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September 16, 2002

MEMORANDUM FOR MEMBERS OF THE SUBCOMMITTEE ON ENERGY POLICY, NATURAL RESOURCES AND REGULATORY AFFAIRS

FROM: Doug Ose 

SUBJECT: Briefing Memorandum for September 19, 2002 Hearing – Agency
Implementation of the SWANCC Decision

On Thursday September 19, 2002, at 10:00 a.m., in Room 2154 Rayburn House Office Building, the Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs will hold a hearing on agency implementation of the SWANCC decision.

On January 9, 2001, the Supreme Court ruled that the U.S. Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA) had exceeded their authority under the Clean Water Act (CWA) by claiming jurisdiction over isolated waters in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* No. 99-1178 (SWANCC).

Case Background

In the SWANCC case, a consortium of Chicago area municipalities and counties sought to develop a landfill for solid waste on a 533 acre site in Illinois. The site had been used for sand and gravel mining until about 1960. Since then, the excavation trenches from the gravel mining had evolved into various ponds. The consortium obtained the needed local and State permits, but the Corps, based on the ponds and their use by migratory birds, asserted jurisdiction under Section 404 of the CWA and denied a permit.

Section 404 authorizes the Secretary of the Army (i.e., the Corps) to issue permits for "the discharge of dredged or fill material into the navigable waters" (33 USC § 1344(a)). "Navigable waters" are defined in the CWA as "the waters of the United States." In its original CWA regulations (33 CFR § 328.3), the Corps interpreted "waters of the United States" under a traditional definition of navigability, i.e., "waters that are subject to the ebb and flow of the tide shoreward to their mean high water mark and/or waters that are presently used, were used in the past, or are susceptible to use to transport interstate or foreign commerce." In response to a

Federal District Court decision in 1975, overturning the Corps' original regulations, in 1977, the Corps adopted new regulations (33 CFR § 328.3) that asserted the Corps' CWA jurisdiction to the "maximum extent permissible under the Commerce Clause of the Constitution" (42 FR 37123).

In 1986, the Corps adopted additional regulations that further expanded jurisdiction. The Corps defined "waters of the United States" to include both interstate waters and certain intrastate waters, including intrastate lakes, rivers, streams, wetlands, wet meadows, playa lakes and natural ponds were subject to CWA jurisdiction if "the use, degradation or destruction" of those waters "could affect interstate or foreign commerce" (33 CFR § 328.3).

The Court's holding in SWANCC is based on its view that in enacting Section 404 of the CWA, Congress intended to exert only its commerce power over navigation, not its full powers under the Commerce Clause. In an earlier ruling (*U.S. v. Riverside Bayview Homes Inc.* 474 U.S. 121, 1985), the Court held that the term "navigable," as used in the CWA, was of "limited effect." In the SWANCC decision, however, the Court reasoned that "it is one thing to give a word limited effect and quite another to give it no effect whatever. The term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made."

While the Court in its opinion expressed a broad rationale for limiting the jurisdiction of the Corps, the actual legal holding did not specifically vacate any Corps regulations.

Agency Reaction to SWANCC

On January 19, 2001, ten days after the decision came down and two days before the end of the Clinton Administration, the Corps and EPA issued a legal memorandum to Corps and EPA regional offices. The memorandum notes the difference between the SWANCC decision's broad rationale and its narrow holding and consequently took a case-by-case approach to jurisdiction.

In essence the memorandum asserted that:

- Traditionally navigable waters, interstate waters, their tributaries and wetlands adjacent to each are still jurisdictional;
- Intrastate waters that could affect interstate commerce solely by virtue of their use as habitat for migratory birds are no longer covered; and
- As to intrastate waters having other (non-migratory bird) connections to interstate commerce, staff is advised to consult agency legal counsel.

In response to this legal memorandum, Corps and EPA regional offices have effectively been making jurisdiction determinations on a case-by-case basis. This has led to increasing confusion and chaos in the Section 404 regulatory program. Various field offices of the Corps and EPA are adopting widely varying interpretations of the scope of the SWANCC decision and consequently jurisdiction under the Section 404 program.

While the current Administration has repeatedly promised to issue clarifying internal agency guidance and initiate a rulemaking to clarify the jurisdiction of the Section 404 in light of the SWANCC decision, it has failed to do so over the last 18 months.

Invited witnesses include: R.L. "Les" Brownlee, Under Secretary of the Army; Thomas Sansonetti, Assistant Attorney General for Environment and Natural Resources, Department of Justice; Robert Fabricant, General Counsel, EPA; Virginia S. Albrecht, Director, Government Affairs, Foundation for Environmental and Economic Progress; M. Reed Hopper, Principal Attorney, Pacific Legal Foundation; Jonathan H. Adler, Assistant Professor of Law, Case Western Reserve University School of Law; Nancie G. Marzulla, President, Defenders of Property Rights; Raymond Steven Smethurst, Partner, Adkins, Potts & Smethurst; Gary Guzy, Partner, Foley Hoag, LLP; and Patrick Parenteau, Professor of Law, Vermont Law School.