BEVERIDGE & DIAMOND, P.C.

WETLANDS UPDATE
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EPA & U.S. Army Corps of Engineers Initiate Post-*SWANCC* Rulemaking on Isolated Wetlands and Issue Interim Guidance Memorandum

Introduction

On January 9, 2001, the Supreme Court decided *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*[1] ("*SWANCC*," commonly pronounced "swank"). The case involved statutory and constitutional challenges to the U.S. Army Corps of Engineers' ("Corps") assertion of jurisdiction over former quarry pits based on their use by migratory birds. The Court's decision to invalidate the Migratory Bird Rule sent shock waves through the wetlands world. Until then, the Corps' jurisdictional reach had been expanding with no apparent limit in sight. While *SWANCC* did not clearly define the limit, the case did serve notice to everyone that there is one. Federal courts have had two years to wrestle with what *SWANCC* really means, with only limited success. EPA and the Corps have now begun the difficult process of providing much-needed guidance to its field staff and the regulated community.

On January 15, 2003, EPA and the Corps published an Advance Notice of Proposed Rulemaking ("ANPR") on the Clean Water Act[2] definition of "waters of the United States"[3] and an Interim Guidance Memorandum[4] for field staff pending rulemaking. The purpose of the ANPR is to gather information from the general public, the scientific community, and resource agencies on the implications of *SWANCC* and the proposed rulemaking. The comment period for the ANPR ends **March 3, 2003**. Section I provides the background for this issue, Section II describes the issues raised by the ANPR, and Section III analyzes the immediate effect of the Interim Guidance Memorandum.

I. Background

Pursuant to the Clean Water Act,[5] the Corps' federal jurisdiction over "waters of the United States" requires the application of several convoluted and somewhat circular statutory and regulatory definitions. "Waters of the United States" is defined by

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[1] *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001).
[2] 33 U.S.C. § 1351 *et seq*.
[3] 68 Fed. Reg. 1991 (January 15, 2003).
[4] 68 Fed. Reg. 1991, 1995, Robert E. Fabricant, General Counsel, U.S. Environmental Protection Agency and Steven J. Morello, General Counsel, U. S. Army Corps of Engineers, "Joint Memorandum" (January 10, 2003)) ("Interim Guidance Memorandum"). This Interim Guidance Memorandum supercedes the guidance released immediately after *SWANCC* (Gary S. Guzy, General Counsel, U.S. Environmental Protection Agency and Robert M. Andersen, Chief Counsel, U. S. Army Corps of Engineers, "Supreme Court Ruling Concerning CWA Jurisdiction over Isolated Waters," (January 19, 2001)). *Id.*
[5] 33 U.S.C. § 1351 *et seq*.

the Clean Water Act as "navigable waters."[6] In turn, the Corps and EPA regulations define "navigable waters" both <u>physically</u>, (i.e., the existence of certain aquatic characteristics) <u>and legally</u>, (i.e., the connection to federal interstate commerce).

Physically, non-tidal water bodies, such as lakes, ponds, rivers, and streams are defined by their ordinary high water mark,[7] while wetlands are defined by the use of the Corps' methodology for identifying a certain combination of water, hydric soils, and hydrophilic plants.[8]

Legally, however, to determine which of the physical waters and wetlands are subject to federal jurisdiction, Corps regulations lay out several possible links to federal navigable waters, as well as other federal interests.[9] In addition to waters that are "navigable in fact," the regulations establish jurisdiction over "interstate waters" that are located or flow between two or more states and (far more controversially) 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

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[6] 33 U.S.C. § 1362(7).

[7] "The term wetlands means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas." "The term ordinary high water mark means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas." 33 C.F.R. § 328.3(b); see also 40 C.F.R. § 230.3(t).

[8] 33 C.F.R. § 328(b); Environmental Laboratory, Department of the Army, Wetlands Delineation Manual (January 1987).

[9] "For the purpose of this regulation these terms are defined as follows:
(a) The term waters of the United States means
(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
(2) All interstate waters including interstate wetlands;
(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 including any such waters: (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or (iii) Which are used or could be used for industrial purpose by industries in interstate commerce;
(4) All impoundments of waters otherwise defined as waters of the United States under the definition;
(5) Tributaries of waters identified in paragraphs (a) (1) through (4) of this section;
(6) The territorial seas;
(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) (1) through (6) of this section.
(8) Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA." 33 C.F.R. § 328.3; *see also* 40 C.F.R. § 230.3(s).

commerce including any such waters."[10] This broad definition of "waters of the United States" is further expanded by the inclusion of all "tributaries" to such waters and any wetland "adjacent" to such waters or their tributaries.[11]

The Corps' regulation of waters that are "navigable in fact" or interstate, as well as their tributaries and adjacent wetlands, is fairly straightforward and generally considered unaffected by *SWANCC*. The controversy relates primarily to the Corps' legal authority reach to reach the more amorphous "other waters." The Corps relied on the use by migratory birds of purely intrastate, "isolated" quarry pits ("isolated" meaning no demonstrated hydrologic connection to a clearly regulated, i.e., navigable, waterbody) to assert jurisdiction in *SWANCC*. The Court reversed the Corps' jurisdictional decision, but, so far, what exactly the Court held has been the subject of much debate and speculation, with little resolution.

Immediately following the opinion, the Corps and EPA responded with a joint guidance memorandum asserting that "the Court did not strike down §328.3(a)(3) or any other component of the regulations defining 'waters of the United States.' . . .the Court's actual holding was narrowly limited to [Clean Water Act] regulation of 'nonnavigable, isolated, instrastate' waters based solely on the use of such waters by migratory birds."[12] This guidance has now been superceded by the Interim Guidance Memorandum discussed in Section III, below. Others argued that *SWANCC* calls into question the legitimacy of the Corps' regulation of purely intrastate, isolated waters based on <u>any</u> assertion of a connection to interstate commercial activity, by migratory birds or otherwise. In addition, although *SWANCC* was a wetlands case (under Section 404 of the CWA), there has been debate over the potential effect on the scope of regulatory jurisdiction under the Section 402 NPDES program, the Section 311 oil spill program, water quality standards under Section 303, Section 401 water quality certifications, as well as the Oil Pollution Act (OPA), all of which rely on the jurisdictional definition of "waters of the United States." Both the ANPR and the new Interim Guidance Memordandum give credence to these open questions, while not resolving the issue entirely at this point.

Court cases citing *SWANCC* have been inconsistent in their interpretation of the Court's holding.[13] As one federal district court summarized, "*SWANCC* does not clarify

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[10] Although the regulation does not specify the type of commercial connection, a clarifying discussion in a 1986 regulatory interpretation of 33 C.F.R. Section 328.3(a)(3) has become known as the "Migratory Bird Rule." 51 Fed. Reg. 41206, 41217; *see also* 53 Fed. Reg. 20,764, 20,765.

[11] 33 C.F.R. §328.3(a)(5) and (7).

[12] Gary S. Guzy, General Counsel, U.S. Environmental Protection Agency and Robert M. Andersen, Chief Counsel, U. S. Army Corps of Engineers, "Supreme Court Ruling Concerning CWA Jurisdiction over Isolated Waters," (January 19, 2001).

[13] The following cases represent a cross-section of opinions that demonstrate the confusion in the field. *See e.g.*, *United States v. Interstate General Co.*, 152 F.Supp.2d 843, 852 (D.Md. 2001) (finding that in *SWANCC*, the Supreme Court held that "the Corps' Migratory Bird Rule, along with 33 C.F.R. § 328.3(a)(3), were invalid" but upholding a conviction pursuant to 33 C.F.R. §§ 328.3(a)(5) and (a)(7)); *Rice v. Harken Exploration Co.*, 250 F.3d 264, 269-272 (5th Cir. 2001) (expanding the holding of *SWANCC* to limit federal jurisdiction over intermittent and ephemeral tributaries under the Oil Pollution Act); *Borden Ranch Partnership v. U.S. EPA*, 262 F.3d 810, 816 (9th Cir. 2001) (reversing finding of liability for

what points between those two extremes a nonnavigable body of water falls within the CWA definition of navigable waters."[14] The ANPR and the Interim Guidance Memorandum are intended to begin the process of clarifying where in this spectrum the CWA definition of "waters of the United States" will fall post-*SWANCC*.

II. Proposed Rulemaking: CWA Definition of "Waters of the United States"

The main stated purpose of the January 15 Advance Notice of Proposed Rulemaking on the CWA definition of "waters of the United States" is to gather information from the general public, the scientific community, and resource agencies on the implications of *SWANCC* and the proposed rulemaking.[15] The comment period for the ANPR ends March 3, 2003, and the ANPR includes specific instructions for submitting comments.

The ANPR identifies the primary post-*SWANCC* issues that EPA and the Corps plan to addressed in the rule-making:

A. Application of a Regulatory Change to the CWA Definition

As described in the ANPR, any regulatory change in the definition of "waters of the United States" will confirm what has been debated for the last two years: *SWANCC*, to some extent, extends to more than just Section 404 of the Clean Water Act, but all CWA sections that rely on the definition of "waters of the United States" as a basis for jurisdiction (Section 402 NPDES program, the Section 311 oil spill program, water quality standards under Section 303, Section 401 water quality certifications), as well as the Oil Pollution Act (OPA).

B. Migratory Bird Rule

One element of the rulemaking is to confirm the general consensus that *SWANCC* eliminated jurisdiction over isolated, intrastate, non-navigable waters, where the sole

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impacts to an isolated vernal pool based on *SWANCC* and remanding for recalculation of civil penalties); *Headwaters, Inc. v. Talent Irrigation District*, 243 F.3d 526, 533 (9th Cir. 2001) (finding that "the Court invalidated a 1986 Army Corps of Engineers promulgation known as the Migratory Bird Rule, which included in 'waters of the United States' interstate waters with no connection to any navigable waters, but which were or would be used as habitat for migratory birds."); *United States v. Buday*, 138 F.Supp.2d 1282, 1287 (D.Mt. 2001) (noting that "[e]ven though the Court did not strike any part of 33 C.F.R. § 328.3(a)(3), the decision raises serious questions about the continued viability of the subsection"); *United States v. Newdunn Assoc.,* 195 F.Supp.2d 751 (E.D. Va. 2002) (finding that none of the alleged tributaries were contiguous or adjacent to navigable waters or "waters of the United States"); *United States v. Rapanos,* 190 F.Supp.2d 1011 (E.D. Mich. 2002) (remand to district court to reconsider CWA violations because defendant's actions did not have a direct impact on navigable waters as wetlands were located 20 miles from nearest body of navigable water); *United States v. Lamplight Equestrian Center,* 2002 WL 360652 (N.D. Ill. 2002) ("water need not flow in an unbroken line at all times to constitute a sufficient connection to a navigable water").

[14] *U.S. States v. Krilich* 152 F.Supp.2d 983, 988 (E.D.Ill 2001).
[15] 65 Fed. Reg. 1991, 1992.

basis for asserting CWA jurisdiction is the actual or potential use by migratory birds that cross state lines in their migrations.[16] In addition, the ANPR notes that the other factors listed in the Migratory Bird Rule (use of water as habitat for federally protected endangered or threatened species or to irrigate crops sold in interstate commerce) have also been called into question and will be addressed in the rulemaking. According to the Interim Guidance Memorandum, the Corps and EPA will not assert jurisdiction based on these factors, effective immediately (discussed below). Therefore, it is likely that the revised definition will eliminate these factors, by themselves, as a basis for jurisdiction.

C. 33 C.F.R. § 328.3(a)(3) "Other Waters"

The ANRP also confirms that *SWANCC* "calls into question" whether CWA jurisdiction over isolated, intrastate, non-navigable waters can be predicated on not only the Migratory Bird Rule, but the rationales listed in 33 C.F.R. § 328.3(a)(3)(i)-(iii).[17] The Court in *SWANCC* appeared to indicate that Corps' jurisdiction could still be established by a "substantial" connection or nexus to interstate commerce. While the proposed rule may include elimination of these factors, it is more likely that it will instead attempt to define what level of nexus is "substantial" enough how to will be required to support the assertion of jurisdiction. To that end, the ANPR specifically requests information about the use of those factors.[18]

D. Tributaries and Adjacency

While the definitions of tributaries (hydrologic connection) and adjacency are not specifically called out as specific issues in the ANPR, the ANPR requests comments on "whether the regulations should define 'isolated waters' and, if so, what factors should be considered in determining whether a water is isolated for jurisdictional purposes?"[19] The issues of hydrologic connection (surface, groundwater, how much, how far) and adjacency (proximity only, if so, how close) will certainly have to be addressed in any definition of an "isolated water."

III. Interim Guidance Memorandum

The Interim Guidance Memorandum will serve as the policy document for field staff pending rulemaking (or the issuance of further interim guidance). The Interim Guidance Memorandum notes that its intent is only to summarize the existing state of the law, but, practically speaking, field staff will rely on it to clarify their jurisdictional decision-making.[20] The Interim Guidance Memorandum provides "clarifying guidance"

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[16] *Id.*
[17] *Id.*; (i) use by interstate commerce or foreign travelers for recreation or other purposes, (ii)production of fish or shellfish sold in interstate or foreign commerce, or (iii) use for industrial purposes by industries in interstate commerce.
[18] *Id.* at 1994 ("Whether and if so, under what circumstances, the factors listed in 33 C.F.R. § 328.3(a)(3)(i)-(iii) [ ] or any other factors provide a basis for determining CWA jurisdiction over isolated, intrastate, non-navigable waters?"
[19] *Id.*
[20] 68 Fed. Reg. 1991, 1996.

as to what clearly out, clearly in, and open to debate and clarification with respect to CWA jurisdiction pending the rulemaking process. Overall, the conclusions are not unexpected or surprising, and generally follow the majority of the holdings of the post-*SWANCC* cases.

A. What is Clearly Out? - The Migratory Bird Rule Factors

The Interim Guidance Memorandum states that neither the Corps nor EPA will assert jurisdiction where the sole basis available is *any* of the factors listed in the Migratory Bird Rule.[21] While the general consensus was that relying on the use by migratory birds alone was clearly out, the effect on the other Migratory Bird Rule factors (use of water as habitat for federally protected endangered or threatened species or to irrigate crops sold in interstate commerce) is still in some doubt.[22] The Interim Guidance Memorandum confirms that the EPA and the Corps are now "precluded" from asserting CWA jurisdiction over isolated, non-navigable, intrastate waters (including, for example, intrastate vernal pools, playa lakes and pocosins) based on migratory birds alone. It also goes a step further, stating that, "neither agency will assert" CWA jurisdiction over those types of waters based on *any* of the factors listed in the Migratory Bird Rule."[23]

B. What is Clearly In? - Navigable Waters, Most Tributaries, and Their Adjacent Wetlands

The Court in *SWANCC* appeared to indicate that Corps' jurisdiction could be established by a hydrologic connection to navigable waters. While the debate over what exactly it means to be "adjacent" or hydrologically connected (e.g., distance, methodology, source) will continue throughout the rule-making process, the Interim Guidance Memorandum confirms the general consensus that traditionally navigable waters (including waters that are intrastate but navigable in fact), their tributary systems, and wetlands adjacent to those waters are still subject to CWA jurisdiction.[24] As described below, questions about what qualifies as a "tributary" remain.

C. What Remains Murky? - "Other Waters" Factors, Ephemeral, Intermittent, and Man-made Tributaries, and Their Adjacent Wetlands

1. "Other Waters"

The Court in *SWANCC* appeared to indicate that Corps' jurisdiction could still be established by a "substantial" connection to interstate commerce, but called into question jurisdiction over isolated, intrastate waters based on the factors listed in 33 Code of Federal Regulations Section 328.3(a)(3)(i)-(iii) ((i) use by interstate commerce or foreign travelers for recreation or other purposes, (ii) production of fish or shellfish sold in interstate or foreign commerce, or (iii) use for industrial purposes by industries in

[21] Migratory Bird Rule, 51 Fed. Reg. 41217.
[22] 68 Fed. Reg. 1991, 1996.
[23] *Id.*
[24] *Id.*

interstate commerce). The debate will certainly continue over what connection to interstate or foreign commerce is "substantial" enough and what will be required to substantiate it, for now, field staff has been directed to make these determinations (for both permitting and enforcement) on a case-by-case basis, and only after formal consultation with and approval by Headquarters.

2. Ephemeral, Intermittent, and Man-Made Conveyances

As discussed above, the Court in *SWANCC* appeared to indicate that Corps' jurisdiction could be established by a hydrologic connection to navigable waters, but what level of connectivity is necessary is still in question. As described in the Interim Guidance Memorandum, the majority of the court decisions post-*SWANCC* have held that tributaries include not only perennial tributaries by intermittent, ephemeral, and even man-made conveyances (ditches, irrigation canals, storm water conveyances) far removed from the navigable waterway, while some have interpreted *SWANCC* to limit jurisdiction to only those that are immediately adjacent to a navigable water.[25]

The Interim Guidance Memorandum is not clear about whether field staff should include or exclude intermittent, ephemeral, and man-made conveyances as "tributaries," but noted that staff should follow the existing Corps regulations that define non-tidal waters by the presence or absence of an ordinary high water mark. The debate over the "tributaries of tributaries" will continue through the rule-making process. And, as with the "other waters" factors, practitioners should expect more formal consultations between the Districts and Headquarters.

Conclusion

While the ANPR and Interim Guidance Memorandum begins the process of providing a uniform definition of *SWANCC*, much remains open for debate. For now, the best advice is to pay close attention and comment on the rule-making process, avoid relying on any extreme interpretations of *SWANCC*, the ANPR, and the Interim Guidance Memorandum, and plan for the Corps to take more time to complete delineations. Keep in mind that these changes apply only to federal CWA jurisdiction, and there are other state and federal statutes and regulations that govern wetlands and waters. As always, consult with the local Corps District and the appropriate state agency (in California, for example, the Regional Boards) prior to commencing any fill activity.

For more information, please contact Fred Wagner at 202-789-6041, Gus Bauman at 202-789-6013, or Tamsen Plume at 415-262-4012.

[25] *Id.* at 1997.