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1 = JAN 2001

MEMORANDUM

SUBJECT: Supreme Court Ruling Concerning CWA Jurisdiction over Isolated Waters

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The purpose of this memorandum is to inform you of a significant new ruling by the Supreme Court pertaining to the scope of regulatory jurisdiction under the Clean Water Act (CWA) and to inform you of what is and is not affected by this ruling Solid Waste Agency of Northern Cook County v U S. Army Corps of Engineers, No. 99-1178 (January 9, 2001) ("SWANCC") involved statutory and constitutional challenges to the assertion of CWA jurisdiction over isolated, non-navigable, intrastate waters used as habitat by migratory birds

Although the SWANCC case itself specifically involved section 404 of the CWA the Court's decision affects the scope of regulatory jurisdiction under other provisions of the CWA as well, including the section 402 NPDES program and the section 311 oil spill program Under each of these sections, the Agencies have jurisdiction over "waters of the United States " CWA § 502(7) Accordingly, the following discussion applies to any program that involves "waters of the United States" as that term is used in the CWA, and will be relevant to any federal, state, or tribal staff involved in implementing sections 402, 404, 311, and any other provision of the CWA which

applies the definition of "waters of the United States "[1]

In the 5-4 decision, the Supreme Court held that the Corps exceeded its statutory authority by asserting CWA jurisdiction over "an abandoned sand and gravel pit in northern Illinois which provides habitat for migratory birds " Slip op at 1 The Court did not reach the question of 'whether Congress could exercise such authority consistent with the Commerce Clause, U S Const , Art I, § 8, cl 3 " Slip op at 1 It summarized its holding as follows "We hold that 33 C F R § 328 3(a)(3) (1999), as clarified and applied to petitioner's balefill site pursuant to the 'Migratory Bird Rule,' 51 Fed Reg 41217 (1986), exceeds the authority granted to respondents under § 404(a) of the CWA." Id. at 14 [2] Although the Court held that the Corps' application of § 328 3(a)(3) was invalid in SWANCC, the Court did not strike down §328 3(a)(3) or any other component of the regulations defining "waters of the United States."

While the Court's actual holding was narrowly limited to CWA regulation of "nonnavigable, isolated, intrastate" waters based solely on the use of such waters by migratory birds, the Court's discussion was wider ranging. For example, the Court clearly recognized the CWA's assertion of jurisdiction over traditional navigable waters and their tributaries and wetlands adjacent to them Slip op at 6, 10 The Court also expressly declined to address certain other aspects of the scope of CWA jurisdiction Slip op at 10 As a result, the Court's opinion has led to questions concerning the effect of the decision on other waters within the definition of "waters of the United

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[1]The SWANCC decision only addresses the scope of regulatory jurisdiction under the federal CWA. Therefore, the scope of regulatory jurisdiction over aquatic features under other federal statutes is not affected by this decision In addition, the Clean Water Act explicitly provides that nothing in the Act "shall . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." 33 U.S.C. § 1370. Therefore, nothing in the SWANCC decision alters the extent of State (or tribal) jurisdiction over aquatic features under State (or tribal) law

33 C F R § 328(a)(3) describes a subset of "waters of the United States" 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 .

The "Migratory Bird Rule" refers to an explanation, in the preambles to 1986 Corps regulations and 1988 EPA regulations, that waters that are or may be used as habitat for migratory birds are an example of waters whose use, degradation, or destruction could affect interstate or foreign commerce and therefore are "waters of the United States " 51 Fed Reg 41217 (1986); 53 Fed Reg. 20765 (1988)

States" in agency regulations. Accordingly, this memorandum describes which aspects of the regulatory definition of "waters of the United States" are and are not affected by SWANCC.

1 In light of the Court's "conclu[sion] that the 'Migratory Bird Rule' is not fairly supported by the CWA," slip op. 6, field staff should no longer rely on the use of waters or wetlands as habitat by migratory birds as the sole basis for the assertion of regulatory jurisdiction under the CWA

2. As noted above, the Court's holding was strictly limited to waters that are "nonnavigable, isolated, [and] instrastate." With respect to any waters that fall outside of that category, field staff should continue to exercise CWA jurisdiction to the full extent of their authority under the statute and regulations and consistent with court opinions.

3. The Court did not overrule the holding or rationale of United States v Riverside Bayview Homes, Inc , 474 U.S. 121 (1985), which upheld the regulation of traditionally navigable waters, interstate waters, their tributaries, and wetlands adjacent to each. See id. at 123, 129, 139 Each of these categories is still considered "waters of the United States," as is discussed below in paragraphs 4 and 6.

4 Because the Court's holding was limited to waters that are "non-navigable, isolated, [and] intrastate," the following subsections of the regulatory definition of "waters of the United States"[3] are **unaffected** by SWANCC

> "(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" (see, e g , SWANCC, slip op. at 7-8),
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> "(2) All interstate waters including interstate wetlands" (see, e g , CWA section 303(a)(1); Hodel v Virginia Surface Mining and Reclamation Ass'n, 452 U.S 264, 282 (1981)),
>
> "(4) All impoundments of waters otherwise defined as waters of the United States under the definition [except subsection (a)(3) waters] " (implicit in SWANCC, slip op. at 6),

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[3]Different CWA regulations contain slightly different formulations of the definition. For simplicity's sake, this memo refers to the Corps' version at 33 C F R § 328.3(a). Other versions appear at, e.g , 40 CFR §§ 110 1, 112 2, 116 3, 117 1, 122 2 230.3(s), and 232.2.

"(5) Tributaries to waters identified in paragraphs (a)(1)[, (2), and] (4) of this section" (see, e g , SWANCC, slip op at 10);

"(6) The territorial seas" (see CWA section 502(7)), and

"(7) Wetlands adjacent to waters (other than waters which are themselves wetlands) identified in paragraphs (a)(1)[,(2), (4), (5), and] (6) of this section" (see, e.g , SWANCC, slip op. at 6, Riverside Bayview at 134-35, 139).[4]

5 The following subsections of the regulatory definition of "waters of the United States" **are, or potentially are, affected** by SWANCC:

"(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

a. Waters covered solely by subsection (a)(3) [5] that could affect interstate commerce solely by virtue of their use as habitat by migratory birds are no longer considered "waters of the United States." The Court's opinion did not specifically address what other connections with interstate commerce might support the assertion of CWA jurisdiction over "nonnavigable, isolated, intrastate waters" under subsection (a)(3). Therefore, as specific cases arise, please consult agency legal counsel

b. The Court's opinion expressly reserved the question of what "other waters" were intended to be addressed by CWA § 404(g)(1) (regarding state 404 programs). Factors not addressed in SWANCC may have a bearing on whether subsection (a)(3) may still be relied on as the basis for asserting CWA jurisdiction over certain "other waters." Jurisdiction over such "other waters" should be considered on a case-by-case basis in consultation with agency legal counsel. Factors that may be relevant to the analysis under 33 C F R. 328 3(a)(3) include, but are not limited to, the following:

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[4] "Adjacent" is defined by regulation as "bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes, and the like are 'adjacent wetlands ' " 33 C.F R. § 328.3(d). This definition was approved in Riverside Bayview and is not undercut by SWANCC.

[5] Subsection (a)(3) is intended to cover waters that are not covered by the other subsections of § 328.3(a)

(1) With respect to waters that are isolated, intrastate, and nonnavigable -- jurisdiction may be possible if their use, degradation, or destruction could affect other "waters of the United States," thus establishing a significant nexus between the water in question and other "waters of the United States."

(2) With respect to waters that, although isolated and intrastate, are navigable -- jurisdiction may also be possible if their use, degradation, or destruction could affect interstate or foreign commerce (examples of ways the use, degradation or destruction of a water could affect such commerce are provided at 33 CFR 328.3(a)(3)(i) – (iii)) [6]

c. Impoundments of subsection (a)(3) waters, tributaries of (a)(3) waters, and wetlands adjacent to subsection (a)(3) waters should be analyzed on a case-by-case basis in accordance with subparagraphs 5.a and 5.b immediately above. Such impoundments, tributaries and adjacent wetlands are also part of the "waters of the United States" if the waters they impound, are tributaries to, or are adjacent to are themselves "waters of the United States."

6. The Supreme Court's decision in SWANCC does provide an important new limitation on how and in what circumstances the EPA and the Corps can assert regulatory authority under the CWA. However, this decision's limited holding must be interpreted in light of other Supreme Court and lower court precedents, unaffected by the SWANCC decision, which precedents broadly uphold CWA jurisdictional authority. The following quotations from the Riverside Bayview decision are provided to remind EPA and Corps field offices that most CWA jurisdiction remains basically intact after the SWANCC decision.

a. The Supreme Court's Riverside Bayview decision (at 123, 139) upheld the legality of the basic provisions of the Corps' CWA jurisdictional regulation, which the Court described (at 129) as follows. "The [Corps and EPA jurisdictional] regulation extends the Corps' authority under Section 404 to all wetlands adjacent to navigable or interstate waters and their tributaries "[7]

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[6] An example of an intra-state lake that is "isolated" (i e , not part of the tributary system of traditional navigable waters or interstate waters) but which might reasonably be considered "waters of the United States" under subsections (a)(1) or (a)(3) is the Great Salt Lake in Utah That "isolated" lake is navigable-in-fact (see United States v Utah, 403 U.S. 9 (1971)), and has substantial connections with interstate commerce (see, e g., Hardy Salt Co. v. Southern Pacific Transportation Co., 501 F. 2d 1156 (10th Cir. 1974))

[7] The one specific part of the Corps' CWA jurisdiction that the Court did not

(continued)

b. The Court in Riverside Bayview also stated, at 132-33, that

> . . Section 404 originated as part of the Federal Water Pollution Control Act Amendments of 1972, which constituted a comprehensive legislative attempt 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.' CWA§ 101, 33 U S C § 1251. This objective incorporated a broad, systemic view of the goal of maintaining and improving water quality: as the House Report on the legislation put it, "the word 'integrity' . . refers to a condition in which the natural structure and function of ecosystems is [are] maintained. Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source. . . In keeping with these views, Congress chose to define the waters covered by the Act broadly.

c. In Riverside Bayview, at 133-134, the Court quoted with approval the following language from the preamble to the Corps' 1977 regulations:

> " The regulation of activities that cause water pollution cannot rely on artificial lines . . . but must focus on all waters that together form the entire aquatic system. Water moves in hydrologic cycles, and the pollution of this part of the aquatic system, regardless of whether it is above or below an ordinary high water mark, or mean high tide line, will affect the water quality of the other waters within that aquatic system. For this reason, the landward limit of Federal jurisdiction under Section 404 must include any adjacent wetlands that form the border of or are in reasonable proximity to other waters of the United States, as these wetlands are part of this aquatic system."

The Court went on to conclude, at 134, that: "In view of the breadth of federal regulatory authority contemplated by the Act itself . . the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act."

d. In sum, the holding, the facts, and the reasoning of United States v Riverside Bayview Homes continue to provide authority for the EPA and the Corps to assert CWA jurisdiction over, inter alia, all of the traditional navigable waters, all

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[7](...continued)
reach in Riverside Bayview related to "wetlands that are not adjacent to bodies of open water" under 33 C.F.R. 328 3(a)(2) or (3). Riverside Bayview, 474 U.S. at 131, n 8.

interstate waters, and all tributaries to navigable or interstate waters, upstream to the highest reaches of the tributary systems, and over all wetlands adjacent to any and all of those waters.

Any questions not answered by this guidance should be addressed to legal staff attorneys Cathy Winer (EPA) at (202) 564-5494 or Lance Wood (Corps) at (202) 761-8556.

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