

Briefing for the Northeast – Midwest Senate Coalition
January 8, 2002
By: John H. Ryan

Introduction:

Affiliations

Land and Water Resources, Inc.
National Mitigation Banking Association
Resident of Northern Cook County, Illinois

Explanation of Wetland Mitigation Banking

As wetland mitigation bankers, we restore, create, enhance and preserve large tracts of land for the purpose of mitigating for losses associated with the permitted activities under section 404 of the CWA. We invest millions of our own dollars to develop these wetland sites. We then work with applicants who need to impact wetlands and contract with them to provide for their mitigation. The Corps and EPA very heavily scrutinize us, along with other agencies. The Corps, EPA, FHWA, National Academy of Science and the GAO have all examined the various methods of mitigating for wetland losses. All have agreed that wetland mitigation banking is the preferred method. One difficulty we have is there seems to be no standardization of the permitting process for mitigation banks, even though the end result is that we provide higher quality wetlands than those, which are impacted.

What does the regulated public need from the government concerning SWANCC?

Clear and concise guidance on what waters of the US are and are not jurisdictional as a result of SWANCC. We are not looking for an expansion of jurisdiction of wetlands, but an appropriate new baseline position from the appropriate federal agencies. This baseline position must be consistent with the goals of CWA while also recognizing the decision of the Supreme Court in SWANCC.

We do have the January 19, 2001 MEMORANDUM from the Corps and USEPA, but it leaves a lot of questions unanswered. The decision clearly eliminated the Migratory Bird Rule as the sole basis for the assertion of regulatory jurisdiction for intrastate or isolated water, but what else? Section 5 of the guidance address waters of the US that **are, or potentially are, affected by SWANCC**. The regulated community deserves more clarity on these items in question.

The questionable areas can be clarified by clearly defining the following terms:

Isolated waters of the US

Significant nexus

What other connections with interstate commerce do support CWA jurisdiction over “non-navigable, isolated, intrastate waters”.

In order to assist the government in this endeavor, I would like to discuss the SWANCC site so that you can understand what the specific site conditions that the Supreme Court was deciding on.

The SWANCC site was originally an upland gravel outcropping. The gravel was excavated out resulting in a truly isolated hole in the ground. No water enters this hole other than rainwater and some shallow groundwater and there are no surface water outlets with evaporative water loss being the primary way that water leaves the site. This made the hole in the ground ideal for a landfill. This site is typical for a gravel operation, but very unusual in a natural setting. Without the Migratory Bird Rule, this site should have never been considered jurisdictional.

The problem is, without clarification; many wetlands and other water far less isolated are not currently being regulated. Most wetlands in my part of the country have at least some connection to regulated waters. I live in what is known as the prairie pothole region of the country. After the glaciers receded, thousands of variable sized and shaped depressional areas remained which fill with water during a snowmelt and rain events. Most of these lands are now used for row crop agricultural land-uses, all but the larger, deeper wetland depressions have been filled, ditched or tile drained by farmers. These wetlands purify, retain and slow down runoff from upland areas before either overflowing to streams or are under-drained by subsequently installed farm field tiles so that they drain slowly into the streams. This system cleans the water and allow a slow release of the water; reducing flooding and staging the water release to sustain base flow in the streams. These tiled drained depressional areas are also very valuable to the ecosystems of the waters of the US, but are not being regulated post-SWANCC.

Hydrologic connections in other regions of the country are vastly different from the prairie pothole region.

So, I looked at the SWANCC decision for guidance and found the following:

The Supreme Court SWANCC opinion, pg.5, states: "Congress passed the CWA for the stated purpose of restoring and maintaining the chemical, physical and biological integrity of the Nation's waters." Please instruct the Corps and EPA to do that by defining isolated waters as those which are completely isolated, with no connection to any tributary of, or any water of the US. If no surface water comes from or goes to any water of the US, it is isolated. Please also define a Significant Nexus as any connection to a tributary system of waters of the US, not by it's relative location.

The Supreme Court also expressed, pg. 6: "We found the Congress' concern for the protection of water quality and aquatic ecosystems indicated it's intent to regulate wetlands inseparably bound with waters of the United States. " The opinion goes on to state, " It was this significant nexus between the wetlands and navigable waters that informed our reading of the court in Riverside Bayview. Indeed we did not express any opinion on the question of the authority of the Corps to regulate discharge of fill material into wetlands that are not adjacent to bodies of open waters." This leaves the door open to

regulate any wetlands that are “wetlands inseparably bound with waters of the United States “, as described above.

The problem with trying to provide protection of wetlands using the CWA is that the CWA was written as an extension of the Rivers and Harbors Act, regulating navigation. Language was added to protect against point discharges, like sewage treatment plants. The functions and values associated with wetlands were not fully understood until after the CWA was written. The regulations concerning wetlands were subsequently added and consist of an assemblage of Band-Aid fixes attached to the CWA. They consist of regulatory guidance, Presidential orders and declarations, rules and interpretations. Many of these rules contradict each other. With this confusing set of regulations, future court challenges are sure to come. If the intent of this country is to fulfill the stated Presidential directive of “no net losses of wetlands in the US”, sooner, rather than later, Congress is going to have to debate the merits of either a stand-alone wetlands protection act or a reauthorization of CWA with specific language for wetlands. Mitigation bankers would welcome working towards comprehensive legislation that recognizes the benefits of banking.

As to the topic for today, SWANCC, we recommend that Congress:

1. Direct the Corps and EPA to issue immediate guidance to fix the SWANCC situation in accordance with the Supreme Court. Such guidance needs to include the following:
 - a. Isolated waters are those waters with no connection to any tributary of, or any waters of the United States.
 - b. Connections include any natural or man made connections to Waters of the United States
2. Address specifically which isolated waters still qualify for jurisdiction under the Commerce Clause. They should explain which waters on their own, or in aggregate, support the stated purpose of the CWA of restoring and maintaining the chemical, physical and biological integrity of the Nation’s waters and whether such waters shall be deemed to possess a Significant Nexus to the Waters of the United States.

This approach is consistent with a majority of the post SWANCC court cases throughout the country, where jurisdiction was the issue and SWANCC was used by the defense. We have summarized the findings of 11 such court cases in a letter to the Corps and EPA. I can provide a copy of that letter to anyone who is interested.

Our concern, as wetland mitigation bankers, is that we have no certainty on how the Corps will regulate wetlands. Without these certainties, we have no idea of demand for wetland mitigation.

We appreciate the support and ask that you help to remedy the confusion brought about by SWANCC to assure the continued protection of wetlands in the interest of Clean Water.