

# UPDATE on the LAW of WETLANDS

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# Federal Jurisdiction Over Wetlands

- Clean Water Act § 404.
- Federal government may regulate discharges of dredged or fill material into “navigable waters.”
- “Navigable waters” means “waters of the United States, including the territorial seas.”



# *U.S. v. Riverside Bayview Homes*

1985

- Justice White - unanimous Opinion of the Court.
- 80-acre parcel of low-lying marshy land located directly adjacent to actually navigable creek.
- Corps sued to enjoin filling of wetlands for construction of housing development.

# *U.S. v. Riverside Bayview Homes*

Issue – Whether § 404 of CWA authorized USACE to require a permit before discharging fill material into wetlands adjacent to navigable waters.



## *U.S. v. Riverside Bayview Homes*

“[T]he Act’s definition of ‘navigable waters’ as ‘the waters of the United States’ makes it clear that the term ‘navigable’ as used in the Act is of limited import.”

Congress intended to “regulate at least some waters that would not be deemed ‘navigable’ under the classical understanding of the term.”

# *U.S. v. Riverside Bayview Homes*

## HELD:

- “[I]t is reasonable for the Corps to interpret the term ‘waters’ to encompass wetland adjacent to waters as more conventionally defined.”
- “[A]djacent wetlands may be defined as waters under the Act.”



# *U.S. v. Riverside Bayview Homes*

## Footnote 8:

“We are not called upon to address the question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water, and we do not express any opinion on that question.”

# AFTER RIVERSIDE BAYVIEW HOMES

Jurisdictional if a hydrological connection to navigable waters.



# *SWANCC v. USACE*

2001

- Opinion by Chief Justice Rehnquist
  - Joined by O'Connor, Scalia, Kennedy, Thomas
- Dissent by Justice Stevens
  - Joined by Souter, Ginsburg, Breyer

# *SWANCC v. USACE*

- SWANCC – consortium of 23 Chicago cities and villages united to locate and develop a disposal site for baled nonhazardous solid waste.
- SWANCC purchased isolated, intrastate, seasonally ponded, abandoned sand and gravel pit (not wetlands).



# *SWANCC v. USACE*

Corps regulations define “waters of the United States” to include intrastate waters:

“the use, degradation or destruction of which could affect interstate or foreign commerce.”

33 CFR § 328.3(a)(3)

# *SWANCC v. USACE*

## Migratory Bird Rule (1986)\*

Interprets 33 CFR § 328.3(a)(3) to include waters that are or would be used as habitat by migratory birds that cross state lines.

\*The Corps issued without following notice and comment procedures of the APA.



# *SWANCC v. USACE*

- Corps found approximately 121 bird species had been observed at the site.
- Corps asserted jurisdiction over balefill site based solely on the Migratory Bird Rule.
- Corps refused to issue a § 404 permit because the proposal was not the “least environmentally damaging, most practical alternative” for balefill disposal.

# *SWANCC v. USACE*

- 7<sup>th</sup> Circuit had held that the CWA reached as many waters as the Commerce Clause allowed and it followed that USACE's Migratory Bird Rule was a reasonable interpretation of the Act.
- Supreme Court reversed.



# *SWANCC v. USACE*

“It was the significant nexus between the wetlands and “navigable waters” that informed our reading of the CWA in *Riverside Bayview Homes*.”

# *SWANCC v. USACE*

“But 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 water that were or had been navigable in fact or which could reasonably be so made.”



# *SWANCC v. USACE*

“In order to rule for respondents here, we would have to hold that the jurisdiction of the Corps extends to ponds that are *not* adjacent to open water. But we conclude that the text of the statute will not allow this.”

# *SWANCC v. USACE*

- The Court refused to reach constitutional issues or extend deference to the Corps' interpretation.
- No clear Congressional intent to invoke outer limits of power under the Commerce Clause.



# *SWANCC v. USACE*

HELD:

33 CFR § 328.3(a)(3), as clarified and applied to the balefill site pursuant to the Migratory Bird Rule, exceeds the authority granted to USACE under § 404 of the CWA.

# *SWANCC v. USACE*

## Dissent

“In its decision today, the Court draws a new jurisdictional line, one that invalidates the 1986 migratory bird regulation as well as the Corps’ assertion of jurisdiction over all waters except for actually navigable waters, *their tributaries*, and wetlands adjacent to each.”  
(emphasis added)



*AFTER SWANCC*

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# FIFTH CIRCUIT

- TWO OPA Cases.
- OPA imposes strict liability for discharges of oil into “navigable waters.”
- Definition same as in the CWA.
- Seeking cleanup costs.



# FIFTH CIRCUIT

- *Rice v. Harken (2001)*
  - Discharges onto dry land and non-navigable “seasonal creek.”
  - Focused on discussion in majority opinion of SWANCC.
  - Federal jurisdiction only if actually navigable or adjacent to open body of navigable water.
  - Held that subsurface waters and surface waters not navigable or adjacent to navigable waters are not “waters of the United States.”

# FIFTH CIRCUIT

- *In re Needham*, 354 (not 342) F.3d 340 (2003).
  - Claim for cleanup costs associated with oil spill into a drainage ditch, which had traversed into Bayou Folsé.
  - It was undisputed that Bayou Folsé was adjacent to an open body of navigable water (it flowed directly into a navigable canal).
  - Held that the OPA applied to the spill



# FIFTH CIRCUIT

*In re: Needham*

- U.S. urged definition of “navigable waters”
  - All tributaries of navigable-in-fact waters, and
  - All waters, excluding groundwater, that have any hydrological connection with “navigable waters.”
- Found definition unsustainable under *SWANCC*.

# FIFTH CIRCUIT

*In re: Needham*

“The CWA and the OPA are not so broad as to permit the federal government to impose regulations over ‘tributaries’ that are neither themselves navigable nor truly adjacent to navigable waters. Consequently, in this circuit the United States may not simply impose regulations over puddles, sewers, roadside ditches and the like; under SWANCC ‘a body of water is subject to regulation . . . If the body of water is actually navigable or adjacent to an open body of navigable water.’”



# CASES PENDING BEFORE THE SUPREME COURT

- Two 4<sup>th</sup> Circuit
  - *Deaton v. U.S.*
  - *Newdunn Assoc. v. USACE*
- One 6<sup>th</sup> Circuit
  - *Rapanos v. U.S.*

# *U.S. v. DEATON*

(4<sup>th</sup> Circuit, 6/12/03)

- U.S. civil suit for failing to obtain a § 404 permit before digging a 1,100-foot drainage ditch in wetlands.
- Water from roadside ditch takes winding 8-mile path to navigable water.
- Deferred to Corps' interpretation of the term "waters of the United States," as including non-navigable tributaries.
- Held that the roadside ditch was a tributary of navigable water.



# *TREACY v. NEWDUNN*

*(4<sup>th</sup> Circuit, 9/10/03)*

- USACE civil enforcement to enjoin Newdunn from ditching and draining wetlands without a permit.
- Wetlands connected to navigable water by intermittent flow of surface water through approximately 2.4 miles of natural streams and manmade ditches.
- Followed *Deaton*, holding there was a sufficient nexus between the wetlands and navigable waters to support federal jurisdiction.

# UNITED STATES v. RAPANOS

(6<sup>th</sup> Circuit, 8/5/03)

- Criminal conviction of Rapanos (3-years probation and \$185,000 fine) for filling forested wetlands without a § 404 permit, despite warnings by EPA and State.
- Wetlands connected to navigable water, 11 to 20-miles away, via manmade drain and creek.



# UNITED STATES v. RAPANOS

(6<sup>th</sup> Circuit, 8/5/03)

- Found case closer to *Riverside Bayview* than *SWANCC*.
- *SWANCC* only invalidated the Migratory Bird Rule.
- Rapanos wetlands were adjacent and hydrologically connected to the manmade drain.
- Held there was ample nexus between wetlands and navigable water for federal jurisdiction.

# OTHER CIRCUIT COURTS

- 7<sup>th</sup> Circuit – *SWANCC* not sufficient change in the law to necessitate modification of consent decrees. *SWANCC* holding more narrow than *Hoffman Homes v. EPA* (7<sup>th</sup> Cir. 1992).
  - *Rueth Development Corp. v. US* (2003)
  - *US v. Krilich* (2003)



# OTHER CIRCUIT COURTS

- 9<sup>th</sup> Circuit – “Navigable waters” include tributaries and irrigation canals (but not vernal pools).
  - *U.S. v. Phillips* (2004)
  - *Headwaters, Inc. v. Talent Irrigation District* (2001)
  - *Borden Ranch Partnership v. USACE* (2001)

# NEW JERSEY DISTRICT COURT (3<sup>rd</sup> Circuit)

- *FD&P Enterprises v. USACE*
  - Wetlands adjacent to non-navigable creek
  - SWANCC requires “significant nexus” – more than a hydrological connection
  - Denied plaintiff’s motion for summary judgment – found fact issue whether filling of wetlands would have substantial injurious impact on navigable river one mile away.



# REGULATORY DEVELOPMENTS

- EPA and USACE published ANPR and Joint Memorandum (1/15/03) seeking public comment on definition of “waters of the United States.”

# ANPR/JOINT MEMORANDUM

- Sought comments on:
  - Whether factors in 33 CFR § 328.3(a)(3) or any other factors provide a basis for CWA jurisdiction over isolated, intrastate, non-navigable waters.
  - Whether regulations should define “isolated waters,” and if so, what factors should be considered.



# ANPR/JOINT MEMORANDUM

- Explained USACE would continue to assert jurisdiction, except using the Migratory Bird Rule.
- Directed field staff to seek formal project-specific Headquarters approval before asserting jurisdiction over isolated, intrastate, non-navigable waters.

# REGULATORY DEVELOPMENTS

- Comment period closed 4/16/03.
- Received approximately 130,000 comments.
- President Bush, EPA and USACE press release (12/16/03) announcing decision to not revise regulations and reiterating Administration's commitment to "no net loss" of wetlands.



# STATE REGULATION OF WETLANDS

- Prior to SWANCC, 15 states had programs regulating isolated wetlands.
- Since SWANCC and as of 1/15/03, 2 more states had adopted new wetlands programs and several were considering programs.

# TEXAS REGULATION OF WETLANDS

- TCEQ goal – “no net loss” of State’s wetlands.
- Goal implemented primarily through TCEQ review of federal permit applications under § 401 (protects only wetlands subject to federal jurisdiction).



# TEXAS REGULATION OF WETLANDS

- “The commission may not require under this chapter any permit for the placing of dredged or fill materials into or adjacent to water in the state for the purpose of constructing, modifying, or maintaining facilities or structures, but this does not change or limit any authority the commission may have with respect to the control of water quality. The commission may adopt rules and regulations to govern and control the discharge of dredged or fill material consistent with the purpose of this chapter.”

Tex. Water Code § 26.027(d).