



MISSOURI DEPARTMENT OF CONSERVATION

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JOHN D. HOSKINS, Director

February 28, 2003

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Water Docket
Environmental Protection Agency
Mailcode 4101T
1200 Pennsylvania Ave., NW
Washington, DC 20460

To Whom It May Concern:

RE: Docket ID No. OW-2002-0050
Advance Notice of Proposed Rulemaking (ANPRM) on the Clean Water Act
Regulatory Definition of "Waters of the United States"
Federal Register Volume 68, No. 10, Pages 1991-1998, January 15, 2003

Please find enclosed Missouri Department of Conservation comments on ANPRM published in *Federal Register*, January 15, 2003. ANPRM potentially redefines "waters of the United States," as identified in the Clean Water Act (CWA), as a result of U.S. Supreme Court decision, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (SWANCC).

The Department's state constitutional mandate is to protect and manage the fish, forest, and wildlife resources of the state. We serve the public, providing opportunity for all citizens to use, enjoy, and learn about fish, forest, and wildlife resources.

Our agency opposes any reduction or critical limitation in existing jurisdictional authority of the U.S. Army Corps of Engineers and U.S. Environmental Protection Agency that, in the balance and over time, affords protection to "waters of the United States," including fish and wildlife habitat in Missouri, under the Clean Water Act (CWA). Missourians deserve clean water, and clean water is central to the quality of life Missourians have come to expect in our state for drinking, bathing, swimming, fishing, and a wide range of outdoor recreation activities Missourians enjoy.

We are providing our economic- and ecologic-based comments in the enclosed document in support of these views.

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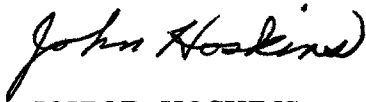
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Thank you for the opportunity to comment. If you have any questions about the enclosed comments, please contact Dr. Dan Witter at 573.751.4115, Extension 3348.

Sincerely,



JOHN D. HOSKINS
DIRECTOR

Enclosure

c/enc: Mr. Stephen Mahfood, Missouri Department of Natural Resources
Mr. Charlie Scott, U.S. Fish and Wildlife Service
Mr. James B. Gulliford, Environmental Protection Agency
Colonel Donald R. Curtis, Jr., Kansas City District, Corps of Engineers
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Colonel William J. Bayles, Rock Island District, Corps of Engineers
Colonel C. Kevin Williams, St. Louis District, Corps of Engineers
Ms. Jeanne Christie, Association of State Wetland Managers
Mr. Gary Taylor, International Association of Fish and Wildlife Agencies
Mr. David Conrad, National Wildlife Federation

MISSOURI DEPARTMENT OF CONSERVATION
Comments on Docket ID No. OW-2002-0050
Advance Notice of Proposed Rulemaking (ANPRM)
on the Clean Water Act
Regulatory Definition of "Waters of the United States"
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Comments are provided in response to:

***Federal Register* Volume 68, No. 10, Pages 1991-1998, January 15, 2003**

Background

On January 9, 2001, the Supreme Court handed down *Solid Waste Agency of Northern Cook County v. U. S. Army Corps of Engineers* (SWANCC). At issue was the scope of Section 404 of the Clean Water Act (CWA). SWANCC may be interpreted to bar Section 404 jurisdiction over isolated waters on any basis. Additionally, a January 19, 2001, joint memorandum from the U.S. Army Corps of Engineers (COE) and the U.S. Environmental Protection Agency (EPA) stated that federal implementation of any CWA provision that involves "waters of the United States" will be governed by the same interpretation that applies to section 404. Such sections include those: (1) governing oil spill cleanup (Section 311), (2) the National Pollutant Discharge Elimination System permit program (Section 402), and (3) state water quality certification (Section 401). Limitations to the jurisdictional authority of these sections would have sweeping effects on protection of water-related resources in Missouri, and ultimately, diminishment of fish and wildlife conservation.

Ecological Issues

Depending upon interpretation, the SWANCC decision could create a major gap in protection of our Nation's wetlands. Though the court's ruling is still subject to interpretation, the National Wildlife Federation estimates this decision might affect more than 20 percent of our nation's remaining wetlands, including most forested wetlands surrounded by uplands and most wetlands not having obvious direct surface water connections to open waters. First, these wetlands become vulnerable to draining and filling. Second, discharges of pollutants into these waters (Section 401 Water Quality Certification) become unregulated. Many wetlands recharge groundwater and/or have some connection to other waterways. Pollutant discharges can seriously contaminate surface and drinking water supplies and create human hazard.

Analysis of the court's decision by the Association of State Wetland Managers (ASWM), identified uncertainties about definition of key terms in the opinion (such as "adjacent" and "tributary") and whether terms will be broadly or narrowly defined. ASWM concludes that impacts are likely to be environmentally significant. Tentative state estimates provided by ASWM, in a congressional research report from The National Council for Science and the Environment (2001), bracket 30 percent to 79 percent of total wetland acreage that may be affected nationwide.

Additionally, a new report by Department of Interior's Fish and Wildlife Service estimates that between 1986 and 1997, a net of 644,000 acres of wetlands in the U.S. were lost. A 2001 memo from the ASWM states even if SWANCC results in only a one percent loss of America's wetlands, the decision could signal the destruction of more wetlands than were lost in the past decade.

In Missouri, a preliminary Geographic Information System analysis was conducted by the Department of Conservation using the National Wetland Inventory (NWI) wetland coverage. By selecting NWI polygons outside of a buffered area (perennial streams buffered by 50 feet), Department staff determined that approximately 660,000 acres (35%) of the 1,868,550 acres of wetlands in Missouri could be adversely affected. Major affected wetland types include wet meadows, river fringing wetlands along small nonnavigable rivers and streams, lake fringing wetlands for smaller nonnavigable lakes, many forested wetlands, old meander channels, oxbows, sloughs, fens, seeps and springs.

The ANPRM specifically requested information regarding the types, functions, and values of wetlands and other waters that may be affected.

1. The NWI wetland types (Cowardin *et al.* 1979) in Missouri outside of the buffered perennial stream area included palustrine scrub-shrub and unconsolidated bottom wetlands (264,564 ac), forested palustrine wetlands (213,855 ac), palustrine emergent wetlands (135,045 ac), lacustrine wetlands (40,546 ac), and palustrine aquatic bed wetlands (1,602 ac).
2. More than two-thirds of all Missouri wildlife species find at least one life requisite in wetlands or stream reaches potentially affected by the ANPRM. Impacts to fish and wildlife species through increased wetland habitat destruction could be extensive. Loss of 35 percent of Missouri's remaining wetlands would severely impact waterfowl populations and other water-dependant species. Other wildlife species will be directly affected through habitat loss or indirectly affected by decreased water quality since these "isolated" wetlands frequently filter pollutants from surface water that would otherwise flow into streams, lakes, and rivers.
3. Continued wetlands disturbance (e.g., drain and fill) could especially exacerbate water management problems such as water shortages on the Great Plains, which ultimately impact human uses of water, but fish and wildlife management as well. Because of the droughty conditions in the entire Missouri River basin over the last three years, flows of the Missouri River in Missouri are expected to remain at very low levels even throughout the spring when normal river rises can be expected. Lower river levels equate to a reduction in wetland areas seasonally inundated, given the impression that these "isolated waters" are not wetlands at all. In fact, these wetlands constitute an important part of our state's small remaining wetland complex.

Economic Issues

Missouri has approximately 110,700 miles of streams, of which almost 76,000 miles are designated as headwater or intermittent (1:100,000 scale National Hydrography Dataset, USGS), so proposed modification to the CWA could affect more than 69 percent of the streams in Missouri. These streams play a critical roll in everyday life, as 62.3 percent of Missourians get their drinking water from river and stream sources. Too, many headwater and intermittent streams have regulated sewage discharge permits associated with them for small and large cities as well as operations that concentrate domestic animals for feeding and processing.

Unarguably, a healthy network of headwater streams is a fundamental component of good river management. Furthermore, social research confirms that people enjoy having streams on or near their property, resulting in increased property, recreation, and aesthetic values.

Headwater streams encompass the network of small streams and drainages that blanket the landscape. Headwater streams can be ephemeral, intermittent, or perennial. Headwater streams are vital to overall water quality and the production of fish, amphibians, and invertebrates, important links in the stream food web that eventually undergirds fish and wildlife recreation and associated economics. Physical, chemical, and biological processes in the headwaters spread throughout the watershed. Channelization, urbanization, pollution events, and riparian forest fragmentation in the headwaters are magnified downstream as increased flooding, erosion of private and public lands, damage to bridges, roads, and utilities, diminished drinking water quality, and lower fishery and recreation potentials. The collective health and function of the primary stream network have influences on the quality and value of larger streams and rivers.

Fish and a myriad of other aquatic organisms colonize headwater streams because of abundant food, reduced predation from larger fish, and early spring spawning (the water is often warmer earlier in the spring). Temporary pools of headwater streams are used by amphibians and aquatic insects for eggs production and offspring development without predation by fish. Many of the aquatic species in Missouri that are federally threatened or endangered or are considered imperiled in the state because of rarity occur only in headwater or intermittent streams.

There is the widely used saying, "We all live downstream." Quite simply, healthy headwaters and clean streams figuratively and literally represent the foundation of a several billion dollar fishing, hunting, wildlife-viewing industry in Missouri, supporting tens of thousands of jobs, as estimated by the U.S. Census Bureau.

Concluding Remarks

It is important to not disappoint Missourians' hopes for a healthy outdoors; reducing existing jurisdictional authority would disappoint them.

In the report, *Growth in the Heartland: Challenges and Opportunities for Missouri* (The Brookings Institution Center on Urban and Metropolitan Policy, 2002), Missourians said they wanted pleasant neighborhoods, nearby jobs, and good schools but abundant green space and recreational areas for their families as well. Healthy streams and other waters in Missouri equate to healthy “green spaces” and support abundant fish and wildlife populations sought after by anglers and hunters.

Missourians are outdoor people. Most Missouri households have one or more participants who enjoy watching television or outdoor programs (92%), reading about nature and wildlife (84%), feeding birds and wildlife at home (77%), gardening (75%), using Conservation areas (67%), fishing (57%), canoeing and boating (48%), hunting (35%), target shooting (34%), or volunteering for conservation groups (16%). One Department program alone, Missouri STREAM TEAM, has over 2,000 teams statewide with over 30,000 volunteers. Just the stream cleanup and trash removal efforts of this enormous voluntary force exceed a \$2 million annual benefit.

Case law supporting continued oversight of jurisdictional wetlands is summarized in the Appendix (attached).

APPENDIX

PREVIOUS COURT PRECEDENTS BROADLY UPHOLD CWA JURISDICTION

Quite simply, the majority of previous court rulings have upheld what every Missourian demands, clean water, regardless of its source, and a healthy environment in which to live and raise a family.

In 1985, the Supreme Court sustained the assertion by the Corps and EPA that waters and wetlands adjacent to navigable waters, interstate waters, or their tributaries are "waters of the United States" and within the COE and EPA jurisdiction under provisions of the CWA. The question posed by the ANPRM is whether waters and wetlands not so adjacent - "isolated waters" - also are so covered. Such jurisdictional lines stand in contrast to the resource conservation perspective, which recognizes the ecological value of wetlands based on water quality and other physical functions that they perform, irrespective of whether the wetlands are isolated or contiguous to other waters.

United States v. Byrd, 609 F.2d 1204 (7th Cir. 1979): Corps could constitutionally exercise jurisdiction over a lake in Michigan, evidenced by: (1) the number of out-of-state visitors to the lake, (2) the value of the lake depended in part on the purity of the water for swimming, and the abundance of fish & other wildlife inhabiting it, and (3) by the importance of wetlands adjacent to the lake was sufficient to allow consideration under Section 404 of the CWA.

Hobbs v. United States, 947 F.2d 941, 22 Evtl. L. Rep. 20331 (4th Cir.): wetlands separated from other "waters of the United States" by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands" and thus waters of the United States.

United States v. Pozsgai, 999 F.2d 719 (3rd Cir. 1993): discharge into wetlands above headwaters which are adjacent to tributaries of waters used or usable in interstate commerce increase water pollution and affects interstate commerce.

United States v. Riverside Bayview Homes, 106 S.Ct. 455 (1985): in that wetlands may affect the water quality of adjacent water bodies by functioning as integral parts of the same aquatic environment. According to a 1995 National Research Council report, wetland functions occur irrespective of whether the wetlands are isolated or contiguous to navigable waters, because of groundwater connections between isolated wetlands and surface waters. Given Missouri's karst geology, the facts upheld by the court in *Riverside* are even more applicable. Small, shallow wetlands that are isolated from rivers are frequently important to waterfowl and