

**SUBJECT:** Supreme Court Ruling Concerning CWA Jurisdiction over Isolate Waters

1. The purpose of this memorandum and its attachment is to inform you of a significant new ruling by the Supreme Court pertaining to the scope of regulatory jurisdiction under the Clean Water Act (CWA) and to inform you of what is and is not affected by this ruling. Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, No. 99-1178 (January 9, 2001) (“SWANCC”) involved statutory and constitutional challenges to the assertion of CWA jurisdiction over isolated, non-navigable, intrastate waters used as habitat by migratory birds.
2. In the 5-4 decision, the Supreme Court held that the Corps exceeded its statutory authority by asserting CWA jurisdiction over “an abandoned sand and gravel pit in northern Illinois which provides habitat for migratory birds.” Slip op. at 1. The Court did not reach the question of “whether Congress could exercise such authority consistent with the Commerce Clause, U.S. Const., Art. I, § 8, cl. 3.” Slip op. at 1. It summarized its holding as follows: “We hold that 33 C.F.R. § 328.3(a)(3) (1999), as clarified and applied to petitioner’s baffle site pursuant to the ‘Migratory Bird Rule,’ 51 Fed. Reg. 41217 (1986), exceeds the authority granted to respondents under § 404(a) of the CWA.” Id. at 14. Although the Court held that the Corps’ application of § 328.3(a)(3) was invalid in SWANCC, the Court did not strike down §328.3(a)(3) or any other component of the regulations defining “waters of the United States.”
3. The Supreme Court’s opinion has led to questions concerning the effect of the decision on the geographic jurisdiction of the Corps’ regulatory program under CWA Section 404, because that jurisdiction depends on the definition of the term “waters of the United States” in agency regulations. Accordingly, the attachment to this memorandum describes which aspects of the regulatory definition of “waters of the United States” are and are not affected by SWANCC.

1. In light of the Court’s “conclu[sion] that the ‘Migratory Bird Rule’ is not fairly supported by the CWA,” slip op. 6, Corps regulatory field staff should no longer rely on the use of waters or wetlands as habitat by migratory birds as the sole basis for the assertion of regulatory jurisdiction under the CWA.

2. As noted above, the Court’s holding was strictly limited to waters that are “nonnavigable, isolated, [and] intrastate.” With respect to any waters that fall outside of that category, field staff should continue to exercise CWA jurisdiction to the full extent of their authority under the statute and regulations and consistent with court opinions.

3. The Court did not overrule the holding or rationale of United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985), which upheld the regulation of traditionally navigable waters, interstate waters, their tributaries, and wetlands adjacent to each. See id. at 123, 129, 139. Each of these categories is still considered “waters of the United States,” as is discussed in paragraphs 4 and 6 of the attached memorandum.

5. The following subsection of the regulatory definition of “waters of the United States” is the provision primarily affected by SWANCC:

“(3) 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 . . .”

a. Waters covered solely by subsection (a)(3) that could affect interstate commerce **solely** by virtue of their use as habitat by migratory birds are no longer considered “waters of the United States.”

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b. The Court’s opinion did not specifically address what other connections with interstate commerce might support the assertion of CWA jurisdiction over “nonnavigable, isolated, intrastate waters” under subsection (a)(3).

6. As specific cases arise presenting legal questions, please consult agency legal counsel. My staff point of contact for this matter is Lance D. Wood, who can be reached at (202) 761-8556.

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