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## WISCONSIN LEGISLATIVE COUNCIL LEGAL MEMORANDUM

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### U.S. Supreme Court Case on Wetlands

#### INTRODUCTION

A recent U.S. Supreme Court decision, *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*, No. 99-1178 (January 9, 2001), has had the effect of restricting some of the authority of the Department of Natural Resources (DNR) to regulate wetlands. This DNR authority was based on federal law that allowed it to issue water quality certification for permits to fill wetlands issued by the U.S. Army Corps of Engineers (Corps). The Corps permit was issued contingent on a favorable DNR decision on the water quality certification.

The U.S. Supreme Court struck down certain portions of the Corps regulations that defined its authority. These regulations applied Corps jurisdiction to isolated wetlands not adjacent to or connected to a navigable body of water. This restriction of Corps jurisdiction means that the state no longer has the ability to issue water quality certifications for those wetlands.

This memorandum provides a brief discussion of the Supreme Court case and its effect in Wisconsin. This memorandum focuses on the legal issues and does not address the acreage of wetlands potentially affected by the Supreme Court decision or the anticipated consequences of this decision for wetlands in Wisconsin. The DNR is currently reviewing data in an attempt to quantify the effect of the U.S. Supreme Court's decision on Wisconsin wetlands.

#### SITUATION PRIOR TO THE SUPREME COURT DECISION

##### CLEAN WATER ACT

Wetlands are subject to an intertwined set of federal, state and local requirements. This section specifically discusses the wetlands regulations affected by the recent U.S. Supreme Court decision in *SWANCC*.

In 1972, Congress passed the Federal Water Pollution Control Act amendments "to restore and maintain the chemical, physical, and biological integrity" of the nation's waters. The Act defined "navigable waters" as "waters of the United States." [33 U.S.C. s. 1362 (7).] The subsequent history of the Act, including the Supreme Court case, turn on this definition.

##### SCOPE OF SECTION 404 OF THE CLEAN WATER ACT

Since its enactment, s. 404 of the Clean Water Act [33 U.S.C. s. 1344] has evolved through a series of statutory amendments, regulatory changes and court decisions into the primary federal program for the protection of wetlands. Under s. 404 (a), a person who wishes to place or discharge dredge or fill materials into navigable waters, including wetlands, must obtain a permit from the Corps.

Activities regulated under s. 404 include the placement of fill for development, water

resource projects (e.g. dams and levees), infrastructure developments (e.g. highways and airports), and conversion of wetlands to uplands for farming and forestry. However, activities that do not include the placement of dredge or fill material, such as draining, excavation, flooding or burning, are not regulated under the Clean Water Act.

### **EARLY STAGES AND 1970'S RULES**

When the Corps issued regulations to implement s. 404 in 1974, it assumed jurisdiction of traditionally navigable waters, including adjacent wetlands, thus excluding many small waterways and wetlands.

In 1975, a federal district court directed the Corps to revise and expand its regulations to be consistent with Congressional intent, which the court determined was broader than the 1974 regulations. In 1977, the Corps issued regulations which defined "waters of the United States" to include "isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation and destruction of which could affect interstate commerce." [33 C.F.R. s. 323.2 (a) (5) (1978).] This definition remains in effect today.

A subsequent series of court decisions established that, under the broad definition of "waters of the United States," Corps jurisdiction includes wetlands adjacent to navigable waters, artificially created wetlands, and waters isolated from navigable waters.

### **MIGRATORY BIRD RULE**

In 1986, the Corps issued regulations to clarify its jurisdiction under s. 404. Under what is popularly known as the "Migratory Bird Rule," waters that are or may be used as habitat for migratory birds are an example of waters whose use, degradation, or destruction could affect

interstate or foreign commerce and therefore are "waters of the United States." [33 C.F.R. s. 328.3 (a) (3).] Therefore, the Corps determined that s. 404 (a) extends to intrastate waters that are or may be used as habitat for migratory birds.

### **STATE WATER QUALITY CERTIFICATION**

#### **AUTHORITY IN THE CLEAN WATER ACT**

In addition to s. 404, s. 401 (a) (1) of the Clean Water Act provides a measure of control over activities that affect wetlands. Under s. 401 (a) (1), states may grant or deny certification for a federally permitted or licensed activity that may result in a discharge into the waters of the United States. If the state denies certification, the Corps will not issue the permit. The decision to grant or deny certification is based on the state's determination of whether the proposed activity will meet state water quality standards. In order for a state to exercise jurisdiction under s. 401 (a) (1), the state must have water quality standards that are applicable to wetlands.

#### **ADOPTION OF CH. NR 103**

The DNR established procedures for water quality certification decisions in ch. NR 299, Wis. Adm. Code. In 1991, the DNR established water quality standards for wetlands in ch. NR 103, Wis. Adm. Code, that provide review criteria to determine whether an activity may affect wetlands.

Chapter NR 103 is applicable to all DNR regulatory, planning, management, liaison and financial aid determinations involving wetlands, and water quality certifications for s. 404 permits under ch. NR 299.

## **THE DECISION**

### **SOLID WASTE AGENCY OF NORTHERN COOK COUNTY (SWANCC) v. U.S. ARMY CORPS OF ENGINEERS**

On January 9, 2001, the U.S. Supreme Court issued a decision in the case of *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*. The question presented in *SWANCC* was whether the Corps, under the Clean Water Act and the Commerce Clause of the U.S. Constitution, could assert jurisdiction over ponds on an abandoned sand and gravel pit in Northern Illinois where those ponds provide habitat for migratory birds.

### **FACTS**

SWANCC, a group of Northern Cook County municipalities, purchased the 533-acre parcel to develop a solid waste disposal site. The plan called for the filling of some of the over 200 permanent and seasonal ponds. SWANCC contacted the Corps to determine if a federal landfill permit was required under s. 404 of the Clean Water Act. The Corps originally declined jurisdiction over the site because the ponds were not considered “wetlands.” However, after learning that migratory birds used the ponds, the Corps reconsidered and asserted jurisdiction over the site pursuant to the Migratory Bird Rule. SWANCC’s application for a s. 404 permit was denied on that basis.

### **PROCEDURAL HISTORY**

A U.S. District Court determined that the Corps had jurisdiction over the site. SWANCC appealed this decision and the decision was affirmed by the Seventh Circuit Court of Appeals. The Seventh Circuit concluded that “the decision to regulate isolated waters based on their actual use as habitat by migratory birds is within Congress’ power under the Commerce Clause, and that it was reasonable for the Corps to interpret the [Clean Water] Act as authorizing

this regulation.” [191 F. 3d 845, 852 (7th Cir. 1999).]

### **MAJORITY HOLDING**

#### **Holding of the Court**

In a 5-4 decision, the U.S. Supreme Court reversed the Seventh Circuit decision and held that the Corps exceeded its statutory authority by asserting Clean Water Act jurisdiction over the Illinois site through the Migratory Bird Rule. The Court’s holding was limited to the application of Corps regulation to nonnavigable, isolated, intrastate waters based upon the use of such waters by migratory birds. The Court did not reach the question of whether Congress could exercise such authority consistent with the Commerce Clause.

#### **Questions Regarding the Scope of the Holding**

There is additional language in the opinion that raises questions about whether *SWANCC* is narrow or broader. The majority states that: “In order to rule for the [Corps] here, we would have to hold that the jurisdiction of the Corps extends to ponds that are not adjacent to open water. But we conclude that the text of the statute will not allow this.” [Slip op. at 7.] The dissenting opinion seems to interpret this language to preclude the Corps’ assertion of jurisdiction over any water body that is not part of or “adjacent” to navigable waters. The dissent states: “In its decision today, the Court draws a new jurisdictional line, one that invalidates the 1986 migratory bird regulation as well as the Corps’ assertion of jurisdiction over all waters except for actually navigable waters, their tributaries, and wetlands adjacent to each.” [Slip op., dissent at 13.]

### **FEDERAL AGENCY GUIDANCE**

On January 22, 2001, staff of the Environmental Protection Agency (EPA) and the Corps issued a joint memorandum that supports the narrow

interpretation of SWANCC, and does not address the issue of a broader interpretation. The memorandum also provides additional guidance regarding the effect of SWANCC on specific programs.

The memorandum notes that “the Court’s opinion did not specifically address what other connections with interstate commerce might support jurisdiction over nonnavigable, isolated, intrastate waters under the Clean Water Act.” The memorandum states that jurisdiction over such waters should be considered on a case-by-case basis. Due to turnover in the federal administration since the memorandum’s release, it is possible that this is not the final word from the Corps or the EPA about the scope of SWANCC.

### **STATE AND LOCAL WETLANDS REGULATION AFTER SWANCC**

The DNR has authority under s. 281.15, Stats., to promulgate water quality standards for wetlands and to apply those standards in certain DNR decisions. These standards are found in ch. NR 103, Wis. Adm. Code, and apply to “all department regulatory, planning, resource management, liaison and financial aid determinations that affect wetlands.” [s. NR 103.06.]

The DNR has authority under s. 404 of the Clean Water Act to issue or deny water quality certifications for permits issued by the Corps. After SWANCC, that DNR authority still exists. However, it applies to a smaller universe of wetlands since the Court held that the Corps does not have jurisdiction under the Act to require a permit for isolated, nonnavigable, intrastate waters.

The DNR has its own regulatory authority regarding wetlands, and applies the ch. NR 103 standards in making those regulatory decisions. The DNR authority under state law is not affected by SWANCC. However, DNR

authority does not apply to all wetlands in the state.

Much of the DNR authority applies to wetlands that are below the ordinary high-water mark of navigable waters. The ordinary high-water mark is the location of the highest effect of the waters on the shore, as evidenced by erosion, the change from aquatic to terrestrial vegetation or other similar characteristics. The remainder of the DNR authority relates to specific activities.

In addition to the DNR authority, current state law provides wetlands regulatory authority through other state agencies and local governmental units. This authority is also not affected by SWANCC, but is not subject to the ch. NR 103 process.

Although this list appears lengthy, most of these statutes relate to specific activities that occur infrequently, such as landfill siting. Other activities that are common, and are not below the ordinary high-water mark or subject to local shoreland/wetland zoning, may not be subject to Corps jurisdiction and, therefore, DNR regulation.

The remainder of this part of the memorandum lists and briefly describes the current state and local wetlands regulatory authority that is based on state law. There may be other regulatory authority in statute or administrative rule. Also, this list is meant to identify the programs but not to describe them fully. The cited statutes and rules should be consulted for more information.

### **STATE REGULATION**

**Chapter NR 103.** The water quality standards for wetlands under ch. NR 103 apply to all regulatory and management decisions of the DNR.

**Navigable Waters.** The DNR regulates various activities affecting navigable waters and any

wetlands located below the ordinary high-water mark of navigable waters. [See chs. 30 and 31, Stats.]

***Threatened and Endangered Species.*** The DNR may issue permits for taking wild animals or plants that are listed as endangered or threatened. [s. 29.604, Stats.]

***Exploration, Prospecting and Mining.*** Exploration, prospecting and mining sites must minimize the disturbance to wetlands. [s. 293.13 (2) (c), Stats., and chs. NR 131, 132 and 182.]

***Land Application of Domestic Septage.*** DNR rules provide that septage (holding tank and septic tank waste) may not be applied to land within 750 feet from any wetland. [s. NR 113.07 (1) (b).]

***Wastewater Treatment Systems.*** Wastewater treatment systems, sewage collection systems and the discharges from them that require a DNR permit may not adversely affect wetlands and may not provide treatment capacity to new structures located on wetlands. [s. 110.10 (2) (b), Stats., and ss. NR 121.05 (1) (g) and 128.11 (10) (e).]

***Solid and Hazardous Waste.*** Most solid and hazardous waste treatment, storage and disposal activities require a DNR permit and may not cause a significant adverse impact to wetlands. [ss. NR 504.04 (4) (a) and 630.18 (2).]

***Remedial Actions.*** Remedial actions under DNR jurisdiction that involve a discharge to wetlands may not exceed the water quality standards in ch. NR 103. [s. NR 722.09 (2) (c).]

***Electric Generating Facilities and Transmission Lines.*** The Public Service Commission (PSC) must determine that proposed large electric generating facilities and high-voltage transmission lines do not have an undue adverse impact on environmental values.

The list of examples given in the statute does not specifically mention wetlands, but its applicability to wetlands can reasonably be inferred. [s. 196.491 (3) (d) 4., Stats.]

### **LOCAL GOVERNMENT REGULATION**

Local units of government (counties, cities and villages) are required by statute to regulate wetlands. The DNR defines the scope of these regulations by rule, but administration and enforcement of the ordinances is provided by the local unit of government. The DNR does not have direct regulatory authority under these programs and ch. NR 103 does not apply. If a county, city or village fails to enforce its wetlands regulations, the DNR must bring an enforcement action against the municipality to compel it to enforce the ordinance.

***County Shoreland/Wetland Zoning.*** Counties are required to regulate various activities affecting wetlands within the “shoreland” zone. This is the area within 300 feet from the ordinary high-water mark of a navigable stream or the landward side of the floodplain, whichever distance is greater, or 1,000 feet from the ordinary high-water mark of a navigable lake, pond or flowage. Counties are required to regulate wetlands of five acres or more. [s. 59.692, Stats., and ch. NR 115, Wis. Adm. Code.]

***City and Village Wetland Zoning.*** The city and village wetlands regulatory program is substantially similar in its scope and effect to county wetlands zoning. [ss. 61.351 and 63.231, Stats., and ch. NR 117, Wis. Adm. Code.]

***Lower St. Croix Riverway.*** Filling of wetlands in the Lower St. Croix Riverway is prohibited through mandated local zoning. [s. 30.27, Stats., and s. NR 118.06 (12).]

***Local Comprehensive Zoning.*** Cities, villages, towns and counties have authority to regulate

land uses within their zoning jurisdiction. The local authority to regulate land uses includes the authority to protect wetlands beyond the minimum scope of regulation under the statutes described above. [ss. 59.69, 60.61 and 62.23, Stats.]

**Mark C. Patronsky, Senior Staff Attorney.** The information memorandum is not a policy statement of the Joint Legislative Council or its staff.

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This memorandum was prepared on January 25, 2001, by **Rachel E. Letzing, Staff Attorney, and**

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