

# STATE OF NEBRASKA



**Mike Johanns**  
Governor

April 11, 2003

## DEPARTMENT OF ENVIRONMENTAL QUALITY

**Michael J. Linder**

Director

Suite 400, The Atrium

1200 'N' Street

P.O. Box 98922

Lincoln, Nebraska 68509-8922

Phone (402) 471-2186

FAX (402) 471-2909

web site : [www.deq.state.ne.us](http://www.deq.state.ne.us)

Water Docket Staff  
Water Docket Mail Code 4101T  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue N.W.  
Washington, D.C. 20460

**APR 14 2003**

Attention: Docket ID No. OW-2002-0050

Dear Staff:

### COMMENTS ON ADVANCE NOTICE OF PROPOSED RULE MAKING ON THE CLEAN WATER ACT (CWA) REGULATORY DEFINITION OF WATERS OF THE UNITED STATES:

Thank you for giving us the opportunity to comment on the "Advance Notice Of Proposed Rule Making (ANPRM) on The Clean Water Act Regulatory Definition Of 'Waters Of The United States,'" dated January 10, 2003. The ANPRM addresses certain issues resulting from the 2001 U.S. Supreme Court decision in *Solid Waste Agency of Northern Cook County vs. U.S. Army Corps of Engineers (SWANCC)*. Comments were solicited on the questions of which, if any, public benefits of a water of the U.S. should continue to be valid bases for CWA jurisdiction, and whether the federal regulations should define the term "isolated waters." Comments were also invited concerning the possibility of limiting the extent of jurisdiction over headwaters to tributary streams. The Nebraska Department of Environmental Quality (NDEQ) does not believe it is necessary to move forward with rulemaking for the reasons provided in this letter.

NDEQ believes that the effect of this ANPRM would be to greatly limit the number of waters subject to federal jurisdiction, leaving these waters to be protected solely by states. In this time of staggering economic difficulties for the states, with the attendant restraints on personnel this burden would strain state resources and dramatically reduce our ability to protect the waters of the State. In the wake of at least two decades of governmental attempts to "get more bang for the water quality buck", this limitation would reverse that effort to unacceptably low levels, negating the original intent of the Clean Water Act.

Our comments on the major questions and issues solicited in the ANPRM follow:

### **Extent of potential losses in Nebraska**

Exact figures projecting expected extent of loss of regulatory oversight in Nebraska of wetlands and intermittent and lower-order streams are not available. However, using GIS and current data sets we have informed estimates, and according to those, the losses could be staggering.

The Nebraska Game and Parks Commission (NGPC) estimates that 40%, or almost 829,000 acres of isolated wetlands, would lose regulatory oversight if this Rule was implemented. In terms of numbers of individual wetlands, NGPC projects between 43% and 66% of wetlands overall would be non-jurisdictional in just three Nebraska wetlands complexes: The Sandhills, the Rainwater Basin, and the northeast region of the state.

The impact of removing protection from intermittent and ephemeral streams is even harder to measure than wetlands impacts, but is likely even more dramatic. Using data from the 1:100,000 National Hydrography Data set (NHD), NDEQ has prepared a map (attached) to illustrate the potential impacts. Perennial streams and rivers add up to around 17,860 miles. The same 1:100,000 NHD data projects about 58,440 miles as intermittent. These are streams with a defined bed and bank, through which water flows at some time during the year and are currently jurisdictional. Nebraska will be developing 1:24,000 NHDs, but based on preliminary work, it appears that NHD 1:100,000 underestimates the intermittent mileage by a factor of 2 to 3, averaged over the state.

As NHD collection and analysis continues, it is expected that many more miles of the intermittent and ephemeral streams will be identified. These lower-order streams are vital to the water quality of their receiving streams and rivers, to ground water recharge and discharge, to aquatic life and to the agricultural, municipal, industrial and recreational uses of downstream waterways and water bodies. Using the extremely conservative estimate of 58,440 miles of intermittent streams, this represents a potential 76% loss of regulatory oversight and protection for these critical waterways.

### **Public benefits of the waters affected**

The public benefits of the waters at issue in this ANPRM are numerous and well-documented. The Nebraska Game and Parks Commission has detailed the public benefits of Nebraska's wetlands in their letter commenting on this ANPRM, and we encourage study of their comments.

Among the most seriously impacted wetlands would be three complexes (the Rainwater Basin, the Central Platte River, and the Sandhills) that have significant international importance for migratory birds. However, Nebraska's wetlands in general provide numerous additional public benefits that have direct or indirect economic ties to interstate commerce. These benefits include attracting both in-state and out-of-state hunters, fishermen, and bird-watchers; threatened and endangered species; ground water recharge; and stream flow maintenance.

The majority of Nebraska citizens depend for both irrigation and drinking water on ground water, which is received from surface recharge and thus replenished and cleansed. The loss of this huge acreage of wetlands is not a loss to be allowed without serious forethought. Ground water recharge and concurrent natural water quality remediation are well-documented benefits from wetlands.

Agriculture is the mainstay of Nebraska's economy, with industry and tourism also pumping economic life throughout the state. Clean ground water is essential for irrigated agriculture, industry, and public drinking water health. Disregarding the benefits associated with wetlands, in essence removing them from the complex interconnected surface and ground water systems, would likely have negative impacts upon the state economy.

Impacts to drinking water are not limited to ground water, nor to the effects of removing jurisdiction from isolated wetlands. Ephemeral and intermittent streams, at the top of the watershed, are critically important to drinking water quality of rivers as well. Indeed, in some areas other federal programs have been invoked to protect and/or restore headwaters specifically to preserve drinking water quality downstream. For example, parts of the Little Blue River watershed in Nebraska have been prioritized for funding under the Conservation Reserve Enhancement Program (CREP) because some Kansas communities, including Kansas City, tap the Little Blue for drinking water. In this case, technically "isolated" wetlands within the Little Blue watershed, as well as ephemeral and intermittent streams, probably also figure strongly in water purification. Without solid CWA protection, impacts to drinking water downstream could prove serious and extremely costly.

**Increasing public confusion,  
weakening established interagency cooperation**

All waters in Nebraska are considered waters of the State, and NDEQ will continue to implement NDEQ programs, both federally-delegated and state law based, on these waters. Without federal jurisdiction, however, NDEQ's position is vulnerable. Implementation has always been greatly enhanced by consistency from federal-level, comparable regulations.

When federal and state regulatory agencies implement programs that have common legal grounds, it causes less confusion for landowners and developers. Through many years of all the Nebraska and federal regulatory and resource agencies (USACE, EPA, USFWS, NRCS, NGPC, NDEQ) working together in the 404 process and various associated projects (The Rainwater Basin ADID, the Eastern Saline Wetlands Assessment Team, the Hydrogeomorphic Manual development for the Rainwater Basin, to name just a few), an efficient and effective partnership has evolved. Applicants know they can come to the USACE first, and for the 404 issues anyway, need not be shunted from agency to agency to determine what requirements they face in trying to accomplish a project.

In addition, removing these waters from federal oversight would leave agricultural regulations such as CAFOs (Confined Animal Feeding Operations) and municipal and industrial NPDES permitting programs to the State. This could cause confusion about authorities and requirements, and potentially decrease the effectiveness of environmental protection.

### **Disregarding scientific understanding of wetlands and upper watershed public benefits**

When the Clean Water Act (CWA) was first enacted, there were good reasons to include all wetlands and intermittent streams within its scope. Subsequent years of regulatory experience has shown that, while it has been difficult to always achieve the aims of the CWA to perfection, at least there was some oversight of how these wetlands and waterways were impacted, and some ability to require mitigation for unavoidable impacts. In the years since 1972, scientific investigation has only added to the understanding of how important intermittent and ephemeral waters and wetlands are to the public interest on many fronts.

Recent studies indicate that activities in headwater and ephemeral streams are where problems begin and also where they are most economically and efficiently rectified. If we are to reach our clean water goals, we have to affect what happens at the top of the watershed in order to have a beneficial outcome on jurisdictional waters at the bottom of the watershed. Therefore NDEQ encourages USACE and EPA to frame any adjustments to the CWA using the broadest possible definition of "waters of the U.S." If we don't have the ability to control water quality in headwaters, we will never be able to achieve the stated goals of the CWA in those areas where there is no argument about jurisdiction.

### **Impacting other successful water quality programs**

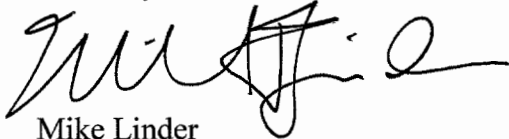
What will be the effect on volunteer incentive programs, in particular federal Section 319, if we lose federal jurisdiction over headwaters and their adjacent wetlands? It is unclear whether we will be able to apply those CWA funds in the newly non-jurisdictional waterways. Any rulemaking should take this into account and attempt to ensure that non-jurisdictional waters for regulatory purposes are still eligible for funding under Section 319 to solve water quality problems.

In sum, NDEQ is seriously concerned about the implications of this ANPRM upon State water quality, the health of surface waters, the public interest, the State's economy, and complementary water quality programs. We believe any attempt to limit the scope of jurisdiction beyond that expressly specified by the Supreme Court in SWANCC (e.g., the invalidation of the migratory bird rule) will have serious negative implications for water quality.

We do not believe, moreover, that it is necessary to move forward with rulemaking. We recognize that nationwide guidance is needed to define isolated waters where the migratory bird rule no longer brings a waterbody into federal jurisdiction. However, this ANPRM is an unnecessary action to solve a "problem" that doesn't exist. In Nebraska, we have worked hard over the years to achieve effective and efficient working relationships with the other resource and regulatory agencies, the public, and both business and agricultural entities. The system that has evolved in Nebraska to protect waters of the U.S. works now. The outcome of this ANPRM would add no benefit and only impair the progress we have worked so hard to attain.

NDEQ appreciates this opportunity to comment on this Advance Notice Public Rulemaking issue.

Sincerely,

A handwritten signature in black ink, appearing to read "Mike Linder", with a stylized flourish at the end.

Mike Linder  
Director

Cc: Leo Alderman, U.S. EPA, Region VII  
Katie Schenk, USACE, Omaha District