



## GENERAL SECTION

## States Step Up To Protect Wetlands

### BACKGROUND

On January 9, 2001, the United States Supreme Court issued a major decision limiting the federal government's jurisdiction of certain isolated wetlands (*Solid Waste Agency of Northern Cook County (SWANCC) v. United States Corps of Engineers*, 531 U.S. 159). The ruling in favor of SWANCC, an association of Chicago municipalities, determined that the Corps had exceeded its authority by denying a Clean Water Act §404 (a) permit to modify abandoned gravel pits for use as a landfill. The pits have filled with water and the surrounding land is being used as a heron rookery and by 120 other bird species. The Corps used the Migratory Bird Rule (51 Fed. Reg. 41217) to classify the ponds as waters of the United States affecting interstate or foreign commerce [33 CFR §328.3(a)(3)]. The Seventh Circuit held that Congress has authority under the Commerce Clause to regulate intrastate waters and that the Migratory Bird Rule is a reasonable interpretation of the CWA, because of their transitory nature, migratory birds can be protected only by federal mandate.

The SWANCC decision appears to reverse a 1985 Supreme Court ruling (*United States v. Riverside Bayview Homes*, 474 U.S. 121) which held that the Corps had sufficient power to regulate wetlands where only occasional surface runoff from the property into a nearby stream was sufficient to constitute a meaningful connection to navigable waters. The SWANCC decision potentially removes federal protection for 30 percent to 60 percent of the Nation's wetlands. The actual amount of wetlands left unprotected will depend upon the definitions for "adjacent," "tributary," and "significant nexus" used by the Corps and United States Environmental Protection Agency and ultimately supported by the courts.

### THE SHIFT IN REGULATORY AUTHORITY

The SWANCC decision affirms that the primary responsibilities and rights over issues of land and waters lie with the States. Section 401 of the CWA allows for state review of projects that result in significant modifications to wetlands and streams. Generally State involvement was reserved for larger projects. As of May 7, 2001 several States have enacted new rules for wetland protection. Wisconsin enacted new legislation to define and protect "non-federal wetlands". An Ohio executive order was adopted requiring developers to obtain a dredge-and-fill permit before beginning any construction that could affect an isolated wetland. Wetland regulatory agencies in California and North Carolina have said that they believe isolated wetlands are adequately protected by existing legislation. Indiana regulators have extended protection to isolated waters of the state that are no longer waters of the United States through the National Pollutant Discharge Elimination System (NPDES) and will modify its Water Quality Certification form to reflect the extended protection.

### SUMMARY

Before consideration is given to filling or dredging a wetland on your property, be aware that many states will enforce a strict interpretation of existing or new laws to protect water quality in light of the regulatory void created by the SWANCC decision. If you require assistance with wetland identification, wetland delineation or would like to obtain further information on permitting under Sections 401 and 404 of the Clean Water Act, please contact Robert Repasky or Donald Fay at (513) 489-2255 or toll free at (800) 229-1443 or via e-mail at [rdr@paynefirm.com](mailto:rdr@paynefirm.com) and [daf@paynefirm.com](mailto:daf@paynefirm.com).