

Is the Corps Changing its Definition of a Wetland?

The short answer to this question is a resounding, No! But a Supreme Court decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)* did limit federal authority under the Clean Water Act to regulate isolated wetlands. In response to this action, the federal government published an Advance Notice of Proposed Rule Making (ANPRM) to solicit from the public data and information to clarify the extent of Clean Water Act coverage in light of SWANCC. The comment period for this notice ends April 16, 2003 after which they will then decide whether to propose a new rule to define “waters of the United States.”

At the heart of the SWANCC decision was the determination that the Corps can no longer assert jurisdiction over isolated, nonnavigable intrastate wetlands. From a practical standpoint, the Norfolk District Corps of Engineers has honored this determination and while isolated wetlands and waters need to be identified on a property, the Norfolk District

has adopted a policy of not regulating their use. Conversely, this decision does nothing to alter the state jurisdiction over or regulation of these areas. The net effect is that impacts to isolated wetlands are still regulated by the Virginia Department of Environmental Quality.

The ANPRM process and the resulting regulations have the potential to clarify which waters are subject to Clean Water Act jurisdiction. Will this further limit federal regulation of these resources in isolated areas and nonnavigable waters? These questions have sparked comments and speculation, but it is too early to make any predictions. What is known is that the resources in question are still regulated even without federal protection under the Clean Water Act. The process may benefit from a more thorough examination of the definitions of these resources and their respective limits, but the regulation of activities in wetlands and other waters of the United States will continue into the foreseeable future.

Corps' New Administrative Penalties May Cost You

The U.S. Army Corps of Engineers (Corps) is responsible for evaluating permit applications pursuant to Section 404 of the Clean Water Act for proposed discharges of dredged and/or fill material in waters of the United States, including wetlands. On March 4, 2003, the Norfolk District office of the Corps released a Public Notice announcing the implementation of an administrative civil penalties process for noncompliance with the conditions of permits issued under Section 404 of the Clean Water Act, **effective immediately**. While the Corps has traditionally utilized cease and desist orders, permit suspension, and notice of violations attached to property deeds to resolve instances of permit noncompliance, this notice announces the addition of administrative penalties. Administrative penalties are defined in Section 326.6.a.1 Section 309(g) of the Clean Water Act, and Section 205 of the National Fishing Enhancement Act. “Section 309(g)(2)(A) specifies that Class I civil penalties may not exceed \$10,000 per violation, except that the maximum amount of any Class I civil penalty shall not exceed \$25,000. The National Fishing Enhancement Act, Section 205(e), provides that penalties for violations of permits issued in accordance with that act shall not exceed \$10,000 for each violation.

The process Colonel Hansen outlined for the Norfolk District entails the preparation of a case assessment, issuance of a proposed administrative penalty order and a public notice, and the issuance of a final administrative penalty order after evaluating comments received in response to the public notice. This option is presented as another method of resolving issues of noncompliance in a cooperative manner. Please be sure to read and understand all conditions contained within permits issued for your projects! For more information, contact the following WEG representatives:

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