

State laws and programs may still protect a water and related ecosystem even if that water is no longer jurisdictional under the CWA following SWANCC. The Federal government remains committed to wetlands protection through the Food Security Act's Swampbuster requirements and Federal agricultural program benefits and restoration through such Federal programs as the Wetlands Reserve Program (administered by the U.S. Department of Agriculture), grant making programs such as Partners in Wildlife (administered by the Fish and Wildlife Service), the Coastal Wetlands Restoration Program (administered by the National Marine Fisheries Service), the State Grant, Five Star Restoration, and National Estuary Programs (administered by EPA), and the Migratory Bird Conservation Commission (composed of the Secretaries of Interior and Agriculture, the Administrator of EPA and Members of Congress).

The SWANCC decision also highlights the role of States in protecting waters not addressed by Federal law. Prior to SWANCC, fifteen States had programs that addressed isolated wetlands. Since SWANCC, additional States have considered, and two have adopted, legislation to protect isolated waters. The Federal agencies have a number of initiatives to assist States in these efforts to protect wetlands. For example, EPA's Wetland Program Development Grants are available to assist States, Tribes, and local governments for building their wetland program capacities. In addition, the U.S. Department of Justice and other Federal agencies co-sponsored a national wetlands conference with the National Governors Association Center for Best Practices, National Conference of State Legislatures, the Association of State Wetlands Managers, and the National Association of Attorneys General. This conference and the dialogue that has ensued will promote close collaboration between Federal agencies and States in developing, implementing, and enforcing wetlands protection programs. EPA also is providing funding to the National Governors Association Center for Best Practices to assist States in developing appropriate policies and actions to protect intrastate isolated waters.

In light of this, the agencies solicit information and data from the general public, the scientific community, and Federal and State resource agencies on the availability and effectiveness of other Federal or State programs for the protection of aquatic resources and practical experience with their implementation. The agencies are also

interested in data and comments from State and local agencies on the effect of no longer asserting jurisdiction over some of the waters (and discharges to those waters) in a watershed on the implementation of Total Maximum Daily Loads (TMDLs) and attainment of water quality standards.

VII. Statutory and Executive Order Reviews

A. Executive Order 12866

Under Executive Order 12866 (58 FR 51735, October 4, 1993), EPA and the Corps must determine whether the regulatory action is "significant" and therefore subject to review by the Office of Management and Budget (OMB) and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may:

- (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities;
- (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
- (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, it has been determined that this Advanced Notice of Proposed Rulemaking is a "significant regulatory action" in light of the provisions of paragraph (4) above as it raises novel legal or policy issues. As such, this action was submitted to OMB for review. Changes made in response to OMB suggestions or recommendations will be documented in the public record.

B. National Environmental Policy Act

As required by the National Environmental Policy Act (NEPA), the Corps prepares appropriate environmental documentation for its activities affecting the quality of the human environment. The Corps has determined that today's Advance Notice of Proposed Rulemaking merely solicits early comment on issues associated with the scope of waters that are properly subject to the CWA, and information or data from the general public, the scientific community, and

Federal and State resource agencies on the implications of the SWANCC decision for the protection of aquatic resources. In light of this, the Corps has determined that today's ANPRM does not constitute a major Federal action significantly affecting the quality of the human environment, and thus does not require the preparation of an Environmental Impact Statement (EIS).

Dated: January 10, 2003.

Christine Todd Whitman,

Administrator, Environmental Protection Agency.

Dated: January 10, 2003.

R.L. Brownlee,

Acting Assistant Secretary of the Army, (Civil Works), Department of the Army.

Note: The following guidance document will not appear in the Code of Federal Regulations.

Appendix A

Joint Memorandum

Introduction

This document provides clarifying guidance regarding the Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) ("SWANCC") and addresses several legal issues concerning Clean Water Act ("CWA") jurisdiction that have arisen since SWANCC in various factual scenarios involving federal regulation of "navigable waters." Because the case law interpreting SWANCC has developed over the last two years, the Agencies are issuing this updated guidance, which supersedes prior guidance on this issue. The Corps and EPA are also initiating a rulemaking process to collect information and to consider jurisdictional issues as set forth in the attached ANPRM. Jurisdictional decisions will be based on Supreme Court cases including *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985) and SWANCC, regulations, and applicable case law in each jurisdiction.

Background

In SWANCC, the Supreme Court held that the Army Corps of Engineers had exceeded its authority in asserting CWA jurisdiction pursuant to section 404(a) over isolated, intrastate, non-navigable waters under 33 C.F.R. 328.3(a)(3), based on their use as habitat for migratory birds pursuant to preamble language commonly referred to as the "Migratory Bird Rule," 51 FR 41217 (1986). "Navigable waters" are defined in section 502 of the CWA to mean "waters of the United States, including the territorial seas." In SWANCC, the Court determined that the term "navigable" had significance in indicating the authority Congress intended to exercise in asserting CWA jurisdiction. 531 U.S. at 172. After reviewing the jurisdictional scope of the statutory definition of "navigable waters" in section 502, the Court concluded that neither the text of the statute nor its legislative history supported the