

State Regulation Of "Isolated" Waters

On January 9, 2001 the United States Supreme Court issued a decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (2001) 121 S.Ct. 675 (SWANCC) that held that the language of the Clean Water Act (CWA) cannot be interpreted as conferring authority for the federal government to regulate "isolated, intrastate, and nonnavigable waters" merely because migratory birds may frequent them. The Court emphasized the states' responsibility for regulating such waters.

Under the California Porter-Cologne Water Quality Control Act (Porter Cologne; Ca. Water Code, Div. 7, §13000 *et seq.*), discharges to wetlands and other "waters of the state" have been and remain subject to state regulation. On January 25, 2001, the Office of Chief Counsel of SWRCB released a legal memorandum confirming the State's jurisdiction over such waters. Under State law anybody discharging "waste" (including clean fill, riprap or other revetment, excavation sidecasting, dredge spoils, soil displaced while clearing vegetation, etc.) where it could affect waters of the State must first file a report with the appropriate Regional Water Quality Control Board (RWQCB), which will regulate the discharge as necessary to protect the beneficial uses of the waters. Discharging without filing the required report may result in civil penalties of up to \$25,000 for each day the violation occurs, and the discharger may be also required to remove the discharged material and restore the condition of the waterbody.

There is a great deal of uncertainty regarding the extent of "isolated" waters because there is no formal hydrologic or other scientific definition of the term. In the context of the CWA, "isolated" waters are not bona fide navigable and/or interstate waters and are not tributary or adjacent to such waters. Generally, then, "isolated" waters have no surface hydrological connection to the ocean or to intrastate waters. In practice, this definition raises many questions regarding the volume, duration, frequency, geographic length, state of human modification, and other characteristics of a hydrologic connection required to make the connected water body "non-isolated." In addition, hydrologically "isolated" waters may still remain within CWA jurisdiction because of the federal power to regulate interstate commerce; for example, use of the water by interstate or foreign travelers for recreation or other purposes, the presence of fish or shellfish that could be taken and sold in interstate commerce, the use of the water for industrial purposes by industries in interstate commerce, or other factors. However, SWANCC has confused the applicability of these "commerce clause" factors. In California, vernal pools, swales, ephemeral or intermittent streams and rivers, desert washes, terminal lakes, desert springs, playa lakes, diked wetlands, and salt ponds may be subject to SWANCC.

Links to the nine RWQCBs are available elsewhere on this website. In general, the RWQCBs will regulate discharges to isolated waters in much the same way as they do for federal-jurisdictional waters, using Porter-Cologne rather than CWA authority.