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# Isolated Wetlands in North Carolina's Coastal Plain in the Aftermath of *SWANCC* and *Rapanos*

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More than a decade has passed since the United States Supreme Court decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (*SWANCC*)[1] and more than a dozen years have passed since the Court's decision in the *U.S. v. Rapanos*[2] cases. These decisions narrowed the Corps' Clean Water Act (CWA) Section 404 regulatory jurisdiction. Prior to these decisions, the Corps asserted jurisdiction over activities impacting isolated wetlands on the ground that such wetlands[3] were "waters of the United States." However, in *SWANCC* and *Rapanos*, the Court disagreed and effectively removed isolated freshwater wetlands from the permit requirements of CWA Section 404.

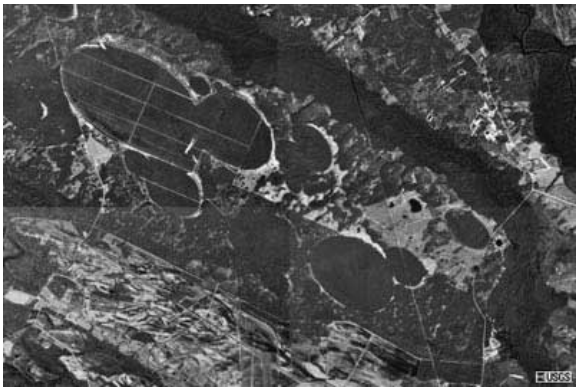
1. 531 U.S. 159 (2001).
2. 547 U.S. 715 (2006).
3. Although there is some disagreement on the definition of "isolated wetlands" or "isolated waters," for purposes of this article, isolated wetlands or isolated waters are those wetlands or waters lacking either a surface or ground water or ecological connection to navigable waters. Pocosins and Carolina bays are two types of isolated wetlands. For a more complete discussion of what waters are subject or not subject to Corps Section 404 jurisdiction, see EPA and U.S. Army Corps of Engineers, *Draft Guidance on Identifying Waters Protected by the Clean Water Act*, dated April 27, 2011.

*A low pocosin with pitcher plants. Courtesy U.S. Fish and Wildlife Service.*

In response to these decisions, a number of states enacted legislation and regulations allowing a state agency to operate a permit program covering activities impacting isolated freshwater wetlands; however, more states did not. In the latter states, some limited protection of wetlands exists under the state's CWA Section 401 water quality certification program. The problem for these states is that any project that does not require a federal permit is not subject to CWA Section 401 review. The outcome, according to some estimates, is that as much as 20 percent of the nation's wetlands have been left unprotected.

The good news for North Carolina is that the *SWANCC* and *Rapanos* decisions did not have as much of an impact upon the Corps' Section 404 jurisdiction in our state as it did in many other states. Although about 5.7 million acres of North Carolina, or 17 percent of the state, are wetlands, 95 percent of these wetlands are located in the coastal plain. The hydrology and ecology of the coastal plain is such that most of its freshwater wetlands and waters satisfy the *SWANCC* and *Rapanos* requirements. Therefore, most North Carolina coastal plain freshwater wetlands and waters remain Section 404 jurisdictional wetlands subject to Corps regulations. At the same time, however, there are also many isolated freshwater wetlands areas, such as coastal plain ponds, Carolina bays, and pocosins, that may not be subject to Corps Section 404 jurisdiction.

Recognizing both the importance and the prevalence of these wetlands, North Carolina moved quickly after the *SWANCC* decision to



Carolina bays. Courtesy U.S. Geological Survey.

establish a state regulatory permit program to cover activities that have an impact on such isolated freshwater wetlands. The critical question that this article focuses on is: does the state program appear to provide adequate protection to these ecologically significant freshwater wetlands? Although providing a complete answer to this question is not possible due to the lack of some important types of data, the available information suggests that the loss of isolated freshwater wetlands to development activities is low. This article first describes the existing state regulatory program and then discusses the results of the program's operations to date.

## How North Carolina Regulates Activities Impacting Isolated Freshwater Wetlands

Understanding North Carolina's program requires an understanding of the regulatory framework that existed prior to the *SWANCC* and *Rapanos* decisions. The CWA, which was passed into law in 1972, required the states to develop water quality standards, which may include "narrative, chemical, and biological water quality criteria, designated uses, and anti-degradation policies." The water quality standards are guidelines that regulators use to determine whether proposed development activities would degrade the waters or be inconsistent with the state's water quality goals.

In the 1990s, states were directed to develop wetland-specific water quality standards. These water quality standards identify uses such as wildlife habitat, shoreline protection, flood storage, and filtration of sediment that are appropriate for wetland areas. Any proposed uses that are inconsistent with the state's wetland-specific water quality standards and require a federal permit can be denied the necessary state Section 401 water quality certification. In 1996, North Carolina promulgated its wetland-specific water quality standards based on narrative criteria relating to water chemistry, visual assessment, hydrology, flora and fauna, and water level and designated uses.

Prior to the *SWANCC* and *Rapanos* decisions, any applicant seeking to engage in activities in isolated freshwater wetland areas needed a Corps CWA Section 404 permit. Even if all federal requirements for such a permit were met, if the proposed activity violated the state's wetland-specific water quality standards the state could refuse to issue the Section 401 water quality certification, thereby blocking the issuance of a Corps Section 404 permit. Although *SWANCC* (and later *Rapanos*) limited the Corps' CWA Section 404 jurisdiction, if a project impacting isolated wetlands requires some other type of federal permit or approval, then a state Section 401 water quality certification is still necessary before the federal permit or approval may be granted. Therefore, some activities that have an impact on isolated freshwater wetlands still are regulated by the state under the Section 401 program.

After the *SWANCC* decision, the state looked to its existing laws to find a way to protect isolated wetlands it believed would no longer be subject to Section 404 and not require a Section 401 water quality certification. The program established by North Carolina is based on the state's Pollution Control Act. This Act, which dates back to 1951[4], provides that no person shall "cause or permit any waste . . . to be discharged to or . . . intermixed with the *waters* of the State *in violation of the water quality standards* applicable to the assigned classification or *in violation of any effluent standards or limitations* established for any point source, unless allowed as a condition of any permit."[5] Waste is defined as "sediment, and all other substances . . . which may be discharged into or placed in such proximity to the water that drainage therefrom may reach the water."[6] Waters of the state are defined as "any stream, river, brook, *swamp*, lake, sound, tidal estuary, bay, creek, reservoir, waterway, *or other body or accumulation of water, whether surface* or underground, public or private, or natural or artificial, that is contained in, flows through, or borders upon any portion of this State, including any portion of the Atlantic Ocean over which the State has jurisdiction."[7]

Based on this language, the North Carolina Environmental Management Commission (EMC) promulgated rules[8] that are administered by the Division of Water Quality (DWQ) of the North Carolina Department of Environment and Natural Resources (NCDENR). These rules are known as the Isolated Wetlands Rules. The state's water quality standards provide the criteria for regulation of activities covering all wetlands in the state, including isolated wetlands. Under the EMC's rules "[i]f the U.S. Army Corps of Engineers or its designee determines that a particular water or wetland is isolated and not regulated under § 404 of the Clean Water Act, then discharges to that water or wetland shall be covered by [the Isolated Wetlands Rules]."[9]

As expected, these rules were challenged. However in 2002, the North Carolina Court of Appeals affirmed the authority of the EMC to promulgate the rules and confirmed that the definition of "waters of the state" includes wetlands.[10] The court's decision meant that the EMC has independent statutory authority to apply its wetland-specific water quality standards to activities that affect wetlands even if a CWA Section 401 water quality certification was not required. Because the North Carolina Supreme Court declined to review the case, the decision of the Court of Appeals stands.

## North Carolina's Isolated Wetlands and Waters Rules

Under the North Carolina Isolated Wetlands Rules, if the impacts of a proposed activity exceed certain thresholds, then an extensive review and an individual permit is required before the activity may proceed. However, if the impact of an activity falls below certain thresholds then, so long as certain conditions are met, the activity is covered by a general permit and does not require an individual review. The current version of the North Carolina State General Permit for Impacts to Isolated and Other Non-404 Jurisdictional

4. Since at least 1951, the General Assembly has granted a state agency the authority to set water quality standards for waters of the state. See Act of Apr. 6, 1951, ch. 606, sec. 1, 1951 N.C. Sess. Laws 530 (codified as amended at N.C. Gen. Stat. §§ 143-211 to 215.7 (2011)).
5. N.C. Gen. Stat. § 143–215.1(a)(6)(2011) (emphasis added).
6. N.C. Gen. Stat. § 143–213(18)(c)(2011).
7. N.C. Gen. Stat. § 143–212(6)(2011) (emphasis added).
8. 15A N.C. Admin. Code 02H .1301(2010).
9. 15A N.C. Admin. Code 02H .1301(b).
10. *In re Ruling by Environmental Management Commission*, 573 S.E.2d 732, 737 (N.C. Ct. App. 2002).

Wetlands and Waters (GP)[11] became effective on Oct. 31, 2008. The GP sets maximum threshold limits of allowable wetland alteration or fill[12] at ≥0.33 acres of impacts to isolated wetlands on projects located east of Interstate 95 and ≥0.10 acres of impacts to isolated wetlands on projects located west of Interstate 95.[13] If a project proposes alteration or fill that exceeds these threshold amounts, then the project will not be eligible for the GP and an individual permit, including a public notice and comment period, is required.

If less than one acre of isolated wetlands is impacted, compensatory mitigation is not required. Compensatory mitigation is designed to replace, in one manner or another, wetlands being lost due to the permitted activity. Therefore, it is possible that significant acreage consisting of small, ecologically important, isolated wetlands could be lost to development activities over time.

On the other hand, when the impact is greater than one acre, compensatory mitigation is required in a ratio of 2:1.[14] This mitigation may take one of a number of forms. For example, the permittee may utilize programs administered by NCDENR such as the fee-in-lieu program administered by the Ecosystem Enhancement Program (EEP) or a Corps-approved mitigation bank to satisfy the compensatory mitigation requirement. If no satisfactory alternatives are available, then the permittee may seek to provide mitigation through restoration, creation, enhancement, or preservation of resources, with restoration or creation being the preferred methods. Where feasible, the impacts should be mitigated within the same river basin and physiographic province.

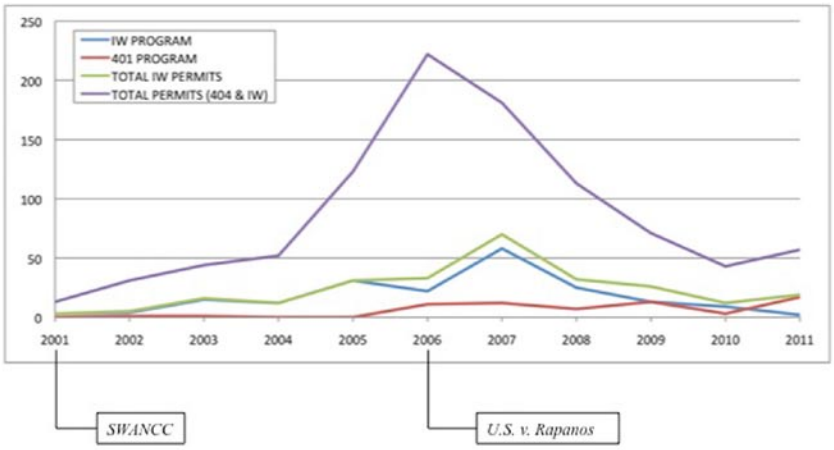



Figure 1. Wetland Permits Issued by NCDENR from 2001 to 2011. *Information from Basinwide Information Management System, October 2001-December 2011 from N.C. Coastal Resources Law, Planning and Policy Center.*

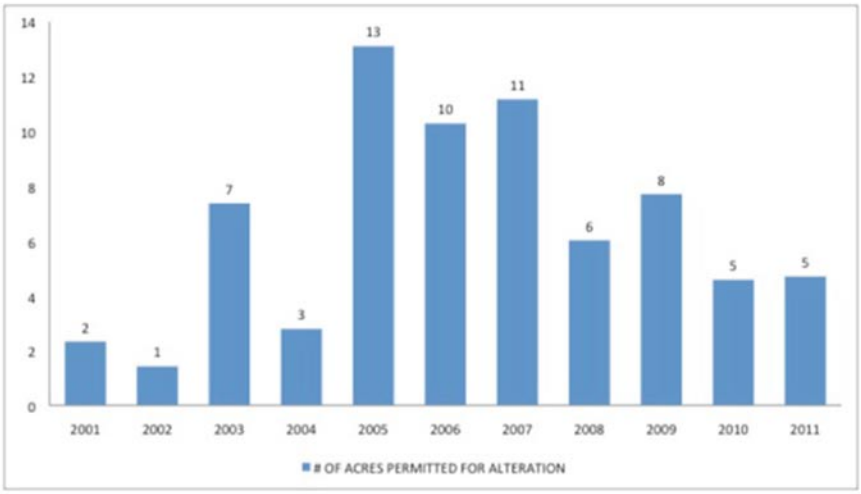



Figure 2. Acres of Isolated Wetlands Permitted for Alteration Statewide in North Carolina. *Information from Basinwide Information Management System, October 2001-December 2011 from N.C. Coastal Resources Law, Planning and Policy Center.*

## The North Carolina Program: Post-*SWANCC* and *Rapanos*

Although no specific data are available that specify the total number of wetlands that were determined to be non-jurisdictional by the Corps and subsequently regulated by the state, the increase in state-permitted actions strongly suggests that activities impacting isolated freshwater wetlands formerly regulated by the Corps are now being regulated under the state program. Since the landmark decision in *SWANCC* and the development of the state isolated wetland program, the number of state-permitted actions within isolated wetlands has steadily risen. The most dramatic rise took place after the 2006 *Rapanos* decision. However, the actual acreage of freshwater wetlands adversely impacted by activities permitted by the state remains small.

## What the Data Tell Us

NCDENR maintains a database that tracks the permits issued each year for actions in wetlands. Isolated wetlands permits account for approximately four percent of the permits issued from October 2001 through the end of 2011. Since October 2001, DWQ has issued 259 permits to alter approximately 71 total acres of isolated wetlands statewide (see ***Figure 1***).[15] Even though the number of permit applications increased rapidly after the *Rapanos* decision, the total number of acres actually filled remained low.

11. NCDENR, DWQ, *State General Permit for Impacts to Isolated and Other Non-404 Jurisdictional Wetlands and Waters Permit Number: IWGP100000* (2008), available at http://portal.ncdenr.org/c/document_library/get_file?uuid=1fbe15bd-1aa9-4e68-a3a1-2be3580bb386&groupId=38364.

12. The threshold limits of allowable alteration or fill of wetlands within North Carolina's GP are slightly more stringent than the federal NWP requirements for § 404. Examples include NWP 29 - Residential Developments, NWP 39 - Commercial and Institutional Developments, and NWP 40 - Agricultural Activities allowing one half acre in non-tidal wetlands; NWP 14 - Linear Transportation Projects allowing one-half acre in non-tidal wetlands and one-third acre in tidal wetlands; and NWP 12 - Utility Line Activities allowing one-half acre in tidal or non-tidal wetlands.

13. See the full text of the permit for all thresholds and conditions; NCDENR, DWQ, *State General Permit for Impacts to Isolated and Other Non-404 Jurisdictional Wetlands and Waters Permit Number: IWGP100000* (2008), available at http://portal.ncdenr.org/c/document_library/get_file?uuid=1fbe15bd-1aa9-4e68-a3a1-2be3580bb386&groupId=38364. The current permit may be revised to lower the threshold east of Interstate 95 from 0.33 to 0.10 acres.

14. 15A N.C. Admin. Code 02H .1305(2010).

15. NCDENR, DWQ staff provided data retrieved from the Basinwide Information Management System from October 2001 through December 2011. The Excel sheet containing the data is available from the North Carolina Coastal Resources Law, Planning and Policy Center.

In fact, the highest number of permitted altered isolated wetlands acres (13) was in 2005, a year before the *Rapanos* decision (see ***Figure 2***). Approximately one-half of the impacted isolated wetlands were located in coastal counties. Of the 71 acres statewide, approximately 30 acres were located in the coastal counties. The authorized isolated impacts in the coastal counties ranged from a low of 0.0007 acres to a high of 1.58 acres. It also appears that in a number of cases, a single project required multiple permits. For example, in 2011, one Carteret County development received seven permits that authorized impacts ranging from 0.002 to 0.29 acres.

## Conclusions

During the mid-2000s when permit applications to alter or fill both jurisdictional and non-jurisdictional wetlands sharply increased, there was a development boom (see ***Figure 1***). The number of applications decreased significantly in 2008, likely due to the nationwide financial crisis. Therefore, the increase in state permit applications after *Rapanos* in 2006 and 2007 may have been attributable either to the state regulating activities in isolated wetlands that were previously regulated by the federal government, or the increased development activities correlating to prosperous economic times, or both.

The data suggest that there were numerous applications to fill smaller wetland areas. A number of factors may account for this trend. Smaller impacts to wetland areas do not require a public notice and comment procedure, are typically more easily ushered through the permitting process, and require less or no mitigation. Ultimately, the cost of permitting a smaller area of impact is a less expensive option for developers.

Based on available data, it would appear that the amount of isolated freshwater acreage being lost to development or other activities is relatively small. However, one must remain concerned that this simply may be a reflection of the current downturn in coastal development. Most isolated freshwater wetlands lie within the inner coast. The real test of the adequacy of the state's isolated wetlands program will come when the economy is more robust and interest in development along the inner coast returns. Then, we will see whether we have a true wetlands protection program or only an orderly, managed wetlands destruction program.

### Save the Date: Shape of the Coast

Mark your calendars for the 2013 Shape of the Coast, scheduled for Feb. 8, 2013, from 8 a.m. to noon at the William and Ida Friday Center for Continuing Education in Chapel Hill. This event will be a part of the UNC School of Law's Festival of Learning. Visit *www.nccoastallaw.org* or *www.ncseagrant.org* for more information.

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