

03-10-03 PM:09 IN

Office of Federal Land Policy

122 West 25th Street □ Herschler Bldg., 1 West □ Cheyenne, WY 82002-0600 □ 307-777-5261 □ 307-777-3524 fax

March 3, 2003

Water Docket, ID #OW-2002-0050
Environmental Protection Agency
Mailcode 4101T
1200 Pennsylvania Ave., NW
Washington, DC 20460

MAR = 4 2003

RE: ANPR, Clean Water Act Regulatory Definition of "Waters of the United States"
(68 FR 1991)

State Identifier #03-009

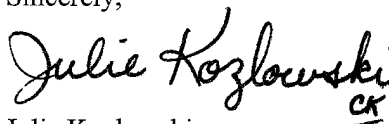
Dear EPA:

The Office of Federal Land Policy distributed the referenced ANPR to affected State agencies for their review, in accordance with State Clearinghouse procedures. Attached are comments from the Wyoming Game & Fish Department and Wyoming Water Development Commission, based on their reviews.

We urge you to give full consideration to the attached agency comments and concerns as you move through the rule-making process. We apologize for any inconvenience due to the lateness of our response.

We appreciate this opportunity to comment and assist you in identifying relevant issues. We can accept electronic documents if they do not exceed 28 typewritten pages in length and no pages (including maps and illustrations) are larger than letter size (8½ x 11). If further notifications, documents, and information relative to this rule-making process are not published in the *Federal Register*, please provide either an electronic (to OFLP@state.wy.us) or **three** hard copies of future documentation and information regarding this action, for distribution to affected State agencies.

Sincerely,



Julie Kozlowski
Assistant Director

JK:ck

Encls (2)

cc: Wyoming Game & Fish Department
Wyoming Water Development Commission



Water Development Commission

HERSCHLER BUILDING

TELEPHONE: (307) 777-7626
FAX: (307) 777-6819

CHEYENNE, WYOMING 82002

Lawrence M. Besson
Director

February 19, 2003

Kevin Behunin
Floyd Field
William J. Franks
James F. Hicks
Dean House
George Jost
Charles Murray
Don W. Riske
Wayne Voss
Robert Yemington

Wyoming State Clearinghouse
Office of Federal Land Policy
Herschler Building, 1 West
Cheyenne, WY 82002-0600

Re: Clean Water Act Regulatory Definition of U.S. Waters, OFLP ID# 2003-009

Dear Sir or Madam:

We would like to offer comments on the Federal Register advanced notice for proposed rulemaking concerning definition of waters of the United States. Our comments are presented below.

1. Clean Water Act (CWA) section 404 regulations should not apply to ephemeral drainages that do not have wetland or riparian characteristics. These drainages, even if they have defined channels, should not be considered waters of the United States, since the channels are simply erosion features and are not an indication of continuous or sustained flow. The dominant vegetation cover could determine jurisdiction under section 404. If greater than fifty percent of the vegetation cover adjacent to and within the channel were made up of upland plants, the ephemeral channel should not be considered a water of the United States.
2. CWA section 404 regulations should not apply to man-made canals used to deliver irrigation, municipal or industrial water, or to canals that provide agricultural, municipal or industrial drainage. Additionally, wetlands that may have developed because of the presence of the canals or in association with the canals should not be regulated under section 404 of the CWA.
3. CWA section 404 regulations should not apply to man-made water storage reservoirs used exclusively for irrigation, municipal or industrial purposes. If such reservoirs provide recreational opportunities, fishing opportunities, or provide waterfowl nesting, brooding and feeding habitat they may be subject to 404 regulations. However, the mere presence of waterfowl on such a reservoir should not bring it into jurisdiction of section 404 through the migratory bird rule.

Thank you for the opportunity to comment.

Sincerely,

A handwritten signature in cursive script that reads "John Jackson".

John Jackson
Administrator, Planning

WYOMING GAME AND FISH DEPARTMENT



"Conserving Wildlife - Serving People"

February 24, 2003

WER 10520
Federal Register
U.S. Army Corps of Engineers
Environmental Protection Agency
Proposed Rulemaking on the Clean Water Act
Regulatory Definition of "Waters of the United
States"
State Identifier Number: 2003-009

Office of Federal Land Policy
Herschler Building, 1W
122 W. 25th Street
Cheyenne, WY 82002

Dear Sir/Madam/Staff:

The staff of the Wyoming Game and Fish Department has reviewed the Federal Register, Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States". We offer the following comments.

The need for this advanced notice for proposed rule-making arose from the need to address uncertainties in agency jurisdictions that were created by the U.S. Supreme Court's 2001 decision in the case of *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (SWANCC). Prior to that decision, the U.S. Army Corps of Engineers (Corps) believed it had jurisdiction to regulate deposition of fill into "navigable" waters defined as, "waters of the United States." Among the criteria the Corps had adopted to identify jurisdictional waters was the presence of migratory birds that fly across state or international boundaries and thereby sustain interstate or foreign commerce (derived from *Missouri v. Holland, 1920*). On a 5 to 4 split vote, the Court decided this criterion, known as the Migratory Bird Rule, exceeded the scope of authority Congress intended under Section 404 of the Clean Water Act (CWA). The SWANCC decision was confined to the Corps' jurisdictional authority under Section 404. However, the EPA and other agencies also regulate activities affecting waters of the United States. It is unclear whether other sections of the CWA can be extended to isolated wetlands, or must also be interpreted as narrowly as the Corps' Section 404 jurisdiction. It is also unclear whether additional criteria can be applied to encompass isolated, non-navigable, intra-state wetlands within the Corps' Section 404 jurisdiction, or the other CWA jurisdictions.

It is important to note the majority opinion in SWANCC did not concern itself with actually defining “waters of the United States.” The opinion speculated the original intent of Congress was to limit jurisdiction under Section 404 of the CWA to navigable waters, their tributaries, and adjacent wetlands. We believe isolated wetlands used by migratory birds are undoubtedly waters of the United States by virtue of the Interstate Commerce Clause. However, the majority opinion believed such wetlands may not be sufficiently connected to waters that are navigable, in the traditional sense, to meet Congressional intent for regulation under Section 404 of the CWA. It is also worth noting the Court did not attempt to quantify the manner or degree to which a wetland must be connected with navigable waters in order to be considered jurisdictional. We are left with only the decision that isolated wetlands cannot be considered jurisdictional solely by virtue of their use by migratory birds. The Court did not consider other possible rationales for establishing a connection between isolated wetlands and navigable waters. In addition, the Court provided no clarification whether its interpretations are applicable to the CWA generally, or confined strictly to Section 404 of the CWA. These issues will be discussed in greater detail in our comments.

We must preface our comments by expressing our disagreement with the majority opinion issued by Justice Rehnquist. We are convinced the Court was misguided in its interpretations and its speculations about Congressional intent. We agree with the minority opinion delivered by Justice Stevens. When the Court stepped beyond the realm of “traditional” navigability in *United States v. Riverside Bayview Homes, Inc. (1985)*, it acknowledged the Corps’ jurisdiction extended to waters of the United States, as clearly stated by the CWA. However, the Act does not articulate or even imply such waters need be connected to or be inseparably bound with traditionally navigable waters. The CWA provides no clear basis to conclude Congress intended such waters would be regulated only if they are adjacent to traditionally navigable waters.

The EPA has made several key statements within the text of the Advanced Notice of Proposed Rule Making (ANPRM). We have quoted or paraphrased each, then provided our response beneath.

“One of the purposes of the ANPRM is to solicit additional information, data, or studies addressing the extent of resource impacts to isolated, intrastate, non-navigable waters.”

Wyoming is a semi-arid state that contains a comparatively low density of wetlands. Wetlands currently comprise less than 2% of the land area (Wyoming Game and Fish Department 1995). Approximately 38% (750,000 acres) of natural wetlands historically present in Wyoming have already been destroyed (Dahl 1990). Although we cannot estimate the number or area of remaining wetlands that may be considered as isolated, such wetlands are inordinately valuable water sources for terrestrial wildlife, reproduction sites for amphibians, and habitat for migratory birds. A large percent of the State’s wetlands, including isolated wetlands, exist on private lands where they will be highly vulnerable in the absence of protection under Section 404 of the CWA. In addition, much of the migratory wildlife that supports recreation in Wyoming is

either produced from or seasonally sustained by isolated wetlands in other states. Those wetlands and the wildlife dependent upon them are seriously threatened by the SWANCC decision.

Many rare or sensitive plant and animal species inhabit wetlands. Of particular concern are amphibians, many of which are declining throughout North America. Continued losses of isolated wetlands will further the demise of these species, thereby increasing the probability of eventual petitioning under the Endangered Species Act. Thus, the SWANCC decision may ultimately result in future listings.

“The ANPRM seeks information regarding the functions and values of wetlands and other waters that may be affected by the issues discussed in this ANPRM.”

As mentioned above, isolated wetlands in Wyoming are inordinately valuable habitats for a large variety of resident and migratory wildlife. Ninety percent of the wildlife species in Wyoming utilize wetland habitats at least seasonally during their life cycles (Wyoming Game and Fish Department 1995). Seventy species of birds found in Wyoming are wetland obligates. Waterfowl production from Wyoming ranks sixth among the lower 48 states (Wyoming Game and Fish Department 1995). Isolated wetlands are often important reproduction sites for amphibians, and the only water sources available for terrestrial species throughout large areas. In addition, isolated wetlands cumulatively fulfill several very important physical functions within the watersheds of navigable waters and their tributaries, and on this basis, we believe they are inseparably bound with navigable waters (as discussed later).

“The SWANCC holding eliminates CWA jurisdiction over isolated, intrastate, non-navigable waters where the sole basis for asserting CWA jurisdiction is the actual or potential use of the waters as habitat for migratory birds [33CFR328.3(a)(3)] ...”

a) The agencies seek comment on the use of the factors in 33 CFR 328.3(a)(3)(i)-(iii) ... in determining CWA jurisdiction over isolated, intrastate, non-navigable waters.

The SWANCC decision confines itself to the scope of jurisdiction of Section 404 only, not that of the overall CWA. The various sections of the CWA, including Section 404, regulate activities that affect the chemical, physical, and biological integrity of navigable waters, defined under the CWA as waters of the United States. The Corps of Engineers published an interpretation [51 Fed. Reg. 41217] that set forth additional criteria for identifying wetlands subject to Section 404 jurisdiction, including their use by migratory birds. The Supreme Court did not actually interpret the meaning of waters of the United States, nor did it address whether the Migratory Bird Rule was a reasonable extension of Congress’s authority to identify waters of the United States. The Court’s attention was narrowly focused on whether the regulatory criteria adopted by the Corps fell within the scope of jurisdiction the Court believed Congress had intended under Section 404 of the CWA. In its analysis, the Court held that the term navigable is of limited import, but not of no import. Use of the term navigable, in the Court’s opinion,

indicates Congress had in mind its traditional jurisdiction over navigable waters as its authority when the CWA was enacted. The Court determined this jurisdiction includes wetlands inseparably bound up with the waters of the United States. This quality of inseparability is interpreted to encompass non-navigable tributaries and adjacent wetlands but not isolated wetlands if the sole basis for jurisdiction is the Migratory Bird Rule, at least so far as Section 404 is concerned.

The three criteria of 33 CFR 328.3(a)(3) are based on use of wetlands and other waters of the United States for commerce purposes. We support the use of these criteria, just as we continue to believe the Migratory Bird Rule is an appropriate jurisdictional criterion. The Migratory Bird Rule encompassed wetlands that were not navigable in the traditional sense, and were too isolated from navigable wetlands to be considered adjacent wetlands. The three criteria of 33 CFR 329.3(a)(3) would also encompass these kinds of wetlands. It is unclear whether the Court's view of the three criteria of 33 CFR 329.3(a)(3) would prove substantively different from its view of the Migratory Bird Rule.

The three criteria of 33 CFR 329.3(a)(3) differ in principle from the Migratory Bird Rule only from the standpoint that humans must use the isolated wetlands directly in conducting interstate commerce. The wetlands must be used for recreation by interstate travelers, they must produce fish or shellfish harvested and sold in interstate commerce, or they must be used for industrial purposes in interstate commerce.

Virtually any isolated wetland in Wyoming is susceptible to use by interstate travelers for recreation (waterfowl hunting, wildlife viewing) and, undoubtedly, most wetlands have been used for such purposes at some time in modern history. To our knowledge, Wyoming contains no isolated wetlands that are used for interstate, industrial purposes, nor to produce fish or shellfish for sale. Accordingly, the only criterion of 33 CFR 329.3(a)(3) that would potentially apply to most isolated wetlands in Wyoming is the first one that pertains to recreational use by interstate travelers. Such use would generally be infrequent and sporadic. Records generally do not exist to document it. However, any wetland that sustains wildlife is susceptible to being used for recreation by interstate travelers. For example, playa beds visible from Interstate-80 west of Laramie support large flocks of waterbirds that provide a visual diversion to travelers who are interested in such things. This wildlife viewing is a recognized form of nonconsumptive wildlife recreation. Therefore, any wetland visible from a public road or is present on public lands sustains interstate recreation. Any wetland on private land, on which wildlife are present, is capable of being used in interstate recreation. Although such wetlands are not navigable in the classic sense, they are waters of the United States.

It was Congress's intent to regulate discharges into wetlands that are navigable in the "traditional sense" or at least "inseparably bound" with "navigable" waters. Therefore, use of the 33 CFR 329.3(a)(3) criteria to identify jurisdictional wetlands will inevitably step beyond the limits apparently set by the Court, with regard to wetlands that are jurisdictional under Section

404 of the CWA. Conversely, if the criteria set forth in 33 CFR 329.3(a)(3) are valid, then there is no argument against using the “Migratory Bird Rule.”

The agencies seek comment on 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. [This request is unclear. We presume the purpose of defining “isolated wetlands” is to identify those wetlands that would not be considered jurisdictional].

We encourage EPA to limit its rule-making to the identification of jurisdictional wetlands. The act of identifying non-jurisdictional wetlands is tantamount to stating a universal negative, which in logic cannot be proved, and in applied use invariably leads to complications. For example, a wetland possessing a general [defined] attribute of non-jurisdictional wetlands might also possess some particular attribute that would otherwise make it jurisdictional. It is better to exercise discretion to exclude an item that has been included by rule than it is to argue for inclusion of an item that has been excluded by rule.

The EPA also asked for any additional factors [other than the 33 CFR 328.3(a)(3) criteria] that may provide a basis for determining CWA jurisdiction over isolated, intrastate, non-navigable waters.

In his dissenting opinion, Justice Stevens properly characterized the CWA as “watershed” legislation, and he recognized achievement of the CWA objectives [to restore and maintain the chemical, physical, and biological integrity of the Nation's waters] is utterly dependent upon the implementation of a comprehensive, regulatory program. His insights may provide a solution that will afford adequate protection to wetlands pursuant to the SWANCC decision. The Rehnquist Court stipulated jurisdictional wetlands must be inseparably bound with navigable waters. However, the Court did not attempt to define what “inseparably bound” or “connected to” or “adjacent to” meant in the context of its decision.

It is a physical fact that the majority of wetlands are inseparably bound with navigable waters. The hydrology, water quality, and sedimentation of navigable waters are determined by quantity and quality of runoff, which in turn are heavily influenced by the sum total of wetland basins within a watershed. Connectivity is just as much a function of direct liquid exchange [through aquifer or surface flow] as a function of liquid interception [by closed basins]. If isolated wetlands are filled or drained, the water volume they intercepted is directed elsewhere, perhaps into another isolated wetland. Eventually, if enough isolated wetlands are eliminated, the water volume historically intercepted by isolated wetland basins must enter a navigable water or a tributary to a navigable water. The result is increased flood stages, increased frequency of flooding, increased flow velocity, increased erosion, increased sediment transport, impaired water quality, increased damage to property, reduced recreation benefits, and increased cost to society to abate these impacts. The severe consequences if draining and filling isolated wetlands were apparent in the recent unprecedented flooding of the Red and Mississippi Rivers. In addition, when isolated wetlands are connected to the ground water table, the drainage or filling

of isolated wetlands can lower the groundwater level. This impacts wells from which irrigation water is pumped to grow crops that are marketed in interstate commerce. Depletion of groundwater also reduces the base flow of streams, which can have serious negative impacts on aquatic ecosystems, navigation, and recreation throughout the interstate fluvial system.

Isolated wetlands are limited in area, easily identifiable, and of inordinate hydrological, ecological, and social value. The great majority are inseparably bound with navigable waters, as described above. Accordingly, the criteria for inclusion of isolated wetlands under CWA jurisdiction should simply be (1) the wetlands are within the watershed of a navigable water or a tributary of a navigable water, or (2) the potential filling or drainage of isolated wetlands would individually or cumulatively direct additional surface flow into a navigable water or the tributaries of a navigable water, or (3) the potential filling or drainage of isolated wetlands would disrupt flow into an aquifer that connects with a navigable water or the tributaries of a navigable water. Contrary to implications of the GIS evaluation by Petrie et al. (2001), there should be no distance criterion because this broad-brush approach fails to address the essential hydrologic functions of isolated wetlands within the watershed of a navigable water or its tributaries.

The Rehnquist Court did not consider the many physical aspects of connectivity that can lead to catastrophic, negative impacts upon navigable waters when isolated wetlands are drained or filled. Even if the Rehnquist Court was deaf to Society's [and Congress's] concern about the preservation of interstate, migratory wildlife and endangered species, it stands to reason that the physical aspects of connectivity described above are consistent with the Court's line of reasoning and should be adopted as legitimate criteria for identification of jurisdictional wetlands under the CWA. Such physical criteria are clearly consistent with the purposes of the CWA adopted by Congress.

“As noted elsewhere in this document, the agencies are also soliciting data and information on the availability and effectiveness of other Federal or State programs for the protection of aquatic resources.”

The Rehnquist Court's deference to state primacy in land and water management decisions, and to the states' prerogatives to adopt legislation protecting isolated wetlands, is naïve. The likelihood of strong environmental protective measures being adopted at the state level is lowest in rural and agricultural settings where the protection is most needed. As noted in Justice Stevens' dissenting viewpoint, the states are in competition to attract and retain business. Unless federal oversight creates a level playing field, the cost of environmental protection becomes an element of this competition. Some interests may be attracted to settings in which overhead costs are lowest, even if this means taking shortcuts with respect to issues of protecting the environment. Given the opportunity these interests may seek to externalize the overhead costs of avoiding or repairing impacts caused by their activities. This practice is especially prevalent when impacts are incremental and diffuse, as is the case with isolated wetlands. Yet, public trust resources are severely impacted by cumulative effects of these activities and the costs to society of dealing with these impacts have been enormous.

Wyoming has no effective state laws that will protect isolated wetlands in the absence of CWA jurisdiction. The Swampbuster provision of the Food Security Act only pertains to wetlands affected by agricultural activities, and it does not preclude such wetlands from being drained or filled. It imposes sanctions in the form of disqualification for certain federal subsidization programs. The various restoration programs mentioned do not protect wetlands. They provide inconsequential funding for some minor amounts of restoration and rehabilitation work, but this does not come close to matching the pace of wetland destruction. Isolated wetlands on public lands (BLM, U.S. Forest Service) may receive some protection within the mandates of those agencies, but absent the Section 404 permitting process, it will become more difficult for land management agencies to prohibit activities that impact isolated wetlands.

“The agencies are also interested in data and comments from State and local agencies on the effect of no longer asserting jurisdiction over some of the waters (and discharges to those waters) in a watershed on the implementation of Total Maximum Daily Loads (TMDLs) and attainment of water quality standards.”

The response to this question is obvious. Loss of jurisdiction over some of the waters in a watershed will exacerbate pollution in navigable waters and their tributaries. In Wyoming, the EPA would lose CWA jurisdiction over some point-source discharges into waters that are no longer considered jurisdictional, and ultimately this will increase pollutant loading of other waters. Such pollutant loading may only occur during high runoff events, but the effect could be just as severe as if the discharge is directly into the receiving navigable water. It is conceivable we could lose our ability to regulate some feedlot runoff, hydrocarbon discharges from produced waters at oil, gas, and coal-bed methane wells, some urban runoff, some mine discharges, and some industrial processing discharges.

SUMMARY

The SWANCC decision will exclude a large proportion of isolated wetlands from jurisdiction under Section 404, and possibly the other regulatory programs of the CWA in cases where the Migratory Bird Rule had been the sole basis for asserting jurisdiction. This excluded category of isolated waters includes ponds, lakes, potholes, playas, fens, bogs, wet meadows, seeps, and other ephemeral, temporary and intermittent wetland habitats that are crucial to the ecology of many migratory, non-migratory, and endangered wildlife. As described above, we do not believe wetlands in general can be considered isolated from the hydrologic systems of navigable waters. On this basis, it is conceivable jurisdiction might be reinstated for most isolated wetlands based on physical rather than solely biological or commerce-related criteria. Irrespective, we believe it is absolutely essential to retain CWA jurisdiction to regulate deposition of fill, discharge of pollutants, and other deleterious activities within isolated wetlands. The objectives of the CWA cannot be effectively realized absent this jurisdiction. Other federal authorities, such as the Swampbuster Provision of the Food Security Act and the various Executive Orders, afford insufficient protection of isolated wetlands to support a

comprehensive program to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. The continuing, large-scale loss of wetlands nationally is plain evidence that reliance upon state laws will not adequately protect isolated wetlands consistent with the objectives of the CWA.

Unlike other provisions of the CWA, Section 404 has carried with it a long-standing legislative history predating the CWA. This history originated in an era during which Congress was clearly more interested in exploiting natural resources and preserving the ability of the nation to conduct traditional commerce upon navigable waters. As noted in Justice Stevens' dissenting opinion, the CWA itself was much broader than this; it was a "watershed" legislation that was comprehensive in scope. It is conceivable the Court's myopic perspective about Section 404 jurisdiction is tied to the history of that section specifically. Perhaps the Court may entertain a more enlightened interpretation consistent with the overall purposes of the Act with respect to its other sections. For this reason, we encourage the EPA and other jurisdictional agencies to continue to apply the Migratory Bird Rule to identify waters of the United States for regulatory purposes, forcing the Court to address its own ambiguities before changes are made. In addition, we would encourage the EPA and Corps of Engineers to explore additional, physical criteria for asserting jurisdiction, in order to establish connections between isolated and navigable waters, consistent with the precepts of the SWANCC decision. Finally, we must consider the possibility EPA may not be able to repair the ambiguities caused by the SWANCC decision, and this will lead to the accelerated loss of irreplaceable national resources as well as further deterioration of the Nation's water quality. The EPA and other jurisdictional agencies may wish to encourage a resolution by Congress of its actual intent under the CWA for regulating impacts to isolated wetlands and other waters of the United States.

Sincerely,



BILL WICHERS
DEPUTY DIRECTOR

BW:TC:as

REFERENCES:

Dahl, T.E. 1990. Wetland losses in the United States, 1780s to 1980s. USFWS. Washington, D.C. 21pp.

Sir/Madam/Staff
February 24, 2003
Page 9 – WER 10520

Petrie, M., J.P. Rochon, G. Tori, R. Pederson, and T. Moorman. 2001. The SWANCC Decision: Implications for Wetlands and Waterfowl. Ducks Unlimited, Inc. Memphis, TN. 54pp.

Wyoming Game and Fish Department. 1995. Section Two, Wetland Component. Pages 91-100 in Mahoney, J.F., C. Colgan, and G. Thorson. State Comprehensive Outdoor Recreation Plan. Wyoming Department of Commerce. Cheyenne.