

# Administration Cancels Rulemaking on Wetlands Jurisdiction

December 18, 2003

On December 16, the U.S. Army Corps of Engineers (Corps) and the Environmental Protection Agency announced the cancellation of a rulemaking to clarify the definition of “waters of the United States” subject to federal jurisdiction under the Clean Water Act (CWA).

The Administration’s decision means that federal jurisdiction under the Section 404 wetlands permitting program and other CWA programs may differ among the 38 Corps district offices around the country. Sponsors of pipeline construction projects, transmission lines, office complexes and other projects that disturb “isolated” wetlands and certain kinds of “tributaries” may or may not be required to apply for a federal permit depending on the view of the local Corps district and decisions of the federal courts in the area.

## Supreme Court Decision Triggered Rulemaking

The Administration’s announcement brings to an abrupt close the rulemaking process that began earlier this year with issuance of an Advance Notice of Proposed Rulemaking (ANPRM). The question of the extent of federal jurisdiction over “isolated” and other waters has been the subject of intense debate since the Supreme Court’s January 2001 decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), referred to as *SWANCC*. The Supreme Court in *SWANCC* held that intrastate, non-navigable, isolated waters are not jurisdictional “waters of the United States” where the sole basis for asserting jurisdiction under the CWA is the use of such waters by migratory birds. Read in its entirety, however, the opinion of the Court is much broader than the immediate holding in the *SWANCC* case, and arguably excludes from CWA jurisdiction not only all “isolated” waters, but all waters except traditionally navigable waters and their adjacent wetlands.

## Decision Involved the President

The decision to call off the rulemaking is said to have reached the President, who was influenced by the highly organized efforts of duck hunters, fishermen, and conservationists to maintain broad federal jurisdiction. In addition, although the Supreme Court noted the traditional jurisdiction of the states over water and land use decisions, many states claimed they lacked the government resources to adequately regulate wetlands in the absence of federal jurisdiction.

## Guidance Still In Place

Cancellation of the pending rulemaking leaves the guidance issued by the agencies in January 2003 as the prevailing federal policy. The federal guidance, however, gives unprecedented authority to Corps field staff to make jurisdictional calls. For example, under the guidance:

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**VanNess  
Feldman**

ATTORNEYS AT LAW

A Professional Corporation

1050 Thomas Jefferson Street, NW  
Washington, DC 20007-3877  
(202) 298-1800 (202) 338-2416

821 Second Avenue  
Suite 2000  
Seattle, Washington 98104  
(206) 623-9372 (206) 623-4986

[www.vnf.com](http://www.vnf.com)

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- The Corps district offices are no longer restricted from changing, on a case-by-case basis, pre-SWANCC criteria concerning whether a water is considered a “tributary” and whether a wetland is considered “adjacent” to a tributary;
- Corps districts are given authority to interpret not only the guidance, but applicable statutes, the regulations, as well as case law; and
- Corps districts can decide not to apply the guidance at all to a particular case.

The result is that the Section 404 wetlands permitting program is likely to apply inconsistently to landowners and project sponsors throughout the nation.

### **For Additional Information**

Van Ness Feldman regularly counsels clients on issues related to wetlands regulation and policy. If you are interested in additional information regarding this action, or any other wetlands-related federal activity, please contact Howard Bleichfeld, Sam Kalen, or Bob Szabo at (202) 298-1800 or visit our website at [www.vnf.com](http://www.vnf.com).

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