



Isolated Wetlands: Wisconsin Steps In with Regulations after Supreme Court Decision

Photos courtesy of Wisconsin Department of Natural Resources

A significant portion of the nation's wetlands were left unregulated last January after the U.S. Supreme Court ruled that the Clean Water Act does not give the federal government the authority to regulate "isolated" wetlands. In response to the ruling, Wisconsin was the first state to pass legislation to protect these vulnerable areas.

"The state did not have any stand-alone wetlands regulations. Our whole program was piggybacked on the federal program," says Scott Hausmann, wetland team leader for the Wisconsin Department of Natural Resources. With the potential of up to 3 million acres of the state's wetlands being impacted, "we knew we had to act immediately."

Four months after the Supreme Court's decision, Wisconsin legislation was signed into law that gives the state jurisdiction over all wetlands not regulated by the federal government. "All our wetlands now have some type of regulatory protection," Hausmann notes.

The Ruling

The Supreme Court's 5-4 decision in *Solid Waste Agency of Northern Cook County (SWANCC) vs. U.S. Army Corps of Engineers* held that the corps did not have the authority to regulate 31 acres of long-abandoned sand and gravel pits in Illinois that provide habitat to migratory birds.

The lawsuit arose following the corps' denial of a permit application by a consortium of local municipalities to fill the pits to construct a landfill. The corps asserted jurisdiction over the area under the so-called "migratory bird rule," a section of the Clean Water Act that the corps had interpreted to extend to certain intrastate waters based on their use as migratory bird habitat. The corps' claim was based on the millions of dollars spent annually on hunting and observing migratory birds, which was thought to fall under the Interstate Commerce Clause of the U.S. Constitution.

Writing for the majority, Chief Justice William Rehnquist notes, "permitting [the corps] to claim federal jurisdiction over ponds and mudflats falling within the 'migratory bird rule' would result in significant impingement of the state's traditional and primary power over land and water use."

Impacts to States

Prior to the SWANCC decision, virtually all wetlands throughout the nation were potentially subject to regulation under the Clean Water Act. The court's decision leaves it unclear how much is now under the states' purview and how much regulatory authority the corps and U.S. Environmental Protection Agency (EPA) maintain.

An article in the March-April 2001 edition of the *National Wetlands Newsletter* notes that as little as 20 percent of the nation's wetlands might be subject to federal regulation under the Clean Water Act if the court's decision is read restrictively to

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include only traditionally navigable waters and their adjacent wetlands. If courts interpret the decision more inclusively, federal regulations would cover 40 to 60 percent, or more, of the nation's wetlands.

At the time of the court's decision, regulatory programs for isolated wetlands were limited or nonexistent in 35 states. Only 15 states, most of them coastal, provided considerable protection for isolated freshwater wetlands, according to the *Newsletter*.



Wisconsin's wetlands are so important, Hausmann says, because the majority of the state's fish and wildlife species use wetlands during some point in their life cycles. Wetlands also store water to prevent flooding, protect water quality, and provide habitat for the majority of species that are hunted, fished, or watched.

Before the Ruling

Since the 1980s, Hausmann says, Wisconsin has taken its water quality certification program "very seriously." In 1991, it was the first state to pass water quality standards specifically for wetlands. Section 401 of the Clean Water Act requires that any federal permit or action to be state certified must meet all applicable state water quality standards.

"We've used that tool very effectively," Hausmann reports. "Before 1991, about 1,400 acres of wetlands a year were being filled. Since 1991, it's down to about 175 acres per year, excluding transportation projects." Of the 4,500 to 4,800 water regulatory applications in Wisconsin a year, about 700 are for filling wetlands. Of those, about 86 percent are approved.

Assessing the Damage

The Supreme Court's decision was not a total surprise to Hausmann and his co-workers, who were following

the SWANCC case. "We got on-line and looked at a transcript [of the oral arguments] and said, 'Oh boy. From the questioning by the justices, we could tell it was not going to turn out well for wetlands.'"

Although they were discussing what the state should do in light of such a ruling, Hausmann says they were caught off guard by the speed of the decision, which was issued January 9, 2001. "We were expecting it to come down in

March or April," he says. The timing, however, was fortuitous because they had just briefed the state's incoming governor on the potential impacts of the case.

Once the decision was known, Hausmann says, they were able to use a department geographic information system (GIS) wetlands inventory to get an idea of the isolated wetlands

that might no longer be covered under the corps' jurisdiction.

"We have 5.3 million acres of wetlands in the state. Our widest guess was that up to 3 million acres could be impacted." After the corps and EPA issued a memorandum with the agencies' preliminary interpretation of the decision, which defined the area no longer under federal jurisdiction very narrowly, the state's estimate of impacted wetlands dropped to "a little over 1 million acres," Hausmann says.

Taking Action

Hausmann says they knew they needed to communicate with the public and to the legislature about the "huge impact" the decision could have on the state. They sat down with their public information officer and wrote out a communications plan to "continually get out the message about which wetlands were no longer protected, and why that's important to you as a duck hunter, or you as a bird watcher, or you as a fisherman, or you as an educator."

He says they also drafted a briefing paper for the legislature that outlined the problem and suggested a "legislative fix. We told them that what we would like to do is put everything back the way it was on January 8. Give us the authority and we will use the same water quality certification procedures and the same standards that we used before the decision came out. It would just be coming from the state's authority rather than the Clean Water Act."

The legislation was pushed forward, Hausmann says, by the fact that the Department of Natural Resources made protecting isolated wetlands a priority. For four months, two staff members "basically worked full-time keeping our message out there and working with legislators, interest groups, and citizens."

Support came early from the secretary of state and the new governor. The nonprofit Wisconsin Wetlands Association hired a lobbyist, and a coalition of other

nonprofits, ranging from "all the conservation and environmental groups to the sportsman groups," came together to support the legislation. Thousands of citizens wrote letters to the legislature, "sending the clear message to protect our wetlands and to protect them now."

"It was amazing," Hausmann says. "I've been doing this for 28 years, and I've never seen such a diverse group of interest groups come together with the same message."

In a special session called by the governor, the new wetlands law was passed unanimously by the state legislature on May 6, 2001. It was signed by the governor on May 7 and went into effect May 8—almost four months to the day after the SWANCC decision came out.

During the four months that there were no regulations over isolated wetlands, Hausmann notes that the corps determined that over 244 acres of proposed wetland fill in the state was no longer under its jurisdiction.

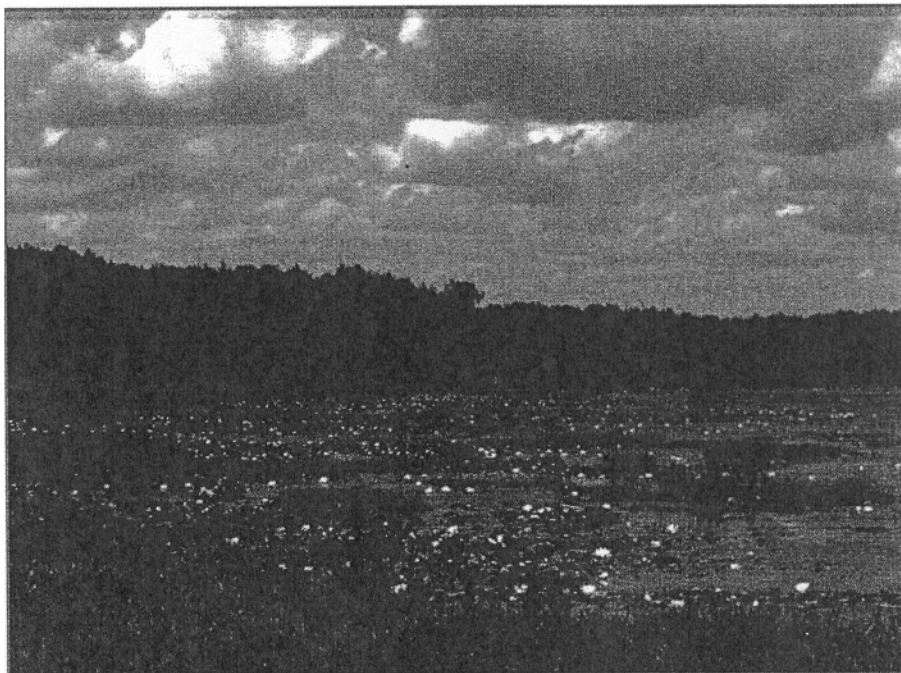
Wisconsin's Legislation

The key elements of the state's legislation, Hausmann says, are that it requires a state water quality certification permit to fill or otherwise impact all nonfederal wetlands in Wisconsin. It allows all the exempted activities, such as normal farming practices, that were previously allowed by the corps.

It also provides the state with inspection authority in order to gain access to the approximately 75 percent of the state's wetlands that are privately owned. "Basically the process is if we can't get consent from the owner, we go to the circuit court and get an inspection warrant," Hausmann says.

The state is given enforcement authority through the Department of Justice. Penalties include a \$10 to \$5,000 a day fine for each violation, and the ability to also require restoration or abatement.

A timeline for the water quality certification process is established, and a general permit can be



Wisconsin's wetlands offer flood control, filter pollution, and provide habitat to wildlife.

established by rule for specific activities, such as placing a boardwalk over an isolated wetland. The legislation also requires the use of the corps' 1987 wetlands delineation manual to identify nonfederal isolated wetlands.

"I think Wisconsin's is a good statute because it's basically asserting jurisdiction over those areas that SWANCC left open," says John Treadwell, research assistant with the Mississippi-Alabama Sea Grant Consortium Law Center. "People who would have had to get a permit a year ago are going to have to get a permit now. The difference is they have to go somewhere else to get it."

Treadwell notes that the legislation also provides the state some "leeway. No matter how the federal courts define the corps' jurisdiction, Wisconsin will automatically have jurisdiction over anything that isn't covered by federal regulations."

Travis Olson, wetlands protection coordinator with the Wisconsin Coastal Management Program, says the only real change for his program is that the state will see a "reduction in the number of acres subject to federal consistency review" under the Coastal Zone Management Act. He

anticipates, however, that this will have little impact on the state's wetlands. "We're removing a level of review, but with the same result anyway in the majority of cases."

"I'm very proud of our wetlands program and what we do," Hausmann says. "We've taken care of the problem in Wisconsin, but we see this as a short-term fix. Where do all the waterfowl in this state come from? If there are no wetlands left on the migratory routes, it still has an effect on Wisconsin."

Hausmann adds, "We've done what we can do, but a lot of our resources are national resources. We think that isolated wetlands in other states and in this nation are important and that they need to be protected. It would be a great tragedy to lose those resources." ♦

For more information on Wisconsin's legislation protecting isolated wetlands, contact Scott Hausmann at (608) 266-7360, or hausmp@dnr.state.wi.us. For more information on the SWANCC case, to view the corps and EPA memorandum on the case, or to compare wetland regulations across the country, point your browser to the Web site of the Association of State Wetland Managers at www.aswm.org.