



FACT SHEET

NATIONAL HEADQUARTERS

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CLEAN WATER ACT:

ADVANCE NOTICE OF PROPOSED RULEMAKING

Solid Waste Agency of Northern Cook County (SWANCC) Decision

- Ducks Unlimited (DU) has over one million members, supporters and volunteers who care passionately about our nation's wetlands and water resources, and about the waterfowl and other wildlife dependent upon those resources. DU has conserved almost 11 million acres over its 66-year history.
- In 1972, Congress passed the Clean Water Act (CWA) with the stated intent of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity" of the United States' waters.
- The shared nature of much of the nation's waters among the states, and the interstate commerce issues related to the use of these waters and the maintenance of its quality were the fundamental bases for legislation establishing federal jurisdiction over the nation's waterways, lakes and wetlands.
- The Environmental Protection Agency (EPA) was vested with the primary responsibility for administering the CWA. However, Section 404 of the act required that disposal of dredged or fill material in "waters of the U.S." required that a permit be obtained from the U.S. Army Corps of Engineers (USACE).
- Since 1972, the EPA and USACE have developed and refined rules and regulations in response to Congress' amendments to the Act, and to court decisions arising from challenges to various individual provisions of the Act. Because the Act does not explicitly define "waters of the United States," many of these court challenges have focused on which waters and wetlands Congress originally intended to be included within the regulatory jurisdiction of the CWA. However, "the legislative history made plain that Congress intended the broadest possible Federal jurisdiction, expanding beyond traditionally navigable waterways" [EPA website; 1/23/03]. The vast majority of court decisions at all levels over the last 30 years have supported that interpretation.
- Although the CWA and other programs helped slow the loss of wetlands since the 1950-70's when over 450,000 acres were being lost annually, over half (53%) of the country's original wetlands were gone by 1997. The most recent surveys showed that wetlands continued to be lost at a rate of over 100,000 acres per year.
- On January 9, 2001, the U.S. Supreme Court issued the so-called SWANCC decision. The Solid Waste Agency of Northern Cook County (SWANCC), Illinois, had been denied a 404 permit by the USACE and challenged that denial in the courts. The primary basis for the permit denial was that the wetlands were used by many species of birds that migrated across state and national boundaries. The USACE and EPA judged (since 1986) that migratory bird use triggered federal jurisdiction because "the use, degradation or destruction of [those wetlands] could affect interstate or foreign commerce."

- Ultimately making its way to the Supreme Court, its decision in the SWANCC case struck down use of one aspect of the so-called “Migratory Bird Rule” as the basis for exercising CWA jurisdiction over “isolated, non-navigable, intrastate waters that are not tributary or (in the case of wetlands) adjacent to navigable waters or tributaries.”
- A narrow and literal reading of the Court’s decision meant that “isolated, non-navigable, intrastate waters” would no longer be afforded CWA protection if use by migratory birds was the sole basis for asserting federal jurisdiction. To attempt to clarify the extent of regulatory changes subsequent to the SWANCC case, the EPA and USACE issued guidance immediately after the ruling. However, because the Supreme Court did not explicitly define important terms such as “adjacent,” the agencies’ guidance did not make clear which waters and wetlands were jurisdictional. Thus, the extent of the SWANCC decision’s impact on wetland loss and water quality remains uncertain, but is significant.
- DU scientists evaluated the potential impacts of the Court’s decision (*The SWANCC Decision: Implications for Wetlands and Waterfowl*; Sept. 2001; available at www.ducks.org/conservation/404_report.asp) in light of other federal regulations, state-based protections, geographic distribution, and other factors. They found that the SWANCC decision could have significant consequences for wetland conservation in the U.S., particularly in areas important for breeding and migratory waterfowl.
- Others organizations and agencies have estimated that CWA protections could be withdrawn from as much as 30-60% of the nation’s wetlands (Assoc. of State Wetland Managers), with examples from individual states being 79% in Wisconsin, 40% in Nebraska, 74% in Indiana, and 33% in Delaware.
- While most post-SWANCC court challenges to CWA jurisdiction have applied a narrow reading of the SWANCC decision (which lessens the potential impact to wetlands), there have been a few decisions in lower courts which, if upheld, would result in accelerated loss of protection to a significant proportion of the country’s wetlands. Creating additional confusion and uncertainty, application of the CWA protections among geographic districts of the USACE has been inconsistent.
- In light of the jurisdictional questions that SWANCC raised, the EPA and USACE issued an “Advance Notice of Proposed Rulemaking (ANPRM) on January 15, 2003. The intent of the ANPRM is to seek “public input on issues associated with the definition of ‘waters of the United States’” and to solicit “information or data ... on the implications of the SWANCC decision for jurisdictional decisions under the CWA.” Thus, objective information is being sought regarding what constitutes “adjacency” and a “significant nexus” between wetlands and a navigable waterway, and what a “tributary” means in terms of the Clean Water Act. For example, functional and hydrologic relationships between these waters are in many ways more important than geographic proximity in assessing wetland-water quality linkages. Stated another way, “isolated” wetlands are often not truly “isolated” when viewed in a hydrologic context.
- The public comment period for this ANPRM ended on April 16, 2003. Ducks Unlimited staff submitted a 27-page comment to provide the EPA and USACE our perspective on these critical issues. Changes which could ultimately be made to how the Clean Water Act is applied to the protection of our nation’s wetlands and other waters could have significant negative impacts on these resources, and on the waterfowl and wildlife which depend upon them.