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Subject: Attention Docket ID NO. A-2002-04

Please find attached the comments of the State of Idaho to the
above-referenced docket number.

Thank you for your attention to this matter.

<<dk.SWANCC.041303.final.doc>>

Dirk Kempthorne
Governor

April 16, 2003

VIA ELECTRONIC FILING

The Honorable Christine Todd Whitman
Administrator
Environmental Protection Agency
c/o Water Docket
Mailcode 4101T
1200 Pennsylvania Ave., N.W.
Washington, DC 20460

Re: Docket ID No. OW-2002-0050
Advance Notice of Proposed Rule Making on the Clean Water Act Definitio
on
of "Waters of the United States"
68 Fed. Reg. 1991 (Jan. 15, 2003) and 68 Fed. Reg. 9613 (Feb. 28, 2003
)

Dear Administrator Whitman:

The State of Idaho hereby submits the following comments on the Advance Notice of
Proposed
Rule Making (ANPRM), 68 Fed. Reg. 1991 (Jan 15, 2003), and 68 Fed. Reg. 9613 (Fe
b. 28,
2003)(extension of comment deadline to April 16, 2003), on the following issues
as posed by the
United States Environmental Protection Agency and the United States Army Corps o
f Engineers:

1. Whether, and, if so, under what circumstances, the factors listed in
33 CFR [§
§]328.3(a)(3)(i)-(iii) (i.e., use of the water by interstate or foreign trave
lers for
recreational or other purposes, the presence of fish or shellfish that coul
d be taken and
sold in interstate commerce, the use of the water for industrial purposes b
y industries in
interstate commerce) or any other factors provide a basis for determining C
WA
jurisdiction over isolated, intrastate, non- navigable waters?
2. Whether the regulations should define "isolated waters," and if so,
what factors should be
considered in determining whether a water is or is not isolated for jurisdic
tional
purposes?

I. Introduction

- A. Overview of Regulatory Infrastructure

1. Brief Overview of the Clean Water Act

The Clean Water Act (CWA or Act), was intended to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Federal authority to regulate waters of the United States under the CWA stems from the Commerce Clause of the Constitution and extends to "all waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce " See 33 C.F.R. § 328.3(a)(1).

Section 404 of the CWA defines "waters of the United States" in detail, based primarily on interstate or foreign commerce connections (which can include use by interstate or foreign travelers for recreation, among other things). Existing section 404 regulations include as waters of the United States "all other 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 ." 33 C.F.R. § 328.3(a)(3).

B. Overview of the SWANCC Decision

1. Facts

In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001), (SWANCC), a consortium of 23 suburban Chicago cities and villages developed plans for a disposal site for baled nonhazardous solid waste. The location for the site was an abandoned sand and gravel pit operation between Cook and Kane counties in Illinois.

Before operations could begin, the consortium, SWANCC, had to secure numerous county and state permits. During this process, SWANCC contacted the Corps to determine whether a federal landfill permit was necessary since the operation included filling some permanent and seasonal ponds. The Corps initially determined that it lacked jurisdiction under §404(a) of the Clean Water Act, which grants the Corps "the authority to issue permits 'for the discharge of dredge or fill material into navigable waters at specified disposal sites.'" 33 U.S.C. § 1344(a).

The Northern Illinois Nature Preserves Commission informed the Corps that a number of migratory birds frequently occupied the site. The Corps reversed its previous jurisdiction decision and asserted jurisdiction under the "Migratory Bird Rule" (MBR) an attempt by the Corps to clarify the actual reach of 404(a) jurisdiction to include waters that "are or would be used as habitat by other migratory birds which cross state lines." The formal decision by the Corps determined that the seasonally ponded, abandoned gravel mining depressions located on

the project site, while not wetlands, did qualify as "waters of the United States."

The Corps refused to issue a section 404(a) permit, after determining jurisdiction, despite the fact that SWANCC secured the required water quality certification from the Illinois Environmental Protection Agency. The Corps maintained that SWANCC had not established its proposal as the least environmentally damaging, most practicable alternative for disposal of nonhazardous solid waste; that SWANCC's failure to set aside sufficient funds to remediate leaks posed an unacceptable risk to the public's drinking water supply; and that the impact of the project upon area-sensitive species was unmitigatable since a landfill surface cannot be redeveloped into a forested habitat.

On appeal, the Seventh Circuit Court of Appeals analyzed the constitutional question, holding that Congress has the authority to regulate such waters based upon "the cumulative impact doctrine, under which a single activity that itself has no discernible effect on interstate commerce may still be regulated if the aggregate effect of that class of activity has a substantial impact on interstate commerce." 191 F.3d 845, 850 (7th Cir. 1999).

The Court of Appeals then turned to the regulatory question and held that the CWA reaches as many waters as the Commerce Clause allows and, relying on an earlier Commerce Clause ruling, it therefore followed that respondents' "Migratory Bird Rule" was a reasonable interpretation of the Act. See *id.* at 851-52.

2. The Decision in SWANCC

The Supreme Court, in granting certiorari, discussed the contours of the CWA, including the Corps' expansive jurisdictional view that section 404(a) extends to waters that "are or would be used as habitat by other migratory birds which cross state lines" under the MBR. The Court concluded that the Migratory Bird Rule was not fairly supported by the CWA.

The Supreme Court refused to follow the Corps expansive interpretation of its jurisdiction under section 404(a) the Clean Water Act. The articulated issue before the Court was "whether the provisions of section 404(a) may be fairly extended to [an abandoned sand and gravel pit in Northern Illinois which provided habitat for migratory birds], and, if so, whether Congress could exercise such authority consistent with the Commerce Clause." *Id.* at 162. The Supreme Court answered that the Clean Water Act could not be so expanded.

The SWANCC decision thus eliminates CWA jurisdiction over isolated waters that are intrastate and non-navigable where the sole basis for asserting CWA jurisdiction is the actual or potential use of the waters as habitat for migratory birds that cross state lines in their migration patterns.

II. Comments

A. The Importance of Isolated Waters

1. Why Are Isolated Waters Important?

In arid and semi-arid regions, isolated waters provide fresh water oases for wildlife and function as stepping stones for migrating waterfowl, shorebirds and song birds. Isolated waters are found throughout Idaho from small desert pools and springs to forest ponds and wet meadows to subalpine lakes.

Isolated waters are important for the same reasons that other wetlands are important - because they provide crucial habitat for many fishes, wildlife and plant species. Wetlands are important for water quality renovation, flood water storage, shoreline stabilization, sediment retention, and as vital habitat for numerous fish, wildlife and plant species. Some isolated waters are especially important breeding habitats for amphibians and continental waterfowl populations.

2. What is a "Jurisdictional Wetland?"

Currently, for purposes of jurisdiction under section 404 of the CWA, an area must meet all three parameters used to define a wetland to be considered a wetland. These include (1) presence of wetland vegetation, (2) presence of wetland soils, and (3) wetland hydrology. 33 C.F.R. § 328.3(b). There is no official lower size threshold for jurisdiction (i.e., all wetlands that meet the three parameters may be considered). For practical purposes, the Corps in Idaho uses 20 feet in diameter as a minimum size if the wetland is surrounded by upland or agricultural lands.

If a number of smaller wetlands were found in a mosaic with other types of land (upland or agricultural land, for example) then the mosaic could be considered for jurisdictional purposes even if the individual wetlands were smaller than 20 feet in diameter. Under current guidelines (post-SWANCC), recommendations from the Corps field offices go to the District office for review before the Corps asserts jurisdiction over isolated wetlands.

B. The Idaho Perspective on the SWANCC Issues

1. The Idaho Department of Environmental Quality

The Idaho Legislature has provided to the Idaho Department of Environmental Quality (IDEQ) broad authority to develop a system to safeguard the quality of the waters of the state, including authority to adopt and enforce rules relating to the discharge of effluent into the waters of the state, and to adopt and enforce state water quality standards that designate uses and provide criteria to protect those uses. Idaho Code § 39-105(e); §§ 39-3601 - 39-3624.

In providing this authority to the IDEQ, the state legislature very broadly defined "waters or water body" to mean "all accumulations of surface water, natural and artificial, public and private, or parts thereof which are wholly or partially within, flow through or border upon this state." Idaho Code § 39-3602(28). See also Idaho Code § 39-103(16) (defining "water" almost identically).

While providing IDEQ authority to regulate water quality with respect to a very broad definition of waters of the state, the Legislature also expressed the intent for DEQ to fully meet the goals and requirements of the federal Clean Water Act, but through rules not impose requirements beyond those of the federal Clean Water Act. It is unclear, in light of the legislative definition of "waters," whether this provision in state law limits IDEQ to regulating only those waters that are regulated under the CWA.

If this provision does limit IDEQ to regulating only within the limits of federal jurisdiction under the CWA, the SWANCC decision and its progeny, as well as any federal rulemaking that defines CWA jurisdiction, will control the scope of Idaho's water quality authority.

2. The Idaho Department of Fish and Game

The Idaho Department of Fish and Game (IDFG) has no statutory authority to regulate wetlands or the CWA.

However, IDFG personnel review stream alteration permits and section 404 permit applications, including field inspections, and provide recommendations to the regulatory agency on permit terms and conditions. Although IDFG's recommendations are not binding, they often result in reduced impacts to wetlands and water quality. The SWANCC decision will not directly impact IDFG programs other than reducing the number of permit applications reviewed and may reduce some benefits to wildlife in Idaho.

3. The Idaho Department of Water Resources

Any resulting modifications to the Clean Water Act jurisdiction resulting from the U.S. Supreme Court's decision in SWANCC will not directly impact any of IDWR's programs.

Under Idaho's Stream Channel Alteration Act, Idaho Code §§ 42-3801 - 42-3813, IDWR's jurisdiction is limited by the definition of "stream channel" which means "a natural watercourse of perceptible extent, with definite bed and banks, which confines and conducts continuously flowing water." Idaho Code § 42-3802(d). This definition would not be affected by a change in the definition of "waters of the United States" under the CWA.

The Waste Disposal and Injection Well program, Idaho Code §§ 42-3901 - 42-3919, administered by IDWR, requires the issuance of a permit to authorize the construction or use of

any waste disposal and injection well. The act defines "aquifer" to mean "any geologic formation that will yield water to a well in sufficient quantities to make production of water from the formation feasible for beneficial use, except when the water in such formation results solely from injection through a waste disposal and injection well." Idaho Code § 42-3902 (1). This program would not be affected by a change in the definition of "waters of the United States" under the CWA.

C. Question One:

Whether, and, if so, under what circumstances, the factors listed in 33 CFR 328.3(a)(3)(i)-(iii) (i.e., use of the water by interstate or foreign travelers for recreational or other purposes, the presence of fish or shellfish that could be taken and sold in interstate commerce, the use of the water for industrial purposes by industries in interstate commerce) or any other factors provide a basis for determining CWA jurisdiction over isolated, intrastate, non-navigable waters?

Some isolated waters provide important habitat and water sources for some species of fish and wildlife and associated recreation.

Migratory birds, particularly shorebirds and waterfowl, use isolated wetlands such as playa lakes as resting and feeding locations during migrations. Some isolated wetlands in Idaho are streams and contain sensitive species of fish, amphibians and in one case bull trout, a fish listed as threatened.

The factors contained in 33 CFR §§ 328.3(a)(3)(i)-(iii) could be an important indicator of appropriate federal jurisdiction under the Clean Water Act. The factors described in the present configuration cannot be summarily dismissed, but, as noted by one federal judge reviewing a CWA case who echoed the theme of SWANCC, "[t]he Commerce power as construed by the courts is indeed expansive, but not so expansive as to authorize regulation of puddles merely because a bird traveling interstate might decide to stop for a drink." *Hoffman Homes, Inc. v. U.S. Env'tl. Prot. Agency*, 999 F.2d 256, 263 (7th Cir. 1993) (Manion, J., concurring).

D. Question Two:

Whether the regulations should define "isolated waters," and if so, what factors should be considered in determining whether a water is or is not isolated for jurisdictional purposes?

The determination as to whether the regulations should define "isolated waters," and if so, the factors to be considered should be guided by the fact that Congress in enacting the CWA recognized "the primary responsibilities and rights of States to prevent, reduce

, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources ." 33 U.S.C. § 1251(b).

In light of Idaho's current regulatory mechanisms, Idaho recommends that the EPA and Corps adopt an appropriate regulatory interpretation of the SWANCC decision in determining jurisdictional wetlands. A definition of "isolated waters" is important because it will provide certainty to the public regarding what conduct is appropriate under the Clean Water Act.

The SWANCC decision dealt with placing of fill in an abandoned gravel and sand pit, a wetland that was clearly created as a result of man's activities. Any regulatory gloss to SWANCC should exclude from the CWA those isolated wetlands that result from man's purposeful or inadvertent activities, for example, gravel pits, constructed ponds, leakage from irrigation ditches or canals, water storage facilities or irrigation ditches, and aquifer recharge sites and wetlands created for treating irrigation return water. All naturally occurring isolated wetlands, streams, wet meadows and riparian areas should continue to receive protection and should be accommodated in the definition.

III. Conclusion

The U.S. Supreme Court decision in SWANCC specifically eliminated Clean Water Act jurisdiction over isolated, intrastate, non-navigable waters where the sole basis for asserting CWA jurisdiction is the actual or potential use of the waters as habitat for migratory birds that cross state lines.

While SWANCC and the subsequent federal court decisions raise significant issues regarding federal CWA jurisdiction, the CWA clearly recognizes the traditional authority of states to control sources of pollution and to plan the use and development of state land and water resources. 33 U.S.C. § 101(b).

Therefore, the CWA preserves to states the authority to adopt or enforce standards and limitations respecting discharges of pollutants or requirements respecting the control or abatement of pollution, as long as state effluent limitations or other limitations are no less stringent than those effective under the CWA. 33 U.S.C. § 1370. See also 33 USC § 1344(t) (preserving to states the authority to control the discharge of dredged or fill material in any portion of navigable waters within the jurisdiction of the state).

As discussed above, Idaho law arguably prohibits Idaho from regulating waters not regulated under the CWA.

If the federal agencies eliminate or narrow jurisdiction over certain water bodies

es or wetlands,
Idaho may be unable to step in and control water quality issues relating to all
of these bodies or
wetlands without an additional grant of authority from the Idaho Legislature.

Sincerely,

DIRK KEMPTHORNE
Governor

DK: lmb