COMMON QUESTIONS:

THE SWANCC DECISION; ROLE OF THE STATES IN FILLING THE GAP

Prepared by:

Jon Kusler and Jeanne Christie
Association of State Wetland Managers

In Cooperation With:

The International Institute for Wetland Science and Public Policy

PREFACE

The following guide concerning frequently asked questions has been prepared to help states and others understand and respond to the SWANCC decision. This is one of four publications posted to our web page and prepared by the author to help the states address the gap in regulations created by SWANCC. See, in addition to this memorandum, J. Kusler, Addressing the Gaps Created by SWANCC: A Federal, State, Tribal, and Local Partnership for Wetland Regulation, ASWM, 2004; J. Kusler et al., Model State Wetland Statute to Close the Gap Created by SWANCC, ASWM 2001, http://www.aswm.org/swp/model-leg.pdf; and J. Kusler, "Waters of the U.S." After SWANCC, ASWM 2005, http://www.aswm.org/calendar/legal/legalpaper.pdf.

We welcome any further comments, corrections, improved estimates of "isolated" wetland acreage, or copies of proposed or adopted state or local statutes, rules, or regulations to address isolated wetlands.

Funding for this publication has been provided by the U.S. Environmental Protection Agency, Headquarters, Divisions of Wetlands and Region 2. The opinions expressed in the document are the author's and do not necessarily reflect the view of the sponsor.

Photos in this report are mostly derived from websites. Please let us know, if you do not wish your photo to be included in this brochure.

Cover photo by Tim McCabe, 1980, USDA Natural Resources Conservation Service

Photo on page 1, 4, and 9 by Jon Kusler, Association of State Wetland Managers, Inc., Berne, New York

Photo on page 12 by U.S. Water Resources Council

COMMON QUESTIONS:

THE SWANCC DECISION;
ROLE OF THE STATES IN FILLING THE GAP

What did the U.S. Supreme Court decide in the SWANCC decision?

A. On January 9, 2001 the U.S. Supreme Court issued a decision, *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* (531 U.S. 159, 2001) (herein referred to as *SWANCC),* that limited the scope of the U.S. Army Corps of Engineers (Corps) Clean Water Act (CWA) regulatory permitting program (Section 404) as applied to isolated waters of the U.S.

In the case, Chief Justice Rehnquist, writing for the majority of a narrowly divided Court (a 5-4 decision), held that the Corps' denial of a Section 404 permit to the Solid Waste Agency of Northern Cook County to fill several permanent and seasonal ponds that served as a heron rookery was invalid because the Corps lacked jurisdiction over these ponds under Section 404(a) of the Water Pollution Control Amendments of 1972 and the CWA of 1977. These ponds were located on a 533-acre parcel purchased by a consortium of 23 suburban cities and villages as a disposal site for nonhazardous solid waste. The site was an abandoned sand and gravel pit operation that had reverted to a successional forest. Remnant excavation ditches had evolved into a scattering of permanent and seasonal ponds varying in size from under one tenth of an acre to several acres, and from several inches to several feet deep.

The Solid Waste Agency had applied for and received a number of state and local permits. These included a special use planned development permit from the Cook County Board of Appeals and from the Illinois Department of Conservation. The Solid Waste Agency also secured water quality certification from the Illinois Environmental Protection Agency.

The Solid Waste Agency also sought a Section 404 permit from the Corps, who initially concluded that it had no jurisdiction over the site because it contained no "wetlands", or areas which support "vegetation typically adapted for life in saturated conditions." (Slip Opinion) However, the Illinois Nature Preserves Commission informed the Corps that a number of migratory bird species had been seen at the site. The Corps ultimately found that approximately 121 bird species had been observed at the site, including "several known to depend upon aquatic requirements for a significant portion of their life requirements." (Slip Opinion) The Corps reconsidered its initial conclusion and in 1987 formally determined that the area, while not wetlands, qualified as "waters of the United States" pursuant to the Migratory Bird Rule (see below). The Corps refused to issue a Section 404 permit because it concluded that SWANCC had not established that its proposal was the "least environmentally damaging, most practical alternative"; that SWANCC's failure to set aside sufficient funds to remediate leaks posed "an unacceptable risk

Wetlands associated with rivers and streams are not affected by SWANCC

to the public's drinking water supply"; and that project impact upon "area-sensitive species was unmitigatable since a landfill surface cannot be redeveloped into a forested habitat." (Slip Opinion)

The Solid Waste Agency filed suit against the Corps in federal District Court claiming that the Corps did not have jurisdiction. The District Court ruled for the Corps on this issue. The Solid Waste Agency then appealed the jurisdictional determination to the U.S. Court of Appeals for the Seventh Circuit which also ruled in favor of the Corps. The Solid Waste Agency next appealed to the U.S. Supreme Court which accepted the case and overturned the District Court and Court of Appeals and ruled in favor of the consortium.

Specifically, the Supreme Court held that the Corps' "Migratory Bird Rule" which the Corps had adopted in 1986, exceeded the authority granted to the Corps by Congress in Section 404(a) and that Corps jurisdiction over these ponds was lacking. The "Migratory Bird Rule" was an administrative interpretation stating that the presence of migratory bird aquatic habitat was sufficient to make such aquatic habitat jurisdictional under 33 CFR 328(a)(3), which provides for CWA jurisdiction over "other waters" based upon the Commerce Clause. The Court held that Congress did not intend Section 404(a) to regulate such isolated waters based solely upon the use of such waters by migratory birds.

In reaching its decision, the Court stated that a "clear indication" of Congressional intent would have been needed for the Corps to regulate isolated waters. The Court suggested that such a clear indication of intent was needed "where an administrative interpretation of a statute invokes the outer limits of Congress' power." The Court also observed that the "concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." (Slip Opinion). Finding that there was not a clear indication of Congressional intent, the Court declined to interpret the statute as allowing jurisdiction to be asserted over isolated waters based solely on the basis of their use as migratory bird habitat.

The Court rejected arguments that the Corps had sufficiently broad discretion to issue the Migratory Bird Rule based upon the broad definition of "waters of the United States" contained in the 1972 Water Pollution Control Amendments and comments by members of the Senate and House in the Congressional Record indicating that these Amendments should have the broadest possible interpretation in order to implement a comprehensive water pollution control scheme for the Nation. The Court rejected arguments that Congress endorsed the Corps' interpretation of the 1972 Amendments to apply Section 404 to isolated wetlands and waters by defeating a proposed House Bill in 1977 which would have restricted the scope of the Corps' authority. The Court rejected arguments that 1977 CWA amendments exempting some activities and isolated waters and wetlands from regulation and providing a mechanism to delegate to the states power to regulate waters and wetlands other than traditionally navigable waters indicated Congressional intent to regulate such isolated waters and wetlands. In reaching its decision, the Court also observed that "permitting respondents to claim federal jurisdiction over ponds and mudflats falling within the 'Migratory Bird Rule' would result in significant infringement of the States' traditional and primary power over land and water use."

What waters are regulated and not regulated after SWANCC?

A. Although the Court held that the Migratory Bird Rule was invalid, it failed to make clear what waters and wetlands are regulated by Section 404(a). It did provide, in discussing various legal points in the case, some helpful but not entirely consistent hints.

The Court several times quoted from its earlier decision, *United States v. Riverside Bayview Home*s, 474 U.S. 121 (1985), in which the Court held that the Corps had sufficient power under Section 404(a) to regulate wetlands adjacent to navigable waters. The Court, in citing *Riverside Bayview Home*s, observed that in this case "we recognized that Congress intended the phrase 'navigable waters' to include 'at least some waters that would not be deemed "navigable" under the classical understanding of that term." Referring to *Riverside Bayview Home*s, the Court "found that Congress's concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands 'in separately bound up with the "waters of the United States.'" The Court also observed that "It was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in Riverside Bayview Homes." In addition, the Court observed: "We said in *Riverside Bayview Homes* that the word 'navigable' in the statute was of 'limited effect' and went on to hold that Section 404(a) extended to nonnavigable wetlands adjacent to open waters. But it is one thing to give a word limited effect and quite another to give it no effect whatever."

Why are the definitions of "adjacent", "tributary", and "significant nexus" important?

A. As will be discussed shortly, courts are wrestling with the ambiguities contained in SWANCC and have, not surprisingly, come to somewhat different conclusions concerning the scope of waters regulated by the Corps after the decision. States, federal agencies, and not for profit organizations have attempted, with difficultly, to determine how much of a "gap" in regulations SWANCC created. Individual Corps Districts have interpreted key terms differently in making jurisdictional calls. These key terms include "adjacent", "tributary", and "significant nexus". Differences in the scope of Section 404 permitting requirements depending upon the definitions used for these terms.

What guidance has been provided by the Corps in interpreting SWANCC?

A. On January 19, 2001, the General Counsel of the U.S. Environmental Protection Agency (EPA) and the Chief Counsel of the Corps issued a joint memorandum interpreting CWA jurisdiction in light of SWAANC (available at http://www.epa.gov/owow/wetlands/). This memorandum was broadly disseminated to the public and Corps and EPA field staff. The memorandum narrowly interpreted SWANCC, but it failed to provide much guidance on the meaning of key terms in the SWAANC decision such as "significant nexus", "adjacent", and "tributary".

In the three years since SWANCC, Corps District offices have interpreted SWANCC quite differently. Some Districts, such as Maryland, have apparently taken a narrow view of SWANCC and have continued to require permits for wetlands with any direct hydrologic connection with waters. Others, like Galveston, have apparently taken a broader view and have not continued to require permits for wetlands like coastal "bays", unless there is a substantial natural drainage channel between navigable waters and wetlands. No study has been done to document the full extent of these differences but they are apparently quite large.

In January of 2003 the Corps and EPA published in the Federal Register an Advance Notice for Proposed Rulemaking on CWA Definition of Waters of the United States. More than 130,000 comments were submitted to the Corps and EPA in response to this rule. Comments were overwhelmingly supportive of a narrow interpretation to SWANCC and continued broad federal Section 404 jurisdiction:

- Comments were submitted by forty-three states. Of these, forty-one were favorable. Only two argued against for broad interpretation of SWANCC--Alaska and Idaho.
- States largely reported that a broad reading of SWANCC would substantially undermine their state Section 401 water quality certification and wetland protection efforts (see discussion below).
- States were also concerned with impact of a broad interpretation on tributaries to navigable waters. Many states estimated that omission of nonnavigable tributaries would reduce by more than one half regulated waters in the state. See discussion below.

As a result of rumors that the Corps and EPA were about to issue proposed rules broadly excluding some waters from Section 404 regulation, more than 200 members of Congress signed a letter requesting the Corps and EPA not to issue new rules in November 2003. The Administration of EPA announced on December 16, 2003 that no new rules would be issued at that point in time.

How have the Courts interpreted SWANCC since 2001?

A. Since January 2001, there have been at least thirty-four district and court appeal decisions interpreting SWANCC. This included the Borden case which was appealed to and argued before the U.S. Supreme Court. It did not, however, result in a formal U.S. Supreme Court decision in this case which involved Corps jurisdiction over "deep ripping" practices in California because there was a tie vote in the Court.

Tributaries and adjacent wetlands continue to be subject to Clean Water Act jurisdiction

In all but two of the decisions which are briefly described at the end of this paper, the courts took a narrow view of SWANCC and have held that waters were jurisdictional in a particular setting. Many of these decisions applied a broad concept of regulated "tributary" to include nonnavigable as well as navigable waters, a broad concept of "adjacency", and a broad concept of "substantial nexus". The list of decisions at the end is based upon an independent Lexis/Nexis search by the author and lists of cases provided by EPA, the National Wildlife Federation, and the U.S. Department of Justice.

Has remedial congressional action been proposed?

A. On February 27, 2003 Senators Feingold, Jeffords, and Boxer and Congressmen Oberstar, Dingell, Leach, and Boehlert introduced S.473 and HR. 962 to remedy the gap in federal wetland regulation created by SWANCC. This proposed Clean Water Authority Restoration Act of 2003 would clarify that Congress intends CWA protections to apply to all wetlands. No action has been taken on this bill.

How much wetland has been affected by the SWANCC decision?

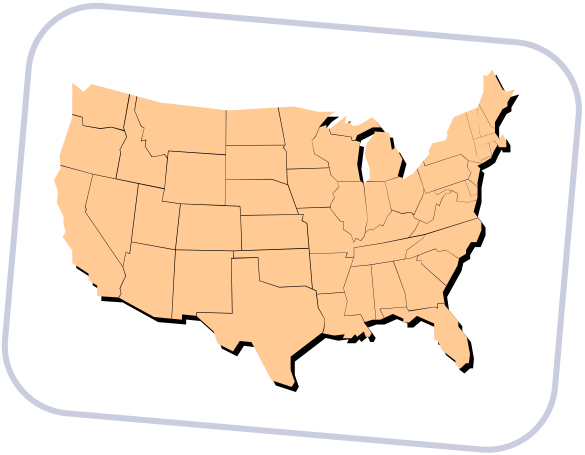
A. Unfortunately even after four years, it is still difficult to determine how much wetland is affected because there has been no definitive guidance from the regulatory agencies and only partial agreement in the courts concerning key issues such as the definition of "tributary", "adjacent", and "significant nexus" discussed above.
A number of states, however, have made estimates of the impact in response to the Advance Notice for Proposed Rule Making for SWANCC. These responses are summarized below. Note, particularly, the estimated impact of omitting nonnavigable streams from jurisdiction.

- **Arizona.** Over 95% of its waters are intermittent or ephemeral streams and redefinition of regulated water to omit intermittent and ephemeral streams would place 95% of its waters outside the CWA.
- **Delaware.** If only navigable and directly adjacent wetlands were regulated, 50% of all wetlands would be omitted from CWA jurisdiction and 92.4% of freshwater wetlands.
- **Florida.** 34 to 66% of total wetlands in Florida's Panhandle would be at risk.
- **Indiana.** Between 9% and 33% by area and between 32% and 89% by number of waters would be excluded from CWA jurisdiction depending upon the definitions used for tributary and adjacency.
- **Iowa.** Between 11% and 72% of streams and wetlands will not be regulated, depending upon the definitions used for adjacency and tributary.
- **Kentucky.** If only streams that have perennial flow or are navigable were to be regulated, the CWA would not apply to the majority of stream miles.
- **Michigan.** 16.7% of wetlands would be removed from CWA jurisdiction.
- **Minnesota.** 12% to 23% would be omitted from CWA jurisdiction with a much higher percentage (up to 92%) in the Northern Glaciated Plains ecoregion.
- **Missouri.** If intermittent/ephemeral stream miles were omitted, 69-76% of all stream miles would be affected; 33% of the wetlands would be outside of CWA jurisdiction if an isolation threshold of 50 feet were used to determine isolation.
- **Montana.** If intermittent/ephemeral steam miles were omitted, 71% of all stream miles would be omitted.
- **Nebraska.** 40% of wetlands would be outside of CWA jurisdiction; 76% loss of coverage of stream miles if intermittent streams were omitted from coverage.
- **New Mexico.** Approximately 80% of the drainages in New Mexico are not perennial.
- **Rhode Island.** Nonnavigable tributary streams constitute 85% of the total stream miles in the state.
- **South Carolina.** More than 20% of all wetlands in two coastal counties could be delineated as isolated. Approximately 16% of total wetlands would be removed from regulation if intermittent streams were not used to determine jurisdiction.
- **South Dakota.** 95-95% of wetland basins in Clark County and 98% of wetland acreage could be considered isolated.
- **Tennessee.** 57% of the rivers are non-navigable waters.
- **Texas.** Approximately 75-79 % of the stream miles are intermittent; approximately 48% of Texas Pollution Discharge Elimination Systems permitted wastewater discharges into intermittent streams; 8% of the wetlands in the coastal zone are isolated.
- **Virginia.** Up to 43% of Virginia's wetlands could become unregulated by the CWA.
- **Wisconsin.** 25 to 90% of Wisconsin wetlands could become unregulated by the CWA.

What has been the impact of SWANCC on state programs?

A. Prior to SWANCC, virtually all wetlands throughout the Nation were (at least theoretically) subject to regulation under Section 404. Some were also regulated by state and local governments as will be discussed below. This broad federal coverage backed up and filled many of the gaps in geographical coverage of state and local regulatory programs.

When SWANCC was first issued there was rejoicing by some advocates of state's rights. That rejoicing became muted as the states faced the political and financial realities of developing wetland programs to address the gaps created by SWANCC.



The SWANCC decision affirmed the "primary responsibilities and rights of the States" over land and waters. But, by narrowing the federal Section 404 program, the decision also limited existing state wetland programs built upon Section 404 permitting and shifted more of the economic burden for regulating wetlands to states and local governments.

SWANCC has reduced the scope of state Section 401 programs since the scope of these programs depends upon the scope of federal Section 404 regulatory permitting authority. The impact upon wetland protection has been particularly great in the thirty-two states lacking independent freshwater wetland regulatory programs for isolated wetlands. In these states, prior to SWANCC, state wetland regulatory protection has been primarily achieved through Section 401 water quality certification procedures. Pursuant to Section 401 of the Water Pollution Control Amendments of 1972, applicants for a federal permit must also receive state water quality certification. The states have "veto" power on the federal permit and quite often condition certification. These conditions become part of a permit. State Section 401 water quality certification programs have also been important in states with explicit tidal and freshwater wetland regulatory statutes in filling the gaps in these programs.

State water quality certification for federal permits has allowed many states to exercise a significant measure of regulatory control over wetlands without the expense of establishing independent state permitting, monitoring, and enforcement programs. This has been particularly important in states with limited wetlands and limited budgets. With the Corps' Section 404(a) jurisdiction reduced, states will need to adopt their own independent programs if they wish to maintain a pre-SWANCC level of wetland protection.

SWANCC also somewhat limited the scope of state "assumption" under Section 404(g) as indicated above. States will have less to "assume" from the federal government. Under Section 404(g) states can "assume" Section 404(a) permitting power for waters other than traditionally navigable waters and adjacent wetlands. Prior to *SWANCC* the states could assume permitting for tributary waters and their adjacent wetlands and isolated waters and their adjacent wetlands. With the federal Section 404 jurisdiction no longer applicable to isolated waters and their adjacent wetlands, the only remaining "assumable" waters may be the tributary waters and wetlands adjacent to tributaries.

This will reduce the incentive for state assumption by other states. In addition, existing assumption agreements may need to be partially rewritten although these changes will not be great. Only two states—Michigan and New Jersey—have assumed the Section 404 program and both states have adopted comprehensive state wetland programs.

SWANCC also affects state/Corps programmatic permitting agreements. Agreements may need to be revised (at least in their scope of application) because the Corps will no longer oversee state regulation of isolated waters and wetlands.

Finally, the scope of state Coastal Zone Management consistency review has been somewhat reduced in coastal states because activities in isolated wetlands in coastal zones are no longer subject to Section 404 permitting.

What efforts have states made to fill the gaps created by SWANCC?

A. A number of states have made a variety of efforts to fill the gaps created by SWANCC. This action has taken several forms:

- **Extend water quality programs to explicitly include isolated and other wetlands.** This approach has been taken by Indiana, Ohio, South Carolina, Nebraska, Tennessee, Washington State and North Carolina. Some of these efforts, like North Carolina, were initiated prior to SWANCC.
- **Adopt limited legislation closing the gaps created by SWANCC (for states that already regulate some wetlands).** This approach has been taken by Wisconsin, Indiana and Ohio.
- **Adopt new comprehensive wetland legislation.** No state has, as yet, taken this approach although a comprehensive wetland bill was introduced in Illinois. Many states, however, have adopted comprehensive wetland legislation over the last two decades such as Minnesota, Michigan, Massachusetts, Rhode Island, Maine, New Hampshire, New York, New Jersey, Connecticut, Maryland, Virginia, Florida, Vermont, Pennsylvania, and Oregon.

What states now regulate isolated wetlands?

A. A considerable gap continues to exist in at least thirty-two states without independent wetland regulations for isolated wetlands. This is because state and local wetland regulatory programs throughout the nation focus primarily upon navigable waters (using state tests for navigability), tributaries, and adjacent wetlands. See generally, Kusler, Jon et. al. 1995. State Wetland Regulation: Status of Programs and Emerging Trends, Association of State Wetland Managers, Berne, NY 12023; Kusler, Jon and Richard Hamann. 1985. Wetland Protection: Strengthening the Role of the States. Proceedings of a National Symposium. Univ. of Florida College of Law, Gainesville. Association of State Wetland Managers, Berne, NY 12023; Want, William. 1989 and 2000 revised edition. The Law of Wetland Regulation. Clark Boardman, New York, New York. World Wildlife Fund. 1992. Statewide Wetlands Strategies, A Guide to Protecting and Managing the Resource. Island Press, Washington, DC.

A brief summary of state programs includes:

> **State regulatory programs applying to isolated freshwater wetlands.** State and cooperative state/local regulatory programs for isolated waters and wetlands are limited in thirty-two states due to lack of basic enabling statutes or lack of funding and staff for existing water quality regulatory efforts. Eighteen states now provide protection for many isolated freshwater wetlands including Maine,

Connecticut, New Hampshire, Rhode Island, Massachusetts, Vermont, New York, New Jersey, Maryland, Virginia, Florida, Minnesota, Michigan, Pennsylvania, Ohio, Wisconsin, North Carolina and Oregon. Most of these programs are, with the exception of New Jersey, New Hampshire, Pennsylvania, and Rhode Island, cooperative state/local regulatory efforts where much of the actual regulation is achieved in cooperation with local governments. Some of the programs are very comprehensive and regulate virtually all wetlands such as New Hampshire, New Jersey, Maine and Pennsylvania. However, regulations are limited in other states by wetland size (e.g., 12.4 acres in New York's), mapping requirements, and exemptions for agriculture and other activities. State regulations do not generally apply to federal lands (one third of the nation's land).

Some additional states provide some limited protection for isolated wetlands. South Carolina regulates isolated wetlands in the coastal zone. A number of additional states such as California and Washington regulate some discharges into wetlands pursuant to comprehensive pollution control statutes. Some limited protection may be provided through critical area statutes and local land planning and management programs. However, these states have not established independently staffed and funded wetland regulatory efforts. To date, these states have relied primarily upon Section 401 water quality certification for Section 404 permits to gain a measure of state control.

Little or no state protection is provided in the states with some of the largest isolated wetland acreages such as Alaska, Louisiana, Texas, North Dakota, South Dakota, Georgia, Nebraska, Kansas, and Mississippi. A small number of local governments in these states have also adopted wetland protection regulations.

State regulatory programs applying to wetlands adjacent to tributaries. The number of states providing protection for wetlands adjacent to tributaries including ephemeral streams is larger than the number for isolated wetlands but the majority of states provide only limited protection for tributaries. Twenty-three states provide a least partial, independent protection for freshwater wetlands adjacent to tributaries. These include the eighteen states listed above which regulate isolated wetlands. They also include other states which provide some measure of protection for wetlands adjacent to tributaries through shoreland or shoreline zoning (Washington), state land use controls (Hawaii), drainage laws (North Dakota) and pollution control statutes (e.g., California, Nebraska). The latter vary greatly in scope. Most of these regulatory efforts lack comprehensiveness because they apply only to wetlands within "shoreline" or "shoreland" or other designated areas. Many of these wetland regulatory programs also limit regulation based on size as noted above. Most of these programs are, in fact, cooperative state/local programs (e.g., New York, Massachusetts, Maine, Connecticut, Florida, Oregon). Many but not all local governments in these states have adopted wetland protection overlay zones, conservancy zoning, or other regulations for at least a portion of the wetlands adjacent to tributaries.

The remaining twenty-seven states provide little or no protection for freshwater wetlands adjacent to ephemeral or intermittent tributaries.

What actions could be taken at federal, state and local levels to fill the gaps created by SWANCC?

A. There are a number of actions that could be undertaken at the national, state, tribal and local levels to help close the gap created by SWANCC. A short list of options is provided below:

- **EPA and Corp's adoption of revised regulations.** EPA and the Corps will sooner or later need to adopt revised definitions for waters of the U.S. through rulemaking or less formal administrative actions. Revised definitions should be consistent so that interpretations of "regulated waters" do not vary greatly from one Corps district to another. Substantially different interpretations are not only unfair to landowners but create administrative nightmares for states with two, three, or more Districts. In redrafting guidance, EPA and the Corps will need to approach the concepts of "tributary" and "adjacency" with care to insure that wetlands with a substantial relationship or nexus (water quality, flood storage, flood conveyance, ground water recharge, etc.) to navigable waters and their tributaries continue to be regulated by the Section 404 program as well as navigable waters tributaries, adjacent wetlands, and interstate waters and wetlands.

Many wetlands are adjacent" to navigable waters

- **Leadership from the Bush Administration.** The White House could help fill the gap in federal regulations and support state and local regulations in several ways. It could require that the individual Corps districts and EPA provide coordinated responses concerning the scope of CWA jurisdiction. This is much needed. It could require that federal agencies carefully comply with the Wetlands Executive Order for activities on federal lands including alternatives analysis and mitigation requirements. The Order might also be amended to more specifically address protection of isolated wetlands of federal lands. The White House could support increased funding for state programs and incentive programs for landowners, also much needed. It could work with Congressional committees to develop remedial legislation of the sort suggested below.

- **Congressional adoption of an amendment to Section 404.** Congress could amend Section 404 to make clear that Section 404 (and the Clean Water Act more generally) applies to isolated wetlands and waters. Whether this would be considered Constitutional by the Supreme Court remains to be seen although it seems likely such an amendment would be upheld if criteria were included for regulated wetlands that clearly established links ("significant nexus") between isolated wetlands and waters and traditionally navigable waters and their tributaries (particularly hydrologic and water quality links) and if the roles of the states and local governments were more clearly and specifically spelled out with a more explicit sharing of powers. Such an amendment might also invoke treaty powers (i.e. protection as necessary to implement migratory bird treaties to which the U.S. is a party) as well as the Commerce Clause to provide a Constitutional basis for regulation.

Federal agencies with wetland maps and data bases such as the U.S. Fish and Wildlife Service, USDA Natural Resources Conservation Service, National Oceanic and Atmospheric Administration, and the EPA could aid Congress in more accurately evaluating the impact of SWANCC and alternative amendment strategies by determining the acreage, numbers, and types of "isolated" wetlands which are encompassed by different interpretations for key terms such as tributary and adjacent. With alternative estimates concerning wetland acreages, numbers and types in hand, federal and state agencies could then project impacts upon functions and values. They could also better evaluate the need for and implications of possible statutory amendments.

- **Congressional adoption of broader wetlands legislation.** Congress could adopt more sweeping wetland and water regulatory provisions to replace Section 404. The U.S. Supreme Court might be particularly sympathetic to a comprehensive wetland statute tied into broader water quality protection and more explicitly involving states and local governments in a power-sharing arrangement. These provisions could not only address isolated wetlands but clarify federal/state/local roles including state assumption and programmatic permits for all wetlands. Background surveys concerning the impact of SWANNC on wetland resources of the sort suggested above could aid these efforts as well.

- **Congressional continuation and enhancement of landowner incentive programs.** Congress could continue and enhance the Wetland Reserve Program and other private landowner incentive programs to encourage protection of isolated wetlands through acquisition and easements rather than regulations. States and local governments could also more specifically target threatened isolated wetlands for acquisition or easements.

- **Congressional increase in funding of the state and tribal wetland grant program.** Congress could increase the present $15-17 million per year EPA state wetland grant program to help states establish and implement wetland programs for isolated wetlands. Some increase in funds is essential if states are to take over some of the Corp's wetland permitting, monitoring, and enforcement roles.

- **Congressional and federal agency increase in federal technical assistance.** Congress could fund and federal agencies could update and expand wetland mapping, technical assistance, and funding to states, tribes and local governments to help them establish and implement wetland regulatory programs for isolated and other wetlands.

- **State amendment of water quality statutes and regulations to include wetlands.** State legislatures could adopt wetland "water quality" statutory amendments to state pollution control statutes and regulations. Such statutory or regulation amendment changes might include a redefinition of water to specifically include "wetlands" and a redefinition of "pollutants" to include discharges of fill material. Such a statute and the administrative regulations and the programs established pursuant to them might not provide comprehensive protection for all wetlands but it could provide some protection and would more closely integrate wetlands, water quality, and watershed management. Such an approach may be particularly attractive for states with limited wetland acreages and budgets.

A number of states such as California and Washington with broad existing water quality statutes and regulations could move to establish independent wetland permitting programs as part of water quality programs without the need for new legislation or regulations. However, to do so, they will need to find the funds and staffing to issue, monitor, and enforce wetland permits. And, this will not be easy.

- **State amendment of floodplain, critical area, sensitive area, river protection, public water, watershed management and other programs to include wetlands.** State legislatures could add protection of wetland functions and values into the goals and permitting criteria for floodplain regulation, critical area, sensitive area, watershed management, and other resource management statutes. Adding these goals could, to some extent, help protect isolated wetlands through existing programs without substantial new budgets. But, protection for isolated wetlands might also often be "spotty" due to the piecemeal coverage of these programs and lack of wetland expert staffs and budgets.

- **State adoption of more comprehensive wetland statutes.** States could adopt more extensive "wetland regulatory" statutes similar to statutes adopted in Minnesota, New York, Massachusetts, New Hampshire, Maine, or other states. Such statutes could include goals, legislative findings of fact, wetland definition, wetland delineation criteria, mapping, permitting requirements and criteria, restoration provisions, mitigation bank provisions, tax incentives, and other types of provisions. Adoption of a comprehensive statute may be particularly appropriate in a state with large acreages of wetlands.

Filling the gap with comprehensive legislation will require new statutes and regulations, new staffing, additional training and added budgets. Many states will, therefore, be reluctant to assume this role even if there is political support. In addition, states and local governments may also be more vulnerable to takings claims and judgments since they, rather than the Corps, become the primary permitting authority.

- **Local government adoption of wetland plans and regulations, tax incentives, other incentives.** Local governments could help fill the gaps by adopting comprehensive land and water use plans with wetland protection components, special wetland ordinances, floodplain ordinances with wetland provisions, wetland overlay zones as part of zoning regulations, or other regulations and measures to apply to isolated and other wetlands. They could provide tax incentives to landowners and help acquire wetlands for open space. States, federal agencies, and not for profits including local land trusts could assist local governments by providing model ordinances, wetland maps, wetland training, and funding.

What will be the long term implications of SWANCC?

A. The precise amount of wetland not presently subject to regulation as a result of the interpretation of the SWANCC decision by various Corps district offices remains to be seen but best estimates are in the 20%-25% plus range for acreage and a higher percentage by number. The total will be less if jurisdiction is also based upon small drainage ditches and surface water flows during floods and other high water events. It will be much greater if a narrow concept of adjacency is applied and intermittent streams and adjacent wetlands are not regulated (perhaps as high as 70%-80%).

Rule making by the Corps and EPA to interpret critical terms and provide more guidance for field staff has been halted for the present to let the courts more fully address jurisdictional questions. But, rule making and perhaps action by Congress will be needed in the long run.

This loss of CWA jurisdiction will likely, in the long run, result in destruction of many wetlands and waters with attendant loss of water quality protection, flood control, and habitat and other functions. This could have broad impact on homeowners, communities, duck hunters, fisherman, bird watchers and many other groups of citizens who depend upon the habitat, fisheries, water pollution control, flood attenuation and other functions of isolated wetlands.

The impacts of SWANCC will not, of course, stop with impacts upon federal, state, tribal, and local government wetland regulations. The decision leaves unanswered legal questions with regard to what broader waters are validly regulated under the Clean Water Act including pollution and stormwater sources. This will create confusion and uncertainty for some developers and landowners although it may also be viewed as providing "regulatory relief" by others.

Ephemeral streams, riparian areas, and closed basins may be most impacted by SWANCC

Over time states and local governments will likely fill some of the gaps, particularly if funds and technical assistance are made available to them. But these regulations will vary from community to community and state to state. This will create more complexity and uncertainty for developers. Engineering consulting firms will find that they need less staff with a reduction in overall workload for preparing permits, carrying out delineations, and designing and constructing mitigation projects. Many of the 200 mitigation banks being created throughout the Nation with investment of hundreds of millions of dollars in private and public funds have found that they now have fewer customers and some designed to compensate for isolated wetland losses have apparently been put out of business.

In summary, the full implications of *SWANCC* will not be apparent for some time. Considerable confusion and misunderstanding has resulted from the decision in the federal/state wetland and water relationships that had slowly developed over a twenty-nine year period. At a minimum, the decision creates serious new vulnerabilities in water and wetland resource protection and requires adjustments in federal, state, tribal and local roles in the planning and regulation of waters and wetlands. Some rethinking of roles is needed not only for isolated wetlands and waters but broader watershed management, floodplain management, water supply, stormwater management, and point and nonpoint source pollution control efforts which depend, to a greater or less extent for their accomplishment, upon the protection and restoration of isolated wetlands and waters. For more detailed discussion of options see J. Kusler, Filling the Gaps Created by SWANCC: Strengthening the Federal, State, Tribal, and Local Government Partnership for Wetland Regulation, ASWM, 2005.

APPENDIX A
Court Decisions Interpreting SWANCC

Federal district court and court of appeals decisions holding that particular wetlands and waters are subject to CWA jurisdiction include:

United States v. Deaton, 332 F.3d 698 (4th Cir., 2003), reh'g (en banc) denied (August, 2003), petition for cert. filed (Court or Appeals upheld the Corp's jurisdiction over a wetland adjacent to a roadside ditch that connects through a culvert and an eight mile long series of nonnavigable ditches and creeks to the navigable Wicomico River and ultimately to the Chesapeake Bay 25 miles later. The Court deferred to the Corp's interpretation of the Clean Water Act to include all nonnavigable tributaries.)

United States v. Rapanos, 339 F.3d 447 (6th Cir. Aug. 5, 2003), reh'g (en banc) denied (2003) (Court of Appeals reinstated a criminal conviction for filling wetlands which were adjacent and hydrologically connected to a 100 year old man made drain which flowed into a creek which flowed into a navigable in fact river.)

United States v. Rueth Development Co., 335 F.3d 598 (7th Cir, 2003) (Court of Appeals affirmed a consent decree in a Section 404 civil enforcement case which the plaintiff sought to reopen based on SWANCC. The Court upheld CWA act jurisdiction based on adjacency.)

United States v. Krilich, 303 F.3d 784 (7th Cir., 2002), cert. denied, 123 S.Ct. 1782 (2003) (Court of Appeals held that SWANCC was not an adequate basis for reopening a 1992 consent decree in a CWA Section 404 enforcement action because SWANCC did not represent such a significant change in the law that refusal to reopen was an abuse of discretion.)

United States v. Newdunn, 344 F.3d 407 (4th Cir., 2003), petition for cert. filed (Court of Appeals held that wetlands that abutted and had a hydrologic connection to a drainage ditch which flows via a culvert to nonnavigable portions of a stream before flowing into traditional navigable water were jurisdictional under the CWA. The court also held that Virginia's regulation of waters was based upon independent state powers and were not simply tied to CWA jurisdiction.)

United States v. Interstate General Co., No. 01-4513, 2002 WL 1421411 (4th Cir, 2002) (Court of Appeals rejected the argument in a civil enforcement action that SWANCC restricted CWA jurisdiction to navigable-in-fact waters and wetlands immediately adjacent thereto.)

Community Ass'n for Restoration of the Env't v. Henry Bosma Dairy, 305 F.3d 943 (9th Cir., 2002) (Court or Appeals held that a drain that carried flows from an animal feeding operation either directly or by connecting waterways into the Yakima River was jurisdictional under the Clean Water Act.)

Headwaters, Inc. v. Talent Irrigation District, 243 F.3d 526 (9th Cir., 2001) (Court of Appeals held that shallow irrigation canals tributary to other waters of the U.S. were jurisdictional.)

Ailello v. Town of Brookhaven, 136 F.Supp. 2d 81 (E.D.N.Y, 2001) (District court concluded that nonnavigable pond and creek that flowed into a lake which in turn flowed into a traditional navigable water were jurisdictional.)

United States v. Buday, 138 F.Supp. 2d 1282 (D. Mont, 2001) (District court held in a criminal enforcement action that that wetlands surrounding a small, intermittent, non-navigable tributary some 235 miles upstream from the navigable in fact Clark Fork River were jurisdictional under the CWA.)

United States v. Bruce Dyer, No. 00-11013 (D. Mass. March 12, 2003) (District court refused to reopen consent decree based upon SWANCC for filling of wetlands adjacent to the Taunton River because the wetlands were adjacent to a navigable waterway.)

Idaho Rural Council v Bosma, 143 F.Supp. 2d 1169 (D. Idaho, 2001) (District court held that discharges from a concentrated animal feeding operation were subject to CWA jurisdiction including a spring that ran into a pond that drained across a pasture into a canal that flowed into a creek that was either navigable in fact or flows into a navigable in fact river. The court also concluded that discharges into groundwater that leads to surface water may require a Section 402 permit.)

Colvin v United States, 181 F.Supp. 2d 1050 (C.D., Cal.., 2001) (District court held that the Salton Sea, a large, isolated, navigable in fact lake was a water of the U.S. and unaffected by SWANCC.)

United States v. Lamplight Equestrian Center, Inc. No. 00-6486, 2002 WL 360652 (N.D. Ill. 2002) (District court held that CWA jurisdiction existed for a wetland that drained through a man made drainage ditch, then through a 50 foot delta or meandering swale, then into Brewster Creek (a nonnavigable stream) and ultimately into the navigable in fact Fox River because there was a significant nexus).

California Sportfishing Protection Alliance v. Diablo Grande, Inc., 209 F.Supp. 2d 1059 (E.D. Cal., 2002) (District court held that a creek running over a weir and into an underground pipeline which eventually connected to the San Joaquin River was jurisdictional under the CWA.)

FD & P Enterprises, Inc. v. United States Army Corps of Engineers, 239 F.Supp. 2d 509 (D.N.J. 2003) (District court denied summary judgment because there were genuine issues of material fact regarding whether the filling of wetlands would have a substantial nexus to navigable in fact waters.)

San Francisco v. Cargill Salt Division, No. C 96-2161 SI (N.D. Cal. 2003) (District court held that a pond which was separated from a navigable in fact water only by a man-made berm was jurisdictional under the CWA.)

United States v. Robert L. Hummel, No 00 C 5184, 2003 WL 1845365 (N.D. Ill. 2003) (District court held that a "significant nexus" exists for wetlands which are hydrologically connected to a creek that flows into the navigable in fact Des Plaines River 11 miles away, and are therefore subject to CWA.)

United States v. Bruce Dyer, No. 00-11013 (D. Mass 2003 (District court rejected an attempt to reopen a consent decree in a CWA 404 civil enforcement action based on SWANCC where the court found that wetlands were adjacent to a tributary that nourished the Taunton River.)

United States v. Jones, 267 F.Supp. 2d 1349 (M.D. Ga, 2003) (District court held that Oil Pollution Act applied to discharge of oil into a storm drain that flowed into a drainage ditch that flowed into a creek that flowed into the navigable in fact Ocmulgee River.)

North Carolina Shellfish Growers Association v. Holly Ridge Associates, No. 7:01-CV-36, 2003 WL 21995171 (E.D.N.C. 2003) (District court held that wetlands and other water bodies were jurisdictional under the CWA because there was a "significant nexus" between these waters and a traditionally navigable water "whether the hydrologic connection occurs in a channelized flow or a networks of flat bottoms and braids, continuously or intermittently."

In addition, a number of cases are on appeal in which lower courts have found Section 404 jurisdiction:

United States v. Phillips, CA, 02-30035 and C.A. 02-30046, 2004 WL 193258, affirmed, Nos. 02-30035, 02-30046 (9th Cir.) (District court instructed jury that wetlands and streams into which the defendant discharged pollutants were waters of the U.S.)

June Carabell v. The United States Army Corps of Engineers and the United States Environmental Protection Agency, No. 01-72797 (E.D. Mich, March 27, 2003), appeal pending, No. 03-1700 (6th Cir.) (District court held that wetlands neighboring nonnavigable tributaries of Lake St. Clair, a navigable water body, were jurisdictional.)

Baccarat Fremont Developers v. U.S. Army Corps of Engineers, No. C 02-3317 (N.D. Cal. Aug. 11, 2003), appeal pending, No. 03-16586 (9th Cir.) (District court held that wetlands separated from jurisdictional waters by man-made berms are waters of the U.S.)

Robert Brace v. United States, 51 Fed. Cl. 649(2002) (U.S. Court of Federal Claims denied U.S. motion for summary judgment based on ruling that there was a factual dispute as to whether, post-SWANCC, a sufficient jurisdictional nexus existed between the wetlands at issue and navigable waters.)

Other decisions taking a less broad approach and holding that particular areas or waters were not jurisdictional include the following. It is to be noted that both Harken and Needham involve the Oil Pollution Control Act, not Section 404 of the Clean Water Act:

Rice v. Harken Exploration Co., 250 F.3d 264 (5th Cir., 2001, reh'g (en banc) denied, 263 F.3d 167 (2001) (Court of Appeals held in an Oil Pollution Act case that discharges onto dry land which seeped through the ground into groundwater which, in turn, contaminated several intermittent streams was not jurisdictional under the Oil Pollution Act where there was little evidence in the record concerning how often the creek runs, how much water flows in it, and whether the creek ever flowed into a navigable body of water.)

United States v. Needham, 2002 WL 1162790 (W.D. La. Ja. 22, 2002); rev'd by 354 F.3d 340, (5th Cir.) (2003). (Court of Appeals held in an Oil Pollution Act case that the connection between an oil spill in a drainage ditch some 60 miles from the Gulf of Mexico shoreline and navigable waters was too tenuous for the OPA to apply.)

SUGGESTED READINGS

SWANCC Decision and Follow Up Actions

Christie, J. and S. Hausmann. 2003. Various State Reactions to the SWANCC Decision. Wetlands, Vol. 23, No. 3. Abstract available online. See below.

Citizens for a Green North Tonawanda. 2004. Web site describing efforts in New York to close the gaps in freshwater wetlands created by SWANCC. Includes brief summaries of wetland laws in northeast states. Available online. See below.

Ducks Unlimited, Inc. 2002. The SWANCC Decision; Implications for Wetlands and Waterfowl. Memphis, Tennessee. Available also online. See below.

GAO Report, February 2004. Waters and Wetlands. Corps of Engineers Needs to Examine Its District Office Practices in Determining Jurisdiction. Available online. See below.

Hausmann, S. 2002. Expanded Water Quality Protection for Wisconsin's Isolated Wetlands. National Wetlands Newsletter. Vol. 24, No. 4.

Holman, Blan. 2003. State Wetland Regulation: Development of Wetlands Regulation in N.C. and Implications for Other States. Southern Environmental Law Center. PowerPoint presentation describing North Carolina's wetland regulations based on water quality statute. http://www.cep.unc.edu/outreach/manteo/ManteoPDFDocs/Presentations/Holman-Wetland_Regulations_10-22-03.pdf

Kusler, J. 2004 update. The SWANCC Decision; State Regulation of Wetlands to Fill the Gap. Association of State Wetland Managers, Berne, New York. Also available online. See below.

Liebesman, L. 2003-04. Judicial, Administrative, and Congressional Responses to SWANCC. National Wetlands Newletter. Vol 25, No. 6.

National Wetlands Newsletter. Vol. 23, No. 2. Environmental Law Institute, Washington, D.C. Abstract on SWANCC. Available online. See below.

National Wildlife Federation. 2001. Summary of state wetland laws with special reference to SWANCC and isolated wetlands. This article summarizes the statutes of Wisconsin, Indiana, Michigan, Ohio, Minnesota, Delaware, Virginia, North Carolina, South Carolina, and Georgia. Washington, D.C. Available online. See below.

National Wildlife Federation. October 2004. Summary of Post-SWANCC Court Decisions. Available online. See below.

National Wildlife Federation and Natural Resources Defense Council. 2002. Wetlands at Risk-Imperiled Treasures. Available online. See below.

Ohio General Assembly. 2003. Substitute House Bill Number 231. Act adopted by the Ohio legislature to address isolated wetlands. Available online. See below.

Range, J. 2003. Jurisdiction Under the Clean Water Act: Implications of the SWANCC Decision. Isaac Walton League. Available online. See below.

Sierra Club. State-by-state summary of state responses to proposed rule-making to change the Clean Water Act rules pertaining to isolated wetlands. See http://www.sierraclub.org/cleanwater/reports_factsheets/all_dried_up.PDF

Sierra Club, Illinois Chapter. How the Illinois Wetland Protection Act (HB 913) Works. Available online. See below.

Sierra Club, Illinois Chapter. Support the Illinois Wetland Protection Act – House Bill 6013. Description of Proposed Illinois Wetland Protection Act, House Bill 6013. Chicago, Illinois. Available online. See below.

Simmons, Daniel. 2004. Navigating SWANCC: An Examination of the Army Corps' of Engineers Authority Under the Clean Water Act. Environmental Law Reporter, Environmental Law Institute, Washington, D.C. Available online. See below.

State of New York, Senate Bill, S04480 (May 17, 2004). Proposed bill which would amend the New York State Freshwater Wetland Legislation to better protect isolated wetlands.

Terrell, C., and C. Luthin. 2001. How We Won the Battle for Isolated Wetlands in Wisconsin. Article describes Senate Bill 1 which the Wisconsin legislature adopted in 2001. Available online. See below.

Tiner, R.W., H.C. Bergquist, G. P. DeAlessio, and M. J. Starr. 2002. Geographically Isolated Wetlands: A Preliminary Assessment of Their Characteristics and Status in Selected Areas of the United States. U.S. Department of the Interior, Fish and Wildlife Service, Northeast Region, Hadley, Massachusetts. Available online. See below.

U.S. Department of Justice. Office of Legal Education. 2002. Wetlands Protection and Endorsement: A State/Federal Conference. Materials from Conference, December 9-11, 2002. Columbia, South Carolina.

State Programs

Association of State Wetland Managers. 1993. Classification of Wetlands for Regulatory Purposes. Association of State Wetland Managers. Berne, New York.

Kusler, J. 1994. State Wetland Regulation: Status of Programs and Emerging Trends. Association of State Wetland Managers. Berne, New York.

Kusler, J. 1977. Strengthening State Wetland Regulations. U.S. Fish and Wildlife Service. Washington, D.C.

Silverberg, S. and M. Dennison. 1993. Wetlands and Coastal Zone Regulation and Compliance. Wiley Press, New York, New York.

Want, W. 2004 update. The Law of Wetland Regulation, Clark Boardman Callaghan.

World Wildlife Fund. 1992. Statewide Wetlands Strategies: A Guide to Protecting and Managing the Resource. Island Press, Covelo, California

SUGGESTED WEB SITES

SWANCC Decision and State Responses

http://www.nrdc.org/water/conservation/atrisk/wetlands.pdf
National Wildlife Federation and Natural Resources Defense Council. 2002. Wetlands at Risk-Imperiled Treasures.

http://www.endangeredlaws.org/downloads/tef_what_are_waters_of_us.pdf
The Environmental Forum. 2003. What Are "Waters of the United States"? Series of papers online. The Environmental Law Institute, Washington, D.C.

http://www.co.lake.il.us/smc/regulatory/iwp/default.asp
Stormwater Management Commission. Lake County Illinois adoption of an amended wetland protection ordinance to close the gap created by SWANCC.

http://www.ducks.org/conservation/404_report.asp
Ducks Unlimited, Inc. 2002. Executive Summary – 404 Report. The SWANCC Decision: Implications for Wetlands and Waterfowl.

http://www.aswm.org/fwp/swancc/aswm-int.pdf
Kusler, J. 2004 update. The SWANCC Decision; State Regulation of Wetlands to Fill the Gap. Association of State Wetland Managers, Berne, New York.

http://web.pdx.edu/~maserj/ESR424-524/Wetland%20Regulations%203ppg.pdf
Maser, J. 2004. Wetland Regulations. PowerPoint Presentation briefly describing wetland regulations in Washington and Oregon.

http://www.mercatus.org/pdf/materials/803.pdf
Simmons, D. 2004. Navigating SWANCC: An Examination of the Army Corps' of Engineers Authority Under the Clean Water Act. Environmental Law Reporter, Environmental Law Institute, Washington, D.C.

http://www.propertyrightsresearch.org/feingold_introduces_legislation_.htm
Feingold Introduces Legislation to Protect Wetlands: Aims to Restore the Intent of the Clean Water Act of 1972. 2003. Senator Feingold introduces legislation to close the gap created by SWANCC. Washington, D.C.

http://www.planning.org/policyguides/pdf/WetlandPolicy.pdf
American Planning Association. 2002. Policy Guide on Wetlands. Chicago, Illinois.

http://www.maccweb.org/wetlands_bylaw.html
Massachusetts Association of Conservation Commissions. 2002. Model Wetlands Bylaw and GIS Map of Communities with Bylaws. Wetland protection ordinance for local communities, list of communities which have adopted local wetland protection ordinances.

http://www.geocities.com/ntgreencitizen/nywetlands.html
Citizens for a Green North Tonawanda. 2004. Take Action to Improve New York's Wetland Laws. Web site describing efforts in New York to close the gaps in freshwater wetlands created by SWANCC. Includes brief summaries of wetland laws in northeast states.

http://www.angelfire.com/in4/earthpages/indianawetlands.html
A Model Wetlands Ordinance for Indiana Communities. Model ordinance for Indiana communities to help them close the gaps created by SWANCC.

http://www.michiganwetlands.org/nwf_post_swancc.pdf
National Wildlife Federation. October 2004. Summary of Post-SWANCC Court Decisions.

http://www.trcp.org/pressroom/iwla_wetlands_swancc_analysis.pdf
Range, James D. 2003. Jurisdiction Under the Clean Water Act: Implications of the SWANCC Decision. Isaac Walton League.

http://www.sws.org/wetlands/abstracts/volume23n3/CHRISTIE.html
Christie, J. and S. Hausmann. 2003. Various State Reactions to the SWANCC Decision. Abstract of an Article in the Wetlands Journal. Wetlands, Vol. 23, No. 3.

http://www2.eli.org/nwn/nwnarchive/23-02articles.cfm
National Wetlands Newsletter. Vol. 23, No. 2. Brief abstracts on SWANCC. Environmental Law Institute, Washington, D.C.

http://www.deq.state.ne.us/RuleAndR.nsf/23e5e39594c064ee852564ae004fa010/9f07eae313ae56d686256888005bc61e/$FILE/WQS07.pdf
Nebraska Department of Environmental Quality. 2002. Water Quality Standards for Wetlands. (Adopted in part in response to SWANCC).

http://www.gao.gov/new.items/d04297.pdf
GAO Report, February 2004. Waters and Wetlands. Corps of Engineers Needs to Examine Its District Office Practices in Determining Jurisdiction.

http://wetlands.fws.gov/Pubs_Reports/isolated/report.htm
Tiner, R., H. Bergquist, G. DeAlessio, and M. Starr. 2002. Geographically Isolated Wetlands: A Preliminary Assessment of Their Characteristics and Status in Selected Areas of the United States. U.S. Department of the Interior, Fish and Wildlife Service, Northeast Region, Hadley, MA.

http://www.greatlakesdirectory.org/zarticles/1220wetlands.htm
National Wildlife Federation. 2001. Summary of state wetland laws with special reference to SWANCC and isolated wetlands. This article summarizes the statutes of Wisconsin, Indiana, Michigan, Ohio, Minnesota, Delaware, Virginia, North Carolina, South Carolina, and Georgia. Washington, D.C.

http://www.wsn.org/wetlands/wetlandsbattle.html
Terrell, C., and C. Luthin. 2001. How We Won the Battle for Isolated Wetlands in Wisconsin. Article describes Senate Bill 1 which the Wisconsin legislature adopted in 2001.

http://illinois.sierraclub.org/take_action/alert2.htm
Sierra Club, Illinois Chapter. How the Illinois Wetland Protection Act (HB 913) Works.

http://illinois.sierraclub.org/RPG/Action%20Alerts/aa021502.htm
Sierra Club, Illinois Chapter. Support the Illinois Wetland Protection Act – House Bill 6013. Description of Proposed Illinois Wetland Protection Act, House Bill 6013. Chicago, Illinois.

http://www.legislature.state.oh.us/bills.cfm?ID=124_HB_231
Ohio General Assembly. 2003. Substitute House Bill Number 231. Act adapted by the Ohio legislature to address isolated wetlands.

State Programs

http://www.serconline.org/wetlands/stateactivity.html
State Environmental Resource Center. Issue: Protecting Isolated Wetlands. Brief description of state wetland programs with links to state contacts.

http://www.cicacenter.org/swift.html
Construction Industry Compliance Assistance. State Wetlands Information Tool (SWIFT). State-by-state description of state wetland programs and laws. Contact points. Links. Excellent site.

http://www.calepa.ca.gov/Publications/Reports/Mandated/2003/SupBudgetAct.pdf
Regulatory Steps Needed to Protect and Conserve Wetlands Not Subject to the Clean Water Act. 2003. Report to the legislature concerning the conservation of wetlands not subject to the Clean Water Act.

http://www.aswm.org/swp/states.htm.
Association of State Wetland Managers. State Wetland Protection Statutes. Summary of state wetland statutes of selected states. Berne, NY.

http://www.aswm.org/propub/statepartnership.pdf
Kusler, J. 2004. Addressing the Gaps: A Federal, State, Tribal and Local Partnership for Wetland Regulation. Association of State Wetland Managers, Berne, New York.

www.lawguru.com/ilawlib/1.htm
Internet Law Library.

http://www.hg.org/torts.html
HierosGamos. Tort Law. Comprehensive law and government portal.

http://www.statelocalgov.net/index.cfm
State and Local Governments on the Net. Many, many sites listed state-by-state.

http://www.epa.gov/docs/epacfr40/find-aid.info/state/
U.S. Environmental Protection Agency. Laws & Regulations. Federal and State Government Regulations and Program References. Links to state environmental laws. State/federal programs described state-by-state. Good list of links.

http://www.law.cornell.edu/topics/state_statutes.html
Legal Information Institute. State laws by topic.

http://www.law.cornell.edu/opinions.html
Legal Information Institute. State Courts – by Jurisdiction. Links to individual states and courts and full text of decisions.

http://www.epa.gov/owow/wetlands/restore/links
U.S. Environmental Protection Agency. River Corridor and Wetland Restoration. Wetlands Restoration Links by State and Local Governments.

Association of State Wetland Managers, Inc.

1434 Helderberg Trail, Berne, NY 12023
Phone (518) 872-1804; Fax (518) 872-2171; www.aswm.org

An electronic version of this brochure is available in PDF at:
http://www.aswm.org/brochure/swancc.pdf