

# Looking to Local Law: Can Local Ordinances Help Protect Isolated Wetlands?

*If federal regulatory agencies say that Clean Water Act protection no longer extends to certain isolated wetlands, and state legislatures delay in passing laws to “fill the gap,” perhaps environmental advocates need to fight for wetland protections on new fronts, such as city halls, county municipal buildings, and township offices.*

BY KIM DIANA CONNOLLY

For more than three decades, wetland regulation has been viewed primarily as the province of the federal government. Although no single, comprehensive federal law exists to protect wetlands, the 1972 passage of what has come to be known as the Clean Water Act has yielded a complex federal regulatory web governing many activities in wetlands.<sup>1</sup> Yet since key strands in this web were stretched or broken as a result of the 2001 U.S. Supreme Court decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (the SWANCC decision),<sup>2</sup> other regulatory avenues have become more attractive. One much-discussed avenue has been state wetland regulation.<sup>3</sup> However, in the four years since the Supreme Court handed down the SWANCC decision, only a few states have passed new wetland legislation or updated regulations. Local wetland regulation—another viable avenue for defending areas left unprotected by the decision—has received significantly less attention.

The SWANCC decision arose because the U.S. Army Corps of Engineers asserted federal jurisdiction over certain intrastate ponds in Illinois used as habitat by more than 121 species of migratory birds but without any additional significant hydrological or ecological connection to other waters. SWANCC, a consortium of suburban Chicago municipalities, sought to develop a solid waste disposal site on a 533-acre parcel previously mined for sand and gravel. The area had reverted to a successional-stage forest containing seasonal and permanent ponds. When the Corps denied SWANCC a permit, the resulting challenge led to a Supreme Court opinion holding that it was beyond the Corps' authority, as granted by Congress pursuant to the Clean Water Act, to assert jurisdiction over waters on the sole basis of the waters' use or potential use by migratory birds.

While careful reading and analysis makes clear that this decision was a narrow one, confusion arose because of the Corps' long history of heavy reliance on the presence of migratory birds to assert Clean Water Act jurisdiction, coupled with uproar about dicta in the SWANCC decision that raised concern over the Court's view of the scope of the Clean Water Act. In 2003 the Corps and the Environmental

Protection Agency issued guidance to field officers that could be read as broadly interpreting the decision.<sup>4</sup> In many Corps districts, this guidance resulted in a substantial decrease in the numbers of wetlands and other waters the agencies are now regulating.

Local regulation of wetlands is not a new concept. Land-use regulation has traditionally been the responsibility of local governments, and regulation of activities in wetlands is not an unusual part of a local land-use system. In fact, the opinion in the SWANCC decision noted that “[p]ermitting respondents to claim federal jurisdiction [of the local ponds at issue] . . . would result in a significant impingement of the States' traditional and primary power over land and water use. . . . ‘Regulation of land use [is] a function traditionally performed by local governments.’”<sup>5</sup> (Oddly, in the next sentence, the Court seems to interpret “local” as meaning state-level regulation: “[r]ather than expressing a desire to readjust the federal-state balance in this manner, Congress chose to ‘recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources . . .’”<sup>6</sup> However, the quote in the Court's statement regarding local government cites to a Supreme Court opinion, *Hess v. Port Authority Trans-Hudson Corporation*, that seems to use the term “local” government to mean counties, municipalities, and the like.<sup>7</sup>)

Some local governments have adopted ordinances dedicated specifically to wetland protection, while others have developed buffer, riparian, or other land-protection ordinances, or zoning restrictions or master planning efforts that include wetland protection. Some local wetland protections even are required by state law, like in Wisconsin, where the state requires counties, cities, and villages to implement certain wetland-protective measures.<sup>8</sup> Local units of government in Wisconsin must adopt, administer, and enforce compliant zoning ordinances for lands within 1,000 feet of the ordinary high water mark of wetland areas located near lakes and streams.<sup>9</sup> Some local governments, like those in Minnesota, are integral players in state-based wetland protections.<sup>10</sup> Under the Minnesota Wetland Conservation Act, local government units (typically the city or county, but sometimes another entity such as a watershed district or soil and water conservation district) have primary responsibility for administering the act.<sup>11</sup> Yet in the context of “responding” to the

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SWANCC decision, many of these ordinances either predate the holding or deal with very narrow issues that do not always entirely “fill the gap” in isolated wetland protections that the holding produced. A comprehensive movement to update existing local ordinances or enact new ones has not yet been fully explored as part of the debate over appropriate responses to the SWANCC decision.

### Why Local Regulation?

In this discussion, it is important to acknowledge that the wetland regulatory schemes governed by section 404 of the Clean Water Act or by various state laws generate significant, and sometimes vicious, debate. Why, therefore, would any sane local government official voluntarily step into the midst of a constant battle among representatives of the conservation community, the property rights community, the development community, and federal and state regulators? Moreover, why would local governments without current wetland protections

governmental regulation and the extent to which the government’s action interferes with the reasonable, investment-backed expectations of the property owner. A thorough review of the caselaw demonstrates that most governmental actions necessary to provide important environmental protection generally will not constitute a compensable taking.<sup>16</sup> Yet occasionally a taking is found in extreme circumstances, such as the 2003 *Friedenburg v. New York State Department of Environmental Conservation* ruling, where the court held that a local governmental taking was compensable after finding that the value of land held since before passage of a local law declined by more than 95 percent following the law’s passage.<sup>17</sup>

Consideration of local wetland regulation also must examine whether another law preempts the local government from issuing a law. Law is generally applied hierarchically, and sometimes federal law, as the law of the nation, will override state or local law under the supremacy clause of the Constitution, especially if the federal law is

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not view the addition of a local wetland law as further overburdening local governance systems already truly strapped for resources?

In fact, local governments have many reasons to protect wetlands, especially if these wetlands currently are unprotected by state or federal law. Wetland functions contribute to the health, safety, and welfare of the local citizenry. Protected wetlands can minimize flooding and erosion, enhance groundwater quality and recharge groundwater sources, safeguard surface water quality by trapping sediments and pollutants, provide habitat for wildlife and natural crops and timber for humans, and offer open space and recreational and educational opportunities.<sup>12</sup> Furthermore, wetland protection ordinances can be valuable public relations tools; in 1998, a poll by the National Audubon Society showed that a large majority of Americans—roughly 82 percent—supports wetland protection over development.<sup>13</sup>

### Takings and Preemption Concerns

Any consideration of local wetland regulation must acknowledge the specter of regulatory takings. The Fifth Amendment to the U.S. Constitution states in part that “private property [shall not] be taken for public use, without just compensation.”<sup>14</sup> The relevant question in this context is: When does an otherwise lawful regulation of land use become a compensable taking?<sup>15</sup> Many cases and much scholarship have been dedicated to regulatory takings claims, and a thorough evaluation is beyond the scope of this brief article. Briefly, regulatory takings cases see courts generally applying a balancing test to examine the character of the government’s action and its effect on the property’s economic value. The courts look at the nature and importance of the

pervasive, there are certain federal interests at stake, or other laws might frustrate federal goals.<sup>18</sup> Generally, on the federal level, congressional passage of Clean Water Act section 404 has not “occupied the field,”<sup>19</sup> and accordingly, most local wetland laws are not preempted. However, if a local government wanted to pass a local law that conflicted with the Clean Water Act (such as “no development by a county entity shall require a section 404 permit”), then such a law would be preempted. Likewise, if state legislation made a proposed local wetland regulation impermissible or the local regulation was in conflict with state legislation, the local regulation might not be allowed. But because local governments are created and regulated by the states, there are 50 different legal and political situations and thus 50 different policies when it comes to the issue of how much power should be delegated to local governments (a concept often referred to as “home rule”<sup>20</sup>). It is thus difficult to generalize when it comes to preemption issues on a state level.

### Advantages and Challenges of Local Action

Even if a local government was not interested in comprehensive wetland regulation, it might choose to enact a law promoting wetland stewardship to stem some wetland losses. Such a law could include suggested management practices to protect wetlands; recommended habitat facilitation techniques such as nesting boxes, platforms, and limits on fencing; tips on establishing and maintaining buffers and greenbelts and enhancing adjacent upland habitat; suggested methods of stormwater runoff control and septic system control; recommended methods for wise use of fertilizers and pesticides; plans for dock and

pier installation to minimize impacts; suggested pest control; encouragement for conservation easements and other voluntary measures; and other stewardship options appropriate to the locality.

But the sad fact is that such optional methods will have a limited ability to stem the continuing tide of wetland losses following the SWANCC decision. State responses have been slow in coming. The prospects for a federal fix seem remote at best: federal agency-based efforts to reexamine the regulatory language interpreting the scope of Clean Water Act jurisdiction were called off in 2003, and federal legislative efforts, including the Clean Water Authority Restoration Act of 2003 and the Federal Wetlands Jurisdiction Act of 2004, have stalled.<sup>21</sup> Thus, it may be time to consider the ability of local governments to be key players in comprehensive wetland protection.

Wetland regulation on a local level can offer advantages, including:

- Diverse protection capabilities, such as water management, land use, and zoning authorities;
- Interconnection with other environmental protection efforts and local programs, such as floodplain and stormwater regulation, wildlife corridor establishment, greenway planning, and forms of riparian protection;
- Prioritization and specific designation of protection areas;
- Landscape-scale consideration of wetland functions and values, allowing prioritization of protection and restoration efforts; and
- Ability to use planning rather than permitting mechanisms for wetland protection.

However, local regulation of wetlands is not a perfect cure for the gap left by the SWANCC decision. Assuming that a local government wants to consider enacting local wetland regulation, and putting aside concerns over takings and preemption, other, more practical limitations might hinder protection efforts. For example, wetlands often cross local government boundaries, and activities in one jurisdiction may affect wetlands in another jurisdiction in the same watershed, making regulation by one entity somewhat difficult. At the same time, economic and other resources for drafting, implementing, and enforcing such laws may be limited at the local level, and local politics can interfere with larger protection goals.

Local laws present their own problems, and the variables in state requirements and local realities makes it nearly impossible to create a single model local ordinance, applicable nationwide. (However, a few states, including Indiana, New York, and Michigan, do have local model ordinances available, sometimes written by government officials and more often written by private entities.<sup>22</sup>) This variability adds a significant drafting burden to the implementation and enforcement requirements that local governments would face. Likewise, relying on local laws presents the danger of lax regulatory schemes that would encourage race-to-the-bottom scenarios, or “unique” local politics that could engender questionable laws.

Furthermore, local laws can be attacked by stakeholders on both sides of the post-SWANCC debate as inappropriate, inefficient, piecemeal, and a way of avoiding a better, more comprehensive “fix.” Indeed, federal amendments to section 404 of the Clean Water Act or comprehensive state-level responses would offer far better protection

for the nation’s isolated wetlands. Yet given the lack of progress in these areas in the more than four years since the SWANCC ruling was issued, local laws may present a viable interim response to current circumstances. It is time they became part of the discourse. ■

#### REFERENCES

- <sup>1</sup> 33 U.S.C. § 1344 (2000).
- <sup>2</sup> 531 U.S. 159 (2001).
- <sup>3</sup> See generally JON KUSLER, ASSOCIATION OF STATE WETLAND MANAGERS, THE SWANCC DECISION: STATE REGULATION OF WETLANDS TO FILL THE GAP (2004), available at <http://www.aswm.org/fwp/swancc/aswm-int.pdf>.
- <sup>4</sup> *Advanced Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of “Waters of the United States,”* Appendix A, Joint Memorandum, 68 Fed. Reg. 1995 (Jan. 15, 2003), available at <http://www.epa.gov/owow/wetlands/pdf/ANPRM-FR.pdf> (last visited Mar. 14, 2005).]
- <sup>5</sup> 531 U.S. at 174.
- <sup>6</sup> 33 U.S.C. § 1251(b).
- <sup>7</sup> 513 U.S. 30 (1994).
- <sup>8</sup> See, e.g., WIS. ADMIN. CODE, NR 115 (for counties) and 117 (for cities and villages), available at <http://www.legis.state.wi.us/rsb/code/nr/nr100.html> (last visited Mar. 1, 2005).
- <sup>9</sup> Wisconsin Department of Natural Resource, *Shoreland-Wetland Zoning Standards*, at <http://www.dnr.state.wi.us/org/water/wm/dsfm/shore/slwstandards.htm> (last visited Mar. 10, 2005).
- <sup>10</sup> See, e.g., Minnesota Wetland Conservation Act, Minn. Stat. ch. 8240, available at <http://www.bwsr.state.mn.us/wetlands/wca/chapter8420.pdf>.
- <sup>11</sup> Minnesota Board of Water and Soil Resources, *The Minnesota Wetland Conservation Act Manual: A Comprehensive Implementation Guide to Minnesota’s Wetland Law* (Version 1.3, Sept. 2004), available at <http://www.bwsr.state.mn.us/wetlands/wcmanual/wcmanual02.pdf> (last visited Mar. 10, 2005).
- <sup>12</sup> For a good general overview on wetland functions and values, see William S. Sipple, U.S. Environmental Protection Agency, *Wetland Functions and Values*, at <http://www.epa.gov/watertrain/wetlands> (last updated Aug. 18, 2003).
- <sup>13</sup> See, e.g., National Audubon Society, *82% Of U.S. Voters Support Wetland Protection*, at <http://www.audubon.org/campaign/wetland/voters.html> (last updated Jan. 5, 1999).
- <sup>14</sup> U.S. CONST. amend. V.
- <sup>15</sup> See generally, Robert Meltz, Congressional Research Service, *Wetlands Regulation and the Law of Property Rights “Takings”* (2000), available at <http://www.nconline.org/nle/crsreports/wetlands/wet-6.cfm?&CFID=19296350&CFTOKEN=84186688>.
- <sup>16</sup> 767 N.Y.S.2d 451 (N.Y. App. Div. 2003).
- <sup>17</sup> U.S. CONST. art. VI, § 2.
- <sup>18</sup> *Pennsylvania v. Nelson*, 350 U.S. 497, 502–04 (1956).
- <sup>19</sup> For a brief but good description of the concept of “home rule” as well as links to more detailed sources, see National League of Cities, *About Cities: Home Rule*, at [http://www.nlc.org/about\\_cities/cities\\_101/153.cfm](http://www.nlc.org/about_cities/cities_101/153.cfm) (last visited Mar. 1, 2005).
- <sup>20</sup> *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Brotherton v. N.Y. State Dep’t of Envtl. Conservation*, 675 N.Y.S.2d 121 (N.Y. App. Div. 1998); *Volkema v. Dep’t of Natural Res.*, 542 N.W.2d 282 (Mich. Ct. App. 1995), *aff’d*, 586 N.W.2d 231 (Mich. 1998), *cert. denied*, 525 U.S. 1040 (1998); *Alegria v. Keeney*, 687 A.2d 1249 (R.I. 1997); *Gazza v. N.Y. State Dep’t of Envtl. Conservation*, 679 N.E.2d 1035 (N.Y. 1997), *cert. denied*, 522 U.S. 813 (1997); *FIC Homes of Blackstone, Inc. v. Conservation Comm’n of Blackstone*, 673 N.E.2d 61 (Mass. App. Ct. 1996), *rev. denied*, 676 N.E.2d 55 (Mass. 1997); *Zealy v. City of Waukesha*, 548 N.W.2d 528 (Wis. 1996); and *Mock v. Dep’t of Envtl. Res.*, 623 A.2d 940 (Pa. Commw. Ct. 1993), *aff’d*, 667 A.2d 212 (Pa. 1995), *cert. denied*, 517 U.S. 1216 (1996), *but see* *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).
- <sup>21</sup> U.S. Environmental Protection Agency, *Clean Water Act Definition of “Waters of the United States,”* at <http://www.epa.gov/owow/wetlands/guidance/SWANCC/index.html> (last updated July 13, 2004); see also Clean Water Authority Restoration Act of 2003, introduced as S. 473 and H.R. 962, 108<sup>th</sup> Cong. (2003), and the Federal Wetlands Jurisdiction Act of 2004, H.R. 4843, 108<sup>th</sup> Cong. (2004).
- <sup>22</sup> See, e.g., *A Model Wetlands Ordinance for Indiana Communities*, at <http://www.angelfire.com/in4/earthpages/indianawetlands.html> (last visited Mar. 1, 2005); *Model Ordinance for Wetland, Waterbody, and Watercourse Protection Summary* (New York), at <http://www.dcemc.org/wetlandordinance.htm> (last visited Mar. 1, 2005); *Wetland Stewardship for Local Governments: Model Wetland Ordinance* (Michigan), at <http://www.crcw.org/programs/watershedmgmt/scwetlands/modelwetlandord.html> (last updated June 1, 2004).