January 2003

Environmental Law

The newsletter of the Tennessee Bar Association's Environmental Law Section

SWANCC Revisited — A Note on Two Recent Court Decisions

By Randy Womack

Most practitioners would agree that the decision of the U.S. Supreme Court in the case of *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, (SWANCC)* 531 U.S. 159, 121 S.Ct. 675, 148 L.E. 2d 576 (2001), was one of the most interesting developments in environmental law in a number of years. For me, this decision highlighted what I believe is one of the most thought provoking issues in environmental law — what constitutes "waters of the United States?" What constitutes "waters of the United States" (and thus the scope of federal authority) lies at the core of two major regulatory programs — the Clean Water Act's wetlands protection and permitting program[1] and the Oil Protection Act's Spill Prevention Control and Countermeasures program.[2]

You may recall that the Supreme Court in *SWANCC* struck down the U.S. Army Corps of Engineers' reliance on the "Migratory Bird Rule" as a basis of the Corps' exercise of its Section 404 permitting authority over an isolated wetlands that did not lie adjacent to a navigable waterway. A group of 23 suburban Chicago municipalities had purchased an abandoned sand and gravel pit with excavated trenches for use as a disposal site for baled nonhazardous solid waste. The trenches had, over time, filled with water, and had developed into permanent and seasonal ponds that had become a habitat for migratory birds.[3] The group contacted the Corps to determine whether, under Section 404(a), they needed a permit to dump fill into the area.[4] Under Section 404(a), the Corps has authority to issue permits for the discharge of dredged or fill material into the navigable waters at specified disposal sites. The Clean Water Act defines "navigable waters" as "waters of the United States, including the territorial seas."[5] Corps regulations further defined "waters of the United States" to include, *inter alia:*

> Waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce …[6]

The Corps had also issued the "Migratory Bird Rule,"[7] which provides that the Corps had jurisdiction over any waters that provide habitat for migratory birds. The Corps invoked the "Migratory Bird Rule" in refusing to issue a permit to the *SWANCC.*[8] The *SWANCC* unsuccessfully challenged that decision in district court, and the Seventh Circuit affirmed, concluding that the "Migratory Bird Rule" was a reasonable interpretation of the Clean Water Act.[9] The Supreme Court granted certiorari and reversed. The court determined that allowing the Corps to "claim federal jurisdiction over ponds and mudflats falling within the 'Migratory Bird Rule' would result in a significant impingement of the states' traditional and primary power over land and water use."[10] The court concluded that 33 CFR §328.3(a)(3) (1999), "as clarified and applied to petitioner's balefill site pursuant to the 'Migratory Bird Rule,' … exceeds the authority granted to [the Corps] under §404(a) of the

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gjones@tnbar.org

221 Fourth Ave. North,
Suite 400
Nashville, TN 37219-2198
615.383.7421
1.800.899.6993
615.297.8058 (FAX)

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From the Chair

Steven Stout

In this issue I write a second installment in a promised series during my tenure as section chair about the book *Breaking the Vicious Circle: Toward Effective Risk Regulation* by Stephen Breyer, now an associate justice on the U.S. Supreme Court. Before being appointed by President Clinton to serve on this court, Justice Breyer had taught regulatory law at Harvard and had served in the federal judiciary on the First Circuit Court of Appeals. Breyer identified three fundamental problems in how the government makes environmental laws and regulations: tunnel vision, random agenda selection and inconsistency. This time I said I would write to describe the second problem, but, invoking the prerogative of the chair, I now deviate from the charted course to write about something related but different. I hope to address the two remaining problems next time. This issue will otherwise be beneficial to section members in its focus on developments in the area of water pollution.

I recently made a trip to Washington, DC , and found some inspiration there on an early morning walk/jog down a path along the Potomac River from a hotel in the area of the George Washington University campus to the Lincoln Memorial. The imposing statue of the seated Lincoln inside the memorial is itself inspiring, but I was also inspired by some of Lincoln's words inscribed in stone. Both the words of the Gettysburg address and Lincoln's Second Inaugural Address were inscribed on the walls of this great national monument.

In his Second Inaugural Address, Lincoln spoke to a nation ravaged by war, but the remarkable thing about the speech was that he did not speak about the war but about how to make peace. The basic tone of the speech was one of conciliation toward the South. Several of you may also recall the last part of the speech:

> With malice toward none; with charity for all; with firmness in the right, as God gives us to see the right, let us strive to finish the work we are in; to bind up the nation's wounds; to care for him who shall have borne the battle, and for his widow, and his orphan — to do all which may achieve a just and lasting peace, among ourselves, and with all nations.

History shows that following Lincoln's assassination, the policies of reconstruction were far different than what Lincoln had envisioned and were vindictive toward the South.

I know that you will ask how this relates to environmental law. Well, the thought occurred to me that Lincoln was right in his approach to reconciling the nation. At least for those in the South, the Civil War is not over. Much of the bitterness over the Civil War remains to this day, I maintain, because Lincoln's policy was rejected. The reason the wounds did not heal sooner and have not fully healed to this day were due to a failure to follow Lincoln's wisdom. In the rancorous debate over the protection of the environment in this country today, I believe there is the same mistake that Lincoln wanted to avoid.

Not only have I read about Breyer and his book, I have also read criticism of the book. This criticism sounded like other recent topics of debate over environmental issues. The debate over environmental policy is marked not by robust and constructive debate, but by personal attack to impugn the character of the opponents. I think the mistake is the tendency to demonize one side of the debate.

Lincoln wanted a policy of mercy and grace while remaining uncompromising about the preservation of the union and the abolition of slavery. (In the interest of historical accuracy, Lincoln was not at the outset of the Civil War in favor of total abolition of slavery, just ending the expansion of the system. Yet you see in this speech a very eloquent and spiritual expression of what a national sin he felt slavery was.)

Let's all just acknowledge that the air and the water and land are precious gifts and that these must be protected to the best of our ability for the benefit of our posterity. I know this is a belief that we share as lawyers, as citizens, as people. I see the extreme positions articulated. I see the two sides talking past each other, not talking to each other. Neither side is entirely right — or entirely wrong. As I wrote previously, we lawyers don't often get a vantage of the forest from our places among the trees. However, if given the opportunity we should seek common ground and avoid the rancor. There are very few intent on malicious

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A Brief Introduction to the Tennessee Stormwater Program

By Danielle Droitsch

Have you ever noticed the trash and filth that collects in our streets and parking lots? Or the gunk that piles up near dumpsters next to restaurants or even industrial sites? When it rains especially in urban areas, do you detect the increase in flooding? Or that construction sites become a major source of sediment pollution during rain events? These are the results of stormwater pollution: one of the most significant sources of pollution in Tennessee and the United States.

New rules to be implemented in 2003 by the Tennessee Division of Water Pollution Control are geared to address stormwater. Stormwater comes from many different sources including construction sites, parking lots, golf course, and industrial sites. Laced with pesticides, heavy metals such as copper, zinc and lead, as well as suspended solids or oxygen depleting phosphorous and nitrogen, stormwater pollution eclipses point source discharges from factors and municipalities.

In 1990, EPA adopted the stormwater rules that first addressed large urban areas serving more than 100,000 people. The rule also established a national stormwater permitting program for industrial sites and construction areas. The initial Phase I requirements applied to four Tennessee urban areas: Chattanooga, Nashville, Knoxville, and Memphis who have had operating stormwater programs for a number of years. Phase II of the Clean Water Act's stormwater program require certain sized urban areas to obtain a National Pollutant Discharge Elimination System (NPDES) permit. Phase II of the EPA rule, discussed in this article, extends coverage of Phase I of the stormwater requirements to smaller urban areas (UA) as defined by the Bureau of Census. In Tennessee, 84 communities have been identified by the state mostly consisting of medium to smaller cities as well as several universities.

In Tennessee, the primary method to implement Phase II will be a general permit: NPDES General Permit for Discharges from Small Municipal Separate Storm Sewer Systems, Permit No. TN5000000. To obtain compliance under this general permit, each of the 84 communities will be required to submit a Notice of Intent (NOI) application (available on the TDEC website). The NOI will require the applicant to outline a stormwater program that must meet six required elements: public education and outreach, public participation and involvement, illicit discharge detention and elimination, construction site runoff control, post-construction runoff control, pollution prevention/good housekeeping. For all six elements, Best Management Practices (BMPs) will be used to establish compliance.

The Tennessee general permit, not fully adopted by the time of this publication, must require each permittee to implement a program that will "reduce or eliminate contamination in its discharges." The measure to assure compliance is the permittee's stormwater plan must reduce stormwater to the maximum extent practicable (MEP). CWA 402(p)(3)(B)(iii)

The implementation of Phase II stormwater requirements should be viewed as an opportunity for all communities subject to compliance. Stormwater pollution extols a high price on communities through increased flooding, decreasing property values, unsightly construction practices, and an overall quality of life. Model communities that have undertaken exemplary programs to control stormwater runoff have experienced positive results. Once stormwater managers acquaint themselves with the options available, there are hundreds of excellent examples of BMPs that are both cost-effective and beneficial to local citizens. For example, some communities have enacted requirements requiring developers to limit impervious surface resulting in more attractive green spaces and pedestrian-friendly areas. Others have focused on litter, greenways, and public education about the importance of protecting local creeks and rivers.

One of Tennessee's most innovative programs is a certification program for stormwater control on construction sites. Sediment runoff from construction sites is 10-20 times greater than runoff from agricultural lands and up to 2,000 times greater than runoff from forest lands. The certification program, designed and operated by the Tennessee Division of Water Pollution Control in partnership with the UT Water Resources Center, provides training, information, and compliance instruction for construction sites. Under the new rules, construction sites that impact more than one acre of earth must obtain a stormwater permit.

To obtain more information on the state's stormwater program, EPA stormwater requirements, and state's construction stormwater program, please see the following websites:

http://www.state.tn.us/environment/wpc/stormh2o/index.html
http://cfpub1.epa.gov/npdes/stormwater/swphase2.cfm
http://www.state.tn.us/environment/permits/conststrm.htm

Danielle Droitsch is the executive director of the Tennessee Clean Water Network. She received her law degree from the University of Tennessee College of Law in 1998. Prior to working with TCWN, she served as the associate regional director for the Southeast Office of the National Parks Conservation Association. In 1998, she won first place in the Association of Trial Lawyers of America's Roscoe Hogan Environmental Law Essay Contest addressing the subject of natural resource damages.

The Challenges of the 303(d) Listing Process

By James Weaver

On Oct. 1, 2002, the State of Tennessee was required to submit to the Environmental Protection Agency (EPA) its 303(d) list identifying impaired waters within the state that are unable to meet water quality standards. This submission is required under the federal Clean Water Act, which also asks states to rank and prioritize such impaired waters based upon the amount of pollution in the streams, and the different designated uses of the streams. The importance of this list should not be overlooked: for every stream segment included, a Total Maximum Daily Load (TMDL) must be developed for each particular pollutant causing impairment. The 303(d) list was developed pursuant to the May 27, 1998 agreement between EPA, Region 4 and TDEC. Under this agreement, Tennessee agreed to take on the primary responsibility for the development of TMDLs for each listed stream segment. Tennessee is one of 22 states in which EPA is under court order or consent decree to establish TMDLs if the state does not do so. Tennessee is on a 10-year schedule for completion of all TMDLs.

As part of its development of the 303(d) list, TDEC placed the state's water bodies into one of four categories: (1) fully supporting designated uses; (2) fully supporting, but threatened; (3) partially supporting; or (4) not supporting. These designations reflect whether or not the water body is meeting those designated uses assigned to it by the Tennessee Water Quality Control Board. Only those water bodies falling into the "partially supporting" or "not supporting" categories were included on the 303(d) list. While TDEC claims that it had the authority to list "fully supporting" or "threatened" stream segments, neither were included on the 303(d) list due to the "general lack of high quality trend data." The designated uses adopted by the board include (1) domestic water supply; (2) industrial water supply; (3) fish and aquatic life; (4) recreation; (5) irrigation; (6) livestock watering and wildlife; and (7) navigation.

This is not the first time that Tennessee has submitted such a list to EPA. In 1998, TDEC submitted a 303(d) list which contained approximately 850 stream segments. The 2002 list submitted by TDEC contained over 4,000 stream segments. TDEC has stressed to industry and other interested parties that the 2002 list contained a much higher degree of precision, which resulted in the inclusion of many more individual stream segments.

For each stream segment listed on the 303(d) list, TDEC has identified the type of impairment (i.e. pollutant) and the source of impairment (i.e. polluter). As an example, Boones Creek, in the Watauga River basin in Washington County, is listed as impaired due to siltation caused by pasture grazing, and "other habitat alterations" due to land development. Examples of pollutants listed on the 303(d) list are: siltation, fecal coliform, phosphorus, other habitat alterations, organic enrichment/low oxygen, PCBs, mercury, thermal modifications and pathogens.

As part of the mandated public participation process, a draft 303(d) list was released to the public by TDEC in July 2002. TDEC held meetings across the state and public comments were received through mid-September. Instead of responding individually to commenters, however, TDEC prepared general responses to the comments and placed those comments on their website. Many commenters were unaware of these responses and were not notified directly by TDEC of their existence.

In addition to the problems associated with the public comment process, the development of the 303(d) list and related TMDLs will raise several legal issues in the future. Will these standards be developed? Will a rulemaking for these standards be undertaken? What process is required for development of TMDLs? To date, TDEC has issued draft TMDLs and the draft 303(d) list and submitted those to EPA for approval.

Perhaps more challenging, however, is the future implementation of these policies. How will the state regulate "siltation" or "habitat alterations"? Obviously future NPDES permits may be fair game for additional permit conditions, but many activities causing these impairments are unregulated. Expanding the regulated community statewide to address TMDLs will not be an easy task.

Tennessee is not alone in facing these issues. Other states in the region, most notably Florida, have taken a more structured, data intensive approach to the analysis of impaired waters through the adoption of specific statutes and related regulations. As industry continues to monitor this process very carefully in this state, we are hopeful that TDEC will have the resources necessary to obtain the requisite data it needs to ensure that every decision, whether it be listing a stream segment on the 303(d) list, or the development of TMDLs for a specific pollutant, be based upon sound, publicly available, verifiable data. The burden of meeting TMDLs should also be spread evenly among all of the proven sources of impairment, not just among those who entities currently regulated. ■

James Weaver is a member of the Nashville based law firm of Waller Lansden and chairs the firm's Regulatory Group (environmental, land use, utilities, state and local government and government relations practices). He has extensive experience in the area of environmental law, specifically in the areas of federal and state regulated impacted site cleanups, water pollution issues, wetlands and stream impact regulation, and project development. Weaver received his bachelor of arts degree from Vanderbilt University and his law degree from the Cecil C. Humphreys School of Law at the University of Memphis.

James Weaver

Shortcomings of TDEC's Proposed 303(d) List

By Danielle Droitsch

In the past four years, the Tennessee 303(d) list has taken on new meaning. Prior to 1998, the state's "impaired waters list" had little to no impact on regulatory activities. But with the advent of national litigation including a settlement in Tennessee, the state must now implement the 1970's Clean Water Act requirement to develop Total Maximum Daily Loads (TMDLs). TMDLs are a calculation and a plan: a calculation of the maximum amount of a pollutant that a river, lake or coastal water can receive before becoming unsafe; and a plan to lower pollution to that identified safe level. In the legal sense, a TMDL is "[t]he sum of the individual WLAs for point sources and LAs for nonpoint sources and natural background …" See 40 C.F.R. 130.2(i)

The requirement that a TMDL must be developed for every waterbody on the 303(d) list has elicited much debate about this previously ignored inventory. The most recent Tennessee 303(d) list was submitted by the Tennessee Division of Water Pollution Control to EPA Region 4 on Oct. 1, 2002 for approval. At the time of the writing of this article, the list had not yet been approved by EPA.

The environmental community's perspective on the 303(d) list are both policy and legal in nature. For the reasons that follow, the Tennessee Clean Water Network, Tennessee Public Employees for Environmental Responsibility, Tennessee Environmental Council, and American Rivers have recently petitioned the EPA to disapprove the current list under consideration by EPA. The newly elected Bredesen administration will have an opportunity to evaluate current TDEC policy with regard to the 303(d) list.

There are many legal reasons why the current 303(d) list should be disapproved by EPA that cannot be elaborated on in this article. The concerns of the environmental community about the 303(d) list, however, include one overriding public policy issue that could greatly improve the general protection of Tennessee watersheds: water quality monitoring. Currently, the public has a mistaken impression that the 303(d) list and the corresponding 305(b) state water quality report is comprehensive. Unfortunately, the state monitors only 40 percent of the state's waters leaving thousands of rivers unrepresented on the list.

TDEC has the opportunity to increase its water quality database, using other sources, considering the financial and institutional constraints it faces. One source of data can be increased requirements for in-stream study and monitoring by applicants for permits and permitted parties, under the NPDES, Aquatic Resource Alteration Permit (ARAP), and 401 certification programs. Applicants for these permits could bear the burden of proving that their operations will meet all state and federal requirements. All applicants for permits must be required to establish current conditions in the streams they propose to affect. This should include sampling sufficient to assess both chronic and acute pollution impacts that may exist. Under NPDES and ARAP regulations, TDEC has full authority to require submittal of valid, quality-assured data as application requirements and/or to include permit special conditions or to condition 401 certifications on the completion of studies.

In addition to identifying impaired waters, the 303(d) list includes threatened waters. While this recognizes threatened waters, only two waterbodies were proposed for the recent draft list: the Little River in Townsend, Tenn., and a portion of the Obed River in Cumberland County, Tenn. TDEC has a legal responsibility to list "threatened" waters on the 303(d) list. To fulfill this requirement, the state must focus attention on developing a protocol for identifying "threatened" waters such that the 2004 list provides a more accurate reflection of waters that are decreasing in water quality. ■

Danielle Droitsch is the executive director of the Tennessee Clean Water Network. See her previous article on page 3.

Transitions & News

The Office of the Attorney General, Environmental Division has two additions:

Philip Hilliard. Hilliard received his law degree from the University of Memphis, Cecil C. Humphreys School of Law in 2001 and his bachelor of arts degree from the University of Tennessee at Knoxville in 1998. During his time at the University of Memphis, he interned with the Guatemalan Consulate in Memphis, clerked with two Memphis law firms, and clerked with the Attorney General's Office. After graduation, Hilliard was an assistant district attorney in Jackson.

Stephen Jobe. Jobe received his law degree from Vanderbilt University and his undergraduate degree at the University of Pennsylvania. Since graduating from law school, he has clerked for the Tennessee Court of Criminal Appeals, then joined the Criminal Division of the Tennessee Attorney General's Office, and then moved to the Tennessee Department of Environment and Conservation Office of General Counsel. During his free time, you can find Jobe rockclimbing throughout Tennessee. ■

Mark Your Calendar

The TBA Real Estate and Environmental Law Sections present “Environmental Issues in Real Estate Transactions” CLE program on January 16 at the BellSouth Building, 333 Commerce Street in Nashville. Registration begins at 9:30 a.m. and the program runs from 10 a.m. - 3:00 p.m. (lunch included with registration). 3 general and 1 E&P credit applied for. For more information or to register for this program, contact TBA at 383-7421 in Nashville or 1-800-899-6993 or you may register online at www.TBA.org.

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The next TDEC “Fundamentals of Erosion Prevention and Sediment Control” Workshop in Nashville is set for Jan. 28, 2003, and will be at the Willis Conference Center. For directions go to http://www.meetatwillis.com/maps.htm. Contact Tim Gangaware of the UT WRRC at (865) 974-2151 or via email at gangwrrc@utk.edu for further information on workshop registration. UT WRRC web site is at http://eerc.ra.utk.edu/divisions/wrrc/Default.htm.

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The deadline for submitting news, announcements, and articles for the next newsletter is Monday, April 7, 2003. The theme for the next newsletter is “land.” Although we are attempting to have themes, please feel free to submit articles even if even not quite within the theme. Please e-mail me at karen.stachowski@state.tn.us with questions, comments, news or articles.

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The 2003 schedules for the Level I and Level II TDEC Erosion Prevention and Sediment Control Workshops are now available. Go to http://www.nashville.gov/stormwater/ for more information.

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The 32nd Annual Solid/Hazardous Waste Conference hosted by TDEC and UT is scheduled for April 30-May 2, 2003 in Gatlinburg. This year, the environmental law sessions are being co-sponsored with the Tennessee Bar Association, Environmental Division. For more information go to http://www.state.tn.us/environment/swm/conference.htm. ■

TENNESSEE RULES OF PROFESSIONAL CONDUCT

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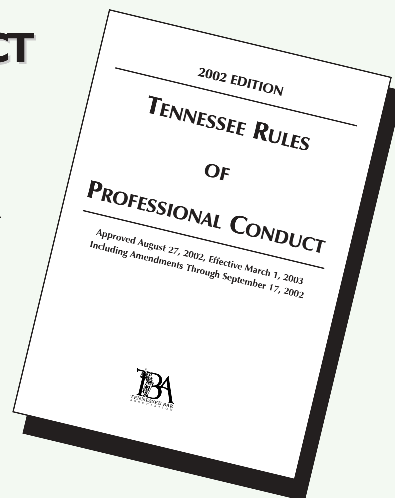

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From the Chair, *continued from page 2*

destruction of the quality of our natural environment. But yet the rhetoric seems to say otherwise. On the other hand, there are very few who want to see our civilization de-industrialized and our economy drastically altered. Raising fuel economy standards is not a communist plot. Both sides need to shut up the spokespersons for the extremes and have rational, moderate leaders step to the forefront.

I don't think that the truth really ever reaches the public in the policy debates. It can't really be heard above the name-calling. I also think that the media tend to report the controversy, but it does not report enough information to allow informed, balanced choices to be made to resolve controversies. As lawyers we can't resolve the national issues or affect the tone of discourse, but within our limited sphere of influence we can promote the sense of a shared concern and responsibility for the environment among all the groups we represent. I truly believe that in most situations we encounter we are not dealing with the struggle between good and evil. We are mostly disagreeing about the means to the same desired end. We are disagreeing about the rate of progress, not about whether there should be progress. Perhaps if lawyers can get clients to relate to one another in the smaller contexts of specific disputes, then this might influence the larger debates.

Government needs to realize that its primary objective is a cleaner environment, not unnecessary hindrance to business. Business needs to realize that its business is not only making goods — part of its business is the compliance with the environmental laws and the improvement of the environment to the extent reasonably compatible with necessary economic functions. I think that this is already so to a large extent, and if we can avoid the "us vs. them" mentality and unite rather than divide, then I think we build a model for progress, a foundation on which our society can move ahead in building a better tomorrow. ■

Steve Stout works in the Office of General Counsel in the Tennessee Department of Environment & Conservation in Nashville. He attended East Tennessee State University and the University of Tennessee College of Law. Steve is married and has two daughters.

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[Clean Water Act]."[11]

In the aftermath of *SWANCC*, some courts faced with the task of assessing the Corps' authority have had to determine whether the "Migratory Bird Rule" is the only "victim" of *SWANCC* or whether *SWANCC* limited the Corps' jurisdiction even further. Two recent court decisions demonstrate how the perceived effect of *SWANCC* can effect the results in a particular situation. These two cases are U*nited States v. Lamplight Equestrian Center Inc.,* 54 ERC 1217, 32 Envtl. L. Rep. 20,523, 2002 WL 360652 (N.D. Ill. 2002), and *United States v. RGM Corporation,* 222 F. Supp. 2d 780 (E.D. Va. 2002).

In *Lamplight,* the federal district court for the Northern District of Illinois ruled in favor of the Corps in an enforcement action brought under Section 301 of the Clean Water Act (33 U.S.C. §1311).[12] Lamplight, a corporation, owned approximately 52 acres of land in Wayne, Ill.[13] On this land Lamplight operated facilities for horse shows and other horse-related activities.[14] In 1999 Lamplight built a small road across the southern portion of the property.[15] It was the construction of this road that attracted the attention of the Corps and resulted in the enforcement action.[16]

The wetlands on the property were not adjacent to a navigable waterway.[17] There was a drainage ditch on the property and the drainage ditch, even by Lamplight's own admission, would carry water away from the property during rains and wet season.[18] At the end of the drainage ditch, water would flow over the surface and into a swale which then emptied into a creek.[19] This creek flowed into a river which drained into an interstate waterway.[20]

The court in *Lamplight,* after reviewing a number of cases decided in the aftermath of *SWANCC*, concluded that *SWANCC* did not affect a substantial change in the Corps' jurisdiction.[21] In the court's view, the critical issue in Lamplight was whether there was a "significant nexus" between the wetlands on the property in question and the river which flowed into an interstate waterway.[22] The court concluded that water need not flow in an unbroken line at all times to constitute a sufficient connection to a navigable water or its tributaries.[23] The intermittent flow of water was, in the court's opinion, sufficient to establish the Corps' jurisdiction over the wetlands on the property.[24]

In *RGM,* the Corps was unsuccessful in its enforcement action brought against several corporations owning several parcels of contiguous land that were being developed for a residential neighborhood and golf course.[25] The testimony indicated that the only connection between the wetlands on the property and the navigable waters of the United States were drainage ditches and ephemeral streams.[26]

The Corps claimed that rain and water flowed into these ditches and streams at various places and at various seasons of the year and created a surface water or hydrological connection between the wetlands and the navigable waters.[27] The court concluded that the Corps had failed, even under its expansive interpretation of its own regulations, to establish an "ordinary high water mark, flowing continuously from the wetlands to navigable water."[28] The court read *SWANCC* as making it clear "that the unilateral expansion of the Corps' jurisdiction under the CWA [Clean Water Act]

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221 Fourth Ave. North, Suite 400
Nashville, TN 37219-2198

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regulations would not be allowed to continue in a limitless fashion."[29] More specifically, the court read the *SWANCC* decision as drawing a new jurisdictional line, one that invalidates the "Migratory Bird Rule" as well as the Corps' assertion of jurisdiction over all waters except for actually navigable waters, their tributaries, and wetlands adjacent to each.[30]

Arguably, these two cases can be distinguished on a factual basis. In *RGM* the Corps struggled in demonstrating the requisite nexus (even an intermittent surface water or hydrological connection) between the wetland and the navigable waterway. Nevertheless, the court in *RGM* made it clear that the Corps does not have the authority over wetlands it has asserted or "defined" through the rule-making process and that there are limitations on the Corps' authority over wetlands that invalidate more than the Corps' use of the "Migratory Bird Rule." It appears to this writer that the results reached in these two cases depended very much upon the respective court's view of the authority granted to the Corps and how that authority may have been limited by *SWANCC*. ■

Randy Womack is a member of the Glankler Brown PLLC law firm and a member of the TBA's Environmental Law Section Executive Council. His practice is concentrated in the areas of environmental law, insurance, contracts and commercial litigation. You can contact him by telephone at (901)525-1322 or by email at rwomack@glankler.com.

Endnotes

1. 33 U.S.C. §1344. (See also 33 C.F.R. Parts 320-331).
2. 33 U.S.C. §1251. (See also 40 C.F.R. Part 112).
3. *Id.* at 163.
4. *Id.* at 163-64.
5. 33 U.S.C. §1362(7).
6. (See CFR §328.3(a)(3) (1999)).
7. (51 Fed.Reg. 41217)
8. *Id.* at 164.
9. *Id.* at 165-66.
10. *Id.* at p. 174.
11. *Id.*
12. 2002 WL 360652 at *9
13. *Id.* at *1.
14. *Id.*
15. *Id.*
16. *Id.* at *2.
17. *Id.* at *2.
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* at *5-6.
22. Id. at *6.
23. *Id.* at *7.
24. *Id.*
25. 222 F. Supp. 2d at 788.
26. *Id.* at 786.
27. *Id.*
28. *Id.* at 787.
29. *Id.* at 785.
30. *Id.* at 786. The court noted that in a previous decision (U.S. v. Newdunn, 195 Fd. Supp. 2d 751 (E.D. Va. 2002)), the court ruled that the Corps' 1986 wetland regulations exceeded the authority granted by the Clean Water Act by substituting the term "waters of the United States" for "navigable waters" as the basis for the Corps' jurisdiction.