



FEB 28 2003

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Bob Wise
Governor

Ed Hamrick
Director

February 26, 2003

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

03-05-03 P02:51 IN

Re: Docket ID No. OW-2002-0050, Comments Pertaining to the Advanced Notice of Proposed Rulemaking (ANPRM) on the Clean Water Act Regulatory Definition of "Waters of the United States" in Light of the SWANCC Decision.

To Whom It May Concern:

The West Virginia Division of Natural Resources, Wildlife Resources Section (WRS) is providing comments in response to the subject notice of proposed rulemaking (ANPRM)¹. We understand that the involved agencies are the U.S. Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA). The purpose of the notice is to obtain early comment on issues associated with the scope of waters that are subject to the Clean Water Act (CWA) in light of the U.S. Supreme Court decision in *Solid Waste Agency of Northern Cook County vs. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*). The ANPRM requests input on issues associated with the definition of "waters of the United States," whether, and, if so, under what circumstances, the factors listed in 33 CFR 328.3(a)(3)(i)-(iii) (*i.e.*, use of the water by interstate or foreign travelers for recreational or other purposes, the presence of fish or shellfish that could be taken and sold in interstate commerce, the use of the water for industrial purposes by industries in interstate commerce) or any other factors provide a basis for determining CWA jurisdiction over isolated, intrastate, non-navigable waters, and whether the regulations should define "isolated waters," and, if so, what factors should be considered in determining whether a water is or is not isolated for jurisdictional purposes? The Corps and EPA are also soliciting data and information on the availability and effectiveness of other Federal or State programs for the protection of aquatic resources.

¹ Federal Register / Vol. 68, No. 10 / page 1991 / Wednesday, January 15, 2003 / Proposed Rules.

On Jan. 9, 2001, the U.S. Supreme Court issued a 5-4 decision in *Solid Waste Agency of Northern Cook County vs. U.S. Army Corps of Engineers (SWANCC)*. The court determined that the Federal Clean Water Act could not be used to deny a permit to 23 suburban Chicago municipalities to build a landfill on wetlands inhabited by migratory birds. The Corps had denied the 500-acre landfill construction permit because 17 acres of gravel pits had filled with water to form shallow ponds. Although these ponds are not connected to larger bodies of water, migratory birds used them. Under the Federal Clean Water Act, no person may discharge dredged or fill material into "navigable waters" without a federal permit. Congress enacted the law to protect the nation's waterways and municipal water supplies from pollution. The Corps has regulatory authority over the country's "navigable waters," and its authority includes wetlands at or near navigable waters. This regulatory authority affects dredge or fill activities on navigable waters. The Corps relied upon the Migratory Bird Rule to provide authority over isolated wetlands on the grounds that bird-watching and hunting generate large sums of money annually and that any land that birds use during the migratory process "substantially affects interstate commerce." The Corps contended that it had the authority to protect migratory birds under the commerce clause of the U.S. Constitution.

The West Virginia Division of Natural Resource, through a Memorandum of Agreement with the West Virginia Department of Environmental Protection, is involved with, and has significant interest in the regulatory protection of "Waters of the United States." While state law includes statutory protection for wetlands and isolated wetlands, West Virginia has failed to pass regulations specifically addressing wetland protection. Therefore, the primary protection of wetlands in West Virginia is through the regulatory programs of the U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency.

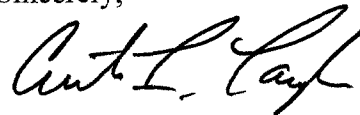
Isolated wetlands do not comprise a large component of the jurisdictional wetlands found in West Virginia. However, we recognize that isolated wetlands do provide the same functions as jurisdictional wetlands, and they are valuable as wildlife habitat. The WRS is concerned that the SWANCC decision may be interpreted in a way that might preclude exercising jurisdiction over non-navigable waters. The WRS contends that *SWANCC* does not change the principle that Clean Water Act jurisdiction extends to tributaries of navigable waters. Jurisdiction has been recognized even when the tributaries in question flow for a significant distance before reaching a navigable water or are several times removed from the navigable waters (*i.e.*, "tributaries of tributaries"). We support the position that Clean Water Act jurisdiction should also be extended to a surface tributary of navigable waters even if it flows for some of its length through ditches, culverts, pipes, storm sewers, or similar manmade conveyances.

We urge the Corps and EPA to take the narrowest view of the SWANCC decision when formulating regulations defining "waters of the United States." We do not believe that the court's ruling precluded jurisdiction of isolated waters, but substantively challenged the use of the "waterfowl rule" to determine interstate commerce. The factors listed in 33 CFR 328.3(a)(3)(i)-(iii) are adequate for establishing interstate commerce and jurisdiction over isolated.

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Thank you for the opportunity to review the referenced notice of proposed rule making.
If you have any questions regarding this letter, feel free to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "Curtis I. Taylor". The signature is written in a cursive style with a large, sweeping initial "C".

Curtis I. Taylor, Chief
Wildlife Resources Section

CIT/abk