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TO: State Board Members
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FROM: Craig M. Wilson
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DATE: January 25, 2001

SUBJECT: EFFECT OF *SWANCC V. UNITED STATES* ON THE 401 CERTIFICATION PROGRAM

This memorandum has been prepared to explain the effect of the recent US Supreme Court decision of *Solid Waste Association of Northern Cook Counties v. United States Corps of Engineers* (hereinafter "SWANCC"), which was issued on January 9th. The memo is intended to address the impact of the decision on the 401 program (33 U.S.C. § 1341), and to indicate alternative regulatory avenues available to the Regional Boards for waters that are no longer covered by section 404/401 jurisdiction.

I. Facts of the *SWANCC* decision and holding

SWANCC is a consortium of suburban Chicago cities and villages looking to develop a solid waste disposal site. It located a 533-acre parcel that was a gravel-mining pit until about 1960. The pit has reverted into a successional stage forest with seasonal and permanent ponds, but it was not a delineated wetland. SWANCC purchased the site and applied for a § 404 permit. In furtherance thereof, it sought certification from the state of Illinois.

The Clean Water Act (CWA) only regulates what it refers to as "navigable waters." The CWA defines navigable waters as "waters of the United States." In the past, the agencies responsible for implementing the Clean Water Act interpreted the term "waters of the United States" broadly. They determined that it reflected Congress' intention to regulate all waters that the Congress could constitutionally regulate under its commerce power. (See Art. I, Section 8 of the U.S. Constitution, generally known as the Commerce Clause.) Specifically, if the water had any possible connection to interstate commerce, it fell within the scope of the CWA. Since 1986 the Army Corps of Engineers' (COE) regulations reflected this determination. They stated that "waters of the United States" includes, among other things, intrastate waters:

- (a) That are or would be used as habitat by birds protected by migratory bird treaties; or
- (b) That are or would be used as habitat by other migratory birds that cross state lines; or
- (c) That are or would be used as habitat for endangered species; or
- (d) That are or would be used to irrigate crops sold in interstate commerce.

This has been dubbed “The Migratory Bird Rule.”

Although the SWANCC site was not a “wetland” according to the COE’s wetland delineation manual, the COE found that approximately 121 bird species dependent on aquatic environments were observed at the site, and thus found the site to be a water of the United States. Accordingly the COE asserted jurisdiction over the site. The state of Illinois granted 401 certification, but the COE denied the 404 permit on traditional grounds.¹

SWANCC sued to challenge the COE’s jurisdiction over the site, claiming that the COE could not regulate non-navigable, isolated, intrastate waters based on the presence of migratory birds, and that Congress lacked authority under the Commerce Clause to grant the COE such jurisdiction in any event. Although the COE prevailed in the trial and appellate courts, the US Supreme Court reversed, and invalidated the Migratory Bird Rule. It held that the rule is not a fairly supported interpretation of the term “waters of the United States,” and the COE exceeded its jurisdiction by interpreting the CWA’s reach to include isolated, inland, non-navigable waters. The Court held or implied that the CWA might fairly extend to:

- “(a) [t]hose waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce;
- “(b) waters that were or had been navigable in fact or which could reasonably be so made;
- “(c) non-navigable wetlands adjacent to open waters;
- “(d) wetlands [that are] ‘inseparably bound up with the waters of the United States; and
- “(e) water bodies [capable] of use by the public for purposes of transportation or commerce.”

¹ The COE found (1) that SWANCC had not established that the proposal was the least harmful practicable alternative; (2) that SWANCC’s failure to set aside funds for leak remediation was unacceptable risk to public drinking water supplies; and (3) that the impact to the waters was unmitigable because a landfill cannot be redeveloped into forested habitat.

The Supreme Court questioned the constitutionality of any amendment to the CWA, if Congress was so inclined, that would purport to assert federal jurisdiction over isolated, inland waters. In other words, if Congress tried to adopt the “migratory bird rule,” a majority of the Court indicated its belief that it would exceed the power granted to Congress under the U.S. Constitution.

II. *SWANCC*'s effect upon the 401 certification program will not be wholly determined until the COE issues guidance implementing the decision.

California's right and duty to evaluate certification requests under section 401 is pendant to (or dependent upon) a valid application for a section 404 permit from the COE, or another application for a federal license or permit. Thus if the Corps determines that the water body in question is not subject to regulation under the COE's 404 program, for instance, no application for 401 certification will be required. Accordingly, the COE's interpretation of the *SWANCC* decision will determine *SWANCC*'s impact upon a major portion of California's 401 program. The COE has yet to issue guidance setting forth how the *SWANCC* decision will be implemented. Clearly, however, the Migratory Bird Rule will not determine the scope of the COE's authority over isolated waters. Isolated non-navigable waters (including most non-tidal wetlands) appear to be outside the purview of section 404 of the Clean Water Act.

III. The *SWANCC* decision does not affect the Porter-Cologne authorities to regulate discharges to isolated, non-navigable waters of the state.

If anything definitive can be said about the *SWANCC* decision, it is that the Supreme Court believes regulating inland waters, including isolated wetlands, vernal pools, etc., are the primary (and probably now the exclusive) province of the state. California has numerous authorities that require these waters to be protected. None of those state authorities are affected by the U.S. Supreme Court's decision. Accordingly, the *SWANCC* decision has no impact upon the Regional Board's authority to act under state law. Some major relevant provisions are set forth below.

Water Code section 13260 requires “any person discharging waste, or proposing to discharge waste, within any region that could affect the *waters of the state* to file a report of discharge (an application for waste discharge requirements).” (Water Code § 13260(a)(1) (emphasis added).) The term “waters of the state” is defined as “any surface water or groundwater, including saline waters, within the boundaries of the state.” (Water Code § 13050(e).) The U.S. Supreme Court's ruling in *SWANCC* has no bearing on the Porter-Cologne definition. While all waters of the United States that are within the borders of California are also waters of the state, the converse is not true—waters of the United States is a subset of waters of the state. Thus, since Porter-Cologne was enacted California always had and retains authority to regulate discharges of waste into any waters of the state, regardless of whether the COE has concurrent jurisdiction under section 404. The fact that often Regional Boards opted to regulate discharges to, e.g.,

vernal pools, through the 401 program in lieu of or in addition to issuing waste discharge requirements (or waivers thereof) does not preclude the regions from issuing WDRs (or waivers of WDRs) in the absence of a request for 401 certification.

Under state law, the duty to file a report of waste discharge is mandatory:

All of the following persons *shall* file with the appropriate regional board a report of the discharge. (Water Code § 13260(a).)

Furthermore, the Regional Board is required to issue or waive WDRs whenever it receives a report of discharge:

The regional board, after any necessary hearing, *shall* prescribe requirements as to the nature of any proposed discharge, existing discharge, or material change in an existing discharge... with relation to the conditions existing in the disposal area or receiving waters upon, or into which the discharge is made or proposed. The requirements *shall* implement any relevant water quality control plans that have been adopted, and shall take into consideration the beneficial uses to be protected, the water quality objectives reasonably required for that purpose [etc.] (Water Code § 13263(a).)

Notably, every person is precluded from initiating new discharges or making material changes to discharges prior to filing the report of waste discharge described in section 13260, and for 120 days thereafter unless they have received WDRs (or appropriate waivers). (Water Code § 13264(a).) Given the state's interest in protecting wetlands, it is incumbent upon staff to act within the 120 days. A fill thereafter may be lawful. If, however, it appears that the Regional Board is unable to meet and consider WDRs (or a waiver thereof) within the statutory time allotted, the Regional Board could issue a cleanup and abatement order under section 13304 against anyone who, through a discharge to waters of the state, has created or threatens to create a condition of pollution. "Pollution" is defined as an alteration of the quality of the waters of the state, which unreasonably affects its beneficial uses. (Water Code § 13050(l).) Wildlife is a beneficial use, and thus filling or threatening to fill wetlands would provide grounds to issue an appropriate order under 13304.

The California Environmental Quality Act (CEQA) also provides a requirement for the Regional Boards to exercise their authorities to require minimization and mitigation of impacts to waters of the state. Whenever a Regional Board is a responsible agency under CEQA, and the Lead Agency has prepared an EIR, the Regional Board must not only review the CEQA document, but it must reach its own conclusions on whether and how to approve the project involved. (14 CCR § 15096(a).) Moreover, the Regional Board must mitigate or avoid the direct or indirect environmental effects of the parts of the project it approves, and it is prohibited from approving a project if there is a feasible alternative or feasible mitigation measures that would

lessen or avoid significant impacts. (14 CCR § 15096(g)(1) and (g)(2).) Furthermore, as a responsible agency the Regional Board must make specific findings relating to the feasibility of avoidance, minimization, or mitigation of the adverse effects. (14 CCR §§ 15096(h), 15091, 15093.) Feasible changes or alterations within the control of the Regional Board must be articulated in the WDRs.

Notably, since 1993 and continuing through the present, the official policy of the United States and the State of California respecting wetlands has and continues to be one of “no net loss.” Accordingly, the charge to protect the state’s wetlands has already been articulated. In areas where the COE determines it no longer has jurisdiction, it would be consistent with present federal and state policy for the Regional Boards to fill the gap. This may require contacting the applicable COE divisions for assistance in identifying pending 404 permit applications, or conducting outreach to the local development interests to remind them that, irrespective of the COE’s authority or the 404 program, they still must comply with applicable state requirements for discharges.

IV. Conclusion

While the *SWANCC* decision will no doubt have repercussions for the state’s 401 certification program, the reach of the decision will not be clear until the COE issues guidance indicating how it intends to implement the holding. The 404 program may be dramatically scaled back or the COE could read the decision narrowly, as merely invalidating the Migratory Bird Rule. Irrespective, the state retains its independent authority under Porter-Cologne and other statutes, to regulate discharges of waste to all waters of the state, including those waters that are no longer considered waters of the United States. The thrust of the *SWANCC* decision is that regulation of inland, isolated waters is and should be under the primary authority of the state rather than the federal government. Given the state and federal “no net loss” of wetlands policy, the Regional Board’s should consider that regulating any discharges of waste to waters that may no longer be subject to COE jurisdiction is both authorized and justified.

If you have any questions about this memo, please contact Michael Levy, Staff Counsel at (916) 341-5193.

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State Board Members

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