of the U.S. and unaffected by SWANCC.)

**United States v. Lamplight Equestrian Center, Inc.** No. 00-6486, 2002 WL 360652 (N.D. Ill. 2002) (District court held that CWA jurisdiction existed for a wetland that drained through a man made drainage ditch, then through a 50 foot delta or meandering swale, then into Brewster Creek ( a nonnavigable stream) and ultimately into the navigable in fact Fox River because there was a significant nexus).

**California Sportfishing Protection Alliance v. Diablo Grande, Inc.**, 209 F.Supp. 2d 1059 (E.D. Cal., 2002) (District court held that a creek running over a weir and into an underground pipeline which eventually connected to the San Joaquin River was jurisdictional under the CWA.)

**FD & P Enterprises, Inc. v. United States Army Corps of Engineers**, 239 F.Supp. 2d 509 (D.N.J. 2003) (District court denied summary judgment because there were genuine issues of material fact regarding whether the filling of wetlands would have a substantial nexus to navigable in fact waters.)

**San Francisco v. Cargill Salt Division**, No. C 96-2161 SI (N.D. Cal. 2003) (District court held that a pond which was separated from a navigable in fact water only by a man-made berm was jurisdictional under the CWA.)

**United States v. Robert L. Hummel**, No 00 C 5184, 2003 WL 1845365 (N.D. Ill. 2003) (District court held that a “significant nexus” exists for wetlands which are hydrologically connected to a creek that flows into the navigable in fact Des Plaines River 11 miles away, and are therefore subject to CWA.)

**United States v. Bruce Dyer**, No. 00-11013 (D. Mass 2003) (District court rejected an attempt to reopen a consent decree in a CWA 404 civil enforcement action based on SWANCC where the court found that wetlands were adjacent to a tributary that nourished the Taunton River.)

**United States v. Jones**, 267 F.Supp. 2d 1349 (M.D. Ga, 2003) (District court held that Oil Pollution Act applied to discharge of oil into a storm drain that flowed into a drainage ditch that flowed into a creek that flowed into the navigable in fact Ocmulgee River.)

**North Carolina Shellfish Growers Association v. Holly Ridge Associates**, No. 7:01-CV-36, 2003 WL 21995171 (E.D.N.C. 2003) (District court held that wetlands and other water bodies were jurisdictional under the CWA because there was a “significant nexus” between these waters and a traditionally navigable water “whether the hydrologic connection occurs in a channelized flow or a networks of flat bottoms and braids, continuously or intermittently.”

In addition, a number of cases are on appeal in which lower courts have found Section 404 jurisdiction:

**United States v. Phillips, CA**, 02-30035 and C.A. 02-30046, 2004 WL 193258, affirmed, Nos. 02-30035, 02-30046 (9th Cir.) (District court instructed jury that wetlands and streams into which the defendant discharged pollutants were waters of the U.S.)

**June Carabell v. The United States Army Corps of Engineers and the United States Environmental Protection Agency**, No. 01-72797 (E.D. Mich, March 27, 2003), appeal pending, No. 03-1700 (6th Cir.) (District court held that wetlands neighboring nonnavigable tributaries of Lake St. Clair, a navigable water body, were jurisdictional.)

**Baccarat Fremont Developers v. U.S. Army Corps of Engineers**, No. C 02-3317 (N.D. Cal. Aug. 11, 2003), appeal pending, No. 03-16586 (9th Cir.) (District court held that wetlands separated from jurisdictional waters by man-made berms are waters of the U.S.)

**Robert Brace v. United States**, 51 Fed. Cl. 649(2002) (U.S. Court of Federal Claims denied U.S. motion for summary judgment based on ruling that there was a factual dispute as to whether, post-SWANCC, a sufficient jurisdictional nexus existed between the wetlands at issue and navigable waters.)

Other decisions taking a less broad approach and holding that particular areas or waters were not jurisdictional include the following. It is to be noted that both Harken and Needham involve the Oil Pollution Control Act, not Section 404 of the Clean Water Act:

**Rice v. Harken Exploration Co.**, 250 F.3d 264 (5th Cir., 2001, reh'g (en banc) denied, 263 F.3d 167 (2001) (Court of Appeals held in an Oil Pollution Act case that discharges onto dry land which seeped through the ground into groundwater which, in turn, contaminated several intermittent streams was not jurisdictional under the Oil Pollution Act where there was little evidence in the record concerning how often the creek runs, how much water flows in it, and whether the creek ever flowed into a navigable body of water.)

**United States v. Needham**, 2002 WL 1162790 (W.D. La. Ja. 22, 2002); rev'd by 354 F.3d 340, (5th Cir.) (2003). (Court of Appeals held in an Oil Pollution Act case that the connection between an oil spill in a drainage ditch some 60 miles from the Gulf of Mexico shoreline and navigable waters was too tenuous for the OPA to apply.)

**United States v. RGM Corps.**, 222 F. Supp. 2d 780 (E.D. Va., July 26, 2002), appeal pending, No. 02-2093 (4th Cir.) (Stayed pending decision in *United States v. Newdunn*) (District court held that Corps lacked regulatory jurisdiction over wetlands at issue.)

### **Remedial Congressional Action**

On February 27, 2003 Senators Feingold, Jeffords, and Boxer and Congressmen Oberstar, Dingell, Leach, and Boehlert introduced S.473 and HR. 962 to remedy the gap in federal wetland regulation created by SWANCC. This proposed Clean Water Authority Restoration Act of 2003 would clarify that Congress intends Clean Water Act protections to apply to all wetlands. See <http://Thomas.loc.gov/cgi-bin/query/z?c108:S.473>. No action has been taken on this bill.

### **WHAT DOES SWANCC MEAN TO THE STATES?**

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. This broad federal coverage backed up and filled many of the gaps in geographical coverage of state and local regulatory programs.

When SWANCC was first issued there was rejoicing by some advocates of state's rights. That rejoicing became muted as the states faced the political and financial realities of developing wetland programs to address the gaps created by SWANCC.

## State Estimates of Changes in the Scope of Federal Clean Water Act Jurisdiction

How much wetland has been affected by the SWANCC decision? Unfortunately even after three years, it is still difficult to determine how much wetland is affected because there has been no definitive guidance from the regulatory agencies and only partial agreement in the courts concerning key issues such as the definition of “tributary”, “adjacent”, and “significant nexus” discussed above.

A number of states, however, have made estimates of the impact and provided them to EPA and Corps in response to the Advance Notice for Proposed Rule Making for SWANCC. These responses are summarized below. Note, particularly, the estimated impact of omitting nonnavigable streams from jurisdiction.

- **Arizona.** Over 95% of its waters are intermittent or ephemeral streams and redefinition of regulated water to omit intermittent and ephemeral streams would place 95% of its waters outside the CWA.
- **Delaware.** If only navigable and directly adjacent wetlands were regulated, 50% of all wetlands would be omitted from CWA jurisdiction and 92.4% of freshwater wetlands.
- **Florida.** 34 to 66% of total wetlands in Florida’s Panhandle would be at risk.
- **Indiana.** Between 9% and 33% by area and 32 and 89% by number of waters would be excluded from CWA jurisdiction depending upon the definitions used for tributary and adjacency.
- **Iowa.** Between 11% and 72% of streams and wetlands will not be regulated, depending upon the definitions used for adjacency and tributary.
- **Kentucky.** If only streams that have perennial flow or are navigable were to be regulated, the CWA would not apply to the majority of stream miles.
- **Michigan.** 16.7% of wetlands would be removed from CWA jurisdiction.
- **Minnesota.** 12% to 23% would be omitted from CWA jurisdiction with a much higher percentage (up to 92%) in the Northern Glaciated Plains ecoregion.
- **Missouri.** If intermittent/ephemeral stream miles were omitted, 69-76% of all stream miles would be affected; 33% of the wetlands would be outside of CWA jurisdiction if an isolation threshold of 50 feet were used to determine isolation.
- **Montana.** If intermittent/ephemeral steam miles were omitted, 71% of all stream miles would be omitted.
- **Nebraska.** 40% of wetlands would be outside of CWA jurisdiction; 76% loss of coverage of stream miles if intermittent streams were omitted from coverage.
- **New Mexico.** Approximately 80% of the drainages in New Mexico are not perennial.
- **Rhode Island.** Nonnavigable tributary streams constitute 85% of the total stream miles in the state.
- **South Carolina.** More than 20% of all wetlands in two coastal counties could be delineated as isolated. Approximately 16% of total wetlands would be removed from regulation if intermittent streams were not used to determine jurisdiction.
- **South Dakota.** (?) 95-95% of wetland basins in Clark County and 98% of wetland acreage could be considered isolated.
- **Tennessee.** 57% of the rivers are non-navigable waters.
- **Texas.** Approximately 75-79 % of the stream miles are intermittent; approximately 48% of Texas Pollution Discharge Elimination Systems permitted wastewater discharges into intermittent streams; 8% of the wetlands in the coastal zone are isolated.
- **Virginia.** Up to 43% of Virginia’s wetlands could become unregulated by the CWA.
- **Wisconsin.** 25 to 90% of Wisconsin wetlands could become unregulated by the CWA.

## Impact of SWANCC on State Programs

SWANCC has reduced the scope of state Section 401 programs since the scope of Section 401 programs depends upon the scope of federal Section 404 regulatory permitting authority. The impact upon wetland protection has been particularly great in the thirty-two states lacking independent freshwater wetland regulatory programs for isolated wetlands. In these states, prior to SWANCC, 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 also somewhat limited the scope of state “assumption” under Section 404(g) as indicated above. States will have 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 the states could assume permitting for tributary waters and their adjacent wetlands and isolated waters and their adjacent wetlands. With the federal 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 also affects state/Corps programmatic permitting agreements. Agreements may need to be revised (at least in their scope of application) because the Corps will no longer oversee state regulation of isolated waters and wetlands.

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

## State Efforts to Fill the Gaps

A number of states have made efforts to fill the gaps created by SWANCC. This action has taken several forms:

- **Extend water quality programs to explicitly include isolated and other wetlands.** This approach has been taken by Indiana, Ohio, South Carolina, and North Carolina.
- **Adopt limited legislation closing the gaps created by SWANCC (for states that already regulate some wetlands).** This approach has been taken by Wisconsin and Ohio.

- **Adopt new comprehensive wetland legislation.** No state has, as yet, taken this approach although a comprehensive wetland bill was introduced in Illinois. Many states, however, have adopted comprehensive wetland legislation over the last two decades such as Minnesota, Michigan, Massachusetts, Rhode Island, Maine, New Hampshire, New York, New Jersey, Connecticut, Maryland, Virginia, Florida, Vermont, Pennsylvania, and Oregon.

## **FILLING THE GAPS**

Given existing federal, state, and local regulatory programs including new efforts, how much of a gap now exists? What could be done to fill the gap?

### **The Continuing Gap**

As indicated above, the gap varies from Corps District to Corps District because the Section 404 program is being administered with somewhat different concepts of jurisdictional waters. This also affects the scope of the state Section 401 programs as described above.

This having been said, a considerable gap continues to exist in at least thirty two states without independent wetland regulations for isolated wetlands. This is because 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. A brief summary of state programs includes:

**State regulatory programs for isolated freshwater wetlands.** State and cooperative state/local regulatory programs for isolated waters and wetlands are limited in thirty-two states due to lack of basic enabling statutes or lack of funding and staff for existing water quality regulatory efforts. Eighteen states now provide a protection for many isolated freshwater wetlands including Maine, Connecticut, New Hampshire, Rhode Island, Massachusetts, Vermont, New York, New Jersey, Maryland, Virginia, Florida, Minnesota, Michigan, Pennsylvania, Ohio, Wisconsin, North Carolina and Oregon. Most of these programs are, with the exception of New Jersey, New Hampshire, Pennsylvania, and Rhode Island, are 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 states by wetland size (e.g., 12.4 acres in New York's), 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).

Some additional states provide some limited protection for isolated wetlands. South Carolina regulates isolated wetlands in the coastal zone. A number of additional states such as California and Washington regulate some discharges into wetlands pursuant to comprehensive pollution control statutes. Some limited protection may be provided through critical area statutes and local land planning and management programs. 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.

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, Georgia, Nebraska, Kansas, and Mississippi. A small number of local governments in these states have also adopted wetland protection regulations.

**State regulatory programs for wetlands adjacent to tributaries.** The number of states providing protection for wetlands adjacent to ephemeral tributaries is larger but the majority of states provide only limited protection for tributaries. Twenty-three states provide a least partial, independent protection for freshwater wetlands adjacent to tributaries. These include the eighteen 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 (Washington), state land use controls (Hawaii), drainage laws (North Dakota) and pollution control statutes (e.g., California, Nebraska). 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 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-seven states provide little or no protection for freshwater wetlands adjacent to ephemeral or intermittent tributaries.

## OPTIONS

There are a number of actions that could be undertaken at the national, state, tribal and local levels to help close the gap created by SWANCC. A short list of options is provided below.

- **EPA and Corp’s adoption of revised regulations.** EPA and the Corps will sooner or later need to adopt revised definitions for waters of the U.S. through rulemaking or less formal administrative actions. Revised definitions should be consistent so that interpretations of “regulated waters” do not vary greatly from one Corps district to another. Substantially different interpretations are not only 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 concerning the scope of 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 would 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 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 U.S. Fish and Wildlife Service, USDA Natural Resources Conservation Service, National Oceanic and Atmospheric Administration, and the U.S. Environmental Protection Agency could aid Congress in more accurately evaluating the impact of SWANCC 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. 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 water 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 SWANCC 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 and tribal 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, tribes 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 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 might 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.

Filling the gap with comprehensive legislation will require new statutes and regulations, new staffing, additional 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 may also be more vulnerable to takings claims and judgments since they, rather than the Corps, become the primary permitting authority.

- **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.

## LOOKING TO THE FUTURE

The precise amount of wetland not presently subject to regulation as a result of the interpretation of the SWANCC decision by various Corps district offices remains to be seen but best estimates are in the 20%-25% plus range for acreage and a higher percentage by number. The total will be less if jurisdiction is also based upon small drainage ditches and surface water flows during floods and other high water events. It will be much greater if a narrow concept of adjacency is applied and intermittent streams and adjacent wetlands are not regulated (perhaps as high as 70%-80%).

Rule making by the Corps and EPA to interpret critical terms and provide more guidance for field staff has been halted for the present to let the courts more fully address jurisdictional questions. But, rule making and perhaps action by Congress will be needed in the long run.

This loss of Clean Water Act jurisdiction will, in the long run, result 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.

The impacts of SWANCC will not, of course, stop with impacts upon federal, state, tribal, and local government wetland regulations. The decision leaves unanswered legal questions with regard to what broader waters are validly regulated under the Clean Water Act including pollution and stormwater sources. This will create confusion and uncertainty for some developers and landowners although it may also be viewed as providing “regulatory relief” by others.

Over time states and local governments will likely fill some of the gaps, particularly if funds and technical assistance are made available to them. But 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 have found that they now have fewer customers and some designed to compensate for isolated wetland losses have apparently been put out of business.

The full implications of *SWANCC* will not be apparent for some time. Considerable confusion and misunderstanding has resulted from the decision in the federal/state wetland and water relationships that had slowly developed over a twenty-nine year period. At a minimum, the decision creates serious new vulnerabilities in water and wetland resource protection and requires adjustments in federal, state, tribal and local roles in the planning and regulation of waters and wetlands. Some rethinking of roles is 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. For more detailed discussion of options see Draft, J. Kusler, Filling the Gaps Created by SWANCC: Strengthening the Federal, State, Tribal, and Local Government Partnership for Wetland Regulation, ASWM, 2003.