



State of New Mexico  
*Office of the Governor*

Bill Richardson  
*Governor*

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**To:** Environmental Protection Agency **Docket OW-2002-0050** regarding 33 C.F.R. §328.3

**From:**   
Bill Richardson, Governor

**Subject:** Comments in Response to the Advance Notice of Proposed Rulemaking Regarding the U.S. Supreme Court Decision in Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers et al. (SWANCC). No. 99-1178 Argued October 31, 2000 – Decided January 9, 2001.

**Date:** March 5, 2003

❖ **Executive Summary**

The January 2001 decision of the U.S. Supreme Court in the case of Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers et al. (SWANCC) limited the jurisdiction of the United States Army Corps of Engineers (Army Corps) under Section 404 of the federal Clean Water Act (CWA). The court ruled that the Migratory Bird Rule was insufficient as the sole basis for the Army Corps to exercise federal CWA jurisdiction over isolated, intrastate, non-navigable waters. The interpretation of this decision by the Army Corps and the Environmental Protection Agency (EPA) has significant implications for New Mexico, which has an abundance of isolated wetlands and intrastate closed basins.

Both the Albuquerque (Alb) and El Paso (EP) Districts of the Army Corps have interpreted SWANCC broadly in New Mexico by asserting that closed basins are no longer jurisdictional under Section 404 of the CWA. This interpretation threatens the health of rivers, streams, and wetlands within 20 percent of the land area of the state, including the Tularosa, Mimbres, Estancia, San Augustine and Salt Basins. Isolated wetlands, which are abundant in the eastern plains of New Mexico, are also threatened. Although some of these waters may be legitimately

exempted by SWANCC, the Army Corps interpretation exceeds the scope of the SWANCC decision.

Waters within the closed basins of New Mexico provide recreation and fishing for interstate and foreign travelers, as well as water for industry. Therefore the Surface Water Quality Bureau (SWQB) of the New Mexico Environment Department (NMED) maintains that people or agencies that propose projects in these waters should be required to prove that there is no basis for CWA jurisdiction before receiving an exemption from federal Clean Water Act regulation as a result of SWANCC.

### ❖ **Interpretations of SWANCC**

#### ➤ Army Corps (Broad) vs. EPA R6 and NMED (Narrow)

The Army Corps Districts and the U. S. Environmental Protection Agency Region 6 (EPA R6) have maintained differing interpretations of SWANCC in New Mexico. This has led to confusion for industries and citizens trying to comply with regulations, and for state agencies charged with protecting surface waters. The Albuquerque and El Paso Districts of the Army Corps have interpreted SWANCC broadly in New Mexico by extending it to exclude entire closed basins from CWA §404 jurisdiction. Only following a recent meeting with EPA R6 and the SWQB did the Army Corps (Alb) begin to solicit information on individual waters within closed basins to determine a nexus to interstate and foreign commerce on a project-specific basis. Alternatively, the EPA R6 and SWQB have promoted a narrow interpretation of the jurisdictional limits caused by SWANCC.

An inappropriately broad reading of SWANCC implies that the Army Corps only has CWA jurisdiction over waters that are either navigable in fact, or are connected to navigable waters. Most importantly, a broad reading would be contrary to the intent of Congress, which withheld the term “navigable” from Section 502(7) of the Clean Water Act. The Act’s legislative history also states that Section 502(7) was intended to “be given the broadest possible constitutional interpretation.” Further, a broad interpretation of SWANCC is inappropriate because it would result in continued inconsistency among the Army Corps’ regional offices in defining jurisdictional waters. A broad interpretation may encourage lower courts to invalidate other definitions of “waters of the United States”, which the Supreme Court avoided doing in SWANCC.

Under the narrow interpretation promoted by EPA R6 and NMED, the only waters that the Army Corps will no longer regulate as a result of SWANCC are those for which the sole basis of CWA jurisdiction is the presence of migratory birds. Under this interpretation the “Migratory Bird Rule” is invalidated but the other definitions of “waters of the United States” in 33 C.F.R. §328.3 still apply. To adequately protect surface water resources, NMED recommends that the Army Corps and EPA assert this narrow interpretation of the SWANCC decision in developing new rules regarding the scope of the Clean Water Act.

#### ➤ Additional Components of the “Migratory Bird Rule”: Endangered Species and Irrigated Crops

In addition to asserting migratory birds as indicators of interstate commerce, the regulatory preamble that became known as the “Migratory Bird Rule” (51 Fed. Reg. 41217) also included irrigated crops used in interstate commerce and the presence of endangered species as a basis for Clean Water Act jurisdiction. Although the court ruled against the migratory bird argument, the Court did not have before it the portions of the Migratory Bird Rule that deal with habitat for endangered species or irrigation of crops sold in interstate commerce (*SWANCC*, 531 U.S. 159 at 164: “...the Corps ultimately asserted jurisdiction over the balefill site pursuant to subpart (b) of the ‘Migratory Bird Rule.’”). Although the Court refers to the “Migratory Bird Rule” its comments have legal effect only over the portions of the rule dealing with migratory birds. The Court’s comments, if applied to the other aspects of the rule concerning endangered species and crops, should be recognized as dictum, or “expressions in court's opinion that go beyond the facts before the court and therefore are individual views of the author of opinion and not binding in subsequent cases” (Black's Law Dictionary, 1983). Those aspects were not argued and there was no evidence presented concerning them, so no conclusions can be drawn from the opinion regarding endangered species or crops. Therefore, CWA jurisdiction based on irrigated agriculture and endangered species habitat should be incorporated into a new rule.

The use of water to irrigate crops is of particular importance to the State of New Mexico. The perennial waters within the closed basins are used for irrigating crops used in interstate and foreign commerce. All perennial waters within closed basins are classified under the state water quality standards designated for uses such as irrigation and livestock watering. These waters need protection under the CWA to support the designated uses that are important to local communities along these drainages.

Although the Court ruled against the migratory bird argument, it did not rule out jurisdiction based on the presence of migratory birds in combination with other factors. Additional links to interstate commerce include the presence of mineral resources dependent on water quality such as salt from the Estancia Basin, potential use by interstate or foreign travelers for recreational or other purposes, and potential industrial use related to interstate commerce. While the mere presence of migratory birds is no longer a sole basis for jurisdiction, the potential use by interstate or foreign hunters and birdwatchers affects interstate and foreign commerce. Therefore, most intrastate isolated waters should retain protection under the CWA.

#### ➤ Definition of Isolated Waters

A clear definition of Isolated Waters is necessary to resolve differences in the interpretation of *SWANCC* between the Army Corps and EPA R6. The definition should define isolation in terms of hydrologic, topographic, and other environmental factors. The definition should include groundwater interactions, as discharges to “isolated” surface waters have the potential to contaminate groundwater.

A clear definition of isolated waters could resolve the discrepancy over basins isolated by a lack of water rather than physical boundaries. These basins include the North Plains and the Plains of San Augustine (see attached maps), which the Army Corps has asserted as isolated and non-jurisdictional, even though they are included in the Rio Grande Basin by the United States

Geological Survey Hydrologic Unit Code Map (Hydrologic Unit Map, 1974, U.S. Department of the Interior, Geological Survey).

### ❖ **Implications For New Mexico**

#### ➤ Effects of Limiting Jurisdiction in New Mexico

The SWANCC decision threatens to undermine the gains made through the federal Clean Water Act in protecting water quality in a significant portion of the state of New Mexico. If not for the requirement to obtain a 404 Permit and the associated 401 Water Quality Certification, many construction projects would not have included best management practices (BMPs) to minimize impacts to water quality. As a result of the Army Corps' broad interpretation of the SWANCC decision, construction projects in a large portion of the state are no longer required to implement BMPs such as installing silt fence, reseeding disturbed areas, cleaning heavy equipment and inspecting for oil leaks.

In addition to directly protecting water quality, the Water Quality Certification Program provides public outreach and promotes understanding of the importance of protecting the scarce surface waters of New Mexico. Through the Water Quality Certification Program, the State has informed government agencies and the private sector about best management practices and water quality standards for New Mexico. Public awareness about the 404/401 process has grown over the years and has reached the point where applicants in both the private and public sectors are aware of the need for State 401 certification for their construction projects. These gains in public outreach are also undermined by the Army Corps' broad interpretation of SWANCC.

Mining impacts are an important concern in how SWANCC relates to the closed basins of New Mexico. Several active large mines and many historic smaller mines exist within closed basins. These mines can create huge amounts of acid mine drainage, and without coverage under NPDES through the CWA it would be impossible for water quality standards to be met. Exclusion of waters affected by mine drainage threatens the designated uses that communities rely on.

#### ➤ Effect on Regulated Entities

The Army Corps' broad interpretation of SWANCC puts water quality at risk for minimal benefits to the regulated entities. Assuming that many projects in closed basins occur in ephemeral channels, the regulatory burden on the applicant is not heavy. It is fairly easy to get projects with minimal environmental impact approved in ephemeral channels due to the combination of the Nationwide Permits and the "blanket" 401 water quality certification issued by the SWQB on March 15, 2002. This regulatory framework allows projects to be certified in advance as long as they are in ephemeral streams and fit the conditions of a Nationwide Permit. Eliminating these projects from 404 jurisdiction does not significantly reduce the burden on the project proponent as the process has already been streamlined. However, limiting the jurisdiction does expose these channels to the risk of degradation from larger projects and from the unmonitored cumulative effects of smaller ones.

#### ➤ Basis for jurisdiction on Closed Basins

- Closed Basin Functions and Values in General

Although closed basins in New Mexico are largely intrastate and non-navigable, they still have functions and values that provide a basis for protection under the federal Clean Water Act. Perennial waters exist in the Mimbres, Tularosa, Sacramento, and San Augustine closed basins. Over the last seven years, approximately 50 Water Quality Certifications have been issued in the perennial waters of these four basins, and many more closed-basin projects have been authorized by the general 401 certification for Nationwide Permits in ephemeral channels. Furthermore, many informal consultations on water quality standards and BMPs have also been issued. There are also National Pollutant Discharge Elimination System (NPDES) permit activities in closed basins. Closed basins are home to a diverse range of fish and other biota, including Threatened and Endangered species, which are prevalent because of the isolated nature of the habitat. There will be significant detrimental effects on water quality and fisheries if closed basins are no longer jurisdictional.

The SWQB conducted a two-year water quality study of 40 playa lakes and related closed basin wetlands in New Mexico from 1992 to 1993 (Davis et al.). These studies confirm the beneficial roles of playa lakes in storing seasonal precipitation and irrigation return flow, groundwater recharge, wildlife habitat, forage and cover for livestock (Bolen et al 1989). These surveys and reports were completed pursuant to Section 314(a)(1) of the CWA, and the program was partially funded by a grant from the EPA for lake water quality assessment.

- Mimbres River Basin

Although the Mimbres River drains a closed basin, it has a strong basis for inclusion as a water of the United States according to 33 CFR 328.3(a)(3)(i-iii), due to its use by out-of-state travelers and industrial uses in interstate commerce. The Mimbres River has its headwaters in the Aldo Leopold Wilderness, which is a travel destination for many interstate and foreign tourists. The river is an essential part of the wilderness experience and provides the only reliable source of drinking water for backpackers or tourists on horseback. It also provides habitat for trout fishing which is an activity that brings many visitors to the area.

There are also three species of fish known to be native to the Mimbres River: Chihuahua chub (*Gila nigrescens*), Rio Grande sucker (*Catostomus (Pantosteus) plebeius*), and the extirpated beautiful shiner (*Cyprinella formosa*). All three species are also native to other streams that drain the neighboring Guzman Basin, which is an indication that these basins may have been hydrologically connected in the past.

Tourism associated with the Aldo Leopold Wilderness, the Gila National Forest, and the Mimbres River is an important factor in the local economy that has been weakened by declines in the mining industry. The Wilderness Ranger District of the Gila National Forest reported more than 14,500 visitors to the Visitors Center through the third quarter of 2002. The Silver City Chamber of Commerce reports the following statistics through the third quarter of 2002:

- Silver City lodging revenue of approximately \$2,350,000.00.
- Grant County (excluding Silver City) lodging revenue of about \$350,000.00.
- The Chamber of Commerce website is accessed about 130,000 times per month.
- The Chamber of Commerce mails 800 information packets per month.

In addition to interstate and foreign commerce from tourism in the National Forest, the Mimbres River provides recreational opportunities further downstream. Although land status is generally dominated by private properties through the lower reaches of the Mimbres River, the New Mexico Department of Game and Fish has a parcel of State land open to fishing and other river-related recreational activities.

The privately held properties located along the lower Mimbres River are generally rural farm and ranch operations. The principle crops are hay and alfalfa grown for cattle feed. Apples are another source of agricultural income. These are commercial activities that rely on water from the Mimbres River.

In addition to tourism and agriculture the Mimbres River Basin supports a mining industry. Phelps Dodge Mining Company conducts mining operations in the Mimbres watershed and holds significant water rights from both surface and groundwater sources. Phelps Dodge is a large international corporation that sells copper from the Santa Rita Mine throughout the world.

- Central Closed Basins

The Central Closed Basins of Tularosa and Estancia comprise another large area that is at risk of losing protections under the Clean Water Act as a result of SWANCC. These basins support perennial waters, riparian areas, and wetlands that are important resources to communities such as Bent, Nogal, Tularosa, and Mescalero – the primary community of the Mescalero Apache tribe. The Mescalero Tribe uses drinking water from springs at the headwaters of the Rio Tularosa, and the residents of Nogal and Bent depend on the local shallow water table associated with the Tularosa for their drinking water. Some residents drink directly from the river.

The jurisdictional uncertainty related to closed basins threatens coordination and water quality protection across tribal boundaries. The Mescalero Tribe operates a wastewater treatment plant situated within the floodplain of the Tularosa River, which the town of Bent has claimed discharged untreated waste to the river. This issue was resolved through the National Point Source Discharge Elimination System (NPDES) provisions of the Clean Water Act, which are also affected by SWANCC.

The Bureau of Land Management is developing recreation and a riparian demonstration area along the Rio Tularosa. Other areas along the stream are managed under grazing permits, and cow-calf operations water their cattle in the stream. Other uses of the stream are for irrigating apple orchards, alfalfa, and pistachios that are used in interstate and foreign commerce. Large ranches threatened by development are also situated along the stream and some new subdivisions are springing up. An old abandoned mine is situated above the town of Bent and is a possible source of acid drainage which is affecting the local water table. The U.S. Fish and Wildlife Service runs a trout hatchery near the Town of Mescalero and trout fishing occurs along the stream.

➤ Ephemeral and Intermittent Drainages

Approximately 80 percent of the drainages in New Mexico are not perennial (USGS 1:2,000,000 Digital Line Graph). Many of these fit the definition of waters of the U.S. under 33 CFR 328.3(a)(5) as they are tributaries to waters of the U.S. However, even ephemeral drainages in closed basins should be considered waters of the U.S. as they are designated for livestock and wildlife uses. Many of these drainages supply water to stock tanks, and the livestock and wildlife uses of these waters affect interstate and foreign commerce.

❖ **An Alternative Process for Jurisdictional Determination in light of SWANCC**

➤ Tajique Model

A model for improved jurisdictional determinations regarding SWANCC is illustrated by the authorization of a proposed waterline installation across Tajique Creek in the Estancia closed basin (Army Corps Action Number 2002-00717). In this case a nexus to interstate or foreign commerce was made within a closed basin that is otherwise isolated. The Army Corps had been interpreting SWANCC broadly in New Mexico to exclude closed basins, and would have likely determined that they did not have CWA jurisdiction over this project. However, after discussions with the EPA R6 and NMED Surface Water Quality Bureau staff, the Army Corps conducted a more careful review and determined that Tajique Creek was indeed jurisdictional due to recreational use by interstate or foreign travelers. This example shows that rather than declaring entire closed basins as non-jurisdictional in light of SWANCC, the Army Corps Districts should evaluate jurisdiction on a project-specific basis.

The guidance attached to the ANPRM lays the burden of proof on the regulators as it instructs the field staff to seek formal project-specific HQ approval prior to *asserting jurisdiction*, rather than prior to exempting an action. This requirement causes an impractical increase in the workload of regulatory 404 and 401 staff, which will delay permitting for all projects. Furthermore, if no jurisdiction is asserted it is very likely that the Army Corps, and especially the state 401 agency, will not be informed of projects proposed in isolated waters, negating any possibility of project specific review. SWQB staff recently learned of a project in a closed basin only because the project proponent called to ask why the corps said not to submit an application. The burden of proof must be shifted to the discharger to demonstrate that the affected water is non-jurisdictional as a result of SWANCC. This will allow notification and review of these determinations by states, tribes, and EPA.

❖ **References**

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