Wetlands/Section 404 Clean Water Act Program

Galveston Roundtable Forum

May 9, 2001

National Wetland Goal:

An increase in the quantity and quality of the nation's wetlands

- Net annual gain of 100,000 acres per year by 2005 (developed with other federal agencies)
- No overall net loss in the Section 404 regulatory program (goal since 1989)
- Develop wetlands monitoring programs to improve the quality of wetlands

Discussion Topics

- Implementation of Supreme Court "SWANCC" decision
- Status of "Tulloch" Rule
- The bigger picture: EPA's wetlands priorities
- Other upcoming issues/decisions

Isolated Waters: SWANCC

- **Illinois landfill permit denied in isolated waters used by migratory birds**
- **January 9, 2001: Supreme Court overturns "migratory bird rule"(MBR)**
  - **Held it exceeded Clean Water Act authority**
  - **Holding was narrow, but discussion was wider ranging.**

Implications of SWANCC

- **Impacts are still being assessed, but are potentially significant:**
  - **Some estimate that 20% or more of wetlands are "isolated," and less clearly protected by the CWA after SWANCC**
  - **If 1% of wetlands were lost due to SWANCC that would be more wetlands than total acreage lost in the past decade**

SWANCC Legal Interpretation

- **EPA and Corps January19 memo interpreting legal implications of SWANCC for CWA jurisdiction**
  - **Clarified that decision affects all CWA programs involving "waters of the U.S." (e.g., 404, 402, 311)**
  - **Identified waters with jurisdictional status unchanged, waters no longer jurisdictional, and waters which require case-by-case determination (i.e., isolated waters)**

SWANCC Legal Interpretation

- **Waters unaffected by SWANCC**
  - **navigable waters**
  - **interstate waters**
  - **impoundments of jurisdictional waters**
  - **tributaries to jurisdictional waters**
  - **territorial seas**
  - **wetlands adjacent to jurisdictional waters**

SWANCC Legal Interpretation

- **Waters no longer jurisdictional:**
  - **Isolated intrastate non-navigable waters, with use by migratory birds as sole basis for CWA jurisdiction**
- **Waters necessitating case-by-case jurisdictional determination:**
  - **Isolated intrastate waters that might have other bases for asserting jurisdiction (links to commerce or to "waters of the U.S.")**

SWANCC Issues: What Isolated Intrastate Waters Remain Jurisdictional?

- **How narrowly or broadly should the concept of navigability be considered?**
- **If a water is not navigable, how should other connections to waters that are navigable be considered?**

SWANCC Issues: What Interstate Commerce Links are Necessary for Isolated Intrastate Waters?

- **If a water is navigable, how should interstate commerce connections be considered:**
  - **commercial navigation use**
  - **interstate traveler use**
  - **industrial use with interstate commerce**
  - **yield of fish/shellfish sold in interstate commerce**

SWANCC Issues: What Establishes the Necessary Link to Other "Waters of the U.S.?"

- **For those not navigable in any sense, how should links to waters with a navigation connection be considered?**
  - **factors used to determine "adjacency" of wetlands (hydrology, geographic proximity)**
  - **physical, chemical, and biological connections with "waters of the U.S."**

Issues: What Factors Establish "Adjacency" for Wetlands?

- **How should factors be considered:**
  - **geographic proximity**
  - **surface hydrological connections**
  - **related water fluctuations**
  - **subsurface flow connections**
  - **groundwater connections**
  - **floodwater or sheetflow connection**
  - **floodplain connections**

Tulloch Rule – Background

- **1998 - Appeals Court overturns 1993 EPA/Corps rule asserting jurisdiction over <u>any</u> redeposit of dredged material that could degrade/destroy waters**
- **1999 - EPA/Corps publish rule to make conforming change; indicate proposal will follow based on Court's conclusions that some redeposit could be regulated**

Tulloch Rule – Impacts and Proposal

- **Many read 1998 decision as open season on ditching, draining, channelization activities**
  - **estimated 20,000 wetlands acres impacted**
  - **estimated 150 miles streams channelized**
  - **no review, mitigation, reporting**
- **August 2000 proposed rule**
  - **Rebuttable presumption for mechanized activities**
  - **No regulatory definition of incidental fallback**
- **10,000 comments received**

Tulloch Rule – Final

- **Rebuttable presumption replaced with statement and opportunity to demonstrate otherwise**
  - **“No shift in burden” added to regulation**
  - **Definition of “incidental fallback” added**
- **January 17 effective date delayed 60 days; Administrator Whitman announces implementation with Presidential support**
- **Two lawsuits filed on rule, environmental interests file as intervenor on May 7**

The Bigger Picture: Wetland Loss and Degradation

- **Less than half of wetlands remain in contiguous 48 States**
- **Loss rate has been reduced from 460,000 acres per year (mid-1950's) to 58,500 acres per year today**
- **Other stressors on wetlands include pollution, hydrology modification, habitat fragmentation, and invasive species**

The Bigger Picture: Other EPA's Wetlands Program Activities

- **Supporting state, tribal, and local wetlands programs**
- **Developing private/public partnerships**
- **Providing tools for wetlands decision-making**
- **Integrating wetlands into water quality and watershed management programs**
- **Education and information**

EPA 2001 Wetlands Priorities

- **Developing wetlands monitoring programs**
- **Improving the success rate of compensatory mitigation**
- **Improving protection for vulnerable wetlands**

Other Upcoming Issues/Decisions

- **Farm programs to protect wetlands are at risk: Wetlands Reserve Program and Swampbuster**
- **Conclusions by NAS and GAO on compensatory mitigation are expected in May**
- **Oregon and North Dakota may assume CWA Section 404 program**
- **Cumulative impacts: NAS Study, general permits; Section 404(c) “veto”decision on Martin County Coal permit**
- **Congressional interest in increasing State role/ funding for grants**