

# Administration Promises Action in Implementation of the SWANCC Decision

September 27, 2002

Twenty months after the Supreme Court ruled that the Clean Water Act (CWA) does not allow federal agencies to assert jurisdiction over ponds or wetlands that are “not adjacent to open water,” (*Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (531 U.S. 159 (2001))) (SWANCC) the Bush Administration is still struggling to decide what exactly is meant by “adjacent,” and how to define “isolated” waters and wetlands which are no longer subject to federal jurisdiction. Late last week, though, in response to tough questioning by members of the House Energy Policy, Natural Resources and Regulatory Affairs Subcommittee, the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) — the two agencies that share responsibility for administering the wetlands permitting program under Section 404 of the CWA — pledged to move forward with several actions related to the ruling.

Specifically, the Bush Administration promised swift action in issuing guidance to their field offices. This guidance will state what wetlands clearly remain subject to federal jurisdiction and what wetlands are clearly no longer subject to jurisdiction. However, a large “gray area” will be left where jurisdiction will not be clear. According to the agencies, a rulemaking involving public notice and comment will be required to resolve issues such as:

- whether the EPA and Corps rules that define “adjacent” wetlands as “bordering, contiguous, or neighboring” to navigable waters and their tributaries must be modified in light of SWANCC;
- whether CWA jurisdiction extends to non-navigable tributaries of navigable waters (and wetlands adjacent thereto); and
- whether CWA jurisdiction can be asserted over wetlands or waters that connect to navigable waters through intermittent streams, ephemeral drainages, or man-made or underground conveyances.

These are key decisions that will determine whether a federal permit will be required for a wide range of energy construction projects such as transmission lines, oil and gas pipelines, and generation facilities. The gas, electric and other industries should be aware that proposals to define isolated waters as narrowly as possible are likely to be vigorously contested. In addition, legislation has been introduced in Congress that would give the federal government explicit authority to regulate these areas.

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### **Upcoming Briefing**

Van Ness Feldman has been at the forefront of this debate through its representation of The National Wetlands Coalition, a broad cross-section of local governmental entities, state and national trade associations, Native American groups, business and agricultural interests, and others that have joined together to advocate a balanced federal policy for conserving and regulating the nation's wetlands. The Coalition is sponsoring a briefing on the issues involved in implementing the *SWANCC* decision on Tuesday, October 22 from 10:00 a.m. to noon in Washington, DC.

### **For Additional Information**

For more information on this issue, or to attend the October 22 briefing, please contact Paula Dietz or Howard Bleichfeld with Van Ness Feldman at (202) 298-1800.

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