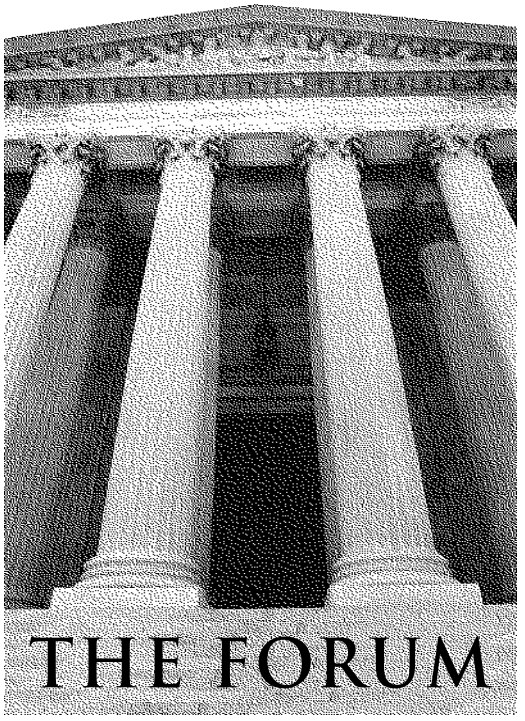

What Are "Waters Of The United States"?

On January 15, the Environmental Protection Agency and the Army Corps of Engineers surprised, pleased, or annoyed (take your pick) environmental professionals when they placed an Advance Notice of Proposed Rulemaking on the Clean Water Act regulatory definition of "Waters of the United States" in the Federal Register. Those "waters" of course are those that are subject to federal jurisdiction under the Clean Water Act, which prohibits discharges into navigable waters without a permit. The notice sought public comment and other input following the 2001 Supreme Court decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, in which the Court ruled that the application of the so-called "Migratory Bird Rule" to the wholly intrastate ponds at issue was an impermissible extension of the CWA's jurisdiction. The Court's holding was limited to the statute itself; it did not venture into the question of whether the Constitution's Commerce Clause was insufficient to give the federal government jurisdiction over non-interstate waters, as many had expected.

As the Advance Notice goes on to say, "The goal of the agencies is to develop proposed regulations that will further the public interest by clarifying what waters are subject to CWA jurisdiction and affording full protection to these waters through an appropriate focus of federal and state resources consistent with the CWA. The input of the public in response to today's ANPRM will be used by the agencies to determine the issues to be addressed and the substantive approach for a future proposed rulemaking addressing the scope of CWA jurisdiction."

So, even though this platform isn't exactly the Administrative Procedure Act's preferred venue, we thought we would give five experts the chance to deliver comments publicly, which we will duly forward to the agencies. We note that one of the commenters, Leon G. Billings, as environmental advisor to Senate Environment Subcommittee Chairman Edmund S. Muskie, helped to draft the statute in question.

Jay Austin
Director
Endangered Environmental Laws Program
Environmental Law Institute

"This broad reliance on *SWANCC* to reopen a smorgasbord of legal and policy issues ventures quite some distance.... It also runs contrary to the majority of courts that have resolved similar questions in light of *SWANCC*, and to EPA's own consistent litigation position."

Leon G. Billings
President
Leon G. Billings Inc.

"A fair reading of the law is that the limitation is not the waters subject to federal jurisdiction but the sources of pollution required to be cleaned up. The Congress intended the broadest possible attack on pollution expecting that all of the waters of the United States would enjoy the result of a successful assault."

Derb Carter
Senior Attorney
Southern Environmental Law Center

"It is inexcusable that EPA has not stepped up and clearly stated that failure to provide protection to so-called 'isolated waters' and all tributaries will cripple efforts to maintain and restore water quality and the aquatic ecosystem. At least 32 states have no protections for 'isolated waters' that may be excluded from federal protection."

Jon Kusler
Associate Director
Association of State Wetland Managers

"The Court concluded that permitting the Corps to claim jurisdiction over the ponds at issue 'would result in significant impingement of the states' traditional and primary powers over land and water use.' But state managers view the Section 404 program as a help rather than an 'impingement.'"

Ronda Azevedo Lucas
Attorney
Natural Resources and Environment Division
California Farm Bureau Federation

"The Court relied on several well-established principles. First, the commerce power, while broad, is limited. Second, state and local governments have traditional and primary power over the management of land and water resources. Last, states' rights in these areas must be respected."

No Need For EPA To Act After Court Ruling

JAY AUSTIN

The Corps of Engineers and EPA's proposal for a post-*SWANCC* rulemaking to redefine "Waters of the United States" is at best self-contradictory, at worst disingenuous. On the one hand, the agencies' Federal Register notice repeatedly acknowledges the limited holding of Chief Justice Rehnquist's *SWANCC* opinion: that it applies only to "isolated waters that are intrastate and non-navigable, where the sole basis for asserting CWA jurisdiction is the actual or potential use of the waters as habitat for migratory birds that cross state lines in their migrations."

On the other hand, the notice simply presumes that the Supreme Court also intended to strike down the remainder of the so-called "Migratory Bird Rule," which deals with such disparate matters as endangered species and irrigation; it calls into question other long-standing jurisdictional bases — such as tourism and recreation, fishing and shellfishing, and industrial discharges — that are grounded in sixty years of Commerce Clause jurisprudence; and it implies that the scope of the rulemaking may extend beyond Section 404 to include permitting under the act's National Pollutant Discharge Elimination System plus state water quality standards and certification and the Oil Pollution Act.

This broad reliance on *SWANCC* to reopen a smorgasbord of legal and policy issues ventures quite some distance beyond the "abandoned sand and gravel pit" that Rehnquist pointedly located at the center of that case. It also runs contrary to the majority of courts that have resolved similar questions in light of *SWANCC*, and to EPA's own consistent litigation position in those cases and in cases still pending on appeal. By and large, these decisions have distinguished *SWANCC* on its exceptional facts, and collectively served to bolster the Supreme Court's earlier holding in *United States v. Riverside Bayview Homes* — which even the *SWANCC* majority grudgingly reaffirmed — that "the term 'navigable' as used in the act is of limited import."

SWANCC and its progeny have carefully confined themselves to such statutory analysis of "navigability" and "waters of the United States." But considering the clear, inclusive direction of most Clean Water Act case law both pre- and post-*SWANCC*, the proposed rulemaking is superfluous, even baffling, unless there is something more on the agencies' minds. As much as anything else, their open-ended notice seems designed to elicit opinions on the same constitutional questions that the *SWANCC* Court deliberately avoided.

This is, for example, the only plausible reason for inviting new comment on the decades-old jurisdictional factors found in EPA and Corps regulations, which include (but are not limited to) fishing, recreation, and industrial discharge. Congress's unmistakable intent to address these activities is found repeatedly in the core provisions of the act, and permeates its legislative history. Calling these factors into question cannot be justified by *SWANCC*'s narrow inquiry into statutory language and Congressional intent, but rather is a pretext for reviving the Commerce Clause challenge that the *SWANCC* Court expressly declined to reach. Certain commenters have jumped at this invitation to reargue before the agencies what they could not obtain from the Court.

Despite these urgings and hints of predisposition, the agencies should resist the temptation to revise constitutional history by rulemaking. First, any language in the *SWANCC* opinion beyond its statutory holding is dictum, binding neither on the agencies nor on future litigants. Second, given the extraordinarily qualified nature of that holding as applied "to petitioner's balefill site pursuant to the 'Migratory Bird Rule,'" the agencies should not be attempting to extrapolate even a statutory rule from it, much less a constitutional one. As the maxim goes, "hard cases make bad law," and any needed clarification of *SWANCC* can await the further emergence of a pattern from lower-court dispositions of specific issues on specific factual records — a process that is well underway. Third, given at least EPA's mission of environmental protection, and its steady litigation in support of expansive Clean Water Act and Commerce Clause jurisdiction, revision of these principles without a much more insistent judicial mandate would be a poor policy choice indeed.

More broadly, now is a particularly odd time for administrative agencies to be tinkering with constitutional subtexts. Following the initial shock of the Supreme Court's *Lopez* and *Morrison* decisions, lower courts have distinguished most federal regulatory schemes from the essentially criminal issues at stake in those two rulings, and *SWANCC* itself betrays the Court's own reluctance to extend them into the environmental sphere. The 1981 *Hodel* cases that upheld the Surface Mining Control and Reclamation Act are still good law; every circuit to consider constitutional challenges to the Endangered Species Act has affirmed Congress's broad authority to legislate; and most recently, a panel of the D.C. Circuit signaled its extreme skepticism toward a Commerce Clause and Tenth Amendment attack on the Safe Drinking Water Act.

The question we, and the agencies and courts, should be asking is not how the Clean Water Act is somehow different from these comparably structured, contemporary statutes, but how it is the same. Like those visionary laws, the Clean Water Act's explicit purpose — "to restore and maintain the chemical, physical, and biological integrity of the nation's waters" — embodies a far more comprehensive, *modern* mindset than whatever vestiges of "navigability" it may have inherited from the Rivers and Harbors Act of 1899. As Justice Stevens wrote

in his *SWANCC* dissent, "It is a paradigm of environmental regulation." While the Rehnquist Court may well have its own back-to-the-future agenda, EPA has little reason to subvert the dominant paradigm for Section 404 or any other part of the Clean Water Act.

Jay Austin is an ELI Senior Attorney and Director of the Endangered Environmental Laws Program.

1972 Law Did Not Restrict Federal Action

LEON G. BILLINGS

"Waters of the United States." Those words define the scope of coverage of the federal Clean Water Act. They were carefully selected after serious debate among the members of the conference committee on the Federal Water Pollution Control Act in 1972.

Senator Edmund S. Muskie of Maine included in the record of debate on that Conference Report the following statement:

"One matter of importance throughout the legislation is the meaning of the term 'navigable waters of the United States.'

"The conference agreement does not define the term. The Conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes."

His statement was intended to make clear that Congress wanted the broadest possible definition of waters subject to the new Clean Water regulatory regime. Senator Muskie and his colleagues on the conference committee knew that water pollution did not relate in any way to traditional views of navigability. They also knew that under various laws and regulations "navigable" meant different things to different agencies.

Senator Muskie was comfortable with the Senate version of the definition, which limited the law's application to "the waters of the United States and their tributaries, including the territorial seas." It was the Senate's intention that all waters that have the capacity to contribute pollution to other waters be encompassed by that definition.

The waters and wetlands encompassed by federal water pollution law was evolutionary. There were intense early debates on waters to which the federal interest should apply. Thus, the law prior to 1972 limited federal clean water authority to "interstate waters" without reference to navigability. But by 1972 there were two parallel and important issues which had evolved in the Congress and the Courts.

First, there was the issue of the dredging and filling of waters under the jurisdiction of the U.S. Army Corps of Engineers. Second was the judicial decision which enforced the prohibition on the discharge of pollutants pursuant to the Refuse Act of 1899.

These issues were crystallized in the debate on the 1972 act. Not only did Congress establish and codify the national policy with respect to the filling of wetlands under Section 404 (later expanded in 1977), but also the Congress declared all discharges of pollutants were subject to either federal or state-issued federal permits.

Discharge of a pollutant was defined as "(A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft."

The distinction between interstate and intrastate waters was eliminated. All "waters of the United States" were subsumed under the rubric of the Federal Water Pollution Control Act.

Congress also created a program to deal with urban and agricultural runoff. Section 208 of the 1972 law was intended to address those sources of pollution which did not flow into the "waters of the United States" through pipes or other discrete conveyances and required the states to develop area-wide waste management plans to address these sources of pollution.

Congress retained a water quality standards provision but made water quality standards a measure of the performance of state and federal regulatory programs, not an enforcement mechanism. There was no distinction among the waters of the United States to be incorporated in the water quality standards or area-wide waste management process.

Thus, while many look at the definition of "waters of the United States" to discern which waters are included in the Federal Water Pollution Control Act, it is a more constructive exercise to determine which waters are not subject to federal jurisdiction.

To this end, the debate of the members of the Senate Committee and of the conference committee is informative. What about isolated wetlands and waters like prairie potholes? The issue was encapsulated in the Senate Committee discussion of Lake Tulare in California. It was alleged in that debate that Lake Tulare was an isolated water that drained into no other waterway. Presumably, it derived its water from springs and groundwater sources and runoff and was reduced by evaporation. But in no case did it drain outside of its own borders.

Senator Muskie and his colleagues accepted the idea that this particular, very limited type of water might not be "waters of the United States."

In this period, Congress was concerned about the quality of the nation's waters. The members recognized that pollution was caused by municipal waste discharges, industrial sources, agricultural runoff, and even rain storms. They recognized that the more impervious surfaces the more rapid runoff would occur, the more pollution would result.

The objective of the 1972 Clean Water Act was to restore and maintain the chemical, physical and biological integrity of the nation's waters by eliminating the discharge of pollutants. Thus, a fair reading of the law

is that the limitation is not the waters subject to federal jurisdiction but the sources of pollution required to be cleaned up. The Congress intended the broadest possible attack on pollution expecting that all of the waters of the United States would enjoy the result of a successful assault.

A final note: any reading of the 1972 amendments must reflect an understanding that Congress did not constrain what the federal government can do. It did preserve, in Section 510, the rights of states to do more than federal law required. And it preserved "any right or jurisdiction of the states with respect to the waters (including boundary waters) of such states," thus making clear that federal jurisdiction extended to all "waters of the United States."

Leon G. Billings is President of Leon G. Billings Inc., an environmental consulting firm in Washington, D.C. At the time the 1972 act was written he was Staff Director of the Senate Environment Subcommittee and principal environmental advisor to the Chairman, Senator Edmund S. Muskie of Maine, in which capacity he drafted the Clean Water and Clean Air Acts.

EPA Should Not Compound Court's Error

DERB CARTER

The Environmental Protection Agency should not compound the confusion and problems created by the poorly reasoned Supreme Court decision in *SWANCC* by revising regulations to eliminate federal Clean Water Act protection for some waters. The Court's decision does not require revisions to existing regulations. Revisions hinted in the Corps of Engineers and EPA's Advance Notice of Proposed Rulemaking would create regulatory uncertainty and unnecessarily undermine protection and restoration of the nation's aquatic ecosystem.

As Justice Stevens's dissent in *SWANCC* convincingly explains, the Court majority simply got it wrong. Congress intended that Clean Water Act regulation be comprehensive in scope to include all waters to the full extent of federal authority under the Commerce Clause. The Senate Committee reporting out the 1972 act states the definition of waters subject to the act is to "be given the broadest possible constitutional interpretation." This is necessary because "water moves in hydrologic cycles and it is essential that discharges of pollutants be controlled at the source."

While an anachronistic reference to "navigable waters" was retained in the act, Congress defined "navigable waters" as all "waters of the United States." The majority in *SWANCC*, searching for a peg on which to hang a federalism decision, ignored Congress's explicitly broad definition of "navigable waters" and concluded the reference to "navigable" limited the statute's reach.

Although the Supreme Court majority got it wrong, it also is important to recognize the limited holding in *SWANCC*. The Court held only that Clean Water Act jurisdiction over the ponds at issue in the case could not be based solely on use of the ponds by migratory birds pursuant to the "Migratory Bird Rule." The rule is not a regulation but language from a preamble to regulations that states use of waters by migratory birds is adequate to establish federal jurisdiction within the reach of the Commerce Clause.

Thus, the only necessary conclusion from the Court's decision is that federal jurisdiction over intrastate, non-navigable waters cannot be predicated entirely on use of the waters by migratory birds. EPA promptly issued guidance to this effect after the Court's decision, and that is all that is required. Since the Migratory Bird Rule is not a regulation, no revision of regulations is necessary as a result of the *SWANCC* decision.

The Court specifically refused to address the scope of federal authority over waters under the Commerce Clause (suggesting a lack of votes for the dramatic rollback of federal environmental protection such a constitutional decision would engender). Existing EPA regulations provide that federal jurisdiction over intrastate, non-navigable waters may be based on use of waters by interstate travelers for recreation, on production of fish or shellfish sold in interstate commerce, or on use for industrial purposes by industries engaged in interstate commerce. These bases of federal jurisdiction are unaffected by the decision. EPA's suggestion to the contrary is misplaced.

In 1985, a unanimous Supreme Court upheld federal regulation of wetlands that "tend to drain" into navigable waters, a decision left undisturbed by *SWANCC.* Since all tributaries in the watershed of navigable waters, no matter how small or remote, ultimately drain to the navigable waters, federal jurisdiction clearly exists over these tributaries. EPA's statement in guidance issued with the rulemaking notice, that tributaries "generally speaking" remain jurisdictional, should not be equivocal. Nothing in the *SWANCC* decision calls into question federal jurisdiction over all tributaries to navigable waters.

Any attempt to define in regulation "isolated waters" within the aquatic ecosystem, as suggested by EPA, will turn science on its head. A sole focus on continuous surface water connection to other waters ignores equally important connections that may be intermittent, subsurface, or biological.

Many so-called "isolated wetlands" store storm and flood waters, moderating flows in streams within the watershed. Many "isolated wetlands" recharge subsurface waters to provide the base flow to distant streams. To many amphibians, declining throughout our aquatic environments, the fact that waters are not regularly connected by surface waters to other waters is essential to provide predator-free breeding sites. To attempt by regulation to pick a point on the continuum of connection be-

tween waters that comprise the aquatic ecosystem would be entirely arbitrary.

The overwhelming weight of federal court decisions since *SWANCC* narrowly construed the decision and found Clean Water Act jurisdiction over waters, in some cases waters significantly removed from the nearest navigable-in-fact water. Most of the aberrant decisions not finding federal jurisdiction are under appeal. The government has consistently (and with nearly unanimous rulings) argued that the actual holding in *SWANCC* is narrow and existing regulations defining federal jurisdiction are unaffected by the decision. EPA should not abandon this position to embark on a rulemaking foray into defining away protection for certain waters.

It is inexcusable that EPA has not stepped up and clearly stated that failure to provide protection to so-called "isolated waters" and all tributaries will cripple efforts to maintain and restore water quality and aquatic ecosystems. At least 32 states have no protections for "isolated waters" that may be excluded from federal protection. These states are unlikely to enact protections without a clear statement from EPA that these waters are important. More troubling, states with comprehensive water quality protections, such as Virginia, have expressed concerns to the federal agencies that a retreat on Clean Water Act jurisdiction will create pressure for the state to follow.

The simple fix for the problem created by the *SWANCC* decision is for Congress to amend the act to clarify that it did in fact intend to extend federal jurisdiction to all the waters of the United States, including so-called "isolated waters." Proposed legislation has been introduced with bipartisan support to restore any Clean Water Act jurisdiction lost as a result of the *SWANCC* decision. The administration should abandon ill-advised proposals to revise regulations and instead put its weight behind these legislative proposals. Proceeding to arbitrarily eliminate federal protection of some waters will set back three decades of effort to restore the nation's aquatic environment.

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'Impinging On The States'? We Don't Think So

JON KUSLER

The U.S. Supreme Court in *SWANCC* concluded that permitting the U.S. Army Corps of Engineers to claim jurisdiction pursuant to the Migratory Bird Rule over the ponds and mudflats at issue "would result in significant impingement of the states' traditional and primary powers over land and water use." But, do states themselves view federal regulatory jurisdiction for isolated waters and wetlands as an "impingement"?

The Association of State Wetland Managers has hosted conference calls and participated in six meetings with the states concerning *SWANCC* since the decision. We have found state wetland managers to be, with little exception, opposed to *SWANCC* and a broad interpretation of excluded waters through further federal guidance or rulemaking. State managers view the Section 404 program as a help rather than an "impingement," although there are frustrations with the program.

As will be discussed below, state wetland managers want state programs to be more fully involved in protecting and restoring isolated wetlands (and other waters). State managers want state and local wetland programs to be taken more seriously by Congress and federal agencies. They want more financial and technical help. But, this does not equate with reduced federal regulatory jurisdiction for isolated, adjacent, and possibly tributary waters for a number of reasons:

First, any interpretation of the Clean Water Act which suggests that isolated ponds, mudflats, wetlands or other waters are separate from other waters is scientifically unsound and undermines state as well as federal pollution control and watershed management efforts. State scientists, whether in pollution control or wetland agencies, share the belief of their federal counterparts that a "comprehensive" national pollution control program cannot regulate discharges only into major waters. Water, including point and nonpoint pollutants, really does run downhill.

Second, federal agencies have not attempted to prevent states from adopting their own wetland or waters programs. State wetland managers have in New Jersey and Michigan "assumed" a portion of the Section 404 program. The Corps has issued state programmatic permits for state wetland or water programs in 13 states and additional permits are under consideration. State wetland managers do not see the Section 404 program as "significant impingement" on their programs.

Third, the majority of states lack effective wetland regulatory programs for isolated wetlands and other waters. Effective state wetland programs have been confined primarily to the Midwest, Northeast, and the states bordering the Pacific. Most other states, including those with the Prairie Potholes, have depended over the last two decades upon federal regulation of most wetlands, with state veto power of federal permits pursuant to Section 401 of the Clean Water Act. The Corps and EPA have assumed most of the costs of regulating these wetlands, including the costs of delineations, assessment of impacts, monitoring, and in some cases enforcement. States have often spent limited funds in establishing and implementing Section 401 programs. However, the scope of state 401 programs has been reduced by *SWANCC* with the reduction in the geographical and subject matter scope of federal Section 404 permitting. Even fur-

ther reductions in state programs will occur if a broad interpretation of *SWANNC* occurs in rule making.

Fourth, states are suffering from severe budget problems and new wetland or other waters protection efforts will be economically and politically unlikely in the near future. Only three states — Ohio, North Carolina, and Wisconsin — have adopted remedial legislation or regulation to address the gap in wetland regulation created by *SWANCC.* In all instances, however, the states had established Section 401 wetland regulatory programs prior to the new legislation.

Despite a great deal of wishful thinking at the federal level, most states will not fill the gap created by *SWANCC* in the foreseeable future without substantial financial incentives and technical assistance.

Fifth, state wetland managers do not believe that state, local, or federal wetland restoration and creation programs, such as the Wetland Reserve program, are a substitute for wetland regulations. States strongly support the Farm Bill, Partners for Wildlife, and other restoration and creation programs to help compensate for habitat losses. But, these programs apply primarily to rural areas. Wetland losses are occurring in urban areas with resulting pollution, habitat loss, flood hazard, erosion, sedimentation, and other problems. Reasonable regulation of private property is needed and not simply more restoration.

What, then, would the states like to see? Several suggestions include (note, these are my observations and should not necessarily be attributed to the Association or any specific state):

First, the Corps and EPA should narrowly interpret *SWANCC* in any guidance or rulemaking. Adjacent wetlands and tributary waters should continue to be regulated as well as isolated wetlands. Isolated wetlands should continue to be regulated where a significant nexus to broader waters may be presumed based on pollution control, flood storage, flood conveyance, habitat, or other interconnections. Guidance should be tailored to different physical contexts based upon weather, hydrology, geology, and other factors. For example, indicators and presumptions of significant nexus might be somewhat different for arid states such as New Mexico and Arizona with many ephemeral streams than for Louisiana and Florida with high rainfall and many permanent lakes, streams, and wetlands. EPA and the Corps should involve the states in preparing such guidance.

Second, the Corps, EPA, USDA Natural Resources Conservation Service, U.S. Geological Survey, and others should encourage states and tribes to play more important, collaborative roles in issuing permits in lieu of direct federal permitting for isolated and other waters where state or local programs meet or exceed federal standards. They could do this by issuing additional guidance supporting development of state and local programmatic permits and joint permitting. They could do this by not issuing provisional Section 404 permits prior to state 401 water quality certification/ Coastal Zone Management Act consistency determinations. Even where direct federal permitting will continue, states, tribes, and local governments can play a greater role in assisting the federal government in evaluating, mapping, planning, regulating, monitoring, and enforcing regulations and restoring wetlands and broader aquatic ecosystems. States, tribes, and local governments possess on-site staff and expertise and both land and water use planning and regulatory powers, which can supplement federal roles.

Third, Congress should encourage the establishment and administration of state, tribal, and local wetlands and waters programs by providing additional funds. The EPA state wetland grant program has been extremely useful in encouraging state wetland programs. This program should be continued and funding levels increased. At present, Congress provides about $15 million per year through the EPA state grant program for development of state programs. This amount should be at least doubled in light of *SWANCC,* and program implementation authorized.

In conclusion, states want to be more fully involved. They want a "national" wetland protection and restoration program rather than a federal program. But, states do not want reductions in federal Clean Water Act jurisdiction. They want a rethinking of federal, state, tribal, and local roles with more emphasis upon watershed approaches and shared responsibilities. State and local information gathering, planning, and regulatory permitting are particularly important for isolated wetlands and other waters, because such waters require a watershed approach. Management of these wetlands and waters must be increasingly tied in with state and local stormwater, floodplain, nonpoint source pollution control, water supply, and broader ecosystem protection and restoration efforts.

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The 'Chicken Little' Syndrome

RONDA AZEVEDO LUCAS

After the U.S. Supreme Court's *SWANCC* decision, a great hue and cry emanated from certain sectors of society, characterizing the decision and the Bush administration's attempts to follow this Supreme Court precedent as a "war" on the environment. Some politicians and environmental activists alike prophesied environmental calamities and boldly proclaimed that the Supreme Court "got it wrong."

However, the high court's majority did not view this case solely as an environmental battleground. Instead, they focused on the seemingly endless reach of federal jurisdiction if the Court agreed with the U.S. Army

Corps of Engineers' regulations and the "Migratory Bird Rule." As the justices noted during oral argument, if the Court followed the Corps' interpretation, every "farm pond" and "prairie hole" in the nation would be subject to federal regulation — a "bizarre point" since it is the primary responsibility of the states to eliminate pollution and plan development and use of land.

The Court relied on several well-established and incontrovertible legal principles in reaching its decision. First, the commerce power, while broad, is limited. Second, state and local governments have traditional and primary power over the management of land and water resources. Last, states' rights in these areas must be respected. Therefore, it is not surprising that the five-member majority, which has a history of supporting states' rights and limiting the federal government's role, indicated that protection of intrastate waters and wetlands is the responsibility of state governments rather than federal regulators. This conclusion is neither extraordinary nor controversial considering that Congress, when passing the Clean Water Act of 1972, expressly recognized and sought to protect the primary responsibilities and rights of states in the management and use of land and water resources.

Prior to SWANCC, EPA and/or the Corps used a tenuous connection to interstate commerce as an excuse to assert jurisdiction over almost any waterbody located anywhere. Field regulators did not have to determine whether something was a "tributary," was "adjacent," or qualified as an "impoundment" because the Corps exerted unfettered authority over essentially everything; even, in some cases, if water was not present. *SWANCC* declared this incredible reach unconstitutional, making the meaning of these regulatory terms essential to determining whether EPA and/or the Corps can assert federal jurisdiction under the CWA. The appropriate role for the federal government is to enhance state efforts to protect waters that were never properly subject to CWA jurisdiction by proceeding with a rulemaking clearly defining these terms, thereby clarifying which waters and wetlands are subject to federal jurisdiction in the post-*SWANCC* era.

Even without these clarifications, several states have seized the opportunity to re-establish their jurisdiction over land and water management. The fallacy of the notion espoused by some naysayers that federal regulation is the only way to ensure adequate environmental protections has been exposed by states that have enhanced the protections afforded intrastate waters and wetlands under state laws. The actions highlighted below strongly refute the doomsday assertions, made by a variety of environmental organizations and a few members of Congress, that the *SWANCC* decision and the recently published Advance Notice of Proposed Rulemaking are decimating the protections provided to our nation's waterways.

For example, California's Porter-Cologne Water Quality Control Act provides the State Water Resources Control Board with very broad authority, including the power to regulate wetlands that are no longer subject to federal jurisdiction. Further, the board has taken the position that *SWANCC* has no impact on the authority granted by state law. Wisconsin did not have pre-existing authority over wetlands prior to *SWANCC*, but quickly adopted a law in May 2001 requiring a state-issued permit for any activity that will fill or otherwise impact any wetlands not subject to federal jurisdiction. Ohio passed comprehensive legislation in July 2001 protecting wetlands that are not subject to federal regulation. This legislation established tiered requirements for the issuance of permits for activities that may degrade wetlands in the state. Indiana has proposed amending its existing regulations and creating a state wetlands program specifically designed to protect waters that are no longer covered by federal jurisdiction. Florida regulates wetlands primarily through its Surface Water Regulatory Program, which essentially covers any movement of soil or any type of construction. Additionally, in October 2001, Escambia County in Florida adopted an ordinance requiring county review of building plans that would impact wetlands and established a "no net loss" wetlands policy. Connecticut, Delaware, Minnesota, and South Carolina have proposed legislative or regulatory initiatives to protect wetlands that are no longer under federal jurisdiction. These are just a few examples of states throughout the nation that are willing and able to provide the necessary level of environmental protection in a manner that works best for the environment and the local constituents.

SWANCC did not strip away or roll back environmental protections as some individuals have claimed. *SWANCC* merely reiterated that the states are the proper entities to provide such protections because allowing the federal government to assert jurisdiction over intrastate waters necessarily federalizes land and water decisions. Allowing state and local governments to have control over such land and water decisions not only enhances the protections provided, it also respects the delicate balance between federal and state power established by the U.S. Constitution. State and local governments are capable of protecting their resources without the intrusion of federal bureaucrats.

SWANCC reaffirmed that it is properly the role of state governments to protect intrastate waters and wetlands. The result, contrary to the hysterical claims of many, is even greater protection of intrastate waters and wetlands and greater involvement of local governments. The sky is not falling — *SWANCC* is not an assault on the environment. The Supreme Court got it right, and, most important, states have responded and will continue to protect their own mudflats, farm ponds, and prairie holes.

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