



DEPARTMENT OF GAME, FISH AND PARKS
Foss Building
523 East Capitol Avenue
Pierre, South Dakota 57501

April 15, 2003

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

Attention Docket ID No. OW-2002-0050

Dear Staff:

South Dakota Department of Game, Fish and Parks (SD GF&P) staff has reviewed the "*Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of 'Waters of the United States'*" (ANPRM) published in the January 15, 2003 Federal Register (Vol. 68, No. 10, pp 1991-1998). We appreciate the opportunity to provide the following comments regarding the implications of the SWANCC decision [U.S. Supreme Court decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001)] for jurisdictional decisions under the Clean Water Act. In light of SD GF&P's mission "to perpetuate, conserve, manage, protect, and enhance South Dakota's wildlife resources, parks, and outdoor recreational opportunities for the use, benefit, and enjoyment of the people of this state and its visitors, and to give the highest priority to the welfare of this state's wildlife and parks, and their environment, in planning and decisions", we feel obligated to share with you general and specific comments, information, and recommendations regarding implications to South Dakota's important wildlife, fish, habitat and recreational resources.

In addition to my staff's review, I have personally added my own review and comments to this critical issue. My wildlife management career spans 30 plus years and specifically includes a wide variety of experience with "prairie pothole" wetlands in the Dakotas and Minnesota. I also currently serve as the vice-chairman of the North American Wetlands Conservation Council, a position appointed by the Secretary of the Interior. It is our collective hope that the following will help reiterate the need for continued protection of all waters under the Clean Water Act that are not explicitly excluded by the SWANCC decision.

General Comments

The SWANCC decision has resulted in considerable uncertainty for jurisdictional decisions under section 404 of the Clean Water Act for over two years. There has been confusion among and disagreement between agencies, conservation and agricultural groups, as well as the regulated public. We have observed many instances where post-SWANCC jurisdictional determinations by the U.S. Army Corps of Engineers (Corps) have resulted in significant impacts to wetlands and other aquatic resources. Our attempt to quantify these specific impacts by examining the Corps records was fruitless because their permit record keeping system does not track wetland areas excluded from regulation as a result of SWANCC and subsequent agency guidance. We strongly suggest that the Corps' Omaha District direct state regulatory offices to change their tracking system such that wetland losses resulting from the SWANCC decision are monitored and available to other agencies. Evaluation of the cumulative effects of the decision and guidance will be extremely difficult and time consuming without such a change.

To put it bluntly, we were extremely disappointed with the court's decision in SWANCC. It comes at a time when South Dakota's wetland resources are coming under increasing urban, suburban and agricultural development pressures. As a result of improved protection of South Dakota's wetlands and other aquatic resources under the Corps/EPA 404 permit program and the "Swampbuster" conservation provisions of the federal farm program, loss of wetlands had generally slowed over the last two decades. However, in recent years, subtle administrative and policy changes in Natural Resources Conservation Service (NRCS) wetland delineation procedures have resulted in the erosion of wetland protection on some agricultural lands. This is particularly evident for linear wetlands in eastern South Dakota.

Additionally, administration of the Corps' regulatory program in South Dakota has also been disappointing over the years. We, as well as other resource agencies (e.g. US Fish and Wildlife Service and SD Department of Environment and Natural Resources) have consistently urged to Corps to more aggressively apply section 404 of the CWA and the associated regulations. In our view, there has been inadequate application of the 404(b)(1) guidelines and applicable rules in the 404 permit process. Evaluation of project water dependency, evaluation of cumulative effects, and identification of the least damaging practicable alternative (through the avoidance, minimization and mitigation sequencing process) routinely have not been given appropriate consideration by Corps regulatory staff in South Dakota. Now with the SWANCC decision and present guidance, CWA protection of a significant portion of South Dakota wetlands, other aquatic resources and associated fish and wildlife will be offered even less protection. The calendar has effectively been rolled back 30 years for some of South Dakota's and the Nation's most important wetland resources.

By enacting the Federal Water Pollution Control Act in 1972 and through a subsequent 1977 amendment referred to as the Clean Water Act, Congress established the national objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters". Congress also declared that "it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983." These goals cannot be

met with the application of an overly broad interpretation of the SWANCC decision, which could result in derailing the continued restoration and maintenance of the natural structures and functions of South Dakota's and the Nation's aquatic ecosystems.

It is clear that the SWANCC decision refutes the sole use of the "Migratory Bird Rule (MBR)" to establish federal Clean Water Act jurisdiction over isolated waters that are intrastate and non-navigable. We strongly suggest a narrow interpretation of this ruling which would allow continued federal regulation of intrastate, isolated waters if a connection or "significant nexus" to other jurisdictional waters or to interstate commerce, under 33 CFR 328(a)(3)(i)-(iii), can be established. The ANPRM indicates that the court's decision calls into question these factors, but we believe continued use of them is possible and is clearly supported by the broad definition of "navigable waters" that Congress enacted in 1972. In section 502(7) of the CWA Congress defined "navigable waters" as "waters of the United States, including the territorial seas." The legislative history on this issue is crystal clear as pointed out in the dissenting opinion. A 1972 conference report explained that the "conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." It is unfortunate that the majority in SWANCC seemingly ignored this legislative history, congressional intent, as well as some facets of the relevant case law (e.g. *United States v. Riverside Bayview Home, Inc.*, and others) which have broadly upheld CWA jurisdictional authority.

The SWANCC decision raised several complex questions of law related to federalism, the extent of federal authority under the Commerce Clause, and the interpretation of relevant case law. We will leave the debate over these questions to the legal community and future courts. We suggest that the Corps and EPA also allow future courts to interpret the SWANCC case prior to adopting new rules that might allow SWANCC more latitude than it deserves. The balance of our comments will focus primarily on the natural resource implications of the decision and other specific issues identified in the solicitation of comments.

South Dakota's Wetland Resources

Eastern South Dakota's Prairie Pothole Region

The glaciated eastern half of South Dakota is located in the heart of the Prairie Pothole Region (PPR), a landscape characterized by millions of depressional, palustrine and lacustrine wetlands, as well as deepwater habitats of varying forms and sizes. Wetland densities in the PPR can be as high as 100 basins per sq. mile (Kantrud and others, 1989). While many of these wetlands might be considered to be geographically or physically isolated, they are not hydrologically or functionally isolated. On a regional scale, about 50 percent of the Prairie Pothole Region's original wetland base has been converted to other land uses. During the 20 years from the mid-1950's to the mid-1970's, such losses averaged 458,000 acres annually (SDGF&P, 1992). Dahl (1990) estimated that Iowa has lost nearly 90% of its' original wetlands. Fortunately South Dakota has managed to conserve more of its' wetlands than most PPR states. Dahl (1990) estimated that about 35% of South Dakota wetlands have been lost since settlement. Most of

these losses are related to agricultural development. Because of their ecological importance to many fish and wildlife species, patterns of historic loss and future agricultural and development related threats, prairie pothole wetlands are a conservation priority in South Dakota. The importance of the PPR is recognized at a national and international level, thus the PPR is considered a waterfowl habitat area of major concern under the North American Waterfowl Management Plan.

National Wetland Inventory data show that within the 35,400 square mile area in eastern South Dakota, wetlands and deepwater habitats account for over 2.2 millions acres or nearly 10% of the landscape. Of these totals, palustrine system wetlands constitute 80.1% (1,780,859 acres), lacustrine system wetlands and deepwater habitats 16.8% (371,982 acres), and riverine system wetlands 3.1% (69,273 acres) (Johnson and Higgins, 1997).

A total of 932,829 wetland basins (potholes or lakes) covering 2,128,674 acres occur within the PPR of eastern South Dakota. Temporary basins, which pond water for only a brief period during the growing season account for 55.7% (520,379) of the total number of basins and 18.3% (390,054 acres) of the total area. Seasonal basins, which pond water well into the growing season, through June or later, account for 35.9% (334,699) of the basins and 26.0% (553,515 acres) of the total wetland area. Semi-permanent basins typically hold water through the year, except during extended drought, and make up 8.1% (76,260) of the total basins and 34.0% (722,904 acres) of the total area. Permanent basins comprise 0.2% (1457) of the basins and comprise 21.7% (462,201 acres) of the total area (Johnson and Higgins, 1997; Johnson and others, 1997).

The median size of all wetland basins in eastern South Dakota is 0.4 acres, with approximately 59% being 0.5 acres or less in size and about 73% being 1.0 acre or less in size. From an ecological perspective, particularly as it relates to waterfowl habitat requirements (discussed further below), it is extremely important to recognize that shallow, temporary and seasonal wetlands comprise 92% of all wetlands in the PPR of eastern South Dakota (Johnson and Higgins, 1997; Johnson and others, 1997). Loss of federal protection of these small wetlands, as well as other wetlands in eastern South Dakota that might be considered isolated, could have devastating and lasting effects on continental waterfowl populations. A myriad of other wetland dependent shorebirds, waterbirds, amphibians, game and non-game fish, and many state or federally listed threatened or endangered species could also be adversely affected. We will discuss these ecological implications further below.

Western South Dakota Wetland Resources

While western South Dakota wetlands have been inventoried as part of the National Wetlands Inventory, a detailed GIS based summary based on digital data has not yet been completed. In general, many of the wetlands in the mixed grass prairie portion of western South Dakota are associated with stream and river corridors and associated riparian areas. Palustrine forested wetlands (e.g. forested oxbows) are relatively common along larger river systems. However some areas west of the Missouri River do have significant areas of palustrine emergent wetlands that function similarly to those in the PPR of eastern SD. For example, parts of Lyman, Jones, Stanley, Dewey, Ziebach and Corson counties have numerous wetlands of various sizes, including small pothole like basins less than 1 acre in size to large wetlands up to several hundred acres in

size that local residents call “lakebeds”. These palustine wetlands are oftentimes surrounded by native grassland and are very important breeding, brood rearing and staging (during migration) habitat for waterfowl, shorebirds and other wetland dependent species when water conditions are favorable. These areas can also provide vital winter cover for upland game species such as pheasants and deer. Many, if not most, of these palustrine basins might be considered isolated in a physical or geographic sense and likely would be at risk if future federal protection ignores the functional and hydrologic connection of such waters to regulated waters or their interstate commerce connection.

The Black Hills region of southwestern South Dakota is a unique ecoregion more similar to mountainous ecoregions in the Rocky Mountains to the west. Like other areas in unglaciated western SD, wetlands in the Black Hills are primarily related to streams (riverine system) and related riparian areas. Saturated wet meadow montane wetlands characterized by sedges and associated wetland plants occur along some stream/riparian corridors. Most of these wetlands are classified as palustrine, emergent, saturated wetlands. Saturated scrub/shrub or forested palustrine wetlands, with various water regimes also occur in association with these riverine systems. Additionally, beaver ponds along stream corridors are of local significance and add a unique diversity to these riverine systems. We believe many Black Hills region wetland resources will still be afforded protection under the CWA due to the fact that they are hydrologically and functionally adjacent to jurisdictional waters (this assumes the Corps similarly recognizes such adjacency). However we remain very concerned that many of the headwater streams and associated wetlands are at risk under the current Nationwide Permit program thresholds. We have shared our concerns and provided comment on this issue to the Corps previously, but with little beneficial result.

Functions and Values of South Dakota Wetlands

There is a huge body of literature that documents the wide range of important functions and values that wetlands provide. Besides supporting a diversity of wildlife and plant communities, including threatened and endangered species, wetlands of various types provide numerous other functions and values that are well documented in the literature. These include water storage, flood attenuation and reduction, ground water recharge, water quality enhancement, erosion control, nutrient retention and recycling, sediment retention, carbon sequestration, food production, stock water, forage production, fishing, hunting, other forms of outdoor recreation, education, and aesthetics. The environmental and socio-economic benefits of wetlands are also well documented and recognized by the scientific community, policy makers, as well as most of the general public. We will only briefly discuss some of these functions and values as they relate to South Dakota’s fish, wildlife, habitat and recreational resources. We refer the readers to the body of established literature for a broader perspective. The US Geological Survey, Northern Prairie Wildlife Research Center located at <http://www.npsc.nbs.gov/> maintains a large on-line library and bibliography at <http://library.npwrc.cr.usgs.gov/> that should be of use in evaluating the potential ecological effects of any policy or regulatory changes in the northern great plains. The Association of State Wetland Managers has also compiled a bibliography on isolated wetlands that is available on-line at <http://www.aswm.org/science/isolated.htm> - 9 .

Fish and Wildlife Habitat

More specifically, it is well established in the literature that small temporary and seasonal wetlands in the PPR are vitally important for breeding, foraging and migrating waterfowl, shorebirds and other water birds (Evans and Black, 1956; Hubbard, 1988; and Kantrud and others, 1989). The PPR is the most critical waterfowl breeding habitat in North America. It encompasses only 10 percent of the waterfowl breeding habitat in North America, yet can produce as much as 50 to 70 percent of the continental duck population during wet years (Batt and others, 1989, Ducks Unlimited, 2001). Many areas in eastern South Dakota can support over 100 breeding pairs of ducks per sq. mile when water conditions are favorable. In 2001, such conditions in the eastern Dakotas alone supported an estimated 25% of all breeding ducks in the north central North America traditional survey area (USFWS, 2001). Often South Dakota is ranked number two in total waterfowl production for the contiguous 48 states. However, in some recent years, depending on water conditions and available nesting cover (e.g. remaining native prairie and Conservation Reserve Program grass cover), South Dakota's overall waterfowl production ranked first for the contiguous 48 states. Continued federal protection of South Dakota's PPR wetlands, as well as other wetlands across the state, is critical to sustain nationally and internationally important waterfowl populations. This protection is also vital to maintain viable populations of dozens of other wetland dependent migratory passerine, shorebird and waterbird species.

The worldwide decline in amphibians is well documented and has been of great concern to the public. One of the major causes of declining amphibian populations is loss of wetland habitat. Seasonal and temporary wetlands are extremely important as breeding habitat for amphibians because most are fish free. Fish cannot survive in these wetlands, but amphibians thrive. Most amphibian species cannot successfully breed in wetlands with populations of fish because fish will eat the eggs and larvae. With the loss of federal CWA protection, which will lead to additional losses of isolated temporary and seasonal wetlands, amphibian populations dependent on these habitats will decline even further. Loss of amphibians also has a broader effect. Herons, bitterns, mink, snakes, and many other species that rely on amphibians thriving in fish-free waters as sources of food would also be adversely affected.

Within the Midwest and northern plains, "fens" constitute one of the rarest wetland types and provide habitat for a variety of rare plants and invertebrates. Within South Dakota, at least 12 plants monitored as rare in South Dakota are restricted to fen habitats. It is likely that these rare wetland types would receive virtually no protection under a broad interpretation of the SWANCC decision and the current agency guidance.

Economic Benefits Related to Hunting, Fishing and Wildlife Watching

Millions of people in the United States enjoy recreational activities that depend upon intrastate and isolated waters. Hunting, fishing, bird watching, photography, as well as numerous other activities and their associated travel, generate billions of dollars of income each year for the travel, tourism, recreation, and sporting sectors of the economy of the United States. The total economic value of outdoor activities related to wetlands is extremely important to South Dakota's economy and is on the rise.

According to the 1996 National Survey of Fishing, Hunting and Wildlife-Associated Recreation, residents and non-residents spent \$625 million on wildlife related recreation in South Dakota. In 2001, resident and nonresident hunters alone spent over \$251 million, with the migratory bird hunters' share totaling over \$44 million. These migratory bird hunters primarily pursue ducks and geese and spend much of their time on or near wetlands of various types where waterfowl congregate in the fall. Other hunters spend considerable time near or on wetlands because of the quality cover some wetlands (e.g. seasonal wetlands) provide for pheasants and deer. Upland bird hunters in South Dakota spent \$117 million in 2001 (IAFWA, 2002).

The 1996 National Survey also indicates that 418,000 residents and nonresidents spent over \$151 million in SD on wildlife-watching activities such as observing, feeding or photographing wildlife. Of these 65,000 who visited some type of public land to pursue such activities visited a marsh or wetland site. Also, 160,000 wildlife watchers observed waterfowl and shorebird species, most of which would have been observed on wetlands. Although numbers are unavailable, many other folks likely participated in these activities on or near privately owned wetlands.

South Dakota experienced an abnormal wet cycle starting in the early to mid 1990's. In northeastern part of the state, where many large palustrine and lacustrine prairie pothole basins occur, rising waters created "new" lakes out of areas that were functionally sloughs or marshes for decades. High quality fisheries quickly evolved with and without management efforts by SDGF&P. We estimate that there are approximately 65,000 acres of "new" fishable waters in the northeast part of the state. Retail sales related to these fisheries are estimated to total over \$18 million annually. Many of these waters occur in closed basins and may be considered isolated, depending on how CWA rules and guidance evolve. Such waters undoubtedly meet the interstate commerce test in 33 CFR 328.3 (a) (3) (i)-(iii) and deserve full protection under the CWA. It is our understanding that the Corps' South Dakota regulatory office may not be taking jurisdiction on some such waters because they do not have boat ramps. In other words if it doesn't have a formal ramp, it's not considered available to interstate users. We strongly disagree with this approach because many of these waters are accessible from unimproved areas with small fishing and hunting boats, can be accessed on top of the ice in the winter, and also support non-consumptive wildlife watching activities that may not even require access onto the lake or wetland itself.

Wetlands adjacent to lakes, immediately upstream from lakes and in the immediate watershed serve as spawning areas for many species of fish. Wetland areas near river systems also have high values as spawning areas. Johnson and others (1997) estimated that wholesale and retail baitfish sales of minnows in South Dakota totals about \$2 million annually. These baitfish are harvested primarily in wetlands within the state. The retail value of fathead minnows in Minnesota exceeds \$12 million in some years and many of these fish are also harvested in South Dakota.

Johnson and others (1997) reported that South Dakota trappers and predator hunters took over \$500,000 in furs during a single season. Although not as important as it once was due to a declining fur market, trapping is an important source of income for many South Dakota families.

Furbearers often trapped on or near wetlands include mink, muskrats, raccoons, beaver and skunk.

Economic Benefits Related to Storage of Flood Water

The U.S. Army Corps of Engineers recognized wetland values for flood water storage in at least two South Dakota projects (Harmon, 1976). Various federally and state funded projects have advocated restoration and/or acquisition of wetlands to store water on the landscape in lieu of constructing additional flood control dams.

In relation to water storage ability of wetlands, Shjeflo (1968) and Eisenlohr and others (1972) have shown the amount of water loss from May to October is roughly 2.5 feet. This provides an approximate 2.5 foot storage cushion per unit for spring runoff and precipitation. Ludden and others (1983) found in a study completed in the Devils Lake Basin in North Dakota that small wetlands could contain 657,000 acre-feet of water, equivalent to about 72 percent of the total runoff from a 2-year frequency runoff and about 41 percent of the total runoff from a 100-year frequency runoff.

The US Fish and Wildlife Service estimates that each acre of small wetland reduces flood damage to roads by \$6.11 per year. If one applies this value to all eastern South Dakota wetland basins less than one acre in size (73%), the total flood prevention value related to roads totals over \$4 million. Each acre of small wetland also provides \$29.23 worth of flood damage protection to agricultural land per year.

Implications of Not Regulating Isolated Wetlands under the CWA

Tiner and others (2002) have provided an excellent review and assessment of geographically isolated wetlands for many areas across the country. They have provided an excellent discussion of how such physically isolated basins may not be hydrologically or ecologically isolated. The inherent difficulty, or even the impossibility of defining hydrological or ecological isolation is addressed and we ask that their discussion be carefully considered by the readers. They also provide a comprehensive review of the important functions and values of PPR wetlands.

Tiner and others (2002) evaluated and presented three different scenarios, each using different width buffers or other criteria to partition isolated wetlands from streams. While we acknowledge the authors' warning not to expand the results of their analysis over larger geographic regions, we believe that the data generated from Clark County in northeastern South Dakota illustrates well the magnitude of the potential implications of not protecting geographically isolated wetlands under the CWA. About 11% of the Clark County study area is wetland, a figure very close to the 10% wetland area for eastern South Dakota. Their results indicate that 94-95% of all wetland basins, by number, in the Clark study area would be considered isolated. By area, 98% of wetland acreage in the Clark County study area would be isolated. Petrie and others (2001) did a similar analysis of the implications of defining certain wetlands not immediately adjacent to stream corridors as isolated and therefore at potential risk as a result of the SWANCC decision. Their results are similar to Tiner and others' (2002), but one must recognize the different adjacency and tributary assumptions used. Under a 100 meter buffer scenario (wetlands w/in 100 meters of stream considered adjacent and protected), 91% of the wetlands, or an average of 65% of the

acreage in the South Dakota PPR study areas would be at risk of no CWA protection (Petrie and others, 2001).

Potential real losses of wetlands in South Dakota resulting from loss of CWA are difficult to predict, but some experts (Bismarck USFWS HAPET office staff) estimate that substantial losses of isolated temporary wetlands could lead to a 50% decrease in duck production in the PPR. There are too many unknowns to quantify adverse effects to other fish and wildlife resources, but such landscape scale changes in protection would undoubtedly lead to substantial losses.

Use of Factors in 33 CFR 328.3 (a)(3)(i)-(iii)

As we have alluded to above in a few places, we request that all these factors continue to be used to determine jurisdictional status of isolated, non-navigable intrastate waters. Protection of intrastate waters, including waters that appear to be isolated, along with other waters of the United States, is necessary to meet the stated objective of the Clean Water Act. Protection becomes increasingly important in states that have historically promoted wetland drainage and in those states, such as South Dakota, that have no existing state laws that effectively protect such waters.

Most if not all geographically isolated wetlands in South Dakota support or may support many uses by interstate travelers and therefore meet the interstate commerce test in these criteria. These waters support a wide range of activities such as fishing, hunting, wildlife watching, and baitfish harvest. Food production from farming and ranching activities that use isolated wetlands are clearly an industrial use of these areas and meet the criteria of factor (iii) in this section of the rules.

Definition of Isolated Waters in the Rules

The regulatory uncertainty created by the SWANCC decision seems to beg the regulatory community to more clearly define what isolated means in CWA rules. As we have discussed above, defining isolated waters will be fraught with problems because of the complex variables, such as hydrological and ecological isolation that are so difficult to define in the field. We urge the Corps and EPA to exercise the utmost caution in proceeding down this path and to not establish rules that arbitrarily establish isolation of waters based on simple visible physical or geographic isolation.

We believe that truly isolated waters are very rare, if not non-existent in the real world, particularly if isolation, or adjacency is examined from a functional perspective. Essentially all water is transported through interconnected hydrologic cycles, and connection can vary both temporally and spatially. The pollution, impairment, or destruction of part of an aquatic system may affect the chemical, physical, and biological integrity of other interconnected parts of the aquatic system. To base regulatory jurisdiction on whether or not a body of water has a surface water connection to another body disregards any groundwater connection that may connect the

two and essentially only looks at half of the picture. It is our understanding that just this approach has been employed recently by Corps regulatory staff here in South Dakota to the detriment of wetlands on floodplains (above the bankfull elevation) that were clearly adjacent waters during relatively common high water events. We believe this approach is inconsistent with SWANCC, current guidance and suggest that this practice be discontinued.

Ecological isolation is even more complex, but we suggest that any discussion of defining isolated waters include a very careful examination of this concept. Tiner and others, (2002) discuss this issue. We refer the readers to that paper and will not reiterate it here.

Effectiveness of Other Federal of State Programs For Protection of Aquatic Resources

Conservation of South Dakota's wetland resources through continued federal regulatory protection is vital if their important functions and values are to be preserved for future generations. Gigliotti (1998) demonstrated that over 82% of South Dakotans believe that wetlands are important in preserving clean water and should be protected. Further, 89% feel that healthy wildlife populations are very (59.3%) or moderately (29.4%) important to the economy and well being of South Dakota residents. These data demonstrate that there is significant public support for conservation of wetlands and wetland dependent wildlife in the state. SDGF&P's wetland conservation efforts fall into several broad categories including: education; management; acquisition; continued support of various state and federal regulatory; and legislative measures.

However, as alluded to above, most regulations, laws or provisions that protect wetlands in South Dakota are federal (Clean Water Act, Swampbuster provisions of the Farm Bill). Wetlands regulations have historically been very controversial in the state, and despite popular opinion just described, legislative support for more protection in state law seems very unlikely. Continued support of federal programs by the state and the public is important for wetland protection in lieu of formal state regulatory protection. SDGF&P will continue to provide the Army Corps of Engineers and the Natural Resources Conservation Service with technical guidance regarding proposed regulation changes and specific projects that are likely to adversely affect wetland resources. Such guidance will include supporting avoidance, minimization and mitigation of wetland losses on State and Federally funded projects, with priority given to restoring drained wetlands. State laws and regulations that protect water quality of all waters, including wetlands, will be supported and enforced. Improved state-level wetland protection legislation should be considered in the future if and when public support demands it. Nevertheless, these activities cannot replace federal protection of South Dakota's isolated wetland resources. These wetlands are an ecological gem of national and international importance. Continued protection of them is clearly consistent with Congress' intent when they enacted and amended the Clean Water Act.

We are very concerned that the ANPRM and associated news releases seem to suggest that other federal non-regulatory incentive, restoration and enhancement programs such as "Swampbuster", the Wetland Reserve Program, the USFWS Partners for Fish and Wildlife program, and the North American Wetland Conservation Act grant program, etc. are being held up as new variables in the no net loss of wetlands equation. We hope that this is not the administration's real intent. All

these programs, as well as parallel state programs, were never intended to become defacto mitigation programs for compromised federal regulation of waters under the Clean Water Act. Such incentive, restoration and enhancement programs have been a huge success, but we believe it is inappropriate for these general taxpayer, resource user (e.g. anglers and hunters) and privately funded programs to be placed on the no net loss balance. Doing so is to the potential benefit of the regulated community that generally experiences some financial gain as a result of their regulated activity in waters of the U.S. Under future regulatory scenarios, the goal of no net loss may be unattainable. We strongly suggest that the Corps and EPA quantify potential future losses as a result of the SWANCC decision and compare them carefully to what can be expected to be restored or enhanced under the various incentive and enhancement programs available.

It is also extremely important to recognize that Swampbuster has been critical in protecting PPR wetlands on agricultural lands in South Dakota and other PPR states. While loss of federal protection under the CWA may not be an immediate threat to isolated wetlands on agricultural land, future protection is only as good as the future integrity of Swampbuster. Johnson (1999, personal communication) indicated that in eastern South Dakota over 50 % of temporary and seasonal wetlands occur in crop fields and are annually or regularly disturbed by tillage. Johnson et al. (1996) estimated that 63% of temporary basins, which represents 35% of eastern South Dakota wetlands, have a high probability of drainage, regardless of size, if Swampbuster provisions of the Food Security Act decrease protection of such areas.

Conservation provisions of Swampbuster remain extremely controversial within the agricultural community. Lucrative commodity support programs have resulted in increased pressure from the agriculture community for more flexibility in draining wetlands. In South Dakota subtle, yet significant, decreases in protection of some wetlands on agricultural lands have resulted. This is particularly true for linear wetlands, many, if not most, of which are clearly connected or tributary to waters of the U.S.

Summary

We trust that the above comments will be useful to the Corps and EPA as they proceed in their evaluation of the implications of the SWANCC decision and whether new rules need to be promulgated. We strongly urge a narrow interpretation of SWANCC which only eliminates use of the “Migratory Bird Rule”, as clarified in the regulatory preambles, as a sole jurisdictional test for isolated waters or wetlands. We believe that such an interpretation is consistent with congressional intent, legislative history, relevant case law and the powers of congress under the Commerce Clause. Factors in 33 CFR 328.3 (a)(3)(i)-(iii) should continue to be liberally used to determine jurisdictional status of waters that are, or are capable of, supporting various interstate activities or uses.

The definition of isolated waters in future rule should be approached with extreme caution. We strongly suggest that any effort to do so not hinge on simplistic geographical isolation. Instead,

careful consideration of hydrologic and ecological connection, or significant nexus to waters of the U.S. must be made in the context of functional adjacency.

Over the years, cumulative losses of wetlands have resulted in high costs associated with degraded water quality, increased flooding problems and degraded biological communities. Protection of the waters of the United States, including intrastate and seemingly isolated waters, is necessary to prevent further degradation of the chemical, physical, and biological integrity of all waters in the United States. Wetlands that are at risk under the SWANCC decision and under potentially less protective future rules could prove to be some of the “parts” Aldo Leopold referred to when he wrote, “The first step of intelligent tinkering is to save all the parts.”

We appreciate the opportunity to provide the above comments. If South Dakota Department of Game, Fish and Parks can be of any further assistance to the Corps and EPA regarding this matter please do not hesitate to contact us at (605) 773-3387.

Sincerely,



John L. Cooper
Department Secretary

cc: Senator Tom Daschle
Senator Tim Johnson
Representative William Janklow

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