Water Quality and Wetlands Committee Newsletter

Vol. 6 , No. 1 **January 2005**

MESSAGE FROM THE COMMITTEE CHAIR

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Greetings. Many thanks to the vice chairs and other volunteers who help with the Water Quality and Wetlands Committee. Let me share some goals and highlights for 2005.

Your colleagues need to hear from you in our publications. We will use our Newsletter to publish short "war stories, bragging rights and helpful hints" based on your experiences dealing with water quality issues. We can also publish longer articles on topics of interest. But we can't do it without your participation. Please contact me or our vice chairs for Publications to spread the word.

Several programs are in the works. At the 34th Annual Conference on Environmental Law at Keystone, Colorado (March 2005), we are presenting a panel on Wetland Mitigation Law and Science. Stay tuned for information on the 2005 Eastern Water Law program, and the June 2005 Wetlands Law and Regulation program. Looking ahead to the fall, the Clean Water Act Update program will be held in October 2005. If you have an idea for these programs, or other short programs, please contact me or our vice chair for Programs.

We are working on the advancement of our practice through networking, with other professional associations, and state and local organizations. I have been meeting with the Executive Committee of the Society of Wetland Science (SWS) to maintain a relationship between our organizations. SWS operates through local chapters, where you may find a new network for your practice and for public service opportunities. Check out the Web site at www.sws.org. If you have a similar experience to share, let you colleagues know about it.

On the public service side, be sure to check the Section's Web site for public service ideas. Our Committee will continue to work with law schools and community organizations to address issues of water quality and wetlands. Your bar community might want to join in sponsoring or helping with annual river clean ups organized by Riverkeeper associated groups for Earth Day.

The law of wetlands and water quality presents many challenges. I look forward to working with the Committee to address these important topics.

Water Quality and Wetlands Committee Newsletter
Vol. 6, No. 1, January 2005
Larry Liebesman and Janet McQuaid, Editors

In this issue:

This newsletter is a publication of the ABA Section of Environment, Energy, and Resources, and reports on the activities of the committee. All persons interested in joining the Section or one of its committees should contact the Section of Environment, Energy, and Resources, American Bar Association,
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HABITAT EQUIVALENCY ANALYSIS: A TOOL FOR ASSESSING THE NET ENVIRONMENTAL IMPACTS OF PROJECT ALTERNATIVES

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Economists often use benefit-cost analysis to evaluate the net impacts of various project alternatives. However, benefit-cost analysis is less useful when the impacts of such alternatives are mainly environmental and reliable monetary values are unavailable for the environmental impacts. In such situations, habitat equivalency analysis (HEA) can be a useful tool for assessing net environmental impacts.

The National Oceanic and Atmospheric Administration developed HEA in the early 1990s for assessing natural resource damages (NRD) from oil spills. Specifically, HEA is used in that context to determine the amount of habitat that must be created or enhanced in order to fully offset the reduction in habitat services caused by an oil spill. Habitat services are the physical and biological functions provided by habitat to other natural resources or people. For example, wetlands provide food and nesting habitat for resident wildlife.

One of the requirements of HEA in its simplest form is that the created or enhanced (*i.e.*, compensatory) habitat be of the same type and quality as the injured habitat, which allows for an "apples to apples" comparison of service losses from the injured habitat and service gains from the compensatory habitat. Consequently, a monetary value is not needed for the injured and compensatory habitat services in such a situation. However, if the compensatory habitat and the injured habitat are not of the same type and quality, then a conversion factor reflecting the relative value of the two types of habitat is needed.

HEA has become the tool of choice to address habitat service impacts when developing a restoration-based NRD settlement for oil spills, hazardous-substance releases, and other causes of natural resource injuries in certain areas (*e.g.*, injuries to coral reefs resulting from ship groundings). Furthermore, courts have upheld the use of HEA in two simple NRD applications involving injuries to the seabed in the Florida Keys National Marine Sanctuary.

Recently, HEA has been used to evaluate the net environmental impacts of project alternatives in several non-NRD applications. For example, HEA was recently used to compare mitigation alternatives for covering part of the bottom of the Elizabeth River in Virginia with a storage facility for dredged material. In another application HEA was used to evaluate wetland mitigation alternatives for petroleum pipeline construction.

Most habitats provide multiple environmental services. In non-NRD applications of HEA a common service must be found for all of the potentially impacted habitats. Then, annual service gains and losses are estimated for the common service for all impacted habitats for each project alternative. The annual net service impacts for each project alternative are determined by subtracting service losses from service gains each year, and then the annual net service impacts are converted into their present-value equivalent using the economic process of discounting. Finally, the project alternatives can be ranked from best to worst based on the magnitude of the present-value equivalents of the net environmental impacts. In particular, the best alternative has the largest positive net environmental impact and the worst alternative has the largest negative (or smallest positive) net environmental impact.

Discounting has two roles in HEA. First, it reflects the relative value of net service impacts over time. Specifically, a given amount of net service gains next year is preferred to an equal amount of net service gains ten years into the future, because of the cost of waiting for the gains. Second, converting different amounts of annual net service impacts over time into their present-value equivalent allows for an easy determination of the relative magnitude of the streams of annual service impacts. Otherwise, it would be difficult to select the best alternative when, for example, one alternative has small net gains in the near future but large net gains in the distant future, while another alternative has moderate net gains in both the near future and the distant future.

HEA has several restrictive assumptions that may not be met in some situations. For example, it assumes that the real, but unknown, monetary value for the common service is constant over the duration of the project impacts. Furthermore, HEA input parameters often are not known with certainty, which can make the comparison of project alternatives sensitive to the input parameter estimates (*e.g.*, annual service impact). However, HEA allows for a scientific, quantitative assessment of the net environmental impacts of project alternatives without using potentially unreliable monetary values for those impacts. Additionally, the sensitivity of the HEA results to the input parameter estimates can be investigated with a sensitivity analysis. In many situations the sensitivity analysis reveals that the same project alternatives tend to be best (or worst) under a wide range of input parameter estimates. Consequently, HEA can be a very useful tool for assessing net environmental impacts of project alternatives.

Please contact the author by e-mail or phone (919) 544-2244 for citations to the cases and HEA applications discussed in this article.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT V. MICCOSUKEE ON REMAND

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Background

For over 90 years, the South Florida Water Management District (District) and its predecessors built a vast system of canals, levees and water control facilities to provide stewardship over Florida's public water resources. Billions of gallons of water are continuously moved throughout central and south Florida to provide flood protection, conserve water supply and enhance the environment. The U.S. Environmental Protection Agency (EPA) has never attempted to regulate these governmental facilities nor thousands like them nationwide under the Clean Water Act's National Pollutant Discharge Elimination System (NPDES) in the 30 years the Clean Water Act has been in place.

In 1998, citizen suits were filed to enjoin the District from pumping water across a levee without a federal NPDES permit. *Miccosukee Tribe of Indians of Florida v. South Florida Water Management District*, 1999 WL 33494862 (S.D. Fla. 1999). An NPDES permit is required for the "discharge of pollutants," which means "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). Prior to *Miccosukee*, the courts of appeals had followed EPA's interpretation that an "addition" required the introduction of pollutants to the navigable waters, not merely the movement of navigable water containing pollutants through a point source.

In a watershed holding, the 11th Circuit court of appeals in *Miccosukee* declared that an "addition" occurs "from" a point source any time the point source causes navigable water containing pollutants to flow into another body of navigable water into which it would not otherwise have flowed, "but for" operation of the point source. 280 F.3d 1364 (11th Cir. 2002). Under the Eleventh Circuit's test an "addition" occurs not only when a pollutant is discharged into the navigable waters, but whenever navigable water (since all water contains some pollutant) is conveyed (since every conveyance moves water where it would not otherwise flow). Thus, the Eleventh Circuit's interpretation potentially expands the scope of the NPDES program to virtually every water conveyance.

The Supreme Court granted certiorari to consider whether the pumping of water by a state water management agency that adds nothing to the water being pumped constitutes an "addition" of a pollutant "from" a point source triggering the need for an NPDES permit. *South Florida Water Management Dist. v. Miccosukee Tribe of Indians, et al.*, 124 S. Ct. 1537 (2004). The Supreme Court discussed three arguments: (1) that an addition occurs only if the point source itself "generates" the pollutant, (2) that an addition occurs only when a pollutant is first introduced to the navigable waters as a whole, and (3) that an addition occurs whenever water is transferred between distinct navigable water bodies. Unfortunately, after rejecting the first argument, the Court declined to answer the more fundamental legal questions raised by the second and third arguments. Instead, it remanded for further development of the record.

The Future of *Miccosukee*?

There is no shortage of speculation why the Supreme Court chose not to clarify – or, in the eyes of many, "punted" – the critical jurisdictional issues presented in *Miccosukee*. The parties' Web sites show everyone claiming victory. The pundits practice tasseography and profess to foresee the outcome on remand. Given their conflicting views on the case, many are bound to be disappointed. Amidst this contentious backdrop, what can those involved really expect from the Court's "do over"?

Our first glimpse is found in respondent's petition for rehearing, which took umbrage with the Court's assertion that the movement of pollutants within the same water body does not require an NPDES permit. While the petition was quickly denied, it highlights a key problem for the plaintiffs, that the waters being moved in *Miccosukee* are all part of a naturally singular wetland system. Under the circumstances, plaintiffs appear drawn to the argument that an NPDES permit is required to move water to a different place within the same natural water body, as in *U.S. v. M.C.C. of Florida, Inc.,* 967 F.2d 1559 (11th Cir. 1992).

As of this writing, all eyes are upon the second and third arguments discussed by the Supreme Court yet left unresolved: whether all navigable waters are considered unitary for purposes of NPDES permitting, and under what circumstances two water bodies should be considered "meaningfully distinct," so that the transfer of water between them requires a permit. Another interesting question will be whether the Court's holding on the first argument, that a pollutant need not be "generated" by a point source to trigger NPDES requirements, has any effect upon the ultimate outcome of the case. It is after all upon that holding that the plaintiffs stake their claim of victory.

Most watchers view the Court's holding to be extremely narrow and inconsequential. Prior to the decision, no one believed that the point source itself had to actually produce a pollutant. For example, a point source could convey pollutants originating from an industrial or municipal wastewater plant. To most, the finding that a point source does not have to "generate" a pollutant simply begs the critical question: To require a permit, where must the pollutants come from?

The deceivingly simple answer is, of course, from the "outside world." Unfortunately, what constitutes the "outside world" has been given different meaning by different courts of appeal. The point was first raised by the District of Columbia Circuit in *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982) (*Gorsuch)*, which explained that the pollutant must be introduced from somewhere "outside" the navigable waters. The court held in *Gorsuch* that the movement of water from one polluted navigable water body to another less polluted water body does not trigger NPDES requirements. Pollutants already in the navigable waters were considered "pre-existing," not added. Thus, the District of Columbia Circuit applied what is essentially the "unitary waters" approach discussed in *Miccosukee*.

In *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2d Cir. 2001)(*Catskill*), however, the Second Circuit extended the "outside world" concept to include other navigable waters that lay outside the receiving water body. (See related case *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 244 F. Supp. 2d 41 (N.D.N.Y. 2003).) For the first time, a mere transfer of navigable waters between basins was considered to trigger the NPDES process. The unitary approach applied in *Gorsuch,* and supported by the federal government in *Miccosukee,* obviously conflicts with the Second Circuit's interpretation in *Catskill*.

The Supreme Court characterized the first argument in *Miccosukee*, whether a point source must "generate" a pollutant, as the "precise question" upon which certiorari was granted. Nevertheless, it is not hard to see that the second and third arguments also fit nicely within the question presented to the Court: whether the pumping of water by a state water management agency that adds nothing to the water being pumped constitutes an "addition" of a pollutant "from" a point source, triggering the need for an NPDES permit. Perhaps that is why Justice Scalia was not able to convince the

majority to end its analysis and affirm the Eleventh Circuit's decision, after the Court had disposed of the first argument (see Justice Scalia's concurring and dissenting opinion).

As for the second, "unitary waters" argument, the Court identified a number of pros, cons and concerns, without apparently prejudging the issue. How the Court will ultimately resolve this question is unpredictable. However, unlike appellate courts, trial courts have the tools to adjudicate the accuracy and credibility of assertions presented to them. It will be interesting to see how many of the points discussed by the Court hold up under scrutiny at trial.

If the courts ultimately determine that all navigable waters are not considered unitary for purposes of NPDES permitting and, therefore, that an "addition" can result from mixing waters from distinct navigable water bodies, the question becomes: Under what circumstances should two water bodies be considered "meaningfully distinct" so that a federal permit becomes necessary for movement of water between them? That is the third argument pondered by the Supreme Court in *Miccosukee*.

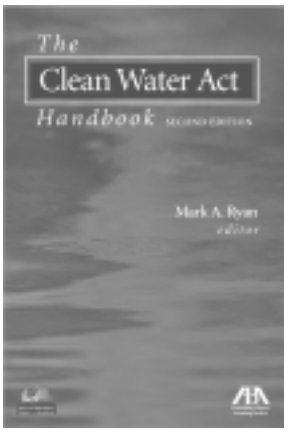
In *Catskill*, the Second Circuit considered it meaningful that the waters would never naturally intermingle. In *Miccosukee*, it will not be hard to show that the waters are part of a naturally singular wetland. Therefore, the plaintiffs need a different test than *Catskill*, which explains their attempt to challenge the Supreme Court's belief that the movement of water within the same water body does not require an NPDES permit. The plaintiffs will also argue that the waters involved are meaningfully distinct because they have different water quality. After all, what better argument under the Clean Water Act, which is intended to address water quality? But, the plaintiffs cannot distinguish *Gorsuch* or *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988) on a water quality basis. Those cases, like *Miccosukee*, involve facilities which altered the quality of the waters by dividing a single water body into separate parts. Pollutants were created in the reservoir and then moved into the relatively pristine downstream river. It will be interesting to watch the plaintiffs try to reconcile or challenge those well established opinions.

Plaintiffs will also be challenged to explain how the NPDES program can properly regulate water management facilities and protect the environment. Under NPDES permits, even water that meets water quality standards must be treated to strict technological standards. After all, the NPDES program is designed to eliminate effluent discharges altogether. The program simply does not allow consideration of the many environmental benefits of moving water. The fact is that in many areas the environment depends upon water received from point sources, the delivery of which would not be feasible if NPDES permit requirements were applied. The NPDES program is inflexible and cannot accommodate those needs. It is simply not a defense that water must be moved for environmental needs.

What the ecopessimists prosecuting the *Miccosukee* lawsuit seek is a permitting program that simply does not yet exist – a program which can take into account many factors all of which should be considered in regulating the movement of water. It will be interesting to see if the NPDES program can be morphed to provide a reasonable solution. It does seem unfortunate, however, that over 30 years after the Clean Water Act's adoption, Congress and the agencies have left the development of a solution to the judiciary and the adversary process.

From ABA Publishing and The Section of Environment, Energy, and Resources

The Clean Water Act Handbook, Second Edition
Mark A. Ryan, editor



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COURTS AND EPA MAY DIFFER OVER INTERPRETATIONS OF FIFRA AND THE CWA

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Whether or not a National Pollutant Discharge Elimination System (NPDES) permit, required by the Clean Water Act (CWA) is required in order to spray a pesticide currently depends on the jurisdiction. The Ninth Circuit, the Second Circuit, EPA and some states have begun to address the issue, and to date, there is no final, consistent interpretation of the requirements of the potential overlap between the CWA and the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA).

The tensions between FIFRA and the CWA first came to light in the Ninth Circuit in *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526 (9th Cir. 2001). In *Headwaters*, the Irrigation District had applied an EPA-approved aquatic herbicide to irrigation canals to control the growth of weeds. The EPA approval under FIFRA necessarily included a finding that the chemical did not pose an "unreasonable adverse effect on the environment." However, due to improper application of the pesticide, it leaked into a nearby creek and resulted in the death of approximately 92,000 juvenile steelhead, prompting the lawsuit by environmental nonprofit organizations. The court quoted EPA's amicus brief to support its holding that the registration and labeling of a pesticide under FIFRA does not preclude the need for an NPDES permit under the CWA. EPA persuasively described how the two statutes accomplish separate goals, in that FIFRA-approval is a general approval and does not contemplate how a certain pesticide will affect a particular waterbody, whereas the NPDES permit program addresses the particularized needs of a given waterbody. Therefore, the court reasoned, an NPDES permit may be required to discharge a pesticide even if EPA has approved that pesticide for use in or over a body of water.

The Ninth Circuit revisited this issue one year later in *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181 (9th Cir. 2002). In *Forsgren* there was no discussion or attempt by the parties to readdress the FIFRA issue. It was an unstated presumption by the court that the pesticide was a pollutant and the court instead focused on regulation regarding the definition of a point source for silviculture activities. The court narrowly construed the limited regulatory definition of a point source for silviculture activities in light of the broader definition of a point source in the CWA. In *Forsgren*, it became clear that, in the Ninth Circuit, any spraying of a pesticide that would directly enter a water of the United States would be subject to the CWA's requirements to obtain an NPDES permit.

At the same time the Ninth Circuit was deciding *Headwaters*, two cases presenting similar questions about the overlap of FIFRA and the CWA were making their way through the Second Circuit. *Altman v. Town of Amherst*, 190 F. Supp. 2d 467 (W.D. NY 2001), *vacated*, 2002 WL 31132139 (2d Cir. 2002); *No Spray Coalition, Inc. v. New York*, 2002 WL 31682387 (S.D.N.Y. 2002), *vacated*, 351 F.3d 602 (2d Cir. 2003). In both cases, the district courts dismissed the CWA claims, holding that when a pesticide is used for its intended purpose, it does no constitute a "pollutant" under the CWA and its proper or improper application is more appropriately regulated under FIFRA. In both cases the Second Circuit overruled the district courts and remanded the cases for further development.

In *Altman*, the defendant town had requested guidance from EPA to support its position in the case. EPA responded that it had "no specific policy under the NPDES Program on the spraying of pesticides . . . where pesticide is discharged directly into the waters of the United

States." The court noted that EPA's "ambiguous stance" left it an open question as to whether a properly used pesticide is a pollutant that requires an NPDES permits. The court invited EPA to participate in the litigation and to articulate its interpretation of the law to aid the court's decision.

On July 11, 2003, EPA issued Interim Guidance on the interrelationship between FIFRA and the CWA and later solicited comment on the Guidance. 68 Fed. Reg. 48385 (Aug. 13, 2003). Under the Interim Guidance, EPA has declared that generally, application of pesticides in compliance with FIFRA requirements does not require an NPDES permit. EPA stated that application of a FIFRA-approved pesticide does not require a NPDES permit in two circumstances: (1) application of pesticides directly to waters of the United States to control aquatic pests (*e.g.*, mosquito larvae or aquatic weeds), and (2) application of pesticides to control pests that incidentally results in the pesticides being deposited in the waters of the United States (*e.g.*, insecticides applied aerially over a forest canopy were waters of the United States may be present below the canopy). In essence, EPA's memorandum directly contravenes the holdings in both *Headwaters* and *Forsgren*.

EPA asserts that its Interim Guidance is meant to clarify regulatory requirements and harmonize FIFRA and the CWA. Under the Interim Guidance, EPA will only consider that the application of a pesticide is an illegal discharge if the pesticide is discharged in violation of the FIFRA requirements. EPA's interpretation of FIFRA is that a pesticide, when applied in compliance with the approved environmental requirements, is not a "pollutant" as defined by CWA 506(a). The term "pollutant" is defined by the CWA as dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal and agricultural waste discharged into water.

In the Interim Guidance, EPA focused on whether a pesticide could be considered a "chemical waste" or a "biological material." EPA reasoned that a pesticide applied consistent with FIFRA is a "product" and not a "waste." Referring to the plain English dictionary definitions of a waste, EPA reasoned that a pesticide applied for its intended purpose could not be a waste because it is not being "discarded as no longer useful." Finally, EPA reasoned that if chemical pesticides could not be considered pollutants, then it would be nonsensical to treat biological pesticides any differently. Quoting Sen. Muskie's remarks made during the Senate Debate on the CWA, EPA reasoned that its interpretation of the CWA's applicability to pesticides is firmly tied to the manner in which the pesticide is used, which it asserts is consistent with the legislative intent behind the CWA. ("I do not get into the business of defining or applying these definitions to particular kinds of pollutants . . . Sometimes a particular kind of matter is a pollutant in one circumstance, and not in another." Senate Debate on S. 2770, Nov. 2, 1971 (117 Cong. Rec. 38,838)).

It will be interesting to follow how states respond to EPA's Interim Guidance. In response to *Headwaters*, many states within the Ninth Circuit's jurisdiction have developed NPDES permit programs (most commonly general permits) to address application of aquatic herbicides. Now it appears those permit programs will have to be expanded to account for other pesticides that may be sprayed in or over water, as in *Forsgren*. In light of the fact that these states have already begun to develop their NPDES programs to encompass pesticides, it is unlikely that the EPA Guidance will halt those programs just yet. For instance, on July 25, 2003, just after EPA released its Interim Guidance, the California State Water Resources Control Board, Office of Chief

Counsel, issued a memorandum concluding that EPA's Interim Guidance was inconsistent with the Ninth Circuit's decisions in *Headwaters* and *Forsgren* and advising that until EPA promulgates more formal regulations, in California, NPDES permits are required for discharges of pesticides.

In December 2003, the Second Circuit reviewed its second FIFRA/CWA case, *No Spray Coalition v. New York*, 351 F.3d 602 (2003). (In 2000, the Second Circuit had affirmed the district court's dismissal of plaintiff's motion for preliminary injunction and dismissal of all claims not involving discharge over water. 2000 WL 1401458 (S.D.N.Y. 2000), *aff'd*, 252 F.3d 148 (2d Cir. 2001). It is interesting to note that although it had previously solicited guidance from EPA on this issue, the Second Circuit did not mention the EPA Interim Guidance document although EPA had issued the Guidance before the case was decided.

In *No Spray*, a coalition of environmental groups brought action against the City of New York to enjoin the city from spraying insecticide to prevent the spread of the West Nile virus. Plaintiffs argued that the pesticide had been sprayed over lakes, streams, ponds and marshes without an NPDES permit in violation of the CWA. The district court dismissed the plaintiffs' claims by summary judgment, holding that the spraying did not violate FIFRA, or only constituted minor violations of FIFRA. The district court held that violations of FIFRA, if any, were not enforceable by citizen groups because FIFRA contains no citizen suit provisions. Further, the district court held that because FIFRA did not permit citizen suits, the plaintiffs could not use the CWA to bring a citizen suit either. The Second Circuit reversed, holding that an action alleging violation of the CWA was an independent action from an action under FIFRA. Thus, instead of denying standing because FIFRA contains no citizen suit provision, the Second Circuit vacated the district court's decision and allowed the citizens to pursue their CWA claims.

The Second Circuit specifically declined to address the underlying legal question, *i.e.*, whether spraying in compliance FIFRA was or was not a violation of the CWA. It is clear from both *Altman* and *No Spray* that the Second Circuit will not directly address whether compliance with FIFRA satisfies compliance obligations under the CWA until the issue is presented squarely before it. Perhaps at that time the court will also address the significance of EPA Guidance on the subject. To date, neither *Altman* nor *No Spray* has been resolved.

It is unclear what the status of the law is in the Second Circuit regarding the need for an NPDES permit program for aquatic pesticides. While that court has not affirmatively held that an NPDES permit is required to use an aquatic pesticide, it has vacated the rulings of district courts that have held that permits are not necessary. Currently, states within that circuit's jurisdiction do not have permit programs for application of aquatic pesticides. In contrast, the Ninth Circuit has made clear rulings and some states have developed permit programs. However, in its recently issued Interim Guidance, EPA has directly contradicted the Ninth Circuit's interpretation of the CWA and FIFRA. On thing that is clear, these issues will continue to develop as the cases make their way through the courts and as EPA finalizes its Guidance.

JOIN THE IN-HOUSE COUNSEL COMMITTEE'S PUBLIC SERVICE EFFORT!

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The Section's In-House Counsel Committee invites you to join our exciting community service project with *Earth Force – Youth for a Change!* This article gives you a brief overview of our efforts to date, and provides information on how you can get involved in our activities. Earth Force is a national non-profit organization created in 1994 by The Pew Charitable Trusts in recognition of two emerging national trends: young people's desire to act on behalf of the environment and their desire to help their communities through voluntary service. Through a variety of programs Earth Force, which serves 35,000 youth a year through 11 offices nationwide, helps young people discover and implement lasting solutions to environmental problems in their communities.

The In-House Counsel Committee's public service project is with Earth Force's GREEN program – the Global Rivers Environmental Education Network. This award-winning program developed nearly a decade ago at the University of Michigan matches middle and high school science classes with private sector sponsors to study and improve water quality in their community. A local watershed group also is involved in each GREEN project. The students and their teacher begin GREEN by doing a watershed assessment that includes physical, chemical and biological monitoring. Using this data and other resources, they identify a problem they would like to address. Students research the problem in a balanced fashion, review applicable legal or community considerations, and decide on their preferred solution. They then design and implement an action plan to address the problem, and conclude by reflecting on what they learned.

The private sector sponsors fund the students' water monitoring and testing equipment, which are kits pre-assembled by Earth Force. Professionals from the private sector sponsors are mentors to the students in the program, and serve as resources for their teachers by assisting in monitoring events, attending a class session or being available by phone to give input to the class. There is no steadfast time commitment. Mentors can provide just a few hours of their time or more routine support to their host schools. The cost of sponsoring the necessary training, manuals, kits and support for a GREEN school in a city where Earth Force has existing GREEN infrastructure is $10,000. That sponsorship fee also includes: training and follow-up support for up to 10 mentors, a mini-grant for the local GREEN partner to provide additional support to mentors and educators, $1,000 for up to three teachers participating in the program to purchase materials. Additional teachers can participate for an additional $1,000. Of course, this is often an excellent opportunity to meet other corporate leaders and to gain public recognition for your organization or firm. Bottom line, this is a "turn key" project – if we can raise the funds, Earth Force does the work to match the sponsors with schools and a watershed partner, and conducts the training!

By recruiting and pooling sponsors within a geographic area to reach the $10,000 needed to move forward in a city with pre-existing GREEN activities, the In-House Counsel Committee started two projects during the 2003-2004 school year. Our Indianapolis, Indiana, project was funded and supported by the law firm of Harrison & Moberly; the corporation, Eli Lilly; and the law firm of Krieg DeVault, LLP. Our Baltimore, Maryland, project was supported through funding, mentor

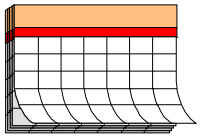
assistance, or both, provided by the Section, Constellation Energy, Quality Environmental Solutions, the law firm of McGuire Woods, LLP and Crown Central Petroleum Corporation. We thank all of these dedicated entities for helping us make the ABA/Earth Force 2003-2004 school year a success. Under the leadership of Vicki Wright, formerly of Harrison and Moberly, and now associated with Krieg DeVault LLP, and Joan Heinz, associate general counsel with Eli Lilly and Company, three Lilly attorneys and several private firm attorneys have been trained in the classroom and the field with Earth Force and non-profit partner, Indiana Hoosier Riverwatch. The team worked with five middle school classes talking about the project and doing an outdoor activity on erosion and pollution, spent a day in the field assisting teachers and parents with small group activities in a stream and associated river, and visited each class after the sample results came back. Our Baltimore supporters partnered with Baltimore City Recreation and Parks to conduct water sampling with two elementary schools in the winter and spring, participated in canoe trips and classroom sessions to assist students in analyzing the data and in developing community action plans for addressing problems raised by the data. At an end- of-year, two-day outdoor Celebrations Days picnic, the Baltimore students showcased their action plans, which included implementing a public awareness campaign on litter prevention through a community picnic and cleanup day; making signs and writing a play relating to litter prevention; writing letters to officials over concerns about animal waste and nitrogen in the Gwynns Falls watershed and recommending that buffers be planted to deter goose droppings; and developing a brochure on pollution prevention relating to topics such as salt on roadways, oil and petroleum pollution, and homeowner use of excess fertilizer.

The In-House Committee is excited about continuing this initiative in Baltimore and Indianapolis in the 2004-2005 school year. The enthusiastic response to the program by the mentors and supporters, as well as the students, teachers and non-profit partners is infectious and we are excited to bring this partnership to other cities. We are hoping to start another project soon in one of the following cities with existing GREEN infrastructure: Washington, DC; Lansing, MI; Detroit, MI; Bay City, MI; Pontiac, MI; Ann Arbor, MI; Flint, MI; Rochester Hills, MI; Saginaw, MI; Spring Hill, TN; Shreveport, LA; Houston, TX; Austin, TX; Philadelphia, PA; Erie, PA; Pittsburgh, PA; Tampa/St. Pete, FL; West Palm Beach, FL; Charleston, SC; Portland, OR; Marion, IN; Fort Wayne, IN; Massena, NY; Wilmington, DE; Toledo, OH; Bedford, OH; Dayton, OH; Defiance, OH; Lordstown, OH; Chicago, IL; Denver, CO; Doraville, GA and Atlanta, GA. We are hoping to accomplish this in Houston and Washington, D.C. to start. If your organization, firm, or company is interested in committing all or part of the funds needed to start a project in one of these cities, please let us know by e-mail.

What makes GREEN so exciting is that our efforts and time contributions show quick returns. The GREEN program generally is implemented from start to finish during a school year. As you can imagine, GREEN builds essential academic skills including critical thinking, teamwork, problem solving, and decision making; teaches students how to assess watershed health with the proper tools; and encourages youth to undertake projects to improve environmental quality based on their findings. Visit their Web site at http://www.green.org to learn more about GREEN or check out the Sections' In-House Counsel Committee Web site, http://www.abanet.org/environ/committees/counsel/home.html. When we work together, young people and attorneys can improve their communities, learn, and have fun at the same time! We hope you join our efforts!

AMERICAN BAR ASSOCIATION
SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES

Calendar of Section Events



ABA Midyear Meeting
Feb. 9-15, 2005
Salt Lake City, Utah

23rd Annual Water Law Conference
Feb. 24-25, 2005
San Diego, California

34th Annual Conference on Environmental Law
March 10-13, 2005
Keystone, Colorado

Key Environmental Issues in Region 4
April 22, 2005
Atlanta, Georgia

Key Environmental Issues in Region 6
May 26, 2005
Dallas, Texas

ABA Annual Meeting
Aug. 4-9, 2005
Chicago, Illinois

13th Section Fall Meeting
Sept. 21-25, 2005
Nashville, Tennessee

For more information, see the Section Web site at http://www.abanet.org/environ or contact the Section at (312) 988-5724.

INTERPRETATION AND APPLICATION OF *SWANCC* IN 2003-2004

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The U.S. Supreme Court, in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (*SWANCC*), 531 U.S. 159 (2001), limited the Corps' jurisdiction over wetlands under section 404 of the Clean Water Act (CWA) by invalidating the Migratory Bird Rule. The Migratory Bird Rule had extended CWA jurisdiction to non-navigable, isolated wetlands frequented by migratory birds. The Court held in *SWANCC* that CWA jurisdiction does not extend to such waters; however, it made it clear that CWA jurisdiction would cover wetlands adjacent to and "inseparably bound up to" navigable waters.

Under a narrow interpretation of *SWANCC*, the Corps loses jurisdiction where a wetland is completely isolated, non-navigable, intrastate, and the where sole reason for federal jurisdiction is the presence of migratory birds. Alternatively, a broad interpretation of *SWANCC* only gives the Corps jurisdiction where waters are either navigable-in-fact or have a "substantial nexus" to navigable water, such as wetlands adjacent to navigable waters. The question of whether the *SWANCC* holding extends CWA jurisdiction to wetlands not directly adjacent to navigable waters but flowing into tributaries – either natural or man-made – that subsequently flow into navigable waters was addressed by appellate courts in 2003.

The Court of Appeals for the Fourth Circuit, in *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003), considered whether the Corps' jurisdiction under the CWA extends to wetlands adjacent to, and draining into, a roadside ditch whose waters were a tributary of the navigable Wicomico River, which subsequently flowed into the Chesapeake Bay. Appellants argued that under *SWANCC* the Corps' CWA jurisdiction

cannot possibly extend to a roadside ditch because such a ditch is not a tributary regulated under the CWA as a non-navigable tributary of navigable waters. However, the court found the Corps' interpretation of the word "tributary" to mean all tributaries – whether primary, secondary, tertiary, etc. – of navigable waters. Thus, the roadside ditch squarely fell within the Corps' definition. The court reasoned that the Corps may assert jurisdiction over any branch of a tributary system and adjacent wetlands flowing into a navigable body of water because pollutants added to such tributaries will eventually flow into the navigable waters protected under the CWA.

Subsequently, in *Treacy v. Newdunn Associates, LLP*, 344 F.3d 407 (4th Cir. 2003), the court of appeals affirmed its *Deaton* interpretation of what constitutes a "tributary" by concluding that the wetlands on appellees property were within CWA jurisdiction because they flowed into 2.4 miles of natural streams and man-made ditches serving as tributaries to a navigable waterway. On April 5, 2004, the U.S. Supreme Court denied petitions for writ of *certiorari* for *Newdunn* and *Deaton*, 124 S. Ct. 1874 (2004).

SWANCC was also narrowly interpreted by the Sixth Circuit Court of Appeals in *United States v. Rapanos*, 339 F.3d 447 (6th Cir. 2003), where the court held that the Migratory Bird Rule, alone, exceeded the authority granted to the Corps under the CWA and wetlands adjacent to tributaries flowing into navigable waterways continue to fall under CWA jurisdiction. Defendant-appellee was criminally convicted of unlawfully filling wetlands in Michigan in violation of the CWA. Described as being 11 to 20 miles from the nearest navigable waterway covered by the CWA, the wetlands flowed into a 100-year-old man-made drain, which, in turn, flowed into a creek that flowed into a navigable river. Following the conviction, an appeal, a denial of *certiorari*, a second appeal and a grant of *certiorari*, the Court remanded the case to the appellate court for review in light of *SWANCC*. The case was then remanded to the district court, which held that under *SWANCC* the wetlands were outside CWA jurisdiction.

On appeal, the appellate court rejected the district court's broad interpretation of *SWANCC* to exclude all wetlands not directly adjacent to navigable water under CWA jurisdiction; however, the court noted that the need to protect navigable waters from pollution does not necessarily require extending the federal government's jurisdiction over all non-navigable waters. The court adopted the analysis and holding presented in *Deaton*, finding that because defendant's wetlands were adjacent to a man-made drain flowing into navigable waters, there was a "significant nexus" between the wetlands and the navigable waters to establish CWA jurisdiction. On April 5, 2004, the U.S. Supreme Court also denied a petition for writ of *certiorari*, 124 S. Ct. 1875 (2004).

In *United States v. Rueth Development Co.*, 335 F.3d 598 (7th Cir. 2003), the court considered whether CWA jurisdiction extended to defendant's wetlands where defendant illegally discharged fill material into wetlands adjacent to an unnamed tributary of a ditch, flowing into another ditch, that subsequently flowed into a navigable river. The court first considered whether 40 C.F.R. § 230.3(s)(3) (formerly codified as 33 C.F.R. § 328(a)(3)), the section of the federal code covering the Migratory Bird Rule, was invalidated by *SWANCC*. The government asserted *SWANCC* did nothing more than invalidate the Migratory Bird Rule but left other provisions of section 230.3(s)(3) intact, specifically the interstate-commerce nexus of isolated waterways not used as a habitat for migratory birds. The court declined to decide the case on the Corps' jurisdiction under section 230.3(s)(3), but noted that *SWANCC* does not expressly make section 230.3(s)(3) illegal. However, such a reading of the rule may be the only logical extension of the *SWANCC* ruling.

The court then decided the case on the government's alternative basis for jurisdiction, the Corps' adjacency requirement (40 C.F.R. § 230.0(s)(7)), finding that the wetlands fulfilled the requirement, thus falling under CWA jurisdiction. In addition, the court noted *SWANCC* reaffirmed adjacency jurisdiction first established in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) and did not address the question of what "adjacency" means. On Dec. 1, 2003, the Supreme Court of the United States denied a petition for writ of certiorari, *Rueth v. United States*, 124 S.Ct. 835 (2003).

A broader interpretation of *SWANCC* was adopted in *United States v. Needham*, 354 F.3d 340 (5th Cir. 2003), where the court rejected the argument that CWA jurisdiction extends to "puddles, sewers, roadside ditches and the like" because under *SWANCC* such tributaries are neither navigable nor truly adjacent to navigable waters. The court considered what establishes a navigable waterway and an adjacent tributary under *SWANCC*, finding that the two disputed waterways – the navigable Company Canal and adjacent Bayou Folse where oil from appellees' business spilled – fell within CWA jurisdiction.

The inland Company Canal was a navigable waterway because it supported commerce, was unobstructed and was traversed on a consistent basis. The court then considered whether a "significant nexus" between the adjacent Bayou Folse and Company Canal existed, noting the term "adjacent" cannot include every possible tributary that eventually flows into a navigable waterway but only tributaries that demonstrate a significant measure of proximity to a navigable waterway. The court concluded that sufficient evidence was presented to prove Bayou Folse's adjacency and direct discharge into Company Canal, so that it too was governed by CWA jurisdiction.

In addition to the evolving interpretation and application of *SWANCC* by appellate courts, on Dec. 16, 2003, EPA and the Corps withdrew their January 2003 Advance Notice of Proposed Rulemaking. The Notice proposed developing regulations to clarify CWA jurisdiction over isolated wetlands after *SWANCC* and was withdrawn due to the 133,000, mostly adverse, comments the agency received.

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Like to Write?

The Water Quality and Wetlands Committee welcomes the participation of members who are interested in preparing this Newsletter.

If you would like to lend a hand by writing, editing, identifying authors or identifying issues, please contact one of the editors:

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