



Nez Perce

TRIBAL EXECUTIVE COMMITTEE

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February 25, 2003

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

Attention Docket ID No. OW-2002-0050

**RE: Comments on Advance Notice of Proposed Rulemaking on the Clean Water Act
Regulatory Definition of "Waters of the United States"**

Dear Sir or Madam,

In the court case "Solid Waste Agency of Northern Cook County v. the U.S. Army Corps of Engineers" (the SWANCC decision), the Supreme Court ruled that "the mere presence of migratory birds was insufficient to apply the federal Clean Water Act (CWA) to non-navigable, wholly isolated, intrastate waters." Subsequently, the administration issued an "Advance Notice of Proposed Rulemaking" that may lead to an even more restrictive interpretation of the CWA, such as exclusion of tributaries to navigable waters. The proposed reinterpretation appears as an attempt to weaken the current protections for wetlands and to give in to the interests of developers and polluters at the expense of healthy wetland ecosystems.

The Nez Perce Tribe (Tribe) is concerned that by weakening the protection of wetlands under the CWA, an increasing number of these fragile ecosystems will be lost to development and degraded by industrial use. The Tribe is opposed to any changes in the existing regulatory definitions that would cause any natural wetlands to lose protection under Section 404 and 303 of the CWA.

For the last 30 years, the CWA has been effective in improving the health of the nation's waters. We cannot afford to lose ground in our continued battle to stem the loss of our wetland resources. As the State of Idaho does not have adequate regulations for wetlands

wetland resources. As the State of Idaho does not have adequate regulations for wetlands protection in place, we depend on the CWA to guard the integrity of our wetland ecosystems.

The CWA's purpose is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Wetlands play a crucial role in achieving these goals. The following are some of the well-known functions and values of wetlands:

- They purify surface and groundwater,
- help prevent flooding,
- maintain the water table,
- are important wildlife habitat (esp. for waterfowl and amphibians, but also many other birds as well as mammals and reptiles),
- serve as spawning and rearing habitat for many fish species,
- provide recreation, such as bird- and wildlife-watching, and
- produce water-dependent plants, such as bulrush, duck potato, and camas.

The efficiency of wetlands in filtering out water pollution is widely recognized and has been utilized by numerous wetland water treatment systems. As many isolated wetlands occur in agricultural areas, they are important for filtering out excess nutrients from fertilizers as well as toxic substances from pesticides and herbicides. Another important role of wetlands is attenuation of floods and maintenance of water tables. Wetlands act like a sponge, soaking up excess water in the wet season and slowly releasing it during dry periods. Their role in maintaining the water table has a direct bearing on the continued productivity of non-irrigated agricultural fields.

Wetlands are vitally important as breeding and rearing habitats for a wide variety of animals. More than 75% of Idaho's wildlife depends on wetlands during some part of their life cycle, but wetlands account for less than 1% of the state's area (Idaho Department of Fish and Game 1990). Isolated wetlands are often the last refuge for wildlife in a predominantly agricultural landscape. Because wetlands are transition zones between uplands and deepwater aquatic systems, they attract species from both habitat types (Mitsch and Gosselink 1993). The resulting species richness as well as the productivity of wetlands far exceeds that of terrestrial ecosystems (Lieth 1975). Wetlands are the most productive ecosystems in the world in terms of the amount of plants and energy produced (Berry and Buechler 1993). Because of their species richness and potential use by rare or endangered species, isolated wetlands are prime destinations for bird-watching, the fastest-growing outdoor activity in America, which was enjoyed by 46 million people in the U.S. in 2001 (U.S. DOI 2002) and may involve interstate or foreign travelers.

All of these functions and values could be lost if all isolated, non-navigable wetlands were to lose protection under the CWA and become subject to filling and development. The Tribe has a vested interest in healthy, productive wetlands because it recognizes and values the abovementioned benefits of those ecosystems. Of particular importance to the Tribe is the continued availability of wetland-dependent cultural plants such as camas, tule, and Indian hemp. Because of extensive draining of isolated wetlands and wet

meadows for agricultural use, cultural plants important to the Nez Perce Tribe are becoming increasingly rare. This trend can only be reversed by strengthening any existing wetland regulations.

SWANCC involved "CWA jurisdiction over *isolated*, intrastate, non-navigable ponds that formerly had been gravel mine pits, but which over time attracted migratory birds." In my opinion, there are few truly isolated bodies of water. All waters are part of the hydrologic cycle; most are connected to the groundwater table, which in turn connects them to streams and rivers. The hyporheic zone (the saturated transitional zone between surface and groundwater) may extend for several kilometers from stream channels. For instance, stonefly larvae, an indicator of healthy streams, have been found in the hyporheic zone several kilometers from the nearest stream (Stanford and Ward 1988). Any pollutants discharged into an "isolated" wetland will eventually infiltrate the aquifer and may subsequently be discharged into waterbodies under the jurisdiction of the CWA, causing degradation of their water quality. In United States v. Buday, 138 F. Supp. 2d 1282, 1291-92 (D. Mont. 2001) the court ruled that "water quality of tributaries ... distant though the tributaries may be from navigable streams, is vital to the quality of navigable waters." By the same logic, the water quality of wetlands, isolated though they may appear, may be vital to the quality of navigable waters.

Rather than basing the determination of jurisdiction on whether or not a wetland is isolated, a distinction should be made between isolated natural wetlands and accidentally created ones (such as a gravel pit filling in with groundwater, or a broken water pipe resulting in a wet area). Though the latter may eventually take on some of the functions of natural wetlands, because of their incidental existence the burden of maintaining and protecting them should not be placed on the landowner. All natural wetlands, however, as well as wetlands created for mitigation of the loss of natural wetlands, should continue to be protected under the CWA.

The Tribe appreciates the opportunity to comment on this proposed rulemaking. If you have any questions regarding these comments, please do not hesitate to contact Elisabeth Brackney in the Water Resources Division (208-843-7368). Thank you.

Sincerely,



Samuel N. Penney
Chairman

Attachment

Literature Cited

- Berry, C., and D. Buechler. 1993. Wetlands in the Great Plains: A guide to values and management. U.S. Fish and Wildlife Service, South Dakota Cooperative Fish and Wildlife Research Unit, South Dakota State University.
- Idaho Department of Fish and Game. 1990. Between land and water: The wetlands of Idaho. Nongame leaflet No. 9. 12 pp.
- Lieth, H. 1975. Primary productivity of the major vegetation units of the world. Pages 202-215 in H. Lieth and R.H. Whittaker, editors. Primary productivity of the biosphere. Springer-Verlag, New York.
- Mitsch, W.J., and J.G. Gosselink. 1993. Wetlands, second edition. Van Nostrand Reinhold. 722 pp.
- Stanford, J.A., and J.V. Ward. 1988. The hyporheic habitat of river ecosystems. *Nature* 335:64-66.
- U.S. Department of the Interior, Fish and Wildlife Service and U.S. Department of Commerce, U.S. Census Bureau. 2002. 2001 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation.