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The unintended ramifications of the SWANCC decision: Local regulation of isolated waters

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The recent United States Supreme Court ruling in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*[1] held that the Corps' authority under the Clean Water Act does not extend to isolated waters—those waters that are not connected or adjacent to interstate or navigable waters. In doing so, the Court eliminated Corps 404(a) jurisdiction over certain isolated wetlands, prairie potholes and ponds, which had been grafted on under the Corps' Migratory Bird Rule. While this ruling paves the way for 23 Illinois municipalities to establish a long sought after baleful without Federal interference, the ruling has far-reaching application, leaving the protection of isolated waters formerly governed by the Corps' regulation to the state and local governments, many of which currently have no regulations covering these issues.

Because the SWANCC decision left in its wake a gap in the regulatory arena and it has important implications for local governments in dealing with developers, mining companies, utilities and others seeking permits involving isolated waters. The decision may also result in federal and/or state legislative action. This article is a brief overview of the decision and responds to some of the questions being asked regarding the potential impact of this important ruling.

The SWANCC decision

23 Illinois municipalities organized themselves into a municipal corporation known as the Solid Waste Agency of Northern Cook County ("SWANCC"). SWANCC brought this action and purchased a 533-acre site for disposing of baled nonhazardous solid waste. The site was an abandoned sand and gravel pit with excavation trenches that had evolved to several small permanent and seasonal ponds used by migratory birds. SWANCC applied to the Corps for a section 404 permit under the CWA to fill 17.6 acres of the ponds. The Corps asserted jurisdiction over the site pursuant to its Migratory Bird Rule.[2] When the Corps denied the permit, SWANCC sought judicial review, ultimately by the United States Supreme Court.

The Supreme Court held that the Corps did not have jurisdiction over the site because the sole basis of the Corps' jurisdiction was the Migratory Bird Rule, and that rule exceeded the authority granted under section 404(a) of the CWA[3] The Court held that the Corps' expansive definition through its regulations of the CWA term "waters of the United States" was so broad that the word "navigable" was effectively eliminated from the statutory term, "navigable waters." So as not to retract from its prior decision upholding Corps jurisdiction over wetlands "adjacent" to navigable waters,[4] the Court declared that there is a difference between giving the term "navigable" limited effect, and giving the term no effect at all.

Questions on the impact of SWANCC decision

The Supreme Court's ruling has left open questions concerning the Corps' jurisdiction under section 404 of the Clean Water Act.

"What is the Supreme Court's decision applicable to?"

The following determinations regarding the Corps' jurisdiction are found in the Court's decision in SWANCC:

- **Corps' jurisdiction:** Traditionally navigable waters, interstate waters, their tributaries and wetlands adjacent to each. Each of these categories is still considered "waters of the United States." The Court did not overrule its earlier holding regarding adjacent waters jurisdiction.[5] The Corps' jurisdiction over navigable and/or interstate water remains unaffected by the decision. Thus, for streams that flow freely to navigable waters and wetlands adjacent to them, nothing has changed. However, the issue of "adjacency" is sufficiently open and will likely be the Corps' (and others) next focus.
- **Outside of jurisdiction:** Isolated waters formerly covered under section 404 of the CWA solely by virtue of section 328.3(a)(3) of the Corps' regulations and the Migratory Bird Rule--waters that could affect interstate commerce solely by virtue of their use as habitat by migratory birds--are no longer considered "waters on the United States."
- **Possible jurisdiction:** Isolated waters with a connection to interstate commerce other than use by migratory birds. The Court did not specifically address what other connections with interstate commerce might support the assertion CWA jurisdiction over "non-navigable, isolated, intrastate waters" under section 328.3(a)(3). Thus, for isolated pocketed areas, the Corps may have jurisdiction if there is a reason other than the Migratory Bird Rule

that interstate commerce would be affected to support jurisdiction.[6]

Is the SWANCC Ruling applicable to previously rendered Corps opinions?

Yes. Under the decision, the Corps has "lost" jurisdiction over isolated waters, even for matters pending prior to the Court's decision. This fact has the potential of creating a class of projects which are seemingly unregulated with respect to the filling in of isolated wetlands or ponds, which local governments have historically relied on the Corps to regulate. Accordingly, local governments must examine their pending permit applications and projects to identify any that fall within this gap, and assert jurisdiction to the extent authorized by state and local law. Concomitant with this review, local and state law must be examined in order for the local government to determine what, if any, local regulations govern now and the extent of the local government's authority to regulate under state law. Local governments should shore up their existing ordinance provisions and/or enact a comprehensive wetlands/storm water run-off/protected species ordinance. The State may, of course, ultimately pre-empt the field, delegate all or part of its regulatory authority, or create concurrent jurisdiction. However, given the time typically involved with state agencies' hearing and notice requirements for rulemaking, local governments should act to fill in the gap, if they so desire.

Can people fill in wetlands without the Corps approval?

No. Although the SWANCC decision clarifies that the Corps' jurisdiction is limited to navigable waters or waters abutting navigable waters, the decision has no impact on the jurisdiction of the State or its agencies (e.g., the IDNR and IEPA) or even local conservation districts, local governments, etc.[7]

Moreover, the Corps will still determine whether or not a particular area is subject to its jurisdiction. Even if a developer believes that the wetland does not abut any navigable waters, it is still the Corps', and not the developers', role to make that decision.

How should a local government advise developers presently working with the local government?

Business as usual. As just noted, although the SWANCC decision limited the Corps' jurisdiction over certain waters, the Corps still has the authority to determine whether or not any particular area falls within its jurisdiction. Thus, the local government's position vis a vis developers remains unchanged. If the Corps requires a permit, the developer must obtain a permit. If the Corps does not require a permit, a "no action"-type letter from the Corps must be provided to the local government. Here again, each local government will need to undertake a review of its own ordinances, as well as its practices in enforcing the ordinance, in view of the potential for no Corps involvement in the permitting of certain developments.

Existing city ordinances

Most local governments currently have in place various ordinances addressing such issues as soil erosion, wetlands, flood plains and conservancy districts. While these ordinances address some of the issues raised by the SWANCC decision, they are by no means comprehensive and leave a number of issues unaddressed. If your local government wishes to continue regulating development of isolated wetlands, it must review and likely amend its ordinances.

Summary

By some accounts, Isolated waters may account for as much as 10 percent of "waters of the United States," including wetlands, or about 10 million acres nationwide. Thus, we anticipate one or more of the following as a result of the decision:

- **Federal agency guidance.** The Corps and EPA are likely to issue guidance to their field staff on how to implement the SWANCC decision. The guidance may attempt to limit the reach of the decision, or may address the "no-action" analysis and/or procedure inevitable under the decision.
- **Reduced FWS-ESA involvement.** Consultations with the U.S. Fish and Wildlife Service under section 7 of the Endangered Species Act are triggered by applications for a federal permit, often by applications under section 404 of the CWA. A reduction of waters subject to jurisdiction under the CWA could result in a decrease in the number of section 7 ESA consultations. For example, as a result of the decision, some developers may avoid both section 404 regulation and ESA issues. Plants on private property are not subject to the ESA unless a federal permit is required in connection with the property. Thus, a developer of private property with isolated wetlands in which ESA-protected plants have grown may be free of both the Corps and the FWS.
- **Federal legislation.** The elimination of isolated waters from federal jurisdiction may result in congressional efforts to amend the Clean Water Act. However, the Court signaled that such legislation could raise constitutional questions involving Congress' authority to regulate isolated waters consistent with the Commerce Clause of the Constitution.
- **State and local legislation.** The SWANCC decision appears to leave the protection of isolated waters exclusively to state and local governments. States and local governments will likely respond to the decision by enacting or strengthening state and local laws, or intensifying enforcement of existing laws, in order to protect isolated waters. This is the decision each local government must make.

Local governments should focus on this last point: enacting or strengthening local laws and the enforcement of them to address the potential regulatory gap in federal, state and local law left in the wake of the SWANCC decision. Each local government needs to determine, based on this information, whether it wants to fill that regulatory breach. If so, it should, as soon as possible, pass ordinances that will address these issues. Developers are aware of the SWANCC decision and its ramifications and intend to take full advantage of it. Obviously, time is of the essence. So long as regulations are not in place, local governments are subject to the argument that these issues are unregulated. ■

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1. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, No. 99-1178 (U.S. January 9, 2001) ("SWANCC").

2. Section 404 of the Clean Water Act requires a permit for the discharge of dredged or fill material into "navigable waters." The term"navigable waters" is defined in section 502(7) of the Act as "waters of the United States, including the territorial seas." Under Corps regulations, "waters of the United States" include not only interstate and traditionally navigable waters and their adjacent wetlands, but "all other 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 C.F.R. § 328.3(a)(3). This definition was clarified by the Migratory Bird Rule which provided that the use of water as habitat for migratory birds was sufficient connection to interstate commerce

to bring a site under Corps jurisdiction. 50 Fed. Reg. 41217 (1986).

3. In addition, the Court ruled that even if the CWA's grant of authority in Section 404 was not clear, the Court would not defer to the Corps' interpretation of the Act in this case because the regulation raised constitutional questions. The majority stated that allowing the Corps and EPA to claim jurisdiction over isolated waters such as ponds and mudflats would result in a "significant impingement of the State's traditional and primary power over land and water use," the regulation of which is traditionally performed by local governments.

4. *Riverside Bayview Homes, Inc*., 474 U.S. 121 (1985).

5. Id. at 123, 129, 139.

6. The Court did not strike down section 328.3(a)(3) of the Corps' regulations, or any other component of the regulations defining the CWA term "waters of the United States." Instead, the Court held that the section 328.3(a)(3), as clarified and applied to the balefill site pursuant to the Corps' Migratory Bird Rule, exceeded the Corps authority under section 404(a) of the CWA.

7. Many counties have wetlands and storm water management regulations in place. See 55 ILCS 5/5-1062 (authority for county storm water management commission.)