

STATE OF MISSOURI
DEPARTMENT OF NATURAL RESOURCES

Bob Holden, Governor • Stephen M. Mahfood, Director

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MAR - 4 2003

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Water Docket
Attention Docket ID No. OW-2002-0050
Environmental Protection Agency
Mail Code 4101T
1200 Pennsylvania Ave., NW
Washington, DC 20460

RE: Docket Identification Number (OW-2002-0050) Advanced Notice of Proposed Rulemaking Related to the Definition of "Isolated Waters" under the Clean Water Act.

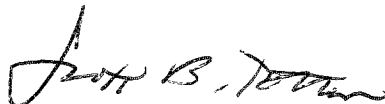
Dear Sirs:

Please find enclosed the Missouri Department of Natural Resources' comments regarding the questions posed in the Advanced Notice of Proposed Rulemaking (ANPRM) published in the January 15, 2003, edition of the Federal Register. The State of Missouri contains many thousands of acres of water resources, including streams, wetlands, and rivers. We are thus very concerned about any possible loss of jurisdiction over these waterbodies, as they provide revenue, wildlife habitat and aesthetic beauty for the enjoyment of all.

If you have any questions, please contact Scott Hamilton of this department at (573) 751-7428 or at Missouri Department of Natural Resources, Water Pollution Control Program, P. O. Box 176, Jefferson City, MO 65102-0176. Thank you.

Sincerely,

WATER PROTECTION & SOIL CONSERVATION



Scott B. Totten
Division Director

SBT:shd

Enclosures (4 copies)

c: John Hoskins, MDC *Integrity and excellence in all we do*

RE: docket identification number (OW-2002-0050) Advanced Notice of Proposed Rulemaking Related to the Definition of “Isolated Waters” under the Clean Water Act

Comments submitted by the Missouri Department of Natural Resources

These comments are in response to the requested public input on issues associated with the definition of “waters of the United States” as they relate to isolated waters. It is the understanding of the Missouri Department of Natural Resources (the department) that implementation of any Clean Water Act (CWA) provision (such as oil spill cleanups under Section 311 and the National Pollutant Discharge Elimination System under Section 402) that involves “waters of the United States” will be governed by the same interpretation that applies to Section 404. Any limitations to the jurisdictional authority of these sections could have devastating impacts to Missouri’s water resources.

The CWA was intended to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters” and was designed to improve upon the protection of the Nation’s waters provided under earlier statutory schemes. Because the CWA focuses on these factors, it is the belief of the department that these same factors should be the primary consideration in determining appropriate definition of “isolated waters.” Various correspondences have indicated that federal “jurisdictional waters” may be limited in the future to only navigable or perennial waterways and the wetlands adjacent to them. The comments herein are written in partial response to this possibility.

Implications for the State of Missouri

There are 25,590 Classified stream miles within Missouri, and 84,450 Unclassified stream miles within Missouri. Intermittent/ephemeral streams account for at least 84,450 stream miles, or at least 76% of all stream miles recorded. Missouri Department of Conservation staff determined that approximately 660,000 acres (35%) of the 1,868,550 acres of wetlands in Missouri could be adversely affected if the “isolation” threshold was determined as greater than 50 feet. The National Wetland Inventory (NWI) wetland types in Missouri outside of the buffered perennial stream area included palustrine scrub-shrub and unconsolidated bottom wetlands, forested palustrine wetlands, palustrine emergent wetlands, lacustrine wetlands, and palustrine aquatic bed wetlands.

The State of Missouri issues National Pollutant Discharge Elimination System (NPDES) permits for any discharge of pollutants into the “Waters of the State,” which has a much broader definition than the current definition of jurisdictional waters by the federal government. Approximately 82.5% of the state’s NPDES permits discharge to unclassified streams, which would fit into the category of “intermittent/ephemeral.” Similarly, the state’s 401 program issues the majority of its certifications upon activities discharging into non-perennial waterbodies. Though the NPDES program will not be directly impacted by narrowing of the definition of jurisdictional waters, the overwhelming majority of activities overseen by the 401 program will no longer be regulated.

Isolated Waters

“Isolation” should not be a function solely defined by surficial connection. In *United States v. Texas Pipeline Co.*, 611 F.2d 345 (10th Cir. 1979), it was decided that waters flowing even a small amount at the time of a spill, but which flow more during times of significant rainfall, were “navigable waters” within the meaning of the CWA, even if the stream was not discharging water continuously into a river navigable in the traditional sense. The court recognized the intent of CWA to cover all tributaries to Waters of the United States and it was irrelevant that at the time of the discharge the water was not flowing continuously. It is not only prior case law, but also common sense, that pollutants discharged into a waterway that is temporarily disconnected from other waters, will eventually contaminate the whole of the system.

In Missouri, “Waters of the State” includes all rivers, streams, lakes and other bodies of surface and subsurface water that are not entirely confined and located completely upon lands owned by an individual entity. Missouri is underlain with extremely karstic geology, which has produced an abundance of caves, sinkholes, losing streams, and other geologic features that have interaction with surface water. The state recognizes this interaction, as did the Corps in the preamble to their 1977 regulations, which stated “The regulation of activities that cause water pollution cannot rely on artificial lines but must focus on all waters that together form the entire aquatic system. Water moves in hydrologic cycles, and the pollution of this part of the aquatic system, regardless of whether it is above or below an ordinary high water mark, or mean high tide line, will affect the water quality of the other waters within that aquatic system.” All waters that are hydrologically connected influence the quality of water of the system as a whole.

Jurisdictional waters should remain all of the traditional navigable waters, all interstate waters, and all tributaries to navigable or interstate waters, upstream to the highest reaches of the tributary systems, and all wetlands adjacent to any and all of those waters. Existing guidance on defining the upper limits of stream jurisdiction should remain based upon morphological conditions; wetlands should be considered jurisdictional if they possess the requisite characteristics of a wetland and are connected via surface or ground water to navigable waters. Water is one of Missouri’s greatest commodities; it would be extremely imprudent to reduce the core protection of this resource.

Interstate Commerce

The ruling of *United States v. Pozsgai*, 999 F.2d 719 (3rd Cir. 1993) determined that a discharge into wetlands above headwaters adjacent to tributaries of waters used or usable in interstate commerce increase water pollution and affects interstate commerce. In the *United States v. Byrd*, 609 F.2d 1204 (7th Cir. 1979), the court ruled that the Army Corps of Engineers could constitutionally exercise jurisdiction over a lake in Michigan. The decision to allow consideration under Section 404 of the CWA was evidenced by the number of out-of-state visitors to the lake; that the value of the lake depended in part on the purity of the water for swimming or the abundance of fish and other wildlife inhabiting it; and by the importance of wetlands adjacent to the lake.

Tourism is important to Missouri, as 4.1% (an estimated \$8 billion) of the state's total economy is driven by visitor spending. In 2001, Missouri anglers' retail purchases of fishing-related items totaled \$832,776,355. Those purchases helped fund approximately 15,000 jobs in the state. These purchases also generated more than \$14,100,000 in state income tax and \$57,714,000 in federal income tax revenues. The revenue that Missouri generates from water-related tourism, such as floating, fishing, and duck-hunting, is dependent upon the quality of those waters, which are dependent upon the quality of connected wetlands and the intermittent headwaters that feed them. Similar to the *United States v. Byrd* case, interstate commerce, in the form of tourism dollars, is not dependent upon just one single waterbody, but is related to the intertwined network of waters that produce quality water and wildlife that attract tourism to our state.