



## **DRYING OUT: WETLANDS OPENED FOR DEVELOPMENT BY U.S. SUPREME COURT AND U.S. ARMY CORPS**

Nearly five years ago, the Supreme Court ruled 5-4 that the Clean Water Act did not protect so-called “isolated” wetlands that provide critical habitat for migratory birds. *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*, 531 U.S. 159 (January 9, 2001). Since the spring of 2004, the U.S. Army Corps of Engineers has opened more than 11,000 acres of wetlands to development in fifteen states, after determining that they are exempt from the Clean Water Act under the Court’s *SWANCC* decision.

Many of the Corps decisions go well beyond the holding in *SWANCC*. But the Supreme Court’s opinion in that case opened the door for development interests to challenge the Constitutional basis for federal wetlands regulation. Our next Chief Justice may well determine whether our wetlands will continue to shrink because the federal power to protect them is cut back even further.

Section 404 of the Clean Water Act prohibits filling wetlands and other waters without first obtaining a permit from the U.S. Army Corps of Engineers. Following the Supreme Court’s decision, the Corps has determined that these requirements no longer apply to wetlands affected by nearly 1900 development projects in 15 states. These notices of non-jurisdiction are generally available on the Corps’ district office websites.

The Corps’ data offers a look at how the fate of our natural resources may depend on seemingly abstract decisions by both the nation’s highest court and federal agencies that implement that law:

- Corps’ decisions since 2004 have opened between 11,000 and 15,000 acres of “isolated waters” to development in fifteen states: Nebraska, North Dakota, Florida, Illinois, Georgia, South Dakota, Colorado, Indiana, Wisconsin, Ohio, California, Minnesota, Iowa, New York, and Kansas. Corps determinations in other states appear to have had less impact, although data in some states is incomplete.
- In at least one state, most of the wetlands reviewed by the Corps so far have been found to be exempt from the Clean Water Act under the *SWANCC* decision. For example, the Corps found that the affected wetlands in North Dakota were exempt in 69 of the 77 projects it has reviewed since March 30, 2004. Wetlands were determined to be exempt in 54 out of 125 cases reviewed in South Dakota since April 27, 2004. Both states are

home to “prairie potholes” and other wetlands that provide critical habitat for waterfowl that migrate between Canada and our southern states.

- A wide range of commercial interests will benefit from recent determinations by the Corps to exempt wetlands from the Clean Water Act, including a Wal-Mart shopping center in Texas, a titanium sand mine in Georgia, a peat bog mine in Florida, a highway project in North Dakota, and residential development and golf courses in several states. Interestingly, several large projects in Nebraska were apparently undertaken to enhance wildlife habitat.
- The limited data that is available underestimates the potential for destruction. For example, the Corps district office in Galveston, Texas, did not know the size or even the location of some of the wetlands it has determined to be no longer subject to the Clean Water Act. In at least 34 cases in other states, the Corps reported that the “isolated” wetlands exceeded 50 acres, but did not know their full extent. Most importantly, the data do not include the large number of development projects undertaken every year by private interests without any Corps’ review.
- Losses are not limited to traditional wetlands, but reach other waters that the Corps believes were “isolated” from the Clean Water Act under SWANCC. In California, a 38 mile creek was declared an unprotected “isolated water,” even though it drained to a national wildlife refuge suffering from drought. Additionally, the mudflats of China Lake in California cover many square miles, but were judged “isolated” under SWANCC.
- The Corps is writing wetlands off under the SWANCC decision even if they provide habitat for endangered species. Endangered species were present, or thought to be present, in about fifteen percent of the cases in which the Corps determined that wetlands were no longer covered by the Clean Water Act. In many other cases, the Corps simply did not know. The USEPA estimates that about 1/3 of endangered species live their entire lives within wetlands.
- The agency’s decisions to date affect relatively few wetlands in the hurricane-ravaged coastal areas of Louisiana and Mississippi. But isolated wetlands upstream can play a significant role in absorbing rainfall that would otherwise swell floodwaters further downstream.
- The fact that the Corps has determined a wetland to be exempt from the Clean Water Act does not necessarily mean that all of it will be destroyed. Developers may choose to preserve some for aesthetic reasons, and in a few instances, state or local regulation could help to fill the void left by the Corps. But in the vast majority of cases, once the Corps decides that the Clean Water Act no longer applies, the wetland at issue may be disposed of by commercial interests.

Section 404 of that law prohibits the dredging and filling of “waters of the U.S.” without first obtaining a permit from the Corps. The law has proved controversial, as it sometimes limits

the ability of private landowners to develop wetlands on their property. But the law recognizes that wetlands benefit the public at large by, for example, absorbing floodwaters, breaking down pollutants that would otherwise contaminate surface or groundwater, and providing habitat for migratory birds and endangered species. In practice, the Corps approves most development projects involving wetlands, but requires measures to limit wetland losses, or mitigate any losses that do occur.

The United State has lost more than half its native wetlands since European settlement began. Wetland losses averaged 300,000 a year in the late seventies and early eighties, according to the U.S. Fish and Wildlife Service, but slowed to about 60,000 acres a year in the late nineties, thanks to a combination of Clean Water Act regulation and voluntary incentives for conservation.

The Supreme Court's decision in SWANCC threatens to reverse that trend. Chief Justice William Rehnquist, writing for the majority in that case, struck down federal rules finding that Section 404 protected isolated ponds, streams, or wetlands that provide habitat for migratory birds, but which are not connected to navigable waterways. The minority argued that the migratory bird rule was grounded in the federal government's Constitutional power to regulate commerce, which includes, "the power to preserve the natural resources that generate such commerce."

The SWANCC opinion sidestepped this issue, but warned that federal authority to protect wetlands under the commerce clause was limited by, "...the states' traditional and primary power over land use." Development interests picked up this invitation and continue to litigate the scope of the commerce power in lower courts. So far, most federal courts have rejected arguments that wetland regulation under the commerce clause infringes on states rights under the Constitution, but it is only a matter of time until the question returns to the Supreme Court.

Unfortunately, the Army Corps is not waiting for the courts, but has already moved beyond SWANCC in writing isolated wetlands out of the Clean Water Act. For example, the Corps appears to have decided that it has no authority to protect wetlands that are home to endangered species, although the SWANCC opinion did not address that issue at all.

On paper, the Corps agrees that the Clean Water Act covers isolated wetlands that have some connection to interstate commerce, e.g., the promotion of tourism or recreation. In practice, the agency seems to be working from a presumption that a wetland is exempt under SWANCC unless it has some connection to navigable waters. In a few cases, even waters that can be navigated by boat have been exempted from the Clean Water Act because they were remote from larger waterbodies.

In at least one instance, the Sacramento district office tried to present data showing that California's 38 mile Poso Creek was subject to the Clean Water Act, in part because it supported recreational fisheries. The Corps' Washington office refused to consider this evidence, and the creek and its watershed are not longer protected under the Clean Water Act. Poso Creek flows only intermittently today because it has been dammed and diverted by agricultural interests for many years. As a consequence, the Kern National Wildlife Refuge into which it flows is

suffering from a drought that threatens to extinguish the endangered Buena Vista Lake shrew, San Joaquin kit fox and the blunt-nosed leopard lizard.

Until very recently, the commerce clause was almost universally accepted as providing the legal basis for federal environmental law, as well as civil rights and other protections that we have come to take for granted. In the last few years, the Rehnquist court began to question and, in some cases, to eliminate federal regulations based on its much narrower reading of the commerce power. The Supreme Court's new appointees may soon determine whether that trend will continue and open even more wetlands to commercial exploitation.

For additional summary data, please see attached Fact Sheet. For individual state tables as well as a Top 15 state breakdown, go to <http://www.environmentalintegrity.org>.

## **DRYING OUT: FACT SHEET**

### **Army Corps Determinations in Key States**

Under Section 404 of the Clean Water Act, persons who want to fill in wetlands must first obtain permission from the US Army Corps of Engineers. The following provides a state-by-state summary of determinations by the Army Corps that certain wetlands are exempt from these requirements, following a 2001 Supreme Court decision holding that the Clean Water Act does not protect certain "isolated" waters. Links to the Army Corps district offices that make determinations for specific sites can be found at <http://www.usace.army.mil/where.html#State>.

#### **CALIFORNIA**

- Since January 2004, the Corps has issued 67 determinations, which exempt a total of 215 to 344 acres of wetlands, lakes, and ponds in California from Section 404 requirements of the Clean Water Act.
- Excluding lakes and ponds, the balance of the exemptions are wetlands, affecting between 184 and 276 acres.
- Greatest number of exemptions: Sonoma County – 6
- Largest exempt acreage: Los Angeles County – 136 to 174 acres
- Determinations made by the Corps' Los Angeles, Sacramento, and San Francisco District Offices

#### **COLORADO**

- Since May 2004, the Corps has issued 105 determinations, which exempt a total of 469 to 872 acres of wetlands, lakes, and ponds in Colorado from Section 404 requirements of the Clean Water Act.
- Excluding lakes and ponds, the balance of the exemptions are wetlands, affecting between 347 to 653 acres.
- Greatest number of exemptions: Weld County – 25
- Largest exempt acreage: Adams County – 93 to 147 acres
- Determinations made by the Corps' Albuquerque and Omaha District Offices

#### **FLORIDA**

- Since February 2004, the Corps has issued 213 determinations, which exempt a total of 1,699 to 1,884 acres of wetlands, lakes, and ponds in Florida from Section 404 requirements of the Clean Water Act.
- Excluding lakes and ponds, the balance of the exemptions are wetlands, affecting between 1,657 and 1,839 acres.
- Greatest number of exemptions: Brevard County – 40
- Largest exempt acreage: Lee County – 453 acres
- All determinations made by the Corps' Jacksonville District office

#### **GEORGIA**

- Since January 2004, the Corps has issued 103 determinations, which exempt a total of 539 to 1,104 acres of wetlands, lakes, and ponds in Georgia from Section 404 requirements of the Clean Water Act.

- Excluding lakes and ponds, the balance of the exemptions are wetlands, affecting between 534 and 1,092 acres.
- Greatest number of exemptions: Camden County – 20
- Largest exempt acreage: Brantley County – 135 to 246 acres
- All determinations made by the Corps' Savannah District Office

## **ILLINOIS**

- Since January 2004, the Corps has issued 290 determinations, which exempt a total of 643 to 1,332 acres of wetlands, lakes, and ponds in Illinois from Section 404 requirements of the Clean Water Act.
- Excluding lakes and ponds, the balance of the exemptions are wetlands, affecting between 613 and 1,247 acres.
- Greatest number of exemptions: Will & Cook Counties – 51 each
- Largest exempt acreage: Cook County – 140 to 282 acres
- Determinations made by the Corps' Chicago, Louisville, and Rock Island District Offices

## **INDIANA**

- Since March 2004, the Corps has issued 128 determinations, which exempt a total of 407 to 645 acres of wetlands, lakes, and ponds in Indiana from Section 404 requirements of the Clean Water Act.
- Excluding lakes and ponds, the balance of the exemptions are wetlands, affecting between 250 and 407 acres.
- Greatest number of exemptions: Lake County – 25
- Largest exempt acreage: Elkhart County – 57 to 66 acres
- Determinations made by the Corps' Detroit and Louisville District Offices

## **IOWA**

- Since April 2004, the Corps has issued 62 determinations, which exempt a total of 150 to 274 acres of wetlands, lakes, and ponds in Iowa from Section 404 requirements of the Clean Water Act.
- Excluding lakes and ponds, the balance of the exemptions are wetlands, affecting between 121 and 217 acres.
- Greatest number of exemptions: Polk County – 11
- Largest exempt acreage: Dickenson County – 17 acres
- All determinations made by the Corps' Rock Island District Office

## **MINNESOTA**

- Since July 2004, the Corps has issued 87 determinations, which exempt a total of 169 to 356 acres of wetlands, lakes, and ponds in Minnesota from Section 404 requirements of the Clean Water Act.
- Excluding lakes and ponds, the balance of the exemptions are wetlands, affecting between 166 and 352 acres.
- Greatest number of exemptions: Pine County – 20
- Largest exempt acreage: Cass County – 58 to 72 acres
- All determinations made by the Corps' St. Paul District Office

## **NEBRASKA**

- Since April 2004, the Corps has issued 71 determinations, which exempt a total of 2,970 to 3,139 acres of wetlands, lakes, and ponds in Nebraska from Section 404 requirements of the Clean Water Act.
- Excluding lakes and ponds, the balance of the exemptions are wetlands, affecting between 2,132 and 2,283 acres.
- Greatest number of exemptions: Lancaster & Fillmore Counties – 6 each
- Largest exempt acreage: Cherry County – 676 acres
- All determinations made by the Corps' Omaha District Office

## **NEW YORK**

- Since January 2004, the Corps has issued 146 determinations, which exempt a total of 140 to 205 acres of wetlands, lakes, and ponds in New York from Section 404 requirements of the Clean Water Act.
- Excluding lakes and ponds, the balance of the exemptions are wetlands, affecting between 139 and 202 acres.
- Greatest number of exemptions: Orange County – 34
- Largest exempt acreage: Orange County – 19 to 30 acres
- Determinations made by the Corps' Buffalo and New York Districts

## **NORTH DAKOTA**

- Since March 2004, the Corps has issued 72 determinations, which exempt a total of 2,134 and 2,474 acres of wetlands, lakes, and ponds in North Dakota from Section 404 requirements of the Clean Water Act.
  - From August 2004 to September 2005, North Dakota issued about 375 Jurisdictional Determinations.
- Excluding lakes and ponds, the balance of the exemptions are wetlands, affecting between 1,085 and 1,408 acres.
- Greatest number of exemptions: Griggs County – 8
- Largest exempt acreage: Kidder County – 806 to 809 acres
- All determinations made by the Corps' Omaha District Office

## **OHIO**

- Since January 2004, the Corps has issued 168 determinations, which exempt a total of 259 to 325 acres of wetlands, lakes, and ponds in Ohio from Section 404 requirements of the Clean Water Act.
- Excluding lakes and ponds, the balance of the exemptions are wetlands, affecting between 175 and 233 acres.
- Greatest number of exemptions: Cuyahoga, Franklin, & Lake Counties – 15 each
- Largest exempt acreage: Franklin County – 82 acres
- Determinations made by the Corps' Buffalo, Huntington, Louisville, and Pittsburgh District Offices

## **SOUTH DAKOTA**

- Since April 2004, the Corps has issued 73 determinations, which exempt a total of 479 to 704 acres of wetlands, lakes, and ponds in South Dakota from Section 404 requirements of the Clean Water Act.
  - From August 2004 to September 2005, South Dakota issued about 320 Jurisdictional Determinations.
- Excluding lakes and ponds, the balance of the exemptions are wetlands, affecting between 400 and 624 acres.
- Greatest number of exemptions: Lincoln County – 14
- Largest exempt acreage: Lyman County – 110 to 126 acres
- All determinations made by the Corps' Omaha District Office

## **TEXAS**

- Since January 2004, the Corps has issued 130 determinations, which exempt a total of 642 to 887 acres of wetlands, lakes, and ponds in Texas from Section 404 requirements of the Clean Water Act.
- Excluding lakes and ponds, the balance of the exemptions are wetlands, affecting between 596 and 838 acres.
- Greatest number of exemptions: Harris County – 57
- Largest exempt acreage: Fort Bend County – 143 to 145 acres
- Determinations made by the Corps' Albuquerque, Fort Worth, Galveston, and Tulsa District Offices
- The Galveston District reported 29 determinations with an unknown isolated acreage

## **WISCONSIN**

- Since July 2004, the Corps has issued 174 determinations, which exempt a total of 434 to 641 acres of wetlands, lakes, and ponds in Wisconsin from Section 404 requirements of the Clean Water Act.
- Excluding lakes and ponds, the balance of the exemptions are wetlands, affecting between 421 to 610 acres.
- Greatest number of exemptions: Waukesha County – 26
- Largest exempt acreage: Kenosha County – 92 acres
- All determinations made by the Corps' St. Paul District Office