

February 26, 2003

Water Docket  
Environmental Protection Agency  
Mail code 4101T  
1200 Pennsylvania Ave., NW  
Washington, DC 20460

Donna Downing  
U.S. Environmental Protection Agency  
Office of Wetlands, Oceans and Watersheds (4502T)  
1200 Pennsylvania Avenue NW  
Washington, D.C. 20460

Ted Rugiel  
U.S. Army Corps of Engineers  
ATTN CECW-OR  
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Washington, DC 20314-1000

Re: Public comments on Advanced Notice of Rulemaking on the Clean Water Act  
Regulatory Definition of "Waters of the United States" Docket ID No. OW-2002-  
0050

Ms. Downing and Mr. Rugiel:

I am the president of the National Mitigation Banking Association. We are a group of private companies that operate wetland mitigation banks. These banks are constructed in advance of wetland impacts with private investment dollars. This is performed under the scrutiny of the US Army Corps of Engineers (Corps), EPA, USFWS and other Federal and State resource agencies. When an applicant for a Clean Water Act (CWA) Section 404 permit has gone through the CWA b(1) sequencing of avoidance and minimization, and their impact is permitted, the mitigation can be accomplished by the purchase of wetland credits from a bank. The legal responsibility for the success of the mitigation transfers from the applicant to the banker. Once the bank has achieved the agreed upon ecological goals, the sites are transferred to a public agency or not for profit resource group. This assures that it remains a functioning wetland and as permanent open space at no cost to the public.

As wetland bankers, we have invested millions of dollars to develop high quality wetlands throughout the United States. The Federal government has long supported wetland mitigation banking as good for the environment and the economy. We hear over and over from the Corps and EPA that our wetland mitigation banks represent outstanding wetland mitigation projects. We believe that we are part of the team, along with the resource agencies, contributing to achieve the national goal of "no net loss" of wetlands. Good wetland mitigation is an essential component of a fair, wetlands regulatory program as it assures that permitted impacts are properly compensated.

We are greatly concerned with the Advanced Notice of Proposed Rulemaking on the Clean Water Act and the accompanying Joint Memorandum. We are very familiar

with not only the Supreme Court's decision in SWANCC, but also all of the lower court decisions referred to in this document. We feel that many of the directives and conclusions drawn from these cases are not substantiated by the decisions and are conflicting. Creating guidance based in contradictory case law is equivalent to creating law without Congressional Authority.

We acknowledge that the scope of the Clean Water Act under SWANCC was clarified as follows: SWANCC eliminates CWA jurisdiction over isolated waters that are both intrastate and non-navigable, where the sole basis for asserting CWA jurisdiction is the actual or potential use of the waters as habitat for migratory birds that cross State lines in their migrations. We do not agree with the further interpretation stating that SWANCC also calls into question whether CWA jurisdiction over isolated, intrastate, non-navigable waters could now be predicated on the other factors listed in the "Migratory Bird Rule" or the other rationales of 33 CFR 328.3(a)(3)(I)-(iii). Our reading of the SWANCC decision is that the court neither re-defined "Waters of the United States", nor did it direct the EPA and Corps to do so.

The SWANCC decision specifically declined reaching beyond the question of the presence of Migratory Birds as a sole basis of jurisdiction. If the other factors in the Migratory Bird Rule were eliminated as jurisdictional considerations, protection would be lost in the areas of habitat for federally protected, endangered and threatened species. This is critical protection afforded to waters clearly meant to be jurisdictional. It would also eliminate a legitimate connection to interstate commerce by removing protection to lands that use water to irrigate crops sold across state lines. This is contrary to the Food Securities Act. The requirement of forcing field staff to "seek formal project-specific Headquarters approval" to act on these issues is unfounded and will most certainly cause lengthy delays in the permitting process. A slower permitting process will be burdensome to landowners and negatively affect business growth. What is needed is a method of achieving "no net loss" while allowing permitted projects to move forward with minimal delays. Requiring field staff to consult with Headquarters any time there is a question of jurisdiction will only add to delay and further confusion.

Because the Clean Water Act was intended to "restore and maintain the chemical, physical and biological integrity of the nation's waters," one must consider any hydrologic connection of a wetland to any other waters of the United States. Many wetlands throughout the country that are not connected directly by surface waters do have subsurface connections or other indirect connections. Such connections may be alluvial flow or connections made by pipes, ditches (manmade or natural), agricultural drain tiles, etc. The Court in Riverside found that "Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands 'inseparably bound up with' jurisdictional waters. Discharges of pollutants to wetlands with any hydrologic connection, surface or subsurface, would be detrimental to the goal of maintaining the chemical, physical and biological integrity of the nation's waters. These connections are well known, but not addressed to date. Federal jurisdiction of these hydrologically connected wetlands can be substantiated by properly defining the term "neighboring" in the CWA and by properly defining isolated waters as those without any

hydrologic connection to waters of the United States. The term “isolated waters” needs to be defined and the definition should consider any hydrologic connection such as ground water and connectivity via ditches and pipes.

We are aware that there was legislation introduced last year, which would strike the word “navigable” from the CWA. We are also aware that to date this has not been passed into law. The SWANCC decision pointed out that the term “navigable” has at least the impact of showing us what Congress had in mind as its authority for enacting the CWA. Hydrological connections to tributaries, groundwater, and ditches link wetlands and other waters, unlike the abandoned sand and gravel pit at issue in the SWANCC decision. This truly was an “isolated wetland”.

Almost all of the post SWANCC lower court decisions have taken a very narrow interpretation of SWANCC. The decisions seeking a more liberal interpretation are under appeal by the Federal government. This majority of case law and the appeals entered by the Federal government all substantiate the consensus of a narrow interpretation. We agree with the legal consensus and request that the proposed rule-making reflect this opinion.

One additional concern we need to address is as follows: “Why were substantial changes made to the Final Rule sent to OISA for review prior to signature?” We have had numerous meetings with high-ranking EPA and Corps officials who worked on the rules for two years. The additions and deletions made in the Final Rule dramatically reduced the clarity and intent of the original draft of the rule. We reviewed a redline/strike out of the Final Rule at <http://www.EPA.gov/edocket>, and are amazed that the Final Rule is so altered from the original draft.

As a group of businessmen who are committed to a strong economy, appropriate wetland protection, and sensible mitigation strategies, we ask that you revise or stop this process and encourage Congress to take up these central questions that affect water quality and appropriate wetland regulation in the United States.

Sincerely,

Richard Mogensen, President  
National Mitigation Banking Association