



**RECKLESS ABANDON:**  
How the Bush Administration is Exposing  
America's Waters to Harm



**August 2004**

*Reckless Abandon* is a publication of Earthjustice, National Wildlife Federation, Natural Resources Defense Council, and Sierra Club. These organizations recognize the following individuals for their valuable work in researching, drafting, editing and/or compiling information and photographs for this report and thank them for making its publication possible: Navis Bermudez, John Garder, David Groves, Ed Hopkins, Cat Lazaroff, Robin Mann, Amy Maron, Joan Mulhern, Jim Murphy, Daniel Rosenberg, Julie Sibbing, Nancy Stoner, Ray Wan, and Maria Weidner.

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# EXECUTIVE SUMMARY

Every region of the country contains unique types of aquatic ecosystems — some so rare that they are found only in part of a single state. These wetlands, ponds, lakes, and streams support a wide variety of life, supply clean drinking water, sustain imperiled species, provide natural flood control, and perform a host of other functions important to both human and wildlife communities. These waters are varied in their names and descriptions — including arroyos, prairie potholes, intermittent and ephemeral streams, bogs, playa lakes, forested vernal pools, and desert springs — but all are an important part of our natural and cultural heritage.

More than thirty years ago, Congress enacted the Clean Water Act to make the nation's waters safe for fishing and swimming by eliminating water pollution at its source. Yet a new Bush administration policy is now placing many streams, wetlands, and other waters in serious danger of pollution and destruction, threatening not only these waters but also the larger rivers, lakes, and coastal waters into which they flow. This threat comes at a time when water pollution continues to be one of the nation's most serious environmental problems — and a central environmental concern for most of the public.

On January 15, 2003, the Bush administration announced a new policy directive designed to remove Clean Water Act protections for many streams, wetlands, ponds, lakes, and other waters. The policy — initiated through a joint memorandum issued by the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) — effectively directed federal regulators to withhold protection from tens of millions of acres of wetlands, streams, and other waters unless they first get permission from their national headquarters in Washington, DC. The directive made clear that no prior permission is required for EPA and Corps field staff to ignore Clean Water Act protections and allow industrial dischargers, developers, and others to pollute, fill, or destroy these waters.

This report illustrates how federal officials are using the January 2003 policy directive to deny Clean Water Act jurisdiction over waters that had been included in the Clean Water Act's protective scope for over thirty years. The case studies in the report provide several examples of the Corps declining to enforce federal restrictions against water pollution in lakes, rivers, streams and wetlands across the country,



Wyman Meinzer

such as a 150-mile-long river in New Mexico, thousands of acres of wetlands in one of Florida's most important watersheds, headwater streams in Appalachia, playa lakes in the Southwest, a sixty-nine-mile long canal used as a drinking-water supply, and even an eighty-six-acre lake in Wisconsin that is a popular fishing spot. The implementation of the Bush administration's policy has effectively left all of these waters — and many, many more — without the Clean Water Act to protect them.

As the examples in this report demonstrate, the Bush administration's policy has given developers and other polluters a green light to ignore the Clean Water Act where it legally applies. The administration must immediately withdraw the January 2003 policy directive and replace it with clear instructions to Corps and EPA staff that they shall enforce existing Clean Water Act limits on water pollution to the full extent of the law. In addition, Congress should act to ensure that the nation's waters remain protected.

*Playas are critical habitat for millions of migratory birds.*

# BACKGROUND

Early in 2001, a bare majority of the U.S. Supreme Court ruled in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*<sup>1</sup> that the Clean Water Act does not apply to certain non-navigable, intrastate, “isolated” waters, *based solely on the use of these waters by migratory birds*. Nothing in the SWANCC decision compelled any change to the longstanding definition of waters of the United States used by both the EPA and the Corps. Nevertheless, the Bush administration has used the Supreme Court decision as an excuse to remove protections for all kinds of small streams, wetlands, lakes, and ponds by declaring them “isolated.”

*“These sound like wetlands with functions that should be protected, but alas...”*

– EMAIL MESSAGE BETWEEN  
CORPS EMPLOYEES  
IN SACRAMENTO DISTRICT

As scientists have extensively documented, very few waters are truly “isolated” from a hydrological perspective, since pollution in or destruction of even small wetlands, headwater streams, and seasonal waterways will have serious effects on the chemical, physical, and biological integrity of other downstream waters. But the January 2003 policy directive by the Bush administration is based on the assertion that many wetlands, headwater or seasonal streams, non-navigable ponds, and certain other waters should be treated as if they are “isolated.”<sup>2</sup> Under this policy, even some tributaries of rivers could be treated as “isolated.”<sup>3</sup>

The majority of states, many members of Congress, hunting and fishing groups, environmental organizations, respected scientists, and members of the public from across the country have strongly criticized the policy of removing federal Clean Water Act protections from these so-called “isolated” waters. However, the Bush administration’s policy directive is still in effect today. As a result, many waters are being left unprotected.

EPA itself has estimated that some 20 million acres of wetlands in the continental United States are at risk of losing Clean Water Act protections under the administration’s policy directive.<sup>4</sup> In addition, tens of thousands of miles of seasonal and headwater streams<sup>5</sup> as well as small lakes and ponds are also at risk of being deemed “isolated” and becoming discharge sites for toxics, sewage, animal waste, oil, or other pollution or being destroyed by dredge or fill activities.

If the Bush administration is allowed to continue to follow this policy instead of enforcing the Clean Water Act, more wetlands and small streams will be polluted or lost altogether, and the rivers, lakes, and coastal waters they feed will become more degraded. The administration must withdraw its policy directive and Congress must enact the Clean Water Authority Restoration Act (H.R. 962 and S. 473), reaffirming its original intent to protect all waters of the United States.

<sup>1</sup> *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* 531 U.S. 159 (2001). Five Justices joined the Court’s opinion; four strongly dissented.

<sup>2</sup> The January 2003 policy directive does not define the term “isolated,” but numerous industry groups pressing the Bush administration to restrict the scope of the Clean Water Act have taken the position that any waters that are not themselves navigable or do not have an above-ground, year-round, natural connection directly touching a commercially navigable waterway should be considered “isolated.” See, for example, the comments of the National Mining Association, the Independent Petroleum Association of America, National Association of Home Builders, and other industry groups on the January 2003 policy directive and proposed rulemaking. These comments are available on the Web at [www.epa.gov/edocket](http://www.epa.gov/edocket).

<sup>3</sup> See *Federal Register* notice on the Clean Water Act Regulatory Definition of “Waters of the United States,” 68 Fed. Reg. 1991, 1997, January 15, 2003.

<sup>4</sup> Eric Pianin, “Administration Establishes New Wetlands Guidelines,” *The Washington Post*, January 11, 2003; p. A05. See also Douglas Jehl, “U.S. Plan Could Ease Limits on Wetlands Development,” *The New York Times*, January 11, 2003.

<sup>5</sup> *National Water Quality Inventory: 1998 Report to Congress*, 2000, Appendix A-1, <http://www.epa.gov/305b/98report/appenda.pdf>.

# THE CLEAN WATER ACT: A Landmark in Protecting the Nation's Waters

**T**hirty-two years ago, Congress overhauled the Federal Water Pollution Control Act, marking a national commitment to control water pollution.<sup>6</sup> In passing the 1972 law that became known as the Clean Water Act, Congress articulated one of the broadest ecosystem restoration and protection aspirations in all of environmental law. This objective — to reverse the many years of degradation of the nation's waters and to make them again capable of supporting aquatic life and recreation — was an enormous advancement from the narrow goals of simply limiting pollution in interstate waters or only protecting navigation that were in earlier laws.

The Clean Water Act established broad new authority to restore and protect *all* of the nation's waters. For the first time, the Act made certain that previously unprotected bodies of water such as wetlands, small streams, arroyos, prairie potholes, bogs, playa lakes, forested vernal pools, and desert springs were protected from unrestricted pollution and destruction.

Under the Clean Water Act, great advances have been made in reducing water pollution as well as

the rate of wetland destruction. This progress could not have been made unless the Clean Water Act was applied to a broad category of water bodies, not simply to interstate or commercially navigable waters. As such, the application of the law's protections — not only to rivers and oceans, but also to lakes, ponds, streams, wetlands, and other waters — has been critical to reducing water pollution.



Running Water Publications ([www.running-water.com](http://www.running-water.com))

<sup>6</sup> Pub. L. No. 92-500, 86 Stat. 816 (1972).



# Bush Administration Seeks to Narrow the Scope of the Clean Water Act

In January 2003, the Bush administration began a formal effort to restrict the types of waters protected under the Clean Water Act. It simultaneously issued two documents: an Advanced Notice of Proposed Rulemaking<sup>7</sup> to begin the process of changing Clean Water Act rules; and a new policy directive ordering federal regulators to immediately begin withholding protections for certain streams, wetlands, ponds, and other waters. Although the effort to formally change Clean Water Act rules was eventually abandoned after an enormous public outcry, the policy directive is still in effect today.

This directive, issued as a joint memorandum by the EPA and the Corps, directs federal regulators to withhold protection from tens of millions of acres of wetlands, streams, and other waters. The directive purports to provide guidance to federal regulators on how to interpret the 2001 U.S. Supreme Court *SWANCC* decision that held that Clean Water Act protections do not extend to certain non-navigable, intrastate, “isolated” waters, based solely on the use of these waters by migratory birds.

While the *SWANCC* opinion itself and many subsequent lower court decisions have made clear that *SWANCC* applies in only the very limited instances described above, the Bush administration has used this narrow court ruling as a pretext to undermine clean water protections for a much broader category of waters.

In a bold departure from existing Clean Water Act law, the policy directs regulators to stop extending Clean Water Act protections to any intrastate, non-navigable water — even streams — that they might consider “isolated.” The directive created an unfair and one-sided process whereby regulators must gain permission from headquarters in Washington, DC, before extending protections to any water that might be considered “isolated,” but are not required to defend or even document when they decide *not* to extend protections. The fact that EPA and Corps headquarters have received very few requests for approval of decisions to *affirmatively* regulate waters is indication that regulators are erring on the side of not protecting waters.<sup>8</sup>

## Specifically, the directive:

- Instructs federal agencies to stop protecting so-called “isolated” waters without first obtaining “project-specific” approval from Corps headquarters in Washington, DC. Agency personnel are not required to get permission to allow pollution or destruction of these waters without any federal permit or limitations.
- Tells staff not to assert Clean Water Act jurisdiction over so-called “isolated” waters on the basis that the waters are used as habitat for federally protected endangered or threatened species or to irrigate crops sold in interstate commerce—an unwarranted reversal of a Reagan-era policy.
- Presumes that all so-called “isolated” intrastate, non-navigable waters are no longer protected, even if the water is used in interstate commerce or if the pollution or destruction of the water would affect interstate commerce. This means the agencies’ default position is that such waters are not protected.
- Indicates that “generally speaking,” the agencies will continue to protect tributaries of navigable waters and wetlands directly adjacent to those tributaries. (The exceptions to this “generally speaking” policy are not spelled out, but our research suggests that this “general” protection has opened the way for many specific streams and other waters to be denied Clean Water Act safeguards.)

<sup>7</sup> 68 Fed. Reg. 1991, January 15, 2003.

<sup>8</sup> Additionally, it is disturbing to note that the instances where field staff have requested permission to assert protection over “iso-

lated” waters have been shrouded in secrecy, with few if any details publicly available regarding the water at issue, the basis for the field staff’s request, or the final determination by headquarters, including the basis for the final decision.

# Public Outcry Unleashed Over Policy

**R**eaction to the administration's plans to narrow the scope of the Clean Water Act was overwhelmingly negative. EPA and the Corps received approximately 135,000 comments, close to 99 percent of which opposed narrowing the scope of the Act.<sup>9</sup> Thirty-two states provided negative comments on the policy directive. Indeed, as many pointed out, most states lack the legal authority or the funding to protect waters should the federal government relinquish its authority.<sup>10</sup>

In addition to the states, a number of state associations and regional authorities, the scientific community, and a bi-partisan group of 219 U.S. Representatives and twenty-six U.S. Senators all urged the administration to abandon the rulemaking and withdraw the directive.

Unsurprisingly, the major trade associations representing polluting industries including mining, oil, developers, and agriculture took a different approach. Their consistent position is that, after the SWANCC decision, only "traditionally navigable waters" and their immediately abutting wetlands should remain protected under the Clean Water Act. This radical interpretation, if adopted by the Bush administration, would result in the complete loss of

*"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. . . . It is likely that these rare wetland types would receive virtually no protection under . . . the current agency guidance."*

-SOUTH DAKOTA DEPARTMENT OF GAME, FISH, AND PARKS



F.G. Courtney, National Wildlife Federation

*Hunters and anglers from across the southeast learn about the harm being caused to the nation's waters by the Bush administration's policy directive at a workshop sponsored by the Georgia Wildlife Federation, National Wildlife Federation, Trout Unlimited and Ducks Unlimited.*

Clean Water Act protections for the vast majority of the nation's streams and wetlands. In many states, more than 90 percent of the waters would lose all Clean Water Act protections.

As a result of the national outcry in support of clean water, in December 2003 the Bush administration announced that it was abandoning plans for a rulemaking to officially narrow the scope of the Clean Water Act. However, the policy directive was not withdrawn and EPA and the Corps have indicated that they have no plans to do so, effectively leaving many waters unprotected even though the law has not been changed.

<sup>9</sup> Personal communication with EPA staff.

<sup>10</sup> For example, only nineteen states currently have any state-level laws or programs that protect wetlands or other waters from dredge and fill activities not regulated by federal law, and most

of these are considerably weaker than the Clean Water Act. Little or no state protection is provided in the states with some of the largest at-risk wetland acreages, including Alaska, Georgia, Kansas, Louisiana, Mississippi, North Dakota, South Carolina, South Dakota, and Texas.

# Corps' Implementation of Policy Directive Results in Destruction and Pollution of Waters

To evaluate how federal regulators are implementing or applying the Bush administration's policy directive, Earthjustice, the Natural Resources Defense Council (NRDC), the National Wildlife Federation (NWF), and the Sierra Club submitted a series of Freedom of Information Act (FOIA) requests to Corps headquarters and its districts to determine the basis for their decisions not to enforce Clean Water Act protections over certain waters. In addition, our organizations have spoken with federal, state, and local officials and citizens around the country to learn more about waters being abandoned by the Bush administration.

As the following case studies illustrate, many of the decisions not to regulate particular water bodies violate the Clean Water Act and put important water resources at risk. This report understates the problem because several Corps districts do not appear to be documenting any of their decisions not to regulate and, in many cases, the Corps is not consulting or coordinating with EPA or the

Fish and Wildlife Service prior to abandoning protection for previously protected waters. One thing is certain: The result of the Bush administration's policy is that untold thousands of acres of wetlands, small streams, and other waters that provide critical environmental values are being opened up to destruction and degradation without any federal environmental review or limitations.

## GETTING THE PUBLIC'S INFORMATION OUT OF THE CORPS

On September 25, 2002, Earthjustice submitted a Freedom of Information (FOIA) request to Corps headquarters on behalf of itself, the Natural Resources Defense Council, the National Wildlife Federation, and the Sierra Club, seeking information regarding withdrawals of assertions of jurisdiction over any waters that were or would have been classified as jurisdictional prior to *SWANCC* (individual determinations) and information regarding the development of policy and guidance interpreting the ruling (policy development). While Corps headquarters provided some documents regarding policy development, it took nearly a year for it to begin providing a response to the request for individual determinations, even though the statutory deadline for responding to a FOIA request is twenty days.

In August 2003, the Corps began providing the responses from its eight divisions and forty-one districts. Ultimately, thirty-four districts responded to the 2002 request for individual determinations. The responses varied widely: some districts, such as Jacksonville, stated that they had no information; others, including Charleston and Savannah, provided thousands of pages of documents.

In light of the Bush administration's January 2003 policy directive, the groups sent a new FOIA request to individual Corps districts seeking non-jurisdiction determinations. Between August 2003 and April 2004, FOIA requests were sent to thirty-five of the districts. In some

instances, Corps districts have sent documents responding to the 2002 FOIA request together with the response to the more recent request.

In sum, the results of the 2003-2004 FOIA request, which are the primary basis of the case studies in this report, are as follows:

**Districts that have responded to the FOIA request and provided some or all files, in several instances after delays of several months:** Albuquerque, Anchorage, Buffalo, Honolulu, Huntington<sup>79</sup>, Jacksonville, Little Rock<sup>80</sup>, Los Angeles, Louisville, Memphis, Mobile, Nashville, New England<sup>81</sup>, New Orleans, New York, Omaha, Philadelphia, Pittsburgh, Portland, Rock Island, Sacramento, Seattle, St. Louis, St. Paul, Tulsa, Walla Walla, and Wilmington.

**Districts that have not yet responded:** Ft. Worth and Vicksburg.

**Districts that have refused to grant a fee waiver:** Chicago (denied Sierra Club appeal), Detroit (granting limited waiver in response to appeal), and Omaha (granted waiver after NWF appeal).

**Districts that either claim not to have documents or refuse to provide them:** Baltimore, Galveston (Earthjustice is administratively appealing), Kansas City (provided some documents but is still withholding 92 files as privileged), and San Francisco (called the FOIA request a "fishing expedition"; NRDC is administratively appealing their refusal).

<sup>79</sup> Response provided after Earthjustice appeal of initial "no documents" determination.

<sup>80</sup> Response provided following Sierra Club appeal of initial fee waiver denial.

<sup>81</sup> Summary information only; fee waiver withheld for files.



## NEW MEXICO RIVERS: Entire Basins Deemed “Isolated”

The Tularosa Basin, located in New Mexico and Texas, averages sixty miles in width and is approximately 150 miles long. Within it lies the Sacramento River and Tularosa Creek, the two major waterways of the region. Water is diverted from the Sacramento River and Tularosa Creek for community water supplies as well as for numerous private ranches and the U.S. Forest Service. In a region with scarce water supplies, the availability and quality of these surface waters is of critical importance.

Yet in June 2003, the Corps’ Albuquerque District ruled that the entire Sacramento River and all of its tributaries are non-jurisdictional under the Clean Water Act because they are part of a “closed basin” system.<sup>11</sup> This decision was in response to applications for Clean Water Act permits filed by the Federal Highway Administration, which wanted to realign a highway to cut across the Sacramento River in four places. The Albuquerque District told the Federal Highway Administration that no permits were required to discharge pollutants into the river.

Indeed, according to documents obtained under the FOIA, the Albuquerque District has refused to assert Clean Water Act protections in all other instances to date where the permit request would affect waters in so-called closed basin systems.

The New Mexico Department of Game and Fish has determined that 20 percent of New Mexico’s waters could be considered within a closed basin, including eighty-four miles of perennial streams and rivers and 3,900 miles of intermittent streams and rivers.<sup>12</sup> All of these waters could lose federal protections under the Albuquerque District’s interpretation of the policy directive. Not only is the Corps failing to consider other factors that could clearly justify maintaining protections for such waters — such as use for industry, recreation, and fishing — they are also failing to protect waters that cross state lines, such as the Tularosa Basin that is within both New Mexico and Texas. This is in direct contradiction to federal law, which has explicitly protected interstate waters since 1948.

*“It appears that no waters of the United States are located within the project site. However, a site visit was not made and waters of the United States may be located on the site.”*

—A “NO JURISDICTION”  
CALL BY THE CORPS’  
ALBUQUERQUE DISTRICT



Forest Guardians (<http://www.forestguardians.org/>)

*The U.S. Army Corps of Engineers Albuquerque District ruled that the entire Sacramento River, a water supply for communities, and all of its tributaries are non-jurisdictional under the Clean Water Act.*

<sup>11</sup> Corps letter declining jurisdiction over the Sacramento River (and all other waters within the Tularosa Basin), June 23, 2003.

<sup>12</sup> Letter from Larry G. Bell, Commissioner, New Mexico Department of Game and Fish, to U.S. EPA, April 15, 2003.

Other basins in New Mexico that have already been ruled non-jurisdictional include the Estancia, Jornada del Muerto, Mimbres, San Augustine, and Santa Clara Basins. On these same facts, basins the Corps could consider “isolated” in the future are the North Plains, Salt, and Southwestern Basins.

## STREAMS IN APPALACHIA: Obliterated by Coal Mining Industry

Appalachia's headwater tributaries are critically important to the health of all of the region's watersheds.<sup>13</sup> Even the Bush administration, in its recent draft Environmental Impact Statement on mountaintop removal mining, acknowledged that these headwater streams are of great ecological and hydrological importance and that filling them with mining waste has irreversible harmful effects<sup>14</sup> — effects the Corps is largely ignoring.

In June 2000, the coal mining company Beech Fork Processing, Inc., was given an authorization by the Corps under a nationwide general permit that allowed the company to dump waste generated by its massive mountaintop removal mining operation into streams and wetlands in Martin County, Kentucky. As originally approved, this project was to “permanently impact” (i.e., bury) more than six miles of jurisdictional waters in eastern Kentucky's Big Sandy River Basin, an area that includes the headwater tributaries of Little Beech Fork Creek, Rough Branch, Upper and Lower Twin Branch, Lick Fork, Rockhouse Fork, and Bent Branch.

The proposed destruction of six miles of streams brought a legal challenge from the non-profit group Kentuckians For The Commonwealth, which contended that filling streams with waste was illegal under the Clean Water Act. This case also drew the attention of the EPA, which took issue with the fact that Beech Fork had been granted a general permit

rather than an individual permit for such a large and destructive project.<sup>15</sup>

In February 2003 — just one month after the Bush administration released the policy directive — Beech Fork requested a revised authorization to bury streams at the Martin County mining site. The new proposal was similar to the project described in the company's original submission, but there was at least one glaring difference. While the company's mountaintop removal mining project remained virtually the same in its scope and magnitude, the “permanent impacts” to streams were now reported to be much less. Instead of more than six miles of jurisdictional waters destroyed, the permit now declared that barely two miles would be buried.

Unfortunately, the claim that fewer miles of *jurisdictional* streams would be destroyed appears not because fewer miles of actual streams would be destroyed. While the mining companies made some changes that reduced some stream impacts, the reduction in the estimate of stream miles affected was mostly due to new jurisdictional determinations made by the Corps that favored Beech Fork's dumping activities. That is, while the Corps had previously determined that the Beech Fork project would destroy more than six miles of U.S. waters, it revisited and reversed these determinations to find that less than one-third of the stream miles that would be destroyed were still covered by the Clean Water Act.

*This photo shows the point in the stream at which the mining company consultant tells the Corps to cut off Clean Water Act jurisdiction; this means the stream above that point can be filled with mining waste without any federal permits or environmental protections.*



U.S. Army Corps of Engineers Huntington District



On June 27, 2003, EPA wrote to the Corps stating its concern that stream impacts had been reduced due to changes in jurisdictional determinations and that Beech Fork's revised application "... indicates that the scope of jurisdictional waters has *decreased sharply* from previous Corps determinations."<sup>16</sup> EPA noted that some of the reduction in stream impacts occurred by moving the valley fills higher up in the valleys, but they concluded that the original jurisdictional determinations included more stream miles to be protected by the Clean Water Act than the revised proposal.<sup>17</sup>

Despite these concerns, on November 4, 2003, the Corps determined that the proposed project would permanently destroy only two miles of streams subject

to the Clean Water Act and left the rest of the streams without any federal protection.<sup>18</sup> In response to the EPA's comments, the Corps claimed that a portion of the difference in stream miles affected was due to changes in the acreage of the valley fills, but even by its reckoning, at least two miles of streams were simply deemed non-jurisdictional.

Unfortunately, this is not a solitary case of headwater streams being dropped from protections; as the groups' FOIA results examined to date show, the Huntington District has also redrawn the jurisdictional lines of the Clean Water Act to benefit other coal mining operations since the January 2003 policy directive was issued.



Vivian Stockman, Ohio Valley Environmental Coalition

**According to recent studies, coal companies have already buried over 1200 miles of streams in Appalachia with mountain-top removal mining waste.**

<sup>13</sup> See Testimony of J. Bruce Wallace, Professor, University of Georgia, before the U.S. Senate Committee on Environment and Public Works, June 6, 2002.

<sup>14</sup> Mountaintop Mining/Valley Fills in Appalachia, Draft Programmatic Environmental Impact Statement, 68 Fed. Reg. 32487, May 30, 2003.

<sup>15</sup> In May 2002, the Bush administration changed the Clean Water Act rule at issue and repealed a twenty-five-year-old ban on filling streams and other waters with industrial waste. A federal district court in West Virginia found that the dumping and the rule change were illegal in *Kentuckians For The Commonwealth v. Rivenburgh*, 204 F. Supp. 2d 927 (S.D.W.Va. 2002), but this decision was overturned by the Fourth Circuit Court of Appeals, 317 F.3d 425 (4th Cir. 2003).

<sup>16</sup> Letter from Thomas C. Welborn, Chief, Wetlands, Coastal and Watersheds Branch, EPA Region 4, to Ginger Mullins, Chief, Regulatory Branch, U.S. Army Corps of Engineers, Huntington, June 27, 2003 (emphasis added).

<sup>17</sup> *Id.*

<sup>18</sup> The Corps' decision is even more disturbing given that Beech Fork acknowledged in a 2002 letter to the Corps' Huntington District that it could avoid the use of U.S. waters for waste disposal by instead placing its waste in an old mining site, although it indicated its preference for the option of dumping the waste into streams. Letter from Paul B. Horn Jr., P.E., manager of engineering, Beech Fork Processing, Inc., to Ginger Mullins, Chief, Regulatory Branch, U.S. Army Corps of Engineers, Huntington, June 3, 2002.



## FLORIDA WETLANDS: Four Thousand Acres Sacrificed to Phosphate Mine

Florida is home to many of the country's important rivers and wetlands, including the Suwannee River and its environs, designated by the EPA as a "national showcase watershed."<sup>19</sup> The Suwannee flows from the Okefenokee Swamp in southeastern Georgia 235 miles to the Gulf of Mexico in northern Florida. Along the way, the river and its wetlands are used by people for recreation and provide important habitat for numerous wildlife species.

The Corps and EPA created a significant new threat to the health of the Suwannee watershed in March 2003 when they released a Final Supplemental Environmental Impact Statement approving the Potash Corporation of Saskatchewan's (PCS) proposed Hamilton County Mine expansion, which eliminated 3,997 acres of forested wet-

lands as "waters of the United States."<sup>20</sup> With this decision, the agencies dramatically reduced their calculation of federally protected wetlands — from 5,768 to 1,671 acres — associated with expanding the massive phosphate mining operation in the deep bend of the Suwannee River as it snakes through Hamilton County.

The Corps and EPA excluded as "isolated" and non-jurisdictional essentially all of the wetlands outside of the floodplain that they determined did not have a direct, hydrological link to the Suwannee River. The agencies ignored the presence of indicators that these wetlands function integrally with the Suwannee River ecosystem and have multiple existing and potential connections to interstate commerce.

First, the depressional pond-cypress and other forested wetlands and their surrounding uplands provide habitat for federally threatened and endangered species of wildlife. The presence of the endangered wood stork and the threatened eastern indigo snake and bald eagle are well documented. The wetlands are recognized as potential habitat for the federally endangered red-cockaded woodpecker and gray bat and the threatened flatwoods salamander. Prior to the issuance of the policy directive, presence of these species would have been a basis for protecting this 4,000-acre tract of wetlands.

Second, the agencies ignored the critical role played by the mosaic of forested depressional wetlands for maintaining the water quality and hydrology of the Suwannee River, a major navigational and recreational waterway that is already experiencing pollution problems, including excessive nutrients.

Third, the agencies dismissed the fact that these wetlands themselves "are or could be used by interstate or foreign travelers for recreational or other purposes" as provided in Clean Water Act regulations.<sup>21</sup>

In a letter to EPA regarding the January 2003 policy directive and proposed rulemaking, Florida's Department of Environmental Protection recognized the important ecosystem functions of the forested and other depressional wetlands in the Florida panhandle

*Hamilton County phosphate mining operation in progress, with nearby clay slurry pits representing post-mining wildlife habitat.*



Wyatt Gallery (www.WyattGallery.com)

<sup>19</sup> See <http://www.epa.gov/owow/showcase/suwanneeriver>.

<sup>20</sup> Final Supplemental Environmental Impact Statement on White Springs Agricultural Chemicals, Inc. (d/b/a PCS Phosphate-

White Springs), Hamilton County Mine Continuation Permitting, Hamilton County, Florida, March 26, 2003.

that might be excluded from Clean Water Act protection under the administration's policy changes. Their letter noted that these wetlands provide the following critical uses: drinking-water sources as well as shelter, resting, and feeding habitat for threatened and endangered species; collection and storage of overland flows of stormwater that can reduce flooding; and recreational opportunities, including birding and hunting. The Florida DEP raised the PCS mining site as a specific concern with respect to the agency's interpretation of the Clean Water Act, noting the similarity of the wetland features on the mine site to those of concern in the panhandle. The Florida DEP concluded that:

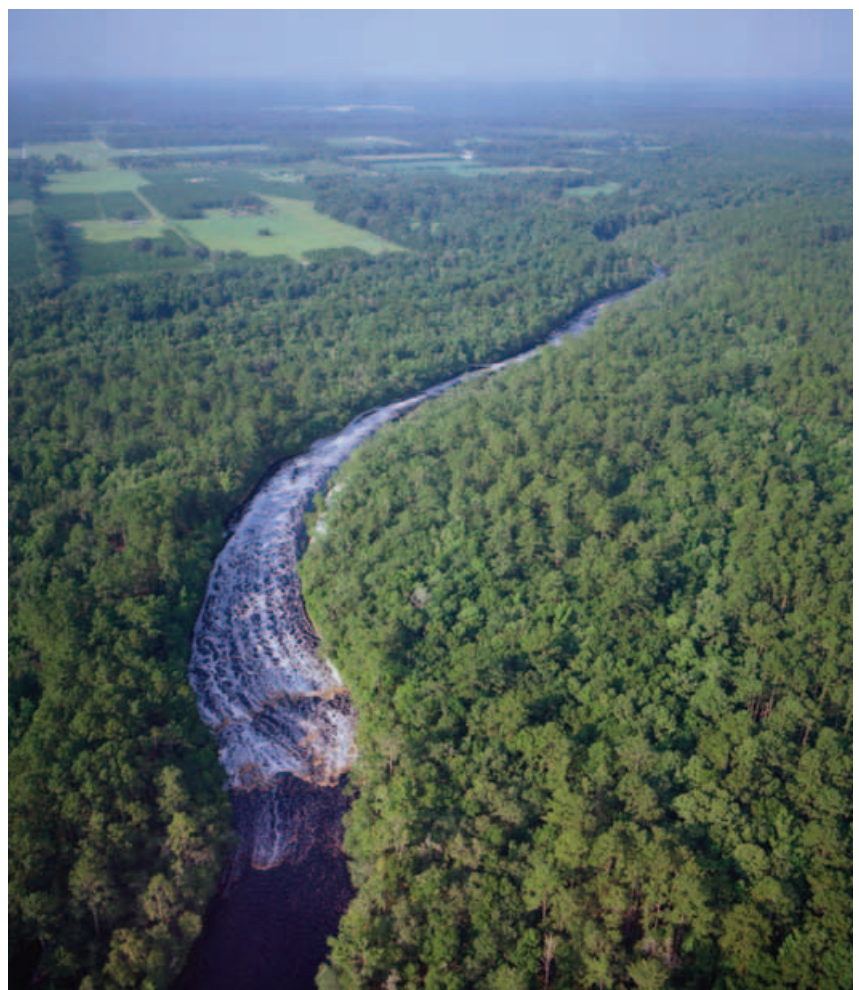
The "isolated" wetlands in the Florida panhandle are used by hunters, hikers, photographers, and bird-watchers, and for industrial purposes, such as collecting frogs and harvesting of cypress mulch by non-state residents who travel to Florida. "Isolated" wetlands also are used by migrating birds, which are protected under the Migratory Bird Treaty Act. We believe from the evidence in Florida and elsewhere that "isolated" wetlands do have a clear nexus to interstate commerce, and that the [Clean Water Act] should regulate alterations to all "isolated" wetlands that are navigable waters, that are adjacent to navigable waters, that could affect interstate or foreign commerce, or that could be used by interstate or foreign travelers for recreational or other purposes.<sup>22</sup>

The consequences of writing off the 3,997 acres of wetlands along the Suwannee as non-jurisdictional are profound. Under the Clean Water Act, pollution or destruction of waters of the United States must be avoided or minimized whenever possible; the Corps and the EPA's decision, in contrast, gives PCS a green light to destroy these wetlands without these considerations.

In addition, the federal non-jurisdiction determination for these pond-cypress and other so-called "isolated" wetlands relegates them to the substantially lower standard for mitigation under Florida's requirements, which allow the functions of these complex wetland systems to be "replaced" with the construction of the ponds

designed to hold the clay slurry generated by the mining operation. The federal agencies make the dubious argument in the impact statement that the clay slurry areas provide a net ecological benefit because they add aquatic habitat, since they are more continuously inundated than the more intermittently wet natural systems. The agencies justify this argument by noting that these slurry ponds attract a wider diversity of species, without any scientific support for the notion that introducing new species to a complex, natural system is an environmental benefit. The agencies note that wood storks have been sighted at the clay slurry areas, apparently suggesting that these artificial ponds are an ecologically equivalent substitute for the wetlands that existed before becoming polluted or filled by the phosphate mine.

*A stretch of the famous Suwannee River, with its forested corridor still intact, near the phosphate mine. (see opposite page)*



Wyatt Gallery (www.WyattGallery.com)

<sup>21</sup> 33 CFR 328.3(a)(3)(i).

<sup>22</sup> Florida Department of Environmental Protection letter to U.S. EPA, April 16, 2003.



## IDAHO'S LOST RIVER DRAINAGES: Lost for Good?

The southern portion of Idaho contains numerous creeks and rivers that do not flow on the surface beyond the borders of the state of Idaho. These are the Lost River Drainages. These watersheds contain seventy-three streams and rivers in an area that covers over 5,500 square miles, which is nearly as large as the states of Connecticut and Rhode Island combined.

The more prominent waters within this area are the Big Lost River, the Little Lost River, Birch Creek, Medicine Lodge Creek, and Mud Lake. The Big Lost River is 131 miles long, the Little Lost River is forty-two miles long, and Birch Creek is fifty-three miles long. Most of the creeks in the area are tributaries to one of these water bodies, which mainly have their headwaters in the high mountains of south-central Idaho and flow in a generally southern direction toward the Snake River.

Even though these are substantial water bodies, they do not flow through to the Snake River on the surface because of the underlying, highly fractured basalt that essentially swallows them up. But these rivers and creeks do feed the Snake River Plain Aquifer, a very large aquifer that supplies substantial flow to the Snake River.

Although all are intrastate water bodies, they all have significant ties to interstate commerce. For example,

the Big Lost River and Mud Lake are navigable waters, while the Little Lost River, Birch Creek, and Medicine Lodge Creek may be considered capable of supporting navigation, as each has enough flow to float a canoe or kayak. There are FERC-licensed hydroelectric projects on Birch Creek and Little Lost River. Most of these water bodies supply irrigation water for large areas of croplands, and the Big Lost River, Little Lost River, and Birch Creek support high-quality trout fisheries that attract anglers from all over the United States.

The Snake River Plain Aquifer, which is fed by these water bodies, supports much of the southern Idaho ecosystem, where the majority of the population of the state lives. Much of the irrigation water for farming in southern Idaho is drawn from wells sunk into the aquifer, and the Thousand Springs area near Twin Falls is the primary outlet for the aquifer. This area supports a world-class trout farming industry that utilizes the high flow of cold, clean water flowing out of the basalt cliffs into the Snake River. These springs contribute approximately 5,000 to 7,000 cubic feet per second of flow to the Snake River.

All of the drainages contain extremely important aquatic resources. In this very dry landscape, the lim-

*Birch Creek is one of several large watersheds in southern Idaho for which the Corps is contemplating removing all Clean Water Act protections.*

Bart Gamett, U.S.D.A. Forest Service





ited stream and wetland areas provide critical habitat for wildlife. Although less than 1 percent of Idaho's area is wetland, more than 75 percent of the state's wildlife species depend on these wetlands during some part of their lifecycle.<sup>23</sup>

In 2003, the Walla Walla District requested permission from Corps headquarters to declare the "isolated" Lost River Drainages of Idaho jurisdictional under the Clean Water Act. EPA Region 10 and the state of Idaho<sup>24</sup> were supportive of declaring the watersheds jurisdictional. The Corps' headquarters agreed that the Big Lost River and Mud Lake were jurisdictional based upon their navigability; however, they declined to approve a positive jurisdictional determination for the Little Lost River, Birch Creek, or Medicine Lodge Creek. A final decision by the Corps as to whether this vast network of springs, wetlands, streams, and rivers remains protected by the Clean Water Act is still pending nearly a year after the request was made by the Corps' district office.<sup>25</sup>

Several factors make the recalcitrance of Corps headquarters particularly troubling and underscore how the January 2003 policy directive has undermined protections for the nation's waters.

First, the Corps already determined back in 1985 that each of the Lost River Drainages, despite their intrastate and "isolated" nature, had sufficient connections to interstate commerce to support their protection as waters of the United States under the Clean Water Act. A report by the Corps, prepared at the request of the Fish and Wildlife Service to determine which "isolated" waters the Corps considered jurisdictional, describes "a list of isolated waters in the State of Idaho which were studied and determined to be subject to Clean Water Act jurisdiction ... because of their connection to interstate or foreign commerce. Following each water body listed is a brief summary



Bart Garnett, U.S.D.A. Forest Service

of the connection to interstate commerce which formed the basis for our determination."<sup>26</sup>

Under the heading "Birch Creek, Big Lost River, Little Lost River (Lemhi, Custer, Butte, and Clark Counties)," the report offers four bases for finding a sufficient connection to interstate or foreign commerce to warrant assertion of Clean Water Act jurisdiction: fishing, recreation, hunting, and agriculture. Similar bases for asserting jurisdiction over Medicine Lodge Creek are outlined elsewhere in the report.<sup>27</sup>

Second, while the Corps report does not go into great detail as to the types of fish and other species found in these waters, at least one fish species listed as threatened under the Endangered Species Act, the Bull Trout, is found in the Little Lost River. As previously discussed, prior to issuance of the administration's policy directive, the use of a water body by an endangered or threatened species as well as its use for irrigation of crops sold in foreign commerce were factors used by the Corps and EPA as bases for asserting jurisdiction over intrastate, "isolated" waters. By contrast, the policy directive explicitly prohibits use of these factors for asserting jurisdiction,<sup>28</sup> and thus removes two previously available grounds for protecting the Little Lost River, Birch Creek, and Medicine Lodge Creek.

***Bull Trout, a threatened species, is found in the Birch Creek watershed. Prior to issuance of the Bush administration's policy, presence of threatened or endangered species was a basis for extending Clean Water Act protection to these valuable waters.***

<sup>23</sup> The preceding summary is drawn from "Fact Sheet Re Idaho Lost River Drainages," August 2003, obtained via FOIA request to EPA Region 10.

<sup>24</sup> Idaho does not have its own permitting program that regulates dredge and fill discharges in so-called "isolated" wetlands, lakes, and closed basins nor in most headwaters. In addition, Idaho has a "no more stringent than" provision in its state law, which could be interpreted to bar state law from protecting waters not protected by the federal Clean Water Act.

<sup>25</sup> EPA considered making a "special case" of the matter and elevating the issue within both EPA and the Corps, an action reserved for the most contentious of jurisdictional disputes between the two agencies.

<sup>26</sup> "Initial Report on Isolated Waters in the State of Idaho Subject to Clean Water Act Jurisdiction," Walla Walla District, April 26, 1985.

<sup>27</sup> Id.

<sup>28</sup> See 68 Fed. Reg. 1997.

## FISH OR FOUL: Abandoning Wetlands Important to Fisheries on the Texas Coast



Carol Hollister, Member, Houston Yacht Club

White pelicans roosting at wetlands in Bayport, adjacent to Galveston Bay.

*“Indeed, these ‘isolated’ wetlands constitute the majority of the tributary system that cleanses and then delivers freshwater runoff into coastal plain streams and bays from undeveloped lands.”*

—TEXAS PARKS AND WILDLIFE DEPARTMENT

Along large parts of the Texas coast, the Corps is failing to enforce Clean Water Act jurisdiction over large tracts of unique and ecologically important wetlands that the agency previously considered protected by federal law. The destruction of these wetlands will lead to an overall deterioration of water quality in Galveston Bay, which produces two-thirds of Texas’s oyster harvest and one-third of the state’s recreational fishery and commercial shrimp catch.<sup>29</sup> Biologists in the state estimate that there are 3.3 million acres of freshwater wetlands on the Texas coastal plains, many of which are put in jeopardy if they are no longer protected by the Clean Water Act.<sup>30</sup>

The Galveston District ruled that the Clean Water Act no longer protects more than 120 acres of freshwater wetlands on the northwest shoreline of Galveston Bay. The decision came in response to an application by the Port of Houston Authority to build a shipping container terminal at Bayport, dredging new channels and filling wetlands. The 1,100-acre project site is filled with wetlands that are hydrologically connected by ditches and overland sheet flow to the Bay, and many are even within the Bay’s one-hundred-year floodplain.

According to Corps documents, there are approximately 146 acres of freshwater wetlands on the proposed project site. Originally, in 1999, the Galveston District found

102.2 acres of these covered by the Clean Water Act.<sup>31</sup> Then, in January 2004, after the policy directive was issued, the Corps issued its permit for the project that only considered 19.7 acres of these wetlands to be jurisdictional; the vast majority, 126.7 acres — *more than 86 percent of the freshwater wetlands on the site* — were stripped of protections afforded by the federal Clean Water Act because the Corps deemed them “isolated.”

Nonetheless, an extensive system of ditches on the Bayport site connects many acres of wetlands to traditional navigable waters. None of the wetlands connected by these ditches is more than one mile from a tidal water body. Some of the wetlands the Corps said were non-jurisdictional are within a few hundred feet of Galveston Bay or the Bayport navigation channel. The Corps even refused to consider Harris County Flood Control District topographic data establishing many of these wetlands to be in the 100-year floodplain.

The surrounding communities of Shoreacres, Seabrook, Taylor Lake Village, and El Lago — along with the Galveston Bay Conservation and Preservation Association, Houston Yacht Club, Galveston Bay Foundation, Gulf Restoration Network, Texas Committee on Natural Resources, and seafood professionals’ organization PISCES — opposed the wetlands destruction and brought suit, arguing that the Corps violated the Clean Water Act by ignoring multiple hydrological connections between the wetlands and the Bay.

In court, the Corps claimed that even if all 146 acres *were* jurisdictional, they were requiring enough mitigation that they would have approved Bayport’s application to fill all the wetlands anyway — an argument that completely ignores the way the Clean Water Act works. The Act requires the Corps to ensure that wetlands losses are avoided and minimized whenever possible; only when unavoidable losses will occur is mitigation required. Unfortunately, the district court chose to defer to the Corps’ decision.<sup>32</sup>

<sup>29</sup> See [www.gbpc.net/galveston\\_bay.htm](http://www.gbpc.net/galveston_bay.htm).

<sup>30</sup> Letter from Larry D. McKinney, Ph.D., Senior Director, Aquatic Resources, Texas Parks & Wildlife Department, to U.S. EPA, April 15, 2003.

<sup>31</sup> U.S. Army Corps of Engineers, File Memorandum: Port of Houston Authority, Jurisdiction Delineation Verification, April 21, 1999.

<sup>32</sup> *City of Shoreacres v. The Army Corps of Engineers*, H-03-2443 (S.D. Tex., May 4, 2004). This case demonstrates how destructive the impacts of the policy directive and the Corps’ decision making can be when courts defer to the agency and do not scrutinize its actions. The case is on appeal.

## PLAYA LAKES IN THE SOUTHWEST: Open for Pollution, No Questions Asked

Perhaps nowhere are wetlands more critical than in the arid Southwest and the southern plains of Texas. Along the vast Southern High Plains and Llano Estacado Plateau of Texas and New Mexico are some 22,000 shallow round basins, known as playa lakes. “When inundated, the [playa] basins form shallow lakes and wetlands that significantly increase plant and animal diversity in an intensively cultivated landscape.”<sup>33</sup>

Playas serve a number of crucial functions for people and for wildlife. Dry much of the year, they fill during rainstorms in May through September, capturing rainwater and helping to control flooding. Playas replenish the Ogallala Aquifer, the only source of water on Llano Estacado. If playas are depleted, existing water shortages in the region will become critical.

The playa lake region also offers critical habitat for waterfowl, shorebirds, raptors, and other migratory birds. Some 2 million ducks winter in the region, as do an estimated 400,000 to 500,000 sandhill cranes and similar numbers of geese. Between 12 and 15 million migrating birds are estimated to rest and refuel around playas. In the absence of playas, amphibians could not survive in the region.<sup>34</sup>

Although playas are specifically identified in the current Clean Water Act rules as waters of the United States, the Bush administration’s policy directive explicitly prohibits continued protection of these critically important wetlands.<sup>35</sup>

The Tulsa District, which is responsible for Clean Water Act permitting in Oklahoma and most of the Texas panhandle, has applied this directive vigorously. In response to permit applications, the district is routinely sending out a largely boilerplate letter declaring that the playa at issue is not jurisdictional under the Clean Water Act. Tulsa disclosed ten of these letters in response to the groups’ FOIA request — all of them virtually identical in content. Based upon the records provided, it appears that the Tulsa District is not conducting site visits or any

independent review whatsoever in considering whether any particular playa might have hydrological connections to other waters, be used in interstate commerce, be navigable part of the year, or exhibit other features that would form an additional basis for Clean Water Act jurisdiction.

In one instance, in June 2003, a playa that was slated to receive an average of more than a quarter of a million gallons per day of effluent from the City of Panhandle, Texas’s new wastewater treatment plant, was declared outside the scope of the Clean Water Act, in the same cursory manner of a form letter.<sup>36</sup>

In another instance, in February 2003, the Texas Department of Transportation (DOT), in materials provided as part of its preconstruction notification pursuant to a nationwide permit, stated its conclusion that the playa at issue *was* jurisdictional, because it was clearly hydrologically connected to a nearby playa. The Texas DOT stated: “[T]his lake lacks the ‘isolated hydrological’ status for it to be non-jurisdictional — meaning the Corps of Engineers has jurisdiction over this playa because it has a hydrological connection to a separate waterbody — a nearby playa located approximately 1,600 feet to the northwest.”<sup>37</sup> Nevertheless, the Corps’ only response was to send the DOT its standard boilerplate letter stating that the playa was “non-navigable, intrastate, and hydrologically isolated” and therefore not protected by the Clean Water Act.<sup>38</sup>

The importance of playas for replenishing the Ogallala Aquifer and as wildlife habitat in an otherwise barren landscape demonstrates the recklessness of the current policy directive, which opens these vital wetlands to unlimited discharges from an array of industrial polluters.



Wyman Meinzer

*Although dry for much of the year, after heavy rains many playas can support navigation by boat or canoe.*

<sup>33</sup> Eric G. Bolen, Loren M. Smith, and Harold L. Schramm Jr., 1989, *Playa Lakes: Prairie Wetlands of the Southern High Plains*, *BioScience* (9): 615-622.

<sup>34</sup> Beth Baker, *Wetlands at Risk: Imperiled Treasures*, a Report of the National Wildlife Federation and the Natural Resources Defense Council, July 2002.

<sup>35</sup> 68 Fed. Reg. 1997.

<sup>36</sup> Letter from Larry D. Hogue, P.E., Chief, Planning, Environmental and Regulatory Division, Tulsa District of the

Army Corps, to Scott W. Honeyfield, P.E. of Parkhill, Smith & Cooper, Inc. June 25, 2003.

<sup>37</sup> Pre-Construction Notification to the United States Army Corps of Engineers of Highway Work Planned in a Water of the United States, Texas Department of Transportation, February 2003. p.5.

<sup>38</sup> Letter from Army Corps, Larry D. Hogue, P.E., Chief, Planning, Environmental, and Regulatory Division, Tulsa District of the Army Corps, to Mr. Davis Melton, Texas Department of Transportation, February 27, 2003.



## WISCONSIN: Land O' Endangered Lakes?

Gurno Lake in Sawyer County, Wisconsin, is a twenty-seven-foot deep, eighty-six-acre lake that is popular with anglers for its populations of bluegill, largemouth bass, muskellunge, northern pike, and walleye.<sup>39</sup> There are two inlets that feed the lake; one originating from nearby Indian Lake, an eighty-four-acre lake with a boat ramp. Gurno Lake is surrounded on three sides by roads within one hundred yards from the lake's edge. According to the Wisconsin Department of Natural Resources' database of Wisconsin lakes, Gurno Lake has two roadside access points from these roads. Moreover, Gurno Lake is located in the Hayward Lakes region of northwestern Wisconsin, an area that draws international travelers for its fishing opportunities, including an annual muskie tournament.

While acknowledging that public access to the lake exists, in February 2003, the St. Paul District nonetheless decided "Gurno Lake is not and can not be used by interstate or foreign travelers for recreational or other purposes." No comment was made on the lake's obvious navigability or its adjacency to the navigable Indian Lake. The Corps ruled the entire lake non-jurisdictional; therefore, no permit was required for any work that would discharge pollutants

into Gurno Lake and its associated wetlands. Unfortunately, the St. Paul District's response to the groups' FOIA request did not include sufficient information to determine, for the majority of non-jurisdiction determinations (including this one), what the nature of the proposed impact was or even who was proposing the project.

The St. Paul District's adherence to the administration's policy directive (and erroneous interpretation of the *SWANCC* decision) has prompted it to determine that many waters, including other large lakes, are "geographically isolated."<sup>40</sup> For example, this district, which covers all of Minnesota and Wisconsin, has determined that no permit would be required to work in a 300-acre wetland complex as well as lakes larger than one hundred acres in size.

Through FOIA, the St. Paul District released files for 840 cases where it ruled that lakes, wetlands, and other waters were non-jurisdictional. Of these, only 68 percent had recorded the acreage of affected lakes or wetlands. Based on these cases alone, the St. Paul District has ruled that the Clean Water Act no longer covers more than 4,000 acres of waters.

*Eighty-six acre Gurno Lake was ruled non-jurisdictional by the St. Paul District. As a result, no Clean Water Act permit is required to dump animal waste, toxic chemicals or other pollutants into this lake.*



Bob Olsgard

<sup>39</sup> See [www.lake-link.com](http://www.lake-link.com).

<sup>40</sup> Other lakes in Minnesota and Wisconsin that have been ruled non-jurisdictional by the St. Paul District include Anderson

Lake, Colby Lake, Eagle Point Lake, Finnegan Lake, Fish Lake, Horseshoe Lake, Long Lake, Mann Lake, Markgrafs Lake, Powderhorn Lake, Powers Lake, S.E. Bass Lake, Staples Lake, Wakefield Lake, and Wright's Lake.

## EYES WIDE SHUT IN DELAWARE: Wetlands Left Unprotected Without Site Inspection

In January 2004, a seven-acre forested wetland just 1,800 feet from the Little River in Kent County near Dover, Delaware, was written off as non-jurisdictional by a senior staff biologist with the Philadelphia District of the Corps. The biologist's decision was based solely on information submitted by a consultant to the landowner. No site inspection was conducted.

The Corps' memorandum for the record characterizes the wetland as "isolated," "closed," "not navigable," and lacking a surface connection to other waters of the United States, including the Little River.<sup>41</sup> The consultant's report indicated that a small "remnant" ditch formerly connected the wetland to the Little River but that it had been severed with the construction of State Route 1, adjacent to the parcel.<sup>42</sup> The report included a hand-drawn map of the parcel, indicating the remnant ditch as terminating on the property.

As a result of the groups' FOIA request, the Philadelphia District's Office of Counsel was made aware of this case and arranged a site inspection. The inspection turned up an additional ditch — a "good-sized" one, according to a Corps official — which was not shown on the consultant's map and which flows along the eastern edge of the property adjacent to the wetlands.<sup>43</sup> The ditch drains to a culvert running under the highway and into a network of pipes, apparently discharging the flow to the nearby Little River.

The Corps official acknowledged the need to review the district's flawed "desk only" determination in this case, given the discovery of the direct hydrological link between the wetland and the river. Available information indicates that while the Philadelphia District rarely makes such non-jurisdictional determinations without a site visit, several other districts routinely rely solely on applicants' submissions to make determinations without leaving the office.



R. Mann

*Approximately one mile upstream from this location on the Little River, a ditch channels flow from the forested wetland that was declared "closed" and "isolated." From here, the Little River flows through the Little Creek Wildlife Area to the Delaware Bay.*

<sup>41</sup> John Brundage, Philadelphia District Senior Staff Biologist, "Memorandum for Record", January 14, 2004 (regarding project file #200300103).

<sup>42</sup> Michael F. Green, Environmental Consulting Services, Inc., "Wetlands Investigation of The Dover 8 Acres Site, Kent County, Delaware," January 10, 2003.

<sup>43</sup> Personal communication with Philadelphia District Office of Counsel, June 3, 2004.



## MORE DRIVING, LESS DRINKING IN CALIFORNIA: Highway Project Threatens Drinking Water Source

The Folsom South Canal is a man-made structure that conveys water diverted from Lake Natoma on the American River in California. After running for sixty-nine miles,<sup>44</sup> the canal terminates at a road crossing. The canal provides drinking water for the city of Rancho Cordova and serves other industrial and agricultural uses. According to a recent story in the local newspaper, water from the Folsom South Canal may also be sent to the East Bay Municipal Utility District in the future.<sup>45</sup>

Despite these domestic and commercial uses of the water, the Corps determined that the Folsom South

Canal was not a water of the United States under the Clean Water Act in response to a proposal to widen a highway in Sacramento County that crosses the canal. According to the Corps' April 15, 2003, letter to the county's Board of Environmental Review approving the project, the Sacramento District accepted the jurisdictional recommendations of the county's consultant, who decided that just under one-half acre of the Folsom South Canal could be filled without any Clean Water Act protections because it does not connect with other waters of the United States.

According to the consultants, the canal has no surface outlet. For this reason, the Corps ruled that the canal's waters are not protected by the Clean Water Act. The consultants' report states that:

The Folsom South Canal was not considered a Waters of the United States (*sic*) because the hydrology of the canal is artificially maintained, it does not connect Waters of the U.S., and it does not bisect other Waters of the U.S.<sup>46</sup>

The determination by the Corps to decline Clean Water Act jurisdiction over an entire canal ignores not only the fact that the water is large enough to be navigable, but more importantly, that the canal has several commercial uses and is even used as a source of drinking water. Clearly, even if the canal is man-made and has no outlet into another surface water, it has substantial connections to interstate commerce, and pollution of the water could cause serious threats to public health and welfare.<sup>47</sup> While the Corps claims that its determination that the canal is not a water of the United States is for purposes of "dredge and fill" permits under Section 404 and does not affect other parts of the Act, this argument does not hold water (see sidebar). Following the Corps' logic, the Folsom South Canal would not be protected against other forms of water pollution by the Clean Water Act.

*In spite of being a source for drinking water, the Corps determined that the Folsom South Canal was not a water of the United States under the Clean Water Act.*



Jan Fleckenstein

<sup>44</sup> [www.recreation.gov](http://www.recreation.gov)

<sup>45</sup> Molly Dugan, Officials, Cyclists Chart New Path for Folsom Canal, <http://www.SacBee.com>, January 3, 2004.

<sup>46</sup> Area West Environmental, *Wetland Delineation for the Hazel Avenue Widening Project*, March 2003, p. 11. The canal does go under (through culverts) and over (through raised structures) streams in the area, but apparently does not connect with these waters.

<sup>47</sup> In their 1998 water quality reports to EPA, states reported over 110,000 miles of canals and ditches as waters within their

borders. See *National Water Quality Inventory: 1998 Report to Congress*, 2000, Appendix A-1. This is a vast underestimation of the total number and extent of these man-made water bodies, as many states did not submit any information about these waters within their borders. Other states, however, reported a large number of canal miles — including eight that reported over 5,000 miles of canals and ditches in their state (California, Colorado, Florida, Georgia, Idaho, Louisiana, Montana, and Texas). Under the policy directive, these states' canals could lose all federal protections against increased water pollution.

## HEAR NO EVIL: Ignoring State Biologists in Georgia

When a Georgia state official went out to inspect a proposed 1,017-acre residential subdivision in Effingham County for water quality compliance, he was surprised by what he found. On July 2, 2003, the Corps issued a Joint Public Notice determining that 159 of the 270 acres of wetlands on the project site were protected under the Clean Water Act, and that a Section 404 permit would be required for any impacts to 5.74 acres of these jurisdictional wetlands, with the rest of the 159 acres to be set aside as mitigation. However, upon visiting the site, the state official found that there were more than 111 acres of wetlands that were likely to be affected by the project but were not discussed in the Corps' notice. More surprisingly, the state official found that for much of these wetlands there appeared to be "hydrological connectivity" to other waters.

Two major wetland areas were of concern to the state official. One was a forty-eight-acre wetland separated from other jurisdictional waters only by a one-lane dirt road. According to existing Clean Water Act rules, this barrier in itself is not enough to sever jurisdiction since "wetlands separated from other waters of the United States by man-made dikes or barriers ... are 'adjacent wetlands'" and therefore jurisdictional.<sup>48</sup>

The state official describes this wetland as "contiguous with the floodplain of [jurisdictional] Polly Creek" and questioned the Corps' determination.<sup>49</sup>

The other large wetland of concern was a twenty-eight-acre water body adjacent to a railroad track bed. According to the state official, "a swale in the road provides hydrological connectivity [from the jurisdictional wetlands] to the wetland on the project property."<sup>50</sup> Moreover, there is a sixteen-inch concrete culvert under the railroad track connecting the two wetlands.

These wetlands are contained within a pine plantation area contiguous to the floodplain of Polly Creek, which feeds the lower Savannah River. Wetland loss due to rapid development, like that proposed at the site, has been a major factor in the degradation of the lower Savannah River Basin, which provides habitat to abundant wildlife and provides anglers with a warm-water fishery of bass, pickerel, shad, and catfish. Unregulated wetland loss like the Corps is allowing in this area will lead to further sediment loading, algal blooms in the river, decreases in groundwater recharge — a pressing issue as drinking water becomes scarcer — habitat destruction, flooding, and stream turbidity.

### THE CLEAN WATER ACT HAS ONLY ONE DEFINITION OF WATERS ...

**M**any of the Corps' rulings included in this report — finding that certain wetlands, streams, ponds, canals, and other waters are no longer within the Clean Water Act's scope — contain the following clause (or something close to it):

*This disclaimer of jurisdiction is only for Section 404 of the federal Clean Water Act. Other federal, state, and local laws may apply to your activities.*

This statement misleads the public into thinking that there is a different definition of "waters of the United States" for purposes of dredge and fill activities permitted under Section 404 than exists for other parts of the Act. This is not true.

The Bush administration's January 2003 policy directive affects the application of the *entire* Clean Water Act, not just one part of the Act or a single permitting program. The Act has one definition of waters that applies to the entire law, so whichever streams, ponds, lakes, wetlands, and other waters the policy directive and Corps decisions leave unprotected could be left without any federal limits on polluting, filling, and destroying. Even the *Federal Register* notice announcing the Bush policy recognizes that it affects provisions limiting point sources of pollution, preventing oil spills, and the general provisions of the Act.

<sup>48</sup> 33 CFR §328.3(c).

<sup>50</sup> *Id.*, p. 2.

<sup>49</sup> Letter from Keith Parsons, Environmental Specialist with the Georgia Department of Natural Resources, to Chief of Regulatory of the Savannah District, September 8, 2003, p. 1.



## SOLOMON RIVER: Are Impaired Waters Getting Dirtier in Kansas?

Even the smallest of streams are sources of water for larger streams and rivers, which is why one of the central goals of the Clean Water Act is to eliminate water pollution at the source, even if that source is not a “navigable” water.

Nonetheless, in February 2004 — and based on the files provided through the groups’ FOIA request, relying on very little data — an intermittent stream running through a wetland that then flowed directly into a tributary of the Solomon River in north-central Kansas was found to be outside of the scope of the Clean Water Act by the Kansas City District of the Corps.

Electronic mail from a local Natural Resources Conservation Service (NRCS) employee requested an opinion from a Corps field office about the jurisdictional status of the intermittent stream and wetland. The NRCS official stated in the six-sentence message that the stream, or “drain,” lacked an ordinary high water mark and a defined bed and bank although it drained water from twenty-seven acres of lands, but then stated, “The unnamed intermittent stream is flows (*sic*) in to Battle Creek and this creek ends at the Solomon River less than one mile away.”<sup>51</sup>

Based only on this information and a 1:10,000 scale NRCS map,<sup>52</sup> the Corps official replied two business

days later, “From the information provided, I wouldn’t call this small drain a water of the U.S.” He attached to this message a form declaring the stream and wetland non-jurisdictional for the purposes of the Clean Water Act<sup>53</sup> — despite the fact that it was clear that the water from this stream went directly into the Solomon River through Battle Creek.

The lower Solomon River, into which Battle Creek flows, has the following designated uses, according to the Kansas Department of Health and Environment:

Expected Aquatic Life Support, Primary Contact Recreation, Domestic Water Supply; Food Procurement; Ground Water Recharge; Industrial Water Supply Use; Irrigation Use; Livestock Watering Use for Main Stem Segments.<sup>54</sup>

Unfortunately, because of poor water quality conditions, including elevated levels of fecal coliform and other bacteria, environmental standards to make these uses safe and healthy are currently not being met in the Solomon River. This pollution will undoubtedly be made even worse in the future by decisions — such as this one — that cut the river’s tributaries out of the Clean Water Act.

*A tributary to the Solomon River in north-central Kansas was found to be outside of the scope of the Clean Water Act by the Kansas City District of the Corps. Protections are lost for a river already impaired by fecal coliform and other pollutants.*



Roger Hrabec

<sup>51</sup> Email message from Gary Parks, Soil Scientist, Natural Resources Conservation Service, USDA, to Luke M. Cory, U.S. Army Corps of Engineers, February 13, 2004.

<sup>52</sup> Records supplied in response to the FOIA request do not include any other information considered by the Corps or indicate that a Corps site visit was performed.

<sup>53</sup> The Corps email message indicated that the wetland might be jurisdictional even if the stream was not, but then said, “we exempt all pit ponds even when they are constructed in wetlands.”

<sup>54</sup> See [http://www.kdhe.state.ks.us/tmdl/so/SolomonR\\_Cl.pdf](http://www.kdhe.state.ks.us/tmdl/so/SolomonR_Cl.pdf).

## TENNESSEE WILDLIFE: Victim to Airport Expansion

Abundant wildlife is known to utilize a ten-acre wetland complex between Cookeville and Sparta, Tennessee. Although these wetlands are hydrologically connected to navigable waters, the Corps recently determined that they do not fall within the scope of the Clean Water Act. The wetlands are home to barking tree frogs, raccoons, deer, ducks, geese, and the endangered gray bat and support a wide variety of vegetation, including the buttonbush, sedge, soft rush, and woolgrass. Habitat for the federally endangered yellow-eyed grass has also been documented at this site.

The wetlands are hydrologically connected to the Falling Water River, which feeds the Caney Fork and Cumberland rivers. The wetlands connect through a pipe to a clear running stream that flows underground and reemerges several times before finally flowing into the Falling Water River. This area of Tennessee abounds with recreational opportunities, boasting trails and spectacular vistas along Falling Water River.

Nonetheless, when the Upper Cumberland Regional Airport applied for a permit to fill and destroy these wetlands to expand its existing facility, the Corps incorrectly determined that the wetlands in question were not waters of the United States even though they are clearly connected by both surface water and groundwater to the



John Harwood

*This 10-acre wetland in the headwaters of Tennessee's Cumberland River provides habitat to a diversity of flora and fauna, including endangered species. Denied Clean Water Act protection, it will soon be paved over to make way for an airport expansion.*

Falling Water River. The Corps' decision was based entirely on a report produced by a consultant for the Upper Cumberland Regional Airport — a report that contained no information about the hydrology of the wetlands and instead used an economic analysis to justify the fill activities necessary for airport expansion.

## WEST VIRGINIA STREAMS: Out of Sight, Out of the Clean Water Act

In January 2004, the Pittsburgh District declared a small wetland, a 670-foot section of stream running from the wetland, and a one-acre pond in Berkeley County, West Virginia, to be outside the scope of the Clean Water Act. The pond appears to have been declared non-jurisdictional because a berm “separates the pond from downstream waters,”<sup>55</sup> although the Corps' regulations define “adjacent” to mean “bordering, contiguous, or neighboring.”<sup>56</sup>

The wetlands and stream were declared non-jurisdictional because the stream ran into a sinkhole and disappeared underground. In a telephone conversation, a Corps official acknowledged that such waters might ultimately resurface or otherwise hydrologically connect

to downstream waters. The Corps official also conceded that the Pittsburgh District does not require permit applicants to conduct dye tests to support claims of non-jurisdiction based upon the subsurface flow of streams and other waters.<sup>57</sup> Typically, a Corps official will conduct a site visit and walk “downstream” of the sinkhole where the stream disappears to see if it resurfaces, but if it does not show up within some indeterminate distance, it is deemed “isolated.”

Because of West Virginia's geology, many waters disappear underground only to re-surface elsewhere, including the well-known Lost River, which plunges underground for more than a mile.

<sup>55</sup> Delineation of Waters of the United States Fries Property, Approximately 34 Acres, Berkeley County, West Virginia. Prepared by Resource International, Ltd., October 8, 2003, p. 5.

<sup>56</sup> 33 CFR 328.3(c).

<sup>57</sup> Personal communication with Allen Edris, June 23, 2004.



## ALASKAN TREASURES UNDERVALUED: Pond's Connections to Marine Area Ignored

According to a city employee in Anchorage, Alaska, the Anchorage District of the Corps has applied arbitrary and troubling interpretations of what waters retain Clean Water Act protections around Anchorage since the policy directive was put in place. The Corps is also refusing to consult with EPA or local agencies, despite Anchorage's demonstrated interest in protecting its wetland resources. The employee says that the Corps' practices here "now make wetland decisions a nightmare."<sup>58</sup>

One example of the troubling actions of this district office is the case of Exxon Pond in Anchorage. According to the Corps, water from Exxon Pond flows northeasterly into a Municipality of Anchorage storm drain, and a second channel along the eastern edge of the pond flows into the same storm drain. This drainage network eventually flows into Knik Arm, an ecologically thriving, tidally influenced marine community supporting expansive habitat for waterfowl

and many other forms of marine life as well as providing outstanding scenic vistas for the surrounding communities. Three state refuges, popular with local hunters and tourists alike, are located on Knik Arm.

Despite clear surface connections explicitly acknowledged by the Corps, Exxon Pond was deemed "isolated" and outside the scope of the Clean Water Act by the Anchorage District when a development company applied to completely fill the pond and its associated wetlands to construct roads and other infrastructure.<sup>59</sup> This ruling was made even after a Corps employee visited the site and staked the wetlands and the channel connecting Exxon Pond to the storm drain network.<sup>60</sup> While filling the pond will likely cause damaging sediment to flow downstream, it is even more troubling to contemplate the damage that could have occurred had the company decided to dispose of waste oil or other pollutants in the pond in the absence of federal Clean Water Act protections.

*Knik Arm, an ecologically thriving, tidally influenced marine community could be harmed by sedimentation from upstream waters, such as Exxon Pond, which was found to be "isolated" and not protected under the Clean Water Act.*

www.UntraveledRoad.com



<sup>58</sup> Personal communication.

<sup>59</sup> The non-jurisdiction determination for Exxon Pond was made in 2001, before the policy directive was issued, but the result in this case is reinforced by the January 2003 policy directive, which

questions the basis for asserting jurisdiction based on connections between waters by man-made conveyances such as the stream between Exxon Pond and Knik Arm. See 68 Fed. Reg., 1997.

<sup>60</sup> Alaska District Memorandum for Record, prepared by Dave Casey, Project Manager, South Section, May 15, 2001.

## COLORADO: Bridge over Troubled Waters

The Lower Boulder Ditch is a major water conveyance that winds through the many farms around Longmont, Colorado. Irrigation equipment is a common sight along its route. Although called a ditch, it likely follows the path of former stream channels, and many other streams have been diverted to feed it, directing water to the agricultural producers of this dry landscape. The flow of the ditch is comparable to a large stream or small river. The banks of the ditch form what a consultant's report termed "self-sustaining healthy wetland communities" offering aquatic habitat for wildlife in the area.<sup>61</sup>

A consultant hired by Weld County noted that the Lower Boulder Ditch "flows from southwest to northeast into Boulder Creek and eventually into the South Platte River."

Nonetheless, when the county applied for a permit in August 2002 to replace two bridges over the ditch, the Omaha District of the Corps ruled that it was not a water of the United States. Despite the obvious connection to the South Platte River, the Omaha District decided that the Lower Boulder Ditch was "isolated" and beyond the scope of the Clean Water Act.<sup>62</sup>

Many farmers depend on this ditch as the lifeblood of their farming operations. Any disruption in the flow of this waterway or discharges of pollution into it could harm the livelihood of many who live and farm downstream, not to mention the impacts to fish and wildlife that rely on the few water sources and wetland habitats available in this arid region.

Unfortunately, this is not an isolated incident in the Omaha District, which is continuing to rule that many man-made streams, ditches, and canals are outside the scope of the Clean Water Act, no matter where the water eventually flows or how much there is of it, an interpretation promoted, rather than prohibited by the administration's policy.<sup>63</sup> As most natural waterways in the region have already been



Julie Sibbing, National Wildlife Federation

conveyed or converted into ditches or culverts for irrigation or flood control purposes, this could have catastrophic effects on the region's water resources. Additionally, the Omaha District is not regulating reservoirs or lakes they deem to be geographically "isolated," even if they are large, navigable, or have potential for interstate commerce.<sup>64</sup>

*The flow of the Lower Boulder Ditch, similar to a large stream or small river, eventually flows into the South Platte River.*

<sup>61</sup> Darcy Tiglas, "Wetland Delineation at a Bridge Replacement Site Along Lower Boulder Ditch at Bridge 3/12B," August 6, 2002.

<sup>62</sup> This "no jurisdiction" decision was made shortly before the Bush administration published the policy directive in the Federal Register, but the directive explicitly encourages field staff to question federal Clean Water Act protections for ditches and other man-made (or enhanced) stream channels such as the Lower Boulder Ditch. See 68 Fed. Reg at 1997.

<sup>63</sup> Other streams, creeks, and ditches ruled non-jurisdictional by the Omaha District include Brantner Ditch, Brighton Lateral

Ditch, City Channel Creek, Croak Canal, Denver Hudson Canal, Farmer's Independent Ditch, Highland Ditch, Irrigation Tailwater Ditch, Lake Canal, Leyner Cottonwood No.1 Ditch, Longmont Supply Ditch, Oligarchy Ditch, Tuck Lateral, Twomile Canyon Creek, Union Ditch, and Wadsworth Ditch.

<sup>64</sup> Such water bodies that have been ruled non-jurisdictional by the Omaha District include Croke Reservoir, Eastlake Reservoirs 2 & 3, Hayes Lake, Independent Reservoir, Ketring Lake, Lutz Reservoir, Milton Reservoir, Ward Lake, and Westerdol Lake.



# ENVIRONMENT AT RISK

## from Implementation of Policy Directive

**T**he case studies offered in this report are merely the tip of the iceberg of the overall wetlands, streams, lakes, and other waters that have been wrongly denied Clean Water Act protection under the Bush administration's January 2003 policy directive. We have reviewed many more cases where Corps districts across the country have ignored Clean Water Act requirements. In case after case, the Corps has blatantly disregarded evidence that destruction of these waters violates the Clean Water Act and threatens public health, our natural environment, and the U.S. economy.

Our nation's network of rivers, lakes, and streams originates from a myriad of small streams, springs, and wetlands — many so small they do not appear on any map. Yet these headwater streams and wetlands exert critical influences on the character and quality of downstream waters. The natural processes that occur in such headwater systems benefit humans by mitigating flooding, maintaining water quality and quantity, and recycling nutrients. According to many studies, small, or headwater, streams make up 80 percent of the nation's stream network.<sup>65</sup> The health of these small streams and wetlands is critical to the health of the entire river watersheds.

Small streams and wetlands also offer an enormous array of habitats for plants and animals. Such small freshwater systems provide animals with shelter and food, protection from predators, spawning sites, nursery areas, and travel corridors through the landscape. Many species depend on small streams and wetlands at some point in their life history. For example, headwater streams are vital for maintaining many of America's fish species, including trout and salmon.

Further abandoning these waters to destruction and degradation under the Bush administration's policy will:

- **Increase water pollution.** EPA's most recent data show that the nation's waters are already getting dirtier and almost half of the rivers, streams, lakes, and coastal estuaries are not safe for fishing, swim-

ming, or boating.<sup>66</sup> Even where waters are deemed fishable, in many cases, EPA has issued dietary restrictions on fish consumption.

- **Exacerbate flooding.** Wetlands — nature's sponges — will no longer be available to absorb excess water. When wetlands are destroyed they are often replaced by impermeable paving or structures that increase runoff.
- **Threaten public health** when citizens drink water contaminated with bacteria, pathogens, toxics, and other pollutants that would no longer be regulated for all types of industrial discharges. It will also increase treatment costs to remove pollutants.
- **Deplete drinking-water sources** that are recharged by playa lakes and other wetland and stream systems.
- **Reduce and potentially extinguish endangered or threatened wildlife species** — 43 percent of which rely on wetlands for survival.
- **Place at risk the breeding habitat used by over half the ducks in North America.**
- **Eliminate many seasonal wetlands** that serve as nurseries for juvenile frogs, toads, salamanders, and other species as well as small streams that are essential to sustain healthy populations of fish, amphibians, and other aquatic species.

<sup>65</sup> Judy L. Meyer, et al., *Where Rivers are Born: The Scientific Imperative for Defending Small Streams and Wetlands*, September 2003.

<sup>66</sup> EPA, *National Water Quality Inventory Report to Congress: 2000 Report*.

# BUSH ADMINISTRATION'S ACTIONS Contrary to Its Own Justice Department's Arguments and Court Rulings

**T**he Supreme Court's *SWANCC* decision is a misinterpretation of the Clean Water Act and Congressional intent, yet it is a very narrow opinion. As summarized by the five to four majority: "We hold that 33 C.F.R. §328.3(a)(3) (1999), as clarified and applied to petitioner's balefill site pursuant to the 'Migratory Bird Rule,' ... exceeds the authority granted to respondents under §404(a) of the CWA."<sup>67</sup> The decision only invalidated the policy of asserting Clean Water Act protections over so-called "isolated" waters solely because the water is used as habitat for migratory birds that cross state lines.

The authors of the Bush administration's January 2003 policy directive, however, took great liberties with the *SWANCC* opinion to reach their goal of leaving many waters used for other purposes, and connected to larger water bodies, without federal protections.

Not only is the policy directive flatly inconsistent with the *SWANCC* opinion itself, it is contradicted by the Bush administration's own lawyers' interpretation of current law and the overwhelming majority of federal courts that have ruled on the scope of the Clean Water Act in the wake of the *SWANCC* decision.

As represented in at least two-dozen briefs filed since *SWANCC*, the Department of Justice (DOJ) has argued for a much narrower interpretation of that decision than the one EPA and the Corps concocted to justify the January 2003 directive. Rather than finding that the definition of waters of the United States needs to be changed or reinterpreted, as the Bush administration has done, the DOJ has steadfastly and successfully argued in its briefs in federal court that *the agencies' existing definition of waters of the United States is valid and, indeed, required to achieve the purposes of the Clean Water Act*. In the vast majority of cases, the federal courts have agreed, ruling that the Clean Water Act continues to protect these waters.



Bart Gamett, U.S.D.A. Forest Service

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<sup>67</sup> *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. at 174 (internal citations omitted).



For example, in disputing a lower court's ruling, the DOJ's brief to the Fourth Circuit Court of Appeals in the case *United States v. Newdunn* argues that:

The [district] court fails to explain *why or how* Congress could have intended to regulate discharges into all primary tributaries but not secondary tributaries, regardless of their significance to the traditional navigable waters into which they flow, *directly or indirectly*.<sup>68</sup>

In that case, the Newdunns claimed that the Corps had no jurisdiction under the Clean Water Act to require them to obtain a permit to fill approximately 38 acres of wetlands — with over 2.4 miles of intermittent natural streams and man-made ditches — that flowed into a navigable river, Stony Run. The district court held that these waters were not protected; DOJ disagreed, noting that the federal government:

... has consistently construed the Act to encompass wetlands adjacent to tributaries to traditional navigable waters — be they primary, secondary, tertiary, etc. — since 1975, a construction that comports with *Congress's intent to control pollution at its source and broadly protect the integrity of the aquatic environment*.<sup>69</sup>

The Fourth Circuit of the U.S. Court of Appeals agreed with the Justice Department and overturned the district court's ruling. The U.S. Supreme Court refused to hear the Newdunns' appeal.

In another influential case, *United States v. Rapanos*, the Sixth Circuit Court of Appeals overturned a lower court decision and ruled that the Clean Water Act continued to protect wetlands adjacent to a non-navigable man-made drain which eventually flowed into the Kawkawlin River and ultimately into Saginaw Bay, a part of Lake Huron. In this case, the property owner, Rapanos, filled several acres of wetlands on his property in flagrant disregard of a state agency determination that he needed a permit to do so. He was convicted of violating the Clean Water Act, but his conviction was sent back to district court on appeal for consideration in

light of *SWANCC*. The district court overturned Rapanos's conviction, saying the wetlands on his property were no longer covered under the Clean Water Act.

The federal government appealed. In its brief, DOJ contended:

To exclude non-navigable tributaries and their adjacent wetlands from the coverage of the Act would *disserve the recognized policies underlying the Act, since pollution of non-navigable tributaries and their adjacent wetlands can have deleterious effects on traditionally navigable waters*.<sup>70</sup>

The Sixth Circuit Court of Appeals agreed with the DOJ, ruling that:

Although the [*SWANCC*] opinion limits the application of the Clean Water Act, the Court did not go as far as Rapanos argues, restricting the Act's coverage to only wetlands directly abutting navigable water. ... The evidence presented in this case suffices to show that the wetlands on Rapanos's land



Running Water Publications (www.running-water.com)

<sup>68</sup> *United States v. Newdunn Associates*, 195 F. Supp. 2d 751 (E.D. Va. 2002). Emphasis added.

<sup>69</sup> Brief for the United States in *United States v. Newdunn* (emphasis added).

<sup>70</sup> Brief for the United States in *United States v. Rapanos* (emphasis added).

are adjacent to the Labozinski Drain, especially in view of the hydrological connection between the two . . . Any contamination of the Rapanos wetlands could affect the Drain, which, in turn, could affect navigable-in-fact waters. Therefore, the protection of the wetlands on Rapanos’s land is a fair extension of the Clean Water Act.<sup>71</sup>

The court affirmed the policy need for broad Clean Water Act protection, stating, “[T]he Clean Water Act cannot purport to police only navigable-in-fact waters in the United States in order to keep those waters clean from pollutants.”<sup>72</sup> The court further stated, “Although wetlands are not traditionally navigable-in-fact, they play an important ecological role where they exist.”<sup>73</sup> The U.S. Supreme Court has also declined to review this circuit court’s decision.

Another significant decision is the U.S. Court of Appeals for the Ninth Circuit, *Headwaters, Inc., v. Talent Irrigation District*.<sup>74</sup> The court considered whether a local irrigation district needed a permit under the Clean Water Act’s National Pollution Discharge Elimination System (NPDES) to spray pesticides in non-navigable irrigation canals. The court found that the canals were not “isolated” and were connected as tributaries to other waters of the United States because they “receive water from natural streams and lakes and divert water to streams and creeks.” The court further concluded that even tributaries that flow intermittently are waters of the United States. In explaining its reasoning, the court quoted favorably from an Eleventh Circuit decision:

Pollutants need not reach interstate bodies of water immediately or continuously in order to inflict serious environmental damage.... It makes no difference that a stream was or was not at the time of the spill discharging water continuously into a river navigable in the traditional sense. Rather, as long as the tributary would flow into the navigable body [under certain conditions], it is capable of spreading environmental damage and is thus a “water of the United States” under the Act.<sup>75</sup>



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The DOJ’s briefs and the federal courts’ near-unanimous agreement that the *SWANCC* decision is narrow and the scope of the Clean Water Act remains broad underscores the legal bankruptcy of the Bush administration’s policy of denying Clean Water Act protections for non-navigable streams, wetlands, ponds, canals, and other waters.

<sup>71</sup> *United States v. Rapanos* 339 F. 3d at 453 (citations omitted).

<sup>72</sup> *Id.*, at 451.

<sup>73</sup> *Id.*

<sup>74</sup> 243 F. 3d 526 (9th Cir. 2001).

<sup>75</sup> *Id.*, at 534, quoting favorably from *United States v. Eidson*, 108 F. 3d 1336, 1342 (11th Cir. 1997).



# BUSH ADMINISTRATION MUST RESCIND ITS POLICY DIRECTIVE and Fully Enforce the Clean Water Act

As the case studies described above clearly demonstrate, the Bush administration is using its policy directive to undermine key environmental protection requirements of the Clean Water Act, even in the face of court opinions that require a narrow interpretation of the SWANCC decision. The directive is allowing federal regulators to make decisions every day to allow dredging, filling, and polluting of waters that clearly fall under the Act's jurisdiction. Each day that this reckless and illegal policy remains in place, our nation's water quality, wildlife habitat, and groundwater supplies continue to deteriorate, facing permanent destruction and degradation.

*"[B]y issuing the joint guidance memorandum and proposing new rule-making, the agencies have gone well beyond their obligation under the SWANCC decision and consequently initiated a major federal action that may place them in violation of NEPA if not the CWA."*

-ARKANSAS GAME AND FISH COMMISSION

The United States has lost over half of its original wetlands since European settlement. The U.S. Fish and Wildlife Service estimates that — even prior to the Bush administration's January 2003 policy directive — wetlands were being destroyed at a rate in excess of 58,500 acres per year or *160 acres of wetlands every day*.<sup>76</sup> Approximately 45 percent of the nation's waters still do not meet water quality standards for supporting fishing and swimming.<sup>77</sup>

The nation cannot afford to needlessly sacrifice any more valuable wetland acreage or the health of rivers, streams, lakes, and coastal waters to a flawed and destructive federal policy. For our nation's waters to be truly protected from pollution and degradation, immediate action is needed.



Wyman Meinzer

To start, *the Bush administration must rescind its January 2003 policy directive immediately* and replace it with instructions to agency staff to enforce Clean Water Act protections to the full extent of the law. Additionally, all Corps districts need to maintain public transparency in their decision-making and be held accountable for their decisions. Currently it is virtually impossible for citizens to get clear, accurate, and complete information regarding waters in their area that are being denied Clean Water Act protections.<sup>78</sup>

Finally, Congress needs to pass the Clean Water Authority Restoration Act (H.R. 962 and S. 473) to reaffirm the Act's original intent to protect all waters of the United States, so that we may restore the chemical, physical, and biological integrity of our nation's waters.

<sup>76</sup> U.S. Department of the Interior, Fish and Wildlife Service, Status and Trends of Wetlands in the Conterminous United States 1986 to 1997, 2000.

<sup>77</sup> Statement of G. Tracy Mehan III, Assistant Administrator for Water, U.S. EPA, Before The Committee on Environment and Public Works, United States Senate, October 8, 2002.

<sup>78</sup> In response to an August 8, 2003, request from EPA to the Corps, Acting Assistant Secretary of the Army John Paul Woodley Jr. agreed that, for a one-year period beginning in

April 2004, the Corps would post summary information about its decisions to decline Clean Water Act protections over waters on its websites and otherwise make this information publicly available. See letter from John Paul Woodley Jr. to G. Tracy Mehan III, Assistant Administrator for Water, EPA, October 27, 2003. While the posting of data is an improvement over having no data available (other than through FOIA requests), in almost all instances the information being provided is missing most key information about the basis for ruling that a water is no longer jurisdictional and relevant supporting documents.

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