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Bush Administration Weakens Wetlands Protections

By Cat Lazaroff

WASHINGTON, DC, January 10, 2003 (ENS) - The Bush administration issued new, and immediately controversial, guidance today regarding federal authority over the nation's wetlands. While the administration claims the guidance reaffirms federal authority "over the vast majority of America's wetlands," conservation groups charge that the administration's action will repeal Clean Water Act protections for a large percentage of the nation's waterways.

The new guidance attempts to clarify the authority of the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers over isolated, non-navigable wetlands. Federal authority to protect such wetlands from development was called into question by a 2001 Supreme Court decision in a case brought by a developer who was penalized for filling manmade ponds that were providing habitat for migratory birds.

Isolated wetlands, like this prairie pothole in North Dakota, form important habitat for migrating birds and other species. (All photos courtesy USFWS unless specified)



But environmentalists said the proposal is the first step in an industry led effort to gut one of the nation's most important environmental laws, the 30 year old Clean Water Act.

"The administration's proposals are scientifically bankrupt," said Daniel Rosenberg, a wetlands expert at the Natural Resources Defense Council (NRDC). "The Clean Water Act has been tremendously successful because its longstanding rules ensure that all waterbodies, large or small, are protected.

Under the decision announced this afternoon, the EPA and Corps are instructing their field staff not to require permits under the Clean Water Act for the pollution or destruction of wetlands that are located within a single state and are not associated with any navigable waterway, such as a lake or river. Field agents should

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seek formal approval from agency headquarters before asserting their jurisdiction over isolated wetlands that cross state boundaries, which may fall under Clean Water Act rules regarding interstate commerce.

Field staff should continue to assert jurisdiction over traditional navigable waters, their tributary systems and adjacent wetlands, the agencies said. But the document suggests to federal permit writers at the local level that they may be on shaky legal ground if they assert jurisdiction over small streams and other waterways that are not used for shipping or commerce.



Nesting and migrating birds depend on a variety of isolated wetlands. (Photo by Stephan Dobert/USFWS)

"We are committed to protecting America's wetlands and watersheds to the full extent under the Clean Water Act and the recent Supreme Court ruling," said EPA Administrator

Christie Whitman.

In a crucial statement, the agencies said the use of isolated wetlands by migratory birds, which are protected under a variety of federal regulations, can not be the sole reason for requiring a federal permit for a pond, swamp or other non-navigable wetlands. In the lawsuit that triggered the Supreme Court decision, Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC), the Corps had relied on language in the preamble to the Clean Water Act, commonly referred to as the Migratory Bird Rule, in asserting jurisdiction over isolated ponds used by migratory birds.

The Supreme Court ruled that more important language in the Clean Water Act limited the Corps' jurisdiction to navigable waters, such as rivers that support interstate travel.

Under the Clinton administration the Corps and the EPA looked for loopholes in the Supreme Court ruling that would allow continued protection for isolated wetlands. The Bush administration has now accepted the ruling as removing these small waterways from federal jurisdiction under the Clean Water Act.

This salt flat wetland is typical of those found around the Great Salt Lake in Utah, and Mono Lake and the Salton Sea in California. Salt flat wetlands provide critical feeding and resting areas for migrating birds.

"Today's announcement is important because the Corps of Engineers regulatory officers and the regulated community now have guidance which more clearly describes the scope of jurisdiction for which permits are required," said Les Brownlee, undersecretary for the Army and acting assistant secretary of the Army for civil works.

The two agencies said they plan to publish an Advance Notice of Proposed Rule Making (ANPRM) to solicit information and comments to clarify the extent of Clean Water Act coverage in light of SWANCC. The proposal will ask for public comment on how to define "isolated" - a term not defined or used in current rules.

Depending on how the term is ultimately defined, the administration could decide that a large percentage of the nation's wetlands, streams and ponds will no longer receive federal protection.

"The agencies have not engaged in a review of the regulations with the public concerning Clean Water Act jurisdiction for some time," noted Brownlee. "The ANPRM will help ensure that the regulations are consistent with the CWA and that the public understands what waters are subject to CWA jurisdiction."



A playa wetland during a wet phase. These shallow, seasonal wetlands form in dry prairie and desert regions.

"We are also committed to full public involvement in this process, and we will seek additional information and scientific data for possible rulemaking," Whitman added.

Conservation groups said the impact of the new guidance, and of potential rule changes under the Clean Water Act, could be devastating. Any change would jeopardize the integrity of the Clean Water Act, said Nancy Stoner, director of the Clean Water Project at NRDC.

"There is no legal or scientific justification for legalizing pollution in waterways that have been protected for three decades," said Stoner. "The Bush administration doesn't seem to understand that

all of our waters are connected. If you allow corporate polluters to dump toxic waste in creeks, it will flow into our rivers and threaten our drinking water."

The proposal questions whether the Clean Water Act should continue to prohibit pollution in isolated streams, ponds and wetlands, which are often linked with other waterways through underground water supplies or surface runoff. These waters, which are used for recreation and commercial fishing and are vital to wildlife, have been explicitly included in the 1972 Clean Water Act's implementing regulations since 1975, according to Joan Mulhern, senior legislative counsel for the environmental law group Earthjustice.

Even seemingly isolated wetlands are often linked to surrounding water sources via groundwater or surface runoff.



"The Bush administration's proposal ignores basic hydrology, since pollution in streams and wetlands eventually flows into big rivers and causes more pollution downstream," said Mulhern. "And it ignores the law, since the very purpose of the Clean Water Act is to eliminate pollution where it begins rather than forcing huge clean up expenses on communities who depend on clean waterways for fishing, swimming, and drinking water. That fundamental purpose is ignored by Bush's actions."

According to Earthjustice, neither the Supreme Court ruling nor the majority of federal courts that have ruled on this issue have suggested that any such weakening of Clean Water Act authority over non-navigable wetlands is warranted.

"The Bush proposal is even contradicted by this administration's own Justice Department," said Mulhern. "The Department of Justice has filed dozens of legal briefs in federal court arguing that current Clean Water Act regulations covering all waters of the United States under the law are not only legal but required in order to meet the goal of protecting the health of the nation's waters."

"The Supreme Court did not suggest that the basic framework of the Clean Water Act be dismantled," agreed Stoner. "Invoking this court decision is just an excuse to allow developers, mining companies, and other polluting industries to fill in wetlands and to dump waste into small streams."

The waterways at risk could include creeks, small streams, and many types of wetlands, which could become vulnerable to unrestricted dredging, filling and waste dumping. Exempting them from clean water protection could affect all Americans by drying up and polluting drinking water sources, and flooding homes and businesses.



If isolated wetlands lose protection, environmentalists warn that duck populations in the U.S. could be devastated.

Removing protections for small wetlands could decimate wildlife habitat needed by a variety of species, including much of the U.S. duck population, which relies on seasonal ponds and marshes during migration and nesting.

In June 2002, a report released by the U.S. Fish and Wildlife Service (USFWS) emphasized the ecological importance of isolated wetlands - those with "no apparent surface water connection to perennial rivers and streams, estuaries, or the ocean" - calling them "irreplaceable resources."

"People increasingly realize how important geographically isolated wetlands in their areas are to wildlife conservation and a healthy environment," said USFWS Director Steve Williams. "Isolated wetlands are also vital for human well being. Many of them contribute important subsurface water flows to other wetlands and streams."

States do not have programs to compensate if the administration kills federal protection, said the NRDC's Stoner. Since most states rely on the backstop of federal regulation, few have comprehensive programs that protect wetlands, creeks, streams and ponds.

The Bush administration argues that other federal or state laws and programs still cover these waters and wetlands, including the Food Security Act's "Swampbuster" requirements and the Wetlands Reserve Program under the U.S. Department of Agriculture. The administration said today it will ask for additional funding for the Wetlands Reserve program, and for a \$5 million a year increase for the EPA's Wetland Program Development Grants, currently funded at \$15 million a year.

Some states, including Wisconsin,



have already taken steps to protect isolated wetlands within their borders. (Photo courtesy [Wisconsin Wetlands Association](#))

But most states have long relied on federal Clean Water Act permits as the primary way to control pollution in their waterways.

"This is the first step in the Bush administration's effort to dismantle significant Clean Water Act protections," said Earthjustice's Mulhern. "This attack on one of this nation's most important environmental laws flies in the face of common sense and American values. The public does not want more dirty water."

The Bush administration action will likely be challenged in court, and will also be challenged in Congress. Last July, three Democratic members of Congress introduced a bill - the Clean Water Authority Restoration Act - that would restore federal jurisdiction for isolated wetlands, but the bill never made it out of the committee level.

On Tuesday, the first day of the 108th Congress, Senator Russ Feingold of Wisconsin, and Representatives James Oberstar of Minnesota and John Dingell of Michigan, said they plan to reintroduce the bill this year.

More information on today's administration actions is available at: <http://www.epa.gov/owow/wetlands/swanccnav.html> and at: <http://www.usace.army.mil/inet/functions/cw/cecwo/reg/citizen.htm>

More information about wetlands is available at: <http://wetlands.fws.gov/>

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