



# Nebraska Game and Parks Commission

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April 2, 2003

## **Electronic Docket comments to the Environmental Protection Agency**

### **Re: Advance Notice of Proposed Rule making on the Clean Water Act Regulatory Definition of Waters of the United States.**

The Nebraska Game and Parks Commission is pleased to have an opportunity to comment on the "Advance Notice of Proposed Rule making on the Clean Water Act Regulatory Definition of Waters of the United States". As the state agency with responsibilities for the conservation of fish and wildlife resources we recognize the importance of wetlands, including isolated wetlands, to our state and Nation. And we are very concerned with the possible loss of Clean Water Act protection for these vitally important habitats. Because of the abundance of these wetlands and their importance to our state, including commerce, we urge that the U.S. Environmental Protection Agency and U.S. Army Corps of Engineers formulate rules that continue Clean Water Act jurisdiction over all tributaries, their associated flood plain wetlands, and natural isolated wetlands. Following are our comments in support of this position.

#### **Extent of the Isolated Wetland Resource in Nebraska**

In Nebraska it is estimated that 828,918 acres of wetlands are isolated, comprising over 40% of our total wetland acreage (Attachment A). Even though isolated wetlands can be defined in different ways, this estimate by Nebraska Game and Parks Commission wetland staff and partners is supported by recently generated GIS data (Tiner et al. 2002). In their analysis they selected sample areas in the Sandhills, Rainwater Basin, and northeast regions of Nebraska. In the Rainwater Basin sample they determined that 64% of the wetlands were isolated and 84% of the wetland acreage was isolated. In the Sandhills sample they determined that 66% of the wetlands were isolated and 47% of the wetland acreage was isolated. In the northeast Nebraska sample they determined that 43% of the wetlands were isolated and 24% of the wetland acreage was isolated. A GIS analysis of a small sub-sample of the state by the Nebraska Department of Environmental Quality also supports the findings that there are a large number of isolated wetlands in Nebraska (John Bender, Nebraska DEQ, Personal Communication).

#### **Value of Isolated Wetlands and Reasons to Continue Their Protection using the Clean Water Act**

The value of isolated wetlands has been well documented in the literature, including a number of studies conducted in Nebraska (Attachment B). One of the most studied values of isolated wetlands is the role that they play in supporting migratory bird populations. Throughout Nebraska, isolated wetlands serve as critical habitat for both the production of

migratory birds and as migration habitat. Three wetland regions in Nebraska are considered of international importance to migratory birds (LaGrange 1997). These include the Rainwater Basin, Central Platte River, and the Sandhills. Isolated wetlands are numerous in all of these areas and are predominant in the Sandhills and Rainwater Basin.

The isolated wetlands of the Rainwater Basin host millions of spring-migrating ducks and geese annually. Approximately 90% of the mid-continent population of greater white-fronted geese, 50% of the mid-continent population of mallards and 30% of the continent population of northern pintails use the Basins during spring migration. The North American Waterfowl Management Plan lists the Rainwater Basin as a habitat area of major concern in North America. Recent surveys have identified that a minimum of 200,000-300,00 shorebirds represented by over 30 different species migrate through the Basins during the spring. Over 257 species of birds have been recorded in the Rainwater Basin, and the wetlands are regularly used by the federally endangered whooping crane (Austin and Richert, 2001), and the threatened bald eagle.

During the spring, nearly one-half million sandhill cranes comprising 80 percent of the North American population, converge on the Central Platte River valley and its associated wetlands, some of which may be considered isolated. Five to seven million ducks and geese stage along the Platte River and in nearby Rainwater Basin wetlands. This reach also hosts large concentrations of migrant wading birds and shorebirds and several nesting colonies of great blue herons. Over 300 bird species have been observed along the Platte River, including more than 75 percent of the species on the 1986 Audubon Blue List. Over half of the 300 species are neotropical migrants that winter largely south of the Tropic of Cancer but nest north of the tropics. The Central Platte provides habitat for several federally threatened and endangered species. The endangered whooping crane uses the river during spring and fall migration, and a portion of the Central Platte has been designated as critical habitat necessary for the survival and recovery of this migratory species. Numerous threatened bald eagles winter in the Central Platte area annually. The endangered interior least tern and threatened piping plover nest on the few remaining unvegetated sandbars in the river and at times use adjacent wetlands for foraging.

Sandhills wetlands provide habitat for more than 300 species of birds, including large numbers of waterfowl, as well as numerous shorebirds, waders, and other migratory water birds. The North American Waterfowl Management Plan lists the Sandhills as a habitat area of major concern in North America. The Sandhills are the most important waterfowl production area in Nebraska and are considered by Bellrose (1980) to be the best duck production area south of the Prairie Pothole Region. The Nebraska Game and Parks Commission counted an average of 218,414 ducks by aerial surveys in the Sandhills during the 1999-2002 nesting seasons. These aerial counts are not corrected for visibility bias, which means the actual number of breeding ducks in the Sandhills could be 2-3 times the number actually counted. Several state and federally listed threatened and endangered species use the Sandhills and associated wetlands. The migration corridor of the endangered whooping crane encompasses most of the Sandhills. Threatened bald eagles move through the area during migration. Wet meadows provide habitat for the western prairie fringed orchid, which is a threatened species. Sandhills streams and their associated wetlands also provide habitat for 3 state threatened fish species in Nebraska: the northern redbelly dace, finescale dace, and blacknose shiner.

The isolated wetlands of Nebraska are also very important to inter-state and international commerce. Migratory birds produced and/or sustained by Nebraska wetlands generate this commerce by people in other states and countries making expenditures to hunt and/or observe these birds. In addition, last year nearly 4,400 out-of-state hunters traveled to Nebraska to hunt waterfowl and other migratory birds. It is much harder to track non-resident bird watchers, but we are aware that many are attracted to Nebraska to observe migratory water birds. As an example, up to 80,000 crane watchers, including people from every state and numerous countries, flock to the Platte River each spring and benefit the local economy with more than 40 million dollars (Lingle 1992). Bird watching in the Rainwater Basin is also growing rapidly and people have indicated a willingness to pay to support this wetland habitat (Poor 1999).

Nebraska hunters and wildlife observers are also dependent on other states to provide breeding, migration, and wintering habitat for migratory birds. The isolated wetlands in these other states are critical to support these migratory bird populations (Petri et al. 2001) and the commerce that they generate in Nebraska.

Nebraska is a state blessed with an abundance of quality ground water. This ground water supports extensive agricultural commerce as well as providing for municipal and industrial uses and their associated commerce. In addition, this vast ground water resource supports stream flows that contribute to the maintenance of navigable waters. In many regions of the state the soils are porous, and isolated wetlands are connected to this ground water resource (Rus et al. 2001, Steele et al. 2001, Winter 2001, Frankforter 1996). Loss of extensive areas of isolated wetlands would likely have a major effect on both the quantity and quality of the ground water resource and its associated commerce.

### **Considerations in Defining the Extent of Jurisdiction**

In reviewing the language in the Advanced Notice, we offer the following for your consideration as you work to formulate rules that define the extent of jurisdiction.

- ▶ **Migratory Bird Use-** We continue to believe that a strong case can be made that isolated wetlands support inter-state commerce. However, if the SWANCC case does not allow this to be the sole basis for Federal jurisdiction, then we believe that a strong case can be made on the basis of the items listed below.
  
- ▶ **Potential to Support Recreational Use-** Page 12, Item (3) (i) of the Advanced Notice provides the definition of waters of U.S. as waters “which are or could be used by interstate or foreign travelers for recreational or other purposes”. All surface waters in the state of Nebraska are open to public use, even if the land under the water is privately owned (Nebraska Boat Act, Chapter 37-1206). Therefore, all wetlands have the potential to provide public recreation. In addition, all waters, including wetlands, adjacent to public lands and/or bisected by public roads, are open to public access and use. All wetlands also have the potential in the future to come under public ownership and provide for recreational use.

- ▶ **Potential to Support Navigational Use-** Page 12, Item (1) of the Advanced Notice provides the definition of waters of U.S. as waters “which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce”. All surface waters in the state of Nebraska are open to public use, even if the land under the water is privately owned (Nebraska Boat Act, Chapter 37-1206). Therefore, all wetlands currently have the potential to provide public navigational use. In addition, all waters, including wetlands, adjacent to public lands and/or bisected by public roads, are open to public access and navigational use. All wetlands also have the potential in the future to come under public ownership and provide for navigational use.
- ▶ **Maintenance of Stream Flows-** As mentioned earlier, many isolated wetlands in Nebraska interact with ground water. These wetlands have an effect on ground water quality, quantity, and the maintenance of stream flows supported by ground water. This ground water resource is vital to agricultural, industrial, and municipal commerce throughout the state of Nebraska. In addition, through its contribution to stream flow, ground water has a direct effect on all navigable waters.

### **Considerations in Defining the Connectivity of Wetlands to Waters of the U.S.**

As a state resource agency, we have extensive expertise and knowledge that we hope will be helpful to EPA and the Corps in defining the connectivity of wetlands to other waters of the U.S. We have shared this information with the Nebraska Regulatory Office of the Corps and the Region 7 EPA staff. However, at this point in time, we feel that it is premature to provide further input on defining this connectivity (e.g. defining adjacency) until we obtain a response to the extent of jurisdiction based on our above comments. Once this extent is clearly established, then we will be happy to provide extensive input on the implementation of the rules.

### **Other Considerations**

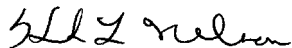
- ▶ **Role of Clean Water Act in Meeting No Net Loss Goal-** In the Advance Notice (page 16) it is inferred that if Clean Water Act protection is reduced that we may be able to rely on other conservation programs to fill the void. In a state like Nebraska that is simply not feasible or reasonable. Over 97% of Nebraska’s wetlands are on private lands. Even though in recent years there has been a growing number of local, state, and federal wetland conservation programs, the reality is that these programs impact only a very small percentage of the wetland resources in the state. For example, in Nebraska since 1993, about 30,000 wetland acres have been enrolled in the federal Wetlands Reserve Program and 4,000 wetland acres have been enrolled the state Wetland Initiative Program. Combined, these acres represent less than 2% of Nebraska’s total wetland acres. These programs may some day allow us to maintain “no net loss” and possibly even begin to make gains, but only if the base resource protection of the Clean Water Act is kept in place. If this base of protection is lost or reduced, then there is absolutely no doubt that wetland destruction will greatly increase. As an example, since the SWANCC ruling, the Corps of Engineers has issued 136 letters to Nebraska landowners informing them that their project no longer is jurisdictional under the Clean Water Act. It’s unknown how many

landowners assumed that their wetland was "isolated" and never even contacted the Corps, but it is likely a substantial and growing number.

It was also noted that the USDA's Swampbuster rules may make Clean Water Act protection unnecessary. We are supportive of the Swampbuster rules of the Farm Bill and they offer important protection. However, Swampbuster rules apply only to landowners participating in the voluntary federal farm program. Also, Swampbuster does not apply to wetlands that are converted to non-agricultural uses (e.g., roads, houses). In addition, wetland protection under Swampbuster is vulnerable to future changes in administrative rules.

We appreciate the opportunity to respond to this Advanced Notice. We again urge that the U.S. Environmental Protection Agency and U.S. Army Corps of Engineers formulate rules that continue Clean Water Act jurisdiction over all tributaries, their associated flood plain wetlands, and natural isolated wetlands. If you have questions on any of these items, please direct them to our Wetland Program Manager, Ted LaGrange, (402) 471-5436, [tlagran@ngpc.state.ne.us](mailto:tlagran@ngpc.state.ne.us). Thank you.

Sincerely,



Kirk Nelson  
Assistant Director

cc: Rex Amack, Frank Albrecht, and Ted LaGrange, Nebraska Game and Parks  
Mike Rabbe, USACE Nebraska Regulatory Office  
Larry Long, USEPA Region 7  
Bob Harms, USFWS Nebraska Ecological Services Office  
Jerry Jasmer, NRCS, Nebraska State Office  
Terry Hickman, Nebraska Department of Environmental Quality

## Attachment A.

### Estimated Acres of Isolated Wetlands in Nebraska

January 12, 2001

By: Ted LaGrange, Wetland Program Manager, Nebraska Game and Parks Commission  
In consultation with other agency staff and partners.

The table below provides an estimate of the acres of isolated wetlands in Nebraska. The following definition of isolated wetlands was used and is based on language from the U.S. Army Corps of Engineers- "those waters that do not have a surface tributary connection, including prairie potholes, vernal pools, and playa lakes. A water is not isolated if it is contiguous, or it is adjacent to a surface tributary water". The number of acres of wetlands in each area is based on numbers provided in the 1997 Nebraska Game and Park's publication entitled *A Guide to Nebraska's Wetlands and Their Conservation Needs*. Because National Wetland Inventory data are not available for the Southwest Playas, an estimate was derived by extrapolating information from the similar Central Table Playas area. It needs to be clearly understood that the percent of wetland acreage considered to be isolated in each region is an estimate based on best professional judgement from agency staff and wetland partners. The numbers are considered to be conservative estimates.

AREA	TOTAL ACRES	% ISOLATED	TOTAL ACRES ISOLATED
Rainwater Basin	34,103	90	30,693
Central Table Playas	3,503	95	3,328
Southwest Playas	4,000	95	3,800
Todd Valley	1,769	95	1,681
<b>Total Playa Wetlands</b>			<b>39,502</b>
Sandhills	1,307,000	60	784,200
Loup/Platte River Sandhills	6,431	50	3,216
<b>Total Sandhill Wetlands</b>			<b>787,416</b>
Isolated wetlands located outside of the above areas			2,000
<b>TOTAL ISOLATED WETLANDS</b>			<b>828,918</b>

## Attachment B.

*Publication copies are available upon request*

### ISOLATED WETLAND REFERENCES FOR NEBRASKA

Prepared by: Ted LaGrange, Nebraska Game and Parks Commission  
February 13, 2001 and updated in March 2003

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