



ENVIRONMENTAL ISSUE BRIEF

Changes in Federal Jurisdiction Over Wetlands

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Overview

On January 10, the U.S. Environmental Protection Agency and the Army Corps of Engineers announced new guidelines that clarify federal jurisdiction over the nation's wetlands. The move was in response to a 2001 Supreme Court ruling that cast doubt on the Clean Water Act's (CWA) jurisdiction over isolated wetlands. The guidelines eliminate federal authority over isolated wetlands that lie wholly within one state and are not connected to other bodies of water.

The agencies also issued a proposed rulemaking which could redefine what bodies of water should be protected under the CWA. The EPA said that it would invite 45 days of public comment on the proposed rules following their publication in the Federal Register.

Wetlands provide a host of valuable functions for their ecosystems, including flood and storm damage protection, groundwater recharge, pollution abatement, and habitats and water sources for fish and wildlife. Fifteen states offer considerable protections for isolated freshwater wetlands. But regulations are limited in many states by wetland size, and they do not generally pertain to public lands. In the Northeast, most states have fairly comprehensive programs that protect wetlands. But they do not all apply to isolated wetlands, and statutes and regulations addressing wetlands and other isolated waters vary substantially from state to state.

Definitions: There is no single, ecologically or scientifically accepted definition of an isolated wetland. From a geographic standpoint, wetlands separated from other wetlands by dry land may be considered isolated. From a hydrologic standpoint, they can be defined as wetlands that are not connected to other wetlands or water bodies by surface water or ground water, according to the U.S. Fish and Wildlife Service.¹ Up to one fifth of the nation's 100 million acres of wetlands are isolated, the EPA estimates.

The SWANCC Decision

The new guidelines were issued in response to the 2001 Supreme Court decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (SWANCC). The decision eliminates Clean Water Act jurisdiction over isolated wetlands that lie completely within the borders of one state, are non-navigable, are not connected to other bodies of water, and where the sole basis for CWA protections is their value as a habitat for migratory birds.

The Supreme Court decision overturned an Army Corps decision to block the creation of a landfill in the Chicago area, and permitted developers to fill in isolated wetlands in areas where no state laws applied. Before the ruling, any party that wished to fill an isolated wetland had to apply for an Army Corps permit.

The decision also invalidated the Army Corps' Migratory Bird Rule for regulating isolated wetlands. That rule said that because migratory birds, which use isolated wetlands, are important to interstate commerce, the federal government may regulate those wetlands even if they have no other connection to commerce or to federal waters.

SWANCC also calls into question whether CWA jurisdiction over isolated, intrastate, non-navigable waters could be applied based on the other factors listed in the Migratory Bird Rule — such as use of the water as a habitat for birds protected by migratory bird treaties, as a habitat for federally protected endangered species, or to irrigate crops sold in interstate commerce.

¹ See U.S. Fish and Wildlife Service, "Geographically Isolated Wetlands: A Preliminary Assessment of their Characteristics and Status in Selected Areas of the United States," June 2002. Available online: http://wetlands.fws.gov/Pubs_Reports/isolated/report.htm.

The New Guidelines

As part of the new guidelines:

- Regional offices were instructed not to assert CWA jurisdiction over isolated waters that lie solely within the borders of one state and are non-navigable, where the sole basis available for asserting CWA jurisdiction rests on any of the factors listed in the Migratory Bird Rule.
- Regional offices were told to seek formal approval from EPA headquarters in Washington, D.C. in order to provide federal protection for isolated non-navigable waters located within a single state based on other types of interstate commerce.
- Regional offices are to continue to assert federal jurisdiction over traditional navigable waters.

The EPA noted that other federal or state laws and programs may protect a waterway and ecosystem even if that waterway no longer falls under CWA jurisdiction following SWANCC.

The Proposed Rulemaking

In addition to issuing the new guidelines, the agencies asked for public comment on the term “isolated waterways,” and on the proper role of interstate commerce in wetlands jurisdiction, including:

- 1) Whether use of isolated wetlands by interstate or foreign travelers for recreation or other purposes, by companies engaged in interstate commerce, or by fish that could be sold in interstate commerce provide a basis for determining CWA jurisdiction over isolated wetlands; and
- 2) Whether the regulations should define “isolated wetlands” and if so, what factors should be used to determine whether or not a waterway is isolated, for jurisdictional purposes.

Critics claimed that the agencies went beyond the court ruling by leaving open the possibility of eliminating other reasons for protecting isolated wetlands. Supporters, in turn, view the action as progress toward establishing regulatory certainty.

State Impacts

The SWANCC decision limits federal CWA jurisdiction over isolated wetlands, but other state laws and programs do cover these waters in much of the Northeast. For example, Maine, New Jersey and Pennsylvania have regulations governing nearly all wetlands in the state, including isolated ones. However, there are exceptions. In New York State, only wetlands that are 12.4 acres in size or greater are regulated (unless they are coastal wetlands). One wetlands official there noted that as the result of the new guidelines, protections for isolated wetlands smaller than 12.4 acres are now gone, and the state has lost hundreds of acres of wetlands since the SWANCC ruling. In Delaware, where protections are limited to tidal wetlands, isolated wetlands are also not covered by state programs.

For states in the Northeast with wetlands regulations that are more stringent than the federal government’s, the new guidelines could raise an additional issue. Some environmental officials are concerned about potential efforts to loosen existing regulations, because some states have policies indicating that their environmental programs should not be more rigid than federal ones.

Given the complexity of the issue, one expert urged state officials to take a careful look at their current laws and regulations governing wetlands, to assess how the new guidelines will impact these natural resources.

According to the Association of State Wetland Managers, two thirds of states in the country currently lack regulatory programs that comprehensively address wetlands in general, and isolated wetlands in particular. Officials considering the possibility of introducing legislation to close the gap created by the SWANCC decision can view the ASWM’s model legislation, available on their Web site at www.asm.org/swp/model-leg.pdf . The legislation is intended to serve as a departure point for discussion within each state.